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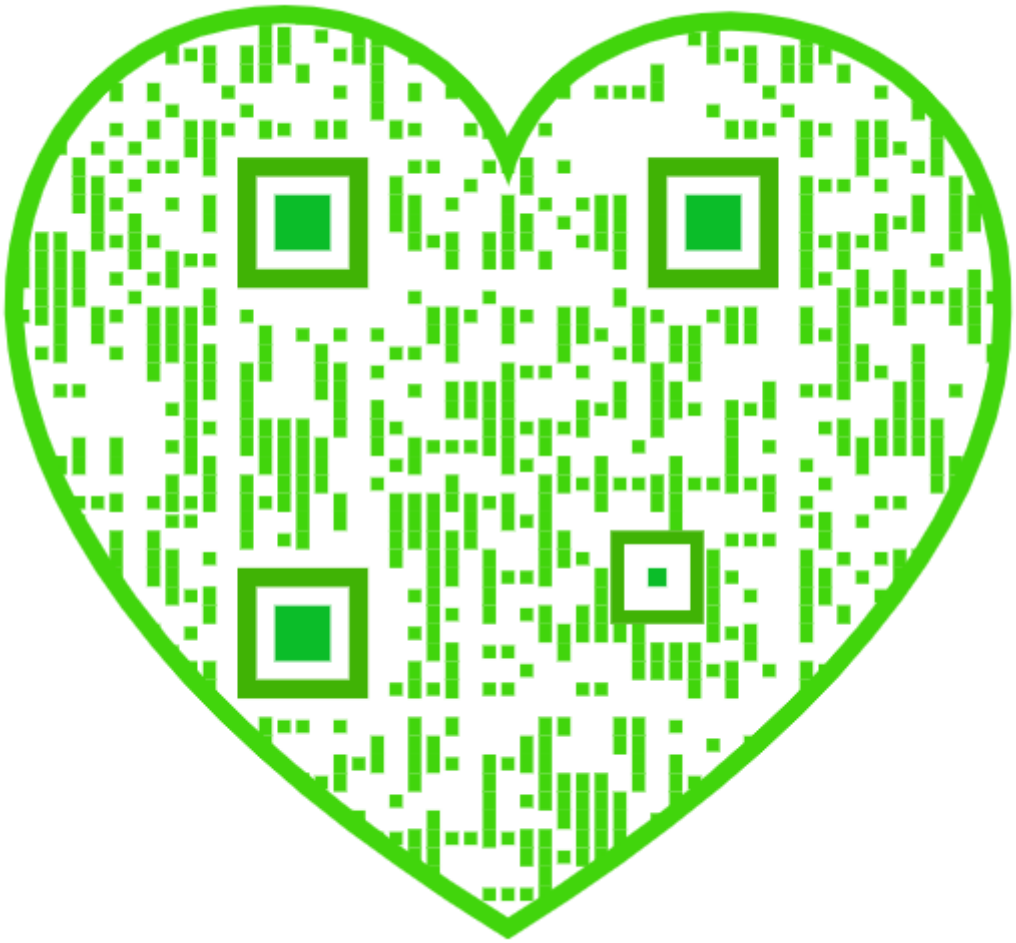

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more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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Building and Loan Societies, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 162, 164.
Insurance Companies, see INSURANCE, 22 Cyc. 1427; MUTUAL BENEFIT INSURANCE, 29 Cyc. 53.
Joint Stock Companies, see JOINT STOCK COMPANIES, 23 Cyc. 480.
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Sequestration, see SEQUESTRATION.

I. RECEIVER DEFINED.[1]

A receiver is an indifferent person between the parties, appointed by the court,[2] and on behalf of all parties, and not of the complainant or defendant only,

1. **Ancillary or auxiliary receiver** see *infra*, VIII, B.
As common carrier see CARRIERS, 6 Cyc. 371.
As legal representative see Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; *infra*, VI, B, 1, a, note 75. See also FIRE INSURANCE, 19 Cyc. 887 note 61.
As officer of court see *infra*, IV, E, 1.
As "owner," "proprietor," "hirer," or "charterer" see *infra*, VI, D, 1, c, note 71.
As personal representative see *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163, *infra*, IV, D, 3, d, (I), note 82.
As representative of parties see *infra*, IV, E.
"Dry receivership" see *infra*, II, B, 11, note 40.
Equitable execution see *infra*, II, B, 12, b, (I).
In action of account see ACCOUNTS AND ACCOUNTING, 1 Cyc. 404.

2. **Appointment by executive officers.**—*The governor* of the state is sometimes empowered, by statutes granting public aid to railroads, to appoint a receiver to operate the road in certain contingencies. See Cherry

to receive and hold the thing or property in litigation, pending the suit,[3] to receive the rents, issues, or profits of land, or other thing in question;[4] to receive rents or other income,[5] and to pay ascertained outgoings,[6] when it does not seem reasonable to the court that either party should hold it;[7] to hold possession and control of property which is the subject-matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court.[8] He is said to be the arm[9] and the hand of the court,[10] a part of the machinery of the

v. North, etc., R. Co., 59 Ga. 446; State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369; State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353; Newman *v.* Davenport, 9 Baxt. (Tenn.) 538; Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44.

The controller of the currency appoints receivers of national banks, under act of congress. See BANKS AND BANKING, 5 Cyc. 602. Such receivers have been held to be officers of the United States. Pepper *v.* Fidelity, etc., Co., 125 Fed. 822; Platt *v.* Beach, 19 Fed. Cas. No. 11,215, 2 Ben. 303; Stanton *v.* Wilkeson, 22 Fed. Cas. No. 13,299, 8 Ben. 357, 2 N. Y. Wkly. Dig. 91.

3. *Illinois.*— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 80, 70 N. E. 662; Nevitt *v.* Woodburn, 190 Ill. 283, 289, 60 N. E. 500; Baker *v.* Backus, 32 Ill. 79, 96.

Maryland.— Gaither *v.* Stockbridge, 67 Md. 222, 235, 9 Atl. 632, 10 Atl. 309.

Missouri.— Rumsey *v.* People's R. Co., 154 Mo. 215, 249, 55 S. W. 615; State *v.* Ross, 122 Mo. 435, 455, 25 S. W. 947, 23 L. R. A. 534.

New York.— Keeney *v.* Home Ins. Co., 71 N. Y. 396, 401, 27 Am. Rep. 60.

Ohio.— State *v.* Fabin, 17 Ohio S. & C. Pl. Dec. 49, 53.

United States.— Booth *v.* Clark, 17 How. 322, 331, 15 L. ed. 164; Shainwald *v.* Lewis, 3 Fed. 878, 879.

This is a chancery or common-law receiver as distinguished from a statutory receiver who, as in the case of receivers of corporations, are assignees. Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870. See also *infra*, IV, D, 1 *et seq.*

One who receives.— The term "receiver" means one who receives, and implies a transfer of possession of the things received. Keeney *v.* Home Ins. Co., 3 Thomps. & C. (N. Y.) 478, 480. See also *infra*, IV, D, 2, a.

General receiver.— A general receiver is one appointed by a court of chancery independent of any statute. His authority is derived from, and his duty prescribed by, the order of appointment, and he is called the common-law receiver. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 894, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13.

Temporary receiver.— The term "temporary receiver" perhaps might better be confined to the mere custodian receiver, who is often appointed, upon the filing of the bill, under the general equity power of the court, in order to preserve the assets from waste until the hearing can be had which will determine whether the corporation is to be disabled or not, and its assets vested in a receiver. Gallagher *v.* Asphalt Co. of America, 67 N. J. Eq. 441, 457, 58 Atl. 403.

Difference between clerk and receiver.— A clerk of court is not, by virtue of his office, a receiver of the court. Hammer *v.* Kaufman, 39 Ill. 87; Kerr *v.* Brandon, 84 N. C. 128. And the offices of clerk and master in chancery, and of receiver, are, in their nature and functions, distinct. Waters *v.* Carroll, 9 Yerg. (Tenn.) 102. In State *v.* Odom, 86 N. C. 432, it is held that the clerks of the courts may have committed to their keeping and management funds that have, for any reason, been brought under the actual custody or immediate cognizance of the court; or by virtue of some express statute they may by direction of the court be charged with the duty of selling property and with the collection and preservation of the proceeds, so as to render them and their sureties liable, but that there is no authority which would warrant the court in affixing to the office of clerk a responsibility for a receivership of property over which the court had not only acquired no control, as where it consisted merely of a debt due from a foreign corporation, and was thus wholly removed from the court's jurisdiction; that such an appointment as receiver is as absolutely distinct from the office of clerk as if the two had been filled by different individuals. See also Barnard *v.* Davis, 54 Ala. 565, *infra*, II, B, 10, a, note 59. And see, generally, as to liability for money paid clerks of court, CLERKS OF COURT, 7 Cyc. 235.

As to quality of indifference see *infra*, III, F, 1.

4. State *v.* Fabin, 17 Ohio S. & C. Pl. Dec. 49; Bayly *v.* Gaines, (Va. 1887) 2 S. E. 739 [*quoting* Edward Rec. 2, 3; High Rec. 824, 825, 832; Kerr Rec. 21]; Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164.

5. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

6. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

7. Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729; Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615; State *v.* Fabin, 17 Ohio S. & C. Pl. Dec. 49; Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Shainwald *v.* Lewis, 8 Fed. 878 [*affirmed* in 48 Fed. 492].

8. Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184.

9. American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345.

10. *Illinois.*— Chicago Title, etc., Co. *v.* Caldwell, 58 Ill. App. 219.

court,[11] by which the rights of parties are protected. When a receiver is required not only to preserve the property but also for the purpose of carrying on or superintending a trade or business he is sometimes called a receiver, or receiver and manager.[12] A statutory receiver is one appointed in pursuance of special statutory provisions,[13] under which the office is sometimes expressly defined.[14]

II. NATURE, PURPOSE, AND AVAILABILITY OF RECEIVERSHIP.

A. Nature of Remedy in General. The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it.[15] It is one of the modes in which the preventive justice of a court of equity is administered,[16] an equitable remedy which bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been stated to be an equitable execution,[17]

Indiana.— Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

Iowa.— Manker *v.* Phœnix Loan Assoc., (1903) 96 N. W. 982; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Kansas.— Jackson *v.* King, 9 Kan. App. 160, 58 Pac. 1013.

Maryland.—Williamson *v.* Wilson, 1 Bland 418.

Missouri.— State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963.

South Carolina.— Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

Utah.— McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

11. Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609.

12. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714. See also *infra*, IV, F, 6, e, (III).

And so he is defined to be an indifferent person appointed by the court as a quasi-officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court, during the continuance or in pursuance of the litigation (Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609); an officer or representative of the court appointed to take charge and management of property which is the subject of litigation before it, for the purpose of preservation and ultimate disposition (Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549). See also *infra*, note 24.

Manager for guardian.— Sometimes one employed by the guardian of an infant to look after and manage certain properties of the infant has been called a receiver, although but the servant of the guardian. Clavering's Case, Prec. Ch. 535, 24 Eng. Reprint 240.

Manager distinguished see *infra*, IV, F, 6, e, (III), (A), note 15.

13. Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13. The man who is appointed receiver upon the return-day of the order to show cause, or upon the appearance of the corporation upon the filing of the bill, is the "statutory receiver." He is appointed after the summary final hearing prescribed by the statute has been held. Gallagher *v.* Asphalt Co. of America, 67 N. J. Eq. 441, 58 Atl. 403.

14. Martin *v.* Martin, 14 Oreg. 165, 167, 12 Pac. 234; Libert *v.* Unfried, 47 Wash. 182, 91 Pac. 474; Denny *v.* Cole, 22 Wash. 372, 377, 61 Pac. 38, 79 Am. St. Rep. 940; Oleson *v.* Tacoma Bank, 15 Wash. 148, 151, 45 Pac. 734, in which cases it appears that the statutory definition of a receiver is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, suit, or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct.

15. Myres *v.* Frankenthal, 55 Ill. App. 390; Galloway *v.* Campbell, 142 Ind. 324, 41 N. E. 597; Bitting *v.* Ten Eyck, 85 Ind. 357; Williamson *v.* Wilson, 1 Bland (Md.) 418; Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83.

This power of the court of chancery of England was called into action at an early date and all the leading principles in relation to it were settled in England long before the American Revolution. Williamson *v.* Wilson, 1 Bland (Md.) 418.

16. Mays *v.* Rose, Freem. (Miss.) 703.

17. *Alabama.*— Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

California.— Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549.

Nebraska.— Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791.

New Jersey.— Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938.

New York.— Hunt *v.* Wolfe, 2 Daly 298.

Ohio.— Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1; Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir. Ct. 479, 7 Ohio Cir. Dec. 349; Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

or attachment,[18] although it is also said to be in the nature, not of an attachment, but a sequestration.[19] It is in the nature of and in effect an injunction;[20] but the rights to the two remedies are essentially distinct and depend upon different grounds and circumstances.[21] The same power, to be exercised for the same purposes and in the same emergencies, is conferred upon particular courts under the codes, although under such provisions the remedy is also enlarged and extended to cases other than suits in equity.[22] The great object of the remedy is to secure the property or thing in controversy [23] so that it may be subjected to such order or decree as the court may make, or that rents and profits may be kept from waste, loss, or destruction pending the suit,[24] and it is intended equally for the security of both plaintiff and defendant.[25] It is held to be a proceeding quasi *in rem*.[26]

B. Availability of Remedy and Propriety of Exercising Power of Appointment [27]— **1. In General.** A reference to the various decisions upon applications for the appointment of receivers will show that each case has been made to depend upon its own peculiar features in so far as particular facts are concerned and it is not often that one case will throw light upon another except so far as it may establish the general principles which should govern the exercise

Virginia.— Beverly *v.* Brooke, 4 Gratt. 187.

See 42 Cent. Dig. tit. "Receivers," § 1.

18. Jay *v.* Squire, 5 Ohio S. & C Pl. Dec. 318, 7 Ohio N. P. 345; Todd *v.* Lee, 15 Wis 365.

19. Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157; Beverly *v.* Brooke, 4 Gratt. (Va.) 187. See also *infra*, IV, A.

20. *Illinois.*— Gilbert *v.* Block, 51 Ill. App. 516.

New York.— Patten *v.* Accessory Transit Co., 4 Abb. Pr. 235.

Pennsylvania.— Treat *v.* Pennsylvania Mut. L. Ins. Co., 199 Pa. St. 326, 49 Atl. 84, 85 Am. St. Rep. 788; Schlecht's Appeal, 60 Pa. St. 172; Gravenstine's Appeal, 49 Pa. St. 310.

Virginia.— Smith *v.* Butcher, 28 Gratt. 144; Beverly *v.* Brooke, 4 Gratt. 187.

England.— Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

See 42 Cent. Dig. tit. "Receivers," § 13. See also *infra*, II, B, 3; IV.

21. Hall *v.* Hall, 15 Jur. 363, 20 L. J. Ch. 585, 3 Macn. & G. 79, 49 Eng. Ch. 60, 42 Eng. Reprint 191, referring to the difference between the remedy by injunction where the object is to prevent a breach of articles of partnership and that by the appointment of a receiver for breaches of such articles furnishing grounds for a dissolution of the partnership

22. See *infra*, II, B, 1 *et seq.*; III, A, 2, e.

23. **Ancillary nature of remedy** see *infra*, II, B, 6.

To enforce judgment or decree see *infra*, II, B, 8, d; II, B, 12.

24. *California.*— Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549.

Delaware.— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

Georgia.— Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642.

Illinois.— Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569; Gilbert *v.* Block, 51 Ill. App. 516.

Maryland.—Williamson *v.* Wilson, 1 Bland 418.

Mississippi.— Mays *v.* Rose, Freem. 703.

New Jersey.— McCarter *v.* Clavin, (Ch. 1907) 66 Atl. 599.

New York.— Stokes *v.* Hoffman House, 167 N. Y. 554, 560, 60 N. E. 667, 53 L. R. A. 870 [*citing* Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316]; Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Suppl. 639.

Ohio.— Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

Pennsylvania.— Schlecht's Appeal, 60 Pa. St. 172; Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83; Pottsville Lumber, etc., Co. *v.* Kopitzsch Soap Co., 13 Pa. Co. Ct. 139.

Virginia.— Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349.

West Virginia.— Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746; Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514.

United States.— Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249; Overton *v.* Memphis, etc., R. Co., 10 Fed. 866, 3 McCrary 436.

See 42 Cent. Dig. tit. "Receivers," § 1. And see *infra*, II, B, 10; IV, D, 2, c; IV, F, 6, e, (III).

25. See the cases cited in the last preceding note; and *infra*, IV, E, F.

26. Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132; Denny *v.* Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940; Hayes *v.* Columbus, etc., R. Co., 67 Fed. 630, where the court holds property of a corporation, through a receiver, for sale and distribution among creditors and lienors.

27. **Of corporate property** see *infra*, II, C.

of the court's discretion upon such motions.[28] These general principles are that plaintiff must show: (1) Either that he has a clear right to the property itself, that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim;[29] and (2) that the possession of the property by defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from neglect, waste, misconduct, or insolvency, in which cases a receiver will be appointed.[30]

2. Discretion of Court — a. In General. Generally the application for a receiver is addressed to the sound legal discretion of the court to be exercised as an auxiliary to the attainment of the ends of justice.[31] But the power is not an

28. *Alabama.*— Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

District of Columbia.— Wood *v.* Grayson, 16 App. Cas. 174.

Maryland.— Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338.

Mississippi.— Mays *v.* Rose, Freem. 703.

Ohio.— Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5.

United States.— Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114.

England.— Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752.

29. See *infra*, II, B, 7, 9.

30. *Alabama.*— Ft. Payne Furnace Co. *v.* *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

Georgia.— Barnwell *v.* Wofford, 67 Ga. 50; Poythress *v.* Poythress, 16 Ga. 406.

Illinois.— Baker *v.* Backus, 32 Ill. 79; Lemker *v.* Kalberlah, 105 Ill. App. 445; Schack *v.* McKey, 97 Ill. App. 460; Flood *v.* Forst, 93 Ill. App. 309; Hancock *v.* American Binding, etc., Co., 86 Ill. App. 630.

Iowa.— Home Sav., etc., Co. *v.* Polk County Dist. Ct., 121 Iowa 1, 95 N. W. 522.

Maryland.— Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982; State *v.* Northern Cent. R. Co., 18 Md. 193.

Michigan.— Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

Mississippi.— Mays *v.* Rose, Freem. 703.

New York.— Conro *v.* Gray, 4 How. Pr. 166; Illinois *v.* Delafield, 8 Paige 527 [*affirmed* in 2 Hill 159, 26 Wend. 192]; Willis *v.* Corlies, 2 Edw. 281.

Pennsylvania.— Schlecht's Appeal, 60 Pa. St. 172, holding that an injunction and receiver are resorted to only to preserve property *in statu quo* pending a contest.

Virginia.— Norris *v.* Lake, 89 Va. 513, 16 S. E. 663.

Washington.— Sengfelder *v.* Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666.

England.— Podmore *v.* Gunning, 5 Sim. 485, 9 Eng. Ch. 485, 58 Eng. Reprint 420.

See 42 Cent. Dig., tit. "Receivers," § 18 *et seq.* And see *infra*, II, B, 4, 7, 10.

31. *Alabama.*— Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; *Ex p.* Walker, 25 Ala. 81.

Alaska.— Sylvester *v.* Willson, 2 Alaska 325.

District of Columbia.— Wood *v.* Grayson, 16 App. Cas. 174.

Florida.— Frisbee *v.* Timanus, 12 Fla. 300.

Georgia.— The Anvil *v.* Savery, 116 Ga. 321, 42 S. E. 495; Cosby *v.* Weaver, 99 Ga. 143, 25 S. E. 16; Powell *v.* Achey, 87 Ga. 8, 13 S. E. 108; Atwater *v.* Equitable Mortg. Co., 86 Ga. 581, 12 S. E. 1065; Bliley *v.* Taylor, 86 Ga. 163, 13 S. E. 283; Nesbit *v.* Donald, 86 Ga. 26, 12 S. E. 183; Pendleton *v.* Johnson, 85 Ga. 840, 11 S. E. 144; Graham *v.* Fuller Electrical Co., 75 Ga. 878; Shackleford *v.* Twiggs, 74 Ga. 828; Carter *v.* Monroe, 66 Ga. 755; Citizens' Bank *v.* Cook, 63 Ga. 159; Jones *v.* Johnson, 60 Ga. 260; Gardner *v.* Howell, 60 Ga. 11; Smith *v.* McLaren, 59 Ga. 879; Wachtel *v.* Wilde, 58 Ga. 50; Douglass *v.* Fitzgerald, 56 Ga. 526; Gunby *v.* Thompson, 56 Ga. 316; Visage *v.* McKellar, 54 Ga. 268; Reid *v.* Reid, 38 Ga. 24.

Illinois.— Schack *v.* McKey, 97 Ill. App. 460; Edwards *v.* Rodgers, 41 Ill. App. 405.

Indiana.— State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Robinson *v.* Dickey, 143 Ind. 214, 42 N. E. 638; Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68; Naylor *v.* Sidener, 106 Ind. 179, 6 N. E. 345; Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188.

Kansas.— Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914; Fluker *v.* Emporia City R. Co., 48 Kan. 577, 30 Pac. 18.

Kentucky.— Hurst *v.* Nicola Bros. Co., 65 S. W. 364, 23 Ky. L. Rep. 1406; Woodward *v.* Woodward, 31 S. W. 734, 17 Ky. L. Rep. 464; Harmon *v.* Kentucky Coal, etc., Co., 21 S. W. 1054, 15 Ky. L. Rep. 12.

Louisiana.— McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310; Pratt *v.* McHatton, 11 La. Ann. 260.

Maryland.— Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982.

Massachusetts.— Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550, 44 N. E. 617.

Michigan.—Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077; Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375

arbitrary one,[32] and before judicial action can be justified on the ground of discretion there must be a case calling for the exercise of such discretion. If no

(holding that in reviewing the action of a circuit judge in appointing a receiver two things will be considered: (1) whether the discretion vested in him has been abused; and (2) whether a right has been impaired by such appointment); Brown *v.* Vandermeulen, 41 Mich. 418, 49 N. W. 920.

Mississippi.— Myers *v.* Estell, 48 Miss. 372; Mays *v.* Rose, Freem. 703.

Missouri.— Stark *v.* Grimes, 88 Mo. App. 409, under a statutory provision for the appointment of a receiver in any legal or equitable proceeding where it is necessary to preserve the property, etc.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297; Provident Life, etc., Co. *v.* Keniston, 53 Nebr. 86, 73 N. W. 216; Jacobs *v.* Gibson, 9 Nebr. 380, 2 N. W. 893.

New Hampshire.— Eastman *v.* Savings Bank, 58 N. H. 421.

New Jersey.— New Foundland R. Constr. Co. *v.* Schack, 40 N. J. Eq. 222, 1 Atl. 23; Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126 (upon a decree declaring a corporation insolvent); Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 347 [*affirming* 9 N. J. Eq. 95].

New York.— Dawson *v.* Parsons, 137 N. Y. 605, 33 N. E. 482; Ostrander *v.* Weber, 114 N. Y. 95, 21 N. E. 112; Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272; Lottimer *v.* Lord, 4 E. D. Smith 183; Thalmann *v.* Hoffman House, 27 Misc. 140, 58 N. Y. Suppl. 227; Stuyvesant *v.* Grissler, 12 Abb. Pr. N. S. 6; McMahon *v.* Allen, 14 Abb. Pr. 220; Jenkins *v.* Jenkins, 1 Paige 243; Verplank *v.* Caines, 1 Johns. Ch. 57.

Ohio.— Manning *v.* Ludington, 6 Ohio Dec. (Reprint) 620, 7 Am. L. Rec. 117; Behrens *v.* Equality Bldg. Assoc., 3 Ohio S. & C. Pl. Dec. 275, 2 Ohio N. P. 259.

Pennsylvania.— Beaumont *v.* Beaumont, 166 Pa. St. 615, 31 Atl. 336; Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83.

South Dakota.— Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

Tennessee.— Cone *v.* Paute, 12 Heisk. 506.

Texas.— Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706; Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802.

Utah.— Pitts *v.* New Mammoth Gold Min. Co., 23 Utah 623, 65 Pac. 1076.

Virginia.— Norris *v.* Lake, 89 Va. 513, 16 S. E. 663; Smith *v.* Butcher, 28 Gratt. 144.

Washington.— Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229; Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26; Roberts *v.* Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26.

West Virginia.— Lamp *v.* Homestead Bldg. Assoc., 62 W. Va. 56, 57 S. E. 249; Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660; Grantham *v.* Lucas, 15 W. Va. 425.

Wisconsin.— Nash *v.* Meggett, 89 Wis. 486, 61 N. W. 283.

United States.— Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 14 S. Ct. 1158, 17 L. ed. 604; Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Moore *v.* British Columbia Bank, 106 Fed. 574; Hutchinson *v.* American Palace-Car Co., 104 Fed. 182 (holding that the same principles apply with reference to the exercise of this discretion as to the exercise of the power of granting a preliminary injunction); McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; Ames Iron-Works *v.* West, 24 Fed. 313; Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225; Morrison *v* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647; Williamson *v.* New Albany, etc., R. Co., 30 Fed. Cas. No. 17,753, 1 Biss. 198.

England.— *In re* Prytherch, 42 Ch. D. 590, 59 L. J. Ch. 79, 61 L. T. Rep. N. S. 799, 38 Wkly. Rep. 61 (under the Judicature Act); Skip *v.* Harwood, 3 Atk. 564, 26 Eng. Reprint 1125; Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752.

See 42 Cent. Dig. tit. "Receivers," § 14.

But see Jones *v.* Thorne, 80 N. C. 72.

The fact that plaintiff is a judgment creditor does not make the appointment a matter of absolute right. Crawford *v.* Spurling, 56 Ga. 611 (where complainant did not seek the appointment of a receiver on the ground that the land levied on was specially charged with the payment of his debt, or on the ground that he had any specific lien thereon, but only claimed a general lien on the land as a general judgment creditor, and such being the case, it was held that there was no abuse of the discretion of the chancellor in refusing the injunction and the appointment of a receiver); Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

At suit of general creditors by statute.— So the departure provided by such statute by permitting suit by general creditors which formerly could not be filed does not require the appointment of a receiver when the suit is brought, the court still being left to exercise its discretion upon the particular facts of each case. Barnesville Mfg. Co. *v.* J. S. Schofield's Sons Co., 118 Ga. 664, 45 S. E. 455; Barnwell *v.* Mofford, 67 Ga. 50.

Appealability of the order see APPEAL AND ERROR, 2 Cyc. 611.

Effect of stipulation in mortgage see MORTGAGES, 27 Cyc. 627.

32. Bosworth *v.* St. Louis Terminal R.

case for the appointment is made, or if the appointment was originally proper and under changed conditions appearing from undisputed facts he ought not to be continued, the appointment in the one case or the refusal to terminate the receivership in the other is judicial error.[33] And so where a statutory remedy is provided, upon the establishment of particular facts, which remedy can be enforced only through a receiver, while before a determination of the material issues of fact to sustain the right to the remedy the appointment of or refusal to appoint a receiver is discretionary, being in the nature of a provisional remedy, it is an abuse of discretion to refuse the appointment when the facts in favor of the right are determined or admitted.[34]

b. Exercise of Discretion — (I) *In General.* While, by the statutes and by force of adjudicated cases, the exercise of that discretion is to a certain extent governed by general rules, still in each case the particular circumstances must be regarded,[35] and if, considering all the circumstances, the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the possession of the property undisturbed, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient none will be appointed.[36]

(II) *Power Exercised With Caution.* The power to appoint a receiver is a delicate one, especially when invoked upon interlocutory *ex parte* applications, and should be exercised with extreme caution,[37] and only under circumstances

Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941.

33. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900.

34. State *v.* New England Bank, 55 Minn. 139, 56 N. W. 575; Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 56 How. Pr. (N. Y.) 391 (as to winding up of insurance company); New York Nat. Exch. Bank *v.* Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905; Oleson *v.* Tacoma Bank, 15 Wash. 148, 45 Pac. 734.

No discretion see Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294.

35. Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752.

36. *Alabama.*— Meyer *v.* Thomas, 131 Ala. 111, 30 So. 89; Warren *v.* Pitts, 114 Ala. 65, 21 So. 494.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297; Provident Life, etc., Co. *v.* Keniston, 53 Nebr. 86, 73 N. W. 216.

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293, where it was held that the court would refuse to appoint a receiver upon a showing from which it appeared that to declare the company insolvent and to make the appointment on that ground would cause an instant depression in the value of its stock and entail an actual loss upon the stock-holders who were admittedly without fault and would not be of advantage to a single stockholder or any one entitled to stock.

United States.— McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247 (where applying these principles the court refused to appoint a receiver, although there had been default in the payment of interest on bonds and insolvency was in effect admitted, the circumstances demonstrating that the appointment of a receiver would imperil the interests of others whose rights were entitled to as much consideration as those of the complainants); Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

See 42 Cent. Dig. tit. "Receivers," § 14.

37. *Alabama.*— Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909; Randle *v.* Carter, 62 Ala. 95; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

Georgia.— Barnesville Mfg. Co. *v.* J. S. Schofield's Sons Co., 118 Ga. 664, 45 S. E. 455 (under statute providing for cautious exercise of power); Barnwell *v.* Wofford, 67 Ga. 50.

Maryland.— Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Blondheim *v.* Moore, 11 Md. 365; Furlong *v.* Edwards, 3 Md. 99.

Missouri.— St. Louis Nat. Bank *v.* Field, 156 Mo. 306, 56 S. W. 1095.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 25 Mont. 164, 64 Pac. 330 (under a statutory provision for the appointment of a receiver "when receivers have heretofore been appointed by the usages of courts of equity"); State *v.* Silver Bow County Second Judicial Dist. Ct. Min. Co., 20 Mont. 284, 50 Pac. 852.

New York.— Patten *v.* Accessory Transit Co., 4 Abb. Pr. 235, where it was said that the too free use of such remedy was one of the causes of the destruction of the late court of chancery in New York.

Virginia.— Norris *v.* Lake, 89 Va. 513, 16 S. E. 663.

West Virginia.— Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746.

United States.— Sage *v.* Memphis, etc., R.

requiring summary relief or where the court is satisfied that there is imminent danger of loss,[38] lest the injury thereby caused be far greater than the injury sought to be averted.[39] It should never be exercised in a doubtful case,[40] and when no advantage is to be gained from such appointment,[41] or no injury will result from its refusal — in other words, when it does not appear to be necessary.[42] The court should consider the consequences to all of the parties,[43] and the power

Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Hutchinson *v.* American Palace Car Co., 104 Fed. 182 (where it is said that unless the power is used carefully, like that to grant preliminary injunctions, it will run into uncontrolled and arbitrary action on the part of the judge); Lancaster *v.* Asheville St. R. Co., 90 Fed. 129; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442.

See 42 Cent. Dig. tit. "Receivers," § 14.

Where the property is in the enjoyment of no one the court can hardly go wrong in taking possession. U. S. *v.* Church of Jesus Christ, etc., 5 Utah 361, 15 Pac. 473; Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752. See also *infra*, II, B, 6, b, (II).

38. See *infra*, II, B, 10.

In the absence of notice see *infra*, III, D.

39. Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Heinze *v.* Kleinschmidt, 25 Mont. 89, 63 Pac. 927; Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281. See Provident Life, etc., Co. *v.* Keniston, 53 Nebr. 86, 73 N. W. 216, where the appointment of a receiver in a mortgage foreclosure proceeding was refused after judgment of foreclosure from an order confirming the sale, where greater injury would ensue from the appointment than from permitting the property to remain undisturbed.

40. Hatcher *v.* Massey, 66 Ga. 66 (where complainant's debt had first been charged against a trustee individually and the trust estate had not been adjudged liable and it did not clearly appear to be so, and the court refused to appoint a receiver *ad interim* on account of the insolvency); Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914 (as to the appointment of a receiver of a liquidating bank, at the instance of stock-holders); Beecher *v.* Bininger, 3 Fed. Cas. No. 1,222, 9 Blatchf. 170. See also *infra*, II, B, 7, b; II, B, 10, b.

Probable cause — interlocutory and final order distinguished see *infra*, III, E, 5, a, note 45.

41. *Indiana.*— Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207.

New Jersey.— Sternberg *v.* Wolff, 56 N. J. Eq. 555, 42 Atl. 1078.

Ohio.— Behrens *v.* Equality Bldg. Assoc., 3 Ohio S. & C. Pl. Dec. 275, 2 Ohio N. P. 259.

United States.— Romare *v.* Broken Arrow Coal, etc., Co., 114 Fed. 194; Trust, etc., Co. *v.* Spartanburg Waterworks Co., 91 Fed. 324; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262.

England.— Barkley *v.* Reay, 2 Hare 306, 12 L. J. Ch. 320, 24 Eng. Ch. 306, 67 Eng. Reprint 127.

See 42 Cent. Dig. tit. "Receivers," § 14. And see *infra*, II, C.

A pertinent illustration of the rule may be given by reference to Kell *v.* Murdock, 6 Ohio S. & C. Pl. Dec. 390, 4 Ohio N. P. 247, where in a suit for an accounting by a tenant in common of an office building the court said that a receiver was not what plaintiff wanted or needed and that if the suit for the accounting was not really a fiction for the purpose of laying a basis for the motion for a receiver, there was no probability of a result that would require a sequestration of the property inasmuch as the whole matter of the accounting would be disposed of in ten days and with the disposition of the main suit the receiver would go too and the parties confront the same problems then before them. So the fact that lands were in danger of forfeiture to the state under a statute providing that lands held by corporations contrary to the laws against perpetuities shall be subject to forfeiture, and making it the duty of the attorney-general to institute suit for the condemnation and sale thereof, the proceeds to be distributed to the stock-holders, did not entitle plaintiffs to the appointment of a receiver, as that remedy would be no protection against forfeiture proceedings. American Tribune New Colony Co. *v.* Schuler, 34 Tex. Civ. App. 560, 79 S. W. 370.

42. See *infra*, II, B, 10.

Merely that no harm will result is no reason for appointing a receiver. Young *v.* Rutan, 69 Ill. App. 513; Clark *v.* Ridgely, 1 Md. Ch. 70; Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427; Orphan Asylum Soc. *v.* McCartee, Hopk. (N. Y.) 429. See also Young *v.* Rutan, 69 Ill. App. 513.

43. Conover *v.* Tansey, (N. J. Ch. 1907) 67 Atl. 1013; Whitehead *v.* Hale, 118 N. C. 601, 24 S. E. 360; Venable *v.* Smith, 98 N. C. 523, 4 S. E. 514; Hanna *v.* Hanna, 89 N. C. 68; Lancaster *v.* Asheville St. R. Co., 90 Fed. 129; Ames Iron-Works *v.* West, 24 Fed. 313 (holding that the appointment should be made whenever it is necessary in the opinion of the court under the showing made to protect the assets to which complainant looks to satisfy his lien and meet the demands of the decree, but in cases of insolvency when the court is properly informed of the existence of other creditors, their interest in the matter should be looked into and guarded in the exercise of the court's sound discretion); Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752; Skinners' Co. *v.*

should not be exercised when it is likely to produce irreparable injustice or injury to private rights,[44] or where the facts demonstrate that the appointment will imperil the interests of others whose rights are entitled to as much consideration from the court as those of the complainant.[45] The chancellor should so mold his order that while favoring one, injustice is not done to another, and if this cannot be accomplished the application should ordinarily be denied.[46]

3. As Incident to Injunction. The power to appoint a receiver, when one is necessary for the preservation of property pending an injunction suit, is incident to the power to grant an injunction,[47] and the appointment may be made when it is necessary to render an injunction effective, upon the theory that equity will not stop short of complete relief when it has once properly assumed jurisdiction.[48]

4. Existence of Other Adequate Remedies — a. In General. One of the grounds upon which a receiver may be appointed is that there is no other adequate remedy;[49] the appointment will never be made where there is another safe or expedient remedy, or where the court can find another and less stringent means of protecting the rights of the parties,[50] and this in some cases has seemed to be

Irish Soc., 1 Myl. & C. 161, 13 Eng. Ch. 161, 40 Eng. Reprint 338.

Expense see *infra*, II, B, 10, a, text and note 61.

44. Harwell *v.* Potts, 80 Ala. 70; Wood *v.* Grayson, 16 App. Cas. (D. C.) 174; Speights *v.* Peters, 9 Gill (Md.) 472; Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

45. Devlin *v.* Hope, 16 Abb. Pr. (N. Y.) 314 (holding that upon the application of a *cestui que trust* having but a small interest in the profits, a receiver would not be appointed of a contract held by a trustee for the benefit of several where the appointment would deprive the contractors of money sufficient to perform the contract, and the trustee is solvent and not guilty of any breach of duty involving moral turpitude); McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; McHenry *v.* New York, etc., R. Co., 25 Fed. 114; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247. See also *infra*, II, C, 2, b.

To wind up partnership.— Where to appoint a receiver to sell and wind up a business would destroy its value without benefiting either party, the appointment will be refused. Bard *v.* Bingham, 54 Ala. 463 (where there was no charge that defendant was insolvent and of danger to assets and complainant's interest was bought from defendant on long credit and he did not show a willingness or ability to make the payments therefor as they would fall due on the mortgage given to defendant for the purchase-money, complainant himself being insolvent); Slemmer's Appeal, 58 Pa. St. 168, 98 Am. Dec. 255. See also, generally, Partnership, 30 Cyc. 473, 579, 726.

Possession of persons not parties see *infra*, III, C, 2.

46. Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

47. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1; Smith *v.* Butcher, 28 Gratt. (Va.) 144; Penn *v.* Whiteheads, 12 Gratt. (Va.) 74; Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615. In Kirby *v.* Kirby, 1 Paige (N. Y.) 261, it was held that an injunction, a receiver, and a writ of ne exeat may all be resorted to in the same suit.

Injunction incidental to receivership see Injunctions, 22 Cyc. 774 note 72, 981 note 51.

48. Columbian Athletic Club *v.* State, 143 Ind. 98, 40 N. E. 914, 52 Am. St. Rep. 407, 28 L. R. A. 727, holding that where an injunction is granted at the instance of the state to restrain a corporation from violating its charter and using its property as a nuisance, a receiver may be appointed in aid of the injunction.

Necessity to preserve property see *infra*, II, B, 10, f.

Enforcement of judgment see *infra*, II, B, 12.

49. Meyer *v.* Thomas, 131 Ala. 111, 30 So. 89; Warren *v.* Pitts, 114 Ala. 65, 21 So. 494; American Freehold Land Mortg. Co. *v.* Turner, 95 Ala. 272, 11 So. 211 (where the appointment at the suit of a purchaser at foreclosure, to collect rents, etc., pending an ejectment suit by him, was justified because the remedy by attachment in favor of a landlord was not available to him); Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 735, 11 L. R. A. 267; Cotton *v.* Rand, (Tex. Civ. App. 1906) 92 S. W. 266.

50. *Alabama.*— Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909; Bridgeport Dev. Co. *v.* Tritsch, 110 Ala. 274, 20 So. 16; Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Roman *v.* Woolfolk, 98 Ala. 219, 13 So. 212; Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Randle *v.* Carter, 62 Ala. 95.

Arizona.—Hallenborg *v.* Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052.

Georgia.— Satterwhite *v.* Beall, 28 Ga. 525.

Illinois.— Schack *v.* McKey, 97 Ill. App. 460, 100 Ill. App. 294; Nusbaum *v.* Locke, 53 Ill. App. 242; Gilbert *v.* Block, 51 Ill. App. 516.

Indiana.— Stephens *v.* Kaga, 142 Ind. 523,

a part of or corollary to the rule that in the exercise of judicial discretion upon the application for the appointment of a receiver, the appointment will not be made except in the case of imperative necessity,[51] while in other cases it refers

41 N. E. 930, holding that under a statute providing for a new trial in ejectment on the applicant giving an undertaking that he will pay all costs and damages which shall be recovered against him in the action, if plaintiff in ejectment is entitled to the crops sown by defendant after the first trial, which terminated in plaintiff's favor, plaintiff has his remedy on the bond for defendant's conversion thereof, and therefore a receiver to take charge of such crops should not be appointed.

Kentucky.— Harmon *v.* Kentucky Coal, etc., Co., 21 S. W. 1054, 15 Ky. L. Rep. 12.

Louisiana.— Marcuse *v.* Gullett Gin Mfg. Co., 52 La. Ann. 1383, 27 So. 846.

Maryland.— Speights *v.* Peters, 9 Gill 472; Crane *v.* Seymour, 3 Md. Ch. 483.

Massachusetts.— Falmouth Nat. Bank *v.* Cape Code Ship-Canal Co., 166 Mass. 550, 44 N. E. 617.

Michigan.— Jenks *v.* Horton, 96 Mich. 13, 55 N. W. 372.

Minnesota.— Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464.

New Jersey.— Swallow *v.* Swallow, 31 N. J. Eq. 390, where, on a bill by a beneficiary under a will against other beneficiaries for an accounting and for possession, a receiver will not be appointed when complainant may be given possession of her portion of the land and may manage it for herself and obtain a decree for rent.

New York.— Stern *v.* Shapiro, etc., Co., 99 N. Y. App. Div. 405, 91 N. Y. Suppl. 249; Arndt *v.* Williams, 16 How. Pr. 244.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

Texas.— American Tribune New Colony Co. *v.* Schuler, 34 Tex. Civ. App. 560, 79 S. W. 370; Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

Washington.— Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229.

United States.— Overton *v.* Memphis, etc., R. Co., 10 Fed. 866, 3 McCrary 436; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

See 42 Cent. Dig. tit. "Receivers," § 12.

In replevin by a husband against his wife, it was held that a receiver *pendente lite* was improperly appointed on plaintiff's affidavit that defendant had departed from her residence without disclosing where she was going and had not returned, and that plaintiff was unable to furnish a sufficient bond to replevin the property, and the affidavit of defendant's sister that defendant took but a small valise with her and that she kept her papers in a safety deposit box, and that affiant did not know whether they had been removed, it not being shown that other available remedies were inadequate or that a receiver was necessary to preserve the property. Libby *v.* Libby, 68 N. Y. App. Div. 15, 74 N. Y. Suppl. 57. But see Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976, under a statute providing for the appointment of a receiver when, in the discretion of the court, etc., "it may be necessary to secure ample justice to the parties." And see *infra*, III, A, 2, c.

Property in hands of administrator.— Sylvester *v.* Willson, 2 Alaska 325 (where it was held that, the court of probate having ample power to compel an administrator to account and to care for the estate, a receiver would not be appointed); St. Louis Nat. Bank *v.* Field, 156 Mo. 306, 56 S. W. 1095 (refusal to appoint at the instance of lien-holders, to collect rents, etc., where an administrator had taken possession of the land under an order of the probate court, since the property was in the care of an officer liable on his bond for the lawful application of the rents, etc.); Patterson *v.* McCunn, 46 How. Pr. (N. Y.) 182 (which was an action for partition, the apparent title to the property being in executors and trustees under a will and the right of plaintiff as heir not being clear, it was held that a receiver would not be appointed on the ground of misconduct, etc., since on a proper application to the surrogate the executors might from time to time be compelled to account and also upon proper proceedings in the supreme court an order might be made requiring the proceeds of the estate from time to time to be deposited in some suitable trust company). But in Everett *v.* State, 28 Md. 190, the court appointed a receiver of property in the hands of an administrator in a proceeding to enforce a lien upon the personal estate of a decedent, where the statute created an exclusive remedy for the enforcement of the lien which could not be administered in the orphans' court. See also *infra*, II, B, 10, h.

An assignment for the benefit of creditors by a firm will not preclude either member of the firm from resorting to a court of equity for the appointment of a receiver. Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682.

Right to possession under mortgage see MORTGAGES, 27 Cyc. 1623.

51. *Arizona.*— Hallenborg *v.* Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052 [*affirmed* in 200 U. S. 239, 26 S. Ct. 236, 50 L. ed. 458].

Georgia.— Clay *v.* Clay, 86 Ga. 359, 12 S. E. 1064.

Kentucky.— Harmon *v.* Kentucky Coal, etc., Co., 21 S. W. 1054, 15 Ky. L. Rep. 12.

New York.— Libby *v.* Libby, 68 N. Y. App. Div. 15, 74 N. Y. Suppl. 57.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618.

to the entire want of authority to apply the remedy in a purely legal matter as a substitute for a purely legal remedy,[52] or where an execution on a decree will be sufficient, when plaintiff sues merely for a money judgment.[53] A receiver will not be appointed when the party applying therefor has an adequate remedy at law, or in other words to take the place of a mere action at law,[54] and the remedy cannot be resorted to merely as a substitute for an attachment at law or solely upon a ground which would justify such attachment,[55] or in aid of attachment in the absence of special circumstances showing impediments rendering the attachment inadequate;[56] and even where, under the statutory procedure, creditors in one action may attack a sale made by their common debtor as fraudulent and recover judgment for their several demands, plaintiffs will not be entitled to a receiver if it appears that an attachment against the debtor will afford complete and adequate relief.[57] In a suit founded upon a statement of facts which make a case for replevin or trover, a receiver will not be appointed.[58] It is not necessary that a party applying for a receiver should exhaust his remedies at law. It is sufficient if it appears that such remedies are inadequate or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property or fund or to secure justice to the parties.[59]

b. Injunction or Attachment. Where an injunction will protect all the

United States.— Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442.

See 42 Cent. Dig. tit. "Receivers," § 12.

52. See *infra*, text and note 54 *et seq.*; and III, A.

Interference with title or possession generally see *infra*, II, B, 10.

53. Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64. See also *infra*, II, B, 7, c.

54. *Florida.*— Montgomery *v.* Knox, 20 Fla. 372.

Maryland.— Blain *v.* Everitt, 36 Md. 73; Knighton *v.* Young, 22 Md. 359.

Pennsylvania.— Schlecht's Appeal, 60 Pa. St. 172.

South Carolina.— Nathans *v.* Steinmeyer, 57 S. C. 386, 35 S. E. 733.

Texas.— Wotring *v.* Indemnity Imp. Co., 45 Tex. Civ. App. 300, 100 S. W. 358; Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

West Virginia.—Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528.

See 42 Cent. Dig. tit. "Receivers," § 12.

Waiver of objection.— Where a corporation in a bill filed by creditors alleging insolvency and praying for the appointment of a receiver suffers the bill to be taken *pro confesso*, enters its appearance on the day the bill is filed, and makes no objection to the appointment, it is taken to assent to the appointment and it is too late nine months after the receiver has taken possession and carried on the business to object that plaintiffs had an adequate remedy at law. Brown *v.* Lake Superior Iron Co., 134 U. S. 530, 10 S. Ct. 604, 33 L. ed. 1021.

55. *Alabama.*—Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4; Hughes *v.* Hatchett, 55 Ala. 631, holding that a party cannot be permitted thus to get advantage of the attachment laws against a debtor on a disputed debt without giving the bond required by the attachment statutes for the protection of the adversary party.

Georgia.— See Spence *v.* Solomons Co., 129 Ga. 31, 58 S. E. 463.

Indiana.— May *v.* Greenhill, 80 Ind. 124.

Maryland.— Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172 [*followed* in Rich *v.* Levy, 16 Md. 74; Hubbard *v.* Hubbard, 14 Md. 356]; Crane *v.* Seymour, 3 Md. Ch. 483.

Ohio.— Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir. Ct. 479, 7 Ohio Cir. Dec. 349, holding that the benefit of the attachment laws cannot be had in this way.

Texas.— City Nat. Bank *v.* Dunham, 18 Tex. Civ. App. 184, 44 S. W. 605; Cahn *v.* Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000; Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

See 42 Cent. Dig. tit. "Receivers," § 12.

At whose instance see *infra*, II, B, 7.

56. Pearce *v.* Jennings, 94 Ala. 524, 10 So. 511. But see Gassaway *v.* Heidenheimer, (Tex. Civ. App. 1896) 37 S. W. 343.

Statutory proceedings are sometimes provided for the appointment of a receiver and sale of attached property. See H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337.

57. Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173. *Compare* Stern *v.* Austern, 120 N. C. 107, 27 S. E. 31.

58. Schack *v.* McKey, 100 Ill. App. 294, 97 Ill. App. 460.

59. Sallee *v.* Soules, 168 Ind. 624, 81 N. E. 587; Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26; Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075; De Barrera *v.* Frost, 39 Tex. Civ. App. 544, 88 S. W. 476, 33 Tex. Civ. App. 580, 77 S. W. 637; Columbia Nat. Sand Dredging Co. *v.* Washed Bar Sand Dredging Co., 136 Fed. 710. The remdy must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. Jones *v.* Mutual Fidelity Co., 123 Fed. 506.

rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed;[60] and so where the party may resort to injunction or attachment.[61]

c. Lis Pendens. Where the filing of a *lis pendens* will secure the fruits of the litigation there is no abuse of discretion in refusing an interlocutory appointment of a receiver.[62]

d. Bond. When every purpose of a receivership can be effectually accom-

60. *Alabama.*— Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; American Freehold Land Mortg. Co. *v.* Turner, 105 Ala. 520, 17 So. 85. See also Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109.

Florida.—State *v.* Jacksonville, etc., R. Co., 15 Fla. 201, as to appointment without notice.

Georgia.— Virginia-Carolina Chemical Co. *v.* Provident Sav. L. Assur. Soc., 126 Ga. 50, 54 S. E. 929.

Illinois.— Schack *v.* McKey, 97 Ill. App. 460; Nusbaum *v.* Locke, 53 Ill. App. 242; Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406.

Indiana.— Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210.

Iowa.— French *v.* Gifford, 30 Iowa 148.

Kentucky.— Tarvin *v.* Walker's Creek Coal, etc., Co., 109 Ky. 579, 60 S. W. 185, 22 Ky. L. Rep. 1473, holding that the code provision for the appointment of a receiver "on the motion of any party to an action who shows that he has, or probably has, a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured," applies only to personal property, or to property on which plaintiff appears to have a lien for the enforcement of some legal demand, and that, even if this were not true, the court would not be authorized to place land in the hands of a receiver to prevent defendants from trespassing thereon, and from confusing plaintiff's boundary, injunction being the proper remedy.

Maryland.— Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576; Baltimore City Brick Co. *v.* Robinson, 55 Md. 410.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 25 Mont. 164, 64 Pac. 330 (holding that in a suit by parties claiming title to a mine, for an injunction to restrain others and their lessee from working the mine, where the lessee's estate would terminate before a final adjudication of the matter could be had, a receiver could not be appointed on the ground that the bond which would be required on granting the restraining order, suit on which would be the lessee's only remedy, does not afford such lessee adequate protection, since it will be presumed that the bond would be sufficient to protect the lessee from any loss caused by the order); State *v.* Second Judicial Dist. Ct., 13 Mont. 416, 34 Pac. 609.

New Jersey.— Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756, 26 Atl. 886.

New York.— Waterbury *v.* Merchants' Union Express Co., 50 Barb. 157.

North Carolina.— Hanna *v.* Hanna, 89 N. C. 68.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618.

Washington.— Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666.

United States.— U. S. *v.* Masich, 44 Fed. 10; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647. See also Jones *v.* Smith, 49 Fed. 314.

See 42 Cent. Dig. tit. "Receivers," § 12.

Difficulty in ascertaining damages for injury which may be caused by an injunction will not require the appointment of a receiver. Hickey *v.* Parrot Silver, etc., Co., 25 Mont. 164, 64 Pac. 330.

Inadequacy of injunction — removal of property.— Where the injunction might be inadequate to protect against the removal of the property or person out of the jurisdiction, the appointment of a receiver is approved. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666 (where property sought to be reached by a creditor's bill was of a kind easily to be put out of reach, and it would have been difficult to prove a breach of an injunction); Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267 (where in a suit to enjoin the use or communication of a secret code of letters, figures, etc., showing the cost and selling price of plaintiff's goods in copies of its catalogue, which code defendant acquired by collusion with one of plaintiff's traveling salesmen, it was held that a preliminary injunction was not an adequate remedy, since the code might be taken beyond the jurisdiction of the court). See also Sanderson *v.* Stockdale, 11 Md. 563; Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408; Haywood *v.* Scarborough, 41 Tex. Civ. App. 443, 92 S. W. 815.

61. Harmon *v.* Kentucky Coal, etc., Co., 21 S. W. 1054, 15 Ky. L. Rep. 12. Equitable attachments and injunctions are allowed only upon the execution of an adequate bond, and when such writs will afford protection the court should rarely appoint a receiver. Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622.

62. Clay *v.* Clay, 86 Ga. 359, 12 S. E. 1064; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Bennett *v.* Consolidated Apex Min. Co., 12 S. D. 234, 80 N. W. 1078; Jones *v.* Smith, 40 Fed. 314, where the court refused to continue a receivership pending a controversy over real estate, on the ground that the filing of a notice of *lis pendens*, etc.,

plished and the rights of the parties as effectually protected by bond with good and sufficient sureties, which the adverse party is ready to furnish, a receiver will not be appointed.[63] But in a suit for a sale and division of property, including a division of the proceeds of other property already sold, in the hands of one of the joint owners, in which the parties agree upon the necessity for a receiver, but are at variance as to their shares upon a division, it is proper that all of the property should be turned over to the receiver and an offer by the party in pos-

would secure the safety of complainant's rights as to the *corpus* of the property, and continued the receivership as to rents and profits already collected until the conclusion of the suit and required future rents to be secured by bond with surety. See also Lloyd *v.* Passingham, 3 Meriv. 697, 36 Eng. Reprint 267, 16 Ves. Jr. 59, 33 Eng. Reprint 906, as to the suit being sufficient notice to subsequent purchasers of land.

63. *Georgia.*— Cordele Ice Co. *v.* Sims, 120 Ga. 428, 48 S. E. 12; Conquest *v.* Brunswick Nat. Bank, 97 Ga. 500, 25 S. E. 343; Stillwell *v.* Savannah Grocery Co., 88 Ga. 100, 13 S. E. 963; Mayo *v.* McPhaul, 71 Ga. 758, holding that where defendants, in possession of land, were committing serious damage by cutting and boxing trees for turpentine purposes, and gathering the crude turpentine, and failed to comply with an order to produce their title papers, alleging that the safe in which they were deposited was rusted, and could not be immediately opened, an order granting an injunction and appointing a receiver, and providing that the order might be vacated on defendant's giving a bond for the eventual condemnation money, was reasonable and discreet. But see A. B. Steele Lumber Co. *v.* Laurens Lumber Co., 92 Ga. 446, 17 S. E. 657, where upon the peculiar facts there was no abuse of discretion in appointing a receiver over the offer of defendants to execute a bond in any sum the court might deem proper.

New Jersey.— Low *v.* Holmes, 17 N. J. Eq. 148.

New York.— Stern *v.* Shapiro, 99 N. Y. App. Div. 405, 91 N. Y. Suppl. 249; Buchanan *v.* Comstock, 57 Barb. 568.

Ohio.— Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345, holding that where the property involved was being managed so as to produce a large income and disastrous consequences might result by a change of management, and the parties would be secured by requiring the trustee, who was managing the property and who denied plaintiff's interest, to give a bond, a receiver should not be appointed.

Virginia.— See Virginia, etc., Steel, etc., Co. *v.* Wilder, 88 Va. 942, 14 S. E. 806.

West Virginia.— Grantham *v.* Lucas, 15 W. Va. 425.

England.— Huguenin *v.* Baseley, 13 Ves. Jr. 105, 9 Rev. Rep. 148, 276, 33 Eng. Reprint 234.

See 42 Cent. Dig. tit. "Receivers." § 12.

Supersedeas bond allowed to stand in lieu of receiver.— Where the appointment of a receiver of a corporation was superseded by a bond given on appeal, it was held that, upon the determination in the appellate court that the appointment was not an abuse of discretion, the receiver would not be reinstated but the bond would be allowed to stand in the place of a receiver. Oudin, etc., Fire Clay Min., etc., Co. *v.* Conlan, 38 Wash. 134, 80 Pac. 283.

By statute.— In South Carolina it was provided by statute that there should be no receiver before final judgment on the giving of a bond by defendant, under which it was held that where a receiver *pendente lite* was appointed and the party claiming the goods offered a good and sufficient bond to account for and deliver them, etc., the appointment was annulled. Roberts *v.* Pipkin, 63 S. C. 252, 41 S. E. 300.

A bond which is an inadequate substitute for a receiver and injunction, voluntarily tendered between the time the application is heard and the time it is decided, should not be permitted to encumber the exercise of the court's discretion, otherwise the denial of the application will be held error. Thus in an action against an insurance company on behalf of plaintiffs and all other creditors and stock-holders, etc., such a bond was voluntarily tendered conditioned to pay complainants and such others as may be made parties to the bill the amount which may be adjudged to be due them under their respective policies after the assets of the company shall first have been exhausted for the payment thereof, and it was held that this was not an adequate substitute for injunction and receiver and the judgment denying the application was reversed with directions to hear it *de novo,* unless defendant would enter into a bond, etc., of a certain sum conditioned to pay whatever recovery might be had on a final decree in the cause in behalf of any and all persons who should be parties thereto when the decree is rendered. Harrison *v.* Cotton States L. Ins. Co., 78 Ga. 716.

Liability as on common-law bond.— Although the court has no power to compel a party to the suit to execute such a bond, it has undoubted authority to appoint a receiver and if the party chooses to execute the bond rather than deliver property to a receiver of the court it is his voluntary act and the bond is good at common law. In this respect he is not to be considered as a receiver or officer of the court, but as a party who, for a personal accommodation, has assumed a legal responsibility, and after receiving its benefits on his part should be estopped from denying its legality. Baker *v.* Bartol, 7 Cal. 551.

Bond as sufficient protection see *infra,* II, B, 10, i, note 28.

session of the proceeds of sale to give a bond is no reason for allowing him to retain in his possession more of the fund than he is unquestionably entitled to.[64]

5. PENDENCY OF CAUSE — a. Rule Requiring. The general rule is that a receiver cannot be appointed except in a pending cause,[65] and under statutory authority for the appointment of a receiver by the court or a judge thereof in which an action is pending or has been passed to judgment an appointment before the commencement of the action is held to be void,[66] whether made in term-time or vacation.[67]

b. Application of Rule — (I) *BEFORE FILING OF BILL OR COMPLAINT.* Pursuant to the general rule therefore before the filing of a bill which is the commencement of the suit,[68] or of a complaint where such filing is the commencement of the action under the code, an order appointing a receiver cannot be made,[69] and if so made it is held to be void.[70] The mere filing of a petition for the

Termination of receivership see *infra*, III, K.

64. Whitley *v.* Berry, 105 Ga. 251, 31 S. E. 171.

65. *Alabama.*— Crowder *v.* Moone, 52 Ala. 220.

California.—Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191; *In re* French Bank Case, 53 Cal. 495.

Colorado.— People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908; Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272.

Georgia.— Stone *v.* Wetmore, 42 Ga. 601.

Idaho.— Gold Hunter Min., etc., Co. *v.* Holleman, 3 Ida. 99, 27 Pac. 413.

Indiana.— Winona, etc., Traction Co. *v.* Collins, 162 Ind. 693, 69 N. E. 998; Alexandria Gas Co. *v.* Irish, 152 Ind. 535, 53 N. E. 762; State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188; Dale *v.* Kent, 58 Ind. 584.

Kansas.— Guy *v.* Doak, 47 Kan. 236, 366, 27 Pac. 968.

Michigan.— Jones *v* Schall, 45 Mich. 379, 8 N. W. 68.

Mississippi.— Barber *v.* Mainer, 71 Miss. 725, 15 So. 890; Hardy *v.* McClellan, 53 Miss. 507.

New York.— People *v.* New York, 19 How. Pr. 289.

Ohio.— Dwelle *v.* Hinde, 18 Ohio Cir. Ct. 618, 8 Ohio Cir. Dec. 177.

West Virginia.— Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660; Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424 52 S. E. 528.

United States.— *In re* Brant, 96 Fed. 257.

England.— *Ex p.* Whitfield, 2 Atk. 315, 26 Eng. Reprint 592, before the Judicature Act. *Compare* Grimston *v.* Turner, 22 L. T. Rep. N. S. 292, 18 Wkly. Rep. 724.

See 42 Cent. Dig. tit. "Receivers," § 5.

An order to show cause why a receiver should not be appointed served before the commencement of the suit is irregular and the motion will be denied on that ground, the objection having been taken preliminarily. Kattenstroth *v.* Astor Bank, 2 Duer (N. Y.) 632.

Presumptions.— Where the record of a case shows that a receiver was appointed on the same day on which the action was commenced therefor, it will be presumed that each was done in its proper order. Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

66. Popp *v.* Daisy Gold Min. Co., 27 Utah 83, 74 Pac. 426, holding that an understanding between counsel and the court that an order appointing a receiver, entered prior to the commencement of the action, should not take effect until after its commencement, will not validate the appointment.

67. Harwell *v.* Potts, 80 Ala. 70; State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682; Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188; Guy *v.* Doak, 47 Kan. 236, 366, 27 Pac. 968; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

68. Crowder *v.* Moone, 52 Ala. 220; Jones *v.* Schall, 45 Mich. 379, 8 N. W. 68; Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627; Barber *v.* Manier, 71 Miss. 725, 15 So. 890. But see Universal Sav., etc., Co. *v.* Stoneburner, 113 Fed. 251, 51 C. C. A. 208.

69. Gold Hunter Min., etc., Co. *v.* Holleman, 3 Ida. 99, 27 Pac. 413.

70. Gold Hunter Min., etc., Co. *v.* Holleman, 3 Ida. 99, 27 Pac. 413; Jones *v.* Schall, 45 Mich. 379, 8 N. W. 68; Smith *v.* Ely, etc., Dry Goods Co., 79 Miss. 266, 30 So. 653; Barber *v.* Manier, 71 Miss. 725, 15 So. 890. *Compare* Scott *v.* Cox, 30 Tex. Civ. App. 190, 70 S. W. 802, holding that the appointment of a receiver, without notice, and before filing of petition, to take charge of property, in a suit to subject it to a lien, is no ground for reversing the judgment; motion to vacate the receivership not having been made, and it appearing the property was subject to the lien, and was applied by the court to its satisfaction.

By chancellor in vacation.— *In general.*— An order appointing a receiver made by the chancellor in vacation before the filing of the bill has been held to be void. Harwell *v.* Potts, 80 Ala. 70; Crowder *v.* Moone, 52 Ala. 220; Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627.

Appointment on bill and answer.—An order appointing a receiver signed by a circuit judge at chambers in another district on

appointment of a receiver before the filing of a bill or complaint or the issue of process will not authorize such appointment.[71]

(II) *Process or Appearance.* Under the rule requiring a suit to be pending, the statute which makes the issuance of process necessary to the commencement of an action applies.[72] But where the judge is empowered to appoint a receiver in vacation and the complaint is filed and voluntary appearance of defendant entered in vacation, the suit is held to be pending at and from the time of such appearance for the purpose of the appointment of a receiver.[73]

(III) *When Main Object of Suit Fails.* If the main object of the suit fails,[74] or the court has no jurisdiction of the subject-matter of the main relief sought, a receiver cannot be appointed.[75]

(IV) *Upon Dismissal by Plaintiff.* Upon a dismissal of his suit by plaintiff there is no cause pending and the subsequent appointment of a receiver in such dismissed cause at the instance of defendant is erroneous.[76]

6. Character of Remedy as Incidental to Other Relief — a. Rule Stated. It is well settled as a general rule that the appointment of receivers is an ancillary remedy in aid of the primary object of a litigation between the parties,[77] and such

presentation to him of bill and answer (the latter joining in the prayer for a receiver), which have not been filed, to take effect when the pleadings and order are filed with the clerk, becomes effective on such filing. Horn *v.* Pere Marquette R. Co., 151 Fed. 626.

71. Winona, etc., Traction Co. *v.* Collins, 162 Ind. 693, 69 N. E. 998; Hardy *v.* McClellan, 53 Miss. 507; Anonymous, 1 Atk. 578, 26 Eng. Reprint 363. See also *Ex p.* Mountfort, 15 Ves. Jr. 445, 33 Eng. Reprint 822.

72. Alexandria Gas Co. *v.* Irish, 152 Ind. 535, 53 N. E. 762; Dwelle *v.* Hinde, 18 Ohio Cir. Ct. 618, 8 Ohio Cir. Dec. 177. But see *infra*, II, B, 8, a.

To compel appearance see *infra*, II, B, 8, b, note 30.

Notice dispensed with see *infra*, III, D, 5.

73. Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682.

Defective service and appearance.— It has been held that there may be a pending action so as to authorize the appointment of a receiver, although the notice of service is defective and defendant had entered a special appearance. Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976.

Power of judge in vacation see Judges, 23 Cyc. 554.

74. People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908; Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293 (where the suit for dissolution of a corporation could not be maintained under a statute providing a particular method for such relief); Goebel *v.* Herancourt Brewing Co., 2 Ohio S. & C. Pl. Dec. 377, 7 Ohio N. P. 230. But in Goldsmith *v.* Fletcheimer, 28 S. W. 21, 16 Ky. L. Rep. 433, it was held that where creditors petitioned for the cancellation of a deed of assignment and incidentally for the appointment of a receiver, the mere denial of the substantial relief would not prevent a chancellor from appointing a receiver to take the funds from the assignee's control if the facts warranted it, it appearing that the facts in this case were considered sufficient to justify the court in removing the assignee.

No cause of action stated see *infra*, III, B, 2, a.

Duration of receivership see *infra*, III, K.

75. People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Hopper *v.* Davies, 70 Ill. App. 682; Gillespie *v.* Illinois Steel Co., 62 Ill. App. 594; Grand Rapids School Furniture Co. *v.* Pike County School Dist. No. 29, 102 Ky. 556, 44 S. W. 98, 19 Ky. L. Rep. 1610; Condon *v.* Mutual Reserve Fund Life Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; Schacht *v.* Eschbacher, 7 Pa. Dist. 437, discharging a rule to show cause why a receiver should not be appointed on, and sustaining a demurrer to, a bill seeking the sale of a tug boat and a division of the proceeds, the jurisdiction of admiralty being held exclusive.

Order void.— An interlocutory appointment of a receiver in such a case is not merely irregular but void. People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908; People *v.* Weigley, 155 Ill. 491, 40 N. E. 300.

76. Dale *v.* Kent, 58 Ind. 584. See also *infra*, III, K, 2, b.

77. *California.*— Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191; French Bank Case, 53 Cal. 495, 550. Provisional remedy under the code. Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549.

Indiana.—Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

Kentucky.— Goldsmith *v.* Fletcheimer, 28 S. W. 21, 16 Ky. L. Rep. 433.

Louisiana.— Saxon *v.* Southwestern Brick, etc., Mfg. Co., 113 La. 637, 37 So. 540.

Maryland.—State *v.* Northern Cent. R. Co., 18 Md. 193.

Nebraska.— Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253; Mann *v.* German-American Inv. Co., 70 Nebr. 454, 97 N. W. 600; Vila *v.* Grand

relief must be germane to the principal suit;[78] and a suit cannot be maintained under this general rule where the appointment of a receiver is the sole primary object of the suit and no cause of action or ground for equitable relief otherwise is stated,[79] although, on the other hand, the appointment may be a part of the relief asked in a complaint in an action of the class in which receivers may be appointed.[80]

b. Application of and Exceptions to Rule — (i) *In General.* Thus in applying the general rule it is held that a court of equity cannot appoint a receiver for a concern merely for the purpose of preventing its creditors from maintaining actions against it for the recovery of their demands,[81] and that an insolvent

Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791 (referring particularly to appointments at the instance of private parties); Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594.

Ohio.— Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1; Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir. Ct. 479, 7 Ohio Cir. Dec. 349; Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185; Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293; Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

Tennessee.— Slover *v.* Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 106 Am. St. Rep. 851, 68 L. R. A. 52.

Texas.— Farwell *v.* Babcock, 27 Tex. Civ. App. 162, 65 S. W. 509; People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738; Espuela Land, etc., Co. *v.* Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

West Virginia.—Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528, under the statute providing expressly for the appointment of a receiver by a court of equity in any proper case pending therein, etc.

United States.— Hutchinson *v.* American Palace-Car Co., 104 Fed. 182; Brassey *v.* New York, etc., R. Co., 19 Fed. 663.

See 42 Cent. Dig. tit. "Receivers," § 3.

An appointment after judgment to carry the judgment into effect is not merely ancillary. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627.

78. Hardy *v.* Abbott, 32 Tex. Civ. App. 66, 73 S. W. 1079.

79. *Alabama.*— Harwell *v.* Potts, 80 Ala. 70.

California.—Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191 [*quoting* French Bank Case, 53 Cal. 495, where it is said that there is no such thing as a suit brought distinctively for the mere appointment of a receiver].

Connecticut.— Barber *v.* Mexico International Co., 73 Conn. 587, 48 Atl. 758.

Indiana.— Winona, etc., Traction Co. *v.* Collins, 162 Ind. 693, 69 N. E. 998; State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209.

Kansas.— Hottenstein *v.* Conrad, 9 Kan. 435.

Michigan.— Jones *v.* Schall, 45 Mich. 379, 8 N. W. 68.

Missouri.— State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

Nebraska.— Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Mann *v.* German-American Inv. Co., 70 Nebr. 454, 97 N. W. 600.

New Jersey.— See Bilder *v.* Robinson, (Ch. 1907) 67 Atl. 828.

New York.— Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

Ohio.—Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir Ct. 479, 7 Ohio Cir. Dec. 349; Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618.

Tennessee.— Slover *v.* Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 106 Am. St. Rep. 851, 68 L. R. A. 852.

West Virginia.— Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660; Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528.

United States.— Hutchinson *v.* American Palace-Car Co., 104 Fed. 182, holding that a court of equity of the domicile of a corporation would not appoint a receiver on a bill filed by a minority of stock-holders merely in order that such receiver might appear and represent the corporation in litigation instituted by complainants in a court of another district. See also Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72.

See 42 Cent. Dig. tit. "Receivers," § 3.

"A suit actually commenced and pending" that will support the appointment of a receiver must be one for relief that could be litigated between the parties even if the application for the appointment be denied. Mann *v.* German-American Inv. Co., 70 Nebr. 454, 97 N. W. 600.

80. State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Newell *v.* Schull, 73 Ind. 241, which was a suit for the foreclosure of a mortgage with a prayer for a receiver as a part of the final relief. But see Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594; *infra*, II, B, 12, a, note 47.

81. Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253; Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613,

debtor cannot take refuge in a chancellor's decree, on his or its own application, and obtain protection against pursuing creditors by such a remedy.[82] To employ that extraordinary remedy as a means by which to indefinitely prolong by aid of a friendly receiver the substantial control of the managing body of an insolvent private corporation over its assets and business can be justified, in the absence of statutory authority, by circumstances only, if there can be any, that most unequivocally demand such action, or by the consent of all parties in interest.[83] The general rule, however, is subject to exceptions, some of which seem well defined while others amount to a repudiation of the rule itself under the particular circumstances and create a practical conflict of authority.[84] And so it has been

110 Am. St. Rep. 400, 63 L. R. A. 791; Matter of Atlas Iron Constr. Co., 38 N. Y. Suppl. 172, 2 N. Y. Annot. Cas. 124 (as to such an order on the petition of a corporation); Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542; Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72 (where it was said that a managing receivership of a private business corporation is never undertaken except with a view of winding up its affairs and the sale of its property, the business being taken over and continued in order that the whole may be disposed of in the end as a going concern, and therefore the court doubted its authority to entertain a bill by general creditors of an insolvent corporation, the sole purpose of which was to have receivers appointed and stave off lien creditors, there being no statute in the state to wind up the corporation, but as there was a prayer in the bill that plaintiff's debt might be ascertained and decreed to be paid, to effect which a sale might be necessary, and the bill being confessed and no one seeming to question it, the court assumed that jurisdiction was complete for the further purposes of the suit).

82. *Arkansas.*— Wormser *v.* Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198, as to impropriety of appointment for corporation under bill by it.

Colorado.—Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272.

Illinois.— Gillespie *v.* Illinois Steel Co., 62 Ill. App. 594.

Louisiana.— *In re* Moss Cigar Co., 50 La. Ann. 789, 23 So. 544.

Michigan.— Kimball *v.* Goodburn, 32 Mich. 10.

Mississippi.— Whitney *v.* Greenville Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531, appointment void.

Missouri.— State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, appointment void.

United States.— Hugh *v.* McRae, 12 Fed. Cas. No. 6,840, Chase 466, holding that the fact that a corporation is insolvent will not authorize it to apply to a court of equity for a receiver to wind up its affairs; that such appointment will only be made at the instance of a creditor.

See 42 Cent. Dig. tit. "Receivers," § 3.

Courts do not sit to conduct private business about which there is no controversy. Gillespie *v.* Illinois Steel Co., 62 Ill. App. 594.

83. Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534, 42 N. E. 690.

84. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513, involved an application by a railroad company mortgagor whose property was burdened with a variety of encumbrances and obligations, the railroad running through several states and the property being split up into fragments, the aggregate value of which would be as nothing compared with the value of the property intact, and upon the question whether two days before a default the various rights of attack would arise in different parts of the territory the court might anticipate them and take possession of the property and preserve it intact, the court assumed the authority to act upon the ground that the value of the property lay chiefly in keeping it together and that a refusal to appoint a receiver would result in its disintegration and a consequent destruction of the security. This is an extreme case and the decision is opposed to those already cited in this section and has been characterized as *sui generis*, and as being without the support of any source of equity jurisdiction and without precedent. State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534, in which case Brassey *v.* New York, etc., R. Co., 19 Fed. 663 (cited *infra*, note 85), is distinguished from the case criticized in that the action in the former was brought by the bondholders against the corporation. In Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632, the propriety of the appointment of a receiver under the circumstances of the case of Wabash, etc., R. Co. *v.* Central Trust Co., *supra*, was raised but the court held that the question was not properly before it and refused to decide it. See also where suits for the appointment of receivers of corporations were brought by the corporations, but the question here was not discussed: Leigh *v.* National Hollow Brake-Beam Co., 224 Ill. 76, 79 N. E. 318; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219 (where the bill alleged that the corporation was insolvent, and that its system was in danger of being broken up, and asked no final relief, and no relief except the appointment of receivers to hold the system intact, and to protect the corporation against its creditors and the court said it was one of those anomalous proceedings, so common in such cases, which the supreme court has never formally ap-

held that while, as a rule, a mortgagee cannot ask relief until his mortgage debt is due, nevertheless he may come into a court of equity before that time and ask for an injunction and receiver to prevent the subject-matter of his mortgage from being impaired or wasted,[85] unless the equity of the bill is fully met by the

proved or disapproved, and which have been tolerated on account of the public and general interests involved, for which legislatures have given no protection under such emergencies; that occasional criticism has been expressed against the courts for retaining proceedings of this class, but that, as was usual under such circumstances, no formal objections appeared to have been brought to the attention of the court in this case); Cleveland, etc., R. Co., *v.* Knickerbocker Trust Co., 64 Fed. 623. But it has been held that the court will not entertain a bill filed by such a corporation against its creditors and at once without notice place the property in the hands of one or more of the directors whose management has been unsuccessful. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161. See also *infra*, II, C.

In suit for removal of officers.— In Clarke *v.* Central R., etc., Co., 54 Fed. 556, it was held that in a suit to oust directors illegally chosen in which a receiver is appointed to preserve the property until it can be turned over to legally elected officers, such receiver may be continued at the instance of the legally elected officers and this, although the corporation is not insolvent in a technical sense but only embarrassed and its credit impaired, in order to preserve the value of the property by providing a means for its operation as an entire system and although the continuance of the receiver is the ultimate relief asked.

Fraud, neglect, or misconduct of trustee.— A receiver may be appointed in any case, where it appears to be necessary, by reason of the fraud, misconduct, or neglect of a trustee, to collect and preserve the funds belonging to a *cestui que trust*. Eastman *v.* Savings Bank, 58 N. H. 421, which was a suit by depositors of a bank for the appointment of a receiver to collect moneys due from some of defendants to defendant bank.

85. Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170; Clagett *v.* Salmon, 5 Gill & J. (Md.) 314; Long Dock Co. *v.* Mallery, 12 N. J. Eq. 431; Brassey *v.* New York, etc., R. Co., 19 Fed. 663. It has been held that a bill may be filed by a mortgagee and creditor of a defendant corporation for the appointment of a receiver upon the ground that the management of the corporation is so grossly corrupt and bad as to entitle the complainant to invoke the interference of the court for the protection of his debt (Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90), and that a receiver may be appointed as the ultimate relief sought in order to preserve the integrity of the property and prevent its disintegration when its chief value consists in its preservation as a whole (Brassey *v.* New York, etc., R. Co., *supra*); but it has been doubted whether the complainant in a bill to foreclose a mortgage upon failure to sustain an application for the appointment of a receiver as a mere ancillary remedy may be permitted to proceed with the suit as one having for its main object the appointment of a receiver upon such grounds as those first stated (Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., *supra*, where an application for a receiver pending the foreclosure proceeding failed because the facts did not warrant the appointment on the ground of waste or destruction of the security and under the law of the state the appointment was not justified in such a suit merely on the ground of the inadequacy of the security because the mortgagor was entitled to possession as well as to rents and profits until actual foreclosure sale and confirmation thereof).

To prevent forfeiture of franchise.— In Union St. R. Co. *v.* Saginaw, 115 Mich. 300, 73 N. W. 243, it was held that where a city has the power to enforce forfeiture of a street railway company's franchise for failure to pay a tax, and the company confesses its inability to pay such tax, and the mortgagee of the company stands ready to advance the necessary funds in case a receiver be appointed with power to borrow money, the appointment of a receiver upon the prayer of the mortgagee is proper, not as foreclosing the mortgage, and giving the mortgagee possession before the redemption period has expired, but as a means of preserving the property for the benefit of all concerned.

Contra.— Gilbert *v.* Block, 51 Ill. App. 516, holding that the mere fact that mortgaged goods are being levied upon by creditors of the mortgagor is not ground for the appointment of a receiver in a suit by the mortgagee against the mortgagor as sole defendant, the application stating no controversy between the mortgagor and the mortgagee. See also Vila *v.* Grand Island Electric, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791, holding that there is no authority for giving unqualified support to the doctrine that a mere mortgagee of corporate property may, in an independent action, and for no other purpose, have a receiver appointed, the corporate property sequestered, the business conducted by the receiver until by the receiver's sale the estate may sell subject to the mortgage indebtedness, because of an anticipated default of the indebtedness, a possible inability to continue the conduct of the business, threatened attachments, financial weakness or insolvency, and, in the event of the suspension of the business, consequent depreciation of the value of the mortgaged property.

answer;[86] so where the owner of the legal title to property may, pending the determination of his right at law, come into equity and have a receiver appointed to prevent a threatened and imminent loss, when he is without an adequate remedy at law to accomplish the purpose.[87] So in some cases of extraordinary character affecting quasi-public corporations, some courts have assumed jurisdiction and claim authority to appoint a receiver where that is the main purpose of the suit;[88] and the general rule may be said to be modified to some extent by statute in particular instances, as for example, under provisions for the appointment of receivers of corporations which have been dissolved or are insolvent or are in imminent danger of insolvency,[89] although under such provisions it is not always entirely certain that the appointment of the receiver is not incidental to other relief granted in the suit.[90]

(II) *Where There Is No One Competent to Hold the Property.* The courts have recognized exceptions to the general rule and have exercised the power to appoint a receiver where there was no person having a legal right to deal with property,[91] as in the case of an appointment of a receiver until administration could be granted, where the right to administer was in litigation or other impediment existed,[92] and exception is made in the case of the estates

86. Long Dock Co. *v.* Mallery, 12 N. J. Eq. 431.

87. American Freehold Land Mortg. Co. *v.* Turner, 95 Ala. 272, 11 So. 211 (at suit of purchaser at foreclosure sale pending ejectment, when attachment in favor of landlord to secure rent is not available to him); Ulman *v.* Clark, 75 Fed. 868.

88. See Fisher *v.* Concord R. Co., 50 N. H. 200; Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,706, 2 Dill. 448. See also RAILROADS, 33 Cyc. 612.

89. See Hall *v.* Nieukirk, 12 Ida. 33, 85 Pac. 485; Gibbs *v.* Morgan, 9 Ida. 100, 72 Pac. 733; Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; *In re* Lewis, 52 Kan. 660, 35 Pac. 287; Oil City Ironworks *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987; McNary *v.* Bush, 35 Oreg. 114, 56 Pac. 646 (on collateral attack); Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528.

Dissolution and winding up of corporations see CORPORATIONS, 10 Cyc. 1270 *et seq.*

Statute inapplicable to private persons.— Granting that a statute providing for the appointment of receivers permits such appointment as the ultimate object of the suit when a corporation has been dissolved or is insolvent or is in imminent danger of insolvency, etc., this has been held to form no justification of the appointment of a receiver for the property of an individual as the sole object and purpose of the suit. State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

90. State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209, referring to Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846, and Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210, and pointing out that it is doubtful whether the appointment in those cases was not merely in aid of the main object of the suits, namely, an accounting by the officers and a proper application of the funds of the corporation.

91. *Ex p.* Galluchat, 1 Hill Eq. (S. C.) 148; *In re* Moore, 13 P. D. 36, 52 J. P. 200, 57 L. J. P. D. & Adm. 37, 58 L. T. Rep. N. S. 386, 36 Wkly. Rep. 576 (where an executor intermeddled in the estate before probate and without the assent of his co-executor and the court gave leave to issue a writ against him claiming an injunction and praying for the appointment of a receiver); Blackett *v.* Blackett, 24 L. T. Rep. N. S. 276, 19 Wkly. Rep. 559 (where on a bill filed for the purpose a receiver was appointed on an *ex parte* application to carry on the business of an intestate before grant of letters of administration had been obtained).

92. *Maryland.*— *In re* Colvin, 3 Md. Ch. 278, where it is pointed out that the question of the power to appoint a receiver pending a litigation in the ecclesiastical court for probate or administration was assumed to be free of doubt in King *v.* King, 6 Ves. Jr. 172, 31 Eng. Reprint 997, and although the position was apparently to some extent shaken in Richards *v.* Chave, 12 Ves. Jr. 462, 33 Eng. Reprint 175, it was firmly established in Atkinson *v.* Henshaw, 2 Ves. & B. 85, 35 Eng. Reprint 251; Edmunds *v.* Bird, 1 Ves. & B. 542, 35 Eng. Reprint 211, and Ball *v.* Oliver, 2 Ves. & B. 96, 35 Eng. Reprint 255, the court proceeding in such cases upon the ground that the property is in danger and may go into the hands of persons who have nothing to do with it, and the court will not forbear to make the appointment because the ecclesiastical court might provide for the collection of the effects of the decedent by granting letters *pendente lite*.

New Jersey.— McCarter *v.* Clavin, (Ch.

of infants, idiots, and lunatics, which has been said to be a particular jurisdiction.[93]

7. At Whose Instance and For Protection of What Right or Interest[94] — a. In General. While the appointment of a receiver involves the decision of no right,[95] it must be made only upon the application of some one who appears to have an interest in the subject-matter,[96] or at least a probable or apparent right or interest in or to the property, fund, or assets over which he seeks to have a receiver appointed,[97] or of one having an acknowledged or strong presumptive

1907) 66 Atl. 599; Flagler *v.* Blunt, 32 N. J. Eq. 518.

Tennessee.—Smiley *v.* Bell, Mart. & Y. 378, 17 Am. Dec. 813 [*cited* in Slover *v.* Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 106 Am. St. Rep. 851, 68 L. R. A. 852]; Stratton *v.* Cain, (Ch. App. 1901) 62 S. W. 231 (pending a will contest in the circuit court, and although the latter court might have appointed a receiver under the statute).

Texas.— Long *v.* Richardson, 26 Tex. Civ. App. 197, 62 S. W. 964.

England.— Wood *v.* Hitchings, 2 Beav. 289, 4 Jur. 858, 17 Eng. Ch. 289, 48 Eng. Reprint 1192; Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752; Grimston *v.* Turner, 22 L. T. Rep. N. S. 292, 18 Wkly. Rep. 724. See also Parkin *v.* Seddons, L. R. 16 Eq. 34, 42 L. J. Ch. 470, 28 L. T. Rep. N. S. 353, 21 Wkly. Rep. 538. In Anderson *v.* Guichard, 9 Hare 275, 41 Eng. Ch. 275, 68 Eng. Reprint 506; Edwards *v.* Edwards, 17 Jur. 826, 22 L. J. Ch. 1055, and Barton *v.* Rock, 2 Beav. 81, 52 Eng. Reprint 1038, it was held that in such cases a suit is never brought to a hearing, although in the last case it is shown that after litigation is ended in the ecclesiastical court the costs of the suit will be disposed of on motion.

See 42 Cent. Dig. tit. "Receivers," § 3. See also *infra*, II, B, 10, h.

93. Jones *v.* Leadville Bank, 10 Colo. 464, 17 Pac. 272; Baker *v.* Backus, 32 Ill. 79; *In re* Colvin, 3 Md. Ch. 278; *Ex p.* Whitfield, 2 Atk. 315, 26 Eng. Reprint 592. See also Skinner *v.* Maxwell, 66 N. C. 45; Beaufort *v.* Berty, 1 P. Wms. 702, 24 Eng. Reprint 579.

To protect infant tenant in common a receiver has been appointed. Hargrave *v.* Hargrave, 9 Beav. 549, 15 L. J. Ch. 280, 50 Eng. Reprint 456; Smith *v.* Lyster, 4 Beav. 227, 10 L. J. Ch. 344, 49 Eng. Reprint 326, holding that when one of two infants comes of age the receiver will not for that reason be discharged.

Provisional order in lunacy proceedings see Insane Persons, 22 Cyc. 1127 note 83.

94. Not at instance of party in possession see *infra*, II, B, 10, a note 59.

Stock-holders see *infra*, II, C, 3, a.

95. See *infra*, III, E, 3, b; IV, A.

96. *Idaho.*— Chemung Min. Co. *v.* Hanley, 11 Ida. 302, 81 Pac. 619; Sweeny *v.* Mayhew, 8 Ida. 455, 56 Pac. 85.

Indiana.— Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; Davis *v.* Niswonger, 145 Ind. 426, 44 N. E. 542; Steele *v.* Aspy, 128 Ind. 367, 27 N. E. 739.

Kansas.— Jackson *v.* King, 9 Kan. App. 160, 58 Pac. 1013.

Missouri.— Wesby *v.* Bowers, 58 Mo. App. 419. holding that one having no interest in defendant's business, but who had allowed his name to appear in the firm-name to prevent defendant's creditors from seizing the property, was not entitled to have a receiver appointed to take charge of such property, and collect and pay off the debts.

New York.— O'Mahoney *v.* Belmont, 62 N. Y. 133 [*affirming* 37 N. Y. Super. Ct. 380]; Smith *v.* Wells, 20 How. Pr. 158.

South Dakota.— Kelly *v.* Fargo Mercantile Co., 16 S. D. 73, 91 N. W. 350.

England.— Atty.-Gen. *v.* Day, 2 Madd. 246, 56 Eng. Reprint 325.

See 42 Cent. Dig. tit. "Receiver," § 18.

Stranger trespasser.— O'Mahoney *v.* Belmont, 62 N. Y. 133, holding that where a stranger procures himself to be appointed receiver and obtains control of the fund in controversy without the consent and contrary to the wishes of the parties, he is an intruder and trespasser and will be held to strict responsibility.

For attorney to secure costs.— On settlement by the parties of a suit in which otherwise a receiver might have been appointed, the attorney of defendant is not entitled to a receiver on the ground that the settlement omitted provision for the payment of the costs of the attorney. Anonymous, 2 Daly (N. Y.) 533.

Suit by receiver for appointment of receiver see *infra*, VI, B, 1, a.

No property to protect see *infra*, II, B, 11.

97. *Alaska.*— McBride *v.* Coy, 1 Alaska 238.

Indiana.— Sallee *v.* Soules, 168 Ind. 624, 81 N. E. 587; Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

New York.— Brown *v.* Northrup, 15 How. Pr. N. S. 333; Goodyear *v.* Betts, 7 How. Pr. 187.

Utah.— Ogden City *v.* Bear Lake, etc., Water-Works, etc., Co., 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305.

United States.— Lancaster *v.* Asheville St. R. Co., 90 Fed. 129.

See 42 Cent. Dig. tit. "Receivers." § 18.

Objection that plaintiff fraudulently acquired her interest from her husband, in fraud of his creditors, cannot be made by

title in himself, or in common with others in the fund, and where there is danger of loss or injury to the property, or the rents and profits.[98] He must show a right to the property itself or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort.[99] Under various statutes it is provided in effect that a receiver may be appointed at the instance of a party to the action having an apparent or probable right to or interest in the property which is in the possession of the adverse party.[1]

b. Title or Right in Doubt or Dispute. It is a well settled principle that upon an application in a case in which the court is empowered to appoint a receiver and the application is addressed to its discretion, the power will not be exercised *in limine* and before a decree upon the merits, where plaintiff's right is doubtful or it does not appear that there is a reasonable probability that he will succeed

defendant in an action for the appointment of a receiver where defendant is not a creditor of the husband. Jay *v.* Squire, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

Creditors interested in surplus of mortgaged property.— In Goshen Woolen Mills Co. *v.* City Nat. Bank, 150 Ind. 279, 49 N. E. 154, it was held that where a trust deed securing certain creditors provided that any surplus should be paid back to the grantor, in a suit to set aside the conveyance as fraudulent an unpreferred creditor has such a real interest as to justify the appointment of a receiver, whether the deed should be set aside or not, since it was possible that the property might bring more than the amount of the secured debts.

98. Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Vause *v.* Woods, 46 Miss. 120; Platt *v.* Elias, 101 N. Y. App. Div. 518, 91 N. Y. Suppl. 1079; International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152.

99. *Alabama.*— Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109.

Illinois.— Lemker *v.* Kalberlah, 105 Ill. App. 445.

Mississippi.—Vause *v.* Woods, 46 Miss. 120; Mays *v.* Rose, Freem. 703.

Texas.— Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898, holding that the same principle prevails under a statutory provision for the appointment of a receiver of a corporation which is insolvent or in imminent danger of insolvency, the court holding that when this point in the affairs of a corporation is reached the trust fund doctrine may be invoked by general creditors.

United States.— International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152.

See 42 Cent. Dig. tit. "Receivers," § 18.

1. See the statutes of the several states; and the cases cited *infra*, this note.

The right to the property as provided by the statute, as well as the danger of loss or injury, must appear. See Twitty *v.* Logan, 80 N. C. 69, where a case within the statute was not shown in an action to enforce an alleged lien.

Lien sufficient.— Where an insolvent executed a chattel mortgage to one as trustee, instructing him to take possession of the property and sell it for cash for the payment of certain debts, and an unsecured creditor filed a bill alleging that the property conveyed exceeded the amount of the debts, and that the chattel mortgage was void because it authorized the trustee to sell in parcels, that the debts secured were fraudulent, and that plaintiffs had attached the property, it was held that a receiver would be appointed. Gassaway *v.* Heidenheimer, (Tex. Civ. App. 1896) 37 S. W. 343.

Under contract for purchase.— A petition, in an action praying for the appointment of a receiver of property, which sets forth a contract between plaintiff and defendants with reference to the purchase of the property, thereby showing that plaintiff had a probable interest in the property, is sufficient to justify the appointment of a receiver within Tex. Rev. St. (1895) art. 1465, authorizing the appointment of a receiver on the application of a party whose right in the property is probable. Cotton *v.* Rand, (Tex. Civ. App. 1905) 92 S. W. 266.

Suit to restrain execution sale.— Under N. C. Code, § 379, subd. 1, authorizing the appointment of a receiver before judgment when a party establishes an apparent right to property which is the subject of the action, is in the possession of the adverse parties, and is in danger of being lost, it was held that a receiver may be appointed in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, executions have been levied on the only property of the debtor within the state, and the execution creditors are non-residents and seek to take the proceeds outside the state. Stern *v.* Austern, 120 N. C. 107, 27 S. E. 31.

Judgment creditor's suit to reach property. — In an action brought by a judgment creditor to reach certain shares of mining stock, claimed to belong to the judgment debtor, but which are standing on the company's books in the name of his wife, the creditor has "such an apparent right to or interest in" the suit as to entitle him to apply for the appointment of a receiver. Syracuse State Bank *v.* Gill, 23 Hun (N. Y.) 410.

An action at law for a mere money judgment is not one in which a receiver can be appointed. Adee *v.* Bigler, 81 N. Y. 349;

in obtaining the ultimate relief sought,[2] and the rule that in making and refusing an order for the appointment of a receiver the court will not determine the merits of the cause[3] is true only when a case is presented upon which there is reasonable probability of plaintiff's ultimate success.[4] It is not necessary, however, that it should appear conclusively that plaintiff is entitled to the relief prayed for, but it is sufficient if there are any grounds of relief presented and he appears to have reasonable expectations of succeeding,[5] and the mere pendency of a

O'Mahoney *v.* Belmont, 62 N. Y. 133 [*affirming* 37 N. Y. Super. Ct. 223, 380]; Mack *v.* Stanley, 74 N. Y. App. Div. 145, 77 N. Y. Suppl. 574. See also *infra*, II, B, 7, c.

2. *Alabama.*— Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909; Pollard *v.* Southern Fertilizer Co., 122 Ala. 409, 25 So. 169; Builders, etc., Supply Co. *v.* Lucas, 119 Ala. 202, 24 So. 416; Warren *v.* Pitts, 114 Ala. 65, 21 So. 494; Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110; Ashurst *v.* Lehman, 86 Ala. 370, 5 So. 731.

Alaska.— McBride *v.* Coy, 1 Alaska 238.

Georgia.— Davis *v.* Taylor, 86 Ga. 506, 12 S. E. 881.

Illinois.— People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Ruprecht *v.* Henrici, 113 Ill. App. 398.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338; Goshen Woolen Mills Co. *v.* City Nat. Bank, 150 Ind. 279, 49 N. E. 154.

Iowa.— Cofer *v.* Echerson, 6 Iowa 502.

Kansas.— Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

Kentucky.— Brashears *v.* Dickinson, 66 S. W. 1011, 23 Ky. L. Rep. 2182.

New York.— Stern *v.* Shapiro, 99 N. Y. App. Div. 405, 91 N. Y. Suppl. 249; Waterbury *v.* Merchants' Union Express Co., 50 Barb. 157; Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Patterson *v.* McCunn, 46 How. Pr. 182. See also Valentine *v.* Juch, 18 N. Y. Suppl. 747.

Ohio.— See Baker *v.* Fraternal Mystic Circle, 1 Ohio S. & C. Pl. Dec. 579, 32 Cinc. L. Bul. 84.

Pennsylvania.— Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83; Post *v.* Weeks, 3 Pa. Dist. 380, 7 Kulp 228 (as to the refusal to appoint when the essential facts are in doubt and the costs of a receivership will likely exceed the assets); Pottsville Lumber Co. *v.* Kopitzsch Soap Co., 2 Pa. Dist. 802; Oil Co. *v.* Petroleum Co., 6 Phila. 521.

West Virginia.— Harden *v.* Wagner, 22 W. Va. 356, holding that on a bill to set aside a conveyance to a trustee as fraudulent a receiver cannot be appointed upon a motion heard on the pleadings and proofs where it does not appear therefrom that the conveyance is fraudulent.

United States.— Moore *v.* British Columbia Bank, 106 Fed. 574; Ryder *v.* Bateman, 93 Fed. 16; American L. & T. Co. *v.* Toledo, etc., R. Co., 29 Fed. 416; Wilkinson *v.* Dobbie, 29 Fed. Cas. No. 17,670, 12 Blatchf. 298.

England.— Clark *v.* Dew, 1 Russ. & M. 103, 5 Eng. Ch. 103, 39 Eng. Reprint 40.

See 42 Cent. Dig. tit. "Receivers," § 34. See also *infra*, II, B, 10.

Where the fact of partnership is denied in a suit for dissolution and accounting the court will not ordinarily appoint a receiver until the fact is established. McCarty *v.* Stanwix, 16 Misc. (N. Y.) 132, 38 N. Y. Suppl. 820; Goulding *v.* Bain, 4 Sandf. (N. Y.) 716; Baxter *v.* Buchanan, 3 Brewst. (Pa.) 435; Norway *v.* Rowe, 19 Ves. Jr. 144, 12 Rev. Rep. 157, 34 Eng. Reprint 472.

Record showing no right in appellate court. — In Pacific R. Co. *v.* Ketchum, 95 U. S. 1, 24 L. ed. 347, on foreclosure of a third mortgage on a railroad, the railroad company answered, making no defense, and a decree of foreclosure and sale was rendered by consent. At the sale the property was purchased by the solicitor for the railroad company, in behalf of the holders of the third mortgage bonds, who subsequently took an assignment of the bid and operated the railroad. Subsequently the stock-holders of the old railroad company repudiated the action of the directors in making no defense to the foreclosure, and in authorizing the solicitor to consent to the foreclosure, and appointed a committee to take charge of their interests. This committee took an appeal from the foreclosure decree, and moved in the supreme court for the appointment of a receiver to take possession of the road, and it was held that the motion must be denied, since the hearing must be upon the pleadings and proof below, without any new evidence, and the pleadings disclosed no defense which the stock-holders could make to the suit, but did disclose the fact that the decree was made by consent.

Denial of equities by answer see *infra*, III, E, 5, b.

Real property see *infra*, II, B, 10, b.

3. See *infra*, III, E, 3, b.

4. Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110; Chase's Case, 1 Bland (Md.) 206, 213, 17 Am. Dec. 277.

5. Houston Cemetery Co. *v.* Drew, 13 Tex. Civ. App. 536, 36 S. W. 802. Where there is something more than a probability that the complainant will be entitled ultimately to a decree the appointment of a receiver is then a matter within the court's discretion. West *v.* Chasten, 12 Fla. 315.

But in an action for the dissolution of a corporation in which the answer denied the entire equity of the bill, it was held that a motion for a receiver, with a view to the examination of the affairs of the concern and the determination of whether it should be allowed to go on in business, could not be granted, unless the supporting affidavits conclusively showed the certainty of plaintiff's ultimate success. Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157.

demurrer to the bill or complaint is not of itself sufficient to defeat an application for a receiver upon sufficient allegations, since this field of equitable relief cannot be so unreasonably narrowed as to require a decision on the merits before the appointment.[6]

c. Creditors. When a plaintiff is permitted to come into a court of chancery in behalf of himself and other creditors,[7] or may sue there because of the equitable nature of his claim, or in respect of a fund in the hands of defendant out of which he has a right to ask payment, he may, under certain circumstances, have a receiver put upon the property or assets liable to his claim.[8] But generally, and in the absence of statutory authority, one who has no specific lien on the property and no interest therein other than that which any creditor might have in realizing his debt,[9] or a general or simple contract creditor who has not reduced

Pending motion to dissolve injunction see *infra*, II, B, 8, a, note 23.

Pending plea to jurisdiction see *infra*, II, B, 8, a, note 23.

6. Cogswell *v.* Norwich Second Nat. Bank, 76 Conn. 252, 56 Atl. 574; Turnbull *v.* Prentice Lumber Co., 55 Mich. 387, 21 N. W. 375 [*distinguishing* Cook *v.* Detroit, etc., R. Co., 45 Mich. 453, 8 N. W. 74, in that the receiver was there appointed without notice and the property of the corporation which was still conducting its business was sequestered]; Howard *v.* Palmer, Walk. (Mich.) 391, holding that, where notice was given to defendant's solicitor on a special motion for a receiver and he did not appear, there was no objection to granting the order by reason of the fact that a demurrer had been interposed; that if defendant had wished to oppose the appointment he should have appeared for that purpose and the court would then have looked into the proceedings and if doubtful as to the ruling to be made on the demurrer would have ordered the motion to stand over until the ruling on the demurrer was made.

Even where a demurrer was sustained, but only on the ground of a defect of parties, in a case in which the bill presented strong equities in favor of complainant and in which his right to annuities in excess of the rental value of real estate are admittedly due him under a conveyance which he seeks to set aside upon the ground of fraud, the court may order the rents to be paid him unless defendants without delay pay him the balance of the amount of arrears of the annuity after applying the rents thereto, and in default of which appoint a receiver. Probasco *v.* Probasco, 30 N. J. Eq. 108.

7. See CREDITORS' SUITS, 12 Cyc. 49.

8. Cohen *v.* Meyers, 42 Ga. 46; Sanderson *v.* Stockdale, 11 Md. 563; Williamson *v.* Wilson, 1 Bland (Md.) 381; Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; Todd *v.* Lee, 15 Wis. 365.

Where the court may enjoin the disposition of property it is held that it may appoint a receiver before judgment. Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408.

The right of a surety to invoke the aid of a court of equity to compel the principal to pay off a debt is not a mere right to recover a judgment and have an execution against the property of the principal. Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5. See also in this connection PRINCIPAL AND SURETY, 32 Cyc. 249 note 42.

Under the code, where the case is one in which, if plaintiff succeeds in establishing the cause of action, the court will exercise its general equity power to compel defendants to restore to those entitled thereto moneys which have been improperly appropriated, the court may, as a part of its incidental power, impound the fund in litigation during the pendency of the action. Bird *v.* Lamphear, 92 Hun (N. Y.) 567, 36 N. Y. Suppl. 1069.

9. *California.*—Smith *v.* Los Angeles Super. Ct., 97 Cal. 348, 32 Pac. 322; Ibbetson *v.* Pearison, 6 Cal. App. 261, 94 Pac. 252.

Georgia.— Bush *v.* Mattox, 110 Ga. 472, 35 S. E. 640; Walker *v.* Zorn, 50 Ga. 370. See also Ray *v.* Carlisle, 125 Ga. 316, 54 S. E. 119.

Indiana.— Steele *v.* Aspy, 128 Ind. 367, 27 N. E. 739, holding that under an agreement for the sale of goods which provided that the purchaser should not remove the same from the town, but should be allowed to sell the goods and turn over the money taken in until they were paid for, but without stipulating that the title should not pass until the goods were paid for, the seller had no such interest in the property as would authorize the appointment of a receiver, although the purchaser was insolvent and was appropriating to his own use the proceeds of the sales.

Maryland.— Williamson *v.* Wilson, 1 Bland 418.

Massachusetts.—Pond *v.* Framingham, etc., R. Co., 130 Mass. 194.

Missouri.— Miller *v.* Perkins, 154 Mo. 629, 55 S. W. 874, under a provision authorizing the appointment of a receiver "whenever such appointment shall be deemed necessary . . . to keep and preserve any money or other thing deposited in court," and "to keep . . . and protect any business or business interest intrusted to him pending any legal or equitable proceeding concerning the same."

New York.— O'Mahoney *v.* Belmont, 62 N. Y. 133 [*affirming* 37 N. Y. Super. Ct. 223, 380].

Ohio.— Hulse *v.* Wright, Wright 61.

Texas.— Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200. So a statute providing that a receiver may be ap-

his claim to judgment and who has no right or interest in, or lien on, the property, has no standing to have a receiver put upon the property;[10] and this rule is applied, although defendant is disposing of his property, where the remedy by injunction against such disposition is not recognized, the remedy being at law in such cases,[11] and the mere fact of the insolvency of the debtor,[12] or an allegation of fraud, will not change the rule.[13] The rule is controlled by statute in some

pointed in an action "by a creditor to subject any property or fund to his claim" is limited to some particular fund or property belonging to a debtor upon which the creditor has a specific lien. Carter *v.* Hightower, 79 Tex. 135, 15 S. W. 223.

Virginia.— Finney *v.* Bennett, 27 Gratt. 365.

West Virginia.— Thompson *v.* Adams, 60 W. Va. 463, 55 S. E. 668.

See 42 Cent. Dig. tit. "Receivers," §§ 18, 29.

Action at law for money judgment see *supra*, note 1.

10. *Georgia.*— Virginia-Carolina Chemical Co. *v.* Provident Sav. L. Assur. Soc., 126 Ga. 50, 54 S. E. 929 (holding that, although since the passage of the Uniform Procedure Act, a plaintiff might seek both legal and equitable relief in one action, he could not obtain the appointment of a receiver under circumstances which would not have justified it prior to the act, and that a general creditor by note which had not been reduced to judgment, and having no lien, was not entitled to a receiver for his debtor's property); Dodge *v.* Pyrolusite Manganese Co., 69 Ga. 665; Johnson *v.* Farnum, 56 Ga. 144; Walker *v.* Zorn, 50 Ga. 370 (holding that pending an action of ejectment plaintiff was not entitled to the appointment of a receiver under a bill alleging that defendant in the ejectment suit was insolvent and had in his possession grain made by him on the land, which the bill alleged belonged to plaintiff, as in such case the complainant had no lien, but his standing was that of any other creditor).

Indiana.— State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 575, 57 Am. St. Rep. 209.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Maryland.— Rich *v.* Levy, 16 Md. 74; Hubbard *v.* Hubbard, 14 Md. 356; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172; Crane *v.* Seymour, 3 Md. Ch. 483.

New York.— Adee *v.* Bigler, 81 N. Y. 349; Crippen *v.* Hudson, 13 N. Y. 161; Bayaud *v.* Fellows, 28 Barb. 451; Voit *v.* Collins, 39 Misc. 39, 78 N. Y. Suppl. 763.

Ohio.— Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir. Ct. 479, 7 Ohio Cir. Dec. 349, holding that to appoint a receiver in such case would be in effect to grant an attachment, and to get such a remedy the statutory steps are provided and should be pursued.

Texas.— New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828; Cahn *v.* Johnson, 12 Tex. Civ. App. 304, 33 S. W. 1000; Waples-Platter Co. *v.* Mitchell, 12 Tex. Civ. App. 90, 35 S. W. 200.

West Virginia.— Thompson *v.* Adams, 60 W. Va. 463, 55 S. E. 668, appointment not authorized at the instance of a common creditor, merely on the ground of waste or misappropriation of the debtor's property.

United States.— Hollis *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 977, 37 L. ed. 804; Tompkins Co. *v.* Catawba Mills, 82 Fed. 780.

See 42 Cent. Dig. tit. "Receivers," § 18. And see further as to the requirement of exhausting legal remedies before resorting to equity, CREDITORS' SUITS, 12 Cyc. 6 *et seq.*; FRAUDULENT CONVEYANCES, 20 Cyc. 682 *et seq.*, 831.

As a method of obtaining and executing a judgment against a debtor an *ex parte* appointment of a receiver is not proper. Hutchinson *v.* Rice, 109 La. 29, 33 So. 57.

The irregularity of a return of an execution will not be considered a ground for resisting the application for a receiver on a creditor's bill founded upon the judgment, which irregularity consisted in returning the execution into the office of the wrong clerk, because the remedy at law is exhausted by the sheriff's return. Clark *v.* Dakin, 2 Barb. Ch. (N. Y.) 36.

The rule is held to be inapplicable in suits to marshal the assets of a debtor's estate. Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98. And where a debt is due from a partnership which has been dissolved by the death of one of the partners, and the partnership property is in possession and control of the surviving partner or partners, a court of equity is held to treat the property as a trust fund in which the creditors have an equitable or quasi-lien, and for misconduct of the surviving partner they may have the property placed in the hands of a receiver. Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

Illustrating the rule as applied to corporations see *infra*, II, C, 4, c, (I).

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1409, 1451.

Other adequate remedies see *supra*, II, B, 4, a.

11. Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Rich *v.* Levy, 16 Md. 74; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172.

12. Adee *v.* Bilger, 81 N. Y. 349.

13. Adee *v.* Bigler, 81 N. Y. 349. In McGoldrick *v.* Slevin, 43 Ind. 522, it was held that the fact that an insolvent debtor had entered an appearance to a complaint by one creditor, and allowed a judgment to go on proof for a just debt, and contemplated an

instances, however,[14] as by statutes under which a simple contract creditor is permitted to file a bill to reach property fraudulently conveyed, in which cases a receiver may be appointed;[15] or by statute under which creditors of insolvent traders or firms of traders are given a remedy in equity.[16]

d. On Defendant's Application. A receiver may be appointed at the instance of a defendant in a suit in which the jurisdiction of the subject-matter attaches, and the appointment of the receiver is in other respects appropriate for the preservation of the property and the protection of the rights of the parties, to preserve it for final distribution.[17] And where the court may decree relief as between

assignment, did not entitle other creditors without judgments to a receiver in the absence of a showing of danger of fraudulent disposition.

14. See the statutes of the several states.

Chattel mortgage not assignment.— Under a statute in Michigan providing that a person having a preferred labor claim against an insolvent might proceed in chancery for the appointment of a receiver, if a common law or other assignment for the benefit of creditors had been made by any of defendants, it was held that a chattel mortgage executed by such insolvent to secure a creditor was not an assignment for the benefit of creditors within the statute. Wineman *v.* Fisher Electrical Mfg. Co., 118 Mich. 636, 77 N. W. 245.

15. See FRAUDULENT CONVEYANCES, 20 Cyc. 831.

Other cases are unaffected by such statute. Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298; Rich *v.* Levy, 16 Md. 74; Uhl *v.* Dillon, 10 Md. 500, 69 Am. Dec. 172.

Where possession is retained.— It is not necessary that a creditor should have judgment and return of "no property" in order to enable him to maintain an action to have a conveyance declared to have been made in contemplation of insolvency. The statute does not authorize the appointment of a receiver in such an action, except to take charge of such property as may be under the control of the person to whom the sale, mortgage, or assignment shall have been made, unless the property is in danger of being lost, removed, or materially injured; so where a mortgage does not pass the possession and control of the property mortgaged, the court has no power to compel its surrender to a receiver before it is decided that the mortgage was made in contemplation of insolvency. Griffith *v.* Cox, 79 Ky. 562.

16. Fechheimer *v.* Baum, 37 Fed. 167, under a Georgia statute providing that a creditor of an insolvent trader, or firm of traders, whose debt is mature, unpaid, demanded, and payment refused, may invoke the aid of equity to collect the debts, and make distribution.

Defendant must be an insolvent trader to justify the appointment at the instance of general creditors. If he is not a trader (Reynolds, etc., Mortg. Co. *v.* Kingsbury, 118 Ga. 254, 45 S. E. 235; Birdsong *v.* Allen-Dumas Co., 94 Ga. 729, 19 S. E. 885), or is not shown to be insolvent (Collins *v.* Myers, 68 Ga. 530), a receiver cannot be appointed. The fact that the sheriff seized defendant's stock of goods under a mortgage fieri facias, before daylight in the morning, five hours before the injunction was granted, did not deprive defendant of his character of trader, so as to preclude the filing of an application for injunction and receiver, under the above section. Wilcox *v.* Dunlap, 83 Ga. 417, 9 S. E. 1046.

The statute does not interfere with liens of other creditors and if the debtor's estate is encumbered will not help a creditor who has no interest in the mortgage. The unsecured creditor must show that the assets are more than sufficient to pay off all encumbrances as well as that the debtor is insolvent. Collins *v.* Myers, 68 Ga. 530; Barnwell *v.* Wofford, 67 Ga. 50.

17. *Iowa.*— Hablitzel *v.* Latham, 35 Iowa 550, on cross bill.

Mississippi.— Hamberlain *v.* Marble, 24 Miss. 586.

Nebraska.— Philadelphia Mortg., etc., Co. *v.* Oyler, 61 Nebr. 702, 85 N. W. 899, as to rule on the application of a defendant in foreclosure who is liable for deficiency judgment.

North Carolina— McNair *v.* Pope, 96 N. C. 502, 2 S. E. 54 (where in a real action the legal title was conceded to be in defendants who denied the equities upon which plaintiffs relied, and plaintiffs who were in possession were insolvent, by reason of which the rents and profits were in danger of loss); Horton *v.* White, 84 N. C. 297 (where plaintiff sued *in forma pauperis* to recover land, and during the pendency of the action took possession of the land and resisted defendant's reoccupation, the appointment of a receiver to secure the rents and profits was granted). See also John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22, where in an action to restrain interference with plaintiff's possession of land, defendant answered claiming to be the owner and asked for an injunction against cutting timber, and it was held that plaintiff should be required to give bond to pay any damages that might be awarded against him and that a receiver should be appointed to keep an account of timber cut.

Ohio.— See Mathers *v.* Cincinnati R. Tunnel Co., 12 Ohio Cir. Ct. 136, 5 Ohio Cir. Dec. 592.

South Carolina.— Harmon *v.* Wagener, 33 S. C. 487, 12 S. E. 98.

Texas.— De Barrera *v.* Frost, 33 Tex. Civ.

defendants, it may make an interlocutory order necessary to obtain such relief, and may appoint a receiver on such application of one defendant against another.[18] But interveners seeking relief not germane to the original suit cannot ask for a receiver, the obvious purpose of which is merely to maintain a receivership for an indefinite term in aid of a suit which does not seek or pray for any final relief.[19]

8. Time For Application[20] — a. Promptness Part of Efficiency of Remedy. From the very nature of the power to appoint a receiver and of the purposes for which it may be invoked, its efficiency often depends on the promptness with which it may be exercised,[21] and the court has power in unusual and pressing emergencies, at the instance of a party interested, to put its hand upon the property effectually and without delay so as to prevent waste, inextricable confusion, or total destruction,[22] at any stage of the suit when the facts authorize and require the appointment.[23] Sometimes the receiver may be appointed before defendant is affected with notice of the pendency of the suit, upon a proper case of urgent necessity made in the original or a distinct petition and supported by evidential facts.[24]

App. 580, 77 S. W. 637, 39 Tex. Civ. App. 544, 88 S. W. 476, in cross action.

Washington.— Sibson *v.* Hamilton, etc., Co., 21 Wash. 362, 58 Pac. 219, on cross complaint.

West Virginia.— Ogden *v.* Chalfant, 32 W. Va. 559, 9 S. E. 879.

England.— Sargant *v.* Read, 1 Ch. D. 600, 45 L. J. Ch. 206.

See 42 Cent. Dig. tit. "Receivers," § 15.

Although complainant has served notice of a like motion, defendant may ask for a receiver, and in such case one order will be made, but the conduct of the proceedings will in general be given to plaintiff. Sargant *v.* Read, 1 Ch. D. 600, 45 L. J. Ch. 206.

But a complainant should not be burdened with such expense unnecessarily and against his will, where the appointment is not obviously necessary to protect the opposite party. Thus, where plaintiff secured the appointment of a receiver who afterward died, it was held that the death of the receiver did not warrant the appointment of another receiver at defendant's instance, plaintiff not desiring or applying for it. De Leonis *v.* Walsh, 148 Cal. 254, 82 Pac. 1047.

Necessity of cross bill.— It is held that such relief will not be granted a defendant except upon cross bill (Leddel *v.* Starr, 19 N. J. Eq. 159), that defendant should be in the position of one asking affirmative relief, and that a mere petition is not sufficient, nor is an answer which is not made a cross bill, upon which a receiver will be appointed at defendant's instance (Ruprecht *v.* Henrici, 113 Ill. App. 398; Robinson *v.* Hadley, 11 Beav. 614, 18 L. J. Ch. 428, 50 Eng. Reprint 954). See also Barlow *v.* Gains, 8 Beav. 329, 50 Eng. Reprint 129; Grote *v.* Bury, 1 Wkly. Rep. 92. But in Ogden *v.* Chalfant, 32 W. Va. 559, 9 S. E. 879, in an action by a judgment creditor to subject lands to the lien of his judgment, a lien creditor whose lien was reported on a reference ordered for the purpose of reporting all liens on such lands, and who filed his claim in the cause, was held to be entitled to move for the appointment of a receiver, although not formerly a party to the suit.

18. Henshaw *v.* Wells, 9 Humphr. (Tenn.) 568.

19. Hardy *v.* Abbott, 32 Tex. Civ. App. 66, 73 S. W. 1079.

20. **Enforcement of judgment** see *infra*, II, B, 12.

21. Bitting *v.* Ten Eyck, 85 Ind. 357; Maynard *v.* Railey, 2 Nev. 313.

In vacation see Judges, 23 Cyc. 554.

22. Williamson *v.* Wilson, 1 Bland (Md.) 381.

23. Columbia Finance, etc., Co. *v.* Morgan, 44 S. W. 389, 628, 45 S. W. 65, 19 Ky. L. Rep. 1761; Henshaw *v.* Wells, 9 Humphr. (Tenn.) 568. See also *In re* Francke, 57 L. J. Ch. 437, 58 L. T. Rep. N. S. 305, as to an action commenced by originating summons.

Pending a plea to the jurisdiction of the court the court will not appoint a receiver, but in order to prevent the abuse of such dilatory pleas or any irreparable mischief it will order an immediate hearing or trial of the plea. Ewing *v.* Blight, 8 Fed. Cas. No. 4,590, 3 Wall. Jr. 139.

The pendency of a motion to dissolve an injunction is no objection to a motion for a receiver. Barnard *v.* Darling, 1 Barb. Ch. (N. Y.) 76.

Pending resistance to order of restoration of possession.— Where the court had determined the right to possession to land in favor of one of the parties and ordered its restoration to him, an application for the appointment of a receiver *pendente lite* will not be considered before the applicant has made complete restoration in compliance with the former order of the court. Rollins *v.* Henry, 77 N. C. 467.

Pending demurrer see *supra*, II, B, 7, b, text and note 6.

24. *District of Columbia.*— Barley *v.* Gittings, 15 App. Cas. 427.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273, temporary or *ad interim* receiver.

Illinois.— Russell *v.* Chicago Trust, etc., Co., 40 Ill. App. 385 (creditors' suit in

b. Before Answer. By the ancient practice of the court of chancery in England a receiver was not appointed until after the coming in of defendant's answer.[25] But this practice appears to have been broken in upon at an early day,[26] and while it is held that there must be strong and special reasons for the appointment before answer,[27] as on proof of fraud, by affidavits, or immediate danger to the property, unless at once taken in charge by the court,[28] the modern practice is well settled both in England and in this country that a receiver may be appointed before answer where the complainant can satisfy the court that he has an equitable claim to the property in controversy,[29] and where there is clear proof of the exigency of the particular case shown by affidavit. If any other rule were allowed to prevail the purpose designed by the application might often be defeated by delay.[30]

which it is said that the appointment will depend upon defendant's being brought into the suit afterward by service of process or appearance); Siegmund *v.* Ascher, 37 Ill. App. 122.

Iowa.— Jones *v.* Graves, 20 Iowa 596, by statute.

Nevada.— Maynard *v.* Railey, 2 Nev. 313.

United States.—Hazzard *v.* Credit Mobilier, 11 Fed. Cas. No. 6,289, 7 Reporter 360, 6 Wkly. Notes Cas. (Pa.) 417, before service but after actual notice and opportunity to appear after filing of bill.

England.— *In re* H., 1 Ch. D. 276, 45 L. J. Ch. 749, 24 Wkly. Rep. 317.

Notice dispensed with see *infra*, III, D. 5.

25. Jones *v.* Dougherty, 10 Ga. 273; French *v.* Gifford, 30 Iowa 148; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574.

26. Vann *v.* Barnett, 2 Bro. Ch. 158, 29 Eng. Reprint 91; Compton *v.* Bearcroft, 2 Bro. Ch. 158 note, 29 Eng. Reprint 91.

27. Little Warrior Coal Co. *v.* Hooper, 105 Ala. 665, 17 So. 118; Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Monroe *v.* Thompson, 1 Lack. Leg. Rec. (Pa.) 323. See also Keller *v.* Young, 1 Lanc. Bar (Pa.) Nov. 27, 1869.

28. *Alabama.*— Little Warrior Coal Co. *v.* Hooper, 105 Ala. 665, 17 So. 118.

Maryland.— Baltimore City Brick Co. *v.* Robinson, 55 Md. 410; Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Blain *v.* Everitt, 36 Md. 73; Bloundheim *v.* Moore, 11 Md. 365; Rose *v.* Bevan, 10 Md. 467, 69 Am. Dec. 170; Williamson *v.* Wilson, 1 Bland 418; Clark *v.* Ridgely, 1 Md. Ch. 70.

Mississippi.— Whitehead *v.* Wooten, 43 Miss. 523 [*citing* Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294].

New York.— Simmons *v.* Wood, 45 How. Pr. 262; Ogden *v.* Kip, 6 Johns. Ch. 160; West *v.* Swan, 3 Edw. 420; Micklethwaite *v.* Rhodes, 4 Sandf. Ch. 434.

England.— Duckworth *v.* Trafford, 18 Ves. Jr. 283, 34 Eng. Reprint 324.

See 42 Cent. Dig. tit "Receivers," § 9.

29. Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626; Probasco *v.* Probasco, 30 N. J. Eq. 108; Bloodgood *v.* Clark, 4 Paige (N. Y.) 574; U. S. *v.* Church of Jesus Christ, etc., 5 Utah 361, 15 Pac. 473 [*affirmed* in 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478, and *affirmed* with modification in the final decree in 140 U. S. 665, 11 S. Ct. 884, 35 L. ed. 592]. In Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180, 183, 35 Eng. Reprint 71, the lord chancellor said: "With respect to appointing a Receiver before answer, I take it, that the cases, where the Court has refused it, turned upon this: that the Party applying for the Appointment could not state, that he had, strictly speaking, an equitable title," and referring to Vann *v.* Barnett, 2 Bro. Ch. 158, 29 Eng. Reprint 91, cited *supra*, note 26, said that the receiver would not have been appointed therein unless defendant had filed an affidavit showing in substance that plaintiff had an equitable title.

30. *Alabama.*— Micou *v.* Moses, 72 Ala. 439; Weiss *v.* Goetter, 72 Ala. 259.

California.— Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626.

Georgia.— Johns *v.* Johns, 23 Ga. 31; Williams *v.* Jenkins, 11 Ga. 595.

Indiana.— Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188.

Michigan.— Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

Mississippi.— Whitehead *v.* Wooten, 43 Miss. 523 [*citing* Vann *v.* Barnett, 2 Bro. Ch. 157, 29 Eng Reprint 91].

New York.— Austin *v.* Figueira, 7 Paige 56, 58, where it is said: "It is very common practice to give notice of the application to appoint a receiver at the time of the service of the . . . subpœna upon the defendant. Although the defendant has a certain number of days after the return day of the subpœna to enter his appearance, before he is liable to be attached or to have the bill taken as confessed against him, there is nothing in the rules or the practice of the court which requires all other proceedings on the part of the complainant to be stayed in the meantime."

Pennsylvania.— Monroe *v.* Thompson, 1 Lack. Leg. Rec. 323.

Utah.— U. S. *v.* Church of Jesus Christ, 5 Utah 361, 15 Pac. 473 [*affirmed* in 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 478, and *affirmed* with modification of the final decree in 140 U. S. 665, 11 S. Ct. 884, 35 L. ed. 592].

England.— Taylor *v.* Eckersley, 2 Ch. D. 302, 45 L. J. Ch. 527, 34 L. T. Rep. N. S. 637, 24 Wkly. Rep. 450; Meaden *v.* Sealey,

c. Before Judgment. It is the common practice in appointing receivers to take such action upon the coming in of the answer,[31] and this is proper where the appointment is for a merely ancillary purpose, which is concerned with the temporary incidents of the suit.[32] But it is held otherwise where the propriety of the appointment is the principal question in the case, and it is required, if at all, by the view which the court shall ultimately take of the case as part of the means which should be taken to afford the relief contemplated by the decree,[33]

6 Hare 620, 18 L. J. Ch. 168, 31 Eng. Ch. 620, 67 Eng. Reprint 1310; Acheson *v.* Hodges, 3 Ir. Eq. 516, 523 (defendant having made an affidavit for the purpose of resisting the motion, and going into the merits of the case); Scott *v.* Becher, 4 Price 346; Tanfield *v.* Irvine, 2 Russ. 149, 3 Eng. Ch. 149, 38 Eng. Reprint 292; Duckworth *v.* Trafford, 18 Ves. Jr. 283, 34 Eng. Reprint 324; Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294.

See 42 Cent. Dig. tit. "Receivers," § 9.

Waiver of objection.— Where defendant appeals to the chancellor from the receiver's appointment by the register, the filing before the chancellor of defendant's answer to the bill as part of the proofs against the application for a receiver is a waiver of his right to insist that the receiver was prematurely appointed, because appointed by the register before answer to the bill was filed. Brooke *v.* Tucker, 149 Ala. 96, 43 So. 141.

Abuse of power.— The power is considered as in all respects as safe and as little liable to abuse as any judicial procedure known to the common law. Williamson *v.* Wilson, 1 Bland (Md.) 418, 424, where the court answers the argument that a measure so prompt and vigorous as the appointment of a receiver upon the filing of the bill may be applied to most pernicious abuses and is open to the greatest abuse, by showing the necessity of notice, affidavit, and bond and the remedy on short notice for a rescission of the appointment, and said that "it will be found in practice, that little or no useless pressure can be produced in any case; and that, in no instance, can the mischief continue long before the party aggrieved may have an opportunity of being fully heard, and of obtaining complete relief."

Parties before court and consenting.— In Brodie *v.* Barry, 3 Meriv. 695, 36 Eng. Reprint 267, a receiver was appointed before answer in a case of a devise to four trustees, of whom two declined to act, all parties being before the court, and consenting.

To enforce appearance.— Where a defendant resides out of the jurisdiction of the court, and a bill is filed against him to raise a charge specifically affecting his lands, a receiver will be appointed over them in order to compel appearance. Nash *v.* Hughes, Hayes & J. 400. But a receiver will not be appointed for such purpose unless plaintiff has a specific lien, or there is danger of immediate loss of the property. Arthurs *v.* Arthur, 1 Hog. 95.

Where defendant absconds or resides out of jurisdiction for the purpose of avoiding service, a receiver will be appointed. Dowling *v.* Hudson, 14 Beav. 423, 51 Eng. Reprint 349; Maguire *v.* Allen, 1 Ball & B. 75; Quin *v.* Gunn, 1 Hog. 75. See also Gibbins *v.* Mainwaring, 9 Sim. 77, 16 Eng. Ch. 77, 59 Eng. Reprint 287.

Leave to serve notice of motion.— A receiver cannot be applied for before appearance except leave be given to serve the notice personally, and such leave will not be granted unless plaintiff has used diligence to compel appearance. Ramsbottom *v.* Freeman, 4 Beav. 145, 10 L. J. Ch. 362, 49 Eng. Reprint 294.

Notice see *infra*, III, D, 5.

31. Dutton *v.* Thomas, 97 Mich. 93, 56 N. W. 229 (before replication); Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077; Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069; Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

Under the Judicature Act the court has a discretion as to the appointment of a receiver, and the power given can be exercised at the trial of an action, as well as upon an interlocutory application. *In re* Prytherch, 42 Ch. D. 590, 59 L. J. Ch. 79, 61 L. T. Rep. N. S. 799, 38 Wkly. Rep. 61.

32. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90.

33. Union Mut. L. Ins. Co. *v.* Union Mills Plaster Co., 37 Fed. 286, 3 L. R. A. 90, which was an application for a receiver in a suit for the foreclosure of a mortgage, and which held that as under the state law the mortgagor was entitled to possession and to rents and profits until the foreclosure sale and confirmation thereof a receiver will not be appointed merely on the ground of the inadequacy of the security, and that the facts did not warrant an appointment on the ground that the security was being wasted or destroyed; and further, that as the mortgagor had offered in its answer and at the hearing of the motion to pay the amount of the instalment and annual interest, etc., which were in arrears, the further prosecution of the suit (if such practice is proper) must be as upon a bill by a creditor and mortgagee of a corporation upon the ground that the management thereof is so grossly corrupt and bad as to entitle the complainant to invoke the interference of the court for the protection of his debt and that in such case the appointment before hearing should not be ordered because it would anticipate the very object of the litigation by a prejudgment involving the whole merits of the case. See also Rice *v.* St. Paul, etc., R. Co., 24 Minn. 464, the decision being on the ground that the remedy at law to recover possession is adequate. But upon the ques-

and where the whole equity of plaintiff's case is denied by the answer, and his claims are not otherwise supported.[34]

d. After Judgment or Decree.[35] It is perhaps of rare occurrence that courts are called upon to appoint a receiver after final decree in a cause.[36] But that such appointments may be made is well settled;[37] and this may be done notwithstanding the original bill did not pray a receiver, since the appointment in such case is made because of occurrences subsequent to the decree,[38] and where a court of chancery obtains jurisdiction of the subject-matter of a suit it will retain jurisdiction until complete justice has been done.[39]

tion of the propriety of appointment in foreclosure proceedings this case seems not in accord with the current of authority. See Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124, where the authorities are reviewed. And see also MORTGAGES, 27 Cyc. 1621.

Suit by minority stock-holder.— In Downing *v.* Dunlap Coal, etc., R. Co., 93 Tenn. 221, 24 S. W. 122, it was held that the appointment of a receiver for a solvent corporation, on bill, answer, and *ex parte* affidavits, without submitting other evidence, would not lie at the instance of minority stockholders, the answer denying the material allegations of the bill, the result so obtained being the merit of the case to be decided at its end.

34. See *infra*, III, E, 5, b.

Under the practice requiring a general replication (U. S. Equity Rule 66) and entitling defendant to a dismissal of the suit upon failure to file such replication, if the complainant fails to except or reply to an answer within the time limited for such action the power of the court is limited to a dismissal unless for cause shown complainant is permitted to file a replication *nunc pro tunc* and the appointment of a receiver after answer denying the material allegations of the bill and without such exceptions or replication have been filed is unwarranted. Harrington *v.* Union Oil Co., 144 Fed. 235.

35. **Upon final decree** see *infra*, II, B, 12, a.

36. Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 42 N. E. 225; Connelly *v.* Dickson, 76 Ind. 440.

37. *California.*— Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549, holding that the court may appoint a receiver for property of defendant, that it might be available for satisfaction of the judgment, where defendant had obtained a stay of execution pending a motion for new trial, the action being still pending. See also Whitney *v.* Buckman, 26 Cal. 447.

Illinois.— Haas *v.* Chicago Bldg. Soc., 89 Ill. 498.

Indiana.— Harris *v.* U. S. Savings Fund, etc., Co., 146 Ind. 265, 45 N. E. 328; Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 42 N. E. 225; Brinkman *v.* Ritzinger, 82 Ind. 358; Connelly *v.* Dickson, 76 Ind. 440.

Nevada.— Hyman *v.* Kelley, 1 Nev. 179.

New York.— Astor *v.* Turner, 11 Paige 436.

Tennessee.—Enochs *v.* Wilson, 11 Lea 228; Hoge *v.* Hollister, 8 Baxt. 533; Jones *v.* Stewart, (Ch. App. 1900) 61 S. W. 105; Merrill *v.* Elam, 2 Tenn. Ch. 513.

Virginia.— Adkins *v.* Edwards, 83 Va. 316, 2 S. E. 439; Moran *v.* Johnston, 26 Gratt. 108.

Wisconsin.— Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124.

England.— Thomas *v.* Davies, 11 Beav. 29, 50 Eng. Reprint 727; *In re* Bywater, 1 Jur. N. S. 227.

See 42 Cent. Dig. tit. "Receivers, § 11.

Pending appeal see APPEAL AND ERROR, 2 Cyc. 979.

In foreclosure of mortgages see MORTGAGES, 27 Cyc. 1621.

38. Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 42 N. E. 225; Brinkman *v.* Ritzinger, 82 Ind. 358; Connelly *v.* Dickson, 76 Ind. 440; Cooke *v.* Gwyn, 3 Atk. 690, 26 Eng. Reprint 1196, holding that a receiver may be granted on motion notwithstanding the reservation of all matters under the decree until after the master has made his report. Wright *v.* Vernon, 3 Drew 112, 61 Eng. Reprint 845; Bowman *v.* Bell, 14 L. J. Ch. 119, 14 Sim. 392, 37 Eng. Ch. 392, 60 Eng. Reprint 409. But in Fallows *v.* Dillon, 1 Wkly. Rep. 101, a receiver was refused on a motion after decree but before the master's report, those in possession being entitled to the legal estate, the court distinguishing Bowman *v.* Bell, *supra*, in that the application in that case was granted after the master had made his report, and Thomas *v.* Davies, 11 Beav. 29, 50 Eng. Reprint 727, *supra*, note 37, in that the case was one in which the estate was in the hands of a person who had paid no rent for it for twenty years.

39. Haas *v.* Chicago Bldg. Soc., 89 Ill. 498.

Under amended cross bill after failure of sale.— So in Mathers *v.* Cincinnati R. Tunnel Co., 12 Ohio Cir. Ct. 136, 5 Ohio Cir. Dec. 592, it was held that a decree determining priority of liens against, and ordering the sale by a master, of certain property of a railroad company did not deprive the court of jurisdiction under a subsequent amended answer and cross petition filed by a lien-holder, whose lien had by the first decree been declared a prior lien except as against that of plaintiff, to appoint a receiver and order a sale of the whole property of the company, that included in the first decree as well as other property affected by the lien of the cross complainant, the whole being

e. Delay in Application. An application for the appointment of a receiver is not viewed with great indulgence when the applicant, with full knowledge of the conduct upon which he seeks to base his application, has for a long time acquiesced in such conduct.[40] On the other hand under a statute giving a creditor a right to enforce his debt against a corporation by the appointment of a receiver, it is held that so long as plaintiff has a valid subsisting claim and the corporation is insolvent, this being a reason upon which the application may be based, he may resort to the remedy,[41] and mere delay for a long time in asserting rights in property should not prevent the party from invoking the assistance of a court of equity in protecting such rights from destruction or material injury.[42]

9. Property Subject to Receivership.[43] Any interest in property, legal or equitable, may be the subject of a receivership, where the case otherwise properly appeals to the jurisdiction of the court.[44] But a court cannot appoint a receiver to take charge of property which is not involved in the litigation, or to take charge of all of a debtor's property, including that which is not as well as that which is specially bound for the payment of the claim in suit.[45] A receiver cannot be put

necessary for the carrying on of the company's business.

40. *Florida.*— Johnson *v.* McKinnon, 45 Fla. 388, 34 So. 272.

Michigan.— Brown *v.* Chase, Walk. 43, where a neglect for three years to apply for a receiver was held to be a waiver of the right to make the application.

New Jersey.— Conover *v.* Tansey, (Ch. 1907) 67 Atl. 1013; Tibbals *v.* Sargeant, 14 N. J. Eq. 449.

South Carolina.— Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867.

United States.— Hood *v.* Tremont First Nat. Bank, 29 Fed. 55, where the application itself was allowed to sleep for six years, although some testimony had been taken in the meantime.

England.— Gray *v.* Chaplin, 3 L. J. Ch. O. S. 47, 2 Russ. 126, 26 Rev. Rep. 22, 3 Eng. Ch. 126, 38 Eng. Reprint 283; Skinners' Co. *v.* Irish Soc., 1 Myl. & C. 161, 13 Eng. Ch. 161, 40 Eng. Reprint 338; Clark *v.* Dew, 1 Russ. & M. 103, 5 Eng. Ch. 103, 39 Eng. Reprint 40. And see Bartley *v.* Bartley, 9 Jur. 224, where a receiver was appointed upon motion in a suit for the appointment of new trustees, reasons being assigned for the delay in bringing the cause to a hearing.

See 42 Cent. Dig. tit. "Receivers," § 35.

And see State *v.* Allen, 1 Tenn. Ch. 512, where the facts sufficiently accounted for the delay, the property having been in the hands of receivers with whose management the parties had been satisfied.

Collateral attack see *infra*, III, J, 3.

41. New York Nat. Exch. Bank *v.* Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

42. Cotton *v.* Rand, (Tex. Civ. App. 1905) 92 S. W. 266.

43. **Property or interest which passes to receiver** see *infra*, IV, D, 3.

Real property see *infra*, II, B, 10, b.

44. Freeman *v.* Stewart, 119 Ala. 158, 24 So. 31 (equity of redemption in land which is subject to execution where the owner is in possession and in perception of the rents); Jenkins *v.* Purcell, 29 App. Cas. (D. C.) 209, 9 L. R. A. N. S. 1074 (equitable assignable interest in property recognized as such by the legal owner).

Emblements protected.— Where in a suit for the enforcement of the purchase-price of land the complainant alleged the recovery of judgment and levy of execution, and that the vendee's wife claimed the land on the ground that she had paid the amount which had been paid as a part of the purchase-price and which was all that the land was worth, and that after much delay the claim was decided against her, but that on further attempt to sell the property plaintiff was met with other frivolous claims, etc., and that the parties colluded to delay the complainant with a view to keep the profits, it was held that while plaintiff was entitled to a receiver, yet as the wife's claim was not decided and the application for a receiver was not made until the growing crop was planted, the receiver should be instructed to allow defendants a reasonable time to gather the crops and use the property for that purpose. Chappell *v.* Boyd, 56 Ga. 578.

Homestead.— In Bromley *v.* McCall, 18 S. W. 1016, 13 Ky. L. Rep. 915, it was held that a receiver, pending litigation, might be appointed for the property in controversy on which plaintiffs have a lien, although defendants are entitled to a homestead in it. But it is held otherwise in Tennessee. Hoge *v.* Hollister, 8 Baxt. (Tenn.) 533, where a similar order had been made by the chancellor after a decree ordering the sale of realty, and the appellate court superseded the order upon the ground that the appellant who claimed a homestead right in the property ought not to be deprived of the possession pending litigation.

45. *Arkansas.*— Wormser *v.* Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198.

California.— Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549 (holding that where defendant was directed by judgment to make certain payments, and in default thereof the court ordered certain real estate to be sold and the proceeds applied on the judgment, and in case of a deficiency that judgment

upon property which is already in the custody of the law under process from another court of competent jurisdiction,[46] but the court may appoint a receiver at the suit of a mortgagee to enjoin sale of the mortgaged property under attachments,

should be docketed therefor, the court could not appoint a receiver for any property not embraced in the judgment); Staples *v.* May, 87 Cal. 178, 25 Pac. 346 (property not embraced in mortgage).

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201, property not embraced in mortgage.

Indiana.— State *v.* Union Nat. Bank, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209, property not embraced in mortgage.

Kansas.— Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589; Branner *v.* Webb, 10 Kan. App. 217, 63 Pac. 274, holding that in an action by a tenant in common to recover an undivided interest in land from a cotenant, the court cannot appoint a receiver over other lands of defendant.

New York.— Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532, where such order was held erroneous but not void.

United States.— Smith *v.* McCullough, 104 U. S. 25, 26 L. ed. 637; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659; Scott *v.* Farmers' L. & T. Co., 69 Fed. 17, 16 C. C. A. 358, which cases are as to property not embraced in mortgage.

See 42 Cent. Dig. tit. "Receivers, § 17.

Rents not subject.— In the foreclosure of a lien of a tax-sale certificate, the owner of the land not being personally liable for the tax but the land only being liable therefor, a receiver cannot be appointed on the ground that the property is insufficient to satisfy the lien, since that would be to make the owner pay in rents to which he is entitled — a debt for which he is not liable, and a provision of the revenue statute authorizing the holder of a tax-sale certificate to foreclose his lien in the same manner as though it were a mortgage, applies only to the procedure relative to foreclosure of real estate mortgages, and does not authorize the appointment of a receiver. Walker *v.* Fitzgerald, 69 Nebr. 52, 95 N. W. 32. So in Ahlhauser *v.* Dowd, 74 Wis. 400, 43 N. W. 169, extension of receivership to rents and profits of land in suit in aid of an execution to procure a sale of the land seized on the execution was improper, such relief not including rents and profits pending litigation.

Personalty at instance of purchaser of mortgaged land.— The purchaser of mortgaged land on execution against the mortgagor has no equity to have personal property covered by the mortgage applied to the reduction thereof in exoneration of land, and therefore a receiver cannot be appointed of such personalty on application of the purchaser in a suit to redeem the land from the mortgage. Lovelace *v.* Webb, 62 Ala. 271.

Where the debtor and another jointly own the property it cannot be placed in the hands of a receiver unless the equities clearly demand it. Holmes *v.* Stix, 104 Ky. 351, 47 S. W. 243, 20 Ky. L. Rep. 593.

The property must be the direct subject of the action, and the judgment to be granted must act upon the specific property. Johnson *v.* Cochrane, 91 Hun (N. Y.) 163, 36 N. Y. Suppl. 287, 25 N. Y. Civ. Proc. 215.

Where the court has lost its jurisdiction over the property by the execution of a replevy bond, under statute, whereby the levy of an attachment under a bill in equity was discharged, such bond is held to stand in the place of the property and upon rendition of a final decree in the cause the appointment of a receiver with directions for its seizure and sale is *coram non judice* and void; the property had passed effectually out of the custody of the court and was thereafter subject to sale and disposition by the party executing the replevin bond. Jones *v.* Stewart, (Tenn. Ch. App. 1900) 61 S. W. 105.

46. Williams *v.* Dismukes, 106 Ala. 402, 17 So. 620; Dollins *v.* Lindsey, 89 Ala. 217, 7 So. 234, which cases hold that a receiver to take property which has been seized on attachment and delivered to a claimant on the execution of a statutory bond is improper, the property being *in custodia legis*, unless at the suit of one asserting a paramount lien. But in Sackhoff *v.* Vandegrift, 98 Ala. 192, 13 So. 495 [*distinguishing* Dollins *v.* Lindsey, *supra*, in that there the proceedings were in different courts and there was no averment that the property attached was of value exceeding the amount of the debt for which it had been attached], it is held that under an equitable attachment in the chancery court, on goods in the hands of a third person but alleged to have been fraudulently transferred to him by the debtor, the goods are not *in custodia legis* so as to prevent the same court granting a creditor at large an injunction and receiver as to the surplus of the property after the discharge of the prior claim. *Compare infra*, IV, D, 7, e.

Property involved in garnishment proceedings.— A statute forbidding the bringing of actions against garnishees, concerning property liable to garnishment, until the termination of the garnishment proceedings, except by special permission of the court, would seem not to inhibit the appointment of a receiver, in a suit for the settlement of partnership affairs, to take property of the firm which was garnished at a suit of the creditor of one of the partners; and in any event the objection is not available where it appears that permission to sue for such settlement of the partnership was granted. Brande *v.* Bond, 63 Wis. 140, 23 N. W. 101.

Conflicting jurisdictions generally see COURTS, 11 Cyc. 982 *et seq.*

Property in hands of administrator see *supra*, II, B, 4, a, note 50; and *infra*, II, B, 10, h.

in order to prevent a multiplicity of suits and preserve the property,[47] or in a suit to enforce the lien of general creditors upon assets as a trust fund and attacking the process under which they had been seized,[48] or in a suit in equity in aid of an execution at law,[49] or where the proceedings under which the property was first taken have been abandoned.[50] A receiver cannot be appointed to subject debts which, on grounds of public policy, are not liable to attachment, such as a claim against a city,[51] or to subject a pension, against which creditors can have no execution at law,[52] or the fees and emoluments of a public officer,[53] or a mere privilege under a license from the municipal authorities.[54] It is not essential that the property should be in the custody of the court at the time the receiver is appointed, but only that the person having possession should be before the court. In such case the court has power to appoint a receiver and authorize him to take possession.[55]

10. Preservation and Protection of Property — a. In General — Interference With Title and Possession. As has been stated, the primary object of a receiver is to secure the property or thing in controversy so that it may be subjected to such order or decree as the court may make in the particular case.[56] To this end the courts exercise the power of appointing receivers,[57] the appoint-

47. Wiedman *v.* Sann, (N. J. Ch. 1895) 31 Atl. 211. In Moore *v.* Diament, 41 N. J. Eq. 612, 7 Atl. 509, a similar ruling was made where complainant claimed to be the owner of goods levied on under execution against another.

48. Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706 (holding that upon the theory that upon the dissolution of a partnership for misconduct on the part of the partners in possession of the assets, such assets become a trust fund or the general creditors have a quasi or equitable lien thereon, and upon allegations of collusion between a surviving partner and an attachment creditor in a suit by a general creditor in which the attachment creditor and the officer levying the attachment are parties, that a receiver may be appointed to take possession of the property); Ford *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766 (money in hands of sheriff upon execution against insolvent corporation).

Condemnation of land after levy of execution.— Where after levy of execution land is condemned, the money paid into the hands of the clerk of the court for the county in which the land is situated stands in the place of the land, plaintiff in execution cannot sell the land, and in a suit in aid of his execution brought in the proper county and removed to another county the court in the latter county may direct the transfer of such money to a receiver appointed by it. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

49. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

50. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

Dismissal of suit in which money was deposited.— Where, after money was deposited with a trust company to the credit of an action in a state court, to enforce a lien against freight moneys of a steamship company, under stipulation between the parties, a receiver of the company was appointed in a creditor's suit in the state court and intervened in the first suit, and plaintiff in the first suit had also sued *in rem* in the federal court, it was decided in the first suit that the court had no jurisdiction, the moneys would be ordered to be paid to the receiver since the stipulation did not provide for its disposition under the conditions existing, and the court was without power to determine the rights of the parties in that suit. Brown *v.* U. S., etc., Mail Steamship Co., 8 Misc. (N. Y.) 562, 28 N. Y. Suppl. 642.

51. Granite Co. *v.* Douglass, 3 Pa. Dist. 133.

52. Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Swanst. 108, 36 Eng. Reprint 555, 2 Wils. Ch. 130, 37 Eng. Reprint 258, as to an inalienable pension. See also *infra*, II, B, 12, b, (II), (A).

53. Tappan *v.* Gray, 7 Hill (N. Y.) 259 [*reversing* 3 Edw. 450, and *affirming* 9 Paige 507]; Cooper *v.* Reilly, 2 Sim. 560, 2 Eng. Ch. 560, 57 Eng. Reprint 897 [*affirmed* in 1 Russ. & M. 560, 5 Eng. Ch. 560, 39 Eng. Reprint 215], salary non-assignable. But where profits of the office of a clerk of the peace were assigned for payment of creditors, a receiver was appointed pending the determination of the validity of the assignment. Palmer *v.* Vaughan, 3 Swanst. 173, 36 Eng. Reprint 818.

54. Barry *v.* Kennedy, 11 Abb. Pr. N. S. (N. Y.) 421, where it was held that the court could not, as a provisional remedy, appoint a receiver of a market stand; that the granting or withholding permits to occupy stalls, etc., in the city markets was vested wholly in the city inspectors' determination, subject to certain restrictions beyond the control or the authority of the courts, and that a permit was a mere license to occupy.

55. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

56. See *supra*, II, A.

57. See *infra*, III.

ment being made upon the theory that if the property is left in the hands of the owner or possessor it is liable to waste or destruction, and that it is for the best interests of all concerned that it be taken into the custody of the court for ultimate disposition in accordance with the rights of the parties as they shall be determined.[58] Generally a resort to this remedy can be had only in extreme cases and the appointment will not be made where it does not appear that without it there will be irreparable loss to the party or that the property or fund is liable to loss, waste, or destruction,[59] or where no injury will apparently be caused by refusing to make

58. Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Home Sav., etc., Co. *v.* Pope County Dist. Ct., 121 Iowa 1, 95 N. W. 522; Goodyear *v.* Betts, 7 How. Pr. (N. Y.) 187; Rollins *v.* Henry, 77 N. C. 467; Battle *v.* Davis, 66 N. C. 252.

59. *Alabama.*— Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909; Ensley Dev. Co. *v.* Powell, 147 Ala. 300, 40 So. 137; Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204, 25 So. 581; Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Randle *v.* Carter, 62 Ala. 95; Briarfield Iron Works *v.* Foster, 54 Ala. 622.

Georgia.— Houchin *v.* Turner, 89 Ga. 26, 14 S. E. 862; Barnwell *v.* Wofford, 67 Ga. 50; Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 344; Macon *v.* Huff, 60 Ga. 221, where it was held that a receiver was properly denied in a suit by a city to set aside a lease of a park made by it to its mayor under which the lessee undertook to keep the park in proper condition for public use and to that end had expended large sums, inasmuch as, although the lease was valid, the city was bound in equity to restore the amount paid by the lessee as a condition to rescinding the contract which amount was in excess even of the estimate of the city of the value of rent of the park.

Idaho.— Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887.

Illinois.— Baker *v.* Backus, 32 Ill. 79; Lemker *v.* Kalberlah, 105 Ill. App. 445; Schack *v.* McKey, 97 Ill App. 460.

Iowa.— Hart *v.* Mt. Pleasant Park Stock Co., 97 Iowa 353, 66 N. W. 190, holding that there is no occasion for taking property out of the hands of the owners in the absence of any showing that they are doing anything to injuriously affect plaintiff's rights or to impair his security.

Kansas.— Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

Kentucky.— Floor *v.* Floor, 87 S. W. 272, 27 Ky. L. Rep. 894; Combs *v.* Breathitt County, 49 S. W. 2, 20 Ky. L. Rep. 1247.

Louisiana.—Malady *v.* Malady, 26 La. Ann. 438.

Maryland.— Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576; Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Knighton *v.* Young, 22 Md. 359; Haight *v.* Burr, 19 Md. 130; Triebert *v.* Burgess, 11 Md. 452; Furlong *v.* Edwards, 3 Md. 99; Speights *v.* Peters, 9 Gill 472; Thompsen *v.* Diffenderfer, 1 Md. Ch. 489; Clark *v.* Ridgely, 1 Md. Ch. 70.

Michigan.— Simon *v.* Schloss, 48 Mich. 233, 12 N. W. 196; McCombs *v.* Merryhew, 40 Mich. 721.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 25 Mont. 164, 64 Pac. 330 (under the statutory provision for the appointment of a receiver "where receivers have heretofore been appointed by the usages of courts of equity"); Heinze *v.* Kleinschmidt, 25 Mont. 89, 63 Pac. 927.

New Jersey.— Hamburgh Mfg. Co. *v.* Edsall, 8 N. J. Eq. 141, 7 N. J. Eq. 298; Hager *v.* Stevens, 6 N. J. Eq. 374.

New York.— O'Mahoney *v.* Belmont, 62 N. Y. 133; Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Suppl. 639; Libby *v.* Libby, 68 N. Y. App. Div. 15, 74 N. Y. Suppl. 57; Bagaley *v.* Vanderbilt, 16 Abb. N. Cas. 359; Goodyear *v.* Betts, 7 How. Pr. 187; Orphan Asylum Soc. *v.* McCartee, Hopk. 423; Willis *v.* Corlies, 2 Edw. 281.

North Carolina.— Levensan *v.* Elson, 88 N. C. 182.

Ohio.— Behrens *v.* Quality Bldg. Assoc., 3 Ohio S. & C. Pl. Dec. 275, 2 Ohio N. P. 259. See also Baker *v.* Fraternal Mystic Circle, 1 Ohio S. & C. Pl. Dec. 579, 32 Cinc. L. Bul. 84.

Rhode Island.— Chafee *v.* Quidnick Co., 14 R. I. 75.

South Carolina.— Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281, where the applicants for a receiver of a corporation had been tendered the amount due them.

Texas.— Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

Virginia.— Norris *v.* Lake, 89 Va. 513, 16 S. E. 663.

Washington.— Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37; Union Boom Co. *v.* Samish Boom Co., 33 Wash. 144, 74 Pac. 53; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666.

West Virginia.— Thompson *v.* Adams, 60 W. Va. 463, 55 S. E. 668; Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746; Ruffner *v.* Mairs, 33 W. Va. 655, 11 S. E. 5.

United States.— Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152; Moore *v.* British Columbia Bank, 106 Fed. 574; Lancaster *v.* Asheville St. R. Co., 90 Fed. 129; Kelley *v.* Boettcher, 89 Fed. 125; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; Naumburg *v.* Hyatt, 24 Fed. 898; Ames Iron-Works *v.* West, 24 Fed. 313; Beecher *v.* Bininger, 3 Fed. Cas. No. 1,222, 7

the order or no benefit will apparently result from granting it.[60] So also the court will not incur the risk of the attendant expense of a receivership where the property appears to be in no danger.[61] The court reluctantly interferes against the legal title and then only in case of fraud clearly proved and of imminent danger and when the matter in dispute depends upon the legal title a receiver will not be appointed except in a strong case shown.[62] On the other hand it

Blatchf. 170; Morrison *v.* Buckner, 17 Fed. Cas. No. 9,844, Hempst. 442; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114.

England.— Barkley *v.* Reay, 2 Hare 306, 12 L. J. Ch. 320, 24 Eng. Ch. 306, 67 Eng. Reprint 127; Lloyd *v.* Passingham, 3 Meriv. 697, 36 Eng. Reprint 267, 16 Ves. Jr. 59, 33 Eng. Reprint 906; Clark *v.* Dew, 1 Russ. & M. 103, 5 Eng. Ch. 103, 39 Eng. Reprint 40.

See 42 Cent. Dig. tit. "Receivers," § 21. See also *infra*, II, C, 2 *et seq.*

Where clerk may receive money.— Where the only thing necessary is the collection and safekeeping of a fund, to be realized by enforcement of a judgment, pending the final disposition of the cause, it is unnecessary to appoint a special receiver; the register of the court being a proper person to receive the money, and hold it, to abide the further order of the court. Barnard *v.* Davis, 54 Ala. 565.

Although erroneous the order will not be reversed where it is not reviewed until the main case has been heard on appeal, when it is determined that the party applying for the receiver is entitled to the rents and profits, as it could not benefit either party to the action, and the successful party would have to bring another action to recover the property. Sheldon *v.* Parker, 66 Nebr. 610, 92 N. W. 923, 95 N. W. 1015, as to receiver pending appeal.

Not at instance of party in possession.— Under such a statute providing for the appointment of a receiver of property in the possession of defendant, the appointment can be made only when the property is in the possession of the party adverse to the applicant and cannot be made on motion of plaintiff in an action of interpleader who is in possession of the property. La Femina *v.* Arsene, 72 N. Y. App. Div. 474, 76 N. Y. Suppl. 576. But see Fellows *v.* Heermans, 13 Abb. Pr. N. S. (N. Y.) 1. There can be no ground for a receiver in the case of joint ownership of property, when the joint owner who applies for the appointment has the property in his own possession and under his control. Buchanan *v.* Comstock, 57 Barb. (N. Y.) 568; Smith *v.* Lowe, 1 Edw. (N. Y.) 33.

Before answer see *supra*, II, B, 8, b.

60. See *supra*, II, B, 2, b; II, B, 4.

The mere right to an accounting does not necessarily include the right to stop an enterprise by a receiver in the absence of special facts as mismanagement, fraud, or actual danger to the assets. Warwick *v.* Stockton, 55 N. J. Eq. 61, 36 Atl. 488 (which involved the rights of parties to a joint adventure under a contract which gave defendant the right to possession and management); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. So in Spier *v.* Hyde, 92 N. Y. App. Div. 467, 87 N. Y. Suppl. 285, it was held that where the parties entered into a contract whereby plaintiff was to have a certain per cent of net profits for his services and stock contributed to a pool, whether the arrangement was a partnership or a joint adventure, on an interlocutory judgment for an accounting of plaintiff's share a receiver was not necessary to protect his rights.

61. De Leonis *v.* Walsh, 148 Cal. 254, 82 Pac. 1047; Clark *v.* Ridgely, 1 Md. Ch. 70; Rhodes *v.* Wilson, (N. J. Ch. 1890) 19 Atl. 732, where a partner in possession pending a dissolution suit is solvent and the expense of a receivership could not be borne by the partnership assets. See also Continental Nat. Bank *v.* Myerle, 24 N. Y. App. Div. 154, 48 N. Y. Suppl. 718.

Where a receivership would probably destroy a business or concern, by reason of the attendant extraordinary expenses, if there are other means of protecting the parties or a very clear case is not shown, the appointment will be refused. Barnesville Mfg. Co. *v.* J. S. Schofield's Sons Co., 118 Ga. 664, 45 S. E. 455 (holding that where the claims can be satisfied in the ordinary way by judgment and execution and are very small as compared with the value of the property sought to be sequestered, the court will not incur the costs and expenses of a receivership which would probably precipitate defendant into bankruptcy and cause a shrinkage in the value of the property); Semple *v.* Flynn, (N. J. Ch. 1887) 10 Atl. 177 (holding that where the appointment would destroy the business involved, it would be refused except upon clearest evidence); United Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673.

Relief not denied on ground of expense.— But on the other hand where the proper case for the appointment is otherwise made out, the relief will not be denied merely because it will entail large costs and expenses, inasmuch as the court will not permit the spoliation of the estate by the allowance of exorbitant charges, fees, and costs. Davies *v.* Monroe Waterworks, etc., Co., 107 La. 145, 31 So. 694

62. West *v.* Chasten, 12 Fla. 315 (holding that a receiver against an acknowledged legal title where the relief sought is a decree of payment and the performance of an agreement to save harmless, there being no lien or acknowledged trust, should not be appointed except in a plain case, but that if in such a case arising out of confidential relations the party acts iniquitously and un-

is equally well settled that where personal property, or the rents and profits of real estate in dispute, are in imminent danger of being wasted or lost, a receiver may be appointed for the benefit of all concerned during the controversy.[63] So in

justly, or fraudulently, pays no attention to his covenants, disregards the claims of his surety, and is pursuing such a course as threatens to result in his great damage and injury, the court may interfere); Furlong *v.* Edwards, 3 Md. 99 (refusing to appoint a receiver as against a mortgagee in possession of personal property, having constituted the mortgagor his agent to sell, and no fraud or improper conduct being imputed to him); Thompsen *v.* Diffenderfer, 1 Md. Ch. 489; Kipp *v.* Hanna, 2 Bland (Md.) 26; Williamson *v.* Wilson, 1 Bland (Md.) 418; Vause *v.* Woods, 46 Miss. 120. In Patten *v.* Accessory Transit Co., 4 Abb. Pr. (N. Y.) 235, it is held that the appointment of a receiver of chattels held by a mortgagee in possession except in case of necessity to secure the rights of other parties was to impair the obligations of the contract between the mortgagor and mortgagee and therefore was beyond the constitutional power of the court or of the legislature.

Other adequate remedy see II, B, 4.

Prevention of removal or other disposition see *infra*, II, B, 10, k.

Parties equally entitled see *infra*, II, B, 10, i.

63. *Alabama.*— Smith *v.* Lusk, 119 Ala. 394, 24 So. 256; Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729.

Georgia.— Smith *v.* Zachry, 128 Ga. 290, 57 S. E. 513; Garlington *v.* McKibben, 99 Ga. 128, 24 S. E. 873, as against insolvent trespasser after his defeat on a claim interposed to defeat a sale of land under execution, at suit of purchaser at execution sale.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193; Duvall *v.* Waters, 1 Bland 569, 18 Am. Dec. 350.

Michigan.— Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

New Jersey.— McCarter *v.* Clavin, (Ch. 1907) 66 Atl. 599, holding that sufficient ground is shown for the appointment of a receiver to protect decedent's real property, worth one hundred thousand dollars, claimed by the state to escheat, and also claimed by defendant under an alleged will and by another claiming to be decedent's only heir at law, the lands having been sold for municipal taxes, the rents being collected by the purchasers at the tax-sale, a mortgagor having filed foreclosure proceedings, defendant as administratrix having in no way attempted to protect the property, and it appearing that the conflicting claims will produce prolonged litigation.

North Carolina.—McNair *v.* Pope, 96 N. C. 502, 2 S. E. 54; Horton *v.* White, 84 N. C. 297.

West Virginia.— Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514; Ballard *v.* Callison, 4 W. Va. 326.

United States.— Kelley *v.* Boettcher, 89 Fed. 125; Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225 (when the property is exposed to danger or loss and the party in possession has not a clear legal right); Parkhurst *v.* Kinsman, 18 Fed. Cas. No. 10,760, 2 Blatchf. 78, Fish. Pat. Rep. 180; Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

See 42 Cent. Dig. tit. "Receivers," § 21.

To collect debt pending suit.— A receiver may be appointed to enforce a debt before final hearing in the litigation over the right thereto if it becomes necessary to enforce such debt. Mills *v.* Pittman, 1 Paige (N. Y.) 490. Thus in Hazzard *v.* Credit Mobilier, 11 Fed. Cas. No. 6,289, 7 Reporter 360, 6 Wkly. Notes Cas. (Pa.) 417, where persons who were directors in two corporations, one of which was plaintiff and the other defendant in an action on a promissory note, were enjoined from surrendering the note to defendant corporation in the action and from canceling same, upon a showing that the directors were about to discontinue said action on the note and that a new action would be barred by the statute of limitations, a receiver was appointed with authority to carry on the action. See also Osborn *v.* Heyer, 2 Paige (N. Y.) 342. And see GARNISHMENT, 20 Cyc. 1072.

Pending action at law.— One of the heads of jurisdiction in a court of equity is to protect property pending litigation in a court of law. Stitwell *v.* Williams, 6 Madd. 49, 23 Rev. Rep. 56, 56 Eng. Reprint 1008. In Crane *v.* Seymour, 3 Md. Ch. 483, it was said that in a proper case a court of chancery might interpose to prevent property charged to be liable to the claims of creditors from waste or destruction pending the litigation at law.

To prevent scattering of funds and multiplicity of suits, a receiver may be appointed. Thus where the right to the fund originally due a debtor is claimed by numerous creditors, under various assignments, upon issuing a preliminary injunction restraining payment pending the determination of the right the court may appoint a receiver to collect the fund and prevent a multiplicity of suits if such appointment should become necessary. Hopper *v.* Morgan, (N. J. Ch. 1898) 42 Atl. 171. To the same effect Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514. So where a chattel mortgagee sues to foreclose, and an attaching creditor of a stranger to the mortgage seizes the goods and is offering them for sale through an auditor, the court may not only restrain the sale but may also appoint a receiver with authority to sell in order to avoid a multiplicity of suits and to preserve the value of the property until the rights of the parties can be determined. Wiedemann *v.* Sann, (N. J. Ch. 1895) 31 Atl. 211. See also Moore *v.* Diament, 41 N. J. Eq. 612, 7 Atl. 509, involving a similar ruling as

many states the statutes regulating the subject provide for the appointment of receivers upon the application of a party interested in the property or funds when there is danger of its removal,[64] loss, or destruction,[65] under which the courts, while recognizing their inherent power as courts of equity to act in such emergencies,[66] will make or refuse the order as they deem the emergencies provided for are or are not made to appear.[67]

between a complainant and various judgment creditors of defendant. So where the rents and profits of real property were endangered by reason of the fact that the persons receiving them were numerous and scattered, it was held that a receiver might be appointed merely to husband such rents and profits without disturbing defendant's possession. Ulman *v.* Clark, 75 Fed. 868, where the case is distinguished from those in which the court is required to act with reluctance in interfering where the legal title of the party in possession is involved. See also Higgins Oil, etc., Co. *v.* Snow, 113 Fed. 433, 51 C. C. A. 267.

Appointment to sell in order to preserve property see *infra*, IV, H, 2, a.

64. See *infra*, II, B, 10, k.

65. See the statutes of the several states; and the cases cited *infra*, note 67.

66. McIntosh *v.* Perkins, 13 Mont. 143, 32 Pac. 653, holding that such statute is declaratory of the doctrine which always prevails in courts of equity.

67. *Indiana.*— Levin *v.* Florsheim, 161 Ind. 457, 68 N. E. 1025 (under a provision that a receiver may be appointed in all actions where the property in controversy is in danger of being materially injured, and in such other cases in which it may be necessary to secure ample justice); McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272; Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976.

Iowa.— Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839; Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523.

Kentucky.— Thompson *v.* Page, 76 S. W. 128, 25 Ky. L. Rep. 557; Dupoyster *v.* Ft. Jefferson Imp. Co., 72 S. W. 268, 24 Ky. L. Rep. 1782; Bromley *v.* McCall, 18 S. W. 1016, 13 Ky. L. Rep. 915.

Missouri.— Stark *v.* Grimes, 88 Mo. App. 409, under a code provision conferring on the circuit court, or a judge thereof in vacation, power to appoint a receiver whenever he shall deem such appointment necessary for the purpose of keeping and preserving all property, etc., pending any legal or equitable proceeding concerning the same.

Montana.— State *v.* Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281; McIntosh *v.* Perkins, 13 Mont. 143, 32 Pac. 653.

New Hampshire.— Ladd *v.* Harvey, 21 N. H. 514.

New York.— Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Supp. 639 (exclusiveness of statutory causes); Ashley *v.* Ashley, 59 N. Y. App. Div. 611, 69 N. Y. Suppl. 173 (where a receiver was held to be proper in a suit by a father who had transferred securities to his son and daughters in consideration of future support, to set aside the agreement as secured by fraud and to enjoin the transfer of the security upon a showing that the agreement was procured by fraud, that the support was not furnished, and that there had been a devastavit); Bathmann *v.* Bathmann, 79 Hun 477, 29 N. Y. Suppl. 959; Buchanan *v.* Comstock, 57 Barb. 568; Thalmann *v.* Hoffman House, 27 Misc. 140, 58 N. Y. Suppl. 227; Gillig *v.* Barrett, 5 N. Y. Suppl. 380; Brown *v.* Northrup, 15 Abb. Pr. N. S. 333; Hamilton *v.* Accessory Transit Co., 3 Abb. Pr. 255; People *v.* New York, 19 How. Pr. 289.

North Carolina.— Venable *v.* Smith, 98 N. C. 523, 4 S. E. 514; Rheinstein *v.* Bixby, 92 N. C. 307; Levenson *v.* Elson, 88 N. C. 182; Twitty *v.* Logan, 80 N. C. 69; Carter *v.* Hoke, 64 N. C. 348.

Ohio.— Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5. Under the petition in an action for possession and payment of rent on the forfeiture of a lease, disclosing the right of reëntry, a lien for rent, non-payment and waste, and consequent injury to the reversion, it was held that the case was brought within the provision of the code authorizing the appointment of a receiver. Countee *v.* Armstrong, 8 Ohio Dec. (Reprint) 531, 8 Cinc. L. Bul. 286.

Texas.— City Nat. Bank *v.* Dunham, 18 Tex. Civ. App. 184, 44 S. W. 605 (holding that the statute is merely declaratory of the equitable doctrine, and that a receiver cannot be appointed in the absence of such showing); Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567.

Utah.— Ogden City *v.* Bear Lake, etc., Water-Works, etc., Co., 16 Utah 440, 52 Pac. 697, 41 L. R. A. 305.

Washington.— Union Boom Co. *v.* Samish Boom Co., 33 Wash. 144, 74 Pac. 53.

See 42 Cent. Dig. tit. "Receivers," § 21.

Under statute providing the remedy in law actions, as a provision giving the court the power to appoint a receiver of property attached, the appointment is confined to cases where it appears that the property is in danger of being lost or materially injured or impaired, under the general statute providing for the appointment of receivers in these emergencies. Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523 [*distinguishing* Hughes *v.* Cory, 20 Iowa 399]. In Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650, in an action for the enforcement of a landlord's lien by attachment in which other persons claimed an interest in the property attached, which consisted of live stock, farm produce, and materials, the court considered the nature of the property to justify the appoint-

b. Real Estate, Rents, and Profits.[68] It is not the policy of courts to take charge of real estate and manage and control it through the aid of a receiver as against a party in possession asserting title in himself, unless it is in imminent danger of waste or irreparable injury,[69] or the case falls within the statutory provisions under which an appointment is authorized; [70] and where the rights in litigation between the parties depend upon the determination of adverse claims of legal title and defendant is in possession, the question being one to be determined at law, or being legal as distinguished from equitable, courts of equity will not ordinarily interfere by appointing a receiver,[71] in the absence of fraud or of some equity which can affect the conscience of the party in possession and

ment of a receiver under the particular conditions of the case.

Under the Judicature Act "just or convenient" in the provision for the appointment of a receiver by an interlocutory order in all cases in which it shall appear to the court to be "just or convenient" is construed to mean "just and convenient." North London R. Co. *v.* Great Northern R. Co., 11 Q. B. D. 30, 52 L. J. Q. B. 380, 48 L. T. Rep. N. S. 695, 31 Wkly. Rep. 490.

68. In foreclosure suits see MORTGAGES, 17 Cyc. 1621.

69. See *infra*, text and notes 77-83.

Receiver appointed to keep account.— In John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22, a party in possession was required to give bond to pay any damages adjudged to the other on final hearing and a receiver appointed to take, state, and keep an account of timber cut from the land by the party in possession.

Insufficiency of personalty in creditor's suit.— It has been held that upon a creditor's bill, a receiver of the rents and profits of the testator's real estate will not be granted where plaintiff does not allege in his bill, and clearly prove the insufficiency of the personal estate to pay the debts, and does not pray by his bill for the application of the realty, or the rents and profits thereof, to that object. Sanders *v.* Christie, 1 Grant Ch. (U. C.) 137.

Jurisdiction generally see *infra*, III, A, 2, a *et seq.*

70. See *infra*, note 74.

71. *California.*— Bennallack *v.* Richards, 125 Cal. 427, 58 Pac. 65.

District of Columbia.— Wood *v.* Greyson, 16 App. Cas. 174.

Idaho.— Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887.

Illinois.— Lemker *v.* Kalberlah, 105 Ill. App. 445.

New York.—Patterson *v.* McCunn, 46 How. Pr. 182; Willis *v.* Corlies, 2 Edw. 281.

United States.— Lenox *v.* Notrebe, 15 Fed. Cas. No. 8,246*b*, Hempst. 225, holding that where one party has a clear right to the possession of the property and the dispute is as to the title only, the court will disturb that possession with great reluctance.

England.— Owen *v.* Homan, 15 Jur. 339, 20 L. J. Ch. 304, 3 Macn. & G. 378, 49 Eng. Ch. 290, 42 Eng. Reprint 307 [*affirmed* in 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752]; Lloyd *v.* Passingham, 3 Meriv. 697, 36 Eng. Reprint 267, 16 Ves. Jr. 59, 33 Eng. Reprint 906.

See 42 Cent. Dig. tit. "Receivers," §§ 24, 28.

Mining property — *In general.*— The general rule is applied to mining claims and with special force as against the appointment of a receiver to operate the mine and extract from the property that which constitutes its value. Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642; Hickey *v.* Parrot Silver, etc., Co., 25 Mont. 164, 64 Pac. 330, where it was said, in referring to mining property in a suit to enjoin trespassers on it, that to appoint a receiver before a decision determining the title is often to effect the levy of an execution *in limine.* Sometimes it is considered against public policy to interfere by injunction to stop the working of mines, and that a receiver should be appointed where it appears that the parties in possession are insolvent. Parker *v.* Parker, 82 N. C. 165; Falls *v.* McAfee, 24 N. C. 236; Thomas *v.* Nantahala Marble, etc., Co., 58 Fed. 485, 7 C. C. A. 330, where the rule in North Carolina was approved, but held inapplicable to the facts of the particular case, the land in dispute being a narrow strip between the main bodies of lands occupied by the parties, and an injunction to preserve such strip *in statu quo* would not prejudice either party. See also *infra*, II, B, 10, i, notes 27, 29.

Oil and gas wells.— The rule of the text is applied to oil wells. Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172. In Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615, the title was in dispute, but all parties admitted the necessity of operating the property containing oil and gas wells, because, unless a receiver was appointed to take charge and operate the property, the oil and gas would escape and be lost; and in Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. 673, a receiver was appointed to perform the annual work required by the statutes of the United States upon an unpatented mining claim, to the end that the possessory title be preserved for the benefit of the party who should ultimately be adjudged entitled to it, the court holding also that an injunction ought not to issue, because the result would necessarily be the draining of a part of the oil from the land in controversy by those operating the adjoining territory. In these respects the cases are distinguished in and distinguishable from Hickey *v.* Parrot Silver,

when there is no privity between the parties.[72] This general rule has been applied

etc., Co., 25 Mont. 164, 64 Pac. 330, *supra*, this note.

Receiver of proceeds.— In Hill *v.* Taylor, 22 Cal. 191, under a statute providing for the appointment of a receiver on the application of a party who establishes "a *prima facie* right to the property, or to an interest in the property which is the subject of the action, which is in possession of an adverse party, and the property or the rents and profits are in danger of being lost or materially injured or impaired," it was held that in an action by the purchaser of a one-third interest in a mining claim at a foreclosure sale against the mortgagor in possession and refusing to pay, a receiver should be appointed to take a one-third share of the proceeds rather than to restrain the working of the mine. To the same effect see West *v.* Hermann, (Tex. Civ. App. 1907) 104 S. W. 428.

72. *California.*— Bennallack *v.* Richards, 125 Cal. 427, 58 Pac. 65.

Illinois.— Mapes *v.* Scott, 4 Ill. App. 268.

Mississippi.— Vause *v.* Woods, 46 Miss. 120.

Pennsylvania.— Schlecht's Appeal, 60 Pa. St. 172.

Tennessee.— Richmond *v.* Yates, 3 Baxt. 204; State *v.* Allen, 1 Tenn. Ch. 512.

England.— Carrow *v.* Ferrior, L. R. 3 Ch. 719, 37 L. J. Ch. 569, 18 L. T. Rep. N. S. 806, 16 Wkly. Rep. 454, 922; Parkin *v.* Seddons, L. R. 16 Eq. 34, 42 L. J. Ch. 470, 28 L. T. Rep. N. S. 353, 21 Wkly. Rep. 538 (no jurisdiction to appoint where one of the parties is in possession, although it is otherwise if the possession is vacant); Hitchen *v.* Birks, L. R. 10 Eq. 471, 23 L. T. Rep. N. S. 335, 18 Wkly. Rep. 1015 (as between parties contesting heirship, one being in possession); Talbot *v.* Scott, 4 Jur. N. S. 1172, 4 Kay & J. 96, 27 L. J. Ch. 273, 6 Wkly. Rep. 269, 70 Eng. Reprint 40; Bainbrigge *v.* Baddeley, 3 Macn. & G. 413, 49 Eng. Ch. 321, 42 Eng. Reprint 320; Jones *v.* Jones, 3 Meriv. 161, 36 Eng. Reprint 62 (as to restraining heirs on the appointing of a receiver pending litigation of title between heir and devisee, where the order was refused but it does not appear that jurisdiction was denied); Knight *v.* Duplessis, 2 Ves. 360, 28 Eng. Reprint 230, 1 Ves. 624, 27 Eng. Reprint 1059 (not appointed for heir at law to turn devisee out of possession).

See 42 Cent. Dig. tit. "Receivers," § 24.

Under the Judicature Act the court has power to appoint a receiver where the title to the property is disputed. Foxwell *v.* Van Grutten, [1897] 1 Ch. 64, 66 L. J. Ch. 53, 75 L. T. Rep. N. S. 368; Berry *v.* Keen, 51 L. J. Ch. 912.

Pending forfeiture of lease.— A suit will not lie simply to appoint a receiver to take into custody and to deprive a lessee of his share of the profits of the leased property until the complainant can try to obtain a judgment of forfeiture of the lease, the object being to take into custody that which will be mesne profits in the event of establishing a forfeiture. Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83, holding that the purpose of the suit was simply to obtain the assistance of the court in giving effect to alleged forfeiture of a lease, and to restrain defendants from exercising legal rights while plaintiff was engaged in experimenting at law for the forfeiture.

Where the property is already in custody. — Where property was in the custody of the court by its receivers at the instance of several defendants setting up adverse claims, and in this attitude the claimants chose, in view of a claim hostile to all of them, to agree upon a division of the property among themselves by a compromise, and not by the judicial decision of their rights, the question of the appointment of a receiver in another suit cannot be said to turn upon peaceable possession under the legal title. State *v.* Allen, 1 Tenn. Ch. 512.

But in a suit to enforce an equitable claim or a claim which is the subject of equity jurisdiction, a receiver may be appointed when necessary to protect the subject-matter and to collect and preserve the rents and profits. Smith *v.* Lusk, 119 Ala. 394, 24 So. 256 (complainant having good equitable title and right to immediate possession, charging defendant with destruction of valuable timber, and alleging his insolvency, entitled to a receiver); Worrill *v.* Coker, 56 Ga. 666; Ware *v.* Ware, 42 Ga. 408 (on bill by guardian alleging waste and insolvency of party in possession, after a decree establishing ward's interest to extent of ward's money which had been applied in the purchase of the property); Blain *v.* Everitt, 36 Md. 73; Cole *v.* O'Neill, 3 Md. Ch. 174 (where plaintiff shows equitable title to a part of the property in dispute, and a legal and equitable title to the rest, it being decided that defendant has no title legal or equitable, and where preservation of the property requires it); Vause *v.* Woods, 46 Miss. 120; Mitchell *v.* Barnes, 22 Hun (N. Y.) 194 (suit by committee of person of unsound mind to set aside conveyances); Rogers *v.* Marshall, 6 Abb. Pr. N. S. (N. Y.) 457 (in action to recover on ground that judicial proceedings by which the title of plaintiff's ancestor was apparently divested were void for fraud, mistake, and want of jurisdiction, and defendants being pecuniarily irresponsible); Hlawacek *v.* Bohman, 51 Wis. 92, 8 N. W. 102 (in an action involving title to land, for specific performance, where both parties are interfering with each other in harvesting crops); Finch *v.* Houghton, 19 Wis. 149 (where, in a suit to foreclose a mortgage, the secured debt being past due and the owner of the equity of redemption being in possession and having neglected to pay taxes and the evidence showing that he

to defeat a bill for the appointment of a receiver pending an action of ejectment,[73] and an appointment in ejectment on an application under code or statutory provisions which contemplate the appointment of receivers as a merely auxiliary equitable remedy.[74] On the other hand a receiver is appointed under a bill for that purpose to preserve rents and mesne profits pending the determination of an action of ejectment,[75] and it has been held that an appointment for the mere purpose of collecting rents is made with less reluctance than where the possession

had endeavored to obtain tax deeds in order to defeat the mortgage and that the mortgage was not adequate security, said owner of the equity of redemption having set up a paramount title under certain tax deeds and insisted that he was in possession thereunder and that he should not be compelled to surrender his possession to a receiver, it was held that if the affidavits established the latter state of facts it might be well that a court of equity would refuse to take the possession from him but that under the facts first above detailed and the affidavits not establishing such paramount title and the presumption being that he went in under his conveyance as purchaser of the equity of redemption subject to the mortgage, the case was a proper one for a receiver); Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322; Stitwell *v.* Williams, 6 Madd. 49, 23 Rev. Rep. 56, 56 Eng. Reprint 1008; Huguenin *v.* Baseley, 13 Ves. Jr. 105, 9 Rev. Rep. 148, 276, 33 Eng. Reprint 234. See also *supra*, II, B, 1; *infra*, II, B, 10, d *et seq.*

Other adequate remedies see *supra*, II, B, 4.

73. Mapes *v.* Scott, 4 Ill. App. 268; Emerson's Appeal, 95 Pa. St. 258; France *v.* French, 2 Pa. Co. Ct. 165; Enterprise Transit Co.'s Appeal, 9 Wkly. Notes Cas. (Pa.) 225. So under a statutory provision that "in any action in which the right to real estate, or to goods and chattels is in controversy, the court or any judge thereof, may make an order for the protection of the property in controversy from waste, destruction, or removal beyond the jurisdiction of the court," it is held that the supreme court has no power to appoint a receiver to take charge of the rents of the premises pending an action of ejectment, as the waste provided for refers to real estate and cannot cover rents. Oehme *v.* Rucklehaus, 50 N. J. L. 84, 11 Atl. 145.

74. See *infra*, III, A, 2, c.

Under other statutes receivers are appointed in ejectment. Bitting *v.* Ten Eyck, 85 Ind. 357 (appointment to take charge of crops pending ejectment, holding that it is not ground for refusal to appoint a receiver that it is not shown that the action cannot be speedily tried); Kron *v.* Dennis, 90 N. C. 327 (appointment to secure rents and profits in ejectment, the power of the court in this regard being held not to be abridged by a code provision requiring a defendant in ejectment to give a bond before defending); Horton *v.* White, 84 N. C. 297; Rollins *v.* Henry, 77 N. C. 467 (holding that reason to apprehend that the rents and profits will be lost is the primary ground for appointing a receiver of real property pending litigation); Union Boom Co. *v.* Samish River Boom Co., 33 Wash. 144, 74 Pac. 53. See also Cofer *v.* Echerson, 6 Iowa 502.

Provisions applicable to personal property only.— It has been held that the provision of statute for the appointment of a receiver at the instance of the party to the action who has a probable right to or lien upon the property, where the property is in danger of loss, etc., applies only to personal property or property on which the party has a lien for the enforcement of a legal demand. Tarvin *v.* Walker's Creek Coal, etc., Co., 109 Ky. 579, 60 S. W. 185, 22 Ky. L. Rep. 1473.

75. Baker *v.* Starling, (Ala. 1905) 39 So. 775; Hereford *v.* Hereford, 134 Ala. 321, 32 So. 651; American Freehold Land Mortg. Co. *v.* Turner, 95 Ala. 272, 11 So. 211 (where complainant was purchaser under a mortgage foreclosure sale, and proceeded against the mortgagor and his tenants under a tenancy created after the execution of the mortgage, and complainant's title was established and by reason of the insolvency of the tenants and the fact that the remedy by attachment provided in favor of landlords was not available to complainant, it was held that a receiver should be appointed); Whyte *v.* Spransy, 19 App. Cas. (D. C.) 450 (where complainant who had foreclosed a trust deed securing a loan purchased the property at the sale but was refused possession, defendants being insolvent and converting the rents); Vizard *v.* Moody, 117 Ga. 67, 43 S. E. 426 [*distinguishing* Walker *v.* Zorn, 50 Ga. 370] (at suit of purchaser under foreclosure sale against mortgagor in possession who was insolvent and collecting rents, to restrain such collection pending ejectment); Payne *v.* Atterbury, Harr. (Mich.) 414 (appointment under bill pending ejectment for a mill site, defendant's insolvency being alleged and the answer raising a strong presumption against defendant's title which was impeached by the bill, and where defendant was holding over against his own deed).

In suit to stay waste.— Millbank *v.* Penniman, 73 Ga. 136; McFadden *v.* Nolan, 15 Phila. (Pa.) 187, where defendant had refused to deliver possession of a mill and the machinery sold under execution and it was held that equity might appoint a receiver to take care of the machinery until plaintiff could obtain possession by legal proceedings, although such court had no power to deliver possession of the land, the court saying that the suit was not an ejectment bill but a bill to stay waste.

itself is to be disturbed.[76] Where the property is untenanted a receiver may be appointed,[77] and if the person holding the legal interest is not in possession, the equitable claimant will be entitled to the interference of the court for the purpose of preserving it from waste and of securing the rents and profits accruing pending the litigation.[78] The grounds upon which the court will exercise its jurisdiction to appoint a receiver are that there is a reasonable probability of success on the part of plaintiff and that the property involved is in danger.[79] While plaintiff must show his title where the rights involved depend upon title,[80]

76. Ulman *v.* Clark, 75 Fed. 868, where pending ejectment to recover mining land it appeared that the titles to the lands of an association organized for the purpose of holding large tracts of land were held by trustees who were not personally liable for any act done by them without the sanction of the board of management, and under whose sanction alone they could act; that the trustees had leased the particular property to other of the defendants for the purpose of mining coal, and it was alleged that in the event of plaintiff's recovery there was no one directly responsible to satisfy the judgment for damages against the trustees or the owners of the land and that it would require one or more suits to recover a judgment for damages, as well as other litigation, showing that it would be difficult to enforce a claim for damages and it was held that a receiver should be appointed to husband the rents and profits.

77. Parkin *v.* Seddons, L. R. 16 Eq. 34, 42 L. J. Ch. 470, 28 L. T. Rep. N. S. 353, 21 Wkly. Rep. 538; White *v.* Smale, 22 Beav. 72, 52 Eng. Reprint 1035 (where, in a suit on behalf of a number of grantees of rent charges on the same property, who had powers of distress and entry, a receiver was appointed to protect the property pending the litigation, it being untenanted, and it being impossible to obtain tenants, for want of protection against the powers of the several grantees of the rent charges); Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752.

78. Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322, where it is said further that, if there is a prior mortgagee having the legal estate, the court will not, by the appointment of a receiver, deprive him of his right to the possession; but at the same time it will not permit him to object to the appointment by any act short of a personal assertion of his legal rights, and the taking possession himself.

79. *Idaho.*— Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887.

Massachusetts.— Squire *v.* Hewlett, 141 Mass. 597, 6 N. E. 779, under a bill for appointment of receiver of rents and profits pending an action of ejectment, the parties claiming under legal titles, and there being no mismanagement or waste on the part of defendant, who was not insolvent.

New York.— Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; Willis *v.* Corlies, 2 Edw. 281.

Washington.— Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088.

West Virginia.— Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172, 94 Am. St. Rep. 910.

England.— Lancashire *v.* Lancashire, 9 Beav. 120, 9 Jur. 956, 15 L. J. Ch. 54, 50 Eng. Reprint 289; Bainbrigge *v.* Baddeley, 3 Macn. & G. 413, 49 Eng. Ch. 321, 42 Eng. Reprint 320; Lloyd *v.* Passingham, 3 Meriv. 697, 36 Eng. Reprint 267, 16 Ves. Jr. 59, 33 Eng. Reprint 906; Clark *v.* Dew, 1 Russ. & M. 103, 5 Eng. Ch. 103, 39 Eng. Reprint 40, not appointed at instance of devisee.

See 42 Cent. Dig. tit. "Receivers," §§ 24, 28. See also *supra*, II, B, 2, b, (II); II, B, 7, b.

When the evidence on which the court is to act is clear in behalf of plaintiff, the risk of effectual injury to defendant is correspondingly small and to the extent of the degree of such clearness of proof the court acts with less hesitation; where there is more of doubt in this respect the greater will be the circumspection and hesitation in granting the order. Owen *v.* Homan, 1 Eq. Rep. 370, 4 H. L. Cas. 997, 17 Jur. 861, 10 Eng. Reprint 752.

80. Cofer *v.* Echerson, 6 Iowa 502 (refusal in action in the nature of an ejectment where plaintiff's right was doubtful); People *v.* New York, 10 Abb. Pr. (N. Y.) 111; Patterson *v.* McCunn, 46 How. Pr. (N. Y.) 182 (where claim of plaintiff in partition, as heir at law, was doubtful and uncertain); Spokane *v.* Amsterdamsch Trustees Kantoor 18 Wash. 81, 50 Pac. 1088 (refusal where plaintiff's right is doubtful).

Where defendant was a bona fide purchaser it was held that a receiver would not be appointed pending action of ejectment. Whitworth *v.* Wofford, 73 Ga. 259.

Peaceable possession for a series of years under an apparently good title will not be disturbed except for adequate reasons and will be favored by the presumptions of law, and if such possessor is solvent a receiver will not be appointed. Kelley *v.* Boettcher, 89 Fed. 125. And where the possession was for more than seven years under color of title insolvency was held not to justify the appointment of a receiver. Davis *v.* Taylor, 86 Ga. 506, 12 S. E. 881.

On application of the appellant in an action involving the question of disputed title it was held that a receiver would not be appointed, appellee having prevailed below on the ground that he was purchaser and not tenant. Corbin *v.* Thompson, 141 Ind. 128, 40 N. E. 533. But see Fellows *v.* Heermans,

if title or the probability of success is not shown insolvency alone will not be sufficient;[81] on the other hand such title or probability of ultimate success will not be sufficient to disturb a possession under claim of right unless the property is in danger of loss or destruction,[82] or the rents and profits are in danger of loss by reason of the insolvency of the party in possession.[83]

13 Abb. Pr. N. S. (N. Y.) 1, where a different conclusion was reached under a statutory provision for the appointment of a receiver pending appeal.

Where the answer creates a strong presumption against defendant's title a receiver may be appointed. Payne *v.* Atterbury, Harr. (Mich.) 414; Stitwell *v.* Williams, 6 Madd. 49, 23 Rev. Rep. 56, 56 Eng. Reprint 1008.

Where the legal title is established or conceded to be in one of the parties this will be sufficient as to the probability of the success of such party. Frisbee *v.* Timanus, 12 Fla. 300 (where a verdict and judgment had been rendered in ejectment in a state court and certiorari issued improvidently at the instance of the failing party out of the circuit court of the United States, in obedience to which the record had been certified into the latter court, and the state court suspended execution of the judgment in order to prevent a conflict of jurisdictions, the party against whom the judgment was rendered being in possession, in receipt of rents, and irresponsible, and it was held that the state court of chancery might appoint a receiver to collect and hold the rents and profits until the determination of the proceedings in the federal court); Atlas Sav., etc., Assoc. *v.* Kirklin, 110 Ga. 572, 35 S. E. 772; Ware *v.* Ware, 42 Ga. 408. Pending an interlocutory judgment finding that title in the name of one of two persons who is insolvent, collecting the rents and profits and expending the same in his own interest, is for the benefit of both, it is proper to appoint a receiver as to that portion of the property which was rented. Roche *v.* Roche, 3 N. Y. St. 500. And where legal title to land was conceded to be in defendants who deny in their answer the equities upon which plaintiff relied, if plaintiff is in possession and insolvent and the rents and profits will probably be lost to defendants, a proper case is made for the appointment of a receiver. McNair *v.* Pope, 96 N. C. 502, 2 S. E. 54.

The right must appear from the pleadings or in the progress of the trial and not by separate affidavits. Rollins *v.* Henry, 77 N. C. 467.

81. *Illinois.*— Lemker *v.* Kalberlah, 105 Ill. App. 445.

New York.— Gregory *v.* Gregory, 33 N. Y. Super. Ct. 1; People *v.* New York, 10 Abb. Pr. 111.

North Carolina.— Rollins *v.* Henry, 77 N. C. 467.

South Carolina.— De Walt *v.* Kinard, 19 S. C. 286.

United States.—Ryder *v.* Bateman, 93 Fed. 16.

See 42 Cent. Dig. tit. "Receivers, §§ 21, 27.

Notwithstanding the Judicature Act under which the court has power to appoint a receiver where the title to land is in dispute, it is not a proper case for the exercise of this judicial discretion where defendant in an action for ejectment is the admitted heir at law of the last owner, and as such has taken possession of the property in dispute, and there appears to be a question to be decided between the parties, and the property is safe, and there is no evidence of waste; and the mere fact that such defendant is impecunious is not a ground for the appointment of a receiver. Foxwell *v.* Van Grutten, [1897] 1 Ch. 64, 66 L. J. Ch. 53, 75 L. T. Rep. N. S. 368.

82. Carter *v.* Hoke, 64 N. C. 348; Spokane *v.* Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088. In Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887, it is said that the realty, the substance of the litigation, is not capable of destruction or removal, and hence the necessity for a receiver can seldom be so urgent as in other cases, although exception to this rule has been recognized in cases of mining property, where the actual values of the property may be taken out.

83. *Idaho.*— Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887.

Maryland.— Blain *v.* Everitt, 36 Md. 73 (where it is stated that the averment of insolvency of the party in possession and receipt of rents and profits is most important in making out that strong and special case of imminent danger of loss which is always required as essential to justify a departure from the rule not to make such appointment in any case before answer); Clark *v.* Ridgely, 1 Md. Ch. 70.

Mississippi.— Vause *v.* Woods, 46 Miss. 120.

New York.— People *v.* New York, 10 Abb. Pr. 111.

North Carolina.— Rollins *v.* Henry, 77 N. C. 467; Carter *v.* Hoke, 64 N. C. 348, appointment should be refused in action involving title to mining property unless the parties in possession are insolvent or are injuring the property by their management.

Washington.— Union Boom Co. *v.* Samish Boom Co., 33 Wash. 144, 74 Pac. 53; Sengfelder *v.* Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36.

England.—Mordaunt *v.* Hooper, Ambl. 311, 27 Eng. Reprint 211.

See 42 Cent. Dig. tit. "Receivers." § 21.

Pending a claim case a receiver may be appointed. Smith *v.* Zachrey, 128 Ga. 290, 57 S. E. 513 (where defendant in the fieri facias delayed sale of land subject to the fieri facias, through meritless claims interposed *in forma pauperis*, remained in possession and received the rents, issues, and profits, and the amount of the executions had increased

c. Exceptions. Where the applicant is entitled to the specific property or fund and his right is admitted, while the purpose of a receiver is to preserve the property or fund for the final determination of the cause, the element of immediate danger does not appear to be controlling,[84] at least so far as misconduct of the party in possession is concerned.[85] The same may be said of those instances in which a receiver is appointed as a matter of course as between parties who are equally entitled to possession and in which neither should be permitted to retain it as against the other,[86] or where a receiver is appointed at the instance of a mortgagee without regard to the adequacy or inadequacy of his security,[87] or for the purpose of taking and holding an estate left without any one of capacity to hold it, as in the case of infants' estates,[88] or where in a creditor's suit the

by accruing interest, and the value of the land had diminished by reason of his method of cultivating it, so that there was danger of loss to the creditor of a part of the execution debt due him); Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275 (where claimants were insolvent and the land was going to waste and depreciating in value and claimants were making crops and selling them); Roberts *v.* Mullinder, 94 Ga. 493, 20 S. E. 350 (claim interposed *in forma pauperis*).

84. See Skinner *v.* Maxwell, 66 N. C. 45, where an infant who had bought a stock of goods and executed a mortgage for the price rescinded the transaction and sued to enjoin a sale of goods placed by him with the stock after said purchase and mortgage and his infancy being admitted it was held that the court properly appointed a receiver pending the suit.

85. See Fidelity Ins., etc., Co. *v.* Huber, 13 Phila. (Pa.) 52, holding that the court will appoint a receiver to take charge of bonds or property that might be transferred, without possibility of identification, by a custodian or *de facto* trustee, at the instance of the beneficial owner, who asks for an account and distribution; and this, although neither fraud nor misconduct is charged; that not to speak of other danger, the property is subject to the contingency of passing into the hands of a stranger to all the trusts upon the death of the custodian, whose executor or administrator might, without intentional wrong, deem it only prudent to retain it until administered in the regular course of the estate, and thus subject the real owners to further delay, if not actual loss, and this is a condition of danger which a court of equity bound to protect property in its charge from possible, as well as probable perils, will not sanction.

Property already in custody of court.— In Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 47 Fed. 536 [*affirmed* in 49 Fed. 306], pending a suit to recover land the parties made a stipulation agreeing on a special commission to take possession of and sell the lands in dispute and after dismissal of the suit without prejudice the commissioner had in the depository of the court proceeds of sale made by him when a second suit was brought to recover the land and it appeared that the control of the commissioner over the proceeds would cease when the mandate in the first suit should be executed and that he had in his hands contracts for unpaid purchase-money of land sold, and it was held that a receiver should be appointed, and should not turn the property over to defendant because of its alleged pecuniary responsibility to pay any decree that might be obtained against it, but should preserve the subject of the controversy in its present condition to prevent merely the doing of an act whereby rights in controversy may be in danger; that such a course is in accordance with the principles of equity particularly where a fund is in the hands of the court by consent of all parties who claim an interest therein. So where real estate is already in the custody of the court by its receivers, such possession is continued in another suit with less reluctance than ordinarily. State *v.* Allen, 1 Tenn. Ch. 512.

86. See *infra*, II, B, 10, i.

87. See Schreiber *v.* Carey, 48 Wis. 208, 4 N. W. 124, referring to the rule in England under the statute 23 & 24 Vict. c. 145, §§ 11–43. And see MORTGAGES, 27 Cyc. 1626.

88. See *supra*, II, B, 6, b, (II). In Gardner *v.* Blane, 1 Hare 381, 23 Eng. Ch. 381, 66 Eng. Reprint 1080, in a suit of an infant against his testamentary guardians who were also executors under his father's will, for an account of rents and profits of real estate and for a receiver, defendants, the testamentary guardians, asked that one of them be appointed receiver without being required to give security, adding that he was willing to be receiver without salary and insisting that the court could not displace the testamentary guardians because by St. 12 Car. 2, c. 24, the father was empowered by law to dispose of the custody of his children during their minority and the person to whom such custody is given shall take into his custody the profits of the children's rents for their use and the management of their personal estate and bring such actions as by law a guardian in socage could bring. The vice-chancellor ordered one of the defendants to be appointed receiver without salary but not upon the grounds urged at the bar, holding that the statute referred to did not make certain the precise extent of the powers of the testamentary guardian and that he had no estate and was frequently unable to act effectually without the assistance of the court.

return of an execution unsatisfied presupposes that the property of defendant, if any he has, will be misapplied, and a receiver is appointed almost as a matter of course.[89]

d. Insolvency, Fraud, or Misconduct of Party in Possession — (i) *In General.* It may be stated as a general proposition that upon a showing of insolvency of a party in possession and that the assets are in danger of waste or misappropriation, a receiver should be appointed,[90] as where a security is inadequate and it becomes necessary to preserve the rents and profits,[91] or property in the possession of a mortgagor is wasted or the security is jeopardized by misconduct.[92] Insolvency alone is sufficient where the lienor is entitled to rents and profits,[93] and where plaintiff is entitled to the possession of personal property as against a defendant standing to him in the relation of trust.[94] Insolvency

89. Bloodgood *v.* Clark, 4 Paige (N. Y.) 574, holding that in such a case it is no answer to an application for the appointment of a receiver that there may not be any property to protect; for plaintiff proceeds at the peril of costs, if there is no property. So in Micou *v.* Moses, 72 Ala. 439, it is said that where judgment creditors have pursued their debtor to insolvency in a court of law, and have an execution on their judgment unsatisfied, and the interest sought to be subjected is a mere equitable one, not liable to be sold under execution at law, the courts lend a ready ear to applications for the appointment of a receiver.

In creditors' suits generally see CREDITORS' SUITS, 12 Cyc. 49.

Fraudulent conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 831.

90. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

91. Stenhouse *v.* Davis, 82 N. C. 432; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. 221, 1 L. R. A. 397; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260; Kerp *v.* Michigan, etc., R. Co., 14 Fed. Cas. No. 7,727.

A receivership to collect rents of attached property is properly vacated by the decree under a bill for the collection of an ordinary debt by attachment, although the debtor's insolvency is alleged, where it is not alleged that the attached property is insufficient to satisfy the debt sued on, and the contrary appears from the averments of the bill. Cleveland Nat. Bank *v.* Bryant, (Tenn. Ch. App. 1899) 54 S. W. 73.

92. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

To protect the beneficiary under a second mortgage a receiver may be appointed where the trustees under the first mortgage having possession of the property undertook to execute trusts prejudicial to the said encumbrances (Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008); or where the persons in possession claiming to be the equitable owners are seeking to force a sale under a prior trust deed so as to destroy the value of the second trust, after a default had been made in the payment of interest both upon the first and second trusts, the maker of the deed of trust notes being insolvent and the parties secured under the second trust having offered to advance the deficit in the amount necessary to pay the accrued interest on the first trust in order to stop the sale, which offer was refused, and there being other fraudulent conduct on the part of those in possession collecting the rents. Wood *v.* Grayson, 16 App. Cas. (D. C.) 174.

Receivers in foreclosure proceedings see MORTGAGES, 27 Cyc. 1621.

93. Mayor *v.* Northern Trust Co., 93 Ill. App. 314 (in a proceeding to foreclose a lien for rent created by a lease providing that the lienor should have a first and valid lien on the interest of the lessee to secure the payment of money at any time to become due to the lienor, it being apparent that the building was to be rented by the lessee to others); Baker *v.* Mayo, 86 Ill. App. 86 (where the property was scant security for the debt); Ogden *v.* Chalfant, 32 W. Va. 559, 9 S. E. 879; Beard *v.* Arbuckle, 19 W. Va. 145; Grantham *v.* Lucas, 15 W. Va. 425.

Insolvency of assignee of lease. — In a suit to enforce a lien for rents allegations of the insolvency of an assignee of the lease are sufficient for the purpose of appointing a receiver. Mavor *v.* Northern Trust Co., 93 Ill. App. 314, where the lease was assigned by consent of the lessor in pursuance of the provisions of the lease whereby the original lessee was discharged.

94. McKinnon *v.* Pike County Guano Co., 94 Ala. 521, 10 So. 344 (holding that where complainant shipped goods to defendant who was to deliver to complainant as collateral security the notes to be taken from customers in payment for the goods, and defendant delivered to complainant certain of such notes, which were turned over to defendant for collection, and collected some of them and failed to pay over the proceeds, defendant stood in the relation of agent and trustee of the notes to the extent of the unpaid purchase-money which he owed the complainant, and this, supplemented by defendant's insolvency, made a clear case for equitable interposition); Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434 (injunction and receiver in suit by consignor against factor, although the consignment was on a *del credere* commission).

Under the code providing for the appointment of a receiver in any case where plaintiff has an apparent right to property in

of a person in possession or enjoyment of property for which a receiver is sought is not always indispensable to the granting of the order,[95] although the fact of financial irresponsibility may be sufficient to justify the appointment and in any case necessarily intensifies the probability of loss to the complainant, and will serve at least to show that his remedy at law for any loss or injury that may be sustained would be inadequate.[96] On the other hand, where there is no ground for apprehension of loss or danger of injury to the property by leaving it to remain in the occupancy of him who has the use of it, and whose solvency is not questioned, a receiver will not be appointed.[97] The rule has been applied to the case of a solvent debtor in possession of property adequate to satisfy a lien in a suit to enforce the lien;[98] to the suit of an executor under a subsequent will against

litigation and there is danger of loss, etc., a receiver was properly appointed in an action to recover negotiable paper alleged to have been transferred by plaintiff's collection agent to defendant in payment of the agent's debt, upon plaintiff's showing an apparent right, especially where defendant is insolvent or has suspended payment. Brown *v.* Northrup, 15 Abb. Pr. N. S. (N. Y.) 333.

95. Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338 (under a statutory provision for the appointment of a receiver in all actions where it is shown that the property in controversy is in danger of being lost, etc., or where in the discretion of the court it may be necessary to secure ample justice to the parties, this particular suit being for specific performance of a contract to sell an electric lighting plant and it appearing that defendants refused to carry any insurance, that the risk was hazardous, that they were making extensions to the plant and that the property was liable to damage if permitted to remain in their possession); Bird *v.* Lanphear, 92 Hun (N. Y.) 567, 36 N. Y. Suppl. 1069 (in a case where the court exercises equitable powers upon the establishment of the cause of action for the restoration of property misappropriated, defendant being shown to be attempting to dispose of all of his property in the state); Woodford *v.* Kelley, 18 S. D. 615, 101 N. W. 1069 (where plaintiffs were entitled to a lien on certain hay under the code for services rendered, dependent on possession of the hay).

The owner being entitled to the particular property it is held in West Virginia that the authorities there discountenance the view that no injury results if the owner may obtain its value in damages; that the cases requiring defendant's insolvency to be alleged are usually those in which questions of title are not involved. Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083.

Faithless conduct and fraud on the part of a trustee may justify the appointment of a receiver without regard to his solvency. Bauer *v.* Haggerty, 42 Wash. 313, 84 Pac. 871; Clay *v.* Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141.

Peril to trust see *infra*, II, B, 10, g.

96. Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

97. Huggins *v.* Huggins, 117 Ga. 151, 43 S. E. 759 (holding that a receivership is not intended to be better than an action of ejectment or trover, and to take property from a defendant claiming title and right of possession; that where such defendant is himself solvent and there is no reason to doubt that he will be able to answer the final decree in the case, and there are no other special circumstances requiring the interposition of the extraordinary remedies, his solvency makes the court treat him as a quasi-receiver, the property being regarded as in safe hands, that if later the solvency of this quasi-receiver should become doubtful, or if waste or danger of probable loss should appear, the chancellor would interfere and grant appropriate relief); Simon *v.* Schloss, 48 Mich. 233, 12 N. W. 196 (holding that a receiver will not be appointed to take possession of partnership accounts on dissolution when the parties have agreed as to how the account should be collected and they are responsible); Hamburgh Mfg. Co. *v.* Edsall, 7 N. J. Eq. 298; Twitty *v.* Logan, 80 N. C. 69. See also Hager *v.* Stevens, 6 N. J. Eq. 374; Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64.

To make case for appointment before answer.— In those cases in which the main object of the bill is some relief properly cognizable in equity, and the application is for a receiver of rents and profits, the averment of insolvency of the party in possession is most important in making out that strong and special case of imminent danger of loss always required as essential to a departure from the old rule against making such an appointment in any case, under any circumstances, before answer. Blain *v.* Everitt, 36 Md. 73, 81. See also *supra*, II, B, 8, b.

After answer.—And so it is held from the reasoning in Blain *v.* Everitt, 36 Md. 73, last above cited, that it is obvious that where the answer under oath fairly meets the averments of the bill, and the hearing is on bill and answer, the rule announced in that case must be applied. Horner *v.* Bell, 105 Md. 113, 66 Atl. 39.

98. St. Augustine First Nat. Bank *v.* Kirkby, 43 Fla. 376, 32 So. 881, where the suit was to enforce liens of laborers aggregating less than one thousand dollars on property consisting of a sawmill and its business, stock on hand, eight miles of railroad track and its equipment, and sixty thousand acres of land, no misconduct on the

an executor under a prior will pending an appeal from the probate of the latter will; [99] to the attempt to displace a mortgagee legally in possession of the property covered by the mortgage; [1] and to protect the possession of property conveyed by the owner pending the determination of plaintiff's rights which depend upon equities to overcome the title conveyed.[2]

(II) *FRAUD.* As has been shown, one of the grounds for invoking the aid of a court of equity by the appointment of a receiver is that the possession of the property was obtained by fraud.[3] A statute embracing such ground is merely declaratory of the equitable doctrine.[4] It is not necessarily indispensable, however, that there should be fraud or spoliation if it is established that the property or fund is in danger.[5] And so fraud or an effort to violate or disregard an injunction of the court [6] is sufficient ground for the appointment of a receiver for the purpose of preserving the property to which the parties are entitled to look for the ultimate satisfaction of the decree fixing their rights.[7]

part of the debtor or inadequacy of security with regard to the property being alleged.

99. Floor *v.* Floor, 87 S. W. 272, 27 Ky. L. Rep. 894.

1. Patten *v.* Accessory Transit Co., 4 Abb. Pr. (N. Y.) 235; Quinn *v.* Brittain, 3 Edw. (N. Y.) 314; Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666.

2. *Alabama.*— Lehman-Durr Co. *v.* Griel Bros. Co., 119 Ala. 262, 24 So. 49.

Iowa.— Clark *v.* Raymond, 86 Iowa 661, 53 N. W. 354.

Maryland.— Horner *v.* Bell, 105 Md. 113, 66 Atl. 39, holding that where heirs representing one third of an estate sued to set aside conveyances of stock, land, etc., as having been obtained from decedent through undue influence, and did not allege defendant's insolvency, and he alleged under oath that he paid par for the stock, there being no evidence to the contrary, and asserted his abundant ability to meet any liability that might be established against him, and heirs representing two thirds of the estate adopted his answer and maintained the validity of the conveyances, a receiver was improperly appointed to take charge of the land, etc.

Michigan.— Thayer *v.* Swift, Harr. 430.

Mississippi.— Buckley *v.* Baldwin, 69 Miss. 804, 13 So. 851.

See 42 Cent. Dig. tit. "Receivers," §§ 20, 27; and cases cited *infra*, II, B, 10, b.

The possession under trust deed.—A trust deed executed in favor of preferred creditors will not be disturbed by the appointment of a receiver where there was no claim that the trustee or the beneficiary were insolvent or that the trust deed was fraudulent or that there was any committed or contemplated waste, etc. Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095. See also Levenson *v.* Elson, 88 N. C. 182; City Nat. Bank *v.* Dunham, 18 Tex. Civ. App. 184, 44 S. W. 605.

Property taken in wife's name.— In a suit to reach property alleged to have been bought by the debtor in his wife's name in order to defraud creditors, it appearing that the goods were the property of the wife and another who were at least ostensibly partners, and that the land conveyed to the wife was sufficient to pay the debts; that the copartners were carrying on the business in the ordinary way and that one of them at least was solvent, the appointment of a receiver was properly refused. Venable *v.* Smith, 98 N. C. 523, 4 S. E. 514.

3. See *supra*, II, A.

Fraudulent purchase of goods — remedy at law.— It has been held that the allegations in a suit to set aside a sale as fraudulent are such as amount merely to a statement of a case for which the law affords an adequate remedy either in replevin or in trover, and a receiver cannot be appointed. Schack *v.* McKey, 97 Ill. App. 460. But other cases hold that a seller of goods alleging fraud in the purchase of an insolvent purchaser and repudiating the sale has an equity on which to proceed to reclaim the goods or their proceeds, and in such case a receiver may be appointed. Martin *v.* Burgwyn, 88 Ga. 78, 13 S. E. 958; Wolfe *v.* Claflin, 81 Ga. 64, 6 S. E. 599; Cohen *v.* Meyers, 42 Ga. 46. See also *supra*, II, B, 4.

Fraudulent conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 831.

4. McIntosh *v.* Perkins, 13 Mont. 143, 32 Pac. 653.

5. Goshen Woolen Mills Co. *v.* City Nat. Bank, 150 Ind. 279, 49 N. E. 154 (under the statute authorizing the appointment when there is danger of material injury to the property in suit, when a corporation is insolvent or is in danger of insolvency, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties); State *v.* Northern Cent. R. Co., 18 Md. 193.

6. See *infra*, II, B, 10, k, note 38.

7. Thompson *v.* Thompson, 125 Ga. 102, 53 S. E. 607 (as to rents and profits); Hancock *v.* American Bonding, etc., Co., 86 Ill. App. 630 (without regard to the solvency or insolvency of the party); Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 489, 25 Atl. 942; Tyler *v.* Poppe, 4 Edw. (N. Y.) 430. But in Cleveland, etc., R. Co. *v.* Jewett, 37 Ohio St. 649, pending an action to prevent an illegal consolidation of two corporations, the two original corporations were enjoined from surrendering the possession of the property and the stock-holders thereafter proceeded to elect directors of the new company,

e. Future Grounds or Anticipated Danger. Receivers should not be appointed simply because an occasion for their appointment is anticipated or may arise in the future. The occasion must exist when the appointment is made, and past conduct under circumstances which create no condition of present danger is not sufficient.[8]

f. Necessity Following From Injunction. Where an injunction is issued in a proper case, the effect of which is to leave the property involved without any one to care for it, or where it is necessary that someone should be authorized to collect rents which by the injunction the party is restrained from collecting, it is proper [9] and necessary to appoint a receiver for the purpose of preserving the property.[10]

g. Peril to Trust Fund or Property. Peril of a trust alone moves the court to displace the trustee from the exercise of his legal rights pending litigation against him.[11] The appointment of a receiver in such a case is not necessarily

and it was held that this was no ground for appointing a receiver as against the corporation of which they were stock-holders, it not appearing that the company or any of the directors were intending, in violation of the injunction against the company, to surrender or transfer its property.

8. *Illinois.*— Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406.

Nebraska.— Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594.

New Jersey.— Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756, 26 Atl. 886; Kean *v.* Colt, 5 N. J. Eq. 365.

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293.

South Carolina.— Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867.

United States.— Lancaster *v.* Asheville St. R. Co., 90 Fed. 129.

9. Sidway *v.* American Mortg. Co., 67 Ill. App. 24 (where upon an order enjoining defendant from collecting notes belonging to plaintiff and an appeal from an order appointing a receiver for the property, the appeal not involving the order granting the injunction but defendant acquiescing in the injunction, it was held that defendant was prevented from caring for his own interests as well as those of plaintiff and a receiver was properly appointed); Cole *v.* O'Neill, 3 Md. Ch. 174; Thompson *v.* Diffenderfer, 1 Md. Ch. 489; De Rustafjaell *v.* De Rustafjaell, 43 Wkly. Notes Cas. (Pa.) 56 (where the collection of rents was enjoined); Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615 (where the various parties had been restrained from taking possession in suits relating to rights claimed by the several parties in oil and gas leases, and all the parties concurred in the necessity of operating the property, each side desiring permission to do so); Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621. See also Hamberlain *v.* Marble, 24 Miss. 586; Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

To harvest and preserve crops.— In Corcoran *v.* Doll, 35 Cal. 476, it was held that on granting an injunction to restrain *pendente lite* the sale of land on which stands a large crop of grain, it is proper to consider the crop a part of the land, and to appoint a receiver to harvest and preserve it.

When injunction not adequate see *supra*, II, B, 4, b; *infra*, II, B, 10, k.

10. Olcott *v.* Heermans, 3 Hun (N. Y.) 431.

Duty to have receiver appointed.— In all cases of bills to reach the equitable property of debtors, on an execution at law returned unsatisfied, it is the duty of the complainant, within a reasonable time after he has obtained an injunction restraining defendants from collecting their debts, or disposing of their perishable property, to apply to the court and obtain the appointment of a receiver, or to make some other provision for the collection of the debts and the preservation of the property, or the injunction should be dissolved so far as to enable defendants to preserve it themselves. Bloodgood *v.* Clark, 4 Paige (N. Y.) 574; Osborn *v.* Heyer, 2 Paige (N. Y.) 342. See also Terrell *v.* Ingersoll, 10 Lea (Tenn.) 77.

11. Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Satterfield *v.* John, 53 Ala. 127; Eastman *v.* Savings Bank, 58 N. H. 421; Cotton *v.* Rand, (Tex. Civ. App. 1905) 92 S. W. 266, suit to remove a trustee and determine rights of parties. See also Flood *v.* Forst, 93 Ill. App. 309; Skinner *v.* Maxwell, 66 N. C. 45; Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706. *Compare* Philadelphia *v.* Philadelphia Gas Works, 12 Wkly. Notes Cas. (Pa.) 477.

At instance of general creditors see *supra*, II, B, 7, c; *infra*, II, C, 4, 5.

Where a portion of a trust fund has been lost, that is *prima facie* a breach of trust and sufficient ground for the appointment of a receiver on an interlocutory application. Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

Principal and agent.— In Union Mut. L. Ins. Co. *v.* Kellogg, 24 Fed. Cas No. 14,373,

predicated upon the apprehended loss of the debt,[12] and under the general power of a court of chancery over trust estates it may lay hold of the trust fund which is alleged to be in danger of waste and preserve and administer it according to the purposes of the trust. In doing this a receiver is often necessary and will be appointed when applied for.[13] The court is not so reluctant to act in such cases as in the case of applications to supersede executors or administrators where preventive and protective remedies are available in the court of probate.[14]

h. Property in Hands of Executor or Administrator. Where a court of equity entertains jurisdiction of an administration suit at the instance of creditors, devisees, or legatees, it has power to make all necessary orders for the protection or preservation of the property, payment of taxes, etc., essential to the purpose and end for which the court lends its aid, and in this connection may appoint a receiver,[15] and may call in assets through a receiver for the purpose of preserving funds and applying them in due course of administration.[16] And where a creditor

5 Reporter 682, 5 Wkly. Notes Cas. (Pa.) 477, it was held that a receiver may be appointed pending a suit to recover a fund alleged to be held by defendant as plaintiff's agent, where it appears that defendant received as agent a fund *prima facie* belonging to the plaintiff which was presumably still under his control and in peril. See also Coe *v.* Davidge, 6 N. Y. St. 93.

Insufficient showing.— Where, pending a proceeding in chancery for the removal of a testamentary trustee, application is made for the appointment of a receiver, such relief will not be granted except in a strong case made therefor, and it is not enough to allege that the habits of the trustee are bad and that his conduct toward his *cestui que trust* is capricious, but it must appear that there is good reason to fear that the trust property will not be forthcoming to answer the decree at the end of the litigation. Poythress *v.* Poythress, 16 Ga. 406.

Property in hands of executor or administrator see *infra*, II, B, 10, h.

12. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409, where it is said that it would be sufficient to allege that the trustee refused to perform the trust.

13. *Ex p.* Walker, 25 Ala. 81; Dougherty *v.* McDougald, 10 Ga. 121; Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409. Where a clear case of breach of trust and conversion of the trust funds has been made out against an insolvent firm, a petition signed by creditors and reputable citizens looking to a continuation of the business, and the gradual liquidation of claims by the insolvents, but not showing the amount of such claims, nor any plan for a speedy settlement by responsible parties, is held not to warrant the court in declining to appoint a receiver to protect the interests of the *cestuis que trustent*. Ames Iron Works *v.* West, 24 Fed. 313.

Insufficient grounds for removal of trustee. — Where a trust was created by contract between several parties and trustees appointed therein, the trust not to take effect until the happening of a certain event, until the event occurs the trust is passive and the court will not interfere to remove the trustees for alleged misfeasance and consequently the appointment of a receiver in the place of such trustees until others can be appointed according to the ordinary course of the court, must be denied in such a case. And where one of the grounds of relief asked was delay in fulfilling the contract, the ground is not tenable where such delay was acquiesced in by the party complaining Sloo *v.* Law, 22 Fed. Cas. No. 12,956, 1 Blatchf. 512.

14. See *infra*, II, B, 10, h.

15. Fisher *v.* Southern L. & T. Co., 138 N. C. 90, 50 S. E. 592. See, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1.

Suit by legatee to uncover estate.—In Gunn *v.* Blair, 9 Wis. 352, it was held that where an executor had fraudulently conveyed property bought with trust money of the estate, and through his grantee had the property conveyed to the executor's wife for the purpose of preventing a levy by a devisee for the amount of a decree in the latter's favor, it was held that the court might appoint a receiver to take and sell the property upon a decree in favor of the legatee, instead of merely directing the trustee to do so, and that it was proper in such a case to deprive defendant of all benefit of the statute which gives a debtor two years to redeem after sale on execution.

16. Davis *v.* Chapman, 83 Va. 67, 1 S. E. 472, 5 Am. St. Rep. 251; Farmer *v.* Gates, 23 Gratt. (Va.) 145, where it is said that in a creditor's suit especially it seems to be fit and proper that the court should have power to call in the assets from the hands of a personal representative. See, generally, CREDITORS' SUITS, 12 Cyc. 1.

Where there is no executor or administrator, a court of equity will not appoint a receiver to collect assets and administer the estate in a suit by a creditor against an alleged wrongful executor, a creditor of the intestate and a debtor to the intestate. Whatever may be the liability of such intermeddler or executor *de son tort* he has no authority to collect debts, is not entitled to an action, has no right to reduce assets, and his liability is founded upon tort: the creditor has no direct action against the debtors of the estate and as neither an executor *de son tort* nor a creditor, nor both combined,

of a deceased debtor acquires a specific lien upon property fraudulently conveyed by the latter, in a suit to subject such property which is in the hands of the administrator of the fraudulent grantee, a receiver may be appointed where it is necessary to preserve the property.[17] So in administration suits a receiver will be appointed when the executor or administrator has been guilty of misconduct, waste, or misuse of assets, and there is real danger of loss,[18] and it is held *a fortiori* that the assets of an estate may be disposed of through a receiver for the benefit of all concerned when the personal representative has been removed after the court has obtained jurisdiction over his person as well as over the property in his possession;[19] and where an executor voluntarily abandons his trust, the court will

have an equity to sue to recover debts due in the state, they have no equity to have a receiver to do these acts. Walker *v.* Drew, 20 Fla. 908.

Funds once administered.— It appearing that unadministered assets will not pay the indebtedness against the estate, and that the fund would have to be drawn on, to what extent was not known, to discharge the debts involved in the suit, and it being manifestly improper to pay it to the distributees until the debts had been paid, and the administrator *de bonis non* not being entitled to receive and hold these assets, as they had once been administered, it was held that the court could not as effectually protect the rights of the sureties, creditors, and distributees by any other means as by the appointment of a receiver, who should hold the fund until a proper disposition of it could be made. Harman *v.* McMullin, 85 Va. 187, 7 S. E. 349.

17. Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729, which was a bill against the administrator of two brothers alleging that one of them prior to his death was cosurety with the complainant on a guardian's bond upon which complainant had been compelled to pay a certain amount and that his cosurety during action on the bond fraudulently conveyed all his property to his brother and that the administrator was rapidly selling such property and had no property of his own subject to execution.

18. *Arkansas.*— Du Val *v.* Marshall, 30 Ark. 230, where the conduct of an administrator is such as to hinder and embarrass the collection of the debts.

Georgia.— Walker *v.* Morris, 14 Ga. 323; Dougherty *v.* McDougald, 10 Ga. 121.

Kentucky.— See Thompson *v.* Page, 76 S. W. 128, 25 Ky. L. Rep. 557.

Maryland.— State *v.* Wilmer, 65 Md. 178, 3 Atl. 252, where a fund belonging to the estate is endangered by reason of the refusal of the executors to collect it.

New Jersey.— Price *v.* Price, 23 N. J. Eq. 428.

New York.— Jenkins *v.* Jenkins, 1 Paige 243, where there has been great and unnecessary delay and negligence in closing an administration and some of the heirs have been permitted to receive and retain large sums above their distributive share and some of the executors have misapplied the funds and are insolvent.

South Carolina.— Harmon *v.* Wagener, 33 S. C. 487, 496, 12 S. E. 98 (which was a suit instituted by the executor for the sale of land, and to marshal assets and enjoin creditors from suing at law, and in answer to an objection that there was no jurisdiction to appoint a receiver to take the assets out of the hands of the executor, who had legal title to them, and deliver them to a receiver for the benefit of creditors who had no specific legal right to them, and that a receiver is appointed only to take and hold possession of property where the title is in controversy, it was answered: "This action . . . is as much in the nature of a creditors' bill as if the creditors had brought it against the executor. It is true that the creditors are not entitled to the possession of the assets themselves, which are entrusted to a representative (executor) of the deceased debtor, but they have an interest in the assets for the payment of their debt, and the representative (executor) is a quasi trustee for them, and this gives them the right in a proper case to have a receiver appointed to take charge of the assets in order to prevent waste"); Edmonds *v.* Crenshaw, Harp. Eq. 224 (where the executor neglected to make collections, had failed to invest funds as directed by the will, had neglected to file accounts with the ordinary, and had been generally negligent and intemperate).

England.— Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294; Anonymous, 12 Ves. Jr. 4, 33 Eng. Reprint 2.

See 42 Cent. Dig. tit. "Receivers," § 23.

Misconduct of one of co-executors.— In Jenkins *v.* Jenkins, 1 Paige (N. Y.) 243, it was held that where one of several co-executors was guilty of improper conduct, a receiver might be appointed as to the malfeasant executor if the others should consent to act with such receiver; otherwise a receiver should be appointed generally. But in Fairbairn *v.* Fisher, 57 N. C. 390, the court disapproves an appointment as to one co-executor saying that it would be a novel proceeding to appoint a receiver for the part of the estate in the hands of one executor leaving the other to administer the other part in the name of himself and his co-executor.

The executor is not removed by the appointment of a receiver by a court of equity. Gadsden *v.* Whaley, 14 S. C. 210. See also Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

Enforcement of judgment see Bennett *v.* Rhodes, 58 Md. 78, *infra*, a note 47.

19. Walker *v.* Morris, 14 Ga. 323.

take care that this shall not prejudice the *cestui que trust*, by the appointment of a receiver.[20] But a strong case is required to induce the appointment of a receiver to take assets from the custody of an executor or administrator, inasmuch as the executor is appointed by the testator who has a right to declare in whom the management of the estate after his death should be reposed, and the administrator derives his authority from, and is, in a qualified sense, the officer of another court of exclusive jurisdiction, generally compelled to give bond for the favorable discharge of the trusts of the administration, and a court of equity therefore is reluctant to interfere with them by the appointment of a receiver, and the power so to interfere will not be exercised unless there is actual misconduct or fraud and danger of loss.[21] While a receiver may be appointed pending proceedings

Jurisdiction of equity to administer estates generally see EQUITY, 16 Cyc. 91 *et seq.*

20. *Ex p.* Galluchat, 1 Hill Eq. (S. C.) 148, where the executor departed with the purpose of removing from the state leaving the estate and those entitled to it within the state.

21. *Alabama.*— Randle *v.* Carter, 62 Ala. 95, where it is pointed out that a different rule obtains, and should obtain, from that in the case of trustees; that the court of probate has, by the constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation; that the grant may be revoked whenever gross misconduct is shown, or whenever a necessity exists additional security may be required, and protection against loss to creditors, legatees, or next of kin, and security for a faithful administration, are within the power of the parties and the competency of that court.

Georgia.— Powell *v.* Quinn, 49 Ga. 523; Harrup *v.* Winslet, 37 Ga. 655; Douherty *v.* McDougald, 10 Ga. 121.

Mississippi.— Vause *v.* Woods, 46 Miss. 120.

North Carolina.— Gray *v.* Gaither, 74 N. C. 237 (holding that while the court may appoint a receiver in case of dereliction of duty on the part of an executor in direct reference to his management of the estate or in his failure to comply with an order requiring him to give bond, etc., in a pending action for an account and payment of assets, it is error to appoint a receiver before the order for the bond has been entered and upon a mere apprehension that the assets are not secure because the executor has converted his real and personal property into notes and money); Fairbairn *v.* Fisher, 57 N. C. 390 (holding that a misunderstanding between two executors is not sufficient reason for the appointment of a receiver, although one of them is in mean circumstances).

United States.— Haines *v.* Carpenter, 11 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23 L. ed. 345].

England.— Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294.

See 42 Cent. Dig. tit. "Receivers," § 23.

Insolvency.— Insolvency after the death of the testator, although a commission issued before and the testator knew thereof, was held to be sufficient for the appointment of a receiver. Langley *v.* Hawk, 5 Madd. 46, 56 Eng. Reprint 812. In Middleton *v.* Dodswell, 13 Ves. Jr. 266, 33 Eng. Reprint 294, it is indicated that if a manifest abuse of the trust, by wasting the property, appears, as by an habitual and prospective course of dealing bringing the property into danger, it cannot be said that the court is not to treat an executor as every other trustee and that the court is to refuse the appointment unless the executor is proved to be insolvent. But see otherwise Haines *v.* Carpenter, 11 Fed. Cas. No. 5,905, 1 Woods 262 [*affirmed* in 91 U. S. 254, 23 L. ed. 345].

Mean circumstances of an executor is not of itself and alone a sufficient reason for appointing a receiver, the testator having placed his confidence in the party without regard to his circumstances. Hathornthwaite *v.* Russel, 2 Atk. 126, 26 Eng. Reprint 480; Howard *v.* Papera, 1 Madd. 142, 56 Eng. Reprint 54; Anonymous, 12 Ves. Jr. 4, 33 Eng. Reprint 2. See also Fairbairn *v.* Fisher, 57 N. C. 390.

Where a married woman was executrix, she was restrained from getting in the assets of the testator where her husband was in the West Indies and not amenable to the process of the court, because in such a case plaintiff could have no remedy if the executrix should waste the assets or refuse to pay, it being necessary to have joined the husband with her in the action. Taylor *v.* Allen, 2 Atk. 213, 26 Eng. Reprint 532. And in Stairley *v.* Rabe, McMull. Eq. (S. C.) 22, where the executrix was the widow of the testator and intermarried a second time with a man in necessitous circumstances and incapable of properly managing the estate, the court appointed a receiver saying that interference is with less reluctance where the executrix contracts a second marriage, inasmuch as the confidence of the testator was reposed in his widow and that ordinarily where her situation is changed her authority ceases and the government of the estate passes into other hands.

Property not belonging to estate.— Where a surviving husband applied for a receiver to take charge of personal property, alleged by him to have belonged to his deceased wife, the fact that her administrator had inventoried such personal property as belonging to the estate of the deceased wife was sufficient evidence to justify the appointment pending the settlement of the question whether the property belonged to such deceased wife,

in the probate court,[22] it is held that when an administrator *pendente lite* is appointed in that court, inasmuch as the chancery court appoints a receiver only where the legal representation is vacant, no appointment will be made to displace such legal representative.[23]

i. As Between Parties Equally Entitled. Pending a suit involving only the determination of the priority of payment of two claims equally just, the court may appoint a receiver of the property out of which satisfaction is to be had.[24] And a court of equity may appoint a receiver as between parties whose relation to each other and to the property entitles each to an equal right of possession of the whole with the other, when such appointment is necessary to preserve the property or protect the right to its enjoyment;[25] but the courts are adverse to appointing receivers in such a case,[26] and generally, in the absence of fraud, waste, or danger of loss or destruction and where neither has excluded the other from his enjoyment of his possession or rents and profits, a receiver will not be appointed.[27] On the other hand if one of several parties equally entitled to the possession or

or was part of the estate of her former husband, since, if the property had belonged to the wife, it vested in the surviving husband by force of the marriage. Tinnin *v.* Price, 27 Miss. 619.

Under statute.— Where a non-resident executor denied the right of testator's wife to any part of the estate, removed a part thereof, and was about to dispose of the balance and divide the proceeds, to the exclusion of the wife, the court, on the application of the wife, might appoint a receiver of the community property, under the statute providing therefor in an action between joint owners of property where it is in danger of removal. Merrell *v.* Moore, (Tex. Civ. App. 1907) 104 S. W. 514.

As between co-executors see *infra,* note 27.

22. See *supra,* II, B, 6, b, (II).

23. *In re* Colvin's Estate, 3 Md. Ch. 278 (holding that the chancery court could not appoint a receiver in such a case); Veret *v.* Duprez, L. R. 6 Eq. 329, 37 L. J. Ch. 552, 18 L. T. Rep. N. S. 501, 16 Wkly. Rep. 750 (holding that if an appointment should be made in such a case, it would be the duty of the receiver pending the litigation in the probate court to get in the personal estate and to act in the same way generally as the administrator appointed by the court of probate and that under these circumstances it would not be proper to exercise jurisdiction and appoint an officer as against one already appointed with the same powers by another court of competent jurisdiction). To the same effect see Hitchen *v.* Birks, L. R. 10 Eq. 471, 23 L. T. Rep. N. S. 335, 18 Wkly. Rep. 1015. *Compare* Atkinson *v.* Henshaw, 2 Ves. & B. 85, 35 Eng. Reprint 251.

Appointment de bonis non after resignation of executor.— In Lunsford *v.* Lunsford, 122 Ala. 242, 25 So. 171, after the administration of an estate had been removed into the chancery court the executor resigned, and it was held that the probate court alone had jurisdiction to appoint an administrator *de bonis non,* and that after such appointment all objections to the original executor set up in an application for the appointment of a receiver are fully answered and therefore such appointment would be defeated.

24. Hamberlain *v.* Marble, 24 Miss. 586.

25. Ames *v.* Ames, 148 Ill. 321, 36 N. E. 110; Weise *v.* Welsh, 30 N. J. Eq. 431; Merrell *v.* Moore, (Tex. Civ. App. 1907) 104 S. W. 514, under statute, where there is danger that the property will be lost, removed, or materially injured.

As incident to an accounting the court may appoint a receiver to collect rents and profits. Bilder *v.* Robinson, (N. J. Ch. 1907) 67 Atl. 828.

26. Bilder *v.* Robinson, (N. J. Ch. 1907) 67 Atl. 828.

27. *Montana.*— Heinze *v.* Kleinschmidt, 25 Mont. 89, 63 Pac. 927, holding that mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a cotenant, and the mere fact that the care of the property involves considerable expense will not authorize the appointment of a receiver pending a partition suit.

Nebraska.— Lamaster *v.* Elliot, 53 Nebr. 424, 73 N. W. 925.

New Jersey.— Low *v.* Holmes, 17 N. J. Eq. 148.

New York.— Bathmann *v.* Bathmann, 79 Hun 477, 29 N. Y. Suppl. 959, holding that a receiver will not be appointed on the ground that defendant in possession had refused to account for rents where such defendant expresses willingness to account and there is no evidence of improper action on the part of such defendant or that he is unable to respond to any claim of the other party. To the same effect see Darcin *v.* Wells, 61 How. Pr. 259.

North Carolina.— Vaughan *v.* Vincent, 88 N. C. 116.

Ohio.— Kell *v.* Murdock, 6 Ohio S. & C. Pl. Dec. 390, 4 Ohio N. P. 247.

Tennessee.— Cassetty *v.* Capps, 3 Tenn. Ch. 524.

England.— Norway *v.* Rowe, 19 Ves. Jr. 144, 12 Rev. Rep. 157, 34 Eng. Reprint 472.

See 42 Cent. Dig. tit. "Receivers," § 26.

Mere occupancy by one tenant under circumstances which do not render him liable to account is not a ground for a receiver. Varnum *v.* Leek, 65 Iowa 751, 23 N. W. 151.

management of property assumes to exclude the other or to appropriate the rents and profits as his own, a receiver may be appointed, and that too without regard to the solvency or insolvency of the party in possession. The court will take the property for the purpose of preserving it to the end of the litigation, as in such a case it would seem that neither of the parties should be permitted to remain in possession,[28] and a receiver will be appointed where it appears in a suit

Where right is doubtful.— And so it has been held that where it is doubtful whether either party to a controversy has the right to control and operate the property to the exclusion of the other, a receiver will be appointed where by reason of encumbrances upon the property and the circumstances of the case the rights of the parties are threatened and cannot be otherwise fully protected. Graham *v.* Fuller Electrical Co., 75 Ga. 878.

As between co-executors, the fact that one of two joint executors maintained exclusive possession of the securities belonging to the estate and refused to deliver them to his co-executor is not a sufficient ground for the removal of the securities from the custody of such executor and transferring them to a special receiver in the absence of any showing of maladministration on the part of the executor in possession and that the interests of the estate are in danger. Burt *v.* Burt, 41 N. Y. 46 [*distinguishing* Wood *v.* Brown, 34 N. Y. 337, in that defendant in that case had been found guilty of wrong, misconduct, and mismanagement in the execution of his trust as executor in certain respects and in refusing the plaintiff access to certain notes, bonds, etc., in common with him, which greatly embarrassed the administration and jeopardized the interests of the beneficiaries under the will]. But where one of two devisees of land charged with the payment of debts, both of whom are appointed executors, claimed a part of the land under a deed subsequent in date to the execution of the will, and entered upon and was proceeding to operate the property as mining property, and it appeared that there was danger of waste and the solvency of such vendee, executor was doubtful, it was held to be a proper case for the appointment of a receiver, but that the order should not take the mining operations out of the hands of the party in possession and place them exclusively under a receiver in the first instance, as every legitimate object could be secured by leaving the operations to go on as theretofore and requiring returns to be made to the receiver from time to time, the execution of a bond to account for and pay over such proceeds, or upon refusal to execute such bond requiring the receiver to take charge of the operations. Stith *v.* Jones, 101 N. C. 360, 8 S. E. 151.

28. Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68; Duncan *v.* Campau, 15 Mich. 415 (where tenants not only denied complainant's title but endeavored to entangle the whole title and were not disposed to account for rents and profits); Weise *v.* Welsh, 30 N. J. Eq. 431; Hackett *v.* Multnomah R. Co., 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327 (holding that an appointment on the application of a joint owner of a business who has been excluded from participation in the profits is proper, although the relation of partners may not legally exist between the parties). See also Bowers *v.* Durant, 2 N. Y. St. 127.

Exclusion by insolvent.— And *a fortiori* if one of such parties is in possession to the exclusion of his cotenants and is insolvent, a receiver should be appointed. Williams *v.* Jenkins, 11 Ga. 595; Roche *v.* Roche, 3 N. Y. St. 500.

Exclusion by cotenant's husband.— In Weise *v.* Welsh, 30 N. J. Eq. 431, it was held that where the exclusion of a wife's cotenants was by her husband, the unity of husband and wife would be recognized under the circumstances of that case so far as the preventive remedy was concerned.

Where a bond was sufficient to protect the complainant in the rents of the property and compensation for its deterioration or destruction by use, such security was held to be all that he could fairly require. Lowe *v.* Holmes, 17 N. J. Eq. 148. See also Stith *v.* Jones, 101 N. C. 360, 8 S. E. 151, for similar ruling as to mining property. But see Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68, where it was held that an offer of security was not sufficient to meet the right to a receiver under the statute.

Equitable tenants.— Where an estate in common is equitable, the court interferes upon the ground that it acts against the legal estate of the trustee who is guilty of a breach of trust if he permits one equitable tenant in common in any manner to prejudice the interests of the other. Tyson *v.* Fairclough, 2 Sim. & St. 142, 25 Rev. Rep. 175, 1 Eng. Ch. 142, 57 Eng. Reprint 300. And so in Street *v.* Anderton, 4 Bro. Ch. 414, 29 Eng. Reprint 965, it was ordered that such equitable tenant in common in possession give security for the payment of the proportion of rents to his cotenant, or otherwise that a receiver be appointed. In Smith *v.* Lyster, 4 Beav. 227, 10 L. J. Ch. 344, 49 Eng. Reprint 326, a receiver for the benefit of two such infant cotenants in common was appointed and the court refused to discharge him on the coming of age of one of the tenants because the object for which the suit was instituted and the receiver appointed had not been fully accomplished. In Sandford *v.* Ballard, 30 Beav. 109, 54 Eng. Reprint 830, and Hargrave *v.* Hargrave, 9 Beav. 549, 15 L. J. Ch. 280, 50 Eng. Reprint 456, a receiver of a moiety of an estate claimed by plaintiff as such tenant in common was appointed, but when the first case afterward came before the court (Sandford *v.* Ballard, 33 Beav. 401, 55 Eng. Reprint 423), a receiver of the whole property

for partition that by reason of the hostile feelings and conduct of the cotenants the property cannot be rented and that there is danger to the interests of the parties.[29] Where, however, one of several parties having a common interest in property has the legal right to its custody and management, although liable to account, his possession will be disturbed by the appointment of a receiver only with great reluctance;[30] but if he is wasting and misapplying the property it is otherwise, and the appointment will be made without hesitation.[31]

was appointed at the hearing as between such tenants, there being evidence that the defendant had excluded his cotenants.

29. Goldberg *v.* Richards, 5 Misc. (N. Y.) 419, 26 N. Y. Suppl. 335; Verplanck *v.* Verplanck, 22 Hun (N. Y.) 104; Pignolet *v.* Bushe, 28 How. Pr. (N. Y.) 9.

Partition generally see PARTITION, 30 Cyc. 241.

Rights of tenants in common generally as between each other see TENANCY IN COMMON.

Disagreement in operation of mine.—Where the several owners of a mine cannot agree as to the working thereof, or its disposition, and no one of them is willing to advance the necessary funds to continue its operation, whereby the entire property is in danger of being lost, a receiver will be appointed. Barbour *v.* Lockard, 9 Ohio Dec. (Reprint) 254, 11 Cinc. L. Bul. 319; Jefferys *v.* Smith, 1 Jac. & W. 298, 21 Rev. Rep. 175, 37 Eng. Reprint 389, where it was held that a receiver would be appointed of mines, in which several persons were interested, the concern, from the nature of the subject, being a species of trade, and not a mere tenancy in common in land.

30. Drury *v.* Roberts, 2 Md. Ch. 157 (as to right of liquidating partner under contract of dissolution whereby he was given the right to possession, etc.); Milbank *v.* Revett, 2 Meriv. 405, 35 Eng. Reprint 995. So in Munroe *v.* Thompson, 1 Lack. Leg. Rec. (Pa.) 323, it is held that where two firms composed of the same persons were dissolved by the death of one of them and the surviving partner entered into an agreement with the executor of the deceased partner by which each was to settle one of the partnership's account to the other and each had so far fulfilled the agreement as to pay all the debts of both firms and it only remained to account to each other for property still in their possession, a receiver should not be appointed. See also Wagoner *v.* Warne, (N. J. Ch. 1888) 14 Atl. 215, holding that where the assets of a company consist of outstanding accounts of a few thousand dollars in all, and complainant, who has the right to control them, is able to respond to defendant for any money which may be due him, a receiver will not be appointed.

31. West *v.* Chasten, 12 Fla. 315; Bauer *v.* Haggerty, 42 Wash. 313, 84 Pac. 871, holding that where the parties were jointly interested in accounts and by agreement defendant was trustee for the purpose of collecting them and placing the proceeds in bank for their joint benefit, and it appeared that he had exclusive control of the books and the persons owing the accounts were widely scattered and unknown to plaintiff, and that defendant had made false representations regarding collections and refused to account, the appointment of a receiver was proper. See also *supra*, II, B, 10, g.

Exception to rule as to immediate danger. — Referring to the general rule hereinbefore stated that a receiver is not usually appointed except in the case of immediate danger apprehended to the property involved (see *supra*, II, B, 10, a), the authorities cited in this subdivision which justify the appointment of a receiver upon the exclusion of one party by another where both are equally entitled to possession, would seem to announce a rule which is in effect an exception. So in illustration of the practice of appointing receivers almost as a matter of course, it is pertinent to refer here to instances of receivers of partnership property. Thus, upon a dissolution of a partnership any interference by one partner with the mutual right of another to assist in collecting the assets and winding up the affairs would justify the appointment of a receiver. Drury *v.* Roberts, 2 Md. Ch. 157. And where after such dissolution the parties cannot agree upon an adjustment, the court will appoint a receiver. Whitman *v.* Robinson, 21 Md. 30 (where it is shown that the broad rule laid down in Blondheim *v.* Moore, 11 Md. 365, to the effect that fraud or immediate danger must be shown to justify the appointment of a receiver is not applicable to the case of a dissolved partnership where there is a serious and irreconcilable disagreement between the parties both as to the control and disposition of their property and their respective claims and demands against each other); Speights *v.* Peters, 9 Gill (Md.) 472, 479 (where it is said that while as against the legal title in defendant the court interferes only in case of danger of loss or injury, "in respect of a fund which is claimed, and is *prima facie* the proceeds of a partnership," it is but a provident exercise of equity power to place the property under the care of the court); Walker *v.* House, 4 Md. Ch. 39. See also Coe *v.* Davidge, 6 N. Y. St. 93. So the rule that if one of several parties who may have a common interest in the property is legally entitled to its possession, a receiver will not be appointed unless there is danger of loss, may be illustrated by the decisions that where one partner withdraws (Macdonald *v.* Trojan Button-Fastener Co., 10 N. Y. Suppl. 91) or dies (Walker *v.* House, 4 Md. Ch. 39), the remaining partner cannot be disturbed in his possession for the purpose of winding up the partnership affairs unless he is guilty of mis-

j. Management of Property — (i) *Insurance.* A mere creditor, even if his claim is such as is directly chargeable on his debtor's property, cannot have a receiver to force the taking out of fire insurance for the protection of the property.[32]

(ii) *Deterioration and Failure to Keep Down Encumbrances.* Mere deterioration in the value of real property, such as is incident to age and the action of the elements, is no ground of itself for disturbing the possession of one holding under a claim adverse to plaintiff.[33] But if one in possession of property in which another has an interest allows it to deteriorate so that such interest is not properly preserved, a receiver may be appointed.[34] And parties in possession of land which is the subject of litigation in the suit may be required to keep down the taxes and upon default in that regard a receiver may be appointed in order that the property may be saved from loss,[35] but mere tardiness in paying

conduct or improper conduct, although if both partners die, the court will, as a matter of course, appoint a receiver in a suit for an account by the representatives of one deceased partner against the representatives of the other deceased partner (Walker *v.* House, *supra*; Connor *v.* Allen, Harr. (Mich.) 371). And in an action between partners, for a settlement of the copartnership affairs and to recover a balance claimed by plaintiff to be due to him, a receiver will not be appointed, to sell stock owned by the parties jointly, although in proportions dependent on the state of the partnership accounts, before it is judicially determined how much of the stock belongs to each party; where no insolvency is alleged, and defendant denies the entire equity of the complaint, and offers and consents that one half of the stock may be transferred to plaintiff, and to give security to indemnify him for any balance he may establish in his favor. Buchanan *v.* Comstock, 57 Barb. (N. Y.) 582. See also Peacock *v.* Peacock, 16 Ves. Jr. 49, 10 Rev. Rep. 138, 33 Eng. Reprint 902. These cases are cited by way of illustration merely. As to receivers of partnership property generally see Partnership, 30 Cyc. 473, 726.

32. Ray *v.* Carlisle, 125 Ga. 316, 54 S. E. 119, holding that even if the claims are liens upon the property, its destruction by fire is too remote a contingency to warrant a court in exercising its extraordinary power of wresting the property from the owner and placing it in the charge of a receiver, and the fact that in the event of the destruction of the building by fire the land could not be sold for enough to pay the amount claimed by plaintiff does not constitute manifest danger of loss or destruction of the property under the statute. See also Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095.

33. Kelly *v.* Steele, 9 Ida. 141, 72 Pac. 887. See also Mortgages, 27 Cyc. 1625, text and note 2 *et seq.*

Misconduct and insolvency of party in possession see *supra*, II, B, 10, d.

34. Goodwynne *v.* Bellerby, 116 Ga. 901, 43 S. E. 275 (insolvent interposing claim to delay sale under fieri facias); Tufts *v.* Little, 56 Ga. 139 (holding that when the vendor of lands puts the vendee in possession under a bond for title, and the vendee has remained in possession some four years, enjoying the rents, issues, and profits thereof without having paid anything either on the principal or interest of the purchase-money, and the premises, by reason of no repairs and bad cultivation, are daily deteriorating in value, so as to have become insufficient to pay the debt thereon, and the vendee has become insolvent, there is equity in a bill for an injunction against further waste of the land and the use of the profits, and also for a receiver to take charge of the land and preserve the rents, issues, and profits to abide the final hearing); Jones *v.* Quayle, 3 Ida. 640, 32 Pac. 1134; Bailey *v.* Bailey, 10 S. W. 660, 10 Ky. L. Rep. 793 (where it appeared in an action to enforce liens that, owing to defendant's mismanagement, land was deteriorating and the fences becoming destroyed); St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 27 N. W. 657, 60 Am. St. Rep. 441, 32 L. R. A. 756. But where one entitled to dower subject to plaintiff's life-estate was in possession and collected the rents by consent of the life-tenant and the owners of the fee, the former is not entitled to the appointment of a receiver of rents and profits because the party in possession failed to keep the premises in repair so that the board of health filed complaints, the property consisting of tenement houses and it appearing that the character of the complaints was not unusual and that all complaints made before the action had been complied with. Rollwagen *v.* Rollwagen, 13 N. Y. Suppl. 635.

35. Holmes *v.* Holmes, 29 N. J. Eq. 9 (holding that upon allowing permanent alimony against a non-resident which is made a charge on his real estate, a receiver will be appointed where he has left interest on encumbrances and taxes on the property unpaid, unless within a fixed time he gives security for their payment, etc.); Darusmont *v.* Patton, 4 Lea (Tenn.) 597 (holding that a neglect to pay taxes may result in the loss of the property by a title against which the *lis pendens* would be of no avail); Cone *v.* Paute, 12 Heisk. (Tenn.) 506; Johnson *v.* Tucker, 2 Tenn. Ch. 398; Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897. See also Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. 440. In Torrence *v.* Shedd, 202 Ill. 498, 67 N. E. 168, a receiver was held to be improperly ap-

taxes is no ground for a receiver where they are actually paid before suit brought.[36]

k. Prevention of Removal or Disposition of Property. The rule justifying the appointment of a receiver for the purpose of preventing its loss, etc., at the instance of one having a sufficient interest to invoke the jurisdiction of the court either under the statutes regulating the appointment of receivers,[37] or under general principles of equity jurisdiction,[38] is extended to prevent a wrongful dis-

pointed where, after a decree fixing the interests of the parties in the property, it became the duty of the parties to pay the taxes on their own shares.

Mortgagees.— The rule is applied where the security of a mortgage is endangered by the failure of the debtor to keep down taxes. Ortengren *v.* Rice, 104 Ill. App. 428; Harris *v.* U. S. Saving Fund, etc., Co., 146 Ind. 265, 45 N. E. 328 (after decree of foreclosure, defendant being insolvent and out of possession, appointment to collect rents and pay maturing insurance and taxes); Mahon *v.* Crothers, 28 N. J. Eq. 567. See also Finch *v.* Haughton, 19 Wis. 149. But where the statute providing that, in order to save mortgaged premises from being sold for taxes, the mortgagee may pay the taxes and include the amount in the mortgage debt, gives the mortgagee a remedy at law for non-payment of taxes, it was held that equity will not interfere to appoint a receiver where it was not alleged that the security was insufficient, or that such section did not afford an adequate remedy. Nathans *v.* Steinmeyer, 57 S. C. 386, 35 S. E. 733.

Where a life-tenant fails to pay taxes a receiver may be appointed. St. Paul Trust Co. *v.* Mintzer, 65 Minn. 124, 67 N. W. 657, 60 Am. St. Rep. 444, 32 L. R. A. 756 (holding that where the life-tenant in a homestead estate neglected and refused to pay taxes or make repairs thereon for many years, and to save the estate from entire loss to the reversioners the taxes were paid by the administrator with the will annexed, having the power so to do by the express terms of the will, he might proceed in equity to have a receiver appointed to take charge of the premises, collect the income or rentals of the property, and apply the proceeds to pay the taxes and necessary expenses of repairs, and reimburse the administrator for such taxes and expenses so paid, and also pay from such income any unpaid taxes or necessary expense for repairs necessarily made to save the property; and that, if such rental is insufficient, the receiver may, under authority and direction of the trial court, proceed to sell the life-estate of defendant in the premises, or so much thereof as may be sufficient for such purpose); Murch *v.* J. O. Smith Mfg. Co., 47 N. J. Eq. 189, 19 Atl. 142; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163; Cairns *v.* Chabert, 3 Edw. (N. Y.) 312 (holding that the court may order the appointment of a receiver to pay the taxes unless the tenant will, within a certain time, show that they are paid). *Contra*, Jenks *v.* Horton, 96 Mich. 13, 55 N. W. 372. See also Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729, as to the propriety of the remedy where that is the sole object of the suit. See also ESTATES, 16 Cyc. 644.

36. Rollwagen *v.* Rollwagen, 13 N. Y. Suppl. 635.

37. See the statutes of the various states. And see Loaiza *v.* San Francisco Super. Ct., 85 Cal. 11, 24 Pac. 704, 20 Am. St. Rep. 197, 9 L. R. A. 376; State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281; Le Brantz *v.* Conklin, 39 Misc. (N. Y.) 715, 80 N. Y. Suppl. 967; Merrell *v.* Moore, (Tex. Civ. App. 1907) 104 S. W. 514 (at suit of partner or others jointly owning or interested in property, etc.); Stone *v.* Stone, 18 Tex. Civ. App. 80, 43 S. W. 567; Lynn *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. 228.

38. *Florida.*— West *v.* Chasten, 12 Fla. 315.

Georgia.— Orton *v.* Madden, 75 Ga. 83, where employees of a circus sued to recover their wages, and petitioned for a receiver, alleging that the owners had brought the property to the state line, where they had discharged complainants, and were about to cross the line with the property; that complainants were very numerous, and were non-residents, and that, although they had severally attached the property in different courts, the attachment bonds might be declared insufficient, since they had been compelled to go security for each other; that defendants were non-residents, and were insolvent; and that the wife of one of the principal owners had put in a claim to the property; and it was held that the case was one for the intervention of a court of equity, and that a receiver was properly appointed.

Idaho.— Jones *v.* Quayle, 3 Ida. 640, 32 Pac. 1134.

Illinois.— E. A. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666.

Maryland.— Rose *v.* Bevan, 10 Md. 466, 69 Am. Dec. 170, where a good cause for an injunction restraining a mortgagor from selling goods and for the appointment of a receiver was held to have been made by bill alleging that complainants had recovered judgment against one of the defendants on which execution had issued and been levied upon certain goods; that the other defendant interposed a prior mortgage to prevent a sale; that the property so mortgaged and levied on was more than sufficient to pay the mortgage; that the mortgagor had no other property out of which the judgments could be satisfied and had since the execution of the mortgage been permitted to use and dispose

position of the property involved, or its removal out of the jurisdiction of the court.

11. No Property to Administer or Protect. While the fact that there can be nothing for a receiver to take or administer may justify the refusal to appoint a receiver in particular instances,[39] it has been held that the fact that there may

of the goods; that part of the goods levied on were not the same as those mortgaged; and that unless the goods levied on should be taken from the possession of the mortgagor they would be disposed of and complainants subjected to an entire loss of their claims.

New Jersey.— Flagler *v.* Blunt, 32 N. J. Eq. 518.

New York.— Bird *v.* Lanphear, 82 Hun 567, 36 N. Y. Suppl. 1069, holding that where the court exercises equitable powers upon the establishment of the cause of action, in an action for restoration of property alleged to have been misappropriated it may before judgment appoint a receiver where it is shown that the party in possession is attempting to dispose of his property in the state.

North Carolina.— Ellett *v.* Newman, 92 N. C. 519.

Pennsylvania.— Hite Natural Gas Co.'s Appeal, 118 Pa. St. 436, 12 Atl. 267.

United States.— Vose *v.* Reed, 28 Fed. Cas. No. 17,011, 1 Woods 647.

See 42 Cent. Dig. tit. "Receivers," § 30.

Where an injunction may not be sufficient to preserve the property a receiver may be appointed. E. A. Moore Furniture Co. *v.* Prussing, 71 Ill. App. 666; Sanderson *v.* Stockdale, 11 Md. 563; Mitchell *v.* Bettman, 25 Barb. (N. Y.) 408 (where it is held, under a statute allowing an injunction against a fraudulent disposition of property as security for any judgment that might be obtained in the action, that the court has the power to appoint a receiver); Tyler *v.* Poppe, 4 Edw. (N. Y.) 430 (holding that where defendant enjoined from disposing of goods had offered to sell them a receiver would be appointed). In Hayward *v.* Scarborough, 41 Tex. Civ. App. 443, 92 S. W. 815, it was held that it was error to appoint a receiver on a petition alleging that defendant was trying to sell property in which plaintiffs were interested, and that he was insolvent, etc., there being no allegation that the property was in danger of loss, removal, or material injury, and an injunction to prevent the sale or removal having been granted, the statute providing for the appointment of a receiver in an action between persons jointly interested in property where it is shown that the property is in danger of being lost, removed, or of material injury, and another section applying the rules of equity to the appointment of receivers.

Mere suspicion that a foreign corporation doing business in the state is about to remove its goods will not justify the appointment of a receiver. Smythe *v.* Empire Rubber Co., 2 N. J. L. J. 154.

Under statute in case of insolvent debtors. — Under a statute providing that on a petition preferred as there prescribed a receiver may be appointed to take possession of the property of a debtor and distribute it equally among his creditors whenever the debtor, "being insolvent, shall do any act or make any conveyance whereby any one of his creditors shall obtain a preference over any other of his creditors, or knowingly omit to do any act which he might lawfully do to prevent one of his creditors from obtaining a preference over his other creditors, contrary to the intent of the act," and directing that upon such petition the court shall proceed after notice to "the creditors sought to be preferred," it was held that the language imports preferences proceeding directly from the act or conveyance of the debtor and with his volition, and that the making of an assignment which did not purport to create illegal preferences, but which was adjudged fraudulent and void against dissenting creditors upon which attachments were sued out and preferences thus acquired, was not such an act or omission as justified the appointment of a receiver. *Ex p.* Bank of America, 13 R. I. 176.

39. See Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217 (where the evidence showed that under its charter the capital stock of the defendant corporation was to be ten thousand dollars, with the privilege of increasing the same to fifty thousand dollars, which privilege was never exercised except to the extent of increasing the capital stock to fifteen thousand dollars, which amount was subscribed for and fully paid in; that long before the filing of the petition the corporation had parted absolutely with all of its property, other than choses in action, the whole proceeds going to the payment of its debts, and no fraud being alleged or shown, no case for the appointment of a receiver to sue for any unpaid stock subscriptions, or take possession of the property with which the corporation had so parted was shown; and as some of the choses in action consisted of notes, and these were transferred as collateral security to certain creditors whose claims far exceeded the amount likely ever to be realized by collection, and the fair presumption being that the notes were negotiable, there was apparently no case for a receiver as to them); Davis *v.* Niswonger, 145 Ind. 426, 44 N. E. 542 (failure to show ground for receiver because the complaint for dissolution of a partnership and for a receiver failed to show interest in plaintiff in the property by allegations of a prior mortgage of all the partnership property, that the mortgagee purchased at foreclosure sale, under an agreement that any surplus at such sale should be held for the mortgagor's benefit, a sale by the mortgagee to defendant, and that defendant sold the property for a sum in excess of the mortgage

be no property to protect is no answer to an application for a receiver upon the filing of a creditors' bill upon the return of an execution *nulla bona*, since such return presupposes that defendant's property will be misapplied and plaintiff proceeds at the peril of costs,[40] although it has been held otherwise upon the theory that a receiver should not be appointed unless it appears that there is imperious necessity to preserve some particular property for the benefit of the creditor.[41] So it will not do to say that because a corporation may be insolvent and nothing will be eventually coming to the stock-holders, they are without interest to take action to prevent abuses,[42] and under statutory provisions authorizing the appointment of a receiver at the instance of a creditor or stock-holder where the corporation is insolvent, it is no answer sufficient of itself to defeat the application for a receiver that defendant has no property since in that event there could be no injury to defendant.[43]

12. Performance and Enforcement of Judgment or Decree [44] — a. In General. While out of consideration for property rights the power to appoint a receiver is sparingly and cautiously exercised,[45] when the execution of a decree depends upon the exercise of the power, the court will use it to the full extent demanded by the exigencies of the case.[46] The court may, in its final decree on the merits,

debt, but with no allegation that the sum realized by the mortgagee at his sale exceeded the mortgage debt) ; Cape May *v.* Cape May, etc., R. Co., 59 N. J. Eq. 59, 44 Atl. 973.

40. Bloodgood *v.* Clark, 4 Paige (N. Y.) 574.

"Dry receivership."— Where the receiver does not get any fund it has been termed a "dry receivership." Lembeck *v.* Jarvis Terminal Cold Storage Co., 68 N. J. Eq. 352, 59 Atl. 565. See also *infra*, III, E, 7, b; V, C.

41. Sioux City First Nat. Bank *v.* Gage, 79 Ill. 207.

42. Davies *v.* Monroe Waterworks, etc., Co., 107 La. 145, 31 So. 694.

43. Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126, where it appeared that the insolvency had been long known to the directors who, with such knowledge, had made sales of the corporate property to themselves to pay antecedent debts and it was held that a receiver should be appointed to investigate the legality of such sales notwithstanding the corporation appeared to have no property and that in this case the facts made it not merely a matter of discretion but one of duty.

After assignment.— In an action under the statute against an insolvent corporation for the appointment of a receiver which in addition to the necessary averments alleged a previous voluntary assignment of all the corporate property for the benefit of its creditors and that such assignment was fraudulent, etc., it was held that the argument that nothing was left to sequester and that a receiver could do nothing to aid plaintiff and other creditors assumed not only a valid assignment but that the powers and functions of a receiver were no broader than those of an assignee where as such a receiver has the same powers as one appointed in a general creditors' suit or in proceedings supplementary to execution and might maintain an action against any person holding property of the corporation in secret trust for it and which had been conveyed by it in fraud of its creditors. Powers *v.* C. H. Hamilton Paper Co., 60 Wis. 23, 18 N. W. 20.

44. Enforcement of decree for alimony see Divorce, 14 Cyc. 797.

Necessity of prayer see *infra*, III, B, 2, g.

45. See *supra*, II, B, 2, b; II, B, 10, a.

46. Stockton *v.* New Jersey Cent. R. Co., 50 N. J. Eq. 489, 25 Atl. 942, referring to the appointment of a receiver for the enforcement of a decree enjoining certain acts, wherein, however, a receiver was not appointed, the parties having evinced a disposition to render complete obedience to the writ. See also *supra*, II, B, 10, k.

To receive income for infant.— In Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 568, an infant was a devisee of an annuity and would be entitled as heir if there had been no will to one fourth of the estate and the will having been disputed during its probate a receiver was appointed on a bill for maintenance to whom should be paid a part of the income of the estate not exceeding the amount of the devised annuity.

Property in hands of sheriff.—Where plaintiff asked for a sufficient amount of funds in the hands of the sheriff to satisfy his demand, there is no necessity for the appointment of a receiver to turn it over to him, where the sheriff is a party to the proceedings. Hardy *v.* Pecot, 113 La. 350, 36 So. 992.

Collection of rents of decedent's estate for creditors.— Where the court has directed a sale of a part of real estate of a decedent to pay debts upon the ground that the personal estate is not sufficient, if it is made to appear that there is still a strong probability that the claims of creditors will not be fully satisfied, a receiver may be appointed to take charge of his other real estate and collect and appropriate rents and profits thereof for their benefit, but not otherwise. McKaig *v.* James, 66 Md. 583, 8 Atl. 663.

appoint a receiver as a proper means of enforcing a decree,[47] and for the purpose of protecting and preserving the property so that the decree may be effective to the fullest extent of the rights which it intended to fix.[48] The same power is granted under various statutes and code provisions in effect declaring that receivers may be appointed after judgment for the purpose of enforcing the

To enforce equitable claim where lien fails. — In Rudd *v.* Littell, 45 S. W. 451, 46 S. W. 3, 20 Ky. L. Rep. 158, remainder-men under a will were permitted by the chancellor to mortgage the devised property through an agent and erect permanent improvements thereon and it was held that a contractor would not be allowed to enforce a mechanic's lien because the agent had no authority to contract for such work, and while no personal judgment could be rendered against the remainder-men, they may be compelled to do equity and for the purpose of enforcing the contractor's claim a receiver may be appointed to collect his debt out of the rents.

The parties may render a receiver unnecessary, and where in an action tried before a referee he reported that a receiver should be appointed for the purpose of selling certain logs in defendant's possession and to raise a certain sum to be applied on debts in defendant's control, whereupon defendant offered to apply the amount as directed, it was held that the only purpose of the sale of the logs would be fully accomplished by the voluntary action of the party and at a saving of expense as well as prejudice to the parties interested, and therefore a receiver would not be appointed. Grant *v.* Webb, 21 Minn. 39.

After judgment or decree see *supra*, II, B, 8, d.

47. *Connecticut.*— Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758.

Indiana.— Newell *v.* Schnull, 73 Ind. 241.

Maryland.— Bennett *v.* Rhodes, 58 Md. 78, which was a suit by residuary legatees for the construction of a will and the administration of the estate, against executors, one of whom owed a large debt to the estate and the other united with him in placing an erroneous construction on the will by which the existence of such debt was denied and both refused to take any steps to collect the same, both being interested in the estate and being without means to pay the debt unless it should be charged upon the interest in the estate, and it was held proper to appoint a receiver to enforce the decree which gave a construction to the will making the debt enforceable.

New York.— Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

Ohio.— See Klonne *v.* Bradstreet, 2 Handy 74, 12 Ohio Dec. (Reprint) 336.

Texas.— De Barrera *v.* Frost, 39 Tex. Civ. App. 544, 88 S. W. 476, 33 Tex. Civ. App. 580, 77 S. W. 637, holding that in a suit by a wife to cancel a deed of trust executed by her and her husband on her separate property, in which the mortgagee files a cross action for the appointment of a receiver and the foreclosure of the trust upon a decree canceling the trust deed to the extent of the wife's separate estate, it was proper to appoint a receiver to collect the rents either under the statute providing for the appointment as a receiver in an action by a mortgagee for the foreclosure of his mortgage, etc., or under the general provision of the statute authorizing the appointment of receivers in all other cases than those provided where such appointment might have been proper by the usages of the court of equity.

West Virginia.— Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142.

See 42 Cent. Dig. tit. "Receivers," § 32.

Appointments not by way of enforcing the judgment have been held to be improper. Thus under the code provision for the appointment of receivers after judgment to carry the decree into effect or to preserve the property during the pendency of an appeal, it was held that in an action to foreclose a mortgage in which the petition prayed for the appointment of a receiver pending the action, the application was improperly granted on the final hearing before the institution of an appeal or application for a stay because such appointment was not by way of a provisional remedy and was not for the purpose of carrying the judgment into effect but merely for the purpose of holding the property, preserving it and collecting the rents. Chadron Banking Co. *v.* Mahoney, 43 Nebr. 214, 61 N. W. 594. See also Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74.

Suit to uncover trust estate see *supra*, II, B, 10, h.

48. McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272, under a statute which empowers the court to appoint a receiver "where . . . it may be necessary to secure ample justice to the parties," although it was held that such power was inherent in the court. See Holmes *v.* Holmes, 29 N. J. Eq. 9 (as to the appointment of a receiver of land upon which permanent alimony is a charge); Edwards *v.* Edwards, 14 Tex. Civ. App. 87, 36 S. W. 1080 (where in an action by next friends in the name and on behalf of a person of weak mind to set aside conveyances by such person and to protect him from the undue influence and fraud of others, the appointment of a receiver, until a duly qualified person should apply for the property, was held to be proper).

Upon the dissolution of an injunction obtained by false affidavits that the complainants were officers *de facto* and *de jure* of a corporation, restraining others from interfering with the possession of the corporate property, whereas the affiants had on the same day acquired possession forcibly from the parties enjoined, the court may appoint custodian of the company's property to be de-

judgment or carrying it into effect.[49] Such a provision, however, has been held not to apply where the object of a suit is merely to compel the payment of money,[50] while on the other hand it has been regarded as contemplating a proceeding in execution which the court may adopt when more effectual and beneficial than the ordinary process at law.[51]

b. Equitable Execution [52] — (i) *In General.* "Equitable execution" is a term which has been applied to the remedy of a receiver under a bill in equity to enforce a judgment when, owing to legal impediments, such judgment could not be enforced under an execution at law.[53] Under the Judicature Act in England, the provisions of which in this respect have been adopted in Canada,[54] this remedy by bill for the enforcement of a judgment has been augmented [55] by a

livered by him to defendants. Ciancimino *v.* Man, 1 Misc. (N. Y.) 121, 20 N. Y. Suppl. 702.

49. See the statutes of the various states. And see Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250, to collect statutory liability of stock-holders.

Power under and independent of statute.— In King *v.* Barnes, 51 Hun (N. Y.) 550, 4 N. Y. Suppl. 247 [*affirmed* in 113 N. Y. 655, 21 N. E. 184], the appointment of a receiver to carry into effect a judgment for the transfer of stock was approved under the provision authorizing the appointment of a receiver "by or after the final judgment to carry the judgment into effect," the court holding further that it had power inherently under its equity jurisdiction and that the general provisions of the code respecting the appointment of receivers for corporations did not interfere with the equity power of the court to execute its judgment.

Receiver to take legal title and make conveyance.— Under such provision, in an action to compel the transfer of real property, defendants being numerous and some of them minors, a receiver may be appointed to take the legal title and make the conveyance. Scadden Flat Gold-Min. Co. *v.* Scadden, 121 Cal. 33, 53 Pac. 440.

To receive proceeds.— In an action by a stock-holder, not in his own right but on behalf of the corporation, to recover a fund in which others are equally interested, against the president of the corporation and others for conspiracy to defraud the corporation, upon a judgment for plaintiff it is proper to appoint a receiver to collect the judgment and distribute the proceeds in conformity with its terms. Fox *v.* Hale, etc., Silver Min. Co., 108 Cal. 478, 41 Pac. 328.

50. Young *v.* Hughes, 39 Oreg. 586, 65 Pac. 987, 66 Pac. 272, where, in a suit brought by stock-holders in behalf of themselves and all other stock-holders so situated against an administrator of a trustee to distribute a fund to the stock-holders of a corporation after the death of the trustee before complete distribution, it was held that the money should be paid into court to be distributed by the clerk.

51. Naumburg *v.* Hyatt, 24 Fed. 898, approving the appointment of a receiver where an attachment had been sued out and a levy made upon merchandise, in order to take charge of the property in the interest of defendant's creditors or sell the goods in the ordinary way of business so as to avoid the loss consequent on an execution sale, the court further holding that the same remedy may be administered in federal courts under U. S. Rev. St. (1878) § 916 [U. S. Comp. St. (1901) p. 684]. It may be observed, however, that in this case the appointment of a receiver was by consent.

52. Receiver in supplementary proceedings see EXECUTIONS, 17 Cyc. 1451.

Sequestration generally see SEQUESTRATION.

53. Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3, where it is pointed out that before the passing of the Judicature Act the mode of obtaining equitable execution was by issuing a writ of elegit, and, without obtaining a return, to file a bill in equity alleging that plaintiff had issued his writ of elegit, and that owing to legal impediments it could not be enforced at law, and asking for payment of the judgment debt by means of a receiver. According to the practice the application for the receiver was made by interlocutory application before the hearing, and in a proper case it was granted.

54. Davidge *v.* Kirby, 10 Brit. Col. 231; Nova Scotia Min. Co. *v.* Greener, 31 Nova Scotia 189; *Re* Asselin, 4 Ont. L. Rep. 170, 2 Ont. Wkly. Rep. 712. In Kirk *v.* Burgess, 15 Ont. 608, equitable execution is defined as a mode of obtaining payment of a judgment by the appointment of a receiver of property of a defendant which the sheriff is unable to reach or deal with by reason of the imperfection of the statutes respecting executions.

55. **Equitable remedies not affected.**— The equitable remedies which a judgment creditor had prior to the 27 & 28 Vict. c. 112, are not prejudicially affected by that act, nor by the Judicature Act of 1873. Where, therefore, a judgment creditor issued writs of elegit, and was unable to obtain a delivery in execution by reason of the judgment debtor's real estate being mortgaged, in an action instituted by the judgment creditor to obtain a charge on the debtor's real estate, and for a sale, he is entitled to have a receiver appointed pending the trial of the action. Anglo-Italian Bank *v.* Davies, 9 Ch. D.

motion after judgment, without a new suit, for a receiver, or, as it is called, an equitable execution.[56]

(II) *AVAILABILITY OF REMEDY* — (A) *In General.* This remedy is competent in any case in which equity would of old have stepped in to enjoin or remove an obstacle to the enforcement of legal process.[57] But the statute does not give such jurisdiction in cases where prior to the act no court had such jurisdiction,[58] and brings nothing within the reach of a creditor which could not have been realized by some legal or equitable remedy before the act was passed,[59]

275, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3.

56. Smith *v.* Cowell, 6 Q. B. D. 75, 50 L. J. Q. B. 38, 43 L. T. Rep. N. S. 528, 29 Wkly. Rep. 227; Salt *v.* Cooper, 16 Ch. D. 544, 50 L. J. Ch. 529, 43 L. T. Rep. N. S. 682, 29 Wkly. Rep. 553; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3; McLean *v.* Allen, 14 Ont. Pr. 84.

"Interlocutory order."— The words "interlocutory order," in the Judicature Act of 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after. Smith *v.* Cowell, 6 Q. B. D. 75, 50 L. J. Q. B. 38, 43 L. T. Rep. N. S. 528, 29 Wkly. Rep. 227; Barrowman *v.* Fader, 32 Nova Scotia 284.

Remedy not in fact "execution"— *In general.*— The remedy is not an execution at all but is rather the equitable relief by the appointment of a receiver because there is no remedy by execution; it is a taking out of the way a hindrance which prevents execution at law. Harris *v.* Beauchamp, [1894] 1 Q. B. 801, 63 L. T. Rep. N. S. 636, 9 Reports 653, 42 Wkly. Rep. 451; *In re* Shephard, 43 Ch. D. 131, 59 L. J. Ch. 83, 62 L. T. Rep. N. S. 337, 38 Wkly. Rep. 133; *Re* Craig, 18 Ont. Pr. 270.

Execution on judgment in favor of decedent.— Under Order XLII, rule 23, substituting for a scire facias or writ of revivor an execution for the enforcement by executors of a judgment recovered by the testator before his death, a receivership, or equitable execution, is not available, especially when said rule is considered with rule 8 of the same order in which "issuing execution" is defined as the issuing of any such process as under the preceding rules of the order are applicable to the case, and the preceding rules of the order deal with various matters and methods of enforcing judgments, but are wholly silent as to a receivership. Norburn *v.* Norburn, [1894] 1 Q. B. 448, 63 L. J. Q. B. 341, 70 L. T. Rep. N. S. 411, 10 Reports 10, 42 Wkly. Rep. 127.

57. Harris *v.* Beauchamp, [1894] 1 Q. B. 801, 63 L. J. Q. B. 480, 70 L. T. Rep. N. S. 636, 9 Reports 653, 42 Wkly. Rep. 451; Ideal Bedding Co. *v.* Holland, [1907] 2 Ch. 157, 76 L. J. Ch. 441, 96 L. T. Rep. N. S. 774, 14 Manson 113, 23 T. L. R. 467; *In re* Peace, 24 Ch. D. 405, 31 Wkly. Rep. 899; Salt *v.* Cooper, 16 Ch. D. 544, 50 L. J. Ch. 529, 43 L. T. Rep. N. S. 682, 29 Wkly. Rep. 553; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 275, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3; Barrowman *v.* Fader, 32 Nova Scotia 284.

58. Harris *v.* Beauchamp, [1894] 1 Q. B. 801, 63 L. J. Q. B. 480, 70 L. T. Rep. N. S. 636, 9 Reports 653, 42 Wkly. Rep. 451; O'Donnell *v.* Faulkner, 1 Ont. L. Rep. 21. *Compare* Manchester, etc., Banking Co. *v.* Parkinson 22 Q. B. D. 173, 58 L. J. Q. B. 262, 37 Wkly. Rep. 264; Smith *v.* Cowell, 6 Q. B. D. 75, 50 L. J. Q. B. 38, 43 L. T. Rep. N. S. 528, 29 Wkly. Rep. 227.

59. Central Bank *v.* Ellis, 16 Can. L. T. Occ. Notes 248, 27 Ont. 583 (as to claim of debtor for unliquidated damages); Slemin *v.* Slemin, 7 Ont. L. Rep. 67, 2 Ont. Wkly. Rep. 1176 (unearned pension); Stewart *v.* Jones, 1 Ont. L. Rep. 34 (as to money to be paid by the crown to the judgment debtor purely out of bounty).

In other words, the remedy is equitable relief granted to a judgment creditor when, and only when, he would be entitled to go into a court of equity to enforce his judgment against some equitable interest of his debtor which cannot be reached by an execution at law but which could be reached in equity. Harris *v.* Beauchamp, [1894] 1 Q. B. 801, 63 L. J. Q. B. 480, 70 L. T. Rep. N. S. 636, 9 Reports 653, 42 Wkly. Rep. 451; Holmes *v.* Millage, [1893] 1 Q. B. 551, 57 J. P. 551, 62 L. J. Q. B. 380, 68 L. T. Rep. N. S. 205, 4 Reports 332, 41 Wkly. Rep. 354; Cadogan *v.* Lyric Theatre, [1894] 3 Ch. 338, 67 L. J. Ch. 775, 71 L. T. Rep. N. S. 8, 7 Reports 594; *In re* Shephard, 43 Ch. D. 131, 59 L. J. Ch. 83, 62 L. T. Rep. N. S. 337, 38 Wkly. Rep. 133; Westhead *v.* Riley, 25 Ch. D. 413, 53 L. J. Ch. 1153, 49 L. T. Rep. N. S. 776, 32 Wkly. Rep. 273 (holding that since the judicature acts the court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable); *Ex p.* Evans, 13 Ch. D. 252, 49 L. J. Bankr. 7, 41 L. T. Rep. N. S. 565, 28 Wkly. Rep. 127; Central Bank *v.* Ellis, 16 Can. L. T. Occ. Notes 248, 27 Ont. 583; Burns *v.* Munn, 2 West. L. Rep. 128; Nova Scotia Min. Co. *v.* Greener, 31 Nova Scotia 189; *Re* Asselin, 6 Ont. L. Rep. 170, 2 Ont. Wkly. Rep. 712; Stuart *v.* Grough, 15 Ont. App. 299.

Contingent liability or payment contrary to trust.— There is no case in which a receiver has been directed to receive a sum

and will not be granted merely because it would be a more convenient mode of obtaining satisfaction of a judgment than the usual mode of execution.[60]

the payment of which to the debtor is wholly contingent and dependent on the will of another person. Moreover, so far as the order affects the trustees, who are strangers to the action, there is no precedent for an order directing trustees to pay money contrary to the trusts of the will and the intention of the testator. Reg. *v.* Lincolnshire, etc., County Ct. Judge, 20 Q. B. D. 167, 57 L. J. Q. B. 136, 58 L. T. Rep. N. S. 54, 37 Wkly. Rep. 174 [*followed* in McInnes *v.* McGaw, 30 Ont. 38]. But where defendant was entitled to an interest in the estate of a decedent, contingent upon the death of the widow, who had a life-interest therein, and plaintiff recovered judgment against him and issued execution which was returned *nulla bona*, a receiver by way of equitable execution was granted. Conrad *v.* Cunningham, 17 Can. L. T. Occ. Notes 62.

The salary of a school teacher being one that could not be reached by ordinary legal execution, or garnishee process, plaintiff was entitled to the equitable relief sought. Fisher *v.* Cook, 32 Nova Scotia 226. *Contra*, Trust, etc., Co. *v.* Gorsline, 12 Ont. Pr. 654, holding that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all.

Equitable reversionary interest in personalty.— The court has jurisdiction to appoint, by way of equitable execution, a receiver of an equitable reversionary interest in personal estate. Fuggle *v.* Bland, 11 Q. B. D. 711 [*following* Tyrrell *v.* Painton, [1895] 1 Q. B. 202, 64 L. J. P. D. & Adm. 33, 71 L. T. Rep. N. S. 687, 11 Reports 589, 43 Wkly. Rep. 163].

Debtor's share of deceased wife's estate may be reached by a receiver appointed to receive it. Smith *v.* Egan, 17 Ont. Pr. 330.

Interest in property acquired by will, giving defendant a life-interest for the maintenance of himself and his children, etc., may be reached by a receiver. McLean *v.* Allen, 14 Ont. Pr. 84. But in Graham *v.* Devlin, 9 Can. L. T. Occ. Notes 137, it was held that the relief would not be granted where it involved the construction of the will.

Assigned paid-up insurance policy.— Plaintiffs, judgment creditors, were held entitled to a receivership order in respect to defendant's interest in a fully paid-up life policy which he had assigned to plaintiffs as security, reserving to himself the cash surrender value of the bonus additions. Canadian Mut. Loan, etc., Co. *v.* Nisbet, 31 Ont. 562.

60. Harris *v.* Beauchamp, [1894] 1 Q. B. 801, 63 L. J. Q. B. 480, 70 L. T. Rep. N. S. 636, 9 Reports 653, 42 Wkly. Rep. 451; Holmes *v.* Millage, [1893] 1 Q. B. 551, 57 J. P. 551, 62 L. J. Q. B. 380, 68 L. T. Rep. N. S. 205, 4 Reports 332, 41 Wkly. Rep. 551; Manchester, etc., Banking Co. *v.* Parkison, 22 Q. B. D. 173, 58 L. J. Q. B. 262, 37 Wkly. Rep. 264; Nova Scotia Min. Co. *v.* Greene, 31 Nova Scotia 189. But see *In re* Pope, 17 Q. B. D. 743, 55 L. J. Q. B. 522, 55 L. T. Rep. N. S. 369, 34 Wkly Rep. 693; Kirk *v.* Burgess, 15 Ont. 608.

This rule is not unqualified, however, and while the cases are not entirely clear and harmonious, it would seem that the clause in the act which empowers the court to make the appointment of a receiver whenever it appears to the court to be just or convenient authorizes the appointment if there are special circumstances which render it just or convenient. Thus in Goldschmidt *v.* Oberrheinische Metallwerke, [1906] 1 K. B. 373, 75 L. J. K. B. 300, 94 L. T. Rep. N. S. 303, 22 T. L. R. 285, 54 Wkly. Rep. 255, where plaintiff had no means of ascertaining particulars of debts owing to the judgment debtor and therefore could not make an affidavit in the form No. 25, Appendix B, to the rules of the supreme court in order to found garnishee proceedings, and it further appeared that there was reason to believe that defendants were endeavoring to collect all debts due to them from customers in this country in order to avoid such proceedings, it was held that, having regard to the special circumstances, the case was one in which a receiver of such debts might be appointed by way of equitable execution, the court applying the statement of Fry, L. J., in Manchester, etc., Banking Co. *v.* Parkinson, 22 Q. B. D. 173, 177, 58 L. J. Q. B. 262, 37 Wkly. Rep. 264, that "I do not say that there would have been no jurisdiction to appoint a receiver under that section, if there had been special circumstances in the case rendering it just or convenient to make such an order. It may be, for instance, that an order could be made for appointment of a receiver to hold property liable to execution, to prevent some one making away with it, or to get in debts, where under particular circumstances it was a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment." In the latter case, however, it was held, in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by fieri facias, or attachment of debts, and there being no special circumstances showing it to be just or convenient that a receiver should be appointed, that the order for appointment should not be made. So where defendant was under an order to pay money into court due from him in respect of an alleged breach of trust, and the order could be enforced by attachment, but for the fact that defendant is out of the jurisdiction of the court, and therefore cannot be attached, it was held that under the circumstances the cheaper and more convenient mode of enforcing the order is to obtain a receiver of certain property belonging to defendant. *In re* Coney, 29 Ch. D. 993, 54 L. J. Ch. 1130, 52

(B) *Time For Granting.* Equitable execution should not in any case be granted until after judgment,[61] and as a matter of practice it is improper that an order for the appointment of a receiver should be obtained *ex parte*, when there is really no danger to the property, nor any of the circumstances under which such orders used to be made *ex parte* in the court of chancery.[62]

(III) *Effect of Appointment of Receiver.* The order appointing a receiver does not confer on the judgment creditor any charge on the debtor's property,[63] so as to make him a secured creditor, and is not equivalent to a seizure of property in execution. Hence if there is an adjudication in bankruptcy against the judgment debtor (company) before the order of appointment is acted on, such order creates no priority.[64] And money which comes into the hands of the receiver is not a debt due from him to the persons interested in the estate and

L. T. Rep. N. S. 961, 33 Wkly. Rep. 701. See also Bryant *v.* Bull, 10 Ch. D. 153, 48 L. J. Ch. 325, 39 L. T. Rep. N. S. 470, 22 Wkly. Rep. 246.

Discretion.— Whether it was "just and convenient" to grant plaintiff's motion was held to be a matter in the discretion of the judge which ought not to be interfered with except for good cause; and the smallness of the amount involved is not sufficient ground for such interference. Fisher *v.* Cook, 32 Nova Scotia 226.

Other remedies.— In Davidge *v.* Kirby, 10 Brit. Col. 231, it is held that a receiver will not be appointed until the creditor has exhausted his legal, as distinguished from equitable, remedies. And so in Bryant *v.* Bull, 10 Ch. D. 153, 48 L. J. Ch. 325, 39 L. T. Rep. N. S. 470, 27 Wkly. Rep. 246, where a sequestration could not be enforced because defendant could not be found, if the appointment of a receiver is one of any number of remedies which plaintiff is permitted to invoke, the existence of the other remedies will not prevent the appointment. This rule is applied in Kincaid *v.* Kincaid, 12 Ont. Pr. 462, to justify the appointment of a receiver to reach funds notwithstanding defendant owned real estate of sufficient value and that plaintiff had issued a fieri facias and placed the same in the hands of the sheriff.

61. Pacific Inv. Co. *v.* Swann, 34 Can. L. J. N. S. 207 (holding that the attachment of debts is an ordinary mode of execution, and the extension of that by giving the right to a creditor before judgment does not authorize an extension in such a case to other remedies); Montreal Bank *v.* Goodwyn, 13 Can. L. T. Occ. Notes 186.

62. *In re* Potts, [1893] 1 Q. B. 648, 62 L. J. Q. B. 392, 69 L. T. Rep. N. S. 74, 10 Morr. Bankr. Cas. 2, 4 Reports 305, 41 Wkly. Rep. 337. But such receiver may be appointed *ex parte* in case of emergency, or where there is danger apprehended in the disposal of property. Stark *v.* Ross, 17 Ont. Pr. 237 [*citing In re* Potts, [1893] 1 Q. B. 648, 62 L. J. Q. B. 392, 69 L. T. Rep. N. S. 74, 10 Morr. Bankr. Cas. 2, 4 Reports 305, 41 Wkly. Rep. 337; Minter *v.* Kent, etc., Land Soc., 59 J. P. 102, 72 L. T. Rep. N. S. 186, 14 Reports 236, 11 T. L. R. 197].

63. Ideal Bedding Co. *v.* Holland, [1901] 2 Ch. 157, 76 L. J. Ch. 441, 96 L. T. Rep. N. S. 774, 14 Manson 113, 23 T. L. R. 467; Flegg *v.* Prentis, [1892] 2 Ch. 428, 61 L. J. Ch. 705, 67 L. T. Rep. N. S. 107, establishing that no declaration of charge can be made on a judgment debtor's reversionary personalty in favor of a judgment creditor who has obtained such an appointment; and it follows that the judgment creditor has no right to have his debt raised by sale or mortgage of that subjected to the receivers.

Under the Creditors' Relief Act in Canada it has been held that the most that a judgment creditor could get on an application for a receiver to receive the share of a defendant in his deceased father's estate in the hands of the administratrix is a receiver to receive and distribute the estate according to that act. Sylvester Mfg. Co. *v.* McEachon, 9 Can. L. T. Occ. Notes 138. See also Harris *v.* Harper, 9 Can. L. T. Occ. Notes 39. But in McLean *v.* Allen, 14 Ont. Pr. 84, it was held that where defendant had acquired under a will a life-interest for the maintenance of himself and his children, etc., a receiver might be appointed for the benefit of plaintiff alone, and that the Creditors' Relief Act did not actually apply to such case and could not be extended to it.

64. *In re* Potts, [1893] 1 Q. B. 648, 62 L. J. Q. B. 392, 69 L. T. Rep. N. S. 74, 10 Morr. Bankr. Cas. 2, 4 Reports 305, 41 Wkly. Rep. 337 (where it is said that property which is in the hands of the receiver is held by the court *in medio* until the rights of plaintiff, as it would have been in the old proceeding, have been determined; but until that has been done, and the proceeds of the sale of the property by the receiver have been handed over by him to the person who obtained the order, he acquires no property in, no lien, and no charge whatever on that which is the subject-matter of the order); *In re* Dickinson, 22 Q. B. D. 187, 58 L. J. Q. B. 1, 60 L. T. Rep. N. S. 138, 6 Morr. Bankr. Cas. 1, 37 Wkly. Rep. 130; *In re* Anglesey, [1903] 2 Ch. 727, 72 L. J. Ch. 782, 52 Wkly. Rep. 124; Croshaw *v.* Lyndhurst Ship Co., [1897] 2 Ch. 154, 66 L. J. Ch. 576, 76 L. T. Rep. N. S. 553, 45 Wkly. Rep. 570 (holding that in the absence of special circumstances the court ought not in the exercise of its discretion under section 87 of the Companies Act of 1862, to allow the order to be further proceeded with).

cannot be attached by process of garnishment.[65] But on the other hand the order appointing a receiver operates as an injunction to restrain the judgment debtor from himself receiving the moneys over which the receiver is appointed, and prevents subsequent judgment creditors from gaining priority over the creditor obtaining the order.[66]

C. Receiver of Corporate Property[67] — **1. In General.** As has been shown elsewhere, as a general rule a court of equity as such has no jurisdiction over corporate bodies for the purpose of restricting their operation or winding up their concerns in the absence of statute conferring such jurisdiction,[68] except possibly where the object of the corporation has become manifestly impossible of attainment,[69] or in cases of extreme necessity, as where the corporate property is abandoned or there are no persons authorized to take charge of and conduct its affairs,[70] and the court cannot accomplish indirectly that which is thus beyond its jurisdiction, by the appointment of a receiver and the decreeing of a sale of the corporate property and a settlement and winding up of the corporate affairs,[71]

65. Gray *v.* Purdy, 5 Brit. Col. 241. See also GARNISHMENT, 20 Cyc. 1026.

66. Tyrrell *v.* Painton, [1895] 1 Q. B. 202, 64 L. J. P. D. & Adm. 33, 71 L. T. Rep. N. S. 687, 11 Reports 589, 43 Wkly. Rep. 163; Ideal Bedding Co. *v.* Holland, [1907] 2 Ch. 157, 76 L. J. Ch. 441, 96 L. T. Rep. N. S. 774, 14 Manson 113, 23 T. L. R. 467; *In re* Anglesey, [1903] 2 Ch. 727, 72 L. J. Ch. 782, 52 Wkly. Rep. 124. The case of Levasseur *v.* Mason, [1891] 2 Q. B. 73, 60 L. J. Q. B. 659, 64 L. T. Rep. N. S. 761, 39 Wkly. Rep. 596 (in the court of appeal) shows the advantage of obtaining such an order. In that case judgment creditors had obtained the appointment of a receiver of certain copper, which was subject to a lien, and subsequently the debtors were adjudicated to be in judicial liquidation in France, and plaintiffs were appointed liquidators. The order, as varied by the divisional court and affirmed by the court of appeal, did not contain any direction to pay the judgment debt; and, moreover, nothing whatever had been received by the receiver before the appointment of plaintiffs as liquidators. It was nevertheless held by the court of appeals that the judgment creditors, and not the liquidators, were entitled to the proceeds of the copper, Lord Esher stating that the receivership order had the effect of giving to the judgment creditors a right to have the property in dispute handed to them after a certain difficulty had been got rid of.

67. Impairment of obligation of contract see CONSTITUTIONAL LAW, 8 Cyc. 1004.

Effect of appointment on liability of shareholders see CORPORATIONS, 10 Cyc. 729.

68. See CORPORATIONS, 10 Cyc. 988, 989, 1304.

69. See *infra*, II, C, 5, d.

70. See *infra*, II, C, 5, d.

71. *California.*— Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191 [*citing* Fischer *v.* San Francisco Super. Ct., 110 Cal. 129, 42 Pac. 561; People's Home Sav. Bank *v.* San Francisco Super. Ct., 103 Cal. 27, 36 Pac. 1015; Harrison *v.* Hebbard, 101 Cal. 152, 35 Pac. 555; Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627; *In re* French Bank Case, 53 Cal. 495 (a leading case in this state); Neall *v.* Hill, 16 Cal. 145, 76 Am. Dec. 508].

Illinois.— People *v.* Weigley, 155 Ill. 491, 40 N. E. 300.

Iowa.— Wallace *v.* Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; French *v.* Gifford, 30 Iowa 148.

Louisiana.— In Baker *v.* Louisiana Portable R. Co., 34 La. Ann. 754, it was said that the court has no jurisdiction to appoint receivers of corporations in the absence of express statute and that the rule is subject to no exception unless where the corporate property is abandoned or there are no persons authorized to conduct its affairs. In *In re* Louisiana Sav. Bank, etc., Co., 35 La. Ann. 196, 199, being a case in which receivers had been selected by the parties in interest, and the court was merely asked to confirm the selection, the doctrine as enunciated in the case last above cited was modified or explained in the following language, to wit: When . . . we laid down the general rule that 'courts have no jurisdiction to appoint receivers for corporations in absence of express statutory authority,' the word jurisdiction was, perhaps, inaccurately used. The exception which we maintained in that case was not one to the jurisdiction of the court, but one of no cause of action. Certainly we did not mean to impute to the courts such defect of jurisdiction *ratione materiæ* as could not be supplied by consent and as would render their judgments in the premises absolute nullities." And in State *v.* Ellis, 108 La. 521, 32 So. 335, it is held that the result of the decisions there established the doctrine that the authority of the courts of this state to appoint receivers for corporations and partnerships was limited, where corporations were concerned, to cases in which they were without representatives, and their property was in a manner derelict, or to those in which the parties interested consented to and practically made the appointments, and asked the courts to ratify them.

at least where the charter has not expired or been declared forfeited and when the corporate affairs are in the hands of competent officers.[72] Where the power is conferred by statute in particular cases it cannot be extended to other cases not within the provision.[73] The statutory and code provisions which deal with the appointment of receivers generally in civil actions and specify the grounds upon or the actions in which such appointment may be made in a pending cause do not authorize the dissolution of corporations and therefore the authority to appoint receivers of corporations for the purpose of winding up and settling their affairs cannot be found in such provisions.[74] On the other hand numerous cases establish the power of the court by virtue of its general jurisdiction to preserve the subject of litigation *pendente lite*, although it may relate to the affairs of a corporation;[75] and it has been held also that a receiver of corporate property may

Missouri.— Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297; Vila *v.* Grand Island Electric Light, etc., Storage Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791.

New York.— *In re* Binghamton Gen. Electric Co., 143 N. Y. 261, 38 N. E. 297; Howe *v.* Deuel, 43 Barb. 504; Matter of Atlas Iron Constr. Co., 38 N. Y. Suppl. 172, 2 N. Y. Annot. Cas. 124.

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293.

Texas.— People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738; Espuela Land, etc., Co. *v.* Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

72. Baker *v.* Louisiana Portable R. Co., 34 La. Ann. 754.

73. *Colorado.*— People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908, where construing a statute which declared, in substance, that if any corporation shall do an act which subjects it to a forfeiture of its corporate powers, or shall allow any execution of a court of record for a payment of money, after demand made, to be returned "no property found," or to remain unsatisfied for ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against the corporation and all who are stock-holders at the time, or who are liable in any way for the debts of the corporation, and courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation and to appoint a receiver therefor, it was held not to be within the purview of such provisions that, at the suit of an individual stock-holder who complained of frauds in the management, the court was given authority either to dissolve a corporation or to appoint a receiver. The statute, in substance, was copied almost literally from Illinois, and the construction put upon it there in repeated decisions is that the statute was intended merely to afford a remedy in the nature of a creditor's bill. See the Illinois cases cited *infra*, this note.

Illinois.— Klein *v.* Independent Brewing Assoc., 231 Ill. 594, 83 N. E. 434; Coquard *v.* National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563; People *v.* Weigley, 155 Ill. 491, 40 N. E. 300 (holding that if the case is not one in which the court may wind up the corporation, the appointment of a receiver is not merely irregular but is void); Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818.

Louisiana.— See *In re* John Lange Land, etc., Co., 106 La. 466, 31 So. 51.

New York.— Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Suppl. 639; Galwey *v.* U. S. Steam Sugar Refining Co., 36 Barb. 256; Matter of Atlas Iron Constr. Co., 38 N. Y. Suppl. 172, 2 N. Y. Annot. Cas. 124; Rochester *v.* Bronson, 41 How. Pr. 78. But see Porter *v.* Industrial Information Co., 5 Misc. 262, 25 N. Y. Suppl. 328, *infra*, note 82.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293 (where the statute provided for the appointment of a receiver of a corporation when it has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights, and a method was provided by statute by which corporations might be dissolved, which method was exclusive, and it was held that where the prayer is for dissolution of a corporation, a receiver cannot be appointed unless the suit for dissolution was brought within the terms of the statute giving the court the power to decree a dissolution); Goebel *v.* Harancourt Brewing Co., 2 Ohio S. & C. Pl. Dec. 377, 7 Ohio N. P. 230.

South Dakota.— Dudley *v.* Dakota Hot Springs Co., 11 S. D. 559, 79 N. W. 839.

74. *In re* French Bank Case, 53 Cal. 495; People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908; Wallace *v.* Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; French *v.* Gifford, 30 Iowa 153; New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 328. *Compare* Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487.

75. *Alabama.*— Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

Maryland.— Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982; State *v.* Northern Cent. R. Co., 18 Md. 193.

Michigan.— Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

be appointed under the provisions of the general statutes for the appointment of receivers as an ancillary remedy in civil actions, where the applicant brings himself or his case within the terms of such provision;[76] and the decisions in which the courts refuse to exercise jurisdiction to appoint receivers of corporate property upon the theory that this is tantamount to winding up and dissolving the corporation may be reconciled sometimes upon the ground that the appointment for the purpose of preserving the property *pendente lite* is to preserve and hold the property intact and not to destroy, dismember, or by a receiver's sale dispossess the corporation of its property and franchises.[77] And even in the exercise of the power to the extent of winding up the affairs of an insolvent corporation, where such relief is the only mode of doing complete justice between the artificial person and its creditors, it has been held that no statute is necessary to give the court jurisdiction because this may be accomplished without dissolving the corporation.[78] The court may appoint a receiver *pendente lite* to take only that part of the property which is in danger and leave the rest undisturbed, although where that might not afford real relief, the whole of the property may be placed in the hands of a receiver to protect that which is in danger.[79]

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

New Hampshire.—Fisher *v.* Concord R. Co., 50 N. H. 200.

New Jersey.— Sternberg *v.* Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762.

New York.— Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480.

Washington.— Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229.

England.— Trade Auxiliary Co. *v.* Vickers, L. R. 16 Eq. 303, 21 Wkly. Rep. 836; Featherstone *v.* Cooke, L. R. 16 Eq. 298, 21 Wkly. Rep. 835; Fripp *v.* Chard R. Co., 1 Eq. Rep. 503, 11 Hare 241, 17 Jur. 887, 22 L. J. Ch. 1084, 1 Wkly. Rep. 477, 55 Eng. Ch. 241, 68 Eng. Reprint 1264.

76. Wallace *v.* Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395; French *v.* Gifford, 30 Iowa 148; Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5, holding that under a statutory provision for the appointment of receivers in actions between partners or others interested in any property or fund on the application of any party whose interest is probable and the property is shown to be in danger of loss, and in all other cases where they have usually been appointed by courts of equity, and under provisions allowing a surety to sue to compel his principal to pay the debt after the same has become due, a receiver may be appointed under a petition of a surety of the corporation which shows the insolvency of the corporation; that the debts for which the petitioner is surety are past due; that the business of the corporation cannot be continued without loss and waste of assets; that no effort is being made to pay the debts, and that it is necessary to sell the corporate property and collect the demands of the corporation in order to pay its debts. But see New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828.

77. Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480.

Provision in mortgage for application of income.— So in Sacramento, etc., R. Co. *v.* San Francisco Super. Ct., 55 Cal. 453, the appointment of a receiver was upheld in a suit by a trustee in a mortgage to secure bonds, which mortgage provided that upon default the trustee should take possession of the property and apply the net income to the payment of principal and interest on the bonds, the suit being in the nature of one for specific performance, of which the court had jurisdiction, and the statute providing for the appointment of receivers in all cases where "receivers have heretofore been appointed by the usages of Courts of Equity." See also MORTGAGES, 27 Cyc. 1622 *et seq.*; RAILROADS, 33 Cyc. 1. And see *infra*, II, C, 4, c, (II); II, C, 5.

78. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758. See also Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Pinchback *v.* Bessemer Min., etc., Co., 137 N. C. 171, 49 S. E. 106.

79. Fisher *v.* Concord R. Co., 50 N. H. 200. See, however, Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244, where it was held that in a creditors' suit against an insolvent corporation the appointment is erroneous if not extended to all of the corporate property and effects, but that where there was nothing before the court to show that any other debts were owing by the corporation than those of plaintiffs, the appointment of a receiver for so much of the property as would pay plaintiffs' debts cannot be objected to by defendant.

Partial receivership cannot bring a case within the statute which enumerates the instances in which an appointment of a receiver may be made. A construction which would tolerate a receivership at the discretion of the court because it is proposed to extend it to but a part of the corporate prop-

2. Exercise of Power in General — a. Rule as to Caution. As a rule of equity practice, the courts are very reluctant to appoint receivers, upon the idea that it is a practical displacement of the board of directors. It is an assumption of the functions of the directors. It displaces the board of managers placed there by the stock-holders, who sustain the relation of trustees for the stock-holders, trustees for the corporation, and trustees for its creditors; and, before the court will take charge of the corporation, and thus displace its chosen directors and managers, it ought to have the clearest evidence of the absolute necessity for such extraordinary action for the protection of the creditors, stock-holders, and all parties concerned.[80] The subjection of corporate property and franchise to the custody of a receiver is a suspension in a greater or less degree of the powers of the corporation, in addition to devolving on the court often the continuance of the business of the corporation, and this is the explanation of the greater reluctance to appoint receivers over them and their property, than in the case of

erty would increase instead of lessen the abuses which the statute intended to remedy. Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78.

80. *Alabama.*— Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

Florida.— Continental Nat. Bldg., etc., Assoc. *v.* Miller, 44 Fla. 757, 33 So. 404.

Illinois.— Young *v.* Rutan, 69 Ill. App. 513; Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406.

Indiana.— Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210.

Kansas.— Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914; Fluker *v.* Emporia City R. Co., 48 Kan. 577, 30 Pac. 18.

Louisiana.— Bartlett *v.* Fourton, 115 La. 26, 38 So. 882; Posner *v.* Southern Exhaust, etc., Pipe Co., 109 La. 658, 33 So. 641.

Maryland.— Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Steinberger *v.* Independent Loan, etc., Assoc., 84 Md. 625, 36 Atl. 439; Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982.

Missouri.— Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962; Ford *v.* Kansas City, etc., R. Co., 52 Mo. App. 439.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297; Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253; Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46.

New Jersey.— Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934, referring to the power to wind up an insolvent corporation under statute whereby the corporation is forever extinguished under which mere insolvency is not sufficient.

New York.— Weber *v.* Wallerstein, 111 N. Y. App. Div. 700, 97 N. Y. Suppl. 852; Thalmann *v.* Hoffman House, 27 Misc. 140, 58 N. Y. Suppl. 227; Rochester *v.* Bronson, 41 How. Pr. 78.

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293.

South Carolina.— Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867; Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281.

South Dakota.— Bennett *v.* Consolidated Apex Min. Co., 12 S. D. 234, 80 N. W. 1078.

Texas.— Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898; People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738; New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828. The application of a few persons owning comparatively small interests in an insolvent going corporation is not sufficient to induce a court of equity to appoint a receiver therefor, and to order a speedy sale of its property during a period of great financial stringency. Espuela Land, etc., Co. *v.* Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

Washington.— Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37; Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229.

United States.— Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694; Columbia Nat. Sand Dredging Co. *v.* Washed Bar Sand Dredging Co., 136 Fed. 710; Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449; Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53; Hutchinson *v.* American Palace-Car Co., 104 Fed. 182; Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 43 Fed. 204.

Corporation regulated by special statute.— A particular kind of corporation subject to the regulations of a special statute relating to the particular contracts of its business and to its general management, and which further provides that such corporations "shall be subject only to the provisions of this act," is not by such clause exempted from all the laws, rules, and decisions of the state governing corporations generally. Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191.

Building and loan societies see Building and Loan Societies, 6 Cyc. 162, text and note 73.

individuals.[81] This reason loses much of its force, however, where the receiver is not to interfere with the exercise of corporate power or his custody will not suspend corporate functions in any degree, as where the corporation is bankrupt and dissolved.[82]

b. Where No Necessity or Danger Appears — (i) *In General.* Where a case is presented in which the court may exercise its power to appoint a receiver, the general rule already stated [83] that there must be some necessity therefor in the way of protecting the rights of the parties by preserving the property or assets is applied and unless such necessity clearly appears the court will refuse to displace the regular corporate officers from the possession or management of the corporate property or affairs.[84] Some distinction in this respect may be noted between a quasi-public and a private business corporation, since in the first case the court must consider the interests of the public as well as those of creditors and stock-holders, and any act on the part of the corporate officers which would interrupt or suspend the regular continued operation of the corporation in its public capacity so as to cause inconvenience and loss to the public might be sufficient to induce the court to appoint a receiver.[85]

(ii) *Other Adequate Remedy.* A receiver should not be appointed of corporate property or to displace the regularly constituted corporate officers when the specific acts complained of are capable of redress and complete restitution by other means.[86]

81. Kelly *v.* Alabama, etc., R. Co. Trustees, 58 Ala. 489. See also *supra*, II, B, 6, b, (I).

82. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489; Porter *v.* Industrial Information Co., 5 Misc. (N. Y.) 262, 25 N. Y. Suppl. 328; Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 43 Fed. 204; Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. 849, 4 Hughes 415. See also *infra*, II, C, 5.

83. See *supra*, II, B, 10, a.

84. *Georgia.*—Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 344.

Kansas.— Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254, 32 Pac. 914.

New Jersey.— Hager *v.* Stevens, 6 N. J. Eq. 374.

New York.— Thalmann *v.* Hoffman House, 27 Misc. 140, 58 N. Y. Suppl. 227, where it was said that the fact that defendant directors represented in actual ownership the majority of the stock for which they had paid large sums of money, asserting that they had no purpose of wrecking the corporation for their own benefit, of which there was no evidence, was a strong guaranty that the business might be safely left in their hands.

Pennsylvania.— Gracey *v.* Pittsburgh Trolley Co., 28 Pittsb. Leg. J. N. S. 109, holding that under a bill by a member of a corporation praying for a receiver on the ground of insolvency and mismanagement, plaintiff must show an undoubted right in danger from abuse of the powers exercised by defendants.

Washington.— Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37.

United States.— Romare *v.* Broken Arrow Coal, etc., Co., 114 Fed. 194; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; McHenry *v.* New York, etc., R. Co., 25 Fed. 114; Union Trust Co. *v.* St. Louis, etc., R. Co., 8 Fed. Cas. No. 4,402, 4 Dill. 114.

Under statute.—Where it is not shown that a corporation and its officers are insolvent or unable for any reason to comply with any judgment which may be rendered in the action, or that its property is to be taken out of the jurisdiction of the court, or is going to be lost, materially injured, or destroyed, or that the interests of the corporation are not safe in the hands of the board of directors, a receiver will not be appointed at the instance of a stock-holder, under a statute providing for a receiver *pendente lite* "on the application of a party who establishes an apparent right to or interest in the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed." Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Suppl. 639.

85. Cowan *v* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075. See also, generally, Railroads, 33 Cyc. 612.

86. *Arizona.*— Hallenborg *v.* Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052.

Florida.— Continental Nat. Bldg., etc., Assoc. *v.* Miller, 44 Fla. 757, 33 So. 404, at suit of minority stock-holders.

Georgia.— Barnesville Mfg. Co. *v.* J. S. Schofield's Sons Co., 118 Ga. 664, 45 S. E. 455.

Illinois.— Baker *v.* Backus, 32 Ill. 79 (holding that the fact that stock-holders refused to pay the company or advance means to relieve it from pecuniary embarrassment furnished no ground for interfering with the corporate property by a receivership, since it was in the power of the trustees to sell out the stock of the delinquent holders); Original Vienna Bakery Co. *v.* Heissler, 50 Ill. App. 406, injunction.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297.

3. STOCK-HOLDERS' SUITS — a. Right of Stock-Holder in General. In so far as the interest of a stock-holder is concerned, the authorities enunciate the doctrine that the right to call into action the power of a court of equity to appoint a receiver in a proper case exists in a share-holder in a corporation as well as in a creditor thereof,[87] and this, although the remedy and the relief are invoked

New Jersey.— Fougeray *v.* Cord, 50 N. J. Eq. 756, 26 Atl. 886, injunction.

New York.— Hastings *v.* Tousey, 121 N. Y. App. Div. 815, 106 N. Y. Suppl. 639; Waterbury *v.* Merchants' Union Express Co., 50 Barb. 157, injunction.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618, injunction.

South Dakota.— Bennett *v.* Consolidated Apex Min. Co., 12 S. D. 234, 80 N. W. 1078.

Texas.—People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738.

United States.— United Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673.

Where the stock-holder may sue on behalf of the corporation in particular cases, a receiver will not be appointed in a stock-holder's suit for the purpose of such appointment in order that such suit may be brought by the receiver on behalf of the corporation. Hallenborg *v.* Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052, holding further that the fact that a receiver of a corporation, being in possession of the books and records thereof, would be in a better position to prosecute actions on its behalf than a stock-holder, who might be denied an inspection of the books and records, affords no sufficient ground in itself for the appointment. And charges that the directors have improperly devoted surplus earnings instead of declaring dividends, etc., shows no necessity for the appointment of a special receiver since the individual stock-holder may sue in his own name. Marcuse *v.* Gullett Gin Mfg. Co., 52 La. Ann. 1383, 27 So. 846. See also Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53.

Notwithstanding mandamus is available against a parliamentary corporation to compel it to do all things which it ought to do, the court may, on motion by mortgagees, appoint a receiver of rents and tolls. Fripp *v.* Chard R. Co., 1 Eq. Rep. 503, 11 Hare 241, 17 Jur. 887, 22 L. J. Ch. 1084, 1 Wkly. Rep. 477, 45 Eng. Ch. 241, 68 Eng. Reprint 1264.

Other adequate remedies generally see *supra*, II, B, 4; *infra*, II, C, 3, b, (I).

87. *Indiana.*— Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210.

Iowa.— Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395, maintaining the sufficiency of the interest of a stock-holder of a bank, under a general statute providing for the appointment of a receiver on the petition of a party to a civil action who shows he has a probable right to or interest in any property which is the subject of the controversy, and that such property or its rents and profits are in danger of being lost, etc., such stock-holder being subject to a statutory liability to creditors in case the assets are found insufficient to pay the debts, whereby his interest is greater than the mere right to share in any surplus which may remain.

Missouri.—Ford *v.* Kansas City, etc., Short Line R. Co., 52 Mo. App. 439, receiver to collect amounts due on stock where the franchises had been abandoned and complainants were in danger of being subjected to the payment of the corporate debts.

Montana.— State *v.* Bow County Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219.

New Hampshire.—Fisher *v.* Concord R. Co., 50 N. H. 200.

New Jersey.— Wood *v.* American Mach., etc., Co., (Ch. 1906) 62 Atl. 768, where persons suing were both creditors of and minority stock-holders in a corporation and had financed the corporation under an agreement that they should have practical control of its business, and their rights were repudiated by the owner of the majority of the stock and it was held that they had a sufficient standing to enable them to maintain receivership proceedings against the corporation and that their standing as stock-holders was higher than it was as creditors.

South Carolina.— Matthews *v.* Allendale Bank, 60 S. C. 183, 38 S. E. 437.

See 42 Cent. Dig. tit. "Receivers," §§ 15, 18. See also *infra*, III, C.

Controlling question.— Whether a receiver will or not be appointed upon the petition of an individual stock-holder depends upon whether his relation as stock-holder gives him a "probable right to or interest in the assets of the corporation," under a general statute providing for the appointment of receivers at the instance of such persons. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

Purchase of stock for purpose of suit.— One has sufficient standing as a stock-holder to proceed against an insolvent corporation, although he purchased the stock knowing the condition of defendant and for the purpose of acquiring a standing as stock-holder. Reinhardt *v.* Inter-State Tel. Co., 71 N. J. Eq. 70, 63 Atl. 1097.

Right in dispute.— Where none of the actual holders of the stock or bonds of a railroad company who would be affected similarly with plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock. Overton *v.* Memphis, etc., R. Co., 10 Fed. 866, 3 McCrary 436. In Kelly *v.* Fargo Mercantile Co., 16 S. D. 73, 91 N. W. 350, the appointment was refused where complain-

by a single share-holder or one who holds but a single share of stock.[88] But a stock-holder has no property in the assets of the corporation in the sense that he may control it, by the appointment of a receiver, otherwise than as the charter directs.[89]

b. Mismanagement and Fraud— (i) *In General.* Even though a court of chancery by virtue of its general equity jurisdiction may enjoin conduct on the part of corporate directors, in violation of the trust or of the law, at the suit of a stock-holder,[90] in a suit by such party the general rule already stated [91] has been applied in many cases, that in the absence of statute conferring such authority, the court cannot take any step the sole purpose, or the primary object of which is, to wind up the affairs of the corporation,[92] or in ordinary cases to take the control and management thereof from those to whom the stock-holders and the law have intrusted them.[93] And so the courts refuse to interfere by the appointment of a receiver on the ground merely that there has been mismanagement or fraudulent conduct on the part of the officers or directors of the corporation,[94] because in such case the principles of remedial or preventive justice

ant's right to the stock was in dispute and he did not show title thereto, but there were other grounds for the refusal. See also Downing *v.* Dunlap Coal, etc., Co., 93 Tenn. 221, 24 S. W. 122.

A pledgee of corporate stock for the benefit of creditors has been held to be an equitable stock-holder as well as creditor and as such entitled to the protection of the court in a proper case on a motion for the appointment of a receiver of corporate assets. Chafee *v.* Quidnick, 14 R. I. 75.

Trustee of stock.— Under a statute providing that all persons having an interest in the subject of the action, etc., may be joined as plaintiffs, a registered owner of a share of stock in a corporation, although but a trustee thereof, is a proper party plaintiff in a suit for the appointment of a receiver and to restrain a sale of the corporation's stock to another corporation. Kuhn *v.* Woolson Spice Co., 10 Ohio S. & C. Pl. Dec. 292, 8 Ohio N. P. 686.

Stock in name of broker.— Where complainant in fact owned stock in defendant corporation, he could sue for the appointment of a receiver for the corporation in insolvency proceedings, although the stock stood in the name of the broker by whom it was purchased for complainant. Reinhardt *v.* Inter-State Tel. Co., 71 N. J. Eq. 70, 63 Atl. 1097.

Clean hands.— It is a familiar rule of equity jurisprudence that a suitor must come into a court of equity with clean hands. Thus, if a party seeks to set aside a transaction for fraud, he must himself be free from any participation in the fraud. If he comes as a stock-holder of a corporation to arraign ministerial officers of such corporation for breaches of trust, he himself must be free from any participation in such breaches, or the misappropriation of the corporate funds or property. Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 132. See also Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Hager *v.* Stevens, 6 N. J. Eq. 374; Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21.

Necessity to seek redress through officers see Corporations, 10 Cyc. 976.

Stock-holders' suits generally see Corporations, 10 Cyc. 963 *et seq.*

88. Du Pey *v.* Transportation, etc., Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910; Miner *v.* Bell Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412.

89. Huet *v.* Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846.

90. See Corporations, 10 Cyc. 963 *et seq.*

91. See *supra*, II, C, 1.

92. See Corporations, 10 Cyc. 1304 *et seq.*

93. Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; Goebel *v.* Herancourt Brewing Co., 2 Ohio S. & C. Pl. Dec. 377, 7 Ohio N. P. 230.

Refusal to allow examination of books.— The refusal of the officers of a corporation to allow a stock-holder to examine its books is not sufficient ground for the appointment of a receiver. Original Vienna Baking, etc., Co. *v.* Heissler, 50 Ill. App. 406. See also Goebel *v.* Herancourt Brewing Co., 2 Ohio S. & C. Pl. Dec. 377, 7 Ohio N. P. 230.

94. *Alabama.*— Hayes *v.* Jasper Land Co., 147 Ala. 340, 41 So. 909 [*citing* Donald *v.* Manufacturers' Export Co., 142 Ala. 578, 38 So. 841]; Alabama Coal, etc., Co. *v.* Shackelford, 137 Ala. 224, 34 So. 833, 97 Am. St. Rep. 23, holding that if such officers and directors are solvent they can be brought to an accounting, which will afford complete relief and is therefore an adequate remedy.

Georgia.— Empire Hotel Co. *v.* Main, 98 Ga. 176, 25 S. E. 413.

Illinois.— Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 132, the corporation being solvent. So where a bill by a minority stock-holder and director of a corporation for an accounting by the dominating officers and directors for certain illegal acts did not allege that the corporation was insolvent or had done anything which would authorize its dissolution or the appointment of a receiver in dissolution proceedings under the statute, and it appeared that the corporation was solvent and a going concern, and that no receiver was necessary to preserve the corporation's

go no further than to enjoin or forbid the misconduct of or to remove the unfaithful officer.[95]

(II) *Dissatisfaction With Management and Internal Dissensions.* Mere internal dissensions among stock-holders, or mere differences and disputes as to and dissatisfaction with the corporate management, at least so long as the officers or stock-holders do no act that is fraudulent, illegal, or *ultra vires*, will not warrant the intervention of a court of chancery by the appointment of a receiver, because, in the absence of fraud, illegality, or *ultra vires* conduct, the will of the majority is entitled to control the policy and the business of the body corporate.[96] This is true not only in cases where the jurisdiction of the court

property or funds pending an accounting, it was held that a receiver should not be appointed. Klein *v.* Independent Brewing Assoc., 231 Ill. 594, 83 N. E. 434.

Massachusetts.— Richardson *v.* Clinton Wall Trunk Co., 181 Mass. 580, 64 N. E. 400.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297 (the corporation and its officers being solvent and the corporation being a going concern); Neitzel *v.* Lyons, 48 Nebr. 892, 67 N. W. 867 (reversing an order refusing to vacate an appointment under the following facts: A bank was managed by a board of three directors, one of whom, as a stock-holder, instituted the proceeding in which the receiver was appointed, the grounds of appointment being that the bank was grossly mismanaged, and that its officers had wasted and lost part of the capital stock, and had borrowed money for the bank without authority of the directors; an appearance was entered on behalf of the bank in said proceeding by another of the three directors, who was president of the bank; there was by him a consent entered that the receiver might be appointed, issuance and service of summons being waived; the cashier was the third director, but no attempt was made to substantiate the charges against him, and the affidavits showed all his acts to have been for the bank's benefit; the bank was solvent; the receiver was an officer of a rival bank, and other stock-holders opposed the receivership and winding up).

North Carolina.— Huet *v.* Piedmont Springs Lumber Co., 138 N. C. 443, 50 S. E. 846.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; North Fairmont Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185.

Pennsylvania.— Thoma *v.* East End Opera House Co., 30 Pittsb. Leg. J. N. S. 230, holding that the fact that the income of a solvent corporation is not sufficient to pay its fixed charges is not an adequate ground for the appointment of a receiver at the suit of a stock-holder.

South Dakota.— Dudley *v.* Dakota Hot Springs Co., 11 S. D. 559, 79 N. W. 839.

Texas.— People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738.

United States.—Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449.

95. *Georgia.*— Virginia-Carolina Chemical Co. *v.* Provident Sav. L. Assur. Soc., 126 Ga. 50, 54 S. E. 929; Empire Hotel Co. *v.* Main, 98 Ga. 176, 25 S. E. 413.

Illinois.— Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406.

Massachusetts.— Richardson *v.* Clinton Wall Trunk Co., 181 Mass. 580, 64 N. E. 400.

Nebraska.— Miller *v.* Kitchen, 73 Nebr. 711, 103 N. W. 297.

New Jersey.— Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756, 26 Atl. 886.

New York.— Belmont *v.* Erie R. Co., 52 Barb. 637; Waterbury *v.* Merchants Union Express Co., 50 Barb. 157.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618; North Fairmont Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185; Goebel *v.* Herancourt Brewing Co., 2 Ohio S. & C. Pl. Dec. 377, 7 Ohio N. P. 230.

Texas.— People's Inv. Co. *v.* Crawford, (Civ. App. 1898) 45 S. W. 738; New Birmingham Iron, etc., Co. *v.* Belvins, 12 Tex. Civ. App. 410, 34 S. W. 828.

United States.— New Albany Waterworks *v.* Louisville Banking Co., 122 Fed. 776, 58 C. C. A. 576; United Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673; Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776.

Other adequate remedies generally see *supra*, II, B, 4.

96. *Alabama.*— Little Warrior Coal Co. *v.* Hooper, 105 Ala. 665, 17 So. 118; Roman *v.* Woolfolk, 98 Ala. 219, 13 So. 212.

Idaho.— Hall *v.* Nieukirk, 12 Ida. 33, 85 Pac. 485.

Illinois.— Wheeler *v.* Pullman Iron, etc., Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Black Diamond Co. *v.* Waterloo, 62 Ill. App. 206.

Kansas.— Fluker *v.* Emporia City R. Co., 48 Kan. 577, 30 Pac. 18.

Maryland.— Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916.

Nebraska.— Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46.

New Jersey.— Sternberg *v.* Wolff, 56 N. J. Eq. 555, 42 Atl. 1078; Edison *v.* Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195. A receiver of a corporation will not be appointed at suit of the holders of less than one quarter of the stock; it not being insolvent, the fraudulent procurement of proxies by which it is alleged defendants

is invoked upon its general equity powers, but also where it is acting upon statutory grounds and where its powers have been extended by legislation with reference to the winding up of corporations,[97] and when there is no reason shown why the corporation itself could not wind up its affairs if a majority think it advisable,[98] or that the interests of the majority of the stock-holders would be subserved by winding up the concern at the suit of a complaining stock-holder.[99]

c. Limitations and Exceptions to Rule — (i) *In General.* But the rule that a receiver will not ordinarily be appointed at the instance of stock-holders is not without limitation or exception. The authorities are sometimes to be reconciled upon the theory that the receivership is not for the purpose of working a dissolution of the corporation, but is merely to preserve the property intact,[1]

obtained control being denied, and there being little evidence of it, and an arrangement being agreed to by which time of maturity of obligations of the corporation, collateral for which complainants apprehend may be sacrificed by enforcement thereof, shall be extended till after change in control of the corporation may be made, if the stock-holders so desire. Stokes *v.* Knickerbocker Inv. Co., 70 N. J. Eq. 518, 61 Atl. 736.

Ohio.— Straman *v.* North Baltimore Water-Works Co., 8 Ohio Cir. Ct. 89, 4 Ohio Cir. Dec. 339.

Texas.— Espuela Land, etc., Co. *v.* Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

United States.— Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449; North American Land, etc., Co. *v.* Watkins, 109 Fed. 101, 48 C. C. A. 254; Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; Hardee *v.* Sunset Oil Co., 56 Fed. 51.

See also Corporations, 10 Cyc. 969.

Refusal to appear in suit.— Hutchinson *v.* American Palace-Car Co., 104 Fed. 182, holding that a court of equity in the domicile of a corporation would not appoint a receiver therefor on a bill filed by minority stock-holders, to the end that such receiver may appear and represent the corporation in litigation instituted by complainants in a court of another district to which the corporation was a necessary party and in which it had refused to appear in accordance with a vote of a majority of its stock-holders.

Mere apprehension on the part of the complainant that a suit brought by the corporation against an officer will not be diligently prosecuted, owing to the relations of the parties, will not warrant the appointment of a receiver to take charge of such suit, where no laches on the part of the corporation is shown. Griffing *v.* A. A. Griffing Iron Co., 96 Fed. 577.

Exclusion from profits.— To make a *prima facie* showing of a right to share in the profits of the concern and a denial of such right by the persons in actual control is not sufficient, because for wrongs of this character the ordinary remedies administered by the courts will furnish ample relief. Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37; Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229.

Failure to file certificate and refusal to permit stock to be voted.— In Thalmann *v.* Hoffman House, 27 Misc. (N. Y.) 140, 58 N. Y. Suppl. 227, it was held that the fact that a certificate showing an increase of stock was not filed as required by law was not cause for the appointment of a receiver pending a suit against the corporation and its directors for an accounting for the alleged overissue of stock, there being no evidence that the failure was to accomplish a wrongful purpose, and that the fact that the directors refused to permit a pledgee of stock to vote it, although it stood in his name, was not a ground for the appointment of a receiver, pending a proceeding to declare the election of the directors void, the proof failing to show that the refusal was through any corrupt motive.

97. Posner *v.* Southern Exhaust, etc., Pipe Co., 109 La. 658, 33 So. 641; Callaway *v.* Powhatan Imp. Co., 95 Md. 177, 52 Atl. 916; Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46; Columbia Nat. Sand Dredging Co. *v.* Washed Bar Sand Dredging Co., 136 Fed. 710; North American Land, etc., Co. *v.* Watkins, 109 Fed. 101, 48 C. C. A. 254 (holding that a statutory provision authorizing an appointment of a receiver at the instance of a stock-holder or creditor "when the directors or other officers of the corporation are jeopardizing the rights of stockholders or creditors by grossly mismanaging the business or by committing acts *ultra vires*," etc., could not be intended to enable a minority stock-holder to obtain a receiver so as to enforce his views of the management and policy to be pursued); Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53.

98. Rumney *v.* Detroit, etc., Cattle Co., 116 Mich. 640, 74 N. W. 1043.

Where the articles of association between the members of a corporation provide the manner in which the business shall be wound up, and no reason is shown why the mode specified cannot be adopted, a receiver cannot be appointed on demand of one of the members who is dissatisfied with the action of the majority. Pringle *v.* Eltringham Constr. Co., 49 La. Ann. 301, 21 So. 515.

99. Rumney *v.* Detroit, etc., Cattle Co., 116 Mich. 640, 74 N. W. 1043.

1. See *supra*, II, C, 1; and the cases cited *infra*, this note.

The appointment in such cases is not necessarily to dissolve the corporation, nor will it necessarily result in its extinction.

and to this extent, to say nothing here of statutory provisions under which the general rule is modified,[2] it has been recognized that facts may arise which would justify the appointment of a temporary receiver, even when the court cannot liquidate the affairs of the corporation, and when the corporation is a going concern,[3] and that if on the application of a stock-holder for other equitable relief it should be made clearly to appear that the appointment of a receiver is necessary to effect the purpose of the action, the court would have power to make such appointment.[4]

The property and assets of the corporation which are being dissipated and fraudulently absorbed will be preserved and rightfully applied under the supervision of the court, and may be restored to the officers of the corporation when there has been a change of officers, or when it is deemed prudent and safe to restore the property and affairs of the corporation to its duly constituted officers. Hall *v.* Nieukirk, 12 Ida. 33, 85 Pac. 485 (holding that unless the court so directs the corporation is not dissolved and the appointment may be made *pendente lite*); Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210; *In re* Lewis, 52 Kan. 660, 35 Pac. 287 [*distinguishing In re* French Bank Case, 53 Cal. 495, in that the statutes in these two states differed, that in California providing that a receiver could be appointed only in a pending action or as an auxiliary remedy]; State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219; State *v.* Silver Bow County Second Judicial Dist. Ct., 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392 [*distinguishing In re* French Bank Case, *supra*, in that the appointment there operated as a dissolution, and also in that the action there was against the corporation only while in the case at bar the managing officers of the corporation are joined as defendants, and their unlawful acts are sought to be set aside, and their future wrongful conduct enjoined]; Aiken *v.* Colorado River Irr. Co., 72 Fed. 591 [*distinguishing In re* French Bank Case, *supra*, in that, as afterward said in People's Home Sav. Bank *v.* San Francisco Super. Ct., 103 Cal. 27, 36 Pac. 1015, all that was decided in that case was that a court of equity has no jurisdiction, in a suit by a private person against the corporation alone, to appoint a receiver to wind up its business, the practical effect of such a decree being a dissolution of the corporation, a result which, it was held, could be accomplished only at the suit of the state, while that an action might be maintained against the directors in a proper case was conceded]. See also Wallace *v.* Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; French *v.* Gifford, 30 Iowa 148. And see *infra*, II, C. 4, c, (II); II, C, 5.

2. See *infra*, II, C, 4, (II); II, C, 5.

3. See Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406; Richardson *v.* Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219; Sternberg *v.* Wolff, 56 N. J. Eq. 555, 42 Atl. 1078.

4. *Montana.*— State *v.* Silver Bow County Second Judicial Dist. Ct., 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392.

Nebraska.— Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46.

New Jersey.— Avery *v.* Blees Mfg. Co., 27 N. J. Eq. 412.

New York.— Blatchford *v.* Ross, 54 Barb. 42, 5 Abb. Pr. N. S. 434, 37 How. Pr. 110, which was a suit to enjoin a company and its officers from merging with another company into a new company, and an injunction having been granted as to property not already turned over to the new concern, it was held that in the condition in which the company was placed the appointment of a receiver was proper.

Ohio.— Cincinnati, etc., R. Co. *v.* Duckworth, 2 Ohio Cir. Ct. 518, 1 Ohio Cir. Dec. 618 (where it is said that if it should be manifest, in a suit to enjoin certain illegal acts on the part of the contractors, that unless the property were placed in the hands of an officer of the court it would be fraudulently and instantly disposed of by them, it would seem to be a denial of justice to refuse it relief); North Fairmont Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185.

Washington.— Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26.

Wisconsin.— Haywood *v.* Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184.

United States.— Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963 (as to the sufficiency of the equity of a bill alleging in effect that one of plaintiffs was the largest stock-holder of several companies which had been combined into the corporation as afterward established, that his co-plaintiffs were judgment creditors of one of such companies with judgments unsatisfied; setting out the precarious condition of all the property of the present company and the necessity of a receiver in the interest of all the creditors in all the combined property to prevent a levy upon the property, with a prayer for judicial ascertainment and marshaling of the debts of all the corporations and for proper payments and adjustments to and with creditors); Aiken *v.* Colorado River Irr. Co., 72 Fed. 591; Earle *v.* Seattle, etc., R. Co., 56 Fed. 909 (where, in a suit by common stock-holders against an insolvent corporation and its managing officers

(II) *Fraud Ultra Vires and Breach of Trust* — (A) *In General.* And so it is held that such temporary receivership may be created where the corporation is entirely solvent, yet the corporate officers by mismanagement or fraud or by violation of the charter rights of the minority are jeopardizing the property.[5] A stock-holder may invoke and set in motion the plenary and far-reaching powers of a court of equity to investigate, strike down, and strip of its covering any act of the corporation to which he belongs, when that act is tainted with fraud, or is *ultra vires* or illegal.[6] And it is held that the power to appoint a receiver of corporate property at the instance of stock-holders is inherent in a court of equity where the corporation is fraudulently mismanaged by the officers whereby it is in imminent danger of insolvency,[7] or has been rendered insolvent by reason of such mismanagement.[8]

(B) *Despoiling One Corporation in Interest of Another.* An illusory suit in the name of a shareholder, but really prosecuted by and in the interest of a rival and competing company, cannot be maintained for the purpose of dissolving or restraining another association or company, of which the nominal plaintiff may be a member.[9] But a receiver may be appointed over a corporation to protect it from destruction at the instance of a competing corporation which has acquired a majority of the stock of the former and is fraudulently using its power to finally destroy its competitor,[10] or to otherwise protect the assets of

and agents, facts were shown to justify an accounting, and it was held proper to take the corporation and its books and property into the custody of the court through the medium of a receivership).

Past misconduct and a mere apprehension based thereon of future misdoing will not, standing alone, justify the appointment. Original Vienna Bakery, etc., Co. *v.* Heissler, 50 Ill. App. 406; Kean *v.* Colt, 5 N. J. Eq. 365; Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293; Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867.

Where there are no officers see *infra*, II, C, 5.

5. Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075; Columbia Nat. Sand Dredging Co. *v.* Washed Bar Sand Dredging Co., 136 Fed. 710, as where the violation of the charter rights of the minority consists of a diversion by the directors of all the earnings of the company to themselves.

To prevent disposition of property.—A stock-holder and creditor is entitled to an injunction and receiver where the trustees have undertaken to sell to a new company in which they were largely interested substantially the whole property of the corporation. Such transfer is in violation of trust and an abuse of power and the relief is proper without regard to the question of fraudulent intent and fraud in fact. Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578.

Inherent power to wind up.— It has been held that in case of fraud, abuse of trust, etc., the court has inherent power to wind up and dissolve the corporation at the suit of a single stock-holder, apparently upon the principle that the purpose of the corporation has become impossible of attainment. Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412. So where the suit is at the instance of the owners of a great majority of the stock, this inherent power has been held to exist. Arents *v.* Blackwell's Durham Tobacco Co., 101 Fed. 338.

6. Du Puy *v.* Baltimore City Transp., etc., Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910; Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338; Fisher *v.* Concord R. Co., 50 N. H. 200 (where the dominion of the directors arose through fraud, intimidation, and corruption, and where they pervert the corporate power and personal trust, the court holding that in such a case it is no justification or extenuation that no loss had happened); Aiken *v.* Colorado River Irr. Co., 72 Fed. 591.

7. Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26, in a suit for an accounting.

Necessity.— But the complainant in such a suit must show that the business of the corporation is being diverted from the purposes for which the corporation was organized, that its property is in danger of being wasted, destroyed, or removed from the jurisdiction of the court, or that there is no competent person entitled to manage the business or hold the property pending the litigation. Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37; Ridpath *v.* Sans Poil, etc., Ferry, etc., Co., 26 Wash. 427, 67 Pac. 229.

8. U. S. Shipbuilding Co. *v.* Conklin, 126 Fed. 132, 60 C. C. A. 680. See also *infra*, II, C, 4, c, (II).

9. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157.

10. Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982.

One monopoly as against another.— In Kuhn *v.* Woolson Spice Co., 10 Ohio S. & C. Pl. Dec. 292, 8 Ohio N. P. 686, it was held that equity would not lend its aid to one

one corporation whose officers or directors, occupying the same position in another corporation, are wasting the former's assets in the interest of the latter.[11]

(c) *Under Statutory Provisions.* Under various statutory provisions the appointment of a receiver is authorized when the directors or officers are jeopardizing the rights of stock-holders or creditors by mismanagement, *ultra vires* acts, waste, or misapplication of assets; and when the charter rights of the minority stock-holders are violated,[12] or when the corporation is insolvent, or is in imminent danger of insolvency, has been dissolved, or has forfeited its corporate rights, under such provisions conduct such as that just mentioned [13] is taken to justify the order.[14]

monopoly as against another monopoly, or interfere with the laws of trade permitting one party to drive another out of business by underselling him.

Proceeding against wrong corporation.—A receiver cannot be appointed for a corporation which owns the stock of another corporation, on the ground of mismanagement and waste by the latter corporation. The mismanagement must be of the affairs of the corporation of which a receiver is sought. O'Connor *v.* Long Island Traction Co., 15 Misc. (N. Y.) 501, 37 N. Y. Suppl. 953.

11. Hazzard *v.* Credit Mobilier, 11 Fed. Cas. No. 6,289, 7 Reporter 360, 6 Wkly. Notes Cas. (Pa.) 417, where it appeared that certain persons were directors in two corporations, one of which was plaintiff and the other defendant in a pending action on a promissory note; that the interest of such directors was greater in defendant than in plaintiff company; that they had been enjoined on a bill filed against them and both companies by stock-holders of plaintiff company, from surrendering or canceling the note; and that the directors were about to discontinue action on said note and that a new action would be barred by the statute of limitations, and a receiver was appointed with authority to carry on the action.

12. See the statutes of the several states. And see Bartlett *v.* Fourton, 115 La. 26, 38 So. 882; Posner *v.* Southern Exhaust, etc., Pipe Co., 109 La. 658, 33 So. 641 (holding that a receiver will not be appointed, on the ground that officers and directors were mismanaging the affairs of the corporation, in that they had created a surplus fund and had invested the same, where the volume of the business annually renders some surplus necessary, and prior to the date of the suit plaintiff had not objected to the management in such a way as to enable him to obtain a distribution of the funds); Davies *v.* Monroe Waterworks, etc., Co., 107 La. 145, 31 So. 694; Sincer *v.* Alverson, 51 La. Ann. 955, 25 So. 650; North American Land, etc., Co. *v.* Watkins, 109 Fed. 101, 48 C. C. A. 254 (under the statute in Louisiana which provides for the appointment at the instance of stock-holders and creditors upon such grounds).

13. See *supra*, II, C, 3, c, (II).

14. *Idaho.*— Hall *v.* Nieukirk, 12 Ida. 33, 85 Pac. 485; Gibbs *v.* Morgan, 9 Ida. 100, 72 Pac. 733.

Kansas.— *In re* Lewis, 52 Kan. 660, 35 Pac. 287, holding that under such provision a receiver may be appointed at the suit of stock-holders, where the officers and directors have conspired to divert its business to another company, dissipate its funds, and apply its assets to the individual benefit of such officers.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 15 Mont. 324, 39 Pac. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392.

New Jersey.— In this state, under a statute providing for the administration of the assets of an insolvent corporation, the appointment of a receiver does not follow as a matter of course upon a decree declaring the company insolvent. Nichols *v.* Perry Patent Arm Co., 11 N. J. Eq. 126; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173. And the exercise of the power to its full extent extinguishes a mere manufacturing or mercantile corporation completely and forever. Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934.

South Dakota.— Glover *v.* Manila Gold Min., etc., Co., 19 S. D. 559, 104 N. W. 261 [*distinguishing* Dudley *v.* Dakota Hot Springs Co., 11 S. D. 559, 564, 79 N. W. 839, 1127, in that there was no allegation of insolvency or danger of imminent insolvency] (holding that the corporation was entitled through plaintiff to the relief to prevent a forfeiture of its property where the officers and directors in pursuance of their plan to unlawfully and fraudulently render the corporation's stock practically worthless are acting to the end that assessment work might not be prosecuted on the company's mining claims which was essential to a compliance with the law in order to prevent a forfeiture of the company's rights); Kelly *v.* Fargo Mercantile Co., 16 S. D. 73, 91 N. W. 350 (holding that under such a statute a receiver *pendente lite* cannot be appointed, where the complaint stated that the corporation had been transacting a successful business and the proof did not show danger of insolvency); Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115.

Washington.— Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26.

West Virginia.— Code (1906), § 2286, provides a receiver may be appointed when the corporation expires or is dissolved, or before its expiration or dissolution, upon sufficient cause being shown, under which it was held that where a building association

4. At Suit of Creditors — a. In General. A receiver of a corporation will not be appointed ordinarily unless the same relief would be given against individuals.[15]

b. Failure or Refusal to Pay Debts. The mere failure or refusal of a corporation to pay its debts is not of itself sufficient to justify an application by a creditor for a receiver,[16] certainly not if the corporation is solvent,[17] or is a going concern running harmoniously and with its whole machinery intact, even though there is an allegation of insolvency,[18] and even though, under such circumstances, other creditors may be proceeding to collect their claims through the ordinary course of judgments and execution.[19]

c. Simple Contract and Judgment Creditors — (i) *In General.* The mere fact that a plaintiff is a creditor is no reason for the appointment of a receiver, as his remedy at law is adequate.[20] A simple contract creditor without any interest in or lien upon the property, generally speaking, has no right to the aid of a court of equity to take charge of assets of a corporation for the purpose

for several years failed to keep accounts of its business, and finally transferred the business and property to a corporation as trustee, whose president was a surety on the bond of the defaulting treasurer of the building association, the appointment of a special receiver was within the discretion of the trial court. Lamp *v.* Homestead Bldg. Assoc., 62 W. Va. 56, 57 S. E. 249.

Appointment as ultimate relief.— On the other hand it is held that a statute authorizing the appointment of a receiver when a corporation is insolvent or in imminent danger of insolvency does not make such insolvency or danger thereof a cause of action and does not entitle a stock-holder to the appointment of a receiver if he does not show a cause of action against the corporation independently of the receivership as well as that the corporation is insolvent or in imminent danger thereof and that his interest as such stock-holder requires the appointment to be made. People's Inv. Co. *v.* Crawford, (Tex. Civ. App. 1898) 45 S. W. 738. See also Murray *v.* Los Angeles County Super. Ct., 129 Cal. 628, 62 Pac. 191; *In re* French Bank Case, 53 Cal. 495, which cases, in affirming the doctrine that the winding up of a corporation at the suit of an individual must be authorized by statute, and that the appointment at the suit of an individual is tantamount to a dissolution, and that the statute authorizing the appointment of a receiver in the case of an insolvent corporation does not authorize the dissolution of a corporation at the suit of a private party, would seem to be in accord with and to go no further than People's Inv. Co. *v.* Crawford, *supra*. And see, generally, the cases cited *supra*, II, C, 1.

Appointment necessary to secure ample justice.— Under a statute in Indiana which authorized the appointment of a receiver whenever it was necessary to secure ample justice to the parties, it was held that a receiver of a corporation might be appointed in a suit by a stock-holder, upon the ground that the directors had allowed the property to become unproductive. Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487.

15. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194.

Condemnation and sale of property.— Ordinarily a creditor's interest is best served by the condemnation and sale of his debtor's property and its appropriation to the payment of his claims. This at least is the only legal ground upon which creditors of a private business corporation can ask that property be taken from the possession of its owner and placed in the hands of a receiver. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522, holding further that the creditors of such a corporation cannot invoke the power of a chancery court to remove a trustee to whom the corporation has conveyed its assets for the benefit of its creditors, and to supplant him with a receiver for the purpose of indefinitely continuing the business until the creditors are paid out of the income, and not merely for the purpose of holding the assets *pendente lite* for the removal of the trustee.

16. Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898. See also Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694.

17. Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898, where it is said that if a creditor of a solvent concern which has purposely refused to sell its property at prevailing prices and thus meet its obligations chooses to proceed by judgment and execution, he ought not to be stayed at the suit of another creditor merely because defendant concern has not the cash to meet its obligations; that if such were the case, a real estate corporation, with holdings worth millions, and with debts paltry in amount as compared to its holdings, could be placed in the hands of a receiver.

18. Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542.

19. Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542; Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898.

20. Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528. See also, generally, *supra*, II, B, 4.

of applying them to the payment of its debts until it appears that he has exhausted his remedies at law, chief among which is the recovery of a judgment at law and a return of an execution on the same unsatisfied in whole or in part,[21] and where the corporation itself does not consent to such appointment.[22] And a receiver should not be appointed at the instance of such a party merely to prevent the corporation from disposing of its unencumbered property and upon the theory that such conduct will put it beyond its power to resort to such property to satisfy the judgment which is sought upon an unsecured debt.[23]

(II) *INSOLVENCY*[24] — (A) *In General.* In the absence of statute a receiver cannot be appointed for a corporation at the suit of creditors holding mere legal claims not reduced to judgment or secured by any direct lien merely upon the

Enforcement of stock-holders' liability see CORPORATION, 10 Cyc. 730 *et seq.*

21. *Alabama.*—Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

Minnesota.— Klee *v.* E. H. Steele Co., 60 Minn. 355, 62 N. W. 399.

Nebraska.— Mann *v.* German-American Inv. Co., 70 Nebr. 454, 97 N. W. 600.

New York.— Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 43 Hun 546; Galwey *v.* U. S. Steam Sugar Refining Co., 36 Barb. 256 (under the statute, in a case not falling within other statutory provisions permitting such appointment); Dambman *v.* Empire Mill, 12 Barb. 241.

Ohio.— North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185.

Tennessee.— Slover *v.* Coal Creek Coal Co., 113 Tenn. 421, 82 S. W. 1131, 106 Am. St. Rep. 851, 68 L. R. A. 852, holding that power of the court cannot be invoked in behalf of a person suing in tort to the end that the property may be held and managed by a receiver to await the decision of other actions growing out of the same occurrence which gave rise to complainant's claim, to prevent waste of the corporate property in the meantime with a view of having it ready to be applied in satisfaction of such judgment as may be obtained in the actions at law.

Texas.— Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898.

Wisconsin.— Hinckley *v.* Pfister, 83 Wis. 64, 53 N. W. 21.

United States.— Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775.

See also, generally, *supra*, II, B, 7, c.

Judgment creditors.— The usual remedy afforded creditors of corporations having judgments, and return of "No property found," is to apply to the chancellor for a receiver, who shall, under direction of the court, take charge of the property, and collect, by suit or otherwise, the assets of the corporation. Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57, receiver in suit by judgment creditor on behalf of himself and all other creditors to collect money due from stock-holders for subscription. See also Efird *v.* Piedmont Land Imp., etc., Co., 55 S. C. 78, 32 S. E. 758, 897. And for collection of subscriptions to stock generally see CORPORATIONS, 10 Cyc. 653 *et seq.*

Nulla bona return is not necessary where the facts show that the suing out of an execution would be an idle ceremony causing useless expense. Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694.

Application in action after judgment.— Under a statute in Kansas, a judgment creditor of an insolvent corporation, after the return of execution unsatisfied, was entitled to apply in the original action for a receiver and the remedy was preserved for the benefit of a plaintiff in an action pending at the time of the repeal of the statute. Consolidated Barb Wire Co. *v.* Stevenson, 71 Kan. 64, 79 Pac. 1085.

Mismanagement.— In the absence of allegation of fraud or concealment, the fact that a corporation's affairs have been improperly managed, although a ground for complaint by its stock-holders, furnishes no reason for equitable interference, and the appointment of a receiver, at the instance of general creditors who have not reduced their claims to judgment. Dodge *v.* Pyrolusite Manganese Co., 69 Ga. 665.

22. Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775.

The corporation may waive the objection that the complainants are simple contract creditors (*In re* Metropolitan R. Co., 208 U. S. 90, 28 S. Ct. 219, 52 L. ed. 403; Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Grand Trunk R. Co. *v.* Central Vermont R. Co., 85 Fed. 87), as by not objecting and acquiescing (Brown *v.* Lake Superior Iron Co., 134 U. S. 530, 10 S. Ct. 604, 33 L. ed. 1021); and the decree appointing a receiver will not be set aside on motion of a creditor whose judgment was entered subsequent to the appointment, because the creditor applying for the appointment had not had an execution issued and returned unsatisfied, the corporation having made no objection (Enos *v.* New York, etc., R. Co., 103 Fed. 47).

23. International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59; Young *v.* Rutan, 69 Ill. App. 513; Pond *v.* Framingham, etc., R. Co., 130 Mass. 194; Adee *v.* Bigler, 81 N. Y. 349.

24. **No dissolution by appointment** see CORPORATIONS, 10 Cyc. 1297.

ground that the corporation is insolvent,[25] nor will an allegation of fraud obviate the objection which is raised by this rule.[26] The rule is enforced in the federal courts notwithstanding a different practice may be authorized by the state statute.[27]

(B) *Qualifications and Exceptions* — (1) In General. The general rule that a creditor of a corporation will not be entitled to a receiver merely on the ground of insolvency or where he has not reduced his claim to a judgment and procured a return of execution *nulla bona*[28] is subject to exceptions, however. Thus it has been held that where the assets of an insolvent corporation which a creditor is entitled to have applied in satisfaction of his demands will probably be lost or fraudulently disposed of by improvident or corrupt officers and the creditor has no adequate remedy at law, the order will be made.[29] So where liability is admitted and defendant had executed a mortgage to secure its debts, including that of the complainant, the conditions of the rule of equity jurisdiction requiring an acknowledged debt or one established by judgment and an interest in or lien upon the property are sufficiently complied with.[30] And a bill charging violation of trust, conspiracy, and fraud for the purpose of despoiling defendant, and dissipation and concealment of its assets, does not come within the rule requiring judgment and execution returned unsatisfied.[31]

(2) Under Statute Making Insolvency Ground For Appointment. Where the statute declares that a receiver may be appointed for a corporation which is insolvent, the appointment may be justified at the instance of the general creditor without judgment, no other conditions than those prescribed by the statute being necessary,[32] and the doctrine that where there is a complete and adequate remedy at law a receiver should not be appointed does not apply.[33]

5. Insolvent, Dissolved, or Abandoned Corporation — a. Insolvency in General. The appointment of a receiver does not necessarily follow upon the insolvency of a corporation and will not be made unless it is also shown that loss will ensue to the parties in interest if the persons or officers in the present control and management of the affairs are not superseded.[34] And it has been laid down as a general rule that insolvency alone will not authorize the appointment of a receiver of a corporation where such condition has not been brought about by

25. *California.*— Smith *v.* Los Angeles County Super. Ct., 97 Cal. 348, 32 Pac. 322; *In re* French Bank Case, 53 Cal. 495.

Massachusetts.—Pond *v.* Framingham, etc., R. Co., 130 Mass. 194.

Missouri.— Brown *v.* Home Sav. Bank, 5 Mo. App. 1.

New York.— Adee *v.* Bigler, 81 N. Y. 349.

Texas.—San Antonio, etc., R. Co. *v.* Davis, (Civ. App. 1895) 30 S. W. 693.

United States.— Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113; Jones *v.* Mutual Fidelity Co., 123 Fed. 506.

See also, generally, Creditors' Suits, 12 Cyc. 6 *et seq.*

26. Adee *v.* Bigler, 81 N. Y. 349.

27. Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113.

28. See *supra*, II, B, 7, c; II, C, 4, c, (I).

29. Kentucky Racing, etc., Assoc. *v.* Galbreaith, 117 Ky. 66, 77 S. W. 371, 25 Ky. L. Rep. 1212.

30. Tompkins Co. *v.* Catawba Mills, 82 Fed. 780.

31. Merchants' Nat. Bank *v.* Chattanooga Constr. Co., 53 Fed. 314.

32. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26; Oil City Iron Works *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987; Davis *v.* Edwards, 41 Wash. 480, 84 Pac. 22; New York Nat. Exch. Bank *v.* Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905; Oleson *v.* Tacoma Bank, 15 Wash. 148, 45 Pac. 734, holding that the jurisdiction to make such appointment cannot be evaded by a voluntary assignment. See also Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207. And see *infra*, II, C, 5, e, note 66.

33. Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207.

34. Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542; McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. 262; Tysen *v.* Wabash R. Co., 24 Fed. Cas. No. 14,315, 8 Biss. 247; Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114.

Where there may be equitable rights sufficient to satisfy the debts it is held that a receiver cannot be appointed on the allegation that the corporation is insolvent or that it has no property subject to levy. Fox River Paper Co. *v.* Snider Paper Co., 8 Ohio S. & C. Pl. Dec. 671.

the fraud or mismanagement of the officers or directors of such a character as to create a clear necessity for interference in order to protect the interests of the parties or unless there is other apparent necessity for such a step in order to preserve the assets, and this rule is applied in suits by minority stockholders,[35] as well as in suits by creditors.[36] The application for a receiver of an insolvent corporation, although charging misapplication of the assets, is addressed to the discretion of the court;[37] but wherever such condition exists and renders a receivership necessary for the protection of the assets and rights of the parties, the order will be granted,[38] at the suit of any party whose interest entitles him to proceed in a court of equity.[39] So a receiver may be appointed at the suit of lien creditors where it appears that the corporation cannot go on, that it is important to make the property produce its value as a going concern,[40] or where the corporation becoming insolvent makes default in the payment of the principal and interest of its bonds secured by a mortgage and the mortgage property is an inadequate security,[41] or such corporation is wasting its mortgaged property,[42] especially in the case of quasi-public corporations where it is necessary to preserve the property by a continuance of the operation of the business of the concern or by such continuance to secure the income for the satisfaction of the particular claims,[43] especially where the only fund for

35. Denike *v.* New York, etc., Lime, etc., Co., 80 N. Y. 599; Worth Mfg. Co. *v.* Bingham, 116 Fed. 785, 54 C. C. A. 119 (where it was said that if the allegation of insolvency were true the complainant had no further interest in the matter); Lawrence Iron-Works *v.* Rockbridge, 47 Fed. 755.

Controlling question.—Whether or not a receiver will be appointed because of the insolvency of a corporation depends upon whether, by reason of the insolvency, the assets are in danger of being lost, injured, or impaired, under a general statute providing for the appointment of receivers in such emergency. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

36. Romare *v.* Broken Arrow Coal, etc., Co., 114 Fed. 194; Onondaga Trust, etc., Co. *v.* Spartenburg Water Works, 91 Fed. 324, as to a private corporation. But see *infra*, note 43.

37. The Anvil *v.* Savery, 116 Ga. 321, 42 S. E. 495.

38. The Anvil *v.* Savery, 116 Ga. 321, 42 S. E. 495, holding that upon a finding that there was no dishonesty in any of the transactions of the officers of the corporation but with full knowledge of the insolvency they had paid some claims in full and refused to pay others holding claims of equal rank, the court was justified in appointing a receiver.

39. M. V. Monarch Co. *v.* Hardinsburg Bank, 103 Ky. 276, 33 S. W. 956, 46 S. W. 700, 20 Ky. L. Rep. 92 (suit by a judgment creditor with a *nulla bona* return where the appointment was made because the corporation was fraudulently diverting its assets and the owner of the capital stock and manager was disposing of the assets to his own use and resorting to various schemes to defeat the creditors); Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514 (suit of lessor with lien for royalty reserved in the lease in which the appointment was made where creditors of lessee had proceeded by way of attachment and were proceeding to seize and scatter and otherwise destroy the property).

40. Grainger *v.* Old Kentucky Paper Co., 105 Ky. 683, 49 S. W. 477, 20 Ky. L. Rep. 1491; Pacific Northwest Packing Co. *v.* Allen, 109 Fed. 515, 48 C. C. A. 521, where it was held that the appointment at the suit of the mortgagee of the entire plant of a corporation was justified where it appeared that some of the numerous creditors had commenced actions against the corporation and that it was to the interest of all the parties that the particular business of the corporation should be continued through the canning season).

41. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

In foreclosure proceedings generally see MORTGAGES, 27 Cyc. 1621.

Railroad receiverships generally see RAILROADS, 33 Cyc. 612

42. Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691, where a corporation, notoriously insolvent, was wasting its property which had been mortgaged, and the appointment of a receiver to apply the proceeds solely to the payment of current expenses and claims of parties for whose protection the property was taken into the custody of the court was justified.

43. Taylor *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 451 (where it would have been disastrous to suspend business and the trustee under the mortgage refused to act and take charge); Putnam *v.* Jacksonville, etc., R. Co., 61 Fed. 440 (where, under a bill to foreclose such a mortgage, the appointment was held proper where it appeared that the company had made default in the payment of taxes; that, in certain counties, it suffered its property to be sold for such taxes; that it was insolvent, and unable to pay its present and accruing in-

the payment of the debt is in the earnings of the concern and these are being misapplied,[44] or where a valuable land grant is about to lapse,[45] or the corporate franchise itself is about to be forfeited and the appointment of a receiver will result in saving the life of the corporation and thus secure the corporate assets.[46]

b. Under Statute.[47] Under various statutes provision is made for the appointment of a receiver of a corporation which is insolvent or is in imminent danger of insolvency, or is dissolved or has forfeited its corporate rights, under which the

debtedness; that it had failed to pay wages and operating expenses, and other obligations, amounting to more than two hundred thousand dollars; that complainant, on discovering such facts, applied to the trustee to take action; and that the trustee had failed to do so); Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316 (where the trust deed covered income and profits and authorized the trustee to take possession in default of payment of interest and it was held that such default gave the bondholders as matter of right, power to invoke the aid of the court in executing the trust and justified the appointment of a receiver upon the application of the trustee). It has been held, however, that the appointment should not be made on default in payment of interest except where it is shown that a loss will happen if the property remains in the hands of its present owners, or in the case of fraud, incompetency, etc. (Blair *v.* St. Louis, etc., R. Co., 20 Fed. 348), even though the mortgage covers the income and gives the trustee immediate possession on default (Union Trust Co. *v.* St. Louis, etc., R. Co., 24 Fed. Cas. No. 14,402, 4 Dill. 114). But in Van Benthuysen *v.* Central New England, etc., R. Co., 17 N. Y. Suppl. 709, it is held that the mere fact that the company is properly managed is no reason why a receiver should not be appointed.

Terms of mortgage controlling.— Where, however, by the express terms of the mortgage the complainant is given no ground to ask to have possession unless default in the payment of interest has been caused by some misappropriation or mismanagement on the part of the corporation and not by a failure of business without its fault, a receiver will not be appointed in the absence of a showing of such contingencies as those required or unless it is shown that there has been such corporate misconduct injurious to the bondholders as demonstrates the necessity of taking the property out of the hands of the corporation for the protection of their rights. Stewart *v.* Chesapeake, etc., Canala Co., 5 Fed. 149, 4 Hughes 47.

At suit of judgment creditor.— In Sage *v.* Memphis, etc., R. Co., 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694, confining the decision to the particular facts and expressly refusing to say that one or more judgment creditors of a railroad company may, as a matter of right, require the corporate property to be put in the hands of a receiver merely because the company fails or refuses to pay its debts, it was held that a bill by a judgment creditor of such a company showing that the property was heavily mortgaged, that if plaintiff should attempt to enforce payment of his debt by seizure and sale upon execution there would be no bidders at more than a nominal amount, while, if the property were placed in the hands of a receiver and carefully used in the ordinary course of the corporate business, there would be a large surplus each year for the payment of plaintiff's debt, contains sufficient to give the court jurisdiction to make the appointment. See also Union Trust Co. *v.* Illinois Midland Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

44. Kelly *v.* Alabama, etc., R. Co., 58 Ala. 489.

45. Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,706, 2 Dill. 448, where a receiver was appointed at the instance of bondholders to prevent a valuable land grant in favor of the corporation from lapsing, which land was the bondholders' principal security, with power to borrow money to complete the unfinished portions of the company's road.

46. Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 511, 73 N. W. 839 (under the statute which authorized the appointment of receivers on the petition of a person having an interest in the property which is in danger of being lost or impaired, a receiver was appointed where it appeared that by a failure to complete certain work in which the public was largely interested, under a charter granted by congress, the corporate franchise would be forfeited, and that the corporation itself could not complete the work within the time limited, the creditors of the corporation, most of whom had liens, consenting to such appointment); Union St. R. Co. *v.* Saginaw, 115 Mich. 300, 73 N. W. 243 (where under a condition which gave a city the power to enforce a forfeiture of a street railway franchise (failure of the corporation to pay a tax which the company confessed its inability to pay), it was held that where a mortgagee stood ready to advance the funds in case a receiver should be appointed with power to borrow money, the appointment should be made upon the application of such mortgagee, not as a foreclosure of the mortgage and giving the mortgagee possession before the expiration of the redemption period, but as a means of preserving the property for the benefit of all parties concerned).

47. **Winding up corporations** generally see CORPORATIONS, 10 Cyc. 1305 *et seq.*

appointment may be made for the purpose of taking and holding corporate property *pendente lite*,[48] or for the purpose of winding up the affairs of the corporation.[49]

48. See the statutes of the several states; and the following cases: Hall *v.* Nieukirk, 12 Ida. 33, 85 Pac. 485; Gibbs *v.* Morgan, 9 Ida. 100, 72 Pac. 733; Supreme Sitting O. I. H. *v.* Baker, 134 Ind. 293, 32 N. E. 1128, 20 L. R. A. 210.

49. See the statutes of the several states; and the following cases:

Connecticut.— Stedman *v.* American Mut. L. Ins. Co., 45 Conn. 377, holding that a statute authorizing the appointment of a receiver for an insurance company if its assets are less than three fourths of its liabilities authorizes the appointment of a receiver for a corporation within the class designated which had assets exceeding three fourths of its liabilities, but transferred them to another corporation, with the permission of the legislature, the policy-holders not assenting.

Georgia.— Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217; Augusta Nat. Bank *v.* Richmond Factory, 91 Ga. 284, 18 S. E. 160.

Louisiana.— Saxon *v.* Southwestern Brick, etc., Mfg. Co., 113 La. 637, 37 So. 540, under a provision for the appointment of a receiver at the instance of a creditor "when the board of directors of the corporation shall have declared by resolution that the corporation is unable to meet its obligations as they mature and that a receiver is necessary to preserve and administer its assets for the benefit of all concerned," the court holding that a resolution that, among other things, "a receiver be appointed," is not sufficient under the requirement of a resolution that a receiver is necessary to "preserve and administer" the assets, since the board of directors had no authority either to appoint a receiver or to direct such appointment by the court.

New Jersey.— Under the statute providing for the appointment of a receiver at the suit of a stock-holder and creditor, the exercise of the power to its full extent is held to extinguish a mere manufacturing or mercantile corporation. Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934. There must be not only insolvency but it must also appear that there is no reasonable prospect that the corporation if let alone will soon be placed by the efforts of its managers in a condition of solvency. McMullin *v.* McArthur Electric Mfg. Co., (Ch. 1907) 68 Atl. 97; Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 41 Atl. 217 [*affirmed* in 58 N. J. Eq. 579, 43 Atl. 1098]; Cook *v.* East Trenton Pottery Co., 53 N. J. Eq. 29, 30 Atl. 534; Atlantic Trust Co. *v.* Consolidated Electric Storage Co., *supra*. The order will not be granted unless it appears that because of the insolvency the corporation cannot resume business with safety to the public and advantage to the stock-holders. Cook *v.* East Trenton Pottery Co., *supra*; Rawnsley *v.* Trenton Mut. Life, etc., Co., 9 N. J. Eq. 347. See also Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294; Parson *v.* Monroe Mfg. Co., 4 N. J. Eq. 187, in which cases the facts were held to justify the appointment. An appointment will not be made because of an expected insolvency at some future time. Edison *v.* Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195. On the other hand it is not necessary to show absolute insolvency to authorize the appointment but it will be sufficient if it appears that the corporation cannot continue its business. Wood, etc., Co. *v.* American Mach., etc., Co., (Ch. 1906) 62 Atl. 768. And an application for the appointment of a receiver of a corporation on the ground of its insolvency is not defeated by proof that the misfortunes of the corporation are due to the wrongful conduct of complainant. McMullin *v.* McArthur Electric Mfg. Co., (Ch. 1907) 68 Atl. 97.

New York.— Zeltner *v.* Henry Zeltner Brewing Co., 79 N. Y. App. Div. 136, 80 N. Y. Suppl. 338 [*affirmed* in 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574].

Ohio.— Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293.

South Carolina.—Miller *v.* Southern Land, etc., Co., 53 S. C. 364, 31 S. E. 281, where it was held that under such a statute the appointment was improperly made where it appeared that the assets of the corporation were three times its stated indebtedness, although it was also indebted to its officers in an amount not shown, it appearing that so far from its property being seriously depreciated large additions had recently been made to it, and it not appearing that it had in any way endeavored to dispose of its property with intent to hinder, delay, or defraud its creditors; that under the definition adopted in that state insolvency is that condition of the debtor when his entire property and assets are insufficient to pay his debts.

Texas.— Ripy *v.* Redwater Lumber Co., (Civ. App. 1907) 106 S. W. 474.

Remedy by lien creditor in federal court.— The remedy given by the statute in New Jersey was held to be enforceable by a mortgage lien creditor and stock-holder in the federal court, the court otherwise having jurisdiction of the case by reason of diverse citizenship and the value in dispute. U. S. Shipbuilding Co. *v.* Conklin, 126 Fed. 132, 60 C. C. A. 680.

Effect of prior suit to wind up.—After the passage of a statute authorizing the circuit judges to appoint receivers of the assets of insolvent banks of the state, the president and directors of a bank filed a bill to wind up its affairs, and obtained orders calling on creditors to present their claims, "the President and Cashier acting as Receivers to this end," and it was held that the power of the circuit judges to appoint a receiver

c. Upon Dissolution or Winding Up. Where a corporation has voluntarily dissolved and it is without officers to manage its affairs and preserve its effects, a receiver should be appointed.[50] But a receiver is not a common-law officer and his functions have no relation to the title to the exercise of a franchise, which is the sole question raised upon quo warranto to oust a corporation of its corporate franchise. Therefore no authority exists for the appointment of a receiver upon a judgment of ouster in such a proceeding unless it can be found in express statutory provisions,[51] and the state has no such interest as will sustain an application for such appointment either as a punishment of the illegal use of the corporate franchises or to see that the assets are properly distributed,[52] although after such judgment of ouster and an abandonment of the corporate assets by the directors and officers, a receiver may properly be appointed upon the application of a stock-holder or creditor in the court having jurisdiction under the statute,[53] to preserve and distribute the assets among creditors and stock-holders of the corporation.[54] On the other hand the mere dissolution of a corporation by resolution or involuntarily as by expiration of its charter through efflux of time or otherwise, its property or effects being in the custody and its affairs under the management of persons designated by statute or by its charter, is not of itself a reason for the appointment of a receiver in the absence of facts which require the appointment under the general practice of equity jurisprudence.[55]

was not suspended by the bill, and the receiver was entitled to possession of the assets. Donaldson *v.* Johnson, 3 S. C. 216. See also Morgan *v.* Quo Vadis Amusement Co., 45 Misc. (N. Y.) 130, 91 N. Y. Suppl. 882.

Who is a creditor.— The holder of unpaid coupons of bonds secured by a mortgage given by defendant corporation is a creditor of the corporation for the purpose of prosecuting a suit to have defendant declared insolvent and for the appointment of a receiver. Reinhardt *v.* Inter-State Tel. Co., 71 N. J. Eq. 70, 63 Atl. 1097.

50. Dobson *v.* Simonton, 78 N. C. 63.

51. Fraternal Guardian's Estate, 159 Pa. St. 603, 28 Atl. 479; Com. *v.* Order of Vesta, 156 Pa. St. 531, 27 Atl. 14.

52. Havemeyer *v.* San Francisco Super. Ct., 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627 [*distinguishing* People *v.* Washington Ice Co., 18 Abb. Pr. (N. Y.) 382 on the terms of the New York statute], holding that, under the statute, on an involuntary as well as a voluntary dissolution, the directors are the proper persons to wind up the corporation's affairs, unless a receiver is appointed on the application of a creditor or stock-holder.

53. Com. *v.* Order of Vesta, 156 Pa. St. 531, 27 Atl. 14, holding that under the statute, no power being conferred upon the county court to appoint a receiver in quo warranto, but it being provided that upon dissolution by judgment of ouster the supreme court or any judge thereof sitting at nisi prius may, upon the petition of any stock-holder or creditor, appoint a receiver, the appointment can be made in the supreme court only, without regard to the court which rendered the judgment of ouster, and upon the petition of a stock-holder or creditor, and that in no event did the county court have such jurisdiction.

54. Midland Co. *v.* Anderson, 63 Ill. App. 51.

Suit to restrain exercise of corporate rights. — In a suit by the state to restrain an organization from exercising corporate rights without authority of law, a receiver cannot be appointed under a code provision which authorizes an appointment of a receiver where property, etc., is in danger of loss, "or where a corporation has been dissolved or is insolvent or has forfeited its corporate rights," the state having no right or interest whatever to or in the property of the defendant in such a case. State *v.* Spokane County Super. Ct., 15 Wash. 668, 45 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111. See also State *v.* New Orleans Debenture Redemption Co., 107 La. 562, 32 So. 102.

By statute it is sometimes provided that the attorney-general on behalf of the people may maintain an action against one or more directors, trustees, etc., of the corporation to procure a judgment to compel an accounting for their official misconduct or mismanagement and in such a proceeding, under another provision permitting the appointment of a receiver where there are no officers competent to manage the affairs of the concern, sufficient evidence of mismanagement will justify the appointment of a receiver. People *v.* Bruff, 9 Abb. N. Cas. (N. Y.) 153.

55. Anderson *v.* Buckley, 126 Ala. 623, 28 So. 729; Weatherly *v.* Capital City Water Co., 115 Ala. 156, 22 So. 140; Russell *v.* Citizens' Ice Co., 118 La. 442, 43 So. 44; New Foundland R. Constr. Co. *v.* Schack, 40 N. J. Eq. 222, 1 Atl. 23; North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185.

Statute relating to voluntary dissolution. — The provision for the winding up of the affairs of a corporation by the trustees thereof under the statute in Washington was

d. Objects of Corporation Becoming Impossible of Attainment — (I) *In General.* The rule against the interference by a court of equity with the property of the corporation, for the purpose of winding up its affairs, is stated with this exception: In cases of extreme necessity, as where the corporate purposes have become impossible of attainment,[56] or the corporate property has been abandoned, or there are no officers to take charge of and conduct the corporate affairs.[57]

(II) *Cessation of Business and Abandonment of Corporate Functions* — (A) *In General.* A mere cessation of the business of the corporation will not alone justify the appointment of a receiver of the remaining assets.[58] On the other hand a receiver may be appointed where the corporation has become insolvent and has ceased to exercise its corporate functions and such appointment is necessary to protect the assets and properly administer them for the parties entitled.[59] And in a creditor's suit against a corporation which has ceased to do

held to be confined to voluntary dissolutions and not operate against the appointment of a receiver at the suit of stock-holders when there has been an involuntary dissolution. Conlan *v.* Oudin, 49 Wash. 240, 94 Pac. 1074.

Where the liquidating officers are violating their trust by continuing the business of the corporation a suit for an accounting and a receiver is maintainable and a receiver will be appointed. Matthews *v.* Allendale Bank, 60 S. C. 183, 38 S. E. 437.

Under a statute giving the court no discretion as where a stock-holder is given the right to apply for the winding up of the company's affairs and the appointment of a receiver in the event that the "ordinary and lawful business" of the corporation has been suspended for one year, such relief cannot be refused, although a majority of the stock-holders desires the company's affairs to be closed up under the direction of a committee appointed by the stock-holders, and although it would probably be for the benefit of all that such a course should be pursued. Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294.

Under a statute for winding up insolvent corporations at the suit of stock-holders or creditors, it is held that the appointment of a receiver does not follow as a matter of course upon a decree declaring the corporation insolvent, but rests in the discretion of the chancellor. It has been said that generally receivers will be appointed unless it appears to be for the interest of the creditors and stock-holders to leave the directors in the management of the corporate affairs (Nichols *v.* Perry Patent Arms Co., 11 N. J. Eq. 126), while on the other hand the court has refused to take the management out of the hands of the directors where it did not appear to be necessary (City Pottery Co. *v.* Yates, 37 N. J. Eq. 543; Rawnsley *v.* Trenton Mut. L., etc., Ins. Co., 9 N. J. Eq. 347, where it appeared that the insolvency was not brought about through the acts of the directors and they had been guilty of no fraud; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173).

56. Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Porter *v.* Industrial Information Co., 5 Misc. (N. Y.) 262, 25 N. Y. Suppl. 328; People's Inv. Co. *v.* Crawford, (Tex. Civ. App. 1898) 45 S. W. 738.

Neglect of officers to wind up.— Where it becomes the duty of the company's agent to put an end to its operations and to wind up its affairs, the continuance of operations in violation of the charter, or a refusal to make distribution of the assets, is held to give any shareholder the right to the assistance of the court by the appointment of a receiver, independently of the statute regulating the winding up of corporations, the shareholder's remedy in such an emergency not being a technical dissolution in the sense of a proceeding whereby the franchises are extinguished. Porter *v.* Industrial Information Co., 5 Misc. (N. Y.) 262, 25 N. Y. Suppl. 328, where it was held upon the principles stated that where a corporation is insolvent and the directors refuse to institute proceedings for distribution and there is danger that the assets will be absorbed by judgments, the court has inherent power to appoint a receiver on the application of the stock-holders. But see Galwey *v.* U. S. Steam Sugar Refining Co., 36 Barb. (N. Y.) 256.

Probable right and danger to property.— So under a general statute providing for the appointment of a receiver on the petition of either party to an action wherein he shows he has a probable right to or interest in property which is the subject of the controversy, and that such property or its rents and profits are in danger of being lost or materially injured or impaired, it is held that a receiver may be appointed at the suit of a stock-holder of a bank which is in an insolvent condition, the assets of which are scattered, which cannot maintain its credit, and upon which a run is threatened. Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

57. Baker *v.* Louisiana Portable R. Co., 34 La. Ann. 754; De Puy *v.* Baltimore City Transp., etc., Co., 82 Md. 408, 33 Atl. 889. 34 Atl. 910.

58. Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867; Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53.

59. Ralph *v.* Shiawassee Cir. Judge, 100

business and has abandoned its corporate functions and has no officers to manage its affairs, a receiver will be appointed.[60] Where the complainant's cause is in substance an appeal to the court of equity to secure the enforcement of a contractual right which defendant holds in what may be regarded as a fiduciary capacity and which it collusively refuses to enforce for the benefit of those who are equitably entitled to claim its benefits, the court may appoint a receiver.[61]

(B) *Abandonment of or Dissensions Practically Destroying Corporate Functions.* Where there are no directors and none can be elected, or where there is such dissension among the directors that the functions of the corporation cannot be discharged, and its business is thereby impaired, making the intervention of a court of equity necessary, a receiver may be appointed pending a proper adjustment of the conditions under which the corporate affairs may be regularly administered by its ordinary officers, or for the protection of the assets for those entitled to them, at the suit of a stock-holder,[62] or at the suit of a creditor who is in a

Mich. 164, 58 N. W. 837; Greenleaf *v.* Land, etc., Co., 146 N. C. 505, 60 S. E. 424 (at suit of stock-holder); Powers *v.* C. H. Hamilton Paper Co., 60 Wis. 23, 18 N. W. 20 (where the corporation has made an assignment which is attacked as fraudulent); Consolidated Tank-Line Co. *v.* Kansas City Varnish Co., 43 Fed. 204 (where the corporation had made a conveyance of all its property for the benefit of certain creditors and unpreferred creditors filed a bill to enjoin further proceedings under the deed); Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. 849, 4 Hughes 415 (where a life insurance company made an assignment of all its assets, it being held that insolvency and an assignment of all the effects of such corporation work final and irremedial death to its corporate existence and it is incapable of taking care of its own affairs, the trustee in this case having confessed his inability to administer the property in accordance with the deed by taking steps to obtain the aid of a court of chancery). See also Christian *v.* Michigan Debenture Co., 134 Mich. 171, 96 N. W. 22.

60. Brown *v.* Union Ins. Co., 3 La. Ann. 177; Youree *v.* Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175; Conro *v.* Gray, 4 How. Pr. (N. Y.) 166, where the case was brought within the statute providing that a corporation shall be dissolved by the suspension of its business for one year, there being no persons authorized to take charge of the property and the president by assigning the property being guilty of fraud or breach of trust. See also Finney *v.* Bennett, 27 Gratt. (Va.) 365.

In suit by mortgage creditor.— Fernald *v.* Spokane, etc., Tel., etc., Co., 31 Wash. 672, 72 Pac. 462, where the appellate court refused to interfere with an appointment in an action by a mortgage creditor of a telephone company upon allegations that the corporation's entire business was about to be discontinued; that its entire tangible property consisting of miles of telephone wires, polls, etc., had been left to go to ruin; that the whole concern had been wrecked and no effort made to care for its property, attend to its business or provide for the payment of the interest or principal upon plaintiff's mortgage, and that the board of trustees could not hold a legal meeting or agree on the management of its affairs.

As against purchaser of corporate property. — The fact that a corporation is defunct is not material where it is not in possession and has long since lost its right to possess the property which is in the possession of a purchaser under a trust deed, there being no claim that the trustee in the deed or the beneficiaries were insolvent or that the trust deed was fraudulent or that there was any permitted or contemplated waste. Pullis *v.* Pullis Bros. Iron Co., 157 Mo. 565, 57 S. W. 1095.

61. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758, where defendant corporation had stripped itself of all tangible property; had no officers to conduct its affairs, having transferred all its assets to a foreign corporation under an agreement that the latter would pay all of its liabilities and defendant corporation refused to enforce the contract against the foreign corporation which was solvent, and it was held that the general creditors occupied the position stated in the text as none of them could maintain a suit at law against the foreign corporation upon its promise, and a receiver was appointed to wind up the affairs of the corporation by collecting its assets and distributing them under the provisions of the decree granting such relief.

62. Alabama Coal, etc., Co. *v.* Shackelford, 137 Ala. 224, 34 So. 833, 97 Am. St. Rep. 23; Jasper Land Co. *v.* Wallis, 123 Ala. 652, 26 So. 659; Sternberg *v.* Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762 (holding that where by reason of dissensions among directors there is a deadlock in the management of its business, a receiver *pendente lite* should be appointed); Edison *v.* Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195; Archer *v.* American Water Works Co., 50 N. J. Eq. 33, 24 Atl. 508 (recognizing the propriety of an appointment in such cases); Lawrence *v.* Greenwich F. Ins. Co., 1 Paige (N. Y.) 587 (where the owners of the majority of the stock neglected to elect officers and it appeared that no one was authorized

position to invoke the jurisdiction of a court of equity.[63] So where the corporation is insolvent and has been abandoned by its officers and directors, and the complainant shows a right to an accounting for misapplication of the corporate assets, the court may appoint a receiver.[64]

e. Under the Trust Fund Doctrine. Under the trust fund doctrine,[65] when, through insolvency and the fraudulent misapplication of its assets by its officers, the corporation is no longer able to proceed with its business, its property becomes the subject of an equitable lien for the benefit of creditors, and a proper case is made for the appointment of a receiver.[66]

to conduct the affairs of the corporation); Trade Auxiliary *v.* Vicker, L. R. 16 Eq. 303, 21 Wkly. Rep. 836; Featherstone *v.* Cooke, L. R. 16 Eq. 298, 21 Wkly. Rep. 835 (in which cases the court interfered by injunction and receiver to protect the property, but to continue no longer than until a governing body should be duly elected). See also Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207 (under a statute providing that a receiver may be appointed, where the property is in danger, etc., where the corporation is insolvent or in danger of insolvency, and in other cases when necessary to justice); Ward *v.* Sea Ins. Co., 7 Paige (N. Y.) 294.

Mere failure to elect new directors will not justify the appointment of a receiver at the suit of minority stock-holders, the directors in possession being legally competent to manage the corporate affairs. Alabama Coal, etc., Co. *v.* Shackelford, 137 Ala. 224, 34 So. 833, 97 Am. St. Rep. 23.

Under a statutory provision in New York for the appointment of a receiver in an action by a stock-holder to preserve assets, where there was no officer empowered to hold the same, it was held that the fact that the directors who had been held by the courts not to have been duly elected were resisting proceedings to oust them was no ground for the appointment of a receiver; nor was it sufficient ground that defendant in another action by the corporation to recover the assets which the applicant here sought to recover was resisting said action on the ground of a want of title in the officers suing. Rochester *v.* Bronson, 41 How. Pr. (N. Y.) 78. And so directors of a corporation against which an action is pending cannot, by resigning in a body, authorize the appointment of a receiver, because such resignation does not deprive the directors of their authority or release them from their obligation to care for the property until their successors are duly chosen. Zeltner *v.* Henry Zeltner Brewing Co., 79 N. Y. App. Div. 136, 80 N. Y. Suppl. 338 [*affirmed* in 174 N. Y. 247, 66 N. E. 810, 95 Am. St. Rep. 574 (*distinguishing* Smith *v.* Danzig, 64 How. Pr. (N. Y.) 320, in that such resignation was considered to justify the appointment because the law furnished no other remedy in that case where the corporation was insolvent, and its remaining property was liable to waste, this reason not applying to the principal case because of new statutory provisions relating to the voluntary dissolution of a corporation, under which a temporary receiver may be immediately appointed when the corporation is insolvent)].

Unauthorized assignment for creditors.— Where directors made an assignment for the benefit of creditors, without consulting the shareholders, and delivered the assets of the corporation to the assignee, which acts were repudiated by the shareholders and thus rendered void, and new directors and officers were elected, a receiver *pendente lite* should be appointed in a suit by shareholders to set aside the assignment and restore the assets to the corporation, the new board of directors not being lawfully elected because the shareholders irregularly deposed the old board whose term of service had not expired. Under such a condition of corporate disorganization the assets should go into the hands of a receiver until there can be elected a directorate which will lawfully represent those interested. Powers *v.* Blue Grass Bldg., etc., Assoc., 86 Fed. 705.

Extent of power limited.— This power is held to be subject to certain limitations, viz., it must be exercised with great caution and only for such time and to such an extent as may be necessary to preserve the property of the corporation and protect the rights and interests of its stock-holders. Sternberg *v.* Wolff, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. Rep. 494, 39 L. R. A. 762; Edison *v.* Edison United Phonograph Co., 52 N. J. Eq. 620, 29 Atl. 195; Fougeray *v.* Cord, 50 N. J. Eq. 756, 26 Atl. 886.

63. D. A. Tompkins Co. *v.* Catawba Mills, 82 Fed. 780.

64. Bridgeport Dev. Co. *v.* Tritsch, 110 Ala. 274, 20 So. 16. So under such circumstances of abandonment stock-holders who were about to have cast upon them the payment of the entire corporate indebtedness were held entited to maintain a bill for the appointment of a receiver, to assess the stockholders to pay debts, etc. Ford *v.* Kansas City, etc., Short Line R. Co., 52 Mo. App. 439.

65. See CORPORATIONS, 10 Cyc. 653, 1246–1250.

66. Cheney *v.* Maumee Cycle Co., 20 Ohio Cir. Ct. 19, 10 Ohio Cir. Dec. 717 (which was a suit by a judgment creditor but the general principle recognized is that it is the duty of officers and directors of a corporation which has become insolvent and ceased to prosecute the object for which it was organized to convert its property into money and apply the proceeds to the payment of its debts and that upon failure to do so a court

6. Foreign Corporation.[67] Questions of local administration should be relegated to the courts of the state or country under the laws of which the corporation is organized;[68] courts of equity have no right or authority to dissolve a foreign corporation, or to wind up its business,[69] and the only proper tribunal to grant an order to practically restrain the exercise of the ordinary business of the corporation and of its charter powers is a court of general jurisdiction in the state of corporate domicile.[70] In such cases receivers cannot be appointed outside of the domicile of the corporation.[71] A radical distinction is recognized, how-

of equity will appoint a receiver to hold the property for the benefit of creditors); Doe *v.* Northwest Coal, etc., Co., 64 Fed. 928; Belmont Nail Co. *v.* Columbia Iron, etc., Co., 46 Fed 8. See also Kentucky Racing, etc., Assoc. *v.* Galbreaith, 117 Ky. 66, 77 S. W. 371, 25 Ky. L. Rep. 1212.

Mere insolvency not sufficient.—Under this doctrine mere insolvency is not sufficient. The meaning of the rule that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors is true only in the qualified sense that after a court of equity has acquired jurisdiction of the assets in a proper proceeding such creditors have an equitable right to share in the distribution thereof and mere insolvency of the corporation does not render such assets the subject of a trust in favor of general creditors. Hollins *v.* Brierfield Coal, etc., Co., 150 U. S 371, 14 S. Ct. 127, 37 L. ed. 1113; Jones *v.* Mutual Fidelity Co., 123 Fed. 506; Doe *v.* Northwest Coal, etc., Co., 64 Fed. 928. See also North Fairmount Bldg., etc., Co. *v.* Rehn, 8 Ohio S. & C. Pl. Dec. 594, 6 Ohio N. P. 185. But assets of a corporation have been held to constitute a trust fund in a general sense where abandoned by the managers of the corporation, so that the appointment of a receiver at the suit of general creditors without judgments or liens is not so unauthorized and void as to be subject to collateral attack for want of jurisdiction. Whitney *v.* Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531.

Under insolvency statute.—Under a statute declaring that a receiver may be appointed for an insolvent corporation, it is held that the appointment cannot be made at the instance of a general creditor until that point has been reached in the corporate affairs at which the trust doctrine can be invoked. Brenton *v.* Peck, 39 Tex. Civ. App. 224, 87 S. W. 898. In Jones *v.* Mutual Fidelity Co., 123 Fed. 506, the remedy under a state statute was enforced upon the ground that it gave an equitable right and remedy wholly independent of any legal remedy, although depending upon the existence of a pecuniary legal demand, and that a distinction was to be observed between the exercise of equitable jurisdiction in aid of a legal remedy for the collection of a pecuniary legal demand and the exercise of equitable jurisdiction for the enforcement of a purely equitable right by a purely equitable remedy. See also U. S. Shipbuilding Co. *v.* Conklin, 126 Fed. 132, 60 C. C. A. 680, where, however, it was not necessary to decide the point in the last case but the complainants being lien creditors it was held that there was no objection to their seeking the remedy by injunction and the appointment of a receiver in the federal court which was given by the state statute against an insolvent corporation, other jurisdictional grounds being present in the case.

Waiver of rights of creditor.—Where the creditors of a corporation ratify an arrangement whereby a partnership succeeds to the business, assets, and liabilities of a corporation, and accept such partnership as their debtor in lieu of the corporation, they waive the right to have a receiver appointed to administer the assets of the corporation for the benefit of its creditors. Tenney *v.* Ballard, etc., Hat Co., 17 Tex. Civ. App. 144, 43 S. W. 296.

67. Ancillary receivers see *infra*, VIII, B.
Actions generally see Foreign Corporations, 19 Cyc. 1323 *et seq.*; Courts, 11 Cyc. 853.
Where corporation is in process of liquidation in state of domicile see *infra*, VIII, B.

68. See Foreign Corporations, 19 Cyc. 1236 text and note 49 *et seq.*

69. See Foreign Corporations, 19 Cyc. 1237 text and note 56.

70. See Foreign Corporations, 19 Cyc. 1237 text and notes 54 *et seq.*

71. Culver Lumber Co. *v.* Culver, 81 Ark. 102, 99 S. W. 391; Condon *v.* Mutual Reserve Fund Life Assoc., 85 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; Acken *v.* Coughlin, 103 N. Y. App. Div. 1, 92 N. Y. Suppl. 700, 34 N. Y. Civ. Proc. 200; Phillips *v.* Sonora Copper Co., 90 N. Y. App. Div. 140, 86 N. Y. Suppl. 200; Hallenberg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332; Barclay *v.* Talman, 4 Edw. (N. Y.) 128 [*affirmed* in 3 Ch. Sent. 56]; Parks *v.* U. S. Bankers' Corp., 140 Fed. 160; Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775 (holding that in a suit against the corporation and its managing officers, by a stock-holder who charges the officers with an abuse of their trust, and with wasting the earnings of the company, a receiver will not be appointed where the officers are beyond the jurisdiction of the court, and cannot be brought to account, nor be compelled to restore ill-gotten gains, and where the main purpose of the suit is the protection of complainant's interest); Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776. And see

ever, between the appointment of a receiver of a foreign corporation and the appointment of a receiver merely of the property of the corporation to preserve it from unlawful disposition, waste, or material injury; authority to make the appointment is upheld in the latter case,[72] as a part of the general power of a court of equity in the particular litigation of which it has jurisdiction; [73] and under this rule, in a suit properly brought by stock-holders or creditors to enforce a right of the corporation against directors and officers who are in default, if a fund belonging to the corporation is in the state of the forum and is in danger of loss to the creditors and stock-holders, the court may appoint a receiver thereof pending litigation.[74] But the object of appointing a receiver for a foreign cor-

FOREIGN CORPORATIONS, 19 Cyc. 1236 notes 49 *et seq.*

Insolvency.— Thus in a suit in which it did not appear that the corporation was insolvent and there seemed to be no creditors, but which involved a controversy between stock-holders as to the management of the internal affairs of the corporation, a receiver could not be appointed. Parks *v.* U. S. Bankers' Corp., 140 Fed. 160. But where the proceeding is one which requires interference with the internal management of the corporation itself, a mere allegation of insolvency will not justify the appointment of a receiver, where the corporation has not been declared insolvent by the courts of the state of its domicile. Smythe *v.* Empire Rubber Co., 2 N. J. L. J. 154. And so where the corporation made an assignment for creditors, but its charter had not been surrendered, revoked, or become invalid, it was held that the shareholders could not file a bill, recognizing the assignment, to restrain the assignee in relation to the property assigned; that if creditors of such corporation should complain of misconduct on the part of the assignees and the like, the court might protect the property in the state and have the trust executed but that so long as the corporation retained its life and legal capacity, the stock-holders must bring any proceeding for the dissolution and winding up of the corporation and the distribution of surplus assets among them in the state of the domicile of the corporation. Barclay *v.* Talman, 4 Edw. (N. Y.) 128 [*affirmed* in 3 Ch. Sent. 56]. Under a statute in Rhode Island, providing for the appointment of a receiver of the property of resident debtors by petition of creditors in insolvency proceedings, it was held that the property of non-resident debtors was not contemplated and that a receiver for a foreign corporation doing business in Rhode Island could not be appointed under that statute. Stafford *v.* American Mills Co., 13 R. I. 310. But this does not prevent the appointment of an ancillary receiver by a court of equity in the exercise of its general power. Evans *v.* Pease, 21 R. I. 187, 42 Atl. 506.

Suit by stock-holders and members.— In Condon *v.* Mutual Reserve Fund Life Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149, it was held that an action on an insurance policy in a company operated on the mutual assessment plan to recover a loss would be within the jurisdiction of the courts of a state other than that of the corporate domicile, but that a suit by a policy-holder to determine whether assessments in the foreign insurance company were fraudulent and illegal involved an inquiry into the internal management of the corporation and that a receiver could not be appointed notwithstanding the mere allegation of the insolvency of the company. But in Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513, 4 Abb. Pr. N. S. 378, 36 How. Pr. 20, it was held that actions by citizens of New York as holders of stock in a foreign corporation might be brought in that state for the purpose of restraining the use of proceeds of an illegal and void issue of stock and that a receiver might be appointed of the proceeds of such stock in that state.

72. Reusens *v.* Manufacturing, etc., Co. of America, 99 N. Y. App. Div. 214, 90 N. Y. Suppl. 1010 [*distinguishing* Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805] (in that refusal to entertain that suit was based upon the fact that it was brought by a foreign receiver of the corporation against the corporation as sole defendant); Popper *v.* Supreme Council O. C. F., 61 N. Y. App. Div. 405, 70 N. Y. Suppl. 637; Hamilton *v.* Accessory Transit Co., 3 Abb. Pr. (N. Y.) 255 [*affirmed* in 26 Barb. 46].

Failure of corporation to comply with foreign statute.—A stock-holder is not precluded from suing for the appointment of a receiver of property of a foreign corporation because the latter has failed to procure the certificate of the secretary of state that it has complied with all the requirements of law to authorize it to do business in the state. Walter *v.* F. E. McAlister Co., 21 Misc. (N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33; Williams *v.* Hintermeister, 26 Fed. 889.

73. Barley *v.* Gittings, 15 App. Cas. (D. C.) 427; Hellenberg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Popper *v.* Supreme Council O. C. F., 61 N. Y. App. Div. 405, 70 N. Y. Suppl. 637; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Williams *v.* Hintermeister, 26 Fed. 889.

74. Reusens *v.* Manufacturing, etc., Co. of America, 99 N. Y. App. Div. 214, 90 N. Y. Suppl. 1010; Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403. See also *infra*, VIII, B; and see RAILROADS, 33 Cyc. 633.

Under a statute authorizing such a suit for the purpose, among other things, of compelling an account of the official conduct and

poration is to preserve its property and effects in the state for the benefit of creditors and shareholders,[75] and the authority thus to take property of such corporation into the custody of the court is restricted in purpose to its preservation from loss, unlawful disposition, or material injury,[76] and is to be exercised only as to property within the state of the forum or in the possession of the individual over whom the court has acquired jurisdiction.[77] Where a corporation has been wound up in the state of its domicile and the receiver there appointed has been discharged,[78] or where the affairs of a foreign corporation are in process of liquidation in the state of its domicile and the corporation is in the hands of a receiver appointed in the proceedings in that state, a receiver may be appointed to take the corporate property in another state for the purpose of preserving and distributing it among the creditors there at the suit of stock-holders, or members ;[79]

disposition of corporate property and to compel payment to the corporation or to creditors, a receiver may be appointed. Acken *v.* Coughlin, 103 N. Y. App. Div. 1, 92 N. Y. Suppl. 700, 34 N. Y. Civ. Proc. 200.

75. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

76. Acken *v.* Coughlin, 103 N. Y. App. Div. 1, 92 N. Y. Suppl. 700, 34 N. Y. Civ. Proc. 200 (holding that under the statute providing for suit by stock-holders, creditors, etc., against delinquent officers and directors for an account of corporate property, etc., a temporary injunction against disposition of property, consisting mainly of patents, was sufficient without the appointment of a receiver) ; Hamilton *v.* Accessory Transit Co., 3 Abb. Pr. (N. Y.) 255 [*affirmed* in 26 Barb. 46] (where it was held that a receiver would not be appointed on the ground that the corporation had been declared dissolved by a published decree of the executive of a foreign country, where it was organized, it not appearing that the property was in danger of loss, etc., before a full investigation and final determination could be had).

In aid of execution.— Under N. Y. Code Civ. Proc. § 1784, which provides for an action for sequestrating the property of a corporation created by or under the laws of New York and for a general distribution of the corporate property, at the suit of a judgment creditor upon the return of an execution unsatisfied partly or wholly, such remedy is not available against a foreign corporation. Burgoyne *v.* Eastern, etc., R. Co., 13 N. Y. Suppl. 537. To justify the appointment of a receiver at the instance of such a creditor, it must appear that the corporation has fraudulently disposed of property and the party who took it must be before the court. Dreyfus *v.* Seale, 37 N. Y. App. Div. 351, 55 N. Y. Suppl. 1111. But in De Bemer *v.* Drew, 57 Barb. (N. Y.) 438, 39 How. Pr. 466, it was held that under the New York code, providing for the appointment of a receiver in proceedings supplementary to execution, the court, having obtained jurisdiction of the original action against a foreign corporation, had jurisdiction to give its judgment effect; that chapter 2, title 9, section 292, providing for an order requiring the judgment debtor to appear and answer concerning his property, etc., upon the return of an execution unsatisfied did not require such steps before the appointment of a receiver under section 298 of the same charter, which provided that the judge might also, by order, appoint a receiver of the property of the judgment debtor with like authority as a receiver under section 244, the latter section being in chapter 5, of title 8, of the code, in subdivision 4 of which section it was provided that after judgment, when a foreign corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights, a receiver might be appointed.

77. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Acken *v.* Coughlin, 103 N. Y. App. Div. 1, 93 N. Y. Suppl. 700, 34 N. Y. Civ. Proc. 200.

78. Culver Lumber, etc., Co. *v.* Culver, 81 Ark. 102, 99 S. W. 391, suit by stock-holder.

79. Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815; Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869 (upon allegation that the domiciliary receiver was about to remove the assets from Indiana and thereby defeat the claims of resident creditors) ; Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; McNabb *v.* Porter Air-Lighter Co., 44 N. Y. App. Div. 102, 60 N. Y. Suppl. 694 (under the statute for the preservation of assets in the state where no officer has power to hold them) ; Mosher *v.* Supreme Sitting O. I. H., 88 Hun (N. Y.) 394, 34 N. Y. Suppl. 816 (under Code Civ. Proc. § 713, providing that a receiver may be appointed before final judgment on the application of any person interested, where there is danger that the property affected by the action will be removed beyond the jurisdiction of the court, or lost, or materially injured or destroyed) ; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140; Redmond *v.* Hoge, 3 Hun (N. Y.) 171 (where the foreign corporation had funds deposited in New York with one of its officers, who was shown to be an unsafe depositary) ; Walter *v.* F. E. McAlister Co., 21 Misc. (N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33; Woerishoffer *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 113; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106; Kean *v.* Supreme Sitting O. I. H., 3 Pa. Dist. 323

That the stock-holder is a non-resident will not bar his action under the rule of the text. Walter *v.* F. E. McAlister Co., 21 Misc.

and the same remedy is available at the suit of creditors in another jurisdiction for the protection and distribution of assets there.[80]

III. APPOINTMENT, QUALIFICATION, AND TENURE.[81]

A. Jurisdiction of Courts and Judges — 1. IN GENERAL. The matter of the appointment of a receiver is the subject of equitable jurisdiction,[82] to be exercised in proper cases in any cause of which the court, as a court of equity, has jurisdiction,[83] and courts of chancery as well as those courts in the various states which exercise a general jurisdiction in equity, and the judges thereof,[84]

(N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33.

80. Day *v.* Baltimore City Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Popper *v.* Supreme Council O. C. F., 61 N. Y. App. Div. 405, 70 N. Y. Suppl. 637 (holding that a provision of the code of civil procedure extending to foreign corporations transacting business or having a business or fiscal agency in New York another provision that a receiver of the property of a corporation can be appointed in an action by the attorney-general or by a stock-holder to preserve assets of the corporation does not prevent the exercise of jurisdiction of an action by a resident creditor for the appointment of a receiver of property of an insolvent foreign corporation and to secure an equitable distribution of the assets in New York among its resident creditors, and that where such assets in New York were being attached by resident creditors, and there was danger of their waste and dissipation, a receiver might be appointed at the suit of a resident creditor not secured by attachment on behalf of himself and all others similarly situated); Douglas *v.* Atlantic Mut. L. Ins. Co., 25 Grant Ch. (U. C.) 379.

Pending contest between claimants to corporate offices the trustees of bondholders may have a receiver appointed in a foreign court to take charge of property situated within its jurisdiction. Schmidt *v.* Mitchell, 98 Ky. 218, 32 S. W. 599, 33 S. W. 408.

81. **Effect of appeal and stay** see APPEAL AND ERROR, 2 Cyc. 914, 979.

Equitable execution see *supra*, II, B, 12, b. And see EXECUTIONS, 17 Cyc. 1451.

Foreign and ancillary receivership see *infra*, VIII, B.

Legislative action see CONSTITUTIONAL LAW, 8 Cyc. 812, 813.

Prohibition against appointment see PROHIBITION, 32 Cyc. 610.

Provisional remedy in lunacy proceedings see INSANE PERSONS, 22 Cyc. 1127 note 83.

82. Naumburg *v.* Hyatt, 24 Fed. 898. See also *supra*, II, A.

Chambers and vacation — *Generally.*— See JUDGES, 23 Cyc. 554.

In insolvency proceedings see INSOLVENCY, 22 Cyc. 1276 note 40.

Order in court instead of by judge at chambers.— Over an objection that under a statute for the appointment of a receiver of an insolvent corporation by a judge, the order must be made by a judge at chambers and not in court, it was held that the mere entitling an order as at special term, which by law may be made before a judge, out of court, or the making of it by the judge when sitting at special term, instead of when sitting at chambers, does not vitiate the order; that he has power to make the order as a judge, and it detracts nothing from the force of the order made by him as a judge that he makes it at the special term, or entitles it as made at the special term. *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602. See also Stewart *v.* Beebe, 28 Barb. (N. Y.) 34.

Appointment by executive officers see *supra*, I, note 2.

Reference see *infra*, III, F, 3, b.

Want of jurisdiction of subject-matter see *supra*, II, B, 6.

83. National Park Bank *v.* Goddard, 131 N. Y. 494, 30 N. E. 566 [*affirming* 62 Hun 31, 16 N. Y. Suppl. 343].

Discretion see *supra*, II, B, 2.

Preservation and protection of property see *supra*, II, B, 10.

84. *Alabama.*— Ensley Dev. Co. *v.* Powell, 147 Ala. 300, 40 So. 137.

Georgia.— Jones *v.* Dougherty, 10 Ga. 273.

Maryland.— Williamson *v.* Wilson, 1 Bland 418.

Mississippi.— State Bank *v.* Duncan, 52 Miss. 740.

Missouri.— Miller *v.* Perkins, 154 Mo. 629, 55 S. W. 874; Cox *v.* Volkert, 86 Mo. 505.

North Carolina.— Battle *v.* Davis, 66 N. C. 252; Skinner *v.* Maxwell, 66 N. C. 45.

Oklahoma.— Garrett *v.* London, etc., F. Ins. Co., 15 Okla. 222, 81 Pac. 421.

Washington.— Washington Iron-Works *v.* Jensen, 3 Wash. 584, 28 Pac. 1019.

See 42 Cent. Dig. tit. "Receivers," § 38 *et seq.*

Under a statute creating a new equitable right in respect to the appointment of receivers, the enforcement of which would devolve upon a court of chancery, the power may be exercised by the court having general equity jurisdiction. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Jelly *v.* Paraiso Reduction Co., 1 N. Y. Suppl. 111, 15 N. Y. Civ. Proc. 86. And such a court in administering the remedy is held to act as one of general jurisdiction and not in the exercise of a mere special statutory power. Bangs *v.* Duckinfield, 18 N. Y. 592 [*overruling* in effect, Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591]; Palmer *v.* Clark, 4 Abb. N. Cas. (N. Y.) 25.

The same power as that exercised by courts of chancery is conferred upon the court

or the courts upon which is conferred full chancery jurisdiction and powers in particular matters,[85] have inherent power to appoint receivers. The power is referable solely to those powers which the court exercises as a court of chancery,[86] and a court of law has no inherent power in this regard; any authority which it may exercise in appointing receivers must be derived entirely from some positive law.[87]

2. Particular Courts and Judges[88] — a. In General. The appointment of a receiver being a function pertaining to the chancellor, in the absence of statute it cannot be exercised by the judge of a law court in a suit pending in the chancery court merely by virtue of a power to issue remedial writs,[89] and a provision rela-

under the code to be exercised in the same emergencies. Bitting *v.* Ten Eyck, 85 Ind. 357. See also McIntosh *v.* Perkins, 13 Mont. 143, 32 Pac. 653.

Statutory summary proceeding.— Where a circuit court is a court of law or a court of equity, it acts as the one or the other according to the nature of the particular matter which the law refers to its jurisdiction, and a statutory proceeding to be begun by petition rather than by summons, in which a receiver is to be appointed, is held to be one in which such court, to which the jurisdiction of administering the remedy is referred, acts as a court of equity. Gephart *v.* Starrett, 47 Md. 396.

85. Sloan *v.* Moore, 37 Pa. St. 217.

86. Folsom *v.* Evans, 5 Minn. 418.

Judges of different districts.— In North Carolina a motion for a receiver must be made before a resident judge of the district or one assigned to the district and holding the courts thereof by exchange; or at least, in analogy to the grant of restraining orders, if the motion for a temporary receiver is granted by another judge than one of those just named, the order must be made returnable before one of such judges. Worth *v.* Piedmont Bank, 121 N. C. 343, 28 S. E. 488; Corbin *v.* Berry, 83 N. C. 27. But the order to show cause may be made returnable before a judge residing in the district in which the order was made but assigned to a different district. Stith *v.* Jones, 101 N. C. 360, 8 S. E. 151.

While sitting in another county of circuit. — A judge of the circuit court holding a session in one of the counties of his circuit may make an order appointing a receiver in an action brought in another county under the statutory provision that receivers may be appointed by the court or the judge thereof in vacation. Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 44 N. E. 225.

87. *Illinois.*— Myres *v.* Frankenthal, 55 Ill. App. 390.

Minnesota.— Folsom *v.* Evans, 5 Minn. 418.

Missouri.— Miller *v.* Perkins, 154 Mo. 629, 55 S. W. 874.

Nebraska.— Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022.

New Jersey.— Oehme *v.* Rucklehaus, 50 N. J. L. 84, 11 Atl. 145.

England.— Walmsley *v.* Mundy, 13 Q. B. D. 807, 53 L. J. Q. B. 304, 50 L. T. Rep. N. S. 317, 32 Wkly. Rep. 602, showing the rule before the Judicature Act.

See 42 Cent. Dig. tit. "Receivers," § 38 *et seq.*

88. **Appointment pending appeal** see Appeal and Error, 2 Cyc. 979.

Judges see 23 Cyc. 499.

Special judge see Judges, 23 Cyc 611, text and note 53.

89. Alexander *v.* Manning, 58 Miss. 634. See also Ruthrauff *v.* Kresz, 13 Cal. 639 (where a county judge's jurisdiction was limited to such cases as the legislature might prescribe and the act of the legislature conferring such jurisdiction did not give the power to appoint a receiver, and it was held that no such power existed, although such judge was given the power to grant an injunction, at least as a distinct proceeding from the injunction); Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461.

A police judge was held to have no power in an action of forcible detainer to appoint a receiver. Reed *v.* Taylor, 78 S. W. 892, 25 Ky. L. Rep. 1793.

Court commissioner, master, or register.— In Quiggle *v.* Trumbo, 56 Cal. 626, it was held that the court commissioner had no jurisdiction to appoint a receiver, since the authority is conferred upon the court or a judge thereof and therefore an appointment by such commissioner is void. So in Illinois it was held that the master in chancery had no power to appoint a receiver. Brush *v.* Blanchard, 19 Ill. 31. In *Ex p.* Smith, 23 Ala. 94, it was held by a majority of the court that under the provisions of the code declaring that a register should have no power to appoint receivers and also that receivers could be appointed only by a chancellor, etc., an appointment by a register was void even though the chancellor had passed upon the equities, decided that the appointment should be made, and referred the matter to the register to select a fit person and make the appointment. But under a later statute the register was given power to appoint a receiver in vacation, upon notice or a good reason shown for omitting notice, and an appeal to the chancellor was provided, and it is held that on such appeal from an order of appointment the chancellor's jurisdiction is not merely appellate, but the matter comes before him as on an original petition, and his action thereon is precisely as if it were taken on the original application. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Werborn *v.* Kahn, 93

tive to proceedings in vacation where a judge is disqualified does not of itself authorize a circuit judge to exercise the functions of a chancellor by the appointment of a receiver, but only means that in such an emergency the application may be made to a chancellor or a judge of the adjoining district, each class of judicial officers exercising the powers appropriate to his sphere.[90] The constitutional distribution of jurisdiction will exclude the power of any court, or judge thereof, to exercise the equitable jurisdiction in the appointment of a receiver except such court or judge whose jurisdiction comes within the constitutional grant.[91]

b. Priority in Acquiring Jurisdiction. Where two suits are commenced in different courts, and the subject of the action and the parties are the same in each, the court which first acquires jurisdiction should dispose of the whole matter.[92]

Ala. 201, 9 So. 729; Heard *v.* Murray, 93 Ala. 127, 9 So. 514.

Evidence of appointment.—Where in a collateral proceeding an advantage or right is sought to be derived from the fact of a receivership, it is necessary to prove that the receiver was appointed by a court of competent jurisdiction and the fact that persons acted as receivers raises no presumption that they were appointed. International, etc., R. Co. *v.* Moore, (Tex. Civ. App. 1895) 32 S. W. 379. See also *infra*, VI, G, and VIII, A, 6.

90. Alexander *v.* Manning, 58 Miss. 634.

Presumption because of absence of particular judge.—Where the county judge may appoint a receiver in the absence of the circuit judge, it will be presumed in a collateral proceeding that the county judge would not have made the order unless the circuit judge had been absent from the county. H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337.

91. Garrett *v.* London, etc., F. Ins. Co., 15 Okla. 222, 81 Pac. 421, holding further that the legislature cannot confer powers in this regard contrary to the constitutional distribution of the judicial powers and that the probate court whose powers were otherwise limited by the constitution had no chancery jurisdiction and could not appoint a receiver.

Original jurisdiction over executors.—In Long *v.* Wortham, 4 Tex. 381, under the constitutional provision original jurisdiction was conferred on the district court, under which it was held that such court had authority to appoint a receiver and temporarily suspend the authority of an executor.

Appellate court of last resort.—In Chemung Min. Co. *v.* Hanley, 11 Ida. 302, 81 Pac. 619, it was held that the supreme court had power to appoint a receiver under a provision of the constitution giving such court original jurisdiction to issue writs of mandamus and other writs therein named and also to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. See also Kerr *v.* White, 7 Baxt. (Tenn.) 394; West *v.* Weaver, 3 Heisk. (Tenn.) 589 (in which cases it does not appear upon what ground the jurisdiction is assumed and it being held in the first case that the property sought to be placed in the hands of a receiver must be brought under the jurisdiction of the supreme court by virtue of the appeal or of some order or decree rendered in the appellate court, and it may be mentioned here that in this state the statute clothes all courts of record with the power to appoint receivers in cases of necessity); Waters-Pierce Oil Co. *v.* State, (Tex. 1907) 106 S. W. 326 (where the court had no doubt of its power to appoint a receiver in order to enable it to perform its duties of revising and correcting errors in the proceedings of the lower court if that were necessary, but not for the purpose of exercising original jurisdiction, and where none of the conditions upon which the application for such appointment is based in any way interferes with the appellate court in the discharge of its duty, such appointment does not fall within the scope of its appellate jurisdiction); Virginia, etc., Steel, etc., Co. *v.* Wilder, 88 Va. 942, 14 S. E. 806 (where the authority of a judge of such court was assumed for the purposes of the decision); Pacific R. Co. *v.* Ketchum, 95 U. S. 1, 24 L. ed. 347 (where, however, the question of the propriety of the appointment only was considered, the court assuming for that purpose that there was jurisdiction). But see Allen *v.* Harris, 4 Lea (Tenn.) 190. The appointment by such court is also sometimes expressly provided for by statute. Eastman *v.* Cain, 45 Nebr. 48, 63 N. W. 123.

92. McCarthy *v.* Peake, 18 How. Pr. (N. Y.) 138, holding therefore that where two partners commenced a suit, each against the other, to close up the partnership, and to enjoin his partner from interfering with the partnership effects, one in the superior court, by procuring a temporary injunction on the fourteenth of September, which, with the summons, was served on the fifteenth of September about three P. M., and the other commenced in the supreme court by obtaining an *ex parte* order for a receiver, who took possession of the property on the fifteenth of September, and afterward, at about eight o'clock on the same day, the summons and injunction were served, the action commenced in the superior court, by the allowance of an injunction, on the fourteenth September, conferred on that court jurisdiction, and gave it priority; that the appointment of a receiver was of no more weight than the allowance of the injunction,

c. Under Statute.[93] However, the subject of the appointment of receivers has been regulated by various statutory provisions under which the power has sometimes been enlarged,[94] and extended to actions at law, as for example where the remedy is given as an equivalent for a judgment creditor's bill,[95] or all of the courts of the state, and the judges thereof, are clothed with the power to appoint receivers for the safekeeping, management, etc., of property in litigation.[96] Under the judicial systems which blend the law and equity practice or administer legal and equitable remedies through the same court or through the same forms of procedure, the inherent power of the court to appoint a receiver has been held to be referable solely to its power as a court of chancery,[97] and, in the exercise of its jurisdiction in an action at law, the appointment of a receiver is foreign to its powers, except under some express provision of law;[98] but these statutes

both being provisional remedies, and either would give jurisdiction.

Where the parties are not the same in both cases it is held that the rule laid down in McCarthy *v.* Peake, 10 How. Pr. (N. Y.) 138, *supra*, this note, does not apply. Carter *v.* Dime Sav. Bank, 61 Nebr. 587, 86 N. W. 29. See also Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

At suit of bondholders pending application of stock-holder.— The rule that when the property is drawn within the jurisdiction of the court in one case, the court having acquired jurisdiction of the cause and subject-matter, the complainant has a right to prosecute it and obtain relief asked, if he establishes his case in that suit, and cannot be forced into another suit even in the same court, is held not to apply so as to entitle a stock-holder, who has sued the corporation and obtained a restraining order and an order to show cause why a receiver should not be appointed, to intervene in a suit subsequently brought by mortgage bondholders, in which a receiver was appointed, and have the latter suit stayed until the stock-holder's suit is determined, in the absence of special circumstances making an extraordinary case. Pennsylvania L. Ins., etc., Co. *v.* Jacksonville, etc., R. Co., 55 Fed. 131, 5 C. C. A. 53, where the bonds secured by the mortgage aggregated, in all reasonable probability, more than the value at foreclosure sale of all the property covered by the mortgage, and as against the charge that the second suit was the result of collusion between the bondholders and directors it appeared that the complainant in the first suit owned only one sixteenth of the stock while the stock-holders charged with fraudulently controlling the directors owned more than sixteen eighteenths of the stock, and under such circumstances it was held that such a minority stock-holder should not be allowed to precipitate a litigation with the other stock-holders so as to require bond-holders to be stayed in their proceedings to enforce their lien until the fight between the stock-holders is terminated, or to force the bondholders in such case to proceed by intervention in the stock-holder's suit.

The pendency of a suit to recover corporate property, and for an injunction against trespassers brought by the corporation, the action not involving the taking of such property into the custody of the court, will not render the appointment of a receiver by another court an improper exercise of jurisdiction; and such receiver may be substituted for plaintiff in the original action, and prosecute the same to final judgment. San Antonio, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 30 S. W. 693.

Concurrent and conflicting jurisdiction see COURTS, 11 Cyc. 988, 1011.

Extending receivership and subsequent appointments see *infra*, III, H.

Property in custodia legis see *supra*, II, B, 9.

93. **Sequestration** see SEQUESTRATION.

94. See the statutes of the several states. And see Kimbrough *v.* J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576 (appointment of receiver of property held by garnishee as pledgee); John L. Roper Lumber Co. *v.* Wallace, 93 N. C. 22; Anglo-Italian Bank *v.* Davies, 9 Ch. D. 375, 47 L. J. Ch. 833, 39 L. T. Rep. N. S. 244, 27 Wkly. Rep. 3 (under the provision of the Judicature Act for the appointment of receivers whenever it shall appear to be just or convenient).

95. Myres *v.* Frankenthal, 55 Ill. App. 390 (construing a statute permitting the appointment of a receiver in garnishment proceedings to confine the exercise of the power to an appointment after judgment); Second Ward Bank *v.* Upmann, 12 Wis. 499 (where it was held that, although the county court was not vested with general equity jurisdiction it had civil jurisdiction and therefore possessed the power upon a supplemental proceeding to appoint a receiver because the code made all equitable remedies in aid of judgments at law a part of the remedy in every civil action).

96. Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118; Enochs *v.* Wilson, 11 Lea (Tenn.) 228.

97. Folsom *v.* Evans, 5 Minn. 418.

98. Folsom *v.* Evans, 5 Minn. 418; Miller *v.* Perkins, 154 Mo. 629, 55 S. W. 874. In Satterwhite *v.* Beall, 28 Ga. 525, under a statute authorizing claims against trust estates to be recovered at law, it was held that the judgment was a lien on the *corpus* of the trust property to be enforced by execution in the ordinary way so that the appointment of a receiver to take and pay over rents would be unwarranted.

often prescribe particular instances in which, or the circumstances under which, receivers may be appointed without regard to the form or character of the principal action, or as applicable to all civil actions, and extend the power of appointment to actions at law.[99] The specific cases or grounds set out in such provisions exclude the exercise of the power of the court to appoint a receiver in any other case[1] unless in the exercise of inherent and general equity jurisdiction, in a case

Order not void.— In Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022, it is held that, although the appointment may have been made upon an insufficient showing or in an action where such appointment is not proper, this does not make the order absolutely void so that it may be ignored by everyone, although it may be erroneous and voidable and subject to be set aside when properly questioned.

Waiver of objection — legal and equitable actions consolidated.— In Pitts *v.* New Mammoth Gold Min. Co., 23 Utah 623, 65 Pac. 1076, a receiver was appointed for an insolvent corporation, and thereafter, by consent of all parties, many suits against defendant, some legal and some equitable, were consolidated and tried together, in which the receiver was recognized and took part, and it was held that objection could not be made for the first time after judgment that the appointment of the receiver was illegal because made in an action at law.

99. Smith *v.* Dayton, 94 Iowa 102, 62 N. W. 650; Rabb *v.* Albright, 93 Iowa 50, 61 N. W. 402; Silverman *v.* Kuhn, 53 Iowa 436, 5 N. W. 523 (in attachment, holding, however, that the facts must show the necessity for the appointment as in other cases); Jones *v.* Graves, 20 Iowa 596; Bromley *v.* McCall, 18 S. W. 1016, 13 Ky. L. Rep. 915 (in an action of forcible detainer); Miller *v.* Perkins, 154 Mo. 629, 55 S. W. 874; Stark *v.* Grimes, 88 Mo. App. 409; Union Boom Co. *v.* Samish Boom Co., 33 Wash. 144, 74 Pac. 53. See also *supra*, II, B, 10, b.

A proceeding to enforce a lien of an employee under N. Y. Laws (1880), c 440, was held to be an action, so that the court had authority to appoint a receiver of the property *pendente lite*. Gallagher *v.* Karns, 27 Hun (N. Y.) 375. See also MECHANICS' LIENS, 27 Cyc. 419.

"To secure ample justice"— *In general.*— Under a provision authorizing the appointment of a receiver whenever in the discretion of the court it may seem to be necessary to secure ample justice to the parties, it is held that the appointment may be made in any case according to the established rules of equity where such necessity appears to the court, without regard to the form or character of the action. Sheridan Brick Works *v.* Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. Rep. 207; Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

Replevin.—In Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976, it is held that Ind. Rev. St. (1881) § 1270, authorizing the appointment of receivers in actions of replevin, where the property claimed has a peculiar value that cannot be compensated by damages, does not alone control in that regard, but under section 1222, authorizing in general the appointment of receivers when "it may be necessary to secure ample justice to the parties," the court may, whenever justice requires it, appoint receivers in actions of replevin.

1. Sweeny *v.* Mayhew, 6 Ida. 455, 56 Pac. 85; Hutchinson *v.* Rice, 109 La. 29, 33 So. 57; State *v.* Ellis, 108 La. 521, 32 So. 335; Battle *v.* Davis, 66 N. C. 252; Skinner *v.* Maxwell, 66 N. C. 45, under a provision for the appointment of a receiver before judgment where the applicant establishes an apparent right to property, etc., which, while held to be exclusive, is held not to materially change the jurisdiction of the court acting according to ordinary course of courts of equity.

Will case.— In Bryam *v.* Moring, 94 N. C. 694, it was held that a receiver cannot be appointed under the statute last above mentioned in a proceeding to establish a will. But in Le Brantz *v.* Conklin, 39 Misc. (N. Y.) 715, 80 N. Y. Suppl. 967, it was held that in a suit by a beneficiary under one of several wills seeking a decree for the cancellation of the wills of the testator and to have the rights of various parties claiming under such wills declared void, upon assuming jurisdiction to determine the matters involved, the court may appoint a receiver under N. Y. Code Civ. Proc. § 713, authorizing the appointment of receivers before final judgment on the application of a party who establishes an apparent right to or interest in the property where it is in the possession of an adverse party and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed, and that the provision of the code for the appointment of a receiver where the estate of a decedent has been brought under the jurisdiction of the supreme court upon the death of the sole surviving executor, was not exclusive of the power to appoint under the provision first mentioned.

Escheat — personalty in hands of administrator.— In Territory *v.* Forrest, 1 Ariz. 49, 25 Pac. 527, it was held that on an information alleging an escheat of the estate of an intestate and bad management by the administrator the district court had no power to order the administrator to deliver personalty in his hands to a receiver appointed by the court, because the district court had only appellate jurisdiction of matters cognizable in the probate court, and the statute which provided that a receiver should be the custodian of the real estate and rents and profits, and that the administrator should settle the estate, and after paying the debts pay the residue of the estate to the treasurer of the territory, precluded the authority of the dis-

falling legitimately within that jurisdiction;[2] and where in addition to such specific cases the statute expressly extends the power to all other cases where receivers have been appointed by the usages of courts of equity, a receiver may be appointed only in those actions which are specified, and the last clause mentioned is held to be declaratory of the general equity jurisdiction conferred upon the court by the constitution and to include such cases, and only such, as those in which a court of equity might have appointed a receiver according to the rules of the old chancery practice.[3]

3. Appointment by Consent of Parties.[4] Jurisdiction to appoint a receiver cannot be conferred by consent,[5] and that the parties in interest have agreed to the appointment does not relieve the court from looking at the question of jurisdiction, and especially from inquiring whether the application for receivership is with the view of obtaining final relief or merely for the purpose of securing a receivership.[6] Where the court has jurisdiction to appoint a receiver in a

trict court to order the administrator to turn over personalty.

Action for money judgment see *supra*, II, B, 7, c.

2. Bateman *v.* San Francisco Super. Ct., 54 Cal. 285.

3. Bateman *v.* San Francisco Super. Ct., 54 Cal. 285, holding under such statute that the district court had no jurisdiction to appoint a receiver in an action of ejectment. See also San Jose Safe-Deposit Sav. Bank *v.* Madera Bank, 121 Cal. 543, 54 Pac. 85 (holding that the court has no power to appoint a receiver of lands *pendente lite* by one not entitled to possession and where mere legal as distinguished from equitable rights are involved, and distinguishing Whitney *v.* Buckman, 26 Cal. 447, in that the statute then existing authorized the particular appointment in that case); Smith *v.* Los Angeles County Super. Ct., 97 Cal. 348, 32 Pac. 322; Scott *v.* Sierra Lumber Co., 67 Cal. 71, 7 Pac. 131. Similar provisions were construed and applied in conformity with Bateman *v.* San Francisco Super. Ct., *supra*, in State *v.* Eighth Judicial Dist. Ct., 14 Mont. 577, 37 Pac. 969; Smith *v.* White, 62 Nebr. 56, 86 N. W. 930 [*distinguishing* Rogers *v.* Marshall, 38 How. Pr. (N. Y.) 43, in which the action was different from an action of ejectment in that relief was sought on the ground of fraud, etc., thereby presenting a distinct ground for equitable relief]; La Bua *v.* Huetwohl, 60 Hun (N. Y.) 407, 15 N. Y. Suppl. 491; Guernsey *v.* Powers, 9 Hun (N. Y.) 78 [*following* Thompson *v.* Sherrard, 35 Barb. (N. Y.) 593, 12 Abb. Pr. 427, 22 How. Pr. 155, and indicating that Ireland *v.* Nichols, 37 How. Pr. (N. Y.) 222, was peculiar or if not should not be followed]; Burdell *v.* Burdell, 54 How. Pr. (N. Y.) 91; De Barrera *v.* Frost, 39 Tex. Civ. App. 544, 88 S. W. 476, 33 Tex. Civ. App. 580, 77 S. W. 637 (holding that the court may appoint a receiver whenever it would have been proper under the equity practice before the statute, although the cause may not fall within the specific instances enumerated in the statute); New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828; Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74. See also *supra*, II, B, 10, b. In Whitney *v.* Buckman, 26 Cal. 447, it was stated that the appointment of a receiver after judgment in an action of ejectment was proper but the authority was placed solely on a statute then in force, which expressly authorized the appointment of a receiver in such cases after entry of judgment.

The constitutional jurisdiction is not taken away and cannot be taken away by the clause referred to in the text, and notwithstanding it the court would have jurisdiction to appoint a receiver where the usages of the courts of equity had before authorized such appointment. Bateman *v.* San Francisco Super. Ct., 54 Cal. 285; Smith *v.* White, 62 Nebr. 56, 86 N. W. 930.

Cases falling within the provision.— The provision referred to embraces an action by a deserted wife for maintenance (Murray *v.* Murray, 115 Cal. 266, 47 Pac. 37, 56 Am. St. Rep. 97, 37 L. R. A. 626); an action to sell a leasehold estate for non-payment of rent to secure which a lien was executed (Doane *v.* Donough, 5 Ohio S. & C. Pl. Dec. 166, 1 Ohio N. P. 22); a suit for partition (Goodale *v.* San Francisco Fifteenth Dist. Ct., 56 Cal. 26).

The usages of courts of equity, both as to the manner of appointing and discharging receivers, are applicable, where it is not otherwise provided by the statute. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

4. Representation by receiver of court and parties see *infra*, IV, E, 1.

Waiver of notice see *infra*, III, D, 5, c.

5. Smith *v.* Los Angeles County Super. Ct., 97 Cal. 348, 32 Pac. 322 (holding that the consent by a defendant, in an ordinary action for the recovery of a debt, to the appointment of a receiver, will not affect the right of any creditor aggrieved by the order to have it annulled in a proper proceeding); Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791 (holding that where neither equitable nor statutory grounds exist for the appointment of a receiver of a corporation, the parties cannot confer jurisdiction by consent so as to affect the rights of other parties who have not been notified).

6. Hutchinson *v.* American Palace-Car Co., 104 Fed. 182.

particular cause, however, the appointment may proceed upon the consent of the parties interested,[7] and in such a case the appointment is not invalid on the ground that the proceedings are not adversary in character because defendant enters his appearance voluntarily and answers admitting the allegations of the complaint.[8] But an order for a receiver will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned,[9] nor does the fact that both parties in their pleadings ask for the appointment of a receiver justify the court in making the appointment upon the motion of one of them whose moving papers show no ground for such appointment other than the concurrent demands therefor in the pleadings.[10]

4. Appointment on Court's Own Motion. The court may upon its own motion appoint a receiver where the case requires it,[11] although its action in this regard will constitute error if a proper case is not made for the appointment.[12]

5. Property or Owner Beyond Territorial Jurisdiction of the Court.[13] It has been held that jurisdiction of the *res* is essential to the power of the court to appoint a receiver thereof, without which such power cannot exist;[14] that there

7. Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839; Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116; Stratton *v.* Cain, (Tenn. Ch. App. 1901) 62 S. W. 231 (holding that where a will contest was pending in a circuit court on an issue of *devisavit vel non*, and the contestant filed a bill in equity for the appointment of a receiver to preserve and protect the property involved, and the proponent answered, and consented to the appointment of a receiver, it was error for the chancellor to dismiss such bill and discharge the receiver appointed thereon of his own motion); *In re* Reisenberg, 208 U. S. 90, 28 S. Ct. 219, 52 L. ed. 403; Horn *v.* Pere Marquette R. Co., 151 Fed. 626. See also State *v.* New Orleans, 43 La. Ann. 829, 9 So. 643; Tuckerman *v.* Brown, 11 Abb. Pr. (N. Y.) 389 [*affirmed* in 33 N. Y. 297, 88 Am. Dec. 386]; Olmstead *v.* Distilling, etc., Co., 67 Fed. 24.

A receivership may be the only method of carrying out an agreement of the parties that rents and income shall be collected only under the authority of the court. Bowers *v.* Durant, 2 N. Y. St. 127.

The president of a corporation has no ex-officio authority to consent to the appointment of a receiver for the corporation. Saxon *v.* Southwestern Brick, etc., Mfg. Co., 113 La. 637, 37 So. 540; Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. 316. And a consent by the president will not be recognized, where it appears from the pleadings that he has an interest adverse to the corporation, and no authority from the directors to give the consent is shown. Nesbit *v.* North Georgia Electric Co., 156 Fed. 979.

8. Mauch Chunk First Nat. Bank *v.* U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846.

9. Whelpley *v.* Erie R. Co., 29 Fed. Cas. No. 17,504, 6 Blatchf. 271.

10. Dusenbury *v.* Dusenbury, 11 Daly (N. Y.) 112, 4 N. Y. Civ. Proc. 126, where the order was made on the motion of plaintiff and on appeal by defendant was reversed, the court saying that the mere asking for relief by a party does not preclude him from declining to take any part thereof.

11. *California.*— Whitney *v.* Buckman, 26 Cal. 447.

Georgia.— McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 987.

New York.— O'Mahoney *v.* Belmont, 62 N. Y. 133.

Ohio.— Klonne *v.* Bradstreet, 2 Handy 74, 12 Ohio Dec. (Reprint) 336, under statutory provisions specifying particular cases in which the court may exercise the power of appointing a receiver, and which seem to make the duty to appoint imperative on the court, if the circumstances require it, to prevent a failure of justice.

Texas.— Waters-Pierce Oil Co. *v.* State, (Civ. App. 1907) 105 S. W. 851, holding that where there is a judgment forfeiting corporate rights, the court can, independent of the request of any one, exercise its judicial discretion as to the appointment of a receiver.

United States.— Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615.

See 42 Cent. Dig. tit. "Receivers," § 43.

But see White *v.* Britton, 72 S. C. 175, 51 S. E. 547.

And see *infra*, III, B, 1; III, B, 2, g.

Where a judicial sequestrator is necessary, and the law has provided an officer to take care of the property seized, he is to act only in the event of the parties failing to appoint a fit and proper sequestrator and the court cannot of its own accord, and without the consent of the parties, appoint another as receiver. U. S. *v.* U. S. Bank, 11 Rob. (La.) 418; Frazier *v.* Willcox, 4 Rob. (La.) 517. See also Sequestration.

Necessity of notice as affecting the question see *infra*, III, D.

12. Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 344.

13. See *infra*, VIII.

14. Miller *v.* Perkins, 154 Mo. 629, 638, 55 S. W. 874, where, however, the court was speaking of the power of appointment in an action at law under a statute providing that

is no power to appoint a receiver of property which is beyond the territorial limits of the jurisdiction of the court;[15] and that the court cannot acquire jurisdiction merely by the appointment of a receiver in a suit to subject particular property which is not within the territorial jurisdiction of the court.[16] But on the other hand it is held that a court of chancery may appoint a receiver for property beyond its territorial jurisdiction inasmuch as the court has jurisdiction of the parties and can compel them to put a receiver in possession or do all in their power to that end,[17] although the receiver may be under the necessity of asking the assistance of foreign courts to obtain possession of the property,[18] or the court to which such application is made will assume that the courts of foreign jurisdictions will assist the receiver to obtain possession;[19] and this rule would seem to be recognized in those jurisdictions which afford to receivers appointed elsewhere assistance in obtaining possession of the property,[20] and is not necessarily denied because the right of such receiver to sue in a foreign jurisdiction is not recognized there, since the right to sue may rest in comity and may be denied only because resisted by creditors or claimants in the foreign state.[21] But a receiver cannot be appointed of property not within the territorial jurisdiction

the court, etc., might appoint a receiver "whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be subject of a tender, and to keep and preserve all property and protect any business or business interest intrusted to him pending any legal or equitable proceeding concerning the same."

15. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52, where the question did not arise on an application for an appointment but in a collateral proceeding and upon the effect of an appointment in another jurisdiction.

Property in another circuit or county.— In State *v.* Jacksonville, etc., R. Co., 15 Fla. 201, it was held that under the constitution and laws of that state a receiver could not be appointed by a judge of one circuit to take possession of property in another circuit. But in Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273, under a statute authorizing proceedings to sequester tolls a single suit gave the court jurisdiction to sequester the whole tolls; the company was suable in the county where its functions were exercised and its franchises could be seized by the court to whose jurisdiction it was subjected; and the authority of the receiver extended throughout the state, wherever it was necessary to exercise it.

16. Kittel *v.* Augusta, etc., R. Co., 78 Fed. 855.

17. Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610; *In re* Besuden, 5 Ohio S. & C. Pl. Dec. 565, 7 Ohio N. P. 538; Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409; *In re* Maudslay, [1900] 1 Ch. 602, 69 L. J. Ch. 347, 82 L. T. Rep. N. S. 378, 8 Manson 38, 48 Wkly. Rep. 568. See also Winans *v.* McKean R., etc., Co., 30 Fed. Cas. No. 17,862, 6 Blatchf. 215; Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 106, receiver of tolls, profits, and revenues of a railway. A court of equity in England will appoint a receiver over estates in Ireland; and although the court has no power of sending its officers to Ireland to enforce its orders and decrees, yet if they be resisted by a party to the cause, such party will be guilty of contempt. Houlditch *v.* Donegal, 8 Bligh N. S. 301, 5 Eng. Reprint 955, 2 Cl. & F. 470, 6 Eng. Reprint 1232; Langford *v.* Langford, 5 L. J. Ch. 60. So it may appoint a receiver in India, with sureties resident in England. Cockburn *v.* Raphael, 2 Sim. & St. 453, 25 Rev. Rep. 244, 1 Eng. Ch. 453, 57 Eng. Reprint 419, where an executor who had proved the will in India and in England filed a bill in England for the administration of the assets and for a receiver. But in —— *v.* Lindsey, 15 Ves. Jr. 91, 33 Eng. Reprint 689, the course adopted was to appoint a receiver in England who might appoint an agent in India. See also Keys *v.* Keys, 1 Beav. 425, 17 Eng. Ch. 425, 48 Eng. Reprint 1004; Barkley *v.* Reay, 2 Hare 306, 12 L. J. Ch. 320, 24 Eng. Ch. 306, 67 Eng. Reprint 127, where the appointment was refused on the evidence. And so it may appoint a receiver of property in a foreign country. *In re* Maudslay, *supra*; Hinton *v.* Galli, 2 Eq. Rep. 479, 24 L. J. Ch. 121, receiver to collect personal estate, as well as to collect rents and sell real estate in a foreign country, with direction that if found expedient the receiver should be authorized to appoint an agent in the foreign country.

Sale of property out of jurisdiction of court see *infra*, IV, H, 2, b.

18. Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409; *In re* Maudslay, [1900] 1 Ch. 602, 69 L. J. Ch. 347, 82 L. T. Rep. N. S. 378, 8 Manson 38, 48 Wkly. Rep. 568; Smith *v.* Smith, 10 Hare appendix lxxi, 44 Eng. Ch. 795, 68 Eng. Reprint 1156.

19. Barbour *v.* Lockard, 9 Ohio Dec. (Reprint) 254, 11 Cinc. L. Bul. 319.

20. See Lewis *v.* American Naval Stores Co., 119 Fed. 391. And see also *infra*, VIII.

21. See Booth *v.* Clark, 17 How. (U. S.) 322, 15 L. ed. 164.

of the court, as against one who is beyond such territorial jurisdiction[22] and is not before the court.[23] The fact that defendant is a non-resident of the state does not affect the court's jurisdiction over property within the territorial jurisdiction, or its authority to appoint a receiver for such property.[24] But where the purpose is to wind up a corporation,[25] or a copartnership,[26] on account of alleged insolvency or fraudulent transactions, or where it is desired to obtain a general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto,[27] and so under local statute providing insolvency proceedings for the administration of the estates of insolvent debtors, it is held that a receiver cannot be appointed for the estate of a non-resident.[28]

6. Venue. Where all the property of a corporation is situated in a county other than that in which the suit is brought and an independent action must necessarily be brought in such other county to adjust the liens and sell the property, it is proper that the control of the property should be left with the court of the county where the property is located and the appointment of a receiver should not be made in a suit brought in another county.[29] And where a suit for equitable relief can be maintained only in the county of the residence of one of the defendants, it has been held that a prayer for an injunction and receiver cannot be granted in an action to recover land on the legal title brought in the county where the land lies, although such action must be brought in that county.[30] A statutory provision that an action seeking the appointment of a receiver of a corporation shall be brought in the county where the principal office of the corporation is located relates to venue and confers a privilege which the corporation may waive by appearing without objection in a suit brought in another county,[31] and does not apply to prevent the appointment of a receiver of property embraced in a mortgage, pending a foreclosure suit, under another pro-

22. Harvey *v.* Varney, 104 Mass. 436 (in which case, however, and in Amy *v.* Manning, 149 Mass. 487, 21 N. E. 943, it appears that one of the reasons for refusing to appoint a receiver of debts due to a defendant in foreign jurisdictions was that the receiver could not enforce the collection); Field *v.* Ripley, 20 How. Pr. (N. Y.) 26. See also Shaw *v.* Shore, 5 L. J. Ch. 79.

23. See *infra*, III, C, 2.

24. Beall *v.* Stokes, 95 Ga. 357, 22 S. E. 637; Hellebush *v.* Blake, 119 Ind. 349, 21 N. E. 976.

Non-resident insane person see Insane Persons, 22 Cyc. 1122 note 53.

25. Smythe *v.* Empire Rubber Co., 2 N. J. L. J. 154. See also Corporations, 10 Cyc. 1304 *et seq.*; Foreign Corporations, 19 Cyc. 1349; 1237 text and notes 55 and 56; 1239 text and note 60.

26. See Partnership, 30 Cyc. 334.

27. Hutchinson *v.* American Palace-Car Co., 104 Fed. 182.

28. Phillips *v.* Newton, 12 R. I. 489. See also Wheelock's Petition, 18 R. I. 463, 28 Atl. 966.

29. Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542.

Upon transfer of cause.— Where it does not appear that an action brought in a county was improperly brought there, it must be treated, although removed to another county, as in the county in which it was begun, so far as the right to direct the transfer to a receiver of money in the possession and control of the court of the latter county is concerned. Ahlhauser *v.* Doud, 74 Wis. 400, 43 N. W. 169.

30. Vizard *v.* Moody, 115 Ga. 491, 41 S. E. 997.

31. Bonner *v.* Hearne, 75 Tex. 242, 12 S. W. 38; Ripy *v.* Redwater Lumber Co., (Tex. Civ. App. 1907) 106 S. W. 474. See also Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26.

Exemption from being sued out of the federal district of its domicile is a privilege which a corporation may waive, and which is waived, by pleading to the merits (Central Trust Co. *v.* McGeorge, 151 U. S. 129, 14 S. Ct. 286, 38 L. ed. 98; Horn *v.* Pere Marquette R. Co., 151 Fed. 626; Lewis *v.* American Naval Stores Co., 119 Fed. 391), and such waiver is conclusive upon third persons not parties, who cannot claim that the appointment of the receiver was without jurisdiction; there being the requisite diversity of citizenship to confer constitutional jurisdiction on the court (Horn *v.* Pere Marquette R. Co., 151 Fed. 626).

Where the corporation contracts to pay its obligations in another county, it is held to waive the privilege created by such statute and the action may be brought and a receiver appointed in the district court of the county where the obligations are to be paid. Wills Point Mercantile Co. *v.* Southern Rock Island Plow Co., 31 Tex. Civ. App. 94, 71 S. W. 292; Ripy *v.* Redwater Lumber Co., (Tex. Civ. App. 1907) 106 S. W. 474.

vision that such foreclosure suits may be brought in any county in which the property or any part thereof is situated.[32]

B. Form and Sufficiency of Application — 1. Form in General. The mode of seeking the appointment of a receiver in equity is on motion, based on the averments and prayer of the bill, or on motion or petition filed in the pending case,[33] where the bill does not show all of the facts necessary to the relief.[34] Such motion or petition is heard by the court before making an order either granting or denying it. There is a hearing in equity, although it is *ex parte*.[35] Under a statute containing a special delegation of power as to the appointment of receivers of corporations, it has been held, as in other cases of delegated authority, that the form prescribed for obtaining jurisdiction of the person and subject-

32. Commercial Tel. Co. *v.* Territorial Bank, etc., Co., 38 Tex. Civ. App. 192, 86 S. W. 66.

Appointment in county where action is triable.— In U. S. Trust Co. *v.* New York, etc., R. Co., 35 Hun (N. Y.) 341 [*overruling* U. S. Trust Co. *v.* West Shore, etc., R. Co., 6 N. Y. Civ. Proc. 90, 67 How. Pr. 390, and *affirmed* in 101 N. Y. 478, 5 N. E. 316], it was held that the requirement of a statute that an application for a receiver of a corporation shall be made in the judicial district wherein the principal office of the corporation is located has no application to the appointment of a receiver to hold mortgage property pending a foreclosure and that such order can be made in any county where the action is triable. And in Knickerbocker Trust Co. *v.* Oneonta, etc., R. Co., 41 Misc. (N. Y.) 204, 83 N. Y. Suppl. 930, where defendant in the foreclosure proceedings before answer demanded that the trial of the action be changed to the county in which the mortgaged property was situated, as authorized by statute, a motion for the appointment of a temporary receiver in the county where the action was then pending, made within the five days allowed plaintiff to consent to such demand, was denied.

Sale of property see *infra*, IV, H.

33. Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118, where a separate bill was treated as a motion or petition in the cause in the same court.

34. Harris *v.* U. S. Savings Fund, etc., Co, 146 Ind. 265, 45 N. E. 328 (petition after decree of foreclosure); Pressly *v.* Harrison, 102 Ind. 14, 1 N. E. 188; Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593 (holding that a manager may properly be applied for by petition in the main cause; a proceeding by original bill not being necessary); Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64. But see also *infra*, III, E, 4, b, note 24.

The filing of a petition is not essential to the jurisdiction of the court to appoint a receiver. Klonne *v.* Bradstreet, 2 Handy (Ohio) 74, 12 Ohio Dec. (Reprint) 336 (under a statute specifying particular cases in which the court may exercise the power of appointing a receiver, which it is said seemingly makes it the duty of the court to appoint a receiver if the circumstances require it to prevent a failure of justice); Waters-Pierce Oil Co. *v.* State, (Tex. Civ. App. 1907) 105 S. W. 851 (holding further that upon the arising of the conditions in a statutory proceeding by the state against a corporation, which by the statute authorizes the appointment of a receiver, an application by the state showing the facts is in the nature of a pleading upon which the court may act). See also *supra*, III, A, 4.

A copy of the bill should be served upon defendant or his solicitor, in a creditors' suit, before moving for a receiver, instead of presenting a petition setting out the contents of the bill. Hart *v.* Tims, 3 Edw. (N. Y.) 226.

Receivership as sole relief.— Under the exception to the rule against the appointment of a receiver as the sole relief, in favor of infants, idiots, and lunatics (see *supra*, II, B, 6, b, (II)) the appointment will not be made on petition only, but a bill must be filed. Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 568; Anonymous, 1 Atk. 578, 26 Eng. Reprint 363; *Ex p.* Mountfort, 15 Ves. Jr. 445, 33 Eng. Reprint 822. But see Laddel *v.* Starr, 19 N. J. Eq. 159; *In re* Leeming, 20 L. J. Ch. 550. Sometimes under statute a proceeding against an insolvent corporation for a receivership is provided by petition under which the chancellor may proceed in a summary way. See for example Headly *v.* Ocean City Imp. Co., (N. J. Ch. 1887) 10 Atl. 471.

No pleadings are contemplated so far as respects the motion or application. Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188; Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510 (holding that no answer or other formal pleading to an application for the appointment of a receiver was authorized); Pouder *v.* Tate, 96 Ind. 330 (where it was held that an offer to file a demurrer to an application was properly refused); Bitting *v.* Ten Eyck, 85 Ind. 357 (holding that the appointment is on motion, the evidence being the sworn pleadings of the parties, etc.).

Waiver of an answer under oath constitutes no objection to the appointment of a receiver in a creditor's suit. Root *v.* Safford, 2 Barb. Ch. (N. Y.) 33.

At the instance of defendant see *supra*, II, B, 7, d.

35. Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64, holding that the hearing, as the term is used in the federal statute providing for appeal from an inter-

matter must be strictly pursued;[36] but under a statute creating a new equitable right the enforcement of which is devolved upon the court of chancery relief may be had by bill, although a proceeding on petition only is named in the statute.[37]

2. Sufficiency — a. In General. The facts upon which an application for a receiver is founded must be alleged in the bill, petition,[38] or affidavit, and mere legal conclusions will not be sufficient.[39] If no cause of action is alleged no right to the appointment of a receiver can be asserted under the pleading;[40] but technical accuracy in the pleading, in this regard, is not necessary to the exercise of the power of appointment.[41]

locutory order or decree upon a "hearing in equity" in the district or circuit court upon such application, is not to be understood as the technical hearing of the case.

Hearing see *infra*, III, E.

36. Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591.

37. Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244 note; Judson *v.* Rossie Galena Co., 9 Paige (N. Y.) 598 [*cited* in Bangs *v.* Duckinfield, 18 N. Y. 592], which cases were decided under the statute then in force authorizing a creditor of an insolvent corporation to proceed by petition for the appointment of a receiver. See also Tuckerman *v.* Brown, 11 Abb. Pr. (N. Y.) 389 [*affirmed* in 33 N. Y. 297, 88 Am. Dec. 386]. And see Corning *v.* Mohawk Valley Ins. Co., 11 How. Pr. (N. Y.) 190, where the proceeding by petition was sustained. But in Dambman *v.* Empire Mill, 12 Barb. (N. Y.) 341, it was held that while a creditor at large could not apply by petition for a receiver, other powers of the court, as defined by statute, in respect to corporations, were available to him by means of a suit brought to enforce payment of his debt. In Clinch *v.* South Side R. Co., 1 Hun (N. Y.) 636, 4 Thomps. & C. 224, it is shown that under N. Y. Laws (1870), c. 151, a receiver of a corporation could be appointed only in a civil action and which remedy superseded the remedy by petition as provided by the former statute, and did not justify the appointment upon an affidavit showing the recovery of a judgment, issue, and return of an execution unsatisfied and that the corporation was insolvent, which was held not a civil action within the statute.

38. *Colorado.*— Robinson *v.* Dolores No. 2 Land, etc., Co., 2 Colo. App. 17, 29 Pac. 750.

Connecticut.— Tomlinson *v.* Ward, 2 Conn. 396.

Indiana.— Heavilon *v.* Frankfort Farmers' Bank, 81 Ind. 249, holding that a receiver should not be appointed upon allegations of petitioner's ignorance of material facts, or upon allegations of legal conclusions.

Maryland.— Clark *v.* Ridgely, 1 Md. Ch. 70.

West Virginia.— Wilson *v.* Maddox, 46 W. Va. 641, 33 S. E. 775.

England.— Dawson *v.* Yates, 1 Beav. 301, 2 Jur. 960, 17 Eng. Ch. 301, 48 Eng. Reprint 956.

See 42 Cent. Dig. tit. "Receivers," § 46.

All the grounds for a provisional receiver need not be set forth in detail in plaintiff's petition. It is necessary, however, that the action should be one in which a provisional receiver may be appointed. Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

Objection.— If plaintiff's pleading fails to set up a cause of action for the appointment of a receiver objection thereto may be taken at any stage of the proceeding. Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253.

On applications without notice see *infra*, III, D, 5, d.

39. Union Boom Co. *v.* Samish Boom Co., 33 Wash. 144, 74 Pac. 53.

40. Saxon *v.* Southwestern Brick, etc., Co., 113 La. 637, 37 So. 540; Benepe-Owenhouse Co. *v.* Scheidegger, 32 Mont. 424, 80 Pac. 1024; Farwell *v.* Babcock, 27 Tex. Civ. App. 162, 65 S. W. 509; People's Inv. Co. *v.* Crawford, (Tex. Civ. App. 1898) 45 S. W. 738; New Birmingham Iron, etc., Co. *v.* Blevans, 12 Tex. Civ. App. 410, 34 S. W. 828; Espuela Land, etc., Co. *v.* Bindle, 5 Tex. Civ. App. 18, 23 S. W. 819.

A prayer for general relief will not be considered as a prayer for other relief than the appointment of a receiver unless a good cause of action for other relief is stated in the petition. Mann *v.* German-American Inv. Co., 70 Nebr. 454, 97 N. W. 600.

Where main cause fails see *supra*, II, B, 5, b, (III).

41. *Ex p.* Walker, 25 Ala. 81 (holding that it is not necessary that the bill be drawn with such technical accuracy as to defy a demurrer for every special cause relating to parties or form, in respect to which, if it were defective, the defect might be readily supplied by an amendment, which would be allowed as a matter of course); Belding *v.* Washington Cornice Co., 36 Wash. 549, 79 Pac. 37 (holding that it must appear that complainant has no cause of action, and that the only order that can be made is for a dismissal); Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

Multifariousness in the bill has been held to be no answer to a motion for an interlocutory order for a receiver. Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

b. Allegation as to Applicant's Right or Interest. A bill upon which the appointment of a receiver is sought is fatally defective if it does not show an interest in the subject of the suit or a right to the thing demanded.[42]

c. Showing as to Inadequacy of Other Remedies. If from the allegations of the complaint it does not appear but that the petitioner has a complete and adequate remedy at law, a receiver will not be appointed.[43]

d. Showing as to Necessity of Appointment and Danger of Loss. The facts must be alleged which show the necessity of the appointment and the danger of loss, waste, etc., to prevent which is one of the objects of the remedy.[44]

Theory of bill to invoke particular equitable jurisdiction.—Although a receiver will be appointed for an estate until administration can be granted, where it is in litigation or other impediments exist (see *supra*, II, B, 6, b, (II)), if the bill does not claim this relief and the complainant does not come into court under this head of equity jurisdiction, the bill cannot be maintained as one by a creditor proceeding against the estate of his debtor in the absence of administration. Smiley *v.* Bell, Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813.

42. McBride *v.* Coy, 1 Alaska 238; Anderson *v.* Cecil, 86 Md. 490, 38 Atl. 1074; Ramsey *v.* Erie R. Co., 38 How. Pr. (N. Y.) 193. In Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622, it is held that, although plaintiff's interest need not be conclusively shown to exist, as a general rule the facts alleged and the exhibits and affidavits in support of them ought to tend to strongly establish it, and the averments specially ought not to be uncertain or inconsistent either as to the plaintiff's interest or the interest of those he represents or as to the circumstances of peril which justify the court in assuming to act. See also *supra*, II, B, 7, a, b; II, B, 10.

The cause of action relied upon should be alleged particularly. Gray *v.* Kendall, 5 Bosw. (N. Y.) 666, 10 Abb. Pr. 66, where in an action by creditors of a limited partnership to obtain the removal of an assignee of the firm effects, and the appointment of a receiver and distribution of the property, the complaints of one of the creditors, alleging an indebtedness to himself "on several promissory notes of said firm, made before the execution of said assignment," and of another alleging that he was "a creditor in the sum of one thousand nine hundred dollars and upwards," were held to be defective, and were ordered to be amended, so as to state particularly the causes of action relied upon.

Setting forth demand as in ordinary suits. —Under La. Acts (1898), providing for the appointment of receivers of corporations plaintiff should set forth his demand as in ordinary suits. A mere allegation that plaintiff is a creditor without alleging the amount and nature of his demand and without prayer for judgment in his favor is insufficient. Saxon *v.* Southwestern Brick, etc., Co., 113 La. 637, 37 So. 540.

43. Heavilon *v.* Frankfort Farmers' Bank, 81 Ind. 249. But a complaint is not insufficient because it does not show that plaintiffs have exhausted their legal remedies, it appearing that such remedies are inadequate or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property or fund, or to secure justice to the parties. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26. See also *supra*, II, B, 4.

44. Hand *v.* Dexter, 41 Ga. 454; Malady *v.* Malady, 26 La. Ann. 438 (petition in a pending proceeding); Clark *v.* Ridgely, 1 Md. Ch. 70; Hanna *v.* Hanna, 89 N. C. 68 (holding that a receiver will not be appointed *pendente lite*, on a general allegation that loss will ensue from non-appointment, without a full statement of the facts); Twitty *v.* Logan, 80 N. C. 69.

Specific allegation of danger of loss of debt. —In Combs *v.* Breathitt County, 49 S. W. 2, 20 Ky. L. Rep. 1247, it was held that under a statute providing that, on the motion of any party who shows that he has a lien upon a fund in controversy, and that the fund is in danger of being lost, the court may appoint a receiver to take charge thereof, it was error to appoint a receiver to take charge of a fund in the hands of the sheriff which he offered to pay into court, without a specific allegation that plaintiff would be in danger of losing its debt to secure which it claimed a lien on the fund.

Mere expression of vague fears will not be sufficient to move the court to appoint a receiver so as to replace a temporary administrator. Fears expressed are not facts. Le Brantz *v.* Conklin, 39 Misc. (N. Y.) 715, 80 N. Y. Suppl. 967.

Peril of a trust fund alone moves the court to displace the trustee from the exercise of his legal rights over the trust funds, pending litigation against him; and unless such peril is shown by specific allegations supported by clear proof, the court ought not to interfere. Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Satterfield *v.* John, 53 Ala. 127; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

Insolvency.— If insolvency of defendants is necessary, it is sufficiently alleged by averments that executions against one of them have been returned *nulla bona*, and, in substance, that the other has no property that can be subjected to his debts. Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634. And, as a ground of appointment over a corporation, under statute, the mere allegation that defendant is insolvent, in the language

e. Fraud. Where fraud is relied on as a ground for the appointment of a receiver, the facts constituting the fraud must be distinctly set forth.[45]

f. Description of Property.[46] A receiver should not be appointed to take charge of property unless it is described with such reasonable certainty as to enable him to ascertain the subject-matter of his trust,[47] and so where the description of property is not set out with sufficient exactness to warrant the enforcement of the lien set up there are no *res* of which possession can be taken and it is erroneous to appoint a receiver.[48] But in a suit, under the statute, for administering the assets of a corporation, while it would be better to state distinctly what the assets are and where they are situated,[49] such assets need not be particularly described, since the receiver is to take all of the assets of the corporation,[50] although the receiver might act at his peril, as against the rights of other persons, if he should seize anything not expressly mentioned.[51]

g. Prayer. A prayer for a receiver is not necessary to get a receiver appointed, if the facts stated authorize the appointment [52] at the hearing,[53] or after decree,[54] and while it has been held that this rule does not apply to an appointment before the hearing,[55] the weight of authority is the other way, and maintains the propriety of making the order at any stage of the proceedings.[56] A bill praying for

of the statute, tenders an issue of fact. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26. But in New Jersey, under the statute for the appointment of a receiver of a corporation on a bill or petition "setting forth the facts and circumstances," it is not sufficient to allege that the corporation is insolvent, but the facts and circumstances of the alleged insolvency must be alleged. Atlantic Trust Co. *v.* Consolidated Electric Storage Co., 49 N. J. Eq. 402, 23 Atl. 934; New Foundland R. Constr. Co. *v.* Schack, 40 N. J. Eq. 222, 1 Atl. 23.

Preservation of property generally see *supra*, II, B, 10.

45. Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4; Ft. Payne Furnace Co. *v.* Ft. Payne Coal, etc., Co., 96 Ala. 472, 11 So. 439, 38 Am. St. Rep. 109; Robinson *v.* Dolores, No. 2 Land, etc., Co., 2 Colo. App. 17, 29 Pac. 750 (holding that in a suit by one of the stock-holders of a corporation for the appointment of a receiver and for an accounting, general assertions of conspiracy, fraud, mismanagement, and incompetency are insufficient for such purpose, but the specific facts relied on in proof of such matters should be pointed out); Powell *v.* Quinn, 49 Ga. 523; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173 (as to insufficient affidavits in a suit for the appointment of a receiver of a corporation, under the statute).

46. **What property subject** see *supra*, II, B, 9.

What property receiver takes see *infra*, IV, D, 3.

47. Jones *v.* Minogue, 29 Ark. 637, where a bill to recover the assets of an estate was held defective because no property, real or personal, was described or specified except by the general description of the estate of the decedent.

48. Salisbury *v.* Wilcox, 128 Cal. 347, 60 Pac. 979, where a receiver was erroneously appointed to take charge of a crop standing and growing on mortgaged premises, the complaint failing to describe the premises with sufficient exactness to warrant a lien or justify an order of sale.

49. Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217.

50. Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217; Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207, where the petition was held sufficient to embrace real estate of the corporation notwithstanding neither the petition nor motion in terms referred to such property.

By appearance and consent of the company, even if the petition is defective for lack of fullness of statement in this regard, such defect would be cured. Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207.

51. Hale-Berry Co. *v.* Diamond State Iron Co., 94 Ga. 61, 22 S. E. 217.

52. Malcolm *v.* Montgomery, 2 Molloy 500.

Of court's own motion see *supra*, III, A, 4.

53. Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973; Osborne *v.* Harvey, 11 L. J. Ch. 42, 1 Y. & Coll. 116, 20 Eng. Ch. 116, 62 Eng. Reprint 815.

54. Chicago, etc., R. Co. *v.* St. Clair, 144 Ind. 371, 42 N. E. 225; Brinkman *v.* Ritzinger, 82 Ind. 358; Bowman *v.* Bell, 14 L. J. Ch. 119, 14 Sim. 392, 37 Eng. Ch. 392, 60 Eng. Reprint 409, after the cause had been heard and the master had made his report.

55. Wilson *v.* Maddox, 46 W. Va. 641, 33 S. E. 775; Pare *v.* Clegg, 7 Jur. N. S. 1136, 3 L. T. Rep. N. S. 648, 9 Wkly. Rep. 216.

56. *Georgia.*— McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 989 [*distinguishing* Augusta Ice Mfg. Co. *v.* Gray, 60 Ga. 344, in that the decision reversing the judgment appointing a receiver was put mainly on the ground that the facts did not make a proper case for the appointment even if there had been a prayer, and that the absence of the prayer was merely given by the judge delivering the opinion as an additional reason why the appointment was erroneous], holding that a prayer for the appointment of a receiver would amount to nothing more than a suggestion to the

the appointment of a receiver is not defective because it does not pray for an injunction.[57] But where there is a prayer for a receiver to administer the property of a corporation and the prayer is sufficient for any relief which may be necessary if the receiver is appointed, if the appointment of a receiver is denied a judgment for the debt will not be rendered where there is no prayer for such judgment.[58]

3. AFFIDAVIT. Regularly a motion for a receiver should be founded upon affidavits,[59] or, as in the practice of some states, on a bill sworn to by the complainant or by someone cognizant of the facts stated.[60]

4. AMENDMENT.[61] The court may grant leave to amend any pleading or proceeding on behalf of either or both parties when in the interest of justice such amendment is deemed necessary.[62]

C. Parties on Application — 1. APPLICANTS. An order for the appointment of a receiver can be made only on the application of a party who has an interest in the subject-matter.[63] A statutory proceeding should be initiated by

court that a proper case had been made for his appointment, and as a general rule it would be entirely discretionary with the court to act on this suggestion or not.

New Hampshire.— Ladd *v.* Harvey, 21 N. H. 514.

Pennsylvania.— De Rustafjaell *v.* De Rustafjaell, 43 Wkly. Notes Cas. 56, holding that a receiver may be appointed under a prayer for further and general relief.

Tennessee.— Henshaw *v.* Wells, 9 Humphr. 568.

United States.— Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172.

See 42 Cent. Dig. tit. "Receivers," § 48.

Receiver as ultimate relief — indorsement of writ.— In Colebourne *v.* Colebourne, 1 Ch. D. 690, 45 L. J. Ch. 749, 24 Wkly. Rep. 235, it appears that a plaintiff should indorse his writ with a claim for a receiver when that is a substantial object of his action.

57. Treat *v.* Pennsylvania Mut. L. Ins. Co., 199 Pa. St. 326, 49 Atl. 84, 85 Am. St. Rep. 788. See also *supra*, II, B, 1; II, B, 3.

Injunction incident of receivership see INJUNCTIONS, 22 Cyc. 774 note 72, 981 note 51.

58. Tenney *v.* Ballard, etc., Hat Co., 17 Tex. Civ. App. 144, 43 S. W. 296.

59. New Castle, etc., R. Co.'s Appeal, 3 Walk. (Pa.) 281; Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118; Hungerford *v.* Cushing, 8 Wis. 320.

Before answer a receiver is never appointed except upon very strong special ground supported by affidavit. Williamson *v.* Wilson, 1 Bland (Md.) 418; Heller *v.* Young, 1 Lanc. Bar (Pa.) 27. See also cases cited *supra*, II, B, 8, b.

When a default is entered the rule is to require affidavit before the property shall be taken out of the custody of its true owners. Baker *v.* Backus, 32 Ill. 79.

60. Williamson *v.* Wilson, 1 Bland (Md.) 418, as to appointment before answer.

Waiver — affidavit not jurisdictional.— Failure to verify a bill or petition is not such a jurisdictional defect as to render the appointment void without regard to whether timely exception to the appointment is taken. Bass *v.* Wolff, 88 Ga. 427, 14 S. E. 589 (no ground for dismissal at final hearing, no exception having been taken to appointment); Russell *v.* Chicago Trust, etc., Bank, 40 Ill. App. 385 [*reversed* on other grounds in 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345]; Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820 (waiver of statutory requirement of verification of an application by the applicant); Clark *v.* Brown, 119 Fed. 130, 57 C. C. A. 76 (failure to verify amended bill not objected to at time application was made).

Pleading and affidavits as evidence see *infra*, III, E, 4.

61. **Of pleading generally** see PLEADING, 31 Cyc. 359 *et seq.*

62. McCord *v.* Weil, 29 Nebr. 682, 46 N. W. 152, holding that the statute providing that no receiver shall be appointed except on notice stating on what papers the application is based does not deprive the court of the power to allow amendments, and that when such leave is granted and material amendments are made by one of the parties, it may be necessary to grant the adverse party a reasonable opportunity to make amendments also. But see Pare *v.* Clegg, 7 Jur. N. S. 1136, 3 L. T. Rep. N. S. 648, 9 Wkly. Rep. 216, where upon refusing to appoint a receiver upon motion before decree because there was no prayer in the bill for such appointment, the court held that leave to amend for the purpose of the motion could not be allowed.

63. See *supra*, II, B, 7.

Testing capacity to sue as creditor or stock-holder.— In a suit to have a corporation declared insolvent and placed under disabilities in reference to the exercise of its franchises by an injunction, if the suit is commenced by bill, a proper mode of contesting the capacity of the complainant as a creditor or stock-holder to bring the suit would be by plea. When the suit is commenced by petition, so that the technical rules of pleading which distinguish between demurrers, pleas, and answers are to a large extent inapplicable, the answer to the petition

the persons designated in the statute;[64] but where the statute creates a new equitable right in respect of the appointment of receivers of corporations, the enforcement of which devolves upon the court exercising chancery jurisdiction, it has been held that such court acts as one of general jurisdiction and not as one exercising a special statutory power, and that a mere irregularity in designating a petitioner in the proceedings, which might have been fatal on appeal, will not render the appointment void and subject to impeachment collaterally.[65]

2. Respondents or Defendants[66] — a. In General. The appointment of a receiver cannot properly be made when it is to interfere with the possession of property in a person who is not a party to the record.[67] So it is held that where the purpose of the suit is to prevent one from obtaining possession of property which he is pursuing under judicial process, he should be a party before the court,[68] and where the order of appointment would necessarily affect property which is vested in executors and trustees under a will they should be made parties.[69] But

may well be strictly confined to the defense in all cases where that defense is set up. Hoopes *v.* Basic Co., 69 N. J. Eq. 679, 61 Atl. 979, where it was said that in all cases under the statute, whether on bill or petition, the trial is not hampered by forms or technical rules of procedure, but is "summary" in its nature, and very largely at every stage under the control of the court.

Stock-holders' suit see *supra*, II, C, 3.

64. Lowe Bros. Cracker Co. *v.* Brooke, 91 Ga. 243, 18 S. E. 136, where it is said that when three unsecured creditors are requisite to inaugurate a statutory proceeding, and only two of that class join in it at first, it is questionable whether the place of the third can be supplied by adding another unsecured creditor by amendment pending the imperfect and unauthorized proceeding and it is held that granting that this may be done, the amendment should show on its face that the added creditor is unsecured.

65. Bangs *v.* Duckinfield, 18 N. Y. 592 [*overruling* in effect Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591], where the petition under the statute described the person making it as the attorney of a creditor instead of being upon the petition of the person obtaining the judgment as prescribed by the statute was held not to render the proceedings void, the subject-matter being within the jurisdiction of the court and the parties having appeared to the process whatever it was.

66. **Associations** see Associations, 4 Cyc. 313.

Effect of appointment as against omitted parties see *infra*, IV, D, 5, h, (II); IV, H, 12, c.

Notice see *infra*, III, D.

67. *Illinois.*— Baker *v.* Backus, 32 Ill. 79; Gilbert *v.* Block, 51 Ill. App. 516, as to an order appointing a receiver to take possession of and sell property in the hands of persons not parties to the bill.

New York.— People *v.* O'Brien, 111 N. Y. 1, 63, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; Mutual Redemption Bank *v.* Sturgis, 9 Bosw. 608.

Tennessee.— Mays *v.* Wherry, 3 Tenn. Ch. 34.

Texas.— Farmers', etc., Nat. Bank *v.* Scott, 19 Tex. Civ. App. 22, 45 S. W. 26.

United States.— Searles *v.* Jacksonville, etc., R. Co., 21 Fed. Cas. No. 12,586, 2 Woods 621, as against a person who has prevailed on a plea in abatement to the jurisdiction.

See 42 Cent. Dig. tit. "Receivers," § 52.

Tenant in possession.— Where a defendant in a foreclosure suit is in possession of the mortgaged premises by a tenant who is not a party, the possession of the tenant cannot be disturbed. Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Kerp *v.* Michigan Lake Shore R. Co., 14 Fed. Cas. No. 7,727, holding that when the tenant is a party before the court a receiver of the premises may be appointed. See also Coffin *v.* Burnstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274. But as to ordering tenant to attorn see *infra*, IV, D, 5, i.

Possession under contract of purchase.— Where a bill for the appointment of a receiver of a mining company shows that a party has paid a large amount under a contract of purchase, and is in possession of the property, claiming to be the owner, he is a necessary party to the suit. Consolidated Stanley Min., etc., Co. *v.* Loeber, 96 Ill. App. 128.

Objection to jurisdiction of person.— If a defendant is not properly brought in to answer a rule and appearance by counsel is special to make such objection, this would seem to afford a sufficient obstacle in the way of making the appointment. Cape May *v.* Cape May, etc., R. Co., 59 N. J. Eq. 59, 44 Atl. 973. See also as to waiver of notice *infra*, III, D, 5; and as to waiver of objection to venue *supra*, III, A, 6.

Enforcement of receiver's right of possession see *infra*, IV, D, 5, a, *et seq.*

68. Walker *v.* Gibson, 35 Ill. App. 49, where the bill sought to restrain the execution of a writ of replevin and prayed for the appointment of a receiver and it was held that the party in whose behalf the writ was issued was a necessary party. See also Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627.

69. Rice *v.* Tonnele, 4 Sandf. Ch. (N. Y.) 568, where such parties were required in a bill by an infant who was devisee of an annuity under the trusts in the will, and

an officer in possession under an execution in behalf of a party to the suit who, together with all the other parties, except an intervener setting up a lien, consents to the appointment of a receiver, is not a necessary party to the application, his possession not being adverse to the claimants or plaintiff and other lienholders who applied for the appointment in such sense as to render him a necessary party.[70] On the other hand, that parties are omitted who might properly have been brought before the court in the main suit, for a complete determination of the issues involved therein, is not necessarily a reason for denying an interlocutory order for a receiver of property in the possession of a party before the court.[71] On collateral attack in an action by a receiver, the objection to his appointment upon the ground of the omission of an absolutely necessary party in the suit in which the order was made must present matter which would have been good in abatement had it been opposed to the application for the appointment.[72]

b. Corporations. The appointment of a receiver of a corporation cannot be made unless the corporation is a party to the proceeding,[73] and the same is true

also heir at law to a part of the estate, pending a contest over the probate of the will.

70. Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839, which was a suit in equity to set aside a deed of conveyance and to determine the amount and order of priority of claims of creditors of a corporation who were parties to the action.

71. Ashley *v.* Ashley, 59 N. Y. App. Div. 611, 69 N. Y. Suppl. 173 (which was a suit to set aside for fraud a transaction under which plaintiff had transferred certificates of stock to his son and daughters upon their joint agreement to render certain services, the son being the sole defendant, and upon an application for a receiver of the stocks transferred to him it was said that assuming that the daughters should be made parties defendant might at any time move to have them brought in); Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr. N. S. (N. Y.) 283.

Objection cannot be taken by one before the court that another is not a party to the application or was not served with notice. Rapp *v.* Reehling, 122 Ind. 255, 23 N. E. 68.

72. Stelzer *v.* La Rose, 79 Ind. 435, where the objection was that one of the members of a firm was not made a party to the proceeding in which the receiver was appointed, but it did not appear that such omitted party was within the jurisdiction of the court or had a substantial interest in the partnership.

73. *Illinois.*— Baker *v.* Backus, 32 Ill. 79.

Iowa.— French *v.* Gifford, 30 Iowa 148.

Michigan.— Scripps *v.* Crawford, 123 Mich. 173, 81 N. W. 1098.

Nebraska.— Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46.

New York.— Verplanck *v.* New York Mercantile Ins. Co., 2 Paige 438.

Pennsylvania.— Gravenstine's Appeal, 49 Pa. St. 310.

South Carolina.— Hubbard *v.* Camperdown Mills, 25 S. C. 496, 1 S. E. 5.

See 42 Cent. Dig. tit. "Receivers," § 52.

Extinct corporation.—An order appointing a receiver of an extinct corporation cannot properly be made, except in a proceeding to which the successor or substitute, to which has been transferred its property and powers have been transferred by statute, is a party. Young *v.* Rollins, 85 N. C. 485.

An ex parte bill or petition, with no defendant, brought by stock-holders for the appointment of a receiver of a corporation, is absolutely void. Smith *v.* Ely, etc., Dry Goods Co., 79 Miss. 266, 30 So. 653.

All of the directors need not be parties to a suit by a stock-holder based upon mismanagement and fraud. Ponca Mill Co. *v.* Mikesell, 55 Nebr. 98, 75 N. W. 46.

Where the directors are sued individually, a receiver of the corporate affairs cannot be appointed. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302.

Stock-holders.— The stock-holders of a corporation are neither necessary nor proper parties to a bill by a creditor, on behalf of himself and all other creditors who may choose to join, alleging the insolvency of the corporation, and asking that its property may be administered as a trust fund for the benefit of its creditors, where no relief is asked against the stock-holders. Bristol Iron, etc., Co. *v.* Thomas, 93 Va. 396, 25 S. E. 110. But the court may, in its discretion, allow a stock-holder to become a party defendant in a bill by creditors for a receiver, for the purpose of protecting his own interest and the interest of such other stock-holders as choose to join, although they cannot appear for the corporation. Kanawha Coal Co. *v.* Ballard, etc., Coal Co., 43 W. Va. 721, 29 S. E. 514. But see also CORPORATIONS, 10 Cyc. 729 text and note 72, 733 text and notes 1 and 2, 735 text and note 15.

A corporation may appear voluntarily by attorney, like a natural person. Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272.

Appearance by foreign corporation on motion for removal of cause after appointment of receiver is held to supply the place of citation. Krotz *v.* Louisiana Const. Co., 120 La. 363, 45 So. 276.

where it is sought to have property in the possession of a corporation placed in the hands of a receiver.[74] Under a statute requiring a particular officer to be made a party to a proceeding instituted to wind up the affairs of the concern, such officer need not be made a party to a bill by stock-holders which prays for a receiver, not for the purpose of winding up the corporation but to take charge of its assets and manage its affairs.[75]

3. Misjoinder or Defect of Parties. The appointment will not be denied on an interlocutory motion on the ground of misjoinder of plaintiffs,[76] nor will a mere defect as to parties prevent the court from entering the order at a preliminary stage of the suit when justice requires it.[77] And so where there is no dispute as to who the real debtor is or as to the justice of the debt the appointment of a receiver in the face of a technical objection for misjoinder of defendants will not be held error.[78]

D. Notice of Application — 1. Necessity in General. It may be stated as a general rule that a receiver should not be appointed *ex parte*, without notice to the parties to be affected thereby,[79] and before they have had an opportunity

74. Morrow *v.* Edwards, 20 D. C. 475.

Transferee of corporate property.— Where corporate property had been transferred to an alleged new company, but such new company was not made a party to the petition for a receiver, and the officers of the new company having control of the property refused to surrender it, the court cannot grant a writ directing the sheriff to place the receiver in possession, and to arrest for contempt the persons refusing to surrender possession, since the new corporation and its officers not being parties to the proceedings, the court was without jurisdiction to grant the writ. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341. See also *infra*, IV, D, 5, h, (II).

75. Treat *v.* Pennsylvania Mut. L. Ins. Co., 199 Pa. St. 326, 49 Atl. 84, 85 Am. St. Rep. 788. And this seems to be so notwithstanding the appointment of the receiver will work a dissolution of the corporation unless something should be done to revive it. Treat *v.* Pennsylvania Mut. L. Ins. Co., 203 Pa. St. 21, 52 Atl. 60.

76. Evans *v.* Coventry, 5 De G. M. & G. 911, 3 Eq. Rep. 545, 3 Wkly. Rep. 149, 54 Eng. Ch. 714, 43 Eng. Reprint 1125.

Creditors of corporation.— Under a code provision that all persons having an interest in the subject of an action, and in obtaining the relief demanded, shall be joined as plaintiffs, the creditors of a railroad company may jointly prosecute an action for the appointment of a receiver, although, in other respects than having a common interest in the relief sought, their interests are distinct. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26, holding that even if some of the claims set out in the complaint were improperly joined with others over which the court had jurisdiction, such misjoinder would not defeat the jurisdiction of the court; that as to them the action might be dismissed in the trial court.

Multifariousness see Equity, 16 Cyc. 239.

77. Probasco *v.* Probasco, 30 N. J. Eq. 108, where a demurrer to the bill had been sustained for a defect as to parties.

78. Boston Mercantile Co. *v.* Ould-Carter Co., 123 Ga. 458, 51 S. E. 466, where a petition against a corporation showed that the indebtedness sued on was due to plaintiffs by the corporation, and also alleged an indebtedness by the stock-holders of the corporation as a partnership, and the petition would have been good, had all reference to the stock-holders been left out, and the action was one more against the property involved than the parties in whose possession it was.

79. Whitehead *v.* Wooten, 43 Miss. 523; Chambers *v.* Barker, 2 Nebr. (Unoff.) 523, 89 N. W. 388, holding that the parties "to be affected thereby," who are required to be notified, under Nebr. Code Civ. Proc. § 267, are those interested in the possession of the property, and the disposition of the rents and profits.

Receiver for corporation — *In general.*— In Hutchinson *v.* American Palace-Car Co., 104 Fed. 182, it is said that an interlocutory receivership of a corporation should not be granted, except in extreme emergencies, unless after public notice, so that creditors and stock-holders generally may intervene and be heard on the application if they desire. In Louisiana the statute providing for the appointment of a receiver of a corporation to administer its assets and wind up the corporation does not require notice to creditors of the corporation of the application, but it is held that their interests are safeguarded by the remedies afforded to them after the order. Oil City Ironworks *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987; *In re* Eckhardt Mfg. Co., 114 La. 119, 38 So. 78.

Attorney-general.— N. Y. Laws (1883), c. 378, required notice to the attorney-general in proceedings for the dissolution of the corporation or the distribution of its assets, under which the appointment in a creditors' suit to sequestrate the property of a railroad corporation, without such notice, is invalid. Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164, 66 How. Pr. 436. But in Morrison *v.* Menhaden Co., 37 Hun (N. Y.) 522, it was held that where the notice was not served until after the appointment, a *nunc*

to be heard in relation to their rights,[80] and even though there is no provision in the statute requiring notice of the application for the appointment of a receiver,

pro tunc order of appointment after the notice was served, and on the notice so served, made a valid appointment from the time of the last order. In *In re* Gay, 4 N. Y. Suppl. 602, it was held that the statute did not apply to the appointment of a trustee of corporate property assigned for creditors under an insolvency statute, the powers of the trustee coming from the deed of assignment. And in MacNabb *v.* Porter Air-Lighter Co., 44 N. Y. App. Div. 102, 60 N. Y. Suppl. 694, it is held that the statute applies only to domestic corporations.

Creditors.— When a receiver of a corporation is applied for all creditors need not have notice of such application. Where notice is mentioned, unless otherwise specified, it applies only to defendant in the action, and an appearance by defendant without objection to the appointment is conclusive as to creditors, unless there is collusion or fraud in such appearance. Ripy *v.* Redwater Lumber Co., (Tex. Civ. App. 1907) 106 S. W. 474.

Appointment to fill vacancy see *infra*, III, L, 4.

On renewal application see *infra*, III, G.

80. *Alabama.*— Ensley Dev. Co. *v.* Powell, 147 Ala. 300, 40 So. 137; Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4 (holding that a receiver cannot be appointed on the single verified fact of the debtor's insolvency without notice to the latter of the application); Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110; Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Crowder *v.* Moone, 52 Ala. 220. See also Maxwell *v.* Peters Shoe Co., 109 Ala. 371, 19 So. 412. *Compare* Little Warrior Coal Co. *v.* Hooper, 105 Ala. 665, 667, 17 So. 118 (where it is said: "In many states the courts are not authorized to appoint a receiver until after notice or answer filed; and though this rule does not prevail with us, we have held in numerous decisions that the power should not be exercised except in cases of extraordinary urgency of which the courts must be reasonably satisfied either from the circumstances stated or *ex parte* affidavits); Micou *v.* Moses, 72 Ala. 439.

California.— Fischer *v.* San Francisco Super Ct., 110 Cal. 129, 42 Pac. 561; Hobson *v.* Pacific States Mercantile Co., 5 Cal. App. 94, 89 Pac. 866.

Florida.— Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141, 23 So. 557; Fricker *v.* Peters, etc., Co., 21 Fla. 254; State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Georgia.— Johns *v.* Johns, 23 Ga. 31.

Idaho.— Cummings *v.* Steele, 6 Ida. 666, 59 Pac. 15.

Illinois.— Haas *v.* Chicago Bldg. Soc., 89 Ill. 498 (after final decree); Nathan C. Dow Co. *v.* Deist, 123 Ill. App. 364; Anderson *v.* Hultberg, 117 Ill. App. 231; Consolidated Stanley Min., etc., Co. *v.* Loeber, 96 Ill. App. 128; English *v.* People, 90 Ill. App. 54; Craver, etc., Mfg. Co. *v.* Whitman, etc., Mfg. Co., 62 Ill. App. 313; Gilbert *v.* Block, 51 Ill. App. 516.

Indiana.— Henderson *v.* Reynolds, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. N. S. 960; Continental Clay, etc., Co. *v.* Bryson, 168 Ind. 485, 81 N. E. 210; Chicago, etc., R. Co. *v.* Cason, 133 Ind. 49, 32 N. E. 827; Pressley *v.* Harrison, 102 Ind. 14, 1 N. E. 188.

Iowa.— Bisson *v.* Curry, 35 Iowa 72; French *v.* Gifford, 30 Iowa 148.

Kentucky.— Wilson *v.* Jones, 8 Ky. L. Rep. 510; Price *v.* Price, 5 Ky. L. Rep. 330.

Louisiana.— Martin *v.* Blanchin, 16 La. Ann. 237, holding that it is not within the authority of the court to appoint *ex parte* a receiver of assets belonging to a partnership, but that a writ of sequestration, or a rule upon the defendants to concur in the appointment of a receiver by the parties, would be the proper remedy.

Maryland.— Anderson *v.* Cecil, 86 Md. 490, 38 Atl. 1074; Haight *v.* Burr, 19 Md. 130; Nusbaum *v.* Stein, 12 Md. 315; Triebert *v.* Burgess, 11 Md. 452; Blondheim *v.* Moore, 11 Md. 365.

Michigan.— Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

Mississippi.— Buckley *v.* Baldwin, 69 Miss. 804, 13 So. 851; Hardy *v.* McClellan, 53 Miss. 507; Vause *v.* Woods, 46 Miss. 120; Whitehead *v.* Wooten, 43 Miss. 523; Mays *v.* Rose, Freem. 703.

Missouri.— State *v.* Dearing, 184 Mo. 647, 84 S. W. 21; Rees *v.* Andrews, 169 Mo. 189, 69 S. W. 4.

Montana.— Benepe-Owenhouse Co. *v.* Scheidegger, 32 Mont. 424, 80 Pac. 1024; State *v.* Silver Bow County Second Judicial Dist. Ct., 20 Mont. 284, 50 Pac. 852, by statute, as to appointment before judgment.

Nevada.— Maynard *v.* Railey, 2 Nev. 313.

New Jersey.—Tibbals *v.* Sargeant, 14 N. J. Eq. 449.

New York.— People *v.* Albany, etc., R. Co., 1 Lans. 308, 7 Abb. Pr. N. S. 265, 38 How. Pr. 228; Simmons *v.* Wood, 45 How. Pr. 262; Gibson *v.* Martin, 8 Paige 481; Sandford *v.* Sinclair, 8 Paige 373; Devoe *v.* Ithaca R. Co., 5 Paige 521; Verplank *v.* Mercantile Ins. Co., 2 Paige 438; People *v.* Norton, 1 Paige 16.

North Dakota.—Grandin *v.* La Bar, 2 N. D. 206, 50 N. W. 151.

Ohio.— Cincinnati, etc., R. Co. *v.* Jewett, 37 Ohio St. 649.

South Carolina.—White *v.* Britton, 72 S. C. 175, 51 S. E. 547.

Texas.— Wotring *v.* Indemnity Imp. Co., 45 Tex. Civ. App. 300, 100 S. W. 358; Haywood *v.* Scarborough, 41 Tex. Civ. App. 443, 92 S. W. 815; Cotton *v.* Rand, (Civ. App. 1906) 92 S. W. 266; American Tribune New Colony Co. *v.* Schuler, 34 Tex. Civ. App. 560, 79 S. W. 370; Webb *v.* Allen, 15 Tex. Civ. App. 605, 40 S. W. 342.

under the rules of equity in matters relating to the appointment of receivers which govern when not inconsistent with the statutes on the subject, such notice should be given.[81]

2. SUFFICIENCY. The notice should be such as the statute requires,[82] when

Washington.— Larsen *v.* Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864.

West Virginia.— Baltimore Bargain House *v.* St. Clair, (1906) 52 S. E. 660; Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142 (before service of process, or in vacation after service of process); Hutton *v.* Lockridge, 27 W. Va. 428; Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

Wisconsin.— Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 470; Hungerford *v.* Cushing, 8 Wis. 320.

United States.— Huff *v.* Bidwell, 151 Fed. 563, 81 C. C. A. 43; Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64; Cabaniss *v.* Rico Min. Co., 116 Fed. 318, 54 C. C. A. 190; North American Land, etc., Co. *v.* Watkins, 109 Fed. 101, 48 C. C. A. 254.

See 42 Cent. Dig. tit. "Receivers," §§ 54, 55.

Amendment of bill between notice of motion and hearing.—A motion for an injunction and receiver is irregular where plaintiff amends his bill between the time of giving notice of moving and the time of bringing on the motion. Gouthwaite *v.* Rippon, 1 Beav. 54, 3 Jur. 7, 17 Eng. Ch. 54, 48 Eng. Reprint 859; Smith *v.* Dixon, 4 New Report 259, 12 Wkly. Rep. 934.

Order enlarging power of receiver.— In State *v.* New Orleans, 43 La. Ann. 829, 9 So. 643, it was held that after a receiver appointed by consent of a city to receive and distribute certain taxes for certain years has carried out the purpose of such special appointment, an order authorizing him to collect from the city taxes alleged to have been collected by the city for other years, virtually appoints a new receiver, and cannot be granted if no notice is first given to the city.

Before answer see *supra*, II, B, 8, b.

Fraudulent conveyances see FRAUDULENT CONVEYANCES, 20 Cyc. 832.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1454.

Pendency of cause see *supra*, II, B, 5, a, b.

81. Cotton *v.* Rand, (Tex. Civ. App. 1906) 92 S. W. 266; Larsen *v.* Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864; Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185. See also Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142.

Statute providing for pleadings and hearing.—A statute providing that the application for the appointment of a receiver shall be made by filing a petition in the action in which a receiver is desired, and that the party opposing the appointment shall do so by filing an answer, etc., and that the court may hear evidence and decide the same like any other issue, contemplates that the adverse party should have notice of the petition and a right to file an answer thereto, and that evidence should be heard before a decision is made. People *v.* Denver Dist. Ct., 33 Colo. 293, 80 Pac. 908.

Due process of law.—An act provided that upon the dissolution of a partnership if the parties could not agree upon the distribution of the effects and the settlement of the affairs either of them might apply to any judge or superior court for the appointment of a receiver, to receive, hold, and dispose of all the estate of the partnership, etc., but did not in terms require notice of the application to be given. It was held that such an act if intended to dispense with notice would be a deprivation of property without due process of law and the court in order to uphold the statute construed it to require notice. Bostwick *v.* Isbell, 41 Conn. 305. See also CONSTITUTIONAL LAW, 8 Cyc. 1080 *et seq.*

82. Ensley Dev. Co. *v.* Powell, 147 Ala. 300, 40 So. 137 (under a code provision requiring reasonable notice of the application in vacation, the court holding that where, on the question as to whether a corporation had had the notice required, there was in evidence a letter from the vice-president to an attorney, stating that the appointment of a certain person as a receiver would be satisfactory, but it did not appear whether the letter was written before or after the order for the appointment of a receiver, and the letter was not signed in the vice-president's official capacity, there was not sufficient notice); Vause *v.* Woods, 46 Miss. 120 (under an early statute fixing the time of the notice); Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820; Johnson *v.* Powers, 21 Nebr. 292, 32 N. W. 62.

Service after the hour specified in the notice under a statute requiring reasonable notice of an application in vacation is of no effect, although it states that the application will be heard at a certain hour "or at such other time thereafter as the chancellor may fix," and the defect cannot be cured by adjourning the hearing, but the chancellor should fix a new date for the hearing and order an alias notice to issue. Schilcer *v.* Brock, 124 Ala. 626, 27 So. 473.

Service of papers.— Under circuit court rules requiring copies of papers upon which a motion is founded to be served with notice of the motion, such papers must be served with notice of motion for a receiver, unless they have been filed with the clerk in which case they may be referred to. Hungerford *v.* Cushing, 8 Wis. 320.

In Louisiana under a statute requiring a return to a rule to show cause why a receiver should not be appointed to be made within ten days from the date of the order, unless the circumstances require, in the judgment of the court, a shorter delay, it is held that the court may, in the exercise of its discretion, require the return on the day

particular notice to be given is so prescribed.[83] If there is no hearing pursuant to the notice and no steps are taken thereunder, a hearing at a subsequent date cannot be referred to the original notice.[84] Legal notice of the application for a receiver having been given, and defendants having appeared and being at the time in court, jurisdiction was acquired, and having once attached, the court has the power and right to appoint some person other than the one named or suggested by plaintiff without any additional, other, or future notice.[85]

3. SERVICE. An application for a receiver in a pending suit may be supported by notice served upon the attorney of record representing the party adverse to the application.[86] And where a general statute provides for substituted service of notice, the manner of serving which is not otherwise prescribed, substituted service of a notice of an application for the appointment of a receiver under a statute requiring notice of such application without prescribing how it shall be served is good.[87] But where a statute regulating a purely statutory proceeding for the appointment of a receiver requires notice without prescribing the kind of service, personal notice must be given.[88]

after the order is made. Krotz *v.* Louisiana Const. Co., 120 La. 363, 45 So. 276.

83. See the statutes in the various states.

84. Vause *v.* Wood, 46 Miss. 120 (where a motion made in term-time under the proper statutory notice was, by consent, continued to a particular date in vacation, but the motion was not heard on the date so fixed by consent and it was held that it could not be heard regularly in vacation except by agreement as to the time or upon another notice as prescribed by statute); Tibbals *v.* Sargeant, 14 N. J. Eq. 449 (where the notice was given for a particular day, and application was not made pursuant to the notice but an agreement was made by counsel that the motion should be renewed at a further date on written briefs, and at a subsequent date notice was given that the motion would be heard on the next day, and it was held that due notice was not given).

In vacation.— In Stephens *v.* Kaga, 142 Ind. 523, 41 N. E. 930, it was held that there should be no rule enabling a litigant to give notice to his adversary of a hearing at a particular time, and then to so delay his application and to so present it as to require the adversary to stand guard constantly at the place of hearing, to avoid an advantage being taken of his interests; that the moving party should proceed within such reasonable time after the time fixed in the notice, and within the convenience of the judge, as will enable his adversary to be present and be heard, without the unreasonable burden of attending through protracted periods of delays and uncertainty; that if he so delays in presenting his application as to cast such burden upon his adversary he should be deemed to have waived his right to proceed under the notice given; that where the judge was absent on the day set for the hearing of a petition for the appointment of a receiver, he has jurisdiction to hear it on the following day, without further notice to defendants.

85. Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820, under a statute providing for notice containing the name of the proposed receiver.

86. Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022.

Admission of service and appearance by attorneys.— In Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272, it was held that the court acquired jurisdiction of the proceeding for the appointment of a receiver of a life insurance company by the petition of the attorney-general for its dissolution, setting forth the requisite facts, and of the corporation by its voluntary appearance by its attorneys on the return-day of the order to show cause, service of which had previously been admitted by them, which dispensed with the necessity of actual service of the order on the president or other officer of the corporation, there being no proof that the appearance of the attorneys was unauthorized.

The statutory requirement of notice to a party or his attorney of all subsequent proceedings in an action in which the party has appeared justifies the service of an amended complaint and notice of a motion for the appointment of a receiver on the attorney of the adverse party where such party has appeared by attorney and demurred to the original complaint, and the appointment based upon such notice is good. Haggard *v.* Sanglin, 31 Wash. 165, 71 Pac. 711.

87. Allen *v.* Cooley, (S. C. 1898) 31 S. E. 634.

88. Barker *v.* Johnson, 4 Abb. Pr. (N. Y.) 435; Beck *v.* Ashkettle, 18 R. I. 374, 27 Atl. 505, 28 Atl. 333, under a statute providing for a petition in equity for the appointment of a receiver for the estate of insolvent debtors and "notice to the debtor."

Dismissal in default of service.— Under a statute for the appointment of a receiver of property attached or levied on within a fixed number of days from the filing of the petition, on the petition of creditors, it has been held that if service of process on the petition is unnecessarily delayed, the court will order the petition dismissed in default of services within a fixed time. Whipple *v.* Babcock, 18 R. I. 611, 30 Atl. 464.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1455.

4. Effect of Failure to Give. If without notice a valid order of appointment may be made in the cases of extreme emergency, it has been considered that the question then must be whether the necessity for the appointment exists so as to justify the exercise of power, or whether the court erred in the particular case in making the appointment under circumstances which did not require summary action; and that the power and jurisdiction being conceded the order, however unwarranted, is not void.[89] In other cases, however, the objection for want of notice goes to the power of the court to make the appointment,[90] and such orders made *ex parte* and without an opportunity to be heard are illegal and unenforceable,[91] although they may be authorized under a proper showing of emergency and are held to be void only in the absence of such showing.[92]

5. Exceptions to Rule Requiring Notice — a. In General. The rule[93] is

89. Wilson *v.* Jonas, 8 Ky. L. Rep. 510; Maynard *v.* Railey, 2 Nev. 313, holding that where there is no showing of necessity, as the court has jurisdiction, the order cannot be disturbed on certiorari.

Collateral attack.—Appointment without notice will not render the order void on collateral attack. McKay *v.* Van Kleeck, 133 Mich. 27, 94 N. W. 367; Miller *v.* Brown, 1 Nebr. (Unoff.) 754, 95 N. W. 797; Dayton *v.* Borst, 7 Bosw. (N. Y.) 115 [*affirmed* in 31 N. Y. 435]; Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909.

Irregular appointment.— Where an absent defendant had been advertised to appear within a certain time, an order appointing a receiver obtained *ex parte* before the expiration of the time limited for the appearance, unless required by special circumstances, will be set aside as irregular. Sanford *v.* Sinclair, 3 Edw. (N. Y.) 393.

90. May *v.* Greenhill, 80 Ind. 124 (under a statute requiring notice); Mestier *v.* A. Chevallier Pavement Co., 51 La. Ann. 142, 24 So. 799 (as to a receiver in a pending suit against a corporation); Whitehead *v.* Wooten, 43 Miss. 523; State *v.* Second Judicial Dist. Ct., 20 Mont. 284, 50 Pac. 852 (where the appointment was made upon insufficient pleadings, before service of process); Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820; Johnson *v.* Powers, 21 Nebr. 292, 32 N. W. 62 (the last two cases being under a statute requiring a particular notice in all cases, which statute was held to be mandatory and a failure to comply with which was held to render the appointment not merely voidable but void).

91. Cummings *v.* Steele, 6 Ida. 666, 59 Pac. 15 (order annulled on certiorari); Salling *v.* Johnson, 25 Mich. 489 (where the appointment was made without notice on the day the bill was filed, the appeal, however, being dismissed because the order was not final, the court saying at the time that the order could not be enforced).

Ex parte appointment of receiver for corporation void.— Remington Paper Co. *v.* Watson, 46 La. Ann. 793, 15 So. 203; Ober *v.* Excelsior Planting, etc., Co., 44 La. Ann. 570, 10 So. 792 (holding that under a statute providing for the forfeiture of the charter of a certain class of corporations, on account of insolvency evidenced by the return of no property found on execution and making it the duty of the court in such case at the instance of the creditor to decree such forfeiture and appoint a commissioner effecting the liquidation, such appointment on an *ex parte* order is unauthorized and void on collateral attack); Turgeau *v.* Brady, 24 La. Ann. 348 (where the *ex parte* appointment of a receiver for a corporation was held void in an action brought by the receiver); People *v.* St. Clair Cir. Judge, 31 Mich. 456 (where mandamus was awarded to compel a judge to vacate an *ex parte* appointment of a receiver to manage the corporate business, the order being held to be absolutely void); State *v.* Dearing, 184 Mo. 647, 84 S. W. 21 (holding that where a judge in vacation appointed a receiver of a corporation without notice, an application to vacate the order is not essential to entitle parties injured by the order to a writ of prohibition against the enforcement of the order).

Dismissal of appeal by receiver.—An appeal taken by a third person, not a party, who appears as receiver of a defendant corporation, will be dismissed, when the order appointing him such receiver, attached to his petition of appeal, shows upon its face that it was made *ex parte*, and without notice to the corporation, in a case where the statute did not authorize such *ex parte* appointment. Ober *v.* Excelsior Planting, etc., Co., 44 La. Ann. 570, 10 So. 792.

92. Cummings *v.* Steele, 6 Ida. 666, 59 Pac. 15 (where the order was annulled on certiorari); State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 220, 56 Pac. 219 (in which case it was indicated that a writ of prohibition may issue to restrain the lower court from acting without notice upon no evidence of necessity, such evidence being necessary to the exercise of the power); State *v.* Silver Bow Second Judicial Dist. Ct., 20 Mont. 284, 50 Pac. 852 (where it was held on a certiorari that an order appointing a receiver before judgment, at chambers, on the application of minority stock-holders of a corporation, to take charge of its property and wind up its business was without authority of law, no facts and circumstances showing any emergency being disclosed by the record). See also *infra*, III, D, 5.

93. See *supra*, III, D, 1.

generally stated with qualifications, however, as that notice should be required unless it is impracticable to give it,[94] or where the giving of notice will jeopardize the delivery of the property over which the receivership is extended;[95] or except in those cases where the interested party is out of the jurisdiction of the court, or cannot be found, or where, from some other imperious reason, it becomes necessary for the court to interfere before there is time to give notice, to prevent the destruction or loss of property;[96] but in such exceptional circumstances the appointment may be made without notice.[97] In some cases it appears that the

94. Mays *v.* Rose, Freem. (Miss.) 703.

95. Culver *v.* Guyer, 129 Ala. 602, 29 So. 779; Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269; Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

Secrecy of proceedings.— In Olmstead *v.* Distilling, etc., Co., 67 Fed. 24, where on a bill by stock-holders a receiver was appointed with the consent of the company, and on an application by other stock-holders to remove the receiver it was held that there was nothing improper in keeping secret the application for and appointment of receivers of a corporation, until the papers in such proceedings have been filed in the proper office, that the application was necessarily made out of court, and without notice; otherwise its presumably legitimate purpose might have been defeated by bringing on the adverse attacks which the proceedings were intended to forestall.

96. Cases cited *infra*, note 97, and *supra*, note 80, from which it appears also that the statutes sometimes so fix the rule.

Illustrations of improper appointments without notice.— Wilson *v.* Jonas, 8 Ky. L. Rep. 510 (holding that *ex parte* evidence that defendants had refused to obey an order of injunction restraining him from interfering with plaintiff's possession of certain property did not authorize the appointment of a receiver without notice to defendant; the property not being endangered, but plaintiff merely prevented from conducting the business); Anderson *v.* Cecil, 86 Md. 490, 38 Atl. 1074 (holding that allegations that defendant had bid property at a trustee's sale, and thereafter remained in possession without paying the price, that the trustees had been ordered to resell the property, but had not done so; that defendant was insolvent, and that he was receiving the profits, which would be lost to complainants unless the court interfered, are not sufficient to authorize the appointment of a receiver without first hearing defendant in response to the application therefor); State *v.* Dearing, 184 Mo. 647, 84 S. W. 21 (holding that where plaintiff seeks to have the property of a corporation, against which he has no claim, placed in the hands of a receiver pending an action to settle a difference between plaintiff and a third person, a contention that the case is one where, without even an allegation that the corporation is insolvent, the appointment of a receiver should be made in vacation, and in the absence of notice to defendants is untenable); Merriam *v.* St. Louis, etc., R. Co., 136 Mo. 145, 36 S. W. 630 (holding that the insolvency of a corporation and the default in the payment of interest on its mortgage bonds do not, of themselves, authorize the appointment of a receiver for it without notice); Sanford *v.* Sinclair, 3 Edw. (N. Y.) 393 (where the court set aside as irregular an order appointing a receiver where an absent defendant had been advertised to appear within a certain time, and the order for the appointment was obtained by plaintiff *ex parte* before the expiration of the time limited for defendant's appearance); Cincinnati, etc., R. Co. *v.* Jewett, 37 Ohio St. 649 (where there was no obstacle to giving notice to the company before acting on the appointment of a receiver; no fraud or insolvency was charged against any of the parties; nor was it charged that the property of the company was in danger of removal beyond the jurisdiction of the court, or of otherwise being lost).

97. *Alabama.*— Culver *v.* Guyer, 129 Ala. 602, 29 So. 779 (holding that in a bill filed seeking the enforcement of a trust, and asking for the appointment of a receiver of the trust property, where facts are averred showing that the respondent is insolvent, and that there is imminent danger of his disposing of the trust property before a receiver could be appointed if he had notice of an application for a receiver, and the bill is properly verified, such averments authorize the appointment of a receiver without notice); Sims *v.* Adams, 78 Ala. 395 (appointment in a pending suit without notice to defendants when it is shown by affidavits that they are disposing of the property in which plaintiff claims an interest, appropriating the proceeds, and are insolvent, whereby the object of the suit would probably be defeated by delay). See also Micou *v.* Moses, 72 Ala. 439.

Delaware.— Davis *v.* Browne, 2 Del. Ch, 188.

Maryland.— Rosenberg *v.* Moore, 11 Md. 376.

Mississippi.— Hardy *v.* McClellan, 53 Miss. 507, where under the code provision to authorize the appointment of a receiver ten days' notice of the time and place of making the application must be given to the opposite party, unless it should be made to appear that an immediate appointment is necessary, in which case it may be made without notice.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 22 Mont. 241, 56 Pac. 281, holding that under Code Civ. Proc. § 951, a showing that there was imminent danger that property in the possession

proper practice is to make an order requiring defendant to show cause why the application should not be granted, and, if a proper showing of emergency is made, to appoint a temporary receiver until the day for hearing on the rule to

of defendant would be removed beyond the jurisdiction of the court, and unlawfully disposed of, unless a receiver was appointed *ex parte*, is sufficient to give the court jurisdiction to appoint such receiver, without notice of the application therefor.

Ohio.— Dwelle *v.* Hinde, 18 Ohio Cir. Ct. 618, 8 Ohio Cir. Dec. 177, under allegations that if notice be required defendant will remove his property beyond the reach of creditors.

Pennsylvania.— Gowan *v.* Jeffries, 2 Ashm. 296, holding that where irreparable injury would arise from delay, a receiver will be appointed without notice, leaving the other party the right to apply to have the order superseded on cause shown.

West Virginia.— Baltimore Bargain House *v.* St. Clair, 58 W. Va. 565, 52 S. E. 660.

United States.— Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64. In Olmstead *v.* Distilling, etc., Co., 67 Fed. 24, it is held that where an insolvent corporation had assets scattered all over the country, with liabilities approaching maturity on which attachments and local receiverships were threatened, whereby there was danger that the assets would be wasted and the interests of stock-holders and creditors endangered, an application for a receiver by the stock-holders was properly made without notice.

See 42 Cent. Dig. tit. "Receivers," § 55. And see *infra*, III, D, 5, d; *supra*, II, B, 8, a.

Party out of jurisdiction — *In general.*— As against a party who is out of the jurisdiction so that notice cannot be served, a receiver may be appointed without notice. Cotton *v.* Rand, (Tex. Civ. App. 1906) 92 S. W. 266 (where on an application for the appointment of a receiver of property it was shown that an order for the sale thereof for delinquent taxes had been issued, and that the trustee in whose custody the property had been placed was a non-resident, and it was held that the court did not abuse its discretion in appointing a receiver without notice, irrespective of the fact of a subsequent stay in the proceedings to sell the property); Gibbins *v.* Mainwaring, 9 Sim. 77, 16 Eng. Ch. 77, 59 Eng. Reprint 287. See also Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673. In Ettlinger *v.* Persian Rug, etc., Co., 66 Hun (N. Y.) 94, 20 N. Y. Suppl. 772 [*affirmed* in 142 N. Y. 189, 36 N. E. 1055, 40 Am. St. Rep. 587], in a suit to foreclose a corporate mortgage executed to a trustee who was confined in an insane asylum in a foreign country, it was held that it was not necessary to serve notice on him and that the code provision requiring that a temporary receiver shall be appointed without notice only in a case where an order of publication for the purpose of acquiring jurisdiction over defendant has been published, did not prevent the appointment of a receiver for the insolvent corporation, the court having acquired jurisdiction of the corporation by service on it and by its appearance in the cause by attorney.

Where defendant has absconded to prevent service of the subpœna to appear and answer the bill, or has left the jurisdiction, and has no residence or place of business where a subpœna can be served, a receiver may be appointed without notice. People *v.* Norton, 1 Paige (N. Y.) 17; Van Rensselaer *v.* Morris, 1 Paige (N. Y.) 1; Maguire *v.* Allen, 1 Ball & B. 75; Dowling *v.* Hudson, 14 Beav. 423, 51 Eng. Reprint 349; Quin *v.* Gunn, 1 Hog. 75 (on affidavit that the party resided out of the jurisdiction to avoid service of process); London, etc., Bank *v.* Facey, 24 L. T. Rep. N. S. 126, 19 Wkly. Rep. 676; Tanfield *v.* Irvine, 2 Russ. 149, 3 Eng. Ch. 149, 38 Eng. Reprint 292 (where the grantor of an annuity secured by an equitable charge on certain lands which were subject to a prior charge, went to reside abroad, but by his agent continued in receipt of the rents and profits, and the court, on the application of the annuitant, appointed a receiver, although the grantor had not appeared to the suit). But see otherwise in May *v.* Greenhill, 80 Ind. 124, 129, under a statute providing that receivers "shall not be appointed by any court, in any case, until the adverse party shall have appeared . . . or shall have had reasonable notice of the pendency of the action and of the application for such appointment."

Where the officers of a corporation cannot be served a receiver for the corporation may be appointed without notice. Lindgren-Mahan Chemical Fire Engine Co. *v.* Revere Rubber Co., 70 Ill. App. 379 (insolvent corporation); Dayton *v.* Borst, 7 Bosw. (N. Y.) 115 [*affirmed* in 31 N. Y. 435].

By statute it is sometimes expressly provided that receivers shall not be appointed in any case until the adverse party shall have appeared or shall have had reasonable notice of the application, except upon sufficient cause shown by affidavit. Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823, where, the statute being silent as to what will constitute sufficient cause, precedents for the general practice in equity were resorted to and followed. So in Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64, it is held that the statutory provision in Georgia that "under extraordinary circumstances a receiver may be appointed before and without notice to the trustee or other person having charge of the assets," is only confirmatory of equity procedure. And in Maish *v.* Bird, 59 Iowa 307, 13 N. W. 298, it is held that under a code provision for the appointment of a receiver in certain cases, "on such notice to the adverse party as the court or judge shall prescribe," where the adverse party is not within the jurisdiction of the court, and cannot be served, or cannot be readily served,

show cause.[98] On the other hand, even in such an extreme case a temporary injunction may be sufficient to protect the rights of the parties without resorting to so drastic a measure as a receivership,[99] and if so a receiver should not be appointed.[1]

b. Where the Parties Have an Opportunity to Be Heard. Where the order appointing the receiver is made in a pending suit fully matured for hearing, as the parties are already in court, it is held that no notice is necessary,[2] and where the appointment of a receiver is prayed for as a measure of final relief, the process

with notice, the court may appoint a receiver without notice.

In interpleader ordinarily, a special receiver should not be appointed to take possession of the property without notice. Still there are exceptions to the rule, as where immediate action is necessary to prevent great loss or injury, and especially where it is not sought to dispossess a party of his own property. Oil Run Petroleum Co. *v.* Gale, 6 W. Va. 525.

In equitable execution see *supra*, II, B, 12, b.

98. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341 (holding that the statute in Missouri providing a remedy by appeal from an order refusing to revoke or modify an order appointing a receiver contemplates that no court there can appoint a receiver pending suit, without notice, for a longer time than is fairly and reasonably requisite to allow defendant whose possession is invaded to show cause against a further continuance of the receivership, and it is held that, while the reasonableness of the time will generally depend on the circumstances of each case, three months is far beyond any reasonable day for the showing of such cause); Haggard *v.* Sanglin, 31 Wash. 165, 71 Pac. 711; Cole *v.* Price, 22 Wash. 18, 60 Pac. 153; Ford *v.* Taylor, 137 Fed. 149.

Form of order to show cause against the appointment of receivers of corporation see Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484, 493.

99. Fischer *v.* San Francisco Super. Ct., 110 Cal. 129, 42 Pac. 561.

1. *Alabama.*— Walker County Coal, etc., Co. *v.* Long, (1905) 39 So. 770.

Florida.— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

Illinois.— Nusbaum *v.* Locke, 53 Ill. App. 242, where defendant, the purchaser of goods, placed the seller in charge to sell them off, and a creditor of the seller having applied for the appointment of a receiver for the goods, the only fact stated in the petition which tended to support the pleader's conclusion of law that complainant's interests would be endangered by the delay necessary to give notice of the application being that the seller was insolvent, it was held that an *ex parte* appointment was erroneous, since an injunction against further sales pending a hearing of a motion for a receiver on notice would have been sufficient protection.

Mississippi.— Meridian News, etc., Co. *v.* Diem, etc., Paper Co., 70 Miss. 695, 12 So. 702.

New York.— Devoe *v.* Ithaca, etc., R. Co., 5 Paige 521, holding that the court will not grant a sequestration, or appoint a receiver of a corporation, against whom an execution has been returned unsatisfied, upon an *ex parte* application of the judgment creditor, but upon filing a petition duly verified, an order to show cause at a future day why the prayer of the petitioner should not be granted may be entered; and an injunction will be allowed restraining the officers of the company from selling, assigning, transferring, or encumbering the property or effects of the corporation, in the meantime.

United States.—North American Land, etc., Co. *v.* Watkins, 109 Fed. 101, 48 C. C. A. 254.

See 42 Cent. Dig. tit. "Receivers," § 55.

Other adequate remedies generally see *supra*, II, B, 4, b.

2. Ogden *v.* Chalfant, 32 W. Va. 559, 9 S. E. 879. And even after process served, during the pendency of the suit, if such application is made in vacation, there must be notice; but there need be no notice when made in term-time in a decree on the merits. Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142; Ruffner *v.* Mairs, 33 W. Va. 655, 11 S. E. 5; Odgen *v.* Chalfant, 32 W. Va. 559, 9 S. E. 879. But see Cummings *v.* Steele, 6 Ida. 66, 59 Pac. 15; Winchester Electric Light Co. *v.* Gordon, 143 Ind. 681, 42 N. E. 914, holding that under the statute in that state providing that receivers shall not be appointed until the adverse party shall have appeared or shall have had reasonable notice of the application of such appointment except upon sufficient cause shown by affidavit, where the adverse party appears the application for a receiver may be granted in open court without notice, the appointment being prayed for as final relief, but when such appointment is made at chambers, although during term-time, notice is necessary in the absence of the required affidavit of sufficient cause for the appointment without notice.

Default.— On petition by a creditor of a bank, under the New York "act to prevent fraudulent bankruptcies by incorporated companies," time having been allowed the bank to show cause against the petition, and no cause having been shown, a receiver was appointed, under full directions by the court, as to his duties. Matter of Franklin Bank, 1 Paige (N. Y.) 85. And after the bill has been taken as confessed against defendant for want of appearance, an application for the appointment of a receiver may be made *ex parte* and without any notice thereof. Austin *v.* Figueira, 7 Paige (N. Y.) 56.

that brings defendant into court to answer the complaint is sufficient notice to him of the final relief prayed for.[3] Appearance and resistance of the application may obviate any objection based upon want of notice;[4] and so it has been held that the want of notice is not material where the parties have had a full opportunity to be heard on the merits of the application, as on a motion to set aside the order of appointment,[5] or on a motion for other relief, upon which the parties appear and have an opportunity to be heard,[6] or where there is a hearing *de novo* on appeal to the chancellor from the order of appointment made by the register,[7] or where by the final judgment in the action, due notice of which was served, the temporary receiver, whose appointment was illegal for want of the required notice, is continued as permanent receiver.[8]

c. Waiver and Consent.[9] The parties may waive the required notice of an application for the appointment of a receiver, and the court, in that event, will have power to act upon it.[10] And so notice is not essential when the parties to

Performance or enforcement of judgment or decree see *supra*, II, B, 12, a.

3. Winchester Electric Light Co. *v.* Gordon, 143 Ind. 681, 42 N. E. 914; Newell *v.* Schnull, 73 Ind. 241, holding that the statute requiring notice intends that special notice shall be given only when a receiver is asked for pending the action. But it is also held that where the bill prays for the appointment of a receiver, it may be done any time after the process is served, without further notice, and that whether or no the bill prays such appointment, it may be made in term, without further notice, in the decree on the merits. Batson *v.* Findley, 52 W. Va. 343, 43 S. E. 142.

4. See *infra*, III, D, 5, c.

5. West *v.* Chasten, 12 Fla. 315 (where upon the coming in of the answers, the chancellor, upon a hearing of the motion to dissolve an injunction and vacate an order appointing a receiver, did virtually vacate the first order appointing a receiver, and make a new order appointing a different receiver with modified powers, and it was held that the record disclosed that the receiver then in charge was appointed after notice and argument); Hancock *v.* American Bonding, etc., Co., 86 Ill. App. 630; Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399; Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673; Cotton *v.* Rand, (Tex. Civ. App. 1906) 92 S. W. 266. The question then, on such motion after answer, becomes one as to the propriety of the appointment upon the merits, and the absence of notice originally will not be considered. Voshell *v.* Hynson, 26 Md. 83.

6. Whitney *v.* Buckman, 26 Cal. 447 (where, on the hearing of an application for an injunction, the appointment of a receiver by the court of its own motion was upheld over the objection that there was no notice of the application for a receiver, no objection having been made on the ground that the notice did not specify that a receiver would be applied for, it being held that the necessary facts were before the court and that if the party complaining had been surprised he should have asked for further time to meet the questions as to the propriety of the appointment); Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615 (on motions for injunction). See also McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 987.

Contra.— White *v.* Britton, 72 S. C. 175, 51 S. E. 547, where the parties were before the court on a rule to show cause why a restraining injunction should not issue and the court appointed a receiver of its own motion, it was held that the action being taken without notice to any party to the cause and without application by either party was erroneous. See also Hungerford *v.* Cushing, 8 Wis. 320, where it was held that the appointment of a receiver could not be sustained where it was made under a motion giving no notice of such relief, and no proof had been adduced as to the propriety of the appointment.

7. Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729 [*distinguishing* Moritz *v.* Miller, 87 Ala. 31, 6 So. 269, which was on appeal to the supreme court from an order of the lower court not preceded by an order of the register].

8. *In re* Stonebridge, 13 N. Y. Suppl. 770, where, in an action for sequestration of the property of a corporation after return of execution unsatisfied, a receiver was appointed temporarily, without the notice to the attorney-general required by Laws (1883), c. 378, § 8, to be given of all motions or other applications in any action for the dissolution of a corporation or a distribution of its assets; but by the final judgment in the action, notice of the application for which was duly served on the attorney-general, the same receiver was continued as the permanent receiver, and it was held that this appointment, legally made, vested the appointee with all the rights of his office, although the appointment during the pendency of the action was illegal and void.

9. **Consent to appointment** see *supra*, III, A, 3.

10. Longstaff *v.* Hurd, 66 Conn. 350, 34 Atl. 91 (under a statute providing that on an application of a partner for the appointment of a receiver for the firm, the court "shall forthwith appoint a day for the hearing upon the same, and shall make such order relative to notice of such application and

be affected are in court and appear and resist the application;[11] or acquiesce in the appointment by failure to move for the receiver's discharge,[12] or where the application is made in open court, the parties being present in person or by counsel, and no objection is then interposed,[13] and such appearance waives not only the notice but any irregularities therein or in the service thereof.[14]

d. Showing of Cause For Dispensing With Notice. In every case where the court is asked to deprive defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which such application is founded,[15] or by affidavits in support of the application.[16] And in this connection it is not sufficient to allege a mere conclusion that the appointment is necessary, but the facts which show such emergency as justifies the appointment without notice should be alleged positively.[17]

hearing to the other partners as may be deemed proper; said hearing to be at least six days from the service of such order of notice"); Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022; Vieth *v.* Ress, 60 Nebr. 52, 82 N. W. 116; Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820.

The president of a corporation may waive notice of an application for the appointment of a receiver of the corporation. Davis *v.* Edwards, 41 Wash. 480, 84 Pac. 22.

Joining in application.— On an application for a receiver of a corporation, if the corporation answers and joins in the application, notice to it is not necessary. *In re* Eckhardt Mfg. Co., 114 La. 119, 38 So. 78.

Waiver and estoppel generally see *infra*, III, J, 2.

11. Haas *v.* Chicago Bldg. Soc., 89 Ill. 498; Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820; Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118; McLean *v.* Lafayette Bank, 16 Fed. Cas. No. 8,887, 3 McLean 503. See also Consolidated Barb Wire Co. *v.* Stevenson, 71 Kan. 64, 79 Pac. 1085 (as to appointment after judgment, execution and *nulla bona* return, under statute); Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272.

12. Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083.

Appearance before appointment of a successor upon the resignation of a receiver cures want of notice. Ripy *v.* Redwater Lumber Co., (Tex. Civ. App. 1907) 106 S. W. 474.

Fraudulent concealment of service of notice by an agent of a corporation authorized to receive such service, by reason of which concealment the corporation fails to resist the application, will justify the court in reopening the case and hearing the corporation on a motion to vacate the order, if after the appointment the corporation has not been guilty of such delay as to estop it, in which latter event the court will not interfere. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

13. Kimbrough *v.* J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576.

14. Robertson *v.* Ostrom, 1 Nebr. (Unoff.) 200, 95 N. W. 469; Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

15. Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110; Continental Clay, etc., Co. *v.* Bryson, 168 Ind. 485, 81 N. E. 210 (holding that a complaint averring that a corporation was insolvent, that its president was a non-resident of the state, and that if he were permitted to turn the assets into cash or available securities he would, in all probability, take the same outside the jurisdiction of the court, and that plaintiff believes that he would not dispose of the assets to the best advantage of the minority stock-holders, and that the corporation was threatening to sell the property of the corporation over the protest and objection of plaintiff, was not sufficient to authorize the appointment of a receiver without notice, since there were no facts alleged showing that irreparable injury or any loss of property would have resulted if notice had been given); Larsen *v.* Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864; Baltimore Bargain House *v.* St. Clair, (W. Va. 1906) 52 S. E. 660.

16. Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141, 23 So. 557; Larson *v.* West, 110 Ill. App. 150; Baltimore Bargain House *v.* Clair, (W. Va. 1906) 52 S. E. 660. Sometimes it is expressly provided by statute that the cause for appointment without notice shall be shown by affidavit. Winchester Electric Light Co. *v.* Gordon, 143 Ind. 681, 42 N. E. 914.

17. *Alabama.*— Gilreath *v.* Union Bank, etc., Co., 121 Ala. 204, 25 So. 581; Florence Bank *v.* U. S. Savings, etc., Co., 104 Ala. 297, 16 So. 110 (holding that a complaint which alleges that the appointment of a receiver is necessary "to prevent irreparable injury and total destruction of an insolvent's assets," without alleging the facts constituting the necessity for an immediate appointment, is insufficient); Thompson *v.* Tower Mfg. Co., 87 Ala. 733, 6 So. 928; Moritz *v.* Miller, 87 Ala. 331, 6 So. 269.

Florida.— Jacksonville Ferry Co. *v.* Stockton, 40 Fla. 141, 23 So. 557; Fricker *v.* Peters, etc., Co., 21 Fla. 254, holding that it is no ground for the appointment of a receiver, pending suit, that plaintiff "greatly

E. Hearing and Determination — 1. Hearing by Court. Upon application for the appointment of a receiver in equity there is a hearing in equity;[18] the application is heard by the court, and where the same power is conferred upon the courts by the code, to be exercised for the same purposes and in the same emergencies as in the courts of equity before the adoption of the code, the formation of issues and the intervention of juries for their trial, at least in cases of interlocutory applications for such appointments, are not contemplated.[19] But under a code provision that upon the trial of an issue of fact by a referee his report stands as the decision of the court, the referee's report in such a case finding that a receiver should be appointed is final until reversed and cannot be reversed by a judge at special term who has no alternative but to appoint a receiver.[20]

2. Open and Close. On a motion for the appointment of a receiver by plaintiff, he is entitled to open and close under the provision of a rule that the actor or party submitting any motion or special matter shall begin and close.[21] But where the opposing party is called on to show cause it has been held that he is entitled to open and conclude.[22]

fears if the defendants are permitted to remain in possession of said property . . . that the same will be disposed of so as to be placed beyond the reach of your orators, and their debt will be wholly lost."

Illinois.— Larson *v.* West, 110 Ill. App. 150; English *v.* People, 90 Ill. App. 54.

Indiana.— Henderson *v.* Reynolds, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. N. S. 960; Sullivan Electric Light, etc., Co. *v.* Blue, 142 Ind. 407, 41 N. E. 805; Wabash R. Co. *v.* Dykeman, 133 Ind. 56, 32 N. E. 823.

Iowa.— French *v.* Gifford, 30 Iowa 148, where it was held insufficient to aver, in an application for the appointment of a receiver for a corporation, that the petitioner verily believes that, if notice of the application be given to the corporation and its officers, the books, records, and papers of the company will be falsified or concealed, so that frauds committed by the officers cannot be ascertained.

Maryland.— Blondheim *v.* Moore, 11 Md. 365, holding that a bill charging positively that defendants are indebted to the complainant, but alleging, merely upon information, a belief of facts tending to show a fraudulent conveyance of defendants' property, and, also upon information, a belief that defendants are liable to remove their property for the purpose of hindering, delaying, and defrauding their creditors, is held to be insufficient.

New York.— Verplanck *v.* Mercantile Ins. Co., 2 Paige 438.

Wisconsin.— Davelaar *v.* Blue Mound Inv. Co., 110 Wis. 470, 86 N. W. 185, holding that under a statute providing for the appointment of a receiver at the instance of a judgment creditor with an execution unsatisfied, in a proceeding to sequestrate the stock and property of the corporation, allegations that defendant corporation was indebted to various persons, and that it had equitable interests which could not be reached by execution, and that other creditors threatened to begin actions, were not sufficient to justify the appointment of a receiver without notice to defendant of the application therefor.

See 42 Cent. Dig. tit. "Receivers," § 57.

Reason for delay.— Henderson *v.* Reynolds, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. N. S. 960, holding that an affidavit, in an application for a receiver for a crop of mint, alleging the necessity for harvesting and distilling it without delay, does not show any excuse for not giving defendant notice of the application, where no reason is assigned why the application was not made earlier.

18. See *supra*, III, B, 1.

Appointment a judicial act see *infra*, III, F, 3, a.

19. Bitting *v.* Ten Eyck, 85 Ind. 357.

By chancellor on appeal from register.— In Alabama, by statute, the register was given power to appoint a receiver in vacation, upon notice or good reason shown for omitting notice, and an appeal to the chancellor provided, and it is held that on such appeal from an order of appointment the chancellor's jurisdiction is not merely appellate, but the matter comes before him as on an original petition, and his action thereon is precisely as if it were taken on the original application. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Heard *v.* Murray, 93 Ala. 127, 9 So. 514.

Appointment by executive officers see *supra*, I, note 2.

Selection as function of court see *infra*, III, F, 3.

20. Durant *v.* Pierson, 12 N. Y. Suppl. 145, 19 N. Y. Civ. Proc. 203.

21. Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

22. Boyce *v.* Burchard, 21 Ga. 74, where, upon the coming on of a motion for an injunction and a receiver, the court granted the injunction and passed an order that the motion for the appointment of a receiver be suspended for a reasonable time to allow an opportunity to defendant to make answer and show why it should not be granted, and it was held that if the import of this

3. Scope of Inquiry and Relief [23] — a. In General. The court will not consider or determine questions not directly connected with the immediate object of the application,[24] and a sound rule which ought to be observed on such preliminary hearings is that the court should determine whether it is probable that on the final hearing of the case the allegations of the bill will be made good by competent proof, and whether the character and situation of the property is such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties in interest.[25] Other relief not within any of the issues in the cause should not be ordered,[26] and where the jurisdiction in the particular matter is statutory, the court cannot administer relief beyond the statutory limitations on its jurisdiction.[27]

order was that the receiver would be appointed unless defendant should show cause by answer against the appointment, then the lower court was right in giving the opening and conclusion to defendant; that the above order was susceptible of this import and that the appellate court would not disturb that interpretation of the order as given to it by the judge of the lower court by his action in giving the opening and conclusion to defendant.

On motions generally see Motions, 28 Cyc. 15.

Open and close generally see Trial.

23. Discretion of court see *supra*, II, B, 2.

Sale of property see *infra*, IV, H, 2.

24. Chicago, etc., R. Co. *v.* Kenney, 159 Ind. 72, 62 N. E. 26 (holding that on an application by creditors of a railroad company for the appointment of a receiver, it was not error to refuse to postpone the hearing of the application to enable defendant to obtain evidence against certain claims, on the tender of a bond to secure their payment, which bond was not large enough to cover all claims set out in the complaint as this was matter not connected directly with the appointment of the receiver and the validity of the claims was open to full investigation on the final trial); Higgins *v.* Bailey, 4 Rob. (N. Y.) 613 (holding that on a motion for the appointment of a receiver of partnership property, the court will not undertake to determine what is partnership property as between the partners and third persons, the proper course to determine whether any particular property is partnership property or not being by an action either against or in favor of the receiver). But in Gregory *v.* Gregory, 1 Sweeny (N. Y.) 613, it was held that an order for a receiver of partnership property should not specifically cover property the ownership of which by the partnership is denied and not proved.

In foreclosure proceedings see Mortgages, 27 Cyc. 1629 text and note 36.

25. Kelley *v.* Boettcher, 89 Fed. 125. See also *supra*, II, B, 7, a, b; II, B, 10, a, b.

26. Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 27 N. E. 487, holding that where a suit is brought against a corporation and its officers by a stock-holder merely for the purpose of obtaining an accounting and the appointment of a receiver, it is error to decree that the corporate property be sold and the proceeds divided among the stock-holders. So in Headly *v.* Ocean City Imp. Assoc., (N. J. Ch. 1887) 10 Atl. 471, it is held that on an application, under the corporation act, for an injunction and receiver for an insolvent corporation, the corporation cannot be proceeded against for violation of the statute in impairing the value of its stock.

General distribution of corporate property. — Where a corporation which was no longer a going concern filed a bill for a receiver and the distribution of a specific fund among its stock-holders, it was held that the court will consider this fund only, and will not settle all accounts between the corporation and its stock-holders; and if a stock-holder desires a general distribution of all the property, he must seek relief by an original bill, or an original bill in the nature of a cross bill. Pacific R. Co. *v.* Cutting, 27 Fed. 638. But in a suit for the appointment of a receiver to enforce a contract of the corporation, that a judgment against it might be collected, the appointment of a general receiver with power to receive the assets and enforce any rights of the corporation, etc., and limiting the time in which all creditors should present their claims to the receiver and giving such creditors the right to be parties, is held to be proper to the end that full and complete justice might be done between the corporation and its shareholders on the one hand and all of its creditors upon the other, all of whom were represented by the parties to the suit, inasmuch as equity never does anything by halves; and the general claim for relief was sufficient to justify the provision in the decree looking to the final distribution of whatever might be realized from the insolvent estate. Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758.

27. Clark *v.* Banner, etc., Printing Co., 50 Wis. 416, 7 N. W. 309, where it is held that a statute authorizing the court to sequester property and appoint a receiver to compel an insolvent corporation to account having undertaken specifically to provide what may be done by the court in such a proceeding, limits the power to those acts; that the court has no jurisdiction to add to its order appointing a receiver an injunctional order against another company, made a defendant as claiming certain property and rights by assignment from the insolvent company, restraining it from publishing a newspaper under the same name or title as that pre-

b. Merits of Cause. In dealing with interlocutory applications the court will confine itself strictly to the immediate object sought and as far as possible abstain from prejudging the question in the cause.[28] It will not consider or pass upon the merits of the case and the rights of the parties,[29] except as furnishing the grounds for the order, for the security of the property until the rights of the parties can be ascertained,[30] or further than may be necessary to ascertain that probability of ultimate success which the applicant is required to show in order to justify a resort to the remedy.[31]

4. Pleading, Affidavits, and Other Evidence — a. In General. Ordinarily the evidence on a motion for the appointment of a receiver consists of the sworn pleadings of the parties, and such affidavits or depositions as may, within the rules of practice, be offered on either side.[32] As in other cases in which affidavits

viously employed by the insolvent company; and that in such a proceeding the power conferred by the statute upon the court in respect to any person to whom it is alleged that any transfer of property of the insolvent corporation has been made, is to compel such person "to testify in relation thereto" which does not justify the injunctional order.

28. Skinners' Co. *v.* Irish Soc., 1 Myl. & C. 161, 13 Eng. Ch. 161, 40 Eng. Reprint 338.

29. *Georgia.*— Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642.

Indiana.— Bitting *v.* Ten Eyck, 85 Ind. 357.

Maryland.— Everett *v.* Avery, 19 Md. 136 (holding that in a proceeding under a statutory provision to secure priority for claims for work and labor questions of priority as between parties claiming liens under the statute and one claiming a mortgage lien set forth in an answer to the proceedings, do not properly arise under a motion to dissolve an injunction and for the appointment of a receiver for the estate of the employer); Williamson *v.* Wilson, 1 Bland 418.

New York.—Putnam *v.* Henderson, 49 N. Y. App. Div. 361, 63 N. Y. Suppl. 250; Ross *v.* Vernam, 6 N. Y. App. Div. 246, 39 N. Y. Suppl. 1031; Thalmann *v.* Hoffman House, 27 Misc. 140, 58 N. Y. Suppl. 227 (suit by stock-holder against directors and corporation charging mismanagement, etc., and attacking election of directors which is sought to be set aside); Brown *v.* Northrup, 15 Abb. Pr. N. S. 333; Conro *v.* Gray, 4 How. Pr. 166.

North Carolina.— Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869; Rheinstein *v.* Bixby, 92 N. C. 307.

Tennessee.— Downing *v.* Dunlap Coal, etc., R. Co., 93 Tenn. 221, 24 S. W. 122, where such adjudication was held improper.

West Virginia.— Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897.

United States.— Kelley *v.* Boettcher, 89 Fed. 125; Kerp *v.* Michigan, etc., R. Co., 14 Fed. Cas. No. 7,727.

England.—Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Swanst. 113, 146, 36 Eng. Reprint 555, 2 Wils. Ch. 130, 37 Eng. Reprint 258.

See 42 Cent. Dig. tit. "Receivers," § 63.

Under the insolvency laws in Minnesota the court on hearing a petition should proceed on the merits. Prouty *v.* Hallowell, 53 Minn. 488, 55 N. W. 623.

Effect of order of appointment see *infra*, IV, A.

30. Rheinstein *v.* Bixby, 92 N. C. 307; Dobson *v.* Simonton, 78 N. C. 63; Skinners' Co. *v.* Irish Soc., 1 Myl. & C. 161, 13 Eng. Ch. 161, 40 Eng. Reprint 338, holding that the court will not go out of its way in order to give plaintiff an opportunity of obtaining, previous to the hearing, the opinion of the court upon the subject-matter of the suit; and will express its opinion only so far as is necessary to show the grounds on which the interlocutory application is disposed of.

31. See *supra*, II, B, 7, a, b; II, B, 10, a, b.

Right under lease.— In a suit to foreclose a lien for rent the appointment of a receiver to take possession of the leasehold premises, and to collect and receive the rents and profits pending the suit, must be determined from the lease. Mavor *v.* Northern Trust Co., 93 Ill. App. 314, 315, where the lease was held in legal effect to contain a specific pledge of the rents by the lessee to the lessor as security for all moneys to become due under the lease under a provision "that the lessors shall have a first and valid lien, which is hereby given them, upon the rights and interests of the lessee, under this lease, to secure the payment of any and all moneys at any time to become due," etc.

32. Etowah Min. Co. *v.* Wells Valley Min., etc., Co., 106 Ala. 492, 17 So. 522 (holding that on the hearing of an application for the appointment of a receiver the chancellor may receive affidavits on behalf of both parties and admit any competent evidence material to the issue); Bitting *v.* Ten Eyck, 85 Ind. 357.

Oral evidence.—It is discretionary with the court whether or not oral evidence will be heard on a motion for a receiver, and it is only in exceptional cases that it should be done. State *v.* Egan, 62 Minn. 280, 64 N. W. 813. See also Boyce *v.* Burchard, 21 Ga. 74, where the appellate court refused to disturb the discretion of the lower court in refusing to hear oral evidence.

Where the case was not tried on the petition and answer, but there was a regular hearing, the parties introducing their witnesses, and their oral testimony was taken

are taken for use in a pending cause, affidavits for use on an application for the appointment of a receiver should be entitled in the cause.[33]

b. Affidavits in General. Regularly an application for a receiver is founded upon affidavits or a sworn bill.[34] Such affidavits may be read on the motion in support thereof and in support of the case made by the complainant's pleading,[35] and while it has been said that where an application for a receiver is made after answer, plaintiff can rely only upon the admissions in the answer,[36] as the object of the court is to be informed of the true circumstances of the case there seems to be no reason why affidavits should not be considered in connection with the answer.[37] But it is held that affidavits on behalf of the applicant on such motion may not be received to enlarge the case made by the bill, but only in support of it,[38]

in court, it was held that the allegations in the petition will not be considered as evidence to support plaintiffs' case. Dallas City Nat. Bank *v.* Dunham, (Tex. Civ. App. 1898) 44 S. W. 605.

In insolvency proceedings under the statute in Minnesota, the rule of the district court relative to hearing orders to show cause on affidavits only has no application on a petition for the appointment of a receiver, and the court, on hearing such a petition, should proceed on the merits, receiving such evidence as may be pertinent, unless from the admissions of the parties at the hearing the court is as fully informed of the facts as it would be if oral or documentary evidence is admitted. Prouty *v.* Hallowell, 53 Minn. 488, 55 N. W. 623.

On appeal — *In general.* — On an appeal in equity to the supreme court of the United States, no new evidence can be introduced, and even if that court would in any case appoint a receiver in a cause pending there on appeal, the hearing must be upon the pleadings and proof below. Pacific R. Co. *v.* Ketchum, 95 U. S. 1, 24 L. ed. 347.

On appeal to the chancellor from an order of appointment made by the register, under a statute in Alabama giving to the register the power to appoint receivers in vacation, upon notice or good reason shown for omitting notice, and providing an appeal to the chancellor from such order of appointment, the hearing is *de novo* and affidavits may be read. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Werborn *v.* Kahn, 93 Ala. 201, 9 So. 729; Heard *v.* Murray, 93 Ala. 127, 9 So. 514.

Original pleading and application taken together.—Where the original pleading shows the facts making the appointment of a receiver necessary, and is properly verified but contains no prayer for a receiver, on an unverified application the original pleading and subsequent application may be taken together. Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820.

Verification without subscription. — The verification of a bill is sufficient without subscription of the affiant to the affidavit. Culver *v.* Guyer, 129 Ala. 602, 29 So. 779.

The affidavit of the attorney for plaintiff in the petition to the effect that he knows the recitals of fact in the petition to be true, is a sufficient verification, under a statute requiring such petition to be verified by the petitioner or supported by other satisfactory proof. Boston Mercantile Co. *v.* Ould-Carter Co., 123 Ga. 458, 51 S. E. 466.

33. Whitley *v.* Berry, 105 Ga. 251, 31 S. E. 171, affidavit excluded because not entitled and not shown to have been taken for use as evidence in the cause.

Entitling affidavits generally see AFFIDAVITS, 2 Cyc. 18.

34. See *supra*, III, B, 1.

Additional affidavits.—Allowing or refusing additional affidavits after argument on a motion for the appointment of a receiver has commenced (Levenson *v.* Elson, 88 N. C. 182), or refusing to hear more affidavits not presented at the proper time, after giving the parties ample opportunity to present affidavits, is discretionary with the court hearing the application (Farmers' Nat. Bank *v.* Backus, 64 Minn. 43, 66 N. W. 5).

35. Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077 (in opposition to an answer before the time for replying has expired); Connor *v.* Allen, Harr. (Mich.) 371; Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897.

36. See Keller *v.* Young, 1 Lanc. Bar (Pa.) Nov. 27, 1869.

Where one defendant only of two material defendants had answered, plaintiff was permitted to read his affidavit in support of the application, and the answer which had come in was treated as an affidavit. Kershaw *v.* Mathews, 1 Russ. 361, 46 Eng. Ch. 322, 38 Eng. Reprint 140.

Motion not heard before answer. — Where a notice for a hearing of a motion for a receiver on a particular day was given, but before the motion was heard the answer came in, Lord Eldon permitted plaintiff's affidavits to be read, and regarded the answer as a counter affidavit. Goodman *v.* Whitcomb, 1 Jac. & W. 589, 37 Eng. Reprint 492.

37. Ladd *v.* Harvey, 21 N. H. 514, holding that this is particularly so where the respondent has produced affidavits on his side, and where he has not objected to the character of the evidence.

38. Hayes *v.* Heyer, 4 Sandf. Ch. (N. Y.) 485; Webb *v.* Allen, 15 Tex. Civ. App 605, 40 S. W. 342; Dawson *v.* Yates, 1 Beav. 301, 2 Jur. 960, 17 Eng. Ch. 301, 48 Eng. Reprint 956, holding that where facts, not founded on allegations in the bill, are introduced into affidavits in support of an application for a receiver, the court will disregard them, and a

and regularly should be served on the opposing party.[39] The sworn answer of defendant may be read as an affidavit in opposition to the motion for a receiver,[40] and on application before answer the court may hear defendant by affidavit.[41]

5. SUFFICIENCY OF SHOWING — a. In General. The burden is on the applicant to show a proper case for the appointment of a receiver and the necessity therefor,[42] and such an order should be made only when the court can point to specific allegations, sustained by credible evidence.[43] The affidavit of the party alone to the bill may be a sufficient verification of the facts to authorize the appointment of a receiver on an interlocutory application, where the allegations are not denied,[44] and it is not necessary on applications for ancillary relief that the

defendant acts properly in not answering them.

Grounds shown by motion.— The grounds for the appointment of a receiver need not be incorporated into the pleadings, but it is enough if the pleadings disclose a case of the class in which receivers may be appointed, and the special reasons therefor may be set out on a motion. Hottenstein *v.* Conrad, 9 Kan. 435; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172. See also Elwood *v.* Greenleaf First Nat. Bank, 41 Kan. 475, 21 Pac. 673.

39. Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 277, 39 Pac. 666. See also Hungerford *v.* Cushing, 8 Wis. 320.

Filed with bill.— In Brundred *v.* Paterson Mach. Co., 4 N. J. Eq. 294, it is held that affidavits filed by the complainants after they have filed their bill for an injunction and the appointment of receivers of a corporation are not proper to be read on the hearing of the motion, complainant having had the opportunity to subjoin such affidavits to the bill.

It is discretionary with the court below to refuse to hear further affidavits of which the opposing party has had no notice. Boyce *v.* Burchard, 21 Ga. 74.

40. Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077.

41. Kean *v.* Colt, 5 N. J. Eq. 365.

New matter and rebuttal.— Where, on application for receiver, defendant meets plaintiffs' allegations by counter affidavits, it is competent for plaintiffs to support their original affidavits by others to the same effect and in reply to those offered by defendants, and this is held to be consistent with the practice under the code. Young *v.* Rollins, 85 N. C. 485. So it is proper to permit affidavits to be read on the hearing of a motion for a receiver to meet matters set up in evidence in defendant's answer. Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077; Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234, holding that the strict rule would seem to be that defendant cannot set up new matter in his answer or affidavits, and rely upon it on the motion; that the rule is seldom strictly enforced, the desire of the court being to avoid, as far as possible, making a decision upon a part only of the facts, and hence it is a common practice to allow defendant to rely on new matter; but such practice would lead to injustice, unless the complainant be permitted in turn to reply to such new matter, and the latter need not be taken on notice in the absence of special order.

42. Gregory *v.* Gregory, 1 Sweeny (N. Y.) 613 (upon denial that particular property is partnership property); Brookshire *v.* Farmers' Alliance Exch., 73 S. C. 131, 52 S. E. 867; Davis *v.* Reaves, 2 Lea (Tenn.) 649; Ryder *v.* Bateman, 93 Fed. 16.

But after judgment against a corporation in a proceeding by the state which creates a condition under which the statute authorizes, if it does not require, the appointment of a receiver, the court may take judicial notice of the facts exhibited in the main case and of the judgment therein. Waters-Pierce Oil Co. *v.* State, (Tex. Civ. App. 1907) 105 S. W. 851.

43. Young *v.* Rutan, 69 Ill. App. 513; Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576; Mitchell *v.* McCullough, 12 Ohio Cir. Ct. 763, 4 Ohio Cir. Dec. 471; Roberts *v.* Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26, holding that where on an application for the receiver of notes claimed by petitioner, and alleged to be fraudulently held by defendant, the proofs of the fraud were entirely hearsay, and the fraud was denied by the uncontradicted testimony of one having personal knowledge of the circumstances, and there is no proof of defendant's insolvency, a receiver should not be appointed.

Resolution of board of directors as to necessity.— Under a statute providing for the appointment of a receiver of a corporation at the instance of a creditor "when the board of directors . . . shall have declared by resolution that the corporation is unable to meet its obligations . . . and that a receiver is necessary," etc., such resolution is evidence of the necessity of the appointment. Saxon *v.* Southwestern Brick, etc., Mfg. Co., 113 La. 637, 37 So. 540.

An appointment in obedience to the mandate of the court of last resort requires no evidence to support it. Farmers', etc., Bank *v.* German Nat. Bank, 59 Nebr. 229, 80 N. W. 820.

Admissions of the parties in open court may be sufficient to sustain an appointment under proper allegations. Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839.

Consent see *supra*, III, A, 3.

Other remedies see *supra*, II, B, 4.

Probable cause see *supra*, II, B, 7, b.

44. Culver *v.* Guyer, 129 Ala. 602, 29 So. 779 (appointment without notice); Jones *v.*

proof should be as full and complete as if the trial were upon the main issues.[45] But a receiver will not be appointed on a preliminary hearing where all the grounds of the application are fully met by affidavit,[46] although the appointment may

Dougherty, 10 Ga. 273; Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746. *Compare* New Castle, etc., R. Co.'s Appeal, 3 Walk. (Pa.) 281.

45. Pearce *v.* Elwell, 116 N. C. 595, 21 S. E. 305.

Technical objections to evidence on preliminary motions are not regarded. Fisher *v.* Concord R. Co., 50 N. H. 200.

Evidence taken in anotner cause in which all of the defendants are parties in interest, and nearly all parties of record, may be considered on such preliminary motion, the evidence being free from the defects of *ex parte* testimony, very nearly the whole of it consisting of the testimony of defendants and their associates, and the whole of it having been taken with full examination or cross-examination by their own counsel upon ample conference and deliberation. Fisher *v.* Concord R. Co., 50 N. H. 200.

Probable cause — interlocutory and final order distinguished.— Greater discretion is allowed to the court when the application is for an interlocutory order of appointment than where the appointment is upon final hearing. Probable cause would be sufficient ground for the appointment during the suit' while satisfactory proof of right would be required to justify an appointment upon final hearing. It is in consequence of this greater discretion reposed in the judge with reference to interlocutory proceedings that under the ordinary rule of procedure no appeal is allowed from such order, and although by statute an appeal is granted in such cases this right does not in any manner modify the discretionary power of the judge to pass such order upon probable cause. Clark *v.* Walter T. Bradley Coal, etc., Co., 6 App. Cas. (D. C.) 437.

Principal relief — suit against corporation. — Davis *v.* U. S. Electric Power, etc., Co., 77 Md. 35, 25 Atl. 982, where the evidence of alleged fraudulent conduct, in a suit by stockholders for the appointment of a receiver, consisted of certain declarations of persons who denied having made them, and it was held that the charges were not sustained and the bill was dismissed. In Rainey *v.* Freeport Smokeless Coal, etc., Co., 58 W. Va. 424, 52 S. E. 528, it was held that under the code provision there, under a bill by a stock-holder as creditor for a receiver to administer the assets of a corporation, on cause shown the receiver should be appointed, but that he should be discharged and the bill dismissed unless the allegations of the bill are supported by the evidence. But see Downing *v.* Dunlap Coal, etc., Co., 93 Tenn. 221, 24 S. W. 122, *supra*, II, B, 8, c, note 33; and Waterbury *v.* Merchants' Union Express Co., 50 Barb. (N. Y.) 157, *supra*, II, B, 7, b, note 5.

46. Weber *v.* Wallerstein, 111 N. Y. App. Div. 700, 97 N. Y. Suppl. 852 (holding that the statement of a cause of action alone does not warrant the appointment of a receiver pending the action, and something beyond the mere unsupported statement of plaintiff, made on information and belief in the general allegations of the complaint, should appear to warrant the appointment, where the allegations are explicitly denied); Patterson *v.* McCunn, 46 How. Pr. (N. Y.) 182 (especially where other relief exists for the full protection of the estate); Henn *v.* Walsh, 2 Edw. (N. Y.) 129 (where the affidavit on behalf of complainant was not positive and was met by defendants' positive affidavit); Whitehouse *v.* Point Defiance, etc., R. R. Co., 9 Wash. 558, 38 Pac. 152 (in the absence of evidence rebutting denials by affidavit before answer).

Insufficient showing.— The court properly refused to appoint a receiver, on the coming in of the answer, and on affidavits filed by the complainant in support of the bill and by defendant in support of his answer, where it appeared that all the equity of the bill was successfully avoided by the answer, and the affidavits filed by the complainant gave very feeble support to his bill, while the affidavits filed by defendant strongly corroborated his answer. Rhodes *v.* Lee, 32 Ga. 470. So in Pottsville Lumber, etc., Co. *v.* Kopitzsch Soap Co., 13 Pa. Co. Ct. 139, complainants prayed the appointment of a receiver for defendant corporation, on the ground that it was insolvent, and that there was a combination of its officers and certain of its creditors to prevent complainants from collecting their claims. The bill was sworn to, and there was an affidavit that affiant believed that a number of judgments against the corporation were without consideration. No particular judgments were named, and no particular fact upon which the belief was based was alleged. Defendant, in its answer, denied the material allegations of the bill, and showed that all the judgments against it were obtained by adverse proceedings in court, except two, and averred that it was seeking relief from the latter. The answer was supported by three affidavits. It was held that no necessity for the appointment of a receiver was shown.

General denial.—Affidavits denying all the equities of a complaint do not amount to a *prima facie* case in favor of defendants, on the hearing of an application for a temporary receiver based on the complaint, where they are not full and responsive to all its material allegations, or do not contain more than a general denial. Cameron *v.* Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26.

Corporations — refusal to try questions on conflicting affidavits.— Upon an application for a receiver of a corporation, where all the charges upon which the application is predicated are fully met and denied by affidavits on behalf of defendant, the court has refused to try the question on affidavit, postponing it until a hearing on the evidence. Jacobus *v.*

be made notwithstanding there is some conflict in the evidence presented by the opposing parties.[47]

b. Equities of Bill Met by Answer. It is a well-established rule that plaintiff, the equities of whose bill have been fully met and denied, is not entitled to the appointment of a receiver, unless he overcomes the denials in such answer by further proof in support of his bill.[48] In other words, where the equities of plain-

American Mineral Water Mach. Co., 67 N. Y. App. Div. 615, 73 N. Y. Suppl. 289 (holding that the appointment of a receiver and an injunction *pendente lite* were properly refused on affidavits, where the facts were in dispute, and an opportunity given to have them determined at the special term after trial was declined); Downing *v.* Dunlap Coal, etc., Co., 93 Tenn. 221, 24 S. W. 122; Brady *v.* Bay State Gas Co., 106 Fed. 584; Taylor *v.* Cuban Land, etc., Co., 106 Fed. 437.

47. Wilcoxon Mfg. Co. *v.* Atkinson, 78 Ga. 338 (refusal to disturb discretion of lower court); Nimocks *v.* Cape Fear Shingle Co., 110 N. C. 230, 14 S. E. 684 (refusal to disturb action of lower court); Stith *v.* Jones, 101 N. C. 360, 8 S. E. 151 (holding that where it may be inferred from the affidavits that there is danger of loss of the profits of the property claimed by the executrix as her own, a receiver will be appointed at the instance of her co-executor, although the proofs of the facts on which the exercise of judicial interference depends are conflicting); Frazier *v.* Brewer, 52 W. Va. 306, 43 S. E. 110 (where on the bill, answer, affidavits, and exhibits the facts are strongly in favor of plaintiff's equity). See also *infra*, III, I, 2, b.

Denial of insolvency.— Where plaintiff averred the insolvency of defendants, which was denied, but defendants averred that they have suspended payment, it was held that such suspension by defendants, private bankers, puts in jeopardy the safety of the property for the recovery of which the action was brought; that if the suspension continues (there being nothing averred to the contrary but that it may), it is quite likely to lead to consequences injurious to plaintiff's rights, in the event that it be adjudged that she is entitled to the property, and that a receiver should be appointed. Brown *v.* Northrup, 15 Abb. Pr. N. S. (N. Y.) 333. *Compare* Livingston *v.* State Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. 338.

As to defendants not denying allegations. — A complaint on an application for receivers alleged that defendant debtor and other defendants named, all of whom were insolvent, had combined to defraud plaintiff out of his claims against the debtor. None of the defendants except the debtor denied these allegations. His answer was used as an affidavit and the motion was supported by surrounding circumstances which threw suspicion on the transaction, as well as by the complaint and affidavit on behalf of the applicant, and it was held that a receiver was properly appointed for the debtor and therefore should have been appointed for the other defendants also. Pearce *v.* Elwell, 116 N. C. 595, 21 S. E. 305.

48. *California.*— Williamson *v.* Monroe, 3 Cal. 383.

Georgia.— Rhodes *v.* Lee, 32 Ga. 470.

Idaho.— Sweeny *v.* Mayhew, 6 Ida. 455, 56 Pac. 85.

Maryland.— McKaig *v.* James, 66 Md. 583, 8 Atl. 663 (holding that when the hearing is on petition and answer, all statements in the answer must be regarded as true if they are susceptible of proof by legitimate evidence); Furlong *v.* Edwards, 3 Md. 99; Thompsen *v.* Diffenderfer, 1 Md. Ch. 489 (holding that the rule that the answer, when responsive to the averments of the bill, shall be taken as true, unless discredited by two witnesses, etc., is not subject to a modification that defendant should be required to make proof of averments in the answer because such proof is within his reach and is inaccessible to complainant).

Mississippi.— Simmons *v.* Henderson, Freem. 493.

New York.— Buchanan *v.* Comstock, 57 Barb. 568; Waterbury *v.* Merchants' Union Express Co., 50 Barb. 157 (where in an action for the dissolution of a joint stock corporation the supporting affidavits are required to show conclusively the certainty of plaintiff's ultimate success); Rochester *v.* Bronson, 41 How. Pr. 78; Henn *v.* Walsh, 2 Edw. 129.

Pennsylvania.— Crombie *v.* Order of Solon, 157 Pa. St. 588, 27 Atl. 710; Pottsville Lumber, etc., Co. *v.* Kopitzsch Soap Co., 13 Pa. Co. Ct. 139.

South Carolina.— De Walt *v.* Kinard, 19 S, C. 286.

Texas.— San Antonio, etc., R. Co. *v.* Davis, (Civ. App. 1895) 30 S. W. 693, holding that while if the answer contains an absolute denial of insolvency, or of indebtedness to petitioner, further hearing must be had before the application can be granted, but allegations that defendant has enough outstanding assets to pay his debts, and that petitioner has been fully paid by bonds, are insufficient, when the complaint avers that interest is due on such bonds, without any provision for payment.

West Virginia.— Wilson *v.* Maddox, 46 W. Va. 641, 33 S. E. 775.

United States.— Ford *v.* Taylor, 137 Fed. 149 (holding that under the amendment to equity rule 41, an answer under oath may be used as an affidavit on a motion for the appointment of a receiver, or on a motion to discharge a receiver apointed *ex parte*; and where the bill does not waive answer under oath, such answer, which distinctly denies the material allegations of the bill, not only makes an issue, but proves it to the extent that to overthrow it will require the evidence of two witnesses, or of one witness

tiff's bill have been fully met and denied by a sworn answer on behalf of defendant, the court has no discretion, and its appointment of a receiver in such case is unauthorized.[49] And so where the receiver is appointed before answer, if the equities of the bill are fully met and denied by the sworn answer the order should be discharged on defendant's motion.[50] On the other hand, it is held that a sworn answer is not conclusive so as to prevent absolutely the appointment of a receiver;[51] that the rule that plaintiff is never entitled to a receiver when the equities of the case are fully and fairly denied by sworn answer is true when the motion for a receiver is heard on bill and answer only, but when there is other evidence besides the bill to support the application, the court will consider whether the evidence adduced in support of the bill does not overcome the denials of the answer, and if they do, the receiver will be appointed, notwithstanding the denials of the answer.[52]

c. Affidavit or Verification Upon Information and Belief. A bill verified upon information and belief is held to afford no evidence upon which alone to predicate an order appointing a receiver,[53] or when met by positive denials in

and circumstances equivalent to a second); Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53.

See 42 Cent. Dig. tit. "Receivers," § 61. See also *supra*, II, B, 8, b.

Denial of indebtedness by one partner.— Where an action was brought on behalf of one firm out of a large number of creditors of an insolvent firm, not only against the general partners of the firm indebted, but also against a special partner who denied his indebtedness, it was held that an application for an injunction and the appointment of a receiver must be denied. La Chaise *v.* Lord, 1 Abb. Pr. (N. Y.) 213, 10 How. Pr. 461.

Effect of replication.—An answer to a judgment creditor's bill, used in opposition to a motion for the appointment of a receiver before the time for replying has expired, can only be treated as an affidavit. Rankin *v.* Rothschild, 78 Mich. 10, 43 N. W. 1077. In Spies *v.* Butts, 59 W. Va. 385, 53 S. E. 897, it is held that under the code in that state an answer, even when sworn to, is not taken as proof, and a general replication to the answer puts defendant on proof of the allegations thereof.

Although the bill waives an answer under oath a sworn answer may be considered as an affidavit, the same as the bill, on a application for a receiver. Ryder *v.* Bateman, 93 Fed. 16.

No knowledge or information sufficient to form belief.— In an action to sequester the property of a corporation and for a receiver, an answer that defendant has no knowledge or information sufficient to form a belief as to the entry of a judgment against it and the return of an execution thereon unsatisfied is held to be frivolous, since the judgment and execution should be peculiarly within the knowledge of defendant's officers, and are matters of public record, open to public inspection, and such want of knowledge and information arises from unwillingness to learn the facts. Morgan *v.* Quo Vadis Amusement Co., 45 Misc. (N. Y.) 130, 91 N. Y. Suppl. 882.

49. Sweeny *v.* Mahew, 6 Ida. 455, 56 Pac. 85 (reviewed on certiorari); Buchanan *v.* Comstock, 57 Barb. (N. Y.) 568; Crombie *v.* Order of Solon, 157 Pa. St. 588, 27 Atl. 710; Wilson *v.* Maddox, 46 W. Va. 641, 33 S. E. 775. See also the other cases cited in the last preceding note.

50. See *infra*, III, I, 1.

51. Barron *v.* Meyers, 140 Mich. 431, 103 N. W. 842, construing a chancery rule, and holding that the force of the answer is to be determined by the court having the application. See also Cohen *v.* Meyers, 42 Ga. 46. In Loder *v.* New York, etc., R. Co., 4 Hun (N. Y.) 22, in an action under the statute by a judgment creditor against a corporation for a receiver and sequestration of the corporate property, upon a sworn answer alleging that the judgment was procured by fraud, the court granted time for defendant to proceed in the suit in which the judgment was rendered for proper relief and upon defendant's failure to take advantage of the opportunity it was held, over its contention that its sworn answer was sufficient to defeat a motion for a receiver, that the court was authorized to infer that the defense was without merit.

52. Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Wood 316. See also the cases cited *supra*, III, E, 5, a.

53. *Alabama.*—Smith-Dimmick Lumber Co. *v.* Teague, 119 Ala. 385, 24 So. 4 (holding, on an application without notice, that a bill sworn to "as being true to the best of affiant's knowledge and belief" is not sufficiently verified); Burgess *v.* Martin, 111 Ala. 656, 20 So. 506 (where the allegations of the bill were sworn to by the person named "as true to the best of his knowledge, information and belief," and it was held that when the averment is positive the verification should be so, and when upon information and belief the verification should embrace both the facts that affiant has been informed and believes them to be true, either in terms or by affirming positively that the facts alleged in the bill are true as therein stated).

Illinois.— Siegmund *v.* Ascher, 37 Ill. App. 122.

Indiana.— Henderson *v.* Reynolds, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. N. S. 960.

an answer or affidavits;[54] but the objection is not material when the answer is in and itself states facts sufficient to warrant the appointment.[55]

6. Findings.[56] It has been held that under a bill for a receiver, the court should make findings of fact to support its decree appointing a receiver,[57] and where in a statutory proceeding the statute permits an application to be made to a judge of a court and requires a finding by him that the application for the appointment of a receiver is just and reasonable, the making of the appointment will not be taken as equivalent to such finding especially as the statute so enlarges powers of receivers as to move the court to a strict construction of its provisions.[58]

Montana.— Benepe-Owenhouse Co. *v.* Scheidegger, 32 Mont. 424, 80 Pac. 1024, where the appointment is sought on the complaint alone.

North Dakota.— Grandin *v.* La Bar, 2 N. D. 206, 50 N. W. 151.

See 42 Cent. Dig. tit. "Receivers," § 64.

An affidavit by complainant's attorney, upon information and belief, made in support of an application for a receiver, is not sufficient. Davis *v.* Reaves, 2 Lea (Tenn.) 649.

Probability of right to ultimate relief see *supra*, II, B, 7, b.

54. Briarfield Iron Works Co. *v.* Foster, 54 Ala. 622; Clark *v.* National Linseed Oil Co., 105 Fed. 787, 45 C. C. A. 53, bill verified on information and belief met by positively verified answer denying the material allegations of the bill.

Neither petition nor answer positively verified.— In New South Bldg., etc., Assoc. *v.* Willingham, 93 Ga. 218, 18 S. E. 435, in a suit against a building and loan association and others, upon the hearing of an application for a receiver upon the petition, demurrer of the building and loan association and answers of other defendants, neither the petition nor the answer being verified in positive terms, and no other evidence being offered to establish the facts alleged in the petition, it was held error to appoint a receiver as against the rights and over the objection of the building and loan association.

Undenied allegation — *In general.*— Goodyear *v.* Betts, 7 How. Pr. (N. Y.) 187, where it was said that in an action in which plaintiff seeks to reach the property of a debtor in the hands of a third person, to whom it had been assigned, an allegation, on information and belief only, that the assignee was not the owner of property or effects of any description sufficient to pay his debts and liabilities, if undenied, will be sufficient to show that the property was in danger and require the appointment of a receiver, but it being satisfactorily shown by affidavits that plaintiff was mistaken in respect to the pecuniary condition of the assignee, it was held that there was no ground for disturbing his possession.

Matters within knowledge of opposite party. — Under a statutory provision that a receiver may be appointed on the application of a party who establishes an apparent right to or interest in the property, a verified complaint, although on information and belief, is sufficient where the matters so alleged were within the knowledge of defendant, and were not met either by answer or affidavits. Holland Trust Co. *v.* Consolidated Gas, etc., Co., 85 Hun (N. Y.) 454, 32 N. Y. Suppl. 830. So under a statute which made it the duty of the attorney-general, whenever an incorporated bank was insolvent, to apply for a receiver of its property, it was held that the information verified by the attorney setting forth that a bank had stopped payment, that a large amount of its bills were notoriously in circulation, and that it was reputed to be insolvent; and accompanied by the further statement of the attorney-general, under oath, that he believed the bank was insolvent, was sufficient where there was no denial by the corporation of the facts stated in the information. Atty.-Gen. *v.* Columbia Bank, 1 Paige (N. Y.) 510.

Official report of bank contradicting allegation of insolvency.— In Livingston *v.* New York Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. 338, it was held that an affidavit on information and belief that a bank was insolvent was not sufficient to authorize the appointment of a receiver, especially where the affidavit is in direct contradiction to the official report of the bank made under oath and published by express direction of law, such report being entitled to at least as much weight as the unknown and unsworn information of the party.

55. Connale *v.* Sedgwick, 2 Barb. (N. Y.) 210.

56. **In equity** generally see Equity, 16 Cyc. 476.

57. Jones *v.* Weir, 213 Pa. St. 135, 62 Atl. 643, holding that the failure to make such findings is a disregard of the equity rules, and if the court, on appeal from the decree, should consider the merits of the case it would be obliged to examine the evidence in detail and make findings of fact, thus assuming the duties of the court of first instance.

58. Bostwick *v.* Isbell, 41 Conn. 305. See also Journeay *v.* Brown, 26 N. J. L. 111, where under a statute providing for the appointment of receivers in supplementary proceedings it was held that the order must show that the judge decided the case on what he considered sufficient evidence to establish the allegations in the petition.

Separate orders are not required, one recognizing the necessity of the appointment and the other making the appointment, under a statute providing for the appointment of a receiver of a corporation when the directors have declared by resolution that the corpora-

But on the other hand a general finding, based upon the petition and proof, that a receiver ought to be appointed, has been held sufficient on proceedings to review an order overruling a motion to vacate the appointment, the facts alleged being sufficient to justify the appointment, and the failure to find specifically the facts alleged being held at most irregular and not jurisdictional.[59]

7. Terms and Conditions — a. In General. Sometimes the court will impose certain terms as conditions upon which the order for the appointment of a receiver is granted,[60] or will specifically limit the operation of the appointment so as not to work obvious injustice against the adverse party,[61] or will make the appointment unless conditions are performed by the adverse party.[62] The appointment

tion is unable to meet its obligations, etc., but the two orders must be read together as constituting one order. Oil City Iron Works *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987.

Where a fact is admitted in the answer, as where, in the application for a receiver of a mutual fire insurance company, the complaint averred insolvency, and the answer admitted it, the court is presumed to know such fact and to have acted upon it in appointing a receiver; and it is not necessary that a finding of such fact should appear in the decree. Reliance Lumber Co. *v.* Brown, 4 Ind. App. 92, 30 N. E. 625.

59. Dwelle *v.* Hinde, 18 Ohio Cir. Ct. 618, 8 Ohio Cir. Dec. 177, holding that in such case the appellate court is bound to assume that the judge making the order found the facts to be as alleged.

In the absence of a request for special findings on an application for a receiver *pendente lite* the judge is presumed to have found the facts in accordance with the contention of the party in whose favor the motion was decided, and need not have found the facts specially in the absence of such request. Whitehead *v.* Hale, 118 N. C. 601, 24 S. E. 360.

60. Webb *v.* Van Zandt, 16 Abb. Pr. (N. Y.) 314 note, where in an action to foreclose a mechanic's lien the court granted the order upon condition that plaintiff would discontinue another action which he had brought for the same debt.

General license to sue receiver.— In a suit by the trustees in a railroad mortgage it is held proper to impose as one of the terms of an order appointing a receiver that a general license should be given to sue the receiver in any court of competent jurisdiction for liabilities incurred by him in operating the road, since it is not necessary for the accomplishment of the purpose for which receivers of railroads are appointed to impose upon the citizen the deprivation of his right to sue in the local state courts and neither the railroad company nor its bondholders have any equity to ask it. Walker *v.* Green, 60 Kan. 20, 55 Pac. 281; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

Diligent prosecution of suit.— In a suit by the trustees in a railroad mortgage it is held proper to impose as one of the terms of an order appointing a receiver that plaintiffs should be required to prosecute their suit to final decree with diligence and failing to do so the receiver should be discharged by the court of its own motion, which clause is admonitory, since neither a railroad company nor its mortgage bondholders can rightfully ask a court to operate a railroad merely because it is desirable or profitable to them to have the road operated by such agency, and when a bill is filed for possession or a decree of foreclosure and a receiver is appointed he should not be continued any longer than is necessary for plaintiff by the exercise of diligence to obtain and execute a final decree. Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

61. Chappell *v.* Boyd, 56 Ga. 578, where the judgment creditor levied an execution on his debtor's land and the latter's wife claimed the land but her claim was decided adversely to her, and upon another attempt to sell the property the creditor was met by another frivolous claim by the wife's brother and in a suit setting up the collusive character of such claims it was held that while plaintiff was entitled to a receiver, as the claim by the wife was not decided and the application for the receiver was not made until a growing crop was planted, the receiver should be instructed to allow defendants a reasonable time to gather the crop and to use the premises for that purpose.

62. Probasco *v.* Probasco, 30 N. J. Eq. 108, holding that, on a bill by a father to set aside, on account of duress, a conveyance to his children of all of his property, by which he reserved to himself an annuity which had not been paid, but had been withheld by defendants from the commencement of the suit, and on which he depended wholly for support, the court would order that, unless the arrears of the annuity were paid, a receiver would be appointed, the right of the complainant being uncontradicted.

Bond instead of receiver.— The court may refuse to appoint a receiver upon condition that the party enter into a bond sufficient to afford the necessary protection. Cordele Ice Co. *v.* Sims, 120 Ga. 428, 48 S. E. 12. In Frank *v.* Robinson, 96 N. C. 28, 1 S. E. 781, in an action to set aside a trust deed and a bill of sale of the property by the trustee to a non-resident, an order was made appointing a receiver, unless the non-resident defendant gave bonds to plaintiffs, the court holding that, where a fund is under the control of the court, and the result is in doubt, such control will be retained to await the determination of the controversy on such terms as will be least onerous for the one party and

of a receiver being not ordinarily a matter of strict right,[63] one who calls upon a court of chancery to put forth its extraordinary powers and grant him such purely equitable relief may with propriety be required to submit to conditions and do equity in order to get equity,[64] although, on the other hand, the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens.[65]

b. Bond by Party Procuring the Appointment. While the order should require the receiver to give security,[66] in the absence of statute there is no rule of law which requires that a bond shall be exacted from plaintiff before granting his application for the appointment of a receiver.[67] In some states, however, there are such express statutory provisions under which the party procuring the appointment of a receiver is required to enter into a prescribed bond ;[68] but

yet sufficient for the protection of the other. See also *supra*, II, B, 4, d; II, B, 10, i.

63. See *supra*, II, B, 2.

64. Walker *v.* Green, 60 Kan. 20, 55 Pac. 281; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

Receivers of railroads see RAILROADS, 33 Cyc. 612.

65. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379. See also *infra*, V, B, 1, g, (II).

Priority of liens and claims.— By way of illustration of the application of these principles, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor and supplies as may, under the circumstances of the particular case, appear to be reasonable. Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260. See also Walker *v.* Green, 60 Kan. 20, 55 Pac. 281. But one holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot, and when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by such rulings as those last above considered, have been declared to have an equitable priority. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379. See also Brown *v.* New York, etc., R. Co., 19 How. Pr. (N. Y.) 84. See further as to priority of liens against railroads, RAILROADS, 33 Cyc. 612.

The better practice is for the judge or court appointing a receiver to stipulate at the time, and as a condition of the appointment, what debts and liabilities of a mortgagor railway company shall be made a charge on the property, and paid by the receivers. If the mortgagee is unwilling to take a receiver on the terms imposed, the foreclosure can proceed without a receivership. Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551. But if no order is made when the receiver is appointed it may be made afterward. Central Trust Co. *v.* St. Louis, etc., R. Co., *supra*.

66. See *infra*, III, F, 6, a.

67. De Walt *v.* Kinard, 19 S. C. 286.

Where receiver in effect attachment.— In Hughes *v.* Hatchett, 55 Ala. 631, it was said, the court speaking generally, that the power of appointing a receiver should not be exercised so as to give to a creditor, in effect, and without security against the abuse of it, an attachment on property as a provision to insure the payment of a disputed debt; that the statutes prescribe certain securities that must be required before a creditor will be entitled to either an "equitable attachment," or an attachment through a court of law, upon his debtor's property; and in analogous cases in chancery the rule should be observed that "equity will follow the law." See also *supra*, II, B, 4.

In the case of a "dry receivership," or one in which the receiver may not get any fund to administer and out of which his compensation may come, it is proper to compel the complainant to put up a bond to secure the fees of the receiver. Lembeck *v.* Jarvis Terminal Cold Storage Co., 68 N. J. Eq. 352, 59 Atl. 565.

68. Dreyspring *v.* Loeb, 113 Ala. 263, 21 So. 73 (holding that a statutory provision that when the application is made to a chancellor, judge, etc., he must require the complainant to enter into a prescribed bond, is mandatory and prohibitory, failure to comply with which renders the appointment invalid); Capital City Water Co. *v.* Weatherly, 108 Ala. 412, 18 So. 841 (which case arose under an earlier statute than that governing the first case above cited, and under a provision relating to appointments without notice, and it was held that the order was invalid for failure to comply with the statute without regard to whether defendant was in contempt and for that reason was not entitled to notice); Walker *v.* Kersten, 115 Ill. App. 130 (where, under a statute similar to that in Alabama, failure to require such bond is not reversible error where the appointment of a receiver is proper, the error in that case being held harmless).

a provision requiring a bond for costs does not create a condition to the appointment of a receiver, the penalty for the refusal to file such bond being a dismissal of the case, and the fact that the judge refuses to grant a motion to require such bond will not render the appointment of a receiver in the action invalid on appeal from the order of appointment.[69]

8. Order or Decree[70] — a. In General. Mere formal errors or defects in an order appointing a receiver will not vitiate it, if it is good in substance and effect as an appointment of a receiver,[71] and an inadvertent error therein may be corrected by the judge making the order.[72] An order containing no direction to defendant to deliver over his property on oath or otherwise does not render

Bond given, although not required by order. — In Nebraska, under a statute requiring a particular bond to be provided for in the order, a failure to require such bond is not fatal where no objection is taken on that ground and a proper bond is in fact given and approved at the same term and before the order goes into effect. Johnson *v.* Young, 1 Nebr. (Unoff.) 28, 95 N. W. 497.

Simultaneous appointment and order for bond.—An order appointing a receiver and requiring the complainant in a cause to give bond as required by statute may be entered simultaneously, and the appointment of the receiver need not be deferred until such bond has been executed and filed. Anderson *v.* Hultberg, 117 Ill. App. 231.

Purpose of bond.— The bond given by a complainant obtaining the appointment of a receiver does not take the place of or secure the receiver's responsibility and liability on his bond or otherwise for property coming into his hands, but is for the damages resulting and attorney's fees incurred by the appointment and acts of the receiver, if the appointment is revoked or set aside. Anderson *v.* Hultberg, 117 Ill. App. 231. See also in this connection *infra*, V, C; X.

The amount of the bond is to be determined by the appointing court, and if the bond is defective in that regard the remedy is by application to that court and not by appeal. Anderson *v.* Hultberg, 117 Ill. App. 231.

Injunction and receiver — waiver of objection.— Where the appointment of a receiver is also in effect an injunction, the failure to give the bond required before an injunction issues is cured by the parties entering into a stipulation that the receiver shall continue the business under the control and direction of the court. Crouse *v.* Bedell, 11 Pa. Super. Ct. 598.

69. Galloway *v.* Campbell, 142 Ind. 324, 41 N. E. 597, bond for costs by non-residents.

70. Exercise of discretion with caution see *supra*, II, B, 2, b.

Jurisdiction see *supra*, III, A.

Requiring security see *infra*, III, F, 6, a.

71. Kimbraugh *v.* J. K. Orr Shoe Co., 98 Ga. 537, 25 S. E. 576, holding that the designation of one, appointed to perform the duties of receiver, as "commissioner" is immaterial.

The judge having power only to appoint a receiver in vacation, the appointment of one as temporary administrator in a suit for a receiver, and in which the appointment of a receiver is proper, is not invalid as the designation of the officer will be considered as immaterial. Long *v.* Richardson, 26 Tex. Civ. App. 197, 62 S. W. 964. So where, in an action by creditors of an insolvent corporation to have a receiver appointed, and also to set aside a trust deed for the benefit of preferred creditors, the judge, in vacation, although refusing to appoint a receiver, ordered the trustee to hold the assets, and required him to file a bond and inventory and report to the court, it was held that the trustee would be considered a receiver. Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co., 88 Tex. 468, 27 S. W. 100.

Entitling order.— Where during the pendency of a suit plaintiff brought another suit in the same court in aid of the original for the appointment of a receiver of the property involved therein pending such litigation, and the court, in granting the application, considered the record in both suits, and the chancellor's order appeared as though made on motion supported by such records, it was not invalidated by the fact that it was entered under the style of dependent cause, rather than under style of the original cause. Troughber *v.* Akin, 109 Tenn. 451, 73 S. W. 118.

Form of order in whole, in substance, or in part see Montgomery *v.* Enslen, 126 Ala. 654, 665, 28 So. 626 (as to property to be taken); Henry *v.* Henry, 103 Ala. 582, 584, 15 So. 916; Lewis *v.* Singleton, 61 Ga. 164, 165; Screven *v.* Clark, 48 Ga. 41, 42; Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271 (order by consent of parties); St. Louis, etc., R. Co. *v.* Vandalia, 103 Ill. App. 363, 364; Frank *v.* Morrison, 58 Md. 423, 425; Williamson *v.* Wilson, 1 Bland (Md.) 418, 428; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417, 418; Wheeling Bridge, etc., R. Co. *v.* Cochran, 68 Fed. 141, 142, 15 C. C. A. 321; Ahlhauser *v.* Doud, 74 Wis. 400, 404, 43 N. W. 169; American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937, 938 (clause requiring delivery of property); Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320, 322.

72. Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634, where the circuit judge, in an order appointing a receiver, made an inadvertent error in fixing the value of the property, and the consequent amount of the bond to be given by defendants in order to entitle them to move to vacate such order.

it necessary to examine either parties or witnesses for the purpose of ascertaining whether that part of the usual order in such cases had been complied with by defendant.[73] On a motion for a temporary receiver an order which does not specify that the appointment is temporary is nevertheless of the same effect as if it were so specified.[74]

b. As to Property to Be Taken.[75] An order for a receiver ought to state distinctly on the face of it over what property the receiver is appointed,[76] and should not direct the delivery of more property than that involved in the particular suit, under the pleadings.[77] But in a suit for the appointment of a receiver of all the property of a corporation, the entire context of the bill and the unmistakable purpose sought to be accomplished by it will not be permitted to be overcome by a technical objection so as to confine the order to particular property only which was described in the bill.[78]

9. What Constitutes Appointment.[79] It has been held that where the reference to a master is to report a proper person to be appointed, etc., the appointment

73. Copous *v.* Kauffman, 8 Paige (N. Y.) 583.

74. Haggard *v.* Sanglin, 31 Wash. 165, 71 Pac. 711.

75. Directing sale see *infra*, IV, H, 2.

76. O'Mahoney *v.* Belmont, 62 N. Y. 133; Crow *v.* Wood, 13 Beav. 271, 51 Eng. Reprint 104.

All of defendant's property of a particular class.—An order appointing the receiver is sufficiently specific in its description as to notes and books of account to be turned over to him which specifies them as "the books, notes and accounts of all kinds of the said defendant in the business of selling cigars, snuff, tobacco and other goods." Martin *v.* Burgwyn, 88 Ga. 78, 13 S. E. 958.

Reference to pleading.— Where land involved was fully described in the pleading, the order appointing the receiver, which described the property as "the premises described in plaintiff's petition" sufficiently described the property. Cotton *v.* Rand, (Tex. Civ. App. 1906) 92 S. W. 266, which was as between the parties, on appeal from the order. But see Salisbury *v.* Wilcox, 128 Cal. 347, 60 Pac. 979 (holding that where, in an action to foreclose a mortgage upon real property, an order was made, on an application for a receiver "to take charge of the fruit crop now standing and growing upon the mortgaged premises described in the complaint herein," appointing a receiver of the property in the terms of the application, and the complaint did not sufficiently describe any property to sustain a judgment of foreclosure, there was no *res* of which the receiver could take possession, and the order was reversed); Crow *v.* Wood, 13 Beav. 271, 51 Eng. Reprint 104 (where such description was held insufficient as against one not a party).

Property necessarily included in a general description is committed to the receiver's care. Thus where "mills and block" were committed to a receiver's care, it was held that this included a wharf constructed chiefly for the greater convenience of transacting business in the buildings, it being in effect all one property, and known by the name given it in the order, and the case is likened to the ground surrounding a house or the yards connected with a mill or depot. Grant *v.* Davenport, 18 Iowa 179.

Effect of subsequent resignation see *infra*, III, L, 3.

What property passes see *infra*, IV, D, 3.

77. Triebert *v.* Burgess, 11 Md. 452 (holding an order erroneous which directed defendant to deliver to the receiver all his goods, wares, merchandise, and effects under a bill involving only defendant's stock in trade); Smith *v.* McCullough, 104 U. S. 25, 26 L. ed. 637; Central Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659 (in which cases orders broad enough to cover property not included in a mortgage in suit were considered as not covering such property).

Amendment to conform to intention.— In an action to recover possession of a tract of land, a receiver was appointed who, as authorized by the order appointing him, allowed defendants to remain in possession on their giving security for the rents and profits. Although suing to recover possession of the whole tract, plaintiffs were actually in possession of a part of it. Defendants moved to attach plaintiffs and others for contempt in committing a trespass upon that part of the lands in plaintiffs' own possession, claiming that the order appointing the receiver applied to the whole tract, and it was held that, the order having plainly been intended by the court and the parties to apply only to the lands in defendants' possession, the court rightly amended it, so as to make the acts charged outside of its scope. Kron *v.* Smith, 96 N. C. 386, 2 S. E. 463.

Property subject to receivership see *supra*, II, B, 9.

78. Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626, holding that where a decree appointing a receiver authorizes him to receive and hold all the property of an insolvent corporation, his right to all the property is not limited to property specifically described by a statement in the prayer as the property "hereinbefore set out." See also Showalter *v.* Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491. And see *infra*, IV, D, 3.

79. With relation to time of perfecting security see *infra*, III, F, 6, a; IV, D, 4.

is not complete until it is confirmed by the court, but where the direction is to appoint a receiver, etc., no order of confirmation is necessary, and the receiver may upon the filing of the master's report and the execution and acceptance of a bond by the master enter upon the duties of his office immediately.[80] The order on an application for a receiver may in effect constitute the persons to whom the property is intrusted receivers, although they are not so designated in the order;[81] but the mere direction that moneys under the control of the court should be deposited with one upon such condition as will bind him to pay interest will not constitute him a receiver subject to the usual rules that may issue against receivers.[82] One designated to receive funds in the capacity of receiver of the court is not bound to accept the trust.[83]

F. Eligibility, Selection, and Qualification of Receiver[84] — **1. Impartial and Indifferent Person — a. In General.** When there are adversary rights to be determined an indifferent person between the claimants ought to be appointed receiver, as he is to hold the property for the benefit of such party as may establish his right,[85] and it is laid down as a general principle that a receiver should be impartial and disinterested.[86] No one should be appointed who is in such

80. Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183; Matter of Eagle Iron Works, 8 Paige (N. Y.) 385. But see Kimball *v.* Goodburn, 32 Mich. 10.

Selection see *infra*, III, F, 3, a, b.

81. *In re* Fifty-four First Mortg. Bonds, 15 S. C. 304.

82. Coleman *v.* Salisbury, 52 Ga. 470, holding that such an order, to constitute the person a receiver, should be explicit in its terms and accepted accordingly.

Order continuing question of appointment. — The designation of one to collect certain assets, by consent of the parties, in an order expressly continuing the hearing of an application for a receiver, does not confer the powers of a receiver on such person. Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Under out-of-court agreement. — Under a statute giving to employees and materialmen a lien upon the property or effects of any owner or operator of any rolling mill, foundry, or other manufacturing establishment, when such property or effects shall be assigned for the benefit of creditors or come into the hands of a receiver of a court, one to whom lumber was pledged to secure advances, who takes the property under an agreement with attaching creditors that he might sell the lumber and account for the proceeds, is not a receiver of court. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452.

83. Waters *v.* Carroll, 9 Yerg. (Tenn.) 102, holding that the court cannot impose upon the clerk and master the office of receiver without his consent, and consequently, if money come to his hands as clerk and master, which he is, by order of court, directed to loan out as receiver, and there is nothing to show that he did loan it out, or that he did any act indicating acceptance of the office of receiver, the sureties on his bond as clerk and master would be liable for such money.

84. **Extension of receivership and subsequent appointments** see *infra*, III, H.

85. Coy *v.* Title Guarantee, etc., Co., 157 Fed. 794; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546; Naumburg *v.* Hyatt, 24 Fed. 898; Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (U. C.) 99. The appointment of a receiver who acts under the direction of a defendant is objectionable. Lupton *v.* Stephenson, 11 Ir. Eq. 484.

A trust company may be receiver. *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602. See also Le Brantz *v.* Conklin, 39 Misc. (N. Y.) 715, 80 N. Y. Suppl. 967; Goff *v.* Goff, 54 W. Va. 364, 46 S. E. 177.

Appointment involves finding of eligibility. — An order appointing a receiver in a proceeding in which the court has jurisdiction to act involves a finding that the appointee is eligible. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

86. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504; Coy *v.* Title Guarantee, etc., Co., 157 Fed. 794; Olmstead *v.* Distilling, etc., Co., 67 Fed. 24; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161; Taylor *v.* Life Assoc. of America, 3 Fed. 465; Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642; Matter of Northumberland, etc., Banking Co., 2 De G. & J. 508, 59 Eng. Ch. 401, 44 Eng. Reprint 1087.

Assignee in fraudulent assignment. — An assignee under an assignment which was known to him either to be a fraud or a violation of an express statute will not be appointed receiver in a suit to set aside the assignment. Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 28 How. Pr. 208. See also Eichburg *v.* Wickham, 21 N. Y. Suppl. 647, *infra*, note 88.

Reappointment after void order. — One who was appointed receiver under an order which is void because no cause was pending when the order was made is not ineligible for a second appointment under a valid order. Robinson *v.* Dickey, 143 Ind. 214, 42 N. E. 638.

A receiver to recover property fraudulently conveyed, the fraud being admitted, need not

circumstances, or would by the appointment be placed in such a dual position, as that there must arise conflicts between his personal interest and his duty as receiver,[87] or whose duty it might be at some time to call the receiver to account.[88]

b. Master or Clerk. A master in chancery [89] or clerk of the court is not a proper person to be receiver because he is an officer of the court whose duty it is to pass the accounts and check the conduct of the receiver.[90] In some cases, however, the practice does not appear to be opposed to the appointment of such persons.[91]

be an indifferent person as his duty requires him to be the active adversary of the fraudulent debtor and his accomplices. Shainwald *v.* Lewis, 8 Fed. 878, where it was said that where by decree one was adjudged to be indebted as assignee of bankrupts for the value of assets of the bankrupt, of which defendant had obtained possession, etc., in a creditor's bill to reach the fraudulently conveyed property, defendant should have no voice in the selection of a receiver any more than a criminal should have in the choice of a detective to ferret out and recover the fruits of his crime.

That the attorney for creditors procured one to act as receiver will not render his appointment improper. Daniel *v.* Citizens' Mut. F. Ins. Co., 149 Mich. 626, 113 N. W. 17.

87. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522; Baker *v.* Backus, 32 Ill. 79; Fripp *v.* Chard R. Co., 1 Eq. Rep. 503, 11 Hare 241, 17 Jur. 887, 22 L. J. Ch. 1084, 1 Wkly. Rep. 477, 45 Eng. Ch. 241, 68 Eng. Reprint 1264.

88. Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627; *In re* Lloyd, 12 Ch. D. 447, 41 L. T. Rep. N. S. 171, 28 Wkly. Rep. 8; Stone *v.* Wishart, 2 Madd. 64, 56 Eng. Reprint 258; *Ex p.* Pincke, 2 Meriv. 452, 35 Eng. Reprint 1013.

Next friend.— Stone *v.* Wishart, 2 Madd. 64, 56 Eng. Reprint 258, where the parties united in a request that the next friend of infant complainants be appointed receiver, and the vice-chancellor refused to appoint him.

Assignee in fraudulent assignment.—A new receiver will be substituted in place of one appointed by consent of the parties where it appears that he was originally selected as assignee of the same property under a general assignment which has been set aside as fraudulent, and therefore, in the course of the proceedings, he, as assignee, would be accounting to himself as receiver, and where it further appears that, as the assets are insufficient to pay the claims, there will be a contest over the assignee's accounts, which may necessitate further and more complicated dealings of the receiver with himself in his other capacity as assignee. Eichberg *v.* Wickham, 21 N. Y. Suppl. 647.

Trustee.— It has been held that a trustee should not be appointed receiver if any other can be procured, and then only without emolument. Sutton *v.* Jones, 15 Ves. Jr. 584, 33 Eng. Reprint 875; Sykes *v.* Hastings, 11 Ves. Jr. 363, 32 Eng. Reprint 1128; Anonymous, 3 Ves. Jr. 515, 30 Eng. Reprint 1134. See also Benneson *v.* Bill, 62 Ill. 408. But it would seem that there is no general rule disqualifying a trustee which will not bend to circumstances. Patterson *v.* Northern Trust Co., 230 Ill. 334, 82 N. E. 230 [*affirming* 132 Ill. App. 63]; Banks *v.* Banks, 14 Jur. 659; Sykes *v.* Hastings, 11 Ves. Jr. 363, 32 Eng. Reprint 1128 (where the chancellor refers to a case in which he continued a trustee as receiver because it was for the interest of the estate). See also Taylor *v.* Life Assoc. of America, 3 Fed. 465, which, after stating the general rule that a trustee whose business it is to watch the receiver should not be appointed, indicates that an exception to the rule might be made when the party proposed is not trustee solely for particular persons antagonistic to others but is trustee for all and is wholly impartial and indifferent); Newport *v.* Bury, 23 Beav. 30, 53 Eng. Reprint 12.

89. Benneson *v.* Bill, 62 Ill. 408; Allen *v.* Colley, 60 S. C. 353, 38 S. E. 622; Kilgore *v.* Hair, 19 S. C. 486; *Ex p.* Fletcher, 6 Ves. Jr. 427, 31 Eng. Reprint 1127. See also Waters *v.* Carroll, 9 Yerg. (Tenn.) 102, where it was said that a practice very early existed in the chancery courts of that state which has perhaps not been discontinued, of sometimes appointing the clerk and master, which offices in that court had been combined, receiver in those cases in which it was supposed the latter office would the least interfere with the proper discharge of his other duties; that this practice, originating when the simplicity and paucity of chancery suits and the limited number of persons qualified to act as receivers, was such as might seem to indicate its existence should be entirely abandoned under the change in the circumstances of the country and in the character of chancery investigations. But see De Walt *v.* Kinard, 19 S. C. 286, where the master was appointed practically, although not nominally, receiver.

90. White *v.* Britton, 72 S. C. 175, 51 S. E. 547 [*following* Kilgore *v.* Hair, 19 S. C. 486].

Appointment not void.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Moore *v.* Taylor, 40 Hun (N. Y.) 56, appointment in violation of statute.

Difference between receiver and clerk see *supra*, I, note 3.

91. See State *v.* Odom, 86 N. C. 432; Kerr *v.* Brandon, 84 N. C. 128; State *v.* Cole, 13 Lea (Tenn.) 367.

c. Relation to Parties and Subject-Matter — (i) *In General.* It has been laid down as a general proposition that parties are not proper appointees as receivers,[92] unless by consent of both parties.[93] But this rule is subject to exception,[94] and while the court may refuse to appoint a party to the cause, unless in cases of necessity,[95] the weight of authority establishes the rule that the mere fact that one is interested in or a party to the suit does not disqualify him, in the absence of statutory disqualification,[96] although in such case his appointment is without compensation,[97] and he being a near relation of either party is not in itself an absolute disqualification, but the fact must be allowed to have its weight when connected with other circumstances.[98] The appointment of a party to

92. Benneson *v.* Bill, 62 Ill. 408; Donaldson *v.* Johnson, 3 S. C. 216, as to directors of corporations, in respect to whom see further *infra*, III, F, 1, c, (IV). See also Young *v.* Rollins, 85 N. C. 485.

By statute sometimes it is expressly declared that a party shall not be appointed receiver (Turpin *v.* McGill, 6 Ohio Dec. (Reprint) 768, 8 Am. L. Rec. 23), and persons interested in an action seem to be disqualified to act in that capacity (Cook *v.* Martin, 75 Ark. 40, 87 S. W. 625, 1024; Tait *v.* Carey, 3 Indian Terr. 765, 49 S. W. 50, holding that such statute applies to an assignee filing an interplea in an action in which the assigned property is attached, although where such appointment is made by consent of all the parties, and the receiver has executed the trust and sold the property and the proceeds are subject to the order of the court, and no rights have been prejudiced, the appointment and acts thereunder will not be disturbed).

Mortgagee see MORTGAGES, 27 Cyc. 1629.

93. Benneson *v.* Bill, 62 Ill. 408.

94. Taylor *v.* Life Assoc. of America, 3 Fed. 465.

95. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436, as to receivers of insolvent railroads.

96. *Delaware.*— Reynolds *v.* Austin, 4 Del. Ch. 24.

District of Columbia.— Jenkins *v.* Purcell, 29 App. Cas. 209, 9 L. R. A. N. S. 1074.

Illinois.—Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399; People *v.* Illinois Bldg., etc., Assoc., 56 Ill. App. 642.

Louisiana.— McGilliard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145.

United States.— Bayne *v.* Brewer Pottery Co., 82 Fed. 391.

England.— Boyle *v.* Bettws Llantivit Colliery Co., 2 Ch. D. 726, 45 L. J. Ch. 748, 34 L. T. Rep. N. S. 844 (where, on application by an unpaid vendor of the property of a company in voluntary liquidation, the vendor was appointed receiver); Taylor *v.* Eckersley, 2 Ch. D. 302, 45 L. J. Ch. 527, 34 L. T. Rep. N. S. 637, 24 Wkly. Rep. 450 (where, in an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels upon evidence of immediate danger, plaintiff was appointed interim receiver for fourteen days or until a receiver should be appointed under a reference to chambers); Hyde *v.* Warden, 1 Ex. D. 309, 25 Wkly. Rep. 65 (where, in an action for the specific performance of an agreement to accept a lease of a farm in which judgment had been given for defendant, and plaintiff having appealed, the court of appeals appointed plaintiff receiver and manager of the farm); McGarry *v.* White, L. R. 16 Ir. 322; Cookes *v.* Cookes, 2 De G. J. & S. 526, 67 Eng. Ch. 412, 46 Eng. Reprint 479; Downshire *v.* Tyrrell, Hayes 354; Rawson *v.* Rawson, 11 L. T. Rep. N. S. 595.

See 42 Cent. Dig. tit. "Receivers," § 75.

The mere existence of differences and disputes between the parties will not absolutely disqualify one of them to be receiver. Cookes *v.* Cookes, 2 De G. J. & S. 526, 67 Eng. Ch. 412, 46 Eng. Reprint 479.

Judgment creditor — equitable execution.— Plaintiff, who had obtained judgment against defendants, husband and wife, was upon his application *ex parte* appointed receiver of the income of the wife's reversionary interest under a will. Fuggle *v.* Bland, 11 Q. B. D. 711. And as to appointment in supplementary proceedings see EXECUTIONS, 17 Cyc. 1454.

One whose connection with the proceeding is merely nominal may properly be receiver. People *v.* Illinois Bldg., etc., Assoc., 56 Ill. App. 642.

Administrator.—An administrator, who has filed a bill for an accounting of partnership property and the appointment of a receiver, may, if a proper person, be appointed receiver. Miller *v.* Jones, 39 Ill. 54. So in Le Brantz *v.* Conklin, 39 Misc. (N. Y.) 715, 80 N. Y. Suppl. 967, it was held that where no reason appeared why the property was not adequately preserved and would not be protected if left in the custody of one who was at the time acting as temporary administrator the court would not cancel the appointment of the administrator by the designation of a new receiver, although it would appoint the temporary administrator as receiver so as to bring him under the direct control of the court.

97. Warren *v.* Stagner, 7 Wkly. Notes Cas. (Pa.) 127; Boyle *v.* Bettws Llantivit Colliery Co., 2 Ch. D. 726, 45 L. J. Ch. 748, 34 L. T. Rep. N. S. 844; Rawson *v.* Rawson, 11 L. T. Rep. N. S. 595. See also McGarry *v.* White, L. R. 16 Ir. 322.

98. Williamson *v.* Wilson, 1 Bland (Md.) 418; Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92; Shainwald *v.* Lewis, 8 Fed. 878.

The son of a next friend suing for an infant ought not to be receiver. Taylor *v.* Old-

the suit is proper where the appointee has no interest inimical to those complaining, and the appointment is in pursuance of an express stipulation in a trust deed being foreclosed,[99] as well as where it clearly appears that the party in interest will be entitled to practically the whole of the estate involved, and his integrity and capacity are unimpeached.[1] And where the parties interested in the property had previously, and before the litigation arose, voluntarily agreed upon a person to act as agent for them, it has been held that upon litigation arising between such parties as to such property, the person who has been so acting as agent is a fit and proper person for appointment as receiver.[2]

(II) *Creditor.* One is not disqualified as a matter of law by his interest as a creditor, no other facts appearing to show that his selection is an improper one,[3] and there is no unbending rule of law that one who is a creditor of an insolvent institution shall not be its receiver.[4]

(III) *Attorney and Client.* The mere fact that one is a solicitor or practising barrister, being in no way connected with the particular parties or subject-matter, does not disqualify him to be receiver;[5] but solicitors and counsel in a cause are not proper persons to be appointed receivers therein,[6] and the same is true of one connected with counsel for one of the parties.[7]

(IV) *Stock-Holders, Officers, and Directors of Corporation.* Officers and stock-holders of a corporation have been recognized as proper appointees,[8] and there is generally no inflexible rule rendering such persons

ham, Jac. 527, 4 Eng. Ch. 527, 37 Eng Reprint 947.

99. Kehm *v.* Mott, 86 Ill. App. 549 [*affirmed* in 187 Ill. 519, 58 N. E. 467].

1. Warren *v.* Stagner, 1 Wkly. Notes Cas. (Pa.) 127.

2. Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399; Hanover F. Ins. Co. *v.* Germania F. Ins. Co., 33 Hun (N. Y.) 539.

3. Barber *v.* International Co. of Mexico, 73 Conn. 587, 48 Atl. 758; Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 92.

Subsequent advancements to save estate.— Where a receiver is not a creditor of the estate in his hands, but advances his own money to redeem the estate from a tax-sale which is about to become absolute, the liability of the estate to him does not disqualify him. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

4. Moran *v.* Wayne Cir. Judge, 125 Mich. 6, 83 N. W. 1004; Gypsum Plaster, etc., Co. *v.* Adsit, 105 Mich. 497, 63 N. W. 518; *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602.

Receiver of debtor and creditor.— In *In re* Knickerbocker Bank, 19 Barb. (N. Y.) 602, a trust company, having been appointed a receiver of a savings institution, brought a suit as such against a bank on a contested claim due from the bank to the savings institution. The trust company was subsequently appointed receiver of the bank also, and applied to the court for instructions, and it was held that there was no impropriety in making the trust company receiver of both institutions.

5. Wilson *v.* Poe, 1 Hog. 322; Garland *v.* Garland, 2 Ves. Jr. 137, 30 Eng. Reprint 561. But a general order forbidding any clerk or agent of a solicitor to be appointed a receiver is held to be general, and not confined to clerks or agents of the solicitors in the cause or matter (*In re* Stokes, 7 Ir. Eq. 450, 1 J. & L. 675), and applies as well to the extension as to the appointment of a receiver (Meara *v.* Egan, 9 Ir. Eq. 259).

Fitness see *infra*, note 19.

6. Cook *v.* Martin, 75 Ark. 40, 87 S. W. 625, 1024 (by statute); Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436; *In re* Lloyd, 12 Ch. D. 447, 41 L. T. Rep. N. S. 171, 28 Wkly. Rep. 8; Wilson *v.* Poe, 1 Hog. 322; *Ex p.* Pincke, 2 Meriv. 452, 35 Eng. Reprint 1013 (where the lord chancellor refused to appoint the solicitor to the commission as receiver of a lunatic's estate, although it was stated that no one else would accept the office, the ground of the refusal being that it might become the duty of the solicitor himself to call the receiver to account); Garland *v.* Garland, 2 Ves. Jr. 137, 30 Eng. Reprint 561. *Compare* Roller *v.* Paul, 106 Va. 214, 55 S. E. 558.

Attorneys for both parties.— Where the court appointed two receivers, the mere fact that one of them was attorney for complainant will not be deemed an abuse of discretion, where the other was attorney for defendant. Shannon *v.* Hanks, 88 Va. 338, 13 S. E. 437.

Competent to undertake to file claim.— In Keene *v.* Gaehle, 56 Md. 343, it is held that a receiver might undertake, as the attorney of a claimant, to prepare and file the latter's claim with proper proofs and vouchers and that in this there would be nothing inconsistent with the receiver's official character.

Objection see *infra*, III, F, 5.

7. State Trust Co. *v.* National Land Imp., etc., Co., 72 Fed. 575.

The law partner of the solicitor for a complainant in foreclosure cannot, even by consent, be made receiver in the suit. Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627.

8. *In re* Eckhardt Mfg. Co., 114 La. 119, 38 So. 78 (creditor and stock-holder); McGil-

absolutely ineligible or disqualified to be receivers of the corporation merely by reason of their relation to the corporation.[9] The practice of making such appointments has been disapproved, however, and the courts have refused to designate such persons as receivers,[10] unless the case is exceptional and urgent and the parties interested consent thereto, since receivers should be impartial between the parties in interest,[11] and have held them to be improper persons to be appointed;[12] but often this attitude of the courts against the appointment of

liard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145 (holding that the appointment of a stock-holder of a corporation as receiver is not improper because his interest is opposed to that of creditors, for, in protecting his own interests in a proper manner, he must protect that of the creditors; nor because he has been a negligent stock-holder and has not protected his own interest, since stock-holders are not supposed to assume management and direction of the corporation; nor because of bad management of officers with which he had nothing to do); Moran *v.* Wayne Cir. Judge, 125 Mich. 6, 83 N. W. 1004; Barker *v.* Wayne Cir. Judge, 117 Mich. 325, 75 N. W. 886 (not cause for removal); Gypsum Plaster, etc., Co. *v.* Kent Cir. Judge, 105 Mich. 497, 63 N. W. 518; Covert *v.* Rogers, 38 Mich. 363, 31 Am. Rep. 319 (holding that the propriety of such appointment was recognized by the statutes of that state).

Managers.— In England, where a receiver and manager or managers were appointed, if the business was to be carried on (see *infra*, IV, F, 6, e, (III)), the directors and officers of a corporation might be appointed such managers, where they are acting fairly, since they are the most familiar with the affairs of the concern. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714; *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

9. Townsend *v.* Oneonta, etc., R. Co., 86 N. Y. App. Div. 604, 83 N. Y. Suppl. 1034 (director); Coy *v.* Title Guarantee, etc., Co., 157 Fed. 794; Olmstead *v.* Distilling, etc., Co., 67 Fed. 24.

Appointment not void.— In a suit by a stock-holder and director the appointment of complainant as receiver is not void. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; Hewett *v.* Adams, 50 Me. 271, no objection in suit by receiver, on ground of his legal capacity to prosecute the suit.

Statutory prohibition.— Sometimes, however, such appointments come within the direct prohibition of statute. Moss Nat. Bank *v.* Lakeside Co., 19 Ohio Cir. Ct. 365, 10 Ohio Cir. Dec. 542, holding further that where the directors, having decided to put the affairs of the corporation into the hands of a receiver to prevent creditors taking action, secured a bondholder to bring action for the appointment of a receiver, guaranteeing him against any expense of counsel, etc., the consent of the parties to such action to the appointment of a director as aforesaid is not such consent as should be permitted to set aside the plain provisions of the statute.

Adverse interest arising after appointment. — Under a statute authorizing receivers of corporations to proceed against stock-holders in behalf of claimants for statutory liability, it is only at the institution of such proceedings that a stock-holder's interest becomes adverse to his position as receiver. Hewett *v.* Adams, 50 Me. 271.

10. Wiswell *v.* Starr, 48 Me. 401; Donaldson *v.* Johnson, 3 S. C. 216; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 45 Fed. 436, where it is said that it has always been thought that while the insolvency of the company might have been caused by misfortune, and by no default of its direction, nevertheless those who were about to lose their property, or had it placed in jeopardy, were entitled, in all reason and fairness, to a new management, although perhaps not a better one; that in the one case, there is some hope; in the other, there can be expected but the former result. But see *In re* Fifty-Four First Mortg. Bonds, 15 S. C. 304.

Transfer of stock.— In People *v.* Illinois Bldg., etc., Assoc., 56 Ill. App. 642, it is held that a stock-holder may obviate objection to his appointment as receiver by transferring his stock.

11. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161, involving the appointment of one or more of the directors of a corporation whose management has been unsuccessful, in a suit filed by the corporation against its creditors.

In a suit by a stock-holder and directors for the appointment of a receiver for the corporation, it was said that the court did not sanction the appointment of such parties who were complainants and praying for the receiver, as it was rare that they were impartial and indifferent. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17.

12. McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217 (where such a receiver was removed and another appointed, the reason of the rule making such appointments improper being that a person who cannot, with the aid of others, manage a business successfully, is, as a general rule, unfit to wind it up alone); Middlesex County *v.* New Brunswick State Bank, 28 N. J. Eq. 166; Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588 [*affirming* 1 Paige 511] (where in an adverse proceeding against a bank for the appointment of a receiver, the direction by the chancellor requiring the master in appointing a receiver not to nominate any person who was an officer or agent of the bank within six months previous to or at the time of the commencement of the proceedings was held discreet and proper).

such persons as receivers is affected by the consideration of other circumstances, such as the connection of the person proposed with the misfortune of the company.[13] Where the officer is well qualified and the parties desire it,[14] and the misfortunes of the company are not attributable to reckless management on his part, he may be properly appointed receiver.[15]

2. PARTICULAR FITNESS.[16] A receiver should be honest and capable,[17] and in selecting such officer the court will give due consideration not only to his quality of indifference but also to his business ability and his fitness with respect to the character of the property which is to come under his care and the duties he will be required to perform in its management and conservation.[18] And so it is held

Express statutory provisions — voluntary dissolution.— In Matter of Eagle Iron Works, 8 Paige (N. Y.) 385 [*distinguishing* Atty.-Gen. *v.* Columbia Bank, 1 Paige (N. Y.) 511, *supra*, this note], it was held that upon a proceeding for the voluntary dissolution of a corporation under the statute then prevailing, the president of the corporation might be appointed receiver, if not otherwise disqualified, since the statute in express terms authorized such appointment.

13. Coy *v.* Title Guarantee, etc., Co., 157 Fed. 794; Olmstead *v.* Distilling, etc., Co., 67 Fed. 24 (where it is said that while an officer of a corporation, whose misfortunes have made a receivership necessary, is not ineligible to appointment as receiver, yet, where the corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, an officer should not be appointed without careful scrutiny of his official and personal antecedents, and one who is or has been a speculator in the stock of the corporation should never be appointed); Buck *v.* Piedmont, etc., L. Ins. Co., 4 Fed. 849, 4 Hughes 415 (as to the impropriety of appointing an officer who has been officially and responsibly connected with the mismanagement which had brought the company's affairs to ruin); Richards *v.* Chesapeake, etc., R. Co., 20 Fed. Cas. No. 11,771, 1 Hughes 28. See also Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

Circumstances justifying appointment.— In Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. 888, the circumstance that the business of the corporation was complicated, intricate, and widely extended, with millions of dollars invested upon small mortgages scattered through several states, was sufficient to justify the court in appointing persons who were familiar with all the details of the business, since as receivers there would be no new investments for them to make calling for the exercise of discretion, and all that was to be done would have to be done under the supervision of the court with full opportunity to all concerned of inspecting the books, papers, etc., and the mere fact that the appointees were officers of the company, under whose management the corporation had come to grief, was not sufficient ground for selecting strangers entirely unfamiliar with the assets or the machinery for their collection.

Jointly with one unconnected with corporation.— Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. 888, *supra*, this note came before the court subsequently, in 66 Fed. 14, after one of the receivers had withdrawn and another had been appointed in his place, and it was said in the latter report that if the question of appointing receivers were then before the court as an original application, the course best fitted to secure a careful and intelligent administration of the business of winding up the affairs of the corporation would indicate the selection of receivers one of whom was wholly unconnected with the prior administration of the corporation, and the other thoroughly familiar with the same.

Officer sustaining other relations making him ineligible.— In Baker *v.* Backus, 32 Ill. 79, it was held that a receiver who was secretary and treasurer as well as the largest single creditor of the company and who was also the legal adviser of the complainant and framed the bill of complaint, as well as the legal adviser of defendant company, was disqualified and should not have been appointed.

14. Ralston *v.* Washington, etc., R. Co., 65 Fed. 557.

15. Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546, where the parties interested consent.

Appointment in ignorance of relation.— In Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366, a stock-holder was appointed receiver of a bank in ignorance of the fact that he was such stock-holder, and it was held that the court would not remove him immediately but that it would be dangerous precedence to continue him without giving the opposite party an opportunity to make objections before the master and so the matter was referred again to the same master to appoint a receiver with liberty to propose the same receiver.

16. Appointment of receiver in prior proceeding see *infra*, III, H, 2.

17. Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522.

18. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504; Land Title, etc., Co. *v.* Asphalt Co. of America, 120 Fed. 996; Fowler *v.* Jarvis-Conklin Mortg. Trust Co., 66 Fed. 14, 63 Fed. 888; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546; Taylor *v.* Life Assoc. of America, 3 Fed. 465; Lupton *v.* Stephenson, 11 Ir. Eq. 484 (holding that it is not proper to appoint as receiver over a particular kind of property a person who is entirely unfamiliar with the management thereof even though he gives an undertaking

that one should not be appointed whose personal attention to the estate cannot be given in the degree in which it ought,[19] or who will not be amenable to the usual remedies against such officers.[20]

3. Selection — a. Province of Court and Parties. The appointment of a receiver is a judicial act,[21] and the right to name him belongs to the court.[22] The power cannot be abdicated by the court to one or both of the parties to the suit,[23]

to attend to the directions of another person who does understand it); Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (U. C.) 99. See also McGilliard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145; Sykes *v.* Hastings, 11 Ves. Jr. 363, 32 Eng. Reprint 1128, where the lord chancellor referred to a case in which he had continued a trustee as receiver on the ground that it was for the benefit of the estate, considering all his knowledge upon the subject.

Personal relations between receiver and parties.— In making the appointment the court will endeavor to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication. Simpson *v.* Ottawa, etc., R. Co., 1 Ch. Chamb. (U. C.) 99.

One not an expert in the particular business to be managed is not therefore disqualified. Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 62 Fed. 675.

He need not be a financier to run the particular business. Land Title, etc., Co. *v.* Asphalt Co. of America, 120 Fed. 996, where it is said that the court knows that many a practical man is no financier, and that many financiers rely upon practical men to carry out the workings of their undertakings. But see Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

19. Wynne *v.* Newborough, 15 Ves. Jr. 283, 33 Eng. Reprint 761. See also McGilliard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145.

Practising barrister and member of parliament.— In Wynne *v.* Newborough, 15 Ves. Jr. 283, 33 Eng. Reprint 761, it was held that the circumstances that a person proposed was in parliament, a practising barrister in town, and distant from the estate, although no absolute disqualification, are to be considerably regarded by the master in making the appointment.

Non-resident.— It has been held that a non-resident or temporary resident of the state is disqualified from being a receiver. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 92. In other cases this is held no disqualification. Bayne *v.* Brewer Pottery Co., 82 Fed. 391 (holding that a receiver appointed by a federal court in New Jersey for a New Jersey manufacturing corporation whose plant and business are located in Ohio, and subsequently appointed on the commencement of an ancillary suit, by a federal court in Ohio, will not be removed by the latter court it appearing that he is a fit person to manage the business and intends to give it his personal attention); Farmers' L. & T. Co. *v.* Cape Fear, etc., R. Co., 62 Fed. 675 (receiver of North Carolina corporation who was not a citizen of that state); Taylor *v.* Life Assoc. of America, 3 Fed. 465. And it is not an abuse of discretion to appoint a non-resident a receiver, where he has an interest in the property and a resident is appointed co-receiver. Burwell *v.* Farmers', etc., Bank, 119 Ga. 633, 46 S. E. 855.

20. Atty.-Gen. *v.* Gee, 2 Ves. & B. 208, 35 Eng. Reprint 298, where it was held that since receivers are sometimes committed, as a peer could not be committed, he should not be appointed receiver.

21. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274.

Managers.— So where it was necessary in England to appoint a manager as well as receiver in order to carry on a business, the appointment was by the court. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

Appointment by executive officer see *supra*, I, note 2.

22. People *v.* Globe Mut. L. Ins. Co., 57 How. Pr. (N. Y.) 481.

Prayer for appointment of particular person.— It does not follow that because the bill prayed for the appointment of a particular person as receiver he was appointed on that sole recommendation. The chancellor must be presumed to have acted on his own judgment. Johns *v.* Johns, 23 Ga. 31.

Questions formerly settled by a reference to the master are now determined by the chancellor. Williamson *v.* Wilson, 1 Bland (Md.) 418. See also *infra*, III, F, 3, b.

The appointment of a successor to a withdrawing receiver cannot be objected to by an intervener because he was not consulted as to the selection, there being no showing of unfitness or incompetence. Fowler *v.* Jarvis-Conklin Mortg. Trust Co., 66 Fed. 14.

Ethical considerations.— In Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 424, 28 How. Pr. 208, the court refused to consider the name of a proposed receiver on account of the relation of friendship which existed between him and such nominee, saying that he "is my personal friend. I have the highest respect and esteem for him. And that respect and esteem prevent my appointing him. The indelicacy of his appointment in this case is so manifest that I am quite certain his name has not been suggested with his concurrence."

Removal see *infra*, III, L, 2, b, (IV).

23. Polk *v.* Johnson. 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274.

nor can they dictate [24] or by private agreement,[25] or otherwise, control or obstruct the proper exercise of that power.[26] But there is nothing peculiar in the appointment of a receiver that his selection must be evolved wholly from the personal knowledge and observations of the judge;[27] each of the parties interested will be heard upon the question who shall be receiver,[28] and while the ultimate appointment rests solely with the court there is no principle that forbids the judge the freest access to the counsels and opinions of those interested in the trust, with respect to the fitness of the selection,[29] it being proper, however, for the court to consider the nature of the particular proceeding and the charges made in the pleadings.[30]

24. Hill *v.* Robertson, 24 Miss. 368; Richards *v.* Chesapeake, etc., R. Co., 20 Fed. Cas. No. 11,771, 1 Hughes 28.

25. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274, holding, however, that if efficiency and economy can be secured by private agreement, open and fairly entered into, with one who is willing to perform the work of administering for considerations moving to him wholly outside the trust, there is no principle of law or public policy that forbids the making of such a contract; that the court will closely scrutinize the bargain, when known to him, and if it seems clear that the bargainer is qualified, and the contract free from overreaching, and will be beneficial to the trust, the court may properly respect the contract, and make the appointment in pursuance of its terms.

26. People *v.* Globe Mut. L. Ins. Co., 57 How. Pr. (N. Y.) 481, holding that where the court has entered an order appointing a receiver for an insolvent corporation, the parties cannot, with a view of thwarting such action in the selection of the receiver, stipulate with each other for a change of the place of trial and that an order for such change obtained *ex parte* will be set aside on motion, even upon the suggestion of a stranger to the cause, since if such an order should be permitted to stand the parties might go on from term to term by the same process until they could find a judge subservient to their wishes.

27. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274. See also *infra*, III, F, 3, b.

28. Haggerty *v.* Granger, 15 How. Pr. (N. Y.) 243.

Parties in different suits.— In Lottimer *v.* Lord, 4 E. D. Smith (N. Y) 183, it was held that where two suits were brought against an insolvent firm for the distribution of its assets among its creditors, in both of which receivers are sought, plaintiffs in one, in which an order of appointment is unexecuted, should be heard on the reference in the other.

One who has admitted fraudulent disposition of property which a receiver is appointed to recover has been said to be in no better position to have a voice in selecting a receiver than would be a criminal to select a detective to ferret out and recover the fruits of his crime. Shainwald *v.* Lewis, 8 Fed. 878.

29. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274.

Action upon choice of parties — *In general.* — The recommendations of those most interested and who are most likely to sustain injury without an appointment of a receiver have been most regarded. Williamson *v.* Wilson, 1 Bland (Md.) 418; Land Title, etc., Co. *v.* Asphalt Co. of America, 120 Fed. 996. And an appointment of a proper person as the choice of a large majority, in amount and numbers, of the creditors of an insolvent firm, as against another as the choice of a single creditor, will not be disturbed. Jacoby *v.* Kiesling, 87 Ga. 28, 13 S. E. 161.

Upon objection by either party to a particular person the court will make the selection. Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 28 How. Pr. 208, where it was further held that if the court has no personal acquaintance with the person proposed and not assented to he would not be appointed.

Private preferences must yield to public considerations, and no one has a right to complain that he or his particular friend is not appointed receiver, especially where the assets are large and there are absent parties interested as well as those who are present. Matter of Empire City Bank, 10 How. Pr. (N. Y.) 498 (where a trust company was preferred because no mere personal obligation could be equal to the mortgages and public stocks pledged as security by such nominee which had been created by law, among other things, for the express purpose of meeting such requirements); Taylor *v.* Life Assoc. of America, 3 Fed. 465.

The majority will not control the court's action where the protection of the interests of the minority requires a course contrary to the wishes of such majority. Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

Objection by one whose title is disputed.— Where the hearing at which a receiver for a corporation was appointed was reopened it was held that the appointment should be confirmed, the objection being made by one as the owner of a bare majority of the corporate bonds, practically all others financially interested in the corporation having requested the appointment and continuance of the original receiver, and since his appointment the receiver having commenced an action in equity against the said bondholder for an adjudication that the bonds actually belonged to the corporation, and the said receiver being capable, honest, and efficient in the management of the property. Townsend *v.* Oneonta, etc., R. Co., 41 Misc. (N. Y.) 298, 84 N. Y. Suppl. 119.

30. Street *v.* Maryland Cent. R. Co., 58 Fed. 47.

b. Reference to Master. Under the early chancery practice in England, the selection of a suitable person was commonly referred to a master by whom both parties were heard to propose suitable persons for appointment,[31] and the same practice was adopted in some of the earlier cases in this country.[32] Under this practice it appears that the reference was made not only to select but to appoint a receiver,[33] although the power of the chancellor was not confined to reviewing the action of the master but might have been exercised in the first instance by appointing a receiver without a reference,[34] or by a reference to receive nominations and report their sufficiency and fitness, reserving to the chancellor the final appointment.[35] The court never orders a reference in such a case for the mere purpose of authorizing the complainant to hold an inquisition to hunt up testimony, to be afterward used in the cause, to enable him to collect his debt,[36] and the master is not to try the whole matter in litigation between the parties.[37]

4. Number. Under a discretionary power to appoint receivers, not only the persons to be appointed, but their number is left to the court's discretion.[38] But regard should be had to the necessities of the case and the rights of the parties, and the appointment of more than one receiver, entailing unnecessary expense upon the estate, when one might perform the duties, has been condemned.[39]

5. Objections and Review. When the question of the selection of a receiver was referred to a master,[40] the chancellor would never inquire into the particular reason of the master's preference upon the mere naked allegation that another person was a more proper one,[41] or disturb the master's choice unless

31. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274; Williamson *v.* Wilson, 1 Bland (Md.) 418.

Objections and review see *infra*, III, F, 5.

32. Matter of Eagle Iron Works, 8 Paige (N. Y.) 385; Atty.-Gen. *v.* Columbia Bank, 1 Paige (N. Y.) 511 [*affirmed* in 3 Wend. 588]; Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366. See also Kimball *v.* Goodburn, 32 Mich. 10. But see *supra*, III, A, 2, a, note 89.

After the code in New York, it was held that the selection and appointment of a receiver, etc., was a proper matter of reference, following the English chancery practice, as such practice was not inconsistent with any of the provisions of the code or the rules then governing the court. Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92.

33. Matter of Eagle Iron Works, 8 Paige (N. Y.) 385; Thomas *v.* Dawkin, 3 Bro. Ch. 508, 29 Eng. Reprint 671, 1 Ves. Jr. 452, 30 Eng. Reprint 433; Bowersbank *v.* Colasseau, 3 Ves. Jr. 164, 30 Eng. Reprint 949.

Contra, under a statute in Alabama, permitting a chancellor to appoint a receiver and providing that a register, who was in effect the master, could not appoint a receiver, it was held that a reference to a register to appoint a receiver was void. *Ex p.* Smith, 23 Ala. 94. See also *supra*, III, A, 2, a.

Where upon trial of the cause by the referee under a provision of the code which makes his decision on the trial of an issue of fact the decision of the court, his report of judgment and finding that a receiver should be appointed is the judgment of the court to that extent, although the judge at special term is the proper officer to appoint the receiver upon such report. Durant *v.* Pierson, 12 N. Y. Suppl. 145, 19 N. Y. Civ. Proc. 203.

34. Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588.

35. Columbia Bank *v.* Atty.-Gen., 3 Wend. (N. Y.) 588.

Effect of such reference see *supra*, III, E, 9.

36. Copous *v.* Kauffman, 8 Paige (N. Y.) 583, indicating, however, that, previous to the appointment of a receiver, it may be necessary, for the purpose of the reference, to examine witnesses as to the nature and extent of defendant's property for the purpose of enabling the master to decide who would be a proper person to be appointed receiver of such property and the amount of the security which the receiver should be required to give.

37. Fitzburgh *v.* Everingham, 6 Paige (N. Y.) 29.

38. Wiswell *v.* Starr, 50 Me. 381; Hewett *v.* Adams, 50 Me. 271; *Re* Hull, etc., R. Co., 57 L. T. Rep. N. S. 82.

That there cannot be independent receivers over the same estate at the same time, each having full power to act, does not mean that the court cannot appoint more than one to act jointly in one receivership. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358.

Managers.— So in England, where for the purpose of continuing and carrying on the business a manager was necessary since the receiver as such had no power to perform such functions (see *infra*, IV, F, 6, e, (III), (A) more than one such manager might be appointed. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

39. Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill 476, 6 Reporter 642.

40. See *supra*, III, F, 3, b.

41. *In re* Bangor, 2 Molloy 518; Anonymous, 3 Ves. Jr. 515, 30 Eng. Reprint 1134.

the person chosen was shown to be unfit.[42] To induce the court to interfere it must have been shown that the person appointed by the master was legally disqualified, or that his situation was such as to induce a belief that the interests of the parties would not be properly attended to by him.[43] In other words, the court never entertained any objection to the master's report which was not founded upon principle.[44] The same rule governs an appellate court sitting in review upon an order of a judge or chancellor appointing a receiver;[45] the lower court is vested with some discretion which should remain undisturbed when it has been exercised unless there is some overwhelming objection in point of the propriety of the selection, or some objection fatal in principle.[46] Objections to the appointment of a particular person must be timely,[47] and if not presented when the matter is before the court on the application they cannot be urged for the first time after the receiver has acted and made his final settlement,[48] nor can the appoint-

42. Atty.-Gen. *v.* Day, 2 Madd. 246, 56 Eng. Reprint 325.

Practice — exception to report.— In Matter of Eagle Iron Works, 8 Paige (N. Y.) 385, it was held that, if either party is dissatisfied with the appointment made by the master, the proper course is to present a petition to the court, upon due notice to all the other parties who have appeared and who are interested in the appointment, stating the grounds of objection to the receiver, and praying that the master may review his report. See also Wynne *v.* Newborough, 15 Ves. Jr. 283, 33 Eng. Reprint 761 (where the party objecting proceeded by petition); Bowersbank *v.* Colasseau, 3 Ves. Jr. 164, 30 Eng. Reprint 949. *Contra*, Creuze *v.* London, 2 Bro. Ch. 253, 29 Eng. Reprint 140, Dick. 687, 21 Eng. Reprint 439.

43. Matter of Eagle Iron Works, 8 Paige (N. Y.) 385; Thomas *v.* Dawkin, 3 Bro. Ch. 508, 29 Eng. Reprint 671, 1 Ves. Jr. 452, 30 Eng. Reprint 433; Creuze *v.* London, 2 Bro. Ch. 253, 29 Eng. Reprint 140, Dick. 687, 21 Eng. Reprint 439; Anonymous, 3 Ves. 515, 30 Eng. Reprint 1134; Tharpe *v.* Tharpe, 12 Ves. Jr. 317, 33 Eng. Reprint 121; Wilkins *v.* Williams, 3 Ves. Jr. 588, 30 Eng. Reprint 1169; Garland *v.* Garland, 2 Ves. Jr. 137, 30 Eng. Reprint 561. In Wynne *v.* Newborough, 15 Ves. Jr. 283, 33 Eng. Reprint 761, the master was directed to review his report for further consideration of the fact that the appointee was a member of parliament, etc., and so circumstanced that he might not be able to give proper attention to the estate.

44. Cookes *v.* Cookes, 2 De G. J. & S. 526, 67 Eng. Ch. 412, 46 Eng. Reprint 479.

45. Cookes *v.* Cookes, 2 De G. J. & S. 526, 67 Eng. Ch. 412, 46 Eng. Reprint 479.

46. *Georgia.*— Jacoby *v.* Kiesling, 87 Ga. 28, 13 S. E. 161.

Louisiana.— McGilliard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145.

Mississippi.— Hill *v.* Robertson, 24 Miss. 368, holding that a party who applies for the appointment, offering to execute a bond with good security, cannot complain of the chancellor's refusal to appoint him.

Virginia.— Shannon *v.* Hanks, 88 Va. 338, 13 S. E. 437.

England.— Cookes *v.* Cookes, 2 De G. J. & S. 526, 67 Eng. Ch. 412, 46 Eng. Reprint 479.

See 42 Cent. Dig. tit. "Receivers," § 81. And for review of such order generally see APPEAL AND ERROR, 3 Cyc. 325, 330.

Presumption.— Where a bill in equity asks that a particular person named be appointed receiver, and he is appointed, it will be presumed to be by the judgment of the court. Johns *v.* Johns, 23 Ga. 31.

Liquidator.—An order having been made for continuing under supervision the voluntary winding-up of a company, under which a liquidator had been appointed and an equitable mortgagee of property of the company having filed a bill to enforce his security, and obtained an order for a receiver, the company proposed the liquidator as receiver, and it was held that inasmuch as no personal objection was alleged against him, the liquidator ought to have been appointed receiver, since the appointment of another person would cause great and unnecessary expense. The question was treated as one of principle, the receiver appointed by the vice-chancellor discharged and the liquidator appointed. Perry *v.* Oriental Hotels Co., L. R. 5 Ch. 420, 23 L. T. Rep. N. S. 525, 18 Wkly. Rep. 779.

47. See *infra*, note 48.

Collateral attack.— The mere fact that an improper person is appointed receiver does not render the appointment absolutely void, although redress may be secured in proper appellate proceedings (San Antonio, etc., R. Co. *v.* Adams, 11 Tex. Civ. App. 198, 32 S. W. 733); and the question cannot be raised in a collateral proceeding (Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Haynes *v.* Carter, 9 La. Ann. 265; Moore *v.* Taylor, 40 Hun (N. Y.) 56). The capacity of a corporation to act cannot be so raised. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792. And in Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403, it was held, over the objection that the receiver's powers had ceased because he had become a non-resident, that he was receiver in fact and his authority continued until it was annulled.

48. Rogers *v.* Rogers, (Tenn. Ch. App. 1896) 42 S. W. 70, appointment of one who

ment of one person rather than another be urged as error when no request was made for the appointment of such other person.[49]

6. QUALIFICATION [50] — a. Bond [51] — (i) *In General.* The power to require the receiver to enter into a bond with sureties for the faithful discharge of his duties is one which the court has always had and exercised, and a bond in pursuance of such direction is one given in pursuance of law,[52] and after the appointment of a receiver and the assumption of his duties the court may require a bond to secure the payment or delivery of a fund for distribution, although no statutory bond is prescribed in such cases.[53] The course of the court of chancery in England required security by the receiver,[54] and the general practice is to require a receiver to execute bond with approved sureties, for the faithful discharge of his trust and to account, etc., before he will be permitted to take charge of the property.[55] This is approved as the better practice notwithstanding the

was a solicitor in the cause and interested in the subject-matter. See also Tait *v.* Carey, 3 Indian Terr. 765, 49 S. W. 50, appointment of assignee, contrary to statute against appointment of parties interested.

After affirmance.—And the objection that a trust company could not be legally appointed because the act under which it was organized was unconstitutional and its organization illegal cannot be raised after the decree becomes conclusive by affirmance on appeal. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

49. Bliley *v.* Taylor, 86 Ga. 163, 13 S. E. 283.

50. **Notice of appointment** see *infra*, IV, D, 5, j.

51. **Liability on bond** see *infra*, IX. **Supplementary proceedings** see EXECUTIONS, 17 Cyc. 1457.

52. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 211.

53. Rowlet *v.* Eubank, 1 Bush (Ky.) 477.

54. Mead *v.* Orrery, 3 Atk. 235, 26 Eng. Reprint 937.

55. *Connecticut.*— Tomlinson *v.* Ward, 2 Conn. 396.

Maryland.— Williamson *v.* Wilson, 1 Bland 418.

Michigan.— Smith *v.* Menominee Cir. Judge, 53 Mich. 560, 19 N. W. 184.

New York.— Jones *v.* Blun, 145 N. Y. 333, 39 N. E. 954 (receiver in proceeding to sequester assets of corporation under statute); Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658.

North Carolina.— Nesbitt *v.* Turrentine, 83 N. C. 535.

Washington.— Libert *v.* Unfried, 47 Wash. 182, 91 Pac. 774, *infra*, note 60.

West Virginia.— Carper *v.* Hawkins, 8 W. Va. 291.

See 42 Cent. Dig. tit. "Receivers," § 86.

The order of appointment should require the receiver to give security (Tomlinson *v.* Ward, 2 Conn. 396; Smith *v.* Menominee Cir. Judge, 53 Mich. 560, 19 N. W. 184); and it is generally true that the order so provides (Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658).

Receiver to get in assets — indemnity to executor.—A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. Taylor *v.* Allen, 2 Atk. 213, 26 Eng. Reprint 532.

Substantial compliance with the statute prescribing a bond is sufficient. Rowlet *v.* Eubank, 1 Bush (Ky.) 477.

Common-law obligation.—A bond in a case not provided for by statute may nevertheless be good as a common-law obligation. Ellis *v.* Carr, 1 Bush (Ky.) 527, *infra*, note 62.

Obligee — *In general.*—A bond in which no obligee is named, but which is conditioned for the faithful discharge of duties and obedience of the orders of the court, is held sufficient. Sanford *v.* Carr, 8 Ky. L. Rep. 618.

Public officer.—A statute prohibiting a sheriff or other officer from taking any bond, obligation, or other security, by color of his office, etc., does not apply to a bond given in pursuance of an order or judgment of a court of competent jurisdiction as a portion of the machinery by which it is enabled to carry its judgment into effect. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 211.

Form prescribed by court.—A statute providing that before entering upon his duties the receiver must, with one or more sureties, approved by the court, execute a bond to such person and in such manner as the court shall direct to the effect that he will faithfully discharge the duties of receiver and obey the orders of the court, modifies a former provision prescribing a form of bond to be made payable to the commonwealth, and the court has a right to make the bond payable to itself. Rowlet *v.* Eubank, 1 Bush (Ky.) 477.

Descriptio personæ.— The rule that where a party to a written instrument is described by some title without introducing any words to show that he intends to act in such capacity, such phrase is a mere *descriptio personæ* and must yield to the evident purpose of the instrument, and if upon an examination of all the provisions of a receiver's bond, it is apparent that, although it purports to be an obligation to one described "clerk," etc., it is in reality taken to him in his capacity as clerk of the court, it will be deemed valid without words to show that the obligee's representatives are to succeed to his

execution of such bond may not be absolutely essential to the validity of the appointment,[56] and although the proceeding in which the appointment is made is statutory and the statute does not expressly require such bond.[57] Where the order requires the receiver to enter into a bond before assuming to intermeddle with the property to which the receivership relates, he is held to have no authority as receiver until such bond is given,[58] unless the provision of the order is waived by the court or parties in interest having power to dispense with the bond.[59]

rights. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 211.

The penalty of the bond is sufficient where the estate is almost entirely real estate, which the receiver cannot sell without an order of court, the rents being all that he can get into his possession of which he cannot likely receive an amount greater than the bond will cover. Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366.

Sureties — *In general.*— Mead *v.* Orrery, 3 Atk. 235, 26 Eng. Reprint 937, holding that two sureties in a recognizance were required, the chancellor disapproving the practice of going out of the course of the court and taking an assignment of a mortgage belonging to the receiver.

Freehold qualifications are not necessary. Tottenham *v.* Tottenham, Hayes 575.

A guarantee society is sufficient as surety. Colmore *v.* North, 42 L. J. Ch. 4, 27 L. T. Rep. N. S. 405, 21 Wkly. Rep. 43.

Non-residents.—A receiver's bond has been held sufficient in the federal court, although the sureties are non-residents of the state in which the appointment is made. Taylor *v.* Life Assoc. of America, 3 Fed. 465. But in Cockburn *v.* Raphael, 2 Sim. & St. 453, 25 Rev. Rep. 244, 1 Eng. Ch. 453, 57 Eng. Reprint 419, a receiver was appointed, on application of executor, to collect assets in India, but required to find sureties in England.

Approval.— The approval of a receiver's bond by the court is an adjudication that the bond is sufficient and connot be collaterally attacked. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26. The validity of the bond is not affected by the fact that the order of approval was entered before the bond was executed. Sanford *v.* Carr, 8 Ky. L. Rep. 618. And a statute requiring such bond to be approved is held to be directory, so that an approval *nunc pro tunc* is sufficient. Gephart *v.* Starrett, 47 Md. 396. In Newman *v.* Hammond, 46 Ind. 119, the statute required approval by the court and the appointment was held void because it was made by the judge and the bond approved by the clerk in vacation. This decision does not turn so much upon the mere approval of the bond as upon the authority to appoint receivers in vacation.

56. Johns *v.* Johns, 23 Ga. 31.

57. Mechanics' F. Ins. Co.'s Case, 5 Abb. Pr. (N. Y.) 444.

58. Phillips *v.* Smoot, 1 Mackey (D. C.) 478 (holding that until the bond is given the receiver cannot dispossess a party in possession of the property); Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658; Johnson *v.* Martin, 1 Thomps. & C. (N. Y.) 504 (where, in an action by a receiver who had not complied with the order of appointment, although he had executed an insufficient obligation in the form of a bond, plaintiff was nonsuited); Davis *v.* Snead, 33 Gratt. (Va.) 705; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

Defective bond.— But in Morgan *v.* Potter, 17 Hun (N. Y.) 403 [*distinguishing* Johnson *v.* Martin, 1 Thomps. & C. 504, *supra*, this note, in that for aught that appears in that case the objection was taken by a judgment debtor, and in that it does not appear in that case that the receiver had obtained leave of court to sue, as he did in the case at bar], it was held that in an action by a receiver appointed in supplementary proceedings the fact that the bond or obligation executed by the receiver was not sealed was an irregularity of which the judgment debtor alone could take advantage.

Filing nunc pro tunc.— In Whiteside *v.* Pendergast, 2 Barb. Ch. (N. Y.) 471, it was held that where a bond was executed and approved pursuant to an order of appointment, but through inadvertence was not filed in the clerk's office, the court might subsequently direct it to be filed *nunc pro tunc* so as to complete the appointment and render the receiver liable to account for the property which came to his hands subsequent to the time when the bond should have been filed. This was an appeal by the receiver and the sureties from the order directing such filing, and it was not necessary to determine, and it was not decided, what was the effect of the order to render the sureties liable for property which might have been wasted by the receiver before the making of the order. So in Blois *v.* Betts, Dick. 336, 21 Eng. Reprint 298, and Vaughan *v.* Vaughan, Dick. 90, 21 Eng. Reprint 202, where a surety in a recognizance procured his discharge and fresh recognizance was entered into but was not enrolled in time, it was entered *nunc pro tunc*, and the court added in the first case cited that it was not to take effect as against intermediate purchasers from the cognizors but only from the time of the enrolment.

Receiver de facto.— It is also held, however, that the appointee may be receiver *de facto*, although he has not given any bond, so that his authority to sue cannot be collaterally attacked. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Relation back of title to time of giving security see *infra*, IV, D, 4, b.

59. Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658.

(II) *Security Dispensed With* — (A) *In General.* A requirement that the receiver enter into bond is not prerequisite to the validity of the appointment,[60] and the English chancery practice recognized the power of the court to dispense with security but without salary to the receiver.[61] And so it has been held that a receiver's bond need not be required of the master, a bonded officer of the court,[62] nor of other officers whose official bonds cover the duties imposed upon them as receivers,[63] nor of trust companies whose assets, under the law regulating such companies, are considered as the security required by law for the faithful performance of such duties.[64] But if an administrator, in a suit for an accounting brought by him, is appointed receiver, he should be required to give a new bond as such.[65]

(B) *Waiver and Consent.* While it is said that it would perhaps be best to require of a receiver bond with good security in all cases,[66] it is nevertheless held that where the parties in interest apply for his appointment, and are in all respects capable of judging of the competency and responsibility of the person appointed, they may unquestionably waive it.[67]

60. Wilson *v.* Welsh, 157 Mass. 77, 31 N. E. 712 (no defense to action by receiver that decree appointing him does not require, and the receiver has not given, bond); Dilling *v.* Foster, 21 S. C. 334.

An order is not void because of the omission to require adequate security. Nesbitt *v.* Turrentine, 83 N. C. 535; Morrison *v.* Skerne Ironworks Co., 60 L. T. Rep. N. S. 588. See also *In re* Fifty-four First Mortgage Bonds, 15 S. C. 304. *Contra,* Libert *v.* Unfried, 47 Wash. 182, 91 Pac. 774, holding that an order on an *ex parte* application which directs the receiver to seize and retain property is void.

61. Boyle *v.* Bettws Llantwit Colliery Co., 2 Ch. D. 726, 45 L. J. Ch. 748, 34 L. T. Rep. N. S. 844 (where, on the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the vendor was appointed receiver without security or salary); Taylor *v.* Eckersley, 2 Ch. D. 302, 45 L. J. Ch. 527, 34 L. T. Rep. N. S. 637, 24 Wkly. Rep. 450; Hyde *v.* Warden, 1 Ex. D. 309, 25 Wkly. Rep. 65; Gardner *v.* Blane, 1 Hare 381, 23 Eng. Ch. 381, 66 Eng. Reprint 1080 (which was a suit by an infant against testamentary guardians who were also executors under the will of the infant's father for an account of rents and profits of the infant's real estate and for a receiver, and the vice-chancellor appointed one of the guardians receiver without salary and without being required to give security, observing that it was not unusual where no salary was given to dispense with security). See also as to dispensing with security of receiver appointed pursuant to the nomination of a testator in his will Hibbert *v.* Hibbert, 3 Meriv. 681, 17 Rev. Rep. 169, 36 Eng. Reprint 261. But in *In re* Ward, 2 Chamb. (U. C.) 188, it was held that sureties could not be dispensed with except when all the parties are *sui juris* and consent.

Equitable execution.— Upon an application of a judgment creditor by way of equitable execution, if the receiver is to be authorized to receive money belonging to any one but the debtor, it would be wrong to appoint a receiver without security, but where his rights will be limited to receiving those moneys which are the absolute property of the debtor, free from any trust, it is not improper to make the appointment without security, the receiver's rights being limited to receiving the amount of the judgment debt, and plaintiff consenting to be responsible for him. McLean *v.* Allen, 14 Ont. Pr. 84. And so a plaintiff who had obtained judgment was upon his application *ex parte* appointed receiver without security of the income of the interest of a defendant under a will. Fuggle *v.* Bland, 11 Q. B. D. 711; Kincaid *v.* Kincaid, 12 Ont. Pr. 462.

62. De Walt *v.* Kinard, 19 S. C. 286, as to special bond of master appointed to collect rents *pendente lite.* See also Ellis *v.* Carr, 1 Bush (Ky.) 527, where it was held that, although there was no statutory authority for the appointment of a standing master or receiver of the court, yet where one was appointed and entered into a general bond for the faithful discharge of all the duties enjoined on him by the laws and decrees of the court, etc., and acted in a matter in which the court had authority by statute to appoint a receiver, such general bond should be upheld as a good common-law obligation. But see Waters *v.* Carroll, 9 Yerg. (Tenn.) 102. And see State *v.* Odom, 86 N. C. 432, *supra,* I, note 3.

63. Smith *v.* Butcher, 28 Gratt. (Va.) 144 (sheriff); Moran *v.* Johnston, 26 Gratt. (Va.) 108 (sergeant of city appointed to receive rents and profits pending appeal from an order of sale of land to satisfy liens).

64. Matter of Empire City Bank, 10 How. Pr. (N. Y.) 498; Goff *v.* Goff, 54 W. Va. 364, 46 S. E. 177.

65. Miller *v.* Jones, 39 Ill. 54.

66. Johns *v.* Johns, 23 Ga. 31.

67. Johns *v.* Johns, 23 Ga. 31; Carlisle *v.* Berkeley, Ambl. 599, 27 Eng. Reprint 390; Ridout *v.* Plymouth, Dick. 68, 21 Eng. Reprint 193. See also Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658.

Failure to object.— Where a receiver is

(c) *New or Additional Security.* If a receiver's security becomes insufficient he may be ruled to show cause why he should not give other sureties or be removed.[68] Where a surety of a receiver dies,[69] or is discharged,[70] a new surety or a fresh recognizance may be ordered. But where a temporary receiver in a proceeding to sequester the assets of a corporation is continued as permanent receiver, the court is dealing with its own officer with his bond on file, and a new bond need not be required in order to enable the receiver to act with authority.[71] An order requiring one surety only, in contravention of a statute requiring two, may be subsequently amended so as to require a bond with two sureties.[72]

b. Oath. A receiver need not be sworn, the statute not requiring it, as he is an officer of the court whose proceedings are always subject to its revision.[73] And where the statute provides that the receiver shall take an oath, if his authority to sue is questioned it will be presumed from his appointment and qualification by giving bond that the oath was taken.[74]

G. Renewal of Application. The principle of *res adjudicata* which prevents a matter being twice litigated between the same parties has no application to a mere interlocutory motion for a receiver.[75] An application for the appointment of a receiver may be renewed at any time on a new state of facts arising,[76] but it will not be granted upon the same papers or a part of the same papers

appointed to carry into effect the decree of the court, it behooves one party as much as the other to see that the receiver is required to give bond; and a failure to do so precludes objection on that account on appeal. Shulte *v.* Hoffman, 18 Tex. 678.

Practice in England.— Where a reference had been made to appoint a receiver, the court would not, even by consent of the parties, dispense with the usual security; but the proper course was, for the parties, of their own authority, to nominate a receiver, and then to apply for liberty for him to act without security. Tylee *v.* Tylee, 17 Beav. 583, 51 Eng. Reprint 1161; Manners *v.* Furze, 11 Beav. 30, 12 Jur. 129, 17 L. J. Ch. 70, 50 Eng. Reprint 727.

Parties not competent to consent.—A receiver will not be appointed without sureties, although not objected to, if persons not competent to consent are interested. See Tylee *v.* Tylee, 17 Beav. 583, 51 Eng. Reprint 1161. But see Carlisle *v.* Berkley, Ambl. 599, 27 Eng. Reprint 390. In the case of infants the chancellor ought to look closely into the matter, and see that their interests are secure, and if the receiver is not entirely responsible, security ought to be required. There should be no risk of loss. Johns *v.* Johns, 23 Ga. 31.

68. Shackelford *v.* Shackelford, 32 Gratt. (Va.) 481. See also Wise *v.* Ashe, 1 Ir. Eq. 210.

A showing that the former security is inadequate will be required before the court will order one who has been placed in possession of property to give additional security. Hungerford *v.* Cushing, 8 Wis. 327.

69. Baldwin *v.* Crawford, 1 Ch. Chamb. (U. C.) 264, where the receiver obtained an *ex parte* order referring it to the master to approve a new surety. See also Averall *v.* Wade, Fl. & K. 341.

70. See Blois *v.* Betts, Dick. 336, 21 Eng. Reprint 298, and Vaughan *v.* Vaughan, Dick. 90, 21 Eng. Reprint 202, as to fresh recognizance, *supra*, note 58.

71. Jones *v.* Blun, 145 N. Y. 333, 39 N. E. 954, holding, however, that the court has ample power to direct a further bond to be given if it deems such a course proper.

72. Holmes *v.* McDowell, 15 Hun (N. Y.) 585 [*affirmed* in 76 N. Y. 596], holding that the original order was not void, the court not deriving its power from the statute but exercising it as an inherent power of a court of chancery; that the statutory mode of exercising the power, not being declared to be jurisdictional, was directory.

73. American Bank *v.* Cooper, 54 Me. 438.

74. Seymour *v.* Aultman, 109 Iowa 297, 80 N. W. 401.

Directory statute.— In Dayton *v.* Borst, 7 Bosw. (N. Y.) 115 [*affirmed* in 31 N. Y. 435], it was held that the omission of a receiver of an insolvent bank to take an oath prescribed by the statute of New Jersey, until after he had brought suit in New York, was not sufficient cause for dismissing the suit, the order of appointment not requiring the oath to be taken, as the statute is directory.

75. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

By a dismissal of his action by plaintiff after his motion for the appointment of a receiver has been denied, he is not barred from bringing a new action, and the right to move for the appointment of a receiver in the latter action is as much an incident thereto as it was to the first action, although he might have appealed from the order denying the motion in the first action. Anderson *v.* Powell, 44 Iowa 20.

Refusal of different judge in supplementary proceedings see EXECUTIONS, 17 Cyc. 1453 note 76.

76. Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 41 Atl. 217 [*affirmed* in 58 N. J. Eq. 579, 43 Atl.

upon which a similar motion has been refused; new facts or circumstances must be shown to sustain a new motion.[77] If an order of appointment is void it will not stand in the way of a subsequent valid appointment,[78] and pending a motion to vacate an appointment made without notice and for other irregularities, a notice of motion for another appointment in the event the first order is vacated may be served and acted on upon vacating such original appointment.[79]

H. Continuance, Extension, and Subsequent Appointments — **1. Continuance of Receiver.** Where a receiver has been appointed generally in an action it is unnecessary, when the action comes on upon further consideration, to insert in the minutes a direction to continue the receiver.[80] The appointment of a temporary receiver is superseded by a judgment appointing a permanent receiver when all the parties are before the court, and it is then too late to question the regularity of the temporary appointment.[81]

2. Subsequent Appointment and Extending Receivership.[82] The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit.[83]

1098]; Oakley *v.* Paterson Bank, 2 N. J. Eq. 173.

77. Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 41 Atl. 217 [*affirmed* in 58 N. J. Eq. 579, 43 Atl. 1098]; Fenton *v.* Lumberman's Bank, Clarke (N. Y.) 360.

To discourage litigiousness.— This practice is adopted by the courts in order to discourage mere litigiousness. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637, where it is said that where a motion has been once fully heard and decided it should not be revived again except upon leave of the court first had and obtained or unless a different state of facts has arisen since the first decision.

In appellate court.— In Allen *v.* Harris, 4 Lea (Tenn.) 190, after a decree for defendants in a suit to enjoin the prosecution of an action of ejectment, and appeal prayed and granted, but before it was perfected defendant filed a petition for a receiver which the chancellor denied, from which order also there was an appeal, and it was held that the supreme court could not entertain an application for a receiver to revise the action of the lower court because it would not undertake to act separately upon each error committed by the lower court, and a party is entitled only to one hearing on appeal; that if the application is intended as a new one without reference to the action of the chancellor, it could not be granted because there was nothing to support it except what appeared on the record, and to act upon that would be to revise the action of the chancellor; that a new affidavit repeating the facts stated in the affidavit below did not change the result, and an affidavit of new facts which have since occurred would be to require the court to exercise original and not appellate jurisdiction.

Postponement of action — *In general.*— To postpone a discretionary order such as that appointing a receiver is not a bar to it, and where an application for a receiver has been continued till the hearing, and a writ of error to the order of continuance has been sued out, the judge, during term-time and before the main case is brought on for final hearing, may properly grant the application on the same bill and the same facts. McCaskill *v.* Warren, 58 Ga. 286.

Leave to renew the application on additional evidence is sometimes granted upon denying the first application. Devlin *v.* Hope, 16 Abb. Pr. (N. Y.) 314, where upon denying an application partially on the ground that to grant it would practically destroy the interest in dispute, and also because the equities of plaintiff were almost entirely controverted by the answer, leave to renew the application on additional evidence was granted. See also Merchants, etc., Bank *v.* Griffith, 10 Paige (N. Y.) 519.

78. Robinson *v.* Dickey, 143 Ind. 214, 42 N. E. 638, holding that upon setting aside an appointment because no action was pending when it was made, the court may grant another application before the property is restored.

79. Clark *v.* Clark, 11 Abb. N. Cas. (N. Y.) 333, holding that an appointment made under such counter notice was not invalidated by the fact that the order to show cause contained a stay, defendant not having raised the objection on the hearing of the motion.

80. *Re* Underwood, 60 L. T. Rep. N. S. 384, 37 Wkly. Rep. 428.

Continuance by order of sale.—A receiver already appointed is in effect continued in office by an order directing him to sell, and such order is an exercise of the power given the court to dispose of property through a receiver after judgment. Buist *v.* Merchants', etc., Bank, 65 S. C. 487, 43 S. E. 958.

81. MacNabb *v.* Porter Air-Lighter Co., 44 N. Y. App. Div. 102, 60 N. Y. Suppl. 694.

Termination and retention of receivership see *infra*, III, K.

82. **As to property in hands of stranger** see *infra*, IV, D, 5, h, (II).

Ancillary appointment see *infra*, VIII, B.

83. *In re* Watts, 190 U. S. 1, 23 S. Ct. 718, 47 L. ed. 933. And see, generally, as

But the appointment of a receiver in one suit will not necessarily preclude the appointment of another receiver in a subsequent suit.[84] And while if the receivership in the first instance is general, and the receiver is appointed to take possession of all the property of every character and description and preserve it for the benefit of all creditors entitled thereto, there is no necessity for another receiver having like powers,[85] another appointment will be made on behalf of all creditors where the first receivership is not of that character.[86]

to this principle COURTS, 11 Cyc. 988, 1011; MORTGAGES, 27 Cyc. 1633.

After discharge of receiver.— Where the court, after appointing a receiver at the instance of a lien claimant, accepts a bond as security, in lieu of the property itself, and thereupon discharges the receiver, and orders him to return the property to its owners, the property thus surrendered becomes free for the action of any other court of competent jurisdiction; and if such a court then appoints a receiver, who takes possession, he cannot be displaced by the subsequent action of the former court in setting aside its order for acceptance of security in lieu of the property, and making a new order for taking possession by a receiver. Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660. See also Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

Bankruptcy.— The rule of the text can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. *In re* Watts, 190 U. S. 1, 23 S. Ct. 718, 47 L. ed. 933.

Interference as between receivers see *infra*, IV, D, 6, a, (II).

84. Syracuse State Bank *v.* Gill, 23 Hun (N. Y.) 410; Bailey *v.* O'Mahony, 33 N. Y. Super. Ct. 239, 10 Abb. Pr. N. S. 270; Rogers *v.* De Forest, 7 Paige (N. Y.) 272 [*reversed* on the merits of the cause in 22 Wend. 483], prior appointment for estate of debtor no answer to application for similar appointment in subsequent suit.

Jurisdiction.— See Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507, as between receivers of the state and federal courts, the court saying that both receivers are receivers *de jure* with respect to the source of their authority, although one may not be able to hold property placed in his possession.

In supplementary proceedings.— Under N. Y. Code Civ. Proc. § 2466, it is provided that only one receiver of the property of a judgment debtor shall be appointed. See EXECUTIONS, 17 Cyc. 1457. But this provision is held to apply only to supplementary proceedings, and therefore where a judgment creditor brings an action to reach certain shares of mining stock claimed to belong to the judgment debtor, but which are standing on the company's books in the name of his wife, and application is made for appointment of a receiver, it is not necessary to appoint the same receiver as has already been appointed in proceedings supplementary to execution. Syracuse State Bank *v.* Gill, 23 Hun (N. Y.) 410.

Injunction against first receiver.—An injunction against one personally, who was a receiver, restraining him from interfering with the property in his hands, except to preserve it, granted in an action to set aside his appointment, will have no effect upon his right to the management and control of the same property by virtue of his appointment as a receiver in a subsequent and independent action. Eddy *v.* Co-operative Dress Assoc., 3 N. Y. Civ. Proc. 434.

Partial relief only obtainable in first suit. — Under a statute in New York making it imperative upon the attorney-general to institute proceedings against the officers of a corporation to compel the restitution to the corporation, or payment to its creditors of the value of property misappropriated by a violation of duty, and to suspend such officers from their positions, when, in the opinion of the attorney-general, the public interest requires these steps to be taken, it was held that, although an action had been brought by a director to recover the assets of the corporation, and a receiver had been appointed therein, these facts did not constitute a bar to the institution of proceedings by the attorney-general, there being doubt as to the good faith of plaintiff and the receiver in the pending action, and it being apparent that in any event only partial relief could be obtained therein. People *v.* Bruff, 60 How. Pr. (N. Y.) 1.

Opportunity to be heard on second application.— Where, in case of assets in controversy among creditors, a receiver has been appointed in a suit brought by a part of the creditors, other creditors, prosecuting another suit, which seeks to appropriate and apply the assets, to the exclusion of the rights claimed by the former, cannot have a second receiver appointed, unless the first receiver, or the creditors he represents, are made parties to the latter action, and have opportunity to be heard on the question. Mutual Redemption Bank *v.* Sturgis, 22 Bosw. (N. Y.) 608.

85. Fernald *v.* Spokane, etc., Tel., etc., Co., 31 Wash. 219, 71 Pac. 731. See also Walther *v.* Seven Corners Bank, 58 Minn. 434, 59 N. W. 1077.

86. Oswald *v.* St. Paul Globe Pub. Co., 60 Minn. 82, 61 N. W. 902 (in creditors' suit after appointment in suit by stock-holder to set aside fraudulent transfer of corporate assets); Dambman *v.* Empire Mill, 12 Barb. (N. Y.) 341; Phinizy *v.* Augusta, etc., R. Co., 56 Fed. 273 (holding that where a receiver was appointed at the instance of another corporation which controlled stock of defendant company, for the purpose of furthering the

The same receiver will be appointed in the subsequent suit, however, unless his interest is such as to render his appointment improper,[87] where everything sought to be obtained by the subsequent appointment can be obtained through the instrumentality of the first receiver.[88] There cannot be two persons acting at the same time, independently and each with full power to act,[89] and if a second receiver should be appointed in a cause, pending the possession and management of property by one previously appointed, the power of the second receiver must be subordinate to the first,[90] unless, as in some cases, the court in the subsequent

interests of the dominant party, and not in the interest of the creditors of defendant company, in a suit instituted by creditors against the same company for the protection of their interests as superior to those of stockholders praying for the foreclosure of a mortgage, a new receiver should be appointed who can represent all interests).

An appointment pending a contest for corporate offices will not preclude the trustee of bondholders from instituting a suit for the appointment of a receiver of corporate property in the interest of creditors. Schmidt *v.* Mitchell, 98 Ky. 218, 32 S. W. 599, 33 S. W. 408, 17 Ky. L. Rep. 850.

87. St. Louis Car Co. *v.* Stillwater St. R. Co., 53 Minn. 129, 54 N. W. 1064; Matter of Hoagland Robinson Co., 36 Misc. (N. Y.) 28, 72 N. Y. Suppl. 435 (holding that while the directors cannot, by subsequently taking proceedings for a voluntary dissolution of their corporation, oust the receiver appointed in the sequestration action, the latter proceeding cannot prevent their procuring a dissolution of the corporation in the manner provided for by the statute; that upon complying with its terms they have a right to have it dissolved, and their responsibility therefor in every respect ended; that the proceedings for a voluntary dissolution provide for the appointment of a temporary and a permanent receiver, and that such provisions of the code can be complied with by appointing the same person receiver who has already been regularly appointed). Where a judgment creditor had proceeded under the statute relating to proceedings supplementary to execution against an insolvent corporation, as far as the appointment of a receiver, and afterward a petition was filed and motion made to set aside such proceeding, and for general equitable relief for the benefit of all its creditors, and for the appointment of another receiver, it was held that, there seeming to be no objection to the receiver already appointed, his appointment would be continued. Hammond *v.* Hudson River Iron, etc., Co., 11 How. Pr. (N. Y.) 29.

88. Bigelow *v.* Niagara River Brewing Co., 41 N. Y. App. Div. 204, 58 N. Y. Suppl. 812; Farmers' L. & T. Co. *v.* Hotel Brunswick Co., 12 N. Y. App. Div. 626, 42 N. Y. Suppl. 350, as to appointment, at suit of holder of chattel mortgage, of receiver already appointed in proceedings to dissolve the corporation.

89. Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358 (holding that the rule that there cannot be two receivers does not mean that the court cannot appoint two persons as receivers to act jointly, as to which distinction see also Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17); Lloyd *v.* Chesapeake, etc., R. Co., 65 Fed. 351. See also Biddulph *v.* Hickman, 1 Hog. 244 (as to receivers appointed by the courts of exchequer and chancery); Downshire *v.* Tyrrell, Hayes 354.

90. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17 (where the court has no reference, however, to cases where two or more persons are jointly appointed as receivers); O'Mahoney *v.* Belmont, 62 N. Y. 133 [*affirming* 37 N. Y. Super. Ct. 380] (holding that the subsequent receiver only takes what is undisposed of by the court in the litigation, and that even if the powers of a receiver may be extended in one case to another, there is no reason why the receiver last appointed should be vested with any authority over the fund, after it has been disposed of by the determination of the previous action); Bailey *v.* O'Mahony, 33 N. Y. Super. Ct. 239, 10 Abb. Pr. N. S. 270. But see State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

The proper course for parties in any other action is to make application to the court whose receiver was first appointed and who is in possession. O'Mahoney *v.* Belmont, 62 N. Y. 133.

Order making second appointment subject to first.— In Thau *v.* Bankers', etc., Tel. Co., 56 N. Y. Super. Ct. 588, 2 N. Y. Suppl. 11, it was held that an order of the New York superior court appointing a receiver, and providing that nothing therein contained shall affect the right of any receiver theretofore appointed over any property of defendant to act in accordance with the powers and duties conferred on him does not conflict with a previous order of the supreme court appointing a receiver of defendant's property.

Before and after judgment.— Under the New York code of civil procedure, providing for the appointment of receivers before final judgment and by final judgment, the first for the preservation of property until final judgment and the second for the purpose of carrying the final judgment into effect, it is held that the appointment by final judgment is the exercise of a different and distinct power from that of appointing a receiver before judgment, and that the appointment of a receiver to carry a final judgment into effect supersedes all previous actions taken for the purpose of preserving the property until final judgment. Glines *v.* Binghamton Trust Co., 68 Hun (N. Y.) 511, 22 N. Y. Suppl. 1023.

suit may invoke the first appointment as fraudulently and collusively procured.[91] The general practice is to extend the receivership in the first suit to the second, subject to the legal and equitable claims of all parties, and the rights of the parties will be substantially the same as if different persons had been appointed at the several times,[92] and where a receiver is appointed over a portion of the property

Priority in acquiring jurisdiction see *supra*, III, A, 2, b.

91. Connolly *v.* Kretz, 78 N. Y. 620, holding that where a receiver has been appointed at the instance of a judgment creditor, it is within the discretion of the court to set aside the proceedings and appoint another receiver, in an action by another judgment creditor, on the ground of collusion between the parties in the first proceedings. See also National Mechanics' Banking Assoc. *v.* Mariposa Co., 60 Barb. (N. Y.) 423; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183. But where a circuit court has appointed a receiver of a corporation at the suit of one stock-holder on the ground of its insolvency, another circuit court cannot, pending the receivership, on the complaint of another stock-holder and judgment creditor alleging fraud in the first proceedings, enjoin the receiver from performing his duties, and appoint another person as receiver, the latter action not being one to vacate a fraudulent final judgment, but being an attempt to stay pending proceedings, and hence contrary to a statutory provision prohibiting the granting of an injunction to stay a pending judicial proceeding. Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115. See also *infra*, III, I.

92. *Florida.*— State *v.* Jacksonville, etc., R. Co., 15 Fla. 201.

New York.— Lottimer *v.* Lord, 4 E. D. Smith 183.

Pennsylvania.— Farmers', etc., Nat. Bank *v.* Philadelphia, etc., R. Co., 14 Phila. 456, extension upon the petition of first mortgage bondholders.

United States.— Lloyd *v.* Chesapeake, etc., R. Co., 65 Fed. 351 (extending receivership in judgment creditor's suit against railroad company to a suit by trustees of a mortgage for foreclosure, the proper practice being to consolidate the suits); Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8.

England.— Weldon *v.* O'Reilly, Fl. & K. 320; Downshire *v.* Tyrrell, Hayes 354 (exchequer and chancery); Valle *v.* O'Reilly, 1 Hog. 199.

See 42 Cent. Dig. tit. "Receivers," § 92.

Additional receivers.— Where an insolvent corporation, having both general and underlying mortgages upon its property, instituted equitable proceedings to have its property sold, and obtained the appointment of general receivers for the benefit of all concerned, and one of the defendants, a trustee under one of said general mortgages, filed a cross bill to have said mortgage foreclosed, and asked for the appointment of additional receivers, it was held that such appointment should be denied unless shown to be necessary for the protection of the parties interested under said mortgage. Wabash, etc., R. Co. *v.* Central Trust Co., 22 Fed. 272.

Two suits by same party in different counties.— Where one sued certain defendants in the superior court of one county, and had a receiver appointed for all the property of one of them, with authority to continue its business, etc., and thereafter commenced foreclosure in the superior court of another county against the same defendant, and had the same person again appointed receiver, it was held, under the constitutional provision making superior courts tribunals of general jurisdiction, with process extending to all parts of the state, and a statute which authorizes a receivership in foreclosure where there is danger of the property being lost, removed, or materially injured, that the second appointment was error, and could not be justified as an extension of the first receivership. Fernald *v.* Spokane, etc., Tel., etc., Co., 31 Wash. 219, 71 Pac. 731.

The first receiver may be compelled to accept the duties demanded by the case made by a second suit, whether it be purely an original suit, or an original suit in the nature of a cross suit. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

When rights asserted may be set up against the original receiver the receivership will not be extended. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

Unless an original appointment would have been proper under the facts presented a receivership will not be extended upon the dismissal of the bill in the first suit. Scott *v.* Ware, 65 Ala. 174. See also Dolan *v.* Conlon, 114 N. Y. App. Div. 570, 99 N. Y. Suppl. 1090, where after admeasurement of dower and the appointment of a receiver to collect rents and pay them to the widow, she transferred her dower interest, and in a suit by the creditor to set aside such transfer an order restraining the transferee from receiving such rents and extending the receivership, upon plaintiff's affidavit upon information and belief that the transferee was a nonresident and that the transfer was fraudulent, no facts being stated upon which the belief of the fraud was founded, and there being no showing of the transferee's financial irresponsibility, and the transferee's affidavit showing that he is a resident and financially responsible, was held improper.

Persons to be heard.— On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver. Walsh *v.* Walsh, 11 Ir. Eq. 607.

Application.— Where an application is made to extend a receiver from one cause to another, the notice of motion and affidavit should be intituled in both cases. Tenant *v.* Watson, 4 Ir. Eq. 700.

of a defendant, the receivership may be extended to other property at the suit of a new party claiming an interest in the property already in possession of the court, and also in other property belonging to the defendants.[93]

I. Revocation, Vacation, and Modification of Order[94] — 1. In General. The order for the appointment of a receiver is not irrevocable,[95] and may be modified or changed[96] without the consent of the parties,[97] and if it should subsequently appear that the appointment was improvidently made the court has undoubted power to vacate it.[98]

A formal order is not necessary and the fact that the judgment for the sale of property by a receiver is made in a suit other than that in which he was appointed, and to which the receivership has not been expressly extended, is not ground for a collateral attack on the judgment of sale, all the parties to the first suit being parties to the second, and both the court and parties having treated the causes as consolidated and the receivership as extended. Gila Bend Reservoir, etc., Co. *v.* Gila Water Co., 9 Ariz. 57, 76 Pac. 990 [*affirmed* in 202 U. S. 270, 26 S. Ct. 615, 50 L. ed. 1023]. And in Beverley *v.* Brooke, 4 Gratt. (Va.) 187, it is held that where there are conflicting claimants of a trust fund, who are prosecuting separate suits in the same court, to subject the fund, the appointment of a receiver in one of the suits, on the motion of plaintiff in that suit, will inure to the benefit of plaintiff in the other suit, upon the establishment of his superior right to the fund, and he may have an order in his own suit for the settlement of the receiver's accounts, and a decree against him for the amount found to be in his hands.

Form of extension see Farmers', etc., Bank *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 456, 461.

93. Fernald *v.* Spokane, etc., Tel., etc., Co., 31 Wash. 219, 71 Pac. 731.

94. **Removal** see *infra*, III, L, 2.

Subsequent appointments see *supra*, text and note 91.

Waiver of objection by delay in moving see *supra*, III, F, 5; *infra*, III, J, 2.

95. Hand *v.* Savannah, etc., R. Co., 8 S. C. 207.

96. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637.

To exclude operation against one not a party.— In National Park Bank *v.* Goddard, 20 N. Y. Suppl. 499, after a creditor of an insolvent firm had attached its entire stock, other persons claiming as creditors for goods sold, assumed to rescind the various sales for fraud, and replevied their property from the sheriff; the attaching creditor brought suit for an injunction and receiver, so that all claims might be adjudicated in one action, and a receiver was appointed —the order directing him to take possession of the property attached by plaintiff, and then a prior attaching creditor, but who was not made a party to the receivership action, moved to modify the order appointing the receiver, in so far as it ordered the sheriff to surrender to the receiver the property which movant had attached, and it was held that it was no defense to such application that there was no property in the receiver's hands which was not attached in plaintiff's suit, unless it was shown that such property was different from that attached in movant's suit.

Amendment see *supra*, III, E, 8.

97. Hand *v.* Savannah, etc., R. Co., 8 S. C. 207.

98. Copper Hill Min. Co. *v.* Spencer, 25 Cal. 11 (holding that the order may be vacated before trial upon a proper showing, and with much greater reason after it appears on the trial that there is no probability of an ultimate recovery); Crawford *v.* Ross, 39 Ga. 44; Kroz *v.* Louisiana Const. Co., 120 La. 363, 45 So. 276; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637 (power to reopen original motion for hearing of further proof which defendant could not produce on first hearing).

A special judge may vacate an order of appointment previously made by the regular judge. State *v.* Ross, 118 Mo. 23, 23 S. W. 196.

At special term.—And in New York it has been held that the motion to vacate an order of appointment made by a judge of the supreme court need not be made before the judge granting the order but may be heard at special term. Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S. (N. Y.) 156, 38 How. Pr. 193.

The power is implied in the power to make the appointment. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

Removal and discharge are distinguished from vacating the order, although the words are frequently used indiscriminately by the courts as synonymous. To vacate the appointment is to set aside the order of appointment because improvidently granted, the motion for which is based on the circumstances and conditions attending the appointment. The term "remove," as applied to a receiver, means simply a change in the *personnel* of the receivership, which continues unaffected. The effect of the removal is only to substitute one person for another in the office. The cause of the "removal" of a receiver is some personal objection to him. The "discharge" of a receiver relates to the termination of the receivership, and is asked and ordered for the reason that, because of the state of the suit, there is no longer any necessity for continuing the receiver. Pagett *v.* Brooks, 140 Ala. 257, 37 So. 263. Sometimes, however, the term "vacate" is used in a more extended sense to mean the setting aside of the appointment for reasons arising after it was made, such action taking effect as of the day the order of vacation is entered and not rendering void all acts there-

2. Exercise of Power — a. In General. Objections made to the proceedings which require the introduction of evidence to support them should be made on motion to vacate the order of appointment, and not by appeal.[99] And such an application by petition, setting up new facts, rather than a bill in the nature of a bill of review, is proper, since the latter remedy is necessary only after final decree.[1] A motion to rescind an appointment of a receiver is heard on a short notice ;[2] but the receiver is not a party in interest and has no standing to entitle him to oppose a motion to vacate the order appointing him, in the sense of merely terminating the receivership and discharging the receiver.[3] The motion is based upon circumstances and conditions attending the appointment,[4] and may be upon the original papers,[5] although it is also held that the applicant may present

tofore lawfully performed by the receiver in pursuance of the original appointment. Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 24 Mont. 148, 60 Pac. 1088, 61 Pac. 309. See also L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266.

Terms imposed.— In McCarthy *v.* Peake, 9 Abb. Pr. (N. Y.) 164, it was held that, where another court had acquired prior jurisdiction of the subject-matter, a motion to vacate the order for the appointment of the receiver should be granted on condition that his expenses and compensation be paid by the moving party, since the receiver had expended money in protecting the property.

Form of order see Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1, 3.

Annulled by bond under statute see Roberts *v.* Pipkin, 63 S. C. 252, 41 S. E. 300, *supra*, II, B, 4, d, note 63.

99. Oil City Ironworks *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987.

The usages of courts of equity as to the manner of revoking an order for the appointment of a receiver are applicable to cases arising under the code, in the absence of special statutory provision. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

Objection by stranger — *Petition.*— Where, in a suit for dissolution, partnership property comes into the hands of a receiver before one claiming a special lien levies his attachment upon it, and such claimant desires to vacate the order appointing the receiver, it is held that he must proceed by filing a petition setting forth the facts upon which he relies, and that a summary proceeding by motion is not the appropriate method. Jacobson *v.* Landolt, 73 Wis. 142, 40 N. W. 636, 9 Am. St. Rep. 767.

Action to set aside for fraud.— In Wooding *v.* Wooding, 10 Wash. 531, 39 Pac. 137, it was held that in a stock-holder's suit for appointment of a receiver for a corporation a creditor who was not a party, and who had not intervened (as no steps were taken to that end, and further because the case was not one in which intervention was proper), could not have the decree set aside by simply filing a motion in the action, but that he must bring a separate action for that purpose.

1. Franklin Electric Light Co. *v.* Ft. Wayne Electric Corp., 58 N. J. Eq. 543, 43 Atl. 650 [*reversing* in effect 57 N. J. Eq. 16, 41 Atl. 666, on this point, although the ultimate decision of the lower court is not affected].

2. Williamson *v.* Wilson, 1 Bland (Md.) 418.

Notice of motion to modify.— The receiver holds for the benefit of all the parties to the suit, and all of them should have notice of the application to modify the order appointing a receiver. National Park Bank *v.* Goddard, 20 N. Y. Suppl. 499.

3. L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266 (when the adverse party consented to the granting of the motion to vacate); Howard *v.* Lowell Mach. Co., 75 Ga. 325 (holding that the receiver is entitled to notice and hearing only where his conduct is called in question, or where he is called on to account or to make return, and not where the question relates to the necessity of his appointment or its continuance).

Who may object see *infra*, III, J, 1.

4. Pagett *v.* Brooks, 140 Ala. 257, 37 So. 263; Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. 316 (on application of directors of a corporation for which a receiver had been appointed at the suit of officers thereof who were about to be turned out of office, it appearing that the bill was entirely without merit, and that the proceeding was instituted for the purpose of wrecking the company, and obtaining control of its business); Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316 (holding that if there has been no opportunity to be heard on the original application, and any of the defendants in interest can make it appear that the appointment of a receiver by the court was an invasion of their rights, that the facts did not justify such an appointment, and that the same was unadvisedly and improvidently made, they ought to be heard and the appointment revoked, and the condition of things before the appointment, as far as possible, restored).

If the appointment is procured by fraud or collusion it should be set aside (Brassey *v.* New York, etc., R. Co., 19 Fed. 663), and the court will not inquire whether or not the person selected was suitable (Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183); but the fraud and collusion should be something more than the abandonment of a fruitless resistance (Lottimer *v.* Lord, *supra*); and the mere concurrence of the directors in an attempt to secure the appointment of a receiver is insufficient of itself to show fraudulent collusion, for which the receiver should be discharged (Brassey *v.* New York, etc., R. Co., 19 Fed. 663).

5. Ramsey *v.* Erie R. Co., 7 Abb. Pr. N. S.

new facts;[6] and when the term is used in the sense of merely terminating the receivership, the application may be based upon facts arising after the entry of the original order of appointment, the existence of which at the time of the original application for a receiver would have defeated it.[7]

b. Discretion. Ordinarily an application to vacate or revoke the appointment of a receiver is addressed to the sound legal discretion of the court upon the facts which will not be controlled if the court is not without jurisdiction to make the appointment.[8]

c. After Coming in of Answer. Defendant may, after answer, move to set aside an appointment made before answer,[9] and if the material allegations of the bill are denied in the sworn answer and are not supported by further proof the order of appointment should be rescinded.[10] But it is proper to continue

(N. Y.) 156, 38 How. Pr. 193, as to a receiver of a corporation, the court holding that, under the code provision in force, the motion to vacate an *ex parte* order might be made on the complaint and affidavits on which the order was granted, or on affidavits on defendant's part, with or without an answer.

6. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637. See also Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 16, 41 Atl. 666 [*affirmed* in 58 N. J. Eq. 543, 43 Atl. 650].

Leave of court motion is on original papers. — Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637, holding that an order appointing a receiver may be opened and vacated and the motion heard anew upon the same papers and the same facts, by leave of court first obtained, or upon new facts arising after the first determination as a matter of right, and that where a party, upon such an application, shows material facts which were not presented to the court upon the previous motion, because he was prevented from so doing by mistake, inadvertence, surprise, or excusable neglect, this presents such a case as will justify the granting of a motion to open the rule taken against him.

7. Louisville, etc., R. Co. *v.* Southworth, 38 Ill. App. 225 (error in refusing to vacate an appointment of a receiver of a corporation at the instance of a judgment creditor, where it is shown that a writ of error has been allowed, and a supersedeas bond filed, in the case in which the creditor recovered his judgment); Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 24 Mont. 148, 60 Pac. 1088, 61 Pac. 309; Rodbourn *v.* Utica, etc., R. Co., 28 Hun (N. Y.) 369 (holding that when a judgment against a corporation, under which an execution is issued and returned unsatisfied, is opened to permit the corporation to defend, the appointment of a receiver in sequestration proceedings begun under the judgment should be vacated). See also Kratz *v.* Louisiana Constr. Co., 120 La. 363, 45 So. 276.

The continuance of a receiver may be justified by the conditions existing when the motion to vacate is made (*In re* Eckhardt Mfg. Co., 114 La. 119, 38 So. 78, holding that where a creditor moves to set aside an order appointing a receiver in a proceeding to wind up a corporation the issues on the motion and on appeal are to be broader than they would have been had the creditor appealed from the order on the face of the record, and where, under the evidence and in view of the attitude of the majority of the stock-holders, the action of the court is justified, it will be maintained); and if a receiver is improvidently appointed before subpœna issues, a decree, after a hearing on defendant's application to vacate, denying such relief, amounts in substance to appointing a receiver (Universal Sav., etc., Co. *v.* Stoneburner, 113 Fed. 251, 51 C. C. A. 208).

8. Copper Hill Min. Co. *v.* Spencer, 25 Cal. 11; Cohen *v.* Meyers, 42 Ga. 46; Robenson *v.* Ross, 40 Ga. 375; Crawford *v.* Ross, 39 Ga. 44; Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183. See also, generally, *supra*, II, B, 2.

Setting aside vacating order.— But where the appointment of a receiver has been properly vacated by the order of a judge at chambers, the validity of such order does not depend on the mere discretion of the court or judge making the appointment, and where the court, without any new showing or change of circumstances calling for judicial action, directs the order to be set aside, as a nullity, it assumes authority not warranted by law. Cincinnati, etc., R. Co. *v.* Sloan, 31 Ohio St. 1.

9. Phœnix Mut. L. Ins. Co. *v.* Grant, 3 MacArthur (D. C.) 220. The order may be vacated after answer, although the appointment was made upon notice. Sanders *v.* Christie, 1 Grant Ch. (U. C.) 137.

10. Phœnix Mut. L. Ins. Co. *v.* Grant, 3 MacArthur (D. C.) 220; Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576; Voshell *v.* Hynson, 26 Md. 83; Furlong *v.* Edwards, 3 Md. 99; Ford *v.* Taylor, 137 Fed. 149.

Judge not bound to revoke.— But on the other hand it is held that the judge is not required by law to revoke his order granted *ex parte* simply because the answer in terms denies the charges in the bill, but that he is to take the whole case, to consider the credibility of the answer, its consistency with itself, and with the nature of the case; and if, on the whole, it appear that justice requires things to remain *in statut quo* until a jury can pass upon the case, the order ought to stand. Cohen *v.* Meyers, 42 Ga. 46.

No necessity for receiver.—When the judge,

a temporary receiver appointed before answer where the facts on the bill, answer, affidavits, and exhibits strongly tend to support plaintiff's equity and to discredit defendant's denials.[11]

d. Effect. As the appointment of a receiver as an ancillary remedy does not determine the rights of the parties,[12] so the fact that such receiver is discharged before a trial on the merits of the cause, and the property restored to the possession of one of the parties, does not conclude the parties upon the question of the ultimate right to its possession.[13]

J. Objections — 1. Who May Object. One who has no interest in the subject-matter of the suit cannot object to the appointment,[14] or intervene to move for the vacation of the appointment.[15] So in proceedings against a cor-

on the coming in of the answer, finds that the danger is not imminent, and that there was no pressing necessity for the order, it is very proper for him to revoke or modify the order on such terms as he thinks wise. Crawford *v.* Ross, 39 Ga. 44, 49.

11. Frazier *v.* Brewer, 52 W. Va. 306, 43 S. E. 110.

12. See *infra*, IV, A.

13. Marshall *v.* Otto, 59 Fed. 249, where the order was made without notice, before trial, and it was said that the appointment might have been wrongfully made, although plaintiff was lawfully entitled to the possession of the property.

Collateral attack see *infra*, III, J, 3, a, (I).

Effect upon subsequent application see *supra*, III, G.

14. Pease *v.* Waters, 16 Ill. App. 359, holding that where defendant has no interest in the subject-matter of the action except as sheriff, under levies made by him of an attachment upon the property, he has no right to object to an order in the suit appointing a receiver, to which plaintiff in attachment consents.

Continuance of receivership.— Where a litigant consented to the original appointment of a receiver of property in litigation, he was not prejudiced by an order continuing such receivership, in view of the fact that a final decree was formally and properly entered that he had no interest in the subject-matter of the action. Ellis *v.* Harris, 56 Nebr. 398, 76 N. W. 898.

Party disclaiming interest.— One made a party to a foreclosure suit upon the theory that he claims some interest in the premises, but who denies in his answer that he has any interest, cannot object to the appointment of a receiver. Kehm *v.* Mott, 86 Ill. App. 549 [*affirmed* in 187 Ill. 519, 58 N. E. 467]; Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399.

Debtor under void judgment.—Where property is levied on under executions issued on void judgments by confession, an order procured by subsequent attaching creditors, appointing a receiver, and directing him to take possession of the property, to preserve it, and avoid certain expenses in preserving it, will not be disturbed at the instance of the execution plaintiffs. Puget Sound Nat. Bank *v.* Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

15. Barth *v.* Enger-Kress Co., 92 Wis. 225, 65 N. W. 1035, holding that where a corporation, having procured a policy of insurance, makes an assignment, and thereafter a receiver is appointed, the insurance company, on loss by fire, after action on its policy by the receiver, cannot intervene in the original action, and ask that the appointment of the receiver be set aside.

The right to intervene is not conferred on every stranger to the action by the erroneous appointment of a receiver therein. Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101.

Trespassers.—Where a receiver is appointed to collect a judgment, he should not be discharged on the motion of trespassers on the land of which he is in possession under such judgment, who have improperly been admitted as parties to the action. McAllaster *v.* Edgerton, 3 Indian Terr. 704, 64 S. W. 583.

Waiver of objection.— Where a stranger filed a motion in a pending case in the district court showing that he was directly interested in the subject-matter of the litigation, and a hearing of this motion was had without any objection that such motion was not presented by a party to the action, it was held, on error proceedings to review the ruling made on such motion, that the parties who resisted it solely on its merits thereby waived all rights of objection to such motion not being originally presented by a proper party. Neitzel *v.* Lyons, 48 Nebr. 892, 67 N. W. 867.

One whose rights are injuriously affected has been held, in New York, entitled to have himself made a party to the proceeding for the purpose of vacating an order as improvident or erroneous. Wilson *v.* Barney, 5 Hun (N. Y.) 257.

Modification in favor of one not a party.— In National Park Bank *v.* Goddard, 20 N. Y. Suppl. 499, one who claimed a prior lien by virtue of an attachment moved, in a subsequent action by another attaching creditor against plaintiff in an action to replevin attached property, for a modification of an order appointing a receiver therein in so far as it directed the sheriff to deliver to the receiver the property held under the prior attachment, and his right so to move was recognized, although he was not a party to the action. But in Wright *v.* Weisel, 19 N. Y. App. Div. 630, 46 N. Y. Suppl. 483, it was held that a decree in which a receiver is ap-

poration by a creditor the court has refused to permit another creditor to intervene for the purpose of attacking the jurisdiction of the court to appoint a receiver,[16] and a stock-holder or bond-holder has been denied the right to intervene to question of the propriety of the appointment of particular receivers.[17]

2. ESTOPPEL AND WAIVER OF RIGHT TO OBJECT. Defendant in an action wherein a receiver has been appointed is held to have waived any objection to the appointment founded upon irregularities in making the same by his acquiescence in such appointment,[18] as by a failure to interpose a timely objection thereto,[19]

pointed will not be revoked or modified on the mere application of a stranger, the decree standing unassailed as between the parties; that such stranger has other remedies for protecting his alleged rights which are adverse or superior to those of the receiver.

A receiver embarrassed in the discharge of his duties by another and void appointment may move to vacate such appointment, although he is not a party to the action in which it was made. Whitney *v.* New York, etc., R. Co., 32 Hun (N. Y.) 164, 66 How. Pr. 436.

Rights and remedies as between receiver and other claimants, creditors, etc. see *infra*, IV, D, 6.

16. Holmes *v.* Knapp Electrical Works, 59 Ill. App. 58. See also *infra*, text and note 25.

That an execution had not been issued and returned unsatisfied cannot be set up by a creditor whose judgment against the corporation was entered after the appointment of the receiver, the corporation having waived the objection. Enos *v.* New York, etc., R. Co., 103 Fed. 47.

17. Oil City Ironworks *v.* Pelican Oil, etc., Co., 115 La. 265, 38 So. 987 (where, under the statute in that state for the winding up of a corporation, the court refused to permit parties alleged to be the president and directors of the corporation to reopen the case in order to resist the application for a receiver); Land Title, etc., Co. *v.* Asphalt Co. of America, 114 Fed. 484 (stock-holders or bondholders). See also Forbes *v.* Memphis, etc., R. Co., 9 Fed. Cas. No. 4,926, 2 Woods 323. As to the right of stock-holders to appear for corporation see CORPORATIONS, 10 Cyc. 963 *et seq.*

But lien-holders subsequently made parties to a proceeding for the dissolution of a corporation have been permitted to ask for the rescission of the order appointing a temporary receiver. Mercantile Trust Co. *v.* Etna Iron Work, 4 Ohio Cir. Ct. 579, 2 Ohio Cir. Dec 718.

And where a trustee in a corporate mortgage is permitted to intervene in a suit by stock-holders, he may object that the petition states no cause for the appointment of a receiver, or, in other words, that the pleading is fatally defective, as not being within the particular jurisdiction of the court. Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253.

Collateral attack see *infra*, III, J, 3.

18. *Georgia.*— Bliley *v.* Taylor, 86 Ga. 163, 13 S. E. 283, failure to request particular appointment.

Iowa.— Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395.

Kansas.— Branner *v.* Webb, 10 Kan. App. 217, 63 Pac. 274.

New York.— Wright *v.* Nostrand, 94 N. Y. 31; Tyler *v.* Willis, 33 Barb. 327; Post *v.* Dorr, 4 Edw. 412.

Ohio.— Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250.

West Virginia.— Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083.

United States.— Brown *v.* Lake Superior Iron Co., 134 U. S. 530, 10 S. Ct. 604, 33 L. ed. 1021, assent by appearance on the day the bill was filed, failure to object to appointment and suffering the bill to be taken *pro confesso*.

See 42 Cent. Dig. tit. "Receivers," § 96.

Particular objections: *Bond by applicant* see *supra*, III, E, 7, b.

Eligibility see *supra*, III, F, 5.

Failure to exhaust legal remedy see *supra*, II, B. 7, c; II, C, 4, c.

Notice see *supra*, III, D, 5, c.

Prematurity of appointment see *supra*, II, B, 8, b.

Remedy at law see *supra*, II, B, 4; III, A, 2, c.

Verification see *supra*, III, B, 3.

19. Russell *v.* Chicago Trust, etc., Bank, 40 Ill. App. 385 [*reversed* on other grounds in 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345]; Post *v.* Dorr, 4 Edw. (N. Y.) 412 (as to the right to have a receiver); Pitts *v.* New Mammoth Gold Min. Co., 23 Utah 623, 65 Pac. 1076; Hollins *v.* Brierfield Coal, etc., Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. ed. 1113 (objection that creditor at whose instance a receiver of a corporation is appointed was not a judgment creditor).

If no hearing is had, although notice is given, as where complainant's counsel was unaware of any intended opposition and obtained an order of reference by default, unobserved by defendant's counsel who was in court to resist the motion, on an application to vacate the order of appointment defendant will be considered in the same situation as if complainant's original application were being heard. Merchants, etc., Bank *v.* Griffith, 10 Paige (N. Y.) 519.

Failure to appeal will preclude subsequent objection. Pagett *v.* Brooks, 140 Ala. 257, 37 So. 263; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; Post *v.* Dorr, 4 Edw. (N. Y.) 412; Saunders *v.* Kempner, (Tex. Civ. App. 1895) 32 S. W. 585; Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909. See also *infra*, III, J. 3.

and permitting the receiver to enter upon and continue in the discharge of his duties,[20] and unreasonably delaying in moving for the vacation of the order.[21] And so neither a party who moves for,[22] nor one who consents to, the appointment,[23] or participates in the proceedings thereafter and recognizes the acts of the receiver and the regularity of his appointment, can object to the appointment.[24] And if one who comes into a suit after its institution wishes to attack a prior appointment of a receiver, he should promptly act to that end, as by a proceeding to have the order vacated or the receiver discharged, and if he recognizes the validity of the appointment or takes under the proceedings he will not be heard thereafter to object.[25]

Collateral attack upon void appointment see *infra*, III, J, 3.

20. Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615; Rogers *v.* Rogers, (Tenn. Ch. App. 1896) 42 S. W. 70.

Failure of adverse claimant to apply to court.— Where one brought an action in a federal court against a corporation, and caused property to be attached and sequestered, and upon petition of a receiver, previously appointed for the corporation by a state court, the federal court ordered the property surrendered by the marshal to the receiver, unless plaintiff in that court should within five days apply to the state court for, and ultimately receive, authority from that court for its retention, no application to the state court having been made and the property having been surrendered to the receiver, it was held that plaintiff had no cause of action against the receiver for damages, and no standing to question the validity of his appointment. Remington Paper Co. *v.* Watson, 49 La. Ann. 1296, 22 So. 355.

21. Rumsey *v.* People's R. Co., 154 Mo. 215, 55 S. W. 615; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083; Allen *v.* Dallas, etc., R. Co., 1 Fed. Cas. No. 221, 3 Woods 316.

A receiver will not be treated as a trespasser under such circumstances, upon a motion to vacate the order of appointment, so as to leave him to bear the burden of the expenses necessarily and in good faith incurred by him while attempting to carry out the orders of the court. Hardt *v.* Levy, 79 Hun (N. Y.) 348, 29 N. Y. Suppl. 373.

22. State *v.* New Orleans, 106 La. 469, 31 So. 55 (holding that, on an application for the enlargement of the powers of a receiver, a party at whose instance the appointment was made is not in a position to say that a receiver was not necessary); Davis *v.* Walker, 51 Miss. 659.

23. Tait *v.* Carey, 3 Indian Terr. 765, 49 S. W. 50; Monumental Mut. L. Ins. Co. *v.* Wilkinson, 100 Md. 31, 59 Atl. 125 (holding that an order was to all intents and purposes passed by consent, where the attorney for an insurance company informed the court, after the argument and decision in another case, that no further objection would be made in the case at bar to the appointment of a receiver under the statute providing for proceedings for the liquidation of insolvent or fraudulently conducted insurance companies, and the appointment of a receiver, and further asked for and received representation in the receivership, and agreed with opposing counsel upon the persons who were appointed receivers); People *v.* Globe Mut. L. Ins. Co., 60 How. Pr. (N. Y.) 57, 82.

Jurisdiction by consent see *supra*, III, A, 3.

24. *Georgia.*— Booth *v.* Mohr, 122 Ga. 333, 50 S. E. 173, where receiver was discharged on defendant's executing a bond.

Illinois.— Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110, estoppel to complain that the receiver was not lawfully appointed or competent to act, by consenting to an order providing for the advancement of money by the receiver (a corporation), and thus recognizing its capacity to act.

Kansas.— State Journal Co. *v.* Commonwealth Co., 43 Kan. 93, 22 Pac. 982, voluntary execution of bond to procure discharge of receiver.

Kentucky.— Ft. Jefferson Imp. Co. *v.* Dupoyster, 112 Ky. 792, 66 S. W. 1048, 24 Ky. L. Rep. 1199, 2 L. R. A. N. S. 263, by stipulation to pay part of expenses.

Michigan.— Kimmerle *v.* Dowagiac Mfg. Co., 105 Mich. 640, 63 N. W. 529, by stipulation for payment of expenses.

New York.— Battershall *v.* Davis, 31 Barb. 323 (joining in application to court by receiver for authority to sell assets); Kelsey *v.* Sargent, 2 N. Y. St. 669.

Pennsylvania.— Crouse *v.* Bedell, 11 Pa. Super. Ct. 598.

Utah.— Pitts *v.* New Mammoth Gold Min. Co., 23 Utah 623, 65 Pac. 1076, 1077, holding that an objector cannot participate in proceedings to wind up the affairs of an insolvent concern, permit the receiver to manage and dispose of the corporate property under the direction of the court, without objection, and then, after final decree, when he has failed to secure all that he expected, question the appointment, and put in jeopardy the rights of others.

See 42 Cent. Dig. tit. "Receivers," § 96.

25. *Illinois.*— Commercial Nat. Bank *v.* Burch, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331 (where creditors intervened in a suit to dissolve a corporation were precluded from objecting, by seeking to establish an alleged priority of claim); Russell *v.* Chicago Trust, etc., Bank, 40 Ill. App. 385 [*reversed* on other grounds in 139 Ill. 538, 29 N. E. 37, 17 L. R. A. 345].

Iowa.— Dickerson *v.* Cass County Bank, 95 Iowa 392, 64 N. W. 395, where creditors of

3. COLLATERAL ATTACK — a. Rule Against — (I) *IN GENERAL.* Wherever the court has jurisdiction of the subject-matter and of the necessary parties, its action in regard to the appointment of a receiver cannot be questioned in a collateral proceeding, whether erroneous or not. However erroneous such an order may be, it is binding not only on the parties, but upon everyone and everywhere until it is vacated in a direct application or reversed by superior authority,[26]

a corporation acquiesced for several months in the appointment of a receiver, during which time large expense was incurred, and pursued their remedies thereunder, the appointment not being absolutely void.

Nebraska.— Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 4 Tex. Civ. App. 66, 23 S. W. 856.

Washington.— Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499, 48 Pac. 333, 737, where creditors of a corporation petitioned for priority of their claims.

See 42 Cent. Dig. tit. "Receivers," § 96.

But see Smith *v.* Los Angeles, etc., R. Co., (Cal. 1893) 34 Pac. 242, where an intervening judgment creditor asked that his claim be allowed and paid, with those of other creditors, from the sale of certain defendant's property, and subsequently moved to be allowed to issue execution on his judgment against the property in the hands of the receiver, and, the appointment of the receiver being void and of no effect, it was held that by having made himself a party to the action, as above stated, he did not ratify the appointment of the receiver therein, and was not estopped from attacking the order, since by merely intervening he could not receive any benefit, and the element of mutuality was wanting. See also Grant *v.* Los Angeles, etc., R. Co., 116 Cal. 71, 47 Pac. 872.

Where intervening creditors admitted the necessity of a receiver of a corporation, but themselves sought the appointment of another person, it was held that all defects in the proceedings looking to the appointment were cured. McGilliard *v.* Donaldsonville Foundry, etc., Works, 104 La. 544, 29 So. 254, 81 Am. St. Rep. 145.

Participation in distribution by receiving payments from liquidators will preclude a subsequent application to annul the appointment. Rouge *v.* Lafargue Bros. Co., 49 La. Ann. 998, 22 So. 190, holding further that no reservation in the receipts given will preserve the right to so apply.

A substituted party who had purchased plaintiff's interest in the action, after the appointment of a receiver was obtained by intervening creditors, is not estopped to deny the validity of such appointment. Grant *v.* Los Angeles, etc., R. Co., 116 Cal. 71, 47 Pac. 872.

26. *Alabama.*— Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343.

California.— Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

Colorado.— Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536.

Georgia.— Brown *v.* Drake, 101 Ga. 130, 28 S. E. 606.

Illinois.— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Richards *v.* People, 81 Ill. 551; Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

Indiana.— Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231; Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682; Storm *v.* Ermantrout, 89 Ind. 214; Cook *v.* Citizens' Nat. Bank, 73 Ind. 256.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Kansas.— Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589; Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

Louisiana.— Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418; Case *v.* Marchand, 23 La. Ann. 60.

Michigan.— Nichol *v.* Murphy, 145 Mich. 424, 108 N. W. 704; McKay *v.* Van Kleeck, 133 Mich. 27, 94 N. W. 367.

Minnesota.— Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266.

Missouri.— Neum *v.* Blackstone Bldg., etc., Assoc., 149 Mo. 74, 50 S. W. 436; Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645.

Nebraska.— Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022; Andrews *v.* Steele City Bank, 57 Nebr. 173, 77 N. W. 342; Miller *v.* Brown, 1 Nebr. (Unoff.) 754, 95 N. W. 797.

New York.— Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532; Jones *v.* Blum, 145 N. Y. 333, 39 N. E. 954; Atty.-Gen. *v.* Guardian Mut L. Ins. Co., 77 N. Y. 272; Bangs *v.* Duckinfield, 18 N. Y. 592; Moore *v.* Taylor, 40 Hun 56; Dayton *v.* Borst, 7 Bosw. 115 [*affirmed* in 31 N. Y. 435]; Viburt *v.* Frost, 3 Abb. Pr. 119; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Peters *v.* Carr, 2 Dem. Surr. 22.

North Dakota.— Brynjolfson *v.* Osthus, 12 N. D. 42, 96 N. W. 261.

Ohio.— Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; Egbert *v.* Third Ward Bldg. Assoc., 9 Ohio S. & C. Pl. Dec. 646.

Oregon.— McNary *v.* Bush, 35 Oreg. 114, 56 Pac. 646.

Pennsylvania.— Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260.

South Carolina.— Green *v.* Bookhart, 19 S. C. 466.

Tennessee.— Troughber *v.* Akin, 109 Tenn.

and if the party to the suit whose property is placed in the hands of a receiver is bound by the order or decree no one can attack it.[27] Questions determined upon the application for a receiver and by the order of appointment cannot be reopened upon objection to subsequent orders in the cause.[28]

(II) *APPLICATION OF RULE*[29] — (A) *In General.* Although a bill which seeks the appointment of a receiver may be defective,[30] or the appointment is based upon an erroneous assumption that the pleading discloses a cause for equitable

451, 73 S. W. 118, objections going to matters of form.

Texas.— Edrington *v.* Pridham, 65 Tex. 612; Long *v.* Wortham, 4 Tex. 381.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Washington.— Carroll *v.* Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.

Wisconsin.— Davis *v.* Shearer, 90 Wis. 250, 62 N. W. 1050; Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909.

United States.— Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660; Gunby *v.* Armstrong, 133 Fed. 417, 66 C. C. A. 627; Clark *v.* Brown, 119 Fed. 130, 57 C. C. A. 76; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Grand Trunk R. Co. *v.* Central Vermont R. Co., 85 Fed. 87.

England.— Ames *v.* Birkenhead Docks, 20 Beav. 332, 19 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630.

See 42 Cent. Dig. tit. "Receivers," § 103.

Form of proceeding.—Whether the particular proceedings should regularly have been commenced as a special proceeding or as an action is immaterial in a collateral suit, the subject-matter of the proceeding in which the receiver was appointed being within the authority of the court. Bangs *v.* Duckinfield, 18 N. Y. 592.

Appointment in vacation.— The regularity or legality of the appointment of a receiver by a judge in vacation, who has acquired jurisdiction of the subject-matter and of the parties, cannot be collaterally attacked. Pressley *v.* Lamb, 105 Ind. 171, 4 N. E. 682, under a statutory provision whereby the judge in vacation has the same power and authority as the court in term-time. See also as to the power of judges in vacation in this regard JUDGES, 23 Cyc. 554.

Under statute.— The rule of the text is applied, although the appointment of the receiver was under a purely statutory power. Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561.

In subsequent proceedings in the cause.— *On a motion to substitute another as receiver* the regularity of the original order of appointment cannot be questioned, although the motion is by notice founded on the pleadings, decree, and proceedings, as well as on the affidavits in the action. Fassett *v.* Tallmadge, 13 Abb. Pr. (N. Y.) 12.

On appeal from or objection to subsequent orders in the cause the regularity of the appointment cannot be questioned. Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418 (holding an objection on appeal by creditors, in a proceeding for the administration of the assets of an insolvent corporation, from a judgment ordering sale, a collateral attack); State *v.* German Sav. Bank, 59 Nebr. 292, 80 N. W. 901; Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909 (on appeal from order authorizing receiver to bring an action).

Objection made on the allowance of compensation to the receiver is a collateral attack. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

A plea in reconvention for damages for wrongfully and maliciously procuring the receivership is in effect a collateral attack. Holland *v.* Preston, (Tex. Civ. App. 1897) 41 S. W. 374.

An order vacating an appointment is within the protection of the rule of the text. State *v.* Ross, 118 Mo. 23, 23 S. W. 196; Wilson *v.* Barney, 5 Hun (N. Y.) 257.

Effect of failure to give notice see *supra*, III, D, 4.

Evidence of appointment see *supra*, III, A, 2, note 89.

Ineligibility of appointee see *supra*, III, F.

Order vacating appointment see *supra*, III, I.

Presumption because of absence of particular judge see *supra*, III, A, 2 note 90.

Receiver in supplementary proceedings see EXECUTIONS, 17 Cyc. 1456.

Waiver and estoppel see *supra*, III, J, 2.

27. *Nebraska.*— Miller *v.* Brown, 1 Nebr. (Unoff.) 754, 95 N. W. 797.

New York.— Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Whittlesey *v.* Frantz, 74 N. Y. 456 (in sequestration proceeding against corporation under statute); Tyler *v.* Willis, 33 Barb. 327.

Oregon.— McNary *v.* Bush, 35 Oreg. 114, 56 Pac. 646.

Washington.— Carroll *v.* Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.

United States.— Grand Trunk R. Co. *v.* Central Vermont R. Co., 85 Fed. 87.

See 42 Cent. Dig. tit. "Receivers," § 103.

A member or stock-holder of a corporation is bound by the appointment of a receiver of the corporation, if the corporation is bound. Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231.

28. State *v.* German Sav. Bank, 59 Nebr. 292, 80 N. W. 901, insolvency of corporation concluded on subsequent order of sale.

29. **In subsequent proceedings in the cause** see *supra*, note 26.

30. Comer *v.* Bray, 83 Ala. 217, 3 So. 554; Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660.

relief,[31] or on an insufficient showing [32] or an erroneous determination that the facts justify it,[33] or the order is broader than the facts justify in respect of the property to be taken by the receiver,[34] everyone is concluded by the appointment except in a direct proceeding. So where a receiver may be appointed in a proceeding to sequestrate the assets of a corporation, after a judgment against it and an execution thereunder unsatisfied, such judgment is valid until reversed and the receiver's authority cannot be questioned collaterally, on account of any objection to such judgment.[35]

(B) *In Suit by Receiver.* Pursuant to the general rule against the collateral attack of an appointment which is not void,[36] in a suit by the receiver in relation to matters connected with his trust the order of appointment will be conclusive.[37]

31. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; Carroll *v.* Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32; Clark *v.* Brown, 119 Fed. 130, 57 C. C. A. 76; Shinney *v.* North American Sav., etc., Assoc., 97 Fed. 9; Farmers' L. & T. Co. *v.* Centralia, etc., R. Co., 96 Fed. 636, 37 C. C. A. 528, 100 Fed. 11, 40 C. C. A. 248.

That the suit was by simple contract creditors or persons who had not exhausted their legal remedies is an objection which may be waived and cannot be raised collaterally. Powell *v.* Nat. Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Murphy *v.* Fidelity Mut. F. Ins. Co., 69 Nebr. 489, 95 N. W. 1022; Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178; Grand Trunk R. Co. *v.* Central, etc., R. Co., 85 Fed. 87; Olmstead *v.* Distilling, etc., Co., 73 Fed. 44.

Objection by an intervener, a trustee in a corporate mortgage, upon coming into a suit by a stock-holder against the corporation, that the petition states no cause of action for the appointment of a receiver, or in other words that the pleading is fatally defective as not making a case within the particular jurisdiction of the court, is held not to be a collateral attack. Smiley *v.* Sioux Beet Syrup Co., 71 Nebr. 581, 99 N. W. 263, 101 N. W. 253.

32. *Illinois.*— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662.

Oregon.— McNary *v.* Bush, 35 Oreg. 114, 56 Pac. 646.

Texas.—Edrington *v.* Pridham, 65 Tex. 612.

Wisconsin.— Davis *v.* Shearer, 90 Wis. 250, 62 N. W. 1050.

United States.— Gunby *v.* Armstrong, 133 Fed. 417, 66 C. C. A. 627.

See 42 Cent. Dig. tit. "Receivers," § 103.

33. Powell *v.* Nat. Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Brown *v.* Drake, 101 Ga. 130, 28 S. E. 606; Dayton *v.* Borst, 7 Bosw. (N. Y.) 115 [*affirmed* in 31 N. Y. 435] (determination of insolvency of corporation); Smith *v.* Hopkins, 10 Wash. 77, 38 Pac. 854 (determination of insolvency of corporation).

34. Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532.

35. Jones *v.* Blun, 45 N. Y. 333, 39 N. E. 954; Whittlesey *v.* Frantz, 74 N. Y. 456.

36. See *supra*, III, J, 3, a, (I).

37. *Alabama.*— Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; Comer *v.* Bray, 83 Ala. 217, 3 So. 554.

Connecticut.— Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161.

Georgia.— Brown *v.* Drake, 101 Ga. 130, 28 S. E. 606, as to necessity of appointment.

Illinois.— Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

Indiana.— Howard *v.* Whitman, 29 Ind. 557.

Iowa.— Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26; Schoonover *v.* Hinckley, 48 Iowa 82; Stewart *v.* Lay, 45 Iowa 604, irregularities in the proceedings of the receiver.

Kansas.— Greenwald *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

Louisiana.— Case *v.* Marchand, 23 La. Ann. 60, holding that the maker of a note in favor of a bank cannot set up, in a suit by the receiver of the bank appointed by the government, irregularity in the receiver's appointment.

Minnesota.— Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266.

Missouri.— Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561.

Nebraska.— Miller *v.* Brown, 1 Nebr. (Unoff.) 754, 95 N. W. 797.

New York.—Jones *v.* Blun, 145 N. Y. 333, 39 N. E. 954; Wright *v.* Nostrand, 94 N. Y. 31; Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301; Whittlesey *v.* Frantz, 74 N. Y. 456; Bangs *v.* Duckinfield, 18 N. Y. 592; Dayton *v.* Borst, 7 Bosw. 115 [*affirmed* in 31 N. Y. 435]; Viburt *v.* Frost, 3 Abb. Pr. 119; Sagary *v.* Dubois, 3 Sandf. Ch. 466 [*affirmed* in 3 Sandf. 161].

Ohio.— Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250; Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; Clarke *v.* Thomas, 34 Ohio St. 46.

Pennsylvania.— Backenstoe *v.* Kline, 31 Pa. Super. Ct. 268.

South Carolina.— Green *v.* Bookhart, 19 S. C. 466.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Virginia.— Reed *v.* Gold, 102 Va. 37, 45 S. E. 868.

Washington.—Carroll *v.* Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32; Smith *v.* Hopkins, 10 Wash. 77, 38 Pac. 854; Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089.

Wisconsin.— Davis *v.* Shearer, 90 Wis. 250,

(c) *Interference With Receiver's Possession.* So under the general rule above stated [38] one cannot successfully justify an interference with, or obstruct the enforcement of, the receiver's right to possession.[39] This rule is held to apply not only as to property actually in the receiver's possession, but also to property which he has been appointed to receive but which he has not reduced to possession.[40]

62 N. W. 1050; Neeves *v.* Boos, 86 Wis. 313, 319, 56 N. W. 909.

United States.— Gunby *v.* Armstrong, 133 Fed. 417, 66 C. C. A. 627.

See 42 Cent. Dig. tit. "Receivers," § 104.

Rule applied in proceeding against stockholders see Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161 (shareholder is a party by representation in action by creditor against corporation in which the corporation is declared insolvent and a receiver is appointed); Howard *v.* Whitman, 29 Ind. 557; Schoonover *v.* Hinckley, 48 Iowa 82 (in action by receiver of corporation to recover assessment upon unpaid stock, defense precluded that there was fraud in procuring the receiver's appointment, or that the corporation was not indebted); Haynes *v.* Carter, 9 La. Ann. 265; Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266; Whittlesey *v.* Frantz, 74 N. Y. 456 (in suit against stock subscriber by receiver of corporation in sequestration proceedings, the fact that there was a misnomer of the corporation, in the proceedings against it in which the judgment under which the receiver was appointed was obtained, constitutes no defense, where the corporation did not, in the proceedings against it, appear and plead the misnomer in abatement, under a statute providing that the failure of the corporation so to plead such matter shall be a waiver of the objection); Sagary *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466 [*affirmed* in 3 Sandf. 161]; Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5; Clarke *v.* Thomas, 34 Ohio St. 46 (as to mere irregularities, in action by receiver of corporation against shareholder); Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089. But where the statute under which the receiver is to be appointed contemplates a suit in which the stock-holders are parties, a stock-holder not a party is not concluded (Chandler *v.* Brown, 77 Ill. 333), although a stock-holder who was a party to the decree will be bound (Rowell *v.* Chandler, 83 Ill. 288; Elliott *v.* Ashby, 104 Va. 716, 52 S. E. 383; Reed *v.* Gold, 102 Va. 37, 45 S. E. 868, where a stock-holder who, under the practice in this state, is made a party to the proceeding in equity for the ascertainment of debts and the appointment of a receiver to collect subscriptions is concluded as to such matters, but not as to the validity of his alleged subscription or the fact that he is a subscriber, which questions are transferred by statute to a court of law in proceedings provided for to collect subscriptions). See also *infra*, VI, B, 2 *et seq.* And see, generally, CORPORATIONS, 10 Cyc. 673 text and note 74, 733, 735.

Evidence and presumptions see *infra*, VI, G.

Other defenses in actions by receivers see *infra*, VI, C.

38. See *supra*, III, J, 3, a, (I).

39. *Alabama.*— Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626, in a suit by receiver to enjoin an action against him for conversion of property held by him as receiver.

Illinois.— Richards *v.* People, 81 Ill. 551.

Indiana.— Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231; Cook *v.* Citizens' Nat. Bank, 73 Ind. 256.

Kansas.— Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072.

Michigan.— McKay *v.* Van Kleeck, 133 Mich. 27, 94 N. W. 367, holding that where a receiver of a corporation is appointed by a court having jurisdiction, the regularity of the appointment cannot be questioned in a suit to recover the assets in his hands, by a receiver of another corporation.

Missouri.— Neun *v.* Blackstone Bldg., etc., Assoc., 149 Mo. 74, 50 S. W. 436, in collateral proceeding by stock-holders to enjoin further proceedings in which the receiver of the corporation was appointed, and to recover possession of the assets.

Pennsylvania.— Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

See 42 Cent. Dig. tit. "Receivers," §§ 103, 104.

Rule applied in contempt proceedings.— Bagley *v.* Scudder, 66 Mich. 97, 33 N. W. 47; State *v.* Silver Bow County Second Judicial Dist. Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645; Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; Edrington *v.* Pridham, 65 Tex. 612; *In re* Day, 34 Wis. 638; Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

The ordinary procedure is to go to the appointing court for relief. Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072. And in McKay *v.* Van Kleeck, 133 Mich. 27, 94 N. W. 367, it was held that leave obtained by one receiver to institute proceedings to determine the rights and status as between him and another receiver did not contemplate a proceeding in another court.

40. Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072; Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630.

Protection of receiver's possession see *infra*, IV, D, 5 *et seq.*

b. Void Order — Want of Jurisdiction.[41] If the court is without jurisdiction to appoint a receiver, the order is void and may be attacked or disregarded whenever it comes collaterally in question,[42] although the general jurisdiction of the court will be upheld by every legitimate inference if the record does not disclose the absence of, or merely defectively shows, jurisdiction in the particular case.[43] The right to possession in the character of receiver cannot be enforced or defended under it and it cannot form the basis of contempt proceedings for interference with such possession.[44]

K. Duration and Termination of Receivership[45] **— 1. In General.** The functions of a receiver may cease when the appointing court desires to and does end his powers.[46] But as a receiver appointed under the authority of the

41. Prohibition see PROHIBITION, 32 Cyc. 610.

42. *California.*— Grant *v.* Los Angeles, etc., R. Co., 116 Cal. 71, 47 Pac. 872; Smith *v.* Los Angeles, etc., R. Co., (1893) 34 Pac. 242 (in which case it is recognized that a party may estop himself from repudiating the action of a receiver, although the order of appointment is void, if the elements of estoppel are present); Staples *v.* May, 87 Cal. 178, 25 Pac. 346 (as to property not embraced in mortgage in foreclosure suit); Quiggle *v.* Trumbo, 56 Cal. 626 (action not maintainable on bond of receiver appointed by a court commissioner, which officer had no jurisdiction to make such appointments).

Illinois.— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662 (as where there is no law authorizing the appointment); People *v.* Weigley, 155 Ill. 491, 40 N. E. 300 (where the ultimate relief sought by the proceeding is not within the jurisdiction of the court).

Kansas.— Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589, as to orders of a court, purporting to vest a receiver with the authority and control of property and funds not involved in the litigation in which the receiver was appointed.

Louisiana.— Ober *v.* Excelsior Planting, etc., Co., 44 La. Ann. 570, 10 So. 792; Turgeau *v.* Brady, 24 La. Ann. 348.

Montana.— State *v.* Silver Bow County Second Judicial Dist. Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645.

New York.— Bangs *v.* McIntosh, 23 Barb. 591.

See 42 Cent. Dig. tit. "Receivers," § 103.

The appointment of a receiver for a corporation on its own application, in the absence of statutory authority therefor, has been held to be void and assailable collaterally. Whitney *v.* Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531; State *v.* Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.

Receiver de facto.— There can be no *de facto* officer without a *de jure* office, hence there can be no receiver without a receivership, and as the appointment of a receiver *pendente lite* creates both the office and the officer, if the court is without jurisdiction to appoint, the appointees are not *de facto* receivers so as to render their acts unassailable in a collateral proceeding. Thurber *v.* Miller, 11 S. D. 124, 75 N. W. 900. But where the objection was that the receiver's office was vacated by his becoming a non-resident so that his authority ceased, it was held that he was a receiver in fact and his authority could not be questioned until his appointment had been set aside. Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403.

The power of a receiver which depends entirely upon statute may be attacked upon the ground that the proceeding in which the receiver was appointed was wholly unauthorized, as that the facts existed which under the statute did not authorize proceedings of the corporation to dissolve it. Cuykendall *v.* Corning, 88 N. Y. 129.

43. Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60. See also *infra*, VI, G.

44. People *v.* Weigley, 155 Ill. 491, 40 N. E. 300 (objection to appointment available in defense of contempt proceedings for interfering with receiver's possession); Holmes *v.* Knapp Electrical Works, 59 Ill. App. 58; Turgeau *v.* Brady, 24 La. Ann. 348; State *v.* Silver Bow County Second Judicial Dist. Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. Rep. 645 (holding that the court has no authority in contempt proceedings to direct a third person, not a party to the original proceedings, to pay over to the receiver moneys which the receiver has deposited with him); Johnson *v.* Powers, 21 Nebr. 292, 32 N. W. 62 (sustaining the right of one entitled to money collected under a void appointment to recover it, in an action for money had and received to plaintiff's use, from the person so acting as receiver).

The receiver may justify under the process under which he acts, however, in an action for trespass, where, although his appointment was by a master in chancery, who was without jurisdiction to appoint a receiver, the papers were regularly issued under the seal of the proper court. Brush *v.* Blanchard, 19 Ill. 31.

45. Death, resignation, and removal see *infra*, III, L.

Discharge generally see *infra*, VII, D.

In foreclosure proceedings see MORTGAGES, 27 Cyc. 1633.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1458.

Receivership after rights are ascertained see *infra*, IV, E, 2, c.

46. Lynn *v.* McGregor First Nat. Bank, (Tex. Civ. App. 1897) 40 S. W. 228, where it is said that in this sense all receivers are,

court is for the benefit of all parties interested,[47] he will not be discharged merely on the application of the party at whose instance the appointment was made;[48] what the court will consider on such an application is that one party ought to have the protection, while the other ought not to be unnecessarily charged with the costs of a receiver.[49] On the other hand, when the purposes of the receivership have been accomplished, it is held to be the duty of those at whose instance the appointment was made to apply for the receiver's discharge, if they would not be bound by his future conduct under apparent authority.[50] It is not necessary, in a decree on the merits continuing a receivership, to forestall and provide the time limit of the receivership.[51] Unnecessary delay in closing a receiver-

in contemplation of law, temporary. See also New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166, 21 N. E. 1036; Rockwell *v.* Portland Sav. Bank, 31 Oreg. 431, 50 Pac. 566.

But by the appointment of a receiver for an insolvent corporation and his qualifying and entering upon the execution of his trust, it has been held that the matter is within the grasp of the law for all proper purposes appearing upon a trial of the merits of the cause, and that it is error, on mere motion, to discharge such receiver, and order him to turn over the property to an assignee subsequently appointed by a court of another county, before hearing the case on its merits. France *v.* Peerless Refining Co., 15 Ohio Cir. Ct. 232, 8 Ohio Cir. Dec. 261. See also Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 56 How. Pr. (N. Y.) 391, as to relinquishing hold on insurance company after finding that the circumstances existed for winding it up under the statute.

Dissolution upon execution of bond — *In general.*—A court of equity has power to accept from a defendant, as a condition of the discharge of a receiver for its property, a bond conditioned for the performance of the final decree, and to render judgment thereon against both principal and surety for the amount of complainant's ultimate recovery. Twin City Power Co. *v.* Barrett, 126 Fed. 302, 61 C. C. A. 288 [*affirming* 118 Fed. 861]. See also *supra*, II, B, 4, d; III, I.

Form of order see Twin City Power Co. *v.* Barrett, 126 Fed. 302, 61 C. C. A. 288 [*affirming* 118 Fed. 861].

Interference by other courts see *infra*, III, L, 2, b, (I).

Vacating order see *supra*, III, I.

47. See *infra*, IV, E, 1.

48. Bainbrigge *v.* Blair, 3 Beav. 421, 10 L. J. Ch. 193, 43 Eng. Ch. 421, 49 Eng. Reprint 165.

Where creditors' rights have become fixed. —At least as against creditors who, upon intervention or otherwise, have become parties to the suit and obtained judgment of allowances, the court cannot, without their consent, abdicate its jurisdiction, and relegate them to the pursuit of contract remedies that it has sought to establish for them. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028.

Consent — winding up corporation.— When parties have voluntarily placed property in the hands of a receiver made by the court for the purpose of winding up a corporation, by no mere consent of theirs can he be removed and the trust abrogated. The court has assumed a duty which is beyond their control. People *v.* Globe Mut. L. Ins. Co., 60 How. Pr. (N. Y.) 82.

By stipulation and decree entered thereon. — In Andrews *v.* Smith, 5 Fed. 833, 19 Blatchf. 100, trustees in a railroad mortgage to secure bondholders were appointed receivers in proceedings of a lessor to enforce a lien for rent, and subsequently the parties entered into an agreement providing for the custody and the disposal of the property, and that a decree should be entered accordingly, which was done, and it was held that as under the agreement and decree no property was left in the custody of the court for the receiver to have, and nothing was left to the court to do about it, there was no necessity for a formal discharge of the receivers, the parties having accomplished the discharge by their own act; that after said decree the trustees were in possession as agents of the parties, and in a suit in another court by persons not parties to the original suit, to recover funds coming into the hands of the trustees acting under said agreement, they could not set up that the funds were received by them as receivers.

49. Bainbrigge *v.* Blair, 3 Beav. 421, 10 L. J. Ch. 193, 43 Eng. Ch. 421, 49 Eng. Reprint 165.

Of its own motion the court will consider the question of the dissolution of a receivership, to prevent an abuse of the remedy, when the parties fail to provide a means for the discharge of the receivers appointed as a temporary remedy. Platt *v.* Philadelphia, etc., R. Co., 65 Fed. 872.

50. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228.

51. De Barrera *v.* Frost, 39 Tex. Civ. App. 544, 88 S. W. 476, where in a suit by a woman to cancel a trust deed on her separate property, which had been executed to secure a debt owing by her husband, upon rendering a decree canceling the deed so far as the property was concerned, and against the husband for the debt, the receivership was continued on account of the rents, and it was held not error not to have limited the receivership to the period during which the marriage relation might continue between plaintiff and her husband; that there were other contingencies which might require the termination of the receivership before the dissolution of such relation.

ship is not favored.[52] It will not be permitted to continue indefinitely.[53] When a receiver has been appointed to hold property in which third parties have an interest it is incumbent on the persons who have secured the appointment to prosecute the litigation effectively, and without unnecessary delay; and it is equally incumbent upon a court which has acquired the possession of property through the agency of a receiver to discharge it from judicial custody at the earliest practicable moment to the end that it may not be held in such custody at the instance of one suitor or suitors to shelter it from the just claims of others,[54] and property which is in the court's custody for temporary preservation should pass into the possession of the owners with as little delay as is reasonably practicable.[55] But ordinarily, as the reasons for the appointment of a receiver usually continue until the case is tried and decided, a receivership continues during the pendency of the suit until the decree is rendered,[56] or until the object of the suit has been accomplished,[57] and if its duration is intended to be limited the intention should be expressed in the order of appointment.[58] The receiver himself has no interest such as will entitle him to be heard upon the propriety of terminating the receivership.[59]

52. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504 (where the court refused to remove a receiver who was interested because, the receivership having run for seven years and no fraud being shown, such a course would result in unnecessary delay and expense in closing the receivership, and ordered a sale of the property); Katz *v.* Freeman, 114 N. Y. App. Div. 124, 99 N. Y. Suppl. 613; Crane *v.* Ford, Hopk. (N. Y.) 114 (holding that where a vessel has been sailed for two years under the direction of a receiver, and must be fitted out for another season or lie useless, a sale will be ordered to terminate the receivership, it being inconvenient for the court to continue such operations for so long a time); *In re* Reisenberg, 208 U. S. 90, 28 S. Ct. 219, 52 L. ed. 403 (where it is said that if the receivership is unduly prolonged the court will listen to any creditor upon due notice for orders requiring the closing of the trust within a reasonable time or else vacating the orders appointing the receiver).

53. Platt *v.* Philadelphia, etc., R. Co., 65 Fed. 872, where it is said generally, in speaking of a receivership of a railroad, that the remedy is a beneficent one in many cases but that any unnecessary and futile protraction of the period of legal custody is a grave evil.

Leave to interfere with possession see *infra*, IV, D, 7, e, (III), (C).

54. Minot *v.* Mastin, 95 Fed. 734, 37 C. C. A. 234; Cohen *v.* Gold Creek, Nevada, Min. Co., 95 Fed. 580.

And the court will not conduct the business of a corporation unless in a clear case of necessity. If a railroad company, by collusion, allows its property to go into a receiver's hands, not for the purpose of meeting its obligation to the petitioning creditor, but for the purpose of keeping its property from other creditors, the court which appointed the receiver will, upon information of the facts, discharge him of its own motion. Sage *v.* Memphis, etc., R. Co., 18 Fed. 571, 5 McCrary 643 [*approved* in 125 U. S. 361, 8 S. Ct. 887, 31 L. ed. 694]. See also Brassey *v.* New York, etc., R. Co., 19 Fed. 663.

55. Taylor *v.* Philadelphia, etc., R. Co., 9 Fed. 1, where it is said that the modern practice, prevailing to some extent, of transferring corporate property to the custody of the courts, to be thus held and managed for an indefinite number of years, to suit the convenience of the parties, whereby general creditors are kept at bay, is a mischievous innovation, and under the circumstances presented the court disallowed an application by the receivers of a railroad to borrow money, the receivership in this case being temporary and the court expecting the proceeding to reach its termination without any prolonged delay.

56. Weems *v.* Lathrop, 42 Tex. 207.

57. Young *v.* Rollins, 90 N. C. 125 (as to receiver of corporation, under statute providing for the continuance of the office "as long as the court shall think necessary for the purposes aforesaid"); Smith *v.* Lyster, 4 Beav. 227, 10 L. J. Ch. 344, 49 Eng. Reprint 326. See also Northern Illinois Coal, etc., Co. *v.* Young, 12 Fed. 809, 11 Biss. 331; and *infra*, III, K, 2.

Abandonment by receiver of official character.— Where a receiver undertakes to act in his official capacity, the court will assume that he continued so to act until the evidence forces on it a contrary conviction, and even then the court will not permit him to bandon his official character at his own convenience or interest where that abandonment will work an injustice to the parties, or to either of them. Starrett *v.* Berkovec, 118 Ill. App. 683.

58. Weems *v.* Lathrop, 42 Tex. 207.

59. L'Engle *v.* Florida Cent. R. Co., 14 Fla. 226; *In re* Colvin, 3 Md. Ch. 278; Herman *v.* Dunbar, 23 Beav. 312, 53 Eng. Reprint 122, holding that upon a petition for the discharge of a receiver and the payment of money in his hands into court, the receiver, although served, ought not to appear, and his costs were not allowed.

No assets — continuance for benefit of receiver.—A receivership will not be continued merely for the benefit of the receiver, and it

2. When Necessity For Receiver Is Removed — a. In General. Whenever the reason or necessity for a receiver ceases to exist the property should be discharged from the receivership,[60] although the mere coming into existence of this state of things does not *ipso facto* discharge the receiver.[61] Thus upon payment of the sum due the order appointing a receiver will be discharged,[62] and when the amount of the debt sought to be enforced has been fixed, the right of defendant to pay it and have a restoration of his property by the discharge of the receiver is held not to depend upon discretion.[63]

b. Dismissal, Discontinuance, or Termination of Suit. The receiver's functions, however, cease *inter partes*, upon the entry of a judgment in favor of the party against whom the receiver was appointed, although he is not discharged without an order.[64] The property should then be restored to its rightful

is not error to discharge a receiver of a corporation who has no assets in his hands or to refuse to continue the receivership until the receiver's charges are paid. Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534, 46 N. W. 77, where the order of discharge was without prejudice to the right of the receiver to have an allowance of his fees, etc.

60. Branner *v.* Webb, 10 Kan. App. 217, 63 Pac. 274; Tewart *v.* Lawson, L. R. 18 Eq. 490, 43 L. J. Ch. 673, 22 Wkly. Rep. 822; Bainbrigge *v.* Blair, 3 Beav. 421, 10 L. J. Ch. 193, 43 Eng. Ch. 421, 49 Eng. Reprint 165, where a receiver, who had been appointed in consequence of the misconduct and incapacity of trustees under a will, was discharged upon the appointment of new trustees by the court; the controlling question was whether sufficient reliance was to be placed in the new trustees, no objection to them having been shown, and the case was regarded as different from that which would be presented if it were sought to have the property restored to its owner.

One of two infants coming of age.— Where, under a bill by two infants, who were tenants in common with defendants, a receiver was appointed, with the consent of defendants, for the protection of the infants, and one of the infants attains majority and adopts the proceedings, the receiver will not be discharged upon her application, so far as the receivership covered her interest, since the object of the suit had not been accomplished, namely, the protection of the property during the infancy of both plaintiffs. Smith *v.* Lyster, 4 Beav. 227, 10 L. J. Ch. 344, 49 Eng. Reprint 326.

After probate of will or determination of issue devisavit vel non a receiver theretofore appointed will not be continued. Scotch Plains Baptist Church *v.* Hetfield, 46 N. J. Eq. 502, 19 Atl. 721.

After issue of letters of administration pendente lite the powers of a receiver appointed by the chancery court for property in litigation in the orphans' court will cease and the receiver will be discharged, with directions to deliver the property to such administrator. *In re* Colvin, 3 Md. Ch. 278.

Where an election of new officers of a corporation has been had, a receiver appointed in a suit by a stock-holder against the corporation, not for the purpose of dissolving the corporation or distributing its assets but to prevent wrong-doing of the old directors and waste of the corporate assets, should not be continued. Duncan *v.* George C. Treadwell Co., 82 Hun (N. Y.) 376, 31 N. Y. Suppl. 340, holding that such receivership could not be made use of for the purpose of giving the corporation time to raise money to pay its debts, and that a motion by judgment creditors for an order directing the receiver to pay the amount due on their judgments should be granted. But in Keokuk Northern Line Packet Co. *v.* Davidson, 13 Mo. App. 561, it was held that such election of officers after the appointment in a suit which had for one of its purposes the removal of old directors did not itself operate to terminate the receivership, although it might furnish ground for an application to that end to the court making the appointment, and that the receiver's authority to sue could not be questioned collaterally.

61. Ellis *v.* Warshauer, 92 Minn. 444, 100 N. W. 214, holding that the reversal of an order removing an executrix did not discharge a receiver appointed to collect rents, etc., pending the appeal; that while the judgment reversing the order removed the necessity for the receiver, it was still his duty to close his account and be discharged, but not having done so, and having assumed to continue in that capacity by consent of all parties interested, he is in no position to deny the jurisdiction of the court to call him to account for his acts in connection with the trust.

62. Braham *v.* Strathmore, 8 Jur. 567; Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Swanst. 108, 36 Eng. Reprint 555, 2 Wils. Ch. 130, 37 Eng. Reprint 258.

In an action for sequestration of corporate property the corporation, upon paying its creditors, is entitled to have the action discontinued and the receiver discharged. Parry *v.* American Opera Co., 12 N. Y. Civ. Proc. 194; Angell *v.* Silsbury, 19 How. Pr. (N. Y.) 48.

63. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900. See also *infra*, note 72.

64. Colwell *v.* Garfield Nat. Bank, 119 N. Y. 408, 23 N. E. 739 (holding that the active functions of a receiver *pendente lite* under the code terminate with a judgment adverse to the party who procures his appointment, although his character as receiver may continue for the purpose of rendering

owner,[65] unless there is something in the record which affords sufficient reason for making an exception to the rule.[66] However, the mere termination of the suit does not *ipso facto* operate to discharge the receiver,[67] and so the abatement or discontinuance of a suit or the dismissal of the bill will not have this effect;[68] the receiver under such circumstances is not relieved from the duty of holding and protecting the property in his hands as receiver, until it shall be taken from his possession by an order of the court, and to account;[69] he may be continued when it is necessary for the protection of rights properly involved and brought to the

his account); Ireland *v.* Nichols, 9 Abb. Pr. N. S. (N. Y.) 71; Very *v.* Watkins, 23 How. (U. S.) 469, 16 L. ed. 522. In Beverley *v.* Brooke, 4 Gratt. (Va.) 187, 420, the court recognizes the correctness of the general statement of the rule that the appointment of a receiver before decree is superseded by it, unless the receiver is expressly continued, as applied to a decree which settles the controversy and gives the possession to the party entitled, but denies the application of the rule to a decree which does not decide the controversy, and which leaves the possession of the receiver undisturbed. But see Visage *v.* Schofield, 60 Ga. 680.

Where plaintiff dismisses as to a particular defendant after the appointment of a receiver and pays the costs of such defendant the effect is to restore matters to their *statu quo* in so far as such defendant is concerned. A judicial declaration to this effect for the guidance of the receiver as an officer of the court may properly be made and will not be a reversal by one judge of the order of another but simply an adjudication that the parties by their own acts had taken from under the order the basis upon which it rested. People *v.* New York, 19 How. Pr. (N. Y.) 289.

Upon sustaining a demurrer of one defendant the pendency of a counter-claim of another which does not involve the fund in the receiver's hands is no reason for denying a motion to discharge the receiver. Katz *v.* Freeman, 114 N. Y. App. Div. 124, 99 N. Y. Suppl. 613.

65. See *infra*, IV, I.

After final decree and settlement of the receiver's account the receivership should end. State *v.* Spokane County Super. Ct., 31 Wash. 481, 71 Pac. 1095.

Order of discharge self-executing.— When a final judgment in favor of the party against whom the receiver was appointed makes no provision for the continuance of the receiver, and is affirmed on appeal, the termination of the receivership should follow as a matter of course, and the order then discharging the receiver is self-executing. State *v.* Spokane County Super. Ct., 31 Wash. 481, 71 Pac. 1095, holding therefore that on appeal from such order of discharge a supersedeas bond does not reinstate the receiver.

Effect — change of order.— Where the receiver of a corporation is discharged and the property in his possession restored to the corporation, the court cannot, after the expiration of the term at which the order was made, alter, change, modify, or expand the decree so as to again obtain jurisdiction of the property. Davis *v.* Duncan, 19 Fed. 477.

Form of decree see Davis *v.* Duncan, 19 Fed. 477.

Liability of parties or purchasers for obligations of receivership see *infra*, IV, F, 6, f, (I); IV, H, 12, b; IV, I, 2.

Pending appeal see APPEAL AND ERROR, 2 Cyc. 979 note 55.

66. Campbell *v.* Eversole, 38 S. W. 486, 18 Ky. L. Rep. 723.

67. Ellis *v.* Warshauer, 92 Minn. 444, 100 N. W. 214, holding that whether the discharge of the receiver will follow the termination of the suit will depend upon the exigencies of the case.

68. Pagett *v.* Brooks, 140 Ala. 257, 37 So. 263; Fountain *v.* Mills, 111 Ga. 122, 26 S. E. 428 (dismissal by plaintiff); Nicoll *v.* Boyd, 90 N. Y. 516; Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 471; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329.

Appointment of successor see *infra*, III, L, 4.

69. Baughman *v.* Calaveras County Super. Ct., 72 Cal. 572, 14 Pac. 207; McCosker *v.* Brady, 1 Barb. Ch. (N. Y.) 329; Baltimore, etc., R. Co. *v.* Vanderwerker, 33 W. Va. 191, 10 S. E. 289 (court not precluded by final decree from requiring receiver to obey its order as to the fund); Pitt *v.* Bonner, 5 Sim. 577, 9 Eng. Ch. 577, 58 Eng. Reprint 456. In State Bank *v.* Duncan, 52 Miss. 740, it was held that if the court takes the fund out of the possession of defendant, although it may afterward be satisfied that it has no jurisdiction to grant the relief sought by the complainant, and for that reason dismiss his bill, it has power to retain the cause for the purpose of repairing the wrong and making restitution.

Receiver appointed trustee in insolvency.— Where a receiver in a court of equity, who by order of the court had sold property of defendant, was afterward appointed trustee in an insolvency proceeding by defendant under the insolvency laws, the receiver was not *functus officio* until the amount of liability was determined, and he was not discharged from responsibility to the court of equity for the faithful discharge of his trust as receiver by his appointment by the insolvent court. Henry *v.* Kaufman, 24 Md. 1, 87 Am. Dec. 591.

Reversal of the order of appointment does not *ipso facto* discharge the receiver. Matter of Murray Hill Bank, 14 N. Y. App. Div. 318, 43 N. Y. Suppl. 836 [*affirmed* in 153 N. Y. 199, 47 N. E. 298].

cognizance of the court,[70] and where rights of other creditors are acquired under a proceeding in which a receiver is appointed, plaintiff has no absolute right to discontinue the proceedings and discharge the receiver,[71] but the court may continue the receiver if the circumstances are such as to require this course for the protection of the interests of such parties.[72]

Right to require account see *infra*, VII, A, 3, c.

70. Scott *v.* Ware, 65 Ala. 174 (recognizing right to transfer receivership to another cause in the same court, but confining the practice to cases in which the applicant in the second suit would have been entitled to a receiver in the first instance); Fountain *v.* Mills, 111 Ga. 122, 36 S. E. 428 [*distinguishing* Warren *v.* Buch, 80 Ga. 124, 7 S. E. 270, where it was held that the property must be restored upon dismissal, in that the dismissal there was for want of jurisdiction, and therefore all proceedings under which the property was taken were absolutely void]; Field *v.* Jones, 11 Ga. 413; Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 471 (holding that the discontinuance of a suit will entitle the receiver to apply for his discharge, and to pass his account, etc., unless the interests of defendants require that he should continue in the receivership, in which event the court will not grant a discharge but will require defendant thus protected, to file a bill forthwith to settle his rights). See also Beverley *v.* Brooke, 4 Gratt. (Va.) 187, recognizing rights of claimants in another suit, in the same court, whose claims have been contested.

71. Fay *v.* Erie, etc., R. Bank, Harr. (Mich.) 194; Lenoir *v.* Linville Imp. Co., 117 N. C. 471, 23 S. E. 442. One who has brought a suit for a receiver for a corporation may not take a nonsuit after the creditors have intervened and proved their claims, and a final decree has been rendered, and under it the property involved has been sold. Culver Lumber, etc., Co. *v.* Culver, 81 Ark. 102, 99 S. W. 391. See also, generally, EQUITY, 16 Cyc. 460.

72. Fay *v.* Erie, etc., R. Bank, Harr. (Mich.) 194.

The authorities are not entirely harmonious in dealing with this question. In High Receivers, § 837, it is said that the English doctrine was that with the right of plaintiff to a receiver must fall the rights of all other parties to the action, but that the better doctrine was to the contrary. In support of this Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Swanst. 108, 168, 36 Eng. Reprint 555, 2 Wils. Ch. 130, 37 Eng. Reprint 258, is cited. While as applied to that case, the court said that "it would be most extraordinary, if, because a receiver has been appointed on behalf of the Plaintiff, and Defendant is entitled to have a receiver appointed on his behalf," it does not appear that the interests of defendant required the retention of the receiver. In Andrews *v.* Smith, 5 Fed. 833, 844, 19 Blatchf. 100; Davis *v.* Marlborough, *supra*, and Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900, are cited in support of a *dictum* announcing a similar proposition, but in the last case, in announcing the right of a party to pay an ascertained amount and thereupon have the restoration of his property, the court was evidently not dealing with the question of a discharge as opposed to the interests of other parties, but upon subsequently taking up that question the refusal to continue the receiver upon the insistance of other parties whose interests were set up was based upon the merits, and the power of the court to continue the receiver in a proper case was distinctly recognized, and in the mandate to the lower court it was ordered that no discharge should be made until a bond had been executed to secure such parties. Davis *v.* Marlborough, *supra*, is criticized and distinguished in Beverley *v.* Brooke, 4 Gratt. (Va.) 187, where the right to extend a receivership in favor of contested claims in another suit in the same court was upheld. In Lenoir *v.* Linville Imp. Co., 117 N. C. 471, 23 S. E. 442, *supra*, note 71, a suit by a stock-holder and creditor of a corporation was held to be for the benefit of all the creditors of the corporation, and therefore the right of plaintiff to discontinue the suit and have the receiver discharged, upon his claim being satisfied, was denied, but the court proceeds further, and seems to recognize the right of such other creditors in that case to have the receiver continued as opposed to the doctrine above referred to, that under such circumstances the receiver must have been discharged. See also Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480; Fay *v.* Erie, etc., R. Bank, Harr. (Mich.) 194, which was a suit against a bank which under the statute then prevailing was held to be for the benefit of all the creditors, but the power to dissolve the corporation in such a proceeding was independent and incidental merely, and it was held that the satisfaction of plaintiff's demand did not entitle him as a matter of right to dismiss his bill and discharge the receiver, although the court had the undoubted power to permit such a course, if upon looking into the condition and circumstances of the corporation, it should appear to be for the benefit of all the parties concerned. In Fountain *v.* Mills, 111 Ga. 122, 36 S. E. 428, it is held that plaintiff has a right to dismiss his action, but that other lien-holders and creditors of defendant may make a claim for the fund before the receiver is discharged; that plaintiff's dismissal will not discharge the receiver, but that the jurisdiction of the court to make other disposition of the fund among other creditors notwithstanding such dismissal must be under a petition filed by such other creditors, and not under the original bill.

L. Death, Removal, and Resignation of Receiver — 1. Death. The death of a receiver does not end the receivership,[73] and in a creditor's suit, upon such an event, the property which had been assigned to the receiver by the judgment debtor vests in the court.[74]

2. Removal — a. In General. Strictly the removal of a receiver affects only the person. The necessity for a receiver and his duties continue. The one removed is succeeded by another.[75]

b. Exercise of Power — (I) *By What Court.* The possession of a receiver is the possession of the court,[76] and he cannot be removed and his possession as such agency disturbed unless by an order of the court under whose authority he is acting.[77] A receiver appointed by a court of competent jurisdiction should not be removed by another judge of the same court except for valid cause.[78]

(II) *At Whose Instance.* A receiver may be removed at the instance of an interested party.[79] But he will not be removed at the instance of one whose debt has already been secured to him by the action of the court and whose interest extends no further than this, none of the other parties joining in the application for removal,[80] or at the instance of the receiver's sureties.[81]

73. Smith *v.* Harris, 135 Ind. 621, 35 N. E. 984; Brien *v.* Paul, 3 Tenn. Ch. 357.

74. Nicoll *v.* Boyd, 90 N. Y. 516.

Accounting see *infra*, VII.

Appointment of successor see *infra*, III, L, 4.

75. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963.

Appointment of successor see *infra*, III, L, 4.

Failure to give additional security see *supra*, III, F, 6, a, (II), (C).

Vacating order and removal or discharge distinguished see *supra*, III, I.

76. See *infra*, IV, D, 2, c.

77. Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368; Gates *v.* McGee, 15 S. D. 247, 88 N. W. 115 (holding that a court in one county cannot interfere with the appointment of a court in another county); Illinois Cent. R. Co. *v.* Mississippi Cent. R. Co., 12 Fed. Cas. No. 7,008; Young *v.* Montgomery, etc., R. Co., 30 Fed. Cas. No. 18,166, 2 Woods 606.

In different judicial districts.— In Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376, it is held that a receiver of an insolvent corporation under N. Y. Laws (1870), c. 151, § 3, subd. 4, appointed in one judicial district, where the action was triable, could not, under the code provisions relating to motions (N. Y. Code Civ. Proc. §§ 762, 769) be removed on motion made in another judicial district, and that the act of 1880, chapter 537, made no exception unless the case was one in which the receiver had, at the time, been required to make and file reports.

78. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 92, where it appears that such interference is not proper unless the person could in no case be appointed.

Cause existing before the appointment of a mortgagee who had been adjudged to be in possession as such is not sufficient for his removal by another judge, although the latter might control the administration of the trust. Bolles *v.* Duff, 35 How. Pr. (N. Y.) 481.

79. Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738, as to interest of creditor who has appeared and proved his claim.

Interference by attorney-general.— Under New York Laws (1880), as amended by Laws (1881), which required receivers of insolvent corporations "who are now required by law to make and file reports of their proceedings," to serve a copy on the attorney-general and giving the power to him, in case of the neglect to comply with its provisions, to move to compel compliance or for removal of the receiver, or to move for an account or for the removal of the receiver if the attorney-general shall believe that the interests of stock-holders, etc., will be subserved, the right given to the attorney-general is limited to such receivers as are already by statute required to file reports and does not extend to others, although they may be ordered by the appointing court to report, so as to permit the attorney-general to interfere in this manner in all private actions to close up the business of corporations. Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376, 509.

Application by stock-holder.— Where any irregularities in the conduct of a receiver of a corporation, in so far as they affect the interest of a stock-holder, are explained satisfactorily, although the receiver has not performed his duties in the interest of creditors of the corporation or has been partial as between them but they do not complain and it does not appear that his manner of dealing with them has resulted or will result in any injury or loss to the corporation or its stock-holders, he will not be removed at the instance of a stock-holder. Jordan *v.* Electrical Supply Co., (Iowa 1905) 105 N. W. 160.

80. Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657. See also *infra*, note 86.

81. Griffith *v.* Griffith, 2 Ves. 400, 28 Eng. Reprint 256, where the sureties sought the removal upon the ground that the receiver al-

(III) *DISCRETION.* The court confers upon a receiver his functions and may put an end to them whenever in its judgment expediency requires such action.[82] The power is one which, as a general rule, rests in sound discretion,[83] but, like all other judicial action resting in discretion, its exercise should be grounded in some consideration of justice or convenience; it should not be arbitrary and capricious, but only for cause,[84] and must be exercised according to the circumstances of each particular case.[85]

(IV) *GROUNDS.* The only sufficient cause for removing a receiver is loss or danger of loss to the fund.[86] Contumacy or contempt may be punished by removal,[87] but the court would act of its own motion in such matter.[88] Where the receiver appointed upon the filing of a bill may be considered an improper person,[89] as by reason of his relationship to one of the parties [90] in connection with other circumstances,[91] or by reason of other objections affecting his con-

lowed the owner of the estate to continue in possession of part, by whose going beyond the sea a loss was likely to happen to the estate, and it was held that no regard is due to their application, unless for the benefit of the parties in the cause, or something of that kind; that application should be made to the court, that the owner should deliver possession to the receiver, who cannot distrain on the owner in possession, as he is not tenant to him; and that if a loss arises, it was the party's fault in not applying for that.

82. Wiswell *v.* Starr, 50 Me. 381; State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963; McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217.

83. McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217.

Before the appointee has qualified by executing bond the court may revoke the particular appointment and substitute another person as receiver, and the discretion in this regard cannot be controlled by appeal. Siney *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 435, 28 How. Pr. 481.

The refusal to remove a receiver and appoint another is a matter of sound discretion. Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657; Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 541, 14 S. Ct. 1158, 17 L. ed. 604.

84. McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217; Conner *v.* Belden, 8 Daly (N. Y.) 257, reversing order of removal.

By statute sometimes a receiver is subject to removal at any time, at the pleasure of the court. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

85. Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657.

86. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504; Jordan *v.* Electrical Supply Co., (Iowa 1905) 105 N. W. 160 (holding that where a receiver has accounted for all of the property, including accounts and money collected, and has reduced it to cash so that the court may order it paid to those entitled, there is no occasion for his removal for misconduct and the appointment of another receiver); Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657 (refusing to remove because of a display of favoritism by the receiver adverse to petitioner's claim where the receiver stood ready to pay the claim on its proper adjudication and the other creditors were satisfied with the receiver); Conner *v.* Belden, 8 Daly (N. Y.) 257 (holding that where opposing parties in a suit are appointed receivers under a stipulation entered therein, no importance can be attached to any accusation by plaintiff receiver against defendant receiver, the grounds of which were fully known to the former at the time he executed the consent, and the latter, in the administration of the estate, may adhere to views entertained by him before his appointment; that mere incompatibility of temper between the two receivers and their personal quarrels are of no consequence to the court if the estate does not suffer thereby).

Where process is open equally to two co-receivers, who were opposing parties to the suit and appointed under a stipulation therein, one will not be removed at the instance of the other for the failure of the former to take advantage of such process. Conner *v.* Belden, 8 Daly (N. Y.) 257.

87. Guardian Sav. Inst. *v.* Bowling Green Sav. Bank, 65 Barb. (N. Y.) 275; Conner *v.* Belden, 8 Daly (N. Y.) 257.

88. Conner *v.* Belden, 8 Daly (N. Y.) 257. See also *infra*, IV, F, 5, a, *et seq.*

89. See *supra*, III, F, 1, *et seq.*

90. Taylor *v.* Oldham, Jac. 527, 4 Eng. Ch. 527, 37 Eng. Reprint 949.

Change of position of party by amendment. — When the legal position of one of several receivers of a corporation has become incompatible with his private relations, it becomes not only a matter of right to the parties, but a matter of duty on the part of the court, to have his position changed, and by allowing an amendment in a suit by such receivers against stock-holders by striking out the name of one of the receivers as complainant and inserting it as a defendant because he was a stock-holder his appointment as receiver is in effect revoked. Hewett *v.* Adams, 50 Me. 271.

91. Williamson *v.* Wilson, 1 Bland (Md.) 418.

duct,[92] or his qualifications to properly, impartially, or efficiently administer the trust, the court may remove him.[93] But where objections do not go to his entire want of capacity or disqualification his mere relation to the subject-matter or the parties will not require his removal;[94] nor will a receiver who is competent,

Where by statute a party to the suit is ineligible his appointment is erroneous. Turpin *v.* McGill, 6 Ohio Dec. (Reprint) 768, 8 Am. L. Rec. 23.

92. *In re* Louisiana Sav. Bank, etc., Co., 35 La. Ann. 196, removal of one who absented himself and failed to file a bond ordered.

Failure to execute new bond.— It being proper for the appointing court to require a receiver to give a new bond if the original bond is insufficient it follows as a necessary consequence that it is proper to remove the receiver in the event of his failure to comply with such requisition. Shackelford *v.* Shackelford, 32 Gratt. (Va.) 481. See also Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

93. *Alabama.*— Etowah Min. Co. *v.* Wills Valley Min., etc., Co., 106 Ala. 492, 17 So. 522, interest adverse to corporation and improper conduct as receiver.

Connecticut.— *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800, holding that it is proper to consider the fact, not known to the court when the receiver was appointed, that while an officer of the insolvent corporation he had joined in the execution of the mortgage on the property thereby giving a preference to a creditor holding a note upon which the receiver was liable as indorser.

Michigan.— Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657.

New Jersey.— McCullough *v.* Merchants' L. & T. Co., 29 N. J. Eq. 217, removal of director of an insolvent corporation, as receiver, who had shortly before the insolvency proceedings transferred an account due him from the corporation to a firm of which he was a member, which was indebted to the corporation, to enable it to offset the account against its indebtedness, although there was no evidence other than the fact of transfer that at the time of the transfer he knew of the insolvency of the corporation.

New York.—Eichberg *v.* Wickham, 21 N. Y. Suppl. 647 (removal of one who had previously been selected as assignee under a general assignment which had been set aside as fraudulent, because he, as assignee, would be accounting to himself as receiver, etc.); Keeler *v.* Brooklyn El. R. Co., 9 Abb. N. Cas. 166 (removal of receiver of corporation, who had previously, as a director, acquiesced in acts of mismanagement and had been improperly interested in contracts made by the corporation); McArdle *v.* Barney, 50 How. Pr. 97 (removal of receiver under circumstances savoring strongly of collusion in the appointment and because such receiver could not be impartial as to defendant or as to his own acts in a former capacity as trustee which it would become his duty to investigate); People *v.* Third Ave. Sav. Bank, 50 How. Pr. 22 (removal of one who had been appointed secretary of an insolvent bank by its directors and was used by them shortly thereafter to make and verify a false statement declaring its solvency).

United States.— Wood *v.* Oregon Dev. Co., 55 Fed. 901; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161, where receivers were incompetent and a part of them had interests in other corporations adverse to the interests of minority mortgagees and were using their influence and powers as receivers in advancing such other corporations.

See 42 Cent. Dig. tit. "Receivers," § 109.

Reference back to master.— In Wynne *v.* Newborough, 15 Ves. Jr. 283, 33 Eng. Reprint 761, it was held, on a petition to remove the receiver, that while it was no insuperable objection that the receiver is a practising barrister and a member of parliament, the matter should be referred back to the master so that he might consider these circumstances as bearing upon the question as to who would be the best person to appoint under the circumstances. See also Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366, where a similar course was taken as to a receiver who was an interested party.

If a receiver is mismanaging the affairs intrusted to him, the proper remedy is his removal. Therefore it is held that upon complaint by the employees of a railroad receiver in respect to a reduction of their wages, the court will not interfere to reverse the receiver's administration by settling the details of the complaints, involving, as this would, an extensive investigation of administrative details, but if an abuse of discretion is made manifest, will select a new receiver to whom such matters may more satisfactorily be intrusted. Continental Trust Co. *v.* Toledo, etc., R. Co., 59 Fed. 514. Failure to exercise ordinary diligence will justify the receivers' removal, and the court's discretion in removing a receiver will not be held to have been abused where it appears he did not accomplish what he ought to and would have accomplished had he exercised the diligence which a prudent man would exercise in winding up his own business. *In re* Angell, 131 Mich. 345, 91 N. W. 611.

94. *Alabama.*— Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17.

Illinois.— Iroquois Furnace Co. *v.* Kimbark, 85 Ill. App. 399.

Michigan.— Moran *v.* Wayne Cir. Judge, 125 Mich. 6, 83 N. W. 1004; Barker *v.* Wayne Cir. Judge, 117 Mich. 325, 75 N. W. 886, which cases refer to the refusal to remove a creditor, stock-holder, or officer of a corporation.

New York.— Chamberlain *v.* Greenleaf, 4

efficient, and impartial be removed merely because he is objectionable to one of the parties, although he applies as a controlling stock-holder,[95] or for other reasons, which under the particular circumstances do not affect the proper performance of the duties of the office.[96] The court may confirm the appoint-

Abb. N. Cas. 92 (as to removal of creditor as receiver); Wetter *v.* Schlieper, 7 Abb. Pr. 92.

United States.— Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. 888, 66 Fed. 14 (holding that officers of a mortgage company appointed on account of the complicated nature of its business will not be removed merely because they had formerly made imprudent investments while acting as officers, no fraudulent practices to disqualify them being shown, as no other investments were to be made but their duties were confined to realizing assets by collection and sale and to the distribution thereof under the orders of the court; and that it is no ground for the removal of such receivers that they are acting as selling agents of trustees of mortgages executed by the company to secure its debentures, as the power to sell the mortgages rested with the trustees and was not controlled by the court or the receivers as such); Shainwald *v.* Lewis, 8 Fed. 878 (holding that the relationship of a receiver to the complainant in a bill in the nature of a creditor's bill to reach property fraudulently transferred to evade payment of a decree in which defendant was adjudged to be indebted is no ground for removing the receiver, since the rule requiring the receiver to be an indifferent person does not apply in this case where there is no *lis pendens* as to a fund and the fraudulent transfer and concealment of defendant's property is admitted).

See 42 Cent. Dig. tit. "Receivers," § 109.

Member of reorganization committee.—Although the court requires absolute neutrality on the part of its officers, as between conflicting plans of reorganization of a corporation, the court will refuse to remove a receiver who is a member of a reorganization committee if he promptly resigns from such membership as soon as a conflict over the plan of reorganization is foreshadowed. Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. 888.

Where removal would result in delay in winding up the receivership, which had already run sufficiently long, and in additional and useless expense, the court refused to remove a receiver, although he had not been indifferent and unbiased. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

95. Street *v.* Maryland Cent. R. Co., 58 Fed. 47.

96. Land Title, etc., Co. *v.* Asphalt Co. of America, 120 Fed. 996, refusing to remove merely because the receiver, who was appointed to conduct the practical business of a corporation pending proceedings for its liquidation, was so connected with the corporation that at some future time he might not be a proper person to enforce rights which it might possibly be necessary or desirable to assert against the officers or promoters of the corporation; and also refusing to remove such receiver because he had at one time misstated the amount of earnings of the company, over the objection that as he was vice-president and was acquainted with the financial status of the company he was not therefore a proper person to be continued as a receiver.

Non-resident.— Bayne *v.* Brewer Pottery Co., 82 Fed. 391, refusing to remove merely upon the ground of non-residence. But see *In re* Louisiana Sav. Bank, etc., Co., 35 La. Ann. 196, *supra*, note 92; Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 92; Davy *v.* Gronow, 14 L. J. Ch. 134, where, upon a receiver, whose appointment was occasioned by refusal of executors to act under the will, quitting his place of residence in South Wales where the property was situate and removing to London to live, the executors, then consenting, were ordered to act.

Objections relating to management.— *In general.*— And a receiver will not be removed upon the ground that he had discharged a treasurer and increased the expenses where nothing is shown as to the ability of the person discharged, no extravagant expenditure is shown, and the receiver denied any unnecessary increase in expenses. Farmers' L. & T. Co. *v.* Cape Frear, etc., R. Co., 62 Fed. 675.

Good faith.— Although the court may see things which it disapproves in the management of extensive properties, or some acts may have been done which were not best under all the circumstances, but for which the receiver could not reasonably be blamed, and, although contracts might have been made which, in the light of subsequent events, it would have been better not to have entered into and which the court might not have sanctioned, yet if the receiver has acted in the exercise of an honest intention for the purpose of subserving the interests committed to his management, such mistakes will not move the court to dismiss him. Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16, where the court refused to remove the receiver because labor paid for had been used by private parties for their advantage when it was not alleged that the receiver knew or consented to such use; or because an agent of the receiver had acted fraudulently in particular matters when it appeared that the receiver had used due care in the selection and appointment of his agents and had discharged the wrong-doer upon discovering the fraud; or because the receiver had made misleading reports when it appeared that he had continued the existing method of accounting without intentionally misrepresenting the company's condition.

Loss incurred in operation.— The court has refused to remove a receiver because of

ment by reason of its experience with the receiver subsequent to his appointment, although the propriety of the original appointment might be questionable.[97]

(v) *Procedure*[98]— (a) *In General.* The court may consider objections offered in support of an application for the removal of a receiver notwithstanding irregularity of method by which such complaints are brought to its notice.[99]

(b) *Notice and Specification of Grounds.* Notice of an application for the removal of a receiver should be given to the parties who have appeared in the action.[1] The grounds of the application must be set out and supported,[2] and the receiver himself should have notice,[3] and be apprised of the grounds upon which his removal is sought so that he may have an opportunity to meet the charges,[4] and the court will confine its action to such grounds as have been presented in the orderly way for that purpose.[5]

the mere fact that there had been a loss in the operation of the business, no bad faith being shown. Jordan *v.* Electrical Supply Co., (Iowa 1905) 105 N. W. 160.

Action under court's direction.—A receiver will not be removed for mistakes committed by the court in directing and authorizing certain transactions by the receiver. Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16.

Employment of counsel of either party to the suit while improper is held not to furnish sufficient ground for removing a receiver after he has been once appointed and has entered upon his duties, unless such employment was perverse and collusive. Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366.

97. Gypsum Plaster, etc., Co. *v.* Kent Cir. Judge, 105 Mich. 497, 63 N. W. 518. See also Townsend *v.* Oneonta, etc., R. Co., 41 Misc. (N. Y.) 298, 84 N. Y. Suppl. 119.

Form of order see *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

98. Review at instance of receiver see Appeal and Error, 2 Cyc. 641.

99. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 31, where, although the application was denied on the merits, the objections were considered on a verified petition of persons who were proceeding under leave given them to put in for themselves and others, first mortgage bondholders, in the name of a receiver in insolvency, such answer in the suit as they might be advised to put in to protect their interests, their said petition presenting grave charges of mismanagement by the receivers. See also Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17, where an original bill in the nature of a cross bill in a suit in which a receiver had been appointed was considered in the nature of a motion for the removal of the receiver.

Findings are not necessary where the court, under statutory provision, has the power of removal at pleasure. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

1. Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376, which case involved a motion by the attorney-general in an action by a stock-holder to close up the business of a corporation.

But notice to all creditors who have proved their claims is held to be unnecessary on an application in a proceeding by stockholders against the corporation for the winding up of its affairs. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

The receiver cannot complain on an appeal by him alone, from an order removing him, because parties to the action were not notified, where they had actual notice and do not object for want of formal notice. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

2. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17, where the court refused such relief upon a bill in the nature of a cross bill, no grounds being set out except the sworn bill on information and belief to show the unfitness of the receiver and no other evidence being offered.

3. Dougherty *v.* Jones, 37 Ga. 348; Atty.-Gen. *v.* Haberdashers' Co., 2 Jur. 915, where on petition for a reference to ascertain whether the health of the receiver rendered him incompetent, it appeared that the notice had not been personally served, but had been left at the receiver's house and served on his brother, and it was held that personal service could not be dispensed with without an order for a substituted service first obtained. See also *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800, holding five days sufficient notice under a statute giving any judge of the particular court power to remove a receiver after due notice given, when the court is not actually in session.

Receiver in supplementary proceedings see Executions, 17 Cyc. 1459.

4. Dougherty *v.* Jones, 37 Ga. 348, where it was held that the grounds of removal should be specifically set out in the written notice, otherwise it was proper to refuse to hear the motion.

5. Townsend *v.* Oneonta, etc., R. Co., 86 N. Y. App. Div. 604, 83 N. Y. Suppl. 1034, refusal to remove for want of fitness, where the order to show cause was not based upon papers attacking the receiver on this ground and he was not apprised of the charges until the hearing.

New charges in additional affidavits filed by petitioner under leave to reply to new matter in the receiver's answer and affidavits, without notice of such new charges, will not be considered. Fowler *v.* Jarvis-Conklin Mortg. Co., 63 Fed. 888.

The receiver's answer may broaden the scope of investigation, and where his removal is sought because of his disobedience of an

3. Resignation. The court appointing a receiver may permit him to resign.[6] But it is not a matter of course to change a receiver upon his own application; he must show reasonable cause why he should be relieved from the further performance of duties which he has voluntarily agreed to perform,[7] although upon such a showing his application will be granted.[8]

4. Appointment of Successor.[9] Upon the removal,[10] resignation,[11] or death of a receiver a successor may be appointed[12] by the court having jurisdiction of the cause,[13] *ex mero motu*,[14] and without further notice.[15] And while under a

order and his answer explains his management and alleges that he had done nothing prejudicial to the interests involved, which the petitioner denied, his removal for unfitness was held not improper. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

6. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72.

7. Beers *v.* Chelsea Bank, 4 Edw. (N. Y.) 277 (holding that reasons which are only such as might excuse any business man and person of capacity for such trust from accepting it, or if taken, from going through with the duties of the appointment, are insufficient, and of this character are the reasons that the accounts are complicated and that much time will be lost from his own business; that especially should such application be denied where the discharge and appointment of a successor might inconvenience parties in interest and third persons); Smith *v.* Vaughn, Ridg. t. Hardw. 251, 27 Eng. Reprint 820.

8. See Richardson *v.* Ward, 6 Madd. 266, 56 Eng. Reprint 1092, where it was shown that after accepting the trust the receiver's eyesight became affected; that he had entirely lost the use of one eye and was unable to read or write; that he was subject to giddiness in the head, which impaired his memory, and that such affection was increased by the anxiety arising from his situation.

Resignation will not cure an invalid order so as to justify the dismissal of an appeal, since such resignation would still leave it in the power of the court to appoint a substitute. Salisbury *v.* Wilcox, 128 Cal. 347, 60 Pac. 979.

9. **Administration** see *infra*, IV, F, 2.

Continuance of action on change of receiver see Abatement and Revival, 1 Cyc. 120, 121.

Upon renewed application see *supra*, III, G.

Form of order see Williamson *v.* Wilson, 1 Bland (Md.) 418, 429, upon death of original appointee.

10. *In re* Louisiana Sav. Bank, etc., Co., 35 La. Ann. 196; State *v.* Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. N. S. 963.

Substitution as affecting original appointment.— In Fassett *v.* Tallmadge, 13 Abb. Pr. (N. Y.) 12, it was held that a motion for the substitution of one person for another as receiver may be granted without prejudice to the right to move to set aside the entire proceedings as irregular including the appointment of the original receiver.

11. Nichol *v.* Murphy, 145 Mich. 424, 108 N. W. 704.

12. Nicoll *v.* Boyd, 90 N. Y. 516, holding that the property of judgment debtors in a creditor's suit which had been assigned to a receiver vests in the court upon the death of the receiver and, although the suit abates by the death of the judgment debtors before the appointment of a new receiver, the functions of the receiver continue and devolve upon the court by his death and it was competent for the court then to appoint another receiver to fulfil the duties which were left uncompleted by the first receiver. See also Matter of Townsend, 44 Misc. (N. Y.) 415, 89 N. Y. Suppl. 1012.

13. Weymouth *v.* Roselius, 36 La. Ann. 527, where the appointment of a successor, after the death of the original receiver, made by the court in which the original appointment was made, was void because all jurisdiction of the original cause had been transferred to another court.

In different districts.— In Attrill *v.* Rockaway Beach Imp. Co., 25 Hun (N. Y.) 376, it is held that under the provisions of N. Y. Laws (1880), c. 537, where a court of one judicial district has power to remove a receiver of a corporation appointed in an action pending in another judicial district, it has no power to appoint a successor, no such authority either in terms or by implication being conferred, and therefore for this purpose the proceedings must be remitted to the district in which the action is pending.

Death of temporary receiver appointed in vacation.— Under a statute providing that if any receiver dies the court that appointed him, or, if such court is not actually in session, a judge thereof, may fill the vacancy, it was held that upon the death of a temporary receiver appointed by the judge in vacation the vacancy might be filled by the court in term-time; that the appointment by the judge at chambers was the exercise of the judicial authority of the court; and that it was manifestly proper under such circumstances to appoint a temporary receiver to fill the vacancy rather than a permanent receiver, the merits not having been finally determined. Cogswell *v.* Norwich Second Nat. Bank, 76 Conn. 252, 56 Atl. 574.

14. Fowler *v.* Jarvis-Conklin Mortg. Trust Co., 66 Fed. 14, appointment of successor upon withdrawal of an original receiver.

15. Buchanan *v.* Berkshire L. Ins. Co., 96 Ind. 510 (upon death of receiver); Nichol *v.* Murphy, 145 Mich. 424, 108 N. W. 704 (after resignation); Fowler *v.* Jarvis-Conklin Mortg. Trust Co., 66 Fed. 14.

Notice to parties sued by receiver.—Where upon the death of a receiver in a creditor's

discretionary power to appoint receivers the court may allow those remaining to continue alone upon the removal or resignation of one of the several receivers,[16] refusal to appoint a successor where a vacancy occurs in the office of a single receiver may be erroneous where such a course amounts to a refusal to carry out the purposes for which the court has assumed possession of the property.[17]

IV. Operation and Effect of Appointment, and Management and Disposition of Property.[18]

A. Merits Not Determined and Rights and Liens Not Affected by Appointment. The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens,[19] and while a receiver will be appointed only on the application of one who appears to have an interest in the subject-matter,[20] yet when the appointment is made the receiver is a mere officer of the court,[21] and the appointment creates no lien in favor of any of the parties applying for it and gives no advantage or preference to such parties over other claimants to the property; it does not determine the rights of the parties, or even affect them except so far as it preserves and retains control of the property to answer the final judgment.[22]

suit his successor was appointed to bring suits for the purpose of getting in the estate, notice to defendants in such suits is not necessary. Nicoll *v.* Boyd, 90 N. Y. 516.

16. Wiswell *v.* Starr, 50 Me. 381. See also Hewett *v.* Adams, 50 Me. 271, *supra*, note 91.

17. Smith *v.* Harris, 135 Ind. 621, 35 N. E. 984.

As against a plaintiff who procured the original appointment the mere fact of the death of the receiver does not warrant the appointment of another receiver on defendant's motion against plaintiff's will, where such appointment is not necessary for the protection of defendant's rights, as plaintiff should not in such a case be compelled to submit to the expense of a receivership. De Leonis *v.* Walsh, 148 Cal. 254, 82 Pac. 1047.

When successor need not be appointed see Davy *v.* Gronow, 14 L. J. Ch. 134, *supra*, III, L, 2, b, (IV), note 96.

18. As act of bankruptcy see BANKRUPTCY, 5 Cyc. 292 text and note 29, 30.

As affecting breach of condition against alienation see FIRE INSURANCE, 19 Cyc. 753.

Continuance, extension, and subsequent appointments see *supra*, III, H.

Upon running of limitations see LIMITATIONS OF ACTIONS, 25 Cyc. 1282.

19. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379. See also *supra*, III, E, 7; and *infra*, V, B, 1, g, (II).

Effect upon creditors' rights in other states see *infra*, VIII, A.

20. See *supra*, II, B, 7.

21. Receiver as representative of court and parties see *infra*, IV, E.

22. *Alabama.*— Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157.

California.— *Ex p.* Cohen, 5 Cal. 494.

Florida.— Frisbee *v.* Timanus, 12 Fla. 300.

Georgia.— Moise *v.* Chapman, 24 Ga. 249.

Illinois.— Standish *v.* Musgrove, 223 Ill. 500, 79 N. E. 161; Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Coates *v.* Cunningham, 80 Ill. 467; Burleigh *v.* Keck, 84 Ill. App. 607; Gary *v.* Brown, 33 Ill. App. 435.

Indiana.— Mead *v.* Burk, 156 Ind. 577, 60 N. E. 338.

Iowa.—Home Sav., etc., Co. *v.* Pope County Dist. Ct., 121 Iowa 1, 95 N. W. 522.

Kansas.— Jackson *v.* King, 9 Kan. App. 160, 58 Pac. 1013.

Maryland.—Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Washington City, etc., R. Co. *v.* Southern Maryland R. Co., 55 Md. 153; Brown *v.* Hazlehurst, 54 Md. 26; State *v.* Northern Cent. R. Co., 18 Md. 193; Ellicott *v.* Warford, 4 Md. 80; Ellicott *v.* U. S. Insurance Co., 7 Gill 307; *In re* Colvin, 3 Md. Ch. 278; Williamson *v.* Wilson, 1 Bland 418; Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

Massachusetts.— Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, 28.

Missouri.— Heiman *v.* Fisher, 11 Mo. App. 275.

Ohio.— Jay *v.* Squires, 5 Ohio S. & C. Pl. Dec. 318, 7 Ohio N. P. 345.

Pennsylvania.— Com. *v.* Overholt, 23 Pa. Super. Ct. 199; Lewis *v.* Germantown, etc., R. Co., 16 Phila. 608.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 8 S. C. 207.

Virginia.— Beverley *v.* Brooke, 4 Gratt. 187.

West Virginia.— Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746.

Wisconsin.— Ford *v.* Plankington Bank, 87 Wis. 363, 58 N. W. 766.

United States.— Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; *In re* John L. Nelson, etc., Co., 149 Fed. 590; Atchison, etc., R. Co. *v.* Osborn, 148 Fed. 606, 78 C. C. A. 378 (holding that an interlocutory order appointing receivers for a railroad confers no vested rights on any outside creditor and makes no pro-

B. Effect Upon Contracts and Agreements. Although the appointment of a receiver may not absolve the party over whose property he is appointed from liability for failure to carry out his contracts with others, the claim is at most a claim at large against the estate.[23]

C. Effect as Suspending or Superseding Corporate Functions.[24] The authorities are not altogether harmonious as to the effect of the appointment of a receiver of a corporation in respect of the right of the corporation thereafter to act in particular matters. On the one hand receivers *pendente lite* are held not to represent the corporation in its individual or personal character nor supersede it in the exercise of its corporate powers, except so far as the property which is committed to their care is concerned, and in every other respect the corporation is free to exercise its franchise,[25] as distinguished from receivers in proceedings under statutory provisions for the dissolution and winding up of corporations,[26] or in the absence of an order restraining the exercise of its franchises or of some statute so providing, although there is an adjudication of insolvency, and notwithstanding the appointment may have the practical effect of stopping the corporate business.[27] After the appointment of such a receiver,

vision which cannot be modified or changed later or in the final decree); Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 41 Fed. 8 (as to extension of receivership).

England.— Portman *v.* Mill, 3 Jur. 356, 8 L. J. Ch. 161.

See 42 Cent. Dig. tit. "Receivers," § 91. See also *supra*, III, E, 3, b.

Affirmance of order on appeal.—A like effect as that which an order appointing a receiver has upon the rights of the parties is given to a judgment affirming such order, and such affirmance will not be considered in any manner prejudicial to the claims of the parties upon the final trial of the cause. Gassoway *v.* Heidenheimer, (Tex. Civ. App. 1896) 37 S. W. 343.

As to rights to be tried in action by receiver.— Where the order authorizes the receiver to sue for property in the hands of an assignee under an assignment, the rights of the assignee are not determined on the application for a receiver, although the appointment is based upon the invalidity of the assignment for fraud or illegality and the assignee is not precluded from being heard on the validity of the assignment. Journeay *v.* Brown, 26 N. J. L. 111.

Claims, equities and liens see *infra*, IV, D, 3, d, (II).

Right of action in receiver see *infra*, VI, B.

23. See *infra*, IV, D, 6, b, (II); IV, F, 6, e, (I), (D).

Cancellation of insurance policies see INSURANCE, 22 Cyc. 1404.

24. **Receiver of bank** see BANKS AND BANKING, 5 Cyc. 560, 602, 611.

Receiver of corporation see *supra*, II, C, 1; II, C, 3, c.

Right of action in receiver see *infra*, VI, B, 6.

Right to sue corporation see *infra*, IV, D, 6, b, (II).

25. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561; Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480. To the same effect see Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28.

Performance of statutory duties.— Corporations transacting business in its nature public are subject to all reasonable police regulations deemed necessary for the common welfare. The mere fact that its property may be temporarily in the hands of a receiver does not relieve a corporation from the operation of such regulations any more than a private citizen is released from the duty to observe the law because his property may be sequestered by the order of a court for the benefit of his creditors. Ohio, etc., R. Co. *v.* Russell, 115 Ill. 52, 3 N. E. 561. On the other hand the receiver of a corporation (a railroad company) conducting its business and corporate affairs is held to be substituted for the corporation itself and to assume all of its duties and liabilities to the municipality and to the public. Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114. See, generally, in this connection RAILROADS, 33 Cyc. 719. And see *infra*, IV, F, 1; VI, D, 1, c.

Employment of counsel to protect interest.— The impounding of the assets of a homestead loan association, or the appointment of a receiver therefor, does not strip such association of the power to employ counsel to defend its interests. Assets Realization Co. *v.* Defrees, 127 Ill. App. 454 [*affirmed* in 225 Ill. 508, 80 N. E. 263].

26. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*distinguishing* Combs *v.* Smith, 78 Mo. 32, and Pickersgill *v.* Myers, 99 Pa. St. 602, in that in the first case it sufficiently appears that the receiver was a statutory receiver so that the case is not out of the accord with the decision in New York, and in the second case the corporation was dissolved and the receiver appointed after dissolution]. See also U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316, where the distinction between statutory receivers of corporations and receivers of mortgaged property is fully discussed.

27. Rosenbaum *v.* U. S. Credit System Co.,

it is competent for stock-holders to elect directors;[28] the mere receivership of itself does not have the effect to dissolve the corporation,[29] or to prevent its continuing after the object of the receiver is accomplished, as by reacquiring its property after sale by the receiver,[30] or by taking back the surplus of assets after liquidation of its liabilities, although the receivership may operate to suspend temporarily its ordinary business;[31] nor does it prevent a resumption of business under the charter after the object of the suit and receivership has been attained.[32] The appointment of a receiver for an insolvent corporation is held to suspend its rights to exercise corporate functions,[33] so that the corporate officers are without authority to intermeddle with the corporate property,[34] and so where the receiver of a corporation succeeds to the rights of the corporation, the right of the company to sue is held to be suspended while the receivership exists, and can be exercised only by the receiver.[35] On the other hand, the appointment of a receiver

61 N. J. L. 543, 40 Atl. 591, holding further that an injunction which merely restrains certain acts short of the exercise of its corporate franchises by the corporation will not have such effect. See also Paterson Second Nat. Bank *v.* New York Silk Mfg. Co., 11 Fed. 532, as to the continuance of the corporate entity of an insolvent corporation after the appointment of a receiver of the corporation by the state court until the injunction continues four months, under a statute in New Jersey.

Election of directors.— In Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 349, it was held that the court might order an election of directors by the stock-holders of an insolvent corporation which had been in the hands of the court for some years and an injunction had issued restraining the managers from exercising the franchise of the company.

28. State *v.* Merchant, 37 Ohio St. 251; Com. *v.* Overholt, 23 Pa. Super. Ct. 199. See also Farmers', etc., Nat. Bank *v.* Philadelphia, etc., R. Co., 7 Fed. 381, holding that the receiver of a corporation did not put the annual meetings and election of directors under the control of the receiver or of the court.

29. People *v.* New York City R. Co., 57 Misc. (N. Y.) 114, 107 N. Y. Suppl. 247; Com. *v.* Overholt, 23 Pa. Super. Ct. 199, in connection with right of a corporation to elect officers. See CORPORATIONS, 10 Cyc. 1294, 1297.

A mere interlocutory order appointing a receiver with power to continue the business does not dissolve the corporation or revoke or annul the authority of its agents to receive its funds for the receiver. Rice *v.* Barnard, 127 Mass. 241, as to authority of an agent of an insurance company to collect premiums after such an order of appointment in which the officers and agents of the company were enjoined from receiving and disposing of its property except to deliver it to the receiver.

Calls on stock see CORPORATIONS, 10 Cyc. 485 *et seq.*

30. City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033.

31. Heath *v.* Missouri, etc., R. Co., 83 Mo. 617; Mann *v.* Pentz, 3 N. Y. 415; Parry *v.* American Opera Co., 12 N. Y. Civ. Proc. 194. See also *supra*, II, C, 1.

32. Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962.

33. Linville *v.* Hadden, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222; Combs *v.* Smith, 78 Mo. 32 [*distinguished* in Decker *v.* Hardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, *supra*, note 26] (in arriving at the conclusion that the court might permit an action to be brought against a receiver for a cause of action in tort arising before the appointment, the court saying that the receiver was the representative of the corporation); Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. W. 185, 51 L. R. A. 146 (holding that the effect of the appointment suspends the functions of the officers of the corporation without a restraining order); Brynjolfson *v.* Osthus, 12 N. D. 42, 96 N. W. 261.

Reason.— This must necessarily be so, otherwise both the receiver and the board of directors would be competent to exercise the rights, privileges, and franchises of the corporation, and endless confusion would be the result. Linville *v.* Hadden, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222.

34. Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924; Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840, under an act of congress as to national banks, the receiver being required to take possession of the books, records, and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking.

35. Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098; Davis *v.* Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494 (where the action was brought by the receiver in the name of the corporation, as to which see *infra*, VI, A, 3, b, (II); Kokomo City St. R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ind. App. 335, 58 N. E. 211; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 142, 60 Pac. 990 (under a statute placing the right to sue in the receiver which is held to have the effect of taking the right out of the corporation for the time being);

of a corporation not having the effect of itself to dissolve it, it is held that the corporation may sue,[36] and where a temporary receiver is appointed, even in a proceeding for dissolution, who has no title to the property,[37] and does not represent the corporation except for the purposes of preserving the property, his appointment does not affect the right of the corporation to sue for injuries to its property.[38] And when the functions of a receiver in a foreclosure suit have terminated, the corporation may sue with reference to the property involved in the foreclosure suit.[39]

D. As to Right and Title to and Possession of Property[40] **— 1. In General.** The effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property,[41] notwithstanding the right to the property is in no way affected,[42] and he over whose property a receiver has

McMaster *v.* Drew, 70 N. J. Eq. 6, 62 Atl. 559; Phenix Ins. Co. *v.* Schultz, 80 Fed. 337, 25 C. C. A. 453 [*affirming* 77 Fed. 375].

The right of a dissolved corporation should be enforced by the receiver. Michel *v.* Betz, 108 N. Y. App. Div. 241, 95 N. Y. Suppl. 844.

Pending actions — *In general.*— So as to actions pending when the receiver is appointed, the right of the corporation to prosecute is suspended, and the receiver may continue or dismiss such actions, under the direction of the court appointing him. Kokomo City St. R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ind. App. 335, 58 N. E. 211.

Stay pending hearing in appellate court.— Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471, holding that pending a stay of proceedings on order appointing a receiver for a corporation until hearing in the appellate court, the corporation may sue until the receiver has taken possession and after his discharge may prosecute the action to completion.

Injunction against exercise of rights and franchises.— In Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627, under a statute permitting the prosecution of actions by corporations for a certain period after dissolution subject to the power of any court of competent jurisdiction to make in any case a different provision, it was held that the appointment of a receiver was such a "different provision" and the prosecution of an action by the corporation is the exercise of a corporate right, privilege, or franchise within the prohibition of an injunction in these terms issued upon the adjudication of insolvency and the appointment of a receiver.

Foreign receiver see *infra*, VIII, A.

36. People *v.* Barnett, 91 Ill. 422.

Pending action.—A suit brought by a corporation does not abate by the subsequent appointment of a receiver for the corporation. People *v.* Barnett, 91 Ill. 422 (holding that a mandamus proceeding brought by the corporation may go on to its termination, at least as long as the receiver makes no objection, the fruits of which, when realized, would then form assets of the company to be held and disposed of as its other assets); Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 [*affirming* 6 Hun 293]. The appointment of a receiver in supplementary proceedings against a corporation and an order restraining a defendant in an action which had been brought by the corporation before such appointment from paying the debt is no defense, as plaintiff was entitled to recover and defendant could take the order of the court directing the payment as a protection against further liability. Glenville Woolen Co. *v.* Ripley, 43 N. Y. 206.

37. See *infra*, IV, D, 2.

38. Mutual Brewing Co. *v.* New York, etc., Ferry Co., 16 N. Y. App. Div. 149, 45 N. Y. Suppl. 101, although the order contained the usual injunction provision restraining the corporation from interfering with its property.

When corporation is dissolved see Corporations, 10 Cyc. 1293, 1299, 1326.

Effect of dissolution see Corporations, 10 Cyc. 1310, 1327.

39. Northern Illinois Coal, etc., Co. *v.* Young, 12 Fed. 809, 11 Biss. 331, holding that an original bill in the nature of a bill of review, assailing the decree in a foreclosure suit, may be filed by the corporation in its own name.

40. **In supplementary proceedings** see Executions, 17 Cyc. 1462.

41. Keeney *v.* Home Ins. Co., 3 Thomps. & C. (N. Y.) 478; Com. *v.* Overholt, 23 Pa. Super. Ct. 199; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp (Pa.) 142; Lewis *v.* Germantown, etc., R. Co., 16 Phila. (Pa.) 608; Payne *v.* Baxter, 2 Tenn. Ch. 517; *In re* Day, 34 Wis. 638, holding that under an order of appointment of one as "receiver of all the moneys, assets, and property of the firm of," etc., it is proper for the receiver to take into his possession all the property of the firm, or claimed to be and in its possession or the possession of its agents.

Qualification of rule.— The appointing a receiver is not in every case a turning the party out of possession. Thus where an infant is entitled there can be no color to say that the appointing a receiver puts the infant out of possession, there being no adverse suit involving the right to the property. Sharp *v.* Carter, 3 P. Wms. 375, 24 Eng. Reprint 1108.

Books and papers see *infra*, IV, D, 5, b, note 32.

42. See *supra*, IV, A.

been appointed has no authority thereafter to subject it to any legal liability in the hands of the receiver,[43] or to deal with it in a manner which operates as an interference with the receiver's possession.[44]

2. NATURE OF RIGHT AND POSSESSION — a. In General. The mere order appointing a receiver of property does not transfer the ownership of or legal title to the property over which he is appointed,[45] without statutory provision to that

43. McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237; Barnes *v.* Newcomb, 89 N. Y. 108; Ford *v.* Gilbert, 44 Oreg. 259, 75 Pac. 138.

Where one became a general creditor of an auctioneer after the sale of the former's goods by the auctioneer, by reason of his having consented to the auctioneer's depositing moneys arising from such sale in his own general account in the bank, a check drawn by the auctioneer in favor of such party and an assignment of an amount on deposit equal to the amount of the check given, after the appointment of a receiver of the effects of the auctioneer who had become insolvent, conferred no right on the party to the moneys on deposit and no right of action against the bank. Levy *v.* Cavanagh, 2 Bosw. (N. Y.) 100.

44. Thornton *v.* Washington Sav. Bank, 76 Va. 432. See also *infra*, IV, D, 5.

Expiration of receivership.—A receiver's right, being purely for the purposes of the suit, cannot outlast the suit nor be used for any purpose not justified thereby. Montgomery *v.* Merrill, 18 Mich. 338. See also *supra*, III, K.

45. *Illinois.*— Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405; Heffron *v.* Gage, 149 Ill. 182, 36 N. E. 569.

Indiana.— Polk *v.* Johnson, (App. 1906) 76 N. E. 634.

Massachusetts.— Harrison *v.* J. J. Warren Co., 183 Mass. 123, 66 N. E. 589.

Michigan.— Montgomery *v.* Merrill, 18 Mich. 338.

New York.— Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870; Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Felter *v.* Maddock, 11 Misc. 297, 32 N. Y. Suppl. 292; Devlin *v.* New York, 4 Misc. 106, 23 N. Y. Suppl. 888; Matthews *v.* Cooper, 21 N. Y. Suppl. 71 (where the receiver is appointed to take charge of and conduct a business pending litigation but is not given authority by the order to sell property except in the ordinary course of such business); Brooklyn *v.* Jourdan, 7 Abb. N. Cas. 23 (which cases are as to receivers *pendente lite*, or common-law receivers).

Ohio.— Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207 (where assignees and receivers are distinguished, the case involving the rights of a receiver of an insolvent corporation); Monnett *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469 (receiver of corporation); Snyder *v.* Snyder, 1 Ohio S. & C. Pl. Dec. 340, 31 Cinc. L. Bul. 256 (receiver in suit to dissolve partnership).

Pennsylvania.— Singerly *v.* Fox, 75 Pa. St. 112; Yeager *v.* Wallace, 44 Pa. St. 294; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

Texas.— Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934.

Vermont.— Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

Virginia.— Boyle *v.* Townes, 9 Leigh 158, as to the "curator and receiver."

United States.— Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408 (holding that strictly the title to the property in the hands of a receiver is in those for whose benefit he holds, so that where a policy of insurance runs to a receiver in a designated suit, a mere change of receivers does not involve a change in title or possession); Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537; Coler *v.* Grainger County, 74 Fed. 16, 20 C. C. A. 267 (where it was held that the naked legal title to a subscription for stock in a corporation did not pass to the receiver, it not being essential to the proper discharge of his duties, although he was, by the order appointing him, vested with the power, right, and title so far as it was necessary to take possession of the road, to operate it and assert the company's title to property in the hands of others); Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305; Naumburg *v.* Hyatt, 24 Fed. 898.

Canada.— Campbell *v.* Lepau, 19 U. C. C. P. 31, holding that in the case of leasehold property it is not as owner of the reversion that the receiver exercises the right of distress.

See 42 Cent. Dig. tit "Receivers," § 124. See also in this connection *infra*, IV, F, 1 *et seq.*

In an action for trespass by a receiver of a telegraph company for cutting telegraph wires, plaintiff's damages depend upon the extent of the interruption of his use and possession, he being not the owner but merely the custodian of the property, and evidence as to the value of the telegraph system not material to such damage is improperly admitted. Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735.

Insurable interest see Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408; *In re* Hamilton, 102 Fed. 683, receiver in bankruptcy. See also *infra*, IV, F, 6, e, (II), (D), (3) *et seq.*

Title in court.— In Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132, it is said that while a common-law receiver is not the assignee or owner, beneficially at least, of the property intrusted to him, it is an in-

effect,[46] or where the appointment is pursuant to the general powers of the court and the usual practice in chancery as distinguished from an appointment under statutory provisions conferring special powers and rights.[47] Such a receiver, appointed to preserve a fund or property *pendente lite*, derives his authority from the act of the court appointing him;[48] the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled.[49]

complete and inaccurate statement of his relations to the property to say that he is merely its custodian; that when a court has taken property into its own charge and custody, for the purpose of administration and disposition, in accordance with the rights of the parties to the litigation, the title of the property for the time being, and for the purposes of such administration, may, in a sense, be said to be in the court.

46. Forker *v.* Brown, 10 Misc. (N. Y.) 161, 30 N. Y. Suppl. 827 [*citing* Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, which distinguished a permanent receiver of a corporation under the statute from a receiver *pendente lite*, as to which distinction see also Herring *v.* New York, etc., R. Co., 105 N. Y. 340, 12 N. E. 763; Mutual Brewing Co. *v.* New York, etc., Ferry Co., 16 N. Y. App. Div. 149, 45 N. Y. Suppl. 101]. See also Daniel *v.* Wilson, 91 Ga. 238, 18 S. E. 134, as to title to realty. But as to the distinction indicated in Decker *v.* Gardner, *supra*, see Nealis *v.* American Tube, etc., Co., 150 N. Y. 42, 44 N. E. 944 [*cited* with approval in Matter of Warren E. Smith Co., 31 N. Y. App. Div. 39, 52 N. Y. Suppl. 877, which involved a receivership in a proceeding for voluntary dissolution], which was a temporary receivership of an insolvent corporation in a sequestration proceeding under N. Y. Code Civ. Proc. § 1788, and it was held that under that provision which gives a temporary receiver power to collect, etc., and to maintain any action or special proceeding for that purpose, the receiver for the purpose of holding, protecting, etc., the property of the company, is vested with title and represents the corporation and its creditors as fully as a permanent receiver.

Actions by receivers see *infra*, VI, A, 3, b, (II); VI, B.

47. Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305. See also the cases cited *supra*, note 45.

Statutory receiver of corporation.— The rule, however, is different in some cases where the right of a receiver does not depend merely upon the order of appointment under the general power of the court but under statutory provisions for the appointment of receivers of insolvent or dissolved corporations which vests in the receiver appointed to distribute the assets of the corporation, all the property thereof. Standley *v.* Hendrie, etc., Mfg. Co., 27 Colo. 331, 61 Pac. 600 (dissolution statute); Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617; Squire *v.* Princeton Lighting Co., (N. J. 1907) 68 Atl. 176 (showing that under N. J. Act (1896), pp. 298, 299, § 68, the title vests in the receiver, and that the statute settles the doubt theretofore existing by reason of conflicting decisions, such as Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436; Middlesex County *v.* New Brunswick State Bank, 29 N. J. Eq. 268 [*affirmed* in 30 N. J. Eq. 311]; and Corrigan *v.* Trenton Delaware Falls Co., 7 N. J. Eq. 489, which maintained that the title changed; and Kirkpatrick *v.* Corning, 37 N. J. Eq. 54 [*reversed*, however, in 38 N. J. Eq. 234]; State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377, which maintained that the title was unchanged); Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272 (upon dissolution of corporation and appointment of receiver); Osgood *v.* Maguire, 61 N. Y. 524; Michel *v.* Betz, 108 N. Y. App. Div. 241, 95 N. Y. Suppl. 844; Matter of Hoagland, 36 Misc. (N. Y.) 28, 72 N. Y. Suppl. 435; Dickey *v.* Bates, 13 Misc. (N. Y.) 489, 35 N. Y. Suppl. 525; Brynjolfson *v.* Osthus, 12 N. D. 42, 96 N. W. 261; American Nat. Bank *v.* National Ben., etc., Co., 76 Fed. 420 (involving the statute of Wisconsin governing proceedings by the attorney-general for the dissolution of the corporation). See also Daniel *v.* Wilson, 91 Ga. 238, 17 S. E. 134; Van Wagoner *v.* Paterson Gaslight Co., 23 N. J. L. 283.

Title in trust.— The legal title which vests in the receiver of an insolvent corporation, in a creditors' suit to administer the affairs of the corporation for their benefit, is in trust, not for the court but for those having the equitable title — the creditors. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. The receiver takes no beneficial title. Knabe *v.* Johnson, 107 Md. 616, 69 Atl. 420.

A receiver on final decree to collect an estate and satisfy a judgment out of the proceeds in his hands is invested with the title. Passavant *v.* Bowdoin, 60 Hun (N. Y.) 433, 15 N. Y. Suppl. 8.

48. See *infra*, IV, F, 1.

49. Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Joseph *v.* Nelson Co., 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913; Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23 (as to title of corporation to franchise to use streets); Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 34. And see the cases cited *supra*, note 45.

Receiver to receive and manage income.— Where receivers and managers of the income and business of a company were appointed at the instance of mortgage debenture holders, but without any direction to the company to

b. Assignment or Other Transfer.[50] At law, an ordinary receiver, or one appointed in pursuance of the general power of the court, was not considered as having the legal title [51] so as to authorize him to institute a suit in his own name for any debt or demand not transferred to him, or to the possession or control of which he was entitled under the order of the court,[52] although it is otherwise where the appointment is under some special provision of statute,[53] as in the case of a receiver appointed in supplementary proceedings,[54] or in proceedings to close up the affairs of a corporation which is insolvent or has been dissolved or has forfeited its corporate rights.[55] In equity, however, it is held that an order for a receiver, when his appointment is completed, vests in him all the property and effects subject to the order without an assignment,[56] although as to the legal title to real estate a transfer has been held indispensable.[57] The

give up possession of the premises, and the receivers entered upon the premises for the purpose of managing and carrying on the business, it was held that there was no change of occupation within the Poor Rate Assessment and Collection Act of 1869, which provided for the apportioning of the poor rate assessment upon change of occupation, so that the receivers did not occupy the premises in such way as to make them responsible for the rates. *In re* Marriage, [1896] 2 Ch. 663, 60 J. P. 805, 65 L. J. Ch. 839, 75 L. T. Rep. N. S. 169, 45 Wkly. Rep. 42.

Receiver of partnership in dissolution proceedings see PARTNERSHIP, 30 Cyc. 730.

Supervision of court see *infra*, IV, F, 5.

50. Assignment as fraudulent conveyance see ATTACHMENT, 4 Cyc. 422 note 36.

Jurisdiction as to property beyond state see *supra*, III, A, 5; and *infra*, VIII, A.

Property passing by assignment see *infra*, IV, D, 3.

Transfer as assignment for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 128 note 25.

51. See *supra*, notes 45 *et seq.*

52. See *infra*, VI, A, 3, b, (II).

53. Wilson *v.* Allen, 6 Barb. (N. Y.) 542, where under a statute giving receivers and committees of lunatics and habitual drunkards, appointed by a decree of the court of chancery, the right to sue in their own names for any debt, etc., it was held that the title of the receiver was complete.

54. See EXECUTIONS, 17 Cyc. 1462.

55. Middlesex County *v.* New Brunswick State Bank, 29 N. J. Eq. 268 [*affirmed* in 30 N. J. Eq. 311], (holding that on the appointment of a receiver for an insolvent corporation the title is divested out of the corporation by force of law and vested at once in the receiver); Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193. But see Montgomery *v.* Merrill, 18 Mich. 338, where a judicial declaration of forfeiture was necessary.

56. Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257 [*reversed* upon the merits of the question as to the particular cause of action in the receiver in 3 N. Y. 415] (partnership property); Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510 (equitable title to partnership property vests without assignment).

It may be proper, although not necessary, to take an assignment. Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257 [*reversed* upon the question as to the particular cause of action in the receiver in 3 N. Y. 415], where it is said that this was not the practice in England.

57. Barker *v.* Dayton, 28 Wis. 367; King *v.* Cutts, 24 Wis. 627 (where, although involving real estate, it is laid down in general terms that, according to the chancery practice, a receiver appointed in pursuance of the general power of the court in that regard before assignment or transfer to him by the person having the legal title, acquires no estate or interest in the property and it is held that an appointment of a receiver "to let certain premises and collect the rents, during the pendency of an action," conferred no interest in the premises without an assignment); Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305. See also Caldwell *v.* McWhorter, 84 Ky. 130.

The authorities are not entirely in accord or consistent with each other upon this subject. Thus in Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686, it is held that no formal assignment is necessary to pass the title to real estate sold by a receiver under an order of court; that it is not a question whether the receiver had title but whether the court had power to pass the title, and that the assignment is a matter entirely formal as evidenced by the fact that no reassignment is necessary to reinvest the assignor with title if the purposes of the suit are accomplished without sale. In New York before the code, the distinction between real and personal property as indicated in the text was recognized. Wilson *v.* Allen, 6 Barb. (N. Y.) 542; Mann *v.* Pentz, 2 Sandf. Ch. (N. Y.) 257 [*reversed* upon the merits of the question of the particular cause of action in the receiver in 3 N. Y. 415]. The code was held to have changed the rule as to real estate so that thereafter, upon the completion of the appointment of a receiver, real estate vested in him without any assignment. Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519. And see Wing *v.* Disse, 15 Hun (N. Y.) 190; Cooney *v.* Cooney, 65 Barb. (N. Y.) 524; Voorhees *v.* Seymour, 26 Barb. (N. Y.) 581, as opposed to Scott *v.* Elmore, 10 Hun (N. Y.) 68, and Moak *v.* Coates, 33 Barb. (N. Y.) 498, which recognize the earlier rule. So in Cole *v.* Tyler,

court may require an assignment to a receiver,[58] or order a transfer to him of real property which is to be subjected to the satisfaction of the owner's debts,[59] and where, from the peculiar nature of the property coming to the hands of the receiver, some further conveyance than the usual assignment from the debtor to the receiver is necessary to vest in the receiver the complete legal title and enable him to dispose of the property to advantage, and to protect it while he holds it, the court *ex necessitate* must have the power to compel the judgment debtor to execute such further conveyance.[60]

c. Possession of Court. As a general rule it may be stated that property in the possession of a receiver is *in custodia legis*; that the receiver's possession is the possession of the court for the benefit of the party or parties ultimately entitled.[61]

65 N. Y. 73, it was held that since the court had authority to order a transfer of real property to its receivers, the direction that the receiver sell, execute deed, etc., in a decree setting aside a conveyance as fraudulent under a bill by judgment creditors for that purpose, if erroneous, could be rectified only by an application to correct the judgment and not by appeal from it, the matter being one of detail only. In Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858, it is held that no conveyance is necessary in order to vest the receiver with control over real estate, so that a sale by a sheriff under a levy made after the appointment of a receiver passes no title, and in this respect Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347, holding that such an execution sale under a judgment prior to the suit in which the receiver was appointed was valid as against a purchaser at the receiver's sale, is distinguished in that the receiver is held to have taken only such title as was conveyed by the deed of the party over whose property he was appointed, and this case is also shown to be inconsistent with Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400, which, while involving personalty, yet in holding that a sale by the sheriff after the appointment of a receiver was void the court relied on Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322, which involved the same question where the property was land. See also in this connection as to the effect of a sale under execution after the appointment of a receiver, *infra*, IV, D, 7, e, (III), (B).

But a receiver under special statutory provisions, as in the case of a receiver to wind up and settle the affairs of an insolvent corporation or in supplementary proceedings, and the like, is held to take the title to both the real and personal property without any formal conveyance. Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193, holding that under a statutory provision for the appointment of a receiver of a corporation, to take "all the assets and credits," the word "assets" means all the property, real and personal, and the purpose of the statute was to vest the title in the receiver. See also Daniel *v.* Wilson, 91 Ga. 238, 18 S. E. 134.

58. Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610.

Patents.— It has been held that the title to a patent can vest only by virtue of an instrument in writing, and the court may compel a debtor to execute an assignment of the patent to a receiver. Clan Ranold *v.* Wyckoff, 41 N. Y. Super. Ct. 527; *In re* Keach, 14 R. I. 571.

59. Cole *v.* Tyler, 65 N. Y. 73, *supra*, note 57; Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347.

An action by a receiver to compel a conveyance has been held maintainable. Barker *v.* Dayton, 28 Wis. 367.

Form of order see Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417, 418.

60. Atkinson *v.* Foster, 27 Ill. App. 63 [*affirmed* in 134 Ill. 472, 25 N. E. 528], holding that the court may order a defendant, over whose property a receiver has been appointed, to execute a power of attorney enabling the receiver to vote stock in a corporation.

Form of order see Atkinson *v.* Foster, 27 Ill. App. 63, 65 [*affirmed* in 134 Ill. 472, 25 N. E. 528].

61. *Arkansas.*— Walker *v.* Geo. Taylor Commission Co., 56 Ark. 1, 18 S. W. 1056, 19 S. W. 601.

Delaware.— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

District of Columbia.— Fields *v.* U. S., 27 App. Cas. 433 [certiorari *denied* in 205 U. S. 292, 27 S. Ct. 543, 51 L. ed. 807].

Georgia.—Tindall *v.* Wescott, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; Charters *v.* Candler, 94 Ga. 210, 21 S. E. 518; Wikle *v.* Silva, 70 Ga. 717.

Illinois.— Nevitt *v.* Woodburn, 190 Ill. 283, 60 N. E. 500; People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Coates *v.* Cunningham, 80 Ill. 467; Hooper *v.* Winston, 24 Ill. 353.

Indiana.— Polk *v.* Johnson, (App. 1906) 76 N. E. 634; Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

Iowa.— Home Savings, etc., Co. *v.* Pope County Dist. Ct., 121 Iowa 1, 95 N. W. 522; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

Kansas.— State *v.* Hubbard, 58 Kan. 797, 51 Pac. 290, 39 L. R. A. 860.

Kentucky.— Hazelrigg *v.* Bronaugh, 78 Ky. 62; Johnson *v.* Gunter, 6 Bush 534; Thomp-

3. Particular Property, Rights, and Interest [62] — a. In General. Upon the appointment of a receiver under which the debtor's property passes, a valuable right belonging to the debtor capable of transfer and assignment is property and as such the receiver is entitled to it,[63] and equitable interests in the estate of an insolvent debtor vest in the receiver by his appointment as a trust fund for the equal benefit of the creditors of the estate.[64] The receiver of a corpora-

son *v.* Page, 76 S. W. 128, 25 Ky. L. Rep. 557.

Louisiana.— *In re* New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

Maryland.— Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Ellicott *v.* U. S. Insurance Co., 7 Gill 307; *In re* Colvin, 3 Md. Ch. 278; Williamson *v.* Wilson, 1 Bland 418.

Massachusetts.— Harrison *v.* J. J. Warren Co., 183 Mass. 123, 69 N. E. 589.

Minnesota.—Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132.

Mississippi.— Mays *v.* Rose, Freem. 703.

New Mexico.— Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157.

New York.— Fallon *v.* Egberts Woolen Mill Co., 31 Misc. 523, 64 N. Y. Suppl. 466 [*affirmed* in 56 N. Y. App. Div. 585, 67 N. Y. Suppl. 347]; Felter *v.* Maddock, 11 Misc. 297, 32 N. Y. Suppl. 292; Devlin *v.* New York, 4 Misc. 106, 23 N. Y. Suppl. 888; Eddy *v.* Cooperative Dress Assoc., 3 N. Y. Civ. Proc. 434; Brooklyn *v.* Jourdan, 7 Abb. N. Cas. 23; Corey *v.* Lang, 12 Abb. Pr. N. S. 427; Noe *v.* Gibson, 7 Paige 513.

North Carolina.— Battle *v.* Davis, 66 N. C. 252.

Ohio.— Snyder *v.* Snyder, 1 Ohio S. & C. Pl. Dec. 340, 31 Cinc. L. Bul. 256.

Oklahoma.— Foster *v.* Field, 13 Okla. 230, 74 Pac. 190.

Oregon.— Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 31 Oreg. 237, 48 Pac. 706, 65 Am. St. Rep. 822, 38 L. R. A. 424.

Pennsylvania.— Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Yeager *v.* Wallace, 44 Pa. St. 294; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

Tennessee.— Weaver *v.* Duncan, (Ch. App. 1899) 56 S. W. 39; Payne *v.* Baxter, 2 Tenn. Ch. 517.

Texas.— Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686.

Virginia.— Thornton *v.* Washington Sav. Bank, 76 Va. 432; Beverley *v.* Brooke, 4 Gratt. 187.

Wisconsin.— Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909.

United States.— *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408 (where it is said that in a legal sense the property is not in the possession of the receiver but is in the possession of the court by the receiver as its officer); Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; Dayton Hydraulic Co. *v.* Felsenthal, 116 Fed. 961, 54 C. C. A. 537; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 110 Fed. 491; Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609; Rothschild *v.* Hasbrouck, 65 Fed. 283; Naumburg *v.* Hyatt, 24 Fed. 898.

See 42 Cent. Dig. tit. "Receivers," § 124. See also *infra*, IV, E, 1.

Sequestrator distinguished.— In *In re* Hoare, [1892] 3 Ch. 94, 61 L. J. Ch. 541, 67 L. T. Rep. N. S. 45, 41 Wkly. Rep. 105, a receiver was appointed in an action for the administration of the estate of a decedent who had mortgaged shares in a company and the company issued debenture bonds to him for dividends on the shares which accrued in the mortgagor's lifetime, and upon holding that the mortgagee was not entitled to such bonds it was said that money in the hands of a receiver is not *in custodia legis* in the same way as if it were in the hands of a sequestrator; that the true rule is that in each case the nature of the action and the object of the appointment of the receiver must be regarded.

Successive receivers.— The possession of the court is not interrupted by the appointment of a receiver of an insolvent corporation at the suit of the attorney-general after a receiver had been appointed at the suit of stock-holders and the assets are transferred to the receiver last appointed. Atty.-Gen. *v.* Continental L. Ins. Co., 28 Hun (N. Y.) 360 [*affirmed* in 93 N. Y. 630 without opinion].

After determination of rights see *infra*, IV, E, 2, c.

After sale see *infra*, IV, H, 12.

62. Description in order see *supra*, III, E, 8, b.

In supplementary proceedings see Executions, 17 Cyc. 1462.

Property fraudulently conveyed see *infra*, VI, B, 1, c.

Property in custodia legis see *supra*, II, B, 9.

Property out of jurisdiction see *supra*, III, A, 5, and *infra*, VIII, A.

Property subject to receivership see *supra*, II, B, 9.

Rights of action see *infra*, VI, B.

63. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301, involving a seat in the New York Cotton Exchange.

Non-assignable rights do not pass to a receiver. Milwaukee Mut. F. Ins. Co. *v.* Sentinel Co., 81 Wis. 207, 51 N. W. 440, 15 L. R. A. 627, right of action in corporation for mere personal tort, as libel.

64. *In re* Hamilton, 26 Oreg. 579, 38 Pac. 1088; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

tion is entitled to the possession of all the property which the corporation has at the time of the appointment,[65] the statute relating to the appointment of a receiver of an insolvent corporation contemplating nothing less than the administration of the whole of its property subject to the payment of its debts;[66] and, without reference here to his right to sue or the propriety of the proceedings to enforce his right,[67] he is *prima facie* entitled to take any money that may be due to the corporation.[68] An assignment of defendant's personal and real estate in compliance with the order of appointment is effectual to pass the assignor's lands without any specific description thereof,[69] and a receiver of rents and profits to whom the tenants have attorned or accounted is constructively in possession, being placed in the shoes of the landlord.[70] But where the receiver is appointed

65. *Maine.*— Baker *v.* Cooper, 57 Me. 388, real as well as personal property.

North Dakota.— Brynjolfson *v.* Osthus, 12 N. D. 42, 96 N. W. 261.

Texas.— Showalter *v.* Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491.

Washington.— Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819.

United States.— Horn *v.* Pere Marquette R. Co., 151 Fed. 626, declaring the right of a receiver to the possession of money of a corporation deposited in bank by the agents of a corporation after a receiver therefor had been appointed, although the bank claimed a lien thereon.

See 42 Cent. Dig. tit. "Receivers," § 117 *et seq.*

Liabilities of stock-holders and directors see *infra*, VI, B, 2, 3.

66. Showalter *v.* Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491, holding that the order of appointment is not necessarily limited to such property as may be mentioned in the petition. To the same effect see Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207, holding that an order appointing a receiver for all the property and assets of the company includes the company's real estate not specifically mentioned in the petition, motion, or order.

The corporate seal is embraced in an order appointing a receiver of a corporation and providing for the delivery of "all and every part of the properties, interest, effects, moneys, receipts, earnings," etc. American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937.

Funds in hands of trustee.— While the court upon the dissolution of a corporation may decree distribution of its funds, it cannot take away from a trustee funds placed in his hands for a specific purpose and distribute them through its receiver instead of through the trustee, whether the right of the trustee is founded upon contract or is created by statute (*In re* Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 N. E. 323, where the question was decided with respect to the right of the court to take out of the hands of a trustee sums received by a life insurance association on certificates of membership and paid over to a trust company as a safety fund for the security of the members to be paid out by the trustee in a particular manner specified, all of which was under the contract under which the certificates were issued; People *v.* Chapman, 64 N. Y. 557; Ruggles *v.* Chapman, 1 Hun (N. Y.) 324 [*affirmed* in 59 N. Y. 163], in which cases it is held that the court had no power to take securities from the statutory depositary and pass them over to its receiver for distribution according to the conditions of the trust, among the creditors of an insolvent and dissolved corporation, the trust being a fund paid by an insurance company under the insurance laws to the controller as security for policy-holders and it was held that the fund should not be taken from the superintendent of the insurance department and administered through the receiver; *In re* Guardian Mut. L. Ins. Co., 13 Hun (N. Y.) 115 [*affirmed* in 74 N. Y. 617]); especially in the absence of misconduct on the part of the trustee (Ruggles *v.* Chapman, *supra*). See also INSURANCE, 22 Cyc. 1407 text and note 56.

Property not in possession see *infra*, IV, D, 5, h.

67. See *infra*, VI, A, B.

68. Glover *v.* Wells, 40 Ill. App. 350 [*affirmed* in 140 Ill. 102, 29 N. E. 680].

69. Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442, holding that under a direction of the court requiring a defendant to assign, transfer "and set over, all the things in action, equitable interests, rents and real estate, which were in his possession," etc., the contention that the transfer conveyed to the receiver just interest enough in the property to enable him to protect it and receive the rents and profits was unsound and that a judgment recovered after the conveyance to the receiver created no lien on the land.

70. Delozier *v.* Bird, 125 N. C. 493, 34 S. E. 643. See also Crow *v.* Wood, 13 Beav. 271, 51 Eng. Reprint 104 (where in dealing with the sufficiency of an order to require delivery it was said that the appointment of a receiver of "the income of property" would not put the receiver in possession of the realty, although it would be otherwise if the receiver was ordered to receive the rents of the estate out of which they were issuing); Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551 (cited in Thompson Corp. § 6, 928, to the proposition that where tenants have attorned to a receiver of rents and profits or have accounted to him for a share of the crops belonging to

only for the purpose of completing a sale of land already negotiated and of collecting the purchase-money under the direction of the court, the land being in the possession of those who applied for the sale, the order does not contemplate that the receiver should be put in possession and a refusal to deliver possession to him is not an interference with his rights.[71] The appointment of a receiver, by way of equitable execution, at the instance of a judgment creditor, is held to operate as an immediate delivery of the land in execution.[72]

b. Property Not Involved. Property not involved in the suit,[73] as property which is not embraced in the complainant's mortgage,[74] nor protected from the remedies of other creditors by any contract or legal liens, is not properly in the hands of the receiver.[75] He has no right to property which does not belong to those over whose estate he was appointed,[76] at the time of the appointment,[77] and if the receiver assumes to take property of one not a party to the record under an appointment over the property of a party to the record he will be a trespasser.[78]

the landlord, a subsequent levy of execution thereon will be in contempt as a disturbance of the constructive possession of the re-receiver).

The relation of landlord and tenant is created by estoppel as between a tenant and a receiver of the leasehold property under an order directing the tenant to attorn to him and subsequent attornment by the tenant, but such relation is not created as between the tenant and the person ultimately decided to have the legal title. Evans *v.* Mathias, 7 E. & B. 590, 3 Jur. N. S. 793, 26 L. J. Q. B. 309, 90 E. C. L. 590 [*cited* in Campbell *v.* Lepan, 19 U. C. C. P. 31].

Past and future rents.—An appointment giving the receiver "full power to collect the rents, take care of and preserve the same," is sufficient authority to collect the rents to become due after as well as those which were due at the date of the appointment. Cox *v.* Volkert, 86 Mo. 505.

71. Wardlaw *v.* Herrington, 125 Ga. 828, 54 S. E. 699.

72. *Ex p.* Evans, 13 Ch. D. 252, 49 L. J. Bankr. 7, 41 L. T. Rep. N. S. 565, 28 Wkly. Rep. 127.

In supplementary proceedings generally see EXECUTIONS, 17 Cyc. 1462.

73. Noyes *v.* Rich, 52 Me. 115.

Rights not reached by creditors' bills.— The mere right of action of a judgment debtor for a personal tort, as for assault and battery, slander, etc., cannot be reached in a judgment creditor's suit and will not pass to the receiver under the usual assignment in such suit. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

74. See *supra*, II, B, 9.

Rents already paid to landlord see MORTGAGES, 27 Cyc. 1630 note 55.

75. Wormser *v.* Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198; Staples *v.* May, 87 Cal. 178, 25 Pac. 346.

If he is not appointed until after judgment his functions, either for the purpose of carrying the judgment into effect, or for the preservation of the property described in the judgment until the judgment shall be executed, are limited to the property described in the judgment. Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549.

76. Wheat *v.* State Bank, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47 (holding that where a receiver was appointed to collect debts due, and to take possession of the property of, a partnership alleged to exist between two persons he could not recover money due to a partnership existing between one of the parties and a stranger); Wiener *v.* Sturgiss, 79 Md. 271, 29 Atl. 613; Wheaton *v.* Spooner, 52 Minn. 417, 54 N. W. 372 (holding that the judgment of a creditor on whose suit a receivership is founded is the property of such judgment creditor and does not pass to the receiver by his appointment and that levying upon it by execution in no way interferes with the duties of the receiver); Farmers' etc., Nat. Bank *v.* Scott, 19 Tex. Civ. App. 22, 45 S. W. 26. See also *supra*, III, C, 2.

77. Nealis *v.* Insley, 33 Misc. (N. Y.) 742, 67 N. Y. Suppl. 235; Gabert *v.* Olcott, (Tex. Civ. App. 1893) 22 S. W. 286, holding that an order appointing a receiver of the property of a railroad company, enumerating the property, "and all other rights or property whatsoever," applies only to property or rights then owned, and not to property to be thereafter acquired.

Sequestration.— The same rule applies to a receiver in sequestration proceedings to enforce the payment of alimony. Continental Trust Co. *v.* Wetmore, 67 Hun (N. Y.) 9, 21 N. Y. Suppl. 746, holding that such receiver of the personal property and the rents and profits of real estate has no authority over the income which may result from investments held in trust, because such income does not become in any sense the personal property of the beneficiary until it has accrued.

So a receivership in supplementary proceedings is held not to apply to property subsequently acquired by defendant unless such property issued out of property the possession of which passed to the receiver, as the rents of real estate of which a receiver has been appointed. Continental Trust Co. *v.* Wetmore, 67 Hun (N. Y.) 9, 31 N. Y. Suppl. 746 [*citing* Dubois *v.* Cassidy, 75 N. Y. 298]. And see as to the right to after-acquired property in supplementary proceedings EXECUTIONS, 17 Cyc. 1466.

78. See *infra*, VI, D, 1.

c. Exempt Property. A receiver in a proceeding to subject assets to the payment of debts is not entitled to property of the debtor which is reserved to him under the exemption laws,[79] unless such exemption has been waived,[80] and the order appointing a receiver should be read as not directing the receiver to take charge of anything which is properly exempt. The law relating to exemptions becomes a part of the order just as if written into it.[81]

d. Interest and Title of Party — (i) *In General.* A receiver can acquire no other, greater, or better interest than the debtor had in the property,[82] and to this extent the receiver has been held to stand in the shoes of the debtor; and

79. Masterman *v.* Lumberman's Nat. Bank, 61 Minn. 299, 63 N. W. 723; Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

So a suit for a tort in taking exempt property, brought by defendant in a judgment creditor's suit, does not appear to be a breach of the usual injunction in such suit. Hudson *v.* Plets, 11 Paige (N. Y.) 180.

But mere exemption from particular process is not sufficient. Thus, although a patent right, being incorporeal, was held not attachable at law, it was held to pass to a receiver under a statute which required the receiver of an insolvent debtor to take possession of all property not exempt "from attachment by law." *In re* Keach, 14 R. I. 571. See also Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368, *infra*, note 81.

80. Levy *v.* Rossel, 82 Miss. 527, 34 So. 321.

81. Levy *v.* Rossel, 82 Miss. 527, 34 So. 321.

Assignment.— Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368, holding that even if the order for the appointment of the receiver, and directing defendant to assign and deliver over his property, is expressed in general terms, and contains no exception of exempt property, the master, upon ascertaining the fact that defendant is entitled to the benefit of the statutory exemption, should insert the proper exception in the assignment, but that defendant's objection that the assignment, as settled by the master, should have contained an exception of property which was not liable to execution, was much too broad; as that exception would have embraced all equitable interests, as well as choses in action of defendant.

82. *Alabama.*— Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157.

Connecticut.— *In re* New Haven Wire Co.'s Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

Georgia.— Crine *v.* Davis, 68 Ga. 138.

Illinois.— Shinkle *v.* Knoll, 99 Ill. App. 274; Gillam *v.* Nussbaum, 95 Ill. App. 277.

Michigan.— Brownson *v.* Roy, 133 Mich. 617, 95 N. W. 710.

Nebraska.— Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

New Jersey.— Miller *v.* Savage, 60 N. J. Eq. 204, 46 Atl. 632.

New York.— Prentiss *v.* Nichols, 100 N. Y. 227, 3 N. E. 81; Nealis *v.* Insley, 33 Misc. 742, 67 N. Y. Suppl. 235; *In re* Bailey, 4 N. Y. Civ. Proc. 140, as to right of attorney to costs recovered in an action against a corporation which he represented therein, the judgment in favor of the corporation being rendered after the corporation had been declared insolvent and a receiver appointed, holding that the judgment was not an asset of the corporation. See also Bowling Green Sav. Bank *v.* Todd, 64 Barb. 146 [*affirmed* in 52 N. Y. 489], as to right of attorney to retain money upon which he had a lien as attorney.

Oregon.— *In re* Hamilton, 26 Oreg. 579, 38 Pac. 1088.

Rhode Island.— Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919.

Washington.—Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819; Woodward *v.* Winehill, 14 Wash. 394, 44 Pac. 860; State *v.* Chehalis County Super. Ct., 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354, under an order of appointment for the property generally of a corporation.

United States.— Philadelphia Fourth St. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855; Tilford *v.* Atlantic Match Co., 134 Fed. 924.

See 42 Cent. Dig. tit. "Receivers." § 124.

However broad the terms of an assignment or conveyance may be, it is impossible that it should transfer to the receiver property in which defendant had no interest whatever, at the time of the execution of such assignment. Fitch *v.* Wetherbee, 110 Ill. 475; Cagger *v.* Howard, 1 Barb. Ch. (N. Y.) 368.

Title retained by seller.— Where property was held by the estate over which a receiver is appointed under a contract reserving the title until the purchase-price should be paid the receiver takes the property in the same condition and subject to the rights of the vendor, and when such sales are valid as against strangers the vendee therein cannot put any burdens upon the property to the prejudice of the vendor's rights and title. Sales *v.* National Water Purifying Co., 16 N. Y. Suppl. 555; Tilford *v.* Atlantic Match Co., 134 Fed. 924. But as to such a conditional contract of sale not made in conformity with the statute governing such sales, if a receiver of an insolvent corporation comes into possession of property so purchased by the corporation, he is to be regarded as the agent of the creditors and not the personal representative of the corporation within the provision of the statute that such sales shall be held to be absolute sales, except as between the vendor and the vendee or their "personal representatives," and the property is to be re-

he has the same right which the insolvent would have had,[83] and can set up no rights against claims which the debtor could not have set up.[84] He can take no right or title which was extinguished before his appointment,[85] and where

garded as the absolute property of the corporation so far as it might be needed for the payment of debts. *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163. And where such property is subject to levy by creditors of the vendee in the conditional sale, the receiver in a creditor's suit on behalf of plaintiff and all other creditors of the vendee takes it as against the conditional sale vendor. Duplex Printing Press Co. *v.* Clipper Pub. Co., 213 Pa. St. 207, 62 Atl. 841. See also Hart *v.* Barney, etc., Mfg. Co., 7 Fed. 543, as to invalidity of such sale as against purchasers without notice or creditors, unless recorded. And for the treatment of this question generally see SALES.

Under a contract which receivers cannot perform.— In Winchester *v.* Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300 [*affirming* 64 Fed. 664], it was held that a contract under which ore was sold to be burned by the purchaser and the cinder remaining after extraction of the sulphur to be the property of the seller required all ore to be burned and no part of it could be disposed of otherwise and that where the purchasing company failed and receivers were appointed who did nothing to and could not burn a considerable part of the ore still on hand, they had no right to sell it for the benefit of their trust; and that in equity it belonged to the sellers and should be returned to them.

Rights reserved under transfer of patent for secret process.— Where one transferred patents for a secret process for making electrodes, under an agreement that he was to retain the secret and conduct the manufacture for the transferee, at a place to which no one else should be admitted, and that on failure by the company to pay royalties, etc., all chemicals, machinery, etc., used in such manufacture should revert to the transferrer and that he might take immediate possession of them, it was held that the transferrer was entitled to the possession of such property as against the receiver of the transferee company pending final determination of his rights and should be allowed a reasonable time in which to remove it. Wilt *v.* Reed Electric Co., 187 Pa. St. 424, 41 Atl. 317.

Consignment.— Where no more appears than that merchandise was shipped to be sold on commission, the goods are consigned property, and the shipper is entitled to the possession of them as against the receiver of the consignee. Williamson *v.* Prairie Queen Mill Co., 111 Ill. App. 373. But the receiver of the property of a debtor is entitled to the proceeds of goods theretofore consigned by the debtor for sale on commission, as against a creditor who claims such proceeds by virtue of garnishment proceedings had against the commission merchant after the receiver was appointed. Pope *v.* Ames, 20 Oreg. 199, 25 Pac. 393.

Foreign and ancillary receivers see *infra*, VIII.

83. Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656.

Chattel mortgage invalid as to third persons.— Weill *v.* Zacher, 92 Ill. App. 296 (holding that while a receiver, representing the insolvent, could not reach assets which equitably should be subjected but which the insolvent had placed beyond the reach of creditors, the creditor had a right to reach such assets by proceedings supplemental to his judgment; that the mere intervening of a receiver in the proceedings to subject such assets did not affect that right and that a purchaser at a receiver's sale of property embraced in a chattel mortgage which was not acknowledged in compliance with the requirements of the statute, and was therefore invalid as against *bona fide* purchasers and creditors although valid as between the mortgagor and the mortgagee, took title free from such encumbrance); Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154 [*affirmed* upon other grounds in 161 Ill. 281, 43 N. E. 1074] (holding that a chattel mortgage which is void because not properly executed was void after the appointment of a receiver in a creditor's suit as against claims of creditors of the receiver in the management of the property).

84. See *infra*, VI, B, 1, a.

As representing all parties see *infra*, IV, E.

Contracts, leases, etc. see *infra*, IV, F, 6, e.

Defenses see *infra*, VI, C.

Repudiation of invalid transactions see *infra*, VI, B, 1, c.

85. Fitch *v.* Wetherbee, 110 Ill. 475; Morrison *v.* Savage, 56 Md. 142; McIlrath *v.* Snure, 22 Minn. 391; Prentiss *v.* Nichols, 100 N. Y. 227, 3 N. E. 81; Wilcox *v.* National Shoe, etc., Bank, 67 N. Y. App. Div. 466, 73 N. Y. Suppl. 900; Hyde *v.* Lynde, 4 N. Y. 387; Ironwood *v.* Coffin, 39 Misc. (N. Y.) 278, 79 N. Y. Suppl. 502.

Property held under fraudulent or invalid sale.—A receiver in a suit on behalf of creditors is held not to take title, and therefore as to property which had been fraudulently conveyed, he has at most only a right to some affirmative action to have the conveyance set aside. Tapscott *v.* Lyon, 103 Cal. 297, 37 Pac. 225; Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405. See also Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678 (as to receiver in supplementary proceedings); Prentiss *v.* Nichols, 100 N. Y. 227, 3 N. E. 81. And if the fraudulent assignee is in possession of the property it has been held that the proper practice is to have the receivership extended to him so that an order might be obtained requiring him to deliver over the property in controversy to the receiver in a creditors' suit. Cassillar *v.* Simons, 8 Paige (N. Y.) 273. So, to cancel a certificate of sale under

property is conveyed or assigned to him by the party under the court's order, the receiver can claim only such rights as the grantor or assignor could have enforced.[86]

(II) *EQUITIES, LIENS, ETC.*[87] The general rule is that a receiver takes the property of which he has been appointed in the same plight and condition and subject to the same equities and liens as he finds it in the hands of the person or corporation out of whose possession it is taken.[88] And it is held that any

execution held by a stranger to the receivership suit, the receiver must bring an independent action. Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136. See also *infra*, IV, D, 5, h, (II).

86. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; Brownson *v.* Roy, 133 Mich. 617, 95 N. W. 710, holding that where rents are assigned to secure the payment of a claim, a subsequent conveyance of the premises, under the court's order, to a receiver does not destroy the right created by the assignment, so as to entitle the receiver to the rents, as against the assignee.

87. Time of vesting or accrual of right or title see *infra*, IV, D, 4.

88. *California.*— Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177; Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358; Naglee *v.* Palmer, 7 Cal. 543.

Colorado.— Hammond *v.* Solliday, 8 Colo. 610, 9 Pac. 781.

Georgia.— Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111, receivers are not purchasers for value. Under a statute giving a new remedy by injunction and receivership in a suit by creditors against insolvent traders, preëxisting liens are not interfered with. Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860; Blanchard *v.* Vansyckle, 70 Ga. 278.

Illinois.— Link Belt. Mach. *v.* Hughes, 174 Ill. 155, 51 N. E. 179; Chicago Title, etc., Co. *v.* Smith, 158 Ill. 417, 41 N. E. 1076; Gillam *v.* Nussbaum, 95 Ill. App. 277; Peterson *v.* Lindskoog, 93 Ill. App. 276.

Indiana.— American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345; Totten, etc., Iron, etc., Foundry Co. *v.* Muncie Nail Co., 148 Ind. 372, 47 N. E. 703; J. W. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347; Favorite *v.* Deardorff, 84 Ind. 555; Lorch *v.* Aultman, 75 Ind. 162; Kentucky Southern Bank *v.* Ohio Ins. Co., 22 Ind. 181; Shopert *v.* Indiana Nat. Bank, 41 Ind. App. 474, 83 N. E. 515; Hubbard *v.* Security Trust Co., 38 Ind. App. 156, 78 N. E. 79, holding that where property levied on is returned to the execution defendant upon his giving a delivery bond, a receiver of the execution defendant occupies the same position with regard to the property as said defendant would have occupied.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419; Snow *v.* Winslow, 54 Iowa 200, 6 N. W. 191.

Kansas.— Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108; Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Bates *v.* Wiggin, 37 Kan. 44, 14 Pac. 442, 1 Am. St. Rep. 234.

Massachusetts.— Kittredge *v.* Osgood, 161 Mass. 384, 37 N. E. 369; Colt *v.* Brown, 12 Gray 233.

Missouri.— Rogers, etc., Hardware Co. *v.* Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335, (1895) 32 S. W. 1.

Nebraska.— Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709; Arnold *v.* Globe Inv. Co., 40 Nebr. 225, 58 N. W. 712.

New Jersey.— New Jersey Southern R. Co. *v.* Railroad Com'rs, 41 N. J. L. 235 (holding that the receiver of an insolvent corporation takes its property subject to all the duties and obligations which rested upon the corporation with respect thereto whether imposed by charter or general laws); Van Wagoner *v.* Paterson Gaslight Co., 23 N. J. L. 283; Kane *v.* Lodor, 56 N. J. Eq. 268, 38 Atl. 966; Bolles *v.* Crescent Drug, etc., Co., 53 N. J. Eq. 614, 32 Atl. 1061.

New York.— Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642 (receiver of corporation takes subject to existing liens and obligations); *In re* Binghamton Gen. Electric Co., 143 N. Y. 261, 38 N. E. 297; Matter of Muehlfeld, etc., Piano Co., 12 N. Y. App. Div. 492, 42 N. Y. Suppl. 802, 26 N. Y. Civ. Proc. 90; Dunlop *v.* Paterson F. Ins. Co., 12 Hun 627 [*affirmed* in 74 N. Y. 145, 30 Am. Rep. 283]; Bowling Green Sav. Bank *v.* Todd, 64 Barb. 146 [*affirmed* in 52 N. Y. 489]; Bell *v.* Shibley, 33 Barb. 610; Berliner *v.* Piqua Club Assoc., 32 Misc. 470, 66 N. Y. Suppl. 791; Matter of Pond, 21 Misc. 114, 46 N. Y. Suppl. 999; Matter of North American Gutta Percha Co., 17 How. Pr. 549.

North Carolina.—Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461; Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837.

Ohio.— Gates *v.* Merchants' Banking, etc., Co., 22 Ohio Cir Ct. 724, 11 Ohio Cir. Dec. 721.

Rhode Island.— Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919.

Texas.— Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324; Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

Vermont.— Baldwin *v.* Spear, 79 Vt. 43, 64 Atl. 235.

Wisconsin.— Ford *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766.

United States.— Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855; Scott *v.* Armstrong, 146 U. S.

previous equitable assignment of property will be enforced in a court of equity against the receiver.[89]

(III) *SET-OFF AND COUNTER-CLAIM.*[90] While the cases are not entirely harmonious on this subject, yet upon the principle last stated,[91] and because the receiver can acquire no greater interest than the debtor had in the estate,[92]

499, 13 S. Ct. 148, 36 L. ed. 1059; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Horn *v.* Pere Marquette R. Co., 151 Fed. 626; Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418; New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659; Auten *v.* City Electric St. R. Co., 104 Fed. 395; Cohen *v.* Gold Creek, Nevada, Min. Co., 95 Fed. 580; McRae *v.* Bowers Dredging Co., 86 Fed. 344; Georgia *v.* Atlantic, etc., R. Co., 10 Fed. Cas. No. 5,351, 3 Woods 434.

See 42 Cent. Dig. tit. "Receivers," §§ 124, 138.

Void contract.— Where one made a contract with a bank, after it had suspended payment, to purchase real estate belonging to it, agreeing to pay in instalments and in the bills of the bank, a deed being executed by the corporation and deposited in the hands of a third person to be delivered on payment of the bills, it was held that such purchaser could not tender the bills and require a deed from the receiver of the corporation. Suydam *v.* New-Brunswick Bank, 3 N. J. Eq. 276.

Appropriation by bank of depositor's balance.— Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111, holding that where a depositor of a bank instructed it to charge to his account a note upon which he was surety and which was payable to the bank, it being agreed that the bank should at any time thereafter have the right to make such entry, and that the note should be held by the bank, to be collected for the benefit of the depositor and the account of the depositor was at no time to be drawn down to an amount less than the amount of the note, such agreement gave to the bank a right which it would not otherwise have had, and that the depositor became the owner of the note, and entitled to the amount collected on it, as against the receiver of the bank.

Trust fund.— The receiver of an insolvent corporation acquires no right in a trust fund held by the corporation. This rule was applied to money of a ward which was placed in a bank without right and mingled with the funds of the bank so that its assets were augmented and bettered in a tangible way, and when a receiver subsequently appointed sold the assets to one having knowledge of the facts the purchaser was held as a trustee of the fund. Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108.

Disaffirmance or rescission — *By minor.*— Where a minor who becomes indebted to a corporation properly rescinds the transaction, the receiver takes the property subject to the minor's rights. Seeley *v.* Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961.

Proceeds of a fraudulent sale of its stock by a corporation are held not to be assets of the corporation in the hands of its receiver as against the rescinding purchaser; that as to him the receiver is holding property which did not belong to the corporation. Merrill *v.* Florida Land, etc., Co., 60 Fed. 17, 8 C. C. A. 444, 52 Fed. 77, 2 C. C. A. 629.

Deposits fraudulently received see BANKS AND BANKING, 5 Cyc. 564.

Election of remedies.— Where a bank, known to its officers to be insolvent, accepted a deposit, the action of the depositor in including the amount of such deposit, which went into the hands of the receiver of the bank, in his claim, did not amount to an election of remedy or create an equitable estoppel which precluded him, on learning the facts, from recovering the amount of such deposit upon tendering back the dividends received thereon. Richardson *v.* Olivier, 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113.

In foreclosure proceedings see MORTGAGES, 27 Cyc. 1630.

Liens or priorities subsequent to appointment see *infra*, IV, D, 7, e, (III).

Lien transferred to proceeds see *infra*, V, B, 1, e, (IV).

Mechanics' liens see MECHANICS' LIENS, 27 Cyc. 290.

Parties entitled to priority see *infra*, V, B, 1, a *et seq.*

Property of insolvent corporation as trust fund see CORPORATIONS, 10 Cyc. 1236 *et seq.*

Title acquired by sale see *infra*, IV, H, 12, c.

89. Miller *v.* Savage, 60 N. J. Eq. 204, 46 Atl. 632 [*reversed*, however, upon the application of the rule, in 62 N. J. Eq. 746, 48 Atl. 1004 (holding that a mortgage given by an insolvent corporation to secure general creditors should not be reformed after it has been adjudged insolvent and a receiver has been appointed, to correct a mistake of the draughtsman by which a life-estate instead of the fee was conveyed, where the mortgagees have not changed their attitude on the supposition that the fee was conveyed)]; *In re* Le Blanc, 75 N. Y. 598 [*affirming* 14 Hun 8]; Fourth St. Nat. Bank *v.* Yardley, 165 U. S. 634, 17 S. Ct. 439, 41 L. ed. 855.

Dividends declared on corporate stock see CORPORATIONS, 10 Cyc. 546 text and notes 16–20.

90. See, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

Effect of failure to file claim see *infra*, V, A, 2, b, text and note 64.

Leave to sue receiver see *infra*, VI, D, 2, a *et seq.*

91. See *supra*, IV, D, 3, d, (II).

92. Hade *v.* McVay, 31 Ohio St. 231;

the general rule may be said to be that the appointment of a receiver does not affect a right of set-off then existing;[93] choses in action pass to him subject to the equitable right of set-off then existing,[94] so that a debtor of the insolvent

In re Hamilton, 26 Oreg. 579, 38 Pac. 1088. See also *supra*, IV, D, 3, a.

93. State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138; Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419; Cox *v.* Volkert, 86 Mo. 505; Hade *v.* McVay, 31 Ohio St. 231, upon the ground that the receiver of a corporation succeeds only to the rights of the corporation at the time it goes into liquidation.

94. *Georgia.*— Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138, right of depositor to set off his claim against his debt to bank on note.

Iowa.— Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419, set-off of claim for legal services rendered a corporation pending a suit for the appointment of a receiver against an account for goods purchased from the corporation before the appointment.

Maine.— See American Bank *v.* Wall, 56 Me. 167, as to set-off by indorser of note held by bank, of bills of the bank held by the indorser when the bank failed and passed into the hands of the receiver.

Massachusetts.— Colt *v.* Brown, 12 Gray 233.

New Jersey.— Van Wagoner *v.* Paterson, Gaslight Co., 23 N. J. L. 283, holding that as between the receiver of an insolvent corporation and a debtor thereof, in an action by the receiver, a set-off at law is not authorized because the claims are not mutual, but by analogy to the rules applied in bankruptcy such debtor is equitably entitled to set off such claims as he had against the corporation at the time the receiver was appointed; and that under the statute in that state to prevent frauds by incorporated companies which provides that the receiver shall have the right in case of mutual dealings between the said corporation and any other person or persons to allow just set-offs in favor of such persons, in all cases in which it shall appear to the said receiver or receivers that the same ought to be allowed according to law or equity, the remedy is available at law.

New York.— Hughitt *v.* Hayes, 136 N. Y. 163, 32 N. E. 706; *In re* Van Allen, 37 Barb. 225 (holding that the principle that parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver does not prevent the application of the doctrine of set-off, where the credit equitably and in reality belongs to the same persons from whom the debt is owing, or where it is established, or is obvious, from the dealings of the parties, that their contract or intention was to apply the one in extinguishment of the other); Berry *v.* Brett, 6 Bosw. 627 [*distinguishing* Lawrence *v.* Nelson, 21 N. Y. 158, *infra*, note 97]; Matter of Croton Ins. Co., 3 Barb. Ch. 642; Holbrook *v.* American F. Ins. Co., 6 Paige 220 (as to equitable adjustment of cross claims in the case of a receivership of an insolvent corporation under the statutes); Matter of Middle Dist. Bank, 1 Paige 585, 19 Am. Dec. 452; Miller *v.* Franklin Bank, 1 Paige 444. But see Haxton *v.* Bishop, 3 Wend. 13.

North Carolina.— Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322, holding that since the code authorizes the receiver of an insolvent corporation to sue for debts due it, either in his own or its name, his complaint in his own name is subject to all legal or equitable counter-claims against the corporation.

Ohio.— Armstrong *v.* Warner, 49 Ohio St. 376, 31 N. E. 877, 17 L. R. A. 466; Hade *v.* McVay, 31 Ohio St. 231 (right to plead a set-off in action by receiver, under a general statute providing that "when cross-demands have existed between persons under such circumstances, that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other"); Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100.

Oregon.— *In re* Hamilton, 26 Oreg. 579, 38 Pac. 1088.

Rhode Island.— Clarke *v.* Hawkins, 5 R. I. 219, following the rule as to set-off against insolvent estates applied under the bankrupt systems of England and the United States; that is, without regard to any special connection between the claims sought to be set off, to sink the sum due to the insolvent by the amount of the sum actually due from him to his debtor.

United States.— Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059.

See 42 Cent. Dig. tit. "Receivers," § 136.

But see Eastern Bank *v.* Capron, 22 Conn. 639.

Equitable appropriation of depositor's balance.— In Chase *v.* Petroleum Bank, 66 Pa. St. 169 [*approved* in Lamb *v.* Morris, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111], a depositor, having a balance to his credit in his bank, procured the bank to pay a debt for him upon his agreement that the balance should be applied in payment; the bank paid the debt, and the depositor gave his note for the amount to the bank, and before the balance was actually applied and the account adjusted, the bank failed, holding the depositor's note, which, with the other assets of the bank, was taken possession of by a receiver, and in an action by the receiver to collect the note it was held that the agreement effected an equitable appropriation of the balance of the deposit account to the payment of the note. See also Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059.

who has such right is not bound to pay what he owes and take his chances with the other creditors, but is bound to pay only the balance.[95] But the right of set-off in such cases exists only to the extent of the concurrence of the two claims. No lien can be obtained against the receiver for any excess due defendant,[96] and to entitle a debtor of an insolvent corporation to offset his claim against the receiver in a case not provided for by the statute, his natural equity to have one

Allowance by receiver under statute.— State Bank *v.* New Brunswick Bank, 3 N. J. Eq. 266, holding that under Act Feb. 16, 1829, "to prevent frauds by incorporated companies," which act did not confine itself to legal set-offs but referred to just set-offs and expressly directed the receivers to allow them when they ought to be allowed according to equity, the receivers had equitable powers and that a claim which cannot be allowed as a set-off under the statute to enable mutual dealers to discount may be allowed as a set-off by receivers appointed under the act. See also Van Wagoner *v.* Paterson Gaslight Co., 23 N. J. L. 283 (as to allowance of set-off in action at law, under such statute); *In re* Van Allen, 37 Barb. (N. Y.) 225 (where it is said that where the debt is unliquidated and incapable of liquidation without the aid of a jury or of extrinsic evidence, the right of set-off is not absolute, but in equity must depend upon the circumstances of the case; that it does not come within the statute of set-off, but at the same time the receiver would not be justified in interposing any unconscionable obstacles to the liquidation of the demand, or with unreasonable haste to press the collection of the claim due to the corporation with a view of excluding the set-off).

There must be mutual debts and credits, and although the debt to the insolvent may not be due, the creditor may waive the credit and a court of equity will then apply it upon the debt from the insolvent, if that has matured. Hughitt *v.* Hayes, 136 N. Y. 163, 32 N. E. 706. To the same effect see Berry *v.* Brett, 6 Bosw. (N. Y.) 627 [*distinguishing* Lawrence *v.* Nelson, 21 N. Y. 158, *infra*, note 97]; Scott *v.* Armstrong, 148 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059 (equitable but not legal right of set-off). See also Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

Allowance in equity of claims not due for want of demand.— It has been held that in the eye of a court of equity claims will be regarded as due, notwithstanding the absence of a technical demand, when equitable considerations require that they shall be applied each to the other. Hughitt *v.* Hayes, 136 N. Y. 163, 32 N. E. 706.

Claims accruing during receivership or after insolvency.— Where a claim accrues pending a receivership and the appointment of a receiver amounts to an equitable execution upon all the property and choses of a debtor and the assumption of them by the court for distribution among creditors upon equitable principles, it is held that such claim cannot be set off against a debt due to the original debtor as that would give the creditor preference over other creditors to which he is not entitled. Wheeler Bridge, etc., R. Co. *v.* Cochran, 68 Fed. 141, 15 C. C. A. 321. See also U. S. Trust Co. *v.* Harris, 2 Bosw. (N. Y.) 75. So in Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467, in an action by a receiver of a national bank on a note due the bank from two jointly at the time of the assignment, it was held that notes made by the bank and others and which were not due and were owned by one of the defendants only at the time of the appointment, could not be set off against the receiver's claim, since the failure of defendants to pay the note when due ought not to place them in a better position than they would have occupied had they paid the note at maturity, in which event the proceeds would have passed into the hands of the receiver subject to ratable distribution. In Lees *v.* Hayden, 78 Hun (N. Y.) 370, 29 N. Y. Suppl. 179, it was held that where an assignment for the benefit of creditors was set aside at the suit of a creditor as fraudulent and a receiver was appointed, one who had given a note payable on demand to the assignee for goods purchased from the assignor could not set off a draft on the assignor which he owed but which was not due when the assignment was made, although it matured before the assignment was set aside. In Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 1 Keyes 9, where the debtor gave a note to the assignee of the insolvent and thereafter and subsequently to the commencement of an action to set aside the assignment at the suit of another creditor, acquired a note made by the insolvent and recovered a judgment thereon against the receiver, it was held that the judgment merely determined the validity of the claim, and could not be set off in an action by the receiver against the holder of the note. But under a statute in North Carolina a receiver of an insolvent corporation being authorized to sue for debts due it either in his own name or in the name of the corporation, it was held that creditors of the corporation are those to whom it was indebted at the date of the appointment of the receiver whether the debts were then due or not. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

95. See the cases cited *supra*, note 94. See also BANKRUPTCY, 5 Cyc. 379; BANKS AND BANKING, 5 Cyc. 569, 603, 612; INSOLVENCY, 22 Cyc. 1284, 1316, text and note 1; INSURANCE, 22 Cyc. 1409, 1425; and, generally, RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

96. Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those parties for whose benefit his claim to an equitable offset is resisted.[97] The debts must have been due to and from the same persons in the same capacity in order that the right of set-off may exist,[98] and as against a receiver as the representative of the creditors of an insolvent, a claim against the latter cannot be set off,[99] and where the receiver of a corporation,

97. Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378, holding that a depositor in, who was also a creditor of, an insolvent savings bank was not entitled to set off the amount of his deposit against his indebtedness, because of the relation which the depositors in such institutions bore to each other and to the property of the bank as stock-holders in other monetary institutions; that the assets of such banks were its invested funds, the common contributions of all the depositors, in which they all had a common interest, and all the profits of the business were divided among the depositors or accumulated in a surplus fund for their joint benefit and greater security, and as each depositor was entitled to his proportionate share of the profits, so, in equity, each should bear his proportionate share of the losses. See also BANKS AND BANKING, 5 Cyc. 612.

Mutual insurance company.— So in Lawrence *v.* Nelson, 21 N. Y. 158 [*distinguished* in Berry *v.* Brett, 6 Bosw. (N. Y.) 627, in that in this case the insurance company was an ordinary one in which any one could be insured and credits could be given on insurance premiums and the premiums were not required to be kept as a fund], it is held that a member of a mutual marine insurance company which had become insolvent could not set off against his indebtedness for premiums due upon policies a loss sustained by him which had been adjusted and was payable by the company, since the premiums in such a company constituted a fund which as insurer the member was bound to make good for the benefit of all creditors, and in his quality of assured he was bound to take a *pro rata* dividend from such fund. See also INSURANCE, 22 Cyc. 1425.

As between stock-holder and corporation.— The capital stock of a corporation is a trust fund for the security and payment of creditors, and a stock-holder cannot set off a debt due him from the corporation, which is insolvent, against his liability for unpaid subscriptions. Williams *v.* Traphagen, 38 N. J. Eq. 57; Hannon *v.* Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378; Lawrence *v.* Nelson, 21 N. Y. 158; Efird *v.* Piedmont Land-Imp., etc., Co., 55 S. C. 78, 32 S. E. 758 [*distinguishing* Nettles *v.* Marco, 33 S. C. 47, 11 S. E. 595, in that there the advances were made by a stock-holder, with the knowledge and approval, and for the benefit, of the corporation; and that the principal reason why he was not compelled to pay the amount he subscribed was because the directors, who were clothed with authority for that purpose, in good faith released him from any further payment on his subscription]. And in a suit in equity by a receiver against all the stock-holders, for contribution of such part of unpaid subscriptions as is necessary to pay debts, individual stock-holders cannot plead in set-off debts due them from the corporation. Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015. See also Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322, where it is said that the word "debtor" of an insolvent bank does not include a stock-holder against whom the receiver may be directed to recover sums due for stock subscriptions, as such liability is due to the receiver and not to the corporation. But where a stock-holder had paid to the corporation an amount on a proposed increase of the capital stock which was never effected because of the insolvency of the corporation, it was held that such sum may be set off against a note executed by the stock-holder for a loan and in the hands of the receiver. Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100. See also as against liquidators winding up corporations *In re* Paraguassu Steam Tramroad Co., L. R. 8 Ch. 254, 42 L. J. Ch. 404, 28 L. T. Rep. N. S. 50, 21 Wkly. Rep. 249; *In re* Overend, L. R. 1 Ch. 528, 35 L. J. Ch. 752, 14 L. T. Rep. N. S. 843, 14 Wkly. Rep. 1015. And a stock-holder sued by the liquidator of an insolvent corporation for his subscription, to pay bonds and coupons of a series, for which his stock mortgage was pledged was held entitled to plead in compensation bonds and coupons of the same series which he holds himself. Haynes *v.* Kent, 8 La. Ann. 132. And as to the nature of capital stock as a trust fund generally see CORPORATIONS, 10 Cyc. 653 *et seq.*

98. Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467; Williams *v.* Traphagen, 38 N. J. Eq. 57; Bowling Green Sav. Bank *v.* New York, 52 N. Y. 489 [*affirming* 64 Barb. 146]; *In re* Van Allen, 37 Barb. (N. Y.) 225, holding that where, on the one side, the debt due to a bank is due from a firm or from several persons jointly, and the credit belongs to an individual, or *vice versa*, equity does not require or justify an application of the rule of set-off; that it cannot be said, in any just sense, that these are mutual debts or credits.

Set-off in behalf of receiver.— The receivers of a railroad system cannot set off, as against a claim for rentals accruing to a leased line during the receivership, any cross demands alleged to have accrued to the lessee prior to the receivership, since the two claims arose in different rights. Farmers' L. & T., etc., Co. *v.* Northern Pac. R. Co., 58 Fed. 257.

99. Hall *v.* Holland House Co., 12 Misc. (N. Y.) 55, 33 N. Y. Suppl. 50 [*affirming* 9 Misc. 245, 30 N. Y. Suppl. 263, 10 Misc. 778, 30 N. Y. Suppl. 1132], where this rule is

as the representative of creditors,[1] repudiates an illegal transfer of corporate assets before his appointment, the transferee cannot set up a counter-claim arising out of his own illegal contract for money paid in pursuance of it.[2] Claims acquired after insolvency, where the statute prohibits preferences and assignments after insolvency,[3] or after the appointment of a receiver, cannot be set off against him.[4] And where the rights of the receiver become fixed at the time of his appointment, the rights of creditors to an equal distribution of the assets of an insolvent cannot be disturbed by permitting a debtor to acquire a claim against the insolvent after the appointment of a receiver and to accomplish a set-off, thus acquiring a preference to that extent,[5] and the assignment of a claim against an insolvent corporation after the appointment of a receiver will not affect the receiver's right to set off against it claims which he holds against the assignor.[6] So it is held that a claim against an estate before the receivership cannot be set off against a claim accruing to the receiver after his appointment,[7] although a court of equity, like a court of law, will not compel a party to do a vain thing, and therefore will not order him to pay money into court which he would be entitled to receive back immediately.[8]

applied to a note made by a foreign corporation when attempted to be set up in an action by a receiver who represents only the domestic creditors. So in Osgood *v.* Ogden, 3 Abb. Dec. (N. Y.) 425, 4 Keyes 70, the rule is applied to a claim against an insolvent corporation attempted to be asserted in an action by the receiver to set aside a transfer or recover payments made by the corporation in fraud of its creditors. See also *supra*, note 97.

1. See *infra*, IV, E, 2; VI, B, 1, c.

2. Gillet *v.* Phillips, 13 N. Y. 114.

3. Miller *v.* Audenried, 67 N. J. Eq. 252, 57 Atl. 1076 [*affirmed* in (1905) 60 Atl. 1134].

The burden is on defendant, in an action by the receiver, to show that he acquired the claim asserted as a set-off prior to the filing of the bill by which the assets of the insolvent were impounded for the benefit of all its creditors. Smith *v.* Mosby, 9 Heisk. (Tenn.) 501; Lanier *v.* Gayoso Sav. Inst., 9 Heisk. (Tenn.) 506.

4. *In re* Beecher, 19 N. Y. Suppl. 971.

5. Van Dyck *v.* McQuade, 85 N. Y. 616; *In re* Van Allen, 37 Barb. (N. Y.) 225; Hall *v.* Holland House Co., 12 Misc. (N. Y.) 55, 33 N. Y. Suppl. 50; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; *In re* Hamilton, 26 Oreg. 579, 38 Pac. 1088. *Compare* Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467, *supra*, note 94.

Before and after insolvency see BANKRUPTCY, 5 Cyc. 379; BANKS AND BANKING, 5 Cyc. 570, 603; INSOLVENCY, 22 Cyc. 1316.

6. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

7. Chicago Architectural Iron Works *v.* McKey, 93 Ill. App. 244; Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Stowe *v.* Hamilton First Nat. Bank, 1 Ohio Cir. Ct. 524, 1 Ohio Cir. Dec. 292, where after the dissolution of a partnership and the appointment of a receiver he was made a party to a suit by a bank on a note pledged by the partnership and set up a claim for judgment against the makers for the balance after satisfaction of the principal debt of the partnership to the bank, and the amount of such collateral note having been paid to the bank without prejudice to the receiver, it was held that the bank could not set up as against the receiver's right to the balance, after satisfying the principal note, another debt of the partnership to the bank, since the receiver's claim was one against the makers of the collateral note and when the bank received the payment, it was money received to his benefit and became a claim against the bank. See also Beeler *v.* Pittsburgh Farmers', etc., Turnpike Road Co., 14 Pa. St. 162.

When the action is ex delicto for the wrong of defendant, an equitable offset will not be allowed. McQueen *v.* New, 86 Hun (N. Y.) 271, 33 N. Y. Suppl. 395, as to a claim against the corporation for goods which he was induced to sell it on the false representations of its officers, in an action by the receiver of the corporation against defendant for a conversion of goods belonging to the corporation, the court saying that if such a procedure could obtain, a new way to get payment for old debts might easily be imagined; that all that a creditor of an insolvent corporation, of which a receiver had been appointed, would have to do in order to procure a preference over the other creditors of the corporation, would be to take possession of the property of the corporation and convert it to his own use, and, when an action was brought for its conversion, ask to offset his claim.

As against a claim of a receiver for goods purchased from him, a creditor of the corporation over which the receiver was appointed cannot set off a claim due him from the corporation. Cook *v.* Cole, 55 Iowa 70, 7 N. W. 419.

On purchase at receiver's sale see *infra*, IV, H, 10.

8. Naglee *v.* Palmer, 7 Cal. 543, where plaintiff filed a bill as receiver of an insolvent firm, to foreclose a mortgage given to plaintiff in that capacity to secure a certificate

e. Acquiring Liens After Appointment. One who has no lien when a receiver is appointed, although the mere right to acquire one may then exist,[9] cannot proceed for that purpose by independent action after the appointment of the receiver and gain a preference over other creditors, as in the case of the administration of insolvent's estates in which creditors are entitled to *pro rata* and equitable distribution.[10] The application of this rule depends upon the nature of the suit in which the receiver is appointed,[11] and the rule has been held not to apply to a receiver *pendente lite* where the sole object is to preserve the property for the purpose of the decree as between the parties to the suit only, without affecting the interests of third persons as distinguished from a receivership for the general administration of assets as above mentioned.[12]

4. Time of Vesting or Accrual of Right or Title — a. In General. In so far as the rule against the acquiring of preferences after the appointment of a receiver is concerned, the receiver's rights become fixed at the date of his appointment.[13]

of deposit for one hundred thousand dollars, originally deposited by the receiver, and defendants admitted the debt, but claimed that the amount was to be distributed *pro rata* among the creditors of the insolvents, whom plaintiff represented; that the claims of the creditors had been filed and reported upon; that defendants were large creditors of the insolvents, and that they would, upon the distribution of the assets, be entitled to fifty thousand dollars as their dividend; and that defendants had advanced a further sum to the former custodians of the assets of about fifty thousand dollars, which they prayed to have ascertained, and the whole amount set off against the certificate of deposit, and until then, that plaintiff be restrained, and it was held that a court of equity would not compel them to pay the money into court, which they would immediately be entitled to receive back, but would order an account and allow the set-off.

A debtor of the estate who becomes creditor of the receiver for services rendered, which is a necessary expense in protecting the trust property, may have the reasonable value of such services considered as an equitable set-off against the debt due from him to the estate, since the receiver has the right to incur and pay such expenses, and the same result would follow by paying the party and immediately taking back the sum in payment of his debt to the estate. Davis *v.* Stover, 58 N. Y. 473.

Rents accruing from persons adjudged to be owner.— Where, pending the determination of the ownership of property, a party in possession entered into a lease for the whole and paid the receiver rent therefor up to a certain time, and it was ultimately determined that such party owned one half of the property, in an action for rent of the whole by the receiver it was held that defendant could set off against the rent claimed the amount which he had paid on the property adjudged to be his; that this was not a case in which defendant, indebted to an estate which is insolvent, seeks to set off a claim against the estate in absolute payment of a debt due from him and thus obtain a preference, since an undivided one half of the property was never the property of the estate vested in the receiver but was wrongfully taken possession of by him and the rent therefor belonged to defendant and is held by the receiver as defendant's money. Grant *v.* Buckner, 172 U. S. 232, 19 S. Ct. 163, 43 L. ed. 430 [*affirming* 49 La. Ann. 668, 21 So. 580].

9. Halpern *v.* Clarendon Hardwood Lumber Co., 64 Ark. 132, 40 S. W. 784.

10. *Arkansas.*— Halpern *v.* Clarendon Hardwood Lumber Co., 64 Ark. 132, 40 S. W. 784, as to effect of receivership of insolvent corporation.

Georgia.— Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860, under the statute in Georgia relating to insolvent corporations and traders.

Illinois.— Jackson *v.* Lahee, 114 Ill. 287, 2 N. E. 172.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457, where it is held that preference orally agreed upon at the time of appointment must be disregarded.

Kansas.— Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617.

Louisiana.—*In re* Immanuel Presby. Church, 112 La. 348, 36 So. 408.

Minnesota.— Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467.

Oklahoma.— Foster *v.* Field, 13 Okla. 230, 74 Pac. 190.

Pennsylvania.— Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075, after receiver appointed for insolvent corporation.

South Carolina.— Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850; Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318.

See 42 Cent. Dig. tit. "Receivers." § 138.

Effect of discharge see *infra*, VII, E.

Foreign and ancillary receivership see *infra*, VIII.

11. See *infra*, IV, D, 6, b; IV, D, 7, e. See also Partnership, 30 Cyc. 730 text and note 26, 731 text and note 40 *et seq.*

Set-off see *supra*, IV, D, 3, d, (III).

12. Ellicott *v.* U. S. Insurance Co., 7 Gill (Md.) 307; Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075; Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318.

13. *In re* Van Allen, 37 Barb. (N. Y.) 225.

His title accrues at that time,[14] and thenceforth at the farthest the property is *in custodia legis*,[15] so that other creditors, up to that time, may pursue their legal remedies and acquire liens and priorities, the order of appointment not relating back to the commencement of the suit as against third persons.[16] A distinction, however, is made with reference to the kind of property to which this principle is applied, in that a lien obtained by the commencement of a creditor's suit attaches upon equitable assets and choses in action of the debtor, but that as to tangible personal property and real estate the receiver's title commences from the date of the appointment and overreaches all intermediate liens.[17] On the other hand it is also held that where a bill brings under the direct control of the court all the property and estate of defendants, or of certain named defendants, or certain designated property of all or either of defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may be held to be *in gremio legis*;[18] and such has been held to be the effect of a bill having

Notice see *infra*, IV, D, 5, j.

Set-off see *infra*, IV, D, 3, d, (III).

14. See the cases cited *infra*, this note.

Upon signing order.— It has been held that where the order of appointment is signed by the judge at chambers, on presentation to him of the bill and answer, which have not been filed, to take effect when the pleadings and order are filed with the clerk, becomes effective on such filing, any delay in transcribing the order upon the records or in the qualification of the receiver is immaterial. Horn *v.* Pere Marquette R. Co., 151 Fed. 626.

Upon filing of order.— Where an order appointing a receiver is signed by a judge at his residence upon the presentation to him of a petition for voluntary dissolution, and the papers are turned over to the attorney presenting the petition, the order is not perfected until it is filed with the clerk of the court. Wilcox *v.* National Shoe, etc., Bank, 67 N. Y. App. Div. 466, 73 N. Y. Suppl. 900.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1459, 1462.

15. *New York.*— *In re* Schuyler's Steam Tow Boat Co., 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391 (appointment of receiver of corporation in proceeding for voluntary dissolution); Van Alstyne *v.* Cook, 25 N. Y. 489; Mosher *v.* Supreme Sitting O. I. H., 88 Hun 394, 34 N. Y. Suppl. 816.

North Carolina.— Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461.

South Carolina.— Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850; Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318, settlement of affairs of corporation.

Tennessee.— McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Wisconsin.—Hagedon *v.* State Bank, 1 Pinn. 61, 39 Am. Dec. 275.

See 42 Cent. Dig. tit. "Receivers," § 126.

Conflicting jurisdiction see COURTS, 11 Cyc. 982.

16. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457 (which was a suit by a stock-holder against an insolvent corporation and it was held therein that a pendency of an application for the appointment of a receiver did not defeat a creditor's right to attach); Van Alstyne *v.* Cook, 25 N. Y. 489 (after suit for settlement of accounts of insolvent limited partnership); Matter of Muehlfeld, etc., Piano Co., 12 N. Y. App. Div. 492, 42 N. Y. Suppl. 802, 26 N. Y. Civ. Proc. 90 (validity of lien of judgment recovered and execution issued against a corporation after petition filed for voluntary dissolution); Matter of Gies Lithographic Co., 7 N. Y. App. Div. 550, 40 N. Y. Suppl. 146 (execution against corporation before appointment of receiver in proceedings for voluntary dissolution); Bergin *v.* Deering, 70 Hun (N. Y.) 379, 24 N. Y. Suppl. 36 (in suit for settlement of partnership which did not appear to be insolvent); Artisans' Bank *v.* Treadwell, 34 Barb. (N. Y.) 553 (in suit for settlement of insolvent limited partnership); Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461. See also *infra*, IV, D, 7, e.

In New Jersey it was held in Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436, that the lien of attachments which were levied, some before and some after an injunction issued in a suit against an insolvent foreign corporation on behalf of complainant and other creditors, but before the receiver was appointed, should be given preference. But under the Act of 1896 (pp. 298, 299, § 68) the title of the corporation ceases upon the adjudication of insolvency or the appointment of a receiver. Squire *v.* Princeton Lighting Co. (1907) 68 Atl. 176.

17. Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461, applying the rule that if tangible personal property is levied upon by execution or attachment prior to the appointment of the receiver, it passes to the receiver subject to the lien of the levy. The same distinction is observed in Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 3 Keyes 13, and Storm *v.* Wardell, 3 Sandf. Ch. (N. Y.) 494.

18. Illinois Steel Co. *v.* Putnam, 68 Fed.

for its object the appointment of a receiver and the payment and discharge of the debts of defendant, especially where the judge has acted upon the application in such a way as to indicate that he will investigate the matter and may appoint a receiver at some future date,[19] and of proceedings under statutory provisions for the distribution of the estates of insolvent debtors.[20]

515, 15 C. C. A. 556, holding, however, that where a stock-holders' bill asks the appointment of a receiver for a railroad merely to secure better management till arrangements can be made for discharging the company's debts, the mere filing thereof, and the service of process, do not draw the property into the possession of the court, so as to prevent the company, prior to a receiver's appointment, from surrendering rails not attached to its road in partial extinguishment of the purchase-price of a large lot of rails.

After institution of a foreclosure suit, the mortgage covering all the property and net earnings of a railroad company, in which a receiver is appointed according to the prayer of the bill, no lien on such earnings can be acquired by a general creditor. Farmers' L. & T. Co. *v.* Detroit, etc., R. Co., 71 Fed. 29. See also, generally, MORTGAGES, 27 Cyc. 1621. And for the nature of liens and priorities on railroad property in general see RAILROADS, 33 Cyc. 458 *et seq.*

19. Riesner *v.* Gulf, etc., R. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171 (where it was said, however, that this might not apply to a case where third parties had acquired rights in the property for a valuable consideration without notice, as for instance, by purchase from defendant or by a contract lien a valuable consideration paid, and that if such case should arise the equities of such persons would be recognized and protected); Ft. Worth City Nat. Bank *v.* Merchants' Nat. Bank, 7 Tex. Civ. App. 584, 27 S. W. 848. But see Callahan *v.* Consumers Ice, etc., Co., 13 Ohio Cir. Ct. 479, 7 Ohio Cir. Dec. 349 (where it was held that the commencement of an action in which the appointment of a receiver for a corporation was asked does not confer such right to the possession of the corporate property as will preclude an assignee in a deed of general assignment for the benefit of creditors, executed before the appointment of the receiver, from obtaining possession of the property, since there could be no action for the appointment of a receiver as the ultimate relief, and therefore, while the court in such a case acquired jurisdiction of the controversy to proceed to final adjudication without interruption by any other tribunal, the appointment of the receiver is not the cause of action and the institution of the suit does not preclude another court from seizing the property before a receiver is appointed); Wilmer *v.* Atlantic, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

Vacation of order discharging receiver — notice of proceeding. In Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536, it was held that an order vacating an order discharging a receiver and reinstating the order of appointment, modified only as to the name of the receiver and the penalty of the bond, related back to the date of defendant's motion to discharge the receiver and took precedence over a mortgage given later on the same day, the mortgagee having notice of the proceedings for the appointment of the receiver.

20. Whipple *v.* Babcock, 18 R. I. 611, 30 Atl. 464, under a statutory provision authorizing a receiver to be appointed to take "possession of all property . . . of the debtor, including estate and property attached or levied on, within sixty days prior to the filing of said petition," etc., the court holding that the date of the filing of the petition is that which determines the right of the receiver and that property attached or levied on within sixty days therefrom should go to the receiver.

In a proceeding by bill against an insolvent corporation under a statute contemplating the distribution of the estate for the benefit of all creditors, between the issuing of an injunction restraining the corporation and its officers from interfering with its affairs, and the appointment of receivers, attaching creditors acquire no valid liens which can be set up to prevent the receivers from selling the property for the benefit of all creditors. Atlas Bank *v.* Nahant Bank, 23 Pick. (Mass.) 480, where it was held that the sequestration intended to be made by force and operation of the statute took effect not only from the appointment of a receiver which was an incidental step in the proceeding but at least from the act of the court sustaining the suit by issuing an injunction, although it was not decided whether the rights of the parties would relate back to the time of the filing of the bill, it being unnecessary to decide this question. Subsequently it was held that the rights of the parties related back to the time of the filing of the bill. Hubbard *v.* Hamilton Bank, 7 Metc. (Mass.) 340, as to attachment after institution of proceedings. See also Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860; Fogg *v.* Supreme Lodge O. G. L., 159 Mass. 9, 33 N. E. 692; Burdon *v.* Massachusetts Safety Fund Assoc., 147 Mass. 360, 17 N. E. 874, 1 L. R. A. 146.

Date of insolvency. In Crane *v.* Pacific Bank, 106 Cal. 64, 39 Pac. 215, 27 L. R. A. 562, it is held that the date of insolvency as adjudicated in proceedings under the statute fixes the time after which an attachment cannot be levied upon the assets. But a statute in Connecticut providing that attachments shall be dissolved by the appointment of a receiver for a corporation within a prescribed number of days is held to apply only to general receivers of all the property of the corporation situated in the state and not to

b. Relation Back to Time of Appointment. While a receiver cannot intermeddle with the estate in his official capacity before he has qualified and given bond as required, nevertheless his title attaches from the date of the order and not from the date of his compliance with such requirement; when the bond is given his title relates back to the date of his appointment as against intermediate levies or liens,[21] and actual manual seizure is not necessary, but the custody and jurisdiction of the court attach when the appointment is made so that intermediate liens cannot be acquired thereafter, although the receiver has not taken possession.[22]

the appointment of a receiver for mortgaged property only in a suit to foreclose the mortgage. New York Cent. Trust Co. *v.* Worcester Cycle Co., 114 Fed. 659.

Insolvency — *In general* see INSOLVENCY, 22 Cyc. 1249.

Of banks see BANKS AND BANKING, 5 Cyc. 557 *et seq.*

Of corporations generally see CORPORATIONS, 10 Cyc. 1236 *et seq.*

21. *Missouri.*— Maynard *v.* Bond, 67 Mo. 315.

New York.— *In re* Schuyler Steam Tow Boat Co., 136 N. Y. 169, 32 N. E. 623, 28 L. R. A. 391 (restraining proceedings commenced after order of appointment in a suit for the voluntary dissolution of a corporation which interfered with the receiver's possession, although the act might not have been a contempt); *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665 (restraining suits commenced after the usual injunction order and appointment of receiver in voluntary dissolution proceedings, to interfere with the possession of the property which should go into the receiver's hands); Matter of Lenox Corp., 57 N. Y. App. Div. 517, 68 N. Y. Suppl. 103 [*affirmed* in 167 N. Y. 623, 60 N. E. 1115]; Matter of Muehlfeld, etc., Piano Co., 12 N. Y. App. Div. 492, 42 N. Y. Suppl. 802, 26 N. Y. Civ. Proc. 90; Mosher *v.* Supreme Sitting O. I. H., 88 Hun 394, 34 N. Y. Suppl. 816; Rutter *v.* Tallas, 5 Sandf. 610 (after order of appointment in suit to settle partnership accounts); Matter of Hoagland, etc., Co., 36 Misc. 28, 72 N. Y. Suppl. 435; Steele *v.* Sturges, 5 Abb. Pr. 442.

Oregon.— See Pope *v.* Ames, 20 Oreg. 199, 25 Pac. 393.

South Carolina.— Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850 (attachment levy ineffectual); Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318 (judgment entered after order of appointment created no lien as against creditors at large entitled to equitable distribution in the receivership suit).

Texas.— Riesner *v.* Gulf, etc., R. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171; Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

United States.— Horn *v.* Pere Marquette R. Co., 151 Fed. 626; Connecticut River Banking Co. *v.* Rockbridge Co., 73 Fed. 709 [*affirmed* in 80 Fed. 441, 25 C. C. A. 540], judgment ineffectual to create lien.

See 42 Cent. Dig. tit. "Receivers," § 126. And see *supra*, III, F, 6.

The reason of this rule is stated to be that when the court appoints a receiver it is because it has first adjudged that the property is no longer to be under the control of the parties to the suit, but is thereafter to be and is in the custody of the court. Steele *v.* Sturges, 5 Abb. Pr. (N. Y.) 442 [*approved* in Maynard *v.* Bond, 67 Mo. 315; Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776]. In a proceeding against an insolvent for general distribution, as in the case of an insolvent corporation, the reason of the rule is based upon the object of the appointment to preserve equality among the creditors by preventing a multiplicity of suits and the obtaining by some creditors of advantages over others. Connecticut River Banking Co. *v.* Rockbridge Co., 73 Fed. 709.

22. *New York.*—Mosher *v.* Supreme Sitting O. I. H., 88 Hun 394, 34 N. Y. Suppl. 816 (receiver of corporate property in suit to distribute the corporate assets); Dickey *v.* Bates, 13 Misc. 489, 35 N. Y. Suppl. 525.

North Carolina.— Skinner *v.* Maxwell, 68 N. C. 400, where the receiver refused to act.

Tennessee.— McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Texas.— Riesner *v.* Gulf, etc., R. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 53 L. R. A. 171; Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776.

Wisconsin.— Hagedon *v.* State Bank, 1 Pinn. 61, 39 Am. Dec. 275, after appointment and qualification.

United States.— Horn *v.* Pere Marquette R. Co., 151 Fed. 626, in suit for administration of assets of corporation for the benefit of all its creditors.

See 42 Cent. Dig. tit. "Receivers," § 126.

The contrary view is maintained, however, in Cock *v.* Cole, 55 Iowa 70, 7 N. W. 419 (where in speaking of rights accruing after the order of appointment was superseded on appeal, it was held that the property became subject to the custody of the law only after the receiver actually went into possession); Farmers' Bank *v.* Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226; Boston, etc., Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471 [*citing* Cock *v.* Cole, *supra*, and holding similarly as to the right of a corporation to bring suit until the receiver takes possession after a stay granted of the order appointing the receiver pending appellate proceedings]. So in Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860, in denying a preference to a judgment creditor it was said that no creditor can obtain a preference by reason of a judgment rendered "after the receiver has the property of

On the other hand liens which had been acquired at that time are not affected by the receiver's appointment.[23]

the debtor actually in his possession," although this appears to have been said with reference to the particular case in which the facts justified the denial of the lien on that ground. See also Everett *v.* Neff, 28 Md. 176; Merchants, etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627. As distinguished from Cock *v.* Cole, *supra*, and Boston, etc., Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., *supra*, and giving a different effect to a supersedeas on appeal from an appointment by the register to the chancellor under the statute in Alabama see Stanton *v.* Heard, 100 Ala. 515, 14 So. 359.

Conditional appointment — land and chattels distinguished — *In general.*—In Edwards *v.* Edwards, 2 Ch. D. 291, 45 L. J. Ch. 391, 34 L. T. Rep. N. S. 472, 24 Wkly. Rep. 713, it was held, in a case relating to chattels, that the appointee is not receiver until he has given security, and that it is not a contempt of court for an execution creditor to seize such chattels after the order appointing the receiver on his giving security, but before the security is given or the possession taken. This case is distinguished in *Ex p.* Evans, 13 Ch. D. 252, 49 L. J. Bankr. 7, 41 L. T. Rep. N. S. 565, 28 Wkly. Rep. 127, where it is held that the appointment of a receiver of the rents and profits of land, although conditional upon the receiver's giving security, operates as an immediate delivery of the land, and that when the security required by the order of appointment is given, the order relates back to the date when it was made.

Limitation of rule as to conditional appointment.— The principle that the appointment of a receiver is merely conditional until his security is perfected applies only to cases where the question is as to his title as against third parties. It has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received and expended by him as receiver. Smart *v.* Flood, 49 L. T. Rep. N. S. 467. And so where before the receiver had perfected his security money arising from the sale of a part of the property belonging to the estate was received by a solicitor in the cause he was not at liberty to do anything but retain the moneys and hand them over to the receiver when his recognizance was perfected. *In re* Birt, 22 Ch. D. 604, 52 L. J. Ch. 397, 48 L. T. Rep. N. S. 67, 31 Wkly. Rep. 334 (as to duty of one who had undertaken the duty of solicitor to a party interested in the equal distribution of the assets); Wickens *v.* Townshend, 1 Russ. & M. 361, 5 Eng. Ch. 361, 39 Eng. Reprint 140. So in Matter of Lewis, etc., Mfg. Co., 89 Hun (N. Y.) 208, 34 N. Y. Suppl. 983, it was said that the doctrine of relation back is a fiction of law and should not be allowed to work an injustice; that the rule of the text does not apply so as to defeat the lien of an execution issued on a judgment recovered after the appointment of a receiver, and levied before he qualified, where the debtor had no defense to the creditor's claim, and prevented him from obtaining judgment before the appointment of the receiver by interposing a frivolous demurrer, and that it was no violation of the principles which underlie the doctrine of relation to subject the title of the receiver to the lien of the judgment.

In contempt proceedings different considerations are held to apply, and a third person may not be guilty of contempt for interfering with the possession of the receiver when he has not in fact taken possession. *In re* Schuyler Steam Tow Boat Co., 136 N. Y. 169, 32 N. E. 623, 28 L. R. A. 391 [*distinguishing* Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551, which held that there was no contempt in such a case, from the doctrine that the receiver's title relates to the date of the order of the appointment as applied to other cases than contempt]; Defries *v.* Creed, 11 Jur. N. S. 360, 34 L. J. Ch. 607, 12 L. T. Rep. N. S. 262, 6 New Rep. 17, 13 Wkly. Rep. 632.

Subsequently acquired property.— Where, in a suit to foreclose a mortgage of an entire railroad and all property appurtenant thereto, the mortgage being expressly to cover after-acquired property, the order appointing a receiver of the mortgaged property did not refer specifically to certain real estate acquired after the execution of the mortgage and the receiver never took possession of it, it was held that a sale under an execution based on a judgment rendered in a state court against the mortgagor passed a valid title to the purchaser, the receiver never having done anything to notify the public that the property was claimed as a part of the mortgaged property further than to receive the rents thereof. Mississippi Valley Co. *v.* Chicago, etc., R. Co., 58 Miss. 896, 38 Am. Rep. 348.

Between date of order of reference and appointment.— In Rich *v.* Loutrel, 18 How. Pr. (N. Y.) 121, it was held that in an action between partners to dissolve and settle the partnership accounts, rights may be acquired by the levy of process between the date of the order of reference on the application for the appointment of a receiver and the order making the appointment. See also Dutcher *v.* Culver, 24 Minn. 584, in which case, however, while it was held that an order directing the appointment of a receiver for goods does not place them *in custodia legis* until the receiver is actually appointed, until which time such goods are liable to distress or levy, the order had been stayed for twenty days to allow an appeal therefrom, pending which time the goods were distrained for rent. *Contra*, Rutter *v.* Tallis, 5 Sandf. (N. Y.) 610. In Fairfield *v.* Weston, 2 Sim. & St. 96, 1 Eng. Ch. 96, 57 Eng. Reprint 282, the rule that the right of the receiver would relate from the date of the order of reference to the master is applied as between the parties to the suit so as to prevent a defendant from exercising any right of ownership upon the estate without authority of court.

23. See *supra*, IV, D, 3, d, (II).

5. Enforcement of Right and Protection of Possession[24] — a. Order For Delivery by Parties. Courts of equity have the power, upon appointing receivers, to order them to take possession of the property which is involved in the controversy,[25] and when such possession is withheld by persons who are parties to the suit,[26] or by others who are claiming under such parties, with notice of the appointment of the receiver,[27] the court may interfere in a summary way and order the delivery of the property,[28] and may enforce its order by writ of assistance,[29]

24. Collateral attack on appointment see *supra*, III, J, 3.

Duty of receiver to take possession see *infra*, IV, F, 1, 6.

Liability for taxes see Taxes.

Proceedings by receiver see *infra*, IV, D, 5, h, (II); IV, F, 5, b; VI, A.

Restitution after vacating judgment generally see Appeal and Error, 3 Cyc. 462 *et seq.*

25. *Ex p.* Cohen, 5 Cal. 494.

Due process of law.— This power does not conflict with the provision of law that no man shall be deprived of his property without due process of law (*Ex. p.* Cohen, 5 Cal. 494); since the surrender to the receiver does not affect the right of property or the ultimate decision of the case, any more than does the levy of an attachment (see *supra*, IV, A).

26. *Georgia.*— Maddox *v.* Tidwell, 96 Ga. 783, 22 S. E. 390.

New York.— Iddings *v.* Bruen, 4 Sandf. 417; Murphy *v.* Du Berg, 11 Abb. N. Cas. 112 (holding that the court may summarily compel plaintiff to turn over to a receiver appointed upon plaintiff's application in an action between partners collections made by plaintiff before the action was brought; that he does not stand in the relation of a mere creditor of the partnership, and that as a party to the cause he may be thus dealt with); Parker *v.* Browning, 8 Paige 388, 35 Am. Dec. 717.

Pennsylvania.— Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

Virginia.— Thornton *v.* Washington Sav. Bank, 76 Va. 432.

United States.— Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91 [*affirming* 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818].

England.— Griffith *v.* Griffith, 2 Ves. 400, 28 Eng. Reprint 256, where it is held that the proper course for acquiring possession of land in possession of a party is by an application to the court that such party shall deliver possession as the receiver cannot distrain on the owner in possession, he not being a tenant.

See 42 Cent. Dig. tit. "Receivers," § 129.

Aid of court necessary.— The statutory powers conferred upon receivers will not enable them to obtain possession against persons resisting their authority, without the aid and intervention of the court; and the authority of the statute "to take into their hands all the estate," etc., is not any more cogent or comprehensive than the direction in the decree appointing the receiver, that the parties shall execute suitable transfers and deliver to the receiver the actual possession of the property described in the decree. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417.

27. See *infra*, IV, D, 5, h.

28. Sharp *v.* Carter, 3 P. Wms. 375, 379 note, 24 Eng. Reprint 1108. See also the cases cited *supra*, note 26.

Reference to ascertain property.— In New York the practice was to refer it to the master, or to a referee as a substitute for the proceeding before the master prior to the code (Davies *v.* Davies, 20 Abb. N. Cas. (N. Y.) 170), to ascertain whether all the property had been delivered to the receiver pursuant to the order of the court, and upon an order for the appointment of a receiver and a reference (see *supra*, III, F, 3, b) the master might examine defendant and other witnesses (Fitzburgh *v.* Everingham, 6 Paige (N. Y.) 29). See also Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Cassilear *v.* Simons, 8 Paige (N. Y.) 273.

Property not in one's possession or control should not be ordered to be delivered up by him so as to form the basis of a commitment for contempt. Fitzburgh *v.* Everingham, 6 Paige (N. Y.) 29 (on reference to master); Burger *v.* Tobias, 1 Ch. Sent. (N. Y.) 6 (holding that if the master decides erroneously as to the property in defendant's possession, he should appeal to the court to review the decision instead of committing a contempt by refusal to comply with the order, but that the master ought not to direct delivery of property in the possession of other persons or claimed by others who are parties to the suit as being in their possession until the complainants have applied and had the receivership extended to such parties); State *v.* Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866. See also Matter of Murray Hill Bank, 9 N. Y. App. Div. 554, 41 N. Y. Suppl. 920, *infra*, note 32.

Where a tenant under a receiver holds over his term, having been a party to the litigation, an order to dispossess him may be granted at the instance of the receiver and the possession restored to the receiver. Visage *v.* Scofield, 60 Ga. 680.

29. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417 (where it was pointed out that under the ancient chancery practice this remedy was available); Thornton *v.* Washington Sav. Bank, 76 Va. 432; Sharp *v.* Carter, 3 P. Wms. 375, 379 note, 24 Eng. Reprint 1108; Cazet de la Borde *v.* Othon, 23 Wkly. Rep. 110; A. G. *v.* Tastett [*cited* in Wilson *v.* Polk, 51 Am. Dec. 151, 153 note].

Early practice — execution.— The course of proceeding was stated to be that there must

or attachment.[30] And indeed when the court has made a lawful order in respect of the delivery of property by a party to a receiver appointed in the cause, it is said to be its imperative duty to compel obedience thereto.[31]

b. Duty of Parties to Deliver. It is the duty of the parties to deliver to the receiver all property in their possession which is covered by the order of appointment, and pursuant thereto.[32]

c. Interference With Receiver's Right and Possession in General.[33] It is

be first an order to deliver possession, then a writ of execution of that order served on defendant, and that until that is done no further order can be made. Green *v.* Green, 2 Sim. 394, 430, 2 Eng. Ch. 394, 430, 57 Eng. Reprint 836, 849. Where a decree in favor of plaintiff provided for payment to the receiver of the court of a part of the amount adjudged in favor of complainant, to be disbursed by the receiver to creditors of complainant, it was held that an execution to get in the money under the decree need not be such an execution as would enable each of the creditors to maintain an action against the officer, and that a statute which required that when an execution issued on a judgment for the benefit in whole or in part of any other person than plaintiff, and the fact appeared on the record, the clerk should state in the execution or in the indorsement thereon the extent of the interest therein of such person, etc., did not apply; that such statute applied only to those cases where a judgment at law is obtained in the name of one for the benefit of another, as in the case of an action in the name of an assignor for the benefit of an assignee. Baltimore, etc., R. Co. *v.* Vanderwarker, 19 W. Va. 265.

30. See *infra*, IV, D, 5, e.

31. Young *v.* Rollins, 90 N. C. 125.

32. Drakeford *v.* Adams, 98 Ga. 722, 25 S. E. 833; Tolleson *v.* Greene, 83 Ga. 499, 10 S. E. 120; Lewis *v.* Singleton, 61 Ga. 164; Murphy *v.* Du Berg, 11 Abb. N. Cas. (N. Y.) 112; People *v.* Rogers, 2 Paige (N. Y.) 103; Campbell *v.* Lapan, 19 U. C. C. P. 31.

That he may be liable for stealing the property, in a criminal prosecution, does not confer on the party a privilege exempting him from surrendering it in obedience to the legal order of the court. The distinction is between relief and discovery. Tolleson *v.* Greene, 83 Ga. 499, 10 S. E. 120.

Books and papers.— The court may compel the surrender of books belonging to a corporation, by an officer who is a party to the litigation. Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91 [*affirming* 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818]. See also Mathushek Piano Mfg. Co. *v.* Pearce, 79 Hun (N. Y.) 417, 29 N. Y. Suppl. 781. The books and papers of a liquidating partnership (Andrew's Succession, 16 La. Ann. 197), or of a corporation, of which a receiver has been appointed, must be placed in the hands of the receiver (Young *v.* Rollins, 90 N. C. 125; American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937); and an order appointing a receiver of a railroad company, providing that "all the books, vouchers, and papers touching the operation of the road" should be delivered to such receivers, includes all books relating to the previous history of the corporation, and all records of its transactions (American Constr. Co. *v.* Jacksonville, etc., Co., 52 Fed. 937). But in Haught *v.* Irwin, 166 Pa. St. 548, 31 Atl. 260, it was held that, although in performing the duty of collecting and holding assets to await the final determination of the case, it may be proper and perhaps necessary that the receiver should have access to the books, yet where they presumably contain other matters that are not relevant to the issues of the case, and disclosure of these might indirectly do serious injury to many interests not involved in the present contest, and not in fault in any way concerning it, such interests are entitled to protection from unnecessary scrutiny, publicity, and impertinent intermeddling, and for the purpose of such protection the books being in the custody of the court, both parties will be allowed access to them under such regulations as the court shall prescribe.

Officer of corporation.— Where an order appointing a receiver of a corporation empowers him to take possession of its books and effects, the officers are required to turn such effects over to him, without specific direction in the order to that effect. Young *v.* Rollins, 90 N. C. 125. See also Brandt *v.* Allen, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653; Edrington *v.* Pridham, 65 Tex. 612.

Officers in possession claiming see *infra*, IV, D, 5, h, (II).

Protection under order — *In general.*— Delivery to a receiver under the order of the court having jurisdiction to make it will protect the party from accounting for such assets in another suit between different parties, although in such other suit the party had been enjoined from turning over said assets to any other person or from in any wise disposing of them. Carter *v.* Dime Sav. Bank, 61 Nebr. 587, 86 N. W. 29. *Compare* Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

Mandamus.— So in Matter of Murray Hill Bank, 9 N. Y. App. Div. 554, 41 N. Y. Suppl. 920, it was held that after the superintendent of banks had turned over to certain receivers in another action all the property, assets, and books of the bank then in his possession, mandamus should not be granted in a proceeding for voluntary dissolution of the bank, on motion of the temporary receivers therein, to compel him to deliver the same property to them.

Notice see *infra*, IV, D, 5, j.

33. **Conflicting jurisdictions** generally see COURTS, 11 Cyc. 982.

the duty of the court to protect from interference the property in its possession through its receiver.[34] It never tolerates such interference without its leave,[35] whether it is done by the consent or submission of the receiver or by compulsory process against him,[36] and has the power by summary process to require restoration of property wrongfully abstracted from his possession.[37] In thus restricting claimants or third persons from interfering with the receiver's possession without leave the rule is applied regardless of whether such persons claim paramount to or under the right which the receiver was appointed to protect,[38] and the court has power to preserve the property in the custody of the law, although by statute leave to sue the receiver is not necessary.[39] The rule is applied to prevent an attorney who aids or advises in an interference with the receiver's possession,[40] and to prevent one holding property as receiver from disposing of it in a private capacity to the prejudice of one of the parties.[41]

d. Injunction. The court will enjoin an unauthorized interference with the receiver's possession.[42] The remedy is a necessary incident to the power of

Admiralty jurisdiction see ADMIRALTY, 1 Cyc. 814.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1473 *et seq.*

Proceedings by and against receiver see *infra*, VI, A, D.

34. *Georgia.*— Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Robinson *v.* Woodmansee, 76 Ga. 830; Marshall *v.* Lockett, 76 Ga. 289.

New Jersey.— Moore *v.* Mercer Wire Co., (Ch. 1888) 15 Atl. 737.

New York.—Parker *v.* Browning, 8 Paige 388, 35 Am. Dec. 717.

Wisconsin.—*In re* Day, 34 Wis. 638.

United States.— U. S. *v.* Kane, 23 Fed. 748.

England.— Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201.

See 42 Cent. Dig. tit. "Receivers," § 131 *et seq.*

35. Foster *v.* Field, 13 Okla. 230, 74 Pac. 190; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp (Pa.) 142; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687; De Winton *v.* Brecon, 28 Beav. 200, 6 Jur. N. S. 1046, 8 Wkly. Rep. 385, 54 Eng. Reprint 342; Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Randfield *v.* Randfield, 1 Dr. & Sm. 310, 30 L. J. Ch. 18, 3 L. T. Rep. N. S. 284, 9 Wkly. Rep. 70, 62 Eng. Reprint 398; Evelyn *v.* Lewis, 3 Hare 472, 25 Eng. Ch. 472, 67 Eng. Reprint 467; Fripp *v.* Bridgewater, etc., Canal Co., 3 Wkly. Rep. 356; Campbell *v.* Lepan, 19 U. C. C. P. 31.

Leave to sue receiver see *infra*, VI, D, 2, a.

36. De Winton *v.* Brecon, 28 Beav. 200, 6 Jur. N. S. 1046, 8 Wkly. Rep. 385, 54 Eng. Reprint 342.

37. Erie R. Co. *v.* Heath, 8 Fed. Cas. No. 4,514, 8 Blatchf. 536, holding that the court could, by summary process, compel a party to make restoration, or in default thereof make good the pecuniary value. See also *In re* Day, 34 Wis. 638, *infra*, note 48.

38. Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964; Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608; *In re* U. S. Reflector Co., 8 N. Y. Civ. Proc. 120; Evelyn *v.* Lewis, 3 Hare 472, 25 Eng. Ch. 472, 67 Eng. Reprint 467; Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42.

39. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; U. S. *v.* Murphy, 44 Fed. 39. So in Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934, in an action against receivers, upon rendering a judgment for plaintiff, the court was held to have properly declined to award a writ of restitution, because interference with the property would be a contempt of the court appointing the receiver, and no officer could execute the writ without committing a contempt.

40. Fletcher *v.* McKeon, 74 N. Y. App. Div. 231, 77 N. Y. Suppl. 465 (holding that an attorney is guilty of contempt on whose advice an alleged lessee who had been made a party in foreclosure commenced proceedings to dispossess tenants after the appointment of a receiver, both the party and the attorney having notice of the appointment); Chafee *v.* Quidnick Co., 13 R. I. 442 (holding that an attorney and counselor is an officer of the court; that he is presumed to understand its orders, and is sworn to obey them; and that it can make no difference that the attorney is a member of a bar of another state, being counsel of record in the cause before the court in which the receiver is appointed); Geisse *v.* Beall, 5 Wis. 224, 230; Wickens *v.* Townshend, 1 Russ. & M. 361, 5 Eng. Ch. 361, 39 Eng. Reprint 140.

41. Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851 [*reversing* 16 App. Cas. (D. C.) 530].

42. *Florida.*— McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237.

Georgia.— Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964.

New York.—*In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665 [*affirming* 59 N. Y. Super. Ct. 552, 15 N. Y. Suppl. 144] (restraining the prosecution of replevin against a corporation under the code provisions in proceedings for the voluntary dissolution of corporations); Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y.

appointing a receiver,[42] and is said to be a mild remedy when attachment and punishment for contempt might have been used.[44]

e. Contempt in General. When the court appointing a receiver has made an order requiring the delivery to him by a party of the effects of the estate or of the property over which the receivership is extended, it may enforce obedience by contempt process.[45] And if the court has jurisdiction of the parties and the

Civ. Proc. 106 (enjoining suits against corporation binding on creditors).

Pennsylvania.— Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

Texas.— Harrison *v.* Waterberry, (1894) 27 S. W. 109 [*reversing* (Civ. App. 1894) 27 S. W. 439].

Washington.— State *v.* King County Super. Ct., 11 Wash. 63, 39 Pac. 244, in action by receiver to restrain sale of property of insolvent corporation upon allegations which would entitle creditors to equitable distribution.

United States.— *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687.

England.— Tink *v.* Rundle, 10 Beav. 318, 50 Eng. Reprint 604 (on *ex parte* motion); Atty.-Gen. *v.* St. Cross Hospital, 2 Wkly. Rep. 542.

Canada.— Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42, rule applied on petition by receiver to restrain a party to the suit from proceeding with an action against the receiver's tenant.

See 42 Cent. Dig. tit. "Receivers," § 131 *et seq.* And see *infra*, VI, A, 1, b.

Enjoining actions by parties represented by receiver see *infra*, VI, B, 6.

Of suit against receiver see *infra*, VI, D, 2, a.

43. Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964; Woerishoffer *v.* North River Constr. Co., 99 N. Y. 398, 2 N. E. 47 (as to power of court appointing a receiver of a corporation in a proceeding for the equitable distribution of the corporate assets, to forbid any interference with the property in the receiver's possession, by way of levy or seizure, on motion of plaintiff in the receivership suit upon notice to a creditor prosecuting an independent action); Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106 (holding that the power to thus protect assets for distribution, upon appointing a receiver of an insolvent corporation, is not the creature of the code, but is inherent).

44. Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Marshall *v.* Lockett, 76 Ga. 289.

45. *Georgia.*— Ryan *v.* Kingsbery, 88 Ga. 361, 14 S. E. 596; Lewis *v.* Singleton, 61 Ga. 164.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

New York.— King *v.* Barnes, 51 Hun 550, 4 N. Y. Suppl. 247 [*affirmed* in 113 N. Y. 655, 21 N. E. 184] (where upon demand for books and papers the party did not allege inability or non-possession but refused to comply with the order because he was advised that it was illegal and that he had taken steps to have it vacated, and on motion for punishment for contempt he stated that he did not have the books or papers in his possession, and his commitment for contempt was held proper); Watkins *v.* Pinkney, 3 Edw. 533 (holding that where a receiver has been appointed in a judgment creditor's suit and the debtor has been required to transfer his property, the fact of his having applied for the benefit of the bankrupt act, intermediate the filing of the bill and the requirement, will not shield him from an attachment for refusing to deliver his property to a receiver).

North Carolina.— Young *v.* Rollins, 90 N. C. 125.

Pennsylvania.— Yeager *v.* Wallace, 44 Pa. St. 294; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

United States.— American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937.

Canada.— Campbell *v.* Lepan, 19 U. C. C. P. 31.

See 42 Cent. Dig. tit. "Receivers," § 130.

The attachment should not be made to depend upon conditions such as the act and judgment of a special commissioner in filing his certificate that defendant had complied with the order, since the court itself is the only proper judge of the fact of such compliance. Geisse *v.* Beall, 5 Wis. 224.

Personal demand.— No refusal to deliver can be based upon a demand not made by the receiver but by plaintiff or his attorney or a referee appointed to see that such delivery is made. Panton *v.* Zebley, 19 How. Pr. (N. Y.) 394, where the order was that the party deliver notes to the receiver and it was referred to a referee to summon the parties before him and direct the delivery to be made.

Order partially good — property not in possession.— Where the order is valid as to part of the property which is in the party's possession, if he is committed for contempt for failure to comply with the order as to such property no relief can be granted on habeas corpus without compliance with that part of the order, although the order included other property as to which it might not have been enforceable. *Ex p.* Tinsley, 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818 [*affirmed* in 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91]. See also Tolman *v.* Jones, 114 Ill. 147, 28 N. E. 464; Burger *v.* Tobias, 1 Ch. Sent. (N. Y.) 6.

Instructions as to the delivery of property to the receiver have been held to be necessary before a partner can be punished for contempt for failure to deliver the partnership property to the receiver thereof. McKelsey *v.* Lewis, 3 Abb. N. Cas. (N. Y.) 61.

subject-matter of the action in which the receiver is appointed, any interference with the receiver's possession after notice of the character in which such possession is held, either by taking forcible possession of the property committed to his charge or by legal proceedings for that purpose, without the sanction of the court appointing him, is a contempt of court which will subject the party to attachment and commitment.[46] It makes no difference that the party charged with

Commitment not punishment.—A judgment in a contempt proceeding fining the respondent and committing him until such fine was paid and the order of the court complied with was held not to impose a punishment which would cause his imprisonment beyond the time prescribed by the statute for imprisonment upon commitments for contempt, since the only punitive part of the judgment was the fine. *Ex p.* Tinsley, 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818.

Reference to ascertain property.— Where defendant claimed that the receiver demanded of him not only the property directed to be surrendered but also other property not embraced within the terms of the order, on motion to punish for contempt for refusal to deliver property, a reference was ordered for the information of the court as it was unable to decide on the affidavits whether the receiver was entitled to the property. Davies *v.* Davies, 20 Abb. N. Cas. (N. Y.) 170. So where it appears, upon such a reference that a judgment debtor has the use of furniture, but the same was bought under a judgment against him, and an agent (a relation), who lives with the debtor is to protect the possession for the buyer, the court will not, where such agent and buyer are not before the court, direct the debtor to deliver the furniture to a receiver, and his refusal to do so will be treated more as an appeal to the court than as a matter of contempt. Robeson *v.* Ford, 3 Edw. (N. Y.) 441.

An officer of a corporation, who is a party to the suit, is in contempt if he refuses to turn over property of the corporation to its receiver, in obedience to the court's order, although he may personally claim a lien on it. Tinsley *v.* Anderson, 171 U. S. 101, 18 S. Ct. 805, 43 L. ed. 91 [*affirming* 37 Tex. Cr. 517, 40 S. W. 306, 66 Am. St. Rep. 818]. So in Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 11 S. E. 599, it is held that where the president of the corporation, on whom a rule *nisi* against the company was served, comes into court, answers in his individual capacity, and takes part in the proceedings, the court may attach him for contempt in refusing to obey its order directing the company to turn over its assets in his possession to the receiver, although he has not been made individually a party to the proceedings. But see *infra*, note 74.

After termination of receivership.— In a proceeding in equity to enjoin the use of and interference with certain school property, after injunction granted and the appointment of a temporary receiver, who was directed under an amended order to permit defendant to remain in possession of the property and teach school there until further ordered, the court finally passed an order under an amendment of the original petition appointing trustees of the property in pursuance of a trust and ordering the temporary receiver to turn over the property to said trustees, and it was held on a petition by the receiver in contempt proceedings against defendant for continuing in possession of the property and refusing to deliver it upon his demand that the order appointing the trustees vacated the first order restraining defendant and appointing a temporary receiver, and that defendant could not be attached and punished for interfering with the receiver in the control of the property thereafter. Loyd *v.* Lancaster, 117 Ga. 111, 43 S. E. 501.

Form of order see Tolleson *v.* People's Sav. Bank, 85 Ga. 171, 175, 11 S. E. 599 (commitment to imprisonment until compliance with order); Tolleson *v.* Greene, 83 Ga. 499, 500, 10 S. E. 120.

Compelling assignment see *supra*, IV, D, 2, b; *infra*, IV, D, 5, h, (III).

Property not in possession or control see *supra*, note 28; and *infra*, IV, D, 5, h, (I), (II).

Remedy generally for failure to pay money or deliver property see CONTEMPT, 9 Cyc. 9.

46. *Arkansas.*— Walker *v.* Geo. Taylor Commission Co., 56 Ark. 1, 18 S. W. 1056, 19 S. W. 601.

Florida.— McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237.

Georgia.— Wikle *v.* Silva, 70 Ga. 717.

Illinois.— People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324 (constructive contempt); Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 [*affirming* 30 Ill. App. 258]; Richards *v.* People, 81 Ill. 551 (garnishment after appointment of receiver contempt); Gunning *v.* Sorg, 113 Ill. App. 332 [*affirmed* in 214 Ill. 616, 73 N. E. 870].

Kansas.— Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072, seizure under attachment.

Kentucky.— Hazelrigg *v.* Bronaugh, 78 Ky. 62; Biggs *v.* Garrard, 6 B. Mon. 484, 44 Am. Dec. 778.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

Michigan.— Smith *v.* Wayne Cir. Judge, 84 Mich. 564, 47 N. W. 1092.

New Jersey.— Moore *v.* Mercer Wire Co., (Ch. 1888) 15 Atl. 737.

New York.— O'Mahoney *v.* Belmont, 62 N. Y. 133; Coffin *v.* Burstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274; Levy *v.* Stanion, 33 N. Y. App. Div. 632, 53 N. Y. Suppl. 472; *In re* Woven Tape Skirt Co., 12 Hun 111;

the contempt was not a party to the proceeding in which the receiver was

Sainberg *v.* Weinberg, 25 Misc. 327, 54 N. Y. Suppl. 559; James *v.* James Cement Co., 8 N. Y. St. 490; Corey *v.* Long, 12 Abb. Pr. N. S. 427; Riggs *v.* Whitney, 15 Abb. Pr. 388; Albany City Bank *v.* Schermerhorn, 9 Paige 372, 38 Am. Dec. 551; Noe *v.* Gibson, 7 Paige 513; Matter of Hopper, 5 Paige 489.

North Carolina.— Delozier *v.* Bird, 125 N. C. 493, 34 S. E. 643, 123 N. C. 689, 31 S. E. 834, disturbance of constructive possession under an appointment in ejectment to collect part of the crops grown during the litigation, etc.

Ohio.— Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (indicating liability of sheriff for levying execution); Spinning *v.* Ohio L. Ins., etc., Co., 2 Disn. 336. See also Eisenmann *v.* Thill, 1 Cinc. Super. Ct. 188.

Pennsylvania.— Com. *v.* Young, 11 Phila. 606, liability of sheriff for levying process.

Rhode Island.— Chafee *v.* Quidnick Co., 13 R. I. 442.

Tennessee.— Young *v.* Vanhooser, 6 Lea 136; Payne *v.* Baxter, 2 Tenn. Ch. 517.

Texas.— Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Virginia.— Thornton *v.* Washington Sav. Bank, 76 Va. 432; Beverley *v.* Brooke, 4 Gratt. 187.

Wisconsin.— *In re* Day, 34 Wis. 638, as to property delivered by mistake.

United States.— Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851 [*reversing* 16 App. Cas. (D. C.) 530]; *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *In re* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689 (violation of injunction under bill by receiver by levying process, the officer being in contempt); Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447 (contempt to disturb the possession of a receiver by force, or to offer violence to the person of such receiver while he is in discharge of his official duties); Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322; *In re* Wilk, 155 Fed. 943; Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418; Bibber-White Co. *v.* White River Valley Electric R. Co., 107 Fed. 176; *In re* Acker, 66 Fed. 290; U. S. *v.* Murphy, 44 Fed. 39 (contempt to cause arrest of a receiver of a corporation for violation of a statute against nuisances by obstructing the free use of streets or highways, although the town ordinances granting the corporation the right to construct and operate its road through the streets of the town might have been void, and notwithstanding a statute allowing suits against receivers without leave); *In re* Higgins, 27 Fed. 443; *In re* Doolittle, 23 Fed. 544; De Visser *v.* Blackstone, 7 Fed. Cas. No. 3,840, 6 Blatchf. 235; Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513; Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508.

England.— Helmore *v.* Smith, 35 Ch. D. 449, 56 L. J. Ch. 145, 56 L. T. Rep. N. S. 72, 35 Wkly. Rep. 157; Searle *v.* Choat, 25 Ch. D. 723, 53 L. J. Ch. 506, 50 L. T. Rep. N. S. 470, 32 Wkly. Rep. 397; *Ex p.* Cochrane, L. R. 20 Eq. 282, 44 L. J. Bankr. 87, 23 Wkly. Rep. 726; Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Hawkins *v.* Gathercole, 1 Drew. 12, 16 Jur. 650, 21 L. J. Ch. 617, 61 Eng. Reprint 355; Lane *v.* Sterne, 3 Giffard 629, 9 Jur. N. S. 320, 10 Wkly. Rep. 555, 66 Eng. Reprint 559 (contempt on part of execution creditor and sheriff in seizure of property on execution); Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201; Broad *v.* Wickham, 4 Sim. 511, 6 Eng. Ch. 511, 58 Eng. Reprint 191 (order for commitment without an order *nisi* previously obtained, for forcibly taking possession of estate); Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214, 32 Eng. Reprint 632; Fripp *v.* Bridgewater, etc., Canal Co., 3 Wkly. Rep. 356.

See 42 Cent. Dig. tit. "Receivers," § 132. And see *infra*, IV, D, 7, e.

The officer may be required to withdraw his levy and answer for the contempt. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (where the objection to the levy was not raised in the court below, however, and permission was inferred in the appellate court); Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201 (where the sheriff submitted and was not committed, but was ordered to withdraw).

Interference with patent.— *In re* Woven Tape Skirt Co., 12 Hun (N. Y.) 111, holding that where the rights and business of a corporation, which manufactured articles under a patent right, had passed into the hands of a receiver, it was a contempt for a former officer of the corporation to obtain a new license from the patentee and carry on the business in competition with the receiver, and this, although an action for infringement must be brought in the federal court, since the protection of the receiver's possession and punishment for contempt are in no sense in the nature of such action.

Waiver.— A receiver waives the right to insist that a creditor is guilty of contempt in instituting garnishment proceedings, by interpleading in the garnishment suit. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324. To the same effect see *In re* Young, 7 Fed. 855, where the custodian of the property for the receiver appeared and pleaded in an action of replevin against him in which plaintiff recovered judgment.

Contempt not in court's presence.— Under the federal statute limiting the power to punish for contempts, so that persons not parties and not holding official positions requiring them to yield obedience to the court in their official conduct could be punished

appointed;[47] the restoration of the property may be thus enforced,[48] and the receiver's title or ultimate right to possession cannot be tried in contempt proceedings.[49] Such process cannot be used, however, to get into the receiver's hand mere debts due to the parties over whose property the receiver is appointed. The obligation of such debtor cannot be thus enforced.[50]

f. Actual Interference. Proceedings which do not actually and physically interfere with,[51] or disturb or restrict, the receiver's rights or possession are sometimes regarded as not obnoxious to the rule against interference with such possession.[52] So it is held that a motion should not be made for committal on the ground of a disturbance of possession when its object is merely to compel the payment of costs, the question of possession having been settled.[53]

g. Strikes and Labor Combinations. Employees of a receiver have the right to organize into or join a labor union which has only legal purposes in view,[54] as the taking of joint action as to the terms of their employment,[55] and such employees

only for acts committed in the immediate presence of the court or so near thereto as to interfere with the administration of justice, or for wilfully resisting execution of the lawful process or commands of the court, it was held that a shipper of logs who had agreed that after transportation each lot of logs should be held by a particular person as the agent of the receivers of the railroad, and who subsequently induced such person to release a raft without the receivers' consent, could not be convicted of contempt without convincing the court beyond reasonable doubt that the release of the raft was accomplished by fraud and of proof that it was done with knowledge of the agent's instruction from the receivers. U. S. *v.* Jose, 63 Fed. 951.

Form of order see *Ex p.* Tyler, 149 U. S. 164, 169, 13 S. Ct. 785, 37 L. ed. 689; U. S. *v.* Weber, 114 Fed. 950, 954, punishment.

Leave to sue receiver see *infra*, VI, D, 2, a.

47. People *v.* Weigley, 155 Ill. 491, 40 N. E. 300; Erie R. Co. *v.* Heath, 8 Fed. Cas. No. 4,514, 8 Blatchf. 536. But it also held that such a proceeding is not an appropriate one in which to try the title or the validity of a lien claimed by a stranger, under which claim possession is retained as against a receiver. Baldwin *v.* Hosmer, 101 Mich. 432, 59 N. W. 669.

48. *Georgia.*— Wilke *v.* Silva, 70 Ga. 717.

New York.— Schultz *v.* Luft, 74 N. Y. App. Div. 628, 77 N. Y. Suppl. 493, restoration of rents collected after appointment of receiver to collect them.

North Carolina.— Delozier *v.* Bird, 125 N. C. 493, 34 S. E. 643, 123 N. C. 689, 31 S. E. 834.

Pennsylvania.— Com. *v.* Young, 11 Phila. 606.

United States.— *In re* Swan, 150 U. S. 637, 14 S. Ct. 225, 37 L. ed. 1207; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689, fine and also commitment until the party purges himself of contempt.

England.— Parker *v.* Pocock, 30 L. T. Rep. N. S. 458.

See 42 Cent. Dig. tit. "Receivers," § 131 *et seq.* And see the cases cited generally *supra*, note 46.

Payment of value.— *In re* Day, 34 Wis. 638, holding that where the property taken from the receiver was sold and removed from the state so that it was impossible for the court to compel restoration, the court may find the value of the property and order it paid to the receiver by way of reparation.

49. Wikle *v.* Silva, 70 Ga. 717 (holding that possession only may be put in issue, and the question of possession by the receiver having been contested upon conflicting affidavits the discretion of the chancellor in ruling that the party was not in contempt will not be controlled); *In re* Day, 34 Wis. 638.

On attempt to reach debts due out of state see *infra*, IV, D, 5, h, (III).

50. Elwell *v.* Goodnow, 71 Minn. 383, 73 N. W. 1092.

An ordinary judgment for the amount withheld to be satisfied by execution is not proper in this kind of a proceeding. Edrington *v.* Pridham, 65 Tex. 612.

Imprisonment for debt see CONTEMPT, 9 Cyc. 9.

51. Eisenmann *v.* Thill, 1 Cinc. Super. Ct. (Ohio) 188, where a later attaching creditor instituted proceedings in bankruptcy to compel a *pro rata* distribution of partnership effects and the assignee in bankruptcy interfered with the receiver previously appointed and placed in possession in a suit by one of the partners for a ratable distribution of the property among the partnership creditors, and the hearing of contempt proceedings was postponed until the receiver should be disturbed in the performance of his duties or until the final hearing.

52. The Halladay Case, 27 Fed. 830, *infra*, IV, D, 6, b, (II) note 11. See also Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177. But see in this connection *infra*, VI, D, 2, a.

Levy of execution see *infra*, IV, D, 7, e, (III).

53. Ward *v.* Swift, 6 Hare 309, 12 Jur. 173, 31 Eng. Ch. 309, 67 Eng. Reprint 1184, where it was held that the remedy should be confined to the protection of possession and that the court's authority is best vindicated by reserving its extreme powers for cases which imperatively call for their exercise.

54. U. S. *v.* Weber, 114 Fed. 950.

55. Thomas *v.* Cincinnati, etc., R. Co., 62

may be induced, by legal methods and fair moral suasion, to join such an organization.[56] They cannot be compelled by the court to remain in the receiver's service,[57] but may abandon it if dissatisfied with the terms of employment and by persuasion or argument induce others to do the same.[58] Neither they nor such union, however, will be permitted to interfere with or disturb the receiver or his subordinates in the possession and operation of the property;[59] it is a contempt of court to incite such employees to leave the receiver's service in pursuance of an unlawful combination or conspiracy to prevent his operation of the business,[60] and to interfere with such employees as voluntarily remain in the receiver's service, by violence, threats, or intimidation.[61]

Fed. 803, where it is said that such employees have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer; that they may unite with other unions; and that the officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory.

56. U. S. *v.* Weber, 114 Fed. 950.

57. Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; Beers *v.* Wabash, etc., R. Co., 34 Fed. 244. See, generally, LABOR UNIONS, 24 Cyc. 815.

58. Arthur *v.* Oakes, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414 (holding that in order that employees and their associates may not unwillingly place themselves in antagonism to the court's authority, and become subject to fine and imprisonment as for contempt, the order should indicate that strikes intended to be restrained are those designed to physically cripple the trust property, or to actually obstruct the receivers in the operation of the road, or to interfere with their employees who do not wish to quit, or to prevent, by intimidation or other wrongful modes, or by any device, the employment of others to take the places of those quitting, and not such as are the result of the exercise by employees, in peaceable ways, of rights clearly belonging to them, and not designed to embarrass or injure others, or to interfere with the actual possession and management of the property by the receivers); U. S. *v.* Kane, 23 Fed. 748.

59. Beers *v.* Wabash, etc., R. Co., 34 Fed. 244.

60. U. S. *v.* Weber, 114 Fed. 950 (holding that the object of a union to control mining operations for the purpose of enforcing compliance with their demands, if the union miners in some other state should make complaint of agreements by ordering and carrying into effect a general strike, is illegal); Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 803 (holding that a combination to incite employees of all the railroads in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment in order to starve the railroad companies and the public into compelling an owner of cars used in operating the road to pay his employees more wages is an unlawful conspiracy whether the purpose is effected by means usually lawful or otherwise).

Where the intent is to cripple the property or its operation, a combination of the employees of a railroad in the hands of a receiver, made with such intent, with or without notice to quit his employ, is said to be a contempt of court and all those who combine and conspire with the employees to quit, or who, as officials of labor organizations, issue printed orders to quit or strike with such intent are liable for contempt. *In re* Higgins, 27 Fed. 443.

61. U. S. *v.* Weber, 114 Fed. 950; *In re* Higgins, 27 Fed. 443.

Actual violence is not necessary and it is the same thing if employees are overawed by preconcerted demonstrations of force. The act cannot be considered a mere request or invitation when made by one or more of a body of strikers under circumstances calculated to convey a threatening intimidation with a design to hinder or obstruct the employee in the performance of his duty. U. S. *v.* Kane, 23 Fed. 748; *In re* Doolittle, 23 Fed. 544.

A notice to quit may by implication carry with it something sinister and in such a case it is something more than a mere invitation to quit work. U. S. *v.* Weber, 114 Fed. 950; *In re* Wabash R. Co., 24 Fed. 217, where a notice, after requesting parties to stay away from a shop until a strike should be settled, continued "your compliance with this will command the protection of the Wabash employees," and that "in no case are you to consider this an intimidation," and it was held that this was an unlawful interference with the receiver's management of the road.

Employees of another railroad who prevent the receiver's employees, by intimidation, from operating his trains, are in contempt of court. Secor *v.* Toledo, etc., R. Co., 21 Fed. Cas. No. 12,605, 7 Biss. 513. And where the employees of such other road by concert of action quit work and take possession of and obstruct the movement of engines and cars on the tracks of such company, and while in so doing obstruct the operation of engines or cars in a receiver's custody, they will be guilty of contempt. *In re* Doolittle, 23 Fed. 544.

Controversy with receiver see *infra*, IV, F, 6, e, (IV), (B).

h. Property Not in Hand — (i) *In General.* The rule that the court may interfere in a summary way and order the delivery of property to its receiver [62] has been held to apply in proper cases where the immediate possession is in the agents or employees of defendant, although they are not parties to the record,[63] or in others claiming under parties to the suit, with notice of the appointment;[64] and the general rule against interference with a receiver's possession,[65] and establishing the power of the court summarily to protect such possession is not confined to property actually in the receiver's hands, but is applied to any attempt to intercept or prevent payment to him or to hinder him in acquiring possession,[66] and the court requires and insists that application should be made to the court for the permission to take possession of any property of which the receiver either has taken or is directed to take possession.[67] But on the other hand it is held that as against a third person the appointment of a receiver is not equivalent to giving him possession; that the receiver must possess himself of the property in the same manner as any one else,[68] and that before he acquires possession a third person claiming to be the owner of the property is not guilty of contempt in taking possession and cannot be ousted by a mere order of court in the receivership suit.[69] If another is rightfully in possession of property when the receiver

62. See *supra*, IV, D, 5, a.

63. *Ex p.* Cohen, 5 Cal. 494. See also *In re* Day, 34 Wis. 638.

64. Thornton *v.* Washington Sav. Bank, 76 Va. 432, writ of possession against one claiming under a lease made by a party to the suit after the appointment of the receiver. See also Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28.

65. See *supra*, IV, D, 5, c.

66. *Kentucky.*— Hazelrigg *v.* Bronaugh, 78 Ky. 62.

New York.— *In re* U. S. Reflector Co., 8 N. Y. Civ. Proc. 120.

Rhode Island.— Chafee *v.* Quidnick Co., 13 R. I. 442.

Virginia.— Thornton *v.* Washington Sav. Bank, 76 Va. 432, writ of possession against one claiming under a lease from a party to the suit after the appointment of the receiver.

United States.— Bowker *v.* Haight, 146 Fed. 257 (holding that an attorney who received a check from a corporation as a retainer for services to be rendered, and who presented and received payment of the check after he had knowledge that a receiver had been appointed for the property of the corporation, will be required to turn over the sum so received to the receiver); Bibber-White Co. *v.* White River Valley Electric R. Co., 107 Fed. 176; American Constr. Co. *v.* Jacksonville, etc., R. Co., 52 Fed. 937. See also Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193.

England.—Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Langford *v.* Langford, 5 L. J. Ch. 60; Parker *v.* Pocock, 30 L. T. Rep. N. S. 458.

See 42 Cent. Dig. tit. "Receivers," § 129.

Collections.— Robinson *v.* Woodmansee, 76 Ga. 830 (commitment of defendant until money collected by him in violation of an injunction is restored to the receiver); Gary *v.* Brown, 33 Ill. App. 435 (where the court enjoined proceedings to prevent the collection of a note which the receiver was appointed to collect); Parker *v.* Pocock, 30 L. T. Rep. N. S. 458 (order to restore money collected or be committed). See also Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146 [*affirmed* in 52 N. Y. 489], as to payment by attorney in cause of money collected after appointment of receiver, and upon which the attorney had no lien, and right to retain that upon which there was a lien.

Collusive removal by partnership before appointment.— In Skip *v.* Harwood, 3 Atk. 564, 26 Eng. Reprint 1125, in a suit between partners for an accounting defendant was held guilty of contempt and punishable for collusively removing part of the partnership property in order to evade the decree for a receiver to collect the partnership debts, etc., although the decree had not been drawn up at the time, he having been present in court during the hearing.

Interference with rents see *infra*, IV, D, 7, a.

67. See *infra*, IV, D, 6; VI, A.

68. Metcalfe *v.* Commonwealth Land, etc., Co., 113 Ky. 751, 68 S. W. 1100, 24 Ky. L. Rep. 527; Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819; Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136.

69. Metcalfe *v.* Commonwealth Land, etc., Co., 113 Ky. 751, 68 S. W. 1100, 24 Ky. L. Rep. 527 (holding that, where contracts of renting made by a receiver's agent have expired, and the tenants have removed, leaving no one in possession, the purchaser at a tax-sale, having a deed, is not guilty of a contempt of court in taking possession); Elwell *v.* Goodnow, 71 Minn. 383, 386, 390, 73 N. W. 1092, 1095 (where the order was that "the city of Minneapolis and its treasurer and comptroller pay to said receiver, and to no other person, all moneys now due and owing, and which hereafter may become due and owing, from said city under said contract, during said receivership, and until the fur-

is appointed, although the property passes to the receiver, his right to possession is postponed until the termination of the right of the party in possession.[70]

(II) *Strangers in Possession and Claiming Right Thereto.* The court exercises no summary jurisdiction over strangers who are in possession of property claiming the right to retain it;[71] the receiver must either proceed by suit against him, or the complainant must make him a party to his suit, and apply to have the receivership extended[72] to the property in his hands, so that an order may be made for its delivery, and may be enforced by process of contempt;[73] and as a general rule the court will not interfere in a summary way as

ther order of this court," and it was held that this order does not assume to adjudge that there is any specific personal property or fund belonging to the partnership, or any member thereof, in the possession of the city, or any of its officers; and the court did not thereby obtain possession or jurisdiction over any specific property or fund; that it cannot be construed as an order to pay the receiver any money on the contract, due to a third person, not a party to the action, although it does invest the receiver with all the rights of the partnership, or any member thereof, to the money growing out of such contract, and cannot be construed as authorizing the receiver to collect from the city the money claimed to be due or to become due from it to the partnership, or any member thereof, by proceedings for contempt); *In re* U. S. Reflector Co., 8 N. Y. Civ. Proc. 120 (holding that one having a bill of sale of property from a corporation executed before the appointment of its receiver is not in contempt for taking such property after the appointment, where the receiver had not taken or claimed it); Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819, *infra*, IV, D, 7, c, note 30.

70. Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28.

Possession protected under equitable right. — In Conklin *v.* U. S. Ship Building Co., 123 Fed. 913, it was held that if one owning a ship yard makes a parol lease, or even an implied lease, to another, to construct a vessel in the yard, although at common law such a lease may be terminated at will, or by summary notice under the statute, equity courts would sustain it until the person constructing the vessel had reasonable time to get her off the ways, and that in view of the circumstances in this case, the lessee was entitled as against the lessor or its receiver to maintain possession for the purpose of the completion of such contract.

71. *Alabama.*— Musgrave *v.* Gray, 123 Ala. 376, 26 So. 643, 82 Am. St. Rep. 124, denying writ of assistance.

Indiana.— Cook *v.* Citizens' Nat. Bank, 73 Ind. 256.

New York.— Brein *v.* Light, 36 Misc. 112, 72 N. Y. Suppl. 1087; Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558.

Pennsylvania.— Yeager *v.* Wallace, 44 Pa. St. 294; Darling *v.* Wyoming Coal, etc., Co., 2 Kulp 142.

Washington.— State *v.* Chehalis County Super. Ct., 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354.

Wisconsin.— Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454, writ of assistance denied.

United States.— Horn *v.* Pere Marquette R. Co., 151 Fed. 626.

Canada.— Campbell *v.* Lepan, 19 U. C. C. P. 31.

See 42 Cent. Dig. tit. "Receivers," § 129.

Intervening rights of innocent purchaser.— If the rights of third persons, in no manner parties to the record, have intervened, as, where they have purchased the property in good faith, the master or chancellor will not exercise such a supervisory control as to order it into the possession of the receiver. These purchasers have rights which cannot be adjudicated in this summary and collateral method. Levi *v.* Karrick, 13 Iowa 344.

72. Extending receivership generally see *supra*, III, H, 2.

73. *Maine.*— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

New Jersey.— Miller *v.* Mackenzie, 29 N. J. Eq. 291.

New York.— Matter of Muehlfeld, 16 N. Y. App. Div. 401, 45 N. Y. Suppl. 16 (applying the rule in a decision that a receiver of a corporation cannot, by motion, compel its assignee for benefit of creditors to surrender the property of the corporation where the assignment was made before the receiver was appointed, and the assignee was not a party to that proceeding); Olmsted *v.* Rochester, etc., R. Co., 46 Hun 552 (as to books of a corporation which were held under a sale of the corporate property); Bowery Sav. Bank *v.* Richards, 6 Thomps. & C. 59; Parker *v.* Browning, 8 Paige 388, 35 Am. Dec. 717; Cassilear *v.* Simons, 8 Paige 273 (practice of extending receivership to fraudulent assignee).

Ohio.— White *v.* Gates, 42 Ohio St. 109, holding that in a proceeding in aid of execution, upon a finding by the court that the judgment debtor had placed money in the hands of a third person to defraud creditors, it had no power to imprison such third person for contempt for refusing to deliver the money to the receiver, but the receiver must resort to an action against such person.

Washington.— State *v.* Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866.

See 42 Cent. Dig. tit. "Receivers," § 129.

But see Appleton Waterworks Co. *v.* Central Trust Co., 93 Fed. 286, 35 C. C. A. 302; Prentiss *v.* Brennan, 2 Grant Ch. (U. C.) 18.

But where the wife of a tenant of the receiver, after the expiration of the term and an order on the tenant to restore possession

against the possession of a stranger to the action claiming by paramount title, but will leave the question of title to be tried by a proper action to be brought for that purpose.[74]

(III) *Property Beyond Jurisdiction* — (A) *In General.* While a court of equity cannot send its receiver out of its jurisdiction to enforce its orders or decrees,[75] it may act upon parties within its jurisdiction and amenable to its process,[76] who will be in contempt if they resist such orders,[77] and may restrain them from interfering with the receiver's possession of property beyond the jurisdiction,[78] and by attachment or otherwise protect from interference by suits in foreign jurisdictions, by those acting with notice or knowledge, the funds which the receiver had been directed to collect.[79]

to the receiver, claimed to retain the possession on the ground that the right was in her, and also alleged that she had no notice of the rule to dispossess her, it was held that the court properly ordered that she be dispossessed unless within ten days she should show some reason in law or equity why she should not be, it appearing that if the matter were delayed, a receiver would not be able to rent the land for want of time. Visage *v.* Schofield, 60 Ga. 680.

74. Thornton *v.* Washington Sav. Bank, 76 Va. 432. See also Sullivan *v.* Colby, 71 Fed. 460, 18 C. C. A. 193.

An officer of a corporation who claims title to certain property under assignments from the corporation prior to the commencement of the proceedings in which the receiver was appointed cannot be punished for contempt for refusal to turn it over to the receiver, the process being against the corporation alone, and the fact that such officer verified the answer of the corporation did not make him a party. *Ex p.* Hollis, 59 Cal. 405; State *v.* Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866, where the president of a bank on whom process against the bank had been served as its president was not in contempt for refusal to turn over property held by another bank of which also he was the president. But on the other hand it is held that the receiver of a corporation may invoke the aid of the court by a petition ancillary to the main action for the purpose of compelling corporate officers to surrender assets which it is alleged they are concealing and seeking to convert to their own use, and an objection that an action at law by the receiver will lie is not maintainable, since allegations of the petition, which sets up in addition to the concealment, etc., that the officers were insolvent, showed grounds of equitable jurisdiction. Brandt *v.* Allen, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653. See also *supra*, note 32.

When right not adverse.— In Miles *v.* New South Bldg., etc., Assoc., 95 Fed. 919, it is held that in administering the assets of an insolvent corporation, the court may, on petition by its receiver, against another corporation require the latter to deliver to the receiver property belonging to defendant corporation, but which the second company holds as trustee to secure certain creditors and stock-holders, as it is only where a right adverse to defendant and its creditors is asserted that a separate suit is necessary to adjudicate such right.

Attack upon attachment of property in officer's hands see *infra*, IV, D, 7, e, (II), note 43.

75. See *infra*, VIII.

76. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

77. Langford *v.* Langford, 5 L. J. Ch. 60.

78. Schindelholz *v.* Cullum, 55 Fed. 885, 5 C. C. A. 293, where one who had joined in a proceeding for the winding up of a corporation and an equal distribution of its assets among all of its creditors, and had been active in extending the receivership to lands in another state, caused suit to be brought in the latter jurisdiction and obtained a lien on the lands, and it was held that under these circumstances, without reference to the nature of the receiver's title, the court appointing a receiver might enjoin such party from enforcing the lien or in any way interfering with the receiver's possession.

79. *Illinois.*— Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147 [*affirming* 30 Ill. App. 258] (attachment of goods in another state by a creditor of one over all of whose property a receiver had been appointed in Illinois); Gary *v.* Brown, 33 Ill. App. 435 (holding that where a receiver is appointed with directions to collect a note, the court may, in regular proceedings for contempt in seeking to hinder and embarrass the receiver in making the collection, require the party to terminate so much of garnishment proceedings instituted by him in another state as tends to prevent payment to the receiver of the money due on the note, etc.).

New Jersey.— Chesapeake, etc., R. Co. *v.* Swayze, 62 N. J. Eq. 369 [*affirmed* as reported in 60 N. J. Eq. 369, 47 Atl. 28].

Ohio.— Besuden *v.* E. Besuden Co., 4 Ohio S. & C. Pl. Dec. 144, 3 Ohio N. P. 165, power to order a creditor of a corporation of which a receiver had been appointed to dismiss garnishee proceedings in another state and to punish him for contempt for failure to obey.

Pennsylvania.— Line *v.* Carlisle Mfg. Co., 5 Pa. Dist. 642, 18 Pa. Co. Ct. 370, rule on creditors of insolvent corporation to withdraw and discontinue attachment suits in another jurisdiction, or that they be attached.

(B) *Assignment or Conveyance.* The court may order a party to execute an assignment or conveyance to the receiver of property beyond its territorial jurisdiction, and disobedience of the order will be a contempt.[80]

i. Attornment and Interference With Rents and Possession. The court may order parties in possession to attorn to the receiver,[81] and for this purpose it is not necessary that tenants should be parties to the suit,[82] although if not

Rhode Island.— Chafee *v.* Quidnick Co., 13 R. I. 442.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792, contempt in bringing suit in another state and summoning parties as trustees holding funds of the corporation over which the receiver was appointed, and such acts restrained on receiver's petition.

See 42 Cent. Dig. tit. "Receivers," § 131 *et seq.*

Determination as to paramount right or superior equity.— Where a court of equity is asked to proceed as for a contempt against a creditor, who seeks to reach by attachment or garnishment debts due to an insolvent debtor from persons residing out of the state, it is proper to inquire which of the parties has a paramount right or superior equity to those debts. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

80. Fenner *v.* Sanborn, 37 Barb. (N. Y.) 610; Barbour *v.* Lockard, 9 Ohio Dec. (Reprint) 254, 11 Cinc. L. Bul. 319; Wilmer *v.* Atlantic, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

81. Woodyatt *v.* Connell, 38 Ill. App. 475 (tenant in possession, being a party to foreclosure suit); Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565 (tenant of mortgaged premises in foreclosure); Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417 (*citing* Edwards Receivers, to the rule that the order or a notice should be served on the tenants and if they refuse to attorn application should be made to the court for an order compelling them, and on their disobedience they should be proceeded against for contempt); Sharp *v.* Carter, 3 P. Wms. 375, 379 note, 24 Eng. Reprint 1108. See also Williams *v.* Williams, 11 Wkly. Rep. 635.

Costs on motion against tenants.— On a motion that tenants may attorn it was held not the course of the court to order the tenants to pay the costs of the motion. Hobhouse *v.* Hollcombe, 2 De G. & Sm. 208, 64 Eng. Reprint 92.

Owner in possession — *In general.*— It has been said to be the course of the court of chancery in England that if a receiver is appointed of real estate and the owner is in possession application should be made to the court for delivery of possession to the receiver, who could not distrain on such owner who is not tenant to the receiver. Griffith *v.* Griffith, 2 Ves. 400, 28 Eng. Reprint 256. But it has also been held that where the suit is to enforce a charge on real estate, against one who owns and occupies the estate, he will be compelled to attorn to a receiver. Everett *v.* Belding, 22 L. J. Ch. 75, 1 Wkly. Rep. 44, where a reference was directed to the master to fix an occupation rent.

In supplementary proceedings under the statute in New York it is held that it is a contempt for the judgment debtor to interfere with the collection of rents of real property not occupied by himself after the appointment of a receiver and the filing of the order in the county where the property is situated. Vermont Marble Co. *v.* Wilkes, 30 N. Y. Suppl. 381. And as to title of receiver generally in such proceedings see EXECUTIONS, 17 Cyc. 1464.

Occupation rent prior to appointment.— But an order before the hearing is erroneous if it directs a party who was in possession as equitable owner of a share of the property to pay an occupation rent for a period antecedent to the order for fixing the occupation rent and appointing a receiver, since the latter order is the origin of the tenancy, and consequently his liability to rent could only commence as from that date. Lloyd *v.* Mason, 2 Myl. & C. 487, 14 Eng. Ch. 487, 40 Eng. Reprint 725.

82. Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565 (tenant of mortgagor not party to foreclosure); Reid *v.* Middleton, Turn. & R. 455, 12 Eng. Ch. 455, 37 Eng. Reprint 1176 (where the lord chancellor said that where a receiver was appointed the ordinary direction was that the tenants should attorn; that the court could not know who were tenants; but that if application was made to A, B, and C, to attorn, and they would not do so, the course was to move that they should attorn, and then they were to come and inform the court whether they were tenants or not). See also Smith *v.* Butcher, 28 Gratt. (Va.) 144.

Rents due and to become due.— In a suit by judgment creditors to subject real estate encumbered by deeds of trust, the executions were held to be a charge upon the rents in arrear and it was held proper to direct the receiver to collect such rent as well as rent to accrue, and to order the tenants to attorn and pay rents to him. Smith *v.* Butcher, 28 Gratt. (Va.) 144.

Order to pay sum claimed as rent.— In American Mortg. Co. *v.* Sire, 103 N. Y. App. Div. 396, 92 N. Y. Suppl. 1082, it is held that the court cannot order a tenant in possession under a prior contract with the owner, and who is not a party to the foreclosure suit, to pay to a receiver a sum of money claimed by him as rent; that such relief can be obtained only in an action, and the tenant cannot be punished for contempt for interfering with the receiver's possession. But see Hobson *v.* Sherwood, 19 Beav. 575, 52 Eng. Reprint 474; Mitchel *v.* Manchester, Dick. 787, 21 Eng. Reprint 477.

parties their possession of the premises cannot be disturbed.[83] And where a mortgagor, his lessee, and subtenants are parties to the suit in which a receiver is appointed to collect rents pending the determination of the ultimate title thereto, an attempt by the tenant to collect rents and the institution by him of proceedings to eject subtenants who have paid rent to the receiver are acts which tend to impair and defeat the receiver's rights under the order of appointment and are punishable as contempt.[84]

j. Notice of Appointment.[85] It has been held that the appointment of a receiver of the property of an insolvent corporation is legal notice to all persons having contractual relations with it; that their rights are not affected by notice or want of it, but by operation of law which the court has put in motion,[86] and the duty of a party to the suit to deliver property in his possession to the receiver[87] upon his demand does not depend upon official notice of the appointment and qualification,[88] if the party has actual notice of the order.[89] But notice has been required[90] of the appointment of a receiver to collect rents, in order to put the tenant in default,[91] or to render a lessee guilty of contempt for instituting dispossess proceedings against tenants after the appointment of a receiver in a foreclosure suit,[92] or to render a tenant, who is not a party to the suit, liable

Notice see *infra*, IV, D, 5, j.

83. Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565. See also *supra*, III, C, 2; IV, D, 3, a.

84. Schultz *v.* Luft, 74 N. Y. App. Div. 628, 77 N. Y. Suppl. 493 (contempt for lessee who is party to an action for the foreclosure of a mortgage to collect rents from a tenant after service on the lessee of the order appointing the receiver and directing him to collect and enjoining the owner or her agents or servants from collecting such rents); Coffin *v.* Burstein, 68 N. Y. App. Div. 22, 74 N. Y. Suppl. 274.

But as against an assignee of rents not a party to a foreclosure action, who after the appointment of a receiver to collect the rents *pendente lite* collected such rents, the order appointing the receiver never having been served upon him and the tenants never having attorned to the receiver, he was held not liable for contempt, the proper remedy to bring him within the reach of the power of the court to punish him in that manner being to secure the attornment of the tenant or to extend the action by amendment so as to make him a party to it. Bowery Sav. Bank *v.* Richards, 6 Thomps. & C. (N. Y.) 59.

85. **Rule against interference applied to attorney** see *supra*, IV, D, 5, c.

86. Breed *v.* Glasgow Inv. Co., 92 Fed. 760.

Notice of agent's authority see U. S. *v.* Jose, 63 Fed. 951, *supra*, note 46.

87. See *supra*, IV, D, 5, b.

88. Geisse *v.* Beall, 5 Wis. 224.

89. Drakeford *v.* Adams, 98 Ga. 722, 25 S. E. 833; Lewis *v.* Singleton, 61 Ga. 164, holding that it is the party's duty to so deliver, although the bill and order of appointment have not been served.

90. **Concluded by other objections raised on demand.**— Where a person who has been appointed receiver of the property of a judgment debtor demanded the delivery to him of personal property as the property of such debtor, if the demand was sufficient in other respects, the objection that he did not exhibit at the time of such demand the evidence of his appointment as receiver, if the refusal to deliver was not placed on that ground, could not be taken at the trial of an action by the receiver to recover the possession of such property. Livingston *v.* Stœssel, 3 Bosw. (N. Y.) 19.

91. Hunt *v.* Wolfe, 2 Daly (N. Y.) 298, where a lessor died and a receiver was appointed to collect rents pending a controversy over the probate of an alleged will of the deceased, and it was held in analogy to the rulings under a statutory provision that where any lands or tenements occupied by a tenant, or the rents or profits or any other interest therein, shall be conveyed by the landlord of such tenant, the latter shall not be liable to such grantee for any breach of the condition of the demise until he shall have had notice of such grant, the receiver should give notice of his appointment; that if the commencement of the action should be held a sufficient notification or demand, then defendant must pay the costs of the action on payment of the money into court, although he was not aware to whom it should have been paid, and is thus subjected to a penalty without default on his part.

92. Schultz *v.* Luft, 74 N. Y. App. Div. 623, 77 N. Y. Suppl. 493.

Order served on one before he is brought in. — In Fletcher *v.* McKeon, 74 N. Y. App. Div. 231, 77 N. Y. Suppl. 465, an order appointing a receiver in a foreclosure suit to collect rents from tenants, and enjoining the owner from collecting such rents or interfering with property, was served on one claiming to have leased the premises and subsequently the summons was amended by making him a party, and a copy served. Thereafter, on the advice of counsel, such lessee commenced proceedings to dispossess tenants and it was held that both he and his counsel were guilty of contempt.

for contempt for refusing to attorn to the receiver; [93] and previous notice or knowledge of the appointment of a receiver of an insolvent's property has been deemed material where the courts have enjoined the prosecution of foreign suits or have committed creditors so prosecuting them for contempt, upon the theory of an interference with the receiver,[94] or on the question of interference by the levy of process.[95] Sometimes the matter is the subject of statutory regulation.[96]

6. Adverse Claimants, Creditors, Etc. — a. Application in Receivership Suit — (i) *In General.* One having a claim upon the property must intervene in the court of the receivership and in the case in which the receiver has been appointed, and establish his right in that tribunal, or must obtain leave of that court to bring an independent action,[97] and it may be taken as a general

93. American Mortg. Co. *v.* Sire, 103 N. Y. App. Div. 396, 92 N. Y. Suppl. 1082, where the order was not served on the tenant.

94. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324 [*distinguishing* Sercomb *v.* Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. Rep. 147, where the creditor who instituted the attachment proceeding in the foreign jurisdiction had full knowledge before he did so of the appointment of the receiver in Illinois, under which condition he was held in contempt, in that in the principal case the attaching creditor had no notice or knowledge of such appointment; and further because the common debtor in the attachment and in the proceedings in Illinois in the principal case was a foreign corporation and the receiver in Illinois took nothing outside of that state]. See also Chafee *v.* Quidnick Co., 13 R. I. 442; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

95. See Albany City Bank *v.* Schemerhorn, 10 Paige (N. Y.) 263, *infra*, note 62; *In re* Wilk, 155 Fed. 943, knowledge without formal notice sufficient.

96. See Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634, where it appears that the statute required notice of the appointment to be given where "the party claiming the property cannot be found in the State," but it was held that jurisdiction to make an order directing such receiver in regard to his duties is not affected by the fact that notice of such appointment has not been served, in the absence of evidence that the party claiming the property cannot be found in the state, especially where such appointment was made at a hearing at which he was represented by counsel, in a cause to which he had become a party by answer.

Statute confined to permanent receiver.— In New York it was held that a statute which required permanent receivers to give notice of their appointment was not rendered applicable to temporary receivers by the provision of the code of civil procedure requiring the latter to qualify as prescribed by law in the case of permanent receivers, as the requirement to qualify has no reference to proceedings after appointment but rather to what must be done in order that the appointee may act at all, as the giving of bond. Nealis *v.* American Tube, etc., Co., 76 Hun (N. Y.) 220, 27 N. Y. Suppl. 733 [*affirmed* in 150 N. Y. 42, 44 N. E. 944].

97. *Alabama.*— Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157.

Florida.— McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237.

Georgia.— Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

New York.— *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665 [*affirming* 59 N. Y. Super. Ct. 552, 15 N. Y. Suppl. 144] (as to remedy of one claiming property wrongfully in the possession of corporation at the date of the order appointing a receiver, and restraining replevin brought between that time and the qualification of the receiver); *In re* Le Blanc, 75 N. Y. 598 [*affirming* 14 Hun 8] (requiring funds set apart to pay a dividend on corporate stock to be paid by the receiver of the corporation to the stock-holder without action); O'Mahoney *v.* Belmont, 62 N. Y. 133; *In re* U. S. Reflector Co., 8 N. Y. Civ. Proc. 120; Riggs *v.* Whitney, 15 Abb. Pr. 388.

Pennsylvania.— Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160, as to levy on mortgaged property in the possession of a receiver, the court holding that if a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody in order that he may proceed against it.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858.

Vermont.— Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Wisconsin.— *In re* Day, 34 Wis. 638.

United States.— Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322 [*approved* in Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851]; Horn *v.* Pere Marquette R. Co., 151 Fed. 626; Winchester *v.* Davis Pyrites Co., 67 Fed. 45, 14 C. C. A. 300 [*affirming* 64 Fed. 664]; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704.

England.— Ames *v.* Birkenhead Docks, 20 Beav. 332, 1 Jur. N. S. 529, 24 L. J. Ch. 540, 3 Wkly. Rep. 381, 52 Eng. Reprint 630; Smith *v.* Effingham, 2 Beav. 232, 17 Eng. Ch. 232, 48 Eng. Reprint 1169; Hawkins *v.* Gathercole, 1 Drew. 12, 16 Jur. 650, 21 L. J. Ch. 617, 61 Eng. Reprint 355;

rule that, although the court may have issued a process, or may have made an order which may interfere with the supposed rights and interests of other persons not parties to the cause, it is always competent to them to make an application to the court for relief, and that justice will be duly administered to them on that application, either at the hands of the court itself or in some other mode which the court will sanction,[98] since the refusal of leave to sue in other tribunals or to

Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201; Wardle *v.* Lloyd, 2 Molloy 388.

Canada.— Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42, no right to proceed without leave of court against tenant of receiver. In Gardner *v.* Burgess, 13 Ont. Pr. 250, actions brought by mortgagees without the leave of this court for sale of mortgaged premises to receive the rents and profits of such premises were allowed to stand on the petition of the mortgagees.

See 42 Cent. Dig. tit. "Receivers," § 138.

Examination pro interesse suo.— Under the chancery practice the proper course is to apply to the court to direct an examination of the party as to his right or title, which is called an examination *pro interesse suo.* Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Noe *v.* Gibson, 7 Paige (N. Y.) 513; Young *v.* Vanhooser, 6 Lea (Tenn.) 136; Beverly *v.* Brooke, 4 Gratt. (Va.) 187; Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322; Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201; Fowler *v.* Haynes, 2 New Rep. 156. By rule or statute any person who might have moved under the chancery practice to be examined *pro interesse suo* may apply upon motion or petition in the cause for such relief as he may deem himself entitled to. Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837; Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 106, holding that an applicant might proceed by petition, although where an application must be made by petition it cannot be made by motion. See also Conley *v.* Deere, 11 Lea (Tenn.) 274, where the practice in court of chancery in England under which the party applying to be examined was permitted to go before the master and state his title upon which he might have had the judgment of the master, and ultimately of the court, if necessary, is distinguished from the practice in that state where the master had no quasi-judicial powers appertaining to that office in the English court of chancery, in that upon a reference to the master and his report on the facts the court would take the proper action and make the proper decree.

Action by stranger as owner see *infra,* VI, D, 1.

98. *Illinois.*— Heise *v.* Starr, 44 Ill. App. 406; Andrews *v.* Stanton, 18 Ill. App. 163.

New York.— *In re* Bailey, 4 N. Y. Civ. Proc. 140 (where costs adjudged in favor of a corporation in an action against it after a receiver was appointed for the corporation, and upon which the attorney for the corporation claimed a lien, but which had nevertheless been paid to the receiver, were ordered to be paid by the receiver to the attorney); Howell *v.* Ripley, 10 Paige 43; Vincent *v.* Parker, 7 Paige 65 (holding that where a receiver was appointed of the rents and profits of real estate, a part of which rents and profits was not in controversy in the suit in which the receiver was appointed, but belonged to a third person, not a party to the suit, in right of his wife, and upon the application of the husband for the payment of that part of the fund to him, the wife came in and claimed it, on the ground that her husband had violated the marriage contract and that she had filed a bill against him for a divorce and for a restoration of her property acquired by the marriage, and the court refused to decide the question between the husband and wife upon that application, but the share of the rents and profits belonging to them was directed to be paid into court, by the receiver, to the credit of the suit between the husband and wife, to abide such order or decree as should be made in that suit respecting the same).

United States.— Commonwealth Roofing Co. *v.* North-American Trust Co., 135 Fed. 984, 68 C. C. A. 418; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704.

England.— Russell *v.* East Anglian R. Co., 14 Jur. 1033, 20 L. J. Ch. N. S. 257, 3 Macn. & G. 104, 6 R. & Can. Cas. 501, 49 Eng. Ch. 80, 42 Eng. Reprint 201; Gooch *v.* Haworth, 3 Beav. 428, 43 Eng. Ch. 428, 49 Eng. Reprint 168.

Canada.— Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42.

See 42 Cent. Dig. tit. "Receivers," § 138. And see the cases cited *supra,* note 97. See also *infra,* VI, D, 2.

The course of the court of chancery.— It was not according to the course of the court of chancery to refuse liberty to try a right claimed against a receiver unless it was perfectly clear that there was no foundation for the claim. See *infra,* VI, D, 2, b. When a party was prejudiced by having a receiver put in his way, the course was either to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo,* which may perhaps often be the most convenient mode. Beverley *v.* Brooke, 4 Gratt. (Va.) 187 (holding that upon such application, examination, master's report, etc., it is for the court to decide the question of the right of an encumbrancer claiming the possession or the rents and profits accruing under the order of appointment, or, in its discretion, the court sometimes gives

enforce the judgments of other courts might in some cases destroy or impair rights which the court appointing the receiver has no power to conserve.[99]

(II) *As Between Different Receivers.* A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession, without the authority of the court,[1] and it has been held that where the attention of a trial judge is not called to the proceedings in a previous action in which a receiver of certain property was appointed, and he appoints another receiver of the same property, the receiver first appointed should take possession of the property.[2]

the claimant leave to bring an action of ejectment, to try a pure matter of legal title, with such directions, however, as will still guard the possession); Brooks *v.* Greathed, 1 Jac. & W. 176, 37 Eng. Reprint 342; Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214, 32 Eng. Reprint 632; Anonymous, 6 Ves. Jr. 287, 31 Eng. Reprint 1055.

The petition must set out the applicant's title, for an examination *pro interesse*, from its very nature, requires a statement of the charge or case of the party to be examined, as otherwise it would be impossible for the adversary to know how to point the interrogatories. Brien *v.* Paul, 3 Tenn. Ch. 357.

Order where money is paid into court to release property.— In Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717, it was held that where a claimant of property who was a stranger to the suit, and from whose possession the receiver took it, paid a sum of money into court in order to release the property, which was to abide the further order of the court, an order authorizing a suit at law to try the right to the property should direct that in the event of a recovery against the receiver the money should be applied in part payment of the damages recovered for the alleged injury in taking forcible possession of the property; that the claimant should stipulate to abide the result of the suit, and that if he failed to recover on the ground that the transfer of the property was fraudulent, the fund in court should be delivered to the receiver as the property of defendant for the purposes of the suit.

Necessity of evidence to support motion.— Where, on petition for an order to compel a receiver to turn over to petitioner certain property alleged to belong to him, all the allegations of the petition are denied, it is error to grant such an order without any evidence being taken. Smith *v.* Mason, 54 Ill. App. 258.

Claim of creditor of party entitled to fund see *supra*, IV, E, 2, c.

99. Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177, where, as illustrating the rule of courts of equity, it is said that if a claimant of real property, under title adverse to that of the parties represented by the receiver, asks leave to commence his action of ejectment, no court would hesitate to grant his motion; that it would not attempt to try the question of title — a question appertaining to another forum — with a view to denying leave to sue, if, in its opinion, the title asserted was not a good one. See this case *infra*, note 66.

Allowance and payment of claims see *infra*, V.

1. Ward *v.* Swift, 6 Hare 309, 12 Jur. 173, 31 Eng. Ch. 309, 67 Eng. Reprint 1184.

The proper practice on the part of a receiver to obtain property in the possession of another receiver of the same court is to apply by petition in the cause in which the latter receiver was appointed for an order requiring him to deliver possession. Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28.

Writ of assistance denied in Gelpeke *v.* Milwaukee, etc., R. Co., 11 Wis. 454; Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28; Wilmer *v.* Atlantic, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409.

Petition for restoration.—A receiver appointed by a state court who, after taking possession, has been dispossessed by a receiver subsequently appointed by a federal court, has sufficient interest in the property to give him a standing in the federal court to petition for the restoration of the property to him, and also to maintain an appeal from an order denying his petition. Shields *v.* Coleman, 157 U. S. 168, 15 S. Ct. 570, 39 L. ed. 660.

Conflicting jurisdiction see COURTS, 11 Cyc. 982 *et seq.*

Different appointments generally see *supra*, III, H, 2.

2. Central Nat. Bank *v.* Seligman, 64 Hun (N. Y.) 615, 19 N. Y. Suppl. 362.

Subsequent appointment pending appeal from first order.—Where in an action against a corporation and its trustees, the court issued an order for the appointment of a receiver, and referred the same to a referee to appoint a suitable person, and the trustees appealed and obtained a stay of proceedings, and in the meantime brought a suit against the corporation and obtained the appointment of a receiver, it was held that upon affirmance of the first order for a receiver and the appointment by the referee thereunder, his appointment related back to the time of the granting of the order directing him to appoint a suitable person, and gave the receiver so appointed all rights to the possession of the assets of the corporation, to the exclusion of the other receiver. Deming *v.* New York Marble Co., 12 Abb. Pr. (N. Y.) 66. *Compare* Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183.

b. Suspension of Ordinary Remedies — (I) *In General.* Ordinarily, it is held, proceedings at law are not available to those holding liens against property in the hands of a receiver pending the receivership.[3] And where the receiver is appointed in a proceeding involving a general distribution of the assets of an insolvent corporation, it is held that the rights of the creditors in such assets can be worked out in no other way than through the receiver,[4] and a statutory remedy afforded a creditor of an insolvent corporation after the appointment of a receiver in proceedings to administer its assets, in a provision directing notice to creditors and pointing out the method of procedure, is held to be exclusive.[5] On the other hand it is held that if third persons who are not parties to a suit by a creditor in which a receiver is appointed and who have no opportunity to be heard, are interested in the property, and the process is not so framed as to divest such interest, it cannot be affected,[6] and the rule against interference with a

3. Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876; Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418.

A creditor may be permitted to enforce his lien on petition where a receiver was appointed at the instance of a stock-holder of a corporation in a suit brought ostensibly in behalf of the stock-holders and creditors unless the appointment is followed by action indicating a purpose in good faith to secure the speedy payment of creditors, or unless the claim is paid within a fixed time. Cohen *v.* Gold Creek, Nevada, Min. Co., 95 Fed. 580; Scott *v.* Farmers' L. & T. Co., 69 Fed. 17, 16 C. C. A. 358. See also *supra*, III, K.

Lien accruing pending receivership.—Where liens accrued to laborers on property leased by a receiver under order of the court, and thereafter the lease is surrendered and possession resumed by the receiver, the lien will not be enforced in the ordinary manner, but the equity power of the court being invoked by the lienors and the court having possession of the property, it will direct payment of the claims by the receiver. McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291.

4. *New York.*— Rankin *v.* Elliott, 14 How. Pr. 339, effect of sequestration of corporate property and appointment of receiver in a suit by a judgment creditor on behalf of himself and all other creditors in which all creditors are called in to exhibit their claims.

Ohio.— Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207.

West Virginia.— Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125.

Wisconsin.— Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357, 78 Wis. 404, 47 N. W. 516, where the lienor under attachment and the officer holding the process were parties to a sequestration proceeding under the statute.

United States.— Malcomson *v.* Wappoo Mills, 88 Fed. 680, where the corporation itself is turned over to the receiver and an order is made restraining interference, etc.

See 42 Cent. Dig. tit. "Receivers," § 145 *et seq.*

But where a lien is established in an independent suit without objection, the receiver and purchaser of the property in the receivership proceedings being before the court, the judgment will bind them and parties claiming under them, although if timely objection had been made in the independent suit, the lienor would have been required to intervene in the receivership proceeding, and parties so bound cannot avail themselves of the fact that they had no notice of the lien, it being unrecorded as to them. Cameron *v.* Jones, 41 Tex. Civ. App. 4, 90 S. W. 1129.

Equitable remedies.— While a creditor having a legal lien may stand out and prosecute his legal remedies against the assets of an insolvent corporation his claim for equitable remedies should be asserted in the original suit in which a receiver was appointed. Augusta Nat. Bank *v.* Richmond Factory, 91 Ga. 284, 18 S. E. 160.

5. Buffum *v.* Hale, 71 Minn. 190, 73 N. W. 856 (as against the right of a creditor to sue the receiver, recover judgment and base a claim in intervention thereon); Danforth *v.* National Chemical Co., 68 Minn. 308, 71 N. W. 274 (holding under such provision that one having a simple contract cause of action against a corporation whose property has passed into the hands of a receiver cannot proceed at law, obtain a default judgment, and then intervene setting up the judgment as his sole cause of action and right to share in the distribution).

Under the Georgia statute giving a new remedy against insolvent traders by injunction and receivership in a suit by creditors (see *supra*, II, B, 7, c) while preëxisting liens are not to be interefered with (see *supra*, note, IV, D, 3, d, (II), parties with such liens may exercise their usual common-law remedies (Blanchard *v.* Vansyckle, 70 Ga. 278); but if they voluntarily come into such suit and submit their liens to that investigation which a court of equity may exercise over them, they must abide the court's judgment as to the validity of the liens, although if they are valid they must be preserved and it will be the duty of the court to see that this is done (Blanchard *v.* Vansyckle, *supra*).

6. J. W. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347 (under the doctrine that the proceeding in which a receiver of a corporation is appointed is not purely *in*

receiver's possession without leave of court has been held to have no application where the holders and claimants of prior liens and encumbrances are not proper parties to the suit in which the receiver is appointed or subject to the jurisdiction of the court in which it is pending, and the statutory steps to preserve such rights must be enforced within a fixed time or they will be lost.[7]

(II) *Right to Sue Debtor and Effect Upon Pending Actions.*[8] The appointment of a receiver will not of itself debar a creditor of the person over whose estate the receiver is appointed from pursuing his legal remedy by action against such debtor,[9] or from bringing suits for relief touching the same property but which in no way interfere with the possession or jurisdiction of the court in which the receivership is pending,[10] although as to an action which seeks the immediate possession of the same property the rule is held to be otherwise.[11]

rem and that in any event mere seizure of the corporate property is not sufficient to give notice to the world so as to divest the lien of a stranger); Snow *v.* Winslow, 54 Iowa 200, 6 N. W. 191; Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383 (lien on real property). See also Gates *v.* Merchants' Banking, etc., Co., 22 Ohio Cir. Ct. 724, 11 Ohio Cir. Dec. 721.

Effect of receiver's sale see *infra*, IV, H, 12.

7. Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177, *infra*, note 66.

8. **Action against receiver and joining receiver** see *infra*, VI, D, 2; VI, E, 1, b.

Cause of action arising out of receivership see *infra*, IV, F, 6, f.

In foreign jurisdiction see *infra*, VIII, A, 2, a *et seq.*

Suits by corporation see *supra*, IV, C.

9. Van Dusen *v.* Bla , 20 Wkly. Notes Cas. (Pa.) 45, after appointment for partnership. See also Scavey *v.* Jenkins, 15 Wkly. Notes Cas. (Pa.) 124. And see, generally, PARTNERSHIP, 30 Cyc. 730.

10. Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897; Mercantile Trust Co. *v.* Lamoille Valley R. Co., 17 Fed. Cas. No. 9,432, 16 Blatchf. 324, foreclosure to cut off equity of redemption. See also American L. & T. Co. *v.* Central Vermont R. Co., 86 Fed. 390, *infra*, note 11. But see Merchants', etc., Nat. Bank *v.* Kent County Cir. Judge, 43 Mich. 292, 5 N. W. 627, where it was held that it was improper to enjoin one from interfering with the property, who had replevied property about the time of the appointment of a receiver in a proceeding to which such plaintiff was not a party, and confine him to an action in trover and thus require him to submit to the management and sale of the property by a receiver and to recover only the net proceeds after costs of the receivership had been paid.

Receiver to collect rents.— The appointment of a receiver to collect rents from one of the parties in a controversy between landlord and tenant, with no authority in the receiver to enforce payment or take possession, did not prevent the landlord from reëntering upon a forfeiture of the lease under the terms thereof, or suspend the remedies of the landlord against such defaulting tenants. Washington Market Co. *v.* Warthen, 2 Mackey (D. C.) 432.

A suit solely to determine title to land, brought by direction of the governor, may be brought against a railroad in the hands of a receiver, without the consent of the federal court appointing the receiver. Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 39 S. W. 390 [*affirmed* in 95 Tex. 507, 68 S. W. 777].

11. American L. & T. Co. *v.* Central Vermont R. Co., 86 Fed. 390, distinguishing the case of a suit for foreclosure in which immediate possession of the property is sought from one of strict foreclosure to cut off the right to redeem. The court also distinguishes Continental Trust Co. *v.* Toledo, etc., R. Co., 82 Fed. 642, where the receivers in a creditors' suit had, by leave of court, been made defendants in a foreclosure suit which set out the receivership, the suits had been consolidated under the title of the foreclosure suit, and the receivers had been continued in that suit, and the statement of the judge therein on a motion to dismiss the bill of foreclosure, that it could not be of importance that the bill was apparently filed as an independent bill, in that this must be considered as said with reference to the suits as they then stood together and falls short of saying that the foreclosure suit could properly be maintained during the receivership in the other, as a wholly independent suit. But see Real Estate Title Ins., etc., Co. *v.* Mahoning Rolling Mill Co., 6 Pa. Dist. 409; Holladay Case, 27 Fed. 830, holding that the fact that a state court has acquired jurisdiction of a suit between a grantor and grantee of land, the object of which suit does not appear, but which in the nature of things could not involve the matters in controversy in a subsequent suit by a creditor of the grantor against the grantee to set aside or postpone the conveyance of said property to the latter on the ground that it was made to hinder and delay plaintiff in the collection of his demand against the grantor, and that the former court has taken possession of the property and appointed a receiver, constitutes no objection to the prosecution of the latter suit; that a finding for plaintiff and a decree setting aside or postponing the conveyance in his favor would not operate as an interference with the process of the state court or the possession of its receiver, although the court would not

While the rule is sometimes laid down that no person can bring an action against a corporation after a receiver has been appointed, without the consent of the court,[12] generally the mere fact that a receiver has been appointed for a corporation and its property and revenues have been sequestered by him does not destroy the existence of the company as a body corporate so that it may not be sued, but independent actions may still be brought against it,[13] unless the corporation is dissolved or such actions are enjoined,[14] and such suits may be brought when

provide for the sale of the property while the receiver in the first case is in charge thereof.

12. Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733.

13. *District of Columbia.*— McDermott *v.* Crook, 20 App. Cas. 465, cause of action prior to appointment for which receiver could not be sued.

Georgia.— Citizens' Bank *v.* Hubbard, 70 Ga. 411, where it is said that to hold that where a portion of the creditors of an insolvent debtor filed a creditors' bill for themselves and such as might choose to come in and be made parties thereto, and procured the appointment of a receiver, this precluded other creditors from proceeding to obtain judgments against the debtor himself, would be in such cases to discharge the debtor from all liability, except as to the specific assets, as effectually as a judgment in bankruptcy.

Illinois.— Wolf *v.* Illinois Nat. Bank, 178 Ill. 85, 52 N. E. 896; People *v.* Barnet, 91 Ill. 422; Wyatt *v.* Ohio, etc., R. Co., 10 Ill. App. 289, holding that in this respect it can make no difference whether the appointment is made by a state or United States court.

Indiana.— See Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277, where the receivership is under a decree which does not attempt to take away the corporate existence, but merely substitutes the possession and management of the receiver for that of the corporate officers.

Iowa.— Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38, (1903) 96 N. W. 982 (holding that in such suit to cancel mortgages executed to an association, the court may determine the rights of the parties against the association, although a general receivership is pending); Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; Allen *v.* Central R. Co., 42 Iowa 683 (no necessity for leave to sue).

Missouri.— Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

New York.— Pringle *v.* Woolworth, 90 N. Y. 502; Kincaid *v.* Dwinelle, 59 N. Y. 548 [*affirming* 37 N. Y. Super. Ct. 326] (although the corporation itself is enjoined from exercising its corporate franchises); People *v.* Rensselaer Ins. Co., 38 Barb. 323. So under a statute providing that a receiver of an insolvent corporation might settle controversies between him and creditors by having a reference and that the report of the referee "shall be conclusive of the rights of the parties," if not set aside by the court, it is held that, although there is no express provision allowing the corporation to be made a party, if it consents to the reference and appears before the referee and takes part in the proceedings, the report may conclude it as well as the receiver and creditor. Del Valle *v.* Navarro, 21 Abb. N. Cas. 136.

Ohio.— Monnett *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.

Texas.— City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033; Dulling *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178.

Washington.— Allen *v.* Olympia Light, etc., Co., 13 Wash. 307, 43 Pac. 55; Scott *v.* Ranier Power, etc., Co., 13 Wash. 108, 42 Pac. 531.

United States.— Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 10 S. Ct. 439, 40 L. ed. 595 [*affirming* 156 Ill. 522, 41 N. E. 225]; Bethel First Nat. Bank *v.* Pahquioque Nat. Bank, 14 Wall. 383, 20 L. ed. 840, national bank.

See 42 Cent. Dig. tit. "Receivers," § 148.

To charge directors and stock-holders as voluntary association.— In Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449, it was held that the fact that a creditor had obtained the appointment of a receiver of a defendant on a bill treating it as a valid corporation was no reason why another creditor could not maintain a suit against the corporation and its directors and stock-holders charging them as a swindling association under color of the general banking law, and that they never became incorporated.

Temporary receiver.— So the petition of creditors or stock-holders might set forth facts which would warrant a temporary receivership and a temporary possession by him of the corporate property, real and personal, as where the corporation is entirely solvent, yet the corporate officers by mismanagement and fraud are jeopardizing the property (see *supra*, II, C, 3, 4), without affecting the legal title to either and leaving the corporation subject to suits (Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075).

Suspension of corporate functions see *supra*, IV, C.

14. Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862.

A creditor may be restrained from proceeding at law for his debt where a final order is made for the appointment of a receiver and the creditor comes in and makes his claim thereunder. *In re* Buffalo City Bank, 10 Paige (N. Y.) 378.

Purpose to make equitable distribution of funds.— Where the only object of a decree appointing receivers and awarding an injunction, so far as disclosed upon its face, was to provide for the safekeeping of the effects of defendant corporation, and to prevent any fraudulent transfer thereof, and where such

the appointment of a receiver is in a suit for an accounting and not for the winding up of the corporate affairs.[15] And so a pending suit with reference to which a receiver, appointed under the chancery powers of the court to preserve property *pendente lite*, is invested with no duty or authority, is not affected by such appointment,[16] and a like rule has been held to obtain in a number of cases as to the effect of the appointment of a receiver of a corporation upon pending actions against the corporation,[17] unless the order of appointment is tantamount to a dissolution,[18] or unless there is an injunction restraining the suit, or a legislative provision to the contrary.[19] The corporation may in such cases defend itself

decree does not state that the ulterior intent of the court is to make an equitable distribution of the funds, and contains no direction to the receivers to give notice to creditors to file their claims, it has been held that it imposes no restriction upon creditors in prosecuting their claims, either at law or in equity. Ellicott *v.* U. S. Insurance Co., 7 Gill (Md.) 307; Moore *v.* Southern States Land, etc., Co., 83 Fed. 399. But under a statute providing for a suit by a judgment creditor to sequester the property of a corporation and the *pro rata* distribution of its assets among all creditors, an injunction may issue to restrain all creditors from bringing or maintaining other actions. Ballin *v.* Loeb, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742. To the same effect see Morton *v.* Stone Harbor Imp. Co., (N. J. Ch. 1899) 44 Atl. 875; Davis *v.* Butters Lumber Co., 132 N. C. 233, 43 S. E. 650.

Upon the ground that without statute there can be no sequestration of corporate property by means of a receiver, under such a provision embracing the power to restrain the bringing of independent actions the power of the court in the latter respect must be confined by the terms of the statute. *In re* Binghamton General Electric Co., 143 N. Y. 261, 38 N. E. 297.

15. Paddack *v.* Staley, 13 Colo. App. 363, 58 Pac. 363.

16. Gadsden *v.* Whaley, 14 S. C. 210, holding that the receiver being no party to such suit cannot appear in it without an order making him a party.

So the appointment of a receiver in a suit against a mortgagor at the instance of a judgment creditor was held not to abate another suit pending against the mortgagor, but that at most it would be but an irregularity to proceed in the latter suit until the receiver was brought in. Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592.

Under a code provision that after a transfer of interest in a pending action it may be continued by the original party unless the court directs a substitution or joinder of the transferee, it is error to dismiss a complaint in replevin upon proof of the appointment of a receiver of plaintiff's property subsequent to the commencement of the action and in another cause. Stearns *v.* Early, 49 Misc. (N. Y.) 614, 96 N. Y. Suppl. 837.

17. *Illinois.*—Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199; Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613, in which cases it is held not error to refuse a continuance.

Massachusetts.— Kittredge *v.* Osgood, 161 Mass. 384, 37 N. E. 369.

New Jersey.— Cooper *v.* Philadelphia Worsted Co., (Ch. 1904) 57 Atl. 733 (even where the rule is that without the consent of the court no person can bring an action against a corporation after the appointment of a receiver); Ennis *v.* Eden Mills Paper Co., 65 N. J. L. 577, 48 Atl. 610; Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668; Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

New York.— Parry *v.* American Opera Co., 12 N. Y. Civ. Proc. 194.

United States.— Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732. See also Central Trust Co. *v.* Evans, 73 Fed. 562, 19 C. C. A. 562, where the receiver was appointed in foreclosure proceedings.

See 42 Cent. Dig. tit. "Receivers," § 131 *et seq.*

Appeal by corporation.— In Bowker *v.* Haight, etc., Co., 147 Fed. 923, it was held that a federal court which is in charge of the assets of an insolvent corporation will not interfere with an action in a state court by directing the corporation not to appeal from the judgment which has been rendered therein against it, where such appeal will not involve expense to the estate.

Receiver appointed pending appeal — liability of sureties on appeal-bond.— In Steinhauer *v.* Colmar, 11 Colo. App. 494, 55 Pac. 291, a receiver of a corporation was appointed after judgment against the company and appeal by it, which was affirmed on appeal, no application having been made to substitute the receiver, and it was held that the sureties on the appeal-bond were liable, the judgment against the corporation being valid.

18. See, generally, CORPORATIONS, 10 Cyc. 1316.

19. Squire *v.* Princeton Lighting Co., (N. J. 1907) 68 Atl. 176 (under the New Jersey statute of 1896); Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733; Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668.

An injunction before an adjudication of insolvency or appointment of a receiver, under a statute which provides for an injunction against the exercise of corporate franchises upon an adjudication of insolvency and for the appointment of a receiver, which injunction as issued merely restrains the transferring of property, contracting debts, etc., pending a hearing of a rule to show cause why an injunction should not be issued and a receiver appointed, but is not directed

against a liability which it may ultimately have to discharge.[20] No decree or judgment in such a suit can operate to disturb the custody of the receiver,[21] or be satisfied from the property in the hands of a receiver except through the administering assistance of the court appointing him,[22] although it is held that it will bind the parties as to the recovery thereon against defendant.[23]

7. Particular Applications of Foregoing Rules — a. Right of Landlord Against Tenant.[24] The appointment of a receiver does not affect the rights of a landlord; but he cannot exercise them without first obtaining leave of the court.[25]

against the exercise of corporate franchises, does not restrain third persons from pursuing their remedies *in invitum* the company. Squire *v.* Princeton Lighting Co., (N. J. 1907) 68 Atl. 176 [*reversing* (Ch. 1906) 64 Atl. 474].

The court may stay suits in a dissolution proceeding under a statute for dissolving and winding up corporations, to which proceeding it is held the corporate creditors are parties, so as to prevent the recovery by creditors of assets to which the receiver is entitled. Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272.

After judgment and garnishment an action does not abate against the garnishee, although the principal defendant is dissolved and a receiver appointed. Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621. See also *infra*, IV, D, 7, e.

Suits against foreign corporations see *infra*, VIII, A, 2.

20. Parry *v.* American Opera Co., 12 N. Y. Civ. Proc. 194, as distinguished from its right to prosecute a suit for rights of property after the transfer of its interest therein to a receiver, the injunction order restraining the corporation from exercising any power or authority over any of the assets or property rights thereof.

21. Monette *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469; French *v.* McCready, (Tex. Civ. App. 1900) 57 S. W. 894.

After its property is returned to its custody by the court taking charge of it, such judgment could be enforced against it, in the usual way, on final process. Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

Effect of judgment as lien see *infra*, IV, D, 7, e, (III), (A).

22. Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

23. Gray *v.* Taylor, (N. J. 1899) 44 Atl. 664; Pringle *v.* Woolworth, 90 N. Y. 502; Monette *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469; Pine Lake Iron Co. *v.* La Fayette Car Works, 53 Fed. 853.

Property not embraced within the receivership may be subject to a judgment recovered after the appointment of the receiver. City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033.

Judgment of no effect.— It has been held, however, that a judgment after the appointment of a receiver is of no legal effect. *In re* Immanuel Presb. Church, 112 La. 348, 36 So. 408; Bell *v.* Chicago, etc., R. Co., 34 La. Ann. 785. And under a statute providing an exclusive remedy for creditors of an insolvent corporation over which a receiver is appointed, upon notice calling them in, it is held that a subsequent judgment rendered against the insolvent cannot form the basis of the creditor's right to share in the distribution of the assets. Danforth *v.* National Chemical Co., 68 Minn. 308, 71 N. W. 274.

A judgment recovered upon the theory of no incorporation, as under a bill against a banking corporation and its directors and stock-holders charging them as a swindling association under color of the general banking law, is held to entitle the complainant to his dividend of whatever might be obtained from the property in the hands of the receiver. Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449.

Judgment against corporation binding receiver generally see Judgments, 23 Cyc. 1248.

24. Distraining by receiver see Landlord and Tenant, 24 Cyc. 1291.

25. Everett *v.* Neff, 28 Md. 176; Martin *v.* Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574; Noe *v.* Gibson, 7 Paige (N. Y.) 513 (all of which cases show that the proper course for him is to apply to the court for an order that the receiver pay the rent, or that the landlord be at liberty to proceed by distress or otherwise, as he may be advised; the last case showing further that if the landlord's claim is contested the court will give him leave to go before a master and be examined *pro interesse suo*); *In re* Battersby, L. R. 31 Ir. 73 (as to leave to commence action to recover possession for non-payment of rent, holding that in disposing of such applications the court will be slow to interfere with the rights of the landlord, and will only impose conditions when necessary for the benefit of the estate, and not likely to occasion the landlord any appreciable injury); Gooch *v.* Haworth, 3 Beav. 428, 43 Eng. Ch. 428, 49 Eng. Reprint 168 (where a party wished to distrain for rent on property in possession of the receiver, and the court, being satisfied that the legal right of distress was paramount to the title of the party for whose benefit the receiver was appointed, allowed the distress to be made); Sutton *v.* Rees, 9 Jur. N. S. 456, 1 New Rep. 464, 8 L. T. Rep. N. S. 343, 11 Wkly. Rep. 413 (holding that where a receiver who was appointed to realize a testator's estate, advertised the furniture for sale, and the day before the sale the landlord gave him notice of his claim for rent, but took no further steps, he had no lien on the proceeds of the sale in priority to the other creditors); Eyton *v.* Denbigh, etc., R. Co., 38 L. J. Ch. 74, 16 Wkly. Rep. 928 (holding

Sometimes, however, the landlord's rights are protected by express statutory provision.[26]

b. Mechanics' Liens. The rule that a receiver takes the property subject to existing liens applies to mechanics' liens.[27] But the right to proceed with its enforcement by ordinary methods is suspended,[28] and therefore it has been held that a lien is not lost by a failure to secure it by attachment within the time of

that the chancery court will grant leave to distrain unless it is clear that the property is not subject to distress).

Injunction.— Distraining for rent by one of the parties to the suit against another is an interference with the possession of a receiver and may be enjoined. Marshall *v.* Lockett, 76 Ga. 289.

Where both parties to a suit lose the right to possession by failing to pay rent, and no creditors' rights are involved in the suit, it is held error for a court of equity to permit the receiver to retain possession and pay over net profits and rent to a depositary, as against the landlord. Foster *v.* Foster, 98 N. Y. App. Div. 24, 90 N. Y. Suppl. 451, which was an action between husband and wife to determine which was owner of a lease under which they held the premises, wherein the husband was appointed receiver.

Proceedings for unlawful detainer against lessee see LANDLORD AND TENANT, 24 Cyc. 1414 text and note 75.

26. Wood *v.* McCardell, etc., Carriage Co., 49 N. J. Eq. 433, 24 Atl. 228, holding that an order directing the receiver to take possession of and convert the goods and chattels of a corporation into money is embraced in the phrase "any other process," in the act respecting landlords and tenants, which provides that no goods and chattels on leased land shall be taken by virtue of any execution, attachment, or other process, unless the party at whose suit the process is issued shall first pay the landlord all rent due for the premises, not exceeding one year's rent; and in case of proceedings against an insolvent corporation, the owner of the premises upon which it carried on its business, under a lease from him, is entitled to an order directing the receiver to pay the amount of rent due at the time of the declaration of insolvency, not exceeding one year's rent.

Statutory right under bankruptcy act to distrain for a year's rent see *Ex p.* Cochrane, L. R. 20 Eq. 282, 44 L. J. Bankr. 87, 23 Wkly. Rep. 726; *Ex p.* Till, L. R. 16 Eq. 97, 42 L. J. Bankr. 84, 21 Wkly. Rep. 574, distinguishing receivers in chancery.

27. See MECHANICS' LIENS, 27 Cyc. 290 text and note 25.

Lien after appointment.—A contractor cannot acquire a lien for work done subsequent to the appointment of a receiver and in completing the execution of the original contract, without an order of court permitting such course. Breed *v.* Glasgow Inv. Co., 92 Fed. 760. But it has been held that where the material is furnished to the receiver who is erecting a building, the materialman may file his lien against the building without an order from the court; that the filing of the lien is a proceeding *in rem* which does not interfere with the possession. Maloney *v.* Mears, 5 Pa. Dist. 420.

28. Fisher Foundry, etc., Co. *v.* Susquehanna Co., 23 Lanc. L. Rev. (Pa.) 398 (holding that such lien may be filed against realty of a corporation in the hands of a receiver and judgment may be entered thereon, although no proceedings to collect the same by execution should be allowed); De Visser *v.* Blackstone, 7 Fed. Cas. No. 3,840, 6 Blatchf. 235.

A sale cannot be made except under an order of the court in which the receiver was appointed or by its consent to a foreclosure of the lien under the statute. Baldwin *v.* Spear, 79 Vt. 43, 64 Atl. 235. And the granting of permission to join the receiver in a suit to enforce the lien is not a consent to relinquish the possession of the property and to its sale, but only submits to another court the inquiry as to the extent of the credit, and the validity and priority of the lien claimed, as between the parties. Premier Steel Co. *v.* McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876 [*cited* in Baldwin *v.* Spear, 79 Vt. 43, 64 Atl. 235].

Permission to enforce on petition in receivership suit see Cohen *v.* Gold Creek, Nevada, Min. Co., 95 Fed. 580, *supra*, note 3.

Refusal to recognize judgment as lien.— Where, during the pendency of a suit in a state court to enforce a statutory lien on mortgaged railroad property, for work done and materials furnished, foreclosure proceedings were instituted in the United States court, and a receiver was appointed and took possession, and plaintiff in the first suit continued to prosecute it without obtaining the leave of the latter court, and finally obtained judgment, and was decreed to be entitled to a lien for the amount due him on such property, the court would not entertain a petition to have such judgment declared a lien on the property in its receiver's hands paramount to that of mortgage creditors; that the parties might have proceeded by petition in the receivership proceeding, and failing to do so, that court would not aid them. Blair *v.* St. Louis, etc., R. Co., 25 Fed. 2.

Sale of property free of lien.—A court of equity may at the suit of its receiver against the lienors require a release of the liens so that the property may be sold free thereof, and determine the rights of the parties in respect of the liens they claim, and, if the determination is in favor of the lienors, satisfy the liens out of the proceeds of sale. De Visser *v.* Blackstone, 7 Fed. Cas. No. 3,840. 6 Blatchf. 235.

Lien transferred to fund see *infra*, V, B, 1, e, (IV).

the continuance of the lien under the statutory provision which would control in ordinary cases.[29]

c. Mortgages. If a receiver is in possession of mortgaged property the mortgagee cannot interfere with that possession, without leave of court, by foreclosure suit or attachment.[30] But pursuant to the rule that the receiver takes only the interest which the owner had,[31] subject to all liens, legal and equitable,[32] if an outstanding mortgage on the property is valid as against the mortgagor's creditors the receiver of the mortgagor's estate takes the property subject to the lien and it must be enforced;[33] the court may permit a party holding such lien to proceed against the mortgaged property, although it is in the hands of a receiver,[34] or sell it under the power of sale in the mortgage;[35] and equity will reform a mortgage to correct a mistake therein and make it conform to the inten-

29. Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418.

30. Kidder *v.* Beavers, 33 Wash. 635, 74 Pac. 819, holding, however, that such mortgagee of personal property belonging to an insolvent corporation in the hands of a receiver is not required to obtain leave of court to foreclose the mortgage where the property is in possession of third persons claiming to have purchased it, and the receiver had never been in actual or constructive possession thereof, but that the mortgagee may seize such property and the receiver acquired no greater right to recover possession by reason of his appointment than any individual claiming an interest in the property. *Contra*, Real Estate Title Ins., etc., Co. *v.* Mahoning Rolling Mill Co., 6 Pa. Dist. 409, holding that where the receiver of a corporation is appointed at the suit of stock-holders and creditors to continue the business, foreclosure may be brought against the corporation without leave.

Void sale under power in instrument see Scott *v.* Crawford, 16 Tex. Civ. App. 477, 41 S. W. 697, *infra*, note 35.

Statutory provision as to sequestration of corporate property.— Upon the ground that a proceeding to sequestrate the property of a corporation by means of a receiver is purely statutory, where the authority to restrain creditors from bringing independent actions upon the appointment of a temporary receiver is confined by the statute to actions for the recovery of money, it cannot be enlarged so as to permit the court to enjoin the foreclosure of a mortgage. Matter of Hamilton Park Co., 1 N. Y. App. Div. 375, 37 N. Y. Suppl. 310 [*following In re* Binghamton Gen. Electric Co., 143 N. Y. 261, 38 N. E. 297, as to enjoining the enforcement of collateral security]. Such a provision is held not to prevent one who holds a mortgage on property belonging to the corporation, given by a prior owner of such property, and which was not assumed by the corporation, from maintaining a suit to foreclose. Davidson *v.* John Good Cordage, etc., Co., 63 N. Y. App. Div. 366, 71 N. Y. Suppl. 565.

Suit to cut off equity of redemption no interference with possession see *supra*, IV, D, 6, b, (II).

31. See *supra*, IV, D, 3, d, (I).

32. See *supra*, IV, D, 3, d, (II).

33. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117.

Avoiding conveyances see *infra*, VI, B, 1, c, (II).

Receiver as representing debtor or creditor see *infra*, IV, E, 2, a.

34. Waxelbaum *v.* Mathews, 96 Ga. 774, 22 S. E. 380; Howard *v.* Lowell Mach. Co., 75 Ga. 325, mortgage fieri facias. See also Matthews *v.* Cooper, 21 N. Y. Suppl. 71 (*infra*, VI, D, 2, b, (II), note 30); Gates *v.* Merchants' Banking, etc., Co., 22 Ohio Cir. Ct. 724, 11 Ohio Cir. Dec. 724.

35. Scott *v.* Crawford, 16 Tex. Civ. App. 477, 41 S. W. 697, where on the application of a purchaser of lands of an insolvent corporation at a sale under a power in a trust deed while the property was in the hands of a receiver, for an order for delivery of the land to him, or, if the sale was not valid, for an order permitting the trustee to again sell, it was held that the sale was void, but that the suit being by stock-holders who could get no benefit from the land until all the debts had been paid, and other defendants being subsequent attachment creditors, and the property not being of sufficient value to pay the debts secured, permission should be granted to resell the lands under the power in the trust deed.

Mortgaged property reserved with directions.— In Weihl *v.* Atlanta Furniture Mfg. Co., 89 Ga. 297, 15 S. E. 282, it was held that in appointing a receiver of the assets of an insolvent corporation under a petition in the nature of a creditor's bill, the court might withhold from the receiver assets upon which there were large mortgage liens even though the value of the assets were considerably in excess of the amount of the mortgages, provision being made in the order of appointment for turning over such excess to the receiver when it should be realized through the exercise of the power of sale embraced in the mortgage; and that usury being set up against the mortgage, it is proper to direct that when the fund should be realized by the sale of the mortgaged property, enough of it should be paid over to the receiver to cover the sum which might turn out to be usurious interest, to be held by the receiver subject to the adjudication

tion of the parties, as against the receiver of the mortgagor appointed after the execution of the mortgage.[36]

d. Pledge and Security. A pledgee is entitled to the possession of the pledged property as against the receiver of the pledgor, and to enforce his security in accordance with the contract under which he holds,[37] and one secured against liability cannot be compelled to deliver his security until relieved of the liability intended to be secured.[38]

of the question as to usury by the final decree.

36. Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919, where, over the objection that a chattel mortgage was invalid, under a statute providing that such mortgage should not be good against any persons other than the parties to it unless possession of the mortgaged property should be taken and retained by the mortgagee, or unless the mortgage should be recorded, the mortgage was reformed so as to embrace property not included therein as originally drawn, the receiver having been appointed in a suit for the dissolution of a partnership on motion of creditors who had been allowed to intervene, the ruling being upon the ground that the receiver occupied no better position with reference to the property included in the mortgage as reformed than that of an assignee in a general assignment for the benefit of creditors in respect to property conveyed by an unrecorded mortgage. *Compare* Miller *v.* Savage, 62 N. J. Eq. 746, 48 Atl. 1004 [*reversing* 60 N. J. Eq. 204, 46 Atl. 632], *supra*, IV, D, 3, d, (II), note 89. And see, generally, CHATTEL MORTGAGES, 6 Cyc. 1066; REFORMATION.

37. Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025 (right of pledgee of note under assignment to secure loan, as against receiver of insolvent corporation); National Exch. Bank *v.* Benbrook School Furnishing Co., (Tex. Civ. App. 1894) 27 S. W. 297 (denying the right, at the instance of creditors who had acquired no specific interest in the property which had been pledged by a corporation before it became insolvent, to wrest such property from the pledgee without requiring payment of his debt, or to prevent the pledgee's dealing with the property under the terms of the pledge); Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439; Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262.

Injunction in dissolution proceedings to restrain enforcement.— A proceeding for the voluntary dissolution of a corporation of which a temporary receiver is appointed is purely statutory and a provision of the statute empowering the court to restrain the creditors of the corporation from bringing any action against it for the recovery of a sum of money does not empower the court to restrain creditors from disposing of bonds held by them as collateral loans under lawful contracts empowering them to sell. *In re* Binghamton Gen. Electric Co., 143 N. Y. 261, 38 N. E. 297.

Redemption.—A receiver under a statutory appointment in whom vests the property of the debtor may redeem personal property which had been pledged by the debtor. Powell *v.* Waldron, 89 N. Y. 328, 42 Am. Rep. 301. See also Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262.

The mere authority from a corporation to a creditor to receive rents payable on a lease and apply the same to the satisfaction of a debt ceases upon the appointment of a receiver for the corporation under a statute providing for the distribution of the corporate assets for the benefit of its creditors, under which the property and assets of the corporation pass to the receiver. Corrigan *v.* Trenton Delaware Falls Co., 7 N. J. Eq. 489.

Delivery by receiver.—And where a corporation assigned to a bank, as collateral security for a loan, an underwriting agreement by which the subscribers agreed to take an issue of its bonds, and were to receive as a bonus a certain amount of its stock, the agreement and bonds being delivered to the bank, and certificates of stock in amounts corresponding to those required by the agreement being signed, but for some reason not delivered, after the corporation became wholly insolvent, and receivers were appointed in proceedings to wind it up, who came into possession of such certificates, as against the receivers the bank was entitled to an order for possession of the certificates, to enable it to tender the same to the underwriters in support of a suit on the agreement. Kirkpatrick *v.* Eastern Milling, etc., Co., 137 Fed. 387, 69 C. C. A. 579 [*affirming* 135 Fed. 146]. And in Risk *v.* Kansas Trust, etc., Co., 58 Fed. 45, it is held that the appointment of a receiver of an insolvent corporation on the bill of an unsecured creditor does not deprive secured creditors or their trustees of the right to possess, control, and enforce their securities, and, if the receiver has come into possession thereof, the court will require him to deliver them up.

Liabilities not determined.— In Kirkpatrick *v.* Eastern Milling, etc., Co., 137 Fed. 387, 69 C. C. A. 579 [*affirming* 135 Fed. 146], *supra*, this note, it was held that the petition for an order on the receiver to turn over the property there involved was an application for incidental administrative relief not adapted to the determination of substantive issues; that the only question was whether the petitioners had shown such title to the property that the court ought in justice to make the order and that it could not consider the defenses which the underwriters may have to their liability to the petitioner.

38. Brady *v.* Furlow, 22 Ga. 613 (as to

e. Judgment, Execution, and Attachment [39] — (i) *Priority of Lien.* The lien acquired by a creditor by a judgment,[40] or by judgment and execution placed in the hands of the officer,[41] or by the levy of an execution or attachment, cannot be destroyed by the subsequent appointment of a receiver of the debtor's estate.[42]

(ii) *Retaining Possession or Delivery to Receiver.* Where a cred-

possession of one having the legal title to funds held as security); Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262. See also Smith *v.* Lansing, 22 N. Y. 520.

Pledges generally see PLEDGES, 31 Cyc. 779.

39. Allowance of claims see *infra*, V, B, 1, e.

Attachment, execution, and judgment liens generally see ATTACHMENT, 4 Cyc. 622 *et seq.*; EXECUTIONS, 17 Cyc. 1049 *et seq.*; JUDGMENTS, 23 Cyc. 1350 *et seq.*

40. *California.*— Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177.

Georgia.— Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860.

New Jersey.— Doane *v.* Millville Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625.

North Carolina.— Battery Park Bank *v.* Western Carolina Bank, 127 N. C. 432, 37 S. E. 461, lien on land by docketing judgment.

Texas.— Central Coal, etc., Co. *v.* Southern Nat. Bank, 12 Tex. Civ. App. 334, 34 S. W. 383.

Washington.— Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136.

See 42 Cent. Dig. tit. "Receivers," § 142 *et seq.*

41. J. W. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347; Doane *v.* Millville Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625; Matter of Gies Lith. Co., 7 N. Y. App. Div. 550, 40 N. Y. Suppl. 146 (execution issued on day judgment rendered and on day of appointment of receiver of insolvent corporation in proceedings for voluntary dissolution); Frayser *v.* Richmond, etc., R. Co., 81 Va. 388.

42. *Colorado.*— Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280, attachment lien on property of insolvent corporation.

Illinois.— Pease *v.* Smith, 63 Ill. App. 411.

Iowa.— Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457, attachment lien on property of insolvent corporation before appointment of receiver in suit by stockholder.

Massachusetts.— Kittredge *v.* Osgood, 161 Mass. 384, 37 N. E. 369 (valid attachment lien against corporate property before appointment); Hubbard *v.* Hamilton Bank, 7 Metc. 340.

Michigan.— Baldwin *v.* Hosmer, 101 Mich. 119, 59 N. W. 432, 25 L. R. A. 739.

Nebraska.— Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709; Arnold *v.* Globe Inv. Co., 40 Nebr. 225, 58 N. W. 712, which cases relate to attachments against insolvent corporations.

New Jersey.— Squire *v.* Princeton Lighting Co., (1907) 68 Atl. 176; Van Steenberg *v.* E. R. Parsil Button Co., (Ch. 1896) 34 Atl. 135 (holding that under a statute authorizing debts due to a corporation to be applied to the satisfaction of an execution when the officer holding the execution is unable to find other property subject to execution, it was not necessary, as against a receiver of the corporation, that notice of the levy should have been received by the debtors prior to the appointment of said receiver, to perfect the rights of said execution creditors under the statute); Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436. See also Doane *v.* Millville Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625.

New York.— Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400; Beardslee *v.* Ingraham, 106 N. Y. App. Div. 506, 94 N. Y. Suppl. 937, 35 N. Y. Civ. Proc. 55 [*reversed* on other grounds in 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. N. S. 1073]; People *v.* National Mut. Ins. Co., 19 N. Y. App. Div. 247, 46 N. Y. Suppl. 102; Bergin *v.* Deering, 70 Hun 379, 24 N. Y. Suppl. 36; Dunlop *v.* Paterson F. Ins. Co., 12 Hun 627 [*affirmed* in 74 N. Y. 145, 30 Am. Rep. 283]; Matter of Pond, 21 Misc. 114, 46 N. Y. Suppl. 999.

Texas.— See Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

Wisconsin.— Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357 (attachment lien against insolvent corporation); Ford *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766 (right to proceeds of execution sale).

See 42 Cent. Dig. tit. "Receivers," § 142 *et seq.*

But as to effect of dissolution of corporation to dissolve attachments see CORPORATIONS, 10 Cyc. 1318.

Lien acquired before suit — *In general.*— In those cases in which the lien has been actually acquired before the commencement of the suit in which jurisdiction is acquired or receiver appointed, the rule is stated to be that after the aid of a court of equity has been invoked and that court has taken the assets of an insolvent into its hands, its jurisdiction becomes exclusive for the administration of the estate equitably and that creditors who have attached before the court has acquired this jurisdiction are entitled to priority. Breene *v.* Merchants', etc., Bank, 11 Colo. 97, 17 Pac. 280 (in which case the rule is stated that creditors may attach assets of an insolvent corporation at any time before suit brought and was applied where the corporation had ceased to do business); Roseboom *v.* Whittaker, 132 Ill. 81, 23 N. E. 339; La Grange Butter Tub Co. *v.* National Bank of Commerce, 122 Mo. 154,

itor has lawfully obtained a lien upon property by the levy of process and the possession of the property is taken thereunder, the law, it is held, gives him a right not only to be paid out of the proceeds of the property but also to have the property itself retained intact in the hands of the officer for the purpose of enforcing his lien.[43] A receiver has no right to property of defendant which was taken in execution before his appointment.[44] If, however, the property is surrendered in order to avoid a conflict of authority, the rights of such creditor will

26 S. W. 710, 43 Am. St. Rep. 558; Florsheim Bros. Dry Goods Co. *v.* Wettermark, 10 Tex. Civ. App. 102, 30 S. W. 505; Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357 (maintaining the doctrine that a diligent creditor, although knowing of the insolvency of the corporation, may pursue his legal remedy by attachment in an honest effort to collect his debt and acquire a valid lien which will be protected in a subsequent suit for the sequestration of the corporate property). See in this connection *supra*, IV, D, 4.

Before the service of process and appointment of a receiver, although after the filing of the bill in the federal court, it is held that a judgment in the state court creates a valid lien and the receiver's possession, although not disturbed, is subject to such lien. Wheeler *v.* Walton, etc., Co., 65 Fed. 720.

43. Pease *v.* Smith, 63 Ill. App. 411; Baldwin *v.* Hosmer, 101 Mich. 432, 119, 59 N. W. 669, 432, 25 L. R. A. 739 (denying right to interfere with funds which have been garnished, before the garnishment is determined, as against a corporate creditor); Bergin *v.* Deering, 70 Hun (N. Y.) 379, 24 N. Y. Suppl. 36 (as to property of a partnership levied on by execution before the appointment of a receiver in a suit between the partners for dissolution, it not appearing that the firm or its individual members were insolvent and the validity of the judgments not being impeached); Matter of North American Gutta Percha Co., 17 How. Pr. (N. Y.) 549 (lien by levy of execution). See also Everett *v.* Neff, 28 Md. 176. In Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136; State *v.* Graham, 9 Wash. 528, 36 Pac. 1085; State *v.* Chehalis County Super. Ct., 8 Wash. 659, 35 Pac. 1092; State *v.* Chehalis County Super. Ct., 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; and State *v.* Snohomish County Super. Ct., 7 Wash. 77, 34 Pac. 430, the right of an attachment creditor to have the property held intact until he may obtain judgment and issue execution, subject to such power as the attachment suit itself may give the court to appoint a receiver in particular cases, was maintained, in all of which cases one of the principles controlling would seem to be the absence from the record of the parties whose rights under the attachment liens were sought to be affected, in which respect they are distinguished in State *v.* King County Super. Ct., 36 Wash. 91, 78 Pac. 461, *infra*, note 47.

Attack upon attachment of property in officer's hands.— In Andrews *v.* Paschen, 67 Wis. 413, 30 N. W. 712, when the action by a stock-holder for dissolution and winding up of a corporation was commenced, property of the company was in the possession of the sheriff under writs of attachment, and thereafter another attachment was levied upon the same property by the officer, and it was held that the receiver could not attack the validity of the last attachment by summary motion in the suit in which he was appointed and to which neither the sheriff nor the attaching creditor was a party; that the attaching creditor had a right to be heard upon the questions whether the stock-holder could maintain his action, whether the receiver was properly appointed, and whether the attachment was a paramount lien upon the property, and that in order to litigate these questions, the receiver must bring an independent action to avoid the attachment, making the attaching creditor a party.

Pending delay in executing judgment.— Where the order of sale in a judgment against a corporation establishing a lien was not issued until about eighteen months after the judgment, during which time the property, which exceeded in value the amount of the judgment, remained in the possession of the corporation, it was held that such property was properly included in a receivership granted in an action begun on the date of the issue of the order of sale; that such order of sale being an original, the judgment was dormant and the execution thereof subject to be enjoined, although the sale would be voidable only, and the property was not liable to sell for its value by reason thereof, and since the excess in the value of the property over the amount of the judgment was liable to the claims of other creditors, it should be administered for the best interest of the estate and the rights of all parties should be protected in the receivership. Ripy *v.* Red Water Lumber Co., (Tex. Civ. App. 1907) 106 S. W. 474.

Property in custodia legis see *supra*, II, B, 9.

44. Hays *v.* Lycoming F. Ins. Co., 99 Pa. St. 621, right of judgment creditor of corporation under attachment execution to judgment against garnishee.

The officer cannot defend an action for a false return of *nulla bona* on an execution by showing that the court, subsequently to the levy of an execution and the taking of property thereunder into the officer's possession, had appointed a receiver for the execution debtor and ordered him to take charge

be preserved.[45] And if property subject to such a lien is sold by the order of the court appointing the receiver, the lien will attach to the proceeds.[46] But on the other hand in a suit in which all the parties are before the court, property held under such process may be ordered into the possession of the receiver, especially where the suit involved the equitable distribution of the assets of an insolvent.[47] It has been held, however, that where the property is not capable of being reduced to the possession of the officer, the effect of an attachment being merely to create a lien (as in the case of an attachment levied upon land) a receiver of another court is entitled to the undisturbed possession subject to such lien as might have attached under the levy.[48]

of all the property, since the property levied on did not pass to the receiver. People *v.* Finch, 19 Colo. App. 512, 76 Pac. 1120.

45. New York Cent. Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659, where the surrender was for the purpose stated, to a receiver of a federal court, under an order of court providing that the attaching creditors' rights should not be prejudiced.

46. See *infra*, V, B, 1, e, (IV).

47. Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706 (where there was an attachment lien on a part of the property of a dissolved firm, whose assets were then considered as a trust for the general creditors or the general creditors were considered to have an equitable lien, the sheriff and attaching creditor being parties to the receivership proceedings in which the latter and the attachment debtor were charged to have acted in collusion); State *v.* King County Super. Ct., 36 Wash. 91, 78 Pac. 461 (holding that where the question whether an attaching creditor of a corporation or a receiver appointed subsequent to the attachment is entitled to possession depends solely upon the question of the solvency of the corporation, it may be decided on citation to the sheriff and the attaching creditor after the latter has become a party by intervention to the suit in which the receiver was appointed, directing them to show cause why the property should not be delivered to the receiver. The court proceeds upon the principle that assets of an insolvent corporation are a trust fund and that if insolvent at the time of the attachment the attaching creditors acquire no lien, and distinguishes State *v.* Chehalis County Super. Ct., 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354, and State *v.* Snohomish County Super. Ct., 7 Wash. 77, 34 Pac. 430, in that in the first the reason of the decision was that the sheriff and attaching creditors were not parties to the action in which the receiver was appointed whereas in the case at bar both were brought in by citation; and in that in the second case the attachment debtor was a private person and his property was not subject to the same rule as that of an insolvent corporation. It may be noted, however, that while the two cases mentioned are thus distinguished, in the later of the two cases so distinguished the earlier case is relied upon); State *v.* King County Super. Ct., 11 Wash. 63, 39 Pac. 244 [*distinguishing* State *v.* Snohomish County Super. Ct., 7 Wash. 77, 34 Pac. 430, and State *v.* Chehalis County Super. Ct., 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354, in that in the case at bar the parties restrained were parties to the suit] (where at the suit of the receiver a sale was enjoined under an execution upon the ground of a fraudulent preference occasioned by the corporation debtor); Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278, 61 N. W. 1118, 46 Am. St. Rep. 834, 27 L. R. A. 357, 78 Wis. 404, 47 N. W. 516 (where the property was held under an attachment lien by the creditor of an insolvent corporation which creditor and the officer holding the process were before the court); Fork *v.* Plankinton Bank, 87 Wis. 363, 58 N. W. 766 (propriety of order appointing a receiver on the petition of corporate creditors to take possession of proceeds of an execution sale in the sheriff's hands).

In an insolvency proceeding in California, upon the voluntary petition of the insolvent, under the statute there prevailing, it was held that while the sheriff held property levied on by attachment when the insolvency proceedings were commenced, he might be directed to turn it over to the receiver. Von Roun *v.* San Francisco Super. Ct., 58 Cal. 358.

Injunction against sale of land by the marshal who was proceeding in an action in the federal court under an attachment, was refused, neither of the parties sought to be restrained being a party to the action in which the motion was made. Strickland *v.* National Salt Co., 105 N. Y. App. Div. 640, 94 N. Y. Suppl. 936.

Without an injunction restraining further prosecutions of an attachment proceeding, the sheriff who holds property under such attachment will not be ordered to deliver the property to a receiver in an action brought to have a transfer of property declared a general assignment. Strickland *v.* Gay, 104 Ala. 375, 16 So. 77, which proceeds upon the ground that if such an order were made without an injunction, the attachment suit might proceed to judgment and condemnation and the sheriff might become liable for the property levied on, although the possession had been taken from him.

48. *In re* Hall, etc., Co., 73 Fed. 527, where the doctrine was adopted in order to uphold the title of receivers appointed by a federal court as against the claim under a levy of attachment issued out of a state court, a

(III) *After Custody of Law Attaches*[49] — (A) *In General.* Where the court in the administration of the assets of a debtor lawfully takes into its possession through the medium of a receiver the assets and property of the debtor, no creditor can obtain any preference by lien under any judgment rendered thereafter,[50]

distinction being recognized in this regard between the effect of a levy of an attachment upon personalty and a levy upon realty. *Contra*, Beardslee *v.* Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. N. S. 1073 [*reversing* 106 N. Y. App. Div. 506, 94 N. Y. Suppl. 937, 35 N. Y. Civ. Proc. 55], where the distinction in the case last above cited was repudiated, the court holding that a warrant of attachment from a federal court against the property of a corporation after it is duly filed, etc., brings the property constructively within the custody of that court until the attachment is vacated, and that in a subsequent action in the state court for the dissolution of the corporation, the latter court cannot enjoin the United States marshal from selling the attached property nor by injunction prevent the further prosecution of the action in the federal court. See also *supra*, II, B, 9. And see, generally, ATTACHMENTS, 4 Cyc. 572.

49. **Attaching of legal custody** see *supra*, IV, D, 4.

50. *Georgia.*— Lang *v.* Macon Constr. Co., 101 Ga. 343, 28 S. E. 860, although the suit in which the judgment was rendered was begun before the receiver took possession. See also Branan *v.* Excelsior Shoe Co., 94 Ga. 465, 20 S. E. 131.

Minnesota.— Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862.

New Jersey.— Doane *v.* Millville Mut. Marine, etc., Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739 (holding that a creditor who obtains judgment the same day a bill for the appointment of a receiver is filed, and a restraining order issued, is entitled to no preference over general creditors); Kelly *v.* Neshanic Min. Co., 7 N. J. Eq. 579.

New York.—Atty-Gen. *v.* Continental L. Ins. Co., 28 Hun 360 [*affirmed* in 93 N Y. 630].

Pennsylvania.— Cowan *v.* Pennsylvania. Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075, after adjudication of insolvency of corporation and appointment of receiver.

South Carolina.— *Ex p.* Layne, 18 S. C. 87; *Ex p.* Brown, 15 S. C. 518 (which cases refuse to give priority to the judgments, although the equities of the original claims were given priority); Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318.

United States.— Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439; Temple *v.* Glasgow, 80 Fed. 441, 25 C. C. A. 540 [*affirming* 73 Fed. 709]; Clyde *v.* Richmond, etc., R. Co., 56 Fed. 539; Jennings *v.* Philadelphia, etc., R. Co., 23 Fed. 569, holding that a statute abolishing judgment-rolls and directing that the judgment record shall be made up by entering the pleadings, judgments, etc., in a separate book, and that until this is done the verdict or rule for judgment in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment and shall be received in evidence in said court, as such judgment, etc., authorizes a court to treat the entries or rules for judgment in its own minutes as evidence of the record of a judgment before the clerk has had time to make up the record, but does not repeal an existing statutory provision that no judgment shall affect or bind any lands, etc., but from the time of the actual entry of such judgment in the minutes or records of the court, so as to impress a lien on land by virtue of a verdict where the judgment is not entered before the appointment of a receiver.

See 42 Cent. Dig. tit. "Receivers," § 140 *et seq.*

As against unrecorded conditional sale.— Under a statute requiring a conditional sale contract to be recorded in order to render it valid as against a judgment creditor without notice, one recovering his judgment after the appointment of a receiver is such creditor and the judgment is entitled to protection as against such unrecorded contract. Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733.

Temporary receiver — *In general.*— In Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075, the qualification of the text is recognized that there are circumstances under which a receiver may be appointed for a corporation temporarily, leaving the corporation subject to suits, and its property to liens, as before, as where the corporate officers are jeopardizing the property by mismanagement and fraud and for that reason a receiver is appointed at the suit of a stock-holder to protect the property. See also *supra*, II, C.

No showing of purpose to distribute assets.— In Ellicott *v.* U. S. Insurance Co., 7 Gill (Md.) 307, it was held that where it does not appear upon the face of the decree appointing a receiver that the proceeding is for an equitable distribution of the assets of the corporation and no directions are given for bringing in the creditors or requiring them to file their claims and they are not enjoined from suing, they may proceed with ordinary remedies against the corporation and recover a judgment which will be a lien as if no receiver had been appointed. This ruling has been adopted to this extent: That until the court has made some decree showing that the ulterior intent is to make an equitable distribution of the fund and giving notice to creditors to file their claims such creditors may sue at law, and while the recovery of a judgment after the appointment of a receiver will not confer a lien, the court

even though such judgment may have been entered by leave of court.[51] And so the general rule is that property which has passed into the hands of a receiver is in the custody of the court and therefore is not subject to attachment or execution unless by leave of the court appointing the receiver,[52] and in a suit in which the custody is for the benefit of all creditors, it cannot be withdrawn

will recognize the priority of the judgment as one which should be enforced in equity. Moore *v.* Southern States Land, etc., Co., 83 Fed. 399. And it was recognized in Holladay Case, 29 Fed. 226, although not adopted because opposed to what the court considered a *dictum* in Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322.

Equitable title superior to judgment lien.— In Atty.-Gen. *v.* Atlantic Mut. L. Ins. Co., 100 N. Y. 279, 3 N. E. 193, it was held that where a receiver was appointed for a corporation under the statute in that state he became vested with the title to all of its property, or if not, that he had the equitable title, the title remaining in the corporation being formal and held by it in trust for the receiver, and the court could compel its conveyance to the receiver; that the receiver's title was therefore superior to and older than the lien of a judgment recovered against the corporation after the receiver's appointment.

An injunction order restraining suits against a corporation will not be vacated as to one creditor, on his motion based merely on the ground that the corporation bought goods from him when it was insolvent, and was known to be so by the directors, without any showing that such creditor was entitled to perfect his judgment in preference to other creditors, or that a judgment would be of any avail to him if perfected. Carson *v.* New York Terminal Express Co., 74 Hun (N. Y.) 536, 26 N. Y. Suppl. 639.

Against partnership pending dissolution suit see PARTNERSHIP, 30 Cyc. 730.

51. Cowan *v.* Pennsylvania Plate Glass Co., 184 Pa. St. 1, 38 Atl. 1075, holding that such judgments cannot be made liens by an entry *nunc pro tunc* as of a time before the appointment of the receiver, by leave of court.

52. *Alabama.*— Stanton *v.* Heard, 100 Ala. 515, 14 So. 359 (levy void); Dugger *v.* Collins, 69 Ala. 324.

Arkansas.— Walker *v.* Geo. Taylor Commission Co., 56 Ark. 1, 18 S. W. 1056, 19 S. W. 601, after the appointment of a receiver in the chancery court of property assigned for the benefit of creditors the assignee having failed to qualify, the court holding that a justice of the peace could not upon an attachment sued out of his court decide that the assignment was void and sustain the attachment, nor could the circuit court on appeal from the justice, although the attachment need not be dismissed.

California.— Yuba County *v.* Adams, 7 Cal. 35; Adams *v.* Haskell, 6 Cal. 113, 65 Am. Dec. 491. But see Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177, *infra*, note 66.

Iowa.— Martin *v.* Davis, 21 Iowa 535.

Kansas.— Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; Missouri Pac. R. Co. *v.* Love, 61 Kan. 433, 59 Pac. 1072.

Louisiana.— State *v.* Ellis, 45 La. Ann. 1418, 14 So. 308; Gest *v.* New Orleans, etc., R. Co., 30 La. Ann. 28; Nelson *v.* Conner, 6 Rob. 339.

Maryland.— Glenn *v.* Gill, 2 Md. 1.

Massachusetts.— Columbian Book Co. *v.* De Golyer, 115 Mass. 67, as to charging insolvent corporation under trustee process after an injunction against its continuing business and the appointment of receivers, the remedy of the creditor, if he can have the property of the corporation applied in any form of remedy, being by petition in the cause in which the receivers were appointed.

New York.— Woerishoffer *v.* North River Constr. Co., 99 N. Y. 398 (after appointment of receiver of corporate property in a suit involving equitable distribution among all creditors); National Broadway Bank *v.* Sampson, 85 N. Y. App. Div. 320, 83 N. Y. Suppl. 426 [*affirmed* upon other grounds in 179 N. Y. 213, 71 N. E. 766, 103 Am. St. Rep. 851, 66 L. R. A. 606]; Mosher *v.* Supreme Sitting O. I. H., 88 Hun 394, 34 N. Y. Suppl. 816; Gouverneur *v.* Warner, 2 Sandf. 624 (as to the right of a judgment creditor in a creditor's bill after the appointment of a receiver to levy an alias execution on personal property recovered by the receiver); Chapman *v.* Douglas, 5 Daly 244; Storm *v.* Waddell, 2 Sandf. Ch. 494.

Ohio.— Croy *v.* Marshall, 3 Ohio Cir. Ct. 489, 2 Ohio Cir. Dec. 280, holding that if a creditor claims that property is improperly in the hands of a receiver he must apply to the court appointing the receiver to release the same, so that he may levy on it.

Oklahoma.— Foster *v.* Field, 13 Okla. 230, 74 Pac. 190.

Pennsylvania.— Thompson *v.* McCleary, 159 Pa. St. 189, 29 Atl. 254 (although the claim may be established as in equity in the court in which the receiver is appointed); Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160; Robinson *v.* Ohio, etc., R. Co., 2 Pittsb. 257.

South Carolina.— Cleveland *v.* McCravy, 46 S. C. 252, 24 S. E. 175.

Texas.— Riesner *v.* Gulf, etc., R. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171; Harrison *v.* Waterbury, (1894) 27 S. W. 109; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858; Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776; Edwards *v.* Norton, 55 Tex. 405; City Nat. Bank *v.* Merchants' Nat. Bank, 7 Tex. Civ. App. 584, 27 S. W. 848.

Washington.— Allen *v.* Stallcup, 13 Wash. 631, 43 Pac. 884.

United States.— Wiswall *v.* Sampson, 14

and the property seized for the benefit of a single creditor.[53] Any attempt thus to interfere with property held by the court through the medium of its receiver will constitute a contempt;[54] no lien can be acquired by such interference so as to create a preference against other creditors entitled to share equitably in the distribution of the estate,[55] and if a valid lien had been acquired before the appointment of the receiver and the attaching of the court's jurisdiction, the proceedings to enforce it are suspended,[56] unless leave of court is obtained to go on,[57] and any sale under such process without leave of the court appointing the receiver will be illegal and void and no title will pass to the purchaser.[58] The same rules apply where the attachment or execution issues out of a federal court and the property is in the hands of a receiver appointed by the state court,[59] or *vice versa*.[60]

How. 52, 14 L. ed. 322; Mercantile Trust Co. *v.* Baltimore, etc., R. Co., 79 Fed. 389; The Roslyn, 20 Fed. Cas. No. 12,068, 9 Ben. 119.

England.— See Try *v.* Try, 13 Beav. 422, 15 Jur. 809, 20 L. J. Ch. 368, 51 Eng. Reprint 163.

See 42 Cent. Dig. tit. "Receivers," § 146.

Notice to parties.— Notice of an application to a federal court for leave to levy an execution from a state court on property in the hands of a receiver of the federal court, based upon the ground that the property was attached on process from the state court before it came into the receiver's possession, should be given the parties to the suit in the federal court, and notice to the receiver is not sufficient. *In re* Hall, etc., Co., 69 Fed. 425.

Admiralty jurisdiction see ADMIRALTY, 1 Cyc. 814.

After receiver appointed in another state see *infra*, VIII.

Conflicting jurisdictions generally see COURTS, 11 Cyc. 982 *et seq.*

Exemption from attachment generally see ATTACHMENT, 4 Cyc. 569.

Property in custodia legis see EXECUTIONS, 17 Cyc. 980.

Reaching property when rights of parties are determined see *infra*, IV, E, 2, c.

Receiver not subject to garnishment see GARNISHMENT, 20 Cyc. 1026.

53. Knode *v.* Baldridge, 73 Ind. 54; Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418, property of corporation in hands of receiver.

54. See *supra*, IV, D, 5, e.

55. *Connecticut.*— Longstaff *v.* Hurd, 66 Conn. 350, 34 Atl. 91; *In re* New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A. 300.

New York.—National Park Bank *v.* Clark, 92 N. Y. App. Div. 262, 87 N. Y. Suppl. 185; Mosher *v.* Supreme Sitting O. I. H., 88 Hun 394, 34 N. Y. Suppl. 816; People *v.* Mutual Ben. L. Assoc., 86 Hun 219, 33 N. Y. Suppl. 191; Dickey *v.* Bates, 13 Misc. 489, 35 N. Y. Suppl. 525.

South Carolina.—Regenstein *v.* Pearlstein, 30 S. C. 192, 8 S. E. 850; Clinkscales *v.* Pendleton Mfg. Co., 9 S. C. 318.

Tennessee.— McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

Wisconsin.— Hagedon *v.* State Bank, 1 Pinn. 61, 39 Am. Dec. 275.

See 42 Cent. Dig. tit. "Receivers," § 145 *et seq.*

The equity of a second mortgage is held to be superior to the rights of a creditor who has been permitted to levy an execution upon a part of personal property of a corporation including a portion of property acquired subsequent to the date of both the second and third mortgages, the levy having been made after the action was brought and while the property was in the hands of a receiver. Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

56. Dann Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347; Cass *v.* Sutherland, 98 Wis. 551, 74 N. W. 337.

57. Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737. See also *infra*, IV, D, 7, e, (III), (C).

58. *Alabama.*— Dugger *v.* Collins, 69 Ala. 324.

New York.— Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400; Beardslee *v.* Ingraham, 106 N. Y. App. Div. 506, 94 N. Y. Suppl. 937, 35 N. Y. Civ. Proc. 55 [*reversed* on other grounds in 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. N. S. 1073]; French *v.* Pratt, 7 N. Y. Suppl. 240. But where the sheriff had levied on and taken into possession property of a corporation before it was dissolved and a receiver appointed, it was held that a sale by the sheriff therafter is at most irregular and not void. Varnum *v.* Hart, 119 N. Y. 101, 23 N. E. 183 [*distinguishing* Walling *v.* Miller, *supra*].

North Carolina.— Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837; Skinner *v.* Maxwell, 68 N. C. 400.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858; Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686; Edwards *v.* Norton, 55 Tex. 405.

United States.— Wiswall *v.* Sampson, 14 How. 52, 14 L. ed. 322.

See 42 Cent. Dig. tit. "Receivers," § 138 *et seq.*

59. Beardslee *v.* Ingraham, 106 N. Y. App. Div. 506, 94 N. Y. Suppl. 937, 35 N. Y. Civ. Proc. 55 [*reversed* on other grounds in 183 N. Y. 411, 73 N. E. 476, 3 L. R. A. N. S. 1073]; Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322.

60. *Ex p.* Tyler, 147 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689.

But property which under a statute is not part of the estate that goes into the receiver's custody is not affected by the appointment and execution may be levied thereon.[61]

(B) *Interference With Possession — Real and Personal Property.* The levy of an execution has been held not to be a contempt if it does not amount to an actual disturbance of the receiver's possession,[62] and sometimes, under such a condition, the case may be such that a party can go on with his remedy and sell property, notwithstanding the appointment of a receiver and consistently with the general rules against interference with the receiver's possession.[63] And so it has been held that the mere levy upon land, the sheriff not entering into possession of the property, is not a contempt; that a sale might be made thereunder, although the purchaser could not interfere with the receiver's possession without leave of court; [64] or that a sale after the appointment of a receiver under a levy made before such appointment will convey a good title to the purchaser; [65] but the decisions on this question are conflicting, and while some distinction is made between real and personal property, the weight of authority seems to establish a general rule to the contrary.[66]

61. *In re* West Lancashire R. Co., 63 L. T. Rep. N. S. 56, as to unpaid stock subscriptions where a receiver of a railroad was appointed under English statute of 1867.

62. Albany City Bank *v.* Schermerhorn, 10 Paige (N. Y.) 263, where defendant in a creditors' bill had let his lands to be cropped on shares, and a receiver subsequently appointed went on the land and gave notice to the tenants of his appointment, and requested them to deliver to him defendant's share of the growing crops, after which the sheriff, without notice of the appointment of the receiver, levied on the crops and advertised them for sale, but, on being informed of the claim of the receiver, consented that the receiver should take possession of them and dispose of defendant's interest therein, and hold the proceeds subject to the order of the court in which the creditors' bill was filed, and it was held that the sheriff was not guilty of contempt. See also the same case reported on another appeal in 9 Paige (N. Y.) 372, 38 Am. Dec. 551, *supra*, IV, D, 4, b, note 23.

63. Darling *v.* Wyoming Coal, etc., Co., 2 Kulp (Pa.) 142, where a decree had been entered that plaintiff should not be delayed in foreclosing a mortgage and upon his obtaining a judgment on his mortgage thereafter and issuing execution it was held that the appointment of a receiver of defendant company in another suit by a creditor, the former decree being recognized and the receiver not being in possession, did not have the effect to nullify the former decree and the receiver was not entitled to stay the writ issued by the mortgagee. This case would seem also to recognize the rule that until the appointment of a receiver has been perfected and he is in actual possession a creditor is not debarred from proceeding to execution, which if applied only to the liability for contempt is distinguishable from the ruling as above stated. See *supra*, IV, D, 4, a. b.

64. Kentucky Southern Bank *v.* Ohio Ins. Co., 22 Ind. 181, upon the authority of Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

Receivership ending without change of title through receiver.— In Montgomery *v.* Merrill, 18 Mich. 338, under a statutory proceeding for the dissolution of a corporation, the purpose of such receivership being first to pay creditors and second to pay the balance, if any, to stock-holders, it was held that whatever may be the effect of a temporary receivership in creating priorities, or in regard to possession, the statute authorizing lands to be sold on execution was inconsistent with the idea that, as against the debtor himself, such a levy would not be good when he has made no assignment to the receiver; and that when the right of the receiver terminates, and he has made no sale, or other legal disposition of the land, the execution title will stand as if there had never been a receivership.

65. Cherry *v.* Western Washington Industrial Exposition Co., 11 Wash. 586, 40 Pac. 136. See also Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347, *infra*, note 66.

66. Dugger *v.* Collins, 69 Ala. 324 (sale under levy made after appointment of receiver of the estate of a testator under a judgment rendered prior to such appointment); Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837 (levy after appointment); Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858 (levy before appointment); Edwards *v.* Norton, 55 Tex. 405 (levy and sale after appointment); Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322 (levy before appointment). See also Brady *v.* Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Cass *v.* Sutherland, 98 Wis. 551, 74 N. W. 337, where the principle is recognized, the levy having been made before the appointment.

Authorities compared.— In Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347 [*reversing* 4 Den. 480, and *followed* and *applied* under similar facts in Matter of Loos, 50 Hun (N. Y.) 67, 3 N. Y.

(c) *Leave of Court.* While the general rule that property which has been taken into the possession of the court and is in the custody of its receiver cannot be levied on and sold without its leave is well settled,[67] it is equally clear that in proper cases such leave may be given, and that a court of equity is not required to retain possession of property where it would be inequitable to do so.[68] But

Suppl. 383], it was held that the purchaser from a receiver of real estate of which he had received a conveyance by an insolvent debtor by order of the court upon setting aside an assignment as fraudulent at the suit of a judgment creditor acquired title not from the judgment but by force of the conveyance to the receiver, and that a judgment creditor who did not join in the bill to set aside the assignment and whose judgment was recovered subsequent to that of the creditor who filed such bill, but prior to the filing thereof, had the right to sell the property on execution and the purchaser at such a sale would acquire a title superior to that of the receiver's vendee, since the receiver's sale was subject to the lien of this last judgment creditor. This case seems to announce the doctrine that, although by sale under the execution the party might be guilty of contempt, the sale itself is neither illegal nor void. In Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858, it was held that a sale under process while the property is in the hands of a receiver, although under a levy made before the appointment, passes no title as no conveyance was necessary in order to vest the receiver with control over the real estate. And so in Russell *v.* Texas, etc., R. Co., 68 Tex. 646, 5 S. W. 686, it is shown that no conveyance is necessary and that the question is not whether the receiver has title but whether the court has power to pass the title, to which point see also Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862. But aside from this distinction, in Walling *v.* Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400, where a levy was made upon personal property before the appointment and the sale by the sheriff thereafter, and when a receiver had been appointed in the meantime, without leave of court, it was held to be illegal and void upon the authority of Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322, *supra*, which case involved a sale of real estate by the sheriff after the appointment of a receiver, although the levy had been made before the appointment and the court held that the sale was void. In Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837, the court expressly refused to follow Albany City Bank *v.* Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. Dec. 551 (*supra*, IV, D, 4 b, note 23) because its practical effect would be to permit outside parties to stop all further proceedings of the court of equity by disposing of the subject-matter in controversy or else to put that court in the position of holding simply naked possession of the property. That the mere fact that the actual possession is not interfered with is not controlling is shown in Wiswall *v.* Sampson, 14 How. (U. S.) 52, 14 L. ed. 322, and also in Skinner *v.* Maxwell, 68 N. C. 400, although the latter case deals with personal property. In Holladay Case, 29 Fed. 226, it is recognized that Wiswall *v.* Sampson, *supra*, and Chautauque County Bank *v.* Risley, *supra*, are opposed to each other. In Petaluma Sav. Bank *v.* San Francisco Super. Ct., 111 Cal. 488, 44 Pac. 177, a receiver was appointed in a divorce proceeding under a statute providing for the securing of alimony, and it was held that a judgment creditor of defendant in the divorce suit, seeking to enforce his lien on lands in other counties, by sale, would lose his lien unless he should take the necessary steps to enforce it within the period prescribed by the statute for the life of the lien, and as his rights could not be protected in the divorce suit, if leave of the court in which such suit was pending was necessary, a refusal to grant it would be an abuse of discretion; that such leave was not necessary because the enforcement of the lien would not interfere with the receiver's possession. Wiswall *v.* Sampson, *supra*, is clearly distinguished in this case in that there the fund belonged to the court that had created it for the benefit of the creditor who had by his suit removed the impediments preventing the levy of any execution, and that in such case even if there was no contempt this does not meet the objection that no title could pass under a sale without levy in such circumstances. This distinction, however, in so far as it justifies the decision in Wiswall *v.* Sampson, *supra*, does not appear to have influenced the decision in the other cases cited in this note.

67. See *supra*, IV, D, 5, c, *et seq.*; *infra*, VI, D, 2, a.

68. Pelletier *v.* Greenville Lumber Co., 123 N. C. 596, 31 S. E. 855, 68 Am. St. Rep. 837 (holding that the vacation of an order restraining a judgment creditor from selling land in the hands of a receiver may be taken impliedly to give leave to sell); Cass *v.* Sutherland, 98 Wis. 551, 74 N. W. 337 (holding that where the receiver was a party to another action in the same court brought to subject land to the lien of execution levies, a judgment authorizing and directing the sale can be regarded as nothing less than a formal direction by the court appointing the receiver that the land be sold by the sheriff under execution instead of by the receiver); Gooch *v.* Haworth, 3 Beav. 428, 43 Eng. Ch. 428, 49 Eng. Reprint 168 (where one who had obtained an order in the exchequer for the payment of costs against a party to a suit in which a

it is held that such levy and sale will not be permitted when the priority of the party claiming the lien can be amply protected in the administration of the assets for the creditors and no urgent necessity for such sale is shown.[69]

E. Representative Character of Receiver[70] **— 1. Rule That He Is an Officer of the Court and Not Representative of Parties.** A receiver by his appointment does not become a litigant in the action,[71] but he is an officer and representative of the court appointing him.[72] Under the board and general

receiver had been appointed and who was tenant for life of certain property over which the receiver had been appointed with directions to pay such party the rents, was given leave, notwithstanding the appointment, to sue out and execute such writs as he might be advised).

Where a partnership was solvent when an action to dissolve was commenced, it was held that leave would be granted to levy an execution on the assets in the hands of a receiver. Matter of Thompson, 10 N. Y. App. Div. 40, 41 N. Y. Suppl. 740. And the court will grant leave to plaintiffs in attachment to levy on goods in the hands of a receiver of a firm appointed in an action between the partners and who is therefore the mere liquidator of the parties, where plaintiffs allege that their debtors had transferred the property in fraud of creditors. Webster *v.* Lawrence, 47 Hun (N. Y.) 565. See also PARTNERSHIP, 30 Cyc. 730.

Application to release property.— It has been held that where a creditor believes that property is not legally mortgaged or for any other good reason should not pass into the hands of a receiver, the proper course is to apply to the court which appointed the receiver for the discharge of the property out of the custody of the receiver in order that it may be proceeded against. Robinson *v.* Atlantic, etc., R. Co., 66 Pa. St. 160. See also Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518 (where it was held that the sheriff, not having been ordered to withdraw his levy and no objection having been made thereto in the lower court, it might be inferred in the appellate court that the levy was permitted by the lower court); Croy *v.* Marshall, 3 Ohio Cir. Ct. 489, 2 Ohio Cir. Dec. 280; Fowler *v.* Haynes, 2 New Rep. 156 (where by mistake the receiver was put in possession of goods not belonging to the estate and it was held that the proper course was to apply for their release, and not for leave to levy).

Leave to receiver to sell property of a corporation and distribute the proceeds in satisfaction of execution liens acquired prior to the appointment may be granted. Matter of Muehlfeld, etc., Piano Co., 12 N. Y. App. Div. 492, 42 N. Y. Suppl. 802, 26 N. Y. Civ. Proc. 90.

Where receivership is unduly protracted.— Where the action does not contemplate a distribution of corporate assets among creditors, nor the dissolution of the corporation, as in an action for an accounting against wrong-doing directors, if there is no further necessity for a receiver and the indebtedness of the corporation is not liquidated within a reasonable time, the court will refuse longer to restrain creditors from proceeding to collect their claims by ordinary process against the property of the corporation. Halpin *v.* Mutual Brewing Co., 91 Hun (N. Y.) 220, 36 N. Y. Suppl. 151. So in Scott *v.* Farmers' L. & T. Co., 69 Fed. 17, 16 C. C. A. 358, it was held that the court has no power to hinder and delay creditors of a corporation by withdrawing its property indefinitely from the pursuit of creditors and it was ordered that leave should be given a creditor if not promptly paid by the receivers, to levy an execution on the property subject to the lien of his judgment.

69. Wheeler *v.* Walton, etc., Co., 65 Fed. 720. And see also in this connection cases cited *supra*, note 47.

70. Actions by and against receivers see *infra*, VI.

Amicus curiæ see AMICUS CURIÆ, 2 Cyc. 282 note 4.

In foreclosure proceedings see MORTGAGES, 27 Cyc. 1630 text and note 51 *et seq.*

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1458 text and note 35.

Receivers of banks see BANKS AND BANKING, 5 Cyc. 560 text and note 42 *et seq.*

71. Bassick Min. Co. *v.* Schoolfield, 15 Colo. 376, 24 Pac. 1049; Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Youtsey *v.* Hoffman, 108 Fed. 693. See also Antlers Land, etc., Co. *v.* Fesler, 14 Colo. App. 201, 59 Pac. 406.

Intervention see *infra*, VI, E, 2, b.

72. *Alaska.*— Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

California.— Kreling *v.* Kreling, 118 Cal. 421, 50 Pac. 549.

Colorado.—Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

Delaware.— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

District of Columbia.— Fields *v.* U. S., 27 App. Cas. 433 [certiorari *denied* in 205 U. S. 292, 27 S. Ct. 543, 51 L. ed. 807].

Florida.— Frisbee *v.* Timanus, 12 Fla. 300.

Georgia.— McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 987; Tindall *v.* Nisbet, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225.

Illinois.— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Nevitt *v.* Woodburn, 190 Ill. 283, 60 N. E. 500; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Hooper *v.* Winston, 24 Ill. 353; Starrett *v.* Berkovec, 118 Ill. App. 683; Chicago City R. Co. *v.* People, 116 Ill. App. 633; Carroll *v.* Haigh,

definition of his relation, a receiver ordinarily is not the representative or agent

108 Ill. App. 264 [*affirmed* in 209 Ill. 576, 71 N. E. 317].

Indiana.— Chicago, etc., R. Co. *v.* Kenney, 29 Ind. App. 506, 68 N. E. 20.

Iowa.— State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

Louisiana.— *In re* New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903, receiver of corporation to wind up, etc., under statute. But see as to other receivers Helme *v.* Littlejohn, 12 La. Ann. 298; Kellar *v.* Williams, 3 Rob. 321, holding that where, on the motion of a partner in a suit for the dissolution of the partnership, with the consent of the other partner, a third person is appointed by the court to receive and sue for all amounts due to the partnership, on giving bond, with security, to hold the amounts so received subject to the order of the court, such third person will not be considered an officer of the court, but the agent of the partners, and only responsible as such, the appointment being the act of the partners.

Maryland.— Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367; Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Ellicott *v.* U. S. Insurance Co., 7 Gill 307; *In re* Colvin, 3 Md. Ch. 278; Williamson *v.* Wilson, 1 Bland 418, where it is said that a receiver stands in the situation as regards the chancery court in many respects analogous to that in which a sheriff stands in relation to a court of common law.

Massachusetts.— Harrison *v.* J. J. Warren Co., 183 Mass. 123, 66 N. E. 589 [*citing* Ellis *v.* Boston, etc., R. Co., 107 Mass. 1].

Minnesota.—Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132.

Mississippi.— Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

Nebraska.— Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791.

New Jersey.— Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402 [*reversed* on other grounds in 63 N. J. Eq. 273, 53 Atl. 910], receiver appointed to convert property for the benefit of those entitled.

New Mexico.—Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157.

New York.— Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521; Marshall *v.* Wendell, 45 N. Y. App. Div. 120, 61 N. Y. Suppl. 13; Lottimer *v.* Lord, 4 E. D. Smith 183; Fowler's Petition, 9 Abb. N. Cas. 268; Corey *v.* Long, 12 Abb. Pr. N. S. 427; Merritt *v.* Merritt, 16 Wend. 405.

North Carolina.— Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

Ohio.— Eichert *v.* Eichert, 28 Ohio Cir. Ct. 795 [*affirmed* in 74 Ohio St. 512, 78 N. E. 1124]; Leman *v.* MacLennan, 28 Ohio Cir. Ct. 137 [*affirmed* in 75 Ohio St. 643, 80 N. E. 1129].

Pennsylvania.— Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018, executive hand of the court.

Rhode Island.— Mauran *v.* Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Tennessee.— Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Payne *v.* Baxter, 2 Tenn. Ch. 517.

Texas.— Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1032, 22 Am. St. Rep. 67, 11 L. R. A. 394; Texas, etc., R. Co. *v.* Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135.

Virginia.— Reynolds *v.* Pettyjohn, 79 Va. 327; Beverley *v.* Brooke, 4 Gratt. 187.

Wisconsin.— Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909.

United States.— Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. 510, 17 L. ed. 900; Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249; Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642. As a trustee he is an officer of the law. Standard Oil Co. *v.* Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739.

England.— Bacup *v.* Smith, 44 Ch. Div. 395, 59 L. J. Ch. 518, 63 L. T. Rep. N. S. 195, 38 Wkly. Rep. 697; Portman *v.* Mill, 3 Jur. 356, 8 L. J. Ch. 161.

See 42 Cent. Dig. tit. "Receivers," § 150. See also *supra*, I; II, A, 1.

A receiver and manager are both officers of the court and entitled to its protection while in the proper discharge of their duty. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

A receiver who acts under an agreed order is acting as an officer of the court as much as he would be in acting under an order made without agreement. Hooper *v.* Winston, 24 Ill. 353; H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337. And the fact that particular instructions were given by consent of parties does not make them any less the instructions of the court to its officer. Weems *v.* Lathrop, 42 Tex. 207. But see Kellar *v.* Williams, 3 Rob. (La.) 321, *supra*, this note.

Appointment to carry on business under stipulation in mortgage.— In Meyer *v.* Johnston, 53 Ala. 237, 346, it was said that by a provision in a mortgage it might be stipulated that upon the happening of a certain default or delinquency the mortgagees should be entitled to apply to a court of equity and have persons nominated receivers appointed to manage a business or undertaking or to carry a work to completion under its direction, yet that this, however amply expressed, could not impose on the court the duty or clothe it as a court with capacity to do so; that persons acting under such appointment to manage a business or undertaking or to carry a work forward to completion would be properly not officers of the court but trustees for the parties having such powers and duties as were legally created by the contract and

of either party, in the administration of the trust.[73] His appointment is for the benefit of all parties interested, and he holds the property for the benefit of those ultimately entitled and not in the first place for the benefit of those at whose instance the appointment was made.[74]

as are recognized and imposed by law relating to trustees.

Possession of court see *supra*, IV, D, 2, c.

Supervision of court see *infra*, IV, F, 5.

73. *Colorado.*— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

Georgia.— McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 987.

Illinois.— Starrett *v.* Berkovec, 118 Ill. App. 683; Chicago City R. Co. *v.* People, 116 Ill. App. 633, not the representative of the corporation whose property he holds.

New York.— Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521.

South Carolina.— Fraser *v.* Charleston, 13 S. C. 533, holding that legatees must represent their own interests in a creditor's suit where a receiver has been appointed in the place of the executor, such receiver not representing them.

Texas.— Texas, etc., R. Co. *v.* Bledsoe, 2 Tex. Civ. App. 88, 20 S. W. 1135, receiver of railroad not the agent of the railroad company.

United States.— New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

England.— Bacup *v.* Smith, 44 Ch. D. 395, 59 L. J. Ch. 518, 63 L. T. Rep. N. S. 195, 38 Wkly. Rep. 697, not an agent for any other person, nor trustee.

See 42 Cent. Dig. tit. "Receivers," § 150.

A receiver appointed by the governor under the provisions already referred to (see *supra*, I, note 2) is a public agent. State *v.* McMinnville, etc., R. Co., 6 Lea (Tenn.) 369; Newman *v.* Davenport, 9 Baxt. (Tenn.) 538; Erwin *v.* Davenport, 9 Heisk, (Tenn.) 44. He is not an agent of the corporation, so as to justify service of process against the corporation or an agent acting under the receiver. Cherry *v.* North, etc., R. Co., 59 Ga. 446. See also, generally, PROCESS, 32 Cyc. 555.

A settlement between the administrator of an ancestor and the receiver of the property of his infant heir will not conclude the ward, such settlement not being reported to and approved by the court. Temple *v.* Williams, 91 N. C. 82.

Liability of parties for acts of receiver see *infra*, IV, F, 6, f, (I).

74. *Georgia.*— McGarrah *v.* Southwestern Georgia Bank, 117 Ga. 556, 43 S. E. 987.

Illinois.— Gunning *v.* Sorg, 214 Ill. 616, 73 N. E. 870; Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662.

Indiana.— Chicago, etc., R. Co. *v.* Kenney, 29 Ind. App. 506, 68 N. E. 20; Hay *v.* McDaniel, 26 Ind. App. 683, 60 N. E. 729.

Iowa.— Home Sav., etc., Co. *v.* Polk County Dist. Ct., 121 Iowa 1, 95 N. W. 522; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Maine.— Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

Maryland.— Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Washington City, etc., R. Co. *v.* Southern Maryland R. Co., 55 Md. 153; Ellicott *v.* Warford, 4 Md. 80; Ellicott *v.* U. S. Insurance Co., 7 Gill 307; Chase's Case, 1 Bland 206, 17 Am. Dec. 277.

Michigan.— Port Huron First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657, 58 Mich. 124, 315, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 660.

Minnesota.— Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132.

Mississippi.— Mays *v.* Rose, Freem. 703.

Nebraska.— Vila *v.* Grand Island Electric Light, etc., Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 110 Am. St. Rep. 400, 63 L. R. A. 791; Williams *v.* Turner, 63 Nebr. 575, 88 N. W. 668, receiver of corporation in suit on behalf of all creditors, as representing all creditors and not merely the creditor at whose instance the appointment was made by the court.

New York.— Libby *v.* Rosekrans, 55 Barb. 202 (where by express statute a receiver of a corporation became trustee not only for the creditors at whose instance he was appointed, but for all other creditors of the corporation); Lottimer *v.* Lord, 4 E. D. Smith 183; Corey *v.* Long, 12 Abb. Pr. N. S. 427; Green *v.* Bostwick, 1 Sandf. Ch. 185.

Pennsylvania.— Lewis *v.* Germantown, etc., R. Co., 16 Phila. 608.

Rhode Island.— Mauran *v.* Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Tennessee.— Ross *v.* Williams, 11 Heisk. 410, for benefit of all persons who can work out title to the property.

West Virginia.— McMahon *v.* McClernan, 10 W. Va. 419.

United States.— Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447; Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418; Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268; Hart *v.* Barney, etc., Mfg. Co., 7 Fed. 543, holding that where a receiver has been appointed to take charge of attached property, and a part of it is then seized by one claiming title, the receiver, in replevin, has all the rights to the property in controversy which any or all of the parties to the suit in which he was appointed have. Lansing *v.* Manton, 14 Fed. Cas. No. 8,077, 14 Nat. Bankr. Reg. 127, 3 N. Y. Wkly. Dig. 112.

England.— Bainbrigge *v.* Blair, 3 Beav. 421, 10 L. J. Ch. 193, 43 Eng. Ch. 421, 49 Eng. Reprint 165; Davis *v.* Marlborough, 1 Swanst. 74, 36 Eng. Reprint 303, 2 Swanst. 108, 36

2. Sense in Which He Is Considered Representative of Party — a. In General. On the other hand, while in the sense that a receiver stands indifferent as between the parties whose interests he is appointed to conserve, he may be said to represent no particular party,[75] it may not be accurate to say that he never represents a particular party. Thus in asserting his right to hold assets as those of the person whose receiver he is, he must be said to claim under the right of such person and to this extent to represent that interest,[76] yet if he is invested with authority to assert a right on behalf of creditors [77] which the debtor might be estopped to assert, he may be said to represent the creditors in this respect,[78] and so to have a double character.[79] So reference may be made here to the rule recognized in some cases that a receiver of an insolvent corporation represents not only the corporation but also its creditors or stock-holders,[80] and that the rule restricting

Eng. Reprint 555, 2 Wils. Ch. 130, 37 Eng. Reprint 258.

See 42 Cent. Dig. tit. "Receivers," § 150. See also *supra*, IV, A.

Expression explained.— In La Follett *v.* Akin, 36 Ind. 1, 6, the court say, as to a receiver in supplementary proceedings: "It is sometimes said, a little loosely, that a receiver represents all the parties. This is well explained in the case of McHarg *v.* Donelly, 27 Barb. (N. Y.) 100, where Hogeboom, J., in delivering the opinion of the court, says: 'I am aware that it has been held that for certain purposes — for example, setting aside a certain fraudulent assignment — the receiver represents the creditors of the judgment debtor. But he is so characterized simply in contradistinction to his being the representative of the judgment debtor. He is said to represent the creditors, because he represents the estate of the judgment debtor, in which the creditors are interested, as well as the debtor himself.'"

75. See *supra*, III, F, 1, a.

76. Osgood *v.* Ogden, 3 Abb. Dec. (N. Y.) 425, 4 Keyes 70. See also *supra*, IV, D, 3; IV, F, 1; VI, B.

Employment of attorney.— Where a receiver is appointed to enforce claims due a corporation, in behalf of its creditors, it is not proper, upon authorizing him to bring a suit in which the company may be a defendant, to authorize him to employ counsel to represent the company. There could be no object in making the company a defendant except to support an adjudication affecting its rights, and a defense dictated by plaintiff would be no defense by the company. Barber *v.* International Co. of Mexico, 74 Conn. 652, 51 Atl. 857.

Set-off see *supra*, IV, D, 3, d, (III).

77. Thus, in Porter *v.* Williams, 9 N. Y. 142, 59 Am. Dec. 519, this court declared that a receiver appointed by the court in proceedings supplementary to execution does not stand merely in the place of the judgment debtor, but represents the creditors, and the point was held in that case that he could maintain a suit even against the very party he thus in part represented, to wit, the debtor himself, to set aside an assignment made by such debtor in fraud of his creditors. See also *infra*, VI, B, 1, c; and see, generally, Executions, 17 Cyc. 1451.

In a suit brought for the benefit of the complainants alone, the primary duty of the receiver under the statute regulating the proceedings being to apply the funds realized from the debtor's property in satisfaction of the judgments forming the basis of the bill, the receiver is not necessarily a trustee for the benefit of all the creditors, but for the benefit of the creditors in whose behalf he was appointed. Young *v.* Clapp, 147 Ill. 176, 32 N. E. 187, 35 N. E. 372 [*cited* in Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324].

78. See *infra*, VI, B, 1, c.

79. Osgood *v.* Ogden, 3 Abb. Dec. (N. Y.) 425, 4 Keyes 70.

Further as illustrating the representative character of a receiver, it is held that the receiver of an insolvent corporation in a creditors' suit represents the court in the sense that he derives his power from the court and acts for it, yet he represents the parties entitled to the trust fund and is held to be trustee for them and not for the court. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. Or, as it has been otherwise stated, while the receiver is said to be a trustee for creditors and stock-holders, this only proves that they are the beneficiaries of the fund in his hands, without indicating the source of his title or the extent of his powers; that he is invested with the estate of the corporation and takes his title under and through it. Curtis *v.* Leavitt, 15 N. Y. 9, 44. But in a controversy between the creditors themselves in which creditors of one class are resisting the claims of creditors of another class, the receiver is a mere stakeholder and cannot act in behalf of either side. Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243.

Agent for pledgee under separate contract see Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262, *infra*, IV, F, 6, e, (II), (A), note 45.

80. *Connecticut.*— *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163.

Indiana.— Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738; Kokomo City St. R. Co. *v.* Pittsburgh, etc., R. Co., 25 Ind. App. 335, 58 N. E. 211.

Massachusetts.— Harrison *v.* J. J. Warren Co., 183 Mass. 123, 66 N. E. 589.

Missouri.— Alexander *v.* Relfe, 74 Mo. 495.

his power to the assertion of rights which the corporation could have asserted is subject to the exception that he may disaffirm and avoid transactions of the debtor in fraud of the rights of creditors,[81] as well as to those cases which refuse to recognize the exception last mentioned and hold that the receiver represents the corporation only.[82] The receiver of a corporation is bound by an adjudication made before his appointment in a proceeding in which the corporation was represented, since the corporation is bound by the adjudication, and questions so concluded cannot be relitigated by the receiver.[83] Again, the receiver of a corporation is in a limited sense its representative, as where, on account of his conduct, a liability may be fixed upon its property.[84] If a receiver acts contrary to the order of the court, at the instance of a party in interest, he is held to act as the agent of such party.[85] And if one takes proceedings by which a receiver is authorized to sue for his benefit and on his behalf, he will be concluded by any legal action prosecuted in pursuance of such proceedings.[86]

b. Collusive Appointment. And where a receiver is appointed collusively or by agreement between parties to the suit in order to accomplish a purpose not lawful in itself, he will be considered as the agent of the owner of the property.[87]

Nebraska.— Williams *v.* Turner, 63 Nebr. 575, 88 N. W. 668, receiver of corporation in suit on behalf of all creditors.

New Jersey.— Hayes *v.* Pierson, 65 N. J. Eq. 353, 45 Atl. 1091, 58 Atl. 728; Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571 [*affirmed* in 50 N. J. Eq. 796, 27 Atl. 1033]. After payment of debts and receivership expenses, the receiver of a corporation holds any surplus for the benefit of the stock-holders. McMaster *v.* Drew, 70 N. J. Eq. 6, 62 Atl. 559.

New York.— Bowers *v.* Male, 186 N. Y. 28, 78 N. E. 577; Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46, 26 N. E. 530, 7 L. R. A. 46; Gillet *v.* Moody, 3 N. Y. 479; Fisher *v.* Andrews, 37 Hun 176; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106.

Ohio.— Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207.

Pennsylvania.— Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737.

Rhode Island.— Hayes *v.* Kenyon, 7 R. I. 136.

United States.— King *v.* Pomeroy, 121 Fed. 287, 58 C. C. A. 209; Hamor *v.* Taylor-Rice Engineering Co., 84 Fed. 392.

See 42 Cent. Dig. tit. "Receivers," § 150.

Assignee distinguished.— Unlike a voluntary assignee (see ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, 4 Cyc. 113), a receiver in a suit on behalf of all the creditors of an insolvent derives his authority not from the mere voluntary act of the insolvent or assignor, but from the mandate of the law, and he represents the creditors and is invested with their powers (Duplex Printing Press Co. *v.* Clipper Pub. Co., 213 Pa. St. 207, 62 Atl. 841).

81. See *infra*, VI, B, 1, c.

82. Young *v.* Stevenson, 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236; Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328.

83. See JUDGMENTS, 23 Cyc. 1248.

Representing corporation.— Receivers of a corporation are thus held to represent the corporation. Hopkins *v.* Taylor, 87 Ill. 436.

An injunction against a corporation will operate against a receiver of the corporation appointed subsequently by another court. Safford *v.* People, 85 Ill. 558; Steel *v.* Gordon, 14 Wash. 521, 45 Pac. 151, upon the authority of the case last above cited, and holding that where the corporation had been restrained from carrying on its business, in an action by the receiver subsequently appointed on the injunction bond for loss of profits after his appointment it could not be set up that the order of appointment did not give the receiver authority to carry on the business, since the stock-holders and creditors of the corporation only could have questioned the receiver's acts in that regard.

84. Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60 [*affirmed* in 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81], referring to liability of the corporation for damages for injuries received while the property was in the hands of the receiver, after it is restored to the corporation, as to which see *infra*, IV, I, 2.

85. Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

Wrongful receivership generally see *infra*, X.

86. Tinkham *v.* Borst, 24 How. Pr. (N. Y.) 246, as to privity between the parties in such a case.

Effect of judgments in this connection see JUDGMENTS, 23 Cyc. 1206 text and note 39; 1248 text and notes 46, 47, 48.

87. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52 (referring to an appointment by agreement for the purpose of placing the property of a corporation into the hands of a receiver in order that the company might not be subject to suits in the ordinary course of judicial proceedings, and of enabling the parties to apply the earnings to the betterment of the property belonging to one of the parties and to which the other looked as a security for his debt); San Antonio,

c. After Ascertainment of Party Entitled. When the party ultimately entitled to the property or funds in the hands of a receiver has been ascertained, then the receiver is said to be considered his receiver,[88] or trustee,[89] and the possession has been considered that of such party.[90]

etc., R. Co. *v.* Adams, 11 Tex. Civ. App. 198, 32 S. W. 733 (following the case last above cited and holding further, however, that the mere fact of the appointment of persons as receivers who are interested in the appointment does not have the effect of rendering the appointment void under the rule stated in the text); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909 (holding that if a receiver appointed in an action to administer the property of an insolvent corporation for the benefit of its creditors is imposed upon the court by concealing knowledge of the real purpose of those who nominated him, in the interest of the corporation or its officers, or both, he is deemed as to creditors the agent of their adversaries).

Evidence and burden of proof.— Under a plea of receivership to defeat an action against the party whose property was in the hands of the receiver where the uncontradicted evidence showed the appointment of receivers, and that the property had been placed under their control as such, the burden was on plaintiff to show any invalidity in the appointment, and, proceedings with reference to the removal of a receiver, had long after the appointment, are inadmissible on the question of collusion in the appointment. Adams *v.* San Antonio, etc., R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79.

Injuries inflicted in operation of railroad see RAILROADS, 33 Cyc. 719.

88. *Illinois.*— Jackson *v.* Lahee, 114 Ill. 287, 2 N. E. 172; Coates *v.* Cunningham, 80 Ill. 467; Smith *v.* People, 93 Ill. App. 135.

Maryland.— Ellicott *v.* Warford, 4 Md. 80; Ellicott *v.* U. S. Insurance Co., 7 Gill 307.

North Carolina.— Battle *v.* Davis, 66 N. C. 252.

Oklahoma.— Foster *v.* Field, 13 Okla. 230, 74 Pac. 190.

United States.— Wiswall *v.* Sampson, 14 Wall. 52, 14 L. ed. 322.

See 42 Cent. Dig. tit. "Receivers," § 150.

89. Willard *v.* Decatur, 59 N. H. 137; Very *v.* Watkins, 23 How. (U. S.) 469, 16 L. ed. 522, holding that upon a final decree the property in the hands of a receiver *pendente lite* is subject to execution for debts of the party decreed to be entitled to it. But see as to the last point De Winton *v.* Brecon, 28 Beav. 200, 6 Jur. N. S. 1046, 8 Wkly. Rep. 385, 54 Eng. Reprint 342.

A bill to reach money ordered to be paid the owner of an estate by a receiver after keeping down encumbrances, filed by a judgment creditor of the owner after return of an elegit, and to restrain the receiver from paying such residue to the owner was sustained in Lewis *v.* Zouche, 2 Sim. 388, 2 Eng. Ch. 388, 57 Eng. Reprint 834. And in Eck *v.* Warner, 25 Tex. Civ. App. 338, 60 S. W. 799, it was held that where before the property of a syndicate came into the hands of a receiver, a creditor of one interested therein who had obtained judgment with foreclosure of judgment lien on the interest of his debtor in lands belonging to the syndicate was entitled to have the receiver account for such interest to the extent of the claim against the judgment debtor, the receiver having appropriated and used such interest, or still having it in his possession, if no claims superior to that of the judgment creditor are shown.

But for a different view as to the right of a creditor of an individual member of a firm in a suit by one partner to wind up the affairs of the partnership see Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101. And in other cases it is held that the property intrusted to a receiver by authority of law for the purpose of distribution among the creditors cannot be distributed among the creditors of those creditors. Com. *v.* Hide, etc., Ins. Co., 119 Mass. 155; Columbian Book Co. *v.* De Golyer, 115 Mass. 67; Hamburger *v.* Durasmont, 4 Ohio S. & C. Pl. Dec. 232, 3 Ohio N. P. 185. A creditor with no lien or other interest will not be permitted to come in and impound money in the hands of a receiver which has been adjudged to belong to one of the parties. Spence *v.* Solomons Co., 129 Ga. 31, 58 S. E. 463.

Duration of receivership see *supra*, III, K.

Receiver charged as garnishee see GARNISHMENT, 20 Cyc. 1026 text and note 6.

90. Horlock *v.* Smith, 6 Jur. 478, 11 L. J. Ch. 157; Sharp *v.* Carter, 3 P. Wms. 375, 24 Eng. Reprint 1108.

Specific performance.— Where a receiver is appointed in a suit for specific performance, if the purchaser is compelled to take the title, the receiver is to be considered as his receiver, and the possession of the receiver as his possession. Boehm *v.* Wood, Turn. & R. 332, 12 Eng. Ch. 332, 37 Eng. Reprint 1128.

Presumption as to extent of possession.— In a suit for the recovery of real estate, in which, after final judgment, a receiver was appointed to take charge of the disputed premises and retain the profits derived from them, the court will not order the issue to be tried whether the receiver has taken possession of other property than that which was the subject of the suit, but it will be presumed that he did not transcend the bounds of his authority, and the money in his hands belongs to the successful party. Whitney *v.* Buckman, 26 Cal. 447.

Consent decree changing character of receiver.— In Andrews *v.* Smith, 5 Fed. 833, 19 Blatchf. 100, where trustees in a mortgage were appointed receivers in a proceeding against a lessee railroad company to enforce a lien for rent and thereafter the parties

F. Powers and Duties of Receiver — 1. Extent in General.[91] A receiver appointed by a court of chancery, being an officer of the court,[92] has no rights in himself,[93] no individual status.[94] His duties and powers are directed generally to the preservation of the property pending litigation.[95] He has no original,

agreed on a change of the basis of the rent, that certain things should be done and specific payments made, etc., and that a decree should be entered accordingly, which was done, it was held that funds received by the trustees while in possession under this decree were received by them as agents of the parties; that the parties had taken the property out of the hands of the court.

Qualification of rule.— As a general principle, it is undoubtedly true that a receiver is appointed for the benefit of all parties interested, and his possession will be treated as the possession of the party entitled to the possession; but this rule is not absolute and without qualification, but one that is founded upon a fiction and is resorted to and enforced when it is necessary to secure the ends of justice by promoting and protecting the interests of all parties. If any benefit is to ensue to the party in the right from the mere act of possession he will be regarded as in possession; no rights will be lost to the owner from the possession of a receiver; whatever goes into the hands of the receiver is there for the benefit of the owner subject to the order of the chancellor. But this rule is not carried to the extent of holding that a court of chancery will, by a resort to a fiction, treat a party as in the actual possession of that which by their own injunction they have taken from him and placed in the possession of another. Sturgis *v.* Knapp, 33 Vt. 486.

Champerty see CHAMPERTY, 6 Cyc. 873 note 93.

91. **Discretion in general** see *infra*, IV, F, 5.

How far receiver stands in shoes of party see *infra*, VI, B, 1, c.

Territorial extent of authority see *supra*, III, A, 5; and *infra*, IV, H, 2, b; VIII.

92. See *supra*, IV, E, 1.

93. Ellicott *v.* U. S. Insurance Co., 7 Gill (Md.) 307; *In re* Colvin, 3 Md. Ch. 278.

94. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

95. Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725 (holding that under an order providing that the receiver should "collect, take possession of, preserve and care for all of the property," etc., of defendant, and "hold and dispose of the same under the order of this court," and other orders directing action by the receiver, he has the powers usually conferred by a court of equity upon a receiver); Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546. But as to receiver's title see *supra*, IV, D.

Nature of office — real and personal property.—Many of the reported cases, especially in England, concerning receivers, relate to real estate, and often are such as have arisen between mortgagor and mortgagee, in many of which instances the office and duty of the receiver have been extended no further than to exclude trespass, to make such repairs as are indispensably necessary, and to collect and account for the rents and profits. But where the preservation of personal property has been the object of the appointment, the receiver has been in many respects invested with the authority of a *curator bonis* of the Roman law. He has been directed to take into his possession all the movables and if any were of a perishable nature to sell them. He has been directed to collect and sometimes to pay debts, and where there has been a breach of duty by a partner a receiver has been appointed and charged with the winding up of an unsettled commercial concern. Williamson *v.* Wilson, 1 Bland (Md.) 418 [*citing* Harding *v.* Glover, 18 Ves. Jr. 281, 34 Eng. Reprint 323; Peacock *v.* Peacock, 16 Ves. Jr. 49, 10 Rev. Rep. 138, 33 Eng. Reprint 902].

Receiver in place of executor or guardian.— A receiver appointed upon the removal of executors has no greater power than that of administrator with the will annexed. Cooke *v.* Platt, 98 N. Y. 35; Cooke *v.* De Graw, 55 N. Y. Super. Ct. 548, 14 N. Y. St. 727. A receiver appointed by a court of equity because an executor has been found unfit to administer the estate, although invested with many of the powers and charged with many of the duties of the executor, does not, as the executor would, represent legatees in a creditor's suit, Fraser *v.* Charleston, 13 S. C. 533. See also Gadsden *v.* Whaley, 14 S. C. 210, *supra*, II, B, 10, h, note 18. So it is held that a receiver appointed to take charge of a ward's estate upon the removal of a guardian, under a code provision authorizing the court to appoint a receiver in case of the removal of a guardian, for the causes specified, "to take possession of the ward's estate, to collect all moneys due to him, to secure, loan, invest or apply the same for the benefit and advantage of the ward under the direction and subject to such rules and orders in every respect as the judge may from time to time make in respect thereto, and the accounts of such receiver shall be returned, audited and settled as the judge may direct," is to serve a temporary purpose in place of a guardian, to manage and care for the ward's estate under the direction, supervision, and control of the court, until another guardian shall be appointed, and is not invested with the powers of a guardian. Temple *v.* Williams, 91 N. C. 82. But such a receiver is held to be a quasi-guardian, and when directed to lend out money and pay the income to the ward he will be held to the same accountability as a guardian. State *v.* Gooch, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284.

Receiver in place of assignee in a voluntary assignment, appointed to execute the

intrinsic authority.[96] His power comes from the court,[97] or from statute,[98] and he has only such power as the order of the court under the general principles of law and due course of procedure may confer upon him, or such as may be conferred upon him by statute,[99] or such as may reasonably or necessarily be implied from such orders,[1] or from the statute under which the express power is defined;[2] and he cannot substitute his own discretion where the law has enjoined on him a positive duty.[3] His power is confined, in so far as he may claim recognition by

assignment, is charged only with the duties of such an assignee. Fouche *v.* Brower, 74 Ga. 251.

Actions by receivers see *infra*, VI, A, 3.

96. State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325.

97. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

98. Caldwell *v.* McWhorter, 84 Ky. 130 (where the receiver was held to derive all his power from the code); Boonville Nat. Bank *v.* Blakey, 107 Fed. 891, 47 C. C. A. 43, 6 Am. Bankr. Rep. 13.

99. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916, holding that where the authority of the receiver is specifically defined by the court, all other authority on his part is excluded.

California.— Wheat *v.* State Bank, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47.

Colorado.— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

Delaware.— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

District of Columbia.— Cake *v.* Woodbury, 3 App. Cas. 60; Washington Market Co. *v.* Warthen, 2 Mackey 432.

Illinois.— Nevitt *v.* Woodburn, 190 Ill. 283, 60 N. E. 500.

Indiana.— State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325.

Iowa.— Manker *v.* Phœnix Loan Assoc., (1903) 96 N. W. 982; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 516; Grant *v.* Davenport, 18 Iowa 179.

Kentucky.— Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

Maryland.— Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

New York.— Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 (receivers *pendente lite* as distinguished from permanent receivers); Seymour *v.* Wilson, 16 Barb. 294 [*reversed* on other grounds in 14 N. Y. 567]; Murray *v.* Cantor, 18 Misc. 389, 41 N. Y. Suppl. 652, 26 N. Y. Civ. Proc. 81; Corey *v.* Long, 12 Abb. Pr. N. S. 427; Devendorf *v.* Dickinson, 21 How. Pr. 275; Verplank *v.* Mercantile Ins. Co., 2 Paige 438.

Oregon.— Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 743, 1108.

Pennsylvania.—Lewis *v.* Germantown, etc., R. Co., 16 Phila. 608.

South Carolina.—*Ex p.* Brown, 15 S. C. 518.

Texas.— Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

Virginia.— Reynolds *v.* Pettyjohn, 79 Va. 327.

West Virginia.— Blair *v.* Core, 20 W. Va. 265.

United States.— Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Union Bank *v.* Kansas City Bank, 136 U. S. 223, 10 S. Ct. 1013, 34 L. ed. 341; Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249; Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262.

See 42 Cent. Dig. tit. "Receivers," § 151. See also *infra*, IV, F, 5 *et seq.*

Where the powers of the receiver are not defined by the statute they are such only as are conferred by courts of equity, under their equitable jurisdiction, upon receivers appointed by such courts. Young *v.* Stevenson, 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236.

Right of action see *infra*, VI, B.

1. Henry *v.* Henry, 103 Ala. 582, 15 So. 916; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Manager.— Where a receiver is appointed to preserve the property pending litigation, and for the purpose of carrying on or superintending a trade or business, he is usually called a manager, or receiver and manager, and his appointment as manager implies that he has power to deal with the property over which he is appointed. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792.

Authority of joint receivers see Shirk *v.* Brookfield, 77 N. Y. App. Div. 295, 79 N. Y. Suppl. 225, *infra*, IV, F, 6, e, (III), (A), note 15.

2. Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; Runyan *v.* Farmers', etc., Bank, 4 N. J. Eq. 480, holding that receivers of corporations under the statute in that state "to prevent frauds by incorporated companies" derive their power wholly from the statute and have no authority which is not conferred by it, but that a particular power need not be expressly conferred but may be exercised if it can be fairly implied from the general scope of the statute or as incident to a power expressly given.

3. Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262. See also *infra*, IV, F, 5, a.

Violation of state law by federal receiver.— Under a federal statute providing that a receiver or manager appointed by a federal court shall manage and operate the property in accordance with the laws of the state in which the property is situated in the same manner that the owner or possessor would be bound to do, receivers of federal courts

reason of his appointment alone, within the territorial limits to which the process of the court may run.[4] A receiver will be charged with the consequences of his violation of authority and duty conferred and imposed by the order of appointment,[5] and those dealing with him are presumed to know the limitation of his power.[6] The receiver of a corporation, conducting its business, takes the place of the corporation and its officers for the purpose of performing the necessary corporate duties and functions,[7] and has the same powers for such purposes;[8] while on the other hand he cannot act in excess of the corporate powers and the court cannot invest him with authority to that extent.[9]

2. SUCCESSIVE RECEIVERS.[10] A receivership is a continuing condition, analo-

are not allowed to violate the state laws. Felton *v.* Ackerman, 61 Fed. 225, 9 C. C. A. 457.

4. See *infra*, VIII, A.

Throughout state.— Under a statute authorizing proceedings to sequester tolls it was held that a single suit in the county where the company exercises its functions gives the court jurisdiction to sequester the whole tolls, although the road passes through and the toll gates may be in different counties, and the receiver's authority extends throughout the state. Miers *v.* Zanesville, etc., Turnpike Co., 11 Ohio 273.

5. See *infra*, IV, F, 6, f, (II); VI, D, 1, b.

6. See *infra*, IV, F, 6, e, (II), (D), (2).

7. *Georgia.*—Asheville Cigar Co. *v.* Brown, 100 Ga. 171, 28 S. E. 37; Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64, exercise of charter franchise by receivers of railroad.

Indiana.— Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50, as to duty to perform the public duties of the corporation.

Iowa.— Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243, holding that in the matter of compelling performance of a duty on the part of a railroad company to the municipality comity does not require that proceedings shall be delayed to await the action of the court of another state or in the same state in other proceedings, wherein a receiver has been appointed as to mortgaged property.

Montana.— Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114.

New Jersey.— Kirkpatrick *v.* State Bd. of Assessors, 57 N. J. L. 53, 29 Atl. 442. See also Phœnix Iron Co. *v.* New York Wrought Iron R. Chain Co., 27 N. J. L. 484.

New York.— Rochester *v.* Bronson, 41 How. Pr. 78, takes the place of the directors.

South Carolina.— *Ex p.* Brown, 15 S. C. 518.

United States.— Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225; McNulta *v.* Lockbridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796, which cases are as to the character of a receiver under the federal statute providing that suit may be brought against them without leave for their acts in managing the property, etc.

See 42 Cent. Dig. tit. "Receivers," § 169.

Charter duties.— When it appoints the receiver, the court assumes the management of the corporation under and in accordance with the charter, and is bound by its provisions to the same extent as the directors, and the agents appointed by the court are required by it to act within the limits of the charter, and to perform all duties imposed thereby. Safford *v.* People, 85 Ill. 558.

Exercising franchises.— Where the legislature granted to a gaslight company the right to use the streets of a city, the title to such franchise was not changed by the appointment of a receiver thereof *pendente lite*, and it was held that an injunction should not be granted to restrain such receiver from exercising the franchise. Brooklyn *v.* Jourdan, 7 Abb. N. Cas. (N. Y.) 23.

As carriers see CARRIERS, 6 Cyc. 371.

Railroads see RAILROADS, 33 Cyc. 612, 683, 690, 719.

8. Central R., etc., Co. *v.* Farmers' L. & T. Co., 113 Fed. 406 [*affirmed* in 125 Fed. 1001, 60 C. C. A. 400]. See also Erwin *v.* Davenport, 9 Heisk. (Tenn.) 44, holding receiver appointed by governor under provisions referred to *supra*, I, note 2, vested with powers and duties of board of directors.

Quasi-public and private corporations.— In New Jersey under the corporation act relating to insolvent corporations, two classes are contemplated: (1) Those of a public character, such as a canal, railroad, etc., wherein the franchise is taken by the receiver and kept alive by the performance of corporate duties and ultimately sold; (2) mere private enterprises incorporated to secure a franchise which enables the transaction of lawful business, in which class the franchise may be, and after insolvency is generally, valueless and no duty necessarily devolves upon the receiver to care for it. Mathers' Sons Co.'s Case, 52 N. J. Eq. 607, 30 Atl. 321.

9. Safford *v.* People, 85 Ill. 558; Lewis *v.* Germantown, etc., R. Co., 39 Leg. Int. (Pa.) 13.

Corporate existence necessary.— In Louisville, etc., R. Co. *v.* Cauble, 46 Ind. 277, it is held that the power and authority of the receiver to manage and control the company and its operations depends upon its corporate existence; that if this is taken away, the power and authority of the receiver ceases and terminates, for no court, federal or state, can confer corporate powers and franchises upon an individual. But as to the dissolution of corporations see CORPORATIONS, 10 Cyc. 1310 *et seq.*

10. Accountability to successor see *infra*, VII, A, 1, note 76.

gous to a corporation sole, so long as the property remains in custody of the court and is administered through the agency of a receiver, although the *personnel* of the receivership may change.[11] The status of a claim against the property is not affected by such change in *personnel*,[12] and while it has been held that contracts made by one receiver cannot bind his successor in an action at law,[13] unless such contracts are ratified by the successor,[14] the liability of the funds upon the contracts, or for the official misfeasance or negligence of a receiver, may be enforced in a proper proceeding through a successor receiver.[15] The order appointing a successor may necessarily confer the power and impose the duties of the original receiver, although it does not do so in express terms.[16]

Representatives of deceased receiver see *infra*, text and notes 23–26.

11. Knickerbocker *v.* Benes, 195 Ill. 434, 63 N. E. 174; McNulta *v.* Lockridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796 [*affirming* 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 (*affirming* 32 Ill. App. 86)]; Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 113 Fed. 405 [*affirmed* in 125 Fed. 1001, 60 C. C. A. 400]; State *v.* Port Royal, etc., R. Co., 84 Fed. 67. See also Detroit Electric Light, etc., Co. *v.* Applebaum, 132 Mich. 555, 94 N. W. 12.

Continuance of action on change of receiver see ABATEMENT AND REVIVAL, 1 Cyc. 120, 121.

Duration of receivership generally see *supra*, IV, K.

12. *Ex p.* Brown, 15 S. C. 518; State *v.* Port Royal, etc., R. Co., 84 Fed. 67.

Successor may be sued.— Cobb *v.* Sweet, 46 N. Y. App. Div. 375, 61 N. Y. Suppl. 545.

13. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744; Kerr *v.* Little, 42 N. J. Eq. 528, 9 Atl. 110 [*reversed* on other grounds in 44 N. J. Eq. 263, 14 Atl. 613], 39 N. J. Eq. 83, *infra*, note 15.

14. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744, holding that the mere fact that a portion of the rebates under a contract made by a receiver's predecessor in the position, and accruing before he entered on the discharge of his duties, was paid after such time, does not constitute a ratification of such contract.

15. Knickerbocker *v.* Benes, 195 Ill. 434, 63 N. E. 174; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 41 N. J. Eq. 167, 3 Atl. 134 [*reversed* in part on the merits in Vanderbilt *v.* New Jersey Cent. R. Co., 43 N. J. Eq. 669, 12 Atl. 188, *infra*, this note] (on proceedings between the parties subsequent to those reported in 38 N. J. Eq. 175, *infra*, the court holding that the particular contract was unenforceable); Kerr *v.* Little, 39 N. J. Eq. 83, 42 N. J. Eq. 528, 9 Atl. 110 (the latter report being on the merits [*reversed* on the evidence in 44 N. J. Eq. 263, 14 Atl. 613] and the former on demurrer to the bill where the suit was maintained, because of the absence of legal remedy on such contract against the successor receiver, although it was afterward indicated that the practice of permitting an action at law was the proper one, in Vanderbilt *v.* New Jersey Cent. R. Co., *supra*; Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 38 N. J. Eq. 175 (holding that such contracts may bind the trust if not improvident, but that the question is for the court appointing the receiver); McNulta *v.* Lockridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796 [*affirming* 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362] (liability for injuries caused by the servants of a predecessor, and particularly as to the right to sue without leave in such case, under the federal statute shown *infra*, VI, D, 2, a, (II), (B)).

Claim in favor of receivership.— The principle of the text is applied to a claim in favor of a receivership. Thus where, after a railroad, which was a part of a system, was discharged from a general receivership over the whole system, and by reason of such discharge an ancillary receivership in another state was also discharged, and subsequently a receiver was appointed for the railroad in the latter state in an independent suit, it was held that a claim in favor of the first general receivership for supplies, etc., furnished to the last receiver may be set off against his claim for funds in the hands of the ancillary receiver; that it does not matter that the claim set off is in the name of the first receiver and another, since the account is due the general receivership and not to the person of the receiver. Georgia Cent. R., etc., Co. *v.* Farmers' L. & T. Co., 113 Fed. 405 [*affirmed* in 125 Fed. 1001, 60 C. C. A. 400].

Postponement of current claims.—A receiver cannot be compelled to postpone present claims properly incurred by him in order to meet old claims incurred under the former receivership. Especially is this so, since in order to meet the old claims for premiums, the present receiver must neglect to pay the rent due the landlord, a claim for which he would be personally liable. Weber *v.* Naltner, 10 Ohio S. & C. Pl. Dec. 96, 7 Ohio N. P. 290.

Expenses of different receiverships.—A receiver of a state court is not chargeable with expenses incurred by a receiver of a federal court while the property was in the hands of the latter, or for the hire of property which the latter used on a contract of hire made by him. Especially is this true where the appointment by the federal court was void for want of jurisdiction. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

16. Battaile *v.* Fisher, 36 Miss. 321, where the original order of appointment required

3. Report, Inventory, and Account. The taking and filing of an inventory,[17] and the making of an appraisement of property and the filing of a statement of liabilities, as in the case of a receiver to administer the assets of a corporation for the benefit of its creditors,[18] are proper acts of administration and should be done within a reasonable time after he takes charge,[19] or within the period prescribed by the rules of the court;[20] and a receiver should keep regular accounts, item by item, of all the expenses of the administration of the affairs with which he is charged, and of the receipts of money and property coming into his possession.[21] His books, accounts, and papers in or upon which may be found anything pertaining to the trust or his administration thereof are quasi-public in character, and open to examination not only by the court but by persons who are interested in the estate.[22]

4. Representative of Deceased Receiver. Upon the death of a receiver,[23] in so far as he had a mere duty to perform, like that of a sheriff to safely keep his prisoners, nothing could devolve upon his representatives;[24] but where he had acquired a qualified interest in personal property as bailee, which it was his duty to keep apart from his own and account for, or where he had converted property into money, such property and money must be considered as having rightfully passed into the hands of his personal representatives,[25] and may be followed there by the successor receiver.[26]

5. Supervision, Orders, and Instructions of Court — a. In General. A receiver, being an officer of the court appointing him,[27] is ordinarily subject to

the receiver to hire out slaves and by the terms of the order appointing a successor he was required to perform the duties of the receiver in the case, and well and truly to collect all assets, notes, claims, money, "hire of property, as heretofore ordered," etc., and it was held that the last clause plainly indicated that the powers of the successor were intended to be coextensive with those of the former receiver, and that it was contemplated that he should hire out the slaves.

17. *In re* New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903.

18. *In re* New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903.

19. *In re* New Iberia Cotton Mill Co., 109 La. 875, 33 So. 903.

20. Matter of Seaman, 2 Paige (N. Y.) 409.

Form of order requiring filing see Matter of Seaman, 2 Paige (N. Y.) 409, 410.

21. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504; Hooper *v.* Winston, 24 Ill. 353. See also *infra*, IV, F, 6, e; VII, A, 3, e.

The receiver should have personal knowledge of the affairs he has undertaken to administer and not refer to assistants and bookkeepers when required to report concerning matters connected with his trust. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504.

Correction.—A mistake in a receiver's report may be corrected. How *v.* Jones, 60 Iowa 70, 14 N. W. 193.

Periodical reports.— It is the duty of a receiver to make a full report at least once a year, under the chancery practice. Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Lowe *v.* Lowe, 1 Tenn. Ch. 515, which cases follow the practice adopted by rule in the early English chancery. So by statute periodical reports are required to be filed in particular cases as in *In re* Dugdamonia Shingle, etc., Co., 118 La. 242, 42 So. 789 (under a statute making such requirement as to receivers vested with power of administration, the purpose of which is to show the condition of the business periodically for the information of the court and parties); People *v.* Knickerbocker L. Ins. Co., 18 N. Y. Wkly. Dig. 492 (under statute relating to receivers of corporations, holding that the provision requiring the filing of accounts did not require the court to pass upon them before final accounting).

22. Decker *v.* Berners Bay Min., etc., Co., 2 Alaska 504; Fowler's Petition, 9 Abb. N. Cas. (N. Y.) 268, books, papers, and accounts of receiver as contra-distinguished from those of the corporation prior to his appointment, and the court confined the examination to such time as would not interfere with the business of the corporation.

23. See *supra*, III, L, 1, 4.

24. Williamson *v.* Wilson, 1 Bland (Md.) 418.

Sale after death of receiver see *infra*, IV, H, 6, a, note 81.

25. Williamson *v.* Wilson, 1 Bland (Md.) 418. And the executor of a receiver's estate, as against the deceased receiver's depositary, has a right to funds deposited so that they may be turned over to the successor receiver in discharge of the liability of the deceased receiver's estate. Avery *v.* Preston Nat. Bank, 132 Mich. 445, 93 N. W. 1062, holding that in such a case the bank could not withhold the funds on the ground that they were a trust fund and really belonged to the bank.

26. Avery *v.* Preston Nat. Bank, 132 Mich. 445, 93 N. W. 1062.

Accounting required by executor see Reynolds *v.* Pettyjohn, 79 Va. 327.

27. See *supra*, IV, E, 1.

its orders, direction, and control, to which he must render obedience,[28] and may be proceeded against summarily by such court [29] until he is finally discharged; [30]

Appealability of orders see APPEAL AND ERROR, 2 Cyc. 612.

28. *California.*—Adams *v.* Haskell, 6 Cal. 475.

Georgia.— Asheville Cigar Co. *v.* Brown, 100 Ga. 171, 28 S. E. 37.

Illinois.— Hooper *v.* Winston, 24 Ill. 353; Starrett *v.* Berkovec, 118 Ill. App. 683.

Kentucky.— Hodge *v.* Quiry, 9 Ky. L. Rep. 650.

Maryland.— Burroughs *v.* Bunnell, 70 Md. 18, 16 Atl. 447.

Massachusetts.— Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, 28.

Nebraska.— Jennings *v.* Simpson, 12 Nebr. 558, 11 N. W. 880.

New Jersey.— Delaware Bay, etc., R. Co. *v.* Markley, 45 N. J. Eq. 139, 16 Atl. 436.

New York.— Guardian Sav. Inst. *v.* Bowling Green Sav. Bank, 65 Barb. 275.

North Carolina.— Strauss *v.* Carolina Interstate Bldg., etc., Assoc., 118 N. C. 556, 24 S. E. 116.

Ohio.— Eichert *v.* Eichert, 28 Ohio Cir. Ct. 795 [*affirmed* in 74 Ohio St. 512, 78 N. E. 1124].

Pennsylvania.— Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; McCay *v.* Black, 36 Leg. Int. 471.

South Carolina.— Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634, holding that an order directing a receiver in the performance of his duties is not beyond the jurisdiction of the court, although notice of an appeal from the order appointing such officer has been given, where the return on appeal has not been filed.

Virginia.— Lyle *v.* Sarvey, 104 Va. 229, 51 S. E. 228; Reynolds *v.* Pettyjohn, 79 Va. 327.

West Virginia.— Baltimore, etc., R. Co. *v.* Vanderwerker, 33 W. Va. 191, 10 S. E. 289.

United States.— Felton *v.* Ackerman, 61 Fed. 225, 9 C. C. A. 457; Naumburg *v.* Hyatt, 24 Fed. 898.

See 42 Cent. Dig. tit. "Receivers," § 195 *et seq.*

Written orders.— Under a statute requiring orders and instructions to be in writing and entered of record, a receiver is not justified in disobeying the written orders of the court relating to the management of the property by anything that may be said to him by the judge in private conversation. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Managers.— So where the court appoints managers as well as a receiver when the business is to be carried on, the managers are under the control of the court. See *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

Appealability of order see APPEAL AND ERROR, 2 Cyc. 612 text and note 27; 641 text and note 26 *et seq.*

Disposition of funds see *infra*, IV, F, 6, e, (II).

In term or vacation see JUDGES, 23 Cyc. 554.

Remedies against receiver in the receivership suit see *infra*, VI, D, 2.

Right to sue see *infra*, VI, A, 3, a.

29. Williamson *v.* Wilson, 1 Bland (Md.) 381 (holding that a receiver is appointed to keep the property placed in his hands so that it may be easily traced and immediately produced when called for and his failure to do so will render him, or in the event of his death, his personal representatives liable to be proceeded against in a summary way); New York, etc., Tel. Co. *v.* Jewett, 6 N. Y. St. 656; Felton *v.* Ackerman, 61 Fed. 225, 9 C. C. A. 457.

Restraining continuance of nuisance.— Under the act of congress declaring that a receiver or manager appointed in a federal court shall operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do, if in possession thereof, where it is shown on an intervening petition that a receiver of a railroad has been guilty of a public nuisance, by erecting a fence across a highway, it is the duty of the court to order its discontinuance, although the public character of the nuisance would prevent petitioner from maintaining a suit for injunction. Felton *v.* Ackerman, 61 Fed. 225, 9 C. C. A. 457.

Direction to dismiss action.—A court will not direct its receiver to dismiss an ejectment suit brought by him to recover property alleged to have been purchased with money of the estate, on petition of defendant therein who holds the legal title, except on clear proof that the property was not so purchased. Pakradooni *v.* Storey Cotton Co., 151 Fed. 607.

30. Matter of Murray Hill Bank, 14 N. Y. App. Div. 318, 43 N. Y. Suppl. 836, *infra*, note 54. See also *supra*, III, K.

In other causes.—A receiver is not subject to the mere order of the court as its officer, in a suit other than the one in which he was appointed. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003; Galster *v.* Syracuse Sav. Bank, 29 Hun (N. Y.) 594 [*citing* Rinn *v.* Astor F. Ins. Co., 59 N. Y. 143] (order to pay money); Matter of Mallory, 2 N. Y. Suppl. 437 (application for order to compel receiver to pay a tax on property in his hands); French *v.* Union Pac. R. Co., 92 Fed. 26. And so he is not bound to obey orders in other suits without the right to appeal therefrom. Curtis *v.* Levitt, 1 Abb. Pr. (N. Y.) 274. See also *infra*, IV, F, 5, c.

An order made in an action brought against him personally and not as receiver, and not in terms in any way purporting to affect him in his official character, has no force or bearing upon the receiver in that capacity. Eddy *v.* Co-Operative Dress Assoc., 3 N. Y. Civ. Proc. 434.

In other judicial districts.— The practice

the judgment appointing a receiver does not terminate the cause, but it remains the duty of the court to supervise and direct his conduct as receiver, and to make whatever orders may be necessary from time to time to settle the rights of all parties claiming an interest in the estate.[31] The receiver has but a limited discretion, if his powers are not enlarged by order or statute,[32] and can do nothing on his own mere motion which will diminish the fund in his care,[33] although by the weight of modern authority acts not expressly authorized may be sanctioned by the court in many instances,[34] and administrative details incident to the duties and authority conferred upon him are necessarily committed to his discretion in a large measure and in the absence of an abuse this discretion will not be disturbed by the court;[35] but even in such cases he is under the control of the court and answerable to it for the due exercise of that discretion.[36]

b. Exercise of Supervision — (I) *In General.* The court may enlarge or vary its receiver's duties according as the facts may demand,[37] and by supple-

of applying for orders in such cases in districts remote from that in which the venue of the action is laid, in which the receiver was appointed, cannot be sanctioned; for it leads to great inconveniences, and tends to promote conflicts between the courts of the different districts, which should be avoided. Matter of Commercial Bank, 35 N. Y. App. Div. 224, 54 N. Y. Suppl. 722.

On change of venue the receiver becomes the officer of the court to which the cause is removed. He is subject to its orders and may be committed if he refuses to obey them. *Ex p.* Haley, 99 Mo. 150, 12 S. W. 667 [*affirming* 37 Mo. App. 562].

In appellate court.— Where a receiver is appointed after the entry of a final decree but before prayer for appeal, although an appeal may be taken subsequently, the receiver, unless restrained, may proceed to execute the directions contained in the order of appointment, and the remedy of a party to the cause who conceives the appointment to be oppressive, or the management of the receiver to be legally objectionable, is to apply to the appellate court, inasmuch as the appeal carries up the receivership and the receiver *ipso facto* becomes an officer of the appellate court and subject to its control and direction. Jones *v.* Stewart, (Tenn. Ch. App. 1900) 61 S. W. 105.

After discharge see *infra*, VII, D, E.

Ancillary receivers see *infra*, VIII, B.

On removal of cause see REMOVAL OF CAUSES.

Restraining receiver see *infra*, VI, F, 2.

31. Barber *v.* Mexico International Co., 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246.

32. Hooper *v.* Winston, 24 Ill. 353; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

33. See *infra*, IV, F, 6, e, (II), (A) *et seq.*

34. See *infra*, IV, F, 6, e, (II), (D) *et seq.*

The tests.— In State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712, the court lays down the following general propositions which may be said to represent the trend of modern authority on the questions covered in this chapter. "Not every act within the letter of an order can be sanctioned, nor everything done without the direction of the court condemned. The tests to be applied are: (1) Was the act under investigation within the authority conferred by an order of court? (2) If so, was it performed with reference to the preservation of the estate, as a man of ordinary sagacity and prudence would have performed it under like circumstances? (3) If without authority, was it beneficial to the estate?"

35. *Iowa.*— Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

Michigan.— Taylor *v.* Sweet, 40 Mich. 736.

Tennessee.— Payne *v.* Baxter, 2 Tenn. Ch. 517.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— Continental Trust Co. *v.* Toledo, etc., R. Co., 59 Fed. 514.

See 42 Cent. Dig. tit. "Receivers," § 198 *et seq.*

36. Knott *v.* Morris Canal, etc., Co., 4 N. J. Eq. 423, holding that receivers of a corporation appointed under the statute have a discretion in the management of the trust property, for the due exercise of which they are responsible to the court appointing them, and in the exercise of which they are under its control; that where they advertised that they would receive proposals for the leasing of the canal until a certain date they were not bound to take the offer of the highest bidder, nor were they limited to a certain time within which to receive bids.

37. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17. See also Bowser *v.* Patrick, 65 S. W. 824, 23 Ky. L. Rep. 1578.

Receiver appointed by governor.— The rule does not apply to a receiver appointed by the governor under provisions above referred to. See State *v.* Edgefield, etc., R. Co., 6 Lea (Tenn.) 353, *supra*, I, note 2.

In appellate court.— Where a receiver is appointed after the entry of a final decree and an appeal is subsequently taken, if any affirmative action is required of the receiver which is not covered by the order made in the appointing court, application must be made to the appellate court. Jones *v.* Stewart, (Tenn. Ch. 1900) 61 S. W. 105.

Form of order see Henry *v.* Henry, 103 Ala. 582, 15 So. 916, on application of receiver.

mentary order authorize him to do such things as may be necessary to accomplish the purposes of the receivership and for which no special authority is conferred by the order of appointment,[38] upon its own motion,[39] or upon the application of the receiver [40] or interested parties.[41] Formerly, under the English practice, a receiver was not ordinarily permitted to originate steps or proceedings on his own motion. The parties were left to make such application in the case as might be deemed necessary, although the rule was not absolute and applications were allowed to be made by the receiver under special circumstances.[42] In this country [43]

38. Barber *v.* Mexico International Co., 74 Conn. 652, 51 Atl. 857; Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96; People *v.* Security L. Ins., etc., Co., 79 N. Y. 267.

Directions as to sale see *infra*, IV, H, 2, a; IV, H, 7, d, (II).

39. State *v.* New Orleans, 106 La. 469, 31 So. 55.

40. State *v.* New Orleans, 106 La. 469, 31 So. 55.

Form of order see Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

41. See the cases cited *infra*, this note.

Any creditor, after establishing his claim by intervening in the original suit in which the receiver is appointed, acquires a sufficient standing in court to ask for orders and directions on the receiver in furtherance of the interest of creditors. Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738.

Form of petition by party for direction to receiver to sue see Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484, 486.

42. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96; Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427 (showing the early practice); Parker *v.* Dunn, 8 Beav. 497, 50 Eng. Reprint 195 (holding that the receiver should apply to plaintiff to make the necessary application, and on his default the receiver may then properly apply to the court); Ireland *v.* Eade, 7 Beav. 55, 13 L. J. Ch. 129, 29 Eng. Ch. 55, 49 Eng. Reprint 983 (where it was said that there was difficulty in adhering to the general rule and that many exceptions to it had been allowed, and in that case the receiver, after a long delay and after applying to the parties to move, presented a petition for the payment of his extraordinary expenses and charges, and the master of rolls granted his petition). See also where applications were improperly made by receivers *In re* Doolan, 2 C. & L. 232, 3 Dr. & War. 442; Clark *v.* Fisher, Sau. & Sc. 684.

Enforcing and protecting receiver's rights see *infra*, VI, A, 1.

43. *California.*— Free Gold Min. Co. *v.* Spiers, 136 Cal. 484, 69 Pac. 143.

Missouri.— Neun *v.* Blackstone Bldg., etc., Assoc., 149 Mo. 74, 50 S. W. 436, party interested or receiver may apply.

New Jersey.— Cammack *v.* Jonson, 2 N. J. Eq. 163.

New York.— Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772; Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96; People *v.* Security L. Ins., etc., Co., 79 N. Y. 267 (especially where the fund in his custody may be in danger of being unfairly distributed through some error on the receiver's part); People *v.* St. Nicholas Bank, 77 Hun 159, 28 N. Y. Suppl. 407 (right of receiver to instructions held to be a right to the judgment not only of the special term, or any other branch, but of the entire court made up of its different branches, including the general term); *In re* Van Allen, 37 Barb. 225; Corey *v.* Lang, 12 Abb. Pr. N. S. 427; Curtis *v.* Leavitt, 1 Abb. Pr. 274, 10 How. Pr. 481 (holding that a special receiver to take the custody of a fund is entitled to advice when the question is as to his duty under the order).

Pennsylvania.— Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Givin *v.* Givin, 1 Leg. Gaz. 48.

South Carolina.— Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

See 42 Cent. Dig. tit. "Receivers," § 200.

Duty to apply.—And it has been held that when the receipts are not sufficient to maintain the trust, it is the duty of the receiver for his own protection to apply to the court for instructions, instead of voluntarily continuing the trust and allowing necessary claims to accumulate. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Weber *v.* Naltner, 10 Ohio S. & C. Pl. Dec. 96, 7 Ohio N. P. 290.

As to controversies between the parties a receiver who is a mere stake-holder has no interest. National Park Bank *v.* Goddard, 20 N. Y. Suppl. 526.

Application at instance of party.— It does not follow that because the directions were applied for at the instance of one of the parties they are assailable collaterally as unauthorized. Libby *v.* Rosenkrans, 55 Barb. (N. Y.) 202.

Discretion — *In general.*— The matter of directing the conduct of the receiver may, as a general proposition, be said to be one of discretion in the court whose officer he is, which discretion will not be controlled except in the case of a manifest abuse. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288; Simmons *v.* Allison, 118 N. C. 761, 24 S. E. 740 (direction to whom property shall be rented); Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 (as to question of administration). The court has refused on such an interlocutory application to decide momentous constitutional questions, especially where the rights of the parties may be otherwise protected. Thus upon an applica-

a broader view is taken, and it is common practice for receivers, on their own motion, to apply to the court for directions as to the execution of their duties, and inasmuch as they are officers of the court and subject to its direction, and are charged with responsible and often embarrassing duties, it is held proper that they should on suitable occasions apply to the court for such instructions, and in this connection it is not necessary that the original order of appointment should give the receiver liberty to apply to the court for instructions.[44]

(II) *APPLICATION.*[45] As a matter of propriety, a wise discretion dictates the reasonableness of requiring a receiver who seeks the direction of the court in important matters to give notice to the parties beneficially interested;[46] but it is not jurisdictional,[47] and it has often been held that an application for instructions and ordinary advisory orders may be made *ex parte.*[48]

c. Obedience and Disobedience of Orders. It is the duty of a receiver to obey the orders and instructions of the court appointing him.[49] So long as he renders such obedience his action is that of the court,[50] and this authority is sufficient protection to him.[51] On the other hand disobedience will subject him to be dealt with as for contempt.[52]

tion of a receiver in a suit by trustees of bondholders to foreclose a railroad mortgage for instructions as to his duty to conform to the state statute which regulated freight and passenger rates, fixing a maximum at which it was insisted the railroad could not be operated except at a loss, the court refused to determine whether the act was bad under the constitution of the United States, and refused to instruct the receiver either to obey or disregard it, leaving it to the receiver to continue the same course he had theretofore pursued with liberty to act for the time being under the direction and advice of the trustees, where he is of opinion that the rates fixed by the statute are unjust and will not compensate for the services required, as all funds will be in the hands of the court and the court will be open to allow parties aggrieved by the charges to sue the receiver or have the excess beyond the statute rate refunded. *In re* McElrath, 16 Fed. Cas. No. 8,780, 2 Dill. 460.

Reduction of rents.— In Ficener *v.* Bott, 47 S. W. 251, 20 Ky. L. Rep. 632, where property was rented out when it was placed in the hands of a receiver, it was held error for the court to reduce the rent as fixed in the rental contract made by the owner, upon application of the receiver.

Specific expenditures see *infra,* IV, F, 6, e, (II), (D), (1) *et seq.*

The ultimate ownership of the property should not be determined on such interlocutory application. Stratton *v.* Cain, (Tenn. Ch. App. 1901) 62 S. W. 231.

Right to appeal see APPEAL AND ERROR, 2 Cyc. 641.

44. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96.

45. Applications for orders affecting receivers are in effect motions in the action in which the receiver was appointed, and the character of a motion is not changed by entitling the moving papers, "In the Matter of," etc., instead of in the action. Matter of Commercial Bank, 35 N. Y. App. Div. 224, 54 N. Y. Suppl. 722. See also Matter of Thompson, 10 N. Y. App. Div. 40, 41 N. Y. Suppl. 740.

46. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96, leave to lease property. See also Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 28 How. Pr. 208.

Notice to receiver.— Where a receiver was directed to make necessary repairs on property in his hands, an application to the court, requesting it to urge forward the mechanic employed by the receiver in completing the same, will not be considered until the receiver has had notice thereof. *In re* Lindabury, 10 N. J. L. J. 112.

47. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96.

48. *California.*— Free Gold Min. Co. *v.* Spiers, 136 Cal. 484, 69 Pac. 143.

Maryland.—Alexander *v.* Maryland Trust Co., 106 Md. 170, 66 Atl. 836, as to compromise agreement by receiver of corporation without notice to the corporation.

New York.— Sullivan *v.* Miller, 106 N. Y. 635, 13 N. E. 772.

South Carolina.—Allen *v.* Cooley, 53 S. C. 414, 31 S. E. 634.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 42 Cent. Dig. tit. "Receivers," § 200.

Compare Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 31 Fed. 862, where it is said that if there are parties in interest and they have their day in court, the court's advice to its receiver may be decisive, but that if the matter is *ex parte,* such advice is probably binding only on the receiver, for the judge may change his mind on hearing full argument.

But as to expenditures and disposition of property see *infra,* IV, F, 6, e, (II), (D), (1), (a), note 65.

49. See *supra,* IV, F, 5, a; *infra,* IV, F, 6, e, (II).

50. Carroll *v.* Haigh, 108 Ill. App. 264 [*affirmed* in 209 Ill. 576, 71 N. E. 317].

51. See *infra,* IV, F, 6, f, (II).

52. *Arkansas.*— State *v.* Gibson, 21 Ark. 140, payment of amount due on accounting.

California.—Adams *v.* Haskell, 6 Cal. 475.

6. Collection, Custody, and Management — a. Duty in General. It is a receiver's duty actively to reduce to his possession the assets of the estate over

Georgia.— Tindall *v.* Nisbet, 114 Ga. 224, 39 S. E. 849, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225, failure to deliver fund and commitment for such time as may be necessary to compel its production, the decision in the later case being upon a petition to discharge from imprisonment upon the ground that petitioner had been punished sufficiently, but the court holding that forty-five days confinement in the common jail is insufficient punishment for an officer of court who, without any legal excuse, wrongfully appropriates to his own use six thousand dollars placed in his custody by the court; that to discharge said officer on the ground that he had by such confinement been sufficiently punished for his past contempt in thus appropriating such funds, and for his ever-present and continuing contempt in failing to pay them over to the clerk of the court, would be such an example as would increase the number of such offenses and would encourage other officers in like positions to commit similar crimes.

Iowa.— How *v.* Jones, 60 Iowa 70, 14 N. W. 193, order to apply money.

Maryland.— Williamson *v.* Wilson, 1 Bland 418, 436.

Michigan.— People *v.* Brooks, 40 Mich. 333, 29 Am. Rep. 534 (order to pay over money); People *v.* Jones, 33 Mich. 303.

New York.— Clapp *v.* Clapp, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495, 49 Hun 195, 1 N. Y. Suppl. 919, payment of amount due on accounting.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, payment of amount due on accounting.

United States.— Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132, payment of amount due on accounting.

England.— *In re* Bell, L. R. 9 Eq. 172, 21 L. T. Rep. N. S. 781, 18 Wkly. Rep. 369; Davies *v.* Cracroft, 14 Ves. Jr. 143, 9 Rev. Rep. 254, 33 Eng. Reprint 475 (which cases are as to amount due on accounting); Macarty *v.* Gibson, Mosely 40.

Canada.— Fawkes *v.* Griffin, 18 Ont. Pr. 48, failure to pay money into court found to be in receiver's hands.

See 42 Cent. Dig. tit. "Receivers," § 202.

In other actions.—A receiver cannot be punished for contempt in disobeying an order directing him to pay a judgment against him, not made in the action in which he was appointed. Merritt *v.* Sparling, 88 Hun (N. Y.) 491, 34 N. Y. Suppl. 882.

On change of venue the court to which the cause is removed may commit a receiver for contempt for disobedience of its order to pay over funds. *Ex p.* Haley, 99 Mo. 150, 12 S. W. 667 [*affirming* 37 Mo. App. 562].

The proper order of the court is in the alternative that by a certain day the receiver shall pay or stand committed (Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132; Davies *v.* Cracroft, 14 Ves. Jr. 143, 9 Rev. Rep. 254), which is necessary, although he is under an order to pay by a certain day (Davies *v.* Cracroft, *supra*), and the order should provide also that, in the event of the receiver's failure to pay, the parties interested may bring suit on his bond against him and his sureties (Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132).

Commitment upon failure to obey order.— Where money is found to be in the receiver's hands and a specific order is made for its payment, the court will, upon his failure to obey the order, commit him for contempt without requiring any further order to be served. McIntosh *v.* Elliott, 2 Grant Ch. (U. C.) 396 [*citing In re* Gent, 40 Ch. D. 190, 58 L. J. Ch. 162, 60 L. T. Rep. N. S. 355, 37 Wkly. Rep. 151; *In re* Bell, L. R. 9 Eq. 172, 21 L. T. Rep. N. S. 781, 18 Wkly. Rep. 369]. But the disobedience of a direction of a court to its receiver to satisfy a lien out of a certain fund in the custody of the court, and which was committed to the receiver solely as the court's receiving and disbursing officer, is held to come within the provision of a statute as a disobedience by a person "appointed to perform . . . ministerial services," of a lawful order of the court, and under the requirements of the statute in such cases he must have an opportunity to be heard, and there must be an adjudication that he was guilty of misconduct; and under another provision of the statute the court may punish by fine and imprisonment such misconduct by which the rights or remedies of a party may be defeated, impaired, impeded, etc., and "if an actual loss or injury shall have been produced," etc., a fine may be imposed "sufficient to indemnify a party," etc., but in all other cases not to exceed two hundred and fifty dollars, etc., and under these provisions it is held that where there is an adjudication of misconduct and that it was calculated to or did defeat, etc., the rights and remedies, etc., it need not be adjudicated expressly that actual loss or injury was produced in order to justify a fine of the amount of the lien ordered to be satisfied out of the funds in the hands of the receiver, although to justify such fine in excess of two hundred and fifty dollars the judgment must in fact be based upon the damages ascertained by affidavit or other proof to have been suffered by the misconduct. And under these provisions a contempt order imposing a fine and ordering commitment should order the party to stand committed until he complies with the order requiring payment of the amount of the lien, and not until the fine is paid. Clark *v.* Bininger, 75 N. Y. 344.

Service of copy of order sufficient.— Since a receiver appointed by the court is an officer of the court, it is held that he need not be served with a writ of execution of a decretal order, but only with a copy of the order, and if he disobeys it he should be committed. Macarty *v.* Gibson, Mosely 40, 25 Eng. Reprint 258.

which he is appointed, in pursuance of the order of the court in that respect;[53] he should take possession of the property and retain it until otherwise ordered by the court,[54] and protect it for the benefit of all parties interested,[55] and not for the benefit of third persons,[56] since in this respect he represents all the parties[57] in their conflicting interests, and must act consistently with that duty and not pursuant to the representations or interests of any particular party.[58] And in

At instance of surety of removed receiver. — Where an order directing a receiver who had been removed to pay over to his successor the amount found due on his accounting was not complied with, and his surety, on demand for the amount so found due, obtained an order authorizing him to pay the amount to the new receiver, and to take an assignment of all his rights, which amount the sureties then paid, and took an assignment which stated that it was made with the intention of subrogating the surety to all rights under the order, it was held that the fact that the surety was not a party to the proceeding in which the order directing the payment was made did not prevent him from proceeding against the late receiver for contempt in disobeying the order to pay the amount found due from him. People *v.* Anthony, 7 N. Y. App. Div. 132, 40 N. Y. Suppl. 279 [*affirmed* in 151 N. Y. 620, 43 N. E. 1133].

Death of person to whom payment ordered. — Where an order has been made in a cause directing a receiver to pay the fund to a particular person, and that person dies, the receiver is not bound in the first instance to take out a representation to the deceased, nor to apply to have the order revised; it is sufficient for him to keep the money in the custody in which it was originally placed, until the state of the proceedings in the court enables him to pay it over. White *v.* Baugh, 3 Cl. & F. 44.

Officers of court generally see CONTEMPT, 9 Cyc. 9.

Removal see *supra*, III, L, 2, b, (IV).

53. Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919 [*affirmed* in 125 N. Y. 693, 26 N. E. 751].

54. Baker *v.* Cooper, 57 Me. 388 (duty of receiver of corporation to take possession of real as well as personal estate of the corporation); Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486. See also Salway *v.* Salway, 2 Russ. & M. 215, 11 Eng. Ch. 215, 39 Eng. Reprint 376, *infra*, IV, F, 6, e, (II), (B), note 49.

This is the extent of his authority in the absence of other express authority conferred by the court. Demain *v.* Cassidy, 55 Miss. 320.

Continuance of duty. — The receiver's duty to hold and protect the property continues until it is taken from his possession by order of court, even though the order of appointment shall have been vacated in the meantime. Matter of Murray Hill Bank, 14 N. Y. App. Div. 318, 43 N. Y. Suppl. 836, upon reversal of order appointing temporary receiver.

Authority of order of appointment — In *general.* — A receiver is held to be under no obligation to take property out of the possession of another who resists, without the express direction of the court. Davies *v.* Davies, 20 Abb. N. Cas. (N. Y.) 170; Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Cassilear *v.* Simons, 8 Paige (N. Y.) 273. But he may demand from a stranger to the record property in his hands and which is included in the order of appointment, and if voluntarily surrendered to the receiver it is rightfully in his possession. Tapscott *v.* Lyon, 103 Cal. 297, 37 Pac. 225. And pursuant to the general rule above stated (see *supra*, text and not 99) an order of appointment merely for the purpose of collecting the rents of property from one of the parties pending the controversy between them does not authorize the receiver to take possession of the premises. Washington Market Co. *v.* Warthen, 2 Mackey (D. C.) 432. And an appointment merely to sell property to particular parties, etc., and hold the balance subject to the order of the court, the applicants for the order of sale being the parties in possession, does not authorize the receiver to take charge of the property and collect the rents. Wardlaw *v.* Herrington, 125 Ga. 828, 54 S. E. 699. But the receiver of a defunct corporation which owes debts and has assets should be clothed with the power to reduce to possession and to distribute to the creditors all the assets of the corporation of which he is receiver, to be found within the jurisdiction of the court that has appointed him. State *v.* New Orleans, 106 La. 469, 31 So. 55.

Sufficient property to satisfy claim. — But an order appointing one a receiver of "all of the copartnership property . . . of every description or so much thereof as may be necessary to satisfy the plaintiff's judgment," makes it the duty of the receiver to take care to reduce to his possession enough property to pay plaintiff's claim as it should eventually be established. Adams *v.* Elwood, 104 N. Y. App. Div. 138, 93 N. Y. Suppl. 327.

A partner who is one of the receivers of the partnership holds the property as receiver and not as partner. Hills *v.* Reeves, 31 Wkly. Rep. 209.

Duration see *supra*, III, K.

55. Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427, 43 How. Pr. 492; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275; Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963, as to character of property as giving character to particular preservation which it requires.

56. Shadewald *v.* White, 74 Minn. 208, 77 N. W. 42.

57. See *supra*, IV, E.

58. *Iowa.* — Home Sav., etc., Co. *v.* Polk

this respect it is as much the receiver's duty to protect valid preferences and priorities as it is to make a just distribution among the general creditors.[59] His trust is a personal one which he cannot abdicate by contract with third persons for the performance of his official duties.[60] But receivers appointed to administer an insolvent's estates are not bound to accept property which would burden instead of benefiting the estate, although the court might compel a different course.[61]

b. Prudence and Good Faith — (i) *In General.* The degree of care proper to be exercised in the preservation of funds arising from the seizure of the property of a citizen requires that a receiver intrusted with such fund should be held to a rigid accountability.[62] But nothing more is required of him than that he act in good faith and exercise the discretion and prudence of ordinarily careful men in pursuits of a similar character.[63]

County Dist. Ct., 121 Iowa 1, 95 N. W. 522; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Michigan.— Detroit First Nat. Bank *v.* E. T. Barnum Wire, etc., Works, 60 Mich. 487, 27 N. W. 657, 58 Mich. 124, 315, 24 N. W. 543, 25 N. W. 202, 55 Am. Rep. 660.

New York.— People *v.* Security L. Ins., etc., Co., 79 N. Y. 267; People *v.* Family Fund Soc., 31 N. Y. App. Div. 166, 52 N. Y. Suppl. 867; Iddings *v.* Bruen, 4 Sandf. Ch. 417, where under the rule of the text it was held to be the duty of the receiver to protect the property to the best of his ability under the practice corresponding with the ancient practice in England, which authorizes a receiver to originate proceedings as opposed to the practice which required that necessary application should be made by the parties to the suit.

North Dakota.— Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243.

United States.— Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851; Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16; Meier *v.* Kansas Pac. R. Co., 16 Fed. Cas. No. 9,395, 5 Dill. 476, 6 Reporter 642.

See 42 Cent. Dig. tit. "Receivers," § 150. And see *supra*, III, F, 1.

Promotion of plan of reorganization.— In Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16, it was held that a receiver of a railroad corporation might prosecute a reorganization scheme which offers the prospect of securing the largest measure of protection to all persons concerned in or connected with the property and assets, but could not promote one interest at the expense of others.

Independent agency for purchaser.— In De Jarnatt *v.* Peake, 123 Cal. 607, 56 Pac. 467, a receiver in foreclosure proceedings assisted a stranger, as his agent, in bringing about a sale to such stranger of the note and mortgage involved for the full face value thereof, and, there being no evidence that the receiver was, through his official position, seeking any advantage against the purchaser inconsistent with his duties, it was held that in his acting as defendants' agent he did not violate his duties as receiver, so as to prevent his recovering from defendants for services rendered.

59. American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345.

60. Shadewald *v.* White, 74 Minn. 208, 77 N. W. 42.

Employees see *infra*, IV, F, 6, e, (IV).

61. Dushane *v.* Beall, 161 U. S. 513, 16 S. Ct. 637, 40 L. ed. 791.

62. Tindall *v.* Nisbet, 113 Ga. 1114, 39 S. E. 450, 55 L. R. A. 225; Atkins *v.* Judson, 33 N. Y. App. Div. 42, 643, 53 N. Y. Suppl. 504, 54 N. Y. Suppl. 1095, holding that under a code provision imposing the duty of preserving corporate property upon a temporary receiver of a corporation, such receiver occupies a fiduciary relation and is held to the utmost good faith in his dealings with the property.

Liability on receiver's bond see *infra*, IX.

63. *Illinois.*— Johnston *v.* Keener, 23 Ill. App. 220.

New York.— Hynes *v.* McDermott, 14 Daly 104, 3 N. Y. St. 582.

North Carolina.— Alston *v.* Massenburg, 125 N. C. 582, 34 S. E. 633.

Oklahoma.— McKennon *v.* Pentecost, 8 Okla. 117, 56 Pac. 958.

Pennsylvania.— McDowell's Appeal, 4 Pennyp. 384.

Texas.— Groesbeck Cotton Oil, etc., Co. *v.* Oliver, 44 Tex. Civ. App. 303, 97 S. W. 1092; Hamm *v.* J. Stone, etc., Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503–524, renting out sheep in time when the particular industry was in a depressed condition, for less than the value of such rentals in other years upheld.

Virginia.— Reynolds *v.* Pettyjohn, 79 Va. 327.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 42 Cent. Dig. tit. "Receivers," § 190 *et seq.*

Same prudence as in his own affairs.—A receiver is bound to the exercise of prudence and good faith in all his dealings with the trust estate, and to bring to the discharge of his official duties the same measure of skill and prudence, and the same personal supervision that he would give if the estate

(II) *Personal Interest and Advantage* — (A) *In General.* One who accepts an appointment as receiver should not be permitted to say that he has any interest other than his official or representative interest as receiver, to conflict with his duties in respect to the interests he was appointed to represent.[64] He will not be permitted to derive personal profit out of his office other than the compensation which the court may allow him under the law;[65] he occupies a fiduciary relation to the property involved even though he is not invested with the title,[66] and his dealings with it must be considered as in that character; he cannot deal with it for himself while he is receiver and if he does the benefit must inure to the trust estate.[67]

was his own. Heffron *v.* Milligan, 40 Ill. App. 291; State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Plisson *v.* Duncan, 36 Can. Sup. Ct. 647, holding that the fact that the receiver is the sheriff of the district does not absolve him from this obligation, although the partners consented to his appointment knowing that he would not be able to manage the business in person.

64. Bolles *v.* Duff, 54 Barb. (N. Y.) 215, holding that, by accepting the office or position of receiver, he must be deemed to have assumed the duties and responsibilities of a receiver, unqualified or unmodified by the fact or circumstance that he had been declared to be a mortgagee in possession, or by the fact or circumstance that he claimed the decree to be erroneous, and that he was, and finally might be held to be, the absolute owner.

Individual claim of receiver — *In general.*— A receiver who has been directed to pay funds to a particular person cannot set up a personal claim against such person and retain the funds in satisfaction thereof. Johnson *v.* Gunter, 6 Bush (Ky.) 534; Wood *v.* Wilcox, 14 Ky. L. Rep. 574.

Mortgage.— The same objection exists against allowing a receiver to take a mortgage upon the property to secure his private debt. Thompson *v.* Holladay, 15 Oreg. 34, 14 Pac. 725.

Application of collections to individual claim.— Where the receiver is a creditor of the estate of which he is appointed his claim stands on no better footing than those of other creditors and he cannot pay himself first out of the assets. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809. A receiver being appointed to collect certain debts, an owner of an interest in the fund to be collected gave to one of the debtors an order on the receiver for an amount on account of such owner's interest in the fund, and the receiver credited that sum on a bond due him individually from such debtor, instead of crediting it on the debt which he was to collect as receiver, and it was held that the receiver's duty was to apply the order as a credit first on the debt which he was officially bound to collect in preference to that due him individually, and he should be held accountable for that sum and interest thereon, as though it were actually collected. Reynolds *v.* Pettyjohn, 79 Va. 327.

65. *Arkansas.*— Cook *v.* Martin, 75 Ark. 40, 87 S. W. 625, 1024.

Minnesota.— Shadewald *v.* White, 74 Minn. 208, 77 N. W. 42.

Missouri.— Adair County *v.* Ownby, 75 Mo. 282.

New Mexico.— Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157.

Pennsylvania.— Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

Texas.— Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600.

See 42 Cent. Dig. tit. "Receivers," § 190.

Interest on funds see *infra*, IV, F, 6, e, (II), (C).

Loan to self or firm see *infra*, IV, F, 6, e, (II), (A), note 35.

66. Donahue *v.* Quackenbush, 75 Minn. 43, 77 N. W. 430.

67. Donahue *v.* Quackenbush, 75 Minn. 43, 77 N. W. 430.

Use of trust funds.— People *v.* Merchants' Bank, 35 Hun (N. Y.) 97, holding that where a receiver uses trust funds for the purchase of property the profit inures to the benefit of those whom the receiver represents. But see Whitesides *v.* Lafferty, 3 Humphr. (Tenn.) 150, where, upon the dissolution of a partnership and the appointment of one of the parties as receiver, it was held, on a supplemental bill by the other party against the receiver for an accounting, that there was no such relation between a receiver and a party to a suit as makes him liable for profits made by any use of the money during the continuance of his receivership.

Use of property.—A receiver will not be permitted to derive a personal advantage from the use of property committed to his care and which is capable of being productive of profit to those interested in it, and, whether or not he has been expressly required to hire it out, if he uses it in and about his own business he will be charged with the reasonable value of its hire. Battaile *v.* Fisher, 36 Miss. 321, use of slaves intrusted to a receiver for an indefinite period, the order, however, being construed to require the receiver to hire them out.

Tenancy of receiver.— But, upon consent of the parties in a cause claiming substantial interests in the lands in litigation, the receiver over those lands was permitted to

(B) *Acquiring Trust Property.* So a receiver will not, in ordinary cases, be permitted to purchase as an individual what he sells as a receiver,[68] or to purchase as receiver what he sells as an individual, however free from fraud the transaction may be.[69] And, as in the case of others who occupy fiduciary relations respecting property, a receiver is utterly disabled from acquiring for his own benefit, pending the receivership, the property committed to his custody for management,[70] and this rule is entirely independent of any question of fraud,[71] and applies to a purchase by a receiver at a judicial sale based upon a title paramount to that of the receiver and to the interest of the *cestuis que trustent.*[72]

(III) *Dealing With Parties in Interest.* Parties connected with and owing duties to a corporation, by reason of their official relations therewith, should not be permitted to deal with the receiver of the company, directly or indirectly, in respect to articles or subjects they might have to sell or contract about.[73]

become a tenant of part of them, the adoption of such a course appearing to be for the benefit of the estate. Stannus *v.* French, 13 Ir. Eq. 161.

68. See *infra,* IV, H, 6, b, (II).

69. Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013.

But where the contracts of the receiver are clearly for the best interests of the trust, and where they were entered into with the full knowledge and consent of the parties, and where the trust estate has received the full benefit of such contracts, the parties cannot be heard to say that compensation shall not be made therefor. Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013, holding that where a receiver of real estate, who was directed to farm it pending foreclosure proceedings, purchased seed grain from himself, and threshed grain with his own outfit, and the parties consented beforehand to such transaction, and the trust received the full benefit thereof, the parties cannot afterward be heard to object to his reasonable charges therefor.

70. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Donahue *v.* Quackenbush, 75 Minn. 43, 77 N. W. 430 (purchase at execution sale is for benefit of the estate); Shadewald *v.* White, 74 Minn. 208, 77 N. W. 42 (holding that a purchase by the receiver in his own name of a certificate of sale on foreclosure of the property which was the subject of the receivership will, at the election of the parties interested in the property, be deemed a redemption for their benefit, and the title thus acquired will be held by him in trust for them, subject to his right to be reimbursed for any advances); Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751 (purchase at mortgage foreclosure).

He cannot, on his own account, buy up debts payable out of funds held by him in his fiduciary capacity, but whatever advantage is thus derived by him by purchases at an under value is the common benefit of the estate. Roller *v.* Paul, 106 Va. 214, 55 S. E. 558. See also Titherington *v.* Hodge, 5 Ky. L. Rep. 211, *infra,* IV, H, 6, b, (II), note 87.

Purchasing for wife.— In Cook *v.* Martin, 75 Ark. 40, 87 S. W. 625, 1024, a receiver in a creditors' suit purchased for his wife a part of the property from one who claimed under an execution sale and it was held that the wife was not entitled to hold the property.

A clerk of the receiver cannot be permitted by him to deal in property belonging to the receivership, in his own interest, and detrimental to the trust; nor can he ratify or sanction such act on the part of his clerk, except perhaps by express authority and approval of the court appointing him, upon a showing to such court of all the facts. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486.

Purchase of property from parties.—A receiver in a partition suit to collect rents *pendente lite* occupies a position which prohibits him from buying the property for himself from the parties who do not know that he is the purchaser. Jahn *v.* Gleason, 89 Hun (N. Y.) 254, 34 N. Y. Suppl. 1141, 1147 [*affirming* 11 Misc. 483, 33 N. Y. Suppl. 447], where the sale was set aside.

Interest in a different right.— In King *v.* O'Brien, 15 L. T. Rep. N. S. 23, it was held that a receiver over the estate of a reversioner is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right.

71. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751, in which cases it is held that it is to avoid the necessity of any such inquiry that the rule takes so general a form, and that the rule stands on the moral obligation to refrain from placing one's self in positions which ordinarily excite conflicts between self-interest and integrity.

Remedy.— The *cestui que trust* has the right to demand a resale of the property, or to adopt the purchase as made for his benefit, subject to the lien for advances. Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751. See also Harrigan *v.* Gilchrist, 121 Wis. 127, 363, 99 N. W. 909.

72. Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751, for a further ruling in which see *infra,* IV, H, 12, c, (II), (A), note 12.

73. Clarke *v.* Georgia Cent. R., etc., Co., 66 Fed. 16.

c. Waiver or Surrender of Rights and Claims.[74] A receiver as an officer of the court is clothed with no power to waive the equitable rights of judgment creditors he was appointed to protect.[75] And while, upon an application made directly by the party affected, it might be proper for the court appointing a receiver to require him to disclaim or surrender liens improperly asserted by him under a general power given him by the court,[76] yet this right should not be exercised in a case in which the usual and ordinary methods of procedure are better suited to determining and protecting the rights of all the persons interested.[77]

d. Collection of Assets [78] — (i) *In General.* A receiver's authority being limited by the order appointing him,[79] the authority to collect funds has been denied under an order directing other and particular acts,[80] but the intention in the particular case, considering the object and purposes of the suit, may control the construction of the order,[81] and a receivership to collect debts due and to become due has been held to extend to debts not due and the receiver may collect money before it becomes payable.[82] Payment to a receiver appointed to get in debts is a proper discharge of the debt.[83] The right of a receiver of a corporation in liquidation proceedings to bid off property at a sale under a deed of trust

Employment of parties see *infra*, IV, F, 6, e, (IV), (B), note 34.

74. **Compromise and settlement** see *infra*, IV, F, 6, d, (IV).

75. Keiley *v.* Dusenbury, 42 N. Y. Super. Ct. 238 [*affirmed* in 77 N. Y. 597].

76. Andrews, etc., Iron Co. *v.* Smead Foundry Co., 1 Ohio S. & C. Pl. Dec. 117, 7 Ohio N. P. 237.

77. Andrews, etc., Iron Co. *v.* Smead Foundry Co., 1 Ohio S. & C. Pl. Dec. 117, 7 Ohio N. P. 237.

78. **Actions by receiver** see *infra*, VI, A, B.

Appointment to collect debts pending suit see *supra*, II, B, 10, a, note 63.

Attornment see *supra*, IV, D, 5, i.

Avoiding transactions of parties see *infra*, VI, B, 1, c.

Liabilities of stock-holders and directors see *infra*, VI, B, 2, 3.

79. See *supra*, IV, F, 1.

80. Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

The court may in its discretion order its receiver to collect bonds for the price of property which he had previously sold under the direction of the court. Bowser *v.* Patrick, 65 S. W. 824, 23 Ky. L. Rep. 1578.

Payment into court to save poundage or to receiver.— Under the English chancery practice, where a receiver was appointed to get in the outstanding estate of a testator, the court gave leave to a party who was willing to pay a sum due the estate into court to do so in order to save poundage which would have been incurred had the amount passed into the hands of the receiver. High *v.* Grattan, 1 Beav. 201, 8 L. J. Ch. 249. But in *Ex p.* Clayton, 1 Russ. 476, an order was made that the receiver of the rents and profits of a lunatic's estate should receive balances due from purchasers for the purchase-money of timber belonging to the lunatic's estate, and that he should pay the money into court when received, it appearing that the only doubt was whether there was any objection to making such order on the ground that the receiver's poundage would be increased by such proceeding and that the order should not be made that the purchasers should pay the money into court.

Power necessarily incident to those expressly conferred see Weems *v.* Lathrop, 42 Tex. 207, intimating that an order appointing a receiver, which recited that he should take possession of certain negroes, "and hire out the same from year to year until the termination of the suit," empowered the receiver to receive payment on notes taken by and payable to himself for the hire of the negroes, remaining in his hands at maturity. See also *infra*, VI, B, 5.

Sale for cash see *infra*, IV, H, 6, c, (VI); IV, H, 10.

81. Olcott *v.* Heermans, 3 Hun (N. Y.) 431.

Proving claim against estate of legatee in bankruptcy.— Under a bill by a legatee for administration, a receiver was appointed and having, without leave of court, proved against the estate of a bankrupt legatee who was debtor to the estate represented by the receiver, it was held that the receiver must be treated for this purpose as having authority, and that the effect of the proof was to discharge the debt and entitle the bankrupt whose bankruptcy has been annulled to his legacy. Armstrong *v.* Armstrong, L. R. 12 Eq. 614, 25 L. T. Rep. N. S. 199, 19 Wkly. Rep. 971.

82. Olcott *v.* Heermans, 3 Hun (N. Y.) 431, where the receiver was appointed to sue for and collect such debts as were or might become due and to pay the proceeds to a third person, and it was held that the words "debts due and to become due," in the order of appointment, were not intended to limit the power of the receiver but as descriptive of the property conveyed.

Authority to execute formal satisfaction and discharge of mortgages in the receiver's hands, upon payment, is broad enough to include authority to receive payment of the amount secured and to satisfy the mortgage, although the debt is not payable at the time. Heermans *v.* Clarkson, 64 N. Y. 171.

83. McGuin *v.* Fretts, 13 Ont. 699.

given to secure debts owing to the company belongs to the power of the receiver to collect the debts of the company.[84] Reasonable diligence in endeavoring to collect accounts which come into the receiver's hands is all that is required.[85] Particular powers in this regard are sometimes derived from the statute under which the receiver acts.[86]

(II) *Payment by Check or Note.* A receiver appointed to sue for and collect debts due and to become due may accept a check or note in payment of a debt due the estate, although when he comes to account he must have the money on hand to pay over.[87]

(III) *Taking Security.* If the general power with which a receiver was invested would not authorize him in any instance to take security for the fund which it was his duty to collect, it will be presumed, where he has obtained security while it was in the hands of a bankrupt, that he has acted in so doing by the particular direction of the court from which his authority is derived,[88] especially when the objection comes from one who has no interest in the fund.[89]

(IV) *Compromise and Settlement.* A receiver may compromise claims and suits with the approval of the court.[90] To authorize the release of claims

84. Jacobs *v.* Turpin, 83 Ill. 424, where it is held that such a course would be necessary and proper in order to make the most of the property held in security and prevent its sacrifice, and that such receiver can do anything in this respect that the company could have done to make the most out of its assets.

85. McDowell's Appeal, 4 Pennyp. (Pa.) 384.

86. Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505. See also *infra*, VI, A, 2.

87. Olcott *v.* Heermans, 3 Hun (N. Y.) 431, holding that if the receiver is directed to collect and pay proceeds to a party such party may receive notes or acknowledge payment without having received anything; that the question of the necessity of the receiver's having the money when the time comes for settlement is one that should be raised upon the settlement of the receiver's accounts.

88. Beardsley *v.* Warner, 6 Wend. (N. Y.) 610.

89. Beardsley *v.* Warner, 6 Wend. (N. Y.) 610.

90. Jackson *v.* Horton, 126 Ill. 566, 21 N. E. 490; Alexander *v.* Maryland Trust Co., 106 Md. 170, 66 Atl. 836; State *v.* Rushville Bank, 57 Nebr. 608, 78 N. W. 281 (compromise and settlement of suit brought by receiver of insolvent corporation); *In re* Croton Ins. Co., 3 Barb. Ch. (N. Y.) 642 (holding that the receiver of an insurance company is to be allowed to compromise disputed and doubtful claims against the company, and he is also at liberty to submit such claims to arbitration, as provided by the statute; and that the court will give him a general power in any case where he may deem it expedient and for the interest of the creditors and stock-holders of the company to do so, to compromise with debtors of the corporation who are unable to pay in full). See also Henderson *v.* Myers, 33 Leg. Int. (Pa.) 360.

Subsequent approval.— In U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 43, 21 Pac. 503, 524, the receiver of a dissolved corporation compromised all claims for an amount probably much less than the value of property involved, acting upon the advice of counsel, the property being in such condition that it would have entailed a vast expense to reclaim it, consisting of a large quantity of personalty — to wit, horses, cattle, sheep, etc., which was scattered about among various local organizations, and which the receiver had made numerous attempts to recover in specie, but the greater part of which he found it impossible to identify, and the persons guilty of converting it were in most cases financially irresponsible, and while he made no special report of such action there was no attempt to conceal his action and it was a matter of common knowledge, and it was held that his action was proper.

A settlement upon condition that the court's approval be obtained by the receiver will not give him any right to enforce it until he has obtained such approval. Iglehart *v.* Bierce, 36 Ill. 133.

Advice of counsel.— Where a receiver of a dissolved corporation acts upon the advice of his attorneys in applying for leave to compromise suits, the court acting upon such application in reliance upon such attorneys, he will be held blameless without regard to the good or bad faith of the attorneys. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 43, 21 Pac. 503, 524.

Void contract.— The court will not direct a receiver of an insolvent corporation to compromise a claim set up against the corporation under a contract which has been held to be void. Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 276.

Releasing directors from personal liability. — An action to annul only that part of an order approving an agreement releasing directors from personal liability, on the ground that the receiver had been induced to procure it by fraud on the part of the directors, cannot be maintained where the order contained other provisions imposing obligations on the directors beneficial to the stock-holders and the compromise embodied therein was entire.

due the estate, which are neither bad nor doubtful, for less than the amount thereof, except on new and sufficient consideration, would be an abuse of discretion.[91] But a receiver, acting under an order of the court, may compromise a suit where the recovery or collection of a judgment is doubtful,[92] compound bad or doubtful debts,[93] and upon a new and sufficient consideration release debts which are neither bad nor doubtful,[94] and the court may permit the acceptance of an offer of compromise and settlement on the part of several debtors jointly, although some of the debts are neither bad nor doubtful, where the amount will cover the good debts in full and leave something to be applied on the bad or doubtful ones.[95]

e. Contracts, Investments, and Expenditures — (i) *Assumption and Performance of Obligations* — (a) *Effect of Contracts on Receiver.* A receiver who is a bare custodian of property for safekeeping does not represent the parties having the legal title, and does not stand as their personal representative responsible for the fulfilment of their personal contracts. He stands as the representative of the court holding funds in the hands of the court, and can be subjected to no action or proceeding except in reference to the fiduciary relation which it occupies,[96] although a valid subsisting contract at the time of the appointment of a receiver, which fixes the obligations and determines the rights of the respective parties, cannot be impaired by any act on the part of the receiver.[97] But

Craig *v.* James, 89 N. Y. App. Div. 541, 85 N. Y. Suppl. 583 [*affirmed* in 181 N. Y. 538, 73 N. E. 1121].

Vested rights of stock-holders.— In Chandler *v.* Brown, 77 Ill. 333, it is held that each stock-holder has a vested right in the contract for subscription of every other stock-holder, and therefore a court of equity cannot confer upon the receiver, in a creditors' suit to wind up the affairs of an insolvent corporation, discretionary powers to compromise with stock-holders with regard to the payment of subscriptions, especially where the stock-holders are not parties to the suit.

Against wish of parties interested.— In an action by a receiver of an insolvent bank against the managers and officers to compel them to make good to depositors losses sustained in consequence of their misconduct, the court will not advise acceptance of an offer of compromise made by some of defendants, where the receiver submits the question to the court without recommendation, and a large portion of the depositors who have expressed a preference are opposed to its acceptance. Williams *v.* Halliard, (N. J. Ch. 1888) 14 Atl. 880.

Under statutory provisions enlarging the powers of receivers, as in the case of receivers of corporations to administer the assets as trustees of insolvent debtors, such receivers may exercise the power of such a trustee to make settlements. Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881, holding that under a statute giving to receivers of corporations the powers of trustees of insolvent debtors, they may make an accord and satisfaction, the trustees of insolvent debtors having that power under statute.

91. Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff.) 762, 89 N. W. 996.

92. Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff) 762, 89 N. W. 996.

93. Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff.) 762, 89 N. W. 996.

94. Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff.) 762, 89 N. W. 996.

95. Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff.) 762, 89 N. W. 996, holding that by such an offer of compromise a new consideration moved from each of the debtors joining therein, and upon its acceptance each became liable, to the extent of the offer, for the debts of all the others, and that therefore no one of the debts could be said to have been released for less than the amount actually due thereon and without a new consideration.

Secret conditions.— Where upon an action by a receiver of an insolvent corporation against its managers an offer of the managers to pay a certain amount in settlement and release of the claim against them is ratified by the court, they cannot afterward claim the benefit of any secret promise by the receiver, and not made a part of the offer submitted to and sanctioned by the court, nor will such promise be ratified afterward by the court where it does not appear that had it been disclosed originally the offer, with the promise annexed, would have been accepted by the court. Una *v.* Newark Sav. Inst., (N. J. Ch. 1900) 46 Atl. 660.

Form of order authorizing compromise see Morrison *v.* Lincoln Sav. Bank, etc., Co., 2 Nebr. (Unoff.) 762, 89 N. W. 996.

96. Shrady *v.* Van Kirk, 51 N. Y. App. Div. 504, 64 N. Y. Suppl. 731, where it was held error to grant leave to sue a receiver.

Enforcement of rights against receiver see *infra*, VI, D, 1.

97. Wolf *v.* State Nat. Bank, 178 Ill. 85, 52 N. E. 896 [*reversing* 77 Ill. App. 325] (holding that a receiver of a bank appointed after it has sold bonds, with a provision that, if the buyer desire to resell to the seller at a

the general rule is well established that a receiver is not bound by the covenants, leases,[98] and executory contracts of those over whose property he is appointed and, subject to the control of the court, he may abandon or repudiate them, if in his opinion it would not be profitable or desirable to adopt and perform them,[99] nor will specific performance be required where that would be equivalent to diverting funds going to lien-holders.[1] In the exercise of the general jurisdiction

certain time, it will buy them back at the price paid, and interest, can do nothing to impair the obligation of the contract, although appointed before the time provided for the resale); *In re* Marriage, [1896] 2 Ch. 663, 60 J. P. 805, 65 L. J. Ch. 839, 75 L. T. Rep. N. S. 169, 45 Wkly. Rep. 42 (as to receivers to receive income of company with no direction to occupy property). See also Murray *v.* Cantor, 18 Misc. (N. Y.) 389, 41 N. Y. Suppl. 652, 26 N. Y. Civ. Proc. 81, where a receiver of a corporation was appointed to collect and receive the debts, etc., and preserve the same, and it was held that, not being empowered by statute or order to discharge employees, he could not give such authority to a deputy; that the receiver himself was not liable on a contract of the corporation and had no power to break it; and that if the employee accepted an unlawful discharge by such deputy he had no cause of action either against the receiver or the corporation for breach of contract, since the employee himself by such acceptance broke the contract.

The receiver is bound by the lawful and executed contract of the corporation. Hyde *v.* Lynde, 4 N. Y. 387.

Assailing unlawful transactions see *infra*, VI, B, 1, c.

Successive receivers see *supra*, IV, F, 2.

98. See *infra*, IV, F, 6, e, (I), (C).

Cancellation of insurance policies see INSURANCE, 22 Cyc. 1404.

99. *California.*— Russ Lumber, etc., Co. *v.* Muscupiabe Land Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

Connecticut.— Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599.

Iowa.— Worthington *v.* Oak, etc., Imp. Co., 100 Iowa 39, 69 N. W. 258.

Massachusetts.— Com. *v.* Franklin Ins. Co., 115 Mass. 278. In Ellis *v.* Boston, etc., R. Co., 107 Mass. 1, 28, the court said: "The receivers are officers of the court for this purpose (that of preserving the property), and act under its direction and control. They continue the operation of the road and conduct of its business, because this is essential to its proper preservation. They may fulfil the contracts of the corporation so far as beneficial. They may not pay its debts, or fulfil contracts which are burdensome, or tend to diminish the value of the property in their control, unless such contracts are charged as incumbrances upon the property, or are necessary to its proper preservation and security."

New York.— Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642; Matter of Chasmar, 22 Misc. 680, 50 N. Y. Suppl. 1065.

Texas.— Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1032, 22 Am. St. Rep. 67, 11 L. R. A. 394.

Washington.— Casey *v.* Northern Pac. R. Co., 15 Wash. 450, 48 Pac. 53 (contract for transportation made by railroad company before appointment); Scott *v.* Rainier Power, etc., Co., 13 Wash. 108, 42 Pac. 531 (holding that a statute providing that a receiver shall manage the property in his possession "in the same manner the owner or possessor thereof would be bound to do if in possession thereof" does not prevent the receiver from refusing to carry out executory contracts of the owner).

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— U. S. Trust Co. *v.* Wabash R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632 (receiver under the ordinary power of a court of chancery); Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 12 S. Ct. 235, 35 L. ed. 1025; Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319; Moore *v.* New Orleans Waterworks Co., 114 Fed. 380; Central Trust Co. *v.* East Tennessee Land Co., 79 Fed. 19; Empire Distilling Co. *v.* McNultor, 77 Fed. 700, 23 C. C. A. 415; New York Gen. Electric Co. *v.* Whitney, 74 Fed. 664, 20 C. C. A. 674 (holding that the receiver appointed in a suit based upon insolvency and fraudulent management is no more bound by such contracts than are receivers in suits to foreclose liens); United Electric Securities Co. *v.* Louisiana Electric Light Co., 71 Fed. 615; *In re* Seattle, etc., R. Co., 61 Fed. 541. In Commonwealth Roofing Co. *v.* North American Trust Co., 135 Fed. 984, 68 C. C. A. 418, it is held that the appointment of a receiver for the property of a corporation in a foreclosure suit may entitle one engaged in the performance of a building contract with the corporation involving the same property to treat such contract as abandoned as of the date of the receiver's appointment, but that he is also entitled to a reasonable time before electing to do so for the purpose of ascertaining what may be done by the parties in interest or the receiver with respect to completion of the work.

See 42 Cent. Dig. tit. "Receivers," § 164.

Acquiring liens after appointment see *supra*, IV, D, 7, b.

Contracts with employees see *infra*, IV, F, 6, e, (I), (D).

1. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319, holding that to require the receiver to per-

of courts of chancery to appoint receivers *pendente lite*, the court may empower the receiver to execute and perform existing contracts.[2]

(B) *Election to Perform or Abandon.* Ordinarily the receiver is held to have the right to elect whether he will perform such contracts or not,[3] always assuming of course that the performance of such functions is within the scope of his

form such contract by rendering services would be equivalent to paying the claim in money.

2. Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343.

So where the appointment is purely statutory and such provisions mark the limits of the court's competency to confer powers on the receiver, as in the case of the appointment of a receiver upon the dissolution of a corporation, with power to collect assets, etc., the receiver may complete the execution of a contract if this is necessary in order to enable him to perform the express power conferred by the statute. Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343, where the performance or offer to perform in full a contract of the corporation which had already been nearly completed was a condition precedent to a demand for the payment of a debt which the receiver was empowered to collect, and therefore, without deciding that the power to complete performance of contracts was a necessary incident in all cases to the power to collect debts, it was held that the receiver was empowered to complete the execution of this contract. So in Sager Mfg. Co. *v.* Smith, 45 N. Y. App. Div. 358, 60 N. Y. Suppl. 849, it is held that the same rule is applicable where a decree appointing a receiver expressly authorizes him to carry on and continue the business so far as necessary to enable him to collect debts due or to become due.

Not matter of course.— The court will not as of course order its receiver to complete unfinished contracts of the insolvent, unless necessary to save investments already made, or such completion is clearly required in the interests of the general creditors. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

3. Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250 [*affirming* 58 Ill. App. 637]; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909 (holding that a receiver is by no means expected to abandon as a matter of course unfinished contracts; that while he is not bound to finish them, or warranted in doing so where property of the trust fund would not be otherwise jeopardized, he is bound to investigate them, to pass judgment upon what is for the best interests of his trust under all the circumstances); New York Gen. Electric Co. *v.* Whitney, 74 Fed. 664, 20 C. C. A. 674 (holding that such a contract was not binding on the receivers until renounced by them, but, on the contrary, was not binding on them at all until adopted by them). See also the cases cited generally *supra*, note 99.

Void contract.— Under a statute in New Jersey relating to the administration of insolvent corporations, it was held that a receiver might ratify a sale made by the corporation after its insolvency or suspension of business, although such contracts are declared void as against creditors by the act; but they are not bound to do so. Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 114.

The right to elect is confined to the receiver and is not extended to the other party to the contract should the receiver elect to adopt it. Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125.

Power of court to stop performance.— It has been held that an adoption of such contracts by the receiver will not deprive the court of power and discretion to stop its further performance. Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125 (holding that if such contract is afterward found to be unfair and burdensome, and is abandoned and abrogated by order of the court, the contracting party is not entitled to damages as for a breach of such contract, but is only entitled to a just compensation for the actual expenditure of labor and money by him in fulfilment of his contract, subject to a deduction of all sums paid him thereunder); New York Gen. Electric Co. *v.* Whitney, 74 Fed. 664, 20 C. C. A. 674.

Demand of performance.—As a receiver of a corporation may perform contracts of the corporation, although not bound to do so, it is held that where under the terms of the particular contract demand of performance is necessary on the part of the other party to it, in order to create a default on the part of the corporation, demand upon the receiver is proper. Russ Lumber Co. *v.* Muscupiabe Land, etc., Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

Adoption and repudiation — *In general.*— The receiver cannot perform the contract and receive the benefits without satisfying the obligations of the corporation thereunder. Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250; Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642. Thus where the owner of land granted the railway company a right of way over his land in consideration of the company agreeing to take water from a spring belonging to him at a certain stipulated price, and a receiver appointed over the property of the company continued to use the right of way but refused to carry out the contract to take and pay for the water, it was held that there was but one contract, and that since the receiver adopted it as to the right of way he became bound for its fulfilment as to the water. Howe *v.* Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. Rep. 17. A petition by receivers of an electric lighting company to restrain a city from

authority and the purpose of his appointment,[4] and he is entitled to a reasonable time after taking possession within which to make his election.[5] In the exercise of his power in this regard it is his duty to use all reasonable efforts to carry out and perform beneficial contracts and to refuse to adopt such as he finds will prove so burdensome as to imperil the fund.[6]

(c) *Leases*[7]—(1) In General. Where a lease purporting to bind a corporation as lessor was in fact unauthorized and of no binding force, acceptance by the receiver of the corporation of rent reserved in the lease, without knowledge of the facts, is not a ratification of the lease.[8] Between lessor and lessee it is held that the lease must stand until it is abrogated by a resort to some one of the conditions contained therein, and a receiver of the lessee's property cannot abrogate it.[9] But the broad general rule is established that a receiver is not bound to accept, and does not become liable for the rent or on the covenants of, a lease merely because he is appointed receiver of the property of the lessee, even though the order embraces the leasehold and he is placed in possession of the premises,[10]

paying to a pledgee under a contract of the lighting company for city lighting whereby it pledged its future earnings as security for money borrowed was held to constitute an election to repudiate the pledge contract. United Electric Securities Co. *v.* Louisiana Electric Light Co., 71 Fed. 615.

Contract becomes that of receiver.—Where a receiver, who was appointed to take control of a college, with authority to adopt any contract that had been made with teachers for the ensuing year, informed one of such teachers that he would "make good" such contracts and that she could have her position if she desired, and she entered upon the discharge of her duties under the contract, it was held that the receiver was bound and the question then is what is the contract of the receiver? Worthington *v.* Oak, etc., Imp. Co., 100 Iowa 39, 69 N. W. 258. So the proceeds under the contract belong to the receiver and cannot be attached as a debt due to the insolvent corporation of which he is receiver. Cooke *v.* Orange, 48 Conn. 401; Blake Crusher Co. *v.* New Haven, 46 Conn. 473.

4. See *supra*, IV, F, 1; *infra*, IV, F, 6, e, (II), (D); IV, F, 6, e, (III).

5. Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250 [*affirming* 58 Ill. App. 637]; U. S. Trust Co. *v.* Wabash R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085. See in this connection *infra*, IV, F, 6, e, (I), (C).

6. New York Gen. Electric Co. *v.* Whitney, 74 Fed. 664, 20 C. C. A. 674.

7. **Covenant in lease against assigning** see Landlord and Tenant, 24 Cyc. 963 note 79.

Letting by receiver see *infra*, IV, F, 6, e, (II), (D), (6).

8. Groveland Imp. Co. *v.* Farmers' Supply Co., 25 Wash. 344, 65 Pac. 529, 87 Am. St. Rep. 755, where the court further said that such lease could not be ratified by the receiver without the court's consent.

9. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

10. *Illinois.*—De Wolf *v.* Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250.

Iowa.—Johnston *v.* Amos, 114 Iowa 530, 87 N. W. 491.

Maryland.—Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

Massachusetts.—Bell *v.* American Protective League, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452; Com. *v.* Franklin Ins. Co., 115 Mass. 278.

Michigan.—Stoepel *v.* Union Trust Co., 121 Mich. 281, 80 N. W. 13.

Minnesota.—Nelson *v.* Kalkhoff, 60 Minn. 305, 62 N. W. 335.

New Hampshire.—New Hampshire Trust Co. *v.* Taggart, 68 N. H. 557, 44 Atl. 751.

New York.—Stokes *v.* Hoffman House, 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821 [*affirmed* in 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870].

Tennessee.—Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593.

United States.—U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632; Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 12 S. Ct. 235, 35 L. ed. 1025; Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Empire Distilling Co. *v.* McNulta, 77 Fed. 700, 23 C. C. A. 415; Ames *v.* Union Pac. R. Co., 60 Fed. 966; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257; Fidelity Safe Deposit, etc., Co. *v.* Armstrong, 35 Fed. 567.

See 42 Cent. Dig. tit. "Receivers," § 167.

Appointment to collect rents.—But where a receiver is appointed to take charge of a leasehold estate, which is sublet to various tenants for the purpose of collecting rents and profits, his primary duty is to pay the head rent, or rent which is due from the debtor whose custody he has displaced, to the principal landlord, which he is bound to do without any order of court. Balfe *v.* Blake,

or the right of the lessor may arise under an order of court as to the receiver's occupation and requiring him to pay rent during such occupancy.[11]

(2) Adoption of Lease and Liability For Occupation of Premises. Since the appointment of an ordinary chancery receiver, or receiver *pendente lite*, does not divest the title to the property but merely creates a custodian to preserve the possession,[12] the necessary and logical conclusion is that the rule that assignees become vested with the legal title and are assignees of the term by operation of law unless they reject the term has no application,[13] and he cannot be held to a legal liability as tenant for use and occupation of the premises,[14] or for rent

1 Ir. Ch. 365; Walsh *v.* Walsh, 1 Ir. Eq. 209. See also Bartlett *v.* Amberg, 92 Ill. App. 377; Neate *v.* Pink, 16 Jur. 69, 21 L. J. Ch. 574, 3 Macn. & G. 476, 49 Eng. Ch. 368, 42 Eng. Reprint 344.

11. Woodruff *v.* Erie R. Co., 93 N. Y. 609 [*distinguished* in Stokes *v.* Hoffman House, 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821 (*affirmed* in 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870), in that the order appointing the receiver in the first case contemplated the payment of rent under the lease as the receiver was given authority to continue the business and pay any rent then due or thereafter becoming due under the lease, and that it further appeared that the rent was claimed by the landlord and that the receiver refused to pay or to surrender possession and the court held that under such circumstances by continuing the use and occupation of the property acquired under the lease, a liability for the payment of rent under the lease was incurred]; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383 (holding that if the court properly accepts and adopts leases, the rents reserved under them become an integral part of the operating expenses of the trust estate; and that the decision of the court, being upon a question of business policy and not of law, and administrative rather than judicial in its nature, should not be disturbed by an appellate court, unless it appears that the discretion was abused).

Where the order provides for a fixed rental and for occupancy by the receiver, it was held that after such occupancy had continued for nearly a year, while the parties were contending as to whom the monthly sum was to be paid, the receiver should not be allowed to insist that payment of rent should not be made according to the provisions of the order, and that the party entitled to the rent should be required to show by proof the reasonable rental value thereof. Blackall *v.* Morrison, 170 Ill. 152, 48 N. E. 705.

Order not authorizing.— Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 [*affirming* 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821], holding that an order appointing a temporary receiver to carry on the business of a hotel with authority to "do any and all other things which may be necessary or proper to be done in the general and ordinary conduct of similar places of business" does not authorize him to pay rent accruing during the receivership.

12. See *supra*, IV, D, 2; IV, F, 1.

13. Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Bell *v.* American Protective League, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452; Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 [*affirming* 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821]; Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009; New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268, *infra*, note 17.

In the case of a statutory receiver of a corporation who is vested with the property the rule is held to be different. Woodruff *v.* Erie R. Co., 93 N. Y. 609, which in Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870, is said to depend in part upon the nature of the receiver as a statutory receiver. See also People *v.* Universal L. Ins. Co., 30 Hun (N. Y.) 142, which, as shown in Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009, involved a permanent receiver of a corporation. In Nelson *v.* Kalkhoff, 60 Minn. 305, 62 N. W. 335, it was held that a receiver of an insolvent and dissolved corporation under the statute had a reasonable time within which to make his selection to accept or reject the lease for an unexpired term and that during such reasonable time he might occupy and use the premises; that when he takes the premises, however, he takes it under the lease and that the court has no power by its receiver to take possession of the property of a third person without his consent and then make its own terms for the compensation to be paid for the use; that the receiver is equitably bound to pay the rent at the rate stipulated in the lease for the term he occupies the premises.

A receiver in bankruptcy is held not bound to assume the lease unless for the benefit of creditors. *In re* Chambers, 98 Fed. 865, holding further that if the receiver is confronted with the alternative of an ejectment from the premises, with a consequent depreciation of the estate, or an assumption of an undesirable lease, equity should relieve him from coercion; that the time necessary for the proper removal of the goods is not necessarily the limit of equitable delay in placing the landlord in possession.

14. Gaither *v.* Stockbridge, 67 Md. 222, 9

accruing under the covenant to pay rent, after the receiver has surrendered possession of the premises.[15] But it is nevertheless recognized that the court may, while not as a matter of absolute legal liability, require the receiver to pay rent during his occupancy by way of enforcing an equitable claim of the lessor for the application of a fund in court.[16] On the other hand, while recognizing that the mere appointment of the receiver does not render him an assignee of the term, the courts have considered such receiver to stand in the same position as an assignee with respect to his right to adopt the lease and become liable on its covenants, and the general rule has become established by the weight of authority that he may retain possession for a reasonable time to enable him to determine whether he will adopt the lease, and that he may thus become liable to pay rent according to the covenant in the lease.[17]

Atl. 632, 10 Atl. 309 [*distinguishing* Martin *v.* Black, 9 Paige (N. Y.) 641, 38 Am. Dec. 574, in that the court was dealing with the question of liability under an entry by one not only as receiver but as assignee under an assignment, the court in that case saying that if the term had been assigned to the receiver and he had taken possession of the demised premises or had otherwise elected to take the term under the assignment, he would have taken it *cum onere*, and for the time being would have been tenant of the premises]; Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 [*affirming* 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821]; Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009.

15. Johnston *v.* Amos, 114 Iowa 530, 87 N. W. 491; Bell *v.* American Protective League, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452 (*infra*, note 17); Stoepel *v.* Union Trust Co., 121 Mich. 281, 80 N. W. 13 [*citing* Bell *v.* American Protective League, *supra*] (but in which it further appears that the court considered that there had been an express repudiation of the lease). In these cases the principle is recognized that the taking of possession by such a receiver cannot create any privity of estate as in the case of a permanent receiver having title to the corporate assets under the statute as shown in Stokes *v.* Hoffman House, 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821 [*affirmed* in 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870]. See also Bartlett *v.* Amberg, 92 Ill. App. 377; New Hampshire Trust Co. *v.* Taggart, 68 N. H. 557, 44 Atl. 751. So a lessor in a lease with a corporation which becomes insolvent and for which a receiver is appointed under the statute in New Jersey, which lease gives the lessor the right of reëntry in the event of default in payment of rent, is not entitled to demand from the receiver the rent accruing under the lease after the receiver quits the premises. Klien *v.* W. A. Gavenesch Co., 64 N. J. Eq. 50, 53 Atl. 196. See also Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163.

16. Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 [*affirming* 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821, where it is held that mere occupation, undisturbed, and with the consent of the landlord, by the chancery receiver, in no manner renders the fund in his hands liable for rents accruing during such occupation; but that if such receiver remains in possession after a demand for the payment of rent by the landlord or keeps the landlord out of possession of the premises with the sanction of the court, the funds in his hands become equitably chargeable with the rent accruing during such occupation] (holding that Woodruff *v.* Erie R. Co., 93 N. Y. 609, is of this nature); Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009; Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537 (holding that notwithstanding the receiver had neither intentionally nor impliedly adopted the lease, nor had ever expressly agreed to pay rent for the premises, nor ever had any actual physical possession of the leasehold estate, it is entirely agreeable to the equitable principles regulating the relation of such officers to leasehold estates, that, by acts and conduct not involving an actual occupation of the premises, a receiver may come under an equitable obligation to a lessor for rents accruing during the receivership.

17. *Illinois.*— Link Belt Mach. Co. *v.* Hughes, 174 Ill. 155, 51 N. E. 179 [*affirming* 62 Ill. App. 318].

Massachusetts.— The principle of the text was recognized in Com. *v.* Franklin Ins. Co., 115 Mass. 278. But in Bell *v.* American Protective League, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452, that case was distinguished in that it in fact turned upon the effect of a contract made by the receivers with the lessors and its effect to establish the rule that the receiver might elect to take possession and assume liability under the covenants of the lease was destroyed. In the distinguishing case, the question was considered an open one in Massachusetts, and it was held that if a receiver of an insolvent takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains it and does not become assignee of the term. It may be said further of this case that no more was decided than that the receiver was not liable under the covenants of the lease, since he had already paid

(D) *Damages For Breach and Claim Against Estate.* The privilege of the receiver in acting for the best interest of the estate and its creditors by refusing

rent to the satisfaction of the lessor while in possession, and therefore the liability of the receiver for reasonable rent was not a question in the case.

Michigan.— Stoepel *v.* Union Trust Co., 121 Mich. 281, 80 N. W. 13 [*citing* Bell *v.* American Protective League, *supra*, this note].

New Hampshire.— New Hampshire Trust Co. *v.* Taggart, 68 N. H. 557, 44 Atl. 751.

New York.— Wells *v.* Higgins, 132 N. Y. 459, 30 N. E. 861, held that a chancery receiver was liable in an action at law for default during his occupation in a covenant to pay rent. In Stokes *v.* Hoffman House, 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870 [*affirming* 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821], it is said that the first case seems to have proceeded on the ground that the title to the demised premises vested in the receiver and that it did not appear that the question was raised that a chancery receiver did not take title, and the court refused to be bound by that case as an authority. In the latter case the court also referred to U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085, with respect to that part of the opinion which says that if a chancery receiver elects to adopt a lease, he becomes vested with the title to the leasehold interest, etc., and points out that this statement was made in an application in a foreclosure suit in which the receiver was appointed, and that it might well be that the court intended to assert only what would constitute an equitable claim of the lessor, since it also appeared that the lessors were not liable for the rental for the whole period during which the receiver was in possession but only for rent accruing subsequent to an order made by the court for the payment of rent or surrender of the premises, which result could not have been reached if the right of the lessor to rent depended upon privity of estate between him and the receiver; and in this respect it is also said that the latter case may be construed as a modification of Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632, *infra*, this note. In Woodruff *v.* Erie R. Co., 93 N. Y. 609, it was said that the principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised. See *supra*, note 13.

Tennessee.— Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. Rep. 943, 31 L. R. A. 593, which, while citing Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309, *supra*, note 13, also bases the decision that rent for temporary occupation is not a preferred claim of administration on the ground that there was no adoption of the lease.

United States.—U. S. Trust Co. *v.* Wabash Western R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085 (where no rent was allowed during occupancy); Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632 (which case recognizes the principle of Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309, *supra*, note 13, but the authority of the first case is said in Bell *v.* American Protective League, 163 Mass. 558, 40 N. E. 857, 47 Am. St. Rep. 481, 28 L. R. A. 452, *supra*, to be weakened by the fact that the court proceeded to show that the receiver was not liable even if he is regarded as assignee); Sunflower Oil Co. *v.* Wilson, 142 U. S. 313, 322, 12 S. Ct. 235, 35 L. ed. 1025; Thomas *v.* Cincinnati, etc., R. Co., 77 Fed. 667; Carswell *v.* Farmers' L. & T. Co., 74 Fed. 88, 20 C. C. A. 282; Ames *v.* Union Pac. R. Co., 60 Fed. 966 (where under the facts the receiver was not required to pay for the use of leased lines, pending the time he might have adopted or rejected the leases, more than such lines had earned); New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268 (where it is said that the receiver has the right to adopt the lease under the direction of the court, and it was held that the mere appointment of receivers for a railroad system, and their taking possession of a leased road, did not, even if the bill showed that receivership was brought about for the purpose of preventing a disintegration of the system, render them assignees of the lease, or require their adoption thereof, so as to make the rental a preferred claim which they were bound to discharge; nor did the fact that they continued to operate the leased line for some time work an adoption of the lease, when the lessor had never demanded a surrender of its road, although entitled to do so because of breach of condition by non-payment of rent); Farmers' L. &. T. Co. *v.* Northern Pac. R. Co., 58 Fed. 257 (where it was held that if the lessor immediately demands of the receivers and of the court either adoption of the lease or a surrender of the property and against his protest a decision is delayed for several months in order to determine which policy is expedient, the receivers should equitably pay the full rental during the time of their possession, and that especially is this true where the receivers were appointed at the request of mortgagees and upon their allegations that the property must be held and operated together in order to prevent ruinous sacrifice. The court here considered that Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632, *supra*, was an exception to the rule arising under peculiar circumstances which equitably required a different measure of compensation). In Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537, the court assimilates the practice to that under the English Companies Act of 1862, under which the statu-

to carry out executory contracts not only extends to the right to elect what contracts he will adopt, but also to make the election without subjecting the fund required for the satisfaction of existing claims of creditors to a charge for damages,[18] since otherwise persons claiming under such contracts would become

tory liquidator is said to be identical with that of a chancery receiver inasmuch as no change of title occurs upon his appointment.

See 42 Cent. Dig. tit. "Receivers," § 165 *et seq.*

Liquidator.— Under the English Companies Act referred to in Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537, *supra*, this note, it was held that if the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent ought to be regarded as a debt contracted for the purpose of winding up the company and be paid in full like other debts of like kind during the time the property is so retained or used; but that the landlord is not entitled to such full payment for rent accruing since the commencement of the winding up where the liquidator has done nothing except abstain from getting rid of the property which the company holds as lessee. *In re* Oak Pits Colliery Co., 21 Ch. D. 322, 51 L. J. Ch. 768, 47 L. T. Rep. N. S. 7, 30 Wkly. Rep. 759. See also *In re* Bridgewater Engineering Co., 12 Ch. D. 181, where, under the facts, it was held that the case was one of mixed accommodation of the landlord and the tenants and that the court could not say that because the chattels were sold upon the premises the liquidator had used the premises and that they were in his sole occupation for the purposes of the liquidation.

Privity created between the lessor and receiver see De Wolf *v.* Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; U. S. Trust Co. *v.* Wabash W. R. Co., 150 U. S. 287, 14 S. Ct. 86, 37 L. ed. 1085, in which cases it is said that if the receiver adopts the lease he becomes vested with the title to the leasehold. Neither the court nor the receiver may thereafter disregard or violate the contract and pay rent only on the basis of *quantum meruit*, and the receiver cannot remain in occupancy under the lease for so much of the time as he may choose and at his pleasure abandon the premises and surrender the lease. Link Belt Mach. Co. *v.* Hughes, 174 Ill. 155, 51 N. E. 179 [*affirming* 62 Ill. App. 318]; De Wolf *v.* Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250 [*affirming* 58 Ill. App. 637], where, however, the receiver kept the premises to the end of the term. But see Bartlett *v.* Amberg, 92 Ill. App. 377 [*affirmed* in 190 Ill. 15, 60 N. E. 84].

If he retains possession beyond a reasonable time necessary to make his election he will be considered to have adopted the lease. De Wolf *v.* Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Morrison *v.* Blackall, 68 Ill. App. 504 [*affirmed* in 170 Ill. 152, 48 N. E. 705]; Thomas *v.* Cincinnati, etc., R. Co., 77 Fed. 667 (where it was held, however, under the facts, that the receiver's possession was traceable to an agreement between him and the lessor rather than to the lease); Park *v.* New York, etc., R. Co., 57 Fed. 799 (where the receivers had paid rent, although less than that stipulated in the lease, and it was held that by taking possession they had not become bound to pay the stipulated rental and that the retention in the particular case did not show an election on their part to accept the lease).

Election express or implied.— The receiver may either expressly elect, or, by unequivocal acts inconsistent with the right of entry by the landlord indicating an election to appropriate the leasehold estate, be held to have done so impliedly, without any act on the part of the landlord whatever putting the court or the receiver to an election. Link Belt Mach. Co. *v.* Hughes, 174 Ill. 155, 51 N. E. 179 [*affirming* 62 Ill. App. 318]; De Wolf *v.* Royal Trust Co., 173 Ill. 435, 50 N. E. 1049; Spencer *v.* World's Columbian Exposition, 163 Ill. 117, 45 N. E. 250 [*affirming* 58 Ill. App. 637], over the contention that the receiver was not the lessor's receiver, or one appointed on his application, and that the lessor must himself be the actor in such cases, and must put the receiver to his election, and that unless he does so the receiver is bound to pay only the reasonable value.

Rejection of a demand by the lessor for possession except on a condition which he had no right to impose was held equivalent to an election to retain possession from that time and binds the receiver for the payment of the rental thereafter. Dayton Hydraulic Co. *v.* Felsenthall, 116 Fed. 961, 54 C. C. A. 537.

The interest of the lessor should not be the controlling factor in reaching a conclusion, but if the interests of creditors demand that the lease should not be adopted the wider interests should control. New York, etc., R. Co. *v.* New York, etc., R. Co., 58 Fed. 268.

Extent of use.— The owners of property, who have leased it to a corporation which goes into the hands of a receiver, are entitled to a reasonable rental, irrespective of the actual use made of it by the receiver. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379.

Payment of taxes under terms of lease.— In Clyde *v.* Richmond, etc., R. Co., 63 Fed. 21, it was held that where the receiver of a leased property receives the earnings thereof for more than a year, and applies such earnings to the payment of interest on the bonds, when the lease requires that the taxes shall be first paid, the court will require him, even after the property has been surrendered, to restore the diverted money by paying the taxes.

18. Wells *v.* Hartford Manilla Co., 76 Conn.

preferred creditors.[19] For a failure to perform such a contract the cause of action at best is against the party to the contract, not against the receiver of his property,[20] although it would be a claim at large.[21] Upon the question of the effect of the appointment of a receiver of a corporation to discharge its executory contracts, the authorities are not entirely harmonious. Where the breach of the contract by reason of the insolvency of the corporation occurs before any intervention of the law, it is held that the creditors may stand upon the breach, and upon dissolution or winding-up proceedings the broken contracts must be treated

27, 55 Atl. 599; Fidelity Safe-Deposit, etc., Co. *v.* Armstrong, 35 Fed. 567.

19. Brown *v.* Sheldon, 78 Tex. 543, 14 S. W. 1032, 22 Am. St. Rep. 67, 11 L. R. A. 394; Casey *v.* Northern Pac. R. Co., 15 Wash. 450, 48 Pac. 53; Scott *v.* Ranier Power, etc., Co., 13 Wash. 108, 42 Pac. 531.

20. Brown *v.* Warner, 78 Tex. 543, 14 S. W. 1032, 22 Am. St. Rep. 67, 11 L. R. A. 394.

Solvent corporation.—After defendant corporation had entered into a subcontract to do certain work for plaintiff, one of defendant's stock-holders, because of dissension in the management, was appointed receiver. The corporation was not insolvent, and the receivership proceedings were instituted to enable the stock-holder to get control of the corporation. Shortly thereafter he purchased the stock of the other stock-holders and paid the corporation debts out of the personal estate, and the receivership proceedings were dismissed under an order directing a restoration to the company of all the property in the hands of the receiver, subject to existing liabilities. It was held that the receivership proceedings were no defense to the corporation's breach of such contract. Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521.

Cancellation of insurance policies see INSURANCE, 22 Cyc. 1404.

21. Central Trust Co. *v.* East Tennessee Land Co., 79 Fed. 19. See also Wolf *v.* State Nat. Bank, 178 Ill. 85, 52 N. E. 896. And see *infra*, V, A, 1, b.

After payment of other creditors.—In Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599, *supra*, note 18, it was recognized that if there were to remain in the hands of the receiver a balance after the expenses of settlement and claims were paid so that the allowance of a claim of this character would not encroach upon the assets necessary to satisfy other creditors, it might be allowed, and that there might be cases where the act of a receiver in not adopting an executory contract would entail such injury upon the other party to the contract by reason of what he had already done under it and of his reliance upon the faith that it would be carried out that a claim against the estate would, upon principles of equity which underlie receivership proceedings, be recognized and allowed. So in Eddy *v.* Co-operative Dress Assoc., 3 N. Y. Civ. Proc. 442 [*following* People *v.* Globe Mut. Ins. Co., 91 N. Y. 174, *infra*, note 24], it was held that claims of existing creditors must be paid before the funds in the hands of the receiver could be used in the settlement of a claim of an employee of a corporation for future salary. The court *distinguished* Kincaid *v.* Dwinelle, 59 N. Y. 548, in that it involved a receiver *pendente lite* and arose before the code provision controlling the case in hand, under which the property left after the payment of creditors was to be distributed to stockholders instead of being returned to the corporation, which seemed to indicate that a final decree of sequestration worked a practical dissolution of the corporation. But see in this connection *supra*, IV, D, 6, b, (II).

As between lessor and lessee, it is held that the lessor's remedy on the covenants to pay rent in a lease remains and may be pursued by the lessor against the lessee as a claim at large. Johnston *v.* Amos, 114 Iowa 530, 87 N. W. 491; Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309. And liability of the lessee in such case is not affected by the election of the receiver not to accept the lease. Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. ed. 595 [*affirming* 156 Ill. 522, 41 N. E. 225]. And where, under statute, upon the dissolution of a corporation its assets become a trust fund for the payment of all its debts, which include those to mature as well as those matured, until a lease to the corporation is extinguished the lessor is entitled to payment of rent as it accrues; if he does not reënter the estate will be liable for the rent in the due course of administration (People *v.* National Trust Co., 82 N. Y. 283); and if the lessor reënters and lets the property for the balance of the term he may have the difference between the rent reserved in the lease and that for the balance of the term (People *v.* St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129). But on the other hand it is held that a claim for rent accruing after the surrender of the premises by a receiver of an insolvent corporation, appointed under the statute of New Jersey, which rent accrued under the covenant by the corporation, cannot be proved at all. Klien *v.* W. A. Gavenisch Co., 64 N. J. Eq. 50, 53 Atl. 196; Stockton *v.* Mechanics', etc., Sav. Bank, 32 N. J. Eq. 163. See also for a similar holding as to rent under a contract with a national bank in an insolvency and dissolution proceeding Fidelity Safe-Deposit, etc., Co. *v.* Armstrong, 35 Fed. 567.

Judgment recovered after appointment of receiver see *supra*, IV, D, 7, e, (III), (A).

as they are found;[22] but when there is no matured claim or right of action for breach at that time damages cannot be recovered against the receiver, although the corporation might still be liable,[23] and where a receiver is appointed to take control of all the property of the company and to assume the entire management of its affairs, the corporate officers are thereby suspended, and in respect of compensation for services thereafter the corporation is guilty of no breach of contract, since the order of the court operates upon both parties alike and prevents the officers and agents from interfering with the receiver's management, and performance of contracts for services to the corporation would be illegal;[24] this rule is recognized even though the corporation is not dissolved in the proceeding, but is permitted to resume its functions after the receiver is discharged,[25] although

22. Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599; People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174 [*citing* People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, as illustrating the doctrine, where an insurance company failed to keep on hand funds required by law, became insolvent and discontinued business and failed to carry its policies, whereby it broke its contracts with its policy-holders who had a right to stand upon the breach in the proceedings for the dissolution of the corporation]. See also Commercial Pub. Co. *v.* Beckwith, 167 N. Y. 329, 60 N. E. 642; Eddy *v.* Co-operative Dress Assoc., 3 N. Y. Civ. Proc. 442; Central Trust Co. *v.* East Tennessee Land Co., 79 Fed. 19.

23. Wells *v.* Hartford Manilla Co., 76 Conn. 27, 55 Atl. 599; Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1, 16 S. Ct. 439, 40 L. ed. 595 [*affirming* 156 Ill. 522, 41 N. E. 225].

24. Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146 [upon the authority of People *v.* Globe Mut. L. Ins. Co., 91 N. Y. 174, *supra*, note 22, which involved the right of a general agent of an insurance company to salary under a contract, after the appointment of a receiver and an order restraining the corporation, its officers, etc., from the prosecution of the corporate business or the exercise of its corporate franchises, and an order of dissolution, in a proceeding by the state under the statutes, the court holding that what had happened was the dissolution of the contract by the sovereign power of the state rendering performance by either party impossible, and basing the ruling also upon the principle that the natural death of the agent or the corporate death of the company ended the contract], as to the right of officers to salary after the appointment of a receiver in a creditor's suit, the court holding that the practical effect of such an order was to enjoin the performance of the contract by either party. People *v.* Globe Mut. L. Ins. Co., *supra* [*followed* in Eddy *v.* Co-Operative Dress Assoc., 3 N. Y. Civ. Proc. 442, upon the theory that under the code provision controlling, a final decree of sequestration of corporate property operated as a practical dissolution of the corporation], further distinguishes such case from those illustrated by People *v.* Security L. Ins., etc., Co., 78 N. Y. 222, *supra*, note 22, and indicates that the same distinction explains the following English cases involving the right to damages for the breach of contract in proceedings under the English statutes for the winding up of corporations: *In re* English, etc., Mar. Ins. Co., L. R. 5 Ch. 737, 39 L. J. Ch. 685, 23 L. T. Rep. N. S. 685, 18 Wkly. Rep. 1122; *In re* London, etc., Bank, L. R. 9 Eq. 149, 21 L. T. Rep. N. S. 742, 18 Wkly. Rep. 273; *In re* London, etc., Co., L. R. 7 Eq. 550, 38 L. J. Ch. 562, 20 L. T. Rep. N. S. 1931; *In re* English Joint Stock Bank, L. R. 4 Eq. 350; *In re* Patent Floor Cloth Co., 41 L. J. Ch. N. S. 476, 26 L. T. Rep. N. S. 467.

Rule of text applied in other cases.— Griffith *v.* Blackwater Boom, etc., Co., 46 W. Va. 56, 33 S. E. 125 [*citing* People *v.* Globe Mut. Ins. Co., 91 N. Y. 174] (where, as in the case cited, there was an order of dissolution, and the court distinguishes the case of a voluntary dissolution, and there had been no breach at the time the receiver was appointed); Tennis Bros. Co. *v.* Wetzel, etc., R. Co., 140 Fed. 193 (holding that a federal court sitting in West Virginia, although having priority of jurisdiction, will not decree damages for the wrongful termination of a contract by a defendant corporation, where a few days afterward a receiver was appointed for defendant by a state court in insolvency proceedings, which, under the law of the state as settled by decision, had the effect of terminating all executory contracts not adopted by the receiver, without liability for their breach); Malcomson *v.* Wappoo Mills, 88 Fed. 680 (holding that damages are not recoverable against a corporation for its failure to perform a contract for the sale and delivery of merchandise).

Mere license.— Where the president of a corporation by a verbal agreement grants permission to another to box and gather the turpentine from the pine trees growing on the land of the corporation, such verbal permit amounts only to a license, which becomes void on the appointment of a receiver for the properties of such corporation at the suit of its creditors. McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237.

25. Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146, which case would seem to be distinguishable to some extent from People *v.* Globe Mut. Ins. Co., 91 N. Y. 174, *supra*, note 24, since the rule in that case is partially founded on the corporate death of the company.

it would not apply if the receivership were only partial, extending to particular property, and leaving the corporation in the general and even partial management of its affairs.[26] On the other hand it is held that a claim for damage for a breach of contract for services, occasioned by the insolvency of the corporation, may, upon such insolvency being ascertained by adjudication and a receiver appointed, participate in the *pro rata* distribution of the funds in the hands of the receiver.[27] Insolvency, if excusing the performance of an executory contract by the other party, will not relieve him from the necessity of tendering performance if he would claim damages for a breach of the contract,[28] and the appointment of a receiver upon the dissolution of a partnership, with power to continue the business of the firm, will not entitle one claiming under a contract of employment to recover for future services irrespective of the breach or performance on his part.[29]

(II) *Disposition of Property or Funds*[30] — (A) *In General.* One who, by a decree which remains unchallenged, has been divested of all interest in property of which the court has jurisdiction, cannot thereafter complain of any order respecting its ownership and control.[31] But, the real custody of property in the hands of a receiver being in the court of which he is an officer,[32] he has no personal control of money so in his hands;[33] he cannot speculate with the subject of his trust,[34] and ordinarily he can invest it,[35] or pay it out only with the sanction

26. Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146.

27. Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378, where after calling attention to the fact that after the payment of the corporate debts under the statute all surplus assets are returned to the stockholders, it is said that it could not have been the intention of the lawmakers to distribute the surplus of assets, or, in other words, return capital to the stock-holders of the company (that is, to those who deliberately ventured for gain and pledged their capital for the security of those who were induced to deal with them, and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off; that such distribution would be the protection of capital against its just liability; and that this rule applies even though the breach and consequent damage follow the insolvency. Some of the English cases cited in People *v.* Globe Mut. Ins. Co., 91 N. Y. 174, to the distinction there mentioned (*supra*, note 24) are cited in this case also; but it does not appear that the distinction in the New York case influenced this decision, and in Lenoir *v.* Linville Imp. Co., 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146 (*supra*, note 24), the court adopts the rule of the New York case as directly opposed to that laid down in Spader *v.* Mural Decoration Mfg. Co., *supra*. In Rosenbaum *v.* U. S. Credit System Co., 61 N. J. L. 543, 40 Atl. 591, a result similar to that in the case first above cited was reached, the court distinguishing People *v.* Globe Mut. Ins. Co., *supra*, in that the company and its agent were restrained by injunction in that case at the instance of the attorney-general from the further prosecution of the business of the company, etc., and the receiver was appointed and the corporation dissolved, while in the case in hand the suspension of the business of the company was in August and the forfeiture of the charter was in the following October, the injunction issued in August not restraining defendant from exercising its franchises, and the statutes in New Jersey nowhere providing that the mere adjudication of insolvency and appointment of a receiver should take from the corporation its right to transact business. It will be seen that this case differs from Lenoir *v.* Linville Imp. Co., *supra*, note 24, in that the appointment of the receiver in that case was taken to have the same effect as the injunction issued in People *v.* Globe Mut. L. Ins. Co., *supra*.

28. Florence Min. Co. *v.* Brown, 124 U. S. 385, 8 S. Ct. 531, 31 L. ed. 424, which was upon the appointment of a receiver of a corporation.

29. Bird *v.* Austin, 40 N. Y. Super. Ct. 109.

Termination of relation of master and servant generally see Master and Servant, 26 Cyc. 985.

30. **Distribution** generally see *infra*, V, D.

31. La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415.

32. See *supra*, IV, D, 2, c.

33. Fields *v.* U. S., 27 App. Cas. (D. C.) 433.

34. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Profits accrue to estate see *supra*, IV, F, 6, b, (II).

35. Fields *v.* U. S., 27 App. Cas. (D. C.) 433; Ricks *v.* Broyles, 78 Ga. 610, 3 S. E. 772, 6 Am. St. Rep. 280; Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271 (no right to loan trust funds); Atty.-Gen. *v.* North American L. Ins. Co., 89 N. Y. 94.

of the court appointing him;[36] and it has been held that no legal right can be asserted by one whose title is based on the receiver's unauthorized act in disposing of assets.[37] But it has been held that where property capable of being productive of profit to those interested in it is intrusted to a receiver for an indefinite period and in all probability will remain in his hands for several years, it would be improper for him to permit it to remain unproductive,[38] and that if he has such a sum of money on hand as that if it were his own he would invest, it is his duty to ask leave of the court to invest it and to try, in good faith, to keep it invested for the benefit of the owners.[39] A receiver is bound to obey the orders of the court under whose authority he is acting as to the disposition of funds in his hands.[40] If he has wrongfully taken property under a misapprehension of

He must pursue the directions of the court as to the manner of investing funds which he is appointed to receive and invest. Roller *v.* Paul, 106 Va. 214, 55 S. E. 558. And he will be chargeable with any loss if he acts otherwise. Carr *v.* Morris, 85 Va. 21, 6 S. E. 613. But an order authorizing the receiver to "collect all moneys due them, to secure, loan, invest, and apply the same for the benefit and advantage of the said infants, under the direction and subject to such rules and orders in every respect as this court may from time to time make in regard thereto," was held virtually to instruct the receiver to invest the fund, using good faith and sound discretion, and he was not bound to report the investment to the court before making it. Alston *v.* Massenburg, 125 N. C. 582, 34 S. E. 633.

Profit upon an illegal investment will be added to the principal and not paid out as income, since the capital was risked in the investment. Baldwin *v.* Crawford, 2 Ch. Chamb. (U. C.) 9.

Loan to self or firm.— It is a violation of his trust for a receiver to loan money to himself, or to a firm of which he is a member, and the dual relation as receiver and borrower will not protect the firm, although it may clearly appear that the money has been repaid by the firm to the receiver. Ryan *v.* Morrill, 83 Ky. 352.

36. Fields *v.* U. S., 27 App. Cas. (D. C.) 433; Willis *v.* Sharp, 124 N. Y. 608, 26 N. E. 974.

Receiver appointed by consent.— In Louisiana it was held that a receiver to collect moneys due parties appointed on the motion of one of the parties with the consent of the other is the agent of the parties and not the officer of the court and that, although he has no authority to pay their debts, if they know he is doing so and do not then object, they cannot object afterward. Kellar *v.* Williams, 3 Rob. (La.) 321.

Notice see *infra*, note 65.

Reconveyance and redelivery on termination of receivership see *infra*, IV, I.

Sale of property see *infra*, IV, H.

37. The Clara A. McIntyre, 94 Fed. 552, holding that recovery on a note assigned by receivers cannot be had unless it is shown that the assignment was authorized by the court. But see Atchison *v.* Davidson, 2 Pinn. (Wis.) 48, where it was presumed that receivers of a bank had full power to disburse and divide the assets to and among creditors and where they transferred a negotiable promissory note which was among the assets of the bank in payment of a demand against it, in the absence of proof of the extent of their authority, it was held that the title to the note passed and that if other creditors had not been paid in full the receiver would be liable for the misapplication of the assets.

Indorsement of note given in individual transaction.— But in Davis *v.* Peck, 54 Barb. (N. Y.) 425, it was held that where notes were given to one as "receiver of" a particular bank and were indorsed by him as receiver, in an action by the indorser individually on the notes, the indorsement *prima facie* vested him with the title, and he might sue on them individually, the testimony being uncontradicted that the transactions between the parties were individual transactions.

Sale as trustee not passing title.— Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851 [*reversing* 16 App. Cas. (D. C.) 530], holding that a sale of real property, without special leave of court, by the trustee in a private deed of trust, while such property was in his possession as receiver in a case to which he was a party, and which had at the time been removed to the supreme court of the United States by appeal with supersedeas, conferred no title on the beneficiary in the deed of trust, for whose benefit the purchase was made, and who was also a party to the suit, as against a party who by cross bill dismissed by the decree appealed from was seeking to have such deed set aside as void as to her.

38. Battaile *v.* Fisher, 36 Miss. 321.

Leasing see *infra*, IV, F, 6, e, (II), (D), (6).

39. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018. *Compare* the cases cited *infra*, notes 51 *et seq.*

40. *Illinois.*— Dewar *v.* Ellwood, 98 Ill. App. 46, order to pay over money.

Iowa.— How *v.* Jones, 60 Iowa 70, 14 N. W. 193.

Kentucky.— Johnson *v.* Gunter, 6 Bush 534; Wood *v.* Wilcox, 14 Ky. L. Rep. 574; Hodge *v.* Quiry, 9 Ky. L. Rep. 650.

Maryland.— Hamill *v.* Hamill, 27 Md. 679.

Missouri.— *Ex p.* Haley, 99 Mo. 150, 12 S. W. 667 [*affirming* 37 Mo. App. 562].

New York.— Platt *v.* New York, etc., R.

his rights and duties, he is bound to obey the order of the court to make restitution.[41] The court may direct the application of funds of the estate [42] to preserve from complete loss an asset of greater value than the amount so expended,[43]

Co., 170 N. Y. 451, 63 N. E. 532; Willis *v.* Sharp, 124 N. Y. 406, 26 N. E. 974.

West Virginia.— Baltimore, etc., R. Co. *v.* Vanderwerker, 33 W. Va. 191, 10 S. E. 289.

See 42 Cent. Dig. tit. "Receivers," § 182.

As between different jurisdictions.—A receiver of an insolvent corporation in New Jersey to administer the assets there was held to have no power to transfer to a foreign jurisdiction any question touching the distribution of such assets, or to deprive the court appointing him of its authority over him and over the fund which he holds as its officer. Reynolds *v.* Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305 [*affirmed* in 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464].

Failure of banker after premature payment of instalment.— In Shaftsbury's Case, Prec. Ch. 558, 24 Eng. Reprint 250, a receiver of an estate out of which he was to pay an annuity acquainted the annuitant with the name of his banker and that the money would be deposited in the latter's hands for the use of the annuitant who named another and ordered payment into the latter's hands, which the receiver did several times. The money payable on Michaelmas was paid in the preceding July and on Michaelmas day the banker stopped payment and became insolvent, and it was held that the loss should fall on the receiver since the annuitant had no right to the money before the day for payment, although whether the estate or the receiver should ultimately bear the loss was reserved until the final accounting.

Collateral attack.— Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532 (holding that where the court had erroneously ordered the receiver to take possession of a particular class of property the order was not void, and a subsequent order directing a payment of such fund was at most erroneous and not void *ab initio* and subject to collateral attack); Clark *v.* Binninger, 75 N. Y. 344 (holding that the question of the propriety of such orders, unappealed from, as distinguished from the power to make them, cannot be raised when the receiver is punished for such disobedience).

Appeal from order.— In Kirkpatrick *v.* Eastern Milling, etc., Co., 135 Fed. 151, it was held that a receiver is not entitled to appeal from an order directing him to deliver property to the intervener but that other parties joined as respondents in the petition were entitled to appeal. See also APPEAL AND ERROR, 2 Cyc. 641.

Death of person to whom payment ordered see *supra*, IV, F, 5, c, note 52.

Obedience and disobedience of orders generally see *supra*, IV, F, 5.

Set-off of personal claim of receiver see *supra*, IV, F, 6, b, (II), note 64.

41. See *infra*, VI, D, 2, b, (IV).

Fund paid out under order of court.— But where the court, upon the dissolution of a life insurance association, erroneously took from a trustee funds placed in his hands for a specific purpose, to be distributed through the receiver instead of through the trustee, and there was laches on the part of the trustee in applying to have the fund restored, the receiver will be protected in payments made therefrom by him in good faith under the orders of the court. *In re* Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 N. E. 323, holding further that the attorneys to whom any portion of the fund had been so paid should be compelled to pay it back to the receiver, and upon receipt thereof he should be directed to pay it to the trustee.

42. See the cases cited *infra*, this note.

Payment to parties — discretionary order. — Platt *v.* Platt, 66 N. Y. 360, holding that where an interlocutory judgment in an action to set aside fraudulent conveyances determines the title to be in plaintiff, subject to certain liens of defendant, and directs an accounting, and by consent a receiver is appointed, it is within the discretion of the court to order the receiver to pay plaintiff rents collected, on proper terms, as upon the execution of a bond conditioned for the repayment of the money if so ordered. But in Taylor *v.* Sweet, 40 Mich. 736, it was held that an order directing the receiver in a suit for partnership accounting to pay a certain amount from the partnership funds to each of the parties, without reference to the state of their accounts, and to charge them with the sums so paid, was improperly granted as the parties might not be able to respond to a decree for sums so charged on final accounting.

Order for repayment.— Where money in court, in the hands of a receiver appointed to convert property for the benefit of those entitled, is improperly paid out to a party under order of the court, the court may order the person who received it to reimburse those entitled to it, the payment having been made without their consent. Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402 [*modified* in other respects in 63 N. J. Eq. 273, 53 Atl. 910].

On order of sale see *infra*, IV, H, 2, a, text and note 42.

43. Asheville Cigar Co. *v.* Brown, 100 Ga. 171, 28 S. E. 37, where a penalty was assessed by the governor against the receiver of a penitentiary company because of maltreatment of convicts, and it was held that although the assessment was unauthorized, the lease of the company might have been canceled, and the court properly exercised its discretion in ordering the payment of the penalty and thereby preserving the lease which might otherwise have been lost to creditors by its cancellation.

and so the court has the power, for the purpose of preserving and making valuable the property which it is administering, to direct the payment and discharge of threatening encumbrances in the interest of all parties,[44] and by subsequent approval may ratify payments of this nature made by a receiver without previous express authority.[45]

Loan and security.— In Kalbfleish *v.* Kalbfleish, 13 N. Y. Suppl. 397, it was held that where a receiver had among the assets of his assignor shares of stock of a corporation, which shares were in immediate danger of becoming valueless by the inability of the corporation to pay its working expenses, the court may authorize the receiver to advance money to such corporation, taking security therefor, to enable it to continue its business.

Advancing money to preserve business.— Where upon the dissolution of a partnership in a brewery business the receiver was directed to carry on the business, and it appearing that the copartnership was accustomed to advance money to saloon-keepers for the fitting up of their saloons — taking back chattel mortgages — and also to advance money for the saloon licenses, which were assigned to it as security, and that the licenses were about to expire, and the customers could not renew them, and the market for the beer would be lost, it was held that permission might be given to the receiver to advance money for the renewal of the licenses, granted in such manner as not to bind the parties to a continuance of the business for any fixed period, nor to interfere with any application to have the business sold. Bernheimer *v.* Schmid, 71 N. Y. App. Div. 244, 75 N. Y. Suppl. 899.

44. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; Lloyd *v.* Chesapeake, etc., R. Co., 65 Fed. 351 (where receivers in a suit to foreclose a second mortgage were directed to pay interest on first mortgage bonds in order to prevent the foreclosure of such first mortgage, where it was for the interest of the second mortgage bondholders and general creditors to avoid such foreclosure, it appearing that the earnings of the road were sufficient to pay such interest and operating expenses, although this course was opposed by the first mortgage bondholders and by holders of a majority of the second mortgage bonds, the latter, however, being more largely interested in the first mortgage than in protecting the rights under the second mortgage); Park *v.* New York, etc., R. Co., 64 Fed. 190 (direction to receiver of an insolvent railroad corporation to pay coupons of bonds, default in the payment of which would be likely to break up the system); Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320 (authority to receiver of a railroad consolidated from several divisions, each of which carried its own first mortgage, to issue interest coupons for attachment to bonds of the division mortgages which have matured and whose holders are willing to postpone payment of principal, as a means of preventing disintegration of the line); but in Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 64 Fed. 623 [*distinguishing* Park *v.* New York, etc., R. Co., *supra*, in that there the relief was granted to prevent the dismemberment of the railroad property or the sale of some part thereof, which was exceedingly valuable], holding that where a railroad company which was formed by a consolidation of several other companies, mortgaged its whole line, which was a second lien with reference to other mortgages previously made by the component companies on parts of the line, instituted a suit against the trustees of the several mortgages and obtained the appointment of a receiver, the court would not, on the petition of the trustee in the mortgage first mentioned, instruct the receiver to pay overdue interest on one of the prior mortgages upon the allegation that otherwise foreclosure proceedings would be begun on such prior mortgage, there being no allegation that by a foreclosure of such prior mortgage the system would be dismembered and its earning power destroyed; that the money in the hands of the receiver to a certain extent represented net earnings, but that as against such earnings the court had incurred indebtedness since taking possession of the property and should first look after the security of such indebtedness.

Completing unfinished work see *infra*, IV, F, 6, e, (III), (D).

Diversion of income see *infra*, V, B, 1, g, (II).

45. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478, approval of payments by a receiver of partnership property of debts of the parties, where the creditors were threatening to attach, which would have prevented a completion of contracts by the receiver under the order of appointment. See also Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432, where it was held that the receiver of an insolvent corporation had wisely exercised his discretion in paying encumbrances on property in his hands.

Acting for pledgee in collecting proceeds.— So in Benedict *v.* Maynard, 3 Fed. Cas. No. 1,295, 5 McLean 262, it was held that since the receiver had no right to take the possession of collaterals held by a pledgee until the secured debt had been discharged, and having no means of redeeming the securities, there was nothing inconsistent with his duties as receiver in his entering into an agreement with the pledgee to take the securities, and as agent of the pledgee collect the proceeds and pay over to him the amount received until the debts secured should be paid, with all interest, costs, and expenses, and a reasonable commission, and to pay the remainder to the creditors of the estate represented by the receiver.

(B) *Deposits.* In the absence of statute or order of court a receiver is under no duty to keep the funds in his hands in a bank.[46] As to the right of a receiver to deposit trust funds in bank, and the effect of such a course, the authorities are not entirely harmonious. Thus it has been held that since the general deposit in bank is a loan, the receiver who has a fund in his possession merely awaiting the termination of the cause cannot part with its actual custody by depositing it in bank or otherwise save at his own risk, without some order, leave, or direction of the court.[47] On the other hand the rule which seems best supported by the authorities is that a receiver may use a bank as a depository and if he acts in good faith and with ordinary prudence, he will not be charged with loss occasioned by the subsequent failure of the bank;[48] but it is his duty to keep such moneys separate from his own, and if he uses a bank for the custody of it, he should have the account so kept as to show the fund to which it belongs.[49] The measure of

Power to bid in property under power to collect debts see *supra*, IV, F, 6, d, (I), text and note 84.

46. Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604.

Bank of England as custodian.— The English practice is distinguished in that the bank of England had custody of the funds of suitors as the bankers of the English court of equity; these funds were managed by the bank, and invested under the directions of the court; an officer called an accountant general was the medium through which the operations pertaining to these funds were performed. Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604.

47. Ricks *v.* Broyles, 78 Ga. 610, 3 S. E. 772, 6 Am. St. Rep. 280 [*distinguishing* Morgan *v.* Hardee, 71 Ga. 736, in that the latter case did not decide that a receiver had a right to substitute the credit of a banker for his own responsibility, but only ruled that there was no such material error of law before the court as to require a new trial]. See also Ficener *v.* Bott, 47 S. W. 251, 20 Ky. L. Rep. 632, where it was held that a receiver must account for money lost by the failure of a bank in which he deposited it without authority.

48. State *v.* Corning State Sav. Bank, 128 Iowa 597, 105 N. W. 159 (holding that in determining the character of the bank that degree of prudence and care is exacted which is ordinarily exercised by reasonably cautious men in transacting their own business of like importance, and the same rule obtains with reference to continuing the deposit); Brett *v.* Brett, 4 N. Y. St. 704; Groesbeck Cotton Oil, etc., Co. *v.* Oliver, 44 Tex. Civ. App. 303, 97 S. W. 1092; Rowth *v.* Howell, 3 Ves. Jr. 565, 30 Eng. Reprint 1157. *Compare* Shaftsbury's Case, Prec. Ch. 558, 24 Eng. Reprint 250, *supra*, note 40.

Creditor bank.— Possibly the fact of a bank being a creditor might have some bearing on the care to be exercised in the selection by a receiver, but it is not ground for rejecting such a bank as an illegal depository of the moneys of an estate for safe-keeping. State *v.* Corning State Sav. Bank, 128 Iowa 597, 105 N. W. 159.

A banker is not custodian of funds deposited by a receiver who takes a certificate of deposit secured by mortgage, but is a debtor of the estate. Naglee *v.* Palmer, 7 Cal. 543.

One fraudulently procuring his appointment as receiver, against the resistance of and without authority from any of the parties in interest, will be held strictly responsible, and the failure of a savings bank in which the fund was deposited will not excuse him from returning the fund when his appointment is revoked. O'Mahoney *v.* Belmont, 62 N. Y. 133 [*affirming* 37 N. Y. Super. Ct. 223, 380].

49. *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018 (notwithstanding a parol direction to the clerks to be ready to pay over at any time when called upon); Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591; Wren *v.* Kirton, 11 Ves. Jr. 377, 32 Eng. Reprint 1133 (remittance of bills of exchange to bank). So where a receiver was in the habit of paying the moneys he received into a banker's hands, and receiving interest on the balance, he was held liable for the loss occasioned by the banker's bankruptcy. Drever *v.* Maudesley, 8 Jur. 547, 13 L. J. Ch. 433. But in Barton *v.* Ridgeway, 92 Va. 162, 23 S. E. 226, where a member of a firm of attorneys, who was appointed receiver in 1861 to collect money and have it in court at the next term, made the collection and deposited the money in a bank to the credit of his firm's account, it appearing that such account always had more to its credit than the sum so collected, that each member of the firm had a private account in the bank in which his individual funds were deposited, and that the firm account was used for moneys received in a fiduciary capacity, it was held that the receiver was not liable for the loss of the funds caused by the wrecking of the bank by the Civil war, no term of court having been held for five years after his appointment, because of the war.

The receiver becomes the debtor of the estate by depositing the funds of the estate with his own individual funds, to his own credit individually, and is the creditor of the bank, to the amount so deposited. It is in effect a loan, not as receiver, but on his own individual account. *In re* Stafford, 11 Barb. (N. Y.) 353.

Relinquishing control.— In Salway *v.* Salway, 2 Russ. & M. 215, 11 Eng. Ch. 215, 39

his responsibility in this respect may sometimes be found in the particular capacity in which he acts.[50]

(c) *Interest on Funds.* Ordinarily a receiver will not be charged with interest on an unproductive fund,[51] not having been ordered to make interest,[52] and not having refused to pay the fund over on the court's order,[53] or made personal use thereof.[54] It is otherwise, however, if the receiver holds the funds longer than he ought and fails to pay them to the owner,[55] or if he earns interest on or makes personal use of the funds.[56] But he will not be charged with interest in excess

Eng. Reprint 376, it was held that if a receiver puts a fund out of his own control so that other persons are able to deal with it, he guarantees the solvency of such persons and becomes answerable for any loss that may ensue, however good his intention in parting with such control, and under this rule it was held that where a receiver paid into a banking house sums received by him to the joint account of his sureties upon an agreement with them that all drafts upon such deposits should be written by one of the sureties and signed by himself, and the bankers subsequently failed, the receiver was liable for the loss.

Rule as to trustees generally see TRUSTS.

50. State *v.* Gooch, 97 N. C. 186, 1 S. E. 653, 2 Am. St. Rep. 284, where it was held that when a receiver is appointed to take charge of the estate of an infant who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian; that as such guardian he is required to keep the money safely invested; that a guardian would be deemed derelict who should invest the estate of his ward by deposit in another state and without security; and that the receiver here having deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterward failed, he was liable for the loss.

51. Johnson *v.* Moon, 82 Ga. 247, 10 S. E. 193; How *v.* Jones, 60 Iowa 70, 14 N. W. 193 (holding that a decree entered upon a receiver's report, without any evidence, requiring him to pay interest upon the money in his hands from the date of the last item of receipt is erroneous); Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604; Clark *v.* Brown, 119 Fed. 130, 57 C. C. A. 76. In Champlain First Nat. Bank *v.* Wood, 30 Misc. (N. Y.) 278, 63 N. Y. Suppl. 324, a receiver was appointed to take funds of an estate pending suit to set aside an assignment, and he held the funds knowing that they might be distributed any day, and the assignee, with superior knowledge of the probable duration of the suit, failed to notify the receiver or obtain an order to have the funds invested and it was held that the receiver could not be charged with interest because neighboring banks would have been willing to pay interest for the use of the funds.

52. Hodge *v.* Quiry, 9 Ky. L. Rep. 650. *Compare* Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Rosenthal *v.* McGraw, 138 Fed. 721, 71 C. C. A. 277.

If he is directed to place out the funds it is held that he will be charged with interest if he fails to do so. Hicks *v.* Hicks, 3 Atk. 274, 26 Eng. Reprint 960.

53. Johnson *v.* Moon, 82 Ga. 247, 10 S. E. 193; Hodge *v.* Quiry, 9 Ky. L. Rep. 650; Malcomson *v.* Wappoo Mills, 99 Fed. 633, where the receiver of an insolvent corporation properly withheld payment of a dividend until he could obtain instructions of the court.

54. Adair County *v.* Ownby, 75 Mo. 282.

55. Johnson *v.* Moon, 82 Ga. 247, 10 S. E. 193; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243 (simple interest); Rosenthal *v.* McGraw, 138 Fed. 721, 71 C. C. A. 277; Wilkinson *v.* Washington Trust Co., 102 Fed. 28, 42 C. C. A. 140 (where a receiver who had conceded in his final report that he had a certain amount above his disbursements, etc., which had been withheld from the beneficiaries for four years, and when called upon for an accounting and payment he sought to obtain an allowance for compensation and counsel fees and took an appeal from an order disallowing such claim and continued to hold the entire sum in his hands, and it was held that he should be charged with six per cent interest from the date of the order appealed from and ten per cent upon the same amount as damages for the delay caused by the appeal); Potts *v.* Leighton, 15 Ves. Jr. 273, 33 Eng. Reprint 758 (receiver of personal estate of a testator, whose duty it was to pay in balances to the bank, holding, however, that he should not be charged as a receiver of rents and profits who is to make annual or half-yearly accounts, but rather as an executor, having regard to all the circumstances as to his actual retention of the sums received); —— *v.* Jolland, 8 Ves. Jr. 72, 32 Eng. Reprint 278 (interest on balances upon failure to pass accounts regularly); Fletcher *v.* Dodd, 1 Ves. Jr. 85, 30 Eng. Reprint 242; Harrison *v.* Boydell, 6 Sim. 211, 58 Eng. Reprint 573; Bristowe *v.* Needham, 9 Jur. N. S. 1168, 8 L. T. Rep. N. S. 652, 11 Wkly. Rep. 926 (interest on balances upon failure to pass accounts regularly). But as to receiver of rents see Foster *v.* Foster, 2 Bro. Ch. 616, 29 Eng. Reprint 340.

56. *Illinois.*— Hooper *v.* Winston, 24 Ill. 353; Cool *v.* Jackman, 13 Ill. App. 560.

Kentucky.—Hodge *v.* Quiry, 9 Ky. L. Rep. 650.

New York.— *In re* Commonwealth F. Ins. Co., 32 Hun 78.

Pennsylvania.— Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018, where the receiver loaned the funds to a bank which he owned and it was held that he was charge-

of that received upon a loan made without authority where the transaction was in good faith and to the advantage of the fund.[57] Since a receiver is not required to keep trust funds in bank,[58] and until final decree neither party is entitled to the balance in his hands, where the receiver is not in default in making disbursements or in reporting his transactions he cannot be charged with interest merely because he deposited the funds to the credit of his individual account if he has not made personal use thereof or acquired any profit therefrom.[59] But on the other hand a receiver should not mingle trust funds with his own;[60] and if he deposits such funds to the credit of his private account and the court can see that by thus mingling the funds he has derived any benefit from their use he is chargeable with interest.[61]

(D) *Contracts, Expenditures, Etc., by Receiver* — (1) PREVIOUS AUTHORITY OR SUBSEQUENT APPROVAL — (a) IN GENERAL. It is within the competency of the court to empower its receiver, in administering the estate, to enter into and carry out new contracts,[62] and such contracts are said to be in reality contracts of the

able with the interest representing the actual value of the money, rather than the interest received, notwithstanding the loan was made under an improvident order of the court.

Wisconsin.— Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243.

England.— Shaw *v.* Rhodes, 2 Russ. 539, 3 Eng. Ch. 539, 38 Eng. Reprint 437; Lonsdale *v.* Church, 3 Bro. Ch. 41, 29 Eng. Reprint 396.

See 42 Cent. Dig. tit. "Receivers," § 189.

Where the receiver was required to invest funds but failed to do so and instead purchased claims against the debtor for a sum less than their fair value, the beneficiaries were entitled to interest on the funds and to the profits arising from the purchase of the claims and were not required to elect to take interest or profits. Roller *v.* Paul, 106 Va. 214, 55 S. E. 558, construing the statute of Virginia and holding that in such case the receiver was chargeable only with simple interest.

Where one of two receivers illegally appropriated funds and the other negligently permitted it, interest was held chargeable against both. Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 344.

Personal interest and advantage generally see *supra*, IV, F, 6, b, (II).

57. Atty.-Gen. *v.* North American L. Ins. Co., 89 N. Y. 94.

58. See *supra*, IV, F, 6, e, (II), (B).

59. Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604.

Rule as to trustees generally see TRUSTS.

60. See *supra*, IV, F, 6, b, (II).

61. *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78; Utica Ins. Co. *v.* Lynch, 11 Paige (N. Y.) 520, where the receiver drew out and used part of the funds from time to time by loaning the same to his friends and otherwise, and he was charged with simple interest.

Where the receiver declined to explain his conduct in withdrawing funds deposited to his credit as receiver and placing them to the credit of his private account in another bank, it was held that he was properly chargeable with interest on the funds so withdrawn. Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 155, 25 L. ed. 591.

62. Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415; Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431 (authority of a court of equity to empower its receiver, placed in charge of the mineral property of an insolvent mining company which has no marketable value independent of a railroad constructed and used by it for the transportation of ore, to perfect title to the railroad property and to repair the road-bed in order to preserve the property from destruction and put it into a salable condition); Girard L. Ins. Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. ed. 1062 [*affirming* 51 Fed. 332, 2 C. C. A. 245].

The proper attitude of a court toward a receiver's obligations, duly authorized, is that "the court should be chary of promise, but eager of performance, careful not to burden property in its possession with obligations, and equally careful to see that every obligation is discharged before possession is fully surrendered." American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 877, 60 C. C. A. 52 [*quoting* Farmers' L. & T. Co. *v.* Burlington, etc., R. Co., 32 Fed. 805]; Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644.

Assignability.— In American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 60 C. C. A. 52, where receivers of a corporation in foreclosure proceedings entered into a contract for betterments, under the authority of the court, and the contractor gave bond with surety for the performance of the contract, and pending the work the property was sold under the foreclosure decree subject to all contracts, etc., it was held that the contract and bond were assignable by the receiver, there being nothing to indicate that it was the intention that they should not be assignable; that a clause in the contract giving the receivers the right to cancel the same at any time at their option did not indicate an intention that the contract should not be assignable or should be canceled in case of sale of the property; and that the fact that the bond was a contract of guaranty did not

court,[63] and cannot be annulled or revoked at the pleasure of the court except upon the same conditions that an individual may break his engagements.[64] Strictly a receiver has no right to make any contract binding the property or fund in his custody or to pay out funds in his hands without first obtaining the authority of the court,[65] although such authority may be conferred by necessary implica-

render the assignment by the obligee invalid, since it was a guaranty of performance of a contract already in existence and the terms of the obligation were not changed nor the surety's liability increased.

Receivers' certificates see *infra*, IV, G.

63. *In re* Denison, 114 N. Y. 621, 21 N. E. 97; American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 60 C. C. A. 52; Walton *v.* Johnson, 12 Jur. 299, 15 Sim. 352, 38 Eng. Ch. 352, 60 Eng. Reprint 654.

Parties subject to court's jurisdiction.—One entering into an authorized contract with a receiver is held to become in effect a party to the proceedings in respect of the court's future dealing with him and his rights under the contract. *In re* Denison, 114 N. Y. 621, 21 N. E. 97; Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207, 416 (holding that where a buyer, under a contract by a receiver to sell property, with the approval of the court, assigns the contract to a third person who stipulates to carry out all the terms thereof, the assignee becomes a party to the proceeding and subjects himself to the jurisdiction of the court so as to be bound by an order afterward made annulling the contract according to its provisions on the the ground of a breach of its terms); Walton *v.* Johnson, 12 Jur. 299, 15 Sim. 352, 38 Eng. Ch. 352, 60 Eng. Reprint 654 (where the receiver had let to a party, not in the cause, a farm, part of the estates in question, and the court, by order in a summary way, restrained him from carrying straw, etc., therefrom, contrary to the custom of the country).

64. McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291; Vanderbilt *v.* New Jersey Cent. R. Co., 43 N. J. Eq. 669, 12 Atl. 188 (holding that where the contract is one which is within the general discretion conferred upon a receiver, relief upon such contract must be originally pursued in the court of chancery either by invoking its aid by way of appropriate equitable relief or by obtaining leave to sue the receiver at law, but that in whichever mode the court is approached, the first question to be determined is whether the contract is one which entitles the party to the relief asked and this determination is not to be reached upon the theory that the chancellor can disregard or annul such contracts upon pleasure but upon equitable principles applied to the management and winding up of an insolvent estate; that if the contract has been completely performed and the claim is for compensation, relief of that nature would seem necessarily to be awarded unless the applicant appeared to have dealt fraudulently or collusively with the receiver; that if the contract has not been performed and the contractor seeks a direction of performance, or damages for non-performance, the contractor must be assumed to know that the contract will be scrutinized by the court and will not be carried out if it appears to be injurious to the trust); Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640.

Contracts not previously authorized.— The court is at liberty to deal with the contracts of the receiver which have not been previously authorized or directed, as it shall appear to be just and may either modify them or disregard them entirely. Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 426.

65. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916, holding that a receiver cannot charge the estate with expenses incurred in doing that which is outside of his powers.

California.— Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478.

Illinois.— Hooper *v.* Winston, 24 Ill. 353.

Kentucky.— Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

Louisiana.— Schwartz *v.* Rosetta Gravel Paving, etc., Co., 110 La. 619, 34 So. 709 (refusal to recognize unless actual advantage accrues to the receivership); *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

England.— Fletcher *v.* Dodd, 1 Ves. Jr. 85, 30 Eng. Reprint 242.

See 42 Cent. Dig. tit. "Receivers," § 173. And see *infra*, IV, F, 6, f, (II).

Notice.— While it is held that the court may give its receiver instructions and directions upon *ex parte* applications (see *supra*, IV, F, 5, b, (II)), and the rule has been applied to an application for authority to make expenditures, the order not being appealable and the parties being at liberty to contest the correctness of the receiver's account in respect of such matter when the account comes on for settlement (Free Gold Min. Co. *v.* Spiers, 136 Cal. 484, 69 Pac. 143), it is held on the other hand that where the application is for leave to expend the funds in the receiver's hands it cannot be granted properly except upon notice to the parties interested therein, since such an order is appealable and if it remains unappealed from would be conclusive on the receiver's accounting (State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380); and like considerations have sometimes impelled the court to refuse to sanction in advance, on *ex parte* application, the withdrawal of funds for specific purposes, where the receiver was required to deposit all money received by him in some moneyed corporation designated in the order and such money could not be withdrawn except upon the court's order, but in-

tion;[66] formerly he was never permitted to do so, and if he laid out money in violation of this rule he was entitled to no allowance therefor.[67] But the courts recognize the receiver's power and duty to defray out of the trust funds in his hands expenses which are absolutely necessary for its protection and preservation,[68] although still he is not ordinarily authorized, without the previous direction of the court, to incur any expenses beyond such as are essential to the preservation and use of the property, as contemplated by the appointment,[69] and the authorities very generally agree that beyond this little discretion is allowed him in the matter of expenses and that he cannot bind the trust by contracts which have not been directed or approved by the court.[70] The general rule against such contracts or expenditures without the previous authority of the court should not be rigidly and sternly enforced so as to work wrong and injustice, where the receiver has acted in good faith and under such circumstances as will enable the court to see that if previous authority had been applied for it would have been granted,[71] and under the modern practice the court will give its subsequent approval when the officer has so acted in good faith, and what he has done appears to have been for the benefit of the trust.[72] Nevertheless it is held to be the order of the court

stead the court has granted an order permitting the receiver to withdraw from the general account a certain sum to be deposited in a special account upon which he might draw for expenditures, but for which expenditures he is required to account on his final settlement (People *v.* Manhattan F. Ins. Co., 41 Misc. (N. Y.) 611, 85 N. Y. Suppl. 221). See also People *v.* Family Fund Soc., 31 N. Y. App. Div. 166, 52 N. Y. Suppl. 867, *infra*, IV, F, 6, f, (II), note 57; *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78.

Reservation of right to pass upon particular expenses see Clarke *v.* Georgia Cent. R. etc., Co., 54 Fed. 556.

66. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60. See also *infra*, IV, F, 6, e, (III), (C).

67. Conley *v.* Deere, 11 Lea (Tenn.) 274 (where the rule was merely recognized, as stated in Story Eq. Jur. (16th ed.) § 833*a*); Tempest *v.* Ord, 2 Meriv. 55, 35 Eng. Reprint 861.

68. Davis *v.* Stover, 58 N. Y. 473.

Nature of power and duty to preserve property — *In general.*— Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 455, 6 S. Ct. 809, 29 L. ed. 963, where, speaking of the character of the property as giving character to the particular preservation which it requires, it is said: "Unimproved land may lie idle, with only payment of taxes. Improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable, it must be sold, by way of preservation. A railroad, and its appurtenances, is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order."

The character of the suit does not determine the extent of the receiver's power and duty to "preserve the property." Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237.

69. Brown *v.* Hazlehurst, 54 Md. 26; Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Sager Mfg. Co. *v.* Smith, 45 N. Y. App. Div. 358, 60 N. Y. Suppl. 849; Meyer *v.* Lexow, 1 N. Y. App. Div. 116, 37 N. Y. Suppl. 67; Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950; Morris *v.* Elme, 1 Ves. Jr. 139, 30 Eng. Reprint 269, as to a manager to account for produce of an estate coming into his hands.

70. *Colorado.*— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 112, holding that if expenses have been incurred in violation of the court's order or without the court's authority, the receiver may be personally liable therefor, but that they cannot be taxed in his favor as costs of the action and made a charge against any of the parties to the suit.

Illinois.— Hooper *v.* Winston, 24 Ill. 353; Heffron *v.* Milligan, 40 Ill. App. 291.

Iowa.— State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Maryland.— Brown *v.* Hazlehurst, 54 Md. 26, where it is held that a receiver will not be permitted to lay out more than a small sum at his discretion in the preservation or improvement of the property, but should, in all cases where it is practicable, apply to the court.

New Jersey.— Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 426.

Oregon.— Pacific Lumber Co. *v.* Prescott, 40 Oreg. 374, 67 Pac. 207, 416.

England.— Swaby *v.* Dickon, 5 Sim. 629, 9 Eng. Ch. 629, 58 Eng. Reprint 475; Waters *v.* Taylor, 15 Ves. Jr. 10, 13 Rev. Rep. 91, 33 Eng. Reprint 658, where it was said that the court would not permit a receiver in the broad discharge of his duty to lay out more than a small sum at his discretion.

See 42 Cent. Dig. tit. "Receivers," § 173.

71. Brown *v.* Hazlehurst, 54 Md. 26.

72. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

allowing and approving such expenditures and not the act of the receiver which creates the charge and upon which its validity depends,[73] and without previous authority the receiver acts at his own risk.[74] No inflexible rule can be laid down

California.— Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478; Adams *v.* Woods, 15 Cal. 206. See also *In re* Moore, 88 Cal. 3, 25 Pac. 915.

Illinois.— Atwood *v.* Knowlson, 91 Ill. App. 265; Heffron *v.* Milligan, 40 Ill. App. 291.

Indiana.— Brunner *v.* Central Glass Co., 18 Ind. App. 274, 47 N. E. 686, 63 Am. St. Rep. 339.

Maryland.— Alexander *v.* Maryland Trust Co., 106 Md. 170, 66 Atl. 836 (as to an agreement which should be ratified by the court); Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60.

New Jersey.— Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432.

New York.— Hynes *v.* McDermott, 14 Daly 104, 3 N. Y. St. 582.

South Carolina.— State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380.

Texas.— International, etc., R. Co. *v.* Herndon, 11 Tex. Civ. App. 465, 33 S. W. 377.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 506, 524.

Wisconsin.— Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243, expense in defending right to possession of property and in managing and disposing of merchandise and in effort to obtain possession of the books and assets of the corporation.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

See 42 Cent. Dig. tit. "Receivers," § 173.

It may be referred to the master to see if the transaction was beneficial to the parties and if found so the receiver will be allowed the money so laid out. Hooper *v.* Winston, 24 Ill. 353; Brown *v.* Hazlehurst, 54 Md. 26; Tempest *v.* Ord, 2 Meriv. 55, 35 Eng. Reprint 861; Atty.-Gen. *v.* Vigor, 11 Ves. Jr. 563, 32 Eng. Reprint 1207; Blunt *v.* Clitherow, 6 Ves. Jr. 799, 31 Eng. Reprint 1315.

Presumption of court's consent.—And when the receiver's act is manifestly for the benefit of the fund, it has been held that it will be presumed, until it otherwise appears, that it was done by the consent of the court. Beardsley *v.* Warner, 6 Wend. (N. Y.) 610 [*affirmed* in 8 Wend. 194].

Upon resignation.— Where a receiver's resignation and its acceptance by the court are not superinduced by any malfeasance or improper discharge of duty, it is equitable that he be protected, within the limits of just principles, against personal loss in respect to the expenses of his administration. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72.

The court may accord some degree of discretion to the receiver in these matters, in the performance of multifarious duties imposed upon him. Vanderbilt *v.* New Jersey Cent. R. Co., 43 N. J. Eq. 669, 12 Atl. 809; Girard L. Ins., etc., Co. *v.* Cooper, 162 U. S. 529, 16 S. Ct. 879, 40 L. ed. 1062, discretion as to price for work for which receiver is authorized to contract.

Expenses caused by parties.— Where a receiver at the solicitation of both partners, and acting in good faith and under the advice of counsel, continued a business at a loss, and being prevented by the active interference of the partners from effecting a sale of machinery and a patent, stored and insured the machinery at a considerable, although not unreasonable, expense, he ought not to be surcharged with the expense of continuing the business or the amount expended for storage and insurance. McDowell's Appeal, 4 Pennyp. (Pa.) 384.

Compensation for contract performed.— In respect to contracts which have been completely performed by a party dealing with a receiver, and when the claim is merely for compensation, equitable relief is granted, although there was no previous approval or subsequent ratification of the receiver's act. Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819 [*citing* Vanderbilt *v.* New Jersey Cent. R. Co., 43 N. J. Eq. 669, 12 Atl. 188, *supra*, note 64].

Contract to take property rightfully held by another.— Where, at the time of the appointment of a receiver of a corporation, a part of the property had been levied on under an execution and left with an officer of the corporation as custodian for the sheriff, and the receiver made an agreement with the officer that he would take possession of such property, sell it and apply so much of the proceeds as should be necessary to the payment of the judgment, it was held that, although the agreement was one which technically should not have been made without leave of court, it was a proper one and should therefore be enforced, since the receiver was thereby enabled to get possession of the property and save something over and above the amount of the execution. People *v.* National Mut. Ins. Co., 19 N. Y. App. Div. 247, 46 N. Y. Suppl. 102.

73. Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Rogers *v.* Wendell, 54 Hun (N. Y.) 540, 7 N. Y. Suppl. 781, 8 N. Y. Suppl. 515.

Confirmation of reports showing expenditures or unauthorized acts is not a ratification of such expenditures or acts. Peoria Steam Marble Works *v.* Hickey, 110 Iowa 276, 81 N. W. 473 (confirmation of report showing liability but not referring to notes executed therefor, not a ratification of receiver's unauthorized act in executing notes); Chicago Deposit Vaults Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819 (as to confirmation of reports showing expenditures which were in fact under an unauthorized lease involving a large expenditure and extending beyond the receivership).

74. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

to govern every case as to precisely what particular item of expenditure is proper or will be approved, but due regard must be had to the nature and surroundings of the property and the exigencies of the moment.[75]

(b) Loans and Advances to Receiver. Parties who advance moneys to a receiver under the authority of the court, in order to enable him to carry on operations necessary to accomplish the purpose of his appointment, should be reimbursed.[76] Ordinarily the receiver raises necessary funds by means of certificates,[77]

Iowa.— State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Louisiana.— *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

New Jersey.— Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 426.

New York.— Wyckoff *v.* Scofield, 103 N. Y. 630, 9 N. E. 498.

Wisconsin.—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 42 Cent. Dig. tit. "Receivers," § 173.

75. Brown *v.* Hazlehurst, 54 Md. 26; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243 (where it is said that only in the wise discretion and firmness of the courts can there be found prevention or remedy for the abuse of judicial conservation of estates); Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408.

The receiver must show: (1) That the expense was a reasonable one and for service not within the ordinary duties which he himself should perform; (2) that the amount claimed is a fair and reasonable value of the services; and (3) that the amount has been actually paid in good faith. Henry *v.* Henry, 103 Ala. 582, 15 So. 916; Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313, as to payment and charging the amount in his account, as proper method of obtaining court's approval.

Receiver entitled to reimbursement.— On the other hand it is held that it follows necessarily that as receivers are bound to obey the orders of the court in their relation to the fund, as well as regards its safe custody as its return, they are correlatively entitled to the protection of the court against all loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified and sustained in expending. Adams *v.* Haskell, 6 Cal. 475; Pullis *v.* Pullis Bros. Iron Co., 90 Mo. App. 244; Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71.

Unnecessary expenditures not allowed.— American Trust, etc., Bank *v.* Frankenthal, 55 Ill. App. 400 (fees for services of Pinkerton detectives in protecting the property disallowed, since the receiver can call upon the officers of the court to protect his possession); Battaile *v.* Fisher, 36 Miss. 321 (refusal to allow credit for a sum advanced by a receiver to pay a charge against his predecessor in that office, where it appears that the former receiver is in arrears); Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548 (rent of telephone for personal convenience); Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243 (voluntary expenditures in joining as a partisan with one creditor against another); Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950 (expenditure to defeat a proposed subsidy from a city in aid of a construction of a railroad competing with the one in the hands of the receiver, although such road if constructed might have diminished the future earnings of the road in charge of the receiver); Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644 (hotel bills); *In re* Dunn, [1904] 1 Ch. 648, 73 L. J. Ch. 425, 91 L. T. Rep. N. S. 135, 52 Wkly. Rep. 345 (holding that a receiver is not entitled to be indemnified for costs paid in defending himself against charges of fraud made against him personally, but only where he is defending himself in an action brought in respect of the estate and in which he is also defending the estate, since otherwise the defense could not result in any benefit to the estate).

76. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615 (which case see for order authorizing advances and payment); Elk Fork Oil, etc., Co. *v.* Jennings, 90 Fed. 767.

Where the order shows consent of parties, it cannot be attacked. Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Brown *v.* Schintz, 98 Ill. App. 452 [*affirmed* in 202 Ill. 509, 67 N. E. 172].

Lien.— Where one advances to a receiver money to gather a cotton crop planted by a tenant, he has no lien on other cotton grown on the leased premises but the matter must be settled by the receiver and accounted for in his settlement. Goodwin *v.* Mitchell, (Miss. 1905) 38 So. 657.

Borrowing instead of selling property to satisfy liens.— In Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110, where, on a bill to determine rights in land, the receiver was required to sell sufficient lands to satisfy liens which would bar the parties' interests if not paid and it was found impracticable to sell sufficient lands to redeem within the time allowed and the receiver was permitted to borrow money and the lenders were subrogated to the rights of the lien-holders, it was held that by such order there was no change of the material part of the original decree.

Borrowing in conducting business see *infra*, IV, F, 6, e, (III), (C).

Priorities see *infra*, V, B, 1, g, (I), (C).

Receivers' certificates and priority thereof see *infra*, IV, G.

77. See *infra*, IV, G.

although other forms of obligation or security have sometimes been adopted,[78] and the court may, in a proper case, and in order to rescue the whole or as much of the property as possible from an impending *vis major*, there being no other means of raising the funds, authorize the receiver to execute a mortgage on such property for that purpose.[79] But while courts will be zealous to protect the rights of parties who may have furnished money for the preservation of the trust property, equal care will be observed that the property is not wasted by the receiver's improvident acts,[80] and will not sanction the borrowing of large sums of money without previous authority and the fixing of such debts as a preferred charge, although the money has been applied to pay expenses of the receivership.[81] The court may permit the receiver to advance funds necessary to preserve the trust property,[82] and may reimburse him for moneys advanced in good faith for that purpose and in the performance of his duties without previous express approval,[83] but if others have made like advances the receiver has no preference over them in the funds.[84]

(2) All Persons Charged With Notice of Authority. All persons dealing with a receiver are charged with knowledge of his functions and authority and contract with him at their peril in so far as the liability of the estate is concerned.[85] But on the other hand if the receiver enters into individual transactions with others to whom he is liable to account, he cannot take advantage of his own delinquency by setting up that he acted as receiver and that his particular conduct was without authority.[86]

(3) Insurance. The nature of the property rendering it proper that it should be insured, the court would grant an order authorizing it and if the receiver,

78. See Evansville, etc., R. Co. *v.* Frank, 3 Ind. App. 96, 29 N. E. 419 (traffic debenture with coupons receivable in payment of freight, which case see also for form of the debenture); Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228, *infra*, IV, G, 3, g, note 12 (bonds).

79. Burroughs *v.* Gaither, 66 Md. 171, 7 Atl. 243. See also La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415; Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136; Postal Tel. Cable Co. *v.* Vane, 80 Fed. 961, 26 C. C. A. 342.

And under an authority to borrow money on his certificate which is declared to be a first lien, it is held that while it is unusual for a receiver to execute a mortgage, a mortgage executed by him to secure such loan is of the same effect as a certificate, especially when no remedy on any of the covenants of the mortgage is sought. Brown *v.* Schintz, 98 Ill. App. 452 [*affirmed* in 202 Ill. 509, 67 N. E. 172].

80. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

Certificates without consideration see *infra*, IV, G, 3, e.

81. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

82. See Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

83. Buster *v.* Mann, 69 Ark. 23, 62 S. W. 588; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, holding that where a receiver conserves an equity belonging to the trust which the court has decided it would be better to lose than to burden the trust fund to save, he will be deemed to have an equitable lien on the property so conserved for his reasonable expenditures, any profit to inure to the trust.

84. Buster *v.* Mann, 69 Ark. 23, 62 S. W. 588.

85. *Colorado.*— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

Illinois.—Heffron *v.* Milligan, 40 Ill. App. 291.

Indiana.— Brunner *v.* Central Glass Co., 18 Ind. App. 174, 47 N. E. 686, 63 Am. St. Rep. 339.

Iowa.— Tripp *v.* Boardman, 49 Iowa 410.

New Jersey.— Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 35 N. J. Eq. 426.

United States.— Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819; *In re* Erie Lumber Co., 150 Fed. 817.

See 42 Cent. Dig. tit. "Receivers," § 173.

86. Etowah Min. Co. *v.* Christopher, 112 Ala. 554, 20 So. 924, where in a suit by a receiver as such to recover money alleged to be due by account, a plea setting up that the amount claimed involved the settlement of a partnership between plaintiff and defendants and that the amount due the respective partners could not be known without a settlement of the partnership existing between them, was held to be good over a demurrer based upon the ground that the plea attempted to set up a partnership with plaintiff who could not enter into a partnership because he was a receiver, the court holding that so long as the receiver is the party complaining his official character and disabilities will be put out of view and that if by his misdoing the trust is in danger, he is responsible to the court appointing him

acting in good faith, insures without previous authority, the expenditure will be allowed,[87] and it has been said that under some circumstances a receiver would be derelict in his duty if he did not cause property in his hands to be insured against fire.[88] But even if it were true that a receiver cannot incur expenses which are absolutely essential to the preservation of the property without a previous order of the court, yet if he applies funds in his hands for such purpose, the contract of insurance will not be void as between him and the insurance company.[89]

(4) TAXES.[90] The court may authorize its receiver to redeem property from a tax-sale which is about to become absolute.[91] So it is proper for the receiver to pay taxes which are a prior lien on the property;[92] those assessed during the period of the receivership are properly allowed as necessary expenses of the administration of the trust,[93] and when taxes are due and the receiver has no funds to pay them, the court may authorize him to borrow money for that purpose and make the obligation a prior lien on the property on which the taxes were due.[94] This is not fixing a new and additional lien, or displacing any prior lien, on the property, but it is simply changing the form of the tax lien from one for taxes to one for money borrowed to pay taxes.[95] But, on the other hand receivers are not bound to pay a tax in their judgment unlawful, without the order of the court; and when they consider the legality of the tax questionable it is their right — their manifest duty — to apply to the court either for instruction or protection.[96]

for the consequences and ample remedies may be found against any one who may have wrongfully participated with him in any misappropriation of the trust assets.

87. Stevens *v.* Hadfield, 196 Ill. 253, 63 N. E. 633 (receiver in foreclosure proceedings); Atwood *v.* Knowlson, 91 Ill. App. 265; Robinson Bank *v.* Miller, 47 Ill. App. 310 [*affirmed* in 153 Ill. 244, 38 N. E. 1078, 46 Am. St. Rep. 883, 27 L. R. A. 449] (requiring receiver in foreclosure proceedings to keep the property insured from the rents, the value of the property depending on its preservation and without it the security being insufficient); Brown *v.* Hazlehurst, 54 Md. 26 (where a receiver appointed to take charge of a large hotel property pending a suit for a rescission of a contract for sale was credited with money so paid out).

88. Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408. But see *infra*, IV, F, 6, f, (II).

89. Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408, where it was held that whether the receiver exceeded his authority or rightly applied the funds in his hands are questions in which no one is concerned except himself, the court to which he is amenable, and the parties interested in the property; that if he is not technically authorized to use the funds in his hands to pay for insurance, still, upon the settlement of his accounts, if he acted in good faith the court may allow him any sums paid out for that purpose; that he held such relations to and was under such personal responsibility for the safety of the property that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court.

90. **In foreclosure proceedings** see MORTGAGES, 27 Cyc. 1631.

Taxation of property in hands of receiver generally see TAXATION.

91. See Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110.

92. Hamacker *v.* Commercial Bank, 95 Wis. 359, 70 N. W. 295; *Ex p.* Chamberlain, 55 Fed. 704, where it is said that receivers are accustomed to pay all just and lawful taxes without asking or needing the sanction of the court, and in their accounts such payments are passed without question.

Under a statute making it the duty of a receiver of a corporation to pay the taxes due upon its property and providing that if he neglects to do so he may be cited to show cause why such taxes, with penalty, etc., should not be paid, in the court in which he was appointed, and upon his failure to show "good and sufficient cause," the court shall order him to pay the same, he is protected by showing that he had sold the property by the court's order and that the purchaser took it subject to the taxes, the liability of the trust having been transferred, by such sale, to the purchaser and the property, realty, standing as indemnity for the tax. Stoner *v.* Bitters, 151 Ind. 575, 52 N. E. 149.

Payment of taxes under terms of lease see *supra*, IV, F, 6, e, (I), (C), (2), note 17.

93. Gehr *v.* Mont Alto Iron Co., 174 Pa. St. 430, 34 Atl. 638.

94. Central Trust Co. *v.* Tappan, 6 N. Y. Suppl. 918; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

95. Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201.

96. Ledoux *v.* La Bee, 83 Fed. 761; *Ex p.* Chamberlain, 55 Fed. 704.

(5) Repairs and Improvements. The court may, under proper circumstances, order a change to be made in the estate or property in its receiver's hands for distribution among creditors with a view to increase the value of the fund, but a pursuit of mere speculative advantage will not present a proper case for the exercise of such power.[97] The rule that a receiver will not be allowed to incur liabilities against the estate in his hands or be credited with any outlays which are made without leave of court first obtained [98] is applied to liabilities and outlays for repairs and improvements,[99] the exception to the rule being that his action may be approved by the court where repairs are made without permission if the sum expended or incurred is very small, or if it be shown that he acted in good faith and for the best interests of the property intrusted to him, or that it was necessary to act immediately, in order to prevent damage,[1] and it would be clearly wrong, under the pretense of keeping property in necessary repair, to permit the receiver to spend large sums upon it for the benefit of a party holding the certificate of purchase.[2] On the other hand the modern rule that the court will approve and allow reasonable expenditures made in good faith for the benefit of the estate [3] is applied to expenditures for repairs.[4]

(6) Rents and Leases. If the receiver is appointed to collect rents that may accrue from particular property, it is his duty to take and rent such prop-

97. Hand *v.* Savannah, etc., R. Co., 10 S. C. 406, where it was held that in an action to wind up the affairs of an insolvent railroad company in which different classes of creditors, embracing probably many individuals, have been made parties by publication, an order directing the receiver to change the location of a part of the road and build a bridge with the income of the company should not be made upon the recommendation of the receiver and the report of an engineer, but only upon the report of the master showing that necessity for the change exists consistently with the sole purpose of the court's holding the property, which is its preservation and application to the demands of the creditors.

It is the duty of the court to see that a railroad is in such a state of repair that it can be operated with safety to the traveling public. Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4. And especially is this duty imposed on the court where the legislature has made it the court's duty to operate the road for the public convenience. Hoover *v.* Montclair, etc., R. Co., *supra*.

98. See *supra*, IV, F, 6, e, (II).

99. Heffron *v.* Milligan, 40 Ill. App. 291. Repairs which do not enhance the selling value of the property cannot be approved as inuring to the benefit of the creditors. *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

1. Heffron *v.* Milligan, 40 Ill. App. 291, where the allowance was refused, the master having found that the repairs were necessary and of lasting benefit to the estate, but an examination of the evidence disclosed that they were not necessary to the preservation of the property, although desirable and of a character probable to make the property more remunerative, but not necessary in the sense that the property would be injured unless they were made; and further, which was the controlling feature of the decision, because of a lack of evidence that the items of work and material charged were furnished or that the prices charged were fair and reasonable.

2. Standish *v.* Musgrove, 223 Ill. 500, 79 N. E. 161, holding that the correctness of such expenditures should be made to appear from something more than the statement of the report itself. See also, generally, Mortgages, 27 Cyc. 1631.

3. See *supra*, IV, F, 6, e, (II), (D), (1).

4. Hooper *v.* Winston, 24 Ill. 353 (holding that a receiver cannot lay out money in repairs at his discretion and if he does so it is referred, before an allowance, to a master to ascertain if they are reasonable); Atwood *v.* Knowlson, 91 Ill. App. 265; Brown *v.* Hazlehurst, 54 Md. 26; Wyckoff *v.* Scofield, 103 N. Y. 630, 9 N. E. 498 (where it is held that whether the court should allow its receiver to reimburse the contractor was a matter entirely within its discretion, the determination of which would not be reviewed on appeal); Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582 (holding that under an order directing a receiver generally to apply money derived from one of several pieces of property to the support of the others, the receiver need not apply for leave to make necessary repairs, subject to the approval of the court as to what was reasonable and proper); Tempest *v.* Ord, 2 Meriv. 55, 35 Eng. Reprint 861 (reference to master to consider whether buildings erected were fit and necessary and for the benefit of the several parties interested); Thornhill *v.* Thornhill, 14 Sim. 599, 37 Eng. Ch. 599, 60 Eng. Reprint 491 (holding that the direction in the order appointing a receiver that he shall manage as well as set and let the estate authorized him to propose to the master from time to time to make ordinary repairs and that a special direction for that purpose was unnecessary); Atty.-Gen. *v.* Vigor, 11 Ves. Jr. 563, 32 Eng. Reprint

erty.[5] Strictly a receiver cannot *ex mero motu* let the premises which he holds as receiver,[6] nor has a receiver, whose expenditure of funds is limited and confined to designated objects and purposes, any authority to enter into a lease, as lessee, for a term extending beyond the duration of the receivership.[7] But the court having the custody of the property through its receiver may authorize him to make a lease,[8] and it is not confined in its power to letting the premises

1207 (where the court directed an inquiry whether the repairs were reasonable though at the same time observing that the court was not in the habit of permitting receivers to apply trust funds to repairs to any considerable extent without a previous application).

5. Downs *v.* Allen, 10 Lea (Tenn.) 652.

6. Gooden *v.* Vinke, 87 Ill. App. 562; Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96; Morris *v.* Elme, 1 Ves. Jr. 139, 30 Eng. Reprint 269, receiver to receive and account for the produce of an estate.

A receiver appointed by the governor under provisions above referred to has no power to lease. McMinnville, etc., R. Co. *v.* Huggins, 3 Baxt. (Tenn.) 177, *supra*, I, note 2.

7. Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819, holding that under such circumstances the court is not bound to recognize any equitable right of the lessor to be paid for the unexpired term after the receiver ceases to occupy. See also *supra*, IV, F, 6, e, (I), (C), (2).

Contract binding while in force.—A contract leasing property to a receiver, approved by the court, must be observed by the receiver as long as it and the confirming order remain in force. Matter of U. S. Rolling Stock Co., 57 How. Pr. (N. Y.) 16.

8. Gooden *v.* Vinke, 87 Ill. App. 562; McAnally *v.* Glidden, 30 Ind. App. 22, 65 N. E. 291; Shreve *v.* Hankinson, 34 N. J. Eq. 413; Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640; Western Union Tel. Co. *v.* Boston Safe-Deposit, etc., Co., 112 Fed. 37, 50 C. C. A. 106, lease pending sale in foreclosure binding on mortgagee, although he is not a formal party thereto.

Under authority to let from time to time no further special authority to let is required. Shreve *v.* Hankinson, 34 N. J. Eq. 413; —— *v.* Lindsey, 15 Ves. Jr. 91, 33 Eng. Reprint 689.

To whom the property shall be rented has also been held to be a matter within the discretion of the court. Simmons *v.* Allison, 118 N. C. 761, 24 S. E. 740.

Evidence of authority.— Under a statute making it a misdemeanor for the lessee of turpentine trees to remove the crop, or any part thereof, before satisfying all liens on the crop by the lessor, upon an indictment charging the offense against a lessee in a lease by a receiver, it was held that if it was necessary to show the right of the lessor to make the lease it was competent to show it by the order of appointment. State *v.* Turner, 106 N. C. 691, 10 S. E. 1026.

Application and notice.— The rule that the court has the power to give directions to its receiver upon his application *ex parte* (see *supra*, IV, F, 5, b), is applied to the power to authorize the execution of leases. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96. But a clause in the order of appointment giving the receiver power to lease the premises for a term not exceeding a year for such rentals "as he shall deem advisable and just," without notice to the mortgagor or holder of the legal title and without any order of court duly entered upon such notice, is held to be too broad. Gooden *v.* Vinke, 87 Ill. App. 562.

Failure of proposed lessee to accept lease.— Where the receiver in a foreclosure suit was authorized to rent a part of the premises to one of the owners at a fixed annual rent but such owner failed to accept the lease and pay the rent, he is not entitled to the excess which the receiver receives over that sum from others to whom he leases that portion, under the authority of the court, but the receiver is to hold it subject to the final order of the court in the suit. McComb *v.* Cordova Apartment Assoc., 1 Silv. Sup. (N. Y.) 100, 5 N. Y. Suppl. 64 [*affirming* 2 N. Y. Suppl. 570, and *affirmed* in 115 N. Y. 654, 21 N. E. 1118].

The receiver is to rent to the best advantage, and it has been held that a receiver in foreclosure proceedings whose duty it is to make rentable property productive may reduce rents when that is necessary to secure tenants and obtain an income from the property, and where he has acted prudently and in good faith in this respect his conduct will be approved. Northwestern Mut. L. Ins. Co. *v.* Burr, 60 Nebr. 467, 83 N. W. 664. But in Wynne *v.* Newborough, 1 Ves. Jr. 164, 30 Eng. Reprint 282, it was held that a receiver of an estate, with usual powers of setting and letting, cannot raise the rents upon slight grounds, nor turn out tenants without application to the master, although in this case the court refused a motion by a remote remainder-man and tenants to restrain the receiver from ejecting tenants, on the ground that their interest was not sufficient.

Upon reversal of the order authorizing a receiver to lease a theater for three years, because the order was inadvertently granted without considering circumstances showing that the receiver was not acting in good faith in applying for it, the court held that the lessee should be entitled to occupy for one year from the date of his lease as it would be unfair to turn him out in the height of the theatrical season. Bolles *v.* Duff, 54 Barb. (N. Y.) 215, 37 How. Pr. 162.

Reletting upon default of assignee.—Where a receiver executed a lease of a part of the property, and an assignee of the lease, who took an assignment for the whole term save one day, no rent being reserved to the as-

for a term not to extend beyond the period of the termination of the suit; for the suit may be ended at any time by a compromise or other arrangement, and therefore, to limit the power of the court in the premises to the duration of the suit, would be, substantially and practically, to deny the existence of the power.[9] But the court has refused to assume jurisdiction to authorize a lease to bind an infant remainder-man,[10] and it has been pointed out that in general when a court authorizes its receiver to lease, for the time being, property in his custody, it should act with great circumspection, and see to it that the lease is not given for such a period of time as will needlessly prolong the litigation or endanger the rights of any parties thereto.[11]

(III) *Continuance and Conduct of Business* — (A) *Authority in General.* A receiver has no right to carry on and conduct a business unless he is authorized or directed by the court to do so, and such authority is not derived from an order of appointment to take and preserve the property.[12] It is not

signor, the assignment containing a provision that it was subject to the rents, covenants, conditions, and provisions in the lease, took possession and paid the owner rents up to a certain period, after which he declined to pay further rent at the rate agreed but offered to surrender the lease and take a new one at a smaller rental, on application of the receiver for authority to accept the surrender and give a new lease, three fifths of the owners agreeing to the arrangement and two fifths opposing it, and the original lessee being irresponsible, the court declined to sanction the arrangement, and held that to entitle the assignee to its favorable consideration he should pay all the rent in arrear at the reduced rate, etc., and should surrender the lease and procure a surrender from his assignor if the parties consented to take the reduced rent, and that then the receiver should advertise the premises to lease for the residue of the term at auction under the same terms mentioned in the original lease, except that the new lease should require the building, which under the original lease was to be erected on the premises and belong to the owners of the land, to be sustained or an equally good one kept erected. Lorillard *v.* Lorillard, 23 Barb. (N. Y.) 528, 4 Abb. Pr. 210.

Jurisdiction of court over tenant see Walton *v.* Johnson, 12 Jur. 299, 15 Sim. 352, 38 Eng. Ch. 352, 60 Eng. Reprint 654, *supra*, IV, F, 6, e, (II), (D), (1), (a), note 63.

Sequestrators distinguished see SEQUESTRATION.

9. Shreve *v.* Hankinson, 34 N. J. Eq. 413 (where the order of appointment gave the receiver in foreclosure proceedings authority to let the mortgaged premises, which was a farm, from time to time, the lease must necessarily be, as to term and otherwise, in accordance with the nature of the thing demised, and the receiver having been appointed in the winter, it clearly appeared to be advantageous to all the parties, as well in view of the possible, if not probable, length of the litigation that a lease should be made for the ensuing agricultural year); Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96 (in partition suit).

Reference to ascertain term.— In England the practice was to direct a reference, to inquire what should be the term beyond which the receiver should not be permitted to let. —— *v.* Lindsey, 15 Ves. Jr. 91, 33 Eng. Reprint 689 (under an appointment of a receiver to let the estate); Neale *v.* Baily, 23 Wkly. Rep. 418.

10. Gibbins *v.* Howell, 3 Madd. 469, 56 Eng. Reprint 577.

11. Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640.

Modification or vacation.— If need be clauses should be inserted in such leases reserving to the court the power to cancel them whenever it is deemed expedient to do so. Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640. But when property is leased for a fixed term, with the express sanction and approval of the court, and no right to terminate the lease is reserved, and the lessee is ousted by order of the court before the natural termination of the lease, compensation should be awarded to the lessee for such damages as he has sustained. Weeks *v.* Weeks, 106 N. Y. 626, 13 N. E. 96 [*modifying* 19 Abb. N. Cas. 356, by declaring that when the damages are ascertained they shall be paid out of the fund reserved under the order of the court] (upholding the power of the court to modify or vacate an *ex parte* order, which the court had power to make, authorizing a receiver in a partition suit to grant a lease for a term extending beyond the termination of the suit); Farmers' L. & T. Co. *v.* Eaton, 114 Fed. 14, 51 C. C. A. 640.

12. *Idaho.*— Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267.

Mississippi.— Demain *v.* Cassidy, 55 Miss. 320.

New Mexico.— Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157, holding that a receiver to preserve property, ordered to sell, should sell in bulk, and is not authorized to continue the business.

New York.— Meyer *v.* Lexow, 1 N. Y. App. Div. 116, 37 N. Y. Suppl. 67; Appleton *v.* Welch, 20 Misc. 343, 45 N. Y. Suppl. 751. But see Cobb *v.* Sweet, 46 N. Y. App. Div. 375, 61 N. Y. Suppl. 545, where it is held that in the case of a railroad it would be the duty of a receiver appointed to preserve

a function of a court of equity to carry on a business,[13] and it will not usually appoint a receiver to permanently continue such operations.[14] It has the power, however, in the exercise of a wise discretion, to direct a continuance of a business, and to authorize its receiver to make expenditures and contract debts in that connection, when such a course seems necessary to preserve the property and to secure a more advantageous disposition of it.[15] But, since the court may

the property to continue to operate the road unless ordered not to do so.

Pennsylvania.— McCay *v.* Black, 36 Leg. Int. 471.

United States.— Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447.

See 42 Cent. Dig. tit. "Receivers," § 169.

Objection for first time on appeal.— But on the other hand it has been held that while the receiver is not liable as such unless he is authorized to make the contract, he should make that objection on the trial when he is sued as receiver. Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751, holding further that in the appellate court the authority of a temporary receiver of a corporation to manage its business might be presumed from the testimony of the receiver that he employed a certain person as superintendent who was actually managing the concern and from other facts in the testimony showing that the receiver was running and managing the business.

13. Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201.

14. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478. So in Vance *v.* Shiawassee Cir. Judge, 102 Mich. 342, 60 N. W. 761, where in a suit by a village, which had advanced money to procure the location of a manufacturing company, to set aside mortgages on the company's property and enforce the village's rights, the action of the court in enjoining the company's officers and agents from interfering with its property, and appointing a receiver, with authority to pay debts, collect claims, and continue the business generally, was affirmed except that the receiver's powers were limited to the protection of the property and collection of debts.

Farming beyond period necessary to gather crop.— In Robenson *v.* Ross, 40 Ga. 375, a lease of a plantation for a term of years contained numerous provisions as to what the parties were to do, and expressly stipulated that "said lease shall cease and determine whenever either of said parties shall fail to carry out the stipulations of said agreement, or shall violate any of its provisions." About the time a crop matured the lessee notified the lessor that he considered the lease as void on account of the lessor's repeated violations of its provisions. Upon a bill by the lessor against the tenant, alleging repeated violations of the conditions of the lease, defendant's insolvency, and that in consequence of his bad management plaintiff was in danger of suffering loss, it was held that the appointment of a receiver to take and preserve the crop would not be disturbed but that if it were necessary to continue the receivership until the termination of the litigation, complainant should be required to furnish the receivers with the supplies necessary for continuing the cultivation of the plantation, as specified in the written agreement for the lease, and if he fail to do so, the appointment of the receiver should be revoked.

Expedition in making sale.— Where the receivership is over property engaged in a business enterprise, the continuance of which is necessary in order to maintain its value as a going concern, the proceeding being one in which the ultimate sale of the property is a part of the relief to be administered, the sale should be made at the earliest opportunity. Hooper *v.* Winston, 24 Ill. 353 (where the receiver was directed to sell, and to carry on the business until he could sell); Marten *v.* Van Schaick, 4 Paige (N. Y.) 479. See also *infra*, IV, H, 6, c, (I).

Duration see *supra*, III, K.

15. *Alabama.*—American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 83 Am. St. Rep. 21; Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442.

California.— Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478.

Georgia.— Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642.

Illinois.— Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

Kentucky.— See Wagner *v.* Swift Iron, etc., Works, 26 S. W. 720, 16 Ky. L. Rep. 273.

New York.— Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. 419, 28 How. Pr. 277; Dayton *v.* Wilkes, 17 How. Pr. 510.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858, to keep the property and business a "going concern" until the rights of all the parties can be adjusted and a sale effected.

West Virginia.— Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172, 94 Am. St. Rep. 910.

United States.— Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447.

England.— Makins *v.* Ibotson, [1891] 1 Ch. 133, 60 L. J. Ch. 164, 63 L. T. Rep. N. S. 515, 2 Meg. 371, 39 Wkly. Rep. 73; Peek *v.* Trinsmaran Iron Co., 2 Ch. D. 115, 45 L. J. Ch. 281, 24 Wkly. Rep. 361, which are as to the jurisdiction to appoint a receiver and manager on interlocutory application of debenture holders.

See 42 Cent. Dig. tit. "Receivers," § 169.

Where two joint receivers are conducting the business of a corporation, each has equal authority, and in the ordinary conduct of the business may give directions concerning

not determine *in limine*, upon an application for the appointment of a receiver, the question of possession as between adverse claimants,[16] it should move with extreme caution when invited by one of the parties to embark property seized by it, through its receiver, in industrial enterprises and expose it to the hazard incident to the conduct of such a business;[17] and the power itself has been denied

it. Shirk *v.* Brookfield, 77 N. Y. App. Div. 295, 79 N. Y. Suppl. 225.

Receiver and manager.— In England a receiver, as known to the old court of chancery, did not manage the property in the sense of buying and selling or of continuing a business. Thus if a receiver was appointed of partnership assets the trade stopped immediately. He collected the debts, sold the stock in trade, etc., and then under order of the court, the debts of the concern were liquidated and the balance divided. If it was desired to continue the trade, it was necessary to appoint a manager, or a receiver and manager, as he was generally called, who could buy and sell or carry on trade. The same distinction was known also in the working of mines. The receiver as such merely took the income and paid necessary outgoings. *In re* Manchester, etc., R. Co., 14 Ch. D. 645, 49 L. J. Ch. 365, 42 L. T. Rep. N. S. 714.

In foreclosure suits see MORTGAGES, 27 Cyc. 1631.

16. See *supra*, III, E, 3, b; IV, A.

17. Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642; Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858. And see *supra*, II, C, 2, a.

Proper exercise of power — *Discretion in general.*— It has been held that the continuance of a business can only be justified when it is absolutely necessary to the preservation of the rights of the parties, it being borne in mind that preservation of the property is the purpose for which a receiver is primarily appointed, and that a judicial administration through him of an estate seized by the court, although the final, is nevertheless a secondary consideration; that while necessarily these matters are largely within the discretion of the trial judge, at last it becomes a question of law whether the court can lawfully embark property seized by it in an industrial enterprise, and the exercise of this power depends upon how far such conduct may be fairly necessary to the preservation of the existing status, taking into consideration the character of the property, the uses to which it may be applied, and how far and to what extent use may be necessary to its preservation. Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642. But on the other hand it is held that the question is one of business economy as well as law, and that the lower court's discretion will not be interfered with save in instances of flagrant error and injustice. Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288.

Mining.—Applying the rule stated in Bigbee *v.* Summerour, 101 Ga. 201, 28 S. E. 642, *supra*, this note, it was there held that where the only controversy between the parties was as to the right of defendant to mine ore under an alleged parol license from plaintiff, who was solvent, and whose title was not in controversy, it was error to authorize a receiver to work the mine and enter actively into the mining business, at the instance of defendant. But in Wilmington Star Min. Co. *v.* Allen, 95 Ill. 288, applying the rule therein stated, *supra*, this note, it was held that where leasehold interests of an insolvent mining company are placed in the hands of a receiver, and depend for their preservation on continued operation of the mines, the determination of the lower court upon the question whether a receiver should continue to operate them will not be disturbed. See also *supra*, II, B, 10, b.

The boring of new wells is not justifiable under the rule permitting a receiver to keep a business a "going concern," in a suit involving merely a contest between conflicting titles. Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172, 94 Am. St. Rep. 910.

Publishing newspaper.— The receiver of a firm whose business is the publication of a newspaper may be empowered to carry on the paper till sufficient time is allowed to dispose of it advantageously. Dayton *v.* Wilkes, 17 How. Pr. (N. Y.) 510.

Secret process of manufacture.— Ordinarily the court should not, before final decree, engage, through a receiver, in the manufacture and sale of patent or proprietary medicines, and require the parties to disclose to the receiver secret information necessary for beginning and carrying on the business. Merrell *v.* Pemberton, 62 Ga. 29.

To sell as going concern.— The court does not assume the management of a business except with the view of winding up its affairs and the sale of its property; the business being taken over and continued in order that the whole may be disposed of in the end as a going concern. Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72; Gardner *v.* London, etc., R. Co., L. R. 2 Ch. 201, 212, 36 L. J. Ch. 323, 15 L. T. Rep. N. S. 552, 15 Wkly. Rep. 324; Waters *v.* Taylor, 15 Ves. Jr. 10, 13 Rev. Rep. 91, 33 Eng. Reprint 658.

Quasi-public and private corporations.— In Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672, it is pointed out that the new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets; that two very different courses of proceeding are presented

in many cases where the expenses are to take precedence of prior valid liens without the consent of the lien-holders.[18]

(B) *Where Business Is Run at Loss.* A business should not be continued under a receivership when it cannot be conducted except at a loss.[19] The receiver should exercise the same reasonable care to prevent loss as one of ordinary prudence would exercise in the conduct of his own affairs,[20] and if he is authorized to operate the business for particular purposes, he will not be protected against losses incurred in operations beyond the scope of such authority carried on upon his own judgment.[21] When it becomes apparent that the business cannot be continued save at the expense of the estate, and no ulterior benefit is reasonably to be anticipated, the officer, in the exercise of reasonable prudence in the care of the property intrusted to his keeping, should proceed no further without specific directions.[22]

(C) *Expenditures and Obligation.* When a receiver is authorized to carry on a business temporarily, his power to incur obligations for supplies, materials, and other expenses in the proper and usual conduct of such business follows as

for adoption, one the old method, usually applied to banking, insurance, and manufacturing companies, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction; the other, to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all parties having any title to or claim upon the *corpus* of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim; that the first method would often be highly injurious, and result in a total sacrifice of the property, and besides, the cessation of business for a day would be a public injury. See also Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Lehigh Coal, etc., Co. *v.* Central, etc., R. Co., 41 N. J. Eq. 167, 3 Atl. 134 [*reversed* on other grounds in 43 N. J. Eq. 669, 12 Atl. 188], where the same principle is recognized, and it appears that legislative authority has been conferred in the same direction. See also, generally, RAILROADS, 33 Cyc. 612. But while the circumstances which justify the appointment of a receiver with authority to keep the business a going concern have been said not ordinarily to arise except in cases of railroad companies, it is held that the same rules apply in other cases under similar circumstances and that such a course may be justified upon the ground of necessity to preserve the property as well as upon the ground of public interest. Knickerbocker *v.* McKindley Coal Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858.

Objection.— In Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432, it is held that the propriety of an order authorizing a receiver to continue the business of the corporation cannot be questioned by an exception to the master's report on the receiver's accounting.

18. See *infra*, IV, G, 2.

19. Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739; Matter of Punnett Cycle Mfg. Co., 24 Misc. (N. Y.) 310, 53 N. Y. Suppl. 204 [*affirmed* in 33 N. Y. App. Div. 643, 54 N. Y. Suppl. 1114] (holding that under authority to operate the plant of a corporation and to make up and dispose of goods owned by it and purchase materials for that purpose so long as it could be done at a profit and until the further order of the court, the receiver had no power to enter into a contract binding himself to manufacture and deliver a certain quantity of goods within a specified time); Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 28 How. Pr. 208, 277.

20. See *supra*, IV, F, 6, b, (I).

21. Gillespie *v.* Blair Glass Co., 189 Pa. St. 50, 41 Atl. 1112. So a receiver who is authorized to borrow and expend a particular sum in order to complete unfinished work is not justified in continuing the operations at a loss because he has not money enough to pay off his employees before discharging them. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

22. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712 (holding that knowledge on the part of several interested persons that the receiver was so operating the plant did not justify such operation without authority and at a loss especially when such persons did not know that the operations were otherwise than as directed by the court, and that the fact that the lease of the company whose business was being operated had a long time to run did not justify such operation at a loss); Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72.

Where at the instance of both parties the receiver, acting in good faith and under advice of counsel, continues a business at a loss, and was prevented by interference from effecting a sale of property stored and insured at considerable expense, it was held that he should not be charged with the loss incurred in continuing the business or for the amount expended for storage. McDowell's Appeal, 4 Pennyp. (Pa.) 384.

a necessary incident to the receivership.[23] The courts, however, decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays or contracts extending beyond the receivership and intended to be binding upon the trust.[24]

(D) *Completing Work or Contracts.* The court may properly authorize its receiver to complete unfinished contracts made before his appointment,[25] and to manufacture materials on hand into finished products, so that he may collect the sums which can accrue only upon completing contracts for such manufactured products,[26] or to make such material available on the market as an asset of value by rendering it salable.[27] But on the other hand, when the receiver undertakes

23. *Alabama.*— Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442.

District of Columbia.— Cake *v.* Woodbury, 3 App. Cas. 60, under an order authorizing a receiver to carry on and manage a business "in substantially the same manner in which it had heretofore been carried on."

New Jersey.— Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Lehigh Coal, etc., Co. *v.* Central R. Co., 41 N. J. Eq. 167, 3 Atl. 134 [*reversed* upon other grounds in 43 N. J. Eq. 669, 12 Atl. 188].

Pennsylvania.— Lewis *v.* Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 [*affirming* 27 Pittsb. Leg. J. N. S. 395].

United States.— Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269; Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447; Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819; *In re* Erie Lumber Co., 150 Fed. 817.

See 42 Cent. Dig. tit. "Receivers," § 169.

Purchase on credit is authorized by an order giving the receiver power to purchase. Highland Ave., etc., R. Co. *v.* Thornton, 105 Ala. 225, 16 So. 699, 94 Ala. 353, 10 So. 442 (under an order to "run a hotel," and for that purpose "to make such purchases as may be necessary"); Eskridge *v.* Rushworth, 3 Colo. App. 562, 34 Pac. 482 (authority to buy goods necessary to replenish stock at thirty days' time, as customary, liquidating the bills out of the proceeds of sales, under an order authorizing the receiver to continue the business and replenish the stock from moneys received, until such stock could be sold at a good and reasonable price).

Execution of notes.— But it has been held that authority conferred upon a receiver to make purchases of stock gives him no implied authority to execute notes therefor. Peoria Steam Marble Works *v.* Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. Rep. 296.

Where to enable a receiver to collect sums due and to become due, he is authorized to continue a business so far as may be necessary for this purpose, he may contract debts for materials to complete partially executed contracts in order to render the consideration thereof due and collectable. Nason Mfg. Co. *v.* Garden, 52 N. Y. App. Div. 363, 65 N. Y. Suppl. 147; Sager Mfg. Co. *v.* Smith, 45 N. Y. App. Div. 358, 60 N. Y. Suppl. 849 [*affirmed* in 167 N. Y. 600, 60 N. E. 1120]. See also Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343.

Operations conducted by consent of parties. — Where plaintiff and all other creditors consented to an order to a receiver to take charge of defendant's property, to pay all outstanding commercial paper of defendant, as the same might mature, and all expenses in carrying on the business as a going concern, as well as to a subsequent order for the sale of property and the payment of proceeds into court, it was held that plaintiff could not object to the application of such proceeds to the payment of such notes and expenses, on the ground that there would not be sufficient balance left to pay a claim for unliquidated damages which he was prosecuting against defendant in another state. New York Bank-Note Co. *v.* Kidder Press Mfg. Co., 176 Mass. 151, 57 N. E. 348. See also Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

Expenses against parties interested in particular contracts see *infra*, V, C, 3.

Power to mortgage see *supra*, IV, F, 6, e, (II), (D), (1), (b).

24. Brunner *v.* Central Glass Co., 18 Ind. App. 174, 47 N. E. 686, 63 Am. St. Rep. 339; Vanderbilt *v.* Little, 51 N. J. Eq. 289, 26 Atl. 1025, 43 N. J. Eq. 669, 12 Atl. 188 (in the latter report of which case it is said that under the statute in respect to insolvent corporations, the primary duty imposed upon the court is that of winding up the corporation and disposing of its property, and that any discretionary power of the receiver must be affected by the limitation of power of the court which requires that an insolvent corporation should be retained in the hands of the court for no longer period than is reasonably necessary to enable its assets to be converted for the benefit of those concerned); Chicago Deposit Vault Co. *v.* McNulta, 153 U. S. 554, 14 S. Ct. 915, 38 L. ed. 819; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

25. See, generally, *supra*, IV, F, 6, e, (I).

Under a general order for the continuance of a business for the very purpose, among other things, of finishing uncompleted contracts, the details of executing the order will be passed upon by the receiver in other than exceptional cases and mere mistakes of judgment on his part will not work to his loss. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

26. See *supra*, IV, F, 6, e, (I); and *supra*, note 23.

27. American Pig Iron, etc., Co. *v.* German,

to complete such work on contracts, he must keep strictly within the limits of such authority.[28]

(IV) *EMPLOYEES OF RECEIVER* — (A) *In General.* While the duties of a receiver are personal,[29] and he cannot employ another at the expense of the trust, to perform his functions as receiver,[30] yet, as a necessary incident to his powers and duties as expressly conferred and imposed, he may employ such agents as the nature of such duties and the affairs to be administered may require.[31] The propriety of particular expenditures in this regard will be considered with respect to the extent and character of the business to be transacted.[32]

(B) *Employment and Compensation.* Where a corporation is in the hands of a receiver, the agents and employees are not the agents and employees of the company.[33] Ordinarily the selection, engagement, and retention of employees are matters of administrative detail left largely to the discretion of the receiver, with which discretion the court will not interfere unless an abuse is shown;[34]

126 Ala. 194, 28 So. 603; Florence Gas, etc., Co. *v.* Hanby, 101 Ala. 15, 13 So. 343; National Park Bank *v.* Goddard, 62 Hun (N. Y.) 31, 16 N. Y. Suppl. 343 [*affirmed* in 131 N. Y. 494, 30 N. E. 566] (holding that where an insolvent firm of clothiers had goods on hand which when made up into clothing would sell for more than the cost of manufacture, and also unfinished garments in the hands of workmen claiming a lien thereon, it was proper to order the receiver to have the goods cut, made up, and sold, and to allow him to settle with the workmen claiming liens at his discretion); Gehr *v.* Mont Alto Iron Co., 174 Pa. St. 430, 34 Atl. 638.

28. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; Gillespie *v.* Blair Glass Co., 189 Pa. St. 50, 41 Atl. 1112.

29. See *supra*, IV, F, 6, a.

30. Joost *v.* Bennett, 123 Cal. 424, 56 Pac. 43.

Deputy.—A receiver cannot appoint a deputy to be paid out of the fund, unless so authorized by an order of the court. Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427, 43 How. Pr. 492 [*affirmed* in 53 N. Y. 641]. See also Murray *v.* Cantor, 18 Misc. (N. Y.) 389, 41 N. Y. Suppl. 652, 26 N. Y. Civ. Proc. 81.

31. Buster *v.* Mann, 69 Ark. 23, 62 S. W. 588; Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60 (allowance for an accountant, where the partnership had kept no books for a long time and the receiver could not adjust the account without such clerical help); Corey *v.* Long, 12 Abb. Pr. N. S. (N. Y.) 427, 43 How. Pr. 492 [*affirmed* in 53 N. Y. 641] (holding that while a receiver of partnership property cannot appoint a deputy, he may appoint a competent person to take charge of and wind up the business, and a reasonable number of keepers for the protection of the property); Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269; Gunn *v.* Ewan, 93 Fed. 80, 35 C. C. A. 213.

Superintendent.— Where in the conduct of the business of a corporation it is for the interest of bondholders and creditors, the court may order the conduct of such business to be intrusted to a competent superintendent. *In re* Bucks County R. Co., 22 Pa. Co. Ct. 170.

Bound by knowledge and acts of agent.— In Watts *v.* Dubois, (Tex. Civ. App. 1902) 66 S. W. 698, it was held that a receiver of a national bank, who is not the "arm of a court" but an appointee of a federal officer, is bound by the acts and knowledge of his agent within the scope of the agency, when the receiver comes into the state court to enforce contracts entered into by such agent. So in Shirk *v.* Brookfield, 77 N. Y. App. Div. 295, 79 N. Y. Suppl. 225, it was held that where receivers appointed to operate a business were without practical knowledge thereof, and employed an agent to conduct the business, such agent was authorized to contract for services to be rendered in its management, and a contract so made was binding on the receivers.

In the case of a railroad it is held that the receiver must necessarily act through agents in many matters; that such agents may have authority to make transportation contracts on behalf of the receiver, and that it may be assumed that the agents' authority is the same as that exercised by him while occupying a similar position before the management passed into the hands of the court. Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 35 Pac. 744 (freight agent); Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 25 S. Ct. 84, 49 L. ed. 269 (general agent).

32. *In re* Union Bank, 37 N. J. Eq. 420 [*reversed* on other grounds in 38 N. J. Eq. 265] (refusal to allow charge for unnecessary clerks and of a daily newspaper); Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548 (holding that a manufacturing business with assets of about fifteen thousand dollars is not large enough to authorize the employment of a permanent stenographer by a receiver who is operating such business).

33. Henderson *v.* Walker, 55 Ga. 481. The same rule applies where the receiver is appointed by the governor of the state. Cherry *v.* North, etc., R. Co., 59 Ga. 446, *supra*, I, note 2.

34. Taylor *v.* Sweet, 40 Mich. 736; Continental Trust Co. *v.* Toledo, etc., R. Co., 59 Fed. 514.

and one employed as a receiver to render a particular service, under an order of the court permitting such employment, is held to be an employee of the receiver and not of the court so that the matter of terminating such employment rests with the receiver.[35] But these matters are not beyond the supervision and control of the court;[36] and where the property of a railway or other corporation is being administered by a receiver, under the superintending power of a court of equity, it is competent for the court to hear, and adjust difficulties between the receiver and his employees which in the absence of such adjustment would tend to injure the property and to defeat the purpose of the receivership.[37]

Discharge or reinstatement of employees.— The court will not direct the reinstatement of employees of a railroad company who had quit the service to join in a sympathetic strike without grievance of their own under circumstances which made it necessary to fill their places and where such reinstatement would displace competent and worthy men. Booth *v.* Brown, 62 Fed. 794.

An arbitration clause in a contract made before the receiver's appointment, under which employees of a railroad company were not to be discharged except for cause to be determined by arbitrators, was held to have no binding force upon the receiver. *In re* Seattle, etc., R. Co., 61 Fed. 541, where it was further held that if the receiver himself had made such contract it would have been void because it would necessarily deprive him of an important part of the power vested in him by the order of appointment and a receiver cannot lawfully thus restrict himself in the exercise of his powers.

A mere volunteer, or one who performs services of value to the receiver but without any contract, express or implied, cannot claim compensation therefor. *In re* Whittemore, 157 Mass. 46, 35 N. E. 93.

Employment of parties.— There is nothing wrong in a receiver's employing parties to the suit to perform necessary services where he pays no more and gets as good work as if others were employed. Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013; Oudin, etc., Min., etc., Co. *v.* Cole, 35 Wash. 647, 77 Pac. 1066.

Employees of parties.— Under an order of court, a receiver of a dissolved copartnership is justified in retaining in his employment persons who had charge of partnership realty before the dissolution and in paying them for their services, although since the dissolution one of the partners had attempted to discharge such employees. Holloway *v.* Turner, 61 Md. 217.

Release of portion of property under mortgage.— So where a receiver was appointed under a chattel mortgage, it was held that he had authority to enter into an arrangement whereby the claim of a mortgagor for services might be satisfied by a release of a portion of the property covered by the mortgage, since such arrangement had no other effect than if the receiver had sold the property and paid so much of the proceeds to the mortgagor for his services. Ayres *v.* Hawk, (N. J. Ch. 1887) 11 Atl. 744.

35. Grabbe *v.* Moffit, 133 Iowa 54, 110 N. W. 142, where an accountant was so employed for a particular investigation and upon termination of the employment by the receiver it was held that the accountant would not be permitted to recover for work performed in excess of the explicit direction of the receiver.

36. See *infra*, note 37.

Payment while recovering from injuries.— Where, upon a claim of an employee of a receiver of a railroad for damages for injuries received in the line of his duty, the receiver was exonerated from liability for negligence, it was held proper to allow such employee his wages while recovering from such injuries. Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 319; Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 33 Fed. 701. In Thomas *v.* East Tennessee, etc., R. Co., 60 Fed. 7, the same policy was approved except that it was held that the compensation should be confined to faithful and deserving employees.

37. Ames *v.* Union Pac. R. Co., 60 Fed. 674; Continental Trust Co. *v.* Toledo, etc., R. Co., 59 Fed. 514; U. S. *v.* Kane, 23 Fed. 748; *In re* Doolittle, 23 Fed. 544.

Reduction of wages.— The court may consider an application by railroad employees to rescind an order of the receiver reducing wages. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 669. In Continental Trust Co. *v.* Toledo, etc., R. Co., 59 Fed. 514, it was held, upon the question of the propriety of a reduction of wages by the receiver of a railway company, that the court will not interfere to reverse the receiver's administration by settling such details and that if an abuse of discretion is shown the proper course is to select new receivers. But on the other hand, it is held that a receiver should not reduce the wages of employees unless they are notified and given a hearing. U. S. Trust Co. *v.* Omaha, etc., R. Co., 63 Fed. 737 (holding that the master's report on the propriety of reducing employees' wages on the petition of a receiver is not conclusive on the court); Ames *v.* Union Pac. R. Co., 62 Fed. 7, 60 Fed. 674 (in the first report of which case it was held that the court would not confirm the action of receivers of a railroad in reducing wages and changing regulations for the conduct of employees where they were not notified of such proposed changes). And it has been held that where the wages are not shown to be excessive for the labor performed and are not higher than those paid for like services on other lines, etc., the court will not reduce the wages of employees over their protest merely because of the inability of the road to pay dividends or interest and although other em-

(v) *Selection and Employment of Attorneys* — (a) *In General.* The general rule is that where a receiver is charged with duties and the performance of a particular trust requiring the benefit of counsel to guide and assist him, he is entitled to the benefit of such assistance,[38] and he will be allowed out of the fund reasonable and proper fees in this behalf;[39] and although there is no specific original order giving the receiver authority to employ counsel,[40] counsel fees are nevertheless within the just allowances that may be made by the court.[41] The receiver cannot, without previous authority from the court, make any binding contract for the compensation of his attorney, since it is ultimately the function of the court to determine both the necessity for counsel and the compensation to be allowed therefor.[42]

ployees may be secured for smaller wages. U. S. Trust Co. *v.* Omaha, etc., R. Co., 63 Fed. 737; Ames *v.* Union Pac. R. Co., 62 Fed. 7. But where the sole property of a railroad company consisted of an equipment and leasehold of another road and the annual rent was a first lien on the equipment, and the leasehold was subject to forfeiture for non-payment of rent, and owing to general business depression the earnings of the road had fallen off until they were not sufficient to pay the rent, it was held that a ten per cent reduction by the receiver from the wages of employees was not unreasonable, it appearing that similar reductions had been made by competing roads, and that such reduction was not rendered unreasonable by the fact that the employees were already working on short time, which was made necessary in order to avoid the discharge of many of their number, and which course had been directed with their consent. Thomas *v.* Cincinnati, etc., R. Co., 62 Fed. 17.

Contracts with members of labor union.— In Waterhouse *v.* Comer, 55 Fed. 149, 19 L. R. A. 403, it was held that the court will consider the grievance of employees of members of labor organizations and while it will authorize such contracts with them as appear to be proper for the preservation of the property, the contract will not be restricted to the members of such labor organization and membership on the other hand will be no disqualification to service so long as the rules and regulations of the organization are treated as subordinate to the law of the land. But in Platt *v.* Philadelphia R. Co., 65 Fed. 660, it was held that where a rule was enforced excluding members of labor organizations from employment on a railroad at the time receivers took possession, they will not be required to abrogate such rule or denied the right to discharge employees who violated it, especially upon the petition of men who have obtained employment with notice of the rule and in violation of it. And see, generally, in this connection Labor Unions, 24 Cyc. 818.

Strikes and labor unions see *supra*, IV, D, 5, g.

38. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

California.— Adams *v.* Woods, 8 Cal. 306.

Minnesota.— Olson *v.* State Bank, 72 Minn. 320, 75 N. W. 378.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

New Jersey.— Emmons *v.* Davis, etc., Pottery Co., (Ch. 1888) 16 Atl. 157.

New Mexico.— Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157.

United States.— Petersburg Sav., etc., Co. *v.* Dellatore, 70 Fed. 643, 17 C. C. A. 310.

See 42 Cent. Dig. tit. "Receivers," § 184.

The fact that the receiver is a lawyer is not a sufficient objection by itself to the employment of counsel. Olson *v.* State Bank, 72 Minn. 320, 75 N. W. 378; Gunn *v.* Ewan, 93 Fed. 80, 35 C. C. A. 213.

39. **Allowance** see *infra*, VII, C, 2.

Parties, property, or fund liable see *infra*, V, C.

Priority see *infra*, V, B, 1, f, (III).

Contract for part of recovery of land.— Where an attorney was employed by the receiver of a railroad company to sue for land, under a special contract to receive one half of the recovery, land, and damages, and he succeeded in recovering the land, which was sold with the other property of the company and the proceeds placed in the common fund, it was held that the attorney was entitled to pursue the proceeds and establish his claim against the fund instead of the land. Hand *v.* Savannah, etc., R. Co., 21 S. C. 162.

40. See *supra*, IV, F, 6, e, (II), (D), (1).

41. Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568; American L. & T. Co. *v.* South Atlantic, etc., R. Co., 81 Fed. 62.

Proper services to be allowed for see *infra*, VII, C, 2.

Receiver acting as attorney see *infra*, IV, F, 6, e, (V), (B).

42. *Alabama.*— Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

New Mexico.— Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157, holding that the necessity for the employment of the attorney must be clearly apparent or a claim for attorney's fees will be disallowed.

New York.— Corey *v.* Long, 12 Abb. Pr. N. S. 427, 43 How. Pr. 492 [*affirmed* in 53 N. Y. 641], where it was held that, although in cases presenting difficult questions, a receiver, instead of taking up the time of the court with frequent applications for instruc-

(B) *Selection of Attorney and Proper Person to Serve.* The receiver usually selects his own counsel,[43] and sometimes it is the practice for the court to appoint the person so selected to be counsel for the receiver.[44] As a general rule the practice in equity does not sanction the employment by a receiver of the solicitors of any of the parties in the suit or one whose interests may be opposed to those of the parties, since such solicitors are bound to watch the proceedings of the receiver in the interest of their clients and the undertaking to act for the receiver at the same time might impose upon them inconsistent and conflicting duties.[45]

tions, may and should apply to his own counsel, yet this should be done either with the sanction of the court or at the expense of the receiver, and in the present case, no authority to employ counsel having been asked for, or given, and no necessity for such employment appearing from the evidence, but on the other hand it appearing from the whole conduct of the receiver that the counsel whom he had employed either did not advise the receiver as to his proper conduct, and therefore earned nothing, or else that he gave erroneous advice which was of no value, his claim for fees was disallowed.

Texas.— International, etc., R. Co. *v.* Herndon, 11 Tex. Civ. App. 465, 33 S. W. 377, necessity of showing that claim was authorized or approved by court which had control of receivership, when solicitor seeks to enforce it in another court against the property after redelivery.

United States.— Blair *v.* St. Louis, etc., R. Co., 20 Fed. 348.

See 42 Cent. Dig. tit. "Receivers," § 184.

Statute governing corporations.— Under N. Y. Laws (1902), c. 60, governing the practice in actions for the dissolution or sequestration of the property or the annulment of the charter of a corporation formed under or subject to the banking or insurance law, as amended by N. Y. Gen. St. (1906) p. 1362, it was provided that it should not be lawful for a receiver of such corporation to pay to any attorney or counsel any costs, fees, or allowances until the amount thereof should have been stated to the special term as expenses incurred by such receiver and approved by that court, the order of the court being subject to review by the appellate division and the court of appeals, both the original statute and the amendment providing that the receiver should not employ more than one counsel, the amendment permitting the employment of an additional counsel as authorized by the supreme court after notice to the attorney-general, and the original act requiring that no payment on account of such employment should be made except upon the approval in writing by the attorney-general. The original statute was held to produce a change of practice only, to interfere with no vested right, and to control in accountings by receivers, although appointed prior to its passage, and although it could not affect a contract of employment or payments made to counsel before its passage. People *v.* Manhattan F. Ins. Co., 77 N. Y. App. Div. 517, 79 N. Y. Suppl. 11. Before the amendment it was held that the approval of the attorney-general which was required went to the amount of the compensation to be paid, and not merely to the expediency of employing counsel, and that therefore the attorney-general could not be compelled by mandamus to approve a contract by a receiver for the employment of an attorney in which contract the compensation is provided for generally and without fixing the amount. Candee *v.* Cunneen, 92 N. Y. App. Div. 71, 86 N. Y. Suppl. 723.

43. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Emmons *v.* Davis, etc., Pottery Co., (N. J. Ch. 1888) 16 Atl. 157, right of receiver to select.

Dismissal of attorney.— In *In re* Herman, 50 Fed. 517, it was held that the receiver of an insolvent national bank might at any time dismiss an attorney employed by him, regularly or otherwise, to prosecute claims of the bank, and employ another attorney whom the court will substitute by its order for the dismissed attorney, except as to such cases as the latter may have commenced and finished, and that where a contract had been entered into between the receiver and the attorney whose dismissal is sought, he should receive the fees under the contract and the court will not direct the substitution in unfinished cases except upon deposit by the receiver of the amount of fees reserved in the notes he was employed to collect, as security to the dismissed attorney for services which he may have rendered.

44. Emmons *v.* Davis, etc., Pottery Co., (N. J. Ch. 1888) 16 Atl. 157.

The court will not go outside of the bar of the circuit to select a legal adviser for the receiver in the absence of any special reason for such a course. Blair *v.* St. Louis, etc., R. Co., 20 Fed. 348, in which case the court refused to appoint one who was related to the receiver and who had come from abroad and become a member of the bar of the circuit for the purpose of securing the appointment as such adviser.

45. *California.*—Adams *v.* Woods, 8 Cal. 306.

Illinois.— Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Heffron *v.* Flower, 35 Ill. App. 200.

Michigan.— Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627.

Nebraska.— Vieth *v.* Ress, 60 Nebr. 52, 82 N. W. 116.

New Jersey.— Emmons *v.* Davis, etc., Pottery Co., (Ch. 1888) 16 Atl. 157, where it was held that the receiver of an insolvent

While this rule is applied with some strictness, especially in the earlier cases,[46] it is held to be subject to qualifications. Thus where the employment is in good faith with the assent of the parties, it will escape the condemnation or censure of the court.[47] So the fact of such employment, it has been held, unless it was perverse and collusive, will furnish no sufficient ground for removing the receiver after he has entered upon his duties,[48] and in several cases the propriety of retaining such counsel is upheld where he is to assist in securing a fund for the benefit of all parties, or is not to act adversely to either party.[49] The receiver, how-

corporation had a right to select, and the duty rested upon the court to appoint, independent counsel for the receiver when such assistance is necessary, and that such duty rested upon the court whether the appointment is asked by the receiver or not, because the court has the entire control of the affairs of such insolvent corporation.

New York.— Corey *v.* Long, 12 Abb. Pr. N. S. 427, 43 How. Pr. 492 [*affirmed* in 53 N. Y. 641]; Ryckman *v.* Parkins, 5 Paige 543; Warren *v.* Sprague, 4 Edw. 416 [*affirmed* in 11 Paige 200]; Ray *v.* Macomb, 2 Edw. 165 (where an application to the court on behalf of the receiver was signed by complainant's solicitor, and the court said that it was improper, but as the question was a new one, the application was denied without costs); Matter of Ainsley, 1 Edw. 576 (where upon granting an application for leave to bring suit, the receiver was directed, in recognition of the rule stated in the text, not to employ counsel of either party).

Utah.—Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151.

United States.— Blair *v.* St. Louis, etc., R. Co., 20 Fed. 348, on a preliminary application to appoint counsel for the receiver.

See 42 Cent. Dig. tit. "Receivers," § 180.

Substitution of solicitor.— In Warren *v.* Sprague, 4 Edw. (N. Y.) 416 [*affirmed* in 11 Paige 200], the filing of a bill on behalf of the receiver by the solicitor who was prosecuting the original suit in which the receiver was appointed rendered the bill irregular, and it was held that while the irregularity authorized the removal of the bill from the files, yet as defendant appeared by the same solicitor as appeared for defendants in the original suit, so that it appeared that the solicitor of defendant knew that the solicitor for the original complainants was the same as appeared for the receiver, although this was not a waiver of the objection, it authorized the court to let the bill remain on file upon the receiver's substituting another solicitor who had no concern with the original parties and upon payment of the costs of the motion.

That counsel for a receiver is the latter's partner is no objection to the allowance of his attorney's fees, where it appears that the receiver is not to share in the compensation. *In re* Simpson, 36 N. Y. App. Div. 562, 55 N. Y. Suppl. 697 [*affirmed* in 158 N. Y. 720, 53 N. E. 1132].

46. See *supra*, note 45.

47. Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919 [*affirmed* on reargument in 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 (*affirmed* in 125 N. Y. 693, 26 N. E. 751)]; Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151.

If the parties do not object, the receiver may employ the solicitor of other parties to aid him in the discharge of his duties and a stranger to the suit cannot raise the objection in a suit brought against him. Warren *v.* Sprague, 11 Paige (N. Y.) 200. But see Merchants', etc., Nat. Bank *v.* Kent Cir. Judge, 43 Mich. 292, 5 N. W. 627, where it was said that the rule might be departed from by consent of all parties, but that this meant the consent of all parties concerned in the results of the receivership and that one not a party to the suit might be as much concerned in the question as those who were parties.

The creditors' attorney may be employed by the receiver in proceedings to wind up a corporation. Daniel *v.* Citizens' Mut. F. Ins. Co., 149 Mich. 626, 113 N. W. 17.

48. Monroe Bank *v.* Schermerhorn, Clarke (N. Y.) 366.

49. Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673; Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582; Smith *v.* New York Consol. Stage Co., 18 Abb. Pr. (N. Y.) 419, 28 How. Pr. 208, 277, as to appearance on application of the receiver for instructions respecting the management of the estate, where it was said that it was only when the receiver was acting adversely that it had ever been supposed that there was any impropriety in appointing the counsel of a party and it was indicated that if any general practice ever existed which prohibited the appearance by the solicitor of one of the parties for the receiver, it had been disregarded almost daily for many years.

Receiver appointed to act adversely.— The same considerations which render the interested party eligible as receiver where the appointment is for the purpose of taking adverse action on behalf of such party against a defendant (see *supra*, III, F, 1, c), have been held to make it proper for the receiver to employ plaintiff's solicitor in such adverse proceedings. Thus where after decree adjudging a defendant indebted to complainant as assignee of bankrupts, for the value of assets of the bankrupt firm converted by defendant by means of a fraudulent conspiracy, defendant having admitted that he was a party to the fraud, and the return of an unsatisfied execution, a receiver was appointed under a bill in the nature of a creditor's bill, it was held that the fittest person to advise the receiver was the solicitor who had succeeded in

ever, is not permitted to charge counsel fees for legal services performed by himself, in addition to his compensation as receiver.[50]

f. Loss or Cause of Action Accruing in Administration — (i) *LIABILITY OF PARTIES.* Loss which occurs after the court has taken property into its possession through its receiver must be borne by him from whom the property was taken rather than by him at whose instance the receiver was appointed,[51] and ordinarily neither party to the suit is responsible for the receiver's misfeasance or malfeasance,[52] and deficiencies in a receiver's accounts fall upon the estate.[53] The receiver is not the agent of either party [54] in the sense that he has authority to bind such parties by any act or omission on his part,[55] and a corporation in the hands of a receiver has no control over the receiver or his servants, and therefore generally is not responsible for the negligence or torts of the employees of the receiver, and no suit against it for damages occasioned thereby can be maintained.[56]

exposing the fraudulent conspiracy and obtained the decree against the respondent. Shainwald *v.* Lewis, 8 Fed. 878 [*affirmed* in 48 Fed. 492]. See also U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 43, 21 Pac. 503–524, which was a suit in the supreme court of the territory of Utah involving property escheated to the United States under an act of congress, and it was held that the interests of the receiver and of the complainant, the United States, being in exact harmony against the defendant, there was no impropriety in the receivers appointing the United States district attorney to assist him.

50. Matter of Niagara Bank, 6 Paige (N. Y.) 213; State *v.* Butler, 15 Lea (Tenn.) 104.

51. Kaiser *v.* Kellar, 21 Iowa 95 (nonliability of plaintiff, at whose instance a receiver of personal property was appointed, for injuries to the property while in the receiver's possession); Williamson *v.* Wilson, 1 Bland (Md.) 418.

Loss on owner.— In Lee *v.* Cone, 4 Coldw. (Tenn.) 392, in a suit for specific property (slaves) which had been stolen, defendant from whom the property was taken and placed in the hands of a receiver was held not liable for the value of the property which was lost (by emancipation) after it came into the receiver's possession.

Costs and expenses see *infra*, V, C.

52. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900.

53. Ellicott *v.* U. S. Ins. Co., 7 Gill (Md.) 307.

But this rule does not always prevail and some of the cases would seem not to support it. Thus it has been held that *prima facie* complainant is liable for all losses caused by the neglect of the receiver to perform his duties, whether it be in realizing the assets or in accounting for them after they are realized (Downs *v.* Allen, 10 Lea (Tenn.) 652; Terrell *v.* Ingersoll, 10 Lea (Tenn.) 77; Winslow *v.* Mulchey, (Tenn. Ch. App. 1895) 35 S. W. 762); that such liability is not relieved by the fact that defendant consented to the appointment of the particular person as receiver (Terrell *v.* Ingersoll, *supra*; Winslow *v.* Mulchey, *supra*); although it would be otherwise if defendant agrees to a waiver of security by the receiver and the loss occurs by reason of the receiver's insolvency (Terrell *v.* Ingersoll, *supra*). So in Sorchan *v.* Mayo, 50 N. J. Eq. 288, 23 Atl. 479, it is held that where the complainant in a foreclosure suit nominates and procures the appointment of his own solicitor and agent, he must bear the loss caused by the receiver's defalcation and the insufficiency of his sureties. In this case it is pointed out that the English authorities usually cited in support of the broad rule stated in the text do not support it; that in Rigge *v.* Bowater, 3 Bro. Ch. 365, 29 Eng. Reprint 585, it was intimated, although not decided, that if a receiver be appointed upon the application of a mortgagee, and he afterward embezzles or otherwise wastes the rents and profits, the loss must fall on the mortgagor, and that it appeared from a note to that case that such rule did not always prevail and that the rule was not applied in Hutchinson *v.* Massareene, 2 Ball & B. 55.

54. See *supra*, IV, E, 1.

55. Brunner, etc., Co. *v.* Central Glass Co., 18 Ind. App. 174, 47 N. E. 686, 63 Am. St. Rep. 339; Ahern *v.* Steele, 115 N. Y. 203, 232, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L. R. A. 449; Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521; Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 28 S. Ct. 406, 52 L. ed. 528; Texas, etc., R. Co. *v.* Rust, 17 Fed. 275, 282.

56. *Illinois.*— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*limited* in Bartlett *v.* Cicero Light Co., 177 Ill. 68, 52 N. E. 339, 99 Am. St. Rep. 206, 42 L. R. A. 715, *infra*, IV, I, 2, note 46, to the particular facts involved].

Missouri.— Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

New York.— Metz *v.* Buffalo, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201.

Pennsylvania.— Anderson *v.* Buffalo, etc., R. Co., 2 Pa. Co. Ct. 402.

Texas.— Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853; Ryan *v.* Hays R. Co., 62 Tex. 42; Hicks *v.* International, etc., R. Co., 62 Tex. 38; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

(II) *Liability of Receiver.* Generally obedience to the order and direction of the court is sufficient protection to the receiver,[57] although the order may be erroneous or subsequently reversed,[58] and he will not be personally liable for losses sustained in administering an estate pursuant to such orders and directions,[59] and in the exercise of good faith and ordinary care and prudence.[60] And

United States.— Davis *v.* Duncan, 19 Fed. 477, after discharge of receiver and restoration of property without reservation of jurisdiction as to such rights of action. But see State *v.* Port Royal, etc., R. Co., 84 Fed. 67.

See 42 Cent. Dig. tit. "Receivers," § 192 *et seq.*

Plea of receivership.— A plea that at the time of the injury complained of defendant corporation was in the hands of a receiver is not defective for failing to set out the order appointing the receiver (Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313); or for failure to set out the application for the receiver and the bond (Adams *v.* San Antonio, etc., R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79).

Matter of defense to be pleaded as such.— But where defendant in an action for damages for personal injuries and injury to property was at the time of the alleged accident in the hands of receivers who were not made parties to the suit, such fact is held to be a matter of defense and cannot be brought upon the record by a motion in arrest of judgment but must be pleaded in the first instance. Vonderhorst Brewing Co. *v.* Amrhine, 98 Md. 406, 56 Atl. 832.

Plea need not be verified, the statute which prescribes the cases in which this is necessary not embracing a plea of receivership at the time the cause of action arose. Adams *v.* San Antonio, etc., R. Co., 34 Tex. Civ. App. 413, 79 S. W. 79.

Liability of purchaser see *infra*, IV, H, 12, b.

Property redelivered without sale see *infra*, IV, I, 2.

57. *Illinois.*— Heise *v.* Starr, 44 Ill. App. 406, sale of property belonging to another but turned over to receiver by judgment debtor in creditors' suit.

Iowa.— How *v.* Jones, 60 Iowa 70, 14 N. W. 193.

New York.— *In re* Home Provident Safety Fund Assoc., 129 N. Y. 288, 29 N. E. 323; Willis *v.* Sharp, 124 N. Y. 406, 26 N. E. 974; Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641 [*affirmed* in 171 N. Y. 668, 64 N. E. 1125] (holding that where a receiver of property collected rents, and, in accordance with the order confirming his sale of the property, paid the balance of the rent, after paying expenses, to the attorney for defendant in the creditor's action in which he was appointed, he is not liable for damages for such rents, either personally or as receiver, in ejectment by the owner against him and one claiming the property by virtue of the receiver's sale); Pierce *v.* Lees, 17 N. Y. App. Div. 346, 45 N. Y. Suppl. 294; Matter of Home Provident Safety Fund Assoc., 15 N. Y. Suppl. 211; Corey *v.* Long, 12 Abb. Pr. N. S. 427, 43 How. Pr. 492 [*affirmed* in 53 N. Y. 641].

South Carolina.— State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380.

Texas.— Corsicana First Nat. Bank *v.* Cohen, (Civ. App. 1899) 55 S. W. 530.

See 42 Cent. Dig. tit. "Receivers," § 194.

The rule does not apply as against the real party in interest where such party was not bound by the order and the payer had notice of his rights. People *v.* Family Fund Soc., 31 N. Y. App. Div. 166, 52 N. Y. Suppl. 867, where the receiver obtained an order for payment to one party, who had no notice, espousing his cause as against another party, and as between whom the receiver should have been neutral. So in Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72, it was held that receivers appointed merely to carry on the business of a corporation and keep it a going concern at suit of creditors will be charged with personal liability for money paid out in satisfaction of debts of the company, having no relation to the conduct of the business, although such payments were authorized by the court on their *ex parte* application, where their representations that they were in funds to make the payments without detriment to the business were untrue, and they were in fact conducting the business at a loss, and contracting indebtedness which they had no means of paying.

58. Platt *v.* New York, etc., R. Co., 170 N. Y. 451, 63 N. E. 532 (holding that the receiver was protected in payments made by him in pursuance of the orders of the court in a foreclosure proceeding, although the money involved belonged to general creditors of the corporation who had no notice of the orders); Coe *v.* Paterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127 (protection under order for expenditures, although the property in the receiver's hands might have been applicable to the payment of the judgment against him); Lesster *v.* Lawyers' Surety Co., 50 N. Y. App. Div. 181, 63 N. Y. Suppl. 804 (as to payment in good faith); Hovey *v.* McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. ed. 888 (decree requiring disposition of a fund, not retaining jurisdiction of the fund pending appeal and not within the provision of rules of court relating to supersedeas and stay of executions).

59. Eskridge *v.* Rushworth, 3 Colo. App. 562, 34 Pac. 482, sale at loss, under order procured by the parties.

60. *Illinois.*— Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271 (holding that the receiver of a hotel conducting the business thereof is not personally liable for the loss of twenty-five dollars caused by cash-

so when damages are sustained by reason of the negligence of a receiver's employees, without personal fault on his part, in matters necessarily or properly committed to them in the management of the trust property, as, for example, in operating railroads, such damages are, as between the receiver and the trust estate, to be paid, not by him out of his own money, but out of the trust property.[61] But if

ing a worthless check for one of the guests of the hotel, such advances to guests not being unusual among hotel managers); Johnston *v.* Keener, 23 Ill. App. 220 (shrinkage in stock).

Iowa.— How *v.* Jones, 60 Iowa 70, 14 N. W. 193, holding that the fact that a receiver paid money to parties under an order of court, nine days after its making, and before any appeal was taken or motion for a new trial made, when the order provided that all parties should have leave to move for a new trial at the next term of court, is not of itself evidence of bad faith, and he will be protected in such payment.

New Jersey.—Powers *v.* Londridge, 38 N. J. Eq. 396; *In re* Union Bank, 37 N. J. Eq. 420 [*affirmed* in 38 N. J. Eq. 265].

New York.— Brett *v.* Brett, 4 N. Y. St. 704.

Texas.— Hamm *v.* Stone, etc., Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427.

Virginia.— Barton *v.* Ridgeway, 92 Va. 162, 23 S. E. 226.

Washington.— Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

England.— Knight *v.* Plimouth, 3 Atk. 480, 26 Eng. Reprint 1076, Dick. 120, 21 Eng. Reprint 214.

See 42 Cent. Dig. tit. "Receivers," § 194.

Mere mistake of judgment while acting in good faith in managing the property will not subject the receiver to loss. Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582; Brett *v.* Brett, 4 N. Y. St. 704; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Failure to insure.— While it has been said that under particular circumstances a receiver might be derelict in his duty if he did not cause property in his hands to be insured against fire (Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408) the mere failure to insure has been held not to render him liable for the value of the property destroyed by fire, ordinary care being the test of his liability (Hamm *v.* Stone, etc., Live Stock Co., 13 Tex. Civ. App. 414, 35 S. W. 427).

Failure to sue.—A receiver having no authority to sue except by the court's order, and the parties in interest being cognizant of his course and having it equally within their power to procure an order directing suit, will not be charged with negligence in not suing for a debt which at one time was well secured but which afterward became worthless. Reynolds *v.* Pettyjohn, 79 Va. 327. So in Strauss *v.* Casey Mach., etc., Co., (N. J. Ch. 1907) 66 Atl. 158, after the appointment of a receiver for a corporation, the court directed that suits against stock-holders to cover unpaid subscriptions should be held in abeyance until the determination of other suits and thereafter the receiver called the matter to the court's attention but no order was made, and it was held that as the receiver was unable to enforce such liabilities without an order of the court he was not chargeable with a neglect of duty in failing to sue.

Pursuing ordinary customs.—A receiver will not be chargeable with the use of an opera house on occasions when he has donated it for charitable and social purposes where he had received nothing for its use and it is not shown that he would have received anything or that the property would have been so used if he had required compensation and where it is customary for ordinarily prudent owners of similar property to donate the use of the same for such purposes. McKennon *v.* Pentecost, 8 Okla. 117, 56 Pac. 958.

Collections.— McDowell's Appeal, 4 Pennyp. (Pa.) 384, holding that where a receiver having accounts in his hands collected all that he could, took others to a reliable collection agency, and instructed them to collect all that were available, and they, refusing some of them, reported to him from time to time as to the remainder, and he charged himself with the proceeds reported, he should not be charged with the alleged value of the accounts.

Transmission of proceeds by bill.— In Knight *v.* Plimouth, 3 Atk. 480, 26 Eng. Reprint 1076, Dick. 120, 21 Eng. Reprint 214, where a receiver, having collected a large sum of money in rents, thought it unsafe to remit the money to London and therefore delivered it to a tradesman and took bills of exchange from him drawn on persons in London, having no reason to doubt the safety of the funds by such transaction, it was held that the receiver should not be obliged to make good the loss caused by the subsequent bankruptcy of the drawer of the bills. The authority of this case, however, seems to have been shaken in Wren *v.* Kirton, 11 Ves. Jr. 377, 32 Eng. Reprint 1133, and Salway *v.* Salway, 2 Russ. & M. 215, 11 Eng. Ch. 215, 39 Eng. Reprint 376.

Neglect to take possession of certain land alleged to belong to a defendant corporation cannot be charged where it appeared that the receiver had brought several suits to test the question of his right to recover some of the property from parties holding the legal title and that his delay in taking steps to recover other property in like condition was because such suits were being pressed as test cases. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 43, 21 Pac. 503, 524.

61. Kerr *v.* Little, 39 N. J. Eq. 83.

Rule applied to contracts.—And it is held that this rule applies equally to contracts and that where the receiver's subordinates enter into a contract in the course of their management of the business intrusted by

a receiver goes outside of the plain letter of his authority as contained in the order appointing him,[62] or loss occurs by reason of his negligence and failure to perform the duties so imposed upon him,[63] or the assets are wasted, misappropriated, or their full value not realized by reason of his misconduct or bad faith,[64] he must bear the consequences and will be charged with the loss.[65]

G. Receivers' Certificates — 1. Nature in General. Receivers' certificates are of comparatively recent introduction.[66] They are, generally speaking, merely evidence in the hands of the holder that he is entitled to receive from the fund under the control of the court the amount specified if the fund is sufficient to pay in full all holders of such certificates, or if it is not sufficient, then a *pro rata* share with other such holders.[67]

2. Power to Authorize Issue — a. In General. It may be laid down broadly as a general rule that courts of chancery have the power, in proper cases, to issue receivers' certificates which shall constitute a paramount charge upon the property;[68] and the court having jurisdiction, the validity and binding effect of the

him to them, and damages arise from their breach thereof, those damages, as between the receiver and the trust estate, are to be paid out of the latter. Kerr *v.* Little, 39 N. J. Eq. 83.

Rule applied to collections.— Powers *v.* Oudridge, 38 N. J. Eq. 396; *In re* Union Bank, 37 N. J. Eq. 420 [*affirmed* in 38 N. J. Eq. 265], in which cases it is held that the receiver was not liable for money misappropriated by an attorney employed to make collections. But see Gunn *v.* Ewan, 93 Fed. 80, 35 C. C. A. 213.

Personal liability to others generally see *infra*, VI, D, 1.

62. McCay *v.* Black, 14 Phila. (Pa.) 635.

63. *Michigan.*— *In re* Augell, 131 Mich. 345, 91 N. W. 611.

New York.— Clapp *v.* Clapp, 49 Hun 195, 1 N. Y. Suppl. 919 [*affirmed* on reargument in 54 Hun 638, 7 N. Y. Suppl. 495, and in 125 N. Y. 693, 26 N. E. 751].

Tennessee.— Downs *v.* Allen, 10 Lea 652, liability for rent upon failure to take and rent property.

United States.— Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

England.— *In re* Skerretts, 2 Hog. 192.

Canada.— Plisson *v.* Duncan, 36 Can. Sup. Ct. 647.

See 42 Cent. Dig. tit. "Receivers," § 194.

64. *In re* Shea, 57 Minn. 415, 59 N. W. 494; Demain *v.* Cassidy, 55 Miss. 320; Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93, 54 Atl. 508; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Joint receivers.— Where two receivers are appointed to close up the concerns of a corporation, and one of them illegally appropriates the funds in his hands, using them for his own profit, and the other negligently permits such illegal appropriation, they will be jointly liable for the balance found due from them, upon stating their account, with interest. Com. *v.* Eagle F. Ins. Co., 14 Allen (Mass.) 344.

65. See *supra*, notes 62–64.

Measure of damage.—A receiver will be liable for the actual damage sustained by reason of his misconduct, but for nothing more. Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506. And if by negligence or bad faith he fails to realize the full value of property sold, he will be liable for the real value and not for probable or speculative profits. Demain *v.* Cassidy, 55 Miss. 320.

66. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144.

67. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513.

Expenditures, loans, and advances generally see *supra*, IV, F, 6, e, (II), (D).

Negotiability see *infra*, IV, G, 3, b.

68. *Alabama.*—American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21.

Illinois.— Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Humphreys *v.* Allen, 101 Ill. 490.

New York.—Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456; Walton *v.* Grand Belt Copper Co., 56 Hun 211, 9 N. Y. Suppl. 375; Central Trust Co. *v.* Tappan, 6 N. Y. Suppl. 918.

Virginia.— Osborne *v.* Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446; Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

United States.— Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895; Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201.

See 42 Cent. Dig. tit. "Receivers," § 204 *et seq.*

Ratification by state court of issue by federal court.— Where there were suits pending in the federal court and the state court for the appointment of a receiver of the same railroad, upon jurisdiction subsequently being wholly assumed by the state court it was within its power to authorize the issuance of receiver's certificates by ratifying the acts of the federal court; and they were valid, at least as to persons then parties to the cause. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507. See also Postal Tel. Cable Co. *v.* Vane, 80 Fed. 961, 26 C. C. A. 342, where it appears that an order of a state court authorizing the issue of certificates and the execution of a mortgage to

certificates will not depend upon the proper exercise of the court's judgment in appointing the receiver.[69] The authority to issue such certificates is held not to be confined to foreclosure suits in which the trustees or bondholders come into court initially asking the aid of equity in the appointment of a receiver, but it is enough that the suit is one in which the court may administer the property and marshal the debts, including those of the mortgage bondholders.[70]

b. Exercise of Power — Necessity and Purpose — (i) *In General.* The power to issue receivers' certificates is to be exercised very largely in the discretion of the court, and if that discretion is not abused the action of the court will not be disturbed in the appellate tribunal;[71] it is a power to be exercised with the utmost prudence and caution.[72] It is laid down in general terms that receivers' certificates may be properly issued only when the preservation of the property presents an urgent necessity therefor.[73]

(ii) *Railroad and Other Receivership Distinguished.* A practice has grown up incident to railroad receiverships, which has become firmly established by judicial sanction, whereby the receiver may be authorized to issue receiver's certificates for the purpose of paying the incidental and necessary expenses for carrying forward the business of the corporation, so that it may continue a going concern, and thereby to supplant or supersede prior liens, and

secure them was ratified and confirmed in a federal court in another state when the same receiver was appointed.

Extraterritorial jurisdiction.— In Pool *v.* Farmers' L. & T. Co., 7 Tex. Civ. App. 334, 27 S. W. 744, it is held, upon the principle that a court in one state has no jurisdiction to appoint a receiver of property situated in another state (as to which, however, see *supra*, III, A, 5; and *infra*, VIII), that such court cannot authorize the issue of certificates which shall be a lien on property situated in Texas, and that the fact that in obedience to an order of the appointing court a conveyance of the property to the receiver was attempted did not change the rule.

Power to mortgage see *supra*, IV, F, 6, e, (II), (D), (1), (b).

Forms of orders and certificates see Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518, 520; Neafie's Appeal, 9 Pa. Cas. 284, 287, 12 Atl. 271; Farmers', etc., Nat. Bank *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 456, 463; Kampmann *v.* Sullivan, 26 Tex. Civ. App. 308, 309, 63 S. W. 173; Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,706, 2 Dill. 448, 454, debentures.

69. Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Farmers' L. & T. Co. *v.* Centralia, etc., R. Co., 96 Fed. 636, 37 C. C. A. 528, 100 Fed. 11, 40 C. C. A. 248.

Collateral attack see *supra*, III, J, 3.

70. Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963. So where the trustee in a railroad mortgage appeared on the application of the receiver in a proceeding other than for the foreclosure of the mortgage, the court had jurisdiction to authorize the issue of certificates as a paramount lien. Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237.

71. Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662; Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38, 35 Atl. 926.

72. Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. (N. Y.) 222, 60 N. Y. Suppl. 409; Osborne *v.* Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446.

73. Cort's Application, 7 Pa. Dist. 536.

That there is no property in the possession of the receiver and nothing upon which to base certificates except the uncertain results of proposed litigation which the court has authorized the receiver to institute is no reason by itself for adjudging that the power to authorize the issue of receiver's certificates has been improperly exercised. Vandalia *v.* St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662, where, in a suit by stock-holders of a railroad company which had been leased to another railroad company in the hands of a receiver, a receiver was appointed and directed to bring suit to recover the rent, but was unable to do so for lack of funds, it was held that if such certificates are negotiated they must be sold to persons who will take the risk of a recovery in the proposed litigation.

Pending appeal after sale free from liens.— In Porch *v.* Agnew Co., (N. J. Ch. 1904) 57 Atl. 546, a sale of property was ordered to be made free from liens under the statute, and upon challenge by some of the lien creditors upon the ground that the price obtained was too low, the court refused confirmation of the sale and ordered another sale for not less than a fixed sum, the challenging creditors to give bond to secure such price. Pending an appeal from the order denying confirmation of the first sale, the court authorized the receiver to issue certificates for expenses incident to the preservation of the property, where the company owning it was insolvent and the income insufficient to pay such expenses, and there appearing no reason for charging the persons who challenged the sale, the order au-

such an order may bind the parties even though entered without their consent.[74] There is no fixed and inflexible rule defining the precise purposes in all cases for which such certificates may be issued,[75] and while some of the courts have discouraged the practice except when absolutely necessary for the preservation of the property as a going concern pending litigation,[76] the propriety of the issue of such certificates is recognized where the purpose is to pay for supplies, rentals, and equipment necessary for the operation of the road,[77] or to make repairs neces-

thorizing such issue provided that if the receiver should get in any income from the property such income should be first applied in payment of the receiver's certificates.

74. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237.

California.— Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60.

Iowa.— Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

New York.— Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743; Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237; Townsend *v.* Oneonta, etc., R. Co., 88 N. Y. App. Div. 208, 84 N. Y. Suppl. 427 (holding that the authority does not rest upon consent where the issue of the certificates is absolutely necessary for the preservation of the property as a going concern); Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. 222, 60 N. Y. Suppl. 409.

Pennsylvania.—Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38, 35 Atl. 926; Farmers', etc., Nat. Bank *v.* Philadelphia, etc., R. Co., 14 Phila. 456.

Texas.— Kampmann *v.* Sullivan, 26 Tex. Civ. App. 308, 63 S. W. 173.

United States.— Kneeland *v.* Luce, 141 U. S. 491, 12 S. Ct. 32, 35 L. ed. 830; Union Trust Co. *v.* Illinois Midland Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Burham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152; Royal Trust Co. *v.* Washburn, etc., R. Co., 120 Fed. 11, 57 C. C. A. 31; Bibber-White Co. *v.* White River Valley Electric R. Co., 115 Fed. 786, 53 C. C. A. 282; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3; London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23.

See 42 Cent. Dig. tit. "Receivers," § 204 *et seq.*

Operation of railroad by receiver generally see RAILROADS, 33 Cyc. 626.

75. Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. (N. Y.) 222, 60 N. Y. Suppl. 409.

76. Meyer *v.* Johnston, 53 Ala. 237; Townsend *v.* Oneonta, etc., R. Co., 88 N. Y. App. Div. 208, 84 N. Y. Suppl. 427; Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. (N. Y.) 222, 60 N. Y. Suppl. 409.

Past-due interest on first mortgage bonds. — In Townsend *v.* Oneonta, etc., R. Co., 88 N. Y. App. Div. 208, 84 N. Y. Suppl. 427, it was held that over the objection of the trustee for the mortgage bondholders and the holders of the legal title to a majority of the bonds, the court could not properly authorize the issue of certificates of indebtedness constituting a prior lien upon all of the railroad property for the purpose of paying past-due interest on first mortgage bonds, and thereby preventing the bondholders from declaring the bonds due as authorized by a mortgage, the operating expenses of the railroad being equal to its income and there being no expectation of a larger income in the future.

77. Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743 (purchase of rolling stock); Central Trust Co. *v.* Tappan, 6 N. Y. Suppl. 918; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

Where the receivership is about to end.— *In re* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 501, it was doubted whether the court had power to authorize a receiver thus to borrow money for the purchase of things necessary where there was income which might be used for that purpose, and it was held that when a receivership was nearly at an end it would be improper to make such an order; that the property should pass with as little delay as possible into possession and control of owners who would best be able to determine how it should be managed.

Labor and supplies furnished before receivership.— The courts have authorized the issue of such certificates in payment of claims for labor and supplies furnished within certain periods before the appointment of the receiver. Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38, 35 Atl. 926 (as to claims accruing within six months, the court holding that other creditors of this kind whose claims did not accrue within six months prior to the receivership had no standing to complain of the order); Farmers', etc., Nat. Bank *v.* Philadelphia, etc., R. Co., 14 Phila. (Pa.) 456, 7 Fed. 377 (application of net income to payment of such claims, in suit by mortgage bondholders); Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150. *Contra*, Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245, 8 N. E. 488 [*reversing* 40 Hun 80] (*followed* in Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456, which was not a railroad receivership and from which cases it appears that there is

sary to keep the road and its structures in a safe and proper condition to serve the public.[78] But the primary object of the receivership being to preserve the property, some courts have refused to exercise power for the purpose of completing the construction of an unfinished road or the making of permanent improvements not absolutely necessary to preserve the property;[79] while on the other hand, power of the court has been recognized and exercised for such purposes.[80] The reasons, however, for the authority to issue certificates for purposes beyond the immediate necessity of preserving and protecting the property have been held to be peculiar to railroad corporations, because they are quasi-public concerns, through which the public interests and convenience, as well as private ownership,

no distinction in this respect between railroad and other receiverships upon this question); Street *v.* Maryland Cent. R. Co., 59 Fed. 25 (where the receiver was appointed on the petition of a stock-holder and not of the bondholders, and no earnings had been diverted to pay interest on the bonds, and it was held that, although such claimants had an equity to be paid out of the net earnings for labor which actually kept the road a going concern, such earnings could not be anticipated). See also *infra*, V, B, 1, g, (II).

78. *New Jersey.*— Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

New York.— Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. 222, 60 N. Y. Suppl. 409; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106], rebuilding of bridges and approaches not only for the safe but for any running of trains over the road, after condemnation of the old bridges.

Pennsylvania.— *In re* Bucks County R. Co., 22 Pa. Co. Ct. 170, to place road-bed and equipment in good condition where it is for the interest of the bondholders and creditors.

Tennessee.— Crosby *v.* Morristown, etc., R. Co., (Ch. App. 1897) 42 S. W. 507.

United States.— London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

See 42 Cent. Dig. tit. "Receivers," § 206.

79. Meyer *v.* Johnston, 52 Ala. 237; Rochester Trust, etc., Co. *v.* Rochester, etc., R. Co., 29 Misc. (N. Y.) 222, 60 N. Y. Suppl. 409, holding that the court will not ordinarily authorize expenditures for the completion of structures and improvements unless it is morally certain that the railroad in consequence of such improvements will sell for a higher price, the judge delivering the opinion saying that he was inclined to the view that the court had no power to complete unfinished work or erect new bridges or undercrossings beyond what were necessary for the preservation of the property. And it has been held that the court is under no duty to build railroads even though all the parties assent thereto, and that there is no difference in principle between the building of a railroad by the issue of certificates and making extensive repairs and betterments approximating the original cost of construction. London Credit Co. *v.* Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23. But if no objection is made by the parties, the order is not assailable collaterally. Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237.

Jurisdiction itself has been denied to appoint a receiver of a railroad company, whose only asset is its franchise to build a railroad, and to authorize him to issue certificates for the purpose of building the railroad. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496.

80. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117 [*distinguished* in Bibber-White Co. *v.* White River Valley Electric R. Co., 115 Fed. 786, 53 C. C. A. 282, in that the security of prior lien-holders in that case was augmented instead of impaired by the expenditure permitted, and it was said that this was the only case brought to the court's attention in which the exercise of the power had been approved where it was not invoked at the instance of the prior lien-holders, or sanctioned subsequently by their acquiescence, or their conduct did not create an estoppel]; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150 (for repairs, construction, etc., and for purchase of rights of way); Kennedy *v.* St. Paul, etc., R. Co., 14 Fed. Cas. No. 7,706, 2 Dill. 448 (to prevent lapsing of valuable land grant and restricting the lien to particular parts of the property). So in Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506, the court authorized such certificates for the purpose of preserving the road which had become decayed and dilapidated, and to complete some inconsiderable portions of the road and put it in condition for the transaction of its business, in a suit brought by trustees of a mortgage for foreclosure.

But the power has been rarely exercised and, it is held, should not be exerted unless it can be done without ultimate loss to the existing lien-holders, and only with the consent or acquiescence of the parties in interest if possible (Bibber-White Co. *v.* White River Valley Electric R. Co., 115 Fed. 786, 53 C. C. A. 282 [*distinguishing* Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117, *supra*, this note], where only one third of the railroad was built at the time of the appointment of the receiver and its value did not exceed the amount of the liens against it, and it was held that the court was not warranted in authorizing the receiver to complete the road

are largely subserved;[81] and the rule has been applied in a number of cases that in administering the affairs of an ordinary private business the receiver has no authority and the court no power to direct him to incur debts in continuing the business and to make the same a paramount lien upon the *corpus* of the property superior to that of prior lien-holders without their consent; that in an appropriate action and with the interested parties present, it may be proper to carry on such business temporarily and to make such expenses a paramount lien, but the expenses must have been contracted for and must relate strictly to the preservation of the status of the property at the time of the receiver's appointment.[82]

c. Proceedings — (I) *In General.* It has been held that an order direct-

and to issue certificates to be a first lien over the objection of the lien-holders); and ought never to be used to enable railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances (Shaw *v.* Little Rock, etc., R. Co., 100 U. S. 605, 25 L. ed. 757, where it is said to be better to reorganize the enterprise on the basis of existing mortgages as stock or something which is equivalent, and by a new mortgage with a lien superior to the old raise the money which is required without asking the courts to engage in the business of railroad building).

Useless improvement over objection of bondholders.— In Street *v.* Maryland Cent. R. Co., 59 Fed. 25, it was held that a receiver of a narrow gauge railroad appointed on the petition of a comparatively small holder of stock would not be authorized to issue certificates to provide for new equipment, additional sidings, and permanent structures, in order to test its earning capacity if fully developed, all others interested opposing the issue and the first mortgage bondholders pressing for a foreclosure of their past due mortgage, it being apparent that the road could not cancel the certificates in any reasonable time and that the first measure of any new owners would be to change the road to the standard gauge and thus render the proposed improvements useless.

Order without prejudice to parties objecting.— Ordinarily, in the case of a non-going concern, it would not be proper to issue certificates to complete the road, but there is no abuse of discretion in permitting such issue on the request of a large percentage of the bondholders, the order being expressly without prejudice to those not consenting. Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38, 35 Atl. 926.

81. International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152, where it is pointed out that while the supreme court of the United States has not as yet expressly said this, it has so strongly observed the distinction in that relation between the two characters of corporations that there is left but little room for conjecture as to what its determination in a case calling for a decision in the premises would be, as indicated in Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472. See also the cases cited *supra*, note 80.

82. Lamar Land, etc., Co. *v.* Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210; Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212; Standley *v.* Hendrie, etc., Mfg. Co., 27 Colo. 331, 61 Pac. 600; International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59; Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456; Wiggins *v.* Neversink Light, etc., Co., 47 Misc. (N. Y.) 315, 93 N. Y. Suppl. 853; *In re* Cord, 7 Pa. Dist. 536; International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152; Baltimore Bldg., etc., Assoc. *v.* Alderson, 90 Fed. 142, 32 C. C. A. 542; Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62; Newton *v.* Eagle, etc., Mfg. Co., 76 Fed. 418 (where it was determined that the court would not order receiver's certificates to issue for the purpose of raising money to pay interest on the bonds of the company, and thus displace existing liens); Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201 (wherein it was sought to issue receiver's certificates for the purpose of raising funds whereby to carry out certain contracts of sale of real property with purchasers); Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 68 Fed. 623; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603.

The duty of the court is rather to preserve liens than to displace them by subsequent encumbrances. Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 68 Fed. 623; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603.

Unsecured claims against corporation.— The court cannot displace existing liens in such cases by issuing certificates in payment of unsecured claims against the corporation. Hooper *v.* Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262; Laughlin *v.* U. S. Rolling-Stock Co., 64 Fed. 25. See also *infra*, V, B, 1, g, (II).

Distinction not observed — *In general.*— The distinction between railroad and other receiverships seems not always strictly observed. See Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431, where in a receivership of a mineral property of an insolvent mining company the court applies the rule in Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895, as to railroads, in permitting the receiver to issue certificates and declaring them to be a first lien on the company's property, although it appeared that the purpose of the

ing the issue of certificates which are to be a first lien on the property cannot be made properly except upon an investigation and hearing of an application [83] showing sufficient facts to advise the court of the propriety of such issue.[84]

(II) *Notice or Opportunity to Be Heard.* The general rule is that such certificates cannot be issued so as to affect the rights of interested parties except upon notice to them or an opportunity to be heard,[85] unless they consent.[86] It is not necessary, however, that formal notice should be shown if it appears that its equivalent has been enjoyed by the contesting parties,[87] and although parties

expenditure was to perfect title to a railroad by condemnation proceedings as well as to repair the road-bed, where the mineral property had no market value independent of the railroad which was constructed and used by the company for the transportation of its ore. So in Jerome *v.* McCarter, 94 U. S. 734, 24 L. ed. 136 [*distinguished* in Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 68 Fed. 623, from the rule in the text in that the necessity was so imperative that all the lien creditors made no objection to the issue of the certificates and that the question of their validity was raised by the assignee in bankruptcy of the insolvent company who had no interest in the property other than what should remain after satisfying all the lien debts including the receivers' certificates], certificates were issued for the purpose of completing a ship canal, the period for finishing the canal being about to expire, and under the act of congress the lands would have reverted to the United States in the event that the canal should not be finished before the expiration of such time. See also Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S Ct. 650, 36 L. ed. 352.

Other public service corporations have been recognized to be within the rule of greater latitude applied to railroad receiverships, as water and lighting companies. Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858. See also Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 339, 64 Pac. 212.

83. *Ex p.* Mitchell, 12 S. C. 83.

84. Meyer *v.* Johnston, 53 Ala. 237 (where it is held that the court should not authorize the issue of receivers' certificates of indebtedness, unless a detailed statement is first made out specifying the items of the sum needed and the purposes to which it is to be applied, supported by clear proof of the correctness thereof and of the necessity for raising the money); *In re* Cort, 7 Pa. Dist. 536 (holding that a petition showing that the proceeds of the loan were proposed to be used for "the payment of watchman, insurance, which is about to expire, and other incidental expenses," did not sufficiently advise the court of the facts to enable it to judge of the propriety thereof; that the receiver was but the hand — not the head — of the court, and that no agent would consider that he had sufficiently advised his principal about any business proposition, if he had only attempted to do so, by the use of the vague and indefinite terms here employed); Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

Property improperly purchased returned to seller.— Where the proof failed to show that rolling stock and a lot for depot grounds purchased by the receiver were properly purchased, and that the certificates to pay therefor should have been issued, such property should not be treated as assets of the company, but the proceeds of such rolling stock should be turned over to the parties furnishing the same, and the proceeds of said lot to the vendor, such property having been sold by order of the chancellor. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507.

85. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237, holding that the proper mode of objecting to the order is by application to vacate and set it aside.

New York.—Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456.

Pennsylvania.—*In re* Cort, 7 Pa. Dist. 536.

South Carolina.— State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380.

Virginia.— Osborne *v.* Big Stone Gap Colliery Co., 96 Va. 58, 30 S. E. 446, as to parties whose liens for supplies had been reported and confirmed and who also had a lien by virtue of a deed of trust.

United States.—Bibber-White Co. *v.* White River Valley Electric R. Co., 115 Fed. 786, 53 C. C. A. 282.

See 42 Cent. Dig. tit. "Receivers," § 209.

Jurisdiction does not depend upon notice to general creditors, so that the validity of certificates for loans issued by a receiver pursuant to the order of the court cannot be affected by the fact that the general creditors were not notified of the application for the issue, or that the court was erroneously led to suppose that they acquiesced therein. National Banking Assoc. *v.* American Ship Bldg. Co., 3 Pa. Co. Ct. 133, 19 Wkly. Notes Cas. 471 [*affirmed* in 9 Pa. Cas. 284, 12 Atl. 271, where the precise question appears not to have been raised or determined]. *Compare* Laughlin *v.* U. S. Rolling-Stock Co., 64 Fed. 25, *infra*, IV, G, 4, note 14.

Objection by parties having notice upon the ground that mortgagees were not parties cannot be made for the first time on appeal. State *v.* Port Royal, etc., R. Co., 45 S. C. 413, 23 S. E. 363.

86. Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895. See also *infra*, IV, G, 3, g.

87. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507 (holding that a recital in the order that the parties consented to a hearing by a special judge was sufficient to show notice, as was also the testimony of the attorney for the parties

in interest not before the court [88] cannot be concluded by the order, if they are subsequently brought in or have an opportunity to be heard, they become entitled to contest the necessity, validity, effect, and amount of the certificates as if the questions were then for the first time presented, and the court will then enforce the priority of the certificates or protect the prior liens according as the original order appears to be proper or otherwise.[89]

3. Issue, Disposition, and Validity — a. Authority of Receiver to Issue. Without an order of the court authorizing it, a receiver cannot issue certificates which will be binding upon the trust estate.[90]

b. Negotiability in General. Receivers' certificates are not commercial paper, good in the hands of *bona fide* holders irrespective of what vice or infirmity might attend their original issue. They are good for the amount of money actually paid for or loaned on them to the receivers, in accordance with the terms of the order of the court, but they have not the quality of negotiable instruments by the law merchant, and are subject to the same defenses in the hands of the holder, notwithstanding he may have in good faith paid full value therefor, as could be made against the original payee,[91] although the parties may become bound

that he had actual knowledge of the entry of the order); Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

88. Snow *v.* Winslow, 54 Iowa 200, 6 N. W. 191 (mechanic's lienor not a party when order made authorizing certificates for extending a railroad); Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897.

Fraudulent suit set aside.— Where proceedings by some of the bondholders of a railroad were annulled and set aside at the suit of other bondholders who were not parties to the first proceedings, upon the ground that such proceedings were fraudulent, it was held that the claims of the bondholders alone who were not parties to the first proceeding took priority over certificates issued in such proceedings and it was ordered that the net amount realized to the bondholders from the sale of the property should be paid to them, except that the part coming to the bondholders in the fraudulent proceedings should be first applied to the certificates issued therein. Stevens *v.* Boston Cent. Nat. Bank, 144 N. Y. 50, 39 N. E. 68.

Another court may determine priorities.— In Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897, it is held that where a court which has appointed a receiver for a corporation, and authorized him to issue certificates of indebtedness, attempts to make such certificates liens upon the property of the corporation superior to the liens of other creditors who are not parties to the suit, such court has not exclusive jurisdiction to determine the question of such priorities, but that another court, in a suit by other creditors of the corporation, to which holders of such certificates are made parties, may determine the priority of lien as between the parties before it.

89. Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212; International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 437, 6 S. Ct. 809, 29 L. ed. 963; Royal Trust Co. *v.* Washburn, etc., R. Co., 120 Fed. 11, 57 C. C. A. 31; Farmers' L. & T. Co. *v.* Centralia, etc., R. Co., 96 Fed. 636, 37 C. C. A. 528. See also Meyer *v.* Johnston, 53 Ala. 237.

Presumption that the necessary parties were present will be indulged when the record is attacked collaterally. Illinois Trust, etc., Bank *v.* Pacific R. Co., 115 Cal. 285, 47 Pac. 60.

90. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367; Wesson *v.* Chapman, 77 Hun (N. Y.) 144, 28 N. Y. Suppl. 431; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513, general authority as receiver not authority to issue certificates.

Where the appointment of the receiver was annulled and set aside and no order authorizing the issue of certificates by him was shown, it was held that an insolvent estate was not liable for money loaned on receiver's certificates to one acting as its receiver. Ludington *v.* Thompson, 4 N. Y. App. Div. 117, 38 N. Y. Suppl. 768 [*affirmed* in 153 N. Y. 499, 47 N. E. 903].

Execution of notes see Peoria Steam Marble Works *v.* Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. Rep. 296, *supra*, IV, F, 6, e, (III), (C), note 23.

91. *Illinois.*— Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144 (holding that such certificates bind no one personally, nor can any action be maintained on them against any one; only the fund or property under the control of the court is bound and that only when it is equitable to charge such fund with the payment of the money evidenced); Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

Indiana.— McCurdy *v.* Bowes, 88 Ind. 583, holding further that the assignor of such certificate, in form a mere evidence of indebtedness to be paid out of a particular fund, is not liable as assignor of a non-negotiable promissory note, both because the instrument is payable out of a specific fund and does not do more than evidence a claim

to innocent holders of negotiable obligations issued by the receiver with their acquiescence and consent.[92]

c. Purchasers Charged With Notice. The purchaser or holder of a receiver's certificate is put upon notice of the authority of the receiver to issue it and that by final action of the court the validity or security of the certificate may be prejudicially affected.[93] He is also charged with notice of the rank of the certificate as a preferred claim, according to the terms of the order authorizing the issue.[94] He takes the risk of the final action of the court in regard to the loans where the order is made without notice and an opportunity to interested persons to be heard;[95] but if the objection is not jurisdictional it is held that the purchaser need not look beyond the order authorizing the issue,[96] and in such case it has been said that when the court impresses upon the certificate a preferential lien good faith requires that its promise should be redeemed, unless perhaps the issue was actually fraudulent.[97]

d. Duty to See to Application of Proceeds. It is not incumbent upon the holders of receivers' certificates issued in pursuance of the order of the court to show that the proceeds of the sale have been properly applied by the receiver.[98]

e. Consideration and Purpose. In order to hold the body of the trust liable for receiver's certificates, the proceeds must have come into the hands, custody, or control of the receiver, otherwise the certificates are invalid and unenforceable.[99] And so a receiver cannot issue valid certificates except in the manner

thereon, and because there is no promise of the assignor to pay; and that such assignor is not bound as guarantor, for the law annexes no such incident to the assignment.

Iowa.— Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518.

Tennessee.— Crosby *v.* Morrison, etc., R. Co., (Ch. App. 1897) 42 S. W. 507.

United States.— Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Stanton *v.* Alabama, etc., R. Co., 31 Fed. 585; Boston Cent. Nat. Bank *v.* Hazard, 30 Fed. 484; Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513.

See 42 Cent. Dig. tit. "Receivers." § 215.

92. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228, *infra*, note 12.

93. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144 (holders charged with notice of the authority under which the certificates were issued and for what purpose, and the printed order on the back is notice that the certificate was made payable to bearer contrary to the order); Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518 (certificates reciting upon their face that they are issued under an order of court); Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3 (where it is held that the holder of a receiver's certificates is put upon inquiry as to all that has been done in the litigation in which the certificates were authorized, and is charged with notice of all subsequent proceedings therein).

94. Lewis *v.* Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 [*affirming* 27 Pittsb. Leg. J. N. S. 395].

95. Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456; Crosby *v.* Morrison, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963, which cases refer to the rule as to persons not before the court when the order is entered. See also Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 44 Fed. 526, *infra*, note 99.

96. National Banking Assoc. *v.* American Ship Bldg. Co., 3 Pa. Co. Ct. 133, 19 Wkly. Notes Cas. 471 [*affirmed* in 9 Pa. Cas. 284, 12 Atl. 271].

97. Kneeland *v.* Luce, 141 U. S. 491, 12 S. Ct. 32, 35 L. ed. 83.

98. Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237; Wesson *v.* Chapman, 77 Hun (N. Y.) 144, 28 N. Y. Suppl. 431; National Banking Assoc. *v.* American Ship Bldg. Co., 3 Pa. Co. Ct. 133, 19 Wkly. Notes Cas. 471; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

But where the certificates are unauthorized, it must be shown that the proceeds were applied for the benefit of the trust where the holder comes in to claim equitable relief. Wesson *v.* Chapman, 77 Hun (N. Y.) 144, 28 N. Y. Suppl. 431.

99. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144 (where certificates were issued to one to whom the trust property equitably owed nothing and the rule was enforced even against an innocent holder); Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518 (holding that under an order authorizing certificates for money borrowed for materials furnished, labor performed, or on account of contracts made by the receiver in the construction of the road, the receiver had no authority to issue certificates for payment of material until it had been furnished and that certificates for material contracted for but never delivered are void); Alabama Iron, etc., Co. *v.* Anniston L. & T. Co., 57 Fed. 25, 6 C. C. A. 242.

and for the very purposes for which the court has sanctioned the issue.[1] The court may, however, authorize a lump sum to be expended without designating particular amounts for the particular purposes for which the expenditure is permitted.[2] Certificates issued in excess of the amount authorized by the court are invalid and unenforceable,[3] although if the proceeds of such certificates actually go into the hands of the receiver and are applied by him for the benefit of the estate, equity requires that the payment of such amounts should be allowed.[4]

f. Value or Price. Under an authority to issue certificates bearing a fixed rate of interest, the receiver cannot sell them at less than par.[5] And if he negotiates them at a discount which has not been authorized by the court, the holder, although he be a purchaser for value without notice, will be protected only to

Negotiation by agent.— Where a certificate was made payable to the person, or his order, to whom the receiver delivered it for sale and negotiation, but such person never accounted for the certificate or its proceeds, it was held that the receiver could not delegate his authority to an agent to negotiate the certificate; that the person to whom it was so delivered must be regarded therefore as the payee; that the rule stated in the text was violated; that another person buying the certificate dealt with such payee as owner, and that the defense as against such payee was available against the subsequent purchaser and indorsee. Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513. But where after an order, entered with the consent of all the parties interested, authorizing the issue of certificates to be a first lien on the property, a decree ordering a sale of the property subject to such prior lien was modified on the *ex parte* application of the receiver in which he set up that certain of the certificates were negotiated without his authority and the proceeds never came to his hands, the modifying decree excluding such certificates from the operation of the lien but giving the holders leave to intervene and present the question of their validity, it was held that by reciting the entry of the modified order in the petition of intervention the holders of the certificates did not admit the statements in the receiver's *ex parte* application as to their invalidity. Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 44 Fed. 526. And later, on the merits of the petition in the last case, it was held that where such sale was made by the president of the bank in which the receiver kept his accounts, after authority to the president to make the sale had been revoked by the receiver, and the amount was credited to the receiver on the books of the bank and on the receiver's pass-book, and after learning of the facts he did not repudiate the same but drew checks against his deposits and reported the transactions to the court which in the foreclosure decree recognized the validity of the certificates, the proceeds came to the hands of the receiver and the court would recognize the estoppel of its agent in favor of the innocent purchasers of the certificates and as against the purchaser at the foreclosure sale. Alabama Iron, etc., Co. *v.* Anniston L. & T. Co., 57 Fed. 25, 6 C. C. A. 242.

Issuance after judgment against accepter of draft.— In Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140, the receiver drew a draft for the first payment for building a bridge, payable to the contractor, which was accepted, and the contractor having indorsed the draft, and a bank having discounted it and afterward recovered judgment thereon against the accepter, it was held that a subsequent order authorizing the issue of certificates to pay the draft was not void on the ground that the draft had become merged in the judgment, the judgment not having been paid.

1. Turner *v.* Peoria, etc., R. Co., 95 Ill. 134, 35 Am. Rep. 144; Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367; Montreal Bank *v.* Chicago, etc., R. Co., 48 Iowa 518; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372; Stanton *v.* Alabama, etc., R. Co., 31 Fed. 585.

Bonds or other negotiable instruments cannot be issued under a mere authority to the receiver to issue certificates, so as to make such bonds or other instruments good in the hands of *bona fide* holders irrespective of any infirmity attending their original creation. The paper issued must be governed by the authority under which it is issued and not by the form the receivers may choose to give it. Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513; Stanton *v.* Alabama, etc., R. Co., 22 Fed. Cas. No. 13,296, 2 Woods 506.

2. Bucks County R. Co.'s Case, 22 Pa. Co. Ct. 357, holding that estimates presented in the receiver's petition and in the court's order were referred to only for the purpose of approximating the total amount. See also Coe *v.* New Jersey Midland R. Co., 27 N. J. Eq. 37, holding that an application by receivers for authority to issue certificates of indebtedness covering certain expenses and an order of the court thereon accordingly do not bind the receiver or the trust fund to pay any particular items of such expenses, the propriety of whose payment was not before the court.

3. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367.

4. Newbold *v.* Peoria, etc., R. Co., 5 Ill. App. 367; Wesson *v.* Chapman, 77 Hun (N. Y.) 144, 28 N. Y. Suppl. 431; Bucks County R. Co.'s Case, 22 Pa. Co. Ct. 357.

5. Union Trust Co. *v.* Chicago, etc., R. Co., 7 Fed. 513.

the amount actually advanced to the receiver.[6] But if certificates are sold within the limit of discount fixed by the order of the court, they should be paid according to their tenor.[7]

g. Objection and Estoppel to Object. If one who is before the court is dissatisfied with the classification, rank, and priority of receiver's certificates as fixed by the decree authorizing their issue remains passive and fails to contest their validity until the final decree of distribution, he will not be heard then to raise such objections.[8] If one is not a party at the time the order is made, but becomes a party subsequently, he should not then assume a position inconsistent with his acquiescence in the order authorizing the issue of the certificates.[9] So it has been held that if one who is interested, although he is not a party, has actual knowledge of the order, he ought to intervene before the certificates are issued, if he would object to its propriety as against innocent third persons.[10] One who consents to the issue of receiver's certificates may thereby subordinate his lien to the payment of the certificates,[11] and where the order is entered by agreement, making the receiver's certificates a preferred claim, and one relying upon such order and agreement surrenders valuable rights to which he cannot be restored,

6. Swann *v.* Clark, 110 U. S. 602, 4 S. Ct. 241, 28 L. ed. 256 (under an order providing that the certificates should not be disposed of at less than a fixed per cent of their face value); Boston Cent. Bank *v.* Hazard, 30 Fed. 484.

7. Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

Usury.—And it has been held that the chancellor has no power to disregard the laws against usury by authorizing a receiver to borrow money by selling interest-bearing certificates of indebtedness at less than their face value. Meyer *v.* Johnston, 53 Ala. 237.

8. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150. See also Postal Tel. Cable Co. *v.* Vane, 80 Fed. 961, 26 C. C. A. 342, requiring objection at time the order is entered. So where in a suit by a second mortgagee to foreclose a railroad mortgage, to which the first mortgagee is made a party, a receiver is authorized from time to time to borrow money on certificates for the purchase of rolling stock and for the making of repairs, etc., and the first mortgage bondholders, more than a year after the appointment of the receiver, filed a cross bill claiming that the rolling stock so purchased, etc., shall be subject to the lien of the first mortgage under a provision thereof covering after-acquired property, but pending the proceedings made no specific objections to repeated expenses and obligations incurred by the receiver as above mentioned, they will not be heard upon final decree to insist that the receiver's certificates shall be subordinate to the first mortgage. Miltenberger *v.* Logansport, etc, R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117.

9. Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895, where the appellant did not seek to be made a party to the suit until several months after the order was made and when he became a party and filed his cross bill and answer, he prayed that the court would continue to hold the property by its receivers and would continue to direct and control them in the administration thereof without suggesting any objection to the terms of the order, etc.

Failure to object to a later issue of certificates when the bondholders are before the court does not estop them to object to a prior issue before they were in court. Belknap Sav. Bank *v.* Lamar Land, etc., Co., 28 Colo. 326, 64 Pac. 212.

10. Humphreys *v.* Allen, 101 Ill. 490, where a stock-holder and director, being a bondholder, knew as director of the company that the property of the company had been placed in the hands of a receiver; that the order for the issue of certificates, made a first lien upon the property, had been entered of record; that the proceeds of a part of the certificates were to be applied in releasing from a chattel mortgage property upon which the bondholders claimed to have a lien and in which he had an interest as a stock-holder, and it was held that he could not lie by and permit others in good faith to invest their money in the certificates, the proceeds to be applied for his benefit in discharging the liabilities of the company for services and supplies and for a debt for which the rolling stock of the company was tied up; that purchasers of the bonds from him with knowledge that they had become overdue and under circumstances showing that they were advised of the condition of the litigation, occupy no better position. It would appear also that the trustees in the mortgages were parties to the proceeding and consented to the order.

But the fact that trustees in a mortgage knew that the receiver had been appointed and did not intervene to prevent the issue of certificates, the trustees not being parties to the action and having no notice of the application for the order or of the issuing of the certificates until the advances were made, is not ground for alleging an estoppel against the bondholders. Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456.

11. Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62.

the parties represented on the entry of the order are concluded upon the question of the propriety of the issue for the particular claim.[12]

4. STANDING AS TO OTHER DEBTS OR CERTIFICATES.[13] Receivers' certificates, being merely evidences of indebtedness, can have no higher character than the debts of which they are the representatives.[14] Therefore if two sets of certificates are made liens prior to a mortgage it is held that the set which represents debts incurred by the receiver in his administration should be paid before those repre-

12. Central Trust Co. *v.* Seasongood, 130 U. S. 482, 9 S. Ct. 575, 32 L. ed. 985.

The trustee of bondholders sufficiently represents the bondholders, and if such trustee has notice or consents it is equivalent to notice to the bondholders, and the propriety of the particular issue will not thereafter be questioned at the instance of parties so represented (Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237; Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106]; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895), at least so far as concerns the power of the court to act in making the order, and so far as the interests of third persons, acting upon the faith of it, might be affected (Humphreys *v.* Allen, 101 Ill. 490; Kneeland *v.* Luce, 141 U. S. 491, 12 S. Ct. 32, 35 L. ed. 830; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895). See also Kent *v.* Lake Superior Ship Canal, etc., Co., 144 U. S. 75, 12 S. Ct. 650, 36 L. ed. 352; Central Trust Co. *v.* Seasongood, 130 U. S. 482, 9 S. Ct. 575, 32 L. ed. 985. But conceding without deciding the correctness of this rule, its application has been confined to a suit brought by the trustee to foreclose the mortgage, or to a case in which he is brought in as a party defending the validity of bonds or protecting the interests of his beneficiaries, or when his action is within the scope of the power as defined by the instrument creating the trust relation; and has been denied where the action is not for the purpose of foreclosing the mortgage or protecting the interests of the bondholders, but is merely for the purpose of conserving the property so that a simple contract creditor may finally obtain satisfaction out of a surplus. International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59. And no estoppel can arise where the trustee and bondholders, on every occasion when they were called upon to act, protested against anything that would give preference over them to persons dealing with the receiver. International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59.

Assent to issue of negotiable obligations.— Where receivers issue negotiable obligations with the knowledge and consent of all the parties interested, such parties are estopped to deny that they are the obligations of the receivers, and as such entitled to priority of payment, as against *bona fide* holders, and even if the necessity for the receivers is terminated and those acting as such are not strict receivers, it is immaterial, upon the principle that as between two innocent parties he whose acts have occasioned the confidence and loss must suffer the loss; and a committee elected by mortgage bondholders to represent them in the management and operation of the property with the receivers may bind their principals in this respect. Langdon *v.* Vermont, etc., R. Co., 53 Vt. 228.

Committee appointed to protect legal rights.— But a committee appointed by the bondholders of a railroad company, with power to act for them and in their stead in matters essential to the enforcement and protection of their legal rights in the premises, is held to have no authority to consent in their behalf to the issuance of receiver's certificates, to constitute a lien prior to the mortgage on the property of the company, and the proceeds of which are to be used in the payment of claims which are not entitled to preference over the bonds, the bondholders not being represented before the court at the time. Farmers' L. & T. Co. *v.* Centralia, etc., R. Co., 96 Fed. 636, 37 C. C. A. 528, 100 Fed. 11, 40 C. C. A. 248.

13. Priorities generally see *infra*, V, B.

14. Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372.

Prior debts.— Thus receiver's certificates, authorized by an order made without notice to creditors, and issued to creditors of the corporation for debts arising prior to the receivership, give their holders no preference over other creditors. Laughlin *v.* U. S. Rolling-Stock Co., 64 Fed. 25. So certificates issued to pay pay-roll indebtedness for services rendered prior to the appointment of the receiver, in the absence of a showing that the payment of such antecedent indebtedness was necessary for the preservation of the property by the receiver and the operation of the road, are subordinate to a traffic lien of a connecting road which is expressly given by statute. International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097.

Statutory lien of laborers.— In Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15, it was held that the claims of laborers employed by the receiver of an insolvent corporation are a lien prior to that of a certificate under the statute in that state as well as because the certificate was expressly made subject to expenses.

Statutory lien on earnings.— Certificates issued to raise funds to pay off labor liens existing against a railroad, to purchase ties, for repairs, and to procure car wheels necessary to profitable conduct of the business were held not to be deprived of their priority as first liens by a statute governing the classification of claims against funds in the hands of receivers which referred only to the earn-

senting an indebtedness of the company before the receivership.[15] A subsequent issue of certificates may be put upon the same footing as a prior issue in respect of priority over existing liens,[16] or the holder of certificates may by agreement with a purchaser of a subsequent issue subordinate his certificates to the priority of the later certificates, which, however, subjects him to no liability other than to forego payment of his certificates out of the proceeds until subsequent certificates have been paid;[17] but a subsequent issue under an order which does not provide for equal rank with prior certificates does not stand on the same footing with such prior certificates which were given a preference.[18] Creditors of a receiver who have furnished supplies, etc., stand upon an equal footing with other creditors to whom certificates have been issued if the order authorizing the issue of certificates does not make them a prior lien;[19] but subsequent creditors under a contract made with notice of previous certificates issued under an order making them a prior lien are not on a footing of equality with the holders of such certificates.[20]

5. Enforcement. The court has inherent power to place itself in a position which will enable it to enforce its order with respect to the receiver's indebtedness,[21] and the final payment of certificates and determination of the amounts

ings coming into the hands of receivers, and gave no lien on other property. Kampmann *v.* Sullivan, 26 Tex. Civ. App. 308, 63 S. W. 172.

15. Bank of Commerce *v.* Central Coal, etc., Co., 115 Fed. 878, 53 C. C. A. 334.

16. International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097, holding that an order which authorizes an additional issue "of like character as" a previous issue, which previous issue was secured by a lien upon the property, requires that the subsequent issue should be secured by a like lien. See also Central Trust Co. *v.* Seasongood, 130 U. S. 482, 9 S. Ct. 575, 32 L. ed. 985, for order reserving right to issue other certificates of equal rank.

17. Fletcher *v.* Waring, 137 Ind. 159, 36 N. E. 896, where it was further held that if the owner of certificates for parts of a right of way sold to a railroad company also owned part of the right of way which had not been sold to the railroad agreed to waive the first lien for the right of way and that his claim should be postponed to certificates to be sold by the receiver, the parts of the right of way not sold to the railroad were not included in the agreement, but where on foreclosure sale the right of way which had been sold to the railroad company was paid for, he was liable to the extent of the money so received to the holder of the last certificates for the amount not realized on them.

18. Lewis *v.* Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 [*affirming* 27 Pittsb. Leg. J. N. S. 395].

Waiver of lien by substituting certificates. — Where certificates, which are by the terms of the order a lien upon the property, are taken up by a subsequent receiver and other certificates issued in their place under an order which does not make the latter a prior lien, the persons so taking them are not entitled to a preference given under the first order. Lewis *v.* Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 [*affirming* 27 Pittsb. Leg. J. N. S. 395].

Certificates subject to costs and expenses. — Where a second certificate in point of time was made a prior lien to all claims except that of a prior certificate which was for cash loaned to the receiver, a third certificate which is made a lien prior to all others except the first certificate and the costs and expenses of the trust, and without reciting the second certificate, is junior to such second certificate. Nesbit *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

19. Lewis *v.* Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 [*affirming* 27 Pittsb. Leg. J. N. S. 395].

20. Kampmann *v.* Sullivan, 26 Tex. Civ. App. 308, 63 S. W. 173.

21. La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

Action to establish lien. — Sometimes a separate action is brought to establish and foreclose the lien of receiver's certificates. Hilton Bridge Constr. Co. *v.* Foster, 26 Misc. (N. Y.) 338, 57 N. Y. Suppl. 140 [*affirmed* in 42 N. Y. App. Div. 630, 59 N. Y. Suppl. 1106], where it is held that on demurrer to the complaint in such action the court will not determine whether the lien of the certificates is paramount to that of a prior mortgage, the question being for the trial or when there are proceeds to distribute; that under the code provisions declaring that persons united in interest must be joined as parties, except "where the question is one of a common or general interest of many persons," one of three holders of receiver's certificates may sue for all to have the certificates declared a first lien; and that plaintiff, suing for himself and others, to have receiver's certificates declared a first lien, need not allege that he had a common interest with the other holders, where facts are alleged from which the court may draw that conclusion.

Upon dismissal of a collusive suit, it was held that the court might, as a preliminary to the order of dismissal, protect receiver's

due thereon are ordinarily matters for the court authorizing their issue.[22] The court may enforce the lien of certificates either by directly ordering the prior payment of the loans out of the proceeds of the sale of the property, or by enforcing a continuing lien on the property through a provision in its decree of sale that the purchaser of the property shall take it subject to such liens.[23] If the latter method is followed, then a lien is established by contract with the purchaser in favor of the lender,[24] which, appearing in the chain of title by which the purchaser holds, is attached to the property in the hands of all subsequent grantees of the purchaser, and may of course be enforced by the lender in an independent action.[25] But the court may order the sale of the property free of all liens, in which case it is held that the purchaser takes a title freed from the burden, as well of receiver's loans as of mortgage debts, and that the pledge of the court that the receiver's debts shall constitute a paramount lien can only be fulfilled

certificates by directing a sale of sufficient property in the receiver's hands to pay them. Electrical Supply Co. *v.* Put-In-Bay Waterworks, etc., Co., 84 Fed. 740. See also Stevens *v.* Boston Cent. Nat. Bank, 144 N. Y. 50, 39 N. E. 68, *supra*, note 88.

22. Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62.

23. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3.

Certificates not payable out of any particular fund by the order authorizing their issue are entitled to full payment out of the entire proceeds of sale; such payment is not restricted to any particular fund notwithstanding the petition of the receiver for authority to issue the certificates asked for authority to issue certificates redeemable out of a particular fund, and notwithstanding any such limitation apparent on the face of the certificates, since the purchaser thereof is bound to look only to the order of the court and that need not be confined to the precise prayer of the petition. Neafie's Appeal, 9 Pa. Cas. 284, 12 Atl. 271 [*affirming* 3 Pa. Co. Ct. 133, 19 Wkly. Notes Cas. 471].

Provision for assumption by purchaser.—A provision that if, in case of a sale of the property by judicial proceedings or otherwise, the sum realized should not be sufficient to pay the certificates in full, the purchaser should assume them, does not mean that a deficiency on a sale to pay the certificates should be assumed by the purchaser, but refers to a sale on foreclosure of the mortgage, over which the certificates had a priority. Wesson *v.* Chapman, 76 Hun (N. Y.) 592, 28 N. Y. Suppl. 192.

Form of intervention to enforce lien after sale under a decree ordering sale subject to the liens see Central Trust Co. *v.* Sheffield, etc., Coal., etc., Co., 44 Fed. 526.

Objection by purchaser at receiver's sale.—Ordinarily purchasers of property under a decree for sale subject to the payment of the liens of receiver's certificates are concluded by the decree authorizing the sale and estopped from questioning the validity of such certificates. Swann *v.* Clark, 110 U. S. 602, 4 S. Ct. 241, 28 L. ed. 256; Swann *v.* Fabyan, 110 U. S. 590, 4 S. Ct. 235, 28 L. ed. 252; Alabama Iron, etc., Co. *v.* Anniston L. & T. Co., 57 Fed. 25; 6 C. C. A. 242; Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 44 Fed. 526 (where all the parties consented to the issue of the certificates); Central Nat. Bank *v.* Hazard, 30 Fed. 484. *Compare* Stanton *v.* Alabama, etc., R. Co., 31 Fed. 585.

Defenses which are available to bondholders, but such only, are available to a purchaser at the mortgage foreclosure sale of corporate property which was made subject to the claims, if any, on receiver's certificates issued by a receiver appointed in sequestration proceedings against the corporation. Rochester Trust, etc., Co. *v.* Oneonta, etc., R. Co., 122 N. Y. App. Div. 193, 107 N. Y. Suppl. 237.

24. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3.

Second sale as redemption.—Where, by reason of the failure of the purchasers of property at the foreclosure sale to comply with an express condition of the sale that they should pay certain liens, the property is sold a second time, to satisfy a superior lien, and comes back into the hands of the original purchasers, equity will consider their reacquisition as an equitable redemption for the benefit of the holders of outstanding liens, and enforce such liens upon the property. Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459.

Form of order see Swann *v.* Fabyan, 110 U. S. 590, 593, 4 S. Ct. 235, 28 L. ed. 252.

25. Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459; Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3 [*citing* Swann *v.* Clark, 110 U. S. 602, 4 S. Ct. 241, 28 L. ed. 256].

Foreclosure of liens by different holders.—Where the decree for sale provided that the purchaser might contest certain of the certificates, and in subsequent proceedings by the holders thereof, to which the other certificate holders were not made parties or represented, the contested certificates were declared valid, and the property ordered sold to satisfy them, it was held that the lien of the other certificate holders was not affected by the sale, and that the fact that the holder of uncontested certificates entered into an agreement with the holder of the contested certificates, who became the purchaser at the sale to enforce his lien, that the sale should not in any way prejudice his rights, did not make him a party to the proceeding, and the sale did not extinguish his lien as to the property and trans-

by the court in its distribution of the proceeds of sale;[26] and where the sale is not expressly made subject to receiver's debts, holders of such claims must depend for their ultimate rank and payment upon the final decree made in the cause wherein they were issued; having obtained the claims *pendente lite*, the certificate holders are privies, and affected by such subsequent decrees.[27]

H. Sale of Property[28] **— 1. Nature of Receiver's Sale.** A receiver's sale made in pursuance of an order of court is a judicial sale.[29] So is a sale by a receiver without previous order, but which is reported to and confirmed by the court.[30] And when directed as a preliminary measure to preserve the estate, it has no other effect than to bring the proceeds of sale into court instead of the property.[31]

2. Power and Authority to Sell[32] **— a. In General.** The sale and disposition of property in the hands of a receiver is generally under the control and super-

fer it to the proceeds. Sheffield, etc., Coal, etc., Co. *v.* Newman, 77 Fed. 787, 23 C. C. A. 459.

Liability of parties and property for costs and expenses generally see *infra*, V, C.

26. Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3. So in Matter of Muller, 21 N. Y. App. Div. 629, 47 N. Y. Suppl. 277, it is held that an order authorizing a receiver to borrow money on certificates and providing that the money so borrowed should "be a first and prior lien upon the property and assets" remains in force after sale under an order for sale free from all liens, and the sums so borrowed should be paid out of the proceeds of the sale.

Sale generally see *infra*, IV, H, 6, c, (VII); IV, H, 12, c, (II), (C).

27. Carlisle *v.* Mercantile Trust Co., 109 Fed. 177, 48 C. C. A. 275 (holding that certificates under an order providing that they should be paid out of the earnings of the receivership "or out of the proceeds of the sale of such property when the same is sold, after the payment of the costs," do not constitute a lien on the property after sale, in the hands of the purchaser, but are a charge only upon the proceeds of the sale); Gordon *v.* Newman, 62 Fed. 686, 10 C. C. A. 587 (where a decree for foreclosure of railroad mortgages provided for sales subject to any liens prior to the mortgage which had not been ascertained and adjudicated and subject to receiver's certificates previously authorized, declaring such certificates a prior lien as between them and the mortgagees, and after sale a mechanic's lien was established by decree on an intervention and its enforcement directed by sale as a paramount lien in default of payment, and it was held that such enforcement could not be restrained by the certificate holders claiming priority over the mechanic's lien since they were bound by the decree and an injunction for such purpose would in effect stay execution of the final decree); Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3 (where the certificate holders made no demand for three years and until after the foreclosure sale had been confirmed and the debts of the receiver judicially ascertained, the certificates not being included, and a final decree of confirmation and distribution had been made and it was held that such holders were guilty of gross laches and were estopped by the decree from seeking payment against the purchasers or distributees). But a provision of a decree foreclosing a railroad mortgage directing that the fund arising from sale should be applied "to the payment of all interventions or other claims heretofore or hereafter to be allowed . . . as superior to the lien of the bonds . . . if the fund realized be not sufficient to pay the same, then to the payment of the same *pro rata*" was held not to apply to receiver's certificates issued under the order of the court in payment of an indebtedness which it had itself contracted in the operation of the property, but should be construed as referring only to claims against the mortgagor, and does not put it out of the power of the court to thereafter deal with the question of the priority of such certificates. Bank of Commerce *v.* Central Coal, etc., Co., 115 Fed. 878, 53 C. C. A. 334.

28. **Effect of covenant against assigning lease** see LANDLORD AND TENANT, 24 Cyc. 963 note 79.

Judicial sales generally see JUDICIAL SALES, 24 Cyc. 1.

Leases see *supra*, IV, F, 6, e, (II), (D), (6).

Sales in foreclosure proceedings: *Generally* see MORTGAGES, 27 Cyc. 1680.

Of railroad mortgages see RAILROADS, 33 Cyc. 584.

29. Thompson *v.* Brownlie, 76 S. W. 172, 25 Ky. L. Rep. 622; *In re* Dennison, 114 N. Y. 621, 21 N. E. 97; Hoyt *v.* Thompson, 5 N. Y. 320 (assignment of debt due to corporation in part payment of a debt due from the corporation); Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

A sale by a receiver of a national bank, under authority of an act of congress which directed the sale to be made under the order of a court upon such terms as the court might direct. Schabug *v.* McDonald, 60 Nebr. 493, 83 N. W. 737; *In re* Third Nat. Bank, 4 Fed. 775, 9 Biss. 535.

30. Campbell *v.* Parker, 59 N. J. Eq. 342, 45 Atl. 116.

31. Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839, over the objection that the sale was in effect a foreclosure of a trust deed on the property.

32. **Continuance of business** see *supra*, IV, F, 6, e, (III).

Extended receivership see *supra*, III, H, 2.

vision of the court.[33] Ordinarily, the receiver appointed pending the action, particularly as to real estate, should simply be directed by the court to take care of and let the property in proper cases, collect the rents, etc., and to collect debts and hold funds coming into his hands, subject to the order of the court, from time to time, and when the action is determined;[34] and the ordinary chancery receiver, being a mere stakeholder, has no power to sell.[35] But there are cases in which it is expedient and proper to direct the sale of property both real and personal,[36] and pursuant to the general rule justifying the appointment of a receiver when such appointment is necessary to preserve property involved from loss or destruction,[37] the court may appoint a receiver for the purpose of taking such property into his possession and selling it, to the end that its value may be preserved, the character of the property or the circumstances being such as to render a sale necessary for the adequate protection of the rights of the parties.[38] Ordinarily a receivership should be terminated as soon as practicable after its purposes have been accomplished,[39] and in proceedings in which the main object is the conversion of assets into money and its distribution among those entitled thereto, the court has undoubted power to order a sale of the property whenever it appears proper or necessary in order to preserve the assets and protect the rights of the parties, and this although the conflicting claims to liens and priorities have not been adjudicated.[40] The order is one resting in the sound discretion of the court — a judicial discretion, however, not arbitrary, but impartial, to be

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1459.

33. See Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110; Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244, *infra*, note 51.

Where the receiver is appointed after final decree but before prayer for appeal, unless restrained, he may proceed to execute the directions contained in the order of appointment, although an appeal is afterward taken. Jones *v.* Stewart, (Tenn. Ch. 1909) 61 S. W. 105 [*citing* Enochs *v.* Wilson, 11 Lea (Tenn.) 228].

Disposition of property generally see *supra*, IV, F, 6, e, (II).

34. Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869. See also *supra*, I; II, B, 10, a, b; IV, F, 1.

Evidence of necessity is required to support the order. Dixon *v.* Rutherford, 26 Ga. 149.

Pending an issue as to the jurisdiction of the court over the suit it is error to order a sale of the property. McNab *v.* Noonan, 28 Wis. 434, suit for dissolution of partnership.

35. Matthews *v.* Cooper, 66 Hun (N. Y.) 626, 21 N. Y. Suppl. 71, receiver *pendente lite* to take charge of the hotel, and to conduct the business thereof, involved in a suit by a lessee to reform a second mortgage on the furniture and a deed of trust, made to secure rent.

Sale by trustee holding as receiver see Hitz *v.* Jenks, 185 U. S. 155, 22 S. Ct. 598, 46 L. ed. 851 [*reversing* 16 App. Cas. (D. C.) 530], *supra*, IV, F, 6, e, (II), (A), note 37.

36. Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869, holding that the court should always be careful to see that a proper case is presented for the exercise of such power, and to see particularly that the owner of the property cannot be unduly prejudiced by a sale thereof; that it should have in view the rights and advantages of all the parties, as nearly as may be.

Before the maturity of a mortgage debt and before default in payment of interest, the court may order a sale of the property of the corporation of which a receiver has been appointed to wind up and liquidate its affairs. Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418, holding that after such sale is ordered, the property cannot be taken from the possession of the receiver to be made to await the creditors' pleasure in the matter of foreclosing his mortgage, the proceeding being one which, under the statute, contemplates the complete winding up of the corporation and distribution of its assets.

37. See *supra*, II, B, 10, a.

38. Wiedman *v.* Sann, (N. J. Ch. 1895) 31 Atl. 211; Moore *v.* Diament, 41 N. J. Eq. 612, 7 Atl. 509; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083; Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746, where a receiver was appointed for a stock of goods on the ground that it had been levied on under numerous small judgments; that it would result in great loss to sell the property at auction on a constable's sale, the constable having no authority to invoice the goods and sell them in bulk; and that the goods would be dissipated by contests in regard to conflicting claims.

39. See *supra*, III, K.

40. *California.*— Wulff *v.* San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78, sale of business and good-will of an insolvent partnership, before dissolution, pending suit for dissolution, where the continuance of the business will result in the dissipation of the assets, the court holding that a showing that the busi-

exercised in obedience to the rules of law.[41] But it is not proper to order a sale and distribution at a preliminary stage of the suit when the cause is not ready for determination on the merits, or in the order of appointment at such preliminary stage to settle the principles of the cause and order distribution;[42] and in the absence of some emergency creating a condition of immediate necessity, the court has no authority upon mere motion before trial to order a sale of property when such sale depends upon the determination of an issue of fact, raised by the pleadings, which is properly the subject of the final judgment in the case, and thus put it out of its power to award the subject of the action to those who may be ultimately entitled to it.[43]

ness has been carried on at a loss since it came into the receiver's hands and that the loss will be further increased by the continuance of the business, etc., shows that the property is of a perishable character; that without the tangible assets the good-will would be valueless and that these two classes of property are indissolubly connected and if the court had power to sell either it had power to sell both; that the book-accounts should also be included where it appears that this is for the best interests of the co-partnership and the creditors.

Iowa.— Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839, approval of order of sale immediately upon the appointment and qualification of receivers, the property being an uncompleted bridge which would be a public benefit when completed, and the franchise to build which was about to expire.

Louisiana.— State *v.* Judge Civil Dist. Ct., 45 La. Ann. 1418, 14 So. 308, sale of property of an insolvent corporation.

New York.— National Park Bank *v.* Goddard, 62 Hun 31, 16 N. Y. Suppl. 343 [*affirmed* in 131 N. Y. 494, 30 N. E. 566] (sale of merchandise of an insolvent firm); Smith *v.* New York Consol. Stage Co., 28 How. Pr. 377 (where it appears upon the application of the receiver that moneys arising from the prosecution of the business are insufficient to defray the current expenses and that there are no other means of doing so); Marten *v.* Van Schaick, 4 Paige 479 (where it was said, in a suit for the dissolution of a newspaper partnership, that if a receiver is appointed he must proceed and sell the establishment without delay and in the meantime the business must be carried on by him as usual); Crane *v.* Ford, Hopk. 114 (where a vessel had been sailed under the direction of a receiver for two years and it appeared that in order to be further operated it was necessary to fit it out for another season or permit it to lie useless and a sale was ordered to terminate the receivership, it being inconvenient for the court to conduct such operations for so long a time).

North Carolina.— Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869, property of insolvent corporation.

Vermont.— Smith *v.* Burton, 67 Vt. 514, 32 Atl. 467, holding that the condition calling for such sale exists where the property, when in a condition to produce rents, did not increase but slowly and surely lessened the *corpus* of the estate available for the parties interested.

Virginia.— Richmond First Nat. Bank *v.* Trigg, 106 Va. 327, 56 S. E. 158, property of insolvent corporation, the court holding that in view of the facts a decree for sale was not erroneous under the doctrine that land should not be decreed to be sold where there appears to be liens binding upon it until the amount of such liens and their order of priority have been fixed and established.

United States.— Cleveland First Nat. Bank *v.* Shedd, 121 U. S. 74, 7 S. Ct. 807, 30 L. ed. 877.

Canada.— McLaren *v.* Whiting, 16 Ont. Pr. 552, sale of assets of insolvent partnership in action for dissolution.

See 42 Cent. Dig. tit. "Receivers," § 226 *et seq.*

41. International Trust Co. *v.* Decker, 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. N. S. 152. So in Bibber-White Co. *v.* White River Valley Electric R. Co., 110 Fed. 473, the court refused to order a sale of railroad property where the purpose of the receivership was to secure the completion of the road, to save the company certain subsidies and subscriptions, the right to which had been pledged by the receivers to raise funds, until the road had been so completed as to assure their collection.

Pending proceedings for the removal of a receiver, an order refusing to allow him to sell certain of the property of the estate to pay debts contracted by him in the management of the business was held to be a matter of discretion with which the appellate court refused to interfere. *In re* Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800.

42. West *v.* Chasten, 12 Fla. 315; Esterlund *v.* Dye, 56 Ga. 284; Krohn *v.* Weinberger, 47 W. Va. 127, 34 S. E. 746. See also State *v.* Clancy, 20 Mont. 284, 50 Pac. 852.

43. Brush *v.* Jay, 113 N. Y. 482, 21 N. E. 184, which was a suit for the dissolution of a partnership in which the complaint alleged that certain property was a part of the assets of the firm and the answer denied the ownership of such property by the firm, and it was held that an order of sale before trial under such circumstances was erroneous.

Pending final order of dissolution of corporation.— Where the relief by sale of the property is such as should ordinarily follow

b. What Property. In proceedings against an insolvent corporation, under a statute contemplating the administration of the whole corporate property,[44] jurisdiction to order a sale of such property is not affected by the fact that some of it is not inventoried.[45] The receiver of a corporation under a statute providing for his appointment with power to sell, etc., is not limited in his power to sell the property which is actually in possession,[46] nor is it incompetent to order a sale of property outside the state belonging to the parties over whom the court has jurisdiction;[47] and it is held that a statutory provision requiring actions for the sale of land to be brought in the county where the land is situated does not apply so as to prevent the sale of such land in a suit in another county for the settlement of a corporation or partnership.[48] It is not proper, however, to order a sale of that which is not vested in the receiver as property.[49] The receiver should not be directed to sell debts due to the concern over which he is appointed instead of collecting the same where the latter course would yield greater returns,[50] and the court has temporarily stayed sale in a judgment creditor's suit upon affidavit that the value of the property was greatly in excess of the amount of the judgments to be enforced.[51] The court may invest the receiver with the discretionary power to sell all or any part of the property as he may think best, the sales to be made subject to the subsequent approval of the court.[52] The fact that property not covered by a mortgage is sold by the receiver in a suit to foreclose the mortgage becomes immaterial where a general receiver of the

the final order of dissolution of a corporation, the statutory authority to sell while the corporate property is in the hands of a temporary receiver and before such order of dissolution is made must be strictly pursued, and the court should confine its consideration of an application for an order of sale to the reasons given which would then justify it, and should not base its decision upon a forecast of the outcome of the proceedings when completed, and thus in effect substitute its determination of a material issue upon affidavits which the statute requires must be reached after a hearing by the court or a referee. Matter of Malcom Brewing Co., 78 N. Y. App. Div. 592, 79 N. Y. Suppl. 1057, as to sale of non-perishable property.

44. See *supra*, IV, D, 3.

45. French *v.* McCready, (Tex. Civ. App. 1900) 57 S. W. 894, 896.

46. Hoyt *v.* Thompson, 5 N. Y. 320, 324, construing a statute in New Jersey which authorized the appointment of a receiver or receivers, or trustees of an insolvent corporation, with power to take into their possession "all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description, belonging to the company at the time of its insolvency or suspension of business, and to sell, convey or assign all the said real or personal estate."

47. Loney *v.* Penniman, 43 Md. 130, debts owing to parties by non-residents.

48. Mechanics' Trust Co. *v.* Cobb, 20 S. W. 391, 14 Ky. L. Rep. 444, holding that a court which has obtained jurisdiction to wind up an insolvent corporation has jurisdiction to decree a sale of its mortgaged land, although situated in another county, where the mortgagee is a party to the action, and has filed a cross petition praying foreclosure, and no settlement of the corporate affairs can be made without such sale.

49. Goldberg *v.* Silberstein, 19 N. Y. App. Div. 428, 46 N. Y. Suppl. 479, where, in an action to set aside a fraudulent conveyance, a judgment was entered by consent in favor of the receiver against defendants for the agreed amount of the proceeds of the property and it was held that no property in the judgment vested in the receiver except as the officer of the court to enforce plaintiff's judgment as against defendants and therefore there was nothing subject to sale, especially over the objection of plaintiff, for whose benefit the proceeding was instituted.

50. Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488 (where it was held that such sale should not be directed of debts amounting in the aggregate to a large sum and due from debtors scattered over the country); Case *v.* Fish, 63 Wis. 475, 22 N. W. 322. But see Wulff *v.* San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78, *supra*, note 40, where the sale of accounts along with other assets and good-will of a partnership is approved as advantageous.

51. Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244, where the affidavits showed that the aggregate amount of the judgments was one thousand dollars and the value of the property sixty thousand dollars, and the receiver, on the rule to show cause why the sale of the entire property should not be stayed, showed that the greater part of the property consisted of mining stocks and that he had no knowledge of its value.

52. Smith *v.* New York Consol. Stage Co., 28 How. Pr. (N. Y.) 377, where it appears upon the application of the receiver for instructions that the moneys arising from the prosecution of the business are insufficient to defray the current expenses, and that there are no other means to do so.

mortgagor corporation has been substituted for the receiver in the foreclosure suit.[53]

3. Proceedings to Procure [54] — a. Application. Ordinarily a sale may be ordered on application by the receiver for that purpose or for instructions, upon a showing of conditions requiring a sale,[55] or upon the petition of a party to the suit.[56] No petition for sale is necessary, however, where the bill itself prayed for sale and the appointment of a receiver until the sale could be made.[57]

b. Notice. Regularly property should not be taken from its owner, placed in the hands of a receiver,[58] and sold upon mere *ex parte* application, without notice to such owner and an opportunity to be heard.[59] But where the court has acquired jurisdiction of the parties and property, while it is better practice to require notice of an application under which an order of sale may be entered, the want of notice has been considered as not going to the jurisdiction of the court to make the order.[60]

c. Judgment or Order. The ordinary powers of a receiver do not extend to a sale of the property without an order of the court.[61] But under statute, sometimes, a receiver of an insolvent corporation is charged with the duty, upon his

53. Farmers' L. & T. Co. *v.* Hotel Brunswick Co., 12 N. Y. App. Div. 628, 42 N. Y. Suppl. 693, because the receiver of the corporation becomes entitled to the proceeds both of the sale of the mortgaged property and also of what may not have been covered by the mortgage.

54. Objections see *infra*, IV, H, 7, d; IV, H, 8, 9; IV, H, 12, e.

55. *California.*— Wulff *v.* San Joaquin County Super. Ct., 110 Cal. 215, 42 Pac. 638, 52 Am. St. Rep. 78.

Idaho.— Pocatello First Nat. Bank *v.* Bunting, 7 Ida. 387, 63 Pac. 694.

Illinois.— Pitzele *v.* Cohn, 217 Ill. 30, 75 N. E. 392 [*affirming* 117 Ill. App. 342].

Iowa.— Boston Inv. Co. *v.* Pacific Short-Line Bridge Co., 104 Iowa 311, 73 N. W. 839.

Louisiana.— Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418, holding that the receiver of a corporation in a proceeding to wind up the concern is a "party in interest" within the meaning of the statute providing that the court may order the sale of property in such cases "on application of any party in interest." A creditor joined in the application, however.

New York.— Libby *v.* Rosekrans, 55 Barb. 202 (on application of a receiver of a corporation, who by statute is trustee for all the creditors); Smith *v.* New York Consol. Stage Co., 28 How. Pr. 377.

See 42 Cent. Dig. tit. "Receivers," § 229.

Showing necessity.— Where property is in the hands of a receiver to hold and preserve the same, an application for its sale should show the necessity therefor. Matter of Malcom Brewing Co., 78 N. Y. App. Div. 592, 79 N. Y. Suppl. 1057.

Application for instructions generally see *supra*, IV, F, 5, b, (II).

56. Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

57. Smith *v.* Burton, 67 Vt. 514, 32 Atl. 467.

58. Notice of application for appointment see *supra*, III, D.

59. State *v.* Clancy, 20 Mont. 284, 50 Pac. 852 (where the precise question determined was the void character of an order appointing a receiver of a corporation before service of process on the corporation and upon insufficient pleadings, wherefore such order and subsequent proceedings culminating in a sale made upon the *ex parte* application of the receiver, without notice to defendant or opportunity to be heard, was set aside and annulled on certiorari, and the court animadverted the practice of ordering sales summarily upon such *ex parte* applications); Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230 (in receivership of insolvent corporation); Simmons *v.* Wood, 45 How. Pr. (N. Y.) 262.

60. Smith *v.* New York Consol. Storage Co., 28 How. Pr. (N. Y.) 377.

Subsequent opportunity to be heard.— Pocatello First Nat. Bank *v.* Bunting, 7 Ida. 387, 63 Pac. 694 (where the right to make the order on the receiver's *ex parte* application is recognized, but after the sale, fairly made, and confirmation thereof upon a full report, notice to the parties, and hearing of evidence, it was held that if there was any irregularity in making the order of sale without notice it was cured by a hearing on the report of sale and its confirmation); Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15 (ruling similar to that in the last preceding case, where a creditor of an insolvent had an opportunity to be heard on petition to set aside sale and approval thereof).

61. Jackson *v.* Horton, 126 Ill. 566, 21 N. E. 490 (sale of land); Mason *v.* Hubner, 104 Md. 554, 65 Atl. 367 (chancery receiver).

Ratification by subsequent approval of the court of a sale not previously directed has been held to give it the same validity as if it had been made under express authority previously granted. Tobin *v.* Portland Flouring Co., 42 Oreg. 117, 68 Pac. 749. But see otherwise in Ackerman *v.* Ackerman, 50 Nebr. 54, 69 N. W. 388.

The receiver of a national bank, appointed

appointment, to proceed at once to dispose of the corporate assets, and no order of sale is necessary.[62] The order of sale [63] of a part of the property in the custody of the receiver, made to meet some particular emergency, should designate the specific property to be sold; [64] but where all the property and assets of a firm are placed in the hands of a receiver in a suit to wind up its affairs, a judgment ordering sale of all the property of the concern embraces all property owned by it, including that not particularly mentioned in the pleading.[65] Questions which have been determined by the appointment of the receiver cannot be raised on objection to the order of sale.[66] If the order has been improvidently granted the court may revoke it *ex mero motu* before sale.[67]

4. NOTICE OF SALE.[68] The notice of a receiver's sale should conform to requirements of the statute,[69] but in the absence of any statutory provision on the subject, compliance with the court's order or decree is all that is necessary.[70] The purpose of advertising the sale is to call the attention of the public to the property which is about to be offered,[71] and to the terms and conditions of the sale, and it must be sufficient for this purpose.[72]

by the controller of the currency under an act of congress which provides that he may sell assets upon the order of a court of record of competent jurisdiction, cannot sell in the absence of such an order. Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434; Bidwell *v.* Rice, 19 Wash. 146, 52 Pac. 1019. See also, generally, BANKS AND BANKING, 5 Cyc. 602.

Order making receiver an officer to sell see *infra*, IV, H, 6, a.

62. Campbell *v.* Parker, 59 N. J. Eq. 342, 45 Atl. 116. See also the statutes of the several states.

63. **Form of order in whole or in part** see Pocatello First Nat. Bank *v.* Bunting, 7 Ida. 387, 63 Pac. 694; Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434; *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809; Williamson *v.* Wilson, 1 Bland (Md.) 418 (authorizing sale of partnership property); Foster *v.* Barnes, 81 Pa. St. 377.

Order signed after sale.— Under a statute providing for the sale of attached property by a receiver, the fact that the order, if regularly passed, is not signed until after the sale is made, will not render the sale void. H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337.

Discretion see *supra*, IV, H, 2, a.

64. Dixon *v.* Rutherford, 26 Ga. 149, where the estate consisted of lands in several states, and on application of the receiver for leave to sell some of the property for the purpose of paying taxes on said lands, an order granting leave to sell a portion of the property in Columbus, Ga., without specifying the particular property to be sold, was too indefinite, since under such authority the receiver might sacrifice the most valuable land in Columbus to pay taxes upon land in other states.

Manner and terms of sale see *infra*, IV, H, 6, c.

65. Barron *v.* Mullin, 21 Minn. 374.

66. State *v.* German Sav. Bank, 59 Nebr. 292, 80 N. W. 901, insolvency of corporation.

Collateral attack on order of appointment see *supra*, III, J, 3, a.

67. Fitzner *v.* Noullet, 114 La. 400, 38 So. 398, holding that the receiver cannot complain of such order of revocation.

68. **Judicial sales generally** see JUDICIAL SALES, 24 Cyc. 17.

69. Rawolle *v.* Kalbfleisch, 47 Misc. (N. Y.) 364, 94 N. Y. Suppl. 16.

70. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938; Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703. See also Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

A statute governing execution sales has no application. Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

Creditors of an insolvent corporation are not entitled to personal notice of sale in the absence of statute so providing. Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

Violation of directions by consent.— Where the receiver sells upon a shorter notice than required by the order, with the consent of the parties, the sale, being fair and for a full price, may be confirmed by the court. Ghiradelli *v.* Leverone, 5 Ohio Dec. (Reprint) 486, 6 Am. L. Rec. 255, confirmation upon conflicting affidavits as to consent.

71. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913; Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230.

72. Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488; Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230, advertisement giving no other description of the property to be sold than the "remaining assets of the bank" held insufficient.

The notice should be sufficient in time according to the nature and situation of the property to give an opportunity to those likely to bid to make necessary examination of the property in order to enable them to bid. Strickland *v.* National Salt Co., 43 Misc. (N. Y.) 172, 88 N. Y. Suppl. 323 [*affirmed* in 105 N. Y. App. Div. 640, 94 N. Y. Suppl. 936].

A notice at variance with the order and which excludes bidders of a certain class is

5. Time of Sale.[73] The sale of property by a receiver must be made within the time fixed by the order of the court.[74] But where the sale is to be made upon notice, in proper cases the sale may be adjourned to another day.[75]

6. Conduct of Sale[76] **— a. By Whom Made.**[77] When the court sells property which it has in its possession through a receiver, it may order the sale to be made by the receiver,[78] and although an ordinary chancery receiver is clothed with no estate in the property, he may become an officer of the court to effect sale, by special authority,[79] or the sale may be made through other officers so empowered by the court.[80] If after the order of sale is made it transpires that the receiver cannot be present at the time fixed, the court may appoint a master for the sole purpose of conducting the sale and reporting the proceedings to the court.[81]

bad and a sale thereunder should not be confirmed. Slaughter *v.* Strother, 99 Ga. 633, 27 S. E. 764.

Form of advertisement see Charter Oak Stove, etc., Co. *v.* Rice, 106 La. 77, 30 So. 321; Foster *v.* Barnes, 81 Pa. St. 377.

73. **Where business is continued** see *supra*, IV, F, 6, e, (III), (A), note 14.

74. Ackerman *v.* Ackerman, 50 Nebr. 54, 69 N. W. 388 (holding that where the receiver is required to sell on a day named, if he advertises and sells after that date, without an order of court, the sale is void, and not merely irregular in the sense that confirmation over objection will render it valid); Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230.

75. See Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

Refusal to adjourn.— Where the receiver refuses to adjourn a sale in the exercise of a discretion, the court will not refuse to confirm the same on that account. Bethlehem Iron Co. *v.* Philadelphia, etc., R. Co., 49 N. J. Eq. 356, 23 Atl. 1077. Where the proposed adjournment is sought for the purpose of making an application to the court for an order discharging the receiver of a corporation, under a provision for such discharge in the discretion of the court, when it appears that "the debts of the corporation have been paid or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business," the propriety of the exercise of the receiver's discretion in refusing an adjournment will depend upon the merits of the proposed application to be made to the court. Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739.

76. **Judicial sales generally** see Judicial Sales, 24 Cyc. 21 *et seq.*

Place — location of land see *infra*, note 98.

77. **By whom judicial sales generally made** see Judicial Sales, 24 Cyc. 11.

78. See the cases cited *infra*, this note; and *supra*, IV, H, 2, a, note 40.

A statute requiring the master to make all sales ordered by the court in granting equitable relief, and a statute providing for the appointment of a receiver to dispose of property according to a judgment or to preserve it pending appeal, must be construed together, and when so construed the rule is that while generally sales ordered by the court in granting equitable relief must be made by the master, the court is not bound to follow this rule where the property is already in its possession through a receiver, but may order the sale to be made by the receiver. Buist *v.* Merchants', etc., Bank, 65 S. C. 487, 43 S. E. 958.

A statute requiring a sheriff to make all sales of property under process of execution or order of sale is not exclusive of the right of the court to order a sale by a receiver of property which it is administering through a receiver, although the court may resort to the statute. Stith *v.* Moore, 42 Tex. Civ. App. 528, 95 S. W. 587; Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131.

79. Mason *v.* Hubner, 104 Md. 554, 65 Atl. 367; Gaither *v.* Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309.

80. See Cleveland First Nat. Bank *v.* Shedd, 121 U. S. 74, 7 S. Ct. 807, 30 L. ed. 877.

81. Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703, where it was held that the statutes of Oklahoma did not require that a person appointed to make a judicial sale should give bond or take an oath and that the statute embracing such requirements as to a receiver did not apply; that in the absence of such statutory requirement the court had authority to make the appointment, one reason suggested being that a purchaser would not pay the purchase-price to the special agent appointed merely for the purpose of conducting the sale, but would pay it to the receiver and would be fully protected in such payment by the statutory bond which had been given by the receiver.

Sales after death of receiver.— Where, after the death of a testator who devised real estate in trust for sale, a receiver was appointed in a friendly suit in England for the administration of the estate, to collect the assets in Canada and sell the lands there, to which suit the trustee was a defendant, and subsequently the receiver died and the agents of the trustee in Canada, who had managed the estate for the deceased receiver, continued to collect the assets and make sales, with the knowledge and concurrence of the trustee and the parties in England, it was held that such sales were not void, and would be enforced or not, according as to the court appeared, in view of the circumstances, to be proper; and a decree was

b. Who May Purchase — (i) *In General.* As in judicial sales generally,[82] the rule is against permitting any one who sustains fiduciary relations to the parties or property from gaining personal advantage by purchasing at the sale of property in the hands of the receiver,[83] although a sale to such person is voidable only.[84] Others may purchase, if the sale is in good faith and not for any fraudulent purpose,[85] and a mere close relationship of the purchaser to the receiver does not show such fraud or bad faith.[86]

(ii) *The Receiver.* Ordinarily a receiver will not be permitted to purchase as an individual what he sells as receiver,[87] either directly or indirectly,[88] nor is it proper for him to purchase at his own sale even though he does so as agent of another.[89] Such a sale is voidable at the election of interested parties, at whose instance it will be set aside,[90] and the court will not stop to inquire whether or not there was actual fraud in the transaction.[91] So the receiver's account

made for the purchaser in respect of the sale in question. Stickney *v.* Tylee, 13 Grant Ch. (U. C.) 193.

82. See Judicial Sales, 24 Cyc. 29.

83. Crayton *v.* Spullock, 87 Ga. 326, 13 S. E. 561, holding that an attorney who brings an equitable petition to marshal and administer the assets of a corporation, and who, by a consent decree, is to be paid for his services out of the proceeds of a receiver's sale of the property, so far represents the corporation that he cannot purchase the property for himself at the sale at a grossly inadequate price.

Statute against purchase by attorneys.— In Mann *v.* Fairchild, 14 Barb. (N. Y.) 548, it was held that a statute prohibiting the purchase of choses in action by attorneys, counselors, or solicitors, generally, for the purpose of bringing suits thereon, extended to purchases made at judicial sales had under the direction of a receiver.

Purchase by attorney generally see Attorney and Client, 4 Cyc. 958.

84. See Judicial Sales, 24 Cyc. 29.

Directors of corporation.— The relation of directors to a corporation is essentially a fiduciary one and they are therefore generally inhibited from purchasing the corporate property for their own benefit (see, generally, Corporations, 10 Cyc. 791 *et seq.*), but where the legal title and control of all the corporate property is vested in a receiver in trust for the benefit of creditors, a director creditor, having interests to protect, may, in good faith, purchase the property at a sale ordered by the court, especially where there are other active directors and the sale is made subject to confirmation by the court, but the director must act in the utmost good faith because the transaction will be jealously scrutinized. Janney *v.* Minneapolis Industrial Exposition, 79 Minn. 486, 82 N. W. 976, 50 L. R. A. 273.

85. See, generally, Judicial Sales, 24 Cyc. 29.

A party may purchase at such sale. McDonald *v.* Miller, 54 Ill. App. 325.

Creditors.— The judgment creditors of a corporation may bid on and buy the property sold to satisfy the judgments. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202. And a creditor, acting in good faith and with the approval of the court, may purchase from the receiver the debtor's equity of redemption at any reasonable agreed price. Pitzele *v.* Cohn, 217 Ill. 30, 75 N. E. 392 [*affirming* 117 Ill. App. 342].

86. Yetzer *v.* Applegate, 85 Iowa 121, 52 N. W. 118, where the sale was to the receiver's sons, and the lower court's refusal to approve it was reversed, it appearing that the property was of an unsalable character, and had already been sold to pay taxes, and the time for redemption had almost expired, and the consideration for the sale was in excess of the appraised value of the property, and the fairness of the sale was not questioned.

87. *Arkansas.*— Penzel Grocer Co. *v.* Williams, 53 Ark. 81, 13 S. W. 736.

Iowa.— Groeltz *v.* Cole, 128 Iowa 340, 103 N. W. 977.

Kentucky.— Wagner *v.* Swift's Iron, etc., Works, 26 S. W. 720, 16 Ky. L. Rep. 273.

Louisiana.— *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

North Dakota.—Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 363, 99 N. W. 909.

England.—Anderson *v.* Anderson, 9 Ir. Eq. 23.

See 42 Cent. Dig. tit. "Receivers," § 234.

A receiver of two estates cannot buy a claim held by one of the estates against the other, but the purchase inures to the benefit of the parties interested. Titherington *v.* Hodge, 81 Ky. 286, 5 Ky. L. Rep. 211.

Acquiring trust property generally see *supra*, IV, F, 6, b, (II), (B).

88. Penzel Grocer Co. *v.* Williams, 53 Ark. 81, 13 S. W. 736; French *v.* Pittsburg Vehicle, etc., Co., 184 Pa. St. 161, 39 Atl. 63, sale to firm of which receiver was to become a member.

89. Carr *v.* Houser, 46 Ga. 477, where the receiver insisted that he bid off property as agent of his brother and not for himself, and on timely election by parties beneficially interested the sale was set aside.

90. Carr *v.* Houser, 46 Ga. 477; Titherington *v.* Hodge, 81 Ky. 286, 5 Ky. L. Rep. 211; Harrigan *v.* Gilchrist, 121 Wis. 127, 363, 99 N. W. 909.

91. Titherington *v.* Hodge, 81 Ky. 286, 5

may be surcharged with the difference between the price received and the value of the property.[92] The sale is not void *per se*, however,[93] and the parties beneficially interested may ratify it,[94] or by their conduct preclude themselves from asserting its invalidity.[95]

c. Manner, Terms, and Conditions of Sale — (I) *In General.* In the sale of property in the hands of a receiver, the aim of the court and the efforts of the receiver should be directed toward securing the best price obtainable under all the circumstances.[96] The receiver exercises a naked power according to the mandate of the court,[97] the terms of which he should pursue,[98] and a direction to sell assets confers no authority to exchange them for other property.[99] He

Ky. L. Rep. 211; Harrington *v.* Gilchrist, 121 Wis. 127, 363, 99 N. W. 909.

92. *In re* Dugdamonia Shingle, etc., Co., 118 La. 242, 42 So. 789 (holding that a receiver who sold almost the entire product of a sawmill under his administration to a firm of which he was a member should be required to prove, otherwise than by his bare statement, that the full market price had been paid for the lumber, and that no profit was made by the firm out of the transaction); *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809 (holding that a receiver who buys property of the estate under his administration, when sold under order of court, will be held liable for at least the appraised value of such property, when the sale is not attacked for nullity); Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93, 54 Atl. 508; French *v.* Pittsburg Vehicle, etc., Co., 184 Pa. St. 161, 39 Atl. 63 (where a receiver sold to a firm of which it was then understood he was to become a member after his release from the receivership, and of which he was a member at the time of the audit of his account as receiver, and it was held that his account should be surcharged with the difference between the appraised value of the goods and the sale price, in the absence of evidence explaining his conduct).

93. Jackson *v.* Clark First State Bank, 21 S. D. 484, 113 N. W. 876 (sale to bank in which receiver was interested not vacated where parties not injured thereby); Harrigan *v.* Gilchrist, 121 Wis. 127, 363, 99 N. W. 909 (holding that where there was no fraud and to set aside the transaction would result only in expense without adding anything to the trust fund, the transaction would not be disturbed).

Sale at highest market price at place of sale.— Where a receiver sold products of the business for cash, for the highest market price at the place of sale, to a concern of which he was manager, he was not required to account for profits made by the latter firm by selling the property in distant markets, it appearing that the trust estate was benefited by the sale, and that the funds of the trust estate were insufficient to meet the expense of shipping to distant markets, and the original owner, before the appointment of the receiver, had sold one third of its products to the same vendee. Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

Collateral attack on such sales is not permitted. Groeltz *v.* Cole, 128 Iowa 340, 103 N. W. 977. See also Wagner *v.* Swift Iron, etc., Works, 26 S. W. 720, 16 Ky. L. Rep. 273. So in Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, it was held that under a statute of Minnesota providing that in an action by a creditor against the corporation the court may order the receiver to invite bids from the creditors for the corporate assets in full satisfaction of their claims, and may direct the acceptance of any such bid, and a conveyance accordingly, a sale and assignment by receivers to themselves as trustees for certain creditors of the corporation being confirmed by the court of Minnesota, and no appeal taken, in an action by the receivers' assignee, brought in Connecticut, for unpaid subscriptions to the capital stock, the proceedings in Minnesota were conclusive.

94. Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548, holding that a party ratified a sale by claiming the proceeds thereof.

95. Jackson *v.* Clark First State Bank, 21 S. D. 484, 113 N. W. 876.

Objections and estoppel generally see *infra*, IV, H, 8.

96. Horse Springs Cattle Co. *v.* Schofield, 9 N. M. 136, 49 Pac. 954.

97. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548.

98. Slaughter *v.* Strother, 99 Ga. 633, 27 So. 764; Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

Under a statute providing for a sale of assets by a receiver, upon an order of court and upon such terms as the court shall direct, the receiver cannot sell upon terms in conflict with the order. Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434.

Place — location of land.— In Stith *v.* Moore, 42 Tex. Civ. App. 528, 95 S. W. 587, it was held that there was no statute, as in the case of execution sales, requiring a receiver's sale to be made in the county where land to be sold is situated, and that it was within the discretion of the court wherein the receivership was pending to permit the sale to be made in that county of land lying in another county.

Confirmation equivalent to previous direction see *infra*, IV, H, 7, d, (II).

99. Ellis *v.* Little, 27 Kan. 707, 41 Am. Rep. 434, under a direction to sell, "on such terms and in such manner as in his judgment shall be for the best interest of the creditors and all interested."

should offer the property according to the advertised terms of the sale.[1] A receiver may be authorized to sell property according to the usual course of business;[2] but a general order to sell the property which has been placed in the hands of the receiver for preservation contemplates a sale in bulk and not the continuance of a retail business.[3]

(II) *Public or Private Sale.* Ordinarily, as in the case of other judicial sales,[4] all possible publicity as to the time, terms, and mode of a receiver's sale is commended and adopted to obtain the best price,[5] and the sale should be made at public auction unless the officer is authorized to make a private sale.[6] But the court may permit a private sale of property upon a showing that such sale is proper and for the advantage of the estate;[7] or the receiver may be ordered to sell at public or private sale, as he may deem it best for the interests involved,[8] although such sales are required to be made subject to the subsequent approval of the court.[9]

(III) *Unauthorized Conditions Generally.* While a receiver may adopt conditions of sale amply sufficient to secure compliance by the purchaser with his bid, he cannot impose any liability upon the purchaser with respect to the property sold which would not result by law from his purchase,[10] nor can the court adopt unauthorized conditions which affect the rights of creditors after participation in the distribution, so as to bind non-assenting creditors,[11] or impose

1. Patterson *v.* Patterson Dry Goods Co., 207 Pa. St. 252, 56 Atl. 442.

2. Williamson *v.* Wilson, 1 Bland (Md.) 418.

Sale in the ordinary way of business of finished articles, rather than in any other way, if they can be sold within a reasonable time, has been favored. Case *v.* Fish, 63 Wis. 475, 22 N. W. 322.

Conduct of business generally see *supra*, IV, F, 6, e, (III).

3. Terry *v.* Martin, 7 N. M. 54, 32 Pac. 157.

4. See Judicial Sales, 24 Cyc. 22.

5. *In re* New York Silk Mfg. Co., 10 N. J. L. J. 88; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395 [*affirmed* in 17 N. J. Eq. 516], under a statute permitting a public or private sale.

6. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913, holding that a decree directing a sale of property, and requiring that notice thereof be given by advertisement, requires a public sale, and that no deviation from the terms of a decree is more obnoxious to objection than selling at private sale when the decree directs a public sale.

7. Pitzele *v.* Cohn, 217 Ill. 30, 75 N. E. 392 [*affirming* 117 Ill. App. 342]. See also Brookfield *v.* Sharp, 88 Md. 713, 41 Atl. 1072.

Showing reasons for sale.— In practice it is usual and proper, when officers of the court charged with the duty of making sale of property deem it judicious or advantageous to make a private sale, for them, either in a previous application to the court for authority to sell at private sale, or in the report of such sale, when made without previous authority, to give reasons and facts — with some evidence if the court so requires — that will enable the court to act advisedly in respect to the sale so proposed or reported. Mason *v.* Hubner, 104 Md. 554, 65 Atl. 367; South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913, holding that where a consent decree directs a sale at public auction and the receiver desires to sell at private sale, the proper course is to pass an order, on the receiver's petition, to show cause why such sale should not be authorized.

Consent of the parties to a private sale made in good faith after an appeal from a decree directing a public sale will justify the approval of such private sale, and this without regard to whether a prior order directing a private sale had been superseded. Getzer *v.* Applegate, 85 Iowa 121, 52 N. W. 118.

8. Smith *v.* New York Consol. Stage Co., 28 How. Pr. (N. Y.) 377.

9. See *infra*, IV, H, 7.

10. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548, holding that if he attempts to annex unauthorized conditions he does a nugatory act.

11. Loney *v.* Bayly, 45 Md. 447, 43 Md. 10, where a receiver of partnership effects reported a proposition of a party to purchase the entire stock of goods, debts, etc., of the firm, praying the court to accept it and authorize the sale, and with the report was filed an agreement between the partners and a large number of creditors wherein the proposed sale was assented to and recommended, and the creditors executed the same under their hands and seals, covenanting and agreeing with the partners that in consideration that the latter would assent to the sale, as well as of the dividends to be received from the proceeds, the creditors did and would forever acquit, etc., the firm and the several members thereof from any and all balance or balances that might remain due on their several claims, whereupon the proposition was accepted and the sale authorized, and it was held that a creditor who had not joined in such agreement was not estopped to sue the

upon the receiver conditions annexed to an offer to purchase which affect him in his private rights.[12]

(iv) *SALE IN GROSS OR IN PARCELS.* The court may order the sale of the entire property in bulk,[13] and under a general authority to sell the receiver may sell all the property together,[14] and taking into consideration the nature and character of the property, that it was constructed and operated as a single plant, and the adaptation of each part of the property to the whole, this may be the most advantageous and judicious mode of selling the property.[15] But the method should be adopted which will produce the most money or be most advantageous to all the parties interested.[16]

(v) *PRICE.* Ordinarily the receiver should accept the highest bid offered for the property, and as between responsible persons he has no discretion to sell to one whose bid is lower than that of another.[17] So the court, upon ordering

debtors for the balance due him after accepting his dividend out of the proceeds of such sale.

12. *In re* Irish, 40 Ch. D. 49, 58 L. J. Ch. 279, 60 L. T. Rep. N. S. 224, 37 Wkly. Rep. 231, where a business was in the hands of a manager and receiver, and an offer was made to buy the whole business as a going concern on condition that the receiver and manager be restrained from soliciting orders from the existing customers, and the court refused so to order.

13. See Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862.

14. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938; Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739; Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

Judicial sales generally see JUDICIAL SALES, 24 Cyc. 24.

15. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938; Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739, where the assets were those of a hotel corporation and consisted largely of household goods, liquors, cigars, etc., and an unexpired leasehold and it did not appear that the goods would have realized a greater sum if sold by the receiver as separate articles to be removed from the premises and it was held that the sale in bulk was not objectionable.

Question left to creditors.— In Wenar *v.* Schwartz, 117 La. 81, 41 So. 360, it was held that the question whether property of an insolvent corporation should be sold in bulk or parcels should be left to the creditors, and that where a creditor holding a large majority of the claims against the corporation requested the receiver to sell in bulk, such request will be granted unless there is some conclusive reason against it.

16. Case *v.* Fish, 63 Wis. 475, 22 N. W. 322, where it was said by the court of last resort that while that court was not disposed to direct in what manner the receiver should proceed in this respect, it being in a great degree a matter for the discretion of the court appointing the receiver, yet the appellate court was inclined to hold that an order directing the sale of a large business and all the personal property belonging thereto as a whole was not calculated to produce the most money or result most advantageously to the parties, as it would of necessity limit the bidders to a very few persons; that while the buildings, machinery, fixtures, material in process of construction and good-will of the business would probably bring more when sold as a whole than if sold in parcels, the same is not true as to finished articles on hand, or even as to materials on hand which have not been partially converted into finished products; that as to the latter a more advantageous sale in smaller quantities would be likely; and that if they can be sold within a reasonable time in the ordinary course of business that method should be pursued, or they should be sold in separate parcels.

With reference to particular claims against particular parts of property.— Where the sale is free of encumbrances, under a statute, it should be ordered in such mode and parcels as that the proceeds of the sale of each description of the property may be distributed with reference to the particular liens which are preserved and transferred to such proceeds. Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395 [*affirmed* in 17 N. J. Eq. 516]. In Louisiana it is held that the court may provide for the sale of the mortgaged property of a corporation in the hands of a receiver in separate lots, for a pro-rating of the liens of the mortgage based on the report of the appraisers. Metropolitan Bank *v.* New Orleans Brewing Assoc., 51 La. Ann. 1525, 26 So. 418.

Where the receiver advertised to offer the property as a whole or in lots and parcels as might be for the best interests of the trust, he should not refuse to offer the property as a whole where bidders were present offering to pay more for it if so offered than it brought when sold in parcels. Patterson *v.* Patterson, 207 Pa. St. 252, 56 Atl. 442.

17. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913.

Bid less than that at prior private sale.— In Buster *v.* Mann, 69 Ark. 23, 62 S. W. 588, it was held that where the receiver of the insolvent owner of a sawmill contracted with one of the creditors for the sale of the output of the mill, after which the price of lumber declined and such creditor induced

the sale, may fix a minimum price at which the property shall be sold,[18] or an upset price.[19]

(VI) *CASH OR CREDIT.* Whether a sale by a receiver shall be for cash or credit is ordinarily under the control of the court,[20] and the direction of the court is held to be the measure of the receiver's authority in this respect.[21]

(VII) *SALE FREE FROM ENCUMBRANCES.*[22] Existing liens and encumbrances being in no way affected by the appointment of a receiver of the property,[23] it is held that the court has no inherent power to order a sale of such property by the receiver free from such encumbrances,[24] and such a sale cannot affect liens in favor of persons not parties to the suit, or their right to pursue the property thereafter for the enforcement of such liens.[25] But when the court has jurisdiction of the property and of the parties concerned in a contest over the priority of encumbrances thereon, and a sale of the property becomes expedient in the interests of all the parties, the court has power to order a sale free from such encumbrances.[26] The subject is sometimes controlled by statute under which

the receiver to obtain an order of court for the sale of the manufactured product at public auction, if at such sale no one offered to pay the contract price, the receiver should have held the lumber for the creditor and demanded the contract price, but that the court could not render judgment against such party, on the receiver's settlement, for any loss caused by the public sale.

Chilling bidding see *infra*, IV, H, 7, c, (III).

Puffing see JUDICIAL SALES, 24 Cyc. 28.

18. Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073; Slaughter *v.* Strother, 99 Ga. 633, 27 S. E. 764.

Correction of mistake in computation.—Although the court may only confirm or set aside a receiver's sale and cannot modify it, it may correct a mere mistake made in computation when the record and papers furnish all the data for the correction. Thus where the court ordered a sale for not less than seventy per cent of the invoice price of the goods to be sold and the sale was so advertised and a party to the suit bid seventy per cent for the property, the contract between the receiver and the bidder was for seventy per cent of the invoice price, and where the receiver, in computing the amount to be paid, by a mere mistake in extending the value of some of the property, fell short of the actual amount, the mistake might be corrected and the bidder charged with the seventy per cent of the invoice value according to his bid. Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

19. *In re* Newark Sav. Inst., (N. J. Ch. 1887) 9 Atl. 375.

20. Fitzner *v.* Noullet, 114 La. 400, 38 So. 398, where the court revoked an order of sale on credit by a receiver in proceedings to liquidate a partnership in which no question of insolvency was involved, as against one entitled to satisfaction of a lien on the property as against a former owner.

21. Leathers *v.* Kelling, 12 Ky. L. Rep. 92, holding that if a receiver, directed to sell property on credit, sells for cash at the instance of the parties, he acts as their agent and not as receiver.

Compliance with and enforcement of bid see also *infra*, IV, H, 10.

Security from purchaser in judicial sales generally see JUDICIAL SALES, 24 Cyc. 31.

22. **Title of purchaser subject to liens** see *infra*, IV, H, 12, c, (II), (C).

23. See *supra*, IV, D, 3, d, (II).

24. *In re* Lebanon Brewing Co., 3 Pa. Dist. 260.

Receiver of corporation.—Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 516 [*overruling* Kelly *v.* Neshanic Min. Co., 7 N. J. Eq. 579] (holding that under the act at that time governing the receivership of insolvent corporations, courts of equity did not pursue the practice of courts of admiralty in proceedings *in rem* under which all persons interested in the property are parties before the court; that the provision of the act which directs that creditors shall be paid proportionately of the amount of their respective claims, excepting mortgages and judgments, etc., means not that mortgage creditors should be preferred to the whole extent of their mortgages but only that the old liens should remain unaffected); *In re* Coleman, 174 N. Y. 373, 66 N. E. 983 (holding that a receiver in a proceeding to dissolve a corporation under the statutes of New York takes only the title which the corporation had, and that subject to the liens then existing on the property; that a sale subject to particular liens does not convey a title free from the lien of an existing judgment; that the provisions of the code of civil procedure permitting sale of lands in partition free from liens are not applicable to such a case; that the statute gives the receiver in these proceedings power to redeem or to sell subject to liens, and he cannot do otherwise than pursue one of these methods).

But as to sales subject to receiver's certificates see *supra*, IV, G, 5.

25. See the cases cited *supra*, note 24. See also *infra*, IV, H, 12, c, (II), (C).

26. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859 (holding that where one claiming an attachment lien is a party and appears to the application to sell, an order of sale "subject to mortgages" and without right of redemption negatives the existence of any lien except the mortgages);

the power to order a sale free from encumbrances may be exercised in particular cases.[27]

7. CONFIRMATION, VACATING, AND SETTING ASIDE — a. Necessity of Confirmation. Where a receiver is directed generally to sell the property in his charge, the rule is that the sale is not complete and binding, and the purchaser acquires no title, until it is confirmed by the court,[28] before which time the purchaser has been regarded as a mere preferred proposer.[29] So where the receiver is directed to sell, with discretion in him as to the manner of sale, either at public or private sale, the sale is required to be made upon the condition that it shall be subject to approval,[30] and under such an order, with an express reservation that the sale shall be subject to the orders of the court, no transfer of the interests sold can be made until confirmation.[31] But where the terms of the sale as authorized and as represented by the contract are expressed in the order, in making the sale the receiver repre-

Cleveland First Nat. Bank *v.* Shedd, 121 U. S. 74, 7 S. Ct. 807, 30 L. ed. 877.

Lien transferred to proceeds see *infra*, V, B, 1, e, (IV).

27. See the statutes of the several states, And see the cases *infra*, this note.

Of insolvent corporation pending litigation. — In New Jersey, after the decision in Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 516, *supra*, note 24, power was conferred upon the court, upon the insolvency of a corporation, to order a sale of its assets clear of all liens and encumbrances, where the legality of the encumbrances is brought into question and the property is of such a character that it will materially deteriorate in value pending the litigation. Under this statute both of these conditions must exist. Reilly *v.* Penn Cordage Co., 58 N. J. Eq. 459, 44 Atl. 161 (where it was held that the act was not intended to be used as an excuse to deprive preceding encumbrancers of their right to use, by foreclosure or other proceedings, remedies which secured to them by their contracts the power to take the initiative steps and control the time, place, and circumstances when, where, and under which the property should be disposed of); Randolph *v.* Larned, 27 N. J. Eq. 557. The dispute bringing into question the legality of the liens is not limited to an objection to the validity of the mortgage itself but may exist by reason of disputes touching the extent of the lien, its relative priority to other encumbrances, or other equities raising substantial differences between the parties, the effect of which may lead to extended litigation. Reilly *v.* Penn Cordage Co., 58 N. J. Eq. 459, 44 Atl. 161; Emmons *v.* Davis, etc., Pottery Co., (N. J. Ch. 1888) 16 Atl. 158; Middleton *v.* New Jersey West Line R. Co., 26 N. J. Eq. 269 [*reversed* upon other grounds in 27 N. J. Eq. 557, *supra*]. And the court is not bound to wait until such dispute is shown by the parties, but may act on the petition of the receiver showing the existence of the dispute. Emmons *v.* Davis, etc., Pottery Co., *supra*.

Constitutionality. — Such a provision as that under which the New Jersey cases cited above in this note were decided, enacted after the commencement of the suit in which the sale is sought, is held not in violation of a constitutional provision which prohibits the passage of a law impairing the obligation of contracts, or which deprives a party of any remedy for enforcing a contract which existed at the time the contract was made. The latter provision does not relate to any mere change in practice in reference to remedies, nor to the substitution of another remedy which gives the lienor satisfaction in a shorter time and more direct mode. Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395 [*affirmed* in 17 N. J. Eq. 516].

28. *Maryland.* — Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488.

New York. — Simmons *v.* Wood, 45 How. Pr. 262.

North Carolina. — State *v.* Roanoke Nav. Co., 86 N. C. 408.

Pennsylvania. — Patterson *v.* Patterson, 207 Pa. St. 252, 56 Atl. 442.

United States. — Koontz *v.* Kentucky Northern Bank, 16 Wall. 196, 21 L. ed. 465.

See 42 Cent. Dig. tit. "Receivers," § 240.

Compliance with bid before confirmation. — The terms of sale must be complied with befor the purchaser can insist upon a report and confirmation of the sale. Hanke *v.* Blattner, 34 Ill. App. 394.

Interference by an adverse claimant may be enjoined at the suit of the receiver who has sold property subject to confirmation and on condition that the title should not pass until confirmation, although he delivered possession of the property to the purchaser. Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964.

Loss pending confirmation. — The purchaser cannot complain of a depreciation in the value of the property caused by delay arising from exceptions interposed by him. Meyer *v.* Henderson, 88 Md. 585, 41 Atl. 1073, 42 Atl. 241. And as to liability for loss generally before confirmation see JUDICIAL SALES, 24 Cyc. 34.

Conveyance before confirmation see *infra*, IV, H, 10, e.

29. State *v.* Roanoke Nav. Co., 86 N. C. 408. And see also, generally, JUDICIAL SALES, 24 Cyc. 33.

30. Smith *v.* New York Consol. Stage Co., 28 How. Pr. (N. Y.) 377.

31. Simmons *v.* Wood, 45 How. Pr. (N. Y.) 262.

sents the court; the sale is deemed to have been made by the court and no further action on its part is necessary in order to make a completed contract.[32] An order overruling a motion by a bidder to set aside the sale and requiring compliance with the bid is tantamount to an order of confirmation.[33]

b. Proceedings. The rule that any interested party may move for or resist confirmation of judicial sales generally,[34] or move to vacate them, is applicable to sales by receivers.[35] So regularly confirmation of a receiver's sale should be upon notice of some kind to the parties who have appeared in the suit.[36] And it is held that while the court cannot modify the terms of the sale, and can only confirm it or set it aside,[37] it may correct a mere mistake in computation when the record and papers furnish all the facts,[38] and may confirm the sale conditionally.[39] An independent suit may be maintained to set aside a sale in violation of the order under which it was made and in fraud of creditors,[40] or to vacate an order fraudulently obtained and to set aside a sale thereunder.[41]

32. *In re* Dennison, 114 N. Y. 621, 21 N. E. 97; Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403.

33. Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

34. See JUDICIAL SALES, 24 Cyc. 35.

35. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 49 Atl. 913 (holding that an officer and stock-holder of an insolvent corporation whose property has been sold by a receiver at private sale in violation of a consent decree ordering a public sale may except to the ratification of such sale); Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230 (intervention of stock-holder, upon allegations that the officers of a corporation had refused to appear and protect its interests, for the purpose of protecting his own interests and the interests of the corporation, the order confirming a sale upon his motion to vacate it being reversed); Rawolle *v.* Kalbfleisch, 48 Misc. (N. Y.) 607, 95 N. Y. Suppl. 540 [*affirming* 47 Misc. 364, 94 N. Y. Suppl. 16] (interest of debtor moving to set aside sale in proceedings supplementary to execution, although intervening the sale and the motion the property was sold under a mortgage, where he disputes the validity of the mortgage sale).

A bidder who had offered to bid a larger amount for the property as a whole, as the receiver advertised it would be offered, than it brought sold in lots and parcels, may move to set aside the sale and have a resale. Patterson *v.* Patterson Dry Goods Co., 207 Pa. St. 252, 56 Atl. 442.

If a purchaser moves for a direction to the receiver to complete the sale he stands in the position of asking the court to approve the sale. Atty.-Gen. *v.* Continental L. Ins. Co., 94 N. Y. 199.

Surety on bidder's bond.— Where the order of sale required a certain part of the bid to be deposited, a surety on the bond of the bidder to secure the purchase-price is not precluded from maintaining a proceeding to set aside the sale which was ultimately concluded in violation of the terms of the court's order and in fraud of the creditors by delivering the property without payment of the balance of the purchase-money, where such surety at the time he signed the bond had no knowledge of any unlawful design of the parties to violate the order of the court or that the bond was intended to be used for any such illegal purpose. Tozer *v.* O'Gorman, 60 Minn. 42, 61 N. W. 895.

36. Simmons *v.* Wood, 45 How. Pr. (N. Y.) 262. But in Roby *v.* Title Guarantee, etc., Co., 166 Ill. 336, 46 N. E. 1110, it is said that parties who have appeared to the suit must take notice of such motions, and it was held that the objection that a decree providing the manner in which notices of applications for the approval of receiver's sales shall be given to the parties differs from the general rules of court on that subject cannot be raised after the sales have been approved.

Notice to complainant suing on behalf of all creditors as well as for himself is notice to all creditors. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938.

One having notice cannot complain of want of notice to others who do not raise the objection. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938.

After pro confesso against certain parties they need not have notice. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938.

37. See JUDICIAL SALES, 24 Cyc. 33 note 51. And see Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

38. Bryan-Brown Shoe Co. *v.* Block, 52 Ark. 458, 12 S. W. 1073.

39. State Nat. Bank *v.* Neel, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185 (sale confirmed on condition that the bid be increased); Farmers' L. & T. Co. *v.* Burlington, etc., R. Co., 32 Fed. 805.

40. Tozer *v.* O'Gorman, 60 Minn. 42, 61 N. W. 895, conveyance without compliance with the terms, to an alleged insolvent purchaser, the order of the court requiring payment before delivery of the property.

41. Hackley *v.* Draper, 60 N. Y. 88 [*disapproving dictum* in Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202, and *distinguishing* the cases cited therein in that they were all cases of foreclosure sales where it is held that there is a full, adequate, and complete remedy by a motion to the court], holding that such

c. Considerations Governing Actions of Court — (i) *In General.* When the receiver's sale is made and reported it is under the control of the court, and the purchaser buys with that knowledge,[42] but the court will disturb such sale with reluctance and caution.[43] And after confirmation the contract of sale is complete [44] and will not then be vacated except for the same reasons which would move a court of equity to set aside a sale as between individuals.[45] Generally, whether a sale should be confirmed is a matter within the sound discretion of the court,[46] which discretion should be exercised reasonably and not arbitrarily.[47] The sale, although made under authority, should not be approved if it was not made in good faith and for the reasonable value of the property,[48] or if it appears that the terms of the sale in the order of the court and in the receiver's notice

action was available to a creditor of the corporation where the receiver appointed in an action against a corporation fraudulently obtained an order for a sale of a debt due the corporation; that the creditor was not limited to a motion in the action wherein the receiver was appointed, although he might have pursued that remedy.

42. Patterson *v.* Patterson Dry Goods Co., 207 Pa. St. 252, 56 Atl. 442, holding therefore that where the court properly exercises its discretion in setting aside the sale, the purchaser cannot complain. See also Lake City Merchants' Bank *v.* Moore, 68 Minn. 468, 71 N. W. 671.

43. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913; Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488.

Each case depends on its own facts.— The mistake, surprise, omission of duty, or misconduct or fraud, such as will justify the interference of the court in the confirmation of the sale, will depend upon the facts and circumstances of each particular case, the court always bearing in mind that the sale is made by it, through its agent, in behalf of all the parties concerned. Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488; Horse Springs Cattle Co. *v.* Schofield, 9 N. M. 136, 49 Pac. 954.

44. See, generally, Judicial Sales, 24 Cyc. 36.

Where the confirmation is conditional in order to protect the court's contract, the order reserving the power to make any further order or decree with respect to the property, etc., the court may thereafter set aside the sale in order to protect the rights of the party to preserve which the reservation in the order of confirmation was made. Thus where one had a lien on a railroad leased by defendant, which lien defendant agreed with its lessor to pay, and defendant made the leased portion a part of its own line and placed a mortgage on the whole of the line, after which the road went into the hands of a receiver, who, under an order of the court, made a contract with the lienor above mentioned to purchase his interest and pay him from the proceeds of the sale of the road under the mortgage, and the sale having been conditionally confirmed with the reservation above stated, it was held that where the lessor was not paid, the contract with him having been made by order of the court, the court was bound to enforce it, and would, on his application, set aside the sale. Farmers' L. & T. Co. *v.* Burlington, etc., R. Co., 32 Fed. 805.

Title relates back see *infra*, IV, H, 7, d, (i).

45. See Judicial Sales, 24 Cyc. 36. And see Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403, where the sale was under an order which in advance fixed the price and authorized a completed transaction which did not require subsequent confirmation.

If the order of sale was fraudulently obtained by an imposition upon the court, the proceedings may be vacated. Hackley *v.* Draper, 60 N. Y. 88. But it has been held to be no ground for vacating a receiver's sale of corporate property that the creditor obtaining the order was a justice of the court and was thus able to exercise an improper influence over the court, where it was not shown that his official position resulted in producing any different direction than the court was authorized to make under its settled practice. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202.

So if confirmation is induced by deception in the report as to a material fact and the purchaser participated in creating the deception, the court may set aside the entire proceedings at any time before the rights of innocent purchasers have intervened, but thereafter it is held that the authority in this respect can be exercised only consistently with the protection of such intervening rights. Koontz *v.* Kentucky Northern Bank, 16 Wall. (U. S.) 196, 21 L. ed. 465.

Irregularities or informalities see *infra*, IV, H, 7, d, (i); IV, H, 8.

46. Atty.-Gen. *v.* Continental L. Ins. Co., 94 N. Y. 199, discretion to grant or refuse the application of a purchaser for an order requiring the receiver to complete the sale, the contract, while executory, being subject to the supervisory power of the court. See also, generally, Judicial Sales, 24 Cyc. 34.

47. *In re* Third Nat. Bank, 4 Fed. 775, 9 Biss. 535.

Protection of purchaser.— The power, right, and duty of the court to supervise sales orderd by it and to protect the parties from fraud, mistake, unfairness, and imposition extends to purchasers at such sales who by the act of purchase submit themselves to the jurisdiction of the court. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938.

48. Yetzer *v.* Applegate, 85 Iowa 121, 52 N. W. 118.

are not sufficient fairly to place the property before the public,[49] or where, through some mistake, the sale, if consummated, would result in serious sacrifice of the property;[50] but in the absence of fraud or other impropriety the sale should be confirmed notwithstanding mere irregularities have intervened, if the court can give a good title and it is to the interest of the parties.[51]

(II) *Inadequacy of Price—Opening Biddings.* The court may set aside[52] or refuse to confirm a sale upon the ground of gross inadequacy in the price.[53] But the general rule[54] is that the mere inadequacy in price, unless so gross as to amount to fraud or shock the conscience of the court, will not move the court to set aside a sale after confirmation,[55] and the same rule has been applied upon proceeding for confirmation, the court refusing to deny confirmation merely because some other bidder is willing to offer more for the property,[56] or unless the inadequacy in price is such as that a confirmation would be unconscionable

49. Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488. See also Morrison *v.* Lincoln Sav. Bank, etc., Co., 1 Nebr. (Unoff.) 449, 96 N. W. 230.

50. Horse Springs Cattle Co. *v.* Schofield, 9 N. M. 136, 49 Pac. 954, where, upon a sale under an order requiring the approval of the court, at an inadequate price based upon an erroneous estimate of the amount of property involved, defendant moved to set it aside upon the coming in of the report and it was held that the motion should be granted.

51. State *v.* Holmes, 59 Nebr. 503, 81 N. W. 512, where a petition for permission to intervene in order to prevent confirmation of certain receiver's sales was denied.

Circumstances justifying confirmation.— Where the receiver sold furniture of a hotel immediately after the sale of the land and hotel thereon, in the fair exercise of his discretion, the sale should not be set aside because the furniture was not on view at the time of the sale, but was locked in the rooms of the hotel, it not appearing that any one who desired to inspect it before the day of sale was refused leave; nor because a printed catalogue was not furnished to bidders; nor because only a short time was allowed for the removal of the property by the buyer, it appearing that a necessity existed for a prompt delivery of possession of the building to the purchaser thereof. Metropolis Nat. Bank *v.* Sprague, 20 N. J. Eq. 159.

52. Rawolle *v.* Kalbfleisch, 47 Misc. (N. Y.) 364, 94 N. Y. Suppl. 16 [*affirmed* in 48 Misc. 607, 95 N. Y. Suppl. 540], on motion to set aside sale in proceedings supplementary to execution.

53. Lake City Merchants' Bank *v.* Moore, 68 Minn. 468, 71 N. W. 671, refusal to interfere with the court's discretion, the purchaser being the only one complaining of the refusal.

Inadequate price.—A bid of less than one half of the value of the property at forced sale as estimated by a competent expert has been considered inadequate so as, together with other circumstances, to justify a refusal to confirm the sale. Strickland *v.* National Salt Co., 43 Misc. (N. Y.) 172, 88 N. Y. Suppl. 323 [*affirmed* in 105 N. Y. App. Div. 640, 94 N. Y. Suppl. 936].

Refusal to offer the property in bulk according to the terms of the notice of sale when there are bidders present demanding such offer and bidding a higher price than that realized by a sale in parcels will justify the setting aside of the sale in parcels and ordering a resale at the instance of the higher bidders. Patterson *v.* Patterson Dry Goods Co., 207 Pa. St. 252, 56 Atl. 442.

Where the sale is private, in violation of a consent order, evidence that certain persons had made offers of a higher price for the property is admissible in opposition to a ratification of the sale, to show that a resale is not a "mere experiment" but that there is reasonable ground for anticipating fair competition at such sale. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 49 Atl. 913.

54. See Judicial Sales, 24 Cyc. 39.

55. Rogers *v.* Rogers Locomotive Co., 62 N. J. Eq. 111, 50 Atl. 10, (Ch. 1901) 49 Atl. 833, holding that the fact that a bidder on the confirmation of a receiver's sale makes a different and better offer on an application to set aside the confirmation a few months later than at the confirmation will not affect the purchasers, as the bid must be made before or at confirmation, and that where, in a petition to set aside the confirmation of a receivers' sale on the ground of an increased bid made at the time of confirmation on the alleged request of the receivers, there was no allegation that the purchasers were connected with the representation of the receivers, such representation could not avail the subsequent bidders to the detriment of the purchasers.

Rescission.— Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403, where the sale was approved by the court before it was made, and the petition of the receiver for a rescission was denied.

56. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938; Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739; Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403.

Instances of refusal to set aside sale before confirmation see Pocatello First Nat. Bank *v.* Bunting, 7 Ida. 387, 63 Pac. 694; Bethlehem Iron Co. *v.* Philadelphia, etc., R. Co., 49 N. J. Eq. 356, 23 Atl. 1077; Wilber *v.* Wilber, 119 N. Y. App. Div. 740, 104 N. Y. Suppl. 179; People *v.* Bond St. Sav. Bank, 53 How. Pr. (N. Y.) 336.

and work serious injustice.[57] Where the price is measurably adequate, the purchaser is entitled to have the sale confirmed, and a conveyance made, notwithstanding assurance is given at the hearing that a much larger sum will be offered at a resale.[58] Sometimes before confirmation the court will open the biddings and order a resale upon an advance bid;[59] but, while the bidder at a sale subject to the approval of the court may have only an inchoate right, it is a right which he may expect the court to protect and the discretion to refuse to confirm the sale and to open the bidding is one which should not be arbitrarily exercised, since a practice which does not give protection to a *bona fide* bidder is not one which will tend to invite bidding at such sales.[60]

(III) *Chilling or Stifling Competition.* Any agreement operating to chill or stifle competition is illegal and the parties to it will not be permitted to derive any benefit from the sale.[61]

d. Effect of Confirmation — (I) *In General.* Upon confirmation of a receiver's sale and execution of a conveyance by him, the title will relate back to the day of the sale,[62] defects and irregularities being cured generally, except

57. Porch *v.* Agnew Co., 66 N. J. Eq. 232, 57 Atl. 726.

Where the sale is free from encumbrances under a statute providing for such sales of the property of insolvent corporations and is not an ordinary judicial sale after a hearing and judgment or decree therein in which rights of the parties have been inquired into and established, this should afford an additional reason which should lead the court to listen favorably to the opposition of such encumbrancers to a confirmation of a sale at an inadequate price. Porch *v.* Agnew Co., 66 N. J. Eq. 232, 57 Atl. 726.

58. Parker *v.* Bluffton Car Wheel Co., 108 Ala. 140, 18 So. 938, holding that the guaranty of complainant himself to make the property bring as much as ten per cent beyond the amount bid by the purchaser does not address itself to the court with much weight where the complainant was present at the sale, was authorized by the decree to bid, and had full opportunity then to raise the purchaser's bid but refrained from doing so.

59. State *v.* Roanoke Nav. Co., 86 N. C. 408, following the English practice in this regard, as to which see more fully Judicial Sales, 24 Cyc. 42. See also Bass *v.* McDonald, 29 Ind. App. 596, 64 N. E. 934.

Security for advance bid.— If the court refuses to confirm and orders a resale on account of the inadequacy of price, as where the sale is of corporate property before final judgment free from liens, under statute, the court will require some assurance that substantially higher bids will be secured. Porch *v.* Agnew Co., 66 N. J. Eq. 232, 57 Atl. 726, where the practice approved is to require a bond with security satisfactory to the court that in the event of a resale a greater bid will be made for the property and the court will fix the minimum price and require the bond for such a price as the least bid.

Forfeiture of cash payment.— Where the cash payment made by the purchaser is ordered forfeited because of his failure to comply with the terms of the sale, it is held that the payment becomes a part of the fund for disbursement by the receiver. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

Second purchaser taking deposit.— In Bass *v.* McDonald, 29 Ind. App. 596, 64 N. E. 934, it was held that where the mortgagee purchased the property for a sum less than his mortgage debt, and upon a resale, ordered upon an application of junior creditors, the mortgagee became the purchaser at the original price, the amount deposited by the junior creditors to guarantee a resale at a price at least ten per cent in excess of that obtained on the first sale, which was forfeited without objection by the depositors, after the payment of costs and expenses should be paid to the mortgagee, such amount together with his bid being less than his mortgage debt.

60. *In re* Illinois Third Nat. Bank, 4 Fed. 775, 9 Biss. 535, holding that where the court already has ordered a resale and upon proceedings for confirmation of the second sale the bid thereon was raised and the court refused to order another sale, it will not then permit a further raising of the bid; that such a practice should be discountenanced as one not tending to invite bidders at such sales.

61. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913 (holding that if, under an order for a public sale, a person makes an offer for a private sale, with a design to exclude the competition of another, which offer the receiver accepts, the sale is not binding on the court, the purchaser being chargeable with notice of the terms of the decree); Strickland *v.* National Salt Co., 43 Misc. (N. Y.) 172, 88 N. Y. Suppl. 323 [*affirmed* in 105 N. Y. App. Div. 640, 94 N. Y. Suppl. 936].

Bid by creditors jointly.— But the primary object of a sale of a corporation's property by a receiver being to satisfy judgments against it, the judgment creditors may bid on and buy it; and this can be done by all together, or by one for the benefit of all. Libby *v.* Rosekrans, 55 Barb. (N. Y.) 202.

Notice of sale excluding bidders see *supra*, IV, H, 4, note 72.

62. Koontz *v.* Kentucky Northern Bank, 16 Wall. (U. S.) 196, 21 L. ed. 465.

such as are founded on fraud or want of jurisdiction,[63] and after confirmation the court has no power at a subsequent term to modify the order.[64]

(II) *Confirmation Tantamount to Authority to Sell.* If upon a report and hearing of the manner and terms of a receiver's sale, the court confirms all that the receiver has done, this has been held to be equivalent to a previous authority and direction to the receiver.[65]

8. Waiver of Objections and Estoppel. A party with knowledge of facts which might constitute an objection to a sale will not be permitted to stand by and permit the sale without objection and thereafter resist confirmation on such grounds;[66] but while objections to the terms of a sale ought to be made by the parties in interest generally, before the property is sold, the court has the power where the case is one in which it is difficult to determine in advance how far and to what extent the terms prescribed may affect the sale, to refuse to ratify it, although no objections were made before, when it plainly appears that the sale was not fairly and properly made.[67] One who otherwise might have objected to a receiver's sale may by his conduct[68] ratify it and estop himself from raising the objection, as by claiming[69] or accepting the proceeds of the sale,[70] and one joining in the application for the order of sale will not be permitted thereafter to attack its validity.[71] One who fails to object to confirmation of the sale will not be heard afterward to raise such objections as should have been made at the confirmation in resisting the completion of his contract.[72]

63. Pocatello First Nat. Bank *v.* Bunting, 7 Ida. 387, 63 Pac. 694; Thompson *v.* Brownlie, 76 S. W. 172, 25 Ky. L. Rep. 622 (after term); Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15; Koontz *v.* Kentucky Northern Bank, 16 Wall. (U. S.) 196, 21 L. ed. 465. See also Judicial Sales, 24 Cyc. 36.

64. State Nat. Bank *v.* Neel, 53 Ark. 110, 13 S. W. 700, 22 Am. St. Rep. 185, where the court ordered the sale to be confirmed on condition that the bid be increased a certain amount and it was held that the order became final on the acceptance of these terms by the purchaser, and thereafter the court could not relieve the purchaser of the increased bid.

65. Tobin *v.* Portland Flouring Co., 42 Oreg. 117, 68 Pac. 749; Richards *v.* Halliday, 112 Fed. 86, 50 C. C. A. 133.

But upon objection properly made to confirmation it has been held on the other hand that the sale was void because made without authority, and not merely defective, and that in such a case confirmation over objection presenting the vice could not take the place and answer the purpose of an order of sale in advance. Ackerman *v.* Ackerman, 50 Nebr. 54, 69 N. W. 388. And in Mason *v.* Hubner, 104 Md. 554, 65 Atl. 367, a receiver without authority made a private sale and over objections to the ratification thereof by the court showing gross inadequacy in the price, it was held to be error to grant a *nunc pro tunc* order authorizing the sale as of the date it was made and confirming the same.

66. *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809, where it was held that creditors who stand by and make no objection whilst the property of their debtor, a corporation in the hands of receivers, is sold by the sheriff under order of the court, and who acquiesce in the manner in which such sale is conducted, will not be heard upon an opposition to the receivers' final account, filed long afterward, to complain that the sheriff did not conform to the terms of the order, and sold in lots when he should have sold in block.

67. Deford *v.* Macwatty, 82 Md. 168, 33 Atl. 488.

68. Champlain First Nat. Bank *v.* Wood, 30 Misc. (N. Y.) 278, 62 N. Y. Suppl. 324 (where a receiver appointed to hold, pending a suit to set aside an assignment, a bond and mortgage for six hundred dollars against the validity of which there were various claims, sold them for one hundred and fifty dollars without an order of court, it appearing that that was the highest price he could obtain and it was held that he could not be charged with the face value of the bond and mortgage in an action by the assignee of the estate after years of silence on the part of such assignee); Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710 (where a creditor with full notice of the pendency of the proceedings and of the steps therein, and who might have intervened therein before sale stood by and permitted an innocent person to purchase and pay a large amount of money, and it was held that he could not attack the sale in a collateral proceeding).

69. Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

70. Loney *v.* Bayly, 45 Md. 447, 43 Md. 10.

71. Battershall *v.* Davis, 31 Barb. (N. Y.) 323.

72. Barron *v.* Mullin, 21 Minn. 374, waiver of objection on the ground that the report of sale failed to include certain property, where the purchaser, who might have objected to the confirmation of the report of sale, not only failed so to object but consented to the report. See also Rogers *v.* Rogers Locomotive Co.,

9. Collateral Attack. The general rule which protects judicial sales against collateral attack [73] is applied to receivers' sales,[74] and those who are parties to the suit must ordinarily pursue their remedies therein and cannot in collateral proceedings set up irregularities or errors.[75]

10. Compliance With and Enforcement of Purchase — a. In General. Upon sale to a bidder at a receiver's sale, he may be compelled to complete his purchase and pay the price which he offered.[76] By purchasing, he voluntarily submits himself to the jurisdiction of the court,[77] and may be compelled to comply with his bid by motion or similar proceedings in the original cause.[78]

b. Payment — When and How Made. A purchaser must comply with the terms of the sale as to the time and mode of payment.[79] The payment must be made in money to the receiver; [80] but if the purchaser is a creditor, he may

62 N. J. Eq. 111, 50 Atl. 10, waiver by failure to appeal from an order of confirmation and acceptance of a lease for a part of the property from the purchasers.

73. See Judicial Sales, 24 Cyc. 72.

74. *Arizona.*— Gila Bend Reservoir, etc., Co. *v.* Gila Water Co., 9 Ariz. 57, 76 Pac. 990.

Georgia.— Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666.

Minnesota.— Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081.

Nebraska.—Schaberg *v.* McDonald, 60 Nebr. 493, 83 N. W. 737, sale by receiver of national bank, made under order of court.

New Jersey.— Fish *v.* Potts, 8 N. J. Eq. 277 [*affirmed* in 8 N. J. Eq. 909].

New York.— Battershall *v.* Davis, 31 Barb. 323.

Oklahoma.— Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

Wisconsin.— Anderson *v.* Chicago Title, etc., Co., 101 Wis. 385, 77 N. W. 710; Brande *v.* Bond, 63 Wis. 140, 23 N. W. 101.

United States.—McEwen *v.* Harriman Land Co., 138 Fed. 797, 71 C. C. A. 163; Bradley *v.* South Carolina Marine, etc., Phosphate Min., etc., Co., 3 Fed. Cas. No. 1,789, 3 Hughes 26 [*affirmed* in 105 U. S. 175, 26 L. ed. 1034].

See 42 Cent. Dig. tit. "Receivers," § 246.

Purchase by receiver see *supra*, IV, H, 6, b, (II).

75. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859; Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081; Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

76. Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403.

Where the purchaser fails to execute a note for the deferred payment, according to the terms of the sale, the receiver, having a general authority to sue, may sue immediately for the purchase-price. Hanke *v.* Blattner, 34 Ill. App. 394.

Where the sale is made by the debtor himself after the appointment of a receiver and an order to sell land to pay debts, but he makes the bonds given for the purchase-money payable to special commissioners appointed to make the sale and takes a trust deed securing such bonds and the court approves the sale and directs its receiver to collect the bonds, it is held that the sale is a private and not a judicial one and the debtor is the proper party to sue on the bonds for the purchase-money. Ware *v.* Starkey, 80 Va. 191.

Abatement in price see *infra*, IV, H, 10, d.

Caveat emptor see *infra*, IV, H, 10, c; IV, H, 12, c, (II), (A).

Release from increased bid see *supra*, note 64.

77. See *infra*, IV, H, 12, a. See also Judicial Sales, 24 Cyc. 30.

78. *In re* Denison, 114 N. Y. 621, 21 N. E. 97, as to the sale under an order approving all the terms thereof in advance, and which needs no further confirmation.

79. Alvord *v.* Strickler, 10 Colo. 89, 14 Pac. 117, where the inability of the purchaser to obtain possession of property sold by the receiver was held no reason for disturbing the action of the court in refusing to extend the time of the deferred payments, there being no agreement to put the purchaser in possession; he bought the interest of the parties in the condition in which he found it.

Action on bond in violation of order.— Where, before a receiver's sale of property was confirmed, defendants executed a bond conditioned to pay the receiver the price of the property if, after the sale was confirmed, he would deliver the property to the purchaser on credit, the receiver, on delivering the property as specified, could enforce the bond, although the delivery of the property before payment of the price was in violation of the order of sale. O'Gorman *v.* Sabin, 62 Minn. 46, 64 N. W. 84.

80. Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733 (holding that if receivers permit the purchaser to pay the price direct to the creditor, it is at their peril, and in the settlement the price will be dealt with as if collected by the receivers); Singerly *v.* Fox, 75 Pa. St. 112 (holding that a landlord purchasing goods on the premises from the receiver of his lessee cannot set off rent due against the receiver for the purchase-price of the goods); Kidney *v.* Beemer, 27 Pa. Super. Ct. 558 (where the purchaser owed claims for merchandise accounts which were to be paid out of the funds after payment of certain other preferred claims, and it was held that where the terms of sale were one half of the purchase-money in cash and one half in thirty days, but instead of paying the whole amount

be permitted to make payment by applying the debt due to himself in satisfaction of his bid to the extent that such purchase-money would inure to him in the distribution.[81]

c. Release of Purchaser. The doctrine of *caveat emptor*,[82] as applied in judicial sales generally,[83] is applied to a receiver's sale, and it is held under that doctrine that the purchaser will not be relieved of his purchase on account of mere errors and irregularities which do not render the sale void;[84] that the purchaser must take such title as an examination of the proceedings will show that he can get and is bound to examine for himself beforehand to see what title he will obtain by the sale,[85] although it is also held that the purchaser may demand a title free from reasonable doubt as a condition to the completion of his pur-

in cash or all in thirty days, the purchaser gave a note for a part, he could not claim in defense to a suit on the note that he should be allowed credit for his merchandise accounts and that the receiver should file an account before recovering judgment for the purchase-money, but the purchaser must pay the balance of his purchase-money and then upon the filing of the receiver's account present his claim on the funds in the receiver's hands). See also Givin *v.* Givin, 1 Leg. Gaz. (Pa.) 48. But if a receiver of a partnership sells to one of the partners under an agreement that the price may be credited as a payment to the partner on his claim against the assets, the receiver cannot afterward maintain an action for the purchase-price. Barry *v.* Nelms, 2 Pa. Co. Ct. 440.

Offset by claim against receiver.— The fact that a receiver is authorized by the order of the court to retain the amount of his fees out of the proceeds of sale gives him no right to any part of the funds due by the purchaser until it is paid by the receiver into court for distribution and therefore the purchaser cannot set off against the claim for the purchase-money a debt due to him by the receiver. Polk *v.* Garver Coal, etc., Co., 91 Iowa 570, 60 N. W. 111.

81. Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432 (accepting note upon which creditor would be entitled to a dividend in the distribution of the net proceeds, at the same time taking a secured guaranty in writing for the payment of any difference between the amount of the dividend when declared and the amount at which the note was taken); Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15 (propriety of an order permitting the receiver to take receiver's certificates which were a preferred lien on the property in part payment of the purchase-price); Mercantile Trust Co. *v.* Kanawha, etc., R. Co., 58 Fed. 6, 7 C. C. A. 3 (where the purchasers — bondholders — were permitted to deposit bonds in payment of the purchase-price after paying into court sufficient cash to extinguish the costs and liens prior to the bonds, the court saying that this was precisely as if they had paid the whole price in money and then withdrawn their *pro rata* share of the proceeds on the distribution).

But under circumstances showing a design to favor particular parties in the purchase of the property, the court refused approval of a sale under an *ex parte* order which provided that if any creditor of the insolvent corporation having a claim allowed by the receiver should become a purchaser, he should be allowed to offset seventy per cent of his claim against his bid, the party who purchased being the only creditor having such a claim. Strickland *v.* National Salt Co., 43 Misc. (N. Y.) 172, 88 N. Y. Suppl. 323 [*affirmed* in 105 N. Y. App. Div. 640, 94 N. Y. Suppl. 936].

Set-off and counter-claim generally see *supra*, IV, D, 3 d, (III).

82. See *infra*, IV, H, 12, c, (II), (A).

83. See JUDICIAL SALES, 24 Cyc. 57.

84. Thompson *v.* Brownlie, 76 S. W. 172, 25 Ky. L. Rep. 622, where it is held that the purchaser could not be relieved from his purchase after the expiration of the term at which the sale was confirmed, in proceedings to wind up the affairs of a mining corporation, because the judgment for the sale failed to describe the land, or because the holder of a lien on the property was not made a party to the proceeding.

The purchaser cannot object to the appointment of the receiver in an action by the receiver for the purchase-price, when he retains the property purchased. Hanke *v.* Blattner, 34 Ill. App. 394. See also Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703.

Puffing see JUDICIAL SALES, 24 Cyc. 28.

85. Barron *v.* Mullin, 21 Minn. 374 (where the purchaser was required to complete his contract of purchase of real estate after confirmation, over his objection that a release of certain rights of dower in favor of the wives of the parties to the suit was not secured by the receiver); Campbell *v.* Parker, 59 N. J. Eq. 342, 45 Atl. 116 (where after confirmation the purchaser was not permitted to decline to complete the purchase because the property was subject to restriction in its use, although after it was struck off and before signing the bid he had inquired of the receiver whether the land was free and clear of encumbrances and the latter had replied, "Yes, as I understand it;" that the only question in such a case is whether or not the purchaser has shown such a case of fraud, accident, or mistake as will induce the court of equity to relieve him from the purchase).

Release from increased bid see *supra*, note 64.

chase.[86] Where the receiver has no power to convey pursuant to a contract of sale made by him, the purchaser may recover back the amount of the purchase-money paid by him.[87]

d. Abatement of Price. When by mistake resulting from the action of the court or the misrepresentations of its agents, less property is sold than is bid for and supposed to have been sold, the court may allow a proportionate abatement of the purchase-price.[88] If articles are sold in bulk, without representation as to the quantity except that they are of an estimated amount, the bid is for what is actually on hand, and it is no defense to an action for the price that there is a deficiency between the actual quantity and the estimated quantity of the article sold.[89]

e. Completion of Purchase — Transfer of Title. Ordinarily transfers and conveyances of the property sold by receivers are ordered to be made, and are made, by them,[90] or the parties may be required to execute a deed conveying their interests and title,[91] and the authority conferred by the court upon the receiver to sell carries with it authority to give to the purchaser evidence of a transfer of title, and, in the case of the sale of land, to execute a deed of conveyance.[92]

86. People *v.* Open Bd. Stock Brokers' Bldg. Co., 92 N. Y. 98, sale by receiver in suit for dissolution of joint stock company. And see also, generally, JUDICIAL SALES, 24 Cyc. 58 text and notes 29, 30.

Reimbursement upon release from purchase. — Where the purchaser is released from his purchase because of a defect in the title, the purchase-money paid by him with interest, together with legal expenses including counsel fees, will be ordered to be paid to him. Drake *v.* Goodridge, 7 Fed. Cas. No. 4,063, 6 Blatchf. 531, where, however, after the court had refused to release the purchaser and had ordered him to complete the sale, the receiver withdrew the order and consented to treat it as a nullity. In People *v.* New York Bldg.-Loan Banking Co., 189 N. Y. 233, 82 N. E. 184, it is held that the allowance of compensation of that kind upon releasing a purchaser at a private sale of land by a receiver is a matter of discretion with the court, there being no warranty, express or implied, since the purchaser has time for investigation before the purchase and it is the duty of the court to protect the property from waste, etc. Reference is made in this case to People *v.* Open Bd. Stock Brokers Bldg. Co., 92 N. Y. 98, where the purchaser was relieved from his purchase, and his deposit, interest, and reasonable expenses of investigating the title were directed to be paid to him, and it is pointed out that the question raised and reviewed upon the appeal pertained to other matters, and no question appears to have been raised or discussed with reference to the allowance of these items.

87. Bidwell *v.* Rice, 19 Wash. 146, 52 Pac. 1019, where after a contract by the receiver to convey, at which time he had no authority from the court in that regard, he conveyed the property to others, it was held that before authority to convey had been conferred the purchaser under the first contract could not be put in default.

88. Loney *v.* Penniman, 43 Md. 130, referring to the inability to deliver the title to a part of the property under a private sale of all assets, choses in action, etc., of a concern, the court holding, however, that if the question is one merely of the purchaser's remedy, the difficulty being that the choses in action are in another state, the laws whereof prevent the purchaser from coercing collection, the purchaser's title is nevertheless complete and the inability of the court authorizing the sale to assist him will not affect it. See also, generally, JUDICIAL SALES, 24 Cyc. 54.

The amount of abatement to which the purchaser will be entitled on account of a failure of title to a part of the property should equal the amount that the price was enhanced by the inclusion of such property in the bulk of that which was sold, and not the cost of the property to the original owner, such sum to be ascertained by determining the proportion of the actual value of the property title to which has failed to the value of the whole property, and by deducting a like proportion from the whole purchase-price. Cypress Lumber, etc., Co. *v.* Tillar, 73 Ark. 354, 84 S. W. 490.

89. Hanke *v.* Blattner, 34 Ill. App. 394, where it is indicated that the rule would be different if in offering the property a particular quantity is fixed by the receiver, in which event there would be some foundation for a rebate on account of the deficiency.

90. See Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862; Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703; Helfrich *v.* Freck, 3 Pa. Cas. 352, 6 Atl. 89.

Judicial sales generally see JUDICIAL SALES, 24 Cyc. 49 *et seq.*

91. See Cypress Lumber, etc., Co. *v.* Tillar, 73 Ark. 354, 84 S. W. 490 (*infra*, IV, H, 12, c, (II), (A), note 13), in a suit to wind up a partnership.

Assignment to receiver see *supra*, III, A, 5; IV, D, 2, b.

92. Koontz *v.* Kentucky Northern Bank, 16 Wall. (U. S.) 196, 21 L. ed. 465, holding that the intention of the court that the re-

But the transfer should not be made before the contract is completed by confirmation.[93]

11. Resale.[94] As upon the vacation or setting aside of judicial sales generally for causes not involving the absence of power of the court to make the sale, or upon the failure of the purchaser to comply with the terms of his bid, the court may order a resale,[95] and if the resale is ordered upon failure of the purchaser to comply with the terms of his purchase, he may be charged with the deficiency therein on the resale.[96]

12. Effect of Sale — a. In General. As in the case of judicial sales generally,[97] the bidder becomes a purchaser when the officer announces the sale of the property to him,[98] and submits himself to the jurisdiction of the court[99]

ceiver should exercise the authority to make a deed in this case was evident from the requirement that he should, in the event of a sale on credit, retain a lien or take a deed of trust on the land.

Recitals in such deed, of the receiver's appointment, the order of sale, and the sale to the grantee are not *prima facie* evidence of such appointment and authority to make the conveyance as against strangers, and the court's indorsement of its approval on such receiver's deed is not of itself sufficient to dispense with proof of the facts recited. Lawless *v.* Stamp, 108 Iowa 601, 79 N. W. 365.

93. Simmons *v.* Wood, 45 How. Pr. (N. Y.) 262 (transfer and payment before confirmation, at risk of purchaser); Koontz *v.* Kentucky Northern Bank, 16 Wall. (U. S.) 196, 21 L. ed. 465 (holding, however, that if the receiver irregularly executes a conveyance before the sale is confirmed, the conveyance is not void for that reason but only voidable; that if the confirmation is denied the conveyance becomes inoperative, but if the sale is confirmed, the objection to the order in which the conveyance was made is removed). See also, generally, Judicial Sales, 24 Cyc. 49.

Action on bond taken in violation of order see *supra*, note 79.

94. Forfeiture of deposit on advance bid see *supra*, note 59.

Requiring security on advanced bid see *supra*, note 59.

Substitution of purchaser not resale see French *v.* Pittsburg Vehicle, etc., Co., 184 Pa. St. 161, 39 Atl. 63, *infra*, note 98.

95. See Judicial Sales, 24 Cyc. 45 *et seq.* And see the cases *infra*, this note.

The purchaser is entitled to reimbursement of the money paid by him, with interest, costs, and expenses, including solicitor's fees expended in defending the sale, where the court sets aside the sale because it was based upon a material error as to the number and value of cattle to be sold in estimating the price at which the receiver was authorized to sell. Horse Springs Cattle Co. *v.* Schofield, 9 N. M. 136, 49 Pac. 954.

On appeal from an order ratifying a sale, costs on hearing of exceptions and appeal will be directed to be paid out of the proceeds of the resale where the order is reversed and a resale directed, all the parties having acted in good faith. South Baltimore Brick, etc., Co. *v.* Kirby, 89 Md. 52, 42 Atl. 913.

Inadequate price see *supra*, IV, H, 7, c, (II).

96. See Judicial Sales, 24 Cyc. 47. And see the cases *infra*, this note.

An action for the purchase-price will not lie against the first purchaser after a resale. Helfrich *v.* Freck, 3 Pa. Cas. 352, 6 Atl. 89.

And where immediately upon failure to pay the cash required on the bid, a receiver, without application to the chancellor either to compel the purchaser to complete the purchase or to confirm the sale, put up the property and resold it and the latter sale was confirmed and completed, the receiver had no cause of action for a deficiency against the first purchaser. Leslie *v.* Goodhue, 69 Hun (N. Y.) 71, 23 N. Y. Suppl. 389.

Title in different condition.—Where the receiver insists upon the validity of the first sale, when he offers the property on a resale after failure of the first purchaser to comply with his purchase, the order confirming the first purchase and decreeing that the premises remain in the purchaser, his heirs and assigns, etc., remaining unrevoked except for the subsequent decrees and orders relating to another sale, it was held that the condition of the title as offered at the second sale was different from that offered at the first; that the court could not say that these facts did not affect the bidding at the second sale; and that the first purchaser was not liable for the difference in the price between the sales. Helfrich *v.* Freck, 3 Pa. Cas. 352, 6 Atl. 89. See also Judicial Sales, 24 Cyc. 47 text and note 42.

97. See Judicial Sales, 24 Cyc. 30.

98. Files *v.* Brown, 124 Fed. 133, 59 C. C. A. 403, as to sales requiring confirmation. But see Leslie *v.* Goodhue, 69 Hun (N. Y.) 71, 23 N. Y. Suppl. 389.

Payment of rent after sale of leasehold.—Where the order of sale of a leasehold required the purchaser to assume the ground-rent from the date of the sale, subsequent proceedings to substitute another in lieu of the original purchaser, at the instance of the original purchaser, were held not to constitute a resale, and the receiver was not entitled to credit for the amount paid as rent from the date of sale until the substitution. French *v.* Pittsburg, Vehicle, etc., Co., 184 Pa. St. 161, 39 Atl. 63.

99. Parker *v.* Bluffton Car Wheel Co., 108

under whose order or decree the sale is made, although his title is inchoate before confirmation.[1]

b. Liabilities of Purchaser. Ordinarily when property is sold by a receiver under the orders of the court, charges against the assets of the estate can be asserted only against the receiver, and the property passes to the purchaser freed from claims against the receiver,[2] aside from the liability of the property to superior liens existing prior to the receivership,[3] or the liability of the property which may be imposed as a condition of the sale,[4] and the court loses jurisdiction of the purchaser as such, as well as of the property purchased, as soon as the sale is approved and completed,[5] and this is true, although the purchaser is also a party to the suit.[6] The court has inherent power, however, to retain jurisdiction of the property for the purpose of enabling them to make and enforce orders with respect to the receiver's indebtedness,[7] and if the purchaser undertakes and agrees to pay the receiver such sums as may be found due him for compensation and indebtedness incurred in the receivership, he must abide by the finding of the court as to such sums.[8]

Ala. 140, 18 So. 938; *In re* Denison, 114 N. Y. 621, 21 N. E. 97.

By applying for an order to compel completion of sale the purchaser submits himself to the jurisdiction of the court. Atty.-Gen. *v.* Continental L. Ins. Co., 94 N. Y. 199.

1. See *supra*, IV, H, 7, a.

2. McDonald *v.* Miller, 54 Ill. App. 325; Emerson *v.* Schwindt, 108 Wis. 167, 84 N. W. 186, as to debts arising out of receivership. So after title to the property of a corporation is passed to a new company under foreclosure proceedings, the latter company is not liable for a judgment obtained against the first company and its receiver, although the receiver did not turn over the property and obtain his discharge until after the judgment was rendered and at that time had in his hands and turned over to the new company money sufficient to pay the judgment. If the funds in the hands of the receiver after recovery of the judgment were available for the payment thereof, it was the judgment creditor's duty to make proper application to the court in the receivership proceedings and having failed to do this he cannot be heard to say that the new company should pay him. Brockert *v.* Iowa Cent. R. Co., 93 Iowa 132, 61 N. W. 405.

The reacquisition of the property by defendant at foreclosure sale would not of itself render the purchaser liable for claims against the receiver except such as might be imposed by the terms of the sale, or the undertaking of the purchaser. Ryan *v.* Hays, 62 Tex. 42; Hicks *v.* International, etc., R. Co., 62 Tex. 38; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800.

A statute, if intended to change the rule of the text, should do so in express terms and not by doubtful construction. Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800, holding that the purpose of the Texas act of 1889 was to make the expenses of the receivership a lien upon the *corpus* of the property, and to hold the owner or his assigns, where it has been redelivered without sale, liable for such claims without proof of betterments.

3. See *infra*, IV, H, 12, c, (II), (C).

4. Brown *v.* Wabash R. Co., 96 Ill. 297, holding that if, upon the conveyance of property in the hands of a receiver, it is charged with all liabilities incurred in the receivership, a liability in tort must be established by an action at law against the receiver before a bill can be filed to subject the property.

5. McDonald *v.* Miller, 54 Ill. App. 325, holding that the court has no jurisdiction to compel performance by the purchaser of his agreements with others.

6. McDonald *v.* Miller, 54 Ill. App. 325.

7. La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415; Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181.

The proper attitude of a court toward a receiver's obligations, duly authorized, is that "the court should be chary of promise, but eager of performance; careful not to burden property in its possession with obligations, and equally careful to see that every obligation is discharged before possession is fully surrendered." American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 877, 60 C. C. A. 52 [*quoting* Farmers' L. & T. Co. *v.* Burlington, etc., R. Co., 32 Fed. 805].

Personal liability.—In Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736, 84 C. C. A. 392, it was held that where by the local law the obligation assumed by a purchaser from a receivership who assumes liability is one of direct liability and not merely equitable for the payment of claims chargeable against the property, such local law fixes the nature of the cause of action for the enforcement of the liability in a federal court and an action at law may be maintained in such court against the purchaser alone to recover for a personal injury for which the property in the hands of the receiver was chargeable.

Making expenses lien on property see *supra*, IV, G.

8. Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447 (where the purchaser undertook to pay such sums in order to avoid paying any part of the purchase-money into court and in order to obtain posses-

c. Right and Title of Purchaser — (i) *Order or Decree Controls.* A purchaser of property at a receiver's sale looks to the order or decree of the court for the measure of his rights. That is his muniment of title — the contract made with him,[9] and should not be changed after he has purchased in reliance thereon.[10] On the other hand, the receiver cannot sell and convey property so as to confer any right or title in contravention of the order under which he acts.[11]

(ii) *Rights, Title, and Interest of Parties Pass* — (a) *In General.* The sale of property in the hands of a receiver in pursuance of an order or decree for such sale passes the title and claims of all parties to the suit which are not excepted or reserved by the terms of the order or decree.[12] However, the general

sion); Jesup *v.* Wabash, etc., R. Co., 44 Fed. 663 (holding that where the purchaser as a part of the consideration covenanted to discharge all existing debts and liabilities of the receivership, it was the duty of the court to protect him against demands which were not just and proper demands against the receiver and to that end to require all such demands to be presented for allowance).

A judgment for a receiver for his compensation may be enforced by his personal representatives. Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447.

9. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859.

10. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859.

11. Jackson *v.* Horton, 126 Ill. 566, 21 N. E. 490, where an undivided part of the property was sold in contravention of the order of court and it was held that the interest did not pass but that as the receiver was no longer in a position to select the particular interest which was to have been set aside, a partition of the land would be ordered.

Order of sale based upon inventory or appraisal.— Where the petition for the order of sale and the order based thereon both show on their face that the assets referred to in the order to sell all the assets of the concern are those which are mentioned in the inventory, assets not embraced in such inventory do not pass to the purchaser. Illinois Steel Co. *v.* Preble Mach. Works, 116 Ill. App. 268 [*affirmed* in 219 Ill. 403, 76 N. E. 574] (where the question arose in a suit by the receiver brought after such sale for a breach of a contract which did not pass under the sale, the only question before the supreme court, however, being the admissibility of the inventory); Charter Oak Stove, etc., Co. *v.* Rice, 106 La. 77, 30 So. 321 (where it was held that goods ordered by the receiver of a mercantile establishment but which did not arrive until after the sale of the establishment in block as a going concern, and were not included in the appraisement upon which the order of sale was based, are not included in such sale, it appearing also that the petition upon which the order of sale was based asked that the continuance of the business after the order of sale should be for the benefit of the purchaser who should thereafter buy, and that immediately after the order of sale was entered the fact that the goods above mentioned had been ordered was called to the attention of the court and the receiver was directed to cancel the order). See also Houts *v.* Sioux City Brass Works, 134 Iowa 484, 110 N. W. 166.

12. Sinnott *v.* Moore, 113 Ga. 908, 39 S. E. 415 (where a will creating a spendthrift trust, made and probated in another state, was admitted to probate in Georgia and an administrator with the will annexed appointed, and in a suit filed by him for a construction of the will an order by consent of all parties, including the executor and trustee under the will, who had the legal title, for the sale of the property by a receiver appointed in such suit to convey, and a deed by the latter, conveyed a good legal title to the purchaser, although the beneficiaries under the will did not consent); Harrington *v.* Connor, 51 Nebr. 214, 70 N. W. 911 (holding that the purchaser of the assets of a bank takes the title which the receiver had, subject to the same, but no other, equitable defenses which might have been available against the corporation itself, since the receiver represented the creditors and depositors and the purchaser took in their right); Duplex Printing Press Co. *v.* Clipper, 213 Pa. St. 207, 62 Atl. 841; Scott *v.* Farmers', etc., Nat. Bank, (Tex. 1903) 75 S. W. 7 (sale of property of corporation).

Debts due by non-residents pass to the purchaser of the firm's assets, property, book debts, etc., under a sale thereof authorized by the court, and the purchaser will have such power to collect as can be conferred by the sale of the receiver by the authority of the court; if the debts are voluntarily paid, the purchaser will hold the proceeds without accounting to the creditors of the firm, but if payment is refused and cannot be coerced and it is beyond the power of the court to assist the purchaser by reason of any laws operating where the debtors reside, that would not divest the purchaser's title under the receiver's sale although it might prevent his recovery. Loney *v.* Penniman, 43 Md. 130. See also Hoyt *v.* Thompson, 5 N. Y. 320.

Right of a party to a suit against the receiver.— In Jewett *v.* Miller, 10 N. Y. 402, 65 Am. Dec. 751, a bank pledged a mortgage and the receiver of the bank afterward bought the property individually at a foreclosure of the mortgage and subsequently sold at public auction a junior mortgage on the same property as a part of the assets of the bank, the purchaser of the junior mortgage being noti-

rule is that he takes only such title and interest as the parties had,[13] or the interest sold in its then condition,[14] and is subject to the doctrine of *caveat emptor*,[15] although others having rights may be guilty of such conduct as will estop them from setting up such rights as against innocent purchasers at the receiver's sale.[16]

(B) *Redemption.* As in the case of other judicial sales,[17] there is no general right of redemption from receivers' sales except such right as is conferred by statute.[18]

fied of the exact condition of the title, and it was held that he was not entitled to redeem from the receiver, although the beneficiaries of the receiver might have insisted on his purchase as being for their benefit; that the right of the beneficiary did not pass to the purchaser of the junior mortgage because having bought with notice he could not invoke the principle of equitable estoppel.

Conveyance or assignment to a receiver see *supra*, IV, D, 2, b; IV, D, 7, e, (III), (B).

Relation back of title to day of sale see *supra*, IV, H, 7, d, (I).

13. McLaughlin *v.* Taylor, 115 Ga. 671, 42 S. E. 52; Baxter *v.* Mattox, 106 Ga. 344, 32 S. E. 94; People *v.* New York Bldg.-Loan Banking Co., 189 N. Y. 233, 82 N. E. 184; *In re* Coleman, 174 N. Y. 373, 66 N. E. 983 (the last two cases holding that only the title which the corporation had, in proceedings to dissolve a corporation under the statute, passes by the sale); Pfeffer *v.* Kling, 58 N. Y. App. Div. 179, 68 N. Y. Suppl. 641 [*affirmed* in 171 N. Y. 668, 64 N. E. 1125] (sale of equity of redemption by receiver after sale of property by sheriff under execution, and necessity for purchaser at receiver's sale to redeem before title of purchaser at execution sale ripens); Foster *v.* Barnes, 81 Pa. St. 377. See also *supra*, IV, D, 3, d.

The parties are not required to warrant the title under an order of court directing them to convey to the purchaser the property to which they or either of them had title, but need only convey such title as they have. Cypress Lumber, etc., Co. *v.* Tillar, 73 Ark. 354, 84 S. W. 490.

Non-assignable contract.—A contract which the party whose property is sold by receiver could not assign cannot be transferred or assigned by the receiver so as to confer any rights thereunder upon the transferee. Sargent Glass Co. *v.* Matthews Land Co., 35 Ind. App. 45, 72 N. E. 474.

14. Alvord *v.* Strickler, 10 Colo. 89, 14 Pac. 117.

A purchaser of a leasehold takes subject to the provisions of the lease of which he had notice. Brookfield *v.* Sharpe, 88 Md. 713, 41 Atl. 1072.

15. *Georgia.*— Walters *v.* Montgomery, 57 Ga. 501.

Illinois.— Hanke *v.* Blattner, 34 Ill. App. 394.

Kentucky.— Thompson *v.* Brownlie, 76 S. W. 172, 25 Ky. L. Rep. 622.

Minnesota.— Barron *v.* Mullin, 21 Minn. 374, both as to the title and the condition of the property.

Washington.— Fall, etc., Fish Co. *v.* Point Roberts Fishing, etc., Co., 24 Wash. 630, 64 Pac. 792, holding that where the fishing location of the insolvent corporation was sold by its receiver and purchased by plaintiff with knowledge that it was closer than allowed by law to another location retained by the corporation, such purchase from the receiver was subject to the rule of *caveat emptor*, so that the purchaser was not entitled to an injunction restraining the operation of defendant's trap.

See 42 Cent. Dig. tit. "Receivers," §§ 236, 248.

Abatement in price see *supra*, IV, H, 10, d.

Receiver's right or title subject to liens see *supra*, IV, D, 3, d, (II).

16. McAllister *v.* Stumpp, etc., Co., 25 Misc. (N. Y.) 438, 55 N. Y. Suppl. 533, where after the originator of proprietary articles had assigned his rights therein, he transferred, or attempted to transfer, the same rights to a corporation by which they were exercised, and the first assignee, who was a creditor of such corporation, was present at the sale of such rights by the receiver of the corporation upon its subsequent insolvency and made no attempt to assert his rights in the presence of the bidders, and it was held that such first assignee was estopped from asserting that the purchasers acquired no title, and that such purchasers did not have imputed knowledge of want of title in the corporation from the fact that they were stock-holders thereof, the knowledge of the original assignor not being notice to them; and further, that such purchasers did not have the sole proprietorship of such articles and would not be permitted to advertise such sole proprietorship.

17. See JUDICIAL SALES, 24 Cyc. 68.

18. Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862, holding that the right of redemption is not incident to a sale by a receiver of an insolvent corporation appointed, under the statute, upon the return of an execution unsatisfied, to convert the entire corporate assets into money for the payment of the debts of the corporation. See also Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859. But in Lacey Coal Mines *v.* Chicago, etc., Coal Co., 131 Ill. 9, 22 N. E. 503, 8 L. R. A. 598, it was held that under a statutory provision that when any real estate is sold by virtue of an execution, judgment, or decree of foreclosure of a mortgage, or the enforcement of mechanic's lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, master in chancery, or other officer to deliver to the purchaser a certificate entitling him to a deed in case the property is

(c) *Liens and Encumbrances.* The rule is that the purchaser at a receiver's sale takes the property subject to all subsisting paramount liens and that such liens are not divested or affected by such sale, as against strangers to the record,[19] where a sale free from encumbrances is not authorized,[20] and a proceeding by a creditor for the collection of his claim is held not to be a proceeding *in rem* as to parties who have no notice thereof or opportunity to be heard, so that while a receiver may sell he can do so only subject to such prior existing liens,[21] although where the court had ordered the receiver to pay particular liens, a purchaser is entitled to have such liens removed.[22] So a sale under an order directing that it shall be made subject to liens and encumbrances does not divest prior encumbrances.[23] But if one claiming a prior lien who is a party to the receivership suit files his claim with the receiver and appears on the application for sale he is held to have elected to rely on the appropriate orders of the court for the distribution of the proceeds of sale and is bound by his election so that he cannot

not redeemed within the statutory period of redemption, a court of chancery has no power, on creditors' bill against a corporation, to order defendant's property, consisting of coal mines, and personal property used in mining, to be sold by its receiver as a unit, without right of redemption. This statute, however, was held in Blair *v.* Illinois Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269, to be inapplicable to a sale ordered in a suit under a winding-up statute for the dissolution of an insolvent corporation.

19. *Georgia.*— Denny *v.* Broadway Nat. Bank, 118 Ga. 221, 44 S. E. 982; McLaughlin *v.* Taylor, 115 Ga. 671, 42 S. E. 30.

Indiana.— Lorch *v.* Aultman, 75 Ind. 162.

Iowa.— Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859.

New York.— People *v.* New York Bldg.-Loan Banking Co., 189 N. Y. 233, 82 N. E. 184; *In re* Coleman, 174 N. Y. 373, 66 N. E. 983.

Ohio.— Gates *v.* Merchants' Banking, etc., Co., 22 Ohio Cir. Ct. 724, 11 Ohio Cir. Dec. 721.

Pennsylvania.— Foster *v.* Barnes, 81 Pa. St. 377.

Texas.— Scott *v.* Farmers', etc., Nat. Bank, (1903) 75 S. W. 7.

See 42 Cent. Dig. tit. "Receivers," § 249.

Taxes.— But under a statute requiring the court on distribution of the proceeds of a receiver's sale to order the payment of all taxes, penalties, and interest due on the property sold, a purchaser at such sale, in the absence of special agreement, is entitled to have payment from the proceeds of the sale of all taxes, etc., existing at the time of the sale. Sandheger *v.* Banner Brewing Co., 8 Ohio S. & C. Pl. Dec. 592, 6 Ohio N. P. 410. See also New Orleans *v.* Peake, 52 Fed. 74, 2 C. C. A. 626.

Representations of receiver at the sale.— In Walter *v.* Montgomery, 57 Ga. 501, it was held that the representations of the auctioneer at a receiver's sale were true and did not operate as a fraud on the purchaser so as to constitute a defense to an action on a mortgage given to secure the purchase-money where the auctioneer announced that the land was free from encumbrances, the fact being that prior to the sale the land had been levied on by judgment and fieri facias against a former vendor and the claim cause was then pending, but upon the trial of such case the jury returned a verdict that the land was not subject but was the property of the receiver's estate.

20. See *supra*, IV, H, 6, c, (VII).

Assignment of reversion in leasehold.— Under an act authorizing a sale of the property of an insolvent corporation free of all encumbrances, provided the sale should not affect the rights of the creditors of the corporation to receive their distributive shares of the proceeds nor invalidate any existing liens made by the corporation or "assignment thereof," it was held that the latter clause had reference to the assignment by the lessee and not to the assignment by the lessor and did not preclude the purchaser of the property at the receiver's sale to claim rents under a lease of a part of the property as against one claiming under an assignment of the reversion by the corporation before the receiver was appointed. Fish *v.* Potts, 8 N. J. Eq. 277.

21. Damm Mfg. Co. *v.* Parkhurst, 125 Ind. 317, 25 N. E. 347 (proceeding by creditor to collect debt); Snow *v.* Winslow, 54 Iowa 200, 6 N. W. 191; Cameron *v.* Jones, 4 Tex. Civ. App. 4, 90 S. W. 1129 (where the lienor was not precluded from maintaining an independent suit to enforce his lien, although he might have been required to intervene in the receivership suit, where the parties who might have compelled such intervention were parties in the suit brought for the enforcement of the lien in which no objection was raised by them to the maintenance of the independent suit pending the receivership proceedings).

22. Brookfield *v.* Sharpe, 88 Md. 713, 41 Atl. 1072, holding, however, that the purchaser cannot complain where the court ratified the sale upon the theory that the claims either had been or would be paid by the receiver.

23. Bermea Land, etc., Co. *v.* Adoue, 20 Tex. Civ. App. 655, 50 S. W. 131.

Right of purchaser to question validity of encumbrance.— In a creditor's suit against an insolvent corporation, it is held that the purchaser at a sale of the corporate assets made under an order of the court occupied the same position as a creditor and might ques-

afterward enforce his claim against the property,[24] and if the sale is ordered without prejudice as to a particular claim of one of the parties, the sale frees the title of all other claims by the same or any other party to the proceeding.[25] A lien cannot be acquired after the accrual of the receiver's title which will affect the title of the purchaser at the receiver's sale.[26]

d. Errors and Irregularities in Proceedings. Mere errors and irregularities in the proceedings culminating in a sale and conveyance by a receiver will not affect the title of the purchaser.[27]

tion the validity of a chattel mortgage on the property as against creditors, although a receiver as representative of the insolvent could not reach assets of the insolvent which equitably should be subjected to the payment of his debts but which had been fraudulently placed by the insolvent beyond the reach of the law. Weill *v.* Zacher, 92 Ill. App. 296. So in Rogers *v.* Southern Pine Lumber Co., 21 Tex. Civ. App. 48, 51 S. W. 26, in proceedings instituted by an unsecured creditor of an insolvent corporation, to which the trustee and beneficiaries of a trust deed were not made parties, the purchasers at a sale of the property by a receiver under an order to sell without prejudice to persons claiming any interest in the property and directing conveyance of the interest which the corporation had at a time subsequent to the execution of the trust deed, were permitted to question the validity of the trust deed because it was a preference by an insolvent corporation, it being held that the recitals as to the trust deed in the order of sale were merely to show that no issue as to its validity had been determined. In New Jersey, under a statute giving the court power to order the sale of the property of insolvent corporations free of encumbrances, a sale by a receiver under an order which makes no mention of prior liens and encumbrances is held to transfer the property to the purchaser subject to the lien of whatever encumbrance may be upon it, with the right of the purchaser to contest the validity of apparent encumbrances either with respect to their legal existence or the amount due upon them, and the receiver can impose no other conditions. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548. But in Richards *v.* Halliday, 112 Fed. 86, 50 C. C. A. 133 [*affirming* 92 Fed. 798], it was held that under the law of New Jersey if a receiver of an insolvent corporation takes no steps to have a mortgage of its assets to a director declared void as an illegal preference but sells subject to such mortgage and the sale is confirmed after notice to the mortgagees, who were present by counsel at the confirmation, the purchaser at such sale could not maintain a suit to set aside the mortgage on the ground that the corporation was insolvent when it was executed. The court distinguished Hackensack Water Co. *v.* De Kay, *supra*, in that the sale there was subject only to "legal liens and incumbrances," while in the case at bar the sale which the chancellor confirmed was "subject to all chattel mortgages," etc.

Right of purchaser to attack receiver's certificates see *supra*, IV, G, 5.

24. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859; Nelson *v.* Jenks, 51 Minn. 108, 52 N. W. 1081. See also Settegast *v.* Houston, etc., R. Co., 38 Tex. Civ. App. 623, 87 S. W. 197.

25. Mercantile Realty Co. *v.* Stetson, 120 Iowa 324, 94 N. W. 859; Scott *v.* Farmers', etc., Nat. Bank, 97 Tex. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

26. Brockert *v.* Iowa Cent. R. Co., 93 Iowa 132, 61 N. W. 405 (judgment procured after the title to the property had passed under a receiver's sale); Watkins *v.* Minnesota Thresher Mfg. Co., 41 Minn. 150, 42 N. W. 862; Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442 (where on a bill by a judgment creditor to set aside the fraudulent conveyance of the debtor's land, the court directed the debtor and his grantee to convey the lands to a receiver and ordered the receiver to sell, and it was held that the purchaser acquired the title and interest which the debtor had in the lands at the time of his conveyance to the receiver as against a judgment subsequently procured and docketed); Texas Trunk R. Co. *v.* Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776 (superiority of title of purchaser at receiver's sale over lien of execution or judgment procured after the appointment of the receiver). In this connection see also *supra*, IV, D, 4; IV, D, 7, e, (III), (B).

Estoppel of purchaser at receiver's sale.— An honest although mistaken opinion of the law will not operate as an estoppel on the purchaser at the receiver's sale as against a judgment creditor whose judgment is not a lien. And where such purchaser, before the sale, insisted in a letter to the receiver that the real estate to be sold would be worth nothing above the judgments that were liens upon it, and probably expressed the same opinion to the receiver at the sale, but not in the presence of the purchasers, and assuming that he informed the receiver that the particular judgment in question was a lien upon the premises, in the absence of an allegation that he was influenced by improper motives or that the opinion was not that honestly entertained by him, and the opinion being one not declared to the judgment creditors or upon which they neither did nor omitted to do anything, the judgment creditor is not entitled to establish his title under a sale by the sheriff under the judgment as against the purchaser at the receiver's sale. Chautauque County Bank *v.* White, 6 N. Y. 236, 57 Am. Dec. 442, *supra*, this note.

27. Koontz *v.* Kentucky Northern Bank, 16

e. Effect of Reversal or Vacation of Decree. As in judicial sales generally,[28] the reversal or vacation for irregularity or error in the decree under which the sale was made will not invalidate the title of the purchaser, no question of jurisdiction of the court being involved.[29]

I. Reconveyance and Redelivery of Property — 1. In General. Property in the hands of a receiver will be distributed according to the rights of the parties as fixed by the law.[30] When the receivership has been terminated *inter partes*, the property should be restored to its rightful owners,[31] whose possession was interrupted or interfered with by the appointment of the receiver,[32] and according to such rights of the parties as they are determined in the suit, and

Wall. (U. S.) 196, 21 L. ed. 465, holding that it is sufficient for the purchaser to see that there is a suit in equity, or was one, in which a receiver of the property was appointed; that such receiver was authorized to sell the property; that a sale was made under such authority; that the sale was confirmed; and that the deed accurately describes the property sold, and then, if the title to the property was vested in the receiver, it passes to the purchaser.

28. See JUDICIAL SALES, 24 Cyc. 65.

29. Threadgill *v.* Colcord, 16 Okla. 447, 85 Pac. 703, where it was further said that the rule was the same, although plaintiff in the suit in which the receiver was appointed was himself a purchaser at the receiver's sale, as to which latter point, however, see JUDICIAL SALES, 24 Cyc. 66 text and note 80.

Void order.— But where on appeal from orders appointing a receiver and authorizing a sale of certain of corporate property, such orders are reversed as void for want of jurisdiction, and all proceedings thereunder are set aside, it is held that the appeal by the corporation constituted an election to have the property restored to it or applied to its benefit; that the property might thereafter be subjected to judgments against it, and that the purchaser can recover the purchase-money after the property had been so subjected to the payment of corporate debts. Lutey *v.* Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

30. Sinnott *v.* Moore, 113 Ga. 908, 39 S. E. 415, holding that where property is sold by a receiver appointed to administer an estate under a will creating a trust, the proceeds will belong to the trustees, under the will, whether treated as realty or personalty.

Receiver's deed can give no greater interest. — A receiver appointed upon the removal of a testamentary trustee and directed to convey title and settle the several portions of the estate upon the devisees according to the will can convey to a devisee no more than the will entitles him to, and if the deed, based upon a misconstruction of the will by the receiver, attempts to convey a greater interest, it will not be affected as to the excess. McCord *v.* Whitehead, 98 Ga. 381, 25 S. E. 767.

Where the receiver claims a right to the balance in his hands under an assignment from the debtor after satisfaction of debts, it is held that such right should be determined before ordering him to pay the money into court. Adair County *v.* Ownby, 75 Mo. 282.

31. *Alabama.*— Johnston *v.* Riddle, 70 Ala. 219.

California.—Baughman *v.* Calaveras County Super. Ct., 72 Cal. 572, 14 Pac. 207.

Georgia.— Field *v.* Jones, 11 Ga. 413.

Kansas.— Moyer *v.* Badger Lumber Co., 10 Kan. App. 142, 62 Pac. 434.

Kentucky.— Campbell *v.* Eversole, 38 S. W. 486, 18 Ky. L. Rep. 723.

Montana.— Harris *v.* Root, 28 Mont. 159, 72 Pac. 429, as to the propriety of a discharge upon judgment for defendant.

New York.— Katz *v.* Freeman, 114 N. Y. App. Div. 124, 99 N. Y. Suppl. 613; Pierce *v.* Lees, 17 N. Y. App. Div. 346, 45 N. Y. Suppl. 294.

Texas.— Holland *v.* Preston, (Civ. App. 1897) 41 S. W. 374, where the adverse party relinquishes his claim against the property.

See 42 Cent. Dig. tit. "Receivers," § 105.

Prohibition against maintaining receiver's possession.— Where a judgment in favor of defendants, whose property had been placed in the hands of a receiver, was affirmed, the final decree not providing for the retention of the receiver thereafter, an order discharging the receiver follows as a matter of course upon the affirmance, and is self-executing, immediately terminating the right of the receiver to withhold possession of the property. A supersedeas bond on appeal by plaintiff from the order of discharge does not reinstate the receiver, and if the lower court assumes to maintain the possession of the receiver prohibition will lie on behalf of defendant, since, the discharge having been entered on his motion, he could not appeal. State *v.* Spokane County Super. Ct., 31 Wash. 481, 71 Pac. 1095.

Form of order see State *v.* Spokane County Super. Ct., 31 Wash. 481, 482, 71 Pac. 1095, upon judgment in favor of defendant.

Order to return property wrongfully taken see *infra*, VI, D, 2, b, (IV).

Retaining jurisdiction see *supra*, III, K.

32. Warren *v.* Bunch, 80 Ga. 124, 7 S. E. 270 (holding that upon dismissal of a bill for want of jurisdiction property in the receiver's hands ought to be restored to the party from whom the receiver took it, although the opposite party may have a just claim to the possession by reason of having purchased and been put into possession before the bill was filed); People *v.* Jones, 33 Mich. 303 (restoration by court which made appointment, where

the purposes of the suit.[33] It is not in accordance with equity, however, to order the return of the property to an original party who had no legal or equitable right to it, as against one who intervenes in the receivership and whose title is sustained therein,[34] nor will the court surrender the property even though the primary object of the receivership has been attained and a mere balance remains on hand and the receiver is discharged, where there is a controversy as to the title thereto in which the right to litigate has been regularly preserved.[35] And it has been held that the receiver should not surrender the property to the party

such appointment is held on appeal to be void for want of jurisdiction).

Rents collected by the receiver should be returned according to the rules stated in the text, upon his discharge. Warren *v.* Bunch, 80 Ga. 124, 7 S. E. 270. See also Hayes *v.* Rabold, 4 N. Y. St. 445, holding that where the action was dismissed and an order was procured directing the receiver to pay rents collected to defendant, an *ex parte* order in another action between the same parties in another court restraining the receiver from paying such rent to defendant during the pendency of the action, when in fact no action had been commenced, should be treated as vacated by the order directing the receiver to pay the money to defendant, and the receiver would not be in contempt in obeying the latter order.

A stay of proceedings under the order appointing a receiver requires the immediate return of the property to the parties from whom it was taken. Rumney *v.* Donovan, 28 Mont. 69, 72 Pac. 305, holding, however, that the effect of such a stay not having been decided before, the action of the receiver in refusing to deliver, on advice of counsel, while a technical contempt, would not be visited with more than a nominal fine.

Ex parte affidavits are held to be admissible on a motion to dispose of assets in the hands of a receiver after the dismissal of the bill. Warren *v.* Bunch, 80 Ga. 124, 7 S. E. 270.

The pendency of another action between the same parties in respect to the property will not affect the operation of an order upon the dismissal of the complaint in the action in which the receiver was appointed, directing the receiver to convey the property. The execution of such order may be stayed only by procuring an injunction order upon giving security. Pierce *v.* Lees, 17 N. Y. App. Div. 346, 45 N. Y. Suppl. 294.

33. Coburn *v.* Ames, 57 Cal. 201 (where, in an action involving the right of the parties to a wharf and adjacent lands, possession of which was taken by a receiver from defendant, upon determination that plaintiff was entitled to the land and defendant to the wharf it was held error to direct the entire sum of money derived by the receiver from the use of the premises to be paid to plaintiff); Black *v.* Black, 93 Fed. 346 (holding that a claim by an unsuccessful defendant, in an action to recover the possession of land, that a receiver appointed to harvest and sell the crops from the land pending the action trespassed on other land, and took possession of and sold crops therefrom owned by defendant, cannot be heard and determined on distribution of the fund in the hands of the receiver).

Duty of court.— The authority of the court to appoint a receiver in a suit by a partner to wind up the affairs of a copartnership rests upon the right of the court to retain in its possession the property of the partnership until the rights of the several claimants thereto have been satisfied and when this has been accomplished and the property adjudged to belong to the individual partners the court is not authorized to retain such property for distribution among their respective creditors. Isaacs *v.* Jones, 121 Cal. 257, 53 Pac. 793, 1101.

Demand under certified copy of decree.— According to the practice in equity, under a decree authorizing a party to demand property in the hands of a receiver, the demand should be made under a certified copy of that part of the decree at least which permits such demand and requires the receiver to surrender it, with a receipt upon it either by the party making the demand or his attorney, and upon the return of such certificate the court will direct it to be put on file with the other papers in the suit as a voucher for the protection of the receiver from further responsibility to the parties and as evidence that its decree has been executed; such a course is not merely a form, to be followed or not as the parties may please, but it is a cautionary requirement to prevent further litigation by exactness in the performance of the decree. Very *v.* Watkins, 23 How. (U. S.) 469, 16 L. ed. 522.

34. Gunning *v.* Sorg, 214 Ill. 616, 73 N. E. 870 [*affirming* 113 Ill. App. 332].

Retention of fund after dismissal of bill.— Where a plaintiff in replevin was restrained by an injunction under a bill filed by defendant in the replevin from proceeding therein, and under the bill a receiver was appointed in which suit the replevin plaintiff filed a petition setting up his claim to the property and thereafter the property was sold by the receiver, whereupon the replevin plaintiff withdrew his intervening petition, if a demurrer to the bill by him is subsequently sustained, the court will give him an opportunity to file a petition and prove his right to the proceeds and will not release its jurisdiction of the fund and turn it over to the parties who had been found to have wrongfully resorted to the court in filing the bill which stopped the replevin plaintiff from proceeding with that action. Walker *v.* Gibson, 37 Ill. App. 335. See also as to the continuance of a receivership *supra*, III, K.

35. Brown *v.* McBean, 54 N. Y. App. Div.

from whose possession it was taken when before his discharge he has become answerable as receiver in an action for its possession.[36] After the distribution of the assets of an insolvent or dissolved corporation in the payment of debts and expenses, any balance remaining will be restored to the stock-holders,[37] and where the existence of a corporation is not affected by a proceeding against it or the appointment of a receiver of its property therein, its dominion over such property is suspended only until the property is returned to it and the jurisdiction of the court relinquished;[38] and after payment of the debts for which the corporate property is sequestered any surplus should go back to the corporation.[39]

2. Effect — Liabilities. The owner of property in the hands of a receiver is generally not liable for his act or negligence or that of his employees,[40] and broadly, property which has been released from the custody of the court which once, either rightfully or wrongfully, assumed to have possession of it, stands subject to any claims or charge that may rest upon it, and this may be enforced by any court having jurisdiction through appropriate process.[41] The general rule is subject to exception and qualification, however. The court has inherent power to place itself in a position which would enable it to make and enforce orders with respect to the expenses and indebtedness of the receivership;[42] and where the property of a corporation is returned to it upon condition that such liabilities shall be assumed by it, it will be liable therefor.[43] So if the appointment of the receiver whose acts are in question was collusive and in fact made at the request of and for the benefit of the corporation for the purpose of placing its property for a time beyond the reach of some classes of its creditors, it might, with propriety, be held that the receiver was but the company's agent for whose

635, 66 N. Y. Suppl. 785, where by the terms of a stipulation under which a decree for distribution of the assets of a dissolved partnership were distributed, the receiver was authorized to retain and deposit a certain sum to await the determination of the ownership as between a member of the firm and the assignee of one who formerly held an interest therein, and it was held that this sum would not be ordered to be paid to either of the parties upon a summary application, there being a substantial controversy between them as to the ownership which should be determined by an appropriate action.

36. Peacock *v.* Pittsburg Locomotive etc., Works, 52 Ga. 417, where the appointment of the receiver was vacated "without prejudice to any one, party or claimant," and the receiver surrendered the property to the party after a possessory warrant had been sued out against him, a stipulation having been entered into between the parties to such proceedings, permitting the property to remain in the receiver's hands pending a trial on the merits, and it was held that the vacation of the order of appointment was no reason for his surrendering the possession under these circumstances and that his surrender was at his own risk.

37. McMaster *v.* Drew, (N. J. Ch. 1906) 62 Atl. 559; Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378.

Balance of assessments.— Where after assessing the stock-holders of a bank under the New York act of April 5, 1849, the receiver held the proceeds of certain assets of the bank beyond what he had calculated upon when making the assessment, it was held that these proceeds should not be distributed among the stock-holders so long as any debts of the bank remained unpaid. Pruyn *v.* Van Allen, 39 Barb. (N. Y.) 354.

38. Heath *v.* Missouri, etc., R. Co., 83 Mo. 617.

Debts paid or provided for.— Under the statute in New Jersey authorizing reconveyance of property of a corporation in the hands of a receiver when its debts have been paid or "provided for" requires not a mere extension of time, but a provision for the payment of the debts. Fleming *v.* Fleming Hotel Co., 70 N. J. Eq. 509, 61 Atl. 739.

39. Parry *v.* American Opera Co., 12 N. Y. Civ. Proc. 194.

40. See *supra*, IV, F, 6, f, (1).

41. Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60. See also *infra*, VII, E.

A court cannot constructively retain jurisdiction over property completely surrendered to its owner, so as in that respect to bind those who would otherwise be unaffected by its orders. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81; Davis *v.* Duncan, 19 Fed. 477.

42. La Junta, etc., Canal Co. *v.* Hess, 31 Colo. 1, 71 Pac. 415; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

Upon dismissing a suit because the jurisdiction is defective, it has been held that the court may order a sale of sufficient property to enforce the expenses of the receivership. Electrical Supply Co. *v.* Put-in-Bay Waterworks, etc., Co., 84 Fed. 740.

43. John Kauffman Brewing Co. *v.* Betz, 28 Ohio Cir. Ct. 484 (claim for damages for personal injury); **Baltimore, etc., R. Co. *v.***

acts it would be responsible.[44] It is sometimes expressly provided by statute that when the property in the hands of a receiver is returned to the owner from whose possession it was taken, without sale, he may be held for all unpaid liabilities of the receiver arising out of the receivership.[45] But independently of such provision, and under general principles of equity, it has been held frequently that earnings of a corporation, while in the hands of a receiver, are charged with the liabilities of the receiver incurred in the operation of the business, and if such earnings are invested in betterments and improvements and the property is ultimately returned to the corporation without sale such charges may follow the property and an action may be maintained against the corporation for a recovery to the extent of such betterments,[46] and in such cases the court, upon discharging

Burris, 111 Fed. 882, 50 C. C. A. 48 (where the corporation was allowed to resume possession by an order which reserved jurisdiction to adjudicate and settle all claims against the receivers and requiring the company to pay all debts and claims which should be adjudged valid, the court holding that by acceptance of such condition the company became bound to pay such claims and might be made a defendant in a petition of intervention subsequently filed in the cause by a person injured through the negligence of the receivers).

44. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60 [*affirmed* in 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81]; San Antonio, etc., R. Co. *v.* Adams, 11 Tex. Civ. App. 198, 32 S. W. 733. See also *supra*, IV, E, 2, b.

45. See the cases *infra*, this note.

In Texas such a statutory provision was held to authorize a judgment for damages in the operation of the property by the receiver without showing that betterments were made by the receiver in excess of the damages claimed. Yoakum *v.* Kroeger, (Civ. App. 1894) 27 S. W. 953; Howe *v.* St. Clair, 8 Tex. Civ. App. 101, 27 S. W. 800, *dictum*. And in Missouri, etc., R. Co. *v.* Chilton, 7 Tex. App. 183, 27 S. W. 272, a claim for damages for negligent injuries was maintained in an action against a railroad company where the property had been turned back to it by a consent decree under which it assumed to pay all claims and liabilities that may exist against the receiver. But *compare* in this connection Ryan *v.* Hayes, 62 Tex. 42, which was before the statute, and held that such claims were not liabilities of the receiver unless there were funds in his hands which would have been subject thereto in the receivership suit. And see Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 137, 32 S. W. 526 [*reversing* (Civ. App. 1895) 32 S. W. 18, which *followed* Yoakum *v.* Kroeger, and Howe *v.* St. Clair, *supra*] which was after the statute, where it was alleged in plaintiff's pleading that the cause of action arose while the property of the company was in the hands of receivers appointed by a federal court; that the contract for the shipment of goods, the value of which was sought to be recovered, was made with such receivers; and that since the institution of the suit the receivers had been discharged and the property had been restored to the company, and it was held that under these facts, which were admitted, the company was not liable for the acts of the receiver.

Constitutionality see CONSTITUTIONAL LAW, 8 Cyc. 1102 note 85.

Reacquisition of property upon sale see *supra*, IV, H, 12, b, note 2.

46. Bartlett *v.* Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715 (liability for tort to extent of net income applied to improvements); Texas, etc., R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10; Texas, etc., R. Co. *v.* Brick, 83 Tex. 526, 18 S. W. 947, 29 Am. St. Rep. 675; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Texas, etc., R. Co. *v.* Miller, 79 Tex. 81, 15 S. W. 264, 23 Am. St. Rep. 308, 11 L. R. A. 395; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 15 S. W. 214 (action in state court after discharge of receiver in federal court); Texas Pac. R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471; Texas Pac. R. Co. *v.* Overheiser, 76 Tex. 437, 13 S. W. 468; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60 [*affirmed* in 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81] (action in state court after discharge of receiver in federal court); Missouri, etc., R. Co. *v.* Lacy, 13 Tex. Civ. App. 391, 35 S. W. 515; Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 1043, 41 L. ed. 145 (holding that the conduct of the railroad company in procuring, or, at least, in acquiescing in the withdrawal of the receivership, and in the discharge of the receiver and the cancellation of his bond, and in accepting the restoration of its road, largely increased in value by the betterments, well affords ground to charge an assumption of such valid claims against the receiver as were not satisfied by him or by the court which discharged him). See also Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853; and Ryan *v.* Hayes, 62 Tex. 42, *supra*, note 45.

The facts making the owner liable must be alleged and proved. Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56; Brown *v.* Gay, 76 Tex. 444, 13 S. W. 472. Where plaintiff in an action for personal injuries alleges that he was in the employ of a receiver and the answer sets up a discharge of the receiver and redelivery of the property to defendant and it is admitted that during the receivership all earnings after paying operating expenses were applied to improvements to an amount greater than that sought

a receiver, cannot, by any provisions in its decree, deprive one having a claim against a receiver of his right to resort to such independent remedy by requiring him to intervene and prove his claim in the receivership within a prescribed period.[47] A corporation may render itself liable for claims accruing under the receivership, after the dismissal of the suit for want of jurisdiction.[48]

V. Presentation, Allowance, and Payment of Claims.

A. Presentation and Allowance — 1. Claims Allowable — a. In General. When a court of equity calls upon creditors to come in and prove their claims it is a substitute for separate suits at law on each of the claims, and the party proving must have a claim which is actionable,[49] or a direct obligation at the date of appoint-

to be recovered by plaintiff it was held that the pleadings and proof properly presented the question whether defendant was liable if the accident occurred under such circumstances as would entitle plaintiff to payment out of the earnings had he recovered judgment pending the receivership. Texas, etc., R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60 [*affirmed* in 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81].

The receiver in such cases is not personally liable upon his discharge for claims of this character, but the claims follow the property or fund which alone can be used to satisfy them. Bartlett *v.* Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339; McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327]; Ryan *v.* Hays, 62 Tex. 42.

But a judgment obtained against the receiver before his discharge is conclusive of the right to be paid out of any fund received by the company that would have been subject in his hands to the payment of the claim. Texas Pac., etc., R. Co. *v.* Griffin, 76 Tex. 441, 13 S. W. 471.

If claims have been paid to the extent of betterments it has been held that the fact should be pleaded by defendant who wishes to limit its liability to the amount of net income applied to betterments. Bartlett *v.* Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715.

If the claim exceed the amount of the betterments defendant may show the fact and have the aid of a court of equity to restrict its liability to that amount. Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 216, 41 L. ed. 580.

The remedy has sometimes been confined to a bill in equity to enforce the claim out of such earnings, upon the ground that there is no cause of action against the receiver after his discharge or against the owner of the property *in personam.* Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271, claim for damages for personal injuries.

Liability of railroad companies generally see Railroads, 33 Cyc. 723.

47. Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Texas, etc., R. Co. *v.* Geiger, 79 Tex. 13, 50 S. W. 214; Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Missouri, etc., R. Co. *v.* Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272; Kretz *v.* Texas, etc., R. Co., (Tex. App. 1890) 14 S. W. 1067; Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 216, 41 L. ed. 580 (holding that such a provision means that after the date fixed in the decree the party cannot resort to the court appointing the receiver but must then rely on such other remedies as he may have); Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81 [*affirming* 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60] (distinguishing the case of such restrictions where the court has a fund in court).

Rejection of claim in federal court.— In Garrison *v.* Texas, etc., R. Co., 10 Tex. Civ. App. 136, 30 S. W. 725, it was held that upon return of the property to the company and the discharge of the receiver, the company was liable on a judgment rendered against the receiver in a state court, although the federal court which appointed the receiver had rejected the claim under the judgment on intervention.

48. Denison, etc., R. Co. *v.* Raney-Alton Mercantile Co., 3 Indian Terr. 104, 53 S. W. 496, where the court had authorized the receiver to contract for the construction of a road which the railroad company had undertaken to construct and to issue certificates in payment which were to be a lien on the property of the company, the president and attorney of the company having joined in the petition for such order, the railroad company being a party to the suit and cognizant of the acts of its officers and having received the benefits resulting from such acts, it was held that it was liable, and that if the acts of the officers were in fact unauthorized, the company ratified them and could not deny liability; that the company could not contend that by failure of the claimant to present its claim before dismissal of the suit its rights were adjudicated by the dismissal since the claimant was not relying on the orders but on the conduct of the company which rendered it liable for the benefits it had secured.

49. Atty.-Gen. *v.* Life, etc., Ins. Co., 4 Paige (N. Y.) 224; New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537; Gay Mfg. Co. *v.* Gittings, 53 Fed. 45, 3 C. C. A. 422.

A receiver acts as the guardian of the rights of all parties interested in the fund, and he has no right to allow a claim which is not a proper charge upon that fund without the consent of all who are interested in having such claim rejected. Atty.-Gen. *v.* Life, etc., Ins. Co., 4 Paige (N. Y.) 224.

ment, whether due or not, and an indirect obligation not matured is not provable unless it has since matured or will have matured before order of distribution.[50]

b. Damages For Breach of Contract. When insolvency may not discharge a corporation from its liabilities existing at the time a receiver is appointed, or from those accruing thereafter,[51] those who suffer from breaches of contract are entitled to share in the distribution of assets, even though the breach and consequent damage follow the insolvency;[52] and where, by the dissolution of a corporation and the appointment of a receiver, a lease of the corporation is broken, the landlord can prove his claim for damages against the receiver, and share ratably in the assets.[53] Conversely where the insolvent corporation is a lessor, and the receiver takes possession of the estate, he takes it *cum onere*, subject to the lease.[54] If he does not take possession, yet there is the personal undertaking of the lessor which is broken by his insolvency, and the lessee is entitled to prove his damages arising from such breach.[55]

2. Presentation and Filing of Claims — a. In General. All claims against a company in the hands of a receiver should be presented to the court in which the receivership proceedings are pending for its approval, before any payment upon them from its assets is ordered.[56] In the absence of any special statutory practice on the subject, it is no part of a receiver's duty to report claims to the court for allowance, but such duty devolves upon the creditor himself or his

Claims matured and unmatured.— Thus it has been held that all claims against property in the hands of a receiver should be allowed, which, at the time of his appointment: (1) Furnished a present cause of action against the insolvent; (2) constituted direct obligations on his part, whether due or to become due; or (3) which, although not then matured, or not constituting direct obligations, have since matured, or will mature or become direct obligations, before any order of distribution is made (New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537); and that all claims should be rejected which: (1) Have not matured, and in respect to which there has been no default in payment of interest or of any kind (New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537; Gay Mfg. Co. *v.* Gittings, 53 Fed. 45, 3 C. C. A. 422, holding that owners of bonds of a solvent railroad secured by a mortgage of all its property, and guaranteed by a corporation which has gone into the hands of a receiver, cannot prove the guaranty of the corporation, and have a dividend declared thereon, or have money retained in court to meet a possible liability on the guaranty, as against creditors of the corporation, who were pressing for a sale and distribution, and who held either specific and general liens or demands past due); (2) which arose on guaranties of collection, as distinguished from guaranties of payment, where no proceedings have been taken by the holder to collect from the maker or from the mortgaged premises; or (3) in which, by agreement between the holder and the maker, without the assent of the guarantor, the time of payment of the principal obligation has been extended (New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537).

Filing statutory claims in federal court.— Where a railroad has been placed in the hands of a receiver by a federal court, persons claiming statutory liens may be permitted to file them in such court with the same force and effect as if filed in the state courts. Blair *v.* St. Louis, etc., R. Co., 19 Fed. 861.

50. New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537. *Compare* Gay Mfg. Co. *v.* Gittings, 53 Fed. 45, 3 C. C. A. 422, *supra*, note 49, where it is said *arguendo* that the party proving must have not only a cause of action but a right of action. Claims not yet due have no standing in court, unless by statute.

51. See *supra*, IV, F, 6, e, (I), (D).

52. Spader *v.* Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378. But in this connection see cases compared *supra*, pp. 267, 268, notes 22–27.

53. Chicago Fire Place Co. *v.* Tait, 58 Ill. App. 293; Kalkhoff *v.* Nelson, 60 Minn. 284, 62 N. W. 332.

Effect of reletting of premises by lessor.— Where the receiver of an insolvent lessee vacates the premises before the term expires, and the lessor, under the provisions of the lease, reënters and relets the premises as the lessee's agent, such lessor may recover from the receiver the difference between the diminished rent to be paid by the new lessee for the unexpired term and the amount agreed on in the original lease. People *v.* St. Nicholas Bank, 3 N. Y. App. Div. 544, 38 N. Y. Suppl. 379 [*affirmed* in 151 N. Y. 592, 45 N. E. 1129].

54. Bolles *v.* Crescent Drug, etc., Co., 53 N. J. Eq. 614, 32 Atl. 1061.

55. Bolles *v.* Crescent Drug, etc., Co., 53 N. J. Eq. 614, 32 Atl. 1061.

56. Barber *v.* International Co., 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246; Keene *v.* Gaehle, 56 Md. 343; Atty.-Gen. *v.* Supreme Council A. L. H., 196 Mass. 151, 81 N. E. 966; Rinn *v.* Astor F. Ins. Co., 59 N. Y. 143; Matter of Ziegler, 98 N. Y. App. Div. 117, 90 N. Y. Suppl. 681.

counsel or agent,[57] and the time within which any or all of them shall be presented is to be determined by the court.[58]

b. Effect of Failure to Present in Time. Where, on the application of the receiver of an insolvent corporation, an order is granted, for the publication of notice to the creditors, and notice is duly published, claims not exhibited within the time specified in the notice are precluded in that proceeding from sharing in the assets.[59] This result is held to follow, however, only where there has been, in the meantime, a final distribution of the funds in the hands of the receiver, based upon claims proven.[60] If a reasonable excuse for delaying to make an earlier claim is shown,[61] the court may, in its discretion, permit a creditor to come in and prove his claim at any time before actual distribution,[62] or even after partial payments, if there is a surplus in the hands of the receiver, so as not to interfere with payments already made.[63] Where a receiver brings an action

Determination of priorities see *infra*, V, B, 2.

57. Halsted *v.* Forest Hill Co., 109 Fed. 820.

Proof of claim see *infra*, V, A, 4, a.

58. Barber *v.* International Co., 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246; Penniman *v.* Cole, 41 Md. 609; U. S. Trust Co. *v.* New Mexico, 183 U. S. 535, 22 S. Ct. 172, 46 L. ed. 315. And see *infra*, V, A, 2, b.

59. Leo *v.* Green, 52 N. J. Eq. 1, 28 Atl. 904; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198; *In re* Harmony F. & M. Ins. Co., 45 N. Y. 310; Franklin Trust Co. *v.* Northern Adirondack R. Co., 11 N. Y. App. Div. 249, 42 N. Y. Suppl. 211; Matter of Harmony Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 347 [*affirmed* in 45 N. Y. 310]; Dillingham *v.* Kelly, 8 Tex. Civ. App. 113, 27 S. W. 806; Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 12 S. Ct. 28, 35 L. ed. 824 [*affirming* Lake Superior Iron Co. *v.* Brown, 44 Fed. 539]; Western New York, etc., R. Co. *v.* Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23.

Notice can only be effectually given as to non-residents of the state by personal service of process. Metropolitan Rubber Co. *v.* Place, 147 Fed. 90, 77 C. C. A. 262. In New York it was held that the statutory provisions requiring notice to be given to creditors to present their claims applied only to a receivership created by the final judgment in the action. Therefore where the receivership was of such a nature as not to be subject to such provisions, it was held not to avail a creditor that no such notice was given him. Herring *v.* New York, etc., R. Co., 63 How. Pr. (N. Y.) 497 [*affirmed* in 105 N. Y. 340, 12 N. E. 763].

60. *In re* Pelican Saw-Mill, etc., Co., 50 La. Ann. 404, 23 So. 363; Keene *v.* Gaehle, 56 Md. 343; Matter of Ziegler, 98 N. Y. App. Div. 117, 90 N. Y. Suppl. 681. *Compare* Halsted *v.* Forest Hill Co., 109 Fed. 820.

61. Grinnell *v.* Merchants' Ins. Co., 16 N. J. Eq. 283; Matter of Ziegler, 98 N. Y. App. Div. 117, 90 N. Y. Suppl. 681.

Infancy.—A claim against the receivers of a railroad company for a personal injury received during their operation of the property has been permitted to be filed and heard, notwithstanding the expiration of the time fixed by notice for filing claims, on the ground of the infancy of the claimant. Park *v.* New York, etc., R. Co., 140 Fed. 799.

A creditor bona fide ignorant of the proceedings had for the distribution of the fund should be allowed to come in and prove his claim against the estate after the time fixed for presentation and proof of claims. Washington Bank *v.* Creditors, 80 N. C. 9.

Where receivers have not returned property held by them for taxation, the claim for taxes is not barred by an order limiting the time for presenting claims; but, if the taxing officers have made no application for payment, they cannot enforce a penalty. Walters *v.* Western, etc., R. Co., 68 Fed. 1002.

Delay to reduce claim to judgment.— Delay of a creditor, resulting from proceedings taken at the receiver's request, to reduce his claim to judgment, is not negligence, and will not prevent the creditor from receiving dividends in proportion to those already paid to others, before further dividends are declared. London, etc., Bank *v.* Willamette Steam-Mill Lumbering, etc., Co., 80 Fed. 226.

62. Wall *v.* Young, 54 N. J. Eq. 24, 33 Atl. 526; Grinnell *v.* Merchants' Ins. Co., 16 N. J. Eq. 283; People *v.* Security L. Ins., etc., Co., 79 N. Y. 267; Matter of Ziegler, 98 N. Y. App. Div. 117, 90 N. Y. Suppl. 681; Smith *v.* Manhattan Ins. Co., 4 Hun (N. Y.) 127; Insurance Com'r *v.* Commercial Mut. Ins. Co., 20 R. I. 7, 36 Atl. 930; *In re* Eddy, 15 R. I. 474, 8 Atl. 694.

Such discretion not reviewable.— People *v.* Security L. Ins., etc., Co., 79 N. Y. 267; *In re* Harmony F. & M. Ins. Co., 45 N. Y. 310; Matter of Harmony Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 347.

Power not exhausted by first order.— People *v.* Security L. Ins., etc., Co., 79 N. Y. 267.

Where the creditors who have filed their claims in time consent to have other creditors come in after such time has expired, no one else can object, and the fact that the latter claimants had notice of the order limiting the time will not affect their right to present their claims. *In re* Marx, (N. J. Ch. 1899) 43 Atl. 981.

63. Grinnell *v.* Merchants' Ins. Co., 16 N. J. Eq. 283.

for the purpose of collecting assets of the insolvent corporation, defendant may set off a claim in such action, although such claim has not been presented and filed in pursuance of the notice to creditors.[64]

3. INTERVENTION.[65] Interventions by persons interested in the funds of a receivership will not be permitted if their rights may be conserved without it, since such interventions multiply the number of litigants, and, if begun in the case of one creditor, cannot be consistently denied as to others, thereby resulting in unnecessary expense and confusion of proceedings.[66]

4. PROOF OF CLAIM — a. In General. A creditor of an insolvent corporation in order to entitle himself to a dividend must do more than put the receiver upon inquiry as to his claim.[67] He must file proof in itself satisfactory.[68] If he fails to do so, he cannot, after another creditor has been paid a dividend on satisfactory proof, hold the receiver accountable for the whole or any part of such dividend upon the ground of notice of the existence and particulars of his own claim derived from circumstances extrinsic to the proofs on file.[69]

b. Verification. Sworn proof of the justness of any claim may be required before it will be allowed;[70] but in the absence of a statute requiring a creditor, in presenting his claim to a receiver, to verify it by affidavit the creditor's failure to make such proof will not deprive him of his right to sue on his claim.[71]

5. OBJECTIONS TO CLAIMS — a. By Receiver.[72] A receiver may, by appeal,[73] as well as in the court appointing him, defend the estate in his possession against

Where the receiver has sufficient assets in his hands, he will be required to pay the same dividend on an unpaid claim as he has paid on other claims, although such claim was not proved against the estate within the time required. People *v.* Remington, 59 Hun (N. Y.) 282, 12 N. Y. Suppl. 824, 14 N. Y. Suppl. 98 [*affirmed* in 126 N. Y. 654, 27 N. E. 853].

64. Paxton *v.* Vincennes Mfg. Co., 20 Ind. App. 253, 50 N. E. 583; Union Bldg., etc., Assoc. *v.* Soderquist, 115 Iowa 695, 87 N. W. 433.

65. Of receiver see *infra*, VI, E, 2, b.

66. Sands *v.* Greeley, 80 Fed. 195.

In cases of auxiliary receiverships for non-resident corporations, creditors who reside without the jurisdiction where either the original or auxiliary proceedings are pending are not entitled to intervene and become technical parties, either for the purpose of asserting a claim to equal rights with resident creditors, or of placing themselves in position to object to the claims of other creditors, or to examine and dispute the propriety of the receivers' action. Their proper course is to file their claims with the receivers, and, if rejected by them, to present them to the master. They will then have the same opportunity as other creditors to overhaul the receiver's accounts, and raise all these questions before the master and before the court on the coming up of his report. Sands *v.* Greeley, 80 Fed. 195.

Creditor of a creditor of the estate see *supra*, IV, E, 2, c.

67. Meding *v.* Todd, 56 N. J. Eq. 820, 826, 41 Atl. 222, where it is said: "In matters of this kind a strict rule is desirable for the protection of official trustees and personal representatives, who should not be lightly charged with knowledge and consequent accountability as to contingent, collateral and qualified interests that may be mentioned in claims properly proved before them."

68. Meding *v.* Todd, 56 N. J. Eq. 820, 826, 41 Atl. 222.

By accepting a draft for the full amount of a claim, a receiver thereby approves the same. Southern R. Co. *v.* Adams, 76 Fed. 504, 22 C. C. A. 300.

Where claims against an insolvent estate have passed into judgment with the receiver's knowledge, they should be regarded as established. Demott *v.* Stockton Paper Ware Mfg. Co., 32 N. J. Eq. 124.

In Louisiana, if a particular claim is opposed, it then devolves on the creditor to make the necessary proof of its existence and validity. Zeigler *v.* Interior Decorating Co., 116 La. 752, 41 So. 59; *In re* New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8; *In re* Pelican Saw-Mill, etc., Co., 50 La. Ann. 404, 23 So. 363. It is the concern of the creditors whose claims are opposed to adduce the evidence to sustain them. It is not the duty of the receiver to do so, nor to take part in such a contest between creditors. *In re* Pelican Saw-Mill, etc., Co., *supra*. But when no opposition is made to the approval and homologation of a claim, the presumption is in favor of its correctness, and the testimony of the receiver is sufficient to warrant its homologation. *In re* New Iberia Cotton Mills Co., *supra*.

69. Meding *v.* Todd, 56 N. J. Eq. 820, 41 Atl. 222.

70. Meding *v.* Todd, 56 N. J. Eq. 820, 41 Atl. 222; Runyon *v.* Farmers', etc., Bank, 4 N. J. Eq. 480.

71. Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

72. Defenses in actions against receivers generally see *infra*, VI, D, 2, e.

73. See, generally, APPEAL AND ERROR, 2 Cyc. 641.

all claims which are antagonistic to the rights of both parties to the suit.[74] He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit,[75] subject to the limitation that he may not, in such defense, question any order or decree of the court distributing burdens or apportioning rights between parties to the suit, or any order or decree resting upon the discretion of the court appointing him.[76] Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit.[77] Nor can a receiver contest a claim merely on account of his personal interest in it,[78] and he has no authority to waive any legal defense against a claim offered for proof.[79]

b. By Creditors. Any creditor, having proved his claim, has the right to contest the claim of any other creditor, if the receiver fails or refuses to do so in a proper case,[80] provided his objections are made within a reasonable time.[81] Creditors are not precluded in the matter of contesting claims except in the way the law provides.[82] After having contested claims, creditors are bound by the final decree rendered.[83] The objection that a claim was barred because not presented within the time limited by an order theretofore made in the cause should be raised by plea, and not by demurrer.[84]

c. Reference. If the receiver disputes the validity of a claim, the court has power to order a reference with or without the consent of the receiver.[85] Where a referee has been appointed, only disputed claims should be submitted to him.[86] The receiver may permit those for whose benefit the defense against the claim is made to manage the defense, but it must be made under his direction, and no compromise can be made without his consent.[87] The entry of a formal judgment,

74. Lawson *v.* Dunn, (N. J. Ch. 1901) 49 Atl. 1087; Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941.

For instance, he may thus contest a claim for taxes, because if valid they are superior to the rights of both parties. Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941.

75. Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941.

Where a receiver is appointed on application of a mortgage creditor, it is the receiver's duty to oppose the claim of such creditor, if the mortgage is void, as creating an illegal preference. Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

76. Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941. See also APPEAL AND ERROR, 2 Cyc. 641.

77. Knabe *v.* Johnson, 107 Md. 616, 69 Atl. 420; Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941. See also Matter of Hulbert, 29 Misc. (N. Y.) 484, 61 N. Y. Suppl. 959.

An intervener is not such a party as comes within the scope of this limitation. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver who represents the interests of both parties may rightfully challenge his claim, provided that in such challenge he does not question any orders of the court referred to. Bosworth *v.* Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941.

78. Stanton *v.* Andrews, 18 Ill. App. 552.

79. Evans *v.* Trimountain Mut. F. Ins. Co., 9 Allen (Mass.) 329.

80. Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324; Thompson *v.* Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

A mortgagee who is not shown to have acquiesced in the appointment of the receiver can object to an order giving debts contracted by the receiver for supplies priority over its mortgage, although plaintiff mortgagee may be estopped from doing so by having applied for the appointment of the receiver. Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245, 8 N. E. 488.

81. Krause *v.* Maliga Glass, etc., Co., (N. J. Ch. 1891) 21 Atl. 932. See also Terry *v.* Dubois, 32 Wkly. Rep. 415.

82. City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469, by the filing of an account and its homologation contradictorily with them after notice and delays required to be given.

83. *In re* Sheets Lumber Co., 104 La. 771, 29 So. 328.

84. Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. 156.

85. Guardian Sav. Inst. *v.* Bowling Green Sav. Bank, 65 Barb. (N. Y.) 275.

Where the whole transaction is in writing, and its proper construction and effect can only be drawn from the papers themselves, a reference to take testimony will not be ordered. *Ex p.* Williams, 17 S. C. 396.

Examination pro interesse suo see *supra*, IV, D, 6.

86. People *v.* Universal L. Ins. Co., 30 Hun (N. Y.) 142, holding that, in the settlement of insolvent corporations, referring all claims, whether disputed or not, is unfair to the claimants, and makes an improper expense.

87. Atty.-Gen. *v.* Life, etc., Ins. Co., 4 Paige (N. Y.) 224.

on the report of a referee determining a claim against an insolvent corporation to be valid, is proper.[88]

6. ALLOWANCE — a. In General. When claims against a fund or property in the hands of a receiver are presented to the court, the practice sometimes is to refer the claims to the receiver with directions to ascertain whether the claims are just; and if he so finds and reports, the court allows the claims.[89] Where a receiver has power to allow or disallow claims, an allowance of a claim by him is not conclusive, and, if it afterward appear that it should not have been allowed, it may be disallowed, unless some right is lost thereby.[90]

b. Set-Off. Although choses in action pass to a receiver subject to the equitable right of set-off existing at the time of his appointment,[91] if he settles with parties setting up such claims he necessarily acts at his peril as to the real existence and rightfulness of the demands so allowed as set-offs.[92] In any case the power to allow a set-off does not extend to a case where no mutual debts subsisted at the date of the appointment of the receiver, and a demand had been afterward assigned to effect such purpose.[93] Nor has a receiver any right to retain funds collected by him, and offset his own individual claims against the party to whom the same are directed to be paid.[94]

c. Judgment or Order of Allowance — (I) *NATURE AND EFFECT.* A final allowance of a claim of a debtor against a receiver, affirmed in the appellate court, ends the jurisdiction of the court over the same, further than to require the payment of the sum allowed to the party to whom it is due.[95] In the absence of statute, however, a judgment of allowance against a fund in the hands of a receiver does not become a technical lien on the property which comprises the assets.[96]

(II) *REVIEW.* When a claim presented against a fund in the hands of a receiver of a corporation is contested before the court, such contest becomes in effect a suit against the receiver, which is ended by a final judgment allowing or rejecting the claim; and any party to the contest dissatisfied with the result may have the proceedings revised on appeal.[97] But it has been held that the interests of all parties are better subserved by a single appeal upon the whole allowance.[98] By statute sometimes the court is authorized to hear appeals from a receiver's determination allowing or disallowing claims against an insolvent's estate.[99]

88. Austin *v.* Rawdon, 42 N. Y. 155 [*reversing* 44 Barb. 434].

89. Litzenberger *v.* Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871.

Recovery back when allowance set aside.— Where the amount of a claim is adjudicated, and the receiver pays the sum allowed, and the adjudication as to such allowance is subsequently set aside, and the amount reduced, a cause of action accrues to the receiver to recover the excess. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

90. *In re* United Mut. F. Ins. Co., 22 R. I. 108, 46 Atl. 273.

91. See *supra*, IV, D, 3, d, (III).

92. State *v.* Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

93. Van Dyck *v.* McQuade, 85 N. Y. 616.

94. Johnson *v.* Gunter, 6 Bush (Ky.) 534; Wood *v.* Wilcox, 14 Ky. L. Rep. 574. See also *supra*, IV, F, 6, b, (II).

95. Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046.

96. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028. See also *supra*, IV, I, 2; *infra*, VII, E.

97. People *v.* Security L. Ins. Co., 71 N. Y. 222; Fagan *v.* Boyle Ice Mach. Co., 65 Tex. 324; Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600.

98. Adams *v.* Woods, 8 Cal. 306, 316, where it is said: "If a separate reference and a separate appeal were allowed in regard to each separate claim upon the fund, then the proceedings would be greatly prolonged, to the injury of all parties."

99. See the statutes of the several states. And see the cases *infra*, this note.

Under the General Corporation Act of New Jersey an appeal is authorized to the court of chancery from any determination of the receiver of an insolvent corporation. This right of appeal is not confined to a creditor who has a naked claim against the company, but extends to cases where a set-off is involved. Jackson *v.* People's Bank, 9 N. J. Eq. 205. The appeal given is not technical. Relief may be given under an original bill, or by way of cross bill, or in any proceeding by which jurisdiction may be secured. Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668. Appeals are to be heard by the court in a summary way, and if the receiver consents to the determination of an appeal without answer, the court is justified in so hearing and determining it. Hoskins *v.* Seaside

B. Priorities — 1. Right to Preference[1] — a. In General. A court of equity will always, in the administration of assets, place all the creditors on an equality so far as possibly can be done without disturbing existing laws.[2] *Prima facie* funds in the hands of a receiver must first be applied to the satisfaction of valid subsisting liens, and not to the payment of debts due general creditors,[3] and while it is said that there is no rule of law or equity which allows the funds of an insolvent corporation to be diverted from a proper application of them, because it may be deemed expedient for ulterior purposes to make such a use of them,[4] an exception is made in cases of railroads and other quasi-public corporations in favor of the expenses of preserving and operating the property.[5] Where it appears that property and assets in a receiver's hands will probably be sufficient to pay all debts, it is error to order certain debts paid in preference to others.[6] In any case it is held that the particular property as to which any special right is claimed as against the receiver must be shown to have come into the receiver's hands.[7]

b. Taxes.[8] Property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property.[9] Generally a valid tax upon property of a corporation in the hands of a receiver constitutes a claim upon its assets within the jurisdiction, superior to every other claim,[10] except judicial

Ice Mfg., etc., Storage Co., 68 N. J. Eq. 476, 59 Atl. 645. If, after the receiver's determination, a new element comes into the controversy, it is not necessary to present the same to the receiver before appealing to the court for adjudication. Taylor *v.* Gray, *supra*. If any matter of fact renders the intervention of a jury necessary, an issue may be directed. Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457.

The decision of a receiver of a national banking association upon the validity of a claim presented to him is not final, but the creditor may proceed afterward to have the validity of the claim adjudicated in a suit, in a proper state court, against the bank. Bethel First Nat. Bank *v.* National Pahquioque Bank, 14 Wall. (U. S.) 383, 20 L. ed. 840.

Effect of laches.—A delay for an unreasonable time in appealing from a receiver's disallowance of a claim, notwithstanding repeated notices of an order limiting appeals, is a bar to any relief. Leo *v.* Green, 52 N. J. Eq. 1, 28 Atl. 904.

1. Conditions upon granting order see *supra*, III, E, 7, a.

Receiver's certificates see *supra*, IV, G.

United States and states see Insolvency, 22 Cyc. 1319, 1320.

2. Coddington *v.* Bispham, 36 N. J. Eq. 574.

3. Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258, 25 L. ed. 344; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339.

4. Brown *v.* New York, etc., R. Co., 22 How. Pr. (N. Y.) 451.

5. See *infra*, V, B, 1, g, (II). See also *supra*, IV, G, 2, b, (II).

6. Case *v.* Frederickson, 63 Wis. 501, 22 N. W. 334.

7. Griffin *v.* Davis, 69 Ga. 760 (where factors had accepted drafts of a farmer to enable him to make a crop and during the year he died and his widow, as administratrix, gathered the crop and delivered it to the factors who sold and credited it in the usual order of business with the widow's assent. Subsequently a receiver of the factor's property was appointed, and the widow, upon taking a year's support, ruled the receiver to compel payment of the amount set apart to her, and it was held that to entitle her to a year's support it must first appear that the deceased husband had an estate, and that there had been property which was disposed of by the factors made no difference if none of the proceeds went into the hands of the receiver); Matter of Dolge, 35 Misc. (N. Y.) 107, 71 N. Y. Suppl. 205. But in People *v.* Dansville Bank, 39 Hun (N. Y.) 187, it was held that it made no difference that the identical money belonging to another and which went into the hands of a bank did not pass into its receiver's hands as it went to swell the assets of the bank which did go into his hands.

8. See *supra*, IV, F, 6, e, (II), (D), (4). And see, generally, Taxation.

9. *Georgia.*— Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767.

Illinois.— Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184.

Kentucky.— Spalding *v.* Com., 88 Ky. 135, 10 S. W. 420, 10 Ky. L. Rep. 714.

New Jersey.— New Jersey Southern R. Co. *v.* Railroad Com'rs, 41 N. J. L. 235.

Pennsylvania.— Philadelphia, etc., R. Co. *v.* Com., 104 Pa. St. 80.

United States.— *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; *Ex p.* Chamberlain, 55 Fed. 704.

See 42 Cent. Dig. tit. "Receivers," § 276.

10. *Georgia.*— Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767; Sparks *v.* Lowndes County, 98 Ga. 284, 25 S. E. 426.

Massachusetts.— Waite *v.* Worcester Brewing Co., 176 Mass. 283, 57 N. E. 460.

Missouri.— Greeley *v.* Provident Sav. Bank, 98 Mo. 458, 11 S. W. 980.

costs.[11] It is the duty of the court not only to respect this paramount right, and to make no order for the distribution of assets *in custodia legis*, except in subordination thereto,[12] but also to make such orders as will compel the receiver to discharge this obligation.[13] The lien of the state for taxes does not rest upon net income alone, but upon all and every part of the property which may be in the hands of the receiver,[14] and therefore, where application is made to the court by the officers charged with the collection of taxes, for direction to the receiver to pay the same, the court ought either to direct that the receiver sell a part of the property committed to his care, and thus realize a sum sufficient to pay this charge, or it should give such direction to the receiver as would enable him, without sale, to bring about a like result;[15] and especially is this true where, under management of the receiver, the taxes due the state and counties have been permitted to accumulate

Oklahoma.— Gray *v.* Logan County, 7 Okla. 321, 54 Pac. 485.

Rhode Island.— Insurance Com'r *v.* Commercial Ins. Co., 20 R. I. 7, 36 Atl. 930.

Virginia.— Taylor *v.* Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 S. E. 132, 14 L. R. A. N. S. 1135.

Wisconsin.— Hamacker *v.* Commercial Bank, 95 Wis. 359, 70 N. W. 295.

United States.— Conklin *v.* U. S. Shipbuilding Co., 148 Fed. 129; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657; Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; Wheeler *v.* Walton, 65 Fed. 720; George *v.* St. Louis Cable, etc., R. Co., 44 Fed. 117.

See 42 Cent. Dig. tit. "Receivers," § 276.

A franchise tax due when the receiver of an insolvent corporation takes possession of its assets is by statute entitled to preference in payment. George Mather's Sons Co.'s Case, 52 N. J. Eq. 607, 30 Atl. 321; Central Trust Co. *v.* New York City, etc., R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260 [*reversing* 47 Hun 587]. A receiver of an insolvent corporation who is charged with the duty of preserving the corporate franchise should pay the franchise tax from year to year until the franchise passes from him. George Mather's Sons Co.'s Case, 52 N. J. Eq. 607, 30 Atl. 321.

Taxes assessed after the appointment of a receiver may properly be regarded as part of the costs and expenses of the receivership, and may be enforced against the receiver as such. Wiswall *v.* Kunz, 173 Ill. 110, 50 N. E. 184; Gehr *v.* Mont Alto Iron Co., 174 Pa. St. 430, 34 Atl. 638. So of a license-fee or franchise tax. Crews *v.* U. S. Car Co., 60 N. J. Eq. 514, 43 Atl. 673 [*reversing* 57 N. J. Eq. 357, 42 Atl. 272]. But see George Mather's Sons Co.'s Case, 52 N. J. Eq. 607, 30 Atl. 321.

Right of transferee of tax fieri facias.— Under Ga. Pol. Code, § 888, the transferee of a tax fieri facias stands in the shoes of the state, county, or city by whose authority the tax fieri facias was issued. He has the same rights and priorities that the state, county, or city would have had. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347.

An obligation given by a receiver for money borrowed to pay taxes becomes a prior lien on the property on which the taxes were due. This is not fixing a new or additional lien on the property, or displacing any prior lien. It is simply changing the form of the lien from one for taxes to one for money borrowed to pay the taxes. Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201.

11. Lamkin *v.* Baldwin, etc., Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786; *In re* Tyler, 149 U. S. 104, 13 S. Ct. 785, 37 L. ed. 689; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Ledoux *v.* Le Bee, 83 Fed. 761.

12. Gray *v.* Logan County, 7 Okla. 321, 54 Pac. 485.

13. *California.*— Los Angeles *v.* Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770.

Georgia.— Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767.

Illinois.— Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140, 51 N. E. 200 [*affirming* 72 Ill. App. 640].

New Jersey.— Duryee *v.* U. S. Credit System Co., 55 N. J. Eq. 311, 37 Atl. 155.

Virginia.— Taylor *v.* Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 S. E. 132, 114 L. R. A. N. S. 1135.

See 42 Cent. Dig. tit. "Receivers," § 276.

Taxes not due.—An order directing a receiver to "at once pay the taxes that may be due upon the property" in his hands does not authorize him to pay taxes not due. Fidelity Ins. Co. *v.* Roanoke Ins. Co., 84 Fed. 744.

14. Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767.

A tax is a debt of the property and not of the receivers. After the severance therefore of the connection of the receivers with the property, they can only be chargeable with the payment of such tax, if at all, upon proof that they have assets belonging to the corporation, or have diverted its revenues. Comer *v.* Polk County, 81 Fed. 921, 27 C. C. A. 1.

15. Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767, holding that it is not a good reply to the demand of the state for the payment of taxes due to say that the net income from the property in the possession of the court is insufficient to meet its current expenses, or that a sale of a part of the property might so dismember it as to put in jeopardy the interests of general creditors.

and pass unpaid for several years.[16] It is not necessary for the court to await the end of the litigation, and until final decree, to order the tax paid.[17]

c. Costs. Where a receiver, prosecuting an action for the collection of alleged money demands for the enhancement of the fund, fails to recover, defendant is entitled to costs, which are a charge upon the fund;[18] and he is not to stand as a general creditor to await the final distribution, and receive only a distributive share with those for whose benefit he has been subjected to groundless litigation.[19] But it is only costs incurred while the action is being prosecuted for the benefit of the creditors, or where it was in fact for their benefit, that are entitled to a preference.[20]

d. Fiduciary Obligations. Where a transaction establishes a fiduciary relation between the parties, and not the relation of debtor and creditor only, a trust is created, the violation of which constitutes a fraud by which the trustee or his receiver cannot profit, and entitling the *cestui que trust* to prior payment out of the funds in the hands of the receiver.[21] But whether a trust exists is not decisive of the right to a preference in the distribution of the funds. There must be some showing that the estate has been augmented by the trust fund, or at least that the estate has been so benefited by the misappropriation of the trust fund that the removal of its equivalent from the estate will be without prejudice to creditors.[22] It is immaterial that the identical moneys which went into the hands of the trustee do not pass into the receiver's hands, if in some shape or form they go to swell the assets which fall into his hands.[23]

e. Liens and Encumbrances — (i) *IN GENERAL.* Under the general rule that a receiver takes the property subject to all valid prior liens,[24] such encumbrances are entitled to protection and to payment out of the property which they cover,[25]

16. Dysart *v.* Brown, 100 Ga. 1, 26 S. E. 767.

17. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347. But see Schenck *v.* Consumers' Coal Co., 14 N. Y. Suppl. 343, 26 Abb. N. Cas. 356, holding that payment of personal taxes due from an insolvent corporation will not be enforced, out of the funds in the receiver's hands, before the rendition of his final account, where there may be a prior lien on such funds for the wages of employees, etc.

18. See *infra*, VI, H, 4.

19. Columbian Ins. Co. *v.* Stevens, 37 N. Y. 536.

20. Williams *v.* Groat, 73 Fed. 59, holding that a judgment rendered against a partnership after the appointment of a receiver of its property, for costs of a suit in which it was an unsuccessful plaintiff, such costs having been mainly incurred prior to the receivership, is not to be regarded as a preferred claim merely because, if the judgment had been for plaintiffs, the creditors would have had the benefit of it.

21. Carley *v.* Graves, 85 Mich. 483, 48 N. W. 710, 24 Am. St. Rep. 99; Michigan Steamship Co. *v.* Thornton, 136 Fed. 134, 69 C. C. A. 132.

Where an indorser pays a note to a bank, and takes a receipt containing an order for a surrender of the note on return of the receipt, the relation between the bank and the indorser is not that of debtor and creditor, but is a fiduciary relation, entitling the indorser, on the bank becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof. Massey *v.* Fisher, 62 Fed. 958. See also People *v.* Rochester City Bank, 96 N. Y. 32.

Relation held not fiduciary.— Where a depositor in a bank obtains from it two drafts upon another bank, paying therefor by checks against his deposit, the relation between the bank and the depositor with respect to such drafts remains that of debtor and creditor, and is not changed to a fiduciary relation, entitling the depositor, upon the bank becoming insolvent before the drafts are paid, to have the assets in the hands of its receiver applied by preference to the payment of such drafts in full. Jewett *v.* Yardley, 81 Fed. 920.

22. Seeley *v.* Seeley-Howe-Le Van Co., 128 Iowa 294, 103 N. W. 961.

23. People *v.* Dansville Bank, 39 Hun (N. Y.) 187. See also Butler *v.* Sprague, 66 N. Y. 392.

When trust funds have been distributed by a receiver so that they cannot be reclaimed in specie, the party entitled to the same may demand restitution out of any other funds coming to the hands of such receiver when other parties will not be prejudiced thereby. Standard Oil Co. *v.* Hawkins, 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739.

Property and rights to which receiver entitled see *supra*, IV, D, 3, a *et seq.*

24. See *supra*, IV, D, 3, d, (II).

25. Milhous *v.* Dunham, 78 Ala. 48; Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Cramer *v.* Iler, 63 Kan. 579, 66 Pac. 617; McRae *v.* Bowers Dredging Co., 86 Fed. 344, maritime lien.

in the order of priority;[26] but provision for payment of such preferred claims out of any other property of an insolvent's estate than that upon which the specific lien has fastened is improper.[27]

(II) *ACQUIRED BY JUDGMENT, EXECUTION, AND ATTACHMENT.*[28] Where a receiver is appointed, who takes possession of property, which has been previously levied upon by the sheriff on executions issued upon judgments obtained prior to the appointment of such receiver the receiver will be required to first pay the amount of such executions to the sheriff, out of the property in his possession.[29] The fact that one, before the appointment of a receiver, levies an attachment on certain property or funds does not give him a preference enforceable generally against the receiver,[30] but only a preference to the extent of the property or funds attached;[31] and an application therefore to have the judgment paid by the receiver should, in the absence of any showing that such funds were themselves sufficient for the purpose, be denied.[32]

(III) *STATUTORY LIENS.* Under statutory provisions in various states certain classes of liens are given priority,[33] as those in favor of laborers and material-

Prior liens superior to expenses of receivership.— Link Belt Mach. Co. *v.* Hughes, 174 Ill. 155, 51 N. E. 179; Mears *v.* Hayden, 91 Ill. App. 343; Moore *v.* Lincoln Park, etc., Consol. Co., 196 Pa. St. 519, 46 Atl. 857; Lane *v.* Washington Hotel Co., 190 Pa. St. 230, 42 Atl. 697. See also *infra*, V, B, 1, g.

Although an attorney's lien on papers of his client is not enforceable by sale, and he has only a right to retain them until his claim is paid, yet if he is compelled to deliver them in an insolvency proceeding, such surrender inuring to the benefit of the creditors in swelling the funds for their payment, he is entitled to a preference. McDonald *v.* Charleston, etc., R. Co., 93 Tenn. 281, 24 S. W. 252.

26. Sengel *v.* Patrick, 80 Ark. 384, 97 S. W. 448.

27. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457.

28. Priority not disturbed by appointment see *supra*, IV, D, 7, e, (I).

Time of acquiring lien see *supra*, IV, D, 7, e, (III).

29. Rich *v.* Loutrel, 9 Abb. Pr. (N. Y.) 356, 18 How. Pr. 121; Gibert *v.* Washington City, etc., R. Co., 33 Gratt. (Va.) 645. See also JUDGMENTS, 23 Cyc. 1402.

30. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Glinis *v.* Supreme Sitting O. I. H., 21 N. Y. Suppl. 736.

31. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Kittredge *v.* Osgood, 161 Mass. 84, 37 N. E. 369; Glinis *v.* Supreme Sitting O. I. H., 21 N. Y. Suppl. 736.

Under N. J. Corp. Act, § 80, judgment creditors of insolvent corporations are preferred, in the distribution of funds, only so far as they have acquired liens. Doane *v.* Millville Mut., etc., Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625 [*reversing* 43 N. J. Eq. 522, 11 Atl. 739].

Receiver acts as receiver in attachment case.— Where, subsequent to the levy of an attachment, a debtor applies for and obtains a receiver, and the books of account taken in attachment are turned over to the receiver, under an order to collect the accounts, and bring the proceeds into court, the order is equivalent to the appointment of a receiver in the attachment case, and the attaching creditor preserves his priority. New York Rubber Co. *v.* Gandy Belting Co., 11 Ohio Cir. Ct. 618, 1 Ohio Cir. Dec. 286.

A claim of a resident attaching creditor has preference over one purchased from an assignee for the benefit of creditors of a non-resident corporation. Hughes *v.* Lambertville Electric Light, etc., Co., 53 N. J. Eq. 435, 32 Atl. 69.

In Ohio, under statute, a creditor who levied an attachment upon books of account, thereby obtained priority upon the credits contained in the books. New York Rubber Co. *v.* Gandy Belting Co., 11 Ohio Cir. Ct. 618, 1 Ohio Cir. Dec. 286.

32. Glines *v.* Supreme Sitting O. I. H., 21 N. Y. Suppl. 736.

Plaintiff in attachment cannot by rule against the receivers compel the payment in full of his claim out of the funds in hand. To thus dispose of the fund without a full hearing as to the priorities of the various claims would be to displace the jurisdiction of the court of equity, and defeat the object of the receivership. Lowe *v.* Stephens, 66 Ga. 607.

33. See the statutes of the several states. And see the cases cited *infra*, this note.

Laborers are thus given a prior lien upon the property of a corporation in the hands of a receiver. Nisbet *v.* Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551. Such a statute does not apply to labor claimants who have filed no notice of lien on the owner, where, prior to the appointment of a receiver, the property had been assigned by the owner to part of the creditors in payment of preëxisting debts. McElwaine *v.* Hosey, 135 Ind. 481, 35 N. E. 272. Under Ohio Rev. St. (1892) § 3206*a*, providing that, where the property of an employer is placed in the hands of a receiver, claims for labor, within three months before the receiver is appointed, shall be first paid out of the trust

men, and in such cases the liens so created should be paid in preference to the claims of mortgage bond-holders.[34]

(IV) *Lien Transferred to Proceeds.* If property subject to a valid subsisting lien is placed in the hands of and sold by a receiver, the lien is transferred to the proceeds.[35] Thus where goods upon which a valid lien has been acquired by levy of execution or attachment are converted into money in the receivership proceedings, the sheriff is entitled to the proceeds,[36] to be applied to the judgment or the execution or attachment in the order of their priority.[37] So if a party claiming a lien agrees with the receiver that in order to secure an advantageous disposition of the property such lien should be transferred to the fund, and releases his lien on the property, such agreement should be upheld and the lien on the funds preserved.[38] And where a judgment or attachment creditor, to avoid a conflict of authority, surrenders the property to a receiver of a federal court claiming adversely, under an order of court providing that his rights shall not thereby be prejudiced, the court will see that the provision of such order is carried out in good faith, and that he is paid from the property or its proceeds in case his priority of lien is established.[39]

f. Expenses of Receivership — (I) *In General.* When it becomes the duty of a court of equity to take property under its own charge, through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it,[40] including expenses of litigation by which the trust fund

fund, in preference to all claims except claims for taxes and costs of administering the fund, the trust fund is the general fund remaining after the payment of all securities and liens obtained in good faith for value. St. Mary's Mach. Co. *v.* National Supply Co., 68 Ohio St. 535, 67 N. E. 1055, 69 Am. St. Rep. 677, 64 L. R. A. 845.

Materialmen.—Where a materialman is entitled to a statutory lien against a railroad in the hands of a receiver, the United States circuit court will not compel him to follow the steps required by the state statute to perfect his lien, but will treat his claim as if all necessary steps had been taken, and will allow him an equitable lien prior in right to that of mortgage creditors. Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. 673.

34. Blair *v.* St. Louis, etc., R. Co., 25 Fed. 232, in foreclosure of mortgage.

35. *Illinois.*— Link Belt Mach. Co. *v.* Hughes, 174 Ill. 155, 51 N. E. 179.

Indiana.— Totten, etc., Hogg Iron, etc., Co. *v.* Muncie Nail Co., 148 Ind. 372, 47 N. E. 703.

New York.— Matter of Muller, 21 N. Y. App. Div. 629, 47 N. Y. Suppl. 277.

Vermont.— Baldwin *v.* Spear Bros., 79 Vt. 43, 64 Atl. 235.

United States.— De Visser *v.* Blackstone, 7 Fed. Cas. No. 3,840, 6 Blatchf. 235.

See 42 Cent. Dig. tit. "Receivers," § 277.

If all the property is sold by a receiver for a gross sum, the lien claimant is entitled only to the remainder of the proceeds of sale after deducting the value of the property not covered by the liens. Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733; Houston Ice, etc., Co. *v.* Fuller, 26 Tex. Civ. App. 239, 63 S. W. 1048.

Title acquired by sale see *supra*, IV, H, 12, c.

36. Smith *v.* Sioux City Nursery, etc., Co., 109 Iowa 51, 79 N. W. 457; Rich *v.* Loutrel, 9 Abb. Pr. (N. Y.) 356, 18 How. Pr. 121; Matter of North American Gutta Percha Co., 9 Abb. Pr. (N. Y.) 79, 17 How. Pr. 549.

The levy of attachment on land gives only a lien and the officer does not acquire possession, and sale thereunder after the appointment of a receiver may be restrained and the receiver ordered to sell and the lien transferred to the proceeds. Beardslee *v.* Ingraham, 106 N. Y. App. Div. 506, 94 N. Y. Suppl. 937, 35 N. Y. Civ. Proc. 55.

The application for an order for the delivery of such proceeds should be made by the sheriff. Matter of North American Gutta Percha Co., 9 Abb. Pr. (N. Y.) 79, 17 How. Pr. 549.

37. Matter of Muehlfeld, etc., Piano Co., 12 N. Y. App. Div. 492, 42 N. Y. Suppl. 802, 26 N. Y. Civ. Proc. 90; Matter of Pond, 21 Misc. (N. Y.) 114, 46 N. Y. Suppl. 999.

38. Baldwin *v.* Spear, 79 Vt. 43, 64 Atl. 235.

39. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 114 Fed. 659; Vance *v.* Royal Clay Mfg. Co., 82 Fed. 251.

40. *California.*— McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

Georgia.— Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

Idaho.— Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267.

Illinois.— Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Heise *v.* Starr, 44 Ill. App. 406.

Indiana.— Bartholomew *v.* Mutual L. Ins. Co., 36 Ind. App. 328, 75 N. E. 31.

Iowa.— Frick *v.* Fritz, 124 Iowa 529, 100 N. W. 513.

Missouri.— Orchard *v.* National Exch. Bank, 121 Mo. App. 338, 98 S. W. 824, holding further that when property is turned

is created or preserved.[41] But where the object of the litigation is to diminish or destroy the fund, expenses incurred in the prosecution are not thus chargeable.[42] Allowances to a receiver for the expenses of the receivership should in general be made to the receiver himself, and not to those who furnish supplies to or perform labor for him,[43] although an application to a court of equity for payment of debts incurred by a receiver in the custody and management of the property is held to be proper.[44]

(II) *Compensation of Receiver.* An allowance to a receiver as compensation for his services is taxable as part of the costs,[45] and as such is entitled to priority of payment.[46]

over by the receiver to a third person as owner, the court may order him to pay back to the receiver such sum as may be necessary to pay the expenses of the receivership, if there is a deficiency of assets.

New Jersey.— Nessler *v.* Industrial Land Dev. Co., 65 N. J. Eq. 491, 56 Atl. 711.

New York.— Woodruff *v.* Erie R. Co., 93 N. Y. 609; Fallon *v.* Egberts Woolen Mill Co., 31 Misc. 523, 64 N. Y. Suppl. 466 [*affirmed* in 56 N. Y. App. Div. 585, 67 N. Y. Suppl. 347].

South Carolina.— Friedheim *v.* Crescent Cotton Mill, 64 S. C. 277, 42 S. E. 119.

Texas.— International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243.

United States.— Mercantile Trust Co. *v.* Farmers' L. & T., etc., Co., 81 Fed. 254, 26 C. C. A. 383; Ames *v.* Union Pac. R. Co., 74 Fed. 335.

See 42 Cent. Dig. tit. "Receivers," § 279.

Amount of expenses.— The only excuse for the appointment of a receiver is that the property of an insolvent estate may be applied to the claims of the creditors, and the expenses and charges of administration should be in proportion to the interests involved and the results achieved. City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469.

The court will see that the estate is not plundered and the assets dissipated in unreasonable and unnecessary expenses. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018. See also *supra*, IV, F, 6, e; *infra*, VII, B, C.

Expenses of another receivership.—A receiver cannot be compelled to postpone claims properly incurred by him in order to meet old claims incurred under a former receivership. Weber *v.* Naltner, 10 Ohio S. & C. Pl. Dec. 96, 7 Ohio N. P. 290. Nor is a receiver of a state court chargeable with expenses incurred by a receiver of the federal court while the property was in the hands of the latter, or for the hire of property which the latter used on a contract made by him. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

When property is turned over by the receiver to third parties as owners thereof, the court may order it back to pay such expenses and the order may be enforced by proceeding for contempt, sequestration of assets, or appropriate equitable remedy, but not by the entry of a judgment without pleading or process, in the absence of either an agreement or voluntary appearance of the third person. Orchard *v.* National Exch. Bank, 121 Mo. App. 338, 98 S. W. 824.

41. Bartholomew *v.* Mutual L. Ins. Co., 36 Ind. App. 328, 75 N. E. 31.

Liability of fund for costs generally see Costs, 11 Cyc. 96.

42. Bartholomew *v.* Mutual L. Ins. Co., 36 Ind. App. 328, 75 N. E. 31.

43. Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113; German Nat. Bank *v.* Best, 32 Colo. 192, 75 Pac. 398.

44. Nessler *v.* Industrial Land Dev. Co., 65 N. J. Eq. 491, 56 Atl. 711. See also Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 108 La. 74, 32 So. 221.

45. Wilson Cotton Mills *v.* C. C. Randleman Cotton Mills, 115 N. C. 475, 20 S. E. 770; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310.

In Texas receivers' fees are a part of the "court costs," within Sayles Suppl. Annot. Civ. St. art. 1466, providing that moneys coming into the hands of a receiver, as such, shall be first applied "to the payment of all court costs of the suit"; and such application will be made, regardless of the final outcome of the suit. Espuella Land, etc., Co. *v.* Bindle, 11 Tex. Civ. App. 262, 32 S. W. 582.

Insufficiency of estate to pay all costs.— In administration actions a receiver may be discharged on his passing his accounts, and may be paid his remuneration and costs without waiting to see whether the estate is sufficient to pay all costs. Batten *v.* Wedgwood Coal, etc., Co., 28 Ch. D. 317, 54 L. J. Ch. 686, 52 L. T. Rep. N. S. 212, 33 Wkly. Rep. 203.

46. Beckwith *v.* Carroll, 56 Ala. 12; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310.

Orders of court necessary.—An order of the court to that effect, and also one for authority to incur indebtedness, is necessary to entitle a receiver to retain his salary or compensation as a preferred claim as against claimants who have, at the request of the receiver, advanced money or performed services for the trust, and, where the fund in hand is not sufficient to pay all the receiver's debts and his compensation, the distribution must be made *pro rata*. Nessler *v.* Indus-

(III) *COUNSEL FEES.*[47] Counsel fees for necessary counsel to a receiver are allowed as part of the costs of the receivership,[48] and as such entitled to priority of payment.[49]

(IV) *RENTALS.*[50] The rental of leased property for which receivers are liable[51] is regarded as an expense incident to the administration of the receivership,[52] and, like other costs, is to be paid before the assets of the debtor are distributed among his creditors.[53] A claim for rent takes precedence even over receivers' certificates issued for improvements on the leased premises;[54] and such priority is not lost by reason of the fact that the lease was not recorded.[55] So the court may decree priority over a railroad mortgage to a claim for rental of cars or tracks accruing during the receivership.[56] Thus where the receiver is appointed at the instance of the trustee of the mortgage, and he takes possession of the road and its rolling stock, a part of which is being operated under lease, and continues to operate it,[57] or where it is fairly inferable that the receiver continued in possession of the

trial Land Dev. Co., 65 N. J. Eq. 491, 56 Atl. 711.

47. **Allowance of fees** see *infra*, VII, C, 2.

Employment of counsel see *supra*, IV, F, 6, e, (v).

Property or funds liable see *infra*, V, C, 2, a.

48. See *infra*, VII, C, 2.

49. McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; State *v.* Active Bldg., etc., Assoc., 102 Mo. App. 675, 77 S. W. 171; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310.

Attorney of receiver in another court.— But it has been held that the fees of attorneys acting for a receiver of a state court are not chargeable as a prior lien on the property when in the hands of a receiver appointed by a federal court in an entirely independent suit, and cannot be allowed, even as general claims, unless they have been ascertained and allowed by the state court. American L. & T. Co. *v.* South Atlantic, etc., R. Co., 81 Fed. 62.

Counsel's services as "labor."— Counsel's services to a receiver are included within a decree giving priority to claims for "labor in operation of the road." Bayliss *v.* Lafayette, etc., R. Co., 2 Fed. Cas. No. 1,141, 9 Biss. 90, 8 Reporter 579. See also *infra*, V, B, 1, g, (II), (c), (2).

Where the order appointing a federal court receiver is inoperative because a state court had already acquired jurisdiction of the property, an attorney employed by the federal court cannot claim priority over general creditors. The principle concerning *de facto* officers does not apply. Crosby *v.* Morristown, etc., R. Co., (Tenn. Ch. App. 1897) 42 S. W. 507. But the claim for such services may be allowed as a debt against the estate of the insolvent railroad company, where other creditors do not object thereto. Crosby *v.* Morristown, etc., R. Co., *supra*.

50. See RAILROADS, 33 Cyc. 623.

51. See *supra*, IV, F, 6, e, (I), (C).

52. Link Belt Mach. Co. *v.* Hughes, 62 Ill. App. 318; Filkins *v.* Adams, 60 Ill. App. 410; Perrin, etc., Printing Co. *v.* Cook Hotel, etc., Co., 118 Mo. App. 44, 93 S. W. 337.

Where a receiver takes no property which the landlord can distrain, and does not hold possession of the premises, the landlord has no right to demand payment in preference to other creditors. Matter of Brown, 3 Edw. (N. Y.) 384.

53. Spencer *v.* World's Columbian Exposition, 58 Ill. App. 637; Perrin, etc., Printing Co. *v.* Cook Hotel, etc., Co., 118 Mo. App. 44, 93 S. W. 337; Hatch *v.* Dervoort, 54 N. J. Eq. 511, 34 Atl. 938; Woodruff *v.* Erie R. Co., 93 N. Y. 609; People *v.* Universal L. Ins. Co., 30 Hun (N. Y.) 142.

Royalty accruing to a mine owner from an insolvent mining corporation, during a receivership, is a first charge on the funds in the receiver's hands. Allison *v.* Coal Creek, etc., Coal Co., 87 Tenn. 60, 9 S. W. 226.

54. Perrin, etc., Printing Co. *v.* Cook Hotel, etc., Co., 118 Mo. App. 44, 93 S. W. 337.

55. Perrin, etc., Printing Co. *v.* Cook Hotel, etc., Co., 118 Mo. App. 44, 93 S. W. 337.

56. Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157 (where it is said that, although the bondholders do not in any manner consent to or acquiesce in the possession and use of the leased cars by the receiver, still the claims of the car owner for rent is, upon general equitable principles, to be preferred to that of the bondholders); Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 37 L. ed. 663 [*affirming* 36 Fed. 808]; Central Trust Co. *v.* Continental Trust Co., 86 Fed. 517, 30 C. C. A. 235; Mercantile Trust Co. *v.* Farmers' L. & T. Co., 81 Fed. 254, 26 C. C. A. 383.

But where the receiver does not become liable for rent it cannot be given such priority. Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 12 S. Ct. 787, 36 L. ed. 632 [*affirming* Central Trust Co. *v.* Wabash, etc., R. Co., 34 Fed. 259]; Central Trust Co. *v.* Wabash, etc., R. Co., 46 Fed. 26.

57. Mercantile Trust, etc., Co. *v.* Southern Iron Car Line Co., 113 Ala. 543, 21 So. 373; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379.

Estoppel to deny rental as expense.— Where a railroad receiver used cars in possession of the company under a lease contract, without the consent of the owner, but under order of court, a trustee of the bondholders of the company who resisted the return of the cars to the owner, and participated in

leased line with the consent of the mortgagees,[58] the rental of the leased line or cars is an expense of the receivership prior to the lien of the mortgage.

g. Expense of Operation of Business[59] — (i) *After Appointment of Receiver* — (a) *In General.* Where a court of chancery takes possession of a railroad or other similar property of public corporations, and operates the same through a receiver, debts contracted for labor, supplies, and other necessary purposes, after the appointment of the receiver, may be made a preferred claim.[60] This expense is to be charged, first, upon the net income, and, if that be not sufficient, then upon the property itself, or its proceeds upon sale.[61] This right to charge the *corpus* of the property is, however, a power to be exercised with the greatest caution,[62] and, if possible, with the consent or acquiescence of the parties interested in the fund.[63] While it has been held that this is an extraordinary power to be exercised only in cases of railroad and other like corporations of a

procuring the order refusing to restore them to him, is estopped from denying that the rental of the cars is an expense of the receivership prior to the lien of the mortgage securing the bonds. Lane *v.* Macon, etc., R. Co., 96 Ga. 630, 24 S. E. 157.

58. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117.

Adoption of lease and liability for occupation see *supra*, IV, F, 6, e, (I), (C). And see Railroads, 33 Cyc. 624.

59. Conditions upon granting order see *supra*, III, E, 7, a.

Conduct and continuance of business see *supra*, IV, F, 6, e, (III).

Rentals see *supra*, V, B, 1, f, (IV).

60. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237.

New York.— Vilas *v.* Page, 106 N. Y. 439, 13 N. E. 743.

Oregon.— U. S. Investment Corp. *v.* Portland Hospital, 40 Oreg. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627.

Pennsylvania.— Patterson *v.* Hempfield R. Co., 1 Wkly. Notes Cas. 127.

Vermont.— Langdon *v.* Vermont, etc., R. Co., 54 Vt. 593.

United States.— Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. 245; Clark *v.* Central R., etc., Co., 66 Fed. 803, 14 C. C. A. 112; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. 664; Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Western Div. Western North Carolina R. Co. *v.* Drew, 29 Fed. Cas. No. 17,434, 3 Woods 691.

See 42 Cent. Dig. tit. "Receivers," § 283.

All claims for services rendered to the trust should be paid in full, if possible, as preferred claims, and as expenses of the trust, and, where the fund in hand is not sufficient to pay in full, the claims should, in the absence of special equities, be paid *pro rata*. Nessler *v.* Industrial Land Dev. Co., 65 N. J. Eq. 491, 56 Atl. 711.

Supplies furnished defaulting contractors. — In the absence of a statute, or an order of court made before materials and supplies were furnished to defaulting contractors with the receiver of a railroad such creditors have no equitable lien for the amounts due them from such contractors upon the property of the railroad company which is in the hands of the receiver. Denison, etc., R. Co. *v.* Ranney-Alton Mercantile Co., 104 Fed. 595, 44 C. C. A. 65.

61. *Alabama.*— Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442.

Georgia.— Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

Illinois.—Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54.

Oregon.— U. S. Investment Corp. *v.* Portland Hospital, 40 Oreg. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627.

South Carolina.— Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858. But in Farmers', etc., Nat. Bank *v.* Waco Electric R. Co., (Civ. App. 1896) 36 S. W. 131, the power was denied as against prior liens.

Virginia.— People's Nat. Bank *v.* Virginia Textile Co., 104 Va. 34, 51 S. E. 155.

United States.— Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592, 11 S. Ct. 857, 35 L. ed. 543; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963.

See 42 Cent. Dig. tit. "Receivers," § 283.

62. Makeel *v.* Hotchkiss, 190 Ill. 311, 60 N. E. 524, 83 Am. St. Rep. 131; Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Gillam *v.* Nussbaum, 95 Ill. App. 277; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858; Freer *v.* Davis, 52 W. Va. 35, 43 S. E. 172, 94 Am. St. Rep. 910; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

63. Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

Consent or acquiescence shown.— In the following cases it appears that the parties most materially interested either expressly consented to the order, or offered no objection to it. Buster *v.* Mann, 69 Ark. 23, 62 S. W. 588; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895; Reinhart *v.* Augusta Min., etc., Co., 94 Fed. 901, 36 C. C. A. 541.

quasi-public character charged with a public duty, for reasons peculiar to that character of property, and not in cases of mere private business concerns,[64] yet the same doctrine has been applied in some cases to property of a different character, used in the business of private individuals or corporations, where the expenses of continuing the business appeared to be necessary to preserve the property from destruction or waste, and in conserving the interests of those who might succeed in establishing their superior right or title.[65]

(B) *Repairs and Extensions.* A receiver's expenditures, made under direction of the court, for preserving and rendering productive the property of a quasi-public corporation, as by making repairs,[66] or completing the plant, or building additions thereto, when necessary to its successful operation,[67] it has been held, may be made a lien on the property prior to existing mortgages. But where the receiver in making expenditures for such purposes acts only as the agent of the consenting bondholders, it has been held that his right to reimbursement is subordinate to that of a non-consenting bondholder.[68]

(C) *Loans to Receiver to Continue Business.* Where the continuance of a business in the hands of a receiver seems desirable to protect the interests of all concerned, the court, in the exercise of its equity jurisdiction, has power to authorize the receiver to borrow money for purposes of the receivership, and to make the same a first lien on the property belonging to the trust estate in the hands of the receiver.[69]

(D) *Claims For Damages.* Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employees, are classed as a part of the operating expenses of the corporation.[70] Such expenses

64. Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113; International Trust Co. *v.* United Coal Co., 27 Colo. 246, 60 Pac. 621, 83 Am. St. Rep. 59 (prior liens cannot be displaced); Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267; U. S. Inv. Corp. *v.* Portland Hospital, 40 Oreg. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627; Hanna *v.* State Trust Co., 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603.

See 42 Cent. Dig. tit. "Receivers," § 283.

Non-going concern.— Freer *v.* Davis, 52 W. Va. 35, 37, 43 S. E. 172, 94 Am. St. Rep. 910, where the court says: "I grant that where a business is that of a 'going concern,' as a railroad, and the interests require that it be continued a 'going concern,' the receiver may be authorized to keep the business going, and may charge the outlay beyond revenue upon the very body of the property. . . . But I do not see that the same rule applies where it is not a 'going concern.' This law would not justify boring new oil wells."

Certificates see *supra*, IV, G, 2, b, (II).

65. *Alabama.*— Highland Ave., etc., R. Co. *v.* Thornton, 105 Ala. 225, 16 So. 699; Thornton *v.* Highland Ave., etc., R. Co., 94 Ala. 353, 10 So. 442; Beckwith *v.* Carroll, 56 Ala. 12.

Illinois.— Knickerbocker *v.* McKindley Coal, etc., Co., 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54; Gillam *v.* Nussbaum, 95 Ill. App. 277; Filkins *v.* Adams, 60 Ill. App. 410.

South Carolina.— Friedheim *v.* Crescent Cotton Mill, 64 S. C. 277, 42 S. E. 119.

Texas.— Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858.

Virginia.— People's Nat. Bank *v.* Virginia Textile Co., 104 Va. 34, 51 S. E. 155; Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

See 42 Cent. Dig. tit. "Receivers," § 283.

66. Hoover *v.* Montclair, etc., R. Co., 29 N. J. Eq. 4.

Railroads see RAILROADS, 33 Cyc. 533 text and note 66.

67. Hale *v.* Nashua, etc., R. Co., 60 N. H. 333; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Wallace *v.* Loomis, 97 U. S. 146, 24 L. ed. 895.

68. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219.

69. Blythe *v.* Gibbons, 141 Ind. 332, 35 N. E. 557; *Ex p.* Carolina Nat. Bank, 18 S. C. 289; Ellis *v.* Vernon Ice, etc., Co., 86 Tex. 109, 23 S. W. 858. But in Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131, it is held that the claim of one advancing money to the receiver of an insolvent corporation, to pay its operating expenses, ranks with those of general creditors only, and not with those classed as operating expenses, in the absence of a transfer to him of the claims which arose for operating expenses, or of facts showing that, either by contract or operation of law, he became subrogated to the rights of such preferred creditors.

Railroads see RAILROADS, 33 Cyc. 539.

70. *Illinois.*— Knickerbocker *v.* Benes, 195 Ill. 434, 63 N. E. 174 [*affirming* 93 Ill. App. 305]; Bartlett *v.* Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715.

Mississippi.— Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271.

are to be paid and are payable out of the income of the property if it is sufficient, or, if necessary, out of the *corpus*.[71]

(E) *Claim of Surety on Bond Given in Action Against Receiver.* Where a third person becomes surety for the receiver of an insolvent corporation upon an appeal brought by him for the benefit of the fund to which he is entitled as receiver,[72] or where the fund coming into the hands of a receiver is actually increased to the extent of the money which such third person is compelled to pay in consequence of his having become such surety,[73] the latter is held to be entitled to priority of payment out of the property in the hands of the receiver.

(F) *Diversion of Fund.* When the current income of a corporation in the hands of a receiver is diverted to the improvement of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the property to pay such debts out of the proceeds of the sale of the property.[74] The fact that the receiver, when in funds, does not pay bills contracted or pay cash for necessary supplies then purchased, does not prevent his creditors, who sold in good faith, from enforcing their claims against the estate in his hands, in the absence of knowledge by them at the time of purchase that he had such funds.[75]

(II) *Before Appointment of Receiver* — (A) *In General.* In the winding up of insolvent corporations, the secured creditor is ordinarily entitled to priority of payment, because, with equal equity, he has a legal lien which equity will recognize and enforce;[76] but when the unsecured creditor has some peculiar and superior equity the court may establish his debt as an equitable lien upon

New Jersey.—Klein *v.* Jewett, 26 N. J. Eq. 474 [*affirmed* in 27 N. J. Eq. 550].

New York.— Robinson *v.* New York, etc., Electric Co., 99 N. Y. App. Div. 509, 91 N. Y. Suppl. 153.

South Carolina.— *Ex p.* Brown, 15 S. C. 518.

United States.— Central Trust Co. *v.* Denver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143; Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; St. Louis, etc., R. Co. *v.* Holbrook, 73 Fed. 112, 19 C. C. A. 385, holding that when mortgage creditors ask a court to take possession of railroad property and operate it through receivers, they thereby consent to have all the liabilities resulting from such operation, including damages to persons by negligence, take precedence of their prior contract liens. *Contra*, Davenport *v.* Alabama, etc., R. Co., 7 Fed. Cas. No. 3,588, 2 Woods 519, unless so provided in the order of appointment.

See 42 Cent. Dig. tit. "Receivers," § 288.

Railroads see RAILROADS, 33 Cyc. 540, 719.

71. *Georgia.*— Green *v.* Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. Rep. 379, 33 L. R. A. 806.

Illinois.— Knickerbocker *v.* Henes, 195 Ill. 434, 63 N. E. 174 [*affirming* 93 Ill. App. 305]; Bartlett *v.* Cicero Light, etc., Co., 177 Ill. 68, 52 N. E. 339, 69 Am. St. Rep. 206, 42 L. R. A. 715.

Mississippi.— Mobile, etc., R. Co. *v.* Davis, 62 Miss. 271.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474 [*affirmed* in 27 N. J. Eq. 550].

New York.— Kain *v.* Smith, 80 N. Y. 458.

South Carolina.— *Ex p.* Brown, 15 S. C. 518.

Texas.— Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60; Ryan *v.* Hays, 62 Tex. 42.

United States.— Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950; Anderson *v.* Condict, 93 Fed. 349, 35 C. C. A. 335; Davis *v.* Duncan, 19 Fed. 477.

England.— Smith *v.* Great Eastern R. Co., 18 L. T. Rep. N. S. 18.

See 42 Cent. Dig. tit. "Receivers," § 288.

Property returned to owner see *supra*, IV, I, 2.

Property subject in hands of purchaser see *supra*, IV, H, 12.

72. *In re* Croton Ins. Co., 2 Barb. Ch. (N. Y.) 360; Bayliss *v.* Lafayette, etc., R. Co., 2 Fed. Cas. No. 1,141, 9 Biss. 90.

73. *In re* Croton Ins. Co., 2 Barb. Ch. (N. Y.) 360.

74. Hand *v.* Savannah, etc., R. Co., 17 S. C. 219; Union Trust Co. *v.* Illinois, etc., R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963. See also *infra*, V, B, 1, g, (II), (B).

Return of property to owner see *supra*, IV, I, 2.

75. Highland Ave., etc., R. Co. *v.* Thornton, 105 Ala. 225, 16 So. 699.

76. Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131; Addison *v.* Lewis, 75 Va. 701; Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Huidekoper *v.* Hinckley Locomotive Works, 99 U. S. 258, 25 L. ed. 344; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Farmers' L. & T. Co. *v.* Missouri, etc., R. Co., 21 Fed. 264.

the property paramount to the secured debt,[77] as where a court of equity engaged in administering mortgaged property of a quasi-public corporation under a receivership in a foreclosure suit prefers unpaid claims for current expenses of the ordinary operation of the business, incurred within a limited time before the receivership.[78] But the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens,[79] and it is the exception and not the rule that such priority of liens can be displaced.[80] The court will ordinarily enforce this equity only as against the parties who seek its aid,[81] and the right to give such preference is usually restricted to creditors

To divert any portion of the property to the payment of any other claim or demand is to that extent to impair the vested right of the mortgagee to have his lien paid out of the mortgaged property. Union L. & T. Co. *v.* Southern California Motor Road Co., 51 Fed. 106.

77. Addison *v.* Lewis, 75 Va. 701; Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Farmers' L. & T. Co. *v.* Missouri, etc., R. Co., 21 Fed. 264.

Different basis from that of receivership claims.— The payment of such debts stands *prima facie* on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117.

78. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; Security Trust Co. *v.* Goble R. Co., 44 Oreg. 370, 74 Pac. 919, 75 Pac. 697; Merriam *v.* Victory Min. Co., 37 Oreg. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; Addison *v.* Lewis, 75 Va. 701; Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; Ames *v.* Union Pac. R. Co., 74 Fed. 335; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323; Farmers' L. & T. Co. *v.* Missouri, etc., R. Co., 21 Fed. 264. But see Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245, 8 N. E. 488 [*reversing* 40 Hun 80]; Denniston *v.* Chicago, etc., R. Co., 7 Fed. Cas. No. 3,800, 4 Biss. 414 (holding further that the promise of a receiver cannot give claimants for materials furnished the insolvent corporation a lien prior to mortgage); Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320. See also RAILROADS, 33 Cyc. 529 *et seq.*

The lien created by a mortgage in favor of bondholders is a vested right subject only to the payment of a few unsecured matured claims for operating expenses, equipment, and the like, necessary to equitably restore to unsecured creditors that which by the non-payment of their claims when due amounted to a diversion of the fund in favor of the mortgage creditors. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Atchison, etc., R. Co. *v.* Osborn, 148 Fed. 606, 78 C. C. A. 378.

Expense of operating part of consolidated road.— The claims of receivers of a consolidated road, appointed under an administrative bill, for reimbursement for expenses justly incurred in the operation of divisional mortgaged railroads for a limited time before a bill to foreclose the mortgage upon them is filed, is superior in equity to that of the divisional mortgage, and should be first paid out of the income subsequently derived from the property, and, if that is insufficient, then out of the proceeds obtained from the sale of the property in the foreclosure suit. Ames *v.* Union Pac. R. Co., 74 Fed. 335.

79. Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068; Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 34 L. ed. 663; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657.

80. Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; New York Security, etc., Co. *v.* Louisville, etc., R. Co., 102 Fed. 382.

Discretion exercised with caution.— The discretion of the court in allowing the same should be exercised with great care. Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323.

No inflexible rule has been laid down as to when such preference should be given, but the matter must depend upon the peculiar circumstances of each case, and must be determined by the sound judicial discretion of the court. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140.

81. Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Bound *v.* South Carolina R. Co., 47 Fed. 30.

The lien laws of Georgia are embodied in the code, together with statutes enacted since the adoption of the code. These liens and

of railroads, which are public concerns, and cannot be exercised to give unsecured creditors of an ordinary corporation such preference over contract liens.[82]

(B) *Grounds and Extent of Allowance of Preference.* Claims of this character have been given a preference over the mortgage debt on several grounds:[83] (1) That the mortgage is a lien on the net, and not on the gross, income of the company, or there is an implied agreement upon the part of such mortgagees, in accepting such security that current debts, contracted in the ordinary course of the business, shall be paid from its current earnings, and that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the funds thus improperly diverted from their primary use;[84] (2) that the court appointing the receiver is vested with discretionary power to make such order concerning the

no others are contemplated by section 3149 *et seq.*, of the code and the acts amendatory thereof, touching the distribution of the assets of an insolvent corporation or trader. The same rule as to the preservation of liens prevails in the case of railroad corporations as in the case of other corporations or of traders in general. If the equitable doctrine recognized by some courts that there are preferential debts within a so-called "six months' rule," which will take priority over a mortgage upon a railroad, can be recognized in this state at all, it certainly cannot be when the proceeding is under the above-cited sections of the code, and when the mortgagee does not intervene as a plaintiff, but comes in to make defense only. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141.

Lienors not parties.— It is not within the power of the court which has appointed a receiver for a corporation to make such claims liens upon the property of the corporation superior to the liens of other creditors who are not parties to the suit. Union Trust Co. *v.* Illinois, etc., R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897.

82. *Alabama.*— Merchants' Bank *v.* Moore, 106 Ala. 646, 17 So. 705.

Maryland.— Hooper *v.* Central Trust Co., 81 Md. 559, 32 Atl. 505, 29 L. R. A. 262.

New York.— Raht *v.* Attrill, 106 N. Y. 423, 13 N. E. 282, 60 Am. Rep. 456.

Oregon.— Merriam *v.* Victory Placer Min. Co., 37 Oreg. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

United States.— Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 17 S. Ct. 1003, 41 L. ed. 1149; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; Farmers' L. & T. Co. *v.* Grape Creek Coal Co., 50 Fed. 481, 16 L. R. A. 603; Bound *v.* South Carolina R. Co., 50 Fed. 312 [*distinguishing* Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339]; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372; Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436.

See 42 Cent. Dig. tit. "Receivers," § 293.

Doctrine applicable to street railroads.— McCornack *v.* Salem C. R. Co., 34 Oreg. 543, 56 Pac. 518, 1022; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

83. Such claims are not given priority merely upon the idea of superior equity in the debt itself (Phillips *v.* Wise, (Tex. Civ. App. 1894) 31 S. W. 428), or upon the principle of estoppel based upon the fact that the mortgage trustees and bondholders permitted the property to be operated, and the debts incurred by the corporation, after default in payment of interest upon the bonds (Phillips *v.* Wise, (Tex. Civ. App. 1894) 31 S. W. 428; Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Maryland Steel Co. *v.* Gettysburg Electric R. Co., 99 Fed. 150; Hiles *v.* Case, 14 Fed. 141, 9 Biss. 549).

84. *Connecticut.*— Mersick *v.* Hartford, etc., R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977.

Oregon.— McCornack *v.* Salem R. Co., 34 Oreg. 543, 56 Pac. 518, 1022.

Texas.— McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705.

Virginia.— Addison *v.* Lewis, 75 Va. 701; Williamson *v.* Washington City, etc., R.. Co., 33 Gratt. 624.

United States.— Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 14 L. ed. 458; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596 (where it is held that if the mortgagees prefer to take the property under a decree of strict foreclosure they take it subject to the charge in favor of the current debt creditor, whose money they have got, who can insist on a sale for his benefit if the mortgagees fail to make payment); Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Illinois Trust, etc., Co. *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; International Trust Co. *v.* Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30; St. Louis Trust Co. *v.* Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Clark *v.* Central R., etc., Co., 66 Fed. 803, 14 C. C. A. 112; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 524; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 49 Fed. 693; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 48 Fed. 188; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. 664; Thomas

payment of existing liabilities as shall be equitable and just, as a condition precedent to assuming such control over the property at the suit of the lien-holder;[85] (3) that the payment of such claims is necessary to preserve the mortgaged property and to keep it a going concern.[86] The current income of a railroad company being primarily applicable to the payment of its operating expenses may be made an equitable charge on the income earned during a receivership, although incurred previously by the company, within such reasonable time as shall be fixed by the court,[87] and without regard to whether or not income had been diverted, by the company, before the appointment of the receiver, for the benefit of the mortgage bondholders;[88] but the right to such preference extends to income only, and by the weight of authority there is no equity which entitles a creditor to preferential payment over the mortgagee from the proceeds of the property at foreclosure sale, where it brings less than the mortgage debt, or to subject the *corpus* of the property to its payment, unless it is shown that there was a diversion of income to the benefit of the mortgagee,[89] and also that but for such diversion

v. Peoria, etc., R. Co., 36 Fed. 808; Blair *v.* St. Louis, etc., R. Co., 25 Fed. 232; Atkins *v.* Petersburg R. Co., 2 Fed. Cas. No. 604, 3 Hughes 307.

See 42 Cent. Dig. tit. "Receivers," § 307. And see RAILROADS, 33 Cyc. 529 *et seq.*

Restoration from income.— Primarily this restoration should be made from the income. If this proves insufficient, then it may be made out of the *corpus*. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 524; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 48 Fed. 188.

85. Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 48 Fed. 188; U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800.

Time of making order.— It is not essential that the order for the payment of preferential debts should be made at the time, and as a condition of appointing a receiver. Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 471. The better practice is to do so, but, if such an order is not then made, it may be made afterward. Addison *v.* Lewis, 75 Va. 701; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551. But see Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658; Central Trust Co. *v.* Chattanooga, etc., R. Co., 69 Fed. 295; Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 9 C. C. A. 401.

86. Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Miltenberger *v.* Logansport, etc., R. Co., 106 U. S. 286, 1 S. Ct. 140, 27 L. ed. 117; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; St Louis Trust Co. *v.* Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. 664.

87. Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977; Hand *v.* Savannah, etc., R. Co., 17 S. C. 219; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Street *v.* Maryland Cent. R. Co., 59 Fed. 25; U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800; Blair *v.* St. Louis, etc., R. Co., 22 Fed. 471.

88. Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977; Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068.

89. Hammerly *v.* Mercantile Trust, etc., Co., 123 Ala. 596, 26 So. 646; Mersick *v.* Hartford, etc., Horse R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. Rep. 977; Waters-Pierce Oil Co. *v.* U. S., etc., Trust Co., 44 Tex. Civ. App. 397, 99 S. W. 212; Farmers', etc., Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131; Gregg *v.* Metropolitan Trust Co., 197 U. S. 183, 25 S. Ct. 415, 49 L. ed. 717 [*affirming* 124 Fed. 721, 59 C. C. A. 637]; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472; St. Louis, etc., R. Co. *v.* Cleveland, etc., R. Co., 125 U. S. 658, 8 S. Ct. 1011, 31 L. ed. 832; Fosdick *v.* Schall, 99 U. S. 235, 25 L. ed. 339; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Atchison, etc., R. Co. *v.* Osborn, 148 Fed. 606, 78 C. C. A. 378; Fordyce *v.* Kansas City, etc., Connecting R. Co., 145 Fed. 566; Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Central Trust Co. *v.* Chat-

there would have been net earnings subject to the equitable lien; [90] and the burden rests upon the claimant of such preference to establish such facts.[91] This rule has sometimes been adopted by statute.[92]

(c) *Classes of Claims Preferred*[93] — (1) In General. The decisions which have established the right of the court to require the earnings of a receivership to be applied in payment of debts incurred prior to the appointment of the receiver, in preference to the claims of the mortgagees at whose suit the receiver had been appointed, restrict that right to somewhat narrow limits.[94] The broad language of the leading case on the general subject,[95] extending the preference to "necessary operating and managing expenses, proper equipment, and useful improvements" has been disapproved or modified, and the class of claims entitled to equitable preference has been limited in some of the later decisions to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property,[96] whether for labor or supplies,[97] including, to some extent, or

tanooga Southern R. Co., 69 Fed. 295; Cutting *v.* Tavares, etc., R. Co., 61 Fed. 150, 9 C. C. A. 401; Street *v.* Maryland Cent. R. Co., 59 Fed. 25; American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. 101; U. S. Trust Co. *v.* New York, etc., R. Co., 25 Fed. 800.

The decisions are not entirely reconcilable upon this subject and there are cases which lay down a broader rule. See Lee *v.* Pennsylvania Traction Co., 105 Fed. 405; Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. 73; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; Wood *v.* New York, etc., R. Co., 70 Fed. 741; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 62 Fed. 205, 10 C. C. A. 323; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182.

90. Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481, holding that it is only when the income is diverted from the payment of those claims which have a higher equity, to the payment of those which stand upon a lower plane, that any equity arises in favor of any one on account of diversion.

91. Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Kansas L. & T. Co. *v.* Sedalia Electric R., etc., Co., 108 Fed. 702; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

92. See the statutes of the several states. And see Ellis *v.* Vernon Ice, etc., Co., 4 Tex. Civ. App. 66, 23 S. W. 856 [*affirmed* in 86 Tex. 109, 23 S. W. 858], where it appears that under Sayles Civ. St. Tex. arts. 147*d*, *e*, Addend. art. 1466, claims arising prior to a receivership are limited to a preference lien on the moneys coming into the hands of the receiver as the earnings of the property in his hands, and are last in the order of preference. The only provision for the payment of antecedent floating debts out of the proceeds of the sale of the mortgaged property in preference to the debt secured by the mortgage is where the receiver has spent current earnings coming into his hands as such in improving the property, whereby its value has been increased, and then only to the extent of the value of such improvements.

93. **Rentals of rolling stock and track privileges** see Railroads, 33 Cyc. 534 text and note 74, 542 text and note 35 *et seq.*

94. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301.

95. Fosdick *v.* Schall, 99 U. S. 235, 252, 25 L. ed. 339.

96. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140; Gregg *v.* Metropolitan Trust Co., 197 U. S. 183, 25 S. Ct. 415, 49 L. ed. 717; Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475; Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 30 S. Ct. 347, 44 L. ed. 458; Morgan's Louisiana, etc., R., etc., Co. *v.* Texas Cent. R. Co., 137 U. S. 171, 11 S. Ct. 61, 34 L. ed. 625; Kneeland *v.* American L. & T. Co., 136 U. S. 89, 10 S. Ct. 950, 34 L. ed. 379; Thompson *v.* White Water Valley R. Co., 132 U. S. 68, 10 S. Ct. 29, 33 L. ed. 256; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Lee *v.* Pennsylvania Traction Co., 105 Fed. 405; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Maryland Steel Co. *v.* Gettysburg Electric R. Co., 99 Fed. 150; Central Trust Co. *v.* East Tennessee, etc., R. Co., 80 Fed. 624, 26 C. C. A. 30.

The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

97. *Kentucky.*— Douglass *v.* Cline, 12 Bush 608.

Ohio.— Akron Iron Co. *v.* William N. Whitely Co., 11 Ohio Dec. (Reprint) 192, 25 Cinc. L. Bul. 203.

under some circumstances, necessary equipment and repairs,[98] but excluding debts for original construction,[99] and permanent equipment and improvements.[1] And it must be shown that the demand is not a debt created upon the personal credit of the company, but with the expectation that it was to be met out of current receipts.[2] Moreover, while it may be an indispensable element of every such claim that it be founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgagee,[3] yet if the consideration of a claim is not a part of the current expenses of operation, but is a part of the expense of constructing a permanent addition or improvement to it, the fact that it tended to conserve and improve the property or that it was necessary to keep the mortgagor a going concern, or that the mortgagor pledged the current income to secure it, will not give the claim a preferential equity over the lien of a prior mortgage.[4]

Pennsylvania.— Farmers', etc., Bank *v.* Philadelphia, etc., R. Co., 14 Phila. 456, 7 Fed. 377.

Utah.— Litzenberger *v.* Jarvis-Conklin Trust Co., 8 Utah 15, 28 Pac. 871.

United States.— Kneeland *v.* Bass Foundry, etc., Works, 140 U. S. 592, 11 S. Ct. 857, 35 L. ed. 543; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Union Trust Co. *v.* Souther, 107 U. S. 591, 2 S. Ct. 295, 27 L. ed. 488; Hale *v.* Frost, 99 U. S. 389, 25 L. ed. 419; Dickinson *v.* Saunders, 129 Fed. 16, 63 C. C. A. 666; Clark *v.* Central R., etc., Co., 66 Fed. 803, 14 C. C. A. 112; Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,258, 8 Biss. 315.

See 42 Cent. Dig. tit. "Receivers," § 303. And see RAILROADS, 33 Cyc. 533.

98. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140; Union Trust Co. *v.* Illinois Midland R. Co., 117 U. S. 434, 6 S. Ct. 809, 29 L. ed. 963; Georgia Cent. R. Co. *v.* Hitchcock, 91 Fed. 209, 33 C. C. A. 453. See also RAILROADS, 33 Cyc. 533, 535.

99. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140; Rutherford *v.* Pennsylvania Midland R. Co., 178 Pa. St. 38, 35 Atl. 926 (holding, however, that where there is no manifest abuse of discretion on the part of the court in allowing such expenses, and the rights of the non-consenting parties are protected, the proceedings will not be reversed); Addison *v.* Lewis, 75 Va. 701; Lackawanna Iron, etc., Co. *v.* Farmers' L. & T. Co., 176 U. S. 298, 20 S. Ct. 363, 44 L. ed. 475; Toledo, etc., R. Co. *v.* Hamilton, 134 U. S. 296, 10 S. Ct. 546, 33 L. ed. 905; Wood *v.* Guarantee Trust, etc., Co., 128 U. S. 416, 9 S. Ct. 131, 32 L. ed. 472; Porter *v.* Pittsburg Bessemer Steel Co., 120 U. S. 649, 7 S. Ct. 741, 30 L. ed. 830; Cowdrey *v.* Galveston, etc., R. Co., 93 U. S. 352, 23 L. ed. 950; Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657; St. Louis Merchants' Bridge Terminal R. Co. *v.* Continental Trust Co., 111 Fed. 669, 49 C. C. A. 529; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Lee *v.* Pennsylvania Traction Co., 105 Fed. 405; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; American L. & T. Co. *v.* East, etc., R. Co., 46 Fed. 101. See also RAILROADS, 33 Cyc. 535.

1. Powers *v.* Jourdan, 4 N. Y. St. 839; McCornack *v.* Salem R. Co., 34 Oreg. 543, 56 Pac. 518, 1022; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657; Illinois Trust, etc., Bank *v.* Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481. See also RAILROADS, 33 Cyc. 535.

Meters supplied to a gas company before the appointment of a receiver, the company being accustomed to purchase supplies on thirty days' credit, are not operating supplies, but part of the plant, and are not therefore to be paid for by the receiver in preference to mortgage bonds expressly secured on the personal property, and rents, profits, and income of the same. Reyburn *v.* Consumers' Gas, etc., Co., 29 Fed. 561.

2. Virginia, etc., Coal Co. *v.* Central R., etc., Co., 170 U. S. 355, 18 S. Ct. 657, 42 L. ed. 1068. And see RAILROADS, 33 Cyc. 537 text and note 92.

Effect of taking security.— The lender of money to an embarrassed corporation, subsequently adjudged to be insolvent, who takes security for the loan, is not entitled to a lien on the property of the corporation prior to that of a mortgage existing at the time of the loan, although the money was borrowed and used to keep the company a going concern. Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 148 N. Y. 315, 42 N. E. 707, 51 Am. St. Rep. 690, 31 L. R. A. 403; Addison *v.* Lewis, 75 Va. 701.

3. New York Cent. Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097; St. Louis Trust Co. *v.* Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182. See also *supra*, V, B, 1, g, (II), (B).

4. Southern R. Co. *v.* Carnegie Steel Co., 176 U. S. 257, 20 S. Ct. 347, 44 L. ed. 458; Rodger Ballast Car Co. *v.* Omaha, etc., R. Co., 154 Fed. 629, 83 C. C. A. 403; Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318; Rhode Island Locomotive Works *v.* Continental Trust Co., 108 Fed. 5, 47 C. C. A. 147; Illinois Trust, etc., Bank *v.* Doud, 105

(2) Salary of Officers and Counsel Fees. The claim of the president of the insolvent corporation for unpaid salary before the appointment of a receiver is not one which is entitled to be preferred to that of lien creditors.[5] An order appointing a receiver and providing for the payment of all wages due employees for services rendered within a limited time theretofore means regular employees, employed generally, and not for a particular act.[6] A lawyer employed at a fixed salary is held to come within this class and to be within the protection of the order,[7] but it is otherwise as to counsel employed for a special purpose.[8] In some states the statute prefers all persons doing labor or service of whatever character, in the regular employ of the corporation.[9] In others the preference is restricted to the wages of employees, operatives, and laborers.[10]

(3) Claims For Damages. An unsecured claim for damages arising from the negligence of a corporation before the appointment of a receiver is not a preferential claim to be paid at the expense of the mortgage liens,[11] unless by the order of the court appointing the receiver it may be made so.[12] Nor is a claim for breach of contract one on which a claim to preference over a mortgage can arise.[13]

(4) Claim of Surety on Bond Given in Actions Against Company. Where one becomes surety upon a bond filed in an injunction suit brought to restrain a threatened levy of execution upon the rolling stock of a railroad which is subject to a mortgage, he is entitled to be protected by having a judgment obtained

Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396.

5. Addison *v.* Lewis, 75 Va. 701; Augusta Nat. Bank *v.* Carolina, etc., R. Co., 63 Fed. 25. See also *supra*, IV, F, 6, e, (I), (D).

6. Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501, 11 S. Ct. 405, 34 L. ed. 1023; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 52 Fed. 526.

7. Gurney *v.* Atlantic, etc., R. Co., 58 N. Y. 358 [*reversing* 2 Thomps. & C. 446].

8. Gregg *v.* Mercantile Trust Co., 109 Fed. 220, 48 C. C. A. 318.

Railroad expenses see Railroads, 33 Cyc. 533.

9. See the statutes of the several states. And see cases cited *infra*, this note.

The general manager of a corporation who is also a stock-holder and director is entitled to preferment under such a statute for two months' wages next preceding the institution of proceedings in insolvency. Buvinger *v.* Evening Union Printing Co., (N. J. Ch. 1907) 65 Atl. 482.

10. See the statutes of the several states. And see the cases cited *infra*, this note.

A superintendent and an attorney are not "employees, operatives or laborers," or their earnings "wages," within a statute preferring the claims for wages of such persons. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

Neither the salary nor the commissions of a traveling salesman are "wages" within such a statute. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

Such a statute is designed to secure the prompt payment of the wages of persons who, as a class, are dependent upon their earnings for the support of themselves and their families, and is not designed to give a preference to the salaries and compensation due to the officers and employees of corporations occupying superior positions of trust and profit. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

11. Atchison, etc., R. Co. *v.* Osborn, 148 Fed. 606; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657; Veatch *v.* American L. & T. Co., 84 Fed. 274, 28 C. C. A. 384; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; Ames *v.* Union Pac. R. Co., 74 Fed. 335; Foreman *v.* Central Trust Co., 71 Fed. 776, 18 C. C. A. 321; Farmers' L. & T. Co. *v.* Detroit, etc., R. Co., 71 Fed. 29; St. Louis Trust Co. *v.* Riley, 70 Fed. 32, 16 C. C. A. 610, 30 L. R. A. 456; Farmers' L. & T. Co. *v.* Green Bay, etc., R. Co., 45 Fed. 664; Easton *v.* Houston, etc., R. Co., 38 Fed. 12; Farmers' L. & T. Co. *v.* Vicksburg, etc., R. Co., 33 Fed. 778; Central Trust Co. *v.* East Tennessee, etc., R. Co., 30 Fed. 895; Central Trust Co. *v.* Wabash, etc., R. Co., 28 Fed. 871; Hiles *v.* Case, 14 Fed. 141, 9 Biss. 549. *Compare* Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. 245. *Contra*, Green *v.* Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. Rep. 379, 33 L. R. A. 806. See also Railroads, 33 Cyc. 540.

12. Walker *v.* Green, 60 Kan. 20, 55 Pac. 281; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 74 Fed. 431; Central Trust Co. *v.* East Tennessee, etc., R. Co., 69 Fed. 658; Farmers' L. & T. Co. *v.* Kansas City, etc., R. Co., 53 Fed. 182; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260. See also *Ex p.* Brown, 18 S. C. 87. But see Farmers' L. & T. Co. *v.* Detroit, etc., R. Co., 71 Fed. 29, where it is said that a court of equity has no power to displace the vested right of bondholders in favor of such a claim.

13. Fordyce *v.* Omaha, etc., R. Co., 145 Fed. 544; Central Trust Co. *v.* Wabash, etc.,

against him on the bond paid by the receiver out of the assets of the corporation,[14] especially where the receiver has used earnings to increase the *corpus* of the estate;[15] and it is not necessary for the surety to first pay the judgment before applying for relief.[16] *A fortiori* is this true where the surety enters into his obligation at the request of the trustee in the mortgage.[17] On the other hand it has been held that the claim of a surety cannot be thus given preference over the mortgage bonds, where the lien of the latter is superior to that of the judgment and there has been no diversion of funds to the benefit of the bondholders so as to create an equity to a preference.[18]

(5) STATUTORY PREFERENCES.[19] In many of the states, the legislature has provided for the matter of laborers' and materialmen's preferences more or less extensively.[20] In some states the preference is given to both laborers and materialmen;[21] in others only laborers are protected.[22]

R. Co., 32 Fed. 566. See also *supra*, IV, F, 6, e, (I), (D).

14. Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825, distinguishing the case from those where the claim was for operating expenses only, by referring to the fact that the claim was based upon a *bona fide* effort to preserve the fund itself from waste; and further distinguishing it from the case of the claim of an intervener to be subrogated to the lien of the judgment which was subject to the lien of the mortgage. See also Rome, etc., R. Co. *v.* Sibert, 97 Ala. 393, 12 So. 69; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 71 Fed. 245.

The ground of the claim is that the liability of the surety is incurred for the purpose of preserving the fund which will ultimately be appropriated to the payment of the mortgage debt. Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825; Jones *v.* Central Trust Co., 73 Fed. 568, 19 C. C. A. 569.

15. Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825.

16. Union Trust Co. *v.* Morrison, 125 U. S. 591, 8 S. Ct. 1004, 31 L. ed. 825; Jones *v.* Central Trust Co., 73 Fed. 568, 19 C. C. A. 569.

17. Jones *v.* Central Trust Co., 73 Fed. 568, 19 C. C. A. 569.

18. Whitely *v.* Central Trust Co., 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303; Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 68 Fed. 36. See also Matter of Croton Ins. Co., 2 Barb. Ch. (N. Y.) 360; Blair *v.* St. Louis, etc., R. Co., 23 Fed. 523.

19. See, generally, RAILROADS, 33 Cyc. 537.

20. See the statutes of the several states. And see the cases cited *infra*, this section.

Validity.— Such laws are founded upon the highest public policy, and are constitutional and valid. Trust *v.* Miami Oil Co., 19 Ohio Cir. Ct. 727, 10 Ohio Cir. Dec. 372.

Loss of preference by failure to give notice.— Mould *v.* Mould, 28 Pa. Super. Ct. 318, holding that a sale by a receiver under a decree of court is in effect under execution process, and wage claimants lose their right of preference by failing to give notice prior to the sale.

Salary of officers and attorney under such statute see *supra*, V, B, 1, g, (II), (C), (2).

21. Hicks *v.* Consolidation Coal Co., 77 Md. 86, 25 Atl. 979; Poland *v.* Lamoille Valley R. Co., 52 Vt. 144.

Effect in federal court.— Under the laws of Georgia, which gives no liens on mortgaged property superior to the mortgage, except for taxes and to laborers, mechanics, and materialmen who take proper steps to protect their liens, the federal court will not give priority to any other liens, in distributing the earnings of a mortgaged road in the hands of a receiver and the proceeds of the receiver's sale. Jessup *v.* Atlantic, etc., R. Co., 12 Fed. Cas. No. 7,299, 3 Woods 441.

Goods furnished laborers on orders are not "supplies furnished the company and necessary for its operation" so as to be entitled, under the Virginia statute of March 21, 1877, as amended by the act of April 2, 1879, to priority over a lien created by mortgage. Philadelphia Seventh Nat. Bank *v.* Shenandoah Iron Co., 35 Fed. 436.

22. See Meyer *v.* Chicago, etc., R. Co., 88 Ill. App. 373; St. Paul Title Ins., etc., Co. *v.* Diagonal Coal Co., 95 Iowa 551, 64 N. W. 606; Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 103 N. Y. 245, 8 N. E. 488.

Under N. Y. Laws (1885), c. 376, providing that "where a receiver of a corporation . . . shall be appointed, the wages of the employees, operatives and laborers thereof shall be preferred to every other debt or claim against such corporation, and shall be paid by the receiver from the moneys of such corporation which shall first come to his hands," the preference does not extend to wages earned before the act went into effect. People *v.* Remington, 45 Hun (N. Y.) 329 [*affirmed* in 109 N. Y. 631, 16 N. E. 680].

Ohio Rev. St. § 3206a, giving laborers a preference for claims for labor performed within three months prior to the appointment of a receiver, is not limited to a claim against real estate, and is not waived by failure to file an itemized statement with the recorder, as therein provided for liens on real estate. Trust *v.* Miami Oil Co., 19 Ohio Cir. Ct. 727, 10 Ohio Cir. Dec. 372.

Prior lien on "assets."— Under the New Jersey Act of April 8, 1892, §§ 1, 2, providing that in case of the insolvency of a cor-

(6) Effect of Assignment of Claim. The right of preference is one that attaches to the debt, and not to the person of the original creditor; consequently the right passes to an assignee of the debt.[23]

(D) *Time of Incurring Debt.* Claims which will be accorded priority under the rule above stated [24] must have been incurred within a reasonable time before the appointment of the receiver, the duration of which, however, is not fixed by any arbitrary rule,[25] although the courts have often adopted the period of six months as that behind which they will not go in making such preferential allowance.[26]

2. Determination of Priority. The court in which the receivership is pending may fix priorities as between the parties before it,[27] and the relative dignity or priority of the different claims against property in the hands of a receiver may be settled as well before as after the sale of the property.[28] Sometimes receivers not only have the power but it is their duty to settle priorities.[29] It has been held that one having a right to be paid out of the funds in the receiver's hands may seek its enforcement by petition in the receivership,[30] or motion.[31] A receiver

poration, its employees shall have a prior lien on the "assets" for the amount of wages due them, respectively, for services rendered within two months next preceding the institution of insolvency proceedings, the term "assets" does not mean simply the property remaining after exhausting liens thereon accruing prior to insolvency, but the property which comes to the receiver to be administered, without reference to whether it is encumbered by liens; and consequently a laborer's lien is prior to the lien of a judgment entered against the corporation before its insolvency. Fitzgerald *v.* Maxim Powder Mfg. Co., (N. J. Ch. 1896) 33 Atl. 1064.

23. McIlhenny *v.* Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. Rep. 705; Burnham *v.* Bowen, 111 U. S. 776, 4 S. Ct. 675, 28 L. ed. 596; Union Trust Co. *v.* Walker, 107 U. S. 596, 2 S. Ct. 299, 27 L. ed. 490; Northern Pac. R. Co. *v.* Lamont, 69 Fed. 23, 16 C. C. A. 364; Pennsylvania Finance Co. *v.* Charleston, etc., R. Co., 49 Fed. 693. But see Skiddy *v.* Atlantic, etc., R. Co., 22 Fed. Cas. No. 12,922, 3 Hughes 320.

Claim against railroad see Railroads, 33 Cyc. 537.

24. See *supra*, V, B, 1, g, (II), (A), (B).

25. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141. And see Railroads, 33 Cyc. 536.

26. Manchester Locomotive Works *v.* Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140. And see Railroads, 33 Cyc. 536.

27. Metropolitan Trust Co. *v.* Lake Cities Electric R. Co., 100 Fed. 897, where, however, as to the effect of the declaring of receiver's certificates prior liens in a suit in which mortgagees were not parties, it was held that in a subsequent suit in another court to foreclose a mortgage the order for the issue of the certificates in the first suit was not binding upon those not parties thereto and that the court in the latter suit had jurisdiction to decree foreclosure, without interfering with the possession of the receiver in the first suit, and to determine priorities of the receiver's certificates, all parties interested in the question being before the court in the foreclosure suit.

Receiver not permitted to attack.— Where a judgment under which a levy has been made on the property of the corporation is made, by order of the court, a preferred claim, to be first paid by the receiver, such order cannot be annulled in a separate action brought by the receiver to set aside the judgment. Ridgway *v.* Symons, 4 N. Y. App. Div. 98, 38 N. Y. Suppl. 895.

28. Ferris *v.* Van Ingen, 110 Ga. 102, 35 S. E. 347, holding that where property is in the hands of the receiver, and there are several creditors claiming priority as to their liens, it is not error for the court to render a final decree fixing the rights and priorities of the different creditors before the sale of the property.

29. Ennis *v.* Eden Mills Paper Co., 65 N. J. L. 577, 48 Atl. 610; Demott *v.* Stockton Paper Ware Mfg. Co., 32 N. J. Eq. 124; Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

30. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938.

Adverse claimants generally see *supra*, IV, D, 6, a.

Remedies against receiver generally see *infra*, VI, D, 2.

31. Artisan's Bank *v.* Treadwell, 34 Barb. (N. Y.) 553, holding, in a case involving a motion by an adverse claimant, that the order may be refused if the matters involved require more deliberate consideration than can be given on a motion. See also Mobile Bank *v.* Planters', etc., Bank, 1 Ala. 109.

Priority of adverse claimant.— But it has been held that an order declaring the priority of a claim and adjudging payment will not be made on petition by an intervener until a decree has been made in the action in which the receiver was appointed and notice has been given to all other creditors interested in the distribution of the fund. Hubbard *v.* Guild, 2 Duer (N. Y.) 685, holding, however, that to protect the petitioner

in supplementary proceedings, after the extension of the receivership in several actions, may bring suit to have priorities determined as between the conflicting claims to the fund in his hands.[32]

C. Parties, Property, and Funds Liable For Receivership Expenses — 1. In General.[33] Receivership expenses, in the absence of statute, should in all cases, as between the parties, be adjudged upon equitable principles.[34] The general rule is that a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are a charge upon and should be paid out of the fund or property in his hands,[35] although the party procuring the appointment is

an order should be made restricting the receiver from paying out the funds without notice to the claimant, until his rights are determined.

Adverse claimants generally see *supra*, IV, D, 6, a.

Presentation and filing of claims see *supra*, V, 2.

32. Bamberger *v.* Fillebrown, 12 Misc. (N. Y.) 328, 33 N. Y. Suppl. 614.

33. **Liability of purchaser** see *supra*, IV, H, 12, b.

Liability of party upon redelivery see *supra*, IV, I, 2.

Requiring bond on appointment see *supra*, III, E, 7, b.

34. French *v.* Gifford, 31 Iowa 428; Espuela Land, etc., Co. *v.* Bindle, 11 Tex. Civ. App. 262, 32 S. W. 582; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083.

35. *Alabama.*— Beckwith *v.* Carroll, 56 Ala. 12.

California.— Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177.

Colorado.— Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Florida.— State *v.* Florida Cent. R. Co., 16 Fla. 703.

Georgia.— Sparks *v.* Georgia, etc., R. Co., 113 Ga. 1111, 39 S. E. 470; Rounsaville *v.* Langston, 99 Ga. 117, 24 S. E. 972.

Illinois.— Highley *v.* Deane, 168 Ill. 266, 48 N. E. 50; Heise *v.* Starr, 44 Ill. App. 406.

Iowa.— Frick *v.* Fritz, 124 Iowa 529, 100 N. W. 513; Gallagher *v.* Gingrich, 105 Iowa 237, 74 N. W. 763; St. Paul Title Ins., etc., Co. *v.* Diagonal Coal Co., 95 Iowa 551, 64 N. W. 606; Jaffray *v.* Raab, 72 Iowa 335, 33 N. W. 337; Radford *v.* Folson, 55 Iowa 276, 7 N. W. 604.

Kentucky.— Granger *v.* Old Kentucky Paper Co., 105 Ky. 683, 49 S. W. 477, 20 Ky. L. Rep. 1491.

Maryland.— Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576.

Minnesota.— Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534, 46 N. W. 77.

Montana.— Hutchinson *v.* Hampton, 1 Mont. 39.

New Jersey.— Lembeck *v.* Jarvis Terminal Cold Storage Co., (Ch. 1904) 59 Atl. 565, holding that mortgagees, bondholders, and lienors of a corporation take subject to the effect of insolvency proceedings which may subsequently be commenced, and in which a receiver may be appointed of all the corporate assets, including the property upon which the encumbrance has been so acquired, and a receiver and his counsel appointed in a suit begun on behalf of the stock-holders and general creditors of an insolvent corporation, but which from the start was practically a mortgagee's suit to foreclose liens and adjust priorities, should be allowed the same compensation which they would have been entitled to receive if they had been appointed in a suit to foreclose the mortgage.

New York.— Locke *v.* Covert, 42 Hun 485, 6 N. Y. St. 55, 12 N. Y. Civ. Proc. 31; Galster *v.* Syracuse Sav. Bank, 29 Hun 594; Crook *v.* Findley, 60 How. Pr. 375.

North Dakota.— Cutter *v.* Pollock, 7 N. D. 631, 76 N. W. 235.

Ohio.— Sturwold *v.* George Vehr Parlor Frame Co., 7 Ohio S. & C. Pl. Dec. 133, 5 Ohio N. P. 37.

Oregon.— Ford *v.* Gilbert, 42 Oreg. 528, 71 Pac. 971; Tobin *v.* Portland Mills Co., 41 Oreg. 269, 68 Pac. 749, 1108.

Rhode Island.— Mauran *v.* Crown Carpet Lining Co., 23 R. I. 344, 50 Atl. 387; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510.

Tennessee.— Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

Texas.— Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706; Espuela Land, etc., Co. *v.* Bindle, 11 Tex. Civ. App. 262, 32 S. W. 582.

United States.— Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 52 L. ed. 528 [*reversing* 145 Fed. 820, 76 C. C. A. 396]; Clark *v.* Brown, 119 Fed. 130, 57 C. C. A. 76; Elk Fork Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615; Burden Central Sugar-Refining Co. *v.* Ferris Sugar-Mfg. Co., 87 Fed. 810, 31 C. C. A. 233; Ferguson *v.* Dent, 46 Fed. 88; Blair *v.* St. Louis, etc., R. Co., 20 Fed. 351.

See 42 Cent. Dig. tit. "Receivers," § 397.

Rule applied to counsel fees.— Loudon *v.* Coleman, 62 Ga. 146; How *v.* Jones, 60 Iowa 70, 14 N. W. 193; State *v.* Active Bldg., etc., Assoc., 102 Mo. App. 675, 77 S. W. 171; Atty.-Gen. *v.* Continental L. Ins. Co., 27 Hun (N. Y.) 195, 63 How. Pr. 129; Hand *v.* Savannah, etc., R. Co., 21 S. C. 162; Kilpatrick *v.* Herton, 15 Wyo. 501, 89 Pac. 1035; Pennsylvania L. Ins., etc., Co. *v.* Jacksonville, etc., R. Co., 93 Fed. 60, 35 C. C. A. 202; Sowles *v.* National Union Bank, 82 Fed. 139; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 17 C. C. A. 310. If there is no other fund out of which such a claim

ultimately unsuccessful.[36] It has been held improper, however, to enter a judgment in the receiver's favor for his compensation and expenses. He is not a party to the suit, and has no personal interest in the litigation,[37] although the irregularity in entering such judgment will not justify reversal, where the expenses, if taxed as costs, would equal the amount of the judgment.[38] But the authorities are not entirely agreed as to how far or under what circumstances such expenses are charged against the parties or may be retained out of the funds. Thus they are sometimes taxed as costs to be allowed out of the fund,[39] or are taxed against

can be paid, it is chargeable on the *corpus* of the property. Central Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501, 11 S. Ct. 405, 34 L. ed. 1023.

In proceedings taken by a receiver to bring a particular question before the court, the costs may be ordered to be paid by the receiver out of the fund, the question being one which it was reasonable to have brought before the court. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417.

As between a landlord and tenant, the tenant is liable for the expenses of a receiver, made necessary by the tenant's neglect to care for and gather the crop. Beckwith *v.* Carroll, 56 Ala. 12.

Receivers who by order of court collect accounts assigned as security are entitled to compensation for their services out of the funds so collected. Preston Nat. Bank *v.* George T. Smith Middlings Purifier Co., 102 Mich. 462, 60 N. W. 981.

Waiver of irregularity or impropriety in appointment.— While, on objection made in time, an order irregularly or improperly appointing a receiver will be revoked or reversed on appeal, this defect may be cured by stipulation filed, and it cannot then be invoked to defeat the legitimate expenses of the receiver in the execution of his duties. Crouse *v.* Bedell, 11 Pa. Super. Ct. 598; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083. Thus if defendant, by his stipulation, undertakes to share such expenses, he cannot afterward be heard to complain of the original error. Ft. Jefferson Imp. Co. *v.* Dupoyster, 112 Ky. 792, 66 S. W. 1048, 24 Ky. L. Rep. 1199, 2 L. R. A. N. S. 263; Kimmerle *v.* Dowagiac Mfg. Co., 105 Mich. 640, 63 N. W. 529. So where a receiver irregularly appointed is discharged upon a bond voluntarily executed by defendant to pay the costs of the case, such defendant is in no situation to contest the legal costs of the receiver. State Journal Co. *v.* Commonwealth Co., 43 Kan. 93, 22 Pac. 982.

Matters covered by allowance for compensation not taxed again in fee bill.— *In re* Insolvent Corporation, (N. J. Ch. 1899) 46 Atl. 215, holding that where an order appointing a temporary receiver of an insolvent corporation, which provided that creditors and stock-holders should show cause, etc., why the receiver should not be made permanent receiver, and that a copy of the order should be mailed to each creditor and stockholder, etc., and the copy of the order was printed on postal cards and so mailed to such creditors and stock-holders, on taxation of costs, only the original cost of the postal cards and the amount charged for printing could be allowed; that the clause in the chancery fee bill providing a certain amount "for drawing notice of every motion, copy and service," did not justify the taxing of such amount for the labor involved in preparing and mailing the cards, which labor is always taken into account in fixing the compensation allowed to the counsel and the receiver; that the cost of such labor bears no kind of proportion to the fees allowed for drawing and serving a motion in the cause, and that it is usually paid by the receiver if he has any funds for that purpose.

36. *Iowa.*— Frick *v.* Fritz, 124 Iowa 529, 100 N. W. 513; Harrington *v.* Foley, 108 Iowa 287, 79 N. W. 64; Jaffray *v.* Raab, 72 Iowa 335, 33 N. W. 337.

New York.— O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 223 [*affirmed* in 62 N. Y. 133].

North Dakota.— Cutter *v.* Pollock, 7 N. D. 631, 76 N. W. 235.

Oregon.— Hembree *v.* Dawson, 18 Oreg. 474, 23 Pac. 264.

United States.— Elk Fork Oil, etc., Co. *v.* Jennings, 90 Fed. 767; Ferguson *v.* Dent, 46 Fed. 88.

See 42 Cent. Dig. tit. "Receivers," § 399. See also the cases cited *supra*, note 35.

37. Bassick Min. Co. *v.* Schoolfield, 15 Colo. 376, 24 Pac. 1049; Antlers Land, etc., Co. *v.* Fesler, 14 Colo. App. 201, 59 Pac. 406; McReynolds *v.* Brown, 121 Ill. App. 261; Morse *v.* Hannibal, etc., R. Co., 72 Mo. 585; Hutchinson *v.* Hampton, 1 Mont. 39. But see Herndon *v.* Hurter, 19 Fla. 397, holding that where the costs are taxed against the party improperly securing the appointment, the receiver is entitled to a decree against such party, and upon such decree is entitled to a writ of execution.

38. Antlers Land, etc., Co. *v.* Fesler, 14 Colo. App. 201, 59 Pac. 406.

Creditor of receiver.—*A fortiori* is it wrong to render judgment in favor of creditors of the receiver. Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

39. Morse *v.* Hannibal, etc., R. Co., 72 Mo. 585 (right to tax receiver's compensation as costs at a subsequent term); State *v.* Active Bldg., etc., Assoc., 102 Mo. App. 675, 77 S. W. 171 (counsel fees taxed after term on application of the attorney).

A distinction is drawn between costs of administration and of litigation, in Missouri, by which the latter must be taxed against

the unsuccessful party whose conduct created the necessity for a receiver,[40] and it has been stated broadly in disapproving the practice of rendering a judgment in favor of the receiver that the proper method to be pursued is to tax such charges as costs in the ordinary mode,[41] or to allow the sum out of the property in the receiver's hands and to tax it as costs in the case.[42]

2. Party Securing Appointment of Receiver — a. In General. So the general rule that such expenses are to be taken out of the fund or property in the receiver's hands [43] is held not to contemplate that they shall be taxed as costs or charged against the party at whose instance the receiver was appointed, merely because he is ultimately unsuccessful on the merits of the suit,[44] and when the validity or propriety of the appointment itself is not attacked,[45] although discrimination has been made in this regard between a case where the receiver is seeking protection at the instance of the innocent suitor and one where the defeated litigant is insisting that he should be protected to the detriment of his adversary, it being held that in the latter case the unsuccessful litigant may be called upon for reimbursement to the extent of the charges which have been taken out of the property of the successful litigant.[46]

b. When Fund Insufficient or Fails. Ordinarily and primarily, in proper cases for the appointment of a receiver, the property [47] and not the party who

the losing party, but the former need not in all circumstances. The receiver's compensation is classed as costs of the litigation taxable against the losing party. Pullis *v.* Pullis Bros. Iron Co., 90 Mo. App. 244; St. Louis *v.* St. Louis Gas-Light Co., 11 Mo. App. 237 [*affirmed* in 87 Mo. 223]. Counsel fees are classed as costs of administration, not taxable as costs in the litigation against the losing party. Pullis *v.* Pullis Bros. Iron Co., 90 Mo. App. 244; St. Louis *v.* St. Louis Gas-Light Co., 11 Mo. App. 243 [*affirmed* in 87 Mo. 224]. But such expenses are not necessarily to be paid out of funds in the hands of the receiver. The court, where the receivership proceedings are had, should order counsel fees paid out of the trust fund in the hands of the receiver, if the services of the attorney were rendered in the interest of the receivership or trust; but may, in its discretion, tax such fees as costs against the losing party, if the necessity or utility of the legal services is not shown. Pullis *v.* Pullis Bros. Iron Co., 90 Mo. App. 244; St. Louis *v.* St. Louis Gas-Light Co., 11 Mo. App. 243 [*affirmed* in 87 Mo. 224]. The effect of these decisions is to leave the matter of allowing counsel fees, for services rendered by an attorney to a receiver and the determination of whether such fees shall be taxed against the losing party, to the discretion of the chancellor, subject to revision if the discretion is abused. Pullis *v.* Pullis Bros. Iron Co., *supra*.

40. Ervin *v.* Collier, 2 Mont. 605, as to receiver's compensation.

41. McReynolds *v.* Brown, 121 Ill. App. 261.

42. Antlers Land, etc., Co. *v.* Fesler, 14 Colo. App. 201, 59 Pac. 406; Hutchinson *v.* Hampton, 1 Mont. 39.

Where expenses are incurred by a receiver without authority of court, they cannot be taxed in his favor as costs of the action, and made a charge against any of the parties to the suit. Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

43. See *supra*, text and note 35.

44. Ferguson *v.* Dent, 46 Fed. 88, where it was said that in no case can the proper expenses of a receiver or his compensation be taxed as costs against the losing party where his appointment was proper and legal, and made by a court in the exercise of its undoubted jurisdiction, and where the fund in the receiver's hands is sufficient to pay such expenses.

45. Jaffray *v.* Raab, 72 Iowa 335, 33 N. W. 337; Cutter *v.* Pollock, 7 N. D. 631, 76 N. W. 235; Ford *v.* Gilbert, 42 Oreg. 528, 71 Pac. 971.

46. Cutter *v.* Pollock, 7 N. D. 631, 76 N. W. 235. See also Espuella Land, etc., Co. *v.* Bindle, 11 Tex. Civ. App. 262, 32 S. W. 582. In Mallette *v.* Ft. Worth Pharmacy Co., 21 Tex. Civ. App. 267, 51 S. W. 859, it is held that creditors who are defeated in a suit to have attachment liens on their debtor's property vacated, after they have caused the property to be placed in the hands of a receiver, cannot complain that the costs, except the expenses incident to the care and sale of the attached property, are taxed against them, including the compensation allowed the receiver, which is within the court's discretion.

Mere irregularities in the appointment of a special receiver, which have been acquiesced in by the parties, will not deprive the successful party of a decree over against his adversary for the amount of such damages, when it has been allowed out of a fund belonging to the party so prevailing. Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. 1083.

After making provisional allowance.— The court may make a provisional allowance out of the fund without losing its power to place the burden ultimately upon the party who ought to bear it. Cutter *v.* Pollock, 4 N. D. 205, 59 N. W. 1062, 50 Am. St. Rep. 644, 25 L. R. A. 377; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. 1083.

47. See *supra*, text and notes 35 *et seq.*

procured the appointment is liable for the fees and expenses of the receivership, unless liability is created by bond or other contract to pay as a condition of the appointment or continuance of the receiver.[48] Cases may arise, however, in which the court will, if the fund in court be insufficient for that purpose, require the parties, at whose instance a receiver was appointed, to meet the expenses of the receivership;[49] but it has been held that special circumstances must appear, which, upon equitable principles, will authorize the court to fix liability upon plaintiff for such expenses,[50] and the mere inadequacy of the property or fund to meet such expenses constitutes in itself no reason why liability should be fastened upon plaintiff, who has been guilty of no irregularity, and who has succeeded in his suit by obtaining the relief asked.[51]

c. When Appointment of Receiver Improper or Illegal. Where a court has no power or authority to appoint a receiver in any event,[52] or where it has authority,

48. Farmers' Nat. Bank *v.* Backus, 74 Minn. 264, 77 N. W. 142.

49. *California.*— Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177.

Colorado.— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113; German Nat. Bank *v.* Best, 32 Colo. 192, 75 Pac. 398 (costs and expenses taxed against plaintiff); Bassick Min. Co. *v.* Schoolfield, 15 Colo. 376, 24 Pac. 1049; Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Illinois.— Knickerbocker *v.* McKindley Coal, etc., Co., 67 Ill. App. 291 [*affirmed* in 172 Ill. 535, 50 N. E. 330, 64 Am. St. Rep. 54].

Maryland.— Tome *v.* King, 64 Md. 166, 21 Atl. 279.

Minnesota.—Farmers' Nat. Bank *v.* Backus, 74 Minn. 264, 77 N. W. 142, where plaintiff, in an action involving the rental of real estate, procured the appointment of a receiver and thereafter recovered damages for the income from the property on a bond given by defendant upon appeal from the order of appointment of the receiver which was affirmed, which income plaintiff was unable to collect through the receiver pending such appeal and costs and expenses necessarily incurred in the receivership being greater than the amount of money which actually came into the receiver's hands and defendant in the action being insolvent, it was held that the balance of such fees and expenses should be paid by plaintiff.

Washington.— Lammon *v.* Giles, 3 Wash. Terr. 117, 13 Pac. 417.

See 42 Cent. Dig. tit. "Receivers," § 397 *et seq.*

But see Farmers' L. & T. Co. *v.* Oregon Pac. R. Co., 31 Oreg. 237, 48 Pac. 706, 65 Am. St. Rep. 822, 38 L. R. A. 424, where it is said: "[Employees'] wages are in no sense costs of the litigation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation" where the trust fund is insufficient to pay them.

Defenses.— It is no defense to plaintiffs' liability for expense incurred in the employment of laborers that they may be subjected to action for the same claim by the individual laborers; since the court has power to direct the disbursement of the sum when paid to the receiver. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Where the receivership terminates before final judgment, an interlocutory judgment is properly given against plaintiff for expenses incurred by the receiver in employing laborers, and for wages due him, in order that the laborers and the receiver should not be unnecessarily delayed in receiving their compensation. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Notification of intention to hold plaintiff.— Claimants for supplies furnished a receiver are not obliged to notify plaintiff securing the appointment that they will look to it for reimbursement, especially where defendant is so far insolvent that claims having priority over plaintiff's will exhaust the assets. German Nat. Bank *v.* Best, 32 Colo. 192, 75 Pac. 398.

50. Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 28 S. Ct. 406, 52 L. ed. 528 [*reversing* 145 Fed. 820, 76 C. C. A. 396].

51. Atlantic Trust Co. *v.* Chapman, 208 U. S. 360, 28 S. Ct. 406, 52 L. ed. 528 [*reversing* 145 Fed. 820, 76 C. C. A. 396].

52. People *v.* Jones, 33 Mich. 303; State *v.* People's U. S. Bank, 197 Mo. 605, 95 S. W. 867; Couper *v.* Shirley, 75 Fed. 168, 21 C. C. A. 288.

Where the order appointing a receiver is void for want of jurisdiction, an order awarding counsel fees for the receiver is also void. Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537. But where the court has the general power and authority to appoint a receiver *pendente lite* in proper cases, and the parties to a pending suit appear and admit that such an appointment is necessary in the suit, and, acting on such assent, a receiver is appointed, his compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of the court should be paid out of the fund, although it may be found on further investigation and subsequent examination that the court was in fact without jurisdiction of the subject-matter, and the suit ultimately be decided adversely to plaintiff (Ford *v.* Gilbert, 42 Oreg. 528, 71 Pac. 971); and

but the appointment is improperly made,[53] and subsequently revoked,[54] or reversed on appeal,[55] it is held that the receiver's compensation and expenses should be taxed against the party securing his appointment instead of being allowed out of the receivership funds. Nor should a defendant in a receivership proceeding have its property taken to pay the expenses of a receiver unlawfully and unjustly kept in office as an officer of the court, when justice requires his discharge.[56] And the same rule applies where property taken possession of and cared for by a receiver turns out to belong to third parties who are in no way benefited by the receivership.[57] But the cases are not unanimous on this point, and it has been held that, where a receiver is improperly appointed, sums due him are not taxable as a matter of course as costs against the complainant procuring the appointment.[58] So it

especially is this so where the benefit of the services of the receiver and of the expenses incurred by him has been appropriated by a subsequent receiver, and therefore inured to the estate (Ford *v.* Gilbert, *supra*).

53. *California.*— Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177, remedy of receiver by action against party at whose instance he was appointed.

Colorado.— Hendrie, etc., Mfg. Co. *v.* Parry, 37 Colo. 359, 86 Pac. 113.

Florida.— Moyers *v.* Coiner, 22 Fla. 422; Herndon *v.* Hurter, 19 Fla. 397.

Georgia.— Hamilton *v.* Du Pre, 103 Ga. 795, 30 S. E. 248.

Illinois.— Torrence *v.* Shedd, 202 Ill. 498, 67 N. E. 168; Myers *v.* Frankenthal, 55 Ill. App. 390 (holding that it is not a question whether the compensation of the receiver is contingent upon the ability of plaintiff to pay but the question is shall he be made to pay if the court can compel him to do so); Einstein *v.* Lewis, 54 Ill. App. 520.

Iowa.— French *v.* Gifford, 31 Iowa 428.

Maryland.— Horn *v.* Bohn, 96 Md. 8, 53 Atl. 576, in which the court says that when the appointment of a receiver is not justified, and defendant not only did not consent to, but consistently resisted his appointment and retention, the applicant ought in some way to be required to pay the expenses the receiver has properly incurred as well as the compensation allowed him; especially when the rights of the receiver are involved, and not merely those of the litigants.

Missouri.— St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 357, 658, 33 L. R. A. 341; St. Louis *v.* St. Louis Gas-Light Co., 11 Mo. App. 237 [*affirmed* in 87 Mo. 223].

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

New York.— O'Mahoney *v.* Belmont, 37 N. Y. Super. Ct. 223 [*affirmed* in 62 N. Y. 133].

Tennessee.— Lockhart *v.* Gee, 3 Tenn. Ch. 332.

Washington.— Lammon *v.* Giles, 3 Wash. Terr. 117, 13 Pac. 417.

United States.— Harrington *v.* Union Oil Co., 144 Fed. 235.

See 42 Cent. Dig. tit "Receivers," § 400.

Where the receivership is procured illegally or under the assertion of an unjust and wrongful claim, as finally found by the court, the costs of the receivership may be taxed against the complainant procuring the appointment of such receiver. Link Belt Machinery Co. *v.* Hughes, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673; McAnrow *v.* Martin, 183 Ill. 467, 56 N. E. 168; Highley *v.* Deane, 168 Ill. 266, 48 N. E. 50 [*affirming* 64 Ill. App. 389]; State *v.* People's U. S. Bank, 197 Mo. 605, 95 S. W. 867.

The fact that the order of appointment was based on a consent filed does not exclude the idea that the receiver was appointed at the instance of plaintiff, who must be held responsible for the costs necessarily accruing from the appointment. Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525.

54. McAnrow *v.* Martin, 183 Ill. 467, 56 N. E. 168; Weston *v.* Watts, 45 Hun (N. Y.) 219; Ogden City *v.* Bear Lake, etc., Waterworks, etc., Co., 18 Utah 279, 55 Pac. 385.

55. McAnrow *v.* Martin, 183 Ill. 467, 56 N. E. 168; Pittsfield Nat. Bank *v.* Bayne, 140 N. Y. 321, 35 N. E. 630.

56. Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 181, 76 Pac. 2.

57. Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177; Howe *v.* Jones, 66 Iowa 156, 23 N. W. 376.

Property which should not have been brought within the jurisdiction of a receiver, or taken possession of by him, should not be appropriated to the payment of the expenses of the receivership, but in such cases the receiver must look for his compensation to the portion of the fund which was properly brought within his jurisdiction, or, if there is no such fund, then to the party on whose application the receivership was secured (Frick *v.* Fritz, 124 Iowa 529, 100 N. W. 513), unless it is made to appear that the intervening owner of the property benefited by the receivership in which case he may be required to submit to an equitable apportionment of the expenses in accordance with the benefits received (Frick *v.* Fritz, *supra*).

58. Wills Valley Min., etc., Co. *v.* Galloway, 139 Ala. 276, 35 So. 850. In New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828, it is held that when the appointment of a receiver is erroneously made, the proceedings are not void, and the property committed to the receiver should be charged — especially in cases where both parties are part owners of the property — with the expenses of the receivership, including the compensation al-

is said that the expenses incurred by the receiver which defendant would necessarily have incurred had no receiver been appointed should be paid out of the fund, but such as would not have been incurred in such case should be charged to the party procuring the appointment.[59]

3. APPORTIONMENT. The expense of the receivership must be shared by all the lien-holders for the establishment and foreclosure of whose liens the receivership proceedings were instituted,[60] and no property in the hands of a receiver can be exempt from its share of the proper and necessary expenses of the receivership unless it be affirmatively shown that no part of such expense was incurred for the benefit of said property.[61] Where there are several funds, and the receivership is as necessary for the conservation of the one as of the other, they should bear the expense in proportion to the benefit received by them,[62] and, in the absence

lowed the receiver for his services. So in Kerr *v.* Hill, 27 W. Va. 576, the receiver's compensation and expenses were allowed out of the fund, to the prejudice of defendants, who were subsequent lienors, entitled to the surplus, although the appointment was illegal because without notice, and made at the instance of plaintiff. And in French *v.* Gifford, 31 Iowa 428, the receiver's compensation was apportioned between the fund and the complainant.

59. New Birmingham Iron, etc., Co. *v.* Blevens, 12 Tex. Civ. App. 410, 34 S. W. 828; Ogden City *v.* Bear Lake, etc., Waterworks, etc., Co., 18 Utah 279, 55 Pac. 385. See also Cassidy *v.* Harrelson, 1 Colo. App. 458, 29 Pac. 525; Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Weston *v.* Watts, 45 Hun (N. Y.) 219. In Brundage *v.* Home Sav., etc., Assoc., 11 Wash. 288, 39 Pac. 669, a receiver, erroneously appointed, was allowed out of the funds in his hands for necessary and proper disbursements while in charge of the property, but not for compensation for his services, for which he must look to the party at whose instance he was appointed.

Whether the complainant should be held liable depends not alone upon the mere circumstance that the receiver was improperly appointed, but upon whether, having regard to the character of the demands entering into the balance due him, it would be inequitable or unjust to allow him to be paid out of the fund. Wills Valley Min., etc., Co. *v.* Galloway, 139 Ala. 276, 35 So. 850.

60. International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097. See also Sanford *v.* Carr, 8 Ky. L. Rep. 618; Matter of Ziegler, 98 N. Y. App. Div. 117, 90 N. Y. Suppl. 681.

Where there are several funds not common for the use of each creditor, or each class of creditors, yet if there is but one receivership, any or all of the funds are available to pay receivership expenses. Cannon *v.* Snipes, 32 Wash. 243, 73 Pac. 379, 24 Wash. 166, 64 Pac. 167.

61. International, etc., R. Co. *v.* Coolidge, 26 Tex. Civ. App. 595, 62 S. W. 1097; Brown *v.* Toledo, etc., R. Co., 35 Fed. 444.

Expenses as against parties interested in particular contracts.— Where a corporation had contracted to do the press work of a book, taking the subscriptions as security, and to deliver the books, collect the subscriptions, and divide the same among those entitled thereto, and before the completion of the work a receiver was appointed, who undertook the completion of the contract without objection on the part of the parties interested, it was held that he should be allowed the expenses of completing and marketing the work, commissions on collections, etc., but not commissions on books not sold, such allowances to be taken out of moneys received from collections; that it could not be assumed by the parties interested that such work would be undertaken at the expense of the general creditors and paid out of the general funds. Matter of Chasmar, 22 Misc. (N. Y.) 680, 50 N. Y. Suppl. 1065.

Hire and rental of property of parties.— In Perkins *v.* Sturdivant, (Miss. 1888) 4 So. 555, it was held that the proper method of accounting by a receiver of a plantation appointed pending a litigation between heirs, where he has used the personalty of the party in its cultivation, is to find the rental value of the land and the hire of the personalty, and then apportion the net proceeds; that this will give to each owner an equal relative part of the profits made, if any are realized, or charge each up with a fair part of the losses incurred; and that to charge the receiver with hire of the mules of one of the parties may render it impossible to pay the rent of the lands to the other, which would not be proper since the receiver was acting for all the parties.

62. American Pig Iron Storage Warrant Co. *v.* German, 126 Ala. 194, 28 So. 603, 85 Am. St. Rep. 21; *In re* Immanuel Presby. Church, 113 La. 911, 37 So. 873; Johnson *v.* Garrett, 23 Minn. 565; Atlantic Trust Co. *v.* Dana, 128 Fed. 209, 62 C. C. A. 657. See also Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

Marshaling funds.— Where there are different funds in the hands of a receiver, the court should so marshal them as that general expenses will be paid out of general funds, and nothing out of those affected by special rights or liens, except such as pertain directly to the creation or conservation of some special fund. Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243.

of facts justifying such course, it is error to charge the whole of the expense on one fund.[63]

4. Allowance to Party Out of Fund. Where one party having a common interest with others in a trust fund, at his own expense takes proper proceedings to save it from destruction and restore it for the purpose of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts; and a fee paid to an attorney by a creditor in recovering and preserving a common fund is a proper item of expense chargeable against such fund.[64] It is immaterial whether the fund is recovered before or after the appointment of the receiver. The lien attaches to the fund when it reaches the receiver's hands.[65] It is also held to be immaterial whether the claim for solicitor's fees is presented to the court for allowance by the creditor or creditors who employed him, or by the attorney himself.[66] Likewise the court may make a reasonable allowance out of the funds which may come into the receiver's hands for the attorney's fees of unsuccessful contestants, where they had reasonable ground for their opposition.[67] But no party is entitled to attorney's fees out of a fund brought into court at his instance, and to which another has a superior claim, when it appears that the bringing of the fund into court in no way operated to the benefit of the latter,[68] but to his injury, because of the fact that the amount of the fund was diminished by being charged with the payment of the necessary expenses of a receivership.[69] Where the interests of the parties are adverse, nothing beyond the legal taxable costs can be allowed

The property of a subordinate railroad taken into the hands of a receiver appointed for the controlling company, and afterward surrendered to such company, is liable for its due proportion of the costs of the receivership accruing while it was in the receiver's hands. Pennsylvania L. Ins., etc., Co. *v.* Jacksonville, etc., R. Co., 66 Fed. 421, 13 C. C. A. 550.

Shares of parties who occasion costs.— When a receiver of a corporation appointed in proceedings to wind up the corporation improperly appeals from orders relating to the distribution of funds because he has no interest in his character as receiver to appeal from such orders (see Appeal and Error, 2 Cyc. 641), but the action was taken by direction of the court pursuant to the petition of about one-half the creditors of the corporation, the costs will be taken out of the funds to be distributed to such creditors upon the dismissal of the appeal. Knabe *v.* Johnson, 107 Md. 616, 69 Atl. 420.

63. Johnson *v.* Garrett, 23 Minn. 565.

64. Stone *v.* Omaha F. Ins. Co., 61 Nebr. 834, 86 N. W. 468; Matter of Importers', etc., Exch., 15 Daly (N. Y.) 419, 8 N. Y. Suppl. 322; Olds *v.* Tucker, 35 Ohio St. 581; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Butler *v.* Conwell, 14 Wyo. 166, 82 Pac. 950; Burden Cent. Sugar-Refining Co. *v.* Ferris Sugar-Mfg. Co., 87 Fed. 810, 31 C. C. A. 233; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 7 C. C. A. 310. See also Costs, 11 Cyc. 96; Creditors' Suits, 12 Cyc. 60 text and notes 86–97.

Where funds are produced by surcharging the accounts of a receiver of a corporation on appeal by part of its creditors from a decree confirming the receiver's account, the appealing creditors are entitled to costs of the record on appeal and counsel fees, the fund so created going to all the creditors and not to the appellants only. Schwartz *v.* Keystone Oil Co., 164 Pa. St. 145, 30 Atl. 297.

Costs generally see *infra*, VI, H, 4.

65. Butler *v.* Conwell, 14 Wyo. 166, 82 Pac. 950; Burden Cent. Sugar-Refining Co. *v.* Ferris Sugar-Mfg. Co., 87 Fed. 810, 31 C. C. A. 233.

66. Butler *v.* Conwell, 14 Wyo. 166, 82 Pac. 950.

Application for compensation should be made in the action in which the receiver was appointed and the attorney is not entitled to maintain a separate action therefor. Olds *v.* Tucker, 35 Ohio St. 581.

67. Barnes *v.* Newcomb, 89 N. Y. 108; Matter of Importers', etc., Exch., 15 Daly (N. Y.) 419, 8 N. Y. Suppl. 322.

This claim is not an absolute right which can be enforced by an action against the receiver, but is a matter to be addressed to the sound discretion of the court in which the proceeding is pending, and such discretion should be exercised in that proceeding, and as part thereof, and upon a consideration of all the circumstances. Barnes *v.* Newcomb, 89 N. Y. 108.

68. Buckwalter *v.* Whipple, 115 Ga. 484, 41 S. E. 1010; Weed *v.* Georgia Cent. R. Co., 100 Fed. 162, 40 C. C. A. 319.

Attorney for absent creditors.— If there be authority in law, in the case of a receivership, for the appointment of an attorney to represent absent creditors, his compensation can at most be a charge on the sums coming to such creditors and not on the mass of the creditors. City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469.

69. Buckwalter *v.* Whipple, 115 Ga. 484, 41 S. E. 1010; Mohr-Weil Lumber Co. *v.*

by one party as against the other.[70] After the fund or property has been brought in and made available by the decree of the court, and nothing remains but the proper administration and distribution, contests which may arise between claimants in respect to priorities or to the right to share are individual contests, involving antagonistic interests.[71]

D. Payment and Distribution — 1. In General. In general no discretion is allowed a receiver as to any application or disposition of the funds in his possession;[72] but he holds them subject to the order of the court, and to be paid to whom the court shall adjudge.[73] Modern courts have sometimes sanctioned payments made by receivers without express orders of the court where such payments were either necessary or beneficial to the parties interested in the estate;[74] but courts do not sanction the act of a receiver in turning over, without previous order of the court, specific funds or assets of the estate, in payment of debts due by the estate,[75] especially when the funds or assets so turned over were of a nominal value greatly in excess of the debt so intended to be paid or secured.[76] On proper application, notice to the parties, and proof, the court will award money in the hands of a receiver to the party entitled thereto.[77] Pay-

Russell, 109 Ga. 579, 34 S. E. 1005; Myers *v.* Mutual L. Ins. Co., (Ind. App. 1905) 75 N. E. 31; Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501, 11 S. Ct. 405, 34 L. ed. 1023; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 7 C. C. A. 310.

70. Ryckman *v.* Parkins, 5 Paige (N. Y.) 543; Matter of Importers', etc., Exch., 15 Daly (N. Y.) 419, 8 N. Y. Suppl. 322. See also Pierson *v.* Drexel, 11 Abb. N. Cas. (N. Y.) 150.

Expenses of minor defendants.— Where a bill is filed to avoid deeds for fraud, and the property is placed in the hands of a receiver, the current expenses of minor defendants for costs of litigation will not be paid out of funds in the hands of the receiver, but they will be allowed to defend *in forma pauperis.* Ferguson *v.* Dent, 15 Fed. 771.

71. Petersburg Sav., etc, Co. *v.* Dellatorre, 70 Fed. 643, 7 C. C. A. 310; Central Trust Co. *v.* Valley R. Co., 55 Fed. 903. Nor are the counsel fees or taxable costs of intervening creditors a claim on the fund. Atty.-Gen. *v.* North American L. Ins. Co., 91 N. Y. 57, 43 Am. Rep. 648; People *v.* Security L. Ins. Co., 71 N. Y. 222; Atty.-Gen. *v.* Continental L. Ins. Co., 31 Hun (N. Y.) 623; Atty.-Gen. *v.* Continental L. Ins. Co., 27 Hun (N. Y.) 195, 63 How. Pr. 129.

72. Johnson *v.* Gunter, 6 Bush (Ky.) 534; Hospes *v.* Almstedt, 13 Mo. App. 270 [*affirmed* in 83 Mo. 473]; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275. See also *supra,* IV, F, 6, e, (II), (A) *et seq.*

A receiver cannot capriciously refuse payment in a proper case, nor pay in an improper case. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 31 N. Y. App. Div. 571, 52 N. Y. Suppl. 116.

Receiver cannot prefer himself see *supra,* IV, F, 6, b, note 64.

73. Johnson *v.* Gunter, 6 Bush (Ky.) 534; Cartwright's Case, 114 Mass. 230; Hospes *v.* Almstedt, 13 Mo. App. 270 [*affirmed* in 83 Mo. 473]; Duffy *v.* Casey, 7 Rob. (N. Y.) 79.

Counsel cannot determine that matter to their own satisfaction, and compel a receiver to pay them the moneys to which they think themselves entitled, under penalty of removal. Duffy *v.* Casey, 7 Rob. (N. Y.) 79.

Manager indebted to receiver.— Where a receiver who had employed a manager to perform duties which devolved upon the receiver and was directed to pay the manager out of the compensation awarded to himself, it was held that there was no equity in a petition by the manager to enforce the order upon the refusal of the receiver to pay the manager who owed the receiver individually a larger amount which indebtedness was admitted. Gatzmer *v.* Philadelphia, etc., R. Co., 39 N. J. Eq. 363.

74. Hospes *v.* Almstedt, 13 Mo. App. 270 [*affirmed* in 83 Mo. 473]. See also *supra,* IV, F, 6, e, (II), (D), (1), (a) *et seq.*

Expenses of collection.—A receiver is authorized to use such funds in his hands as may be necessary to defray expenses of collection. Strauss *v.* Carolina Interstate Bldg., etc., Assoc., 118 N. C. 556, 24 S. E. 116.

75. Hospes *v.* Almstedt, 13 Mo. App. 270 [*affirmed* in 83 Mo. 473]; Duffy *v.* Casey, 7 Rob. (N. Y.) 79; Strauss *v.* Carolina Interstate Bldg., etc., Assoc., 118 N. C. 556, 24 S. E. 116.

76. Hospes *v.* Almstedt, 13 Mo. App. 270 [*affirmed* in 83 Mo. 473].

77. Hatch *v.* Van Dervoort, 54 N. J. Eq. 511, 34 Atl. 938; Duffy *v.* Casey, 7 Rob. (N. Y.) 79; Vanderveer *v.* Asbury Park, etc., R. Co., 82 Fed. 355.

Where particular claims against the fund are objected to on the receiver's accounting the court may order the receiver to retain so much of the fund as may be necessary to pay the disputed claims and order distribution of the balance. Adams *v.* Woods, 8 Cal. 306.

Notice of distribution.— Notice to all the creditors of an insolvent corporation that the receiver's report had been filed, and that they could see it, is an insufficient notice for an order of distribution; but notice of

ments are made subject to the rights of the parties who have no notice of the order, and do not consent to it,[78] and subject to any direction or final decree for reimbursement in their favor.[79] In making payments, the receiver should be governed by the decree and not by the preceding findings and conclusions of the court inconsistent therewith.[80]

2. Persons Entitled to Payment. The assets in the hands of a receiver should be collected and converted into money for equitable distribution among all creditors, no matter where they may reside, who shall seasonably come into the proceedings and establish their demands by satisfactory proofs.[81]

3. Time For Payment. As a general rule, until a receiver has accounted for the receipt and disbursement of moneys by him, no order by the court should be made for the distribution thereof.[82] The fund arising from all sources should be held under the direction of the court until the court shall upon final hearing direct its application to be made.[83] There are, however, exceptions to these rules. Thus where substantial distribution of a fund in a receiver's hands can be made, such distribution should not be delayed because of a pending controversy concerning an outstanding claim for a small amount.[84] Even if entitled to priority of payment, it has been held error to direct a receiver to pay debts out of property in his hands, until the claims are reported and allowed by the court.[85] Where a judgment is recovered against a receiver, and it does not appear that the payment of the judgment will exhaust the estate, the creditor has been held entitled to an order directing its payment without awaiting a final settlement of the receiver's accounts.[86] Where a creditor might have prosecuted his claims in the action in which the receiver was appointed, but instead institutes separate actions, it is not error to order a distribution of the funds in the hands of the receiver before such creditor's separate suits are decided.[87]

4. Interest. As a general rule, after property of an insolvent passes into the hands of a receiver, interest is not allowed on the claims against the funds,[88] unless the claimant shows that there were funds in the hands of the receiver especially applicable to the payment of the claim, and which would not have

an application for the order should be given them. Anonymous, 10 N. J. L. J. 88.

78. Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402 [*reversed* on other grounds in 63 N. J. Eq. 273, 53 Atl. 910].

79. Boice *v.* Conover, 54 N. J. Eq. 531, 35 Atl. 402 [*reversed* on other grounds in 63 N. J. Eq. 273, 53 Atl. 910].

80. Cannon *v.* Snipes, 24 Wash. 166, 64 Pac. 167; Bartlett *v.* Reichenecker, 11 Wash. 692, 40 Pac. 339.

81. Barley *v.* Gittings, 15 App. Cas. (D. C.) 427, holding further that if, after the payment of these demands and the expenses of administration, there be any funds remaining, the court may then, in the exercise of a sound discretion, order the same to be delivered to an intervening foreign receiver.

An attaching creditor of a firm whose debt is justly due is entitled to participate in the general assets to the amount of his debt which remains unsatisfied from the goods attached. Byrne *v.* Lake Charles First Nat. Bank, 20 Tex. Civ. App. 194, 49 S. W. 706.

Directors who are creditors.—Where an insolvent corporation makes preferential payments to directors for advances made in good faith, and the directors account for the same to the creditors, they are entitled to share *pro rata* with the creditors. Hill *v.* Standard Tel. Mfg. Co., 209 Pa. St. 231, 58 Atl. 147.

Person named in order.—A receiver is only justified in paying the person named in the order for payment, or on a power of attorney duly executed by him. *In re* Browne, L. R. 19 Ir. 183, holding that express authority for payment in any other mode must be shown by the receiver, on peril of being disallowed credit therefor in vouching his accounts.

Presentation of claim see *supra*, V, A, 2.

82. Duffy *v.* Casey, 7 Rob. (N. Y.) 79; Strauss *v.* Carolina Inter-State Bldg., etc., Assoc., 117 N. C. 308, 23 S. E. 450, 53 Am. St. Rep. 585, 30 L. R. A. 693, 118 N. C. 556, 24 S. E. 116.

83. Musgrove *v.* Nash, 3 Edw. (N. Y.) 172; Forsaith Mach. Co. *v.* Hope Mills Lumber Co., 109 N. C. 576, 13 S. E. 869.

84. Trayhern *v.* National Mechanic's Bank, 57 Md. 590.

85. Penn *v.* Whiteheads, 12 Gratt. (Va.) 74.

86. Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

87. Delafield *v.* Lewis Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10.

88. Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 37 L. ed. 663; Malcomson

been exhausted by the allowance of interest.[89] This rule is applicable to cases where the fund is to be shared by creditors without liens, or by those having liens of equal and common rank.[90] But where there are claims of several classes, with liens of different priorities, the holders thereof are held to be entitled to interest down to the date of the decree.[91] Where the payment of a dividend is deferred by reason of an unsuccessful contest of a claim, the creditor so delayed should be allowed interest on the dividend.[92] In no other way can the delayed creditor be put on an equality with the other creditors.[93] But interest on dividends should not be allowed one who voluntarily delays presenting his claim until long after the dividends have been declared.[94] Likewise the refusal of a creditor to accept a receiver's offer to allow part of his claim under conditions which do not prejudice his rights bars the creditor's right to interest on subsequent dividends on the part offered to be allowed.[95]

5. Order or Decree. An order of distribution is nothing more than a direction by the court to its officer to make a *pro rata* distribution of the money then on hand among the creditors,[96] and does not create a lien on the remaining assets

v. Wappoo Mills, 99 Fed. 633; Grand Trunk R. Co. *v.* Central Vermont R. Co., 91 Fed. 569; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537.

The delay in distribution is the act of the law and is a necessary incident to the settlement of the estate. Thomas *v.* Western Car Co., 149 U. S. 95, 13 S. Ct. 824, 37 L. ed. 663.

This rule is especially applicable to claims in the nature of fees and costs which arise during the administration of the receivership and by reason of it. Jones *v.* U. S., etc., Trust Co., (Tex. Civ. App. 1907) 105 S. W. 328.

A claim for damages against a railroad corporation arising before the appointment of a receiver is, although reduced to judgment, a claim for unliquidated damages, and bears no interest. *Ex p.* Brown, 18 S. C. 87, where it is said that against the receiver's fund, such a judgment becomes divested of its character of a judgment, and rests solely upon the equity of the original cause of action. *Compare* Central Trust Co. *v.* Denver, etc., R. Co., 97 Fed. 239, 38 C. C. A. 143.

89. Malcomson *v.* Wappoo Mills, 99 Fed. 633; New England R. Co. *v.* Carnegie Steel Co., 75 Fed. 54, 21 C. C. A. 219; New York Security, etc., Co. *v.* Lombard Inv. Co., 73 Fed. 537.

90. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

91. Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150; Jourolmon *v.* Ewing, 85 Fed. 103, 29 C. C. A. 41; Central Trust Co. *v.* Condon, 67 Fed. 84, 14 C. C. A. 314.

Where the claim is for taxes, and interest on tax executions is provided for by statute, the interest has the same priority of lien that the tax has, and should be allowed, especially when the funds in the receiver's hands are amply sufficient to pay both the taxes and the interest thereon. Sparks *v.* Lowndes County, 98 Ga. 284, 25 S. E. 426; Gray *v.* Logan County, 7 Okla. 321, 54 Pac. 485, (1897) 51 Pac. 97; Houston First Nat. Bank *v.* Ewing, 103 Fed. 168, 43 C. C. A. 150.

92. Citizens' Sav. Bank *v.* Vaughan, 115 Mich. 156, 73 N. W. 143; People *v.* Remington, 59 Hun (N. Y.) 307, 12 N. Y. Suppl. 829 [*affirmed* in 126 N. Y. 679, 28 N. E. 249]; Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Malcomson *v.* Wappoo Mills, 99 Fed. 633; Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231. See also Younger *v.* Massey, 41 S. C. 50, 19 S. E. 125.

93. Armstrong *v.* American Exch. Nat. Bank, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; Malcomson *v.* Wappoo Mills, 99 Fed. 633.

94. Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231.

95. Chemical Nat. Bank *v.* Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231.

But if the receiver withdraws his offer, interest on dividends should be allowed the owner of the claim as though no offer had been made. Chemical Nat. Bank *v.* Armstrong, 65 Fed. 573, 13 C. C. A. 47, 28 L. R. A. 231.

96. Rockwell *v.* Portland Sav. Bank, 31 Oreg. 431, 50 Pac. 566.

Form.—A decree directing the payment of debts and expenses should set forth specifically the amount of each claim, and the date from which interest is to be computed. Peoples' Nat. Bank *v.* Virginia Textile Co., 104 Va. 34, 51 S. E. 155.

In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the controller of the currency, but such decree should direct that the claim of the creditor, as established, be certified to the controller, to be paid in due course of administration. Merrill *v.* Jacksonville First Nat. Bank, 75 Fed. 148, 21 C. C. A. 282 [*affirmed* in 173 U. S. 131, 43 L. ed. 640]; Wolf *v.* National Bank, 178 Ill. 85, 52 N. E. 896.

in their favor.[97] Where an order directing a receiver to pay a certain claim of any money in his hands available for that purpose is made prior to final decree fixing priorities among creditors and ordering distribution, such decree supersedes the order.[98]

6. Estoppel to Object to Distribution. Where a court orders the money in the hands of a receiver in an action to be distributed according to the facts as stated in the petition, and no answer is filed in the case raising any new issues, plaintiff cannot complain of the distribution made.[99] So an order of distribution made at the request of a creditor, and by consent, cannot be questioned by him.[1] But the fact that a judgment creditor shares in the assets which come into the hands of a receiver, and which are paid out under the court's orders, does not prevent him, where there is no final decree, from insisting that there are other assets in which he is also entitled to share.[2] And by filing his claim and receiving the dividend thereon, a creditor is not bound by conditions to which other creditors assented, and which they had no right to impose except upon themselves.[3]

7. Review. A decree fixing the amount and priority of claims against an insolvent corporation, and ordering a distribution of the fund arising from a sale of its property, is a final decree, from which an appeal lies;[4] but it is the duty of a receiver to dispose of funds in his hands as ordered by the court and it is not his province to intervene and dispute the propriety of the order.[5]

VI. Actions and Proceedings By and Against Receivers.[6]

A. Remedies in Behalf of Receiver — 1. In Receivership Suit — a. In General. According to the practice in this country, the receiver may apply to the court for such orders as may be necessary to enforce and protect his right of possession.[7] Under the general rules for the enforcement and protection of the

97. Rockwell *v.* Portland Sav. Bank, 31 Oreg. 431, 50 Pac. 566, holding that, if the order is not obeyed, the remedy of the injured party is by an application to the court which made it, and not by way of a lien upon the remaining assets.

98. Cannon *v.* Snipes, 24 Wash. 166, 64 Pac. 167.

99. Cooper *v.* Brinkman, 38 Kan. 442, 17 Pac. 157.

1. Joliet First Nat. Bank *v.* Illinois Steel Co., 174 Ill. 140, 51 N. E. 200 [*affirming* 72 Ill. App. 640].

2. Clayton *v.* Ore Knob Co., 109 N. C. 385, 14 S. E. 36.

3. Loney *v.* Bayly, 45 Md. 447; Loney *v.* Bailey, 43 Md. 10.

4. Halsted *v.* Forest Hill Co., 109 Fed. 820; Hoffman *v.* Knox, 50 Fed. 484, 1 C. C. A. 535.

Parties.— But such a decree will not be reviewed on appeal unless all persons interested are made parties. German Sav. Bank *v.* Armour Packing Co., (Iowa 1898) 75 N. W. 503.

Interlocutory order for partial distribution. — No appeal lies from an interlocutory order directing a receiver to make partial distribution of the fund in his hands, unless such order be shown to be improvident. Sykes *v.* Thornton, 152 Pa. St. 94, 25 Atl. 174.

5. Hodge *v.* Quiry, 9 Ky. L. Rep. 650; Bosworth *v.* St. Louis Terminal R. Assoc., 174 U. S. 182, 19 S. Ct. 625, 43 L. ed. 941. And see Appeal and Error, 2 Cyc. 641 text and note 26.

6. **Action on receiver's bond** see *infra*, IX.

Applications by receiver for instructions generally see *supra*, IV, F, 5, b, (II).

Compromise and settlement see *supra*, IV, F, 6, d, (IV).

Distraining by receiver see Landlord and Tenant, 24 Cyc. 1291.

Foreign receivers see *infra*, VIII, A.

Garnishment generally see Garnishment, 20 Cyc. 1026.

In supplementary proceedings see Executions, 17 Cyc. 1466 *et seq.*

Jury trial see Juries, 24 Cyc. 120.

Proceeding to determine priorities see *supra*, V, B, 2.

7. Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717 (where the chancellor recognized the right of a receiver to call upon the master to direct the delivery of possession of the property); Noel *v.* Gibson, 7 Paige (N. Y.) 513 (where a receiver in a creditors' suit applied for an attachment and appealed to the chancellor); Wardell *v.* Leavenworth, 3 Edw. (N. Y.) 244 (where the receiver alone appeared and contested defendant's motion to stay a sale of property which the receiver had advertised); Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417 [*citing* 3 Daniell Ch. Pr. 435–441] (pointing out a different chancery practice in England which does not accord with the ancient practice there or in the Irish court of chancery, as shown in a note by Cox to Sharp *v.* Carter, 3 P. Wms. 375, 379, 24 Eng. Reprint 1108 (where the practice was stated on the authority of Lord Chancellor Parker made in 1718).

receiver's possession,[8] as against strangers to the record who are not brought in as parties so as to become amenable to the court's orders the receiver must proceed by adverse action.[9] On the other hand proceedings to protect the receiver's possession may be by petition of the receiver to the court appointing him;[10] a receiver with the power and under the duty to collect assets may move for an order on a party to the suit who has interfered with his possession by collecting assets since the appointment,[11] and may proceed summarily by petition for a rule to show cause in the court by which he was appointed to require one not a party to the suit to pay over money belonging to the receivership which has come into possession of the respondent since the appointment of the receiver, and which is retained in defiance of the court's order sequestering the property and funds of defendant, although the respondent claims a right to or lien upon the fund; his remedy in such cases being by a petition in intervention setting up his claim.[12] So it is held to be the right and duty of the receiver of a corporation to invoke the aid of the court to compel the corporate officers to surrender assets which they are concealing for the purpose of converting to their own use.[13] The statute sometimes provides a short and convenient remedy for the collection of assets.[14]

b. Injunction Against Interference With Possession. Where in a pending suit the court has in its custody property which it has by its orders placed in possession of a receiver, and an injunction becomes necessary to the protection of such possession, the proper course is for the receiver to file a petition in the same suit, invoking the power of the court to protect his possession and control of the property. He is not required to bring a separate suit in equity,[15] and this,

Authority and leave to sue see *infra*, VI, A, 3, a *et seq.*

8. See *supra*, IV, D, 5, a *et seq.*

Supervision and direction of court see *supra*, IV, F, 5, a *et seq.*

9. See *supra*, IV, D, 5, h, (II).

Remedy of party claiming adversely see *supra*, IV, D, 6, a *et seq.*

Where interest claimed is not adverse see Miles *v.* New South Bldg., etc., Assoc., 95 Fed. 919, *supra*, IV, D, 5, h, (II), note 74.

10. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689.

11. Parker *v.* Pocock, 30 L. T. Rep. N. S. 458, where, upon an application of the receiver in a cause supported by an affidavit founded on information and belief only, the court ordered a defendant, who had obtained payment of certain debts adversely to the receiver, within one week to make an affidavit of the amounts as received by him, and to pay the same to the receiver, or in default to be committed.

12. Horn *v.* Pere Marquette R. Co., 151 Fed. 626. The same remedy is approved in Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; Bibber-White Co. *v.* White River Valley Electric Co., 107 Fed. 176; Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189. But see Bowling Green Sav. Bank *v.* Todd, 64 Barb. (N. Y.) 146 [*affirmed* in 52 N. Y. 489], as to lien of attorney.

Bill required.— In State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450, it was held that a receiver of an insolvent corporation must proceed by bill to recover moneys of the corporation received by another after the receiver's appointment, and could not proceed by petition.

13. Brandt *v.* Allen, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653, *supra*, IV, D, 5, h, (II), note 74.

14. Reed *v.* Gold, 102 Va. 37, 45 S. E. 868, statute for recovery of unpaid stock subscriptions by motion in a court of law.

Reference of disputes see *infra*, VI, H, 1.

15. *Florida.*— McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 44 So. 237.

Georgia.— Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 966.

New Jersey.— Merton *v.* Stone Harbor Imp. Co., (Ch. 1899) 44 Atl. 875, to restrain action pending against corporation.

New York.— Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272, motion by receiver of corporation in dissolution proceedings, as representative of all the creditors, to stay suits brought by creditors. But see Strickland *v.* National Salt Co., 94 N. Y. Suppl. 936, denying the remedy as against strangers.

Vermont.— Vermont, etc., Co. *v.* Vermont Cent. R. Co., 46 Vt. 792, same protection afforded a receiver and manager.

United States.— *Ex p.* Tyler, 149 U. S. 164, 181, 13 S. Ct. 785, 37 L. ed. 689 (where the court said: "The property in question was in the custody of the Circuit Court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth"); Bibber-White Co. *v.* White River Valley Electric R. Co., 107 Fed. 176; Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189; Virginia, etc., Iron Co. *v.* Bristol Land Co., 88 Fed. 134;

although the interference may be with assets which have never come into the receiver's actual possession;[16] but defendant is given the opportunity of making defense by answer or other pleading, according to the common course of equity practice.[17] A petition will not come within this rule, however, which charges no active or constructive interference with the receiver's possession, but raises a question of title between the receiver and a third person.[18]

2. STATUTORY REMEDY FOR DISCOVERY OF ASSETS. By statute a special proceeding is sometimes expressly provided for the discovery of assets of a corporation to render more effectual the proceedings which may be taken by the receiver to sue for and recover the corporate property.[19] But the publication by the

Ex p. Chamberlain, 55 Fed. 704; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 687.

England.— Evelyn *v.* Lewis, 3 Hare 472, 25 Eng. Ch. 472, 67 Eng. Reprint 467.

Canada.— Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42; Simpson *v.* Hutchison, 7 Grant Ch. (U. C.) 308, restraining suit against receiver.

See 42 Cent. Dig. tit. "Receivers," § 318.

Form of petition see McKinnon-Young Co. *v.* Stockton, 53 Fla. 734, 739, 44 So. 237; Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189.

Enjoining actions by parties represented see *infra*, VI, B, 6.

16. Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 46 Vt. 792; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Bibber-White Co. *v.* White River Valley Electric R. Co., 107 Fed. 176.

17. Lake Shore, etc., R. Co. *v.* Felton, 103 Fed. 227, 43 C. C. A. 189.

18. Wood *v.* New York, etc., R. Co., 61 Fed. 236, holding that an application by the receiver of a railroad to restrain another road, not a party to the receivership suit, from unlawfully discriminating against the receiver's road, cannot be entertained.

19. Fidelity, etc., Co. *v.* MacAfee, (N. J. Ch. 1907) 65 Atl. 879 (where it appears that N. J. Pub. Laws (1896) provide that the receiver of a corporation shall have power to send for persons, and to examine them on oath respecting the corporation's affairs, and that if any person shall refuse to be sworn the court of chancery may on report of the receiver commit such person to prison, but it is held that where service of a summons was made by the receiver on a person without the state the courts of the state had no authority to make an order adjudging such person in contempt for failing to appear); Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505 (statute of 1829, authorizing receiver of insolvent corporation to examine officers and agents in order to ascertain and secure corporate assets); Platt *v.* New York, etc., R. Co., 63 N. Y. App. Div. 401, 71 N. Y. Suppl. 913 [*reversed* upon the merits of the orders actually before the court in 170 N. Y. 451, 63 N. E. 532] (where it appears that by the provision of N. Y. Laws (1898), c. 534, in certain cases against corporations, etc., an order may be granted for the examination before the court or a referee of any officer, stock-holder, agent, employee, or any other person as to whom the receiver shows by his verified petition that he has good reason to believe that any such person has embezzled or concealed, or withholds or has in his possession or under his control or has wrongfully disposed of any property of such corporation which ought to be surrendered to the receiver, etc., and that upon the conclusion of such examination and the signed and sworn testimony of the person so examined in the proceeding in which the receiver was appointed, the court may make an order commanding such person forthwith to deliver the property to the receiver if the testimony satisfactorily shows to the court that it has been wrongfully concealed or withheld, etc.); *In re* Stonebridge, 13 N. Y. Suppl. 770 [*affirmed* in 128 N. Y. 618, 28 N. E. 253].

Warrant for examination concerning assets.— In New York all provisions of law respecting trustees of insolvents as to the collection, preservation, concealment, and discovery of property were made applicable to receivers of corporations, and it was provided that where such trustee shall show that there is good reason to believe that the debtor or any other person has concealed or embezzled any part of the debtor's property, or that any person can testify concerning the concealment or embezzlement thereof, a warrant will be issued requiring such person to appear and submit to examination concerning the same. Rich *v.* Sargent Granite Co., 30 N. Y. Suppl. 139, 23 N. Y. Civ. Proc. 359. Under other statutory provisions authorizing receivers of corporations to maintain special proceedings for the purpose of collecting, etc., the property of the corporation, when a receiver brings himself within the provisions of the law he may have the warrant above mentioned under the provision as to special proceedings. Rich *v.* Sargent Granite Co., *supra* (right of temporary receiver); *In re* Stonebridge, 13 N. Y. Suppl. 770 [*affirmed* in 128 N. Y. 618, 28 N. E. 253] (holding that a receiver of an insolvent corporation is entitled to maintain such proceeding against the president, whom the receiver has reason to believe fraudulently transferred corporate assets to another corporation of which he was a member). Under similar provisions it was held that a person so indebted, or so having property, as administrator of a deceased person, was liable to be proceeded against; and that a warrant issued upon a petition alleging that such person had such property in his custody, either individually or as administrator, was good.

receiver of a corporation of a notice requiring all persons having property of the corporation in their possession to deliver it to him, as required by such a statute is not a condition precedent to the right of the receiver to sue to compel a creditor to account for sums paid to him by the corporation when its insolvency was imminent.[20]

3. Separate Suit or Action — a. Control of Court and Authority and Leave to Sue[21] — (i) *In General.* The general rule is that in the absence of statutory authority or the express direction or authority of the court appointing him, a receiver, in his representative capacity and merely by virtue of his general authority as receiver, not having the legal title,[22] has no right to institute actions and suits.[23] The rule requiring leave to sue is announced in some of the cases

Noble *v.* Halliday, 1 N. Y. 330. Under another provision that a copy of any application to the court, although *ex parte*, in any proceeding for the dissolution of a corporation, shall be served on the attorney-general, a copy of an application by the receiver of a corporation for a warrant of arrest against a person for concealment and embezzlement of the property of the corporation must be served on the attorney-general. Matter of Stonebridge, 57 Hun (N. Y.) 441, 10 N. Y. Suppl. 772; *In re* Vanamee, 8 N. Y. Suppl. 219 [*affirmed* in 119 N. Y. 646, 23 N. E. 1149]. And where the statute requires notice of the appointment of the receiver and provides that, after the first publication, everyone having any of its property or indebted to it shall account therefor to the receiver, a warrant cannot be issued until after the first publication. *In re* Stonebridge, 13 N. Y. Suppl. 770 [*affirmed* in 128 N. Y. 618, 28 N. E. 770] (holding, however, that the application in this case was after first publication).

20. Stiefel *v.* New York Novelty Co., 25 Misc. (N. Y.) 221, 55 N. Y. Suppl. 90.

21. Leave to sue receiver and to defend see *infra*, VI, D, 2, a.

Pleading and objection to pleading see *infra*, VI, G, 1 *et seq.*

22. See *supra*, IV, D, 2.

23. *California.*— Tibbets *v.* Cohn, 116 Cal. 365, 48 Pac. 372.

Georgia.— Screven *v.* Clark, 48 Ga. 41, under general authority to collect.

Illinois.— Peabody *v.* New England Water Works Co., 80 Ill. App. 458.

Indiana.— Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633 (action by receiver of corporation to recover stock subscription); Wayne Pike Co. *v.* State, 134 Ind. 672, 34 N. E. 440; Davis *v.* Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494 (holding that it is no answer to the objection for want of leave that the action is brought in the name of the corporation by the receiver, since the right of the corporation to sue was suspended and the action must be prosecuted by the receiver).

Nebraska.— Darner *v.* Gatewood, 2 Nebr. (Unoff.) 561, 89 N. W. 603.

New Jersey.— McMaster *v.* Drew, (Ch. 1906) 62 Atl. 559. That the authority may be implied see Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668.

New York.— Foster *v.* Townshend, 68 N. Y. 203; Fincke *v.* Funke, 25 Hun 616; Hayner *v.* Fowler, 16 Barb. 300 (as to the limited power of a receiver in relation to real estate); Morgan *v.* Bucki, 30 Misc. 245, 61 N. Y. Suppl. 929 (insufficiency of general allegation of due appointment of receiver in sequestration proceedings to show authority to sue, as distinguished from cases of receivers in supplementary proceedings in that in the former class of receivership the authority to sue is not an incidental one); James *v.* James Cement Co., 8 N. Y. St. 490; Smith *v.* Woodruff, 6 Abb. Pr. 65.

North Carolina.— Battle *v.* Davis, 66 N. C. 252, holding that the code had not changed the rule in that state.

Pennsylvania.— Singerly *v.* Fox, 75 Pa. St. 112; Wisener *v.* Myers, 3 Pa. Dist. 687; Philadelphia, etc., Coal, etc., Co. *v.* Schada, 11 Wkly. Notes Cas. 20.

South Carolina.— Gadsden *v.* Whaley, 14 S. C. 210.

Tennessee.— Simmons *v.* Taylor, 106 Tenn. 729, 63 S. W. 1123.

Virginia.— McAllister *v.* Harman, 97 Va. 543, 34 S. E. 474; Reynolds *v.* Pettyjohn, 79 Va. 327; Davis *v.* Snead, 33 Gratt. 705.

United States.— Pendleton *v.* Russell, 144 U. S. 620, 12 S. Ct. 743, 36 L. ed. 574 (broadly requiring express authority to appear in foreign jurisdiction); Huber *v.* New Orleans, 130 Fed. 21, 64 C. C. A. 389.

Canada.— Thomas *v.* Torrance, 1 Ch. Chamb. (U. C.) 9, holding that a receiver appointed to mortgage an estate cannot sue for debts due it except upon application for permission supported by affidavits showing the expediency of such proceedings.

See 42 Cent. Dig. tit. "Receivers," § 327.

Compare Nangle *v.* Fingall, 1 Hog. 142, holding that if waste has been committed and the case is pressing the receiver may file a bill for an injunction without an order, but if the time will permit he should apply for reference to inquire what proceedings he ought to take.

Authority in successive receiver.— In Daniel *v.* Wilson, 91 Ga. 238, 18 S. E. 134, a receiver for all the assets of a corporation was appointed before the charter expired, and in another suit commenced after the expiration of the charter another receiver was appointed for all of the assets then remaining who was ordered to institute such actions as he thought necessary to reduce to possession any property claimed by third persons to

particularly with respect to the right of the receiver to recover property of which he has never had the possession,[24] and the distinction in this respect is expressly recognized when the action is to enforce a right accruing to the receiver as such in the administration of his trust or to protect the possession which he has actually acquired,[25] although in such instances it appears that the question is also as to the receiver's right to maintain the suit in his own name.[26] And further the rule requiring leave to sue has been held not to apply to a petition by the receiver in the court in which he was appointed.[27]

(II) *STATUTORY AUTHORITY.* General authority to sue is sometimes conferred by statute, under which no special leave to bring the suit need be shown,[28]

which the corporation had title, and it was held that a defendant in an action of ejectment brought by the second receiver could not protect himself against recovery by setting up outstanding title in the first receiver, who was appointed *pendente lite*, and no final decree having been made in that cause; that it was doubtful whether the title to the realty of the corporation vested in the first receiver by the mere order of his appointment, and that if it did, it was divested by the order appointing the second receiver in so far as to enable him to recover the property and administer it under the direction of the court as provided by the code, the first receiver never having received title and the same court having jurisdiction over both receivers would be competent to protect the rights of all parties.

The rule is not of universal application, however, and some cases appear to have repudiated it. Helme *v.* Littlejohn, 12 La. Ann. 298 (which, in Hubert *v.* New Orleans, 130 Fed. 21, 64 C. C. A. 389, *supra*, this note, is said to stand single and alone, and to have been decided at a time when the law of receiverships was almost unknown in Louisiana); Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26. And where a receiver is vested with the whole property by force of the decree and is held in equity to have the whole title without assignment, he is accordingly held to be entitled to possession and to sue in his own name, without any leave of court or of the parties, incurring no risk except as to costs. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510, holding that a receiver of a dissolved partnership may, without special leave, bring suits to possess himself of the partnership property. See also the cases cited *infra*, VI, A, 3, b, (II). But in Fincke *v.* Funke, 25 Hun (N. Y.) 616, it was held that where the order appointing a receiver in an action between partners vested in him all the rights and powers of receivers according to law, and defendant was ordered to assign to him all the property of a copartnership but no such assignment was made and no specific authority was conferred upon the receiver to bring action, the title to the property did not vest in the receiver and therefore he could not sue to collect a demand belonging to the firm.

So a receiver as trustee of an express trust, appointed in proceedings to sequestrate the property of an insolvent corporation, being given by the decree appointing him power and authority to collect all the effects, etc., of the corporation is held necessarily to have authority to sue to recover assets. Hause *v.* Newel, 60 Minn. 481, 62 N. W. 817.

Reason of rule.—A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation. At law, the party having the legal right to sue is the proper party, and if one comes suing for the property of another, he must show, as part of his right to recover, the authority he has to come into a court of law, asserting another's right. Screven *v.* Clark, 48 Ga. 41.

Appeal by receiver see APPEAL AND ERROR, 2 Cyc. 641 note 23.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1469.

24. Bishop *v.* McKillican, 124 Cal. 321, 57 Pac. 76, 71 Am. St. Rep. 68; Tibbets *v.* Cohn, 116 Cal. 365, 48 Pac. 372; Screven *v.* Clark, 48 Ga. 41 (receiver to collect effects of corporation cannot bring trover under his general authority to collect); Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633; Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712.

25. Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378; Pouder *v.* Catterson, 127 Ind. 434, 26 N. E. 66; Kehr *v.* Hall, 117 Ind. 405, 20 N. E. 279; Everett *v.* State, 28 Md. 190.

Suit on bond executed to receiver.—Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378; Scott *v.* Duncombe, 49 Barb. (N. Y.) 73.

26. Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712; Singerly *v.* Fox, 75 Pa. St. 112; Philadelphia, etc., Coal, etc., Co. *v.* Schada, 11 Wkly. Notes Cas. (Pa.) 20; *Ex p.* Harris, 2 Ch. D. 423, 45 L. J. Bankr. 71, 34 L. T. Rep. N. S. 291, 24 Wkly. Rep. 851. See also *infra*, VI, A, 3, b, (II).

27. Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Woodburn *v.* Smith, 96 Ga. 241, 22 S. E. 964, petition for injunction. *Contra*, Simmons *v.* Taylor, 106 Tenn. 729, 63 S. W. 1123.

The fact that the court entertains his petition is tantamount to a grant of authority to sue. Vestel *v.* Tasker, 123 Ga. 213, 51 S. E. 300; Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670, under a statutory provision that the receiver shall have power, "under the control of the court," to bring actions, etc., and generally to do such acts "as the court may authorize."

28. See the statutes of the several states. And see Hanke *v.* Blattner, 34 Ill. App. 394;

or the receiver is invested with the power, under the control of the court, to act in this respect;[29] and the leave required to permit ordinary chancery receivers to sue is not more than an equivalent of the authority given particular receivers by statute.[30]

(III) *Granting Leave or Directing Suit.*[31] In proper cases, however, the court may grant such leave or direct the institution of proceedings by the receiver,[32] but is not bound as a matter of course to direct a suit to be brought which would be unprofitable.[33] The authority to institute proceedings may be

Hayes *v.* Brotzman, 46 Md. 519 (receiver of corporation in winding up proceedings); McBryan *v.* Universal Elevator Co., 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453 (receiver appointed at suit of judgment creditor of corporation). See also Bien *v.* Bixby, 18 Misc. (N. Y.) 415, 41 N. Y. Suppl. 433, as to power of temporary receiver of corporation under statute giving him power to collect, etc.

29. See the statutes of the several states. And see La Follett *v.* Akin, 36 Ind. 1; Mitchell *v.* Chenault, 112 Ky. 267, 65 S. W. 447, 23 Ky. L. Rep. 1544 (holding that a general receiver of the court has authority under such statute, as well as receivers appointed in particular actions); Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670.

30. Miller *v.* Mackenzie, 29 N. J. Eq. 291.

31. **Form of order** see Leonard *v.* Storrs, 31 Ala. 488, 489; St. Louis, etc., R. Co. *v.* Vandalia, 103 Ill. App. 363, 364; Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20 (general order sufficiently comprehensive to embrace the particular action); Frank *v.* Morrison, 58 Md. 423, 425; Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484, 487; Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 71, 20 S. W. 1015 (order directing receiver of corporation to sue stock-holders for contribution); Davis *v.* Gray, 16 Wall. (U. S.) 203, 209, 21 L. ed. 447.

32. Green *v.* Winter, 1 Johns. Ch. (N. Y.) 60.

The general receiver of a court may be authorized to bring a suit for the benefit of a trust fund by order of the court to institute actions, and besides it is held that such a receiver has the same authority in this regard as a receiver in particular actions under the statute which provides that receivers, under the control of the court, shall have power to bring and defend actions. Mitchell *v.* Chenault, 112 Ky. 267, 65 S. W. 447, 23 Ky. L. Rep. 1544.

Parties in interest may apply for directions to the receiver to sue to get in assets. Reynolds *v.* Pettyjohn, 79 Va. 327. See also for application for directions to receiver *supra*, IV, F, 5, a, b. However, under a code provision making appealable orders which give directions to receivers, etc., an insolvent corporation may appeal from an order refusing to vacate an *ex parte* order directing the receiver to sue stock-holders for unpaid subscriptions. State *v.* German Sav. Bank, 50 Nebr. 734, 70 N. W. 221.

Or the receiver may apply for leave to sue. Neun *v.* Blackstone Bldg., etc., Assoc., 149 Mo. 74, 50 S. W. 436. But it is held that the stock-holders of a corporation are not necessary parties to an application by the receiver appointed in dissolution proceedings for leave to sue such stock-holders, and therefore they cannot appeal from an order granting leave to sue. People *v.* Commercial Bank, 6 N. Y. App. Div. 194, 39 N. Y. Suppl. 1000.

Propriety of particular orders — *Suits necessary to accomplish entire justice.*— Neeves *v.* Boos, 86 Wis. 313, 56 N. W. 909.

In right of parties not represented.— The court cannot authorize the receiver to sue in the right of parties whose interests are not represented in the receivership suit or by the receiver. Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328.

The receiver cannot maintain another ground of action than that contemplated by the order directing the suit (Pierson *v.* Cronk, 7 N. Y. Suppl. 573), nor bring any other action than that which the order authorizes (McAllister *v.* Harman, 97 Va. 543, 34 S. E. 474, holding that a direction to collect purchase-money due for land will not authorize a suit to set aside a fraudulent conveyance of other land made by the purchase-money debtors in order to subject it to the payment of the debt which the receiver is ordered to collect).

Authority from creditors who, under the statute, are represented by the receiver of a corporation, is not necessary, but a direction by the court to sue is all that is required. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

33. Sterling Electric Co. *v.* Augusta Tel. etc., Co., 124 Ga. 371, 52 S. E. 541 (holding that the court should determine whether the suit would be profitable or would likely result in benefit or loss to the estate); Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815 (holding that the court may direct claims in favor of a corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested).

Oppressive proceedings.— The court will not empower a receiver to sue for debts due to the estate, where the proceedings would be oppressive to creditors, or it is unlikely any advantage would be derived from it. Dacie *v.* John, McClell. 575.

Review of direction to sue.— Where the books in the hands of a receiver showed a debt due by a certain person and the court directed suit, if, on investigation, there is a reasonable prospect of realizing on the judgment, and exception was taken to such direction, but it was not shown what evidence

general[34] in the order of appointment,[35] as in the case of a receiver of an insolvent corporation under a statute giving him such powers under the control of the court,[36] or by subsequent order where the authority is not conferred in the order of appointment.[37]

b. Form of Remedy and Jurisdiction — (i) *In General.* A receiver may resort to those remedies which are available to other litigants, both legal and equitable, according to the nature of the rights to be enforced,[38] or to the remedy available to the party over whose estate he is appointed and to which remedy he succeeds,[39] and he may have an injunction to protect the estate for those represented.[40] Like other litigants he may pursue his remedies in any court

was before the court touching the nature of the claim or the solvency of the debtor, the direction will not be reversed. Sterling Electric Co. *v.* Augusta Tel., etc., Co., 124 Ga. 371, 52 S. E. 541.

34. Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20, if sufficiently comprehensive to embrace the particular action.

35. Comer *v.* Bray, 83 Ala. 217, 3 So. 554.

36. Carnahan *v.* Campbell, (Ind. 1901) 59 N. E. 1054; Frank *v.* Morrison, 58 Md. 423; Hayes *v.* Brotzman, 46 Md. 519.

But as to a receiver pendente lite, the rule requiring leave of the court to be obtained before the receiver can either sue or be sued being in order to prevent any unnecessary waste of the assets in the receiver's hands in unnecessary litigation is held to contemplate at least some investigation by the court of the propriety of the commencement of such suits before permission is granted; and to authorize in advance the commencement of suits without any knowledge of what they are for, or of the necessity thereof, is held to be a complete nullification of the rule, to expose the estate to the very thing that the rule was intended to guard against, and to be improper practice. Witherbee *v.* Witherbee, 17 N. Y. App. Div. 181, 45 N. Y. Suppl. 297. To the same effect see St. Louis, etc., R. Co. *v.* Vandalia, 103 Ill. App. 363.

37. Barber *v.* Mexico International Co., 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246; Lathrop *v.* Knapp, 37 Wis. 307.

Allowing receiver to intervene in action in same court.—A receiver who was directed by the court to make a settlement with defendant company, and to collect the claim due the insolvent debtor by litigation, if necessary, and who was, as receiver, an officer of the court in which he was allowed to intervene as a plaintiff in the suit at bar, is authorized to prosecute the suit. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa 682, 74 N. W. 26.

Nunc pro tunc order.— When the receiver has sued without leave the order may be entered *nunc pro tunc.* De La Fleur *v.* Barney, 45 Misc. (N. Y.) 515, 92 N. Y. Suppl. 926.

38. Pearce *v.* Gamble, 72 Ala. 341; See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116] (right of receiver of corporation to remedy by proceeding in equity to ascertain which of the stock-holders had paid for stock issued to them and the amount necessary for each of them to pay in order to settle the corporate debts, because he is entitled to all the remedies which the creditors would have had); Miller *v.* Mackenzie, 29 N. J. Eq. 291; Lees *v.* Dobson, 26 N. Y. App. Div. 624, 49 N. Y. Suppl. 902; Green *v.* Bostwick, 1 Sandf. Ch. (N. Y.) 185 (concurrent remedies at law and in equity where the cause is based on fraud).

Summary motion against sheriff.— In Goss *v.* Southall, 23 Gratt. (Va.) 825, a sheriff who had collected money and reported the same to the court was ordered to pay the same over to the receiver in the cause, and it was held that a motion by, and judgment for, the receiver against the sheriff were proper under a statute declaring that, if any officer shall make such return on any order as entitles any person to recover money from such officer by action, the court may, on behalf of such person, give judgment.

Judgment at law unnecessary.— The receiver in a creditors' suit may file a bill in equity for the collection of money held in trust for the debtor and it is not necessary that he should first obtain a judgment at law, that having been done by the complainant in the creditors' bill. Terhune *v.* Bell, (N. J. Ch. 1887) 9 Atl. 111.

Misapplied capital stock — enforcement of trust.— Upon the theory that the recovery of money paid out of the capital stock of the corporation to a stock-holder for his stock is the enforcement of a trust, it is held that equity has jurisdiction of a suit by the receiver of the insolvent corporation for the recovery of such money notwithstanding the creditors' remedy at law. Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

Garnishment of party.—A receiver, representing all the parties, plaintiff, defendant, and creditors, may, in an action against a third person for the recovery of a debt due plaintiff and defendant in the suit in which he was appointed receiver, garnish plaintiff. McDonald *v.* Carney, 8 Kan. 20.

39. Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518, 49 N. E. 695. See also *infra*, VI, B, 1, a.

40. Gray *v.* Di Castro, etc., Sugar Refining Co., 10 N. Y. Suppl. 632; Davis *v.* Butters Lumber Co., 132 N. C. 233, 43 S. E. 650 (holding that where a resident creditor of an insolvent bank brought suit in another state, which prevented or interfered with the collection of the assets of the bank by the receiver, the latter was entitled to enjoin the

having jurisdiction of the subject-matter,[41] and it is held that any proceeding by a receiver appointed by a federal court in a suit involving the administration of the assets of an insolvent corporation, whether for the collection of its assets or for the defense of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the federal court, regardless either of the citizenship of the parties, or of the amount in controversy.[42] A receiver may, upon his right of possession or special title, sue to recover property of which he had been lawfully possessed, or the value thereof, and which has been wrongfully taken or converted by another,[43] although it has been held that replevin cannot be resorted to for the purpose merely of maintaining the dignity of the chancery court.[44] So in the performance of his duty to collect the property of a corporation under the statute, the receiver may maintain an action or special proceeding therefor.[45]

prosecution of such suit); Harrison *v.* Waterberry, (Tex. 1894) 27 S. W. 109 [*reversing* (Civ. App. 1894) 27 S. W. 430]; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Brown *v.* French, 80 Fed. 166 (holding that a receiver of an insolvent national bank occupies a fiduciary relation to its creditors, and may sue in equity to enjoin the collection of taxes illegally assessed against the stock of the bank).

41. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567; Hause *v.* Newel, 60 Minn. 481, 62 N. W. 817 (holding that an action by the receiver of a corporation against a stock-holder to recover an amount due from the latter on his subscription is an action at law of which a municipal court has jurisdiction, although the amount, when recovered, is subject to equitable distribution, this latter fact not rendering the action an equitable one); Rockwell *v.* Merwin, 45 N. Y. 166 [*affirming* 1 Sweeny 484, 8 Abb. Pr. N. S. 330] (as to receiver having general authority to commence actions).

A general statute as to venue of particular actions is held to control an action brought by a receiver to recover property, so as to require the removal of the action, on defendant's motion, to the county in which the property is situated. Thompson *v.* Heidenrich, 66 How. Pr. (N. Y.) 391.

Process running to another county.—Where, upon failure of the stock-holders of a corporation to pay assessments due from them on their respective shares of the capital stock, a receiver of such corporation may join all the defendants in one action, he may commence it in the county where a part of them reside, and the jurisdiction of the circuit court of that county can be extended to those residing in another county, by issuing and serving upon each the proper process. Carnahan *v.* Campbell, 158 Ind. 226, 63 N. E. 384; Gainey *v.* Gibson, 149 Ind. 58, 48 N. E. 633.

Territorial limit of receiver's authority see *infra*, VIII, A.

42. White *v.* Ewing, 159 U. S. 36, 15 S. Ct. 1018, 40 L. ed. 67; Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815; *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689; Brown *v.* Allebach, 156 Fed. 697; Ledoux *v.* La Bee, 83 Fed. 761.

43. Kehr *v.* Hall, 117 Ind. 405, 20 N. E. 279; Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716 (*infra*, note 44); Boyle *v.* Townes, 9 Leigh (Va.) 158.

A statutory receiver can maintain no action other than those specifically provided for in the statute which authorizes his appointment and fixes his powers. State *v.* Gambs, 68 Mo. 289.

44. Conley *v.* Deere, 11 Lea (Tenn.) 274 [*distinguishing* Cagill *v.* Wooldridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716, in that there a receiver appointed by a court in another state had shipped property, of which he had taken possession under the order of the court appointing him, into Tennessee, and it was held that he might maintain replevin as against a party to the suit, who had attached the property in Tennessee, the receiver having a special property and right of possession], holding that where after judgment and execution at law, goods of the debtor were attached by another, under a bill in the chancery court, and a receiver was appointed in the latter suit, subsequent to which the execution was levied, the receiver could not maintain replevin, although such levy might have subjected the party to be committed for contempt.

A receiver of a corporation, having title to the personal property of the corporation, may maintain replevin to get such property into his possession. Miller *v.* Mackenzie, 29 N. J. Eq. 291.

45. Nealis *v.* American Tube, etc., Co., 150 N. Y. 42, 44 N. E. 944.

Action against stock-holder — *In general.*— The remedy of a receiver suing in the right of the corporation to enforce the liability of a shareholder to the corporation for an unpaid subscription is by an independent action against the delinquent shareholder. Frank *v.* Morrison, 58 Md. 423 (receivers to wind up the affairs of a corporation with directions to collect all outstanding indebtedness, etc.); Stillman *v.* Dougherty, 44 Md. 380 (upon dissolution of corporation under statute giving receiver right to recover and vesting him with title); Basting *v.* Ankenny, 64 Minn. 133, 66 N. W. 266 (receiver of corporation in sequestration proceedings, where the call was made before the receivership, holding that in such a case the statutory provision for ascertaining debts and enforcing subscription in a suit by creditors against stock-holders did not provide an exclusive remedy);

But it has been held that he is entitled to no privilege not accorded to other suitors in respect of the method of instituting adverse proceedings,[46] and he has been denied the right to maintain a suit in equity upon a purely legal cause of action.[47]

(II) *IN WHOSE NAME*[48]— (A) *In General.* The rule is not uniform upon the question of the right of the receiver to sue in his own name. The strict technical rule is that a receiver, unless appointed under the provision of a special statute giving him authority to sue, and who acquires no estate or interest in the property in controversy before assignment or transfer to him by the person having the legal title,[49] cannot sue in his own name, and if it becomes necessary for him

Campbell *v.* Chapman, (Miss. 1902) 31 So. 101; Hood *v.* McNaughton, 54 N. J. L. 425, 24 Atl. 497; Barkalow *v.* Totten, 53 N. J. Eq. 573, 32 Atl. 2 [*distinguished* in See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 (*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116, *infra*, this note)] (action at law); Whittlesey *v.* Frantz, 74 N. Y. 456; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Dayton *v.* Borst, 31 N. Y. 435; Rankine *v.* Elliott, 16 N. Y. 377; Mann *v.* Pentz, 3 N. Y. 415; Calkins *v.* Atkinson, 2 Lans. 12; Walsh *v.* Seager, 1 N. Y. St. 189; Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518, 49 N. E. 695; Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089.

Several stock-holders should not be joined. — Smith *v.* Johnson, 57 Ohio St. 486, 49 N. E. 693.

Motion under statute in lieu of action at law see Reed *v.* Gold, 102 Va. 37, 45 S. E. 868, holding that a motion by a receiver of a corporation for a judgment for money against delinquent stock-holders where, under the statute, a notice takes the place of a writ and declaration, is a compliance with a direction to institute "suits at law."

But under the equitable provisions of the code sometimes the receiver may join all of the delinquent shareholders (Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626; Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647; Walters *v.* Porter, 3 Ga. App. 73, 59 S. E. 452), the court molding its judgment or decree to adapt it to the different liabilities of defendants and properly apportion the amount to be paid by each (Carnahan *v.* Campbell, 158 Ind. 226, 63 N. E. 384; Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633; Cox *v.* Dickie, 48 Wash. 264, 93 Pac. 523, holding that where the receiver of a corporation was by order of court directed to collect by suit from the stock-holders the balance of the unpaid stock held by them, it was not necessary to bring a separate action against each stock-holder, there being no statute requiring it). And see Wyman *v.* Williams, 52 Nebr. 833, 73 N. W. 285, 53 Nebr. 670, 74 N. W. 48.

So the creditors' right to enforce the statutory liability of stock-holders for sums equal to the amounts of stock held by them may be enforced in a suit against all such stock-holders for the purpose of compelling contribution by them. Calkins *v.* Atkins, 2 Lans. (N. Y.) 12.

A suit to ascertain and fix stock-holders' liability and procure an order in effect making a call for unpaid subscriptions may be brought in equity against all the delinquent stock-holders. See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1115, and *distinguishing* Barkalow *v.* Totten, 53 N. J. Eq. 573, 32 Atl. 2, *supra*, this note, in that there the court had already made an order authorizing the receiver to call in the whole amount of the unpaid subscriptions, after notice to each of the parties and this gave rise to an action at law against each of such parties severally].

And to prevent a multiplicity of suits and because of the inadequacy of the remedy at law, it is held that a receiver of an insolvent corporation may maintain a suit in equity to collect an assessment made against the stock-holders, joining a number of stock-holders as defendants, where defendants are numerous, and the assessments are less than the full legal liability of defendants, and are comparatively small, so that the cost of separate actions would be disproportionate to the amount recovered in many cases, and where from all the circumstances it appears that a single suit will best subserve the substantial interests of all parties. Brown *v.* Allebach, 156 Fed. 697 [*distinguishing* Hale *v.* Allison, 102 Fed. 790 (*affirmed* in 106 Fed. 258, 45 C. C. A. 270 [*affirmed* in 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380]), and Tompkins *v.* Craig, 93 Fed. 885, in which cases it was held that the suit was to collect the amount of the statutory liability, in which no question remained in which defendants had a common interest, and was merely an aggregation of separate suits, each involving separate issues and having little relation to each other, except that there was a common plaintiff, and in each of which a remedy at law was adequate].

Collection of statutory liability see *infra*, VI, B, 3.

Enforcement of liability generally see CORPORATIONS, 10 Cyc. 510 *et seq.*

46. State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450, holding that the receiver of an insolvent bank cannot recover moneys of the bank, received by one of its creditors subsequently to his appointment, on petition, but only by bill.

47. Freeman *v.* Winchester, 10 Sm. & M. (Miss.) 577; Curtis *v.* McIlhenny, 58 N. C. 290; Smith *v.* Sloss Marblehead Lime Co., 57 Ohio St. 518, 49 N. E. 693.

48. Amendment see *infra*, VI, E, 2, a.

Parties in particular capacities see PLEADING, 31 Cyc. 99.

49. See *supra*, IV, D, 2, a *et seq.*

to defend [50] or sue he must do so, if at all, in the name of the person who had the legal right or the legal title to recover at law.[51] The practice was for the receiver to apply to the court for an order to prosecute which was obtained on notice to the person whose name was to be used,[52] and he will be compelled to allow the use of his name upon being properly indemnified out of the estate and effects under

Notes indorsed in blank which belong to a bank and come into the hands of its receiver may be sued on in his name, as indorsee, without specifying his character as receiver. Haxton *v.* Bishop, 3 Wend. (N. Y.) 13.

Assignment to receiver personally.— If the assignment of a mortgage does not designate the assignee to be receiver, the fact of his being receiver, if set up in an answer, would put no difficulty in the way of a decree on a bill in the individual name of the assignee, unless a defense is set up against the corporation for whose creditors and stock-holders he was receiver. Mann *v.* Bruce, 5 N. J. Eq. 413.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1469.

50. Smith *v.* U. S. Express Co., 135 Ill. 279, 25 N. E. 525.

51. *Indiana.*— Moriarty *v.* Kent, 71 Ind. 601; Garver *v.* Kent, 70 Ind. 428; Manlove *v.* Burger, 38 Ind. 211; Horton *v.* Smelser, 5 Blackf. 428, contract not made or assigned to receiver.

Massachusetts.— Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712.

Mississippi.— Newell *v.* Fisher, 24 Miss. 392. See also Freeman *v.* Winchester, 10 Sm. & M. 577.

Missouri.— State *v.* Gambs, 68 Mo. 289.

New York.— Merritt *v.* Merritt, 16 Wend. 405.

North Carolina.— Battle *v.* Davis, 66 N. C. 252.

Ohio.— Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 4 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

Pennsylvania.— Singerly *v.* Fox, 75 Pa. St. 112; Yeager *v.* Wallace, 44 Pa. St. 294 (holding that a receiver of partnership effects cannot maintain trover in his own name for a conversion committed before his appointment, but must sue in the name of the firm); Wisener *v.* Myers, 3 Pa. Dist. 687.

Vermont.— King *v.* Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

Wisconsin.— King *v.* Cutts, 24 Wis. 627, holding that under this rule an action of unlawful detainer under a statute giving the remedy to the lessor, his heirs, executors, administrators, or assigns, could not be brought by a receiver in his own name who was appointed pursuant to the general powers of the court, no assignment of legal interest being made and such receiver not being an assignee under such statute.

United States.— Harland *v.* Bankers', etc., Tel. Co., 32 Fed. 305; Dick *v.* Struthers, 25 Fed. 103.

Canada.— McGuin *v.* Fretts, 13 Ont. 699, holding that the right cannot be conferred by order.

See 42 Cent. Dig. tit. "Receivers," § 346.

Contra.— Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26; Campton *v.* Schwabacher, 15 Wash. 306, 46 Pac. 338; Hardin *v.* Sweeney, 14 Wash. 129, 44 Pac. 138.

Rule applied to receivers of corporations see Moriarty *v.* Kent, 71 Ind. 601; Garver *v.* Kent, 70 Ind. 428 (which cases deny the right of a receiver of an insolvent corporation to sue in his own name on promissory notes executed to the corporation); Manlove *v.* Burger, 38 Ind. 211; Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712; Dick *v.* Struthers, 25 Fed. 103 (holding that in Pennsylvania a receiver of a corporation was a mere custodian of its property). The practice in Massachusetts seems not to have been uniform prior to the cases above cited. See Parker *v.* Nickerson, 137 Mass. 487 (where the suit was in the name of the receiver); Farmers', etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592 (where the suit was in the name of the corporation).

Alleging authority or character of receiver. — In Niagara Bank *v.* Johnson, 8 Wend. (N. Y.) 645, it was held that after dissolution the receiver of a bank can institute a suit in its name for a cause which accrued before the dissolution if it is averred that the suit is brought by the direction of the receiver. But in Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733, it is held that the receiver need not be joined as a party nor need his name be disclosed in the petition. Under a statute providing that a receiver of a corporation whose franchises are forefeited shall have powers and duties of special commissioners conferred by another act which gave such commissioners power to sue for and collect any claims, etc., in the name of the corporation for the use of its creditors, etc., it was held that the right to prosecute a suit in the name of the corporation is in the receiver only, the corporation no longer existing, and that when he uses the corporate name as plaintiff he must set forth sufficient to show the character in which he appears because otherwise suits might be prosecuted by unauthorized persons without right, against law and in violation of the rights of creditors, etc. Miami Exporting Co. *v.* Gano, 13 Ohio 269.

52. Merritt *v.* Merritt, 16 Wend. (N. Y.) 405 [*affirming* 5 Paige 125]; King *v.* Cutts, 24 Wis. 627. See also Pitt *v.* Snowden, 3 Atk. 750, 26 Eng. Reprint 1230; Hughes *v.* Hughes, 3 Bro. Ch. 87, 29 Eng. Reprint 422, 1 Ves. Jr. 161, 30 Eng. Reprint 281.

The court may control the receiver's action in this respect and refuse to allow him to

the control of the court,[53] and may be enjoined from discontinuing, releasing, or restraining the action.[54] Mere leave to sue is held not to be sufficient to authorize suit in the receiver's name,[55] and when, in the absence of a statute, it is proposed to vest in a receiver the right to collect, in his own name, a promissory note, the legal title to which is in another, such power would not be conferred by an order appointing a receiver, and authorizing him to collect the note.[56] On the other hand, where a receiver is by force of the decree vested with the whole property which is directed to be put into his hands, and in equity he has the whole title without an assignment, in order to enable him to perform his trust he may *suo motu*, and without special leave, bring suits to possess himself of the property, incurring no risk except as to costs;[57] and authority to sue personally may depend either upon statute or the order of the court, the theory that the receiver does not become invested with the legal title to choses in action being regarded as unnecessarily technical.[58] So under various statutory provisions,

proceed in the name of another, and restrain him from so proceeding. Merritt *v.* Merritt, 16 Wend. (N. Y.) 405 [*affirming* 5 Paige 125]; Della Cainea *v.* Hayward, McClell. & Y. 272.

53. Battle *v.* Davis, 66 N. C. 252 [*citing* 3 Daniell Ch. Pr. 1977, 1991] (holding that the code in that state had not changed the rule); Dacie *v.* John, McClell. 575; Stuart *v.* Grouch, 14 Ont. 255; McGuin *v.* Fretts, 13 Ont. 699; Mones *v.* McCallum, 17 Ont. Pr. 398 [*reversing* 17 Ont. Pr. 356] (holding that a receiver appointed by the court to aid a judgment creditor in recovering his claim, by receiving the judgment debtor's share in an estate which could not be reached by execution, after the refusal of the judgment debtor to allow the use of his name, was authorized, on giving security to him, to take proceedings in his name for the administration of the estate, and if necessary for the removal of the executor).

If there is no person in whose name the action can be brought it is said: "It may be that there would be jurisdiction to direct the action to be in the name of the receiver, as was suggested by Jessel, M. R., in Hills *v.* Reeves, 31 Wkly. Rep. 209, and as appears to be also indicated by the Irish M. R. in Acheson *v.* Hodges, 3 Ir. Eq. 523. But apart from special circumstances I find no authority for giving permission to the receiver to sue in his own name in respect of a right of action which is vested in another." McGuin *v.* Fretts, 13 Ont. 699, 702.

When such person is insolvent his name may be used without giving security for costs. McGuin *v.* Fretts, 13 Ont. 699.

54. Matter of Merritt, 5 Paige (N. Y.) 125 [*affirmed* in 16 Wend. 405].

55. Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Battle *v.* Davis, 66 N. C. 252.

56. Leonard *v.* Storrs, 31 Ala. 488; Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725.

57. Iddings *v.* Bruen, 4 Sandf. Ch. (N. Y.) 417; Green *v.* Bostwick, 1 Sandf. Ch. (N. Y.) 185; Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510. In Wray *v.* Jamison, 10 Humphr. (Tenn.) 186, suit was commenced by warrant before a justice of the peace, defendant being summoned "to answer the complaint of Young B. Jones, the receiver of the accounts of Gideon B. Wray and William Price, partners in trade," and in the circuit court, at the first term after the appeal, the warrant was amended by striking out the words "Young B. Jones, receiver of the accounts of," and it was held that the necessary effect of the delivery of the account sued for to Jones, as receiver under the appointment of a court of chancery, was to vest him, in that character, with such an interest in the debt to be recovered that he alone could sue therefor, and consequently to divest Wray and Price of the right to maintain any suit for the recovery of the same; that it resulted therefore that upon the name of Jones being struck out of the warrant, there was left no party plaintiff to further prosecute the suit, and of necessity the case was at an end.

Successive receiver without assignment.—Where a receiver of a corporation takes a bond and mortgage in settlement of a debt, due the corporation, a successor receiver in whom all the assets of the corporation are vested by the order of the court may, without assignment from the original receiver, sue in his own name in equity to enforce the equitable right in the bond and mortgage. Iglehart *v.* Bierce, 36 Ill. 133.

Receiver in suit for dissolution of partnership see PARTNERSHIP, 30 Cyc. 731.

58. Evans *v.* Pease, 21 R. I. 187, 42 Atl. 506 [*citing* De Wolf *v.* A. & W. Sprague Mfg. Co., 11 R. I. 380, where it is said that the uniform practice in that state had been for receivers to sue in their own names, and that while in perhaps all of the cases the receivers had been appointed under provisions of statute, impliedly or expressly giving authority, there was no reason why the rules of pleading should be any different as to those appointed under the authority of the court].

In a suit in equity, in its nature in rem, when a receiver is appointed, the right to the custody of the property in controversy vests in him immediately upon the filing of his bond, and he may, by order of court, bring a suit for it in his own name. Noyes *v.* Rich, 52 Me. 115.

Real party in interest.—A receiver in chan-

receivers are authorized to sue in their own names or as receivers,[59] and the prac-

cery, having been ordered by the chancellor to collect the notes and debts due to a partnership, which the parties themselves were enjoined from collecting, may maintain an action on such notes in his own name, as the party really interested under the code provisions. Leonard *v.* Storrs, 31 Ala. 488. In North Carolina it is held that under a system in which legal and equitable rights are administered in separate tribunals, a court of equity could not confer upon a receiver or officer of its own appointment, a capacity to sue not recognized in a court of law; that the decision in Battle *v.* Davis, 66 N. C. 252, *supra*, note 55, rests upon this distinction, and that it is otherwise under the present procedure, which requires the party in interest to sue in his own name. Davis *v.* Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322; Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389; Gray *v.* Lewis, 94 N. C. 392.

Denial of title to note see Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761, *infra*, VI, C, note 50.

59. See the statutes of the several states. And see the following cases:

Arkansas.— Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816.

California.— Daggett *v.* Gray, (1895) 40 Pac. 959.

Illinois.— Rowell *v.* Chandler, 83 Ill. 288, receiver appointed under decree of dissolution of corporation.

Indiana.— Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231, holding that the statute conferring upon the receiver appointed to wind up the affairs of the corporation authority to sue in the name of the corporation or otherwise is sufficient to authorize him to sue in his own name to collect a debt due the corporation, without any specific authority from the court.

Kansas.— McDonald *v.* Carney, 8 Kan. 20.

Minnesota.— Hause *v.* Newel, 60 Minn. 481, 62 N. W. 817, holding that a receiver under the statute in that state for the sequestration of the assets of an insolvent corporation is a trustee of an express trust and therefore may sue in his own name to collect the assets of the company.

New Jersey.— Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436 (receiver of an insolvent corporation who has title to the corporate property); Miller *v.* Mackenzie, 29 N. J. Eq. 291.

New York.— Whittlesey *v.* Delaney, 73 N. Y. 571 (action in name of receiver of corporation to vacate a judgment against it); Rankine *v.* Elliott, 16 N. Y. 377 (under Laws (1845), §§ 90, 91); Wilson *v.* Allen, 6 Barb. 542 (where it appears that under the act of 1845 receivers were authorized to sue in their own names whether the demand was transferred by assignment or by force of the order of appointment, and it was held that the principle of the statute was carried out by provision of the code requiring every action to be prosecuted in the name of the real party in interest); Gillet *v.* Fairchild, 4 Den. 80; Nathan *v.* Whitlock, 9 Paige 152 [*affirming* 3 Edw. 215] (where the receiver of a corporation is vested with all the title of the property of the company, under the statute vesting him with all the rights given by law to trustees or assignees of insolvent debtors, under which it was held that the receiver of the corporation may file a bill in his own name against a debtor of the corporation whose debt had been fraudulently discharged).

Ohio.— Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633 (showing code provision conferring power on receiver to bring and defend suits "in his own name, as receiver"); Sayle *v.* Guarantee Sav., etc., Co., 25 Ohio Cir. Ct. 503 (holding that under statutory provisions in that state, designating particular instances in which a receiver of a corporation may be appointed and adding, "in all other cases where receivers have heretofore been appointed by the usages in equity," and also providing that the receiver shall have power to bring and defend actions in his own name, etc., there is no greater reason why a receiver of an insolvent corporation or one appointed by the usages of equity should not maintain an action in his own name to set aside a transfer of securities by the insolvent corporation, than that a receiver of a dissolved corporation should not do so).

Texas.— Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015, where the statute expressly confers authority upon a receiver to sue in his own name.

United States.— Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 234, 44 Conn. 558, receiver under the statute for winding up the affairs of a corporation.

See 42 Cent. Dig. tit. "Receivers." § 346.

In name of receiver or of corporation.— The court may authorize the receiver of a corporation to sue in his own name or in the name of the corporation. Barber *v.* International Co. of Mexico, 74 Conn. 652, 51 Atl. 857, 92 Am. St. Rep. 246. See also as to receivers of banks BANKS AND BANKING, 5 Cyc. 561 text and notes 50–52, 603 text and note 42.

Power to sue "under the control of the court."— Under a statute providing that a receiver shall have power "under the control of the court," to bring actions in his own name as receiver, etc., it was held that where a motion was made in the court having full control of the receiver, which proceeded to hear the testimony and dispose of the matter, the consent of the court was given in as marked a manner as it could be. Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670. But under such a statute it is held that a receiver cannot sue in his own name for the collection of corporate assets or in matters pertaining to the receivership, unless he is authorized by an order of he court to do so. Garver *v.* Kent, 70 Ind. 428; Manlove *v.* Burger, 38 Ind. 211;

tice of permitting a receiver to sue in his own name is also approved under general authority of the statute to sue,[60] or under implied authority under provisions generally directing him to collect assets,[61] or under a decree authorizing it,[62] where the statute gives the court power to make such order,[63] or under a decree which in general terms confers authority to sue,[64] or to collect assets.[65]

(B) *Right Accruing to Receiver.* Where a cause of action accrues to the receiver himself, he may sue in his own name to recover thereon.[66]

Rhodes *v.* Hilligoss, 16 Ind. App. 478, 45 N. E. 666.

Right confined to cases provided for.— The right of a receiver to sue in his own name has been confined to the particular case provided for by the statute. Garver *v.* Kent, 70 Ind. 428; State *v.* Gambs, 68 Mo. 289.

In tort or contract see *infra*, note 74.

60. Frank *v.* Morrison, 58 Md. 423; Hayes *v.* Brotzman, 46 Md. 519 (in which cases it is further held that a decree authorizing a receiver to prosecute suits at law and in equity is sufficient authority for him to sue in his own name on a cause of action arising before his appointment); Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

61. Wilkinson *v.* Rutherford, 49 N. J. L. 241, 8 Atl. 507 (where the court refused to assent to the doctrine that a receiver appointed by the chancellor to collect the assets of an insolvent corporation was a mere custodian of the property and said that he was rather an assignee of the assets within the scope of his office and that there was no reason why his power should not be held to be coextensive with his functions); De Wolf *v.* A. & W. Sprague Mfg. Co., 11 R. I. 380 (under a statute requiring the receiver of a corporation to "collect debts" and investing him with the powers of a corporation for that purpose). See also Baker *v.* Cooper, 57 Me. 388 (as to the right of a receiver to maintain forcible entry and detainer in his own name, the court saying that the object of the suit is to obtain possession of the real estate in question for the receivers, and not for the bank; that a suit in the name of the bank would not accomplish that purpose, for the execution, or writ of possession, if one was obtained, would require the officer executing it, to put the bank, and not the receivers, into possession); Frankle *v.* Jackson, 30 Fed. 398 (holding that a receiver, duly appointed to take charge of the property, affairs, and business of a corporation, is a proper party, in whose name suits by or against the corporation may be conducted).

The receiver of a national bank, appointed by the controller of the currency under the federal statute, is held to have the right to sue under the construction of the federal statute as impliedly authorizing suit either in the receiver's name or where the common-law forms of pleading prevail in the name of the bank to his use. Beckham *v.* Hague, 44 N. Y. App. Div. 146, 60 N. Y. Suppl. 767, referring to the construction of the statute by the federal courts, as to which see the cases cited in BANKS AND BANKING, 5 Cyc. 603 note 42. And in Peters *v.* Foster, 56 Hun (N. Y.) 607, 10 N. Y. Suppl. 389, 18 N. Y. Civ. Proc. 380, the construction rendered in the federal cases above referred to was approved, but it was further held that under the provisions of the New York code expressly excepting from the provision of the statute that actions must be prosecuted in the name of the real party in interest, persons expressly authorized by statute to sue, applied to such receiver.

62. Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447.

63. Gill *v.* Balis, 72 Mo. 424, power of the court to direct a receiver to bring a suit in his own name for the assets of the company under a provision authorizing the court to appoint receivers for certain insolvent companies and to make such orders and decrees as may be needful to enable it to perform its duty of winding up the affairs of the corporation.

64. Hardwick *v.* Hook, 8 Ga. 354, holding that a receiver ordered to sue for hire of slaves accruing pending the litigation, being substituted in the place of a true owner, is subrogated to all his rights. The receiver of a corporation empowered by the decree to sue for and collect its assets may sue in his own name on a chose in action payable to the corporation. Evans *v.* Pease, 21 R. I. 187, 42 Atl. 506. He is clothed with sufficient equitable title and fiduciary power to maintain a suit in equity to foreclose a mortgage given to the corporation under a decree authorizing and directing him to institute such suits at law and in equity as may be necessary, etc., but the corporation must be before the court as a complainant or a defendant in order to bind the title. Comer *v.* Bray, 83 Ala. 217, 3 So. 554.

65. Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132, where it is said that the rule that a receiver cannot sue in his own name is predicated upon the idea that a common-law receiver is a mere custodian of the property and that courts of chancery when called upon to authorize their receivers to proceed in an action at law were necessarily compelled to conform to the rules of the common-law courts; but that while a common-law receiver is not an assignee, it is an inaccurate statement of his relation to the property to say that he is a mere custodian; that he is, for the time being and for the purpose of the administration of the assets, the real party in interest and there is no reason why the suit should not be instituted in his own name.

66. Daggett *v.* Gray, (Cal. 1895) 40 Pac. 959; Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378; Pouder *v.* Catterson, 127 Ind. 434, 26 N. E. 66; *Ex p.* Harris, 2 Ch. D. 423, 45

c. Security For Costs. The matter of requiring security for costs is generally one of statutory regulation.[67] A receiver may be required to give such security when he comes within the description of those who, under the statute, may be required by the court to do so.[68] Where the order is discretionary,[69] under a statute which provides for the awarding of costs in an action by or against a receiver as in an action by or against one prosecuting or defending his own right,[70] but that they shall be exclusively chargeable upon and collectable from the estate, etc., unless the court shall direct them to be paid by the party personally, for mismanagement or bad faith in the prosecution or defense of the action, it is held that the receiver will not be required to give security merely because he is without funds, unless the action is brought in bad faith or heedlessly and without probable prospect that he will succeed.[71] The security for costs which a defendant may require from a non-resident plaintiff has been held to be demandable as a matter of right, as against a receiver of a national bank;[72] but it has been held further that the federal statute providing that no security for costs shall be required from the United States or any party acting by direction of any department of the government applies to an action by the receiver of a national bank, brought in the federal court.[73]

L. J. Bankr. 71, 34 L. T. Rep. N. S. 261, 24 Wkly. Rep. 851, recovery of sum due for goods sold by receivers. See also Philadelphia, etc., Coal, etc., Co. *v.* Schada, 11 Wkly. Notes Cas. (Pa.) 20.

Recovery of goods or damages for conversion, where the goods were taken out of his actual possession, may be had in action by receiver in his own name. State *v.* Gambs, 68 Mo. 289; Singerly *v.* Fox, 75 Pa. St. 112.

67. See COSTS, 11 Cyc. 170.

68. Gifford *v.* Rising, 48 Hun (N. Y.) 128, 14 N. Y. Civ. Proc. 172 (holding that a receiver in supplementary proceedings is a trustee of an express trust, and also a person expressly authorized to sue, within the meaning of a code provision giving the court the right to require security for costs from persons of such character); Kimberly *v.* Stewart, 22 How. Pr. (N. Y.) 281 (receiver in supplementary proceedings).

69. Briggs *v.* Vandenburgh, 22 N. Y. 467, holding that an order requiring a receiver of an insolvent corporation to give security for costs, under a statute which made such order discretionary in the cases mentioned therein, was not appealable.

70. See *infra*, VI, H, 4.

71. Hale *v.* Mason, 86 Hun (N. Y.) 499, 33 N. Y. Suppl. 789 (the rule applied to a receiver, where the action was commenced by the corporation before his appointment, and he was about to bring it to trial in the name of the original parties, when upon defendant's motion he was substituted as party plaintiff); De la Fleur *v.* Barney, 45 Misc. (N. Y.) 515, 92 N. Y. Suppl. 926; Ridgway *v.* Symons, 14 Misc. (N. Y.) 78, 35 N. Y. Suppl. 197, 25 N. Y. Civ. Proc. 23; Cahn *v.* Sugenheimer, 57 N. Y. Suppl. 406; Kimberly *v.* Stewart, 22 How. Pr. (N. Y.) 281 (which cases are decided upon construction of the code provisions then prevailing).

In Canada, where a receiver was appointed for an insolvent incorporated company by the chancery court and was authorized to proceed in an action at law which had been commenced by the corporation, it was held that neither the company nor the receiver should be ordered to give security for costs. Provincial Ins. Co. *v.* Gooderham, 14 Can. L. J. N. S. 121 [*citing* United Ports, etc., Ins. Co. *v.* Hill, L. R. 5 Q. B. 395, 39 L. J. Q. B. 227, 23 L. T. Rep. N. S. 14, 18 Wkly. Rep. 980, where in an action in the name of a company which was being wound up, brought under the direction of an official liquidator, security for costs was denied].

72. Beckham *v.* Hague, 44 N. Y. App. Div. 146, 60 N. Y. Suppl. 767, holding that such a receiver appointed by the controller of the currency, under the federal statute, is not an official assignee, trustee of an express trust, or person expressly authorized by statute to sue, within the provision of the New York code of civil procedure declaring that in actions by or against such persons the court may in its discretion require security for costs. *Compare* Peters *v.* Foster, 10 N. Y. Suppl. 389, 18 N. Y. Civ. Proc. 380, *supra*, note 61.

73. Pepper *v.* Fidelity, etc., Co., 125 Fed. 822, where it is indicated that but for this provision the state statute requiring security for costs would be applied in the federal court.

A different view of this statute is taken in Platt *v.* Adriance, 90 Fed. 772, where the suit was brought in another jurisdiction than that in which the receiver was appointed, and the decision was based upon the provision of the federal statute that "in case of an adverse decision, such costs as by law are taxable against . . . the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted," the court holding that it did not appear that in the event of an adverse decision the costs taxed against the receiver could be paid from the contingent fund of such department as contemplated by this clause; that the act contemplated a more specific direction than arises from the receivers acting

B. Rights and Causes in Receiver — 1. As Representing Parties in General — a. Rules Stated. The general rule is that a receiver takes the rights, causes, and remedies which were in the corporation, individual or estate whose receiver he is, or which were available to those whose interests he was appointed to represent;[74] and a receiver representing all the parties to a subscription to a common purpose may maintain an action against one of the persons so represented for a sum due from that one to the whole body represented, although defendant may

under the controller's direction, and that it did not intend to relieve receivers of national banks from the ordinary obligation of non-resident litigants when they do not act under such direction as will make the treasury department's contingent funds liable for costs.

74. *Alabama.*— Pearce *v.* Gamble, 72 Ala. 341, maintaining the right of a receiver of a client to enforce a trust resulting from the purchase by an attorney of land at a sale under the client's execution.

Georgia.— Moise *v.* Chapman, 24 Ga. 249.

Illinois.— Burch *v.* West, 33 Ill. App. 359 [*affirmed* in 134 Ill. 258, 25 N. E. 658].

Indiana.— Davis *v.* Talbot, 137 Ind. 235, 36 N. E. 1098, receiver of corporation may be directed to sue for specific performance of contract of the corporation for the purchase of land, under a statutory provision that the authority of a receiver to sue and to perform other acts respecting the property is under the control of the court.

Maine.— Noyes *v.* Rich, 52 Me. 115.

Michigan.— Detroit Electric Light, etc., Co. *v.* Applebaum, 132 Mich. 555, 94 N. W. 12, authority to sue for property of corporation alleged to have been stolen, although previous to the suit the assets of the corporation had been sold by the order of the court by the receiver in a trust capacity.

New Jersey.— Beebe *v.* Geo. H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168; See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1115]; Terhune *v.* Bell, (Ch. 1887) 9 Atl. 111, right of receiver in creditors' suit to file a bill for the collection of money held in trust for the debtor.

New York.— Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; Bien *v.* Bixby, 18 Misc. 415, 41 N. Y. Suppl. 433 (right of temporary receiver of corporation under Code Civ. Proc. §§ 1784, 1788, to redeem premises of which the corporation lessee had been dispossessed, under a statute providing for redemption generally); Bowen *v.* Medina First Nat. Bank, 34 How. Pr. 408 (right to move to set aside irregular attachment); Coope *v.* Bowles, 28 How. Pr. 10; Leavitt *v.* De Launay, 4 Sandf. Ch. 281 [*reversed* on other grounds in 4 N. Y. 363] (right of receiver of corporation to avoid usurious transactions).

Ohio.— Smith *v.* Johnson, 57 Ohio St. 486, 49 N. E. 693; Andrews, etc., Iron Co. *v.* Smead Heating, etc., Co., 5 Ohio S. & C. Pl. Dec. 292, holding that where two corporations are insolvent, and in the hands of receivers, and one of whom is asserting a mechanic's lien against the other, the receiver asserting the claim has the same right which the corporation of which he is receiver would have had, were both corporations solvent and in court.

Wisconsin.— Lathrop *v.* Knapp, 37 Wis. 307, 27 Wis. 214.

United States.— Tilford *v.* Atlantic Match Co., 134 Fed. 924 (to the same effect as the case last above cited); King *v.* Pomeroy, 121 Fed. 287, 58 C. C. A. 209; Schultz *v.* Phenix Ins. Co., 77 Fed. 375 [*reversed* in 80 Fed. 337, 25 C. C. A. 453, upon other points] (right to sue for performance of contract of insurance on corporate property); Movins *v.* Lee, 30 Fed. 298 [*affirmed* in 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662].

See 42 Cent. Dig. tit. "Receivers," § 320.

Receiver to collect rents.— Where a receiver was appointed to receive rents pending litigation between a market company and its tenants, but had no authority to relet in case of abandonment by the tenant, and one tenant failed to pay rent, and abandoned his stall, and the market company let the abandoned stall to a new tenant, a suit against the latter tenant for rent should be maintained by the company rather than by the receiver. Washington Market Co. *v.* Warthen, 2 Mackey (D. C.) 432.

Tort or contract.— There is no greater reason for allowing a receiver of a corporation to recover damages in his own name for the breach of a contract made with the corporation than there is for allowing him to recover damages in his own name for the wrongful withholding of the property of the corporation in another form. Gillet *v.* Fairchild, 4 Den. (N. Y.) 80 (holding that the terms "choses in action," and "things in action," in a statute empowering a receiver of an insolvent corporation to sue for "all . . . things in action," embrace demands arising out of tort); Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 234, 44 Conn. 558.

Right not requiring proof of title.— In Felter *v.* Maddock, 11 Misc. (N. Y.) 297, 32 N. Y. Suppl. 292, it was held that a receiver *pendente lite* authorized by order of the court to sue may maintain an action if it can be sustained by proof of possession only without proof of title.

Appointment of receiver.— The receiver of a corporation which had recovered a judgment may sue for the appointment of a receiver of the assets of the judgment debtor. Wright *v.* Nostrand, 94 N. Y. 31.

Legal representative.— A receiver of an insolvent corporation is a "legal representative," within the meaning of a statute providing for the recovery by "the person by

be ultimately entitled to a share in the proceeds of such suit.[75] And, subject to some qualifications and exceptions especially provided for by statute or the rules of equity authorizing a receiver to sue in the interest of creditors,[76] he stands in the shoes of such person or estate and can enforce only such rights and contracts or maintain only such action or defense as could be enforced or maintained by such person or estate;[77] and for the purpose of determining the nature and extent of his title he is regarded as representing only such person or corporation, and in a controversy between the receiver and third parties in respect to the corporate estate, rights of share-holders, and creditors which the corporation or individual

whom it has been paid, or his legal representatives," in twice the amount of illegal interest paid a national bank. Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 12 N. E. 5.

Appointment to collect debts pending suit see *supra*, II, B, 10, a, note 63.

Defenses against receiver see *infra*, VI, C.

To ascertain stock-holders.— Where certain shares of stock of an insolvent corporation had been issued by it in payment for property conveyed to it, which conveyance was thereafter judicially declared void, so that the consideration for the shares of stock wholly failed, and the shares had been transferred to various persons, it was held to be within the court's discretion to grant the receiver leave to file a bill in behalf of the parties interested to determine the rights of such stock-holders; that the receiver of an insolvent corporation holds its property and franchises for the benefit of the creditors, and if a surplus after satisfying the creditors and the expenses of the receivership remains, then for the benefit of the stock-holders, and he may therefore seek to find out who are the stock-holders to whom he may eventually be liable. McMaster *v.* Drew, 70 N. J. Eq. 6, 62 Atl. 559.

75. Lathrop *v.* Knapp, 37 Wis. 307, 27 Wis. 214, receiver in suit for an account of moneys received under a contract whereby subscribers agreed to pay certain sums for the purchase of lands to be located by a committee appointed by the subscribers.

76. Tibbets *v.* Cohen, 116 Cal. 365, 48 Pac. 372. See also *infra*, VI, B, 1, c.

77. *California.*— Tibbets *v.* Cohen, 116 Cal. 365, 48 Pac. 372.

Connecticut.— *In re* Wilcox, 70 Conn. 220, 39 Atl. 163; *In re* New Haven Wire Cases, 57 Conn. 352, 18 Atl. 260, 5 L. R. A. 300; Greene *v.* Sprague Mfg. Co., 52 Conn. 330.

Illinois.— Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; Shinkle *v.* Knoll, 99 Ill. App. 274; Weill *v.* Zacher, 92 Ill. App. 296; Young *v.* Stevenson, 81 Ill. App. 40 [*affirmed* in 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236]; Chicago First Nat. Bank *v.* Baker, 62 Ill. App. 154; Burch *v.* West, 33 Ill. App. 359 [*affirmed* in 134 Ill. 258, 25 N. E. 658]; Atkinson *v.* Foster, 27 Ill. App. 63, 134 Ill. 472, 25 N. E. 528.

Indiana.— State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325; La Follett *v.* Akin, 36 Ind. 1, holding that there was no right of action in a receiver in proceedings supplementary to execution for an injury to the judgment creditor by the wrongful act or omission of an assignee of the judgment debtor; that for this the judgment creditor himself should sue.

Maryland.— Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617.

Minnesota.— Walsh *v.* St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383.

New Jersey.— Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

New York.— Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46; Savage *v.* Medbury, 19 N. Y. 32; Curtis *v.* Leavitt, 15 N. Y. 9, 44; Little *v.* Garabrant, 90 Hun 404, 35 N. Y. Suppl. 689 [*affirmed* in 153 N. Y. 661, 48 N. E. 1105]; Thomas *v.* Whallon, 31 Barb. 172 (as to conditions for enforcement of premium note of mutual insurance company); Williams *v.* Babcock, 25 Barb. 109; Ironwood *v.* Coffin, 39 Misc. 278, 79 N. Y. Suppl. 278; Coope *v.* Bowles, 28 How. Pr. 10.

North Carolina.— Curtis *v.* McIlhenny, 58 N. C. 290.

South Carolina.— Fraser *v.* Charleston, 23 S. C. 373.

Wisconsin.— Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757; McLaren *v.* Milwaukee First Nat. Bank, 76 Wis. 259, 45 N. W. 223, holding that where the president of a corporation who had entire control of its business and disposition of its funds accepted in the name of the corporation a draft drawn on himself making it payable at the bank wherein the corporate funds were deposited, the acceptance was a direction to pay the draft out of such funds and, although the draft was in fact given on account of the president's individual transaction, the corporation was estopped to recover the amount as against the bank after acquiescing in its payment for a number of months and the receiver of the corporation is in no better position than the corporation itself where it does not appear that at the time of the appointment of the receiver the company was insolvent with creditors who became such subsequently to such misappropriation or that the receiver in fact represented creditors of the company existing at the time of the misappropriation.

United States.— Jacobson *v.* Allen, 12 Fed. 454, 20 Blatchf. 525.

See 42 Cent. Dig. tit. "Receivers," § 320.

Action for damages based on fraud.— In Ray *v.* Louisville First Nat. Bank, 111 Ky. 377, 63 S. W. 762, 23 Ky. L. Rep. 717, it is held that the receiver of an insolvent insurance company cannot maintain an action

could not assert are not represented by the receiver.[78] Where the receiver represents the right of the creditor, however, as well as the estate over which he is appointed, the creditor's right should be worked out through the receiver,[79] and he may maintain and defend actions in that right which the corporation itself could not.[80] But he cannot repudiate the lawful acts of the corporation whose

against a bank to recover damages for defendant's false and fraudulent representations as to the company's deposits, whereby the insurance commissioner was induced to give the company a certificate of solvency, authorizing it to continue in business, because the company itself was a party to the fraud and could not maintain the action.

Claims due from debtor.—A receiver who is invested with authority to collect and dispose of assets of the estate is not thereby authorized to sue for the enforcement of a claim against the debtor over whose estate the receiver is appointed. State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325.

A greater amount than could have been recovered by an insolvent corporation cannot be recovered by its receiver. Savage *v.* Medbury, 19 N. Y. 32.

Rescission of contract.— The rule is applied to a receiver of a partnership after dissolution, who seeks the rescission of a contract of purchase, that in an action to rescind a contract it is incumbent upon the party seeking to rescind, in the absence of fraud, as a condition precedent to the right to the relief asked, to have made restoration of the benefits received, or else, upon the trial, to offer to restore such benefits, and that where such restoration has not been made prior to the commencement of an action, willingness and ability to restore must be alleged, and such allegation complied with at the trial. Ironwood *v.* Wickes, 93 N. Y. App. Div. 164, 87 N. Y. Suppl. 554. See also Alexander *v.* Jones, 8 Mo. App. 591; Pierson *v.* McCurdy, 33 Hun (N. Y.) 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615], which cases involve the inability of receivers of corporations to rescind transactions because restoration could not be made. So a court of equity has refused, at the suit of a receiver of a corporation, to rescind a contract between the corporation and four of its directors whereby the corporation and its creditors receive the amount of an assessment upon its stock, and enforce the collection of the amount again from the original subscribers to the stock, while the corporation and its creditors retain the first payment. Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189. But it has been held that the rule that one seeking to avoid a contract for fraud must offer, before suit, to restore whatever he has received under the contract, is inapplicable, as between receivers of a corporation, representing the stock-holders and creditors, and a third person, who has obtained possession of the corporate assets under a voidable contract with the directors. Guild *v.* Parker, 43 N. J. L. 430.

78. Young *v.* Stevenson, 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236; Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992; Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328. See also *In re* Dickworth, L. R. 2 Ch. 578, 36 L. J. Bankr. 28, 16 L. T. Rep. N. S. 580, 15 Wkly. Rep. 858; Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29, 2 Paton App. Cas. 1812 [*cited* in Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328], which cases are as to the right of the liquidators in winding up proceedings, and hold that the rights of creditors are to be enforced by him in the right of the company.

Not assignee for valuable consideration.— In Van Wagoner *v.* Paterson Gaslight Co., 23 N. J. L. 283, in determining that a debtor of an insolvent corporation was equitably entitled to set off a claim against a receiver of the corporation appointed in a proceeding under the statute providing therefor, said that the receiver was not assignee for a valuable consideration in the ordinary sense of the term but is regarded as a voluntary assignee and personal representative of the corporation.

Where an assignee under a voluntary assignment cannot maintain suits for the benefit of creditors which the assignor could not have maintained, a receiver appointed in the place of such assignee to execute the assignment has no greater rights. Fouche *v.* Brower, 74 Ga. 251.

Binding effect of judgment see JUDGMENTS, 23 Cyc. 1248.

79. Northwestern Mut. L. Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89; Terre Haute Nat. State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330 (action to set aside mortgage); Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207. Whenever the law thus disables creditors from helping themselves by the appointment of a receiver, it provides for the enforcement of whatever rights they may possess against the property of the debtor, through the instrumentality of its agent. *In re* Wilcox, 70 Conn. 220, 39 Atl. 163.

Restriction upon right of others to sue see *infra*, VI, B, 6.

80. *Connecticut.*— Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878.

Indiana.— Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725.

Missouri.— Alexander *v.* Relfe, 74 Mo. 495.

Nebraska.— Harrington *v.* Connor, 51 Nebr. 214, 70 N. W. 911.

Texas.— Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Washington.— Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939; Cole *v.* Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. See also McLaren *v.* Milwaukee First Nat. Bank, 76 Wis. 259, 45 N. W. 223.

receiver he is,[81] and a completed transaction, not *ultra vires*, and not infected with fraud so that creditors might impeach it on such grounds, will bind the receiver.[82]

b. Opening, Vacating, and Enjoining Judgments. Upon the principle that a receiver is clothed with such rights of action as might have been maintained by the person over whose estate he is appointed, and to whose rights, for the purposes of litigation, he has succeeded, the receiver of a corporation will be bound by a valid judgment against it,[83] and cannot maintain a suit to set it aside.[84] But the receiver of a corporation, vested with the assets thereof, or with authority of the court, may proceed to have invalid judgments against the corporation opened or vacated,[85] or maintain a suit to vacate and enjoin the collection of fraudulent and collusive judgments where, not being a party to the original action, he has no adequate remedy to move for relief therein.[86]

c. Repudiation of Fraudulent and Invalid Transactions — (i) *In General.* A receiver of an insolvent corporation may repudiate the void contracts made by the corporation,[87] and to the general rule that a receiver takes only the title of the corporation or individual whose receiver he is,[88] there is a recognized exception, under provisions of statute or the rules of equity, which permit a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor in violation of law and in fraud of the rights of creditors, where under such rules the receiver represents the creditors or under such statutory provisions, in proceedings for the administration of the assets of such insolvents, the receiver represents not only the insolvent but also creditors and stock-holders.[89]

United States.— King *v.* Pomeroy, 121 Fed. 287, 58 C. C. A. 209.

See 42 Cent. Dig. tit. "Receivers," § 320.

81. Hyde *v.* Lynde, 4 N. Y. 387.

82. Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20. See also Alexander *v.* Jones, 8 Mo. App. 591.

83. See JUDGMENTS, 23 Cyc. 1248.

84. Burch *v.* West, 33 Ill. App. 359 [*affirmed* in 134 Ill. 258, 25 N. E. 658], judgment against insolvent corporation on valid debts against it, entered without any fraud on the part of the judgment creditors, will not be set aside at the suit of a receiver appointed in proceedings by unsecured creditors to dissolve the corporation, on the ground that the judgments were rendered on warrants of attorney executed by officers of the corporation without authority.

85. Peabody *v.* New England Water Works Co., 184 Ill. 625, 56 N. E. 957, 75 Am. St. Rep. 195 (as to the right of a receiver of an insolvent corporation under the provision of the statute authorizing such receivers to sue and do all things necessary to close up its affairs, to appear and move to reopen judgments obtained by fraud and collusion, for the protection of the corporation and its creditors); Yorkville Bank *v.* Henry Zeltner Brewing Co., 80 N. Y. App. Div. 578, 80 N. Y. Suppl. 839 (where a temporary receiver was authorized, under an order appointing him which vested him with the assets of the company, to proceed to have vacated an invalid judgment entered after his appointment); Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670.

A receiver representing creditors will stand in the shoes of the corporation, however, as to the judgment against the corporation which is a just and legal one, in attacking it in the court in which it was rendered for the purpose of having it set aside because of irregularities merely in procuring it, and if the corporation could not have succeeded in such an application, neither can the receiver. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

Where the judgment is not fraudulent as to all creditors but is valid as against some, it will not be set aside by the court in which it was entered at the instance of the receiver of the corporation against which the judgment was rendered, since the rights of the creditors as to whom the judgment is fraudulent can be protected in the distribution of the assets by the court having control of that matter. Beebe *v.* George H. Beebe Co., 64 N. J. L. 497, 46 Atl. 168.

86. Rogers *v.* Haines, 114 Ala. 50, 21 So. 411; Whittlesey *v.* Delaney, 73 N. Y. 571, holding that the receiver would have no standing in the court in which the action was pending to move for relief. See also Pierce *v.* Mayer, 13 N. Y. Suppl. 343.

Receiver of partnership appointed in a suit by partners in an insolvent firm against their copartners for a dissolution stands in the place of the firm, and cannot question judgments confessed by the firm for the purpose of giving a fraudulent preference. Weber *v.* Weber, 90 Wis. 467, 63 N. W. 757, distinguishing receivers appointed in aid of judgment creditors in supplementary proceedings.

87. Suydam *v.* New Brunswick Bank, 3 N. J. Eq. 276, refusal to order receivers of corporation to compromise a claim against it which claim has been adjudged void by another court.

88. See *supra*, IV, D, 3; VI, B, 1, a.

89. *Connecticut.*— *In re* Wilcox, etc., Co.,

So it is held that a receiver appointed to succeed a deposed executor cannot repudiate his acts, unless for fraud or collusion between the executor and a creditor; but for this purpose he will be invested with all the rights and equities of other

70 Conn. 220, 39 Atl. 163; Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

Indiana.— Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302, 39 L. R. A. 725; State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325, may maintain suit to set aside fraudulent conveyance.

Kentucky.— Industrial Mut. Deposit Co. *v.* Taylor, 118 Ky. 851, 82 S. W. 574, 26 Ky. L. Rep. 802, action, under order of court, against corporation and a creditor whom it has preferred, in contemplation of insolvency.

Maryland.— Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617, where the precise question is not involved but from which it appears the statute gives the receiver in a proceeding for the winding up of a corporation express authority to maintain suits to set aside preferences and void or fraudulent transfers.

Minnesota.— Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418; Bliss *v.* Doty, 36 Minn. 168, 30 N. W. 465; Weston *v.* Loyhed, 30 Minn. 221, 14 N. W. 892, which cases are under an insolvency statute (Gen. Laws 1881, c. 148), the words "assignment" and "assignee" therein being held to include the proceedings by which the property of the insolvent is passed over to the receiver, and he may, under the provisions of the act, avoid "conveyances and payments made and securities given" by his insolvent within four months of his (the receiver's) appointment.

Missouri.—Alexander *v.* Relfe, 74 Mo. 495. *Compare* Alexander *v.* Jones, 8 Mo. App. 591.

New Jersey.— Brockhurst *v.* Cox, 71 N. J. Eq. 703, 64 Atl. 182; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571 [*affirmed* in 50 N. J. Eq. 796, 27 Atl. 1033].

New York.— Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46, 23 N. E. 530, 7 L. R. A. 46; Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272 (in proceeding by attorney-general for dissolution of corporation); Curtis *v.* Leavitt, 15 N. Y. 9 (where the right seems to have been admitted by the parties rather than decided by the court); Gillet *v.* Phillips, 13 N. Y. 114; Gillet *v.* Moody, 3 N. Y. 479; Stiefel *v.* New York Novelty Co., 14 N. Y. App. Div. 371, 43 N. Y. Suppl. 1012, 25 Misc. 221, 55 N. Y. Suppl. 90; Fisher *v.* Andrews, 37 Hun 176; Vail *v.* Hamilton, 20 Hun 355 [*affirmed* in 85 N. Y. 453]; Green *v.* Bostwick, 1 Sandf. Ch. 185 (receiver in judgment creditor's suit). In Forker *v.* Brown, 10 Misc. 161, 30 N. Y. Suppl. 827 [*affirmed* in 159 N. Y. 540, 53 N. E. 1125], it was held that it was only in proceedings instituted for the purpose of the dissolution of a corporation that the title to the corporate property was transferred to the receiver and the corporate existence merged in the receivership, and that this was only by force of the statute for such cases made and provided. And in Buckley *v.* Harrison, 10 Misc. 683, 31 N. Y. Suppl. 999, the court distinguishes permanent receivers from temporary receivers and holds that the latter have no power to disaffirm, and to maintain an action to set aside, transfers of a corporation unless enabled so to do by statute, or power is specifically conferred by the court; and further that assuming that a temporary receiver might bring such an action, he stands in the shoes of the creditor and the statutory provision dispensing with the necessity of a judgment and execution returned unsatisfied as a condition precedent to bringing an action to set aside such conveyance applies only to permanent receivers, and temporary receivers cannot bring the action in the absence of such judgment and execution. But this last case seems not to be fully in accord with later decisions. In Nealis *v.* American Tube, etc., Co., 150 N. Y. 42, 44 N. E. 944, it was held that Code Civ. Proc. § 1788, which gives to a temporary receiver power to collect and receive the debts, etc., of the company, to preserve its property, etc., and to maintain any action or special proceeding for such purposes, vests him with title for the purposes of holding, protecting, and reducing possession of the assets of the company and that he represents the corporation and its creditors as fully as a permanent receiver and may maintain an action to recover money collected under a judgment entered against the company for the purpose of creating an unlawful preference. It appears, however, that the temporary receiver was expressly authorized by order of court to bring the action. See also Farmers' L. & T. Co. *v.* Baker, 20 Misc. 387, 46 N. Y. Suppl. 266.

North Carolina.— See Latta *v.* Catawba Electric, etc., Co., 146 N. C. 285, 59 S. E. 1028.

Ohio.— Monitor Furnace Co. *v.* Peters, 40 Ohio St. 575; Sayle *v.* Guarantee Sav., etc., Co., 25 Ohio Cir. Ct. 503, right of receiver of insolvent corporation, or receiver appointed by the usages of equity, held the same as receivers of dissolved corporations.

Rhode Island.— Hayes *v.* Kenyon, 7 R. I. 136.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 5 Utah 538, 18 Pac. 35, receiver for a corporation which has been dissolved.

Washington.— Washington Mill Co. *v.* Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

United States.— Werner *v.* Murphy, 60 Fed. 769, receiver of a corporation under laws of New Jersey.

See 42 Cent. Dig. tit. "Receivers," §§ 150, 320.

But a receiver in a suit to foreclose mortgage bonds is held not to represent creditors and cannot, in the absence of special circumstances, contest the validity of a lease of corporate property to a director holding nearly all the stock, assented to or ratified by the other directors, who hold all the remaining stock. Tyler *v.* Hamilton, 62 Fed. 187.

creditors or legatees.[90] The particular case should fall clearly within the exception in order to justify the right of the receiver to repudiate antecedent transactions,[91] and a receiver whose right, under the statute in the particular case and order constituting the receivership, is confined to the possession of the property and the rents and profits thereof, has no concern with the title to the property, and no interest in attacking the transfer of such title, so long as his right to possession is unquestioned and there is no interference with him in the exercise of his powers.[92]

(II) *Invalid and Defective Mortgages.* A mortgage which is good as between the parties to it, notwithstanding defects, is held to be good as against the receiver of the mortgagor,[93] and in a suit in which the receiver does not represent creditors, or others than those over whose property he is appointed, he cannot

And a receiver of an insolvent partner cannot maintain an action to set aside as preferential, and hence fraudulent, a conveyance of property belonging to the firm given to secure firm debts, as such conveyance is not a preference, the property being subject to the firm debts before the individual creditors of the parties could resort to it. Masterman *v.* Lumbermen's Nat. Bank, 61 Minn. 299, 63 N. W. 723.

Fraud on public.—Where a bank financially embarrassed organized a safe-deposit company to aid the bank, after which both bank and trust company became insolvent, it was held that the receiver of the trust company could recover of the bank's receiver funds taken from the trust company and used by the bank on the ground that the organization and use of the trust company was a fraud on the public. Fisher *v.* Adams, 63 Fed. 674, 11 C. C. A. 396.

In Illinois the exception applied in the foregoing cases in this note seems not to have been recognized to its fullest extent in some of the decisions. Gottlieb *v.* Miller, 154 Ill. 44, 39 N. E. 992; Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328 (where a receiver in a proceeding by a state auditor to wind up a corporation, under a statute defining the receiver's powers and property rights to be to take charge of the estate and effects of the company, to collect the debts due it, to prosecute and defend suits in its name or in his own name, and to do all acts necessary for the collection and distribution of the assets, was held to represent the corporation only. The court referred to other cases as falling in one or another of the four classes following: Where the receiver, by force of some statute, can act for the creditors; where the act complained of was *ultra vires*, and not binding upon the corporation; where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance and to secure whose claims he was appointed; and where the receiver was suing for property or assets that belonged to the debtor, and said that with the law of such cases it had no fault to find); Cohn *v.* Waters, 83 Ill. App. 387; Young *v.* Stevenson, 81 Ill. App. 40 [*affirmed* in 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236]. But in Peabody *v.* New England Waterworks Co., 184 Ill. 625, 56 N. E. 957, 75 Am. St. Rep. 195 [*distinguished* in Ross *v.* Sayler, 104 Ill. App. 19, in that the fraud relied on in that case took place after the appointment of the receiver and after the assets of the insolvent had come to his hands], under powers similar to those of the receivers in the cases cited above in support of the text, and relying upon the principle applied in some of those cases, it was held that the receiver of the corporation might protect the rights of creditors by attacking a judgment fraudulently and collusively procured against the corporation, two of the judges dissenting.

Action for conversion.— Under statutory provisions in New York declaring that every person who shall have recovered or in any manner interfered with the property of any insolvent corporation, in fraud of its creditors, shall be liable to the receiver; and that every person receiving, by means of a fraudulent conveyance, any property of a corporation, shall be liable to account therefor to the trustee, a general receiver of a corporation may maintain an action at law for the conversion of property received under a bill of sale which is void under the statute, and a suit in equity for an accounting is not an exclusive remedy. McQueen *v.* New, 45 N. Y. App. Div. 579, 61 N. Y. Suppl. 464 [*distinguishing* Stephens *v.* Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678, in that the receiver there was appointed in supplementary proceedings and his powers were limited by the statute governing such receivers].

Enforcement of liability for misapplied assets see *infra*, VI, B, 4.

In supplementary proceedings see Executions, 17 Cyc. 1467 text and notes 29 *et seq.*

Right of others to sue see *infra*, VI, B, 6.

Setting aside judgments see *supra*, VI, B, 1, b.

90. Fraser *v.* Charleston, 23 S. C. 373.

91. *In re* Wilcox, etc., Co., 70 Conn. 220, 39 Atl. 163; Greene *v.* A. & W. Sprague Mfg. Co., 52 Conn. 330.

92. Foster *v.* Townshend, 68 N. Y. 203, as to a receiver appointed in an action by a married woman for divorce, in pursuance of a statutory provision authorizing the sequestration of personal property, etc., to enforce an order for alimony. See generally Divorce, 14 Cyc. 797.

93. Kane *v.* Lodor, 56 N. J. Eq. 268, 38

attack a mortgage executed by them if they could not.[94] But if a mortgage is fraudulent as to creditors, or is invalid as against them or *bona fide* purchasers for failure to comply with requirements as to execution, recording, etc., it will be invalid as to such persons after the appointment of a receiver of the mortgagor's property,[95] and the receiver of an insolvent estate in a suit for the administration of assets in which he represents all creditors may, by suit or defense, avoid a mortgage which is void or voidable at the suit of such creditors,[96] or in a suit

Atl. 966 (defective affidavit in case of chattel mortgage); Kuser *v.* Wright, 52 N. J. Eq. 825, 31 Atl. 397 (mortgage of real estate to secure antecedent debt taken in good faith).

94. Walsh *v.* St. Paul School Furniture Co., 60 Minn. 397, 62 N. W. 383, as to attack on unrecorded mortgage by receiver in suit between partners for dissolution, the court applying the rule that while to the extent that after it has obtained possession of the assets of the partnership by its receiver it will not permit any creditor to obtain a preference by a levy on the assets in its possession, or to acquire a lien thereon by a creditor's bill, such receiver represents creditors, yet he stands, as to the past transactions of the firm, in the shoes of the partners, precisely as an assignee for the benefit of creditors at common law. See also PARTNERSHIP, 30 Cyc. 731 text and note 32.

But a receiver appointed after decree of dissolution and for distribution of the assets to creditors, upon evidence of the insolvency of the firm, is held to represent the creditors and as such may, by suit or defense, avoid instruments void as against them. Brockhurst *v.* Cox, 71 N. J. Eq. 703, 64 Atl. 182.

95. *Connecticut.*— Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878.

Massachusetts.— Harrison *v.* J. J. Warren Co., 183 Mass. 123, 66 N. E. 589, holding that an unregistered chattel mortgage on property retained by the mortgagor is invalid as against the receiver of the mortgagor, the question being raised on a petition of the mortgagor to be paid out of the funds, although the receiver did not take the legal title to the property in the receivership, because he is not a party to the mortgage and falls within the provision of the statute which by express terms provides that unless property mortgaged has been delivered and retained by the mortgagee the mortgage shall not be valid against a person other than the parties therein until it has been recorded.

Minnesota.— Farmers' L. & T. Co. *v.* Minneapolis Engine, etc., Works, 35 Minn. 543, 29 N. W. 349.

New Jersey.— Fidelity Trust Co. *v.* Staten Island Clay Co., 70 N. J. Eq. 550, 67 Atl. 1078; Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18, 36 Atl. 122; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571 [*affirmed* in 50 N. J. Eq. 796, 27 Atl. 1033].

New York.— Stephens *v.* Perrine, 143 N. Y. 476, 39 N. E. 11 (where, as to a receiver in supplementary proceedings, it was held that he represented the creditors and was trustee for them just as much when the mortgage is void as to them on the ground of the failure to file it as when it is void because executed with a fraudulent purpose); Farmers' L. & T. Co. *v.* Baker, 20 Misc. 387, 46 N. Y. Suppl. 266; Brower *v.* Baucus, 14 N. Y. Suppl. 462, 20 N. Y. Civ. Proc. 389.

Ohio.— Cheney *v.* Maumee Cycle Co., 64 Ohio St. 205, 60 N. E. 207, holding that a mortgage of real property which has not been delivered to the recorder of the proper county before the appointment of a receiver for the property of the mortgagor is not a valid lien on the property as against the receiver of the mortgagor corporation.

United States.— Bayne *v.* Brewer Pottery Co., 90 Fed. 754, on distribution.

See 42 Cent. Dig. tit. "Receivers," §§ 124, 320. See also *supra*, IV, D, 3.

Receiver representing general creditors.— It is not necessary that the receiver should represent a judgment creditor in order that he may avail himself of the invalidity of a mortgage. The creditors of an insolvent corporation upon the appointment of a receiver are held to acquire an equitable interest in the property, the receiver being their trustee and the property being impounded by the court for the payment and discharge of their claims. Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571 [*affirmed* in 50 N. J. Eq. 796, 27 Atl. 1033]; Farmers' L. & T. Co. *v.* Baker, 20 Misc. (N. Y.) 387, 46 N. Y. Suppl. 266.

Under a statute requiring immediate possession as a prerequisite to the validation of an unrecorded chattel mortgage, it is no objection to a suit by a receiver of an insolvent corporation for an accounting of moneys received by defendant at a sale under such chattel mortgage that it appears on the face of the bill that defendant had taken possession of the mortgaged property before the appointment of the receiver, but several months after the mortgage was executed. Pryor *v.* Gray, 70 N. J. Eq. 413, 62 Atl. 439.

Right of assignee to avoid chattel mortgage for failure to record see CHATTEL MORTGAGES, 6 Cyc. 1066.

96. Curtis *v.* Lewis, 74 Conn. 367, 50 Atl. 878; American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345; National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330 (holding that a suit to set aside a mortgage because it was not authorized or ratified by the corporation should be brought by the receiver and not by creditors, since the rights of the creditors vested in him); Brockhurst *v.* Cox, 71 N. J. Eq. 703, 64 Atl. 182; Fidelity Trust Co. *v.* Staten Island Clay Co., 70 N. J. Eq. 550, 67 Atl. 1078; Pryor *v.* Gray, 70 N. J. Eq. 413,

to foreclose a mortgage on the corporation property he may answer in defense matters going to the invalidity of the mortgage as against the interests he was appointed to guard.[97]

2. Enforcement of Liability For Unpaid Corporate Stock[98] — a. In General. It is now well settled that a receiver of a corporation, under the authority of the court appointing him,[99] or the receiver of an insolvent corporation in proceedings for the administration of its assets, or for its dissolution and the distribution of its property, who represents the corporation and its creditors,[1] or who, under the statute, is vested with the corporate assets, may enforce the liability of delinquent stock-holders to the corporation for the amounts unpaid upon their shares of capital stock;[2] and the direction of the court in this respect has been held to be

62 Atl. 439; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. 571 [*affirmed* in 50 N. J. Eq. 796, 27 Atl. 1033] (holding that a receiver need not show that a chattel mortgage is fraudulent but need only show such facts as under the statute render it void as against creditors); Vail *v.* Hamilton, 85 N. Y. 453 [*affirming* 20 Hun 355] (holding that the receiver of an insolvent corporation may maintain an action to set aside a mortgage executed by the corporation without the required assent of its stock-holders); Brower *v.* Baucus, 14 N. Y. Suppl. 462, 20 N. Y. Civ. Proc. 389.

When the question is one for distribution. — In American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345, it was held that the receiver could not have a mortgage given by the corporation to secure bonds as collateral security canceled under averments not that the contract was fraudulent as against prior creditors but that an agreement to withhold the mortgage from the record was fraudulent as against those who became creditors on the faith that the property was unencumbered, such matter being one to be determined on distribution when all the creditors should be made parties; that the receiver should not advocate the cause of one claimant against another and if any one was injured in such a case it was subsequent creditors without notice, and the receiver therefore could not maintain an action in which the relief, if granted, will place the creditors having an equity in a worse condition, and those having no equity in a better condition, than they occupied before his appointment.

97. Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539, holding that where the owner of all the claims against an insolvent corporation, all the assets of which were in his hands under an agreement with the receiver, cannot, on bill to foreclose a mortgage, object to an answer by the receiver going to the validity of the mortgage, or the consideration of the debt secured thereby, on the ground that he has no interest in himself to justify such a defense.

98. Liabilities of shareholders generally see Corporations, 10 Cyc. 373 *et seq.*, 649 *et seq.*

Remedy of receiver see *supra*, VI, A, 3, b, (1).

99. Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633; Voorhees *v.* Indiapapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738 (receiver of insolvent corporation in creditor's suit, authorized by order to collect, etc., and to prosecute suits for that purpose); Armstrong *v.* Danahy, 75 Hun (N. Y.) 405, 27 N. Y. Suppl. 60 (order of court to collect assets as dispensing with any further call).

A direction to collect all sums due the corporation, in the order of the court, shows sufficient authority of the receiver of an insolvent corporation to collect assessments made by its board of directors before his appointment. Wyman *v.* Williams, 52 Nebr. 833, 73 N. W. 285, 53 Nebr. 670, 74 N. W. 48.

1. See *supra*, IV, E, 2, a; VI, B, 1. And see the cases *infra*, this note.

Recovery confined to amount necessary to pay debts. — Sometimes recovery in the suit against a stock-holder for unpaid subscriptions is limited by the debts and the costs and expenses of liquidation, and the judgment against such stock-holder should be confined in its enforcement to the extent necessary to pay such debts and expenses. Jackson F. & M. Ins. Co. *v.* Walle, 105 La. 89, 29 So. 503; Belknap *v.* Adams, 49 La. Ann. 1350, 22 So. 382. If more is collected than is necessary to pay the subscriber's proportionate share of the corporate debts, etc., he will have recourse for reimbursement against the receiver. *In re* New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8. But in Clarke *v.* Thomas, 34 Ohio St. 46, under a statute governing the winding up and dissolution of insolvent corporations which defined the duties and powers of the receiver, it was held that while it might be less burdensome upon the debtors for the receiver to collect from them only their just proportion than to collect the whole amount of their liability and refund them the excess on final settlement and distribution, that matter must be left to the discretion of the court having the control of the receiver's conduct.

2. *Connecticut.* — Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003, under statutory provision for winding up affairs of the corporation on petition of stock-holders, the right of action against delinquent stock-holders vesting in the receiver.

Louisiana. — City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469; New Orleans Gas Light, etc.,

within the general equity jurisdiction of the court.[3] But as the stock-holders' liability to creditors can arise only where there are creditors,[4] whose debts the collection of the subscriptions is intended to liquidate, a receiver will not be directed to enforce such liability merely to meet a probable future obligation on the part of the corporation,[5] and a receiver of particular corporate property, involving relief as to such property, the management and control of the corporate affairs by its officers being uninterrupted except as to the particular property in the receiver's hands, as distinguished from a receiver of the corporation in a suit contemplating the administration of the corporate assets and distribution in payment of the corporate creditors, is not the proper party to enforce payment of stock subscriptions.[6]

b. Assessment or Call. The rule requiring an assessment or call before a share-holder can be sued at law on his contract of subscription[7] is applied to

Co. *v.* Haynes, 7 La. Ann. 114, duty of liquidator.

Maryland.— Frank *v.* Morrison, 58 Md. 423 (receiver to wind up affairs of corporation, with directions to collect all outstanding indebtedness, etc.); Stillman *v.* Dougherty, 44 Md. 380 (under the statute as to dissolution of corporations, which vests the receiver with all the assets of the corporation).

Minnesota.— Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266; Merchants' Nat. Bank *v.* Northwestern Mfg. Co., 48 Minn. 361, 51 N. W. 119.

Mississippi.—Campbell *v.* Chapman, (1902) 31 So. 101.

Missouri.— Berry *v.* Rood, 168 Mo. 316, 67 S. W. 644, duty of receiver to collect unpaid subscriptions which have become trust fund for benefit of creditors of the defunct institution.

New Jersey.— See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116].

New York.— Whittlesey *v.* Frantz, 74 N. Y. 456; Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Rankine *v.* Elliott, 16 N. Y. 377 (receiver in sequestration proceedings on behalf of all the creditors); Armstrong *v.* Danahy, 75 Hun 405, 27 N. Y. Suppl. 60; Ruggles *v.* Brock, 6 Hun 164; Calkins *v.* Atkinson, 2 Lans. 12; Walsh *v.* Seager, 1 N. Y. St. 189 (in dissolution proceedings under the statute).

Ohio.— Clarke *v.* Thomas, 34 Ohio St. 46, under the winding-up statute.

Texas.— Showalter *v.* Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491.

Washington.—Elderkin *v.* Peterson, 8 Wash. 674, 36 Pac. 1089.

United States.— Wyman *v.* Bowman, 127 Fed. 257, 62 C. C. A. 189, as to right to enforce the continuing guaranty of an original subscriber to corporate stock in Nebraska.

The receiver in a creditor's suit may sue to enforce such liability as a part of the assets subject to the satisfaction of the judgment of the creditor, whom the receiver represents in this behalf, although he recovers in the right of the corporation. McBryan *v.* Universal Elevator Co., 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453, under statute allowing receivers to sue. But on the other hand the proper practice in such cases is held to be a suit by the judgment creditor against the stock-holders for the appointment of a receiver and to compel an accounting to him by the stock-holders, etc., for unpaid subscriptions, on behalf of himself and such other creditors as may elect to come in. Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

Nature of right.— In State *v.* Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325, it is said that the general rule that a receiver of a debtor cannot have, nor be made to have, any right of action not vested in the debtor, is subject to exceptions; that one is where the receiver may maintain a suit to set aside a fraudulent conveyance, and another where the receiver of an insolvent corporation may sue the stock-holders; but that the first instance is a real exception, and the second is, in truth, no more than an apparent one, for the corporation and its stock-holders are distinct beings, in legal contemplation, so that the receiver of a corporation who sues a stock-holder does not in reality sue the debtor whose estate he represents.

Failure to notify stock-holders to pay their subscriptions as required by an order of court will not justify a judgment for the stock-holder, the purpose of the notice being to give him an opportunity to pay without suit, and the failure to give such notice together with an offer to pay should be raised by answer which would relieve defendant from liability for costs. Berry *v.* Rood, 168 Mo. 316, 67 S. W. 644.

Consequent inability of creditor to sue see *infra*, VI, B, 6.

Effect of dissolution of corporation see CORPORATIONS, 10 Cyc. 1310 *et seq.*

Foreign and ancillary receivers see *infra*, VIII.

Stock issued as paid up see *infra*, VI, B, 4.

Stock issued for property see *infra*, VI, B, 4.

3. Berry *v.* Rood, 168 Mo. 316, 67 S. W. 644.

4. **Liability to creditors** generally see CORPORATIONS, 10 Cyc. 649 *et seq.*

5. Tichenor *v.* Williams Block Pavement Co., 116 Ga. 303, 42 S. E. 505.

6. Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28, receiver of property in a suit to foreclose a mortgage.

7. See CORPORATIONS, 10 Cyc. 484 *et seq.*

receivers who succeed to the rights of the corporation.[8] But where the assessment has been made the debt comes to the receiver as an asset of the corporation for which he may sue;[9] and so where the assessment is made by the receiver with the sanction of the court in the particular proceeding in which such course is allowed.[10] Where the statute regulating the winding up of dissolved or insolvent corporations provides the particular remedy by suit against the stock-holders for the appointment of a receiver and the ascertainment of their *pro rata* liability for the corporate debts, the stock-holders cannot be concluded in a proceeding in which a receiver was appointed and to which they were not parties.[11]

3. Enforcement of Stock-Holders' Statutory Liability. While the receiver of a corporation may enforce a delinquent stock-holder's liability to the corporation,[12] upon the question of the right of a receiver of a corporation to enforce a superadded statutory liability of stock-holders for corporate debts, the authorities are not in accord. The general rule is that such receiver, in the absence of some statutory authority, cannot sue to enforce a liability created by statute against stock-holders in favor of creditors, independently of what they owe the corporation on account of their stock,[13] and in such case the appointment of a receiver for the corporation does not affect the right of a creditor to maintain

8. See Corporations, 10 Cyc. 728.

By court.—Generally see Corporations, 10 Cyc. 485, 732. Before receiver can sue see Corporations, 10 Cyc. 656, 729 text and note 64 *et seq.* Conclusiveness on stock-holder see Corporations, 10 Cyc. 733, 735. Reference to master see Corporations, 10 Cyc. 656.

9. Basting *v.* Ankeny, 64 Minn. 133, 66 N. W. 266; Wyman *v.* Williams, 53 Nebr. 670, 74 N. W. 48, 52 Nebr. 833, 73 N. W. 285; Carter *v.* Samuel Hano Co., 73 N. H. 588, 64 Atl. 201; Thomas *v.* Whallon, 31 Barb. (N. Y.) 172.

10. Barkalow *v.* Totten, 53 N. J. Eq. 573, 32 Atl. 2 (call by receiver pursuant to order of court); Thomas *v.* Whallon, 31 Barb. (N. Y.) 172 (authority of receiver of mutual insurance company, under statute, to make assessments on premium notes); Maxwell *v.* Akin, 89 Fed. 178.

11. Chandler *v.* Dore, 84 Ill. 275; Chandler *v.* Brown, 77 Ill. 333 (which cases are as to the want of authority of a receiver to sue a stock-holder who is not a party to the proceeding in which the appointment was made under a statute providing that where a corporation subjects itself to a forfeiture of its charter, etc., by certain acts, etc., or allows any execution or decree for payment of money to be returned "no property found," etc., or shall dissolve, etc., leaving debts unpaid "suits in equity may be brought against all persons who were stock-holders at the time, or liable in any way for the debts of the corporation, by joining the corporation in such suit, and each stock-holder may be required to pay his *pro rata* share of such debts or liabilities to the extent of the unpaid portion of his stock after exhausting the assets of such corporation," etc., and that the court shall have power to dissolve and close up the business of the corporation and "to appoint a receiver therefor, who shall have authority, by the name of the receiver of such corporation (giving the name), to sue in all courts and do all things necessary to closing up its affairs," etc.). But it appears in a later report that in such case the record may be amended to make the suit stand in the name of the corporation. Chandler *v.* Frost, 88 Ill. 559. See also, generally, Corporations, 10 Cyc. 733, 735 text and note 15.

12. See *supra*, VI, B, 2, a.

13. *Indiana.*— Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633; Runner *v.* Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

Maryland.— Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 78 Am. St. Rep. 456, 47 L. R. A. 617, holding that the act of 1896 requiring all the assets of an insolvent corporation to be distributed to its creditors, etc., and the code provision vesting in such receivers "all the estate and assets of every kind belonging to such corporation," do not enable him to sue stock-holders under a charter provision making them liable "to the amount of their respective share or shares of stock in this corporation for all of its debts," such liability being held to be a liability to the creditors and not to the corporation.

Massachusetts.— Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396.

Minnesota.— Somers *v.* Dawson, 86 Minn. 42, 90 N. W. 119 (recognizing the rule before a statute in that state referred to); Minneapolis Baseball Co. *v.* City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415; Palmer *v.* Zumbrota Bank, 65 Minn. 90, 67 N. W. 893; *In re* People's Live Stock Ins. Co., 56 Minn. 180, 57 N. W. 468; Allen *v.* Walsh, 25 Minn. 543.

New York.— Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Farnsworth *v.* Wood, 91 N. Y. 308, *infra*, this note [*distinguishing* Story *v.* Furman, 25 N. Y. 214, in that there the decision was controlled by a special act for the dissolution of corporations in Herkimer county, organ-

his action for the enforcement of the stock-holder's liability.[14] If the liability is merely a several one in favor of the creditors, no one creditor can be divested of his right of action by any proceeding or judicial decree to which he is not a

ized under the Manufacturing Law of 1811, which in express terms vested in the trustees, or the receiver appointed in their place, not only the corporate property but the right to enforce the liability of stock-holders for corporate debts, etc., and had no application to a corporation under the act of 1848]; Mann *v.* Pentz, 3 N. Y. 415; Tucker *v.* Gilman, 45 Hun 193 [*affirmed* in 121 N. Y. 189, 24 N. E. 302]. See also Lang *v.* Lutz, 180 N. Y. 254, 73 N. E. 24.

Ohio.— White *v.* Ingersoll, 4 Ohio Dec. (Reprint) 549, 2 Clev. L. Rep. 362, receiver in dissolution proceedings.

Utah.— McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908; Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120.

United States.— Hale *v.* Allison, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 100 Fed. 258, 45 C. C. A. 270 (*affirming* 102 Fed. 790)] (under Minnesota statutes); Wigton *v.* Bosler, 102 Fed. 70; Fidelity Ins. Trust, etc., Co. *v.* Mechanics' Sav. Bank, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228 (under the constitution and statutes of Kansas, subjecting stock-holders in corporations to an additional liability in favor of creditors to the amount of their stock, and providing (Kan. Comp. Laws (1879), c. 23, § 32) that a judgment creditor of the corporation, after an execution returned unsatisfied, "may proceed by action to charge the stock-holders with the amount of his judgment"); Jacobson *v.* Allen, 12 Fed. 454, 20 Blatchf. 525 (under an Illinois statute providing a liability on the part of stock-holders to creditors to an amount equal to double the amount of stock held or owned by such stock-holders). And see Evans *v.* Nellis, 187 U. S. 271, 23 S. Ct. 74, 47 L. ed. 173, construing Kansas statutes.

The principal reason for the rule is that such liability is not an asset of the corporation. Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Farnsworth *v.* Wood, 91 N. Y. 308; McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908; Steinke *v.* Loofbourow, 17 Utah 252, 54 Pac. 120; Jacobson *v.* Allen, 12 Fed. 454, 20 Blatchf. 525.

If the assessment had been made when the receiver was appointed it is a corporate asset and the right to collect it vests in the receiver. Carter *v.* Samuel Hano Co., 73 N. H. 588, 64 Atl. 201.

Compared with action to recover transferred property.— There is no analogy between an action by the receiver to recover such statutory liability and one to recover assets which at one time belonged to the corporation and had been fraudulently transferred. Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617; Minneapolis Baseball Co. *v.* City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415.

Particular class of creditors — depositors. — The liability of stock-holders of the corporation under the General Manufacturing Law of New York of 1848 did not exist in favor of the corporation itself and was not for the benefit of all its creditors, but was in favor only of such creditors as were within the prescribed conditions, and a receiver who was vested only with "the stock, property, things in action and effects of the corporation" sequestrated under the statute could not enforce such liability. Farnsworth *v.* Wood, 91 N. Y. 308, *supra*, this note. So it was held that the receiver of an insolvent bank represents the corporation and succeeds to its rights but is not a trustee for depositors, whom, as a particular class of creditors, the statute gives several rights of action against stock-holders, and he cannot bring suit to enforce their claims under such statute. Wincock *v.* Turpin, 96 Ill. 135, under a statute rendering stock-holders liable severally and individually to the depositors to the amount of stock held by the former respectively. In this case, however, it is said that a state of facts might exist which would authorize a court of equity to bring before it all the stock-holders and depositors and determine their rights and adjust equities, and subsequently in Eames *v.* Doris, 102 Ill. 350, it was held that such state of facts existed and that a proceeding was maintainable in a contest between a receiver in a suit by depositors and creditors. The court said that the liability under the statute constituted a fund for the benefit of all of the classes of creditors mentioned who were entitled to share in it in proportion to the amount of their debts; that the debts in the case in hand largely exceeded the assets and the statutory liability combined, so that the fund would be insufficient to discharge all of the claims upon it; that if individuals of the classes of creditors provided for should be allowed to prosecute separate suits, some might recover payment in full while others having claims equally equitable might be unable to obtain any payment whatever or but a partial payment, and therefore it was proper in such cases to entertain a proceeding in equity by one or more in behalf of all the creditors.

14. Arenz *v.* Weir, 89 Ill. 25; Tibballs *v.* Libby, 87 Ill. 142; Hancock Nat. Bank *v.* Ellis, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; Lang *v.* Lutz, 180 N. Y. 254, 73 N. E. 24 [*affirming* 83 N. Y. App. Div. 534, 82 N. Y. Suppl. 319]; Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Fidelity Ins., etc., Co. *v.* Mechanics Sav. Bank, 97 Fed. 297, 38 C. C. A. 193 [*reversing* 91 Fed. 456].

Remedy of creditors generally in this respect see CORPORATIONS, 10 Cyc. 649 *et seq.*, 665 *et seq.*

party, and therefore a receiver appointed in a suit by one creditor against a corporation cannot acquire the rights of the other creditors;[15] and still further it is held that the court having adopted the rule that the creditors and not the general receiver of the insolvent company are the proper parties to collect such liabilities, it should not fritter away the rule by making exceptions based upon finely drawn distinctions as to the name by which the receiver is called, the form of the order appointing him, or whether he is appointed in a suit brought by the creditor or the stock-holder.[16] On the other hand it is held in some cases that as a receiver represents not only the corporation but all its creditors, as to the latter it is his duty to secure all the assets available for their payment; that for this purpose he succeeds to their rights, and has all the powers to enforce such rights that the creditors before his appointment had in their own behalf, even though such powers be beyond those which he has as the representative of the corporation alone.[17] The statutory liability of stock-holders is sometimes expressly made an asset of the corporation in the event of its insolvency;[18] or the receivers charged with the duty under the direction of the court of collecting the corporation's assets for the benefit of creditors are expressly authorized to sue to enforce the statutory liability of stock-holders;[19] or the statute or constitutional provision contemplates

15. Jacobson *v.* Allen, 12 Fed. 454, 20 Blatchf. 525, where it is held that a receiver in such a case of "all the estate, property and equitable interests" of the corporation cannot sue in equity to enforce the liability of "each stock-holder" for double the amount of stock held or owned by him.

16. McLaughlin *v.* Kimball, 20 Utah 254, 58 Pac. 685, holding that neither a general receiver nor a special one appointed at the instance of a judgment creditor in a suit in behalf of himself and all other creditors for the purpose of collecting the fund, etc., can recover such liability.

17. Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737 [*cited* approvingly in Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714, where the right of a receiver under the Minnesota statute to sue in Maine was involved, and *disapproved* in Colton *v.* Mayer, 90 Md. 711, 45 Atl. 874, 47 L. R. A. 617; Hancock Nat. Bank *v.* Ellis, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396]; Watterson *v.* Masterson, 15 Wash. 511, 46 Pac. 1041; Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939, where it was held that the receiver has the right, under the direction of the court, to enforce every liability, of whatever nature, which the court may find necessary to fully protect the rights of the creditors; that in this way all creditors will share alike, and the entire affairs of the corporation, including the adjustment of the liabilities of its stock-holders, will be subject to the control of the court in a single action, and unnecessary delay and expense prevented; that there was no language which in express terms gave the creditors the immediate or any right of action; that the liability was not on but for the contract debt or agreement, and was in addition to that growing directly from the holding of stock which has not been fully paid for, and that there is no principle by which the two classes of liability are to be distinguished further than that one is primary and the other secondary, for, while one can be enforced by the corporation itself and the other only by creditors, both are created for the benefit of the corporation in carrying on its business to secure to creditors the payment of its obligations. See also Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376, where it is held that the statutory liability of stock-holders of a bank under a provision that "the stock-holders of said bank shall be personally and individually liable for all losses, deficiencies and failures of the capital stock of said bank" means a liability for the benefit of creditors; that the words "personally and individually" are used in contra-distinction to corporate liability.

18. Henley *v.* Myers, 76 Kan. 723, 93 Pac. 168 (under Gen. St. (1901) §§ 1302, 1315); Waller *v.* Hamer, 65 Kan. 168, 69 Pac. 185; Evans *v.* Nellis, 187 U. S. 271, 23 S. W. 74, 47 L. ed. 173 (under Kan. St. (1899) amending the act of 1868).

Where liability to creditor is alleged.— But where, in an action by a receiver to enforce a stock-holder's liability under a foreign statute, the declaration alleged that under such statute shareholders were individually and severally liable "to the creditors" of the corporation, it was held that the receiver could not recover, although the statute made such liability an asset of the corporation, because of the material variance between the pleading and proof. Wigton *v.* Bosler, 102 Fed. 70.

19. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626 (holding that the statute is remedial and is applicable to a case where the liability arose prior to the enactment of the statute); Walters *v.* Porter, 3 Ga. App. 73, 59 S. E. 452; Somers *v.* Dawson, 86 Minn. 42, 90 N. W. 119 (under Laws (1897), c. 341); Hirshfeld *v.* Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839 (holding that the statute did not apply to an action pending when it was enacted). See also

a single trust fund for ratable distribution and a proceeding against the corporation, or against the corporation and stock-holders, in which the equities of the parties are adjusted and a receiver appointed to receive, sue for, and distribute the fund,[20] and when a statute of this nature provides a complete system for the collection of such assets the remedy thus created is held to be exclusive and must be pursued.[21] In those cases in which the liability is enforced through the receiver, the creditor cannot sue independently.[22]

Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864, as to acts of congress governing the liability of stock-holders of national banks.

20. Waller *v.* Hamer, 65 Kan. 168, 69 Pac. 185; Brown *v.* Brink, 57 Nebr. 606, 78 N. W. 280; German Nat. Bank *v.* Farmers', etc., Bank, 54 Nebr. 593, 74 N. W. 1086, where the constitution provided that "in all cases of claims against corporations and joint stock associations, the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock," and it was held that to make collections and disburse the moneys to the creditors there should be some person always amendable to the order of the court and from whom at all times the true state of account may be ascertained; that this points directly to a receiver; that there should in each case of the nature of this one be an application for and the appointment of a receiver; that the court should adjudge the amount due the creditor, or each of the creditors, if more than one, and also the total amount due from each stock-holder, and determine the amount of the *pro rata* share required in the first instance necessary to be paid by each stock-holder to satisfy the indebtedness proved in the suit, and the costs thereof, such amounts to be collected under the court's order by execution or other proper writ or process or by suit, if necessary, all moneys to pass into and through the hands of the receiver.

Where creditors and stock-holders not parties.— State *v.* Union Stock Yards State Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076, which was a proceeding by the attorney-general to wind up an insolvent corporation, to which no creditor or stock-holder was a party, and under a statute declaring "that all stock-holders or shareholders in associations or corporations organized under said chapter shall be individually . . . liable to the creditors . . . over and above the amount of stock by them held therein, to an amount equal to their respective shares so held for all its liabilities accruing while they remained such stock-holders; and should any such association or corporation become insolvent, and its assets be found insufficient to pay its debts and liabilities, its stock-holders may be compelled to pay such deficiency in proportion to the amount of stock owned by each, not to exceed the extent of the additional liability hereby created," it was held that the court might, on the application of the receiver, make an *ex parte* order for an assessment against the stock-holders to discharge such liability subject to the right of each stock-holder to contest his liability when sued, and authorize the receiver to sue therefor; that the liability was not directly to the creditors, but constituted a fund for the debts of the bank, and that the provision of the statute that stock-holders shall only be liable for debts accruing while they remained stock-holders did not operate against the authority of the receiver.

In an equitable proceeding by creditors to enforce the statutory liability of stock-holders, it is held that a receiver may be appointed to collect and distribute the fund which is a trust fund inuring to the equal benefit of the creditors of the corporation, who may, under the authority of the court, prosecute actions to enforce the payment of judgments rendered for such liability. Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250, holding that the judgment against the several stock-holders must be rendered in the original action brought by the creditor or stock-holder as provided by the statute. See also New York Nat. Exch. Bank *v.* Met- See also New York Nat. Exch. Bank *v.* Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

Enforcement of liability of stock-holders of national banks under acts of congress in dissolution and winding up proceedings see Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864; King *v.* Pomeroy, 121 Fed. 287, 58 C. C. A. 209.

Enforcement in other states generally see CORPORATIONS, 10 Cyc. 673 *et seq.*

Foreign receivers generally see *infra*, VIII.

21. Waller *v.* Hamer, 65 Kan. 168, 69 Pac. 185, statute providing suit by receiver against all the stock-holders.

Preliminary action against stock-holders. — Where the statute making the superadded liability of stock-holders a corporate asset in case of the insolvency of the corporation, to be collected by the receiver in an action against the stock-holders brought for the purpose of fixing the sum required for the payment of corporate debts, an action against stock-holders cannot be maintained in the absence of the preliminary action thus required. Evans *v.* Nellis, 187 U. S. 271, 23 S. Ct. 74, 47 L. ed. 173, under the statute of Kansas. See also Chandler *v.* Dove, 84 Ill. 275; Chandler *v.* Brown, 77 Ill. 333; Wigton *v.* Bosler, 102 Fed. 70. And see *infra*, VIII, A, 1.

22. See *infra*, VI, B, 6.

4. Enforcement of Liability For Corporate Assets Misapplied, Withdrawn, Etc.[23] The mere misapplication of corporate funds will not always give a right of action to the receiver of the corporation. Thus where the corporation is bound by a wrongful use of its funds with the assent of its stock-holders, at a time when it was a solvent going concern, and the rights of creditors have not intervened, a receiver of the corporation subsequently appointed stands in no better position than the corporation with respect to such use.[24] But the receiver of an insolvent corporation may recover against one who despoils the corporation of its assets and thus deprives the creditors of the opportunity of resorting to the trust fund for the satisfaction of their claims.[25] And so where the capital of an insolvent corporation is withdrawn and refunded by the corporation to its stock-holders, or the corporate property is fraudulently divided among its stock-holders, leaving creditors unpaid, the right of action to recover such assets from the stock-holders passes to the receiver of the corporation,[26] such right resting upon the same basis as the receiver's right to recover any other property disposed of by the corporation in fraud of its creditors.[27] If certificates of stock are issued as for property

23. Statutory remedy for discovery of assets see *supra*, VI, A, 2.

24. Little *v.* Garabrant, 90 Hun (N. Y.) 404, 35 N. Y. Suppl. 689 [*affirmed* in 153 N. Y. 661, 48 N. E. 1105]. See also Forker *v.* Brown, 10 Misc. (N. Y.) 161, 30 N. Y. Suppl. 827 [*affirmed* in 159 N. Y. 540, 53 N. E. 1125], *infra*, note 31. And see, generally, Corporations, 10 Cyc. 821 *et seq.*

Innocent purchaser.— In an action by receivers of a corporation to recover the value of notes payable to it as having been unlawfully transferred to defendant to secure the personal debt of the president of the corporation, it is a good defense that defendant took the notes in the usual course of business before maturity and for a valuable consideration without notice of any interest of the corporation therein and that the officers and stock-holders had full knowledge of the indorsement and delivery of the notes. Welsh *v.* Benson First Nat. Bank, 103 Minn. 186, 114 N. W. 765.

25. Alexander *v.* Relfe, 74 Mo. 495, holding that where the wrongful acts despoiling the corporation were by another corporation by its officers and directors, the latter corporation would be liable to the receiver to the same extent as an individual for such acts.

Moneys paid by corporate officers after insolvency of the corporation and cessation of the corporate business may be recovered by the receiver, and the payment having been made on notes after their protest it cannot be insisted that it was made in the ordinary course of business. Miller *v.* Audenried, 67 N. J. Eq. 252, 57 Atl. 1076 [*affirmed* in 68 N. J. Eq. 658, 60 Atl. 1134].

Acts not precluding suit by receiver.— Where an insolvent corporation, immediately prior to the suspension of business by it, delivered securities to a creditor in payment of his claim, the amount of the securities exceeding the amount of the claim, and on the books of the corporation the creditor was charged with the difference, so as to make him appear as its debtor, and a receiver subsequently appointed for the corporation, without knowledge of the circumstances under which the entry in question was made in the books, demanded payment of the amount from the ostensible debtor, and it was paid, it was held that, on discovering the transfer, the receiver was not, by reason of having accepted such payment, precluded from recovering the value of the securities so transferred. Atkinson *v.* Rochester Printing Co., 43 Hun (N. Y.) 167 [*affirmed* in 114 N. Y. 168, 21 N. E. 178]. So on the finding of the master that auditing committees were not informed that an entry on the books of the corporation crediting the bond account with a particular sum was in any part fictitious, plaintiffs were not estopped, by the acceptance of the directors of the reports of the auditing committees upon the accounts of the treasurer, from recovering on the bond account whatever was in fact due. Parker *v.* Nickerson, 137 Mass. 487.

26. Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn. 37, 46 N. W. 310.

Dividends thus paid may be recovered by the receiver of an insolvent corporation. Corn *v.* Skillern, 75 Ark. 148, 87 S. W. 142; Davenport *v.* Limes, 72 Conn. 118, 44 Atl. 17; Mills *v.* Hendershot, 70 N. J. Eq. 258, 62 Atl. 542; Osgood *v.* Laytin, 3 Abb. Dec. (N. Y.) 418, 3 Keyes 521, 3 Transcr. App. 124, 5 Abb. Pr. N. S. 1, 37 How. Pr. 63; Hayden *v.* Thompson, 71 Fed. 60, 17 C. C. A. 592, holding further that equity has jurisdiction of such a suit against all the shareholders of a corporation, it being in effect a suit to execute a trust, to undo a fraud, and to prevent a multiplicity of suits. *Compare* Butterworth *v.* O'Brien, 39 Barb. (N. Y.) 192, 24 How. Pr. 438, where the receiver acting for the benefit of stock-holders was held to have no cause of action for dividends improperly declared by an insolvent corporation and paid to persons who were indebted to it, since the claim for such dividends belonged to the creditors.

Withdrawal of capital generally see Corporations, 10 Cyc. 450 *et seq.*, 460–463, 654 *et seq.*

27. Minneapolis Baseball Co. *v.* City Bank, 66 Minn. 441, 69 N. W. 331, 38 L. R. A. 415.

purchased, which was not purchased in fact, the receiver of the corporation, upon its insolvency, may recover from such stock-holders the amounts unpaid on the shares necessary for the payment of debts.[28] The right of action against the officers and directors of a corporation[29] for their wrongful and negligent acts being one which is originally vested in the corporation passes to its receiver,[30] and they will be liable to the receiver, to refund assets misappropriated by them, in an action to recover assets to pay debts;[31] but the liability of directors who assent to the creation of debts in excess of the capital stock of the corporation

Withdrawal of funds by surrender of stock. — The receiver may assert the rights of creditors where the corporation has misapplied its assets in the purchase of its own stock and permitted stock-holders to surrender stock. Crandall *v.* Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Gillet *v.* Moody, 3 N. Y. 479 (where the statute made directors liable personally to stock-holders and creditors to the full extent of the loss they may have sustained by reason of such transaction, and it was held that the receiver in a suit to close up the affairs of a bank under the statute "to prevent the insolvency of moneyed corporations and to secure the rights of corporations," might assert the rights of creditors and stock-holders); Tait *v.* Hofius, 38 Wash. 699, 80 Pac. 173; Tait *v.* Pigott, 38 Wash. 59, 80 Pac. 172 (which cases hold that the receiver of an insolvent corporation may sue the stock-holder for money so received by him whether the corporation was solvent or not at the time of the transaction, since the statute made it unlawful to pay any part of the capital stock to stock-holders or to reduce the capital stock except in the method prescribed, and although there is no express finding that there are allowable claims against the corporation, the finding that the corporation is insolvent being sufficient in this respect); Hamor *v.* Taylor-Rice Engineering Co., 84 Fed. 392. See also CORPORATIONS, 10 Cyc. 451.

Receiver representing corporation only. — But on the other hand it is held that a receiver appointed to wind up the affairs of a corporation represents the corporate body only, so far as concerns the nature and extent of his title, and not the creditors or shareholders, and that the act of a stock-holder in withdrawing the stock at its book value with knowledge that the corporation is insolvent while a fraud upon the creditors and other stock-holders cannot be redressed at the suit of the receiver. Young *v.* Stevenson, 180 Ill. 608, 54 N. E. 562, 72 Am. St. Rep. 236 [*affirming* 81 Ill. App. 40]; Republic L. Ins. Co. *v.* Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328, upon the authority of *In re* Duckworth, L. R. 2 Ch. 578, 36 L. J. Bankr. 28, 16 L. T. Rep. N. S. 580, 15 Wkly. Rep. 858; Waterhouse *v.* Jamieson, L. R. 2 H. L. Sc. 29, 2 Paton App. Cas. 1812; *In re* British, etc., Cork Co., L. R. 1 Eq. 231, 11 Jur. N. S. 941, 13 L. T. Rep. N. S. 267, 14 Wkly. Rep. 22, which were as to the right of a liquidator.

Repudiation of fraudulent transactions generally see *supra*, VI, B, 1, c.

28. Easton Nat. Bank *v.* American Brick, etc., Co., 70 N. J. Eq. 722, 64 Atl. 1095, holding that it was not necessary to first file an independent bill to set aside the supposed contract evidenced by the words "issued for property purchased" stamped on the certificates.

Purchase of stock with property under value. — Completed transactions between a corporation and stock subscribers are held to be unassailable by the receiver of the corporation as the representative of the corporation unless impeached for fraud or *ultra vires*. Thus an action at law cannot be maintained by such receiver against stock subscribers to recover the difference between the alleged actual value of property given to the corporation in payment of subscriptions and the amount of the subscriptions, in the absence of fraud and where the property, although overvalued, was such as the corporation required for the purposes of its legitimate business. Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20. But where the subscriber pays for his stock with property, in a jurisdiction where the "true value rule" prevails (see CORPORATIONS, 10 Cyc. 471–473), the receiver of the corporation may recover the difference between the value of the property and the amount for which it was taken for the stock (Berry *v.* Rood, 168 Mo. 316, 62 S. W. 644).

29. Obligation of directors generally see CORPORATIONS, 10 Cyc. 787, 803, 807, 828.

Powers and liabilities of officers generally see CORPORATIONS, 10 Cyc. 903 *et seq.*

30. Craig *v.* James, 89 N. Y. App. Div. 541, 85 N. Y. Suppl. 583 [*affirmed* in 181 N. Y. 538, 73 N. E. 1121] (right of action of stock-holders against directors); Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815; Allen *v.* Luke, 141 Fed. 694 (bill on behalf of creditors and stock-holders held maintainable, although a recovery might restore solvency to the bank); Howe *v.* Barney, 45 Fed. 668; Stephens *v.* Overstolz, 43 Fed. 771; Movius *v.* Lee, 30 Fed. 298 [*affirmed* in 141 U. S. 132, 11 S. Ct. 924, 35 L. ed. 662]. See also CORPORATIONS, 10 Cyc. 835 *et seq.*, 888.

31. Hayes *v.* Pierson, 65 N. J. Eq. 353, 45 Atl. 1091, 58 Atl. 728 (right of receiver to inquire into actions of directors to the same extent that stock-holders might, and as representative of the corporation, to recover from directors who have diverted assets to themselves, thus producing insolvency, at least such sums as may be necessary to defray the expenses of the receivership, the court holding that the rule that the directors do not sustain to the creditors and their representative the relation of trustee in respect of the cor-

to creditors of a certain kind, under the statute, is not an asset resting in the receiver.[32]

5. Rights Accruing to Receiver Pending Administration.[33] A receiver may sue for a debt due to him as receiver in the administration of his trust,[34] and the cause of action for the recovery back of money improperly paid out by the receiver of a corporation, and for which he is liable to account, is in him and not in those who may be entitled ultimately to the fund.[35]

6. Consequent Suspension of Right of Party Represented.[36] Following the rules above stated,[37] a receiver who, for the purposes of litigation, succeeds to the rights of a party to the suit in which the appointment is made, alone can sue to enforce such rights;[38] the right to reach the assets of an insolvent being in a

porate contracts when the corporation is a solvent going concern does not apply in such a case); Bowers *v.* Male, 186 N. Y. 28, 78 N. E. 577 [*affirming* 111 N. Y. App. Div. 209, 97 N. Y. Suppl. 722]; Gillet *v.* Phillips, 13 N. Y. 114; Mabon *v.* Miller, 81 N. Y. App. Div. 10, 80 N. Y. Suppl. 979 (holding that a single suit against the several directors for wrongful misappropriation and dissipation of the corporate property in pursuance of a common purpose may be maintained in equity, for the directors are not equally liable); Butterworth *v.* O'Brien, 39 Barb. (N. Y.) 192, 24 How. Pr. 438 (fraudulent disposition of assets by president); Forker *v.* Brown, 10 Misc. (N. Y.) 161, 30 N. Y. Suppl. 827 [*affirmed* in 159 N. Y. 540, 53 N. E. 1125] (directors causing issue of stock to themselves at less than its value); Graham *v.* Carr, 130 N. C. 271, 41 S. E. 379; Hayes *v.* Kenyon, 7 R. I. 136. See also Brandt *v.* Allen, 76 Iowa 50, 40 N. W. 82, 1 L. R. A. 653. And see, generally, Corporations, 10 Cyc. 836, 837.

Other illustrations of application of rule: Where the directors fraudulently appropriate assets by taking a mortgage to themselves when the corporation was insolvent. Taylor *v.* Mitchell, 80 Minn. 492, 83 N. W. 418. Where directors prefer debts for which they are personally liable. Williams *v.* Turner, 63 Nebr. 575, 88 N. W. 668. Where the directors commit *ultra vires* acts constituting a waste of corporate funds, as by using the corporate assets to purchase the interest in another company of the surviving incorporators thereof. Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 62, 61 L. R. A. 807. Where the directors satisfied mortgages held by the corporation on property owned by them individually in exchange for certain obligations of the company held by them, by taking credit for a greater amount than the true amount of such obligations. Miller *v.* Doyle, 211 Pa. St. 59, 60 Atl. 496. Where they paid excessive salaries to themselves (Mills *v.* Hendershot, 70 N. J. Eq. 258, 62 Atl. 542), although in a suit by a receiver for an accounting, the directors are properly allowed credit for a reasonable amount as salary, although the salary paid to them be excessive (Miller *v.* Doyle, *supra*). Where the statute prescribes a penalty for the benefit of the corporation, its creditors, etc. Niagara Bank *v.* Johnson, 8 Wend. (N. Y.) 645, statutory penalty against directors for dividing, withdrawing, or in any way paying to the stock-holders, etc., any part of the capital stock of the corporation, or to reduce the capital stock, etc. See also as to the last point Thompson *v.* Swain, 107 Mo. 594, 17 S. W. 967; Thompson *v.* Greeley, 107 Mo. 577, 17 S. W. 962, which cases are under a statute prescribing a penalty for making excessive loans out of the capital stock of a bank, the court holding that, although there was no statute conferring the power on receivers of corporations to recover for such liability, it was competent for the court appointing the receiver to direct that such an action be brought, it being within the general jurisdiction of a court exercising equity powers.

Until the visible assets have been liquidated and the fact and amount of a deficiency is ascertained, the court which appointed the receiver of an insolvent corporation will not direct him to bring suits to enforce the liability of promoters, officers, and directors for the benefit of creditors. Land Title, etc., Co. *v.* Asphalt Co. of America, 121 Fed. 587.

32. Simmons *v.* Taylor, 106 Tenn. 729, 63 S. W. 1123.

33. **Defenses against receiver** see *infra*, VI, C.

Distraining for rent generally see Landlord and Tenant, 24 Cyc. 1291.

Enforcement of purchase-price of property see *supra*, IV, H, 10.

34. *Ex p.* Harris, 2 Ch. D. 423, 45 L. J. Bankr. 71, 34 L. T. Rep. N. S. 261, 24 Wkly. Rep. 851.

35. Stokes *v.* Hoffman House, 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821 [*affirmed* in 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870]; Mills *v.* Ross, 39 N. Y. App. Div. 563, 57 N. Y. Suppl. 680 [*affirmed* in 168 N. Y. 673, 61 N. E. 1131], holding that the remedy of the parties entitled to such funds is to require the receiver in due course to account for them; that if the receiver fails to compel restoration he will be charged with the sum improperly paid out and the parties entitled will then look to him personally, and to his bond for satisfaction.

36. **Effect of appointment on right of corporation to sue** see *supra*, IV, C.

37. See *supra*, VI, B, 1, a.

38. Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816.

receiver, it is to be exercised by him and not by the creditors or stock-holders,[39] unless the receiver has refused to sue,[40] and the court will restrain an interference with the receiver's right in this respect.[41] But if the receiver refuses to sue or is himself involved in the wrongs alleged as the basis of the cause of action, the

One whose right of action has passed to his receiver cannot counter-claim thereon in an action against him where the receiver has not been discharged or the creditors satisfied, although the purchaser of the assets from the receiver may not have acquired the particular claim. Houts *v.* Sioux City Brass Works, 134 Iowa 484, 110 N. W. 166.

39. *Connecticut.*— Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003.

Indiana.— Big Creek Stone Co. *v.* Seward, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5; Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924; Terre Haute Nat. State Bank *v* Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Voorhees *v.* Indianapolis Car, etc., Co., 140 Ind. 220, 39 N. E. 738.

Louisiana.— Gas Light, etc., Co. *v.* Haynes, 7 La. Ann. 114; New Orleans Gas Light Co. *v.* Bennett, 6 La. Ann. 456.

Minnesota.— Merchants' Nat. Bank *v.* Northwestern Mfg., etc., Co., 48 Minn. 361, 51 N. W. 119; Minnesota Thresher Mfg. Co. *v.* Langdon, 44 Minn. 37, 46 N. W. 310.

Nebraska.— Brown *v.* Brink, 57 Nebr. 606, 78 N. W. 280.

New Jersey.— Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436.

New York.— Osgood *v.* Laytin, 3 Abb. Dec. 418, 3 Keyes 521, 3 Transcr. App. 124, 5 Abb. Pr. N. S. 1, 37 How. Pr. 63; Michel *v.* Betz, 108 N. Y. App. Div. 241, 95 N. Y. Suppl. 844 (receiver of dissolved corporation); Passavant *v.* Bowdoin, 60 Hun 433, 15 N. Y. Suppl. 8 (as to a receiver appointed by final decree to collect an estate and pay a judgment out of the proceeds, who is clothed with title to the assets); Walter *v.* F. E. McAlister Co., 21 Misc. 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33; Colorado Nat. Bank *v.* Scott, 19 Abb. N. Cas. 348. See also Mills *v.* Ross, 39 N. Y. App. Div. 563, 57 N. Y. Suppl. 680 [*affirmed* in 168 N. Y. 673, 61 N. E. 1131], *supra*, note 35.

Ohio.— Miami Exporting Co. *v.* Gano, 13 Ohio 269.

Pennsylvania.— Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737.

Texas.— Showalter *v.* Laredo Imp. Co., 83 Tex. 162, 18 S. W. 491.

Washington.— Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

United States.— Werner *v.* Murphy, 60 Fed. 769, as to a receiver of an insolvent corporation under the New Jersey statute, the court holding that since under such statute the receiver is invested with all the rights and equities of the creditors, he alone can enforce them and a creditor cannot maintain a suit to set aside a fraudulent conveyance after the receiver is appointed.

Levy on property.— So it is held that, although the property of a corporation was illegally or fraudulently transferred, a creditor cannot, subsequent to the appointment of a receiver for it, take advantage of such fact, and levy on the property so sold; that the receiver alone can maintain an action or take proceedings to recover it. Chapman *v.* Douglas, 5 Daly (N. Y.) 244.

Discovery of assets.— Under a statute providing for the appointment of a receiver for an insolvent corporation, and authorizing him to examine the officers and agents of the corporation with respect to its affairs and transactions, in order to enable him to ascertain and secure the property of the company, a creditor of such corporation cannot maintain a bill of discovery to compel the officers of the corporation to make a disclosure as to its property and transactions, but he must request the receiver to institute such disclosure proceedings. Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505.

Where the statutory liability of stockholders is enforceable through the receiver of the corporation (see *supra*, VI, B, 3), the creditors cannot sue for such liability. Brown *v.* Brink, 57 Nebr. 606, 78 N. W. 280; Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737 (as to enforcement of contractual liability under Kansas statute, the court intimating a doubt as to the right of a receiver to interfere with suits already begun by creditors); Watterson *v.* Masterson, 15 Wash. 511, 46 Pac. 1041; Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939. Sometimes the statute extends the power to and makes it the duty of the receiver to sue for the statutory liability of stock-holders if no action has been commenced by creditors within a designated period. See Somers *v.* Dawson, 86 Minn. 42, 90 N. W. 119.

40. Crawfordsville First Nat. Bank *v.* Dovetail Body, etc., Co., 143 Ind. 534, 42 N. E. 924; Brown *v.* Brink, 57 Nebr. 606, 78 N. W. 280; Brower *v.* Baucus, 14 N. Y. Suppl. 462, 20 N. Y. Civ. Proc. 389.

In the absence of allegation or offer to prove such refusal an action by one so represented cannot be maintained. Fisher *v.* Andrews, 37 Hun (N. Y.) 176. And it has been held that it cannot be inferred that the receiver has refused to sue because he successfully opposed an application to the supreme court to direct him to sue or to authorize the use of his name in an action against the directors for a misapplication of its funds. Gifford *v.* Clapp, 44 N. Y. App. Div. 192, 60 N. Y. Suppl. 856.

41. Atty.-Gen. *v.* Guardian Mut. L. Ins. Co., 77 N. Y. 272 (on motion by receiver in dissolution proceedings); Rankine *v.* Elliott, 16 N. Y. 377; Osgood *v.* Laytin, 3 Abb. Dec. (N. Y.) 418, 3 Keyes 521, 3 Transcr. App. 124, 5 Abb. Pr. N. S. 1, 37 How. Pr. 63 (holding that in a suit by the receiver of a

persons aggrieved may be permitted to sue,[42] as in the case of creditors and stock-holders suing to recover for the wrongful acts of corporate officers and directors,[43] the receiver being made a party defendant by leave of court,[44] although in some cases even a refusal of the receiver to sue will not authorize suit by another, the remedy being by appeal to the court for a direction to or removal of the receiver.[45]

C. Defenses Against Receiver.[46] Pursuant to the general rule that the mere appointment of a receiver does not affect rights ultimately to be determined,[47] that the receiver takes only the right and interest of the original owner, or the right of action of the party whose interest he is appointed to represent,[48] it follows that defenses which might have been made against the party over whose property the receiver is appointed, or whose title to sue and whose interests are

corporation against a stock-holder to recover dividends withdrawn where the company was insolvent, he may join creditors for the purpose of restraining them from prosecuting separate actions for the same relief); Brower *v.* Baucus, 14 N. Y. Suppl. 462, 20 N. Y. Civ. Proc. 389 (injunction upon application of receiver to restrain a pending action); Walsh *v.* Seager, 1 N. Y. St. 189.

42. Hills *v.* Reeves, 31 Wkly. Rep. 209.

A suit against the receiver of a dissolved corporation for an accounting by the stock-holders may be brought without previous application to him to bring it in the name of the corporation. Lafayette Co. *v.* Neely, 21 Fed. 738.

43. Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426; Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Ackerman *v.* Halsey, 37 N. J. Eq. 356 [*affirmed* in 38 N. J. Eq. 501]; Brinckerhoff *v.* Bostwick, 88 N. Y. 52; Miesse *v.* Loren, 8 Ohio S. & C. Pl. Dec. 448, 5 Ohio N. P. 307.

So the statutory liability of stock-holders may be enforced by creditors under such circumstances. Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376, where request to sue and refusal were sufficiently excused by the receiver's answer that he did not deem it his duty to sue.

No request on the receiver to sue is necessary where he is involved or the bill shows what is equivalent to a refusal on his part to sue, in order to support the right of such persons to maintain the action against the receiver and the corporation and others. Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 890; Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (receiver of national bank who was one of the directors chargeable with neglect of duty); Monitor Furnace Co. *v.* Peters, 40 Ohio St. 575 (holding that where a receiver in a stock-holder's suit to wind up a corporation neglects to perform his duty in that respect a suit by a judgment creditor to set aside the fraudulent conveyance, in which the receiver and all parties interested are made parties, may be maintained and is substantially an application to the court to direct the receiver to do his duty). And the pleading filed in conformity to the order on an application to make the receiver, who was a director, a party defendant, need not allege any demand on the receiver to sue. Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426.

44. Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426; Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Brinckerhoff *v.* Bostwick, 88 N. Y. 52, necessary party. See also Hills *v.* Reeves, 31 Wkly. Rep. 209.

Where the appointing court has refused to permit the receiver to sue or to be made a party defendant to a suit to recover against officers on a cause of action primarily passing to the receiver, stock-holders cannot maintain such suit. Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815 [*affirming* 36 Fed. 475], receiver in state court. To the same effect see Neun *v.* Blackstone, etc., Assoc., 149 Mo. 74, 50 S. W. 436.

The federal statute dispensing with necessity of leave to sue a receiver, appointed by a federal court, "in respect of any act or transaction of his in carrying on the business," does not authorize a suit by a stock-holder of a corporation against its receiver and others, without leave of court, on a cause of action which accrued before the receiver was appointed and upon which he refuses to sue. Swope *v.* Villard, 61 Fed. 417.

Sufficiency of application.— Where an action by stock-holders of a bank against the directors and the receiver, who was one of them, for misconduct, is permitted by the court, and the petition was good against a general demurrer, a motion to vacate permission to sue was properly refused, irrespective of the question whether plaintiff's pleadings were open to objections which could be raised by special demurrer. Weslosky *v.* Quarterman, 123 Ga. 312, 51 S. E. 426.

45. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003; Gas Light, etc., Co. *v.* Haynes, 7 La. Ann. 114; Werner *v.* Murphy, 60 Fed. 769.

46. **Collateral attack** see *supra*, III, J, 3, a, (II), (B).

Necessity of and dispensing with bond see *supra*, III, F, 6, a.

Notice of appointment see *supra*, IV, D, 5, j.

Objection to counsel employed by receiver see *supra*, IV, F, 6, e, (V), (B).

47. See *supra*, IV, A.

48. See *supra*, IV, D, 3, d; IV, E; VI, B, 1, a.

represented by the receiver, may be interposed as against him.[49] So a receiver of a corporation takes its assets subject to the conditions and legal disabilities with which it was trammeled in the hands of the corporation and causes of action in the right of a corporation are subject to the defenses which might have been available against it.[50] But on the other hand in his capacity as the representative of the creditors as well as of the corporation, a defense which might have been available against the corporation itself may not lie against him, and a defense will not prevail which involves the recognition and enforcement of a contract

49. *Georgia.*— Moise *v.* Chapman, 24 Ga. 249; Hardwick *v.* Hook, 8 Ga. 354.

Illinois.— Chandler *v.* Frost, 88 Ill. 559. 21 N. E. 1093, 22 N. E. 325 (holding that the right of sureties on the official bond of an insolvent debtor to oppose the efforts of a receiver of such debtor to enforce the bond is not taken away by the appointment of the receiver); Johnston *v.* May, 76 Ind. 293 (defenses in a suit brought by a receiver of the payee of a note).

Indiana.— State *v.* Sullivan, 120 Ind. 197.

Missouri.— Cox *v.* Volkert, 86 Mo. 505, holding that the right of the receiver of a lessor to collect rent is subject to all the conditions of the contract between the lessor and the lessee.

Virginia.— Gold *v.* Paynter, 101 Va. 714, 44 S. E. 920.

Washington.— Shuey *v.* Holmes, 20 Wash. 13, 54 Pac. 540, *infra*, note 50.

See 42 Cent. Dig. tit. "Receivers," § 323.

The burden is on defendants in a suit to enforce a trust in favor of the party over whose estate a receiver is appointed to show that the right of action was lost by laches and by ratification of the transaction out of which the trust is alleged to have resulted. Pearce *v.* Gamble, 72 Ala. 431.

50. *Connecticut.*— Litchfield Bank *v.* Peck, 29 Conn. 384, defense that defendant was induced by fraud to take the stock of the corporation after its organization, in a suit on the note given therefor.

Illinois.— Garrigue *v.* Arnott, 80 Ill. App. 24.

Indiana.— Coffin *v.* Ransdell, 110 Ind. 417, 11 N. E. 20, *supra*, note 28.

Maryland.— Morrison *v.* Savage, 56 Md. 142, discharge in bankruptcy.

New York.— Devendorf *v.* Beardsley, 23 Barb. 656 (holding that if a note in the hands of a corporation is void or incapable of enforcement by reason of fraud or illegality in its procurement or inception, passing it into the hands of a receiver does not purge it of these defects and the receiver stands in the shoes of the corporation); Olcott *v.* Chandler, 1 N. Y. City Ct. Suppl. 30 (holding that as against an ordinary purchaser of stock after the formation of a corporation the receiver takes the title of the corporation to the cause of action subject to all equities existing against the corporation in favor of the subscriber, as distinguished from a case where there is fraud on the part of the corporation in procuring a person to become a purchaser of its stock which is set up as a defense against the receiver who represents the creditors as innocent third parties).

Virginia.— Elliott *v.* Ashby, 104 Va. 716, 52 S. E. 383.

See 42 Cent. Dig. tit. "Receivers," § 323.

Denial of title to note.— Under a statute providing that the title of the holder of a note cannot be inquired into unless it is necessary for the protection of defendant or to let in defenses which he seeks to make in an action by the receiver of a bank for the bank's use on a note payable to the cashier at the bank, a plea of the maker admitting that the note was part of the bank's assets, but denying that plaintiff was the owner or holder of the same, was properly stricken, it not appearing that an inquiry into the ownership of the note was necessary to any defense interposed, or that the form in which suit was brought affected the maker's rights, and no defense being set up that would be good against the bank and not the receiver. Mayer *v.* Thomas, 97 Ga. 772, 25 S. E. 761.

Where insolvency of a corporation is not alleged there can be no presumption of insolvency, since there are other grounds for the appointment of a receiver, and the action by the receiver of the corporation on a note executed to it will be viewed as though brought by the corporation, and any defense that might have been available against it may be set up against the receiver. Shuey *v.* Holmes, 20 Wash. 13, 54 Pac. 540.

Limitation and laches.— Failure to prosecute a suit by a receiver against the directors of a corporation for ten years was held to be laches requiring the dismissal of the bill where several of the defendants had died, their estates settled and their personal representatives discharged. *Ex p.* Baker, 67 S. C. 74, 45 S. E. 143. But where it is fairly inferable that the facts constituting negligence of a corporate officer were not disclosed by him to the directors until long after their occurrence, the lapse of more than the statutory period of limitation since the occurrence will not be imputed to the receiver as laches in a suit by him to charge the officer with losses arising from such negligence. Lawrence *v.* Stearns, 79 Fed. 878. With respect to the limitation of an action to enforce the liability of a stock-holder (see, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 1205) the mere filing of a petition to rehear the decree by which the receiver of the corporation is directed to sue certain stock-holders does not suspend its operation, and the fact that the receiver was enjoined from prosecuting suit against certain stock-holders will not prevent him from suing others as directed by the decree of the court. Gold *v.* Paynter,

which when made was a fraud on creditors, although the defense might have been good against the corporation itself.[51] The mere want of specific legal authority in the receiver to enter into the particular transaction will not be a defense to an action to enforce a contractual liability accruing to him in such transaction.[52] Representations made by a receiver in his individual or personal character cannot be set up to defeat his right to recover as receiver,[53] but a receiver cannot take advantage of his own delinquency to the injury of another with whom he has dealt by interposing such delinquency to defeat the right of such party to object to the availability of the present remedy against him by reason of the nature of the transaction out of which the asserted cause of action arose.[54]

101 Va. 714, 44 S. E. 920. But in Louisiana it was held that a decree ordering the liquidator of an insolvent corporation to collect certain assets was an adjudication that he discharge a duty attached to his office, and was not a money judgment as to which a plea of prescription of ten years could be interposed. Clinton, etc., R. Co. *v.* Lee, 22 La. Ann. 287; Clinton, etc., R. Co. *v.* Whittaker, 22 La. Ann. 209.

Set-off of claim not presented in receivership see *supra*, V, A, 2, b.

51. Harrington *v.* Connor, 51 Nebr. 214, 70 N. W. 911, which was an action by the receiver of a bank on a note which came into his hands as assets, and it was held that a defense by the maker of the note involving a want of consideration moving to him in that the note was made by him and delivered to another and by the latter indorsed and delivered to the bank and placed among its assets to swell their volume and the apparent capital and responsibility of the bank in the eyes of the public, who might, as depositors or in business transactions, become the creditors of the bank, was not available, and further that a purchaser of the assets in a sale by the receiver took the receiver's title including his exemption from such defense.

Defense by stock-holder.— Fraud of a corporation in procuring a person to become a subscriber to its stock is no defense to an action brought by a receiver of the corporation to recover the amount of the subscription. The receiver represents the creditors and the subscriber is estopped to set up such defenses as against him. Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Olcott *v.* Chandler, 1 N. Y. City Ct. Suppl. 30; Cox *v.* Dickie, 48 Wash. 264, 93 Pac. 523. The same is true of the defense that defendants contracted to purchase the stock at one half its par value, or that there was no full subscription to the capital stock (Cox *v.* Dickie, *supra*; Cole *v.* Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858), or that the corporation was defectively organized (Cox *v.* Dickie, *supra*); and a stock-holder sued on a note for stock subscribed cannot defend on the ground that he and the other stock-holders gave notes for the stock instead of paying money therefor in fraud of the laws of the state (Farmers', etc., Bank *v.* Jenks, 7 Metc. (Mass.) 592).

Participation in illegal organization of corporation.— So where one with his associates constituted the corporation and shared with them in the fraudulent organization he cannot avail himself of the character of the corporation or of the representations under which he had been induced to subscribe for the stock. Litchfield Bank *v.* Church, 29 Conn. 137. And where the organizers of a corporation proceeded to transact business in its name before the minimum capital stock had been subscribed, creditors are not precluded from recovering through the receiver an amount equal to such minimum stock because the creditors had contracted with the corporation as such and could not deny its corporate existence. Walters *v.* Porter, 3 Ga. App. 73, 59 S. E. 452.

Defenses in action on subscription generally see CORPORATIONS, 10 Cyc. 519 *et seq.*

Repudiation of fraudulent transactions see *supra*, VI, B, 1, c.

52. Hanke *v.* Blattner, 34 Ill. App. 394; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408, holding that where an insurance company issues to a receiver a policy on his interest as receiver, with full knowledge of the capacity in which he acts, it is no defense to an action on the policy that the receiver had no special instructions to expend money in his hands for the payment of premiums.

If a receiver loan trust funds without legal authority, and take a promissory note for security, the want of such legal authority is not a good defense in an action on the note brought by a subsequently appointed receiver, who holds it as part of the assets of the trust estate. Corbin *v.* De la Vergne, 44 N. J. L. 70.

In a suit on a bond to plaintiff as receiver it is held that defendants cannot question his appointment or qualification. Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378; Scott *v.* Duncombe, 49 Barb. (N. Y.) 73.

53. Stokes *v.* Hoffman House, 46 N. Y. App. Div. 120, 61 N. Y. Suppl. 821 [*affirmed* in 167 N. Y. 554, 60 N. E. 667, 53 L. R. A. 870], holding that where a chancery receiver paid out money without authority his right to recover it back was not affected by the fact that he had stated to a third person, in an effort to sell a part of the property, that there was no indebtedness due him as receiver.

54. Etowah Min. Co. *v.* Christopher, 112 Ala. 554, 20 So. 924, holding that in an action by a receiver as such, he cannot defeat

D. Enforcement of Rights Against Receiver — 1. Personal or Official Liability — a. In General.[55] A receiver, being an officer of the court, incurs no personal liability for acts done under and in conformity to the order of the court. For such acts an action will lie against him only in his official capacity;[56] actions against him as such are actions against the receivership or the funds in his hands.[57] The proper form of designating the defendant seems to be to name him "as receiver" of the party of whose property he is receiver;[58] and referring to the continuing character of a receivership it is said that if actions were brought against the receivership generally or against the corporation by name, "in the hands of," or "in the possession of," a receiver without stating the name of the individual, it would more accurately represent the character or status of defend-

the plea of defendants that the amount claimed involved the settlement of a partnership existing between them and plaintiff, and that there had been no settlement of the partnership, upon the ground that plaintiff sues as receiver of the chancery court and as such could not enter into partnership with defendants; that so long as plaintiff is the party complaining his official character and disabilities will be put out of view, the chancery court appointing him being competent to protect the receivership if by the receiver's misdoings the trust is in danger.

55. Liability in administration see *supra*, IV, F, 6, f, (II).

56. *Alabama.*—Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626.

Georgia.— Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Iowa.— Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331.

Minnesota.— Schmidt *v.* Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265.

New Jersey.— Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

Texas.— Brown *v.* Gay, 76 Tex. 444, 13 S. W. 472.

Washington.— Vasele *v.* Grant St. Electric R. Co., 16 Wash. 602, 48 Pac. 249.

See 42 Cent. Dig. tit. "Receivers," § 322.

57. Combs *v.* Smith, 78 Mo. 32 (as to past liabilities of a corporation); Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; McNulta *v.* Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796 [*affirming* 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362]; Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736.

After surrender of property see *infra*, VI, H, 2, b, (II); VII, E.

58. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796]; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633 (under code provision as to bringing and defending suits by receiver "in his own name, as receiver"); Vasele *v.* Grant St. Electric R. Co., 16 Wash. 602, 48 Pac. 249. The practice is also indicated by the following cases: Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64; Rouse *v.* Harry, 55 Kan. 589, 40 Pac. 1007; Schmidt *v.* Gaynor, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575; Camp *v.* Barney, 4 Hun (N. Y.) 373, 6 Thomps. & C. (N. Y.) 622; Com. *v.* Runk, 26 Pa. St. 235.

The word "receiver" is not mere descriptio personæ in such cases which may be disregarded. Thompson *v.* Evans, 2 Tenn. Ch. App. 61, denying right to convert a suit framed against defendant as receiver into a personal action against him. But on the other hand it has been held that in a suit for taking property not covered by the order of appointment, defendant's personal liability may be adjudged notwithstanding he is named with his title, as such designation may be regarded as mere description. Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303.

The allegations of the pleading as well as its title, it has been held, may be referred to to ascertain that the action is against a receiver. Thus an action for damages for personal injuries entitled as such against a railroad company followed by: "A corporation, E. and C., receivers, defendants," and alleging that defendants E and C are receivers duly appointed, etc., and operating the road, and thereafter using the singular "defendant," was held to be an action against the receivers alone. Proctor *v.* Missouri, etc., R. Co., 42 Mo. App. 124. See also Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225. But where the title designates defendant simply "receiver," and the body of the complaint, while alleging that he is the duly appointed and acting receiver of the company, fails to allege that he had charge of the company or the property as receiver at the time of the accident and further distinctly alleges that the negligent act complained of was that of a duly authorized agent of the company, it is held that he is not liable in his official capacity since under the allegations he did not have control of the business of the company as receiver, but in his individual capacity, and he is charged with no individual negligence or misconduct, it being alleged that the negligence was on the part of an agent of the company. Vasele *v.* Grant St. Electric R. Co., 16 Wash. 602, 48 Pac. 249.

Election.— Where a purchaser at a receiver's sale sued the receiver in his official capacity for misrepresentation, such action indicated an election not to charge the receiver personally. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

Waiver of objection.— Where the only persons beneficially interested as defendants in a suit to foreclose a mortgage on partnership property after the dissolution of the partner-

ant.[59] Generally a receiver is not individually liable for torts committed by his subordinates but only for those committed by himself;[60] he cannot be made personally liable unless he has been guilty of some neglect or misconduct or has contracted in excess of his authority or has assumed to enter into an obligation in his individual capacity,[61] and he is not suable officially merely because he is receiver of a person, natural or artificial,[62] unless there be some right to relief from him as receiver, and an ordinary chancery or *pendente lite* receiver will not be suable for a personal liability of the party of whom he is receiver created before the appointment.[63] He cannot be held personally liable for conversion of prop-

ship by the death of one of the partners were the surviving partner, who was appointed receiver of the partnership in a suit by the executrix of the deceased partner, and the devisees under his will, whom such receiver represented, and all of these are defendants individually, they cannot stand by without objecting and claim to be heard in equity against the proceeding and decree after sale of the property on the ground that the receiver was not a party in his representative but only in his individual capacity. Kirkpatrick *v.* Corning, 38 N. J. Eq. 234.

Affidavit in attachment by receiver see ATTACHMENT, 4 Cyc. 493 note 98.

59. McNulta *v.* Lockridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796.

60. *Georgia.*—Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Illinois.—McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796].

Iowa.— Sloan *v.* Central Iowa R. Co., 62 Iowa 728.

Minnesota.— Erskine *v.* McIlrath, 60 Minn. 485, 62 N. W. 1130.

New Jersey.— Vanderbilt *v.* Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

New York.— Cardot *v.* Barney, 63 N. Y. 281, 20 Am. Rep. 533; Camp *v.* Barney, 4 Hun 373, 6 Thomps. & C. 622.

United States.— Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736; Davis *v.* Duncan, 19 Fed. 477.

See 42 Cent. Dig. tit. "Receivers," § 322.

61. Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521; Olpherts *v.* Smith, 54 N. Y. App. Div. 514, 66 N. Y. Suppl. 976 [*affirmed* in 173 N. Y. 593, 65 N. E. 1120]; Nason Mfg. Co. *v.* Garden, 52 N. Y. App. Div. 363, 65 N. Y. Suppl. 147; Sager Mfg. Co. *v.* Smith, 45 N. Y. App. Div. 358, 60 N. Y. Suppl. 849 [*affirmed* in 167 N. Y. 600, 60 N. E. 1120] (holding that a receiver may make authorized purchases in the state of his appointment, or any other state, without being personally liable, if he discloses his character and source of authority); Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009; American Bonding, etc., Co. *v.* Baltimore, etc., R. Co., 124 Fed. 866, 60 C. C. A. 52; Farmers' L. & T. Co. *v.* Central Iowa R. Co., 7 Fed. 537, 2 McCrary 181. But see Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313, 9 N. Y. St. 523.

Receivers appointed by the governor are not liable individually on contracts made as such, unless they have pledged their personal credit. Newman *v.* Davenport, 9 Baxt. (Tenn.) 538, *supra*, I, note 2.

Judgment and enforcement thereof see *infra*, VI, H, 2 a, b.

62. Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424.

63. McDermott *v.* Crook, 20 App. Cas. (D. C.) 465; Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480 [*distinguishing* Combs *v.* Smith, 78 Mo. 32, *infra*, this note, in that the receiver there appears to have been a statutory receiver; and Pickersgill *v.* Myers, 99 Pa. St. 602, in that the corporation was dissolved and the receiver was appointed after dissolution] (receiver in suit to foreclose railroad mortgage); Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Fleischauer *v.* Dittenhoefer, 49 N. Y. Super. Ct. 311 (receiver in proceedings of dissolution of corporation, before dissolution); Flynn *v.* Furth, 25 Wash. 105, 64 Pac. 904 (receiver of partnership in suit for partnership accounting); Northern Pac. R. Co. *v.* Heflin, 83 Fed. 93, 27 C. C. A. 460 (receiver in suit for foreclosure of corporate mortgage).

But on the other hand where the claim is entitled to share in the assets of a corporation in the hands of a receiver, he may be sued with leave of court, although the court granting the leave will adjust such equitable share and determine its priority. Ratcliffe *v.* Alder, 71 Ark. 269, 72 S. W. 896 (action maintainable against receiver of a railroad company for a wrongful appropriation of plaintiff's land by the company, previous to the appointment of the receiver, acquired without condemnation proceedings, the receiver having possession of the right of way as part of the assets of the corporation which he holds without having paid for such land, the claim being a subsisting charge against the corporation and its assets); Combs *v.* Smith, 78 Mo. 32 (where this rule was also applied to an action for damages caused by a railroad company for the unlawful appropriation of plaintiff's land in the exercise of its right of eminent domain). In Harding *v.* Nettleton, 86 Mo. 658, it was held that a suit for the breach of a contract before an appointment of a receiver *pendente lite* in a suit in the federal court for the foreclosure of a railroad mortgage might be brought against the receiver in a state court where it appears that the claim was one which might have been allowed against the assets of the company, although the claim might have been proceeded on in the court which appointed the receiver, as the judgment of the state court

erty which comes legally into his possession as receiver and under the order of the court.[64]

b. Acts Outside or in Excess of Authority. On the other hand a receiver is liable only in his individual capacity by reason of transactions outside of or in excess of his authority.[65] As to other property than that in the custody of the court, the management of which is voluntarily assumed and over which the court had no control, he stands in his natural person, and responsible for its careful and proper management to all those whose relations to it are such that they may suffer from his neglect of duty,[66] and if he assumes wrongfully to take and hold property not embraced in the order of appointment, or forcibly to take property from a stranger, he is not acting as the officer or representative of the court but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages or to recover possession of the property illegally taken or detained.[67]

c. In Continuing Business of Corporation. A receiver of a corporation who continues the conduct and operation of the business of the corporation under the order of the court is held to be substituted for the corporation and to assume its duties,[68] and its liabilities to the public and to the municipality,[69] and liability in such cases may be enforced against him officially,[70] even though the liability of the corporation is statutory.[71]

could not be enforced against property in the hands of the receiver but must still be presented for allowance to the federal court which would determine when and how it was to be paid.

64. Montgomery *v.* Ensler, 126 Ala. 654, 28 So. 626; Tapscott *v.* Lyon, 103 Cal. 297, 37 Pac. 225 (property voluntarily surrendered to him on demand); Remington Paper Co. *v.* Watson, 49 La. Ann. 1296, 22 So. 355.

65. Joost *v.* Bennett, 123 Cal. 424, 56 Pac. 43; Peoria Steam Marble Works *v.* Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. Rep. 296 (where it was held that a receiver, authorized to make purchases of stock, has no implied authority to execute notes therefor, and will be individually liable on notes so executed, although the payee takes them knowing them to have been executed in the receiver's representative capacity, under a mistaken belief that the receiver had authority to execute them as such); Meyer *v.* Lexow, 1 N. Y. App. Div. 116, 37 N. Y. Suppl. 67; Rogers *v.* Wendell, 54 Hun (N. Y.) 540, 7 N. Y. Suppl. 781, 8 N. Y. Suppl. 515; Sayles *v.* Jourdan, 50 Hun (N. Y.) 604, 2 N. Y. Suppl. 827 [*affirmed* in 121 N. Y. 685, 24 N. E. 1098]; Metropolitan L. Ins. Co. *v.* Sanborn, 34 Misc. (N. Y.) 531, 69 N. Y. Suppl. 1009; Appleton *v.* Welch, 20 Misc. (N. Y.) 343, 45 N. Y. Suppl. 751.

Liability on a contract made without express authority is a personal one, the proper course of the receiver being to pay the claim and obtain its allowance, and thus the sanction of the court, on the accounting. Brandt *v.* Siedler, 10 Misc. (N. Y.) 234, 31 N. Y. Suppl. 112; Ryan *v.* Rand, 20 Abb. N. Cas. (N. Y.) 313.

66. Kain *v.* Smith, 80 N. Y. 458.

67. *California.*— Staples *v.* May, 87 Cal. 178, 25 Pac. 346.

Massachusetts.— Hills *v.* Parker, 111 Mass. 508, 15 Am. Rep. 63.

Michigan.— Kenney *v.* Ranney, 96 Mich. 617, 55 N. W. 982; Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303, *supra*, note 58.

Missouri.— Kirk *v.* Kane, 87 Mo. App. 274.

New York.— Manning *v.* Monaghan, 10 Bosw. 231; St. Paul Hotel Co. *v.* Segrave, 48 Misc. 657, 96 N. Y. Suppl. 308; Brein *v.* Light, 36 Misc. 112, 72 N. Y. Suppl. 1087; Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558. See also Matter of Platt, 41 N. Y. Super. Ct. 513.

Texas.— Farmers, etc., Bank *v.* Scott, 19 Tex. Civ. App. 22, 45 S. W. 26.

United States.— Curran *v.* Craig, 22 Fed. 101; *In re* Young, 7 Fed. 855.

Canada.— Campbell *v.* Lepan, 19 U. C. C. P. 31.

See 42 Cent. Dig., tit. "Receivers," § 322.

Particular property to which receiver entitled see *supra*, IV, D, 3, a *et seq.*

68. See *supra*, IV, F, 1.

69. Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114. See also Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243.

70. *Georgia.*— Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Illinois.— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796].

Indiana.—Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

Montana.— Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114, liability for injury occurring by reason of the defective repairing of an excavation in a street by a water company, which defect continued after the receiver took charge.

New York.— Fuller *v.* Jewett, 80 N. Y. 46, 36 Am. Rep. 575, for injuries resulting in death.

Ohio.— Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

Washington.— Vasele *v.* Grant St. Electric R. Co., 16 Wash. 602, 48 Pac. 249.

United States.— Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736.

See 42 Cent. Dig. tit. "Receivers," § 322.

71. Hunt *v.* Conner, 26 Ind. App. 41, 59

d. After Surrender of Property. Where the property is surrendered under the court's order which reserves the right and power to determine what debts are due and should be paid and to bind the property for their payment,[72] without discharging the receiver,[73] an action against him in his official capacity may proceed to judgment.[74]

2. Remedies — a. Requirement of Leave to Sue[75] or of Application For Relief in Proceedings[76] — (I) *The Rule Stated.* Property in the hands of a receiver being in the custody of the court,[77] it is held that the receiver is not amenable to suit in respect of such property in any court except that of which he is an officer,[78] and, while the decisions are conflicting, the broad general rule established by the weight of authority is that a receiver appointed by judicial authority cannot, in the absence of a statute to the contrary, be subjected to suit without the leave of the court whose officer he is, granted in the cause in which he was appointed,[79] and that a right asserted against a receiver, to property rightfully in his hands, where the right to sue in an independent action is not given by statute, must be worked out, either in the action in which the receiver was

N. E. 50; Rouse *v.* Redinger, 1 Kan. App. 355, 41 Pac. 433; Wall *v.* Platt, 169 Mass. 398, 48 N. E. 270.

Thus where the fellow-servant rule is abrogated as to the employees of particular corporations, receivers of such corporations are held to come within the statute. Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Rouse *v.* Harry, 55 Kan. 589, 40 Pac. 1007; Mikkelson *v.* Truesdale, 63 Minn. 137, 65 N. W. 260; Peirce *v.* Van Dusen, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705 (Ohio statute); Rouse *v.* Hornsby, 67 Fed. 219, 14 C. C. A. 377 (Kansas statute); Hornsby *v.* Eddy, 56 Fed. 461, 5 C. C. A. 560.

Contra.— Henderson *v.* Walker, 55 Ga. 481 (where it was held that the statute abolishing the fellow-servant rule in the case of employees of railroads did not apply to the receiver of a railroad); Campbell *v.* Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; Houston, etc., R. Co. *v.* Roberts, (Tex. 1892) 19 S. W. 512; Texas, etc., R. Co. *v.* Collins, 84 Tex. 121, 19 S. W. 365; Yoakum *v.* Selph, 83 Tex. 607, 19 S. W. 145; Turner *v.* Gross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; Bonner *v.* Thomas, (Tex. Civ. App. 1892) 20 S. W. 722; Allen *v.* Dillingham, 60 Fed. 176, 8 C. C. A. 554 (which cases hold that a receiver is neither an owner, proprietor, hirer, nor charterer, within the Texas statutory provisions with respect to railroads, creating liability for injuries resulting in death caused by such persons).

Receiver as carrier see Carriers, 6 Cyc. 371.

Receivers of railroads see Railroads, 33 Cyc. 612.

72. See *supra*, IV, I, 2.

73. Effect of discharge see *infra*, VII, E.

74. Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186; Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181.

Enforcement of judgment see *infra*, VI, H, 2, b, (II).

75. Leave to sue receiver's bond see *infra*, IX, D, 2, b.

76. Rule against interference with receiver's possession see *supra*, IV, D, 5, 6.

77. See *supra*, IV, D, 2, c.

78. Porter *v.* Kingman, 126 Mass. 141 [*distinguishing* Hills *v.* Parker, 111 Mass. 508, 15 Am. Rep. 63, *infra*, note 98]; Goodnough *v.* Gatch, 37 Oreg. 5, 60 Pac. 383; Massachusetts Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13 Fed. 857.

79. *Alabama.*— Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157.

California.— Murray *v.* Etchepare, 132 Cal. 286, 64 Pac. 282.

Connecticut.— Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003.

Florida.— Ray *v.* Trice, 53 Fla. 864, 42 So. 901.

Indiana.— Malott *v.* State, 158 Ind. 678, 64 N. E. 458; Wayne Pike Co. *v.* State, 134 Ind. 672, 34 N. E. 440 (action to procure forfeiture of corporate franchises and property); Keen *v.* Breckenridge, 96 Ind. 69; Peirce *v.* Chism, 23 Ind. App. 505, 55 N. E. 795, 77 Am. St. Rep. 441; Vigo Real Estate Co. *v.* Reese, 21 Ind. App. 20, 51 N. E. 350.

Iowa.— Manker *v.* Phœnix Loan Assoc., (1903) 96 N. W. 982.

Michigan.—People *v.* Brooks, 40 Mich. 333, 29 Am. Rep. 534.

Minnesota.— Schmidt *v.* Gayner, 59 Minn. 333, 61 N. W. 333, 62 N. W. 265.

Missouri.— Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368; Neun *v.* Blackstone Bldg., etc., Assoc., 149 Mo. 74, 50 S. W. 436; Haag *v.* Ward, 89 Mo. App. 186; Kirk *v.* Kane, 87 Mo. App. 274.

Nebraska.— Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924.

New York.— *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665; Fallon *v.* Egberts Woolen Mills Co., 56 N. Y. App. Div. 585, 67 N. Y. Suppl. 347 [*affirming* 31 Misc. 523, 64 N. Y. Suppl. 466] (as to one who had appeared in the action upon an accounting of a temporary receiver, to demand money in his hands, upon which the court

appointed, or in an independent action brought only upon leave of the court by

ordered the money to be retained by the permanent receiver); De Groost *v.* Jay, 30 Barb. 483; James *v.* James Cement Co., 8 N. Y. St. 490; Taylor *v.* Baldwin, 14 Abb. Pr. 166.

Pennsylvania.— Melaney *v.* Atkins, 4 Pa. Dist. 644; Anderson *v.* Buffalo, etc., R. Co., 2 Pa. Co. Ct. 402 (*dictum*); Wray *v.* Hazlett, 6 Phila. 155.

Virginia.— Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587; Melendy *v.* Barbour, 78 Va. 544.

Washington.— Brown *v.* Rauch, 1 Wash. 497, 20 Pac. 785.

West Virginia.—Jones *v.* Browse, 32 W. Va. 444, 9 S. E. 873.

United States.— Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815 (holding that the reasons are stronger for not allowing a suit against a receiver appointed by a state court to be maintained in the federal courts in opposition to the orders and without leave of the state court); Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319; Davis *v.* Gray, 16 Wall. 203, 21 L. ed. 447; Werner *v.* Murphy, 60 Fed. 769; Naumburg *v.* Hyatt, 24 Fed. 898; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704; Hale *v.* Duncan, 11 Fed. Cas. No. 5,914, 6 Reporter 422; Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508, 14 Alb. L. J. (N. Y.) 400 (doctrine held particularly applicable in the case of receivers of railroads in the federal court).

England.— Searle *v.* Choat, 25 Ch. D. 723, 53 L. J. Ch. 506, 50 L. T. Rep. N. S. 470, 32 Wkly. Rep. 397; Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214, 32 Eng. Reprint 632.

See 42 Cent. Dig. tit. "Receivers," § 334.

Right to sue in federal court.— This rule is not affected by the constitutional right of citizens to sue in federal courts in certain cases. Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587.

The object of the rule was and is to protect estates in the hands of receivers from unnecessary and expensive litigations, to preserve it for the equal benefit of those equally interested in its distribution (James *v.* James Cement Co., 8 N. Y. St. 490), and to keep the trust property at all times within the control of the court, which could not be done if the receiver might be sued without its leave, or perhaps without its knowledge, in any other court or jurisdiction (Manker *v.* Phœnix Loan Assoc., (Iowa 1903) 96 N. W. 982).

Rule applied to actions: Not involving actual interference with receiver's possession. Martin *v.* Atchison, 2 Ida. (Hasb.) 624, 33 Pac. 47; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672; Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508, 14 Alb. L. J. (N. Y.) 400. For damages. Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368 (action accruing before appointment of receiver); Palys *v.* Jewett, 32 N. J. Eq. 302; Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587; Melendy *v.* Barbour, 78 Va. 544; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672 (action for personal injuries); Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704 (action for damages for injuries inflicted in operating railroad). For money or property in receiver's hands. De Graffenreid *v.* Brunswick, etc., R. Co., 57 Ga. 22; Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486; Schmidt *v.* Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Luby *v.* Schulenberg, 13 Mo. App. 595; *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665; Olds *v.* Tucker, 35 Ohio St. 581; Jones *v.* Moore, 106 Tenn. 188, 61 S. W. 81 (holding that where replevin is brought against a receiver without leave, and the property is taken from his possession, judgment of dismissal and for the value of the property should be awarded); Brien *v.* Paul, 3 Tenn. Ch. 357 (holding that where a receiver appointed by the supreme court dies, a purchaser from one of the litigants pending the litigation will not be allowed to interfere with the possession of a new receiver by an independent suit, without leave of the court first obtained by permission *pro interesse suo*); Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214, 32 Eng. Reprint 632 (ejectment). To disturb receiver's possession or to charge him for acts done in performance of his duties. Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447. Or to interfere with his conduct in pursuance of the directions of the court appointing him. Jones *v.* Crosby, 70 Ga. 726 (holding that a suit to enjoin a sale by a receiver under the direction of the court appointing him, brought without leave of such court, is properly dismissed); Mallot *v.* State, 158 Ind. 678, 64 N. E. 458 (mandamus refused).

Action against tenant of receiver.— The rule is applied where the action is brought against the tenant of the receiver. Baker *v.* Carraway, 133 Ala. 502, 31 So. 933 (ejectment); Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42 (where it was held that a widow entitled to dower was not at liberty, without leave of court, to proceed with an action therefor against a tenant of the receiver of the property).

It is only when the court has jurisdiction to appoint a receiver that it may do so, and thus, by itself taking possession of property, compel parties to resort to it for leave to prosecute suits at law for the possession or attachment of such property. Gilbert *v.* Block, 51 Ill. App. 516.

Paramount title.— The operation of the rule is not defeated by the fact that the adverse action is brought upon a paramount title. Coleman *v.* Glanville, 18 Grant Ch. (U. C.) 42.

An action which is in no sense one against the receiver or against any party to the suit

which the appointment was made;[80] and under the chancery rules a receiver could not defend actions except by authority of the appointing court.[81]

(II) *Extent, Qualification, and Repudiation of Rule* — (A) *In General.* The court will enjoin prosecution of an action against its receivers without its consent,[82] and will stay such proceedings in the same court.[83] The interference with its officers in this respect is regarded as a contempt,[84] as it is the duty of the court to protect him from the annoyance and embarrassment of litigation instituted by others.[85] In some cases the requirement is held to be jurisdictional;[86] and the fact that the action is brought with the consent of the

brought and prosecuted in his behalf, but is against defendant for an independent wrong, may be maintained without leave. Farnsworth *v.* Western Union Tel. Co., 3 Silv. Sup. (N. Y.) 30, 6 N. Y. Suppl. 735.

Cross suit against receiver see *infra*, VI, D, 2, d, (III).

Suit by party represented by receiver who refuses to sue see *supra*, VI, B, 6.

80. Porter *v.* Kingman, 126 Mass. 141 [*distinguishing* Hills *v.* Parker, 111 Mass. 508, 15 Am. Rep. 33, *infra*, note 98] (holding that equitable rights which it is contended are superior to the title made by order of the court can be passed upon only in the cause in which that title is created, and cannot be set up in an independent suit); Olds *v.* Tucker, 35 Ohio St. 581.

After discharge see *infra*, VII, E.

Examination pro interesse suo see *supra*, IV, D, 6, a.

Foreign and ancillary receiverships see *infra*, VIII.

81. *Kansas.*— Patrick *v.* Eells, 30 Kan. 680, 2 Pac. 116.

Ohio.— Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

South Carolina.— Gadsden *v.* Whaley, 14 S. C. 210.

Tennessee.— Conley *v.* Deere, 11 Lea 274.

Virginia.— Reynolds *v.* Pettyjohn, 79 Va. 327; Davis *v.* Snead, 33 Gratt. 705.

England.— Anonymous, 6 Ves. Jr. 287, 31 Eng. Reprint 1055, where there was a reference to the master whether it was for the benefit of the parties that the receiver should be at liberty to defend an ejectment.

See 42 Cent. Dig. tit. "Receivers," § 334.

Costs in defending without leave.— In Swaby *v.* Dickon, 5 Sim. 629, 9 Eng. Ch. 629, 58 Eng. Reprint 475, it was held that a receiver having, without the sanction of the court, defended an action arising out of a distress for rent, made by him on a tenant of the estate, the court would refuse to allow him his costs of the action. But see Bristowe *v.* Needham, 2 Phil. 190, 22 Eng. Ch. 190, 41 Eng. Reprint 914, holding that a receiver who, without the sanction of the court, defends an action brought against him by a party to the cause, is not on that account disentitled to the assistance of the court in recovering from such party the extra costs of the action; although if his defense had failed he would not, under such circumstances, have been entitled to reimbursement. And as to costs generally see *infra*, VI, H, 4.

82. Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626; J. I. Case Plow Works *v.* Finks, 81 Fed. 529, 26 C. C. A. 46 (where leave was given to proceed in the cause in which the property was involved); Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704; Simpson *v.* Hutchison, 7 Grant Ch. (U. C.) 308. See also *supra*, IV, D, 5, d.

83. Fallon *v.* Egberts Woolen Mills Co., 56 N. Y. App. Div. 585, 67 N. Y. Suppl. 347 [*affirming* 31 Misc. 523, 64 N. Y. Suppl. 466]; De Groot *v.* Jay, 30 Barb. (N. Y.) 483 (on motion or petition); Taylor *v.* Baldwin, 14 Abb. Pr. (N. Y.) 166.

84. Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486; Smith *v.* Wayne Cir. Judge, 84 Mich. 564, 47 N. W. 1092 (as to receiver in court having exclusive jurisdiction over assignments); Greene *v.* Odell, 43 N. Y. App. Div. 608, 60 N. Y. Suppl. 346; De Groot *v.* Jay, 30 Barb. (N. Y.) 483; James *v.* James Cement Co., 8 N. Y. St. 490 (holding, however, that where a plaintiff, in bringing a suit against a receiver without leave of court, was not guilty of wilful contempt, but acted innocently, on the assumption that he had a right to sue, no other terms should be imposed on him than such as are necessary to indemnify the receiver, which will be covered by the payment of his costs of motions to set the action aside and to punish for contempt); Taylor *v.* Baldwin, 14 Abb. Pr. (N. Y.) 166; Noe *v.* Gibson, 7 Paige 513; Davis *v.* Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28; Naumburg *v.* Hyatt, 24 Fed. 898; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704; Hale *v.* Duncan, 11 Fed. Cas. No. 5,914, 6 Reporter 422, 26 Pittsb. Leg. J. (Pa.) 32 (court will enjoin and hold the breach of the injunction a contempt); Thompson *v.* Scott, 23 Fed. Cas. No. 13,975, 4 Dill. 508.

Contempt in interfering with possession generally see *supra*, IV, D, 5, e.

85. Naumburg *v.* Hyatt, 24 Fed. 898, duty so to protect receiver whether the litigation is in the same court or in another jurisdiction. See also, generally, *supra*, IV, D, 5, c.

86. Martin *v.* Atchison, 2 Ida. (Hasb.) 624, 33 Pac. 47; Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704, holding that any judgment against a receiver without

appointing court must be alleged and proved; [87] or the action will be dismissed upon demurrer,[88] plea, or answer; [89] and the appearance by the receiver to the merits without raising the objection will not operate as a waiver; [90] and while one court cannot wrest from another of coördinate dignity property of which the latter has acquired prior possession and jurisdiction,[91] and any judgment in another court in a suit affecting the receiver's right of possession is held to be null and void in the court appointing the receiver who was thus impleaded without its leave,[92] the rule requiring leave to sue is not so limited that the only consequence resulting from prosecuting the suit without such leave is that plaintiff may be restrained by injunction or attachment for contempt.[93] On the other hand the rule is held to be one of comity between courts,[94] and is not without qualification; [95] and in some cases it is repudiated altogether in so far as it operates to deny the power of another court to exercise jurisdiction, or furnishes a defense to the action against the receiver, the remedy, in case a party should proceed without leave, being confined to contempt proceedings or a restraining order,[96]

leave would be a nullity. See also Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829.

The leading case usually cited for this position is Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672, *infra*, note 96.

Court having exclusive jurisdiction of assignments.—A statute relating to assignments for the benefit of creditors, and conferring on the circuit court in chancery of the proper county supervisory power over all matters arising thereunder, creates a special jurisdiction in such courts over such assignments, the exercise of which cannot be interfered with by process from other courts; and one who, without leave of the court in which an assignment is pending, institutes proceedings in another jurisdiction against its receivers appointed in the assignment proceeding, in the place of removed assignees to enjoin a sale by the receivers on the ground that the assignment was void is guilty of contempt. Smith *v.* Wayne Cir. Judge, 84 Mich. 564, 47 N. W. 1092.

87. Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587.

88. See *infra*, VI, G, 2.

89. Smith *v.* St. Louis, etc., R. Co., 151 Mo. 391, 52 S. W. 378, 48 L. R. A. 368 (where receiver appeared and pleaded to the merits and also want of permission to sue); Jones *v.* Browse, 32 W. Va. 444, 9 S. E. 873 (defense set up in answer); Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672 (plea to jurisdiction); American L. & T. Co. *v.* Central Vermont R. Co., 84 Fed. 917.

Service of summons set aside and the writ abated see Mealaney *v.* Atkins, 4 Pa. Dist. 644.

Form of plea in abatement see Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 571, 22 So. 157.

90. Haag *v.* Ward, 89 Mo. App. 186, receiver cannot waive objection by appeal and it is available at any stage of the proceeding.

91. See COURTS, 11 Cyc. 988 *et seq.*

92. Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28.

No rights acquired by interference see *supra*, IV, D, 7, e, (III), (A), (B).

93. Martin *v.* Atchison, 2 Ida. (Hasb.) 624, 33 Pac. 47; Barton *v.* Barbour, 104 U. S. 126, 26 L. ed. 672.

94. Ratcliff *v.* Adler, 71 Ark. 269, 72 S. W. 896; Hupfeld *v.* Automaton Piano Co., 66 Fed. 788.

95. Hupfeld *v.* Automaton Piano Co., 66 Fed. 788, holding that the rule that one court will not take jurisdiction of a suit against a receiver appointed by another court until the consent of the court which appointed the receiver has been obtained does not apply to a suit in the federal court, to restrain the infringement of a patent, by a receiver appointed by a state court, since the jurisdiction of the federal court over such a suit is exclusive, and the application of the rule would leave it within the power of the state court to exclude the complaint from the only tribunal having jurisdiction of his suit. But in Curran *v.* Craig, 22 Fed 101, it was held that in an action at law for damages for infringement of a patent by one who was receiver of the property of a licensee of the patent, while the federal court had exclusive jurisdiction, although the acts of the receiver were under the order of a state court, comity required that the federal court suspend its proceedings until application could be made to the state court for a modification of the improvident order under which the receiver acted.

Action in court which appointed receiver see *infra*, note 96.

96. *Iowa.*— Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38; Allen *v.* Central R. Co., 42 Iowa 683.

Kansas.— St. Joseph, etc., R. Co. *v.* Smith, 19 Kan. 225.

Minnesota.— Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652, not a part of the cause of action.

New York.— Pruyn *v.* McCreary, 105 N. Y. App. Div. 302, 93 N. Y. Suppl. 995 [*affirmed* in 182 N. Y. 568, 75 N. E. 1133]; Le Fevre *v.* Matthews, 39 N. Y. App. Div. 232, 57 N. Y. Suppl. 128; Hirshfeld *v.* Kalischer, 81 Hun 606, 30 N. Y. Suppl. 1027 (not ground of demurrer); Hackley *v.* Draper, 4 Thomps. & C. 614 [*affirmed* in 60 N. Y. 88]; Hutchinson *v.* Bein, 46 Misc. 302, 93 N. Y. Suppl. 189

or both,[97] in the court in which the receivership is pending, at least where the action does not involve an actual interference with the receiver's possession,[98] and the receiver may appear and plead and waive the objection.[99]

[*affirmed* in 104 N. Y. App. Div. 214, 93 N. Y. Suppl. 216].

Ohio.— Tobias *v.* Tobias, 51 Ohio St. 519, 38 N. E. 317, holding that the receiver only can raise the objection.

Tennessee.— Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Vermont.— Roxbury *v.* Central Vermont R. Co., 60 Vt. 121, 14 Atl. 92; Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346 (which cases are as to actions for tort); Blumenthal *v.* Brainard, 38 Vt. 402, 91 Am. Dec. 350 (where it is said that the fact that defendants were acting as receivers under the appointment of a court of chancery cannot be recognized as a defense to an action at law for a breach of any obligation or duty which they voluntarily assumed in matters conducted or carried on by them while acting as such receivers).

Wisconsin.—Kinney *v.* Crocker, 18 Wis. 74.

See 42 Cent. Dig. tit. "Receivers," § 340.

Such restraining order operates upon the parties, not upon the court in which the action is brought. Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855; Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346.

The authority of Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672, for the proposition that leave to sue is jurisdictional is attacked or questioned in Ratcliff *v.* Adler, 71 Ark. 269, 72 S. W. 896; Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38; James *v.* James Cement Co., 8 N. Y. St. 490 (in which cases the rule of that decision is considered as limited to actions in foreign jurisdictions, and to have no application to actions in the same court, or the court presided over by the same judge, as that in which the receiver was appointed); Lyman *v.* Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346. To the same effect where the action is in the same court. Murray *v.* Etchepare, 132 Cal. 286, 64 Pac. 282; Mayor *v.* Northern Trust Co., 93 Ill. App. 314; Payson *v.* Jacobs, 38 Wash. 203, 80 Pac. 429 [*distinguishing* and in effect *overruling* Brown *v.* Rauch, 1 Wash. 497, 20 Pac. 785]. But see *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665, recognizing the rule in Barton *v.* Barbour, *supra*, as applied to an action to recover possession, which it is said cannot be maintained without leave. And see Farnsworth *v.* Western Union Tel. Co., 53 Hun (N. Y.) 636, 6 N. Y. Suppl. 735, where the authority of Barton *v.* Barbour, *supra*, is recognized, although the precise point was not decided, in the case of an action in a state court against the receiver of a federal court.

Presumption of leave.— It has been held that since the failure to obtain leave to sue a receiver does not affect the jurisdiction, such leave will be presumed where the receiver appeared without objection. Carter *v.* Rodewald, 108 Ill. 351 (receiver of federal court sued in state court); Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38; Payson *v.* Jacobs, 38 Wash. 203, 80 Pac. 429 (the two cases last cited involving actions in the same court in which the receiver was appointed).

Order nunc pro tunc.—The leave to sue may be granted *nunc pro tunc* after the action against the receiver has been begun. Hirshfeld *v.* Kalischer, 81 Hun (N. Y.) 606, 30 N. Y. Suppl. 1027.

97. Hirshfeld *v.* Kalischer, 81 Hun (N. Y.) 606, 30 N. Y. Suppl. 1027.

98. *Illinois.*— Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702; Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393.

Iowa.— Allen *v.* Central R. Co., 42 Iowa 683.

Massachusetts.— American Steel, etc., Co. *v.* Bearse, 194 Mass. 596, 80 N. E. 623.

North Carolina.— Wilson *v.* Rankin, 129 N. C. 447, 40 S. E. 310, waiver by failure to demur.

Tennessee.— Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855, holding that a receiver of railroad may be sued in another court for his torts and defaults in operating the road, although the court appointing him still has power to direct how payment shall be made by the receiver, and that an order enjoining all bondholders, creditors, and others interested in the property from bringing suits against the receiver in any other court applied only to suits of bondholders, creditors, and others whose claims were in existence at the time the receiver was appointed, and not to claims for such torts.

Wisconsin.— Kinney *v.* Crocker, 18 Wis. 74.

See 42 Cent. Dig. tit. "Receivers," § 340.

Action interfering with possession not maintainable see *In re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. 665 [*affirming* 59 N. Y. Super. Ct. 552, 15 N. Y. Suppl. 144]; Case *v.* Duffy, 86 N. Y. Suppl. 778.

Property in which receiver has no interest. — In Hills *v.* Parker, 111 Mass. 508, 15 Am. Rep. 63 [*distinguished* in Porter *v.* Kingman, 126 Mass. 141, *supra*, note 78], it is held that, although plaintiff in replevin may be in contempt, he may nevertheless maintain his action without leave against the agent of a railroad company whose property is in the hands of receivers, for a locomotive engine in which the company has no interest, although it is used on the road.

99. *Illinois.*— Mulcahey *v.* Strauss, 151 Ill. 70, 37 N. E. 702 (waiver by failure to move to dismiss); Carter *v.* Rodewald, 108 Ill. 351; Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393 (waiver of allegation of leave by appearance).

Indiana.— Elkhart Car-Works Co. *v.* Ellis, 113 Ind. 215, 15 N. E. 249.

Massachusetts.— American Steel, etc., Co. *v.* Bearse, 194 Mass. 596, 80 N. E. 623.

(B) *Statutory Modification of Rule.* The rule requiring leave to sue a receiver is sometimes modified by local statutes and has been changed by act of congress so far as the courts of the United States are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands, arising during the discharge of his duties as such official.[1] Such provision does not authorize the bringing of all actions without limitation, but only such as are of the class mentioned; as to others leave of court should be obtained.[2] Thus a state statute providing that a receiver may be sued in respect to any act or transaction in carrying on the business connected with the property intrusted to him does not authorize a suit against the receiver, without leave, for the *corpus* of the estate,[3] and the operation of the federal statute [4] has been restricted in the same manner to causes in respect to acts or transactions of the receiver,[5] and does not

Nebraska.— Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924.

New York.— Hubbell *v.* Dana, 9 How. Pr. 424.

Ohio.— Tobias *v.* Tobias, 51 Ohio St. 519, 38 N. E. 317.

Washington.— Payson *v.* Jacobs, 38 Wash. 203, 80 Pac. 429 [*distinguishing* Brown *v.* Rauch, 1 Wash. 497, 20 Pac. 785, in that it was decided by the territorial court upon the authority of Barton *v.* Barbour, 104 U. S. 126, the doctrine of which case was changed by federal statute] (which was a foreclosure suit, the court holding further that the objection being raised in a collateral proceeding it would be presumed that leave was obtained, especially where the suit against the receiver was in the same court which appointed him); Sligh *v.* Shelton Southwestern R. Co., 20 Wash. 16, 54 Pac. 763 (action in same court which appointed the receiver).

United States.— Naumburg *v.* Hyatt, 24 Fed. 898. See also *In re* Young, 7 Fed. 855, where, after submitting to jurisdiction of state court in replevin against the custodian of the receiver, it was held too late to complain that the action was in contempt of the federal court.

See 42 Cent. Dig. tit. "Receivers," § 340. See also *supra*, IV, D, 5, e.

When the receiver invokes affirmative relief he cannot thereafter question the jurisdiction to which he has voluntarily submitted. Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38; Flentham *v.* Steward, 45 Nebr. 640, 63 N. W. 924.

The court may waive the contempt. Naumburg *v.* Hyatt, 24 Fed. 898.

Where the receiver resigned after suit brought by leave of the court appointing him, it was held that if it was necessary to reobtain leave as to the new receiver who was made a party upon the resignation of the first, failure to do so would not constitute such error as to require a reversal of the judgment in the absence of exceptions urged at the proper time and in the proper manner, and in the absence of assignments of error. Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504.

1. See the statutes of the several states. And see Act Cong. March 3, 1887, c. 373, § 3 (24 U. S. St. at L. 554); Aug. 13, 1888, c. 866, § 3 (25 U. S. St. at L. 436) [U. S. Comp. St. (1901) p. 582], under which it is provided that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but that such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

Application to existing causes of action.— The federal statute was held applicable to causes of action then existing, and to pending receiverships; and the proviso in section 6 that "this act shall not affect the jurisdiction over or disposition of" any pending suit was held merely intended to limit the effect of the repealing clause contained in that section. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829.

2. Bennett *v.* Northern Pac. R. Co., 17 Wash. 534, 50 Pac. 496 (showing that the language in McNulta *v.* Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796, *infra*, note 5, was not intended to lay down a different rule, but was applied to the receiver so far as the duration of his appointment was concerned); Minot *v.* Mastin, 95 Fed. 734, 37 C. C. A. 234 (which cases refer to the provision of the federal statute *supra*, note 1).

Set-off or counter-claim see *infra*, text and note 55.

3. Baker *v.* Carraway, 133 Ala. 502, 31 So. 933, requiring leave to a mortgagor to maintain ejectment against the lessee of a receiver.

4. See *supra*, note 1.

5. See the cases cited *infra*, this note.

Examples of actions requiring leave.— To quiet title to land claimed by plaintiff under an allegation that the company and its receiver claimed some interest therein. Bennett *v.* Northern Pac. R. Co., 17 Wash. 534, 50 Pac. 496. To establish right to property in receiver's hands. J. I. Case Plow Works *v.* Finks, 81 Fed. 529, 26 C. C. A. 46. To interfere with receiver's possession. Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157 (detinue); Hollifield *v.* Wrightsville, etc., R. Co., 99 Ga. 365, 27 S. E. 715.

limit the power of the court which appointed the receiver to protect the property in his custody from external attack.[6]

(c) *Suit in Same Court.* It has been held also that the rule requiring one to

To recover money in the receiver's hands. Clukies *v.* New York Bank, 74 N. Y. App. Div. 38, 76 N. Y. Suppl. 826. To foreclose mortgage. American Loan, etc., Co. *v.* Central Vermont R. Co., 84 Fed. 917. Garnishment proceedings. Glover *v.* Thayr, 101 Ga. 824, 29 S. E. 36; New York Cent. Trust Co. *v.* Chattanooga, etc., R. Co., 68 Fed. 685. Proceedings to condemn property under the right of eminent domain. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115], holding that the refusal of the receiver to agree on a crossing at a particular place, etc., does not constitute "an act or transaction" by the receiver within the statute. To enforce claim against owner of property, which arose prior to receivership. Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 118 Fed 204. Suit by a stock-holder of a corporation against its receiver and others on a cause of action which accrued before the appointment and upon which the receiver has refused to sue. Swope *v.* Villard, 61 Fed. 417. But *compare* with the foregoing cases Stoltz *v.* Milwaukee, etc., R. Co., 104 Wis. 47, 80 N. W. 68 (where it was held that under the statute in that state which contemplated that upon condemnation proceedings no permanent interest in the property could be acquired before actual payment of the damages awarded or until provision made for such payment as prescribed by law, a suit against a railroad company and its receivers could be maintained for the purpose of restraining the operation of the road until payment of such damages); Royal Trust Co. *v.* Washburn, etc., R. Co., 139 Fed. 865, 71 C. C. A. 579 (where it was held that one might resort to a suit in another court even though the purpose thereof was to enjoin the acts of the receiver under the authority of the court appointing him without being guilty of contempt, if he stops short of actual physical interference with the possession; that the officer in executing the writ might go as far as the service thereof if he does not actually and physically interfere with the receiver's possession, and that the mere institution of the suit by the party was not an interference).

Examples of actions not requiring leave.— Suit by assignee of a claim for wages against receiver. Trumbull *v.* Makeever, 9 Colo. App. 350, 48 Pac. 825. Tort for damages in operating. Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308 (for negligent killing in operating railroad); Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516 (personal injuries); Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114 (failure of receiver of a water company to put a street in a safe condition, although it was excavated and defectively filled by the company before his appointment); Meyer *v.* Harris, 61 N. J. L. 83, 38 Atl. 690 (injuries caused by the maintenance by the receiver of a railroad of a structure which operates as a nuisance); Schonberg *v.* Cowen, 7 Ohio S. & C. Pl. Dec. 522, 7 Ohio N. P. 152; Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766 (personal injuries); Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220 (personal injuries); Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 [*affirming* 49 Fed. 807, 1 C. C. A. 441]; Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81 (personal injuries); Jones *v.* The St. Nicholas, 49 Fed. 671 (marine tort).

Scope of act.— The act of congress was intended to place such receivers of railroad companies upon the same plane with the railroad companies, as respects their liability to be sued for acts done while operating railroads. Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225 [*affirming* 49 Fed. 807, 1 C. C. A. 441]; McNulta *v.* Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796 [*affirming* 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362].

Claim against successive receiver.— The act of congress applies to such a receiver in respect of an act of his predecessor in the office, and it was not intended by the word "his" in the expression "any act or transaction of his" in respect of which the license to sue is granted to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents. McNulta *v.* Lochridge, 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796 [*affirming* 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362]. But in Jones *v.* Schlapback, 81 Fed. 274, it was held that a receiver appointed by a federal court for a road formerly constituting part of a larger system is not liable to be sued in another court, without permission of the appointing court, for alleged wrongful acts committed in the operation of the road by the receivers of the whole system, whom he has displaced; and such a suit will be enjoined.

The appointing court cannot restrain the bringing of suits which come within the statute. Central Trust Co. *v.* East Tennessee, etc., R. Co., 59 Fed. 523.

And notice requiring the filing of claims given pending an action against a receiver does not preclude the prosecution of such action to final judgment. Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362. But see Dillingham *v.* Kelly, 8 Tex. Civ. App. 113, 27 S. W. 806.

But where the federal court has taken jurisdiction of a suit by the receiver of a national bank for the disposition of the assets, an injunction by that court prohibiting a stock-holder of the insolvent bank from instituting proceedings to obtain control of the assets does not violate the statute. Stateler *v.* California Nat. Bank, 77 Fed. 43.

6. *Ex p.* Tyler, 149 U. S. 164, 13 S. Ct. 785, 37 L. ed. 689.

apply for redress against a receiver to the court which appointed him in the case in which he was appointed is met in a proper case by an original bill filed in the same court.[7] And where mandamus proceedings against the receiver of a quasi-public corporation are instituted in and entertained by the court which appointed him, for the purpose of compelling the performance of a public duty of the corporation, it is held that he cannot object that the relief sought might have been obtained by a more summary and less formal remedy.[8]

(D) *As to Successive Receivers.* Permission by the court to bring an action against its receiver will apply to a receiver appointed on the resignation of the one who was acting when the permission was given.[9]

(E) *Action to Enforce Personal Liability.* If a receiver takes property under an order of the court and not in the possession of one claiming it, the court will restrain the prosecution of an action by such person against the receiver for conversion brought without leave.[10] But the rule that an officer does not, by reason of his office, obtain any immunity from liability for his torts [11] applies to a receiver,[12] and actions to enforce such liability,[13] as where he assumes to take and hold property not embraced in the order appointing him, may be brought in another court without leave.[14]

7. Jones *v.* Stewart, (Tenn. Ch. App. 1900) 61 S. W. 105. In this case it was said that a petition in the cause is preferable as better enabling the court to protect the rights of all the parties. The receiver here was appointed after entry of a final decree and thereafter an appeal was taken and it was held that he became an officer of the appellate court subject to its direction and control in so far as the remedy of the party to apply for directions might be concerned, but that strangers to the cause had no such redress by motion or petition in the appellate court because they had no status in the cause and because that court could not entertain such application without going beyond its powers and exercising original jurisdiction; that in such a case a stranger to the cause might file a separate bill in the court in which the receivership originated to protect his rights as owner of the property involved and to restrain interference therewith by the receiver. But see Goodnough *v.* Gatch, 37 Oreg. 5, 60 Pac. 383, *infra*, note 29.

Original bill in same cause by party to receivership cause.— In Payne *v.* Baxter, 2 Tenn. Ch. 517, it was held that an original bill against a receiver by a party to the suit in which the receiver was appointed is unnecessary, unwarranted, and a contempt of court and that no such leave could be obtained by the party to the suit for the reason that his remedy is by motion or petition in that suit.

8. Ft. Dodge *v.* Minneapolis, etc., R. Co., 87 Iowa 389, 54 N. W. 243, to compel construction of street crossing.

9. Fordyce *v.* Dixon, 70 Tex. 694, 8 S. W. 504, where the action was brought against the original receiver under the permission, who resigned thereafter.

10. Montgomery *v.* Enslen, 126 Ala. 654, 28 So. 626. But in Fallon *v.* Egberts Woolen Mills Co., 56 N. Y. App. Div. 585, 67 N. Y. Suppl. 347 [*affirming* 31 Misc. 523, 64 N. Y. Suppl. 466], it was held that after one who claimed money in the hands of a temporary receiver had made himself a party on the accounting of such receiver, to claim such money, and the court ordered it to be retained by the permanent receiver an action could not be brought against the receiver personally and such action will be stayed, although if the claimant had not so appeared on the accounting but in the first instance had demanded the money from the receiver, upon the latter's refusal he would have been subject to a personal action without leave.

Order as protection in same court.— Redress for the acts of a receiver claimed to be trespassing while acting under directions of the court is not to be sought before the same tribunal. The court does not punish its officer for disobedience to its orders. Heise *v.* Starr, 44 Ill. App. 406.

11. See, generally, OFFICERS, 29 Cyc. 1440 *et seq.*

12. See *supra*, VI, D, 1.

13. Manning *v.* Monaghan, 10 Bosw. (N. Y.) 231 [*reversed* on other grounds in 28 N. Y. 585], action for damages against receiver and the party on whose motion he was appointed, for sale of property contrary to receiver's duty.

14. Hills *v.* Parker, 111 Mass. 508, 15 Am. Rep. 63 (replevin); Kenney *v.* Ranney, 96 Mich. 617, 55 N. W. 982 (against receiver of mortgaged property for taking and selling property not covered by the mortgage); Kirk *v.* Kane, 87 Mo. App. 274; Curran *v.* Craig, 22 Fed. 101 (*supra*, note 95); *In re* Young, 7 Fed. 855.

A receiver cannot forcibly take property from a stranger to the record (see *supra*, IV, D, 5, h, (II)), and if he does so the order of the court appointing him is no protection and such stranger may pursue the usual common-law remedies to enforce his rights and is not guilty of contempt in so doing. Kirk *v.* Kane, 87 Mo. App. 274; Brein *v.* Light, 36 Misc. (N. Y.) 112, 72 N. Y. Suppl. 1087; Dewey *v.* Finn, 18 N. Y. Wkly. Dig. 558. Replevin is maintainable. Campbell *v.* Lepan, 19 U. C. C. P. 31.

b. Granting Leave or Disposing of Controversy — (i) *Proceedings in General.* The application for leave to sue a receiver should be made to the court which appointed him,[15] and the petition should, on its face, show that the petitioner has a case. The court should not allow its receiver to be harassed by a suit where, according to his own showing, the petitioner has no cause of action.[16] The application is in effect a motion in the cause,[17] and, it has been held, cannot be granted in any other cause than that in which the receivership is pending.[18] But the rule requiring leave is practically complied with, when leave is granted by a judge in vacation and the suit is afterward tried by him in term-time. Such a subsequent entertainment and trial of the suit is equivalent to a direct authorization for its institution.[19] In a proper case the court may, after the action is brought, grant leave *nunc pro tunc*,[20] and mere delay in entering the order, which had been regularly granted, until after the action is commenced will not require the setting aside of the summons and process but the order when entered will take effect as of the day it was granted.[21]

(ii) *Discretion to Grant Leave or Try Controversy.*[22] It was not according to the course of the court of chancery to refuse liberty to try a right claimed against its receiver, unless it was perfectly clear that there was no foundation for the claim,[23] and while it has been held that the court cannot properly refuse leave to bring an action at law upon a purely legal right, when the applicant comes in asking for a trial at law and by jury,[24] it is otherwise when the

If the receiver acts under an order which is coram non judice an action against him individually without leave is not a contempt. Kroner *v.* Reilly, 49 N. Y. App. Div. 41, 63 N. Y. Suppl. 527.

15. Wilson *v.* Rankin, 129 N. C. 447, 40 S. E. 310.

Courts of other judicial districts.—An application for leave to sue a receiver is within a code provision that a motion upon notice in an action in the supreme court must be made within the judicial district in which the action is triable or in a county adjoining that in which it is triable. Matter of Commercial Bank, 35 N. Y. App. Div. 224, 54 N. Y. Suppl. 722. And such motion cannot be made in one judicial district, while a general order, made by the court in another district, restraining all interference with the receiver is in force. The general order must first be vacated or modified. Wilkinson *v.* North River Constr. Co., 66 How. Pr. (N. Y.) 423.

General license in order of appointment see *infra*, VI, D, 2, c.

16. Jordan *v.* Wells, 13 Fed. Cas. No. 7,527, 3 Woods 527.

If the petitioner makes a prima facie case by his petition and affidavits, it is held that leave should be granted, and that the court should not undertake in advance to decide the case against him. Jordan *v.* Wells, 13 Fed. Cas. No. 7,527, 3 Woods 527. See also *In re* McElrath, 16 Fed. Cas. No. 8,780, 2 Dill. 460, where leave was granted, a constitutional question being involved. But in Lehigh Coal, etc., Co. *v.* New Jersey Cent. R. Co., 38 N. J. Eq. 175, it is held that on a petition for leave to sue a receiver on contracts made with his predecessor, the question whether the receiver was bound by his predecessor's contracts being one for the exclusive jurisdiction of equity, that court should inquire into the facts before taking action on the petition.

17. Matter of Commercial Bank, 35 N. Y. App. Div. 224, 54 N. Y. Suppl. 722 (holding that its character is not changed by entitling it "In the Matter of," etc., instead of in the action); De Groot *v.* Jay, 30 Barb. (N. Y.) 483 (special motion). But it is proper and more regular to entitle the motion as of the cause in which the receiver was appointed. Wilson *v.* Rankin, 129 N. C. 447, 40 S. E. 310.

18. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003. But see in this connection *infra*, VI, D, 2, c, (II).

19. Wade *v.* Ringo, 62 Mo. App. 414.

Different judges of same court.— Under one code provision conferring jurisdiction to appoint receivers on the judges of the superior court having authority to grant injunctions, and another conferring jurisdiction to grant injunctions upon the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district, it was held that a resident judge of the superior court could grant leave in vacation to sue a receiver appointed in term-time by another superior court judge holding court in the district. Wilson *v.* Rankin, 129 N. C. 447, 40 S. E. 310.

20. See *supra*, note 96.

21. Marshall *v.* Friend, 33 Misc. (N. Y.) 443, 68 N. Y. Suppl. 502 [*affirmed* in 59 N. Y. App. Div. 628, 69 N. Y. Suppl. 1140].

22. **Appealability of order** see Appeal and Error, 2 Cyc. 612.

23. Vanderbilt *v.* New Jersey Cent. R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Palys *v.* Jewett, 32 N. J. Eq. 302; Jordan *v.* Wells, 13 Fed. Cas. No. 7,527, 3 Woods 527; Randfield *v.* Randfield, 3 De G. & J. 766, 8 Jur. N. S. 161, 31 L. J. Ch. 113, 5 L. T. Rep. N. S. 698, 64 Eng. Ch. 598, 45 Eng. Reprint 1075 [*quoted* with approval in Lane *v.* Capsey, [1891] 3 Ch. 411, 61 L. J. Ch. 55, 65 L. T. Rep. N. S. 375, 40 Wkly. Rep. 87; Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 106].

24. Palys *v.* Jewett, 32 N. J. Eq. 302.

petitioner voluntarily comes into court in the receivership proceeding, asking that court to determine his rights;[25] and generally it is considered to be a matter within the discretion of such court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere,[26] and the latter is usually done when the issues can be more conveniently tried in the place where the facts arise and the venue belongs.[27] But it is held that the court should not permit its receiver to be made a party to proceedings in another court, where the result may be the dismemberment of the property which is being administered for the benefit of creditors and lienors,[28] and that the court is not precluded by the granting of leave on an *ex parte* application from subsequently dismissing the suit upon a hearing, if the proceeding involves the disposition of the property, and remitting the party to his remedy in the receivership suit.[29] In most cases of claims against a receiver, or the fund or property in his hands, the remedy by application in the cause is adequate. Any person having such a claim may resort to this summary remedy. The fund or property being held by the court, by its receiver, in trust for those entitled to it, or to be paid out of it, the court may

The court expressed no opinion on the purely legal rights of the applicant, and would go no further than to remove out of his way the difficulties of the officer of the court being in possession, upon an application to take proceedings which would interfere with a receiver's possession. Eyton *v.* Denbigh, etc., R. Co., L. R. 6 Eq. 14, 16 Wkly. Rep. 1005. But the court took an opportunity of considering, and, in a sense, of trying the right of the applicant before sanctioning the proceeding; how far such preliminary trial should go depended upon the circumstances of each case. Angel *v.* Smith, 9 Ves. Jr. 335, 7 Rev. Rep. 214, 32 Eng. Reprint 632; Evelyn *v.* Lewis, 3 Hare 472, 25 Eng. Ch. 472, 67 Eng. Reprint 467; Allan *v.* Manitoba, etc., R. Co., 10 Manitoba 106.

25. Potter *v.* Spa Spring Brick Co., 47 N. J. Eq. 442, 20 Atl. 852.

26. *Georgia.*— Stephens *v.* Augusta Tel., etc., Co., 120 Ga. 1082, 48 S. E. 433.

Illinois.— Gunning *v.* Sorg. 214 Ill. 616, 73 N. E. 870 [*affirming* 113 Ill. App. 332]; Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393; Heise *v.* Starr, 44 Ill. App. 406; Andrews *v.* Stanton, 18 Ill. App. 163.

New Jersey.— Klein *v.* Jewett, 26 N. J. Eq. 474 [*affirmed* in 27 N. J. Eq. 550], where it was held that as to the question of liability resulting from the default or misconduct of a receiver, if there is no dispute as to the power of the court to make the order under which the receiver acted, the court may determine the liability or permit a suit to be brought at law, but that if the power of the court to make the order is disputed it must assume exclusive jurisdiction and prevent the aggrieved person from seeking redress against the receiver in any other tribunal.

New York.— Matter of Platt, 41 N. Y. Super. Ct. 513, holding that the court will not grant leave to sue its receiver in another tribunal known to administer the law in a way different from that which the court appointing the receiver is bound to observe, and whose jurisdiction is invoked for the purpose of escaping conclusions arrived at by the appointing court.

Virginia.— Reed *v.* Axtell, 84 Va. 231, 4 S. E. 587; Beverley *v.* Brooke, 4 Gratt. 187.

Washington.— Meeker *v.* Sprague, 5 Wash. 242, 31 Pac. 628.

United States.— Porter *v.* Sabin, 149 U. S. 473, 13 S. Ct. 1008, 37 L. ed. 815; Werner *v.* Murphy, 60 Fed. 769; Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704, right to take all controversies to itself.

Canada.— Prentiss *v.* Brennan, 2 Grant Ch. (U. C.) 582.

See 42 Cent. Dig. tit. "Receivers," § 319 *et seq.*

Property taken with or without direction. — If the receiver takes property from the possession of a third party without direction of the court or the master, it is held that the question of property, if disputed, should be tried at law, but if such possession has been taken under the express direction of the court or under the decision of the master that the property is in the possession and under the control of the party and directing a delivery, the court will assume exclusive jurisdiction and will not permit the receiver to be sued at law by a third person claiming the property. Parker *v.* Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

27. Combs *v.* Smith, 78 Mo. 32.

Refusal to order payment not conclusive.— Where in a suit by a receiver of another jurisdiction a judgment was rendered against him and thereafter the judgment creditors moved for an order in the receivership proceeding for the payment of the judgment by the receiver, which was denied, but leave was granted to sue the receiver, it was held that while parties may fully submit and litigate such matters in dispute in a summary way in the receivership proceedings, yet if the court does not pass upon the merits in such proceeding, the mere denial of the motion is not *res adjudicata* in the action on the judgment. Thomas *v.* Hale, 82 Minn. 423, 85 N. W. 156.

28. Hayes *v.* Columbus, etc., R. Co., 67 Fed. 630.

29. Goodnough *v.* Gatch, 37 Oreg. 5, 60 Pac. 383.

administer justice to claimants without suit, upon special application,[30] and relief may be awarded a petitioner in this court, although his cause of action is within the jurisdiction of a court of law.[31]

(III) *Imposing Conditions, Modification, and Revocation of Order.* The power to grant leave to sue a receiver carries with it as a necessary concomitant the authority to revoke such leave when it is improvidently granted,[32] or when proceedings thereunder are in violation of the purpose of the order and of the court's custody and control of the property.[33] So the court upon granting leave to sue may reserve the question as to the forum in which the suit shall be brought;[34]

30. *Georgia.*— Stephens *v.* Augusta Tel., etc., Co., 120 Ga. 1082, 48 S. E. 433, leave properly denied where no sufficient reason appeared why the relief might not be obtained in an intervention in the receivership suit.

Illinois.—Andrews *v.* Stanton, 18 Ill. App. 163, holding that equity has jurisdiction of a petition in a creditor's suit to decree a receiver a trustee for the person who claims to own the property taken by the receiver, and that such party is not bound to sue at law.

New Jersey.— Smith *v.* Perth Amboy Brick Co., 47 N. J. Eq. 442, 20 Atl. 852.

New York.— Stannard *v.* Reid, 118 N. Y. App. Div. 304, 103 N. Y. Suppl. 521 (as to liability on contracts made by receivers); Matter of Machwirth, 15 N. Y. App. Div. 65, 44 N. Y. Suppl. 80 (denying leave to sue, where the claim is admitted and payment withheld merely to ascertain if the assets will be sufficient to pay all claims in full); Matter of Herbst, 63 Hun 247, 17 N. Y. Suppl. 760 (discretion to deny leave to sue a receiver for the foreclosure of a lien, the claim being of equitable cognizance in the receivership suit); De Groot *v.* Jay, 30 Barb. 483 (special motion).

Washington.— Meeker *v.* Sprague, 5 Wash. 242, 31 Pac. 628, denial of leave to sue for the foreclosure of mortgages on corporate property as against the receiver of the corporation, where all persons holding claims against such property are brought into court and notified to prove their claims.

United States.— Coster *v.* Parkersburg Branch R. Co., 131 Fed. 115 [*affirmed* in 135 Fed. 707, 68 C. C. A. 345], as to practice prior to the federal statute have been mentioned *supra*, note 1.

See 42 Cent. Dig. tit. "Receivers," § 318.

Issues requiring trial should not be determined on mere affidavits on an application for leave to enforce rights against the property. Matthews *v.* Cooper, 21 N. Y. Suppl. 71.

31. Smith *v.* Perth Amboy Brick Co., 47 N. J. Eq. 442, 20 Atl. 852 [*distinguishing* New Brunswick State Bank *v.* Plainfield First Nat. Bank, 34 N. J. Eq. 450, and Polys *v.* Jewett, 32 N. J. Eq. 302, in that in the former the receiver was the petitioner against one not a party to the suit and it was held that he must proceed by bill; and in the latter the question was as to the right of a third person to leave to sue at law when he was asking that relief and not that the court of equity determine his rights], trial of right to possession of land in the receiver's possession.

Tort for personal injuries.—Kain *v.* Smith, 80 N. Y. 458; Murphy *v.* Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; *In re* Merrill, 54 Vt. 200.

Form of petition see *In re* Merrill, 54 Vt. 200, for damages for personal injuries.

32. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115].

But leave may be revoked improvidently as well as improvidently granted, and where a receiver was appointed in a suit against a mortgagor, without notice to a mortgagee who was in possession of the property, it was held to be an abuse of discretion to revoke permission granted the mortgagee to sue the receiver in replevin after he had complied with all the conditions of the order, the leave to sue being regarded as one in the interest of justice and as having a tendency to correct a doubtful order appointing a receiver on an *ex parte* application of property in the possession of the mortgagee. Conwell *v.* Lowrance, 46 Kan. 83, 26 Pac. 461.

33. Ray *v.* Trice, 53 Fla. 864, 42 So. 901 (holding that where leave is granted to make a receiver a party defendant to litigation in another court of equal jurisdiction, and after he is made a party the complaint in such litigation amends his bill and procures from the judge within whose jurisdiction it is pending an injunction against such receiver from making any application to the judge whose receiver he is, looking toward procuring possession of the property in litigation, the judge who appointed the receiver may properly, by rule, require the party procuring such injunction to have it dissolved, and, on default, may revoke the prior leave); Meredith Village Sav. Bank *v.* Simpson, 22 Kan. 414 (holding that a state court, on plaintiff's petitioning to have the cause against a receiver removed to the United States circuit court, may, of its own motion, revoke the order granting permission to sue the receiver, and dismiss the action); Central Trust Co. *v.* Wabash, etc., R. Co., 26 Fed. 74 (holding that where the federal circuit court grants permission to sue its receiver in the state court, on the understanding, based on statements of counsel, that the suit will be removed after commencement, into the federal courts, and such removal is not made, the federal court will revoke its leave).

34. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115].

it may modify,[35] and may attach any reasonable condition to, its order granting permission to sue its receiver,[36] and may subsequently, under its power to modify or revoke such orders, restrict the parties to the right to institute proceedings in a particular forum.[37]

(iv) *Order For Restoration of Property.* In addition to what has already been said as to the necessity of applying to the court having custody of property for leave to interfere with that possession,[38] it should be added here that such court in the exercise of its supervisory control of the receiver may order him to relinquish the possession to a claimant whose title is incontestably clear against the receiver,[39] and if a receiver has wrongfully taken property under a misapprehension of his duties and rights, he is bound to obey the order of the court to restore it.[40]

c. Sufficiency of Leave [41] — (i) *In General.* The order upon which one relies in support of his right to sue a receiver will be construed as a whole and in the light of the law governing receiverships.[42] A general license to sue a receiver in other courts for the enforcement of particular liabilities may be granted in the order of appointment.[43]

(ii) *Entertaining Cause in Same Court.* While it has been held that the application must be made in the very cause in which a receivership is pending,[44] some of the cases recognize the more liberal rule that if the court which appointed the receiver also entertains an independent suit against him, it is equivalent to consent by such court, where the receiver appears.[45] And so leave to amend a bill brought against a receiver, upon sustaining a demurrer to it, has

35. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115].

36. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115].

37. Buckhannon, etc., R. Co. *v.* Davis, 135 Fed. 707, 68 C. C. A. 345 [*affirming* 131 Fed. 115]. But in Atlantic Realty Co. *v.* Wlodar, 119 N. Y. App. Div. 850, 104 N. Y. Suppl. 843, it was held error to stay proceedings under the order and to limit the permission to the bringing of a proper action in equity, where leave to sue a receiver in foreclosure was given to one who wished to obtain possession of personal property which had been delivered to the mortgagor but title to which had been retained until payment of the purchase-price, the party having leave not being a party to the foreclosure proceedings and there being no equitable action which could be instituted.

38. See *supra*, IV, D, 6, a.

39. Palys *v.* Jewett, 32 N. J. Eq. 302; People *v.* Dansville Bank, 39 Hun (N. Y.) 187 (equities need not be established by separate bill); Holland *v.* Preston, (Tex. Civ. App. 1897) 41 S. W. 374.

The application must be in the cause in which the receiver was appointed. Galster *v.* Syracuse Sav. Bank, 29 Hun (N. Y.) 594.

Practice — requiring receiver to answer. — In Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733, on a petition of a creditor of an insolvent corporation for an order directing the receiver to turn over to the petitioner property in the possession of the corporation at the time of the appointment of the receiver, contested by a judgment creditor, the court postponed action until the receivers should appear by filing an answer either submitting himself to the judgment of the court or setting up a claim to the property. See also as to what property the receiver is entitled to take *supra*, IV, D, 3.

Supervision and control generally see *supra*, IV, F, 5.

40. Hulme *v.* San Francisco Super. Ct., 63 Cal. 239 (in insolvency proceedings); Hamill *v.* Hamill, 27 Md. 679.

Disposition of property generally see *supra*, IV, F, 6, e, (II).

Reconveyance and redelivery of property see *supra*, IV, I.

41. **Form of order** see Pearce *v.* Gamble, 72 Ala. 341, 342; Walker *v.* Green, 60 Kan. 20, 21, 55 Pac. 281.

42. Piper *v.* Stratten, (Tex. 1887) 7 S. W. 45, where, under the rule that leave is necessary to sue a receiver in respect of matters pertaining to or growing out of the trust, it was held that an indorsement by the judge on the application, that "the party can sue if he chooses — but there is no earthly occasion for it, because the receiver has instructions to pay all debts, and to sell property to supply the money demanded of him," does not amount to a consent.

43. Walker *v.* Green, 60 Kan. 20, 55 Pac. 281; Dow *v.* Memphis, etc., R. Co., 20 Fed. 260.

Condition to order of appointment see *supra*, III, E, 7, a note 60.

44. See *supra*, VI, D, 2, b, (I).

45. Ratcliff *v.* Adler, 71 Ark. 269, 272, 72 S. W. 896 (where, as to the objection in the appellate court, it was said that the judge "had it in his power, if he had desired to do so, to dismiss this action, and to summon the plaintiff to answer for contempt for bringing

been held to be equivalent to leave to prosecute,[46] and as the same court which holds by a receiver has power to restrain him from paying out the fund, it is held that an order of restraint granted on a bill in which he is defendant implies that leave is granted to bring suit against him for the purpose of procuring such order and rendering it effective.[47]

d. Effect of Granting Leave or of Statute Dispensing With Leave — (I) *In General.* A statute dispensing with the necessity of leave to sue a receiver has no application to receivers appointed in other jurisdictions. Thus a state statute of this kind does not apply to an action against a federal receiver.[48] But the federal statute which provides that receivers of the United States courts may be sued without leave applies to a receiver appointed by a territorial court in its federal, as distinguished from its local, capacity,[49] and to actions against federal receivers brought in any court of competent jurisdiction.[50] In granting leave to sue, the court does not pass upon the receiver's liability, and the order is not a determination that the party has a good cause of action against the receiver.[51]

(II) *No Relinquishment of Control of Receiver or Property.* The mere granting of leave to sue a receiver is not a relinquishment by the court of its jurisdiction of the subject-matter of the receivership or of the possession and administration of the property.[52]

(III) *Cross Bill, Counter-Claim, or Set-Off.* Where a receiver is made a party to an action by leave of court, it has been held that he is in the same position as any other litigant, and that the other parties to the action entitled to affirmative relief have a right to seek it by filing cross bills against him,[53] and a counter-claim or set-off is within the federal statute [54] permitting actions against receivers without leave.[55]

(IV) *Jurisdiction and Venue.*[56] An order of the federal court granting leave to sue its receiver is sufficient to authorize the bringing of an action against him in a state court having jurisdiction of the subject-matter.[57] And the act

a suit against his receiver without his permission. As he did not do so, we know that he consented to the suit, and as he is also the judge of the court which appointed the receiver, we know that the judge of that court also consented to the action. It would seem, therefore, unreasonable and altogether unnecessary that we should dismiss this action and compel the plaintiff to obtain leave from this same judge to bring another suit for the same purpose"); Mayor *v.* Northern Trust Co., 93 Ill. App. 314 (to the same effect as the last case). See also Wade *v.* Ringo, 62 Mo. App. 414, *supra*, note 19.

46. Fox River Paper Co. *v.* Western Envelope Co., 109 Ill. App. 393.

Amendment making receiver party.—An order granting leave to amend a bill by making one a party defendant as receiver is an express permission to sue the receiver. Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891.

47. Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496.

48. Kennedy *v.* Indianapolis, etc., R. Co., 3 Fed. 97, 2 Flipp. 704; Hale *v.* Duncan, 11 Fed. Cas. No. 5,914, 6 Reporter 422.

49. Wheeler *v.* Smith, 81 Fed. 319, receiver of corporation created by act of congress.

50. See *infra*, VI, D, 2, d, (IV).

51. Fleischauer *v.* Dittenhoefer, 49 N. Y. Super. Ct. 311.

Not conclusive as to propriety of remedy see Goodnough *v.* Gatch, 37 Oreg. 5, 60 Pac. 383, *supra*, note 29.

52. Ray *v.* Trice, 53 Fla. 864, 42 So. 901, *supra*, note 33.

Enforcement of judgment see *infra*, VI, H, 2, b, (II).

53. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036, holding that the court may determine the ultimate rights of all the parties and thus put an end to litigation as between them over questions properly involved.

But in an action by a receiver it has been held that an answer in the nature of a cross action cannot be filed without leave of the appointing court. Kortjohn *v.* Seimers, 29 Mo. App. 271.

54. See *supra*, VI, D, 2, a, (II), (B).

55. Grant *v.* Buckner, 172 U. S. 232, 19 S. Ct. 163, 43 L. ed. 430.

Set-off generally see *supra*, IV, D, 3, d, (III).

56. **Diverse citizenship as ground of federal jurisdiction** see COURTS, 11 Cyc. 870 text and note 10.

Receiver of national bank see BANKS AND BANKING, 5 Cyc. 603.

Removal of causes against receiver appointed by federal court see REMOVAL OF CAUSES.

Territorial jurisdiction see *infra*, VIII.

57. Walker *v.* Green, 60 Kan. 20, 55 Pac.

of congress rendering receivers in the federal courts suable without leave for their acts and transactions in the management of the property [58] authorizes the bringing of such actions in any court of competent jurisdiction,[59] state or federal.[60] But leave to sue does not confer jurisdiction upon another court which it would not have otherwise.[61] On the other hand while actions against receivers may be brought in other courts, they may nevertheless be brought in the court by which the receiver was appointed, being regarded as ancillary inasmuch as the judgment to be recovered must be payable from the property or funds in the course of the administration.[62] For the purposes of the venue of an action against a receiver

281 (general license in order of appointment); Harding *v.* Nettleton, 86 Mo. 658. But where the independent suit which is sought to be maintained would involve the adjudication of rights between other parties than the receiver which would concern them separately from him, and which are involved in the suit involving the receivership, leave to sue the receiver does not justify the bringing of such suit in any other court over the objection of such parties. Harper *v.* Printing-Telegraph News Co., 128 Fed. 979, holding that where an action was pending in a state court for the recovery of money against a corporation, in which a receiver had been appointed, and an application by stock-holders to compel the receiver to sue to set aside certain modifications of a favorable contract, by which royalties payable to such corporation were materially reduced, was denied, but the court granted such stock-holders leave to sue the receiver, and to bring suit in equity against certain other corporations which had been instrumental in procuring such modifications, making the receiver a party, for the same and other equitable relief, the leave so granted did not authorize the maintenance of such suit in any other court than that in which the receivership was pending.

58. See *supra*, VI, D, 2, a, (II), (B).

Effect of act upon right to restrain actions see *supra*, note 5.

For garnishment under this act see GARNISHMENT, 20 Cyc. 1026.

59. Trumbull *v.* Makeever, 9 Colo. App. 350, 48 Pac. 825; Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186; Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303; Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220; Central Trust Co. *v.* East Tennessee, etc., R. Co., 59 Fed. 523. See also COURTS, 11 Cyc. 861 text and note 68, 1013.

Suit may be brought in another district for a marine tort. Jones *v.* The St. Nicholas, 49 Fed. 671.

60. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81; Central Trust Co. *v.* East Tennessee, etc., R. Co., 59 Fed. 523.

The jurisdiction of state courts is recognized and upheld in the following cases:

Colorado.— Trumbull *v.* Makeever, 9 Colo. App. 350, 48 Pac. 825.

Georgia.— Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64.

Illinois.— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796].

Indiana.— Malott *v.* Hawkins, 159 Ind. 127, 63 N. E. 308.

Kansas.— Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362.

Kentucky.— Louisville Southern R. Co. *v.* Tucker, 105 Ky. 492, 49 S. W. 314, 20 Ky. L. Rep. 1303.

Montana.— Robinson *v.* Mills, 25 Mont. 391, 65 Pac. 114.

Missouri.— Fullerton *v.* Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. Rep. 516.

New Jersey.— Meyer *v.* Harris, 61 N. J. L. 83, 38 Atl. 690.

Ohio.— Schonberg *v.* Cowen, 7 Ohio S. & C. Pl. Dec. 522, 7 Ohio N. P. 152.

Pennsylvania.— Hill *v.* Baltimore, etc., R. Co., 7 Pa. Dist. 473.

Texas.— Fordyce *v.* Withers, 1 Tex. Civ. App. 540, 20 S. W. 766.

Wisconsin.— Stolze *v.* Milwaukee, etc., R. Co., 104 Wis. 47, 80 N. W. 68.

United States.— Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220; Erb *v.* Morasch, 177 U. S. 584, 20 S. Ct. 819, 44 L. ed. 897 [*reversing* 60 Kan. 251, 56 Pac. 133]; Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81.

See 42 Cent. Dig. tit. "Receivers," § 345.

61. Palmer *v.* Scriven, 21 Fed. 354, where it was held that the order did not authorize the commencement of an action on the law side of the court but only a suit in equity.

62. Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220.

At law or in equity.— But an independent suit in equity will not lie to recover a simple contract debt owing by the receiver. Nash *v.* Ingalls, 79 Fed. 510, where such suit was removed from the state to the federal court, and was docketed on the equity side of the court, and a demurrer to the petition was sustained for want of equity, with leave to plaintiff to amend his pleading so as to make it state a cause in equity or to refile the cause on the law side of the court, striking out his prayer for general relief.

Where there was no legal cause of action against the receiver, a bill was entertained by the court for the purpose of determining the equitable right of the claimant to have his claim allowed out of the property. Kerr *v.* Little, 39 N. J. Eq. 83, 42 N. J. Eq. 528, 9 Atl. 110.

of a corporation it is held that his official residence coincides with the residence of the corporation and he is suable in any county in which it might have been sued.[63]

e. Defenses by Receiver. A receiver may defend the estate in his possession against all claims which are antagonistic to the rights of the parties represented in the suit, in the court appointing him,[64] or by appeal,[65] and when he is made a party defendant to an action, it becomes his duty to defend it in behalf of all those of whom he is the duly appointed representative.[66] Until a receiver is discharged by the order of the court appointing him, if he is made a party defendant to a suit therein and called upon to answer, he should answer fully,[67] and the court is obliged to listen to him, as the representative of the interests which he was appointed to guard and superintend, especially when he is called upon to speak with reference to a matter which affects such interests in the whole, and in every part.[68] If sued in relation to his contracts as receiver in administering the property under the order of the court, his attitude with respect to defenses is the same as that of an individual,[69] and a defense that his executory contract is unfair and burdensome to the trust estate is held to be a purely equitable defense, which, if permissible at all in an independent action against him, is not good where the contract is within the express powers conferred upon him by the court of appointment, and nothing appears in his showing that the legal claim against him would interfere with any equities which ought to be protected by denying a judgment against him.[70] The matters which may be set up by a

63. Ball *v.* Mabry, 91 Ga. 781, 18 S. E. 64 (holding that the receiver of a railroad resides in any county through which the road runs and may be sued in the county where the cause of action originated and the corporation might have been sued); Caldwell *v.* Harrison Tp., 2 Ohio Cir. Ct. 10, 1 Ohio Cir. Dec. 332 (to same effect as the last preceding case, under the statute in Ohio). Under the Ohio statutes it was held that the receiver of a corporation, being the representative of its creditors as well as of the corporation, was not, by the provisions of the statute declaring that certain actions against a corporation might be brought in the county in which such corporation is situate, or has, or had, its principal office, etc., and that an action against a railroad company may be brought in any county through or into which such road or line passes, protected from service in actions in other counties than that of his domicile, but may be served with process from another county under another provision, where the action is for a joint liability and is rightfully brought in the county wherein one of the defendants resides. Rogers *v.* Akron, etc., R. Co., 8 Ohio S. & C. Pl. Dec. 107, 6 Ohio N. P. 291.

64. See *supra*, IV, F, 5, 6; and V, A, 5.

Discharge see *infra*, VII, E.

Effect of judgment see *infra*, VI, H, 2, b, (I).

Order of court a protection see *supra*, IV, F, 6, f, (II).

65. See APPEAL AND ERROR, 2 Cyc. 641.

66. McGregor *v.* Third Nat. Bank, 124 Ga. 557, 53 S. E. 93.

Defenses which have been waived by a failure to plead on the part of defendants, members of a partnership, in an action against them involving liability in partnership transactions, cannot be set up by a receiver appointed in dissolution proceedings. Honegger *v.* Wettstein, 94 N. Y. 252.

67. See *infra*, VI, G, 3.

68. Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539, holding that the court cannot bind a corporation hand and foot, and turn it over to the care of a receiver, taking from it all capacity, for the time being, to perform any of its ordinary functions, and then, when an alleged creditor prosecutes a large claim, and shows that he has possibly lulled the receiver into indifference by an agreement, forbid the receiver making an answer to a point that affects the whole consideration of the claim; that the owner of all the claims against, and having in his possession all the assets of, a corporation, under an agreement with the receiver of the company, filing a bill to foreclose a mortgage, making the receiver a party, cannot object to an answer by the receiver, going to the validity of the mortgage or the consideration of the debt secured thereby, on the ground that he has no interest in himself to justify such a defense.

Objection to allowance of claims see *supra*, V, A, 5.

69. Hallowell *v.* Williams, 217 Pa. St. 501, 66 Atl. 864.

70. Hallowell *v.* Williams, 217 Pa. St. 501, 66 Atl. 864, where the action was against a federal receiver under the statute permitting such actions with respect to the acts and transactions of a receiver or manager in carrying on the business, etc., and providing that such suit shall be subject to the general equity jurisdiction of the court in which the receiver or manager was appointed, etc., the court holding that if the contract involved ought to have been annulled, the court in which the receiver was appointed might, for good cause shown, have declared it annulled

receiver may depend upon the nature and extent of his representative capacity. Thus he may not set up matter in violation of the rule that by the appointment of a receiver the court can reach only such interest of a debtor in the property impounded as the creditors might have reached with an execution,[71] and he cannot by way of defense set up rights in parties who are not represented.[72] As the representative of a corporation the receiver is entitled to set up any defense which would have been available to it if the damages sought to be recovered against him had been inflicted while the corporation was in possession of its property,[73] but, as the representative of its creditors as well as of the insolvent corporation, he may assert defenses to which the creditors in contradistinction to the corporation itself are entitled.[74] If he voluntarily appears in an action and submits to the jurisdiction of the court, it will be presumed that he is authorized to defend it.[75]

E. Parties[76] **— 1. Joinder of Parties Generally — a. In Actions by Receiver.**[77] In suits by receivers, all persons whose rights may be affected or who should be before the court for the purpose of a complete adjudication of the rights involved are necessary parties.[78] Although a receiver may have authority to sue in his own name,[79] if the object of the suit is to condemn a legal title which is not in the receiver, it is held that the party having that title must be before the court either as complainant or defendant.[80] On the other hand, one having

and the suit in the state court could have been stayed, and it would have been better practice for the receiver to have applied to such court for this relief, although the defense might be set up in an action at law in the state court in a proper case.

71. Longfellow *v.* Barnard, 58 Nebr. 612, 79 N. W. 255, 76 Am. St. Rep. 117, holding that if a mortgagor cannot defeat a mortgage on the ground that there was no consideration, neither can the receiver of the mortgagor's property, representing the creditors.

72. Chafey *v.* Mathews, 104 Mich. 103, 62 N. W. 141, 27 L. R. A. 558, holding that a receiver appointed to take charge of goods assigned for the benefit of creditors cannot set up, in an action of replevin against him by a mortgagee of the goods, that part of them were delivered to the mortgagor by a stranger under a contract which reserved the title in such party, because such claim is adverse to both parties to the replevin suit, and if ever it should be set up it would be by one not as a creditor, but as the owner.

73. Hunt *v.* Conner, 26 Ind. App. 41, 59 N. E. 50.

74. McGregor *v.* Third Nat. Bank, 124 Ga. 557, 53 S. E. 93; Hamor *v.* Taylor-Rice Engineering Co., 84 Fed. 392. See also *supra*, IV, E, 2; VI, B, 1, a.

Control of defense.— Where a stock-holder in a corporation applies to the receivers and requests them to set up, by way of answer to a bill filed by a trustee for the sale of certificates pledged by the corporation, certain facts which he alleges on information and belief, and the receivers aver that they have inquired into said alleged facts and have found them without foundation, the court will not require the receivers to make answer to such matters. Land Title, etc., Co. *v.* Asphalt Co. of America, 121 Fed. 192.

Leave to sue a receiver does not prejudice his right to set up any defense he may have; and this can be done by plea, answer, or demurrer. Davis *v.* Duncan, 19 Fed. 477.

A waiver by a corporation of objections to a complaint will not bind the receiver of the corporation subsequently appointed. Knorr *v.* New York State Mut. Ben. Assoc., 79 Hun (N. Y.) 83, 29 N. Y. Suppl. 508.

75. Manker *v.* Phœnix Loan Assoc., 124 Iowa 341, 100 N. W. 38. See also *supra*, VI, D, 2, c.

76. **Parties** generally see Parties, 30 Cyc. 1.

77. **Action in receiver's name** see *supra*, VI, A, 3, b, (II).

After discharge of receiver see *infra*, VII, E.

Describing defendant as receiver see *supra*, VI, D, 1, a, text and note 58.

Enforcement of rights of corporation and creditors see *supra*, VI, B, 1 *et seq.*

Personal and representative character see *supra*, VI, D, 1.

Relating to the remedy see *supra*, VI, A, 3, b, (I).

Statutory proceeding for discovery of assets see *supra*, VI, A, 2.

78. See *infra*, note 80.

Persons charged with fraud.— Thus in a suit by the receiver of a corporation to recover notes and securities which had been given to the corporation for subscriptions of stock and were returned to the maker on his surrender of the stock, under allegation that such transaction was accomplished through the fraud of third persons, the persons alleged to have perpetuated the fraud are necessary parties, as defendant is entitled to have the benefit of their defense and also that the judgment as to the validity of the transaction may bind them. Alexander *v.* Katte, 10 Daly (N. Y.) 506.

79. See *supra*, VI, A, 3, b, (II).

80. Comer *v.* Bray, 83 Ala. 217, 3 So. 554 (necessity of making corporation party

no interest in the subject-matter is not a necessary party to the suit by a receiver;[81] so, in a suit by a receiver affecting him only in his official capacity, to recover on a cause accruing to him as receiver, the original owner of the property is not a necessary party.[82] The receiver of a corporation, representing creditors, may sue for the protection of the corporate property without joining them,[83] and the receiver of a corporation who under a statute has the power to sue for and collect its assets need not join the corporation in such suit,[84] and the same rule is announced with respect to suits by other receivers who are authorized to reduce to possession by suit or otherwise the assets of the parties of whose property they were appointed.[85] Where a receivership has been extended in another court, a suit by the receiver to determine conflicting claims of creditors to priority is not objectionable on the ground of misjoinder of parties plaintiff.[86]

b. Joining as Defendant. The receiver of the property of a party to litigation is not a necessary party to such litigation if no attempt is made thereby to inter-

to suit by receiver of insolvent corporation to foreclose a mortgage given to the corporation); Tyson *v.* Applegate, 40 N. J. Eq. 305 (holding that in a suit by a receiver in his own name to foreclose a mortgage made in trust, under a decree appointing the receiver and divesting the *cestui que trust* of his interest in the mortgage and vesting it in certain persons named in the bill, the *cestui que trust* was not a necessary party but the trustee in the mortgage and the persons in whom the decree vested the interest of the *cestui que trust* were necessary parties); Brigham *v.* Luddington, 4 Fed. Cas. No. 1,874, 12 Blatchf. 237 (holding that a receiver appointed under a general power of a court of equity and not under statute, in a suit by the judgment creditor of a corporation, to collect assets of the corporation in satisfaction of the judgment, suing to compel the satisfaction of a decree which had been entered previously against a debtor of the corporation in its favor, required the presence of the corporation as a party).

81. See *v.* Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966 [*affirmed* in 56 N. J. Eq. 453, 41 Atl. 1116], holding that in a suit by the receiver of a dissolved corporation, relating wholly to contractual and statutory obligations arising out of the existence and operations of the corporation, the attorney-general is not a necessary party because of the character of the corporation as one formed for the purpose of creating a monopoly, since the state upon the dissolution of the corporation is not interested.

Notice to the attorney-general of a suit to recover assets by the receiver of a corporation, and his appearance in such suit, are not required by a statute providing that notice of suits involving the dissolution of corporations or the distribution of its assets shall be given to the attorney-general by the receiver of the corporation. Nealis *v.* American Tube, etc., Co., 76 Hun (N. Y.) 220, 27 N. Y. Suppl. 733 [*affirmed* in 150 N. Y. 42, 44 N. E. 944].

82. Wason *v.* Frank, 7 Colo. App. 541, 44 Pac. 378 (where in a suit on an injunction bond which had been executed to the receiver and the toll road company of which he was receiver, the receiver having been entitled to tolls during the continuance of the injunction, it was held that the toll road company was a party to the receiver's suit through the receiver as his representative and that considering his right to the money of which he had been deprived by the injunction, and the capacity in which he was entitled to it, an appearance by the toll road company as plaintiff except through the receiver as an officer of the court in charge of its assets would have been improper); Iglehart *v.* Bierce, 36 Ill. 133 (corporation not necessary party to foreclose a mortgage executed to the receiver as such, who had been vested with all the property of the defunct corporation, to secure a debt originally due the corporation).

83. Gray *v.* Davis, 10 Fed. Cas. No. 5,715, 1 Woods 420 [*affirmed* in 16 Wall. 203, 21 L. ed. 447]. So in a suit by the receiver for creditors and stock-holders of a corporation to enforce a mortgage assigned to him, such creditors and stock-holders need not be joined. Mann *v.* Bruce, 5 N. J. Eq. 413.

84. Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647; Walters *v.* Porter, 3 Ga. App. 73, 59 S. E. 452; Nealis *v.* American Tube, etc., Co., 150 N. Y. 42, 44 N. E. 944 (action by temporary receiver of an insolvent corporation under N. Y. Code Civ. Proc. § 1788, to recover moneys collected under a judgment confessed by the corporation in fraud of creditors); Bien *v.* Bixby, 18 Misc. (N. Y.) 415, 41 N. Y. Suppl. 433 (receiver of a corporation in an action to sequestrate its property, proceeding to redeem premises of which the corporation had been dispossessed). But see Hubbell *v.* Merchants' Nat. Bank, 42 Hun (N. Y.) 200.

Where the functions of a corporation are merged in its receiver a complaint in which the corporation is joined as plaintiff with the receiver is bad on demurrer for misjoinder of parties plaintiff. Idaho Gold Reduction Co. *v.* Croghan, 6 Ida. 471, 56 Pac. 164.

85. Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389, action on policy of insurance running to a partnership, by a receiver of the firm appointed by order of the court authorizing a receiver to reduce to possession the assets of the firm.

86. Bamberger *v.* Fillebrown, 12 Misc. (N. Y.) 328, 33 N. Y. Suppl. 614.

fere with the right of the receiver to the property intrusted to his care,[87] and the same is true as to the joinder of a receiver of a corporation in an action against its directors in which no relief is sought against the corporation and assets are not attempted to be followed into the receiver's hands; [88] and where the corporate existence and functions are not affected by the receivership proceedings and the receiver has nothing to do with the internal management of the corporation, but merely holds the property which is in execution like a sheriff under a levy, he is not a necessary party to a proceeding relating to such internal management.[89] So, under the rule above stated, as to liability for demands arising before the appointment,[90] the mere fact that one is receiver will not render him a necessary party,[91] and he is considered an improper party where no right to relief against him in his official capacity is sought.[92] But in an action to enforce a lien against specific property in which a receiver has an interest, he should be made a party,[93]

87. Ottumwa State Bank *v.* McElroy, 106 Iowa 258, 76 N. W. 715; Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; Dullnig *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178. See *supra*, IV, D, 6, b, (II).

He is held to be neither a necessary nor a proper party in a proceeding by which the property rights in him are in any manner affected. City Water Co. *v.* State, 88 Tex. 600, 32 S. W. 1033, receiver of corporation not proper or necessary party to proceeding by state to forfeit the corporate charter, since the right to be a corporation is not involved in the receivership, and if the receiver should sell the property after dissolution of the corporation the purchaser would take just the rights which the corporation could have conveyed if it had not been dissolved, which would not embrace its right to be a corporation.

In a suit to annul an ordinance, and rescind a contract granting a corporation right to maintain and operate waterworks, brought against the corporation before the appointment of a receiver in a federal court, the receiver is not a necessary party. Palestine Water, etc., Co. *v.* Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203 [*affirming* (Civ. App. 1897) 41 S. W. 659].

A receiver of a corporation appointed in another state is not a necessary party to a suit by stock-holders of the corporation on behalf of the corporation. Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Nebr. 374, 59 N. W. 838.

Where it is proper to prosecute a suit in the name of a corporation after a receiver is appointed, it is held that he need not be joined as a defendant. Ohio, etc., R. Co. *v.* Indianapolis, etc., R. Co., 3 Ohio Dec. (Reprint) 458, 5 Am. L. Reg. N. S. 733.

In suits against national banks.— New York Nat. Bank *v.* Mechanics' Nat. Bank, 94 U. S. 437, 24 L. ed. 176; Speckart *v.* German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682; Denton *v.* Baker, 79 Fed. 189, 24 C. C. A. 476.

Causes not against receiver or existing before his appointment see *infra*, text and notes 91, 92.

88. Squiers *v.* Thompson, 73 N. Y. App. Div. 552, 76 N. Y. Suppl. 734 [*affirmed* in 172 N. Y. 652, 65 N. E. 1122], action for damages for deceit practised in inducing plaintiff to become a shareholder.

89. Com. *v.* Philadelphia, etc., R. Co., 3 Pa. Dist. 115, holding that such receivers are not necessary parties to a proceeding to compel the opening of the stock list of the corporation to the inspection of a stockholder.

90. See *supra*, VI, D, 1.

91. Chemical Nat. Bank *v.* Hartford Deposit Co., 156 Ill. 522, 41 N. E. 225; Seavey *v.* Jenkins, 15 Wkly. Notes Cas. (Pa.) 124; Dullnig *v.* Weekes, 16 Tex. Civ. App. 1, 40 S. W. 178.

92. McDermott *v.* Crook, 20 App. Cas. (D. C.) 465; Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; Arnold *v.* Suffolk Bank, 27 Barb. (N. Y.) 424; Northern Pac. R. Co. *v.* Heflin, 83 Fed. 93, 27 C. C. A. 460.

Where the receiver was substituted for defendant without objection in an action for trespass against a railroad company it was held not error to refuse to strike out his name during the trial. Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

Joining original party.— If in any case it is proper to sue a receiver appointed to hold property and effects pending the determination of an action, upon a liability incurred before his appointment by the parties to the suit in which he was appointed, such parties must be joined. Flynn *v.* Furth, 25 Wash. 105, 64 Pac. 904. But in a suit by leave of court against a receiver for the specific performance of a contract made by a corporation before the appointment of the receiver in a suit for the foreclosure of a trust deed executed after such contract and the partial performance thereof by plaintiff, brought in the court in which the receiver was appointed, it was held that the receiver was the only necessary party defendant and that he could have specifically performed the contract or paid back the money advanced thereunder if the court had so directed. Southern Express Co. *v.* Western North Carolina R. Co., 99 U. S. 191, 25 L. ed. 319.

93. Flynn *v.* Furth, 25 Wash. 105, 64 Pac. 904; Denny *v.* Cole, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940, necessity of joining a receiver of a partnership with the partners in an action to foreclose a lien.

and the receiver of a corporation is held to be a necessary party to a bill by a creditor of the corporation and the stock-holders thereof to subject the assets of the corporation to the payment of debts and in the event of the insufficiency of such assets to enforce the liability of stock-holders,[94] or to a suit otherwise affecting the assets of the corporation which it is his duty to administer.[95] So a receiver of a corporation in the actual possession of its property, operating the same to the exclusion of the corporation, is a necessary party to a proceeding against the corporation where a judgment against it relates to the operation of the property in the receiver's hands and which it is impossible for the corporation itself to obey.[96] After the sale of property in the receiver's hands and determination of his functions with respect to it,[97] he is not a necessary party in any proceeding involving the enforcement of other rights against such property;[98] and a receiver in the capacity of a mere stakeholder who surrenders the possession of property prior to the determination of the suit is not a necessary party to a suit subsequently brought to recover the value of such property from one who took it with knowledge of the facts.[99] In an action against a receiver as such involving his official liability in the management of his trust the parties represented by him in such capacity need not be joined.[1] In an action against the receiver of a corporation for a tort committed in the course of the administration of the trust all connected with

94. Buda Foundry, etc., Co. *v.* Columbian Celebration Co., 55 Ill. App. 381, holding further that the defect of parties in that the receiver is omitted is waived if not especially assigned for demurrer.

Joining with creditor to enforce latter's cause.— In Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405, in a suit by creditors of an insolvent corporation to which stock-holders were made parties, the receiver was directed by a judgment in favor of the creditors against the stock-holders to collect and enforce the same against the latter, and it was held that in an action on such judgment the receiver, although not beneficially interested in the judgment, represented the creditors, and was a proper, although not a necessary, party to join with the creditors.

95. Smith *v.* Trenton Delaware Falls Co., 4 N. J. Eq. 505, holding that a suit by a creditor to subject property transferred by the corporation before the appointment of a receiver to the satisfaction of a claim against the corporation is for relief which operates to relieve the receiver of part of his duties and as a removal of the receiver *pro tanto*.

But a suit upon the theory that there is no corporation, against persons charged with unlawfully assuming to be a corporation, is not one in which a receiver previously appointed in a suit by other creditors against the corporation as such is a necessary party. Wheeler *v.* Clinton Canal Bank, Harr. (Mich.) 449.

Proceedings in the cause.—In Grand Trunk R. Co. *v.* Central Vermont R. Co., 88 Fed. 622, it is held that where the receivers have all the property in their hands, under order of the court, for whomsoever it may be found to belong, and all proceedings are required to be and are had in this cause for the purpose of ascertaining the rights of all claimants, and how the property should be decreed to be disposed of or distributed by the receivers, whether they are technically made parties to every proceeding for establishing rights to the property or not is immaterial; that while not parties to the original cause, as orators or defendants, they are in effect parties to all proceedings touching the property in their hands, as in their nature the proceedings are *in rem*.

In suit upon refusal of receiver to sue see *supra*, VI, B, 6.

96. Chicago City R. Co. *v.* People, 116 Ill. App. 633, proceeding to compel a traction company to accept a certain fare in exchange for carriage.

A receiver is a proper party in a suit to restrain ditch proceedings against a company of which he is receiver commenced after his appointment. Caldwelt *v.* Harrison Tp., 2 Ohio Cir. Ct. 10, 1 Ohio Cir. Dec. 332.

Cause of action accruing against receiver in management of property see *supra*, IV, F, 6, f.

97. See *supra*, IV, H, 12.

98. Massachusetts Mut. L. Ins. Co. *v.* Chicago, etc., R. Co., 13 Fed. 857, holding that in such case the receiver was not a necessary party in a proceeding to adjudge a lien on such property still subsisting.

Effect of discharge of receiver see *infra*, VII, E.

99. Phelps *v.* Elliott, 29 Fed. 53, where in a suit for the value of such property after determination of the suit in which the receiver was appointed, in which the right to the property was adjudged to be in plaintiff, it was held that the receiver was not a necessary party since the decree in the former suit was conclusive upon all the parties who were before the court and defendant in the last suit was amply protected.

1. Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47 (action against receiver of partnership on a contract made by him in the management of his trust, in which it was held that partners and creditors of the firm were not necessary parties); Cobb *v.* Sweet, 46 N. Y. App. Div. 375, 61 N. Y. Suppl. 545. So in an action for injury re-

the wrongful act may be joined as defendants.[2] And in an action by creditors against a receiver collusively appointed his co-wrong-doer may be joined.[3]

2. New Parties and Change of Parties — a. Amendment in General.[4] Where the action is improperly brought in the name of the receiver, an amendment may be allowed to make the action stand in the name of the owner,[5] and where the action is inadvertently brought in the name of the corporation instead of in the name of its receiver, an amendment may be allowed to make the receiver plaintiff.[6] So where the several receivers of a corporation sue in equity the court may permit an amendment by striking out one of them as plaintiff and inserting him as defendant, when his legal and private positions become incompatible.[7]

b. Addition, Intervention, and Substitution[8] — (i) *Of Receiver in Original Suit.* A receiver is not a litigant in the suit in which he is appointed,[9] and, although he may be one authorized by statute under control of the court to bring and defend actions, and under the practice of the courts persons may be made parties to a suit by pleading, intervention *pro interesse suo*, etc., if none of such methods are pursued it is irregular to permit him to file an answer as a party.[10]

(ii) *Of Receiver to Defend Other Actions* — (a) *In General.* While a receiver may not be a necessary party to an action against the person of whose

ceived while the property of the corporation was operated by it, brought against the purchaser at a foreclosure sale under the statute which provides that mortgages of corporations shall be subject to such claims, it is sufficient if the receiver of the insolvent company is a party and the company itself need not be joined. Howe *v.* Harper, 127 N. C. 356, 37 S. E. 505, holding further that the objection that the corporation is omitted must be made by answer or demurrer or it will be waived.

Where the receiver is not the legal representative of the rights of the corporation the corporation must be joined, although the receiver may be a proper party. Swift *v.* Eckford, 6 Paige (N. Y.) 22.

2. Casey *v.* Oakes, 17 Wash. 409, 50 Pac. 53, as to an action by a passenger against the receivers of a railroad company for an assault under an allegation that the servant who committed the assault was acting for himself, for the receivers, and for the railroad company.

Plaintiff will not be required to elect which defendant he will proceed against in an action for personal injuries against the receiver of a railroad company, in which the railroad company is joined, but he has a right to prosecute his action against both and recover judgment against whichever the proof might show is liable, although if the facts disclosed show that all the property of the company is under the management and control of the receiver and that he alone is responsible, the judgment must be against him alone. Union Pac. R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102.

3. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

4. See, generally, Pleading, 31 Cyc. 468 *et seq.*

5. Chandler *v.* Frost, 88 Ill. 559 (holding that in an action by "George Chandler, receiver of the Lamar Insurance Company," to recover on a stock subscription (see *supra*, VI, B, 2), it was error to refuse an amendment to make the cause stand simply in the name of the company); East Tennessee Land Co. *v.* Leeson, 178 Mass. 206, 59 N. E. 639; Wilson *v.* Welch, 157 Mass. 77, 31 N. E. 712; McGuin *v.* Fretts, 13 Ont. 699 (requiring amendment adding such person as co-plaintiff).

Right to amend answer after amendment see *infra*, VI, G, 4, text and note 1.

6. Hulbert *v.* Hohman, 22 Misc. (N. Y.) 248, 49 N. Y. Suppl. 633, holding that the amendment may be regarded almost as a correction of the name of a plaintiff rather than the substitution of an entirely distinct and different party.

After exceptions sustained in the appellate court on the ground that an action on a cause of action in a corporation could not be maintained in form in the name of the receiver of the corporation, which was the only error at the trial, the trial court may allow the substitution of the corporation as plaintiff and enter judgment on the verdict. Campbell, etc., Co. *v.* Barr Pumping Engine Co., 182 Mass. 304, 65 N. E. 396.

Form of motion by receiver and order thereon see Campbell, etc., Co. *v.* Barr Pumping Engine Co., 182 Mass. 304, 65 N. E. 396.

7. Hewett *v.* Davis, 50 Me. 271, where suit was by receivers of a corporation to recover against stock-holders to enforce statutory liability, and one of them was a stock-holder, the court holding that by allowing such amendment the appointment of such receiver was in effect revoked.

8. Of receiver in supplementary proceedings see Executions, 17 Cyc. 1472.

Subsequent pleading see *infra*, VI, G, 4.

9. See *supra*, IV, E, 1.

10. Youtsey *v.* Hoffman, 108 Fed. 693.

On issue of ownership between parties.— Where the receiver is a mere stakeholder, the court cannot improperly impose upon the fund in his hands the expense of his attending upon and taking part in the trial of the issues between the several parties to the suit as to the ownership of the property. National Park Bank *v.* Goddard, 20 N. Y. Suppl. 526.

property he is receiver,[11] he may, in the discretion of the court,[12] be permitted, by intervening, to interpose any proper defense to the action.[13] A receiver *pendente lite* in a suit to foreclose a corporate mortgage, whose functions are confined to the care and preservation of the particular property, is not a proper party to be substituted for the company in an action for a cause in no way connected with him and which could not be charged on the mortgaged property,[14] and where all the rights of a corporation are in the receiver, and he has the authority to enforce these rights by action under the order of the court, he cannot be compelled to defend a suit in which he as receiver may have interest, nor to submit his rights as receiver to judgment in an action which may be in conflict with one which he has instituted by authority of the court.[15] And the mere appointment of a receiver of a litigant in a pending cause being no bar to the suit,[16] which will not abate in consequence of such appointment,[17] the corporation, in the instance of the appointment of a receiver of a corporation, not being dissolved thereby,[18] the receiver is not a necessary party,[19] although he may be a proper party, to be admitted on his own application to appear and defend if the interests which he represents render it proper or necessary,[20] and the suit may be prosecuted to

11. See *supra*, VI, E, 1, b.

12. Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862.

13. Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; Palestine Water, etc., Co. *v.* Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203 [*affirming* (Civ. App. 1897) 41 S. W. 659].

A receiver in a suit to dissolve a partnership was held to have no such interest as to authorize him to intervene in an action against the members of the firm previously brought to set up defenses which had been waived by a failure on the part of defendants to plead the same. Honegger *v.* Wettstein, 94 N. Y. 252.

He is entitled to intervene and resist an attachment on property as that of the corporation but which had been conveyed to him in insolvency proceedings. Gayoso Sav. Inst. *v.* Burrow, 37 Tex. 88.

After a receiver has accepted his discharge he cannot intervene in a proceeding against a fund discovered after his discharge, for the purpose of securing fees on its distribution. Matter of Grand Central Bank, 27 Misc. (N. Y.) 116, 57 N. Y. Suppl. 418 [*affirmed* in 42 N. Y. App. Div. 157, 58 N. Y. Suppl. 1022].

14. Decker *v.* Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, impropriety of substituting such receiver in an action against the corporation for a trespass. But in Matter of Jacobson, 23 N. Y. App. Div. 75, 48 N. Y. Suppl. 420, such leave was granted to plaintiff to add the receiver as defendant in an action against a railroad company to recover rental and fee damages to property caused by the construction of the road, the receiver being authorized by the order appointing him to defend all actions instituted against him and also to appear and conduct the defenses of any action pending against the company, the court holding that the operation of the road by the receiver being for an indefinite period could not justly postpone plaintiff's proceeding.

15. Colorado Nat. Bank *v.* Scott, 19 Abb. N. Cas. (N. Y.) 348, holding that where, pending an action against a trustee of a corporation, to subject to plaintiff's debt land alleged to have been conveyed by the corporation to defendant in fraud of creditors, proceedings were instituted to dissolve the corporation, and a receiver was appointed who also sued to set aside the conveyance, a motion by plaintiff to bring in the corporation and the receiver as parties defendant should be denied.

16. See *supra*, IV, D, 6, b, (II).

17. Kittredge *v.* Osgood, 161 Mass. 384, 37 N. E. 369; Wilson *v.* Wilson, 1 Barb. Ch. (N. Y.) 592; Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249. At most it can only render the suit defective, so as to make it irregular for the complainant to proceed until the receiver is brought before the court, by a supplemental bill in the nature of a bill of revivor. Wilson *v.* Wilson, *supra*.

18. **Effect of dissolution of corporation** see CORPORATIONS, 10 Cyc. 1314 *et seq.*, 1324.

19. Kelley *v.* Union Pac. R. Co., 58 Kan. 161, 48 Pac. 843 [*distinguishing* Scannell *v.* Felton, 57 Kan. 468, 46 Pac. 948, where the creditors were the parties interested in enforcing a judgment rendered in favor of an insolvent bank before the appointment, and it was held that the receiver of the insolvent who took charge of the assets was a necessary party to a proceeding in error to reverse such judgment] (holding that where the action was against a railroad company for personal injuries, receivers appointed for the company after the filing of a petition in error by plaintiff were not necessary parties, not being interested in establishing the judgment which was not an asset in their hands); Speckert *v.* German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682.

After decree pro confesso against corporation.— Where receivers are appointed, they need not be made parties to a bill to foreclose a mortgage against the corporation which was taken for confessed before the receivers were appointed, and who do not apply for leave to come in and defend. Willink *v.* Morris Canal, etc., Co., 4 N. J. Eq. 377.

20. Kittredge *v.* Osgood, 161 Mass. 384,

judgment without bringing him in,[21] or if plaintiff in the suit is successful, when he undertakes the collection of his judgment it may be that the receiver can interpose.[22] In such cases it has been held that the receiver of a litigant has no status in the action until he has made himself a party by proper proceedings;[23] he has no unqualified right to appear and defend when he has not been made a party, and being an officer of the court, it is held that whether he should be allowed to appear and defend actions is addressed to the discretion of the court.[24]

37 N. E. 369; Cooper *v.* Philadelphia Worsted Co., (N. J. Ch. 1904) 57 Atl. 733; Speckert *v.* German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682; Denton *v.* Baker, 79 Fed. 189, 24 C. C. A. 476; Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732.

Under a statute giving a creditor a right to intervene in an attachment suit upon the presentation of an affidavit that he believes the debt claimed in the attachment suit to be fictitious, a receiver who presents such affidavit, and in whose hands the estate of the attached debtor has been placed by agreement among all the attaching creditors but one, is entitled to intervene as the representative of those creditors in the suit of the attaching creditor who refuses to enter into the agreement, and proceeds with his attachment. Paine *v.* Holliday, 68 Miss. 298, 8 So. 676.

Where the bill against a corporation is for the establishment of a lien on part of the property, the receiver is properly granted leave to intervene and contest plaintiff's right to recover and he may rely upon the insufficiency of the evidence to sustain a decree for plaintiff; therefore it is not proper to dismiss his petition merely because no testimony was taken by him in support of his averments. Perry *v.* Godbe, 82 Fed. 141.

The petition of intervention may contain a statement of the petitioner's view of the case and pray, in addition to intervention, for the final relief which he desires. Perry *v.* Godbe, 82 Fed. 141.

Substitution without objection see Jackson *v.* Dines, 13 Colo. 90, 21 Pac. 918.

21. *Illinois.*— Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199.

Kansas.— Kelley *v.* Union Pac. R. Co., 58 Kan. 161, 48 Pac. 843.

New Jersey.— Cooper *v.* Philadelphia Worsted Co., (Ch. 1904) 57 Atl. 733.

New York.— Tracy *v.* Selma First Nat. Bank, 37 N. Y. 523.

United States.— Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732.

See 42 Cent. Dig. tit. "Receivers," § 349 *et seq.*

22. Toledo, etc., R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613.

23. Tracy *v.* Selma First Nat. Bank, 37 N. Y. 523, 5 Transcr. App. 14 (holding that upon the dissolution of a corporation the receiver must apply to be made a party to the suit and cannot appear or move until such order is obtained continuing the cause in his name); Flynn *v.* Furth, 25 Wash. 105, 64 Pac. 904; Wilder *v.* New Orleans, 87 Fed. 843, 31 C. C. A. 249; Mercantile Trust Co. *v.* Pittsburgh, etc., R. Co., 29 Fed. 732. So in Whittlesey *v.* Delaney, 73 N. Y. 571, where for the reason that the receiver had no standing in an action against the corporation of which he was receiver, it was held that an action to vacate a judgment against the corporation because obtained without consideration, etc., might properly be brought by him in his own name. But in Smead Foundry Co. *v.* Chesbrough, 18 Ohio Cir. Ct. 783, 6 Ohio Cir. Dec. 670, where under the statutory power of a receiver to bring and defend an action in his own name as receiver, etc., it was held that the receiver of a corporation may file a motion to set aside a judgment entered against the corporation in the court which has control of him as receiver.

Where the corporation is dissolved and the receiver is invested with all its rights of possession of the corporate property, and a pending suit against the corporation is thereby abated, it is held that the levy of an attachment which is void against his claim to the property may be removed by him on his application to the court to discharge the attachment. Selma First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609, 22 L. ed. 687, receiver of national bank under act of congress. To the same effect as to the right of a receiver of a national bank see Bowen *v.* Medina First Nat. Bank, 34 How. Pr. (N. Y.) 408.

The refusal of the application of the corporation to make its receiver a party is not error; if the receiver desires to be let in to defend, he should make the application to that end. Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199.

24. Ottumwa State Bank *v.* McElroy, 106 Iowa 258, 76 N. W. 715; Hedrick *v.* McElroy, (Iowa 1898) 76 N. W. 716; Patrick *v.* Eells, 30 Kan. 680, 2 Pac. 116 (as to right of receiver of the property of the corporation appointed with the qualification that he is not to interfere with the possession of mortgaged property which was involved in a suit to foreclose, to be made a party to the foreclosure proceeding); Dunlop *v.* Patterson F. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283; Farmers' L. & T. Co. *v.* Hoffman House, 7 Misc. (N. Y.) 358, 27 N. Y. Suppl. 634.

The court should determine whether the defense should be interposed when the question is presented on the motion of a receiver for leave to defend in a certain action, and it is improper for the court to authorize a receiver to employ counsel to advise him as to a defense and to defend if so advised. Troy Sav. Bank *v.* Morrison, 27 N. Y. App. Div. 423, 50 N. Y. Suppl. 225.

Where the corporation has been represented. — Under a statute providing that "a defendant served by publication alone shall be allowed, at any time before judgment, to ap-

(B) *Effect.*[25] When a receiver intervenes in a pending action he submits himself to the jurisdiction of the court and must be governed in his subsequent steps in the action by the same rules applicable to other litigants.[26]

(III) *Of Receiver to Prosecute, and Continuance of Action in Name of Original Party.*[27] The receiver of plaintiff in a pending action in another court succeeds him in that court as the proper party to prosecute to final judgment the issues relating to possession of the property involved in the receivership,[28] but he has no right to intervene in actions not affecting the particular property of which he is receiver.[29] An action by a corporation not abating by the mere appointment of a receiver,[30] it is sometimes provided by statute that it may be continued in the name of the original party.[31] But the rule that a receiver of a defendant has no status in the action until he is made a party upon his application [32] is applied to the receiver of a corporation plaintiff in another action to which the receiver is not a necessary party,[33] and the mere filing in a

pear and defend the action," it was held that no abuse of discretion was shown in denying the application of the receiver of an insolvent foreign corporation to set aside the default of such corporation, and to permit him to appear and defend on its behalf, in an action commenced by attachment, in which such corporation had been served by publication, and in which a foreign assignee of defendant had appeared, but made no defense, and where there was no attempt to excuse such default, and such receiver was not a necessary party to the pending litigation, and the defense tendered was merely that plaintiff should not be permitted to recover the full amount for which defendant was liable for the reason that it was insolvent. Ottumwa State Bank *v.* McElroy, 101 Iowa 258, 76 N. W. 715. And in Hedrick *v.* McElroy, (Iowa 1898) 76 N. W. 716, it was held that under facts similar to those in the case last above cited, the rule in that case applied, and that the fact that the receiver filed an answer before the default was entered did not enlarge his right to defend. So an application by an ancillary receiver of a corporation for leave to file an answer for the purpose of setting up defenses already pleaded by the corporation was properly denied, especially when it was not made until after all the testimony had been taken and the cause heard and submitted. American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133.

Waiver of order.— Leave to intervene, when granted, should be by order; but, if the suit is proceeded with without objection, the entry of the order will be waived. Perry *v.* Godbe, 82 Fed. 141.

25. Effect of appearance see *supra*, VI, D, 2, e.

Issues see *infra*, VI, G, 5.

26. Arnold *v.* Weimer, 40 Nebr. 216, 58 N. W. 709.

Jurisdiction of cause.— But an order substituting a receiver of a corporation as defendant in the action, with the like effect as if the action were continued in the name of the corporation, can have no effect, in respect to the jurisdiction of the court in the action, over its subject-matter, and over the corporation as defendant, to confer a jurisdiction, in those particulars, which the court would not have had if the receiver had not been substituted as defendant. Cadle *v.* Tracy, 4 Fed. Cas. No. 2,279, 11 Blatchf. 101.

27. Continuance of action on change of receiver see ABATEMENT AND REVIVAL, 1 Cyc. 120, 121.

28. San Antonio, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1895) 30 S. W. 693, holding that as the person lawfully coming into the place of the corporation and its officers, so far as the possession and control of the corporate property is concerned, the orders already made in such suit would inure to his benefit and protect his possession and he would take the property subject to the determination of the court in which that suit was pending of any right asserted by defendants in that suit.

29. Wheeling Bridge, etc., Co. *v.* Cochran, 68 Fed. 141, 15 C. C. A. 321, where a receiver was appointed in a suit to foreclose a corporate mortgage, his powers being limited to the mortgaged property, and it was held that he had no right to intervene in a pending action brought by the corporation involving a claim for money which did not constitute any part of the mortgaged property.

30. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 [*affirming* 6 Hun 293].

31. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294 [*affirming* 6 Hun 293]; Sigua Iron Co. *v.* Brown, 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 [*affirming* 33 Misc. 50, 68 N. Y. Suppl. 141]; Albany City Ins. Co. *v.* Van Vranken, 42 How. Pr. (N. Y.) 281 (holding further that a motion to dismiss the complaint, made by defendant, in an action brought by a corporation, for which a receiver has been appointed pending the action, may be granted without substituting the receiver as plaintiff); Talmage *v.* Pell, 9 Paige (N. Y.) 410.

32. See *supra*, VI, E, 2, b, (II), (A).

33. St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 49 (where the parties in interest were sufficiently represented before the court to enable it to determine the controversy and the refusal of the application by attorneys for the corporation was held to be proper, especially where there was great delay in making the application, and the granting of it would necessitate further delay in the trial); Missouri, etc., R. Co. *v.* German

foreclosure suit by complainant's receiver in a creditor's suit of an affidavit of his appointment, without any further order thereon, does not make such receiver a party to the suit.[34]

(IV) *Of Other Parties.* In an action by a receiver, the rule under a general statute that in order to entitle one to intervene it must appear either that a complete determination of the controversy cannot be had without his presence or that he has an interest in the subject-matter applies,[35] and a party to the suit in which the receiver was appointed whose rights for the purposes of litigation have passed to the receiver is not a proper party to intervene in an action by the receiver for the enforcement of such rights.[36] With respect to intervention by a stranger in the receivership suit, the court has recognized the right to intervene, although the purpose of the intervention respects solely the proper administration of a fund in the custody of the court and in which the intervener is entitled to share,[37] and a court cannot lawfully refuse to permit an intervening petition to be filed when the petitioner shows a title to or a lien upon property in the custody of a receiver, and a present right to its possession, which is superior to any right or title that is or may be asserted by the parties to the suit in which the intervention is filed, and at whose instance a receiver was obtained,[38] although it is held on the other hand that a mere creditor whose rights may be fully protected before the master will not be allowed to intervene as a party.[39]

Nat. Bank, 77 Fed. 117, 23 C. C. A. 65 (where the application to substitute the receiver of an insolvent bank was made by defendants in the action and it was held that while the motion should have been allowed if made at the instance of the receiver and he desired to prosecute the action in his own name, its denial was not ground for reversing the judgment subsequently rendered against defendants; and that if the receiver desired to be substituted as a party plaintiff so as to be in a position to control the judgment, he might still make a proper application to that end).

Where there is no transfer of interest pending the action.— In East River Bank *v.* Cutting, 1 Bosw. (N. Y.) 636, it was held that where in a suit by a bank against the maker and indorser of a note made jointly the maker alone was served, and after default by the maker the bank passed into the hands of a receiver, a motion by the receiver to be substituted as plaintiff could not be granted upon the service of a summons upon the indorser by the receiver because after judgment against the maker there was no action pending against the indorser and therefore there was no transfer of interest pending the action under the code provision governing substitution of parties.

34. Thomas *v.* Van Meter, 164 Ill. 304, 45 N. E. 405.

35. Ironwood *v.* Coffin, 39 Misc. (N. Y.) 278, 79 N. Y. Suppl. 502.

The determination of conflicting claims to a recovery by a receiver is not a proper matter to justify intervention in the receiver's action. Ironwood *v.* Coffin, 39 Misc. (N. Y.) 278, 79 N. Y. Suppl. 502.

36. Driver *v.* Lanier, 66 Ark. 126, 49 S. W. 816.

Consequent suspension of rights of parties represented see *supra*, VI, B, 6.

37. *Ex p.* Breedlove, 118 Ala. 172, 24 So. 363, holding that a cropper, who was ejected from possession of land, and of his crop grown thereon, and whose landlord successfully prosecuted another action of ejectment, and regained the land, and procured sequestration of the crop by a receiver, is, for the purpose of properly administering the fund, entitled as of right to intervene in the receivership proceedings.

So although the person is represented by the receiver, it has been held competent for the court to permit him to be made a party to the proceedings taken by or against the receiver where such party is interested in the administration of the property. Atty.-Gen. *v.* North American L. Ins. Co., 77 N. Y. 297.

38. Graves *v.* Hall, 27 Tex. 148; Minot *v.* Mastin, 95 Fed. 734, 37 C. C. A. 234. See also *supra*, IV, D, 6, a.

Trespassers in whom the record fails to disclose any interest in the original controversy cannot properly be allowed to be made parties to the suit. McAllaster *v.* Edgerton, 3 Indian Terr. 704, 64 S. W. 583.

Pleading taken as petition in intervention. — Where a pleading is filed in the same court in which a receiver has been appointed, setting up rights, alleging that petitioner cannot enforce them by reason of the receivership, and praying that the property may be surrendered for the enforcement of such rights or that the property be sold, etc., will be treated as a petition of intervention, although it purports to be a bill in an independent suit and process is prayed against the parties, including the receiver. Minot *v.* Mastin, 95 Fed. 734, 37 C. C. A. 234.

Presentation of claims see *supra*, V, A, 2.

39. Sands *v.* Greeley, 80 Fed. 195. To the same effect see People *v.* Globe Mut. Ins. Co., 27 Hun (N. Y.) 539. See also as to intervention in equity generally EQUITY, 16 Cyc. 201.

F. Process and Appearance[40] — **1. In General.** Although a receiver may be authorized by statute to bring and defend actions, it is held that until he is made a party regularly to the proceeding in which he was appointed he cannot by the mere filing of an answer acquire the status of a party to the suit, but his pleading must be regarded as the beginning of a new action so that other parties are not required to take notice thereof,[41] and a judgment in an independent adverse suit cannot be sustained unless defendant therein is served with process;[42] but if he appears to a petition in the cause he cannot deny that he had notice of it.[43] So an order, intending to reserve to the court jurisdiction to determine all claims and demands against its receiver, authorizing the filing of intervening petitions setting up claims in the cause against the receiver, does not authorize the institution of an independent action at law without service of summons;[44] but it is held that the receiver of a corporation may appear in an action in response to notice served upon the corporation and by defending submit himself to the jurisdiction of the court so as to be entitled to moneys due the corporation.[45]

2. Injunction.[46] Consistently with the rule that a receiver is the officer of the court appointing him, that he is directly under the supervision and control of such court, and that one who wishes to interfere with the receiver's possession or the exercise of his functions should apply to that court, the proper method of restraining a receiver when engaged in the discharge of his official trust is by application to the court whose officer he is for instructions,[47] and not by an independent suit and injunction therein.[48]

40. **Attachment, execution, etc.** see *supra*, IV, D, 7, e, 1 *et seq.*

Garnishment see GARNISHMENT, 20 Cyc. 1026 text and note 6.

Garnishment of party see *supra*, VI, A, 3, b, (I).

Service of process on receiver of corporation see PROCESS, 32 Cyc. 555 text and note 19 *et seq.*

41. Youtsey *v.* Hoffman, 108 Fed. 693.

42. Orchard *v.* National Exch. Bank, 121 Mo. App. 338, 98 S. W. 824, where on the final settlement of the receiver the court made an order requiring a bank which had received assets from the receiver to repay a specified sum necessary for the payment of expenses of the receiver, and it was held that while the order might have been enforced by attachment for contempt, sequestration of assets, or an appropriate equitable remedy, an independent adverse suit without service of process could not be engrafted on the original proceedings by a mere service of a copy of the order requiring the party to appear and show cause in what purported to be a new action.

43. Glenn *v.* Gill, 2 Md. 1.

44. Baltimore, etc., R. Co. *v.* Freeman, 112 Fed. 237, 50 C. C. A. 211.

45. Glover *v.* Wells, 40 Ill. App. 350 [*affirmed* in 140 Ill. 102, 29 N. E. 680].

So if he appears upon service on his agent, although he is not a party to the suit, a judgment will be valid and bind the property in his hands. South Carolina *v.* Port Royal, etc., R. Co., 84 Fed. 67. See also, generally, PROCESS, 32 Cyc. 555.

Appearance generally see APPEARANCES, 3 Cyc. 500.

Effect of intervention and appearance see *supra*, VI, E, 2, b, (II), (B); VI, D, 2, e.

Enforcement of judgment see *infra*, VI, H, 2, b, (II).

46. **Receiver's remedy** see *supra*, VI, A, 1, b; VI, B, 6; VI, D, 2, a, (I).

To restrain interference with receiver's possession see *supra*, IV, D, 5, d.

47. See *supra*, IV, D, 6, a *et seq.*; IV, E, 1; IV, F, 5.

48. Ray *v.* Trice, 53 Fla. 864, 42 So. 901 (holding that an injunction order, made by the judge of one judicial circuit in a cause pending in his circuit, restraining and enjoining a receiver appointed by the judge of another judicial circuit in a cause pending within the jurisdiction of the latter, from applying to the judge whose receiver he is for a writ of restitution of possession of real estate, or for any other remedial process affecting the property in his custody as receiver, is ill-advised, irregular, and without authority); Winfield *v.* Bacon, 24 Barb. (N. Y.) 154 (holding that a receiver who has obtained authority from the court to sue cannot be restrained by injunction out of another court, or by being made party to a new action, and enjoined therein); Van Rensselaer *v.* Emery, 9 How. Pr. (N. Y.) 135; Goodnough *v.* Gatch, 37 Oreg. 5, 60 Pac. 383; McCoy *v.* Marietta, etc., R. Co., 15 Fed. Cas. No. 8,730*b* (where the federal court refused to enjoin railroad receivers appointed by a state court from making illegal discriminations between parties entitled to the road's services as a carrier).

But the same court which appointed the receiver may entertain a suit to restrain him. See Alspaugh *v.* Adams, 80 Ga. 345, 5 S. E. 496, *supra*, VI, D. 2, c, (II) text and note 47.

Effect of leave to sue receiver see *supra*, VI, D, 2, d.

G. Pleading [49] and Evidence [50] — 1. Allegations as to Authority of Receiver [51] — a. In General. A receiver, like other parties commencing a suit under any special authority, must duly allege his authority in his pleading,[52] and in a traversable form,[53] and must show his title or authority to sue in the right of the parties in whose behalf the particular cause of action is enforceable.[54] As to how far he must show the proceedings under which he was appointed the authorities are not entirely harmonious. It has been held that he must state in his complaint that he has been duly appointed receiver,[55] although it would seem not to have been intended thereby to hold that a mere allegation that plaintiff was duly appointed receiver without alleging in what court or any other facts showing a sufficient appointment would be good, and the general and better rule is otherwise.[56] So the receiver has been required to allege enough of the proceedings to show a legal appointment,[57] or the equity of the parties whose

49. **Form in whole, in substance, or in part, of:** Complaint by receiver of national bank on demand of the bank. Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297. Complaint by receiver of a corporation in action to have a claim against the corporation declared a general claim and a levy of attachment thereunder dissolved. Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26. Complaint by receiver of corporation against stock-holders. Worth *v.* Wharton, 122 N. C. 376, 29 S. E. 370; Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015. Complaint by receiver of corporation to recover statutory liability of stock-holder. Wigton *v.* Kenney, 51 N. Y. App. Div. 215, 64 N. Y. Suppl. 924; Childs *v.* Blethen, 40 Wash. 340, 82 Pac. 405, complaint by receiver and creditors of insolvent corporation on judgment in the original suit by creditors against the corporation and stock-holders. Complaint by receiver of corporation against directors for damages resulting from their negligence. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567. Petition or complaint against receiver for damages for injuries inflicted in operating property. Proctor *v.* Missouri, etc., R. Co., 42 Mo. App. 124; Eddy *v.* Lafayette, 163 U. S. 456, 16 S. Ct. 1082, 41 L. ed. 225. Plea of a receivership of the corporation where the cause of action arose for which it is sought to hold the corporation liable. Ohio, etc., R. Co. *v.* Anderson, 10 Ill. App. 313.

Pleading generally see Pleading, 31 Cyc. 1.

Plea of receivership by corporation subsequently sued see *supra*, IV, F, 6, f, (I), note 56.

50. See, generally, Evidence, 17 Cyc. 1.

Under plea of receivership to defeat action against original party see *supra*, IV, E, 2, b, note 87.

51. In supplementary proceedings see Executions, 17 Cyc. 1470.

52. Daggett *v.* Gray, (Cal. 1895) 40 Pac. 959.

53. Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. 448, 19 Ky. L. Rep. 1788; Hagerman *v.* Thomas, 1 Nebr. (Unoff.) 497, 96 N. W. 631; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; White *v.* Low, 7 Barb. (N. Y.) 204; Dayton *v.* Connah, 18 How. Pr. (N. Y.) 326; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80.

Receivership pleaded in abatement.— The rule of the text was applied to a plea in abatement in replevin that defendant "was in possession of the slaves in the declaration mentioned, as a receiver in a suit in chancery, in which Littleberry Bedford, and Nancy, his wife, are complainants, and the said plaintiff, Hugh C. Armstrong, and James C. Armstrong, are defendants; and that the said property was put in his hands and possession, as receiver, by virtue of legal authority, which the said defendant is ready to verify," it being held that it did not appear when, where, or how defendant was appointed receiver. Armstrong *v.* McMillon, 9 Mo. 721.

54. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10, *infra*, note 58; King *v.* Cochran, 72 Vt. 107, 47 Atl. 394.

55. Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591.

56. Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. 448, 19 Ky. L. Rep. 1788; Rossman *v.* Mitchell, 73 Minn. 198, 75 N. W. 1053; Hagerman *v.* Thomas, 1 Nebr. (Unoff.) 497, 96 N. W. 631; White *v.* Joy, 13 N. Y. 83; Gillet *v.* Fairchild, 4 Den. (N. Y.) 80 [the last two cases being *cited* in Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591, *supra*, note 53], holding that the place as well as the time of the traversable fact must be stated, and that an averment that plaintiff was duly appointed receiver is not capable of trial; that he should state what in particular was done so that the court may determine whether he was duly appointed and the jury may answer as to the truth of the allegation if an issue of fact is tendered thereon. *Contra*, Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26, holding that the objection cannot be raised by demurrer under the code but might be raised by proper motion.

57. Rhorer *v.* Middlesboro Town, etc., Co., 103 Ky. 146, 44 S. W. 448, 19 Ky. L. Rep. 1788.

In an action by the receiver of a corporation against stock-holders, appointed under a statute creating a complete system for the ascertainment of the stock-holders' liability in the suit in which the receiver is appointed, it is held that it is incumbent on plaintiff to show clearly a legal right to institute and carry on the suit, and to this

rights, under the order of the court appointing him, he represents, to maintain the action which he attempts to prosecute;[58] while on the other hand it is held that the receiver need not set out each step or all the proceedings by which he was appointed, being required only to allege the mode of his appointment.[59] The transcript of the decree of appointment need not be filed with the pleading under a statute requiring the filing of instruments which form the foundation of the cause of action.[60] Where the receiver makes title to the property by transfer

end he should show his appointment by a decree which is conclusive as against defendant; and his declaration must, either by averments or by the decree copied in the declaration, show that the receiver was appointed in a proceeding to which defendant stockholder was a party. Chandler *v.* Dore, 84 Ill. 275; Chandler *v.* Brown, 77 Ill. 333.

The petition under which the receiver was appointed need not be exhibited with the petition in the suit by the receiver. Allegations which fully describe the proceedings under which he was appointed are sufficient to show his authority to bring the suit. Wheatley *v.* Glover, 125 Ga. 710, 54 S. E. 626.

58. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10, where in an action by a receiver of a debtor to set aside an assignment made by the debtor, it was held that it was not sufficient to allege merely that the receiver was appointed in supplementary proceedings without showing the judgment and other facts necessary to maintain supplementary proceedings, upon which the relief in the right of the creditor depended.

59. Rossman *v.* Mitchell, 73 Minn. 198, 75 N. W. 1053 (holding that an allegation in general terms by plaintiff, suing as a receiver, that at such a time, in such an action or proceeding, and by such a court or officer, he was duly appointed receiver of the estate of such a party is sufficient, and that anything short of this is not sufficient); Stewart *v.* Beebe, 28 Barb. (N. Y.) 34; *In re* Beecher, 19 N. Y. Suppl. 971; Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297 (holding that this is all that is required in White *v.* Joy, 13 N. Y. 83, *supra*, note 56); Dayton *v.* Connah, 18 How. Pr. (N. Y.) 326. See also for sufficient allegations in this regard Daggett *v.* Gray, (Cal. 1895) 40 Pac. 959; Boland *v.* Whitman, 33 Ind. 64.

An allegation of due appointment in such connection would seem to be sufficient to admit proof of the regularity of the appointment. Rockwell *v.* Merwin, 45 N. Y. 166; Morgan *v.* Bucki, 30 Misc. (N. Y.) 245, 61 N. Y. Suppl. 929.

Under a statute dispensing with allegation of jurisdictional facts in pleading a determination of a court or officer of special jurisdiction, and providing that the determination may be stated to have been duly made, a general allegation of plaintiff's appointment in supplementary proceedings, in a particular matter by an order duly made by a particular officer, is held sufficient, without showing the facts authorizing the order. Manley *v.* Rassiga, 13 Hun (N. Y.) 288; Cheney *v.* Fisk, 22 How. Pr. (N. Y.) 236. But *compare* the cases cited as to the necessity of alleging jurisdictional facts in EXECUTIONS, 17 Cyc. 1470 note 62.

Receiver of national bank.— In an action by the receiver of a national bank, it was held that an allegation that plaintiff was duly appointed receiver by the controller of the currency, naming him, in accordance with the provisions of the act of congress, designating it, etc., was a sufficient allegation of appointment. Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297. See also Stanton *v.* Wilkeson, 22 Fed. Cas. No. 13,299, 8 Ben. 357, 2 N. Y. Wkly. Dig. 91.

Objection that plaintiff was not duly appointed (Walsh *v.* Byrnes, 39 Minn. 527, 40 N. W. 831, holding the proper ground of demurrer to be want of legal capacity to sue; White *v.* Low, 7 Barb. (N. Y.) 204), or to an allegation which does not show the court which appointed him (Hagerman *v.* Thomas, 1 Nebr. (Unoff.) 497, 96 N. W. 631), must be taken by special demurrer pointing out the defect. So general allegations such as referred to in the text have been held sufficient under the code, when objection is raised on demurrer, the remedy being by motion to make the pleading more definite and certain in respect of plaintiff's title to a note sued on if more certainty is desired. Schrock *v.* Cleveland, 29 Ohio St. 499. The sufficiency of the complaint alleging plaintiff's appointment cannot be attacked on the trial upon objection to the admission of evidence of the appointment where there is only a denial of the appointment (Manseau *v.* Mueller, 45 Wis. 430), and objection that there was no allegation as to when or by what court the receiver was appointed is cured by verdict (Griesel *v.* Schmal, 55 Ind. 475).

60. Boland *v.* Whitman, 33 Ind. 64, in a suit by a receiver of a corporation to recover an assessment on a premium note executed to the company. See also, generally, PLEADING, 31 Cyc. 556.

Under a statute requiring that in an action of assumpsit, plaintiff's statement should be accompanied by a particular reference to the records of any court, within the county in which the action is brought, upon which plaintiff's claim is founded, such statement in a suit brought in the court which appointed the receiver need not have attached to it a copy of the whole record, but is sufficient if it merely refers to the record of the proceedings appointing him. Rathfon *v.* Locher, 215 Pa. St. 571, 64 Atl. 790. It is otherwise as to an appointment in another county. Stockley *v.* McClurg, 14 Pa. Super. Ct. 629.

of it to himself, the proceedings by which he was appointed constitute no part of his title,[61] and the same is true when plaintiff sues on promissory notes which he alleges were made to him as receiver by defendant.[62]

b. To Institute Proceedings — (I) *In General.* A receiver in whom there is no authority to sue as merely incidental to his appointment,[63] or except in those cases where leave to sue is not necessary,[64] as when the right accrues to the receiver after his appointment,[65] must allege his authority under the leave or direction of the court appointing him,[66] or his pleading will be bad on demurrer.[67] It is held, however, that the objection is waived by failure to demur,[68] or to answer to the authority of the receiver,[69] and that if the question is not raised in the court below it cannot be assigned for error in the appellate court.[70]

(II) *Condition — Notice.* Where notice of the appointment of a receiver is necessary [71] the complaint should allege it.[72]

61. White *v.* Joy, 13 N. Y. 83, where the answer set up transfer to plaintiff by the payee of a note sued on, after the appointment of plaintiff as receiver.

62. Nelson *v.* Nugent, 62 Minn. 203, 64 N. W. 392.

63. Morgan *v.* Bucki, 30 Misc. (N. Y.) 245, 61 N. Y. Suppl. 929.

Leave to sue see *supra*, VI, A, 3, a.

64. Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26; Compton *v.* Schwabacher, 15 Wash. 306, 46 Pac. 338; Hardin *v.* Sweeney, 14 Wash. 129, 44 Pac. 138, where it is further held that want of capacity to sue must appear from the allegations in order to be available on demurrer.

65. Pouder *v.* Catterson, 127 Ind. 434, 26 N. E. 66, holding that a complaint to recover possession of land leased to defendant by the receiver, alleging a wrongful holding over, need not allege special authority to sue in his own name.

66. Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231, 142 Ind. 350, 39 N. E. 859; Gainey *v.* Gilson, 149 Ind. 58, 48 N. E. 633 (complaint by a receiver of a corporation against the stock-holders to collect unpaid assessments or calls due on their respective shares of stock); Davis *v.* Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494; Garver *v.* Kent, 70 Ind. 428; Rhodes *v.* Hilligoss, 16 Ind. App. 478, 45 N. E. 666 (holding that a complaint in a suit by a receiver, which alleges his appointment and qualification, and states that he entered on his duties as receiver, "and accordingly he brings this suit," does not show that leave of court was obtained); Morgan *v.* Bucki, 30 Misc. (N. Y.) 245, 61 N. Y. Suppl. 929; Simmons *v.* Taylor, 106 Tenn. 729, 63 S. W. 1123.

An allegation that he was duly appointed is not sufficient to show authority to sue when such authority is not incidental to the particular kind of receivership. Morgan *v.* Bucki, 30 Misc. (N. Y.) 245, 61 N. Y. Suppl. 929, as to receivers in sequestration proceedings under the statute who have no general authority to sue as receivers in supplementary proceedings. See also in this connection Executions, 17 Cyc. 1740 text and note 60 *et seq.*

Specific authority to bring the particular action need not be alleged, but it is sufficient if an order comprehensive enough to embrace it is shown. Taylor *v.* Canaday, 155 Ind. 671, 57 N. E. 524, 59 N. E. 20; Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231 (holding that the allegation "that said Luther Cummings was duly appointed and qualified as receiver of said association, and, among other things, was then and there, by said court, duly empowered, ordered, and directed to collect by suit, if necessary, all the claims due said association," is sufficient); Robison *v.* Wolf, 27 Ind. App. 683, 62 N. E. 74.

67. Hatfield *v.* Cummings, 142 Ind. 350, 39 N. E. 859; Davis *v.* Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494 (complaint fatally defective); Garver *v.* Kent, 70 Ind. 428 (demurrable for want of facts if permission to bring suit in his own name is not alleged); Simmons *v.* Taylor, 106 Tenn. 729, 63 S. W. 1123.

68. Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63.

69. Palen *v.* Bushnell, 51 Hun (N. Y.) 423, 4 N. Y. Suppl. 63, holding that by code provision objection for want of capacity to sue is waived if not made by demurrer or answer, and that revival by a receiver will not be prevented after issue joined, because plaintiff has not obtained leave of court to sue. But see Screven *v.* Clark, 48 Ga. 41, where after the close of the evidence the jury were instructed that the receiver was not authorized to maintain the suit.

Presumption of authority is indulged in the absence of a denial and showing to the contrary. Alsobrook *v.* Watts, 19 S. C. 539 (holding that a receiver appointed to displace an administrator had a right, by leave of court, to control a judgment in favor of the estate and that in the absence of any contrary showing it would be presumed that the receiver was authorized to have the judgment made a lien); Howard *v.* Stephenson, 33 W. Va. 116, 10 S. E. 66 (in a collateral proceeding to set aside a judgment).

Presumption on appeal see *infra*, VI, G, 5, note 6.

70. Conley *v.* Deere, 11 Lea (Tenn.) 274.

71. See *supra*, IV, D, 5, j.

72. Hunt *v.* Wolfe, 2 Daly (N. Y.) 298,

2. Allegation of Leave to Sue Receiver. Leave to sue a receiver when necessary,[73] must be alleged in those cases in which absence of leave furnishes more than a ground merely for staying the proceedings or punishing for contempt,[74] otherwise the pleading will be bad on demurrer,[75] unless the allegation shows a receiver who by statute may be sued without leave, as in the case of a receiver appointed by a federal court,[76] although the objection may be waived by answering to the merits without raising it;[77] but where the requirement is jurisdictional,[78] the objection may be raised at any stage of the proceedings.[79] In other cases, the requirement being considered one which does not go to the jurisdiction of the court, the omission to allege is waived by appearance,[80] and in some cases cannot be raised by demurrer but is at most a contempt or a ground for staying proceedings.[81]

3. Cause of Action and Defense. A receiver must allege facts sufficient to constitute a cause of action enforceable by him in his capacity as receiver, for those in whose behalf the particular recovery would be proper, as where the insolvency of the estate represented and the existence of claims against it are necessary in order to entitle its receiver to particular relief;[82] and not being clothed with

where allegation of notice to a tenant of an estate was held to be necessary before an action by a receiver of the estate for nonpayment of rent.

73. See *supra*, VI, D, 2, a, (I).

74. See *supra*, VI, D, 2, a, (II), (A).

75. *Illinois.*— St. Louis, etc., R. Co. *v.* Hamilton, 158 Ill. 366, 41 N. E. 777, in action which interferes with the receiver's possession, as ejectment.

Indiana.— Malott *v.* State, 158 Ind. 678, 64 N. E. 458; Wayne Pike Co. *v.* State, 134 Ind. 672, 34 N. E. 440; Keen *v.* Breckenridge, 96 Ind. 69. But in Ft. Wayne, etc., R. Co. *v.* Mellett, 92 Ind. 535, where there was nothing to show that the receiver had possession of the property and no question was presented as to the property being in legal custody, in an action against a corporation and its receiver, it was held that the complaint was not demurrable because it did not show that leave had been obtained to sue the receiver.

Michigan.— Burk *v.* Muskegon Mach., etc., Co., 98 Mich. 614, 57 N. W. 804.

Texas.— Piper *v.* Stratten, (1887) 7 S. W. 45, where an exception was sustained on the ground that an action in reference to matters pertaining to or growing out of the trust, as distinguished from an action against a receiver holding property adversely to claimant, cannot be maintained without leave.

United States.— American L. & T. Co. *v.* Central Vermont R. Co., 84 Fed. 917; Werner *v.* Murphy, 60 Fed. 769; Hale *v.* Duncan, 11 Fed. Cas. No. 5,914, 6 Reporter 422.

See 42 Cent. Dig. tit. "Receivers," § 362.

76. Malott *v.* State, 158 Ind. 678, 64 N. E. 458; Pierce *v.* Jones, 24 Ind. App. 286, 56 N. E. 683.

It cannot be presumed on demurrer that the receiver was appointed by a federal court if such appointment is not alleged in the pleading. Peirce *v.* Chism, 23 Ind. App. 505, 55 N. E. 795, 77 Am. St. Rep. 441.

77. Elkhart Car-Works Co. *v.* Ellis, 113 Ind. 215, 15 N. E. 249.

78. See *supra*, VI, D, 2, a, (II), (A).

79. Haag *v.* Ward, 89 Mo. App. 186.

80. See *supra*, VI, D, 2, a, (II), (A).

81. Leuthold *v.* Young, 32 Minn. 122, 19 N. W. 652; Hutchinson *v.* Bien, 46 Misc. (N. Y.) 302, 93 N. Y. Suppl. 189 [*affirmed* in 104 N. Y. App. Div. 214, 93 N. Y. Suppl. 216].

82. Daggett *v.* Gray, (Cal. 1895) 40 Pac. 959; Forker *v.* Brown, 10 Misc. (N. Y.) 161, 30 N. Y. Suppl. 827 [*affirmed* in 159 N. Y. 540, 53 N. E. 1125] (holding that in an action against the directors of a railroad company, based upon fraud, plaintiff's right to disaffirm transactions between the corporation and defendants did not appear because it was not alleged that there were creditors of the company, that the company was insolvent, or that the corporation or its stock-holders had repudiated the transaction); Wisener *v.* Myers, 3 Pa. Dist. 687 (requiring an allegation that the subscriptions are needed to pay corporate debts, in an action by a receiver of the corporation to recover unpaid stock subscriptions).

To cut off defenses.— Insolvency will not be presumed from the mere fact of receivership so as to preclude a defense which might otherwise be available against the receiver Shuey *v.* Holmes, 20 Wash. 13, 54 Pac. 540, holding that since the statutes authorize a receivership for other reasons than insolvency, where a complaint on a note by the payee's receiver did not allege insolvency or the existence of debts, a defense good against the payee would be good against the receiver.

Allegations of this character are unnecessary: *In an action to foreclose mortgage.*— Hatfield *v.* Cummings, 152 Ind. 280, 50 N. E. 817, 53 N. E. 231, where an allegation of the existence of debts or judgments or allowance of claims was held to be unnecessary, since the right of action did not depend upon these things and the receiver was not appointed because the corporation was insolvent but because of the expiration of its charter.

In an action against directors for neglect in management.— Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567, where it was held that

any right to maintain an action, which the parties or the estate represented could not maintain,[83] he must show a cause of action existing in such parties.[84] The objection that the facts are not sufficient to entitle the receiver to maintain the particular action is not waived by failure to demur or to answer to his legal capacity to sue [85] and is not cured by judgment.[86] General rules of pleading [87] are applied to allegations in respect of the particular causes of action.[88] The receiver must allege the performance of conditions upon which his cause rests,[89] but matters of defense need not be anticipated; [90] and if a complaint is merely technically

the receiver in such a case recovers on behalf of the corporation in whose right the stock-holders are entitled to the damages and that the existence of claims against the corporation need not be alleged; and further that a general allegation of insolvency was a sufficient averment that there were unpaid claims, and that the assets in the hands of the receiver were not sufficient to pay them.

In a bill to determine who are stock-holders. — McMaster *v.* Drew, 70 N. J. Eq. 6, 62 Atl. 559, holding that since the receiver of the corporation represents stock-holders as well as creditors, and any surplus in his hands after payment of corporate debts and receivership expenses is held for the benefit of stock-holders, such a bill need not disclose whether the assets which the receiver has reached or may reach are sufficient to satisfy creditors.

An allegation that the whole of a stock-holder's indebtedness is needed to pay creditors is held to be admitted by a demurrer to the complaint, and the court will presume that it has been judicially ascertained what part of the subscriber's indebtedness was necessary to pay the creditors of the corporation. Worth *v.* Wharton, 122 N. C. 376, 29 S. E. 370.

Where the allegations showed a suit which could not be maintained by the corporation, in a petition against stock-holders for contribution, it was held that it was sufficiently shown that the receiver was seeking to enforce the rights of creditors. Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

83. See *supra*, VI, B, 1.

84. Daggett *v.* Gray, (Cal. 1895) 40 Pac. 959; Fouche *v.* Brower, 74 Ga. 251; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10, *supra*, note 54.

As representing creditors of a corporation in a suit against stock-holders for contribution, it is not necessary to set out a cause of action against the corporation with the strictness which would be required in an original suit by the creditor to establish it, the claims having been ascertained by the court in the receivership proceeding. Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

85. Ward *v.* Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790. And a demurrer to a bill by a receiver calls in question, not only the sufficiency of the facts to constitute a cause of action, but also the right of plaintiff to maintain the particular suit. American Trust, etc., Bank *v.* McGettigan, 152 Ind. 582, 52 N. E. 793, 71 Am. St. Rep. 345.

86. Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10.

87. See PLEADING, 31 Cyc. 1.

88. See the cases cited *infra*, this note.

Certainty.— Where, in an action against the directors of a bank for damages resulting from their negligence in the management of its affairs, it appears that the directors permitted the books of the bank and the records of its business to be so loosely and imperfectly kept that transactions complained of could not be specifically described, a motion to make the complaint more certain may be properly overruled. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

Presumption on general demurrer.— The complaint, in an action by the receiver of a corporation to have a claim against the corporation declared a general claim, and a levy of attachment sued out thereunder dissolved on the ground of the company's insolvency, was not subject to general demurrer, on the ground that it did not allege that defendants knew that the corporation was insolvent at the time the attachment was sued out, but such knowledge would be presumed as against the general demurrer. Allen *v.* Baxter, 42 Wash. 434, 85 Pac. 26.

An allegation of refusal to pay the claim which the receiver sues on, which stands admitted on the pleadings, is sufficient without further allegation of demand. Worth *v.* Wharton, 122 N. C. 376, 29 S. E. 370, as to demand on stock-holder for unpaid subscription. See also PLEADING, 31 Cyc. 107.

89. Iglehart *v.* Bierce, 36 Ill. 133, where a bond and mortgage were executed to a receiver in compromise and settlement of a claim due the estate, upon condition that the receiver procure the ratification of the settlement by the court, and it was held that in a suit to enforce the bond and mortgage such ratification must be alleged.

90. Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567 (sufficiency of complaint in an action by the receiver of a corporation against directors for damages resulting from negligence in management, without averment that the receiver and parties represented by him were without fault); Somers *v.* Dawson, 86 Minn. 42, 90 N. W. 119 (holding that under a statute extending the power to, and making it the duty of, a receiver to sue for the statutory liability of stock-holders if no action has been commenced by creditors within six months, the receiver's pleading need not allege that no such action had been brought; that the objection that such an action was pending should be by demurrer if the fact ap-

defective in allegation, the objection should be raised by demurrer or otherwise before issue on the facts.[91] In an action against the receiver, the allegations must be such as to show his official or personal liability,[92] and in an action to establish an equitable lien on the assets in the hands of a receiver for moneys supposed to have gone into the estate, it should be alleged that the moneys went into the receiver's hands and operated to swell the funds;[93] and where funds are held by a receiver subject to the determination of the adverse claims of certain persons, a complaint by a third person against the receiver and such adverse claimants seeking a judgment for the fund against the receiver, without asking that his right to it as between himself and the adverse claimants be determined, and without showing such right, will be dismissed.[94] A receiver who is properly made defendant to a suit and called upon to answer should answer fully.[95]

4. After Intervention or Change of Parties. Where a receiver was substituted for the corporation in an action brought against it before its dissolution and the appointment of the receiver, the answer of the corporation was directed to stand as his answer,[96] and where the receiver intervened after default by the corporation, he was bound by the admission of facts alleged in the bill.[97] Where a receiver of a defendant in another litigation is admitted as a party but files no plea and raises no other issue, he will be bound by a judgment on the issue raised by the plea of the original party.[98] But a receiver of a corporation, representing the creditors as well as the corporation, is held not to be bound by a waiver by the corporation of objections to the complaint.[99] A formal amendment to make an action by the receiver of an insolvent corporation stand in the name of the corporation is not treated as the commencement of the suit at the time of substitution so as to entitle defendant to amend his answer.[1]

pear from the face of the pleading, otherwise by answer in the place of the common-law plea in abatement. See also Pleading, 31 Cyc. 109.

91. Whittlesey *v.* Delaney, 73 N. Y. 571, holding that in an action to set aside and vacate a judgment against a corporation, on the ground that it was obtained without consideration, by collusion with the officers of the corporation and in fraud of creditors, a complaint in which it was not expressly averred that the judgment was fraudulent in fact, or that the officers of the corporation had colluded with plaintiff therein, but which averred facts which if proved authorized the inference that the judgment was without consideration, and had been fraudulently and collusively obtained, was sufficient after judgment.

92. Vasele *v.* Grand St. Electric R. Co., 16 Wash. 602, 48 Pac. 249 (holding that the complaint against a corporation and another alleging that the latter is the duly appointed receiver of the court and is in charge and control of the business of the corporation does not allege that he has such charge as the receiver where the title of the cause simply designates him "receiver" and the body of the complaint distinctly alleges that the negligent act complained of was that of a duly authorized agent of the company); U. S. *v.* Globe Works, 7 Fed. 530.

But the objection cannot be raised on appeal for the first time that the petition based on a claim against a defendant as receiver proceeds against him personally. Boston, etc., Smelting Co. *v.* Reed, 23 Colo. 523, 48 Pac. 515.

Allegation of direction to operate a railroad in a complaint against the receiver of a railroad which alleges that he actually operated it and bought the goods from plaintiff for which suit is brought is not necessary. Cobb *v.* Sweet, 46 N. Y. App. Div. 375, 61 N. Y. Suppl. 545, which appears to be upon the theory that, without such specific directions, it is the duty of a receiver appointed to preserve the property of a railroad company to continue its operation.

Personal or official liability see *supra*, VI, D, 1.

93. Oswego Milling Co. *v.* Skillern, 73 Ark. 324, 84 S. W. 475; Empire Distilling Co. *v.* McNulta, 77 Fed. 700, 23 C. C. A. 415.

94. Sheridan *v.* Jackson, 10 Hun (N. Y.) 89 [*affirmed* in 72 N. Y. 170].

95. Ryan *v.* Anglesea R. Co., (N. J. Ch. 1888) 12 Atl. 539.

Time to plead.— But it has been held that the statute fixing the time for filing defenses to actions does not apply to a defense by a receiver to an intervening petition. Bird *v.* Sparks, 100 Ga. 616, 28 S. E. 395.

96. Fuller *v.* Webster F. Ins. Co., 12 How. Pr. (N. Y.) 293.

97. Perry *v.* Godbe, 82 Fed. 141.

98. Braddock Brewing Co. *v.* Pfaudler Vacuum Fermentation Co., 106 Fed. 604, 45 C. C. A. 491.

99. Knorr *v.* New York State Mut. Ben. Assoc., 79 Hun (N. Y.) 83, 29 N. Y. Suppl. 508.

1. East Tennessee Land Co. *v.* Leeson, 178 Mass. 206, 59 N. E. 639, holding that the receiver was *dominus litis* after the substitution as before, and the suit was prosecuted

5. Issues, Proof, and Variance.[2] In actions by and against receivers, recovery cannot be had upon theory and proof inconsistent with the allegations of the pleadings.[3] A receiver must prove as well as allege the material elements of his cause of action.[4] If issue is taken upon the allegation of a receiver's authority,[5] it must be proved on the trial like any other traversable fact.[6] Failure of one sued as receiver to deny the official character[7] and other admissions of the receiver's official character will obviate the necessity of proof thereof.[8] Where the action

for those entitled to the proceeds, and for whose benefit it was brought.

2. See, generally, Pleading, 31 Cyc. 670 *et seq.*

Effect of amendment see *supra*, note 1.

Immaterial issues not submitted see *infra*, note 29.

3. Wigton *v.* Bosler, 102 Fed. 70.

Defense not raised by the pleadings cannot be proved.— Where the receiver does not sue as such, but as assignee of a mortgage, the assignment not designating him to be the receiver of the corporation, if defendant has a defense against the company it must be pleaded in an answer setting up that plaintiff is receiver. Mann *v.* Bruce, 5 N. J. Eq. 413.

It is an immaterial variance where the receivers of a corporation sue for goods sold and delivered by the corporation and the evidence shows a sale by themselves, defendant not being misled, since the corporation continues to exist notwithstanding the receivership and plaintiffs were bound to sue as receivers. Pancoast *v.* A. Siegel Gas Fixture Co., 60 Mo. App. 57.

Amendment to conform pleading to proof. — Where the complaint alleged that plaintiff was a permanent receiver, it was held that the allegation did not bring it within the requirement of a statute which requires permanent receivers to give notice of their appointment, where evidence was received without objection that he was a temporary receiver, and the court conformed the pleadings to the proof. Nealis *v.* American Tube, etc., Co., 76 Hur (N. Y.) 220, 27 N. Y. Suppl. 735 [*affirmed* in 150 N. Y. 42, 44 N. E. 944].

4. Iglehart *v.* Bierce, 36 Ill. 133, proof of compliance with a condition requiring receiver to procure the ratification by the court of a compromise and settlement with the receiver of a claim due the estate.

5. See *supra*, VI, G, 1, 2.

6. *California.*— Wheat *v.* California Bank, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47.

Nebraska.— Hagerman *v.* Thomas, 1 Nebr. (Unoff.) 497, 96 N. W. 631.

New York.— Bangs *v.* McIntosh, 23 Barb. 591; *In re* Beecher, 19 N. Y. Suppl. 971; Cheney *v.* Fisk, 22 How. Pr. 236.

North Carolina.— Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35; Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389.

Wisconsin.— Manseau *v.* Mueller, 45 Wis. 430, holding that where the receiver alleges his appointment but not the proceedings resulting in the appointment and the answer simply denies the appointment the allegation is sufficient to admit evidence of the appointment and a denial of the appointment raises an issue upon the appointment alone.

See 42 Cent. Dig. tit. "Receivers," § 365.

No knowledge or information to form belief.— In a proceeding by receivers an answer that defendants have not sufficient information to admit or deny the appointment is said to be in effect the statutory denial in form that defendants have no "knowledge or information thereof sufficient to form a belief," and to be sufficient to put the receivers to the proof of their appointment. Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35.

Presumption.—A finding that the receiver was authorized to sue will be presumed on appeal to have been based on proper evidence in the absence of anything in the record to the contrary. Naglee *v.* Lyman, 14 Cal. 450.

A decree for plaintiffs will be reversed, but the action will not be dismissed for failure to prove the appointment, the defect being one of proof only. Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35.

7. McNulta *v.* Lockridg 137 Ill. 270, 27 N. E. 452, 31 Am. S. Rep. 362 [*affirming* 32 Ill. App. 86] (holding that in an action for tort of a receiver's predecessor in the receivership, a plea of not guilty did not require proof of plaintiff's allegation that defendant's predecessor was managing the business as receiver at the time of the injury complained of and that defendant was afterward appointed the successor); McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631 [*affirming* 31 Ill. App. 100].

But the termination of the receivership before the cause of action arose may be shown, although not set up in answer. Corser *v.* Russell, 20 Abb. N. Cas. (N. Y.) 316.

Failure to deny the receiver's authority to carry on business which was alleged in the complaint against the receiver in an action for the price of goods alleged to have been sold to him was held to be a complete answer to a subsequent objection that the receiver had no authority to purchase, etc. Harding Paper Co. *v.* Allen, 65 Wis. 576, 27 N. W. 329.

8. McNulta *v.* Lockridge, 32 Ill. App. 86 [*affirmed* in 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 (holding that where a successor receiver is sued for a tort committed in the management of the property by his predecessor and files an application for removal of the cause to the federal court, reciting the appointment of the predecessor and that defendant is the successor, such facts need not be proved at the trial of the cause

is upon a cause accruing to the receiver after his appointment upon notes executed to him, proof of a legal and sufficient appointment is not required.[9]

6. Evidence[10] — a. Admissibility. The proceedings under which a receiver is authorized to sue are admissible in an action by him to show by what authority the action is prosecuted;[11] the judgment or decree appointing him is admissible as evidence of its rendition[12] and of the legal consequences resulting from that fact.[13] Evidence otherwise competent to establish a debt which a receiver is authorized to collect is admissible on behalf of the receiver in an action by him for its collection.[14] The receiver's inventory is admissible upon the question of what was included in an order of sale of assets.[15]

b. Sufficiency. The authority of a receiver to prosecute an action is sufficiently shown by evidence of his appointment, without showing the necessity of such appointment,[16] or the proceedings by which he was appointed.[17] The order being made in the exercise of the court's general jurisdiction,[18] it is held to be *prima facie* evidence of the jurisdictional facts authorizing the appointment,[19]

in the state court after remand); Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35 (where after an answer stating that defendant has not information sufficient to affirm or deny the receivers' appointment defendant filed an affidavit stating that plaintiffs failed to do certain things "since they were appointed receivers").

9. Nelson *v.* Nugent, 62 Minn. 203, 64 N. W. 392.

10. See, generally, Evidence, 17 Cyc. 1.

Evidence of appointment in collateral proceeding see *supra*, III, A, 2, note 89.

In action against original party upon theory that receivership was invalid see *supra*, IV, E, 2, b, note 87.

Presumption of absence of presiding judge see *supra*, III, A, 2, note 90.

Presumption of oath see *supra*, III, F, 6, b, text and note 74.

11. Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484.

12. Hardwick *v.* Hook, 8 Ga. 354; Coddington *v.* Canaday, 157 Ind. 243, 61 N. E. 567.

Foreign receiver see *infra*, VIII.

13. Hardwick *v.* Hook, 8 Ga. 354 (holding that in an action by a receiver appointed to collect the hire of slaves from a third person accruing pending the litigation, the decree is competent to establish plaintiff's right as receiver to maintain the action); Helme *v.* Littlejohn, 12 La. Ann. 298; Frank *v.* Morrison, 58 Md. 423 (decree appointing receiver to wind up corporation, entered by consent, admissible as evidence of authority to institute action against stock subscriber).

In an action against a receiver the order of appointment is admissible on an issue of his authority to carry on business. Harding Paper Co. *v.* Allen, 65 Wis. 576, 27 N. W. 329.

14. Rockwell *v.* Merwin, 1 Sweeny (N. Y.) 484, 8 Abb. Pr. N. S. 330 [*affirmed* in 45 N. Y. 166], admissibility of account kept by defendant in action against him by receiver of defendant's creditor in supplementary proceedings.

The receiver is not bound by entries in the books of account of the insolvent corporation of which he is receiver, and he may contradict them since he represents the creditors as well as the corporation. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400, 29 Atl. 203.

15. Illinois Steel Co. *v.* Preble Mach. Works Co., 219 Ill. 403, 76 N. E. 574 [*affirming* 116 Ill. App. 268], in an action by the receiver for damages for the breach of a contract, in which defendants set up that the contract had been sold with other assets of the insolvent at a sale by the receiver, in support of which he introduced the petition, order of sale, etc., and the inventory was held admissible to show what was covered by the term "assets" as used in the order of sale.

16. Brown *v.* Drake, 101 Ga. 130, 28 S. E. 606.

Admissions see *supra*, note 8.

17. Helme *v.* Littlejohn, 12 La. Ann. 298.

18. See, generally, Courts, text and note 89 *et seq.*; 695 text and note 24 *et seq.*

19. Potter *v.* Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Palmer *v.* Clark, 4 Abb. N. Cas. (N. Y.) 25, which cases refer to orders appointing receivers of insolvent corporations under the statute, the court being held to exercise general jurisdiction in this regard.

Other evidence required.— But it has been held that in an action by the receiver of an insolvent corporation to collect an assessment, the testimony of plaintiff that he was appointed and acted as receiver, and made the assessment in obedience to an order of court, and a paper purporting to be a certified copy of the order, with nothing to show the character of the suit in which the order was made, or that defendant was a member of the company, or that the court ever acquired jurisdiction of defendant or of the company, is not sufficient and requires the direction of a verdict for defendant. Taft *v.* Pullen, 130 Mich. 595, 90 N. W. 329.

When jurisdiction is attacked.— Under N. Y. Laws (1883), c. 378, conferring authority upon the supreme court to appoint a receiver of a domestic corporation in an action commenced against it and providing that "any order appointing a receiver otherwise made, shall be void," it was held that where the answer in an action by a receiver of the corporation sets up that the court never ac-

and the production and proof of an order made by a court or judge authorized by law to make it, which recites the facts necessary to give jurisdiction, furnishes conclusive evidence of the regularity of the order when questioned collaterally,[20] and *prima facie* evidence of the existence of the facts necessary to confer jurisdiction.[21] Any evidence which will justify the inference that the receiver has qualified will defeat a motion for a nonsuit based upon the ground of a want of evidence of that fact.[22] And upon the merits the refusal of a nonsuit should not be disturbed if there is competent evidence in support of the cause of action.[23]

H. Trial, Judgment, and Review — 1. Trial in General. General rules should be consulted as to the conduct of trials of actions by and against receivers.[24] Sometimes, however, particular local statutes govern,[25] as for example, a provision for the reference of disputes between the receiver of a corporation and members or stock-holders thereof instead of an ordinary trial by jury, which has been held to be valid.[26] In a suit in equity by a receiver to enforce a judgment lien against land, the court may ascertain the amount of the lien and direct a sale

quired jurisdiction of the corporation, the order of appointment alone is not sufficient evidence of the appointment in the absence of evidence of an action begun against, and of jurisdiction obtained over, the corporation. Springs *v.* Bowery Nat. Bank, 63 Hun (N. Y.) 505, 18 N. Y. Suppl. 574.

When the receiver justifies under the order of appointment, in an action to recover against him upon the theory that he was acting without authority, the mere allegation that he is acting without authority does not put in issue jurisdiction to make the order and if the order is apparently valid, it is a sufficient defense as to acts done in good faith and in obedience to its commands. Edee *v.* Strunk, 35 Nebr. 307, 53 N. W. 70. See also *supra*, IV, f, 5, a; IV, F, 6, f, (II).

20. Wright *v.* Nostrand, 94 N. Y. 31; Stiefel *v.* Berlin, 20 Misc. (N. Y.) 194, 45 N. Y. Suppl. 746.

Collateral attack see *supra*, III, J, 3.

21. Wright *v.* Nostrand, 94 N. Y. 31.

A certificate of the controller of the currency approved and concurred in by the secretary of the treasury, reciting the existence of all the facts of which the former was required by the act of congress to be satisfied, to authorize him to appoint a receiver of a national bank was held sufficient evidence of the validity of the appointment of the receiver in an action brought by him as such. Platt *v.* Beebe, 57 N. Y. 339.

22. Hegewisch *v.* Silver, 140 N. Y. 414, 35 N. E. 658 [*reversing* 21 N. Y. Suppl. 294], holding that a nonsuit cannot be granted at the close of the evidence on the ground that plaintiff has failed to prove that he ever filed his bond as receiver where it appears that the court which appointed him authorized him to bring this suit, with a provision that he file a bond and that he continued to act as receiver, and resigned more than a year after his appointment.

23. Pickett *v.* Fidelity, etc., Co., 60 S. C. 477, 38 S. E. 160, 629, holding that in a suit by the receiver of a corporation on an insurance policy it was proper to refuse a nonsuit based upon the ground of failure of evidence to show that the policy was an asset of the corporation, where the complaint alleged and the answer admitted execution and delivery of the policy to the corporation and the receiver testified that he had the policy in his possession.

24. See Trials.

25. "Receiver appointed by the court," as used in N. Y. Code Civ. Proc. § 791, entitling to a preference on the calendar an action by a receiver appointed by the court or trustees in bankruptcy, does not include a receiver in bankruptcy, and therefore an action by him is not entitled to a place on the preferred calendar. Hough *v.* Canfield, 54 N. Y. App. Div. 510, 66 N. Y. Suppl. 961.

26. Crosby *v.* Day, 81 N. Y. 242 (where a stock-holder of a corporation coming within the provision of such statute set up that he was induced to purchase by fraud of the president of the corporation as to its financial condition, and want of consideration of the notes sued on, and it was held that notwithstanding an action had been commenced at law to recover the debt, a compulsory reference might be ordered on the application of the receiver and the action discontinued); Sands *v.* Kimbark, 27 N. Y. 147; Sands *v.* Harvey, 4 Abb. Dec. (N. Y.) 147. In People *v.* Hydrostatic Paper Co., 88 N. Y. 623, in a suit by the attorney-general for the dissolution of a corporation, upon a question arising between the receiver and stock-holders who were alleged to have in their possession assets belonging to the corporation, which dispute was referred for adjustment in accordance with the statute prevailing under the written stipulation of the parties, which reference was a separate proceeding not entitled in the action and as between parties not as yet parties to it, it was held that upon the referee's report that certain stock-holders had such assets which they had no right to retain, to which report there was no exception, the irregularity on the part of the receiver in making up his account and filing a petition reporting the amount which the stock-holders should pay and praying that they be adjudged to pay accordingly instead of entering final judgment on the report, was not ground for reversal, a copy of the petition having been served upon the stock-holders and they having appeared and had full opportunity to be heard.

without referring the cause, where it does not appear from the record that there are other liens and the amount of complainant's lien clearly appears from the record.[27] Although an agreed statement of facts between ordinary litigants will not generally be disturbed, as to a receiver who is but the mere custodian of the fund to be distributed among the claimants the court may ascertain the facts notwithstanding an agreed statement, where this may fairly be done.[28] Immaterial issues will not be submitted.[29]

2. Judgment[30] — a. Form and Sufficiency. A personal judgment[31] and execution[32] cannot properly be awarded against a receiver, but it should be against him in his official capacity, to be paid in due course of the administration of his trust,[33] but the disposition of the property being for the court having it in custody,[34] another court cannot, in awarding a judgment against the receiver, fix a lien upon such property.[35] Where the facts disclosed on the trial show liability on the receiver alone in an action in which the corporation whose property he has in charge is joined, a general verdict in favor of plaintiff is sufficient upon which to enter a judgment against the receiver.[36]

b. Effect and Enforcement — (I) *Effect in General.* A judgment against a receiver in his official capacity ordinarily has no greater effect than to establish the existence and amount of liability;[37] it is conclusive as to the existence and amount of plaintiff's claim,[38] and binds the receiver and all parties repre-

27. Howard *v.* Stephenson, 33 W. Va. 116, 10 S. E. 66.

28. Matter of Smith, 9 Abb. N. Cas. (N. Y.) 452, where on exception by such receiver to the report of a referee on a reference to determine a claim which was submitted on an agreed statement of facts, the matter was referred back for an additional report upon certain points as if they had not been agreed upon.

29. Atkinson *v.* Rochester Printing Co., 43 Hun (N. Y.) 167 [*affirmed* in 114 N. Y. 168, 21 N. E. 178]; National Security Bank *v.* Price, 22 Fed. 697 [*affirmed* in 129 U. S. 223, 9 S. Ct. 281, 32 L. ed. 682], in which case it was held that in an action by the receiver of a corporation to recover property transferred by it in fraud of its creditors, want of knowledge by the transferee of the condition of the corporation and the fact that he would not have given credit had he known of its insolvency are immaterial.

30. After discharge see *infra*, VII, E.

31. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; Robinson *v.* Kirkwood, 91 Ill. App. 54; Schmidt *v.* Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Brown *v.* Brown, 71 Tex. 355, 9 S. W. 261.

Personal and official liability see *supra*, VI, D, 1.

32. See *infra*, VI, H, 2, b, (II).

33. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362; McNulta *v.* Ensch, 134 Ill. 46, 24 N. E. 631; Malott *v.* Howell, 111 Ill. App. 233; Malott *v.* Woods, 109 Ill. App. 512; Robinson *v.* Kirkwood, 91 Ill. App. 54; Combs *v.* Smith, 78 Mo. 32; Proctor *v.* Missouri, etc., R. Co., 42 Mo. App. 124; Com. *v.* Runk, 26 Pa. St. 235. See Woodruff *v.* Jewett, 115 N. Y. 267, 22 N. E. 156.

Amendment.— Irregularity of the judgment in this respect may be cured by amendment. Malott *v.* Howell, 111 Ill. App. 233 (venire facias de novo not awarded but cause remanded with directions to enter proper judgment); Proctor *v.* Missouri, etc., R. Co., 42 Mo. App. 124 (remand with directions to enter proper judgment); Com. *v.* Runk, 26 Pa. St. 235 (proper judgment entered in appellate court).

Form of judgment see McNulta *v.* Lockridge, 137 Ill. 270, 280, 27 N. E. 452, 31 Am. St. Rep. 362; Com. *v.* Runk, 26 Pa. St. 235.

34. See *infra*, VI, H, 2, b, (II), (B).

35. Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Brown *v.* Brown, 71 Tex. 355, 9 S. W. 261.

36. Union Pac. R. Co. *v.* Smith, 59 Kan. 80, 52 Pac. 102, holding further that a judgment against a corporation in such a case cannot be sustained.

37. Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 3 Keyes 13; Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127; Harrison *v.* Waterbury, (Tex. 1894) 27 S. W. 109; Brown *v.* Brown, 71 Tex. 355, 9 S. W. 261.

Lien on land.—A judgment against a receiver of an estate of a decedent, appointed upon the removal of executors, the receiver having only the powers of an administrator with the will annexed, is not a lien on land devised by decedent to others. Cooke *v.* De Graw, 55 N. Y. Super Ct. 548 [upon the authority of Platt *v.* Platt, 105 N. Y. 488, 12 N. E. 22, and Cooke *v.* Platt, 98 N. Y. 35].

38. Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362; Reinhart *v.* Sutton, 58 Kan. 726, 51 Pac. 221; Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Garrison *v.* Texas, etc., R. Co., 10 Tex. Civ. App. 136, 30 S. W. 725; South Carolina *v.* Port Royal, etc., R. Co., 84 Fed. 67; St. Louis Southwestern R. Co. *v.* Holbrook, 73 Fed. 112, 19 C. C. A. 385 (although the judgment was procured under a statutory procedure without a jury trial);

sented;[39] but the time and manner of its payment are to be controlled by the court appointing the receiver.[40]

(II) *ENFORCEMENT* — (A) *Out of What Property.* Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver,[41] and judgments against him as receiver are payable only from the funds in his hands,[42] or that may remain subject to the jurisdiction and direction of the court that appointed him.[43] If he has paid out funds under the order of that court which might have been applicable to the payment of a judgment against him as receiver, he will be protected,[44] and whether he has in his possession or under his control assets sufficient to satisfy a judgment is for the determination of that court.[45]

Dillingham *v.* Hawk, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551, the federal cases herein being decided upon the view that the provision of the federal statute that suit brought without leave thereunder should be subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as necessary to the ends of justice, would render the operation of the statute nugatory if the judgment to be recovered were not of binding effect as to the existence and amount of the liability. See also Central Trust Co. *v.* East Tennessee, etc., R. Co., 59 Fed. 523. *Contra,* Missouri Pac. R. Co. *v.* Texas, etc., R. Co., 41 Fed. 311, where the federal statute dispensing with leave to sue receivers was held not to apply, and the decision was further influenced by the fact that on a reference to the master the intervener produced a witness who testified to the fact and extent of the injury on account of which he had recovered judgment, which was held to be a waiver of the right to claim that the judgment against the receiver was conclusive as to the negligence and damages.

39. Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

The purchaser at a foreclosure sale who assumes as a part of the purchase-price liability for adjudged liens on the property in the receiver's hands is concluded by a judgment for personal injuries in the state court as to plaintiff's right and the amount of his recovery. St. Louis Southwestern R. Co. *v.* Holbrook, 73 Fed. 112, 19 C. C. A. 385.

Bondholders and trustees in a foreclosure proceeding are bound by the judgment rendered against the receiver therein in a court of competent jurisdiction. Turner *v.* Indianapolis, etc., R. Co., 24 Fed. Cas. No. 14,260, 8 Biss. 527, 8 Reporter 453.

Where the judgment is against the corporation in an action in which the receiver defended in the name of the corporation with the knowledge of the court which appointed him, the receiver cannot, after obtaining a release of attached property on a forthcoming bond, enjoin the attaching creditors from suing on the forthcoming bond. Smith *v.* U. S. Express Co., 135 Ill. 279, 25 N. E. 525.

But the title to land cannot be affected by a judgment in an action brought by a receiver to which the real parties in interest, having the title, are not joined as parties, and who do not consent to the suit. Caldwell *v.* McWhorter, 84 Ky. 130.

Conclusiveness in general see JUDGMENTS, 23 Cyc. 1248.

40. See *infra,* VI, H, 2, b, (II), (B).

41. See *supra,* VI, D, 1.

42. *Illinois.*— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362 [*affirmed* in 141 U. S. 327, 12 S. Ct. 11, 35 L. ed. 796].

Iowa.— Sloan *v.* Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331.

Minnesota.— Schmidt *v.* Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265.

Missouri.— Combs *v.* Smith, 78 Mo. 32.

New York.— Camp *v.* Barney, 4 Hun 373, 6 Thomps. & C. 622.

Texas.— Yoakum *v.* Mettasch, (Civ. App. 1894) 26 S. W. 129.

United States.— Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829; Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736; Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181.

See 42 Cent. Dig., tit. "Receivers," § 376 *et seq.*

After discharge see *infra,* VII, E.

43. Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186. See also *supra,* IV, I, 2.

44. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127, although the order may be subsequently reversed. See also *supra,* IV, F, 6, f, (II).

45. Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365.

Although the property may have been surrendered to the owner under the orders of the court, if the receiver is not discharged a judgment may be recovered against him in his official capacity, where the court has retained jurisdiction for the purpose of adjudicating claims against the receiver and of binding the property for the payment thereof. Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186. And the same is true where the property has been turned over to purchasers. Houston, etc., R. Co. *v.* Strycharski, (Tex. Civ. App. 1896) 35 S. W. 851; Fordyce *v.* Chancey, 2 Tex. Civ. App. 24, 21 S. W. 181. So where, before the commencement of an action for injuries against a receiver appointed by a federal court as well as against the corporation in his hands and another corporation, the receiver had sold the property and had been discharged by an order directing him to convey to the pur-

(B) *In What Court.* Although a judgment against a receiver may be conclusive of the existence and amount of plaintiff's claim,[46] it cannot establish the priority of the debt.[47] Proceedings under leave to sue or statute dispensing with such leave must stop short of the enforcement of any judgment therein by an interference with the property or with the right of the court to dispose of it in the exercise of its prior jurisdiction;[48] execution cannot properly issue,[49] but payment should be enforced only by application to and order of the court in possession of the property,[50] upon which court it devolves to adjust all the equities and to determine the time and manner of payment.[51]

3. Appeal and Review.[52] A receiver who is merely the officer of the court cannot appeal from the orders and judgments in the cause without its leave or direction.[53] A receiver of a corporation and creditors, as separate and independent

chaser all property, etc., and plaintiff intervened and set up that at the time of the injuries for which he sued the receiver had a policy insuring him against liability for such injuries, an order vacating the order of discharge and providing that the receiver should continue as such until the disposition of suits filed against him upon causes of action accruing pending the receivership was held to be a construction by the federal court that the judgment confirming the sale and discharging the receiver did not pass title to the policy of insurance so that a contract by which plaintiff released the property of the corporation from liability for any judgment against the receiver did not preclude him from recovering such judgment. Reardon *v.* White, 35 Tex. Civ. App. 636, 87 S. W. 365.

46. See *supra*, VI, H, 2, b, (I).

47. Clark *v.* Brockway, 1 Abb. Dec. (N. Y.) 351, 3 Keyes 13; Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

48. Reinhart *v.* Sutton, 58 Kan. 726, 51 Pac. 221; Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934 (under a state statute permitting suit without leave); Baldwin *v.* Spear, 79 Vt. 43, 64 Atl. 235 (holding that permission to join a receiver in a suit to foreclose a lien did not authorize a sale of the property under such proceedings).

49. *California.*— Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

Illinois.— Malott *v.* Howell, 111 Ill. App. 233.

Minnesota.— Irwin *v.* McKechnie, 58 Minn. 145, 59 N. W. 987, 49 Am. St. Rep. 495, 26 L. R. A. 218.

Ohio.— Croy *v.* Marshall, 3 Ohio Cir. Ct. 489, 2 Ohio Cir. Dec. 280.

Texas.—Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353.

See 42 Cent. Dig. tit. "Receivers," § 377½.

A writ of restitution is properly refused in an action against the receiver of a railroad for land occupied by the road-bed. Abbey *v.* International, etc., R. Co., 5 Tex. Civ. App. 261, 23 S. W. 934.

Out of same court.— But in Wilson *v.* Greig, 12 N. Y. Wkly. Dig. 73, it was held that an execution in the form of an order of the court to levy upon the property held by the receiver was in the nature of a consent and direction of the court, where it came from the same tribunal that appointed the receiver, at least for the purpose of relieving the officer obeying the writ from contempt.

Against receiver as garnishee see Garnishment, 20 Cyc. 1119 note 4.

50. Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47; Cowen *v.* Merriman, 17 App. Cas. (D. C.) 186; Harrison *v.* Waterberry, (Tex. 1894) 27 S. W. 109.

Parties to petition.— In an action against a receiver of a partnership on a contract made by him in the management of his trust, it was not necessary that the surviving partner or creditors of the firm should be parties to the petition for an order to enforce payment of the judgment against the receiver. Painter *v.* Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

51. *Alabama.*— Southern Granite Co. *v.* Wadsworth, 115 Ala. 570, 22 So. 157.

District of Columbia.—Cowen *v.* Merriman, 17 App. Cas. 186.

Kansas.— Reinhart *v.* Sutton, 58 Kan. 726, 51 Pac. 221.

Missouri.—Harding *v.* Nettleton, 86 Mo. 658.

Tennessee.— Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855.

Texas.— Dillingham *v.* Russell, 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288; Brown *v.* Brown, 71 Tex. 355, 9 S. W. 261; Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365.

United States.— Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220; South Carolina *v.* Port Royal, etc., R. Co., 84 Fed. 67; Dillingham *v.* Hawk, 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517.

See 42 Cent. Dig. tit. "Receivers," § 376 *et seq.*

It is proper to certify the judgment by a state court to the federal court by which the receiver was appointed. Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365.

52. **Amendment of judgment against receiver** see *supra*, note 33.

Dismissal of appeal of receiver appointed ex parte see *supra*, III, D, 4, note 91.

Presumption: In receiverships generally see Appeal and Error, 3 Cyc. 295. Of authority to sue see *supra*, note 6.

Reversal on failure to prove appointment see *supra*, note 6.

53. Pocatello First Nat. Bank *v.* Bunting,

claimants of a fund, cannot prosecute a joint appeal from a decree distributing the same.[54] Where questions presented on appeal by a receiver from an adverse decree in a suit brought by him cannot be determined without a review of the testimony, the decree will be affirmed in the absence of the evidence from the record,[55] and the general rule is applied [56] that harmless error intervening on the trial will not require a reversal of the judgment.[57]

4. Costs.[58] Costs will be awarded against a receiver, upon dismissal of a bill filed by him,[59] and sometimes, under code provision regulating the subject, in actions prosecuted or defended by a receiver, costs are recoverable as in actions prosecuted or defended by him in his own right,[60] but are chargeable only upon the estate or funds represented and collectable therefrom, and the receiver is not personally liable therefor,[61] unless the court shall direct the same to be paid by

7 Ida. 27, 59 Pac. 929, 1106; McKinnon *v.* Wolfenden, 78 Wis. 237, 47 N. W. 436.

Right to appeal see Appeal and Error, 2 Cyc. 641.

Stay and supersedeas on appeal by receiver see Appeal and Error, 2 Cyc. 897 note 12.

54. Reynolds *v.* Reynolds Lumber Co., 175 Pa. St. 437, 34 Atl. 791, where after judgment in favor of the president of an insolvent corporation and sale of its property under execution, the judgment was opened and a receiver appointed on application of creditors of the corporation, and it was held that the receiver and creditors could not prosecute a joint appeal from a decree distributing the fund in the sheriff's hands. See also Appeal and Error, 2 Cyc. 756 *et seq.*; 766 text and note 30.

55. Miller *v.* Doyle, 211 Pa. St. 59, 60 Atl. 496, where the testimony was not printed, owing to a lack of funds.

Review of directions to sue, in the absence of the evidence upon which the direction was based see *supra*, VI, A, 3, a, (III), note 33.

56. See, generally, Appeal and Error, 3 Cyc. 383.

57. McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 252, 31 Am. St. Rep. 362, where in an action against a receiver for a tort committed by the servants of his predecessor, a reference in the instructions to "defendant's negligence," and "defendant's servants," was not misleading and did not justify a reversal of the judgment against the receiver. In Bonner *v.* Blum, (Tex. Civ. App. 1894) 25 S. W. 60, under a statute providing for liability of a corporation whose property has been redelivered to it, for the unpaid debts of the receiver, and that in suits against him after his discharge plaintiff may make the corporation a party, and that if judgment is rendered against the receiver it shall be entered against both the defendants, it was held that failure to render judgment against the receiver, when judgment is rendered against the company, is not error of which the latter can complain. So in Yoakum *v.* Mettasch, (Tex. Civ. App. 1894) 26 S. W. 129, it was held that error in entering a judgment against a corporation and its former receivers in their official capacity, instead of merely against the company, was harmless, since the receivers could be required to pay the same only out of funds belonging to the company.

58. See, generally, Costs, 11 Cyc. 1.

Allowance of costs and attorney's fees see *supra*, V, B, 1, f; V, C; *infra*, VII, C.

Appeal from judgment for generally see Appeal and Error, 2 Cyc. 593.

Costs and attorney's fees in preserving funds see Costs, 11 Cyc. 96.

Costs of accounting see *infra*, VII, F.

Defending suit without leave see *supra*, VI, D, 2, a, (I), note 81.

Liability of property or funds see *supra*, V, C.

Security for costs see *supra*, VI, A, 3, c.

59. Tillinghast *v.* Champlin, 4 R. I. 173, 67 Am. Dec. 510, where a bill by a receiver, filed in good faith, on the advice of counsel, was dismissed with costs on the ground that the allegations of fraud were not supported, and it was ordered that the costs should be allowed to the receiver out of any funds that had come or should come into his hands in his capacity as receiver.

60. Briggs *v.* Vandenburgh, 22 N. Y. 467.

In action on money demand.— The right of a successful defendant, in an action by a receiver to enforce a money demand, to recover costs was held to be absolute as well by the law before as since the code of procedure. Columbian Ins. Co. *v.* Stevens, 37 N. Y. 536.

An allowance for costs on behalf of defendants, in an action prosecuted against a receiver and other defendants, may be made upon dismissal of the complaint. Sheridan *v.* Jackson, 10 Hun (N. Y.) 89 [*affirmed* in 72 N. Y. 170].

61. Campbell *v.* Adams, 38 Barb. (N. Y.) 132 (where it was held that to be regular the judgment for costs should provide that they should be collected out of the estate or fund, but that the irregularity in omitting such provision was to be corrected by motion to the court entering the judgment); Bates *v.* Dickerson, 12 N. Y. Suppl. 773; Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275 (holding that the fact that the receiver has had funds in his hands sufficient to pay the judgment for costs, but has paid other claims larger in amount, is no ground for compelling him to pay such judgment on motion; that he is not in the attitude of accounting on such proceedings and is not bound to ac-

the receiver personally, on account of mismanagement or bad faith.[62] One not a party to an action [63] brought by a receiver, although beneficially interested in the recovery, is held not chargeable with costs if he is not chargeable with having brought the action.[64] A petition for the payment of money as the property of the petitioner, to which neither the corporation nor its receiver was entitled, is a special proceeding, and upon granting it costs may be awarded in the discretion of the court as in other special proceedings under the statute,[65] and on appeal

count to each particular creditor who brings him up on a like motion to require him to pay costs).

Where an action commenced by a corporation is continued by its receiver, and on the trial plaintiffs are nonsuited, defendant is entitled to costs down to and including the nonsuit out of the funds in the hands of the receiver, and not to costs of making up the record and issuing an execution against the company, where the execution plaintiff knew that the corporation was insolvent and that all its property was in the possession of the receiver. Camp *v.* Niagara Bank, 2 Paige (N. Y.) 283.

Stay of second action until payment of costs.— In Bates *v.* Dickerson, 12 N. Y. Suppl. 773, it was held that a second action by a receiver for the same cause, on a subsequent appointment, would be stayed until payment of costs awarded against him in the previous action, although that was dismissed solely upon the ground of irregularity in his appointment.

On footing of executor or administrator.— In St. John *v.* Denison, 9 How. Pr. (N. Y.) 343, it was held that a receiver suing under direction of the court was entitled to the same indulgence as an executor or administrator prosecuting on behalf of an estate, and is not liable for costs for not proceeding to trial where a good reason is shown for not trying pursuant to notice or stipulation.

62. Briggs *v.* Vandenburgh, 22 N. Y. 467; Marsh *v.* Hussey, 4 Bosw. (N. Y.) 614; Matter of Castle, 2 N. Y. St. 362 (where costs were awarded against the receiver personally); Devendorf *v.* Dickinson, 21 How. Pr. (N. Y.) 275 (holding that the fact that the receiver appealed from the special to the general term was no evidence of mismanagement or bad faith).

Receiver properly charged with costs personally.— Where he intervened in a case without funds, and after the person for whom he was receiver had made affidavit that the funds sued for belonged to plaintiff, and presented no evidence to support his claim. Bourdon *v.* Martin, 74 Hun (N. Y.) 246, 26 N. Y. Suppl. 378 [*affirmed* in 142 N. Y. 669, 37 N. E. 571]. Where he prosecutes or defends without leave. Phelps *v.* Cole, 3 Code Rep. (N. Y.) 157, 2 Edm. Sel. Cas. 167. Where he had no funds to pay costs of his action, which, it was held, should be deemed conclusive evidence of bad faith. Cumming *v.* Egerton, 9 Bosw. (N. Y.) 684, as to which point, however, see *supra*, VI, A, 3, c.

Only the costs caused by the receiver's action in unreasonably defending a suit should be charged against him. Canton First Nat. Bank *v.* Washburn, 20 N. Y. App. Div. 518, 47 N. Y. Suppl. 117.

Notice of the application to charge the receiver personally with costs should be given to him. Canton First Nat. Bank *v.* Washburn, 20 N. Y. App. Div. 518, 47 N. Y. Suppl. 117. But in Matter of Castle, 2 N. Y. St. 362, it is held that no affirmative motion is necessary where that is not needed to bring to the attention of the court the facts and circumstances upon which the question is to be determined, but that it is the customary practice to determine the matter upon the hearing and upon the facts there disclosed. The motion, although properly presented to the same judge before whom the trial was had, need not necessarily be so presented, but may be heard at special term, especially where it appears that for some reason not disclosed the trial judge declined to entertain the motion. Bourdon *v.* Martin, 74 Hun (N. Y.) 246, 26 N. Y. Suppl. 378 [*affirmed* in 142 N. Y. 669, 37 N. E. 571].

63. See COSTS, 11 Cyc. 90 *et seq.*

64. McHarg *v.* Donelly, 27 Barb. (N. Y.) 109; Wheeler *v.* Wright, 23 How. Pr. (N. Y.) 228 (which cases are as to actions by receivers in supplementary proceedings); Thompson *v.* McCloskey, 5 Month. L. Bul. (N. Y.) 19.

But where the action is brought by direction or request of the judgment creditor at whose instance the receiver was appointed (Droeger *v.* Baxter, 77 N. Y. App. Div. 78, 79 N. Y. Suppl. 29; Thompson *v.* McCloskey, 5 Month. L. Bul. (N. Y.) 19, under a rule requiring written request or bond), or where such creditor instigates and conducts the prosecution for his own benefit through the receiver (Ward *v.* Roy, 69 N. Y. 96), the statutory provision that persons beneficially interested shall be liable for costs where the action is brought in the name of another by one who is beneficially interested therein applies; and the person beneficially interested in such case will be required to pay the costs of the trial court as well as the costs on appeal by defendant in the action by the receiver, and on a subsequent appeal by the receiver, although these appeals were without the knowledge of the judgment creditor (Droeger *v.* Baxter, *supra*).

65. People *v.* Rochester City Bank, 96 N. Y. 32. But when the receiver of a corporation in good faith resists a claim upon reasonable grounds, which, however, is finally established, it is held that costs are at most discretionary; that the proceeding is not an action and is not governed by Columbian Ins. Co. *v.* Stevens, 37 N. Y. 536 (*supra*, note 60)

by creditors from the allowance of a claim by a receiver, their costs may be allowed out of the estate.[66] Where a receiver who has commenced an action to recover a debt obtains a compulsory reference of the controversy in the receivership action, under the statute, the court may discontinue the action without costs to defendant therein, in the exercise of its discretion.[67]

VII. ACCOUNTING, ALLOWANCES, COMPENSATION, AND DISCHARGE.

A. Duty to Account and Enforcement of Accounting — 1. IN GENERAL.[68] A receiver being but an officer of the court appointing him is required to account to that court for all property which he has received,[69] and it is his duty to yield prompt and unquestioned obedience to the orders of the court in this regard.[70] It is his duty to keep his accounts and vouchers in such condition that they will be ready for examination at any time;[71] and, as a general proposition, whenever property or funds come into the hands of a receiver pending litigation, the court should require him to report his acts and doings and to render an account[72] according to the usages and practice of the court of chancery, before final decree, in order to ascertain the condition of the property and to enable the court in its final decree to settle the rights of and do justice to all the parties.[73] The duty of the receiver to account is to the court and not to the parties individually;[74] but the parties interested may proceed to enforce an accounting by him,[75] and he must account whenever required by the court to do so at the instance of such parties.[76]

and should not be allowed against the receiver. Matter of Booth, 11 Abb. N. Cas. (N. Y.) 145

66. Dimmick *v.* Fred Quimby Co., (N. J. Ch. 1898) 41 Atl. 101, holding that the receiver had the authority, under the statute, to conduct such examination, and the costs of the proceedings would, in that case, have been chargeable to the estate; and inasmuch as the creditors were, under the circumstances, entitled to an examination, and some of the important facts upon which the validity of the claim was based were disclosed for the first time on this examination, the appellant creditors are entitled to have the costs of the appeal, which, if successful, would have been for the common benefit of all the creditors, paid out of the estate.

67. Crosby *v.* Day, 81 N. Y. 242.

68. **Foreign receivers** see *infra*, VIII, A.

In supplementary proceedings see EXECUTIONS, 17 Cyc. 1461.

Jury trial see JURIES, 24 Cyc. 120 note 29.

Parties, property, and funds liable for receivership expenses see *supra*, V, C.

Remedy on bond see *infra*, IX.

69. Akers *v.* Veal, 66 Ga. 302.

70. Adams *v.* Woods, 8 Cal. 306; Lyle *v.* Sarvey, 104 Va. 229, 51 S. E. 228.

Obedience to orders generally see *supra*, IV, F, 5, a.

71. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

Time and manner of accounting see *infra*, VII, A, 3.

72. Mabry *v.* Harrison, 44 Tex. 286.

When it appears that no assets have come into the receiver's hands the court will not require an accounting but will rather avoid the expense thereof. Lyons *v.* Atlanta Hill Gold Min., etc., Co., 14 N. Y. Suppl. 533, as to a receiver appointed in proceedings to sequestrate the property of a corporation after the return of an execution unsatisfied against it.

Reports, accounts, etc., in administration see *supra*, IV, F, 3.

73. Simmons *v.* Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39; Kelly *v.* McGuire, 15 Ark. 555.

Surety of insane receiver.— The receiver being insane, the court made an order that his surviving surety might pass the accounts, and that on the balance being lodged the recognizance should be vacated, and gave the surety the costs of the motion, and of vacating the recognizance. Webb *v.* Cashel, 11 Ir. Eq. 558.

74. Chande *v.* Chande, 9 N. Y. St. 372, 12 N. Y. Civ. Proc. 454; Musgrove *v.* Nash, 3 Edw. (N. Y.) 172.

Where a receiver of a corporation was appointed by the governor under statutory provisions (see *supra*, I, note 2), it was held that he was a trustee and could not escape accounting to the *cestui que trust* in a proper proceeding for that purpose. Lafayette Co. *v.* Neely, 21 Fed. 738.

Settlement with infant.— Where a receiver settled his accounts and delivered his vouchers to the infant two days before the latter came of age, it was held to be of no weight, although the infant admitted the balance and received it without objection. Hicks *v.* Hicks, 3 Atk. 274, 26 Eng. Reprint 960.

75. See *infra*, VII, A, 3, b.

76. *Arkansas.*— State *v.* Gibson, 21 Ark. 140.

New York.— Chande *v.* Chande, 9 N. Y. St. 372, 12 N. Y. Civ. Proc. 454, holding that the receiver of a business in a suit to

2. After Death of Receiver.[77] While the executors of a receiver have been ordered to pass his final account,[78] there is some disagreement in the cases upon the authority of the court to proceed in a summary way against the executor to bring in and pass his testator's account and pay the balance to be found due out of the assets.[79] The court cannot pass on the accounts of a receiver of a corporation and determine his liability and that of his sureties after his death, his personal representatives not being parties to the proceeding;[80] but it has been held that it may make an order reviving and continuing the accounting against the executors of a receiver who dies pending the proceedings for an accounting instituted by the receiver, and directing them to come into such accounting.[81]

3. Time and Manner of Accounting — a. Time in General. It is the duty of a receiver to keep his accounts and vouchers in such condition that they will be

determine its ownership may be required to account upon the petition of a judgment creditor of any of the parties who upon settlement of the case has been acknowledged to be the owner of the business.

Tennessee.—Lowe *v.* Lowe, 1 Tenn. Ch. 515.

Texas.— Mabry *v.* Harrison, 44 Tex. 286.

West Virginia.— Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753, holding that any party interested may proceed to require a special receiver to make settlement before a commissioner.

United States.— Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

England.— *In re* Burke, 1 Ball & B. 74; Locke *v.* Ashe, 1 Hog. 143, at instance of creditor who has proved his debt.

See 42 Cent. Dig. tit. "Receivers," § 382.

Application of a third person that a receiver should pass his accounts, and applicant be at liberty to attend, was refused in Colburn *v.* Cooper, 8 Ir. Eq. 510.

Accountability to successor.—A receiver who resigns must settle with his successor. City Item Cooperative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469, holding that the former receiver should be proceeded against for a settlement, and if it be found that he owes the estate anything the amount should be collected and accounted for by the successor receiver. So in Clapp *v.* Clapp, 4 Silv. Sup. (N. Y.) 379, 7 N. Y. Suppl. 495, 49 Hun 195, 1 N. Y. Suppl. 919 [*affirmed* in 125 N. Y. 693, 26 N. E. 327], it was held that a receiver who by failure properly to discharge his duties has become liable to account for loss resulting from his neglect and has been removed is accountable to his successor to whom the entire estate has passed and not to the creditors. The practice adopted in settling the receiver's account was by trial before a referee, issues being found and tried and the creditors being given opportunity to be heard as the real parties in interest. In Greason *v.* Goodwillie-Wyman Co., 38 Hun (N. Y.) 138, a receiver of a corporation appointed on notice to the attorney-general proceeded by motion in an action in which another receiver was alleged to have been appointed to have such appointment declared null and void and thereafter as *de jure* receiver proceeded to have predecessor as *de facto* receiver show cause why he should not be required to state and submit his accounts before a referee.

77. Representative of deceased receiver see *supra*, IV, F, 4.

78. Seagram *v.* Tuck, 18 Ch. D. 296, 50 L. J. Ch. 572, 44 L. T. Rep. N. S. 800, 29 Wkly. Rep. 784. See also Thurman *v.* Morgan, 79 Va. 367.

79. Ludgater *v.* Channell, 11 Jur 273, 16 L. J. Ch. 248, 15 Sim. 479, 38 Eng. Ch. 479, 60 Eng. Reprint 705; Jenkins *v.* Briant, 4 L. J. Ch. 2, 7 Sim. 171, 8 Eng. Ch. 171, 58 Eng. Reprint 802 (in which cases it is held that the court has no such jurisdiction); Williamson *v.* Wilson, 1 Bland (Md.) 418 (holding that where the receiver in obedience to the court's order had sold and converted property into money, such property and money must be considered as having passed into the hands of his personal representatives who must be viewed as standing in his place and that the court may proceed against them by a rule *nisi* followed by an attachment on their failure to show good cause, in the same manner as the receiver himself might have been required to account). In Foster *v.* Foster, 2 Bro. Ch. 616, 29 Eng. Reprint 340, a supplemental bill for account was filed.

Form of order see Williamson *v.* Wilson, 1 Bland (Md.) 418.

Submission to account.— In Magan *v.* Fallon, 5 Ir. Eq. 490, the personal representative submitted to account for rents received by the receiver in his lifetime and it was held that the court had jurisdiction to order him to pay the sum appearing to be due on the foot of the account.

Where executors applied to pass the accounts of their testator and pay in the balance, which was ordered, it was held that upon being ordered nearly thirty years thereafter to pay in the balance they could not object for the want of assets. Gurden *v.* Badcock, 6 Beav. 157, 12 L. J. Ch. 62, 49 Eng. Reprint 785.

80. Overholt *v.* Old Dominion Mfg. Co., 98 Va. 654, 37 S. E. 307, where it was held that if there was no personal representative, a party wishing to have the account stated might have the receiver's estate committed to the sheriff and make him administrator and a party to the accounting.

81. *In re* Columbian Ins. Co., 30 Hun (N. Y.) 342 [*affirmed* in 94 N. Y. 636], ac-

ready for examination at any time,[82] and, being the agent of the court, he must account at such time and in such manner as the court may determine.[83] As to the intervals at which a receiver should account there has been some difference in practice. Under the English chancery practice a receiver was required to bring in his accounts at regular intervals,[84] ordinarily once a year.[85] So in this country it is held that receivers should, without order, render accounts and vouchers at reasonable intervals,[86] and, following the English practice, that he should make full report and pass his accounts at least once a year.[87] Elsewhere the practice of the court has justified a receiver's failure to account until he is called on by the court;[88] and in the absence of some postive regulation in that regard, it has been held that the receiver of an insolvent corporation, under statute, is not required to account before he has completed his duties unless he is sooner cited by the court to account,[89] although it does not follow that a voluntary account earlier rendered is improper.[90]

b. Delay and Failure. If a receiver fail to file his accounts when required, the court, upon the application of a party in interest[91] for a rule against the receiver,[92] or upon its own motion will compel him to do so,[93] and may proceed against him in a summary way by attachment.[94]

c. With Respect to Continuance or Termination of Receiver's Functions. When a receiver is removed he will be ordered to pass his accounts,[95] and when in the regular progress of the principal cause the proper stage has been reached for the receiver's discharge he should then close his accounts.[96] While it has

counting by the executors of receivers of an insolvent insurance company.

82. See *supra*, note 71.

83. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, holding that the court within its judicial discretion may make its own rules as to the time and manner in which its receiver's account shall be passed on.

The court may at any time require its receiver to settle his accounts. Mabry *v.* Harrison, 44 Tex. 286; Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

84. Bertie *v.* Abingdon, 8 Beav. 53, 50 Eng. Reprint 21, where it appeared that the order of appointment contained usual directions for passing his accounts.

85. Seagram *v.* Tuck, 18 Ch. D. 296, 50 L. J. Ch. 572, 44 L. T. Rep. N. S. 800, 29 Wkly. Rep. 784 (direction in order of appointment to account on a particular day and on the same day in each succeeding year); Day *v.* Croft, 20 L. J. Ch. 423, 6 Eng. L. & Eq. 62 (holding that where the expenses of attending the passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only); Bertie *v.* Abindon, 8 Beav. 53, 50 Eng. Reprint 21.

By general orders in chancery this practice was adopted and receivers required so to account. Potts *v.* Leighton, 15 Ves. 273, 33 Eng. Reprint 758. See the order referred to in 4 Bro. Ch. 157, 29 Eng. Reprint 828, and set out in 15 Ves. Jr. 278, 2 Ves. Jr. 39.

86. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

87. Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Lowe *v.* Lowe, 1 Tenn. Ch. 515.

88. Armitage *v.* Forbes, Hayes 222.

89. Special Bank Com'rs *v.* Franklin Sav. Inst., 11 R. I. 557.

90. Special Bank Com'rs *v.* Franklin Sav. Inst., 11 R. I. 557.

In analogy to practice of executors or guardians.—In Special Bank Com'rs *v.* Franklin Sav. Inst., 11 R. I. 557, *supra*, this note, it is said that executors and guardians are expected, under the statute, to render annual accounts, and that if a receiver chooses to render similar accounts he is to be commended rather than blamed, although the court need not act upon them at once if it deems it inadvisable to do so.

91. Adams *v.* Woods, 8 Cal. 306; *In re* Burke, 1 Ball & B. 74, receivers obliged to account on application by petition or motion, being bound by recognizance to account regularly, or when called on, being considered as officers of the court.

Charged with debts of corporation see *infra*, VII, C, 1, note 62.

Charged with interest see *supra*, IV, F, 6, e, (II), (C).

Charged with costs of accounting see *infra*, VII, F.

Deprived of compensation see *infra*, VII, C, 3, a, (III).

92. State *v.* Gibson, 21 Ark. 140 (where the proper practice is laid down to be that the interested party shall apply to the court for a rule against the receiver to render his account); Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

93. Adams *v.* Woods, 8 Cal. 306.

94. Williamson *v.* Wilson, 1 Bland (Md.) 418, 436.

Disobedience of orders see *infra*, VII, A, 5; *supra*, IV, F, 5, c.

95. Davy *v.* Gronow, 14 L. J. Ch. 134.

96. Ellis *v.* Warshauer, 92 Minn. 444, 100 N. W. 214.

The receiver may then on motion settle

been held error to dismiss a bill without requiring a receiver in the suit to account,[97] the dismissal of the suit does not discharge the receiver therein from accountability to the court from which he received his appointment. On the contrary he is subject to the orders of the court in this regard until he is finally discharged.[98] So notwithstanding a reversal of the judgment in the principal cause, which terminates the necessity for the receiver, if the receiver continues to act he is still subject to the jurisdiction of the court to require him to account;[99] and the order appointing a receiver being the authority under which he acts, when that is reversed he should at once render his final account and demand his final discharge.[1]

d. In What Court or Proceeding.[2] It is peculiarly the province of the court appointing the receiver to adjust his account,[3] because it is to that court that he must look for the allowance of such compensation for his services as he may be entitled to,[4] which that court may be justified in reducing if the receiver has been guilty of mismanagement or misconduct,[5] and because the final settlement of the account in that court is essential to fixing the liability on the receiver's bond,[6] and as a general proposition it is in that court only that he can be called to account.[7] The usual method of compelling a receiver to account is by summary proceedings in the action in which he was appointed,[8] although it is held that this is not the

his accounts. Bloch *v.* Bloch, 42 Misc. (N. Y.) 278, 86 N. Y. Suppl. 1047, where the proceedings in the state court are suspended by bankruptcy proceedings in the federal court.

A counter-claim not affecting the funds in the receiver's hands, by one of defendants against plaintiff, will not stand in the way of an accounting upon sustaining a demurrer to the complaint by the only defendants who had any interest in the litigation as to the funds. Katz *v.* Freeman, 114 N. Y. App. Div. 124, 99 N. Y. Suppl. 613.

97. Simmons *v.* Shelton, 112 Ala. 284, 21 So. 309, 57 Am. St. Rep. 39.

98. *Arkansas.*— State *v.* Gibson, 21 Ark. 140.

California.— Pacific Bank *v.* Madera Fruit, etc., Co., 124 Cal. 525, 57 Pac. 462, dismissal before issue of summons or appearance, after receiver has taken possession.

New York.— Baker *v.* Baker, 36 N. Y. App. Div. 485, 55 N. Y. Suppl. 824.

Ohio.— Eichert *v.* Eichert, 28 Ohio Cir. Ct. 795 [*affirmed* in 74 Ohio St. 512, 78 N. E. 1124], upon dismissal without prejudice to rights of particular claimants.

England.— Pitt *v.* Bonner, 5 Sim. 577, 9 Eng. Ch. 577, 58 Eng. Reprint 456.

See 42 Cent. Dig. tit. "Receivers," § 381 *et seq.*

99. Ellis *v.* Waishauer, 92 Minn. 444, 100 N. W. 214.

1. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

2. **Personal liability of receiver** see *supra*, IV, F, 6, f, (II); VI, D, 1.

3. State *v.* Gibson, 21 Ark. 140.

4. State *v.* Gibson, 21 Ark. 140. See also *infra*, VII, C, 3.

5. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651. See also *infra*, VII, C, 3.

6. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651. See also *infra*, IX, C, 2, a.

7. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651; Conkling *v.* Butler, 6 Fed. Cas. No. 3,100, 4 Biss. 22.

Upon the attaching of jurisdiction of bankruptcy court.—Although it has been said that bankruptcy proceedings under the federal statutes suspend the further administration of the estate in the state court, and that it only remains for the state court to transfer the assets and settle the accounts of its receiver and close its connection with the matter (*In re* Watts, 190 U. S. 1, 23 S. Ct. 718, 47 L. ed. 933), where the property of a debtor has come into the custody of a court through its receiver, and its right to control and administer such property is not superior to that of the bankruptcy court under the federal statute, because its jurisdiction attached within four months, the bankruptcy court, in a proceeding against the owner of the property, acquires exclusive jurisdiction regardless of what has been done in a state court, and the receiver in the latter court must turn over the assets to the proper officer in bankruptcy, and the allowance of his fees and expenses is a matter for the determination of the latter court (Bloch *v.* Bloch, 42 Misc. (N. Y.) 278, 86 N. Y. Suppl. 1047; *In re* Rogers, 116 Fed. 435); and in view of the main purpose of the bankruptcy law, it is held that the settlement of the accounts mentioned does not mean the disbursement of the assets by the state court, but that such court may, upon motion, settle the accounts of its receiver, recognize such payments as have been properly made before the petition in bankruptcy was filed, and upon transfer of all assets to the bankruptcy court close his account, cancel his bond, and discharge him and his sureties from liability (Bloch *v.* Bloch, *supra*).

Foreign receivers see *infra*, VIII, A.

8. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651 (holding that the exclusive authority and jurisdiction of the court appointing a receiver to settle and adjust his accounts includes the surcharging of his ac-

exclusive remedy and that the court is not limited to any particular method in that regard.[9]

e. Filing and Form of Account. The receiver's account must be so stated as to show the balances due from him;[10] it should be of such particularity that the parties in interest may be sufficiently informed to be enabled to assent to the correctness thereof,[11] and so avoid the necessity of a reference; and to this end his vouchers should be filed with his account.[12] When the receiver has paid no money, but has made an arrangement with a party to receive such compensation as the court may allow, he should report the facts, leaving a blank for the sum that may be allowed.[13] The receiver occupies a position analogous to that of a plaintiff,[14] and the report and exceptions thereto are said to stand as the complaint and answer of the respective parties.[15] The account should be verified by the oath of the receiver.[16]

4. Hearing, Approval, and Reference — a. Notice and Right to Be Heard. When a receiver's accounts come up for adjustment he is a party in interest, entitled to be heard, and it is the duty of the court to see that his rights are protected;[17] and so all other interested parties are entitled to notice and an opportunity to attend and be heard.[18] All persons having any interest in the estate

counts for the losses accruing through his mismanagement or negligence); Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

Accounting to successor see Clapp *v.* Clapp, 4 Silv. Sup. (N. Y.) 379, 7 N. Y. Suppl. 495, 49 Hun 195, 1 N. Y. Suppl. 919 [*affirmed* in 125 N. Y. 693, 26 N. E. 751], *supra*, VII, A, 1, note 76.

9. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909 [*overruling* Boyd *v.* Eau Claire Mut. F. Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918, so far as it holds that in case a receiver trustee for creditors wastes the trust fund wrongfully by appropriating the same to his own use or otherwise the creditors have no cause of action which by permission of the court to whom the receiver is accountable they may enforce by action in equity] as to which case see also *infra*, VII, E, note 36.

10. Bertie *v.* Abingdon, 8 Beav. 53, 50 Eng. Reprint 21.

11. Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241; People *v.* Columbia Car Spring Co., 12 Hun (N. Y.) 585 (necessity of itemized account, verified by his oath, on receiver's application for a reference to pass upon his account); Reeves' Appeal, 3 Walk. (Pa.) 199.

12. Heffron *v.* Rice, 40 Ill. App. 244; Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402; Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753. See also *infra*, VII, A, 4, c.

13. Adams *v.* Woods, 8 Cal. 306.

14. Heffron *v.* Rice, 40 Ill. App. 244.

15. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028.

16. People *v.* Columbia Car Spring Co., 12 Hun (N. Y.) 585.

For such items as there are no vouchers the receiver should file a verified statement, showing to whom, for what, and when such items were paid, and this verification should be positive, not merely upon belief; in such instances as the receiver, from not having himself personally made or witnessed the payment, is unable to swear positively to the disbursement, it would seem the positive affirmation under oath of the person who did make the payment should be filed, and this should be supplemented by the sworn statement of the receiver as to his information and belief in the matter. Heffron *v.* Rice, 40 Ill. App. 244.

Form of verification see Heffron *v.* Rice, 40 Ill. App. 244, 253.

17. Herndon *v.* Hurter, 19 Fla. 397; L'Engle *v.* Florida Cent. R. Co., 14 Fla. 266.

Appeal see Appeal and Error, 2 Cyc. 641.

18. Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241, as to notice to attend before the master when the accounts are referred.

Publication of notice.— Where the practice of the court as established by custom was for the receiver to note on the motion docket the filing of his final report, with petition for discharge, and the order of the court fixing thereon is insufficient if it is not directed publication of notice thereof, such order is of no vitality until entered of record; and a notice of the filing of the report and of hearing thereon is insufficient if it is not directed to any one or signed by any one. Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277.

Consenting to postponement.— Where a case on homologation of a final tableau was fixed for trial before the expiration of the ten days' public notice of its filing, and after said fixing an opposition is filed, it was held that the fixing will not be binding on the opponent, unless he is notified thereof by posting, as required by the rule of court; but that where such fixing was twice postponed and the attorney of the opponent at the latter postponement consented thereto, he cannot, at the calling on the date last set, claim a continuance because not notified by posting, or because his former attorney no longer represented him. Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733.

which the receiver represents have a right to be present and be examined on any subject pertinent to the inquiry which springs out of the proceeding itself,[19] and to except to the receiver's accounts.[20]

b. Approval or Reference.[21] The mere report or account of a receiver has no binding force unless confirmed. It is his own *ex parte* statement, which may be but partial, and is to be examined by the court or master,[22] wherein there is a distinction between the receiver's report and the master's;[23] but if the report is not excepted to it may be approved.[24] The hearing and consideration of the report and objections thereto is sometimes by the court,[25] which has been held to have exclusive control of the accounting and may discharge the referee at any time and cause the whole matter to be brought before itself;[26] but under the ordinary practice in equity, when the account is not assented to,[27] or exceptions thereto are taken, the practice is to refer it to a master.[28] The reference, reg-

Notice of filing of periodical statement.— A judgment approving a receiver's quarterly statement, without notice of the filing of such statement entered in the receivership order book, kept by the clerk of the court, as provided by statute, will be set aside. Barry *v.* American White Lead, etc., Co., 107 La. 236, 31 So. 733.

An adverse claimant asserting title in himself as against the receiver has been held not to have an interest to entitle him to notice of the audit. Black *v.* Black, 93 Fed. 346.

Notice to sureties of the hearing on the accounting is sometimes required by statute and enforced as a condition to the bringing of an action upon the statutory bond of the receiver. Stratton *v.* Philadelphia City Trust, etc., Co., 86 N. Y. App. Div. 551, 83 N. Y. Suppl. 780.

Administrative orders generally see *supra*, IV, F, 5, b; IV, F, 6, e, (II).

Discharge see *infra*, VII, D, 2.

Form of order for publication of order setting receiver's account for settlement see Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 217, 15 S. W. 429.

19. Greason *v.* Goodwillie-Wyman Co., 38 Hun (N. Y.) 138, as to the right of creditors of a corporation, the court saying that while the order directing the accounting to take place required service of the notice upon the creditors named in the application and those creditors appeared before the referee, they had the right to do so not only under the order but without reference to any order.

20. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 23, 60 Atl. 402, right of representative of deceased stock-holder to except to report of receiver of the corporation.

21. **References** generally see REFERENCES.

22. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753, as opposed to commissioner's report.

Approval without prejudice.—An order approving the final account of a receiver "without prejudice to the rights of" a certain party to the suit is held to protect the rights of such party as fully as if the provision had been inserted in the other parts of the order as requested by him. Patterson *v.* Northern Trust Co., 230 Ill. 334, 82 N. E. 837.

23. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753. See also *infra*, VII, A, 4, d, (I).

24. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

25. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478; Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

Formal findings separate from the order approving or disapproving items of the account, on settlement of the receiver's account by the court, are not required. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478.

Form of order setting for hearing see Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

Form of order confirming account see Boyd *v.* Magill, 100 Ill. App. 316, 317; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429, order approving account upon submission thereof on notice.

26. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, holding that if a court refers its receiver's account for the taking of testimony and reporting the same, with conclusions, such proceeding is not governed by the statute or rules of court regarding references of actions for trial.

27. American Trust, etc., Bank *v.* Frankenthal, 55 Ill. App. 400; Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241.

28. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402. The receivers should, without order, render accounts and vouchers at reasonable intervals, with vouchers, for inspection by those interested, who, if not satisfied, can ask a settlement before a commissioner; and he is at all times subject to be called on by the court to pass his accounts before the master. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

The court is not required to pass on an account without a reference by a statute requiring the receiver to file the account with the court. Atty.-Gen. *v.* Continental L. Ins. Co., 31 Hun (N. Y.) 623.

Where the rights of infants are involved a thorough investigation of the receiver's accounts and vouchers is proper. Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582.

At instance of several claimants.— If parties having claims against the receiver should

ularly, should relate specifically to the claims presented in proper form[29] as above indicated;[30] but on the other hand a reference to ascertain and report disbursements and expenses should include such as might be approved by the court, although incurred by the receiver without express and specific authority.[31]

c. Hearing and Evidence. The report of a receiver, and an exception filed thereto, stand as the complaint and answer of the respective parties;[32] the mere *pro forma ex parte* settlement of an important receiver's account, where creditors are dissatisfied therewith, is held to be an indiscretion,[33] and his account will not be confirmed by the court without a reference and over objection when the items of expenditures are not accompanied by voucher or supported by other proof.[34] So on the proceedings before the master the burden is upon the accountants to justify and vouch the accounts which they had rendered so far at least as they were called in question by exceptions;[35] the receiver has been held to great strict-

not be satisfied with the account, separate references should not be ordered upon each separate claim upon the fund. Adams *v.* Woods, 8 Cal. 306.

Jury trial see JURIES, 24 Cyc. 120 note 29.

Proof see *infra*, VII, A, 4, c.

29. People *v.* Columbia Car Spring Co., 12 Hun (N. Y.) 585.

Disputed items.— If objections are filed to the account or any items thereof the English rule is to refer such portion to a master, and, in analogy to the decisions requiring long and complicated accounts between parties to be referred to a master to take testimony and report his conclusions as to the same, the better practice would seem to be to refer the disputed items to the master to take testimony and report his conclusions as to the same. Heffron *v.* Rice, 40 Ill. App. 244.

30. See *supra*, note 11 *et seq.*

31. Adams *v.* Haskell, 6 Cal. 475, holding that an order directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction or authority of the court" was too narrow and should be enlarged, so as to direct him to take evidence and report fully, as to each item, the cause or service for which it was made and the reasonableness of the amount charged therefor. See also *supra*, IV, F, 6, e, (II), (D), (I) *et seq.*

32. See *supra*, VII, A, 3, e.

33. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. In Louisiana a judgment homologating the account of a receiver cannot be sustained if the account is not proved, and *ex parte* affidavits are not testimony and cannot serve to support the account on an issue joined by default any more than they could serve on an issue joined by opposition; and it is held that insolvency proceedings are assimilated to probate proceedings in which all evidence in support of a judgment must appear in the record, and that a judgment homologating the quarterly statements or the final account of a receiver in insolvency proceedings will be set aside on appeal unless supported by evidence in the record. Barry *v.* American White Lead, etc., Works, 107 La. 236, 31 So. 733; *In re* Pelican Saw Mill, etc., Co., 48 La. Ann. 711, 19 So. 636.

34. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402. But in Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967, it was held that a receiver being an officer of the court his report of receipts and expenditures is proof of the correctness of the items set forth, so that in the absence of any more specific objection than that the objector did not have information whereon to base a belief as to whether the items thereof were correct, other proof of the specific items was not required.

35. Hooper *v.* Winston, 24 Ill. 353; Heffron *v.* Rice, 40 Ill. App. 244 (where it is said that before the master, the receiver necessarily holds the affirmative; that it is for him to satisfactorily show that he is entitled to the credits he claims, and that he should have gone before the master with his books, papers, vouchers, and all evidence necessary to establish the justness of his claims); Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72 (where it is said that so far as the mere matter of vouching is concerned (that is to say, the production of receipted bills to correspond with the disbursements claimed), the accounts having been accepted and passed, it will be taken for granted on exception to the report that this was sufficiently done, although it is going a long way to accord this with respect to the pay-rolls, credit for which was apparently allowed without any attempt to prove or verify them.

Vouchers alone not sufficient.— Under a reference directing the referee to make such just allowances as the receiver was entitled to according to law, expenditures not previously authorized should be shown to have been necessary disbursements, and merely the voucher showing the payments, without other proof to support such items, will not be sufficient. Hardt *v.* Levy, 20 N. Y. App. Div. 400, 46 N. Y. Suppl. 815 [*affirmed* in 155 N. Y. 660, 49 N. E. 1097].

As to charges of improper conduct on the part of the receiver the burden is upon the party making them to establish them by proper proof. Heffron *v.* Rice, 40 Ill. App. 244.

Sufficiency of receipts.— Receipts and drafts signed by a trustee for funds in a receiver's hands to be applied to the maintenance of the receiptor's family are *prima facie* correct and, in the absence of evidence to the contrary, should be deemed valid, it

ness in this respect, and upon failure to produce vouchers for disbursements required to give a satisfactory reason for such failure.[36] On an accounting by a *de facto* receiver of a corporation, at the instance of a *de jure* receiver, creditors of the company may require the latter to produce its books and papers for use as evidence before the referee.[37] At the hearing of a receiver's report after trial and decree in the main cause, evidence which might have been proper at such original trial but which is irrelevant to any question arising on the report is properly rejected.[38]

d. Objections, Exceptions, and Confirmation — (i) *In General.* Objections to the receiver's account should be specific and go to the particular item.[39] Strictly

being admitted that the signatures were genuine and the auditor having the merchants' accounts for necessaries before him; no other evidence is required in the absence of proof on the part of the exceptants that the trustee did not apply the necessaries thus obtained to the maintenance of his family but disposed of them for his private benefit. Burroughs *v.* Bunnell, 70 Md. 18, 16 Atl. 447.

Books of account and bills.— Where regular books of account are kept in the conduct of a business by a receiver, such books supplemented by the oath of the bookkeeper that the same contained a complete true and just account of the receipts and disbursements and are a regular and full set of books kept in and about the business are admissible as evidence of payments shown therein. Heffron *v.* Rice, 40 Ill. App. 244. And in Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271, it was held that where such books are proved to be correct, it is proper to approve the account of the receiver made up from them, although he has not taken receipts for all disbursements, such as payments made in the ordinary course of the particular business. So where the receiver furnished a schedule of the debts, and the names of all the parties to whom the same were due, or with whom they had been contracted, and produced the bills and accounts of such debts, it was held that as he was the officer of the court acting for all the parties concerned, in the absence of any imputation of bad faith the auditor and the court could not be required to insist upon a formal proof or additional evidence of the debts, especially since such question did not appear to have been distinctly raised before the auditor. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60.

36. Heffron *v.* Rice, 40 Ill. App. 244.

37. Greason *v.* Goodwillie-Wyman Co., 38 Hun (N. Y.) 138.

Notice to attorney-general.— Under the statute in New York (2 Wadhams Consol. L. (1909) 1455, § 312) relating to receivers of corporations, providing that "a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court, in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which shall hereafter be commenced for such purpose, shall, in all cases, be served on the attorney-general in the same manner as provided by law for the service of papers on attorneys who have appeared in actions, whether the applications but for this law would be *ex parte* or upon notice,' it was held that all that was necessary was to serve a notice of the motion with a copy of the proposed order, or if an order to show cause is obtained to serve a copy of the order to show cause with the proposed order, and that notice of the intended application was not necessary. Greason *v.* Goodwillie-Wyman Co., 38 Hun (N. Y.) 138.

38. Antlers Land, etc., Co. *v.* Fesler, 14 Colo. App. 201, 59 Pac. 406.

39. Welch *v.* Benshaw, 14 Colo. App. 526, 59 Pac. 967 (where it was held that proof of specific items of a receiver's report will not be required by exception on the ground that the exceptor did not have information whereon to form a belief as to whether the items thereof were correct or not); Heise *v.* Starr, 44 Ill. App. 406.

Exceptions to rule.— Instances have arisen which may be regarded in the light of exceptions to the rule of the text. Thus, although there were no objections to a receiver's report showing large expenditures, it was held that the court should scrutinize it and not approve it without vouchers showing such expenditures and without evidence of the necessity of the expense. Standish *v.* Musgrove, 223 Ill. 500, 79 N. E. 161. So in City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469, there was a reversal and a remand of the cause with directions to recast the account where it appeared on the face of the record that assets of the estate were not accounted for in what was presented as the receiver's final account, although there was a failure to complain of this omission in the opposition filed, the appellate court refusing to undertake the task of examining into numerous books and other records brought up on appeal by the opponent in order to eke out the want of showing in the final account as to certain assets of the estate.

Parties who object upon a particular ground are bound thereby and cannot afterward object to other items which are allowed. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967; State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

If a supplemental report is filed after exceptions to the original, the two reports together are held to constitute in effect the complaint in the action, and it is held that if the first report did not state facts sufficient

speaking, under the English chancery practice,[40] adopted in some of the earlier American cases, the master's report did not require confirmation and exceptions thereto would not lie as to an account stated by the receiver himself, but if the master adopted an erroneous principle the court on petition of the proper parties would review the principles rather than examine the items in detail or the evidence upon which they were founded.[41] A different practice, however, has been more generally adopted in this country, under which exceptions lie to the report on the receiver's accounts.[42] Exceptions to the report on a reference of the receiver's accounts must point out clearly and distinctly the matter complained of as error,[43] and will not be considered if not based upon objections which were raised before the master.[44] Where the cause is submitted for an interloc-

to authorize the receiver's discharge, it could not be aided by the supplemental report, particularly where the second pleading or report in no wise changes the real question, and where the exception or answer is a sufficient answer to the original and supplemental complaints or reports. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028, holding that such supplemental report will not prevent a consideration on appeal of exceptions reserved to the ruling on exceptions to the first report.

Objections filed on the day the report of a receiver was approved, the order of approval showing no disposition of the objections, will be presumed on appeal to have been filed before the making of the order. Standish *v.* Musgrove, 223 Ill. 500, 79 N. E. 161.

40. Shewell *v.* Jones, 2 Sim. & St. 170, 1 Eng. Ch. 170, 57 Eng. Reprint 309 [*affirmed* in 3 Russ. 522, 3 Eng. Ch. 522, 38 Eng. Reprint 671, where the precise point was not decided, the lord chancellor saying that while he did not feel disposed to dissent from the rule of practice stated, had the rule been otherwise further inquiry would not be ordered even where there was reason to doubt whether the conduct of the receiver had been strictly correct, if the attention of the parties had been previously directed to the subject and ample opportunity for investigation afforded them]. See also Cowper *v.* Cowper, 2 P. Wms. 720, 729, 24 Eng. Reprint 930.

41. Brower *v.* Brower, 2 Edw. (N. Y.) 621; Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331, holding that if the master has adopted an erroneous principle, the court will refer the report back to him for correction; that a receiver, as well as the master, is an officer of the court and states his own accounts and submits them to a master for inspection under the order of the court, and the master acts in the place of the court, in a judicial, rather than a ministerial, capacity.

42. *California.*— Adams *v.* Haskell, 6 Cal. 475, holding that upon the report coming in it will be subject to exceptions of both parties to the controversy, upon which it becomes the duty of the court to decide upon the merits of every disputed item of the account.

District of Columbia.— Cake *v.* Woodbury, 3 App. Cas. 60.

New Jersey.— Richards *v.* Morris Canal, etc., Co., 4 N. J. Eq. 428.

New York.— *In re* Guardian Sav. Inst., 9 Hun 267, under rule of court which in effect abrogated the practice under which the report of a referee on the passing of a receiver's account was reviewed only on petition in an independent proceeding.

West Virginia.— Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

United States.— Guterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72.

See 42 Cent. Dig. tit. "Receivers," § 404 *et seq.* And see the cases cited *infra*, note 43.

Under statutory practice, the right to appeal from the decision of the master on exception to reports was sanctioned. Magee *v.* Cowperthwaite, 10 Ala. 966.

Notice of application by separate creditors to file exceptions.— In Richards *v.* Morris Canal, etc., Co., 4 N. J. Eq. 428, and Mechanics' Bank *v.* New Brunswick Bank, 3 N. J. Eq. 437, it was held that the receiver of a corporation in insolvency proceedings under a statute in the state represented all the creditors of the corporation and that the solicitor for the complainant in the bill was *sub modo* solicitor of all the creditors, and if he was to be superseded by granting leave to individual creditors to except to a report on the receiver's account by separate solicitors, the order to file exceptions should not be taken without notice of application for leave.

43. Campbell *v.* H. B. Claflin Co., 135 Ala. 527, 33 So. 275; Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432; Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

If the receiver's exception depends on the evidence taken on the reference he should require its return with the report, because his account as filed has no probative force as against the commissioner's report. Felton *v.* Felton, 47 W. Va. 27, 34 S. E. 753.

44. Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432; Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125]; Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods, 331, where it is said that this is required in justice both to the master and to the receiver; to the master, that he may have an opportunity to reconsider his decision; to the receiver, that he may sustain his account, if he can, by additional evidence, or make such explanation as the case may require.

utory decree upon the report and exceptions thereto, the court should not go outside of the scope of the report and adjudicate matters upon which the parties have had no opportunity to be heard.[45]

(II) *Effect of Prior Orders, Reports, Etc.* Objections pertinent only to other stages of the suit will not be considered on the receiver's accounting.[46] So it has been held that an order authorizing expenditures, remaining unimpeached, is conclusive and the expenditure cannot be questioned on the receiver's final accounting;[47] and objections which have been or could have been presented on prior proceedings by the objector attacking the former reports are held to have been adjudicated by the confirmation of such reports and are not pertinent on an application for confirmation of the final account.[48] The mere question of the right of the receiver cannot then be raised.[49] But on the other hand it is held

Exceptions to rule.— There are exceptions to this rule of practice also. Thus it is held that it will not operate to prevent the court from directing an account to be reformed which contains manifest errors or clearly improper charges. Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331. So in Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125], it was held that one who does not appear and object to testimony offered before the referee on a reference to settle the accounts and to report the amount due counsel for services rendered to the receiver cannot object for the first time on exception to the referee's report to the allowance for services for which the estate is liable but that it is otherwise as to services for which the estate is not liable. So where a creditor of a corporation stands in a situation adverse to its general creditors, but, being represented by the solicitor for the complainant in the bill, the draft of the account was not presented to him and he does not appear to have had opportunity to be heard, his exceptions are not too late and he will be permitted to apply upon notice for leave to file exceptions by his own solicitor. Mechanics' Bank *v.* New Brunswick Bank, 3 N. J. Eq. 437.

45. Wills Valley Min., etc., Co. *v.* Galloway, 139 Ala. 276, 35 So. 850, holding that where the accounts of a receiver of a corporation were referred to a register, who rendered a report showing a balance due the receiver, but with no finding as to who was liable for it, the chancellor, on motion of the receiver to confirm the report, and on exceptions thereto by another party, and without an issue being made, was without jurisdiction to determine whether the amont found to be due the receiver was to be paid by complainants or out of the fund in his hands.

46. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402, objections to account of receiver of insolvent corporation which could have been raised against the making of the decree of insolvency.

47. People *v.* Manhattan F. Ins. Co., 41 Misc. (N. Y.) 611, 85 N. Y. Suppl. 221; State *v.* Port Royal, etc., R. Co., 45 S. C. 464, 23 S. E. 380. And where a receiver, in the ordinary and active administration of the trust, renders regular accounts of his proceedings, in which expenditures already made are reported, and which, upon proceedings regularly had upon reference at which parties interested appear or have an opportunity to appear, the court confirms the action of the receiver either by approving the disbursements or by authorizing and directing certain payments to be made, or both, the receiver is entitled to the protection of such order and thereafter cannot be required to account for such items, nor can the orders settling such accounts be vacated. People *v.* U. S. Mutual Acc. Assoc., 88 N. Y. App. Div. 597, 85 N. Y. Suppl. 137, as to the semi-annual accounts of a receiver of a corporation in process of dissolution, where it was held that the attorney-general who had notice of the application to refer such accounts, and who appeared on some of the references if not all, and who had notice of the applications to confirm the reports thereon, could not open matters covered by the periodical accounts on a final accounting or by motion to vacate, in the absence of fraud or deception practised by the receiver, and that his successor in office must be considered in the same position.

The propriety of an order authorizing the receiver to carry on a business for the benefit of the trust cannot be called in question by an exception to the master's report on the receiver's account. Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432. So where a receiver reported as to the conduct of a business, showing that it was conducted at a loss, and the parties did not object or ask the court to change or modify the order, but on the contrary asked that the receivership be continued, they could not thereafter object to the allowance of the account. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Protection by obedience to order generally see *supra*, IV, F, 6, f, (II).

48. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402.

49. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60, holding that where upon surrender of the property to a purchaser he engages and obligates himself with surety to make prompt payment to the receiver of the sums which the court should thereafter find to be due the receiver on account of his expenditures and indebtedness as receiver, the question of the right of the receiver to be allowed for debts contracted by him is not fairly open for contest on his accounting, the purchaser's under-

that if an order authorizing expenditures is made upon the *ex parte* application of the receiver, without notice to the interested parties, they will be at liberty to contest its correctness upon the receiver's final accounting,[50] and that the court may investigate and determine the correctness of all the receiver's accounts notwithstanding a partial report had been previously approved.[51]

5. Order to Pay Balance. When a receiver's account is adjusted and approved by the court he may be ordered to pay the effects in his hands into court [52] or to the party entitled to them,[53] and if he fails to do so he will subject himself to commitment for contempt,[54] which, it is held, although it is the usual,[55] is not the exclusive, method of enforcing payment.[56]

B. Scope of Accounting. A receiver is held to be under the duty and liability to account for all of his acts and for all receipts by him during the whole time he acted in that capacity,[57] but not for receipts prior to that time;[58] and he

taking having been accepted and the parties having acted on the faith of it.

50. Free Gold Min. Co. *v.* Spiers, 136 Cal. 484, 69 Pac. 143, where it is held that such preliminary orders are not appealable and are reviewable only on appeal from the final judgment after the final account. See also *supra*, IV, F, 6, e, (II), (D), (1) *et seq.*

Expenditures only prima facie valid.— Where the inability of the receivers to make ends meet is due in part to the diversion of funds to payments in matters with which they were not directly concerned by virtue of their appointment or the general purposes of the receivership, the payments, although made by order of court, but *ex parte*, on petition of the receivers, and without opportunity on the part of the excepting creditors to be heard sooner with regard to their validity, are only to be accepted as of *prima facie* validity. Gutterson *v.* Lebanon Iron, etc., Co., 151 Fed. 72.

51. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478 (orders on such prior reports not being appealable); Standish *v.* Musgrove, 223 Ill. 500, 79 N. E. 161.

Reserving matters of accounting on provisional report for distribution.— In *In re* Red River Line, 115 La. 867, 40 So. 250, it is held that where a receiver files a provisional account, and the court decrees a distribution of the assets on hand among the privileged creditors, reserving the right of all creditors not paid to demand of the receiver a full and complete account of his administration, all questions of accounting should be postponed until the filing of the final account.

52. State *v.* Gibson, 21 Ark. 140; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

The personal representative of a receiver having submitted to account for the rents received by the receiver in his lifetime, the court has jurisdiction to order him to pay in the sum appearing to be due on foot of the account. Magan *v.* Fallon, 5 Ir. Eq. 490.

Disposition of funds generally see *supra*, IV, F, 6, e, (II).

Redelivery and reconveyance generally see *supra*, IV, I, 1.

Remedy on bond see *infra*, IX.

53. State *v.* Gibson, 21 Ark. 140; Mabry *v.* Harrison, 44 Tex. 286; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

54. See *supra*, IV, F, 5, c.

Contempt generally see Contempt, 9 Cyc. 9.

55. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

56. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, *supra*, note 9.

Execution against general receiver of court.— In West Virginia the order of the court that its general receiver pay fixed sums in his hands to particular parties to a suit is a personal judgment or decree, the lien of which may be enforced as the liens of other judgment creditors (Rickard *v.* Schley, 27 W. Va. 617), and execution may issue thereon (Crawford *v.* Fickey, 41 W. Va. 544, 23 S. E. 662).

57. See the cases *infra*, this note.

Receipts before perfecting security.— The liability of the receiver to account covers receipts by him before and after the date of perfecting his security. Smart *v.* Flood, 49 L. T. Rep. N. S. 467; Western Canada, etc., Co. *v.* Ince, 8 Ont. Pr. 262. But if he makes no collection before the security is perfected it is indicated that he would not be liable to account on the theory of a default by him prior to that time. Western Canada, etc., Co. *v.* Ince, 8 Ont. Pr. 262. See also *supra*, IV, D, 4, b; *infra*, IX.

Continuing to act by consent after reversal. — Where an order removing an executrix and appointing a receiver of an estate was reversed on appeal, such reversal not having the effect of discharging the receiver, if he continues in that capacity by consent of all the parties and collects the rents, he must account for his acts in connection with the trust. Ellis *v.* Warhauer, 92 Minn. 444, 100 N. W. 214.

58. Baker *v.* Baker, 36 N. Y. App. Div. 485, 55 N. Y. Suppl. 824 (holding that if a motion for a receiver of rents and profits which plaintiff is collecting is denied upon the execution of a bond by plaintiff conditioned for the payment of the other parties in interest of their share of the rents, and on a renewal of the motion for a receiver subsequently plaintiff is appointed, and the complaint is finally dismissed, plaintiff cannot be required to account for moneys collected prior to his appointment as receiver, defendant's remedy being by action on the bond

is not required to account for funds in his hands under other lawful authority, pursuant to which they have been disposed of.[59]

C. Charges, Credits, and Allowances[60] — **1. Charges and Credits in General.** The law holds a receiver strictly responsible for property placed in his hands and imposes upon him the duty of fully accounting for it.[61] He is charged with all that he admits or is shown to have received, and it is for him to show that he has properly paid out the sums for which he asks credit.[62] He is entitled to credit for all proper disbursements[63] and expenses incurred under the

given as a condition for denying the motion for a receiver in the first instance); Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156. But in *In re* Allin, 8 Fed. 753, it was held that a receiver of lands, on a part of which he, in his individual capacity, holds a mortgage with condition broken, must account for rent issuing out of such part as was not covered by his mortgage, where he rents them for a term which did not expire until after his appointment, and before his appointment receives the rent, which was payable in advance, for the full term.

Where a surety of a defaulting county collector was appointed receiver after judgment on the officer's bond, it was held that he occupied a position similar to that of the sheriff in an attachment case, where parties named are garnished and the officer is directed to summon such parties as the plaintiff might name as having property in their hands subject to execution; that such receiver should be charged with county warrants obtained by him from garnishees and others, some before and others after the appointment, and could be allowed only for the money paid to procure them. Ely *v.* Ownby, 59 Mo. 437.

59. Hitz *v.* Jenks, 123 U. S. 297, 8 S. Ct. 143, 31 L. ed. 156, funds disposed of as receiver of national bank.

60. **Interest** see *supra*, IV, F, 6, e, (II), (C).
Protection under order of court see *supra*, IV, F, 6, f, (II).

61. Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93, 54 Atl. 508.

62. Heffron *v.* Rice, 40 Ill. App. 244; Jordan *v.* Blakely, 13 Lanc. Bar (Pa.) 99; Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548, holding that a credit in a receiver's account for a rebate allowed a vendee for shortage in goods shipped to him, discovered at the point of destination, cannot be allowed unless it is shown that the proper quantity was not actually shipped. See also De Hart *v.* Georger, 6 Leg. Gaz. (Pa.) 118.

Charged with corporate debts upon failure to account.— In Lyle *v.* Sarvey, 104 Va. 229, 51 S. E. 228, it was held where the receiver of a corporation had stated in the pleadings prepared by himself as counsel, and in a letter to counsel for the creditors, that the corporation's assets were sufficient to discharge all its liabilities, but persistently disobeyed the orders of the court and neglected to settle his account before its commissioners, a commissioners' report requiring him to pay all the indebtedness proved against the corporation was proper.

Payments not out of assets.—Where, after the appointment of a receiver for a savings bank, one of its directors transferred to him certain personal property in trust to be sold, and the proceeds used to pay such creditors of the bank as should assign their claims to the director and subrogate him to their rights against the bank, and the receiver having sold the property, and with its proceeds paid many of the bank's creditors, but taking no assignment of claims so paid, it was held that he was not entitled to credit for such payments in the settlement of his account as receiver, since they were not made from the property of the bank, and, so far as the bank was concerned, the debts to which such funds were applied were still outstanding against it. *In re* Guardian Sav. Inst., 78 N. Y. 408.

Vouchers see *supra*, VII, A, 3, e; VII, A, 4, c.

63. Ruprecht *v.* Henrici, 127 Ill. App. 350; Northern Alabama R. Co. *v.* Hopkins, 87 Fed. 505, 31 C. C. A. 94, holding that traveling expenses of a receiver of an insolvent railroad company incurred at the instance of bondholders could not be objected to by them, nor could the purchasers at the foreclosure sale have any right to complain of such allowance. Payment of claims against estate within the purpose of the appointment are proper to be allowed (Burroughs *v.* Bunnell, 70 Md. 18, 16 Atl. 447), as well as credits for all funds disposed of under the order of the court (Burroughs *v.* Bunnell, *supra; In re* Angell, 131 Mich. 345, 91 N. W. 611).

Amount paid for security is a proper credit. Adams *v.* Elwood, 104 N. Y. App. Div. 138, 93 N. Y. Suppl. 327 (under Code Civ. Proc. § 3320, which provision is held, however, not to authorize the receiver to charge the brokerage paid by him for procuring his bond); Hamacker *v.* Commercial Bank, 95 Wis. 359, 70 N. W. 295 (under the statute authorizing the surety company to become surety in such cases); Harris *v.* Sleep, [1897] 2 Ch. 80, 66 L. J. Ch. 511, 76 L. T. Rep. N. S. 458, 45 Wkly. Rep. 536 (where such premiums paid to a guaranty society were held to be proper allowances where the receiver acts without salary, but not otherwise).

Payment to attorney.—Adams *v.* Elwood, 123 N. Y. App. Div. 649, 108 N. Y. Suppl. 138, holding, in an action for an accounting against a defendant as survivor in the copartnership between him and plaintiff's intestate, that after judgment for plaintiff and appointment of a receiver of the copartnership to satisfy the judgment where there is no dispute as to the amounts received and the disbursements by the receiver he will not be

express or implied authority of the court,[64] and for proper expenditures approved by the court, although made without specific authority in advance, necessary to the performance of his duties under the order of appointment;[65] but he will be charged with all property embraced in the order or which could have been reduced to possession by the exercise of ordinary care,[66] or for loss which has accrued to the estate by reason of his want of diligence or improper conduct,[67] or his acts contrary to law or the order of the court,[68] or for expenditures made without authority and at his peril and which may be disapproved by the court because they were not for the advantage of the estate.[69]

charged with a balance due on plaintiff's judgment remaining unpaid because plaintiff's attorneys applied part of the money paid to them to the payment of their fees.

Expenditures allowable generally see *supra*, IV, F, 6, e, (II), (D), (1) *et seq.*

64. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60; State Central Sav. Bank *v.* Fanning Ball-bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

65. Rochat *v.* Gee, 137 Cal. 497, 70 Pac. 478; Adams *v.* Haskell, 6 Cal. 475.

Interest on firm debt.—A receiver of partnership property in a dissolution proceeding is held to be entitled to credit for interest paid by him on a firm debt secured by a mortgage on the property. Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271.

An order of reference providing for the making of just allowances as the receiver may be entitled to according to law, contemplates the allowance of all such proper expenses as he incurred in the discharge of his duty and does not justify the expunging from the account stated by the referee of all items not made or deemed to have been made under specific orders of the court. Hardt *v.* Levy, 20 N. Y. App. Div. 400, 46 N. Y. Suppl. 815 [*affirmed* in 155 N. Y. 660, 49 N. E. 1097]. See also Adams *v.* Haskell, 6 Cal. 475, *supra*, note 31.

66. *In re* Angell, 131 Mich. 345, 91 N. W. 611; Downs *v.* Allen, 10 Lea (Tenn.) 652; Hamm *v.* J. Stone, etc., Live Stock Co., 18 Tex. Civ. App. 241, 45 S. W. 330, holding that, although a motion to require an account did not ask an account as to personal property which the receiver could have reduced to his possession by the exercise of ordinary care, the fact that the receiver's answer alleged diligence and inability to get possession of certain property, to which the statute supplies a replication traversing the averment, raises the issue of diligence. See also *supra*, IV, F, 6, f, (II).

Proceeds of sale of property.—A receiver who has sold property will be presumed to have received the money and will be held liable for the amount of the sale. Ellis *v.* Carr, 1 Bush (Ky.) 527. But where a receiver is charged with the value of an asset which he has disposed of, taking the obligation of the purchaser, which he substitutes therefor, a settlement between the parties interested in the estate and the purchaser by which the latter is permitted to discharge his debt for less than its face will be approved over the objections of the receiver only upon condition that he be credited with its full face value, it not being determined that such amount cannot be collected. Morehead *v.* Striker, 132 Fed. 943.

67. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651 (holding that the settlement of an account of a receiver includes all objections made thereto by creditors, all questions of bad faith, negligence, and mismanagement by the receiver, and should be determined on the final hearing); Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93, 54 Atl. 508 (surcharged with the loss arising from negligence in the management of the trust property, where he has wasted its assets and has sold the personal property at an inadequate price, and has been interested in its purchase); French *v.* Pittsburg Vehicle, etc., Co., 184 Pa. St. 161, 39 Atl. 63 (surcharged with difference between appraised value of property as shown by inventory and the amount realized on sale to a firm in which he was to and did become interested). See also *supra*, IV, F, 6, b; IV, F, 6, f, (II); IV, H, 6, b, (II).

The fund created by a surcharge of the receiver's account belongs to all of the creditors and not to those alone upon whose appeal the fund was created by the surcharge. Schwartz *v.* Keystone Oil Co., 164 Pa. St. 415, 30 Atl. 297.

Improper relinquishment of possession of property.—Thus a receiver cannot be permitted to put the fund intrusted to his care under the control of his sureties in order to indemnify them against loss, but he must retain complete control in himself; if he acts contrary to this rule, he will be liable for any loss ensuing by failure of the depositary of the funds. White *v.* Baugh, 9 Bligh N. S. 181, 5 Eng. Reprint 1261, 3 Cl. & F. 44, 6 Eng. Reprint 1354. See also *supra*, IV, F, 6, a.

Expenditure resulting from misconduct of the receiver will be charged to him and he may be ordered personally to pay such costs. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; *In re* Suffield, 20 Q. B. D. 693, 58 L. T. Rep. N. S. 911, 5 Morr. Bankr. Cas. 83, 36 Wkly. Rep. 584.

68. State Cent. Sav. Bank *v.* Fanning Ball-Bearing Chain Co., 118 Iowa 698, 92 N. W. 712; *In re* Brown, L. R. 19 Ir. 183, credit denied for payments to others than those named in the order of court.

69. State Cent. Sav. Bank *v.* Fanning Ball-

2. Counsel Fees [70] — a. In General. A receiver, being entitled to the assistance of counsel in proper cases,[71] will be allowed reasonable and proper fees in this behalf out of the funds,[72] not only when the employment has been previously

Bearing Chain Co., 118 Iowa 698, 92 N. W. 712.

Exorbitant and unnecessary expenses disallowed.— City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644.

Expenditures after the receiver should have been discharged will be disallowed as charges against the estate. Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 181, 76 Pac. 2, holding that such charges will not be allowed, except perhaps a reasonable sum for the services of a bookkeeper aiding in rendering accounts to the court.

Expenses not within the scope of the receivership will be disallowed. *In re* Kaiser, 92 Minn. 444, 100 N. W. 214.

70. Employment and selection see *supra*, IV, F, 6, e, (v).

Of parties see *supra*, V, C, 4.

Priority see *supra*, V, B, 1, f, (III).

71. See *supra*, IV, F, 6, e, (V), (A).

72. *California.*—McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748.

District of Columbia.— Cake *v.* Woodbury, 3 App. Cas. 60.

Georgia.— New York Cent. Trust Co. *v.* Thurman, 94 Ga. 735, 20 S. E. 141; Loudon *v.* Coleman, 62 Ga. 146.

Iowa.—How *v.* Jones, 60 Iowa 70, 14 N. W. 193.

Michigan.— *In re* Angell, 131 Mich. 345, 91 N. W. 611.

Minnesota.—Olson *v.* State Bank, 72 Minn. 320, 75 N. W. 378.

Missouri.— St. Louis *v.* St. Louis Gas-Light Co., 11 Mo. App. 243 [*affirmed* in 87 Mo. 224].

New Jersey.— Strauss *v.* Casey Mach., etc., Co., (Ch. 1907) 66 Atl. 958, counsel employed in another state.

Tennessee.— See State *v.* Edgefield, etc., R. Co., 4 Baxt. 92.

Utah.—Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151.

Washington.— Oudin, etc., Fire Clay Min., etc., Co. *v.* Cole, 35 Wash. 647, 77 Pac. 1066.

West Virginia.— Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

Wisconsin.—Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— Elk Folk Oil, etc., Co. *v.* Foster, 99 Fed. 495, 39 C. C. A. 615.

See 42 Cent. Dig. tit. "Receivers," §§ 184, 385.

A stipulation by the parties to a suit that a receiver acted as a receiver of the court, and should be protected, authorizes the allowance of a reasonable sum for counsel fees for the receiver. Kelsey *v.* Sargent, 2 N. Y. St. 669.

A receiver should not be surcharged with part of the attorney's fees paid by him after obtaining approval of the bill by the court. *In re* Angell, 131 Mich. 345, 91 N. W. 611.

If an improper person is employed by the receiver (see *supra*, IV, F, 6, e, (V), (B)), it is held that fees should not be allowed (Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Veith *v.* Ress, 60 Nebr. 52, 82 N. W. 116), as where the services were rendered in a manner influenced by the attorney's connection with the adverse party (Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 [*affirmed* in 125 N. Y. 693, 26 N. E. 751); but if no objection is made to such an attorney (Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151), and his services were valuable and performed with fidelity (Clapp *v.* Clapp, *supra*) reasonable compensation may be allowed. That counsel for a receiver is the latter's partner is no objection to the allowance of his attorney's fees, where it appears that the receiver is not to share in the compensation. Matter of Simpson, 36 N. Y. App. Div. 562, 55 N. Y. Suppl. 697 [*affirmed* in 158 N. Y. 720, 53 N. E. 1132].

Where the same counsel represents a creditor as well as the receivers of an insolvent, fees will not be allowed from both sides. *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

Previous payment by receiver required.— It has been held that where a receiver employs counsel on his own responsibility, an allowance will not be made him therefor, unless he has actually paid such fees, although they were necessary, and such as the court would have authorized if application had been made in advance. Henry *v.* Henry, 103 Ala. 582, 15 So. 916.

Negligence and mismanagement.—A receiver who has managed the property carelessly and negligently will not be allowed credits for counsel fees. Reeves' Appeal, 3 Walk. (Pa.) 199.

Maintaining appointment.— In Cowdrey *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331, it was held that fees incurred in resisting a motion for his removal were properly allowed as a charge against the trust fund, when it appeared that he had acted in good faith and with integrity of purpose, although it further appeared that there were apparent grounds for the motion. And in Kimmerle *v.* Dowagiac Mfg. Co., 105 Mich. 640, 63 N. W. 529, it was held that where, pending a receivership, a settlement was effected whereby plaintiff should pay half the expenses of the receiver, and certain defendants the other half, thereby recognizing the propriety of the appointment and the receiver's right to compensation, a claim for attorney's fees incurred by the receiver in

sanctioned by the court, but also when it was not previously authorized, if the expense has been incurred in the exercise of a sound discretion.[73] But such allowance will be made only for services requiring legal skill, and not for the performance of the ordinary duties which the office imposes on the receiver himself,[74] or for services which were not rendered to the receiver,[75] or for services which were not in behalf of the interests represented by the receiver or which were rendered in matters with which the estate in the receiver's hands had no concern,[76] or in which the interest only of the receiver personally may be involved,[77] or for services the necessity for which had been caused by the receiver;[78] and the court

attempting to maintain its appointment is a proper charge. *Compare* Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72, *infra*, note 79. But where a receiver has counsel who appears for him in resistance to a motion to remove him, other counsel, employed by a person other than the receiver, to aid in this resistance is not entitled to compensation out of the corporate effects. Anderson *v.* Fidelity, etc., Co., 100 Ga. 739, 28 S. E. 463.

Property or funds liable see *supra*, V, C, 1.

Party appointed to collect.— Under a direction of the court upon adjudicating liens, allowing one of defendants, a lien-holder, to collect certain policies of insurance on property involved which had been burned, such party will be allowed his reasonable expenses in the employment of competent attorneys to effect the collection, although the collection was made without suit, the insurance company having at one time refused to pay more than a certain part of the loss. Abbott *v.* Downer, 54 Iowa 687, 7 N. W. 147.

73. See *supra*, IV, F, 6, e, (v), (A).

74. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72. Thus he may have an attorney to obtain for him a necessary order of court to sell a stock of goods, but he can carry out the order as well as the attorney. Henry *v.* Henry, 103 Ala. 582, 15 So. 916. No legal skill is required in insuring and repairing storehouses and renting them out and collecting rents. Henry *v.* Henry, *supra*. If a demand is made upon the receiver of questionable legality, he may have legal advice and aid in reference to it. If he has a demand upon another whose legality is questioned, or which requires legal aid to enforce it, he may have an attorney. Henry *v.* Henry, *supra*.

Reports.—A receiver is not entitled to an allowance for disbursements to attorneys for making reports to the court, involving nothing more than a simple narrative of his acts, and an account of his receipts and disbursements. Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267; Wilkinson *v.* Washington Trust Co., 102 Fed. 28, 42 C. C. A. 140.

75. Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 181, 76 Pac. 2 (services to a superintendent in charge of the corporate property); Sowles *v.* National Union Bank, 82 Fed. 139 (services in conducting the suit in which the receiver was appointed).

76. See De Hart *v.* Yaeger, 6 Leg. Gaz. (Pa.) 118.

Litigation between classes of creditors.— There are cases in which a receiver has been allowed for disbursements in contests between different classes of claimants to assets, but in substantially all of them it will be found either that a new fund has been created, or an existing one saved from depletion, or sought to be, which fund belonged to the class in aid of which the receiver acted; so that the allowance was in fact paid out of the fruits of the receiver's acts. Atty.-Gen. *v.* North American L. Ins. Co., 91 N. Y. 57, 43 Am. Rep. 648; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243. In no case, save as costs are taxable by statute, should a fund belong to one litigant be depleted to pay the expenses of his antagonist, either directly or indirectly in the form of allowance to a receiver. Roller *v.* Paul, 106 Va. 214, 55 S. E. 558; Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243; Petersburg Sav., etc., Co. *v.* Dellatorre, 70 Fed. 643, 7 C. C. A. 310.

Services rendered to a corporation before appointment of a receiver is a debt of the corporation, and not a charge against the property in the receiver's hands, although the attorney becomes attorney for the receiver. Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125].

77. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72, holding that the giving of a bond is a part of a receiver's necessary qualification; it is his duty to prepare and execute it, and he is not entitled to compensation for services of an attorney in preparing it.

Fees by the receiver for prosecuting his own claim against the estate for his compensation and for the allowance of attorney's fees have been held not allowable, the receiver being personally liable therefor. Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267. See also Sowles *v.* National Union Bank, 82 Fed. 139.

In criminal proceedings.—Allowance cannot be made for services of the receiver's attorney in criminal proceedings. Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125].

78. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72, holding that where the necessity for application by a receiver for orders to succeeding receivers to

will not make an allowance for services which were not in the proper pursuit of the receiver's duties.[79]

b. Determination of Allowance.[80] When an allowance is made, it is held that it will not be directly to the attorney, but to the receiver, as a proper expenditure made by him,[81] and counsel must first look to the receiver,[82] who may pay his fees out of any funds that come into his hands as receiver, and then be entitled to a credit for the same upon settling his account.[83] The allowance has been made, however, upon the application either of the receiver,[84] or of the attorney himself,[85] or a regular salary for his services is fixed in advance by the

pay laborers employed by him was due to his voluntary resignation, he is not entitled to compensation for attorney's fees in making the application and procuring the orders.

79. Utica Ins. Co. *v.* Lynch, 2 Barb. Ch. (N. Y.) 573, holding that a receiver, upon the passing of his accounts, is not entitled to an allowance out of a fund in his hands as receiver, for counsel fees which he has paid on an unsuccessful defense to a suit brought against him by the owner of such fund; nor for the expenses of an unsuccessful appeal brought by him from the decree in such suit, neither the defense nor the appeal being made by him in his capacity of receiver, but as a defendant in that suit, the court holding further that even if he had acted as receiver he would not have been entitled to charge the expenses of an unsuccessful appeal upon a fund in his hands belonging to the respondents in such appeal.

Resisting applications.—A receiver cannot charge the fund with counsel fees for resisting applications which should not have been opposed. *In re* Union Bank, 37 N. J. Eq. 420 [*reversed* on other grounds in 38 N. J. Eq. 265] (one application by creditors for an order requiring the receiver to furnish a statement of assets, and another to require him to account); Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 [*affirmed* in 125 N. Y. 693, 26 N. E. 751].

Defending appeal from order of appointment.— So it is held that a receiver is not entitled to compensation for services of an attorney in defending an appeal by defendant from the appointing order, since the duty of sustaining the appointment rests on plaintiff in such action. Saulsbury *v.* Lady Ensley Coal, etc., Co., 110 Ala. 585, 20 So. 72.

80. **Province of court** see *supra*, IV, F, 6, e, (v), (a).

Character of services see *supra*, text and notes 74–79.

81. Sullivan *v.* Gage, 145 Cal. 759, 79 Pac. 537; Joost *v.* Bennett, 123 Cal. 424, 56 Pac. 43; Portland First Nat. Bank *v.* Oregon Paper Co., 42 Oreg. 398, 71 Pac. 144, 971; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. See also McLane *v.* Placerville, etc., R. Co., 66 Cal. 606, 6 Pac. 748; Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503; Oudin, etc., Fire Clay Min., etc., Co. *v.* Cole, 35 Wash. 647, 77 Pac. 1066.

Time of making allowance.—An allowance for services of the receiver's attorney on the accounting should not be made before rendition of the services. Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125].

During the progress of the administration reasonable amounts for expenses of that character upon account may be awarded. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. The full value of their services will not be allowed attorneys at such stages, but only a part thereof; and the balance will be allowed to stand until the litigation is disposed of and the court can see whether or not the property in the receiver's hands will suffice to pay all expenses, and the court will then decide what final allowance should be made. Central Trust Co. *v.* Wabash, etc., R. Co., 23 Fed. 675.

Notice and procedure.— There is no usual method of procedure with reference to making allowances in favor of attorneys who have been employed by the receiver with the sanction of the court. In the absence of any well-settled rule of practice or general order governing the subject, applications to fix the compensation of counsel ought to be accompanied with notice to all parties in interest or to their solicitors of record, and such applications ought not to be heard *ex parte*, unless the parties, when notified of the application, fail to appear. Merchants' Bank *v.* Crysler, 67 Fed. 388, 14 C. C. A. 444. See also *In re* Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78.

82. Ryckman *v.* Parkins, 5 Paige (N. Y.) 543; State *v.* Edgefield, etc., R. Co., 4 Baxt. (Tenn.) 92.

83. Cake *v.* Woodbury, 3 App. Cas. (D. C.) 60; State *v.* Edgefield, etc., R. Co., 4 Baxt. (Tenn.) 92. See also U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503.

Taxed after term see State *v.* Active Bldg., etc., Assoc., 102 Mo. App. 675, 77 S. W. 171.

84. See Henry *v.* Henry, 103 Ala. 582, 15 So. 916; State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

85. See Farwell *v.* Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; Richter *v.* Schroeder, 110 Ill. 112; Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125] (holding that the proper method for obtaining an allowance of counsel fees for services rendered upon the accounting is for the attorney to conduct the proceedings, and then, upon the entry of the final order, to apply

court.[86] It is not necessary in all cases that the court hear evidence as to the amount of compensation to be allowed a receiver as counsel fees.[87] It is a matter very largely within the discretion of the trial court,[88] and, if the facts are such that the court feels at liberty to act without the assistance of such evidence, it may do so.[89] Such allowances are not a matter of course, but they should be carefully scrutinized by a chancellor. If they are unnecessary or extravagant they should be reduced or disallowed altogether,[90] although on the other hand, like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct,[91] and if it does not appear plainly that there has been an abuse of discretion, the action of the court will be upheld.[92] Such allowances are to be governed by the reasonable necessities in that regard, assuming that the receiver has properly discharged the duties which belong to him personally to perform, the time necessarily spent in the administration, the grade of service required, the efficiency of that rendered, the benefit to the trust, the fidelity displayed, and all other circumstances throwing light on the question,[93] the rate to be that ordinarily paid for somewhat similar services in official lines.[94]

for and obtain an allowance); Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600; Merchants' Bank *v.* Crysler, 67 Fed. 388, 14 C. C. A. 444.

86. See State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651; Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600.

87. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967; Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510. But see Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600.

But on a reference to settle a receiver's account and report the amount of counsel fees, it has been held that evidence of the reasonable value thereof should be adduced. Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 [*affirmed* in 125 N. Y. 693, 26 N. E. 751], where the counsel was an improper person by reason of his relation to one of the parties, but who was nevertheless held entitled to reasonable compensation for services faithfully rendered the receiver.

88. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967; Bartholomew *v.* Union Trust Co., 36 Ind. App. 328, 75 N. E. 31.

89. Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Where the court has personal knowledge of the services rendered by an attorney for a receiver, it may use such knowledge without hearing evidence as to the amount which it should allow for attorney's fees. Olson *v.* State Bank, 72 Minn. 320, 75 N. W. 378; Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

90. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Boston Safe-Deposit, etc., Co. *v.* Chamberlain, 66 Fed. 847, 14 C. C. A. 363.

91. Graham *v.* Carr, 3 N. C. 449, 45 S. E. 847; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90; Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

92. *Colorado.*— Welch *v.* Renshaw, 14 Colo. App. 526, 59 Pac. 967.

Iowa.— Abbott *v.* Downer, 54 Iowa 687, 7 N. W. 147.

Nebraska.— Stone *v.* Omaha F. Ins. Co., 61 Nebr. 834, 86 N. W. 468.

Oregon.— Kerslake *v.* Brower Lumber Co., 40 Oreg. 44, 66 Pac. 437.

Pennsylvania.— *In re* Mansfield, 34 Pa. Super. Ct. 413.

United States.— Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644.

See 42 Cent. Dig. tit. "Receivers," § 385.

Where the value of services rendered to a receiver is admitted or clearly established it is an abuse of discretion of the trial court to order the attorney's claim for such services to be reduced a certain amount below such value on the ground that the corporation is insolvent and the creditor will be compelled to lose a large proportion of their claim, and that the attorney received a large volume of business from one client. Stone *v.* Omaha F. Ins. Co., 61 Nebr. 834, 86 N. W. 468.

93. Olson *v.* State Bank, 72 Minn. 320, 75 N. W. 378 (taking into consideration the character of legal services theretofore rendered by counsel, and the amount already allowed on account thereof); Silvers *v.* Merchants', etc., Sav. Fund, etc., Assoc., (N. J. Ch. 1903) 56 Atl. 294; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. And see Lembeck *v.* Jarvis Terminal Cold Storage Co., 68 N. J. Eq. 352, 59 Atl. 565; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503–524; Oudin, etc., Fire Clay Min., etc., Co. *v.* Cole, 35 Wash. 647, 77 Pac. 1066; Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447 (in which cases fees allowed are held not excessive); Drey *v.* Watson, 138 Fed. 792, 71 C. C. A. 158 (fee held excessive); Montgomery *v.* Petersburg Sav., etc., Co., 70 Fed. 746, 17 C. C. A. 360 (fee held adequate).

94. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. But the allowance should not be made upon the scale, which is not uncommon in the case of receivers, that they may pay with great liberality because they

3. Compensation [95] — a. Right to — (i) *In General.* Ordinarily a receiver is entitled to a reasonable compensation for his services properly performed,[96] until the termination of the receivership,[97] but not thereafter.[98] Such right does not depend upon the correctness of the order of appointment, where the appointment has been made by a court having general jurisdiction to take such action,[99] or upon the result of the litigation.[1]

are not using their own property or money to make such payments. This has become by far too common a criterion to be supported, or allowed to be followed, by the courts. Clapp *v.* Clapp, 49 Hun (N. Y.) 195, 1 N. Y. Suppl. 919, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 [*affirmed* in 125 N. Y. 693, 26 N. E. 751].

If the fund is small care must be taken not too greatly to deplete the same by allowances for attorney's fees, although the services rendered were valuable and involved much labor and time. Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 108 La. 74, 32 So. 221. See also Kernochan *v.* Ballance, 26 Misc. (N. Y.) 435, 56 N. Y. Suppl. 132.

Itemized account.— The better way to determine the proper amount to be allowed a receiver for legal assistance is to view the whole situation from the standpoint of the results accomplished in the end, without much or any regard to any itemized account. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. Such account need not be required. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

For extraordinary services.— The matter of the allowance of compensation to attorneys for receivers for extraordinary services above the amount fixed for their general services is within the discretion of the court. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

Where the attorney asks for a certain sum the court should not direct a receiver to pay his attorney more than that amount, even though there be evidence justifying a larger charge. Richter *v.* Schroeder, 110 Ill. 112.

Under an agreement void as to division of fees.— In Hammond *v.* Atlee, 15 Tex. Civ. App. 267, 39 S. W. 600, it was held that an agreement between the receiver and his attorney that they should bring suit on claims and divide the ten per cent attorney's fees stipulated for in the obligations was void as to the provision for division but that the receiver having accepted and performed the service with the understanding that he would receiver five per cent and in his prayer having declared that he was content with that amount, he cannot be allowed any more.

95. Priority of receiver's compensation see *supra*, V, B, 1, f, (II).

96. Ruprecht *v.* Henrici, 127 Ill. App. 350; Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125]; Berry *v.* Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742. See also Joplin Supply Co. *v.* Brennerman, 99 Mo. App. 657, 74 S. W. 405.

A master in chancery, acting as receiver, acts in a distinct character, and is entitled to compensation as receiver. Arthur *v.* Master in Equity, Harp. Eq. (S. C.) 47.

The surviving receiver is entitled to fees for his services rendered after the death of his colleague and of a trustee of the same estate, as he does not thereby become *functus officio.* Burroughs *v.* Bunnell, 70 Md. 18, 16 Atl. 447.

Fund not subjected to claims against receiver.— Hamburger *v.* Durasmont, 4 Ohio S. & C. Pl. Dec. 232, 3 Ohio N. P. 222, holding that an action will not lie to compel the receiver to fix the value of his services and direct payment of the same to satisfy the claim of a judgment creditor of the receiver.

97. Forrester *v.* Boston, etc., Copper, etc., Min. Co., 32 Mont. 240, 79 Pac. 1061, although he should have been discharged at an earlier date.

Time of making objections.— Where an order of court is made that a railroad receiver shall be paid a monthly salary for his services until he shall be discharged, and he continues to act as receiver, making quarterly reports showing the payment to himself of such compensation each month, and such reports are confirmed without objection, and no steps are taken by those interested to have him discharged, objections afterward filed to his reports and compensation, on the ground that he ought to have been discharged years before, should be overruled, and the compensation allowed as long as he continues to act. Dillingham *v.* Moran, 81 Fed. 759, 26 C. C. A. 596, 101 Fed. 933, 42 C. C. A. 91.

98. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Matter of Grand Cent. Bank, 27 Misc. (N. Y.) 116, 57 N. Y. Suppl. 418 [*affirmed* in 42 N. Y. App. Div. 157, 58 N. Y. Suppl. 1022], holding that a discharged receiver cannot intervene in a proceeding against a fund discovered after his discharge, to secure fees on its distribution.

99. St. Louis, etc., R. Co. *v.* Wear, 135 Mo. 230, 36 S. W. 658, 33 L. R. A. 641; Nutter *v.* Brown, 58 W. Va. 237, 52 S. E. 88, 1 L. R. A. N. S. 1083; Northwestern Iron Co. *v.* Land, etc., Imp. Co., 92 Wis. 487, 66 N. W. 515.

A receiver whose appointment is revoked or reversed on appeal is entitled to compensation for services rendered before the receivership has been thus terminated. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; New Birmingham Iron, etc., Co. *v.* Blevins, (Tex. Civ. App. 1897) 40 S. W. 829.

1. Hopfensack *v.* Hopfensack, 61 How. Pr. (N. Y.) 498.

(II) *When Receiver Party to Cause or Interested Person.*[2] Where a receiver is a party to the cause or an interested person, the general rule is against the allowance of any compensation for his services;[3] but where the appointment is made without determining that the service shall be without compensation, the question as to whether an allowance shall be made for his compensation is generally left to the discretion of the court and is to be controlled by the circumstances of each particular case.[4]

(III) *Forfeiture of Right* — (A) *By Negligence or Misconduct.* Neglect, recklessness, or misconduct in the management of the trust estate in his hands may be sufficient to deprive a receiver of all right to compensation.[5] So where a receiver shows want of capacity in the management of property intrusted to him, and a lack of appreciation of his obligations as receiver, his claim for compensation may be rejected or reduced.[6] But where there is nothing in the administration of the trust to convict the receiver of want of integrity or good faith,

Right to compensation from fund not dependent on result of litigation see *supra*, V, C, 2.

2. **Eligibility** see *supra*, III, F, 1, c.

3. Meissler *v.* Meissler, 101 Ill. App. 256; Todd *v.* Rich, 2 Tenn. Ch. 107; Brien *v.* Harriman, 1 Tenn. Ch. 467, in which the court say that the appointment of such a person as receiver can only be sustained upon the implied condition that he discharge his duties free of cost.

A surviving partner, appointed receiver at his own instance, is entitled to no compensation as receiver, in the absence of any stipulation to that effect. Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363; Lennig *v.* Lennig, 15 Phila. (Pa.) 283; Berry *v.* Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; Todd *v.* Rich, 2 Tenn. Ch. 107; Blakeney *v.* Dufaur, 15 Beav. 40, 51 Eng. Reprint 451; Wilson *v.* Greenwood, 1 Swanst. 471, 36 Eng. Reprint 469, 1 Wil. Ch. 223, 37 Eng. Reprint 97, 18 Rev. Rep. 118.

A trustee appointed upon his own undertaking in a suit to act as receiver of the trust property is not under ordinary circumstances entitled to compensation as receiver. *In re* Bignell, [1892] 1 Ch. 59, 61 L. J. Ch. 334, 66 L. T. Rep. N. S. 36, 40 Wkly. Rep. 305; Pilkington *v.* Baker, 24 Wkly. Rep. 234.

A creditor or his representative should not be appointed receiver or be allowed to act; but, if such receiver serves without objection made to him or to the court, he may be allowed a reasonable compensation. Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151. A creditor going into possession as quasi mortgage is not entitled to receiver's fees. Trimleston *v.* Hamill, 1 Ball & B. 384, 12 Rev. Rep. 38.

4. Meissler *v.* Meissler, 101 Ill. App. 256; Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363; *In re* Bignell, [1892] 1 Ch. 59, 61 L. J. Ch. 334, 66 L. T. Rep. N. S. 36, 40 Wkly. Rep. 305.

5. *Idaho.*— Dalliba *v.* Winschell, 11 Ida. 364, 82 Pac. 107, 114 Am. St. Rep. 267.

Kentucky.— Sanford *v.* Carr, 8 Ky. L. Rep. 967, defaulting receiver.

Minnesota.— State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

New York.— Clapp *v.* Clapp, 49 Hun 195, 1 N. Y. Suppl. 919, 4 Silv. Sup. 379, 7 N. Y. Suppl. 495 [*affirmed* in 125 N. Y. 693, 26 N. E. 751].

Pennsylvania.— Pangburn *v.* American Vault, etc., Co., 205 Pa. St. 93, 54 Atl. 508; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Reeves' Appeal, 3 Walk. 199.

Wisconsin.— Speiser *v.* Merchants' Exch. Bank, 110 Wis. 506, 86 N. W. 243, holding that secret loaning of money, resistance of demands for accounting, suppression of facts with reference to his handling of the money, and grossly improper expenditures convict a receiver of such breaches of his highest and most important duties, as to justify the entire disallowance of compensation.

England.— *In re* St. George, L. R. 19 Ir. 566.

See 42 Cent. Dig. tit. "Receivers," § 387.

Where the receiver has dissipated the assets, such conduct is a sufficient warrant for a disallowance of his fees. Carl *v.* Meyer, 51 N. Y. App. Div. 5, 64 N. Y. Suppl. 1077.

The act of a receiver in fraudulently converting or appropriating the moneys in his possession operates to forfeit all right or claim to any commissions, etc., and this irrespective of the question whether he is or is not convicted of any crime in respect thereto. Fields *v.* U. S., 205 U. S. 292, 27 S. Ct. 791, 51 L. ed. 807.

Where the receiver of an estate deposited funds with a creditor bank without any arrangement for interest or other compensation to the estate for the use of the funds, the receiver was not entitled to an allowance of commissions. Champlain First Nat. Bank *v.* Wood, 30 Misc. (N. Y.) 278, 63 N. Y. Suppl. 324.

An excessive claim by a receiver for compensation for his services is not necessarily a fraudulent charge, particularly where he merely declares his opinion as to the value of his services, and where witnesses of known respectability and high business standing give opinions supporting his claim. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503.

6. *In re* Sheets Lumber Co., 52 La. Ann. 1337, 27 So. 809.

mere want of foresight,[7] or error of judgment,[8] in developing or managing the property or business, is no reason for denying him compensation, especially where the trust has been administered with reasonable success.[9]

(B) *By Failure to Account.* A receiver who neglects his duty to account[10] runs the risk of having his claim to the usual commissions or salary excepted to and disallowed.[11] But if the parties do not object to the allowance of compensation because the receiver has not accounted regularly, it has been held that the court will not interfere.[12]

(IV) *WAIVER OF RIGHT.* The right of a receiver to compensation may be relinquished or waived, and in such a case no allowance will thereafter be made,[13] although the duties of the office prove to be more onerous than was expected.[14] So it is competent for a receiver, on being appointed, to agree to look entirely to the income of the property for compensation, and such an agreement is a complete defense in an action by the receiver for compensation against one of the parties to the suit.[15] But a person appointed receiver without salary may be allowed compensation for extraordinary services, although no request therefor was made at the time of his appointment.[16]

(V) *EXTRA COMPENSATION.* As a general rule the allowance made to a receiver for his services must be held sufficient to compensate him for all the labor which he performs in connection with the receivership, and as a result he is not entitled to anything in addition thereto,[17] and no extra compensation will be allowed a receiver merely because he discharged the duties of his office with particular fidelity and efficiency.[18] But the court may, in its discretion, allow its

7. Cowdrey *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

8. Brett *v.* Brett, 4 N. Y. St. 704.

Continuance of business at loss.— The mere fact that the receiver continues the business at a loss furnishes no reason for denying him compensation (*In re* Red River Line, 115 La. 867, 40 So. 250), especially where no objection is made (Filkins *v.* Adams, 60 Ill. App. 410). See also McDowell's Appeal, 4 Pennyp. (Pa.) 384.

9. Cowdry *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

10. See *supra*, VII, A, 1 *et seq.*

11. Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Bristowe *v.* Needham, 9 Jur. N. S. 1168, 8 L. T. Rep. N. S. 652, 11 Wkly. Rep. 926; Potts *v.* Leighton, 15 Ves. Jr. 273, 33 Eng. Reprint 758; White *v.* Lincoln, 8 Ves. Jr. 363, 7 Rev. Rep. 71, 32 Eng. Reprint 395. See also Trapaud *v.* Cormick, 1 Hog. 245; Maxwell *v.* Boate, 7 Ir. Eq. 281.

Where additional assets were got in by a receiver by delaying a short time to pass his accounts, his compensation was allowed. Flood *v.* Aldborough, 8 Ir. Eq. 103.

12. Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Ward *v.* Swift, 8 Hare 139, 32 Eng. Ch. 139, 68 Eng. Reprint 306. In Dease *v.* O'Reilly, 2 C. & L. 441, 4 Dr. & War. 284, it was held that the fees may be allowed upon the consent of the parties in the cause, if they be competent to consent, although it is otherwise if some of the parties are minors. But in Fletcher *v.* Dodd, 1 Ves. Jr. 85, 30 Eng. Reprint 242, where a receiver had passed his accounts, "and all the parties declared themselves satisfied with his conduct," yet Lord Thurlow ordered an inquiry, saying: "Though the parties are satisfied, I will make them more so, if I find he has kept money in his hands longer than he ought."

13. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274 [*affirming* 35 Ind. App. 478, 65 N. E. 536] (holding that the insolvent's agreement to consent to the receiver's appointment is a sufficient consideration for the receiver's contract to perform his services gratuitously); Steel *v.* Holladay, 19 Oreg. 517, 25 Pac. 77.

Illegal agreement.— Where a receiver was appointed to take charge of land until the vendee's debt for the purchase-money should have been paid to the vendor and after payment of such debt the receiver retained possession under an agreement with the vendee that the receiver should hold possession until the vendee should have satisfied his debts to the receiver, arising from dealings between them not concerning the land, in which case it was agreed that no receivership fees should be charged, it was held that, the arrangement having been unauthorized, the court would not examine the accounts between the parties, and hence the receiver would be denied compensation. Davis *v.* Atkinson, 75 Ark. 300, 87 S. W. 432.

14. Polk *v.* Johnson, 160 Ind. 292, 66 N. E. 752, 98 Am. St. Rep. 274 [*affirming* 35 Ind. App. 478, 65 N. E. 536]; Steel *v.* Holladay, 19 Oreg. 517, 25 Pac. 77.

15. Ephraim *v.* Pacific Bank, 136 Cal. 646, 69 Pac. 436.

16. Harris *v.* Sleep, [1897] 2 Ch. 80, 66 L. J. Ch. 596, 76 L. T. Rep. N. S. 670, 45 Wkly. Rep. 680.

17. Thompson *v.* Willamette, etc., Mfg. Co., 15 Oreg. 604, 16 Pac. 647.

18. Farmers' L. & T. Co. *v.* Central R. Co., 8 Fed. 60, 2 McCrary 318.

receiver additional sums for extraordinary services, or unforeseen labor.[19] Thus in case the duties of a receiver prove to be more arduous than he or the court expected,[20] or in case extra duties are required of him,[21] as the giving of a bond,[22] or the institution of legal proceedings,[23] he is entitled to extra compensation in addition to that to which he would otherwise be entitled.

b. Time of Making Allowance. The proper time for the final allowance of compensation to a receiver for his services is at the close of the receivership; and until that time full compensation will not be made.[24] Nevertheless it is not improper to allow the receiver compensation from time to time during the continuance of his functions,[25] reserving the question of a further final allowance until the conclusion of the case, when the amount of such final compensation is usually fixed by the court after notice given.[26] But partial or intermediate allowances of compensation to the receiver should be materially less than the worth of the services rendered by the receiver prior to the making of such allowances; and the final allowance, made at the close of the receivership, should be so adjusted that the receiver will have just and fair compensation for his services as a whole, notwithstanding the inadequacy of the partial or intermediate allowances considered by themselves.[27]

c. Amount and Determination Thereof — (i) *Discretion of Court* — (a) *In General.* In the absence of statute or fixed rule of practice the amount of a receiver's compensation is within the sound discretion of the court[28] from

19. Henry *v.* Henry, 103 Ala. 582, 15 So. 916; State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651; Thompson *v.* Willamette, etc., Mfg. Co., 15 Oreg. 604, 16 Pac. 647. See also Reeves *v.* Hastings, 61 Minn. 254, 63 N. W. 633.

20. Farmers' L. & T. Co. *v.* Central R. Co., 8 Fed. 60, 2 McCrary 318.

Distribution of fund surcharged.— Where, after distribution by a receiver of the amount admitted to be in his hands, his accounts are surcharged on appeal, he may be allowed additional compensation and counsel fees for services in the distribution of such fund. Schwartz *v.* Keystone Oil Co., 164 Pa. St. 415, 30 Atl. 297.

21. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Farmers' L. & T. Co. *v.* Central R. Co., 8 Fed. 60, 2 McCrary 318.

22. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

23. *In re* Angell, 131 Mich. 345, 91 N. W. 611.

24. Meissler *v.* Meissler, 94 Ill. App. 396 (holding that the fixing of a receiver's compensation in the same order by which his appointment is made, in advance of the performance of any services by him, is erroneous); Maxwell *v.* Wilmington Dental Mfg. Co., 82 Fed. 214.

Performance of some service necessary.— The compensation of a receiver for services as such cannot be fixed until he has performed some services. Consequently the amount of compensation is not, in general, fixed until the passing of the receiver's first account. Meissler *v.* Meissler, 94 Ill. App. 396.

Allowance at subsequent term.—After judgment has been entered, the court may on motion for that purpose, even at a subsequent term, make an allowance to the receiver for his services as such. Morse *v.* Hannibal, etc., R. Co., 72 Mo. 585.

25. Battery Park Bank *v.* Western Carolina Bank, 126 N. C. 531, 36 S. E. 39; Special Bank Com'rs *v.* Franklin Sav. Inst., 11 R. I. 557, 559, where it is said: "The duties are sometimes very onerous and may be protracted for years. They may interrupt, either wholly or in part, other avocations from which an income is derived. It would be unreasonable to expect the receiver to wait until the end of his service before receiving any compensation."

26. Merchants' Bank *v.* Crysler, 67 Fed. 388, 14 C. C. A. 444.

Where there are obstacles in the way of a final accounting, it is not error for the court to make an order allowing the receiver commissions, subject to inquiry on his final accounting, without requiring an account preliminary to the granting of such order. People *v.* Anglo-American Sav., etc., Assoc., 107 N. Y. App. Div. 270, 94 N. Y. Suppl. 1113.

27. Maxwell *v.* Wilmington Dental Mfg. Co., 82 Fed. 214.

28. *District of Columbia.*— Cake *v.* Woodbury, 3 App. Cas. 60.

Minnesota.— State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

Mississippi.— Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

South Carolina.— Mann *v.* Poole, 48 S. C. 154, 26 S. E. 229.

Tennessee.— Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

Washington.— Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

Wisconsin.— Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

which he derives his appointment,[29] under the circumstances of the particular case,[30] and is not to be determined by the result of bidding, even by persons every way competent to discharge the duties of the office.[31] But while the matter is left to the discretion of the court, it is discretionary only in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation.[32] The allowance must not be of such a character as

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

See 42 Cent. Dig. tit. "Receivers," § 392.

Agreement as to compensation.—An agreement between the receiver and a party, who is also the purchaser at a sale of the receiver, under which the purchaser is rendered liable for the receiver's compensation at a stated amount or an amount to be thereafter determined, is contrary to public policy and void, unless the agreement is made with the authority of the court or is thereafter approved by it. Hall *v.* Stulb, 126 Ga. 521, 55 S. E. 172.

29. *Alabama.*— Magee *v.* Cowperthwaite, 10 Ala. 966.

Arkansas.— State *v.* Gibson, 21 Ark. 140.

Georgia.— Hall *v.* Stulb, 126 Ga. 521, 55 S. E. 172.

Illinois.— Culver *v.* H. R. Allen Sr. Medical, etc., Assoc., 206 Ill. 40, 69 N. E. 53 [*affirming* 108 Ill. App. 394]; Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271.

Kentucky.— Spears *v.* Thomas, 70 S. W. 1060, 24 Ky. L. Rep. 1154.

New York.— Gardiner *v.* Tyler, 2 Abb. Dec. 247, 3 Keyes 505, 3 Transcr. App. 161, 4 Abb. Pr. N. S. 463; Baldwin *v.* Eazler, 34 N. Y. Super. Ct. 274.

North Dakota.— Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013.

Washington.— Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

Wisconsin.— Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568; Wilkinson *v.* Washington Trust Co., 102 Fed. 28, 42 C. C. A. 140.

See 42 Cent. Dig. tit. "Receivers," § 392.

Such is the established rule of the court of chancery in England, where the amount of compensation allowed to a receiver is often left to the master to fix with reference to the trouble and labor of the case. Day *v.* Croft, 2 Beav. 488, 4 Jur. 429, 9 L. J. Ch. 287, 17 Eng. Ch. 488, 48 Eng. Reprint 1271; Potts *v.* Leighton, 15 Ves. Jr. 273, 33 Eng. Reprint 758.

Compensation on appeal.—A receiver appointed by the trial court under Civ. Pr. Act, § 146 (Comp. Laws, § 3241), is an officer of that court, and accountable to it, and any compensation to be allowed him as costs on appeal must be allowed by the trial court, and not by the supreme court. McKenzie *v.* Coslett, 28 Nev. 220, 80 Pac. 1070.

Receiver appointed in ancillary suit.— When an issue of receiver's certificates has been authorized by the court in which a suit ancillary to the principal suit, in which the receiver was appointed is pending, the court of primary jurisdiction will remit to such court the matter of ordering the final payment of the certificates, and determining what sums are due on them, together with the compensation of the receiver. Doe *v.* Northwestern Coal, etc., Co., 78 Fed. 62.

30. *Illinois.*— Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271.

Kentucky.— Spears *v.* Thomas, 80 S. W. 1060, 24 Ky. L. Rep. 1154.

Mississippi.— Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

New York.— Gardiner *v.* Tyler, 2 Abb. Dec. 247, 3 Keyes 505, 3 Transcr. App. 161, 4 Abb. Pr. N. S. 463.

Tennessee.— Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516.

Washington.— Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90.

Wisconsin.— Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

Wyoming.— Kilpatrick *v.* Horton, 15 Wyo. 501, 89 Pac. 1035.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

31. Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272; Cowdrey *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

32. *Massachusetts.*— Jones *v.* Keen, 115 Mass. 170; Grant *v.* Bryant, 101 Mass. 567.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Forrester *v.* Boston, etc., Silver Min. Co., 30 Mont. 181, 76 Pac. 2.

Ohio.— Hamburger *v.* Durasmont, 4 Ohio Dec. (Reprint) 232, 3 Ohio N. P. 222.

Wisconsin.— Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

United States.— Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 187.

Amounts held reasonable.— See Henry *v.* Henry, 103 Ala. 582, 15 So. 916; Culver *v.* Allen Medical, etc., Assoc., 206 Ill. 40, 69 N. E. 53; Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271; Stearns Paint Mfg. Co. *v.* Comstock, 121 Iowa 430, 96 N. W. 869; Fidelity Nat. Bank *v.* Youtsey, 81 S. W. 263, 26 Ky. L. Rep. 340; Spears *v.* Thomas,

that it would in effect amount to a confiscation of the property of the parties to the suit.[33]

(B) *Considerations Controlling.* The considerations that should be controlling with the court in fixing compensation are the nature of the matters administered,[34] the amount involved,[35] the complications attending it,[36] the amount of bond required,[37] the time spent,[38] the labor and skill needed or expended,[39] the degree of success attained under all circumstances,[40] the fidelity to details,[41] the appreciation evidenced as to the responsibilities of the position,[42] the character of such responsibilities,[43] the expedition with which the trust has been administered in view of results reached,[44] and the method, character, and promptness of the accounting,[45] having regard, as a standard, to what is paid for somewhat similar services in the performance of official duties,[46] not the standard in private business transactions.[47] The amount of a receiver's compensation does not

70 S. W. 1060, 24 Ky. L. Rep. 1154; Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272; Greeley *v.* Provident Sav. Bank, 108 Mo. 212, 15 S. W. 429; Lembeck *v.* Jarvis Terminal Cold Storage Co., 68 N. J. Eq. 352, 59 Atl. 565; Woolsey *v.* Cummings Car Works, 33 N. J. Eq. 432; Baldwin *v.* Eazler, 34 N. Y. Super Ct. 274; Portland First Nat. Bank *v.* Oregon Paper Co., 42 Oreg. 398, 71 Pac. 144, 971; Martin *v.* Martin, 14 Oreg. 165, 12 Pac. 234; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Special Bank Com'rs *v.* Cranston Sav. Bank, 12 R. I. 497; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503; Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

33. Forrester *v.* Boston, etc., Silver Min. Co., 30 Mont. 181, 76 Pac. 2.

34. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

35. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

36. *Kentucky.*— Spears *v.* Thomas 70 S. W. 1060, 24 Ky. L. Rep. 1154.

New Jersey.— Silvers *v.* Mechanics', etc., Sav. Fund, etc., Assoc., (Ch. 1903) 56 Atl. 294.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568.

See 42 Cent. Dig. tit. "Receivers," § 392 *et seq.*

37. U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516.

38. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

39. Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

40. *Kentucky.*—Spears *v.* Thomas, 70 S. W. 1060, 24 Ky. L. Rep. 1154; Sherley *v.* Mattingly, 51 S. W. 189, 21 Ky. L. Rep. 289.

Louisiana.— Standard Cotton Seed Oil Co. *v.* Excelsior Refining Co., 108 La. 74, 32 So. 221, holding that in estimating the fees of the receiver, the results in the way of money realized for creditors should be considered, and care taken not too greatly to deplete by charges the small store of funds constituting the common stock.

Montana.— Hickey *v.* Parrot Silver, etc., Co., 32 Mont. 143, 79 Pac. 698, 108 Am. St. Rep. 510.

Utah.— U. S. *v.* Church of Jesus Christ, etc., 6 Utah 72, 21 Pac. 516.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

See 42 Cent. Dig. tit. "Receivers," § 392 *et seq.*

41. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

42. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

43. *Illinois.*— Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271.

Kentucky.— Spears *v.* Thomas, 70 S. W. 1060, 24 Ky. L. Rep. 1154.

Mississippi.— Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

Washington.— Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

Wisconsin.— Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

United States.— Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568; Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

See 42 Cent. Dig. tit. "Receivers," § 392 *et seq.*

44. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

45. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

46. Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

47. Grant *v.* Bryant, 101 Mass. 567; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909. *Compare* Stretch *v.* Gowdey, 3 Tenn. Ch. 565; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

depend upon the special qualifications or standing, of the person appointed,[48] or the demands made upon his time by private business; [49] nor yet upon the estimates that persons who are themselves in receipt of an ample income may put upon his services from the standpoint they occupy.[50] The value of the services rendered should not be considered generally, but only with reference to the trust administered.[51] Where a receiver is a manager as well as a receiver, his duties and responsibilities are largely increased; and the management of a business like that of a railroad is one of the most difficult and responsible duties that a receiver is charged with.[52] In consequence railroad receivers are usually compensated more liberally than other receivers,[53] although extravagance should be avoided.[54] But a railroad receiver, who resides at a distance from the property, and commits its active management to others, is not entitled to the full compensation usually paid to railroad presidents and receivers who are the active executive heads of going railroads, in immediate charge, and who devote all their time to the same.[55] And for services rendered in winding up his receivership after the sale of the railroad, the receiver is not entitled to compensation at the same rate as while operating the road,[56] unless, by order of court, he has been allowed a monthly salary until he shall be discharged.[57]

(II) *HEARING AND EVIDENCE.* An order allowing compensation to a receiver should be made only after notice and a hearing, at which the parties interested have an opportunity of contesting the claim.[58] And although the compensation to be allowed a receiver is within the discretion of the court, it should not act without evidence; [59] the court should require proof of the facts,[60] and if it is in doubt as to what will be a reasonable allowance, it should also take the testimony

48. Grant *v.* Bryant, 101 Mass. 567; Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

49. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

50. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

51. Stearns Paint Mfg. Co. *v.* Comstock, 121 Iowa 430, 96 N. W. 869.

52. Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

53. McArthur *v.* Montclair R. Co., 27 N. J. Eq. 77 (three thousand dollars for two years' service); Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591 (ten thousand dollars for two years' service); Montgomery *v.* Petersburg Sav., etc., Co., 70 Fed. 746, 17 C. C. A. 360 (five thousand dollars for three and one-half years' service); Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 187 (seventy thousand dollars for two and one-half years' service); Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331 (ten thousand dollars per annum).

The peculiar duties, responsibility, and accountability of a railroad receiver may entitle him to a larger amount than the head officer of the road, in the particular case. Cowdrey *v.* Galveston R. Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

The fact that a receiver has a liberal salary as manager and superintendent may be considered on the question of the amount to be allowed him as compensation for services in managing the road. Williams *v.* Morgan, 111 U. S. 684, 4 S. Ct. 638, 28 L. ed. 559.

54. Boston Safe-Deposit, etc., Co. *v.* Chamberlain, 66 Fed. 847, 850, 14 C. C. A. 363, where it is said: "Such services, under some peculiar circumstances, or by agreement of the parties before the court, or upon *ex parte* applications, have often been, in many courts of this country, so extravagantly compensated that we think there has been a tendency to establish a standard of compensation in matters connected with railroad foreclosures which is unreasonably liberal as compared with similar services in any other employment or with respect to any other subject-matter."

55. Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644; Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. 500.

56. Boston Safe-Deposit, etc., Co. *v.* Chamberlain, 66 Fed. 847, 14 C. C. A. 363.

57. Dillingham *v.* Moran, 81 Fed. 759, 26 C. C. A. 596.

58. Joralmon *v.* McPhee, 31 Colo. 40, 76 Pac. 922; Ruggles *v.* Patton, 143 Fed. 312, 74 C. C. A. 450; Merchants' Bank *v.* Crysler, 67 Fed. 388, 14 C. C. A. 444.

An ex parte order fixing the compensation of a receiver may be modified, and the compensation reduced, on the final accounting. *In re* Angell, 131 Mich. 345, 91 N. W. 611.

59. Heffron *v.* Rice, 40 Ill. App. 244.

60. Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

Order of proof.— On an order to show cause why a certain measure of compensation should not be allowed a receiver of an insolvent bank, where a creditor excepts to the allowance, there is no error in requiring the exceptor to introduce his evidence first, the order of proof being in the discretion of the court. Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

of men of experience in such matters.[61] In connection with the evidence on the subject, the court may take into consideration its personal knowledge of the nature, character, and value of the services.[62]

(III) *Commissions and Percentage* — (A) *In General.* A receiver's compensation is sometimes computed by giving a percentage on his receipts and disbursements.[63] In some states the rate of commission is fixed by statute;[64] in others it is regulated by the courts.[65] Five per cent on the amount received and disbursed by a receiver seems to be the customary allowance for his compensation.[66]

(B) *Regulation of Rate* — (1) By Analogy to Cases of Trustees. In several jurisdictions it is held that as a general rule, governing all cases not attended with peculiar circumstances,[67] the commission of a receiver may well be regulated as far as possible by analogy to the rate of compensation allowed executors, guardians, and trustees.[68] But, owing to the different nature of the services performed by receivers, the analogy is not fixed and invariable and the allowance to receivers may be controlled by the circumstances of the case.[69]

(2) By Statute. Frequently the amount of a receiver's commissions is fixed by statute.[70] In some cases the receiver is given a fixed percentage irre-

61. Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20. *Compare* Stretch *v.* Gowdey, 3 Tenn. Ch. 565, holding that the duties of a receiver are ministerial, not professional, and the compensation must be ascertained by proof of facts, not the opinions of witnesses.

62. Culver *v.* H. R. Allen, Sr., Medical, etc., Assoc., 206 Ill. 40, 69 N. E. 53. See also Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

63. Magee *v.* Cowperthwaite, 10 Ala. 966. And see cases cited *infra*, this section.

64. See *infra*, VII, C, 3, c, (III), (B), (2).

65. See *infra*, VII, C, 3, c, (III), (B), (1).

66. Magee *v.* Cowperthwaite, 10 Ala. 966; Stretch *v.* Gowdey, 3 Tenn. Ch. 565.

The New York rule was held to be to allow five per cent on the first one thousand dollars, two and one-half per cent on the next four thousand, and one per cent on all sums above five thousand. Howes *v.* Davis, 4 Abb. Pr. 71.

In Pennsylvania the rule is more flexible. The usual allowance ranges from two to five per cent, while in exceptional cases commissions as high as ten per cent, and possibly even higher than that, have been allowed. Schwartz *v.* Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

In England, formerly, five per cent constituted, under ordinary circumstances, the commissions of a receiver. Day *v.* Croft, 2 Beav. 488, 9 L. J. Ch. 287, 4 Jur. 429, 17 Eng. Ch. 488, 48 Eng. Reprint 1271. This allowance was increased or reduced at the discretion of the master, in cases of unusual difficulty or facility. Day *v.* Croft, *supra*. But this rule is said to be no longer in force. Prior *v.* Bagster, 57 L. T. Rep. N. S. 760.

In Canada it was held that while, as a general rule, a commission of five per cent on receipts is allowed to a receiver appointed by the court, the allowance will be increased where unusual work is required, or diminished where the receipts are large or the trouble in their collection is insignificant. Hall *v.* Slipp, 1 N. Brunsw. Eq. 37.

67. Tome *v.* King, 64 Md. 166, 21 Atl. 279; Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310.

68. Magee *v.* Cowperthwaite, 10 Ala. 966; Tome *v.* King, 64 Md. 166, 21 Atl. 279; Stretch *v.* Gowdy, 3 Tenn. Ch. 565; Tompson *v.* Huron Lumber Co., 5 Wash. 527, 32 Pac. 536. See also Portland First Nat. Bank *v.* Oregon Paper Co., 42 Oreg. 398, 71 Pac. 144, 971.

Where receivers are appointed to take the place of executors, it is an equitable mode of making compensation to them to deal with them as trustees under a will, or as executors having real and personal estate in charge. Holcombe *v.* Holcombe, 13 N. J. Eq. 415.

In cases in which the receiver's duties are confined to the receipt and disbursement of money, the court may wisely refer to the rule and rate of a given percentage in analogous cases, when such percentage is regulated by law, and may properly adopt such rule and rate, if, in its discretion, the same would amount to reasonable compensation. Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

By statute.— Sometimes this method of determining the amount of a receiver's compensation has been declared by statute. Van Buren *v.* Chenango County Mut. Ins. Co., 12 Barb. (N. Y.) 671, where it appears that 2 N. Y. Rev. St. p. 470, § 76, provided that receivers should be entitled to such commissions as the court might allow, not exceeding the sum allowed by law to executors and administrators. See also *infra*, VII, C, 3, c, (III), (B), (2).

69. Abbott *v.* Baltimore, etc., Steam Packet Co., 4 Md. Ch. 310.

70. See the statutes of the several states. And see cases cited *infra*, this section.

In Louisiana, under Act (1898), No. 159, providing for the fixing of the fees of receivers where the receivership is of a going concern, the fees are the same as those of syndics, under Rev. St. § 1818; but where the receivership is not of a going concern they are in the discretion of the court. Barry

spective of the services rendered,[71] while in others his commissions are limited to such a sum, not exceeding a certain per cent as the court may allow.[72] In such cases the court has no power to make different allowances or to allow commissions in excess of the amount fixed,[73] and conversely a receiver is entitled to the statutory rate, although it may appear to be more than a reasonable compensation for the services rendered.[74]

(c) *Basis of Computation* — (1) In General. The amount of a receiver's commissions or receipts and disbursements is to be computed upon the entire fund which passed through his hands,[75] in the performance of his official duties,[76] if they were properly assets in his hands,[77] whatever may be the nature of the

v. American White Lead, etc., Works, 107 La. 236, 31 So. 733.

In South Carolina, the statute of 1821, regulating the fees of receivers, applies to all receivers, whether officers of court or otherwise. Massey *v.* Massey, Cheves Eq. 159.

71. See cases cited *infra*, this note.

N. Y. Laws (1883), c. 378, § 2, provided that receivers should be allowed five per cent on the first one hundred thousand dollars, and half that rate on the excess. This section was held to apply only to receivers of insolvent corporations, and not to the case of a receiver *pendente lite* appointed in a foreclosure action against a corporation. U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316. Prior to this act the commissions of a receiver of an insolvent life insurance company were properly fixed by the court which appointed him, not exceeding, however, five per cent on receipts and disbursements. Atty.-Gen. *v.* Guardian L. Ins. Co., 93 N. Y. 631. And for the existing provision see Wadham Consol. L. (1909) 1449, § 278.

72. See cases cited *infra*, this note.

N. Y. Code Civ. Proc. § 3320, provided that receivers should be entitled to such commissions, not exceeding five per cent on the sum received and disbursed by them, as the court or judge appointing them might allow. See *In re* Orient Mut. Ins. Co., 21 N. Y. Suppl. 237; Brett *v.* Brett, 4 N. Y. St. 704. This section was held to apply to a receiver *pendente lite* in a foreclosure suit against a corporation (U. S. Trust Co. *v.* New York, etc., R. Co., 101 N. Y. 478, 5 N. E. 316), and to a temporary receiver of a corporation in proceedings for voluntary dissolution (Matter of Warren E. Smith Co., 31 N. Y. App. Div. 39, 52 N. Y. Suppl. 877).

73. Fidelity Nat. Bank *v.* Youtsey, 81 S. W. 263, 26 Ky. L. Rep. 340; Matter of Warren E. Smith Co., 31 N. Y. App. Div. 39, 52 N. Y. Suppl. 877; *In re* Orient Mut. Ins. Co., 21 N. Y. Suppl. 237; Matter of Niagara Bank, 6 Paige (N. Y.) 213, holding that a *per diem* compensation for particular services is improperly allowed.

But for other kinds of services which a receiver may render the court may make a reasonable allowance. Spears *v.* Thomas, 70 S. W. 1060, 24 Ky. L. Rep. 1154 (holding that a statute prescribing the allowance to a receiver for certain duties, and the percentage for collection and distribution of money, does not prevent the court from allowing a receiver of a large estate increased compensation, where the services performed were valuable to the estate, and the compensation prescribed would be inadequate); Sherley *v.* Mattingly, 51 S. W. 189, 21 Ky. L. Rep. 289.

74. Price *v.* White, Bailey Eq. (S. C.) 240.

75. Adams *v.* Elwood, 104 N. Y. App. Div. 138, 93 N. Y. Suppl. 327 (holding that a receiver's commissions are computed on the total value of the property acquired by him in endeavoring to discharge his duty in good faith, although that property proved to be more than was in the end actually required to satisfy the judgment recovered); Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125]; Matter of Warren E. Smith Co., 31 N. Y. App. Div. 39, 52 N. Y. Suppl. 877; Kerlin *v.* Ewen, 149 Pa. St. 58, 24 Atl. 127 (holding that a receiver who collects assigned accounts as well as all other claims due the insolvent is entitled to commissions on the entire amount in his hands, including such accounts).

Rate divided between receipts and disbursements.— Under a statute allowing a receiver a certain commission for receiving and disbursing the trust fund, it has been held that he is entitled to one half of the specified rate for receiving and one half for disbursing. Howes *v.* Davis, 4 Abb. Pr. (N. Y.) 71; Matter of Niagara Bank, 6 Paige (N. Y.) 213. But in Battery Park Bank *v.* Western Carolina Bank, 126 N. C. 531, 36 S. E. 39, it is held that under N. C. Code, § 379 (4), allowing receivers commissions "not exceeding 5 per cent. on the amount received and disbursed by them," a receiver may be allowed commissions on both receipts and disbursements to the extent of five per cent on each.

76. White *v.* Allen, 11 S. W. 364, 10 Ky. L. Rep. 1025, holding that a receiver of a distillery is not entitled to compensation for collections and disbursements of government tax on whisky in bond belonging to third persons, which tax, as was customary among distillers and warehousemen, he collected from the owners on withdrawal of the whisky from bond; although customary, such collections are merely for the accommodation of the owners, and no part of the duties of a receiver.

77. Atty.-Gen. *v.* North American L. Ins. Co., 89 N. Y. 94 (holding that upon a sale by a receiver of the securities deposited by an insurance company with the insurance department, to secure registered policies and annuity bonds, the proceeds of the sale be-

property.[78] Moreover commissions must be computed on the aggregate amount of the receipts and disbursements,[79] except where annual rests are directed to be made,[80] or the receiver renders annual accounts.[81] In addition to commissions on the money received and paid out, a receiver has been held entitled to commissions on the value of all the assets taken out of his hands by order of court, and delivered to the parties.[82] But he is not entitled to commissions on moneys which do not come into his possession and over which he exercises no control.[83] Nor is he entitled to commissions on both the property received and upon the money afterward paid to him in lieu thereof.[84]

(2) In Case of Successive Receivers. Although two or more persons may succeed each other in the relation of receiver, they constitute but the continuance of the receiver of the court, and the law contemplates but one commission for the entire service,[85] and a successive receiver will be allowed no commissions on any sums for the benefit and disbursement of which a commission has already been allowed his predecessor;[86] but he will be allowed commissions on all sums on which no commission has been previously charged and allowed.[87] And while the receipt and disbursement of sums may be severally treated for the purposes of commissions to two persons successively occupying the place of receiver, it is said that there is no recognized method by which either of the two acts of service can be severed for that purpose.[88]

come assets in the hands of the receiver, and he is entitled to commissions thereon, but that he is not entitled to commissions upon premiums, notes and loans, since the proceeds thereof are neither actually received nor disbursed by him); People *v.* Mutual Benefit Associates, 39 Hun (N. Y.) 49 (holding that the liabilities of the members of a mutual insurance company resulting from an assessment imposed by a receiver are not assets upon which commissions can be computed and allowed). But see Van Buren *v.* Chenango County Mut. Ins. Co., 12 Barb. (N. Y.) 671, which is not in harmony with the cases last above cited.

The receipt of a sum on a sale and investment to produce income is not such an act of receiving and paying out as entitles a receiver to commissions. Brett *v.* Brett, 4 N. Y. St. 704.

Money advanced by receiver for payment of taxes.—A receiver is not entitled to commissions upon money advanced by him for the payment of taxes on lands sold on foreclosure of mortgages held by the superintendent of insurance, which advances were repaid from the proceeds of the foreclosure, as otherwise he would get a double commission upon the sum. Atty.-Gen. *v.* North American L. Ins. Co., 89 N. Y. 94.

78. Matter of Warren E. Smith Co., 31 N. Y. App. Div. 39, 52 N. Y. Suppl. 877, holding that the commission is not restricted to that part of the fund which is in the form of cash.

79. Matter of Niagara Bank, 6 Paige (N. Y.) 213; Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673, holding that a receiver is not entitled to make rests and begin anew with a full commission every time he makes a deposit in bank.

80. Matter of Niagara Bank, 6 Paige (N. Y.) 213, holding that in cases where the court directs annual rests to be made, for the purpose of charging the receiver with interest upon the annual balances, the commissions are to be computed upon the amount actually received and disbursed or paid over during each year, and in the same way upon the final balance, in such a manner, however, that the whole amount of commissions shall in no case exceed five per cent upon the whole amount which may come to the receiver.

81. Matter of Niagara Bank, 6 Paige (N. Y.) 213, holding that where a receiver renders a periodical account of his trust, he is at liberty to charge commissions upon the receipts and disbursements of the year, not including, however, reinvestments of the principal of the fund received.

82. Bennett *v.* Chapin, 3 Sandf. (N. Y.) 673, book-accounts and things in action.

83. Wathen *v.* England, 102 Ky. 537, 44 S. W. 92, 19 Ky. L. Rep. 160 (holding that the fact that bonds are made payable to a receiver does not entitle him to a commission where he does not in fact receive the money); *In re* Woven Tape Skirt Co., 85 N. Y. 506.

Payment made before receiver appointed.—A receiver appointed in a suit by a judgment creditor to set aside a fraudulent conveyance is entitled to no commissions on a partial payment of the judgment made by one of the debtors after the suit was commenced and before the receiver was appointed. Kittel *v.* Jones, 11 N. Y. St. 541.

84. Adams *v.* Elwood, 123 N. Y. App. Div. 649, 108 N. Y. Suppl. 138.

85. Williamson *v.* Wilson, 1 Bland (Md.) 418; Atty.-Gen. *v.* Continental L. Ins. Co., 32 Hun (N. Y.) 49; Atty.-Gen. *v.* Continental L. Ins. Co., 32 Hun (N. Y.) 223.

86. Williamson *v.* Wilson, 1 Bland (Md.) 418; Atty.-Gen. *v.* Continental L. Ins. Co., 32 Hun (N. Y.) 223.

87. Williamson *v.* Wilson, 1 Bland (Md.) 418.

88. People *v.* Mutual Benefit Associates, 39 Hun (N. Y.) 49.

(iv) *Salary or Lump Sum.* Where the amounts received and disbursed are large, it is sometimes the practice not to allow a percentage, but to fix the compensation in some other manner,[89] as by the allowance of a salary or lump sum.[90]

(v) *The Order.* Whatever compensation may be given, the order making the allowance should be definite, so that it may not be doubtful on what basis or for what services the particular allowance is made.[91]

(vi) *Review.* If an allowance to a receiver is excessive, the remedy is by appeal from the order making the allowance, and not by motion to vacate it.[92] And while the trial court has a large discretionary power to fix the compensation of receivers, the appellate court has power to review the matter, and fix a different compensation, if, in its judgment, the trial court erred in making the allowance,[93] although the court of review will ordinarily defer much to the judgment of the court that made the appointment,[94] and will not disturb its action, unless the decree is manifestly wrong.[95]

Succeeding to the possession of a fund, after it has been collected by a former receiver, is not such a receiving of the fund as to make it chargeable with commissions in favor of the second receiver. Atty.-Gen. *v.* Continental L. Ins. Co., 32 Hun (N. Y.) 223.

Where a receiver resigns to suit his own convenience, his compensation may fairly be measured by moneys actually received by him, although he has rendered services toward the collection of other moneys that will be received by his successor, who will be entitled to claim a commission on their collection. People *v.* Mutual Benefit Associates, 39 Hun (N. Y.) 49.

89. Cowdrey *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

90. Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803; Crumlish *v.* Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90; Cowdrey *v.* Railroad Co., 6 Fed. Cas. No. 3,293, 1 Woods 331.

In receiverships in which the officer is at once receiver and manager of a business, a gross sum may be allowed as specific compensation for services. Lichtenstein *v.* Dial, 68 Miss. 54, 8 So. 272.

But where the amount coming into the hands of a receiver is small, and his duties few, it has been held error to allow him a monthly compensation. Overholt *v.* Old Dominion Mfg. Co., 98 Va. 654, 37 S. E. 307.

91. Tome *v.* King, 64 Md. 166, 21 Atl. 279.

92. Russell *v.* Red Oak First Nat. Bank, 65 Iowa 242, 21 N. W. 585. And see Appeal and Error, 2 Cyc. 612 text and note 75.

An insolvent, for whom a receiver has been appointed, may appeal from an order allowing the receiver compensation in excess of the limit fixed by law in ordinary cases. Reeves *v.* Hastings, 61 Minn. 254, 63 N. W. 633.

93. *Kentucky.*— Spears *v.* Thomas, 70 S. W. 1060, 24 Ky. L. Rep. 1154.

Louisiana.— City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469.

Missouri.— State *v.* Greene County Bank, 69 Mo. App. 536.

Montana.— Forrester *v.* Boston, etc., Consol. Copper, etc., Min. Co., 30 Mont. 181, 76 Pac. 2.

Oregon.— Martin *v.* Martin, 14 Oreg. 165, 12 Pac. 234.

United States.— Drey *v.* Watson, 138 Fed. 792, 71 C. C. A. 158; *In re* Michigan Cent. R. Co., 124 Fed. 727, 59 C. C. A. 643.

See 42 Cent. Dig. tit. "Receivers," § 396.

The decision of the master, on exceptions to his report, allowing compensation to a receiver, is subject to a revision on appeal to the chancellor. Magee *v.* Coperthwaite, 10 Ala. 966.

Where the facts concerning the administration of a receiver are not contained in the record, the appellate division cannot review a refusal to grant him compensation. Slater *v.* Slater, 78 N. Y. App. Div. 449, 80 N. Y. Suppl. 363 [*modified* in 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796].

The fact that the amount of compensation is limited by statute to a certain percentage does not affect this supervisory power over the allowance, although it does not exceed the statutory amount. Battery Park Bank *v.* Western Carolina Bank, 126 N. C. 531, 36 S. E. 39.

94. *District of Columbia.*— Cake *v.* Woodbury, 3 App. Cas. 60.

Illinois.— Culver *v.* H. R. Allen, Sr., Medical, etc., Assoc., 206 Ill. 40, 69 N. E. 53.

Missouri.— Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

Oregon.— Martin *v.* Martin, 14 Oreg. 165, 12 Pac. 234.

United States.— Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447; Stuart *v.* Boulware, 133 U. S. 78, 82, 10 S. Ct. 240, 33 L. ed. 568, where it is said: "Like all questions of costs in courts of equity, allowances of this kind are largely discretionary, and the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have.'"

See 42 Cent. Dig. tit. "Receivers," § 396.

95. *District of Columbia.*— Cake *v.* Woodbury, 3 App. Cas. 60.

Illinois.—Culver *v.* H. R. Allen, Sr., Medical, etc., Assoc., 206 Ill. 40, 69 N. E. 53; Heffron *v.* Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. Rep. 271.

Kentucky.— Sherley *v.* Mattingly, 51 S. W. 189, 21 Ky. L. Rep. 289.

Missouri.— State *v.* People's U. S. Bank,

D. Discharge [96] **— 1. In General.** A discharge is granted when there is no further use for the office of a receiver,[97] as when the reversal of the judgment in the principal case terminates the necessity for a receiver,[98] or the rights of the parties in the property have been finally decided,[99] or the jurisdiction of the court to administer the property is terminated.[1] And ordinarily the receiver will be entitled to his discharge upon discontinuance or final determination of the suit in which he was appointed,[2] upon rendering his accounts and unless the interests of the parties require a continuance of the receivership,[3] or when his appointment has been vacated and no property has come into his hands.[4] Upon surrender of the property under circumstances rendering the owner liable for claims accruing under the receivership,[5] the court has no power to require in the decree discharging the receiver that such claims must be established by intervention within a given time, where that period is not long enough to constitute an equitable bar, since such order is an infringement of the power to fix the limitation of actions which is vested solely in the legislative branch of the government.[6]

197 Mo. 605, 95 S. W. 867; Greeley *v.* Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

North Dakota.— Patterson *v.* Ward, 6 N. D. 609, 72 N. W. 1013.

Oregon.— Portland First Nat. Bank *v.* Oregon Paper Co., 42 Oreg. 398, 71 Pac. 144, 971; Hembree *v.* Dawson, 18 Oreg. 474, 23 Pac. 264.

Virginia.— Karn *v.* Rorer Iron Co., 86 Va. 754, 11 S. E. 431.

Washington.— Chandler *v.* Cushing-Young Shingle Co., 13 Wash. 89, 42 Pac. 548.

West Virginia.— Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

Wisconsin.— Union Nat. Bank *v.* Mills, 103 Wis. 39, 79 N. W. 20.

United States.— Cake *v.* Mohun, 164 U. S. 311, 17 S. Ct. 100, 41 L. ed. 447 (holding that the amount allowed by the trial and appellate courts would not be disturbed as excessive, although, had the question been an original one, the compensation would have been fixed at a much smaller amount); Stuart *v.* Boulware, 133 U. S. 78, 10 S. Ct. 242, 33 L. ed. 568; Braman *v.* Farmers' L. & T. Co., 114 Fed. 18, 51 C. C. A. 644; Wilkinson *v.* Washington Trust Co., 102 Fed. 28, 42 C. C. A. 140.

See 42 Cent. Dig. tit. "Receivers," § 396. And see, generally, Appeal and Error, 3 Cyc. 325 *et seq.*

When the appellate court is in doubt as to whether the court below erred in fixing the compensation of a receiver or his solicitors, such finding will be allowed to stand; otherwise, however, if the amount is clearly too much or not enough. Geyser Min. Co. *v.* Salt Lake Bank, 16 Utah 163, 51 Pac. 151.

96. Form of order see Boyd *v.* Magill, 100 Ill. App. 316, 317; Lombard *v.* Wade, 37 Oreg. 426, 428, 61 Pac. 856; State *v.* Spokane County Super. Ct., 31 Wash. 481, 482, 71 Pac. 1095.

Pending appeal see Appeal and Error, 2 Cyc. 911 note 60, 979 note 55.

Resignation and removal see *supra*, III, L.

Vacating order and removal or discharge distinguished see *supra*, III, I.

97. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17.

The presumption is that the order was proper where the record in the appellate court contains nothing to show the contrary. Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604.

Duty of party to apply.— In Langdon *v.* Vermont, etc., R. Co., 53 Vt. 288, it is held that, where receivers have accomplished the purposes of their appointment, it is the duty of the party on whose application they were appointed to see to their discharge.

98. Ellis *v.* Warshauer, 92 Minn. 444, 100 N. W. 214, where it is said that the receiver should then close his accounts and procure his discharge.

99. Johnson *v.* Stancliff, 113 Ga. 886, 39 S. E. 296, holding that where a building association instituted a summary proceeding to eject defendant from certain premises as an intruder, and subsequently filed an equitable suit against him, praying that a receiver be appointed to take charge of the land pending the litigation, and prior to the final hearing the issue in the ejectment is determined against defendant, it was proper for the court to direct the disposition of the funds in the hands of the receiver and to discharge him.

1. Bloch *v.* Bloch, 42 Misc. (N. Y.) 278, 86 N. Y. Suppl. 1047, holding that where after the appointment of a receiver in a suit to dissolve a partnership the firm is adjudicated bankrupt by the federal bankruptcy court and the receiver of the state court delivers the firm assets to the receiver in bankruptcy, the former may settle his accounts and obtain cancellation of his bond and discharge of himself and sureties.

2. Whiteside *v.* Prendergrast, 2 Barb. Ch. (N. Y.) 471.

3. See *supra*, III, K, 1, 2.

Duty to account generally see *supra*, VII, A, 1.

4. People *v.* Bushwick Chemical Co., 18 N. Y. Suppl. 542 [*affirmed* in 133 N. Y. 694, 31 N. E. 627].

5. See *supra*, IV, I, 2.

6. Texas, etc., R. Co. *v.* Watts, (Tex. 1891) 18 S. W. 312; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Texas Pac. R. Co. *v.* Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60 [*affirmed* in 151 U. S. 81, 14 S. Ct. 250, 38 L. ed. 81]; Kretz *v.* Texas, etc., R.

2. Notice. While a receiver may in some instances be discharged without personal notice to those who might be interested somewhat in the performance of his trust or in the funds in his hands,[7] regularly the interested parties should have notice of an application for the discharge of a receiver,[8] or of the accounting upon which the discharge is sought,[9] if such discharge is to be given any conclusive effect to prevent one claiming to own the property from pursuing his remedy against the receiver,[10] or to prevent a creditor whose claim has been adjudicated with directions for its payment out of funds applicable thereto, from perfecting his final judgment under a reference ascertaining the amount of funds which had been in the receiver's hands and from which payment might be made.[11] But it has been held that the receiver of a corporation may be discharged without notice to the general creditors of the corporation.[12]

3. Before Accounting. The court should not discharge a receiver from his trust except upon an accounting[13] and payment or delivery of the funds or property.[14]

Co., (Tex. App. 1890) 14 S. W. 1067; Texas, etc., R. Co. *v.* Manton, 164 U. S. 636, 17 S. Ct. 216, 41 L. ed. 580 [*affirming* 60 Fed. 979, 9 C. C. A. 300].

7. Woodruff *v.* Jewett, 115 N. Y. 267, 22 N. E. 156.

8. Coburn *v.* Ames, 57 Cal. 201, where, however, the order provided for the discharge of the receiver "from all and singular the duties imposed upon him by the order of this Court, except the accounting for his acts in the receivership aforesaid," and the accounts of the receiver were afterward settled, and it was held that the irregularity in failing to give notice did not require a reversal.

Notice of motion to vacate recognizance should be given by the receiver. Brown *v.* Perry, 1 Ch. Chamb. (U. C.) 253.

9. Hayden *v.* Chicago Title, etc., Co., 55 Ill. App. 241.

Although not required by statute, the court has inherent power to require such notice before discharging its officer. Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277.

10. Miller *v.* Loeb, 64 Barb. (N. Y.) 454, necessity of notice to claimant of property who has given notice of his claim to ownership and is proceeding for leave to sue the receiver, the court holding that leave to sue should be granted notwithstanding a discharge without notice to the claimant.

11. Woodruff *v.* Jewett, 115 N. Y. 267, 22 N. E. 156 [*reversing* 37 Hun 205], where, however, the court refused to determine how far such discharge would operate as a defense to the receiver when he should be called upon to perform the judgment.

12. New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166, 21 N. E. 1036 (discharge after regular accounting, the court holding that if the creditor's rights are prejudiced his remedy is by motion to vacate the discharge); Rockwell *v.* Portland Sav. Bank, 31 Oreg. 431, 50 Pac. 566.

13. Strauss *v.* Casey Mach., etc., Co., 69 N. J. Eq. 19, 60 Atl. 402, holding further that on objections to the report of a receiver of an insolvent corporation he should not be discharged until he disclosed whether there are debts remaining unpaid, whether any more of the assets have been or could have been collected for the payment of debts, and whether he was bound to enforce the stockholders' liability for unpaid stock. *Compare* Coburn *v.* Ames, 57 Cal. 201, *supra*, note 8.

Settlement with successor.—A former receiver, who, in a suit to destitute him, resigns, must settle with his successor, and his bond should not have been canceled until settlement was made. City Item Co-operative Printing Co. *v.* Phœnix Furniture Concern, 108 La. 258, 32 So. 469.

Duty to account generally see *supra*, VII, A, 1.

14. **Redelivery or reconveyance of property** generally see *supra*, IV, I.

Discharge upon condition.— In Lombard *v.* Wade, 37 Oreg. 426, 61 Pac. 856, it was held that where an order was made confirming a receiver's final account and directing him to make certain payments, to take vouchers therefor, and providing that upon filing of such vouchers he be discharged, while it would have been proper for the court to direct the receiver to deliver possession of the property to the parties entitled to it, since no objection was made on account of the omission of such provision, it will not be material after the time to object has passed, and where the receiver makes the payments required, except to one party who refuses to accept her share, and with the acquiescence of all the parties ceases to collect rents from or exercise any control over the premises, the order will operate as a discharge.

Payment to parties or into court.— In Lawson *v.* Ricketts, 11 Beav. 627, 50 Eng. Reprint 959, the rule of practice upon applications to discharge a receiver and vacate his recognizances was held to be that if the order directs payment of the balance into court, the same order may direct the recognizances to be vacated upon payment of such balance into court, payments being shown by the certificate of the accountant-general; but that if the payment is directed to be made to a person or in any other mode than into court, after it is made it is to be proved and a second petition is then necessary for the purpose of obtaining an order to vacate the recognizances upon the proof being given, although

4. Before Payment of Charges — Reservation of Jurisdiction. As a general rule the receiver's compensation and expenses are a charge upon the funds in his hands,[15] but it has been held that the discharge of a receiver need not be deferred until it has been established that there will be sufficient funds to pay all the costs.[16] So where he has no assets in his hands applicable to the payment of his charges, it has been held that it is not error to discharge him upon the application of those at whose instance he was appointed, without imposing as a condition of such discharge the payment by such parties of the receiver's charges,[17] although the court may reserve the matter of the determination of the payment of such charges to a time after the discharge, and by a subsequent order make provision, in a proper case, for payment by such parties.[18] The court has inherent power to place itself in a position upon relinquishing possession to enforce orders with respect to expenses and indebtedness of the receivership,[19] and may make provision for subsequent actions against the receiver for the adjudication of such claims.[20]

E. Effect of and Vacating Settlement and Discharge. The effect of a discharge of a receiver is to terminate his duties and authority,[21] and if there is a surrender of jurisdiction over the trust, without any reservation as to existing claims, the effect is to release not only the receiver, but also the property from further liability.[22] All right upon the part of the court to proceed against him,

on the second occasion the matter need not be mentioned in court, but, the petition being left at the secretary's office together with proper evidence of payment, the order will be made without further attendance.

15. See *supra*, V, B, 1, f; V, C, 1.

16. Batten *v.* Wedgwood Coal, etc., Co., 28 Ch. D. 317, 54 L. J. Ch. 686, 52 L. T. Rep. N. S. 212, 33 Wkly. Rep. 203, *supra*, V, B, 1, f, (II), note 45.

17. Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534, 46 N. W. 77, where all the funds of an insolvent corporation were appropriated without satisfying the receiver's claim for compensation.

On the other hand, it has been held that a party cannot have a receiver appointed and enter upon the discharge of his duties, etc., and incur large disbursements, and then on his own motion have such receiver discharged without making any provision for his disbursements and compensation, and it is not error to refuse to discharge a receiver in such case, although both parties consent thereto. Hoffman *v.* Minot Bank, 4 N. D. 473, 61 N. W. 1031. See also *supra*, V, C, 2.

18. Joslyn *v.* Athens Coach, etc., Co., 43 Minn. 534, 46 N. W. 77.

19. See *supra*, IV, I, 2; IV, H, 12, b; VI, H, 2, b, (II).

Enforcement of receiver's certificates see *supra*, IV, G, 5.

20. Denver, etc., R. Co. *v.* Gunning, 33 Colo. 280, 80 Pac. 727 (action maintainable against receiver of railroad company after discharge, for death of passenger occurring pending the receivership, where the decree of foreclosure provided for payment by the purchaser of liabilities of the receiver and an order was entered that the discharge should not prevent the receiver from defending such actions); Ohio Coal Co. *v.* Whitcomb, 123 Fed. 359, 59 C. C. A. 487 (under reservation of jurisdiction for the purpose of enforcing debts and liabilities incurred by the receiver). But in Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181, it is held that where the court reserves jurisdiction of the case for the purpose of enforcing debts and liabilities incurred by the receiver, suit to enforce unsatisfied claims, whether upon contract or tort against the receiver, which, if established, would constitute liens upon the property, are to be prosecuted against the property as proceedings *in rem*, upon proper notice to the purchaser, and not against the discharged receiver.

Setting aside discharge for purpose of enforcing liability see Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365, *infra*, note 28.

21. Mercantile Trust, etc., Co. *v.* Florence Water Co., 111 Ala. 119, 19 So. 17; Corser *v.* Russell, 20 Abb. N. Cas. (N. Y.) 316.

Judgment in action by receiver not void.— But in a suit by assignees of a judgment recovered by the receiver of a bank on bills and notes in an action which went to judgment after the receiver's discharge, it was held that under a code provision that all actions shall be in the name of the real party in interest, except that actions on bills and notes payable at a definite place, and other commercial instruments, may be in the name of the person having the legal title, the discharge of the receiver did not cause the action to abate, so that the judgment would be void, since it would be presumed, in support of the judgment, that the bills and notes were within the exception of the statute. Hall *v.* Henderson, 126 Ala. 449, 28 So. 531, 85 Am. St. Rep. 53, 61 L. R. A. 621.

22. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028; Davis *v.* Duncan, 19 Fed. 477; Farmers' L. & T. Co. *v.* Iowa Cent. R. Co., 7 Fed. 537, 2 McCrary 181.

Allowance against fund is not a technical lien on the property, and hence the discharge of a receiver and the surrender of jurisdiction over the trust by the court, without any reservation as to existing claims, is a release not only of the receiver, but also of the property,

upon the application of any claimant summarily ceases, and he is no longer subject to its jurisdiction, except such jurisdiction as is acquired in the ordinary methods available to all suitors.[23] So also since the sole liability of a receiver except in cases in which he is personally at fault is official, when his official career ceases by his discharge from his trust no judgment can be rendered against him thereafter; with the termination of his official existence ends his official liability.[24]

from further liability. Johnson *v.* Central Trust Co., 159 Ind. 605, 65 N. E. 1028.

After dissolution of corporation.— But it has been held that the title to the property of an insolvent corporation which passes to the permanent receiver in a proceeding under the statute in which the corporation is dissolved remains in him as to property which he has not taken and distributed, notwithstanding his discharge, and that a creditor of the corporation acquires no equitable lien on such property so as to entitle him to apply it to his individual claim by discovering that the receiver had a right to it. Berliner *v.* Piqua Club Assoc., 32 Misc. (N. Y.) 470, 66 N. Y. Suppl. 791

Reservation of jurisdiction see *supra*, VII, D, 4.

23. Boyd *v.* Magill, 100 Ill. App. 316; New York, etc., Tel. Co. *v.* Jewett, 43 Hun (N. Y.) 565, 6 N. Y. St. 656 [*affirmed* in 115 N. Y. 166, 21 N. E. 1036]; Farmers' L. & T. Co. *v.* Iowa Cent. R. Co., 7 Fed. 537, 2 McCrary 181.

24. *Illinois.*— McNulta *v.* Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. Rep. 362.

Indian Territory.—Ansley *v.* McLoud, 5 Indian Terr. 563, 82 S. W. 908.

Massachusetts.—Archambeau *v.* Platt, 173 Mass. 249, 53 N. E. 816.

Mississippi.— Bond *v.* State, 68 Miss. 648, 9 So. 353.

New York.— Corser *v.* Russell, 20 Abb. N. Cas. 316.

Texas.— Fordyce *v.* DuBose, 87 Tex. 78, 26 S. W. 1050; Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Brown *v.* Gay, 76 Tex. 444, 13 S. W. 472; Ryan *v.* Hays, 62 Tex. 42; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

United States.— Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464 [*affirming* 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305] (holding that a judgment against an ancillary receiver after his discharge is not binding, although the court did not know of his discharge); Gray *v.* Grand Trunk Western R. Co., 156 Fed. 736, 84 C. C. A. 392; Western New York, etc., R. Co. *v.* Penn Refining Co., 137 Fed. 343, 70 C. C. A. 23 [*affirmed* in 208 U. S. 208, 28 S. Ct. 268, 52 L. ed. 456]; Farmers' L. & T. Co. *v.* Central R. Co., 7 Fed. 537, 2 McCrary 181.

See 42 Cent. Dig. tit. "Receivers," § 407.

As against owner after notice of claim.— But it has been held that the mere discharge of a receiver after notice to him of a claim by a third party of ownership of the property and refusal of the court to grant such party leave to sue the receiver will not stand in the way of a reversal of the order and a final direction permitting such suit. Miller *v.* Loeb, 64 Barb. (N. Y.) 454, *supra*, note 10. So in Peacock *v.* Pittsburg Locomotive, etc., Works, 52 Ga. 417, where an order appointing a receiver was vacated "without prejudice to any one, party or claimant," and the receiver surrendered the property for which a possessory warrant had been previously sued out against him, but which by stipulation had been permitted to remain in his hands pending a trial on the merits, it was held that the vacation of the order was no defense to the possessory action. And in Woodruff *v.* Jewett, 115 N. Y. 267, 22 N. E. 156 (*supra*, note 11) [*reversing* 37 Hun 205], a discharge after the adjudication of a claim was held not to prevent a final judgment on the report of a referee ascertaining funds in the hands of a receiver at a particular time applicable to payment of the claims.

Discharge before affirmance of judgment.— Where a judgment in an action against receivers was rendered before they were discharged, and the discharge was granted prior to the affirmance of the judgment in the appellate court, it was held that the judgment was valid. McCarley *v.* McGhee, 108 Fed. 494, as to liability of sureties on the writ of error bond.

Property returned without sale — *In general.*— Where a receiver is discharged pending an action against him and the property restored to the owner under circumstances rendering the owner liable for expenses incurred during the receivership, the action was held not to abate and the owner may be substituted as a party. Brown *v.* Gay, 76 Tex. 444, 13 S. W. 472.

But a judgment against the receiver alone will not bind the company or its property. Texas, etc., R. Co. *v.* Watson, (Tex. Civ. App. 1894) 24 S. W. 952, 13 Tex. Civ. App. 555, 36 S. W. 290.

The subject is regulated by statute sometimes, as in Texas, where it was provided that any person having a claim against a receiver not sued on at the date of the discharge might sue the receiver either alone or jointly with the person or corporation to whom the receiver delivered the property, and that if judgment is rendered against the receiver a judgment shall also be rendered against the person or corporation for the same amount, etc., under which it has been held that where the property of a corporation has been returned to it the receiver is a proper party defendant after his discharge, to be joined with the corporation, on a cause of action accruing before his discharge, and that a judgment against him is authorized. International, etc., R. Co. *v.* Neff, (Tex. Civ. App. 1894) 26 S. W. 784. See also *supra*, IV, I, 2. And see RAILROADS, 33 Cyc. 631, 722. Failure to enter the judgment against the receiver when judgment is ren-

The court may set aside an order approving its receiver's final report [25] and granting his discharge,[26] as for failure to give the interested parties notice,[27] or for the purpose of retaining the receivership pending the liquidation of claims against the receiver,[28] if the application is made in time.[29] In the absence of such action, however, the settlement of the receiver's accounts [30] and his discharge will be conclusive against a collateral consideration of questions which were or might have been determined on the accounting,[31] or against the reacquiring of jurisdiction of the property after it has been effectually surrendered,[32] and will protect the receiver against any further liability to account for funds or property disposed of under the court's order.[33] So plaintiff in the receivership suit has been

dered against the company is not prejudicial error of which the company can complain. Bonner *v.* Blum, (Tex. Civ. App. 1894) 25 S. W. 60. But in cases not coming within the provision of a statute of this kind, permitting a judgment against a receiver after his discharge, although the owner of the property may be liable and may be made the party to the suit already taken against the receiver, it is proper for the court to dismiss the action as to the receiver. Boggs *v.* Brown, 82 Tex. 41, 17 S. W. 830; Brown *v.* Gay, 76 Tex. 444, 13 S. W. 472. And a statute which authorizes a judgment against receivers after their discharge in actions pending at the time does not apply to receivers appointed by the federal courts. Fordyce *v.* DuBose, 87 Tex. 78, 26 S. W. 1050; Brown *v.* Gay, *supra*; Ryan *v.* Hays, 62 Tex. 42; Missouri, etc., R. Co. *v.* McFadden, (Tex. Civ. App. 1895) 32 S. W. 18; Fordyce *v.* Beecher, 2 Tex. Civ. App. 29, 21 S. W. 179.

Abatement of action by removal of receiver see ABATEMENT AND REVIVAL, 1 Cyc. 120, 121.

Personal liability see *supra*, VI, D, 1.

Right against owner upon surrender of property see *supra*, text and note 6. And see *supra*, IV, I, 2.

25. Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277 (holding that if the discretion of the court in this regard has not been abused its action will not be disturbed); Schenck *v.* Ingraham, 5 Hun (N. Y.) 397; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

26. Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277; New York, etc., Tel. Co. *v.* Jewett, 43 Hun (N. Y.) 565, 6 N. Y. St. 656 [*affirmed* in 115 N. Y. 166, 21 N. E. 1036]; Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365.

Form of order see Reardon *v.* White, 38 Tex. Civ. App. 636, 641, 87 S. W. 365.

27. Williams *v.* Des Moines L. & T. Co., 126 Iowa 22, 101 N. W. 277.

28. Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365.

29. Reardon *v.* White, 38 Tex. Civ. App. 636, 87 S. W. 365 (holding that the court has jurisdiction at the following regular term to set aside an order of discharge entered in vacation); Davis *v.* Duncan, 19 Fed. 477 (holding that after entering an order discharging a receiver, and directing him to turn over the property in his hands to defendant corporation, and which order was complied with by the receiver, the court cannot, after the adjournment of the term at which the order was made and entered of record, in any way alter, change, modify, or expand the decree discharging the receiver, and again obtain jurisdiction over the property and funds which it had by its decree ordered the receiver to turn over to the corporation).

30. Lehman *v.* McQuown, 31 Fed. 138.

Receiver bound.— In Louisiana it was held that where receivers presented to the court a final account for homologation and a litigation ensued to which they were parties, they were bound by the judgment entered and could not thereafter file another account claiming credits mistakenly omitted from that litigated. *In re* Sheets Lumber Co., 104 La. 771, 29 So. 328.

Approval without prejudice see *supra*, VII, A, 4, b, note 22.

31. Lehman *v.* McQuown, 31 Fed. 138, on assessment of damages on injunction bond, the court holding that it would not inquire, or permit inquiry, as to the way the receiver managed.

Sums not accounted for — debt of record.— In England it is held that the sum of money due from a receiver, whether ascertained or not, is a debt of record so long as the recognizance exists; and where a receiver, appointed to get in the personal estate of a decedent, died without having passed his final accounts and without having accounted for particular sums received, and thereafter his executors passed his final account without including such sums, a suit to administer the receiver's personal estate for the purpose of recovering such sum was maintained and it was held that the suit was not barred by the statute of limitations in view of the character of the debt as of record on a particular date; and moreover the court was of opinion that the receiver was a trustee of such moneys for the persons entitled thereto and that his position was one in which the account against him could not readily be barred. Seagram *v.* Tuck, 18 Ch. D. 296, 50 L. J. Ch. 572, 14 L. T. Rep. N. S. 800, 29 Wkly. Rep. 784.

32. Bassick Min. Co. *v.* Schoolfield, 15 Colo. 376, 24 Pac. 1049; Davis *v.* Duncan, 19 Fed. 477, *supra*, note 29.

33. New York, etc., Tel. Co. *v.* Jewett, 115 N. Y. 166, 21 N. E. 1036 [*affirming* 43 Hun 565, 6 N. Y. St. 656] (holding that creditors are not entitled to notice of the receiver's discharge and should move to vacate the order if they are injuriously affected thereby); Fer-

denied the right to maintain a separate bill for an accounting by the receiver who was discharged by the final decree upon plaintiff's petition and without objection,[34] and the court has refused to grant relief under a bill to surcharge a receiver's account in the absence of fraud or some ground for imposing liability upon him as a trustee;[35] but it has been held that a creditor of the fund may review the settlement of a receiver's account on the ground that claims paid out of funds under the order of the court are fictitious, etc., by applying to be made a party and to have such order vacated.[36] Jurisdiction to entertain a bill for an accounting against a receiver as trustee by the *cestui que trust* is recognized, however,[37] and an action for fraud has been held to lie against the receiver of a corporation, by persons not parties to the receivership proceedings, for an account of rents and profits received by him from lands fraudulently acquired, after his accounts as receiver have been approved and he has been discharged.[38]

F. Costs.[39] Where in a proper case the receiver is discharged from his trust upon his application,[40] it has been held that costs of the application will be allowed him.[41] So where there is no dispute as to the correctness of a receiver's accounts, as to the amounts received and as to the propriety of his disbursements,[42] and he has been guilty of no misconduct,[43] and his accounts are substantially sus-

guson *v.* Toledo, etc., R. Co., 85 N. Y. App. Div. 352, 83 N. Y. Suppl. 283 [*affirmed* in 183 N. Y. 557, 76 N. E. 1095].

34. Bovaird *v.* Seyfang, 200 Pa. St. 261, 49 Atl. 958, where it was said that in such case, if there is any fraud or mistake in the receiver's management of the business or in procuring his discharge, plaintiff's remedy is by asking to open or strike off the decree in the cause in which the receiver was appointed and discharged.

35. Neel *v.* Carson, 37 S. W. 949, 18 Ky. L. Rep. 691, holding that in the absence of fraud a bill to surcharge the receiver's account with the amount of a note not collected by him, after settlement and confirmation of the account at the beneficiary's request, cannot be maintained, and there being nothing to show laches on the part of the receiver if he were considered as a trustee.

36. Schenck *v.* Ingraham, 5 Hun (N. Y.) 397, where it was said that in such proceedings the court has a broader discretion and greater power for relief than in an independent action depending for its success upon satisfactory proof of fraud. In Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909, the court applied the doctrine of the case last above cited to the extent of holding that in an action in which a receiver is appointed and which is still pending and in which the jurisdiction to vacate the order on the account is still perfect, the order may be vacated on motion and an issue raised in the action covering the matter of the account, and it was held that a receiver collusively appointed and enabled to use his office for the benefit of those who are in an adversary capacity to creditors was not entitled to the usual protection afforded receivers (see *supra*, IV, E, 2, b), and that as such he might be made a defendant in the main action or in an independent action, as the court might order or permit, and his conduct judicially investigated in that way and his liabilities enforced by the instrumentalities afforded thereby.

37. Lafayette Co. *v.* Neely, 21 Fed. 738, where the court doubted the power of the legislature, in providing for the appointment of a receiver of a railroad company by the governor, to confer exclusive power over the account on the executive department, and held that such receiver could not escape an account as trustee in a suit on behalf of the beneficiary of the trust, under the general equity jurisdiction over such matters, by showing that the judgment creditors of the beneficiary would absorb the fund, or that he had reported to the governor and would not be able to respond in the suit, although the court would not require an account in such a case merely because the trustee's statement of account had been too general and he had failed to file vouchers, in the absence of fraud, and merely for the satisfaction of the beneficiary so that he could see in detail what had been done while the property was in charge of the receiver.

38. Pondir *v.* New York, etc., R. Co., 72 Hun (N. Y.) 384, 25 N. Y. Suppl. 560, 31 Abb. N. Cas. 29, where the suit was by a stock-holder of a corporation under allegations that it had been fraudulently stripped of its property by the corporation for which the receiver had been appointed, etc., and under proper allegations it was held that the action would lie against the receiver for an account, although it might appear that his accounts rendered to the court were so stated that its order approving his transactions and discharging him would be a defense, which, however, could not be determined in advance of the accounting.

39. See, generally, *supra*, VI, H, 4.

40. See *supra*, III, L, 3.

41. Richardson *v.* Ward, 6 Madd. 266, 56 Eng. Reprint 1092.

42. Adams *v.* Elwood, 123 N. Y. App. Div. 649, 108 N. Y. Suppl. 138.

43. Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582; McCay *v.* Black, 14 Phila. (Pa.) 635.

tained,[44] he should not be charged with the costs of the accounting. But it has been held otherwise where the necessity of the audit is attributable to the conduct of the receiver,[45] and so as to the costs of an application for an account where the receiver has failed to account regularly.[46]

VIII. FOREIGN AND ANCILLARY RECEIVERS.[47]

A. Extraterritorial Effect of Appointment of Receiver — 1. RULES AS TO RESTRICTED AUTHORITY. While a court appointing a receiver may act directly upon the parties before it with respect to property beyond the territorial limits of its jurisdiction,[48] it cannot give its receiver authority to act in another state without the assistance of the courts thereof.[49] And the rule, broadly stated, may be said to be that a receiver's power is only coextensive with that of the court which gives him his character, and cannot be asserted as a matter of right beyond the territorial jurisdiction of such court.[50] While the rule is very generally recog-

44. Hynes *v.* McDermott, 14 Daly (N. Y.) 104, 3 N. Y. St. 582.

Mere errors as to some items of the report of a receiver, not shown to have been intentional, for dishonest purposes, do not justify the imposition upon him of the costs of a reference ordered to correct the errors. Radford *v.* Folsom, 55 Iowa 276, 7 N. W. 604.

45. Reeves' Appeal, 3 Walk. (Pa.) 199, where the receiver furnished an insufficient account, requiring an investigation upon which the balance due from the receiver was increased.

46. Bertie *v.* Abingdon, 8 Beav. 53, 50 Eng. Reprint 21.

Receiver accounting after order for attachment.—A receiver who accounts under an order for an attachment against him must pay the costs of passing his accounts; and will only be allowed an abated rate of poundage, at the discretion of the master. Trapaud *v.* Comick, 1 Hog. 245.

47. **Receiver of foreign corporation** generally see *supra*, II, C, 6.

48. See *supra*, III, A, 5; IV, D, 5, h, (III).

As against an ancillary receiver, since he can take only the assets of the corporation within the state in which he is appointed and a debt owing to the corporation has its *situs* at the domicile thereof, it is held that a resident of the state of the ancillary receiver is not guilty of contempt by reason of the fact that he instituted attachment suits in foreign states and garnished debtors of the corporation residing there. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324 [*affirming* 50 Ill. App. 547].

A partner may confess judgment in a state other than that in which the receiver of the assets of the partnership was appointed and where the partnership owned property and is not guilty of a contempt of the authority of the court appointing the receiver. O'Callaghan *v.* Fraser, 37 Hun (N. Y.) 483.

As to strangers to the suit in which the receiver is appointed, it is held that they may go into other states where property is situated and there pursue the legal remedies against it. *In re* Maudslay, [1900] 1 Ch. 602, 69 L. J. Ch. 347, 82 L. T. Rep. N. S. 378, 16 T. L. R. 228, 48 Wkly. Rep. 568.

49. Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62; Wilmer *v.* Atlanta, etc., Air-Line R. Co., 30 Fed. Cas. No. 17,775, 2 Woods 409; *In re* Maudslay, [1900] 1 Ch. 602, 69 L. J. Ch. 347, 82 L. T. Rep. N. S. 378, 16 T. L. R. 228, 48 Wkly. Rep. 568.

50. *Arkansas.*— Choctaw Coal, etc., Co. *v.* Williams-Echols Dry Goods Co., 75 Ark. 365, 87 S. W. 632.

California.— Humphreys *v.* Hopkins, 81 Cal. 551, 22 Pac. 892, 15 Am. St. Rep. 76, 6 L. R. A. 792.

Delaware.— Kirwan Mfg. Co. *v.* Truxton, 2 Pennew. 48, 44 Atl. 427; Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

Indiana.— Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62; Gray *v.* Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117.

Iowa.— Parker *v.* Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704. See Ayres *v.* Siebel, 82 Iowa 347, 47 N. W. 989.

Kansas.— Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163.

Maine.— Hunt *v.* Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592.

Maryland.— Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206; Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Bartlett *v.* Wilbur, 53 Md. 485.

Massachusetts.— Amy *v.* Manning, 149 Mass. 487, 21 N. E. 943; Harvey *v.* Varney, 104 Mass. 436.

Missouri.— Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17; Weil *v.* Burr Oak Bank, 76 Mo. App. 34; Waters-Pierce Oil Co. *v.* Bell, 71 Mo. App. 653.

New Jersey.— Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680.

North Carolina.— Kruger *v.* Buffalo Bank of Commerce, 123 N. C. 16, 31 S. E. 270.

Ohio.— Leman *v.* MacLennan, 28 Ohio Cir. Ct. 137 [*affirmed* in 75 Ohio St. 643, 80 N. E. 1129].

nized by the cases hereinafter referred to upon the effect of the appointment of a receiver, they are not harmonious as to the extent of its application. The leading case of Booth *v.* Clark denies all extraterritorial recognition to a chancery receiver, whatever may be his authority under the order or decree of the appointing court, either as of right or by comity,[51] and other cases have so applied the rule,[52] or

Pennsylvania.— Frowert *v.* Blank, 205 Pa. St. 299, 54 Atl. 1000.

Rhode Island.— Hazlett *v.* Woodhead, 28 R. I. 452, 67 Atl. 736.

Tennessee.— Dillingham *v.* Traders' Ins. Co., (1908) 108 S. W. 1148; Commercial Nat. Bank *v.* Motherwell Iron, etc., Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164.

Texas.— Moseby *v.* Burrow, 52 Tex. 396; Malone *v.* Johnson, 45 Tex. Civ. App. 604, 101 S. W. 503; Moreau *v.* Du Bellet, (Civ. App. 1894) 27 S. W. 503.

Utah.— Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

Vermont.—Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

West Virginia.— Grogan *v.* Egbert, 44 W. Va. 75, 28 S. E. 714, 67 Am. St. Rep. 763.

United States.— Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163; Hale *v.* Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380; Booth *v.* Clark, 17 How. 322, 15 L. ed. 164; Lewis *v.* American Naval Stores Co., 119 Fed. 391; Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424; Dillon *v.* Oregon Short Line, etc., R. Co., 66 Fed. 622; Atkins *v.* Wabash, etc., R. Co., 29 Fed. 161.

See 42 Cent. Dig. tit. "Receivers," § 417.

Disposition of property.— As against a receiver of corporate property in the state where it is situated a receiver of the corporation appointed in another state cannot, by any agreement on his part, alter the status of such property. Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

Title to real estate is not affected by the appointment of a receiver of a corporation. City Ins. Co. *v.* Bristol Bank, 68 Ill. 348; Simpkins *v.* Smith, etc., Gold Co., 50 How. Pr. (N. Y.) 56; Kruger *v.* Buffalo Bank of Commerce, 123 N. C. 16, 31 S. E. 270; Schindelholz *v.* Cullum, 55 Fed. 885, 5 C. C. A. 293. And a foreign receiver whose office or power is statutory, and to whom no voluntary conveyance has been made, cannot effectively convey real estate in another state. Smith *v.* Berz, 125 Ill. App. 122.

Receiver cannot transfer jurisdiction to another court see *supra*, IV, F, 6, e, (II), (A), note 40.

51. Booth *v.* Clark, 17 How. (U. S.) 322, 334, 15 L. ed. 164, where it is said: "Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor. So far as we can find, it has not been allowed in an English tribunal; orders have been given in the English chancery for receivers to proceed to execute their functions in another jurisdiction, but we are not aware of its ever having been permitted by the tribunals of the last. We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit." It was further said that the fact that the statute provides for the appointment does not change the rule.

52. Amy *v.* Manning, 149 Mass. 487, 21 N. E. 943; Harvey *v.* Varney, 104 Mass. 436 (which cases, upon refusing to appoint a receiver, assign as one reason that he would have no power to act to collect debts elsewhere); Leman *v.* MacLennan, 28 Ohio Cir. Ct. 137 [*affirmed* in 75 Ohio St. 643, 80 N. E. 1129] (denying any authority to a receiver of a foreign corporation to sue for assets in Ohio when he does not have title, and indicating that Merchants' Nat. Bank *v.* McLeod, 38 Ohio St. 174, *infra*, note 57, should be confined to its particular facts); Parkinson *v.* Ohio Nat. Bank, 5 Ohio Dec. (Reprint) 317, 4 Am. L. Rec. 401; Dillingham *v.* Traders' Ins. Co., (Tenn. 1908) 108 S. W. 1148; Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163 (receiver cannot sue unless vested with title either by statute or conveyance); Hale *v.* Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380; Edwards *v.* National Window Glass Jobbers' Assoc., 139 Fed. 795 (as to the receiver, in which case, however, see (N. J. Sup. 1908) 68 Atl. 800, *infra*, note 57).

Rule applied to action against stock-holder. — King *v.* Cochran, 72 Vt. 107, 47 Atl. 394; Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779; Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163; Hale *v.* Allinson, 188 U. S. 56, 23 St. Ct. 244, 47 L. ed. 380; Covell *v.* Fowler, 144 Fed. 535; Hilliker *v.* Hale, 117 Fed. 220, 54 C. C. A. 252 [*reversing* 109 Fed. 273].

Rule applied to suit against officer of corporation for misfeasance and negligence see Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779; Great Western Min., etc., Co. *v.* Harris, 128 Fed. 321, 63 C. C. A. 51 [*affirmed* in 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163].

A receiver of a federal court in one district is denied official status in another district. Morrill *v.* American Reserve Bond Co., 151 Fed. 305; Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276; Brigham *v.* Luddington, 4 Fed. Cas. No. 1,874, 12 Blatchf. 237. But see Horn *v.* Pere Marquette R. Co., 151 Fed. 626.

That there are no creditors in the jurisdiction where the receiver of the insolvent corporation attempts to sue is held to be immaterial. Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276.

Other cases in the federal courts have recognized the rule of comity as applied to receivers. Lewis *v.* Clark, 129 Fed. 570, 64 C. C. A. 138; Lewis *v.* American Naval Stores Co., 119 Fed. 391 (where it is said

recognized its correctness.[53] And if, under the statute of the domicile of a corporation, an action to recover the statutory liability of stock-holders to creditors cannot be brought by the receiver of the corporation in the courts of that jurisdiction, he will have no power to prosecute such action in the courts of another jurisdiction,[54] as where, according to the law of the state of incorporation, the statutory liability of stock-holders is to the creditors directly, although contractual, it cannot be enforced by the receiver.[55] On the other hand, a receiver has legal capacity to sue when under the law of the state of his appointment he acquires title to assets or is an assignee or is the successor of a corporation who is empowered by statute to take charge of its assets.[56] And in many cases foreign receivers are

that this tendency is so pronounced, and so well sustained by authority, that it is probable that the doctrine ultimately to be established will give to receivers the same right of action in all the states of the Union with which they are invested in the jurisdiction in which they are appointed); Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424; Rogers *v.* Riley, 80 Fed. 759; Chandler *v.* The Willamette Valley, 76 Fed. 838, 853; Taylor *v.* Life Assoc. of America, 13 Fed. 493; Olney *v.* Tanner, 10 Fed. 101.

53. *Delaware.*— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

Iowa.— Wyman *v.* Eaton, 107 Iowa 214, 77 N. W. 865, 70 Am. St. Rep. 193, 43 L. R. A. 695; Parker *v.* Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704; Ayres *v.* Siebel, 82 Iowa 347, 47 N. W. 989, as to a trustee of a foreign corporation. But that a receiver may be permitted to appear as a matter of comity is also recognized. Hedrick *v.* McElroy, (1898) 76 N. W. 716; Ottumwa State Bank *v.* McElroy, 106 Iowa 258, 76 N. W. 715.

Missouri.— Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17, denying right to sue by receiver of corporation on note to corporation, there being no assignment of the note to the receiver.

Texas.— Moseby *v.* Burrow, 52 Tex. 396; Moreau *v.* Du Bellet, (Civ. App. 1894) 27 S. W. 503, liquidator appointed for corporation in foreign country treated as receiver.

Wisconsin.— Filkins *v.* Nunnemacher, 81 Wis. 91, 51 N. W. 79.

United States.— Hazard *v.* Durant, 19 Fed. 471.

See 42 Cent. Dig. tit. "Receivers," § 417.

54. Hale *v.* Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 106 Fed. 258, 45 C. C. A. 270]; Evans *v.* Nellis, 187 U. S. 271, 23 S. Ct. 74, 47 L. ed. 173.

55. Hancock Nat. Bank *v.* Mills, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396, under a Kansas statute.

56. *Louisiana.*— Planters' Bank *v.* Bass, 2 La. Ann. 430, receiver of dissolved corporation.

New Jersey.— New York Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155; Bidlack *v.* Mason, 26 N. J. Eq. 230, aid extended to receiver of foreign corporation seeking to obtain possession of property in New Jersey.

New York.— Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187] (as to a receiver under a foreign statute providing for the appointment when the corporation is insolvent, "with power, under the control of the court to bring and defend actions," etc., who is held to be a quasi-assignee); Barclay *v.* Quicksilver Min. Co., 6 Lans. 25 (sequestrator who was alleged to have title, and who was held to represent creditors of the corporation who might have brought the suit, and therefore the receiver could bring it as assignee).

Vermont.— King *v.* Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922 (sustaining, on demurrer, a declaration alleging legal title); Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Wisconsin.— Gilman *v.* Ketcham, 84 Wis. 60, 54 N. W. 395, 36 Am. St. Rep. 899, 23 L. R. A. 52.

See 42 Cent. Dig. tit. "Receivers," § 417.

A statutory assignee to wind up a corporation is recognized beyond the territorial limits of the jurisdiction of the appointing court. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846 (intervention by receiver to get assets); Baldwin *v.* Hosmer, 101 Mich. 432, 59 N. W. 669; Avery *v.* Boston Safe-Deposit, etc., Co., 72 Fed. 700; American Nat. Bank *v.* National Ben., etc., Co., 70 Fed. 420 (which involved the question of the right of the receiver to appear after being made a party to the pending suit and apply for its removal to a federal court, but which did not deal with the question of conflicting claims between such receiver and domestic creditors); Parsons *v.* Charter Oak L. Ins. Co., 31 Fed. 305 (upon the authority of Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337, which recognized a similar rule with respect to the title of a state officer whose functions under the statute were to wind up insurance companies, and this case was followed in Bockover *v.* Life Assoc. of America, 77 Va. 85, involving the title of the same officer, and in which it was held that debts due the company in Virginia could not be attached by policy-holders in that state as against the rights of such officer). See also Parker *v.* Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881. But see Bank *v.* Motherwell Iron, etc., Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164, where it was said that the receiver of a dissolved corporation could not sue in Tennessee. The rule affording protection to domestic creditors as against a foreign re-

permitted to sue and assert their rights under their appointments, as a matter of comity, when they have authority to sue in the domiciliary state and appar-

ceiver is sometimes stated with the apparent qualification that the receivership is one of a corporation which has not been dissolved. See Providence City Ins. Co. *v.* Bristol Commercial Bank, 68 Ill. 348 (which case involved, however, only the question of the right of property on the part of a foreign receiver interpleading in an attachment suit, under the statute in Illinois); Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Zacher *v.* Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 1032. In other cases the rule protecting domestic creditors has been applied as against claims of a foreign receiver of a corporation in dissolution proceedings. Hunt *v.* Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592 (where the court considered, however, that the dissolution of the corporation under the New York statutes did not work an entire destruction of the corporation and that it continued to exist for certain purposes); Kruger *v.* Buffalo Bank of Commerce, 123 N. C. 16, 31 S. E. 270. See also *infra*, note 68.

Action against stock-holders.—A receiver upon whom, as a quasi-assignee and representative of the creditors, is conferred by the statute of the state of his appointment the authority to maintain an action to enforce the liability of stock-holders, may sue in a foreign jurisdiction. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; King *v.* Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922; Swing *v.* White River Lumber Co., 91 Wis. 517, 65 N. W. 174 (holding that where the rights of officers do not rest merely upon his appointment by the court of another state, but there has been an assignment to him, in his official capacity, of the property in question, or by virtue of the statute of such state the title to the property is vested in him, he may sue and recover the same, not by virtue of his appointment, but by reason of his title); Parker *v.* Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881; Bernheimer *v.* Converse, 206 U. S. 516, 27 S. Ct. 755, 57 L. ed. 1163; Hale *v.* Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. ed. 380 [*affirming* 106 Fed. 258, 45 C. C. A. 270]; Goss *v.* Carter, 156 Fed. 746, 84 C. C. A. 402 (holding that under Nebr. Const. art. 11*b*, § 7, which provides that every stock-holder in a banking corporation shall be individually liable to its creditors over and above the amount of his stock to an amount equal to his stock, which, as construed by the supreme court of the state, is self-executing and enforceable only after the assets of the corporation have been exhausted by means of a suit in equity in behalf of all creditors against the corporation and its stock-holders, in which all equities shall be adjusted, the total liabilities of the corporation ascertained, and a receiver or trustee appointed to collect from each stock-holder his *pro rata* share of such liabilities, the amount due from the stock-holders when so ascertained constitutes a trust fund, the legal title to which is vested in the receiver or trustee appointed, and he may maintain an action to recover the amount due from a stock-holder in a foreign jurisdiction). See Hale *v.* Coffin, 114 Fed. 567 [*affirmed* in 120 Fed. 470, 57 C. C. A. 52]. The receiver's action is held to be founded not on the right of a foreign receiver to sue upon demands in favor of the party he may represent, but on the right of a substituted promisee to sue a promisor whose contract provided for such substitution and upon the collateral obligation assumed upon subscribing to the stock, and the subscribers are held to have agreed that upon the corporation becoming insolvent a receiver might be appointed and the amount of their liability determined. Fish *v.* Smith, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161; Converse *v.* Ayer, 197 Mass. 443, 84 N. E. 98; Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301 (holding that under a statute imposing a double liability on the stock-holders of banking corporations, but left the method of enforcing it to the courts, who decided that it could only be enforced by a duly appointed receiver after he had applied all other available assets, subscribers must be assumed to have understood the statute as construed, and to have agreed that on insolvency of the corporation a receiver might be appointed, and the amount of liability determined, and they are bound by such proceedings; and it is immaterial that they were absent or non-resident); Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187]; Goss *v.* Carter, 156 Fed. 746, 84 C. C. A. 402.

Preliminary action against stock-holders.—Where the statute making the superadded liability of stock-holders a corporate asset in case of the insolvency of the corporation, to be collected by the receiver in an action against the stock-holders brought for the purpose of fixing the sum required for the payment of corporate debts, an action against stock-holders cannot be maintained in the absence of the preliminary action thus required. Evans *v.* Nellis, 187 U. S. 271, 23 S. Ct. 74, 47 L. ed. 173, under the statute of Kansas. But where a stock-holder is omitted from the original action under the statute in which the receiver was appointed, because the court could not acquire jurisdiction of him, or for any other cause, it is held that the liability may be subsequently enforced by bringing him or his property into the original proceeding if found within the jurisdiction of the court, or by proceeding against him in an ancillary action in another jurisdiction if the comity of the sister state would permit it. Hanson *v.* Davison, 73 Minn. 454, 76 N. W. 254. Later, in Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714, such a receiver, under the Minnesota statute, was

ently without adhering to the strict rule denying extraterritorial recognition to receivers as such.[57] The recognition of receivers is by comity only, however, and is not extended to the detriment of citizens or the prejudice of resident creditors.[58]

permitted to maintain an action against a resident of Maine to recover the statutory liability, and it was said that in such a case it is immaterial whether the receiver succeeded to the rights of either the corporation or the creditors. And so in Hale *v.* Hardon, 95 Fed. 747, 37 C. C. A. 240, the action was held to be maintainable upon the ground that the receiver was entitled to maintain it in Minnesota.

57. *Alabama.*— Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601.

District of Columbia.— Barley *v.* Gittings, 15 App. Cas. 427.

Indiana.— Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62; Metzner *v.* Bauer, 98 Ind. 425.

Kansas.— Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163.

Kentucky.— Johnston *v.* Rogers, 43 S. W. 234, 19 Ky. L. Rep. 1272. See also Rogers *v.* Raines, 100 Ky. 295, 38 S. W. 483, 18 Ky. L. Rep. 768; Hallam *v.* Ashford, 70 S. W. 197, 24 Ky. L. Rep. 870.

Louisiana.— Lichtenstein *v.* Gillett, 37 La. Ann. 522, where the rule of comity is merely recognized.

Maryland.— Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367 [*distinguishing* Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608, and Bartlett *v.* Wilbur, 53 Md. 485, *supra*, note 50, in that the exercise of the jurisdiction of the courts of Maryland had been previously invoked in regard to the same subject-matter].

Minnesota.— Comstock *v.* Frederickson, 51 Minn. 350, 53 N. W. 713.

Missouri.— Weil *v.* Burr Oak Bank, 76 Mo. App. 34.

New Jersey.—Edwards *v.* National Window Glass Jobbers' Assoc., (Sup. 1908) 68 Atl. 800 (as to the receiver, in which case, however, see 139 Fed. 795, *supra*, note 52); Hurd *v.* Elizabeth, 41 N. J. L. 1; Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234.

New York.— Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805; Runk *v.* St. John, 29 Barb. 585 (referring to receivers generally, the case involving a receiver of a dissolved corporation); Hammond *v.* National L. Assoc., 31 Misc. 182, 65 N. Y. Suppl. 407 [*affirmed* in 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585] (dissolved corporation); Dyer *v.* Power, 14 N. Y. Suppl. 873; Pugh *v.* Hurtt, 52 How. Pr. 22.

Ohio.— Merchants' Nat. Bank *v.* McLeod, 38 Ohio St. 174 (receiver in suit by trustees in mortgage of railroad company to enforce their rights considered as clothed with the rights of the trustees and the removal of cars into Ohio pending an application for a receiver was held not to divest the mortgagees of any right to possession but this decision was limited to the peculiar facts in Leman *v.* Maclennon, 28 Ohio Cir. Ct. 137 [*affirmed* in 75 Ohio St. 643, 80 N. E. 1129]); Manhattan Co. *v.* Maryland Steel Co., 1 Ohio S. & C. Pl. Dec. 286, 31 Cinc. L. Bul. 100 (where the rule of comity is merely recognized).

Pennsylvania.—See Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291; Filley *v.* Ithaca Organ, etc., Co., 3 Kulp 396.

West Virginia.— Swing *v.* Parkersburg Veneer, etc., Co., 45 W. Va. 288, 31 S. E. 926; Swing *v.* Bentley, etc., Furniture Co., 45 W. Va. 283, 31 S. E. 925; Grogan *v.* Egbert, 44 W. Va. 75, 28 S. E. 714, 67 Am. St. Rep. 763.

See 42 Cent. Dig. tit. "Receivers," § 417.

Suit against stock-holder.— It has been held broadly, without limiting the rule to a receiver having title as quasi-assignee, that a receiver appointed to wind up the affairs of a corporation may, as a matter of interstate comity, sue in another state to recover unpaid balances due on capital stock. Patterson *v.* Lynde, 112 Ill. 196 (which, however, referred to a corporation which had ceased to exist); Childs *v.* Cleaves, 95 Me. 498, 50 Atl. 714; Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367; Tompkins *v.* Blakey, 70 N. H. 584, 49 Atl. 111; Pugh *v.* Hurtt, 52 How. Pr. (N. Y.) 22; Hale *v.* Tyler, 104 Fed. 757 [*following* Hale *v.* Harden, 95 Fed. 747, 37 C. C. A. 240]. And see Wigton *v.* Kenney, 51 N. Y. App. Div. 215, 64 N. Y. Suppl. 924; Cushing *v.* Perot, 175 Pa. St. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737.

58. *Arkansas.*— Choctaw Coal, etc., Co. *v.* Williams-Echols Dry Goods Co., 75 Ark. 365, 87 S. W. 632.

California.— Ward *v.* Pacific Mut. L. Ins. Co., 135 Cal. 235, 67 Pac. 124.

Delaware.—E. F. Kirwan Mfg. Co. *v.* Truxton, (1899) 44 Atl. 427.

Indiana.— Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 388, 8 L. R. A. 62.

New Jersey.— New York Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155; Bidlack *v.* Mason, 26 N. J. Eq. 230.

New York.— Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187]; Hammond *v.* National Life Assoc., 31 Misc. 182, 65 N. Y. Suppl. 407 [*affirmed* in 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585].

North Carolina.— Kruger *v.* Buffalo Bank of Commerce, 123 N. C. 16, 31 S. E. 270.

Ohio.— Manhattan Co. *v.* Maryland Steel Co., 1 Ohio S. & C. Pl. Dec. 286, 31 Cinc. L. Bul. 100.

Pennsylvania.— Frowert *v.* Blank, 205 Pa.

2. Rights as Between Citizens, Creditors, and Receiver — a. In General. In applying the rule limiting the force of the appointment of a receiver to the property within the state, property situated elsewhere will be administered for the benefit of creditors and others interested by the courts of the state where it is found,[59] and the qualification of the broad rule against extraterritorial recognition of receivers [60] is held to protect resident creditors to the same extent,[61] and such

St. 299, 54 Atl. 1000; Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597; Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291.

Vermont.—Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

West Virginia.— Grogan *v.* Egbert, 44 W. Va. 75, 28 S. E. 714, 67 Am. St. Rep. 763.

See 42 Cent. Dig. tit. "Receivers," § 411 *et seq.* See also Railroads, 33 Cyc. 633.

Right by statute.— Sometimes a receiver appointed in one state may sue in another state by express statutory provision of the latter state. Taylor *v.* Life Assoc. of America, 13 Fed. 493, as to Tenn. Act (1879) c. 135, p. 173.

Limiting time to sue.— Wyman *v.* Kimberly-Clark Co., 93 Wis. 554, 67 N. W. 932, holding that as the right of a receiver appointed in another state to sue in Wisconsin rests upon comity, the legislature may prescribe a condition limiting the time within which such receiver must sue.

Land.—A foreign receiver of a corporation has been permitted to foreclose a mortgage on land given to the company where no creditor of the corporation asserts any rights, and ample opportunity has been afforded for that purpose, and only the parties litigant are interested. Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601. And he has been held to be entitled to maintain an action for the recovery of realty in the possession of a resident of the state, where no rights of resident creditors intervene. Small *v.* Smith, 14 S. D. 621, 86 N. W. 649, 86 Am. St. Rep. 808.

Where a corporation could not have sued in the state because of its failure to comply with the law to entitle it to do business there, it was held that a receiver of the corporation would not be permitted to sue a citizen of the state upon a contract made with the corporation in the course of the corporate business. Parker *v.* Lamb, 99 Iowa 265, 68 N. W. 686, 34 L. R. A. 704. See also Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

The receiver can assert only the right which the parties over whose property he is appointed could have asserted. Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221, receiver of dissolved partnership.

The receiver of a national bank appointed by the controller of the currency has been held not to be a foreign receiver and therefore not compelled to appeal to the doctrine of comity to sue in the state courts. Peters *v.* Foster, 10 N. Y. Suppl. 389, 18 N. Y. Civ. Proc. 380 [*affirmed* in 127 N. Y. 635, 27 N. E. 855]; Platt *v.* Crawford, 8 Abb. Pr. N. S. (N. Y.) 297.

Receiver appointed at suit of receiver see *infra*, VIII, B, 2, a, text and notes 19–28.

59. Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

60. See *supra*, text and note 50 *et seq.*

61. *California.*— Humphreys *v.* Hopkins, 81 Cal. 551, 22 Pac. 892, 15 Am. St. Rep. 76, 6 L. R. A. 792.

Indiana.— Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62.

Missouri.— Waters-Pierce Oil Co. *v.* Bell, 71 Mo. App. 653.

New Jersey.— Hurd *v.* Elizabeth, 41 N. J. L. 1.

Pennsylvania.— Frowert *v.* Blank, 205 Pa. St. 299, 54 Atl. 1000.

West Virginia.— Grogan *v.* Egbert, 44 W. Va. 75, 28 S. E. 714, 67 Am. St. Rep. 763.

See 42 Cent. Dig. tit. "Receivers," § 415 *et seq.*

Others of such cases recognize the doctrine, although it does not appear that the situation of the creditors was such as to make the decisions authoritative of any rule that the mere fact of the existence of creditors would of itself require refusal to recognize the receiver. See Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Howarth *v.* Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725 [*affirming* 39 N. Y. App. Div. 151, 57 N. Y. Suppl. 187]; Pugh *v.* Hurtt, 52 How. Pr. (N. Y.) 22; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526, where it was held that a foreign receiver of a corporation to whom all of the corporate property had passed might sue in Vermont to recover corporate assets since no creditor in Vermont intervened to prevent the prosecution of the suit. And it has been expressly held that the detriment to a citizen who has been induced to give credit to a corporation which will induce the court to refuse to extend comity to a foreign receiver does not exist merely because a citizen debtor is sued by the receiver (Pugh *v.* Hurtt, *supra*), and that at most the right of the receiver will not be recognized as against attaching creditors (Runk *v.* St. John, 29 Barb. (N. Y.) 585), or against citizens who have fairly acquired title to the assets, either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens (Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424).

Where the receiver sues solely on behalf of a citizen of the state of the forum, he will not be refused recognition to assert a

foreign receiver is not permitted to take property in opposition to its retention by the courts of the state where it is situated through their own receivers subsequently appointed.[62] The foreign receiver will not be recognized for the purpose of enforcing foreign laws as against citizens who have fairly acquired rights in the property as opposed to such laws,[63] and the courts will not set aside conveyances to or judgments in favor of residents in behalf of foreign receivers in pursuit of such remedy.[64] Creditors in another state may pursue their legal remedies under the laws of such state to subject property there situated notwithstanding the foreign receivership and as against claim of right on the part of the foreign receiver,[65] and comity does not extend to aiding preferences sought to be acquired by statutory assignments or other proceedings *in invitum*, to the detriment of other creditors or citizens whose interests are in the keeping of foreign or independent tribunals.[66] So where the controversy is between a foreign receiver

lien on property there merely upon the ground that a claim of a citizen of the state will be injuriously affected. Falk *v.* Janes, 49 N. J. Eq. 484, 23 Atl. 813 [*reversed* on other grounds in 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783].

62. Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

Conversely the court will not appoint an ancillary receiver as against resident creditors see *infra*, VIII, B, text and note 28.

63. Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25.

64. Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597. See also Hoyt *v.* Thompson, 19 N. Y. 207. Under the rule that a receiver can acquire no title to property out of the state of his appointment, it is held that he will not be allowed to maintain an action to set aside fraudulent conveyances of property. Filkins *v.* Nunnemacher, 81 Wis. 91, 51 N. W. 79. But under the rule of comity, relief of this character has been awarded to receivers where such a course is not in conflict with the rights of resident creditors or in contravention of local public policy. Comstock *v.* Frederickson, 51 Minn. 350, 53 N. W. 713 (suit to set aside a judgment fraudulent as to creditors represented by the receiver, no rights of resident creditors intervening); Sobernheimer *v.* Wheeler, 45 N. J. Eq. 614, 18 Atl. 234; New York Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155; Bidlack *v.* Mason, 26 N. J. Eq. 230 (suit by foreign receiver of corporation to set aside a fraudulent judgment in which aid was extended to him by the appointment of a receiver in New Jersey); Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25 (on the ground that the suit might have been brought by creditors represented by the receiver); Runk *v.* St. John, 29 Barb. (N. Y.) 585 (where the receiver of a corporation which was chartered in Pennsylvania and New Jersey and dissolved in New Jersey was recognized in New York in a suit to set aside a fraudulent conveyance).

65. Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Hunt *v.* Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608; O'Callaghan *v.* Fraser, 37 Hun (N. Y.) 483; Simpkins *v.* Smith, etc., Gold Co., 50 How. Pr. (N. Y.) 56, judgment against corporation in Colorado and levy upon land there notwithstanding appointment of receiver appointed in state of domicile.

66. *California.*— Ward *v.* Pacific Mut. L. Ins. Co., 135 Cal. 235, 67 Pac. 124.

Massachusetts.— Taylor *v.* Columbian Ins. Co., 14 Allen 353.

New York.— Willetts *v.* Waite, 25 N. Y. 577; Hoyt *v.* Thompson, 19 N. Y. 207. But see Thomas *v.* Merchants' Bank, 9 Paige 216, where it was held that after the title of property of a foreign corporation became vested in a receiver for the benefit of creditors, appointed by a court of equity in the state of its domicile, a creditor could not reach by a creditors' bill property situated in New York, both because the attachment is a proceeding *in rem* merely and a creditors' bill could not reach the property of such corporation which had not been actually attached, and because before recovery of judgments or any attempt to execute the attachment all the debts or choses in action of the corporation had been vested in the receiver. Fenton *v.* Lumbermen's Bank, Clarke 286, where property of a foreign corporation was in the hands of trustees appointed under the authority of the legislature of another state to wind up its affairs, and the court refused in the exercise of its discretion to appoint a receiver at the suit of creditors who had attached corporate property in New York, upon the theory that trustees take such property subject to the lien of the attachment and would respect the opinion of the court as to rights of the attaching creditors.

Utah.— Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

United States.— Olney *v.* Tanner, 10 Fed. 101.

Canada.— Osgood *v.* Steele, 16 L. C. Jur. 141, receiver of corporation in New York whose position was assimilated to that of an assignee in bankruptcy, denied the right to intervene in an action in Canada in which moneys of the corporation had been attached.

See 42 Cent. Dig. tit. "Receivers," § 415.

At the suit of bondholders of a corporation whose business is a game of chance, it

and an attaching creditor who resides in the state where the attachment proceedings are instituted, the courts of the latter state will protect its own citizen,[67] and he may institute such proceedings subsequently to and notwithstanding the foreign appointment.[68] While this last rule has been confined to the protection

was held that the courts of Ohio would not render aid to reach funds of the corporation in the possession of local agents by the appointment of a receiver of such funds but would leave them to be sent to the receiver of the corporation in the foreign state, and all attachments which were issued in the case were dissolved. Central Safe Deposit Co. *v.* Jones, 8 Ohio S. & C. Pl. Dec. 582, 36 Cinc. L. Bul. 87.

Domestic receiver in suit by non-resident.— The rule that a foreign receiver will not be allowed to maintain a right of action against the assets of an insolvent debtor as against a creditor resident in the state does not apply to a domestic receiver appointed at the suit of a non-resident. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

67. Ward *v.* Pacific Mut. L. Ins. Co., 135 Cal. 235, 67 Pac. 124; Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

68. *California.*— Clark *v.* Supreme Council C. F., 146 Cal. 598, 80 Pac. 931; Lackmann *v.* Supreme Council C. F., 142 Cal. 22, 75 Pac. 583.

Delaware.— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

Illinois.— Providence City Ins. Co. *v.* Commercial Bank, 68 Ill. 348 (levy on land); Corn Exch. Bank *v.* Rockwell, 58 Ill. App. 506.

Massachusetts.— Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Taylor *v.* Columbian Ins. Co., 14 Allen 353.

Missouri.— Waters-Pierce Oil Co. *v.* Bell, 71 Mo. App. 653.

New York.— Willitts *v.* Waite, 25 N. Y. 577; National Park Bank *v.* Clark, 92 N. Y. App. Div. 262, 87 N. Y. Suppl. 185; Hammond *v.* National Life Assoc., 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585; Dunlop *v.* Paterson F. Ins. Co., 12 Hun 627 [*affirmed* in 74 N. Y. 145, 30 Am. Rep. 283].

North Carolina.— Kruger *v.* Buffalo Bank of Commerce, 123 N. C. 16, 31 S. E. 270.

Ohio.— Wilson *v.* Gifford, 12 Ohio Cir. Ct. 597, 5 Ohio Cir. Dec. 680.

Pennsylvania.— Frowert *v.* Blank, 205 Pa. St. 299, 54 Atl. 1000 (holding that domestic creditors need not have acquired any lien before the appointment of the foreign receiver); Solis *v.* Blank, 199 Pa. St. 600, 49 Atl. 302; Lett *v.* Thurber Whyland Co., 4 Pa. Dist. 239, 15 Pa. Co. Ct. 666.

Tennessee.— Dillingham *v.* Traders' Ins. Co., (1908) 108 S. W. 1148, where the rule of the text is supported upon grounds principally relating to the law as to the *situs* of debts and credits in garnishment, and upon the ground that a foreign receiver cannot maintain suits in Tennessee, holding further that where the attachment was before notice of assignment by the corporation to the receiver in Illinois based upon the ground that the corporation was about to remove its property from Tennessee, it should be sustained over the contention that the removal was made by the corporation.

Utah.— Thum *v.* Pingree, 21 Utah 348, 61 Pac. 18.

United States.— Schindelholz *v.* Cullum, 55 Fed. 885, 5 C. C. A. 293, holding that the court appointing the receiver of land in another jurisdiction cannot enjoin a citizen of such jurisdiction from levying an attachment on such lands, unless he is a party, either in person or by representation, to the litigation in which the receiver was appointed.

See 42 Cent. Dig. tit. "Receivers," § 415. But as to application of theory of *situs* of debts, etc., in garnishment proceedings see GARNISHMENT, 20 Cyc. 1036.

After the receiver has taken possession of the property of an insolvent corporation in another state, the right of a resident creditor to attach it in his hands and to dispossess him has been recognized. Corn Exch. Bank *v.* Rockwell, 58 Ill. App. 586. See also Cole *v.* Oil-Well Supply Co., 57 Fed. 534. But in other cases it appears to be considered otherwise, as in Gray *v.* Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117, where upon a contention that a receiver should prevail as against attaching creditors because he had taken possession of the property, it was held that the burden was on the receiver to show that he had taken possession of the property prior to the commencement of the attachment proceedings; and in Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424, it is said that when a receiver has reduced such property to possession he may stand upon his possessory title and defend his rights as against all others who cannot prove a better title and that it is only when he is compelled to resort to the courts to obtain possession that he must rely upon the principle of comity. This is the rule where possession is taken in the state where the appointment was made. See *infra*, VIII, A, 2, d.

Effect of filing claim in receivership.—A creditor attaching property of a corporation in one state is not estopped to assert his right to it, as against the receiver of the corporation appointed in another state, by reason of filing his claim in the proceedings in the latter state, he not having ceased to assert his right to the attached property. Zacher *v.* Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480.

This rule is not universally and without exception applied in all cases. Thus it is held that the remedy for dissolving and winding up insurance companies is a part of the contract of policy holders and the domiciliary receiver will be entitled to the assets as

of citizens of the state and not extended to citizens of other states, although not citizens of the state where the receiver was appointed,[69] more generally it is extended even to non-residents who are also non-residents of the state where the receiver was appointed,[70] but not to citizens of the state wherein the receiver was appointed.[71]

b. Situs of Property. The *situs* of a debt is held to be the state of the creditor's residence, for the purpose of recognizing the right of the receiver, who takes assets of such creditor within that state, to go into the debtor's state to collect such debt.[72] And under an assignment of such debt by the receiver of an insolvent corporation, who is empowered to sell, assign, etc., all of its effects, it may be recovered against the debtor in the state of his residence.[73] So where property of a resident of a state foreign to that of the receivership is garnished in another state, the title of a receiver, based upon such proceedings, will be recognized in the state of the debtor's residence.[74]

against policy-holders in other states. Parsons *v.* Charter Oak L. Ins. Co., 31 Fed. 305; Fry *v.* Charter Oak L. Ins. Co., 31 Fed. 197 (which cases involved mutual companies and the rights of members); Rundel *v.* Life Assoc. of America, 10 Fed. 720, 4 Woods 94. See also Bockover *v.* Life Assoc. of America, 77 Va. 85. And members of mutual benefit associations in other states cannot by superior diligence acquire preferences against their associates after the appointment of a receiver in the domiciliary state. Wheeler *v.* Dime Sav. Bank, 116 Mich. 271, 74 N. W. 496, 72 Am. St. Rep. 521.

69. Weil *v.* Burr Oak Bank, 76 Mo. App. 34; Merchants' Nat. Bank *v.* Pennsylvania Steel Co., 57 N. J. L. 336, 30 Atl. 545, where, however, the assets involved belonged to the receiver under a contract made by him. In Smith *v.* Berz, 125 Ill. App. 122, it was said that where, without the aid of the courts in that state, a foreign receiver has taken actual possession of chattels in Illinois or has notified debtors of the estate residing there of his claim before an attachment is made, his claim not being contrary to the public policy of Illinois, will be protected against such attachment unless the attachment is by a citizen of Illinois, and that if he has given no such notice of his claim, he cannot defeat a garnishment by attaching creditors either resident or non-resident.

70. *Delaware.*— Stockbridge *v.* Beckwith, 6 Del. Ch. 72, 33 Atl. 620.

Indiana.— Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62; Gray *v.* Covert, 25 Ind. App. 561, 58 N. E. 731, 81 Am. St. Rep. 117.

Louisiana.— Lichtenstein *v.* Gillett, 37 La. Ann. 522.

Maryland.— Linville *v.* Hadden, 88 Md. 594, 41 Atl. 1097, 43 L. R. A. 222, 86 Md. 210, 38 Atl. 900.

Ohio.— Manhattan Co. *v.* Maryland Steel Co., 1 Ohio S. & C. Pl. Dec. 286, 31 Cinc. L. Bul. 100.

Pennsylvania.— John Ray Clark Co. *v.* Toby Valley Supply Co., 3 Pa. Dist. 518; Warren *v.* Union Nat. Bank, 7 Phila. 156. *Contra*, Perkins *v.* Clear Spring Paper Co., 17 Phila. 168.

See 42 Cent. Dig. tit. "Receivers," § 415.

71. Merchants' Nat. Bank *v.* McLeod, 38 Ohio St. 174; Bagby *v.* Atlantic, etc., R. Co., 86 Pa. St. 291 (holding that a creditor of a corporation residing in the state where a receiver of the corporation is appointed is bound by the decree); Hintermeister *v.* Ithaca Organ, etc., Co., 3 Kulp (Pa.) 490; Gilman *v.* Ketcham, 84 Wis. 60, 54 N. W. 395, 36 Am. St. Rep. 899, 23 L. R. A. 52 (where the propriety of preferring the rights of resident creditors is recognized, but the receivership being under voluntary proceedings for dissolution, the court refused to recognize the claim of a citizen of the same state as that of the corporation to a preference by garnishment of a debt owing the corporation by a citizen of Wisconsin).

Receiver without title to land.— In Illinois it was held that where a foreign receiver interpleaded in an attachment suit, the only inquiry authorized by the statute was as to the "right of property," and the question whether a citizen of Rhode Island could obtain a preference over other citizens of that state, where a receiver of the corporation which owned the land levied on had been appointed under the insolvency laws of that state, could not arise and that since the receiver took no title to the land in Illinois, he could not prevail as against the attaching creditor. Providence City Ins. Co. *v.* Bristol Commercial Bank, 68 Ill. 348.

Effect in state of appointment.— Farmers' L. & T. Co. *v.* Bankers', etc., Tel. Co., 148 N. Y. 315, 42 N. E. 707, 51 Am. St. Rep. 690, 31 L. R. A. 403, where a decree vesting a receiver of an insolvent corporation with title to all its property bound a citizen of the state who had notice thereof and the court in that state refused to recognize the lien of an attachment levied by such parties in another state.

72. Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Parker *v.* Stoughton, 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

73. Hoyt *v.* Thompson, Seld. (N. Y.) 320, where there was no conflict between the title under the receiver's assignment on the one side and attaching creditors or purchasers on the other.

74. Orient Ins. Co. *v.* Rudolph, 69 N. J. Eq. 570, 61 Atl. 26 (where the receiver's right

c. Under Assignment or Conveyance to Receiver. The title of a receiver by virtue of a voluntary conveyance or assignment is sustained as against all, including even domestic creditors,[75] and the receiver of a corporation which assigns to him all its property has a right to appear and litigate for the protection of his claim as assignee; [76] but rights of creditors to proceed in a state other than that in which the receiver was appointed are not affected by involuntary assignments executed under the orders of the appointing court, and such receiver will not be recognized to defeat the preference of such creditors.[77]

was recognized as against the claim of residents under an assignment after the receiver's title took effect); Falk *v.* Janes, 49 N. J. Eq. 484, 23 Atl. 813 [*reversed* on other grounds in 50 N. J. Eq. 468, 26 Atl. 138, 35 Am. St. Rep. 783].

Notes payable by non-resident in state of appointment.— In Osgood *v.* Maguire, 61 N. Y. 524, notes payable to a corporation in the state of its domicile, made by a non-resident of the state, are held to be property, the *situs* of which is in the state of the corporate domicile, and pass to the receiver for the benefit of all creditors; and in an action brought by him thereon his right cannot be affected by a plea that the debt had been attached in an action in another state brought by a creditor of the corporation.

But upon the application of the theory of the situs of debts and other choses in action under garnishment laws see further GARNISHMENT, 20 Cyc. 1036.

75. Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

76. *Iowa.*— Hale *v.* Harris, 112 Iowa 372, 83 N. W. 1046, right of receiver to foreclose a mortgage which had been assigned to him.

Massachusetts.— Witters *v.* Globe Sav. Bank, 171 Mass. 425, 50 N. E. 932.

Michigan.— Graydon *v.* Church, 7 Mich. 36, right to file a bill in another state to foreclose a mortgage by a receiver in a creditor's bill to whom the debtor has made an assignment pursuant to an order of court.

Minnesota.— Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486, where a receiver of property of a resident of the state of Illinois appointed in a creditors' suit in that state, to whom the debtor refused to make a transfer and to whom therefore the property of the debtor was transferred by a master by order of court, was held to acquire title and right to recover upon a debt due to the debtor from a resident of Wisconsin since the *situs* of the debt was at the domicile of the creditor.

New Jersey.— Frazier *v.* Barnum, 19 N. J. Eq. 316, 19 Am. Dec. 666, right of a receiver to collect a chose in action which had been assigned to him under the direction of the court.

New York.— Weller *v.* Pace Tobacco Co., 2 N. Y. Suppl. 292, holding that an assignment to a receiver of corporate stock and a power of attorney to transfer it to himself on the company's books gives him the title and a court of New York will assist him to effect the transfer.

United States.— Oliver *v.* Clarke, 106 Fed. 402, 45 C. C. A. 360, holding that a receiver appointed in another state may sue for land in Texas which had been conveyed to him as receiver after his appointment.

See 42 Cent. Dig. tit. "Receivers," § 412.

But *compare* Seymour *v.* Newman, 77 Mo. App. 578, where an involuntary assignment was not enough by itself to authorize the substitution of a receiver, it not appearing that he had given bond as required by the decree appointing him.

77. Choctaw Coal, etc., Co. *v.* Williams-Echols Dry-Goods Co., 75 Ark. 365, 87 S. W. 632; Taylor *v.* Columbian Ins. Co., 14 Allen (Mass.) 353; Willitts *v.* Waite, 25 N. Y. 577; Zacher *v.* Fidelity Trust, etc., Co., 106 Fed. 593, 45 C. C. A. 480, where it was held that whether the assignment will be considered voluntary will be determined in the federal court according to the adjudications of the state court in which the question arises, and the court in this case followed the rule in Zacher *v.* Fidelity Trust, etc., Co., 109 Ky. 411, 59 S. W. 493, 22 Ky. L. Rep. 987, which held that proceedings by a creditor and stock-holder of an insolvent corporation in Connecticut, in which the receiver was appointed and a deed of assignment executed to him, were *in invitum*, and an attaching creditor in Kentucky should be given priority. See also *infra*, VIII, B, 2, b. But in Ward *v.* Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 Am. St. Rep. 207, 42 L. R. A. 706, it was held that where an assignment to a receiver was made under provisions of statute similar to those in the Kentucky case last above cited, upon evidence that the whole proceeding had been voluntarily instituted and conducted by the corporation, the assignment was held to be voluntary and good as against a New York creditor who had attached and sold property situated in New York, and he was required to account for the full value of such property before being allowed to share in the dividends paid by the receiver.

Assignment or conveyance as against non-resident.— It has been held that an assignment to a receiver pursuant to an order of court in insolvency proceedings, valid where made, will be recognized as against non-resident attaching creditors. Witters *v.* Globe Sav. Bank, 171 Mass. 425, 50 N. E. 932. *Contra*, Catlin *v.* Wilcox Silver-Plate Co., 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62.

Conveyance of land.— In Moseby *v.* Burrow, 52 Tex. 396 [*disapproving dictum* in Gayoso Sav. Inst. *v.* Burrow, 37 Tex. 88], it

d. Right Acquired After, or Perfected in Jurisdiction Of, Appointment. Where a right accrues to the receiver after his appointment he may sue to enforce it.[78] And where a receiver obtains possession of property within the jurisdiction of the court appointing him, such possession is lawful when taken, and creditors residing in other jurisdictions have no rights superior to those of creditors residing within the jurisdiction of the appointing court with respect to such property, and if it is taken into another jurisdiction by the receiver his possession will be protected; the order of the court appointing him vests in him a special property which authorizes him to maintain an action for the protection of his possession.[79] The right of such receiver who sells such property is superior to the right of a domestic creditor of the owner, who attaches the proceeds of the sale in the hands of the purchaser from the receiver; [80] so of the receiver's right to proceeds under a contract made by him or which he had undertaken to perform.[81]

3. Leave to Receiver to Sue. A receiver should ask permission of the foreign court to sue.[82] This would seem to be based upon reasons for which an ancillary receiver is appointed.[83] Under the strict rule denying all extraterritorial authority

was held that land in Texas could not be conveyed under a decree ordering such conveyance in another state in a suit for winding up an insolvent corporation as against the rights of attaching creditors in Texas, and in this instance the creditors were citizens of another state. The conveyance was by the cashier of a bank who held the title for the bank for the benefit of its creditors and it was held that the conveyance was merely to the receiver as such.

In a foreclosure suit by the trustee in a mortgage for sale and conveyance of the title of the trustee, in which the mortgagor in effect joined, it was held that the proceeding was not *in invitum*. Smith *v.* Berz, 125 Ill. App. 122.

Effect of assignment for creditors see Assignments For Benefit of Creditors, 4 Cyc. 194, 225.

78. Oliver *v.* Clarke, 106 Fed. 402, 45 C. C. A. 360 (right to sue for land conveyed to him as receiver); Wilkinson *v.* Culver, 25 Fed. 639, 23 Blatchf. 416 (right to sue on judgment recovered in state of appointment).

Bond and mortgage — suit by successor.— In Iglehart *v.* Bierce, 36 Ill. 133, it was held that a foreign receiver of a corporation might sue on a bond and mortgage on land in Illinois, executed to him, and that where his interest passes to a successor receiver under an order of court, but without regular assignment under the hand of the first receiver, the successor has an equitable right which he may enforce in the courts of Illinois.

79. *Connecticut.*— Pond *v.* Cooke, 45 Conn. 126, 29 Am. Rep. 668.

Illinois.— Chicago, etc., R. Co. *v.* Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557.

Missouri.— Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203.

North Dakota.— Woodhull *v.* Farmers' Trust Co., 11 N. D. 157, 90 N. W. 795, 95 Am. St. Rep. 712.

Tennessee.— Cagill *v.* Woolbridge, 8 Baxt. 580, 35 Am. Rep. 716, sustaining the right of a receiver to maintain replevin where he had been ordered to ship goods to Tennessee and to hold the proceeds, etc., although he had not yet given bond.

See 42 Cent. Dig. tit. "Receivers," § 411.

Contra.— Humphreys *v.* Hopkins, 81 Cal. 551, 22 Pac. 892, 15 Am. St. Rep. 76, 6 L. R. A. 792.

Where property is wrongfully removed from the jurisdiction of the state in which the receiver was appointed, he may reclaim it by action in the foreign jurisdiction. McAlpin *v.* Jones, 10 La. Ann. 552.

The principle governing such cases has been considered to be one of law and not of comity. Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203. But the rule has also been considered to rest upon comity. Woodhull *v.* Farmers' Trust Co., 11 N. D. 157, 90 N. W. 795, 95 Am. St. Rep. 712.

80. Jenkins *v.* Purcell, 29 App. Cas. (D. C.) 209, 9 L. R. A. N. S. 1074; Lett *v.* Kirkpatrick, 15 Pa. Co. Ct. 212.

81. Cooke *v.* Orange, 48 Conn. 401; Pond *v.* Cooke, 45 Conn. 126, 29 Am. Rep. 668; Merchants' Nat. Bank *v.* Pennsylvania Steel Co., 57 N. J. L. 336, 30 Atl. 545, as against non-resident creditors of the corporation.

82. Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367; Person *v.* Leary, 126 N. C. 504, 36 S. E. 35, 127 N. C. 114, 37 S. E. 149.

It would be the proper practice to file a petition setting forth the facts enabling the receiver to sue and asking permission in that respect. Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367.

Failure to obtain is waived by not objecting at the trial. Person *v.* Leary, 126 N. C. 504, 36 S. E. 35, 127 N. C. 114, 37 S. E. 149.

Implied leave.— Where a foreign receiver sued in a court in Rhode Island without permission, and the court did not deny him the privilege of a suitor, but considered the case on the issues raised by the pleadings, the supreme court on exceptions would not determine the question of the right to sue. Hazlett *v.* Woodhead, 28 R. I. 452, 67 Atl. 736.

83. See Person *v.* Leary, 126 N. C. 504, 36 S. E. 35, 127 N. C. 114, 37 S. E. 149,

to a foreign receiver as such by comity or otherwise, leave of court cannot confer authority.[84]

4. In Whose Name Action by Receiver Brought.[85] The cases as a general rule which accord recognition to a receiver who is authorized to sue in the state of his appointment, to exercise his authority in that regard in other states, permit him to sue in his own name;[86] and so of a receiver of a corporation upon the ground that he is a quasi-assignee or successor,[87] or a receiver of a corporation who is the owner of the legal title to a particular fund as trustee for creditors,[88] or where the cause of action accrues to the receiver.[89] On the other hand, a receiver of a corporation may, under the authority conferred upon him by his appointment, sue in other states in the name of the corporation,[90] and it is held

where it is said that the better practice is to have local receivers appointed. See also Inter-State Bldg., etc., Assoc. *v.* Lewis, 31 Pittsb. Leg. J. N. S. (Pa.) 83, under an ancillary order providing that a receiver might foreclose a mortgage in his own name as such receiver and enter and confess bonds, where he was authorized by the order of appointment to proceed to collect such bonds and mortgages and bring suits for that purpose.

84. Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276.

85. See, generally, *supra*, VI, A, 3, b, (II).

86. *Alabama.*— Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601.

District of Columbia.— Barley *v.* Gettings, 15 App. Cas. 427.

Indiana.— Metzner *v.* Bauer, 98 Ind. 425; Minnich *v.* Swing, 36 Ind. App. 119, 73 N. E. 271.

Kansas.— Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163.

New Hampshire.— Tompkins *v.* Blakey, 70 N. H. 584, 49 Atl. 111.

New York.— Runk *v.* St. John, 29 Barb. 585 (receiver of dissolved corporation); Pugh *v.* Hurtt, 52 How. Pr. 22.

Ohio.— Bank *v.* McLeod, 38 Ohio St. 174.

Pennsylvania.— Stewart *v.* U. S. Insurance Co., 9 Watts 126. But see Nail *v.* Ewing, 6 Wkly. Notes Cas. 32, denying the right of a receiver to sue in his own name, there being no evidence of his authority in that regard under the laws of the state of his appointment.

West Virginia.— Swing *v.* Parkersburg Veneer, etc., Co., 45 W. Va. 288, 31 S. E. 926; Swing *v.* Bentley, etc., Furniture Co., 45 W. Va. 283, 31 S. E. 925, in which cases it was held that the trustee of a dissolved foreign corporation may sue for debts due it either in his own name or in the name of the corporation.

See 42 Cent. Dig. tit. "Receivers," § 418. And see, generally, the cases cited *supra*, note 57.

The corporation need not be joined in a suit in equity by its receiver to recover property as against its officers. Bidlack *v.* Mason, 26 N. J. Eq. 230.

As real party in interest.— In Minnesota it was held that a receiver of a partnership with power "to collect all outstanding debts," etc., may maintain an action in that state in his own name as the real party in interest, or at least as a trustee of an express trust, although there was no statute authorizing such action; that technical reasons for refusing to permit common-law receivers to sue in their own names did not exist under the Minnesota code. Henning *v.* Raymond, 35 Minn. 303, 29 N. W. 132. In New York, under a provision requiring actions to be brought in the name of the parties in interest, it was held that a receiver of a New Jersey corporation could not sue in the name of the corporation in New York notwithstanding he was authorized so to sue in New Jersey. Merchants' L. & T. Co. *v.* Clair, 36 Hun (N. Y.) 362 [*affirmed* in 107 N. Y. 663, 14 N. E. 414, 1 Silv. App. 540]. And a receiver was permitted to sue in his own name, although he might not be permitted so to sue by the law of the state where he was appointed. Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25.

87. Planters' Bank *v.* Bass, 2 La. Ann. 430 (receiver in proceedings to dissolve a corporation who by statute is authorized to take charge of the corporate assets wherever situated, etc.); Avery *v.* Boston Safe-Deposit, etc., Co., 72 Fed. 700 (where it is further said that if the corporation survives an action at law should be in its name).

88. Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, recovery of amount of assessment laid by court of another state upon shareholders in proceedings in which the receiver is appointed to collect it. See also Parker *v.* Stoughton, 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

A receiver as sequestrator was held to be substantially an assignee representing the corporate creditors and as such could maintain a suit in his own name where such assignee may so sue under the law of the forum without regard to whether he might so sue in the state where he was appointed. Barclay *v.* Quicksilver Min. Co., 6 Lans. (N. Y.) 25.

89. See *supra*, VIII, A, 2, d.

90. Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163 (holding that where an action had been brought by a corporation, the receiver subsequently appointed might continue it in the name of the corporation, although he might himself sue in his own name and was not controlled by the statute in Kansas as to the name in which such suit should be brought); Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St.

that the receiver of the assets of a corporation, who is without assignment, properly sues in the name of the corporation.[91]

5. Effect of Appointment of Receiver of Corporation. The mere appointment of a receiver for a corporation will not prevent the bringing a suit against it in another state where it is suable aside from any difficulty which such receivership may be supposed to raise,[92] and until some steps have been taken to reduce its assets there to the possession of the receiver, not only is the corporation properly in possession of them but it is vested with the title, so far as the courts of such state are concerned, and so far as any other person in that state is concerned, and therefore the company may sue in its own name to recover such assets.[93] So

Rep. 363, 41 L. R. A. 367 (as to a receiver of an insolvent corporation which did not appear to have been dissolved, although a receiver in that state may sue in his own name when so authorized by the court); Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196 (where the receiver was appointed with power to prosecute and defend suits in the name of the corporation under a statute providing that upon dissolution of a corporation the court might appoint a receiver to take charge of its assets and collect its debts); Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

91. Farmers', etc., Ins. Co. *v.* Needles, 52 Mo. 17, suit on note payable to corporation, and based upon the ground that the receiver as such had no extraterritorial authority. So in an early case in New York it is held that a foreign receiver of an insolvent corporation must sue in the name of the corporation for a debt due it. Hope Mut. L. Ins. Co. *v.* Taylor, 2 Rob. (N. Y.) 278.

Unless a foreign receiver is actual or virtual assignee, as required of receivers appointed in the state of the forum, he cannot sue in his own name. Homer *v.* Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. 883; Hayward *v.* Leeson, 176 Mass. 310, 57 N. E. 656, 49 L. R. A. 725; Ewing *v.* King, 169 Mass. 97, 47 N. E. 597; Buswell *v.* Supreme Sitting, O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846.

An intervening petition by the receiver as trustee after substituting the corporation as nominal plaintiff, asking that any recovery should be for his use because in that capacity he had become liable for the expenses of the suit, will not prevent the entry of a final decree in favor of the corporation; the receiver might abandon his petition, and he did so by taking the decree. East Tennessee Land Co. *v.* Leeson, 185 Mass. 4, 69 N. E. 351.

But under the strict rule against the recognition of any extraterritorial power on the part of a chancery receiver, it is held that he cannot be empowered by the order of the appointing court to sue in a foreign jurisdiction either in his own name or in the name of the party of whose assets he is appointed. Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163.

92. *Colorado.*— Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036.

District of Columbia.— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300.

Maryland.— Southern Bldg., etc., Assoc. *v.* Price, 88 Md. 155, 41 Atl. 53, 42 L. R. A. 206.

New York.—Pringle *v.* Woolworth, 90 N. Y. 502; Simpkins *v.* Smith, etc., Gold Co., 50 How. Pr. 56.

Oregon.— Egan *v.* North American Loan Co., 45 Oreg. 131, 76 Pac. 774, 77 Pac. 392, right to bring action to cancel mortgage, without leave of court appointing receiver who is in neither actual nor constructive possession of the property.

Pennsylvania.— Vogt *v.* Covenant Bldg., etc., Assoc., 7 Pa. Dist. 768, 21 Pa. Co. Ct. 351.

South Carolina.— Pollock *v.* Carolina Interstate Bldg., etc., Assoc., 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695.

Texas.— American Well Works *v.* De Aguayo, (Civ. App. 1899) 53 S. W. 350.

See 42 Cent. Dig. tit. "Receivers," § 409 *et seq.*

Where the corporation has been deprived of its right to sue or exercise any of its powers in the state of its domicile it has been held that the courts of another state will not permit it to sue or exercise powers therein of which it has been so deprived. Kirwan Mfg. Co. *v.* Truxton, 2 Pennew. (Del.) 48, 44 Atl. 427. And where the corporate officers were enjoined from continuing the corporate business or using its corporate name for any purpose, an officer of the corporation will not be allowed to prosecute a writ of error in the name and behalf of the corporation against the objection of the receiver so appointed. American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 203, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338.

93. Sigua Iron Co. *v.* Brown, 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 [*affirmed* in 171 N. Y. 488, 64 N. E. 194]. In Winans *v.* Gibbs, etc., Mfg. Co., 48 Kan. 777, 30 Pac. 163, it was held that since a foreign receiver can sue in another state only as a matter of comity, the corporation may sue in such other state in its own name, the statute of the state of the forum relating to suits by receivers not applying to receivers appointed in other states.

Receiver not a necessary party.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 41 Nebr. 374, 59 N. W. 838.

Insufficient showing in suit by receiver.— A bill by a receiver of a foreign corporation, appointed in another state to collect or protect the assets in Alabama, must aver that the officers of the corporation, at and prior to the time of filing the bill, either negli-

unless there is something in the statute or decretal order tantamount to dissolution, a pending action in the courts of another state than that of the home jurisdiction may regularly proceed notwithstanding an adjudication of insolvency and the appointment of a receiver to wind up its affairs and distribute its assets among creditors and stock-holders,[94] and where the receiver is recognized he may be permitted to be substituted as plaintiff or to defend.[95]

6. PLEADING AND EVIDENCE. When a foreign receiver sues as such he should allege the facts which show his authority to sue and an allegation merely of his appointment by a foreign court is not sufficient;[96] and his authority or appointment,[97]

gently or wilfully, or in obedience to a court having jurisdiction of their persons, refused to protect the corporate assets in Alabama, it not appearing that the corporation had been dissolved, or otherwise incapacitated from bringing the suit; and an amendment to a bill which omitted such allegation, averring merely that the officers refused to do so at the time of filing the amendment, is insufficient. Rogers *v.* Haines, 103 Ala. 198, 15 So. 606.

94. Venner *v.* Denver Union Water Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. Rep. 1036; Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668; Pringle *v.* Woolworth, 90 N. Y. 502; Pine Lake Iron Co. *v.* La Fayette Car Works, 53 Fed. 853.

Judgment against corporation conclusive.— Taylor *v.* Gray, 59 N. J. Eq. 621, 44 Atl. 668; Pringle *v.* Woolworth, 90 N. Y. 502; Pine Lake Iron Co. *v.* La Fayette Car Works, 53 Fed. 853.

But a judgment against the corporation after its dissolution, which causes the abatement of the suit, cannot bind the receiver of the dissolved corporation or the property in his hands. Pendleton *v.* Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. ed. 574.

But for effect of dissolution of corporation see CORPORATIONS, 10 Cyc. 1329 *et seq.*

95. National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (substitution as plaintiff); Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16 (holding that since the court in one jurisdiction, upon the presentation to it of the decree of a court of another jurisdiction appointing the receiver of an insolvent corporation as trustee for creditors and stock-holders, might have appointed him with the same powers in the foreign jurisdiction, it may permit him to defend a single action there).

The receiver must be made a party to a suit in which the property of a foreign corporation has been attached before he can plead to or defend the suit. South Carolina R. Co. *v.* Peoples' Sav. Inst., 64 Ga. 18. See also Allen *v.* Scandinavian Nat. Bank, 46 How. Pr. (N. Y.) 71, holding that a receiver of a foreign national bank, who was not a party to the action, had no status to move to set aside attachments.

Successors of a dissolved corporation, having title, may have an action by the corporation revived in their own names and stand in judgment as such successors. Planters' Bank *v.* Bass, 2 La. Ann. 430, reserving the question of the rights of resident creditors which was not involved in the proceeding. But where an attachment against a dissolved corporation is dissolved, the receiver, it is held, cannot be added as a party by way of amendment. Hintermeister *v.* Ithaca Organ, etc., Co., 3 Kulp (Pa.) 490. See also CORPORATIONS, 10 Cyc. 1330.

96. Hurd *v.* Elizabeth, 40 N. J. L. 218 (holding that an allegation that a promise to pay was made to him will not, as against a demurrer, cure the declaration's omission to show the grounds of his right to sue officially, to recover a debt due the corporation of which he was alleged to have been appointed receiver); Swing *v.* White River Lumber Co., 91 Wis. 517, 65 N. W. 174 (failure to allege that by the laws of the state of appointment or by the judgment or order of the court there plaintiff has any right, title, or authority to sue); Edwards *v.* National Window Glass Jobbers' Assoc., 139 Fed. 795.

Demurrer is the proper remedy to reach the defect. Swing *v.* White River Lumber Co., 91 Wis. 517, 65 N. W. 174.

The objection may be waived by failure to demur or answer. Dawkins *v.* Mathis, 47 S. C. 64, 24 S. E. 990. The objection of want of authority of a receiver to sue in his own name is not raised by a demurrer assigning want of equity, that plaintiff had not stated a good and valid claim against defendant, and that the cause of action was barred by the statute of limitations. Ewing *v.* King, 169 Mass. 97, 47 N. E. 597.

Sufficiency of allegation of title.—A count alleging that, under a foreign statute, as construed by the supreme court of the state, the receiver of a corporation acquired the legal title to all its assets, including the right to enforce the liability of stock-holders to creditors arising from the contract of subscription, is a good allegation that the receiver has title to a cause of action to enforce the stock-holder's liability. King *v.* Cochran, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922.

After verdict a complaint alleging that the supreme court of Ohio, a court of competent jurisdiction, in a certain cause specified, disincorporated a certain insurance company and appointed plaintiff trustee for creditors and policy-holders, and that plaintiff accepted the trust, qualified, and is acting as trustee, and brings this action by order of such court, is good, if it would have been objectionable at any stage. Minnich *v.* Swing, 36 Ind. App. 119, 73 N. E. 271.

97. Homer *v.* Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. 883 (right to sue in

or the jurisdiction of the appointing court being denied the burden is on on him to sustain his right [98] by sufficient competent evidence.[99] Where the receiver recovers a judgment in the state in which he is appointed, he is not required in an action on the judgment in another jurisdiction to prove his title as receiver since he does not sue as receiver but because he is a judgment creditor.[1]

7. Proceedings Against Receiver. A suit against a foreign receiver may be brought by leave of the appointing court,[2] and if as a matter of comity a foreign receiver may bring an action in a state to collect a debt, or enforce or protect any other right or interest,[3] it would seem to follow that upon like principles a citizen of the state may invoke the aid of a court therein to establish any claim arising there which he may have against a foreign receiver who brings himself within the jurisdiction of that court;[4] and if a receiver sues in a foreign state he will be concluded by a judgment against him on the merits.[5] But it has been

own name); Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35. See also Nail *v.* Ewing, 6 Wkly. Notes Cas. (Pa.) 32, where a judgment for want of an affidavit of defense was stricken off because there was no proof of the laws of the foreign state authorizing a receiver to sue in his own name.

General denial puts in issue the right of a foreign receiver suing in Massachusetts in his own name. Homer *v.* Barr Pumping Engine Co., 180 Mass. 163, 61 N. E. 883.

98. Kronberg *v.* Elder, 18 Kan. 150; Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203.

99. Person *v.* Leary, 127 N. C. 114, 37 S. E. 149, 126 N. C. 504, 36 S. E. 35, proof by certified copy of decree dissolving corporation.

Proof of foreign law.—Aside from the introduction of the record in the suit in which a receiver of an insolvent corporation was appointed in Mexico, the only proof of jurisdiction was the evidence of witnesses who had knowledge of the Mexican laws, which showed that the particular courts uniformly exercised jurisdiction in the appointment of receivers and in controlling the affairs of insolvent corporations, and it was not shown that the jurisdiction of those courts was defined by statute. It was held that the evidence was sufficient to establish, *prima facie* that such court had jurisdiction to place the property of an insolvent company in the hands of a receiver. Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203.

Decree evidence of propriety of appointment.—The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union. Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

Judgment alone on petition to be substituted.—Where a foreign receiver of a corporation sought to be substituted as plaintiff in an action previously brought by the corporation it was held sufficient to introduce the record of the judgment without introducing the record of the entire proceedings, and that the record produced showing a decree appointing the receivers, and an order of transfer of the property, coupled with evidence *aliunde* of the actual transfer of the property in conformity with the decree, is sufficient to show the appointment. Seymour *v.* Newman, 77 Mo. App. 578.

Where the decree introduced requires a bond to be executed by the receiver before taking charge of and suing for the assets, proof of compliance with the requirement must be made. Seymour *v.* Newman, 77 Mo. App. 578.

1. Wilkinson *v.* Culver, 25 Fed. 639, 23 Blatchf. 416, holding that the addition of the words "receiver," etc., to the name in which he sues is mere *descriptio personæ*.

2. Carrey *v.* Spencer, 36 N. Y. Suppl. 886.

Leave to sue has been required. Barton *v.* Barbour, 3 MacArthur (D. C.) 212, 36 Am. Rep. 104. But on the other hand it is held not to be jurisdictional. Phelan *v.* Ganebin, 5 Colo. 14; Pruyn *v.* McCreary, 105 N. Y. App. Div. 302, 93 N. Y. Suppl. 995 [*affirmed* in 182 N. Y. 568, 75 N. E. 1133]. And see in this connection *supra*, VI, D, 2, a, (II), (A).

Appearance.—Under N. Y. Code Civ. Proc. § 421, declaring that defendant's appearance must be made by serving a notice of appearance or a copy of a demurrer or an answer, and section 1780, declaring that a foreign corporation may be sued by a resident of this state, a receiver of a foreign corporation appointed in another state, and who served a demurrer in an action against him in this state by a resident of this state to cancel a contract for fraud, thereby gave the court jurisdiction, even though the contract related to lands in a foreign country. Pruyn *v.* McCreary, 105 N. Y. App. Div. 302, 93 N. Y. Suppl. 995 [*affirmed* in 182 N. Y. 568, 75 N. E. 1133].

3. See *supra*, VIII, A, 1.

4. Paige *v.* Smith, 99 Mass. 395; Le Fevre *v.* Matthews, 39 N. Y. App. Div. 232, 57 N. Y. Suppl. 128.

5. Thomas *v.* Hale, 82 Minn. 423, 85 N. W. 156, holding that in a subsequent action on the judgment by leave of court in the jurisdiction where the receiver was appointed the

held that suit against a foreign receiver which interferes with his possession of the property in his hands and being administered by another court should not be permitted.[6]

B. Ancillary or Auxiliary Receivership — 1. Nature in General. It may be stated broadly that by reason of the restricted power of the court to act directly upon that property only which is within its territorial jurisdiction and of its receiver to exercise his functions beyond such territorial limits, it often becomes necessary or convenient that property situated beyond such limits should be placed in the hands of a receiver acting under authority of the courts where the property lies,[7] to aid a court of coördinate jurisdiction in effecting the purposes of a primary receivership,[8] or, as in the instance of a railroad extending through different states or jurisdictions, that the continued operation of the affairs of a corporation should be under one management, the court of the primary jurisdiction directing the receiver and the others recognizing such orders as a matter of comity,[9] or to preserve assets in the jurisdiction for distribution there.[10] Such a receiver is called an ancillary or auxiliary receiver; and where the strict rule is applied that a chancery receiver cannot sue in a foreign jurisdiction,[11] the only method for reaching the property or assets of an insolvent corporation in a jurisdiction foreign to that where the receiver is appointed is by resort to an ancillary receivership.[12]

2. Appointment and Effect Thereof — a. In General. A court of equity may, under its general power, appoint an ancillary receiver of property within its jurisdiction;[13] and the fact that receivers have been appointed in the state of the

receiver cannot defend as to the merits on behalf of the creditors, but it was not decided what the effect of the judgment for plaintiff in an action on the judgment would be as to the creditors who are not actually parties to the action on the judgment.

6. Killmer *v.* Hobart, 58 How. Pr. (N. Y.) 452, attachment in a suit against a foreign receiver as such should be vacated.

Garnishment under judgment against creditor of receiver.— In Phelan *v.* Ganebin, 5 Colo. 14, upon recovery of a judgment against one to whom the foreign receiver was indebted it was held that he might be garnished without leave of the appointing court. See also Garnishment, 20 Cyc. 1026.

7. See Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 34 Atl. 680; Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 31 N. Y. Suppl. 999; Great Western Min., etc., Co. *v.* Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163; Avery *v.* Boston Safe-Deposit, etc., Co., 72 Fed. 700; Williams *v.* Hintermeister, 26 Fed. 889, 3 Kulp (Pa.) 499.

An ancillary receiver has been said to be a final receiver as to the property of a foreign corporation in the state of the forum. Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805. But see Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 31 N. Y. Suppl. 999.

The court of primary jurisdiction ordinarily is the court of initial proceeding. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324, holding that where a receiver has been appointed for a corporation in the state of its domicile a receiver appointed in another state will be deemed ancillary or auxiliary to the first. See also Railroads, 33 Cyc. 634 note 77. And where a federal court appoints a receiver for a corporation of another state, which owns property in the district consisting in part of real estate, on a bill filed by stock-holders and creditors for winding up its affairs, which the corporation has answered, submitting to the jurisdiction, such court should be recognized as the court of primary jurisdiction even as against a similar suit for the same purpose in the state in which the corporation was organized, where it conducts no business and has no property in such state. Lewis *v.* American Naval Stores Co., 119 Fed. 391.

Receiver of property of foreign corporation generally see *supra*, II, C, 6.

8. See *infra*, VIII, B, 2, a.

9. See Railroads, 33 Cyc. 633.

10. See *infra*, VIII, B, 2, a.

11. See *supra*, VIII, A, 1.

12. Fowler *v.* Osgood, 141 Fed. 20, 72 C. C. A. 276.

Even though a receiver may be recognized as a matter of comity, the better rule is said to be to appoint a local receiver. Person *v.* Leary, 126 N. C. 504, 36 S. E. 35.

13. *Illinois.*— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324.

Massachusetts.— Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846.

New Jersey.— National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

Rhode Island.— Evans *v.* Pease, 21 R. I. 187, 42 Atl. 506.

United States.—Shinney *v.* North American Sav., etc., Co., 97 Fed. 9.

See 42 Cent. Dig. tit. "Receivers," § 410.

Where a state court has appointed a receiver a federal court in another jurisdic-

domicile of a corporation or elsewhere will not prevent such appointment.[14] When the application is made for such appointment of a receiver for a foreign corporation which is in the hands of a receiver in the state of its domicile, the court may either refuse to appoint a receiver and permit the domiciliary receiver to bring suit to collect the assets of the corporation within its limits; or it may appoint the domiciliary receiver as ancillary receiver; or it may appoint some other person receiver,[15] and it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver.[16] Often such receiver is appointed strictly in aid of a primary receivership elsewhere and in comity to another court of coördinate jurisdiction,[17] in order that all the assets may be collected and uniformly and equitably administered and distributed without conflict of jurisdiction and with as little expense as possible;[18] and to this end some of the cases recognize the purpose of confirming a foreign appointment by the appointment of the foreign receiver as ancillary receiver upon presenting the decree and proceedings of the foreign court.[19] Other cases have

tion may appoint a receiver in ancillary proceedings. Scaife *v.* Scammon Inv., etc., Assoc., 71 Kan. 402, 80 Pac. 957; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Williams *v.* Hintermeister, 26 Fed. 889, 3 Kulp (Pa.) 499; Taylor *v.* Life Assoc. of America, 3 Fed. 465.

As between different federal districts the practice of bringing ancillary suits and obtaining the appointment of a receiver in such different jurisdictions may properly be followed, as where a corporation for which a receiver has been appointed is engaged in business and owns property in the different districts. Haydock *v.* Fisheries Co., 156 Fed. 988; Conklin *v.* U. S. Shipbuilding Co., 123 Fed. 913; Lewis *v.* American Naval Stores Co., 119 Fed. 391.

By express statute sometimes the court may appoint a receiver auxiliary to the proceeding instituted against a foreign corporation in the state which created it, and may properly invest him with the same powers, so far as they are necessary to the collection and recovery of its assets, that it is authorized to grant to the receiver of a domestic corporation. National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

14. Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324; Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869.

15. Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680.

Appointment of domiciliary receiver see Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Taylor *v.* Life Assoc. of America, 3 Fed. 465, requiring payment of funds into registry of court for protection of resident creditors who were claiming the right to have the property retained in the state. See also RAILROADS, 33 Cyc. 634 note 76. It is a matter of discretion whether the court shall, as a matter of comity, appoint a domiciliary receiver and it is under no legal obligation to do so. Cole *v.* Oil-Well Supply Co., 57 Fed. 534. And it is held that the appointment of the foreign receiver of a corporation will depend mainly upon the question whether the interest of the resident creditors would be likely to antagonize the interests of the shareholders and creditors. Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680.

16. Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

17. National Trust Co. *v.* Miller, 33 N. J. Eq. 155; Haydock *v.* Fisheries Co., 156 Fed. 988; Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

But the practice has also been considered not to rest upon comity but to be governed by law. Conklin *v.* U. S. Shipbuilding Co., 123 Fed. 913.

Necessary parties to require transfer to receiver.— In an ancillary suit in another district to confirm in that district the appointment of a receiver for a corporation, made in the state of its domicile, where such corporation owns a majority of the stock of corporations of the state in which the ancillary suit is brought, and it is sought to have such stock transferred on their books to the receiver, as well as to include their business and plants, held by them under lease from the foreign corporation, in the receivership, such domestic corporations are necessary parties. Conklin *v.* U. S. Shipbuilding Co., 123 Fed. 913.

Notice of a public character has been required before the appointment of such a receiver of a corporation. Haydock *v.* Fisheries Co., 156 Fed. 988.

Bond is required of the receiver. Haydock *v.* Fisheries Co., 156 Fed. 988. But under the particular circumstances it was dispensed with in Conklin *v.* U. S. Shipbuilding Co., 123 Fed. 913.

18. Scaife *v.* Scammon Inv., etc., Assoc., 71 Kan. 402, 80 Pac. 957; Lewis *v.* American Naval Stores Co., 119 Fed. 391; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Platt *v.* Philadelphia, etc., R. Co., 54 Fed. 569.

19. Scaife *v.* Scammon, etc., Inv. Co., 71 Kan. 402, 80 Pac. 957; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9, on petition of receiver in a pending suit. See also Silverstro *v.* East Side Co-operative Bldg.,

refused to adopt the practice of appointing an ancillary receiver where that is the only relief,[20] or upon a mere *ex parte* application without suit,[21] under the rule as to the incidental character of receiverships generally,[22] or of expressly making the proceeding and receiver in one state ancillary to that of another state, to the extent of delegating jurisdiction of the court in one state to that of another.[23] On the other hand where receivers are appointed to take the assets of a foreign corporation at the suit of stock-holders or creditors to preserve them for distribution among the creditors in the jurisdiction where they are situated,[24] it is held that the purpose and effect is to retain the property within the control of the court for distribution among the creditors there and not for its removal to another jurisdiction, thus forcing the domestic creditors to go into another state to bring and enforce their claims;[25] and this is in accord with the rule of other cases protecting the claims of domestic creditors against foreign receivers,[26] and for the purpose of removing the assets to the prejudice of such domestic creditors the appointment of an ancillary receiver will be refused.[27] A domiciliary receiver, who

etc., Assoc., (N. J. Ch. 1902) 53 Atl. 823 (holding that upon the application of a foreign receiver of a building and loan association having property in New Jersey for appointment there in order that he might sell property in that state the case should be referred to a master to take proof as to the proceedings in which the receiver was appointed, and of the order approving the contract of sale, whether there were New Jersey creditors or shareholders, and whether the corporation did business in New Jersey apart from holding the property, and whether the required deposit was made with the secretary of state to secure New Jersey creditors); Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16.

At suit of parties the practice has been followed in Chesapeake, etc., R. Co. *v.* Swayze, 60 N. J. Eq. 417, 47 Atl. 28, 62 N. J. Eq. 369 (where the ancillary receiver is declared to be a mere assistant to the receivership in the primary jurisdiction); Platt *v.* Philadelphia, etc., R. Co., 54 Fed. 569 (appointment on *ex parte* application but without prejudice to a further consideration of the legality of the order on a subsequent motion to dissolve it).

20. Mercantile Trust Co. *v.* Kanawaha, etc., R. Co., 39 Fed. 337, which was a suit seeking no other relief than an ancillary receivership, in aid of a primary receivership in a foreclosure suit, the court holding that if aid in the enforcement of the mortgage is desired, it must be invoked by an independent suit. See also Greene *v.* Star Cash, etc., Package Co., 99 Fed. 656.

A suit by the foreign receiver of a corporation for the appointment of an ancillary receiver, brought against the corporation as sole defendant, is held not to be maintainable in New York. Mabon *v.* Ongley Electric Co., 156 N. Y. 196, 50 N. E. 805.

21. *In re* Brant, 96 Fed. 257.

22. See *supra*, II, B, 5, 6.

23. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9. But *compare* Smith *v.* Eighth Ward Bank, 31 N. Y. App. Div. 6, 52 N. Y. Suppl. 290; Sigua Iron Co. *v.* Brown, 33 Misc. (N. Y.) 50, 68 N. Y. Suppl. 141 [*affirmed* in 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 (*affirmed* in 171 N. Y. 488, 64 N. E. 194)].

24. See *supra*, II, C, 6 text and notes 79, 80.

25. Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Catlin *v.* Wilcox Silver-Plate Co., 124 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62; Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 31 N. Y. Suppl. 999; Woerishoffer *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 113 [*affirmed* in 99 N. Y. 398, 2 N. E. 47]; Frowert *v.* Blank, 205 Pa. St. 209, 54 Atl. 1000.

A citizen of the state of the primary receivership may sue in the foreign jurisdiction in such cases. Walter *v.* F. E. McAllister Co., 21 Misc. (N. Y.) 747, 48 N. Y. Suppl. 26, 27 N. Y. Civ. Proc. 33.

Where the business of the corporation was a game of chance, it was held that the court would not aid bondholders to reach funds of the corporation in the possession of local agents by the appointment of a receiver, but would remit such funds to the domiciliary receiver. Central Safe Deposit Co. *v.* Jones, 8 Ohio S. & C. Pl. Dec. 582, 36 Cinc. L. Bul. 87.

Notice to the attorney-general of a motion for the appointment of a receiver for a corporation in New York, as required by statute (Wadhams Consol. L. (1909) 1455, § 312), is held to be unnecessary in the case of an application for an ancillary receiver. Woerishoffer *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 113 [*affirmed* in 99 N. Y. 398, 2 N. E. 47].

26. See *supra*, VIII, A, 2, a.

27. Clark *v.* Supreme Council C. F., 146 Cal. 598, 80 Pac. 931; Corn Exch. Bank *v.* Rockwell, 58 Ill. App. 506; Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597. But where the property of a foreign corporation is placed under an ancillary receivership for the purpose of preserving it for distribution among resident creditors, an attachment must be levied before the appointment of the ancillary receiver in order to create a right superior to that of other resident creditors, notwithstanding a levy after the appointment of the foreign receiver creates superior rights as against him. National Park Bank *v.*

is permitted to sue to protect or recover assets, may have a receiver appointed in a suit brought for such protection.[28]

b. Powers of Receiver and Control of Assets — (1) *In General.* An ancillary receiver of a foreign corporation, with authority under the decree to sue for and collect the assets of a corporation, may sue for such assets in the jurisdiction of his appointment,[29] and the powers of such receiver may in other respects be like those of a domestic receiver of a corporation.[30] An ancillary receivership is not a mere continuance of or incident to a suit in which a primary receiver is appointed. The two proceedings are independent;[31] the original and ancillary

Clark, 92 N. Y. App. Div. 262, 87 N. Y. Suppl. 185; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106. And creditors levying attachments on property of the foreign corporation before the appointment of an ancillary receiver are not divested of their rights by such appointments Woerishoffer *v.* North River Constr. Co., 99 N. Y. 398, 2 N. E. 47 [*affirming* 6 N. Y. Civ. Proc. 113]; Dunlop *v.* Paterson F. Ins. Co., 12 Hun (N. Y.) 627 [*affirmed* in 74 N. Y. 145, 30 Am. Rep. 283]. On the other hand it is held that creditors attaching assets of an insolvent foreign corporation in Tennessee for the purpose of winding up its affairs under the statutes of that state acquire no lien or right to priority in the assets, which are to be distributed *pro rata* among all the creditors, residents, and non-residents. Taylor *v.* Life Assoc. of America, 13 Fed. 493.

28. Bidlack *v.* Mason, 26 N. J. Eq. 230; Williams *v.* Hintermeister, 26 Fed. 889, 3 Kulp (Pa.) 499, which was a suit to enjoin interference with assets by one charged with notice of and affected by the orders of the court in the primary receivership.

At suit of sequestrator.— It has been held that a sequestrator of a corporation appointed in another state at the instance of a judgment creditor in a suit there may sue to recover assets transferred by the company without consideration, and the court may, in its discretion, appoint a receiver for a domestice company to which such assets were transferred. Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr. N. S. (N. Y.) 283 [*affirmed* in 6 Lans. 25].

29. Sigua Iron Co. *v.* Brown, 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 [*affirmed* in 171 N. Y. 488, 64 N. E. 194] (holding that under the statutory provision that in case of a transfer of interest an action may be continued by the original party, unless the court directs a substitution, it was proper for an ancillary receiver of a foreign corporation to continue an action, commenced before his appointment, in the name of the corporation, by verifying the amended complaint therein); Smith *v.* Eighth Ward Bank, 31 N. Y. App. Div. 6, 52 N. Y. Suppl. 290 (holding that the ancillary receiver acquires the right to enforce the devolution of title of the domiciliary receiver which vested in the latter upon his appointment); Evans *v.* Pease, 21 R. I. 187, 42 Atl. 596 (may sue in his own name); Bay State Gas Co. *v.* Rogers, 147 Fed. 557 (right of ancillary receiver appointed in the federal court in Massachusetts to sue in the name of the corporation). But in Buckley *v.* Harrison, 10 Misc. (N. Y.) 683, 31 N. Y. Suppl. 999, where the ancillary receiver was appointed merely "with the usual powers and duties of receivers in like cases according to law and the practice of this court," it was held that he was a mere chancery receiver or custodian, and not having been authorized to sue he could not do so irrespective of his powers under the order of appointment in the primary jurisdiction.

By statute in New Jersey it was held that the legislative design in providing for the appointment of a receiver of a foreign corporation was to confer upon the court the same powers in respect to corporations for property in the state that it exercised over insolvent domestic corporations and it is bound to give the ancillary receiver the same powers granted to receivers of domestic corporations so far as necessary to the recovery and collection of assets. National Trust Co. *v.* Miller, 33 N. J. Eq. 155.

Under an assignment to a special receiver pursuant to a stipulation that the bonds and mortgages assigned should be collected by him, such stipulation being made in a controversy between the general receiver appointed in another state and the special receiver, it was held that a federal court in another jurisdiction properly permitted the special receiver to maintain a suit in that jurisdiction to foreclose the mortgage given by citizens there on property in that jurisdiction, as a matter of comity. Lewis *v.* Clark, 129 Fed. 570, 64 C. C. A. 138.

Actions by receivers generally see *supra*, VI, A, 3, b.

30. Goodrich *v.* Sanderson, 35 N. Y. App. Div. 546, 55 N. Y. Suppl. 881, authority to effect the settlements of accounts, where the appointment was "with the usual powers and duties of receivers according to the laws of this State and the practice of this court."

A receiver of a foreign corporation may defend an action to foreclose a mortgage on property within the state and of which he is custodian. Jenkins *v.* John Good Cordage, etc., Co., 56 N. Y. App. Div. 573, 68 N. Y. Suppl. 239 [*affirmed* in 168 N. Y. 679, 61 N. E. 1130].

31. Lewis *v.* American Naval Stores Co., 119 Fed. 391; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9.

Appointment as ancillary receiver.— The court has refused to allow an amendment making the action ancillary to that in another state, where the same receiver had been ap-

receivers are to be treated as different legal persons in respect of the management of the property in their hands, and in respect of the torts for which they are liable in connection with such management,[32] and a judgment rendered against an ancillary receiver binds only that portion of the estate which came into his hands as ancillary receiver, and is not an operative and final adjudication against the receiver appointed by the court of original administration.[33] Each of the appointing courts retains full and exclusive jurisdiction of the assets over which its receiver is appointed,[34] and of its receiver in respect of his management and disposition of such assets.[35] The ancillary receiver is the officer of the court appointing him and his conduct and possession are in that capacity,[36] and he cannot transfer questions of administration of such assets to a foreign jurisdiction,[37] or deal with the property inconsistently with the power of the appointing court to control his disposition of it.[38] But the ancillary receivership is generally conducted in harmony with the court of original jurisdiction,[39] and a receiver acting under

pointed in actions brought in several states to foreclose a railroad mortgage, upon the ground that the court could not delegate its powers to foreign tribunals. Taylor *v.* Atlantic, etc., R. Co., 57 How. Pr. (N. Y.) 9.

32. Union Trust Co. *v.* Atchison, etc., R. Co., 87 Fed. 530, holding that an ancillary receiver in one state is not liable for a tort committed by the original receivers of the corporation in another state.

33. Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464 [*affirming* 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305]; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9.

34. Day *v.* Baltimore City Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Reynolds *v.* Stockton, 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464 [*affirming* 46 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305]; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Cohen *v.* Gold Creek, etc., Min. Co., 95 Fed. 580.

Interference in litigation.— When a federal court has appointed a receiver for the property of an insolvent corporation within its jurisdiction, it will not permit his conduct of litigation before a master respecting claims against the estate prosecuted under the court's authority to be interfered with by a receiver subsequently appointed for the same corporation in another jurisdiction. Johnson *v.* Southern Bldg., etc., Assoc., 99 Fed. 646.

35. Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869; Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680; Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

Where the same person has been appointed receiver for a private corporation by two federal courts in different districts, as to property entirely within one district, he is subject to the control of the court in that district. Cohen *v.* Gold Creek, etc., Min. Co., 95 Fed. 580.

36. Hammond *v.* National Life Assoc., 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585 [*affirming* 31 Misc. 182, 65 N. Y. Suppl. 407, and *affirmed* in 168 N. Y. 262, 61 N. E. 244] (holding further that the receiver of a corporation in another state who was also receiver in New York could not move to discharge an attachment against the corporation on the ground that it had been dissolved before the issuance of the writ, because the dissolution on such ground would demonstrate the infirmity of the title of the receiver as ancillary receiver, in which capacity he must be considered to appear on such application); Sigua Iron Co. *v.* Brown, 33 Misc. (N. Y.) 50, 68 N. Y. Suppl. 141 [*affirmed* in 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 (*affirmed* in 171 N. Y. 488, 64 N. E. 194)]; Sullivan *v.* Sheehan, 89 Fed. 247 (holding that notes and mortgages, with respect to litigation in the ancillary jurisdiction which come into the hands of the domiciliary receiver are considered as transferred to him as ancillary receiver).

An assignment to the domiciliary receiver is held to pass title to him as an officer of the court by which he was first appointed and not as ancillary receiver in another jurisdiction, and is not available to him as ancillary receiver to recover property levied on and taken out of the hands of the corporation before the appointment of the ancillary receiver. Cole *v.* Oil-Well Supply Co., 57 Fed. 534. But in Chicago Title, etc., Co. *v.* German Ins. Co., 119 N. Y. App. Div. 347, 104 N. Y. Suppl. 253, where an assignment to the receiver under a foreign appointment was conceded to have passed to the receiver all the assets of the corporation in another state, it was held that the subsequent appointment of ancillary receivers in the latter state, one of whom was the foreign receiver, was ineffectual to transfer to them any of the assets and that an application by one of the ancillary receivers for an order on a depositary of the corporate funds to deliver the same to the ancillary receivers upon execution of a receipt by them should be refused over the objection of the foreign receiver claiming under the assignment.

37. Reynolds *v.* Stockton, 43 N. J. Eq. 211, 10 Atl. 385, 3 Am. St. Rep. 305 [*affirmed* in 140 U. S. 254, 11 S. Ct. 773, 35 L. ed. 464]; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

38. Cohen *v.* Gold Creek Nevada Min. Co., 95 Fed. 580.

39. Great Western Min., etc., Co. *v.* Har-

appointment in different states in respect to the same property may be directed by the court of one state in respect to the management of such property, and if the direction affects portions of the property in other states where he is receiver, the courts of those states will refrain from interfering with such direction or will aid its execution where unity of action is essential to the best interests of all concerned.[40] The determination of the validity of local liens upon property under the control of the court of ancillary jurisdiction is held to be a matter for that court,[41] and the receiver cannot require creditors having liens to go into another jurisdiction to assert their rights,[42] although, on the other hand, where the property over which the receivers are appointed runs into different jurisdictions, it has been held that they should report to and be governed by the court of original appointment in all matters relating to the general management of the trust and their general accounting.[43]

(II) *Surrender or Remission of Assets.* Pursuant to the rule that matters of general administration and accounting are referred to the court of primary jurisdiction,[44] it is held to be the duty of an ancillary receiver after paying the expenses of his receivership to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands.[45] And the need of uniform administration and equitable distribution of the assets of insolvent estates moves the discretion of the court to remit assets under its control to the court of primary jurisdiction,[46] where the claims of foreign and domestic creditors are of equal

ris, 198 U. S. 561, 25 S. Ct. 770, 49 L. ed. 1163.

40. Guarantee Trust, etc., Co. *v.* Philadelphia, etc., R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804. See also Railroads, 33 Cyc. 633.

A court will aid in enforcing an order in another jurisdiction binding the receiver. Thus where the receiver procured a continuance of an action in the court of the primary appointment on condition that he would not press to trial a suit between the same parties in the court of his ancillary appointment it was held that he would not be permitted by the latter court to violate the condition. Wheeling Bridge, etc., Co. *v.* Cochran, 85 Fed. 500.

41. Fletcher *v.* Harney Peak Tin-Min. Co., 84 Fed. 555. But the court of ancillary jurisdiction will not pass upon a claim which arose in another state and was a lien upon the property within that jurisdiction. Clyde *v.* Richmond, etc., R. Co., 65 Fed. 336.

The order of appointment sometimes expressly reserves authority to make all supplemental orders as to priorities and other incidental matters. Haydock *v.* Fisheries Co., 156 Fed. 988.

42. Cohen *v.* Gold Creek, Nevada, Min. Co., 95 Fed. 580, where the person was appointed receiver for a private corporation by two federal courts in different districts as to property entirely within one district and was held subject wholly to the control of the court in the latter district, although the suit there was instituted after that in the other jurisdiction.

Where receivership expenses are left unpaid by the ancillary receiver who under the order of the court in which he was first appointed sold the property and returned the proceeds to that court without the knowledge and concurrence of the court of ancillary jurisdiction, it was held that he may be charged with personal liability and that the order under which he acted affords him no protection. Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

43. Central R., etc., Co. *v.* Farmers' L. & T. Co., 113 Fed. 405 [*affirmed* in 125 Fed. 1001, 60 C. C. A. 400]; Ames *v.* Union Pac. R. Co., 60 Fed. 966. See also Railroads, 33 Cyc. 633. Under this rule, while the court of ancillary jurisdiction will determine the expenses and amount of claims without requiring the creditor to resort to a foreign jurisdiction, it may certify it to the court of primary jurisdiction for satisfaction. New York Security, etc., Co. *v.* Equitable Mortg. Co., 71 Fed. 556. And may remit a claimant, as is sometimes held, to the court of original jurisdiction for relief. Clyde *v.* Richmond, etc., R. Co., 56 Fed. 539.

44. See *supra*, text and note 40 *et seq.*

45. Central R., etc., Co. *v.* Farmers' L. & T. Co., 113 Fed. 405 [*affirmed* in 125 Fed. 1001, 60 C. C. A. 400].

46. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846; Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

Where the primary receiver has been discharged and the affairs of the corporation in the state of domicile have been wound up, and creditors have approved their claims in the ancillary jurisdiction, it is not necessary to remit any part of the assets in the latter jurisdiction to the primary receiver. Culver Lumber, etc., Co. *v.* Culver, 81 Ark. 102, 99 S. W. 391.

Where it is more convenient and less expensive to retain the funds in the hands of its receiver for distribution this will be done. Keystone Bank *v.* Union Oil Co., 25 Ohio Cir. Ct. 464, where the funds were retained

validity,[47] or unless it appears that creditors or stock-holders are asserting a special right in the local assets which should be settled by the court appointing the ancillary receiver,[48] although in other cases the courts refuse to relinquish possession as against their own citizens claiming rights in the funds.[49] But where the assets are particularly applicable to the payment of domestic claims rather than subject to general distribution, the court will retain them and will not turn them over to the domiciliary receiver.[50] It is eminently proper that domestic claimants and creditors should not be compelled to go into other jurisdictions to prove their claims and that provision should be made for securing to them equitable and proportionate shares in the distribution of the assets.[51] And it has been held that in any event the domestic court may permit the intervention of the foreign receiver as a matter of comity, since even if the assets were retained for distribution among resident creditors, the foreign receiver might be entitled to any surplus after the distribution.[52] And where the court has refused to remit proceeds for general distribution, after satisfying domestic claimants the balance may be turned over to the domiciliary receiver.[53]

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.[54]

A. Existence of Liability — 1. NECESSITY OF VALID BOND. Where the

at the instance of foreign and domestic creditors where a foreign corporation had executed an assignment for the benefit of creditors including a leasehold in oil lands in Ohio and a receiver had been appointed in a litigation concerning the rights of creditors under the assignment as against other creditors claiming under another transfer.

47. People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053; Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424.

48. Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680. The application of this rule may be seen in the cases in which the assets of mutual benefit companies or societies are remitted to the court of primary jurisdiction for distribution among the members and certificate holders, where such parties are secured in their right to a proportionate distribution with all other claimants of the same class. See MUTUAL BENEFIT INSURANCE, 29 Cyc. 62, text and note 93.

49. Lackmann *v.* Supreme Council O. C. F., 142 Cal. 22, 75 Pac. 583; Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311; Frowert *v.* Blank, 205 Pa. St. 299, 54 Atl. 1000, which cases are not entirely in accord with those referred to *supra*, note 48; *infra*, note 51.

50. Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680 (as to securities deposited as a condition precedent to a company's obtaining authority to transact business in the state, in trust for the benefit of creditors in the state); People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053.

51. Buswell *v.* Supreme Sitting O. I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846 (where it was held that the reserve fund of a mutual benefit order should be transmitted to the domiciliary receiver, provided it appears by the decree of the foreign court that it would admit the proof of claims against the reserve and benefit funds which was made in the court of Massachusetts, when regularly certified by the Massachusetts court, subject to such revision by the foreign court as justice might seem to require, and would distribute the whole fund so that the benefit certificate members of the branches in Massachusetts should receive the same proportionate dividend as the benefit certificate members of branches in all other states who are admitted to share in the fund); Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680 (indicating that the court might require a bond of the foreign assignee or might retain sufficient assets to be distributed through its receiver according to the proportion fixed by the decree of the court of primary jurisdiction); People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 (holding that the court might require a bond of the domiciliary assignee conditioned that on distributing the assets the New York creditors and shareholders should be awarded the same dividends as were awarded to others without reduction on account of any dividend received by them out of a fund in New York which was specially created for New York creditors); Sands *v.* Greeley, 88 Fed. 130, 31 C. C. A. 424. But in Smith *v.* Taggart, 87 Fed. 94, 30 C. C. A. 563, it was held that no pledge could be required as a condition to turning over funds, since it would be presumed that the court of primary jurisdiction would properly apply them. But see Fawcett *v.* Supreme Sitting O. I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815, refusing to relinquish the possession of assets under circumstances which induced the court to impose the conditions mentioned in Buswell *v.* Supreme Sitting O. I. H., *supra*.

52. Barley *v.* Gittings, 15 App. Cas. (D. C.) 427.

53. Failey *v.* Fee, 83 Md. 83, 34 Atl. 839, 55 Am. St. Rep. 326, 32 L. R. A. 311.

54. **Bonds** generally see BONDS, 5 Cyc. 721.
Official bonds see OFFICERS, 29 Cyc. 1451.

appointment of a receiver is absolutely void, a bond given by such receiver is also void.[55] Where, however, the right of the court to appoint a receiver exists, but this right is exercised in an improper manner, or at an improper time, the bond given upon such appointment is not void, and the sureties are not relieved from liability thereon.[56] A receiver's bond not executed according to statute, but containing the usual provisions, and made on a good consideration, is good as a common-law bond, and the sureties are estopped to deny their liability thereon.[57]

2. Commencement of Liability. While a receiver is held to be liable to account as such for all moneys coming into his hands in that capacity at any time, before or after the date of the perfecting of his security,[58] whether or not a surety, who has undertaken to account for what the receiver "should receive and become liable to pay as such receiver," is liable to account for all such moneys is a question upon which the authorities differ.[59]

B. Extent of Liability — 1. In General. The extent of the liability of the sureties of a receiver can only be ascertained by the terms of their bond,[60] and, in accordance with the general rule, such liability cannot be extended by implication beyond the precise terms and scope thereof.[61] The usual contract of such sureties is to be liable for the faithful performance by the receiver of the duties imposed upon him by order of court.[62] Such a contract necessarily has relation only to the duties falling within the scope of the order of appointment.[63] The

55. Quiggle *v.* Trumbo, 56 Cal. 626.

56. Thompson *v.* Denner, 16 N. Y. App. Div. 160, 44 N. Y. Suppl. 723, where it is said that the appointment of a receiver in such a case has colorable authority, and although his induction into that office is illegal, and he does not thereby become receiver *de jure*, yet by intruding himself into the office and assuming its duties, he becomes receiver *de facto*; and those who voluntarily bind themselves for the faithful performance of his duties cannot absolve themselves from their obligation by insisting that he is not receiver.

Where the appointment of a receiver is regular, and in a matter over which the court has taken jurisdiction, and the receiver takes possession of the property, and embezzles the proceeds, the sureties on his bond are liable, although the bill under which he was appointed is afterward dismissed for want of jurisdiction. Baltimore Bldg., etc., Assoc. *v.* Alderson, 99 Fed. 489, 39 C. C. A. 609.

57. Baker *v.* Bartol, 7 Cal. 551; Carl *v.* Meyer, 51 N. Y. App. Div. 5, 64 N. Y. Suppl. 1077.

Bond to secure payment of fund for distribution.—A court may require a bond after a receiver has assumed to act to secure the delivery or payment of the fund for distribution. For such an object no statutory mode is prescribed, and a surety, executing such a bond on a binding consideration, is estopped to deny, on technical grounds, the validity of his obligation. Rowlet *v.* Eubank, 1 Bush (Ky.) 477.

58. See *supra*, VII, B.

59. Titherington *v.* Hodge, 81 Ky. 286, 5 Ky. L. Rep. 211 (holding that a surety on a receiver's bond is not liable for acts committed by a receiver before the execution of the bond); Hodge *v.* Quiry, 9 Ky. L. Rep. 650 (holding that such a bond is intended to secure the payment of moneys theretofore received and not paid out under order of court); Smart *v.* Flood, 49 L. T. Rep. N. S. 467 (holding that a surety is liable for all moneys coming into the hands of the receiver as such, whether before or after the perfecting of his security, and that the principle that the appointment of a receiver is merely conditional until his security is perfected applies only to cases where the question is as to his title as against third parties and has no application where the question is as to his own liability, or that of his sureties, in respect of moneys received and expended by him as receiver.

60. Ross *v.* Williams, 11 Heisk. (Tenn.) 410.

61. State *v.* Spittler, 79 Conn. 470, 65 Atl. 949. See also Principal and Surety, 32 Cyc. 73 text and note 22.

62. Ross *v.* Williams, 11 Heisk. (Tenn.) 410.

Failure to comply with an order of court in respect to the trust fund is a breach of the bond, upon which suit may be brought by leave of court. Washington Bank *v.* Creditors, 86 N. C. 323.

To account for any surplus, after paying named creditors, is a duty of a receiver, for which, in case of default, his sureties are liable. Ross *v.* Williams, 11 Heisk. (Tenn.) 410.

Where a receiver is appointed to collect rents, it is his duty to pay over as well as to receive, and for default in not so doing, when ordered to do so by the court, the sureties are liable. U. S. *v.* Donohue, 2 MacArthur (D. C.) 214.

63. Preston *v.* American Surety Co., 104 Md. 40, 64 Atl. 292.

Failure to pay personal judgment.— Sureties on a receiver's bond are not liable for his failure to pay a judgment rendered against him personally. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl.

fact that the parties consent to the order under which the receiver acts does not relieve his sureties from liability.[64] Where the receiver acts without authority from the court, the cases are not in accord as to the liability of his sureties.[65] But if the court subsequently approves an unauthorized act of a receiver, there is no question as to the liability of the sureties.[66]

2. Interest. In general the sureties of a receiver are answerable for such interest, as well as principal, as the receiver himself is liable to pay,[67] such interest to be computed only from the date of the defalcation.[68]

C. Enforcement of Liability — 1. In General. Sureties upon the bond of a receiver do not become parties to the suit, or officers of the court, by reason thereof.[69] Ordinarily their liability can only be ascertained and enforced by an independent action, in which they have a trial by jury.[70] They cannot be summarily proceeded against by an order to show cause, or motion in the suit,[71] unless such power is reserved in the bond itself, or is provided by statute or rule of court.[72] The only exception to such a course of proceeding seems to be where the surety has taken possession of some of the funds which came into the hands of the receiver under orders of the court.[73] The regular course of procedure is to go against

659 [*reversing* 53 Misc. 412, 103 N. Y. Suppl. 472], 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

Misapplication of funds not assets of trust estate.— Sureties of a receiver are not responsible for the receiver's application of funds not assets of the trust estate. Preston *v.* American Surety Co., 104 Md. 40, 64 Atl. 292; Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659 [*reversing* 53 Misc. 412, 103 N. Y. Suppl. 472], 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

If a receiver is directed to collect and disburse a particular debt upon executing a bond, with surety, conditioned for the faithful discharge of his duty as such receiver, under that or any future order of the court in that cause, the surety in such bond, when given, is not liable for defaults of the principal in the collection and disbursement of other funds collected under subsequent orders in the cause. The doctrine that a surety of a public officer is bound for funds collected by his principal by color of his office has no application to the surety on the bond of a receiver of a court appointed to collect and disburse a particular fund, and the condition of whose bond is for the faithful discharge of that duty. Ayers *v.* Hite, 97 Va. 466, 34 S. E. 44.

64. H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337.

But if a receiver directed by order of court to sell property on credit sells it for cash, at the instance of the parties in interest, the surety in his bond is not liable for the money which thus comes into his hands. The act of the parties in procuring the receiver to sell the property for cash has the effect of constituting him their agent, and in making the sale and receiving the money he is acting under the agency, and not as the receiver of the court. Leathers *v.* Kelling, 12 Ky. L. Rep. 92.

65. Leathers *v.* Kelling, 12 Ky. L. Rep. 92 (holding that a receiver directed to loan out money has no authority to collect it of the borrower until he is ordered by the court so to do, and if he collects the money without such authority his surety is not liable therefor); Weems *v.* Lathrop, 42 Tex. 207 (holding that even though a receiver has no authority to do a particular act, yet if he does it, and thus puts it out of his power to faithfully discharge his duty, his sureties are liable on their bond).

66. Com. *v.* Leachman, 55 S. W. 430, 21 Ky. L. Rep. 1408, 56 S. W. 151, 21 Ky. L. Rep. 1729.

67. Dawson *v.* Raynes, 2 Russ. 466, 26 Rev. Rep. 149, 3 Eng. Ch. 466, 38 Eng. Reprint 411, holding, however, that under the particular circumstances of the case the sureties would not be made to pay interest.

68. Sanford *v.* Carr, 8 Ky. L. Rep. 967.

69. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

70. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43; Thurman *v.* Morgan, 79 Va. 367; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

Scire facias or action at law.— If a receiver fails to account, or is in any respect delinquent, as an officer of the court, his bond may be put in suit by scire facias in equity, or in an action at law, so as to charge him and his sureties. Williamson *v.* Wilson, 1 Bland (Md.) 418.

71. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43; Thurman *v.* Morgan, 79 Va. 367; Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

72. Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132, where it is intimated that a court may so frame a receiver's bond as to reserve to itself the power to assess damages against the receiver and his sureties.

A statute permitting such an assessment of damages on a receiver's bond has been held constitutional in Mississippi. State Bank *v.* Duncan, 52 Miss. 740.

73. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43; Seidenbach *v.* Denklespeil, 11 Lea (Tenn.) 297, where it was held that because the surety on the receiver's bond had in his hands five hundred dollars, acquired from the

the receiver in the first instance, and if he fails in the proper discharge of his duty within the scope of his bond, then to obtain leave of court to sue upon his bond.[74]

2. Conditions Precedent — a. Accounting and Default by Receiver. Before any resort can be had to the sureties on a receiver's bond, all the remedies available against the receiver must be exhausted.[75] Therefore as a rule the liability of the sureties on a receiver's bond cannot be enforced until a default has been ascertained,[76] on the final settlement of the receivers' accounts,[77] and there has been a decree establishing the receiver's inability to pay.[78] Special cases may arise, however, as where a receiver absconds, in which it becomes impracticable to ascertain what is due from him. In such cases a court of equity may interpose and establish a breach in some other manner, and give a remedy against the sureties.[79] So also upon the death of a receiver without settlement of his accounts, his recognizance may be ordered to be put in suit against the sureties.[80]

b. Leave of Court to Sue. It is not necessary to obtain leave of court to sue the sureties on the bond of a clerk of the court, or other persons who are *ex officio* receivers of certain funds;[81] but in all other cases, it, has been held, there should be leave of court to sue on a receiver's bond.[82]

3. Parties. Under the statutory practice permitting an action on a bond in the name of the real party in interest, an action on a receiver's bond is properly brought by the real party in interest in his own name.[83] Where judgment has

receiver, which he knew to be part of the trust fund, the court had sufficient jurisdiction over him to make an order upon him for the restoration of that sum to the custody of the court.

74. State *v.* Gibson, 21 Ark. 140; Atkinson *v.* Smith, 89 N. C. 72; Washington Bank *v.* Creditors, 86 N. C. 323.

Where a receiver is charged personally with the payment of debts incurred by him as such receiver, the proper form of order is that he pay such debts, and in default thereof stand committed for contempt, and that the creditors have leave to bring suit on his bond against him and his surety. Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

On recognizance.— In Thurlow *v.* Thurlow, 4 Jur. 982, it is said to be the usual course to apply for leave to put the recognizance in suit, and not for a reference to the master to inquire whether it would be proper to do so; and notice of the application must be personally served on the parties liable. See also for statement of proceedings on recognizance Kirker *v.* Owings, 98 Fed. 499, 39 C. C. A. 132.

75. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

76. State *v.* Gibson, 21 Ark. 140; Atkinson *v.* Smith, 89 N. C. 72; Washington Bank *v.* Creditors, 86 N. C. 323.

77. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651; French *v.* Dauchy, 134 N. Y. 543, 31 N. E. 1041 [*affirming* 57 Hun 100, 10 N. Y. Suppl. 468] (holding that the sureties are properly chargeable for no greater amount than that which their principal is liable to pay, and it is essential that an accounting should be had to ascertain what, if any, charges and expenses of the trust he may be entitled to have allowed to him by way of abatement of the amount due from him); Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127; Atkinson *v.* Smith, 89 N. C. 72; Washington Bank *v.* Creditors, 86 N. C. 323.

The case is analogous to those involving the administration of estates of deceased persons, in which no action against the administrator can be maintained until there has been final decree in the probate court. State *v.* Germania Bank, 103 Minn. 129, 114 N. W. 651.

Notice to sureties of the accounting.— The rule of the text is held to mean that the accounting must have been a valid regular accounting, such as is authorized by statute or some rule of law; that a provision of the statute that "in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice . . . shall have been first given to the surety or sureties on the official bond of such receiver," means that at least as against the surety an attempted voluntary accounting by the receiver or one upon the petition of a creditor cannot be regular and valid, and as against the surety or sureties could have no effect, and the failure to give such notice to the sureties works a denial of the privilege of maintaining an action on the statutory bond. Stratton *v.* Philadelphia City Trust, etc., Co., 86 N. Y. App. Div. 551, 83 N. Y. Suppl. 780.

78. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

79. Ludgate *v.* Channell, 3 Macn. & G. 175, 49 Eng. Ch. 132, 42 Eng. Reprint 227; Walker *v.* Wild, 1 Madd. 528, 56 Eng. Reprint 194.

80. Ludgate *v.* Channell, 3 Macn. & G. 175, 49 Eng. Ch. 132, 42 Eng. Reprint 227.

81. Boothe *v.* Upchurch, 110 N. C. 62, 14 S. E. 642.

82. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

83. Titus *v.* Fairchild, 49 N. Y. Super. Ct. 211.

been recovered against the receiver, it has been held that he is not a necessary party to an action against the sureties on his bond.[84]

4. **Pleading.** In an action on a receiver's bond every breach intended to be taken advantage of must be assigned.[85] Furthermore, a complaint on such a bond should allege an accounting by the receiver and a lack of assets in his hands or his inability to pay.[86] Where leave of court is necessary to sue on a receiver's bond, the complaint should allege that such leave has been granted by the court.[87] If there is a demurrer in apt time, the defective complaint may be amended by averring leave of court if such is the fact.[88]

5. **Defenses.** Where, in a suit on a receiver's bond, the complaint alleges merely that the receiver, as such, has money which he refuses to pay over, any defense is valid which shows either that he has no money as receiver or that he has paid over all that he has.[89] Laches working no hardship to the sureties has been held to be no defense.[90]

6. **Issues and Proof.**[91] Upon an issue as to the liability of a receiver for alleged negligence, evidence of conduct not chargeable to him, or which is not material to show the failure of the exercise of ordinary care,[92] is not admissible.[93] But the sureties are entitled to introduce any competent evidence to defeat or reduce the amount of their liability.[94] A judgment or order that a receiver is in default and that a certain sum is due from him is competent evidence against his sureties as well as himself,[95] both of a breach of the bond,[96] and of the amount for which the surety is liable.[97] But unless the language of the bond expressly

On bond of predecessor.— Where a receiver refused to sue the sureties of his predecessor it was held that the court might, under Ky. Civ. Code Pr. § 25, empower one of the creditors to sue for himself and the other creditors, who were numerous. H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky.L. Rep. 337.

Bond given to prevent appointment of receiver.— Where a bond is executed under order of court to prevent the appointment of a receiver, it is good as a common-law bond, and the party for whose protection it was required may sue thereon in his own name, although it is payable to the people of the state. Baker *v.* Bartol, 7 Cal. 551.

84. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

85. Colgate *v.* Roberts, 85 Ind. 464.

86. Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659 [*reversing* 53 Misc. 412, 103 N. Y. Suppl. 472], 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127.

87. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

But failure to do so is not a defect in the cause of action, but a defective statement of a good cause of action, and is cured by failure to demur upon that ground. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

88. Black *v.* Gentery, 119 N. C. 502, 26 S. E. 43.

89. Colgate *v.* Roberts, 85 Ind. 464; Lesster *v.* Lawyers' Surety Co., 50 N. Y. App. Div. 181, 63 N. Y. Suppl. 804, 30 N. Y. Civ. Proc. 388 [*reversing* 30 Misc. 771, 62 N. Y. Suppl. 479], holding that a surety on a receiver's bond, conditioned for the faithful discharge of his duties, can show, in an action on the bond based on the receiver's disobedience of an order of the appellate court requiring him to pay out money, that the receiver's failure to pay out the money under such order was not in fact a disobedience, but that the receiver had before that time faithfuly discharged his duties by paying over all the moneys in his hands in pursuance of a valid order of the trial court, which the appellate court reversed.

90. Carl *v.* Meyer, 51 N. Y. App. Div. 5, 64 N. Y. Suppl. 1077.

91. See, generally, Evidence, 16 Cyc. 821.

92. **Duty of receiver** see *supra*, IV, F, 6, b.

93. Groesbeck Cotton Oil, etc., Co. *v.* Oliver, 44 Tex. Civ. App. 303, 97 S. W. 1092.

94. Com. *v.* Gould, 118 Mass. 300 (holding that the fact that the receiver rendered, as such, valuable services, for which he became and was entitled to compensation, the amount of which has not been determined, is not competent evidence to reduce the amount of the surety's liability); Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659 [*reversing* 53 Misc. 412, 103 N. Y. Suppl. 472], 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127 (holding that where a purchaser of property at a receiver's sale failed to complete his bid, whereupon his initial payment was forfeited, and he subsequently recovered judgment against the receiver for an amount alleged to have been the sum so paid, the receiver's sureties, in an action on his bond based on such judgment, were entitled to show that the purchaser paid a less sum on the purchase-price of the property, or that some portion of the sum paid had been returned to him).

95. Thomson *v.* MacGregor, 81 N. Y. 592 [*reversing* 45 N. Y. Super. Ct. 197].

96. Com. *v.* Gould, 118 Mass. 300; Thompson *v.* Denner, 16 N. Y. App. Div. 160, 44 N. Y. Suppl. 723.

97. Com. *v.* Gould, 118 Mass. 300.

and explicitly contemplates a submission by the sureties to a judgment against the receiver, and that the sureties intended to be bound by it, such a judgment is not conclusive against them, and they may question it when a liability is sought to be established against them on account of it.[98] An immaterial variance will not render evidence inadmissible.[99] And the question whether the receiver acted with ordinary care in respect of particular matters complained of is for the jury.[1]

D. Indemnity and Contribution. A surety for a receiver stands in the place of his principal, and has been held to be entitled to be indemnified for what he has paid for the receiver out of any balance due him.[2] By accepting a mortgage of part of the receiver's property as security, a surety does not waive his general rights, as surety, over the rest of the receiver's property, not included in the mortgage.[3] But a receiver cannot be permitted to put the fund intrusted to his care under the control of his sureties or the control of any person appointed by them, but must retain the complete control over it in himself, so as to be able to act with promptitude on any emergency.[4] When one of two sureties has paid the full amount of a receiver's bond, he is entitled to use the bond for the purpose of recovering, out of the estate of his cosurety, not only one half of the sum so paid by him, but also interest thereon from the date of payment.[5]

X. WRONGFUL RECEIVERSHIP.[6]

The appointment of a receiver by the collusion of a debtor and a creditor, so that his business may be continued without interference on the part of other creditors, is improper, and a fraud on the rights of such creditors.[7] In such case,

98. Preston *v.* American Surety Co., 104 Md. 40, 64 Atl. 292; Thomson *v.* MacGregor, 81 N. Y. 592 [*reversing* 45 N. Y. Super. Ct. 197]; Coe *v.* Patterson, 122 N. Y. App. Div. 76, 106 N. Y. Suppl. 659, 123 N. Y. App. Div. 914, 108 N. Y. Suppl. 1127 (holding further that where, after judgment against a receiver in his official capacity, an order was granted on notice to the receiver, but not to his sureties, directing him to pay the amount of the judgment to plaintiff within ten days, but there was no accounting in such proceeding, nor ascertainment of the condition of the fund, the order did not add to the force of the judgment as against the receiver's sureties); Carl *v.* Meyer, 51 N. Y. App. Div. 5, 64 N. Y. Suppl. 1077; Lesster *v.* Lawyers' Surety Co., 50 N. Y. App. Div. 181, 63 N. Y. Suppl. 804, 30 N. Y. Civ. Proc. 388 [*reversing* 30 Misc. 771, 62 N. Y. Suppl. 479]. But see Clark *v.* Harrisonville First Nat. Bank, 57 Mo. App. 277.

Conclusiveness upon surety of judgment against principal generally see JUDGMENTS, 23 Cyc. 1278; PRINCIPAL AND SURETY, 32 Cyc. 135.

99. H. B. Claflin Co. *v.* Gibson, 51 S. W. 439, 21 Ky. L. Rep. 337, in which case it was held that in an action on a receiver's bond, in which it was alleged that the order under which the sale for the proceeds of which defendants were sought to be made liable was made in October, the order under which the sale was made was admissible in evidence, although made in November, the action being on the bond, and not on the order of sale.

1. Groesbeck Cotton Oil, etc., Co. *v.* Oliver, 44 Tex. Civ. App. 303, 97 S. W. 1092.

2. Glossop *v.* Harrison, Coop. 61, 10 Eng. Ch. 61, 35 Eng. Reprint 429, 3 Ves. & B. 134, 35 Eng. Reprint 429.

Appointment of receiver over receiver's estate.— The surety of a defaulting receiver, having paid the sum due, has been held entitled to have a receiver appointed over his principal's estate. Henderson *v.* Skerrett, 5 Ir. Eq. 404.

3. Brandon *v.* Brandon, 3 De G. F. & J. 524, 5 Jur. N. S. 256, 28 L. J. Ch. 147, 7 Wkly. Rep. 250, 60 Eng. Ch. 407, 44 Eng. Reprint 1371.

4. White *v.* Baugh, 9 Bligh N. S. 181, 5 Eng. Reprint 1261, 3 Cl. & F. 44, 6 Eng. Reprint 1354, holding that it makes no difference in such a case that the arrangement between the receiver and his sureties has not been the direct cause of a loss; nor that neither of them has obtained any personal advantage from it.

5. *In re* Swan, Ir. R. 4 Eq. 209.

6. Liability for receivership expenses in case of wrongful appointment see *supra*, V, C, 2, c.

7. Link Belt Mach. Co. *v.* Hughes, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673 [*affirming* 95 Ill. App. 323]; Stirlen *v.* Jewett, 165 Ill. 410, 46 N. E. 259 [*affirming* 63 Ill. App. 55].

Court may refuse recognition of fraudulent receivership.— It is not error for a court to refuse to recognize receivers appointed for an insolvent firm, where it had been adjudged that the receivership was not in good faith, but part of a scheme to defraud creditors, and that the receivers were appointed on false and fraudulent statements made to the court. Metcalf *v.* Moses, 161 N. Y. 587, 56 N. E. 67 [*modifying* 35 N. Y. App. Div. 596, 55 N. Y. Suppl. 179].

if the creditor has not exhausted his remedy at law to satisfy his claim, it is immaterial that no actual fraud was contemplated; [8] and the appointment cannot be sustained on the ground that the debtor was insolvent, and that the method pursued was for the best interests of all creditors.[9] Statutes often provide that, when application is made for a receiver, the complainant shall enter into a bond conditioned to pay all damages occasioned by the appointment if the same is vacated.[10] Liability on the bond follows as a result of the final judgment in such cases, but the extent of such liability and the measure of damages remains to be determined in an independent action on the bond.[11] Persons who wrongfully procure the appointment of a receiver, as well as the receiver himself, become, after the appointment is judicially declared void, trespassers *ab initio*, and liable for the damages caused by their wrongful acts.[12] A receiver cannot in such a case excuse himself by showing that the use which he made of the funds or property in his hands was to some extent beneficial to the wronged party.[13] It is not necessary, in order to recover damages for wrongfully procuring the appointment of a receiver, to show that the appointment was procured maliciously, and without probable cause.[14] In an action for damages for wrongfully securing the appointment of a receiver, the general rules as to burden of proof,[15] and admissibility of evidence,[16] in civil actions, apply. Plaintiff is entitled

Evidence held not to show collusion.— Proof that the officers of a corporation, interested as stock-holders and creditors, expressed a preference for the appointment of a receiver in the event a creditor determined to sue, did not show a collusion between the officers and creditor for the appointment of a receiver, so as to require the court to vacate the appointment on the application of stock-holders. Davis *v.* Edwards, 41 Wash. 480, 84 Pac. 22.

Evidence held sufficient to show fraud.— Manhattan Trust Co. *v.* Seattle Coal, etc., Co., 16 Wash. 499, 48 Pac. 333, 737.

8. Link Belt Mach. Co. *v.* Hughes, 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673 [*affirming* 95 Ill. App. 323]; Stirlen *v.* Jewett, 165 Ill. 410, 46 N. E. 259 [*affirming* 63 Ill. App. 55]. But see Myers *v.* Myers, 15 N. Y. App. Div. 448, 44 N. Y. Suppl. 513 [*affirming* 18 Misc. 663, 43 N. Y. Suppl. 737], holding that where a creditor seeks to attach assets in the hands of a receiver appointed in a voluntary dissolution proceeding, the burden is on him to show that the receiver was procured with fraudulent intent, and this burden is not sustained by evidence that the debt sued on was fraudulently contracted, or that real estate of the insolvent firm was conveyed by it to the wife of one of the members thereof, in satisfaction of an alleged indebtedness.

9. Stirlen *v.* Jewett, 165 Ill. 410, 46 N. E. 259 [*affirming* 63 Ill. App. 55].

10. See the statutes of the several states. And see cases cited *infra*, this note.

The purpose of such a provision is to afford indemnity to those who suffer damage by reason of the improvident appointment of the receiver and avail themselves of the opportunity afforded by the statutes to have the appointment vacated. Pagett *v.* Brooks, 140 Ala. 257, 37 So. 263. A final decree on the merits, dismissing plaintiff's bill, without more, in a cause in which a receiver was appointed does not operate to vacate the appointment of the receiver, within the meaning of the statute, and hence there is in such case no breach of the bond. Pagett *v.* Brooks, *supra*. The fact that objection to the appointment of the receiver was not based upon this particular ground need not affirmatively appear. Dreyspring *v.* Loeb, 113 Ala. 263, 21 So. 73.

11. Joslin *v.* Williams, 76 Nebr. 594, 107 N. W. 837, 112 N. W. 343, holding that the approval of the accounts of a receiver wrongfully appointed does not adjudicate the question of damages between the litigants in the action in which he was appointed, where the party resisting the appointment and procuring a reversal of it does not participate in the accounting and receives no benefit therefrom.

12. Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589; Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10; Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010.

Items consisting of loss from the acts of the receiver after his appointment, or of speculative profits, cannot be recovered in the suit in which the receiver was appointed and subsequently discharged pending the suit. Coverdill *v.* Seymour, 94 Tex. 1, 57 S. W. 37.

13. Bowman *v.* Hazen, 69 Kan. 682, 77 Pac. 589.

14. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10.

15. See cases cited *infra*, this note.

Amount of damages.— The burden of proof is on plaintiff to show by a preponderance of the testimony what damage he sustained by the appointment of a receiver and his taking possession of the property. Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010.

16. See cases cited *infra*, this note.

Evidence of fact admitted in pleadings.— Admission of a copy of the opinion of the court in the receivership proceedings reversing the order appointing the receiver is not reversible error, although the invalidity of the

to all damages which he may sustain by reason of such appointment,[17] and in determining the measure of damages it is proper to consider the injury to plaintiff's possession during the period of the receivership,[18] the amount of good and collectable accounts lost by reason of the receivership,[19] and the value of the services of counsel employed to procure the vacation of the order appointing the receiver.[20]

appointment was admitted by defendants. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10.

17. Joslin *v.* Williams, 76 Nebr. 594, 107 N. W. 837, 112 N. W. 343; Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010.

By statute it is frequently provided that every order appointing a receiver shall require the applicant to give a good and sufficient bond conditioned to pay all damages which the other parties to the suit or any of them may sustain by reason of the appointment of such receiver, in case it shall be finally decided that the order ought not to have been granted. See the statutes of the several states. And see Joslin *v.* Williams, 76 Nebr. 594, 107 N. W. 837, 112 N. W. 343; Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010, which cases hold that the word "all" does not mean some, or a part, but means the whole, the entire damage, every item of injury.

In Montana the measure of damages for wrongfully procuring the appointment of a receiver for a going and solvent corporation is defined by Civ. Code, §§ 4270, 4330, 4333, and 4334, to be the amount which will afford compensation for the detriment proximately caused by defendant's wrongful act, which, in case of the wrongful conversion of personal property, is presumed to be the value of the property at the time of conversion, with interest from that time, or the highest market value of the property at any time between the conversion and the verdict, without interest. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10.

18. See cases cited *infra*, this note.

The rental value of the premises sequestered during the receivership is a proper measure of damages. Joslin *v.* Williams, 76 Nebr. 594, 107 N. W. 837, 112 N. W. 343.

If the property taken possession of is sold, the measure of plaintiff's damages is the value of his interest in such property. Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010.

If plaintiff is prevented from carrying on the business in which he was engaged by reason of the taking of possession by the receiver, his measure of damages is the actual loss sustained by the suspension of the business during the period of the receivership. Haverly *v.* Elliott, 39 Nebr. 201, 57 N. W. 1010.

19. Thornton-Thomas Mercantile Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10, holding that evidence of the loss of an account through the receivership and the running of the statute of limitations is admissible, although no action had been brought to collect the account.

20. Joslin *v.* Williams, 76 Nebr. 594, 107 N. W. 837, 112 N. W. 343, holding that the fact that the supreme court in vacating the appointment of a receiver puts its decision on a ground different from that urged by counsel does not deprive the party procuring the vacation of the order of the right to recover, in an action for damages, the value of the services of his attorney in procuring such vacation.

[X]

RECEIVING STOLEN GOODS

By Richard W. Flournoy, Jr.

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CROSS-REFERENCES

For Matters Relating to:

Larceny:

In General, see LARCENY, 25 Cyc. 1.

Receiver's Liability For, see LARCENY, 25 Cyc. 59.

Receiving Goods Stolen From Mails, see POST-OFFICE, 31 Cyc. 1013.

Receiver as Accessary, see CRIMINAL LAW, 12 Cyc. 193 note 89.

Venue, see CRIMINAL LAW, 12 Cyc. 234.

I. DEFINITION.

The crime of receiving stolen goods includes generally the receiving,[1] buying, concealing,[2] or aiding in concealing goods stolen or embezzled, with knowledge that they were so stolen or embezzled,[3] and with fraudulent intent [4] to deprive the true owner thereof.[5]

1. See *infra,* III, D.
2. See *infra,* III, E.
3. See *infra,* III, B.
4. See *infra,* III, C.
5. See Watts *v.* People, 204 Ill. 223, 240, 68 N. E. 563, where a receiver of stolen property is defined as being one who receives into his possession or under his control with felonious intent any stolen goods or chattels with knowledge that they have been stolen.

II. History and Grade of Offense.

Under the common law receiving stolen goods was a misdemeanor and treated as misprision or compounding of felony. By the statute of 3 Wm. & M. c. 9, § 4, receivers of stolen goods were made accessaries after the fact, thus elevating the misdemeanor to a felony. The statutes of 1 Anne, c. 9, § 2, and 5 Anne, c. 31, §§ 5, 6, provided that where the principal felon could not be taken the receiver might be separately prosecuted as for misdemeanor. By 7 & 8 Geo. IV, c. 29, § 54, receiving is made a substantive crime, and there may be prosecution therefor irrespective of the conviction of the thief or the question of whether he is amenable to justice.[6] By statute now in most, if not all, jurisdictions, receiving stolen goods is made a distinct and substantive offense.[7]

III. Requisites and Elements of Offense.

A. In General. To convict an offender four things must be proved: (1) That the goods or other things were previously stolen by some other person; [8] (2) that the accused bought or received them from another person, or aided in concealing them; [9] (3) that at the time he bought or received them, or aided in concealing them, he knew they had been stolen; [10] (4) that he so bought or received them, or aided in concealing them, *malo animo*,[11] or with a dishonest intent.[12]

B. Guilty Knowledge of Larceny.[13] Guilty knowledge by the receiver of stolen goods that they were stolen is an essential element of the crime,[14] and

In some states receiving embezzled property is, by statute, a crime distinct from that of receiving stolen goods. Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 56 Am. Rep. 485; State *v.* Fink, 186 Mo. 50, 84 S. W. 921; Hodges *v.* State, 22 Tex. App. 415, 3 S. W. 739.

In some jurisdictions the offense of receiving stolen goods embraces the receiving of goods obtained by false pretenses. Curran *v.* State, 12 Wyo. 553, 76 Pac. 577; Reg. *v.* Rymes, 3 C. & K. 327.

6. 1 Bishop New Cr. L. (8th ed.) §§ 699, 700; 3 Blackstone Comm. c. 3; 3 Chitty Cr. L. 713, 714. See also the following cases:
Connecticut.— State *v.* Ward, 49 Conn. 429.
Maryland.— State *v.* Hodges, 55 Md. 127.
Nebraska.— Engster *v.* State, 11 Nebr. 539, 10 N. W. 453.
Tennessee.— Swaggerty *v.* State, 9 Yerg. 338.
England.— Rex *v.* Jervis, 6 C. & P. 156, 25 E. C. L. 370.

7. *Alabama.*— Sellers *v.* State, 49 Ala. 357.
Connecticut.— State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46.
Florida.— Anderson *v.* State, 38 Fla. 3, 20 So. 765.
Georgia.—Bieber *v.* State, 45 Ga. 569; Wright *v.* State, 1 Ga. App. 158, 57 S. E. 1050.
Illinois.— Watts *v.* People, 204 Ill. 233, 68 N. E. 563.
Indiana.— Reilley *v.* State, 14 Ind. 217.
Kentucky.— Allison *v.* Com., 83 Ky. 254.
Maryland.— Kearney *v.* State, 48 Md. 16.
Massachusetts.—Com. *v.* Barry, 116 Mass. 1.
Nebraska.— Engster *v.* State, 11 Nebr. 539, 10 N. W. 453.
New Jersey.— State *v.* Calvin, 22 N. J. L. 207.
Ohio.— Hall *v.* State, 3 Ohio St. 575.
Tennessee.— Swaggerty *v.* State, 9 Yerg. 338.
Texas.— Street *v.* State, 39 Tex. Cr. 134, 45 S. W. 577.
See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 3.
See also Larceny, 25 Cyc. 59.

8. See *infra*, III, B.
9. See *infra*, III, D.
10. See *infra*, III, B.
11. See *infra*, III, C.
12. Hey *v.* Com., 32 Gratt. (Va.) 946, 34 Am. Rep. 799.
13. **As to proof of guilty knowledge** see *infra*, V, C, 3, a.
14. *Alabama.*— Oddo *v.* State, 152 Ala. 51, 44 So. 646; Boyd *v.* State, 150 Ala. 101, 43 So. 204; Rowland *v.* State, 140 Ala. 142, 37 So. 245.
Florida.— Minor *v.* State, 55 Fla. 90, 45 So. 818.
Georgia.— Birdsong *v.* State, 120 Ga. 850, 48 S. E. 329; O'Connell *v.* State, 55 Ga. 191; Murray *v.* State, 4 Ga. App. 450, 61 S. E. 741.
Illinois.— Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348.
Iowa.— State *v.* Levich, 128 Iowa 372, 104 N. W. 334.
Massachusetts.—Com. *v.* Kronick, 196 Mass. 286, 82 N. E. 39.
Nevada.— State *v.* Pray, (1908) 94 Pac. 218.
South Carolina.— State *v.* Rountree, 80 S. C. 387, 61 S. E. 1072; State *v.* Daniels, 80 S. C. 368, 61 S. E. 1073.
Texas.— Estes *v.* State, 23 Tex. App. 600, 5 S. W. 176.
Virginia.— Williamson *v.* Com., (1895) 23 S. E. 762.

such knowledge must exist at the time of the receiving or concealing.[15] The guilty knowledge, however, need not be direct and actual; it may be circumstantial and inductive. It is sufficient if the receiver believed or reasonably suspected, from the circumstances of the transaction, that the goods were stolen.[16]

C. Intent[17] **— 1. In General.** The receiving or concealing must be with intent to defraud the owner of the stolen goods,[18] and this is sometimes specified in the statutes.[19]

2. Need Not Be Lucri Causa. The act need not be *lucri causa*; it is sufficient that it be to aid the thief.[20]

3. Intent to Receive Reward From Owner. Receiving with the intent to

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5.

15. *Alabama.*— Rowland *v.* State, 140 Ala. 142, 37 So. 245.

Delaware.— State *v.* Freedman, 3 Pennew. 403, 53 Atl. 356.

Florida.— Minor *v.* State, 55 Fla. 90, 45 So. 818.

Georgia.— Pat *v.* State, 116 Ga. 92, 42 S. E. 389.

Massachusetts.—Com. *v.* Kronick, 196 Mass. 286, 82 N. E. 39.

New York.— People *v.* Jaffe, 185 N. Y. 497, 78 N. E. 169.

North Carolina.— State *v.* Caveness, 78 N. C. 484.

South Carolina.— State *v.* Rountree, 80 S. C. 387, 61 S. E. 1072.

Texas.— Wilson *v.* State, 12 Tex. App. 481.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5.

16. *Alabama.*— Hester *v.* State, 103 Ala. 83, 15 So. 857; Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426.

Delaware.— State *v.* Wright, 2 Pennew. 228, 45 Atl. 395.

Florida.— Minor *v.* State, 55 Fla. 90, 45 So. 818.

Georgia.— Licette *v.* State, 75 Ga. 253.

Illinois.— Weinberg *v.* People, 208 Ill. 15, 69 N. E. 936; Huggins *v.* People, 135 Ill. 243, 247, 25 N. E. 1002, 25 Am. St. Rep. 357, where the court said that "in determining whether the fact [of guilty knowledge] existed, the jury will be justified in presuming that the prisoner acted rationally, and that whatever would convey knowledge or induce belief in the mind of a reasonable person, would, in the absence of countervailing evidence, be sufficient to apprise the prisoner of the like fact, or induce in his mind the like impression and belief."

Iowa.— State *v.* Feuerbaken, 96 Iowa 299, 65 N. W. 299, 301, where the court said that "if you find that all the facts and circumstances surrounding the receiving of the goods by defendant were such as would reasonably satisfy a man of defendant's age and intelligence that the goods were stolen, or if he failed to follow up such inquiry so suggested, for fear he would learn the truth and know that the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge."

Massachusetts.—Com. *v.* Kronick, 196 Mass. 286, 82 N. E. 39; Com. *v.* Leonard, 140 Mass. 473, 479, 4 N. E. 96, 54 Am. Rep. 485 (where it was decided that "if the defendant did not know the facts, but believed, from the circumstances, that the property had been actually stolen, it was competent for the jury to find the defendant guilty of the offence charged," receiving stolen goods); Com. *v.* Finn, 108 Mass. 466.

Mississippi.— Frank *v.* State, 67 Miss. 125, 6 So. 842.

Missouri.— State *v.* Goldblat, 50 Mo. App. 186.

South Carolina.— State *v.* Rountree, 80 S. C. 387, 61 S. E. 1072.

Washington.— State *v.* Druxinman, 34 Wash. 257, 75 Pac. 814.

England.— Reg. *v.* White, 1 F. & F. 665.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5; and *infra*, V, C, 3, a.

17. As to proof of intent see *infra*, V, C, 3, b.

18. *Alabama.*— Oddo *v.* State, 152 Ala. 51, 44 So. 646; Boyd *v.* State, 150 Ala. 101, 43 So. 204; Holt *v.* State, 86 Ala. 599, 5 So. 793.

Louisiana.— State *v.* Burdon, 38 La. Ann. 357.

Nevada.— State *v.* Pray, (1908) 94 Pac. 218.

North Carolina.— State *v.* Caveness, 78 N. C. 484.

Texas.— Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685.

Virginia.— Hey *v.* Com., 32 Gratt. 946, 34 Am. Rep. 799.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5.

The fraudulent intent must exist at the time of the receiving or concealing. State *v.* Pray, (Nev. 1908) 94 Pac. 218; State *v.* Caveness, 78 N. C. 484.

19. Aldrich *v.* People, 101 Ill. 16; Levi *v.* State, 14 Nebr. 1, 14 N. W. 543; Cassels *v.* State, 4 Yerg. (Tenn.) 149.

20. *Maryland.*— State *v.* Hodges, 55 Md. 127.

Massachusetts.— Com. *v.* Bean, 117 Mass. 141.

New York.— People *v.* McKenna, 12 N. Y. Suppl. 493.

North Carolina.— State *v.* Rushing, 69 N. C. 29, 12 Am. Rep. 641.

England.— Rex *v.* Davis, 6 C. & P. 177, 25 E. C. L. 381.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5.

obtain a reward from the owner of the stolen property for its restoration is fraudulent.[21]

D. The Receiving — 1. Possession by Defendant. To be convicted of receiving stolen goods defendant must have had such control of the property as amounts to constructive possession, at least;[22] but the possession need not be actual and corporal.[23] It may be through the instrumentality of another person, and the offender need not have seen the goods.[24] The receiving too must have been consummated. It is not sufficient if there was an unexecuted agreement to receive,[25] or a mere attempt.[26] The same is true of concealing.[27]

2. The Goods Received. The property received must be the identical property which was stolen, not something for which the stolen property was exchanged.[28] The thing received must come also within the statutory description,[29] and must measure up to the value limit, but where the statute names a certain minimum

21. *Arkansas.*—Baker *v.* State, 58 Ark. 513, 25 S. W. 603.

New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.

New York.— People *v.* Wiley, 3 Hill 194.

Ohio.— State *v.* Pardee, 37 Ohio St. 63.

England.— Rex *v.* Walkley, 4 C. & P. 132, 19 E. C. L. 441.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 5.

In such case it is no defense that the receiver has a license from the owner of the property to take possession of it. Aldrich *v.* People, 101 Ill. 16; People *v.* Wiley, 3 Hill (N. Y.) 194; Wright *v.* State, 5 Yerg. (Tenn.) 154, 26 Am. Dec. 258; Cassels *v.* State, 4 Yerg. (Tenn.) 149.

22. U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544; Reg. *v.* Wiley, 4 Cox C. C. 414, 2 Den. C. C. 37, 15 Jur. 134, 20 L. J. M. C. 4, T. & M. 367. See also Booker *v.* State, 151 Ala. 97, 44 So. 56, holding that in order to sustain a conviction for receiving stolen property. defendant must be shown to have had control over the property.

The duration of the possession is immaterial. A single moment is sufficient. Leonardo *v.* Territory, 1 N. M. 291.

23. People *v.* Ammon, 179 N. Y. 540, 71 N. E. 1135; Reg. *v.* Smith, 6 Cox C. C. 554, Dears. C. C. 494, 1 Jur. N. S. 575, 24 L. J. M. C. 135, 3 Wkly. Rep. 484; Reg. *v.* Miller, 6 Cox C. C. 353.

24. Huggins *v.* State, 41 Ala. 393; State *v.* Stroud, 95 N. C. 626; Rex *v.* Parr, 2 M. & Rob. 346, where it was held that a receipt of a servant by his master's orders in the latter's absence may constitute a joint receipt by both. In State *v.* Scovel, 1 Mill (S. C.) 274, defendant suffered a trunk of stolen goods to be put on board a vessel in which he had taken passage, as his baggage, and this was held sufficient to constitute a receiving.

25. Com. *v.* Light, 195 Pa. St. 220, 45 Atl. 933.

Receiving must be consummated.— In Com. *v.* Sheriff, 3 Brewst. (Pa.) 342, the stolen goods were reclaimed while on defendant's scales before he had actually taken final possession of them, and while the *locus penitentiæ* still existed, so that he was not held liable as a receiver. In Reg. *v.* Hill, 2 C. & K. 978, 3 Cox C. C. 533, 1 Den. C. C. 453, 13 Jur. 545, 18 L. J. M. C. 199, 3 New Sess. Cas. 348, T. & M. 150, 61 E. C. L. 978, the accused went to a stage coach to get a basket of stolen fowls sent to her by her husband, the thief, and was arrested before taking them into her possession. It was held that she was not guilty of receiving.

26. People *v.* Jaffe, 185 N. Y. 497, 78 N. E. 169.

27. Vanimmons *v.* State, 22 Ohio Cir. Ct. 451, 12 Ohio Cir. Dec. 345, holding that evidence that a person charged with receiving and concealing stolen goods made an unsuccessful attempt by an offer of money to dissuade an officer in search of certain stolen property from searching the premises where the property was concealed may be competent as tending to show that the accused was in fact concealing the property, but is not sufficient in and of itself to constitute the offense.

28. Rex *v.* Walkley, 4 C. & P. 132, 19 E. C. L. 441. When. United States bonds, after being stolen but before they were received by defendant, had the name of the owner erased and another name inserted, their identity was not changed. Com. *v.* White, 123 Mass. 430, 25 Am. Rep. 116.

29. **Statutory provisions.**— A receiver of bank-notes cannot be indicted under the Virginia statute of Dec. 26, 1792, providing punishment for receivers of stolen goods but a special statute (1 Va. Rev. Code (1819), c. 160, § 9) was passed to provide for such cases. Rutherford *v.* Com., 2 Va. Cas. 141. Bank-notes are not "goods and chattels" within the meaning of the statutes. State *v.* Calvin, 22 N. J. L. 207; U. S. *v.* Morgan, 26 Fed. Cas. No. 15,808, 1 Cranch C. C. 278]. But bank-notes were held to come within the New York statute (2 Rev. St. 567 (2d. ed.) § 71) punishing receivers of stolen "personal property of any value whatsoever." People *v.* Wiley, 3 Hill (N. Y.) 194. Coin is included in the term "goods and chattels" in the Ohio statute (Coins Act (1831), § 26). Hall *v.* State, 3 Ohio St. 575. A horse is included in the term "goods or articles" in Conn. Gen. St. p. 503, § 13. State *v.* Ward, 49 Conn. 429. So in Arkansas receiving a stolen hog is an offense. Thrash *v.* State, 79 Ark. 347, 96 S. W. 360.

value the aggregate value of goods received in pursuance of a conspiracy may be counted.[30]

3. From Whom Goods Must Be Received. The goods, when received, must have been in the possession of another person than the owner;[31] but, to constitute the offense, it is not necessary that they be received from the thief. It is immaterial from whom they are received, provided they still retain the character of stolen goods.[32]

4. Receiving as Agent. In a prosecution for receiving stolen goods, it makes no difference whether the accused received the goods, acting for himself, or merely as agent for another.[33]

5. Who May Be Receivers — a. In General. One cannot be at the same time a principal in a larceny and, in a legal sense, a receiver of the property stolen;[34] but an accomplice of the thief may be convicted of receiving the property.[35]

b. Husband and Wife. A husband is responsible for his wife's receiving, he knowing and afterward adopting it.[36] A wife cannot be convicted of receiving stolen goods from her husband,[37] but a wife and husband may be convicted of a joint receiving.[38]

c. Partners. Where one partner, without his copartner's knowledge, receives stolen goods, knowing them to be stolen, and his copartner, afterward learning of the theft, takes charge of them, both are guilty of receiving stolen goods.[39]

30. Levi *v.* State, 14 Nebr. 1, 14 N. W. 543. As to proof of value see *infra*, V, C, 3, g.

31. Tobin *v.* People, 104 Ill. 565; State *v.* Edwards, 36 Mo. 394; People *v.* Rivello, 39 N. Y. App. Div. 454, 57 N. Y. Suppl. 420; Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826.

Possession of owner.— Not only must the goods have been stolen, but they must retain the character of stolen goods at the time of the receiving. There can be no conviction where, between the time of the theft and the receiving, they have come back into the possession of the original owner. People *v.* Jaffe, 185 N. Y. 497, 78 N. E. 169; U. S. *v.* De Bare, 25 Fed. Cas. No. 14,935, 6 Biss. 358; Reg. *v.* Schmidt, L. R. 1 C. C. 15, 10 Cox C. C. 172, 12 Jur. N. S. 149, 35 L. J. M. C. 94, 13 L. T. Rep. N. S. 679, 14 Wkly. Rep. 286.

32. State *v.* Fink, 186 Mo. 50, 84 S. W. 921; Levi *v.* State, 14 Nebr. 1, 14 N. W. 543; Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826; Rex *v.* Jervis, 6 C. & P. 156, 25 E. C. L. 370. *Contra*, Foster *v.* State, 106 Ind. 272, 277, 6 N. E. 641, where it was held that one who received from another receiver is not guilty of receiving stolen goods "unless such second or subsequent receiver receives the goods under circumstances which connect him with the thief." See also U. S. *v.* De Bare, 25 Fed. Cas. No. 14,935, 6 Biss. 358.

The receiving need not be from the thief.— In Rex *v.* Jervis, 6 C. & P. 156, 25 E. C. L. 370, it was said that "the offence created by the act of parliament [7 & 8 Geo. IV, c. 29, § 54] is not the receiving stolen goods from any particular person, but receiving them knowing them to have been stolen." The theory sometimes stated that the receiving must be from the thief is a survival of the rule which formerly held when, under the law, a receiver was considered an accessory of the thief. Levi *v.* State, 14 Nebr. 1, 14 N. W. 543. Thus in State *v.* Ives, 35 N. C. 338, the prosecution was brought under a statute which made receivers of stolen goods accessaries to the main crime.

33. Com. *v.* Kronick, 196 Mass. 286, 82 N. E. 39.

34. State *v.* Honig, 78 Mo. 249 [*affirming* 9 Mo. App. 298]; Reg. *v.* Perkins, 5 Cox C. C. 554, 2 Den. C. C. 459, 16 Jur. 481, 21 L. J. M. C. 152.

35. Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826; Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

36. Rex *v.* Woodward, 9 Cox C. C. 95, 8 Jur. N. S. 104, L. & C. 122, 31 L. J. M. C. 91, 5 L. T. Rep. N. S. 686, 10 Wkly. Rep. 298.

The husband's guilty knowledge must exist at the time of the wife's receiving. Rex *v.* Dring, 7 Cox C. C. 382, Dears. & B. 329, 3 Jur. N. S. 1132, 6 Wkly. Rep. 41.

37. People *v.* Willard, 92 Cal. 482, 28 Pac. 585; Rex *v.* Brooks, Dears. C. C. 184, 6 Cox C. C. 148, 17 Jur. 400, 22 L. J. M. C. 121, 1 Wkly. Rep. 313.

As a wife cannot steal her husband's property (see Criminal Law, 25 Cyc. 31), one who receives property from the wife, knowing that it is the husband's property, cannot be convicted of receiving stolen property. Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397, 46 L. J. M. C. 156, 36 L. T. Rep. N. S. 36, 25 Wkly. Rep. 679.

38. Goldstein *v.* People, 82 N. Y. 231. See also State *v.* Houston, 29 S. C. 108, 6 S. E. 943. But see Rex *v.* Matthews, 4 Cox C. C. 214, 1 Den. C. C. 596, 14 Jur. 513, T. & M. 337, 1 Eng. L. & Eq. 549.

39. Faunce *v.* People, 51 Ill. 311; Sanderson *v.* Com., 12 S. W. 136, 11 Ky. L. Rep. 341.

E. The Concealing. Under the statutes the concealing does not require an actual hiding or secreting of the property, but any acts which render its discovery difficult and prevent identification constitute a concealing.[40]

F. Necessity of Consideration. It is not necessary that any consideration should have passed between the thief and the receiver.[41]

G. Previous Conviction of Thief. Since the modern statutes make receiving stolen goods a substantive offense,[42] the offenders under them are not accessaries, and it is not necessary, for a conviction, to show that the principal thief has been convicted.[43]

IV. JURISDICTION.[44]

In those states in which it is larceny to bring into the state goods stolen in another state or a foreign country, one who there receives goods with knowledge that they have been stolen in such other state or country is liable to indictment for receiving stolen goods,[45] but not in those states in which it is held that the bringing into the state goods stolen in another state or foreign country does not constitute larceny.[46]

40. State *v.* Ward, 49 Conn. 429; People *v.* Harris, 93 Mich. 617, 53 N. W. 780; People *v.* Reynolds, 2 Mich. 422.

Mere keeping silence and failing to discover the whereabouts of stolen goods, where it is a duty to divulge it, may amount to a concealing. State *v.* Turner, 19 Iowa 144; State *v.* St. Clair, 17 Iowa 149.

Giving aid to a thief does not necessarily involve concealing. Upton *v.* State, 5 Iowa 465, where defendant gave breakfast to a thief and fed the horse which he had stolen and was carrying away, and it was held that he did not "aid in concealing."

41. Hopkins *v.* People, 12 Wend. (N. Y.) 76.

42. See *supra*, II.

43. *Georgia.*— *Compare* Wright *v.* State, 1 Ga. App. 158, 57 S. E. 1050, holding that the guilt of the principal must be shown before a conviction of the accessary is authorized. See also Licette *v.* State, 75 Ga. 253.

Maryland.— State *v.* Hodges, 55 Md. 127.

Massachusetts.— Com. *v.* Andrews, 3 Mass. 126; Com. *v.* Andrews, 2 Mass. 14, 3 Am. Dec. 17.

Nebraska.— Engster *v.* State, 11 Nebr. 539, 10 N. W. 453.

New Mexico.— Leonardo *v.* Territory, 1 N. M. 291.

North Carolina.— State *v.* Goode, 8 N. C. 463.

Tennessee.— Swaggerty *v.* State, 9 Yerg. 338.

Vermont.— State *v.* S. L., 2 Tyler 249.

Where the indictment charges, in one count, one defendant with larceny of certain goods, and another defendant, in another count, with receiving the same goods, a verdict acquitting the first defendant of the charge of larceny necessitates the discharge of the other defendant. State *v.* Antoine, 42 La. Ann. 945, 8 So. 529.

44. **As to venue of offense** see CRIMINAL LAW, 12 Cyc. 234. See also State *v.* Pray, (Nev. 1908) 94 Pac. 218 [*citing* 12 Cyc. 234].

45. State *v.* Stimpson, 45 Me. 608; Com. *v.* Andrews, 2 Mass. 13, 3 Am. Dec. 17; People *v.* Goldberg, 39 Mich. 545; Curran *v.* State, 12 Wyo. 553, 76 Pac. 577. See also Reg. *v.* Jewell, 6 Manitoba 460; CRIMINAL LAW, 12 Cyc. 210.

Possession out of state.— On a prosecution for receiving and aiding in the concealment of stolen goods, although possession out of the commonwealth of goods stolen in the commonwealth would not warrant a conviction for receiving them and aiding in their concealment in the commonwealth, evidence of such possession would be competent against defendant. Com. *v.* Phelps, 192 Mass. 591, 78 N. E. 741.

County to county.— On an indictment for receiving stolen property, the venue is sufficiently proved by evidence that the property was received by defendant in another county and brought by him to the county of the venue. Baker *v.* State, 58 Ark. 513, 25 S. W. 603. See also Allison *v.* Com., 83 Ky. 254; Moseley *v.* State, 35 Tex. Cr. 210, 32 S. W. 1042; Bonner *v.* State, (Tex. Cr. App. 1895) 32 S. W. 1043. And see CRIMINAL LAW, 12 Cyc. 234.

In New York a receiver may be tried in any county in which he has the goods. Wills *v.* People, 3 Park. Cr. 473. The statute (1877, p. 177, c. 167, § 1) which provides that a crime or offense in respect to freight may be tried in any county through which the train passes is held to apply to goods taken from a train. People *v.* Dowling, 84 N. Y. 478.

46. Golden *v.* State, 2 Ga. App. 440, 58 S. E. 557, holding that, although, after committing larceny in an adjoining state, the thief brings the stolen property into Georgia, and carries it from place to place in a county in Georgia, he does not commit larceny in the state, and it is not therefore a crime for one to receive in the state goods so stolen. See also Rex *v.* Debruiel, 11 Cox C. C. 207, where it was held that one may not be convicted of receiving in England goods stolen in Guernsey. And see CRIMINAL LAW, 12 Cyc. 210.

V. PROSECUTION AND PUNISHMENT.

A. Indictment or Information[47] — **1. ALLEGATION THAT GOODS WERE STOLEN.** It must appear from the indictment that the goods received were stolen goods;[48] but it need not be specifically stated that they still retained the character of stolen goods when received,[49] or that they were stolen from a person other than defendant.[50] It is not necessary to allege the facts going to constitute the original unlawful taking or embezzlement, as would be required in case of prosecution therefor.[51]

2. GUILTY KNOWLEDGE OF LARCENY. The indictment must charge that defendant received the stolen goods knowing that they were stolen.[52]

3. INTENT. It is sufficient to charge a wrongful receiving without specifying the intent to defraud the owner, where such intent is not mentioned in the statutory provision.[53]

47. As to indictments and informations generally see INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

Joinder of felony and misdemeanor.— Ala. Code, § 3789, makes larceny from a storehouse, regardless of the value of the goods, a felony. Section 3794 provides that any person who receives property knowing that it has been stolen, and not having the intent to restore it to the owner, must, on conviction, be punished as if he had stolen it. It was held that an indictment which charges in one count a larceny of a few dollars' worth of goods from a storehouse, and in another count charges a reception of the same goods knowing that they had been stolen from a warehouse, does not misjoin a felony and a misdemeanor since the allegation, in the second count, of the knowledge of the place from which the goods were stolen raises this offense to a felony. Broughton *v.* State, 105 Ala. 103, 16 So. 912.

Joinder of counts for larceny and receiving stolen goods see INDICTMENTS AND INFORMATIONS, 22 Cyc. 375 note 43.

48. *Alabama.*— Sellers *v.* State, 49 Ala. 357.

Florida.—Anderson *v.* State, 38 Fla. 3, 20 So. 765.

Indiana.— Semon *v.* State, 158 Ind. 55, 62 N. E. 625.

Louisiana.—State *v.* Allemand, 25 La. Ann. 525.

Vermont.— State *v.* Bannister, 79 Vt. 524, 65 Atl. 586.

Washington.— State *v.* Druxinman, 34 Wash. 257, 78 Pac. 814.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 12.

49. Semon *v.* State, 158 Ind. 55, 62 N. E. 625.

50. State *v.* McLaughlin, 35 Kan. 650, 12 Pac. 32.

51. *Iowa.*— State *v.* Lane, 68 Iowa 384, 27 N. W. 266.

Louisiana.— State *v.* Moultrie, 34 La. Ann. 489.

Massachusetts.— Com. *v.* Lakeman, 5 Gray 82.

New York.— People *v.* Stein, 1 Park. Cr. 202.

Texas.— Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737; Hodges *v.* State, 22 Tex. App. 415, 3 S. W. 739.

Utah.— People *v.* Gough, 2 Utah 70.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 12.

52. *Alabama.*— Anderson *v.* State, 130 Ala. 126, 30 So. 375; Huggins *v.* State, 41 Ala. 393.

Louisiana.— State *v.* Allemand, 25 La. Ann. 525.

Missouri.— State *v.* Mayer, 209 Mo. 391, 107 S. W. 1085.

New York.— People *v.* Hartwell, 166 N. Y. 361, 59 N. E. 929, 15 N. Y. Cr. 377.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.

Vermont.— State *v.* Bannister, 79 Vt. 524, 65 Atl. 586.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 10.

The averment must be clear, and it is not sufficient to charge defendant with "knowingly receiving" the stolen property or state that he "feloniously" received it. People *v.* Hartwell, 166 N. Y. 361, 59 N. E. 929.

Details of theft.— The indictment need not state knowledge of the details of the theft, as that the goods were stolen from a particular person. State *v.* Sakowski, 191 Mo. 635, 90 S. W. 435.

53. *California.*— People *v.* Avila, 43 Cal. 196.

Indiana.— Gandolpho *v.* State, 33 Ind. 439.

Iowa.— State *v.* Turner, 19 Iowa 144.

Louisiana.— State *v.* Hartleb, 35 La. Ann. 1180; State *v.* Moultrie, 34 La. Ann. 489.

Maryland.— State *v.* Hodges, 55 Md. 127.

Missouri.— State *v.* Sakowski, 191 Mo. 635, 90 S. W. 435; State *v.* Richmond, 186 Mo. 71, 84 S. W. 880.

New York.— People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279; Chatterton *v.* People, 15 Abb. Pr. 147 [*overruling* People *v.* Johnson, 1 Park. Cr. 564].

Texas.— Nourse *v.* State, 2 Tex. App. 304.

United States.— Bise *v.* U. S., 144 Fed. 374.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 10.

It is otherwise where the statute specifies the fraudulent intent.

4. Description and Ownership of Goods. The indictment should describe the stolen property with certainty sufficient to apprise defendant of the property which he is charged with stealing; but a minute description of such property is not necessary.[54] In the case of stolen money the number and denomination of the coins should be specified.[55] Unless the statute defining the crime specifies a minimum value limit, the value of the goods need not be stated.[56] The ownership of the goods must be averred.[57]

5. Conviction of Thief. Since receiving stolen goods is a substantive offense,[58] not accessary to theft, under the statutes, the indictment need not allege the conviction of the principal felon.[59]

6. Name of Thief. The indictment or information for receiving stolen goods need not state the name of the thief or person from whom the goods were received;[60]

Alabama.—Anderson *v.* State, 130 Ala. 126, 30 So. 375; Holt *v.* State, 86 Ala. 599, 5 So. 793; Sellers *v.* State, 49 Ala. 357.

District of Columbia.— U. S. *v.* Lowenstein, 21 D. C. 515.

Indiana.— Pelts *v.* State, 3 Blackf. 28.

Nebraska.— Darrah *v.* State, 65 Nebr. 201, 90 N. W. 1123.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.

Tennessee.— Rice *v.* State, 3 Heisk. 215; Hurell *v.* State, 5 Humphr. 68.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 10.

An indictment or information following the words of the statute is sufficient in general to inform defendant of the cause and nature of the accusation against him. People *v.* Tilley, 135 Cal. 61, 67 Pac. 42; State *v.* Kosky, 191 Mo. 1, 90 S. W. 454.

54. State *v.* Kosky, 191 Mo. 1, 90 S. W. 454. But see Wells *v.* State, 90 Miss. 516, 43 So. 610, holding that an indictment for receiving stolen property, which fails to describe the property with the same particularity as is required in an indictment for larceny, is bad on demurrer.

Illustrations.— The following descriptions were held sufficient: "One ten-dollar greenback bill, paper currency, lawful money of the United States" (Rowland *v.* State, 140 Ala. 142, 37 So. 245); "thirty yards of cloth and one coat" (Com. *v.* Campbell, 103 Mass. 436); "a lot of brass castings, of the value of thirty-one dollars and eighty cents"—"a more particular description of which is to the grand jurors unknown" (Campbell *v.* Smith, (Miss. 1895) 17 So. 441); "two cases containing thirty-five pairs of shoes" (State *v.* Sakowski, 191 Mo. 635, 90 S. W. 435); "1,200 cigars of the value of $42" (State *v.* Kosky, 191 Mo. 1, 90 S. W. 454); "two horses, thirty mares, and twenty geldings" (State *v.* Hanna, 35 Oreg. 195, 57 Pac. 629). A top of an iron box, which, when stolen, had been separated from the box, was sufficiently described as "one pound of iron," in an indictment for receiving stolen goods. State *v.* Horan, 61 N. C. 571.

The following was held to be insufficient: "To wit, certain lot of brass fittings, to wit, 400 pounds, of the value of three hundred dollars." Brown *v.* State, 116 Ga. 559, 42 S. E. 795.

The description must be of the property as received, not as stolen. Gabriel *v.* State, 44 Fla. 57, 32 So. 779.

55. Burney *v.* State, 87 Ala. 80, 6 So. 391; State *v.* Murphy, 6 Ala. 845; Baggett *v.* State, 69 Miss. 625, 13 So. 816.

This is not true where a statute makes it unnecessary to be stated in prosecution for larceny or embezzlement. Stone *v.* Com., 67 S. W. 841, 24 Ky. L. Rep. 10.

56. People *v.* Rice, 73 Cal. 220, 14 Pac. 851; State *v.* Watson, 3 R. I. 114.

Where, under a statute, it must be stated, the aggregate value is sufficient. State *v.* Gerrish, 78 Me. 20, 2 Atl. 129; State *v.* Watson, 3 R. I. 114.

In Texas the value of the goods received must be stated. Sands *v.* State, 30 Tex. App. 578, 18 S. W. 86.

57. *Colorado.*— Miller *v.* People, 13 Colo. 166, 21 Pac. 1025.

Maine.— State *v.* McAloon, 40 Me. 133.

Missouri.— State *v.* Pollock, 105 Mo. App. 273, 79 S. W. 980.

South Carolina.— State *v.* Williams, 2 Strobh. 229. But see State *v.* Teideman, 4 Strobh. 300.

Texas.— State *v.* Perkins, 45 Tex. 10; Arcia *v.* State, 28 Tex. App. 198, 12 S. W. 599; Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737.

United States.— Kirby *v.* U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. ed. 890.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 13.

The person from whose possession the goods were stolen need not be named in the indictment. Trail *v.* State, (Tex. Cr. App. 1900) 57 S. W. 92.

58. See *supra*, II.

59. Swaggerty *v.* State, 9 Yerg. (Tenn.) 338.

60. *Alabama.*— State *v.* Murphy, 6 Ala. 845.

California.— People *v.* Clausen, 120 Cal. 381, 52 Pac. 658; People *v.* Ribolsi, 89 Cal. 492, 26 Pac. 1082; People *v.* Avila, 43 Cal. 196.

Delaware.—State *v.* Wright, 2 Pennew. 228, 45 Atl. 395.

Indiana.— Semon *v.* State, 158 Ind. 55, 62 N. E. 625.

Iowa.— State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299.

nor need the indictment or information allege that the name of the thief or person from whom the goods were received is unknown.[61]

7. Time and Place of Theft. The time and place of the theft need not be stated.[62]

8. Conspiracy Resulting in Various Acts of Receiving. An indictment is good which charges several defendants with a joint receiving, in pursuance of a conspiracy, although all the goods were received at different times and places, and all were not present on each occasion.[63]

9. Various Thefts and One Act of Receiving. An indictment charging the receiving of goods stolen at different times and from different owners is good, provided only one receiving is alleged.[64]

10. Issues, Proof, and Variance — a. In General. There is no variance where the indictment states that the goods were "stolen" and the proof shows that they were taken by burglary.[65]

b. Name of Thief or Person From Whom Stolen Goods Were Received. There is a conflict in the cases as to whether it is necessary to prove the name of the thief or person from whom the stolen goods were received as laid in the indictment. The weight of authority seems to hold that it is not necessary.[66]

Louisiana.— State *v.* Laqué, 37 La. Ann. 853; State *v.* Moultrie, 34 La. Ann. 489.

Massachusetts.— Com. *v.* Hogan, 121 Mass. 373; Com. *v.* Slate, 11 Gray 60.

Mississippi.— Campbell *v.* State, (1895) 17 So. 441.

Missouri.— State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395; State *v.* Smith, 37 Mo. 58.

Nebraska.— Ream *v.* State, 52 Nebr. 727, 73 N. W. 227.

New Mexico.— Territory *v.* Claypool, 11 N. M. 568, 71 Pac. 463.

New York.—People *v.* Caswell, 21 Wend. 86.

Ohio.— Shriedley *v.* State, 23 Ohio St. 130.

Oregon.— State *v.* Hanna, 35 Oreg. 195, 57 Pac. 629.

Tennessee.— Swaggerty *v.* State, 9 Yerg. 338.

England.— Rex *v.* Wheeler, 7 C. & P. 170, 32 E. C. L. 556; Rex *v.* Jervis, 6 C. & P. 156, 25 E. C. L. 370.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 11.

Contra.— Sault *v.* People, 3 Colo. App. 502, 34 Pac. 263; Licette *v.* State, 75 Ga. 253; State *v.* Perkins, 45 Tex. 10; Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737. The decision in State *v.* Perkins, *supra*, is based on State *v.* Beatty, 61 N. C. 52, in which the court criticized one count of the indictment, which did not name the person from whom the goods were received, but upheld the indictment on another which did. This latter case, moreover, rests upon State *v.* Ives, 35 N. C. 338, at the time of which a receiver was held, under the law of North Carolina, to be an accessary to the thief.

61. *California.*— People *v.* Avila, 43 Cal. 196.

Florida.—Anderson *v.* State, 38 Fla. 3, 20 So. 765.

Indiana.— Beuchert *v.* State, 165 Ind. 523, 76 N. E. 111.

Louisiana.— State *v.* Moultrie, 34 La. Ann. 489.

Ohio.— Shriedley *v.* State, 23 Ohio St. 130.

Rhode Island.— State *v.* Hazard, 2 R. I. 474, 60 Am. Dec. 96.

Wyoming.— Curran *v.* State, 12 Wyo. 553, 76 Pac. 577.

United States.— Kirby *v.* U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. ed. 890.

England.— Rex *v.* Jervis, 6 C. & P. 156, 25 E. C. L. 370.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 11.

62. *Alabama.*— Hester *v.* State, 103 Ala. 83, 15 So. 857; State *v.* Murphy, 6 Ala. 845.

Indiana.— Kaufman *v.* State, 49 Ind. 248; Holford *v.* State, 2 Blackf. 103.

Massachusetts.— Com. *v.* Sullivan, 136 Mass. 170.

Michigan.— People *v.* Smith, 94 Mich. 644, 54 N. W. 487; People *v.* Goldberg, 39 Mich. 545.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 12.

63. People *v.* Stein, 1 Park. Cr. (N. Y.) 202. But see Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826.

64. People *v.* Hartwell, 166 N. Y. 361, 59 N. E. 929; Smith *v.* State, 59 Ohio St. 350, 52 N. E. 826.

65. State *v.* Turner, 19 Iowa 144. But under a statute providing for punishment of receivers of goods taken by burglary or housebreaking there can be no conviction where the goods were taken otherwise. State *v.* Sanford, 1 Nott & McC. (S. C.) 512.

66. State *v.* Murphy, 6 Ala. 845; People *v.* Clausen, 120 Cal. 381, 52 Pac. 658; State *v.* Coppenburg, 2 Strobh. (S. C.) 273. *Contra*, Huggins *v.* People, 135 Ill. 245, 25 N. E. 1002, 25 Am. St. Rep. 357; Henningberg *v.* State, (Tex. Cr. App. 1903) 72 S. W. 175; Moseley *v.* State, 36 Tex. Cr. 578, 37 S. W. 736, 38 S. W. 197.

Some of the decisions to the effect that the name of the thief must be proven as laid

c. Ownership of Stolen Property. The ownership of the property must be proven as laid in the indictment.[67]

d. Proof of One Conjunctive Charge. Where the indictment charges both receiving and concealing or aiding in concealing, the offense is established by proof of either of the modes.[68]

e. Receiving Embezzled Goods on Indictment For Receiving Stolen Goods. Where receiving stolen goods is a crime distinct from receiving embezzled goods there can be no conviction of the former on proof of the latter.[69]

f. Receipt of Part of Property Specified in Indictment. Where the indictment charges the receipt of several articles, proof of the receipt of one of them is sufficient to support a conviction.[70]

g. Separate Conviction on Indictment For Joint Receiving. On an indictment of several individuals for a joint receiving one of them may be convicted of a separate receiving, and the others acquitted.[71]

B. Pleas. A plea of guilty must be specific, where only a part of the various articles named in the indictment are acknowledged to have been received.[72]

C. Evidence[73]**— 1. Burden of Proof.** In a prosecution for receiving stolen

arise from the peculiar forms of the indictments. Thus in Com. *v.* King, 9 Cush. (Mass.) 284, A was indicted in one count for larceny and B in another for receiving the goods so taken by A, and A being acquitted on the ground that the evidence showed embezzlement it was held that B could not be convicted. See also Rex *v.* Woolford, 1 M. & Rob. 384.

Likewise, according to the better rule, it is not necessary to prove that the name of the thief was unknown as alleged in the indictment. Semon *v.* State, 158 Ind. 55, 62 N. E. 625; Curran *v.* State, 12 Wyo. 553, 76 Pac. 577. *Contra*, Foster *v.* State, 106 Ind. 272, 6 N. E. 641; McKay *v.* State, 49 Tex. Cr. 118, 90 S. W. 653.

67. State *v.* Wright, 2 Pennew. (Del.) 228, 45 Atl. 395; Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; Brooks *v.* State, 5 Baxt. (Tenn.) 607; Bryan *v.* State, (Tex. Cr. App. 1908) 111 S. W. 1035.

Proof of ownership.— In an indictment for receiving stolen goods, an allegation of ownership in a corporation is supported by proof of ownership in a corporation *de facto*. Butler *v.* State, 35 Fla. 246, 17 So. 551. But under an indictment charging that the property stolen was that of N, a corporation, no conviction can be had on proof that it was the property of N, an individual. Aldrich *v.* People, 225 Ill. 610, 80 N. E. 320. So on a trial for receiving stolen property, the mere fact that the articles in question are similar in each case to the property kept for sale by the person alleged in the indictment to be the owner is not, without identification or other corroborating circumstances, sufficient to establish the ownership as alleged. Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910.

68. State *v.* Nelson, 29 Me. 329; Stevens *v.* Com., 6 Metc. (Mass.) 241.

Where an indictment charges that defendant "did buy, receive and aid in the concealment," using the conjunctive, "and," where the statute uses the disjunctive, "or," there may be a conviction on proof of concealing only. Territory *v.* Neatherlen, 13 N. M. 491, 85 Pac. 1044. But on an indictment for buying or receiving stolen goods there cannot be a conviction on proof of concealing or aiding in the concealment. Huggins *v.* State, 41 Ala. 393.

69. Com. *v.* King, 9 Cush. (Mass.) 284; State *v.* Fink, 186 Mo. 50, 84 S. W. 921.

70. *Alabama.*— State *v.* Murphy, 6 Ala. 845.

California.— People *v.* Fitzpatrick, 80 Cal. 538, 22 Pac. 215.

New York.— People *v.* Wiley, 3 Hill 194.

Pennsylvania.— Com. *v.* Johnson, 133 Pa. St. 293, 19 Atl. 402.

Rhode Island.— State *v.* Watson, 3 R. I. 114.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 14.

71. Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; Com. *v.* Slate, 11 Gray (Mass.) 60; State *v.* Smith, 37 Mo. 58; U. S. *v.* Montgomery, 26 Fed. Cas. No 15,800, 3 Sawy. 544.

Under the law formerly existing in England, and still surviving in some of the United States, only one of the parties so indicted could be convicted of a separate receiving. Wheeler *v.* State, (Miss. 1898) 24 So. 310 (holding that when an indictment charges two persons jointly with receiving stolen goods, and evidence is introduced of a receiving by one, the court should exclude it, or compel the prosecutor to elect on which transaction, and against which defendant, he will ask for a verdict); Reg. *v.* Dovey, 4 Cox C. C. 428, 2 Den. C. C. 86, 15 Jur. 230, 20 L. J. M. C. 105, T. & M. 411, 2 Eng. L. & Eq. 532; Reg. *v.* Messingham, 2 Moody C. C. 257. This rule, the reason for which has never been clearly shown, has been changed by statute in England, so that any number of the parties jointly indicted may be convicted of separate receiving. St. 24 & 25 Vict. c. 96, § 94.

72. O'Connell *v.* Com., 7 Metc. (Mass.) 460.

73. As to presumption from recent possession see *infra*, V, C, 3, d.

property, the burden is on the state to prove the stealing of the property.[74] But the recent possession of stolen property casts on defendant the burden of explaining his possesssion.[75]

2. ADMISSIBILITY — **a. Character, Habits, and Circumstances of Life of Defendant.** Evidence of the character, habits, and circumstances of life of defendant is admissible.[76]

b. Circumstances of Receiving. Evidence of unusual circumstances under which the goods were received is admissible on behalf of the state to prove guilty knowledge, as that they were obtained at a late hour of the night or for a price greatly under value.[77] On the other hand it is competent for the accused to testify in his own behalf when, from whom, how, and under what circumstances he received the stolen property, and what was done and said at the time in connection with the receipt of it by himself; such facts being a part of the *res gestæ*.[78]

c. Circumstantial Evidence of Receipt. Evidence of the receipt of the stolen goods which is purely circumstantial may be admissible.[79]

d. Delivery to Defendant. In a prosecution for concealing stolen property, it was proper for the state to show by one participating in the larceny that he delivered the property to defendant.[80]

74. Boyd *v.* State, 150 Ala. 101, 43 So. 204.

75. Boyd *v.* State, 150 Ala. 101, 43 So. 204.

Where a party in possession of property recently stolen gives an exculpatory explanation of his possession which is reasonable or probable, the burden devolves upon the state to prove its falsity. Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737. See also Estes *v.* State, 23 Tex. App. 600, 5 S. W. 176.

76. See cases cited *infra*, this note.

Evidence of defendant's character is admissible, whether the other evidence of his guilt is strong or not, and the weight of it is to be left to the jury. Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485. The failure of defendant, a junk dealer, to keep a book, as required by law, wherein all articles purchased by him are to be entered, may be shown in a prosecution against him for receiving stolen property. Com. *v.* Leonard, 140 Mass. 473, 4 N. E. 96, 54 Am. Rep. 485. Evidence of the kind of shop which defendant kept, and the business which he there carried on, was admissible to inform the jury of his habitual occupation and the consequent opportunity to commit the offense. Com. *v.* Campbell, 103 Mass. 436. Evidence of the character of the parties who frequented defendant's house was held to be competent in Goodman *v.* State, 141 Ind. 35, 39 N. E. 939. *Contra*, People *v.* Pierpont, 1 Wheel. Cr. (N. Y.) 139.

77. *Alabama.*— Boyd *v.* State, 150 Ala. 101, 43 So. 204.

Georgia.— Licette *v.* State, 75 Ga. 253.

Illinois.— Gunther *v.* People, 139 Ill. 526, 28 N. E. 1101.

Michigan.— People *v.* Pitcher, 15 Mich. 397.

New Jersey.— State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641.

New York.— People *v.* Schooley, 149 N. Y. 99, 43 N. E. 536; Copperman *v.* People, 56 N. Y. 591.

Texas.— Murio *v.* State, 31 Tex. Cr. 210, 20 S. W. 356.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 15.

The low price paid is not, taken alone, presumptive evidence of guilty knowledge. Sartorious *v.* State, 24 Miss. 602. Evidence that defendant, a second-hand retailer of cloth, according to the custom of his trade, did not generally pay full price for clothing and bought out of season and at reduced prices, was admissible to rebut the inference of guilty knowledge from the fact that the goods were bought at a low price. Andrews *v.* People, 60 Ill. 354. And the fact that the alleged receiver of stolen goods purchased them at a price much below their value is not alone sufficient to sustain a conviction. Minor *v.* State, 55 Fla. 90, 45 So. 818.

Fair price paid for goods.— In order to prove lack of guilty knowledge and intent it may be shown that defendant paid a fair price for the goods. Estes *v.* State, 23 Tex. App. 600, 5 S. W. 176.

Evidence that a junk dealer failed to enter a description of the goods in a book, as required by a city ordinance, is admissible to show that he knew they were stolen. People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

78. State *v.* Bethel, 97 N. C. 459, 1 S. E. 551. See also Wills *v.* People, 3 Park. Cr. (N. Y.) 473.

79. **Circumstantial evidence of receipt.**— Evidence that defendant was a poor man, and showed signs, after the theft, of a great increase in prosperity, was held admissible in a prosecution for receiving stolen money. Martin *v.* State, 104 Ala. 71, 16 So. 82. In such case the evidence need not show that the money was actually identified. State *v.* Murphy, 6 Ala. 845. In a prosecution for receiving stolen goods, certain papers produced from a closet to which there was evidence that defendant had access, which papers, as the testimony also tended to show, were wrappers of the stolen goods, were admissible in evidence. Com. *v.* Mullen, 150 Mass. 394, 23 N. E. 51. See also State *v.* Robens, 79 S. C. 542, 60 S. E. 442, 1110.

80. Oddo *v.* State, 152 Ala. 51, 44 So. 646.

e. Guilty Knowledge of Larceny — (i) *Statement of Defendant by Which Goods Are Discovered.* A statement of defendant, even though made under a promise to reward and not to prosecute, as a result of which the stolen goods are found, is admissible as showing defendant's knowledge of the place where they were concealed.[81]

(ii) *Character of Person From Whom Goods Were Received.* Evidence is admissible showing that defendant knew that the person from whom he received the goods bore a disreputable character.[82]

(iii) *False Explanation of Possession of Goods.* False and contradictory statements of the accused in explanation of his possession of the stolen goods are admissible to show guilty knowledge.[83]

(iv) *Receipt of Other Stolen Goods by Defendant.* Evidence of the receipt of other stolen goods by defendant at a time not remote from, and under circumstances connected with, the receipt in question is admissible to show guilty knowledge; and generally it must be shown that the goods were received from the same person.[84] According to the better rule, it is not necessary to show that the goods were stolen from the same person, since that is not essential in order to show that defendant had notice of the character of the goods; [85] but it

81. Rice *v.* State, 3 Heisk. (Tenn.) 215, 225.

Where the statement is a confession of guilt it is not admissible as such, but evidence of the facts resulting from such inadmissible confession may be received. Warwickshall's Case, 1 Leach C. C. 298, where it was said that "the most that is proper to be left with the jury is the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly."

82. Licette *v.* State, 75 Ga. 253; Com. *v.* Billings, 167 Mass. 283, 45 N. E. 910; State *v.* Goldblat, 50 Mo. App. 186.

Good reputation.— It is competent for defendant to bring evidence of the good reputation of the person from whom the goods were received. Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

83. Gunther *v.* People, 139 Ill. 526, 28 N. E. 1101; State *v.* Mayer, 45 Iowa 698.

Evidence is admissible of suspicious acts and remarks of defendant when the goods were discovered in his possession. State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395.

84. *Connecticut.*— State *v.* Ward, 49 Conn. 429.

District of Columbia.— See Gassenheimer *v.* U. S., 26 App. Cas. 432, holding that where a person is accused of having received embezzled property, proof of guilty knowledge at the time of the receipt of the property cannot be supplied or aided by proof of the receipt or possession of other like property not shown to have been property also embezzled.

Illinois.— Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348.

Indiana.— Beuchert *v.* State, 165 Ind. 523, 76 N. E. 111; Goodman *v.* State, 141 Ind. 35, 39 N. E. 939.

Iowa.— See State *v.* Scott, 136 Iowa 152, 113 N. W. 758.

Kentucky.— Devoto *v.* Com., 3 Metc. 417.

Nebraska.— Goldsberry *v.* State, 66 Nebr. 312, 92 N. W. 906.

New York.— People *v.* McClure, 148 N. Y. 95, 42 N. E. 523; People *v.* Doty, 73 N. Y. App. Div. 78, 76 N. Y. Suppl. 630 [*affirmed* in 175 N. Y. 164, 67 N. E. 303]; Coleman *v.* People, 58 N. Y. 555; Copperman *v.* People, 56 N. Y. 591; Coleman *v.* People, 55 N. Y. 81; People *v.* Rando, 3 Park. Cr. 335.

Ohio.— Shriedley *v.* State, 23 Ohio St. 139.

Pennsylvania.— Com. *v.* Johnson, 133 Pa. St. 293, 19 Atl. 402.

South Carolina.— State *v.* Crawford, 39 S. C. 343, 17 S. E. 799.

Texas.— Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

England.— Rex *v.* Davis, 6 C. & P. 177, 25 E. C. L. 381.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 16.

It is essential that there be some connection between the circumstances of the two receivings. State *v.* Levich, 128 Iowa 372, 104 N. W. 334; State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299; Coleman *v.* People, 55 N. Y. 81; People *v.* Weisenberger, 73 N. Y. App. Div. 428, 77 N. Y. Suppl. 71; Shriedley *v.* State, 23 Ohio St. 130; Com. *v.* Johnson, 133 Pa. St. 293, 19 Atl. 402; Kilrow *v.* Com., 89 Pa. St. 480; Com. *v.* Charles, 3 Leg. Gaz. (Pa.) 336.

The other stolen goods may have been received after, as well as before, the receipt of the goods in question. Goldsberry *v.* State, 66 Nebr. 312, 92 N. W. 906; People *v.* Weisenberger, 73 N. Y. App. Div. 428, 77 N. Y. Suppl. 71. But there must have been a close connection between the two transactions in point of time or circumstance. People *v.* Willard, 92 Cal. 482, 28 Pac. 585; Bismark *v.* State, 45 Tex. Cr. 54, 73 S. W. 965.

85. State *v.* Ward, 49 Conn. 429; Coleman *v.* People, 58 N. Y. 555; Copperman *v.* People, 56 N. Y. 591. *Contra*, Rex *v.* Davis, 6 C. & P. 177, 25 E. C. L. 381.

must appear that they were received with knowledge that they were stolen, since the only ground on which this evidence is admissible is to show that defendant had been put on his guard as to the questionable nature of his dealings.[86]

(v) *SHIELDING THIEF.* It is competent to show that defendant failed to detect the thief so that he might be brought to justice, when the fact of the theft was brought to his attention, or that he was anxious that the thief should abscond.[87]

(vi) *THEFT OF OTHER GOODS FROM SAME OWNER.* Evidence of thefts of other goods from the owner of the goods in question by the same thief is not admissible where such thefts were in no way connected with the present transaction.[88]

(vii) *THIEF'S CLAIM OF OWNERSHIP.* In order to show lack of guilty knowledge on account of the plausible acts of the thief, defendant may bring evidence of the former's claim of ownership on a prior attempt to sell the same goods to another party.[89]

f. Other Thefts. Evidence that the alleged thief had stolen other goods of the same kind is irrelevant.[90]

g. Prior Arrangements and Conversations With Thief or Person From Whom the Goods Were Received. Evidence of arrangements and conversations between defendant and the thief or other person from whom the goods were received, prior to the receiving, is admissible as a part of the *res gestæ*.[91]

h. Record of Indictment, Judgment of Conviction, and Sentence of Thief on Another Trial. There is a conflict of opinion as to the admissibility of the record of the indictment, judgment of conviction, and sentence of the alleged thief in another trial. It has sometimes been admitted to prove the theft;[92] but the better rule, confirmed by the supreme court of the United States, is that such evidence is not admissible, on the ground that the former proceedings, being *res inter alios acta*, should not be allowed to prejudice defendant.[93]

86. Reg. *v.* Oddy, 5 Cox C. C. 210, 2 Den. C. C. 264, 15 Jur. 517, 20 L. J. M. C. 198, T. & M. 593. But see State *v.* Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

87. Adams *v.* State, 52 Ala. 379; People *v.* Pitcher, 15 Mich. 397.

88. Schultz *v.* People, 210 Ill. 196, 71 N. E. 405. *Contra*, People *v.* Grossman, 168 N. Y. 47, 60 N. E. 1050, 15 N. Y. Cr. 527. This case is not supported by former cases on which it was based, viz., People *v.* McClure, 148 N. Y. 95, 42 N. E. 523, and Coleman *v.* People, 58 N. Y. 555. In these cases the evidence was not merely of goods stolen from the same owner by the same thief, but of stolen goods received by defendant from the same thief.

89. Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606. So also it has been held that a bill of sale of the goods claimed to have been purchased is admissible in evidence, even if not properly witnessed and acknowledged by law. Territory *v.* Claypool, 11 N. M. 568, 71 Pac. 463.

For the same purpose evidence of a conversation of defendant with the thief after the latter's arrest for the theft is admissible. Durant *v.* People, 13 Mich. 351.

90. McIntire *v.* State, 10 Ind. 26.

91. *Florida.*— Anthony *v.* State, 44 Fla. 1, 32 So. 818.

Massachusetts.— Com. *v.* Jenkins, 10 Gray 485.

Missouri.— State *v.* Smith, 37 Mo. 58.

New York.— People *v.* Doty, 73 N. Y. App. Div. 78, 76 N. Y. Suppl. 630 [*affirmed* in 175 N. Y. 164, 67 N. E. 303].

Texas.— Sisk *v.* State, (Cr. App. 1897) 42 S. W. 985.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 15.

Conversations between the thieves before and after the commission of the theft are admissible to show how it was planned and accomplished, being part of the *res gestæ*. State *v.* Smith, 37 Mo. 58.

To show guilty knowledge evidence is admissible of conversations between defendant and the thief, on occasions of former receipts of stolen goods. Copperman *v.* People, 56 N. Y. 591.

92. Stripland *v.* State, 114 Ga. 843, 40 S. E. 993; Cooper *v.* State, 29 Tex. App. 8, 13 S. W. 1011, 25 Am. St. Rep. 712; U. S. *v.* Montgomery, 26 Fed. Cas. No. 15,800, 3 Sawy. 544.

93. Com. *v.* Elisha, 3 Gray (Mass.) 460; Kirby *v* U. S., 174 U. S. 47, 19 S. Ct. 574, 43 L. ed. 890 (where it was held that the provision of the act of March 3, 1875, c. 144, § 2, that a judgment of conviction of a thief in another trial "shall be conclusive evidence in the prosecution against said receiver that the property of the United States therein described has been embezzled, stolen or purloined" violates the clause of the constitution of the United States, declaring that, in all criminal prosecutions, the accused shall be confronted with the witnesses against him); Keable *v.* Payne, 8 A. & E. 555, 3

i. Theft of Goods — (I) *In General.* The testimony of the person named in the indictment as owner of the goods is admissible to prove the theft.[94]

(II) *Admissions and Confessions of Thief.* There is a conflict of opinion as to whether admissions and confessions of the thief, not made in the presence of the accused, are admissible to prove that the goods were stolen.[95]

j. Value of Property Stolen. Where the question of the value of the stolen property is an issue the owner may state what its value was to him.[96]

3. Sufficiency — a. Guilty Knowledge of Larceny. The evidence must show beyond a reasonable doubt that defendant knew when he received the goods that they had been stolen;[97] but it need not be shown that he knew they had been stolen from the particular person named in the indictment.[98]

b. Intent. While it is necessary that a fraudulent intent be proven,[99] it has sometimes been held that proof that stolen goods were received with guilty knowledge is sufficient proof of the intent to defraud the owner;[1] but the better rule seems to be that such evidence taken alone is insufficient, for the reason that the goods may have been received with the intent to restore them to the owner.[2]

c. Identity of Goods Received With Those Stolen. While the identity of the articles received with those stolen, as alleged in the indictment, must be shown beyond a reasonable doubt,[3] the identification need not be direct and absolute, but circumstantial evidence is admissible to show it.[4] And the proof must agree

Jur. 40, 7 L. J. Q. B. 218, 3 N. & P. 531, 1 W. W. & H. 383, 35 E. C. L. 728.

Judgment of acquittal.— For the same reason defendant cannot offer in evidence the judgment acquitting the thief in another trial. State *v.* Sweeten, 75 Mo. App. 127.

94. People *v.* Hartwell, 166 N. Y. 361, 59 N. E. 929.

95. Admissible.— Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348; State *v.* Sweeten, 75 Mo. App. 127; Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180.

Not admissible.—Lunsford *v.* Com., 63 S. W. 781, 23 Ky. L. Rep. 709; Keable *v.* Payne, 8 A. & E. 555, 3 Jur. 40, 7 L. J. Q. B. 218, 3 N. & P. 531, 1 W. W. & H. 383, 35 E. C. L. 728. See also Com. *v.* Elisha, 3 Gray (Mass.) 460.

As to testimony of accomplices generally see Criminal Law, 12 Cyc. 445.

Where the confession is made in the presence of the accused there is no objection to its admission. Rex *v.* Robinson, 4 F. & F. 43.

96. Cohen *v.* State, 50 Ala. 108. See also State *v.* Feiss, (N. J. 1907) 66 Atl. 418.

97. Minor *v.* State, 55 Fla. 90, 45 So. 818; Stripland *v.* State, 114 Ga. 843, 40 S. E. 993; Sanford *v.* State, 4 Ga. App. 449, 61 S. E. 741; Lunsford *v.* Com., 63 S. W. 781, 23 Ky. L. Rep. 709. See also *supra*, III, B.

The knowledge may be inferred from circumstances surrounding the receiving. State *v.* Freedman, 3 Pennew. (Del.) 403, 53 Atl. 356; Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348; Delahoyde *v.* People, 212 Ill. 554, 72 N. E. 732; State *v.* Goldman, 65 N. J. L. 394, 47 Atl. 641. Guilty knowledge cannot be inferred from the inadequacy of the price paid alone. Sartorious *v.* State, 24 Miss. 602; Trail *v.* State, (Tex. Cr. App. 1900) 57 S. W. 92. Nor can it be inferred from mere possession of the stolen property. State *v.* Freedman, 3 Pennew. (Del.) 403, 53 Atl. 356; Castleberry *v.* State, 35 Tex. Cr. 382, 33 S. W. 875, 60 Am. St. Rep. 53; Tolliver *v.* State, 25 Tex. App. 600, 8 S. W. 806. See also Dalton *v.* State, (Tex. Cr. App. 1907) 103 S. W. 935. But evidence of possession after denial thereof may be sufficient. Huggins *v.* People, 135 Ill. 243, 25 N. E. 1002, 25 Am. St. Rep. 357; State *v.* Miller, 159 Mo. 113, 60 S. W. 67; State *v.* Sweeten, 75 Mo. App. 127. So evidence of concealing goods received under suspicious circumstances may suffice to show knowledge. Collins *v.* State, 33 Ala. 434, 73 Am. Dec. 426. See also *supra*, III, B.

98. State *v.* Sakowski, 191 Mo. 635, 90 S. W. 435.

99. Nourse *v.* State, 2 Tex. App. 304. See also Bryan *v.* State, (Tex. Cr. App. 1908) 111 S. W. 1035. And see *supra*, III, C.

1. U. S. *v.* Lowenstein, 21 D. C. 515; State *v.* Smith, 88 Iowa 1, 55 N. W. 16.

2. State *v.* Sweeten, 75 Mo. App. 127; Goldsberry *v.* State, 66 Nebr. 312, 92 N. W. 906; People *v.* Weisenberger, 73 N. Y. App. Div. 428, 77 N. Y. Suppl. 71; Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685.

It is sufficient when taken with evidence that the accused afterward attempted to sell the property. People *v.* Flechter, 44 N. Y. App. Div. 199, 60 N. Y. Suppl. 777, 14 N. Y. Cr. 328.

3. Schultz *v.* People, 210 Ill. 196, 71 N. E. 405.

4. Identity of goods.— On a trial for receiving shoes knowing them to have been stolen, testimony by a member of the firm named as the owner of the shoes, that the shoes which had been stolen were of "a pattern of the shoes his firm sold," is admissible in evidence, in connection with other testimony, as tending to show ownership of the shoes as laid in the indictment. Gibbs *v.* State, 130 Ala. 101, 30 So. 393. It is not error to permit a witness to testify that he saw the

with the indictment as to part at least of the goods alleged to have been received.[5]

d. Recent Possession. Recent possession of stolen goods, not satisfactorily explained, is presumptive evidence of receiving, provided there is other evidence to show that defendant was not guilty of the theft.[6] The lapse of time between

goods in defendant's possession, and knew them by certain marks. Hester *v.* State, 103 Ala. 83, 15 So. 857. It is proper to hand to the witness articles similar to those stolen, to enable him to identify and prove the kind of articles stolen. Jupitz *v.* People, 34 Ill. 516. On a trial for receiving a sheep and some honey in the comb, evidence that mutton tallow and strained honey were found on defendant's premises is admissible, in connection with evidence that a sheep was killed and honey strained there. Com. *v.* Slate, 11 Gray (Mass.) 60. Upon the trial of a person accused of receiving stolen wool, the evidence of a witness, who had been at defendant's house and seen the fleeces represented to have come from his sheep, as to the kind and weight of the fleeces, is admissible, as it has a tendency, in connection with the other evidence showing the kind of wool sold by defendant, to show that the stolen wood was among that sold. People *v.* Pitcher, 15 Mich. 397. Evidence as to the stock brand used by the prosecuting witness, and a certificate thereof recorded by him after the larceny of the cattle, while not of itself proof of ownership prior to the date the brand was recorded is admissible to show the identity of the horses alleged to have been stolen with those received and shipped by defendant. State *v.* Hanna, 35 Oreg. 195, 57 Pac. 629. In a prosecution for receiving stolen money, money found in defendant's possession at the time of his arrest is admissible in evidence against him, where corresponding in a general way with that lost by the prosecuting witness, as being of the same denomination; also a witness may testify that there were rust marks on the bills found in the thief's possession which were similar to the marks on the bills found in defendant's possession, and it is not incumbent on the state to produce all the money found on the thief. Polin *v.* State, (Tex. Cr. App. 1901) 65 S. W. 183.

5. Rex *v.* Walkley, 4 C. & P. 132, 19 E. C. L. 441.

Under an indictment for receiving as stolen goods "thirty yards of cloth," and "one coat," proof that the goods consisted of "one piece of cassimere," and "one blue pilot cloth coat," is sufficient. Com. *v.* Campbell, 103 Mass. 436. On trial for receiving as stolen goods "one pound of iron," evidence of the receiving of "a cast-iron top of an iron box" is not a fatal variance. State *v.* Horan, 61 N. C. 571. Defendant was indicted for receiving stolen pork. The evidence showed that the property, when stolen, was not pork, but a live hog, which was killed and cut up by the thieves, and that defendant received and helped conceal the pieces, and it was held that there was no variance between the indictment and the proof. Sands *v.* State, 30 Tex. App. 578, 18 S. W. 86. But proof that defendant received the carcass of a hog, which had been killed by another before defendant received it, constituted a fatal variance from an indictment charging defendant with receiving "one hog, the property of R.," since the term "hog" in the absence of an allegation to the contrary would be presumed to mean a live animal. Hutchinson *v.* State, 73 Ark. 640, 83 S. W. 331. So where, on a prosecution for receiving stolen property, consisting of twenty bags of coffee, the only evidence that the property received was the same as that stolen was that it consisted of twenty "regular, ordinary bags," and, although the bags stolen and those received bore marks and writing, there was no evidence as to what the marks and writing were, the proof was insufficient to identify the property. People *v.* Ennis, 74 N. Y. App. Div. 619, 77 N. Y. Suppl. 228. And under an indictment for receiving stolen bonds, the prisoner cannot be convicted, if the instruments proved are simple contracts not under seal. People *v.* Wiley, 3 Hill (N. Y.) 194. Again a charge of receiving stolen goods, to wit, "two cases of cigars, both of the value of $500," will not be sustained by proof of the receipt by defendant of a lot of loose cigars, not in cases, and not received directly from cases known to have been stolen, although such cigars came from cases of cigars which had been previously stolen. Gabriel *v.* State, 44 Fla. 57, 32 So. 779. So where an indictment charged the receiving of six £100 notes and the proof showed that defendant received £20 notes for which the former had been changed it was held that there could be no conviction. Rex *v.* Walkley, 4 C. & P. 132, 19 E. C. L. 441.

6. *Alabama.*— Boyd *v.* State, 150 Ala. 101, 43 So. 204.

Missouri.— State *v.* Miller, 159 Mo. 113, 60 S. W. 67; State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395.

New York.— People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279; Goldstein *v.* People, 82 N. Y. 231.

Wisconsin.— Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

England.— Reg. *v.* Langmead, 9 Cox C. C. 464, 1 L. & C. 427, 10 L. T. Rep. N. S. 350; Reg. *v.* Matthews, 4 Cox C. C. 214, 1 Den. C. C. 596, 14 Jur. 513, T. & M. 337, 1 Eng. L. & Eq. 549; Arundel's Case, 1 Lew. C. C. 115.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 17.

The presumption is one of fact for the jury to consider. Sartorious *v.* State, 24 Miss.

the theft and discovery of the goods in defendant's possession is to be considered,[7] but it may be negatived by other evidence, as that the goods had been in his possession a considerable time when found.[8]

e. Testimony of Thief. There can be no conviction upon the uncorroborated testimony of the thief where he is an accomplice to the receiving.[9]

f. Proof of Theft. The evidence must show that the goods alleged to have been received had first been stolen.[10]

g. Value of Goods. Usually no specific proof of the value of the goods is necessary, and the value may be inferred from inspection of them by the jury or from having heard them described by witnesses;[11] but it is otherwise where the law requires that the goods be of a specific value in constituting the offense.[12]

602; People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279.

Where there is no evidence to show that the theft was committed by another, recent possession raises a presumption of theft rather than of receiving. Sartorious *v.* State, 24 Miss. 602; State *v.* Bulla, 89 Mo. 595, 1 S. W. 764; State *v.* Adams, 133 N. C. 667, 45 S. E. 553. And even where such evidence does appear the presumption of guilt is not so strong as in the case of prosecution for larceny, for the reason that the element of guilty knowledge must also be shown. State *v.* Richmond, 186 Mo. 71, 84 S. W. 880.

Under Va. Code, § 3715, providing that, if any person buy or receive brass or certain other articles with intent to defraud, he shall be confined in the penitentiary, and that possession of such articles, so bought or received from any other person than the manufacturer thereof or his authorized agent, or of a regularly licensed dealer therein, shall be *prima facie* evidence of such intent, possession of the articles is no evidence that they were bought from any other person than the manufacturer. Goldman *v.* Com., 100 Va. 865, 42 S. E. 923.

7. Estes *v.* State, 23 Tex. App. 600, 5 S. W. 176.

8. Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

9. *California.*— People *v.* Kraker, 72 Cal. 459, 14 Pac. 196, 1 Am. St. Rep. 65.

Illinois.— Cohn *v.* People, 197 Ill. 482, 64 N. E. 306.

Indiana.— Foster *v.* State, 106 Ind. 272, 6 N. E. 641.

Iowa.— State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299.

England.— Reg. *v.* Robinson, 4 F. & F. 43.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 17.

Evidence corroborative of thief's testimony. — Evidence of defendant's possession of the stolen property was held insufficient to corroborate in Reg. *v.* Pratt, 4 F. & F. 315; Reg. *v.* Robinson, 4 F. & F. 43. The finding of the goods in defendant's possession after he had concealed or denied possession of them was said to be corroborative in State *v.* Feuerhaken, 96 Iowa 299, 65 N. W. 299. For examples of evidence held to be sufficient to corroborate see People *v.* Solomon, (Cal. 1899) 58 Pac. 55; State *v.* Greenburg, 59 Kan. 404, 53 Pac. 61. Insufficient see Johnson *v.* State, 42 Tex. Cr. 440, 60 S. W. 667.

10. *Georgia.*— O'Connell *v.* State, 55 Ga. 296.

Michigan.— People *v.* Montague, 71 Mich. 318, 39 N. W. 60.

Missouri.— State *v.* Sweeten, 75 Mo. App. 127.

New York.— People *v.* Seaton, 15 N. Y. Suppl. 270.

Texas.— Bryan *v.* State, (Cr. App. 1908) 111 S. W. 1035; Tucker *v.* State, 23 Tex. App. 512, 5 S. W. 180; Wilson *v.* State, 12 Tex. App. 481. See also Dalton *v.* State, (Cr. App. 1907) 103 S. W. 935.

England.— Reg. *v.* Gruncell, 9 C. & P. 365, 38 E. C. L. 218.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 17.

The exact time and place of the theft and the name of the thief need not be shown. Hester *v.* State, 103 Ala. 83, 15 So. 857; People *v.* Rice, 73 Cal. 220, 14 Pac. 851; Pye's Case, 1 East P. C. 785. See also *supra*, V, A, 6, 7.

Record of conviction of thief.— There is a conflict of opinion as to whether the theft can be proven by the record of the conviction of the thief in another trial. The better opinion seems to be that it cannot. See *supra*, V, C, 2, h. See also State *v.* Daniels, 80 S. C. 368, 61 S. E. 1073.

Testimony of the thief that he stole the property supported by that of the owner that he lost it was held sufficient in People *v.* Clausen, 120 Cal. 381, 52 Pac. 658.

Testimony of the prosecuting witness was held sufficient to prove the theft. People *v.* Moloney, 113 Mich. 536, 71 N. W. 866.

11. State *v.* Gerrish, 78 Me. 20, 2 Atl. 129.

Proof of value.— In a prosecution for receiving stolen goods, it appeared that a bag with some seventy pounds of coffee was stolen; also, flour and dry goods. An empty coffee bag, with prosecuting witness' name on it, some flour, and the dry goods were found in defendant's possession. It was held that, on the question of value, it could be inferred that the flour was the stolen flour, and that the bag had coffee in when received. State *v.* Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395.

12. Wright *v.* State, 1 Ga. App. 158, 57 S. E. 1050; Berneker *v.* State, 40 Nebr. 810, 59 N. W. 372; Engster *v.* State, 11 Nebr. 539, 10 N. W. 453; Smith *v.* State, 59 Ohio

D. Instructions — 1. In General. In a trial on an indictment joining one count for receiving, and another for larceny, or embezzlement, etc., it must be clear whether a particular instruction applies to the indictment as a whole or to a single count.[13] So, in a prosecution for concealing stolen property, an instruction undertaking to state what constituted the offense, but omitting the constituent element of the offense, namely, absence of intent to restore the property to the owner, is bad.[14]

2. Grade of Offense. Where the grade of the offense [15]—felony or misdemeanor — depends upon the amount of goods received,[16] and the evidence does not show certainly that there was enough to constitute felony, the court should charge on misdemeanor also.[17]

3. Guilty Knowledge of Larceny. Although guilty knowledge may be shown by circumstantial evidence,[18] it must be made clear to the jury that, before there can be a conviction, it must appear that the knowledge required by the law actually did exist in defendant's mind when he received or concealed the goods.[19]

St. 350, 52 N. E. 826. See also Booker *v.* State, 151 Ala. 97, 44 So. 56.

13. **An instruction,** on a trial charging in separate counts burglary and receiving stolen property, that if defendant purchased the property from his co-defendant, and did not know that it was stolen, he should be acquitted, was properly refused, because ignoring the charge of burglary. Moss *v.* State, (Ala. 1905) 39 So. 830. Where accused was indicted under certain counts charging, aiding, and abetting embezzlement, and also for the receiving of stolen goods, an instruction that if defendant advised and encouraged R to procure D to steal or embezzle, as charged in the indictment, and D did steal, as the result of R's so procuring, defendant was guilty, should be construed to apply to the embezzlement counts only, and was not therefore objectionable as authorizing a conviction for receiving stolen property without charging what was necessary for a conviction of such offense. Delahoyde *v.* People, 212 Ill. 554, 72 N. E. 732. Under an information charging larceny and receiving stolen goods, the court charged that the possession of recently stolen property raised a presumption of guilt, and, in the absence of reasonable explanation, the jury would be authorized to convict. It was held that, although the charge was directed specifically to the count for theft, it was error, as the jury might have applied it to the count on receiving stolen property, and as such was a charge on the weight of the evidence. Trail *v.* State, (Tex. Cr. App. 1900) 57 S. W. 92.

14. Oddo *v.* State, 152 Ala. 51, 44 So. 646. But where the evidence was that defendant received the goods from the thief, and kept them in his store for several days, and afterward either purchased them from the thief and resold them to R, or acted as a friendly intermediary in a sale made by the thief to R, and the court had explained fully the bearing of this testimony and stated the contention of the parties, and had said that it must be proved that defendant had either bought, or received, or aided in the concealment of, the property, an instruction that "if defendant either knew or believed the property was stolen at the time it came into his possession, or at any time while it was in his possession he ascertained that it was stolen property, and he undertook to deprive the owner of his rightful use of it," was not erroneous, as substituting for the specific acts named in the statute a mere undertaking to deprive the owner of his rightful use of the property. Com. *v.* Kronick, 196 Mass. 286, 82 N. E. 39.

15. See *supra*, II.

16. See *supra*, III, D, 2, text and note 30; V, A, 4, text and note 56.

17. Bismark *v.* State, 45 Tex. Cr. 54, 73 S. W. 965.

18. See *supra*, V, C, 2, e.

19. In Cohn *v.* People, 197 Ill. 482, 64 N. E. 306, the court charged the jury that "absolute knowledge" need not be proven, but that if it appeared by the evidence that circumstances were "such as to have induced them [defendants] and any man of ordinary observation to believe that the property was stolen and was being offered for sale to the defendant or defendants by one who had no right so to do, that is sufficient." It was held erroneous as not showing that there must have been actual belief, at least on the part of defendants that the goods were stolen. But on an indictment for receiving embezzled property, an instruction that the jury, if finding that defendant received the property under such circumstances as would satisfy any man of ordinary observation, intelligence, and caution that it had been embezzled, would be justified in presuming guilty knowledge, is not open to objection, if the jury has also been charged that the guilty knowledge must be proved beyond a reasonable doubt. But in such instruction the word "authorized" would be better than the word "justified." Gassenheimer *v.* U. S., 26 App. Cas. (D. C.) 432. On a prosecution for receiving and aiding in the concealment of stolen goods the court instructed that if defendant honestly believed the statements of the seller that he had purchased the goods defendant could not be convicted. It was held that in view of such instruction there was no error in refusing a requested instruction to the effect that the jury might

E. Verdict — 1. Special Verdict. A special verdict must specify that the goods were received or concealed with guilty knowledge and fraudulent intent. Thus a verdict, "guilty of receiving stolen property," is insufficient.[20]

2. General Verdict. A general verdict, or verdict, "guilty as charged in the indictment," need not specify guilty knowledge, fraudulent intent, ownership, or value.[21]

F. Punishment. The character of the punishment generally depends upon the value of the goods received.[22]

RECENT. Of or pertaining to time just before the present; not long past in occurrence or existence; lately happening or being; newly appearing, done,

consider what manner of man the seller had been prior to the transaction. Com. *v.* Phelps, 192 Mass. 591, 78 N. E. 741. So on a trial for receiving stolen goods, an instruction that the jury can infer from the circumstances as to whether defendant knew the goods were stolen is not open to the construction that the jury were thereby instructed that the only two elements of the crime were that the goods were stolen and that defendant knew they were stolen, although the court failed to instruct that the jury must find that defendant bought or received the goods; it having expressly charged that, if defendant was not there at the time when the goods were alleged to have been received, he could not have bought them, and should be acquitted. State *v.* Feiss, 74 N. J. L. 633, 66 Atl. 418.

The question of guilty knowledge is one of fact for the jury; and an instruction that certain facts would show it is erroneous, as invading the province of the jury. Robinson *v.* State, 84 Ind. 452. So on an indictment for receiving stolen goods, a charge that "a guilty knowledge on the part of the defendant . . . may be shown either directly by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them very much under value, or denied their being in his possession, or the like," is erroneous, as leaving the inference to the jury that either of these facts is conclusive proof of guilt, when it is only a circumstance tending to prove it. People *v.* Levison, 16 Cal. 98, 76 Am. Dec. 505. And an instruction, on a trial for receiving stolen property, that if defendant bought the property from a third person, not knowing where the latter got it, he was not guilty, was properly refused, because defendant, although not knowing where the third person got the property, might know that it was stolen. Moss *v.* State, (Ala. 1905) 39 So. 830. In a prosecution for receiving stolen goods it is not error for the court to refuse to instruct that the fact that defendant did not attempt to prevent the owner from recovering his goods is evidence that he did not know that they were stolen. People *v.* Solomon, (Cal. 1899) 58 Pac. 55. In a prosecution for receiving stolen goods, a charge that, if the jury believed defendant purchased the goods in good faith, they should acquit, was misleading, where the defense relied on was that defendant concealed the goods, believing them to be smuggled. Bargna *v.* State, (Tex. Cr. App. 1902) 68 S. W. 997.

20. *California.*— People *v.* Tilley, 135 Cal. 61, 67 Pac. 42.

Florida.— O'Neal *v.* State, 54 Fla. 96, 44 So. 940; Harris *v.* State, 53 Fla. 37, 43 So. 311.

Georgia.— O'Connell *v.* State, 55 Ga. 191.

Louisiana.— State *v.* Burdon, 38 La. Ann. 357.

New York.— Miller *v.* People, 25 Hun 473.

See 42 Cent. Dig. tit. "Receiving Stolen Goods," § 21.

A special verdict must be responsive to the indictment as to ownership of the goods. State *v.* Whitaker, 89 N. C. 472. And where a statute makes the punishment dependent upon the value of the goods received the value must be specified. Thompson *v.* People, 125 Ill. 256, 17 N. E. 749; Tobin *v.* People, 104 Ill. 565; Sawyer *v.* People, 8 Ill. 53.

21. State *v.* Turner, 19 Iowa 144; State *v.* Fink, 186 Mo. 50, 84 S. W. 921; Territory *v.* Neatherlin, 13 N. M. 491, 85 Pac. 1044; People *v.* Gough, 2 Utah 70.

A general verdict is insufficient where the charges of larceny and robbery are joined, in separate counts, with the charge of receiving. Tobin *v.* People, 104 Ill. 565.

In South Carolina under an indictment charging in one count the receiving of stolen bank-bills, under the statute, and in another the receiving of certain personal property, under the common law, a verdict, "guilty of receiving stolen goods, knowing them to be stolen" was held to apply to either of the counts, the penalty being the same in both cases. State *v.* Posey, 7 Rich. 484.

In Texas, where it is provided by statute that there may be a conviction of receiving stolen goods on an indictment for theft, it is held that, when the evidence shows the former offense, the verdict must specify it. McCampbell *v.* State, 9 Tex. App. 124, 35 Am. Rep. 726.

22. Cohen *v.* State, 50 Ala. 108; Ramsey *v.* State, 34 Tex. Cr. 16, 28 S. W. 808.

It is sometimes the same as that for stealing the goods. Maynard *v.* State, 14 Ind. 427.

Excessive punishment.— In a prosecution for receiving stolen property, a judgment imposing a penitentiary term of four years will not be disturbed as excessive, where the appellate court is satisfied of defendant's guilt

or made.[1] (Recent: Possession of Stolen Property, see Burglary, 6 Cyc. 236; Criminal Law, 12 Cyc. 399; Embezzlement, 15 Cyc. 530; Larceny, 25 Cyc. 140: Receiving Stolen Goods, *ante*, p. 528. See also Recently.)

Recently. A relative term.[2] (See Recent, *ante*, p. 531.)

Recess. In reference to a legislative body, a temporary dismissal.[3] (See Courts, 11 Cyc. 732 note 63.)

Reciprocal. Mutually interchangeable.[4] (Reciprocal: Contract, see Contracts, 9 Cyc. 245.[5] Will, see Wills.)

Reciprocal Contract. See Contracts, 9 Cyc. 245.

Reciprocal Will. See Wills.

Reciprocity. Mutuality.[6] (Reciprocity: Between Courts, see Courts, 11 Cyc. 1002. Between Nations — In General, see Treaties; Customs Laws, see Customs Duties, 12 Cyc. 1110 note 14; Delivery of Fugitive From Justice, see Extradition (International), 19 Cyc. 50. Between States — Delivery of Fugitive From Justice, see Extradition (Interstate), 19 Cyc. 84; Giving Full Faith and Credit to Judgments and Records of Sister State, see Judgments, 23 Cyc. 1545; Privileges and Immunities of Citizens of the Several States, see Constitutional Law, 8 Cyc. 1036. Of Contracts, see Contracts, 9 Cyc. 245. Of Gifts, see Gifts, 20 Cyc. 1193 note 7. Statutes Relating to Foreign Corporation, see Foreign Corporations, 19 Cyc. 1264.)

Recital. The making mention in a deed or writing, of something which has been made or done before;[7] the setting down or report of something done before.[8] (Recital: As to Conditions of Bond in Declaration, Petition, or Complaint in Action on an Administration Bond, see Executors and Administrators, 18 Cyc. 1297. Estoppel by — In Appeal-Bond, see Appeal and Error, 2 Cyc. 932; In Written Instrument, see Estoppel, 16 Cyc. 699. Estoppel to Assert Invalidity of Transfer or Encumbrance of Homestead, see Homesteads, 21 Cyc. 549. In Assessment For Benefits From Public Improvements, see Municipal Corporations, 28 Cyc. 1165. In Bill of Exceptions, see Appeal and Error, 3 Cyc. 78 note 58. In Bill of Lading, see Carriers, 6 Cyc. 422. In Bond — In General, see Bonds, 5 Cyc. 732; Appeal-Bond, see Appeal and Error, 2 Cyc. 838; Bail-Bond, see Bail, 5 Cyc. 20, 101; County Bond, see Counties, 11 Cyc. 564; Guardian's Bond, see Guardian and Ward, 21 Cyc. 48, 133 note 43, 222; Municipal Bond, see Municipal Corporations, 28 Cyc. 1624; On Appeal From

and of his general lack of moral character. State *v.* Levich, 128 Iowa 372, 104 N. W. 334.

1. Century Dict.

In reference to the presumption arising from recent possession of stolen goods after larceny has been committed, the term is incapable of exact definition and has been said to vary "within a certain range, with the conditions of each particular case." White *v.* State, 72 Ala. 195, 200. In this connection the term is relative and a time which might be construed recent under one state of facts would not be so under another and different state of facts. Jenkins *v.* State, 62 Wis. 49, 61, 21 N. W. 232.

Possession of property alleged to have been stolen three months after the alleged theft will not be deemed a recent possession. Rex *v.* Adams, 3 C. & P. 600, 14 E. C. L. 736.

2. Crawford *v.* Lozano, (Tex. Civ. App. 1898) 48 S. W. 538.

3. Tipton *v.* Parker, 71 Ark. 193, 196, 74 S. W. 298, where it is said the term does not mean an adjournment *sine die*.

As used in a statute providing "adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time," the term means the times in which the court is not actually engaged in business. *In re* Gannon, 69 Cal. 541, 545, 11 Pac. 240.

4. Webster Int. Dict.

"Reciprocal demands" means no more than is meant by the phrase "mutual account." Miller *v.* Bradbury, 109 Cal. 170, 174, 41 Pac. 865; Green *v.* Disbrow, 79 N. Y. 1, 7, 35 Am. Rep. 496.

5. See also Cawley's Estate, 136 Pa. St. 628, 20 Atl. 567, 10 L. R. A. 93.

6. Black L. Dict.

7. Frost *v.* Brown, 2 Bay (S. C.) 133, 141.

"The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation." Clark *v.* Post, 113 N. Y. 17, 25, 20 N. E. 573; Montague *v.* Bathoniensem, 3 Ch. Cas. 96, 101, 22 Eng. Reprint 988. A recital in a deed is a notice to a purchaser of the facts recited. Jennings *v.* Bloomfield, 199 Pa. St. 638, 641, 49 Atl. 135.

8. Sheppard Touchst. [*quoted* in Clark *v.* Post, 113 N. Y. 17, 25, 20 N. E. 573].

Justice, see JUSTICES OF THE PEACE, 24 Cyc. 680. In Collateral Paper, see COMMERCIAL PAPER, 7 Cyc. 956. In County Warrant, see COUNTIES, 11 Cyc. 537. In Decree in Equity, see EQUITY, 16 Cyc. 476. In Deed — In General, see DEEDS, 13 Cyc. 541; As Notice, see VENDOR AND PURCHASER; As to Whether or Not Property Constitutes Community Property, see HUSBAND AND WIFE, 21 Cyc. 1645; Ground of Estoppel, see ESTOPPEL, 16 Cyc. 699; Of Ward's Estate, see GUARDIAN AND WARD, 21 Cyc. 139; To Wife as to Payment of Purchase-Price From Her Separate Estate, see HUSBAND AND WIFE, 21 Cyc. 1385 note 63. In Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 758. In Judgment — In General, see JUDGMENTS, 23 Cyc. 788; By Default, see JUDGMENTS, 23 Cyc. 766; Conclusiveness of, see JUDGMENTS, 23 Cyc. 1292; Construction of, see JUDGMENTS, 23 Cyc. 1101, 1540 note 20; In Statement of Indebtedness on Confession of Judgment, see JUDGMENTS, 23 Cyc. 710; Jurisdictional Recitals, see JUDGMENTS, 23 Cyc. 767, 1084, 1580, 1597. In Lease, see LANDLORD AND TENANT, 24 Cyc. 902. In Mortgage — In General, see MORTGAGES, 27 Cyc. 1082; Conclusiveness of as to Amount of Debt Secured, see MORTGAGES, 27 Cyc. 1058. In Order Establishing Highway, see STREETS AND HIGHWAYS. In Order of Court, see ORDERS, 29 Cyc. 1515. In Pleading, see PLEADING, 31 Cyc. 71. In Promissory Note as Affecting Negotiability, see COMMERCIAL PAPER, 7 Cyc. 580. In Recognizance, see RECOGNIZANCES, *post*, p. 544. In Return of Writ or Summons of Garnishment, see GARNISHMENT, 20 Cyc. 1052. In Tax Deed, see TAXATION. In Warrant of Attachment, see ATTACHMENT, 4 Cyc. 546. Of Judgment Against Principal Defendant in Judgment Against Garnishee, see GARNISHMENT, 20 Cyc. 1106.)

RECITE. To state in a written instrument facts connected with its inception, or reasons for its being made.[9] (See RECITAL, *ante*, p. 532.)

RECKLESS. Heedless, careless, rash, indifferent to consequences;[10] not recking of consequences; desperately heedless, as from folly, passion, or perversity, impetuosity, or rashly adventurous;[11] rashly or indifferently negligent; careless heedless; mindless;[12] rashly negligent; utterly careless or heedless.[13]

9. Black L. Dict.

Reciting a statute in pleadings "is 'quoted' or stating its 'contents.'" Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336, 348, where pleading a statute and counting upon a statute are distinguished.

Verbatim statement.—As used in a statute requiring that a sheriff's deed recite the execution, or the substance thereof, and the names of the parties, and the amounts and date of rendition of the judgment, the term does not mean to copy or repeat *verbatim*, but only to state the substance of the execution. Ogden *v.* Walters, 12 Kan. 282, 290. See also Gage *v.* Chicago, 162 Ill. 313, 317, 44 N. E. 729.

10. Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 433, 11 So. 262; Harrison *v.* State, 37 Ala. 154, 156. See also Lake Shore, etc., R. Co. *v.* Bodemer, 139 Ill. 596, 611, 29 N. E. 692, 32 Am. St. Rep. 218 [*affirming* 33 Ill. App. 479].

11. Century Dict. [*quoted* in Plummer *v.* Kansas City, 48 Mo. App. 482, 484].

12. Webster Dict. [*quoted* in O'Brien *v.* Loomis, 43 Mo. App. 29, 34].

13. Webster Dict. [*quoted* in Pickett *v.* Southern R. Co., 69 S. C. 445, 452, 48 S. E. 466].

The word has a wide range of meaning.—"In its milder sense it may imply mere inattention to duty — thoughtlessness — indifference, carelessness, negligence; or import a heedless disregard of obvious consequences." Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 433, 11 So. 262.

Does not imply the same thing as "wilful" or "intentional," but means less than "willfulness," and nothing more than "negligence." Cleveland, etc., R. Co. *v.* Tartt, 64 Fed. 823, 825, 12 C. C. A. 618. See also Alabama Great Southern R. Co. *v.* Hall, 105 Ala. 599, 607, 17 So. 176; Stringer *v.* Alabama Mineral R. Co., 99 Ala. 397, 410, 13 So. 75; Richmond, etc., R. Co. *v.* Farmer, 97 Ala. 141, 146, 12 So. 86; Kansas City, etc., R. Co. *v.* Crocker, 95 Ala. 412, 433, 11 So. 262; Johnson *v.* State, 92 Ala. 82, 84, 9 So. 539; Harrison *v.* State, 37 Ala. 154, 156; Greathouse *v.* Croan, 4 Indian Terr. 668, 76 S. W. 273. But see Crosby *v.* Seaboard Air Line R. Co., 81 S. C. 24, 32, 61 S. E. 1064; Pickett *v.* Southern R. Co., 74 S. C. 236, 241, 54 S. E. 375, 69 S. C. 445, 453, 48 S. E. 466, holding that the term is the equivalent of "wilful." And see Louisville, etc., R. Co. *v.* Anchors, 114 Ala. 492, 500, 22 So. 279, 62 Am. St. Rep. 116, where it is held that the use of the word in connection with averments of fact to which it refers and explains may imply more than mere heedlessness or negligence.

As used in a complaint in an action against a railroad company for reckless killing of live stock the term should be construed to mean no more than a want of that degree of care which the law required of the railroad's

RECKLESSLY. With a wanton disregard of all consequences.[14]

RECKLESSNESS. An indifference whether wrong is done or not; an indifference to the rights of others.[15] In a moral sense, a certain state of consciousness with reference to the consequence of one's acts.[16] (Recklessness: As Constituting Negligence, see NEGLIGENCE, 29 Cyc. 423. As Ground For Exemplary Damages, see DAMAGES, 13 Cyc. 105. Conduct Releasing Insurance Company From Liability on Policy, see ACCIDENT INSURANCE, 1 Cyc. 260. Statements Recklessly Made as Fraudulent Representations, see FRAUD, 20 Cyc. 27.)

RECKON. To conclude.[17]

RECLAMATION. A reclaiming of something as a possession; a claim or demand for return or restoration; a requirement of compensation for something wrongly taken or withheld; also a claim to discovery as having been previously made.[18] (Reclamation: Of Child by Parent, see PARENT AND CHILD, 29 Cyc. 1593 note 81. Of Land Under Water, see NAVIGABLE WATERS, 29 Cyc. 372. Of Low or Swamp Land, see DRAINS, 14 Cyc. 1026. Of Property — Attached, see ATTACHMENT, 4 Cyc. 666 note 87; Stolen or Obtained by Fraud, see CRIMINAL LAW, 12 Cyc. 972; Wrongfully Taken or Detained, see REPLEVIN; TROVER AND CONVERSION. Of Wild Animal, see ANIMALS, 2 Cyc. 307.)

RECLUSION. Incarceration under a sentence to undergo an infamous punishment carrying civil degradation in a house of forced labor.[19]

employees in the operation of the train which collided with the cattle. Louisville, etc., R. Co. *v.* Barker, 96 Ala. 435, 439, 11 So. 453.

As applied to the case of a person injuring another the word is somewhat indefinite in its meaning. It may apply to a case in which the defendant sees the danger of the plaintiff in time to prevent his injury and takes no steps to prevent it. McDonald *v.* International, etc., R. Co., 86 Tex. 1, 14, 22 S. W. 939, 40 Am. St. Rep. 803.

"Reckless carelessness" as used in connection with an action for negligence means reckless indifference not mere negligence or inadvertence. Louisville, etc., R. Co. *v.* Orr, 121 Ala. 489, 499, 26 So. 35.

"Reckless conduct" as used in an instruction in an action for personal injuries, that plaintiff must prove, by a preponderance of the evidence, that the conductor and brakeman of the train injuring plaintiff were guilty of reckless conduct, means more than mere negligence, and hence is not erroneous as authorizing a recovery for mere negligence in removing a trespasser. Union Pac. R. Co. *v.* Mitchell, 56 Kan. 324, 330, 43 Pac. 244.

14. Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 773, 36 C. C. A. 475.

Synonymous with "wantonly" see Harrington *v.* Los Angeles R. Co., 140 Cal. 514, 527, 74 Pac. 15, 98 Am. St. Rep. 85, 63 L. R. A. 238.

When used conjunctively with "wantonly" the word always means something more than "negligently." The two words thus conjoined can never import less than such conscious disregard of and indifference to the probable consequences of the act to which they refer as is the legal equivalent of wilful misconduct and intentional wrong. Highland Ave., etc., R. Co. *v.* Robinson, 125 Ala. 483, 489, 28 So. 28.

As used in a complaint in an action for personal injuries, in qualifying the act of defendant's servants, the word means no more than "negligently." Highland Ave., etc., R. Co. *v.* Sampson, 112 Ala. 425, 434, 20 So. 566. The term as employed in an allegation of a complaint that a certain act was done "carelessly, negligently, and recklessly" is tantamount to the allegation that it was "a wanton disregard of all consequences." Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85, 96.

15. Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 542, 18 Pac. 730.

Frequently employed as a synonym for "carelessness" or "negligence." Eddy *v.* Powell, 49 Fed. 814, 817, 1 C. C. A. 448. But see Kansas Pac. R. Co. *v.* Whipple, 39 Kan. 531, 542, 18 Pac. 730, where it is said that the term is stronger than mere or ordinary negligence. The words "wantonness," "wilfulness," and "recklessness" are in law the substantial equivalents of each other, in so far as they give rise to an action based upon punitive damages. Hull *v.* Seaboard Air Line R. Co., 76 S. C. 278, 281, 57 S. E. 28, 10 L. R. A. N. S. 1213. It sometimes includes "carelessness," but it is much more than carelessness, it implies wilfulness, and when applied to characterize an act done to another person it is wantonness. Plummer *v.* Kansas City, 48 Mo. App. 482, 484.

16. Com. *v.* Pierce, 138 Mass. 165, 175, 52 Am. Rep. 264, where it is said: "No matter whether defined as indifference to what those consequences may be, or as a failure to consider their nature or probability as fully as the party might and ought to have done, it is understood to depend on the actual condition of the individual's mind with regard to consequences, as distinguished from mere knowledge of present or past facts or circumstances from which some one or everybody else might be led to anticipate or apprehend them if the supposed act were done."

17. Webster Int. Dict. See Phipps *v.* State, 34 Tex. Cr. 608, 611, 31 S. W. 657.

18. Century Dict.

19. Jurgens *v.* Ittman, 47 La. Ann. 367, 373, 16 So. 952.

RECOGNITION. An acknowledgment or solemn avowal by which a thing is owned or declared to belong to.[20] (Recognition: Evidence of, see EVIDENCE, 16 Cyc. 1189. Official Recognition of — Corporation as Curing Defect in Organization, see CORPORATIONS, 10 Cyc. 253; Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1233; Person as Foreign Minister Conclusive of the Legality of Credentials, see AMBASSADORS AND CONSULS, 2 Cyc. 263. Of Illegitimate Child, see BASTARDS, 5 Cyc. 633. Of Unauthorized Acts of Agent as Ratification, see PRINCIPAL AND AGENT, 31 Cyc. 1263. Of Validity of Judgment as Waiver of Right to Appeal Therefrom, see APPEAL AND ERROR, 2 Cyc. 656. Political Recognition of — Belligerent Rights, see INTERNATIONAL LAW, 22 Cyc. 1714; WAR; Independence of Existence of New State, see INTERNATIONAL LAW, 22 Cyc. 1709. Renewal of Indebtedness by Acknowledgment, New Promise, or Part Payment, see BANKRUPTCY, 5 Cyc. 407; INSOLVENCY, 22 Cyc. 1351; LIMITATIONS OF ACTIONS, 25 Cyc. 1325.)

It is a temporary afflictive and infamous punishment, consisting in being confined in a hard labor institution and carrying civil degradation [*citing* 2 Rep. Journal du Palais, tit. "Reclusion," p. 83]. Phelps *v.* Reinach, 38 La. Ann. 547, 551.

Distinguished from "seclusion" see Jurgens *v.* Ittman, 47 La. Ann. 367, 373, 16 So. 952; Phelps *v.* Reinach, 38 La. Ann. 547, 551.

20. Imperial Dict. [*quoted* in Arthur *v.* Monck, 21 U. C. C. P. 76, 81].

RECOGNIZANCES

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CROSS-REFERENCES

For Matters Relating to:
Recognizance:
By Sheriff or Constable, see SHERIFFS AND CONSTABLES.
For Appearance, see WITNESSES.
For Good Behavior and Support, see HUSBAND AND WIFE, 21 Cyc. 1616.
For Possession, see POSSESSORY WARRANT, 31 Cyc. 959.
For Purchase-Money of Land Sold in Orphan's Court, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 777.
For Security For Costs, see COSTS, 11 Cyc. 170.
For Stay of Execution, see EXECUTIONS, 17 Cyc. 1142; JUSTICES OF THE PEACE, 24 Cyc. 627.
In Action of Detinue, see DETINUE, 14 Cyc. 279.
In Certiorari, see CERTIORARI, 6 Cyc. 843.
In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1183, 1190.
In Proceedings to Procure Writ of Review, see REVIEW.
On Appeal and Certiorari, see JUSTICES OF THE PEACE, 24 Cyc. 773.
On Appeal and Error:
Generally, see APPEAL AND ERROR, 2 Cyc. 916.
In Criminal Proceedings, see CRIMINAL LAW, 12 Cyc. 947.
On Bail, see BAIL, 5 Cyc. 16, 92.
On Execution, see EXECUTIONS, 17 Cyc. 1124, 1228, 1489.
On Partition, see PARTITION, 30 Cyc. 282.
On Preliminary Examination, see CRIMINAL LAW, 12 Cyc. 312.
To Keep the Peace, see BREACH OF THE PEACE, 5 Cyc. 1031.

I. DEFINITION.

A recognizance is an obligation of record entered into before a court of record or officer with condition to do some particular act.[1] It has been defined to be an

1. 2 Blackstone Comm. 341; 2 Bouvier L. Dict.; 1 Chitty Cr. L. 9; Jacob L. Dict.; 2 Tidd Pr. 1083.

Other definitions are: "An obligation of record (Schultze *v.* State, 43 Md. 295, 306; Jones *v.* Bomberger, 97 Pa. St. 432, 436; State *v.* Johnson, 77 S. C. 252, 254, 57 S. E. 846; U. S. *v.* Insley, 49 Fed. 776, 778; Erwin *v.* U. S., 37 Fed. 470, 489, 2 L. R. A. 229; Gillespie *v.* Grant, 3 U. C. Q. B. 400, 403) entered into before a court or officer duly authorized for that purpose (Clink *v.* Muskegon Cir. Judge, 58 Mich. 242, 244, 25 N. W. 175; Com. *v.* Lamar, 32 Pa. Super. Ct. 200, 204), conditioned for the performance of some particular act" (State *v.* Crippen, 1 Ohio St. 399, 401 [*quoted* in Gregory *v.* State, 94 Ind. 384, 386, 48 Am. Rep. 162; King *v.* State, 18

acknowledgment of a debt of record,[2] and when it is filed it is in the nature of a conditional judgment of record[3] which may be discharged by the performance of the conditions stated.[4] Again a recognizance has been held to be a contract[5] or

Nebr. 375, 379, 25 N. W. 519]); or "with condition to do some particular act" (Morrow *v.* State, 5 Kan. 563, 566; State *v.* Dorr, 59 W. Va. 188, 192, 53 S. E. 120, 115 Am. St. Rep. 915, 5 L. R. A. N. S. 402), as "to appear at the sessions or assizes" (1 Chitty Cr. L. 90 [*quoted* in King *v.* State, 18 Nebr. 375, 378, 25 N. W. 519; Irwin *v.* State, 10 Nebr. 325, 328, 6 N. W. 370]); or "with a condition to do some act required by law, which is therein specified" (Warner *v.* Howard, 121 Mass. 82, 84; 2 Blackstone Comm. 341 [*quoted* in King *v.* State, *supra*; Com. *v.* Savage, 30 Pa. Super. Ct. 364, 365]; Bouvier L. Dict. [*quoted* in Banta *v.* People, 53 Ill. 434, 436; People *v.* Cook, 68 Ill. App. 202, 203, 204; Vierling *v.* State, 33 Ind. 218, 219]), "with a condition to do some act required by law to be done, or to refrain from doing some act forbidden by law, which is therein specified" (1 Bouvier Inst. 342 [*quoted* in State *v.* Dowd, 43 N. H. 454, 455]).

"An obligation of record which a man enters into before some court or magistrate duly authorized (Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239) with condition to do some particular act (2 Blackstone Comm. 341 [*quoted* in State *v.* Howley, 73 Me. 552, 554; McMicken *v.* Com., 58 Pa. St. 213, 218, 222; State *v.* Morgan, 2 Bailey (S. C.) 601; Reg. *v.* Creelman, 25 Nova Scotia, 404, 417]), as to appear at the assizes, keep the peace, pay a debt, or the like" (Jacob L. Dict. [*quoted* in State *v.* Howley, *supra*; State *v.* Walker, 56 N. H. 176, 178).

"An obligation of record, with condition to be void on performance of some act specified." Lang *v.* People, 14 Mich. 439, 442.

2. Gay *v.* State, 7 Kan. 394; Com. *v.* McNeill, 19 Pick. (Mass.) 127; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35; People *v.* Van Eps, 4 Wend. (N. Y.) 387; Com. *v.* Gray, 26 Pa. Super. Ct. 110; Barnes *v.* Lee, 2 Fed. Cas. No. 1,017, 1 Cranch C. C. 430; Gillespie *v.* Grant, 3 U. C. Q. B. 400, 403.

Other definitions are: "An acknowledgment of a debt, and when filed in a court of record, is a matter of record." Gildersleeve *v.* People, 9 N. Y. Leg. Obs. 18, 23.

"An acknowledgment or obligation of record (Reg. *v.* McKay, 28 N. Brunsw. 564, 571) of a debt due" (Philbrick *v.* Buxton, 43 N. H. 462; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35.

"An acknowledgment or obligation of record." Underhill *v.* Devereux, 2 Saund. 68, 85 Eng. Reprint 698 [*quoted* in Reg. *v.* McKay, 28 N. Brunsw. 564, 571; Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239].

"The acknowledgment upon record of a former debt due to our Sovereign Lady the Queen." *Re* Burton, 16 Ont. Pr. 160, 161. See also *In re* Brown, 35 Minn. 307, 308, 29 N. W. 131.

"A debt of record entered into before some court, judge, or magistrate having authority to take the same." Crawford *v.* Vinton, 102 Mich. 83, 85, 62 N. W. 988; Com. *v.* Emery, 2 Binn. (Pa.) 431, 434 [*quoted* in Com. *v.* Savage, 30 Pa. Super. Ct. 364, 367]; Wesley *v.* Sharpe, 19 Pa. Super. Ct. 600, 604.

"A debt upon condition, and on default is forfeited and becomes a debt due and absolute." State *v.* Kinne, 39 N. H. 129, 135.

To "enter into recognizances" in law is to become bound under a penalty, by a written obligation before a court of record, to do a specific act. Century Dict. [*quoted* in Philadelphia Fire Assoc. *v.* Ruby, 60 Nebr. 216, 220, 82 N. W. 629].

Defined by statute see Jones *v.* State, 1 Tex. App. 485, 486; Tex. Code Cr. Proc. art. 283 [*quoted* in Smith *v.* State, 35 Tex. Cr. 9, 10, 29 S. W. 158].

3. Fahey *v.* People, 8 Colo. App. 553, 46 Pac. 836; Adair *v.* State, 1 Blackf. (Ind.) 200; Com. *v.* Gray, 26 Pa. Super. Ct. 110; State *v.* Ahrens, 12 Rich. (S. C.) 493.

In nature of judgment confessed of record. — State *v.* Watson, 54 Mo. App. 416, 417; Gildersleeve *v.* People, 9 N. Y. Leg. Obs. 18, 23 (in its legal effect the confession of judgment); State *v.* Ahrens, 12 Rich. (S. C.) 493. See also Com. *v.* Philadelphia County, 8 Serg. & R. (Pa.) 151, 154 [*quoted* in Gay *v.* State, 20 Tex. 504, 507]; 4 Bacon Abr. 414 [*quoted* in Reg. *v.* Creelman, 25 Nova Scotia 404, 417].

Many of the attributes of a judgment. — People *v.* Van Eps, 4 Wend. (N. Y.) 392 [*quoted* in Colvig *v.* Klamath County, 16 Oreg. 244, 249, 19 Pac. 86]. See also State *v.* Walker, 56 N. H. 175, 178; Philbrick *v.* Buxton, 43 N. H. 462; Respublica *v.* Cobbet, 2 Yeates (Pa.) 352, 362, 3 Dall. 467, 475, 1 L. ed. 683 [*quoted* in Davis *v.* Packard, 6 Wend. (N. Y.) 327, 330; Colvig *v.* Klamath County, 16 Oreg. 244, 248, 19 Pac. 286; Com. *v.* Savage, 30 Pa. Super. Ct. 364, 367].

4. Gregory *v.* Sherman, 44 Conn. 466; Starr *v.* Lyon, 5 Conn. 538; Gay *v.* State, 7 Kan. 394; State *v.* Watson, 54 Mo. App. 416, 417.

5. *Arkansas.* — Blackwell *v.* State, 3 Ark. 320.

Kansas. — State *v.* Weatherwax, 12 Kan. 463.

Missouri. — State *v.* Randolph, 22 Mo. 474.

New Mexico. — Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311.

New York. — People *v.* Tubbs, 37 N. Y. 586.

Ohio. — State *v.* Daily, 14 Ohio 91.

West Virginia. — State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

United States. — U. S. *v.* Van Fossen, 28 Fed. Cas. No. 16,607, 1 Dill. 406.

See 42 Cent. Dig. tit. "Recognizances," § 21.

It is in the nature of a judgment, however, rather than a contract. State *v.*

bond of record,[6] although properly speaking it is more than a contract,[6a] and clearly distinguishable from a bond.[6b]

II. FORM, REQUISITES, AND VALIDITY.

A. Necessity For Authority. Recognizances are valid only when taken by some court or officer authorized to take them,[7] and in a case where the taking

Walker, 56 N. H. 176. See also *supra*, text and note 3.

6. *In re* Brown, 35 Minn. 307, 308, 29 N. W. 131, where it is said: "Thus Blackstone speaks of a recognizance as in most respects 'like another bond.'" See also *In re* Brown, *supra*, where it is said: "The term 'recognizance' is commonly applied to all forms of security for the appearance of the accused in criminal proceedings, whether in the form of a common-law recognizance, or of a common bond."

Although a court of admiralty cannot take a recognizance, which is a bond or obligation of record, from defendants, not being a court of record nor a judge of record, yet it can take a caution or stipulation which is usually for appearance or to perform a decree, etc., and is in the nature of a recognizance. Respublica *v.* Le Caze, 1 Yeates (Pa.) 55, 69.

6a. **More than a contract.**—A recognizance has been defined at common law as being "an obligation of record founded upon an acknowledgment of an existing indebtedness by the person to be bound," and as something more than a contract, although under a statute it has been declared that it may be held and treated as a contract. State *v.* Weatherwax, 12 Kan. 463.

6b. **Compared with and distinguished from bond.**—A recognizance is equal in solemnity to, and in some respects at common law takes priority over, a common bond. Shattuck *v.* People, 5 Ill. 477; King *v.* State, 18 Nebr. 375, 379, 25 N. W. 519; State *v.* Crippen, 1 Ohio St. 399. While there is to a certain extent a similarity in form between a bond and a recognizance and an action of debt will lie on each, the similarity extends no further. A bond is always sealed by the obligor while a recognizance need not be; and the bond creates a debt by specialty, whereas a recognizance creates a debt by record and in this respect is like a judgment. People *v.* Kane, 4 Den. (N. Y.) 530; State *v.* Crippen, 1 Ohio St. 399. And see Fahey *v.* People, 8 Colo. App. 553, 46 Pac. 836; Shattuck *v.* People, 5 Ill. 477. A recognizance differs from a bond in this: That while the latter, which is attested by the signature and seal of the obligor, creates a fresh and new obligation, the former is an acknowledgment of record of an already existing debt. Fahey *v.* People, 8 Colo. App. 553, 46 Pac. 836; Gay *v.* State, 7 Kan. 394; King *v.* State, 18 Nebr. 375, 25 N. W. 519; Irwin *v.* State, 10 Nebr. 325, 6 N. W. 370; State *v.* Crippen, 1 Ohio St. 399; State *v.* Mayson, 2 Nott & M. (S. C.) 425; Gay *v.* State, 20 Tex. 504, 507; Lawton *v.* State, 5 Tex. 270; Reg. *v.* Hoodless, 45 U. C. Q. B. 556; 2 Blackstone Comm. 341 [*quoted* in *In re* Brown, 35 Minn. 307, 29 N. W. 131]. A recognizance is a bond in the strict sense of the word and entering into a recognizance is a sufficient giving bond with surety. Lovejoy *v.* Isbell, 70 Conn. 557, 40 Atl. 531; New Haven *v.* Rogers, 32 Conn. 221. *Contra*, Merrill *v.* Prince, 7 Mass. 396; Johnson *v.* Randall, 7 Mass. 340; Nurse *v.* Porter, 18 N. H. 57. To determine the character of an instrument whether a recognizance or not it is only necessary to inquire whether it has been duly acknowledged before the proper officer. Kearns *v.* State, 3 Blackf. (Ind.) 334. Recognizance for appeal from the judgment of a justice is strictly a recognizance and not a penal bond having been expressly declared by statute to be a recognizance. Cockrill *v.* Owen, 10 Mo. 287. In Minnesota the difference between a recognizance and a common bond is now largely one of form. Hence, not merely in common speech, but also in statutes, the one or the other term is often used without regard to the technical distinction between the two. *In re* Brown, 35 Minn. 307, 308, 29 N. W. 131. See *infra*, II, D, 3.

Distinguished from bail-bond see Crane *v.* Keating, 13 Pick. (Mass.) 339 [*quoted* in Com. *v.* Savage, 30 Pa. Super. Ct. 364, 367]; Gay *v.* State, 20 Tex. 504, 507; State *v.* Dorr, 59 W. Va. 188, 192, 53 S. E. 120, 115 Am. St. Rep. 915, 5 L. R. A. N. S. 402; U. S. *v.* Insley, 49 Fed. 776, 778. A recognizance of bail stands upon a different ground from bail-bonds as to jurisdiction of the court. There the jurisdiction is not founded upon statute, but upon the authority in the court to see that an improper use is not made of its own record. Davey *v.* Prendergrass, 5 B. & Ald. 187, 7 E. C. L. 110 [*quoted* in Steptoe *v.* Harvey, 7 Leigh (Va.) 501, 503].

A recognizance is altogether unlike a mortgage.—It resembles it in nothing; but the same form of remedy may be used upon both. McMicken *v.* Com., 58 Pa. St. 213, 222.

7. *Arkansas.*— Cooper *v.* State, 23 Ark. 278.

Illinois.— Solomon *v.* People, 15 Ill. 291.

Indiana.— State *v.* Winninger, 81 Ind. 51; State *v.* Wenzel, 77 Ind. 428; Byers *v.* State, 20 Ind. 47; Gaspar *v.* State, 11 Ind. 548; Olds *v.* State, 6 Blackf. 91.

Kansas.— Morrow *v.* State, 5 Kan. 563.

Kentucky.— Bowman *v.* Com., 14 B. Mon. 390; Harris *v.* Simpson, 4 Litt. 165, 14 Am. Dec. 101; Com. *v.* Littell, 1 A. K. Marsh. 566.

Massachusetts.— Com. *v.* Loveridge, 11 Mass. 337.

New Jersey.— State *v.* Kruise, 32 N. J. L. 313.

New York.— People *v.* Shaver, 4 Park. Cr. 45.

was authorized [8] and the court to which it was returned had jurisdiction.[9] Nor is such an obligation when taken by one not authorized valid as a common-law obligation.[10]

B. Persons Authorized to Take. Taking a recognizance is an act of a judicial character [11] and courts have inherent power to take them.[12] Other officers must be authorized by statute,[13] and it is competent for the legislature to authorize any officer to take a recognizance.[14] Among those who have or have not been authorized are judges,[15] sheriffs, and officers authorized to execute warrants in criminal actions,[16] justices of the peace,[17] and clerks of court.[18] Deputy officers are held not to be authorized although their principals are,[19] nor can a court deputize another to take and approve a recognizance.[20] Recognizances taken by *de facto* officers are valid.[21] The authority may be limited as to time,[22] place,[23] amount,[24] or to a particular stage of the proceedings,[25] and may depend on the existence of prescribed conditions [26] or proceedings.[27]

Canada.— O'Connor *v.* Mott, 4 N. Brunsw. 509.

See 42 Cent. Dig. tit. "Recognizances," § 1 *et seq.*

It is void when given before a magistrate who is without jurisdiction to receive the same. Reardon *v.* People, 123 Ill. App. 81.

That a recognizance was taken by two justices of the peace in a case where one was authorized will not invalidate it. McFarlan *v.* People, 13 Ill. 9.

Essentials of a recognizance are that it be taken by a competent court or officer, in a case existing before such authority and for the performance of some act that the law allows to be secured in that way and in the form prescribed for that purpose. State *v.* Randolph, 22 Mo. 474.

8. State *v.* Randolph, 22 Mo. 474; Dickenson *v.* State, 20 Nebr. 72, 29 N. W. 184; State *v.* Eastman, 42 N. H. 265.

It must be taken by a competent court or officer in a case existing before such authority. State *v.* Randolph, 22 Mo. 474 [*quoted* in State *v.* Watson, 54 Mo. App. 416, 417].

Before the law requiring it goes into effect a recognizance taken is void. Curry *v.* Dallas, (Tex. Cr. App. 1893) 21 S. W. 930.

9. Pike *v.* Neal, 73 Me. 513; State Treasurer *v.* Wells, 27 Vt. 276; State Treasurer *v.* French, Brayt. (Vt.) 140.

10. Com. *v.* Roberts, 1 Duv. (Ky.) 199; Com. *v.* Lee, 3 J. J. Marsh. (Ky.) 698; Dickenson *v.* State, 20 Nebr. 72, 29 N. W. 184. *Contra*, Dennard *v.* State, 2 Ga. 137; State *v.* Mills, 13 N. C. 555.

11. State *v.* Edwards, 4 Humphr. (Tenn.) 226. But see Albee *v.* Ward, 8 Mass. 79, where it is held that a justice of the peace in taking a recognizance exercises no judicial power but acts merely as a ministerial official.

12. U. S. *v.* Evans, 2 Fed. 147, 2 Flipp. 605.

13. Com. *v.* Littell, 1 A. K. Marsh. (Ky.) 566; U. S. *v.* Evans, 2 Fed. 147, 2 Flipp. 605.

Recognizances are by our law "entered into before courts of record and constitute a part of their proceedings to be recorded; and before justices of the same courts, acting ministerially by virtue of authority conferred upon them by statute for that purpose." Longley *v.* Vose, 27 Me. 179, 186.

14. Cockrill *v.* Owen, 10 Mo. 287.

15. Saxton *v.* State, 8 Blackf. (Ind.) 200; State *v.* Zwille, 22 Mo. 467.

Associate judges.— McCarty *v.* State, 1 Blackf. (Ind.) 338; Adair *v.* State, 1 Blackf. (Ind.) 200.

16. State *v.* Winninger, 81 Ind. 51.

17. McFarlan *v.* People, 13 Ill. 9; Longley *v.* Vose, 27 Me. 179, 187.

18. Marr *v.* State, 26 Ark. 410; Morrow *v.* State, 5 Kan. 563; Chinn *v.* Com., 5 J. J. Marsh. (Ky.) 29.

19. State *v.* Edwards, 4 Humphr. (Tenn.) 226. But see Shreeve *v.* State, 11 Ala. 676.

20. Morrow *v.* State, 5 Kan. 563. *Contra*, State *v.* Houston, 74 N. C. 549; State *v.* Edney, 60 N. C. 463. *Compare* State *v.* Jones, 88 N. C. 683; State *v.* Satterwhite, 20 S. C. 536 (holding that a recognizance entered into before and approved by the clerk of the court under the order of the judge is in effect the taking of such recognizance by the judge himself and renders it valid); U. S. *v.* Evans, 2 Fed. 147, 2 Flipp. 605.

21. Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Rheinhart *v.* State, 14 Kan. 318. See Pack *v.* State, 23 Ark. 235; People *v.* Meacham, 74 Ill. 292; People *v.* Watkins, 19 Ill. 117; People *v.* Cook, 14 Barb. (N. Y.) 259; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213. See also *infra*, p. 562 text and note 75.

22. Com. *v.* Littell, 1 A. K. Marsh. (Ky.) 566. See *infra*, II, H, 7.

23. Paine *v.* State, 7 Blackf. (Ind.) 206.

24. State *v.* Wormell, 33 Me. 200. See *infra*, II, F.

25. State *v.* Young, 56 Me. 219; Com. *v.* Greene, 13 Allen (Mass.) 251.

26. Cooper *v.* State, 23 Ark. 278; Blackman *v.* State, 12 Ind. 556. See *infra*, II, E.

27. Chumasero *v.* People, 18 Ill. 405; Hawkins *v.* State, 24 Ind. 288; Votaw *v.* State, 12 Ind. 497; Trimble *v.* State, 3 Ind. 151; Pugh *v.* State, 2 Head (Tenn.) 227. See BAIL, 5 Cyc. 83. See also *infra*, II, C.

Recognizances are entered into before justices of the peace when there are proceedings between parties pending before them, and

C. Proceedings in Which Authorized. It has been held that recognizances should be taken in all cases in which the state takes an obligation from an individual for the performance of any duty unless the law otherwise direct.[28] Recognizances have been held or treated as valid and authorized in bastardy proceedings,[29] in civil or criminal proceedings when accused may be admitted to bail,[30] in forcible entry and detainer,[31] in probate [32] and partition proceedings,[33] in prosecutions for surety to keep the peace; [34] for security for costs [35] and for appearances of witnesses.[36] The mere fact that the proceedings in which the recognizance was taken were irregular or erroneous will not render the recognizance invalid.[37]

D. Form — 1. In General. Recognizances are of different descriptions, and they are entered into for different purposes.[38] There is no substantial difference between a common-law and a statutory recognizance.[39] Where no form is prescribed by statute the form or language is immaterial if it is sufficient in legal effect;[40] but while every recognizance must contain all the material and substantial parts,[41] a recognizance defective merely in form may be valid if treated as valid by the parties affected.[42]

2. Conformity to Statute. Where the requisites of a recognizance are prescribed by statute it becomes a statutory obligation and must be made substantially in conformity with the law authorizing it,[43] but strict compliance with the statutory form is not required;[44] and hence if the obligation is in other respects

when there are no such proceedings. Longley *v.* Vose, 27 Me. 179, 187.

28. Dickerson *v.* Gray, 2 Blackf. (Ind.) 230.

Taking recognizance when bond is required by statute see *supra*, text and note 6.

29. New Haven *v.* Rogers, 32 Conn. 221; People *v.* Green, 58 Ill. 236; Dickerson *v.* Gray, 2 Blackf. (Ind.) 230; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

30. See Bail, 5 Cyc. 16, 92.

31. Dutton *v.* Tracy, 4 Conn. 79. And see Hardy *v.* Watts, 22 Pa. St. 33.

32. Com. *v.* Haffey, 6 Pa. St. 348.

33. Com. *v.* Haffey, 6 Pa. St. 348.

34. State *v.* Thompson, 62 Ind. 367. See Breach of the Peace, 5 Cyc. 1031.

35. Kinney *v.* O'Bannon, 6 Bush (Ky.) 692. See also Costs, 11 Cyc. 182.

36. People *v.* Rundle, 6 Hill (N. Y.) 506. See also Witnesses.

37. *Arkansas.*—Marr *v.* State, 26 Ark. 410.

Illinois.— People *v.* Meacham, 74 Ill. 292; O'Brien *v.* People, 41 Ill. 456.

Indiana.— Harris *v.* State, 54 Ind. 2; Adams *v.* State, 48 Ind. 212; Adair *v.* State, 1 Blackf. 200.

Maine.— State *v.* Boies, 41 Me. 344; State *v.* Corson, 10 Me. 473.

Nebraska.—King *v.* State, 18 Nebr. 375, 25 N. W. 519.

Pennsylvania.— Com. *v.* Haffey, 6 Pa. St. 348.

See 42 Cent. Dig. tit. "Recognizances," § 3.

38. Longley *v.* Vose, 27 Me. 179, 186.

39. State *v.* Poston, 63 Mo. 521.

Distinction between statutory and common-law bonds and recognizances is abolished by Code Tenn. § 5155. Brewer *v.* State, 6 Lea (Tenn.) 198.

40. Gallagher *v.* People, 88 Ill. 335; Kinney *v.* O'Bannon, 6 Bush (Ky.) 692; Hardy *v.* Watts, 22 Pa. St. 33; State Treasurer *v.* Woodward, 7 Vt. 529.

41. People *v.* Graham, 1 Park. Cr. (N. Y.) 141.

A mere memorandum is insufficient. State *v.* Crippen, 1 Ohio St. 399; Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422.

It need contain only the penalty and condition. McLaughlin *v.* State, 10 Kan. 581.

Forms of recognizances see Vierling *v.* State, 33 Ind. 218, 219; Longley *v.* Vose, 27 Me. 179, 180; Crawford *v.* Vinton, 102 Mich. 83, 84, 62 N. W. 988; King *v.* State, 18 Nebr. 375, 376, 25 N. W. 519; Irwin *v.* State, 10 Nebr. 325, 328, 6 N. W. 370; State *v.* Birchim, 9 Nev. 95, 98; State *v.* Edney, 60 N. C. 463, 464; State *v.* Ahrens, 12 Rich. (S. C.) 493, 494; Burton *v.* State, 48 Tex. Cr. 544, 545, 90 S. W. 498; Reg. *v.* Creelman, 25 Nova Scotia 404, 419; 2 Blackstone Comm. 341 [*quoted* in Irwin *v.* State, *supra*].

Insufficient form of recognizance see State *v.* Crippen, 1 Ohio St. 399 [*quoted* in King *v.* State, 18 Nebr. 375, 388, 25 N. W. 519].

42. Allen *v.* Kellam, 94 Pa. St. 253.

43. *Alabama.*— Lloyd *v.* State, Minor 34.

Colorado.— Connor *v.* People, 4 Colo. 134.

Connecticut.— Ferry *v.* Burchard, 21 Conn. 597.

Maine.— Pike *v.* Neal, 73 Me. 513.

Nebraska.— Zobel *v.* State, 72 Nebr. 427, 430, 100 N. W. 947.

Texas.— Lawton *v.* State, 5 Tex. 270; Smith *v.* State, 35 Tex. Cr. 9, 29 S. W. 158.

When the form is prescribed by statute the recognizance must be in the prescribed form. Clink *v.* Muskegon Cir. Judge, 58 Mich. 242, 244, 25 N. W. 175; State *v.* Randolph, 22 Mo. 474 [*quoted* in State *v.* Watson, 54 Mo. App. 416, 417].

44. *Connecticut.*— Wallingford *v.* Hall, 45 Conn. 350; Billings *v.* Avery, 7 Conn. 236.

plain the obligors will not be released.[45] Again the recognizance may be treated as good at common law although not strictly in pursuance of the statute.[46]

3. Bond as Recognizance. In a number of states it has been held that under a statute requiring a recognizance a bond when properly conditioned and executed is sufficient,[47] although the contrary rule is adopted in other states.[48]

E. Conditions — 1. In General. The conditions of recognizances vary according to the proceedings in which they are taken and are fixed by law.[49] A recognizance must set out the material parts of the obligation and condition,[50] a condition being an indispensable part of a recognizance,[51] and the court will not supply by intendment a necessary word, although omitted by clerical oversight merely.[52] The language of the condition will not invalidate a recognizance, although it varies from the statutory form; it is sufficient if what is required of the principal can be ascertained from the recognizance.[53]

2. Omission of Conditions. Failure of a recognizance to contain all the conditions prescribed by statute need not invalidate it.[54]

3. Imposing Additional Conditions. While it has been held that a recognizance

Illinois.— Gallagher *v.* People, 91 Ill. 590; Shattuck *v.* People, 5 Ill. 477.

Kentucky.— Miller *v.* Com., 1 Duv. 14.

Maine.— State *v.* Baker, 50 Me. 45; State *v.* Boies, 41 Me. 344.

Massachusetts.— Shaw *v.* McIntier, 5 Allen 423.

South Carolina.— State *v.* Mayson, 2 Nott & M. 425.

Canada.— McDonell *v.* Rutter, 2 U. C. Q. B. O. S. 340.

See 42 Cent. Dig. tit. "Recognizances," § 4.

45. State *v.* Birchim, 9 Nev. 95.

46. Phelps *v.* Parks, 4 Vt. 488; U. S. *v.* Evans, 2 Fed. 147, 2 Flipp. 605.

47. *Connecticut.*— Starr *v.* Lyons, 5 Conn. 538.

Georgia.— State *v.* Couper, T. U. P. Charlt. 306.

Illinois.— McFarlan *v.* People, 13 Ill. 9; Shattuck *v.* People, 5 Ill. 477.

Indiana.— Kearns *v.* State, 3 Blackf. 334.

Kansas.— Ingram *v.* State, 10 Kan. 630.

North Carolina.— State *v.* Jones, 88 N. C. 683; State *v.* Edney, 60 N. C. 463.

Texas.— Lawton *v.* State, 5 Tex. 270.

United States.— Deen *v.* Hemphill, 7 Fed. Cas. No. 3,736a, Hempst. 154.

See 42 Cent. Dig. tit. "Recognizances," § 5. See also *supra*, text and note C.

A voluntary bond in a criminal case, although not good as a recognizance, is good as a bond. Park *v.* State, 4 Ga. 329.

48. Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313; Fahey *v.* People, 8 Colo. App. 553, 46 Pac. 836; Ward *v.* Price, 1 Pinn. (Wis.) 57.

A statutory undertaking for bail is not a recognizance. State *v.* Hays, 2 Oreg. 314.

49. State *v.* Crowley, 60 Me. 103; State *v.* Young, 56 Me. 219. See titles referred to in Cross-References, *supra*, p. 538.

It must be conditioned for the performance of some act that the law allows to be secured in that way. State *v.* Randolph, 22 Mo. 474 [*quoted* in State *v.* Watson, 54 Mo. App. 416, 417]. Recognizances may also be entered into before courts of record, conditioned to appear before some court from day to day or at a day fixed by an adjournment of the same term or at the next term. Longley *v.* Vose, 27 Me. 179, 187.

In civil proceedings recognizances are entered into before justices of the peace when they constitute a part of the proceedings before them, conditioned to enter and prosecute an appeal made to the district court; and when no such proceedings are before them, conditioned to enter and prosecute an appeal made from the district court to the supreme judicial court. Longley *v.* Vose, 27 Me. 179, 187.

In criminal cases a recognizance may be entered into before a justice of the peace, conditioned to keep the peace or to appear before some court to answer such matter as may be alleged against him, or to testify as a witness, or to enter and prosecute an appeal. Longley *v.* Vose, 27 Me. 179, 187.

The object of a recognizance may be to secure the presence of defendant to perform or suffer the judgment of the court. Crawford *v.* Vinton, 102 Mich. 83, 84, 62 N. W. 988.

50. State *v.* Crippen, 1 Ohio St. 399; Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422.

51. Caldwell *v.* Brindle, 11 Pa. St. 293; Hand *v.* State, 28 Tex. App. 28, 11 S. W. 679.

52. Carroll *v.* State, 6 Tex. App. 463.

53. *Connecticut.*— Billings *v.* Avery, 7 Conn. 236.

Illinois.— Petty *v.* People, 118 Ill. 148, 8 N. E. 304.

Kansas.— McLaughlin *v.* State, 10 Kan. 581; Gay *v.* State, 7 Kan. 394.

Kentucky.— Miller *v.* Com., 1 Duv. 14.

Maine.— State *v.* Baker, 50 Me. 45; State *v.* Boies, 41 Me. 344.

Massachusetts.— Shaw *v.* McIntier, 5 Allen 423.

Missouri.— State *v.* Potts, 60 Mo. 368.

Tennessee.— State *v.* Quinby, 5 Sneed 419; State *v.* Arledge, 2 Sneed 229.

Texas.— Brite *v.* State, 24 Tex. 219.

See 42 Cent. Dig. tit. "Recognizances," § 13.

54. Gallagher *v.* People, 91 Ill. 590; Miller *v.* Com., 1 Duv. (Ky.) 14; Shaw *v.* McIntier, 5 Allen (Mass.) 423; State *v.* Davidson, 20 Mo. 212, 61 Am. Dec. 603.

which fails to comply with the statute authorizing it by reason of the imposition of conditions not specified in the statute or order requiring it is void,[55] the better rule would seem to be that such additional conditions may, when possible, be treated as surplusage and not binding on the surety.[56]

F. Amount or Penalty. A recognizance which contains no acknowledgment of indebtedness or penalty is invalid.[57] The amount of the penalty is usually fixed by the court [58] and not by the officer taking it.[59] So the amount may be regulated by statute so long as it is not unreasonable.[60] A recognizance taken for a larger sum than required is invalid,[61] but taking one for a less sum has been held not to vitiate it.[62]

G. Recitals — 1. Jurisdiction. In general a recognizance is required to show jurisdiction in the officer taking it,[63] but it is held that it need not recite the special facts which gave the officer authority to act in the particular case, it being enough if he had authority in cases of that general description and is conditioned to do some act for the doing of which a recognizance may properly be taken.[64]

55. Darling *v.* Hubbell, 9 Conn. 350; Pike *v.* Neal, 73 Me. 513; Merrill *v.* Hinckley, 49 Me. 40; Jordan *v.* McKenney, 45 Me. 306; Dennison *v.* Mason, 36 Me. 431; Owen *v.* Daniels, 21 Me. 180; Donley *v.* Brownlee, 7 Pa. St. 109; State's Treasurer *v.* Seaver, 7 Vt. 480.

If the recognizance requires more than the law it is void. State's Treasurer *v.* Seaver, 7 Vt. 480, 485.

56. *Alabama.*— Howie *v.* State, 1 Ala. 113; Whitted *v.* Governor, 6 Port. 335.

Connecticut.— Wallingford *v.* Hall, 45 Conn. 350; New Haven *v.* Rogers, 32 Conn. 221; Waldo *v.* Spencer, 4 Conn. 71.

Maine.— State *v.* Cobb, 71 Me. 198; State *v.* Crowley, 60 Me. 103; State *v.* Hatch, 59 Me. 410.

Missouri.—State *v.* Lewis, 61 Mo. App. 633.

New York.— People *v.* Millis, 5 Barb. 511.

Rhode Island.— State *v.* Edgerton, 12 R. I. 104.

See 42 Cent. Dig. tit. "Recognizances," § 13.

Clause consenting to entry of judgment was held to be surplusage and not to vitiate the balance. People *v.* Hickey, 5 Daly (N. Y.) 365.

57. People *v.* Felton, 36 Barb. (N. Y.) 429; People *v.* Rundle, 6 Hill (N. Y.) 506; Caldwell *v.* Brindle, 11 Pa. St. 293; Fletcher *v.* Tichnor, 1 Phila. (Pa.) 527; Sisco *v.* Hurlburt, 17 Vt. 118; Reg. *v.* Hoodless, 45 U. C. Q. B. 556. But see Hardy *v.* Watts, 22 Pa. St. 33, holding that failure to state a penal sum did not render a recognizance taken on an appeal invalid where the appeal was secured by means of it.

A recognizance in the sum of "three hundred" is insufficient. Irwin *v.* State, 10 Nebr. 325, 6 N. W. 370.

58. Grinestaff *v.* State, 53 Ind. 238, holding that specifying the amount of the recognizance in a criminal proceeding in such instrument is sufficient fixing of the amount by the court when it is taken in open court and entered on the proper book.

59. State *v.* Winninger, 81 Ind. 51; Boaz *v.* Tate, 43 Ind. 60.

60. *In re* McSorley, 15 R. I. 608, 10 Atl. 659.

61. Waugh *v.* People, 17 Ill. 561; Roberts *v.* State, 34 Kan. 151, 8 Pac. 246 (such defect not being aided by the curative act, Kan. Cr. Code, § 154); State *v.* Austin, 4 Humphr. (Tenn.) 213.

62. Chumasero *v.* People, 18 Ill. 405.

63. *Kansas.*— McLaughlin *v.* State, 10 Kan. 581.

Maine.— State *v.* Gilmore, 81 Me. 405, 17 Atl. 316; State *v.* Lane, 33 Me. 536; State *v.* Wormell, 33 Me. 200; State *v.* Magrath, 31 Me. 469; State *v.* Smith, 2 Me. 62.

Rhode Island.— State *v.* Edgerton, 12 R. I. 104.

South Carolina.— State *v.* Ahrens, 12 Rich. 493.

Tennessee.— State *v.* Edwards, 4 Humphr. 226.

See 42 Cent. Dig. tit. "Recognizances," § 2.

But see Pate *v.* People, 15 Ill. 221 (holding that authority of justice to take recognizance need not appear on its face but can be averred in the declaration or scire facias and proved on trial); Territory *v.* Hildebrand, 2 Mont. 426 (under Mont. Cr. Pr. Act, § 257, the recognizance need not show the jurisdiction of the officer taking it).

Record of recognizance must show affirmatively that it was one the justice of peace had authority to take. Jones *v.* Bogert, 4 Kulp (Pa.) 322.

64. *Arkansas.*— State *v.* Williams, 17 Ark. 371.

Colorado.— Chase *v.* People, 2 Colo. 528.

Massachusetts.— Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46; Peck *v.* Thompson, 5 Allen 388.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

Minnesota.— State *v.* Grant, 10 Minn. 39.

Missouri.— State *v.* Railey, 35 Mo. 168; State *v.* Randolph, 22 Mo. 474.

New York.— Gildersleeve *v.* People, 10 Barb. 35 [*overruling* People *v.* Young, 7 Hill 44; People *v.* Kloeber, 7 Hill 39, and *following* Champlain *v.* People, 2 N. Y. 82]; People *v.* Kane, 4 Den. 530.

Virginia.— Archer *v.* Com., 10 Gratt. 627.

See 42 Cent. Dig. tit. "Recognizances," § 2.

2. Regularity of Proceedings. A recognizance need not recite in detail the proceedings before the officer taking it; it is sufficient if enough is stated that the regularity of the proceedings may be presumed.[65]

3. Cause and Place of Taking. It is essential to a recognizance in a criminal case that it recite the cause of taking it,[66] the court [67] and place [68] of taking, a description of the offense charged,[69] and the court at which defendant is to appear.[70]

4. Names of Cognizors. While the proper practice is to state the names of the cognizors in the body of the instrument,[71] the omission to do so has been held not to invalidate the recognizance as to those omitted.[71a]

H. Execution or Taking — 1. In General. Recognizances are not, strictly speaking, executed by the parties, but are acknowledged by them.[72] At common law the mode of taking recognizances was for the court or magistrate taking it to state at large to the bail the obligation and its condition to which they assented; a short minute was made at the time; from this minute a formal record of the recognizance was prepared; and on filing, it became part of the records of the court.[73] It is sometimes required by statute that the substance of the recogniz-

65. State Treasurer *v.* Bishop, 39 Vt. 353.
Recitals of preliminary proceedings in recognizances of bail see Bail, 5 Cyc. 102.

66. *Georgia.*— Nicholson *v.* State, 2 Ga. 363.
Louisiana.— State *v.* Smith, 8 La. Ann. 471.
Maine.— State *v.* Brown, 41 Me. 535.
Massachusetts.— Com. *v.* Daggett, 16 Mass. 447.
Mississippi.— Dean *v.* State, 2 Sm. & M. 200.
New Hampshire.— State *v.* Stevens, Smith 251.
See 42 Cent. Dig. tit. "Recognizances," § 12.

67. State *v.* Zwifle, 22 Mo. 467; Grigsby *v.* State, 6 Yerg. (Tenn.) 354.
Official character of person before whom acknowledgment is taken must appear in recognizance. State *v.* Mills, 13 N. C. 555. Where it appears that the cognizors properly acknowledged the recognizance in open court objection that it does not appear before what judge it was acknowledged will not be sustained. *Re* Talbot, 23 Ont. 65.
It is no objection to a recognizance entered into before an associate judge of the county that it does not state him to be a judge of the circuit court. McCarty *v.* State, 1 Blackf. (Ind.) 338.

68. Billings *v.* Barry, (East. T. 2 Vict.) 3 Ont. Case L. Dig. 6067.
If it appear from the caption where it was taken it is sufficient. Wellman *v.* State, 5 Blackf. (Ind.) 343; State Treasurer *v.* Bishop, 39 Vt. 353; Gedney *v.* Com., 14 Gratt. (Va.) 318.
Abbrevation of county in caption was held not to invalidate. Gedney *v.* Com., 14 Gratt. (Va.) 318.

69. Davidson *v.* State, (Tex. Cr. App. 1898) 45 S. W. 488; Ross *v.* State, (Tex. Cr. App. 1898) 44 S. W. 492; Youngman *v.* State, 38 Tex. Cr. 459, 42 S. W. 988, 43 S. W. 519; Young *v.* State, (Tex. Cr. App. 1897) 42 S. W. 564. See also Bail, 5 Cyc. 98
Naming an offense not known to the law is insufficient. Strain *v.* State, (Tex. Cr. App. 1897) 42 S. W. 383.

70. Grigsby *v.* State, 6 Yerg. (Tenn.) 354. *Contra*, People *v.* Carpenter, 7 Cal. 402.

71. Smith *v.* State, 35 Tex. Cr. 9, 29 S. W. 158, under Tex. Code Cr. Proc. §§ 283, 287.
The very basic principle of a statutory obligation is that there must be at least one defendant, and there may be sureties, and the further plain provision is that this obligation must show the relation of the parties to the obligation they have undertaken, whether principal or surety. Zobel *v.* State, 72 Nebr. 427, 430, 100 N. W. 947; Smith *v.* State, 35 Tex. Cr. 9, 10, 29 S. W. 158.
Who is principal should be stated. Zobel *v.* State, 72 Nebr. 427, 430, 100 N. W. 947; Smith *v.* State, 35 Tex. Cr. 9, 10, 29 S. W. 158.
Who are sureties should be stated. Zobel *v.* State, 72 Nebr. 427, 430, 100 N. W. 947; Smith *v.* State, 35 Tex. Cr. 9, 10, 29 S. W. 158.
Omissions as to principal and surety in the statutory recognizance cannot, it has been held, be supplied by inference, presumption, or intendment on the part of the court. Zobel *v.* State, 72 Nebr. 427, 430, 100 N. W. 947; Smith *v.* State, 35 Tex. Cr. 9, 10, 29 S. W. 158.

71a. Hall *v.* State, 9 Ala. 827; Badger *v.* State, 5 Ala. 21; Burton *v.* State, 6 Blackf. (Ind.) 339; Bruce *v.* Colgan, 2 Litt. (Ky.) 284. *Contra*, Adams *v.* Wilson, 10 Mo. 341. *Compare* U. S. *v.* Pickett, 27 Fed. Cas. No. 16,043, 1 Bond 123, holding that one who, after the execution of a recognizance by all the obligors named in it, signs and acknowledges the instrument without his name being written in it as an obligor, does not become a party to it in such a sense that he may be joined in a suit on it with the other obligors. See *infra*, II, K, 1 text and note 16.
Where no names are set out in the body of the recognizance, it has been held that it will be binding upon all who sign and properly acknowledge it. Cunningham *v.* State, 14 Mo. 402; Adams *v.* Wilson, 10 Mo. 341.

72. State *v.* Mills, 13 N. C. 555. See *infra*, II, H, 4.

73. *Iowa.*— State *v.* Gorley, 2 Iowa 52.
Kansas.— Gay *v.* State, 7 Kan. 394.

ance be read to the persons recognized and it be entered in the minutes of the court.[74]

2. Necessity of Writing. A recognizance to be valid must be of record and hence a parol recognizance is void.[75] A mere verbal acknowledgment, however, of the recognizance of record is sufficient.[76]

3. Signature and Seal. A recognizance at the common law was witnessed by the record and not by the signature and seal of the parties bound and hence need not be signed or sealed.[77] By statute, however, recognizances are now sometimes required to be signed whether executed in open court or not;[78] and the signature of the officer is sometimes required.[79] The place of the signature

Massachusetts.— Martin *v.* Campbell, 120 Mass. 126.

Minnesota.— State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

Missouri.— State *v.* Randolph, 22 Mo. 474; State *v.* Zwifle, 22 Mo. 467.

North Carolina.— State *v.* Houston, taking a recognizance consists in making and attesting a memorandum of the acknowledgment of a debt due to the state and of the conditions on which it is to be defeated. State *v.* Edney, 60 N. C. 463.

Pennsylvania.—Com. *v.* Emery, 2 Binn. 431.

England.— Reg. *v.* St. Albans, 8 A. & E. 932, 8 L. J. M. C. 33, 1 P. & D. 148, 35 E. C. L. 915.

Canada.— *Re* Talbot, 23 Ont. 65.

See 42 Cent. Dig. tit. "Recognizances," §§ 15, 16.

The manner of taking a recognizance is that the magistrate repeats to the recognizors the obligation into which they are to enter, and the condition of it, at large, and asks them if they are content. He then makes a short memorandum, which it is not necessary that they should sign, although a custom has lately taken place in certain jurisdictions for the recognizors to sign their names. From this short minute, the magistrate may afterward draw up the recognizance in full and certify it to the court. Com. *v.* Emery, 2 Binn. (Pa.) 431, 434.

It is no objection to it that it was taken in open court, accompanied by the forms and solemnities of a judicial tribunal, where the judge of a circuit court had power to take the recognizance. Parrish *v.* State, 14 Md. 238.

Minutes which are sufficient to mold a formal recognizance from are sufficient. Pierson *v.* Com., 3 Grant (Pa.) 314; Moore *v.* McBride, 1 Penr. & W. (Pa.) 148; Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422. Form of minutes see Com. *v.* Emery, 2 Binn. (Pa.) 431 [*quoted* in King *v.* State, 18 Nebr. 375, 385, 25 N. W. 519].

74. State *v.* Randolph, 22 Mo. 474; State *v.* Zwifle, 22 Mo. 467; Mo. Rev. Code (1845), c. 138, art. 9, § 14; People *v.* Felton, 36 Barb. (N. Y.) 429; 2 N. Y. Rev. St. 746. See also *infra*, II, I.

75. Bloomington *v.* Heiland, 67 Ill. 278; State *v.* Crippen, 1 Ohio St. 399.

Necessity of reducing recognizances to writing is not dispensed with by the act of Feb. 25, 1848, although it dispenses with entry in journal or record. State *v.* Crippen, 1 Ohio St. 399.

76. Com. *v.* McHenry, 13 Phila. (Pa.) 451; *Re* Talbot, 23 Ont. 65.

77. *Alabama.*— Howie *v.* State, 1 Ala. 113.

Indiana.— Grinestaff *v.* State, 53 Ind. 238; State *v.* Elder, 35 Ind. 368; Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363; Doe *v.* Harter, 2 Ind. 252.

Kentucky.— Com. *v.* Mason, 3 A. K. Marsh. 456; Madison *v.* Com., 2 A. K. Marsh. 131.

Maine.— Longley *v.* Vose, 27 Me. 179.

Nebraska.— King *v.* State, 18 Nebr. 375, 25 N. W. 519; Irwin *v.* State, 10 Nebr. 325, 6 N. W. 370.

North Carolina.— State *v.* Edney, 60 N. C. 463, but does no harm.

Pennsylvania.— Com. *v.* Emery, 2 Binn. 431.

United States.— U. S. *v.* Pickett, 27 Fed. Cas. No. 16,043, 1 Bond 123.

See 42 Cent. Dig. tit. "Recognizance," § 15.

The signature is merely surplusage and cannot vitiate it.

Alabama.— Howie *v.* State, 1 Ala. 113; Hall *v.* State, 9 Ala. 827.

Illinois.— Slaten *v.* People, 21 Ill. 28.

Indiana.— Grinestaff *v.* State, 53 Ind. 238; Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363.

Kentucky.— Madison *v.* State, 2 A. K. Marsh. 131 [*quoted* in Irwin *v.* State, 10 Nebr. 325, 329, 6 N. W. 370].

North Carolina.— State *v.* Edney, 60 N. C. 463.

South Carolina.— State *v.* Foot, 2 Mill 123.

See 42 Cent. Dig. tit. "Recognizances," § 15.

Statute of frauds does not apply to recognizances. Grinestaff *v.* State, 53 Ind. 238; Gay *v.* State, 7 Kan. 394.

Signature and seal will not of themselves prevent an instrument from being a recognizance and make it a penal bond. Kearns *v.* State, 3 Blackf. (Ind.) 334.

78. Shattuck *v.* People, 5 Ill. 477; Tillson *v.* State, 29 Kan. 452; Elliot *v.* Green, 10 Mich. 113.

When taken out of court.— State *v.* Randolph, 22 Mo. 474; State *v.* Zwifle, 22 Mo. 467; State *v.* West, 3 Ohio St. 509.

Failure of principal to sign has been held not to render such instrument void as to the sureties. Tillson *v.* State, 29 Kan. 452.

Requirement of signature of principal and sureties on recognizance for appeal see Cockrill *v.* Owen, 10 Mo. 287.

79. Elliott *v.* Green, 10 Mich. 113.

is immaterial,[80] and signing a blank recognizance has been held sufficient when afterward filled up according to directions of cognizors.[81]

4. Acknowledgment. A recognizance is not invalid because it does not expressly appear on its face that it was acknowledged,[82] and a certificate of such acknowledgment is unnecessary.[83]

5. Approval and Certificate. Approval of a recognizance is essential to its validity.[84] A certificate of the justice or officer before whom it was taken is also necessary, but the form of words is immaterial if it appears that the officer took and accepted the recognizance.[85]

6. Presence. A recognizance being in the nature of a judgment confessed of record requires the personal presence of the parties at the time of its being entered into.[86]

7. Time of Taking. A recognizance in a criminal case is not void because entered on Sunday,[87] but may be when taken to prosecute an appeal in a criminal case.[88]

I. Entry, Filing, Record, and Return — 1. In General. A recognizance is not a complete obligation until it is a record,[89] and when taken out of court is not strictly a record until it is enrolled and filed,[90] or returned to the court to

80. State *v.* Wilcox, 59 Mo. 176, signature in body of instrument.

81. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867; Madden *v.* State, 35 Kan. 146, 10 Pac. 469; Costen's Appeal, 13 Pa. St. 292.

82. State *v.* Wells, 36 Iowa 238; Scott *v.* Marshall, 5 J. J. Marsh. (Ky.) 433; State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

83. Com. *v.* Mason, 3 A. K. Marsh. (Ky.) 456, holding, however, that such a certificate by one of the two justices taking it will not vitiate it.

Acknowledgment must be before only the persons duly authorized for that purpose. Clink *v.* Muskegon Cir. Judge, 58 Mich. 242, 244, 25 N. W. 175.

84. Lawrence *v.* People, 17 Ill. 172; Bacon *v.* People, 14 Ill. 312; State *v.* Carr, 4 Iowa 289 (holding that a mere justification of the surety will not validate it); Cockrill *v.* Owen, 10 Mo. 287; State *v.* West, 3 Ohio St. 509.

Failure of clerk to indorse approval on recognizance does not render it void. State *v.* Wells, 36 Iowa 238.

Approval cannot be withdrawn after the recognizance had been approved, signed, and filed by sheriff. State *v.* Lay, 128 Mo. 609, 29 S. W. 999.

85. *Alabama.*— Badger *v.* State, 5 Ala. 21 (statement preceding the recognizance is sufficient); Howie *v.* State, 1 Ala. 113.

Illinois.— Lawrence *v.* People, 17 Ill. 172; Shattuck *v.* People, 5 Ill. 477, letters "J. P." sufficient.

Minnesota.— State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

Missouri.— State *v.* Zwifle, 22 Mo. 467, such certificate should show whom it was taken by.

Ohio.— State *v.* West, 3 Ohio St. 509.

Tennessee.— State *v.* Austin, 4 Humphr. 213, holding that a failure of attestation of sheriff to show the county of which he was an officer rendered the recognizance void.

See 42 Cent. Dig. tit. "Recognizances," § 16.

Commissioner who takes a recognizance of bail cannot himself make the affidavit of such taking. Walbridge *v.* Lunt, Taylor (U. C.) 462.

86. Schultze *v.* State, 43 Md. 295; Matter of Fowler, 49 Mich. 234, 13 N. W. 530; Com. *v.* Hickey, 172 Pa. St. 39, 33 Atl. 188; State *v.* Ahrens, 12 Rich. (S. C.) 493.

Absence of principal at the time of entering into the recognizance by the surety does not invalidate it as to such surety. Schultze *v.* State, 43 Md. 295.

Attorney-at-law cannot enter into a recognizance for his client as the act of such client. State *v.* Ahrens, 12 Rich. (S. C.) 493.

Who may be recognizors see *infra*, II, J, 2.

87. Johnston *v.* People, 31 Ill. 469.

Sunday transactions generally see Sunday.

88. State *v.* Suhur, 33 Me. 539.

89. Mendocino County *v.* Lamar, 30 Cal. 627; State *v.* Grant, 10 Minn. 39; State *v.* Crippen, 1 Ohio St. 399; U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

Record as well as writing.— To be a recognizance it may be required not only that the instrument be in writing, but also that it be a matter of record. State *v.* Crippen, 1 Ohio St. 399 [*quoted* in King *v.* State, 18 Nebr. 375, 379, 25 N. W. 519].

A person is bound as soon as the obligation is entered into in the form prescribed. State *v.* Randolph, 22 Mo. 474.

Failure of clerk to enter memorandum required by the Ohio act of March 12, 1853, will not defeat recovery where recognizance had been recorded at length. State *v.* Williams, 14 Ohio St. 140.

90. *Colorado.*— Connor *v.* People, 4 Colo. 134.

Illinois.— Raysor *v.* People, 27 Ill. 190.

Indiana.— Lang *v.* State, 3 Blackf. 344; Andress *v.* State, 3 Blackf. 108.

Minnesota.— State *v.* Grant, 10 Minn. 39.

Missouri.— State *v.* Randolph, 22 Mo. 474.

New Hampshire.— Philbrick *v.* Buxton, 43 N. H. 462; State *v.* Dowd, 43 N. H. 454.

which it is to be transmitted.[91] Absence of a minute of filing will not invalidate the recognizance,[92] but such indorsement may be made at a subsequent term *nunc pro tunc.*[93] The entry of record of a recognizance and its acceptance is a judicial or quasi-judicial act from which the force and vitality of the obligation is derived.[94]

2. Time For Filing or Recording. Failure to file, record, or return a recognizance at the time prescribed does not invalidate it,[95] even though it was not filed and recorded until after forfeiture,[96] such requirements being directory merely.[97] And where a recognizance was filed at the proper time but not recorded it may be entered of record at a subsequent term *nunc pro tunc.*[98]

3. What Constitutes Return. The certificate of the officer taking the recognizance reciting that it was taken and approved by him is sufficient to constitute a return.[99] When the first return is insufficient a second return may be made.[1]

J. Parties — 1. To Whom Taken. A recognizance may be taken to the person for whose benefit it is intended,[2] and the legislature has authority to prescribe that a recognizance shall be given to a designated person or court.[3] A recognizance taken to a different obligee than that prescribed by statute is void.[4]

2. Who May Be Recognizors. While infants [5] and married women [6] are not

New Jersey.— Slape *v.* State, 44 N. J. L. 264; State *v.* Kruise, 32 N. J. L. 313.

New York.— People *v.* Kane, 4 Den. 530; People *v.* Koeber, 7 Hill 39.

England.— Glynn *v.* Thorpe, 1 B. & Ald. 153; Underhill *v.* Devereux, 2 Saund. 68, 85 Eng. Reprint 698 [*quoted* in Reg. *v.* McKay, 28 N. Brunsw. 564, 571].

Canada.— Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239.

See 42 Cent. Dig. tit. "Recognizances," § 17.

When filed the recognizance becomes a record in the court. People *v.* Watkins, 19 Ill. 117; Com. *v.* Cheney, 108 Mass. 33.

After such filing the officer filing it has no authority to remove it. State *v.* Lay, 128 Mo. 609, 9 S. W. 999.

The minute or memorandum by the clerk should be drawn up into a formal record. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

If not actually entered on the journals of record books, it must at least be on the files of the court. State *v.* Crippen, 1 Ohio St. 399.

Until fully extended in the court in which the party is required to appear the papers and memoranda duly certified by the magistrate constitute the record. Com. *v.* Cheney, 108 Mass. 33. *Compare* Benedict *v.* Cutting, 13 Metc. (Mass.) 181.

Sufficiency of record to support scire facias see *infra*, V, A, 4.

If entered before a justice of the peace or an inferior court the recognizance, in order to give it effect as such, must be filed in a court of record and must become a matter of record there. Philbrick *v.* Buxton, 43 N. H. 462.

Recognizances taken in the superior courts need not be filed. Franks *v.* State, 12 Ohio St. 1; State *v.* West, 3 Ohio St. 509; Cockrane *v.* Eyre, 6 U. C. Q. B. 289.

Recognizances to keep the peace are not required to be filed. State *v.* Welch, 59 N. H. 134; People *v.* Mitchell, 1 Sandf. (N. Y.) 191.

91. Darling *v.* Hubbell, 9 Conn. 350; State *v.* Smith, 8 La. Ann. 471; State *v.* Walker, 56 N. H. 176.

Certified under seal.—A recognizance taken by a magistrate need not be certified to the court under seal. Slaten *v.* People, 21 Ill. 28. But it has been held that it must be so certified when taken by a county court. State *v.* Zwifle, 22 Mo. 467.

Separate paper.— Under statute requiring recognizance and transcript of proceedings to be transmitted to the proper court in case of forfeiture, the recognizance need not be entered on the docket of the magistrate but may be on a separate paper which becomes a record when filed in the proper court. State *v.* Moran, 18 Nebr. 536, 26 N. W. 357, 24 Nebr. 103, 38 N. W. 29; King *v.* State, 18 Nebr. 375, 25 N. W. 519.

92. Com. *v.* Cheney, 108 Mass. 33.

93. McFarlan *v.* People, 13 Ill. 9.

94. Wesley *v.* Sharpe, 19 Pa. Super. Ct. 600, 604.

95. State *v.* Perry, 28 Minn. 455, 10 N. W. 778; State *v.* Davis, 43 N. H. 600; State Treasurer *v.* Bishop, 43 Vt. 353.

96. Jennings *v.* State, 13 Kan. 80.

97. State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

98. Wellman *v.* State, 5 Blackf. (Ind.) 343.

Nunc pro tunc indorsement or entry may be made at a subsequent term under order of the court. McFarlan *v.* People, 13 Ill. 9.

99. Patterson *v.* State, 10 Ind. 296; Martin *v.* Campbell, 120 Mass. 126.

1. Com. *v.* McNeill, 19 Pick. (Mass.) 127. But see Ingalls *v.* Chase, 68 Me. 113.

Attachment for contempt for failure to return see Justices of the Peace, 24 Cyc. 440.

2. Bishop *v.* Drake, Kirby (Conn.) 378; Nott *v.* Welles, Kirby (Conn.) 12.

3. Morton *v.* Nelms, 118 Ga. 786, 45 S. E. 616.

4. Lawton *v.* State, 5 Tex. 270.

5. State *v.* Satterwhite, 20 S. C. 536. See Infants, 22 Cyc. 600.

6. Com. *v.* Matyiewicz, 17 Pa. Co. Ct. 154,

competent to act as sureties on a recognizance, a recognizance in a criminal case entered into by an infant as principal is valid.[7] It has been held that a recognizance is not invalid, although executed by an attorney who is forbidden by statute to act as surety.[8] Nor can a recognizance be impeached collaterally for incompetency or incapacity of the person acknowledging it.[9]

3. Number of Sureties. A recognizance taken with a single surety is valid, although more than one was required,[10] and a separate recognizance may be taken of each surety.[11] The court may require other sureties if those already recognized are insufficient.[12]

4. Recognizance by Sureties Alone. The general rule is that a valid recognizance may be entered into by the sureties alone without the principal joining.[13] In some states, however, the principal must join in the recognizance to render it good.[14] A recognizance void as to principal is also void as to surety.[15]

K. Defective Recognizances and Amendments — 1. In General. It is generally held that immaterial, clerical, or technical errors or omissions will not invalidate a recognizance,[16] and in a number of states curative acts have been

under the Pennsylvania statute a married woman being incompetent to become a surety. But *compare* Husband and Wife, 21 Cyc. 1310 *et seq.*

7. State *v.* Weatherwax, 12 Kan. 463; Starr *v.* Com., 7 Dana (Ky.) 243.

8. Sherman *v.* State, 4 Kan. 570.

9. Doe *v.* Harter, 2 Ind. 252.

10. State *v.* Baker, 50 Me. 45; State *v.* Benton, 48 N. H. 551; Dickey *v.* Livermore, 34 N. H. 199; Farnam *v.* Davis, 32 N. H. 302.

The state may refuse, however, to accept a recognizance with only one surety. State *v.* Benton, 48 N. H. 551; Gilman *v.* Bartlett, 20 N. H. 168.

Recognizance with ten sureties in the sum of forty dollars each, of whom principal was one, is void under order requiring two sureties in the sum of two hundred dollars each. State *v.* Buffum, 22 N. H. 267.

Not a supersedeas.—A recognizance with a single surety is not a supersedeas by mere operation of law, and the party in whose favor judgment has been entered in the court below may disregard it and proceed with the execution as though no recognizance had been given. Allen *v.* Kellam, 94 Pa. St. 253, 254; Rheem *v.* Naugatuck Wheel Co., 33 Pa. St. 356.

11. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475, stating that such seems to be the usual practice originally. See Hawkins P. C. bk. 2, c. 15, § 82; 4 Coke Inst. 178, c. 31.

12. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

13. *Connecticut.*— Lovejoy *v.* Isbell, 70 Conn. 557, 40 Atl. 531.

Indiana.— Grinestaff *v.* State, 53 Ind. 238; Minor *v.* State, 1 Blackf. 236.

Kansas.— Tillson *v.* State, 29 Kan. 452; Ingram *v.* State, 10 Kan. 630.

Michigan.— People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

Missouri.— State *v.* Peyton, 32 Mo. App. 522.

New York.— People *v.* Huggins, 10 Wend. 464.

Canada.— Rastall *v.* Atty.-Gen., 18 Grant Ch. (U. C.) 138 [*reversing* 17 Grant Ch. (U. C.) 1].

See 42 Cent. Dig. tit. "Recognizances," § 7.

Contra.— State *v.* Taylor, 19 La. Ann. 145; State *v.* Doax, 19 La. Ann. 77.

The signature of the principal being unnecessary (see *supra*, II, H, 3), the sureties may be bound by the recognizance, although the principal has not signed the same. Tillson *v.* State, 29 Kan. 452; State *v.* Peyton, 32 Mo. App. 522.

Principal need not unite in the same recognizance with surety, although 2 N. Y. Rev. Laws, p. 149, § 18, requires all recognizances to be signed by the party to be bound by them. People *v.* Huggins, 10 Wend. (N. Y.) 464.

14. Combs *v.* People, 39 Ill. 183; Ferrill *v.* State, 29 Tex. 489; Chaney *v.* State, 23 Tex. 23.

New recognizance.— If, however, the principal has entered into a recognizance and failing to appear his surety enters into a new one to save the first it is valid. Combs *v.* People, 39 Ill. 183. And see People *v.* Slayton, 1 Ill. 329.

15. Ferry *v.* Burchard, 21 Conn. 597.

16. Wood *v.* People, 16 Ill. 171; Petty *v.* People, 19 Ill. App. 317; McCarty *v.* State, 1 Blackf. (Ind.) 338; Martin *v.* Campbell, 120 Mass. 126; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

Defects in conditions see *supra*, II, E.

Misnomer of court.— People *v.* Hawkins, 5 How. Pr. (N. Y.) 1.

Misnomer of principal.— Lytle *v.* People, 47 Ill. 422; O'Brien *v.* People, 41 Ill. 456; State *v.* Rhodius, 37 Tex. 165.

Misprision as to date for appearance.— Marr *v.* State, 26 Ark. 410; Mooney *v.* People, 81 Ill. 134; Curry *v.* State, 39 Miss. 511; Gibson *v.* Lay, 128 Mo. 609, 29 S. W. 999; State *v.* McElhaney, 20 Mo. App. 584.

Omission of name in body of instrument.— Hall *v.* State, 9 Ala. 827; Badger *v.* State, 5 Ala. 21; Burton *v.* State, 6 Blackf. (Ind.) 339; Bruce *v.* Colgan, 2 Litt. (Ky.) 284; Cunningham *v.* State, 14 Mo. 402 [*overruling* Adams *v.* Wilson, 10 Mo. 341]. *Contra*, U. S. *v.* Pickett, 27 Fed. Cas. No. 16,043, 1 Bond 123.

passed providing that no recognizance shall be void for want of substance or form.[17] But when a recognizance is void when taken no subsequent contingency can render it valid.[18]

2. **Estoppel to Deny Validity.**[19] A person who has entered into a recognizance acknowledges the regularity of the proceedings in which it was taken [20] and cannot afterward object to its validity.[21]

3. **Amendments.** Recognizances or certificates may be amended as to clerical errors so as to conform to the facts,[22] even after suit is commenced,[23] and such amendment may be made *nunc pro tunc*;[24] but a recognizance void when entered into cannot be validated by subsequent acts of the court or officer.[25] Notice to the cognizors is necessary before such an amendment may be made.[26]

4. **Replacing Lost Recognizances and Second Recognizances.** A recognizance

Omission or transposition of character of parties as plaintiff or defendant.— Halsall *v.* Meier, 21 Mo. 136.

Omission of words "to be levied of your goods and chattels, lands and tenements."— Shattuck *v.* People, 5 Ill. 477.

Unnecessarily full description of court.— Jennings *v.* State, 13 Kan. 80.

17. For example see Ill. Rev. St. c. 38, § 361; 2 Ind. Rev. St. (1876) § 790; Kan. Cr. Code, § 154; Ky. Cr. Code, § 80; Me. Rev. St. c. 133, §§ 22, 25; 2 Howell Annot. St. Mich. § 9485.

Erroneous designation of officer who took it does not vitiate. State *v.* Kurtz, 27 Kan. 223.

Jurisdiction of officer or cause of taking need not be shown. Territory *v.* Hildebrand, 2 Mont. 426.

Language not authorized may be rejected as surplusage. State *v.* Hatch, 59 Me. 410; State *v.* Wellman, 3 Ohio 14.

Necessity of embodying the substance of the undertaking is not dispensed with by statute curing defects of form. People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328.

Omission of recognizance to show that it was attested by the officer who took it is cured. Ross *v.* State, 6 Blackf. (Ind.) 315.

Taking larger bail than fixed by court not cured. Miller *v.* Com., 1 Duv. (Ky.) 14.

Want of authority in officer is not cured. State *v.* Winninger, 81 Ind. 51.

18. State Treasurer *v.* Seaver, 7 Vt. 480.

All steps based on a void recognizance are void. Butler *v.* State, 12 Sm. & M. (Miss.) 470.

A recognizance partly legal and partly unauthorized is wholly void. Billings *v.* Avery, 7 Conn. 236.

19. Estoppel generally see Estoppel, 16 Cyc. 671.

20. State *v.* Nicol, 30 La. Ann. 628; Gildersleeve *v.* People, 10 Barb. (N. Y.) 35.

21. State *v.* Wenzel, 77 Ind. 428; Adair *v.* State, 1 Blackf. (Ind.) 200; Daniels *v.* People, 6 Mich. 381; People *v.* Leggett, 5 Barb. (N. Y.) 360. And see Sanders *v.* Buck, 2 J. J. Marsh. (Ky.) 476; State *v.* Nicol, 30 La. Ann. 628.

Nor can a cognizor do so where a recognizance, although defective in form has been treated as valid by the obligee. Allen *v.* Kellam, 94 Pa. St. 253.

But defendants are not estopped from disputing authority as commissioner of one whom they went before supposing him to be a *bona fide* commissioner. Macfarlane *v.* Allan, 6 U. C. C. P. 496.

22. *Kentucky.*— Sanders *v.* Buck, 2 J. J. Marsh. 476.

Maine.— Wright *v.* Blunt, 74 Me. 92; Ingalls *v.* Chase, 68 Me. 113.

Massachusetts.— Com. *v.* McNeill, 19 Pick. 127.

Missouri.— State *v.* McElhaney, 20 Mo. App. 584.

Texas.— Blalack *v.* State, 3 Tex. App. 376.

See 42 Cent. Dig. tit. "Recognizances," § 18.

Corrected certificate.— Morrill *v.* Norton, 116 Mass. 487; State *v.* Randolph, 22 Mo. 474.

Copy of recognizance.— Com. *v.* Field, 11 Allen (Mass.) 488; State *v.* Dowd, 43 N. H. 454.

23. State *v.* Young, 56 Me. 219; Morrill *v.* Norton, 116 Mass. 487; Com. *v.* Cheney, 108 Mass. 33; Com. *v.* Field, 11 Allen (Mass.) 488.

After appeal to superior court an entry of recognizance was amended. State *v.* Cherry, 13 N. C. 550.

At any time before the objection is disposed of defects in a certificate may be amended on such terms as will protect the party. State *v.* Randolph, 22 Mo. 474.

24. Sanders *v.* Buck, 2 J. J. Marsh. (Ky.) 476. See McFarlan *v.* People, 13 Ill. 9; Wellman *v.* State, 5 Blackf. (Ind.) 343.

25. State *v.* Winninger, 81 Ind. 51; People *v.* Felton, 36 Barb. (N. Y.) 429; Peck *v.* Smith, 3 Vt. 265. But see State *v.* Crowley, 60 Me. 103; State *v.* Young, 56 Me. 219.

Oral consent to change of amount to that specified from a less sum did not make a valid recognizance. Sans *v.* People, 8 Ill. 327.

Alteration of recognizances see *infra*, III, E, 2.

26. People *v.* Felton, 36 Barb. (N. Y.) 429; Blalack *v.* State, 3 Tex. App. 376.

Condition cannot be amended by court of its own motion nunc pro tunc over the objection of the sureties and without notice to the principal. Hand *v.* State, 28 Tex. App. 28, 11 S. W. 679.

being a record the court has authority to permit it to be supplied on proof of loss so as to authorize a forfeiture.[27] A recognizance given while a valid one is outstanding for the same purpose is void,[28] but not if the outstanding recognizance is itself invalid.[29]

5. Quashing Recognizance. The sufficiency of a recognizance cannot be determined by a motion to quash, but only on scire facias.[30] A void recognizance, however, may be vacated on motion at any time, even after judgment therein, all proceedings thereon being void;[31] and the burden of proof is on the person moving to quash.[32]

III. Liability.

A. Construction. A recognizance is similar to a bond and subject to the same rules of construction.[33] A recognizance will be strictly construed so far as the condition is concerned;[34] but otherwise it will be construed, if possible, so as to make it answer the purpose intended.[35]

B. Breach or Performance. A recognizance binds the parties until it is performed according to its terms, anything less is not sufficient.[36]

27. McElwee *v.* People, 77 Ill. 493; Montgomery *v.* Henry, 10 Mich. 19. See also Lost Instruments, 25 Cyc. 1607; Records, *post*, p. 606.

Notice of application should be given to the principal and to the sureties. Montgomery *v.* Henry, 10 Mich. 19.

28. Townsend *v.* People, 14 Mich. 388.

29. State *v.* West, 3 Ohio St. 509.

By statute or rule of court provisions may be made for filing a new recognizance in lieu of a defective one. Burton *v.* State, 48 Tex. Cr. 544, 545, 90 S. W. 498.

30. Schultze *v.* State, 43 Md. 295; State *v.* Hopkins, 30 Mo. 404. See Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128 (when made on the trial of a scire facias); State *v.* Hopkins, 30 Mo. 404; State *v.* Davidson, 20 Mo. 212, 61 Am. Dec. 603 (when made before issuance of scire facias).

31. Butler *v.* State, 12 Sm. & M. (Miss.) 470.

Recognizance not warranted by the proceedings may be set aside after a *comperuit ad diem* has been pleaded in an action on the bail bond. McDonell *v.* Rutter, 2 U. C. Q. B. O. S. 340.

Before forfeiture a motion to quash a recognizance is, it has been held, prematurely made. State *v.* Halloway, 5 Ark. 433.

Court will not look beyond the face of the recognizance upon a motion to quash it. Adair *v.* State, 1 Blackf. (Ind.) 200.

32. White *v.* Richardson, 3 T. B. Mon. (Ky.) 176 [*cited* in Higdon *v.* Higdon, 6 J. J. Marsh. (Ky.) 48, 51].

33. Cunningham *v.* State, 14 Mo. 402; Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541. See Bonds, 5 Cyc. 750.

34. *Illinois.*— Adams *v.* People, 12 Ill. App. 380.

Kansas.— Sherman *v.* State, 4 Kan. 570.

Tennessee.— State *v.* Edwards, 4 Humphr. 226.

Vermont.— State Treasurer *v.* Merrill, 14 Vt. 64.

United States.— Barnes *v.* Lee, 2 Fed. Cas. No. 1,017, 1 Cranch C. C. 430.

Canada.— *Re* Gauthreaux, 9 Ont. Pr. 31.

See 42 Cent. Dig. tit. "Recognizances," § 20.

35. *Connecticut.*— Hendee *v.* Taylor, 29 Conn. 448.

Georgia.— Colquitt *v.* Bond, 69 Ga. 351.

Illinois.— Petty *v.* People, 118 Ill. 148, 8 N. E. 304.

Indiana.— McCarty *v.* State, 1 Blackf. 338.

New Hampshire.— State *v.* Eastman, 42 N. H. 265.

Pennsylvania.—Stewart *v.* Moody, 4 Watts 169.

Tennessee.— State *v.* Cherry, Meigs 232.

See 42 Cent. Dig. tit. "Recognizances," § 20.

Ambiguous words may be explained by surrounding circumstances. Colquitt *v.* Bond, 69 Ga. 351.

Words absurd or repugnant to the design of the instrument will be rejected. McCarty *v.* State, 1 Blackf. (Ind.) 338.

Words of same meaning or effect.— There is no difference in their legal effect between "is held and firmly bound" and "owes and is indebted." Shattuck *v.* People, 5 Ill. 477.

Both parties are bound by a joint and several recognizance, although only one directs it to be levied on his lands. Taggart *v.* Cooper, 1 Serg. & R. (Pa.) 497.

36. For illustrations of this rule see the following cases:

Arkansas.— Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214.

Connecticut.— Hendee *v.* Taylor, 29 Conn. 448; Billings *v.* Avery, 7 Conn. 236.

Indiana.— Fowler *v.* State, 91 Ind. 507; State *v.* Thompson, 62 Ind. 367; Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363; State *v.* Whitson, 8 Blackf. 178; Wilson *v.* State, 6 Blackf. 212.

Kentucky.— Starr *v.* Com., 7 Dana 243.

New York.— Covenhoven *v.* Seaman, 1 Johns. Cas. 23.

Pennsylvania.— Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

Tennessee.— Devine *v.* State, 5 Sneed 623.

Vermont.— Blood *v.* Morrill, 17 Vt. 598.

See 42 Cent. Dig. tit. "Recognizances," § 21.

C. Nature of Liability — 1. In General. When the recognizors fail to comply with the conditions of the recognizance it becomes an absolute debt of record in the nature of a judgment.[37]

2. Joint or Several Liability.[38] Unless fixed by statute,[39] the recognizance itself determines the liability of the parties. Thus under the terms of the obligation the obligors may be jointly and severally liable,[40] or only severally liable.[41]

D. Amount of Liability. The liability of the recognizors on breach is limited to the amount of the debt or penalty acknowledged.[42]

E. Discharge From Liability[43] **— 1. In General.** *Vis major*, act of God,[44] operation of the law,[45] or acts and conduct of the obligee[46] will discharge surety on

37. *Illinois.*— Sans *v.* People, 8 Ill. 327.
Indiana.— Andress *v.* State, 3 Blackf. 108; McCarty *v.* State, 1 Blackf. 338; Adair *v.* State, 1 Blackf. 200.
Louisiana.— State *v.* Toups, 44 La. Ann. 896, 11 So. 524.
Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553.
Maryland.— Schultze *v.* State, 43 Md. 295.
Massachusetts.— Com. *v.* McNeill, 19 Pick. 127.
New Hampshire.— State *v.* Dowd, 43 N. H. 454.
See 42 Cent. Dig. tit. "Recognizances," § 22 *et seq.*
It becomes an independent debt.— McCarty *v.* State, 1 Blackf. (Ind.) 338; Adair *v.* State, 1 Blackf. (Ind.) 200; Com. *v.* Shick, 61 Pa. St. 495, where it is said that it is not security for fine or costs except when ordered to stand so on remission to the party.

38. Joint or several judgments see *infra*, IV, A, 3, b; V, E, 2.

39. See cases cited *infra*, this note.
In Kansas, under Gen. St. p. 183, § 1, liability on a recognizance is joint and several. Tillson *v.* State, 29 Kan. 452; Swerdsfeger *v.* State, 21 Kan. 475.
In Texas, under Code Cr. Proc. arts. 290–306, the liability of sureties upon a bail-bond or recognizance is several as well as joint, and it is immaterial whether it be stated in the judgment *nisi* or the citation to be joint or several, or joint and several. Allee *v.* State, 28 Tex. App. 531, 13 S. W. 991. A recognizance is not a joint only, but a joint and several undertaking, and if good as to the principal or any one of the sureties they are not only bound but liable, although another surety may not be. Ray *v.* State, 16 Tex. App. 268, 271.

40. Banta *v.* People, 53 Ill. 434; Sans *v.* People, 8 Ill. 327; State *v.* Chandler, 79 Me. 172, 8 Atl. 553; Scott *v.* State, 1 Head (Tenn.) 433. See also Mussulman *v.* People, 15 Ill. 51.
A recognizance binding several persons in a certain sum to be levied of their goods, etc., respectively is joint and several. Ellison *v.* State, 8 Ala. 273; Wampler *v.* Shissler, 1 Watts & S. (Pa.) 365.

41. See cases cited *infra*, this note.
A recognizance in which each recognizor acknowledges himself indebted in a specified sum is held to be a several obligation. Hildreth *v.* State, 5 Blackf. (Ind.) 80; Adair *v.* State, 1 Blackf. (Ind.) 200; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131; Parrish *v.* State, 14 Md. 238; State *v.* Davidson, 20 Mo. 212, 61 Am. Dec. 603; State *v.* Gardner, Tapp. (Ohio) 92; U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

42. Fletcher *v.* Tichnor, 1 Phila. (Pa.) 527; Hodges *v.* State, 20 Tex. 493.
Amount of judgment on scire facias see *infra*, V, E, 3.

43. Discharge of sureties in recognizance for bail see Bail, 5 Cyc. 28, 115.

44. *Arkansas.*— Adler *v.* State, 35 Ark. 517, 532, 37 Am. Rep. 48; Belding *v.* State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26.
Indiana.— Woolfolk *v.* State, 10 Ind. 532.
New York.— People *v.* Tubbs, 37 N. Y. 586; People *v.* Bartlett, 3 Hill 570; People *v.* Manning, 8 Cow. 297, 18 Am. Dec. 451.
Virginia.— Caldwell *v.* Com., 14 Gratt. 698.
United States.— U. S. *v.* Van Fossen, 28 Fed. Cas. No. 16,607, 1 Dill. 406.
See 42 Cent. Dig. tit. "Recognizances," § 23; Bail, 5 Cyc. 115. See also Act of God, 1 Cyc. 758.
Death of principal.— Woolfolk *v.* State, 10 Ind. 532; People *v.* Meyer, 9 Misc. (N. Y.) 726, 29 N. Y. Suppl. 1148; Blalack *v.* State, 3 Tex. App. 376 (but not death after forfeiture); U. S. *v.* Van Fossen, 28 Fed. Cas. No. 16,607, 1 Dill. 406. But see State *v.* Cone, 32 Ga. 663; Mather *v.* People, 12 Ill. 9, where death after forfeiture but before judgment exonerated sureties.
Sickness of principal does not excuse. State *v.* Edwards, 4 Humphr. (Tenn.) 226.
Nor does insanity of principal excuse. Adler *v.* State, 35 Ark. 517, 532.

45. *Arkansas.*— Belding *v.* State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26.
Kentucky.— Com. *v.* Bronson, 14 B. Mon. 361.
Nebraska.— Smith *v.* State, 12 Nebr. 309, 11 N. W. 317.
New Jersey.— State *v.* Saunders, 8 N. J. L. 177.
New York.— People *v.* Felton, 36 Barb. 429; People *v.* Bartlett, 3 Hill 570.
See 42 Cent. Dig. tit. "Recognizances," § 23.

46. Kiser *v.* State, 13 Ind. 80; Tatem *v.* Potts, 5 Blackf. (Ind.) 534; Niblo *v.* Clark, 3 Wend. (N. Y.) 24; State *v.* Adams, 3 Head (Tenn.) 259; State *v.* Allen, 2 Humphr. (Tenn.) 258; Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541.

recognizance from liability for default. So will surrender of principal.[47] Discharge of one surety has, however, no effect on the others.[48]

2. By Alteration.[49] The rule as to the effect of a change of the terms of a recognizance without consent of the sureties is the same as that in relation to bonds,[50] a material alteration avoids it,[51] while an immaterial one does not.[52]

F. Lien and Priority. A recognizance at common law bound the lands of the cognizors from the date of the acknowledgment.[53] This rule, however, has not been adopted in some of the states in which the lien does not attach till judgment on the recognizance,[54] and in others it has been changed by statute.[55] The lien is limited to lands in the county in which it is taken,[56] and the presumption of law that it has been paid attaches at the end of twenty years.[57] At common law recognizances were entitled to priority,[58] over a common obligation, and bound the lands of the cognizor from the time of enrolment or record.[59]

Principal giving new recognizance.— Where the principal in a recognizance goes into court and offers to give a new recognizance, and such offer is accepted, and a new recognizance is given, the older recognizance is thereby discharged. Young *v.* Deneen, 123 Ill. App. 380 [*affirmed* in 220 Ill. 350, 77 N. E. 193].

47. Shields *v.* Smith, 78 Ind. 425; Com. *v.* Bronson, 14 B. Mon. (Ky.) 361; Bruce *v.* Colgan, 2 Litt. (Ky.) 284; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

The sureties are regarded as keepers of their principal. Crawford *v.* Vinton, 102 Mich. 83, 84, 62 N. W. 988.

48. Adair *v.* State, 1 Blackf. (Ind.) 200.

49. **Alteration of instrument:** Generally see Alterations of Instruments, 2 Cyc. 137. Discharging surety see Principal and Surety, 32 Cyc. 177.

50. Reese *v.* U. S., 9 Wall. (U. S.) 13, 19 L. ed. 541.

51. Starr *v.* Lyon, 5 Conn. 538 (alteration from two recognizances to one); Vincent *v.* People, 25 Ill. 500 (changing names of principal and surety).

Where the original record was still legible the alteration was held not to affect its validity. Cockrill *v.* Owen, 10 Mo. 287.

52. Harris *v.* State, 54 Ind. 2.

Correction of mistake of clerk does not avoid the recognizance and judgment may be entered for the amount before correction where the recognizor admits such amount. Com. *v.* McHenry, 13 Phila. (Pa.) 451.

53. 2 Blackstone Comm. 252; 3 Tomlin L. Dict. 297. See also the following cases:

Delaware.— Reading *v.* State, 1 Harr. 190.

Illinois.— Shattuck *v.* People, 5 Ill. 477.

Indiana.— Andress *v.* State, 3 Blackf. 108.

New Hampshire.— State *v.* Dowd, 43 N. H. 454.

New Jersey.— State *v.* Stout, 11 N. J. L. 362.

New York.— Gildersleeve *v.* People, 10 Barb. 35; People *v.* Van Eps, 4 Wend. 387.

North Carolina.— Hoke *v.* Henderson, 14 N. C. 12; Burton *v.* Murphey, 6 N. C. 339; State *v.* Magniss, 2 N. C. 99.

Tennessee.— Cole *v.* Warner, 93 Tenn. 155, 23 S. W. 110; State *v.* Miller, 11 Lea 620; Wilkins *v.* May, 3 Head 173; Pugh *v.* State, 2 Head 227; State *v.* Winn, 3 Sneed 393.

Canada.—Atty.-Gen. *v.* Daniell, 7 Can. L. J. 122.

See 42 Cent. Dig. tit. "Recognizances," § 25.

Recognizance must be certified and recorded to be a lien on land. Patterson *v.* State, 12 Ind. 86. See Pugh *v.* State, 2 Head (Tenn.) 227.

Under the Pennsylvania act of May 17, 1866, a cognizor may pay money into court for the discharge of the lien before proceedings are commenced against him, where there is a dispute as to who is entitled to it. Mount's Estate, 7 Pa. Dist. 713, 9 Kulp 315.

Lien is not lost by suing out a fieri facias on a judgment on the recognizance. Hoke *v.* Henderson, 14 N. C. 12.

54. *Georgia.*— State *v.* Carswell, 24 Ga. 261.

Illinois.— McKee *v.* Brown, 43 Ill. 130; Shattuck *v.* People, 5 Ill. 477.

Kentucky.—Com. *v.* Adkins, 8 B. Mon. 380.

Ohio.— Dewit *v.* Osborn, 5 Ohio 480.

Pennsylvania.— Patterson *v.* Sample, 4 Yeates 308; Campbell *v.* Richardson, 1 Dall. 131, 1 L. ed. 68.

South Carolina.—State *v.* Morgan, 2 Bailey 601.

Utah.— See Thompson *v.* Avery, 11 Utah 214, 39 Pac. 829.

See 42 Cent. Dig. tit. "Recognizances," § 25.

Terms to be "levied of the goods and chattels, lands and tenements" of the recognizors does not create a lien on land. Com. *v.* Adkins, 8 B. Mon. (Ky.) 380.

Until it is estreated the recognizance is not a lien on the land of the cognizor. State *v.* Morgan, 2 Bailey (S. C.) 601.

55. People *v.* Quigg, 59 N. Y. 83; People *v.* Kane, 4 Den. (N. Y.) 530.

By N. Y. Rev. St. p. 362, § 21, a recognizance is only evidence of a debt. People *v.* Kane, 4 Den. (N. Y.) 530.

56. State *v.* Miller, 11 Lea (Tenn.) 620.

57. Com. *v.* Snyder, 1 Del. Co. (Pa.) 404, 2 Leg. Rec. 396.

58. Andress *v.* State, 3 Blackf. (Ind.) 108; 4 Blackstone Comm. 252.

In Illinois, however, this is not the rule. Shattuck *v.* People, 5 Ill. 477.

59. *In re* Brown, 35 Minn. 307, 308, 29 N. W. 131.

IV. FORFEITURE.

A. Proceedings to Procure — 1. In General. Forfeiture is the judgment of the court on condition and can only be entered on proper hearing and adjudication.[60] Forfeiture is no part of the recognizance.[61] It is a matter exclusively for the court where the recognizance was taken.[62] Only one forfeiture is necessary, and a second one at the same term may be treated as surplusage.[63] It is indispensable to a forfeiture that the principal be called and defaulted,[64] but surety need not be called.[65] Notice to principal [66] or surety [67] is not necessary.

2. Time For Declaring. Forfeiture is premature if entered before the recognizance is filed.[68] Default may be entered on a day subsequent to the first day of the term,[69] but it cannot be done at a subsequent term.[70]

3. Judgment [71] — a. Form. The proper practice on default is to enter a forfeiture,[72] take an interlocutory judgment, and then issue scire facias to show cause why the judgment should not be made final,[73] or why an action should not be instituted on the recognizance to recover the penalty.[74] The judgment need not be for the recovery of any sum of money,[75] although it should specify the sum

60. Com. *v.* Bauer, 9 Phila. (Pa.) 589.

Forfeiture at common law was a judgment. Sans *v.* People, 8 Ill. 327; Andress *v.* State, 3 Blackf. (Ind.) 108; Schultze *v.* State, 43 Md. 295; Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311.

Forfeiture of a recognizance is a debt sufficient to support an attachment. Reg. *v.* Stewart, 8 Ont. Pr. 297.

61. Rheinhart *v.* State, 14 Kan. 318.

62. People *v.* Devlin, 7 Daly (N. Y.) 47.

Where the breach has been determined by a jury the same proceedings should be had in the court where the record is as in cases where the forfeiture is declared in open court as to determining amount of judgment by hearing evidence, etc. State *v.* Walker, 56 N. H. 176.

63. State *v.* Pepper, 8 Mo. 249.

64. Brown *v.* People, 24 Ill. App. 72; State *v.* Gorley, 2 Iowa 52; Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422.

Calling is not necessary where principal appeared. Billings *v.* Avery, 7 Conn. 236. Or where recognizance is entered into by surety alone. Schultze *v.* State, 43 Md. 295.

Calling at new office is not sufficient where principal was required to appear at old. Hannum *v.* State, 38 Ind. 32.

Calling on sureties to produce principal is not sufficient. White *v.* State, 5 Yerg. (Tenn.) 183; State *v.* Grigsby, 3 Yerg. (Tenn.) 280.

65. State *v.* Hinson, 4 Ala. 671; Ingram *v.* State, 10 Kan. 630; State *v.* Grant, 10 Minn. 39; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930.

When the recognizance is several both bail and principal should be called. Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

66. State *v.* Woodward, 7 Vt. 529.

67. People *v.* Blankman, 17 Wend. (N. Y.) 252; *Re* McArthur, 3 Can. Cr. Cas. 195, 2 Northwest Terr. 413; *Re* Talbot, 23 Ont. 65. *Contra*, Reg. *v.* Creelman, 25 Nova Scotia 404. And see Rex *v.* Brooke, 11 T. L. R. 163; Rex *v.* Barrett, 36 Nova Scotia 135 and note.

However by statute notice to surety may be required to be given before forfeiting a recognizance. Reg. *v.* Creelman, 25 Nova Scotia 404.

68. Bacon *v.* People, 14 Ill. 312. But see Jennings *v.* State, 13 Kan. 80.

But calling a recognizance before the expiration of the hour set for appearance was not erroneous where defendant did not appear within the hour. Wallingford *v.* Hall, 45 Conn. 350.

69. Chase *v.* People, 2 Colo. 528; People *v.* Blankman, 17 Wend. (N. Y.) 252.

It may be entered while motion for new trial is pending. Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363. Or after a continuance has been granted. Swank *v.* State, 3 Ohio St. 429. But see Townsend *v.* People, 14 Mich. 388.

70. State *v.* Thistlethwaite, 83 Ind. 317; Kiser *v.* State, 13 Ind. 80. But see Gallagher *v.* People, 88 Ill. 335; State *v.* Morgan, 124 Mo. 467, 28 S. W. 17.

71. See *infra*, V, E.

72. Peacock *v.* People, 83 Ill. 331; People *v.* Witt, 19 Ill. 169.

73. Marr *v.* State, 26 Ark. 410; People *v.* Watkins, 19 Ill. 117; Pinckard *v.* People, 2 Ill. 187. And see Banta *v.* People, 53 Ill. 434; Cable *v.* People, 46 Ill. 467.

Interlocutory judgment is not indispensable. — Marr *v.* State, 26 Ark. 410; Andress *v.* State, 3 Blackf. (Ind.) 108.

Statements in a summons showing that defendant had violated his recognizance and that the parties would be required to show cause why judgment would not be rendered held to be in effect a judgment of forfeiture. Baird *v.* Com., 2 Duv. (Ky.) 78.

To enter final judgment on declaring forfeiture was held to be erroneous. Pinckard *v.* People, 2 Ill. 187. But judgment for the amount specified and then awarding scire facias is not a final recovery. Weese *v.* People, 19 Ill. 643.

74. Pinckard *v.* People, 2 Ill. 187.

75. Peacock *v.* People, 83 Ill. 331; People *v.* Watkins, 19 Ill. 117.

for which the sureties are bound,[76] and state that it will be made final unless good cause be shown.[77] Judgment *nisi* need not be signed by the judge.[78]

b. Joint or Several Judgments.[79] On a joint and several recognizance several judgments *nisi* may be entered.[80]

c. Recitals. The judgment *nisi* need not recite more of the recognizance than necessary to show that there had been a breach of the condition,[81] nor need it show that the sureties were called and defaulted.[82] It must show that the recognizance was returned into court,[83] but not, however, by direct averment,[84] and should designate the defaulters.[85]

d. Amendment. A judgment *nisi* may be amended to conform to the recognizance *nunc pro tunc*.[86]

e. Conclusiveness. The judgment of forfeiture cannot be collaterally attacked in a suit on the recognizance where the proper entry and certificate of forfeiture is made.[87]

4. Record of Forfeiture. The record of the forfeiture is not the forfeiture which is complete without entry on the records;[88] and such entry may be made *nunc pro tunc*.[89] The record should show the forfeiture,[90] and in what case the recognizance and forfeiture were taken.[91] When a forfeiture is declared by a justice of the peace it should be certified on the back of the recognizance.[92]

5. Respite. Under the Pennsylvania practice forfeiture of a recognizance could be respited from term to term to allow the surety opportunity to produce

Rendering judgment for the amount of the recognizance at time of declaring forfeiture is surplusage. Kearns *v.* State, 3 Blackf. (Ind.) 334.

76. State *v.* Cox, 25 Tex. 404.

77. Bailey *v.* State, (Tex. Cr. App. 1893) 22 S. W. 40; Thompson *v.* State, 17 Tex. App. 318.

78. State *v.* Johnson, 12 La. 547.

79. **Joint or several liability** see *supra*, III, C, 2.

80. Brewer *v.* State, 6 Lea (Tenn.) 198 [*overruling* Scott *v.* State, 1 Head (Tenn.) 433]; Avant *v.* State, 33 Tex. Cr. 312, 26 S. W. 411. *Compare infra*, V, E, 2.

81. Badger *v.* State, 5 Ala. 21; Howie *v.* State, 1 Ala. 113.

Erroneous recital that the recognizance was joint and several did not vitiate judgment the remainder being correct. Bradley *v.* People, 21 Ill. App. 78.

Misrecital of part not required to be recited will not invalidate the judgment. Howie *v.* State, 1 Ala. 113.

82. State *v.* Wells, 36 Iowa 238.

83. Pugh *v.* State, 2 Head (Tenn.) 227.

84. Pugh *v.* State, 2 Head (Tenn.) 227.

85. Banta *v.* People, 53 Ill. 434; Minor *v.* State, 1 Blackf. (Ind.) 236. But see Miller *v.* Com., 1 Duv. (Ky.) 14; Barton *v.* Keith, 2 Hill (S. C.) 537.

Forfeiture taken against a principal by a different name without averment that he is the same who executed the recognizance is defective. Lowe *v.* State, 15 Tex. 141.

86. State *v.* Craig, 12 Ala. 363; Browder *v.* State, 9 Ala. 58; Governor *v.* Knight, 8 Ala. 297.

87. *Illinois.*— People *v.* Watkins, 19 Ill. 117.

Indiana.— Friedline *v.* State, 93 Ind. 366.

Ohio.— Calvin *v.* State, 12 Ohio St. 60, for fraud.

Pennsylvania.— Rhoads *v.* Com., 15 Pa. St. 272.

Vermont.— State *v.* Nichols, 43 Vt. 91.

See 42 Cent. Dig. tit. "Recognizances," § 27.

Admissibility of evidence to contradict record of forfeiture see *infra*, V, C, 1, b.

Forfeiture is a judicial act and conclusive of its breach. Pierson *v.* Com., 3 Grant (Pa.) 314.

On entry of forfeiture it will be conclusively presumed that the proper form of calling the recognizance was followed. Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377. And see Fox *v.* Com., 81* Pa. St. 511; Com. *v.* Gray, 26 Pa. Super. Ct. 110.

88. Barkley *v.* State, 15 Kan. 99; Ingram *v.* State, 10 Kan. 630; People *v.* Gordon, 39 Mich. 259; Rhoads *v.* Com., 15 Pa. St. 272. But see Park *v.* State, 4 Ga. 329; Eubank *v.* People, 50 Ill. 496.

89. Rhoads *v.* Com., 15 Pa. St. 272. But see Com. *v.* Bauer, 9 Phila. (Pa.) 589, where it was held that entry of forfeiture *nunc pro tunc* would not be ordered where there was no evidence that it had been declared.

90. Park *v.* State, 4 Ga. 329.

Entry or memorandum on margin of judgment nisi that principal was called is not sufficient to sustain the judgment. Hall *v.* State, 15 Ala. 431.

Estreat roll is sufficiently signed by the clerk where he signed the affidavit at the foot of it. *Re* Talbot, 23 Ont. 65.

Under a statute making memorandum on the back of recognizance sufficient record of forfeiture such entry is not destroyed because a formal record is made. Franks *v.* State, 12 Ohio St. 1.

91. Overaker *v.* State, 4 Sm. & M. (Miss.) 738.

92. Hannum *v.* State, 38 Ind. 32.

the principal. This was merely that the forfeiture should not be estreated for a certain period,[93] or that suit should not be brought till the next term,[94] and did not operate to invalidate the forfeiture, the liability on the recognizance being absolutely fixed by the forfeiture.[95]

B. Relief From Forfeiture — 1. In General. The power of the courts to relieve from forfeiture has been denied in some jurisdictions,[96] but it is generally held to be vested in the court in which the recognizance is of record.[97] This power is sometimes vested both in the governor and the court [98] and sometimes in a higher court.[99] Relief from forfeiture, when allowable at all, may be whole or partial.[1]

2. Time. It has been variously held that remission of forfeiture can be made during the term at which the forfeiture is taken,[2] at any time before issuance of scire facias, although subsequent to term,[3] either before or after final judgment,[4] until an interest has vested in a private person,[5] or until the money has been paid into the treasury.[6]

3. Grounds. Courts can remit forfeiture only for cause shown,[7] and what is a sufficient cause is within the discretion of the court.[8]

4. Proceedings to Procure — a. In General. Payment of costs is sometimes made a prerequisite to relief from a judgment of forfeiture of a recognizance.[9] The application must be made with due diligence.[10] The application may be

93. Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

94. Com. *v.* Oblender, 135 Pa. St. 530, 19 Atl. 1057.

95. Com. *v.* Oblender, 135 Pa. St. 530, 19 Atl. 1057; Foulke *v.* Com., 90 Pa. St. 257; Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

96. Stevens *v.* Hay, 61 Ill. 399; Weese *v.* People, 19 Ill. 643; Pate *v.* People, 15 Ill. 221; Merrill *v.* Prince, 7 Mass. 396; Johnson *v.* Randall, 7 Mass. 340.

Chancery has no authority to give relief to sureties on a recognizance in a criminal proceeding. Rastall *v.* Atty.-Gen., 18 Grant Ch. (U. C.) 138 [*reversing* 17 Grant Ch. (U. C.) 1].

To escape liability the surety can only show that it was invalid or that he has been discharged pleaded in defense to action on the recognizance. Stevens *v.* Hay, 61 Ill. 399.

97. Day *v.* State, 125 Ind. 582, 25 N. E. 817; State *v.* McNeal, 18 N. J. L. 333; Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311; Board of Education *v.* Moody, 74 N. C. 73; Com. *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 261.

98. State *v.* Shideler, 51 Ind. 64; Stone *v.* Riddell, 5 Bush (Ky.) 349; Com. *v.* Spraggins, 18 B. Mon. (Ky.) 512; Com. *v.* Morgan. 14 B. Mon. (Ky.) 392; Com. *v.* Shick, 61 Pa. St. 495.

99. Com. *v.* McNeill, 19 Pick. (Mass.) 127; People *v.* Petry, 2 Hilt. (N. Y.) 523; Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377; Com. *v.* Taylor, 1 Chest Co. Rep. (Pa.) 261; Com. *v.* Phillips, 8 Kulp (Pa.) 230; Com. *v.* Clark, 10 Lanc. Bar (Pa.) 106. But see Com. *v.* Gaul, 2 Woodw. (Pa.) 70.

Erroneous entry of forfeiture by the clerk of the county court will be expunged by the supreme court under N. Y. Laws (1845), p. 250, and Laws (1854), p. 464, § 6. People *v.* Devlin, 7 Daly (N. Y.) 47.

1. Com. *v.* Gaul, 2 Woodw. (Pa.) 70.

2. U. S. *v.* Barger, 20 Fed. 500.

3. Com. *v.* Craig, 6 Rand. (Va.) 731.

4. Board of Education *v.* Moody, 74 N. C. 73; Com. *v.* Shick, 61 Pa. St. 495; Com. *v.* Denniston, 9 Watts (Pa.) 142.

5. Com. *v.* Winpenny, 2 Pearson (Pa.) 107; Com. *v.* Smohe, 2 Pearson (Pa.) 18.

Where the right of the attorney for the commonwealth to a percentage on forfeited recognizances did not accrue till rendition of judgment the governor until then could remit a forfeiture. Stone *v.* Riddell, 5 Bush (Ky.) 349; Com. *v.* Spriggins, 18 B. Mon. (Ky.) 512; Com. *v.* Morgan, 14 B. Mon. (Ky.) 392.

6. Com. *v.* Shick, 61 Pa. St. 495; Com. *v.* Denniston, 9 Watts (Pa.) 142; Com. *v.* Becker, 1 Woodw. (Pa.) 297.

7. State *v.* Speck, 20 Ind. 211; 2 Ind. Rev. St. (1852) p. 367.

For specific grounds for relief see *supra*, III, E.

Judgment nisi for less than the penalty will not be set aside because of such fact. Ditto *v.* State, 30 Miss. 126.

Judgment nisi will be set aside for incompetence of married woman to be a surety. Com. *v.* Matyiewicz, 17 Pa. Co. Ct. 154.

8. Gallagher *v.* People, 91 Ill. 590; Wray *v.* People, 70 Ill. 664; Mason *v.* People, 17 Ill. App. 331; Com. *v.* Davidson, 1 Bush (Ky.) 133; State *v.* Moody, 74 N. C. 73; Com. *v.* Craig, 6 Rand. (Va.) 731.

This discretion is a sound legal and not an arbitrary discretion. Wray *v.* People, 70 Ill. 664; Mason *v.* People, 17 Ill. App. 331.

Public prosecutor is vested with no part of this discretion. Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311.

9. Gallagher *v.* People, 88 Ill. 335. See *infra*, text and note 16.

Mere offer to pay costs is insufficient. Gallagher *v.* People, 88 Ill. 335.

10. Gallagher *v.* People, 91 Ill. 590; Goode *v.* State, 15 Tex. 124.

made by petition,[11] or motion.[12] The application should show that the conditions prerequisite have been complied with.[13]

b. Hearing, Determination, and Effect. Affidavits or testimony of witnesses may be received on motion for remission,[14] but counter affidavits are not admissible.[15] Costs may be imposed as a condition for granting relief.[16] When relief from forfeiture is granted the amount paid under it may be recovered.[17] Where application for remission has been denied in one court it will not be granted in another.[18] Setting aside a judgment *nisi* as to the principal operates as a discontinuance as to surety.[19] The action of the court in remitting a forfeiture is not subject to review on appeal [20] except in case of abuse of discretion.[21]

V. ENFORCEMENT.

A. Proceedings in General — 1. NECESSITY OF ACTION. At common law a recognizance after forfeiture was equivalent to a judgment against the party which could be enforced by execution,[22] but now final judgment cannot be taken on a forfeited recognizance without the intervention of some process or pleading against the recognizors.[23]

2. FORM OF REMEDY. Scire facias is the proper remedy on a forfeited recognizance.[24] Nevertheless an action of debt,[25] or under the modern practice an

It must be made before final judgment where made in the action on the recognizance. Com. *v.* Becker, 1 Woodw. (Pa.) 297.

11. Foulke *v.* Com., 90 Pa. St. 257. But see State *v.* Shideler, 51 Ind. 64.

12. State *v.* Shideler, 51 Ind. 64. See also Wray *v.* People, 70 Ill. 664.

Complaint is unnecessary.— State *v.* Shideler, 51 Ind. 64.

13. People *v.* Rofrano, 16 Daly (N. Y.) 148, 9 N. Y. Suppl. 634; People *v.* Cohen, 1 Misc. (N. Y.) 515, 20 N. Y. Suppl. 854; People *v.* Kirwan, 16 N. Y. Suppl. 956; People *v.* Brady, 11 N. Y. Suppl. 711.

Renewal of motion must show compliance with conditions on which leave to renew motion was granted. People *v.* Samuels, 8 N. Y. Suppl. 475.

Prosecuting attorney is proper party to appear for state on motion to set aside forfeiture. State *v.* Shideler, 51 Ind. 64.

14. Com. *v.* Davidson, 1 Bush (Ky.) 133; Com. *v.* Craig, 6 Rand. (Va.) 731.

15. Wray *v.* People, 70 Ill. 644.

16. Weissinger *v.* State, 11 Ala. 540; Reg. *v.* McCleod, 24 U. C. Q. B. 458. See *supra*, text and note 9.

17. See People *v.* Goltze, 16 Daly (N. Y.) 62, 8 N. Y. Suppl. 530; O'Donnell *v.* New York, 13 N. Y. Suppl. 357.

18. People *v.* Lasher, 18 N. Y. Suppl. 136; People *v.* Street, 14 N. Y. Suppl. 778.

19. Hatch *v.* State, 40 Ala. 718.

20. State *v.* Moody, 74 N. C. 73; Com. *v.* Oblender, 135 Pa. St. 536, 19 Atl. 1057; Bross *v.* Com., 71 Pa. St. 262; *Re* McArthur, 3 Can. Cr. Cas. 195, 2 Northwest Terr. 413. And see Harres *v.* Com., 35 Pa. St. 416.

21. Wray *v.* People, 70 Ill. 664; Mason *v.* People, 17 Ill. App. 331.

22. Morton *v.* Chandler, 8 Me. 9; Schultze *v.* State, 43 Md. 295; Albee *v.* Ward, 8 Mass. 79; State *v.* Randolph, 22 Mo. 474.

23. *Arkansas.*— Johnstons *v.* State, 3 Ark. 524.

Georgia.— Robinson *v.* Gordon, 85 Ga. 559, 11 S. E. 844.

Illinois.— Pinckard *v.* People, 2 Ill. 187.

Missouri.— State *v.* Woerner, 33 Mo. 216; State *v.* Randolph, 22 Mo. 474.

New Hampshire.— State *v.* Dowd, 43 N. H. 454.

See 42 Cent. Dig. tit. "Recognizances," § 31 *et seq.*; *supra*, IV, A, 3, a.

The most usual proceeding against a cognizor is by scire facias; and it is said that an execution may issue upon such scire facias. Schultze *v.* State, 43 Me. 295, 306; State *v.* Walker, 56 N. H. 176, 178; Philbrick *v.* Buxton, 43 N. H. 462; State *v.* Dowd, 43 N. H. 454. See *infra*, V, A, 2.

24. *Alabama.*— Lloyd *v.* State, Minor 34.

Colorado.— Chase *v.* People, 2 Colo. 528.

Maine.— State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

New Hampshire.— State *v.* Walker, 56 N. H. 176; State *v.* Kinne, 39 N. H. 129.

Pennsylvania.— Ebbs *v.* Com., 11 Pa. St. 374.

See 42 Cent. Dig. tit. "Recognizances," § 33.

The remedy must be by scire facias where defendant is out of the state and cannot be served with process. Warner *v.* Moore, 3 Luz. Leg. Reg. (Pa.) 108.

25. *Illinois.*— Eimer *v.* Richards, 25 Ill. 289; People *v.* Witt, 19 Ill. 169; Pate *v.* People, 15 Ill. 221.

Indiana.— State *v.* Inman, 7 Blackf. 225.

Maine.— State *v.* Boies, 41 Me. 344; Longley *v.* Vose, 27 Me. 179; State *v.* Folsom, 26 Me. 209.

Massachusetts.— Green *v.* Dana, 13 Mass. 493; Com. *v.* Green, 12 Mass. 1; Bridge *v.* Ford, 4 Mass. 641.

New Hampshire.—State *v.* Welch, 59 N. H. 134; State *v.* Walker, 56 N. H. 176; State *v.* Dowd, 43 N. H. 454; State *v.* Stevens, Smith 251.

ordinary suit or action at law in the nature of an action of debt [26] lies as well; and summary proceedings are sometimes authorized by statute.[27]

3. NATURE OF ACTION. Scire facias is a judicial writ based on matter of record,[28] and has been held to be both merely a continuation of an existing proceeding [29] and in the nature of an original action.[30] Action of debt on recognizance is analagous to an action on a judgment.[31]

4. RIGHT TO MAINTAIN. Scire facias or action cannot be maintained except on a valid recognizance [32] which has become a matter of record [33] and forfeiture duly taken thereon,[34] properly certified into the court in which the action must be

New York.— People *v.* Van Eps, 4 Wend. 387.

Pennsylvania.— Bodine *v.* Com., 24 Pa. St. 69; Com. *v.* Hoch, 1 Woodw. 332; Warner *v.* Moore, 3 Luz. Leg. Reg. 108.

Vermont.— Anonymous, Brayt. 214.

United States.— Dowlin *v.* Standifer, 7 Fed. Cas. No. 4,041*a*, Hempst. 290.

See 42 Cent. Dig. tit. "Recognizances," § 33.

Debt is proper remedy on recognizance not filed and made of record in the supreme court. State *v.* Wheeler, 67 N. H. 511, 41 Atl. 173.

Debt is made the exclusive remedy in some states. State *v.* Vanvalkenburg, 15 Ind. 185; People *v.* Hickey, 5 Daly (N. Y.) 365; People *v.* Kane, 4 Den. (N. Y.) 530.

Assumpsit lies on recognizance under the act of May 25, 1887. Com. *v.* McCutcheon, 4 Pa. Co. Ct. 309, 20 Wkly. Notes Cas. 365.

Remedy afforded by Me. St. (1885) c. 166, § 24, is cumulative to those at common law and debt still lies. State *v.* Boies, 41 Me. 344.

Where defendant resides in another county the action of debt is preferable. Warner *v.* Moore, 3 Luz. Leg. Reg. (Pa.) 108.

26. State *v.* Wells, 36 Iowa 238; State *v.* Gorley, 2 Iowa 52; Kinney *v.* O'Bannon, 6 Bush (Ky.) 692; State *v.* Randolph, 22 Mo. 474.

Joinder of action to have money which was transferred to surety to indemnify him applied in payment of the penalty with the action on the recognizance was erroneous. People *v.* Skidmore, 17 Cal. 260. And see Shields *v.* State, 78 Ind. 425.

27. Kinney *v.* O'Bannon, 6 Bush (Ky.) 692; People *v.* Quigg, 59 N. Y. 83, 91, where it is said: "The remedies upon forfeited recognizances have at all times been subject to legislative action and regulated by statute, and summary proceedings, rather than formal suits at law, have been usually allowed."

Estreatment.— In proceedings to estreat a recognizance under S. C. Cr. Code (1902), § 85 *et seq.*, no jurisdiction of the person must be obtained as in civil cases, but a rule to show cause why the recognizance should not be estreated is properly served on a nonresident by leaving a copy with him in a foreign state. State *v.* Johnson, 77 S. C. 252, 57 S. E. 846. See also Barton *v.* Keith, 2 Hill (S. C.) 537.

Motion.— Forfeited recognizance may be recovered on by motion without the formality of any pleading. State *v.* Hay, 7 La. 78.

Rule absolute.— The practice in entering up judgment on a recognizance is for clerk to make an affidavit of the entering in to the recognizance, its return, and non-appearance of the party. On this affidavit a rule *nisi* to enter judgment may be obtained, a copy of which and of the affidavit are served on each of defendants and if no cause is shown the rule is made absolute. Reg. *v.* Thompson, 3 Nova Scotia 9 [*approved* in Reg. *v.* Brown, 13 Nova Scotia 51; Reg. *v.* Hickman, 12 Nova Scotia 255].

28. Philbrick *v.* Buxton, 43 N. H. 462; Respublica *v.* Cobbet, 2 Yeates (Pa.) 352, 362, 3 Dall. (Pa.) 467, 475, 1 L. ed. 683 [*quoted* in Davis *v.* Packard, 6 Wend. (N. Y.) 327, 330; Colvig *v.* Klamath County, 16 Oreg. 244, 248, 19 Pac. 286; Com. *v.* Savage, 30 Pa. Super. Ct. 364, 367]. See also SCIRE FACIAS.

29. Wood *v.* People, 16 Ill. 171; State *v.* Heed, 62 Mo. 559; State *v.* Culp, 39 Mo. 530; State *v.* Randolph, 22 Mo. 474.

Proceeding by scire facias is not a civil action within the meaning of the Practice Act of 1849. State *v.* Randolph, 22 Mo. 474. Whether scire facias on a recognizance in a criminal case is a civil or criminal proceeding see BAIL, 5 Cyc. 136.

30. Cooper *v.* State, 23 Ark. 278; Darby *v.* State, 21 Ark. 523; Gray *v.* State, 5 Ark. 265; Blackwell *v.* State, 3 Ark. 320; Brewer *v.* State, 6 Lea (Tenn.) 198.

31. State *v.* Rhonimus, 47 Miss. 314 (defendants being called on to answer the judgment and not the proceedings on the recognizance); Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311.

32. Whitted *v.* Governor, 6 Port. (Ala.) 335; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

Although judgment has been obtained in debt on recognizance one may still proceed on the instrument, the judgment and recognizance both being matters of record of equal degree and cannot be merged into each other. Philbrick *v.* Buxton, 43 N. H. 462.

33. Raysor *v.* People, 27 Ill. 190; Slaten *v.* People, 21 Ill. 28; People *v.* Watkins, 19 Ill. 117; Bacon *v.* People, 14 Ill. 312; State *v.* Smith, 2 Me. 62; Slape *v.* State, 44 N. J. L. 264.

Recording at length is not necessary; it is sufficient if the certificate show that it has been filed before the suit was commenced. Leathers *v.* Cooley, 49 Me. 337.

Sufficiency of filing or entry to constitute a record see *supra*, II, I, 1.

34. *Illinois.*— Combs *v.* People, 39 Ill. 183; Kennedy *v.* People, 15 Ill. 418; Brown *v.* People, 24 Ill. App. 72.

brought.[35] Action may be begun at any time after adjournment of term at which forfeiture is declared.[36]

5. Jurisdiction[37] and Venue.[38] Jurisdiction of action or scire facais when considered as an original action is determined by the amount of the penalty.[39] As a general rule recognizances must be prosecuted in the court in which they were taken or to which they were returned,[40] and scire facias can only issue from the court in possession of the record.[41] Actions on recognizances, however, are not limited to such courts,[42] the residence of the parties sometimes determining the jurisdiction.[43] Venue in scire facias on a recognizance is local,[44] but it is otherwise with actions on recognizances.[45]

6. Parties — a. Plaintiff. The action, suit, or proceeding to enforce a recognizance after forfeiture is properly brought in the name of the people or of the state,[46]

Indiana.— Votaw *v.* State, 12 Ind. 497; Andress *v.* State, 3 Blackf. 108.

Kansas.— Ingram *v.* State, 10 Kan. 630.

Kentucky.— Com. *v.* Gilbert, 5 Ky. L. Rep. 183.

New Mexico.— Brooks *v.* U. S., 6 N. M. 72, 27 Pac. 311.

See 42 Cent. Dig. tit. "Recognizances," § 34.

But see Com. *v.* Hart, 5 Pa. Dist. 109, 17 Pa. Co. Ct. 148; Baughman *v.* Baughman, 13 York Leg. Rec. (Pa.) 19.

35. Connor *v.* People, 4 Colo. 134; Com. *v.* Cheney, 108 Mass. 33; Slape *v.* State, 44 N. J. L. 264. And see People *v.* Green, 58 Ill. 236.

Indorsement of certificate of forfeiture.— Action may be maintained on recognizance without its having a certificate of its forfeiture indorsed on it or its being filed and recorded by the clerk as required by 2 Gavin & H. St. p. 639, § 15, this being necessary only to make it a lien on land. Adams *v.* State, 48 Ind. 212 [*following* Hannum *v.* State, 38 Ind. 32, and *overruling* Gashenheimer *v.* State, 28 Ind. 91; Patterson *v.* State, 12 Ind. 86]; Urton *v.* State, 37 Ind. 339.

36. People *v.* Carpenter, 7 Cal. 402.

Failure to make judgment nisi final at next term of court as required by statute is not fatal, the statute being directory merely. State *v.* Johnson, 12 La. 547.

Action on recognizance to keep the peace may be maintained before the term to which it is returnable. Crump *v.* People, 2 Colo. 316. But see Darling *v.* Hubbell, 9 Conn. 350.

37. Jurisdiction of: Court generally see Courts, 11 Cyc. 659; Justice see Justices of the Peace, 24 Cyc. 440.

38. Venue generally see Venue.

39. Blackwell *v.* State, 3 Ark. 320; Hawkins *v.* State, 24 Ind. 288; McCole *v.* State, 10 Ind. 50; State *v.* Inman, 7 Blackf. (Ind.) 225; Ross *v.* State, 6 Blackf. (Ind.) 315.

When beyond the justice's jurisdiction it should be certified to the circuit court and scire facias may issue from such court. Ross *v.* State, 6 Blackf. (Ind.) 315.

40. Crisman *v.* People, 8 Ill. 351; Adams *v.* People, 12 Ill. App. 380; State *v.* Walker, 56 N. H. 176; State *v.* Byrne, 3 Ohio Dec. (Reprint) 302.

41. *Maine.*— State *v.* Brown, 41 Me. 535; State *v.* Smith, 2 Me. 62.

Massachusetts.— Com. *v.* Downey, 9 Mass. 520.

New Hampshire.—State *v.* Kinne, 39 N. H. 129.

New Jersey.— Slape *v.* State, 44 N. J. L 264.

Pennsylvania.— Warner *v.* Moore, 3 Luz. Leg. Reg. 108.

Vermont.— Shumway *v.* Sargeant, 27 Vt. 440. And see Carlton *v.* Young, 1 Aik. 332.

See 42 Cent. Dig. tit. "Recognizances," § 35.

42. Curtice *v.* Bothamly, 8 Allen (Mass.) 336; Com. *v.* McNeill, 19 Pick. (Mass.) 127; Van Winkle *v.* Alling, 17 N. J. L. 446; People *v.* Van Eps, 4 Wend. (N. Y.) 387. And see People *v.* Blackman, 1 Den. (N. Y.) 632; State *v.* West, 3 Ohio St. 509; Cockrane *v.* Eyre, 6 U. C. Q. B. 289.

Under the Pennsylvania act of Dec. 2, 1783, and the act of March 30, 1821, scire facias lies in the common pleas on a recognizance taken in the quarter sessions. Bodine *v.* Com., 24 Pa. St. 69.

On a recognizance in a criminal case jurisdiction of the suit is in a court having civil jurisdiction. Peirce *v.* Morgan, 3 La. 342; State *v.* Kinne, 39 N. H. 129.

Action in the supreme court will be set aside as irregular if the court in which the recognizance is taken has jurisdiction, although the supreme court also has jurisdiction. People *v.* Blackman, 1 How. Pr. (N. Y.) 221.

43. People *v.* Blackman, 1 Den. (N. Y.) 632; Burtus *v.* McCarty, 13 Johns. (N. Y.) 424; Davis *v.* Gillet, 7 Johns (N. Y.) 318.

District attorney has discretion as to the court in which he will sue whether the parties all reside in the county in which the recognizance was taken or not. People *v.* Allen, 2 How. Pr. (N. Y.) 34.

44. Darby *v.* State, 21 Ark. 523. And see Smith *v.* Clark, 1 Ark. 63; State *v.* Culp, 39 Mo. 530.

Scire facias is not the commencement of a suit within the meaning of the practice act prohibiting suits from being brought out of the county where the cognizors may reside. Crisman *v.* People, 8 Ill. 351.

45. State *v.* Vanvalkenburg, 15 Ind. 185.

46. Black *v.* State, 58 Ind. 589; Hawkins *v.* State, 24 Ind. 288; Territory *v.* Hildebrand, 2 Mont. 426; Kidd *v.* Com., 16 Pa. St. 426; Lawton *v.* State, 5 Tex. 272.

or of a county,[47] or, where the recovery is for the use and benefit of a city, by the city attorney,[48] and may be sustained without the suggestion of any other.[49] But as each individual having an interest in the recognizance may use the name of the state to enforce that interest, convenience requires the name of the *cestui que use* to be suggested of record, and this is frequently done.[50]

b. Defendant — (I) *In Action of Debt.* In debt on a joint and several recognizance, plaintiff may bring a several action against each cognizor, or a joint one against them all.[51] Even where the principal signs the recognizance, as well as the surety, an action may be maintained against the surety alone, without joining the principal.[52]

(II) *In Scire Facias.* The authorities are conflicting as to whether a joint scire facias may be maintained on a several obligation.[53] Where a recognizance is joint and several, scire facias may issue against all the parties jointly, or each may be sued severally.[54] But it is improper to join part and omit the others, for in such case they are sued neither jointly nor severally.[55] Where a recognizance is joint all the parties must be made defendants.[56]

7. Process — a. In General. Process upon a recognizance forfeited, whether a scire facias, or summons, is for the purpose of carrying it into execution and is rather judicial than original.[57] Scire facias on a forfeited recognizance is a mere notice to the recognizors to show cause why the judgment *nisi* should not be made final,[58] and should run in the name of the people.[59] Scire facias may issue from the county in which the prosecution is had to any county in which defendant is found,[60]

"The people of the United States in the territory of Idaho" and "the people of the territory of Idaho" are substantially the same, and an action may be maintained on a recognizance in the name of the people of the United States in the territory of Idaho. People *v.* Myers, 1 Ida. 355. See also People *v.* Sloper, 1 Ida. 158.

47. Mendocino County *v.* Lamar, 30 Cal. 627; Shelby County *v.* Simmonds, 33 Iowa 345. But see Territory *v.* Hildebrand, 2 Mont. 426, holding that the suit should be in the name of the territory, although the penalty recovered goes to the county.

48. New Orleans Second Municipality *v.* Labatut, 8 Rob. (La.) 33; State *v.* Desforges, 5 Rob. (La.) 253.

49. Black *v.* State, 58 Ind. 589; Hawkins *v.* State, 24 Ind. 288, in both of which cases it is held that such an action need not be brought on the relation of anybody, and, if so brought, the name of the relator may be stricken out on motion.

50. Kidd *v.* Com., 16 Pa. St. 426. See also McMicken *v.* Com., 58 Pa. St. 213.

All the cestuis que use need not be marked of record.— Less than the whole number interested may sue in the name of the state and recover so much of the fund as they show themselves entitled to. Kidd *v.* Com., 16 Pa. St. 426.

A party for whose benefit a recognizance is taken may have a scire facias on it whether he be the conusee or not. Bishop *v.* Drake, Kirby (Conn.) 378.

51. Bruce *v.* Colgan, 2 Litt. (Ky.) 284. See also Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

52. Tillson *v.* State, 29 Kan. 452; Swerdsfeger *v.* State, 21 Kan. 475.

53. See Scire Facias.

54. State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

Where the recognizance is joint and several the scire facias on it is in the nature of a several process against each surety. Chumasero *v.* People, 18 Ill. 405; Crisman *v.* People, 8 Ill. 351.

55. State *v.* Chandler, 79 Me. 172, 8 Atl. 553.

56. People *v.* Sloper, 1 Ida. 158; Banta *v.* People, 53 Ill. 434; Stebbins *v.* People, 27 Ill. 240; Alley *v.* People, 6 Ill. 109. *Contra*, by statute. See Barton *v.* Vanzant, 1 Mo. 190.

That the principal has absconded does not dispense with necessity of issuing scire facias against him. Alley *v.* People, 6 Ill. 109.

Scire facias against one of two joint recognizors and the administrators of the other is a misjoinder. State Treasurer *v.* Friott, 24 Vt. 134. But a scire facias properly issues against the survivor and the representative of the deceased cognizor. Ebbs *v.* Com., 11 Pa. St. 374.

57. Respublica *v.* Cobbet, 3 Dall. (Pa.) 475, 1 L. ed. 683 [*quoted* in Davis *v.* Packard, 6 Wend. (N. Y.) 327, 330]; Colvig *v.* Klamath County, 16 Oreg. 244, 248, 19 Pac. 86; Com. *v.* Savage, 30 Pa. Super. Ct. 364, 367].

58. Hall *v.* State, 15 Ala. 431. And see Com. *v.* Miller, 4 B. Mon. (Ky.) 418; State *v.* Glaevecke, 33 Tex. 53.

Prayer of scire facias see *infra*, V, B, 1, b.

In a suit on recognizance of special bail the process must be to answer a plea of debt "on recognizance." Van Winkle *v.* Alling, 17 N. J. L. 446.

Scire facias instead of summons is sufficient. State *v.* Jones, 88 N. C. 683.

59. Shadley *v.* People, 17 Ill. 252.

60. Darby *v.* State, 21 Ark. 523; Crisman *v.* People, 8 Ill. 351.

but in the absence of a statutory provision authorizing or requiring it the scire facias need not be sent out of the county.[61]

b. Service. Judgment awarding execution cannot be rendered until defendant has been served or two *nihils* returned,[62] which is equivalent to personal service.[63] The ordinary rules as to manner of service applies.[64]

c. Quashing and Discontinuance. A scire facias will not be quashed on motion if sufficient appear on the entries and files of the court to justify an award of execution.[65] A scire facias or suit may be discontinued as to a defendant not served and such discontinuance will not operate as a discontinuance as to all.[66] Formal discontinuance is not necessary.[67]

8. Defenses. The defense should strike at the record and show valid reasons why the judgment of forfeiture should not be made final,[68] but the recognizance and forfeiture being a record and importing verity the falsity of the record cannot be urged as a defense,[69] nor is the incapacity of a surety a defense.[70] Defendants cannot go behind the recognizance and show that the proceedings were erroneous or defective,[71] nor can it be shown that the recognizance was illegally or fraud-

Scire facias addressed to the sheriff of one county and served by the sheriff of another is a nullity. Hall *v.* State, 15 Ala. 431; Kennedy *v.* People, 15 Ill. 418.

61. Petty *v.* People, 118 Ill. 148, 8 N. E. 304; Petty *v.* People, 19 Ill. App. 317.

62. Stokes *v.* People, 63 Ill. 489; Lytle *v.* People, 47 Ill. 422; Besimer *v.* People, 15 Ill. 439; Sans *v.* People, 8 Ill. 327; Alley *v.* People, 6 Ill. 109; Graham *v.* State, 7 Blackf. (Ind.) 313; Smith *v.* State, 12 Nebr. 309, 11 N. W. 317.

One defendant cannot object that judgment was rendered against the other without service. O'Brien *v.* People, 41 Ill. 456.

Amendment of return may be allowed to obviate plea that there is no return *nihil* as to the principal. Peacock *v.* People, 83 Ill. 331.

63. Hall *v.* State, 15 Ala. 431; Robinson *v.* State, 5 Ala. 706; Badger *v.* State, 5 Ala. 21; Sans *v.* People, 8 Ill. 327.

The proper return as to those defendants not personally served is "not found." Chase *v.* People, 2 Colo. 528.

Two returns "not found" to a scire facias like two returns *nihil* are equivalent to personal service of the writ. Kearns *v.* State, 3 Blackf. (Ind.) 334; State *v.* Culp, 39 Mo. 530.

For issuing alias scire facias on a forfeited recognizance no order of court is necessary. Lane *v.* People, 76 Ill. 300.

64. See State *v.* Johnson, 12 La. 547. See also Process, 32 Cyc. 447.

65. State *v.* Littlepage, 30 Mo. 322.

66. Hall *v.* State, 15 Ala. 431; Cooper *v.* State, 23 Ark. 278; Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43. And see Goode *v.* State, 15 Tex. 124.

No showing as to diligence to obtain service need be made. Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43.

67. State *v.* Hinson, 4 Ala. 671. And see Goode *v.* State, 15 Tex. 124.

But unexplained failure of the court to take action for one or more terms does not amount to a discontinuance. Hunt *v.* State, 63 Ala. 196.

68. State *v.* Peyton, 32 Mo. App. 522.

Any defense which could be made to a declaration may be interposed to a scire facias. Wood *v.* People, 16 Ill. 171.

The parties may show that the principal has complied with it conditions, that the debt is paid, that there is no such record, etc. Sans *v.* People, 8 Ill. 327.

Act of God.— Where non-performance is excused by act of God it may be set up by plea to scire facias as well as by motion for exoneratur. Caldwell *v.* Com., 14 Gratt. (Va.) 698. And see *supra*, III, E, 1.

Matters entitling parties to relief from forfeiture must be set up by petition therefor and not as defense to action. Foulke *v.* Com., 90 Pa. St. 257.

That person suing in the name of the commonwealth is not entitled to the money is no defense. Com. *v.* Lightner, 9 Watts & S. (Pa.) 117.

Where party secured by defective recognizance treats it as a nullity such conduct is a good defense. Allen *v.* Kellam, 94 Pa. St. 253.

Defenses in recognizances in criminal cases see Bail, 5 Cyc. 140.

69. People *v.* Watkins, 19 Ill. 117; Sans *v.* People, 8 Ill. 327; State *v.* Wenzel, 77 Ind. 428; Com. *v.* Kanenheimer, 25 Leg. Int. (Pa.) 124.

70. Mussulman *v.* People, 15 Ill. 51; Cooper *v.* Harter, 1 Ind. 427.

71. *Alabama.*— Peck *v.* State, 63 Ala. 201.

Connecticut.— Douglass *v.* Wickwire, 19 Conn. 489.

Indiana.— Friedline *v.* State, 93 Ind. 366; Adams *v.* State, 48 Ind. 212; State *v.* Gachenheimer, 30 Ind. 63; Cutshaw *v.* Birge, 4 Blackf. 511.

Maine.— State *v.* Gilmore, 81 Me. 405, 17 Atl. 316.

New Hampshire.— State *v.* Kinne, 39 N. H. 129.

Vermont.— Middletown Treasurer *v.* Ames, 7 Vt. 166.

Virginia.— Archer *v.* Com., 10 Gratt. 627.

See 42 Cent. Dig. tit. "Recognizances," § 39.

ulently taken,[72] but want of authority to take the recognizance is a good defense,[73] but not want of jurisdiction,[74] or the fact that the officer lacking the recognizance was merely a *de facto* officer.[75] A surety cannot avail himself of any insufficiency due to himself,[76] or of any defense not equally good for principal.[77] Claim against town cannot be set off against penalty in action on forfeited recognizance given to the town.[78]

B. Pleading[79] **— 1. Declaration or Scire Facias**[80] **— a. Scire Facias as a Process and Pleading.** A scire facias on a forfeited recognizance fills the place of both the summons and declaration,[81] and no declaration is necessary.[82]

b. Form and Requisites in General.[83] Scire facias should contain every material allegation necessary to recovery.[84] The form of a scire facias is sometimes prescribed by statute and a scire facias in such form is good.[85] The scire facias should show all the acts essential to its validity.[86] It should aver before whom it was taken,[87] and that such officer had authority and jurisdiction to take

72. Peacock *v.* People, 83 Ill. 331; Martin *v.* Campbell, 120 Mass. 126; Clark *v.* McComman, 7 Watts & S. (Pa.) 469; Searfoss *v.* Davenport, 4 Kulp (Pa.) 426.

Duress of principal.— Peacock *v.* People, 83 Ill. 331; Huggins *v.* People, 39 Ill. 241; Plummer *v.* People, 16 Ill. 358.

73. Carmody *v.* State, 105 Ind. 546, 5 N. E. 679; Harris *v.* Simpson, 4 Litt. (Ky.) 165, 14 Am. Dec. 101.

74. Wallingford *v.* Hall, 45 Conn. 350; Dilley *v.* State, 3 Ida. 285, 29 Pac. 48; State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920; Lee *v.* State, 25 Tex. App. 331, 8 S. W. 277.

75. Pack *v.* State, 23 Ark. 235; People *v.* Meacham, 74 Ill. 292; People *v.* Watkins, 19 Ill. 117; Kuhle *v.* People, 65 Ill. App. 378; People *v.* Cook, 14 Barb. (N. Y.) 259; Wilcox *v.* Smith, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; Sturgeon *v.* Com., 22 Wkly. Notes Cas. (Pa.) 146. And see Brown *v.* O'Connell, 36 Conn. 432, 4 Am. Rep. 89; Rheinhart *v.* State, 14 Kan. 318. See also *supra*, p. 541 text and note 21.

76. Mooney *v.* People, 81 Ill. 134.

77. McMicken *v.* Com., 58 Pa. St. 213.

78. Wallingford *v.* Hall, 45 Conn. 350.

79. **Pleading** generally see Pleading, 31 Cyc. 1 *et seq.*

80. **Scire facias** generally see Scire Facias.

81. *Arkansas.*— Cooper *v.* State, 23 Ark. 278; Gray *v.* State, 5 Ark. 265.

Illinois.— Compton *v.* People, 86 Ill. 176; Peacock *v.* People, 83 Ill. 331; Welborn *v* People, 76 Ill. 516; Rietzell *v.* People, 72 Ill. 416; Farris *v.* People, 58 Ill. 26; Conner *v.* People, 20 Ill. 381; Shadley *v.* People, 17 Ill. 252.

Mississippi.— Tucker *v.* State, 55 Miss. 452; Curry *v.* State, 39 Miss. 511.

Tennessee.— State *v.* Johnson, 6 Baxt. 198; State *v.* Robinson, 8 Yerg. 370.

Virginia.— Gedney *v.* Com., 14 Gratt. 318.

See 42 Cent. Dig. tit. "Recognizances," § 42.

But see State *v.* Glaevecke, 33 Tex. 53.

82. Lawrence *v.* People, 17 Ill. 172; Wood *v.* People, 16 Ill. 171; State *v.* Furguson, 50 Mo. 470; State *v.* Randolph, 22 Mo. 474; State *v.* McElhaney, 20 Mo. App. 584; State *v.* Glaevecke, 33 Tex. 53 [*overruling* State *v.* Cox, 25 Tex. 404].

83. **Form of complaint or declaration** see People *v.* Shaver, 4 Park. Cr. (N. Y.) 45.

Form of scire facias upon a recognizance and judgment see Thrash *v.* State, 16 Tex. App. 271, 272.

84. *Arkansas.*— Cooper *v.* State, 23 Ark. 278; Gray *v.* State, 5 Ark. 265; Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313.

Illinois.— Farris *v.* People, 58 Ill. 26; Conner *v.* People, 20 Ill. 381; Wood *v.* People, 16 Ill. 171; Bacon *v.* People, 14 Ill. 312.

Indiana.— Lang *v.* State, 3 Blackf. 344; Andress *v.* State, 3 Blackf. 108.

Tennessee.— State *v.* Johnson, 6 Baxt. 198.

Texas.— Brown *v.* State, 43 Tex. 349; State *v.* Cox, 25 Tex. 404.

See 42 Cent. Dig. tit. "Recognizances," § 41.

Facts which must be answered.— Scire facias must state the facts of which the parties are required to take notice and which they are called upon to answer with reasonable certainty. State *v.* Cox, 25 Tex. 404.

Sufficient as complaint or petition and citation.— Scire facias should state enough to answer the purposes of a petition and writ of citation also. Brown *v.* State, 43 Tex. 349; Cowen *v.* State, 3 Tex. App. 380. So where scire facias contained all the allegations of a good complaint it was sufficient it being immaterial what it was called. Patterson *v.* State, 10 Ind. 296.

If a declaration in debt sets out the facts in a manner proper for a scire facias it will be bad on demurrer. State *v.* Folsom, 26 Me. 209.

85. Gooden *v.* State, 35 Ala. 430; State *v.* Williams, 17 Ark. 371; Cannon *v.* State, 17 Ark. 365.

86. Bacon *v.* People, 14 Ill. 312; Griffin *v.* State, 48 Ind. 258.

The order of the court directing the prosecution of the recognizance need not be averred. People *v.* Blankman, 17 Wend. (N. Y.) 252.

Where the allegations are full, specific, and definite the petition is good. Swerdsfeger *v.* State, 21 Kan. 475. And see State *v.* Cobb, 71 Me. 198; State *v.* Littlepage, 30 Mo. 322.

87. Thomas *v.* People, 13 Ill. 696; Griffin *v.* State, 48 Ind. 258; Andress *v.* State, 3

it;[88] but the special facts showing that the officer had authority in the particular case need not be alleged.[89] A scire facias must show that the recognizance was acknowledged,[90] and approved by the officer taking it,[91] and was returned and filed or made a record in the proper court when return is required.[92] These facts, however, need not appear by direct averment, but it is sufficient if they appear by recital or otherwise.[93] The condition of the recognizance must be set forth and

Blackf. (Ind.) 108; McMahan *v.* Knox, 4 Bibb (Ky.) 450.

Prout patet per recordum.— In debt on recognizance all those matters of record on which plaintiff relies should be referred to in the declaration with a *prout patet per recordum.* State *v.* Davis, 43 N. H. 600.

88. *Arkansas.*— Hogan *v.* State, 23 Ark. 636; State *v.* Sartain, 23 Ark. 541; Darby *v.* State, 21 Ark. 523; Gray *v.* State, 5 Ark. 265; Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313.

Illinois.— Noble *v.* People, 9 Ill. 433.

Indiana.— Friedline *v.* State, 93 Ind. 366; Hannum *v.* State, 38 Ind. 32; Myers *v.* State, 19 Ind. 127; Blackman *v.* State, 12 Ind. 556; Andress *v.* State, 3 Blackf. 108.

Kentucky.— Chinn *v.* Com., 5 J. J. Marsh. 29; Madison *v.* Com., 2 A. K. Marsh. 131.

Maine.— Dodge *v.* Kellock, 13 Me. 136; Libby *v.* Main, 11 Me. 344; State *v.* Smith, 2 Me. 62.

Massachusetts.— Harrington *v.* Brown, 7 Pick. 232; Bridge *v.* Ford, 4 Mass. 641. But see Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46.

Montana.—Territory *v.* Hildebrand, 2 Mont. 426.

New Hampshire.— State *v.* Kinne, 39 N. H. 129.

New York.— People *v.* Young, 7 Hill 44.

Tennessee.— State *v.* Arledge, 2 Sneed 229.

See 42 Cent. Dig. tit. "Recognizances," § 44.

Till the contrary is shown it will be presumed that the officer had jurisdiction. Patterson *v.* State, 12 Ind. 86; State *v.* Inman, 7 Blackf. (Ind.) 225.

That the recognizance was taken by order of court should be shown. Reese *v.* People, 11 Ill. App. 346.

89. Friedline *v.* State, 93 Ind. 366; People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; People *v.* Millis, 5 Barb. (N. Y.) 511; People *v.* Kane, 4 Den. (N. Y.) 530; Archer *v.* Com., 10 Gratt. (Va.) 627; U. S. *v.* George, 25 Fed. Cas. No. 15,199, 3 Dill. 431.

That the recognizance was entered into in open court need not be alleged in a citation to sureties. Pleasants *v.* State, 29 Tex. App. 214, 15 S. W. 43.

90. Lang *v.* State, 3 Blackf. (Ind.) 344.

91. Bacon *v.* People, 14 Ill. 312; McFarlan *v.* People, 13 Ill. 9, holding such a writ sufficient, although the recognizance did not show on its face that it had been taken and approved by the justices.

92. *Arkansas.*— Gray *v.* State, 5 Ark. 265; Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313.

California.— Mendocino County *v.* Lamar, 30 Cal. 627.

Illinois.— Conner *v.* People, 20 Ill. 381; Shadley *v.* People, 17 Ill. 252; Bacon *v.* People, 14 Ill. 312; Noble *v.* People, 9 Ill. 433.

Indiana.— Davis *v.* State, 5 Blackf. 374; Lang *v.* State, 3 Blackf. 344.

Kentucky.— Madison *v.* Com., 2 A. K. Marsh. 131.

Maine.— Libby *v.* Main, 11 Me. 344; Dodge *v.* Kellock, 10 Me. 266; State *v.* Smith, 2 Me. 62.

Massachusetts.— Patterson *v.* Goldsmith, 9 Gray 258; Bowler *v.* Palmer, 4 Gray 445 note; Tarbell *v.* Gray, 4 Gray 444; Bridge *v.* Ford, 7 Mass. 209; Bridge *v.* Ford, 4 Mass. 641.

Minnesota.— State *v.* Grant, 10 Minn. 39.

New Hampshire.— State *v.* Davis, 43 N. H. 600.

New Jersey.— Slape *v.* State, 44 N. J. L. 264.

New York.— People *v.* Huggins, 10 Wend. 464; People *v.* Van Eps, 4 Wend. 387; People *v.* Shaver, 4 Park Cr. 45.

Ohio.— Sargeant *v.* State, 16 Ohio 267.

United States.— U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

See 42 Cent. Dig. tit. "Recognizances," § 46.

The word "recognizance" does not of itself import a record. Reg. *v.* McKay, 28 N. Brunsw. 564, 571; Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239.

The enrolment must be averred or the opposite party is not bound to treat it as a record, but may reply *nil debet.* Reg. *v.* McKay, 28 N. Brunsw. 564, 571; Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239.

Alleging that it was filed with the clerk and became a record is sufficient, although the recognizance set out did not show on its face that it had been certified by the justices in to the circuit court. McFarland *v.* People, 13 Ill. 9.

Declaration on recognizance must count on it as a record of the court in which by law it is to be certified. Connor *v.* People, 4 Colo. 134. And see Sargeant *v.* State, 16 Ohio 267.

Scire facias on recognizance taken in the superior court need not allege that such court has possession of the record. State *v.* Howley, 73 Me. 552.

93. See cases cited *infra*, this note.

Authority.— McFarlan *v.* People, 13 Ill. 9; State *v.* Hiney, 24 Ind. 381; Saxton *v.* State, 8 Blackf. (Ind.) 200; Com. *v.* Miller, 4 B. Mon. (Ky.) 418; Com. *v.* Merriam, 7 Allen (Mass.) 356; Com. *v.* Dunbar, 15 Gray (Mass.) 209.

Acknowledgment and approval.— Lawrence *v.* People, 17 Ill. 172; Shelby County *v.* Simmonds, 33 Iowa 345; State *v.* Cherry, Meigs (Tenn.) 232.

breach alleged,[94] and that the principal was called and defaulted,[95] and that forfeiture was declared and entered of record.[96] The recognizance should be set out in terms or according to its legal effect,[97] and being a written instrument a copy is sometimes required to be filed with the complaint,[98] but a copy of the certificate or judgment of forfeiture need not be set out.[99] Defects in a recognizance may be suggested and remedied in scire facias.[1] Immaterial errors or defects in a scire

Filing, return, and record.— People *v.* Myers, 1 Ida. 355; Barkley *v.* State, 15 Kan. 99; Com. *v.* Miller, 4 B. Mon. (Ky.) 418; Starr *v.* Com., 7 Dana (Ky.) 243; State *v.* Baker, 50 Me. 45; Com. *v.* Dunbar, 15 Gray (Mass.) 209; People *v.* Huggins, 10 Wend. (N. Y.) 464; Gedney *v.* Com., 14 Gratt. (Va.) 318.

As against a demurrer where the action on the recognizance is brought in a superior court it will be presumed that that recognizance was properly certified to such court. State *v.* Edgerton, 12 R. I. 104.

No repugnancy exists between averments that the recognizance was filed in the clerk's office and by him recorded, and that it was afterward filed in open court and again recorded. Paine *v.* State, 7 Blackf. (Ind.) 206.

The recital of the recognizance which purports to be taken by a justice of the county and the implied averment of its transmission in the *prout patet per recordum* is sufficient. Gedney *v.* Com., 14 Gratt. (Va.) 318. See also People *v.* Huggins, 10 Wend. (N. Y.) 464.

Where the caption of the recognizance set out in the scire facias shows that it was taken in the proper county it was a sufficient allegation of such fact. Wellman *v.* State, 5 Blackf. (Ind.) 343.

94. Bridge *v.* Ford, 4 Mass. 641; State *v.* Davis, 43 N. H. 600; Philbrick *v.* Buxton, 43 N. H. 462.

The breach should be set out with a *prout patet per recordum*. State *v.* Davis, 43 N. H. 600; Philbrick *v.* Buxton, 43 N. H. 462. And see Kirkner *v.* Com., 6 Watts & S. (Pa.) 557.

Assigning a breach so narrow as not to exclude the possibility that the condition was performed makes the declaration defective. State *v.* Johnson, 13 Ohio 176.

Failure to state that the recognizors are bound in the sum mentioned in the recognizance renders the scire facias fatally defective. Darby *v.* State, 21 Ark. 523.

It is unnecessary to allege that the penalty had not been paid.— State *v.* Grant, 10 Minn. 39; Snowden *v.* State, 8 Mo. 483. But see Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313.

Recognizances of appeal are like bail-bonds, replevin bonds, and others which do not require assignment of breaches. Cockrill *v.* Owen, 10 Mo. 287.

95. *Indiana.*— Urton *v.* State, 37 Ind. 339; Lingley *v.* State, 1 Blackf. 559.

New Hampshire.— State *v.* Chesley, 4 N. H. 366.

New Mexico.— Brooks *v.* United States, 6 N. M. 72, 27 Pac. 311.

New York.— People *v.* Blankman, 17 Wend. 252; People *v.* Van Eps, 4 Wend. 387.

Tennessee.— White *v.* State, 5 Yerg. 183; State *v.* Grigsby, 3 Yerg. 280.

See 42 Cent. Dig. tit. "Recognizances," § 41.

Averment that principal was called and did not appear is in substance equivalent to averment that their default was entered of record. People *v.* Huggins, 10 Wend. (N. Y.) 464.

Allegation that a judgment of forfeiture was entered is sufficient without alleging that the surety was called. Friedline *v.* State, 93 Ind. 366.

96. Conner *v.* People, 20 Ill. 381; Kennedy *v.* People, 15 Ill. 418; Thomas *v.* People, 13 Ill. 696; Alley *v.* People, 6 Ill. 109; State *v.* Thistlethwaite, 83 Ind. 317; Hannum *v.* State, 38 Ind. 32; State *v.* Davis, 43 N. H. 600. But see Rheinhart *v.* State, 14 Kan. 318.

Allegation that defendant made default which appears of record sufficiently shows a judgment of forfeiture. State *v.* Grant, 10 Minn. 39; State *v.* Edgerton, 12 R. I. 104. And see State *v.* Wheeler, 67 N. H. 511, 41 Atl. 173.

Date of term at which defendant was called and forfeiture declared need not be alleged. State *v.* Davis, 43 N. H. 600.

That recognizance and default were certified to the circuit court must be averred. People *v.* Green, 58 Ill. 236; Slape *v.* State, 44 N. J. L. 264.

Where the forfeiture was declared in a court of superior jurisdiction and it is alleged that defendant was called and did not appear it will be presumed that a judgment of forfeiture was entered. State *v.* Edgerton, 12 R. I. 104.

97. Lawrence *v.* People, 17 Ill. 172; Bolles *v.* Haines, 7 Blackf. (Ind.) 398; State *v.* Johnson, 6 Baxt. (Tenn.) 198; Cowen *v.* State, 3 Tex. App. 380.

Exact copy.— If plaintiff attempt to set out a recognizance *in haec verba* he is bound to set out an exact copy. Burton *v.* State, 6 Blackf. (Ind.) 339. And see Tucker *v.* State, 55 Miss. 452.

98. Swinney *v.* State, 16 Ind. 309; Kiser *v.* State, 13 Ind. 80; Votaw *v.* State, 12 Ind. 497.

Where the complaint sets out the recognizance in haec verba no copy need be attached. Campbell *v.* State, 18 Ind. 375, 81 Am. Dec. 363.

99. Fowler *v.* State, 91 Ind. 507; Gachenheimer *v.* State, 28 Ind. 91; Votaw *v.* State, 12 Ind. 497; Rheinhart *v.* State, 14 Kan. 318.

1. See cases cited *infra*, this note.

facias will be disregarded.[2] The prayer of the scire facias should require defendants to show cause why final judgment should not be rendered or execution awarded against them;[3] but an erroneous prayer will not render the scire facias defective.[4]

2. Answer or Plea.[5] The averments of a scire facias may be put in issue by a plea, or answer,[6] which must be a written answer,[7] or by affidavit of defense.[8] The plea of *nul tiel record* is always a proper plea in debt or scire facias on recognizance.[9] A plea which contradicts the record is bad;[10] so is a plea *non est*

Mistake in name of surety.— Lytle *v.* People, 47 Ill. 422; Garrison *v.* People, 21 Ill. 535.

Sufficient allegation in this respect see State *v.* Hiney, 24 Ind. 381.

Omissions in recognizance.— People *v.* Baughman, 18 Ill. 152. No suggestion of omission of name in body of recognizance is necessary where it appears that the party signed and sealed it with the others. Burton *v.* State, 6 Blackf. (Ind.) 339.

2. Kearns *v.* State, 3 Blackf. (Ind.) 334; State *v.* Culp, 39 Mo. 530; Snowden *v.* State, 8 Mo. 483; State *v.* Glaevecke, 33 Tex. 53; Davidson *v.* State, 20 Tex. 649; Gedney *v.* Com., 14 Gratt. (Va.) 318.

3. Davidson *v.* State, 20 Tex. 649. And see Unterrein *v.* McLane, 10 Mo. 343; Barton *v.* Vanzant, 1 Mo. 192.

Sufficient notice.— Scire facias requiring defendants to appear and show cause why he should not render to the commonwealth the amount of the recognizance is a sufficient notice of the object of the appearance. Com. *v.* Miller, 4 B. Mon. (Ky.) 418.

4. Unterrein *v.* McLane, 10 Mo. 343; Snowden *v.* State, 8 Mo. 483; Barton *v.* Vanzant, 1 Mo. 192; State *v.* Dickenson, 7 N. C. 10. But see Blackwell *v.* State, 3 Ark. 320; Hicks *v.* State, 3 Ark. 313.

5. Form of answer see People *v.* Shaver, 4 Park. Cr. (N. Y.) 45, 48.

6. Wood *v.* People, 16 Ill. 171; Patterson *v.* State, 10 Ind. 296.

It is pleading to a record.— State *v.* McElhaney, 20 Mo. App. 584.

7. Brown *v.* Com., 4 Metc. (Ky.) 221.

8. Harres *v.* Com., 35 Pa. St. 416; Slocum *v.* Slocum, 8 Watts (Pa.) 367; Com. *v.* Hart, 5 Pa. Dist. 109, 17 Pa. Co. Ct. 148; Com. *v.* Boult, 1 Browne (Pa.) 237; Com. *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 263; Knecht *v.* Mortimore, 1 Leg. Rec. (Pa.) 159; Beck *v.* Courtney, 13 Wkly. Notes Cas. (Pa.) 302; Griffith *v.* Salter, 3 Wkly. Notes Cas. (Pa.) 433; Crine *v.* Wallace, 1 Wkly. Notes Cas. (Pa.) 293; Com. *v.* Becker, 1 Woodw. (Pa.) 297. And see Magie *v.* Com., (Pa. 1886) 4 Atl. 738; Boring *v.* Com., (Pa. 1886) 4 Atl. 738. *Contra*, State *v.* Ahrens, 12 Rich. (S. C.) 493.

Form of affidavit of defense to scire facias upon recognizance see Allen *v.* Kellam, 94 Pa St. 253.

By pleading his freehold in stay of execution defendant waived irregularity of entry of judgment for want of affidavit of defense. Harres *v.* Com., 35 Pa. St. 416.

9. Mooney *v.* People, 81 Ill. 134; State *v.* Crippen, 1 Ohio St. 399.

It is the only plea by which a recognizance as an existing fact can be put in issue. State *v.* Kruise, 32 N. J. L. 313.

Defects in a recognizance can only be taken advantage of by pleas *nul tiel record*. State *v.* Rhonimus, 47 Miss. 314.

Denial of forfeiture of record must be by plea *nul tiel record*. Wilson *v.* State, 6 Blackf. (Ind.) 212.

Nul tiel recognizance is not a proper plea in scire facias on recognizance. Mooney *v.* People, 81 Ill. 134.

Objection that the scire facias is premature cannot be taken advantage of by plea *nul tiel record* but must be specially pleaded. Cooper *v.* Gray, 10 Watts (Pa.) 440.

Where a party denies the verity of the record of which oyer is given he should plead *nul tiel record*. Wood *v.* Com., 4 Rand. (Va.) 329.

When variance is sought to be shown the proper plea is *nul tiel record*. Farris *v.* People, 58 Ill. 26; Slaten *v.* People, 21 Ill. 28; State *v.* Furguson, 50 Mo. 470; Green *v.* Ovington, 16 Johns. (N. Y.) 55. See Wood *v.* Com., 4 Rand. (Va.) 329. And see Cooper *v.* Gray, 10 Watts (Pa.) 440, that a material variance between the original suit and the scire facias must be specially pleaded to be available.

Averring that there is no such bond or judgment does not make a plea *nul tiel record* a double plea but simply attacks two defects in the same record. Pounds *v.* State, 60 Miss. 925.

Additional pleas setting up matters admissible under the plea of *nul tiel record* are demurrable. Bradley *v.* People, 21 Ill. App. 78.

10. *Illinois.*— Welborn *v.* People, 76 Ill. 516.

New York.— Green *v.* Ovington, 16 Johns. 55.

Ohio.— State *v.* Daily, 14 Ohio 91.

Pennsylvania.— Furst *v.* Ayres, 2 Wkly. Notes Cas. 722; Warner *v.* Smith, 2 Wkly. Notes Cas. 107.

Vermont.— Middletown Treasurer *v.* Ames, 7 Vt. 166.

See 42 Cent. Dig. tit. "Recognizances," § 49.

A plea offering to put in issue the truth of the record and not merely matter outside thereof is bad. Com. *v.* Kanenheimer, 25 Leg. Int. (Pa.) 124.

A plea that the recognizance was obtained by fraud is bad. State *v.* Daily, 14 Ohio 91; Furst *v.* Ayres, 2 Wkly. Notes Cas. (Pa.) 722; Middletown Treasurer *v.* Ames, 7 Vt. 166.

factum,[11] *nil debet,*[12] or that he did not make or execute the recognizance.[13] Notice of special matter cannot be received under a plea of *nul tiel record.*[14] Pleas must negative all intendments.[15] A plea which neither denies nor confesses and avoids any material fact averred in the scire facias is technically bad.[16] The plea or answer should state all the facts necessary to show that final judgment should not be entered.[17] Under statutes requiring execution of written instruments to be denied under oath the execution of a recognizance is admitted by failure to do so.[18] A default admits the truth of the facts alleged in the scire facias.[19]

3. **Replication.** The replication must respond to the plea.[20]

4. **Demurrer.** A demurrer lies to scire facias on a recognizance,[21] and defendant may demur and answer at the same time.[22] Variance may be taken advantage of by demurrer,[23] so may misjoinder of parties defendant,[24] but not non-joinder.[25] It is unsettled whether the sufficiency of the recognizance to support the writ can be raised by demurrer or not.[26] A demurrer being considered as taken to what

Special plea in bar that defendants did not acknowledge the recognizance is sufficient. State *v.* Daily, 14 Ohio 91.

11. Johnston *v.* People, 31 Ill. 469; Kuhle *v.* People, 65 Ill. App. 378; Barkley *v.* State, Meigs (Tenn.) 93. And see Pugh *v.* State, 2 Head (Tenn.) 227.

12. *Illinois.*— Peacock *v.* People, 83 Ill. 331; People *v.* Watkins, 19 Ill. 117.

New York.— White *v.* Converse, 20 Wend. 266; Niblo *v.* Clark, 3 Wend. 24; Bullis *v.* Giddens, 8 Johns. 82.

Pennsylvania.—Withers *v.* Livezey, 1 Watts & S. 433.

Rhode Island.— State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.

Canada.— Cockrane *v.* Eyre, 6 U. C. Q. B. 289.

See 42 Cent. Dig. tit. "Recognizances," § 49.

2 N. Y. Rev. St. p. 352, § 10, authorizing notices of matter intended to be proven on the trial to be given with the plea of *nil debet* in certain cases does not change the rule that a plea of *nil debet* is not good to a declaration of debt on a recognizance. White *v.* Converse, 20 Wend. (N. Y.) 266.

Where, however, enrolment has not been averred the opposite party is not bound to treat the recognizance as of record, and may reply *nil debet.* Reg. *v.* McKay, 28 N. Brunsw. 564, 571; Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239.

13. Peacock *v.* People, 83 Ill. 331; O'Brien *v.* People, 41 Ill. 456; State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.

14. Card *v.* Sargeant, 15 Vt. 393. And see Hawley *v.* Middlebrook, 28 Conn. 527.

15. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475. And see Powers *v.* State, 4 Ala. 531; Spicer *v.* State, 9 Ga. 49; Matthews *v.* Cook, 13 Wend. (N. Y.) 33; Devine *v.* State, 5 Sneed (Tenn.) 622.

16. Landis *v.* People, 39 Ill. 79.

17. Huggins *v.* People, 39 Ill. 241; People *v.* Watkins, 19 Ill. 117; People *v.* McFarland, 9 Ill. App. 275; Carmody *v.* State, 105 Ind. 546, 5 N. E. 679; Paine *v.* State, 7 Blackf. (Ind.) 206; Lyons *v.* State, 1 Blackf. (Ind.) 309; State *v.* Wellman, 3 Ohio 14; Goode *v.* State, 15 Tex. 124.

Non-joinder of parties defendants must be taken advantage of by plea in abatement. People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338. See also Wilson *v.* State, 6 Blackf. (Ind.) 212.

Remission of forfeited recognizance by governor need not be pleaded in bar. Com. *v.* Winpenny, 2 Pearson (Pa.) 107.

18. State *v.* Carr, 4 Iowa 289; Barkley *v.* State, 15 Kan. 99; Ingram *v.* State, 10 Kan. 630. *Contra,* see Elliott *v.* Green, 10 Mich. 113.

19. Rietzell *v.* People, 72 Ill. 416; Garrison *v.* People, 21 Ill. 535.

20. See Pleading, 31 Cyc. 241 *et seq.*

Replication to plea of former recovery if cause of action was not the same should allege such fact instead of pleading *nul tiel record.* James *v.* State, 7 Blackf. (Ind.) 325. And see Cannon *v.* State, 17 Ark. 365.

21. State *v.* Cox, 25 Tex. 404; Garland *v.* Ellis, 2 Leigh (Va.) 555.

22. People *v.* Meyer, 2 Code Rep. (N. Y.) 49. *Contra,* see State *v.* Mayson, 2 Nott & M. (S. C.) 425, holding that defendant will not be allowed to plead *non est factum* and demur also.

23. State *v.* Craig, 12 Ala. 363 (changing rule announced in Robinson *v.* State, 5 Ala. 706; Chiles *v.* Beal, 3 Ala. 26, in both of which it was held the proper plea for variance between recognizance and writ was *nul tiel record*); State *v.* Williams, 17 Ark. 371; Lockwood *v.* State, 7 Blackf. (Ind.) 417; Chandler *v.* State, 5 Blackf. (Ind.) 471; State *v.* Kinne, 39 N. H. 129; Wood *v.* Com., 4 Rand. (Va.) 329.

Where the condition of the recognizance was not set out in haec verba either in the writ or pleadings variance will not be considered on demurrer. State *v.* Corson, 10 Me. 473.

24. Parrish *v.* State, 14 Md. 238; State Treasurer *v.* Friott, 24 Vt. 134; Garland *v.* Ellis, 2 Leigh (Va.) 555.

25. Wilson *v.* State, 6 Blackf. (Ind.) 212, holding that it must be by plea in abatement, setting up the other party is living. See also People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338.

26. State *v.* Williams, 17 Ark. 371, *quære.* See also cases cited *infra,* this note.

Cannot be raised but must be by plea *nul*

appears in the record reference to it may be had,[27] but it does not go behind the record.[28] Demurrer to plea reaches the scire facias.[29] Answering over after demurrer waives the demurrer.[30]

5. Amendments. The rules as to amendments applicable to pleadings apply to declarations and scire facias on recognizances,[31] and they may be amended to conform to the recognizance,[32] and as to matters of form,[33] in the discretion of the court.[34]

6. Oyer. Where a recognizance is not required to be set out oyer is demandable.[35]

7. Issues, Proof, and Variance. A plea of *nul tiel record* puts in issue only the existence of the record of the recognizance,[36] and this, it has been held, is also put

tiel record. See Ross *v.* State, 6 Blackf. (Ind.) 315; State *v.* Rhominus, 47 Miss. 314; Fields *v.* State, 39 Miss. 509; State *v.* Potts, 60 Mo. 368.

May be raised by demurrer where the recognizance is recited in declaration or writ. Ferry *v.* Burchard, 21 Conn. 597; Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

Objection to the copy of the scire facias served on defendant must be pleaded in abatement and cannot be taken advantage of by exception. Wilson *v.* State, 25 Tex. 169.

Omission of scire facias to suggest defects in recognizance can be taken advantage of if at all by special demurrer, the recognizance having been copied into the scire facias. Ross *v.* State, 6 Blackf. (Ind.) 315.

Where a judgment nisi has been rendered against joint and several recognizors some of whom have regularly executed and acknowledged the recognizance, the question whether the others are bound as recognizors cannot be raised on a joint demurrer to a scire facias against all the parties to the judgment *nisi.* Hall *v.* State, 9 Ala. 827.

27. State *v.* Foster, 2 Iowa 559; State *v.* Lighton, 4 Greene (Iowa) 278; State *v.* Poston, 63 Mo. 521; State *v.* Potts, 60 Mo. 368; State *v.* Randolph, 22 Mo. 474; State *v.* Riley, 34 Mo. App. 426; State *v.* McElhaney, 20 Mo. App. 584. *Contra,* State *v.* Johnson, 6 Baxt. (Tenn.) 198; State *v.* Arledge, 2 Sneed (Tenn.) 229.

Demurrer only raises a question as to the sufficiency of matters appearing on the record or necessarily implied by law. Norfolk *v.* People, 43 Ill. 9.

Want of a record showing that the recognizance was on file may be raised by general demurrer. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

If enough appears from the records and files of the court to entitle the state to execution any errors or omissions in the writ will be disregarded on demurrer thereto. State *v.* Heed, 62 Mo. 559.

On the hearing of a demurrer to a scire facias the recognizance is not before the court to be quashed but for comparison with the scire facias. Com. *v.* Miller, 4 B. Mon. (Ky.) 418.

28. State *v.* Poston, 63 Mo. 521.

29. Wellman *v.* State, 5 Blackf. (Ind.) 343; Archer *v.* Com., 10 Gratt. (Va.) 327. *Contra,* Compton *v.* People, 86 Ill. 176.

30. State *v.* Morgan, 124 Mo. 467, 28 S. W. 17. See *infra,* IV, B, 8.

31. Peacock *v.* People, 83 Ill. 331; Curry *v.* State, 39 Miss. 511; State *v.* Lambert, 44 W. Va. 308, 28 S. E. 930; U. S. *v.* George, 25 Fed. Cas. No. 15,199, 3 Dill. 431.

32. Tucker *v.* State, 55 Miss. 452; Wampler *v.* Shissler, 1 Watts & S. (Pa.) 365, even after judgment.

Such amendment is permissible where the record has been amended pending the action. Morrill *v.* Norton, 116 Mass. 487; Com. *v.* Cheney, 108 Mass. 33.

33. Kirkner *v.* Com., 6 Watts & S. (Pa.) 557; State *v.* Glaevecke, 33 Tex. 53.

34. Com. *v.* Cheney, 108 Mass. 33; U. S. *v.* George, 25 Fed. Cas. No. 15,199, 3 Dill. 431.

Failure to aver that the recognizance is on file is amendable. U. S. *v.* Atwill, 24 Fed. Cas. No. 14,475.

Failure to suggest defect in recognizance is amendable. Patterson *v.* State, 10 Ind. 296.

35. State *v.* Craig, 12 Ala. 363; Ellison *v.* State, 8 Ala. 273. *Contra,* see Slaten *v.* People, 21 Ill. 28.

36. Hawley *v.* Middlebrook, 28 Conn. 527; Compton *v.* People, 86 Ill. 176; Petty *v.* People, 19 Ill. App. 317; Cooper *v.* Gray, 10 Watts (Pa.) 440; State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 920.

Plea of nul tiel record puts in issue all the material allegations of the scire facias including the making, certifying, and filing of the recognizance. Petty *v.* People, 19 Ill. App. 317.

Plea nul tiel record refers to the time of the plea pleaded and a subsequent amendment of the record does not affect the issue. Barnes *v.* Lee, 2 Fed. Cas. No. 1,017, 1 Cranch C. C. 430.

Raising variance by plea nul tiel record see *supra,* V, B, 2.

Previous proceedings or inducement is not put in issue by plea of *nul tiel record.* Cooper *v.* Gray, 10 Watts (Pa.) 440. Defendant cannot show under a plea of *nul tiel record* that the court which took the recognizance had no jurisdiction, that defendant was not the cognizor, or that he did not acknowledge himself to be indebted as stated. State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 930.

Premature issuance of scire facias cannot be raised by plea of *nul tiel record* but must be specially pleaded. Cooper *v.* Gray, 10 Watts (Pa.) 440.

General denial puts in issue the default. Ingram *v.* State, 10 Kan. 630.

in issue by a plea *non est factum*,[37] or *nil debet*, when these pleas are allowed.[38] Special facts amounting to a defense must be specially pleaded in order to be proved.[39] The proper proof on a plea of *nul tiel record* is an inspection of the original recognizance.[40] Variance between the recognizance and scire facias and between the judgment *nisi* and scire facias as to matters affecting the substance of the obligation are material and fatal.[41] Variance, however, as to immaterial matters will not be fatal.[42]

8. Waiver of Defects. Pleading over waives previous defects in pleadings or proceedings.[43]

C. Evidence[44] **— 1. Admissibility — a. In General.** Proof in an action on a recognizance must be by record,[45] and hence the recognizance,[46] certificate to

37. State *v.* Mayson, 2 Nott & M. (S. C.) 425.

38. Swank *v.* State, 3 Ohio St. 429.

39. *Delaware.*— Reading *v.* State, 1 Harr. 190.

Kansas.— Madden *v.* State, 35 Kan. 146, 10 Pac. 469.

Kentucky.— Brown *v.* Com., 4 Metc. 221.

New York.— Mechanics' Bank *v.* Hazard, 13 Johns. 353.

Rhode Island.— State *v.* Sutcliffe, 16 R. I. 520, 17 Atl. 930.

See 42 Cent. Dig. tit. "Recognizances," § 55.

Under a plea of payment, evidence of payment of a less sum than the amount of the judgment is inadmissible. Mechanics' Bank *v.* Hazard, 13 Johns. (N. Y.) 353. Nor could payment of a less sum be pleaded, although accepted in full satisfaction. Mechanics' Bank *v.* Hazard, *supra*. But matter amounting to a discharge or legal payment of a recognizance cannot be given in evidence under the plea of payment. Reading *v.* State, 1 Harr. (Del.) 190. Defendant cannot, under the plea of payment, take advantage of any want of form or substance in the recognizance given in evidence to support the writ which recited one in due and proper form. Abbot *v.* Lyon, 4 Watts & S. (Pa.) 38.

But matters amounting to a general issue cannot be specially pleaded. Reading *v.* State, 1 Harr. (Del.) 190.

40. Bell *v.* Murphy, 6 Watts & S. (Pa.) 50; Blood *v.* Morrill, 17 Vt. 598.

41. Dangerfield *v.* State, 4 How. (Miss.) 658; Wood *v.* Com., 4 Rand. (Va.) 329; Barnes *v.* Lee, 2 Fed. Cas. No. 1,017, 1 Cranch C. C. 430.

Material variances: As to number of justices before whom it was taken. State *v.* Williams, 17 Ark. 371. As to number of sureties. Farris *v.* People, 58 Ill. 26. As to condition. Harrington *v.* Brown, 7 Pick. (Mass.) 232. As to term of court at which appearance is to be made and between amount of judgment *nisi* and that stated in scire facias. Ditto *v.* State, 30 Miss. 126. As to date of execution. Bailey *v.* State, (Tex. Civ. App. 1893) 22 S. W. 40. As to character of instrument. Garrison *v.* State, 21 Tex. App. 342, 17 S. W. 351. As to county in which recognizance was taken. Wood *v.* Com., 4 Rand. (Va.) 329. As to description of crime. Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422.

42. See cases cited *infra*, this note.

Immaterial variances: Verbal variance where substance is the same. Cannon *v.* State, 17 Ark. 365; Waldo *v.* Spencer, 4 Conn. 71; Wood *v.* People, 16 Ill. 171; State *v.* Furguson, 50 Mo. 470; State *v.* Randolph, 22 Mo. 474; State *v.* McElhaney, 20 Mo. App. 584; State *v.* Miner, 14 R. I. 303. As to names of cognizors. Stokes *v.* People, 63 Ill. 489; Lytle *v.* People, 47 Ill. 422; O'Brien *v.* People, 41 Ill. 456; Allen *v.* People, 29 Ill. App. 555; Petty *v.* People, 19 Ill. App. 317; Saxton *v.* State, 8 Blackf. (Ind.) 200; James *v.* State, 7 Blackf. (Ind.) 325; Barkley *v.* State, 15 Kan. 99; Grigsby *v.* State, 6 Yerg. (Tenn.) 354. But see Graves *v.* People, 11 Ill. 542. As to number of cognizors. Com. *v.* McNeill, 19 Pick. (Mass.) 127. As to where it was taken. Paine *v.* State, 7 Blackf. (Ind.) 206. As to amount of judgment *nisi*. Tatem *v.* Potts, 5 Blackf. (Ind.) 534; Ditto *v.* State, 30 Miss. 126. *Contra*, Bibbins *v.* Noxon, 4 Wend. (N. Y.) 207.

Where a scire facias attempts to set out the recognizance an immaterial variance is fatal. Burton *v.* State, 6 Blackf. (Ind.) 339.

43. Warren *v.* State, 19 Ark. 214, 68 Am. Dec. 214; People *v.* Dennis, 4 Mich. 609, 69 Am. Dec. 338; McMicken *v.* Com., 58 Pa. St. 213; Kirkner *v.* Com., 6 Watts & S. (Pa.) 557; Stewart *v.* Moody, 4 Watts (Pa.) 169; Barton *v.* Keith, 2 Hill (S. C.) 537. See also State *v.* Morgan, 124 Mo. 467, 28 S. W. 17.

Failure of declaration to show authority to take recognizance is waived by pleading *nul tiel record*. Harrington *v.* Brown, 7 Pick. (Mass.) 232.

Objection to authority of a deputy sheriff to make a return is waived by submitting to judgment *nil dicit*. Patterson *v.* State, 10 Ind. 296.

Objection to writ or return is waived by filing plea. Petty *v.* People, 19 Ill. App. 317; Lewis *v.* People, 18 Ill. App. 76.

Variance is waived if not objected when recognizance is introduced in evidence. Shreeve *v.* State, 11 Ala. 676; Welborn *v.* People, 76 Ill. 516; Saffold *v.* State, 60 Miss. 928.

44. Evidence generally see Evidence, 16 Cyc. 296 *et seq.*, 465 *et seq.*, 567 *et seq.*

45. State *v.* Gorley, 2 Iowa 52; Longley *v.* Vose, 27 Me. 179.

46. Adams *v.* State, 42 Ind. 212; Votaw *v.* State, 12 Ind. 497.

The short minutes of the recognizance are

recognizance,[47] record of justice,[48] and record of forfeiture,[49] are admissible, and parol evidence of filing is admissible.[50] Proceedings against principal after forfeiture,[51] and judgment against principal showing breach [52] are inadmissible against surety.

b. To Contradict Record. The record of taking a recognizance [53] and of its forfeiture [54] cannot be impeached by extrinsic parol evidence, nor is such evidence admissible to vary the terms of the recognizance,[55] nor can material parts be supplied by parol.[56]

2. Presumptions and Burden of Proof. A recognizance being a matter of record every reasonable presumption will be resorted to for the purpose of upholding it,[57]

admissible where they show the amount and condition and that the party was bound. Com. *v.* Emery, 2 Binn. (Pa.) 431.

47. Gregory *v.* Sherman, 44 Conn. 466.

48. Gay *v.* State, 7 Kan. 394. And see Adams *v.* State, 48 Ind. 212.

Amendment to record by lower court is admissible. Bent *v.* Stone, 184 Mass. 92, 68 N. E. 46.

49. State *v.* Lighton, 4 Greene (Iowa) 278.

Whether parol evidence of magistrate is admissible to show default, *quære*. See Dillingham *v.* U. S., 7 Fed. Cas. No. 3,913, 2 Wash. 422.

50. Com. *v.* Merriam, 7 Allen (Mass.) 356.

51. Com. *v.* Oblender, 135 Pa. St. 530, 19 Atl. 1057.

52. State *v.* Wheeler, 67 N. H. 511, 41 Atl. 173; Respublica *v.* Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

53. *Alabama.*— Whitted *v.* Governor, 6 Port. 335.

Illinois.— Welborn *v.* People, 76 Ill. 516; Bulson *v.* People, 31 Ill. 409; Kuhle *v.* People, 65 Ill. App. 378; Petty *v.* People, 19 Ill. App. 317.

Indiana.— Doe *v.* Harter, 1 Ind. 427.

Maine.— Longley *v.* Vose, 27 Me. 179.

New Hampshire.— Philbrick *v.* Buxton, 43 N. H. 462.

New York.— Gildersleeve *v.* People, 10 Barb. 35; People *v.* Kane, 4 Den. 530.

Pennsylvania.— McMicken *v.* Com., 58 Pa. St. 213; Clark *v.* McComman, 7 Watts & S. 469; Com. *v.* Gray, 26 Pa. Super. Ct. 110.

Vermont.— Ewen *v.* State, 55 Vt. 47; Hinman *v.* Swift, 18 Vt. 315; Beech *v.* Rich, 13 Vt. 595; Walker *v.* Briggs, 11 Vt. 84.

See 42 Cent. Dig. tit. "Recognizances," § 57.

Contra.— Gregory *v.* Sherman, 44 Conn. 466; Elliott *v.* Green, 10 Mich. 113.

If the agreed statement of facts shows that the recognizance was not properly taken the record ceases to be conclusive evidence of its validity. Com. *v.* Greene, 13 Allen (Mass.) 251.

In extreme cases, however, it seems that parol evidence may be admitted, as for instance to show forgery, want of genuineness, or want of identity of defendant. Elliott *v.* Green, 10 Mich. 113. See also Lang *v.* People, 14 Mich. 439, 443; Patton *v.* Miller, 13 Serg. & R. (Pa.) 254.

54. *Connecticut.*—Douglass *v.* Wickwire, 19 Conn. 489.

Indiana.— Friedline *v.* State, 93 Ind. 366.

Iowa.— State *v.* Clemons, 9 Iowa 534; State *v.* Gorley, 2 Iowa 52.

Maine.— State *v.* Gilmore, 81 Me. 405, 17 Atl. 316.

Massachusetts.— Com. *v.* Slocum, 14 Gray 395.

North Carolina.— State *v.* Moody, 69 N. C. 529.

Ohio.— Calvin *v.* State, 12 Ohio St. 60.

Pennsylvania.— Com. *v.* Basendorf, 153 Pa. St. 459, 25 Atl. 779; Pierson *v.* Com., 3 Grant 314; Shriver *v.* Com., 2 Rawle 206; Com. *v.* Burkholder, 3 Pa. Dist. 563.

See 42 Cent. Dig. tit. "Recognizances," § 57.

55. Murphy *v.* Merry, 8 Blackf. (Ind.) 295; State *v.* Daily, 14 Ohio 91; Withers *v.* Livezey, 1 Watts & S. (Pa.) 433.

56. *Georgia.*— Nicholson *v.* State, 2 Ga. 363.

Maine.— Longley *v.* Vose, 27 Me. 179.

Ohio.— State *v.* Crippen, 1 Ohio St. 399.

Texas.— Brite *v.* State, 24 Tex. 219.

Vermont.— State Treasurer *v.* Merrill, 14 Vt. 64.

See 42 Cent. Dig. tit. "Recognizances," § 57.

Failure to specify offense in the recognizance cannot be cured by parol evidence. Nicholson *v.* State, 2 Ga. 363.

Record can only be aided by such intendments as the court can reasonably supply from its judicial knowledge of facts. Brite *v.* State, 24 Tex. 219. And see State Treasurer *v.* Bishop, 39 Vt. 353.

57. *Illinois.*— Shattuck *v.* People, 5 Ill. 477.

Kansas.— Tillson *v.* State, 29 Kan. 452.

Minnesota.— State *v.* Perry, 28 Minn. 455, 10 N. W. 778.

Nebraska.— King *v.* State, 18 Nebr. 375, 25 N. W. 519.

Pennsylvania.— Fox *v.* Com., 81* Pa. St. 511; Bodine *v.* Com., 24 Pa. St. 69.

Vermont.— State Treasurer *v.* Woodward, 7 Vt. 529.

See 42 Cent. Dig. tit. "Recognizances," § 58.

Authority to take in the particular case will be presumed where general authority exists. Parrish *v.* State, 14 Md. 238. And see Carmody *v.* State, 105 Ind. 546, 5 N. E. 679.

That the principal was required to enter into the recognizance will be presumed. Grinestaff *v.* State, 53 Ind. 238; Adams *v.* State, 48 Ind. 212.

and of the fact that the forfeiture was properly taken.[58] The burden of proof in an action on a recognizance rests with defendant,[59] but it has been held that a perfect record must be shown to exist,[60] that the authority of the officer must be shown,[61] and that a valid judgment of forfeiture must be given in evidence.[62]

3. Weight and Sufficiency. The record of the recognizance and forfeiture is sufficient evidence to support a judgment.[63] A note of the substance of the recognizance is sufficient evidence of the recognizance.[64] So an indorsement by the clerk of the return and entry of the recognizance is sufficient evidence of such facts,[65] and the jurisdiction of the justice is shown by his transcript showing that the proceedings were regular.[66] Forfeiture must be shown by the record, evidence *aliunde* is not sufficient.[67]

D. Trial.[68] In actions on recognizances the trial at common law is by the record and by the court and not by the jury.[69] It is only when common-law actions are brought for their collection that they are within the rules prevailing in common-law proceedings, and a jury trial may be demanded.[70] Instructions declaring the legal effect of the recognizance are proper,[71] but not as to the weight of the evidence.[72] Preference is sometimes given to suits on recognizances.[73] A verdict merely finding the issues for plaintiff is sufficient in a proceeding by scire facias,[74] and the court may assess the damages at the time judgment is entered without referring it to the clerk.[75]

58. Friedline *v.* State, 93 Ind. 366.

Strong presumption of the sureties' liability as raised by the recognizance and the record of its forfeiture, but it can be overcome by proof. Belding *v.* State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26.

59. Brown *v.* Colquitt, 73 Ga. 59, 54 Am. Rep. 867; People *v.* Meacham, 74 Ill. 292; State *v.* Carr, 4 Iowa 289.

60. People *v.* Baughman, 18 Ill. 152; State *v.* Gorley, 2 Iowa 52.

Burden rests on plaintiff to explain any alterations in the recognizance. State *v.* Roberts, 37 Kan. 437, 15 Pac. 593. The calling of defendant being denied by plea of *nul tiel record* the burden is on plaintiff to sustain the issue. Brown *v.* People, 24 Ill. App. 72.

61. Gachenheimer *v.* State, 28 Ind. 91; Hawkins *v.* State, 24 Ind. 288.

62. Eubank *v.* People, 50 Ill. 496.

63. Peacock *v.* People, 83 Ill. 331; People *v.* Witt, 9 Ill. 169; State *v.* Dickenson, 7 N. C. 10; Fox *v.* Com., 81* Pa. St. 511. But see Reg. *v.* Sparrow, 12 N. Brunsw. 237.

Recognizance is sufficient evidence that the court required the principal to enter into the recognizance and fixed the amount of it. Grinestaff *v.* State, 53 Ind. 238. In its nature, a recognizance like other records imports absolute authority and is conclusive evidence of the obligation entered into by the cognizor. Philbrick *v.* Buxton, 43 N. H. 462.

64. Seidenstriker *v.* Buffum, 14 Pa. St. 158.

65. Com. *v.* Slocum, 14 Gray (Mass.) 395.

66. Gachenheimer *v.* State, 28 Ind. 91.

67. State *v.* Kinne, 39 N. H. 129.

Entry of forfeiture stands for proof in action on recognizance of all the steps necessary to complete the forfeiture. Fox *v.* Com., 81* Pa. St. 511; Com. *v.* Gray, 26 Pa. Super. Ct. 110.

68. Trial: In general see Trial. In scire facias see Scire Facias.

69. Petty *v.* People, 19 Ill. App. 317; People *v.* Quigg, 59 N. Y. 83; State *v.* Daily, 14 Ohio 91. And see State *v.* Gilbert, 10 La. Ann. 524; Rhoads *v.* Com., 15 Pa. St. 272.

Even an issue upon the existence of the recognizance as well as the forfeiture is not triable by a jury. People *v.* Quigg, 59 N. Y. 83, 91 [*citing* Knapp *v.* Mead, 2 Johns. Cas. (N. Y.) 111; Hoe *v.* Marshal, Cro. Eliz. 131, 78 Eng. Reprint 388; Welby *v.* Canning, Hob. 210, 80 Eng. Reprint 356; 2 Archbold Pr. 873; Bacon Abr. tit. "Trial" [B].

If the issue involved matters of fact, as well as matters of record, it was to the contrary. People *v.* Quigg, 59 N. Y. 83, 91. But it is enough that an action upon a recognizance was not necessarily triable by a jury, although questions of fact might arise in actions thereon properly triable in that form. People *v.* Quigg, 59 N. Y. 83, 91.

70. People *v.* Quigg, 59 N. Y. 83, 91.

Right to jury trial see Juries, 24 Cyc. 135.

In debt on recognizance judgment nil dicit may be entered for the penalty of the recognizance without impaneling a jury to compute the amount. Crump *v.* People, 2 Colo. 316.

71. Shields *v.* Smith, 78 Ind. 425.

72. Spencer *v.* Fish, 43 Mich. 226, 4 N. W. 168, 287, 5 N. W. 95.

73. Respublica *v.* Cobbet, 3 Yeates (Pa.) 93.

74. Mix *v.* People, 29 Ill. 196.

Verdict of default when recorded becomes a matter of record and foundation for judgment. State *v.* Wheeler, 67 N. H. 511, 41 Atl. 173.

Where part of the issues are tried by a jury it was proper for it to find the amount of damages. Bolles *v.* Haines, 7 Blackf. (Ind.) 398.

75. Com. *v.* McAnany, 3 Brewst. (Pa.) 292.

E. Judgment[76] — **1. In General.** Judgment ought not to be rendered so long as any pleas remain undisposed of,[77] but when defendants do not appear or file any plea a judgment by default is authorized.[78] The judgment should recite the judgment *nisi*,[79] and state that plaintiff should have execution according to the force and effect of the recognizance,[80] but informality in entering the judgment will not invalidate it.[81]

2. Joint or Several Judgments.[82] Final judgment must be joint or several according to the liability of the parties,[83] and the same rule determines whether a judgment may properly be rendered against part of the cognizors.[84] On a several or joint and several recognizance judgment may be rendered as to part of defendants, although the others be not served or two *nihils* returned against them.[85]

3. Amount of Recovery and Costs. The recovery on a recognizance is limited to the amount of the penalty,[86] although interest[87] and costs are sometimes allowed.[88] In criminal cases the whole amount of the penalty is recoverable or nothing,[89] but in other cases the recovery is limited to the damages sustained,[90] and

76. **Judgment:** In general see JUDGMENTS, 23 Cyc. 623 *et seq.* In scire facias see SCIRE FACIAS.

77. Mix *v.* People, 26 Ill. 480.

78. Rietzell *v.* People, 72 Ill. 416; Unterrein *v.* McLane, 10 Mo. 343; Slocum *v.* Slocum, 8 Watts (Pa.) 367; Reg. *v.* Cudihey, 5 Nova Scotia 701.

79. Bridges *v.* State, 24 Miss. 153.

80. Passfield *v.* People, 8 Ill. 406; Minor *v.* State, 1 Blackf. (Ind.) 236; Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

81. Minor *v.* State, 1 Blackf. (Ind.) 236; Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128.

One in usual form of judgment with award of execution is not prejudicial. Cassfield *v.* People, 8 Ill. 406. But see Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

82. See *supra*, III, C, 2; IV, A, 3, b.

83. State *v.* Hinson, 4 Ala. 671; Howie *v.* State, 1 Ala. 113; Chumasero *v.* People, 18 Ill. 405.

One judgment and one execution may be rendered against a plurality of recognizors. State *v.* Stout, 11 N. J. L. 124; Gedney *v.* Com., 14 Gratt. (Va.) 318. And see Smith *v.* State, 7 Port. (Ala.) 492, where the judgment described the recognizance, so that the particular sum for which each cognizor was bound and the nature of the obligation was shown, and charged each to the extent of his liability.

Separate judgments cannot be rendered on a joint recognizance and so judgment cannot be rendered against the surety for costs only and against the principal for penalty and costs. People *v.* McFarland, 9 Ill. App. 275.

Where the recogizance is several the execution awarded must be several. Farris *v.* People, 58 Ill. 26; Briggs *v.* People, 13 Ill. App. 172; Madison *v.* Com., 2 A. K. Marsh. (Ky.) 131; Caldwell *v.* Com., 14 Gratt. (Va.) 698.

Where joint action of debt is brought on a several recognizance the judgment must be joint also. Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128; Bruce *v.* Colgan, 2 Litt. (Ky.) 284.

84. See cases cited *infra*, this and note 85.

On joint recognizance judgment must be rendered as to all the joint cognizors. State *v.* Williams, 17 Ark. 371; Burton *v.* State, 6 Blackf. (Ind.) 339; Smith *v.* State, 12 Nebr. 309, 11 N. W. 317; Blalock *v.* State, 35 Tex. 89; Cowen *v.* State, 3 Tex. App. 380. See Ellis *v.* State, 10 Tex. App. 324.

85. *Colorado.*— People *v.* Mellor, 2 Colo. 705; Chase *v.* People, 2 Colo. 528.

Illinois.— Stokes *v.* People, 63 Ill. 489; Wheeler *v.* People, 39 Ill. 430; Mussulman *v.* People, 15 Ill. 51; McFarlan *v.* People, 13 Ill. 9; Passfield *v.* People, 8 Ill. 406; Crisman *v.* People, 8 Ill. 351; Sans *v.* People, 8 Ill. 327 [*overruling* Alley *v.* People, 6 Ill. 109].

Indiana.—Adair *v.* State, 1 Blackf. 200.

Kentucky.— Chinn *v.* Com., 5 J. J. Marsh. 29; Fowler *v.* Com., 4 T. B. Mon. 128; Madison *v.* Com., 2 A. K. Marsh. 131.

Mississippi.— Saffold *v.* State, 60 Miss. 928.

Missouri.— State *v.* Woerner, 33 Mo. 216; State *v.* Peyton, 32 Mo. App. 522.

See 42 Cent. Dig. tit. "Recognizances," § 63.

Although a scire facias is served on all the cognizors judgment may be taken against a part only and the proceeding be allowed to be silently discontinued as to the others. Robinson *v.* State, 5 Ala. 706.

86. State *v.* Hinson, 4 Ala. 671; Unterrein *v.* McLane, 10 Mo. 343; State *v.* Wheeler, 67 N. H. 511, 41 Atl. 173; Donaghy *v.* Gill, 130 Pa. St. 296, 18 Atl. 642, although plaintiff may be entitled to more.

87. See Unterrein *v.* McLane, 10 Mo. 343.

Not allowed see People *v.* Hanaw, 106 Mich. 421, 64 N. W. 328.

Interest begins to run on a recognizance from the time of forfeiture. Swerdsfeger *v.* State, 21 Kan. 475.

88. Cade *v.* Gordon, 88 Ga. 461, 14 S. E. 706.

89. Pate *v.* People, 15 Ill. 221; State *v.* Austin, 4 Humphr. (Tenn.) 213.

90. McMicken *v.* Com., 58 Pa. St. 213; Kidd *v.* Com., 16 Pa. St. 426.

Two judgments on a recognizance, one for the full amount of the penalty in favor of the commonwealth and one for the amount due for the breach in favor of relatrix, will be given the same effect as a judgment for

the amount may be cut down.[91] Costs have been held to be recoverable by defendant if he prevails in scire facias.[92]

4. Setting Aside and Vacating. Courts have power to open and vacate judgments on forfeited recognizances where good ground is shown therefor.[93] A motion in arrest of judgment on scire facias may be made.[94]

F. Execution.[95] Execution must be awarded according to the force, form, and effect of the recognizance.[96] Execution on a judgment against principal and surety is several in its effects on each.[97] Only one execution should be issued at the same time on one judgment.[98] An execution will be void if it misrecite the recognizance.[99] Execution may be issued to another county.[1] On a motion to quash an execution questions of irregularities in taking the forfeiture cannot be tried.[2] Executions may issue at any time on a judgment in favor of the people on a recognizance and a scire facias need not be sued out, although more than a year and a day has elapsed since the rendition of the judgment.[3] Property transferred to sureties to indemnify them cannot be applied in payment of the penalty.[4]

G. Review[5] **— 1. In General.** To secure a review of the final judgment a writ of error is held to be the proper remedy in some jurisdictions.[6] A joint writ of error cannot be sued out when the final judgment is several.[7] The amount necessary to confer jurisdiction is to be determined by whether the proceeding is civil or criminal.[8] Appeal lies only from the final judgment.[9]

2. Bills of Exceptions and Assignments of Error. The evidence and record must be set out in a bill of exceptions,[10] and assignment of errors is essential as in other civil proceedings.[11]

the commonwealth with leave to the relatrix to issue execution for the amount due. Com. *v.* Miller, 42 Wkly. Notes Cas. (Pa.) 213.

91. Colt *v.* Eaton, 1 Root (Conn.) 524.

92. Com. *v.* Stebbins, 4 Gray (Mass.) 25. *Contra*, State *v.* Kinne, 41 N. H. 238.

93. Com. *v.* Taylor, 1 Chest. Co. Rep. (Pa.) 261, where power to set aside judgment for want of affidavit of defense was held not to be taken away by affirmance of such judgment.

On death of principal before final judgment such judgment will be vacated as to him, but not as to surety who gave no reason why such fact was not set up in defense. McLaughlin *v.* State, 17 Kan. 283.

Remission by governor of judgment except as to fees and costs is not ground for setting aside the judgment. Brown *v.* Com., 4 Metc. (Ky.) 221.

94. State *v.* Woerner, 33 Mo. 216.

95. Execution generally see Executions, 17 Cyc. 878.

Form of fieri facias upon a forfeiture of recognizance see Schultze *v.* State, 43 Md. 295, 297.

96. Howie *v.* State, 1 Ala. 113; Minor *v.* State, 1 Blackf. (Ind.) 236; Adair *v.* State, 1 Blackf. (Ind.) 200. See also Bail, 5 Cyc. 153; Executions, 17 Cyc. 932.

97. Chumasero *v.* People, 18 Ill. 405.

98. State *v.* Stout, 11 N. J. L. 362.

99. Albee *v.* Ward, 8 Mass. 79.

1. Schultze *v.* State, 43 Md. 295.

2. Schultze *v.* State, 43 Md. 295.

3. Albin *v.* People, 46 Ill. 372.

It is not error, however, if the people sue out a scire facias and such scire facias need not aver that execution was not issued within a year and a day, but merely that execution remains to be made or that the judgment remains unpaid. Albin *v.* People, 46 Ill. 372.

4. People *v.* Skidmore, 17 Cal. 260.

5. Appeal or error generally see Appeal and Error, 2 Cyc. 474 *et seq.*

6. Com. *v.* Rhoads, 9 Pa. St. 488; Hill *v.* State, 27 Tex. 608. And see Howie *v.* State, 1 Ala. 113; Bail, 5 Cyc. 153.

7. Howie *v.* State, 1 Ala. 113.

8. State *v.* Toups, 44 La. Ann. 896, 11 So. 524.

9. State *v.* Woerner, 33 Mo. 216, holding that judgment on a scire facias awarding execution is such a final judgment. See also Bail, 5 Cyc. 154.

Judgment merely declaring that the penalty was adjudged forfeited without determining the amount is interlocutory and not final. Com. *v.* Teevens, 141 Mass. 577, 6 N. E. 756.

No appeal for state.— In scire facias upon a recognizance for the appearance of a person charged with crime, no appeal lies, for the state, from the judgment of the district court, sustaining a demurrer to the scire facias; and such appeal will be dismissed on motion, with costs against the state. State *v.* Jackson, 33 Me. 259.

10. Fowler *v.* Com., 4 T. B. Mon. (Ky.) 128; Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

The court will not look into a recognizance copied into the record but not referred to in the bill of exceptions. Davis *v.* Com., 4 T. B. Mon. (Ky.) 113.

11. Com. *v.* Hughes, 13 Bush (Ky.) 349. *Contra*, State *v.* Toups, 44 La. Ann. 896, 11 So. 524, where the judgment was reversed on the ground that the record did not show that

3. QUESTIONS REVIEWABLE.[12] The court on appeal will not review matters which rest in the discretion of the lower court,[13] nor the evidence on which the findings of the court are based.[14] Objections not raised in the court below will not be considered,[15] nor will merely harmless error,[16] and the appellate court will presume that the judgment is proper.[17]

4. DECISION. The practice on appeal is to look to and examine the record, and if it is sufficient to support the judgment it should be sustained, although irregularities and omissions appear in the recognizance or the writ.[18] Where reversal of judgment as to one defendant would leave a several judgment against joint recognizors the judgment will be reversed as to all with instructions to enter a new judgment *nisi* and award new scire facias.[19]

H. Distribution of Proceeds. Distribution of the proceeds of a forfeited recognizance must be made as required by statute,[20] and the supreme court cannot review the decree of distribution.[21]

RECOGNIZE. To admit; to acknowledge something existing before;[1] to know; to recall to mind; to recollect or recover the knowledge of a thing or person; to acknowledge.[2]

RECOLLECT. To recover or recall knowledge of; bring back to the mind or memory; remember.[3]

RECOMMENCE. To begin anew; again begin.[4]

RECOMMEND. To commend to the favorable notice of another; to commit to another's care, confidence, or acceptance, with favoring representations; to put in a favorable light before any one; to bestow commendation on.[5] (See RECOMMENDATION.)

the recognizance was accepted pursuant to the order of a competent judge. See also BAIL, 5 Cyc. 154.

The recognizance will not be considered on a writ of error as after judgment *nisi* and scire facias thereon the recognizance is not a part of the record. Ditto *v.* State, 30 Miss. 126. And see Gray *v.* State, 5 Ark. 265.

12. **Decree of distribution of proceeds not reviewable** see *infra*, V, H.

13. Mishler *v.* Com., 62 Pa. St. 55, 1 Am. Rep. 377.

Review of remission of forfeiture see *supra*, IV, B, 4, b.

14. State *v.* Moody, 74 N. C. 73.

15. Marr *v.* State, 26 Ark. 410; Lewis *v.* People, 18 Ill. App. 76; Adair *v.* State, 1 Blackf. (Ind.) 200; Calvin *v.* State, 12 Ohio St. 60. See BAIL, 5 Cyc. 155.

Objection that recognizance is defective cannot be made on appeal after a judgment *nil dicit* where the defect was amendable. Patterson *v.* State, 10 Ind. 296.

General objection to recognizance will not bring up specific objection that it was not filed. O'Brien *v.* People, 41 Ill. 456.

That principal was dead before rendition of judgment cannot be notice on appeal. Dean *v.* State, 2 Sm. & M. (Miss.) 200.

Variance between recognizance and scire facias cannot be objected to for first time on appeal. Welborn *v.* People, 76 Ill. 516; Bradley *v.* People, 21 Ill. App. 78; Saffold *v.* State, 60 Miss. 928, where the judgment on scire facias was by default. But see Douthit *v.* State, 30 Miss. 133, holding that a material variance between judgment *nisi* and scire facias could be reached, although no objection was taken prior to judgment on the scire facias.

16. Mix *v.* Page, 14 Conn. 329 (failure to pass on motion in arrest of judgment for insufficiency of declaration where the declaration was sufficient); Mussulman *v.* People, 15 Ill. 51 (failure of court to dispose of case as to co-cognizor); Votaw *v.* State, 12 Ind. 497; State *v.* Glaevecke, 33 Tex. 53 (incorrect recital of recognizance in scire facias where such recital was unnecessary).

17. Huggins *v.* People, 39 Ill. 241; State *v.* Riley, 34 Mo. App. 426.

18. State *v.* Heed, 62 Mo. 559; State *v.* Riley, 34 Mo. App. 426; State *v.* Peyton, 32 Mo. App. 522. See BAIL, 5 Cyc. 155.

Judgment will be reversed if there is a material variance between the recognizance, the scire facias, and the judgment. Daingerfield *v.* State, 4 How. (Miss.) 658.

19. Robinson *v.* State, 5 Ala. 706.

20. Com. *v.* Becker, 1 Woodw. (Pa.) 297. And see Kidd *v.* Com., 16 Pa. St. 426.

21. Com. *v.* Justice, 34 Pa. St. 165.

1. Leak *v.* Bear, 80 N. C. 271, 273.

2. Arthur *v.* Monck, 21 U. C. C. P. 76, 81.

3. Century Dict.

Affirmation of defendant in an answer that he did not "recollect" that he had authorized any person to sign his name to a covenant for title is not tantamount to a direct and unqualified denial of authority, or even to a declaration that he did not "believe" that he had given such authority. Talbot *v.* Sebree, 1 Dana (Ky.) 56.

4. Lines *v.* Flagg, 4 Conn. 581, 587.

5. Webster Dict. [*quoted* in People *v.* Woodruff, 166 N. Y. 453, 460, 60 N. E. 28].

RECOMMENDATION. The act of one person in giving to another a favorable account of the character, responsibility, or skill of a third.[6] (Recommendation: Fraudulent, see FRAUD, 20 Cyc. 14 note 36. Of Application For License, see INTOXICATING LIQUORS, 23 Cyc. 127. Of Servant, see MASTER AND SERVANT, 26 Cyc. 996. To Mercy, see CRIMINAL LAW, 12 Cyc. 697; HOMICIDE, 21 Cyc. 1083.)

RECOMMITMENT. A second or renewed commitment; a renewed reference to a committee.[7] (Recommitment: Of Award to Arbitrators, see ARBITRATION AND AWARD, 3 Cyc. 634, 769. Of Execution Debtor, see EXECUTIONS, 17 Cyc. 1525. Of Report — Of Commissioners, Appraisers, or Viewers, see EMINENT DOMAIN, 15 Cyc. 912; On Reference, see EQUITY, 16 Cyc. 456; To Master in Chancery, Commissioner, or Auditor, see EQUITY, 16 Cyc. 456; To Referee, see REFERENCES; To Viewers, Commissioners, or Other Like Officers in Proceedings to Establish Highway, see STREETS AND HIGHWAYS.)

RECONCILIATION. The renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides.[8] (Reconciliation: Admissibility of Evidence of Assault Followed by, to Show Self-Defense, see HOMICIDE, 21 Cyc. 963 note 31. Attempted as Prerequisite to Divorce, see DIVORCE, 14 Cyc. 617. Effect of — On Judgment Dissolving Community, see HUSBAND AND WIFE, 21 Cyc. 1700 note 85; On Previous Threats in Homicide Cases, see HOMICIDE, 21 Cyc. 893 note 51, 1003. Sufficiency of to Avoid a Separation, see HUSBAND AND WIFE, 21 Cyc. 1597 note 64.)

RECONNAISSANCE. See CONNOISSEMENT, 8 Cyc. 581 note 48.

RECONSIDER. To think or consider the matter over again for the purpose of passing upon the matter on such second consideration.[9] (See RECONSIDERATION.)

RECONSIDERATION. The taking up for renewed consideration that which has been passed or acted upon previously.[10] (Reconsideration: Of Award, see ARBITRATION AND AWARD, 3 Cyc. 697. Of Decision — In Admiralty, see ADMIRALTY, 1 Cyc. 893; In Equity, see EQUITY, 16 Cyc. 504; Of County Board, see COUNTIES, 11 Cyc. 403; Of Master, Commissioner, Auditor, or Referee, see EQUITY, 16 Cyc. 444; On Appeal of Writ of Error, see APPEAL AND ERROR, 3 Cyc. 212; COURTS, 11 Cyc. 764. Of Indictment by Grand Jury, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 208. Of Vote — In General, see PARLIAMENTARY LAW, 29 Cyc. 1691; Of Municipal Council, see MUNICIPAL CORPORATIONS, 28 Cyc. 340.)

RECONSTRUCT. To rebuild; to build over again;[11] to construct again; to

As used in a verdict declaring that the jury find defendant guilty and recommend his sentence to imprisonment for twenty years, etc., the term is construed as a sufficient declaration of the exercise of discretion by the jury in fixing the period of imprisonment to authorize judgment on the verdict. Lewis *v.* State, 51 Ala. 1, 4.

When its use in a will is sufficient to raise a trust see Major *v.* Herndon, 78 Ky. 123, 129; Malim *v.* Keighley, 2 Ves. Jr. 333, 335, 30 Eng. Reprint 659. See also TRUSTS.

When construed as advice and not as obligatory see *In re* Whitcomb, 86 Cal. 265, 274, 24 Pac. 1028. See also Eberhardt *v.* Perolin, 48 N. J. Eq. 592, 596, 23 Atl. 501.

6. Black L. Dict.

As equivalent to "prescription" see 31 Cyc. 1166 note 70.

7. Century Dict.

The words "recommit" and "imprison," as used in a statute providing that any person recommitting or imprisoning any person who shall have been discharged on habeas corpus shall be guilty of a misdemeanor, refer to courts or magistrates, and imply some judicial or ministerial act on their part, and do not extend to proceedings between parents for the custody of an infant child. Beyer *v.* Vanderkuhlen, 48 Wis. 320, 322, 4 N. W. 354.

8. Black L. Dict.

It is sometimes used in the law of divorce as a term synonymous or analogous to "condonation." Black L. Dict.

9. Oakley *v.* Atlantic City, 63 N. J. L. 127, 131, 44 Atl. 651. See also Lake *v.* Ocean City, 62 N. J. L. 160, 162, 41 Atl. 427.

A resolution adopted by the city council that a certain ordinance theretofore enacted "be reconsidered" does not amount to a repeal of such ordinance. Ashton *v.* Rochester, 60 Hun (N. Y.) 372, 377, 14 N. Y. Suppl. 855.

10. Century Dict.; Webster Dict. [both *quoted* in People *v.* Delaware County, 48 N. Y. App. Div. 428, 432, 63 N. Y. Suppl. 317].

11. Covington *v.* Bullock, 103 S. W. 276, 278, 31 Ky. L. Rep. 688.

rebuild;[12] to construct again; to rebuild; to form again or anew.[13] (See RECONSTRUCTION.)

RECONSTRUCTION. A construction again of what had first been constructed;[14] the act of constructing again.[15] (Reconstruction: Of Governments of States, see CONSTITUTIONAL LAW, 8 Cyc. 750 note 44; STATES.)

RECONVENTION. See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, *post*, p. 618.

RECONVENTIONAL DEMAND. A demand that a defendant in a suit is permitted by a courtesy of the law to engraft on the main action, though it is requisite, when the parties reside within the same jurisdiction, that the demand in reconvention should be necessarily connected with and incidental to the principal demand.[16] (See RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, *post*, p. 618.)

RECONVERSION. See CONVERSION, 9 Cyc. 853.

RECONVEYANCE. A transfer of realty back to the original or former grantor.[17] (Reconveyance: Action For by Guardian, see INSANE PERSONS, 22 Cyc. 1184 note 45. As Champertous, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 879. By Grantee in Deed, see DEEDS, 13 Cyc. 724. Certainty of Award Directing, see ARBITRATION AND AWARD, 3 Cyc. 709 note 73. Contract For as Rendering an Absolute Deed a Mortgage, see MORTGAGES, 27 Cyc. 998. Effect of Fraud in Procuring on Foreclosure, see MORTGAGES, 27 Cyc. 1396 note 50. Necessity For on Performance of Condition Where Absolute Deed Was Given as Mortgage, see MORTGAGES, 27 Cyc. 1030 note 66. Presumption of From Lapse of Time, see MORTGAGES, 27 Cyc. 1396 note 50.)

RECORD. To recite, repeat, to transcribe;[18] to preserve the memory of, by committing to writing, to printing, to inscription, or the like; to make note of.[19] (See RECORDS, *post*, p. 577; REGISTER; REGISTERS OF DEEDS.)

12. Century Dict. [*quoted* in Contas *v.* Bradford, 206 Pa. St. 291, 295, 55 Atl. 989]; Standard Dict. [*quoted* in Farraher *v.* Keokuk, 11 Iowa 310, 313, 82 N. W. 773]; Webster Dict. [*quoted* in Farraher *v.* Keokuk, *supra*; McMillan *v.* Payne County, 14 Okla. 659, 665, 79 Pac. 898]; Norristown *v.* Norristown Pass. R. Co., 9 Pa. Co. Ct. 98, 100.

13. Webster Dict. [*quoted* in Contas *v.* Bradford, 206 Pa. St. 291, 295, 55 Atl. 989].

Where an ordinance granted to a street railway the right to use the streets on condition that it should "reconstruct the said streets with the same kind of material used by the borough on the remaining portion of the streets," the company complied with the ordinance by reconstructing the street, which was then macadamized, with the same material used on the remaining portion, and was not liable to part of the expense of a pavement with Belgian blocks subsequently made by the borough. Norristown *v.* Norristown Pass. R. Co., 9 Pa. Co. Ct. 98, 100.

A building is properly said to be reconstructed when it is rebuilt or restored to its original condition after having been wholly or partially demolished. Vincent *v.* Frelich, 50 La. Ann. 378, 382, 23 So. 373, 69 Am. St. Rep. 436.

An obligation to "repair" does not impose the liability to "reconstruct." Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 534, 26 N. E. 188, 28 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770; State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 277, 55 Am. Rep. 361.

The meaning of the term is not limited to the erection of a new building on the site of an old one, but under a contract to remove and reconstruct a building may include the duty to rebuild on the new site where the old house was blown down by a storm before removal. Allen County Bd. of Education *v.* Townsend, 63 Ohio St. 514, 522, 59 N. E. 223, 52 L. R. A. 868.

One who buys burned-out electric lamps and filaments and repairs them, inserting new filaments, reconstructs, and not merely repairs, such lamps. Gen. Electric Co. *v.* Re-New Lamp Co., 121 Fed. 164, 165.

14. Bell *v.* Maish, 137 Ind. 226, 229, 36 N. E. 358, 1118, where it is said that it is but a form of "construction."

15. Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

Where a pavement was taken up, the grade changed, and new sand was used, and part of the bricks used in relaying were new ones, there was a "reconstruction" and not a "repair." Levi *v.* Coyne, 57 S. W. 790, 791, 22 Ky. L. Rep. 493. See also Rackliffe *v.* Duncan, 130 Mo. App. 695, 108 S. W. 1110.

16. Suberville *v.* Adams, 47 La. Ann. 68, 69, 16 So. 652.

17. Anderson L. Dict.

18. Montgomery Beer Bottling Works *v.* Gaston, 126 Ala. 425, 448, 28 So. 497, 85 Am. St. Rep. 42, 51 L. R. A. 396.

19. Webster Dict. [*quoted* in Seaboard Air-Line R. Co. *v.* Memory, 126 Ga. 183, 185, 55 S. E. 15].

A synonym of "register" see Manchester Bldg., etc., Assoc. *v.* Beardsley, (N. J. Ch. 1907) 66 Atl. 1, 4.

As used in a statute providing for the acceptance and record of the report of commissioners appointed to set off dower in the pro-

RECORDARI. A substitute for an appeal from a judgment of a court not of record, where the appeal has been lost by fraud or accident.[20] (See JUSTICES OF THE PEACE, 24 Cyc. 766.)

RECORDA SUNT VESTIGIA VETUSTATIS ET VERITATIS. A maxim meaning "Records are the traces of antiquity and of truth." [21]

RECORDATION. A species of promulgation of the private law of the act or contract producing it.[22] (See RECORDS, *post*, p. 577, and Cross-References Thereunder.)

RECORDER. A judicial officer in many cities, whose jurisdiction is chiefly confined to the trial of criminal prosecutions.[23] (Recorder: As Municipal Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 787 note 12. Authority — To Administer Oath, see OATHS AND AFFIRMATIONS, 29 Cyc. 1303; To Take Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 546; To Take Affidavit, see AFFIDAVITS, 2 Cyc. 9 note 33. Conferring Judicial Power on, see CONSTITUTIONAL LAW, 8 Cyc. 860. Criminal Jurisdiction, see CRIMINAL LAW, 12 Cyc. 201. Of Deeds and Other Written Instruments, see REGISTERS OF DEEDS, *post*, p. 577.)

RECORDING. Copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor.[24] (Recording: Agricultural Lien, see AGRICULTURE, 2 Cyc. 61. As Delivery of Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1008. Assignment — In General, see ASSIGNMENTS, 4 Cyc. 63; For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 156, 163; Of Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 57; Of Insolvent Corporation, see CORPORATIONS, 10 Cyc. 1242. Brand or Mark, see ANIMALS, 2 Cyc. 325. Chattel Mortgage, see CHATTEL MORTGAGES, 6 Cyc. 1062. Delivery of Mortgaged Chattel as Substitute For, see CHATTEL MORTGAGES, 6 Cyc. 1054. Incorporation, see CORPORATIONS, 10 Cyc. 228. Instrument of Adoption, see ADOPTION OF CHILDREN, 1 Cyc. 925. Logging Lien, see LOGGING, 25 Cyc. 1588. Mechanic's Lien, Mode and Sufficiency of, see MECHANICS' LIENS, 27 Cyc. 133. Mortgage, see MORTGAGES, 27 Cyc. 1155. Notice of Foreclosure of Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 96. Order of County Board, see COUNTIES, 11 Cyc. 533 note 57.)

RECORDING ACTS. See RECORDS, *post*, p. 577.

bate court, the term is used in the sense of "confirm," that is, if the assignment of dower by the commissioners is satisfactory to the judge, then he should accept and record the same. Serry *v.* Curry, 26 Nebr. 353, 363, 42 N. W. 97.

To record an abstract in a judgment record means to transcribe it upon the book required to be kept for that purpose, and when the abstract is transcribed the act of recording is complete. Vidor *v.* Rawlins, 93 Tex. 259, 261, 54 S. W. 1026.

"The word 'recorded' in ordinary usage signifies copied or transcribed into some permanent book." Cady *v.* Purser, 131 Cal. 552, 557, 63 Pac. 844, 82 Am. St. Rep. 391.

20. Critcher *v.* McCadden, 64 N. C. 262, 263.

21. Peloubet Leg. Max. [*citing* Rolle 296].

22. Co-Tiongco *v.* Co-Guia, 1 Philippine 210, 212.

23. Anderson L. Dict. [*quoted* in *Ex p.* Baxter, 3 Cal. App. 716, 86 Pac. 998].

24. Anderson L. Dict. [*quoted* in Cady *v.* Curser, 131 Cal. 552, 557, 63 Pac. 844, 82 Am. St. Rep. 391].

"A stenographer is 'recording' the evidence when he is taking it down in shorthand, although he is not making a record thereof which is intelligible to those who are not versed in the system of shorthand which he uses, and even though no one but himself may be able to read his shorthand notes." Seaboard Air-Line R. Co. *v.* Memory, 126 Ga. 183, 185, 55 S. E. 15.

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* Author of "Escheat," 16 Cyc. 548; "Estates," 16 Cyc. 595; "Ferries," 19 Cyc. 491; "Juries," 24 Cyc. 82. Joint author of "Easements," 14 Cyc. 1134; "Forcible Entry and Detainer," 19 Cyc. 1108; "Railroads," 33 Cyc. 1.

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I. DEFINITION AND NATURE.

The term "record" is ordinarily applied to public records only,[1] in which sense a record is a written memorial made by a public officer authorized by law to perform that function, and intended to serve as evidence of something written, said, or done.[2] To constitute a public record there must be at least these elements,

1. Cyclopedic L. Dict.
2. Bouvier L. Dict. [*quoted* in Sheip *v.* Price, 3 Pa. Super. Ct. 1, 6; Coleman *v.* Com., 25 Gratt. (Va.) 865, 881, 18 Am. Rep. 711].

Other definitions are: "A written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates." Black L. Dict.

"A written instrument, made by a public officer as directed by law, to serve as a memorial and evidence of something written, said, or done." State *v.* Anderson, 30 La. Ann. 557, 567.

"A memorial or remembrance; an authentic testimony in writing contained in rolls of parchment, and preserved in a Court of Record." Wharton L. Lex. [*quoted* in Reg. *v.* Sparrow, 12 N. Brunsw. 237, 239].

"Record, in its broadest sense, is a memorial, public or private, of what has been done. It is ordinarily applied to public records only, in which sense it is a written memorial made by a public officer, judicial, legislative, or executive, authorized by law to perform that function, and intended to serve as evidence of something written, said or done." Cyclopedic L. Dict.

Memorials held to be public records.— Among the memorials that have been held to be public records are, books of a notary public in which he keeps the minutes of his official proceedings (Phillips *v.* Poindexter, 18 Ala. 579); state land tax books in a county treasurer's office (Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634); books of account of tax-collectors kept by the state auditor (Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318); books of a township trustee (Anderson School Tp. *v.* Thompson, 92 Ind. 556); fee books kept by clerks of district courts (State *v.* Meeker, 19 Nebr. 106, 26 N. W. 620); land books made under the authority of the Spanish government (Wright *v.* Thomas, 4 Mo. 577); books known as "plat books" kept by county recorders in which are recorded the plats of towns, cities, and additions thereto (Miller *v.* Indianapolis, 123 Ind. 196, 24 N. E. 228); the warrant book of a sinking fund which is a public fund belonging to the state, the book being kept in the office of the auditor who is a public officer (Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711); a book showing the transactions of a county school commissioner in selling school lands in the county and preserved as a public monument among the county archives (Hedrick *v.* Hughes, 15 Wall. (U. S.) 123, 21 L. ed. 52); marriage license dockets (*In re* Marriage License Docket, 4 Pa. Dist. 162); photographs and measurements of a convict, taken pursuant to statute (Molineux *v.* Collins, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104); and a sworn application of twelve freeholders for a public highway pursuant to Revised Laws, page 75, § 16 (People *v.* Vail, 2 Cow. (N. Y.) 623).

Memorials held not to be public records, are marriage licenses not required to be recorded (Com. *v.* Rodes, 1 Dana (Ky.) 595); a paper filed with the directors of an insane asylum making charges against the medical superintendent of the asylum (Colnon *v.* Orr, 71 Cal. 43, 11 Pac. 814); written instructions as to the enforcement of a judgment given by the attorney for a judgment creditor to the sheriff (Whelan *v.* San Francisco Super. Ct., 114 Cal. 548, 46 Pac. 468); and the record of the transactions of pawn-

namely, that it must be a written memorial, must be made by a public officer, and that officer must be authorized by law to make it;[3] but the authority of the officer need not be derived from express statutory enactment,[4] and if authorized to make it it is not necessary that he should be required to do so;[5] and a written memorial of a transaction in his office when made by a public officer becomes a public record belonging to the office and not his private property.[6] Records may be either of legislative or judicial acts,[7] and whether a given instrument is a public record is a question of law for the determination of the court.[8]

II. Record Books and Index.

A. Record Books. A miscellaneous record book, devoted to the record of exceptional instruments, and properly indexed, constitutes a proper record book.[9]

B. Index — 1. Purpose. The proper office of the index is merely to point to the record.[10] It is designed as an additional means or facility for enabling persons interested to make a search of public records and find the object of that search.[11]

2. Necessity. Unless there is something in the statute making indexing some part of the recording, an index is not essential.[12]

3. Making of Index — a. Who May Make. When the law imposes upon the court the duty of directing the making of indexes of matters contained in books of records belonging to certain offices, it need not commit the work of preparing the indexes to the incumbents of the respective offices, but may intrust it to any person;[13] but if a statute imposes the duty of making indexes upon the incumbent of a particular public office, a local body such as a board of county supervisors has no power to transfer this duty to any other person.[14]

b. Character and Sufficiency. An index of records should be such as suitably to answer the purposes for which it is intended.[15] Where the legislature has prescribed a particular system of indexing to be kept, the requirement must be complied with,[16] and the incumbent of the office has no authority to maintain a different system at the public expense,[17] nor has a local body, such as a board of county commissioners or supervisors, any power to change the method or system prescribed by statute.[18] Where the statute merely provides that the index

brokers required to be submitted by them to the licensing board weekly (Round *v.* Boston Police Com'r, 197 Mass. 218, 83 N. E. 412).

3. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

Necessity for enrolment.— To constitute an instrument or proceeding a matter of record it must be enrolled. Croswell *v.* Byrnes, 9 Johns. (N. Y.) 287; Reg. *v.* McKay, 28 N. Brunsw. 564.

4. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

5. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

"Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record." Cyclopedic L. Dict.

6. Herron *v.* McHenry, McGloin (La.) 108; Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

7. Bouvier L. Dict.

8. State *v.* Anderson, 30 La. Ann. 557.

9. Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641.

10. Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

11. Smith *v.* Royalton, 53 Vt. 604.

12. *Georgia.*— Chatham *v.* Bradford, 50 Ga. 327, 15 Am. Rep. 692.

Missouri.—Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

Pennsylvania.— McHenry *v.* Stockwell, 2 Del. Co. 57.

South Carolina.— Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772.

Tennessee.— Maxwell *v.* Stuart, 99 Tenn. 409, 42 S. W. 34.

But see Sawyer *v.* Adams, 8 Vt. 172, 30 Am. Dec. 459.

13. McCommon *v.* Spong, 10 Pa. Cas. 453, 14 Atl. 260.

14. People *v.* Nash, 62 N. Y. 484.

15. Smith *v.* Royalton, 53 Vt. 604.

16. Dirks *v.* Collin, 37 Wash. 620, 79 Pac. 1112; Smith *v.* Lamping, 27 Wash. 624, 68 Pac. 195.

17. Dirks *v.* Collin, 37 Wash. 620, 79 Pac. 1112, holding further that it is no defense to a taxpayer's action to restrain him from so doing that the books are of public utility and their abolition would cause more expense than the cost of their maintenance.

18. People *v.* Nash, 62 N. Y. 484; Smith *v.* Lamping, 27 Wash. 624, 68 Pac. 195.

shall be suitable, all that is required is that it shall be such as will enable a person of ordinary intelligence and business capacity to find the object of his search,[19] and an index of miscellaneous records separately and correctly kept is none the less a proper index because it is bound in the same volume with one of the books of records to which it refers.[20]

c. Compensation For Making. Ordinarily it is the duty of an officer who makes and keeps public records to keep up the index thereto without extra compensation,[21] but if the statute expressly provides for compensation he is not bound to keep up such indexes if the compensation provided therefor is not made.[22]

d. Liability For Improper Making. If discretion is vested in a recording officer as to how he shall keep his index under the law, and in attempting to comply with the law he makes a mistake which is merely one of judgment, neither the officer nor his surety is liable therefor.[23]

4. Effect of Loss. It has been held that where the index to record books has been lost or destroyed, such books cease to be entitled to the legal force or validity of public records, for the purpose of notice to those affected by their contents, until the index has been restored by public authority.[24]

III. Filing and Recording Written Instruments.

A. Filing — 1. In General. A paper is deemed to be filed, within the meaning of the law, when it is delivered for that purpose to the proper officer and received by him,[25] and it is not necessary to the filing of a paper that it shall be indorsed as having been so filed.[26] The file-mark of the officer is evidence of filing but is not the essential element of the act.[27]

2. Place. To constitute a valid filing for record, the instrument must be delivered at the office where it is required to be filed,[28] and delivery of an instrument to the proper officer at a place other than the office where it is required to be filed is not sufficient, even though the officer indorses it as properly filed;[29] but if the instrument is then taken by the officer to the office and filed there, it will be considered as filed for record from the time of its actual deposit and filing in the office.[30]

3. Time. An instrument is filed for record when it is deposited in the proper

19. Smith *v.* Royalton, 53 Vt. 604.

20. Benton *v.* Nicoll, 24 Minn. 221.

21. Boggs *v.* Caldwell County, 28 Mo. 586, holding, however, that while it is the duty of recorders to keep up their indexes without compensation from the county where their compensation is provided by law to come from persons having their deeds recorded, yet where these books become unfit for use and have to be renewed a county court may order a new index made and allow a reasonable compensation therefor out of the county funds.

22. State *v.* Wickham, 77 Ohio St. 1, 82 N. E. 517, holding that a county recorder will not be required to keep up an index without compensation where the statute provides for compensation and the county commissioners have notified him that it will no longer be allowed.

23. Maxwell *v.* Stuart, 99 Tenn. 409, 42 S. W. 34.

24. Elliott *v.* Harris, 81 Ky. 470.

25. *California.*— Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796; Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501.

Florida.—Franklin County Com'rs *v.* State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183.

Indiana.— Masterson *v.* Southern R. Co., (App. 1907) 82 N. E. 1021.

Kentucky.— Day, etc., Lumber Co. *v.* Mack, 69 S. W. 712, 24 Ky. L. Rep. 640.

Michigan.—Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

Missouri.— Barber Asphalt Paving Co. *v.* O'Brien, 128 Mo. App. 267, 107 S. W. 25.

Oregon.— Bade *v.* Hibberd, 50 Oreg. 501, 93 Pac. 364; *In re* Conant, 43 Oreg. 530, 73 Pac. 1018.

Texas.— Holman *v.* Chevaillier, 14 Tex. 337; Manning *v.* State, 46 Tex. Cr. 326, 81 S. W. 957.

See 42 Cent. Dig. tit. "Records," § 6.

26. Hull *v.* Louth, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405.

27. State *v.* Foulkes, 94 Ind. 493; Masterson *v.* Southern R. Co., (Ind. App. 1907) 82 N. E. 1021.

28. Oats *v.* Walls, 28 Ark. 244.

29. Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796; Schulte *v.* Minneapolis First Nat. Bank, 34 Minn. 48, 24 N. W. 320; Murdoch *v.* Grant, 3 Nova Scotia 100.

30. J. M. Duffy Petroleum Co. *v.* Hooks, (Tex. Civ. App. 1907) 106 S. W. 690, where

office with the person in charge thereof, with directions to record it, although not within the time that the office is required by statute to be kept open.[31]

4. DEPOSIT FOR FILING — a. With Whom Deposited. Delivery of an instrument to the person in charge and performing the duties of the office where it is required to be filed is sufficient.[32]

b. Effect of Indorsement on Instrument. The indorsement on an instrument of the fact and time of deposit for filing not being essential thereto, such indorsement does not validate the filing,[33] nor will a failure to make such indorsement invalidate it.[34]

5. PAYMENT OF FEE. At the time of the delivery of an instrument to be filed for record the fee, if any, allowed by law, must be paid,[35] or the clerk may refuse to admit it to record;[36] but if he does admit it without prepayment the record is not thereby invalidated.[37] The fee fixed by statute for filing a paper covers every act necessary to be done in order to complete a legal filing thereof.[38]

B. Recording — 1. INSTRUMENTS ENTITLED TO BE RECORDED. The question as to what instruments are entitled to be recorded depends as a general rule upon the provisions of the statutes,[39] as do also the questions as to whether a particular instrument of a character which may be recorded is sufficient in form and requisites to entitle it to be recorded,[40] and the conditions precedent which must be complied with.[41] Ordinarily only the original instrument and not a copy thereof is entitled to be recorded.[42]

2. REQUISITES AND VALIDITY — a. In General.[43] The object of a record is not only to give an instrument perpetuity but also publicity, and this must be done by actually transcribing it into a book kept for that purpose;[44] but it will be presumed that an instrument left for record was recorded at length on the day it was received for that purpose.[45] An instrument is ordinarily deemed to be recorded

the clerk thus received and filed an instrument of adoption.

31. Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796, holding further that the hours during which a public office is required by statute to be kept open are for the convenience of the public, but do not limit the time within which individuals may file instruments therein.

32. Oats *v.* Walls, 28 Ark. 244; Bishop *v.* Cook, 13 Barb. (N. Y.) 326.

33. Edwards *v.* Grand, 121 Cal. 254, 53 Pac. 796.

34. *Kentucky.*— Day, etc., Lumber Co. *v.* Mack, 69 S. W. 712, 24 Ky. L. Rep. 640.

Michigan.— Mann *v.* Carson, 120 Mich. 631, 79 N. W. 941.

New York.— Bishop *v.* Cook, 13 Barb. 326.

Oregon.— Bade *v.* Hibberd, 50 Oreg. 501, 93 Pac. 364; *In re* Conant, 43 Oreg. 530, 73 Pac. 1018; Hilts *v.* Hilts, 43 Oreg. 162, 72 Pac. 697; Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 359; McDonald *v.* Crusen, 2 Oreg. 258.

Texas.— Holman *v.* Chevaillier, 14 Tex. 337.

35. Oats *v.* Walls, 28 Ark. 244.

36. Hill *v.* Rixey, 26 Gratt. (Va.) 72. See also Lucas *v.* Clafflin, 76 Va. 269.

37. Lucas *v.* Clafflin, 76 Va. 269.

38. Demers *v.* Cloud County, 5 Kan. App. 271, 47 Pac. 567.

39. Lund *v.* Rice, 9 Minn. 230; Hughes *v.* Wilkenson, 37 Miss. 482.

Particular instruments which have been held entitled to record under the statutes of different jurisdictions include a receiver's certificate of the entry of a tract of land in the United States land-office (Dallemand *v.* Mannon, 4 Colo. App. 262, 35 Pac. 679); a power of attorney for the sale of land (Hughes *v.* Wilkenson, 37 Miss. 482); a testimonio executed in 1832 by the proper Mexican authorities of a power of attorney to convey land (McPhaul *v.* Lapsley, 20 Wall. (U. S.) 264, 22 L. ed. 344); and an instrument acknowledging an obligation by the maker to transfer land to another and duly acknowledged, whatever its form may be (Chamberlain *v.* Boon, 74 Tex. 659, 12 S. W. 727). As to other instruments which may or must be recorded see the cross-references at the beginning of this article to specific titles treated elsewhere in this work, *ante*, p. 579.

40. Durrence *v.* Northern Nat. Bank, 117 Ga. 385, 43 S. E. 726; Eaton *v.* Freeman, 58 Ga. 129; Hughes *v.* Wilkenson, 37 Miss. 482.

41. Chadwick *v.* Gulf States Land, etc., Co., 74 Fed. 616, 20 C. C. A. 563.

42. Mack *v.* McIntosh, 181 Ill. 633, 54 N. E. 1019; Lane *v.* Lesser, 135 Ill. 567, 26 N. E. 522; Lund *v.* Rice, 9 Minn. 230; Lewis *v.* Baird, 15 Fed. Cas. No. 8,316, 3 McLean 56. *Compare* McPhaul *v.* Lapsley, 20 Wall. (U. S.) 264, 22 L. ed. 344.

43. Index to records see *supra*, II, B.

44. Pawlet *v.* Sandgate, 17 Vt. 619, holding that an indorsement upon an instrument that it has been "received into record" is not a compliance with a statute requiring it to be recorded, but that the record must be made by actually transcribing it into a book kept for that purpose.

45. Whitacre *v.* Martin, 51 Minn. 421, 53

when its holder leaves it with the proper officer for the purpose of being recorded,[46] even though it is not then actually recorded,[47] or is recorded in the wrong book;[48] and the person so depositing it in good faith is not required to see that the officer properly performs his duty,[49] or to be prejudiced by a failure of the latter to do so.[50] Instruments not required by statute to be recorded in any particular book may be recorded in any book kept by the recording officer [51] which is not exclusively devoted to the record of other instruments,[52] and in the absence of statute the book in which the records are kept need not contain any official certificate or be designated on the outside as a record book.[53] To constitute a valid record the statutes must be complied with,[54] except as to provisions which are merely directory.[55] A record is not invalidated because the recording officer did not transcribe with the instrument the proof upon which it was admitted to record,[56] because in transcribing the surname of one of the subscribing witnesses to the instrument was so written as not to be intelligible,[57] or certain words in the acknowledgment of the instrument were omitted,[58] because the record does not show the seal of the officer taking the acknowledgment of the instrument recorded,[59] or because the officer recording the instrument is a party thereto.[60]

b. Who May Record. To constitute a valid record it must be made by an

N. W. 806; Wing *v.* Hall, 47 Vt. 182. But see Pawlet *v.* Sandgate, 17 Vt. 619, holding that this rule cannot always be applied but that it in some measure depends upon the question as to which party has the burden of proof.

46. Eufaula Nat. Bank *v.* Pruett, 128 Ala. 470, 30 So. 731; McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Judd *v.* Woodruff, 2 Root (Conn.) 298; McDonald *v.* Leach, Kirby (Conn.) 72; Farabee *v.* McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Shebel *v.* Bryden, 114 Pa. St. 147, 6 Atl. 905; Clader *v.* Thomas, 89 Pa. St. 343; Glading *v.* Frick, 88 Pa. St. 460; Marks' Appeal, 85 Pa. St. 231. See also Commonwealth Bank *v.* Haggin, 1 A. K. Marsh. (Ky.) 306.

By statute in Texas any instrument required to be recorded is considered to be recorded from the time it is deposited for that purpose with the proper officer. Throckmorton *v.* Price, 28 Tex. 606, 91 Am. Dec. 334.

A clerk's indorsement on an instrument to the effect that it has been lodged for record is conclusive that this was done. Webb *v.* Austin, 58 S. W. 808, 22 Ky. L. Rep. 764.

Effect of withdrawal before actual recording.— If a mortgage which has been duly deposited for record is afterward withdrawn by the grantee or by his authority before it is actually recorded, and while it is thus out of the clerk's office the property is purchased by a person without notice thereof, it will not be enforced to the prejudice of the innocent purchaser. Webb *v.* Austin, 58 S. W. 808, 22 Ky. L. Rep. 764.

47. McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Judd *v.* Woodruff, 2 Root (Conn.) 298; Franklin *v.* Cannon, 1 Root (Conn.) 500; McDonald *v.* Leach, Kirby (Conn.) 72; Farabee *v.* McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734.

48. Farabee *v.* McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Clader *v.* Thomas, 89 Pa. St. 343; Glading *v.* Frick, 88 Pa. St. 460 [*overruling* Luch's Appeal, 44 Pa. St. 519].

49. McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Throckmorton *v.* Price, 28 Tex. 606, 91 Am. Dec. 334.

50. McGregor *v.* Hall, 3 Stew. & P. (Ala.) 397; Judd *v.* Woodruff, 2 Root (Conn.) 298; Franklin *v.* Cannon, 1 Root (Conn.) 500; Throckmorton *v.* Price, 28 Tex. 606, 91 Am. Dec. 334.

51. Farabee *v.* McKerrihan, 172 Pa. St. 234, 33 Atl. 583, 51 Am. St. Rep. 734; Paige *v.* Wheeler, 92 Pa. St. 282; Glading *v.* Frick, 88 Pa. St. 460.

52. Tipton Fire Co. *v.* Barnheisel, 92 Ind. 88.

53. Nitche *v.* Earle, 117 Ind. 270, 19 N. E. 749.

54. Pawlet *v.* Sandgate, 17 Vt. 619.

55. Holmes *v.* Marshall, 72 N. C. 37 (holding that a statute requiring the certificate of probate made by the probate judge of a county other than that in which the instrument is to be registered to be passed on by the probate judge of the latter is only directory, and that a registration upon a probate which has not been so passed upon is valid); Lucas *v.* Clafflin, 76 Va. 269 (holding that a statute providing that no deed shall be admitted to record until the tax is paid is merely directory, and that if the clerk chooses to admit it without prepayment he assumes the payment and the admission to record is valid).

56. Pierce *v.* Clark, 25 La. Ann. 111.

57. Whitwell *v.* Emory, 3 Mich. 84, 59 Am. Dec. 220.

58. Thomas *v.* Stuart, 91 Va. 694, 22 S. E. 511.

59. Addis *v.* Graham, 88 Mo. 197, holding that it is sufficient if the record contains the statement of the officer taking the acknowledgment in the body of his certificate that he affixed his seal thereto, without any written scroll or seal being copied in the record.

60. Brockenborough *v.* Melton, 55 Tex. 493.

officer having the authority to do so,[61] and if made by a person having no authority whatever it is void and cannot be validated by a subsequent curative statute;[62] but a valid record of an instrument may be made by a *de facto* recording officer,[63] or one acting under a government *de facto* of paramount force.[64]

c. Notation For Record. Where a statute requires an officer to keep a book in which he shall note the day and hour when instruments are received by him to be recorded, an instrument is not effectually noted for record until such entry is made in the book kept for that purpose,[65] an indorsement upon the back of the instrument itself being insufficient.[66]

IV. Custody and Care of Records.

At common law a public officer, by virtue of his office, becomes the legal custodian of all papers, books, and records pertaining to his office,[67] and is responsible for their safekeeping and protection against alteration, injury, or mutilation,[68] which duty the law presumes that a public officer will properly perform.[69] The federal statutes make it a criminal offense for any officer having the custody of any record, document, or paper specified therein to fraudulently take away, withdraw, or destroy it.[70] The registrar of deeds should keep his office at the county-seat, but his failure to do so will not render void the records in his office;[71] and a statute expressly requiring a recorder to keep his office at the "seat of justice" in the county refers merely to the town which is the county-seat and not to the court-house.[72]

V. Correction and Cancellation of Records.

A. Correction — 1. Defects Amendable. A recording officer's mistake may be amended, when such amendment will be in furtherance of justice and will not subject the party to be affected to any loss or inconvenience other than what he would have suffered had the record been in the proper form originally.[73] An

61. Herring *v.* Lee, 22 W. Va. 661, holding further that where the right and authority of the principal incumbent of an office to act in regard to the duties thereof becomes extinct, that of his deputy or clerk ceases also.

62. Herring *v.* Lee, 22 W. Va. 661.

63. Brush *v.* Cook, Brayt. (Vt.) 89.

64. Henning *v.* Fisher, 6 W. Va. 238, holding that the record of a deed by a clerk of a county court who continued to exercise his office after the state had passed the ordinance of secession but while the county was under the military power of the Confederate states was a valid record and must be so regarded in all judicial proceedings.

65. Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179.

Effect of withdrawal after notation.— If an instrument after being deposited and noted for record is withdrawn by the party or his agent, before it is actually recorded, it loses its priority and takes effect only from the date of its return to the office. Hickman *v.* Perrin, 6 Coldw. (Tenn.) 135.

66. Wilson *v.* Eifler, 11 Heisk. (Tenn.) 179.

67. Scribner *v.* Chase, 27 Ill. App. 36; Lincoln Land Co. *v.* Ackerman, 24 Nebr. 46, 38 N. W. 250. See also Matter of Brearton, 44 Misc. (N. Y.) 247, 89 N. Y. Suppl. 893; U. S. *v.* Deneale, 25 Fed. Cas. No. 14,946, 1 Cranch C. C. 34.

68. Scribner *v.* Chase, 27 Ill. App. 36.

69. Hall *v.* Kellogg, 16 Mich. 135, holding further that if a particular paper is not found in a public office where if in existence it ought to be, it will be presumed that it never existed.

70. Martin *v.* U. S., 7 Indian Terr. 451, 104 S. W. 678, holding that a clerk in the office of the commissioner of the Five Civilized Tribes in Muskogee, Indian Territory, appointed by the commissioner acting on behalf of the secretary of the interior, which appointment was approved by the secretary of the interior, who kept a certain record in his office and could examine it whenever he wished, was an officer and had the custody of the record within the meaning of the statute, and that the taking of such record from the office with the intent to make a copy thereof was fraudulent within the meaning of the statute.

71. Thomas *v.* Hanson, 59 Minn. 274, 61 N. W. 135.

72. Babock *v.* Hahn, 175 Mo. 136, 75 S. W. 93.

73. Bean *v.* Ayers, 70 Me. 421; Caldwell *v.* Blake, 69 Me. 458.

A scroll representing the seal attached to an instrument may, if inadvertently omitted at the time the instrument is recorded, be subsequently added by the recording officer to the record. Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.

omission in a record cannot, however, be supplied from conjecture, but only where the context shows clearly what words are to be added.[74]

2. By Whom Made. A recording officer while in office may amend his record as by correcting mistakes or supplying omissions so as to make it conform to the facts,[75] subject to certain limitations in favor of the rights of third persons;[76] but he has no authority to interpolate anything not in the instrument recorded at the time of the original record,[77] and if at the time of the original record the proper entry was made,[78] or the instrument correctly copied, the officer cannot subsequently alter the record,[79] even though there was a mistake in the original instrument and the alteration of the record is made by consent of the parties.[80] So also one who is no longer in office cannot, without statutory authority, amend a record made by him while in office,[81] or complete a record which he had begun but which was incomplete at the time he ceased to hold office.[82] Defects in public records may also be corrected by a competent tribunal,[83] and every court of record is the guardian and judge of its own records, with full power to control and inquire into them and to correct them if incorrect;[84] but in the absence of statute a court has no summary control over the records of an independent public office.[85]

3. How Made. Defects and mistakes in public records must ordinarily be relieved against by an amendment of the record.[86] Amendments of records should ordinarily be made by the original documents or minutes and not upon the testimony of third persons or upon the officer's own recollection unless in very obvious cases of omission or error,[87] and an amendment by the recording officer must be made under the sanction of an oath if the statute so provides.[88] It has been said that the amendment of a record should be made not by erasures and interlineations upon the record book but by drawing out the amendment in form and annexing it to the book where the original is recorded, so that the whole matter will appear.[89]

4. Presumptions Regarding. In the absence of evidence to the contrary amendments or alterations of public records will be presumed to have been made by someone having authority to do so,[90] and to be mistakes corrected as soon as

74. Lincoln *v.* Chapin, 132 Mass. 470.

75. *Illinois.*— Glencoe Bd. of Education *v.* Trustees of Schools, 74 Ill. App. 401 [*affirmed* in 174 Ill. 510, 51 N. E. 656].
Maine.— Jay *v.* Carthage, 48 Me. 353.
Massachusetts.— Welles *v.* Battelle, 11 Mass. 477.
Nebraska.— State *v.* Cornell, 56 Nebr. 143, 76 N. W. 459.
North Carolina.— Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.
Tennessee.— Baldwin *v.* Marshall, 2 Humphr. 116.
Vermont.— Mott *v.* Reynolds, 27 Vt. 206. See 42 Cent. Dig. tit. "Records," § 9.

76. Jay *v.* Carthage, 48 Me. 353.

77. Burton *v.* Martz, 38 Mich. 761; Sellers *v.* Sellers, 98 N. C. 13, 3 S. E. 917.

78. Wallace *v.* Flewin, 11 Brit. Col. 354.

79. Jennings *v.* Dockham, 99 Mich. 253, 58 N. W. 66; Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

80. Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

81. Baker *v.* Webber, 102 Me. 414, 67 Atl. 144; Hartwell *v.* Littleton, 13 Pick. (Mass.) 229.

An officer who is reëlected to the same office may amend a record made by himself in a former year while in office under a different election (Welles *v.* Battelle, 11 Mass. 477); but it must be remembered that there is an obvious distinction in principle between a case of this kind and that of a person who after he has ceased to hold an office undertakes to amend a record made by him while an officer (Hartwell *v.* Littleton, 13 Pick. (Mass.) 229).

82. Perrin *v.* Reed, 33 Vt. 62, holding that this authority is annexed to the office and passes to the successor of the officer by whom the incompleted record was begun.

83. Buehler *v.* Buffington, 43 Pa. St. 278.

84. Sheip *v.* Price, 3 Pa. Super. Ct. 1.

85. Excelsior Bldg., etc., Assoc. *v.* Reed, 22 Pa. Co. Ct. 654, holding that a court of common pleas has no power in a summary proceeding to order a recorder of deeds to enter a minute on the record of a mortgage of a decree directing a satisfaction of the mortgage to be stricken off.

86. Buehler *v.* Buffington, 43 Pa. St. 278. *Compare* Hiatt *v.* Calloway, 7 B. Mon. (Ky.) 178, holding that the mistake of a clerk in his certificate of a record of deeds, clearly appearing by record evidence, may be relieved against in equity by compelling a release by those claiming under the false certificate.

87. Mott *v.* Reynolds, 27 Vt. 206.

88. Baker *v.* Webber, 102 Me. 414, 67 Atl. 144.

89. Gibson *v.* Bailey, 9 N. H. 168.

90. Hommel *v.* Devinney, 39 Mich. 522.

made rather than a tampering with the record, so that the record as it stands is true.[91]

5. Effect. Where a recording officer corrects a record so as to conform to the original instrument, the corrected words take effect only from the date of the correction,[92] and as a general rule the amendment of a public record is without prejudice to the rights of third parties acquired during the existence of the defect,[93] and cannot deprive an innocent party of the benefit of the record as originally made.[94]

B. Cancellation or Surrender.[95] The custodian of a public record has no right to cancel or surrender it without authority from the same source which required it to be made; [96] but where a public record is false and fraudulent a court of equity had jurisdiction to cancel the same,[97] at the suit of one whose property rights are affected thereby,[98] the remedy in such cases not being confined to an injunction against the use of such record.[99]

VI. Access to, Inspection, and Use of Records.

A. Right to Inspect or Use — 1. In General. At common law no person is entitled to inspect public records, either personally or by agent,[1] or to make copies, abstracts, or memoranda therefrom,[2] unless he has such an interest therein

91. Sheip *v.* Price, 3 Pa. Super. Ct. 1.

92. Baldwin *v.* Marshall, 2 Humphr. (Tenn.) 116.

93. Gibson *v.* Bailey, 9 N. H. 168.

94. Merrick *v.* Wallace, 19 Ill. 486. See also Walls *v.* McGee, 4 Harr. (Del.) 108, holding that an alteration of the record of an old survey, unaccounted for, but proved to have been recently done, will not divest a title or affect rights previously vested by or existing under it.

95. Cancellation of instruments generally see Cancellation of Instruments, 6 Cyc. 282.

Discharge of record on cancellation of instrument recorded see Cancellation of Instruments, 6 Cyc. 338.

Surrender of instrument upon decree for cancellation see Cancellation of Instruments, 6 Cyc. 338.

96. *In re* Molineux, 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104, holding that a person who has been convicted of a crime and whose photograph and measurements have been taken as required by statute is not entitled upon a reversal of the judgment of conviction and subsequent acquittal to a surrender or cancellation of such photograph and measurements, which are public records, and that it would be a usurpation of power for the custodian thereof to surrender them or for the court to direct him to do so.

97. Vanderbilt *v.* Mitchell, (N. J. 1907) 67 Atl. 97 [*reversing* 71 N. J. Eq. 632, 63 Atl. 1107]. See also Randazzo *v.* Ropollo, 105 N. Y. Suppl. 481.

98. Vanderbilt *v.* Mitchell, (N. J. 1907) 67 Atl. 103 [*reversing* 71 N. J. Eq. 641, 63 Atl. 1106], holding that a person whose property rights are affected by the record of a birth certificate procured by fraud and falsely representing the paternity of a certain infant may maintain a suit for the cancellation of such record.

99. Vanderbilt *v.* Mitchell, (N. J. 1907) 67 Atl. 103 [*reversing* 71 N. J. Eq. 641, 63 Atl. 1106].

1. *Alabama.*— Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

Connecticut.— Daly *v.* Dimock, 55 Conn. 579, 12 Atl. 405.

Indiana.— State *v.* King, 154 Ind. 621, 57 N. E. 535.

Kansas.— Cormack *v.* Wolcott, 37 Kan. 391, 15 Pac. 245.

Maryland.— Belt *v.* Prince George's County Abstract Co., 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212.

Minnesota.— State *v.* McCubrey, 84 Minn. 439, 87 N. W. 1126.

New Jersey.— Lum *v.* McCarty, 39 N. J. L. 287.

Pennsylvania.— Com. *v.* Walton, 6 Pa. Dist. 287; *In re* Marriage License Docket, 4 Pa. Dist. 162; Owens *v.* Woolridge, 22 Pa. Co. Ct. 237.

Rhode Island.— *In re* Caswell, 18 R. I. 835, 29 Atl. 259, 49 Am. St. Rep. 814, 27 L. R. A. 82.

West Virginia.— Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927.

United States.— Sloan Filter Co. *v.* El Paso Reduction Co., 117 Fed. 504.

England.— Rex *v.* Staffordshire, 6 A. & E. 84, 6 L. J. M. C. 65, 1 N. & P. 260, 33 E. C. L. 68; Rex. *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; Rex. *v.* Lucas, 10 East 235, 10 Rev. Rep. 283; *Ex p.* Briggs, 1 E. & E. 881, 28 L. J. Q. B. 272, 7 Wkly. Rep. 445, 102 E. C. L. 881; Crew *v.* Saunders, Str. 1005, 93 Eng. Reprint 997; Rex *v.* Allgood, 7 T. R. 746, 4 Rev. Rep. 574; Rex *v.* Shelley, 3 T. R. 141, 1 Rev. Rep. 673; Herbert *v.* Ashburner, 1 Wils. C. P. 297, 95 Eng. Reprint 628.

See 42 Cent. Dig. tit. "Records," § 13.

2. *Kansas.*— Boylan *v.* Warren, 39 Kan. 301, 18 Pac. 174, 7 Am. St. Rep. 551.

as would enable him to maintain or defend an action for which the record sought can be furnished as evidence or necessary information,[3] and the interest of the person demanding the inspection must be direct and tangible.[4] In some jurisdictions, however, the necessity of interest has been done away with by statute, and any person may examine public records and make memoranda therefrom.[5]

2. PARTICULAR PERSONS — a. Abstracters of Title. In the absence of statute conferring the right, expressly or impliedly,[6] an abstracter of title may not use public records for speculative purposes in regard to matters not relating to a personal interest in the particular record,[7] but the rule is otherwise where the abstracter has a present personal interest in such record.[8]

b. Corporator of Municipal Corporation. A corporator of a municipal corporation has a right to inspect and make copies of public documents and records

Louisiana.— Marsh *v.* Sanders, 110 La. 726, 34 So. 752.

Michigan.— Burton *v.* Tuite, 80 Mich. 218, 45 N. W. 88, 7 L. R. A. 824.

New Jersey.— Lum *v.* McCarty, 39 N. J. L. 287.

Pennsylvania.—*In re* Marriage License Docket, 4 Pa. Dist. 162.

See 42 Cent. Dig. tit. "Records," §§ 13, 19.

3. See cases cited *supra*, notes 1, 2.

A user of machinery which is claimed to infringe a patent has such an interest in the subject-matter of a suit between other parties in which the validity of such patent is in issue as entitles him, on proper application, to inspect and make a copy of the record in such suit, including the evidence on file. Sloan Filter Co. *v.* El. Paso Reduction Co., 117 Fed. 504.

4. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 323; People *v.* Walker, 9 Mich. 328; Rex *v.* Staffordshire, 6 A. & E. 84, 6 L. J. M. C. 65, 1 N. & P. 260, 33 E. C. L. 68; Rex *v.* Merchant Tailors' Co., 2 B. & Ad. 115, 9 L. J. K. B. O. S. 146, 22 E. C. L. 57; *Ex p.* Briggs, 1 E. & E. 881, 28 L. J. Q. B. 272, 7 Wkly. Rep. 445, 102 E. C. L. 881.

5. *Florida.*— State *v.* McMillan, 49 Fla. 243, 38 So. 666.

Michigan.— Kalamazoo Gazette Co. *v.* Kalamazoo County Clerk, 148 Mich. 460, 111 N. W. 1070 (public records other than court records); Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634; Burton *v.* Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, 80 Mich. 218, 45 N. W. 88, 7 L. R. A. 824.

Minnesota.— State *v.* Rachac, 37 Minn. 372, 35 N. W. 7.

Nebraska.—State *v.* Elsworth, 61 Nebr. 444, 85 N. W. 439.

New Jersey.— Lum *v.* McCarty, 39 N. J. L. 287.

North Carolina.— Newton *v.* Fisher, 98 N. C. 20, 3 S. E. 822.

West Virginia.— State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

Wisconsin.— Hanson *v.* Eichstaedt, 69 Wis. 538, 35 N. W. 30.

United States.—Bell *v.* Commonwealth Title Ins., etc., Co., 189 U. S. 131, 23 S. Ct. 569, 47 L. ed. 741; *In re* Chambers, 4 Fed. 786.

See 42 Cent. Dig. tit. "Records," §§ 13, 14.

The legislature has power to authorize any person it may see proper to have free access to a public office for the purpose of transcribing the records for such purposes as it may deem the public interest requires. Silver *v.* People, 45 Ill. 224.

In Ontario it is provided by Rev. St. (1897) c. 334, § 11, that "a person affected by any record in any Court in this Province . . . shall be entitled upon payment of the proper fee to search and examine the same." *In re* Chantler, 8 Ont. L. Rep. 111.

The record of the transactions of pawnbrokers required to be submitted by them to the licensing board is not a public record to which all persons may have access. Round *v.* Boston Police Com'r, 197 Mass. 218, 83 N. E. 412.

6. Day *v.* Button, 96 Mich. 600, 56 N. W. 3; Burton *v.* Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73; State *v.* Rachac, 37 Minn. 372, 35 N. W. 7; Bell *v.* Commonwealth Title Ins., etc., Co., 189 U. S. 131, 23 S. Ct. 569, 47 L. ed. 741.

Under a statute providing that the county clerk shall keep his office open during the usual business hours, and that all books and records of his office shall be open to the examination of any person, private parties have no right to occupy the office or to use the books for an extended period of time in getting out abstracts of the entire records for private gain. Bean *v.* People, 7 Colo. 200, 2 Pac. 909; Cormack *v.* Wolcott, 37 Kan. 391, 15 Pac. 245.

7. *Alabama.*— Randolph *v.* State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761.

Georgia.— Land Title Warranty, etc., Co. *v.* Tanner, 99 Ga. 470, 27 S. E. 727; Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

Illinois.— Scribner *v.* Chase, 27 Ill. App. 36.

Maryland.— Belt *v.* Prince George's County Abstract Co., 73 Md. 289, 20 Atl. 982, 10 L. R. A. 212.

Michigan.— Diamond Match Co. *v.* Powers, 51 Mich. 145, 16 N. W. 314; Webber *v.* Townley, 43 Mich. 534, 5 N. W. 971, 38 Am. Rep. 213.

See 42 Cent. Dig. tit. "Records," § 19.

8. West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474, 24 Atl. 381 [*reversed* on other grounds in 53 N. J. Eq. 158, 32 Atl. 222].

of the corporation,[9] but he has no right to a general inspection of all such records at all times and from any motive irrespective of whether he has any personal interest in such documents or any information to be derived therefrom.[10]

c. Dealers in Tax Titles. Under a statute giving access to public records to all persons having occasion to examine them for any lawful purpose, a dealer in tax titles is entitled to examine and make abstracts of such records.[11]

d. Indicted Persons. The accused on trial under an indictment for a public offense is entitled, on proper motion, to inspect the record of preliminary proceedings relating to the offense with which he is charged.[12]

e. Insurers of Titles. In the absence of statutory authority, a person or corporation engaged in insuring titles has no right to inspect public records and make abstracts therefrom in order to set up a rival business to that of the officer in charge of the record; [13] but such a corporation, if employed to examine the title to a particular piece of property, is subrogated to its employer's right of access to the record, and the fact that it contemplates insuring the title thereto does not affect the right of access.[14] So also a corporation so engaged has a right as part of the public to examine the judgment records of federal courts in regard to transactions which are at the time current or depending.[15]

f. Litigants and Attorneys. A litigant interested in an action pending has the right to inspect the records thereof,[16] and unless otherwise provided by statute, an attorney at law may inspect public records in which his client is interested.[17]

g. Publishers. As to whether a person has, in the absence of express statutory authority, the right to inspect and take memoranda from public records for publication, there is a conflict of authority, it being held in at least one jurisdiction that such right does not exist,[18] while in another jurisdiction the contrary view obtains.[19]

h. Taxpayers. A taxpayer is entitled to an inspection of public records whenever the statute expressly so provides,[20] or whenever it declares that such records shall be open to the inspection of any person.[21]

B. Requiring Fee For Privilege. In the absence of statute, it has been held that the officer having the custody of a public record has no right to exact a fee from any person for the privilege of merely examining the same,[22] or even making memoranda therefrom; [23] but that the rule is otherwise with regard to

9. Com. *v.* Walton, 6 Pa. Dist. 287.

10. People *v.* Cornell, 35 How. Pr. (N. Y.) 31 [*reversing* 47 Barb. 329, 32 How. Pr. 149].

11. Aitcheson *v.* Huebner, 90 Mich. 643, 51 N. W. 634.

12. Jenkins *v.* State, 45 Tex. Cr. 173, 75 S. W. 312, holding that the record of an inquest of a statutory proceeding to discover the murderer, where such proceeding is authorized by law and the testimony of witnesses taken down, is a public document, and that a person under indictment and on trial for the homicide to which such record relates is entitled upon proper motion to inspect the same.

Furnishing accused with evidence generally see CRIMINAL LAW, 12 Cyc. 517.

13. Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, 32 Atl. 222.

14. West Jersey Title, etc., Co. *v.* Barber, 49 N. J. Eq. 474, 24 Atl. 381 [*reversed* in 53 N. J. Eq. 158, 32 Atl. 222, on the ground that mandamus and not injunction was the proper remedy for the enforcement of such right].

15. Bell *v.* Commonwealth Title Ins., etc., Co., 189 U. S. 131, 23 S. Ct. 569, 47 L. ed. 741 [*affirming* 110 Fed. 828, 49 C. C. A. 208 (*affirming* 105 Fed. 548)].

16. Daly *v.* Dimock, 55 Conn. 579, 12 Atl. 405; Wilson *v.* Rogers, Str. 1242, 93 Eng. Reprint 1157.

17. Brewer *v.* Watson, 61 Ala. 310; Bond *v.* Lockwood, 40 Ill. 119.

18. Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

19. *In re* Marriage License Docket, 4 Pa. Dist. 162.

Records of divorce case.— In the absence of any regulative statute, the court may refuse inspection of the records of a divorce case for the purpose of publication. *In re* Caswell, 18 R. I. 835, 29 Atl. 259, 49 Am. St. Rep. 814, 27 L. R. A. 82.

20. Neville *v.* New York Bd. of Health, 21 N. Y. Suppl. 574.

21. State *v.* King, 154 Ind. 621, 57 N. E. 535.

22. *In re* Marriage License Docket, 4 Pa. Dist. 162. See also Newton *v.* Fisher, 98 N. C. 20, 3 S. E. 822.

23. *In re* Marriage License Docket, 4 Pa. Dist. 162, making memoranda from marriage license docket for purpose of publication in a newspaper.

persons desiring to make abstracts of such records who are not at the time personally interested therein but merely desire to make and use such abstracts for speculative purposes.[24] In jurisdictions where the necessity of interest has been done away with by statute, the officer having the custody of a public record has no right to charge a fee for the privilege of examining, copying, or making memoranda therefrom,[25] provided no independent search is required or copying done, or other assistance rendered by him or his assistants,[26] unless the statute authorizes him to do so.[27]

C. Regulations as to Inspection or Use. An officer having the custody of public records is entitled to exercise a reasonable discretion in making regulations in regard to the inspection and use thereof,[28] such as in regard to the hours during which the inspection may be made,[29] or which are proper for the purpose of securing the safety of such records.[30] It is also a reasonable regulation to require persons using records for the purpose of making abstracts therefrom to pay a fee for providing additional office facilities,[31] or to require an attorney desiring to inspect records in the interest of a client to produce satisfactory evidence of his authority,[32] and such officer may also exclude from his office persons who conduct themselves in an improper or disorderly manner.[33]

D. Refusal of Privilege — 1. When Proper. The privilege of inspecting public records may properly be denied where the officer in charge thereof is vested with a discretion in regard to admitting persons to inspect the same,[34] or where the party desiring to do so has no interest in the record, and no statute exists giving him the right of inspection,[35] or where the inspection sought would be detrimental to the public interests,[36] and such officer may properly refuse to permit a company engaged in copying the records in his office to keep such a number of persons therein as will obstruct the public business of the office.[37] So also the privilege may be denied of using records compiled and kept by a county pursuant to statutory authority, for the purpose of sale, in a private, as distinguished from its governmental, capacity.[38]

2. Remedy For Wrongful Refusal. Where a person has a right to inspect

24. Newton *v.* Fisher, 98 N. C. 20, 3 S. E. 822.

25. Lum *v.* McCarty, 39 N. J. L. 287; Townshend *v.* Register of Deeds, 7 How. Pr. (N. Y.) 318; State *v.* Long, 37 W. Va. 266, 16 S. E. 578; *In re* Chambers, 44 Fed. 786.

26. See Lum *v.* McCarty, 39 N. J. L. 287; State *v.* Long, 37 W. Va. 266, 16 S. E. 578.

27. Buck *v.* Collins, 51 Ga. 391, 21 Am. Rep. 236.

28. Upton *v.* Catlin, 17 Colo. 546, 31 Pac. 172, 17 L. R. A. 282; Burton *v.* Reynolds, 102 Mich. 55, 60 N. W. 452; State *v.* Rachac, 37 Minn. 372, 35 N. W. 7; People *v.* Reilly, 38 Hun (N. Y.) 429.

Sometimes the statute giving the right to inspect public records also authorizes the officer in charge thereof to make reasonable rules and regulations in relation thereto. Burton *v.* Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73.

29. Upton *v.* Catlin, 17 Colo. 546, 31 Pac. 172, 17 L. R. A. 282.

30. State *v.* Rachac, 37 Minn. 372, 35 N. W. 7.

31. Burton *v.* Reynolds, 102 Mich. 55, 60 N. W. 452.

32. Brewer *v.* Watson, 71 Ala. 299, 46 Am. Rep. 318.

33. People *v.* Reilly, 38 Hun (N. Y.) 429, holding that insolence may justify such exclusion.

34. People *v.* Richards, 99 N. Y. 620, 1 N. E. 258.

A resolution of the county commissioners directing the recorder to deny the use of his office to persons or corporations engaged in making abstracts is void, in that it divests the recorder of the power conferred upon him by law of exercising a reasonable discretion in the management and government of his office. Scribner *v.* Chase, 27 Ill. App. 36.

35. Brewer *v.* Watson, 61 Ala. 310.

But under a statute giving a right of inspection to any person for a lawful purpose, an abstracter cannot be denied access to a city tax sales book made up by the receiver of taxes and by him handed to the city treasurer, on the ground that he is simply seeking information for private gain. Burton *v.* Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73.

36. Brewer *v.* Watson, 61 Ala. 310.

37. People *v.* Richards, 99 N. Y. 620, 1 N. E. 258.

38. Davis *v.* Abstract Constr. Co., 121 Ill. App. 121, holding that where a county is authorized by statute to compile abstract books and sell copies of the abstracts of title, which books are compiled from other records which the county is required to keep and which are open to the public as original sources of information, an abstract company

or copy a public record and the officer in charge thereof refuses to permit him to do so, the right may be enforced by mandamus,[39] and such person may also maintain an action for damages against the officer.[40]

VII. Withdrawal of Records or Papers From Office or Files.

A. Right to Withdraw or Remove — 1. In General. Private persons have no right to remove public records or papers from the office or files where they belong,[41] and when permission to do so is granted it is a matter of favor and not of right.[42] The practice leads to confusion and delay besides the possibility of the loss of the record and should not ordinarily be permitted,[43] and although done by permission of the officer having the custody of the record is not sanctioned by the courts.[44] Such removal may, however, under some circumstances or for some purposes be properly permitted by the court.[45]

2. Judicial Records. Judicial records or papers should not be removed from the office of the clerk or files where they belong except for good and sufficient reasons,[46] and no person has a right to remove them without permission of the court.[47] The court may grant such permission,[48] but it is a matter within the discretion of the court both as to the removal,[49] and as to the terms and conditions upon which the permission shall be granted,[50] and in some cases it is not only proper but the duty of the court to deny such an application.[51] Ordinarily

may be denied the privilege of making copies of such abstracts which it might sell in competition with the county.

39. Upton *v.* Catlin, 17 Colo. 546, 31 Pac. 172, 17 L. R. A. 282; Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, 32 Atl. 222; Com. *v.* Walton, 6 Pa. Dist. 287; Payne *v.* Staunton, 55 W. Va. 202, 46 S. E. 927. See also Mandamus, 26 Cyc. 288.

Mandamus and not injunction is the proper remedy in such cases. Barber *v.* West Jersey Title, etc., Co., 53 N. J. Eq. 158, 32 Atl. 222 [*reversing* 49 N. J. Eq. 474, 24 Atl. 381].

40. Brewer *v.* Watson, 65 Ala. 88.

41. French *v.* Neal, 24 Pick. (Mass.) 55; Sternberger *v.* McSween, 14 S. C. 35.

42. French *v.* Neal, 24 Pick. (Mass.) 55; Sternberger *v.* McSween, 14 S. C. 35.

43. Seay *v.* Yarborough, 94 N. C. 291.

44. Sternberger *v.* McSween, 14 S. C. 35.

45. McCommon *v.* Spong, 10 Pa. Cas. 453, 14 Atl. 260, holding that under a statute authorizing the court to provide for the making of such indexes to public records as it may deem proper, the court need not commit this work to the incumbent of the office to which such records belong, but may intrust it to some other competent and responsible person and may authorize him to remove record books from the office for such purpose.

For use as evidence in federal court.— It is doubtful whether under any circumstances a state court should enjoin a state officer from removing public records from the state pursuant to a subpœna *duces tecum* issued by a federal court, and it will certainly refuse to do so where the only interest shown by plaintiff in such records is that he would be deprived of the privilege of inspecting the same during their absence. Dickinson *v.* Kingsbury, 8 Cal. App. 179, 96 Pac. 329.

Permission to remove judical records see *infra*, VII, A, 2.

46. Seay *v.* Yarborough, 94 N. C. 291.

Copies should be taken instead of removing the originals if what they contain is needed. Federal Chemical Co. *v.* Green, 110 S. W. 859, 33 Ky. L. Rep. 671; Seay *v.* Yarborough, 94 N. C. 291.

47. Federal Chemical Co. *v.* Green, 110 S. W. 859, 33 Ky. L. Rep. 671; French *v.* Neal, 24 Pick. (Mass.) 55.

An attorney cannot withdraw a record from the files for the purpose of preparing a case for trial but may make use of it within the court-house. Bond *v.* Lockwood, 40 Ill. 119.

48. French *v.* Neal, 24 Pick. (Mass.) 55.

But a surrogate cannot, under the provisions of the New York statutes, allow the testimony and proceedings on an application for probate to be withdrawn from his court upon an abandonment of the proceedings by the proponent. Matter of Greeley, 15 Abb. Pr. N. S. (N. Y.) 393.

Removal from state.— In South Carolina it is held that the court has no power to order a record removed from that state for use in another state in view of Cr. Code, § 307, making it a misdemeanor for the clerk of a court of record to allow the removal of any record except when attending therewith in court pursuant to process. Georgia *v.* Jennings, 50 S. C. 156, 27 S. E. 620.

49. French *v.* Neal, 24 Pick. (Mass.) 55; Rogerson *v.* Neal, 16 Pick. (Mass.) 370.

50. French *v.* Neal, 24 Pick. (Mass.) 55.

51. French *v.* Neal, 24 Pick. (Mass.) 55.

For the purpose of destruction.—The power of a court to permit the withdrawal of its records from the clerk's office for the purpose of destruction should be exercised with the greatest caution, and only in the most exceptional cases. Schecker *v.* Woolsey, 2 N. Y. App. Div. 52, 37 N. Y. Suppl. 292.

On an ex parte application the court will not permit a record to be taken out of its jurisdiction into another county for use in

when the originals are withdrawn copies should be left,[52] but the court may grant the permission with or without such condition.[53]

B. Effect of Withdrawal or Removal. Records or papers, although taken from the office or files by permission of the clerk are in contemplation of law still in his possession and on the files of the court,[54] and their removal does not affect the jurisdiction of the court to act thereon,[55] and it is no defense to an action on certain contracts that plaintiff had improperly removed them from the files of a prior action thereon without an order of court;[56] nor should proceedings in a case be stayed because an attorney has not restored papers which by permission he has withdrawn from the files.[57]

C. Proceedings For Restoration. The court may, whenever it learns that a paper has, with or without permission, been withdrawn from its files, proceed on its own motion to have it restored,[58] and a failure to comply with an order for its restoration may be punished as a contempt.[59] If a paper which has been withdrawn from the files and not returned is necessary as evidence in a case, its restoration may be enforced by means of a subpœna *duces tecum*.[60] Proceedings for the restoration of papers withdrawn from the files may be instituted under the title of the original action, which has been settled, the title being merely a matter of convenience and identification and the proceedings in nowise reviving the action.[61]

VIII. REGISTRATION OF LAND TITLES.

A. In General. In a number of jurisdictions there are now statutes providing for a system of registration of land titles,[62] commonly known as Torrens acts and the Torrens system,[63] and so called after the original Torrens act of

taking depositions. Brown *v.* Alexander, 11 Wkly. Notes Cas. (Pa.) 95.

52. Federal Chemical Co. *v.* Green, 110 S. W. 859, 33 Ky. L. Rep. 671; *Ex p.* Tochman, 23 Fed. Cas. No. 14,072, 1 Hayw. & H. 268.

Photographic copies of exhibits.— Upon application to withdraw certain printed exhibits from the files in a copyright case for the purpose of annexing the same to a commission for the examination of witnesses in another state, the court granted such permission upon condition that photographic facsimiles thereof should be made under the direction of the clerk and filed in lieu of the originals. Daly *v.* Maguire, 6 Fed. Cas. No. 3,551, 6 Blatchf. 137.

The rule as to leaving copies does not apply where at the time of the application to withdraw papers originally filed there are no parties litigant before the court and no persons having any right to have the papers retained and the court can see no use in retaining them. *Ex p.* Tochman, 23 Fed. Cas. No. 14,072, 1 Hayw. & H. 268.

53. French *v.* Neal, 24 Pick. (Mass.) 55.

54. French *v.* Neal, 24 Pick. (Mass.) 55; Pollock *v.* Aikens, 4 S. D. 374, 57 N. W. 1.

55. Pollock *v.* Aikens, 4 S. D. 374, 57 N. W. 1.

56. Federal Chemical Co. *v.* Green, 110 S. W. 859, 33 Ky. L. Rep. 671.

57. Wood *v.* Kroll, 43 Hun (N. Y.) 328, holding that in such case if the paper is important the proper procedure is to issue a subpœna *duces tecum* requiring its production.

58. Howe *v.* Mutual Reserve Fund Life Assoc., 115 Iowa 285, 88 N. W. 338; Wisconsin, etc., R. Co. *v.* Given, 69 Iowa 581, 29 N. W. 611.

59. Wisconsin, etc., R. Co. *v.* Given, 69 Iowa 581, 29 N. W. 611.

60. Wood *v.* Kroll, 43 Hun (N. Y.) 328.

61. Howe *v.* Mutual Reserve Fund Life Assoc., 115 Iowa 285, 88 N. W. 338.

62. *California.*— Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Colorado.— People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

Illinois.— People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

Massachusetts.— McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Minnesota.— Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

In New York a similar statute was enacted in 1908, which embodies the essential features of the other Torrens laws, and also contains a number of provisions peculiar to itself, and regarded by its founders as particularly important. 8 Columbia L. Rev. 438, article by Alfred G. Reeves. See also 14 Bench & Bar 1, editorial.

In the Philippine Islands the registration act became effective Feb. 1, 1903. 41 Am. L. Rev. 751, report of attorney-general on work of court of land registration.

In Canada see 29 Can. L. T. 695, article by A. McLeod.

63. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.*

Australia.[64] The basic principle of this system is the registration of the title to the land instead of registering, as under the old system, the evidence of such title,[65] and while the statutes differ somewhat in their details, the primary purpose of all is the creation of an indefeasible title in the registered owner and the simplification of the transfer of land.[66] The institution of proceedings to register title is a purely voluntary act on the part of the applicant,[67] and he may withdraw his application at any time before final decree.[68] As comparatively few cases have as yet arisen under the statutes in this country reference is made in the notes to various treatises and articles in legal publications wherein the provisions of the statutes and the general working of the system are discussed at length.[69]

B. Constitutionality of Statutes. The original Illinois statute of 1895,[70] and the Ohio statute of 1896,[71] were both declared to be unconstitutional, and the Ohio statute was subsequently repealed;[72] but the courts have passed upon and sustained the constitutionality of the later Illinois statute,[73] and the statutes in other jurisdictions.[74] The objections urged against these statutes and which have been held not to render them unconstitutional have been that they deprive persons of their property without due process of law,[75] that they deny the equal protec-

Crissman, 41 Colo. 450, 92 Pac. 949; People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

64. McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037; Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

65. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

66. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.

The objects and purposes of the statutes have been otherwise stated to be, to establish a system for the registration of title to land whereby the official certificate will always show the state of the title and the person in whom it is vested (Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90); to provide a system of registration whereby it shall be possible for an intending purchaser of land to ascertain by an inspection of the register who may convey to him the title (Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632); to establish the title and give certainty to it so that the public or any one dealing with the land may ascertain the true state of the title by an inspection of the register (Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634); to provide a speedy and summary method of determining rights and interests in real property and to authorize the court in proceedings thereunder to hear and determine all controversies respecting the title and by proper decree definitely to fix, establish, and declare the rights and interests of all interested parties (Reed *v.* Siddall, 94 Minn. 216, 102 N. W. 453); and that the decree shall bind the land and quiet title thereto and shall be conclusive upon all persons whether named in the proceedings or not, subject to some few and immaterial exceptions (Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433).

Advantages of system over that of registration of deeds as a means of preventing fraud see 28 Can. L. T. 540.

67. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

68. McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037, decided under the Massachusetts statute expressly allowing a withdrawal "at any time before final decree, upon terms to be determined by the court."

69. 43 Am. L. Rev. 97 (article by Richard W. Hale); Beers Torrens System, § 1 *et seq.*; 14 Bench & Bar 1 (editorial); 65 Cent. L. J. 449 (article by W. F. Meier); 8 Columbia L. Rev. 438 (article by Alfred G. Reeves).

70. People *v.* Chase, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105, holding the statute to be unconstitutional on the ground that it conferred judicial powers upon the registrars and examiners of title.

71. State *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519, holding the statute to be unconstitutional because the provision as to notice did not meet the constitutional requirement as to due process of law, because the provision for an assurance fund constituted a taking of private property without the owner's consent for a purpose not public, and because it conferred judicial powers upon the recorder, a ministerial officer.

72. 65 Cent. L. J. 449 (article by W. F. Meier); 8 Columbia L. Rev. 438 (article by Alfred G. Reeves).

73. People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

74. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

75. *California.*—Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Colorado.— People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

Illinois.— People *v.* Simon, 176 Ill. 165, 52

tion of the laws,[76] that they commit to the judicial department functions purely administrative and executive,[77] that they delegate judicial powers to ministerial officers, the examiners, registrars, and recorders,[78] that they constitute special legislation,[79] that they create a new county office not filled by appointment or election as provided by the constitution,[80] and that the provision in one of the statutes that the law shall take effect only after a favorable vote by counties is an attempt to delegate legislative power.[81] It has also been urged that the statutes are unconstitutional because they provide that examiners shall be appointed instead of elected,[82] and that such appointment shall be made by the courts,[83] because they make no provision for notice before registration of transfers or dealings subsequent to the initial registration,[84] and because they provide that no application by a person not served with process or notified of the proceeding, to open the decree can be made after sixty days from the entry of the decree, and that no action or proceeding to recover the land can be maintained after such time.[85]

N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

Massachusetts.— Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Minnesota.— State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

That no affirmative judgment in favor of a defendant can be rendered but only a decree of dismissal in case the court finds that the applicant has not a proper title for registration does not make the act in violation of the constitutional provision in regard to due process of law. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

That there can be no personal service of notice upon unknown claimants whose rights may be cut off by the decree does not render the act unconstitutional, since both the common law and the constitution permit unknown claims to be dealt with without personal service upon the claimant. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

76. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

77. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90 (holding that the act is not open to the objection that in cases where the title is not disputed the act of describing and declaring such undisputed title is necessarily administrative and cannot be performed by the judicial department); People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

78. *California.*—Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Colorado.— People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

Illinois.— People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

Massachusetts.— Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Minnesota.— State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

79. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90 (holding that the statute is not unconstitutional as special legislation because it makes special provisions in regard to the statute of limitations); People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801; National Bond, etc., Co. *v.* Hopkins, 96 Minn. 119, 104 N. W. 678, 816; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297 (holding that the provision of the Minnesota statute that the act shall apply only to counties having over seventy-five thousand inhabitants does not, by reason of making a classification of counties according to population, render the act unconstitutional and void as constituting special legislation).

80. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949, holding that the statute providing that county clerks who are *ex officio* recorders of deeds shall be registrars of titles under the new system merely imposes new duties upon such clerks and does not create a new county office.

81. People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

82. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297, holding that the examiners of titles are not county officers within the application of the constitutional provision requiring such officers to be elected, but that they are merely subordinate officers or assistants of the court.

83. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297, holding that the examiners of titles are merely subordinate officers or assistants of the courts and that judicial power includes the authority to appoint all necessary subordinates and assistants.

84. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 81, 55 N. E. 812, 51 L. R. A. 433, where the court, in answer to this objection, said: "It must be remembered that at all later stages no one can have a claim which does not appear on the face of the registry. The only rights are registered rights, and when land is brought into the registry system there seems to be nothing to hinder the Legislature from fixing the conditions upon which it shall be held under that system."

85. State *v.* Westfall, 85 Minn. 437, 89

The provision as to an assurance or indemnity fund was one of the objections relied on and sustained as rendering the Ohio statute unconstitutional,[86] but in other jurisdictions this question does not seem to have been directly passed upon.[87]

C. Procedure — 1. In General. The initial registration of title, that is, the conclusive establishment of a starting point binding upon all the world, must necessarily rest upon judicial proceedings,[88] which must meet the constitutional requirement as to due process of law.[89] The statutes usually provide in detail the procedure for effecting the registration,[90] and while this procedure varies to some extent under the different statutes, the essential steps ordinarily consist in the filing of an application or petition by the applicant showing certain facts in regard to his title and the property in question, and the existence of adverse claims, liens, or encumbrances,[91] a reference of such application to examiners who examine into the title and report thereon to the court,[92] the service of process or notice either personally or by publication upon all parties interested in the property,[93] a subsequent hearing and determination by the court in regard to such title,[94]

N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297, holding that such provision is not intended to apply to adverse claimants in the actual possession of the land upon whom summons is not served, and that as so construed the provision is not unconstitutional but is valid as a statute of limitations.

86. State *v.* Guilbert, 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519.

87. See cases cited *supra*, notes 73–85.

In Illinois the court in sustaining the constitutionality of the act of 1897 as against the various objections urged said: "In our view of the case the indemnity fund feature of the law need not be considered. The law can, as we think, stand and accomplish its purpose without it." People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

88. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

89. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

The most important distinction between the American title registration laws and those of England, Australia, and Canada is that the former uniformly require a judicial proceeding because of the constitutional guarantees that no one shall be deprived of his property without due process of law. 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

90. *California.*—Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Colorado.— People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

Illinois.— People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

Massachusetts.— McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Minnesota.— State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. And see Beers Torrens System, §§ 52–63; 65 Cent. L. J. 449 (article by W. F. Meier); 8 Columbia L. Rev. 438 (article by Alfred G. Reeves).

Procedure under the New York statute see 14 Bench & Bar 1 (editorial); 8 Columbia L. Rev. 438 (article by Alfred G. Reeves).

91. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

Form of application see Beers Torrens System, §§ 41–46.

Supplementary papers to be filed with application see Beers Torrens System, §§ 47–50.

The information required by the statute must be given by the applicant in good faith, and any persons known to have any interest in or lien or claim upon the property must be named. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394.

92. See *infra*, VIII, C, 2.

93. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

Under the Minnesota statute all persons who are suggested by the examiner of titles in his report as having any claim or interest making it proper that they should be parties to the proceeding must, it has been held, be named as defendants in the summons. Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

Service of process or notice.— Known parties should be served personally and unknown parties by publication (Reed *v.* Siddall, 89 Minn. 417, 95 N. W. 303), and all adverse claimants who are known must be named in the summons (Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394).

94. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; State *v.*

which if found to be entitled to record is duly ordered to be recorded,[95] and a certificate issued to the holder of the record title.[96] The proceeding is in effect an action *in rem*,[97] and in such proceeding all rules and principles of law applicable to ordinary actions and proceedings and rules of practice with respect to the trial, introduction of evidence, findings, and judgment should, so far as not clearly inappropriate or otherwise provided for by the act, be followed and applied.[98] In Massachusetts there is a special court having jurisdiction of proceedings to register title, formerly known as the court of land registration and under later statutes as the land court.[99]

2. Before Examiner of Title. The statutes usually provide that the application for registration shall be referred in the first instance to an examiner of titles to investigate the title and report thereon to the court.[1] Under one statute it is said that the examiner to whom the application is referred deals therewith merely as a conveyancer at common law deals with a title which he is employed to investigate;[2] but under another statute it is held that the examiner occupies to the court a position similar to that of a master in chancery,[3] that in the proceedings before him the ordinary rules of evidence apply,[4] that the applicant should introduce his evidence before the examiner upon notice to defendants in such manner that the latter may preserve their rights for review by objection thereto,[5] and that it is not proper for the examiner to make *ex parte* examinations of abstracts of title or records not introduced in evidence before him upon which to base his report.[6] An objection may be filed to the report of the examiner, which objection is in the nature of a special demurrer and should point out the grounds of objection with clearness and certainty.[7] The court is not bound by the report of the examiner but may require other and further proof and determine the rights of the parties upon all the evidence regardless of the opinion of the examiner.[8]

3. Parties. Any person claiming to be the owner of property may maintain

Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

95. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

96. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

Certificate of registration see Beers Torrens System, §§ 67–71.

97. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; Woburn First Nat. Bank *v.* Woburn, 192 Mass. 220, 78 N. E. 307; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

98. Owsley *v.* Johnson, 95 Minn. 168, 103 N. W. 903, holding that the court in such a proceeding should make special findings of fact and conclusions of law as in ordinary civil actions.

The procedure differs from an ordinary action in that the complaint is filed before the summons is issued. 14 Bench & Bar 1, editorial.

99. Foss *v.* Atkins, 193 Mass. 486, 79 N. E. 763; Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

Right of appeal to superior court and to supreme court see *infra*, VIII, C, 7.

1. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. See also Beers Torrens System, § 23.

Report of evidence to court.—Although the statute does not require that the examiner shall report to the court more than the substance of the evidence submitted to him except upon the request of some party to the proceeding or by direction of the court, he should so far report the evidence as to show its introduction before him and that the proper foundation was laid for the introduction of any secondary evidence admitted. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80.

2. McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037.

3. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Gage *v.* Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653.

4. Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634.

5. Glos *v.* Grant Bldg., etc., Assoc., 229 Ill. 387, 82 N. E. 304; Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80.

6. Glos *v.* Grant Bldg., etc., Assoc., 229 Ill. 387, 82 N. E. 304; Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80.

7. Glos *v.* Hoban, 212 Ill. 222, 72 N. E. 1.

8. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

the proceeding to have his title registered, although the deed constituting his evidence of title is not recorded,[9] and any person claiming any interest in or lien upon the property may appear and answer,[10] whether named in the summons or not.[11] All persons known as having or claiming any interest in or lien upon the property must be named as defendants,[12] and all other persons unknown who may have such interest or claim are made parties defendant under some general designation.[13] Under the Minnesota statute all persons suggested by the examiner of titles in his report as having any claim or interest making it proper that they should be parties must be made parties to the proceeding,[14] and where the state has any interest in or lien upon the property, it must be joined as a party.[15]

4. PRESUMPTIONS AND BURDEN OF PROOF. In proceedings for the registration of title the burden is upon the applicant to show a good and valid title to the property in question.[16] The applicant is not, however, obliged to establish the invalidity of opposing claims to the title,[17] but the burden is upon the persons asserting such claims to establish their validity.[18] Where the applicant is a corporation, in the absence of any formal denial, its corporate existence as alleged in the application is to be regarded as admitted and need not be proved.[19]

5. EVIDENCE — a. Admissibility. In proceedings for the registration of title, except in so far as modified by the statute,[20] the general rules as to the admissibility of evidence in civil cases apply,[21] and generally speaking any evidence, if otherwise competent, is admissible which has a legitimate bearing upon the questions of title in issue;[22] but an abstract or other secondary evidence of title is not admissible in lieu of the original document or record unless a proper foundation for its admission is first laid in accordance with the general rules of evidence.[23]

9. National Bank, etc., Co. *v.* Alderson, 99 Minn. 137, 108 N. W. 861.

10. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

11. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

12. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

13. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949 ("all other persons or parties unknown"); People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801 ("all whom it may concern"); State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297 ("all other persons or parties unknown").

14. Dewey *v.* Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704, holding that this requirement is mandatory and that a failure to follow the suggestion of the examiner renders the judgment invalid and void as to such persons and others in privity with them who are not made parties to the proceeding, although the judgment is not void as to other defendants.

15. National Bond, etc., Co. *v.* Hopkins, 96 Minn. 119, 104 N. W. 678, 816, holding that the lien of the state for taxes is an "interest in or lien upon" the land within the application of the statute of 1905, and that this change in the wording of the statute was made to meet the decision in National Bond, etc., Co. *v.* Daskam, 91 Minn. 81, 97 N. W. 458, where it was held that a tax lien was not an "interest in or claim upon" the land within the application of the statute of 1903, and did not require the state to be made a party.

16. Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

17. Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707; Glos *v.* Hoban, 212 Ill. 222, 72 N. E. 1.

18. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Glos *v.* Hoban, 212 Ill. 222, 72 N. E. 1.

Mechanic's lien.— The burden of proof is upon a party asserting a mechanic's lien upon the property involved in proceedings under the Torrens Act to register the title thereto to prove that at the time of the trial of such proceedings the lien is a valid and existing one. Reed *v.* Siddall, 94 Minn. 216, 102 N. W. 453.

19. Gage *v.* Consumer's Electric Light Co., 194 Ill. 30, 64 N. E. 653.

20. See Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

21. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634.

22. Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

Evidence admissible.— Where in the conveyance under which the applicant claims, the statements as to distances and directions in the description are inconsistent, there is an ambiguity making evidence that the boundaries were in fact agreed upon and set upon the land admissible. Haskell *v.* Friend, 196 Mass. 198, 81 N. E. 962.

23. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Glos *v.* Talcott, 213 Ill. 81, 72 N. E. 707; Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634; Glos *v.* Hallowell, 190 Ill. 65, 60 N. E. 62.

b. Weight and Sufficiency. To warrant a decree awarding initial registration of a title it is essential that the evidence should be sufficient to establish a title in the applicant good as against the world,[24] and to identify and show the location of the property in question,[25] and so it is essential that the conveyances under which the applicant claims shall identify the premises so that they can be ascertained by the description.[26]

6. Hearing and Decree. On proceedings to register title the court may and should hear and determine all controversies in regard to the title to the property,[27] and the existence and validity of all claims, liens, and encumbrances,[28] and may determine the boundaries of highways;[29] but while the court may determine the existence, validity, and priority of liens of conflicting claimants, a lien cannot be foreclosed in a proceeding to register title.[30] If the applicant establishes a title entitled to registration he may not only have a decree to that effect, but may also have the claims of defendants decreed to be but clouds upon his title;[31] and upon an application to register title to a tract of land the court may grant relief as to such portion thereof as the evidence shows the applicant to have title to, although the portion registered is less in amount than that described in the application;[32] and where a decree is entered for the registration of a title which sets aside a tax deed of an adverse claimant, the decree should require the applicant to reimburse such defendant for the amount paid in purchasing the land at the tax-sale and for subsequent taxes paid.[33] If, however, the applicant does not show such a title as is entitled to registration, the proceedings should be dismissed,[34] and such applicant is not entitled to a decree finding that the adverse claimants have no title,[35] or that their claims are but clouds on such *prima facie* title as he may be able to show,[36] nor do the statutes provide for any affirmative relief in such cases in favor of those who have been made defendants.[37]

7. Appeal and Error. The statutes usually authorize an appeal from a decree in proceedings to register title as in other civil actions or proceedings,[38] but the

24. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80; Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

Proof sufficient to authorize a decree removing a cloud on title is not sufficient to authorize a decree for initial registration. Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634.

Evidence insufficient.—A deed and possession of the premises thereunder for sixteen years without proof of the payment of taxes for at least seven consecutive years during such possession is not sufficient to establish title by limitation or otherwise as against the world, and in the absence of such proof the applicant must show title to the premises in himself by a chain of title from the government. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80. Other evidence held insufficient to show title see Glos *v.* Grant Bldg., etc., Assoc., 229 Ill. 387, 82 N. E. 304; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

Evidence sufficient.— Proof of possession of land under claim and color of title made in good faith and coupled with the payment of all taxes upon the property for a period of seven successive years is sufficient to authorize a registration of the title. Glos *v.* Mickow, 211 Ill. 117, 71 N. E. 830.

25. Glos *v.* Grant Bldg., etc., Assoc., 229 Ill. 387, 82 N. E. 304; Glos *v.* Bragdon, 229 Ill. 223, 82 N. E. 224; Glos *v.* Ehrhardt, 224 Ill. 532, 79 N. E. 605.

26. Glos *v.* Bragdon, 229 Ill. 223, 82 N. E. 224.

27. Reed *v.* Siddall, 94 Minn. 216, 102 N. W. 453.

Intention of testator.—The court has jurisdiction to determine the question of fact whether the omission of a testator, under whom the petitioner claims title by devise, to provide for his children in his will was intentional. Woodvine *v.* Dean, 194 Mass. 40, 79 N. E. 882.

28. Woburn First Nat. Bank *v.* Woburn, 192 Mass. 220, 78 N. E. 307; Reed *v.* Siddall, 94 Minn. 216, 102 N. W. 453.

29. Woburn First Nat. Bank *v.* Woburn, 192 Mass. 220, 78 N. E. 307.

30. Reed *v.* Siddall, 94 Minn. 216, 102 N. W. 453.

31. See Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

32. Glos *v.* Holberg, 220 Ill. 167, 77 N. E. 80.

33. Gage *v.* Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653.

34. Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

35. Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

36. Glos *v.* Cessna, 207 Ill. 69, 69 N. E. 634; Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

37. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

38. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; Luce *v.* Par-

general rule applies that questions not raised by objection or exception either before the examiner or the court cannot be urged for the first time on appeal.[39] In Massachusetts the statute gives a right of appeal from the land court, formerly known as the court of land registration, to the superior court with the right to claim a jury,[40] or to the supreme judicial court upon questions of law,[41] and questions of law may be reported for determination to the supreme judicial court either by the land court,[42] or by the superior court after an appeal to that court from the decision of the land court,[43] and the supreme judicial court may review on exceptions questions of law arising either in the land court or in the superior court.[44] On appeal from a decree for registration a defendant claiming title may insist that the evidence of the applicant's title was insufficient to warrant the decree,[45] unless such objection has been waived by failure to raise the same

sons, 192 Mass. 8, 77 N. E. 1032; Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. See also Beers Torrens System, § 65.

Under the New York statute no appeal is expressly provided for but the right to appeal is probably covered by the general provisions of the code of civil procedure. 14 Bench & Bar 1, editorial.

The same rules apply to the mode of preserving for review the rulings as to objections and exceptions presented to the report of the examiner as are applicable to the review of objections and exceptions to the reports of masters in chancery. Glos *v.* Hoban, 212 Ill. 222, 72 N. E. 1.

39. Gage *v.* Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653.

Objections to evidence.—An appellate court cannot consider an objection to the admission of evidence by the examiner which was not made in the objections filed to the report of the examiner and in the exceptions to such report filed in the circuit court. Glos *v.* Hoban, 212 Ill. 222, 72 N. E. 1.

40. Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032; Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

Who may appeal.—A city may appeal to the superior court from a decree of the land court determining the boundaries of one of its highways, upon a petition for registration by an abutting owner, and deciding that the public have not gained a right of way by prescription over a strip of land of the petitioner adjoining the highway. Woburn First Nat. Bank *v.* Woburn, 192 Mass. 220, 78 N. E. 307. Where the state is a party the attorney-general need not act in person or through a regular assistant in taking an appeal, but may be represented by private counsel, and it is no objection that the same counsel represents a municipal corporation where there is no inconsistency in the claims of these two parties. McQuesten *v.* Atty.-Gen., 187 Mass. 185, 72 N. E. 965.

Filing report of decision.— The Massachusetts statute of 1905 requires that the judge of the land court whose decision is appealed from shall file in the superior court a full report of his decision and of the facts found by him in so far as they relate to or bear upon any questions involved in the appeal, which report upon the trial in the superior court shall be *prima facie* evidence as to the matters therein contained. Woodvine *v.* Dean, 194 Mass. 40, 79 N. E. 882.

Issues on appeal.— On appeal from the land court to the superior court the issues were, under the acts of 1898–1899, to be framed in the superior court, but under the act of 1902 the issues must be framed in the court of land registration, now known as the land court, and this provision has been continued in force by the subsequent statutes, and the framing of such issues is necessary to complete an appeal. Foss *v.* Atkins, 193 Mass. 486, 79 N. E. 763. On such appeal the superior court can deal only with the matters specified in the appeal, but if the issues as framed by the land court are not adequate properly to present the matters specified in the appeal, it has been held that they may be amended in the superior court. Luce *v.* Parsons, 192 Mass. 8, 77 N. E. 1032.

41. McQuesten *v.* Com., 198 Mass. 172, 83 N. E. 1037.

42. *In re* Welch, 175 Mass. 68, 55 N. E. 1043, holding that, in order to authorize the court of registration to report a question of law to the supreme judicial court, it is not necessary that there should be a formal order or decree upon the record, but that it is sufficient if the report shows that the case is ready for judgment or decree, which would be entered but for the question of law, and it provides for a decree when the doubt as to that question is removed.

43. Lancy *v.* Snow, 180 Mass. 411, 62 N. E. 735.

After a decision by the supreme court upon a case reported by the superior court after an appeal to that court from the land court, the case goes back to the superior court which must determine finally the matters involved in the appeal and remand its decision to the land court. It is only when questions of law come directly to the supreme court from the land court that the supreme court makes a certificate of its decision to that court. Jeffery *v.* Winter, 190 Mass. 90, 76 N. E. 282.

44. Woodvine *v.* Dean, 194 Mass. 40, 79 N. E. 882.

45. Glos *v.* Kingman, 207 Ill. 26, 69 N. E. 632.

before the examiner or the court by objections or exceptions to the examiner's report.[46]

D. Operation and Effect of Registration. Where a decree for registration has been rendered and the record duly made and the certificate issued, the land becomes registered land,[47] and the system contemplates, and it is sometimes expressly so provided, that it shall thereafter remain registered land,[48] and that subsequent transfers and dealings in relation thereto shall be made under and in accordance with the statute.[49] While the institution of the proceeding is voluntary, the procuring of a decree for registration constitutes an agreement running with the land that it shall remain registered land and subject to the provisions of the statute.[50] Any existing liens and encumbrances are noted upon the record and the certificate,[51] and generally speaking the holder acquires an indefeasible title to the property,[52] free from all claims and encumbrances except those so noted.[53] This rule, however, is subject to certain exceptions,[54] as the statutes usually provide a certain period within which persons having an interest in or claim or lien upon the property and who were not served with process or had no notice of the proceedings may apply to come in and assert their claims,[55] and also usually contain exceptions in regard to fraud.[56] The property is also held subject to certain claims as for taxes and other encumbrances which are not properly matters of record.[57] Subsequent encumbrances are to be noted upon the certificate and record,[58] and where a conveyance is made a new certificate is issued to the party acquiring title.[59] In case of a conveyance the usual deed is made, but it is considered merely as a contract between the parties and as

46. Gage *v.* Consumers' Electric Light Co., 194 Ill. 30, 64 N. E. 653.

47. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

48. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; 65 Cent. L. J. 449, article by W. F. Meier.

49. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

50. Tyler *v.* Judges Ct. of Registration, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

51. 65 Cent. L. J. 449, article by W. F. Meier.

52. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

53. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

54. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; Beers Torrens System, §§ 27, 28.

The exceptions include easements, taxes, assessments, and short leases. See 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

55. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; Reed *v.* Siddall, 89 Minn. 417, 95 N. W. 303; Beers Torrens System, § 65; 65 Cent. L. J. 449, article by W. F. Meier.

Permitting prior defendants to come in.— Where the judgment is opened and persons who were not notified of the proceedings are permitted to come in and assert their claims, a person who was a defendant in the original proceeding and against whom judgment was regularly entered is not entitled as a matter of right to come in and defend against such other claimants. Reed *v.* Siddall, 89 Minn. 417, 95 N. W. 303.

56. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

The statutes of Minnesota and the Fiji Islands are said to be the only ones which do not contain express exceptions in regard to fraud. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394, citing the statutes of other states and provinces containing exceptions in regard to fraud, and holding that, although the Minnesota statute does not contain such express exception, it does not affect the jurisdiction of a court of equity to relieve against fraud in procuring a decree of registration where the rights of innocent third parties have not intervened.

57. Baart *v.* Martin, 99 Minn. 197, 108 N. W. 945, 116 Am. St. Rep. 394; 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

58. 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

An exception to this rule exists in regard to such matters and transactions as taxes, water rents, easements, assessments, and short leases, that are not properly matters of record, but such matters and transactions as conveyances, mortgages, leases, judgments, and liens are to be noted upon the certificate. 8 Columbia L. Rev. 438, article by Alfred G. Reeves.

59. Robinson *v.* Kerrigan, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; 65 Cent. L. J. 449, article by W. F. Meier.

authority for the transfer of the registered title to the grantee.[60] The statutes also provide for an assurance fund for the compensation of persons having any interest in or claim against the property whose rights, without any fault on their part, may be cut off by the decree,[61] such fund being raised by requiring the applicant for registration to pay a certain per cent of the assessed value of the property.[62]

IX. SUPPLYING LOST OR DESTROYED RECORDS.

A. Nature, Grounds, and Right of Restoration.[63] The purpose of proceedings to restore or supply a lost or destroyed record is to reëstablish evidence of its existence, in itself conclusive, and to dispense with the necessity of resorting to secondary evidence.[64] Proceedings for supplying or restoring such records are not available to make a record which never existed,[65] or to supply papers which are lost or destroyed before being recorded,[66] but they apply to all duly recorded public records,[67] and where such a record has been lost or destroyed, all that is necessary to authorize its restoration is satisfactory proof that such record once existed and that it has disappeared and cannot be produced,[68] and any person interested therein may institute proceedings for such purpose.[69] The court, should, however, proceed with great care and caution,[70] and require very satisfactory proof of the prior existence, loss, and contents of such record.[71] So also a court of equity will not restore a record where it would be of no benefit to the party asking for its restoration, and it would be an injury to others by casting a cloud upon their title.[72] The fact that provision has been made by statute for restoring lost or destroyed records does not impose any duty upon a person to whose property such a record relates to incur the trouble and expense of such proceedings.[73]

B. Jurisdiction. While jurisdiction in regard to the restoration of lost or destroyed records is in some cases expressly conferred by statute,[74] every court of general jurisdiction has, independently of statute, the power to restore or supply its own records where they have been lost or destroyed,[75] either in whole or in

60. 65 Cent. L. J. 449, article by W. F. Meier.

61. People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801; State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; Beers Torrens System, §§ 8, 9, 89–93; 43 Am. L. Rev. 97 (article by Richard W. Hale); 14 Bench & Bar 1 (editorial); 65 Cent. L. J. 449 (article by W. F. Meier); 8 Columbia L. Rev. 438 (article by Alfred G. Reeves).

62. State *v.* Westfall, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297; Beers Torrens System, § 89.

63. **Alterations and corrections** see *supra*, V, A.

64. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

65. Harlan *v.* Arthur, 3 S. W. 151, 8 Ky. L. Rep. 697.

66. Lovelady *v.* Hockenhull, 58 Ga. 469; State *v.* Simpson, 67 Mo. 647.

67. Smith *v.* Ivey, 48 Ala. 48; Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

68. Goetz *v.* Koehler, 20 Ill. App. 233.

69. Pruit *v.* Pruit, 43 Ala. 73.

Parties see *infra*, IX, C, 3.

70. Dabney *v.* Mitchell, 66 Ala. 495.

71. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Dabney *v.* Mitchell, 66 Ala. 495.

Sufficiency of evidence see *infra*, IX, C, 5.

72. Beattie *v.* Whipple, 154 Ill. 273, 40 N. E. 340; Strong *v.* Shea, 83 Ill. 575.

73. Shannon *v.* Hall, 72 Ill. 354, 22 Am. Rep. 146.

74. See the statutes of the several states; and the following cases:

Alabama.— Alabama, etc., R. Co. *v.* Ventress, 149 Ala. 658, 42 So. 1017; Smith *v.* Ivey, 48 Ala. 48; Pruit *v.* Pruit, 43 Ala. 73.

California.— Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

Florida.— Florida Cent., etc., R. Co. *v.* Bostwick, 55 Fla. 665, 45 So. 1033.

Illinois.— Smith *v.* Stevens, 82 Ill. 554; Blakemore *v.* Wilson, 61 Ill. App. 454.

Tennessee.— Graves *v.* Keaton, 3 Coldw. 8; Cornelius *v.* Memphis City Bank, 3 Tenn. Ch. 5.

See 42 Cent. Dig. tit. "Records," §§ 25, 27, 30.

Construction of statute.— The act of April 2, 1872, "to remedy the evils consequent upon the destruction of any public records, by fire or otherwise," is emphatically a remedial act, and must receive a liberal construction. Smith *v.* Stevens, 82 Ill. 554.

75. *Alabama.*—Alabama, etc., R. Co. *v.* Ventress, 149 Ala. 658, 42 So. 1017; Taylor *v.* McElrath, 35 Ala. 330; Doswell *v.* Stewart,

part,[76] and this power may be exercised either after [77] or before judgment.[78] Courts of equity have jurisdiction of proceedings to restore lost or destroyed records,[79] and statutes providing a procedure for such purpose do not divest courts of equity of their jurisdiction; [80] but a court of equity will not ordinarily exercise its jurisdiction where there is an adequate remedy at law,[81] or for the purpose of restoring the lost or destroyed record of a court of law.[82] Only a court of competent jurisdiction has power to authorize the restoration of a lost or destroyed record,[83] and such power cannot be exercised by a clerk,[84] or by a grand jury,[85] nor can parties to the proceeding agree upon a record to be substituted without any evidence as to the contents of the original.[86]

C. Mode of Restoration and Proceedings — 1. In General. There are both common law and statutory modes of restoring lost or destroyed records,[87] and while a form of procedure is in some cases prescribed by statute,[88] it is ordi-

11 Ala. 629; McLendon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640.

Florida.—Pearce *v.* Thackeray, 13 Fla. 574; Keen *v.* Jordan, 13 Fla. 327.

Illinois.— Blakemore *v.* Wilson, 61 Ill. App. 454; Goetz *v.* Koehler, 20 Ill. App. 233.

Iowa.— Loomis *v.* McKenzie, 48 Iowa 416; Gammon *v.* Knudson, 46 Iowa 455.

Kentucky.— Deshong *v.* Cain, 1 Duv. 309.

Minnesota.— Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229.

Missouri.— St. Louis, etc., R. Co. *v.* Holladay, 131 Mo. 440, 33 S. W. 39; State *v.* Simpson, 67 Mo. 647; Warder, etc., Co. *v.* Libby, 104 Mo. App. 140, 78 S. W. 338.

New Jersey.— Frame *v.* Boyd, 35 N. J. L. 457.

New York.— White *v.* Lovejoy, 3 Johns. 448.

North Carolina.— Greenlee *v.* McDowell, 39 N. C. 481; Harris *v.* McRae, 26 N. C. 81.

Ohio.— Hollister *v.* Lucas County Dist. Ct., 8 Ohio St. 201, 70 Am. Dec. 100.

Pennsylvania.— *In re* Covington Road, 1 Wilcox 117.

South Carolina.— Dubois *v.* Thomas, 14 S. C. 30.

Tennessee.— Cornelius *v.* Memphis City Bank, 3 Tenn. Ch. 5.

See 42 Cent. Dig. tit. "Records," §§ 25, 30.

Courts succeeding to jurisdiction of other courts.— In Alabama the probate court is a continuation of the old orphans' court and has power to supply the lost or destroyed records of that court (Taylor *v.* McElrath, 35 Ala. 330); and in North Carolina the superior courts under the new system have power to supply lost or destroyed records of the former county courts and superior courts of law and equity (Stanly *v.* Massingill, 63 N. C. 558).

A lost indictment may be supplied by the court. State *v.* Simpson, 67 Mo. 647, holding, however, that in the particular case there under consideration it did not appear that there was sufficient evidence that the indictment had ever been recorded.

Where a case is transferred from an old county to a new one, lost court papers should be established before the transfer in the court of the old county. McDougald *v.* Maitland, 30 Ga. 703.

76. Bishop *v.* Hampton, 19 Ala. 792; Loomis *v.* McKenzie, 48 Iowa 416.

Where a part of a record is substituted, the substitute must be consistent with the part remaining on file and must not alter or vary its legal effect as evidence. Bishop *v.* Hampton, 19 Ala. 792.

77. Taylor *v.* McElrath, 35 Ala. 330; Doswell *v.* Stewart, 11 Ala. 629; Wilkerson *v.* Branham, 5 Ala. 608; Williams *v.* Powell, 9 Port. (Ala.) 493; Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229.

78. Red River, etc., R. Co. *v.* Sture, 32 Minn. 95, 20 N. W. 229; Harris *v.* McRae, 26 N. C. 81.

Lost court papers may be established on motion during the trial of the case. Morris *v.* Ogle, 56 Ga. 592.

79. Keen *v.* Jordan, 13 Fla. 327; Hale *v.* Hord, 11 Heisk. (Tenn.) 232.

80. Keen *v.* Jordan, 13 Fla. 327; Hale *v.* Hord, 11 Heisk. (Tenn.) 232.

81. Fisher *v.* Sievres, 65 Ill. 99.

82. Keen *v.* Jordan, 13 Fla. 327; Fisher *v.* Sievres, 65 Ill. 99. But see Hale *v.* Hord, 11 Heisk. (Tenn.) 232.

83. Newton *v.* Strang, 48 Mo. App. 538; Graves *v.* Keaton, 3 Coldw. (Tenn.) 8. See also Cooper *v.* Bramel, 7 Ky. L. Rep. 828.

84. Graves *v.* Keaton, 3 Coldw. (Tenn.) 8.

85. Com. *v.* Keger, 1 Duv. (Ky.) 240, holding that neither by common law nor by statute is a grand jury authorized to supply lost or destroyed records.

86. Griswold *v.* Griswold, 13 Leg. Int. (Pa.) 299.

87. Pruit *v.* Pruit, 43 Ala. 73; Com. *v.* Keger, 1 Duv. (Ky.) 240.

88. See the statutes of the several states; and the following cases:

Alabama.— Pruit *v.* Pruit, 43 Ala. 73.

Florida.— Florida Cent., etc., R. Co. *v.* Bostwick, 55 Fla. 665, 45 So. 1033.

Georgia.— *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694.

Kentucky.— Com. *v.* Keger, 1 Duv. 240.

Missouri.— Warder, etc., Co. *v.* Libby, 104 Mo. App. 140, 78 S. W. 338.

North Carolina.— Cowles *v.* Hardin, 79 N. C. 577.

See 42 Cent. Dig. tit. "Records," § 26.

In Kentucky the statute provides for the appointment of a commissioner by the court

narily held that such statutory proceedings are not exclusive,[89] although if the proceedings are instituted under the statute its requirements must be complied with.[90] While it seems that in the absence of statute the precise method of procedure is not well settled or entirely uniform in the different states,[91] the proceedings are usually instituted by motion or application to the court made upon notice to the adverse party,[92] whereupon the court hears all the evidence adduced on both sides, and if satisfied as to the prior existence and loss of the original record and the correctness of the proposed substitute, orders the same to be enrolled and recorded.[93]

2. Notice of Motion or Application. On proceedings to supply or restore a lost or destroyed record, reasonable notice thereof should be given to the party or parties adversely interested,[94] and it has been held that an order of substitution made without such notice is void and of no effect.[95] The notice may be issued either by the party desiring the restoration or by the court in which it is to be made,[96] and it should state explicitly or contain a copy of that which plaintiff in the application will move to have substituted for the record lost or destroyed;[97] but it need not state the evidence intended to be offered in support of the motion or application.[98] It is not necessary in the absence of statute that the notice should be sworn to,[99] or that it should be accompanied by affidavits of the correctness of the record proposed to be substituted,[1] although it has been held proper that such an affidavit should accompany or be embodied in the notice.[2]

to take proof and report the same (Com. *v.* Keger, 1 Duv. 240); but the mode of procedure for procuring such appointment is not prescribed by the statute (Deshong *v.* Cain, 1 Duv. 309). Upon the taking of testimony before such commissioner the person offering it must first file an affidavit that there is no attested copy of such record in existence known to him. Haney *v.* McClure, 88 Ky. 146. 10 S. W. 427, 10 Ky. L. Rep. 711.

89. Bush *v.* Lisle, 86 Ky. 504, 6 S. W. 330, 9 Ky. L. Rep. 667; Halphen *v.* Guilbeau, 37 La. Ann. 710; Mobley *v.* Watts, 98 N. C. 284, 3 S. E. 677; Cowles *v.* Hardin, 91 N. C. 231; Hale *v.* Hord, 11 Heisk. (Tenn.) 232.

A party may elect to proceed either under the common-law rules or the provisions of the statutes. Cowles *v.* Hardin, 91 N. C. 231.

90. Cowles *v.* Hardin, 79 N. C. 577.

If all the substantial provisions are complied with and the parties are all heard and have their day in court, it is sufficient, although the statute is not strictly followed. Bush *v.* Lisle, 86 Ky. 504, 6 S. W. 330, 9 Ky. L. Rep. 667.

91. See Pearce *v.* Thackeray, 13 Fla. 574.

Proper form of procedure in absence of statute see Adkinson *v.* Keel, 25 Ala. 551; Pearce *v.* Thackeray, 13 Fla. 574.

92. Adkinson *v.* Keel, 25 Ala. 551; Pearce *v.* Thackeray, 13 Fla. 574.

Notice see *infra*, IX, C, 2.

A rule upon the clerk to show cause why the case should not be placed upon the docket where court records have been lost or destroyed is not the proper form of procedure in such a case. Snyder *v.* Copes, 5 La. Ann. 666.

93. Adkinson *v.* Keel, 25 Ala. 551; Lane *v.* Jones, 2 Coldw. (Tenn.) 318.

94. *Alabama.*—Adkinson *v.* Keel, 25 Ala. 551; McLendon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640.

Florida.— Rhodes *v.* Moseley, 6 Fla. 12.

Georgia.— Cleghorn *v.* Johnson, 69 Ga. 369.

Illinois.— Harris *v.* Lester, 80 Ill. 307.

Kentucky.— Chambers *v.* Warren, 6 B. Mon. 244.

Louisiana.— Snyder *v.* Copes, 5 La. Ann. 666.

See 42 Cent. Dig. tit. "Records," § 29.

A person who appears and contests the proceedings cannot object to the want of notice. Pearce *v.* Thackeray, 13 Fla. 574.

In Illinois the statute provides that notice shall be given as in chancery cases and that where the original case is *in rem* and no personal service was had the notice shall be as nearly as may be as it was in the original proceeding, and that where notice by publication is required the court may direct the form of notice and the papers in which it shall be published. De Wolf *v.* Boswell, 65 Ill. App. 65.

95. Harris *v.* Lester, 80 Ill. 307. But see Wilkerson *v.* Branham, 5 Ala. 608; Saunders *v.* Smith, 3 Ga. 121, each holding that while notice is proper it is not absolutely essential, and that the absence of such notice will not render the action of the court void.

96. Pruit *v.* Pruit, 43 Ala. 73, holding that while it is not necessary it is proper and more conducive to order that the court should issue the notice.

97. Adkinson *v.* Keel, 25 Ala. 551; McLandon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640.

98. Ward *v.* State, 78 Ala. 455.

99. Pruit *v.* Pruit, 43 Ala. 73.

1. Pruit *v.* Pruit, 43 Ala. 73.

2. Adkinson *v.* Keel, 25 Ala. 551.

If the notice is explicit in describing the record and is sufficient according to the requirements of the common law, it will be sustained, although it does not conform to the requirements of the statute.[3]

3. PARTIES. Any person interested may institute proceedings for the restoration of a lost or destroyed record,[4] and any number of persons so interested may join as parties in the motion or application.[5] In such proceedings all persons whose estates are affected by the record in question ought properly to be made parties,[6] and upon a motion by a private person to restore lost records of proceedings between himself and the state, the latter is a necessary party.[7] Where the statute provides that the proceeding shall be binding only as between the applicant and those who have been notified, such persons as are notified cannot object that other persons are not made parties.[8]

4. PLEADING. In proceedings to restore or supply a lost or destroyed record, the petition must contain some statement as to the specific contents thereof in order to justify the compulsory production by witnesses of private record books and papers as evidence.[9] Where the statute requires that the complaint or petition shall be sworn to as in other actions, the want of a proper verification is a fatal defect.[10] A plea by general denial to a petition to substitute a lost record is not demurrable.[11]

5. EVIDENCE.[12] On a proceeding to restore a lost or destroyed record it is incumbent upon petitioner to prove an allegation that his exhibits are true and correct copies of the record, although the petition is verified and is not denied by answer;[13] and although the parties to the proceeding agree upon a form of substitute for the original record, such agreement will not be sanctioned by the court in the absence of any evidence as to the actual contents of the original record.[14] The court may receive any legitimate evidence either written or oral;[15] but a substitution should be made only upon clear and satisfactory proof of the former existence, contents, and loss of the record sought to be restored,[16] and if the evidence leaves these matters doubtful or uncertain, the motion or application should be denied,[17] although the record of an ancient transaction need not be proved with such fulness of detail as a recent one.[18] Proof of all the essential facts should be made by means of the best evidence that the nature of the case will admit of,[19] but in the absence of other evidence the record may be established by parol.[20] The previous existence of the original record must be proved by competent evidence,[21] and the loss of the record should be proved by the testimony of the cus-

3. Doswell *v.* Stewart, 11 Ala. 629, holding that since the jurisdiction of the court in such cases is not dependent upon the statute but exists at common law, a notice which is good according to the requirements of the common law is sufficient.

4. Pruit *v.* Pruit, 43 Ala. 73.

5. Pruit *v.* Pruit, 43 Ala. 73.

6. Cowles *v.* Hardin, 79 N. C. 577.

7. Buchanan *v.* Beckham, 18 Ga. 527.

8. De Wolf *v.* Boswell, 65 Ill. App. 65.

9. *Ex p.* Calhoun, 87 Ga. 359, 13 S. E. 694.

10. Cowles *v.* Hardin, 79 N. C. 577.

11. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.

12. See, generally, EVIDENCE, 16 Cyc. 821.

13. Llewellin *v.* Dingee, 165 Ill. 26, 45 N. E. 961.

14. Griswold *v.* Griswold, 13 Leg. Int. (Pa.) 299.

15. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Pruit *v.* Pruit, 43 Ala. 73.

16. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Dabney *v.* Mitchell, 66 Ala. 495.

Evidence held sufficient to authorize decree for restoration see Shiver *v.* Shiver, 45 Ala. 349; Goetz *v.* Koehler, 20 Ill. App. 233; Steiner *v.* Steiner, 49 Iowa 70; Terry *v.* Wood, 7 Baxt. (Tenn.) 292.

17. Dabney *v.* Mitchell, 66 Ala. 495; McLendon *v.* Jones, 8 Ala. 298, 42 Am. Dec. 640.

Evidence held insufficient see Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.

18. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.

19. Cornelius *v.* Memphis City Bank, 3 Tenn. Ch. 5.

Both by common law and under the statutes the proof must be by the best evidence that the nature of the case will admit of, and in Tennessee the statute expressly so provides. Lane *v.* Jones, 2 Coldw. (Tenn.) 318.

20. Bullock *v.* Com., 96 Ky. 537, 29 S. W. 341, 16 Ky. L. Rep. 621; Richard's Appeal, 122 Pa. St. 547, 15 Atl. 903; McMillan *v.* State, 18 Tex. App. 375.

21. Weatherhead *v.* Baskerville, 11 How.

todian thereof,[22] which being established the court may admit other secondary evidence as to its contents,[23] and the proof may be made by any one who is able to state the required facts.[24] Alleged copies of the record are not competent as evidence of its contents in the absence of any proof or admission that they are true and correct.[25] An answer filed in such a proceeding has no effect as evidence, notwithstanding it is verified and the person filing it is competent as a witness.[26]

6. Trial and Judgment. On proceedings to establish or restore a lost or destroyed record, the court will not consider collateral issues.[27] On such a proceeding the only questions in issue are the facts as to the previous existence and loss or destruction of the original, and the substantial correctness of the proposed substitute, and the legal sufficiency of such substitute for any particular purpose does not arise.[28] Persons adversely interested are entitled to contest the application,[29] but while one opposing the substitution may show that the record lost or destroyed did not contain particular recitals, he cannot contest the truth of any recitals which it did contain.[30] The applicant in the proceedings may abandon the whole or any part of his application or amend it by striking out a part thereof.[31] Where application is made to restore a record of proceedings in a pending case, all of which has been destroyed, the court should restore the entire record and not merely the part desired by one or the other of the parties to the case.[32]

7. Review. An appeal may be taken from an order granting or denying an application to restore or supply a lost or destroyed record,[33] or from an order striking such an application from the files,[34] and a superior court also has power to rectify an order establishing a lost record by the original if subsequently found.[35] The judgment will not be reversed for an error in the proceedings not prejudicial to the party complaining;[36] but where it clearly appears that the evidence adduced was sufficient to authorize the restoration, a judgment denying the application will be reversed.[37] It is not reversible error to permit the restoration of a lost paper constituting part of the record in a case upon an affidavit made by a party instead of by the clerk.[38]

D. Operation and Effect. A record duly substituted upon proper proceedings by order of a court of competent jurisdiction in the place of one lost or destroyed has the same efficacy, force, and effect as the original record would have,[39] no more and no less.[40] The judgment or decree of substitution merely

(U. S.) 329, 13 L. ed. 717, holding that proof that a certain office and its records were burned is no proof that any particular record existed.

22. Peirce *v.* Tennessee Bank, 1 Swan (Tenn.) 265; Land Mortg. Bank *v.* Quanah Hotel, (Tex. Civ. App. 1895) 32 S. W. 573 [*affirmed* in 89 Tex. 332, 34 S. W. 730].

23. Peirce *v.* Tennessee Bank, 1 Swan (Tenn.) 265.

24. Terry *v.* Wood, 7 Baxt. (Tenn.) 292.

25. Llewellin *v.* Dingee, 165 Ill. 26, 45 N. E. 961.

26. Tanner *v.* Mills, 50 Ala. 356.

27. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

28. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Ward *v.* State, 78 Ala. 455.

29. Chambers *v.* Warren, 6 B. Mon. (Ky.) 244.

30. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

31. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

32. Florida Cent., etc., R. Co. *v.* Bostwick, 55 Fla. 665, 45 So. 1033; Kehoe *v.* Rounds, 69 Ill. 351.

33. Shiver *v.* Shiver, 45 Ala. 349; Buckman *v.* Whitney, 28 Cal. 555. But see Alabama, etc., R. Co. *v.* Ventress, 149 Ala. 658, 42 So. 1017, holding that there is no right of appeal in the absence of statute, and that under the Alabama statute permitting an appeal in certain cases there is no right of appeal where the order is made in a pending cause.

34. Blakemore *v.* Wilson, 61 Ill. App. 454.

35. Phillips *v.* Behn, 19 Ga. 298.

36. Doswell *v.* Stewart, 11 Ala. 629.

37. Shiver *v.* Shiver, 45 Ala. 349; Steiner *v.* Steiner, 49 Iowa 70.

38. Johnson *v.* Hall, 9 Baxt. (Tenn.) 351.

39. Peddy *v.* Street, 87 Ala. 299, 6 So. 3; Ward *v.* State, 78 Ala. 455; Atkinson *v.* Keel, 25 Ala. 551; Starns *v.* Hadnot, 42 La. Ann. 366, 7 So. 672; Hunt *v.* Innis, 12 Fed. Cas. No. 6,892, 2 Woods 103.

Where a restored record is offered in evidence it will be presumed that the proceedings for substituting it in the place of the original which had been destroyed were regular and that the court acted upon sufficient evidence. Grand Tower Min., etc., Co. *v.* Gill, 111 Ill. 541.

40. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259; Peddy *v.* Street, 87 Ala. 299, 6 So. 3.

supplies record evidence of a record previously in existence,[41] and determines that such record did exist, was lost or destroyed, and is replaced,[42] by a substitute which substantially conforms to the original record,[43] and does not establish the legal sufficiency of such substitute for any particular purpose, this being the same as that of the original record.[44]

X. Establishment of Title Evidenced by Lost or Destroyed Record.

A. In General. In some jurisdictions there are statutes, sometimes known as burnt-records acts,[45] providing a procedure for establishing title to property evidenced by a public record which has been lost or destroyed.[46] Under such statutes a person may maintain an action to establish his title although another person is in possession of the land,[47] unless the statute expressly requires actual possession as a prerequisite to the right to maintain the action.[48] So also the right to maintain such action is not affected by the fact that plaintiff's title depends upon the statute of limitations,[49] that he derived his title after the destruction of the record by purchase at a trustee's sale,[50] that there are adverse claimants [51] or persons claiming a contingent interest in the property,[52] or that other questions as to the title are involved.[53]

B. Jurisdiction. Courts of equity have jurisdiction of proceedings to establish titles evidenced by lost or destroyed records.[54] The fact which confers jurisdiction is the loss or destruction of the record,[55] and this being shown the jurisdiction of the court is not affected by the fact that other questions as to the title are involved;[56] but the court having acquired jurisdiction on this ground may retain it for the purpose of granting full relief and may adjudicate upon all claims to the property in question and determine all issues between the parties relative thereto, whether legal or equitable,[57] and make all orders, judgments,

41. Peddy *v.* Street, 87 Ala. 299, 6 So. 3.
42. Tanner *v.* Mills, 50 Ala. 356.
43. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.
44. Whitney *v.* Jasper Land Co., 119 Ala. 497, 24 So. 259.
45. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.
46. Lofstad *v.* Murasky, 152 Cal. 64, 91 Pac. 1008; Title, etc., Restoration Co. *v.* Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. N. S. 682; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.
47. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.
48. Lofstad *v.* Murasky, 152 Cal. 64, 91 Pac. 1008, holding that under the California statute plaintiff must be in actual possession of the property, and that, although such property is vacant, a mere constructive possession is not sufficient to entitle him to maintain the action.
49. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79.
50. Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759.
51. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.
52. McCampbell *v.* Mason, 151 Ill. 500, 38 N. E. 672.
53. Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.
54. Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.
55. South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592; Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.
56. Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062.
Claim of title accruing subsequently to destruction of records.— The circuit court has jurisdiction to pass upon the validity of a claim of title under a tax deed accruing subsequently to the destruction of the records, in an action to restore title under the Burnt-Records Act. Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.
57. Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.
The fact that one defendant admits the allegations of the petition as to title, both in respect to such title as it existed before the destruction of the record and also as it existed thereafter, does not divest the court of jurisdiction where there are other defendants claiming adversely to petitioner. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

or decrees which may be necessary to give effect to and carry out its decision.[58] It is entirely discretionary with the court as to whether or not it shall submit issues to a jury or remit the parties to a court of law to try questions of title.[59]

C. Parties. In proceedings to establish title evidenced by a lost record, all persons in possession of or claiming any interest in the property should be made parties,[60] but the petition may be filed by one who holds the legal title in trust for another without making the equitable owner a party where such equitable owner consents to the filing of the petition.[61]

D. Pleading and Affidavit. In some cases the statutes prescribe what the petition shall allege,[62] or what shall be shown by the affidavit required to be filed therewith.[63] The fact of the loss or destruction of the record is jurisdictional and must be alleged,[64] but plaintiff need not allege the destruction of the deeds or other evidences of his chain of title.[65] The petition should set forth fully plaintiff's chain of title,[66] and if he desires to restore the destroyed evidences of his title he should specify what the evidences so destroyed are; [67] but the petition need not allege that the premises are in the possession of plaintiff,[68] or that they are vacant or unoccupied.[69] With regard to adverse claimants all that is necessary is that they shall be named and made parties,[70] and plaintiff need not allege

Relief granted see *infra*, X, G.

58. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

59. Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

The statutes do not contemplate that the court should merely restore the evidences of title as they were before the destruction of the record and then remit the parties to a court of law to try their titles. Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

Right to jury trial see JURIES, 24 Cyc. 118.

60. Thompson *v.* Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 183; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Heacock *v.* Lubuke, 107 Ill. 396; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

Persons owning the fee in a street are necessary parties to a proceeding under the Burnt-Records Act to establish title to the strip of land reserved for such street. Thompsoon *v.* Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 183.

61. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

62. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

63. Lofstad *v.* Murasky, 152 Cal. 64, 91 Pac. 1008 (holding that under the requirement of the California statute that the affidavit shall show the character of the estate claimed by plaintiff in the premises and the possession he has of the property described in the complaint, the affidavit must show an actual possession on the part of plaintiff and not merely a constructive possession); Hoffman *v.* San Francisco Super. Ct., 151 Cal. 386, 90 Pac. 939 (holding that under the requirement of the California statute that the affidavit shall allege that plaintiff does not know, and has never been informed of any person having any adverse claim, interest in, or lien upon the property, or if he does know of any such person, the name and address of such person, it is sufficient to allege that plaintiff does not know and has never been informed of any such person, without giving the reason for the statement or the inquiry made to ascertain the fact).

64. Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592.

65. Gage *v.* Gentzel, 144 Ill. 450, 33 N. E. 536. *Compare* Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592.

66. Glos *v.* Cary, 194 Ill. 214, 62 N. E. 555; Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

The petitioner need not allege, however, that he derived his title mediately or immediately from the United States, but it is sufficient to show a valid title under the statute of limitations. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79.

Although not in good form, the petition should be held sufficient where it sets out the chain of title in the form of an abstract of title, with proper general averments preceding the chain of title. Glos *v.* Cary, 194 Ill. 214, 62 N. E. 555.

It is not ground for reversal that the petition alleged title derived from the government through mesne conveyances, without specifying each link in the chain of title where appellant, who is the only party complaining, admitted these allegations and that the records of such conveyances were destroyed. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

67. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

68. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Heacock *v.* Lubuke, 107 Ill. 396; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

69. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Heacock *v.* Lubuke, 107 Ill. 396.

70. Gage *v.* Gentzell, 144 Ill. 450, 33 N. E. 536; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

that their titles are illegal or invalid.[71] A person made defendant, if he answers, must admit, confess, and avoid, or traverse all the material allegations of the petition.[72] If a defendant claims title to the property he must set it up by plea or answer so that its validity may be passed upon and determined,[73] and all such defendants may severally file answers setting up their claims of title;[74] and if a defendant who has purchased the property in question at a tax-sale desires reimbursement for the amount paid at such sale and for taxes, he must by answer set up the facts as to such purchase and payment.[75]

E. Burden of Proof. In proceedings to establish title the burden is upon plaintiff to show the destruction of the record,[76] and to establish his own claim of title;[77] but he is only required to show the validity of his own title,[78] and the burden is upon any defendant claiming adversely to establish the title claimed by him.[79] So if plaintiff by his allegations and proof establishes a *prima facie* valid title from whatever source, he is entitled to a decree unless defendant shows a better one.[80] So also if defendant, who is the holder of a tax deed, desires reimbursement for the amount expended in procuring such deed, he must make proof of the facts necessary to authorize such a decree,[81] and must establish both the fact of such expenditure,[82] and the amount expended.[83]

F. Evidence. In proceedings to establish title the general rules of evidence, unless modified by provisions of the particular statute, apply.[84] Plaintiff must prove every material allegation necessary to authorize a decree in his favor.[85] Where a proper foundation is laid for the introduction of such evidence,[86] plaintiff may introduce an abstract of title made prior to the loss or destruction of the record,[87] or a letter-press copy thereof made in the ordinary course of business,[88] or any copy, abstract, or minutes made from the destroyed records by a person engaged in making abstracts of title for others for hire,[89] or a copy of the original deed where the original cannot be produced.[90] An allegation in the petition that certain deeds in plaintiff's chain of title are lost does not render such deeds inad-

71. Gage *v.* Gentzel, 144 Ill. 450, 33 N. E. 536; Gage *v.* Garaher, 125 Ill. 447, 17 N. E. 777.

72. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79, citing the Illinois statute which expressly so requires.

73. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

74. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

75. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543.

76. Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592.

77. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

78. Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

79. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Gage *v.* Thompson, 161 Ill. 403, 43 N. E 1062; Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79; Gage *v.* Gentzel, 144 Ill. 450, 33 N. E. 536; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Smith *v.* Hutchison, 108 Ill. 662.

80. Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79.

81. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Gage *v.* Gentzel, 144 Ill. 450, 33 N. E. 536; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

82. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

83. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378.

84. See, generally, EVIDENCE, 16 Cyc. 821.

Evidence admissible under the Illinois statute see Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

85. Loewenthal *v.* Elkins, 175 Ill. 553, 51 N. E. 592.

Evidence held sufficient to establish title and authorize a decree for plaintiff see Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629.

86. See Glos *v.* Cary, 194 Ill. 214, 62 N. E. 555; Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314; and, generally, EVIDENCE, 17 Cyc. 465 *et seq.*

87. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

Part of abstract.— If it is only necessary to prove a part of the essential facts by means of an abstract of title, plaintiff need not introduce in evidence the whole abstract, but if the abstract as a whole shows that the title is not in him defendant may introduce the balance of it in evidence. Heinsen *v.* Lamb, 117 Ill. 549, 17 N. E. 75.

88. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314. But see Compton *v.* Randolph, 104 Ill. 555.

89. Converse *v.* Wead, 142 Ill. 132, 31 N. E. 314.

90. Glos *v.* Cary, 194 Ill. 214, 62 N. E. 555.

missible in evidence, since they may have been discovered after the filing of the petition.[91] A tax deed alone is not sufficient to establish title in defendant,[92] and the sworn answer in such a proceeding is not evidence and has no other or greater weight as such than the petition.[93]

G. Hearing, Decree, and Relief Granted. The court may inquire into and pass upon any title to or interest in the property in question,[94] whether legal or equitable,[95] and determine and decree in whom the title is vested,[96] and may pass upon any adverse claims and decree in favor of the better title;[97] but persons having interests in the property in question who are not made parties to the proceeding are not bound by the decree.[98] The court may in the same suit remove a cloud on title,[99] abate an obstruction to a right of way,[1] declare the invalidity of an ordinance,[2] or award a writ of assistance to put the petitioner in possession of the land.[3] Where a title is established as against an adverse claimant holding a tax deed, the decree should provide for reimbursement to him for the amount expended in procuring such deed and the payment of taxes,[4] unless such defendant has failed to set up by way of answer,[5] or to establish by proof,[6] the facts in regard to such purchase, payment, and the amount thereof necessary to justify such a decree.

XI. CONSTRUCTION, OPERATION, AND EFFECT OF RECORDS.[7]

A public record imports absolute verity,[8] and every public record is presumed to be correct,[9] and cannot be collaterally attacked.[10] It will also be presumed that the recording officer properly discharged his duty in regard to the making

91. Gage *v.* Gantzel, 144 Ill. 450, 33 N. E. 536.

92. Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1062.

93. Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79.

94. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Mulvey *v.* Gibbons, 87 Ill. 367; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

95. Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777.

96. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Mulvey *v.* Gibbons, 87 Ill. 367.

97. Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Robinson *v.* Ferguson, 78 Ill. 538; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

98. Thompson *v.* Maloney, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133, holding that a decree in a proceeding under the Burnt-Records Act as to the ownership of a strip of land intended for a street is not binding upon the owners of the lots abutting on the strip and owning the fee in such street who are not made parties to the proceeding.

But an equitable owner who consents to the filing of such petition by the holder of the legal title will be bound by the decree, although he was not made a formal party to the proceedings. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053.

99. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; South Chicago Brewing Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732; Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79; Gage *v.* Caraher, 125 Ill. 447, 17 N. E. 777; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

1. Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

2. Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

3. Harding *v.* Fuller, 141 Ill. 308, 30 N. E. 1053; Gormley *v.* Clark, 134 U. S. 338, 10 S. Ct. 554, 33 L. ed. 909.

If plaintiff is already in possession an order that defendant surrender possession to him and that he have a writ of possession to recover the same is irregular and improper, but as defendant could not be injured thereby it is not ground for reversal. Glos *v.* Carey, 194 Ill. 214, 62 N. E. 555.

4. Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. 629; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217.

5. Gage *v.* Harbert, 145 Ill. 530, 32 N. E. 543.

6. Glos *v.* Kelly, 212 Ill. 314, 72 N. E. 378; Gage *v.* Gentzel, 144 Ill. 450, 33 N. E. 536; Gage *v.* Du Puy, 134 Ill. 132, 24 N. E. 866.

7. **Estoppel by record** see. ESTOPPEL, 16 Cyc. 684.

Records as notice see the cross-references at the beginning of this article, *ante*, page 579.

8. Kelley *v.* Dresser, 11 Allen (Mass.) 31.

9. McIntyre *v.* White, 124 Ala. 177, 26 So. 937 (holding further that a failure on the part of the recording officer to compare the record when complete with the original document to insure its correctness will not affect this presumption); Kelley *v.* Dresser, 11 Allen (Mass.) 31; Wilson *v.* Smith, 5 Yerg. (Tenn.) 379.

10. Kelley *v.* Dresser, 11 Allen (Mass.) 31; Waldron *v.* Palmer, 104 Mich. 556, 62 N. W. 731; Facey *v.* Fuller, 13 Mich. 527; Radford Trust Co. *v.* East Tennessee Lumber Co., 92 Tenn. 126, 21 S. W. 329; Taliaferro *v.* Pryor, 12 Gratt. (Va.) 277.

of the record,[11] and that the record was made from the original document.[12] So also a plan corresponding with the description of lots and streets in contemporaneous and subsequent conveyances, which was placed in the recorder's office and remained there for many years, although without any mark of authenticity, will be presumed to have been placed there by the owner of the property.[13] Words which it is manifest from the context have been omitted in a public record may be supplied by construction, provided it clearly appears that they were omitted by mistake or inadvertence,[14] and where an abbreviation in a public record unmistakably stands for a particular word, it may be read as such word.[15] It is not the policy of the law to nullify records where substance is found, and clerical errors and technical omissions should be disregarded and a substantial compliance with the statute held sufficient.[16] So the fact that the record of a deed does not show any word or device indicating the seal will not necessarily warrant the inference that the original was not sealed or justify the rejection of the record as evidence;[17] and although the register of deeds should keep his office at the county-seat, a failure to do so will not render void the records of his office.[18] Where the same deed is recorded in two different books and the records do not correspond, and the original deed is lost, the court in determining which is correct will consider the evidence afforded by the records themselves as to which has been more carefully kept and also the situation of the property and the conduct of the parties with reference thereto.[19] Where an instrument is on its face recordable and is recorded the record is constructive notice to persons chargeable with record notice.[20] In some jurisdictions there are special statutory provisions relating to the operation and effect of certain records.[21]

XII. Offenses Incident to Records.

A. In General. In some jurisdictions there are various acts which done in regard to or affecting public records are criminal offenses,[22] such as the act of

11. Taliaferro *v.* Pryor, 12 Gratt. (Va.) 277.

12. Carbee *v.* Hopkins, 41 Vt. 250.

13. Birmingham *v.* Anderson, 40 Pa. St. 506.

14. State *v.* Martin, 61 N. C. 326.

15. Mason *v.* Belfast Hotel Co., 89 Me. 384, 36 Atl. 624.

16. International Kaolin Co. *v.* Vause, 55 Fla. 641, 46 So. 3.

17. Starkweather *v.* Martin, 28 Mich. 471, holding that where the deed was one which should have been sealed and which it was the duty of the officer to record if sealed and not to record if not sealed, and the wording of the deed and attestation clause and certificate of acknowledgment all speak of it as being sealed it will be presumed that it was under seal, and the absence of any indication of a seal on the record will not, under such circumstances overcome this presumption.

18. Thomas *v.* Hanson, 59 Minn. 274, 61 N. W. 135.

19. Stinson *v.* Doolittle, 50 Fed. 12.

20. Boswell *v.* Laramie First Nat. Bank, 10 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

21. See the statutes of the several states; and cases cited *infra*, this note.

Under the Georgia statute of 1856, providing that an instrument found to have been recorded and the record of which has been burned shall be taken and held to have been recorded legally and upon sufficient proof of its execution, it is held that the presumption of proper probate is not conclusive but only *prima facie* and subject to rebuttal. Oliver *v.* Persons, 30 Ga. 391, 76 Am. Dec. 657.

The Michigan statute of 1867 (Howell St. § 5678), making the record of a deed executed by an executor, administrator, or sheriff *prima facie* evidence of the regularity of all proceedings prior to the deed, applies to existing records as well as those made subsequently. Sauers *v.* Giddings, 90 Mich. 50, 51 N. W. 265.

In Tennessee the act of 1839, chapter 26, section 9, providing that a deed duly registered for twenty years or more "shall be presumed to be on lawful authority," was held to apply only to deeds executed by the grantor himself and not where executed by an attorney. The act of 1859–1860, chapter 91, was passed to supply this omission as to attorneys, and under this act the fact that the attorney had a power of attorney to make it cannot be disputed, but whether the deed was made properly so as to pass a valid title is subject to be disputed. Murdock *v.* Leath, 10 Heisk. 166.

22. See the statutes of the several states; and the following cases:

Michigan.— People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

Montana.— State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

New York.— People *v.* Peck, 138 N. Y. 385, 34 N. E. 347, 20 L. R. A. 381, 10 N. Y. Cr.

altering,[23] mutilating,[24] destroying,[25] removing,[26] secreting,[27] stealing,[28] or forging or falsifying such records,[29] or withholding or detaining the same from a successor in office,[30] or publishing as true a false, altered, or forged record,[31] and such statutes apply to all public records and not merely to court records.[32]

B. Indictment or Information. Indictments and informations for offenses incident to public records are governed by the rules relating to indictments and informations generally.[33] It is ordinarily sufficient to charge the offense in the language of the statute,[34] and while it is not always necessary to follow the literal language of the statute,[35] it is essential that either the same words or words of

410 [*affirming* 67 Hun 560, 22 N. Y. Suppl. 576, 10 N. Y. Cr. 363].

Texas.— Martin *v.* State, 24 Tex. 61.

United States.— U. S. *v.* De Groat, 30 Fed. 764.

See 42 Cent. Dig. tit. "Records," § 45.

23. *Louisiana.*— State *v.* Anderson, 30 La. Ann. 557.

Mississippi.—Harrington *v.* State, 54 Miss. 490.

Oregon.— Whalley *v.* Tongue, 29 Oreg. 48, 43 Pac. 717.

Pennsylvania.— Ream *v.* Com., 3 Serg. & R. 207.

Texas.— Martin *v.* State, 24 Tex. 61, holding that under a statute making the fraudulent alteration of any record "with intent that any person may be defrauded" a criminal offense, the state is a "person" within the application of the statute.

See 42 Cent. Dig. tit. "Records," § 45.

24. Whalley *v.* Tongue, 29 Oreg. 48, 43 Pac. 717.

25. People *v.* Jewell, 138 Mich. 620, 101 N. W. 835 (holding, however, that under Comp. Laws (1897), §§ 11, 361, declaring all papers and records of a township public property, and making the wilful destruction of the same a misdemeanor, it is necessary, in order to constitute the offense, that the destruction be done with criminal intent); People *v.* Peck, 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, 10 N. Y. Cr. 410 [*affirming* 67 Hun 560, 22 N. Y. Suppl. 576, 10 N. Y. Cr. 363].

26. People *v.* Bussey, 82 Mich. 49, 46 N. W. 97; People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131 (holding that one who by bribing a representative of a district attorney's office secures indictments against another for the purpose of destroying them violates Pen. Code, § 94, prohibiting the wilful and unlawful removal of a paper filed in a public office by authority of law); People *v.* Peck, 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, 10 N. Y. Cr. 410 [*affirming* 67 Hun 560, 22 N. Y. Suppl. 576, 10 N. Y. Cr. 363]; U. S. *v.* De Groat, 30 Fed. 764 (holding, however, that the specific intent to destroy a public record as such is the essential element of the offense denounced by U. S. Rev. St. (1878) § 5403 [U. S. Comp. St. (1901) p. 3656], and that a defendant who has stolen papers belonging to an internal revenue office from a barn where they are stored under the belief that they are old papers and without knowledge that they are public records cannot be convicted under the statute).

27. State *v.* Bloor, 20 Mont. 574, 52 Pac. 611, holding that where a bill was placed in the hands of the secretary of the senate after its passage, to be transmitted by him in his official capacity to the house, and he wilfully withheld it, he was guilty of secreting a public record under Pen. Code, § 230, although he was not the officer required by law to take charge of bills.

Defenses.— The fact that some of the inhabitants of a town had knowledge that a book of the town records was left with defendant is no defense to a charge of subsequently secreting it. State *v.* Williams, 30 Me. 484.

28. Wilson *v.* State, 5 Ark. 513, holding that the taking of bank-notes from a justice's court where they were regularly filed as a part of the records, is an offense within the act making it an offense to steal any books process, or paper belonging to any of the public offices of the state, or to the records of any court, with intent to defraud.

29. Ream *v.* Com., 3 Serg. & R. (Pa.) 207; Martin *v.* State, 24 Tex. 61.

30. Baysinger *v.* People, 115 Ill. 419, 5 N. E. 375.

31. State *v.* Anderson, 30 La. Ann. 557.

32. Wilson *v.* State, 5 Ark. 513; Ream *v.* Com., 3 Serg. & R. (Pa.) 207.

Labor statistics gathered by the commissioner of labor statistics, including answers to circulars on that subject, are papers deposited with a public officer within the provisions of N. Y. Pen. Code, § 94. People *v.* Peck, 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, 10 N. Y. Cr. 410 [*affirming* 67 Hun 560, 22 N. Y. Suppl. 576, 16 N. Y. Cr. 363].

33. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

34. Loehr *v.* People, 132 Ill. 504, 24 N. E. 68, holding that an indictment for the alteration of a public record is sufficient if it charges the offense in the language of the statute. See also People *v.* Peck, 67 Hun (N. Y.) 560, 22 N. Y. Suppl. 576, 10 N. Y. Cr. 363 [*affirmed* in 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381, 10 N. Y. Cr. 410], holding that an indictment for the statutory offense of removing or destroying a public record need not set forth the circumstances of the crime other than those set forth in the statute; all that is necessary being to set forth the offense as the statute defines it.

This rule does not apply where in the language of the statute there are no sufficient words to define the offense. Harrington *v.* State, 54 Miss. 490.

35. See Harrington *v.* State, 54 Miss. 490.

equivalent meaning and substantially synonymous should be used.[36] The indictment must have that degree of certainty required in indictments generally,[37] but it is sufficient if it states the offense so plainly that the nature of the offense may be easily understood by the jury.[38] An indictment for wilfully secreting a public record need not allege the means used for that purpose,[39] and where a statute declares that the records of certain offices are public property belonging to the people of the state, an indictment for unlawfully removing such records need not allege that they were the property of the state;[40] but it has been held that an indictment for altering a public record is defective if it fails to allege that such act was done with intent to injure or benefit some person, although this is not expressly required by the statute.[41] A count in an indictment for mutilating a document deposited with a public officer is demurrable where it appears on the face of the indictment that the document was a certified copy and the statute required that the original should be so filed.[42]

C. Evidence. On the trial of indictments for offenses incident to public records the general principles of the criminal law apply as to the admissibility,[43] and to the weight and sufficiency of evidence.[44]

RECOUNT. A counting again, as of votes.[1]

36. Harrington *v.* State, 54 Miss. 490, holding that on an indictment for altering a public record the use of the word "willingly" is not equivalent to the word "wittingly" used in the statute.

Under a statute making it an offense to "alter or publish as true" a false, altered, or forged record, an information charging defendant with "uttering and publishing as true" a false, altered, or forged record, does not charge an offense under the statute. State *v.* Anderson, 30 La. Ann. 557.

37. Harrington *v.* State, 54 Miss. 490, holding that an indictment for altering a record in the county treasurer's office is fatally defective where the allegations leave it doubtful whether the alteration was of the number on a warrant or in the record of the number as entered on the treasurer's ledger; the warrant itself not being a public record.

38. Loehr *v.* People, 132 Ill. 504, 24 N. E. 68.

Description of record.— In an indictment charging the wrongful removal of an enrolled decree consisting of certain papers named, "and other papers," it is not necessary to more specifically describe the other papers if they are parts of the enrolled decree. People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

39. State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

40. People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

41. Harrington *v.* State, 54 Miss. 490. But see State *v.* Bloor, 20 Mont. 574, 52 Pac. 611, holding that an indictment under Pen. Code, § 230, for wilfully secreting a public record need not allege an intent to injure any particular person, in view of section 7 providing that an act may be done wilfully without any intent to injure another.

42. People *v.* Wise, 3 N. Y. Cr. 303.

43. See, generally, CRIMINAL LAW, 12 Cyc. 390 *et seq.*

Evidence admissible.— On an indictment for unlawfully carrying away a public record it is competent as tending to show motive to admit evidence that such papers had been used as evidence against defendant in a case pending at the time they disappeared. People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

Evidence not admissible.— On an indictment for carrying away a public record it is error to permit a witness to testify that in his opinion no person other than defendant could have had any motive or interest in the disappearance of such record. People *v.* Bussey, 82 Mich. 49, 46 N. W. 97.

44. See, generally, CRIMINAL LAW, 12 Cyc. 485.

Evidence held sufficient on an indictment for secreting a public record see State *v.* Williams, 30 Me. 484 (holding that proof that defendant denied having possession of the record or any knowledge of it will sustain a verdict of guilty, although it appears that he kept the record openly with his own books and papers); State *v.* Bloor, 20 Mont. 574, 52 Pac. 611.

Attempt to remove.— Where defendant formed a plot to obtain possession of certain indictments for the purpose of destroying them, by bribing one of the assistant attorneys having them in charge, to deliver them to him for a certain consideration, and a third party, pretending to act for such district attorney, delivered them to him, and he took possession of them and walked away, whereupon he was arrested and the indictments recovered, it was held that he was properly convicted under Pen. Code, § 94, of an attempt to unlawfully remove documents from a public office. People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

1. Webster Int. Dict. See Matter of Stiles, 69 N. Y. App. Div. 589, 593, 75 N. Y. Suppl. 278, holding that the term "recount" does not require that in the first instance there should be a recanvass in the sense that the votes actually distributed to the various columns of the tally sheets by the "canvass" already made should be redistributed therein.

RECOUPMENT, SET-OFF, AND COUNTER-CLAIM

By James Matlock Ogden*

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Action or Proceeding in Particular Court:
Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 475, 479.
United States Court of Claims, see COURTS, 11 Cyc. 968.
Action or Proceeding on:
Bonds:
Arbitration Bond, see ARBITRATION AND AWARD, 3 Cyc. 786.
Attachment Bond, see ATTACHMENT, 4 Cyc. 864.
Guardian's Bond, see GUARDIAN AND WARD, 21 Cyc. 246.
Municipal Bond, see MUNICIPAL CORPORATIONS, 28 Cyc. 1652.
Replevin Bond, see REPLEVIN.
Commercial Paper, see COMMERCIAL PAPER, 8 Cyc. 62.
Contract of Guaranty, see GUARANTY, 20 Cyc. 1485.
Insurance Contract, see ACCIDENT INSURANCE, 1 Cyc. 303; LIFE INSURANCE, 25 Cyc. 907; MARINE INSURANCE, 26 Cyc. 721.
Action or Proceeding to:
Distrain For Rent, see LANDLORD AND TENANT, 24 Cyc. 1290.
Enforce:
Assessment by Insolvent Insurance Company, see INSURANCE, 22 Cyc. 1425.
Assessment in Mutual Company, see INSURANCE, 22 Cyc. 1425.
Special Assessment by Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 1229.
Foreclose:
Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 329.
Mortgage, see MORTGAGES, 27 Cyc. 1556.
Purchase-Money Lien, see VENDOR AND PURCHASER.
Open, Surcharge, or Falsify an Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 459.
Quiet Title, see QUIETING TITLE, 32 Cyc. 1361.
Recover:
Damages Caused by Improvement or Repair of Streets and Ways, see MUNICIPAL CORPORATIONS, 28 Cyc. 1079.

For Matters Relating to — (*continued*)
Recoupment, Set-off and Counter-Claim in — (*continued*)
Particular Actions and Proceedings — (*continued*)
Action or Proceeding to — (*continued*)
Recover — (*continued*)
Damages For Land Taken Under Power of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 767.
Dower, see DOWER, 14 Cyc. 981.
Freight by Owner of Vessel, see SHIPPING.
Mesne Profits in Ejectment, see EJECTMENT, 15 Cyc. 231.
Money Collected by Attorney For Client, see ATTORNEY AND CLIENT, 4 Cyc. 971.
Purchase-Money Paid, see VENDOR AND PURCHASER.
Purchase-Price of Goods Sold at Assignee's Sale, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 240.
Rent, see LANDLORD AND TENANT, 24 Cyc. 1203.
Reform Written Instrument, see REFORMATION OF INSTRUMENTS.
Action or Proceeding Under:
Admiralty, see ADMIRALTY, 1 Cyc. 864.
Bankruptcy, see BANKRUPTCY, 5 Cyc. 379.
Particular Form of Action, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 483; DETINUE, 14 Cyc. 255 note 64; EJECTMENT, 15 Cyc. 78; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1145; MANDAMUS, 26 Cyc. 460; REPLEVIN.
Recoupment, Set-Off, and Counter-Claim of Particular Claim:
Claim For:
Benefits to Land Against Damage Where Land Is Taken Under Power of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 764.
Breach of Warranty of Articles Purchased, see SALES.
Improvements and Taxes Against Damages or Mesne Profits in Ejectment, see EJECTMENT, 15 Cyc. 231.
Trespass in Action For Illegally Injuring or Killing Animals, see ANIMALS, 2 Cyc. 422.
Usury, see USURY.
Wrongful Attachment in the Main Suit, see ATTACHMENT, 4 Cyc. 842.
Claims Barred by Statute of Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1064, 1312.
Judgment, see JUDGMENTS, 23 Cyc. 1478.
Review of Judgment on Counter-Claim, see APPEAL AND ERROR, 3 Cyc. 238.
Revival of Cross Demand by Personal Representative Upon Death of Defendant, see ABATEMENT AND REVIVAL, 1 Cyc. 85.
Time For Pleading Cross Demand, see PLEADING, 31 Cyc. 225.
Writ of Entry on Mortgage, see MORTGAGES, 27 Cyc. 1446.

I. DEFINITION, NATURE, AND HISTORY OF THE REMEDIES.

A. Recoupment. Recoupment is the act of rebating or recouping a part of a claim upon which one is sued by means of a legal or equitable right resulting from a counter-claim arising out of the same transaction. It is the right of defendant, in the same action, to claim damages from plaintiff, either because he has not complied with some cross obligation of the contract upon which he sues, or because he has violated some duty which the law imposed upon him in the making or performance of that contract.[1] It is an innovation on the strict rules of com-

1. Bouvier L. Dict.
Other definitions are: "Defalcation or discount from a demand. A keeping back something which is due, because there is an equitable reason to withhold it. . . . A right of the defendant to have a deduction

mon law,[2] and rests upon the principle that it is just and equitable to settle in one action all claims growing out of the same contract or transaction.[3] In its original strict sense it was a mere reduction of the damages claimed by plaintiff, by proof, of mitigating circumstances connected with or growing out of the transaction upon which plaintiff's claim was based showing that it would be contrary to equity and good conscience to suffer plaintiff to recover the full amount of his claim,[4] being considered in the nature of a doctrine of mere mitigation of damages,[5] and was of very limited application.[6] But in more recent practice the doctrine has been greatly extended in its application,[7] and is spoken of as a liberal

from the amount of the plaintiff's damages, for the reason that the plaintiff has not complied with the cross-obligations or independent covenants arising under the same contract." Black L. Dict.

"The right of the defendant to claim a reduction of the plaintiff's demand on account of some breach of stipulation by the plaintiff in the contract sued on." White *v.* Reagan, 32 Ark. 281, 284.

"A right of deduction from the amount of the plaintiff's claim by reason of either a payment thereon or some loss sustained by the defendant by reason of the plaintiff's wrongful or defective performance of the contract out of which his claim originated." Michigan Yacht, etc., Co. *v.* Busch, 143 Fed. 929, 936, 75 C. C. A. 109.

"A defence by which a defendant, when sued for a debt or damages, might recoup the damages suffered by himself from any breach by the plaintiff of the same contract." Hurst *v.* Everett, 91 N. C. 399, 404.

"A species of common law set-off for damages due the defendant growing out of the same transaction." Maryland Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 458, 28 Atl. 393, 394, 23 L. R. A. 652; Lee *v.* Rutledge, 51 Md. 311, 318.

"The keeping back of something that is due, because there is an equitable reason to withhold it." Wheat *v.* Dotson, 12 Ark. 699, 702; Ives *v.* Van Epps, 22 Wend. (N. Y.) 155, 156; Michigan Yacht, etc., Co. *v.* Busch, 143 Fed. 929, 936, 75 C. C. A. 109.

"The keeping back and stopping something which is due." Jacob L. Dict. [*quoted* in Ward *v.* Fellers, 3 Mich. 281, 287].

"The cutting back on the plaintiff's claim by the defendant." Davenport *v.* Hubbard, 46 Vt. 200, 207, 14 Am. Rep. 620.

"A quasi offset of counterclaims not liquidated." Barber *v.* Chapin, 28 Vt. 413, 416.

It is synoymous with "defalk" or "discount" (Hatchett *v.* Gibson, 13 Ala. 587, 595; Strike's Case, 1 Bland (Md.) 57, 79; Ward *v.* Fellers, 3 Mich. 281, 287; Ives *v.* Van Epps, 22 Wend. (N. Y.) 155, 156), and with "reduction" (Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254, 260; Davenport *v.* Hubbard, 46 Vt. 200, 207, 14 Am. Rep. 620; Michigan Yacht, etc., Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109), and seems to correspond to the reconvention of the civil law (Bouvier L. Dist.).

The term is derived from the French, *recouper,* to cut again, to cut back. The Wellsville *v.* Geisse, 3 Ohio St. 333; Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

2. Lloyd *v.* Manufacturers, etc., Warehouse Co., 102 Ill. App. 551.

3. Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298; Home Sav. Bank *v.* Boston, 131 Mass. 277.

Recoupment looks through the whole contract, treating it as an entirety, and regarding the things done and stipulated to be done on each side as the consideration of the things done and stipulated to be done on the other; and when a plaintiff seeks redress for the breach of the stipulations in his favor, it sums up the grievances on each side, strikes a balance, and gives him a judgment for only such difference as may be found in his favor. Finney *v.* Cadwallader, 55 Ga. 75; Lufburrow *v.* Henderson, 30 Ga. 482, holding that the mere statement of the rule commends it to every lover of justice.

4. *Alabama.*— Mayberry *v.* Leech, 58 Ala. 339.

Illinois.— Wadhams *v.* Swan, 109 Ill. 46; Kingman *v.* Draper, 14 Ill. App. 577.

Missouri.— Grand Lodge of Masons *v.* Knox, 20 Mo. 433, holding that it was a mere right of deduction from the amount of plaintiff's recovery, on the ground that his damages were not really as high as he alleged.

New York.— Batterman *v.* Pierce, 3 Hill 171; Sickels *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527.

Tennessee.— Gibson *v.* Carlin, 13 Lea 440; Pettee *v.* Tennessee Mfg. Co., 1 Sneed 381.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

5. Waterman *v.* Clark, 76 Ill. 428; Spurgin *v.* Kruse, 125 Ill. App. 507; Cram *v.* Dresser, 2 Sandf. (N. Y.) 120.

6. Ward *v.* Fellers, 3 Mich. 281; Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, where the court says that the remedy was of such limited application and so trammeled by technicalities that it was of but little use, and that the term became for a time obsolete, although the principle was always retained.

7. Desha *v.* Robinson, 17 Ark. 228; Grand Lodge of Masons *v.* Knox, 20 Mo. 433; Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, holding, however, that, although the right of recoupment has been extended in modern times the instances and extent to which it may be exercised are to a very considerable degree unsettled. But

and beneficial improvement upon the old doctrine of failure of consideration,[8] and is now generally regarded as in the nature of a cross action,[9] the right of plaintiff to sue being admitted,[10] but defendant alleging that he has been injured by a breach of another branch of the same contract on which the action is founded [11] and claiming to stop, cut off, or keep back so much of plaintiff's damages as will satisfy the damages which have been sustained by defendant.[12] In some states recoupment has been made statutory.[13]

B. Set-Off — 1. Definition and Nature. A set-off is a counter demand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action,[14] the object of which is to liquidate the whole or a part of plaintiff's demand, according to the amount of the set-off,[15] and like the modern recoupment [16] is in the nature of a cross action.[17]

see The Wellsville *v.* Geisse, 3 Ohio St. 333, holding that recoupment, even as enlarged in its meaning by modern usage, signifies nothing more than a reduction of damages.

Recoupment has a wider application in America than in England. Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (Del. 1906) 62 Atl. 1054.

8. Lufburrow *v.* Henderson, 30 Ga. 482; Mell *v.* Moony, 30 Ga. 413. See Wheat *v.* Dotson, 12 Ark. 699.

9. Peck *v.* Brewer, 48 Ill. 54; Mendel *v.* Fink, 8 Ill. App. 378; Houston *v.* Young, 7 Ind. 200; Clark *v.* Wildridge, 5 Ind. 176; Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251 (holding that recoupment is in substance and effect a cross action); Nichols *v.* Dusenbury, 2 N. Y. 283.

10. Wheat *v.* Dotson, 12 Ark. 699; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170 (holding that where plaintiff counts on a contract which defendant denies altogether, or, while admitting it, denies its legal effect as claimed by plaintiff, the doctrine of recoupment is not applicable); Jones *v.* Moore, 42 Mo. 413; Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570 (holding that there can be no recoupment based on a fact necessarily fatal to the whole action); Vassear *v.* Livingston, 13 N. Y. 248; Nichols *v.* Dusenbury, 2 N. Y. 283; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. (N. Y.) 299 (holding that recoupment always implies that plaintiff had a cause of action). And see *infra*, V, F.

Recoupment does not proceed upon the ground that the contract is a nullity and that the recovery is upon a *quantum meruit* or *quantum valebat*, but that the contract stands and the recovery is mitigated to the extent, and because of the fraud or failure. Wheat *v.* Dotson, 12 Ark. 699.

Where defendant is entitled to no more than nominal damages, a plea of recoupment is bad on demurrer. Moore *v.* Westinghouse Electric, etc., Co., 112 Ala. 452, 20 So. 487.

11. Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14.

12. Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14; Nichols *v.* Dusenbury, 2 N. Y. 283.

13. See the codes and statutes of the several states. And see Finney *v.* Cadwallader, 55 Ga. 75; Babbitt *v.* Moore, 51 N. J. L. 229, 17 Atl. 99; Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373.

14. Raymond *v.* State, 54 Miss. 562, 563, 28 Am. Rep. 382.

Other definitions are: "A counter-claim or cross-demand; a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiff's demand, either in whole or in part, according to the amount of the set-off." Black L. Dict.

"A demand which a defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or a part of his claim." Bouvier L. Dict.

"The compensation of one debt or demand for another, by virtue of which damages are recovered by the party in whose favor a balance shall be found." Ward *v.* Fellers, 3 Mich. 281, 286.

"A cause of action in favor of the defendant and against the plaintiff, arising upon contract or ascertained by the decision of a court." Richardson *v.* Penny, 10 Okla. 32, 40, 61 Pac. 584.

"A cross-debt, a counter demand or claim, originating in contract, which the defendant holds against the plaintiff." Kingman *v.* Draper, 14 Ill. App. 577.

"A payment by operation of law." Swasey *v.* Wilmot, 4 N. H. 233, 236.

15. Avery *v.* Brown, 31 Conn. 398; Meriwether *v.* Bird, 9 Ga. 594; Hurst *v.* Everett, 91 N. C. 399.

16. See *supra*, I, A.

17. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Brazier *v.* Fortune, 10 Ala. 516; Carew *v.* Northrup, 5 Ala. 367.

Florida.— Robinson *v.* L'Engle, 13 Fla. 482.

Georgia.— McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Kinard *v.* Sanford, 64 Ga. 630; Whitaker *v.* Pope, 48 Ga. 13; Griffin *v.* Evans, 23 Ga. 438.

Illinois.— Pettis *v.* Westlake, 4 Ill. 535; Barker *v.* Barth, 88 Ill. App. 23; Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394; Graff *v.* Kahn, 18 Ill. App. 485; Kingman *v.* Draper, 14 Ill. App. 577; Breen *v.* Sullivan, 5 Ill. App. 449, holding that set-off is in the nature of a cross action and in effect becomes the declaration for defendant.

2. History. A set-off exists only by virtue of statute, and was unknown at common law, according to which mutual debts were distinct and inextinguishable, except by actual payment or release,[18] and a defendant who had a demand against

Indiana.— Kennedy *v.* Richardson, 70 Ind. 524; Boil *v.* Simms, 60 Ind. 162.

Iowa.— Reed *v.* Darlington, 19 Iowa 349.

Kentucky.— Banton *v.* Hoomes, 1 A. K. Marsh. 19.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; State *v.* Baltimore, etc., R. Co., 34 Md. 344; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133, holding that a set-off means a cross claim, for which an action might be maintained against plaintiff, and is very different from a mere right to a deduction from, or reduction of, his demand, on account of some matter connected therewith.

Massachusetts.— Cook *v.* Mills, 5 Allen 36; Cutler *v.* Middlesex Factory Co., 14 Pick. 483.

Mississippi.— Bullard *v.* Dorsey, 7 Sm. & M. 9.

Missouri.— Russell *v.* Owen, 61 Mo. 185; Brady *v.* Hill, 1 Mo. 183, 13 Am. Dec. 503.

New Hampshire.—Chase *v.* Strain, 15 N. H. 535; Varney *v.* Brewster, 14 N. H. 49.

New York.— People *v.* Dennison, 84 N. Y. 272; Jefferson County Bank *v.* Chapman, 19 Johns. 322; Carpenter *v.* Butterfield, 3 Johns. Cas. 145. But see Taylor *v.* New York, 82 N. Y. 10, holding that, although a set-off is in the nature of a cross action, and in the place and stead of a cross action, it is not an action, and that, although the analogy is often made of a set-off and an action, it does not exist for all purposes, the statute of set-off being passed for the very purpose of eliminating the necessity of cross actions (see *infra*, I, I).

North Carolina.— Battle *v.* Thompson, 65 N. C. 406.

Pennsylvania.— Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 64 Atl. 398; Felper *v.* Hershour, 128 Pa. St. 587, 18 Atl. 419; Everson *v.* Fry, 72 Pa. St. 326; Pennell *v.* Grubb, 13 Pa. St. 552; U. S. Bank *v.* Macalester, 9 Pa. St. 475.

South Carolina.— Union Bank *v.* Heyward, 15 S. C. 296.

Tennessee.— Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169 (holding that the defense of set-off is a creation of the statute, and under the earlier statutes was defensive, and intended to defeat the action without more, but by subsequent legislation it was made an aggressive defense and assumed the nature of a cross action); Keith *v.* Smith, 1 Swan 92; Riley *v.* Carter, 3 Humphr. 230.

Virginia.— Trimyer *v.* Pollard, 5 Gratt. 460.

United States.— Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155, holding, however, that while a plea of set-off in bar is considered in the nature of a cross action, so far as it regards the proof, it cannot be considered as the institution of an action, and is consequently not embraced by the provisions of the twenty-eighth section of the administration law.

England.— Dickson *v.* Evans, 6 T. R. 57, 3 Rev. Rep. 119.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 1 *et seq.*

18. *Alabama.*— Lang *v.* Waters, 47 Ala. 624; White *v.* Governor, 18 Ala. 767; Hall *v.* Cook, 1 Ala. 629.

California.— Naglee *v.* Palmer, 7 Cal. 543.

Connecticut.— Henry *v.* Butler, 32 Conn. 140.

Georgia.— Jordan *v.* Jordan, 12 Ga. 77; Meriwether *v.* Bird, 9 Ga. 594.

Indiana.— Irvin *v.* Rushville Co-Operative Telephone Co., 161 Ind. 524, 69 N. E. 258; Boil *v.* Simms, 60 Ind. 162; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672.

Iowa.— Allen *v.* Maddox, 40 Iowa 124.

Maine.— Robinson *v.* Safford, 57 Me. 163; Call *v.* Chapman, 25 Me. 128.

Maryland.— Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133; Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

Massachusetts.— Stowers *v.* Barnard, 15 Pick. 221.

Michigan.— Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396; Hendricks *v.* Toole, 29 Mich. 340.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Henry *v.* Hoover, 6 Sm. & M. 417; Houston *v.* Smith, 2 Sm. & M. 587.

Missouri.— State *v.* Eldridge, 65 Mo. 584; Frowlin *v.* Calvird, 75 Mo. App. 567.

Nebraska.— Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763; Boyer *v.* Clark, 3 Nebr. 161.

New Hampshire.— Chase *v.* Strain, 15 N. H. 535; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

New York.— Coffin *v.* McLean, 80 N. Y. 560; Johnson *v.* Bridge, 6 Cow. 693 [*affirmed* in 3 Wend. 342]; Williams *v.* Crary, 5 Cow. 368.

North Carolina.— Boyett *v.* Vaught, 79 N. C. 528.

Ohio.— Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1 (holding that there was no right of set-off at common law, and although in general a defendant had a right to retain or claim, by way of deduction, all just allowances or demands accruing to him, or payments made by him, in respect to the same transaction which formed the ground of action, this was not a set-off, that remedy being given exclusively by statute); Ross *v.* Johnson, 1 Handy 388, 12 Ohio Dec. (Reprint) 198.

Pennsylvania.—Irish *v.* Johnston, 11 Pa. St. 483; Com. *v.* Clarkson, 1 Rawle 291; Garner *v.* Price, 4 Kulp 10; Seybert *v.* Hicks, 1 Kulp 45. See Ulrich *v.* Berger, 4 Watts & S. 19.

plaintiff was compelled to resort either to his cross action or a bill in chancery;[19] but the right of recoupment, being formerly so very limited,[20] gave rise to the necessity of the enactment by statute of the remedy of set-off,[21] which was designed by allowing set-offs in actions at law to supersede bills in equity for that purpose,[22] and which was derived from the compensation of the civil law,[23] and the two systems are analogous in many particulars.[24]

3. Statutes — a. Provisions in General. In England, by 2 Geo. II, c. 22,[25] made perpetual by 8 Geo. II, c. 24, § 4, defendant was allowed, in cases of mutual debt, to set off his claim against plaintiff's by pleading it in bar, or by giving it in evidence, when proper notice had been given of such intention, under the general issue;[26] and this statute with slight modifications has been substantially

Tennessee.— East Tennessee, etc., R. Co. *v.* Galbraith, 1 Heisk. 482; Brazelton *v.* Nashville, etc., R. Co., 3 Head 570.

Texas.— Hart *v.* Davis, 21 Tex. 411; Holliman *v.* Rogers, 6 Tex. 91; Brown *v.* Montgomery, 19 Tex. Civ. App. 548, 47 S. W. 803.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

Wisconsin.— Pierce *v.* Hoffman, 4 Wis. 277.

United States.— U. S. *v.* Tillou, 6 Wall, 484, 18 L. ed. 920; Wheeling Bridge, etc., Co. *v.* Cochran, 68 Fed. 141, 15 C. C. A. 321.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 3.

19. *Alabama.*— White *v.* Governor, 18 Ala. 767.

California.— Stoddard *v.* Treadwell, 26 Cal. 294.

Georgia.— Jordan *v.* Jordan, 12 Ga. 77.

Maryland.— Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Baltimore *v.* McFadon, 4 Harr. & J. 31.

New Hampshire.— Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

New York.— Aslop *v.* Caines, 10 Johns. 396.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

England.—Greene *v.* Farmer, 4 Burr. 2214; W. Bl. 651, 96 Eng. Reprint 379; Collins *v.* Collins, 2 Burr. 820, 97 Eng. Reprint 579, 2 Ld. Ken. 530, 96 Eng. Reprint 1268.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 3.

20. See *supra*, I, A.

21. Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

22. Ripley *v.* Bull, 19 Conn. 53.

23. *California.*— Naglee *v.* Palmer, 7 Cal. 543.

Maryland.— Milburn *v.* Guyther, 8 Gill 68, 50 Am. Dec. 681.

Missouri.— Grand Lodge of Masons *v.* Knox, 20 Mo. 433.

New York.— Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Ohio.— Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

Texas.— Brown *v.* Montgomery, 9 Tex. Civ. App. 548, 47 S. W. 803.

Vermont.— Blake *v.* Langdon, 19 Vt. 483, Am. Dec. 701.

But see Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201, holding that in the United States set-off is not a compensation balancing debts *pro tanto* as in the civil law, but mere matter of defense; the party being not bound to make use of it but having his election which, if he does not assert his debt, is not extinguished, and that set-off is a personal privilege and not an incident or accompaniment of the debt.

24. Naglee *v.* Palmer, 7 Cal. 543; Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513.

Under the Louisiana statute of 1821 the word "set-off" is held to be synonymous with "compensation." Pierce *v.* Millard, 3 Mart. N. S. 354.

25. St. 2 Geo. II, c. 22, § 13, provided that where there were mutual debts between plaintiff and defendant or if either party sue or be sued, as executor or administrator where there were mutual debts between the testator or intestate and either party, one debt might be set against the other and such matter might be given in evidence upon the general issue, or pleaded in bar, as the nature of the case required, so as at the time of his pleading the general issue, where any such debt of plaintiff, his testator or intestate, was intended to be insisted on in evidence, notice should be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter should not be allowed in evidence upon such general issue. See Bowyear *v.* Pawson, 6 Q. B. D. 540, 50 L. J. Q. B. 495, 29 Wkly. Rep. 664; Rawley *v.* Rawley, 1 Q. B. D. 460, 45 L. J. Q. B. 675, 35 L. T. Rep. N. S. 191, 24 Wkly. Rep. 995; Middleton *v.* Pollock, L. R. 20 Eq. 515, 44 L. J. Ch. 618; Howlet *v.* Strickland, Cowp. 56; Richards *v.* James, 6 D. & L. 52, 2 Exch. 471, 17 L. J. Ch. Exch. 277; Grant *v.* Royal Exch. Assur. Co., 5 M. & S. 439.

26. *Alabama.*— White *v.* Governor, 18 Ala. 767; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206.

Georgia.— Meriwether *v.* Bird, 9 Ga. 594.

Maryland.— Baltimore, etc., Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 3.

adopted in a majority of the United States.[27] In a few of the states, however, statutes of set-off were passed before the English statute.[28]

b. Construction. English decisions construing the English statutes are considered to be in point in the construction of the American statutes based thereon;[29] but in some states the statutes so differ from the English statute that the English decisions are held to be not of great weight in their construction.[30] Since the

27. See the statutes of the several states. And see the following cases:

Alabama.— Sledge *v.* Swift, 53 Ala. 110; Smith *v.* Hull, 14 Ala. 201; Brown *v.* Chambers, 12 Ala. 697; Dunn *v.* White, 1 Ala. 645; Hall *v.* Cook, 1 Ala. 629.

Connecticut.— Fitch *v.* Gates, 39 Conn. 366.

District of Columbia.— Dale *v.* Richards, 21 D. C. 312, holding that Rev. St. § 810, relating to the District of Columbia, is substantially the English statute of set-off.

Georgia.—Meriwether *v.* Bird, 9 Ga. 594.

Indiana.— Boil *v.* Simms, 60 Ind. 162; Jones *v.* McGrew, 1 Blackf. 192.

Missouri.—Frowein *v.* Calvird, 75 Mo. App. 567.

New York.— Burgess *v.* Tucker, 5 Johns. 105; Gordon *v.* Bowne, 2 Johns. 150.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 3.

Statutes of set-off proceed upon the equitable principle that when both debts are justly due by the neglect of each party to perform his agreement, the one debt should compensate the other. Pierce *v.* Hoffman, 4 Wis. 277.

In Massachusetts the English statute of set-off was not adopted. Stowers *v.* Barnard, 15 Pick. 221.

In Mississippi there is no statute of set-off similar to that of England and many of the United States, and thus a special plea of set-off in an action of assumpsit is a nullity. But all the advantages to be derived from the plea of set-off are available in defense under the plea of payment. Henry *v.* Hover, 6 Sm. & M. 417; Houston *v.* Smith, 2 Sm. & M. 597. But see Anderson *v.* Burke, 6 Sm. & M. 475, holding that, although special plea of set-off in an action of assumpsit is a nullity, it cannot be treated as a nullity so as to permit a demurrer of which it has been made the subject and which has been permitted to stand to pass unanswered and undisposed of, but may be considered in that light in passing upon the demurrer.

28. See cases cited *infra*, this note.

In Maryland the legislative provisions for pleading discount were passed in 1654. Strike's Case, 1 Bland 57, 72.

In New Jersey the Act for Preventing Multiplicity of Law Suits was passed in 1722. Smock *v.* Warford, 4 N. J. L. 306, the statement in which case, however, that this was the first act in this country authorizing set-off in mutual dealings is incorrect. See other cases, this note.

In Pennsylvania the Defalcation Act was passed in 1705, twenty-four years before the English statute, and the act was more comprehensive than the English statute. Gogel *v.* Jacoby, 5 Serg. & R. 117, 121, 9 Am. Dec. 339; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810. A later statute, however, is copied almost verbatim from the English statute and is posterior in point of time. Primer *v.* Kuhn, 1 Dall. 452, 1 L. ed. 219.

The oldest statutes of set-off in the United States are those passed by the legislature of Virginia, the first of which was passed in 1645. Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

29. *Alabama.*— Smith *v.* Hine, 14 Ala. 201.

Connecticut.— Fitch *v.* Gates, 39 Conn. 366.

Kentucky.— Roebuck *v.* Tennis, 5 T. B. Mon. 82.

Mississippi.— Bullard *v.* Dorsey, 7 Sm. & M. 9.

New York.— Burgess *v.* Tucker, 5 Johns. 105; Gordon *v.* Bowne, 2 Johns. 150, holding that the words "mutual debts," in the English statute, and "dealing together and being indebted to each other," in the New York act, are expressions of the same import, and the English decisions upon the construction of their statute are perfectly in point as to the construction of the New York act.

United States.— Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

But see Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, holding that the disposition of the courts in the United States is to construe statutes of set-off more liberally than the English courts.

Statutes of set-off are not restricted to natural persons, but extend to corporations, and the right of set-off exists in suits by municipal corporations. St. Louis *v.* Rogers, 7 Mo. 19.

30. Harris *v.* Hanna, Tapp. (Ohio) 9; Hubbard *v.* Fisher, 25 Vt. 539.

In Virginia and West Virginia the wording of the statutes of set-off is materially different from that of the English statutes and includes "any" debts, while the English statute includes only "mutual" debts, and this accounts for the apparent conflict upon some of the Virginia decisions on the subject with those of other states. Wartman *v.* Yost, 22 Gratt. 595; Allen *v.* Hart, 18 Gratt. 722. But see Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, holding that the diverse holdings of the courts of Virginia and English courts in this respect are not to be attributed so much to the difference in the wording of the statutes as to the disposition of the courts of Virginia to construe more liberally, than the English courts, their statutes of set-off.

In Maryland the act of 1785 varies materially from the English statutes, and there-

courts strongly favor the settling of the entire dispute between litigants in one action,[31] statutes relating to the interposition of cross demands receive very liberal construction with a view of accomplishing that result;[32] but the rule of liberal construction will not be carried to a point of misconstruction.[33]

C. Counter-Claim. A counter-claim is a claim presented by a defendant in opposition to or deduction from the claim of plaintiff. A species of set-off or recoupment introduced by the codes of civil procedure in several of the states, of a broad and liberal character,[34] and embraces, as a general rule, both recoup-

fore the decision on them, by any rational rule of construction, cannot be solely applied to it. Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

In Illinois it has been held that the law allowing set-offs embraces cases not comprehended in the British and American statutes, and that it would be incorrect to apply the decisions made under those laws to the act, as evidence that the interpretation of the act should be the same. Sanger *v.* Fincher, 27 Ill. 346; Edwards *v.* Todd, 2 Ill. 462.

31. See *infra*, I, I.

32. *Alabama.*— Bowen *v.* Snell, 9 Ala. 481; Hall *v.* Cook, 1 Ala. 629.

Arkansas.— Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Leach *v.* Lambeth, 14 Ark. 668; Sillivant *v.* Reardon, 5 Ark. 140.

Georgia.— Mell *v.* Moony, 30 Ga. 413.

Illinois.— Edwards *v.* Todd, 2 Ill. 462.

Iowa.— Campbell *v.* Fox, 11 Iowa 318.

Kansas.— Stevens *v.* Able, 15 Kan. 584.

Maryland.— Clarke *v.* Magruder, 2 Harr. & J. 77.

Massachusetts.—Stowers *v.* Barnard, 15 Pick. 221; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409; Truesdell *v.* Wallis, 4 Pick. 63 (construing a statute allowing a set-off of "moneys paid" to include an account for money had and received, under a fiction that money received to the use of defendant may be considered as money he has paid); Richards *v.* Blood, 17 Mass. 66.

Minnesota.—Midland Co. *v.* Broat, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312.

Mississippi.— Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Kamerick *v.* Castleman, 23 Mo. App. 481.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New York.— Taylor *v.* New York, 82 N. Y. 10; Glenn, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278; More *v.* Rand, 60 N. Y. 208; Ashley *v.* Marshall, 29 N. Y. 494; Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Suppl. 1119; McCarty *v.* Holman, 22 Hun 53; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun 49 [*affirmed* in 93 N. Y. 552]; Chamboret *v.* Cagney, 2 Sweeny 378, 41 How. Pr. 125; Wickham *v.* Weil, 17 N. Y. Suppl. 518 (so holding as to Code Civ. Proc. § 501, subd. 2, relating to counter-claims); Johnson *v.* Bridge, 6 Cow. 693 [*affirmed* in 5 Wend. 342].

North Carolina.— Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Pearsall *v.* Mayers, 64 N. C. 549.

Ohio.— Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534, 42 N. E. 690.

Pennsylvania.— Montz *v.* Morris, 89 Pa. St. 392; Ahl *v.* Rhoades, 84 Pa. St. 319; Hunt *v.* Gilmore, 59 Pa. St. 450; McQuaide *v.* Stewart, 48 Pa. St. 198; Carman *v.* Garrison, 13 Pa. St. 158; Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. 439; Tustin *v.* Cameron, 5 Whart. 379; Stewart *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Primer *v.* Kuhn, 1 Dall. 452, 1 L. ed. 219; Warren Wood-Working Co. *v.* Cooke Mercantile Trust Co., 5 Pa. Dist. 359; Thomson's Estate, 5 Wkly. Notes Cas. 14. See Groetzinger *v.* Latimer, 146 Pa. St. 628, 23 Atl. 393.

South Dakota.— McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingalls, 5 S. D. 183, 58 N. W. 572.

Vermont.— Thompson *v.* Congdon, 43 Vt. 396; Mott *v.* Mott, 5 Vt. 111.

Virginia.— Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Wartman *v.* Yost, 22 Gratt. 595; Allen *v.* Hart, 18 Gratt. 722; Trimyer *v.* Pollard, 5 Gratt. 460.

Washington.— Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775, holding also that the disposition of the courts in the United States is to construe more liberally than the English courts their statutes of set-off.

Wisconsin.— Sprout *v.* Crowley, 30 Wis. 187.

United States.— Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

But see Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396, which seems to strictly construe the Michigan statute of set-off by laying down the rule that "unless a case is positively embraced by the specifications enacted by the Legislature, the remedy is absolutely denied."

A statute disallowing interest on open accounts has no effect on laws of set-off. Meriwether *v.* Bird, 9 Ga. 594.

33. Annan *v.* Houck, 4 Gill (Md.) 325, 45 Am. Dec. 133, holding that, although courts will give a liberal construction to statutes of set-off, still it is the business of the courts to declare and not to make the law of set-off, and radical improvements in the law must be accomplished by further legislation and not by misconstruction.

34. Black L. Dict.

Other definitions are: "A cause of action in favor of the defendant upon which he

ment and set-off,[35] although broader and more comprehensive than either,[36] and

might have sued the plaintiff and obtained affirmative relief in a separate action." Belleau *v.* Thompson, 33 Cal. 495, 497.

"A liberal practice introduced by the reformed codes of procedure in many of the United States, and comprehending Recoupment and Set-off . . . though broader than either." Bouver L. Dict.

Counter-claim is the opposite of claim.— Wolf *v.* H——, 13 How. Pr. (N. Y.) 84, 85.

Counter-claim is equivalent to "offset" (Cable Flax Mills *v.* Early, 72 N. Y. App. Div. 213, 215, 76 N. Y. Suppl. 191), which is defined as a contrary sum or claim by which a given claim may be lessened or canceled (Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511), and which is included in the word "credits" (Merchant *v.* Humeston, 2 Wash. Terr. 433, 437, 7 Pac. 903).

Under N. Y. Code, § 501, which has been substantially followed in a number of the other code states (see the codes and statutes of the several states; and cases cited *infra*, this section), the counter-claim "must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: 1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action. 2. In an action on contract, any other cause of action on contract, existing at the commencement of the action."

The remedy analyzed.—"When the defendant has, against the plaintiff, a cause of action upon which he might have maintained a suit, such cause of action is a counter-claim. The parties then have cross-demands. When such a cross-demand is interposed by the defendant, there are, in effect, two causes of action before the court for trial in the same suit. Both parties are, in some sense, plaintiffs, and both defendants. The answer, containing the cross-demand, called a counter-claim, is, in pleading, treated like a complaint by the defendant against the plaintiff, and the reply to such an answer like the answer to a complaint. Each party claims affirmative relief against the other. The plaintiff asks for judgment against the defendant for the cause of action stated in the complaint, and the defendant asks for judgment against the plaintiff for the cause of action stated in the counter-claim. If both causes of action are established, the one is allowed to cancel the other, and judgment is only rendered against one or the other of the parties to the extent that one demand, as established by the judgment of the court, exceeds the other." Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310, 311.

A counter-claim was unknown before the code.— Bloom *v.* Lehman, 27 Ark. 489; Valentine *v.* Hallman, 63 N. C. 475; Gaither *v.* Gibson, 63 N. C. 93; Teague *v.* James, 63 N. C. 91.

35. *Arkansas.*— White *v.* Reagan, 32 Ark. 281.

California.— St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876.

Kansas.— Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257.

New York.— Vassear *v.* Livingston, 13 N. Y. 248 [*affirming* 4 Duer 285]; Clinton *v.* Eddy, 1 Lans. 61; Wilder *v.* Boynton, 63 Barb. 547; Leavenworth *v.* Packer, 52 Barb. 132; Schubart *v.* Harteau, 34 Barb. 447; Pattison *v.* Richards, 22 Barb. 143; Chamboret *v.* Cagney, 10 Abb. Pr. N. S. 31; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372; Lemon *v.* Trull, 13 How. Pr. 248 [*affirmed* in court of appeals, see 16 How. Pr. 576 note]; Miller *v.* Losee, 9 How. Pr. 356.

North Carolina.—Hurst *v.* Everett, 91 N. C. 399.

South Dakota.— McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766.

Wisconsin.— McArthur *v.* Green Bay, etc., Co., 34 Wis. 139.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 12.

A counter-claim which is not also a set-off is not a defense.— Vasseur *v.* Livingston, 4 Duer (N. Y.) 285 [*affirmed* in 13 N. Y. 248].

36. White *v.* Reagan, 32 Ark. 281; Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257; Vassear *v.* Livingston, 13 N. Y. 248 [*affirming* 4 Duer 285]; Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132; Pattison *v.* Richards, 22 Barb. (N. Y.) 143; Chamboret *v.* Cagney, 10 Abb. Pr. N. S. (N. Y.) 31; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. (N. Y.) 299, 301; Wolf *v.* H——, 13 How. Pr. (N. Y.) 84 (holding that counter-claim includes recoupment and set-off as between the parties to the record and something more, and is the set-off of courts of equity and something further, as it embraces all sorts of claims which a defendant may have against a plaintiff in the nature of a cross action or demand or for which a cross or separate action would lie, within the limitations and restrictions contained in the code); Beardsley *v.* Stover, 7 How. Pr. (N. Y.) 294; McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766.

In New York it has been held to be such a cause of action as would, under the practice of the code, have sustained an action at law or a suit in equity against plaintiff of record, and, to include the old set-off, any claim on contract, sealed or unsealed, for damages liquidated or unliquidated, any breach by plaintiff of any promise or contract on his part contained in the contract sued upon, any equitable relief against a legal demand formerly attainable by a bill in

secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill, would have secured him on the same state of facts,[37] being substantially a cross action by defendant against plaintiff.[38] In some of the codes, however, the term "set-off" is preserved and distinguished from "counter-claim," [39] the latter term being given in some of the decisions the narrower significance of a statutory recoupment, with the additional feature that judgment may be rendered in defendant's favor for the excess of his claim over plaintiff's.[40] But even under the most liberal practice of the codes defendant cannot counter-claim any and every cause of action he may have against plaintiff, without regard to its nature, but only such a cause of action as constitutes a valid counter-claim under the code.[41]

chancery, and any affirmative relief which in equity could be had by a cross bill. Gleason *v.* Moen, 2 Duer 639; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. 372.

In North Carolina by Code Civ. Proc. § 101, "the plea of set-off is merged in the defence of counter-claim, and by paragraph 2, the counter-claim in an action on contract, embraces not only matter that under the old practice was pleaded as a set-off, but every other cause of action arising out of contract, whether legal or equitable, between the plaintiff and defendant; where there are more than one plaintiff or defendant, it is further extended so that not only mutual debts between the plaintiffs and defendants, but every claim by the defendants, or any one of them, against the plaintiffs, or any one of them, between whom a several judgment might be had in the action, is embraced." Neal *v.* Lea, 64 N. C. 678, 679 [*overruled* on other grounds in Harris *v.* Burwell, 65 N. C. 584].

37. Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254, 260 (holding that a counter-claim very closely corresponds to the cross bill of the old chancery practice, but is more comprehensive, for it embraces recoupment); Douthitt *v.* Smith, 69 Ind. 463; Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477 (holding that to say, as was inadvertently done in Slayback *v.* Jones, 9 Ind. 470, that the counter-claim is the same thing as recoupment, would be giving a definition obviously less comprehensive than that given by the statute, the counter-claim thus authorized comprehending recoupment and what was known as the cross bill in equity against plaintiff, and that unless this be so it would result that, in many cases, what formerly might have been fully settled in one litigation would, under the code, require two or more separate suits to determine it, which is not the spirit of the code); Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132; Gleason *v.* Moen, 2 Duer (N. Y.) 639; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. (N. Y.) 299.

38. *Indiana.*— Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672, holding that it is in pursuance of the chancery practice that a counter-claim and a set-off are denominated "answers" and "defenses" by the Indiana statute, but the adjudications seem to have lost sight of this distinction, and they are now treated as cross actions.

Kentucky.— Slone *v.* Slone, 2 Metc. 339.

New York.— McKensie *v.* Farrell, 4 Bosw. 192, holding that a counter-claim is in the nature of a complaint in a cross action.

North Carolina.— McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Hurst *v.* Everett, 91 N. C. 399.

South Carolina.— Inman *v.* Hodges, 80 S. C. 455, 61 S. E. 958 (holding that a counter-claim is in the nature, and has all the characteristics of a separate and independent action); Kentucky Refining Co. *v.* Saluda Oil Mill Co., 70 S. C. 89, 48 S. E. 987; Union Bank *v.* Hayward, 15 S. C. 296; Trimmier *v.* Thomson, 10 S. C. 164.

Canada.— Spiers *v.* Reg., 4 Brit. Col. 388.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 12.

Where the counter-claim does not pray for relief against plaintiff it is not a cross action, but may be either a set-off or recoupment. Hurst *v.* Everett, 91 N. C. 399.

A counter-claim is a substitute for an action, or, more properly, is itself an action commenced by an answer instead of a summons. Vasseur *v.* Livingston, 4 Duer (N. Y.) 285 [*affirmed* in 13 N. Y. 248].

No counter-claim against defendant.— There is no rule or practice of procedure, even under the loose pleading tolerated by the code system, which allows a plaintiff to set up a counter-claim against defendant; such an action would be an anomaly to legal proceedings. Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432.

Distinction between counter-claim and cross complaint see PLEADING, 31 Cyc. 223.

39. See the codes and statutes of the several states. And see Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763.

In Indiana the code distinctly and separately defines set-off and counter-claim, the two definitions differing materially, and in none of the sections are they used synonymously or as being included one within the other, and the construction of "counter-claim" is held to be more restricted than has been given to the same term in the New York code of civil procedure (Lovejoy *v.* Robinson, 8 Ind. 399; Conner *v.* Winton, 7 Ind. 523), and counter-claim as defined in the Indiana code is held to be the blending of the cross bill of the chancery practice, and of recoupment at common law (Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672).

40. See Bloom *v.* Lehman, 27 Ark. 489; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

41. Byerly *v.* Humphrey, 95 N. C. 151;

D. Reconvention. Reconvention is a civil law term [42] signifying an action by a defendant against a plaintiff in a former action,[43] based upon cross demands of either a liquidated or unliquidated nature growing out of or connected with a principal cause of action,[44] and although it has been said that the reconvention of the civil law corresponds to recoupment as a remedy,[45] the term is more extensive than either recoupment or set-off,[46] and is in the nature of a cross action seeking equitable relief.[47]

E. Compensation. Compensation is a civil law term [48] signifying a reciprocal liberation between two persons who are both creditors and debtors of each other,[49] and was founded upon a natural equity which permitted the reciprocal acquittal of mutual debts.[50] Compensation is of three kinds; legal or by operation of law, compensation by way of exception, and by reconvention,[51] and resembles very closely the set-off of the common law.[52] Where two persons are indebted to each other simultaneously,[53] for clear and liquid

Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

42. Duncan *v.* Magette, 25 Tex. 245; Castro *v.* Gentiley, 11 Tex. 28; Egery *v.* Power, 5 Tex. 501; Britton *v.* Thrash, 1 Tex. App. Civ. Cas. § 1237, holding that the remedy by plea in reconvention is derived from the civil law, and that the Texas statute does not give, but simply regulates, the remedy.

43. Black L. Dict.

Other definitions are: "A suit by the defendant against the plaintiff upon the cause of action set up in the answer." Jefferson Lumber Co. *v.* Williams, 68 Tex. 656, 659, 5 S. W. 672, 673.

"An action brought by a party who is defendant against the plaintiff before the same judge." Bouvier L. Dict.

"A reconventional demand is one that a defendant in a suit is permitted, by a courtesy of the law, to engraft upon the main action." Suberville *v.* Adams, 47 La. Ann. 68, 69, 16 So. 652.

"A cumulation of counter suits." Godbold *v.* Harrison, McGloin (La.) 31, 33.

"An incidental demand." Pool *v.* Alexander, 26 La. Ann. 669, 671.

"A cross demand." Pacific Express Co. *v.* Malin, 132 U. S. 531, 537, 10 S. Ct. 166, 33 L. ed. 450.

The Louisiana code definition is: "The demand which the defendant institutes in consequence of that which the plaintiff has brought against him, is termed a demand in reconvention." Garland Rev. Code Pr. 288.

Pleas in reconvention are of three kinds: The first is where defendant sets up a liquidated claim which is of greater amount than that on which he is sued, and asks judgment for the surplus. Pleadings containing such matter embrace two things: Compensation which extinguishes plaintiff's demand, and reconvention for the balance due. The second is where the sum set up in the answer is not liquidated, and the object of the plea is, that it should be so, in order that the sum found due should be used in compensation of plaintiff's claim, and that judgment should be obtained for the overplus. The third is where the demand is totally independent of the action brought by plaintiff; but it has been lately excluded from practice by legislative provision. Lanusse *v.* Pimpienella, 4 Mart. N. S. (La.) 439, 445.

44. Montgomery *v.* Russel, 7 Mart. N. S. (La.) 288; Agaisse *v.* Guedron, 2 Mart. N. S. (La.) 73; Nichols *v.* Jones, 36 Tex. 448; Alford *v.* Cochrane, 7 Tex. 485; Walcott *v.* Hedrick, 6 Tex. 406; Egery *v.* Power, 5 Tex. 501.

45. See Black L. Dict. "Recoupment;" Bouvier L. Dict. "Recoupment."

46. New Orleans State Nat. Bank *v.* Evans, 32 La. Ann. 464; Spinney *v.* Hyde, 16 La. Ann. 250; Sénécal *v.* Smith, 9 Rob. (La.) 418; Mayo *v.* Savory, 4 Rob. (La.) 1; Walcott *v.* Hendrick, 6 Tex. 406; Egery *v.* Power, 5 Tex. 501; Pacific Express Co. *v.* Malin, 132 U. S. 531, 10 S. Ct. 166, 33 L. ed. 450.

47. Coleman *v.* Bunce, 37 Tex. 171.

48. Nolan *v.* Shaw, 6 La. Ann. 40; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Holliman *v.* Rogers, 6 Tex. 91.

49. Bouvier L. Dict.

Other definitions are: "The meeting of two debts due by two parties, where the debtor in the one debt is the creditor in the other; that is to say, where one person is both debtor and creditor to another, and therefore, to the extent of what is due to him, claims allowance out of the sum that he is due." Black L. Dict.

"A reciprocal acquittal of debts between two persons who are indebted the one to the other." Howard *v.* Randolph, 73 Tex. 454, 459, 11 S. W. 495; Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

"A mode of payment." Caldwell *v.* Davis, 2 Mart. N. S. (La.) 135, 136. See Holliman *v.* Rogers, 6 Tex. 91, 98.

50. Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312.

51. Stewart *v.* Harper, 16 La. Ann. 181; Blanchard *v.* Cole, 8 La. 153.

52. Bouvier L. Dict.; 3 Blackstone Comm. 305.

The principle was unknown to common-law jurisprudence, except in the single instance of running accounts between merchants. Holliman *v.* Rogers, 6 Tex. 91.

53. Mutual Nat. Bank *v.* Keenan, 35 La.

debts [54] compensation takes place from the moment the two debts coexist, and they extinguish each other by the mere operation of law to the amount of their respective sums,[55] without the act of either party, or even their knowledge at the time, of the existence of such cross debts.[56] The doctrine rests on good faith and is not permitted to promote unfair dealing, or where it will be against good conscience.[57]

F. Equitable Set-Off — 1. Origin of Exercise of Equitable Jurisdiction. The power to compel a set-off of debts was exercised by courts of equity prior to any statute on the subject,[58] and exists independent of those statutes, being allowed upon the general principles of equity and upon the equitable jurisdiction of the court over its suitors,[59] and statutes allowing set-offs have not taken away the equitable jurisdiction, but have merely provided a remedy at law for the set-off of mutual claims between parties, which might always have been done

Ann. 1129; Haydel *v.* Roussel, 1 La. Ann. 35.

54. Mutual Nat. Bank *v.* Keenan, 35 La. Ann. 1129; Howard *v.* Randolph, 73 Tex. 454, 11 S. W. 495; Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

55. State Bank *v.* Fowler, 10 Rob. (La.) 196; Arbonneaux *v.* Letorey, 6 Rob. (La.) 456; Low *v.* Thomas, 4 Rob. (La.) 183; Atchafalaya R., etc., Co. *v.* Bean, 3 Rob. (La.) 414; Wood *v.* Boyers, 2 Rob. (La.) 130; Caldwell *v.* Davis, 2 Mart. N. S. (La.) 135; Baldwin *v.* Black, 119 U. S. 643, 7 S. Ct. 326, 30 L. ed. 530.

56. Holliman *v.* Rogers, 6 Tex. 91.

57. Mutual Nat. Bank *v.* Keenan, 35 La. Ann. 1129; Vincent *v.* Gandolfo, 12 La. Ann. 526; Bogert *v.* Egerton, 11 La. Ann. 73; Breed *v.* Purvis, 7 La. Ann. 53; Rhodes *v.* Hooper, 6 La. Ann. 355; McKee *v.* Amonett, 6 La. Ann. 207; Nolan *v.* Shaw, 6 La. Ann. 40.

58. *Arkansas.*— Wheat *v.* Dotson, 12 Ark. 699.

California.— Naglee *v.* Palmer, 7 Cal. 543.

Kentucky.— Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865; Hughes *v.* McCoun, 3 Bibb 254.

Maine.— Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260.

New Jersey.— See State *v.* Welsted, 11 N. J. L. 397.

New York.— Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 473, 30 Am. Rep. 319; Lindsay *v.* Jackson, 2 Paige 581.

Pennsylvania.— Garner *v.* Price, 4 Kulp 10.

Vermont.— Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

United States.— Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201.

England.— Green *v.* Farmer, 4 Burr. 2214, W. Bl. 651, 96 Eng. Reprint 379; Anonymous, 1 Mod. 215, 86 Eng. Reprint 837; *Ex p.* Blagden, 2 Rose 249, 19 Ves. Jr. 465, 34 Eng. Reprint 589; *Ex p.* Flint, 1 Swanst. 30, 18 Rev. Rep. 12, 36 Eng. Reprint 285; *Ex p.* Stephens, 11 Ves. Jr. 24, 8 Rev. Rep. 75, 32 Eng. Reprint 996.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 9.

The right of set-off is a favorite in equity. — Loder *v.* Allen, 50 N. J. Eq. 631, 25 Atl. 541.

The relief given in equity depended upon the circumstances of each case. Sometimes the chancellor would enter up a decree that the demand of defendant be applied to payment and discharge of the demand sued on. At other times a decree would be entered restraining plaintiff from prosecuting his demand until defendant had established, or failed to establish, his cross demand in a court of law. Barnes *v.* McMullins, 78 Mo. 260. But see Jackson *v.* Bell, 31 N. J. Eq. 554 [*affirmed* in 32 N. J. Eq. 411], where the court refused to enjoin the enforcement of a judgment at law of a legal counter-claim.

59. *California.*— Hobbs *v.* Duff, 23 Cal. 596.

Kentucky.— Jeffries *v.* Evans, 6 B. Mon. 119, 43 Am. Dec. 158.

Maine.— Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. 1053.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Smith *v.* Donnell, 9 Gill 84.

Montana.— Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715.

New York.— Crary *v.* Goodman, 12 N. Y. 266, 64 Am. Dec. 506; Schermerhorn *v.* Anderson, 2 Barb. 584; Schieffelin *v.* Hawkins, 1 Daly 289; Gay *v.* Gay, 10 Paige 369.

Pennsylvania.— Garner *v.* Price, 4 Kulp 10.

Tennessee.— Edminson *v.* Baxter, 4 Hayw. 112, 9 Am. Dec. 751.

Vermont.— Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701, holding that courts of equity interfere, in cases of set-off, upon analogous grounds to those upon which their whole preventive jurisdiction is based — that is, to prevent irremediable injustice.

Wisconsin.— Spear *v.* Dey, 5 Wis. 193, holding that in a proper case a court of equity will undoubtedly, by virtue of its general jurisdiction, apply the doctrine of set-off, independently of Rev. St. c. 84, § 8, which provides that in suits in chancery for the payment of money, set-offs shall be allowed, in the same manner, and with like effect as in actions at law, but that the circumstances of this action do not constitute

in equity,[60] and were passed mainly to obviate the necessity of a resort to equity in every case of mutual independent claims upon both sides.[61]

2. Adequate Remedy at Law. A defendant at law, entitled to a set-off, has no right to go into a court of equity for relief after he has made his defense at law and failed; otherwise, if he is precluded from making his defense at law,[62] and equity will not aid a defendant in actions at law as to matters of set-off and recoupment, when his legal remedies are complete and adequate,[63] and if complainant has pleaded the claims in set-off to a suit at law, thereby giving the law court jurisdiction, that court must decide the matter and equity will not interfere.[64] But if, from the nature of the claim or situation of the parties, justice cannot be done at law, equity will allow a set-off in a case not within the statute of set-off,[65] and has even divided a debt and set off a portion of it, according to the equitable rights of the parties,[66] and an equitable set-off will be allowed, although the amount be small, and although the party may have a remedy at common law, if to recover

a proper case for the application of the principle.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 9 *et seq.*

60. Tribble *v.* Taul, 7 T. B. Mon. (Ky.) 455; Richardson *v.* Doty, 44 Nebr. 73, 62 N. W. 254 (holding that the provisions of the code of civil procedure in regard to set-off are not exclusive); McLane *v.* Johnson, 59 Vt. 237, 9 Atl. 837 (holding that where defendant purchased claims which had been allowed against an estate with money advanced by the orator as administrator of such estate, equity will compel a set-off of the claims so far as the dividends from said estate were become due and the orator had a right to have the status of the claims fixed by a decree of the court of chancery in advance of any order of the probate court).

61. Tribble *v.* Taul, 7 T. B. Mon. (Ky.) 455; Weeks *v.* Pryor, 27 Barb. (N. Y.) 79; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

62. Garvin *v.* Squires, 9 Ark. 533, 50 Am. Dec. 224.

63. *Alabama.*— Walker *v.* Wigginton, 50 Ala. 579; Nelms *v.* Prewitt, 37 Ala. 389.

Arkansas.— Menifee *v.* Ball, 7 Ark. 520.

Connecticut.— Bulkeley *v.* Welch, 31 Conn. 339.

Georgia.— Collins *v.* Clayton, 53 Ga. 649, holding that, although the actions are brought in a court whose jurisdiction is limited to amounts less than the aggregate sum set up by the defenses of set-off and recoupment, that does not affect the above principal when the several pleas are only of a sum which is less than the notes embraced in each of the pending suits.

Kentucky.— Blackwell *v.* Oldham, 4 Dana 195; Tribble *v.* Taul, 7 T. B. Mon. 455; Collins *v.* Farquar, 4 Litt. 153; Moody *v.* Dowdal, 2 A. K. Marsh. 212. But see Jones *v.* Murray, 3 T. B. Mon. 83; holding that where there are mutual demands, a court of equity, although each of the parties might have a remedy at law, will interpose to compel them to set off the one demand against the other.

Maryland.— Hutchins *v.* Hope, 7 Gill 119.

Minnesota.— Barker *v.* Walbridge, 14 Minn. 469.

Missouri.— Field *v.* Oliver, 43 Mo. 200.

New Jersey.— See Dungan *v.* Miller, 19 N. J. Eq. 218.

New York.— Tone *v.* Brace, 8 Paige 597.

Tennessee.— Ragsdale *v.* Buford, 3 Hayw. 192.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 9–11.

But see Sowles *v.* Plattsburg First Nat. Bank, 100 Fed. 552, holding that a federal court of equity may allow a set-off, although a state statute permits it to be pleaded at law.

64. Gregory *v.* Hasbrook, 1 Tenn. Ch. 218. See Bumpass *v.* Reams, 1 Sneed (Tenn.) 595.

65. *Illinois.*— Quick *v.* Lemon, 105 Ill. 578.

Maryland.— Smith *v.* Donnell, 9 Gill 84.

Mississippi.— Graves *v.* Hull, 27 Miss. 419.

New York.— Ainslie *v.* Boynton, 2 Barb. 258; Lindsay *v.* Jackson, 2 Paige 581, holding that in a case not within the statute of set-off equity will permit an equitable set-off, if, from the nature of the claim or the situation of the parties, justice cannot be obtained by a civil action.

Tennessee.— Smith *v.* Ross, 3 Humphr. 220.

Wisconsin.— Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 9–11. And see cases cited *supra*, ——.

The codes in allowing counter-claims in suits in equity have adopted substantially the rule in regard to filing cross bills, under which the cross bill could only relate to matters touching the matters in the original bill, and could not embrace new and distinct matters not embraced in the original bill, and if it did no decree could be founded upon such new matter. Dove *v.* Hayden, 5 Oreg. 500. See Schieffelin *v.* Hawkins, 1 Daly (N. Y.) 289.

Set-off of claim in personam against claim in rem.— In equity a claim *in personam* may be set off against a claim *in rem*, which the lienor is seeking to enforce. U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472.

66. *Ex p.* Quintin, 3 Ves. Jr. 248, 30 Eng. Reprint 994. And see Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

that small amount he would be driven to many suits and to much trouble and expense.[67]

3. Equity Follows Law in Matters of Set-Off. Courts of equity, as a general rule, put the same construction on the statute of set-off as do courts of law,[68] and generally follow the law in regard to matters of set-off, unless there is some peculiar circumstance or intervening natural equity growing out of the mutual transactions or conditions of the parties going beyond the statute, which constitutes the general basis of set-off at law and which a court of law could not regard, in which case courts of equity will allow a set-off which a court of law would refuse,[69] if no equity of third parties be injured.[70]

67. Burns *v.* Hill, 19 Ga. 22.

68. Brown *v.* Scott, 87 Ala. 453, 6 So. 384; McKinley *v.* Winston, 19 Ala. 301.

69. *Alabama.*— Brown *v.* Scott, 87 Ala. 453, 6 So. 384; Goldthwaite *v.* Montgomery First Nat. Bank, 67 Ala. 549; Jones *v.* Brevard, 59 Ala. 499; Cave *v.* Webb, 22 Ala. 583; McKinley *v.* Winston, 19 Ala. 301; Donelson *v.* Posey, 13 Ala. 752; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206 French *v.* Garner, 7 Port. 549.

Arkansas.— West *v.* Williams, 15 Ark. 682, holding that where a minor son, possessed of real estate, died without issue and the father entered upon the land, mistakenly claiming as heir to the son, and made valuable and lasting improvements, he was entitled in equity to set off such improvements against the rents and profits.

California.— Hobbs *v.* Duff, 23 Cal. 596.

Connecticut.— Goodwin *v.* Keney, 49 Conn. 563. See Bowen *v.* Bowen, 20 Conn. 127.

Georgia.— Jordan *v.* Jordan, 12 Ga. 77; Ruckersville Bank *v.* Hemphill, 7 Ga. 396; Mills *v.* Lumpkin, 1 Ga. 511, 44 Am. Dec. 677.

Illinois.— Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437; Smith *v.* Billings, 62 Ill. App. 77.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Scott *v.* Scott, 17 Md. 78.

Michigan.— Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

Minnesota.— Wallrich *v.* Hall, 19 Minn. 383.

Mississippi.— Kershaw *v.* Merchants' Bank, 7 How. 386, 40 Am. Dec. 70.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260.

New Jersey.— Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

New York.— Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319; Bathgate *v.* Haskin, 59 N. Y. 533; Cumings *v.* Morris, 3 Bosw. 560 [*affirmed* in 25 N. Y. 625]; Van Beuren *v.* Van Gaasbeck, 4 Cow. 496; McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431; Irving *v.* De Kay, 10 Paige 319; Lindsay *v.* Jackson, 2 Paige 581; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Hackett *v.* Connett, 2 Edw. 73.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Pennsylvania.— Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003; Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004; Tustin *v.* Cameron, 5 Whart. 379.

Rhode Island.— Bell *v.* Ward, 10 R. I. 503.

Vermont.— Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701, holding, however, that in almost all the cases where the courts of equity have interfered to go beyond the statutes of set-off, it has been where there had intervened the insolvency of one or more of the parties, and that, as the cases thus far furnish no other ground for interfering, it is obvious that these peculiar circumstances do not ordinarily occur, except in cases of insolvency, and that beyond this courts of equity have not generally gone.

Virginia.— Ford *v.* Thornton, 3 Leigh 695.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,614, 2 Sumn. 628 (holding that the jurisdiction of courts of equity in matters of set-off is very narrow); Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409.

England.— Whyte *v.* O'Brien, 1 Sim. & St. 551, 1 Eng. Ch. 551, 57 Eng. Reprint 218.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 9–11.

In Maine a stricter rule seems to be laid down, and it has been there held that whatever may be the rules of set-off in equity, they cannot prevail in that state, when they are at variance with the provisions of the statute, relating to that subject. Smith *v.* Ellis, 29 Me. 422, holding that a court of equity acting upon an existing state of facts may in conformity to its own rules decree that a set-off should be made, when if either party had before acted in such a manner, as would have prevented the existence of such a state of facts, and thereby have prevented any set-off, he would not have been guilty of any fraud.

Where persons engage in an illegal enterprise equity will not intervene to set off the expenditures of one in the enterprise against a debt which he owes the other, but will leave the parties where it found them. Pond *v.* Smith, 4 Conn. 297.

Where one demand is legal and the other is equitable, and but for its being equitable a court of law would have set it off as a legal demand, the court of equity will allow the set-off to be made. McKelvey *v.* McLean, 34 U. C. Q. B. 635.

70. Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003; Tustin *v.* Cameron, 5 Whart. (Pa.) 379; Childress *v.* Jordan, 106 Va. 275, 58 S. E. 563. See Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839.

4. GROUNDS OF EQUITABLE SET-OFF — a. In General. Although it is often held that there is a natural equity that cross demands should be offset against each other, and that the balance only should be recovered,[71] an equitable right of set-off must be not only a natural equity, but such an equity as can be enforced by judicial action, and not arising merely from moral consideration,[72] for courts of equity will not enforce any vague equities of set-off which involve no rights or interests protected by the recognized rules of justice.[73] But an enforceable equity arises where there is a presumption of mutual credit between the parties, there being an existing debt on the one side which constitutes the ground of a credit on the other side, and an express or implied understanding that the mutual debts shall be a satisfaction or set-off *pro tanto* between the parties,[74] and an

71. *California.*— Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671.

Illinois.— Quick *v.* Leman, 105 Ill. 578; Streeter *v.* Streeter, 43 Ill. 155; Schauchmann *v.* Knoebel, 27 Ill. 175.

Kansas.— Barton *v.* National Land Co., 27 Kan. 634.

Maryland.— Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

New York.— Filkin *v.* Ferris, 18 Barb. 581; Batterman *v.* Pierce, 3 Hill 171; Lindsay *v.* Jackson, 2 Paige 581, where the court says that this was the rule of the civil law and is now adopted and preserved as the law of those countries where the principles of the civil law prevail.

Pennsylvania.— Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700.

Vermont.— Ferris *v.* Burton, 1 Vt. 439.

United States.— Hurlbert *v.* Pacific Ins. Co., 12 Fed. Cas. No. 6,919, 2 Sumn. 471.

72. Van Pelt *v.* Boyer, 8 How. Pr. (N. Y.) 319.

There is no such thing as an inherent equitable right of set-off.— Smith *v.* Billings, 62 Ill. App. 77.

73. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Hendricks *v.* Toole, 29 Mich. 340; Stimson *v.* Hall, 1 H. & N. 831, 26 L. J. Exch. 212, 5 Wkly. Rep. 367, holding that there may be a natural equity quite independent of the equity administered in the court of chancery, but the courts of equity are, in the matter of set-off, bound by rules as well as defined and ascertained as courts of law.

74. *Alabama.*— Tate *v.* Evans, 54 Ala. 16; Simmons *v.* Williams, 27 Ala. 507; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 200; French *v.* Garner, 7 Port. 549.

California.— Naglee *v.* Palmer, 7 Cal. 543.

Georgia.— Moody *v.* Ellerbie, 36 Ga. 666 (holding also that where a judgment debtor of an estate which is solvent and owes no debts purchases the share of a distributee of the estate in the debt, and there appears no reason why the representative of the estate should collect that share, except for the purposes of paying back the money to the debtor, equity will restrain the collection of such portion of the judgment, and order the amount credited on the judgment); Meriwether *v.* Bird, 9 Ga. 594.

Illinois.— Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Union Nat. Bank *v.* Hines, 177 Ill. 417, 53 N. E. 83 [*affirming* 69 Ill. App. 518]; Raleigh *v.* Raleigh, 35 Ill. 512 (holding that it is not necessary to show a distinct agreement that the one demand shall be applied in liquidation or in set-off of the other, in order to establish a mutual credit between the parties, it being sufficient to show that the credit was given under circumstances warranting the conclusion that the parties acted upon the understanding that such application was to be made); Apperson *v.* Gogin, 3 Ill. App. 48.

Kentucky.— Patrick *v.* Langston, 5 J. J. Marsh. 653; Jones *v.* Murray, 3 T. B. Mon. 83; Pierson *v.* Meaux, 3 A. K. Marsh. 4, holding that, where there are mutual demands, a court of equity will interpose to set off one demand against the other; but if the demand sought to be set off is not of a nature to give to a court of equity jurisdiction, there must be some connection between the demands to justify its interposition.

Minnesota.— Wallrich *v.* Hall, 19 Minn. 383.

New Jersey.— Van Buskirk *v.* Bayonne, (Ch. 1897) 38 Atl. 458.

Pennsylvania.— Morgan *v.* Bank of North America, 8 Serg. & R. 72, 1 Am. Dec. 575, holding that it is a principle of equity, whenever the courts find mutual demands, to endeavor to set off one against the other, and courts of law, in Pennsylvania, have adopted the doctrine of courts of chancery with respect to equitable set-offs. But see Cornwell's Appeal, 7 Watts & S. 305, holding that it is not for a court to interfere, and by an exercise of its equitable powers order or direct the mutual claims between even the same persons to be set off, unless they have judgments against each other for their respective claims.

Tennessee.— Caldwell *v.* Powell, 6 Baxt. 82, holding that an account for board, lodging, and attention to a party for a series of years, where, from the facts and circumstances of the case, she appears to have acquiesced in the justice of the same, but which had not been paid, is a proper subject of set-off in equity, after her decease, against the amount of a note executed to her shortly before her death by the party rendering the account.

United States.— Dade *v.* Irwin, 2 How. 383, 11 L. ed. 308; Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201; Howe *v.*

equitable set-off may be allowed upon mutual credit, although there are no mutual debts upon which a set-off could be sustained at law; [75] but the mere circumstance of mutual and independent cross demands does not authorize the interposition of equity to set them off against each other, without circumstances from which it can be inferred that one debt was contracted on the faith of the other, or some intervening equity which renders the interposition of that court necessary for the protection of the demand sought to be set off,[76] and the mere right of set-off is

Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409.

England.— Jeffs *v.* Wood, 2 P. Wms. 128, 24 Eng. Reprint 668.

Canada.— McManus *v.* Wilson, 17 Manitoba 567.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 9–11.

But see Gaylord *v.* Couch, 5 Day (Conn.) 223, holding that there is no principle of equity which will warrant setting off distinct and independent claims against each other unless on the ground of insolvency, as to which see further *infra*, I, F, 4, b.

The grounds of equitable set-off have been held to be in general: (1) That the demands are connected, as that one is the consideration of the other; or (2) that there has been an agreement to set them off; or (3) that they have been completely liquidated at law; or (4) that there is some obstacle to the legal coercion of the demand sought to be set off, as non-residence, insolvency, or the like. Graham *v.* Tilford, 1 Metc. (Ky.) 112; Tribble *v.* Taul, 7 T. B. Mon. (Ky.) 455.

The persuading principle which moved equity was not so much the inconvenience and circuity of two actions as the injustice of compelling defendant to pay the demand against himself and take the uncertain chances of insolvency of plaintiff or plaintiff's assignors, when defendant called on him with an execution. Barnes *v.* McMullins, 78 Mo. 260.

A presumption of mutual credit implies a knowledge on both sides of an existing debt due to one party and credited by the other, founded on a trusting to such debt as a means of discharging it. Burton *v.* Willen, 6 Del. Ch. 403, 33 Atl. 675; Kinney *v.* Tabor, 62 Mich. 517, 29 N. W. 86, 512; King *v.* King, 9 N. J. Eq. 44; Munger *v.* Albany City Nat. Bank, 85 N. Y. 580; Duncan *v.* Lyon, 3 Johns. Ch. (N. Y.) 351, 8 Am. Dec. 513; Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059 [*citing* Blount *v.* Windley, 95 U. S. 173, 24 L. ed. 424].

75. James *v.* Kynnier, 5 Ves. Jr. 106, 31 Eng. Reprint 496.

"Mutual credit" is held to mean something different from mutual debts, the latter embracing many cases not included in the former (Jones *v.* Robinson, 26 Barb. (N. Y.) 310; *In re* Voetter, 4 Fed. 632; Catlin *v.* Foster, 5 Fed. Cas. No. 2,519, 1 Sawy. 37, 3 Nat. Bankr. Reg. 540), and mutual credit, such as will give rise to an equitable set-off, applies to that class of cases where there has been mutual trust or understanding that an existing debt should be discharged by a credit given upon the ground of such debt (U. S. Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94), the term "credit" being held synonymous with trust, and the trust or credit need not be of money, but if one person intrust another with goods it is held to be a case of mutual credit (Catlin *v.* Foster, *supra*).

76. *Alabama.*— Gafford *v.* Proskauer, 59 Ala. 264; Tate *v.* Evans, 54 Ala. 16; Cave *v.* Webb, 22 Ala. 583; McKinley *v.* Winston, 19 Ala. 301; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206.

California.— Naglee *v.* Palmer, 7 Cal. 543.

District of Columbia.— Carver *v.* Hall, 3 App. Cas. 170.

Georgia.— Jordan *v.* Jordan, 12 Ga. 77; Ruckersville Bank *v.* Hemphill, 7 Ga. 396.

Illinois.— Houston *v.* Maddox, 179 Ill. 377, 53 N. E. 599; Raleigh *v.* Raleigh, 35 Ill. 512; Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289; Smith *v.* Billings, 62 Ill. App. 77.

Indiana.— Keightley *v.* Walls, 24 Ind. 205, where the court says, however, that the rule of the civil law was otherwise, and that it prevails in most countries in continental Europe, and expresses wonder that a jurisdiction so just should never have obtained in courts of chancery, which have grown so largely from that source.

Kentucky.— Wathen *v.* Chamberlin, 8 Dana 164; Turpin *v.* Turpin, 7 J. J. Marsh. 33; Talbot *v.* Banks, 2 J. J. Marsh. 548; Markham *v.* Todd, 2 J. J. Marsh. 364; Beall *v.* Squires, 3 T. B. Mon. 372; Robbins *v.* Holley, 1 T. B. Mon. 191; Collins *v.* Farquar, 4 Litt. 153; Hunt *v.* Martin, 2 Litt. 82; Bradley *v.* Morgan, 2 A. K. Marsh. 369; Pennebaker *v.* Wathan, 2 A. K. Marsh. 315.

Maryland.— Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49.

Michigan.— Hendricks *v.* Toole, 29 Mich. 340; Flanders *v.* Chamberlain, 2 Mich. N. P. 132.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Field *v.* Oliver, 43 Mo. 200.

New Jersey.— Norton *v.* Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506 [*modifying* 61 N. J. Eq. 508, 48 Atl. 822]; Hewitt *v.* Kuhl, 25 N. J. Eq. 24, holding also that the mere pendency of an action out of which a cross demand may arise will not confer the right to an equitable set-off.

New York.— Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350 (holding that something more than the mere existence of reciprocal and independent demands is required to authorize a set-off in equity when not allowable under the statute of set-off, and that circumstances must be shown from which it

not of itself an equity, and it becomes an equity only in consequence of some additional circumstance,[77] such as the insolvency,[78] or non-residence,[79] of plaintiff. But it has been held that defendant, in an action at law, having a separate demand arising out of the matter in controversy or consisting of an agreement so connected with the claim in suit that if performed it would defeat the suit, is entitled to equitable relief even against a solvent plaintiff.[80] Equity will not vary an express contract by raising a presumption of mutual credit.[81]

b. Insolvency. The insolvency of the party against whom the set-off is claimed is, as a broad general rule, held to be such a special equity as will induce a court of equity to take jurisdiction to allow the set-off.[82] If, however, the alle-

can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be deducted from the other, or some other intervening equity which renders the interposition of that court necessary for the creditor's protection); Elliott *v.* Gibbons, 30 Barb. 498 [*affirmed* in 31 N. Y. 67]; Schermerhorn *v.* Anderson, 2 Barb. 584; Cumings *v.* Morris, 3 Bosw. 560 [*affirmed* in 25 N. Y. 625]; Tone *v.* Brace, Clarke 503 [*affirmed* in 11 Paige 566]; Wolcott *v.* Sullivan, 1 Edw. 399 [*affirmed* in 6 Paige 117]; Green *v.* Storm, 3 Sandf. Ch. 305.

North Carolina.— Piedmont Bank *v.* Wilson, 124 N. C. 561, 32 S. E. 889; Riddick *v.* Moore, 65 N. C. 382.

Rhode Island.— Bell *v.* Ward, 10 R. I. 503.

United States.— Dade *v.* Irwin, 2 How. 383, 11 L. ed. 308; U. S. Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94; Gordon *v.* Lewis, 10 Fed. Cas. No. 5,614, 2 Sumn. 628 (holding that there must be a mutual credit, founded on a subsisting debt on the other side, or an express or implied agreement for a set-off of mutual debts); Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409; Jackson *v.* Robinson, 13 Fed. Cas. No. 7,144, 3 Mason 138.

England.— Middleton *v.* Pollock, L. R. 20 Eq. 29, 44 L. J. Ch. 584, 33 L. T. Rep. N. S. 240, 23 Wkly. Rep. 766; Rawson *v.* Samuel, Cr. & Ph. 161, 3 Jur. 947, 10 L. J. Ch. 214, 18 Eng. Ch. 161, 41 Eng. Reprint 451; Fisher *v.* Baldwin, 11 Hare 352, 45 Eng. Ch. 347, 68 Eng. Reprint 1311; Stimson *v.* Hall, 1 H. & N. 831, 26 L. J. Exch. 212, 5 Wkly. Rep. 367; Whyte *v.* O'Brien, 1 Sim. & St. 551, 1 Eng. Ch. 551, 57 Eng. Reprint 218.

Canada.— McKelvey *v.* McLean, 34 U. C. Q. B. 635.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 9 *et seq.*

Compare Burton *v.* Willin, 6 Houst. (Del.) 522, 22 Am. St. Rep. 363.

The existence of facts necessary to raise the equity must be affirmatively shown by a party seeking to make a set-off in equity beyond that given by statute. Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

77. Graham *v.* Tilford, 1 Metc. (Ky.) 112.

78. See *infra*, I, F, 4, b.

79. See *infra*, I, F. 4, c.

80. Baker *v.* Hawkins, 14 R. I. 359. See Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

81. Mangle *v.* Stiles, 31 Pa. St. 72.

The condition of a mortgage lien cannot be varied by equitable set-off. Nolley *v.* Rogers, 22 Ark. 227.

82. *Alabama.*— Campbell *v.* Conner, 78 Ala. 211 (holding that as witness' fees taxed as costs in a civil suit are merged in the judgment, and may be collected under execution for the benefit of the witness, under the code, section 3140, a cross demand against the witness not being available as a set-off in an action at law, may be established as a set-off in equity on proof of the witness' insolvency); Malone *v.* Carroll, 33 Ala. 191 (holding also that when, in the absence of all indemnity, complainant would be entitled to the benefit of an equitable set-off set forth in his bill, on the ground of insolvency, his mere failure to disclose in his bill that he had received partial indemnity thereon cannot operate to deprive him of all claim to relief); White *v.* Wiggins, 32 Ala. 424; Betts *v.* Gunn, 31 Ala. 219; Wray *v.* Furniss, 27 Ala. 471; Pulliam *v.* Owen, 25 Ala. 492; Donelson *v.* Posey, 13 Ala. 752; Tuscumbia, etc., R. Co. *v.* Rhodes, 8 Ala. 206; French *v.* Garner, 7 Port. 549.

Arkansas.— See White *v.* Reagan, 32 Ark. 281.

California.— Russell *v.* Conway, 11 Cal. 93. But see Duff *v.* Hobbs, 19 Cal. 646.

Colorado.— Plattner Implement Co. *v.* Bradley, 40 Colo. 95, 90 Pac. 86.

Connecticut.— Goodwin *v.* Keney, 49 Conn. 563 (holding that insolvency of itself will often raise an equity which will justify the interference of the court, even when the party desiring the set-off is himself petitioner, and it would seem to have greater force when the party opposing it is already in court asking relief, and that when a petitioner for foreclosure was insolvent and respondent, who owned the equity of redemption, but was not the original mortgagor, had a claim against him personally, it could be set off against the mortgage debt); Pond *v.* Smith, 4 Conn. 297; Gaylord *v.* Couch, 5 Day 223. See Bowen *v.* Bowen, 20 Conn. 127.

District of Columbia.— Fitzgerald *v.* Wiley, 22 App. Cas. 329.

Georgia.— Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291; Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878; Maddox *v.* Oxford, 70 Ga. 179 (holding that, in an action by a wife to subject lands in which a creditor of her husband had invested her funds which he had knowingly received in payment of her hus-

gation of insolvency is not sustained by proof, equity will refuse to aid defendant

band's debt, the rents and profits of said land used for her separate use are pleadable in set-off by the creditor, the husband being insolvent); Melson *v.* Dickson, 63 Ga. 682, 36 Am. Rep. 128 (holding that in trespass *quare clausum fregit* defendant may set off notes held by him against plaintiff, if the latter is insolvent, for equity will always interpose to set off claims *ex contractu*, where the creditor is about to be mulcted for damages by the insolvent debtor, and under the code the party need not go into equity, but may assert all equitable rights at law on the plea substantially setting out the facts necessary to be alleged in a bill).

Illinois.— Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Walker *v.* Doane, 108 Ill. 236, 101 Ill. 628 (holding that where the rental value of premises purchased at administrator's sale, for the time during which they were wrongfully withheld from the purchaser by the widow, was more than the amount due the widow on her claim for yearly dower payments, and she was insolvent, the purchaser was entitled to relief by equitable set-off of the rental value and the amount of taxes paid by the purchaser); Quick *v.* Lemon, 105 Ill. 578; Chicago, etc., R. Co. *v.* Field, 86 Ill. 270; Hall *v.* Kimball, 77 Ill. 161; Raleigh *v.* Raleigh, 35 Ill. 512; Downs *v.* Jackson, 33 Ill. 464, 85 Am. Dec. 289; Hinrichsen *v.* Reinback, 27 Ill. 295; Hahn *v.* Gates, 102 Ill. App. 385; Smith *v.* Billings, 62 Ill. App. 77.

Indiana.— Keightley *v.* Walls, 27 Ind. 384, 24 Ind. 205, holding that, where plaintiff executed his note to a person who fraudulently transferred it to an insolvent against whom plaintiff held a judgment for an amount greater than the note, plaintiff was entitled to have the note set off against the judgment, and the mutual claims satisfied so far as they were equal. See Wulschner *v.* Sells, 87 Ind. 71.

Iowa.— Davis *v.* Milburn, 3 Iowa 163.

Kentucky.— Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865; Wathen *v.* Chamberlin, 8 Dana 164; Chamberlin *v.* Stewart, 6 Dana 32; Jones *v.* Waggoner, 7 J. J. Marsh. 144; Patrick *v.* Langston, 5 J. J. Marsh. 653; Markham *v.* Todd, 2 J. J. Marsh. (Ky.) 364; Robbins *v.* Holley, 1 T. B. Mon. 191 (holding also that where the demand against which set-off is sought has been assigned to plaintiff, it must be shown that the insolvency occurred before the assignment); Hunt *v.* Martin, 2 Litt. 82. See Wright *v.* Swayne, 5 B. Mon. 441.

Maryland.— Willson *v.* Williams, 108 Md. 522, 70 Atl. 409; Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Levy *v.* Steinbach, 43 Md. 212; Marshall *v.* Cooper, 43 Md. 46.

Minnesota.— Laybourn *v.* Seymour, 53 Minn. 105, 54 N. W. 941, 39 Am. St. Rep. 579.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Field *v.* Oliver, 43 Mo. 200. See Mortland *v.* Holton, 44 Mo. 58.

Nebraska.— Richardson *v.* Doty, 44 Nebr. 73, 62 N. W. 254; Wilbur *v.* Jeep, 37 Nebr. 604, 56 N. W. 198; Thrall *v.* Omaha Hotel Co., 5 Nebr. 295, 25 Am. Rep. 488.

Nevada.— Foulks *v.* Rhodes, 12 Nev. 225.

New Jersey.—Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

New York.— Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905; Richards *v.* La Tourette, 119 N. Y. 54, 23 N. E. 531; Rothschild *v.* Mack, 115 N. Y. 1, 21 N. E. 726; Bradley *v.* Angel, 3 N. Y. 475; Shipman *v.* Lansing, 25 Hun 290; Ives *v.* Miller, 19 Barb. 196; Ainslie *v.* Boynton, 2 Barb. 258; Cumings *v.* Morris, 3 Bosw. 560 [*affirmed* in 25 N. Y. 625]; Keep *v.* Lord, 2 Duer 78; Schieffelin *v.* Hawkins, 1 Daly 289; Simson *v.* Hart, 14 Johns. 63 (holding that insolvency constitutes a sufficient equity to entitle a party, who is a creditor upon a joint judgment, to set off that judgment against a separate judgment debt due by him to one of the joint judgment debtors, both of the latter being insolvent); Knapp *v.* Burnham, 11 Paige 330; Gay *v.* Gay, 10 Paige 369; Irving *v.* De Kay, 10 Paige 319; Sutphen *v.* Fowler, 9 Paige 280 (holding that where on a sale of land the vendee paid to the vendor a sum to be expended in the purchase of an adjoining lot for the benefit of the vendee, and the vendor died without having conveyed the land or applied the sum to the purpose for which it was received and without leaving personal estate sufficient to pay his debts, on a bill against the heir of the vendor for specific performance of the contract to convey, the vendee could set off the sum given the vendor against the balance due on the contract to convey); Lindsay *v.* Jackson, 2 Paige 581. See Mollan *v.* Griffith, 3 Paige 402.

North Carolina.—Smith *v.* Smith, 79 N. C. 455, holding that an executor's equity to compel a legatee to refund the legacy to pay debts is a good counter-claim to a demand against the estate arising from the note against the testator assigned to such legatee, there being no other assets of the estate with which to pay the note.

North Dakota.— See Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Ohio.— Armstrong *v.* Law, 11 Ohio Dec. (Reprint) 461, 27 Cinc. L. Bul. 100, holding that where a bank to which a subscriber to an increase to its capital stock has paid money on account of such subscription becomes insolvent, it is not necessary for such insolvent to make a demand on the bank for a repayment of the sum paid by him on account of his subscription, but he can set up such payment as a counter-claim to an action by the receiver of the bank against him on his note.

Oregon.—Mitchell *v.* Holman, 30 Oreg. 280, 47 Pac. 616.

Pennsylvania.— Lowman's Appeal, 3 Watts & S. 349.

Tennessee.— Parker *v.* Britt, 4 Heisk. 243; Catron *v.* Cross, 3 Heisk. 584; Brazelton *v.* Brooks, 2 Head 194; Hough *v.* Chaffin, 4 Sneed 238; Howe Sewing Mach. Co. *v.*

and will not grant the set-off sought,[83] and there are some very well considered cases which hold that mere insolvency alone does not constitute a ground for the interference of the court, and that some further equity must exist in order to induce an equity court to act.[84]

Zachary, 2 Tenn. Ch. 478; Cohen *v.* Whitman, 1 Tenn. Ch. 269; Gregory *v.* Hasbrook, 1 Tenn. Ch. 218.

Texas.— Duncan *v.* Magette, 25 Tex. 245; Castro *v.* Gentiley, 11 Tex. 28; Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504, holding that, in the Texas blended system of law and equity, the court will, in a statutory action for the trial of the right to personal property, apply the equity rule with regard to an insolvent non-resident.

Vermont.— Smith *v.* McDonald, 56 Vt. 305 (holding that where a mortgagor brought an action for the recovery of usurious interest paid on the loan to one of the two joint mortgagees, a bill in equity would lie to compel the excess of the debt over the value of the property mortgaged after foreclosure to be applied as an equitable set-off, the mortgagor being insolvent); Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

Virginia.— Childress *v.* Jordan, 107 Va. 275, 58 S. E. 563; Feazle *v.* Dillard, 5 Leigh 30, holding that a bond not yet due may be the subject of set-off in equity if insolvency intervenes. See Stimmel *v.* Benthall, 108 Va. 141, 60 S. E. 765.

West Virginia.— Farland *v.* Wood, 35 W. Va. 458, 14 S. E. 140.

Wisconsin.— Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766.

United States.— North Chicago Rolling-Mill Co. *v.* St. Louis Oil, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565; Dewey *v.* West Fairmont Gas Coal Co., 123 U. S. 329, 8 S. Ct. 148, 31 L. ed. 179; Schuler *v.* Israel, 120 U. S. 506, 7 S. Ct. 648, 30 L. ed. 707; Leeds *v.* Marine Ins. Co., 6 Wheat. 565, 5 L. ed. 332. See Dade *v.* Irwin, 2 How. 383, 11 L. ed. 308.

England.— *Ex p.* Stephens, 11 Ves. Jr. 24, 8 Rev. Rep. 75, 32 Eng. Reprint 996.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 11.

Where insolvency is alleged rather as a reason for castigation than as an equitable ground of relief, equity will not intervene. Hart *v.* Davis, 21 Tex. 411.

83. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599; Wright *v.* Swayne, 5 B. Mon. (Ky.) 441; Bunting *v.* Cochran, 99 Va. 558, 39 S. E. 229; Farland *v.* Wood, 35 W. Va. 458, 14 S. E. 140 (holding that, when insolvency is the only ground for equitable interference and plaintiff fails to prove the insolvency, an injunction in aid of a set-off will be dissolved); Smith *v.* Dickinson, 100 Wis. 574, 76 N. W. 766.

84. *Michigan.*— Hale *v.* Holmes, 8 Mich. 37 (holding also that equity will not compel a vendor to receive his own paper on the contract of sale when he had not agreed to do so, and the purchaser has not bound himself to take and pay for the property, nor will it compel a set-off of the vendor's debt on the contract of sale since there is no contract on the part of the purchaser against which to allow it); Lockwood *v.* Beckwith, 6 Mich. 168, 72 Am. Dec. 69.

New York.— Keep *v.* Law, 2 Duer 78, holding that the mere fact of insolvency of one of the parties does not of itself raise an equity of set-off, although it is a circumstance which, in connection with mutual credit, will justify such set-off, and that, although there is much doubt thrown over this branch of the law and conflict of authority, the true rule seems to be that the debt must have existed as a mutual credit at the time of the insolvent's assignment, and that where two persons are indebted to each other on disconnected claims and one becomes insolvent, the solvent party cannot maintain a suit for that cause alone to compel an equitable set-off before the debt owing by the insolvent becomes due.

North Carolina.— Riddick *v.* Moore, 65 N. C. 382, where the court says that it is of the opinion that the preponderance of authority is decidedly against the idea that insolvency can constitute a ground of equity, and that in all of the cases in which the allegation is made, with one or two exceptions, there is some distinct equity, and the insolvency of the other party is relied on only as a make-weight and by way of troubling the court.

United States.— Gordon *v.* Lewis, 10 Fed. Cas. No. 5,614, 2 Sumn. 628; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409, where, after an exhaustive discussion of the subject and a comparison of leading English and American cases, Judge Story held that a court of equity would not entertain a set-off of a separate debt of one partner against a joint debt due to the partnership upon the mere ground of the insolvency of that partner, for it must necessarily involve a settlement of all the partnership debts and an ascertainment of all the partnership equity before any relief could be given, and added, by way of *dictum* that even in a case of mutual debts in the same right, as for example, mutual joint debts or mutual separate debts, although natural equity seems persuasively to urge such a set-off, in such a case, for otherwise the insolvent party might recover his whole debt and the other party might recover a dividend only, or indeed nothing at all, nevertheless there was grave reason to doubt, even in such a case, whether the courts of equity in England ever admitted a set-off upon the mere fact of insolvency.

England.— Bishop *v.* Church, 3 Atk. 691, 26 Eng. Reprint 1197, 2 Ves. 100, 371, 28 Eng. Reprint 66, 238; *Ex p.* Prescot, 1 Atk. 230, 26 Eng. Reprint 147; *Ex p.* Twogood, 11 Ves. Jr. 517, 32 Eng. Reprint 1189.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 11 *et seq.*

c. Non-Residence. The non-residence of a party against whom a set-off is claimed is generally broadly stated to be a sufficient ground for equitable interference to allow the set-off;[85] but in some cases it is held that the mere fact of non-residence unaccompanied by any other equitable condition is insufficient to warrant the application of the doctrine of equitable set-off.[86]

5. Stale, Fraudulent, or Procrastinative Cross Demands. Equity will not allow an offset which would work against equity,[87] and thus will not interfere to allow a set-off where the claim sought to be set off is stale or clouded with presumptions unfavorable to its original foundation or present validity,[88] or is based upon fraud,[89] or if it is interposed merely for the evident purpose of causing

85. *Colorado.*— Plattner Implement Co. *v.* Bradley, 40 Colo. 95, 90 Pac. 86, holding that where a non-resident on whom service of process in an independent action cannot be had within the jurisdiction in which he is attempting to enforce a judgment obtained in a foreign jurisdiction, equity will permit the judgment debtor to set off claims for unliquidated damages for defective goods sold by the judgment creditor to the debtor, but that in an action by a foreign corporation against a domestic corporation on a foreign judgment where it appeared that the foreign corporation has complied with the laws prescribing when a corporation may transact business, and that it has paid its license taxes, and that it has an agent within the state upon whom service in an action against the corporation could be made, such a set-off could not be allowed.

District of Columbia.—Fitzgerald *v.* Wiley, 22 App. Cas. 329.

Georgia.— Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878.

Illinois.— Quick *v.* Lemon, 105 Ill. 578, cross bill by a corporation against a non-resident creditor.

Iowa.— Davis *v.* Milburn, 3 Iowa 163.

Kentucky.— Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865; Wallenstein *v.* Selizman, 7 Bush 175; Moss *v.* Rowland, 1 Duv. 321 (holding that a claim for usurious interest paid by defendant to plaintiff is available as a set-off against the judgment recovered by plaintiff on the debt on which such interest was paid, in case the judgment plaintiff subsequent to the rendition of the judgment becomes a non-resident of the state); Taylor *v.* Stowell, 4 Metc. 175; Carson *v.* Carson, 2 Metc. 96 (holding that a party against whom a proceeding is instituted to compel a restitution of money that had been collected on a judgment, which was afterward reversed can defeat a recovery by making it appear that he has a demand against the claimant, a non-resident, fully equal in amount to the sum which was collected under the judgment, and which he is called upon to refund); Wathen *v.* Chamberlin, 8 Dana 164; Markham *v.* Todd, 2 J. J. Marsh. 364; Robbins *v.* Holley, 1 T. B. Mon. 191 (holding also that where the demand against which the set-off is prayed has been assigned, it must appear that the removal from the state occurred before the assignment). See Wright *v.* Swayne, 5 B. Mon. 441.

Missouri.— Barns *v.* McMullins, 78 Mo. 260.

New Jersey.— Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

Tennessee.— Edminson *v.* Baxter, 4 Hayw. 112, 9 Am. Dec. 751; Gregory *v.* Hasbrook, 1 Tenn. Ch. 218.

Texas.— Fleming *v.* Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504.

United States.— North Chicago Rolling-Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565; Brown *v.* Pegram, 149 Fed. 515.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 11.

In Wisconsin, by Rev. St. § 2656, subd. 3, in an action where a non-resident is plaintiff, defendant is allowed to set up by way of counter-claim any cause of action he may have against such non-resident, regardless of the nature of plaintiff's cause of action. Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

86. Ingram *v.* Jordan, 55 Ga. 356 (holding that the mere fact that plaintiff is a citizen of another state is insufficient, as he may reside in the state in which suit is brought in a way to be sued or have property then accessible to legal process); Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49; Beall *v.* Brown, 7 Md. 393 (holding that where a non-resident plaintiff sues and recovers judgment in the state, and defendant has a cross action at law upon a warranty growing out of the same transaction, the mere fact that plaintiff is a non-resident and will not consent to be sued in the state does not give a court of equity jurisdiction to restrain the execution of the judgment until plaintiff will come into the state and consent to be sued there); Tone *v.* Brace, 8 Paige (N. Y.) 597; Murray *v.* Toland, 3 Johns. Ch. (N. Y.) 569; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133 (holding that the mere inconvenience of being compelled to resort to a foreign jurisdiction is not sufficient to call into operation equitable jurisdiction).

87. Crowninshield *v.* Robinson, 6 Fed. Cas. No. 3,451, 1 Mason 93.

88. Dade *v.* Irwin, 2 How. (U. S.) 383, 11 L. ed. 308.

89. Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569, holding that damages arising from plaintiff's breach of a contract to furnish defendant with a specific kind of merchandise are not available by way of equitable counter-claim in an action for the price of other merchandise obtained by defendant several months later, without any intention to pay

delay;[90] but on the contrary may restrain a set-off at law when to allow it would be against equitable principles.[91]

G. Confusion of Terms. The technical distinctions between the several kinds of cross demands, such as recoupment, set-off, counter-claim, and the like, are sometimes lost sight of by the courts, which often use the terms interchangeably without regard to their technical meaning, which results in a confusion of terms which can be elucidated only by a close reading of the facts and pleadings in the cases decided. Thus the terms "set-off" and "counter-claim" are sometimes used interchangeably in a generic sense,[92] as are similarly "counter-claim" and "recoupment,"[93] "recoupment" and "set-off,"[94] "set-off" and "reconvention,"[95] "reconvention" and "compensation,"[96] and "compensation" and 'set-off."[97]

H. The Remedies Compared — 1. Counter-Claim and Recoupment. Counter-claim is distinguishable from recoupment in that it is a purely statutory remedy,[98] while recoupment is a development of the common law,[99] and while in the case of a counter-claim defendant can recover an excess of his claim over plaintiff's, recoupment is limited to the amount of plaintiff's demand and will not authorize a judgment in defendant's favor for an excess;[1] but with these qualifications

for them, and for the avowed purpose of getting even with plaintiff.

90. Atterbury *v.* Jarvie, 2 H. & N. 114, 26 L. J. Exch. 178.

91. Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387, 38 L. J. Exch. 233, 17 Wkly. Rep. 1125; Wilson *v.* Gabriel, 4 B. & S. 243, 8 L. T. Rep. N. S. 502, 11 Wkly. Rep. 803, 116 E. C. L. 243, where the court deprived defendant of his set-off.

92. See Bowen *v.* Snell, 9 Ala. 481; Farrow *v.* Flatt, 61 Ill. App. 118; Moore *v.* Newland, 90 Ind. 409; Burch *v.* State, 4 Gill & J. (Md.) 444; McGraw *v.* Pettibone, 10 Mich. 530; McCuin *v.* Frazier, 38 Mo. App. 63; Clapp *v.* Wright, 21 Hun (N. Y.) 240; Newell *v.* Salmons, 22 Barb. (N. Y.) 647; Van Dyck *v.* McQuade, 45 N. Y. Super. Ct. 620 [*affirming* 57 How. Pr. 62]; Wood *v.* Davis, 15 N. Y. Suppl. 554; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60; Belknap *v.* McIntyre, 2 Abb. Pr. (N. Y.) 366; Parsons *v.* Nash, 8 How. Pr. (N. Y.) 454; Merritt Milling Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4 (where the phrase "set-off by way of counter-claim" is used); Street *v.* Bryan, 65 N. C. 619; Russell *v.* Miller, 54 Pa. St. 154; Scott *v.* Mexican Nat. R. Co., (Tex. App. 1892) 18 S. W. 137 (where set-off, counter-claim, and reconvention are used interchangeably); Atwater *v.* Schenck, 9 Wis. 160; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810; Dexter *v.* Sayward, 51 Fed. 729; Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463.

93. See Hook *v.* White, 36 Cal. 299; Streeter *v.* Streeter, 43 Ill. 155; Slayback *v.* Jones, 9 Ind. 470, 472 (where the court said: "Want and failure of consideration, breach of warranty, fraud, payment, set-off, and recoupment, have heretofore been familiar to the profession — the latter, however, the least so. Yet it is a common-law term and defense. . . . It was called, also, counter-claim. Indeed, in attempting to define it, writers and judges have said it was a counter-claim. Such was the use and definition of the term in the Report of decisions in this state. . . . They seemed to run together. A counter-claim was the pleading under which a recoupment was had"); Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170 (where the expression is used "counter-claim by way of recoupment"); Peabody *v.* Bloomer, 3 Abb. Pr. (N. Y.) 353; Rush *v.* Kansas City First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627.

94. See Stockton Sav., etc., Soc. *v.* Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181, 21 L. R. A. 406; McLean *v.* McLean, 1 Conn. 397; Burroughs *v.* Clancey, 53 Ill. 30; Hartshorn *v.* Kinsman, 16 Ill. App. 555 (where the court say that the conflict in the cases relating to the remedy is more apparent than real, and arises from some unguarded expressions where the distinction between set-off and recoupment seems to have been ignored and the term used synonymously); Haddix *v.* Wilson, 3 Bush (Ky.) 523 (where the phrase "recouped by a set-off" is used); Warfield *v.* Booth, 33 Md. 63; Fuller *v.* Parrish, 3 Mich. 211; Jones *v.* Moore, 42 Mo. 413; Cole *v.* Colburn, 61 N. H. 499; Price *v.* Reynolds, 39 N. J. L. 171 (where the court in speaking of recoupment, which was a common-law remedy (see *supra*, I, A), said that the doctrine of recoupment was unknown to the common law and existed in New Jersey only by virtue of the Practice Act. The court evidently was alluding to set-off, which exactly fills the description given (see *supra*, I, B); Peabody *v.* Beach, 6 Duer (N. Y.) 53; Peabody *v.* Bloomer, 5 Duer (N. Y.) 678; Hall's Appeal, 40 Pa. St. 409; Riley *v.* Carter, 3 Humphr. (Tenn.) 230 (where set-off is spoken of as "at common-law," where in fact it was unknown (see *supra*, I, B) while what was really meant was recoupment).

95. See Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287.

96. See Godbold *v.* Harrison, McGloin (La.) 31, 34.

97. Holliman *v.* Rogers, 6 Tex. 91.

98. See *supra*, I, C.

99. See *supra*, I, A.

1. Hurst *v.* Everett, 91 N. C. 399; Raisin

recoupment and counter-claim operate somewhat similarly, when the matter to be recouped arose out of the contract set forth in the complaint as the foundation of plaintiff's action.[2]

2. Recoupment and Set-Off. Recoupment and set-off are distinguished from each other in several essential particulars: Recoupment is a remedy of common-law origin,[3] while set-off is wholly a creation of statute;[4] recoupment is allowed for torts,[5] and in actions for torts,[6] while as a general rule set-off is allowed neither for torts,[7] nor in actions for torts;[8] in recoupment the damages claimed by defendant must flow from the same contract as that relied on by plaintiff, or must grow out of the same transaction as that on which plaintiff's cause of action is founded, while in set-off defendant may base his claim on matters extrinsic to plaintiff's cause of action;[9] in recoupment defendant may recoup only to the extent of plaintiff's claim, but in set-off he may recover any excess in his favor;[10] in recoupment the damages may be unliquidated while only liquidated damages or those capable of being ascertained by mere calculation may be set off;[11] and finally, set-off must be specially pleaded, while recoupment need not be.[12]

3. Set-Off and Compensation. Set-off resembles compensation,[13] with, however, this material difference; that in the former the debts are not in themselves and of right balanced and extinguished,[14] and that defendant is not obliged to avail himself of his right of set-off but may at his option pay, or on other grounds contest the one debt, and bring a separate action for the other,[15] while in compensation the debts extinguish each other to the amounts respectively due, by mere operation of law.[16]

v. Thomas, 88 N. C. 148; Francis *v.* Edwards, 77 N. C. 271. And see *infra*, VII, A, 4.

2. McGregor *v.* Auld, 83 Wis. 539, 53 N. W. 845.

3. Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Ward *v.* Fellers, 3 Mich. 281; Myers *v.* Estell, 47 Miss. 4. And see *supra*, I, A.

4. See *supra*, I, B.

5. See *infra*, VI, J, 1.

6. See *infra*, V, E, 1.

7. See *infra*, VI, J, 2.

8. See *infra*, V, E, 2.

9. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Rosser *v.* Bunn, 66 Ala. 89.

Arkansas.— Robinson *v.* Mace, 16 Ark. 97; Wheat *v.* Dotson, 12 Ark. 699.

California.— St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876.

Georgia.— Fontaine *v.* Baxley, 90 Ga. 416, 17 S. E. 1015, holding, however, that in Georgia the difference between recoupment and set-off is no longer of much importance, because, although the code, section 2909, defines recoupment, and the next section distinguishes it from set-off, and the scheme of the code is to recoup where both parties rely on the same contract, and set-off where they urge different contracts, inasmuch as unliquidated damages resulting from breach of contract may, under the code, be set-off the same as liquidated damages, there is no longer any substantial difference between recoupment and set-off which requires to be noticed in pleading.

Illinois.— Stow *v.* Yarwood, 14 Ill. 424.

Indiana.— Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254.

Kentucky.— Trabue *v.* Harris, 1 Metc. 597.

Maryland.— Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Michigan.— Ward *v.* Fellers, 3 Mich. 281.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4.

North Carolina.—Hurst *v.* Everett, 91 N. C. 399.

Tennessee.— Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

Wisconsin.— Rockwell *v.* Daniels, 4 Wis. 432.

And see *infra*, VI, C, 2.

10. Brunson *v.* Martin, 17 Ark. 270; Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 155; Stow *v.* Yarwood, 14 Ill. 424; Batterman *v.* Pierce, 3 Hill (N. Y.) 171. And see *infra*, VII, A, 4.

11. *Alabama.*— Hatchett *v.* Gibson, 13 Ala. 587.

Arkansas.— Robinson *v.* Mace, 16 Ark. 97; Wheat *v.* Dotson, 12 Ark. 699.

Michigan.— Ward *v.* Fellers, 3 Mich. 281.

Mississippi.— Myers *v.* Estell, 47 Miss. 4.

New Jersey.— Parker *v.* Harrtt, 32 N. J. Eq. 225 [*affirmed* in 32 N. J. Eq. 844].

New York.— Batterman *v.* Pierce, 3 Hill 171.

Tennessee.—Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

And see *infra*, VI, I, 3.

12. Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681. And see, generally, Pleading, 31 Cyc. 221.

13. See *supra*, I, E.

14. See *infra*, VII, A.

15. See *infra*, VII, A.

16. Brown *v.* Montgomery, 19 Tex. Civ. App. 548, 47 S. W. 803.

4. SET-OFF, COUNTER-CLAIM, AND DEFENSE DISTINGUISHED. A set-off, strictly speaking, is not a defense to the action in which it may be filed,[17] and when plaintiff's claim has been wholly satisfied by a set-off he has not been defeated by a defense, but rather has been paid by the extinguishment of claims against him to an equal amount.[18] Nor is a counter-claim a defense;[19] and placing a defense on the one side, and counter-claim and set-off on the other, they will be readily distinguishable by the consideration that while the former merely precludes, or resists, any recovery on the part of plaintiff, the latter are in the nature of cross demands, and admit of a recovery in the action by defendant against plaintiff.[20] Some cases lay down the rule that in the absence of an averment in the answer that matter is pleaded as a counter-claim, and of a prayer for appropriate relief, the answer will be deemed to set up a defense and not a counter-claim.[21]

I. Object of the Remedies. The several forms of cross demand, such as recoupment, set-off, counter-claim, and the like, are similar, in that their common object is by allowing the entire controversy between the parties to be litigated and finally determined in one action, to advance justice by preventing circuity of action and suppressing multiplicity of litigation,[22] wherever this can be done

17. Kennedy *v.* Richardson, 70 Ind. 524; Boil *v.* Simms, 60 Ind. 162; Reid *v.* Darlington, 19 Iowa 349; Lewis *v.* Denton, 13 Iowa 441; Jones *v.* Moore, 42 Mo. 413; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

18. Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

19. Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511.

Same facts constituting both defense and counter-claim see PLEADING, 31 Cyc. 225.

Answer held to set up a counter-claim and not a defense see Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468.

20. Roots *v.* Nye, 2 Handy (Ohio) 229, 12 Ohio Dec. (Reprint) 417.

21. Brannan *v.* Paty, 58 Cal. 330; Equitable L. Assur. Soc. *v.* Cuyler, 75 N. Y. 511 (holding that as a distinction exists between a defense and a counter-claim, when the defense is intended as a counter-claim it should be expressly stated in the answer, so as to advise the opposite party; and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counter-claim is intended, such party is not in a position to insist that he has actually set up a counter-claim, and the answer should be construed and considered as a defense); Stowell *v.* Eldred, 39 Wis. 614 (holding that it is so easy to commence a counter-claim by denominating it a counter-claim, and to close it with a demand for relief, that it is not unreasonable, and does no violence to the spirit of the code, to require the pleader to do so). But see Tabor *v.* Mackkee, 58 Ind. 290.

Designation and misnomer of set-off or counter-claim generally see PLEADING, 32 Cyc. 225.

22. *Alabama.*— Bean *v.* Cabbaness, 6 Ala. 343; Pierce *v.* Hickenburg, 2 Port. 196.

Arkansas.— White *v.* Reagan, 32 Ark. 281; Brunson *v.* Martin, 17 Ark. 270; Key *v.* Henson, 17 Ark. 254; Wheat *v.* Dotson, 12 Ark. 699; Field *v.* Ringo, 7 Ark. 435.

California.— Story *v.* Story, 100 Cal. 30, 34 Pac. 671; Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516.

Colorado.—Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298.

Connecticut.— Talbot *v.* Ellis, 33 Conn. 235; Avery *v.* Brown, 31 Conn. 398; Bulkeley *v.* Welch, 31 Conn. 339; Ripley *v.* Bull, 19 Conn. 53.

Delaware.— Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (1906) 62 Atl. 1054.

District of Columbia.— Fitzgerald *v.* Wiley, 22 App. Cas. 329.

Georgia.— Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Mell *v.* Moony, 30 Ga. 413; Meriwether *v.* Bird, 9 Ga. 594.

Illinois.— Scott *v.* Kenton, 81 Ill. 96; Lathrop *v.* Hayes, 57 Ill. 279; Burroughs *v.* Clancey, 53 Ill. 30; Peck *v.* Brewer, 48 Ill. 54; Streeter *v.* Streeter, 43 Ill. 155; Wright *v.* Lattin, 38 Ill. 293; Lunn *v.* Gage, 37 Ill. 19, 87 Am. Dec. 233; Bates *v.* Courtwright, 36 Ill. 518; Sanger *v.* Fincher, 27 Ill. 346; Schuchmann *v.* Knoebel, 27 Ill. 175; Brigham *v.* Hawley, 17 Ill. 38; Stow *v.* Yarwood, 14 Ill. 424; Lloyd *v.* Manufacturers, etc., Warehouse Co., 102 Ill. App. 551; Kelley *v.* Caffrey, 79 Ill. App. 278; Caldwell *v.* Evans, 39 Ill. App. 613; Bross *v.* Cairo, etc., R. Co., 9 Ill. App. 363.

Indiana.— Woodruff *v.* Garner, 27 Ind. 4, 89 Am. Dec. 477; Shannon *v.* Wilson, 19 Ind. 112; Slayback *v.* Jones, 9 Ind. 470; Houston *v.* Young, 7 Ind. 200; Clark *v.* Wildridge, 5 Ind. 176.

Kansas.—St. Louis, etc., R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Stevens *v.* Able, 15 Kan. 584.

Kentucky.— Slone *v.* Slone, 2 Metc. 339.

Louisiana.— Bliss *v.* Patrick, 6 La. Ann. 546; Durnford's Succession, 8 Rob. 488; Agaisse *v.* Guedron, 2 Mart. N. S. 73; Evans *v.* Gray, 12 Mart. 475.

Maine.— Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56; Rogers *v.* Humphrey, 39 Me. 382; Banks *v.* Pike, 15 Me. 268.

Maryland.— Steele *v.* Sellman, 79 Md. 1,

without a violation of any of the settled rules of law or forms of procedure, and

28 Atl. 811; Maryland Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Lee *v.* Rutledge, 51 Md. 311; State *v.* Baltimore, etc., R. Co., 34 Md. 344; Warfield *v.* Booth, 33 Md. 63; Dowler *v.* Cushwa, 27 Md. 354; Baltimore Mar. Ins. Co. *v.* Dalrymple, 25 Md. 269; Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Clarke *v.* Magruder, 2 Harr. & J. 77; Strike's Case, 1 Bland 57.

Massachusetts.— Home Sav. Bank *v.* Boston, 131 Mass. 277; Campbell *v.* Somerville, 114 Mass. 334; Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494; Stacy *v.* Kemp, 97 Mass. 166; Galligan *v.* Fannan, 9 Allen 192; Sawyer *v.* Wiswell, 9 Allen 39; Cook *v.* Mills, 5 Allen 36; Bee Printing Co. *v.* Hichborn, 4 Allen 63; Dorr *v.* Fisher, 1 Cush. 271; Harrington *v.* Stratton, 22 Pick. 510; Stowers *v.* Barnard, 15 Pick. 221; Richards *v.* Blood, 17 Mass. 66.

Michigan.— Pierce *v.* Underwood, 103 Mich. 62, 61 N. W. 344; Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Platt *v.* Brand, 26 Mich. 173; Allen *v.* McKibbin, 5 Mich. 449; Ward *v.* Fellers, 3 Mich. 281. But see Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297, holding that where the case is such that the issue upon the counter-claim would be distinct from that on plaintiff's demand and rest upon distinct evidence, the reasons for permitting the counter-claim have little or no force, for the nearer the controversy is to being single and distinct the more likely the jury is to deal with it with full intelligence and justice.

Minnesota.— Barker *v.* Walbridge, 14 Minn. 469.

Mississippi.— Fowler *v.* Payne, 49 Miss. 32, 73; Graves *v.* Hull, 27 Miss. 419.

Missouri.— Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Mortland *v.* Holton, 44 Mo. 58; Grand Lodge of Masons *v.* Knox, 20 Mo. 433; Kamerick *v.* Castleman, 23 Mo. App. 481; Green *v.* Bell, 3 Mo. App. 291.

Nebraska.— Hier *v.* Anheuser-Busch Brewing Assoc., 60 Nebr. 320, 83 N. W. 77; Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New Hampshire.— Cole *v.* Colburn, 61 N. H. 499; Chase *v.* Strain, 15 N. H. 535.

New Jersey.—Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206; Smock *v.* Warford, 4 N. J. L. 306.

New York.— Taylor *v.* New York, 82 N. Y. 10; More *v.* Rand, 60 N. Y. 208; Waddell *v.* Darling, 51 N. Y. 327; Gutchess *v.* Daniels, 49 N. Y. 605; Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Suppl. 1119; Metropolitan Trust Co. *v.* Tonawanda Valley, etc., R. Co., 43 Hun 521; McCarty *v.* Holman, 22 Hun 53; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun 49; Chamboret *v.* Cagney, 2 Sweeny 378, 41 How. Pr. 125; Wiltsie *v.* Northam, 3 Bosw. 162; Wickham *v.* Weil, 17 N. Y. Suppl. 518; Batterman *v.* Pierce, 3 Hill 171; McAllister *v.* Reab, 4 Wend. 483; Johnson *v.* Bridge, 6 Cow. 693; Columbia Ins. Co. *v.* Black, 18 Johns. 149; Thompson *v.* Ellsworth, 1 Barb. Ch. 624. But see Burns *v.* Nevins, 27 Barb. 493.

North Carolina.—Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Battle *v.* Thompson, 65 N. C. 406; Mizell *v.* Moore, 29 N. C. 255.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 369, 56 N. W. 133.

Ohio.— Peter *v.* Farrel Foundry, etc., Co., 53 Ohio St. 534, 42 N. E. 690; Needham *v.* Pratt, 40 Ohio St. 186; Allen *v.* Stackelton, 15 Ohio St. 145; Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; The Wellsville *v.* Geisse, 3 Ohio St. 333.

Pennsylvania.— Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004; Montz *v.* Morris, 89 Pa. St. 392; Halfpenny *v.* Bell, 82 Pa. St. 128; Mangle *v.* Stiles, 31 Pa. St. 72; Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. 439; Lowman's Appeal, 3 Watts & S. 349; Tustin *v.* Cameron, 5 Whart. 379; Good *v.* Good, 5 Watts 116; Com. *v.* Clarkson, 1 Rawle 291; Shaw *v.* Badger, 12 Serg. & R. 275; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Warren Wood-Working Co. *v.* Cooke Mercantile Trust, 5 Pa. Dist. 359; Lee *v.* Perry, 6 Kulp 339; Seybert *v.* Hicks, 1 Kulp 45.

Rhode Island.— Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022; Bell *v.* Ward, 10 R. I. 503.

South Carolina.— Cooke *v.* Rhine, 1 Bay 16.

South Dakota.— McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766; Laney *v.* Ingall, 5 S. D. 183, 58 N. W. 572.

Tennessee.— Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169, 1 Heisk. 482; Flint *v.* Tillman, 2 Heisk. 202; Brazelton *v.* Nashville, etc., R. Co., 3 Head 570; Moore *v.* Weir, 3 Sneed 46; Blanks *v.* Smith, 7 Peck 186.

Texas.— Holliman *v.* Rogers, 6 Tex. 91; Thomas *v.* Hill, 3 Tex. 270.

Vermont.—Keyes *v.* Western Vermont Slate Co., 34 Vt. 81; Lapham *v.* Green, 9 Vt. 407.

Virginia.— Tidewater Quarry Co. *v.* Scott, 105 Va. 100, 52 S. E. 835, 115 Am. St. Rep. 864; Wartman *v.* Yost, 22 Gratt. 595; Allen *v.* Hart, 18 Gratt. 722; Trimyer *v.* Pollard, 5 Gratt. 460.

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

United States.— North Chicago Rolling-Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565; Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810; Florida R. Co. *v.* Smith, 21 Wall. 255, 22 L. ed. 513; Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487; Dietrich *v.* Ely, 63 Fed. 413, 11 C. C. A. 266; Seaman *v.* Slater, 49 Fed. 37; Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

England.— Caswell *v.* Coare, 2 Campb. 82, 1 Taunt. 566, 10 Rev. Rep. 606, 11 Rev. Rep. 668; Charles *v.* Altin, 15 C. B. 46, 18 Jur. 1105, 23 L. J. C. P. 197, 2 Wkly. Rep. 595, 80 E. C. L. 46; Isberg *v.* Bowden, 1 C. L. R. 722, 8 Exch. 852, 22 L. J. Exch. 322; Wallis

with entire justice to all of the parties before the court,[23] and without great inconvenience in practice.[24] These remedies are for this reason favored by the courts,[25] which have been disposed in recent years to extend to the greatest length compatible with the legal rights of the parties the doctrine of allowing matters to be settled in one suit rather than compel defendant to resort to his cross action;[26] and the courts will, where possible, relax the strict rules of pleading where a right of set-off is shown,[27] and in equity the most liberal rules prevail in allowance of set-off to prevent injustice and circuity of action.[28] But all differences that may exist between litigants cannot be settled in the one suit regardless of the nature of the respective demands,[29] and set-off will not be allowed where it in itself would be the cause of new disputes,[30] or promote injustice,[31] and similarly defendant will not be allowed to recoup his claim unless it would be just and practicable to adjust it in plaintiff's action.[32]

II. JURISDICTION AND VENUE.

The rule is that a claim, to be available as a set-off,[33] counter-claim,[34] or reconven-

v. Bastard, 4 De G. M. & G. 251, 2 Eq. Rep. 508, 17 Jur. 1107, 2 Wkly. Rep. 47, 53 Eng. Ch. 251, 43 Eng. Reprint 503.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 1.

23. Avery *v.* Brown, 31 Conn. 398; Edgemoor Iron Co. *v.* Brown Hoisting Co., (Del. 1906) 62 Atl. 1054.

24. Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (Del. 1906) 62 Atl. 1054; Dorr *v.* Fisher, 1 Cush. (Mass.) 271; Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

In England the court has discretion to exclude a counter-claim which may unduly delay (Gray *v.* Webb, 21 Ch. D. 802, 51 L. J. Ch. 815, 46 L. T. Rep. N. S. 913, 31 Wkly. Rep. 8), or which cannot be conveniently disposed of in the action (Naylor *v.* Farrer, 26 Wkly. Rep. 809).

25. *Arkansas.*— Wheal *v.* Dotson, 12 Ark. 699.

Illinois.— Streeter *v.* Streeter, 43 Ill. 155; Kelley *v.* Caffrey, 79 Ill. App. 278.

Indiana.— Slayback *v.* Jones, 9 Ind. 470; Houston *v.* Young, 7 Ind. 200.

Louisiana.— Durnford's Succession, 8 Rob. 488.

Massachusetts.— Dorr *v.* Fisher, 1 Cush. 271.

Michigan.— Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170.

New York.— Cram *v.* Dresser, 2 Sandf. 120.

Ohio.— The Wellsville *v.* Geisse, 3 Ohio St. 333.

Pennsylvania.—Good *v.* Good, 5 Watts 116; Shaw *v.* Badger, 12 Serg. & R. 275; Gogel *v.* Jacoby, 5 Serg. & R. 117, 9 Am. Dec. 339, holding, however, that while a set-off is favored because it is equitable, it must be so used as not to surprise plaintiff.

Rhode Island.— Davidson *v.* Wheeler, 17 R. I. 433, 22 Atl. 1022.

Texas.— Bodman *v.* Harris, 20 Tex. 31.

Virginia.— Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864.

United States.—North Chicago Rolling Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565.

26. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

27. Stimmel *v.* Benthall, 108 Va. 141, 60 S. E. 765.

28. U. S. Trust Co. *v.* Western Contract Co., 81 Fed. 454, 26 C. C. A. 472.

29. Newport News, etc., R. Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011.

30. Fontaine *v.* Boxley, 90 Ga. 416, 17 S. E. 1015; Mangle *v.* Stiles, 31 Pa. St. 72; Good *v.* Good, 5 Watts (Pa.) 116 (holding that a defendant cannot avail himself by way of a set-off of a debt against plaintiff, for which a suit is pending on an appeal from arbitration by the party offering such set-off); Orr *v.* Foot, 2 Brev. (S. C.) 379.

31. Hier *v.* Anheuser-Busch Brewing Assoc., 60 Nebr. 320, 83 N. W. 77.

32. Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (Del. 1906) 62 Atl. 1054.

33. *Georgia.*— Cash *v.* Cash, Ga. Dec. 97; Picquet *v.* Cormick, Dudley 20.

Kentucky.—Bennett *v.* McCrocklin, 3 Mete. 322.

Missouri.— Almeida *v.* Sigerson, 20 Mo. 497; Robinett *v.* Nunn, 9 Mo. 246.

South Carolina.— Lindsay *v.* Lindsay, 1 McCord 490; Simpson *v.* McMillion, 1 Nott & M. 192; Reynolds *v.* Wells, 1 Treadw. 478; Orr *v.* Foot, 2 Brev. 379.

Canada.— Canadian Bank *v.* Northwood, 5 Manitoba L. Rep. 342, holding that a cause of action which arose out of the jurisdiction cannot be set up by way of counter-claim or set-off, unless the circumstances be such as to permit of an action being brought upon it.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 4.

34. *Kansas.*— Lyman *v.* Stanton, 40 Kan. 727, 20 Pac. 510.

Kentucky.— Bennett *v.* McCrocklin, 3 Mete. 322.

New York.— Cragin *v.* Lovell, 88 N. Y. 258 [*reversing* 22 Hun 101], holding also that where in one count an answer denied that the New York court had jurisdiction of an alleged claim for improvements to real estate in Louisiana and in another counter-claimed for waste thereon, the want of jurisdiction

tion,[35] must be such that the court entertaining the action in which the cross demand is interposed would if defendant had brought an original action upon his cross demand have had jurisdiction thereof as to subject-matter,[36] amount,[37] or territorial limitations,[38] and a set-off exceeding the jurisdictional amount of the court cannot be brought within the jurisdictional amount by a credit for plaintiff's demand;[39] but defendant may waive a portion of his demand so as to bring it within the jurisdiction of the courts.[40] If a claim exceeds the jurisdictional amount and for that reason cannot be pleaded as a set-off before the inferior court, an appellate court will not permit it to be pleaded as such on appeal from the lower court,[41] and upon appeal the set-off,[42] or counter-claim,[43] cannot, in the appellate court, be reduced by a credit or remittitur, so as to bring it within the jurisdiction of the inferior court, but will be regarded as not having been filed at all. All matters

of the counter-claim sufficiently appeared upon the face of the counter-claim as required by Code Civ. Proc. § 498, in order to sustain a demurrer thereto.

North Carolina.— James *v.* McClamroch, 92 N. C. 362.

Canada.— Canadian Bank *v.* Northwood, 5 Manitoba L. R. 342.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 4.

35. Hardeman *v.* Morgan, 48 Tex. 103, holding that the right to reconvene in attachment suits for damages is limited by the jurisdiction of the court in which plaintiff's suit is brought or where it is legally pending when defendant asserts his demand.

36. Lindsay *v.* Lindsay, 1 McCord (S. C.) 490, holding that a discount to an action on a note within the summary process jurisdiction which involves the titles to lands is inadmissible.

Defendant cannot oust jurisdiction to try a claim involving no question of title to real estate by pleading a set-off that involves a question of title. Creighton *v.* Lindsay, 15 Nova Scotia 243.

37. Almeida *v.* Sigerson, 20 Mo. 497; Robinett *v.* Nunn, 9 Mo. 246; Simpson *v.* McMillion, 1 Nott & M. (S. C.) 192 (holding that a discount, although on open account that exceeds the summary jurisdiction of the court, cannot be pleaded by way of a discount in a proceeding by summary process); Orr *v.* Foot, 2 Brev. (S. C.) 379.

Transfer of action to court which has jurisdiction.— Where defendant in summary process has a discount exceeding the summary jurisdiction the court on being satisfied of its merits may transfer and order plaintiff to declare in the higher jurisdiction to enable defendant to set off his discount. Beckham *v.* Peay, 1 Bailey (S. C.) 121.

38. Lyman *v.* Stanton, 40 Kan. 727, 20 Pac. 510 (holding that, in an action brought to recover money only, a defendant cannot avail himself of an equitable cross action or counter-claim involving the foreclosure of a mortgage and the sale of the real estate described therein, where the district court has no power to hear and determine the alleged cross action or counter-claim on account of the premises described in the mortgage being situated in another county and beyond the jurisdiction of the courts of the county where such cross action or counter-claim is filed); Bennett *v.* McCrocklin, 3 Metc. (Ky.) 322 (holding that where a claim can only be asserted by original proceedings in a particular county, it is not available as a set-off of counter-claim in another county, and therefore the distributee of an estate of a decedent, when sued by decedent's personal representative for a debt due the latter in his own right, cannot avail himself by way of set-off of a sum due from plaintiff on a settlement of the estate, where the personal representative was qualified and the settlement made in any county other than that in which the action is pending).

39. Almeida *v.* Sigerson, 20 Mo. 497. See Furnival *v.* Saunders, 26 U. C. Q. B. 119 (holding that a plaintiff cannot, by giving credit for a set-off, compel defendant to set it up, or give the county court jurisdiction); Russell *v.* Conway, 5 U. C. Q. B. 256.

40. Almeida *v.* Sigerson, 20 Mo. 497; Robinett *v.* Nunn, 9 Mo. 246. But see Orr *v.* Foot, 2 Brev. (S. C.) 379, holding that if plaintiff sue by petition and process within the summary jurisdiction of the court, a defendant will not be permitted to set off against plaintiff's demand part of a cross demand, the whole of which is not within the summary jurisdiction of the court.

41. Picquet *v.* Cormick, Dudley (Ga.) 20 (holding that if a set-off be pleaded in an inferior court of limited jurisdiction, and allowed, and there be an appeal, although the cause comes up in its totality, it comes up subject to the same limitation, and where a verdict has been given for the balance of a set-off on appeal under such circumstances, the court would order it to be set aside and grant a new trial); Robinett *v.* Nunn, 9 Mo. 246 (giving as a reason for the rule that the inferior court should treat the set-off as a nullity, and when the case came into the appellate court, it was as though no set-off had been filed before the inferior court, and in such cases the statute prohibits the introduction of a set-off in the appellate court).

42. Robinett *v.* Nunn, 9 Mo. 246; Reynolds *v.* Wells, 1 Treadw. (S. C.) 478.

43. Ijames *v.* McClamroch, 92 N. C. 362, holding that where a counter-claim filed to an action before a justice of the peace amounted to an amount in excess of the justice's jurisdiction, the want of jurisdiction could not be cured by entering a remittitur for the excess in the superior court.

arising under a plea of set-off may be litigated in a court of law unless based upon equitable grounds requiring a rescission of contract.[44]

III. Conflict of Laws.

Laws of set-off relate to the remedy and not to the right,[45] and therefore set-off is governed by the law of the place where the action is brought and not by the law of the place where the contract was made.[46] The question as to the right of set-off must be determined upon the law as it stood when the action was commenced,[47] and similarly the forum in which the reconventional demand may be urged depends upon the conditions existing when it is filed.[48]

IV. Remedies as Affected by Agreement or Estoppel.

A. In General. The statutory restrictions upon set-off may be abrogated by agreement between the parties, which, as a general rule, will be enforced by the courts upon the general doctrine than an individual may waive any statutory or constitutional provision intended for his benefit.[49] But where an agree-

44. Hancock *v.* Whitehall Tobacco Warehouse Co., 100 Va. 443, 41 S. E. 860.

45. Davis *v.* Morton, 5 Bush (Ky.) 160, 96 Am. Dec. 345; Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599; Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168 (holding also that while a state may fix the character of a contract or instrument and its construction, it cannot determine whether a contract or instrument of the character so fixed shall be subject to set-off in an action thereon outside the state); Carver *v.* Adams, 38 Vt. 500 (holding that the provisions of the statutes of New York that if a defendant neglects to plead or give notice of a set-off which was available to him on the trial of an action he shall be barred from maintaining any cause to recover under claim available as a set-off, relating merely to the remedy and being local in its operation, cannot preclude a defendant in Vermont to recover the claim so neglected to be pleaded in New York).

46. *Iowa.*— Savery *v.* Savery, 3 Iowa 271.

Kentucky.— Davis *v.* Morton, 5 Bush 160, 96 Am. Dec. 345 (holding that a set-off allowed by the laws of the state in which suit is brought can be legally set up as a defense, although not allowed by the laws of the state where the contract which constitutes the cause of action was made); Kelly *v.* Smith, 1 Metc. 313; Galliopolis Bank *v.* Trimble, 6 B. Mon. 599 (holding that the laws of a sister state as to set-offs will not be enforced in an action on a contract made in such sister state).

New Hampshire.—Gibbs *v.* Howard, 2 N. H. 296.

New York.— Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482, holding that defendant may interpose a counter-claim in an action brought in one state which arose when both parties lived in another state, and which if sued for there would be barred by the statute of limitations in that state.

Ohio.— Cincinnati Second Nat. Bank *v.* Hemingray, 31 Ohio St. 168.

United States.— Snyder *v.* Pharo, 25 Fed. 398, holding that under the constitutional distinction between actions at law and suits in equity in the federal courts, a plea of equitable set-off to an action at law on a promissory note will not be admitted, although the set-off would be allowed in the state where the note was made.

England.— Meyer *v.* Dresser, 16 C. B. N. S. 646, 33 L. J. C. P. 289, 10 L. T. Rep. N. S. 612, 12 Wkly. Rep. 983, 111 E. C. L. 646.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 2.

The right of set-off is a matter of local legislation, except as it is enforced in equity; and the federal courts, sitting in any state, when dealing with the subject, will follow the rules established by the tribunals of the state. Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157.

47. Jordan *v.* National Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 319 (also pointing out that Brown *v.* Holyoak [*cited* in Hutchinson *v.* Sturges, Willes 261, 263], which counsel advanced as a case in which set-off was governed by a statute passed after the action was commenced and one day before judgment, was decided, not upon that statute, but upon a statute in force at the commencement of the action, as indicated in Buller N. P. 179); Farr *v.* Brigham, 15 Vt. 557 (holding that a statute repealing a former statute which allowed the maker of a note to recover claims due him by the payee by way of set-off cut off all such defenses accruing after that date, although the notes were dated previous to that time).

In an action commenced before adoption of the North Carolina code, section 402 of which provides that all suits pending at the ratification of the code shall be proceeded in and tried under the existing laws and rules applicable thereto up to final judgment, a counter-claim is not admissible, not having been in use before the code. Valentine *v.* Holloman, 63 N. C. 475; Gaither *v.* Gibson, 64 N. C. 93; Teague *v.* James, 63 N. C. 91.

48. Rigney *v.* Monette, 45 La. Ann. 940, 13 So. 201.

49. Gutchess *v.* Daniels, 49 N. Y. 605 [*reversing* 58 Barb. 401].

ment is relied upon in justification of a departure from the general rules governing set-off, it must appear that the proposed set-off is embraced therein.[50]

B. Agreement to Allow Interposition of Cross Demand. The parties to an action may agree to set off claims which, in the absence of agreement, could not be set off,[51] and similarly, may agree to recoup damages which otherwise could not be recouped,[52] and plaintiff may waive the objection that a cross demand is improperly interposed as not being within the statute.[53] An

50. Ogilvie *v.* Lightstone, 1 Daly (N. Y.) 129; Kennedy *v.* Kennedy, 41 Pa. St. 185.

An agreement for a set-off without any set-off produced will avail no more in defeating a suit than the law authorizing set-off, where none is offered. Fugit *v.* Ewing, 9 Ind. 345.

51. *Alabama.*— Kennedy *v.* Manship, 1 Ala. 43.

Connecticut.— Osborn *v.* Byrne, 43 Conn. 155, 21 Am. Rep. 641. See Starkey *v.* Peters, 18 Conn. 181.

Georgia.—Threlkeld *v.* Dobbins, 45 Ga. 144, where a debt due by plaintiff to one of several defendants was permitted to be pleaded as the result of agreement.

Illinois.— International Bank *v.* Ferris, 118 Ill. 465, 8 N. E. 825, holding that, where a bank owes a debt to A, and A owes B, and B owes the bank, and A sues the bank on his claim, the claim of B against A may, by consent of parties, be set off.

Kentucky.— Louisville, etc., R. Co. *v.* Thompson, 18 B. Mon. 735 (holding that defendant, sued for his subscription toward making a railroad, might counter-claim damages sustained to his land by reason of running the railroad through it, where the company's agent soliciting the subscription agreed with defendant that he should be allowed in discharge of the subscription any damages which he might sustain by reason of running the railroad through his land); Caldwell *v.* Hawkins, 1 Litt. 212 (holding that, although a court of chancery will not entertain jurisdiction to liquidate the damages for a defect in personal property sold, and then set off these damages against the price; yet, if the parties settle their own controversy, by agreeing on the amount, and agreeing that the amount so liquidated by the agreement shall be discounted against so much off the price, equity will entertain jurisdiction). See Jones *v.* Waggoner, 7 J. J. Marsh. 144, holding that, although a party may not have a legal right to set-off, yet if those who have right, assent he obtains an equitable right and may maintain a bill in chancery to enforce it.

Maine.— Otis *v.* Adams, 41 Me. 258.

New Hampshire.— Hall *v.* Paris, 59 N. H. 71.

New Jersey.— King *v.* King, 9 N. J. Eq. 44.

New York.— Gutchess *v.* Daniels, 49 N. Y. 605 [*reversing* 58 Barb. 401]. But see Diehl *v.* General Mut. Ins. Co., 1 Sandf. 257, where, in a suit brought on a marine policy to recover from the insurers their contributory share, payable to the assured on the adjustment of the general average after a partial loss, the insurers could not set off promissory notes due to them from the assured, although they had assented to the amount to be paid to them on the policy, provided such set-off would be permitted.

Pennsylvania.— Somerset Colliery Co. *v.* Jolin, 219 Pa. St. 380, 68 Atl. 843; Mays *v.* Mays, 7 Watts 561 (where parties having cross demands agreed to the institution of an action in the nature of trover, and agreed that their cross demands should be settled in such action); Morrison *v.* Moreland, 15 Serg. & R. 61.

Tennessee.— College Mill Co. *v.* Fidler, (Ch. App. 1899) 58 S. W. 382.

Texas.— Lowry *v.* Smith, 42 Tex. Civ. App. 112, 94 S. W. 450. See Schoenfeld *v.* Karnes City Independent School Corp., (Civ. App. 1908) 109 S. W. 406.

Wisconsin.— Manville *v.* Gay, 1 Wis. 250, 60 Am. Dec. 379.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 24.

A set-off of a claim in a different right from that set up by plaintiff is legalized by consent. King *v.* Robinson, 2 N. J. L. 262.

A parol agreement to allow set-off will not be enforced, where its effect would be to vary a written instrument (St. Louis Perpetual Ins. Co. *v.* Homer, 9 Metc. (Mass.) 39, an action on a promissory note), otherwise a parol agreement to allow a set-off is valid (see Cuxon *v.* Chadley, 3 B. & C. 591, 10 E. C. L. 270, 1 C. & P. 174, 12 E. C. L. 110, 5 D. & R. 417, 3 L. J. K. B. O. S. 63, 27 Rev. Rep. 423).

In an action on an insurance policy, which stipulates that in case of loss the unpaid premium shall be deducted from the loss, the insurer may set off the unpaid premium by virtue of the agreement contained in the contract of insurance. Columbian Ins. Co. *v.* Bean, 113 Mass. 541; Livermore *v.* Newburyport Mar. Ins. Co., 2 Mass. 232.

The agreement cannot be defeated by assignment of the evidence of indebtedness. Martin *v.* Richardson, 68 N. C. 255; McConnaughey *v.* Chambers, 64 N. C. 284. See also Riddick *v.* Moore, 65 N. C. 382.

The right of set-off need not be reserved in a bond conditioned to pay a party certain sums upon the sale of property in obedience to the terms of a contract previously made. Van Sandt *v.* Dows, 63 Iowa 594, 19 N. W. 669, 50 Am. Rep. 759.

Agreement to set off deposit against debt to insolvent savings bank see BANKS AND BANKING, 5 Cyc. 612.

52. McLean *v.* McLean, 1 Conn. 397.

53. Wentworth *v.* King, (Tex. Civ. App. 1899) 49 S. W. 696; A. B. Frank Co. *v.* A. H.

agreement to allow set-off need not be express, but may be inferred from the circumstances,[54] and as courts favor the settling of dispute between the parties in one action,[55] an agreement to allow set-off will be inferred from very slight circumstances.[56] But such an agreement will not be presumed to exist without some circumstance from which its existence might be inferred,[57] and mere willingness to set off one demand against another or even an express understanding so to do, without some new consideration to support it as a contract, cannot have the effect to defeat the right of plaintiff to recover.[58] Upon a conditional agreement to allow set-off, set-off cannot be had if the condition is not fulfilled.[59]

C. Waiver of Right to Interpose Cross Demand. A defendant may, on valuable consideration,[60] waive the right to use a set-off which would otherwise be available.[61] Although it is generally held that waiver of set-off may be either

Motley Co., (Tex. Civ. App. 1896) 37 S. W. 868, waiver of the objection that the cross demand was not founded on the transaction sued on).

Failure to object to a set-off improperly interposed in an action constitutes a waiver of the objection (Gillett *v.* Moody, (Tex. Civ. App. 1899) 54 S. W. 35), but plaintiff does not waive the right to object on trial that a cause of action set up in the answer as a counter-claim cannot be enforced as such by replying to the answer, where the cause of action pleaded was not a counter-claim (Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126]).

54. Green *v.* Storm, 3 Sandf. Ch. (N. Y.) 305; Leonard *v.* Smith, 162 Pa. St. 284, 29 Atl. 915.

55. See *supra*, I, I.

56. Price *v.* Mitchell, 10 Sm. & M. (Miss.) 179; King *v.* King, 9 N. J. Eq. 44; Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 41 Eng. Ch. 109, 68 Eng. Reprint 435; Jeffs *v.* Wood; 2 P. Wms. 128, 24 Eng. Reprint 668; Lundy *v.* McCulla, 11 Grant Ch. (U. C.) 368, holding that in the view of equity the setting off of one demand against another between the same parties is extremely just, and where there is any technical difficulty in the way of its being done without an agreement the court accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts.

57. Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 41 Eng. Ch. 109, 68 Eng. Reprint 435.

58. Kennedy *v.* Manship, 1 Ala. 43; Threlkeld *v.* Dobbins, 45 Ga. 144.

If the agreement be executed it needs no consideration. Threlkeld *v.* Dobbins, 45 Ga. 144.

59. Lees *v.* Dwight, 10 La. Ann. 711; Foot *v.* Martin, 1 Metc. (Mass.) 273.

60. Stacy *v.* Cook, 62 Kan. 50, 61 Pac. 399; Gutchess *v.* Daniels, 49 N. Y. 605 [*reversing* 58 Barb. 401]; Louden *v.* Tiffany, 5 Watts & S. (Pa.) 367.

Reduction in the contract price of work is insufficient consideration for an agreement not to buy or bring forward any set-off against the price to be paid for the work. Lovett *v.* King, 16 Ind. 464.

61. Saltmarsh *v.* Bower, 34 Ala. 613 (holding, however, that a contract that an account may be credited upon a judgment is not such a waiver); Davis *v.* Carlisle, 6 Ala. 707; Stacy *v.* Cook, 62 Kan. 50, 61 Pac. 399; Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375; Reed *v.* Penrose, 36 Pa. St. 214; Carman *v.* Garrison, 13 Pa. St. 158; U. S. Bank *v.* Macalester, 9 Pa. St. 475; Henniss *v.* Page, 3 Whart. (Pa.) 275; Fields *v.* Kershaw, 13 Lanc. Bar (Pa.) 68; Feazle *v.* Dillard, 5 Leigh (Va.) 30. *Compare* McGillivray *v.* Simson, 2 C. & P. 320, 12 E. C. L. 595, 9 D. & R. 35, 22 E. C. L. 584, 5 L. J. K. B. O. S. 53, holding that an agreement by a broker that he will sell goods for his principal and pay over the proceeds without setting off a debt due from the principal to him is not binding, but if he also agrees not to set off a debt due from a prior firm which by a previous letter the principal had agreed to pay him, the principal having assumed the funds of that firm, the letter and agreement must be read in connection with the other, and the broker will not be allowed to set off that debt against the proceeds of the goods.

That goods sold were agreed to be paid for in ready money does not prevent a set-off in an action for the price of the goods. McGillivray *v.* Simson, 2 C. & P. 320, 12 E. C. L. 595, 9 D. & R. 35, 22 E. C. L. 584, 5 L. J. K. B. O. S. 53; Eland *v.* Karr, 1 East 375; Cornforth *v.* Rivett, 2 M. & S. 510, holding that in an action for goods sold and delivered defendant may set off money due upon plaintiff's acceptance, of which defendant has become holder since the sale and before delivery of the goods, although he agreed to give plaintiff ready money for them.

Waiver of set-off is not against public policy.— Gutchess *v.* Daniels, 49 N. Y. 605.

Permitting a contractor to work after expiration of the contract time does not constitute a waiver of the right to recoup damage for failure to perform within the time limited. McIntire *v.* Barnes, 4 Colo. 285; Sinclair *v.* Tallmadge, 35 Barb. (N. Y.) 602; Barber *v.* Rose, 5 Hill (N. Y.) 76.

Waiver of damages for delay in building contract see BUILDERS AND ARCHITECTS, 6 Cyc. 115.

Creditor borrowing from debtor.— If a creditor borrows of his debtor, even under an express promise of repayment, he may nevertheless set off the amount of his original

express or implied,[62] other cases hold that the agreement must be express, and

debt (Lechmere *v.* Hawkins, 2 Esp 626), and the same rule obtained in equity (Taylor *v.* Okey, 13 Ves. Jr. 180, 33 Eng. Reprint 263. See Moore *v.* Jervis, 2 Coll. 60, 33 Eng. Ch. 60, 63 Eng. Reprint 637, holding that where a debtor who, for money advanced, had given his creditor his promissory note, and as a collateral security had deposited with him a policy of assurance, and who had on the other hand a right of set-off in respect of goods sold, applied to the creditor to have the policy delivered up for a purpose unconnected with the debt, and replaced by another security, and the policy was accordingly delivered, the debtor's right of set-off was not thereby displaced).

Where a claim is assigned defendant may agree not to use a set-off against the assignee. Batavian Bank *v.* Minneapolis, etc., R. Co., 123 Wis. 389, 101 N. W. 687. And see *infra*, VI, L, 7.

62. Gross *v.* Weary, 90 Ill. 256 (holding that the giving of a note with a *cognovit* authorizing the entry of judgment thereon amounted to a waiver of the right to interpose the value of services previously rendered as a set-off to the note); Gutchess *v.* Daniels, 49 N. Y. 605 [*reversing* 58 Barb. 401] (holding that the right of set-off may be waived by the party entitled to it, and where he, for a valuable consideration by an agreement, deliberately made contracts to waive it, the agreement is binding); Troup *v.* Haight, Hopk. (N. Y.) 239 (holding that where on settlement of accounts a bond and mortgage were given to secure the balance due, and an agreement entered into that the bond should be no bar to lawful claims between the parties, nor to correction of the account, although matters not embraced in the account were not barred thereby, they could not be set off against the bond in a suit to foreclose the mortgage); Ardesco Oil Co. *v.* North American Oil, etc., Co., 66 Pa. St. 375; Reed *v.* Penrose, 36 Pa. St. 214; U. S. Bank *v.* Macalester, 9 Pa. St. 475 (holding that one who receives money delivered to him for his application to a certain use impliedly agrees not to apply it to his own use by pleading a set-off); Fields *v.* Kershaw, 13 Lanc. Bar (Pa.) 68 (holding that a treasurer of a beneficial society cannot set off a claim for benefits due him against money in his hands as treasurer, his acceptance of the office constituting an implied agreement not to set off any private claim against the fund in his hands); U. S. Bung Mfg. Co. *v.* Armstrong, 34 Fed. 94 (holding that the voluntary payment by the maker of a promissory note with a full knowledge of all the facts operates as an abandonment and waiver of all to set off cross demands or independent debts, and a bill disclosing such facts presents no case for equitable relief by way of equitable set-off).

The words "without offset" or "without defalcation" on commercial paper, as commonly used, do not defeat the operation of the statute of set-off as between the maker and the payee, and as to them are to be construed to have the same meaning as the words "without off-set as against a holder by indorsement." Aultman, etc., Co. *v.* Shelton, 90 Iowa 288, 57 N. W. 857 (holding that the words "negotiable without offset" in a note do not prevent offset as against payees, but merely fix terms of negotiation); Louden *v.* Tiffany, 5 Watts & S. (Pa.) 367; Harmanson *v.* Bain, 11 Fed. Cas. No. 6,073, 1 Hughes 391. See Lightey *v.* Brenner, 14 Serg. & R. (Pa.) 127. And thus it is held that, although it is provided by statute that the obligor or maker of a note or bond shall be allowed every just set-off and discount against the assignee or assignor before judgment, unless it shall be expressed in the note or bond that the same shall be paid without defalcation or set-off, as between the original parties the statute does not apply, and a set-off between them is allowed, although the note contains these words. Baker *v.* Brown, 10 Mo. 396. See Collins *v.* Waddle, 4 Mo. 452.

Facts held not to constitute implied waiver of set-off see Moore *v.* Smith, 103 Mich. 387, 61 N. W. 538 (holding that where a husband, at the time of buying a decree of foreclosure of a mortgage on land owned by his wife, told her that he would pay off the mortgage, and hold the place for her, and that if the land increased in value any, and she wanted to sell it, she need pay him only what he expended, no agreement can be inferred that she was to pay him in cash without right of set-off, because at that time he was indebted to her); Picket *v.* Morris, 2 Wash. (Va.) 255.

Waiver by executing note or mortgage.— Where, to the knowledge of defendant, a set-off or counter-claim existed before the execution of a note sued on (Hill *v.* Parsons, 110 Ill. 107; Dayhuff *v.* Dayhuff, 27 Ind. 158; Blake *v.* Krom, 13 N. Y. Suppl. 335. But see Thornton *v.* Williams, 14 Ind. 518, holding that in an action on a note given on a settlement of accounts between the maker and the payee as to items of set-off accruing before the date of the note, the note is *prima facie*, but not conclusive, evidence that they had been settled, and that as to such as did not accrue the note would not be even *prima facie* evidence of settlement, and the burden is upon plaintiff to show that the claim was settled in the note), or mortgage foreclosed (Woodruff *v.* Ackert, 30 N. Y. Suppl. 87 [*affirmed* in 145 N. Y. 600, 40 N. E. 165], holding that in an action to foreclose, a counter-claim in favor of defendant, mortgagor, against the deceased mortgagee for previously performed services cannot be sustained where, according to defendant's testimony, the claim against the mortgagor existed at the time the mortgage was executed), defendant will be held to have waived his right to set-off or counter-claim; at least in the absence of a satisfactory reason why the counter demand was not urged and settled at

cannot be inferred from equivocal words nor deduced from ambiguous expressions.[63]

D. Estoppel.[64] A defendant may, by his conduct or representations, be estopped from interposing a set-off which would be otherwise available,[65] but it must be shown that plaintiff has acted thereon so as to alter his position to his detriment.[66]

V. ACTIONS IN WHICH REMEDY IS AVAILABLE.

A. In General. Both set-off [67] and counter-claim,[68] being the subject of statutory regulation, the actions in which the remedies are available depend almost entirely upon the construction of the statutes of the various states,[69] and

the execution of the note or mortgage (Blake *v.* Krom, *supra*), or a reservation in the note of the counter demand (Dayhuff *v.* Dayhuff, *supra*); but a presumption that a renewal of a note after the accrual of an alleged counter-claim operated as a waiver of a counter-claim does not attach where it was expressly stipulated at the time of the removal that it should be without prejudice to the maker's right to insist on the counter-claim (Waterloo First Nat. Bank *v.* Park, 117 Iowa 552, 91 N. W. 826).

63. Louden *v.* Tiffany, 5 Watts & S. (Pa.) 367 (holding that there must be an express agreement for a valuable consideration); Henniss *v.* Page, 3 Whart. (Pa.) 275.

64. Estoppel to plead set-off or counter-claim existing at the time of making a compromise see COMPROMISE AND SET-OFF, 8 Cyc. 517.

65. *Alabama.*— Nelson *v.* Dunn, 13 Ala. 259 (holding that where the purchasers of real property executed a number of notes for the purchase-price falling due during a series of years, and paid the notes first falling due, he was presumed to have availed himself of any set-off which then existed, and would not be allowed to set off any claim against the payee after the note subsequently falling due had been assigned); Lowrie *v.* Stewart, 8 Ala. 163.

Kentucky.— Phillips *v.* Offutt, 38 S. W. 1044, 18 Ky. L. Rep. 1011.

Minnesota.— Fitzgerald *v.* Duluth State Bank, 64 Minn. 469, 67 N. W. 361.

Mississippi.— Holden *v.* Davis, 57 Miss. 769, holding that the drawee of two drafts of the same date, amount, maturity, and parties, who accepts one, and afterward pays the other by mistake, cannot set off such payment in a suit upon his acceptance, where the payment of the unaccepted draft caused a failure to protest it.

New York.— Nottebohm *v.* Maas, 3 Rob. 249; Wickoff *v.* True, Clarke 237.

England.— Skyring *v.* Greenwood, 4 B. & C. 281, 10 E. C. L. 580, 1 C. & P. 517, 12 E. C. L. 298, 6 D. & R. 401, 28 Rev. Rep. 264, where set-off was disallowed because defendant kept plaintiff in ignorance of his claim against him for four years.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim." § 25.

Where defendant received money on deposit for another under an agreement to pay it out on his order, he cannot set up as a counter-claim against such obligation a debt due before he accepted the fund in trust. Randolph *v.* Walker, 78 S. C. 157, 59 S. E. 856.

Failure to urge set-off when plaintiff's demand was presented raises no implication against defendant, so as to prevent him from subsequently using the set-off. Farrow *v.* Flatt, 61 Ill. App. 118.

That a set-off is inconsistent with another set-off previously claimed and rejected as improper is no objection to its allowance. Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157.

Where the party claiming a set-off has sent a statement of account to the party against whom the set-off is claimed, he is estopped from asserting by way of set-off an amount greater than such sum, in the absence of mistake, unless transactions have arisen subsequent to the sending of the statement. Aygarn *v.* W. A. Fraser Co., 123 Ill. App. 95.

Facts held not to constitute estoppel see Carroll *v.* Malone, 28 Ala. 521.

66. Hogden *v.* Kief, 63 Ill. 146 (holding that a person owing a balance upon an account, but having a greater sum due him for merchandise subsequently furnished, is not estopped from pleading the matter as matter of set-off by a promise to pay the former balance, in the absence of evidence that in consequence of the promise the other party had acted so as to so alter his position that a breach of the agreement would operate to his injury); Ketchum *v.* Foot, 15 Vt. 258, 40 Am. Dec. 678 (holding that a promise without consideration by the obligor to an assignee, after the assignment to pay an assigned demand, which promise had in no way been made the basis of action or an occasion of prejudice to the assignee, cannot, as matter of law, estop or conclude the obligor from setting up an equitable set-off against the assignee, which existed against the assignor at the time of the assignment).

67. See *supra*, I, B, 2.

68. See *supra*, I, C.

69. See cases cited *infra*, this note.

Set-off held admissible in Hooper *v.* Armstrong, 69 Ala. 343 (a bill in equity to enforce a vendor's lien); Allen *v.* Hart, 18 Gratt. (Va.) 722 (action on a forthcoming bond taken under a warrant of distress).

Set-off held inadmissible in Birdsall *v.* Welch, 6 D. C. 316 (suit to set aside fraudulent conveyance); Marquess *v.* La Baw, 82

it is therefore difficult to deduce from their decisions any universal rule as to the cases in which the remedy is available;[70] but it is held as a broad general rule that set-off can be allowed only in actions founded upon demands which could themselves be the subject of a set-off.[71] Recoupment has been so greatly broadened in its effect[72] that the earlier decisions relating to it must be taken as authority with caution, particularly where they disallow the remedy.

B. On Contracts — 1. In General. In actions on contract, express or implied, recoupment has been universally allowed,[73] and under the codes and statutes set-offs and counter-claims are allowed in this class of actions,[74] and it is very generally held to be the rule that both recoupment [75] and the statutory

Ind. 550 (action to set aside a guardian's report); Dedman *v.* Smith, 2 A. K. Marsh. (Ky.) 260 (holding that a successful plaintiff in a warrant of forcible entry should not be restrained from having restitution because defendant has recovered judgment in ejectment for the premises, for claims to real property cannot be thus set off, although pecuniary damages may).

In California the provisions regulating counter-claims, being sections of the Civil Practice Act, apply to all actions that can be prosecuted under that act. Duff *v.* Hobbs, 19 Cal. 646.

In an action for money had and received by defendant to plaintiff's use a counter-claim has been held to be unnecessary because the action being equitable in its nature is only for the recovery of the amount of money that defendant has in his hands, which justly belongs to plaintiff and which he ought to pay over. Dennis *v.* Graf, 31 Wis. 105.

A defendant to a bill for specific performance of a clear contract for a specific sum cannot resist it by way of set-off, on the ground that, on an account between him and plaintiff in respect of antecedent transactions affecting the subject-matter, there would be a balance due to defendant. Phipps *v.* Child, 3 Drew. 709, 61 Eng. Reprint 1074. But see Wallis *v.* Bastard, 4 De G. M. & G. 251, 2 Eq. Rep. 508, 17 Jur. 1107, 2 Wkly. Rep. 47, 53 Eng. Ch. 195, 43 Eng. Reprint 503.

In an action to recover specific chattels a counter-claim cannot be filed where there are no exceptional circumstances entitling defendant to equitable relief. Badham *v.* Brabham, 54 S. C. 400, 32 S. E. 444.

In an action for wages for manual labor set-off has been allowed in Pennsylvania under the Defalcation Act (Felpel *v.* Hershour, 128 Pa. St. 587, 18 Atl. 419; Rogers *v.* Waltz, 5 Pa. Dist. 645, 18 Pa. Co. Ct. 95, 12 Montg. Co. L. Rep. 160), but in Illinois, it has been held that, under Hurd Rev. St. (1899) p. 341, in an action for wages defendant cannot set off a claim for goods sold to plaintiff (Leischke *v.* Miller, 100 Ill. App. 137). And see, generally, Master and Servant, 26 Cyc. 1054.

Money deposited with a garnishee to be remitted to defendant by a bill of exchange, and the deposit not to be preserved in specie, is subject to set-off for a debt due the garnishee from defendant at the time of the service of the garnishee summons. Howe *v.* Hyer, 36 Fla. 12, 17 So. 925.

Recoupment, set-off, and counter-claim in actions on demands exempt from execution see Exemptions, 18 Cyc. 1463.

70. Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 841, 31 Am. Rep. 775.

71. *Alabama.*— Brown *v.* Chambers, 12 Ala. 697.

Florida.— Robinson *v.* L'Engle, 13 Fla. 482.

Michigan.— Smith *v.* Warner, 16 Mich. 390.

Missouri.— State *v.* Modrell, 15 Mo. 421 [*approving* Gordon *v.* Bowne, *infra*, this note].

New York.— Hart *v.* Willard, 1 Sandf. 254; Welch *v.* Hazelton, 14 How. Pr. 97; Osborn *v.* Etheridge, 13 Wend. 339; Wilmot *v.* Hurd, 11 Wend. 584 (holding that a set-off was not allowable in an action brought for breach of warranty in the sale of a horse under 2 Rev. St. (2d ed.) p. 278, § 32); Burgess *v.* Tucker, 5 Johns. 105 (holding also that to allow a set-off plaintiff's cause of action must be specific and certain); Gordon *v.* Bowne, 2 Johns. 150.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 15.

72. See *supra*, I, A.

73. St. Louis, etc., R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Fanson *v.* Linsley, 20 Kan. 235; Lee *v.* Rutledge, 51 Md. 311.

Where plaintiff declares upon a special contract, not upon an implied contract, recoupment is not necessary as plaintiff having counted upon an express contract is bound to show performance on his part of conditions upon which the promise of defendant was based, or he could not recover at all. Thompson *v.* Richards, 14 Mich. 172.

A motion by a lessor for a judgment for rent is an action at law within Va. Code, § 3299, authorizing defendant in an action on a contract to file a plea of set-off. Newport News, etc., R., etc., Electric Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011.

74. See the codes and statutes of the several states. And see Blair *v.* Ellsworth, 55 Vt. 415, holding that a plea in set-off is allowable against a claim for usury, such a claim being founded upon an implied contract within the meaning of that term as used in the statute regulating set-off.

75. Wheat *v.* Dotson, 12 Ark. 699 (holding that under the prevailing statute recoupment was as well allowable when the action was upon any instrument or note in writing under the seal of the party charged therewith as when it was upon a *quantum meruit*

remedy of set-off [76] are admissible in actions for liquidated damages upon contracts or instruments under seal.

2. Unliquidated Demands. As set-off is allowed only in actions founded upon demands which could themselves be the subject of set-off,[77] and as it is generally held that unliquidated demands cannot be the subject of set-off,[78] the general rule is that set-off is not allowed in actions on unliquidated demands, either under the English statutes [79] or under similar statutes throughout the United States.[80]

or *quantum valebat*, or upon a promissory note or bill of exchange); Van Epps *v.* Harrison, 5 Hill (N. Y.) 63, 40 Am. Dec. 314 (holding that in an action on a bond under seal conditioned for the payment of the money upon a contract to purchase real estate, recoupment is allowable upon the ground of fraud on the part of the vendor, since by virtue of the provisions of 2 Rev. St. p. 406, § 77, a seal is only presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if the instrument was not sealed).

In New Jersey, under Pr. Act, § 39, which provides only for recoupment in "actions on contracts not under seal," there can be no recoupment in an action on a sealed instrument. Price *v.* Reynolds, 39 N. J. L. 171.

76. Roebuck *v.* Tennis, 5 T. B. Mon. (Ky.) 82 (holding that a set-off is available in an action of covenant, if the action is for money expressly ascertained); Collins *v.* Collins, 2 Burr. 820, 97 Eng. Reprint 579, 2 Ld. Ken. 530, 96 Eng. Reprint 1268 (holding that a set-off may be pleaded to an action on a bond conditioned for the payment of an annuity on a growing sum, the amount of which is liquidated).

Set-off in actions for unliquidated damages for breach of covenant see *infra*, V, C.

77. See *supra*, V, A.

78. See *infra*, VI, I, 3.

79. Luckie *v.* Bushby, 13 C. B. 864, 1 C. L. R. 685, 17 Jur. 625, 22 L. J. C. P. 220, 1 Wkly. Rep. 455, 76 E. C. L. 864; Boddington *v.* Castelli, 1 C. L. R. 281, 1 E. & B. 879, 17 Jur. 781, 23 L. J. Q. B. 31, 1 Wkly. Rep. 359, 72 E. C. L. 879; Pellas *v.* Neptune Mar. Ins. Co., 5 C. P. D. 34, 49 L. J. C. P. 153, 42 L. T. Rep. N. S. 35, 28 Wkly. Rep. 405.

In an action on a covenant for unliquidated damages, damages arising from the breach of other covenants to be performed by plaintiff cannot be pleaded by way of set-off. Cooper *v.* Robinson, 2 Chit. 161, 18 E. C. L. 563 (holding that in an action on covenant for not indemnifying a person against taxes no plea of set-off can be sustained); Attwood *v.* Attwood, 1 C. L. R. 242, 2 E. & B. 23, 17 Jur. 789, 22 L. J. Q. B. 287, 1 Wkly. Rep. 325, 75 E. C. L. 23 (holding that there can be no set-off to an action on a bond conditioned to indemnify generally); Howlet *v.* Strickland, Cowp. 56; Williams *v.* Flight, 2 Dowl. P. C. N. S. 11, 7 Jur. 197; Weigall *v.* Waters, 6 T. R. 488 (holding that to an action on a covenant for rent by a landlord, defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the other covenants in the lease).

To an action on a bond conditioned for replacing stock a set-off cannot be pleaded, the action being in the nature of an action for unliquidated damages. Gillingham *v.* Waskett, McClell. 198, 13 Price 434.

80. *Alabama.*— Brown *v.* Chambers, 12 Ala. 697 (action for unliquidated damages on a bond); George *v.* Cahawba, etc., R. Co., 8 Ala. 234 (where a set-off was refused in an action for unliquidated damages arising out of a breach of contract in refusing to permit plaintiff to perform services which he had contracted to perform).

Indiana.— Jones *v.* McGrew, 1 Blackf. 192.

Massachusetts.—Tracey *v.* Grant, 137 Mass. 181; Barry *v.* Cavanagh, 130 Mass. 437, 127 Mass. 394.

Michigan.— Smith *v.* Warner, 14 Mich. 152, assumpsit for failure to deliver a portion of goods upon a contract for sale and delivery.

Mississippi.— Burrus *v.* Gordon, 57 Miss. 93; Whitaker *v.* Robinson, 8 Sm. & M. 349.

Missouri.— Johnson *v.* Jones, 16 Mo. 494; State *v.* Modrell, 15 Mo. 421 (where, in an action upon the bond of two executors, set-off was refused because the damages claimed were not necessarily liquidated); May *v.* Kellar, 1 Mo. App. 381 (an action against sureties upon an appeal-bond).

New Hampshire.— Concord *v.* Pillsbury, 33 N. H. 310 (holding, however, that, although a bond is security for unliquidated damages, it is still a debt against which set-off is available); Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380.

New York.— Hart *v.* Willard, 1 Sandf. 254 (adding that, in an action on a bond of indemnity executed to a sheriff on his levying an execution, defendant could not set off a judgment against plaintiff because the demand, being for unliquidated damages, would have itself been invalid as a set-off, 2 Rev. St. (2d ed.) p. 278, § 32, subd. 5, providing that a set-off could only be allowed in actions which could themselves be the subject of set-off); Wilmot *v.* Hurd, 11 Wend. 584 (refusing to allow set-off in an action for breach of warranty in sale of a horse); Hepburn *v.* Hoag, 6 Cow. 613; Gordon *v.* Bowne, 2 Johns. 150; Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513.

North Carolina.— Dowd *v.* Faucett, 15 N. C. 92.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 19.

In an action upon an open policy of insurance a set-off is admissible. Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. (Md.) 31. *Contra*, Gordon *v.* Bowne, 2 Johns. (N. Y.) 150.

In an action of covenant for specific articles, sounding in damages merely, set-off

In some states, however, the statutes, more in harmony with the object of the remedy, which is to settle cross demands in one action, wherever possible,[81] allow a set-off in all actions upon contract, whether for liquidated or unliquidated damages.[82]

C. For Penalties. An action for a statutory penalty being of a quasi-criminal nature,[83] a set-off [84] or counter-claim [85] cannot be interposed therein under the various statutes of set-off and counter-claim. An action upon a bond for a penalty given by statute has been held to come within the operation of this rule;[86] but an action on an undertaking given to secure an attachment,[87] or writ of

cannot be interposed. Barnes *v.* Lloyd, 1 How. (Miss.) 584. But see Moore *v.* Weir, 3 Sneed (Tenn.) 46, holding that a bill single for the payment of money may be set off in an action on a breach of covenant for the payment of specific articles at a certain time and place, the latter being in effect a money demand to an amount easily ascertainable.

81. See *supra*, I, I.

82. See the statutes of the several states. And see the following cases: St. Louis, etc., R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Read *v.* Jeffries, 16 Kan. 534; Stevens *v.* Able, 15 Kan. 584; Raymond *v.* Green, 12 Nebr. 215, 10 N. W. 709, 41 Am. Rep. 763 [*overruling* Boyer *v.* Clark, 3 Nebr. 161].

In Tennessee wherever debt or *indebitatus assumpsit* will lie, a set-off will be allowed, and this includes actions for unliquidated damages. Moore *v.* Weir, 3 Sneed 46; Martin *v.* McAllister, 2 Yerg. 111.

In Texas set-off is allowed in actions upon simple contracts for unliquidated damages. Sanders *v.* Bridges, 67 Tex. 93, 2 S. W. 663; Bodman *v.* Harris, 20 Tex. 31. If, however, plaintiff's cause of action be a claim for unliquidated or uncertain damages founded on a tort or breach of covenant, set-off is not allowed. Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832 (holding, however, that in a suit for wrongful conversion of a package of money, the damages were not unliquidated or uncertain); Wheat *v.* Ball, (Civ. App. 1902) 68 S. W. 181; Santleben *v.* Froboese, 17 Tex. Civ. App. 626, 43 S. W. 571.

83. Woodward *v.* Conder, 33 Mo. App. 147. And see PENALTIES, 30 Cyc. 1344.

84. Spurgin *v.* Kruse, 125 Ill. App. 507; Irvin *v.* Rushville Co-operative Tel. Co., 161 Ind. 524, 69 N. E. 258 (statutory penalty against a telephone company for refusing to furnish service to a subscriber); Lebanon Nat. Bank *v.* Karmany, 98 Pa. St. 65 (action for the recovery of twice the amount of usurious interest paid to a national bank, the penalty prescribed by U. S. Rev. St. (1878) § 5198 [U. S. Comp. St. (1901) p. 3493]; Chambersburg Bank *v.* Com., 2 Grant (Pa.) 384. But see Springfield *v.* Hickok, 7 Ill. 241, holding that where in an action of debt by a city to recover a penalty accruing under an ordinance, defendants filed, by way of set-off, a city order drawn by the mayor upon the treasurer, it was a proper subject of set-off, and that a prior demand on the treasurer was not necessary to charge the city upon such order.

In Alabama it is held that an action for a statutory penalty is an action of debt in which a claim upon which debt would lie may be set off. Kelly *v.* Johnson, 129 Ala. 627, 29 So. 672 (action for a statutory penalty for failure to enter upon the margin of the record of a mortgage partial payments thereon); Hamilton *v.* Griffin, 123 Ala. 600, 26 So. 243 (action for a statutory penalty for cutting down another's trees).

85. Woodward *v.* Conder, 33 Mo. App. 147 (action under Rev. St. § 3921, for treble damages for a trespass on plaintiff's land); Moore *v.* Trimmer, 1 Silv. Sup. (N. Y.) 171, 6 N. Y. Suppl. 430, 17 N. Y. Civ. Proc. 99 (holding that a counter-claim in an action by an overseer for a statutory penalty for illegally selling liquor, alleging that plaintiff owes defendant money advanced to him officially under a promise to refund it if he should sue defendant for such a penalty, is not authorized by the Code Civ. Proc. § 501, providing that defendant may file as a counter-claim a cause of action arising out of the same contract and transaction as that sued on, or if the action be on contract such counter-claim must consist of any other cause of action arising from contract at the commencement of the action).

But a suit to recover penalties collected by a public county treasurer is an action on contract to which any other cause of action on contract existing at the commencement of the action may be pleaded as a counter-claim under Colo. Code Civ. Proc. §§ 56, 57. Arapahoe County *v.* Denver, 30 Colo. 13, 69 Pac. 586.

86. McCoun *v.* New York Cent., etc., R. Co., 50 N. Y. 176, holding that an action on a bond for a penalty given by statute is not an action on contract, and is to be distinguished from an action on a bond given in a proceeding by one party to another to indemnify the party, for whose benefit it is given, from injury which he may suffer by reason of the acts of the other party to the action. But see Concord *v.* Pillsbury, 33 N. H. 310, where a set-off was allowed in an action upon a bond given to secure the collection and payment of public taxes.

87. Wickham *v.* Weil, 17 N. Y. Suppl. 518 [*disapproving* Furber *v.* McCarthy, 54 Hun (N. Y.) 435, 7 N. Y. Suppl. 613, which held that an undertaking executed to obtain the arrest of the maker of a note in an action for false representation was not a contract within the meaning of the code section in question, but was a statutory indemnity in the nature of a penalty, and in an action

replevin,[88] or upon an appeal,[89] or an action on a forthcoming bond taken under a warrant of distress,[90] are held to be actions upon contract in which counter-claims or set-offs are available, and in an action of debt for the penalty of a bond conditioned for the performance of an award a set-off is allowed.[91]

D. For Taxes. It is almost universally held that in an action for taxes set-off of an indebtedness of the state or municipality to the tax debtor will not be allowed, the statutes of set-off being construed in the light of public policy as not allowing the remedy in proceedings for this purpose,[92] nor is such a claim subject to compensation,[93] and it follows with greater force that a private debt of the tax-collector cannot be set off against taxes due from his creditor.[94] But

therefor, by an assignee of the maker of the note, the obligor in the bond could not counter-claim the note].

88. McKelvey *v.* McLean, 34 U. C. Q. B. 635.

89. Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839 (holding that this is so, although the judgment appealed from was rendered for a tort, the tort being merged in the judgment); Delaney *v.* Miller, 78 Hun (N. Y.) 18, 28 N. Y. Suppl. 1059 [*affirmed* in 84 Hun 244, 32 N. Y. Suppl. 505].

In an action against a constable and his sureties on the official bond of the constable, where the alleged cause was the failure of the constable to properly serve an execution, a cause of action set off in defendant's answer that plaintiff owed the constable a certain sum of money for constable fees, which accrued in the original cause, is a proper subject of set-off. Sponenbarger *v.* Lemert, 23 Kan. 35.

90. Hancock *v.* Whitehall Tobacco Warehouse Co., 100 Va. 443, 41 S. E. 860; Allen *v.* Hart, 18 Gratt. (Va.) 737.

91. Burgess *v.* Tucker, 5 Johns. (N. Y.) 105, holding also that the set-off is against the sum actually due, and not the penalty.

92. *Colorado.*— Morgan *v.* Pueblo, etc., R. Co., 6 Colo. 478.

Florida.— Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292, where the court said that, to hold that a tax is liable to set-off would be utterly subversive of the power of government, and destructive of the very end of taxation.

Georgia.— Hawkins *v.* Sumter County, 57 Ga. 166.

Indiana.— Scobey *v.* Decatur County, 72 Ind. 551.

Kentucky.— Somerset *v.* Somerset Banking Co., 109 Ky. 549, 60 S. W. 5, 22 Ky. L. Rep. 1129; Anderson *v.* Mayfield, 93 Ky. 230, 19 S. W. 598, 14 Ky. L. Rep. 370; Newport, etc., Bridge Co. *v.* Douglass, 12 Bush 673. But see Louisville, etc., Co. *v.* Com., 30 S. W. 624, 17 Ky. L. Rep. 136, holding that a railroad company may, in an action against it to recover taxes, plead as a set-off an excess of taxes previously paid by mistake.

Louisiana.— Morris *v.* Lalaurie, 39 La. Ann. 47, 1 So. 659.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398.

North Carolina.— Gatling *v.* Carteret County, 92 N. C. 536, 53 Am. Rep. 432; Cobb *v.* Elizabeth City, 75 N. C. 1, holding that the rule applies irrespective of the form in which the indebtedness may be evidenced.

Pennsylvania.— McCraken *v.* Elder, 34 Pa. St. 239.

South Carolina.— Trenholm *v.* Charleston, 3 S. C. 347, 16 Am. Rep. 732.

Wisconsin.— Keep *v.* Frazier, 4 Wis. 224.

United States.— Apperson *v.* Memphis, 1 Fed. Cas. No. 497, 2 Flipp. 363; U. S. *v.* Pacific R. Co., 27 Fed. Cas. No. 15,983, 4 Dill. 66.

Equity will not intervene to allow a set-off against taxes or enjoin the collection of the taxes till the indebtedness to the tax debtor is paid. Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292; Cartersville Water Works Co. *v.* Cartersville, 89 Ga. 689, 16 S. E. 70; Scobey *v.* Decatur County, 72 Ind. 551; Trenholm *v.* Charleston, 3 S. C. 347, 16 Am. Rep. 732.

93. New Orleans *v.* Davidson, 30 La. Ann. 541, 31 Am. Rep. 228, holding that a tax due for one year cannot be compensated by an overpayment of taxes made by the debtor the year previous. But see New Orleans *v.* New Orleans Water Works Co., 36 La. Ann. 432, holding that the exemption from taxation granted in the charter of a waterworks company as a part consideration for furnishing the city with free water being unconstitutional, the company, in a suit by the city for taxes, was entitled to set off the price of the water furnished under the contract to the extent, and only to the extent, to which the exemption afforded such consideration, which was accomplished by condemning the city to pay for water to the extent of the taxes collected.

94. Shoemaker *v.* Swiler, 2 Leg. Op. (Pa.) 7; Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. 237 (holding that the sheriff's individual indebtedness to the tax debtor cannot be set off, even though the sheriff has settled with the treasurer of the state for the taxes); Humphreys *v.* Patton, 21 W. Va. 220; Keep *v.* Frazier, 4 Wis. 224 (holding that, even under a statute making county orders receivable for county taxes, the holder of such orders cannot, after lands have been returned delinquent to the county treasurer, set them off against the unpaid town or county taxes so returned unpaid).

Damages for injury to the property against which the assessment was issued cannot be counter-claimed in an action for an assess-

a set-off against taxes may be allowed by statute, in the absence of a constitutional prohibition,[95] or it would seem by special contract to that effect.[96]

E. For Torts — 1. Recoupment. Recoupment was in early times applied to actions founded on tort,[97] and is very generally allowed in actions which are based upon a ground of tort,[98] such as false representations,[99] trover,[1] or

ment for the improvement of a street. Himmelmann *v.* Spanagel, 39 Cal. 389.

95. Amy *v.* Shelby County Taxing Dist., 114 U. S. 387, 5 S. Ct. 895, 29 L. ed. 172, holding also that such a statute is not unconstitutional. See Western Town Lot Co. *v.* Lane, 7 S. D. 599, 65 N. W. 17.

96. See Cobb *v.* Elizabeth City, 75 N. C. 1.

97. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494. But see Barhyte *v.* Hughes, 33 Barb. (N. Y.) 320, holding that before the adoption of the code no claim could be affirmatively set up in opposition to that of plaintiff but what was technically called a set-off or recoupment, and neither of these would have been allowed in an action of tort. In so far as this statement applies to recoupment it is against the great weight of authority. See cases cited *infra*, this section.

98. Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 197; Brigham *v.* Hawley, 17 Ill. 38; Spurgin *v.* Kruse, 125 Ill. App. 507; Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652. But see Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725.

In Georgia, under Civ. Code, § 3759, which provides that recoupment may be pleaded in all actions *ex contractu* where from any reason plaintiff under the same contract is in good conscience liable to defendant, it is held that a claim for damages arising from a breach of contract cannot be allowed by a plea of recoupment in defense to an action of trover unless some special intervening equity arises in favor of defendant, such as nonresidence or insolvency. Harden *v.* Lang, 110 Ga. 392, 36 S. E. 100.

99. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494 (where, in an action for false and fraudulent representations of defendant, in exchanging horses with plaintiff, concerning the horse which he delivered to plaintiff in exchange, defendant was allowed to recoup damages for like representations made to him in the transaction, by plaintiff, concerning the other horse); Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297 (where in an action sounding in tort for fraudulent representations in regard to a mortgage taken in part payment for machinery, defendant was allowed to recoup damages resulting to him from misrepresentation of plaintiff in regard to the property sold, and the court said that there seemed to be no reason for excluding recoupment in cases of tort that did not apply with equal force in cases of contract, and that recoupment is as applicable in cases of tort as in cases of contract); Cole *v.* Colburn, 61 N. H. 499 (holding that in an action on the case for deceit, in an exchange of horses, defendant might recoup damages caused by plaintiff's breach of warranty).

1. *Illinois.*— Otter *v.* Williams, 21 Ill. 118; Stow *v.* Yarwood, 14 Ill. 424; Grand Pacific Hotel Co. *v.* Rowland, 88 Ill. App. 519. See Williams *v.* Schmidt, 54 Ill. 205, holding that in an action of assumpsit by a lessee of a coal mine against the lessor to recover the value of tools converted by the lessor on resuming possession for non-fulfilment of the terms of the lease, the lessor could recoup damages for the lessee's unskilful working of the mine in violation of the covenants in the lease.

Maryland.— Lee *v.* Rutledge, 51 Md. 311.

Massachusetts.— Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494.

Michigan.— Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674.

Pennsylvania.— Work *v.* Bennett, 70 Pa. St. 484, holding that in trover against a broker for conversion of stock received by him, or collateral to secure stock carried on margin, he might recoup from the damages the balance due him, on stock transactions.

England.—Whitehall *v.* Squire, Carth. 104, 90 Eng. Reprint 664; Montford *v.* Gibson, 4 East 441, 1 Smith K. B. 129, 7 Rev. Rep. 599.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

Where goods are pledged to secure payment of a debt, and the pledgee converts them to his own use, he may recoup the amount of his debt in an action brought against him for the conversion of the goods. Nabring *v.* Mobile Bank, 58 Ala. 204; Stow *v.* Yarwood, 14 Ill. 424; Fowler *v.* Gilman, 13 Metc. (Mass.) 267; Jarvis *v.* Rodgers, 15 Mass. 389; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248; Work *v.* Bennett, 70 Pa. St. 484; Neiler *v.* Kelley, 69 Pa. St. 403; Rush *v.* Kansas City First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627. See Ward *v.* Fellers, 3 Mich. 281.

In trover defendant may recoup the amount of a lien upon the goods converted, for freight earned in carrying them (Saltus *v.* Everett, 20 Wend. (N. Y.) 267, 32 Am. Dec. 541), or labor performed on the goods (Dresser Mfg. Co. *v.* Waterston, 3 Metc. (Mass.) 9; Green *v.* Farmer, 4 Burr. 2214, W. Bl. 651, 96 Eng. Reprint 379).

If an officer seizes property without legal authority, and applies the proceeds toward the satisfaction of an execution against the owner, he may recoup the amount thus applied in an action of trover or trespass for the goods. Curtis *v.* Ward, 20 Conn. 204; Stow *v.* Yarwood, 14 Ill. 424; Board *v.* Head, 3 Dana (Ky.) 489; Pierce *v.* Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Prescott *v.* Wright, 6 Mass. 20.

replevin;[2] but defendant can claim a recoupment only where his demand against plaintiff arose out of the same contract or transaction which was the subject of plaintiff's action.[3]

2. Set-Off. The statutes of set-off,[4] being as a general rule framed to allow set-off in actions on debts or demand, have been very generally construed to exclude set-off in actions sounding in tort,[5] such as ejectment,[6] an action of damages for being summarily dispossessed,[7] libel,[8] negligence,[9] nuisance,[10] trespass,[11]

2. Ramsay *v.* Capshaw, 71 Ark. 408, 75 S. W. 479.

3. Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 155; Sanger *v.* Fincher, 27 Ill. 346; Brigham *v.* Hawley, 17 Ill. 38; Stow *v.* Yarwood, 14 Ill. 424; Lee *v.* Rutledge, 51 Md. 311; Fuller *v.* Parrish, 3 Mich. 211 (holding that in an action in trover to recover the value of the property covered by a chattel mortgage, brought by the mortgagor after tendering the amount of the indebtedness to the mortgagee, the mortgagee is not entitled to the amount of his debt by way of recoupment, as the lien was discharged by the tender, so that the indebtedness of the mortgagor had no longer any connection with the property covered by the mortgage); Pattison *v.* Richardson, 22 Barb. (N. Y.) 143 (an action for diverting a stream in which recoupment was disallowed for violation of a contract to deepen the stream, made four years before the diversion).

4. See *supra*, I, B, 3.

5. *Illinois.*— Gunnerson *v.* Erickson, 69 Ill. App. 159, holding that a claim for damages based on a contract cannot be set off against a claim arising from a tort totally disconnected with the subject-matter of such contract.

Indian Territory.—Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Maryland.— Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Oklahoma.— Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

Pennsylvania.— Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Kachlin *v.* Mulhallon, 2 Dall. 237, 1 L. ed. 363; Dahl *v.* Auberle, 4 Pa. Super. Ct. 627; Dahl *v.* Louderback, 40 Wkly. Notes Cas. 386; Moyer *v.* Loeb, 3 Wkly. Notes Cas. 95.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

In Georgia a defendant may, under the code, section 4944, set off in an action *ex delicto* any claim he may have against plaintiff which arises *ex delicto*. Horton *v.* Pintchuck, 110 Ga. 355, 35 S. E. 663; Ransone *v.* Christian, 49 Ga. 491, where the court said that this seemed a very startling provision of the code and one which a common-law lawyer must read in astonishment.

The character of the action must be determined by the facts set out in the complaint as constituting the cause of action; and if upon those facts it appears that the action did not arise on contract, and that plaintiff would be entitled to an order for defendant's arrest, the suit must be regarded as being founded in tort. Chambers *v.* Lewis, 11 Abb. Pr. (N. Y.) 210 [*affirmed* in 28 N. Y 454].

6. White *v.* Whitney, 68 Nebr. 739, 94 N. W. 1012.

7. Corpman *v.* Backistow, 2 Pearson (Pa.) 199.

8. Brown *v.* Durham, (Tex. Civ. App. 1897) 42 S. W. 331, holding that where defendant published libelous matter of plaintiff while attempting to collect a claim against him such claim cannot be set off in plaintiff's action on the libel.

9. Collins *v.* Groseclose, 40 Ind. 414; Winchester *v.* Hackley, 2 Cranch (U. S.) 342, 2 L. ed. 299, action for loss arising from mismanagement in taking bad securities for money.

10. Talbot *v.* Whipple, 7 Gray (Mass.) 122 (holding that the law in the matter of nuisance has no doctrine of set-off); Pattison *v.* Richards, 22 Barb. (N. Y.) 143 (diversion of stream).

11. *Colorado.*— Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108.

Florida.— Robinson *v.* L'Engle, 13 Fla. 482.

Indiana.— Humphrey *v.* Merritt, 51 Ind. 197.

New Hampshire.— Gould *v.* Kelley, 16 N. H. 551, trespass on the case to recover fees for neglecting to take depositions.

New York.— Anonymous, 1 Code Rep. 40; Dygert *v.* Coppernoll, 13 Johns. 210; Keeler *v.* Adams, 3 Cai. 84, Col. & C. Cas. 435.

Pennsylvania.— Wilson *v.* McElroy, 32 Pa. St. 82; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Dahl *v.* Auberle, 4 Pa. Super. Ct. 627; Dahl *v.* Louderback, 40 Wkly. Notes Cas. 386.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

In Connecticut, under Gen. St. tit. 19, c. 8, §§ 17, 18, defendant might by petition set off a debt in all actions of trespass other than of assault and battery, and for the taking of property exempt from execution, and the exception applied to an action of trover for attaching exempt property as well as one of trespass for that cause. Williams *v.* Stratton, 45 Conn. 566. But under Gen. St. § 1016, changing the former statute, and allowing a set-off to be pleaded where there are mutual debts between the parties, a plea of set-off to an action for goods sold and delivered and for money lent was held to be properly stricken out where by amendment of the complaint the cause of action was changed from assumpsit to tort or conversion. Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511.

trover,[12] or replevin;[13] and where plaintiff joins in his complaint separate paragraphs of actions on contract and tort, defendant may plead a set-off to the paragraphs on contract, but not to the paragraph on tort, nor to the entire complaint, as that would include the paragraph on tort,[14] and if the counts on contract are discontinued defendant will not be allowed his set-off.[15]

3. Counter-Claim. In New York the old code of procedure, as amended in 1852, allowed defendant to set up as a counter-claim "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of

Trespasses are not the subject of set-off against each other.— Knight *v.* Brown, 25 W. Va. 808.

In an action for assault defendant cannot set off an assault committed upon him by plaintiff at the time of the assault complained of. Barhyte *v.* Hughes, 33 Barb. (N. Y.) 320; Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y.) 37.

12. *Alabama.*— Marlowe *v.* Rogers, 102 Ala. 510, 14 So. 790; Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 781, 3 Am. St. Rep. 725; Russell *v.* Russell, 62 Ala. 48.

Colorado.— Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108, holding that Mills Annot. St. § 2644, requiring all claims which either party has against the other of such a nature as to be consolidated into one action or defense to be brought forward, does not change the rule that a cause of action arising out of contract cannot be set off against an action of trespass or trover.

Georgia.— Barrow *v.* Mallory, 89 Ga. 76, 14 S. E. 878.

Illinois.— Keaggy *v.* Hite, 12 Ill. 99.

Indiana.— Boil *v.* Simms, 60 Ind. 162; Grose *v.* Dickerson, 53 Ind. 460; Allen *v.* Randolph, 48 Ind. 496; Comer *v.* Morgan County Com'rs, 32 Ind. App. 477, 70 N. E. 179.

Maryland.— Fishwick *v.* Sewell, 4 Harr. & J. 393.

Missouri.— Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717.

New York.— Donohue *v.* Henry, 4 E. D. Smith 162; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60 [*affirmed* in 15 Daly 182, 4 N. Y. Suppl. 708]; McLean *v.* Hugarin, 13 Johns. 184.

Pennsylvania.— Arthur *v.* Sylvester, 105 Pa. St. 233; Kater *v.* Steinruck, 40 Pa. St. 501, where, in an action of trover by the administrator of personal property against the mortgagee for taking the property under a power of sale after the mortgagor's death, the mortgagee was not allowed to set off the debt due him by the mortgagor, the court holding that to allow the set-off would be to sanction the seizure of the property and would mix the remedies of tort and debt in the same action.

Texas.— Hillman *v.* Edwards, (Civ. App. 1903) 74 S. W. 787 (holding that a set-off is not allowed in an action for conversion although plaintiff is insolvent); Stagg *v.* Piland, 31 Tex. Civ. App. 245, 71 S. W. 762; Baker *v.* Guinn, (Civ. App. 1895) 32 S. W. 370; Ellis *v.* Stine, (Civ. App. 1900) 55 S. W. 758. But see Schwulst *v.* Neely, (Civ. App. 1899) 50 S. W. 608, holding that in an action against a landlord for converting a tenant's property, by disposing thereof without foreclosing his landlord's lien, he may set off the amount due him for rent but not damages for allowing lewd women on the premises.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

But see Dale *v.* Richards, 21 D. C. 312.

In Michigan, upon the ground that trover is in the nature of a quasi-equitable action and to prevent circuity of action, in trover, to recover money which came into defendant's hands as attorney for plaintiff, defendant was allowed to set off his claim for services. Pierce *v.* Underwood, 103 Mich. 62, 61 N. W. 344.

In the federal courts, as in the state courts, defendant cannot plead an indebtedness of plaintiff as a set-off or counter-claim in an action at law for conversion. Van Zandt *v.* Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23.

13. Whitworth *v.* Thomas, 83 Ala. 308, 3 So. 321, 3 Am. St. Rep. 768 (holding that in detinue on the corresponding statutory action there can be no set-off); Pinch *v.* Willard, 108 Mich. 204, 66 N. W. 42; Macky *v.* Dillinger, 73 Pa. St. 85; Peterson *v.* Haight, 3 Whart. (Pa.) 150; Beyer *v.* Fenstermacher, 2 Whart. (Pa.) 95; Fairman *v.* Fluck, 5 Watts (Pa.) 516; National Cash Register Co. *v.* Cochran, 22 Pa. Super. Ct. 582; Heffner *v.* Sharp, 3 Pa. Super. Ct. 249, 39 Wkly. Notes Cas. 458 (holding that in replevin growing out of a distress for arrears of dower set-off is inadmissible); Patch Mfg. Co. *v.* Killinger, 26 Pa. Co. Ct. 539; Absolom *v.* Knight, Buller N. P. 181; Laycock *v.* Tufnell, 2 Chit. 531, 18 E. C. L. 772. See also Heck *v.* Shener, 4 Serg. & R. (Pa.) 249, 8 Am. Dec. 700.

14. Ross *v.* Faust, 54 Ind. 471, 23 Am. Rep. 655; Allen *v.* Randolph, 48 Ind. 496; Howlett *v.* Dilts, 4 Ind. App. 23, 30 N. E. 313. And see Smith *v.* Warner, 16 Mich. 390, holding that where plaintiff joined an unfounded claim for unliquidated damages with a claim subject to set-off, under the statute requiring that plaintiff's action shall be founded upon demands which could themselves be the subject of set-off according to law, defendant was not precluded from his right of set-off, as the legal inference was that plaintiff based his action rather upon the demands which were established and proved, than upon the baseless one that was merely asserted.

15. Cains *v.* Tirrell, 112 Mass. 22.

the plaintiff's claim, or connected with the subject of the action," [16] and this provision is found in the code of civil procedure expressed in exactly the same language; [17] and in a majority of the code states the sections relating to counter-claims are substantially similar to those of the New York code,[18] and, although this section was construed in some earlier New York cases as not authorizing a counter-claim in an action of tort,[19] it is now well settled that the fact that a cause of action alleged in the complaint sounds in tort is no obstacle, under the New York code or the codes of the other states, to setting up a counter-claim thereto in the answer, if the counter-claim arises out of the transaction which is the foundation of plaintiff's cause of action, or is connected with the subject of it,[20] and thus counter-claims are very generally allowed in actions for conversion,[21]

16. Code Proc. § 150.

17. N. Y. Code Civ. Proc. § 501, subd. 1.

18. See the codes and statutes of the several states. And see the following cases:

Arkansas.— Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624.

California.— Macdougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98; Dennis *v.* Belt, 30 Cal. 247.

Colorado.— Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767.

Kentucky.— Whitlock *v.* Redford, 82 Ky. 390; Nolle *v.* Thompson, 3 Metc. 121.

Minnesota.—Lahiff *v.* Hennepin County Catholic Bldg., etc., Assoc., 61 Minn. 226, 63 N. W. 493.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Ritchie *v.* Hayward, 71 Mo. 560; McAdow *v.* Ross, 53 Mo. 199.

Montana.—Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664.

Nebraska.— Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104; Burgman *v.* Burr, 30 Nebr. 406, 46 N. W. 644.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

North Carolina.— Smith *v.* Young, 109 N. C. 224, 13 S. E. 735; Bitting *v.* Thaxton, 72 N. C. 541.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Ohio.— The Wellsville *v.* Geisse, 3 Ohio St. 333; Mogle *v.* Black, 5 Ohio Cir. Ct. 51, 3 Ohio Cir. Dec. 27.

South Carolina.— Sharp *v.* Kinsman, 18 S. C. 108.

South Dakota.— McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322.

Washington.— Shelton *v.* Conant, 10 Wash. 193, 38 Pac. 1013; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380.

Wisconsin.— Ring *v.* Ogden, 45 Wis. 303; Scheunert *v.* Kaehler, 23 Wis. 523.

19. Smith *v.* Hall, 67 N. Y. 48 (trover); Pattison *v.* Richards, 22 Barb. (N. Y.) 143; Chambers *v.* Lewis, 2 Hilt. (N. Y.) 591, 10 Abb. Pr. 206 [*affirmed* in 11 Abb. Pr. 210 (*affirmed* in 28 N. Y. 454)]; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372, where the court assumes that in a pure action of tort no counter-claim for a tort is permissible. See People *v.* Dennison, 84 N. Y. 272 (where the court said that Code Proc. § 150, had not been regarded as conferring the right to set up a counter-claim founded on contract in an action of tort); Chamboret *v.* Cagney, 10 Abb. Pr. N. S. (N. Y.) 31. But see Richmond Gas Light Co. *v.* Brick, 5 Alb. L. J. (N. Y.) 287, holding that, although plaintiff declared in tort, if defendant established that there was no tort he might set up a counter-claim.

20. Vandervort *v.* Mink, 113 N. Y. App. Div. 601, 98 N. Y. Suppl. 772; Numan *v.* Wolf, 73 N. Y. App. Div. 38, 76 N. Y. Suppl. 371; Teu Kuile *v.* Marsland, 81 Hun (N. Y.) 420, 31 N. Y. Suppl. 5; Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233.

In Missouri, whenever the facts are such that an election is given to plaintiff to sue in form, either for a tort or on contract, and if he sues on contract defendant may counter-claim damages for the breach of that contract, the same counter-claim may also be interposed when the suit is in form for the tort. Barnes *v.* McMullins, 78 Mo. 260; Ritchie *v.* Hayward, 71 Mo. 560; Kamerick *v.* Castleman, 23 Mo. App. 481, action for trespass.

In Indiana it is held that a contract is a matter which cannot arise out of tort or be so connected with it as to be pleaded as a counter-claim to an action sounding in tort. Hess *v.* Young, 59 Ind. 379; Slayback *v.* Jones, 9 Ind. 470. See Shelby *v.* Vanarsdoll, 23 Ind. 543.

Where an action sounds partly in contract and partly in tort, a counter-claim may be maintained for a balance due under the contract, and the fact that the evidence is directed mainly to proof of the tort does not deprive defendant of the benefit of the counter-claim. Seaman *v.* Slater, 49 Fed. 37.

Nature of the connection see *infra*, VI, C, 2, c, (I), (C).

"Subject" defined see *infra*, VI, C, 2, c, (I), (D).

21. Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881 (where in an action for possession of a schooner alleged to have been wrongfully detained by defendant, a claim for services rendered by defendant in caring for such schooner was held to be a proper counter-claim, being connected with the subject of the action); Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552 [*affirming* 22 Hun 49] (where, in an action for the conversion of wood, defendant was allowed to allege by way of counter-claim that, on foreclosure of a mortgage which he held against certain land, there

fraud,[22] libel,[23] slander,[24] negligence,[25] statutory or common-law replevin,[26] tres-

was a deficiency judgment against the owner, who was insolvent; that plaintiff, a second mortgagee, knowing such fact, and with intent to defraud defendant, cut the wood in controversy from the land, thereby lessening defendant's security); Thompson *v.* Kessel, 30 N. Y. 383 (where in an action for conversion a counter-claim for the price and value of the identical goods which were the subject of the action was allowed); O'Brien *v.* Dwyer, 76 N. Y. App. Div. 516, 78 N. Y. Suppl. 600; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 N. Y. App. Div. 476, 52 N. Y. Suppl. 387, 5 N. Y. Annot. Cas. 238 [*reversing* 51 N. Y. Suppl. 659] (holding that in an action for the conversion of a promissory note and collaterals deposited therewith, or of such collaterals alone, defendant may, under Code Civ. Proc. § 501, subd. 1, set up as counter-claims the said note and its non-payment, and also a claim for costs and expenses of an action brought by him, at plaintiff's request, upon one of the collaterals); Ter Kuile *v.* Marsland, 81 Hun (N. Y.) 420, 31 N. Y. Suppl. 5 (where in an action for the conversion of money obtained by him as agent for the sale of goods under contract that such money should be paid directly by the purchaser to plaintiff, defendant was allowed to plead as a counter-claim that plaintiff had broken the contract, and had conspired with others to deprive defendant of his rights thereunder, and that a balance was due to defendant); Monroe Miller Co. *v.* Stokes, 7 Misc. (N. Y.) 433, 27 N. Y. Suppl. 940 (holding, however, that a lien is not a good counter-claim in an action for conversion but constitutes a defense by way of evidence); Birch *v.* Hall, 3 N. Y. Suppl. 747; Chamboret *v.* Cagney, 10 Abb. Pr. N. S. (N. Y.) 31; Xenia Branch Bank *v.* Lee, 7 Abb. Pr. (N. Y.) 372 (holding that where an indorser of notes brought trover to recover their value from the holder who claimed title through plaintiff's indorsement, defendant may set up title in himself and ask judgment against plaintiff as an indorser by way of counter-claim); Gooch *v.* Isbell, (Tex. Civ. App. 1903) 77 S. W. 973; Vilas *v.* Mason, 25 Wis. 310 (holding that in an action for conversion defendant may counter-claim damages for the same conversion of the same articles).

In Wisconsin, under Rev. St. § 2656, subd. 3, providing that a defendant in an action by a non-resident of the state may set up as a counter-claim any cause of action whatever, a defendant in an action by a non-resident for the conversion of property may set up as a counter-claim any cause of action which he may have against the non-resident plaintiff. Phœnix Mut. L. Ins. Co. *v.* Walrath, 53 Wis. 669, 10 N. W. 151.

22. Warren *v.* Hall, 20 Colo. 508, 38 Pac. 767 (holding that in an action to recover part of the price of cattle on the ground that it was fraudulently excessive, a counter-claim for a balance yet unpaid, according to the terms of the contract of sale, is authorized by Colo. Civ. Code, § 57, providing that a counter-claim may be based upon a "cause of action arising out of the transaction set forth in the complaint"); Grimes *v.* Duzan, 32 Ind. 361; Green *v.* Parsons, 14 N. Y. St. 97; New York *v.* Wood, 4 Abb. Pr. N. S. (N. Y.) 332 (holding that in an action to annul an executory agreement for a lease, on the ground that fraud was practised in procuring the tenant to take the lease, the landlord may counter-claim for rent).

23. Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433, where in an action for libel a counter-claim for malicious prosecution was allowed.

24. Richardson *v.* Northrup, 56 Barb. (N. Y.) 105 (holding, however, that in an action for slander defendant cannot set up as a counter-claim any act or declaration unless such act or declaration forms part of the *res gestæ*); Mogle *v.* Black, 5 Ohio Cir. Ct. 51, 3 Ohio Cir. Dec. 27 (an action for assault in which was permitted to be counter-claimed a slander immediately preceding and connected with the assault, as "arising out of the contract or transaction set forth in the petition").

25. Heigle *v.* Willis, 50 Hun (N. Y.) 588, 3 N. Y. Suppl. 497 (where, in an action for defendant's negligence in driving a wagon against the wagon of plaintiff, a counter-claim was allowed for plaintiff's negligence in driving against defendant, and the court held that the fact that N. Y. Code, § 501, subd. 1, includes actions of tort is plainly indicated by the fact that the basis of counter-claim as indicated in that subdivision is contradistinguished from that contained in subd. 2, which is confined to actions on contract); McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139 (holding that in an action for damages to a barge passing through defendant's canal, by reason of defendant's negligence in allowing the water in the canal to run out, defendant might counter-claim damages for plaintiff's negligence in causing the breach in the canal through which the water escaped).

26. *Indiana.*— Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208, holding that an equitable lien based on an agreement to give one possession of a horse as security for money advanced is a good counter-claim in replevin for the horse, although replevin sounds in tort.

Iowa.— Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374.

Kansas.— Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257, holding that in replevin by a mortgagee the mortgagor may plead as a counter-claim the breach of a contract by the mortgagee to buy the goods and pay the difference between the amount of the mortgage and the agreed price of the goods.

Missouri.— Howard *v.* Haas, 131 Mo. App.

pass,[27] waste,[28] and wrongfully issuing an execution.[29] But in actions sounding in tort a counter-claim not connected with the subject of the action, nor arising out of the transaction forming the basis of plaintiff's cause of action, will not be allowed,[30] and thus counter-claims disconnected with the transaction sued on, or with the subject of the action, have been disallowed in actions for assault,[31] conversion,[32]

499, 109 S. W. 1076. But see Small *v.* Speece, 131 Mo. App. 513, 110 S. W. 7, holding that a counter-claim, based on fraud in the sale, for surrender and cancellation of defendant's notes given in payment of goods, for which plaintiff brings replevin, for default in payment, being one arising out of the "transaction" or the "subject of the action," and so, under Rev. St. (1899) § 605 [Annot. St. (1906) p. 635], a proper matter for counter-claim may be preferred in the action of replevin, provided the action is instituted in a court having equity jurisdiction; but not where it is instituted in a justice's court.

Wisconsin.— Collins *v.* Morrison, 91 Wis. 324, 64 N. W. 1000, holding that, in replevin under a lease of realty which authorized the lessor to take and sell the furniture of the lessee for unpaid rent, the lessee might counter-claim damages arising from failure of the lessors to keep the premises in repair, as covenanted.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

27. De Martin *v.* Albert, 68 Cal. 277, 9 Pac. 157.

28. Lazarus *v.* Heilman, 2 N. Y. Civ. Proc. 204, 11 Abb. N. Cas. 93 (holding that in an action against a tenant for waste defendant may set up as a counter-claim an agreement to sell, contained in the lease, and demand specific performance); Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982 (holding that, in an action for waste, tenants may counter-claim for the value of personal property placed on the premises by them during their tenancy and which the landlord converted by preventing its removal); Grignon *v.* Black, 76 Wis. 674, 45 N. W. 122, 938 (where, in an action to enjoin waste, defendant was allowed to plead in his counter-claim title and exclusive possession in himself and ask to have the title adjudged in him).

29. Davis *v.* Frederick, 6 Mont. 300, 12 Pac. 664, an action to recover on account of the wrongful issuance of an execution upon a satisfied judgment previously recovered by appellant against respondent, where a counter-claim was allowed setting up an indebtedness from respondent to appellant.

30. *California.*— Waugenheim *v.* Graham, 39 Cal. 169.

Colorado.— Goldberger *v.* Leibowitz, 42 Colo. 99, 93 Pac. 1108.

Indiana.— Keller *v.* B. F. Goodrich Co., 117 Ind. 556, 19 N. E. 196, 10 Am. St. Rep. 88.

Kentucky.— Chesapeake, etc., R. Co. *v.* Roe, 54 S. W. 1, 21 Ky. L. Rep. 1145.

Minnesota.— Hanson *v.* Byrnes, 96 Minn. 50, 104 N. W. 762.

New York.— Miller *v.* Barber, 66 N. Y. 558 [*affirming* 4 Hun 802]; Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359 [*affirming* 1 Hilt. 320, 5 Abb. Pr. 1, 14 How. Pr. 116]; Empire Dairy Feed Co. *v.* Chatham Nat. Bank, 30 N. Y. App. Div. 476, 52 N. Y. Suppl. 387, 5 N. Y. Annot. Cas. 238; Bradhurst *v.* Townsend, 11 Hun 104; Pattison *v.* Richards, 22 Barb. 143; Van Dyck *v.* McQuade, 45 N. Y. Super. Ct. 620 [*affirming* 57 How. Pr. 62 (and *reversed* on other grounds in 86 N. Y. 38, 16 Abb. Pr. 433)]; Lehmair *v.* Griswold, 40 N. Y. Super. Ct. 100; McKensie *v.* Farrell, 4 Bosw. 192; Kurtz *v.* McGuire, 5 Duer 660; Chambers *v.* Lewis, 2 Hilt. 591, 10 Abb. Pr. 206 [*affirmed* in 11 Abb. Pr. 210 (*affirmed* in 28 N. Y. 454, 16 Abb. Pr. 433)]; Murden *v.* Priment, 1 Hilt. 75; Donohue *v.* Henry, 4 E. D. Smith 162; Drake *v.* Cockcroft, 4 E. D. Smith 34, 1 Abb. Pr. 203, 10 How. Pr. 377; Frick *v.* Freudenthal, 45 Misc. 348, 90 N. Y. Suppl. 344; Eckert *v.* Gallien, 24 Misc. 485, 53 N. Y. Suppl. 879 [*reversed* on other grounds in 40 N. Y. App. Div. 525, 58 N. Y. Suppl. 85]; Kilpatrick *v.* Dean, 3 N. Y. Suppl. 60; Green *v.* Parsons, 14 N. Y. St. 97; New York *v.* Parker Vein Steamship Co., 12 Abb. Pr. 300; Schnaderbeck *v.* Worth, 8 Abb. Pr. 37; De Leyer *v.* Michaels, 5 Abb. Pr. 203; Peabody *v.* Bloomer, 3 Abb. Pr. 353; Askins *v.* Hearns, 3 Abb. Pr. 184; Bissell *v.* Pearse, 21 How. Pr. 130.

North Carolina.— Smith *v.* Young, 109 N. C. 224, 13 S. E. 735.

Texas.— Smith *v.* Bates, (Civ. App. 1894) 27 S. W. 1044; Knight *v.* Old, 2 Tex. App. Civ. Cas. § 77.

Wisconsin.— Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097.

United States.— Gentry *v.* Grand View Min., etc., Co., 13 Fed. 544, under a Missouri statute.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

31. Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624 (holding that where the keeper of a prison assaulted one of the guards for his negligence in permitting an escape, in an action for the assault defendant could not counter-claim damages for the negligence); Macdougall *v.* Maguire, 35 Cal. 274, 95 Am. Dec. 98 (disallowing in an action for assault and battery a counter-claim for libel); Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123 (disallowing in an action for damages for assault a counter-claim for damages for slander, and other disconnected tortious conduct).

32. Schaefer *v.* Empire Lith. Co., 28 N. Y. App. Div. 469, 51 N. Y. Suppl. 104 (holding that in an action for the conversion of plaintiff's property by defendant, with whom it had been stored, a demand by defendant for storage for the period prior to the alleged conversion does not arise in the same trans-

duress,[33] fraud and deceit,[34] malicious prosecution,[35] negligence,[36] nuisance,[37] replevin,[38] and trespass.[39]

action as that from which plaintiff's claim springs, and is not a proper counter-claim); Adams *v.* Loomis, 4 Silv. Sup. (N. Y.) 558, 8 N. Y. Suppl. 17 (where, in an action by a lessee for the alleged conversion by the lessors of certain hay and grain, a counter-claim for plaintiff's breach of the conditions of the lease under which they were grown was disallowed); Reichmann *v.* Nelson, 13 Misc. (N. Y.) 502, 34 N. Y. Suppl. 953 (holding that, where complaint alleged that defendant under a power of attorney from plaintiff collected money and failed to pay it over, the action is in form *ex delicto*, notwithstanding the omission of an allegation that the moneys were received by defendant in a fiduciary capacity, and that a contract unconnected therewith could not be counter-claimed); Barker *v.* Platt, 1 N. Y. Suppl. 416, 15 N. Y. Civ. Proc. 52 (where plaintiff sued for the conversion of moneys due him, and collected by defendant without authority, and a claim for commissions due defendant for sale of lumber as plaintiff's broker was disallowed); Chambers *v.* Lewis, 11 Abb. Pr. (N. Y.) 210 [*affirmed* in 28 N. Y. 454, 16 Abb. Pr. 433] (holding that in an action for conversion a demand against plaintiff in a cause of action not connected with the same transaction cannot be counter-claimed); Scheunert *v.* Kaehler, 23 Wis. 523 (holding that where the complaint charged conversion of goods sold by defendant on commission, the tort was the subject of the action and sole foundation of plaintiff's claim, and defendant could not counter-claim for damages caused by plaintiff's breach of stipulations contained in the agreement under which the goods were delivered, but not having any reference to the very goods in question).

33. Heckman *v.* Swartz, 55 Wis. 173, 12 N. W. 439, holding that in suit to recover money alleged to have been obtained from plaintiff by duress of imprisonment, upon a void warrant, for fornication with defendant's daughter, and by threats of future prosecution for the same, defendant cannot set up by way of counter-claim the debauching of his daughter, and getting her with child, etc.

34. Ring *v.* Ogden, 45 Wis. 303, holding that, in an action which would have been called before the code a special action on the case for fraud, defendant cannot counter-claim on a contract not arising out of the same transaction.

35. Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858 [*affirming* 57 Hun 135, 10 N. Y. Suppl. 427] (holding that where a seller of goods on credit causes the arrest of the buyer for inducing the sale by deceit, and the buyer after discharge, sues for malicious prosecution, a claim by the seller for damages for deceit was not a valid counter-claim); Ferris *v.* Armstrong Mfg. Co., 57 Hun (N. Y.) 592, 10 N. Y. Suppl. 750 (where, in an action for a wrongful arrest, defendant was not allowed to counter-claim the judgment recovered by him in the action wherein plaintiff was arrested, as the judgment did not arise out of the wrongful arrest).

36. Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258 (holding that in an action against a railroad company for the negligent killing of a horse on its tracks by reason of a train running over it, defendant cannot plead by way of a counter-claim damages sustained to the engine by reason of its striking the horse); McLean *v.* Hamilton St. R. Co., 11 Ont. Pr. 193 (disallowing, in an action for damages for negligence, a counter-claim for libel).

37. Street *v.* Andrews, 115 N. C. 417, 20 S. E. 450 (holding that in an action for damages by maintaining an obstruction on defendant's land, which prevented the free flow of water from plaintiff's land, a counter-claim that plaintiff placed an obstruction on his land whereby water was thrown on defendant's land, to his damage, was properly stricken out); Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745 (holding that in an action to restrain defendants from obstructing a watercourse and for damages therefor, defendant could not set up in the counter-claim that the rights of the parties had been settled by judgment, and that plaintiff had violated his right by taking more water than he was entitled to).

38. Bernheimer *v.* Hartmayer, 50 N. Y. App. Div. 316, 63 N. Y. Suppl. 978.

39. *Arkansas.*— Chandler *v.* Lazarus, 55 Ark. 312, 18 S. W. 181, where in an action for damages to plaintiff's building by eaves' drip from defendant's roof, a counter-claim alleging that water from plaintiff's building had injured defendant's foundation was disallowed.

California.— Demartin *v.* Albert, 68 Cal. 277, 9 Pac. 157, holding that damages for a trespass to real property cannot be counter-claimed in an action for trespass to personal property unless it appears that the trespass on the land related to depended upon or affected the trespass charged in the complaint.

North Carolina.— Bazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888, holding that, in an action for trespass on plaintiff's land by cutting timber on it, an injury caused by plaintiffs to defendants' land by raising a milldam so as to back up the water on it is not "connected with the subject of the action," within Code, § 244, par. 1, relating to counter-claims.

South Carolina.— Sharp *v.* Kinsman, 18 S. C. 108, holding that a balance due from a tenant is not a proper subject of counter-claim in an action by the tenant against the landlord for entering the land and seizing and carrying away the crop, not being a part of the transaction or connected with the subject of the action within the meaning of the code.

Utah.— Marks *v.* Tomkins, 7 Utah 421, 27

4. **Reconvention.** In an action for tort defendant may reconvene a demand connected with or growing out of the transaction sued on,[40] but not a wrongful act at another time and place from that set up in plaintiff's petition.[41]

5. **Waiver of Tort.**[42] Where a plaintiff who can sue in tort waives the tort and sues on contract, the action is considered an action on contract, within the meaning of statutes allowing set-offs[43] or counter-claims[44] in actions upon contracts, and the courts, in following their inclination to settle all disputes between the parties in one action whenever practicable,[45] will liberally construe plaintiff's pleadings to have waived the tort, if such a construction is reasonably possible.[46]

F. Existence of Cause of Action in Plaintiff as Condition to Defendant's Right to Interpose Cross Demands. The right to interpose a set-off or counter-claim depends upon the existence of a cause of action in plaintiff, and where it appears that plaintiff has no cause of action defendant cannot recover upon his counter-claim,[47] and the same rule has been held to apply under

Pac. 6, holding that in an action for trespass defendant cannot counter-claim damages for a distinct and separate trespass by plaintiff..

Wisconsin.— Tallman *v.* Barnes, 54 Wis. 181, 11 N. W. 478, holding that in trespass *quare clausum fregit*, with allegations of injury to personal property, defendant cannot set up an equitable counter-claim, as owner in common with plaintiff of the personal property injured, to require plaintiff to account for the use of defendant's share of the property.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 17.

In Indiana it is held that trespasses cannot be made to compensate each other by any form of pleading, the fact that one trespass may be consequent upon another not so connecting them that they may be blended in the same action. Shelly *v.* Vanarsdoll, 23 Ind. 543; Lovejoy *v.* Robinson, 8 Ind. 399.

40. Gulf, etc., R. Co. *v.* Tacquard, 3 Tex. App. Civ. Cas. § 250, an action for the killing of a steer by a train, in which defendant was allowed to reconvene damages for injury to the locomotive as growing out of the same transaction.

41. Harrison *v.* Jurgielewiez, 28 La. Ann. 238 (holding that in an action for malicious mischief defendant cannot reconvene a claim for damages for libels and slanders published and uttered whereby plaintiff accused him of committing the mischief); Kemp *v.* Amacker, 13 La. 65 (holding that in an action for slander, defendant cannot reconvene for slander spoken by plaintiff of him).

42. Waiver of tort by defendant see *infra*, VI, J, 5.

43. Smith *v.* McCarthy, 39 Kan. 308, 18 Pac. 204; U. S. Bank *v.* Macalester, 9 Pa. St. 475 (where plaintiff waived deceit and sued in assumpsit); Garrison *v.* Bryant, 10 Phila. (Pa.) 474; Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Thorpe *v.* Thorpe, 2 B. & Ad. 580, 1 L. J. K. B. 170, 23 E. C. L. 257. But see Crowninshield *v.* Robinson, 6 Fed. Cas. No. 3,451, 1 Mason 93.

44. *Indiana.*— Griffin *v.* Moore, 52 Ind. 295, holding that in an action against a liveryman who had been hired by plaintiff to keep his horse for him, to recover for an injury to the horse occasioned by the liveryman's failure to properly care for the horse, defendant might plead a counter-claim for the price of keeping the animal, since the action is founded on contract, although the injury is alleged to have been caused by defendant's negligence, wilfulness, and maliciousness.

Kansas.— Challis *v.* Wylie, 35 Kan. 506, 11 Pac. 438.

Minnesota.— Becker *v.* Northway, 44 Minn. 61, 46 N. W. 210, 20 Am. St. Rep. 543; Brady *v.* Brennan, 25 Minn. 210.

Mississippi.—Evans *v.* Miller, 58 Miss. 120, 38 Am. Rep. 313.

Missouri.— Green *v.* Conrad, 114 Mo. 651, 21 S. W. 839; Barnes *v.* McMullins, 78 Mo. 206.

New York.— Wood *v.* New York, 73 N. Y. 556; Coit *v.* Stewart, 50 N. Y. 17; Ogilvie *v.* Lightstone, 1 Daly 129; Starr Cash Car Co. *v.* Reinhart, 2 Misc. 116, 20 N. Y. Suppl. 872; Gopen *v.* Crawford, 53 How. Pr. 278.

North Carolina.— Smith *v.* Young, 109 N. C. 224, 13 S. E. 735, holding, however, that plaintiff had not waived the tort.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Wisconsin.— Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 19.

45. See *supra*, I, I.

46. Smith *v.* McCarthy, 39 Kan. 308, 18 Pac. 204, action for conversion, where the court liberally construed the pleadings to have waived the tort, in order to permit a set-off. But see Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133, an action for conversion, where the court held that the waiver must be either averred expressly or by the manner of stating the cause of action, and that in this case the tort had not been waived.

47. Jones *v.* Moore, 42 Mo. 413 (holding that a cause of action which wholly defeats the demand of plaintiff cannot be a counter-claim); Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 15 N. Y. Suppl. 724 [*affirmed* in 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624] (holding that under Code Civ. Proc. § 501, providing that

set-off;[48] but the rule has been held to be otherwise as to reconvention.[49] Where plaintiff becomes nonsuited or has leave to discontinue defendant cannot have judgment for set-off.[50]

VI. SUBJECT-MATTER.

A. In General. Set-off[51] and counter-claim,[52] being both purely statutory, what may be the subject of either depends largely upon the construction of the statutes; the diversity in the decisions of the courts of the different states on this subject arising from the diversity in the language of their respective statutes of set-off and counter-claim.[53] In general damages may be recouped,[54] or set-off,[55]

a counter-claim "must tend in some way to diminish or defeat the plaintiff's recovery," a trespass committed by the city in carrying out an ordinance for removing obstructions from a watercourse abutting on defendant's land is not a proper counter-claim where, through the invalidity of the ordinance, the city cannot recover in the action the expense of removing such obstruction, since it could not be established as a counter-claim until it was decided that the city had no claim); Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534 (holding that in an action by a physician for service, a claim for damages occasioned by negligence of plaintiff is in effect a denial of plaintiff's cause of action and therefore is not a counter-claim).

In Minnesota it is held that matter constituting a complete defense to the cause of action set up in the complaint may, if connected with the subject of plaintiff's action and constituting a cause of action against such plaintiff, be also pleaded as a counter-claim. Griffin *v.* Jorgenson, 22 Minn. 92; Eastman *v.* Linn, 20 Minn. 433.

48. Walter A. Wood Mowing, etc., Mach. Co. *v.* Seaver, 90 Mich. 546, 51 N. W. 637 (where plaintiff had no cause of action because the note sued on was not due); Cobb *v.* Goodhue, 11 Paige (N. Y.) 110; Claridge *v.* Klett, 15 Pa. St. 255. And see Shewalter *v.* Ford, 34 Miss. 417, holding that where, in an action to recover damages for breach of defendant's warranty of the soundness of an article sold, defendant denies plaintiff's right of action, he cannot set off an independent cause of action inconsistent with plaintiff's claim. *Compare* Greenleaf *v.* Low, 4 Den. (N. Y.) 168, holding that it is not necessary to entitle a defendant to a judgment for the amount of a cross demand which is the subject of a set-off and proved on the trial that there should be something proved and allowed to plaintiff, and that where plaintiff's claim was barred because not interposed in an action in which defendant recovered the judgment upon which he relied as a set-off defendant should have judgment for his cross demand. The ground upon which the case was decided seems to be, however, that plaintiff might upon trial have submitted to a nonsuit, but that not having done so and having elected to submit the matter to the court he was bound by its decision.

In Tennessee under St. (1815) c. 53, defendant could recover by means of a set-off only the balance, if any, in his favor, and could not recover at all if no claim of plaintiff be proved against him (Edington *v.* Pickle, 1 Sneed 122); and the same rule applies under the act of 1854 (Brazelton *v.* Nashville, etc., R. Co., 3 Head 570); and under Code, § 2922 (Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169, 1 Heisk. 482; Baker *v.* Grigsby, 7 Heisk. 627).

49. Griffin *v.* Chubb, 16 Tex. 219, holding that the fact that plaintiff had no cause of action was no reason to refuse to give judgment in favor of defendant upon his admitted cause of action set up by way of reconvention, and giving as the reason for the rule that defendant was brought into court by plaintiff, and thereby invited to litigate his rights in that action, and ought not to be put to the necessity of instituting a distinct suit.

50. Sewall *v.* Tarbox, 30 Me. 27; Cummings *v.* Pruden, 11 Mass. 206; Greenleaf *v.* Low, 4 Den. (N. Y.) 168. But see Riley *v.* Carter, 3 Humphr. (Tenn.) 230, holding that plaintiff cannot after set-off pleaded dismiss his suit and thereby escape from the issue which he has voluntarily tendered.

51. See *supra*, I, B.

52. See *supra*, I, C.

53. Wartman *v.* Yost, 22 Gratt. (Va.) 595.

54. White *v.* Reagan, 32 Ark. 281; Platt *v.* Brand, 26 Mich. 173, holding that a distinct refusal to perform a contract will support a claim of recoupment therefor without waiting for the time of performance.

55. Harrison *v.* Slone, 4 Bush (Ky.) 577; Platt *v.* Brand, 26 Mich. 173; Shabata *v.* Johnston, 53 Nebr. 12, 73 N. W. 278; Barnes *v.* Shelton, Harp. (S. C.) 33, 23 Am. Dec. 642.

In Tennessee by the act of 1856, chapter 71, which is in substance incorporated into the code, section 2918, a defendant may set off any matter arising out of plaintiff's demand or growing out of the original consideration of any written instrument for which he could maintain a cross action. Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325 (holding that under the Code, § 2918, subd. 2, defendant may plead, by way of set-off or cross action, any matters arising out of plaintiff's demand, and for which defendant would be entitled to a cross action); Ford *v.* Thompson, 1 Head 265.

Part of an account paid by mistake may be recovered by way of set-off in an action for the balance. Converse Bridge Co. *v.* Collins, 119 Ala. 534, 24 So. 561.

for which a cross action would lie at the time of pleading them. But a counter-claim cannot set up a cause of action which a statute provides shall be recovered by a separate suit.[56] Under some statutes set-off must be founded upon a judgment or contract, express or implied;[57] and the rule is sometimes stated that a set-off must be such a claim as defendant could have maintained an action of assumpsit or debt for.[58] Every claim must have a fair legal or equitable basis to be the subject of recoupment or set-off,[59] and a set-off will not be allowed where it would result in a double recovery for defendant.[60]

B. Necessity That Cross Demand Be a Subsisting Right of Action of Defendant — 1. General Rule. A party cannot avail himself of a matter as a set-off, unless it is a legally subsisting cause of action in his favor upon which he could maintain an independent action,[61] and the same rule

Property received collaterally and not in payment of a note cannot be set off in an action on the note. Homas *v.* McConnell, 12 Fed. Cas. No. 6,656, 3 McLean 381.

56. Caponigri *v.* Altieri, 165 N. Y. 255, 59 N. E. 87, where the claim sought to be counter-claimed was for a forfeiture.

57. See the codes and statutes of the several states. And see Montgomery *v.* Montgomery, 78 S. W. 465, 25 Ky. L. Rep. 1682 (holding that in an action in the nature of express assumpsit, the claim of the holder of the legal title of land against the holder of equitable title for taxes paid, being purely a statutory claim, is not a proper subject of set-off under Civ. Code Pr. § 96, subs. 2, defining set-off as a cause of action arising on a contract, judgment, or award in favor of a defendant); Augusta *v.* Chelsea, 47 Me. 367 (holding that a demand for the support of paupers originates solely in provisions of statute and has in it none of the elements of a contract, express or implied, or a judgment, and such a demand cannot be filed in set-off in an action by one town against another for supplies furnished a pauper); Stevens *v.* Blen, 39 Me. 420 (holding also that, to entitle defendant to set off an account at law, it must be of such a character that plaintiff will be protected by the record from an action on the same subject-matter); Boyer *v.* Clark, 3 Nebr. 161; Thomson's Estate, 5 Wkly. Notes Cas. (Pa.) 14.

In a suit to recover of a stakeholder money staked with him by plaintiff on a wager on the event of a horse-race, defendant cannot set off the amount of the deposit made by him with plaintiff on another wager of the same character, the right to recover in such a case provided by statute being the exclusive remedy, nor is the claim a demand on judgment or on contract, express or implied, within the meaning of Rev. St. p. 354, § 18, regulating set-off. Bevins *v.* Reed, 2 Sandf. (N. Y.) 436. But the right to recover money lost by betting or gaming has been held to be a demand arising on contract, within the meaning of N. Y. Code Proc. § 150, and a proper subject of counter-claim. McDougall *v.* Walling, 48 Barb. (N. Y.) 364.

In Ohio, Rev. St. § 5075, includes as a matter of set-off all causes of action that can arise upon contract, either express or implied. Gellhaus *v.* Allemania Loan, etc., Assoc., 6 Ohio S. & C. Pl. Dec. 443, 4 Ohio N. P. 255.

58. *Minnesota.*— Folsom *v.* Carli, 6 Minn. 420, 80 Am. Dec. 456.

Mississippi.— Cobb *v.* Wilson, 60 Miss. 343.

New Jersey.— Edwards *v.* Davis, 6 N. J. L. 394.

Pennsylvania.— Jenkins *v.* Rush Brook Coal Co., 205 Pa. St. 166, 54 Atl. 715; Ahl *v.* Rhoads, 84 Pa. St. 319; Russell *v.* Miller, 54 Pa. St. 154.

Tennessee.— Bolinger *v.* Gordon, 11 Humphr. 61.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 26 *et seq.*

59. Strike's Case, 1 Bland (Md.) 50.

60. Bodley *v.* Finley, 74 S. W. 284, 24 Ky. L. Rep. 2478.

Credits on a book-account, being payments which extinguish a debt, cannot be claimed by the debtor as a set-off in an action for the balance due on the book-account. Means *v.* Smith, Tapp. (Ohio) 92.

61. *Alabama.*— St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Taylor Mfg. Co. *v.* Key, 86 Ala. 212, 5 So. 303 (holding that, where an order given for a debt and accepted by the drawer was not paid and was surrendered to the maker, who gave his notes in lieu thereof, the drawer could not set off such order in an action against him by the maker); Collins *v.* Greene, 67 Ala. 211; Deens *v.* Dunklin, 33 Ala. 47; McDade *v.* Mead, 18 Ala. 214; Bunnell *v.* Magee, 9 Ala. 433.

Arkansas.— Jenkins *v.* Neal, 52 Ark. 418, 12 S. W. 1015, holding that a note which has been transferred by the payee cannot be set off in an action against him by the maker, unless he has recovered it from the holder.

California.— Wakeman *v.* Vanderbilt, 3 Cal. 380, holding that, as defendant has no right of action on a draft drawn on him by plaintiff till payment, it could not be set off without proving payment.

Georgia.— Brooks *v.* Cook, 20 Ga. 87, holding that a physician's unpaid bill for attending a slave cannot be set off in an action by the owner for the slave's hire.

Illinois.— Chicago Southern-Branch Dock Co. *v.* Dunlap, 32 Ill. 207; Ryan *v.* Barger, 16 Ill. 28.

Indiana.— Stoner *v.* Swift, 164 Ind. 652, 74 N. E. 248; Brake *v.* King, 54 Ind. 294

applies where defendant in the action endeavors to set up his alleged counter-

(holding that, in an action to recover for the amount of a promissory note executed by defendant, the latter cannot set off the amount of a lien for the unpaid balance of the purchase-money on a tract of real property purchased and held by plaintiff with full knowledge of such lien, which is due and owing from an insolvent former owner of such real property on his purchase thereof from defendant); Curran *v.* Curran, 40 Ind. 473; Heavilon *v.* Heavilon, 29 Ind. 509; Nill *v.* Comparet, 15 Ind. 243; Morrison *v.* Glidden, 7 Ind. 561.

Kansas.— Corlett *v.* Mutual Ben. L. Ins. Co., 60 Kan. 134, 55 Pac. 844.

Kentucky.— Brown *v.* Farmers' Bank, 6 Bush 198; Bennett *v.* McCrocklin, 3 Metc. 322 (holding that where a cause of action can only be asserted by original proceeding in a particular county, it is not maintainable in any other county as a set-off or counter-claim, and any other rule would lead to great confusion and tend to defeat the regulation of venue of actions); Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329 (holding that as the right to recover for trespass to real property does not pass with the conveyance of the land, and hence where land was sold at judicial sale, and the purchaser gave purchase-money sale bonds for it, he cannot, in an action on one of them by an assignee, set off a claim for damages resulting from the assignor's trespass on the land before the sale). Pryse *v.* Three Forks Deposit Bank, 48 S. W. 415, 20 Ky. L. Rep. 1057.

Maine.— Cutler *v.* Gilbreth, 53 Me. 176, where defendant could not have maintained an action against plaintiff, because of laches in not rescinding a sale. But see Lyman *v.* Estes, 1 Me. 182, holding that, although a creditor cannot maintain an action against the administrator of an insolvent estate, except to decide the merits of a claim rejected by the commissioners, an equitable claim against an insolvent estate, although never presented to the commissioners, may still be shown by way of set-off to an action of assumpsit brought by the administrator.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; State *v.* Baltimore, etc., R. Co., 34 Md. 344; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133.

Massachusetts.— Tilton *v.* Goodwin, 183 Mass. 236, 66 N. E. 802; Fargo *v.* Saunders, 4 Allen 378; Wheeler *v.* Parks, 15 Gray 527; Cutler *v.* Middlesex Factory Co., 14 Pick. 483.

Michigan.—Meyer *v.* Montgomery, 87 Mich. 278, 49 N. W. 616. See Backus *v.* Morrill, 107 Mich. 466, 65 N. W. 273.

Mississippi.— Kershaw *v.* Mechanics' Bank, 7 How. 386, 40 Am. Dec. 70.

Missouri.— Russell *v.* Owen, 61 Mo. 185. See Pond *v.* Butler, 10 Mo. 448.

New Hampshire.— Weaver *v.* Rogers, 44 N. H. 112 (holding that when one of two partners paid his private debt to plaintiff with funds of the firm, the two partners cannot avail themselves of the sum so paid, by way of set-off, in an action at law brought by plaintiff to recover a debt due from the firm to plaintiff); Molineux *v.* Eastman, 14 N. H. 504; Varney *v.* Brewster, 14 N. H. 49 (holding that to sustain the set-off everything must be proved, showing the party's right to such an action at the date of plaintiff's suit).

New Jersey.— Ostheimer *v.* Single, (Ch. 1907) 68 Atl. 231; Hutchinson *v.* Hutchinson, (Ch. 1904) 58 Atl. 528. See State *v.* Welsted, 11 N. J. L. 397.

New York.— Evernghim *v.* Ensworth, 7 Wend. 326 (holding that where a law provided that a tavern-keeper could not recover for liquors sold on trust, his claim therefor could not be the subject of set-off); Stephens *v.* Beard, 4 Wend. 604; Williams *v.* Crary, 5 Cow. 368 (holding that a bond which has been canceled, although by mistake, cannot be set off).

North Carolina.— Battle *v.* Thompson, 65 N. C. 406.

North Dakota.— J. L. Owens Co. *v.* Doughty, (1908) 116 N. W. 340.

Ohio.— Marthens *v.* Dudley, 7 Ohio Dec. (Reprint) 215, 1 Cinc. L. Bul. 302.

Pennsylvania.— Pocono Spring Water Ice Co. *v.* American Ice Co., 214 Pa. St. 640, 64 Atl. 398; Ahl *v.* Rhoads, 84 Pa. St. 319; Garrison *v.* Paul, 1 Pennyp. 380. See Brotherton *v.* Haslet, 5 Serg. & R. 334. But see Seybert *v.* Hicks, 1 Kulp 45, holding that there is an essential distinction between actions and set-offs, and that a set-off may be allowed under circumstances which would not justify a right of action on the claim set off, but not indicating what those circumstances may consist of.

South Carolina.— Daniel *v.* Ray, 1 Hill 32 (holding that, in an action by the payee against the maker of a note given for a slave, defendant could not plead by way of discount a parol agreement that if the slave did not suit defendant, when the note fell due, plaintiff should take him back, defendant not being entitled to maintain an action on such parol agreement); Massey *v.* Craine, 1 McCord 489 (holding that a possible injury cannot be set off); Miles *v.* McClellan, 2 Nott & M. 133 (holding that, as money paid for forbearance to sue for a certain time cannot be recovered in an action at law, it is not a legal subject of a discount).

Tennessee.— Key *v.* Wilson, 3 Humphr. 405, holding that a note, the collection of which has been enjoined, cannot be set off.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

Vermont.— Brooks *v.* Jewell, 14 Vt. 470. See Ewing *v.* Griswold, 43 Vt. 400.

England.— Rawley *v.* Rawley, 1 Q. B. D. 460, 45 L. J. Q. B. 675, 35 L. T. Rep. N. S. 191, 24 Wkly. Rep. 995; Charlton *v.* Hill, 5 C. & P. 147, 24 E. C. L. 497.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 39.

claim by way of recoupment,[62] or by way of counter-claim,[63] compensa-

Where defendant's claim is merged in a judgment, the claim cannot be set off (Harpstrite *v.* Vasel, 3 Ill. App. 121; Standifer *v.* Bush, 8 Sm. & M. (Miss.) 383; Mizell *v.* Moore, 29 N. C. 255 (where bonds were merged in judgment between suit brought and plea pleaded), or counter-claimed (Lowell *v.* Lane, 33 Barb. (N. Y.) 292; Ives *v.* Goddard, 1 Hilt. (N. Y.) 434), and if there be a judgment in bar to a suit on a note, it cannot be used in set-off in any future proceedings between the parties (Campbell *v.* Mayhugh, 15 B. Mon. (Ky.) 142); but if a judgment on a claim is a final judgment it is a set-off as a judgment (Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231; Naylor *v.* Schenck, 3 E. D. Smith (N. Y.) 135). And see JUDGMENTS, 23 Cyc. 1486.

Where a note was given for a balance on an account stated, the account so settled cannot be pleaded as a set-off. Bower *v.* Douglass, 25 Ga. 714. And see Shipp *v.* Davis, 78 Ga. 201, 2 S. E. 549, holding that where a note sued on was in its inception a security for a real debt on book-account, and a note pleaded against it as a set-off never represented any debt whatever, but, under the name of an "offset" was obviously intended as a protection against having to pay the account twice, the latter note cannot prevail as a set-off against the former so long as the account up to an amount equal to the amount of the former note remained unpaid.

"Cause of action" defined see 1 Cyc. 641.

Where damages are the gist of the action, they must be alleged and proved, in order that the claim may be available as a set-off. McGehee *v.* Slater, 50 Ala. 431; Gadbury *v.* Stahl, 41 Ind. 348. And see Sloan *v.* Chamberlain, 7 Wkly. Notes Cas. (Pa.) 536, holding that where the damages are too remote and speculative set-off cannot be maintained.

Where plaintiff is the state a set-off will be disallowed, on the ground that no citizen can sue the state. Battle *v.* Thompson, 65 N. C. 406.

The right to attach for a debt not yet due, on the ground of a fraudulent conveyance of property by the debtor, does not give an immediate right of action on the debt, so as to render it available as a set-off. Iler *v.* Rieger, 69 Mo. App. 64.

Interest-bearing debt.— The claim of one sued on an interest-bearing debt should be set off against the debt as of the time the claim became due, and not the time of trial. Brown *v.* Montgomery, 19 Tex. Civ. App. 548, 47 S. W. 803.

62. *Alabama.*— Deens *v.* Dunklin, 33 Ala. 47.

Delaware.— Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (1906) 62 Atl. 1054.

Illinois — Chicago Dock Co. *v.* Dunlap, 32 Ill. 297; Patton *v.* Iriquois Furnace Co., 124 Ill. App. 1, holding that recoupment cannot be had for the failure of plaintiff to complete the contract sued upon, where such contract was properly abandoned because of defendant's default.

Indiana.— Reynolds *v.* Rondabush, 59 Ind. 483, disallowing recoupment of a voluntary payment of money which gave no right of action for its recovery.

Michigan.—Meyer *v.* Montgomery, 87 Mich. 278, 49 N. W. 616; Widrig *v.* Taggart, 51 Mich. 103, 16 N. W. 251, holding that recoupment cannot be enforced against an infant who could not be compelled, by an independent action, to respond in damages.

New York.— McKeige *v.* Carroll, 120 N. Y. App. Div. 521, 105 N. Y. Suppl. 342.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 39.

63. *California.*— Murdock *v.* Brooks, 38 Cal. 596.

Illinois.— Litch *v.* Clinch, 35 Ill. App. 654 [*affirmed* in 136 Ill. 410, 26 N. E. 579].

Indiana.— Indiana Mut. Bldg., etc., Assoc. *v.* Crawley, 151 Ind. 413, 51 N. E. 466.

Iowa.— Bardes *v.* Hutchinson, 113 Iowa 610, 85 N. W. 797.

Kansas.— Corlett *v.* Mutual Ben. L. Ins. Co., 69 Kan. 134, 55 Pac. 844; Collins *v.* Martin, 43 Kan. 182, 23 Pac. 95, holding that where defendant did not intend to charge plaintiff for various items when they were furnished, he could not, upon action brought, counter-claim them.

Kentucky.— Bennett *v.* McCorklin, 3 Metc. 322; Pryse *v.* Three Forks Deposit Bank, 48 S. W. 415, 20 Ky. L. Rep. 1057; Burnett *v.* Frazier, 40 S. W. 697, 19 Ky. L. Rep. 299, holding that an allegation that defendant and the assignor of the note sued on are jointly liable on another note is not a good counter-claim, the payment of such other note not being averred.

Minnesota.— Brackett *v.* Osborne, 31 Minn. 454, 18 N. W. 153; Swift *v.* Fletcher, 6 Minn. 550.

Missouri.— Missouri Pac. R. Co. *v.* Kansas City, etc., Air Line Co., 189 Mo. 538, 88 S. W. 3; McPherson *v.* Meek, 30 Mo. 345; Reed *v.* Peper Tobacco Warehouse Co., 2 Mo. App. 82, disallowing a counter-claim set up by a mere intermediary for money collected and paid over, the return of which it had no right to demand.

Nebraska.— Wehn *v.* Fall, 55 Nebr. 547, 76 N. W. 13, 70 Am. St. Rep. 379.

New York.— Nichols *v.* Riley, 118 N. Y. App. Div. 404, 103 N. Y. Suppl. 554; Cassidy *v.* Arnold, 100 N. Y. App. Div. 412, 91 N. Y. Suppl. 570; Clinton *v.* Eddy, 1 Lans. 61 [*affirming* 54 Barb. 54, 37 How. Pr. 23]; Schlesinger *v.* Burland, 42 Misc. 206, 85 N. Y. Suppl. 350; Deering *v.* Schreyer, 27 Misc. 237, 58 N. Y. Suppl. 485 [*affirmed* in 58 N. Y. Suppl. 1139]; Starke *v.* Myers, 24 Misc. 577, 53 N. Y. Suppl. 650; Canavan *v.* Dwyer, 14 Misc. 304, 35 N. Y. Suppl. 763 (holding that defendant must prove facts sufficient to form the basis of a recovery); Portland Co. *v.* Hall, 95 N. Y. Suppl. 36; U. S. Trust Co. *v.* Stanton, 21 N. Y. Suppl. 229 [*affirmed* in 139 N. Y. 531, 34 N. E. 1098]; Belknap *v.* McIntyre, 2 Abb. Pr. 366.

tion,[64] and reconvention.[65] When defendant interposes a set-off he becomes the actor, and in respect to his set-off has the affirmative of the issue.[66] But although matter may not be interposed as a set-off because no action could be maintained thereon, it may still be available by way of defense.[67]

2. Void or Unenforceable Claims. A demand growing out of an illegal transaction and which therefore cannot be recovered or enforced directly cannot be set-off [68] or counter-claimed,[69] and a contract which is void under the statute of

North Carolina.— Askew *v.* Koonce, 118 N. C. 526, 24 S. E. 218.

Ohio.— Hill *v.* Butler, 6 Ohio St. 207, holding that the counter-claim must contain facts recognized by courts of law or equity as constituting an existing cause of action.

South Dakota.— McKinney *v.* Sundback, 3 S. D. 106, 52 N. W. 322, holding that a counter-claim must contain all the substantial averments necessary in a complaint based upon the same cause of action, and must state facts which constitute a cause of action against plaintiff, and its sufficiency must be governed by the same rules as if defendant had brought suit against plaintiff.

Wisconsin.— McAlpine *v.* St. Clara Female Academy, etc., 101 Wis. 468, 78 N. W. 173; Resch *v.* Senn, 31 Wis. 38; Matteson *v.* Ellsworth, 28 Wis. 254. See Gunn *v.* Modigan, 28 Wis. 158.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 39.

A counter-claim should not only present a defense, but should present a cause of action in favor of defendant. Bowen *v.* Sebree, 2 Bush (Ky.) 112.

The criterion for determining whether a defense set up can be maintained as a counter-claim is to see if the answer sets up a cause of action upon which defendant might have sustained a suit against plaintiff, and, if it does, then such cause of action is a counter-claim. Garrett *v.* Love, 89 N. C. 205.

A proceeding for condemnation of a statutory easement not arising in grant or prescription cannot be counter-claimed, as it is not a cause of action. Leigh *v.* Garysburg Mfg. Co., 132 N. C. 167, 43 S. E. 632.

If the counter demand be such as could be asserted in a court of equity, it may be used as a counter-claim, under the codes. Swift *v.* Fletcher, 6 Minn. 550; Kelley *v.* Dee, 2 Thomps. & C. (N. Y.) 286 (holding that an agreement of settlement between plaintiff and defendant in an action for work and defendant's tender of performance constituting a good cause for a suit in equity for specific performance entitles defendant to set up as a counter-claim under the code); Hill *v.* Butler, 6 Ohio St. 207.

A partial failure of consideration in a note is not a counter-claim. Lash *v.* McCormick, 17 Minn. 403.

The defense of usury is not a counter-claim, within the meaning of the New York code. Prouty *v.* Eaton, 41 Barb. (N. Y.) 409.

A lien in favor of defendant on money sued for by plaintiff is not a counter-claim, but constitutes a defense by way of avoidance. Rochester Distilling Co. *v.* O'Brien, 72 Hun (N. Y.) 462, 25 N. Y. Suppl. 281.

A counter-claim for money paid under an alleged mistaken supposition cannot be interposed, in the absence of proof that the supposition was in fact mistaken. Union, etc., Bank *v.* Jefferson, 101 Wis. 452, 77 N. W. 889.

Where parties enter into an executory contract and the contractor sues thereon, if the contract has terminated, a counter-claim dependent upon the contract falls with it. Tribune Assoc. *v.* Eisner, etc., Co., 34 Misc. (N. Y.) 658, 70 N. Y. Suppl. 706 [*affirmed* in 70 N. Y. App. Div. 172, 75 N. Y. Suppl. 100].

64. Case *v.* Henderson, 23 La. Ann. 49, 8 Am. Rep. 590 [*overruled* on other grounds in Gordon *v.* Müchler, 34 La. Ann. 609]. But see Dumford's Succession, 8 Rob. (La.) 488.

65. Pool *v.* Alexander, 26 La. Ann. 669; Gails *v.* The Osceola, 14 La. Ann. 54 (holding that where, in an action for materials, work, and labor furnished, a final settlement between the parties was shown, damages to defendant by delay of plaintiff could not be pleaded in reconvention, the delay and damages being known to defendant before the final settlement); Coleman *v.* Bunce, 37 Tex. 171 (holding that a plea in reconvention must aver matter which would be good in an original bill, or which would constitute a good cause of action at law); Rose *v.* San Antonio, etc., R. Co., 31 Tex. 49; Blair *v.* Reid, 20 Tex. 310 (holding that, as money paid on a debt not due cannot be recovered back, it cannot be pleaded in reconvention, although it may be as payment). See Blymer Ice Mach. Co. *v.* McDonald, 48 La. Ann. 439, 19 So. 459.

66. Caven-Williamson Ammonia Co. *v.* Ice Mfg. Co., 27 Pa. Super. Ct. 381.

67. Jewett *v.* Winship, 42 Vt. 204; Gunn *v.* Madigan, 28 Wis. 254.

Set-off, counter-claim, and defense distinguished see *supra*, I, H, 4.

68. Pond *v.* Smith, 4 Conn. 297 (where the transaction was a privateering enterprise); Payne *v.* Loudon, 3 Bibb (Ky.) 250 (holding that accounts claimed as set-off, arising out of a gambling transaction, are not grounds for relief in equity). But see Lusk *v.* Patton, 70 N. C. 701, holding that a claim for services rendered under an illegal contract, but which has been adjusted and allowed by the parties in a settlement, is available as a set-off.

69. Turnbull *v.* Farnsworth, 1 Wash. Terr. 444, holding that a claim arising out of the transfer of a contract to furnish supplies

frauds,[70] or because of coverture,[71] or because barred by the statute of limitations,[72] or because unsupported by a consideration,[73] cannot be the subject of set-off. Similarly a discharge in bankruptcy is a good answer to a plea of set-off.[74]

3. CLAIMS NON-EXISTENT AT COMMENCEMENT OF ACTION — a. In General. A debt or demand to be available as a set-off [75] or counter-claim [76] must as a general rule

to the United States is unavailable as a counter-claim, such transfer being void under the express provisions of the United States statutes.

70. Ryan *v.* Dunphy, 4 Mont. 342, 1 Pac. 710 [*affirmed* in 116 U. S. 491, 6 S. Ct. 486, 29 L. ed. 703] (holding that an express oral contract for the sale of real estate, void under the statute of frauds, cannot be pleaded by way of counter-claim); Lawrence *v.* Smith, 27 How. Pr. (N. Y.) 327 (holding that a promise by a creditor to allow a specified sum upon the debt of the debtor, by way of damages for breach of a contract, void by the statute of frauds, cannot be recouped in an action for the debt, even though the void contract is such as might have been specifically enforced in equity). But see Foss *v.* Newbury, 20 Oreg. 257, 25 Pac. 669.

71. Sanford *v.* Wood, 49 Ind. 165, holding that in an action by a married woman on a note against a party who has paid her money upon a parol contract for the sale of her land, which she failed to convey, the money so paid her could not be set off, as it could not be recovered in a direct action against her.

72. Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616; Brewer *v.* Grogan, 116 Ga. 60, 42 S. E. 525; Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584. And see, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 1064.

Equity may grant relief, although a claim sought to be set off is barred by the statute of limitations. Fowler *v.* Bellinger, 140 Ala. 240, 37 So. 225.

73. Bloch Queensware Co. *v.* Metzger, 70 Ark. 232, 65 S. W. 929; Walker *v.* Gilbert, 2 Rob. (N. Y.) 214.

74. Francis *v.* Dodsworth, 4 C. B. 202, 17 L. J. C. P. 185, 56 E. C. L. 202.

75. *Alabama.*— Johnson *v.* King, 20 Ala. 270, holding that defendant cannot set off a payment made by him after suit.

Illinois.— Pettis *v.* Westlake, 4 Ill. 535.

New York.— Jefferson County Bank *v.* Chapman, 19 Johns. 322; Cobb *v.* Curtiss, 8 Johns. 470; Thompson *v.* Ellsworth, 1 Barb. Ch. 624; Holden *v.* Gilbert, 7 Paige 208; Hackett *v.* Connett, 2 Edw. 73.

North Carolina.— Reynolds *v.* Smathers, 87 N. C. 24.

Pennsylvania.— Zuck *v.* McClure, 95 Pa. St. 541 (holding that defendant cannot set off against plaintiff damages for a breach of contract unless such breach was complete at the time of suit brought, a mere intention not to perform the contract being insufficient); Huling *v.* Hugg, 1 Watts & S. 418; Morrison *v.* Moreland, 15 Serg. & R. 61; Hendel *v.* Reverting Fund Assur. Assoc., 2 Pa. Dist. 116. But see Miller *v.* Plymire, 1 Walk. 233, holding that where plaintiff agreed to take three wagons as part payment on a note defendant might set off against the note the price of the wagons, although they were not completed and tendered until four months after suit was brought on the note; the ground of the decision being that plaintiff could not by commencing suit on the note before a reasonable time had elapsed for the completion of the wagons prevent the application of their fixed price on the note.

Tennessee.— Brazelton *v.* Brooks, 2 Head 194.

Vermont.— Lewis *v.* Jewett, 51 Vt. 378 (holding that where, after suit brought on a note, plaintiff sold collateral for more than enough to pay the balance due, although this amounted to payment *pendente lite* and discharged the cause of action, defendant could not recover the surplus by way of set-off); Houston *v.* Fellows, 27 Vt. 634 (holding that money paid for plaintiff after the commencement of his action cannot be set off); Carpenter *v.* Coit, 1 D. Chipm. 88.

United States.— Pate *v.* Gray, 18 Fed. Cas. No. 10,794*a*, Hempst. 155.

England.— Richards *v.* Jones, 6 D. & L. 52, 2 Exch. 471, 17 L. J. Exch. 277.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 73.

76. *California.*— Paige *v.* Carter, 64 Cal. 489, 2 Pac. 260; Gannon *v.* Dougherty, 41 Cal. 661.

Minnesota.— Fergus Printing, etc., Co. *v.* Otter Tail County, 60 Minn. 212, 62 N. W. 272.

Nebraska.— Gurske *v.* Kelpin, 61 Nebr. 517, 85 N. W. 557.

New York.— Quayle *v.* Brandow Printing Co., 116 N. Y. App. Div. 9, 101 N. Y. Suppl. 323; Bernheimer *v.* Hartmayer, 50 N. Y. App. Div. 316, 63 N. Y. Suppl. 978; Schlesinger *v.* Burland, 42 Misc. 206, 85 N. Y. Suppl. 350; Corrigan *v.* Ritter, 15 N. Y. Suppl. 163, 21 N. Y. Civ. Proc. 82 (holding also that a claim accrued after commencement of the action cannot be made available by supplemental answer); Chambers *v.* Lewis, 11 Abb. Pr. 210 [*affirmed* in 28 N. Y. 454]; Rice *v.* O'Connor, 10 Abb. Pr. 362.

North Carolina.— A. D. Puffer, etc., Mfg. Co. *v.* Lucas, 112 N. C. 377, 17 S. E. 174, 19 L. R. A. 682; Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256.

South Carolina.— *Ex p.* Carolina Nat. Bank, 18 S. C. 289.

Washington.— Conner *v.* Scott, 16 Wash. 371, 47 Pac. 761.

Wisconsin.— Sprout *v.* Crowley, 30 Wis. 187; Orton *v.* Noonan, 29 Wis. 541; Rickard *v.* Kohl, 22 Wis. 506.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 73.

have existed at the commencement of the action. Damages incident to the institution of the action do not constitute a cause of action existing at the commencement of plaintiff's action within the meaning of the statutes and cannot therefore be counter-claimed [77] or reconvened.[78] If, however, the demand sought to be set off accrued before the commencement of the action, it is not necessary that it should have accrued before plaintiff's cause of action.[79] Under some statutes defendant may set off [80] or counter-claim [81] all debts or demands which he holds against plaintiff, although they accrued after suit brought, and in regard to recoupment it has been held that damages to be recouped are not restricted to the commencement of the action but to the time of trial.[82] The parties may by special agreement provide that a claim accruing subsequent to the commencement of the action may be set off.[83]

b. Inchoate and Contingent Claims. A distinction is sometimes drawn between the cause of action and the remedy by action, and it is accordingly held that, although the remedy may temporarily be suspended so that no action could be maintained, if a good cause of action existed, it may be used as a set-off,[84] and although, where a demand is a condition precedent to the existence of a valid legal claim as distinguished from a right to sue thereon, a demand must have been made before the commencement of the action in order that claim can be set off,[85]

77. Newkirk *v.* Neild, 19 Ind. 194, 81 Am. Dec. 383 (holding that where the holder of an overdue note agrees not to sue and brings suit, such breach cannot be made available by way of counter-claim); Youngerman *v.* Long, 95 Iowa 185, 63 N. W. 674 (holding that where a landlord in an action for rent sues out an attachment, and upon its being quashed filed an amended petition in equity for the foreclosure of the lien under the lease as a mortgage, the filing of the amended petition was not the beginning of a new action, and hence damages caused to defendant by the attachment could not be pleaded as a counter-claim, as they were not an existing cause of action at the time of the commencement of the suit within the meaning of the code); Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22; Moore *v.* Trimmer, 1 Silv. Sup. (N. Y.) 171, 6 N. Y. Suppl. 430, 17 N. Y. Civ. Proc. 99 (holding that in an action by an overseer of the poor for a statutory penalty, a counter-claim alleging that plaintiff held defendant for money advanced to him officially under promise to refund it if he should sue defendant for such penalty, cannot be interposed as it did not exist at the commencement of the action); Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210; Noonan *v.* Orton, 30 Wis. 356. But see Hall *v.* Parsons, 105 Minn. 96, 117 N. W. 240.

78. Knox *v.* Thompson, 12 La. Ann. 114; Keene *v.* Relf, 11 La. 304.

79. Lee *v.* Lester, 7 C. B. 1008, 7 D. & L. 137, 18 L. J. C. P. 312, 62 E. C. L. 1008.

80. Shannon *v.* Wilson, 19 Ind. 112; Foley *v.* Mason, 6 Md. 37; Clarke *v.* Magruder, 2 Harr. & J. (Md.) 77; Trimyer *v.* Pollard, 5 Gratt. (Va.) 460; Wheeling Bridge, etc., R. Co. *v.* Cochran, 68 Fed. 141, 15 C. C. A. 321, construing a West Virginia statute.

In attachments the right of set-off as against the attaching creditor does not extend to any matter originating by the action of the garnishee subsequent to the garnishment. Farmers', etc., Bank *v.* Franklin Bank, 31 Md. 404.

81. Hyman *v.* Jockey Club Wine, etc., Co., 9 Colo. App. 299, 48 Pac. 671 (holding that a counter-claim allowed under Civ. Code, § 57, subd. 1, allowing matters to be counter-claimed which arise out of the transaction set forth in the complaint or which are connected with the subject of the action, may be interposed, although it arose after the commencement of the action, but that a counter-claim under subd. 2, allowing in an action on contract a counter-claim of any other cause of action arising on contract and existing at the commencement of the action, the cause of action must have existed at the commencement of the action in order to be available as a counter-claim); Wilson *v.* Wilson, 40 Iowa 230 (decided under a statute silent as to the time when a demand counter-claimed should mature or exist).

82. Martin *v.* Hill, 42 Ala. 275. But see Harger *v.* Edmonds, 4 Barb. (N. Y.) 256, holding that in an action of covenant for rent due upon a lease defendant could not recoup by reason of a breach of covenant on the part of plaintiff after the commencement of the suit.

83. Morrison *v.* Moreland, 15 Serg. & R. (Pa.) 61.

84. Taylor *v.* Mayor, 82 N. Y. 10; Clark *v.* Story, 29 Barb. (N. Y.) 295 (holding that, although the code prohibits the bringing of an action on a justice's judgment within five years after its rendition, such judgment may nevertheless be used by way of a set-off or counter-claim); Cornell *v.* Donovan, 14 Daly (N. Y.) 295, 14 N. Y. St. 687 [*affirmed* in 109 N. Y. 664, 17 N. E. 869]; Brown *v.* Tibbits, 11 C. B. N. S. 855, 31 L. J. C. P. 206, 6 L. T. Rep. N. S. 385, 10 Wkly. Rep. 465, 103 E. C. L. 855.

85. State Bank *v.* Cape Fear Bank, 35 N. C. 75 (holding that a note made payable

or counter-claimed,[86] where a cause of action exists without a demand the claim may be set off, although no action could be brought without a demand,[87] and a claim of a liquidated nature which would support an action without a previous demand is a proper subject of a set-off without a demand.[88] The same rule applies to other conditions precedent to bringing an action as distinguished from conditions precedent to the existence of a valid legal claim.[89] But defendant cannot plead as a set-off a contingent liability, where the circumstances upon which the liability is contingent have not occurred,[90] nor can a counter-claim be based on an allegation that the action in which it is filed is malicious, a judgment favorable to defendant being essential to a right of action thereon.[91]

4. CLAIMS NOT YET DUE AT COMMENCEMENT OF ACTION — a. Rule at Law. A demand of defendant against plaintiff not due at the commencement of the action

on demand at a particular place cannot be used as a set-off or offered as a payment to the maker, unless so presented); Leas *v.* Laird, 6 Serg. & R. (Pa.) 129 (holding that a bond for the delivery of an article on demand cannot be set off against a promissory note, without first proving that the article had been demanded).

86. Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616.

87. Seymour *v.* Dunham, 24 Hun (N. Y.) 93.

A statute requiring a demand to be made before commencing an action for the recovery of the subject thereof has been held not to apply to a set-off, which may be interposed without such demand. Millet *v.* Watkins, 4 Bush (Ky.) 642, holding that in an action by a personal representative of a decedent a set-off may be proven without a previous demand for the payment thereof, notwithstanding the provision of the code prohibiting the commencement of an action against a personal representative until after demand is made on him, the set-off being held not to be an action within the meaning of the statute.

A code provision requiring leave of court for good cause shown before an action can be brought on a judgment does not prevent defendant from using such judgment as a set-off without such leave of court. Wells *v.* Henshaw, 3 Bosw. (N. Y.) 625.

88. Spencer *v.* Morgan, 5 Ind. 146; Paul *v.* Carroll, 12 Mo. 437, holding that in an action of assumpsit for a recovery for services as agent it is competent for defendant to set off amounts of money collected by plaintiff while acting as agent for defendant, and not paid over without proving a demand prior to the time of instituting the suit.

89. Craigen *v.* Lobb, 12 Leigh (Va.) 627, holding that, although no action lay for clerk's fees until they had been put into an officer's hands for collection, and he had returned that they could not be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due, the fees being in effect due from the time of the services.

90. *Connecticut.*— Parsons *v.* Root, 41 Conn. 161.

Kansas.— Abeles *v.* Cohen, 8 Kan. 180, holding that the obligee of a bond of indemnity has no cause of action against the obligor which he can set up by way of a set-off or counter-claim in an action by the obligor against the obligee, unless he has sustained some loss covered by the bond, or will sustain some loss by reason of a recovery against him in the action.

Kentucky.— Robinson *v.* Shelton, 4 Ky. L. Rep. 996.

Louisiana.— Lacour *v.* Landry, 9 Rob. 529.

Maine.— Houghton *v.* Houghton, 37 Me. 72.

Massachusetts.— Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391.

Nebraska.— Jones *v.* Sherman, 34 Nebr. 452, 51 N. W. 1036.

New Hampshire.— Toppan *v.* Jenness, 21 N. H. 232.

New York.— *In re* Peaslee, 81 Hun 597, 30 N. Y. Suppl. 1028 [*affirmed* in 146 N. Y. 378, 41 N. E. 90].

Ohio.— Colvin *v.* Carter, 4 Ohio 354.

Pennsylvania.—Garrison *v.* Paul, 1 Pennyp. 380; Boyd *v.* Whelen, 17 Phila. 270; Shaw *v.* Folkers, 12 Wkly. Notes Cas. 518, holding that in a suit begun by attachment defendant cannot set off damages on the ground that the attachment was wrongful before the attachment was dissolved, since it was not certain that damages would be sustained by defendant.

South Carolina.— McCullough *v.* Madison, 1 Rice 38.

Vermont.— Carpenter *v.* Coit, 1 D. Chipm. 88.

England.— *In re* Commercial Bank, L. R. 1 Ch. 538, 12 Jur. 806, 36 L. J. Ch. 333, 15 L. T. Rep. N. S. 148, 15 Wkly. Rep. 78.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 68.

Compare Hembree *v.* Glover, 93 Ala. 622, 8 So. 660.

In equity where plaintiff was insolvent, defendant has been allowed to set off a contingent liability. Scott *v.* Timberlake, 83 N. C. 382, holding that, since the surety of an insolvent debtor cannot be compelled to pay a debt he owes his principal until he is released of the responsibility of suretyship, he may retain what he owes as a counter-claim against such principal in an action by the latter on another note against the surety, since the contingent liability of the surety is, in view of the court of equity, a debt itself.

91. Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210. See Arkansas City First

cannot be set off,[92] and the same rule applies to counter-claim,[93] and to compensa-

Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22.

92. *Connecticut.*— Parsons *v.* Root, 41 Conn. 161; Henry *v.* Butler, 32 Conn. 140; Finch *v.* Ives, 28 Conn. 115; Hinsdale *v.* Eells, 3 Conn. 377.

Delaware.— Edwards *v.* Temple, 2 Harr. 322.

Georgia.— See McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502.

Illinois.— Ellis *v.* Cothran, 117 Ill. 458, 3 N. E. 411; Meyer *v.* Temme, 72 Ill. 574; Pettis *v.* Westlake, 4 Ill. 535; Jones *v.* Adams, 81 Ill. App. 183; Sandwich Mfg. Co. *v.* Kelly, 26 Ill. App. 394, holding, however, that an obligation to pay a note assigned by plaintiff may be set off, even though the note was not actually paid until after the action was commenced.

Indiana.— Judah *v.* Potter, 18 Ind. 224; Jackson *v.* Adamson, 7 Blackf. 597, holding that if a surety for a debt pay it before it is due, the payment will, after the debt has become due but not before, be a legal set-off against his note payable to the principal and held by him.

Kentucky.—Walker *v.* McKay, 2 Metc. 294.

Louisiana.— Lacour *v.* Landry, 9 Rob. 529.

Maine.— Robinson *v.* Safford, 57 Me. 163; Houghton *v.* Houghton, 37 Me. 72.

Massachusetts.— Warren *v.* Franklin Ins. Co., 104 Mass. 518. But see Bigelow *v.* Folger, 2 Metc. 255, holding that where, after a suit commenced by an administrator, the estate of his intestate is regarded insolvent, defendant may set off a note against the intestate which falls due pending the suit, although not due when the action was commenced.

New Hampshire.— Toppan *v.* Jenness, 21 N. H. 232; Varney *v.* Brewster, 14 N. H. 49.

New York.— Martin *v.* Kunzmuller, 37 N. Y. 396; Holden *v.* Gilbert, 7 Paige 208. See Niagara Bank *v.* McCracken, 18 Johns. 493, holding that in an action of assumpsit originally brought in the court of common pleas and removed to the supreme court defendant may set off a claim against plaintiff arising after the commencement of the suit in the court of common pleas, and prior to its removal to the supreme court; the suit on its removal not being a continuation of a suit in the court of common pleas.

North Carolina.— Mizell *v.* Moore, 29 N. C. 255; Haughton *v.* Leary, 20 N. C. 14.

Pennsylvania.— Russ *v.* Sadler, 197 Pa. St. 51, 46 Atl. 903; Hotchkiss *v.* Roehm, 181 Pa. St. 65, 37 Atl. 119; Roig *v.* Tim, 103 Pa. St. 115; Sennett *v.* Johnson, 9 Pa. St. 335; Morrison *v.* Moreland, 15 Serg. & R. 61; Tradesmen's Nat. Bank *v.* Cresson, 10 Pa. Co. Ct. 57.

South Carolina.— Union Bank *v.* Heyward, 15 S. C. 296.

Texas.— Holliman *v.* Rogers, 6 Tex. 91.

Vermont.— Jackson *v.* Hunt, 76 Vt. 284, 56 Atl. 1010.

Virginia.— Francisco *v.* Shelton, 85 Va. 779, 8 S. E. 789. But see Turberville *v.* Self, 4 Call 580, holding that in replevin an award posterior to the distress, but upon terms which were anterior, finding a balance due to plaintiff, may be set off against the rent.

United States.— Deale *v.* Krofft, 7 Fed. Cas. No. 3,698, 4 Cranch C. C. 448 (holding that defendant cannot set off plaintiff's acceptation of defendant's draft not due at the commencement of the action, but due before plea pleaded); McCobb *v.* Lindsay, 15 Fed. Cas. No. 8,704, 2 Cranch C. C. 215 (holding that if a factor sells in his own name the vendee cannot set off a claim against the factor's principal not yet payable); Scott *v.* Jones, 21 Fed. Cas. No. 12,536, 1 Brock. 244 (holding that a debt payable in the future cannot be pleaded in bar to a present demand).

England.—Rogerson *v.* Ladbroke, 1 Bing. 93, 1 L. J. C. P. O. S. 6, 7 Moore C. P. 412, 8 E. C. L. 418; Hutchinson *v.* Reid, 3 Campb. 329 (holding that there can be no set-off in an action brought upon a contract for the sale of goods on credit for a bill at a certain time, when the action is brought before the expiration of the time which the bill had to run); Braithwaite *v.* Coleman, 4 L. J. K. B. 152, 4 N. & M. 654, 30 E. C. L. 602; Evans *v.* Prosser, 3 T. R. 186.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 73.

A judgment is matured, within the meaning of a statute requiring a set-off to be "matured at or before the time it is offered as a set-off," although the time of stay of execution has not expired, and a stay obtained, and the stay did not render the judgment immature, but simply delayed its collection on execution for the time provided by the statute. Hays *v.* Boyer, 59 Ind. 341.

Set-off of legacy in action by executor.— A legatee whose legacy has not been assented to, and when the time has not arrived and the circumstances do not exist when by law it becomes payable, cannot set off the pecuniary provision made for him by the will against an action at law by the executor for the recovery of money due the testator. Howze *v.* Davis, 76 Ala. 381; Sorrelle *v.* Sorrelle, 5 Ala. 245.

A surety who pays the debt after commencement of an action against him by the principal cannot set off that payment in such action. Franklin *v.* McGuire, 10 Ala. 557; Cox *v.* Cooper, 3 Ala. 256; Balser *v.* Wood, 69 Ind. 122; Houghton *v.* Houghton, 37 Me. 72; Garrison *v.* Paul, 1 Pennyp. (Pa.) 380; Martin *v.* Solomons, 10 Rich. (S. C.) 533. And see, generally, PRINCIPAL AND SURETY, 32 Cyc. 245.

93. McGuire *v.* Edsall, 14 Mont. 359, 36 Pac. 453; Freide *v.* Weissenthanner, 57 N. Y. Suppl. 831, 29 N. Y. Civ. Proc. 187; Reilly *v.* Lee, 85 Hun (N. Y.) 315, 32 N. Y. Suppl. 976 [*affirmed* in 155 N. Y. 691, 50 N. E. 1121]; Sprout *v.* Crowley, 30 Wis. 187.

tion,[94] and furthermore the debt must continue due up to the time of trial.[95] But defendant may set off a demand not due till after suit brought, if he has made an agreement with plaintiff to that effect,[96] and under some statutes it has been held that a claim coming due before trial may be set off,[97] counter-claimed,[98] or reconvened;[99] and it has been held that, although a debt not subsisting at the commencement of the action cannot be set off, if the debt subsist at that time, but be not demandable or due till after the commencement of the action, it may then be taken advantage of by a plea *puis darrein continuance*,[1] and if part of a book-account be due before action brought the whole may be counter-claimed, although the balance became due after suit brought, on the ground that an account is entire and cannot be subdivided.[2]

b. Rule in Equity. A debt due at a future time cannot as a general rule be set off in equity against a debt presently due;[3] and equity has no power to prevent a party from collecting at law a debt due him because he owes to defendant a debt not due and which defendant may not be able to collect when it is due, if this fund is not stayed in his hands.[4] But a set-off will be allowed in equity on the application of complainant where defendant is insolvent, even though the debt of complainant to defendant is not due,[5] although the rule is otherwise if the debt of defendant to complainant is not due;[6] but where plaintiff is insolvent defendant may set off in equity a demand, although not yet due or payable,[7] and he may set off against a matured debt assigned to plaintiff a debt not due at the time of assignment, the assignor being insolvent.[8]

5. Pendency of Another Action Relating to the Same Claim. Although there has been considerable diversity of opinion on the subject it is held in a majority of the cases that pendency of another action for a claim offered in recoupment,[9] set-off,[10]

94. Sandel *v.* George, 18 La. Ann. 526.

95. Eyton *v.* Littledale, 7 D. & L. 55, 4 Exch. 159, 18 L. J. Exch. 369. See Murray *v.* Mann, 2 Exch. 538, 12 Jur. 634, 17 L. J. Exch. 256.

96. Warren *v.* Franklin Ins. Co., 104 Mass. 518 (holding that in an action on an insurance policy by the insured, where it appears that the policy contained a stipulation that in case of loss all sums due to the insurers when the loss became due should be first deducted, and all sums coming due should be paid or satisfactorily secured, before payment of the loss, the insurer could set off against the amount of the loss the amounts of notes becoming due from the insured, after the commencement of the action); Morrison *v.* Moreland, 15 Serg. & R. (Pa.) 61.

97. Farmers', etc., Bank *v.* Franklin Bank, 31 Md. 404.

In Iowa, under Code, § 3570, defendant may counter-claim a demand which he held at the commencement of the action but not matured at that time, if matured when pleaded. Brown *v.* Wieland, 116 Iowa 711, 89 N. W. 17, 61 L. R. A. 417.

98. Smith *v.* French, 141 N. C. 1, 53 S. E. 435, holding that under Revisal (1905), § 481, providing that a counter-claim must be one existing in favor of a defendant and against plaintiff between whom a several judgment might be had in the action arising: (1) Out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claims, or connected with the subject of the action; or (2) in an action arising on contract any other cause of action also on contract and existing at the commencement of the action, a counter-claim arising under the first subdivision may be pleaded and enforced, although it did not entirely mature before the answer filed or trial had, but that under the second subdivision a counter-claim must exist and be due at the commencement of the action.

99. Dignowitty *v.* Alexander, 25 Tex. Suppl. 162; Griffin *v.* Chubb, 16 Tex. 219.

1. Keith *v.* Smith, 1 Swan (Tenn.) 92.

2. Thetford *v.* Hubbard, 22 Vt. 440.

3. Parsons *v.* Root, 41 Conn. 161; Spaulding *v.* Backus, 122 Mass. 553, 23 Am. Rep. 391; Reppy *v.* Reppy, 46 Mo. 571; Dunn *v.* Uvalde Asphalt Paving Co., 175 N. Y. 214, 67 N. E. 439.

4. Hayes *v.* Hayes, 2 Del. Ch. 191, 73 Am. Dec. 709.

5. Bradley *v.* Angel, 3 N. Y. 475; Lindsay *v.* Jackson, 2 Paige (N. Y.) 581. See also Jones *v.* Robinson, 26 Barb. (N. Y.) 310.

6. Bradley *v.* Angel, 3 N. Y. 475; Lindsay *v.* Jackson, 2 Paige (N. Y.) 581.

7. Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Aldrich *v.* Campbell, 4 Gray (Mass.) 284; Bigelow *v.* Folger, 2 Metc. (Mass.) 255, where plaintiff's debt fell due pending suit.

8. Assets Realization Co. *v.* Buffalo, 118 N. Y. App. Div. 571, 103 N. Y. Suppl. 153.

9. Naylor *v.* Schenck, 3 E. D. Smith (N. Y.) 135.

10. *Illinois.*— Clayes *v.* White, 65 Ill. 357; Gaddis *v.* Leeson, 55 Ill. 522; King *v.* Bradley, 44 Ill. 342. But see Smith *v.* Billings, 62 Ill. App. 77, where in equity a set-off was

counter-claim,[11] or reconvention[12] does not affect the right of plaintiff in the former action to interpose the claim as a cross demand when sued by defendant in the former action, even after verdict in the former action,[13] or after judgment from which an appeal is pending,[14] nor even though plaintiff has paid the money into court in such former suit.[15] But defendant may be compelled to elect between his own suit and the recoupment claimed, and if he choose the latter his own suit may be stayed,[16] and the same rule has been held applicable to counter-claims.[17] A minority of the cases hold that a demand in set-off cannot avail if it appear that an action is then pending for the same cause,[18] and the same rule has been applied to counter-claim[19] and reconvention.[20] These cases take the ground that as a set-off is in the nature of a cross action,[21] defendant cannot be permitted to carry on two suits for the same cause of action at the same time, nor to split up his cause of action which, by introducing the offset, he would in effect do,[22] and that plaintiff may reply to defendant's set-off matter which, if he were defendant, he could set up by a plea in abatement, namely, the pendency of a former action.[23] But even under the minority rule the pendency of another action for a different cause of action does not affect the right of set-off, although the former action involved the same subject.[24] A party cannot avail himself of the same set-off[25] or counter-claim[26] in two or more separate actions against him.

disallowed because of the pendency of other actions for the same cause.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811.

Michigan.— Jennison Hardware Co. *v.* Godkin, 112 Mich. 57, 70 N. W. 428; Seventh Day Adventist Pub. Assoc. *v.* Fisher, 95 Mich. 274, 54 N. W. 759.

Missouri.— Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231.

New York.— Lignot *v.* Redding, 4 E. D. Smith 285; Naylor *v.* Schenck, 3 E. D. Smith 135; Tuckerman *v.* Corbin, 66 How. Pr. 404; Lightbody *v.* Potter, 10 Wend. 534.

Pennsylvania.— Stroh *v.* Uhrich, 1 Watts & S. 57; Cochran *v.* Cutter, 18 Pa. Super. Ct. 282. But see Good *v.* Good, 5 Watts 116 [*distinguishing* Stroh *v.* Uhrich, *supra*], holding that a defendant cannot avail himself by way of set-off of a debt against plaintiff for which a suit is pending on appeal from arbitration by the party offering such set-off on the ground that such a set-off could not be allowed "without contravening the provisions of the Acts of Assembly concerning arbitration, and producing great inconvenience and confusion."

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim" § 71.

11. Lindsay *v.* Stewart, 72 Cal. 540, 14 Pac. 516 (holding, however, that defendant could only use his counter-claim as a defense, and could not obtain an affirmative judgment thereon); Weinberg *v.* Weinberg, 60 Hun (N. Y.) 167, 14 N. Y. Suppl. 352; Wiltsie *v.* Northam, 3 Bosw. (N. Y.) 162; Fuller *v.* Read, 6 Duer (N. Y.) 697, 15 How. Pr. 236 (holding, however, that when both actions shall have been put at issue, if it shall then appear that both causes of action may be tried on their merits in either suit the court may in its discretion stay one until the trial of that which involves the whole merits has been disposed of).

12. Continental Nat. Bank *v.* Weems, 69 Tex. 489, 6 S. W. 802, 5 Am. St. Rep. 85.

13. Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; Naylor *v.* Schenck, 3 E. D. Smith (N. Y.) 135; Bell *v.* Cowgell, 1 Ashm. (Pa.) 7; Baskerville *v.* Brown, 2 Burr. 1229, 97 Eng. Reprint 804, W. Bl. 293, 96 Eng. Reprint 164.

14. Gaddis *v.* Leeson, 55 Ill. 522; King *v.* Bradley, 44 Ill. 342. But see Willard *v.* Fox, 18 Johns. (N. Y.) 497.

15. Evans *v.* Prosser, 3 T. R. 186.

16. Fabbricotti *v.* Launitz, 3 Sandf (N. Y.) 743; Tuckerman *v.* Corbin, 66 How. Pr. (N. Y.) 404, holding that while a defendant is not precluded from using a claim because of the fact that he has commenced suit against plaintiff to recover on such claim, he must elect either to proceed in the suit or to confine himself to his recoupment, and if he elect the former then he may be prohibited from setting up the same matter in this suit, if the latter then the proceedings in the former action must be stayed.

17. Fuller *v.* Read, 6 Duer (N. Y.) 697, 15 How. Pr. 236.

18. Lock *v.* Miller, 3 Stew. & P. (Ala.) 13; Whitaker *v.* Pope, 48 Ga. 13 (holding that a debt could not be set off where there was at the time suit pending against plaintiff for the same debt in favor of one who was at the bringing of said suit the true owner of the set-off); Nave *v.* Wilson, 33 Ind. 294; Snodgrass *v.* Smith, 13 Ind. 393; Rankin *v.* Harper, 4 Ind. 585; Banigan *v.* Woonsocket Rubber Co., 21 R. I. 171, 42 Atl. 518, 43 Atl. 538.

19. Becroft *v.* Dossman, 7 Ohio Dec. (Reprint) 322, 2 Cinc. L. Bul. 110.

20. Pierce *v.* Millar, 3 Mart. N. S. (La.) 354.

21. See *supra*, I, B, 1.

22. Lock *v.* Miller, 3 Stew. & P. (Ala.) 13.

23. Whitaker *v.* Pope, 48 Ga. 13.

24. Debolt *v.* Carter, 31 Ind. 355.

25. Chase *v.* Strain, 15 N. H. 535. See also Merchants' Bank *v.* Rawls, 21 Ga. 289.

26. Tuckerman *v.* Corbin, 66 How. Pr.

C. Claims Arising Out of Contract — 1. In General. Claims arising out of contracts, express or implied,[27] may be set off,[28] recouped,[29] or counter-claimed.[30]

2. Necessity of Connection With Plaintiff's Cause of Action — a. Recoupment — (I) *General Rules.* Defendant may recoup damages arising out of breach of the same contract or transaction as that sued on,[31] and if plaintiff sues on one part of a contract, consisting of mutual stipulations made at the same time

(N. Y.) 404; Strong *v.* District of Columbia, 17 Ct. Cl. 217, holding that defendant must elect in which suit his counter-claim shall be pleaded. But see Ward *v.* Ward, 24 Nova Scotia 179, holding that the same facts may be pleaded as counter-claims to two separate actions and neither can be stricken out.

27. Read *v.* Jeffries, 16 Kan. 534; Stevens *v.* Able, 15 Kan. 584; Woods *v.* Ayres, 39 Mich. 345, 33 Am. Rep. 396 (holding, however, that a claim for log-driving, under Mich. Laws (1863), p. 374, providing that, if any person put timber in the river for the purpose of floating it without making adequate provision for the breaking by jams, any other person floating timber may break such jams at the cost and expense of the person owning the timber, is not an implied contract within the statute relating to set-off, but is a quasi-contract and may not be the subject of set-off); Folsom *v.* Carli, 6 Minn. 28, 80 Am. Dec. 456 (holding, however, that in an action on a promissory note a claim for use and occupation of lands held by plaintiff adversely to defendant cannot be set up as a counter-claim, not being an action upon an implied contract within the meaning of the statute); McDougall *v.* Walling, 48 Barb. (N. Y.) 364.

A liability as for money had and received is a proper subject of set-off. Tisdale *v.* Maxwell, 58 Ala. 40; Truesdell *v.* Wallis, 4 Pick. (Mass.) 63; Richards *v.* Blood, 17 Mass. 66; Harrison Wire Co. *v.* Moore, 55 Mich. 610, 22 N. W. 62; McGee *v.* Pope, 33 N. J. L. 271; De Taslet *v.* Cronsellat, 7 Fed. Cas. No. 3,827, 1 Wash. 504.

28. Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361 (holding that where a person transfers a note payable to bearer and undertakes to guarantee the payment of the note he will be liable to the transferee on that special contract, so that it is a proper matter of set-off); Sponenbarger *v.* Lemert, 23 Kan. 55 (holding that in an action against a constable on his official bond for his failure to sell under an execution, he may, under Civ. Code, § 98, declaring that a set-off can only be pleaded in an action on contract and must be a cause of action arising on contract, plead by way of set-off that plaintiff is indebted to him for fees which accrued to him in the action in which the execution was issued); Harrison *v.* Slone, 4 Bush. (Ky.) 577; Manning *v.* Watson, Cheves (S. C.) 60 (setting off damage *in transitu* in an action for freight, as a claim arising in contract); Thompson *v.* Congdon, 43 Vt. 396 (holding that a claim for the use of a carriage, including damages thereto by plaintiff's negligence, under the contract of hire, is a claim founded on a contract within the statute); Herrick *v.* Richardson, 17 Vt. 375.

A breach of warranty is a breach of a contract, and may be sued on as such; and for that reason has been allowed to be given in evidence by defendant, under the statute of set-off, not only in an action on the same contract, in which it might be admissible by way of recoupment only, without the aid of the statute, but also in an action upon a distinct contract. Halfpenny *v.* Bell, 82 Pa. St. 128; Seigworth *v.* Leffel, 76 Pa. St. 476; Hunt *v.* Gilmore, 59 Pa. St. 450.

Damages arising on a special contract cannot be set off in an action of debt. Smock *v.* War, 4 N. J. L. 306, holding that this is so, not because a jury cannot ascertain the damages on a special contract, but because the policy of the law will not permit matters of a nature so totally distinct, and which require pleadings so totally different, to be blended together in one action.

29. Harman *v.* Bannon, 71 Md. 424, 18 Atl. 862.

30. Dennis *v.* Belt, 30 Cal. 247; Dyas *v.* Hanson, 14 Mo. App. 363 (holding that an answer alleging failure of a plaintiff to present to the drawer a draft, delivered by defendant to plaintiff for collection, states a cause of action arising on contract, within the statute of counter-claim); Shipman *v.* Lansing, 25 Hun (N. Y.) 290; McDougall *v.* Wallings, 48 Barb. (N. Y.) 364 (holding that the right to recover money lost by betting is a demand arising upon an implied contract and may therefore be counter-claimed); Curtis *v.* Barnes, 30 Barb. (N. Y.) 225 (holding that where plaintiff, pending an arbitration, refuses to complete it and brings an action, defendant's claim for the expenses of arbitration, which might be recovered on the arbitration bond, is a claim arising on contract, within the meaning of the code and may be counter-claimed); Denny *v.* Horton, 3 N. Y. Civ. Proc. 255 (breach of contract to employ).

A mere expression of opinion upon which no action on contract would lie cannot be the basis of counter-claim. Kolp *v.* Specht, 11 Tex. Civ. App. 685, 33 S. W. 714.

31. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Martin *v.* Hill, 42 Ala. 275 (holding also that damages are not to be restricted to the time of commencement of suit, but extend to the time of trial); Mauldin *v.* Armistead, 14 Ala. 702; Hatchett *v.* Gibson, 13 Ala. 587; Hunter *v.* Waldron, 7 Ala. 753.

Arkansas.—Berry *v.* Diamond, 19 Ark. 262, holding that, in an action on a note given for the price of slaves, defendant might re-

and relating to the same subject-matter, defendant may recoup damages arising from the breach of another part, whether the different parts are contained in one instrument or several,[32] and whether one part is in writing and the other part by

coup for damages in consequence of plaintiff's harboring and refusal to redeliver the slave, who ran off before the expiration of the time of hiring.

California.— Campbell *v.* Heney, 128 Cal. 109, 60 Pac. 532.

District of Columbia.—Fitzgerald *v.* Wiley, 22 App. Cas. 329.

Georgia.— Hamilton *v.* Granger, L., etc., Ins. Co., 65 Ga. 750; Grimes *v.* Reese, 30 Ga. 330.

Illinois.— McArthur Bros. Co. *v.* Whitney, 202 Ill. 527, 67 N. E. 163 [*affirming* 104 Ill. App. 570]; Waterman *v.* Clark, 76 Ill. 428; Garfield *v.* Huls, 54 Ill. 427; Williams *v.* Schmidt, 54 Ill. 205 (holding that, in assumpsit, by a lessee for the value of personal property taken by the lessor upon resuming possession of a leased mine for non-payment of rent, defendant might recoup for damages sustained in violation of the covenants in the lease as to skilful work, although the lessee had associated others with him in working the mine); Mears *v.* Nichols, 41 Ill. 207, 89 Am. Dec. 381 (holding that in an action for the recovery for the manufacture of an article under a contract defendant may recoup damages for breach of such contract); Lunn *v.* Goge, 37 Ill. 19, 87 Am. Dec. 233; Lloyd *v.* Manufacturers, etc., Co., 102 Ill. App. 551; Beam *v.* Cleveland, etc., R. Co., 97 Ill. App. 24 (allowing recoupment for damages to goods transported in an action to recover for transportation); Davis, etc., Bldg., etc., Co. *v.* Moberly, 65 Ill. App. 228.

Indiana.— Heaston *v.* Colgrove, 3 Ind. 265.

Maine.— Cota *v.* Mishow, 62 Me. 124.

Massachusetts.— Jennings *v.* Moore, 189 Mass. 197, 75 N. E. 214; Stacy *v.* Kemp, 97 Mass. 166, holding that, in an action on a promissory note against the maker, the latter may show in recoupment damages sustained by him in consequence of the payee's depriving him of part of the consideration.

Michigan.— Alderton *v.* Williams, 130 Mich. 626, 90 N. W. 661; Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297; Molby *v.* Johnson, 17 Mich. 382.

New York.— Bloodgood *v.* Ingoldsby, 1 Hilt. 388; Murden *v.* Priment, 1 Hilt. 75; Batterman *v.* Pierce, 3 Hill 171.

Tennessee.— Nashville, etc., R. Co. *v.* Chulmey, 6 Heisk. 325.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 45.

Recoupment will lie for overpayments.— Wiseberg *v.* Novelty Hat Mfg. Co., 3 Ga. App. 362, 59 S. E. 1112.

Recoupment is properly applicable to cases where the same contract imposes mutual duties and obligations on the two parties, and one seeks a remedy for the breach of duty by the second, and the second meets the demand by a claim for the breach of duty by the first. Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

32. *Arkansas.*— Key *v.* Henson, 17 Ark. 254, holding that where there were contemporaneous mutual stipulations between the parties, all relating to the same subject-matter and all uniting in one contract of sale and purchase, there can be no difference, in principle, whether the whole transactions were included in one written instrument setting forth the cross stipulations of each party for himself, or whether it takes the form of a separate and distinct undertaking of each party, and that recoupment will be allowed, by way of damages suffered by a partial failure of the consideration of an agreement, whether the action be on the original contract, or an instrument given to secure the purchase-money.

Colorado.— Strang *v.* Murphy, 1 Colo. App. 357, 29 Pac. 298, holding that where one of two partners gave his individual note in part payment for some horses purchased by the firm, and the seller gave a written warranty that the horses were sound at the time of the sale, it was error for the court, in an action by the seller on the note, to refuse to permit the firm to recoup, as the damages sought to be recovered grew out of the same transaction in which the indebtedness was contracted.

Florida.— Branch *v.* Wilson, 12 Fla. 543.

Georgia.— Aultman *v.* Mason, 83 Ga. 212, 9 S. E. 536 (holding that where a contract of purchase was a single one, although separate notes were given for the property, an engine and a sawmill, damages for a breach of warranty of the engine could be deducted from the notes in an action thereon); Finney *v.* Cadwallader, 55 Ga. 75; Mell *v.* Moony, 30 Ga. 413. See also Thompson *v.* Mitchell, 74 Ga. 797.

Illinois.— Galena, etc., R. Co. *v.* Barrett, 95 Ill. 467; Melendy *v.* Keen, 89 Ill. 395; Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250 [*affirmed* in 103 Ill. 317].

Indiana.— Moellering *v.* Kayser, 110 Ind. 533, 11 N. E. 604, holding also that proof of slight deviation from a contract, by mutual consent, was not an abandonment thereof nor fatal to defendant's right to recoup the damages sustained for defective work done thereunder.

Maryland.— Warfield *v.* Booth, 33 Md. 63, holding that, in an action to recover damages for defendant's breach of agreement not to engage in practice as a physician, in a certain town, made on defendant's sale of his good-will to plaintiff, defendant may plead by way of recoupment a note executed by plaintiff to him for a part of the purchase-price on the sale of such good-will.

Missouri.— Langdon *v.* Markle, 48 Mo. 357 (holding that, where a note grows out of a contract and is executed in pursuance to its stipulation, questions of recoupment between the parties to the note should be treated as though the action had been brought on the original contract, and recoupment was thus allowed in an action for rent, the lessee re-

parol,[33] and although the written part is under seal.[34] Thus recoupment of damages is allowed defendant in cases where plaintiff, who has only partially performed his portion of the contract, comes into court asking compensation for such partial performance;[35] and defendant, in an action on an express contract, is entitled to have deducted from the price, by way of recoupment, all damages arising out of the disregard of the obligations imposed by law in the performance of the contract, as well as those occasioned by a violation of the express terms thereof,[36] and in an action on a *quantum meruit* for labor done under a special contract, which has not been substantially performed by plaintiff on his part, damages growing out of the non-performance of the special contract, which do not enter into the contract price, may be recouped.[37] But defendant cannot recoup for matters not connected with the basis of plaintiff's claim, and which are founded upon an independent and distinct contract or transaction.[38] And the mere fact that by one trans-

couping damages arising from leasing adjoining premises for the sale of intoxicating liquors contrary to contract); Green *v.* Bell, 3 Mo. App. 291 (holding that, in an action by an executor for rent due under a lease executed by his testator, the lessee may recoup the damages sustained by reason of the landlord's breach of the covenant to repair, although the covenant to pay and the covenant to repair are separate and distinct covenants).

New York.—Cram *v.* Dresser, 2 Sandf. 120; Batterman *v.* Pierce, 3 Hill 171; Reab *v.* McAlister, 8 Wend. 109; Spalding *v.* Vandercook, 2 Wend. 431; Estelle *v.* Dinsbeer, 9 Misc. 485, 30 N. Y. Suppl. 226.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 44.

Where a note is given pursuant to a contemporaneous written agreement, in a suit on the note between the original parties, the breach by the payee of the agreement may be shown by the maker by way of recoupment, the note being so intimately connected with the contemporaneous writing that together they constitute "the contract sued upon," within the meaning of the statute concerning recoupment. Babbit *v.* Moore, 51 N. J. L. 229, 17 Atl. 99. But see Hill *v.* Southwick, 9 R. I. 299, 11 Am. Rep. 250, holding that a promissory note and an agreement which is the consideration for the note are such independent contracts that the breach of one cannot be set up by way of recoupment on the other.

33. *Arkansas.*— Key *v.* Henson, 17 Ark. 254.

Florida.— Branch *v.* Wilson, 12 Fla. 543.

Georgia.— Mell *v.* Moony, 30 Ga. 413.

Illinois.— Bross *v.* Cairo, etc., R. Co., 9 Ill. App. 363 (holding that, in an action on a note given to aid the construction of a railway, defendant could recoup damages arising from the construction of the railway across his land in violation of an agreement; and this, although the agreement was by parol, if it was a part of the transaction upon which the note was given); Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250 [*affirmed* in 103 Ill. 317].

New York.— Batterman *v.* Pierce, 3 Hill 171; Reab *v.* McAlister, 8 Wend. 109; Spalding *v.* Vandercook, 2 Wend. 431.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 44.

34. Eckles *v.* Carter, 26 Ala. 563 (holding that, where on an exchange of slaves between plaintiff and defendant, the parties reciprocally executed bills of sale, under seal, containing warranties of soundness; and plaintiff afterward brought covenant to recover damages for defendant's breach of warranty, defendant might recoup the damages which he had sustained by plaintiff's breach of warranty); Hill *v.* Bishop, 2 Ala. 320 (holding that in an action of covenant plaintiff's verdict for damages may be reduced by showing that defendant has been injured by plaintiff's omission to perform stipulations in the same contract).

35. *Massachusetts.*— Campbell *v.* Somerville, 114 Mass. 334; Bee Printing Co. *v.* Hichborn, 4 Allen 63.

Mississippi.— Jefferson County *v.* Arrghi, 51 Miss. 667; Dunlap *v.* Hand, 26 Miss. 460.

Missouri.— Yeats *v.* Ballentine, 56 Mo. 530; Heman *v.* Compton Hill Imp. Co., 58 Mo. App. 480; Linnenkohl *v.* Winkelmeyer, 54 Mo. App. 570.

New York.— Murden *v.* Priment, 1 Hilt. 75; Sickels *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527; Van Hovenburgh *v.* Lindsay, 1 Alb. L. J. 123.

Pennsylvania.—Wright *v.* Cumpsty, 41 Pa. St. 102.

Tennessee.— Crouch *v.* Miller, 5 Humphr. 586.

West Virginia.— Natural Gas Co. *v.* Healy, 33 W. Va. 102, 10 S. E. 56.

United States.— Michigan Yacht, etc., Co. *v.* Busch, 143 Fed. 929, 75 C. C. A. 109.

England.— Basten Foster *v.* Butter, 7 East 479.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 45.

36. Hattin *v.* Chase, 88 Me. 237, 33 Atl. 989.

37. Allen *v.* McKibbin, 5 Mich. 449.

38. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Mayberry *v.* Leech, 58 Ala. 339 (where, in an action to recover a balance of account, recoupment was disallowed for loss incurred by plaintiff's failure to obey instructions to sell goods not included in the covenant); Walker *v.* McCoy, 34 Ala. 659; Mauldin *v.* Armistead, 14 Ala. 702; Hatchett *v.*

action defendant came under obligation to enter into the other does not make them the same,[39] and plaintiff having failed to establish the contract declared on defendant cannot recoup damages for breach of the contract actually made and alleged in the answer.[40]

(II) *APPLICATION TO PARTICULAR CONTRACTS.* In an action for work, labor, and services, if it appears that the work was not performed in a skilful and workmanlike manner, the amount of damages to defendant may be recouped,[41]

Gibson, 13 Ala. 587. See also Hembree *v.* Glover, 93 Ala. 622, 8 So. 660.

Arkansas.— White *v.* Reagan, 32 Ark. 281; Key *v.* Henson, 17 Ark. 254.

Connecticut.— McLean *v.* McLean, 1 Conn. 397. See Starkey *v.* Peters, 18 Conn. 181.

District of Columbia.— McGuire *v.* Gerstley, 26 App. Cas. 193 [*affirmed* in 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581].

Georgia.— Dooley *v.* Gorman, 104 Ga. 767, 31 S. E. 203; Hamilton *v.* Grangers' L., etc., Ins. Co., 65 Ga. 750; Mell *v.* Moony, 30 Ga. 413; Jester *v.* Bainbridge State Bank, 4 Ga. App. 469, 61 S. E. 926; Gem Knitting Mills *v.* Empire Printing, etc., Co., 3 Ga. App. 709, 60 S. E. 365.

Illinois.— Keegan *v.* Kinnare, 123 Ill. 280, 14 N. E. 14 (holding that, in an action on a bond on appeal from a judgment for recovery of real estate, defendant could not recoup damages accruing by the fact that the sheriff, who executed the judgment, forcibly deprived them of the premises and refused to allow him to remove building thereon); Waterman *v.* Clark, 76 Ill. 428; Evans *v.* Hughey, 76 Ill. 115 (holding that, in a suit to recover for services in selling land by an agent, who had neglected to record a mortgage until after the liens had attached to the mortgaged premises, which defendant was compelled to pay, defendant could not recoup therefor); Hubbard *v.* Rogers, 64 Ill. 434; Streeter *v.* Streeter, 43 Ill. 155; De Forrest *v.* Oder, 42 Ill. 500; Stow *v.* Yarwood, 14 Ill. 424; Lloyd *v.* Manufacturers, etc., Warehouse Co., 102 Ill. App. 551; Barker *v.* Turnbull, 51 Ill. App. 226; Poppers *v.* Meager, 33 Ill. App. 19 Hartshorn *v.* Kinsman, 16 Ill. App. 555.

Indiana.— Miles *v.* Elkin, 10 Ind. 329; Slayback *v.* Jones, 9 Ind. 470.

Maryland.— Maryland Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652; Simmons *v.* Haas, 56 Md. 153.

Massachusetts.— Isenburger *v.* Hotel Reynolds Co., 177 Mass. 455, 59 N. E. 120; Brighton Five Cents Sav. Bank *v.* Sawyer, 132 Mass. 185; Home Sav. Bank *v.* Boston, 131 Mass. 277.

Michigan.— Forrest *v.* Johnson, 100 Mich. 321, 58 N. W. 1005; Helwig *v.* Lascowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378; Morehouse *v.* Baker, 48 Mich. 335, 12 N. W. 170; Holland *v.* Rea, 48 Mich. 218, 12 N. W. 167; Molby *v.* Johnson, 17 Mich. 382; Thompson *v.* Richards, 14 Mich. 172.

Mississippi.— Fowler *v.* Payne, 49 Miss. 32.

Missouri.— Grand Lodge of Masons *v.* Knox, 20 Mo. 433, holding that recoupment is where the defense is not presented as a matter of set-off arising on an independent contract, but for the purpose of reducing plaintiff's damages, for the reason that he himself has not complied with the cross obligations arising under the same contract.

New Jersey.— Bozarth *v.* Dudley, 44 N. J. L. 304, 43 Am. Rep. 373, holding that in an action on an implied contract for extras furnished in performing an express contract under seal, defendant cannot recoup damages arising from breach of the express contract.

New York.— Pattison *v.* Richards, 22 Barb. 143; Deming *v.* Kemp, 4 Sandf. 147; Seymour *v.* Davis, 2 Sandf. 239; Cram *v.* Dresser, 2 Sandf. 120; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. 299; Bailey *v.* Martin, 4 Alb. L. J. 30; Batterman *v.* Pierce, 3 Hill 171.

Pennsylvania.— Foster *v.* Bell, 2 Miles 399.

Tennessee.— Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325.

Vermont.— Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

West Virginia.— Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809; Logie *v.* Black, 24 W. Va. 1.

Wisconsin.— Racine County Bank *v.* Keep, 13 Wis. 209.

United States.— Dietrich *v.* Ely, 63 Fed. 413, 11 C. C. A. 266.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 53.

On summary proceedings by a landlord to recover possession of premises for nonpayment of rent, defendant cannot recoup damages for breach of covenants contained in the lease. McSloy *v.* Ryan, 27 Mich. 110.

39. Knitted Mattress Co. *v.* Griggs, 154 Mass. 5, 27 N. E. 774.

40. Haldeman *v.* Berry, 74 Mich. 424, 42 N. W. 57, holding that plaintiff having failed to establish the contract declared on, defendant cannot recoup his damages for breach of the contract actually made and alleged in the answer.

41. *Alabama.*— Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720, holding that where one who has rendered services under a special contract sues therefor under a common count, defendant may set up the special contract and recoup his proper damages for breach thereof.

Arkansas.— Robinson *v.* More, 16 Ark. 97.

Illinois.— Parker *v.* Platt, 74 Ill. 430.

Indiana.— Manville *v.* McCoy, 3 Ind. 148.

Minnesota.— Harlan *v.* St. Paul, etc., R. Co., 31 Minn. 427, 18 N. W. 147.

New York.— Harris *v.* Rathbun, 2 Abb. Dec. 326, 2 Keyes 312; Still *v.* Hall, 20 Wend. 51.

as may damages for any other failure substantially to comply with the contract.[42] Thus, in an action by a contractor, defendant may recoup for damages for delay.[43] If, however, the services are accepted, expressly or impliedly, as a full performance of the contract, defendant cannot recoup for improper performance.[44] Defendant, sued upon a contract of sale, may recoup for breach of warranty,[45] or may defeat recovery by showing that the articles were totally inadequate for the purpose for which they were furnished,[46] and a bailor, when sued upon the contract, may recoup for plaintiff's breach or improper performance of the contract.[47]

b. Set-Off. Although it has been held under some statutes, particularly the earlier ones, that the right of set-off is limited to debts or demands growing out of a transaction independent of the contract sued on,[48] the very general construction of statutes of set-off now is that the right of set-off extends to all mutual debts and demands between the parties, whether independent and unconnected with plaintiff's cause of action,[49] or springing from and connected with the con-

Ohio.— The Wellsville *v.* Geisse, 3 Ohio St. 333, holding that if a person, having performed work under a contract which is an entirety, brings his action on a *quantum meruit* for what work he claims to have fully performed, he cannot cut off defendant's right to recoup the damages on the whole.

Tennessee.— Gibson *v.* Carlin, 13 Lea 440.

Wisconsin.— De Witt *v.* Cullings, 32 Wis. 298.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 45, 46.

42. *Alabama.*— Hunter *v.* Waldron, 7 Ala. 753.

Arkansas.— Ewing *v.* Jansen, 57 Ark. 237, 21 S. W. 430.

Connecticut.— Satchwell *v.* Williams, 40 Conn. 371.

Indiana.— Manville *v.* McCoy, 3 Ind. 148.

Michigan.— Iron Cliffs Co. *v.* Gingress, 42 Mich. 30, 3 N. W. 238; Allen *v.* McKibbin, 5 Mich. 449.

Texas.— Carroll *v.* Welch, 26 Tex. 147; Stoddard *v.* Martin, 3 Tex. App. Civ. Cas. § 85.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 45, 46.

43. Galbraith *v.* Architectural Iron Works, 50 Ill. App. 247 (holding that damages for delay in getting a building ready for occupancy, caused by the non-performance of a building contract, may be recouped in an action for the contract price); Benner *v.* Schmidt, 44 Ill. App. 304 (holding that where a contractor carries out his contract to furnish material, but not as punctually as the contract required, damages from the delay may be recouped from the contract price); Abbott *v.* Gatch, 13 Md. 314, 71 Am. Dec. 635 (holding that damages for not completing a mill at the time agreed may be recouped in an action by the contractor for payment).

Necessary allegations in pleading: Counter-claim in action by architect see BUILDERS AND ARCHITECTS, 6 Cyc. 47. Recoupment, set-off, or counter-claim in action by builder see BUILDERS AND ARCHITECTS, 6 Cyc. 96.

44. Ewing *v.* Janson, 57 Ark. 237, 21 S. W. 430; Delbridge, etc., Co. *v.* Patterson, 105 Mich. 413, 63 N. W. 436, holding that in an action on a note given by the owner of a building in payment for materials furnished the contractor, in the absence of any warranty exacted from plaintiffs when the note was given or other contract in regard to the materials, defendant cannot recoup damages on the ground that the material furnished did not come up to the specifications in the building contract. See also Harris *v.* Rathbun, 2 Abb. Dec. (N. Y.) 326, 2 Keyes 312.

45. The Wellsville *v.* Geisse, 3 Ohio St. 333.

46. Van Havenburgh *v.* Lindsay, 1 Alb. L. J. (N. Y.) 123.

47. Phelps *v.* Paris, 39 Vt. 511, holding also that where a contract to pasture defendant's sheep and cattle was an entire one, defendant could not, in an action to recover the price of the pasturage, be compelled to recoup his damages to the sheep against the cost of the keeping of the sheep, but might recoup such damages against the entire amount due for pasturing both the cattle and sheep.

48. Avery *v.* Brown, 31 Conn. 398; Crookshank *v.* Mallory, 2 Greene (Iowa) 257 (holding that a set-off must be predicated upon an independent demand which defendant has against plaintiff, and that damages caused by reason of work not having been performed according to contract cannot be treated as such); Harris *v.* Ogg, 1 J. J. Marsh. (Ky.) 408 (an action to recover for the sale of tobacco in which defendant was not allowed to set off freight for carrying the tobacco); Richardson *v.* Penny, 10 Okla. 32, 61 Pac. 584.

49. *Alabama.*— Mooney *v.* Hough, 84 Ala. 80, 4 So. 19; Washington *v.* Timberlake, 74 Ala. 259 (holding that a set-off may be a separate and independent demand not connected with the cause of action sued on, if it does not sound in damages merely); Snow *v.* Schomacker Mfg. Co., 69 Ala. 111, 44 Am. Rep. 509 (holding that, in an action for the recovery of pianos sold to defendant, defendant had the right to set off a claim against plaintiff, arising out of the breach of warranty of other pianos sold by plaintiff to defendant).

Georgia.— Nix *v.* Ellis, 118 Ga. 345, 45

tractual transaction upon which plaintiff's claim is based.[50] Similarly, in equity

S. E. 404, 98 Am. St. Rep. 111; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502 (holding that defendant sued on an open account could plead in set-off that he was damaged by plaintiff's wrongful refusal, after demand to return certain notes belonging to defendant, and pledged as collateral to another debt due plaintiff, which was paid); Cannon *v.* Campbell, 69 Ga. 263; Hamilton *v.* Grangers' Loan, etc., Ins. Co., 65 Ga. 750; Zeigler *v.* Scott, 10 Ga. 389, 54 Am. Dec. 395 (holding that usury paid on a former contract may be pleaded as a set-off to an existing debt).

Illinois.— East *v.* Crow, 70 Ill. 91; Lloyd *v.* Manufacturers, etc., Co., 102 Ill. App. 551. But see Freibroth *v.* Miami, 70 Ill. 523, holding that defendant in a mechanic's lien proceeding, upon whose failure to answer a default has been entered against him, has no right to set off against his indebtedness a distinct unconnected debt due him from the petitioner. The ground of the decision seems to be, however, that the set-off could not be allowed because not pleaded, and not because unconnected with petitioner's demand.

Kentucky.—Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628, 17 Ky. L. Rep. 118; Wake *v.* Commonwealth Bank, 2 Dana 394 (holding that, if a partial payment be made upon a note, which is afterward paid in full, or merged in a renewal, without deduction of the partial payment, that may then be considered as so much money had and received by the payee, to the use of the party who paid it; and he may maintain assumpsit for it, or may plead it as a set-off *pro tanto* against the new note); Louisville Bridge Co. *v.* Dodd, 85 S. W. 683, 27 Ky. L. Rep. 454.

Mississippi.— Wilkinson *v.* Searles, 70 Miss. 392, 13 So. 470.

Missouri.— Ashby *v.* Shaw, 82 Mo. 76, holding that the liability of a surety to contribute where his cosurety has paid the debt may be set off in a subsequent action by the surety on a distinct debt against the cosurety.

New York.— Belden *v.* State, 31 Hun 409 [*affirmed* in 103 N. Y. 1, 8 N. E. 363]; Owens *v.* Ackerson, 8 How. Pr. 199; Columbia Ins. Co. *v.* Block, 18 Johns. 149.

Pennsylvania.— Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. 439; Thomas *v.* Shoemaker, 6 Watts & S. 179; Carman *v.* Franklin F. Ins. Co., 6 Watts & S. 155; Phillips *v.* Lawrence, 6 Watts & S. 150; Nickle *v.* Baldwin, 4 Watts & S. 290; Steigleman *v.* Jefferies, 1 Serg. & R. 477. 7 Am. Dec. 626; Wanamaker *v.* Quinn, 27 Pa. Super. Ct. 288; Kelley *v.* Bogue, 1 Phila. 91. See also Brotherton *v.* Haslet, 5 Serg. & R. 334. But see McQuade *v.* Stewart, 48 Pa. St. 198; Charlton *v.* Allegheny City, 1 Grant 208, holding that in scire facias by a city for grading and paving a street defendant could not set off damages sustained by him by reason of the grading of another street by the city, the transactions being independent.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 54.

50. *Arkansas.*— Crawford *v.* McDonald, 84 Ark. 415, 106 S. W. 206.

Florida.— Muller *v.* Ocala Foundry, etc., Works, 49 Fla. 189, 38 So. 64.

Illinois.— East *v.* Crow, 70 Ill. 91; Davis, etc., Bldg., etc., Co. *v.* Moberly, 65 Ill. App. 228.

Iowa.— Logan *v.* Tibbott, 4 Greene 389.

Kansas.— Barton *v.* National Land Co., 27 Kan. 634, holding that in an action brought after judgment in ejectment has been rendered against plaintiff in favor of defendant, for the recovery for the value of lasting and valuable improvements made by plaintiff on the land, defendant is entitled to plead by way of set-off the rental value of the land during the time that plaintiff was in possession thereof.

Maine.— Rogers *v.* Humphrey, 39 Me. 382.

Michigan.— Jones *v.* Hoffman, 150 Mich. 129, 113 N. W. 316.

Pennsylvania.— Noble *v.* James, 2 Grant 278 (holding that where a plaintiff is entitled to recover on a *quantum meruit* or *quantum valebat*, on a contract not entirely performed, defendant may set off the damages arising from the non-performance of the contract, if it be not rescinded by the parties); Carman *v.* Franklin F. Ins. Co., 6 Watts & S. 155; Nickle *v.* Baldwin, 4 Watts & S. 290.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 47.

This rule has been applied in actions for work, labor, and service and materials furnished (Mobile, etc., R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15; Queen *v.* Doolan, 55 Ill. 526; Steinhoff *v.* Centralia Electric Light, etc., Co., 47 Ill. App. 454; Elliot *v.* Heath, 14 N. H. 131; Stover *v.* Hotel Co., 3 Wkly. Notes Cas. (Pa.) 156; Smith *v.* U. S., 11 Ct. Cl. 707, holding that a claim by a contractor for extra work done on a building constructed under contract and a claim by the owner of the building against the contractor for the latter's omission to perform certain work as prescribed by the contract are proper subjects for set-off. But see Rollins *v.* Walker, Brayt. (Vt.) 222), for the recovery of the price for goods sold and delivered (Rogers *v.* Humphrey, 39 Me. 382, where defendant was allowed to set off damages sustained by plaintiff delivering less than the amount contracted for in actions by contractors; Yeomons *v.* Parker, 105 Mich. 323, 63 N. W. 316; Shaw *v.* Badger, 12 Serg. & R. (Pa.) 275, holding that, in an action for the recovery of the price of cattle sold to defendant, defendant may set off the damages sustained by him in consequence of plaintiff's failure to deliver a number of sheep purchased at the same time; Cooke *v.* Rhine, 1 Bay (S. C.) 16), and for freight (Edwards *v.* Todd, 2 Ill. 462; Caldwell *v.* McElroy, 2 Baxt. (Tenn.) 266).

In an action for goods sold at auction for cash defendant may set off a note of plain-

a set-off is not confined to matters arising out of the contract or transaction sued on.[51]

c. Counter-Claim — (I) *Claims Arising Out of the Same Contract or Transaction, or Connected With the Subject of the Action* — (A) *General Rules.* Under the first subdivision of the section of the New York code of civil procedure relating to counter-claims, it is provided that a counter-claim must be based upon a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action,[52] and this provision is found in a majority of the codes and statutes of the other code states, which upon examination are found to be based thereon or substantially similar thereto;[53] and under these sections it is accordingly held that any claim may be counter-claimed which arose out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim,[54]

tiff. Stettinius *v.* Myer, 22 Fed. Cas. No. 13,385, 4 Cranch C. C. 349.

51. Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598.

52. N. Y. Code Civ. Proc. § 501, subd. 1. And see Maders *v.* Lawrence, 49 Hun (N. Y.) 360, 2 N. Y. Suppl. 159; Corrigan *v.* Ritter, 15 N. Y. Suppl. 163, 21 N. Y. Civ. Proc. 82; Littman *v.* Coulter, 7 N. Y. Suppl. 1, 23 Abb. N. Cas. 60; Perry *v.* Foster, 62 How. Pr. (N. Y.) 228.

In New York municipal district courts counter-claims are limited to such as may be set up under Code Civ. Proc. §§ 501, 502. Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269, 93 N. Y. Suppl. 428; Lundine *v.* Callaghan, 82 N. Y. App. Div. 621, 81 N. Y. Suppl. 1052.

53. See the codes and statutes of the several states. And see the following cases:

Idaho.— Murphy *v.* Russell, 8 Ida. 151, 67 Pac. 427.

Indian Territory.— Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Iowa.— Richardson *v.* Richardson, 134 Iowa 242, 111 N. W. 934; Ft. Dodge First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313 (holding that under Code, § 2659, subd. 2, providing that a cause of action in favor of defendant arising out of the transaction connected with the subject of the action may be pleaded as a counter-claim, defendant in an action on a promissory note may set up that certain collateral security for payment of the note, given to the holder of it, has been lost by the negligence of the latter); Bullard *v.* Harkness, 83 Iowa 373, 49 N. W. 855; Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386; Exline *v.* Lowery, 46 Iowa 556.

Nebraska.— Fouts *v.* Mann, 15 Nebr 172, 18 N. W. 64.

Nevada.— Foulks *v.* Rhodes, 12 Nev. 225.

North Carolina.— Lee *v.* Eure, 93 N. C. 5.

Utah.— Dunham *v.* Travis, 25 Utah 65, 69 Pac. 468.

Wisconsin.— Telulah Paper Co. *v.* Patten Paper Co., 132 Wis. 425, 112 N. W. 522; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

United States.— Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281, under an Ohio statute.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 49.

54. *California.*— Stoddard *v.* Treadwell, 26 Cal. 294 (holding that where a merchant employs a manager at a stated salary, and the latter brings an action on the contract for wages, defendant may, on the trial, introduce evidence of a loss of his profits, and diminution of his business, caused by the manager's neglect, under an answer setting up a counter-claim for damages growing out of the neglect of such manager to attend to the business); Mixer *v.* Mixer, 2 Cal. App. 227, 83 Pac. 273.

Connecticut.— Boothe *v.* Armstrong, 80 Conn. 218, 67 Atl. 484.

Idaho.— Murphy *v.* Russell, 8 Ida. 151, 67 Pac. 427.

Indiana.— Hinkle *v.* Margerum, 50 Ind. 240 (where the answer alleged facts arising out of or connected with the cause of action, as the foundation of the claim against plaintiff to enjoin the collection of the notes sued on and prayed for that relief); Mooney *v.* Musser, 34 Ind. 373; Kisler *v.* Tinder, 29 Ind. 270 (holding that in an action for labor an answer setting up that it was done in part performance of a special contract contained in a lease by plaintiff in several specified particulars, wherefore defendant claims damages, is a good counter-claim); Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981; Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672 (where, in an action on a judgment entered against defendants for the price of certain cultivators furnished them by plaintiffs, defendants set up as defense a breach of the warranty made at the time of sale); Cummings *v.* Pence, 1 Ind. App. 317, 27 N. E. 631.

Kansas.— Venable *v.* Dutch, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

Kentucky.— Escott *v.* White, 10 Bush 169 (holding that in an action on a *quantum meruit* for the recovery for work done and materials furnished, defendant may plead by way of counter-claim damages sustained by reason of defective materials furnished and inferior work done); Tinsley *v.* Tinsley, 15 B. Mon. 454 (holding that in an action on an

or any claim which is connected with the subject of the plaintiff's cause of

injunction bond given by defendant to stay execution of a writ of restitution defendant may counter-claim damages sustained by reason of plaintiff's interference with defendant's possession); Linn *v.* Hagan, 92 S. W. 11, 28 Ky. L. Rep. 1292; Garvey *v.* Crouch, 10 Ky. L. Rep. 937 (holding that in an action for the recovery of an alleged balance due to plaintiff, growing out of a consignment and sale of defendant's tobacco, any matter that arose out of that transaction was a proper subject of counter-claim).

Minnesota.— King *v.* Coe Commission Co., 93 Minn. 52, 100 N. W. 667.

Missouri.— Dougherty *v.* Stamps, 43 Mo. 243 (where, in an action on a note by the payee thereof, the answer was that defendant had sustained damages by reason of plaintiff's breach of contract in the sale of land, in consideration of which the note sued on was given, and defendant prayed that the note should be canceled); Johnston *v.* O'Shea, 118 Mo. App. 287, 94 S. W. 783.

New York.— Taylor *v.* New York, 83 N. Y. 625; Vandervort *v.* Mink, 113 N. Y. App. Div. 601, 98 N. Y. Suppl. 772; Numan *v.* Wolf, 73 N. Y. App. Div. 38, 76 N. Y. Suppl. 371; Savage *v.* Buffalo, 50 N. Y. App. Div. 136, 63 N. Y. Suppl. 941; Smith *v.* Rowe, 49 N. Y. App. Div. 582, 64 N. Y. Suppl. 389; Cottle *v.* New York, etc., R. Co., 27 N. Y. App. Div. 604, 50 N. Y. Suppl. 1008; Maders *v.* Lawrence, 49 Hun 360, 2 N. Y. Suppl. 159; Baker *v.* Connell, 1 Daly 469 (holding that in an action to recover liquidated damages fixed in an agreement conveying the goodwill of a business, for a breach thereof, defendant may counter-claim for a portion of the consideration expressed in the consideration which has not been paid, such matters arising out of the cause sued on); Greenwich Warehouse Co. *v.* Maxfield, 8 Misc. 308, 28 N. Y. Suppl. 732 (holding that in an action for storage charges defendant may counter-claim damages to the goods caused by improper storage); Van Horn *v.* New York Pie Baking Co., 110 N. Y. Suppl. 964; Hutkoff *v.* Lauckhardt, 101 N. Y. Suppl. 12; Corrigan *v.* Ritter, 15 N. Y. Suppl. 163, 21 N. Y. Civ. Proc. 82; Barnes *v.* Gilmore, 6 N. Y. Civ. Proc. 286 (where, in a suit to set aside a deed of real property and a contract to reconvey, a claim for rents alleged to be due defendant from plaintiff for use of a part of the premises during a part of the period defendant held under the deed was held to be properly pleaded as a counter-claim); Harris *v.* Curet, 9 Abb. Pr. N. S. 199 (where, in an action *ex contractu* against a licensed innkeeper for loss of plaintiff's goods while a guest, defendant was allowed to counter-claim plaintiff's indebtedness to him for board); New York *v.* Wood, 4 Abb. Pr. N. S. 332; Perry *v.* Foster, 62 How. Pr. 228 (where in an action by a *cestui que trust* under a bill in which plaintiff praved for the income from a trust fund, for an accounting, and for the trustee's removal, defendant was allowed to counter-claim payments to plaintiff under a mistaken interpretation of the will).

North Carolina.— Wilson *v.* Hughes, 94 N. C. 182, where in an action for the specific recovery of a horse defendant was allowed to counter-claim damages sustained by reason of a false warranty of the horse.

South Carolina.— Co-operative Pub. Co. *v.* Walker, 61 S. C. 315, 39 S. E. 525; Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803, where in an action for balance due for work, labor, and service defendant was allowed to counter-claim for the negligent and cruel killing of stock.

Texas.— Bateman *v.* Hipp, (Civ. App. 1908) 111 S. W. 971; Scott *v.* Mexican Nat. R. Co., (App. 1902) 18 S. W. 137.

Washington.— Gray *v.* Granger, 48 Wash. 442, 93 Pac. 912; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380, where in an action by an architect for his plans and his services as superintendent, defendant was allowed to counter-claim damages sustained for defects in the plans.

Wisconsin.— Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263, allowing in an action on interest coupons a counter-claim attacking both the bonds and coupons on the ground of fraud and want of consideration in their issuance.

United States.— Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281 (under an Ohio statute); California Canneries Co. *v.* Pacific Sheet Metal Co., 144 Fed. 886 [*affirmed* in 164 Fed. 978, 980].

Canada.—Dauphin *v.* Starke Cooperage Co., 7 Quebec Pr. 454.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 49, 50.

Where the whole matter arises out of one connected series of transactions the counter-claim is allowable. Harlock *v.* Le Baron, 1 N. Y. Civ. Proc. 168 (where, in an action to recover for professional services rendered by an attorney-at-law in certain cases, defendant was allowed to counter-claim for loss arising from bad, illegal, and foolish advice of the attorney in other cases. This case was decided upon the theory that the entire employment of the attorney in all the cases was the transaction sued on, and carries the doctrine further than the large majority of cases); Roots *v.* Nye, 2 Handy (Ohio) 229, 12 Ohio Dec. (Reprint) 417 (holding that where dealings between merchants have been continuous over a series of years, defendant may, in an action on an account for the dealings for one year, counter-claim a shortage in weights in a previous year in ignorance of which settlement for the preceding year was made); Hunter *v.* Stark, 17 Ont. Pr. 47.

A prayer by defendant for specific performance of the contract sued on is an available counter-claim under N. Y. Code Civ. Proc. § 501, subd. 1. Moser *v.* Cochrane, 107 N. Y. 35, 13 N. E. 442; Bloomgarden *v.* Hoffmann, 116 N. Y. App. Div. 719, 102 N. Y. Suppl. 20; Moser *v.* Cochrane, 13 Daly (N. Y.) 159

action,[55] and the rule is very generally held in the cases to be equally applicable,

[*affirmed* in 107 N. Y. 35, 13 N. E. 442], holding that where plaintiff sought to recover money paid to defendant on a contract for the purchase of real estate, defendant might counter-claim matters tending to show that plaintiff ought not to recover, but ought to be compelled to perform his contract.

The fact that plaintiff alleges no facts to show that the counter-claim arose out of the same transaction does not prevent defendant from setting out the entire transaction, and thus showing the relation of his claim thereto. Story, etc., Co. *v.* Story, 100 Cal. 30, 34 Pac. 671.

In an action to set aside a fraudulent conveyance of land, defendant may plead title in himself by way of counter-claim and ask that the same be quieted as against plaintiff and demand judgment for damages. Tabor *v.* Mackkee, 58 Ind. 290; Grimes *v.* Duzan, 32 Ind. 361.

Counter-claim disallowed as not arising out of the same contract or transaction.— Bloom *v.* Lehman, 27 Ark. 489; James *v.* Center, 53 Cal. 31; Moyle *v.* Porter, 51 Cal. 639; Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125; Miller *v.* Roberts, 106 Ind. 63, 5 N. E. 707; Thompson *v.* Toohey, 71 Ind. 296; McMahan *v.* Spinning, 51 Ind. 187 (holding that to an action for work and labor and materials, an answer claiming damages for a failure to abide by an award of arbitrators, to whom the matter of difference had been submitted, is not matter arising out of or connected with the cause of action, and therefore is not good as a counter-claim); Rennebaum *v.* Atkinson, 103 Ky. 555, 45 S. W. 874, 20 Ky. L. Rep. 254; Nolle *v.* Thompson, 3 Metc. (Ky.) 121; Allen *v.* Hodge, 106 S. W. 255, 32 Ky. L. Rep. 509; McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Schmidt *v.* Bickenback, 29 Minn. 122, 12 N. W. 349; Mayerus *v.* Horscheid, 11 Minn. 243; Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345; Uvalde Asphalt Paving Co. *v.* Morgan Contracting Co., 120 N. Y. App. Div. 498, 104 N. Y. Suppl. 1118; Lilienthal *v.* George Bechtel Brewing Co., 118 N. Y. App. Div. 205, 102 N. Y. Suppl. 1051; Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843 [*affirmed* in 181 N. Y. 584, 74 N. E. 1124]; Burnett *v.* Burnett, 86 N. Y. App. Div. 386, 83 N. Y. Suppl. 760; Marshall *v.* Friend, 66 N. Y. App. Div. 624, 73 N. Y. Suppl. 1140 [*affirming* 35 Misc. 101, 71 N. Y. Suppl. 221]; Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126]; Smith *v.* Hilton, 50 Hun (N. Y.) 236, 2 N. Y. Suppl. 820; Burns *v.* Nevins, 27 Barb. (N. Y.) 493; Moore *v.* Trimmer, 1 Silv. Sup. (N. Y.) 171, 6 N. Y. Suppl. 430, 17 N. Y. Civ. Proc. 99 (disallowing, in an action by an overseer of the poor for a statutory penalty for illegally selling liquor, a counter-claim alleging that plaintiff owes defendant money advanced to him officially, under a promise to refund it if he should sue defendant for such a penalty); Thorp *v.* Philbin, 15 Daly (N. Y.) 155, 3 N. Y. Suppl. 939; Romaine *v.* Brewster, 10 Misc. 120, 30 N. Y. Suppl. 948, 24 N. Y. Civ. Proc. 121 (holding that, in an action for suit, a counter-claim for damages resulting from constructive eviction by reason of the untenantable condition of the premises, without alleging a covenant in the lease for quiet enjoyment, states a cause of action not arising out of the same transaction); Biershenk *v.* Stokes, 18 N. Y. Suppl. 854 (where in an action for work and labor a counter-claim for the expenses of removing a lien filed by plaintiff, and preparing for an anticipated action to enforce the lien, was disallowed); Griffin *v.* Thomas, 128 N. C. 310, 38 S. E. 903; Davison *v.* West Oxford Land Co., 121 N. C. 146, 28 S. E. 266; Byerly *v.* Humphrey, 95 N. C. 151; Smead *v.* Chrisfield, 1 Disn. (Ohio) 18, 12 Ohio Dec. (Reprint) 460; Roots *v.* Nye, 2 Handy (Ohio) 229, 12 Ohio Dec. (Reprint) 417; Evens *v.* Hall, 1 Handy (Ohio) 434, 12 Ohio Dec. (Reprint) 222; Marthens *v.* Dudley, 7 Ohio Dec. (Reprint) 215, 1 Cinc. L. Bul. 302; Allison *v.* Shinner, 7 Okla. 272, 54 Pac. 471; *Ex p.* Carolina Nat. Bank, 18 S. C. 289; Couch *v.* Parker, 1 Tex. App. Civ. Cas. § 436; Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Sprout *v.* Crowley, 30 Wis. 187; Rickard *v.* Kohl, 22 Wis. 506; California Canneries Co. *v.* Pacific Sheet Metal Co., 144 Fed. 886 [*affirmed* in 164 Fed. 978, 980].

A cause of action arising out of the modification of the contract sued on by plaintiff is within Mills Annot. Code Colo. § 57, subd. 1, providing that a counter-claim may be on a cause of action arising out of the transaction set forth in the complaint. Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. N. S. 126.

55. *Arkansas.*— Dale *v.* Hall, 64 Ark. 221, 41 S. W. 761, holding that where plaintiff, on purchase of a half interest in land, allowed defendant, who owned the other half interest, to continue to collect his rents for the benefit of both; in an action for plaintiff's share of the rents collected, a claim by defendant for damages because plaintiff had driven off the tenants and thereby deprived defendants of rents that would otherwise have accrued, was sufficiently connected with the subject of the action to be a proper counter-claim.

Idaho.— Miller *v.* Hunt, 6 Ida. 523, 57 Pac. 315, holding that in an action by the mortgagee to foreclose his mortgage a mortgagor's counter-claim for purchase-money due him from the mortgagee on bargain and sale of realty is not subject to the objection that there is no connection between the subject-matter set out in plaintiff's complaint and the counter-claim.

Iowa.— Sigler *v.* Hidy, 56 Iowa 504, 9 N. W. 374, holding that in an action on a note a defendant may, by counter-claim, attack the validity of the note, and pray possession thereof; that being a "cause connected with the subject of the action," within Code, § 2659.

Kentucky.— Fox *v.* Pedigo, 40 S. W. 249,

whether such claim be in contract or tort;[56] and a demand which is connected with the subject of the action can be counter-claimed, although based upon a different stipulation from the one sued upon;[57] but claims which neither arise

19 Ky. L. Rep. 271 (holding that in an action to recover purchase-money paid at defendant's request for horses purchased by him, alleged damages by reason of breach of warranty of soundness of horses sold by plaintiff to defendant was properly pleaded as a counter-claim); Ford Lumber, etc., Co. *v.* McQueen, 14 Ky. L. Rep. 521 (where in an action for the recovery of possession of logs lodged on defendant's land, defendant was allowed to counter-claim the damages sustained by reason of the logs lodging on his land).

Minnesota.— Hackett *v.* Karrne, 98 Minn. 240, 107 N. W. 1131; Lahiff *v.* Hennepin County Catholic Bldg., etc., Assoc., 61 Minn. 226, 63 N. W. 493, an action to reform a mortgage for mutual mistake in which an answer admitting the mistake, and alleging default in payment of the mortgage, and praying for foreclosure, was held to constitute a good counter-claim.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345; Davis *v.* Davis, 9 Mont. 267, 23 Pac. 715.

Nebraska.— Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399.

New York.— Numan *v.* Wolf, 73 N. Y. App. Div. 38, 76 N. Y. Suppl. 371; Grantier *v.* Austin, 66 Hun 157, 20 N. Y. Suppl. 968; Maders *v.* Lawrence, 49 Hun 360, 2 N. Y. Suppl. 159; Grange *v.* Gilbert, 44 Hun 9 [*modifying* 10 N. Y. Civ. Proc. 98] (holding that where plaintiff sued to have defendant enjoined from diverting water, defendant might counter-claim plaintiff's improper interference with the water, but not that plaintiff wrongfully stored logs in the river bed); Benton *v.* Moore, 42 Misc. 660, 87 N. Y. Suppl. 717; Powell *v.* Linde Co., 29 Misc. 419, 60 N. Y. Suppl. 1044 [*reversed* on other grounds in 49 N. Y. App. Div. 286, 64 N. Y. Suppl. 153]; De Forest *v.* Andrews, 27 Misc. 145, 58 N. Y. Suppl. 358.

North Carolina.— General Electric Co. *v.* Williams, 123 N. C. 51, 31 S. E. 288.

Washington.— Reynolds *v.* Dickson, 48 Wash. 407, 93 Pac. 910; Peters *v.* Lewis, 33 Wash. 617, 74 Pac. 815; Snohomish First Nat. Bank *v.* Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828.

Wisconsin.— Telulah Paper Co. *v.* Patten Paper Co., 132 Wis. 425, 112 N. W. 522; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Jarvis *v.* Peck, 19 Wis. 74, holding that in an action to quiet title by one claiming under a tax deed defendant may counter-claim alleging title under another tax deed.

United States.— Baer *v.* Sleicher, 153 Fed. 129, 82 C. C. A. 281, under an Ohio statute.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 49, 50.

Counter-claims disallowed as not connected with the subject of the action.— Daniel *v.* Gordy, 84 Ark. 218, 105 S. W. 256; Carpenter *v.* Hewel, 67 Cal. 589, 8 Pac. 314; James *v.* Center, 53 Cal. 31; Moyle *v.* Porter, 51 Cal. 639; Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125; Miller *v.* Roberts, 106 Ind. 63, 5 N. E. 707; Novak *v.* Novak, (Iowa 1907) 111 N. W. 10; Cripps *v.* Buffington, (Iowa 1906) 108 N. W. 231; Kansas Loan, etc., Co. *v.* Hutto, 48 Kan. 166, 29 Pac. 558 (disallowing, in an action to recover damages for the removal of a house from real estate upon which plaintiff claimed a mortgage, a counter-claim alleging that defendant had been prevented from making a loan by reason of the bringing of such action, and had been thereby damaged); Wells *v.* Boyd, 1 Duv. (Ky.) 366; Nolle *v.* Thompson, 3 Metc. (Ky.) 121; Allen *v.* Hodge, 106 S. W. 255, 32 Ky. L. Rep. 509; McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Schmidt *v.* Bickenbach, 29 Minn. 122, 12 N. W. 349; Mayerus *v.* Hoscheid, 11 Minn. 243; Illingworth *v.* Greenleaf, 11 Minn. 235; Leyser *v.* Rindskopf, 3 N. M. 233, 5 Pac. 540 (holding that in an action for the price of goods sold defendant cannot counter-claim damages for an attachment wrongly sued out on the same cause of action, as such damages are not connected with the subject of the action); Uvalde Asphalt Paving Co. *v.* Morgan Contracting Co., 120 N. Y. App. Div. 498, 104 N. Y. Suppl. 1118; Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843 [*affirmed* in 181 N. Y. 584, 74 N. E. 1126]; Burnett *v.* Burnett, 86 N. Y. App. Div. 386, 83 N. Y. Suppl. 760; Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126]; Smith *v.* Hilton, 50 Hun (N. Y.) 236, 2 N. Y. Suppl. 820; Burns *v.* Nevins, 27 Barb. (N. Y.) 493; Thorp *v.* Philbin, 15 Daly (N. Y.) 155, 3 N. Y. Suppl. 939; Biershenk *v.* Stokes, 18 N. Y. Suppl. 854; Byerly *v.* Humphrey, 95 N. C. 151; Dove *v.* Hayden, 5 Oreg. 500; Gage *v.* Hunter, 43 Tex. Civ. App. 241, 94 S. W. 1104; Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114; Barber *v.* Blaiberg, 19 Ch. D. 473, 51 L. J. Ch. 509, 46 L. T. Rep. N. S. 52, 30 Wkly. Rep. 362; Harris *v.* Gamble, 6 Ch. D. 748, 46 L. J. Ch. 768; Padwick *v.* Scott, 2 Ch. D. 736, 45 L. J. Ch. 350, 24 Wkly. Rep. 723; Naylor *v.* Farrer, 26 Wkly. Rep. 809.

56. Lee *v.* Eure, 93 N. C. 5; Northwestern Port Huron Co. *v.* Iverson, (S. D. 1908) 117 N. W. 372.

Counter-claiming damages from torts see *infra*, VI, J, 3.

57. Louisville, etc., R. Co. *v.* Thompson, 18 B. Mon. (Ky.) 735; Atwater *v.* Schenck, 9 Wis. 160.

Where an agreement is not canceled by a second agreement in regard to the same subject-matter, but was incorporated in and became part of it, any damages accruing to the promisor in the latter agreement might be recovered as a counter-claim in an action by the promisee. Dempsey *v.* Moeslein, 16 N. Y. Suppl. 849. But the rule is otherwise, where the second agreement takes the place of the

out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, nor are connected with the subject of the action, cannot be counter-claimed under these sections.[58] Subject to these limitations a counter-claim includes nearly every kind of cross demand existing in favor of defendant and against plaintiff in the same right, whether legal or equitable.[59]

(B) *"Transaction" Defined.* A transaction is defined as the act of transacting or conducting any business, negotiation, management, or proceeding,[60] and as relating to counter-claim is construed according to the natural and ordinary signifi-

first. Griswold *v.* Pieratt, 110 Cal. 259, 42 Pac. 820 (holding that an existing contract, superseding one previously made, cannot, in an action on the original contract, be pleaded as a counter-claim, under Code Civ. Proc. § 438, subd. 1, allowing a cause of action "arising out of the transaction" on which plaintiff bases his action, or connected with the subject of the action, to be so pleaded, but that such contract might be set up under subd. 2, allowing a counter-claim on any other contract); Corrigan *v.* Ritter, 15 N. Y. Suppl. 163, 21 N. Y. Civ. Proc. 82.

58. *Arizona.*— Greene *v.* Hereford, (1908) 95 Pac. 105.

Arkansas.— Mitchell *v.* Moore, (1908) 112 S. W. 216; Hoover *v.* Binkley, (1899) 51 S. W. 73; Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006.

California.— Yorba *v.* Ward, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793.

Dakota.— Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125.

Georgia.— Barnes *v.* Moore, 63 Ga. 164.

Indiana.—Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025.

Kentucky.— Arthurs *v.* Thompson, 97 Ky. 218, 30 S. W. 628, 17 Ky. L. Rep. 118; Nolle *v.* Thompson, 3 Metc. 121 (holding that where defendant in an action on a note, and against whom an attachment had issued and was still in force, filed a petition and set up a counter-claim in his answer, alleging such attachment to be malicious, and claiming damages for the same, and alleging plaintiff to be a non-resident and not to have any property in the state save this note, out of which such damages could be reimbursed, this could not be entertained as a counter-claim, since it did not arise out of the original contract, nor have its foundation or subject in plaintiff's claim, as required by Civ. Code, § 126); Allen *v.* Hodge, 106 S. W. 255, 32 Ky. L. Rep. 509; Duff *v.* Bailey, 96 S. W. 577, 29 Ky. L. Rep. 919.

Minnesota.— McLane *v.* Kelly, 72 Minn. 395, 75 N. W. 601; Mayerus *v.* Hoscheid, 11 Minn. 243.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345.

New York.— Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843 [*affirmed* in 181 N. Y. 584, 74 N. E. 1126]; Burnett *v.* Burnett, 86 N. Y. App. Div. 386, 83 N. Y. Suppl. 760; Williams *v.* Clarke, 82 N. Y. App. Div. 199, 81 N. Y. Suppl. 381; Slade *v.* Montgomery, 53 N. Y. App. Div. 343, 65 N. Y. Suppl. 709; Burns *v.* Nevins, 27 Barb. 493; Thorp *v.* Philbin, 15 Daly 155 3 N. Y. Suppl. 939; Corrigan *v.* Ritter, 15 N. Y. Suppl. 163, 21 N. Y. Civ. Proc. 82.

North Carolina.— Byerly *v.* Humphrey, 95 N. C. 151 (disallowing, in an action to have an alleged forged mortgage canceled as a cloud on title, a counter-claim that the money advanced on the forged mortgage was used to pay off a prior genuine mortgage, and asking to be subrogated to the rights of the first mortgagee); Reynolds *v.* Smathers, 87 N. C. 24.

Oregon.— Le Clare *v.* Thibault, 41 Oreg. 601, 69 Pac. 552.

Wisconsin.— Stolze *v.* Torrison, 118 Wis. 315, 95 N. W. 114.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 49, 50, 54.

59. Smith *v.* French, 141 N. C. 1, 53 S. E. 435.

60. Worcester Dict. [*quoted* in Sheehan *v.* Pierce, 70 Hun (N. Y.) 22, 24, 23 N. Y. Suppl. 1119].

Other definitions are: "That which is done, an affair." Webster Dict. [*quoted* in Sheehan *v.* Pierce, 70 Hun (N. Y.) 22, 24, 23 N. Y. Suppl. 1119; Mogle *v.* Black, 5 Ohio Cir. Ct. 51, 54, 3 Ohio Cir. Dec. 27].

"A matter or affair either completed or in course of completion." Century Dict. [*quoted* in Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34, 34 Pac. 671].

"That combination of acts and events, circumstances and defaults, which viewed in one aspect results in the plaintiff's right of action, and viewed in another aspect results in the defendant's right of action." Pomeroy Rem. & Rem. Rights [*quoted* in Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34, 34 Pac. 671].

The term includes all that is said and done in connection with a purchase and sale, or other trade; and all that is said and done in connection with the perpetration of a fraud or cheat (Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257), in short, all the facts and circumstances out of which arose the injury complained of by plaintiff (Ritchie *v.* Hayward, 71 Mo. 560 [*citing* Xenia Branch Ohio State Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372]), and generally refers not merely to an occurrence or act, but to some commercial or business transaction or dealing, something in the nature of contract, or a series of contracts with respect to the same business or subject (Barker *v.* Walbridge, 14 Minn. 469).

In an action for malicious prosecution the transaction was held to be the commencement of an action against defendant, with malice and without probable cause, and his

cation of the term,[61] and is held to mean something different and broader from a contract, both terms being generally found in code sections relating to counter-claims.[62] The word "transaction" as employed in the code cannot, moreover, be restricted to the simple statement of the wrong complained of by plaintiff, but it must be held to include all the facts and circumstances out of which arose the injury complained of by him alone, for, if to constitute his counter-claim no other facts or particulars were necessary than plaintiff had himself stated, there would be no occasion for defendant to answer at all; he should go on trial to the complaint itself.[63]

(c) *Nature of the Connection.* It is difficult to determine or to lay down a rule for determining when a cause of action set forth in the counter-claim is so connected with plaintiff's cause as to be allowable under the section allowing a counter-claim connected with the subject of the action,[64] for the word "connected" may have a broad signification; the connection may be slight or intimate, remote

arrest therein under process that was thereafter set aside as illegal. Rothschild *v.* Whitman, 132 N. Y. 472, 30 N. E. 858.

61. Xenia Branch Ohio State Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372.

Illustration.— Where a municipal corporation brings suit to rescind an executory agreement for a lease under which it has occupied, on the ground that fraud was practised in procuring the corporation to take it, the landlord may set up a counter-claim for rent accrued by such occupancy, the proposed lease and resolution of the corporation to accept it being regarded as "the transaction" constituting the foundation of plaintiff's claim. New York *v.* Wood, 4 Abb. Pr. N. S. (N. Y.) 332, 3 Abb. Pr. N. S. 467.

62. *Kansas.*— Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257, holding that the word "transaction" being placed in immediate connection with the word "contract," and separated therefrom by the disjunctive "or," the conclusion is certain that the legislature intended by it something different from and additional to "contract," for the most familiar rules of textual interpretation would be violated by the assumption that no such signification was intended.

Missouri.— Ritchie *v.* Hayward, 71 Mo. 560.

New York.— Ter-Kuile *v.* Marsland, 81 Hun 420, 31 N. Y. Suppl. 5 (holding also that the term "subject of the action" is broader than the term "cause of action"); Sheehan *v.* Pierce, 70 Hun 22, 23 N. Y. Suppl. 1119.

Ohio.— Mogle *v.* Black, 5 Ohio Cir. Ct. 51, 3 Ohio Cir. Dec. 27.

Oklahoma.— Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009, holding that it is not necessary that a counter-claim should be founded in or arise out of the contract set forth in the petition, it being sufficient if it arises out of the transaction set forth in the petition or is connected with the subject of the action.

Every contract is a transaction; but every transaction is not a contract (Sheehan *v.* Pierce, 70 Hun (N. Y.) 22, 23 N. Y. Suppl. 1119; Xenia Branch Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372), and a contract is the result of a transaction, while the transaction covers all things done and said which result in a contract (Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257).

63. Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671 (holding that there may be, and generally must be, acts, facts, events, and defaults, in the transaction as a whole, which do not enter into each cause of action, but are confined to one of them alone, and as every transaction is more or less complex, consisting of various facts and acts done by the respective parties, it frequently happens that one or more of these acts would, if viewed by itself, be such a violation of duty as to give to the other a right of action, but the obligation thus created may be so counterbalanced by other matters growing out of the same transaction that no compensation ought to be made therefor); Ritchie *v.* Hayward, 71 Mo. 560; Xenia Branch Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372.

The transaction is not limited to the facts set forth in the complaint, but includes the entire series of acts and mutual conduct of the parties in the business or proceeding between them which formed the basis of the agreement, and, if plaintiff omits or fails to set forth in his complaint the entire transaction out of which his claim arose, defendant may supplement this omission by setting forth in his answer the omitted facts, so that the entire transaction may be before the court, for plaintiff is not at liberty to select an isolated act or fact, which is only one of a series of acts or steps in the entire transaction, and insist upon a judgment on the fact alone, if the fact is so connected with others that it forms only a portion of the transaction. Story, etc., Commercial Co. *v.* Story, 100 Cal. 30, 34 Pac. 671.

A counter-claim on the same state of facts as set forth in the complaint is not permissible under the New York code of civil procedure which requires the facts constituting the counter-claim to be new matter. Prosser *v.* Carroll, 33 Misc. (N. Y.) 428, 68 N. Y. Suppl. 542.

64. Hays *v.* McLain, 66 Ark. 400, 50 S. W. 1006; Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881; Carpenter *v.* Manhattan L. Ins. Co., 22 Hun (N. Y.) 49 (holding that "connected with the subject of the action" plainly in-

or near, the best rule for determining the required connection being that the counter-claim must have such a relation to, and connection with, the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counter-claim should be settled in one action and by one litigation, and that the claim of the one should be offset against or applied upon the claim of the other.[65] But some connection between the claims themselves, independent of their being held by the parties to the action, is required, which may be shown from their originating in the same contract, or transaction, or both, involving some right or interest in the subject of the action:[66] and the mere fact that defendant sets up acts on the part of plaintiff which are prejudicial to the rights of defendant, and that he alleges that these prejudicial acts on plaintiff's part is the reason defendant committed the acts complained of by plaintiff, does not constitute such a connection with the subject of plaintiff's cause of action as to make such acts pleadable as a counter-claim.[67] The term connected with the subject of the action should, however, be construed liberally with a view to settling disputes in one action as far as possible.[68]

(D) *"Subject of the Action" Defined.* The words "subject of the action" have been held to be of indefinite signification,[69] and the meaning of the phrase is variously defined, being more usually held to be the facts constituting plaintiff's cause of action,[70] the words being construed as relating not to the thing itself

dicates a design to enlarge the scope of the old rule relating to set-off and recoupment); Grange *v.* Gilbert, 10 N. Y. Civ. Proc. 98.

65. Carpenter *v.* Manhattan L. Ins. Co., 93 N. Y. 552; Grange *v.* Gilbert, 10 N. Y. Civ. Proc. 98; McHard *v.* Williams, 8 S. D. 381, 383, 66 N. W. 930, 59 Am. St. Rep. 766.

66. Roots *v.* Nye, 2 Handy (Ohio) 229, 12 Ohio Dec. (Reprint) 417.

67. Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745.

68. Sheibley *v.* Dixon County, 61 Nebr. 409, 85 N. W. 399.

69. Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. (N. Y.) 611, 94 N. Y. Suppl. 456; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

70. Lehmair *v.* Griswold, 40 N. Y. Super. Ct. 100, 101; Chamboret *v.* Cagney, 10 Abb. Pr. N. S. (N. Y.) 31, 36 (holding the phrase to mean the subject-matter in dispute, or, to be still more explicit, the facts constituting the cause of action); Telulah Paper Co. *v.* Patten Paper Co., 132 Wis. 425, 430, 112 N. W. 522; Mulberger *v.* Koenig, 62 Wis. 558, 564, 22 N. W. 745. But see Lapham *v.* Osborne, 20 Nev. 168, 172, 18 Pac. 881 [*quoting* Pomeroy Rem. § 775], holding that the phrase is not identical with cause of action.

Other definitions are: "The thing or subject-matter to which the litigation pertains." Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 511, 8 N. W. 338, 9 N. W. 386 [*quoted* in Lapham *v.* Osborne, 20 Nev. 168, 172, 18 Pac. 881].

"The rights and liabilities of the litigants, arising out of their performance or nonperformance of the duties owing to each other under their contract and the mutual transactions thereunder." Ter-Kuile *v.* Marsland, 81 Hun (N. Y.) 420, 425, 31 N. Y. Suppl. 5.

"The plaintiff's principal primary right to enforce which the action is brought." Steinmetz *v.* Cosmopolitan Range Co., 47 Misc. (N. Y.) 611, 94 N. Y. Suppl. 456.

"Subject" defined.—A subject is that on which any operation, either mental or material, is performed; as a subject for contemplation or controversy. Ward *v.* Blackwood, 48 Ark. 396, 403, 3 S. W. 624; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 236, 19 Am. Rep. 278, construing Code Proc. § 150, subd. 1, "or connected with the subject of the action," and holding that in an action to restrain defendant from using an alleged trade-mark "Number 10," the subject of the action was the expression "Number 10."

The subject of an action is either property or a violated right. Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624; Glen, etc., Mfg. Co. *v.* Hall, 61 N. Y. 226, 19 Am. Rep. 278.

Illustrations.—In a suit to recover damages for trespass to land, the subject of the action was held to be the land in controversy. Whitlock *v.* Redford, 82 Ky. 390. In an action by a lessee for conversion of hay and grain the subject of the action was held to be the hay and grain. Adams *v.* Loomis, 4 Silv. Sup. (N. Y.) 558, 8 N. Y. Suppl. 17. In an action for trespass for wrongful entry on land and cutting timber the subject of the action is not the land, but the alleged trespass on it. Brazemore *v.* Bridgers, 105 N. C. 191, 10 S. E. 888. In an action to recover damages for the unlawful detention and conversion by defendant of certain bills of exchange, which they aver belonged to them, and were illegally obtained and converted by defendants, the transaction out of which plaintiff's claim arose, or in which it was founded, was the delivery to, or possession by, defendants, of the bills in question. The subject of the action was the possession and right to the bills. Xenia Branch Ohio State Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372.

about which the controversy has arisen, but rather to the origin and ground of plaintiff's right to obtain the relief asked.[71]

(II) *Claims Arising on Other and Distinct Contracts.* Under the New York code of civil procedure in an action on contract defendant may counter-claim any other cause of action on contract existing at the commencement of the action,[72] and the same rule prevails under many of the codes of the other states,[73] the test of determining whether a particular demand arises on contract, within the meaning of the statutes of counter-claim, having been held to be that if the demand could have been redressed at common law by any of the forms of actions which might be resorted to to recover damages for breach of contract, such as an action for an accounting,[74] or a cause of action for breach of a contract for the sale of merchandise,[75] then it is the proper subject of a counter-claim, otherwise not.[76] But if either plaintiff's [77] or defendant's [78] cause of action does not

71. Collier *v.* Erwin, 3 Mont. 142, 145.

72. N. Y. Code Civ. Proc. § 501, subd. 2. And see Parsons *v.* Sutton, 66 N. Y. 92; Hagin *v.* Cayuga Lake Cement Co., 105 N. Y. App. Div. 269, 93 N. Y. Suppl. 428; Carver *v.* Wagner, 51 N. Y. App. Div. 47, 64 N. Y. Suppl. 747; New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534 [*affirmed* in 34 N. Y. 30]; Foley *v.* Scharmann, 29 Misc. (N. Y.) 521, 61 N. Y. Suppl. 969; Pecke *v.* Hydraulic Constr. Co., 21 Misc. 712, 48 N. Y. Suppl. 109 [*affirmed* in 23 N. Y. App. Div. 393, 48 N. Y. Suppl. 225]; Jacobowitz *v.* Strasbourger, 108 N. Y. Suppl. 698; Welch *v.* Hazleton, 14 How. Pr. (N. Y.) 97; Church *v.* Spiegelberg, 31 Fed. 601, 24 Blatchf. 540.

73. See the codes and statutes of the several states. And see the following cases:

California.— Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616; Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223; Stoddard *v.* Treadwell, 26 Cal. 294.

Dakota.— Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125.

Idaho.— Rinker *v.* Laner, 13 Ida. 163, 88 Pac. 1057.

Kansas.— Orr *v.* Gerrold, 8 Kan. App. 441, 57 Pac. 48.

Minnesota.— Midland Co. *v.* Brant, 50 Minn. 562, 52 N. W. 972, 17 L. R. A. 312, holding that under the statute allowing independent causes of action on contract to be set up as counter-claims defendant may counter-claim for breach of a ne exeat bond in an action on a note.

Missouri.— Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280.

North Carolina.— Penn Lumber Co. *v.* McPherson, 133 N. C. 287, 45 S. E. 577; Lynn *v.* Stanly Creek Cotton Co., 130 N. C. 621, 41 S. E. 877; Brown *v.* Carter, 111 N. C. 183, 15 N. E. 934.

South Carolina.— Gwynn *v.* Citizens' Tel. Co., 69 S. C. 434, 48 S. E. 460, 104 Am. St. Rep. 819, 67 L. R. A. 111; Virginia-Carolina Chemical Co. *v.* Moore, 61 S. C. 166, 39 S. E. 346; *Ex p.* Carolina Nat. Bank, 18 S. C. 289.

Texas.— Tyson *v.* Jackson, 41 Tex. Civ. App. 128, 90 S. W. 930.

Wisconsin.— Sprout *v.* Crowley, 30 Wis. 187.

United States.— Gentry *v.* Grand View Min., etc., Co., 13 Fed. 843, construing a Missouri statute.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 56.

74. Petrakion *v.* Arbelly, 26 N. Y. Suppl. 731, 23 N. Y. Civ. Proc. 183.

75. Shelton *v.* Conant, 10 Wash. 193, 30 Pac. 1013.

A suit for injunction brought to protect rights and property acquired under a contract is not an action on contract within the meaning of N. Y. Code Civ. Proc. § 501, subd. 2, allowing in an action on contract any other cause of action on contract to be counter-claimed. Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126].

The character of the action is determined by the complaint.— Lehmair *v.* Griswold, 40 N. Y. Super. Ct. 100.

76. St. Louis Public School Bd. *v.* Broadway Sav. Bank, 12 Mo. App. 104 [*affirmed* in 84 Mo. 56].

Cause of action held to be upon contract within the meaning of the codes.— The cause of action accruing to a bank against its cashier for wrongfully permitting an overdraft is a cause of action founded upon contract. St. Louis Public School Bd. *v.* Broadway Sav. Bank, 84 Mo. 56 [*affirming* 12 Mo. App. 104].

77. Story *v.* Richardson, 181 N. Y. 584, 74 N. E. 1126 [*affirming* 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843]; McIntyre *v.* Swathers, 118 N. Y. App. Div. 776, 103 N. Y. Suppl. 879 (an action for conversion); Duke D'Auxy *v.* Dupre, 47 N. Y. App. Div. 51, 62 N. Y. Suppl. 244; Campbell *v.* Abbott, 60 Misc. (N. Y.) 93, 111 N. Y. Suppl. 782 (holding that in an action against a liveryman for the recovery of plaintiff's horse, harness, and trap, defendant, while entitled to set up in defense his claim for the amount due him as livery-stable keeper, could not interpose as a counter-claim the amount of certain bills against plaintiff which had been assigned to him).

78. Schuster *v.* Thompson, 6 Dak. 10, 50 N. W. 125; Story *v.* Richardson, 91 N. Y. App. Div. 381, 86 N. Y. Suppl. 843 [*affirmed* in 181 N. Y. 584, 74 N. E. 1126]; Slade *v.*

rest in contract a counter-claim will not be allowed under these subdivisions; and the counter-claim allowed by the code in an action not arising on contract must arise out of the transaction set forth in the complaint of plaintiff or be connected with the subject of the action.[79]

d. Reconvention and Compensation. Defendant may claim in reconvention damages arising out of the same contract or transaction which affords the ground of suit,[80] whether the agreement be embodied in one instrument or several;[81] but

Montgomery, 53 N. Y. App. Div. 343, 65 N. Y. Suppl. 709; Smith *v.* Hilton, 50 Hun (N. Y.) 236, 2 N. Y. Suppl. 820 (disallowing in an action by a residuary legatee to set aside fraudulent conveyances from the testator to the executor, a counter-claim alleging that the will is void for the executor's fraud in procuring it); Thorp *v.* Philbin, 15 Daly (N. Y.) 155, 3 N. Y. Suppl. 939; Northwestern Port Huron Co. *v.* Iverson, (S. D. 1908) 117 N. W. 372 (decided under S. D. Rev. Code Civ. Proc. § 127).

79. New York, etc., R. Co. *v.* Schuyler, 38 Barb. (N. Y.) 534 [*affirmed* in 34 N. Y. 30] (holding that in an equitable action for the removal of a supposed injury to a holder of property there can be no counter-claim, except such as arises out of the transaction set forth in the complaint as the ground of action); Henry *v.* Henry, 3 Rob. (N. Y.) 614, 17 Abb. Pr. 411, 27 How. Pr. 5; Bogardus *v.* Parker, 7 How. Pr. (N. Y.) 303. See Xenia Branch Ohio State Bank *v.* Lee, 2 Bosw. (N. Y.) 694, 7 Abb. Pr. 372.

80. Hynson *v.* Wheeler, 15 La. Ann. 409 (holding that a demand for commissions on an amount collected by plaintiff for defendant gives the latter the right to reconvene for the sum of money in plaintiff's hands on which he charges his commission); Wilcoxon *v.* Buford, 10 La. 183 (holding that where demands are different, but have the same origin and are intimately connected, being the consequence of the same transaction, defendant may reconvene for damages in his answer in the same suit); Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287 (holding that in an action on a note defendant may set up, under a plea of reconvention, matters of which the note formed a part, and by which damages are alleged to have been inflicted by plaintiff upon defendant); Jesse French Piano, etc., Co. *v.* Williams, (Tex. Civ. App. 1907) 102 S. W. 948; McBurnett *v.* Lampkin, 45 Tex. Civ. App. 567, 101 S. W. 864; Stacy *v.* Campbell, (Tex. Civ. App. 1898) 45 S. W. 759; Brown *v.* Viscaya, (Tex. Civ. App. 1897) 42 S. W. 309; McDonnell *v.* Home Bitters Co., 1 Tex. App. Civ. Cas. § 1159 (holding that, in an action for goods sold, defendant's plea that he received the goods under a special contract with plaintiff whereby he was appointed plaintiff's sole agent for their sale within a certain territory, that the goods sued for were ordered and received by him as agent, and that plaintiff had violated his contract in manners specified, thereby damaging defendant, was a plea in reconvention, connected with and growing out of a transaction in which the suit was brought); Bacon *v.* Lloyd, 1 Tex. App. Civ. Cas. § 284; Howard *v.* Moore, 1 Tex. App. Civ. Cas. § 225.

If an employee abandons his contract the employer may, in an action by the employee for the part performance, reconvene his damages for the breach of contract by the former. Carroll *v.* Welch, 26 Tex. 147; Stoddard *v.* Martin, 3 Tex. App. Civ. Cas. § 85.

In an action for rent defendant can reconvene damages resulting from breach of plaintiff's covenant to repair (Coleman *v.* Bunce, 37 Tex. 171), or to build a fence around the premises (Taul *v.* Shanklin, 1 Tex. App. Civ. Cas. § 1135).

Whether or not a plea in reconvention is sufficient is determined not merely by the facts of the case as they are stated and made by plaintiff in setting forth his cause of action; nor is it essential that the right to reconvene should grow out of the immediate and specific transaction on which the suit is brought. That immediate and specific transaction may constitute a segment merely of an entire circle; it may be directly connected with and a part of a larger and more extensive contract; it may be but an item, a part in detail, which exists under continuing transactions, all of which may have originated under and had their growth under a general contract between the parties. If such be the case, it is competent for defendant to allege and prove, as the basis of his rights, such relationship between the action brought against him and the other transactions, and if the connection established between them is such as will show that the facts alleged against him are but filaments and threads which are attached to a contract, which he has a right to have considered as a part of and connected with the one sued on, in every and any proper sense, his claim for damages for the breach of the other is but averring a breach in effect of that which is sued on. McDonnell *v.* Home Bitters Co., 1 Tex. App. Civ. Cas. § 1159.

81. Percy *v.* Peyroux, 5 Rob. (La.) 179 (holding that, where the object of an action is to establish that defendant, a builder, has been paid for the work done by him under a contract with plaintiff, and, to procure the erasure from the books of the recorder of mortgages, defendant may claim in reconvention the balance due him under another contract for buildings and material constructed on the same lot); Beckham *v.* Hunter, 37 Tex. 551; Deutschman *v.* Battaile, (Tex. Civ. App. 1896) 36 S. W. 489 (holding that, in an action on an account for goods furnished defendant under a written contract of agency, which he might terminate on thirty days'

not as a general rule for matters not connected with the subject of plaintiff's action;[82] and the same rules apply to compensation.[83]

D. Secured Claims. As a pledgee is as a general rule under no obligation to surrender or enforce collaterals held by him before suing on the principal obligation,[84] a secured claim may be set off without first surrendering the security,[85] or exhausting it;[86] nor is defendant compelled to realize upon the security before setting up the demand as a counter-claim,[87] in the absence of an agreement to the contrary.[88] Conversely a claim unsecured may be set off against a secured claim.[89]

E. Penalties.[90] A statutory penalty cannot be recouped[91] or counter-claimed.[92] But it has been held under some statutes that a claim for a statu-

notice, a plea in reconvention for the breach of a subsequent oral agreement that, if defendant would continue his agency until he should find a purchaser, plaintiff would accept the purchaser as his agent, and credit the purchase-money on defendant's account, is maintainable); Henry *v.* Sanson, (Tex. Civ. App. 1896) 36 S. W. 122 (holding that, although defendant, pending an action on a note, paid the same, he was entitled, in a subsequent action on another note executed at the same time, as part of one transaction, to the benefit of any credit or deduction to which he was entitled against both notes, and was not confined to a credit for the proportion applicable to the note sued on, although there were different sureties on each note).

82. Duncan *v.* Magette, 25 Tex. 245; Carothers *v.* Thorp, 21 Tex. 358; Egery *v.* Power, 5 Tex. 501; Britton *v.* Thrash, 1 Tex. App. Civ. Cas. § 1237.

Facts showing the connection should be distinctly pleaded.— Carothers *v.* Thorp, 21 Tex. 358.

In Louisiana a claim in reconvention must be necessarily connected with plaintiff's demand (Coco *v.* Guyral, 36 La. Ann. 293; Mills *v.* Fellows, 30 La. Ann. 824; Moss *v.* Munn, 28 La. Ann. 574; Murphy *v.* McCarthy, 26 La. Ann. 38; Nuzum *v.* Gore, 24 La Ann. 208; Hope *v.* Howard, 19 La. Ann. 465; Hynson *v.* Wheeler, 15 La. Ann. 409; D'Armond *v.* Pullen, 13 La. Ann. 137; Morgan *v.* Lathrop, 12 La. Ann. 257; Pi *v.* Vidal, 5 La. Ann. 303; Hamilton *v.* Hurst, 5 La. Ann. 150; Phelps *v.* Stone, 3 La. Ann. 617; Sénécal *v.* Smith, 9 Rob. 418; Jonau *v.* Ferrand, 2 Rob. 216; Bayne *v.* Fox, 18 La. 80; Wilcoxon *v.* Buford, 10 La. 183; Fagot *v.* Porche, 7 La. 562; Lacoste *v.* Bordere, 7 Mart. N. S. 516), unless plaintiff resides out of the state (State Nat. Bank *v.* Evans, 32 La. Ann. 464; Woolfolk *v.* Ship Graham's Polly, 18 La. Ann. 693; Spinney *v.* Hyde, 16 La. Ann. 250; Evans *v.* Hatcher, 10 La. Ann. 98; Sénécal *v.* Smith, *supra*; Mayo *v.* Savory, 4 Rob. 1), or within the state, but in a different parish (Spears *v.* Spears, 27 La. Ann. 642; Spinney *v.* Hyde, *supra*; Sénécal *v.* Smith, *supra*; Mayo *v.* Savory, *supra*); under which circumstances defendant may institute a demand in reconvention against plaintiff for any cause, although such demand is not necessarily connected with or incidental to the main cause of action; and where plaintiff and defendant are both residents of the same parish at the inception of an action for breach of contract, but plaintiff subsequently removed to a different parish, defendant need not follow him but may bring his demand by way of reconvention in the original suit, provided he does not thereby retard or delay the progress of plaintiff's action (Rigney *v.* Monette, 45 La. Ann. 940, 13 So. 201).

Where one of two or more plaintiffs resides in the same parish with defendant, the reconventional demand must be connected with the subject of the action. Teal *v.* Lyons, 30 La. Ann. 1140.

83. Patterson *v.* New Orleans, 20 La. Ann. 106; Hutchings *v.* Johnson, 19 La. 437 (holding that in an action for the services of slaves, mortgaged to secure an indorser, who had possession, defendant could plead in compensation the indorsement he has paid); Fagot *v.* Porche, 7 La. 562.

84. See PLEDGES, 31 Cyc. 868.

85. Wallace *v.* Finnegan, 14 Mich. 170, 90 Am. Dec. 243, holding that a note held by a defendant together with certain collaterals for it can be set off without delivering up the collaterals.

86. Hudkins *v.* Ward, 30 W. Va. 204, 3 S. E. 600, 8 Am. St. Rep. 22.

87. Mattern *v.* Sage, 16 Daly (N. Y.) 142, 9 N. Y. Suppl. 527 [*affirmed* in 134 N. Y. 617, 32 N. E. 649], holding that where a stock-holder, who has been holding stock on a customer's account for several years, as partial security for a debt, is sued by the customer on that and other transactions, he is not obliged to realize on the stock before counter-claiming for the whole amount of the indebtedness existing at the time.

88. Willard *v.* Fralick, 31 Mich. 431.

89. Spencer *v.* Chrisman, 15 Ind. 215.

90. **Recoupment, set-off, and counter-claim in actions for penalties** see *supra*, V, C.

91. Bragdon *v.* Freedom, 84 Me. 431, 24 Atl. 895, holding that the penalty imposed by Rev. St. c. 6, § 146, upon a collection of taxes for failure to file his accounts, cannot be recouped in defense to an action, by the collector, to recover of the town his agreed compensation for collecting the town's taxes, the statutory method of collecting the forfeitures being exclusive.

92. Auburn Nat. Bank *v.* Lewis, 81 N. Y 15 (holding that under Act Cong. June 3, 1864, providing that, where a bank receives

tory penalty might be set off,[93] but not a sum of money given under an agreement by way of a penalty;[94] although liquidated damages, as distinguished from a penalty,[95] may be set off.[96]

F. Taxes.[97] A claim for taxes is not such a debt, demand, contract, or judgment as is allowed to be set off under the statutes of set-off, which are construed uniformly, in the light of public policy, to exclude the remedy in an action on any indebtedness of the state or municipality to one who is liable to the state or municipality for taxes.[98] Nor are they subject to recoupment, not arising out of the contract or transaction sued on.[99] A constitutional provision that taxes shall be collected without suit precludes a reconventional demand made for taxes, praying for a personal judgment against the tax debtor.[1]

G. Equitable Demands. Under the statutes of set-off it is generally held that an equitable claim may not be set off in an action at law.[2] The codes, how-

illegal interest it shall be liable in a penal action for debt for twice the amount paid, a person who has paid such illegal interest on a note cannot set up the claim for the penalty in an action on a note in a state court, as the effect would be to defeat the intent of the federal statute and make out a criminal action a mere civil suit); Clapp *v.* Wright, 21 Hun (N. Y.) 240 (holding that a claim for personal liability for debts of a corporation for not filing the annual account is not a claim based upon contract, within the meaning of Code Civ. Proc. § 501, and cannot be counter-claimed).

93. Rosser *v.* Bunn, 66 Ala. 89 (holding that the statutory penalty for cutting down trees being a fixed and definite sum, prescribed and ascertained by law and a cause of action for such penalty not being a demand sounding in damages merely is available as a set-off); Haddix *v.* Wilson, 3 Bush (Ky.) 523 (holding that defendant could, in an action on a promissory note, set off double damages provided by statute for injuries to property by disloyal parties during the Civil war); Auburn Nat. Bank *v.* Lewis, 81 N. Y. 15.

Damages for breach of condition of a bond given to secure an attachment may be set off in a subsequent action by the same plaintiff. Plunkett *v.* Sauer, 101 Pa. St. 356.

94. Davies *v.* Penton, 6 B. & C. 216, 9 D. & R. 369, 5 L. J. K. B. O. S. 112, 13 E. C. L. 108.

95. See DAMAGES, 13 Cyc. 89.

96. Jones *v.* St. John's College, L. R. 6 Q. B. 115, 40 L. J. Q. B. 80, 23 L. T. Rep. N. S. 803, 19 Wkly. Rep. 276; Legge *v.* Harlock, 12 Q. B. 1015, 13 Jur. 229, 18 L. J. Q. B. 45, 64 E. C. L. 1015; Fletcher *v.* Dyche, 2 T. R. 32, 1 Rev. Rep. 414.

Setting off liquidated damages generally see *infra*, VI, H.

97. Recoupment, set-off, and counter-claim in actions for taxes see *supra*, V, D.

98. *Massachusetts.*— Home Sav. Bank *v.* Boston, 131 Mass. 277; Peirce *v.* Boston, 3 Metc. 520.

Nebraska.—Nebraska City *v.* Nebraska City Hydraulic Gas Light, etc., Co., 9 Nebr. 339, 2 N. W. 870.

New Hampshire.— Hibbard *v.* Clark, 56 N. H. 155, 22 Am. Rep. 442.

New Jersey.— Camden *v.* Allen, 26 N. J. L. 398.

Vermont.— Johnson *v.* Howard, 41 Vt. 122, 98 Am. Dec. 568.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 35.

Compare Finnegan *v.* Fernandina, 15 Fla. 379, 21 Am. Rep. 292.

99. Home Sav. Bank *v.* Boston, 131 Mass. 277.

1. Rivers *v.* New Orleans, 42 La. Ann. 1196, 8 So. 484.

2. Loftin *v.* Shackelford, 17 Ala. 455 (so holding as to an equitable demand by a garnishee in a court of law against his indebtedness to defendant); Milburn *v.* Guyther, 8 Gill (Md.) 92, 50 Am. Dec. 681; Gilchrist *v.* Leonard, 2 Bailey (S. C.) 135 (where the holder, by delivery, without indorsement of a sealed note payable to bearer, was not allowed to set it up in discount of a legal demand by the maker). But see Lyman *v.* Estes, 1 Me. 182.

The reason for the rule has been held to be that, if defendant could be allowed to set up an equitable defense while plaintiff was confined to his legal right of action, there would seem to be a want of mutuality in the proceeding, and the greatest injustice might sometimes be done, for plaintiff might have an equitable demand which would countervail that set up by defendant, yet he would be unable to subject the legal demand, inasmuch as defendant could, and he could not, set up his equitable one, and in many cases it would be impossible for a court of law to adjust properly the equities between the parties, even if it possessed the jurisdiction, and such a practice of blending the legal and equitable jurisdiction of the courts would introduce the greatest confusion, uncertainty, and difficulty. Loftin *v.* Shackelford, 17 Ala. 455. See also Doe *v.* Darnton, 3 East 149.

In Virginia, under Code, c. 172, § 4, the common-law rule that an equitable claim cannot be set off against a legal claim is superseded. Wartman *v.* Yost, 22 Gratt. 595, holding that, in an action of debt on a bond against the principal and two sureties, a judgment recovered by a third party against plaintiff and assigned to the principal may be set off.

ever, generally provide that counter-claims may be such as were formerly denominated legal or equitable,[3] but the right to relief must be necessarily or properly involved in the action for a complete determination thereof.[4]

H. Liquidated Demands. Under all the statutes the decisions are uniform that liquidated damages are the subject of cross demands, whether recoupment,[5] set-off,[6] counter-claim,[7] or compensation.[8]

I. Unliquidated Demands — 1. What Are Unliquidated Demands.[9] The cases defining what is a liquidated demand within the meaning of statutes of set-off are very confusing and unsatisfactory,[10] and vary according to the disposition of the various courts to extend or restrict the right of set-off and the wording of the statute. Thus the rule is laid down that a defendant may set off damages capable of liquidation by any known legal standard,[11] and that damages are so unliquidated as not to be the subject of set-off when there is no criterion provided by the parties or by the law for their ascertainment,[12] and that a claim

In the federal courts equitable set-off cannot be pleaded in an action at law. Platt *v.* Larter, 94 Fed. 610; Church *v.* Spiegelberg, 31 Fed. 601, 24 Blatchf. 540.

In Canada an equitable set-off is allowed at law. McKelvey *v.* McLean, 34 U. C. Q. B. 635.

3. See the codes and statutes of the several states. And see McAdow *v.* Ross, 53 Mo. 199; Miller *v.* Crigler, 83 Mo. App. 395; Wheeler *v.* Millar, 90 N. Y. 353; Mathez *v.* Neidig, 72 N. Y. 100; Shipman *v.* Lansing, 25 Hun (N. Y.) 290; Hicksville, etc., R. Co. *v.* Long Island R. Co., 48 Barb. (N. Y.) 355; Currie *v.* Cowles, 6 Bosw. (N. Y.) 452; Dempsey *v.* Rhodes, 93 N. C. 120; Pearsall *v.* Mayers, 64 N. C. 549 (holding that, where a vendor of land brings an action for possession against his vendee, who has been let into possession, the title being reserved, the latter may set up the contract of sale and ask for an account of the judgments upon the purchase-money by counter-claim in the same action); Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009; Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521 (under Rev. St. (1878) §§ 2656, 2657); Atwater *v.* Schenck, 9 Wis. 160.

4. Wyman *v.* Herard, 9 Okla. 35, 59 Pac. 1009.

5. Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Ives *v.* Van Epps, 22 Wend. (N. Y.) 155.

6. *Massachusetts.*— Ford *v.* Burchard, 130 Mass. 424; Pitts *v.* Holmes, 10 Cush. 92.

Michigan.— Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203.

Missouri.— Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231.

New Jersey.— Marshall *v.* Hann, 17 N. J. L. 425; Parker *v.* Hartt, 32 N. J. Eq. 225 [*affirmed* in 32 N. J. Eq. 844].

Pennsylvania.— McFadden *v.* Erwin, 2 Whart. 37.

Rhode Island.— Greene *v.* Harris, 10 R. I. 382; Smith *v.* Eddy, 1 R. I. 476.

United States.— De Taslet *v.* Crousellat, 7 Fed. Cas. No. 3,827, 1 Wash. 504, under a Pennsylvania statute.

7. Morrison *v.* Lovejoy, 6 Minn. 319; Ogden *v.* Coddington, 2 E. D. Smith (N. Y.) 317; Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. (N. Y.) 299.

8. Burbridge *v.* Anderson, 32 La. Ann. 877; Copley *v.* Lambeth, 9 Rob. (La.) 137; Jonau *v.* Ferrand, 2 Rob. (La.) 216; Hoffman *v.* Pontchartrain R. Co., 9 La. 20; Blanchard *v.* Cole, 8 La. 153; Lacoste *v.* Bordere, 7 Mart. N. S. (La.) 516; Carter *v.* Morse, 8 Mart. (La.) 398; Baldwin *v.* Handy, McGloin (La.) 189.

9. **"Liquidated" defined** see Liquidated, 25 Cyc. 1444, and Cross-References Thereunder.

10. Harrington Lumber Co. *v.* Smith, 44 Tex. Civ. App. 363, 99 S. W. 110.

11. Wanamaker *v.* Quinn, 27 Pa. Super. Ct. 288; North German Lloyd Steamship Co. *v.* Wood, 18 Pa. Super. Ct. 488; Haines *v.* Young, 13 Pa. Super. Ct. 303.

12. Sledge *v.* Swift, 53 Ala. 110; Brown *v.* Chambers, 12 Ala. 697; Handley *v.* Dobson, 7 Ala. 359; McCord *v.* Williams, 2 Ala. 71 (holding that damages which could only be ascertained and rendered certain by the verdict of a jury are unliquidated and cannot be set off); Horn *v.* Noble, 95 Ill. App. 99; Scarritt Estate Co. *v.* J. F. Schmelzer, etc., Arms Co., 110 Mo. App. 406, 86 S. W. 489; Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832 (holding a claim for conversion of money to be a liquidated demand); Brooks Tire Mach. Co. *v.* Shields, (Tex. Civ. App. 1908) 108 S. W. 1005 (holding also that whether a cause of action is founded on a liquidated demand within the rule that within a suit founded on a liquidated demand defendant cannot interpose a counter-claim based on a demand for unliquidated damages not growing out of or connected with the action must be determined alone from the petition); Harrington Lumber Co. *v.* Smith, 44 Tex. Civ. App. 363, 99 S. W. 110 (holding that where, in an action for the price of goods sold, defendant pleaded that he had paid plaintiff for a car-load of goods previously sold by plaintiff to defendant at a certain price per sack, but that on opening the car defendant had found a shortage and a certain number of sacks so worthless that they were rejected, the total of the price per sack for each missing and rejected sack constituted a liquidated demand, and hence might be set off in the action).

Demands not payable in money but in property, the value of which is not ascertained

is liquidated only when the amount of it has been determined or the data settled upon which the amount can be calculated,[13] the true construction of the words "sum liquidated" being held to be a sum which may be ascertained by calculation, and being held to apply and limit these words to such judgments or contracts only as that the amount of defendant's demand can be ascertained by the judgment or contract itself, or by mathematical calculation on the same,[14] without the necessity of other proof than of the liability,[15] and without the intervention of a jury,[16] or the conflicting opinions of witnesses.[17] Other cases hold that although unliquidated damages to be ascertained by the discretion of a jury cannot be set off, unliquidated damages to be assessed upon pecuniary demands, as for goods sold and delivered, work and labor done, and in all cases where debt or *indebitatus assumpsit* would lie, may be set off, as the law prescribes a definite

either by the contract of the parties or the law, cannot be set off. Handley *v.* Dobson, 7 Ala. 359; Prather *v.* McEvoy, 7 Mo. 598 (holding that a note given for a certain sum payable in work cannot be set off in an action founded on a debt due in money, although the debt accrued for the same kind of work stipulated for in the note); Carleton *v.* Brooks, 14 N. H. 149; Bolinger *v.* Gordon, 11 Humphr. (Tenn.) 61. But see Whisenant *v.* Towers, 2 Rich. (S. C.) 110 (holding that a covenant to give a sum of money named, as rent, to be paid in splitting rails, repairing fences, and other work, can be set off in an action in a note); Memphis, etc., R. Co. *v.* Walker, 2 Head (Tenn.) 467 (holding that an obligation for money to be paid by a given day may, if not complied with, be the subject of set-off in a suit against the original holder of said obligation or his assignee for money due said company, and that this is so whether the obligation fixes the value at which the bonds are to be received or not; the law having established a rule by which the value may be ascertained and rendered certain, which would be the nominal value of the bonds and interest thereon).

13. Carter *v.* Jaseph, 48 Mich. 615, 12 N. W. 876; Smith *v.* Warner, 14 Mich. 152 (holding that a claim can never be said to be liquidated until some specific amount, or some specific data from which such amount can be calculated by an ordinary mathematical process, shall have been arrived at in such a way as to measure the rights of the parties, and this can never be the case before verdict, where the data for calculation depend on values to be established by witnesses); Parker *v.* Hartt, 32 N. J. Eq. 225 [*affirmed* in 32 N. J. Eq. 844]; McFadden *v.* Erwin, 2 Whart. (Pa.) 37 (holding that damages may be deemed unliquidated when the injury done or suffered is of such a nature as to permit no fixed or certain rule for the measure of the damages sustained); Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Charnley *v.* Sibley, 73 Fed. 980, 20 C. C. A. 157.

14. *Maine.*— Hall *v.* Glidden, 39 Me. 445.

Massachusetts.—Tracey *v.* Grant, 137 Mass. 181; Union Mut. Mar. Ins. Co. *v.* Howes, 124 Mass. 470 (disallowing as unliquidated a set-off for partial loss under a marine insurance policy); Taft *v.* Larkin, 123 Mass. 598; Pitts *v.* Holmes, 10 Cush. 92; Phelps *v.* Rice, 10 Metc. 128 (disallowing as unliquidated a set-off for damages sustained for want of professional skill and diligence of an attorney in prosecuting suits).

Michigan.— Carter *v.* Jaseph, 48 Mich. 615, 12 N. W. 876.

New Hampshire.— Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380, holding that damages arising from the breach of covenants in a deed conveying real estate may be set off where the amount of such damages may be ascertained by mere computation.

New York.— Cumings *v.* Morris, 3 Bosw. 560 [*affirmed* in 25 N. Y. 625] (disallowing as a set-off a demand against the payee of a note, growing out of a partnership between the maker, the payee, and a third person, where there had been no accounting between the parties); Diehl *v.* General Mut. Ins. Co., 1 Sandf. 257; Osborn *v.* Etheridge, 13 Wend. 339; Holbrook *v.* American F. Ins. Co., 6 Paige 220 (disallowing as an unliquidated set-off a claim for loss under a fire policy in consequence of a fire, on the ground that such a claim is unliquidated until adjusted).

Rhode Island.— Bell *v.* Ward, 10 R. I. 503; Greene *v.* Harris, 10 R. I. 382 (holding, however, that this rule applies, although the calculation be intricate and depend upon a variety of matters); Smith *v.* Eddy, 1 R. I. 476.

Texas.— Jones *v.* Hunt, 74 Tex. 657, 12 S. W. 832.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 58.

The verification of an open account sued upon did not affect the nature of the demand so as to make it a certain demand within Tex. Rev. St. (1895) art. 754, providing that, if plaintiff's suit is "founded on a certain demand, defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff." Hallinan *v.* Levytansky, (Tex. Civ. App. 1907) 102 S. W. 463.

15. Bell *v.* Ward, 10 R. I. 503.

16. Dale *v.* Richards, 21 D. C. 312.

17. Kelley *v.* Caffrey, 79 Ill. App. 278; Carter *v.* Jaseph, 48 Mich. 615, 12 N. W. 876; Butts *v.* Collins, 13 Wend. (N. Y.) 139.

rule by which the amount of such money demand shall be ascertained,[18] which can be shown by the testimony of witnesses acquainted with the market,[19] and determined by computing the difference between the contract price and market value.[20] And the same rule applies where the subject of the contract is real estate.[21] A claim recoverable only by action of account or bill in equity is so unliquidated as not to be the subject of set-off.[22] Where plaintiff has acknowledged the amount due defendant, the claim, although formerly unliquidated, is so no longer;[23] and the same rule applies where the parties have fixed the value of the set-off.[24] But damages which are otherwise unliquidated cannot be set off simply because plaintiff promised to pay for them when ascertained.[25]

2. Recoupment. It is a universal rule that unliquidated damages may be recouped, if they arise out of the transaction forming the basis of plaintiff's action;[26]

18. *Alabama.*— Walke *v.* McGehee, 11 Ala. 273; Brazier *v.* Fortune, 10 Ala. 516, holding that money which defendant had to pay as costs on suits, which plaintiff had instituted in his name without his consent, was a valid set-off in an action against him by plaintiff.

Connecticut.— Bulkeley *v.* Welch, 31 Conn. 339.

Georgia.— Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361.

Illinois.— Kelley *v.* Caffrey, 79 Ill. App. 278.

Kentucky.— Eversole *v.* Moore, 3 Bush 49; Wake *v.* Commonwealth Bank, 2 Dana 394; Jenkins *v.* Richardson, 6 J. J. Marsh. 441, 22 Am. Dec. 82; Littell *v.* Shockley, 4 J. J. Marsh. 245.

Missouri.— Austin *v.* Feland, 8 Mo. 309.

New York.— Burgess *v.* Tucker, 5 Johns. 105, holding that an award for the payment of money may be set off as the sum is certain, liquidated, and expressly ascertained.

North Carolina.— Wheeler *v.* Dunn, 27 N. C. 380; Lindsay *v.* King, 23 N. C. 401, holding also that under a statute allowing mutual debts to be set off, a set-off must be a money demand. See Raisin *v.* Thomas, 88 N. C. 148, comparing the practice before and since the code.

Pennsylvania.— Russell *v.* Miller, 54 Pa. St. 154.

Tennessee.— Lowry *v.* Hawes, 10 Heisk. 688 (holding that defendant may set off a promise to pay the value of specified articles on the happening of a contingency, which is found by the jury to have happened as the amount of such money demand is prescribed by a definite rule of law to be the market value of the articles at the time of the happening of the contingency); Martin *v.* McAllister, 2 Yerg. 111; Ragsdale *v.* Buford, 3 Hayw. 192.

Vermont.— Thompson *v.* Congdon, 43 Vt. 396.

Virginia.— Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 58 *et seq.*

19. Bulkeley *v.* Welch, 31 Conn. 339; Stearns *v.* Marsh, 4 Den. (N. Y.) 227, 47 Am. Dec. 248.

20. Kelley *v.* Caffrey, 79 Ill. App. 278.

21. Avery *v.* Brown, 31 Conn. 398.

22. Cumings *v.* Morris, 3 Bosw. (N. Y.) 560 [*affirmed* in 25 N. Y. 625]; Sherman *v.* Ballou, 8 Cow. (N. Y.) 304; Russell *v.* Miller, 54 Pa. St. 154; Sennett *v.* Johnson, 9 Pa. St. 335; Appleby *v.* Barrett, 28 Pa. Super. Ct. 349; Thomson's Estate, 5 Wkly. Notes Cas. (Pa.) 14.

A claim for contribution which can only be enforced in a bill in equity cannot be set off. McLauthlin *v.* Smith, 176 Mass. 46, 57 N. E. 216.

23. Hargroves *v.* Cooke, 15 Ga. 321; Reynaud *v.* His Creditors, 4 Rob. (La.) 514; Wheeler *v.* Dunn, 27 N. C. 380; Jones *v.* Hunt, 74 Tex. 657, 659, 12 S. W. 832. But see Diehl *v.* General Mut. Ins. Co., 1 Sandf. (N. Y.) 257, holding that the claim for a partial loss on a policy of insurance is unliquidated, although the amount of the loss be agreed upon conditionally before suit brought, as this liquidation was merely an adjustment by which the amount of recovery was fixed in event of the company's being held liable, and does not affect the character of the claim as being unliquidated or not.

24. Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042.

25. Robison *v.* Hibbs, 48 Ill. 408 (holding that where plaintiff's hogs entered defendant's field, and destroyed his corn, and plaintiff promised to pay for the corn, the damage sustained by the trespass was not thereby liquidated); Corey *v.* Janes, 15 Gray (Mass.) 543. See also Union Mut. Mar. Ins. Co. *v.* Howes, 124 Mass. 470.

26. *Alabama.*— Hatchett *v.* Gibson, 13 Ala. 587.

Arkansas.— Bloom *v.* Lehman, 27 Ark. 489; Desha *v.* Robinson, 17 Ark. 228; Robinson *v.* Mace, 16 Ark. 97; Wheat *v.* Dotson, 12 Ark. 699.

Illinois.— Chicago Legal News Co. *v.* Browne, 5 Ill. App. 250 [*affirmed* in 103 Ill. 317].

Maine.— Rogers *v.* Humphrey, 39 Me. 382.

Michigan.— Ward *v.* Fellers, 3 Mich. 281.

Mississippi.— Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Myers *v.* Estell, 47 Miss. 4.

New Jersey.— Parker *v.* Hartt, 32 N. J. Eq. 225 [*affirmed* in 32 N. J. Eq. 844].

New York.— Batterman *v.* Pierce, 3 Hill 171; Ives *v.* Van Epps, 22 Wend. 155.

Tennessee.— Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325.

but unliquidated damages arising out of a tort independent of and disconnected with the transaction sued on cannot be recouped.[27]

3. Set-Off. Under a large majority of the statutes it has been uniformly held that unliquidated damages cannot be pleaded as a set-off,[28] even though

West Virginia.— Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

United States.— Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487, holding that, although it is true, as a general rule, that unliquidated damages cannot be the subject of set-off, yet it is well settled that a total or partial failure of consideration, acts of nonfeasance or misfeasance, immediately connected with the cause of action, or any equitable defense arising out of the same transaction, may be given in evidence in mitigation of damages, or recouped; not strictly by the way of defalcation or set-off, but for the purpose of defeating plaintiff's action in whole or in part, and to avoid circuity of action.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 54 *et seq.*

But see Hall's Appeal, 40 Pa. St. 409, where the court says that unliquidated damages in tort could not be recouped. But as the general rule is that torts are subject to recoupment (see *infra* VI, J, 1) and unliquidated damages can be recouped (see *supra*, this note), it would seem that the court referred to set-off rather than recoupment.

Where plaintiff's demand is under seal defendant cannot recoup unliquidated damages. Kinzie *v.* Reiley, 100 Va. 709, 42 S. E. 872.

27. Roth *v.* Reiter, 213 Pa. St. 400, 62 Atl. 1063.

28. *Arkansas.*— Gerson *v.* Slemons, 30 Ark. 50; Robinson *v.* Mace, 16 Ark. 97; Wheat *v.* Dotson, 12 Ark. 699; Woodruff *v.* Laflin, 4 Ark. 527; Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727.

California.— Ricketson *v.* Richardson, 19 Cal. 330.

Connecticut.— New Haven Pipe Co. *v.* Work, 44 Conn. 230.

District of Columbia.— Dale *v.* Richards, 21 D. C. 312.

Georgia.— Mell *v.* Moony, 30 Ga. 413; Grimes *v.* Reese, 30 Ga. 330; Jordan *v.* Jordan, 12 Ga. 77; Crenshaw *v.* Jackson, 6 Ga. 509, 50 Am. Dec. 361. But see Ingram *v.* Jordan, 55 Ga. 356, holding that under the code provision allowing defendant to set off a claim of the same nature as plaintiff's demand, defendant may in an action on an unliquidated claim set off unliquidated damages.

Illinois.— Kelley *v.* Caffrey, 79 Ill. App. 278.

Indiana.— West *v.* Hayes, 104 Ind. 251, 3 N. E. 932; Miles *v.* Elkin, 10 Ind. 329; Abbott *v.* Smith, 4 Ind. 452; Rodman *v.* Baldwin, 2 Ind. 105; Smith *v.* Smith, 1 Ind. 476; McKinney *v.* Bellows, 3 Blackf. 31. See also Stockton *v.* Graves, 10 Ind. 294. *Compare* Hendry *v.* Hendry, 32 Ind. 349; Irish *v.* Snelson, 16 Ind. 365, both holding that an unliquidated demand growing out of unsettled partnership accounts may be set off.

Iowa.— Sample *v.* Griffith, 5 Iowa 376.

Kentucky.— Shropshire *v.* Conrad, 2 Metc. 143; Patrick *v.* Langston, 5 J. J. Marsh. 653; Bruce *v.* Burdet, 1 J. J. Marsh. 80; Pemberton *v.* Brown, 5 Litt. 3; Farquhar *v.* Collins, 3 A. K. Marsh. 31; Williams *v.* Gilchrist, 3 Bibb 49; Morrison *v.* Hart, Hard. 150; Brannin *v.* Crouch, 10 Ky. L. Rep. 773; Marks *v.* Squair, 10 Ky. L. Rep. 589; Forbes *v.* Cooper, 9 Ky. L. Rep. 716. See Doysher *v.* Adams, 29 S. W. 348, 16 Ky. L. Rep. 582, holding that unliquidated damages cannot be set off to a breach of contract without an allegation of the insolvency or non-residence of the parties to the contract, as to which see further *infra*, VI, I, 7.

Maine.— Hall *v.* Glidden, 39 Me. 445; Rogers *v.* Humphrey, 39 Me. 382.

Maryland.— Hearn *v.* Cullin, 54 Md. 533; Smith *v.* Washington Gaslight Co., 31 Md. 12, 100 Am. Dec. 49. But see Baltimore Ins. Co. *v.* McFadon, 4 Harr. & J. 31.

Massachusetts.— Barry *v.* Cavanagh, 127 Mass. 394; Taft *v.* Larkin, 123 Mass. 598; Warren *v.* Franklin Ins. Co., 104 Mass. 518; Montague *v.* Boston, etc., Iron Works, 97 Mass. 502; Cordell *v.* Bridge, 9 Allen 355; Corey *v.* Jones, 15 Gray 543 (holding that unliquidated damages cannot be set off, even though plaintiff agreed to pay them); Phelps *v.* Rice, 10 Metc. 128; St. Louis Perpetual Ins. Co. *v.* Homes, 9 Metc. 39; Pitkin *v.* Frink, 8 Metc. 12. See Ford *v.* Burchard, 130 Mass. 424.

Michigan.— Shipman *v.* Coryell, 105 Mich. 395, 63 N. W. 410; Wood Mowing, etc., Mach. Co. *v.* Seaver, 90 Mich. 546, 51 N. W. 637; Randall *v.* Baird, 66 Mich. 312, 33 N. W. 506; Powell *v.* Powell, 52 Mich. 432, 18 N. W. 203; Carter *v.* Jaseph, 48 Mich. 615, 12 N. W. 876; Hunt *v.* Middleworth, 44 Mich. 448, 7 N. W. 57; Howell *v.* Medler, 41 Mich. 641, 2 N. W. 911; Hendricks *v.* Toole, 29 Mich. 34; Mitchell *v.* Shuert, 16 Mich. 444; Ward *v.* Fellers, 3 Mich. 281.

Mississippi.— W. T. Adams Mach. Co. *v.* Thomas, 87 Miss. 391, 39 So. 810; Raymond *v.* State, 54 Miss. 562, 28 Am. Rep. 382; Caspar *v.* Thigpen, 48 Miss. 635; Myers *v.* Estelle, 47 Miss. 4; Whitaker *v.* Robinson, 2 Sm. & M. 349.

Missouri.— State *v.* Eldridge, 65 Mo. 584; Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Gunn *v.* Todd, 21 Mo. 303, 64 Am. Dec. 231; Brake *v.* Corning, 19 Mo. 125; Pratt *v.* Menkens, 18 Mo. 158; Mahan *v.* Ross, 18 Mo. 121; Johnson *v.* Jones, 16 Mo. 494; State *v.* Modrell, 15 Mo. 421; Scarritt Estate Co. *v.* Schmelzer, etc., Co., 110 Mo. App. 406, 86 S. W. 489; McCuin *v.* Frazier, 38 Mo. App. 63; State *v.* McHale, 16 Mo. App. 478; Walker *v.* Lewandovska, 15 Mo. App. 581.

Montana.— Wells *v.* Clarkson, 2 Mont. 379.

the demand which defendant seeks to interpose as a set-off becomes liquidated after the commencement of the action in which it is sought to be interposed,[29] and as the rule almost universally followed is that a claim sounding in tort is not the subject of set-off,[30] it follows with greater force that a claim for unliquidated

Nebraska.— Boyer *v.* Clark, 3 Nebr. 161.

New Hampshire.— Barker *v.* Barker, 62 N. H. 366; Robinson *v.* Gilman, 43 N. H. 485; Drew *v.* Towle, 27 N. H. 412, 59 Am. Dec. 380.

New Jersey.— Reim *v.* Bissinger, 75 N. J. L. 289, 68 Atl. 88; Godkin *v.* Bailey, 74 N. J. L. 655, 65 Atl. 1032, 9 L. R. A. N. S. 1134; Bird *v.* Magowan, (Ch. 1898) 43 Atl. 278; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83; Parker *v.* Hartt, 32 N. J. Eq. 225 [*affirmed* in 32 N. J. Eq. 844]; Taylor *v.* Stout, 1 N. J. L. 53. See State *v.* Welstead, 11 N. J. L. 397.

New York.— Cumings *v.* Morris, 3 Bosw. 560 [*affirmed* in 25 N. Y. 625]; Deming *v.* Kemp, 4 Sandf. 147; Hart *v.* Brady, 1 Sandf. 626; Diehl *v.* General Mut. Ins. Co., 1 Sandf. 257; S. Liebmann's Sons Brewing Co. *v.* Di Nicolo, 46 Misc. 268, 91 N. Y. Suppl. 791; Batterman *v.* Pierce, 3 Hill 171; Butts *v.* Collins, 13 Wend. 139 (holding that under the statute of 1801 unliquidated damages could not be set off in an action of assumpsit in courts of record, and by the act of 1813, on the subject of set-offs, such demands were the subject of set-off; but that by the Revised Statutes, the law was restored as it was in 1801, and that unliquidated damages could not be set off); Tuttle *v.* Tompkins, 2 Wend. 407; Sherman *v.* Ballou, 8 Cow. 304 (holding that a claim recoverable only by an action of account or bill in equity is not available as a set-off at law); Gordon *v.* Bowne, 2 Johns. 150 (disallowing a set-off of a loss on an open policy); Brown *v.* Cuming, 2 Cai. 33; Jennings *v.* Webster, 8 Paige 502, 35 Am. Dec. 722; Livingston *v.* Livingston, 4 Johns. Ch. 287; Hackett *v.* Connett, 2 Edw. 73. See Welch *v.* Hazelton, 14 How. Pr. 97 (holding that in an action defendant might under the prevailing statute set off a demand for real estate or personal property sold, or for money paid or services done, or, if it was not such a demand, the account must be liquidated and capable of being ascertained by calculation); Rawson *v.* Copland, 2 Sandf. Ch. 251.

North Carolina.— Terrell *v.* Walker, 66 N. C. 244; Wheeler *v.* Dunn, 27 N. C. 380; Lindsay *v.* King, 23 N. C. 401; Hogg *v.* Ashe, 2 N. C. 471.

Oklahoma.— Colcord *v.* Conger, 10 Okla. 458, 62 Pac. 276.

Oregon.— Burrage *v.* Bonanza Gold, etc., Min. Co., 12 Oreg. 169, 6 Pac. 766.

Rhode Island.— Cole *v.* Shanahan, 24 R. I. 427, 53 Atl. 273; Clyde *v.* Knight, 12 R. I. 194; Bell *v.* Ward, 10 R. I. 503; Smith *v.* Eddy, 1 R. I. 476.

Tennessee.— Nashville, etc., R. Co. *v.* Chumley, 6 Heisk. 325.

Virginia.— Kinzie *v.* Rieley, 100 Va. 709, 42 S. E. 872; Harrison *v.* Wortham, 8 Leigh 296; Webster *v.* Couch, 6 Rand. 519. But see Newport News, etc., R., etc., Electric Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011, holding that under Code (1887), § 3299, if plaintiff's claim is connected with the subject of the action it is immaterial that it is unliquidated.

West Virginia.— Case Mfg. Co. *v.* Sweeny, 47 W. Va. 638, 35 S. E. 853; Clark's Cove Guano Co. *v.* Appling, 33 W. Va. 470, 10 S. E. 809; Baltimore, etc., R. Co. *v.* Jameson, 13 W. Va. 833, 31 Am. Rep. 775.

Wisconsin.—Norton *v.* Rooker, 1 Pinn. 195.

United States.— Winder *v.* Caldwell, 14 How. 434, 14 L. ed. 487; Tayloe *v.* Sandiford, 7 Wheat. 13, 5 L. ed. 384; The Zouave, 29 Fed. 296; Armstrong *v.* Brown, 1 Fed. Cas. No. 542, 1 Wash. 43; Homas *v.* McConnell, 12 Fed. Cas. No. 6,656, 3 McLean 381; U. S. *v.* Williams, 28 Fed. Cas. No. 16,721, 5 McLean 133; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

England.— Hardcastle *v.* Netherwood, 5 B. & Ald. 93, 7 E. C. L. 62; Nedriffe *v.* Hogan, 2 Burr. 1024, 97 Eng. Reprint 687; Meyer *v.* Dresser, 16 C. B. N. S. 646, 33 L. J. C. P. 289, 10 L. T. Rep. N. S. 612, 12 Wkly. Rep. 983, 111 E. C. L. 646; Howlet *v.* Strickland, Cowp. 56; Crampton *v.* Walker, 3 E. & E. 321, 7 Jur. N. S. 43, 30 L. J. Q. B. 19, 9 Wkly. Rep. 98, 107 E. C. L. 321; Crawford *v.* Stirling, 4 Esp. 207; Grant *v.* Royal Exch. Assur. Co., 5 M. & S. 439; Weigall *v.* Waters, 6 T. R. 488; Freeman *v.* Hyett, W. Bl. 394, 96 Eng. Reprint 224; Tagart *v.* Marcus, 36 Wkly. Rep. 469.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 58 *et seq.*

In Kentucky the code provisions relating to set-off have been held not to change the former law on the subject as to unliquidated demands. Shropshire *v.* Conrad, 2 Metc. 143; Marks *v.* Squair, 10 Ky. L. Rep. 589; Forbes *v.* Cooper, 9 Ky. L. Rep. 716.

An unliquidated demand cannot be set off against the United States.— U. S. *v.* Wells, 28 Fed. Cas. No. 16,663, 2 Wash. 161; U. S. *v.* Williams, 28 Fed. Cas. No. 16,721, 5 McLean 133.

A claim growing out of a breach of covenant cannot ordinarily be liquidated by calculation and is not the subject of set-off. Dunn *v.* White, 1 Ala. 645; Gridley *v.* Tucker, Freem. (Miss.) 209; State *v.* Eldridge, 65 Mo. 584. See also Thomas *v.* Hill, 3 Tex. 270; Andrews *v.* Whitehead, (Tex. Civ. App. 1901) 60 S. W. 800.

A claim to an inchoate or contingent right of dower is not available as a set-off, since its value cannot be precisely ascertained by any pecuniary standard. Johnston *v.* Smith, 70 Ala. 108.

29. Haselton *v.* Pray, 18 N. H. 554; Cleveland Rubber Co. *v.* Bradford, 6 Ohio Dec. (Reprint) 1160, 11 Am. L. Rec. 44.

30. See *infra*, VI, J, 2.

damages sounding in tort is unavailable as a set-off.[31] A few of the statutes are construed, however, more in the spirit of the remedy, which is to litigate matters between the parties in one action, so far as is possible,[32] to allow a set-off arising *ex contractu,* although the claim may be for an unliquidated amount.[33]

31. *Alabama.*—Betts *v.* Gunn, 31 Ala. 219; Pulliam *v.* Owen, 25 Ala. 492.

Arkansas.— Woodruff *v.* Laflin, 4 Ark. 527.

Florida.— Griffing Bros. Co. *v.* Winfield, 53 Fla. 589, 43 So. 687; Hall *v.* Penny, 13 Fla. 621.

Illinois.— Robison *v.* Hibbs, 48 Ill. 408.

Indiana.— See Abbott *v.* Smith, 4 Ind. 452.

Kentucky.— Brannin *v.* Crouch, 10 Ky. L. Rep. 773.

Massachusetts.— Pitts *v.* Holmes, 10 Cush. 92.

Montana.— Wells *v.* Clarkson, 2 Mont. 379.

New Jersey.— Cooper *v.* Crane, 9 N. J. L. 173.

New York.— Sherman *v.* Ballou, 8 Cow. 304; Holbrook *v.* American F. Ins. Co., 6 Paige 220.

Pennsylvania.— Glennon *v.* Lebanon Mfg. Co., 140 Pa. St. 594, 21 Atl. 429, 12 L. R. A. 321; Hunt *v.* Gilmore, 59 Pa. St. 450; Kachlein *v.* Ralston, 1 Yeates 571; Kachlin *v.* Mulhallon, 2 Dall. 237, 1 L. ed. 363; Ackerman *v.* Smith, 1 Pearson 302; Linen *v.* Feltz, 13 Lanc. Bar 24, 3 L. T. Rep. N. S. 107; Morris *v.* Pott, 1 Leg. Rec. 175; Tinicum *v.* Farrell, 8 Wkly. Notes Cas. 502; McIlvaine *v.* A. W. Rand Co., 6 Wkly. Notes Cas. 176; Lehmaier *v.* Born, 1 Wkly. Notes Cas. 444.

Tennessee.— Brady *v.* Wasson, 6 Heisk. 131.

Texas.— Thomas *v.* Hill, 3 Tex. 270; McCarty *v.* Squyres, (Civ. App. 1896) 34 S. W. 356.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 58 *et seq.*

32. See *supra,* I, I.

33. Robinson *v.* L'Engle, 13 Fla. 482; Ingram *v.* Jordan, 55 Ga. 356 (holding that in Georgia under the code, section 3261, which allows defendant to set off a claim of the same nature with plaintiff's demand, unliquidated damages may be the subject of set-off); St. Louis, etc., R. Co. *v.* Chenault, 36 Kan. 51, 12 Pac. 303; Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Axford *v.* Hubbell, 24 Kan. 444; Stevens *v.* Able, 15 Kan. 584; Hudson *v.* Nute, 45 Vt. 66; Keyes *v.* Western Vermont Slate Co., 34 Vt. 81 (holding that unliquidated damages *ex contractu* may be set off); Hubbard *v.* Fisher, 25 Vt. 539.

In Alabama prior to the code it was held that unliquidated damages could not be set off (Sledge *v.* Swift, 53 Ala. 110; Wray *v.* Furniss, 27 Ala. 471; Pulliam *v.* Owen, 25 Ala. 492; Hatchett *v.* Gibson, 13 Ala. 587; Handley *v.* Dodson, 7 Ala. 359; McCord *v.* Williams, 2 Ala. 71; Dunn *v.* White, 1 Ala. 645); but under the code unliquidated damages may be set off if they do not sound in damages merely (Burns *v.* Reeves, 127 Ala. 127, 28 So. 554; Hunt *v.* Johnson, 96 Ala. 130, 11 So. 387; Lang *v.* Waters, 47 Ala. 624); an unliquidated demand not sounding in damages merely, which is made the subject of set-off, being defined as one which, when the facts upon which it is based are established, the law is capable of measuring accurately by a pecuniary standard. If, however, the law does not fix the measure of damages — if they are committed to the judgment of the jury, dependent on the circumstances of the particular case, the demand sounds in damages merely, and is not available as a set-off (Sledge *v.* Swift, *supra*; Martin *v.* Wharton, 38 Ala. 637, holding that an inchoate right of dower is such a demand, cannot be measured by a pecuniary standard, and cannot be set off; Walker *v.* McCoy, 34 Ala. 659; Holley *v.* Younge, 27 Ala. 203).

In Illinois unliquidated damages may be set off if they arise out of the transaction sued on (Sanger *v.* Fincher, 27 Ill. 346; Crabtree *v.* Kile, 21 Ill. 180; Sargeant *v.* Kellogg, 10 Ill. 273; Hawks *v.* Lands, 8 Ill. 227; Kaskaskia Bridge Co. *v.* Shannon, 6 Ill. 15; Nichols *v.* Ruckells, 4 Ill. 298; Edwards *v.* Todd, 2 Ill. 462; South Chicago City R. Co. *v.* Workman, 64 Ill. App. 383; Weaver *v.* Penny, 17 Ill. App. 628; Hartshorn *v.* Kinsman, 16 Ill. App. 555), but not when they arise out of a different contract or transaction, unconnected with the subject-matter of plaintiff's suit (Higbie *v.* Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204 [*affirming* 112 Ill. App. 218]; Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575 [*affirming* 99 Ill. App. 132]; Clause *v.* Bullock Printing Press Co., 118 Ill. 612, 9 N. E. 201; Robison *v.* Hibbs, 48 Ill. 408; De Forrest *v.* Oder, 42 Ill. 500; Bush *v.* Kindred, 20 Ill. 93; Sargeant *v.* Kellogg, 10 Ill. 273; Hawks *v.* Lands, *supra*; Horn *v.* Noble, 95 Ill. App. 99; Smith *v.* Billings, 62 Ill. App. 77; Brooks *v.* Brady, 53 Ill. App. 155; Lake Superior Mineral Land Dev. Co. *v.* Clapp, 50 Ill. App. 301; Poppers *v.* Meager, 33 Ill. App. 19; Hartshorn *v.* Kinsman, *supra*).

In Ohio the earlier cases unanimously held that unliquidated damages could not be set off (McCullough *v.* Lewis, 1 Disn. 564, 12 Ohio Dec. (Reprint) 798; Smead *v.* Chrisfield, 1 Disn. 18, 12 Ohio Dec. (Reprint) 227; Roots *v.* Nye, 2 Handy 229, 12 Ohio Dec. (Reprint) 417; Evens *v.* Hall, 1 Handy 434, 12 Ohio Dec. (Reprint) 222; Cleveland Rubber Co. *v.* Bradford, 6 Ohio Dec. (Reprint) 1160, 11 Am. L. Rec. 44, holding that the demands allowed to be set off by all the statutes from the original act of George II (see *supra,* I, B, 3, a) to the adoption of the code have been interpreted to mean liquidated demands; Stoutenberg *v.* Freese, 2 Ohio Dec. (Reprint) 463), but in a later case it was held that an unliquidated demand might be set off if it arose out of the

4. COUNTER-CLAIM. As counter-claim is a broad remedy devised to give defendant the benefit of whatever rights of offsetting cross demands of which he could

same contract (Doppler *v.* Cox, 6 Ohio Dec. (Reprint) 1080, 10 Am. L. Rec. 306), and later cases go to still greater lengths and hold that unliquidated damages may be set off, whether connected with the transaction sued on or not, provided they arise upon contract (Needham *v.* Pratt, 40 Ohio St. 186; Hathaway *v.* Gordon, 9 Ohio Cir. Ct. 8, 6 Ohio Cir. Dec. 39; Gellhaus *v.* Allemania Loan, etc., Assoc. No. 2, 6 Ohio S. & C. Pl. Dec. 443, 4 Ohio N. P. 255. See Harris *v.* Hanna, Tapp. 9).

In Pennsylvania the decisions are not easily reconcilable. In some it is laid down broadly that unliquidated damages cannot be set off. Somerset Colliery Co. *v.* John, 219 Pa. St. 380, 68 Atl. 843; Wharton *v.* Douglass, 76 Pa. St. 273 (holding that in an action of debt on a note defendant cannot plead by way of set-off a debt due from plaintiff to him on partnership accounts, since such a defense involves an inquiry with complicated partnership transaction, which cannot be done in an action brought by plaintiff); Kelley *v.* Tibbals, 53 Pa. St. 408 (holding that unliquidated damages cannot be set off against a debt of record); Wright *v.* Smyth, 4 Watts & S. 527; Cornell *v.* Green, 10 Serg. & R. 14; Connor *v.* Schildt, 16 Pa. Super. Ct. 88; Foster *v.* Bell, 2 Miles 399; Caffrey *v.* Carle, 3 Kulp 13; Thomson's Estate, 12 Phila. 36; Hains *v.* Rapp, 2 Wkly. Notes Cas. 595; Lehmaier *v.* Born, 1 Wkly. Notes Cas. 444 (holding that even when damages arise *ex contractu* they must be capable of liquidation by a legal standard). In others it is held that unliquidated damages for violation of a separate and independent contract cannot be set off. Watson *v.* Galloway, 1 Wkly. Notes Cas. 109. While others take the stand that unliquidated damages may be set off, arising from the same (Bayne *v.* Gaylord, 3 Watts 301, holding that unliquidated damages arising from malfeasance in performing a building contract may be set off in scire facias upon a mechanic's lien, but defendant cannot recover a balance), or another contract (Shoup *v.* Shoup, 15 Pa. St. 361, holding that unliquidated damages for breach of contract may be set off; Ellmaker *v.* Franklin F. Ins. Co., 6 Watts & S. 439, holding that unliquidated cross demands arising from a distinct and independent contract may be set off; Kelley *v.* Bogue, 1 Phila. 91; Biswanger *v.* Stocker, 2 Wkly. Notes Cas. 407, holding that in an action for goods sold and delivered defendant may set off unliquidated damages caused by plaintiff's failure to deliver goods on a certain day). While still other cases seem to recognize the principle usually followed in other states that purely unliquidated damages cannot be set off, but adopt a rule for determining what are liquidated damages, which is so broad as to include cases which decisions in other states refuse to allow to be set off. Hunt *v.* Gilmore, 59 Pa. St. 450 (holding that unliquidated damages arising from a breach of contract can always be set off when they are capable of liquidation by the application of any known measure or standard, and thus in an action on notes given on a contract of sale of land defendant could set off damages arising from the failure of plaintiff to keep his contract, as the measure which the jury would in law have been bound to apply, would be the advance which defendant could have obtained in the market for the property over and above the contract price. The court intimates, however, that there may be cases of contract where the damages are not capable of liquidation by any known legal standard which could not be set off, such as breach of a contract of marriage); Russell *v.* Miller, 54 Pa. St. 154; Speers *v.* Sterrett, 29 Pa. St. 192; Nickle *v.* Baldwin, 4 Watts & S. 290 (holding that in an action for the price of goods sold and delivered defendant may set off damages for breach of a contract by plaintiff to do certain work for defendant, the court saying that the damages are in a certain sense liquidated, in that there is a measure within which they must be restrained, which would be the value of the work to him); Appleby *v.* Barrett, 28 Pa. Super. Ct. 349; Rafferty *v.* Clark, 2 Pa. Co. Ct. 301, 18 Wkly. Notes Cas. 378 (holding that in a suit for wages defendant may set off damages for plaintiff's non-performance or negligence, if such damages can be liquidated by any recognized measure). But unliquidated damages consisting of anticipated profits arising out of a breach of contract cannot be set off. Van Kleeck *v.* Pickering, 11 Wkly. Notes Cas. 239; Sitgreaves *v.* Griffith, 2 Wkly. Notes Cas. 705; Bunting *v.* Hopple, 2 Wkly. Notes Cas. 445 [*affirmed* in 3 Wkly. Notes Cas. 472]. And even in Pennsylvania it is held that unliquidated damages sounding in tort cannot be set off. See cases cited *supra*, this section.

In South Carolina an independent demand for unascertained damages arising *ex contractu* is admissible as a set off. Bryce *v.* Parker, 11 S. C. 337; Haynes *v.* Prothro, 10 Rich. 318 [*distinguishing* Gibbes *v.* Mitchell, 2 Bay 351].

In West Virginia unliqudated damages arising out of the transaction sued on may be set off. Davis *v.* Baker, 45 W. Va. 455, 32 S. E. 239.

In Texas where plaintiff's claim is unliquidated, defendant may set off unliquidated demands. Taylor *v.* Bewley, 93 Tex. 524, 56 S. W. 746; Bodman *v.* Harris, 20 Tex. 31. And where plaintiff's claim is liquidated, defendant may set off a liquidated demand. Ruzeoski *v.* Wilrodt, (Civ. App. 1906) 94 S. W. 142. But unliquidated damages arising from tort or breach of a covenant cannot be set off against a liquidated and certain claim. Taylor *v.* Bewley, *supra*; Parks *v.* Dial, 56 Tex. 261 (disallowing a set-off of un-

avail himself under either a set-off or recoupment,[34] it is very generally held that a counter-claim which is otherwise available may be interposed, although for unliquidated damages;[35] but a claim for unliquidated damages disconnected with the cause of action sued on cannot be counter-claimed under code sections allowing counter-claims arising out of the contract or transaction sued on or connected with the subject of the action.[36]

5. Reconvention. Reconventional demands connected with and incident to the demand sued on need not be liquidated,[37] but a demand in reconvention for unliquidated damages not arising out of the transaction sued on or connected with plaintiff's cause of action will not be allowed.[38]

6. Compensation. Although it is sometimes broadly stated that unliquidated damages cannot be set up in compensation[39] the rule more accurately stated is that a debt offered in compensation must be equally liquidated with that of plaintiff,[40] and under this latter rule in an action upon an unliquidated demand unliqui-

liquidated damages for trespass); Beckham *v.* Hunter, 37 Tex. 551; Duncan *v.* Magette, 25 Tex. 245 (disallowing unliquidated damages for negligent or wilful killing of a slave); Clevenger *v.* Galloway, (Civ. App. 1907) 104 S. W. 914; Worley *v.* Smith, 26 Tex. Civ. App. 270, 63 S. W. 903; Andrews *v.* Whitehead, (Civ. App. 1901) 60 S. W. 800; Presnall *v.* McLeary, (Civ. App. 1899) 50 S. W. 1066; Hilliard *v.* Johnson, (Civ. App. 1894) 28 S. W. 100. See Arlington First Nat. Bank *v.* Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042; June *v.* Brubaker, 5 Tex. Civ. App. 79, 24 S. W. 79. Nor can a liquidated claim be set off against an unliquidated demand. Baldwin *v.* Richardson, 39 Tex. Civ. App. 406, 87 S. W. 746; National Guarantee, etc., Co. *v.* Thomas, 28 Tex. Civ. App. 379, 67 S. W. 454; Snelling *v.* Koerner, (Civ. App. 1894) 27 S. W. 887.

34. See *supra*, I, C.

35. *California.*— Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223; Stoddard *v.* Treadwell, 26 Cal. 294. But see Lane *v.* Turner, 114 Cal. 396, 46 Pac. 290.

Indiana.— Stockton *v.* Graves, 10 Ind. 294.

Kentucky.— Tebbs *v.* Lewis, 15 Ky. L. Rep. 537; Garvey *v.* Crouch, 10 Ky. L. Rep. 937.

Minnesota.— Morrison *v.* Lovejoy, 6 Minn. 319.

Missouri.—Empire Transp. Co. *v.* Boggiano, 52 Mo. 294; Miller *v.* Crigler, 83 Mo. App. 395.

New York.— Schubart *v.* Harteau, 34 Barb. 447; Boston Silk, etc., Mills *v.* Eull, 1 Sweeny 359, 37 How. Pr. 299; Ogden *v.* Coddington, 2 E. D. Smith 317.

South Carolina.— Bryce *v.* Parker, 11 S. C. 337.

Texas.— Tyson *v.* Jackson, 41 Tex. Civ. App. 128, 90 S. W. 930.

Washington.— Sheafe *v.* Hastie, 16 Wash. 563, 48 Pac. 246; Niver *v.* Nash, 7 Wash. 558, 35 Pac. 380.

England.— Manchester, etc., R. Co. *v.* Brooks, 2 Ex. D. 243, 46 L. J. Exch. 244, 36 L. T. Rep. N. S. 103, 25 Wkly. Rep. 413.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 58 *et seq.*

A balance due defendant on an unsettled partnership account between the parties who had been partners before the commencement of the action is a proper counter-claim in an action upon contract, and defendant can ask for an accounting and the application of the demand of the balance found due him in extinguishment of plaintiff's claim. Waddell *v.* Darling, 51 N. Y. 327; Clift *v.* Northrup, 6 Lans. (N. Y.) 330. But such a balance is not available as a set-off, as neither debt nor assumpsit could be maintained upon it. State *v.* McHale, 16 Mo. App. 478; Stiles *v.* Dougherty, 16 Leg. Int. (Pa.) 132.

36. Le Geirse *v.* Mathews, 1 Tex. App. Civ. Cas. § 779 (holding that a claim for unliquidated damages not arising out of, incident to, or connected with plaintiff's cause of action cannot be pleaded as a counter-claim); American Manganese Co. *v.* Virginia Manganese Co., 91 Va. 272, 21 S. E. 466; Gentry *v.* Grand View Min., etc., Co., 13 Fed. 843 (holding that under the Missouri Practice Act defendant in an action for a tort cannot as assignee set up as a counter-claim an unliquidated demand against plaintiff arising on contract and unconnected with the cause of action set forth in the petition).

37. Lallande *v.* Ball, 20 La. Ann. 193; Bayne *v.* Fox, 18 La. 80; Montgomery *v.* Russell, 7 Mart. N. S. (La.) 288; Agaisse *v.* Guedron, 2 Mart. N. S. (La.) 73; Evans *v.* Gray, 12 Mart. (La.) 475; Godbold *v.* Harrison, McGloin (La.) 31; Egery *v.* Power, 5 Tex. 501; Thomas *v.* Hill, 3 Tex. 270; Steiner *v.* Oliver, (Tex. Civ. App. 1907) 107 S. W. 359; Hansen *v.* Yturria, (Tex. Civ. App. 1898) 48 S. W. 795; Britton *v.* Thrash, 1 Tex. App. Civ. Cas. § 1237.

38. Agaisse *v.* Guedron, 2 Mart. N. S. (La.) 73.

39. Burbridge *v.* Anderson, 32 La. Ann. 877 (holding that an unliquidated demand cannot be pleaded in compensation to a promissory note); Copley *v.* Lambeth, 9 Rob. (La.) 137; Bayne *v.* Fox, 18 La. 80; Montgomery *v.* Russell, 7 Mart. N. S. (La.) 288; Egery *v.* Power, 5 Tex. 501.

40. Goldman *v.* Goldman, 47 La. Ann. 1463, 17 So. 881; Pike *v.* Wells, 24 La. Ann. 208; Naquin *v.* Durac, 22 La. Ann. 249; Hope *v.* Howard, 19 La. Ann. 465; New Orleans *v.* Cordeviolle, 10 La. Ann. 734; Owen *v.* Vanderslice, 9 La. Ann. 189; Copley *v.* Lambeth, 9 Rob. (La.) 137; Jonau *v.*

dated damages may be pleaded in compensation;[41] but in an action on a liquidated demand defendant cannot plead in compensation an unliquidated claim.[42]

7. Setting Off Unliquidated Demands in Equity. As in matters of set-off equity usually follows the law,[43] and as unliquidated damages cannot be set off at law,[44] it is held as a broad general rule that unliquidated damages cannot be set off in equity, that court refusing to first liquidate the claim and then set it off,[45]

Ferrand, 3 Rob. (La.) 364, 2 Rob. 216; Blanchard *v.* Cole, 8 La. 153; Lacoste *v.* Bordere, 7 Mart. N. S. (La.) 516; Baldwin *v.* Handy, McGloin (La.) 189; Godbold *v.* Harrison, McGloin (La.) 31; Naud *v.* Marcotte, 2 Quebec Pr. 145 [*affirming* 15 Quebec Super. Ct. 366]; Walshaw *v.* Rosenfield, 24 Quebec Super. Ct. 80.

41. Durnford's Succession, 8 Rob. (La.) 488.

42. Hoffman *v.* Pontchartrain R. Co., 9 La. 20; Havard *v.* Stone, 5 Mart. N. S. (La.) 126, holding that it is only when a debt is liquidated that it can be offered in compensation to an execution.

In an action on a note defendant cannot plead in compensation an unliquidated claim (Pi *v.* Vidal, 5 La. Ann. 303), such as open accounts (Coleman *v.* Marble, 9 La. Ann. 476; New Orleans Gaslight, etc., Co. *v.* Hill, 2 La. Ann. 402), or an unliquidated claim for defendant's services as attorney for plaintiff (Berens *v.* Ker, 28 La. Ann. 96).

43. See *supra*, I, F, 3.

44. See *supra*, VI, I, 3.

45. *Alabama.*— Gafford *v.* Proskauer, 59 Ala. 264 (holding that purely unliquidated damages, springing out of transactions not connected with the debt sued on, cannot be set off in a court of equity against a clear and certain debt); Wray *v.* Furniss, 27 Ala. 471; Pulliam *v.* Owen, 25 Ala. 492.

Arkansas.— Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569 (holding that equity will not set off unliquidated damages in aid of a fraud); Dugan *v.* Cureton, 1 Ark. 31, 31 Am. Dec. 727.

California.— Ricketson *v.* Richardson, 19 Cal. 330.

Georgia.— Bonaud *v.* Sorrel, 21 Ga. 108.

Illinois.— Derby *v.* Gage, 38 Ill. 27 (holding that a claim for unliquidated damages not connected with the subject-matter of the suit cannot be pleaded in equity by way of a set-off, but may be taken advantage of by cross bill); Wade *v.* Wade, 12 Ill. 89 (holding that a court of equity will not interfere to set off an unliquidated claim against a judgment except under special circumstances); Parkinson *v.* Trousdale, 4 Ill. 367.

Kentucky.— Taylor *v.* Stowell, 4 Metc. 175; Shropshire *v.* Conrad, 2 Metc. 143; Collins *v.* Farquar, 4 Litt. 153 (holding that the damages to be recovered for a breach of a contract not to carry on a particular business in a certain place are uncertain, and must be liquidated in an action at law before they can form a proper item of set-off in a suit in equity); Caldwell *v.* Hawkins, 1 Litt. 212 (holding that chancery will not entertain jurisdiction to liquidate damages for a defect in personal property sold, and set off the damages against the price); Tebbs *v.* Lewis, 15 Ky. L. Rep. 537; Forbes *v.* Cooper, 9 Ky. L. Rep. 716.

Michigan.— Hendricks *v.* Toole, 29 Mich. 340.

Mississippi.—Gridley *v.* Tucker, Freem. 209.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260 [*citing* State *v.* Welsted, 11 N. J. L. 397].

New Jersey.— McCracken *v.* Harned, 59 N. J. Eq. 190, 44 Atl. 959; Alpaugh *v.* Wood, 45 N. J. Eq. 153, 16 Atl. 676; Trotter *v.* Heckscher, 40 N. J. Eq. 612, 4 Atl. 83.

New York.— Dunn *v.* Uvalde Asphalt Pav. Co., 175 N. Y. 214, 67 N. E. 439; Bradley *v.* Angell, 3 N. Y. 475; Keep *v.* Lord, 2 Duer 78; Pignolet *v.* Geer, 19 Abb. Pr. 264; McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431; Barber *v.* Spencer, 11 Paige 517; Jennings *v.* Webster, 8 Paige 503, 35 Am. Dec. 722; Livingston *v.* Livingston, 4 Johns. Ch. 287, 8 Am. Dec. 562 (holding that there never was a case of set-off in equity where the damages proposed to be set off against a clear and certain debt were unliquidated and dependent upon an unsettled legal right of doubtful aspect); Duncan *v.* Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513.

Oregon.— Burrage *v.* Bonanza Gold, etc., Min. Co., 12 Oreg. 169, 6 Pac. 166, holding that defendant in a suit in equity cannot plead in the way of set-off an unliquidated demand triable before a jury and in no way connected with the subject of the suit.

Rhode Island.— American Bldg. Loan, etc., Assoc. *v.* Booth, 17 R. I. 736, 24 Atl. 779.

Vermont.— Smith *v.* Wainright, 24 Vt. 97; Nims *v.* Rood, 11 Vt. 96, 34 Am. Dec. 669; Ferris *v.* Burton, 1 Vt. 439, holding that to authorize a set-off of mutual demands in equity they must have been rendered certain or liquidated by judgment decree or by the confession of defendant in his answer.

Virginia.— Robertson *v.* Hogshead, 3 Leigh 667; Webster *v.* Couch, 6 Rand. 519.

United States.— The Zouave, 29 Fed. 296; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

England.— Middleton *v.* Pollock, L. R. 20 Eq. 29, 44 L. J. Ch. 584, 33 L. T. Rep. N. S. 240, 23 Wkly. Rep. 766; Best *v.* Hill, L. R. 8 C. P. 10, 42 L. J. C. P. 10, 27 L. T. Rep. N. S. 490, 21 Wkly. Rep. 147.

Canada.— McManus *v.* Wilson, 17 Manitoba 567.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 64.

A sum so uncertain as to require a jury to be impaneled to liquidate it will not be set off in equity, but a judgment at law should be first obtained, and, if there is equity of set-off, it should be presented as liquidated by the judgment. Jones *v* Murray, 3 T. B. Mon. (Ky.) 83; Collins *v.* Farquar, 4 Litt. (Ky.) 153.

unless some special equity intervenes,[46] and this rule applies with even greater force to unliquidated damages sounding in tort,[47] and unliquidated damages cannot be pleaded as a set-off in an action in equity, where defendant has an adequate remedy at law against plaintiff.[48] If, however, there is an agreement express or implied of stoppage *pro tanto* between the parties,[49] or a mutual credit,[50] or defendant confesses the amount to be due in his answer,[51] unliquidated demands may be set off in equity. The insolvency of plaintiff will move a court of equity to set off claims of defendant which would otherwise be disallowed, because unliquidated,[52] but not where the insolvency is denied and not supported by proof;[53] and it has been held that unliquidated damages sounding in tort cannot be set off in equity even when insolvency intervenes.[54] The non-residence of plaintiff is also generally held to be such a circumstance as will move equity to set off unliquidated demands.[55] But the mere fact that one of several plaintiffs is a non-resident or insolvent will not move a court of equity to interpose an unliquidated set-off if other plaintiffs are residents and solvent.[56] A court of equity

46. Jordan *v.* Jordan, 12 Ga. 77.

47. Cotton *v.* Scott, 97 Ala. 447, 12 So. 65; Betts *v.* Gunn, 31 Ala. 219; Pulliam *v.* Owen, 25 Ala. 492; Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83; Davis *v.* American L. Ins., etc., Co., 4 Edw. (N. Y.) 308.

48. Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865; Talbot *v.* Banks, 2 J. J. Marsh. (Ky.) 548; Taylor *v.* Stowell, 4 Metc. (Ky.) 175; Bradley *v.* Morgan, 2 A. K. Marsh. (Ky.) 369 (holding that a court of equity cannot set off an unliquidated land contract against a judgment at law, when the party's remedy at law was complete); Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329; Garner *v.* Jones, 21 S. W. 647, 14 Ky. L. Rep. 792; Garner *v.* Jones, 13 Ky. L. Rep. 304.

49. Bonaud *v.* Sorrel, 21 Ga. 108; Caldwell *v.* Hawkins, 1 Litt. (Ky.) 212; Hackett *v.* Connett, 2 Edw. (N. Y.) 73.

50. Hackett *v.* Connett, 2 Edw. (N. Y.) 73; Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50.

51. Ferris *v.* Burton, 1 Vt. 439.

52. *Alabama.*— Wray *v.* Furniss, 27 Ala. 471, holding that a demand for unliquidated damages arising from a breach of covenant of title may be set off in equity against a note founded on an independent consideration, when the vendor is dead and his estate in insolvent.

Arkansas.— See Matthews *v.* Weiler, 57 Ark. 606, 22 S. W. 569.

Georgia.— Butler *v.* Scandrett, 128 Ga. 432, 57 S. E. 764; Bonaud *v.* Sorrel, 21 Ga. 108.

Kentucky.— Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865; Taylor *v.* Stowell, 4 Metc. 175; Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329; Tebbs *v.* Lewis, 15 Ky. L. Rep. 537. See also Talbot *v.* Banks, 2 J. J. Marsh. 548.

Massachusetts.— Phelps *v.* Rice, 10 Metc. 128 (holding that in an action by the administrator of an insolvent estate defendant may set off unliquidated claims); McDonald *v.* Webster, 2 Mass. 498.

Mississippi.— Gridley *v.* Tucker, Freem. 209.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Reppy *v.* Reppy, 46 Mo. 571. But see Field *v.* Oliver, 43 Mo. 200, holding that equity will not take cognizance of a case or extend its jurisdiction to sustain as a set-off a sum so uncertain as to require a jury to be impaneled to liquidate it, but that where a claim sought to be set off by defendant against plaintiff's cause of action was definite and certain, and the insolvency of plaintiff was admitted, the court had jurisdiction to allow the set-off.

Nebraska.— Thrall *v.* Omaha Hotel Co., 5 Nebr. 295, 25 Am. Rep. 488.

New York.— Littlefield *v.* Albany County Bank, 97 N. Y. 581; Pignolet *v.* Geer, 19 Abb. Pr. 264; Barber *v.* Spencer, 11 Paige 517; Gay *v.* Gay, 10 Paige 369.

United States.— Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598.

England.— Makeham *v.* Crow, 15 C. B. N. S. 847, 109 E. C. L. 847.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 64.

Insolvency as ground of equitable set-off generally see *supra*, I, F, 4, b.

53. Bradley *v.* Morgan, 2 A. K. Marsh. (Ky.) 369; Bunting *v.* Cochran, 99 Va. 558, 39 S. E. 229.

54. Betts *v.* Gunn, 31 Ala. 219; Duncan *v.* Magette, 25 Tex. 245; Fondren *v.* Leake, 1 Tex. Unrep. Cas. 151. But see Jones *v.* Murray, 3 T. B. Mon. (Ky.) 83.

55. Bonaud *v.* Sorrel, 21 Ga. 108; Forbes *v.* Cooper, 88 Ky. 285, 11 S. W. 24, 10 Ky. L. Rep. 865 (holding that damages arising from an independent transaction, although unliquidated, are available to defendant as a set-off, where plaintiff is a non-resident, having no property in the state); Taylor *v.* Stowell, 4 Metc. (Ky.) 175; Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329; Tebbs *v.* Lewis, 15 Ky. L. Rep. 537; Barnes *v.* McMullins, 78 Mo. 260. But see Murray *v.* Toland, 3 Johns. Ch. (N. Y.) 569, holding that the mere inconvenience of following plaintiff to his residence out of the state is not of itself a sufficient ground for equitable set-off of unliquidated damages.

Non-residence as ground of equitable set-off generally see *supra*, I, F, 4, c.

56. Garner *v.* Jones, 94 Ky. 135, 21 S. W. 647, 14 Ky. L. Rep. 792.

will sometimes defer a decree to enable defendant to have the account liquidated, referring him to a court of law to liquidate the claim,[57] and may enjoin plaintiff from proceeding until the matter of set-off is liquidated at law.[58]

J. Torts — 1. Recoupment. It has been almost universally held that a cross demand may be recouped, even though it sounds in tort, if it is connected with, and a part of, the contract or transaction upon which plaintiff's cause of action is based,[59] provided both claims are of such a nature as to be susceptible of adjustment in one action.[60] Thus defendant may recoup damages arising from conversion,[61] false representations,[62] negligence,[63] seduction,[64] or trespass to real [65] or

57. Forbes *v.* Cooper, 9 Ky. L. Rep. 716; Smith *v.* Wainwright, 24 Vt. 97; Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678; Nims *v.* Rood, 11 Vt. 96, 34 Am. Dec. 669; Commercial Bank *v.* Cabell, 96 Va. 552, 32 S. E. 53 (holding that, although a court of equity will not ordinarily suspend the course of legal proceedings to enable defendant in an action at law to set off a balance which he alleges to be due him on an unsettled partnership account, it will do so when it appears that the settlement will show a balance in favor of complainant and the debtor partner is insolvent); Ritchie *v.* McMullen, 79 Fed. 522, 25 C. C. A. 50.

58. Forbes *v.* Cooper, 9 Ky. L. Rep. 716; Gridley *v.* Tucker, Freem. (Miss.) 209.

59. *Delaware.*— Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (1906) 62 Atl. 1054.

Georgia.— Lee *v.* Clements, 48 Ga. 128.

Illinois.— Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 155; Peck *v.* Bligh, 37 Ill. 317; Brigham *v.* Hawley, 17 Ill. 38; Spurgin *v.* Kruse, 125 Ill. App. 507; Lloyd *v.* Manufacturing, etc., Warehouse Co., 102 Ill. App. 551.

Maryland.— Fidelity, etc., Co. *v.* Haines, 78 Md. 454, 28 Atl. 393, 23 L. R. A. 652.

Michigan.— See Sinker *v.* Diggins, 76 Mich. 557, 43 N. W. 674.

Pennsylvania.— Gogel *v.* Jacoby, 5 Serg. & R. 117, 9 Am. Dec. 339, a leading Pennsylvania case.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 31, 32.

But see Hart *v.* Francis, 2 Colo. 719 (only apparently *contra*, because recoupment is used as synonymous with set-off, the latter remedy being evidently meant); Walker *v.* Lewandovska, 15 Mo. App. 581 (holding that in an action for the recovery of a servant's wages defendant cannot recoup damages for a tort of the servant consisting of an abuse of his position and privileges as defendant's servant); Logie *v.* Black, 24 W. Va. 1 (holding that in an action of assumpsit defendant cannot recoup in tort, but only for damages arising from breach, by plaintiff, of the contract sued on).

60. Lloyd *v.* Manufacturing Warehouse, etc., Co., 102 Ill. App. 551.

61. Brigham *v.* Hamby, 17 Ill. 38 (where, in an action for wages due, defendant was allowed to recoup the value of the tools converted by plaintiff); Kingman *v.* Draper, 14 Ill. App. 577 (holding that in an action on promissory notes given to plaintiff for a sawmill defendant might recoup, but could not set off a conversion of the mill, by plaintiff, subsequent to the making of the notes).

62. Avery *v.* Brown, 31 Conn. 398; Burroughs *v.* Clancey, 53 Ill. 30 (holding that in covenant for rent defendant might recoup for false representations of the lessor as to the drainage of the property); Harrington *v.* Stratton, 22 Pick. (Mass.) 510 (where, in an action by the payee against the maker of a promissory note given for the price of a chattel, it was held competent for the maker to prove in reduction of damages that the sale was effected by means of false representations of the value of the chattel); Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810 (holding that in an action for the price of goods sold defendant may set up false representation as to the goods, by way of recoupment of the sum that plaintiff may recover).

In an action of deceit in an exchange of chattels defendant may recoup damages for like false and fraudulent representations of plaintiff. Carey *v.* Guillow, 105 Mass. 18, 7 Am. Rep. 494; Cole *v.* Colburn, 61 N. H. 499.

63. Hatchett *v.* Gibson, 13 Ala. 587 (an action for advances on goods, where defendant was allowed to recoup because the goods were negligently destroyed by fire while in plaintiff's possession); Garfield *v.* Huls, 54 Ill. 427; Belvidere Gas Light, etc., Co. *v.* Wayland, 77 Ill. App. 657.

In an action for work, labor, and services defendant may recoup damages caused by plaintiff's negligent performance of the work. Woodrow *v.* Hawving, 105 Ala. 240, 16 So. 720; Harlan *v.* St. Paul, etc., R. Co., 31 Minn. 427, 18 N. W. 147; Still *v.* Hall, 20 Wend. (N. Y.) 51; Glennon *v.* Lebanon Mfg. Co., 140 Pa. St. 594, 21 Atl. 429, 12 L. R. A. 321. Thus in an action by a physician for services defendant may recoup damages for malpractice, or negligence of plaintiff. McKleroy *v.* Sewell, 73 Ga. 657 (where plaintiff gave an overdose of medicine); Howell *v.* Goodrich, 69 Ill. 556 (negligent setting of a broken arm). And, where a solicitor was attempting to enforce a demand for services, and the defense was the negligence of the solicitor in the performance of the services, it was allowed on the principle of recoupment. Streeter *v.* Streeter, 43 Ill. 155; Piggott *v.* Williams, 6 Madd. 95, 56 Eng. Reprint 1027.

64. Bixby *v.* Parsons, 49 Conn. 483, 44 Am. Rep. 246.

65. Scott *v.* Kenton, 81 Ill. 96, holding that in an action to recover the value of the

personal[66] property. But defendant cannot recoup for torts not connected with plaintiff's cause of action.[67]

2. SET-OFF. In like manner as statutes of set-off have been construed as excluding set-off in actions of tort,[68] so they have been very generally construed as excluding set-off arising in tort, being generally framed only to allow set-off of debts and demands,[69] and thus set-off has been very generally

use of a division fence, defendant might recoup damages for plaintiff's stock breaking into defendant's premises through the fence in question.

66. Brunson *v.* Martin, 17 Ark. 270; Miller *v.* Stewart, 12 La. Ann. 170; Brady *v.* Price, 19 Tex. 285.

While one trespass cannot be set off in bar of another (see *infra*, note 78) if the damage alleged by plaintiff is caused in part by the wrongful act of plaintiff defendant may, by way of defense under a plea of not guilty, prove such wrongful act in mitigation of damages. Hargreaves *v.* Kimberly, 26 W. Va. 787, 53 Am. Rep. 121; Knight *v.* Brown, 25 W. Va. 808.

67. *Arkansas.*—Arnold *v.* Daley, (1891) 16 S. W. 9; Brunson *v.* Martin, 17 Ark. 270.

Delaware.— Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (1906) 62 Atl. 1054.

Georgia.— Gerding *v.* Adams, 65 Ga. 79, holding that in an action upon a note given for three mules, defendant could not recoup on the ground that the vendor had caused one mule to be sold under an attachment void because not supported by an affidavit, as the attachment did not arise out of the contract, but in violation of it in defendant's not paying the note.

Illinois.— Waterman *v.* Clark, 76 Ill. 428; Evans *v.* Hughey, 76 Ill. 115; Brigham *v.* Hawley, 17 Ill. 38.

Maine.— Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56.

Massachusetts.— See Brighton Five Cents Sav. Bank *v.* Sawyer, 132 Mass. 185.

Michigan.— Helwig *v.* Lascowski, 82 Mich. 619, 46 N. W. 1033, 10 L. R. A. 378.

New Jersey.—Bird *v.* Magowan, (Ch. 1898) 43 Atl. 278, holding that a claim for damages for negligence of a director cannot be recouped against a claim he has against the corporation, growing out of a different transaction.

New York.— Peabody *v.* Beach, 6 Duer 53; Peabody *v.* Bloomer, 5 Duer 678; Cram *v.* Dresser, 2 Sandf. 120; Murden *v.* Priment, 1 Hilt. 75.

Vermont.— Sampson *v.* Warner, 48 Vt. 247, holding that a claim for malicious prosecution is not the proper subject of recoupment in a suit subsequently brought upon a contract, in violation of which the former suit was brought.

United States.— Dietrich *v.* Ely, 63 Fed. 413, 11 C. C. A. 266.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 53.

68. See *supra*, V, E.

69. *District of Columbia.*— McGuire *v.* Gerstley, 26 App. Cas. 193 [*affirmed* in 204 U. S. 489, 27 S. Ct. 332, 51 L. ed. 581].

Florida.— Moulie *v.* Hughes, 28 Fla. 617, 10 So. 94.

Georgia.— Ray *v.* Anderson, 119 Ga. 926, 47 S. E. 205; Green *v.* Combs, 81 Ga. 210, 6 S. E. 582; McLendon *v.* Finch, 2 Ga. App. 421, 58 S. E. 690.

Illinois.— Robison *v.* Hibbs, 48 Ill. 408; Edwards *v.* Todd, 2 Ill. 462; Lloyd *v.* Manufacturers, etc., Warehouse Co., 102 Ill. App. 551; Caldwell *v.* Evans, 39 Ill. App. 613.

Indiana.—Harris *v.* Randolph County Bank, 157 Ind. 120, 60 N. E. 1025.

Indian Territory.—Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Nebraska.— Boyer *v.* Clark, 3 Nebr. 161.

New Jersey.— Cooper *v.* Crane, 9 N. J. L. 173.

New York.— Quayle *v.* Brandow Printing Co., 116 N. Y. App. Div. 9, 101 N. Y. Suppl. 323 (holding that an action for compensation for public printing being an action in contract, a cause of action in tort cannot be set off therein); Kurtz *v.* McGuire, 5 Duer 660; Sherman *v.* Ballou, 8 Cow. 304.

Ohio.— Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519, 6 Am. L. Rec. 380.

Pennsylvania.— Jenkins *v.* Rush Brook Coal Co., 205 Pa. St. 166, 54 Atl. 715 (holding that in an action of assumpsit defendant cannot set off a claim for which assumpsit would not lie); Groetzinger *v.* Latimer, 146 Pa. St. 628, 23 Atl. 393 (holding that matters sounding in tort arising out of a different transaction cannot be given in evidence as a set-off); Glennon *v.* Lebanon Mfg. Co., 140 Pa. St. 594, 21 Atl. 429, 12 L. R. A. 321; Ahl *v.* Rhoads, 84 Pa. St. 319 (holding that broad and liberal as has been the construction of the Defalcation Act it has never authorized the admission of proof of damages arising from a technical tort); Halfpenny *v.* Bell, 82 Pa. St. 128; Hunt *v.* Gilmore, 59 Pa. St. 450; Peterson *v.* Haight, 3 Whart. 150; Beyer *v.* Fenstermacher, 2 Whart. 95; Hubler *v.* Tamney, 5 Watts 51; Light *v.* Stoever, 12 Serg. & R. 431; Shaw *v.* Badger, 12 Serg. & R. 275; Cornell *v.* Green, 10 Serg. & R. 14; Gogel *v.* Jacoby, 5 Serg. & R. 117, 9 Am. Dec. 339; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Kachlein *v.* Ralston, 1 Yeates 571; Snyder *v.* Lingo, 30 Pa. Super. Ct. 651; Henion *v.* Morton, 2 Ashm. 150; Shaw *v.* Folkers, 12 Wkly. Notes Cas. 518; Tinicum *v.* Farrell, 8 Wkly. Notes Cas. 502.

South Carolina.—Gibbes *v.* Mitchell, 2 Bay 351, holding that torts are not discountable under the discount law, only money transactions or mutual accounts.

Vermont.— Sampson *v.* Warner, 48 Vt. 247; Hudson *v.* Nute, 45 Vt. 66.

United States.— Winchester *v.* Hackley, 2 Cranch 342, 2 L. ed. 299, holding that de-

disallowed in actions brought for assault,[70] conspiracy,[71] conversion,[72] fraud and

fendant cannot set off a claim for bad debts made by misconduct of plaintiff in selling defendant's goods as factor, plaintiff not having guaranteed the debts.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 31, 32.

The reason for the rule has been held to be that the utmost confusion would be introduced if matters of trespass, assault, slander, and the like were construed to be "demands," within the meaning of the law to be set-off against a debt; or, if in an action for slander or false imprisonment, a set-off of money due upon a promissory note or bond could be allowed. Robinson *v.* L'Engle, 13 Fla. 482.

In Alabama under the code, where defendant's demand sounds in damages merely, it cannot be set off (Nelms *v.* Hill, 85 Ala. 583, 5 So. 344; Collins *v.* Greene, 67 Ala. 211; Mobile, etc., R. Co. *v.* Clanton, 59 Ala. 392, 31 Am. Rep. 15; Walker *v.* McCoy, 34 Ala. 659; Gibson *v.* Marquis, 29 Ala. 668); a demand sounding in damages merely being interpreted to include that class of demands where, when the facts are ascertained, the law is incapable of measuring the damages by a pecuniary standard (Nelms *v.* Hill, *supra*; Collins *v.* Greene, *supra*; Sledge *v.* Swift, 53 Ala. 110; Holley *v.* Younge, 27 Ala. 203, 206 [*cited* and *approved* in Rosser *v.* Bunn, 66 Ala. 89]). And under this provision it is generally held that defendant may not set off a demand sounding in tort. See cases cited *supra*, this note. And see Nelms *v.* Hill, *supra*; Martin *v.* Brown, 75 Ala. 442 (where in an action on a bill of exchange defendant was not allowed to set off a libel or slander, although the tort complained of was held to relate to the contract sued on, or to its subject-matter or breach); Rosser *v.* Bunn, *supra* (holding that since exemplary damages may be recovered where timber is carried off without the owner's consent a cause of action for such a trespass is one sounding in damages merely, within the meaning of Code (1816), § 2991, and cannot be made the subject of a set-off); Walker *v.* McCoy, *supra*; Pulliam *v.* Owen, 25 Ala. 492. And a plea of set-off cannot be amended so as to limit its operation to special damages and be admitted upon this ground (Nelms *v.* Hill, *supra*; Walker *v.* McCoy, *supra*). But it has been held in later cases that a tort not sounding in damages merely may be set off. Morris *v.* Attalla Bank, 153 Ala. 352, 45 So. 219 (holding that a claim for conversion of chattels by plaintiff may be set off in a suit by plaintiff against defendant for the conversion of other chattels); Debter *v.* Henry, 144 Ala. 552, 39 So. 72.

In Arkansas it is held that the code of practice declaring that a set-off must be a cause of action arising on a contract does not extend or enlarge the nature of the demand which could be used as a set-off at common law, but merely recognized the law as it existed when the code was adopted. Bloom *v.* Lehman, 27 Ark. 489.

In Iowa, under Code (1851), § 1740, which provides that "the defendant may also set up, by way of set-off or cross-action, any claim which would have been the subject of an action against the plaintiff," claims for damages arising from a tort may be set off, the words "by way of set-off or cross-action," being construed as including all that is meant by counter-claim, cross demand, recoupment of damages, set-off, and similar words as found in modern legislation and at common law. Campbell *v.* Fox, 11 Iowa 318. This, however, is not a technical set-off, but rather a counter-claim.

In Virginia it is held that Code (1887), § 3299, authorizes a set-off sounding in tort if connected with the subject-matter of plaintiff's claim (Newport, etc., R., etc., Co. *v.* Bickford, 105 Va. 182, 52 S. E. 1011), and defendant in a suit on a contract may file a set-off claiming fraud in its procurement or in any other matter that would entitle him to recover damages at law (Strickland *v.* Graybill, 97 Va. 602, 34 S. E. 475).

Even in equity damages arising out of tort are not the subject of set-off. Chambers *v.* Wright, 52 Ala. 444; Pulliam *v.* Owen, 25 Ala. 492; Matthews *v.* Lindsay, 20 Fla. 962; Holbrook *v.* American F. Ins. Co., 6 Paige (N. Y.) 220; Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133 (holding that even if plaintiff be insolvent equity cannot allow the set-off of a cause of action for an independent tort against a claim arising on contract); Hart *v.* Davis, 21 Tex. 411 (holding that, although it has been held that equity will extend the remedy beyond the limits of the statute, still it never has been held, as is believed, to extend to a case of tort); Fondren *v.* Leake, 1 Tex. Unrep. Cas. 151; Dietrich *v.* Ely, 63 Fed. 413, 11 C. C. A. 266. But see Butler *v.* Mitchell, 128 Ga. 431, 57 S. E. 764.

A claim arising from a bonus paid on a usurious loan is not grounded in tort and is the subject of set-off. Dey *v.* Jackson, 39 N. J. L. 535.

70. Dole *v.* Erskine, 35 N. H. 503.

71. Robinson *v.* L'Engle, 13 Fla. 482, an action of covenant in which set-off for damages growing out of conspiracy was rejected.

72. *Colorado.*— Hart *v.* Francis, 2 Colo. 719.

Florida.— Hall *v.* Penny, 13 Fla. 621.

Illinois.— Kingman *v.* Draper, 14 Ill. App. 577, holding that in an action on promissory notes given to plaintiff for a sawmill defendant might recoup, but could not interpose as a set off a conversion, by plaintiff, of the mill subsequent to the making of the notes.

Indiana.— Zeigelmueller *v.* Seamer, 63 Ind. 488.

Kentucky.— Brannin *v.* Crouch, 10 Ky. L. Rep. 773, holding that in an action on a note a claim for damages alleged to be due, because of the unauthorized sale by plaintiff of tobacco belonging to defendant on storage with plaintiff as warehouseman, cannot be set

deceit,[73] libel,[74] malicious mischief,[75] negligence,[76] nuisance,[77] trespass,[78] and wrongfully suing out an attachment,[79] even though relating to the subject-matter of plaintiff's cause of action.[80] If, however, the parties agree upon the amount, and the tort-feasor agrees to pay the sum to the injured party, it may be set off.[81]

3. COUNTER-CLAIM. Under the codes which very generally provide that a demand may be counter-claimed, if it arises out of the transaction sued upon.

off. But see Chenault *v.* Norton, 99 S. W. 899, 30 Ky. L. Rep. 875.

Maine.— Hopkins *v.* Megquire, 35 Me. 78.

Ohio.— Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519, 4 Am. L. Rec. 380.

Pennsylvania.— Groetzinger *v.* Latimer, 146 Pa. St. 628, 23 Atl. 393 (where, in an action by a landlord to recover rent due upon a lease, defendant was not allowed to set off against plaintiff's demand a claim for damages on account of a wrongful seizure of defendant's goods, under an illegal landlord's warrant issued my plaintiff); Kitchen *v.* Smith, 101 Pa. St. 452; Heck *v.* Shener, 4 Serg. & R. 249, 8 Am. Dec. 700; Dale *v.* Medwoy, 1 Wilcox 155 (holding that, in an action against an executor for work and labor done for decedent, defendant cannot set off the value of personal property of the decedent, alleged to have been converted by plaintiff to his own use, since defendant's claim arises out of a tort for which he cannot sue in assumpsit).

South Carolina.— Schweizer *v.* Weiber, 6 Rich. 159.

Tennessee.— Brady *v.* Wasson, 6 Heisk. 131.

Vermont.— Hudson *v.* Nute, 45 Vt. 66.

Wisconsin.— Pierce *v.* Hoffman, 4 Wis. 277; Conklin *v.* Parsons, 2 Pinn. 264.

United States.— Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810, holding that, under the statute of Pennsylvania of 1705 (the Defalcation Act), which allows defendant, in an action upon a contract, to set off any matter on contract, and to recover judgment thereon against plaintiff, upon proving that plaintiff owes him more than he owes plaintiff, defendant, in an action for goods sold and delivered, may not set off a claim for fraudulent representation, or other claim sounding in tort only.

73. Dean *v.* Allen, 8 Johns. (N. Y.) 390.

74. Hart *v.* Davis, 21 Tex. 411 (holding that in an action for assault and battery defendant cannot set off damages for a previous libel); Brown *v.* Durham, (Tex. Civ. App. 1897) 42 S. W. 331 (holding that where defendant published libelous matter of plaintiff while attempting to collect a claim against him such claim cannot be set off in plaintiff's action for the libel).

75. Atchison, etc., R. Co. *v.* Phelps, 4 Kan. App. 139, 46 Pac. 183, a claim for wilfully and maliciously damaging and delaying a railroad company's business.

76. *Georgia.*— McKleroy *v.* Sewell, 73 Ga. 657, holding that, in an action by a physician for services, a set-off based on a tort in giving defendant too large a dose of medicine is not allowable, although it might be recouped.

Indiana.— Indianapolis, etc., R. Co. *v.* Ballard, 22 Ind. 448.

Massachusetts.—Adams *v.* Manning, 17 Mass. 178, holding that in an action on a note defendant may not set off a demand against plaintiff, arising out of the negligent sale, by plaintiff, of goods consigned to him by defendant, to an insolvent.

Mississippi.— Cobb *v.* Wilson, 60 Miss. 343.

Pennsylvania.— Philadelphia *v.* Pierson, 211 Pa. St. 388, 60 Atl. 999; Baltimore, etc., R. Co. *v.* Longbottom, 9 Del. Co. 294.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 31.

77. Nashburn *v.* Inman, 97 Ga. 396, 24 S. E. 39 (holding that in an action on notes given for the price of land defendant could not set off damages resulting from the maintenance by plaintiff, his grantor, of a nuisance on adjoining land); Kachlin *v.* Mulhallon, 2 Dall. (Pa.) 237, 1 L. ed. 363 (where, in an action on a bond given in payment for a mill which plaintiff had sold to defendants, defendants were not permitted to set off for damages by raising of the water so as to injure the mill).

78. *Illinois.*— Robison *v.* Hibbs, 48 Ill. 408.

Indiana.— Zeigelmueller *v.* Seamer, 63 Ind. 488; Roback *v.* Powell, 36 Ind. 515.

Maryland.— Burch *v.* State, 4 Gill & J. 444.

New Jersey.— Edwards *v.* Davis, 6 N. J. L. 394, trespass on personal property.

South Carolina.— Schweizer *v.* Weiber, 6 Rich. 159.

Tennessee.— Brady *v.* Wasson, 6 Heisk. 131, holding that in an action on a note defendant cannot set off unliquidated damages sustained by reason of trespass in moving away and taking possession of live stock.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 31.

One trespass cannot be set off against another (Shelly *v.* Vanarsdoll, 23 Ind. 543; Hargreaves *v.* Kimberly, 23 W. Va. 757, 53 Am. Rep. 121; Knight *v.* Brown, 25 W. Va. 808), but may be recouped (see *supra*, note 66).

79. Bloom *v.* Lehman, 27 Ark. 489; Kellett *v.* Freeman, 8 Del. Co. (Pa.) 98.

80. Matthews *v.* Lindsay, 20 Fla. 962, holding that damages sustained by reason of annoying visits, malicious prosecution, slander of title, and injury to one's credit occasioned by such proceedings, although relating to the subject-matter of plaintiff's suit cannot be set off. And see cases cited, *supra*, this note.

81. Robison *v.* Hibbs, 48 Ill. 408, 410.

or is connected with the subject of the action,[82] although some of the earlier New York cases tend to a contrary rule,[83] it is now almost universally held that a claim which fulfils these conditions may be interposed by defendant as a counter-claim, although it arises out of or is based upon a tort,[84] such as conspiracy,[85]

82. See *supra*, VI, C, 2, c.

83. Piser *v.* Stearns, 1 Hilt. (N. Y.) 86. See also Askins *v.* Hearns, 3 Abb. Pr. (N. Y.) 184.

84. Tinsley *v.* Tinsley, 15 B. Mon. (Ky.) 454; Ter-Kuile *v.* Marsland, 81 Hun (N. Y.) 420, 31 N. Y. Suppl. 5; Kneeland *v.* Pennell, 49 Misc. (N. Y.) 94, 96 N. Y. Suppl. 403; McKinnon *v.* Morrison, 104 N. C. 354, 10 S. E. 513; Bitting *v.* Thaxton, 72 N. C. 541; Walsh *v.* Hall, 66 N. C. 233.

In Indiana it is held that tort cannot be a basis of counter-claim against contract, the courts there holding that tort cannot be regarded as growing out of or connected with contract, within the meaning of the statute, simply because the contract had suggested it or was remotely incident to it. Blue *v.* Capital Nat. Bank, 145 Ind. 518, 43 N. E. 655 (holding that slander cannot be the subject of counter-claim in an action on a promissory note for borrowed money); Avery *v.* Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Dec. 680; Terre Haute, etc., R. Co. *v.* Pierce, 95 Ind. 496; Roback *v.* Powell, 36 Ind. 515; Shelly *v.* Vanarsdoll, 23 Ind. 543 Slayback *v.* Jones, 9 Ind. 470 (holding that, where the consideration of the note sued on was land and crops, defendant could not counter-claim damages for a trespass upon the land by plaintiff, or for a carrying away of the crops); Lovejoy *v.* Robinson, 8 Ind. 399; Conner *v.* Winton, 7 Ind. 523.

In California it has been held that a counter-claim sounding in tort cannot be set up as a defense to an action arising upon contract, but a promise or agreement to pay a stated sum of money in full satisfaction of damages resulting from a tort becomes a matter arising upon contract, and as such may be properly pleaded as a counter-claim to an action founded upon contract; but proof of an express promise or agreement is necessary in order to sustain such a counter-claim. Poly *v.* Williams, 101 Cal. 648, 36 Pac. 102, where the promise was to pay a certain sum as damages for property destroyed by trespassing animals.

Counter-claiming assault against assault.— In an action for assault a counter-claim may be interposed for an assault alleged to have been committed at the same time and place by plaintiff upon defendant, the subject of the action being the affray between the parties in which each claims that the other assaulted him. Murphy *v.* McQuade, 20 Misc. (N. Y.) 671, 46 N. Y. Suppl. 382; Barholt *v.* Wright, 45 Ohio St. 177, 12 N. E. 185, 4 Am. St. Rep. 535; Mogle *v.* Black, 5 Ohio Cir. Ct. 51, 3 Ohio Cir. Dec. 27; Gutzman *v.* Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744; Pelton *v.* Powell, 96 Wis. 473, 71 N. W. 887. But see Prosser *v.* Carroll, 33 Misc. (N. Y.) 428, 68 N. Y. Suppl. 542 (holding that in an action for assault defendant cannot base a counter-claim for assault on the same state of facts on which plaintiff bases his action for assault); Schnaderbeck *v.* Worth, 8 Abb. Pr. (N. Y.) 37.

Counter-claiming slander against slander.— One slander cannot be set up as a counter-claim against another, although both are uttered at the same time and place and in the same conversation. Sheehan *v.* Pierce, 70 Hun (N. Y.) 22, 23 N. Y. Suppl. 1119 (holding that in an action for slander in calling plaintiff a thief defendant could not allege as a counter-claim that at the time the slanderous words were alleged to have been spoken plaintiff was taking wood from defendant's premises, knowing it to be defendant's wood; that defendant ordered him to desist, whereupon he maliciously charged defendant with being a thief, and with stealing plaintiff's wood); Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705, 112 Am. St. Rep. 687. See Fellerman *v.* Dolan, 7 Abb. Pr. (N. Y.) 395 note, holding that defendant in an action of slander could not set up in an answer containing a general denial a counter-claim against plaintiff for slander alleged to have been uttered by him shortly before the day mentioned in the complaint, his denial of plaintiff's cause of action showing that there was no connection between the two such as would warrant the counter-claim.

In Utah, while it has been held that in an action for trespass, a distinct trespass by plaintiff committed several days after the trespass by defendant cannot be made the basis of the counter-claim, it is to be inferred from the language of the court that the ruling might be otherwise if plaintiff's trespass were connected with defendant's, or with the transaction sued on, or the subject of the action. Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6. But in a later case it is held broadly that one tort cannot be counter-claimed against the other, although the facts did not necessitate such a broad ruling because the torts were entirely disconnected, and thus not in any event the proper subject of counter-claim. Smith *v.* Alvord, 31 Utah 346, 88 Pac. 16.

85. Siebrecht *v.* Siegel-Cooper Co., 38 N. Y. App. Div. 549, 56 N. Y. Suppl. 425 (holding that in an action to recover for sales made to defendant by plaintiff's assignors, a counter-claim that defendant was defrauded by plaintiffs through said sales and others, in which plaintiff's assignors, in conspiracy with plaintiffs, one of whom acted as purchasing agent for defendant, overcharged defendant, is "connected with the subject of the action," within Code Civ. Proc. § 501, subd. 1); Dunlop Pneumatic Tyre Co. Ltd. *v.* Ryckman, 5 Ont. L. Rep. 249, 1 Ont. Wkly. Rep. 699, 820.

conversion,[86] fraud, deceit, and misrepresentation,[87] illegal seizure, distress, and sale of goods under an alleged claim for rent,[88] malicious prosecution,[89] negligence,[90] or trespass.[91] But the answer must state facts showing that the counter-claim is in fact connected with the transaction or subject of the action,[92] for even under the liberal practice of the codes an independent disconnected tort not forming a part of the transaction sued upon as the basis of plaintiff's cause of action or connected with the subject of the action cannot be made the basis of a counter-claim,[93]

86. *Kentucky.*— Hall *v.* Ayer, 102 S. W. 867, 31 Ky. L. Rep. 508.

New York.— Turner *v.* Kouwenhoven, 29 Hun 232 [*affirmed* in 100 N. Y. 115, 2 N. E. 637] (where in an action by a servant for wages the employer was allowed to counter-claim for conversion by the servant); Littman *v.* Coulter, 7 N. Y. Suppl. 1, 23 Abb. N. Cas. 60 (where, in an action for rent, defendant was allowed to set up a counter-claim for conversion of personal property alleged to have been taken from the premises by plaintiff and wrongfully applied on the rent claimed, the two causes of action being held to arise out of the same transaction, within the meaning of the code).

North Dakota.— Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90.

South Dakota.— Northwestern Port Huron Co. *v.* Iverson, (1908) 117 N. W. 372; McHard *v.* Williams, 8 S. D. 381, 66 N. W. 930, 59 Am. St. Rep. 766.

Wisconsin.— Gilbert *v.* Loberg, 86 Wis. 661, 57 N. W. 982 (allowing a counter-claim for conversion by the landlord, of personal property placed on the premises by tenants, in an action for waste); Vilas *v.* Mason, 25 Wis. 310 (holding that in an action for conversion defendant may counter-claim damages for the same conversion of the same articles).

United States.— Rush *v.* Kansas City First Nat. Bank, 71 Fed. 102, 17 C. C. A. 627, holding that, where in an action on a note defendant pleaded that a sale of securities pledged for the note made by plaintiff was unlawful, and that, as plaintiff had wrongfully appropriated the securities pledged, defendant was entitled to a credit for their full value, the counter-claim was one connected with the transaction set forth in the petition as the foundation of plaintiff's claim, as required by Kan. Gen. St. (1889) par. 4178.

87. Thomson *v.* Sanders, 118 N. Y. 252, 23 N. E. 374 (an action on a bond given to secure plaintiff against costs and expenses which might be incurred, in which a counter-claim by defendant for damages resulting from fraud and misrepresentation of plaintiff in inducing him to execute the bond was allowed); Estelle *v.* Dinsbeer, 9 Misc. (N. Y.) 485, 30 N. Y. Suppl. 226 (where in an action for an instalment due on a chattel mortgage given upon the purchase of a boarding-house, defendant was allowed to counter-claim damages for fraud in representations as to the income of the house); Wilson *v.* Hughes, 94 N. C. 182; Allen *v.* Shackelton, 15 Ohio St. 145 (where in a foreclosure suit defendant was allowed to counter-claim fraud practised by the mortgagor upon the mortgagee in the sale of the mortgaged premises to the mortgagor); Steckbauer *v.* Leykom, 130 Wis. 438, 110 N. W. 217; Scott *v.* Menasha, 84 Wis. 73, 54 N. W. 263.

88. Gowenlock *v.* Ferry, 11 Manitoba 257.

89. Cincinnati Daily Tribune Co. *v.* Bruck, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. Rep. 433, allowed in an action for libel.

90. *Indian Territory.*— Patterson *v.* Bradley, 4 Indian Terr. 124, 69 S. W. 821.

Iowa.— Ft. Dodge First Nat. Bank *v.* O'Connell, 84 Iowa 377, 51 N. W. 162, 35 Am. St. Rep. 313.

North Carolina.— Branch *v.* Chappell, 119 N. C. 81, 25 S. E. 783, holding that under code, section 244, defendant in an action for work and labor in cutting timber may plead as a counter-claim damages sustained in consequence of a fire negligently set and permitted to escape by plaintiff in disobedience of orders.

Oregon.— Zigler *v.* McClellan, 15 Oreg. 499, 16 Pac. 179, holding that in an action upon a contract for money expended by a tenant in rejoining a hotel, the owner of the building may defend by showing that the building was burned through carelessness of the tenant, for the damages arose out of the transaction sued upon, and was such a claim as under the former practice would have been subject of recoupment.

South Carolina.— Haygood *v.* Boney, 43 S. C. 63, 20 S. E. 803.

Texas.— Scott *v.* Mexican Nat. R. Co, (App. 1892) 18 S. W. 137.

Wisconsin.— McArthur *v.* Green Bay, etc., Canal Co., 34 Wis. 139, holding that in an action for damages to a barge passing through defendant's canal, by reason of defendant's negligence in allowing the water in the canal to run out, defendant might counter-claim damages for plaintiff's negligence in causing the breach of the canal through which the water escaped.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 49.

91. Tinsley *v.* Tinsley, 15 B. Mon. (Ky.) 454. See also Demartin *v.* Albert, 68 Cal. 277, 9 Pac. 157.

92. Meincke *v.* Bracksieck, 14 Mo. App. 315, holding that an answer by a defendant who, being sued by attachment for the purchase-money of a pair of mules, sets up that at the date of the suit the sheriff took into his possession two mules and delivered them to plaintiff, does not state facts constituting a counter-claim, in not alleging that the mules taken are the same as those attached.

93. *California.*— Glide *v.* Kayser, 142 Cal. 419, 76 Pac. 50.

and because of disconnection with plaintiff's cause of action or the subject thereof, the courts have disallowed counter-claims for conspiracy,[94] conversion,[95]

Kentucky.— Renaker *v.* Smith, 109 Ky. 643, 60 S. W. 407, 22 Ky. L. Rep. 1292; Brannin *v.* Crouch, 10 Ky. L. Rep. 773.

Montana.— Collier *v.* Ervin, 3 Mont. 142.

Nebraska.— Brugman *v.* Burr, 30 Nebr. 406, 46 N. W. 644.

New York.—Lundine *v.* Callaghan, 82 N. Y. App. Div. 621, 81 N. Y. Suppl. 1052; Hall *v.* Werney, 18 N. Y. App. Div. 565, 46 N. Y. Suppl. 33; Murden *v.* Priment, 1 Hilt. 75; Lehleuter *v.* Schano, 49 Misc. 99, 96 N. Y. Suppl. 716; Cupi *v.* Craftsman's Club, 33 Misc. 757, 67 N. Y. 956; Marshall *v.* Cohen, 11 Misc. 397, 32 N. Y. Suppl. 283; Gerry *v.* Siebrecht, 88 N. Y. Suppl. 1034; Rhinelander *v.* Martin. 7 N. Y. Suppl. 154, 23 Abb. N. Cas. 267; Weeks *v.* Berry, 3 N. Y. Suppl. 840 (where in an action for services in leasing and selling property a counter-claim was disallowed for misconduct in regard to the property subsequent thereto); Bissell *v.* Pearse, 21 How Pr. 130.

North Carolina.— Lee *v.* Eure, 93 N. C. 5; Trotter *v.* Swain County, 90 N. C. 455.

North Dakota.— Hanson *v.* Skogmon, 14 N. D. 445, 105 N. W. 90.

Oregon.— Miser *v.* O'Shea, 37 Oreg. 231, 62 Pac. 491, 82 Am. St. Rep. 751; Zigler *v.* McClellan, 15 Oreg. 499, 16 Pac. 179, holding that neither party can claim damages for a distinct tort committed by the other, as a counter-claim, and that it is only where the tort is violative of some express or implied agreement, constituting a part of the transaction, that it can be rendered available as such claim.

Wisconsin.— Brahm *v.* M. C. Gehl Co., 132 Wis. 674, 112 N. W. 1097; Rylander *v.* Laursen, 113 Wis. 461, 89 N. W. 488; Mulberger *v.* Koenig, 62 Wis. 558, 22 N. W. 745, holding that in an equitable action for the removal of an obstruction in a mill race, which is alleged to interfere with plaintiff's right to draw a certain quantity of water therefrom, defendants cannot set up a counter-claim for damages on account of plaintiff's wrongful use of a greater quantity of water than they were entitled to, and to enjoin them from such wrongful use, although it is alleged that the obstruction was erected and maintained for the purpose of preventing such wrongful use.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 56, 57.

In an action for rent a claim arising out of a trespass to personal property and an unlawful detention thereof, not connected with the subject of the action or a part of the transaction, cannot be counter-claimed (Edgerton *v.* Page, 20 N. Y. 281, 10 Abb. Pr. 119, 18 How. Pr. 359 [*affirming* 1 Hilt. 320, 5 Abb. Pr. 1, 14 How. Pr. 116 (*reversing* 12 How. Pr. 58)]; Finkelmeier *v.* Bates, 48 N. Y. Super. Ct. 433 [*affirmed* in 92 N Y. 172]; McKensie, *v.* Farrell, 4 Bosw. (N. Y.) 192; Drake *v.* Cockcroft, 1 Abb Pr. (N. Y.) 203); nor can a claim for damages for a libel not connected with the subject-matter of the action (Rotherham *v.* Priest, 28 Wkly. Rep. 277).

In South Carolina the courts seem to lean to the theory that in an action for a tort another tort cannot so arise out of the transaction sued on or be so connected with the subject of the action as to be available as a counter-claim in that action. Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240; Simkins *v.* Columbia, etc., R. Co., 20 S. C. 258.

94. Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22, holding that a cause of action accruing to defendant for damages resulting from a conspiracy between plaintiff and another to bring an unjustifiable suit against him, and the bringing of such suit in pursuance of the conspiracy, is not a cause of action arising out of the contract or transaction sued on.

95. *Missouri.*— Reamer *v.* Morrison Express Co., 93 Mo. App. 501, 67 S. W. 718, disallowing in an action for conversion a claim for a disconnected conversion.

New York.— New York *v.* Parker Vein Steamship Co., 8 Bosw. 300, 12 Abb. Pr. 300, 21 How. Pr. 289 (holding that where an action is brought on a bond securing rent in a lease, defendants cannot counter-claim a demand against plaintiff for removing from the premises fixtures put there by the tenant, one of the defendants. but which the lease did not in terms give the right to place there or to remove); McKenzie *v.* Farrell, 4 Bosw. 192 (holding that in an action for rent against a surety a claim arising out of the landlord's tortious acts in converting property belonging to the tenant cannot be counter-claimed, not arising out of the contract set forth in the complaint as the foundation of plaintiff's claim); Kurtz *v.* McGuire, 5 Duer 660 (where in an action for the recovery of goods sold and delivered by plaintiff to defendant, defendant was not allowed to counter-claim a claim arising out of plaintiff's conversion of defendant's property, such claim not arising out of the transaction sued on, nor out of the transaction set forth in the complaint); Starr Cash Car Co. *v.* Reinhart, 2 Misc. 116, 20 N. Y. Suppl. 872 (where in an action for the price of cash cars put up in defendant's store, a counter-claim alleging that in putting up said cars, plaintiff removed and appropriated defendant's old cash service, was disallowed); Bell *v.* Lesbini, 66 How. Pr. 385 (an action for board and lodging, where counter-claim for conversion of personal property was rejected); Gager *v.* Small, 19 Alb. L. J. 400 (where in an action by a landlord on a covenant to keep the premises in repair, his negligence in putting up a water-pipe, by which defendant's goods were damaged, or his tortious act in removing a fixture from the premises during the term, was held not the subject of a counter-claim).

fraud,[96] libel,[97] slander,[98] malicious prosecution,[99] negligence,[1] trespass,[2] and wrongfully suing out an attachment,[3] and the mere fact that the tort happens at or near the same time as the transaction upon which the action is based does not sufficiently connect it therewith to entitle defendant to counter-claim it.[4]

4. Reconvention. A tort springing from or connected with the transaction forming the basis of plaintiff's action may be reconvened,[5] but a tort can-

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Ohio.— Broch *v.* Becher, 5 Ohio Dec. (Reprint) 519, 6 Am. L. Reg. 380, where, in an action on a note and mortgage, a counter-claim for personal property fraudulently misappropriated was rejected.

South Carolina.— Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761, disallowing a counter-claim for conversion in an action on a note.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 32.

96. Rensberger *v.* Britton, 31 Colo. 77, 71 Pac. 379 (disallowing a counter-claim for an antecedent disconnected fraud); Barnes *v.* McMullins, 78 Mo. 260 (action on a note, where a counter-claim for fraud and deceit not connected with the subject of the action was rejected); Pittman *v.* Keith, (Tex. Civ. App. 1893) 24 S. W. 88 (holding that a claim for damages for the malicious institution of criminal proceedings by the seller of goods against the purchaser, for alleged false and fraudulent representations as to solvency, transpiring long after the sale, in the faith of which they were obtained, is not a "cause of action arising out of or incident to, or connected with" the seller's cause of action for the purchase-price).

97. Watts *v.* Gantt, 42 Nebr. 869, 61 N. W. 104 (disallowing in an action to foreclose a mortgage a counter-claim for libel); South African Republic *v.* La Compagnie Franco-Belge, etc., [1897] 2 Ch. 487, 66 L. J. Ch. 747, 77 L. T. Rep. N. S. 241, 46 Wkly. Rep. 67 (disallowing in an action for the appointment of trustees a counter-claim for libel); McLean *v.* Hamilton St. R. Co., 11 Ont. Pr. 193 (disallowing in an action for damages for negligence a counter-claim for libel).

98. Merritt Milling Co. *v.* Finlay, 110 N. C. 411, 15 S. E. 4, where, in an action for non-payment of an accepted draft, a slander as to defendant's pecuniary standing was disallowed.

99. Allen *v.* Coates, 29 Minn. 46, 11 N. W. 132, holding that in an action for conversion a cause of action for malicious prosecution of a previous action for the same cause cannot be counter-claimed.

1. Ward *v.* Blackwood, 48 Ark. 396, 3 S. W. 624 (holding that where the keeper of a prison assaulted one of the guards for his negligence in permitting an escape, in an action for such assault defendant could not counter-claim damages for plaintiff's negligence as a matter "arising out of the contract or transaction set forth in the complaint . . . or connected with the subject of the action"); Western Union Tel. Co. *v.* Milliken, 14 Daly (N. Y.) 170, 62 N. Y. St. 252 (holding that to an action by a telegraph company on a running account for transmitting telegrams, a counter-claim for damages caused by plaintiff's negligence in delivering to defendant a telegram not intended, on which they acted to their injury, cannot be set up); Street *v.* Bryan, 65 N. C. 619 (holding that damages to real property, although caused by wilful carelessness, cannot be pleaded by way of set-off or counter-claim in an action of contract for the payment of money); Kuhn *v.* Sol. Heavenvich Co., 115 Wis. 447, 91 N. W. 994, 60 L. R. A. 585 (disallowing a counter-claim for negligence not connected with the subject of the action).

2. Wigmore *v.* Buell, 116 Cal. 94, 47 Pac. 927 (disallowing a counter-claim for a disconnected trespass); Waugheim *v.* Graham, 39 Cal. 169 (disallowing a counter-claim setting up in an action to recover a money demand, an independent mere naked trespass and conversion); Marks *v.* Tompkins, 7 Utah 421, 27 Pac. 6 (holding that in an action for trespass a distinct trespass committed several days after the trespass alleged in the complaint cannot be counter-claimed).

3. Abernathy *v.* Myer-Bridges Coffee, etc., Co., 99 S. W. 942, 30 Ky. L. Rep. 844, 100 S. W. 862, 30 Ky. L. Rep. 1236, 103 S. W. 342, 31 Ky. L. Rep. 807, disallowing a counter-claim for wrongfully suing out an attachment in the action as not arising out of the transaction sued on or connected with the subject of the action.

4. Roberts *v.* Jones, 71 S. C. 404, 51 S. E. 240; Simkins *v.* Columbia, etc., R. Co., 20 A. C. 258.

5. Miller *v.* Stewart, 12 La. Ann. 170; Kennedy *v.* Mason, 10 La. Ann. 519; Solomon *v.* Cavelier, 4 La. Ann. 136 (holding that damages for illegally imprisoning a slave claimed in a petitory action may be pleaded in reconvention as connected with, and incidental to, the petitory action); Hendricks *v.* Phillips, 3 La. Ann. 618; Cammack *v.* Priestly, 12 Rob. (La.) 423 (holding that damages from a creditor's neglect to protest a draft deposited with him as collateral security may, in an action on the principal debt, be pleaded against him, or his syndic, if the damages accrued before his declared insolvency); Morgan *v.* Driggs, 17 La. 176; Abat *v.* Holmes, 8 Mart. N. S. (La.) 145 (holding that defendant, sued by a judgment creditor for a forced surrender of his property for the benefit of his creditors, may by reconvention claim damages for his illegal imprisonment under plaintiff's capias ad satisfaciendum; the cause of action and the claim for damages springing from the same cause); Du Bois *v.* Rooney, 82 Tex. 173, 17 S. W. 528

not be pleaded in reconvention when not connected with the subject of the action.[6]

5. Effect of Waiver of Tort.[7] Where defendant who, having a claim against plaintiff sounding in tort, waives the tort and sets up his claim as upon an implied contract, the claim is considered to be one arising upon contract, within the meaning of the statutes, and may be either set off,[8] or interposed by defendant as a

(holding that, where a written contract provided for the sale by plaintiffs to defendant of a lot of cattle, and also of a designated tract of land, in an action by plaintiffs for defendant's breach of the contract in refusing to accept the cattle, defendant could reconvene in damages for plaintiffs' fraudulent representations in respect to the location and quality of the land); Duncan *v.* Magette, 25 Tex. 245; Stewart *v.* Insall, 9 Tex. 397 (holding that in an action on a note defendant might reconvene for fraud in regard to the transaction sued on, and failure of consideration); Streeper *v.* Thompson, (Tex. Civ. App. 1893) 23 S. W. 326 (holding that, where a chattel mortgagee takes possession of the mortgaged property and sells it without notice to the mortgagors, the latter in an action on the note can reconvene damages for the conversion); Gulf, etc., R. Co. *v.* Tacquard, 3 Tex. App. Civ. Cas. § 250 (holding that in a suit for the value of a steer killed by defendant's train, defendant might plead in reconvention and that the animal was killed through plaintiff's negligence, set up damages for the loss of steam, air, and momentum of the train, loss of time of its employees, and the damage to the locomotive by the collision).

Damages from the wrongful suing out of an attachment may be pleaded in reconvention in the same suit in which the attachment was issued. Offutt *v.* Edwards, 9 Rob. (La.) 90; Boyd *v.* Warfield, 6 Mart. N. S. (La.) 671; Walcott *v.* Hendrick, 6 Tex. 406. See Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287, holding that in a suit on a note defendant may plead in reconvention damages resulting from the payee's seizure under attachment of the maker's property for the release of which the note sued on was executed, the matter so pleaded being necessarily connected with the note sued on. But see Innis *v.* Ware, 1 Mart. N. S. (La.) 556, holding that under Civ. Code, p. 298, art. 191, a trespasser could not plead in compensation or reconvention.

6. Murphy *v.* McCarthy, 26 La. Ann. 38 (disallowing, in an action to recover stolen property, reconvention for malicious criminal prosecution against defendant as receiver of stolen property); Morgan *v.* Driggs, 17 La. 176; Union Bank *v.* Macdonald, 15 La. 25 (holding that in an action on a note defendant cannot reconvene damages for injury done to his reputation and credit by plaintiff); Kemp *v.* Amacker, 13 La. 65 (holding that an action of slander for damages could not be reconvened for slanderous words alleged to have been uttered by plaintiff against defendant, as the reconventional demand was not necessarily connected with and incidental to the principal one); Schmidt *v.* Rost, 1 Tex. App. Civ. Cas. § 684 (holding that defendant sued on promissory notes could not plead in reconvention for damages done them by plaintiff, by reason of a circular letter to defendant's creditors advising them not to accept a proposition of defendants for a composition of debts, because the damages are too remote and not connected with the main action).

7. Waiver of tort generally see Assumpsit, 4 Cyc. 331 *et seq.*

Waiver of tort by plaintiff see *supra*, V, E, 5.

8. *Indiana.*— Whitcomb *v.* Stringer, (App. 1902) 64 N. E. 636, 63 N. E. 582.

Kansas.— Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Fanson *v.* Linsley, 20 Kan. 235, holding, however, that the tort in this case being for a naked trespass could not be waived and therefore could not be set off.

Massachusetts.— Briggs *v.* Call, 5 Metc. 504, holding that where one tenant in common of a vessel, authorized to insure for his cotenant, insured in his own name and adjusted a loss under the policy, by accepting the amount of his own loss "in full of all losses on the policy," the other cotenant might raise the tortious neglect of the former and set off his claim in an action *ex contractu.*

Missouri.— McCuin *v.* Frazier, 38 Mo. App. 63, where trespass being waived defendant was allowed to interpose his set-off.

New York.— Harway *v.* New York, 1 Hun 628, 4 Thomps. & C. 167 (where the set-off was for money obtained under false pretenses, the tort being waived); McDougall *v.* Walling, 48 Barb. 364.

North Dakota.— Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

Ohio.— Hathaway *v.* Gordon, 9 Ohio Cir. Ct. 8, 6 Ohio Cir. Dec. 39.

Pennsylvania.—Nickle *v.* Baldwin, 4 Watts & S. 290. See Nixon *v.* McCrory, 101 Pa. St. 289.

Texas.— Cato *v.* Philips, 28 Tex. 101, where, upon waiver of the tort involved in wrongful sale of land, set-off was allowed.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 33.

Where defendant waives the tort of conversion, he may set off the implied contract involved therein. Bulkeley *v.* Welch, 31 Conn. 339; Hall *v.* Penny, 13 Fla. 621; McAllister *v.* Millhiser, 96 Ga. 474, 23 S. E. 502; Sanderlin *v.* Willis, 94 Ga. 171, 21 S. E. 291; Woodruff *v.* Hoard, 9 Ind. 186; Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Haddix *v.* Wilson, 3 Bush (Ky.) 523; Eversole *v.* Moore, 3 Bush (Ky.) 49; Brown *v.* Brown, 55 N. H. 74; Tidewater Quarry Co. *v.* Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864; Allen *v.* U. S., 17 Wall. (U. S.)

counter-claim,[9] and where a breach of the contract, which is the subject of the suit, results in a tort, damages for the breach may be set off, although it also constitutes a tort.[10] But the tort must in fact be waived,[11] although in cases of doubt it is held that the court will incline against construing the set-off to sound in tort.[12] Where the tort cannot be waived a set-off sounding in tort will not be allowed.[13]

K. Parties to, and Mutuality of, Cross Demands — 1. General Rules.[14] It is a broad general rule of practically universal application that to warrant a set-off the demands must be mutual and subsisting between the same parties,[15]

207, 21 L. ed. 553; McCabe *v.* Winship, 15 Fed. Cas. No. 8,668, 17 Nat. Bankr. Reg. 113. See also Rodgers *v.* Maw, 4 D. & L. 66, 16 L. J. Exch. 137, 15 M. & W. 444.

In Indiana, under Rev. St. (1881) § 348, which provides that a set-off shall be allowed "only in actions for money demands upon contracts, and must consist of matter arising out of debt, duty, or contract," defendant cannot waive the tort and use his set-off. The claim must arise out of contract (Richey *v.* Bly, 115 Ind. 232, 17 N. E. 296, rejecting waiver of conversion and set-off in an action of contract), although under a former statute defendant was allowed to waive the tort of conversion and set off the implied contract (Woodruff *v.* Hoard, 9 Ind. 186).

In Wisconsin, under the statute allowing a defendant to set off a demand for goods sold, he may set off such a demand, where there has been an actual sale, but not where there was a mere conversion of the property by plaintiff retaining and not selling it. Norden *v.* Jones, 33 Wis. 600, 14 Am. Rep. 782; Conklin *v.* Parsons, 2 Pinn. 264, 1 Chandl. 240.

9. Barnes *v.* McMullins, 78 Mo. 260; Crane *v.* Murray, 106 Mo. App. 697, 80 S. W. 280; Bartholow Banking House *v.* Harvey, 12 Mo. App. 588 (where breach of trust was waived); McDougall *v.* Walling, 48 Barb. (N. Y.) 364; Conyngham *v.* Shiel, 20 Misc. (N. Y.) 590, 46 N. Y. Suppl. 374; Starr Cash Car Co. *v.* Reinhart, 2 Misc. (N. Y.) 116, 20 N. Y. Suppl. 872; Bryce *v.* Parker, 11 S. C. 337 (where deceit was waived). But see New York *v.* Parker Vein Steamship Co., 8 Bosw. (N. Y.) 300, 12 Abb. Pr. 300, 21 How. Pr. 289, holding that Code Proc. § 150, was intended to allow counter-claims arising on true contract only, and not upon a contract implied upon waiver of tort. This, however, was an early decision and is clearly contrary to the rule as now established under Code Civ. Proc. § 501. See cases cited *infra*, this note.

Where the tort of conversion is waived defendant may counter-claim for breach of the contract which the law implies. Downs *v.* Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Starr Cash Car Co. *v.* Reinhart, 2 Misc. (N. Y.) 116, 20 N. Y. Suppl. 872; Berrian *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 207; Coit *v.* Stewart, 12 Abb. Pr. N. S. (N. Y.) 216 [*affirmed* in 50 N. Y. 17] Wall *v.* Williams, 91 N. C. 477.

10. Nixon *v.* McCrory, 101 Pa. St. 289; Woodward *v.* Bradenburgh, 6 Pa. Co. Ct. 240.

11. Berrian *v.* New York, 15 Abb. Pr. N. S. (N. Y.) 207 (holding that in an action on contract it is not admissible to set up as a counter-claim that plaintiff had fraudulently induced defendant to pay moneys falsely claimed under the contract, in excess of the true value of the work, and to demand a repayment, but to render these facts available as a counter-claim, the tort must be waived, and the recovery of the moneys overpaid be sought as on an implied contract, and the answer must set forth facts showing defendant's election to proceed on the implied contract, and not for the wrong); Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133. See also New York *v.* Parker Vein Steamship Co., 8 Bosw. (N. Y.) 300, 12 Abb. Pr. 300, 21 How. Pr. 289.

Waiver of tort upon amendment of answer. — It seems that defendant cannot waive the tort by amending his answer. Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133.

12. Braithwaite *v.* Akin, 3 N. D. 365, 56 N. W. 133. See Nickle *v.* Baldwin, 4 Watts & S. (Pa.) 290, holding that merely by claiming the set-off defendant may be considered as waiving the tort.

13. Fanson *v.* Linsley, 20 Kan. 235; Atchison, etc., R. Co. *v.* Phelps, 4 Kan. App. 139, 46 Pac. 183.

14. **Necessity for mutuality in action by and against personal representatives** see Executors and Administrators, 18 Cyc. 894 *et seq.*

15. *Alabama.*— St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518; Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Mauldin *v.* Armistead, 14 Ala. 702; Scott *v.* Rivers, 1 Stew. & P. 19; Rapier *v.* Holland, Minor 176.

Arkansas.— Western Coal, etc., Co. *v.* Hollenbeck, 72 Ark. 44, 80 S. W. 145; Houston *v.* Brown, 23 Ark. 333; Bizzell *v.* Stone, 12 Ark. 378; Field *v.* Watkins, 5 Ark. 672; Trammell *v.* Harrell, 4 Ark. 602.

California.— Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Hobbs *v.* Duff, 23 Cal. 596.

Colorado.— Thatcher *v.* Rockwell, 4 Colo. 375 [*affirmed* in 105 U. S. 467, 26 L. ed. 949]; Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235.

Connecticut.— Nichols *v.* Dayton, 34 Conn. 65; Atkins *v.* Churchill, 19 Conn. 394; Pitkin *v.* Pitkin, 8 Conn. 325; Francis *v.* Rand, 7 Conn. 221.

District of Columbia.— Carver *v.* Hall, 3 App. Cas. 170; Kendall *v.* Vanderlip, 2 Mackey 105; Baltimore United Oil Co. *v.* Barber, 2 Mackey 5.

Georgia.— Bibb Land-Lumber Co. *v.* Lima

for the statutes of set-off were not passed to allow litigation of all claims indis-

Mach. Works, 104 Ga. 116, 30 S. E. 676, 31 S. E. 401, holding that an account against the "Lima Locomotive and Machine Company" cannot be set off against an account in favor of the "Lima Machine Works," it not appearing that these companies are the same); Vason *v.* Beall, 58 Ga. 500; Colquitt *v.* Bonner, 2 Ga. 155; Tinsley *v.* Beall, 2 Ga. 134; Buckhanan *v.* Gamble, Ga. Dec. 156; Cash *v.* Cash, Ga. Dec. 97 (holding that in an action by plaintiff upon notes payable to him as administrator a debt due by deceased cannot be set off).

Illinois.— Howe Mach. Co. *v.* Hickox, 106 Ill. 461; Coates *v.* Preston, 105 Ill. 470; Phelps *v.* Reeder, 39 Ill. 172; Walker *v.* Chovin, 16 Ill. 489; Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269; Ryan *v.* Barger, 16 Ill. 28; Hilliard *v.* Walker, 11 Ill. 644; Burgwin *v.* Babcock, 11 Ill. 28; Hinckley *v.* West, 9 Ill. 136; Engs *v.* Matson, 11 Ill. App. 639; Borchsenius *v.* Irgens, 3 Ill. App. 599 [*reversed* on other grounds in 100 Ill. 82]; Gregg *v.* Phillips, 1 Ill. 143, 12 Am. Dec. 151.

Indiana.— Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Talmage *v.* Bierhause, 103 Ind. 270, 2 N. E. 716 (holding also that the finding of a jury upon evidence that a disputed mutuality existed will not be disturbed); Menaugh *v.* Chandler, 89 Ind. 94; Carter *v.* Compton, 79 Ind. 37; Danville First Nat. Bank *v.* Hill, 58 Ind. 52; Gordon *v.* Swift, 46 Ind. 208; Kent *v.* Cantrall, 44 Ind. 452; Dodge *v.* Dunham, 41 Ind. 186; Griffin *v.* Cox, 30 Ind. 242; Dayhuff *v.* Dayhuff, 27 Ind. 158; Knour *v.* Dick, 14 Ind. 20; Booe *v.* Watson, 13 Ind. 387; Blankenship *v.* Rogers, 10 Ind. 333; Woods *v.* Harris, 5 Blackf. 585; Jennings *v.* Shriver, 5 Blackf. 37.

Indian Territory.—Citizen's Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

Iowa.— Swain *v.* Ewing, Morr. 344.

Kentucky.— Cummins *v.* Williams, 5 J. J. Marsh. 384; Dickinson *v.* Chism, 4 T. B. Mon. 1; Prior *v.* Richards, 4 Bibb 356; Bibb *v.* Saunders, 2 Bibb 86; Louisville First Nat. Bank *v.* Krieger, 89 S. W. 733, 28 Ky. L. Rep. 612; Hancock *v.* Hancock, 69 S. W. 757, 24 Ky. L. Rep. 664; Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

Louisiana.— Guibert *v.* Herpin, 3 Mart. N. S. 395.

Maine.— Adams *v.* Ware, 33 Me. 228; Banks *v.* Pike, 15 Me. 268.

Maryland.— Wilson *v.* Keedy, 8 Gill 195; Turner *v.* Plowden, 2 Gill & J. 455; Howard *v.* Warfield, 4 Harr. & M. 21; Watkins *v.* Zane, 4 Md. Ch. 13.

Massachusetts.— Simmons *v.* Shaw, 172 Mass. 516, 52 N. E. 1087; Stickney *v.* Clement, 7 Gray 170; Walker *v.* Leighton, 11 Mass. 140; Holland *v.* Makepeace, 8 Mass. 418.

Michigan.— Fifield *v.* Edwards, 39 Mich. 264; Hendricks *v.* Toole, 29 Mich. 340, holding that there can be no set-off between claims, where the debtor on one side is not the creditor on the other nominally or really.

Minnesota.— Cooper *v.* Brewster, 1 Minn. 94.

Mississippi.— Wadlington *v.* Gary, 7 Sm. & M. 522; Bullard *v.* Dorsey, 7 Sm. & M. 9.

Missouri.— Finney *v.* Turner, 10 Mo. 207; Gemmell *v.* Hueben, 71 Mo. App. 291.

New Hampshire.—McCaffrey *v.* Kennett, 73 N. H. 189, 60 Atl. 96; Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171; Woodward *v.* Tupper, 58 N. H. 577; Goodwin *v.* Richardson, 44 N. H. 125; Brown *v.* Warren, 43 N. H. 430; Concord *v.* Pillsbury, 33 N. H. 310; Smith *v.* Woodman, 28 N. H. 520; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704; Woods *v.* Carlisle, 6 N. H. 27; Ross *v.* Knight, 4 N. H. 236; Woodman *v.* Barker, 2 N. H. 479.

New York.— Taylor *v.* New York, 82 N. Y. 10; Coffin *v.* McLean, 80 N. Y. 560; Jordan *v.* New York Nat. Shoe, etc., Bank, 74 N. Y. 467, 30 Am. Rep. 311; Patterson *v.* Patterson, 59 N. Y. 574, 17 Am. Rep. 384; Beckwith *v.* Union Bank, 9 N. Y. 211; Windecker *v.* Mutual L. Ins. Co., 12 N. Y. App. Div. 73, 43 N. Y. Suppl. 358; Halliburton *v.* Clapp, 1 N. Y. App. Div. 71, 36 N. Y. Suppl. 1041 [*affirmed* in 149 N. Y. 183, 43 N. E. 558]; Campbell *v.* Genet, 2 Hilt. 290; Mott *v.* Burnett, 2 E. D. Smith 50; Matter of Hill, 17 Abb. N. Cas. 273; Vanderbilt *v.* Baldwin, 15 Abb. N. Cas. 312; Baker *v.* Hoag, 6 How. Pr. 201; Warner *v.* Barker, 3 Wend. 400; Aikin *v.* Satterlee, 1 Paige 289; Dale *v.* Cooke, 4 Johns. Ch. 11; Murray *v.* Toland, 3 Johns. Ch. 569.

North Carolina.— Utley *v.* Fay, 70 N. C. 303; Walton *v.* McKesson, 64 N. C. 154; Jones *v.* Gilreath, 28 N. C. 338; Bunting *v.* Picks, 22 N. C. 130, 32 Am. Dec. 699; Haughton *v.* Leary, 20 N. C. 14; State Bank *v.* Armstrong, 15 N. C. 519; Wofford *v.* Greenlee, 1 N. C. 212; Hogg *v.* Ashe, 1 N. C. 145.

North Dakota.— Patterson *v.* Ward, 8 N. D. 87, 76 N. W. 1046.

Ohio.— Miller *v.* Florer, 19 Ohio St. 356; Holmes *v.* Robinson, 4 Ohio 90; Johnson *v.* Taylor, 1 Disn. 168, 12 Ohio Dec. (Reprint) 553; Ross *v.* Johnson, 1 Handy 388, 12 Ohio Dec. (Reprint) 198; McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481, 2 Clev. L. Rep. 219.

Oklahoma.— Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208.

Oregon.— Richmond *v.* Bloch, 36 Oreg. 590, 60 Pac. 385.

South Carolina.— Shepherd *v.* Tarver, 3 McCord 249, 15 Am. Dec. 631; Kerr *v.* Webb, 9 Rich. Eq. 369; Porter *v.* Cheeseborough, 1 Strobh. Eq. 275.

Tennessee.— Ewing *v.* Coffman, 12 Lea 79; Flint *v.* Tillman, 2 Heisk. 202; Turbeville *v.* Boach, 5 Coldw. 270; Blanks *v.* Smith, Peck 186.

Texas.— Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019; Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405; Allbright *v.* Aldrich, 2 Tex. 166.

criminately in one suit, and furthermore the demands must be due in the same capacity,[16] and in the same right,[17] and the same rule of mutuality of cross demands is very generally held by the cases in the various jurisdictions to apply when defendant sets up his claim in recoupment to plaintiff's demand,[18]

Vermont.— Clough *v.* Clough, 55 Vt. 360.

Virginia.— James *v.* Johnston, 22 Gratt. 461; Pulliam *v.* Winston, 5 Leigh 324.

Washington.— Williams *v.* Miller, 1 Wash. Terr. 88, holding that a claim in which a stranger to the suit is interested cannot be set off.

West Virginia.—Little Kanawaha Nav. Co. *v.* Rice, 9 W. Va. 636.

United States.— McKown *v.* Manhattan L. Ins. Co., 91 Fed. 352; Waters *v.* Bussard, 29 Fed. Cas. No. 17,262, 2 Cranch C. C. 226.

England.— *In re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567, 65 L. J. Ch. 250, 74 L. T. Rep. N. S. 22, 3 Manson 59, 44 Wkly. Rep. 284; Atwooll *v.* Atwooll, 1 C. L. R. 242, 2 E. & B. 23, 17 Jur. 789, 22 L. J. Q. B. 287, 1 Wkly. Rep. 325, 75 E. C. L. 23.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 76 *et seq.*

In Pennsylvania, although the general rule is that demands to be set off must be mutual (Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004; Bache *v.* Philips, 155 Pa. St. 103, 25 Atl. 891; Tenant *v.* Tenant, 110 Pa. St. 478, 1 Atl. 532; Winter *v.* Newell, 49 Pa. St. 507; Carman *v.* Garrison, 13 Pa. St. 158; Reed *v.* Reed, 1 Watts & S. 235; Stuart *v.* Com., 8 Watts 74; Watson *v.* Hensel, 7 Watts 344; Stewart *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Waln *v.* Wilkins, 4 Yeates 461; Union Nat. Bank *v.* Cainsburg Iron Co., 43 Leg. Int. 466; Com. *v.* Dietzler, 1 Leg. Rec. 181), it is held that wherever there is practicability of avoiding circuity of action or needless costs with safety and convenience to all the parties, a set-off will be allowed upon equitable principles, although the case does not, in regard to mutuality, come within the wording of the statute (Hibert *v.* Lang, 166 Pa. St. 439, 30 Atl. 1004; Miller *v.* Kreiter, 76 Pa. St. 78; Tustin *v.* Cameron, 5 Whart. 379; Childerston *v.* Hammon, 9 Serg. & R. 68; Cochran *v.* Cutter, 18 Pa. Super. Ct. 282).

A claim against a partnership which has been merged into a corporation cannot be set off against a claim of the corporation which did not assume the liabilities of the partnership. New York Ice Co. *v.* Parker, 8 Bosw. (N. Y.) 688, 21 How. Pr. 302.

In a suit between two corporations defendant cannot set off a claim against an officer of plaintiff. Cragin Mfg. Co. *v.* Geuder, etc., Co., 85 Ill. App. 379.

A liability founded on privity of estate and not on privity of contract between the parties cannot be set off. Irish *v.* Johnston, 11 Pa. St. 483.

16. *Colorado.*— Miller *v.* Mickel, 9 Colo. 331, 12 Pac. 240, disallowing in an action against a bank for the balance of a private account a set-off for an overdraft of a company of which plaintiff was treasurer.

Connecticut.— Wallingford *v.* Hall, 45 Conn. 350 (disallowing in debt on a bond given to a town in a criminal cause a claim against the town, since in taking the bond the town acts as the representative of the sovereignty of the state and not as creditor in the ordinary sense); Pitkin *v.* Pitkin, 8 Conn. 325; Francis *v.* Rand, 7 Conn. 221; Palmer *v* Green. 6 Conn. 14.

Delaware.— Jones *v.* Wells, 2 Houst. 223.

Georgia.— Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Houston *v.* Ladies' Union Branch Assoc., 87 Ga. 203, 13 S. E. 634.

Iowa.— Cook *v.* Dillon, 9 Iowa 407, 76 Am. Dec. 354.

Maryland.— Scott *v.* Scott, 17 Md. 78; Hall *v.* Creswell, 12 Gill & J. 36; Gibbs *v.* Cunningham, 4 Md. Ch. 322; Watkins *v.* Zane, 4 Md. Ch. 13.

Massachusetts.— Grew *v.* Burditt, 9 Pick. 265.

New York.— Miller *v.* Franklin Bank, 1 Paige 444.

Pennsylvania.— Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004.

South Carolina.— *Ex p.* Doyley, 2 McCord 185; Columbia Corp. *v.* Harrison, 2 Mill 213.

Tennessee.— Beal *v.* Smithpeter, 6 Baxt. 356.

United States.— Manhattan L. Ins. Co. *v.* McKown, 90 Fed. 646, 33 C. C. A. 212.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 100.

In an action by a consignor against the buyer for the price of goods sold, the buyer can set off a debt owing to the factor, where he was ignorant of the existence of the principal, but not where he knew of the capacity in which the factor sold him the goods. Parker *v.* Donaldson, 2 Watts & S. (Pa.) 9. And see, generally, PRINCIPAL AND AGENT, 31 Cyc. 1601 *et seq.*

17. *Arkansas.*— Menifee *v.* Ball, 7 Ark. 520.

Florida.— Lucas *v.* Wade, 43 Fla. 419, 31 So. 231.

Indiana.— Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303.

Pennsylvania.— Sieger *v.* Sieger, 209 Pa. St. 65, 58 Atl. 140.

United States.— The Zouave, 29 Fed. 296.

England.— Stammers *v.* Elliott, L. R. 3 Ch. 195, 37 L. J. Ch. 353, 18 L. T. Rep. N. S. 1, 16 Wkly. Rep. 489; Whitaker *v.* Rush, Ambl. 407, 27 Eng. Reprint 272; Bishop *v.* Church, 3 Atk. 691, 26 Eng. Reprint 1197, 2 Ves. 100, 371, 28 Eng. Reprint 66, 238; Harvey *v.* Wood, 5 Madd. 459, 56 Eng. Reprint 971; Medlicot *v.* Bowes, 1 Ves. 207, 27 Eng. Reprint 985; Gale *v.* Luttrell, 1 Y. & J. 180.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 100 *et seq.*

18. Kinne *v.* New Haven, 32 Conn. 210; Kinard *v.* Sanford, 64 Ga. 630.

or in counter-claim,[19] compensation,[20] and reconvention,[21] a party, in reference to set-off being considered as claiming in his own right, when he is entitled to sue for the demand, without specifying any representative character, and has a right to the application or distribution of the fund when collected,[22] and defendant as a general rule cannot set off a demand which he is not entitled to sue on in his own name;[23] nor set up as a counter-claim allegations of such a character that, if they were in the form of a complaint in a separate action, another person, not a party to the pending suit, would be a necessary defendant to such separate action.[24] The rule as to mutuality may be varied by agreement between the parties.[25]

2. Demands in Favor of Third Person. In accordance with the rule of mutuality above stated,[26] it is very generally held that a demand against plaintiff in favor of a third person not a party to the action cannot be recouped,[27] set off,[28]

19. Hill *v.* Golden, 16 B. Mon. (Ky.) 551; Wood *v.* Munson, 70 Hun (N. Y.) 468, 24 N. Y. Suppl. 287; Lyman *v.* Newman, 29 Barb. (N. Y.) 162; Agate *v.* Gignoux, 1 Rob. (N. Y.) 278; Cumings *v.* Morris, 3 Bosw. (N. Y.) 560 [*affirmed* in 25 N. Y. 625]; Springfield Iron Co. *v.* Kelley, 1 N. Y. Suppl. 351 (holding that in an action by the seller against the purchaser for refusal to accept railroad iron purchased under a written contract, defendant cannot set up damages caused by a failure of plaintiff to deliver iron on a contract with a company of which defendant is a stock-holder); Davidson *v.* Remington, 12 How. Pr. (N. Y.) 310 (holding that a counter-claim must exist against plaintiff as well as in favor of defendant); Devries *v.* Warren, 82 N. C. 356.

A claim against an officer of a corporation cannot be counter-claimed in an action by the corporation. Douglas Planing Mill, etc., Co. *v.* Anderson, 127 Ga. 571, 56 S. E. 635.

20. New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569; Vincent *v.* Gandolfo, 12 La. Ann. 526 (holding that an assignee, for the purpose of distributing a fund which is the common pledge of one's creditors, cannot offset his own debt, the character and terms of which he does not disclose, against a portion of the common fund thus intrusted to him); The Zouave, 29 Fed. 296.

21. Findley *v.* Breedlove, 4 Mart. N. S. (La.) 105.

22. Miller *v.* Franklin Bank, 1 Paige (N. Y.) 444, holding also that the public administrator is entitled to set off against the debt due from him to a bank a demand for deposits in the bank, whether made in his own name or as public administrator.

23. *Alabama.*— Mauldin *v.* Armistead, 14 Ala. 702; Smith *v.* Taylor, 9 Ala. 633; Carew *v.* Northrup, 5 Ala. 367; Bell *v.* Horton, 1 Ala. 413.

District of Columbia.— Kendall *v.* Vanderlip, 2 Mackey 165, holding that in an action on an accommodation note against the maker by one who had advanced money thereon to an accommodation payee at usurious rates of interest, the maker cannot set off the amount of usurious interest paid by the payee, since the statute only authorizes the party who pays the illegal interest to recover the same.

New York.— Elliott *v.* Brady, 118 N. Y. App. Div. 208, 103 N. Y. Suppl. 156; Butts *v.* Collins, 13 Wend. 139 [*affirming* 10 Wend. 399], holding that one having neither a general nor special property in goods placed by him in the hands of a manufacturer, who refuses to deliver them on demand, is not entitled to set off the value of such goods in an action brought by the manufacturer for work and labor spent on other goods, he not having such right to the property as will enable him in his own name to recover in trover or replevin.

Ohio.— Ross *v.* Johnson, 1 Handy 388, 12 Ohio Dec. (Reprint) 198.

Pennsylvania.— Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004; Union Nat. Bank *v.* Canonsburgh Iron Co., 3 Pa. Cas. 58, 6 Atl. 577.

Vermont.— Lapham *v.* Green, 9 Vt. 407.

West Virginia.— Little Kanawha Nav. Co. *v.* Rice, 9 W. Va. 636.

24. Lowndes *v.* City Nat. Bank, 79 Conn. 693, 66 Atl. 514; McConihe *v.* Hollister, 19 Wis. 269.

25. Walker *v.* Chovin, 16 Ill. 489.

Remedies as affected by agreement or estoppel generally see *supra*, IV.

26. See *supra*, VI, K, 1.

27. Gibbony *v.* Wayne, 141 Ala. 300, 37 So. 436; Kinne *v.* New Haven, 32 Conn. 210; Fishwick *v.* Sewell, 4 Harr. & J. (Md.) 393.

28. *Alabama.*— Turner *v.* Lawson, 144 Ala. 432, 39 So. 755; Thompson *v.* Merriman, 15 Ala. 166, holding that in an action by a landlord against a sheriff for failing to turn over money collected by the latter on a judgment for rent, defendant cannot set off a debt due from the landlord to the tenant.

California.— See Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098.

Connecticut.— Foster *v.* Balch, 79 Conn. 449, 65 Atl. 574; Kinne *v.* New Haven, 32 Conn. 210.

Illinois.— Weisenborn *v.* People, 53 Ill. App. 32.

Indiana.— Carter *v.* Berkshire, 8 Blackf. 193; Jennings *v.* Shriver, 5 Blackf. 37.

Iowa.— Reed *v.* Darlington, 19 Iowa 349.

Kentucky.— Morse *v.* Wilcoxson, 30 S. W. 612, 17 Ky. L. Rep. 29.

Michigan.— McGraw *v.* Pettibone, 10 Mich. 530, holding that one seeking to obtain the benefit of a set-off must be the real owner of,

counter-claimed,[29] reconvened,[30] or compensated.[31] in the absence of the execution of an assignment.[32]

3. Demands Against Third Person. As a general rule a debt against a third person not a party to the record cannot be pleaded in recoupment,[33] set-off,[34]

and have control of, the counter-claim, so that his suing creditor is, as to that claim, his debtor.

Missouri.— State *v.* Dickman, 124 Mo. App. 653, 102 S. W. 44.

New York.— Chambers *v.* Lewis, 11 Abb. Pr. 210 [*affirmed* in 28 N. Y. 454].

North Carolina.—Forney *v.* Shipp, 49 N. C. 527, holding that where an agent is liable on a contract made for the benefit of a third person, by reason of not disclosing his agency, he cannot avail himself of a debt due by plaintiff to such third person as a set-off.

Pennsylvania.— Shaw *v.* Fleming, 143 Pa. St. 104, 22 Atl. 816; Oberholtzer *v.* Heist, (1889) 16 Atl. 804; Carman *v.* Garrison, 13 Pa. St. 158 (holding that where the maker of a note, who placed it in the hands of a broker for sale, is sued by one who had advanced money on it, the maker cannot set off a claim alleged to be due to the broker from the holder, who advanced upon it); Longafelt *v.* Bartsher, 3 Penr. & W. 492; Union Nat. Bank *v.* Canonsburgh Iron Co., 3 Pa. Cas. 58, 6 Atl. 577.

South Carolina.— Kimbrel *v.* Glover, 13 Rich. 191.

Vermont.— Plattsburg First Nat. Bank *v.* Post, 66 Vt. 237, 28 Atl. 989; McIntyre *v.* Corss, 18 Vt. 451, holding that defendant, in an action on book-account, will not be allowed to offset against plaintiff's claim a demand which accrued in favor of a third person against plaintiff, and in which defendant had no legal interest, notwithstanding defendant and such third person may both have expected that it would be so applied.

England.— Belcher *v.* Lloyd, 10 Bing. 310, 3 L. J. C. P. 39, 3 Moore & S. 822, 25 E. C. L. 150; Pettat *v.* Ellis, 9 Ves. Jr. 563, 32 Eng. Reprint 721.

Canada.— Ross *v.* McIntosh, 7 Quebec Pr. 329.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 77.

In an action by one stock-holder who is a judgment creditor of a corporation, primarily against other stock-holders to recover from them amounts due the corporation on subscriptions to stock, although the corporation was made a party to the action, the individual defendants cannot set off against their indebtedness the unpaid subscription for stock which plaintiff owed the corporation. Blood *v.* La Serena Land, etc., Co., 150 Cal. 764, 89 Pac. 1090.

Plaintiff's indebtedness to a corporation not a party to the note cannot be set off in an action by an indorser against prior indorsers, although the proceeds of the note were used for the benefit of the corporation. Russ *v.* Sadler, 197 Pa. St. 51, 46 Atl. 903.

29. Davis *v.* Bakersfield Oil, etc., Exch., 2 Cal. App. 195, 83 Pac. 260; Marsh *v.* Low, 55 Ind. 271; Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905; Foley *v.* Mutual L. Ins. Co., 138 N. Y. 333, 34 N. E. 211, 34 Am. St. Rep. 456, 20 L. R. A. 620 [*affirming* 64 Hun 63, 18 N. Y. Suppl. 615]; Beers *v.* Waterbury, 8 Bosw. (N. Y.) 396; Klauck *v.* Federal Ins. Co., 60 Misc. (N. Y.) 170, 111 N. Y. Suppl. 1037; Cabot *v.* Ensign, 13 N. Y. Civ. Proc. 89; Briggs *v.* Seymour, 17 Wis. 255. See also Rogers *v.* Kelsey, 105 N. Y. Suppl. 119.

30. Smith *v.* Adams, 14 La. Ann. 409.

31. Bridges *v.* Simonton, 28 La. Ann. 830; Smith *v.* Adams, 14 La. Ann. 409, holding that even accommodation accepters known to be such by the payee have no right to plead in compensation a debt due by payee to the drawer of the draft.

32. Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905.

33. Tully *v.* Excelsior Ironworks, 115 Ill. 544, 5 N. E. 83; J. C. Winship Co. *v.* Wineman, 77 Ill. App. 161.

34. *Illinois.*— Peoria, etc., R. Co. *v.* Neill, 16 Ill. 269; Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151.

Indiana.— Kent *v.* Cantrall, 44 Ind. 452.

Iowa.— Enix *v.* Hays, 48 Iowa 86.

Kentucky.— Thatcher *v.* Cannon, 6 Bush 541 (holding that an estate devised directly to grandchildren under the will of their grandmother is not subject to set-off of a debt due by their father to their grandmother); Caldwell *v.* Caldwell, 2 Bush 446 (holding that, in an action by a creditor to recover of a third person money won from a debtor in unlawful gaming, the winner cannot set off money subsequently won from him by the debtor); Witt *v.* Thomas, 42 S. W. 338, 19 Ky. L. Rep. 847.

Maine.— Newcastle *v.* Bellard, 3 Me. 369.

Massachusetts.— Sanger *v.* Cleveland, 10 Mass. 415.

Michigan.— Detroit, etc., R. Co. *v.* Smith, 50 Mich. 112, 15 N. W. 39, holding that where a superintendent of two railroad companies, each of whom pays one half of his salary, receives money from one of them to pay its laborers and applied it to his salary, salary due from the other company could not be set off in an action by the company that paid the money, to recover the same.

Missouri.— Field *v.* Hahn, 65 Mo. 417, holding that, where the superintendent of a corporation upon its dissolution continued the business on his own account, and a former customer of the corporation subsequently purchased goods from the superintendent, supposing that he was still acting for the corporation, in an action by the superintendent to recover for such goods the customer could not set off a claim held by him against the corporation, in the absence of evidence that the former superintendent had notice of such claim, or that he had

counter-claim,[35] or reconvention;[36] and as a general rule set-off is allowable only in those cases where, if it exceeds plaintiff's demand, defendant may compel plaintiff to pay the excess.[37]

4. Debts and Demands of Nominal Parties and Real Parties in Interest. While the general rule is stated to be that a claim cannot be set off if it is in favor of[38] or against[39] a third person not a party to the action, other cases qualify the rule and hold that by the term "parties" is meant not merely the nominal plaintiff and defendant, but the real parties in interest,[40] and that the court will go outside

concealed from the customer the fact of the change in the business.

New Hampshire.— Northy *v.* Northy, 45 N. H. 141, holding that where plaintiff conveyed property to his son, taking back a mortgage to secure the maintenance of himself and wife, and also to secure the payment by the son of a certain amount to his daughter, and the son having failed to make the payment as stipulated, plaintiff brought action by writ of entry upon the mortgage, the son could not set off in such suit a claim against the daughter for board.

New York.— Spencer *v.* Babcock, 22 Barb. 326; Nottebohm *v.* Maas, 3 Rob. 249 (holding that where a pledgee of goods authorizes the pledgor to sell them and pay over the price to him, and the pledgor accordingly sells the goods to a third person, who agrees to make payment to the pledgee, such purchaser is liable in an action by the pledgee for the whole price, and cannot set off a debt due him from the pledgor); Gleason *v.* Moen, 2 Duer 639; Winton *v.* Winton, 13 N. Y. Suppl. 759, 18 N. Y. Civ. Proc. 67 (holding that where defendant in a divorce case was awarded costs by the court on its affirmance of a decision discharging him from imprisonment, these costs belonged to defendant's attorney, and consequently plaintiff could not set off the unpaid alimony against them); Johnson *v.* Bridge, 6 Cow. 693 [*affirmed* in 5 Wend. 342]; Wheeler *v.* Raymond, 5 Cow. 231 [*affirmed* in 9 Cow. 295]; Alsop *v.* Caines, 10 Johns. 396 (holding that where A carried on business in the name of B, and in his name sold and delivered goods to C, and afterward brought an action in B's name against C for the price, the action was rightly brought in the name of B, and that a claim against A could not be set off).

North Carolina.— Benzein *v.* Robinett, 17 N. C. 67.

Ohio.— Pennsylvania Orphan's Ct. *v.* Ogle, Wright 281, holding that where A sues for the use of B a set-off against B cannot be pleaded.

Pennsylvania.— Carr *v.* Beck, 51 Pa. St. 269.

Tennessee.— Hamilton *v.* Gilbert, 2 Heisk. 680, holding that notes given by the purchaser of land to one to whom the vendor made a gift of the price are not subject to a set-off of a debt of the donor.

Vermont.— Phelps *v.* Bulkeley, 20 Vt. 17; Leavenworth *v.* Lapham, 5 Vt. 204; Parker *v.* Kendall, 3 Vt. 540.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 78.

35. Howe *v.* Woolsey, 7 Misc. (N. Y.) 33, 27 N. Y. Suppl. 377 (holding that a breach of a contract between defendant and a third person, who is alleged to have acted for plaintiff's firm, is not available as a counter-claim, where such third person was not a member of plaintiff's firm, and there was no evidence to so show that he had authority to bind the firm in regard to the subject of the contract); Bissell *v.* Pearse, 21 How. Pr. (N. Y.) 130 (holding that where a mortgagee of chattels brought suit against a third person to recover damages for a conversion, and defendant set up in his answer that he had a lien on the property for keeping it under an agreement with the mortgagor made before execution of the mortgage, and demanded that the property be sold to satisfy such lien, although this might be a defense, yet it was not a counter-claim, as it did not exist against plaintiff); Thomson-Houston Electric Light Co. *v.* Henderson Electric, etc., Light Co., 116 N. C. 112, 21 S. E. 951; Kipp *v.* Gates, 126 Wis. 566, 105 N. W. 947; Computing Scale Co. *v.* Churchill, 109 Wis. 303, 85 N. W. 337.

36. Casey *v.* Hanrick, 69 Tex. 44, 6 S. W. 405.

37. Johnson *v.* Bridge, 6 Cow. (N. Y.) 693 [*affirmed* in 5 Wend. 342].

38. See *supra*, VI, K, 2.

39. See *supra*, VI, K, 3.

40. *District of Columbia.*— Baltimore United Oil Co. *v.* Barber, 2 Mackey 4, holding that a set-off must be a substantial demand by a real party interested in the payment of that which is the subject of the action; whether the party appears upon the record or not is immaterial, if it be shown that he is the real party interested.

Illinois.— Engs *v.* Matson, 11 Ill. App. 639.

Indiana.— Scobey *v.* Finton, 39 Ind. 275. See also Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665.

Kansas.— Clay *v.* Woodrum, 45 Kan. 116, 25 Pac. 619, holding that where A makes an agreement with B for the benefit of C, and C sues thereon, A can set off a debt due him from C.

Maine.— Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837.

Massachusetts.— Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265.

Michigan.— See Hendricks *v.* Toole, 29 Mich. 340.

New Hampshire.— Woods *v.* Carlisle, 6 N. H. 27.

New York.— Whiting *v.* Hood, 3 N. Y. St. 464.

of the record to find the real party;[41] and thus it is very generally held that a claim against the party having the real beneficial interest in the cause sued on, although not a party to the record, may be set off,[42] or counter-claimed,[43] and in cases where a judgment ought not to be obtained against plaintiff for the excess over the debt sued on, so much of the set-off is allowed as will extinguish the

North Carolina.— Gary *v.* Johnson, 72 N. C. 68, holding that, in an action on a note by the payee for the use of a married woman and her husband, the maker may set off an account for medical services rendered the married woman before her marriage, the wife and husband being the plaintiffs beneficially interested.

Pennsylvania.— Steward *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680.

Texas.— Masterson *v.* Goodlett, 46 Tex. 402.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 101, 102.

Set-off of demands and liabilities of principal and surety see PRINCIPAL AND SURETY, 32 Cyc. 230.

41. Baltimore United Oil Co. *v.* Barber, 2 Mackey (D. C.) 4.

42. *Alabama.*— Hopper *v.* Armstrong, 69 Ala. 343; Moody *v.* Robertson, 46 Ala. 432 (holding that where a person conveyed land to another in consideration of the payment by the latter of the grantor's indebtedness to a third person, and it was afterward ascertained that the debt had been previously paid, in a suit by the grantee making the payment to the agent of such third person to recover it as money paid by mistake, defendant may avail himself of a set-off against the grantor, for whose benefit the money was paid, although such grantor was not a party to the record); Bowen *v.* Snell, 9 Ala. 481.

Illinois.— Engs *v.* Matson, 11 Ill. App. 639, holding also that the right of set-off against the real party in interest, who is not a party to the record, is not limited to a mere recoupment of damages arising out of the same transaction as the demand or contract sued on.

Indiana.— Swindell *v.* Richey, 41 Ind. 281; Waddle *v.* Harbeck, 33 Ind. 231; Jones *v.* Hawkins, 17 Ind. 550. See also Stevens *v.* Songer, 14 Ind. 342.

Kansas.— Challiss *v.* Wylie, 35 Kan. 506, 11 Pac. 438, holding that in an action by a wife defendant might set off a claim against the husband, who was the real party in interest.

Kentucky.— Cummins *v.* Williams, 5 J. J. Marsh. 384; Ward *v.* Martin, 3 T. B. Mon. 18; Jenkins *v.* Bush, 3 A. K. Marsh. 351, holding that a bond given to one, but really for the benefit and use of another, is subject to any equity of set-off which may exist between the obligor and the person for whose benefit the bond is executed.

Maine.— Moody *v.* Towle, 5 Me. 415, holding that where the indorsee of a note has only a lien or a part thereof as collateral security for money due from the payee, a debt due from the payee to the maker may be set off against the residue.

Missouri.— Nickerson *v.* Gilliam, 29 Mo. 456, 77 Am. Dec. 583. But see Walser *v.* Wear, 141 Mo. 443, 42 S. W. 928.

New Hampshire.— Andrews *v.* Varrell, 40 N. H. 17.

New York.— Austin *v.* Rappleye, 19 N. Y. Suppl. 102; Driggs *v.* Rockwell, 11 Wend. 504. But see Young *v.* Thurber, 91 N. Y. 388, holding that where a manufacturing company consigned its goods to its agent who made advances on the understanding that he was to sell the goods and reimburse himself from the proceeds of sale, a buyer of the goods could not, when sued by the agent for their price, claim the right to set off an indebtedness from the company.

North Carolina.— Stanly *v.* Kean, 1 N. C. 58.

Ohio.— Miller *v.* Florer, 15 Ohio St. 148, holding that under the code the right of set-off exists against the persons who are the equitable owners of the demand in suit.

Pennsylvania.— Fahnestock *v.* Schoyer, 9 Watts 102. See also Long *v.* Long, 208 Pa. St. 368, 57 Atl. 759; McCormick *v.* Skiles, 163 Pa. St. 590, 30 Atl. 195.

South Carolina.— Smith *v.* Foltz, 1 Bay 280, holding that the real party in interest cannot by suing in the name of another prevent a set-off.

Texas.— Bolton *v.* Sadler, 1 Tex. App. Civ. Cas. § 1226.

United States.— Campbell *v.* Hamilton, 4 Fed. Cas. No. 2,359, 4 Wash. 92, holding that in an action on a bond given to plaintiff in trust for another, defendant in a court of law will be allowed to set off a debt due from the person beneficially interested, in like manner as if such person were and could be legally plaintiff.

England.— Winch *v.* Keeley, 1 T. R. 619.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 101, 102.

Although an assignee of a chose in action cannot maintain an action thereon in his own name, the courts recognize the beneficial interest of the assignee of such chose in action so far that defendant may set off a debt due to him from the assignee in the same manner as if the action had been brought in the name of the assignee instead of in the name of the assignor. Corser *v.* Craig, 6 Fed. Cas. No. 3,255, 1 Wash. 424.

A purchaser at an auction may set off against the auctioneer a debt due from the owner of the goods sold. Blum *v.* Torre, 3 Hill (S. C.) 155.

Set-off and counter-claim against agent in action by principal see PRINCIPAL AND AGENT, 31 Cyc. 1601.

Set-off and counter-claim against principal in action by agent see PRINCIPAL AND AGENT, 31 Cyc. 1565.

43. Moorehead *v.* Hyde, 38 Iowa 382.

claim.[44] Thus in a suit by a trustee defendant may set off a debt due him from the *cestui que trust*,[45] and, conversely, in an action against a *cestui que trust* he may set off a claim, the legal title to which is in the trustee,[46] and a third party for whose benefit a simple contract has been entered into for a valuable consideration may plead it by way of set-off.[47] But notwithstanding a set-off may be asserted against the actual party in interest, yet it is necessary to show against that party a cause of action for which defendant could sue him in his own name,[48] and it has been held that set-off will not be allowed against plaintiff if plaintiff is a mere nominal party suing for another beneficially interested.[49] The apparent legal holder of a claim may plead it in set-off, although the real interest be in another.[50]

5. Debts and Demands in Representative and Individual Capacities — a. In General. A claim against plaintiff in a representative capacity cannot be set off in a suit brought in his individual capacity,[51] and *vice versa*,[52] nor can such an individual demand against a plaintiff suing in a representative capacity be counter-claimed.[53] Similarly when the cause of action sued on is defendant's failure to fulfil an official or fiduciary obligation he cannot set off a debt due from plaintiff to him in his individual capacity,[54] and a claim due defendant in a representative

44. Bowen *v.* Snell, 9 Ala. 481.

45. Waddle *v.* Harbeck, 33 Ind. 231; Henry *v.* Scott, 3 Ind. 412 (holding that, in a suit by the assignee of a note against the maker, defendant may prove that plaintiff holds the note merely as a trustee for the payee, in order to plead as a set-off an indebtedness from the payee to the maker); Forkner *v.* Dinwiddie, 3 Ind. 34 (holding that whether the use or trust is disclosed upon the record by plaintiff or not defendant may plead and prove the fact); Thornton *v.* Maynard, L. R. 10 C. P. 695, 44 L. J. C. P. 382, 33 L. T. Rep. N. S. 433; Bottomley *v.* Brooke [*cited* in Winch *v.* Keeley, 1 T. R. 619, 621]; Rudge *v.* Birch [*cited* in Winch *v.* Keeley, 1 T. R. 619, 622]. But see Porter *v.* Morris, 2 Harr. (Del.) 509, holding that in scire facias on a judgment issued in the name of the judgment creditor defendant in the judgment could not in a court of law plead as a set-off a claim against the *cestui que trust* of the judgment, but that defendant might apply to the equity side of the court, which would stay proceedings on the judgment until payment was allowed. Tucker *v.* Tucker, 4 B. & Ad. 745, 2 L. J. K. B. 143, 1 N. & M. 477, 24 E. C. L. 326.

Against a judgment obtained by a trustee of an express trust may be set off a judgment against the beneficiary of the trust. Heavenridge *v.* Mondy, 49 Ind. 434.

46. Hunt *v.* Shackleford, 55 Miss. 94 (holding that a defendant in assumpsit may set off a claim as *cestui que trust* for the value of goods converted by plaintiff or by his assignor before notice to defendant of the assignment, the money realized from the conversion belonging to him in fact, and his trustee being merely the nominal owner); Merriman *v.* Cannovan, 9 Baxt. (Tenn.) 93; Cochrane *v.* Green, 9 C. B. N. S. 448, 7 Jur. N. S. 548, 30 L. J. C. P. 97, 3 L. T. Rep. N. S. 475, 9 Wkly. Rep. 124, 99 E. C. L. 446.

47. Green *v.* Morrison 5 Colo. 18; Green *v.* Richardson, 4 Colo. 584; Lehow *v.* Simonton, 3 Colo. 346. See also Dill *v.* Phillips, 13 Ala. 350. But see Clare *v.* Hatch, 180 Mass. 194, 62 N. E. 250, holding that a contract between plaintiff and a corporation requiring the former to pay a certain debt of the corporation, including a debt due defendant, does not authorize defendant to set off such debt in an action by plaintiff to recover a debt owing him by defendant.

48. Bowen *v.* Snell, 11 Ala. 379.

49. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468, holding that, in an action by a city for the recovery of an assessment against property for municipal improvements done under a contract, defendant cannot plead a set-off against the city, since the contractor performing the work is the party beneficially interested, while the city is a mere nominal party. But see Durant Lumber Co. *v.* Sinclair, etc., Lumber Co., 2 Ga. App. 209, 58 S. E. 485, holding that where one having bought a business of another fills an order sold by the latter to a third person, and sues thereon in the name of such other to his own use, such third person may set off counter demands existing against the nominal plaintiff.

50. Thomas *v.* Young, 5 Tex. 253.

51. Clark *v.* Cook, 14 Pa. Super. Ct. 309 [*affirmed* in 197 Pa. St. 643, 47 Atl. 851]; Snow *v.* Conant, 8 Vt. 301.

52. Snow *v.* Conant, 8 Vt. 301.

In an action by a former committee for an idiot against his successor to recover for necessaries furnished before his removal, the latter cannot set off a judgment against the former for an individual debt. Brashears *v.* Frazier, 102 Ky. 237, 43 S. W. 427, 19 Ky L. Rep. 1284.

53. Headington *v.* Smith, 113 Iowa 107, 84 N. W. 982; Smith *v.* Dawley, 92 Iowa 312, 60 N. W. 625, holding that where a minor commences an action by his next friend defendant cannot interpose as a counter-claim a liability incurred by the next friend.

54. Tagg *v.* Bowman, 99 Pa. St. 376; Russell *v.* Pottsville First Presb. Church, 65 Pa. St. 9, holding that the treasurer of a cor-

capacity cannot be counter-claimed against an individual demand.[55] Thus a claim which defendant has against plaintiff in his individual capacity cannot be set off against a claim due plaintiff as trustee;[56] nor can such demand be counter-claimed;[57] and in a suit against one in an individual capacity he cannot set off a debt due to him as trustee,[58] and in a suit against a trustee he cannot set off a claim due to him in his individual capacity.[59]

b. Executors and Administrators[60] — (i) *At Law.* In an action by an executor as such a claim against him in his individual capacity cannot be pleaded

poration when sued by the corporation for its money in his hands cannot set off an individual claim, as there is fairly to be implied from the relation he sustains an undertaking not to plead a set-off, but to account and pay over what money comes to his hands. But see Queen City Suspender Co. *v.* Adamson, 7 Pa. Co. Ct. 412, holding that where a debtor on a note about to mature sends to his creditor the note of a third person for a larger amount, and asks the creditor to get the latter note discounted for him, and to wire him what the proceeds will be, but gives no directions as to the disposition of the proceeds, the creditor, on complying with the request, may retain enough of the proceeds to pay the debt due him; and in an action by the debtor for money had and received the creditor may set off the amount of the debt, the creditor not holding such proceeds in any fiduciary relation, because not under any duty in reference thereto.

55. Avritt *v.* Russell, 58 S. W. 811, 22 Ky. L. Rep. 752, holding it error to allow money due a master commissioner in his fiduciary capacity to be credited upon his private debt.

56. McPherson *v.* Ross, 1 Md. 181; Jeffray *v.* Towar, 63 N. J. Eq. 530, 53 Atl. 182. But see Otwell *v.* Cook, 9 B. Mon. (Ky.) 357 (holding that a maker of a note may set off the joint and several note of the payee and a third person, acquired while the payee was the owner of the note, notwithstanding the fact that the note offered to be set off is held in trust for another, in case no violation of trust appears); Roberts *v.* Williams, 2 Pennyp. (Pa.) 408.

Where a trustee took a note in his own name for loaned trust funds, the maker, knowing of the trust, could not, as against the *cestui que trust*, set off a demand against the trustee. Day *v.* Hanks, 11 Ky. L. Rep. 138.

57. U. S. Trust Co. *v.* Stanton, 139 N. Y. 531, 34 N. E. 1098; Central Trust Co. *v.* Weeks, 15 N. Y. App. Div. 598, 44 N. Y. Suppl. 828 (holding that a mortgagor on foreclosure will not be allowed a counter-claim against the mortgagee, where the mortgagee as an individual had transferred the mortgage to himself as trustee for a third person, although the mortgagor had no notice of the transfer); Hanlon *v.* Metropolitan L. Ins. Co., 9 Misc. (N. Y.) 70, 29 N. Y. Suppl. 65 (holding, however, that Code Civ. Proc. § 502, which provides that if plaintiff is a trustee for another, or if the action is in the name of a plaintiff who has no actual interest in the contract on which it is founded, a demand against plaintiff shall not be allowed as a counter-claim, must be read with section 449, which provides that an action must be brought in the name of the real party in interest, and that therefore the persons against whom a personal indebtedness is not allowable as a counter-claim are trustees of express trusts).

58. Smallwood *v.* Lafayette County, 75 Mo. 450 (holding, however, that where, in an action against a county to recover compensation agreed to be paid for furnishing evidence relative to swamp lands, the county pleaded in set-off plaintiff's indebtedness to it for a loan of school moneys, and it was fairly inferable from the agreement upon which the suit was brought that plaintiff was to be paid out of the funds which should be received by the county from the general government for swamp lands, defendant's and plaintiff's demands were in favor of and against the county as trustee of the school fund, and therefore the set-off would be allowed); McDonald *v.* Harrison, 12 Mo. 447; Lewis *v.* Pickering, 58 Nebr. 63, 78 N. W. 368 (holding that in an action against the maker of a note he cannot set off an amount due from plaintiff to a society, of whose funds he is custodian); Weston *v.* Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319; Middleton *v.* Pollock, L. R. 20 Eq. 29, 44 L. J. Ch. 584, 33 L. T. Rep. N. S. 240, 23 Wkly. Rep. 766.

59. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145 [*reversing* 21 Hun 450]; Wells *v.* Chapman, 4 Sandf. Ch. (N. Y.) 312 [*affirmed* in 13 Barb. 561].

Where part of defendant's claim is in trust he may in an action on a recognizance plead the claim in set-off against plaintiff, defendant's personal interest in the claim being greater than the amount due plaintiff on the recognizance. Plattsburg First. Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093.

A trustee cannot set off his personal claims against a beneficiary so as to avoid payment of a balance due by him as trustee. Harris *v.* Elliott, 24 N. Y. App. Div. 133, 48 N. Y. Suppl. 1020; Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 41 Eng. Ch. 109, 68 Eng. Reprint 435.

60. **Set-off and counter-claim in actions by and against personal representatives** generally see Executions and Administrators, 18 Cyc. 894.

Right of debtor to estate to have distributive share set off against his indebtedness see Descent and Distribution, 14 Cyc. 123.

as a set-off [61] or counter-claim,[62] and the same rule applies to an action by an administrator; [63] and in an action by an administrator defendant cannot set off a demand against him in another capacity,[64] and it has been held that even though an executor sues in his own name if he is in fact claiming a debt due the estate, a set-off against him personally will not be allowed; [65] but where defendant proves that plaintiff individually owns the demand a set-off may be had against plaintiff individually, although the action was brought by plaintiff nominally as executor.[66] Conversely, in an action by an individual, a claim against him as executor [67] or administrator [68] cannot be pleaded as a set-off. In an action against an executor [69] or an administrator [70] a demand due defendant in his individual capacity cannot be set off, even though the administrator has acquired the interest of the heirs of the decedent in the estate,[71] and in an action against defendant in his own

61. Wisdom *v.* Becker, 52 Ill. 342; Banton *v.* Hoomes, 1 A. K. Marsh. (Ky.) 19; Davis *v.* Newton, 6 Metc. (Mass.) 537.

An action on a bill payable to plaintiff, "executor of B," is an action in plaintiff's own right to which a debt due from him to defendant may be set off. Turner *v.* Plowden, 2 Gill & J. (Md.) 455.

The tort of an executor cannot be counter-claimed or set off in an action by him in his representative capacity. Wakeman *v.* Everett, 41 Hun (N. Y.) 278 [*affirmed* in 110 N. Y. 675, 18 N. E. 481].

62. Wakeman *v.* Everett, 41 Hun (N. Y.) 278 [*affirmed* in 110 N. Y. 675, 18 N. E. 481]; Starke *v.* Myers, 24 Misc. (N. Y.) 577, 53 N. Y. Suppl. 650; Conrad *v.* Archer, 7 N. Y. St. 646.

63. *Alabama.*— Collins *v.* Greene, 67 Ala. 211; Jones *v.* Brevard, 59 Ala. 499; Mauldin *v.* Armistead, 14 Ala. 702; Harbin *v.* Levi, 6 Ala. 399.

Arkansas.— Lawson *v.* Fischer, 5 Ark. 52.

Illinois.— Wisdom *v.* Becker, 52 Ill. 342; McCully *v.* Silverburgh, 18 Ill. 306, holding that in an action by an administrator in his official capacity against three defendants, one of defendants cannot plead by way of set-off a claim against the administrator individually.

Kentucky.— Cummings *v.* Bradford, 14 Ky. L. Rep. 527.

Massachusetts.— Davis *v.* Newton, 6 Metc. 537.

New York.— Kettleman *v.* Bradt, 13 Daly 529.

Texas.—Houston *v.* Evans, (1891) 17 S. W. 925.

Virginia.— Pulliam *v.* Winston, 5 Leigh 324.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 104. And see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 894 *et seq.*

An administrator's torts cannot be pleaded by way of set-off to his suits in his representative character (Parker *v.* Daughtry, 111 Ala. 529, 20 So. 362; Phillips *v.* Keifer, 2 Metc. (Ky.) 478; Thompson *v.* Munger, 15 Tex. 523, 65 Am. Dec. 176), not even by waiving the tort and suing in assumpsit (Parker *v.* Daughtry, *supra*).

Where an administrator is substituted as plaintiff in an action commenced by his intestate, and defendant afterward pleads set-off of moneys due from plaintiff, it is regarded as a claim against plaintiff in his individual character, and constitutes no bar to the action. Lawson *v.* Fischer, 5 Ark. 52.

In an action on a note to "B, administrator," the individual debts of B may be set off. Lacompte *v.* Seargent, 7 Mo. 351.

A judgment against two in their individual capacities cannot be set off against them as administrators. McChesney *v.* Rogers, 8 N. J. L. 272.

64. Tate *v.* Chandler, 4 Stew. & P. (Ala.) 417.

65. Merritt *v.* Seaman, 6 N. Y. 168 [*affirming* 6 Barb. 330].

66. Lee *v.* Russell, 38 S. W. 874, 18 Ky. L. Rep. 951.

67. Pitkin *v.* Pitkin, 8 Conn. 325; Davis *v.* Hadden, 115 Ga. 466, 41 S. E. 608; Davis *v.* Newton, 6 Metc. (Mass.) 537; Macdonald *v.* Carington, 4 C. P. D. 28, 48 L. J. Ch. 179, 39 L. T. Rep. N. S. 426, 27 Wkly. Rep. 153.

68. Davis *v.* Newton, 6 Metc. (Mass.) 537; Rutherford *v.* Talent, 6 Mont. 132, 9 Pac. 821; Darroch *v.* Hay, 2 Yeates (Pa.) 208.

69. Davis *v.* Newton, 6 Metc. (Mass.) 537.

Claims purchased by an executor in his individual capacity cannot be set off against a judgment rendered against him as executor. Fusting *v.* Sullivan, 51 Md. 489.

An executor who is sole legatee may, upon proof that all the debts of the testator have been paid, avail himself of a chose in action belonging to the estate in an action against him individually. Blood *v.* Kane, 130 N. Y. 514, 29 N. E. 994, 15 L. R. A. 490 [*reversing* 52 Hun 225, 6 N. Y. Suppl. 353].

In an action by a legatee against the executor to recover the residue of a legacy, defendant may set off a certificate of a balance found due him in a former suit against him to recover a part of the same legacy. Galloney's Appeal, 6 Pa. St. 37.

70. Cummins *v.* Williams, 5 J. J. Marsh. (Ky.) 384; Davis *v.* Newton, 6 Metc. (Mass.) 537.

Where an administrator is personally interested in the subject-matter of an action against him as administrator, he may set off a claim due him in his individual capacity. Phelps *v.* Rice, 10 Metc. (Mass.) 128.

71. McCaffrey *v.* Kennett, 73 N. H. 189, 60 Atl. 96.

right he cannot set off a debt due him as administrator [72] or as executor.[73] But where an administrator has filed his final account and charged himself with a debt, such debt becomes his own, and in an action thereon he may set off individual claims against plaintiff,[74] and an administrator sued in his individual capacity can set off a debt due him individually.[75] In an action on a debt payable to an administrator, a debt due defendant from the intestate cannot be set off, the demands being in different rights.[76]

(II) *IN EQUITY.* In the absence of any special equities a debt due from plaintiff to defendant as administrator is not available as a set-off against an individual debt in equity,[77] and conversely.[78] But if plaintiff is insolvent, a debt due defendant as administrator may be set off against an individual debt; [79] and the same rule applies where plaintiff is a married woman against whom a personal judgment cannot be rendered.[80]

c. Guardians.[81] A claim against a guardian individually cannot be used as a set-off [82] or counter-claim [83] in an action by him as guardian; nor is a debt due to defendant as guardian available as a set-off against a demand due by him individually.[84]

d. Public Officers. Upon the ground that it is against public policy to allow a public officer to commingle his private claims with his official duties,[85] as well as upon the ground that debts in order to be set off must be mutually subsisting between the parties in the same right and capacity,[86] it is held that in an action to recover money received by an officer in his official capacity a debt due from plaintiff to the officer in his private capacity is not the subject of a set-off.[87] Thus

72. White *v.* Word, 22 Ala. 442; Thomas *v.* Hopper, 5 Ala. 442; Call *v.* Houdlette, 70 Me. 308; Davis *v.* Newton, 6 Metc. (Mass.) 537; Sanford *v.* Foss, 58 Mo. App. 474.

In foreign attachment the trustee cannot set off against a debt due from himself to defendant a debt due from defendant to the trustee as administrator. Woodward *v.* Tupper, 58 N. H. 577.

73. Gourley *v.* Walker, 69 Iowa 80, 28 N. W. 444; Dupuy *v.* Dashiell, 17 La. 60; Devore *v.* Devore, 138 Mo. 181, 39 S. W. 68; Lanier *v.* Brunson, 21 S. C. 41.

74. White *v.* Word, 22 Ala. 442; Hall *v.* Chenault, 13 Ala. 710; Jones *v.* Everman, 15 B. Mon. (Ky.) 631, 63 Am. Dec. 521 (holding that where an administratrix takes a note made payable to her as administratrix in settlement of an account due the estate, and charges herself with the amount thereof in her accounts as administratrix, and then, joined by her husband, sues thereon in her own right, the maker is entitled to set off against the note, money due him on the individual account of the wife); Sanford *v.* Foss, 58 Mo. App. 474.

75. Vaughn *v.* Walsh, 122 Wis. 486, 100 N. W. 840.

76. Rapier *v.* Holland, Minor (Ala.) 176. And see, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 894 *et seq.*

77. Farris *v.* Houston, 78 Ala. 250.

78. Jones *v.* Brevard, 59 Ala. 499.

79. Farris *v.* Houston, 78 Ala. 250.

80. Farris *v.* Houston, 78 Ala. 250.

81. See, generally, GUARDIAN AND WARD, 21 Cyc. 195 *et seq.*

Set-off of debt due from guardian: Against distributive share of ward see, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 121 *et seq.* Against legacy or devise due ward see, generally, WILLS. And see, generally, EXECUTORS AND ADMINISTRATORS, 18 Cyc. 621 *et seq.*

82. Robertson *v.* Garshwiler, 81 Ind. 463. But see Ory *v.* Winter, 4 Mart. N. S. (La.) 277, holding that a tutor's private debt may be offset against a note taken by him in his own name for moneys due the minor.

In a suit by the committee of a lunatic for goods sold by them, defendant cannot set off a debt to him by the lunatic. Beale *v.* Coon, 2 Watts (Pa.) 183. But see Nickerson *v.* Gilliam, 29 Mo. 456, 77 Am. Dec. 583, holding that, where a guardian institutes suit upon a note given to him as guardian in his own name, defendant may plead by way of set-off a debt due him from the insane ward, upon the ground that the ward is the real party in interest.

83. Gallagher *v.* David Stevenson Brewing Co., 13 Misc. (N. Y.) 40, 34 N. Y. Suppl. 94, 25 N. Y. Civ. Proc. 106.

84. Gansner *v.* Franks, 75 Mo. 64.

85. Harper *v.* Howard, 3 Ala. 284; Wilson *v.* Lewistown, 1 Watts & S. (Pa.) 428; Shoemaker *v.* Swiler, 2 Pearson (Pa.) 114.

86. See *supra*, VI, K, 1.

87. Harper *v.* Howard, 3 Ala. 284 (holding that a justice of the peace, in an action against him to recover money collected by him in his official capacity, cannot set off costs due to him in another case); Prewett *v.* Marsh, 1 Stew. & P. (Ala.) 17, 21 Am. Dec. 645.

An attorney who has collected money for the treasurer of a town in that capacity is liable for the amount, in an action for money had and received, at the suit of the town, and in such action cannot set off a demand of

a public officer when sued for money which he has failed to pay over as required by statute cannot set off a debt due himself from the municipality for salary in that office,[88] or in another,[89] or for fees,[90] and in an action against a public officer upon a claim for which he is personally liable he cannot set off a claim due the municipality in which he officiates.[91] But in an action against defendant individually he may set off a claim due him for fees earned as a public officer, which had been taxed against plaintiff;[92] and in a suit on an official bond it has been held that defendant may set off against a shortage in certain public funds in his hands the amount due him for his services and overpayments made by him for the benefit of other public funds.[93] A debt due to an officer from a city,[94] or county,[95] cannot be set off against a debt due from the officer to the state, and in an action by a public officer, as such, a claim against him individually cannot be set off,[96] or recouped.[97] A municipal corporation may properly set off, in an action by an officer for his salary, a claim against the officer for moneys of the corporation unlawfully received by him.[98]

6. Mutuality in Equity.[99] Courts of equity usually follow the law in matters

his own against the treasurer in his private capacity. Newcastle *v.* Bellard, 3 Me. 369.

A public officer cannot purchase a title to money in his hands by the subsequent procurement of a set-off which could not have been procured for purposes of set-off by the original debtor. Irwin *v.* Workman, 3 Watts (Pa.) 357, holding that a sheriff, in an action for the recovery of money in his hands acquired by him in his official capacity, cannot set off a note given by plaintiff to his attorney for services rendered in obtaining judgment on which the execution was issued, whereby the sheriff had obtained the money sued for, and assigned by the attorney to the sheriff, it being against public policy to allow a set-off in such a case.

88. Waterbury *v.* Lawlor, 51 Conn. 171; Wilson *v.* Lewiston, 1 Watts & S. (Pa.) 428, holding that in an action against a tax-collector by a township for the amount of a tax committed to him for collection, defendant cannot be allowed to set off a debt due him from plaintiff.

89. State *v.* Floyd, 28 La. Ann. 553, holding that a person sued as tax-collector for proceeds of taxes collected cannot set off a claim for compensation for services performed in another office.

90. Moore *v.* People, 37 Ill. App. 641, holding that under Rev. St. c. 122, § 209, providing that all fines, penalties, and forfeitures, when collected, shall be paid to the county superintendent of schools, and imposing a penalty for failure to pay them over, a justice of the peace who has collected fines cannot set off any claim of his own against them for fees in the proceedings out of which they arose.

91. Bayliss *v.* Pearson, 15 Iowa 279.

92. Law *v.* Vierling, 45 Ind. 25, holding that in an action on a note defendant could set off a claim against plaintiff, consisting of docket fees due and owing defendant, as district attorney, for prosecuting and convicting plaintiff in cases of misdemeanor.

In an action by a city against its former treasurer in his individual capacity, and not as treasurer, for moneys had and received, defendant may set off a demand due to him from the city. Evans *v.* Trenton, 24 N. J. L. 764.

93. State *v.* Finney, 125 Ind. 427, 25 N. E. 544.

In an action on a bond to secure the collection and payment of public taxes, a set-off in favor of the principal in the bond, consisting of an account for services and expenses, is admissible. Concord *v.* Pillsbury, 33 N. H. 310.

94. People *v.* Starkweather, 42 N. Y. Super. Ct. 325, holding that in an action in the name of the people against a collector of assessments in a city for the recovery of moneys alleged to have been paid to him as such collector, in excess of his legal fees, defendant cannot set up by way of a set-off a claim existing in his favor against the city, where the law vests the money for which defendant is responsible in the state, and this right cannot be diminished by a claim against the city in favor of defendant.

95. Byers *v.* State, 2 Ohio 106, holding that in a suit on a collector's bond, for his omission to pay collected moneys into the state treasury, he cannot set off money orders.

96. Wright *v.* Quirk, 105 Mass. 44, holding that where property attached by an officer upon mesne process was replevied by him, and he recovered judgment in replevin for the return of the property, and, no return being made, brought an action on the replevin bond, damages recovered against him by plaintiff in replevin for a false return on the process upon which he originally attached the property could not be set off against the damages recoverable by him in the action on the bond.

97. Wright *v.* Quirk, 105 Mass. 44.

98. Wood *v.* New York, 73 N. Y. 556.

In an action by a constable to recover fees from a county, the county may set off sums previously paid to him in excess of the amount to which he was legally entitled. Price *v.* Lancaster County, 24 Pa. Co. Ct. 225.

99. **Equitable set-off** generally see *supra*, I, F.

of set-off, in the absence of any intervening equity,[1] and thus where there are cross demands between two parties of such a nature that if both were recoverable at law they would be the subject of legal set-off, then if either of the demands is matter of equitable jurisdiction the set-off will be enforced in equity.[2] But it is held as a general rule that in equity, as at law,[3] the right of set-off is reciprocal, and only mutual claims and such as are in the same right can be set off.[4] But this doctrine of mutuality is not permitted to work an injustice, for whenever it is necessary to effect a clear equity or to prevent an irremediable injustice the set-off will be allowed, in equity, although the debts are not mutual, and the set-off therefore one which a court of law would not be authorized to make,[5] and equity,

1. See *supra*, I, F, 3.

2. Clark *v.* Cort, Cr. & Ph. 154, 10 L. J. Ch. 113, 18 Eng. Ch. 154, 41 Eng. Reprint 449.

Where a party to an equity suit owes an estate in court for distribution, and at the same time the estate owes him, he is entitled to set off the one against the other. Berger *v.* Clendinen, 88 Md. 151, 40 Atl. 705.

3. See *supra*, VI, K, 1.

4. *Arkansas.*— Menifee *v.* Ball, 7 Ark. 520.

Indiana.— Elder *v.* Lasswell, 2 Blackf. 349, holding that there is no difference, on the subject of set-off, between courts of law and equity; the rule is the same in both courts.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Scott *v.* Scott, 17 Md. 78 (holding that no principle or practice in equity will enable a respondent to set off a debt due from the complainant's deceased ancestor on the ground that plaintiff is in possession of lands of the ancestor which may be sold to satisfy the ancestor's debts, although a proceeding is pending against the estate to ascertain all claims against it and to subject the decedent's lands to payment thereof); McPherson *v.* Ross, 1 Md. 181; Hall *v.* Creswell, 12 Gill & J. 36; Roberston *v.* Parks, 3 Md. Ch. 65.

New Hampshire.— Brown *v.* Warren, 43 N. H. 430.

New Jersey.— Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423.

New York.— McDonald *v.* Neilson, 2 Cow. 139, 14 Am. Dec. 431; Dale *v.* Cook, 4 Johns. Ch. 11 (holding that joint and separate debts cannot be set off against each other in equity, any more than at law, and to authorize a set-off the debts must be mutual, and due to and from the same persons, in the same capacity, and that therefore a debt arising on a contract made with an executor cannot be set off against a debt from the testator); Duncan *v.* Lyon, 3 Johns. Ch. 351, 358, 8 Am. Dec. 513.

North Carolina.— March *v.* Thomas, 63 N. C. 87.

Pennsylvania.— Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003; Hibert *v.* Lang, 165 Pa. St. 439, 30 Atl. 1004.

Virginia.— See Watkins *v.* Hopkins, 13 Gratt. 743.

England.— Gale *v.* Luttrell, 1 Y. & J. 180; Harvey *v.* Wood, 5 Madd. 459, 56 Eng. Reprint 971; Stammers *v.* Elliott, L. R. 3 Ch. 195, 37 L. J. Ch. 353, 18 L. T. Rep. N. S. 1, 16 Wkly. Rep. 489; Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 41 Eng. Ch. 109, 68 Eng. Reprint 435.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 81.

5. *Alabama.*— Farris *v.* Houston, 78 Ala. 250.

Indiana.— Porter *v.* Roseman, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222; Carter *v.* Compton, 79 Ind. 37.

Kentucky.— Bernard *v.* Gallatin Seminary, 3 J. J. Marsh. 425; Jones *v.* Murray, 3 T. B. Mon. 83.

New Jersey.— Brewer *v.* Norcross, 17 N. J. Eq. 219; Black *v.* Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423, where, upon a bill by a husband and wife for the wife's legacy, the executor was permitted to set off debts due from the insolvent husband to the estate.

New York.— Dale *v.* Cooke, 4 Johns. Ch. 11.

Pennsylvania.—Stewart *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Childerston *v.* Hammond, 9 Serg. & R. 68.

Vermont.— Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701.

United States.— Greene *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201 (holding that, while the general rule in equity is, like that at law, that there can be no set-off of joint debts against separate debts unless some new equity justify it, such an equity may arise under circumstances of fraud, or where the party seeking relief is only a surety for a debt really separate, or where there are a series of transactions in which joint credit is given with reference to the separate debt); North Chicago Rolling Mill Co. *v.* St. Louis Ore, etc., Co., 152 U. S. 596, 14 S. Ct. 710, 38 L. ed. 565; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409, (holding that in the case of an attempt to set off a several debt of one partner against a joint debt due to the partnership, neither at law nor in equity can such a set-off be maintained upon that mere footing, but that there must be some other circumstances creating an equity, in order to justify the set-off).

England.— Stammers *v.* Elliott, L. R. 3 Ch. 195, 37 L. J. Ch. 353, 18 L. T. Rep. N. S. 1, 16 Wkly. Rep. 489; Freeman *v.* Lomas, 9 Hare 109, 15 Jur. 648, 20 L. J. Ch. 564, 41 Eng. Ch. 109, 68 Eng. Reprint 435; Vulliamy *v.* Noble, 3 Meriv. 593, 17 Rev. Rep. 143, 36 Eng. Reprint 228; *Ex p.* Blagden, 2 Rose 249, 19 Ves. Jr. 465, 34 Eng. Reprint 589; *Ex p.* Flint, 1 Swanst. 30, 36 Eng. Reprint 285; Taylor *v.* Okey, 13 Ves. Jr. 181, 33 Eng.

disregarding the form, and looking to the substance of a transaction, may allow a set-off, although not between the nominal parties, but between the real parties in interest, and thus in reality mutual, although not nominally so, if equity demands the set-off.[6] Thus upon a showing of insolvency equity will set off a debt without regard to strict mutuality or whether the debts are due in the same right,[7] and in cases of joint credit given on account of individual indebtedness, or where the joint debt is a mere security for the separate debt of the principal, the equity is obvious and a set-off will be allowed,[8] and, although the general rule in equity, as at law,[9] is that joint and separate debts cannot be set off against each other,[10]

Reprint 263; *Ex p.* Hanson, 12 Ves. Jr. 345, 33 Eng. Reprint 131; James *v.* Kynnier, 5 Ves. Jr. 108, 31 Eng. Reprint 496.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 9 *et seq.*

But see Nashville, etc., Turnpike Co. *v.* Harris, 8 Humphr. (Tenn.) 558.

6. *California.*— Hobbs *v.* Duff, 23 Cal. 596.

Kentucky.— Young *v.* Rodes, 5 T. B. Mon. 498, holding that where, pursuant to a contrivance to avoid a set-off, a note was given, not by the real debtor, but to him, and indorsed to a third person in trust for the creditor, equity will allow the debtor to set off demands against his creditor, the debtor and creditor being the real parties in interest.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965.

Mississippi.— Hall *v.* Waddill, 78 Miss. 16, 27 So. 936, 28 So. 831.

Missouri.— Barnes *v.* McMullins, 78 Mo. 260; Gemmell *v.* Hueben, 71 Mo. App. 291, holding that where as a defense in an action on a note for the purchase-price of goods sold, defendant alleged that the real party in interest was the payee, plaintiff being an assignee; that he had recovered judgment against the payee for breach of contract regarding the goods, and that the payee was insolvent, defendant was entitled to an equitable set-off.

Vermont.— Smith *v.* Wainwright, 24 Vt. 97; Blake *v.* Langdon, 19 Vt. 485, 47 Am. Dec. 701 (holding that a court of equity will, in a case of insolvency, regard as the real parties those ultimately to be affected by the decree, and allow a set-off of demands in reality mutual, although prosecuted in the name of other persons nominally interested); Downer *v.* Dana, 17 Vt. 518 (holding that a court of chancery will set off a separate debt against a joint one, when one of the parties to the joint debt is only a surety, the debts being thus mutual in fact, although not in form); Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678; Ferris *v.* Burton, 1 Vt. 439.

United States.— Central Appalachian Co. *v.* Buchanan, 90 Fed. 454, 33 C. C. A. 598.

England.— O'Connor *v.* Murphy, 1 H. Bl. 657.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 81.

After an interlocutory decree in equity charging executors rents and profits due plaintiff, it is too late on petition to decree a set-off of a debt alleged to be due from the real party in interest; it being alleged that plaintiff was a mere nominal party. Gordon *v.* Lewis, 10 Fed. Cas. No. 5,614, 2 Sumn. 628.

7. *Alabama.*— Renfroe *v.* Yarbrough, 144 Ala. 487, 39 So. 660; Ingraham *v.* Foster, 31 Ala. 123, holding that where an equitable demand accruing to one of several defendants from a fraud perpetrated on him by plaintiff in a former partnership between them is available as a set-off in favor of such defendant, when plaintiff files a bill for a settlement of a new partnership between them and others, and is shown to be insolvent.

Georgia.— Harwood *v.* Andrews, 71 Ga. 784, where, in an action by a widow, who had converted her husband's estate into money, defendant was held entitled to set up by way of an equitable set-off a claim held by him against the deceased husband; the widow being the sole heir and practically insolvent, and no other creditor of the deceased husband appearing in the record.

Maryland.—Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965.

Minnesota.— Gallagher *v.* Germania Brewing Co., 53 Minn. 214, 54 N. W. 115, holding, however, that the demands of stockholders individually cannot be interposed as equitable set-offs to a demand against the corporation, even though plaintiff is insolvent, as such a proceeding would entirely disregard the entire legal fiction of the entity of a corporation.

North Carolina.— March *v.* Thomas, 63 N. C. 87; Benzein *v.* Robinett, 17 N. C. 67.

South Carolina.— Falconer *v.* Powe, Bailey Eq. 156.

Texas.— Hamilton *v.* Van Hook, 26 Tex. 302; Hanchett *v.* Gray, 7 Tex. 549.

United States.— Scott *v.* Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. ed. 1059.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 81.

Where the estate of a cestui que trust was insolvent, the trustee's estate in an action for an accounting, in the absence of fraud, was entitled to set off in equity certain claims held by the trustee individually against the *cestui que trust.* Smith *v.* Perry, 197 Mo. 438, 95 S. W. 337.

Insolvency as a ground of equitable set-off generally see *supra*, I, F, 4, b.

8. Carter *v.* Compton, 79 Ind. 37; Brewer *v.* Noreross, 17 N. J. Eq. 219; Vulliamy *v.* Noble, 3 Meriv. 593, 17 Rev. Rep. 143, 36 Eng. Reprint 228.

9. See *infra*, VI, K, 7.

10. *Connecticut.*—Palmer *v.* Green, 6 Conn. 14.

wherever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off of joint and separate debts will be allowed,[11] and, upon proof of insolvency, a joint debt may be set off against a several debt,[12] and conversely.[13] But the insolvency must be clearly shown,[14] and the rule that equity will allow a joint claim to be set off against a separate claim is not absolute, but is allowed only for the purpose of securing equity, and will not be allowed when the allowance would work injustice,[15] and thus debts nominally due between the same

Georgia.— Ingram *v.* Jordan, 55 Ga. 356.

Illinois.— Phelps *v.* Reeder, 39 Ill. 172; Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437.

Indiana.— Elder *v.* Lasswell, 2 Blackf. 349.

Maryland.—Tyrrell *v.* Tyrrell, 54 Md. 167; Hall *v.* Creswell, 12 Gill & J. 36; Robertson *v.* Parks, 3 Md. Ch. 65, holding that in equity a joint claim against a party and a third person cannot be set off against a debt due to said party.

Michigan.— Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260.

Minnesota.— Birdsall *v.* Fischer, 17 Minn. 100.

New Hampshire.— Brown *v.* Warren, 43 N. H. 430.

New Jersey.— Brewer *v.* Norcross, 17 N. J. Eq. 219.

New York.— Spofford *v.* Rowan, 6 N. Y. St. 250 [*affirming* 3 N. Y. St. 272, and *affirmed* in 124 N. Y. 108, 26 N. E. 350]; Dale *v.* Cooke, 4 Johns. Ch. 11.

Ohio.— Cincinnati Second Nat. Bank *v.* Hemingray, 34 Ohio St. 381; Miller *v.* Florer, 19 Ohio St. 356; Cincinnati Second Nat. Bank *v.* Hemingray, 1 Cinc. Super. Ct. 435 [*affirmed* in 31 Ohio St. 168].

United States.— Jackson *v.* Robinson, 13 Fed. Cas. No. 7,144, 3 Mason 138.

England.— Bowyear *v.* Pawson, 6 Q. B. D. 540, 50 L. J. Q. B. 495, 29 Wkly. Rep. 364.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 90.

11. Carter *v.* Compton, 79 Ind. 37; Brewer *v.* Norcross, 17 N. J. Eq. 219; Halliburton *v.* Clapp, 1 N. Y. App. Div. 71, 36 N. Y. Suppl. 1041 [*affirmed* in 149 N. Y. 183, 43 N. E. 558]; Smith *v.* Myler, 22 Pa. St. 36, holding that set-off, beyond the letter of the statutes, is an equitable defense, and equity regards the substance of things rather than their forms; and although a note is owned jointly by two persons, and can be sued only in a joint action, yet one owner may, by consent of the other, set off his portion of the note in an action brought against him. See Morris *v.* Calumet, etc., Canal, etc., Co., 91 Ill. App. 437.

In an action for partition a judgment lien in favor of one coöwner on the interest of the other is properly offset against an equitable lien in favor of the judgment debtor on the interest of the judgment creditor in the joint estate. Oliver *v.* Lansing, 57 Nebr. 352, 77 N. W. 802.

12. *Illinois.*— Phelps *v.* Reeder, 39 Ill. 172, holding that upon proof of insolvency of one joint debtor a joint judgment against two persons can be set off against a debt due from a judgment creditor to the other judgment debtor individually.

Maryland.— Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965.

New Hampshire.— Hutchins *v.* Riddle, 12 N. H. 464, holding that where defendant pleaded by way of set-off a joint note payable to himself, signed by plaintiff and a third person, and it was disallowed because not signed by plaintiff alone, the court might, in its discretion, because of the insolvency of the makers of the note, stay the entry of judgment in the action against defendant to enable him to obtain a judgment on his note against the makers, for the purpose of making such judgment a set-off.

Ohio.— Baker *v.* Kinsey, 41 Ohio St. 403 (holding that a past-due joint note, the makers of which are insolvent, may be set off by the holder against his own note held by one of such makers); Cincinnati Second Nat. Bank *v.* Hemingray, 1 Cinc. Super. Ct. 435 [*affirmed* in 31 Ohio St. 168] (holding that where parties had treated a joint claim as the individual property of the party seeking to have a separate claim set off to the extent of the interest of the partner in the joint claim, and the separate party having become insolvent, there was a natural equity in such set-off; and it was therefore allowed).

Texas.— Hamilton *v.* Van Hook, 26 Tex. 302; Henderson *v.* Gilliam, 12 Tex. 71; Hanchett *v.* Gray, 7 Tex. 549.

United States.— *In re* Carrier, 39 Fed. 193, holding that where one of two joint debtors becomes bankrupt, the creditor may set off the debt against his separate indebtedness to the bankrupt.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 90.

13. Pond *v.* Smith, 4 Conn. 297 (holding that where A had a separate demand against B, who was insolvent, and B had a demand against A and C jointly, chancery might apply the former demand in satisfaction of the latter); Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260.

14. Howard *v.* Shores, 20 Cal. 277 (holding that where defendant, seeking to set off a debt due to him from plaintiff and his brother jointly against his own separate debt to plaintiff, alleged that plaintiff and his brother were largely indebted, and their property heavily encumbered by judgments, mortgages, and attachments, these facts were not sufficient to justify an allowance of the set-off on equitable grounds); Phelps *v.* Reeder, 39 Ill. 172.

15. Birdsall *v.* Fischer, 17 Minn. 100; Williams *v.* Pultze, 5 Ohio Dec. (Reprint) 503, 6 Am. L. Rec. 337; Stewart *v.* Coulter,

persons cannot be set off in equity, if, by assignment or otherwise, the real interest is different.[16]

7. Joint and Separate Claims and Liabilities — a. In General. As a broad general rule a joint debt cannot be set off against a separate debt,[17] nor counter-claimed,[18] nor can a separate debt be set off against a joint debt,[19] nor counter-

12 Serg. & R. (Pa.) 252, 14 Am. Dec. 680. See Ingram *v.* Jordan, 55 Ga. 356 (holding that when a note which is the property of two jointly is payable to one only, or to bearer, and is in suit in the name of the payee, neither a tort nor a contract by the other joint owner alone is a subject-matter of set-off to the action, without some special equitable circumstance; and the mere fact that plaintiff in the action is a citizen of another state is not such a circumstance); Newton *v.* Lee, 139 N. Y. 332, 34 N. E. 905.

16. Cotton *v.* Evans, 21 N. C. 284.

17. *Arizona.*— Ives *v.* Sanguinetti, (1906) 85 Pac. 480.

California.— Corwin *v.* Ward, 35 Cal. 195, 95 Am. Dec. 93.

Colorado.—Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235.

Connecticut.— Palmer *v.* Green, 6 Conn. 14.

Delaware.— Wingate *v.* Parsons, 4 Del. Ch. 117.

Illinois.— Walker *v.* Chovin, 16 Ill. 489; Ryan *v.* Barger, 16 Ill. 28; Hilliard *v.* Walker, 11 Ill. 644; Burgwin *v.* Babcock, 11 Ill. 28.

Indiana.— Blankenship *v.* Rogers, 10 Ind. 333.

Kentucky.— Bibb *v.* Saunders, 2 Bibb 86.

Maine.— Adams *v.* Ware, 33 Me. 228, holding that in a suit by an administrator defendant cannot set off a demand against the intestate and three other persons still living.

Maryland.—Tyrrell *v.* Tyrrell, 54 Md. 167; Wilson *v.* Keedy, 8 Gill 195; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Missouri.— Finney *v.* Turner, 10 Mo. 207; Miller *v.* Crigler, 83 Mo. App. 395.

New Hampshire.— Brown *v.* Warren, 43 N. H. 430.

New York.— Halliburton *v.* Clapp, 1 N. Y. App. Div. 71, 36 N. Y. Suppl. 1041 [*affirmed* in 149 N. Y. 183, 43 N. E. 558]; Coursen *v.* Hamlin, 2 Duer 513; Campbell *v.* Genet, 2 Hilt. 290; Schenck *v.* Wilson, 2 Hilt. 92.

Ohio.— Miller *v.* Florer, 19 Ohio St. 356.

South Carolina.— Kenedy *v.* Cunningham, Cheves 50.

Tennessee.— Turberville *v.* Broach, 5 Coldw. 270; Robertson *v.* Talbot, 2 Yerg. 258; Blanks *v.* Smith, Peck 186.

Texas.— Henderson *v.* Gilliam, 12 Tex. 71; Allbright *v.* Aldrich, 2 Tex. 166.

Virginia.— Porter *v.* Nekervis, 4 Rand. 359.

West Virginia.— Elliott *v.* Bell, 37 W. Va. 834, 17 S. E. 399.

United States.—Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

England.— Addis *v.* Knight, 2 Meriv. 117, 35 Eng. Reprint 885; *Ex p.* Twogood, 11 Ves. Jr. 517, 32 Eng. Reprint 1189.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 82.

A debt due by two joint debtors to two joint creditors cannot be set off as against a debt due by one of the joint creditors to one of the joint debtors. Langley *v.* Brent, 14 Fed. Cas. No. 8,066, 3 Cranch C. C. 365.

18. *Arizona.*— Ives *v.* Sanguinetti, (1906) 85 Pac. 480.

California.— Howard *v.* Shores, 20 Cal. 277; Duff *v.* Hobbs, 19 Cal. 646.

New York.— Matter of Miller, 23 Misc. 511, 52 N. Y. Suppl. 1023, disallowing in an action by a wife a joint demand against the husband and wife.

South Carolina.— Copeland *v.* Young, 21 S. C. 275.

United States.— Ecorse Transp. Co. *v.* Earhart, 96 Fed. 925, decided under a Minnesota statute.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 82 *et seq.*

19. *Colorado.*— Thatcher *v.* Rockwell, 4 Colo. 375 [*affirmed* in 105 U. S. 467, 26 L. ed. 949]; Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235.

Connecticut — Palmer *v.* Green, 6 Conn. 14.

Georgia.— Ingram *v.* Jordan, 55 Ga. 356 (holding that in an action by a father on a note jointly owned by him and his son, defendant cannot plead by way of set-off damages to his property caused by a contagious disease communicated by reason of the son's conduct, to his property from property belonging jointly to the father and son; it not appearing that the son was a partner with his father or his agent); Buckhannan *v.* Gamble, Ga. Dec. 156.

Illinois.— Heckenkemper *v.* Dingwehrs, 32 Ill. 538; Walker *v.* Chovin, 16 Ill. 489; Ryan *v.* Barger, 16 Ill. 28; Burgwin *v.* Babcock, 11 Ill. 28.

Indiana.— Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987 (holding that a note executed by one of two obligees in a replevin bond cannot be set off in an action on the replevin bond, although the other obligee had no interest in the property involved in the suit in which the bond was given); Jennings *v.* Shriver, 5 Blackf. 37.

Kentucky.— Bibb *v.* Saunders, 2 Bibb 86; Lebanon Steam Laundry *v.* Dyckman, 57 S. W. 227, 22 Ky. L. Rep. 348.

Louisiana.— Thomas *v.* Elkins, 4 Mart. 376; Smith *v.* Duncan, 1 Mart. 24.

Maryland.— Melvin *v.* Aldrige, 81 Md. 650, 32 Atl. 389 (holding that in an action for an accounting between owners of property and their agents for its sale, a personal indebtedness of one of the owners to one of the agents cannot be considered); Tyrrell *v.*

claimed,[20] nor pleaded in reconvention;[21] but where plaintiff sues several defendants for breach of a joint contract and some of them denying a joint liability aver a several liability as to themselves these may set up a counter-claim, and if their averment of several liability is sustained the counter-claim will be allowed;[22] and where defendant shows that one of several plaintiffs is the sole party in interest, he may avail himself of a set-off against that plaintiff, if he might have done so had the action been brought by such plaintiff alone.[23] A debt due by plaintiff to only part of joint defendants cannot be set off against the joint debt due to plaintiff,[24]

Tyrrell, 54 Md. 167; Wilson *v.* Keedy, 8 Gill 195; Milburn *v.* Guyther, 8 Gill 92, 50 Am. Dec. 681.

Massachusetts.— Brooks *v.* Stackpole, 168 Mass. 537, 47 N. E. 419.

Michigan.— Wolff *v.* Jasspon, 126 Mich. 11, 85 N. W. 260; Keystone Mfg. Co. *v.* Forsyth, 115 Mich. 51, 72 N. W. 1109, holding that a partial payment made by a purchaser of goods is not a set-off on suit brought on a joint note given for the balance within the meaning of 2 Howell Annot. St. § 6884, subd. 6, which provides that if there be several defendants the demand set off must be due to them jointly.

Mississippi.— Moody *v.* Willis, 41 Miss. 347; Bullard *v.* Dorsey, 7 Sm. & M. 9.

New Hampshire.— Brown *v.* Warren, 43 N. H. 430; Woods *v.* Carlisle, 6 N. H. 27.

New Jersey.— Williamson *v.* Fox, 30 N. J. Eq. 488.

New York.— Perry *v.* Chester, 12 Abb. Pr. N. S. 131 [*affirmed* in 36 N. Y. Super. Ct. 228]; Warner *v.* Barker, 3 Wend. 400.

South Carolina — Kenedy *v.* Cunningham, Cheves 50.

Tennessee.— Turbeville *v.* Broach, 5 Coldw. 270; Robertson *v.* Talbot, 2 Yerg. 258; Blanks *v.* Smith, Peck 186.

Texas.— Henderson *v.* Gilliam, 12 Tex. 71; Allbright *v.* Aldrich, 2 Tex. 166.

Virginia.— Christian *v.* Miller, 3 Leigh 78, 23 Am. Dec. 251; Porter *v.* Nikervis, 4 Rand. 359.

West Virginia.— Elliott *v.* Bell, 37 W. Va. 834, 17 S. W. 399; Choen *v.* Guthrie, 15 W. Va. 100.

United States.— Young *v.* Black, 11 U. S. 565, 3 L. ed. 440; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

England.— Jones *v.* Fleeming, 7 B. & C. 217, 6 L. J. K. B. O. S. 113, 14 E. C. L. 103; *Ex p.* Twogood, 11 Ves. Jr. 517, 32 Eng. Reprint 1189.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 82 *et seq.*

20. Hopkins *v.* Lane, 4 Thomps. & C. 311; National State Bank *v.* Boylan, 2 Abb. N. Cas. (N. Y.) 216.

21. Senter *v.* Whitaker, 66 Tex. 624, 2 S. W. 89.

22. Clegg *v.* Cramer, 32 Hun (N. Y.) 162, 66 How. Pr. 411 [*affirming* 60 How. Pr. 498].

23. Cowles *v.* Cowles, 9 How. Pr. (N. Y.) 361.

24. *Colorado.*— Thatcher *v.* Rockwell, 4 Colo. 375 [*affirmed* in 105 U. S. 467, 26 L. ed. 949].

Illinois.— Hinckley *v.* West, 9 Ill. 136; Bensley *v.* Brockway, 27 Ill. App. 410.

Indiana.— New Castle First Nat. Bank *v.* Morgen, 99 Ind. 160; Lynn *v.* Crim, 96 Ind. 89; Gregory *v.* Gregory, 89 Ind. 345; Menaugh *v.* Chandler, 89 Ind. 94; Harris *v.* Rivers, 53 Ind. 216; Gordon *v.* Swift, 46 Ind. 208 (holding that two of three defendants cannot plead a set-off); Dodge *v.* Dunham, 41 Ind. 186; Griffin *v.* Cox, 30 Ind. 242; Booe *v.* Watson, 13 Ind. 387.

Kentucky.— Stone *v.* McConnell, 1 Duv. 54, holding that in an action against several defendants upon a joint obligation, one of defendants could not set off a note of plaintiff held by one of his co-defendants.

Maine.—Banks *v.* Pike, 15 Me. 268.

Massachusetts.— Warren *v.* Wells, 1 Metc. 80; Fuller *v.* Wright, 18 Pick. 403; Walker *v.* Leighton, 11 Mass. 140.

Michigan.— Robbins *v.* Brooks, 42 Mich. 62, 3 N. W. 256; Van Middlesworth *v.* Van Middlesworth, 32 Mich. 183.

Minnesota.— Balch *v.* Wilson, 25 Minn. 299, 33 Am. Rep. 467 (holding that in an action by the receiver of a bank on a note due the bank from two jointly at the time of appointment, promissory notes made by the bank and others, not due at the time of the appointment and owned at that time by one of defendants only, and originating in a different transaction, cannot be set off against the claim of the receiver on the joint note); Cooper *v.* Brewster, 1 Minn. 94.

Mississippi.— Paine *v.* Lewis, 64 Miss. 96, 8 So. 207; Bullard *v.* Dorsey, 7 Sm. & M. 9.

New Hampshire.— Ross *v.* Knight, 4 N. H. 236.

New York.— Coffin *v.* McLean, 80 N. Y. 560; Peabody *v.* Beach, 6 Duer 53, 3 Abb. Pr. 353; Mott *v.* Burnett, 2 E. D. Smith 50; Rosenzweig *v.* McCaffrey, 27 Misc. 808, 57 N. Y. Suppl. 219 [*affirmed* in 28 Misc. 485, 59 N. Y. Suppl. 863]; Warner *v.* Barker, 3 Wend. 400; Murray *v.* Toland, 3 Johns. Ch. 569; Davis *v.* American L. Ins., etc., Co., 4 Edw. 308 [*affirmed* in 3 Ch. Sent. 99].

North Carolina.— Utley *v.* Foy, 70 N. C. 303; Walton *v.* McKesson, 64 N. C. 154; Jones *v.* Gilreath, 28 N. C. 338; State Bank *v.* Armstrong, 15 N. C. 519.

Ohio.— McGee *v.* Cleveland Organ Co., 4 Ohio Dec. (Reprint) 481, 2 Clev. L. Rep. 219.

Oklahoma.—Murphy *v.* Colton, 4 Okla. 181, 44 Pac. 208.

Vermont.— Johnson *v.* Kelley, 67 Vt. 386, 31 Atl. 849; Bragg *v.* Fletcher, 20 Vt. 351.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 85.

nor counter-claimed,[25] unless there is proof of insolvency to bring it within the equitable jurisdiction,[26] or unless there is an agreement that it shall operate as a set-off;[27] but if a claim offered as a set-off belonged to all the defendants jointly at the commencement of the suit, it is no objection that one of the defendants has derived his title by assignment from a co-defendant,[28] and where one of two joint debtors is deceased and the right of action is against the survivor, the debt may be set-off against the survivor in an action by him alone;[29] and it has been held that one joint debtor may avail himself of a counter-claim in favor of both defendants to defeat plaintiff's recovery on a joint liability, although he answers separately,[30] or is sued separately.[31] Under some statutes, however, it is held that one of several joint debtors is entitled to set off a debt due to him alone from the common creditor,[32] and in recoupment it has been held that a demand due one defendant may be recouped against a joint demand;[33] and in an action on a joint contract the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract.[34]

b. Illustrations. In accordance with the rules above stated[35] a separate demand against one of plaintiffs cannot be set off against a joint demand due

25. Roberts *v.* Donovan, 70 Cal. 108, 9 Pac. 180, 11 Pac. 599; Collier *v.* Ervin, 3 Mont. 142; Kemp *v.* McCormick, 1 Mont. 420; Davis *v.* Notware, 13 Nev. 421; Rosenzweig *v.* McCaffrey, 27 Misc. (N. Y.) 808, 57 N. Y. Suppl. 219 [*affirmed* in 28 Misc. 485, 59 N. Y. Suppl. 863]; Carey *v.* Baldwin, 61 N. Y. Suppl. 581 (holding that two of three defendants sued jointly cannot set up a counter-claim in favor of themselves).

In an action by an assignee of a contract against two defendants one cannot set up a counter-claim consisting of an individual claim by him against the assignor. McDonald *v.* Poole, 113 Cal. 437, 45 Pac. 702.

26. Phelps *v.* Reeder, 39 Ill. 172; Collier *v.* Ervin, 3 Mont. 142; Kemp *v.* McCormick, 1 Mont. 420. And see *supra*, VI, K, 6.

Discharge in bankruptcy of one of two joint judgment debtors changes the debt in equity into a several one against the other, so that an assignee may make it a set-off against a judgment held by the other against him. Cosgrove *v.* Cosby, 86 Ind. 511.

27. Heckenkemper *v.* Dingwehrs, 32 Ill. 538; Walker *v.* Chovin, 16 Ill. 489; Davis *v.* Notware, 13 Nev. 421; Henderson *v.* Gilliam, 12 Tex. 71.

28. Bell *v.* Davis, 8 Barb. (N. Y.) 210.

But if only one of several joint contractors assigns his interest and the other refuses to join with the assignee in enforcing his claim and is therefore made a party defendant the debtor's liability is not changed into a separate one against which a debt owing by one of the joint claimants may offset. Rosenzweig *v.* McCaffrey, 27 Misc. (N. Y.) 808, 57 N. Y. Suppl. 219 [*affirmed* in 28 Misc. 485, 59 N. Y. Suppl. 863].

29. Wells *v.* Teall, 5 Blackf. (Ind.) 306; McCarthy *v.* Sleight, 114 Mich. 182, 72 N. W. 165.

When one joint maker of a promissory note is the administrator of his co-maker, he may in a suit against him set off against the payee any debt which the payee owes to the deceased co-maker, the concurrence of the deceased co-maker being presumed. Mitchell *v.* Burt, 9 Ala. 226.

30. Tilden *v.* Washburn, 6 N. Y. Suppl. 556.

31. Yorke Mfg. Co. *v.* Rothwell, 119 Fed. 144, 56 C. C. A. 52, decided under an Ohio statute. But see Lamoille County Nat. Bank *v.* Hunt, 72 Vt. 357, 47 Atl. 1078, holding that in an action against one of two joint principals on a note defendant cannot avail himself by way of counter-claim of plaintiff's waste of collaterals given by the other principal, as plaintiff's liability for such waste would be to defendant jointly with his co-maker.

32. *Alabama.*— Mobile Bank *v.* Poelnitz, 61 Ala. 147; Riley *v.* Stallworth, 56 Ala. 481; Huddleston *v.* Askey, 56 Ala. 218; Jones *v.* Jones, 12 Ala. 244; Carson *v.* Barnes, 1 Ala. 93; Pitcher *v.* Patrick, Minor 321, 12 Am. Dec. 54.

Arkansas.— Leach *v.* Lambeth, 14 Ark. 668 [*overruling* Trammell *v.* Harrell, 4 Ark. 602]. But see Sillivant *v.* Reardon, 5 Ark. 140.

Kentucky.— Powell *v.* Hogue, 8 B. Mon. 443.

Missouri.— Kent *v.* Rogers, 24 Mo. 306; Austin *v.* Feland, 8 Mo. 309. But see Finney *v.* Turner, 10 Mo. 207.

Pennsylvania.— Miller *v.* Kreiter, 76 Pa. St. 78; Gable *v.* Perry, 13 Pa. St. 181; Archer *v.* Dunn, 2 Watts & S. 327; Steward *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Childerston *v.* Hammon, 9 Serg. & R. 68; Pasek *v.* Vockroth, 3 Pa. Dist. 150, 13 Pa. Co. Ct. 593. But see Henderson *v.* Lewis, 9 Serg. & R. 379, 11 Am. Dec. 733.

Vermont.— Ashley *v.* Willard, 2 Tyler 391.

England.— Manchester, etc., R. Co. *v.* Brooks, 2 Ex. D. 243, 46 L. J. Exch. 244, 36 L. T. Rep. N. S. 103, 25 Wkly. Rep. 413.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 85.

33. Waterman *v.* Clark, 76 Ill. 428.

34. Langfitt *v.* Clinton, etc., R. Co., 2 Rob. (La.) 217.

35. See *supra*, VI, K, 7, a.

all of plaintiffs,[36] nor can defendant set off a demand against less than all of several joint plaintiffs;[37] and a claim due from plaintiff and another person jointly is not a subject of set-off in an action by plaintiff alone,[38] nor can such claim be counter-claimed;[39] and where one of the coöbligees in a joint obligation assigns his rights therein to the other, who sues thereon, defendant cannot set off a claim against the assigning obligee and another jointly.[40] In a suit by several plaintiffs for a joint demand a debt due from one of the plaintiffs and another person, not a party to the suit, jointly, cannot be set off;[41] but such a claim may be set off by agreement between the parties.[42] A defendant in a suit against him for a debt cannot set off a debt due to him and another, the demands not being mutual,[43] nor

36. *Arkansas.*— Trammell *v.* Harrell, 4 Ark. 602.

Indiana.— Mitchell *v.* Friedley, 126 Ind. 545, 26 N. E. 391; Johnson *v.* Kent, 9 Ind. 252. See Shotts *v.* Boyd, 77 Ind. 223, holding that where, in an action by two plaintiffs on a note and to foreclose a mortgage, defendant pleaded in set-off a note signed by one of plaintiffs, alleging that it was for a debt due by both, but that the other had not signed his name, because he could not write, and was incompetent to transact business, although he afterward acknowledged the note and promised to pay it, if incompetent to execute the note he was incompetent to ratify it, and that there was no proof of the mutuality necessary for set-off.

Michigan.— Fifield *v.* Edwards, 39 Mich. 264.

Pennsylvania.— Archer *v.* Dunn, 2 Watts & S. 327, holding that in a joint action by two commercial houses to recover money had and received by defendant to their use, defendant cannot set off a debt due to him from one of the houses.

Vermont.— Clough *v.* Clough, 55 Vt. 360.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 83.

A judgment against one of two joint judgment plaintiffs cannot be set off against the joint judgment. Hopkins *v.* Drowne, 21 R. I. 80, 41 Atl. 1010.

37. Williams *v.* Ocean Ins. Co., 2 Metc. (Mass.) 303; Watson *v.* Hensel, 7 Watts (Pa.) 344, holding that in an action for the use of three defendant cannot set off separate claims against each plaintiff.

38. *California.*—Duff *v.* Hobbs, 19 Cal. 646.

Connecticut.— Snyder *v.* Spurr, 33 Conn. 407; Atkins *v.* Churchill, 19 Conn. 394, holding that, in an action of book debt against two defendants, defendants cannot plead by way of set-off a judgment recovered by one of them and his wife against plaintiff and a third person, the demands not being mutual.

Illinois.— Phelps *v.* Reeder, 39 Ill. 172.

Indiana.— Blankenship *v.* Rogers, 10 Ind. 333; Reed *v.* Coale, 4 Ind. 283; McKinney *v.* Bellows, 3 Blackf. 31, holding that defendant cannot set off against plaintiff's claim a credit owing him by plaintiff and two others.

Louisiana.— Smith *v.* Duncan, 1 Mart. 24, holding that in an action against a partnership plaintiff cannot set off a debt due to the firm from plaintiff and a third person as partners.

Maryland.— Robertson *v.* Parks, 3 Md. Ch. 66.

Massachusetts.— Bridgham *v.* Tileston, 5 Allen 371.

New York.— Walsh *v.* Ostrander, 22 Wend. 178.

Ohio.— Dougherty *v.* Cummings, 7 Ohio Dec. (Reprint) 184, 1 Cinc. L. Bul. 283.

England.—Vulliamy *v.* Noble, 3 Meriv. 593, 17 Rev. Rep. 143, 36 Eng. Reprint 228.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 84.

39. Finkelmeier *v.* Bates, 48 N. Y. Super. Ct. 433 [*affirmed* in 92 N. Y. 172]; *In re* Miller, 23 Misc. 319, 52 N. Y. Suppl. 245; Richards *v.* Reed, 6 Misc. (N. Y.) 217, 26 N. Y. Suppl. 540.

40. Carpenter *v.* Fulmer, 118 Wis. 454, 95 N. W. 403.

41. Bunting *v.* Ricks, 22 N. C. 130, 32 Am. Dec. 699.

42. Perkins *v.* Hawkins, 9 Gratt. (Va.) 649, holding that in an action on a bond, defendant may set off a bond signed by plaintiff and another, upon evidence of an understanding between the parties that it was to be so applied, and the bond, coupled with such testimony, is admissible in evidence under a plea of set-off.

43. *Indiana.*— Proctor *v.* Cole, 120 Ind. 102, 22 N. E. 101; Parks *v.* Zeek, 53 Ind. 221; Richardson *v.* St. Joseph Iron Co., 5 Blackf. 146, 33 Am. Dec. 460.

Kentucky.— Bibb *v.* Saunders, 2 Bibb 86; Bailey *v.* Penick, 10 Ky. L. Rep. 239.

Massachusetts.— Dehon *v.* Stetson, 9 Metc. 341.

Pennsylvania.— Gerber *v.* Meredith, 160 Pa. St. 102, 28 Atl. 638, holding that defendant in assumpsit cannot set off a claim due from plaintiff to an unsettled estate in which defendant has an interest as one of several legatees.

United States.— Central Ohio R. Co. *v.* Thompson, 5 Fed. Cas. No. 2,550, 2 Bond 296, holding that a plea setting up a claim for damages against plaintiff which shows that the alleged damage was for wrongs to property in which defendant was interested with others is no response to a declaration setting out a breach of defendant's individual promise.

England.— Middleton *v.* Pollock, L. R. 20 Eq. 515, 44 L. J. Ch. 618.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 86.

can defendant avail himself of such debt as a counter-claim,[44] or cross complaint;[45] and in an action on a joint obligation one of the defendants cannot set off a claim due him jointly with persons other than the parties to the joint obligation sued on,[46] and where plaintiff sues on a demand originally owed jointly by defendant and another, but which has become separate by defendant making himself individually liable, defendant cannot set off a claim due from plaintiff to defendant and the other jointly.[47]

c. Joint and Several Debts and Demands. It is held under a majority of the statutes that a defendant, jointly and severally liable to satisfy plaintiff's demand, may set off a demand due by plaintiff to defendant separately,[48] and, conversely, a demand that is joint and several may be set off against a separate demand;[49] and under a statute providing that contracts which by the common law are joint shall be joint and several, and providing that judgments may be given for or against one of the parties, plaintiffs or defendants, one of such defendants may set off a claim held by him individually against plaintiff,[50] and the same rule obtains under the codes and statutes relating to counter-claim, which generally admit of a counter-claim on behalf of one or more several defendants, where a

44. Hook *v.* White, 36 Cal. 299; Hopkins *v.* Lane, 87 N. Y. 501 (holding that where three jointly bought a lot of goods, each giving his own note with an indorser for his share of the purchase-money, in an action on the note of one a counter-claim for breach of warranty and fraud in the sale could not be sustained, since it could not be availed of by a joint buyer alone); Baldwin *v.* Briggs, 53 How. Pr. (N. Y.) 80, 51 How. Pr. 477; Pender *v.* Taddei, [1898] 1 Q. B. 798, 67 L. J. Q. B. 703, 78 L. T. Rep. N. S. 581, 46 Wkly. Rep. 452 (holding also that this cannot be done by making the other person a defendant to the counter-claim). But see Garvey *v.* Crouch, 35 S. W. 273, 18 Ky. L. Rep. 84, holding that, while it is a general rule that a demand existing in favor of persons jointly cannot be pleaded as a counter-claim by one in a suit against him alone, yet, in a case where such demand grew out of a transaction between plaintiff and defendant and others jointly, and plaintiffs in such transaction refused to recognize those associated with defendant, but kept the account with him alone and held him responsible individually therefor, he may plead such demand alone as a counter-claim.

45. Harrison *v.* McCormick, 69 Cal. 616, 11 Pac. 456.

46. Wells *v.* Mace, 17 Vt. 503.

47. *Ex p.* Ross, Buck 125.

48. *Alabama.*— Sledge *v.* Swift, 53 Ala. 110.

Colorado.—Canfield *v.* Arnett, 17 Colo. App. 426, 68 Pac. 784.

Georgia.— Harrison *v.* Henderson, 4 Ga. 198.

Kentucky.— Dunn *v.* West, 5 B. Mon. 376.

New York.— Briggs *v.* Briggs, 20 Barb. 477; Perry *v.* Chester, 12 Abb. Pr. N. S. 131.

Pennsylvania.— Purviance *v.* Sutherland, Add. 291.

South Carolina.— Mitchell *v.* Gibbes, 2 Bay 475, holding that in an action against one obligor on a joint and several bond, a payment made by the coöbligor on account of the bond may be pleaded as a set off.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 80.

Set-off of demands and liabilities of principal and sureties see PRINCIPAL AND SURETY, 32 Cyc. 230.

49. *Kentucky.*— Otwell *v.* Cook, 9 B. Mon. 357, holding that the maker of a note may set off the joint and several note of the payee and a third person acquired while the payee was owner of the note.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811.

Massachusetts.— Donelson *v.* Colerain, 4 Metc. 430, holding that where the official bond given to a town by a collector of taxes and his sureties is several as well as joint, and the collector brings an action against the town on a demand which is itself the subject of set-off, defendants may set off their claim on such bond for money which plaintiff has received on tax bills committed to him for collection, and which he has not accounted for or paid over.

Michigan.— See Rumney *v.* Detroit, etc., Cattle Co., 129 Mich. 644, 89 N. W. 573.

West Virginia.— Elliott *v.* Bell, 37 W. Va. 834, 17 S. E. 399.

England.— Owen *v.* Wilkinson, 5 C. B. N. S. 526, 5 Jur. N. S. 102, 28 L. J. C. P. 3, 94 E. C. L. 526; Fletcher *v.* Dyche, 2 T. R. 32, 1 Rev. Rep. 414.

A judgment against plaintiff and another can be pleaded as a set-off in an action by plaintiff alone, the liability being several as well as joint. Moody *v.* Willis, 41 Miss. 347.

A joint and several note may be set off against the separate claim of either of the makers. White *v.* Rogers, 6 Blackf. (Ind.) 436; Dunwidie *v.* Kerley, 6 J. J. Marsh. (Ky.) 501; Ferguson *v.* Milliken, 42 Mich. 441, 4 N. W. 185; Pate *v.* Gray, 18 Fed. Cas. No. 10,794, Hempst. 155.

50. Scantlin *v.* Allison, 12 Kan. 85; Mortland *v.* Holton, 44 Mo. 58. But see Trammell *v.* Harrell, 4 Ark. 602.

several judgments may be had in the action between plaintiff and any one or more of the defendants;[51] but even under statutes allowing a counter-claim in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, a separate debt cannot be set up against a joint claim.[52] Under some statutes it has been held that a separate debt cannot be set off against a joint and several liability.[53]

d. Discontinuance or Want of Service as to Part of Defendants. If a discontinuance be entered as to one or more of several defendants, the others may plead in set-off a debt due from plaintiff to all the original defendants,[54] and where, in an action against several defendants, plaintiff discontinues as to some of them, the remainder may set off a claim existing in their favor against plaintiff, although they could not have done so while the action stood against all the defendants.[55] Where process is against two on a joint liability, but only one is served, it has been held that he is entitled to any set-off that would be available for the two,[56]

51. See the codes and statutes of the several states. And see McDougald *v.* Hulet, 132 Cal. 154, 64 Pac. 278; Branch State Bank *v.* Morris, 13 Iowa 136 (holding that where an attachment bond is joint and several both as to the obligors and obligees, one of the several obligees may set up damages sustained by reason of the wrongful suing out of the writ of attachment, as a counter-claim against one of the several obligors in the principal action); Coffin *v.* McLean, 80 N. Y. 560; Bathgate *v.* Haskin, 59 N. Y. 533 (holding that in a suit to foreclose a mortgage given as security for a joint bond executed by the mortgagor and another as his surety against both obligors, and for judgment against them for any deficiency, a debt arising from a contract due the mortgagor from plaintiff may be set up by way of a counter-claim, since the action is one in which a several judgment may be rendered); Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325; Cornell *v.* Donovan, 13 N. Y. St. 741; Plyer *v.* Parker, 10 S. C. 464; Boyd *v.* Beaudin, 54 Wis. 193, 11 N. W. 521 (holding that as in a suit on a promissory note against both maker and indorser, a separate judgment may be rendered between plaintiff and each of such defendants, either of defendants may plead a counter-claim solely in his favor).

In an action by several plaintiffs on a contract which itself divides the fund claimed and makes a specific share due to each, a cause of action existing in favor of defendants against one of plaintiffs, although it could not be set up to bar the right to an accounting, is a proper counter-claim against the share of the plaintiff whom it affects. Taylor *v.* Root, 4 Abb. Dec. (N. Y.) 382, 4 Keyes 335.

In an action on a joint and several note against several defendants, one of them may counter-claim a separate debt in his favor against plaintiff. Newell *v.* Salmons, 22 Barb. (N. Y.) 647; Parsons *v.* Nash, 8 How. Pr. (N. Y.) 454.

Where the subject of a counter-claim is a tort, it cannot be objected that the tort was committed by a firm composed of plaintiff and others, not parties to the suit, as the persons committing the tort are severally as well as jointly liable therefor. Walker *v.* Johnson, 28 Minn. 147, 9 N. W. 632.

Joint demands in favor of two out of a number of defendants against plaintiff cannot be set up by way of counter-claim, unless the action is such that a joint judgment can be rendered against such two defendants separately from the others. Bockover *v.* Harris, 43 N. Y. Super. Ct. 548.

52. Birdsall *v.* Fischer, 17 Minn. 100; Mortimer *v.* Chambers, 63 Hun (N. Y.) 335, 17 N. Y. Suppl. 874, holding that in an action against several devisees to charge a decedent's real estate with debts, one of such devisees cannot set up a counter-claim on an implied contract. And see *supra*, VI, K, 7, a.

53. Sillivant *v.* Reardon, 5 Ark. 140.

A debt due to one of the makers of a joint and several promissory note cannot be set off against the note, there being no mutuality as to the parties. Lemon *v.* Stevenson, 36 Ill. 49; Jennings *v.* Shriver, 5 Blackf. (Ind.) 37; Barnstable Sav. Bank *v.* Snow, 128 Mass. 512, holding that in an action by a savings bank against two persons on a joint and several note, defendants cannot set off the amounts severally due them from the bank, the prevailing statute expressly providing that, if there are several defendants, the demand set off shall be due to all of them jointly.

54. Sillivant *v.* Reardon, 5 Ark. 140; Sellers *v.* Streator, 50 N. C. 261, holding that where one partner executed a bond in the name of the firm, under seal, for a debt due by the firm, in an action by the obligee on such bond, a debt due by the obligee to the firm is a good set-off, notwithstanding plaintiff is allowed to enter a *nolle prosequi* as to one of the firm, and proves that only the partner retained as defendant signed the instrument.

55. Bensley *v.* Brockway, 27 Ill. App. 410.

56. Mott *v.* Mott, 5 Vt. 111. *Contra*, Carter *v.* Berkshire, 8 Blackf. (Ind.) 193 (holding that in an action of debt against two jointly liable, in which only one defendant was served with process, such defendant cannot plead by way of set-off a debt due to him from plaintiff alone; the demands not being mutual); Williams *v.* Pultze, 5 Ohio

and in an action against two, with *non est inventus* as to one and entered only against the other, he may set off his separate demands.[57]

8. Partnership and Individual Demands — a. Partnership Debt in Action by Individual Partner. In a suit by a partner, a firm debt due defendant cannot be pleaded as a set-off,[58] recoupment,[59] counter-claim,[60] or in compensation;[61] and the fact that defendant thought the firm contained but one person does not give him the right to set off a partnership debt;[62] but such a set-off is allowed by agreement of the parties,[63] or when plaintiff has assumed the debts of the firm,[64] in which case the demand against the firm may also be counter-

Dec. (Reprint) 503, 6 Am. L. Rec. 337 (disapproving the Vermont doctrine and holding that in an action against a partnership, where only one of the firm is served, he cannot set off a claim by him individually against plaintiff; the demands not being mutual).

57. Snow *v.* Conant, 8 Vt. 301. *Contra,* Carter *v.* Berkshire, 8 Blackf. (Ind.) 193 (holding that in an action of debt against two persons jointly, in which only one defendant was served with process, defendant so served cannot plead by way of set-off a debt due from plaintiff to the defendant not served with process; the demands not being mutual); Jennings *v.* Shriver, 5 Blackf. (Ind.) 37 (holding that in a suit on a joint and several note against one of the makers defendant cannot set off a debt due from plaintiff to the other co-maker).

58. *Alabama.*— Bradley Fertilizer Co. *v.* Pollock, 104 Ala. 402, 16 So. 138, holding also that one garnisheed by a judgment creditor of a member of a firm cannot set off an indebtedness of the firm to the garnishee against a debt due by the garnishee to such member, in the absence of a previous agreement to that effect between the firm member and the garnishee.

Arkansas.— Houston *v.* Brown, 23 Ark. 333.

Connecticut.— Francis *v.* Rand, 7 Conn. 221.

Delaware.— Greer *v.* Arlington Mills Mfg. Co., 1 Pennew. 581, 43 Atl. 609.

Georgia.— West *v.* Kendrick, 46 Ga. 526.

Illinois.— Coates *v.* Preston, 105 Ill. 470; Dameier *v.* Bayor, 68 Ill. App. 477 [*affirmed* in 167 Ill. 547, 47 N. E. 770].

Maine.— Jones *v.* Vinal Haven Steamboat Co., 90 Me. 120, 37 Atl. 879.

Maryland.— Mitchell *v.* Sellman, 5 Md. 376.

New York.— Sewall *v.* Rodewald, 1 Hall 388; Compton *v.* Green, 9 How. Pr. 228.

Pennsylvania.— Jackson *v.* Clymer, 43 Pa. St. 79; Milliken *v.* Gardner, 37 Pa. St. 456 (holding that an unsettled claim against a firm could not be set off in an action by one of the partners for his individual debt, even though they arose out of the same transaction); McDowell *v.* Tyson, 14 Serg. & R. 300.

Tennessee.— Flint *v.* Tillman, 2 Heisk. 202; Meek *v.* McCormick, (Ch. App. 1897) 42 S. W. 458.

Texas.— Haley *v.* Cusenbary, (Civ. App. 1895) 30 S. W. 587; Hilliard *v.* Johnson, (Civ. App. 1894) 28 S. W. 100.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 95.

But see Puller *v.* Roe, 1 Peake N. P. 197, holding that where one was a partner in a firm and also carried on a separate trade himself, and the firm being indebted to him remitted to him a note given to them by a third person, in an action on the note by him, as indorsee, against the maker the latter might set off a demand which he had against the firm.

In Alabama in an action by a partner defendant cannot set off a claim against the partnership, unless the claim is due by judgment, bond, covenant, or promise in writing, so as to render the same a several debt, under Code §§ 2142, 2143. Ingersoll *v.* Robinson, 35 Ala. 292; Duramus *v.* Harrison, 26 Ala. 326; Hoyt *v.* Murphy, 18 Ala. 316.

A claim against an old firm cannot be set off against an individual claim of a member of a new conditional firm, although such latter claim has been credited as a firm one, but without the consent of the debtor. Trunick *v.* Gilchrist, 31 Leg. Int. (Pa.) 404.

59. Fessenden *v.* Forest Paper Co., 63 Me. 175.

60. Wood *v.* Brush, 72 Cal. 224, 13 Pac. 627; Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155; Spofford *v.* Rowan, 124 N. Y. 108, 26 N. E. 350 [*affirming* 6 N. Y. St. 250 (*affirming* 3 N. Y. St. 272)]; Freeman *v.* Lorillard, 61 N. Y. 612; Mynderse *v.* Snook, 1 Lans. 488; Parker *v.* Turner, 8 N. Y. St. 500; Byrd *v.* Charles, 3 S. C. 352. But see Brown *v.* Fresno Raisin Co., 101 Cal. 222, 35 Pac. 639, holding that defendant may counter-claim, for goods sold and delivered to a partnership on the individual credit of plaintiff, one of the partners.

61. Ashley *v.* Sholars, 22 La. Ann. 442 [*overruling* in effect, although not expressly, Bliss *v.* Patrick, 6 La. Ann. 546].

62. Dameier *v.* Bayor, 68 Ill. App. 477 [*affirmed* in 167 Ill. 547, 47 N. E. 770].

63. Ingols *v.* Plimpton, 10 Colo. 535, 16 Pac. 155; Mitchell *v.* Sellman, 5 Md. 376; Sewall *v.* Rodewald, 1 Hall (N. Y.) 388; McDonald *v.* Mackenzie, 24 Oreg. 573, 14 Pac. 866.

Remedies as affected by agreement or estoppel generally see *supra,* IV.

64. Hoyt *v.* Murphy, 18 Ala. 316 (holding that where, upon the dissolution of a partnership, one of the partners upon valuable consideration agrees with the other to pay all liabilities of the firm, such agreement will authorize a joint creditor, although no a party to the agreement, to treat his demand as the several debt of the partner who has thus assumed its payment, and to set it off in

claimed,[65] and in those jurisdictions in which partnership liabilities are joint and several,[66] in a suit by a partner a firm debt may be set off.[67] In a suit by one of two partners, in whose name the particular business respecting which the suit is brought is uniformly done, a demand against the partnership may be allowed as a set-off.[68]

b. Debt of Individual Partner in Action by Partnership. The general rule is that a debt due from an individual partner,[69] or from less than all of the

a suit brought by such partner to recover a debt due to him individually); Lehow *v.* Simonton, 3 Colo. 346 (holding that a defendant in assumpsit may plead as a set-off a debt due to defendant from a firm of which plaintiff had become a member and agreed to assume the firm debts after the debt due to defendant was contracted); Hilliard *v.* Johnson, (Tex. Civ. App. 1894) 28 S. W. 100.

65. Griffin *v.* Hungerford, 19 Misc. (N. Y.) 683, 44 N. Y. Suppl. 1054.

66. **Nature and extent of partnership liabilities** see PARTNERSHIP, 30 Cyc. 533.

67. Allen *v.* Maddox, 40 Iowa 124; Ruddle *v.* Horine, 34 Mo. App. 616. See Sample *v.* Griffith, 5 Iowa 376.

Recoupment, set-off, and counter-claim of joint and several debts and demands generally see *supra*, VI, K, 7, c.

68. Platt *v.* Halen, 23 Wend. (N. Y.) 456.

69. *Alabama.*— Edwards *v.* Parker, 88 Ala. 356, 6 So. 684 (holding that where money is deposited, not with a firm, but with one of the partners individually, and as a special bailee, and is not mixed up with the partnership funds, but kept separate in his possession, it constitutes only a personal liability, and cannot be set off, in an action by the surviving partner, on a demand due the partnership); Cannon *v.* Lindsey, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38; Clark *v.* Taylor, 68 Ala. 453; Evans *v.* Sims, 37 Ala. 710; Ross *v.* Pearson, 21 Ala. 473; Taylor *v.* Bass, 5 Ala. 110; Von Pheel *v.* Connally, 9 Port. 452; Pierce *v.* Hickenburg, 2 Port. 196; Pierce *v.* Pass, 1 Port. 232. See Tillis *v.* McKinna, 114 Ala. 311, 21 So. 465, holding that where a mercantile creditor entered into partnership with one who became a partner in the debt, and the debtor thereafter purchased of the partnership on credit, in an action by the firm on the entire account the debtor could not set off a sum due from the original creditor at the time the partnership was formed, except as against the debt as it stood at that time.

Arkansas.— Collier *v.* Dyer, 27 Ark. 478.

Colorado.— Morganthau *v.* King, 15 Colo. 413, 24 Pac. 1048; Woolman *v.* Capital Nat. Bank, 2 Colo. App. 454, 31 Pac. 235.

Connecticut.— Meeker *v.* Thompson, 43 Conn. 77; Francis *v.* Rand, 7 Conn. 221.

Georgia.— Wise *v.* Copley, 36 Ga. 508 (holding that the holder of a claim against an individual member of a firm, who purchases from such member what he knows to be partnership goods, cannot, in an action by the partners or their assignee for the amount of such goods, plead such claim either in payment or set-off against the partners, unless by their assent the copartnership property was delivered in payment of the individual partner's debt); Harlow *v.* Rosser, 28 Ga. 219.

Illinois.— Gregg *v.* James, 1 Ill. 143, 12 Am. Dec. 151. But see Dishon *v.* Schorr, 19 Ill. 59, holding that an article sold to one of two partners, but credited to the vendor on the partnership books, will be allowed to the vendor by way of a set off against the copartnership account.

Indiana.— Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665.

Kansas.— Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279.

Kentucky.— Warder *v.* Newdigate, 11 B. Mon. 174, 52 Am. Dec. 567. But see Beadles *v.* Carman, 5 Ky. L. Rep. 936.

Louisiana.— Ward *v.* Brandt, 11 Mart. 331, 13 Am. Dec. 352; Thomas *v.* Elkins, 4 Mart. 376.

Maine.— Jones *v.* Vinal Haven Steamboat Co., 90 Me. 120, 37 Atl. 879.

Maryland.— Howard *v.* Warfield, 4 Harr. & M. 21.

Minnesota.— Peck *v.* Snow, 47 Minn. 398, 50 N. W. 470, holding that in an action by partners against a collection agency for money alleged to have been collected for plaintiffs, defendant cannot set off against the demand the amount due on a subscription by one of plaintiffs individually to the agency.

Mississippi.— Denney *v.* Wheelwright, 60 Miss. 733.

Missouri.— Payne *v.* O'Shea, 84 Mo. 129; Nipper *v.* Jones, 27 Mo. App. 538.

Nebraska.— Folsom *v.* Pailing, 58 Nebr. 478, 78 N. W. 926.

New York.— Harrison *v.* Vanderbilt, 9 N. Y. St. 810; Ladue *v.* Hart, 4 Wend. 583; Dob *v.* Halsey, 16 Johns. 34, 8 Am. Dec. 293, holding that where one partner delivers partnership property to a third person, who receives it, knowing it to be such, in payment of such partner's individual debt, he becomes a debtor of the partnership, and, in an action by the partnership for the price of such goods, the debt of the one partner is not a good defense or set-off.

Oklahoma.— Gotthauer *v.* Cunningham, 4 Okla. 551, 47 Pac. 479.

Pennsylvania.— Lee *v.* Perry, 6 Kulp 339; Fargo *v.* Brown, 4 Leg. Gaz. 197; Prescott *v.* Buckwalter, 1 Wkly. Notes Cas. 58.

Rhode Island.— Colwell *v.* Weybosset Nat. Bank, 16 R. I. 288, 15 Atl. 80, 17 Atl. 913.

South Carolina.— Powrie *v.* Fletcher, 2 Bay 146; Kenedy *v.* Cunningham, Cheves 50; Lovel *v.* Whitridge, 1 McCord 7.

Tennessee.— Robertson *v.* Talbot, 2 Yerg. 258.

partners,[70] cannot be set off in an action by the firm; nor can such a debt be made subject of a counter-claim,[71] even though the partner against whom the set-off is claimed is the real owner of the business, and the other only a nominal partner.[72] But where all the partners consent that a debt owing by one of them shall be set off against the debt owing to all of them, such debt may be set off,[73] or counter-

Texas.— Ward *v.* Newell, 37 Tex. 261.

Virginia.— Ritchie *v.* Moore, 5 Munf. 388, 7 Am. Dec. 688; Scott *v.* Trent, 1 Wash. 77.

United States.— Lynn *v.* Hall, 15 Fed. Cas. No. 8,641, 2 Cranch. C. C. 52.

England.— Piercy *v.* Fynney, L. R. 12 Eq. 69, 40 L. J. Ch. 404, 19 Wkly. Rep. 710.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 93.

In North Carolina, under the provisions of Code, § 248, allowing the courts to grant a defendant any affirmative relief to which he may be entitled, a defendant, sued by partners upon a demand of the firm, may set up and obtain judgment upon a demand held by him against one of the firm only. Sloan *v.* McDowell, 71 N. C. 356.

Incoming partner.— Where a firm composed of two lawyers sued defendant for work and labor, defendant could not set off against one of the partners a claim for money received by him before the partnership was formed, although at the commencement of the partnership the incoming partner acknowledged receipt of the money. France *v.* White, 8 Dowl. P. C. 53, Bing. N. C. 33, 9 L. J. C. P. 27, 8 Scott 257, 37 E. C. L. 494.

In an action by a firm on a note payable to one of the partners on the sale of firm property sold to the maker, who had knowledge that it was firm property and who in fraud connived with the partner to have the note so made, the maker cannot plead by way of a set-off a claim against the payee. Bourne *v.* Wooldridge, 10 B. Mon. (Ky.) 492.

In an action by the assignee of a partnership on a debt due to the partnership, a claim due from one partner cannot be set off. Williams *v.* Brimhall, 13 Gray (Mass.) 462.

The rule applies to executed as well as to executory contracts. Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567.

70. Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665; Dawson *v.* Wilson, 55 Ind. 216, holding that where, before the maturity of a note executed by defendant to a copartnership, one of the partners withdrew from the partnership, which was continued by the remaining partners in the name of the old firm, money deposited with the new firm is not available as a set-off against such note, since the deposits belonged to the new firm.

The United States cannot set off or counter-claim in the court of claims against a firm consisting of three partners a judgment against two of them. Boehm *v.* U. S., 20 Ct. Cl. 142.

If defendant's indebtedness is not to the partnership which appears as plaintiff in the action, but to another firm composed of certain individuals composing such partnership, he may set off a claim existing in his favor against these members of the partnership. Rush *v.* Thompson, 112 Ind. 158, 13 N. E. 665.

71. Hoaglin *v.* Henderson, 119 Iowa 720, 94 N. W. 247, 97 Am. St. Rep. 335, 61 L. R. A. 756; Rosenzweig *v.* McCaffrey, 27 Misc. (N. Y.) 808, 57 N. Y. Suppl. 219 [*affirmed* in 28 Misc. 485, 59 N. Y. Suppl. 863]; Roldan *v.* Power, 14 Misc. (N. Y.) 480, 35 N. Y. Suppl. 697; Singer Mfg. Co. *v.* Wood, 1 Tex. App. Civ. Cas. § 1177.

In an action by some of the partners and the assignee in bankruptcy of the others, a demand in favor of defendants against all the members of the firm is not a proper counter-claim, as all the persons thereon are not parties, and the joinder of the assignee of the bankrupt partners is not sufficient. McCulloch *v.* Vibbard, 51 Hun (N. Y.) 227, 4 N. Y. Suppl. 202.

72. Jones *v.* Howard, 53 Miss. 707.

But where a pretended partnership was fraudulent defendant might counter-claim a debt against the party who was the real owner of the business. Rosenberg *v.* Block, 102 N. Y. 255, 6 N. E. 580.

73. *Alabama.*— Clark *v.* Taylor, 68 Ala. 453.

Colorado.— Morganthau *v.* King, 15 Colo. 413, 24 Pac. 1048.

Georgia.— See Harlow *v.* Rosser, 28 Ga. 219.

Kansas.— Werner *v.* Hatton, 54 Kan. 250, 38 Pac. 279.

Kentucky.— See Warder *v.* Newdigate, 11 B. Mon. 174, 52 Am. Dec. 567.

New Jersey.— Hood *v.* Riley, 15 N. J. L. 127.

New York.— Harrison *v.* Vanderbilt, 9 N. Y. St. 810.

Pennsylvania.— Stewart *v.* Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680. But see Clark *v.* Sparhawk, 5 Fed. Cas. No. 2,836, 2 Wkly. Notes Cas. (Pa.) 115, holding that an agreement between a member of a firm and his individual creditor that the claim should be set off against such creditor's liability to the firm is not available to the firm, where it was not assented to by the other partners until after such creditor had made an assignment for the benefit of creditors, although before bankruptcy.

South Carolina.— Lovel *v.* Whitridge, 1 McCord 7.

United States.— Boehm *v.* U. S., 20 Ct. Cl. 142.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 93.

That there was an agreement with one partner that the set-off should be allowed does not change the rule, unless the others consented. Warder *v.* Newdigate, 11 B. Mon. (Ky.) 174, 52 Am. Dec. 567; Armistead *v.* Butler, 1 Hen. & M. (Va.) 176, holding that the delivery of goods to an individual part-

claimed;[74] and where copartners severally agreed with a firm debtor that his separate accounts against the copartners individually should be set off against the firm demand, the firm debtor will be entitled to such set-off not only against the copartners,[75] but also against their assignee;[76] and the set-off is also allowed where at the time of creating the individual debt it was agreed that it should be available as a set-off;[77] where it was the uniform practice of the firm to permit it;[78] or where it can be shown that the other members of the firm have by their conduct induced defendant to believe that such partner is the only person with whom he has to do;[79] but although plaintiff believed that the partner he dealt with was the sole owner of the business, and had no notice of the interest of the other partners, the individual debt cannot be set off unless the other partners consented to their copartner appearing as the sole owner.[80] In an action by a firm defendant can set off a debt contracted with the members thereof when doing business together as another partnership,[81] but where a partnership has been reorganized so as to contain different members, in an action on a demand due the new partnership defendant cannot set off a claim against the old partnership.[82] Where an individual makes a contract and thereafter forms with another a partnership which endeavors unsuccessfully to carry out the contract, defendant in an action to recover for goods furnished under the contract may recoup his damages for breach of the contract.[83]

c. Partnership Demand in Action Against Individual Partner. In an action against one partner for a debt due by him, a debt due to his firm cannot be set-off,[84]

ner cannot be offset to a partnership demand, although such goods, by direction of such partner, were to be entered as a credit against the partnership demand.

Consent may be express or implied, but proof thereof must be clear and satisfactory. Wise *v.* Copley, 36 Ga. 508.

74. Singer Mfg. Co. *v.* Wood, 1 Tex. App. Civ. Cas. § 1177.

75. Hartung *v.* Siccardi, 3 E. D. Smith (N. Y.) 560; Wilson *v.* Dargan, 4 Rich. (S. C.) 544; Kinsler *v.* Pope, 5 Strobh. (S. C.) 126.

76. Wilson *v.* Dargan, 4 Rich. (S. C.) 544; Kinsler *v.* Pope, 5 Strobh. (S. C.) 126.

77. Nipper *v.* Jones, 27 Mo. App. 538; Hartung *v.* Siccardi, 3 E. D. Smith (N. Y.) 560.

78. Clark *v.* Taylor, 68 Ala. 453.

79. Ward *v.* Leviston, 7 Blackf. (Ind.) 466 (holding that in an action by a partnership for the price of goods sold by one of the members of the partnership dealing in his own name, defendant, who was ignorant of the partnership, had the same right of set-off as if the partner selling the goods had sued alone, the concealed members allowing the other partner to deal in his own name); Harrison *v.* Vanderbilt, 9 N. Y. St. 810; Stacey *v.* Decy, 2 Esp. 469 note, 7 T. R. 361 note. And see Bryant *v.* Clifford, 27 Vt. 664, holding that an account accruing on a contract with one partner, but without notice of any partnership, may be set off in an action by the firm.

Representations made by a member of a firm against whom a demand exists, that he is a creditor of the firm and that he had been authorized to manage the business thereof, in no way alter the position of the parties, so as to entitle the debtor of the firm to set off against his indebtedness to it a demand against such member of the firm. Harrison *v.* Vanderbilt, 9 N. Y. St. 810.

80. Gordon *v.* Ellis, 2 C. B. 821, 3 D. & L. 803, 10 Jur. 359, 15 L. J. C. P. 178, 52 E. C. L. 821.

81. McGehee *v.* Harrison, 51 Ala. 522.

As between a partnershp debt and a debt to the partners as tenants in common the principles of set-off are not applicable, the demands not being due in the same right. Fuher *v.* Buckeye Supply Co., 5 Ohio S. & C. Pl. Dec. 187, 7 Ohio N. P. 420.

82. Citizens' Bank *v.* Carey, 2 Indian Terr. 84, 48 S. W. 1012.

83. Posey *v.* West Constr. Co., (Miss. 1908) 46 So. 402.

84. *Alabama.*— Jones *v.* Blair, 57 Ala. 457.

Arkansas.— Western Coal, etc., Co. *v.* Hollenbeck, 72 Ark. 44, 80 S. W. 145.

Colorado.— Doyle *v.* Nesting, 37 Colo. 522, 88 Pac. 862.

Georgia.— Bishop *v.* Mathews, 109 Ga. 790, 35 S. E. 161.

Illinois.— Dameier *v.* Bayor, 68 Ill. App. 477 [*affirmed* in 167 Ill. 547, 47 N. E. 770].

Kentucky.— Garvey *v.* Crouch, 10 Ky. L. Rep. 937.

Maine.— Stevens *v.* Lunt, 19 Me. 70.

Massachusetts.— Howe *v.* Snow, 3 Allen 111, holding that in an action by the assignee of an insolvent corporation defendant cannot set off a claim due from the corporation to the firm of which he is a member.

Missouri.— Weil *v.* Jones, 70 Mo. 560; Lamb *v.* Brolaski, 38 Mo. 51; State *v.* Allen, 124 Mo. App. 465, 103 S. W. 1090.

Nebraska.— Olson *v.* Lamb, 56 Nebr. 104, 76 N. W. 433, 71 Am. St. Rep. 670.

Pennsylvania.—Wrenshall *v.* Cook, 7 Watts 464.

South Carolina.—See Alexander *v.* Meroney, 30 S. C. 335, 9 S. E. 266.

counter-claim,[85] compensation,[86] or reconvention.[87] But such a debt may be set off if the partnership claim was assigned to defendant with plaintiff's assent,[88] and it has been held that a claim due from plaintiff to the firm may be set off if the other partners consent and the rights of third persons are not prejudiced,[89] and if goods sold by a firm are charged to the individual partner and are by him furnished to plaintiff, he may set off the debt against plaintiff's claim;[90] but the mere assent of the partnership alone that the firm debt might be set off is held insufficient without the consent of plaintiff.[91] Where one member of a partnership is sued individually for the entire amount of a partnership debt, he may counter-claim a debt due from plaintiff to the partnership, arising out of the same transaction,[92] and a partner may recoup a claim arising out of the same transaction in which he was jointly interested with another as partner,[93] and in an action against one partner on an individual obligation given for a partnership debt, defendant may avail himself of any recoupment available to the partners in a suit on the debt against them.[94] In an action against a partner he cannot set off a claim he holds against his firm.[95]

Tennessee.— Kamsler *v.* Savage, (Ch. App. 1901) 62 S. W. 357.

Vermont.— Wells *v.* Mace, 17 Vt. 503, holding that where several trustees disclose a joint indebtedness to the principal and one of them claims that the principal is indebted to himself and a third person as partners, such trustee will not be allowed to set off this claim against the joint indebtedness of himself and the others.

Virginia.— Porter *v.* Nekervis, 4 Rand. 359.

England.— Toplis *v.* Grane, 2 Arn. 110, 5 Bing. N. Cas. 636, 9 L. J. C. P. 180, 7 Scott 620, 35 E. C. L. 341.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 96.

That defendant is the only solvent member of the firm does not alter the rule. Garvey *v.* Crouch, 10 Ky. L. Rep. 937.

Under a statute making partners individually liable for partnership debts it is held that a partner sued individually for his own debt cannot set off a debt owed by plaintiff to the partnership. Drennen *v.* Gilmore, 132 Ala. 246, 31 So. 90, 90 Am. St. Rep. 902.

85. McGuire *v.* Lamb, 2 Ida. (Hasb.) 378, 17 Pac. 749 [*affirmed* in 145 U. S. 644, 12 S. Ct. 983, 36 L. ed. 856]; Sullivan *v.* Nicoulin, 113 Iowa 76, 84 N. W. 978; Hammond *v.* Terry, 3 Lans. (N. Y.) 186.

86. Terran *v.* De Lastra, 2 La. 324 (holding that a partner sued individually cannot offer in compensation a sum paid by his firm in plaintiff's behalf); Byrd *v.* McMicken, 8 Mart. N. S. (La.)) 163 (holding that a curator cannot offset his debt to the succession by its debt to a firm of which he is a member).

87. Kirbs *v.* Provine, 78 Tex. 353, 14 S. W. 849.

88. Stevens *v.* Lunt, 19 Me. 70; Hall *v.* Allen, 80 Mo. 286.

The assignment must be proved to have been actually made, and cannot be inferred from the consent of one partner to the setting off of the claim. Dehon *v.* Stetson, 9 Metc. (Mass.) 341.

89. Collins *v.* Campbell, 97 Me. 23, 53 Atl. 837, 94 Am. St. Rep. 458.

90. Lamb *v.* Brolaski, 38 Mo. 51.

91. Jones *v.* Blair, 57 Ala. 457 [*disapproving* an intimation to the contrary in Taylor *v.* Bass, 5 Ala. 110], holding that the reason for the rule is that a party indebted to a firm, and having a claim against one of its members, cannot know that the several partners will give their consent that such partnership claim will be used by the one partner in discharge of his individual debt, and it would be doing such individual creditor a manifest wrong, to leave him exposed to the uncertain fate of meeting a defense to his action, rightfully brought, the authority to make which may or may not be accorded by the other partners.

But in Pennsylvania the rule seems to be well established that defendant may set off a claim due a partnership of which he is a member, if the partners assent thereto and assent of plaintiff seems to be unnecessary. Montz *v.* Morris, 89 Pa. St. 392 (holding that proof of the debt and of the assent of the partners to its use are all that is required); Craig *v.* Henderson, 2 Pa. St. 261, 44 Am. Dec. 193; Tustin *v.* Cameron, 5 Whart. 379; Wrenshall *v.* Cook, 7 Watts 464 (holding that where the creditor is insolvent and the firm consent, such claim may be set off, and the same rule is there applied where the partnership debt is assigned to defendant). See Jarecki Mfg. Co. *v.* Haymaker, 138 Pa. St. 541, 21 Atl. 99. And assignment is also held not necessary to the allowance of the set-off, consent of the partners being alone sufficient. Montz *v.* Morris, *supra*.

92. Seaman *v.* Slater, 49 Fed. 37, holding that where one member of a partnership, which owns a vessel, is alone sued for the breach of a charter-party, he may counter-claim for the entire balance due under the contract for the use of the vessel.

93. Baltimore United Oil Co. *v.* Barber, 2 Mackey (D. C.) 4.

94. McKinnon *v.* Palen, 62 Minn. 188, 64 N. W. 387.

95. Trunick *v.* Gilchrist, 81* Pa. St. 160.

d. Demand of Individual Partner in Action Against Partnership. In an action against a partnership for a partnership debt, the general rule is that the separate claims of the partners are unavailable as set-off,[96] or counter-claim;[97] and in an action against a partnership defendants cannot set off a debt due to another partnership composed of some, but not all, of defendant partners.[98] But in an action not only against a partnership, but also in express terms against its individual members on a partnership account, a defendant can plead as a set-off a demand due him individually,[99] and defendants sued as partners may counter-claim a judgment against plaintiff recovered in an action on a cause of action accruing to them in their partnership capacity, although in that action the individual members of the firm were plaintiffs,[1] and under some statutes it is held that in an action against one of several partners for a partnership debt defendant may set off his separate debt,[2] and although it is held broadly that compensation of partnership and individual debts does not take place by operation of law, and that a firm debt cannot be pleaded in compensation to that of one of its members,[3] it has been held in other cases that the individual debts may be pleaded in compensation with the partnership debt by way of exception.[4] A firm sued on an account may plead as a set-off a claim growing out of transactions had nominally between plaintiffs and the firm and certain individuals, when such individuals are in fact dormant partners, although their names are not set out in that of the firm.[5] In an action against a partnership one partner may avail himself of a counter-claim in favor of the partnership to defeat plaintiff's recovery, although

96. *California.*— Taylor *v.* Hill, 115 Cal. 143, 44 Pac. 336, 46 Pac. 922.

Colorado.— Rogers *v.* McMillen, 6 Colo. App. 14, 39 Pac. 891.

Illinois.— Bailey *v.* Valley Nat. Bank, 21 Ill. App. 642 [*affirmed* in 127 Ill. 332, 19 N. E. 695].

Michigan.— Sager *v.* Tupper, 38 Mich. 258.

New Jersey.— Williams *v.* Hamilton, 4 N. J. L. 220; Bowne *v.* Thompson, 1 N. J. L. 2.

New York.— Hunter *v.* Booth, 84 N. Y. App. Div. 585, 82 N. Y. Suppl. 1000; Pinckney *v.* Keyler, 4 E. D. Smith 469.

Texas.— Olive *v.* Morgan, 8 Tex. Civ. App. 654, 28 S. W. 572.

Wisconsin.— Wilson *v.* Runkel, 38 Wis. 526.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 94.

When only one of the firm is served, he cannot set off a claim by him individually against plaintiff. Williams *v.* Pultze, 5 Ohio Dec. (Reprint) 503, 6 Am. L. Rec. 338.

Where one of the partners paid his private debt to plaintiff with firm funds, the two partners cannot avail themselves of this payment in set-off, in plaintiff's suit at law to recover a debt due from the firm. Weaver *v.* Rogers, 44 N. H. 112.

97. Peabody *v.* Beach, 6 Duer (N. Y.) 53, 3 Abb. Pr. 353, 5 Duer (N. Y.) 678; Coleman *v.* Elmore, 31 Fed. 391, 12 Sawy. 463, construing the Oregon code.

98. Winnipiseogee Paper Co. *v.* Eaton, 65 N. H. 13, 18 Atl. 171.

99. McAllister *v.* Millhiser, 96 Ga 474, 23 S. E. 502; Mason *v.* Rice, (Iowa 1884) 19 N. W. 897.

1. Butler *v.* Delafield, 1 Cal. App. 367, 82 Pac. 260.

2. Jones *v.* Jones, 12 Ala. 244; Trann *v.* Gorman, 9 Port. (Ala.) 456; Fidelity Trust, etc., Co. *v.* Shannahan, 14 Ky. L. Rep. 111 (holding that against a firm note owned by a banker the partners may set off their individual claims for balances due them as depositors); Weiss *v.* Wahl, 5 Mo. App. 408; Warren Wood-Working Co. *v.* Cooke Mercantile Trust Co., 5 Pa. Dist. 359; Hurst *v.* Johnston, 6 Phila. (Pa.) 593.

Where copartners are summoned as trustees in a trustee process, they may set off a claim due from the principal defendant to one of the partners. Robinson *v.* Furbush, 34 Me. 509.

3. Key *v.* Box, 14 La. Ann. 497; Ellis *v.* Fisher, 10 La. Ann. 479, 482; Lewis *v.* Moore, 9 Rob. (La.) 196; Dick *v.* Byrne, 7 Rob. (La.) 465; Morton *v.* Graham, 11 La. 449; Blanchard *v.* Cole, 8 La. 153; Walsh *v.* Wells, 7 La. 337; Crain *v.* Baillio, 2 La. 82; Beauregard *v.* Case, 91 U. S. 134, 23 L. ed. 263.

4. Ellis *v.* Fisher, 10 La. Ann. 482; Dick *v.* Byrne, 7 Rob. (La.) 465 (holding, however, that in an action against a partnership for a debt, brought by an assignee of a creditor, under an assignment with notice to the partnership, defendants cannot compensate by way of exception a debt due by the assignor to a member of the partnership individually); Beauregard *v.* Case, 91 U. S. 134, 23 L. ed. 263.

5. Bird *v.* McCoy, 22 Iowa 549.

In an action against a firm, in which one member only appears, he has a right to set up any claim which his firm had against plaintiffs, and which it could have asserted by way of counter-claim. McMasters *v.* Burnett, 92 Ky. 358, 17 S. W. 1021, 13 Ky. L. Rep. 617.

he answers separately,[6] and in an action against the individuals comprising a firm defendant may set off a debt due to the firm by plaintiff.[7]

e. Survivorship and Representation of Deceased Partner.[8] A claim of a surviving partner is liable to a set-off of his individual debt,[9] particularly where there is but one surviving solvent partner in the firm;[10] and the same rule applies when it does not appear that the partnership creditors have any lien upon the balance of plaintiff's account,[11] and no other equitable interest in another which the law can protect;[12] and in an action by a partnership defendant may set off a demand against a former partnership of which plaintiffs are the surviving members and to which they succeeded.[13] Conversely, in an action against a surviving partner, he may set off an individual debt due him from plaintiff;[14] and in a suit by a surviving partner on an obligation for a debt belonging to the partnership, but in his own name, defendant can set off a partnership claim held by him;[15] and it has been held that in an action against a surviving partner and the widow and sole heir of the deceased partner, who have formed a new firm, defendant may set off a debt due the old firm in an action against the new firm.[16] But in an action by a surviving partner an individual debt against the deceased partner cannot be set off.[17]

f. Equitable Set-Off of Partnership and Individual Debts and Demands. In equity, as at law,[18] an individual debt cannot as a general rule be set off against

6. Tilden *v.* Washburn, 6 N. Y. Suppl. 556.

7. Bartlett *v.* Loomis, 16 Montg. Co. Rep. (Pa.) 206.

8. Set-off and counter-claim in partnership accounting see PARTNERSHIP, 30 Cyc. 714.

Set-off in action by personal representative of claims growing out of partnership between defendant and decedent see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 898.

9. *Illinois.*— Harris *v.* Pearce, 5 Ill. App. 622.

Massachusetts.— Holbrook *v.* Lackey, 13 Metc. 132, 46 Am. Dec. 726.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

Missouri.— Cowden *v.* Elliott, 2 Mo. 60.

Pennsylvania.— Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607. But see Waln *v.* Hewes, 5 Serg. & R. 468.

Vermont.— Meader *v.* Scott, 4 Vt. 26; Meader *v.* Leslie, 2 Vt. 569.

England.— French *v.* Andrade, 6 T. R. 582.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 97.

In an action by a surviving partner and another against a partnership for the balance of an account, defendants cannot plead by way of set-off a debt to them from one of plaintiffs alone, the demands not being mutual. Richardson *v.* Windgate, 1 Ohio Dec. (Reprint) 478, 10 West. L. J. 145.

When sued for a debt to the estate of a deceased partner, a creditor of the firm may set off the debt due him from the firm. Blair *v.* Wood, 108 Pa. St. 278.

10. Chaffin *v.* Chaffin, 22 N. C. 255.

11. Meader *v.* Leslie, 2 Vt. 569.

12. Meader *v.* Scott, 4 Vt. 26.

13. Stewart *v.* Morris, 88 Fed. 461, 32 C. C. A. 7, 89 Fed. 290, 32 C. C. A. 203.

14. *Illinois.*— Harris *v.* Pearce, 5 Ill. App. 622 [*distinguishing* Hughes *v.* Trahern, 64 Ill. 48].

Indiana.— Skillen *v.* Jones, 44 Ind. 136.

Michigan.— Newberry *v.* Trowbridge, 13 Mich. 263.

Missouri.— Cowden *v.* Elliot, 2 Mo. 60.

New Jersey.— Johnson *v.* Kaiser, 40 N. J. L. 286.

Pennsylvania.— Lewis *v.* Culbertson, 11 Serg. & R. 48, 14 Am. Dec. 607.

England.— Slipper *v.* Stidstone, 1 Esp. 47, 5 T. R. 493; French *v.* Andrade, 6 T. R. 582.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 97.

The administrators of the survivor may set off a partnership debt to a suit against them in their representative capacity on a note made by the survivor. Hale *v.* Brown, 11 Ala. 87.

Where the widow of a deceased partner received money belonging to the firm and permitted the partnership affairs to be settled without accounting therefor, such money belonged to the surviving partner and the representatives of the deceased partner, and, where she was sole representative of the deceased partner and entitled to all the money collected by her, except that due the surviving partner, she owed him the duty of accounting to him severally for such money, making his claim for his share of the money held by her a proper subject of set-off in an action by the widow against him on a note. Schnell *v.* Schnell, 39 Ind. App. 556, 80 N. E. 432.

15. Masterson *v.* Goodlett, 46 Tex. 402.

16. Cochran *v.* Cutter, 18 Pa. Super. Ct. 282.

17. Norment *v.* Johnston, 32 N. C. 89, holding that, although the deceased partner agreed to pay defendant's claim out of the partnership funds in an action by the surviving partner against defendant for a firm debt, defendant's bill against the deceased partner could not be set off. But see Beesley *v.* Crawford, 19 Ohio 126.

18. See *supra*, VI, K, 8, a.

a partnership debt,[19] and conversely,[20] unless some peculiar equities intervene;[21] and a debt due to an individual member of a firm cannot be set off in equity against a debt due from the firm when the latter debt has been assigned for the benefit of *bona fide* creditors.[22] But if the partnership is insolvent, defendant may set off in equity an individual debt of a partner thereof,[23] or set off a partnership debt against an individual debt due the insolvent partner;[24] and an individual partner may, in equity, set off his own judgment against an insolvent debtor who seeks to enforce a judgment against the firm,[25] and where one who is indebted to a firm is insolvent, in an action by him against an individual partner, his indebtedness to the partnership may be set off[26] with the assent of the other partners.[27] If one partner of a non-resident firm is individually indebted to a resident debtor of that firm in a suit against such resident, he may plead the debt of the partner to him as an equitable set-off.[28] It has been held, however, that the exceptional rule which permits a defendant, on equitable principles, to set off a joint demand existing against a firm in a suit brought by an individual member thereof on a separate demand held and sued by him alone, applies only where all the members of the firm are insolvent, so that he has no remedy at law unless he is allowed to plead the set-off in defense of an action,[29] and thus a court of equity has refused to entertain a set-off of a separate debt of one partner against a joint debt to the partnership upon the ground of the insolvency of that partner alone,[30] and has held that a debt due from one partner cannot be set against a debt due the firm, even though the other partner be insolvent.[31] When a partner is sued on a partnership debt and there exists a demand in favor of the partnership which, had the firm instead of the partner been sued, could be set off, but which would not support an independent action because, barred by the statute of limitations, equity will give relief.[32]

9. DEBT OR DEMAND OF HUSBAND OR WIFE OF PARTY TO ACTION. In an action by a wife it is held to be a general rule that defendant cannot set off[33]

19. Collins *v.* Butler, 14 Cal. 223; Wasson *v.* Gould, 3 Blackf. (Ind.) 18; Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409.

20. Cummings *v.* Morris, 25 N. Y. 625; Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

21. Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335.

22. Cotton *v.* Evans, 21 N. C. 284.

23. Hall *v.* Kimball, 77 Ill. 161; Dubreuil *v.* Gaither, 98 Md. 541, 56 Atl. 965; Hahn *v.* Cook, 1 Tex. App. Civ. Cas. § 689; Singer Mfg. Co. *v.* Wood, 1 Tex. App. Civ. Cas. § 1177; Seligmann *v.* Heller Bros. Clothing Co., 69 Wis. 410, 34 N. W. 232.

24. Shipman *v.* Lansing, 25 Hun (N. Y.) 290.

In an action by the assignee of a bankrupt partner, a debt due to defendant from the partnership may be set off. Bean *v.* Cabbaness, 6 Ala. 343.

Where a partner in a solvent firm dies insolvent, owing an individual debt, the latter may be set off against a claim which the firm owes such partner's estate. House *v.* Cessna, 6 Tex. Civ. App. 7, 24 S. W. 962.

25. Jeffries *v.* Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

Bond by firm for partner.— Set-off is allowed of a debt of the bankrupts to one partner separately against a joint debt of him and his partner on their bond to secure the separate debt of the former. *Ex p.* Hanson, 1 Rose 156, 18 Ves. Jr. 232, 8 Rev. Rep. 335, 34 Eng. Reprint 305.

26. Chamberlin *v.* Stewart, 6 Dana (Ky.) 32.

27. Wrenshall *v.* Cook, 7 Watts (Pa.) 464.

28. Wallenstein *v.* Sellizman, 7 Bush (Ky.) 175.

29. Spofford *v.* Rowan, 6 N. Y. St. 250 [*affirming* 3 N. Y. St. 272, and *affirmed* in 124 N. Y. 108, 26 N. E. 350].

A debt of one partnership to another cannot be set off in a suit in equity brought by the representatives of a member of one firm, who has died since the contracting of the debt, against one member of the other. Reed *v.* Whitney, 7 Gray (Mass.) 533.

30. Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409.

31. Watts *v.* Sayre, 76 Ala. 397.

32. Fowler *v.* Bellinger, 140 Ala. 240, 37 So. 225.

33. *Illinois.*— Hankins *v.* Beatty, 31 Ill. App. 239.

Iowa.— Stannus *v.* Stannus, 30 Iowa 448, holding that a claim against the husband cannot be pleaded as a set-off in an action by the wife on a note legally transferred to her by her husband, and which was her property, if the claim pleaded as a set-off constituted an independent cause of action against the husband and was in no wise connected with the note sued on.

Kentucky.— Terry *v.* Warder, 78 S. W. 154, 25 Ky. L. Rep. 1486.

or counter-claim[34] a claim against the husband; nor can defendant, sued by the assignee of a chose in action, set off a claim against the wife of the assignor;[35] and in an action by the husband as administrator of the wife, a claim against the husband personally cannot be counter-claimed,[36] and the debt of a husband, during coverture, cannot be set off, after divorce, against the wife's distributive share in her father's estate, although the decree of divorce is subsequent to the testator's death;[37] but in an action by the wife for services defendant has been permitted to set off a debt due from the husband, on the ground that the wife's earnings belong to the husband,[38] and where the wife is only the nominal plaintiff and the husband is the real party in interest, a debt due from the husband may be set off.[39] Conversely, in an action by the husband, defendant cannot set off a claim against the wife;[40] nor can such claim

Mississippi.— Doyle *v.* Orr, 51 Miss. 229.
New York.— Negley *v.* Stone, 32 Misc. 733, 66 N. Y. Suppl. 449.
See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 87.

In an action by a widow for her distributive share of an estate, the administrators cannot set off a debt due from the husband of plaintiff, he never having reduced her distributive share into possession during his life. Flory *v.* Becker, 2 Pa. St. 470, 45 Am. Dec. 610.

On foreclosure by a married woman, where the court refuses to have her husband brought in as plaintiff, defendant cannot set off his demand against the husband against the judgment rendered in favor of the wife. Campbell *v.* Kearns, 13 Ida. 287, 90 Pac. 108.

Where a legacy is bequeathed to a wife the executor cannot set off the debt of the husband who is insolvent. Lewis *v.* Thompson, 2 Rich. Eq. (S. C.) 75.

Debts of a husband to a trustee of his wife's estate cannot be set off by the trustee against the wife's estate in his hands. Owsley *v.* Owsley, 77 S. W. 394, 25 Ky. L. Rep. 1194.

34. Paine *v.* Hunt, 40 Barb. (N. Y.) 75, holding that where, to discharge a certain indebtedness of a third person, defendant gave to him his promissory note, payable to plaintiff, a married woman, and the note, by direction of the third person, was subsequently given to plaintiff as a gift to her, and as her separate property, in an action by the wife on such note, counter-claims against her husband could not be set up. And see Sloteman *v.* Thomas, etc., Mfg. Co., 69 Wis. 499, 34 N. W. 225, holding that in an action to recover for the use of, and for an injury to, a wagon formerly belonging to plaintiff's husband, defendant cannot be allowed, as a counter-claim, a demand existing against plaintiff's husband, on the ground that defendant had no notice of the sale of the wagon to plaintiff, where it is not shown that defendant acted on the belief that the husband was the owner.

35. Shields *v.* Stark, (Tex. Civ. App. 1899) 51 S. W. 540.

36. Holliday *v.* McMillan, 83 N. C. 270, holding that where personal property, the separate estate of a married woman, is sold under execution for a debt of the husband, the purchaser, when sued by the husband, after the wife's death, as her administrator, for conversion of the property by reason of such sale, cannot set up as a counter-claim his claim to be reimbursed the amount of his bid at such sale, because such claim is against the execution debtor, and therefore it cannot be the basis of any demand against the wife or her estate.

37. Fink *v.* Hake, 6 Watts (Pa.) 131.

38. Emmertz *v.* Thurlow, 3 Del. Co. Ct. (Pa.) 368.

39. Challis *v.* Wylie, 35 Kan. 506, 11 Pac. 438; Citizens' Bank *v.* Bowen, 21 Kan. 354, holding that in an action by a wife to recover a deposit made in defendant's bank out of funds arising from the sale of her husband's homestead, the bank may set off its claim against the husband, since the husband is the real party in interest.

Debts and demands of nominal parties and real parties in interest generally see *supra*, VI, K, 4.

40. Vaught *v.* Wellborn, 16 Ala. 377 (holding that, in a suit at law on a note given for the purchase-money of slaves sold and delivered to defendant, damages in respect to them, resulting from the tortious act of the vendor's wife committed in his absence, could not be allowed as a discount or set-off, it not appearing that the husband consented to the tort or gave it his subsequent sanction); Canfield *v.* Nagle, 19 Pa. Super. Ct. 210.

A debt due from a wife dum sola cannot be set off in an action by the husband alone, unless he promised to pay the debt after marriage, thereby making it his own. Burrough *v.* Moss, 10 B. & C. 558, 8 L. J. K. B. O. S. 287, 5 M. & R. 296, 21 E. C. L. 238; Wood *v.* Akers, 2 Esp. 594.

In an action by assignees of a bankrupt on a promissory note given to his wife before marriage, the maker cannot set off a debt due to him from the bankrupt. Yates *v.* Sherrington, 2 Dowl. P. C. N. S. 803, 12 L. J. Exch. 216, 11 M. & W. 42.

But a person advancing to a married woman deserted by her husband and left wholly without provision, sums of money, which have been actually laid out in the purchase of necessaries for her, is, in a court of equity, entitled to stand in the place of the trades-people supplying those necessaries, and the sums so advanced and so laid out constitute an equitable set-off against the legal debt to the husband from the person making

be counter-claimed;[41] nor can defendant counter-claim a claim against the husband and his wife jointly.[42] In an action against a wife she cannot set off a debt claimed in the right of her husband,[43] nor can such a claim be pleaded in compensation;[44] and in an action against the husband he cannot plead in compensation,[45] or set off[46] or counter-claim[47] a debt due his wife. or a debt due him and his wife jointly.[48] In an action by a husband and wife a claim against the husband upon his separate liability cannot be set off,[49] nor can such a claim be pleaded

those advances. Jenner *v.* Morris, 1 Dr. & Sm. 334, 7 Jur. N. S. 385, 3 L. T. Rep. N. S. 497, 9 Wkly. Rep. 29, 62 Eng. Reprint 362.

41. Harrison *v.* State Banking, etc., Co., 15 S. D. 304, 89 N. W. 477.

42. Richards *v.* Reed, 6 Misc. (N. Y.) 217, 26 N. Y. Suppl. 540.

43. Reuter *v.* Sullivan, (Tex. Civ. App. 1898) 47 S. W. 683.

44. Buard *v.* Buard, 5 Mart. N. S. (La.) 132.

45. Stokes *v.* Forman, 12 La. Ann. 671, holding that where a purchaser at the succession sale gave his note for the price and subsequently married the widow of the deceased, he could not in an action upon the note plead in compensation the interest of his wife in the community of her former husband and herself.

46. French *v.* Garner, 7 Port. (Ala.) 549; Brooks *v.* Turner, 63 Ga. 297 (holding that in an action on the note defendant cannot plead by way of set-off that plaintiff has wrongfully possessed himself of the estate of defendant's wife's father, that said estate is situated in another state, and that the share of defendant and his wife amounts to a larger sum than that sued for); Ewing *v.* Coffman, 12 Lea (Tenn.) 79 (holding that one who is sued for money borrowed from an insurance company cannot set off the equitable value of a policy on his life belonging to his wife); Paynter *v.* Walker, Buller N. P. 179. But see Cranor *v.* Winters, 75 Ind. 301, holding that in an action on a note the maker may plead by way of a set-off a claim for services rendered by his wife, since the earnings of his wife belonged to the husband, and therefore the claims were mutual.

A husband cannot reconvene for claims of the community, and obtain judgment during the existence of the community, where the wife sues for the resumption of the control and administration of her paraphernal property. Smith *v.* Reddick, 42 La. Ann. 1055, 8 So. 539.

A debt from a bankrupt to a married woman *dum sola* cannot be set off against a debt from her husband to the bankrupt. *Ex p.* Blagden, 2 Rose 249, 19 Ves. Jr. 465, 34 Eng. Reprint 589.

Choses in action of which a wife died seized not being due the husband personally cannot be set off against a personal debt due by him to plaintiff. Richter *v.* Hanneman, 119 Fed. 471.

47. Chaffee *v.* Cox, 1 Hilt. (N. Y.) 78; Dolph *v.* Rice, 21 Wis. 590, holding that when defendant gives his note as his wife's agent for her debt, and liquidates it with his check, in a suit on such check defendant cannot set up an indebtedness of plaintiff to his wife on account by way of counter-claim.

48. Atkins *v.* Churchill, 19 Conn. 394, holding that in an action of book debt against two defendants, defendants cannot plead by way of set-off a judgment recovered by one of them and his wife against plaintiff and a third person, the demands not being mutual.

49. *Alabama.*— Morris *v.* Booth, 8 Ala. 907. But see Case *v.* Byrne, 12 Ala. 115, holding that upon a suit by husband and wife on a note given to them jointly for a debt created with defendants, by the dealing of the wife with the consent of the husband, defendants may set off an account not included in the note, created in the same course of dealing.

Connecticut.— Whiting *v.* Beckwith, 31 Conn. 596.

Delaware.— Smith *v.* Johnson, 5 Harr 40, holding that in an action by husband and wife on a note to the wife *dum sola*, defendant cannot plead by way of set-off a sale of goods to husband and wife, which is the husband's separate liability.

Indiana.— Wulschner *v.* Sells, 87 Ind. 71, holding that where at the husband's request a note is executed to himself and his wife jointly, although the consideration moved from him, the wife acquires a joint interest with the husband in the note, and therefore a claim against him alone cannot be set off against them or their assignee.

Kentucky.— Gelhaar *v.* Hesse, 13 Ky. L. Rep. 141 (holding that a judgment against a husband cannot be set off against a judgment in favor of the husband and wife for damages arising from the seizure and sale of the wife's separate property); Green *v.* Carson, 4 Metc. 76 (holding that in an action by a husband and wife and their assignee on two notes, one executed to her and the other to her and her husband jointly, and both reciting that they were given to secure the rent of a tract of land which had been assigned to her for dower in the estate of her former husband, defendant cannot set up demands against the husband as a set-off against the debts sued on, since allowing the set-off in such a case would be in effect to subject the rent of the wife's land to the payment of the separate debts of the husband, which cannot be done); Tillett *v.* Com., 9 B. Mon. 438 (holding that where A married B, who was ward under C, by whom B's property was held as guardian, in an action on his bond for the use of A and B, the claim due from C to B, as his ward, having never been reduced into A's possession, C was not entitled to set off debts due from A to him).

in compensation.[50] But where a husband may bring an action in his own name, he cannot defeat the right of set-off by joining his wife as a co-plaintiff.[51] In an action against a husband and wife jointly the husband cannot set off a separate demand due him,[52] and the wife cannot set off a claim due her and others

Maryland.— Darnall *v.* Hill, 12 Gill & J. 388, holding that in a suit by a husband and wife, claiming a portion of rents and profits as damages for the detention of her dower and in lieu of dower, defendants, as heirs at law of the first husband of the wife, cannot set off a demand which they may have against the second husband for the use and occupation of the land during their minority, the two claims not being due in the same right.

New York.— Mollan *v.* Griffith, 3 Paige 402, holding that where a husband has received a legacy due to his wife, and has given security to refund the same in case of a deficiency in assets, the executor cannot, in an action by the husband and wife against him to recover the rents and profits of her real estate, show such a deficiency of assets and set off the same against the claim for such rents and profits, the demands not being due in the same right, the demand for the rents and profits being due in the right of the wife, and the right to a refund of the legacy in case of a deficiency being against the husband on his security to refund.

Pennsylvania.— Bentz *v.* Bentz, 95 Pa. St. 216, holding that in a joint action by a husband and wife on a note executed to them as joint payees defendant cannot set off a debt due to him by the husband.

Texas.— Hubby *v.* Camplin, 22 Tex. 582, holding that in an action by husband and wife for money due her separate estate his debts cannot be set off.

Virginia.— Glazebrook *v.* Ragland, 8 Gratt. 332, holding that where land, conveyed by a husband in trust for himself and wife by deed not duly recorded, was subsequently sold under decree in a suit by them against the trustee brought to enforce the sale, the purchaser is not entitled to set off, in an action against him for the balance due on the purchase-price, a claim against the husband which accrued subsequent to the purchase, the demands not being mutual, and the husband's interest in the trust estate being a joint interest.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 87.

In an action by husband and wife to recover a legacy given to the wife for her sole use, a set-off of demands against the husband will not be allowed (Pierce *v.* Dustin, 24 N. H. 417), and in such an action to recover a legacy bequeathed to her during coverture, a debt from the husband to the testator in his lifetime cannot be set off (Wingate *v.* Parsons, 4 Del. Ch. 117), and a bequest to a married woman "for her own use" being equivalent to a bequest to her for her separate use, in an action by the husband and wife for the legacy a debt due by the husband to the testator cannot be set off (Jamison *v.* Brady, 6 Serg. & R. (Pa.) 466, 9 Am. Dec. 460). But see Lowman's Appeal, 3 Watts & S. (Pa.) 349 (holding that in a proceeding by a husband to recover a legacy to his wife, the executor may set off a bond given by the husband to the testator in his lifetime); Wishart *v.* Downey, 15 Serg. & R. (Pa.) 77.

A bond for purchases made at an estate sale cannot be set off against the distributive share of the purchaser's wife in the estate. Farrow *v.* Farrow, 12 S. C. 168. And where a wife was entitled to a distributive share of an intestate estate, and her husband at the sale of the estate by the administrator, made purchases on credit giving his note therefor, on bill by the wife for account and settlement the note of the husband could not be set off against her claim. Roberts *v.* Adams, 2 S. C. 337.

In an action on a note by the payee for the use of a married woman and her husband, the maker may set off an account for medical services rendered for the married woman before her marriage, the wife and her husband being plaintiffs beneficially interested in the action. Gary *v.* Johnson, 72 N. C. 68.

But under a statute providing that all property acquired by either husband or wife after marriage shall be community property, subject to the husband's debts, a judgment against the husband may be set off against a judgment in favor of the wife. Adams *v.* Baker, 24 Nev. 375, 55 Pac. 362.

50. Defau *v.* Pelane, 15 La. 273, holding that, in a suit by husband and wife to recover a note, the wife's property, placed in defendant's hands to discount, he cannot plead in compensation a sum due him by the husband.

51. Ferguson *v.* Lothrop, 15 Wend. (N. Y.) 625, holding that where a suit is brought by husband and wife for the rent of premises belonging to the wife, the tenant may set off a demand against the husband alone.

52. Musselman *v.* Galligher, 32 Iowa 383, holding that the husband has no common or joint interest in a right of action accruing to the wife on account of a tort inflicted against her, and cannot, in an action against the husband and wife jointly, set up by way of cross demand a claim for damages accruing to himself for a malicious prosecution of his minor children or himself by plaintiff. But see Johnson *v.* King, 20 Ala. 270 (holding that when suit is brought against husband and wife on a note executed by the wife *dum sola*, the husband may set off one half of the amount paid him before suit brought on a judgment which was recovered against the wife *dum sola* and plaintiff, on a note executed by them jointly); Daly *v.* National L. Ins. Co., 64 Ind. 1 (holding that in a suit to foreclose a mortgage given by a

jointly;[53] but in an action on a joint and several note of a husband and wife a separate demand in favor of the husband may be counter-claimed.[54] Equity, relaxing the rigid rules of the statute of set-off, may allow a set-off which the law would refuse.[55]

L. Recoupment, Set-Off, and Counter-Claim Against Assigned Causes of Action — 1. General Rules.[56] Where an obligation is assigned, it is subject to any right of recoupment held by the obligor against the obligee before and at the time of the assignment,[57] and the same general rule applies to set-off,[58]

husband and his wife to secure the payment of a loan made to the husband, a cross complaint in the nature of set-off for moneys alleged to be due and owing by plaintiff to the husband may properly be pleaded).

Where a husband is joined as a technical party, but the cause of action is stated only against the separate property of the wife, debts due from plaintiff to the husband cannot be pleaded as a counter-claim. Carpenter *v.* Leonard, 5 Minn. 155.

53. Hendricks *v.* Toole, 29 Mich. 340, holding that a claim against a complainant by a married woman defendant for a liability as surety with other persons, belonging to such married woman and others, cannot be set off against a mortgage given by her husband and herself to secure a debt of the husband on his property.

54. Conway *v.* Smith, 13 Wis. 125.

Foreclosure of mortgage securing joint and several bond.— In an action against the husband and wife to foreclose a mortgage executed by them to secure their joint and several bond, a claim by the husband alone against the mortgagee is a good set-off and extinguishes the liability on the mortgage and the obligation secured by it, although the action is in form joint. American Guild *v.* Damon, 107 N. Y. App. Div. 140, 94 N. Y. Suppl. 985 [*reversed* on other grounds in 186 N. Y. 360, 78 N. E. 1081].

55. Lane *v.* Fallen, 16 Md. 352 (holding that where a single woman loaned money to a married woman, who had a separate estate, to assist her in improving her property, and for a part of the money so loaned the married woman gave her note, and subsequently the single woman married, and she and her husband filed a bill against the married woman and her husband, praying that the note might be paid out of her separate estate, defendants might plead as a set-off a judgment recovered by the husband against the complainants for the board of the single woman before her marriage); Holloway *v.* Conner, 3 B. Mon. (Ky.) 395 (holding that where a husband and wife are suing for property claimed through the wife, and the husband dies, having sold his interest, and the purchaser has possession of the property, he may set off the purchase-money as against the wife).

But to set off a debt of a deceased husband against his widow the equity must be clearly shown, and, although the husband died insolvent, if the widow is not insolvent and the demands are not connected, and no understanding is shown in the parties that one demand should be set off against the other, equity will not allow the set-off. Houston *v.* Maddux, 179 Ill. 377, 53 N. E. 599 [*reversing* 73 Ill. App. 203].

56. See, generally, Assignment, 4 Cyc. 84 *et seq.*

Set-off against assignee for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 220.

57. Smith *v.* Wall, 12 Colo. 363, 21 Pac. 42; Stilwell *v.* Chappell, 30 Ind. 72 (holding that in an action by the assignee against the maker of a note given in payment of the last instalment of the purchase-money of land conveyed by warranty deed, defendant may recoup a sum which he has been compelled to pay to remove an encumbrance covered by the warranty); Rockwell *v.* Daniels, 4 Wis. 432.

58. *Alabama.*— Campbell *v.* Conner, 78 Ala. 211; Cook *v.* Mutual Ins. Co., 53 Ala. 37, holding that all contracts calling for the payment of money, except negotiable paper, are subject in the hands of the assignee to any set-off which could have been made against the assignor.

Arkansas.— White River Stave Co. *v.* Emmerson, (1899) 56 S. W. 1069; Robinson *v.* Swigart, 13 Ark. 71; Smith *v.* Capers, 13 Ark. 9; Oldham *v.* Wallace, 4 Ark. 559, holding that the assignee of a bond takes it subject to the right of the maker to set off any debt due from the assignor before and at the time of the assignment.

Illinois.— Weir *v.* Dustin, 32 Ill. App. 388, holding that a personal judgment obtained against the debtor in an attachment proceeding can be set off in an action on the attachment bond by the assignee thereof.

Indiana.— Sefton *v.* Hargett, 113 Ind. 592, 15 N. E. 513; Herod *v.* Snyder, 48 Ind. 480.

Iowa.— Zugg *v.* Turner, 8 Iowa 223.

Kansas.— Tracy *v.* Kerr, 47 Kan. 656, 28 Pac. 707; Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584; Leavenson *v.* Lafontane, 3 Kan. 523 [*overruled* on other grounds in Turner *v.* Crawford, 14 Kan. 499].

Kentucky.— Thompson *v.* Clay, 1 J. J. Marsh. 413; Brown *v.* Vance, 2 T. B. Mon. 136; New Farmers', etc., Bank *v.* Crowe, 82 S. W. 287, 26 Ky. L. Rep. 500.

Maine.— Robinson *v.* Perry, 73 Me. 168.

Maryland.— Johnston *v.* Phœnix Ins. Co., 39 Md. 233.

Massachusetts.— Hatch *v.* Greene, 12 Mass. 195; Cleveland *v.* Clap, 5 Mass. 201.

Minnesota.— Massachusetts L. & T. Co. *v.* Welch, 47 Minn. 183, 49 N. W. 740; Martin *v.* Pillsbury, 23 Minn. 175.

Missouri.— State *v.* McHale, 16 Mo. App. 178.

and to cross-demands sought to be introduced by defendant in counter-claim,[59]

New Hampshire.—Bellows *v.* Smith, 9 N. H. 285.

New York.—Taylor *v.* New York, 82 N. Y. 10 [*affirming* 20 Hun 292]; McIlvaine *v.* Egerton, 2 Rob. 422; Beckwith *v.* Union Bank, 4 Sandf. 604 [*affirmed* in 9 N. Y. 211]; Foster *v.* Central Nat. Bank, 93 N. Y. Suppl. 603; Ferguson *v.* Bassett, 4 How. Pr. 168 (holding that where a right of set-off against a judgment exists at the time of the assignment thereof, the assignee takes subject to such set-off, even though he is an attorney having a lien for costs against the judgment); Gay *v.* Gay, 10 Paige 369.

Ohio.—Oliver *v.* Canan, 71 Ohio St. 360, 73 N. E. 466; Brownell *v.* Armstrong, 10 Ohio Dec. (Reprint) 368, 20 Cinc. L. Bul. 465, holding that in an action to recover the amount of a dividend on a deposit of a stock-holder with the corporation, brought by an assignee, the receiver may set off the additional liability of the stock-holder, as the receiver when appointed had forthwith a cause of action against the stock-holders for the additional liability, and the right to set off such liability against the dividend existed before the assignment of the claim to plaintiff. But see McConville *v.* Means, 10 Ohio Dec. (Reprint) 452, 21 Cinc. L. Bul. 193.

Pennsylvania.—Northampton Bank *v.* Balliet, 8 Watts & S. 311, 42 Am. Dec. 297; Mann *v.* Dungan, 11 Serg. & R. 75.

Rhode Island.—Bell *v.* Ward, 10 R. I. 503. But see Trafford *v.* Hall, 7 R. I. 104, 82 Am. Dec. 589.

South Carolina.—Jervey *v.* Strauss, 11 Rich. 376; Hodges *v.* Connor, 1 Speers 120.

Tennessee.—Kamsler *v.* Savage, (Ch. App. 1901) 62 S. W. 357.

Virginia.—Commercial Bank *v.* Cabell, 96 Va. 552, 32 S. E. 53; Hupp *v.* Hupp, 6 Gratt. 310, holding that where a partner retired from the firm, and a new firm was formed, which undertook to pay the debts of the old firm, but failed, leaving debts of the old firm unpaid which the retiring partner had to pay, he might set off such payment against a bond which he had given to the new firm, and which they had assigned to plaintiff for value.

Wisconsin.—Batavian Bank *v.* Minneapolis, etc., R. Co., 123 Wis. 389, 101 N. W. 687.

United States.—Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97], construing a Minnesota statute of set-off. But see Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409, holding that where there are mutual debts, which may be set off at law or in equity, the right of set-off is extinguished by a *bona fide* assignment of one of the debts.

England.—Wilson *v.* Gabriel, 4 B. & S. 243, 8 L. T. Rep. N. S. 502, 11 Wkly. Rep. 803, 116 E. C. L. 243; Watkins *v.* Clark, 12 C. B. N. S. 277, 6 L. T. Rep. N. S. 819, 104 E. C. L. 277.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 107. And see ASSIGNMENTS, 4 Cyc. 86 *et seq.*

But see Himmelmann *v.* Reay, 38 Cal. 163 (holding that where a contract was assigned before any work was performed thereon, and before a set-off existed against the assignor in favor of defendant, defendant could not set off such a claim against the assignor in an action by the assignee); Ripley *v.* Bull, 19 Conn. 53.

The rule is solely for the benefit of the debtor and thus in an action on an assigned claim against one who obtained the money sued for in an invalid garnishment proceeding defendant cannot set off a claim held by him against the assignor. Quigley *v.* Welter, 95 Minn. 383, 104 N. W. 236.

Where a party claiming as assignee of an account also claims as a creditor, he may resist a set-off originating in a fraudulent arrangement between the assignor and defendant. Price *v.* Boswell, 3 B. Mon. (Ky.) 13.

The subsequent discharge of the payee as a bankrupt does not discharge a set-off *bona fide* acquired by the maker of a note against the payee thereof before notice of its assignment to a third person. Harwell *v.* Steel, 17 Ala. 372.

A plaintiff, after bringing suit, cannot assign the demand so as to defeat a legal right of set-off which defendant had when the suit began. Norwich Printing Co. *v.* Kloppenberg, 50 Conn. 295.

The assignee of a fire insurance policy takes it subject to all rights of set-off to which it was subject before the assignment. Gourdon *v.* Insurance Co. of North America, 1 Binn. (Pa.) 432 note; Rousset *v.* Insurance Co. of North America, 1 Binn. (Pa.) 429. And see, generally, FIRE INSURANCE, 19 Cyc. 635 text and note 66.

In an action by the assignee of a patent against a former assignee under an expired assignment, the allowance of a claim against the original owner is held proper. Rhodes *v.* Ashurst, 71 Ill. App. 242 [*affirmed* in 176 Ill. 351, 52 N. E. 118].

59. *Colorado.*—Hottel *v.* Poudre Valley Reservoir Co., 41 Colo. 370, 92 Pac. 918.

Indiana.—Excelsior Clay Works *v.* De Camp, 40 Ind. App. 26, 80 N. E. 981.

Iowa.—Miller *v.* Centerville, 57 Iowa 640, 11 N. W. 631.

Kentucky.—Frankfort *v.* Brislan, 126 Ky. 477, 104 S. W. 311, 1199, 31 Ky. L. Rep. 867, 32 Ky. L. Rep. 377.

New York.—Thalmann *v.* Giles, 116 N. Y. App. Div. 437, 101 N. Y. Suppl. 980.

Oregon.—Louie Chung *v.* Stephenson, 50 Oreg. 244, 89 Pac. 386, 805.

Washington.—Young *v.* Borzone, 26 Wash. 4, 66 Pac. 135, 421.

United States.—Horne *v.* Hoyle, 28 Fed. 743.

England.—Young *v.* Kitchin, 3 Ex. D. 127, 47 L. J. Exch. 579, 26 Wkly. Rep. 403; Exchange Bank *v.* Stinson, 32 U. C. C. P. 158.

But see Gage *v.* Hunter, 43 Tex. Civ. App. 241, 94 S. W. 1104.

or in compensation,[60] although the assignee takes without notice;[61] but in an action by an assignee defendant cannot counter-claim a demand against the assignor in favor of a third person and not assigned to defendant.[62] Defendant may, however, waive the right to use a set-off against the assignee.[63] In an action on a contract by an assignee thereof, defendant may set up as a counter-claim the breach of a contract between himself and plaintiff.[64]

2. Demands Accruing or Becoming Due After Assignment or Notice Thereof. The rule is laid down broadly in the cases that claims accruing in favor of defendant against the assignor subsequent to the assignment are unavailable as a set-off[65] or counter-claim,[66] and that a demand which had not matured when an assignment was made cannot be set off against the claim assigned,[67] nor counter-claimed;[68] and under this rule a claim against the assignor, acquired by purchase or otherwise after assignment, cannot be set off.[69] Conversely a creditor cannot set off

In New York under the old code of procedure it was held that section 150, providing that a counter-claim must be a claim in favor of defendant and against plaintiff, did not allow a claim against an assignor to be counter-claimed in an action by the assignee (Duncan *v.* Stanton, 30 Barb. 533; Spencer *v.* Babcock, 22 Barb. 326; McIlvaine *v.* Egerton, 2 Rob. 422; Dillaye *v.* Niles, 4 Abb. Pr. 253; Ferreira *v.* Depew, 4 Abb. Pr. 131; Van De Sande *v.* Hall, 13 How. Pr. 458; Wolf *v.* H—, 13 How. Pr. 84. But see Byrne *v.* Weeks, 4 Abb. Dec. 657 [*affirming* 7 Bosw. 372]), but that such matter must be pleaded in defense (Duncan *v.* Stanton and Wolf *v.* H—, *supra*); but Code Civ. Proc. § 502, specifically provides that in an action on contract, other than that of a negotiable note or bill of exchange, a demand against the assignor may be counter-claimed against the assignee if it existed against the party thereto or an assignee of the contract at the time of assignment and belonged to defendant in good faith before notice of assignment, and under this section such counter-claims are allowed (Zabriskie *v.* Central Vermont R. Co., 131 N. Y. 72, 29 N. E. 1006 [*affirming* 13 N. Y. Suppl. 735]; Newton *v.* Lee, 69 Hun 90, 23 N. Y. Suppl. 536 [*reversed* on other grounds in 139 N. Y. 332, 34 N. E. 905]; Newburger *v.* Manneck Mfg. Co., 10 Daly 275); but an affirmative judgment against the assignee for the debt due from the assignor cannot be obtained (Avrutin *v.* Hensel, 17 Misc. 160, 39 N. Y. Suppl. 322); and a counter-claim will not be allowed for a claim not existing against the assignor at the time of the assignment (Bayne *v.* Hard, 174 N. Y. 534, 66 N. E. 1104).

In Missouri Code Civ. Proc. § 605, defining counter-claim, has been construed not to allow a claim against an assignor to be counter-claimed in an action by the assignee (Barnes *v.* McMullins, 78 Mo. 260; Scarritt Estate Co. *v.* J. F. Schmelzer, etc., Arms Co., 110 Mo. App. 406, 86 S. W. 489); but such a claim may be set off (Scarritt Estate Co. *v.* J. F. Schmelzer, etc., Arms Co., *supra*).

60. Adams *v.* Webster, 25 La. Ann. 117; Plunkett's Succession, 12 La. Ann. 558.

61. Oliver *v.* Canan, 71 Ohio St. 360, 73 N. E. 466.

62. Davis *v.* Bakersfield Oil, etc., Exch., 2 Cal. App. 195, 83 Pac. 260.

63. Batavian Bank *v.* Minneapolis, etc., R. Co., 123 Wis. 389, 101 N. W. 687.

64. Horne *v.* Hoyle, 28 Fed. 743, under a Missouri statute.

65. Neal *v.* Cornwall, 7 Ky. L. Rep. 755; Martine *v.* Willis, 2 E. D. Smith (N. Y.) 524; Bailey *v.* Martin, 4 Alb. L. J. (N. Y.) 29; Graves *v.* Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312; Heister *v.* Enterprise Ins. Co., 5 Ohio Dec. (Reprint) 479, 6 Am. L. Rec. 238.

If the right of set-off is suspended at the time of assignment, the set-off cannot be used against the assignee and cannot be revived. Johnson *v.* Pearson, 7 Dana (Ky.) 374.

Where the right to a set-off against a verdict does not exist at the time of its assignment, it cannot arise afterward, when a judgment on the verdict is entered. Ferguson *v.* Bassett, 4 How. Pr. (N. Y.) 168.

66. Bayne *v.* Hard, 77 N. Y. App. Div. 251, 79 N. Y. Suppl. 208 [*affirmed* in 174 N. Y. 534, 66 N. E. 1104]; Duncan *v.* Stanton, 30 Barb. (N. Y.) 533; Bailey *v.* Martin, 4 Alb. L. J. (N. Y.) 29.

67. *Michigan.*—Kull *v.* Thompson, 38 Mich. 685.

Montana.— Stadler *v.* Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

New York.— Martin *v.* Kunzmuller, 37 N. Y. 396, 4 Transcr. App. 464 [*overruling* Schieffelin *v.* Hawkins, 1 Daly 289]; Myers *v.* Davis, 22 N. Y. 489; Murray *v.* Deyo, 10 Hun 3; Wells *v.* Stewart, 3 Barb. 40; Watt *v.* New York, 1 Sandf. 23; Horowitz *v.* Brodowsky, 24 Misc. 731, 53 N. Y. Suppl. 815.

Ohio.— Stanbery *v.* Smythe, 13 Ohio St. 495; Ross *v.* Johnson, 1 Handy 388, 12 Ohio Dec. (Reprint) 198.

South Carolina.— McAlpin *v.* Wingard, 2 Rich. 547.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 113.

68. Michigan Sav. Bank *v.* Millar, 110 N. Y. App. Div. 670, 96 N. Y. Suppl. 568.

69. Daviess *v.* Newton, 5 J. J. Marsh. (Ky.) 89; Diossy *v.* Heuberer, 1 N. Y. City Ct. 13 (holding that in an action on a claim by an assignee, defendant cannot plead by way of set-off a claim against the assignor purchased

against the assignee of a chose not due at the time of assignment a claim which was mature at that time.[70] The merit of the rule as to claims acquired after assignment, but before notice thereof, has been questioned on the ground that the fault lies with the assignee in not giving prior notice of the assignment, and thereby leaving defendant to believe that the assignor was still the owner of the demand;[71] and, accordingly, the more equitable rule seems to be that to prevent the set-off of a claim against an assignor in an action by the assignee, defendant must be charged with notice of the assignment before he acquired the set-off,[72] and before that time the debtor has the right to arm himself with any liabilities of his creditor in favor of third persons and may use them as a set-off in an action on his own indebtedness by the creditor's assignee,[73] and where a non-assignable chose in action is transferred, a set-off against the assignor, even though acquired after the assignment, may be set off against the transferee,[74] although the rule has been held otherwise as to assignable choses in action.[75] But all the cases agree that a set-off to be available against an assignee must have existed in favor of defendant before notice of the assignment,[76] and must have been due before that time,[77] and a

subsequent to the assignment, although he had no notice of such assignment); Spencer *v.* Barber, 5 Hill (N. Y.) 568; Thorn *v.* Myers, 5 Strobh. (S. C.) 210.

70. Henderson *v.* Michigan Trust Co., 123 Mich. 688, 82 N. W. 510; Bradley *v.* Smith, 98 Mich. 449, 57 N. W. 576, 39 Am. St. Rep. 565, 23 L. R. A. 305.

71. Mead *v.* Gillett, 19 Wend. (N. Y.) 397, where, however, the court held that demands acquired subsequent to the assignment could not under the express wording of the statute be set off, although defendant became the holder of them without notice of the assignment.

72. *Alabama.*— Stewart *v.* Kirkland, 19 Ala. 162; Harwell *v.* Steel, 17 Ala. 372; Stocking *v.* Toulmin, 3 Stew. & P. 35.

California.— St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876.

Connecticut.— Adams *v.* Leavens, 20 Conn. 73.

Minnesota.— See Martin *v.* Pillsbury, 23 Minn. 175.

New York.— Ketchum *v.* Williams, 7 N. Y. Leg. Obs. 181.

Pennsylvania.—Jordan *v.* Stewart, 1 Pittsb. 54.

South Carolina.— Burkett *v.* Moses, 11 Rich. 432.

United States.— See Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97].

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 109.

The notice must be actual.— Stewart *v.* Kirkland, 19 Ala. 162, holding that where accounts to be created in the future are conveyed by deed of trust, together with certain other property, the registration of the deed is not constructive notice of the assignment so as to prevent a set-off against them, where defendant does not have actual notice of such assignment.

But a negotiable note, expressed to be payable without defalcation or discount, is exempt from any set-off accruing in favor of the maker against the assignor after assignment, although before notice thereof. Smith *v.* Ashby, 20 Mo. 354.

73. Jordan *v.* Stewart, 1 Pittsb. (Pa.) 54.

74. Burkett *v.* Moses, 11 Rich. (S. C.) 432.

75. Davis *v.* Miller, 14 Gratt. (Va.) 1.

76. *Alabama.*—Gildersleeve *v.* Caraway, 19 Ala. 246.

Indiana.— Sample *v.* Lamb, 3 Ind. 180.

Kentucky.—Walker *v.* McKay, 2 Metc. 294; Ridgway *v.* Collins, 3 A. K. Marsh. 410; Overby *v.* Wells, 54 S. W. 955, 21 Ky. L. Rep. 1316; Whallen *v.* Judah, 5 Ky. L. Rep. 316.

Massachusetts.— St. Andrew *v.* Manchaug Mfg. Co., 134 Mass. 42; Backus *v.* Haulding, 129 Mass. 234; Jenkins *v.* Brewster, 14 Mass. 291.

Michigan.— Bacon *v.* Reich, 121 Mich. 480, 80 N. W. 278, 49 L. R. A. 311.

New York.— Wolcott *v.* Sullivan, 1 Edw. 399 [*affirmed* in 6 Paige 117].

Pennsylvania.— Northampton Bank *v.* Balliet, 8 Watts & S. 311, 42 Am. Dec. 297.

South Carolina.— Columbia Bank *v.* Gadsden, 56 S. C. 313, 33 S. E. 575.

Vermont.— Weeks *v.* Hunt, 6 Vt. 15, holding that a note given after notice of an assignment, although for a preëxisting liability, cannot be set off.

United States.— Weightman *v.* Queen, 29 Fed. Cas. No. 17,359, 12 Cranch C. C. 172.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 113.

77. Adams *v.* Rodarmel, 19 Ind. 339; Walker *v.* McKay, 2 Metc. (Ky.) 294; Graham *v.* Tilford, 1 Metc. (Ky.) 112; King *v.* Goddard, 8 Ky. L. Rep. 150, 7 Ky. L. Rep. 682; Soloman *v.* Holt, 3 E. D. Smith (N. Y.) 139; Fuller *v.* Steiglitz, 27 Ohio St. 355, 22 Am. Rep. 312. But see Stewart *v.* Anderson, 23 Fed. Cas. No. 13,421, 1 Cranch C. C. 586 [*affirmed* in 6 Cranch 203, 3 L. ed. 199], holding that in an action on the indorsee against the maker of a promissory note, defendant may set off the payee's note to him, which he held before and at the time he had notice of the assignment of his own note to plaintiff, although not then payable, but becoming payable before his own note.

debtor who, after notice of assignment of the debt by the creditor, purchases a claim against the creditor, cannot set off the same in a suit brought by the assignee,[78] although defendant, while having notice of the assignment, did not have notice of the identity of the assignee,[79] and the same rule has been held to apply to recoupment,[80] counter-claim,[81] compensation,[82] and reconvention;[83] and set-off will not be allowed if defendant had knowledge of facts sufficient to put him on inquiry, or abstain from inquiry for the purpose of avoiding notice.[84] In a few cases, however, it is held sufficient if defendant's claim against the assignor exist at the time of suit brought.[85] But under no rule can a claim not arising or maturing before suit brought be set off at law.[86]

3. Demands Unliquidated at Time of Assignment.[87] In an action on a liquidated demand held by plaintiff as assignee, an unliquidated claim existing in favor of defendant against the assignor at the time of the assignment is not a proper set-off.[88]

4. Claims Against the Assignor and Another. Defendant cannot set off a demand against the assignor and another,[89] unless the assignor was principal and the third person a surety,[90] or unless the claim of the third person had been transferred to the assignor prior to his assignment to plaintiff.[91]

5. Set-Off Against Intermediate Assignee. Defendant cannot, as against plaintiff, set off demands against plaintiff's intermediate assignees,[92] unless there is an agreement between the parties allowing it.[93] Thus a set-off against an intermediate assignee held as a general rule to be unavailable in an action on a note,[94]

78. *Alabama.*— Lewis *v.* Faber, 65 Ala. 460, holding that where a debtor of a bank transferred to the bank as collateral security a note held by him against a third person, and his surety paid the debt to the bank, and took from it an assignment of the note held by it as collateral, in an action on the note by the surety, the maker could not set off a demand against the payee acquired after notice of the transfer to the bank, since the assignment to the surety related back to the time when the note was transferred to the bank.

Indiana.— Goldthwait *v.* Bradford, 36 Ind. 149 (holding that in an action on a note by an assignee against the maker, the maker cannot, by way of a set-off, set up claims against the payee purchased subsequent to the notice of the assignment, notwithstanding the fact that the payee, subsequent to the execution of the note, agreed that he would accept as payment thereon, any legal claims against him that the maker might obtain, since such agreement did not change the rights of the parties); Sayres *v.* Linkhart, 25 Ind. 145; Shannon *v.* Wilson, 19 Ind. 112.

Kentucky.— Jackson *v.* Holloway, 14 B. Mon. 140; Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329.

Mississippi.— Freeland *v.* Man, 1 Sm. & M. 531.

New York.— Solomon *v.* Holt, 3 E. D. Smith 139.

Ohio.— Williams *v.* Pultze, 5 Ohio Dec. (Reprint) 503, 6 Am. L. Rec. 337, 2 Cinc. L. Bul. 253.

West Virginia.— Cochrane *v.* Hyre, 49 W. Va. 315, 38 S. W. 554.

United States.— Whitaker *v.* Pope, 29 Fed. Cas. No. 17,528, 2 Woods 463.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 114.

79. Small *v.* Browder, 11 B. Mon. (Ky.) 212.

80. Jefferson County *v.* Arrghi, 51 Miss. 667.

81. Norton *v.* McCarthy, 10 Misc. (N. Y.) 222, 30 N. Y. Suppl. 1057; Diossy *v.* Heuberer, 1 N. Y. City Ct. 13.

82. Harrison *v.* Wilson, 5 Rob. (La.) 275, holding that in an action to recover an account, brought by an assignee under a gratuitous assignment, followed by notice to the debtor, the debtor cannot plead by way of compensation a claim against the assignor acquired subsequent to the time of receiving notice of such assignment.

83. Falls *v.* Thoms, 22 La. Ann. 173.

84. Cochrane *v.* Hyre, 49 W. Va. 315, 38 S. E. 554.

85. Russell *v.* Redding, 50 Ala. 448; St. Louis Nat. Bank *v.* Gay, 101 Cal. 286, 35 Pac. 876. See also New Farmers', etc., Bank *v.* Crowe, 82 S. W. 287, 26 Ky. L. Rep. 500.

86. Ligare *v.* Hayden, 51 Ill. App. 69; Lowell *v.* Lane, 33 Barb. (N. Y.) 292.

87. Set-off of unliquidated demands generally see *supra*, VI, I, 3.

88. Frick *v.* White, 57 N. Y. 103; Allgoever *v.* Edmunds, 66 Barb. (N. Y.) 579.

89. Woods *v.* Harris, 5 Blackf. (Ind.) 585.

90. Hoffman *v.* Zollinger, 39 Ind. 461.

91. Robinson *v.* Beall, 3 Yeates (Pa.) 267.

92. Frowein *v.* Calvird, 75 Mo. App. 567, particularly where the intermediate assignee held the claim before due.

93. Frowein *v.* Calvird, 75 Mo. App. 567.

94. Bostick *v.* Scruggs, 50 Ala. 10; McKenzie *v.* Hunt, 32 Ala. 494; Thompson *v.* Harrison, 1 Daly (N. Y.) 302 (holding that the fact that the pledgee of a note, under an agreement that it should be collateral merely, brought suit upon it in his own name, does not entitle the maker to set up as a counter-

and the same principle is held to be applicable where plaintiff sues upon a bond.[95]

6. Transfer of Overdue Negotiable Paper. Because the words of the statute embrace only mutual debts,[96] and because a set-off is as a general rule allowed only against a party to the record,[97] it is held that in an action by the indorsee of an overdue promissory note the maker cannot set off independent demands against the payee, but the indorsee is liable only to such equities as arise out of the note transaction itself, and not to a set-off in respect of a debt due from the indorser to the maker arising out of a collateral matter,[98] and the transfer must be actual, and not merely nominal,[99] or as collateral security.[1] Other cases hold, however, that the indorsee stands in the shoes of the original party and takes subject to a notice of a set-off implied by law, and these cases allow defendant, in an action by the indorsee against the maker, to set off a demand against the payee acquired before notice of the assignment, and relating to a distinct and independent transaction;[2] and in several states the set-off in question is expressly

claim a claim against the pledgee in a subsequent action brought by the payee); Perry *v.* Mays, 2 Bailey (S. C.) 354; Hooper *v.* Spicer, 2 Swan (Tenn.) 494 (so holding as to a note transferred after maturity). And see Commercial Paper, 8 Cyc. 64.

95. Blair *v.* Mathiott, 46 Pa. St. 262. But see Metzgar *v.* Metzgar, 1 Rawle (Pa.) 227.

96. Adams *v.* Bliss, 16 Vt. 39. And see *supra*, I, A, 3, a.

97. Johnson *v.* Bridge, 6 Cow. (N. Y.) 693 [*affirmed* in 5 Wend. 342]. And see *supra*, VI, K, 1.

98. *Alabama.*— Stocking *v.* Toulmin, 3 Stew. & P. 35.

California.— See Curtis *v.* Sprague, 41 Cal. 55.

Connecticut.— Simpson *v.* Hall, 47 Conn. 417; Goodrich *v.* Stanley, 23 Conn. 79; Culver *v.* Parish, 21 Conn. 408; Fairchild *v.* Brown, 11 Conn. 26; Stedman *v.* Jillson, 10 Conn. 55; Robinson *v.* Lyman, 10 Conn. 30, 25 Am. Dec. 52.

Florida.— Kilcrease *v.* White, 6 Fla. 45.

Georgia.— Wilkinson *v.* Jeffers, 30 Ga. 153; Tinsley *v.* Beall, 2 Ga. 134.

Indiana.— Hankins *v.* Shoup, 2 Ind. 342.

Iowa.— Whittaker *v.* Kuhn, 52 Iowa 315, 3 N. W. 127; Way *v.* Lamb, 15 Iowa 79; Shipman *v.* Robbins, 10 Iowa 208.

Maryland.— Eversole *v.* Maull, 50 Md. 95; Renwick *v.* Williams, 2 Md. 356; Annan *v.* Houck, 4 Gill 325, 45 Am. Dec. 133.

Michigan.— Hendricks *v.* Toole, 29 Mich. 340.

Missouri.— Hunleth *v.* Leahy, 146 Mo. 408, 48 S. W. 459; Loewen *v.* Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489; Barnes *v.* McMullins, 78 Mo. 260; Cutler *v.* Cook, 77 Mo. 388; Arnot *v.* Woodburn, 35 Mo. 99; Mattoon *v.* McDaniel, 34 Mo. 138; Unseld *v.* Stephenson, 33 Mo. 161; Gullett *v.* Hoy, 15 Mo. 399; Collins *v.* Waddle, 4 Mo. 452; Grier *v.* Hinman, 9 Mo. App. 213; Haeussler *v.* Greene, 8 Mo. App. 451.

New Hampshire.— Leavitt *v.* Peabody, 62 N. H. 185; Ordiorne *v.* Woodman, 39 N. H. 541; McDuffie *v.* Dame, 11 N. H. 244; Jenness *v.* Bean, 10 N. H. 266, 34 Am. Dec. 152; Chandler *v.* Drew, 6 N. H. 469, 26 Am. Dec. 704.

New York.— Johnson *v.* Bridge, 6 Cow. 693 [*affirmed* in 5 Wend. 342].

Pennsylvania.— Long *v.* Rhawn, 75 Pa. St. 128; Clay *v.* Cottrell, 18 Pa. St. 408; Hughes *v.* Large, 2 Pa. St. 103.

Vermont.— Haley *v.* Congdon, 56 Vt. 65; Armstrong *v.* Noble, 55 Vt. 428; Adams *v.* Bliss, 16 Vt. 39; Britton *v.* Bishop, 11 Vt. 70.

Virginia.— Davis *v.* Miller, 14 Gratt. 1.

England.— Burrough *v.* Moss, 10 B. & C. 558, 8 L. J. K. B. O. S. 287, 5 M. & R. 296, 21 E. C. L. 238; Oulds *v.* Harrison, 3 C. L. R. 353, 10 Exch. 572, 24 L. J. Exch. 66, 3 Wkly. Rep. 160; Whitehead *v.* Walker, 7 Jur. 330, 12 L. J. Exch. 28, 10 M. & W. 696; Stillivant *v.* Ford, 11 L. J. C. P. 245, 4 M. & G. 101, 4 Scott N. R. 668, 43 E. C. L. 61. But see Holmes *v.* Kidd, 3 H. & N. 891, 5 Jur. N. S. 295, 28 L. J. Exch. 112, 7 Wkly. Rep. 108.

99. Leavitt *v.* Peabody, 62 N. H. 185; Ordiorne *v.* Woodman, 39 N. H. 541; McDuffie *v.* Dame, 11 N. H. 244.

1. Jenness *v.* Bean, 10 N. H. 266, 34 Am. Dec. 152. But see Wilkinson *v.* Jeffers, 30 Ga. 153.

2. *Kansas.*— Choat *v.* Boyd, 59 Kan. 676, 54 Pac. 1040; Davies *v.* Stevenson, 59 Kan. 648, 54 Pac. 679; Norton *v.* Foster, 12 Kan. 44.

Maine.— Wood *v.* Warren, 19 Me. 23; Burnham *v.* Tucker, 18 Me. 179; Barney *v.* Norton, 11 Me. 350; Shirley *v.* Todd, 9 Me. 83. But see Call *v.* Chapman, 25 Me. 128.

Massachusetts.— Fisher *v.* Leland, 4 Cush. 456, 50 Am. Dec. 805; Ranger *v.* Cary, 1 Metc. 369; Braynard *v.* Fisher, 6 Pick. 355; Sargent *v.* Southgate, 5 Pick. 312, 16 Am. Dec. 409 [*distinguishing* Holland *v.* Makepeace, 8 Mass. 418, and Peabody *v.* Peters, 5 Pick. 1, in which a different opinion was intimated]; Stockbridge *v.* Damon, 5 Pick. 223.

New York.— Ford *v.* Stuart, 19 Johns. 342; O'Callaghan *v.* Sawyer, 5 Johns. 118; Furman *v.* Haskin, 2 Cai. 369.

North Carolina.— Harrington *v.* Wilcox, 53 N. C. 349; Wharton *v.* Hopkins, 33 N. C. 505; Haywood *v.* McNair, 14 N. C. 231, 19 N. C. 283.

Oregon.— McDonald *v.* Mackenzie, 24 Oreg. 573, 14 Pac. 866.

authorized by statute, enacted in some instances shortly after a judgment of the courts against it,[3] and is allowed as a counter-claim under the code practice.[4] But although the note was assigned after due the right of set-off does not extend to claims against intermediate holders, but only against the maker;[5] and the maker is not entitled to set off a demand against the payee if at the time of the transfer of the note to plaintiff the payee had other claims against the maker to an amount sufficient to exhaust the demands sought to be set off.[6]

7. Waiver and Estoppel. If the debtor promise the assignee of a chose in action to pay the debt to him, he cannot afterward avail himself in set-off of claims he may have against the assignor, as such a promise amounts to a waiver of any right of set-off he may have against the assignor.[7] Similarly, the debtor by his conduct in inducing the assignee to believe that the obligation will be met, and that there is no defense thereto, may be held to have waived the right to avail himself of a set-off against the assignor in an action by the assignee,[8] partic-

Vermont.— Foot *v.* Ketchum, 15 Vt. 258, 40 Am. Dec. 678.

Where the payee of notes under seal assigns them when insolvent, and when the notes are overdue, the maker in a suit by the assignee may set off a liability against the maker as surety for the payee of the notes in suit. Craighead *v.* Swartz, 219 Pa. St. 149, 67 Atl. 1003.

3. See the statutes of the several states. And see the following cases:

Arkansas.— Oldham *v.* Wallace, 4 Ark. 559.

Illinois.— Root *v.* Irwin, 18 Ill. 147. See Ligare *v.* Hayden, 51 Ill. App. 69.

Missouri.— Munday *v.* Clements, 58 Mo. 577; Paston *v.* Bussmeyer, 28 Mo. 330.

New York.— Driggs *v.* Rockwell, 11 Wend. 504.

South Carolina.— Perry *v.* Mays, 2 Bailey 354; English *v.* Nixon, 3 McCord 549.

Tennessee.— Gatewood *v.* Denton, 3 Head 380.

Texas.— Goodson *v.* Johnson, 35 Tex. 622; McMahan *v.* Bremond, 16 Tex. 331.

United States.— Bull *v.* Kasson First Nat. Bank, 14 Fed. 612 [*reversed* on other grounds in 123 U. S. 105, 8 S. Ct. 62, 31 L. ed. 97], under a Minnesota statute.

4. Cole *v.* Stearns, 20 Misc. (N. Y.) 502, 46 N. Y. Suppl. 238 [*affirmed* in 23 N. Y. App. Div. 446, 48 N. Y. Suppl. 318 (*affirmed* in 162 N. Y. 637, 57 N. E. 1106)].

5. Sykes *v.* Lewis, 17 Ala. 261; Perry *v.* Mays, 2 Bailey (S. C.) 354; English *v.* Nixon, 3 McCord (S. C.) 549. And see Commercial Paper, 8 Cyc. 64.

6. Collins *v.* Allen, 12 Wend. (N. Y.) 356, 27 Am. Dec. 130.

7. *Alabama.*— Holmes *v.* Bullock, 4 Ala. 228, holding that where a debtor in account gives his note for the amount to the assignee thereof, and afterward pays notes on which he was liable as surety and the assignor as principal, he cannot in an action on the note set off such payments.

Kentucky.— Cabiness *v.* Herndon, Litt. Sel. Cas. 469, holding that the equity which the maker of a note has is extinguished by the maker's unconditional promise to the assignee to pay the note in consideration of the assignee giving time thereon.

Massachusetts.— Mowry *v.* Todd, 12 Mass. 281.

New Hampshire.— Thompson *v.* Emery, 27 N. H. 269.

New York.— Henry *v.* Brown, 19 Johns. 49, holding that where the obligor of a bond, after notice from the assignee, of the assignment, paid to the assignee a part of the sum due, and promised to pay the balance, without mentioning any set-off or demands against the assignor, the obligor, in an action afterward brought on the bond by the assignee, could not set off a demand against the assignor existing prior to the bond, it being presumed from the promise of defendant and his silence on the subject of set-off that a claim against the obligee in the bond had been previously settled.

Pennsylvania.— Henniss *v.* Page, 3 Whart. 275.

South Carolina.— Lane *v.* Winthrop, 1 Bay 116, 1 Am. Dec. 599.

Virginia.— See Mayo *v.* Giles, 1 Munf. 533.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 110.

Where the transferee of a non-negotiable note knew at the time of its transfer that the payee and maker had agreed that the payee's indebtedness to the maker on book-account should be applied on the note, the transferee took the same subject to the right of defendant to make the set-off. Fitch *v.* Gates, 39 Conn. 366.

8. McLellan *v.* Walker, 26 Me. 114 (holding that where a client drew an order on an attorney with whom he had placed a collection, requesting the money when collected to be paid to a person named, and the attorney accepted the order, without saying anything about any demand of his own against the client growing out of another transaction, and the order was afterward assigned to another, and notice given to the attorney, he could not set off his claim against the client against the holder of the order); Merrill *v.* Merrill, 3 Me. 463, 14 Am. Dec. 247 (where a creditor for goods sold became the surety of another in a note not negotiable, payable to his debtor, and the note was assigned by delivery, and the creditor on being required by the assignee to pay the same

ularly where the assignee was induced to purchase the obligation in consequence of representations by the obligor that he had no defense to it.[9]

8. Equitable Set-Off Against Assigned Causes of Action. As a general rule an equitable right of set-off is not defeated by assignment of the debt,[10] and where there are mutual debts, and an express or implied agreement of mutual credit, a court of equity will enforce it against an assignee;[11] but the rights of equitable assignees will be protected in equity against claims in set-off acquired against the assignor after notice of the assignment,[12] and equity will not allow a set-off against an assignee where to do so would be inequitable.[13] The insolvency of the assignor at the time of assignment is good ground in equity to authorize a set-off against the assignee of claims against the assignor at the time of assignment;[14] but where a demand against which a set-off is pleaded on the ground of the debtor's insolvency or non-residence has been assigned, it must appear that the insolvency or removal occurred before the assignment, or equity will not set off the demand.[15] As a general rule equity will not allow a set-off against an assignee of a claim against the assignor not due at the time of assignment;[16] but upon the existence of those equities which move that court to allow set-offs unavailable at law,[17] a set-off may be allowed of a claim accruing after commencement of the action.[18] And in equity upon proof of the non-residence or insolvency of the assignor at the time of the assignment it has been held that even an unliquidated claim sounding in tort may be set off against the assignee.[19]

M. Assigned Claim as Set-Off or Counter-Claim — 1. General Rules. A debtor has as good a right to purchase a cross demand to extinguish a claim

referred him to the other maker as the real debtor, but said nothing of the debt due to himself from the payee as a subsisting claim by way of set-off); Kemp *v.* McPherson, 7 Harr & J. (Md.) 320; King *v.* Fowler, 16 Mass. 397 (holding that where the promisor in a contract knew of the promisee's intention to assign the contract to a certain person, and made no suggestion to the latter of any claim against the promisee, and on receiving formal notice of the assignment made no objection thereto, the promisor must be deemed in equity to have waived his right to any set-off); Dean *v.* Herrold, 37 Pa. St. 150. But see Keyes *v.* Waters, 18 Vt. 479.

9. Dean *v.* Herrold, 37 Pa. St. 150; Elliott *v.* Callan, 1 Penr. & W. (Pa.) 24 (holding that where one who was about to receive the assignment of a single bill called on the payer to know whether he would pay the same, and was informed by the latter that he would, the latter could not afterward set up any defense against the payment of the money to the assignee which existed previous to such promise); McMullen *v.* Wenner, 16 Serg. & R. (Pa.) 18, 16 Am. Dec. 543.

10. Donelson *v.* Posey, 13 Ala. 752; Colyer *v.* Craig, 11 B. Mon. (Ky.) 73; Davidge *v.* Mayo, 1 Silv. Sup. (N. Y.) 336, 5 N. Y. Suppl. 475; Smith *v.* Clark, 4 Paige (N. Y.) 368; Utica Ins. Co. *v.* Power, 3 Paige (N. Y.) 365. But see Davis *v.* Milburn, 3 Iowa 163, holding that a right of set-off, equitable because the same parties are really interested as principals in both debts, but not legal, because as to one there are sureties jointly liable, is defeated by a *bona fide* assignment of one without notice.

11. Green *v.* Darling, 10 Fed. Cas. No. 5,765, 5 Mason 201.

12. Davis *v.* Milburn, 3 Iowa 163 (holding that where a judgment in favor of a non-resident has been assigned *bona fide* for a valuable consideration, claims against such non-resident by the judgment debtor cannot be set off against the assignee); American Bank *v.* Wall, 56 Me. 167; Pass *v.* McRea, 36 Miss. 143.

13. Burton *v.* Willen, 6 Del. Ch. 403, 33 Atl. 675.

14. Groves *v.* Williams, 68 Ga. 598; Dorsey *v.* Reese, 14 B. Mon. (Ky.) 157 (where the assignor was both insolvent and non-resident at the time of assignment); Colyer *v.* Craig, 11 B. Mon. (Ky.) 73; Terry *v.* Wooding, 2 Patt. & H. (Va.) 178.

In an action by receivers of a bank against an indorser of a note indorsed to the bank, defendant may file by way of a set-off bills against the vendor held by him when the bank became insolvent and passed into the hands of receivers. American Bank *v.* Wall, 56 Me. 167.

15. Talbot *v.* Warfield, 3 J. J. Marsh. (Ky.) 83 (holding also that the removal of an assignor from the state gives no right to an obligor of a bond to set off demands which he had against the assignor against the assignee, without showing a connection between them and the bond while the assignor owned it); Robbins *v.* Holley, 1 T. B. Mon. (Ky.) 191. See Colyer *v.* Craig, 11 B. Mon. (Ky.) 73.

16. Kinsey *v.* Ring, 83 Wis. 536, 53 N. W. 842.

17. See *supra*, I, F. 4.

18. Eigenman *v.* Clark, 21 Ind. App. 129, 51 N. E. 725, allowing an equitable set-off for money paid on behalf of plaintiff's assignor after commencement of suit.

19. Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329.

against himself by set-off as he has to accomplish the same effect by making a payment;[20] and thus it is held that a claim against plaintiff assigned to defendant before suit brought may be set off against plaintiff's cause of action,[21] if defendant

20. Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Bramblett *v.* Slemp, 108 S. W. 339, 32 Ky. L. Rep. 1329; Cornell *v.* Donovan, 13 N. Y. St. 704; Rider *v.* Johnson, 20 Pa. St. 190; Russell *v.* Spear, 12 Phila. (Pa.) 230, 4 Wkly. Notes Cas. 476.

But where a partner assigned in his own name a note, executed by plaintiff to a firm, to defendant, the latter could not use it as a set-off in plaintiff's action against him, because no interest in the note passed to him. McIntire *v.* McLaurin, 2 Humphr. (Tenn.) 71, 36 Am. Dec. 300.

21. *Georgia.*— Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111.

Illinois.— Graff *v.* Kahn, 18 Ill. App. 485, holding that where a surety on an obligation is sued alone he may plead as a set-off a demand due to his principal, where he shows that the demand has been assigned to him.

Indiana.— Weader *v.* Crawfordsville First Nat. Bank, 126 Ind. 111, 25 N. E. 887; Hurd *v.* Earl, 4 Blackf. 184.

Kentucky.— Otwell *v.* Cook, 9 B. Mon. 357.

Maryland.— Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811 (holding that Code, art. 75, § 12, providing that in an action on a sealed writing defendant may file any demand he has against plaintiff on a sealed writing in bar, or plead it in discount of plaintiff's claim, does not deprive defendant in such an action of his right to file a demand due a third party on a sealed instrument, and assigned to defendant, in bar of plaintiff's right to recover); Hennighausen *v.* Tischer, 50 Md. 583 (holding that a shareholder in a building association, who has made a mortgage to it, can set off, as against the amount due by him under the mortgage, claims held by him against the association, consisting of balances due from the association to members who have withdrawn and assigned their claims to him).

Michigan.— Hanselman *v.* Doyle, 90 Mich. 142, 51 N. W. 195.

Mississippi.— Ashby *v.* Carr, 40 Miss. 64; Ainsworth *v.* Ainsworth, 24 Miss. 145.

Nebraska.— Salladin *v.* Mitchell, 42 Nebr. 859, 61 N. W. 127, holding that on a foreclosure by the assignee for the benefit of creditors of a mortgage owned by his assignor, an insolvent bank, a purchaser from the mortgagor may set off an indebtedness due him from the bank on a certificate of deposit, although the certificate was originally issued to a third person.

New York.— Martin *v.* Williams, 17 Johns. 330; Tuttle *v.* Bebee, 8 Johns. 152.

Oregon.— Rayburn *v.* Hurd, 20 Oreg. 229, 25 Pac. 635.

Pennsylvania.— Murray *v.* Williamson, 3 Binn. 135; Primer *v.* Kuhn, 1 Dall. 452, 1 L. ed. 219 [*reversing* 1 Dall. 225, 1 L. ed. 111].

South Carolina.— Hemmingway *v.* Farr, 2 Treadw. 753, 3 Brev. 549; Compty *v.* Alken, 2 Bay 481; Russell *v.* Lithgow, 1 Bay 437.

Vermont.— Pittsburg First Nat. Bank *v.* Post, 65 Vt. 222, 25 Atl. 1093.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 118.

Pending proceedings by one partner for a dissolution, and before decree, the firm not having taken the benefit of the insolvent act, a debtor may purchase demands against the firm to use as a set-off. Naglee *v.* Minturn, 8 Cal. 540.

Notice of the assignment at the commencement of suit was required in Connecticut by statute. Francis *v.* Rand, 7 Conn. 221.

In Maine it is provided by statute that no demand shall be set off unless originally payable to defendant in his own right, except that any demand which has been assigned to defendant with notice to plaintiff before the action was commenced may be in like manner set off, if plaintiff shall have agreed to receive it in part payment of his demand or to pay the same to defendant. Soule *v.* Kennebec Maine Ice Co., 85 Me. 166, 27 Atl. 92; Smith *v.* Ellis, 29 Me. 422; Call *v.* Chapman, 25 Me. 128; Stevens *v.* Lunt, 19 Me. 70. But the statute was held not to apply where an intestate had recovered judgment on a bond of defendant, and had assigned it to several creditors, only one of whom had assented, and the bond appearing in the inventory, and defendant having presented a larger claim against the estate, a note of the intestate indorsed to defendant was allowed to be set off in a suit by the administrator. Ellis *v.* Smith, 38 Me. 114.

Set-off against labor lien.—A negotiable note of the laborer, bought up by the employer after the contract of hiring, is not matter of defense to a summary process for enforcing the laborer's lien, in the absence of any request or encouragement to make the purchase, or of any promise to allow the note as payment or as set-off. Fuller *v.* Kitchens, 57 Ga. 265.

A judgment obtained by a third person against plaintiff and assigned to defendant before suit may be used as a set-off. Young *v.* Young, 32 Ill. App. 109; Rowe *v.* Langley, 48 N. H. 391; Ford *v.* Stuart, 19 Johns. (N. Y.) 342; Welliver *v.* Fox, 4 Pa. Dist. 197; Wilson *v.* Reaves, 4 Sneed (Tenn.) 173. But if a judgment is assigned on condition that if it could be set off then the assignment was to be valid, if not then to be void, set-off will be disallowed. Cornell *v.* Donovan, 13 N. Y. St. 704; Porter *v.* Davis, 2 How. Pr. (N. Y.) 30; Miller *v.* Gilman, 7 Cow. (N. Y.) 469 And see *infra*, VI, M, 2.

Where the creditor is insolvent defendant cannot set off in a subsequent action by the creditor's assignee in insolvency a claim purchased by him against the creditor subsequent to the insolvency (Smith *v.* Hill, 8 Gray (Mass.) 572; Stone *v.* Dodge, 96 Mich. 514, 56 N. W. 75, 21 L. R. A. 280; Northern Trust Co. *v.* Healy, 61 Minn. 230, 63 N. W. 625; Smith *v.* Brinkerhoff, 6 N. Y. 305;

could bring an action thereon in his own name,[22] although some cases hold it to be sufficient that defendant could bring an action on the obligation for his own use in the name of the assignor,[23] and defendant may counter-claim an assigned demand.[24] But where defendant produces an assigned note of plaintiff as a set-off, plaintiff may show a total or partial failure of consideration for which the note was given,[25] and may show part[26] or full payment[27] of the assigned claim. The assignee of an unliquidated claim cannot set it off.[28]

2. NATURE AND VALIDITY OF THE ASSIGNMENT. Claims offered in set-off by a defendant who has purchased them must be owned by defendant in good faith, and must be actually, and not colorably, purchased,[29] and a demand assigned conditionally for the purpose of being used by the assignee as a set-off, with an agreement that it be returned if not so used, cannot be used as a set-off to a valid claim against the assignee;[30] nor will a judgment on such a claim be allowed as

Diven *v.* Phelps, 34 Barb. (N. Y.) 224; Venango Nat. Bank *v.* Taylor, 56 Pa. St. 14. See Hughes *v.* Trahern, 64 Ill. 48), and a note purchased by the debtor of an insolvent after it became due cannot be set off against a debt due to the insolvent under an assignment (Johnson *v.* Bloodgood, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93); but it has been held that defendant may be allowed as a set-off the amount of the consideration paid for the assigned claim (Nichols *v.* Martin, 35 Hun (N. Y.) 168).

Where the payee of a promissory note assigns it as collateral security, defendant, in an action by the assignee, cannot plead a set-off against the original payee, without averring an excess in the amount of the paper over the amount which it was intended to secure, and making all the parties in interest parties to the suit. Harrison *v.* Pike, 48 Miss. 46.

In an action against school trustees to recover the price of supplies furnished their school, defendants may set off a note indorsed to them, payable by plaintiff, notwithstanding the fact that the trustees are a corporation for specified purposes. Brewster *v.* Colwell, 13 Wend. (N. Y.) 28.

22. Hamilton *v.* Myrick, 3 Ark 541; Ayres *v.* McConnel, 15 Ill. 230; Hemmingway *v.* Farr, 2 Treadw. 753, 3 Brev. 549.

The holder of a bond to whom it has not been assigned cannot use it as a set-off in equity without making the obligee a party. Winebrinner *v.* Weisiger, 3 T. B. Mon. (Ky.) 32.

In an action on an order in favor of an executor, the accepter cannot plead by way of set-off a note made by the executor's testate to a third person, but not indorsed to defendant. Gayle *v.* Randle, 1 Stew. (Ala.) 529.

In an action for labor and materials furnished a corporation the corporation may plead by way of a discount a note executed by plaintiff to a third person and indorsed by the payee to the president of the corporation by his individual name, with letters attached intended to designate him as such president, where the note was treated as corporate property. Dupont *v.* Mt. Pleasant Ferry Co., 9 Rich. (S. C.) 255.

23. Glass *v.* Moss, 1 How. (Miss.) 519; Frazier *v.* Gibson, 7 Mo. 271; Hickerson *v.* McFaddin, 1 Swan (Tenn.) 258 (holding that a sealed note may be set off by the holder against a bill single, although he be not the payee, and it be transferred by mere delivery); Allen *v.* McNew, 8 Humphr. (Tenn.) 46 (holding that a defendant in an action for labor done may set off notes of plaintiff purchased by defendant, without a written assignment of such notes by the payee to such defendant). See Gary *v.* James, 7 Ala. 640 (holding that where an agreement was made by the payee and the maker of a note that the maker should secure a set-off on the note of any note obtained by him against the payee, a note, although not indorsed to the maker, and thus not suable in his own name, will be a good set-off against the note when sued on for the use of another, where the maker obtained the note before notice that the beneficial plaintiff had acquired an interest in it); Anderson *v.* Warnock, 3 Brev. (S. C.) 2.

24. Lynn *v.* Stanley Creek Cotton Mills, 130 N. C. 621, 41 S. E. 877.

In New York a counter-claim may be set up if existing at commencement of action, although it did not then belong to defendant and was assigned to him subsequent to the commencement of the action. Moody *v.* Steele, 10 N. Y. Civ. Proc. 67 [*reversed* on other grounds in 11 N. Y. Civ. Proc. 205].

25. Messmore *v.* Larson, 86 Ill. 268, holding that in an action on a due-bill defendant cannot set off a note assigned to him against plaintiff, the consideration of which he then knew had failed.

26. Savage *v.* Allen, 34 Mo. 224, holding that where defendants in a suit set up as a set-off a claim against plaintiff assigned to them, plaintiff may introduce evidence of a contract with the assignors, and their agreement, in case of failure to perform the contract, to allow certain amounts on said claim, with proof of such failure, as evidence of part payment of defendant's set-off.

27. Compty *v.* Alken, 2 Bay (S. C.) 481.

28. Brown *v.* Thompson, 2 McCord (S. C.) 476.

Set off of unliquidated demands generally see *supra*, VI, I.

29. Smith *v.* Warner, 16 Mich. 390.

30. *Alabama.*— McDade *v.* Mead, 18 Ala. 214; Adams *v.* McGrew, 2 Ala. 675.

Connecticut.— Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519.

a set-off;[31] and a conditional assignment without consideration of a claim against plaintiff is not good either as a set-off or counter-claim.[32] Similarly a claim agreed to be, but not actually, assigned to defendants before the commencement of plaintiff's action, cannot be availed of as a counter-claim;[33] but a demand assigned to defendant before the commencement of the suit may be set off, although defendant has not paid for it, but only agreed to pay.[34] The beneficial interest in the claim sought to be set off must, however, be in defendant, and defendant cannot set off a claim assigned to him for the sole purpose of enabling him to collect it for the assignor, since, notwithstanding the assignment, the assignor is the real party in interest,[35] and defendant cannot set off claims held as collateral security.[36] A creditor's note may be set off by his debtor, although the latter obtained possession thereof at a discount and with a view to the set-off after he became indebted to the creditor,[37] and a debtor may purchase debts due from his creditor to others at a greater discount than legal interest, and demand a set-off of the full amount with legal interest;[38] and defendant purchasing claims to be used as set-off may set off the full amount of the claims and not merely the amount actually paid therefor;[39] but defendant cannot set off a claim purchased for a mere nominal consideration,[40] or assigned without consideration.[41] It is held to be against public policy to allow the assignment of parts of demands for the purpose of set-off, and such a set-off will therefore be disallowed.[42]

Illinois.— Sprigg *v.* Granneman, 36 Ill. App. 102.

Indiana.— Claflin *v.* Dawson, 58 Ind. 408.

Maryland.— Fusting *v.* Sullivan, 51 Md. 489; Foley *v.* Mason, 6 Md. 37.

Missouri.— McDonald *v.* Harrison, 12 Mo. 447.

Ohio.— Straus *v.* Eagle Ins. Co., 5 Ohio St. 59.

Pennsylvania.— Gump *v.* Goodwin, 172 Pa. St. 276, 33 Atl. 686; Shryock *v.* Basehore, 82 Pa. St. 159; McGowan *v.* Budlong, 79 Pa. St. 470.

England.— London, etc., Bank *v.* Narraway, L. R. 15 Eq. 93, 42 L. J. Ch. 329, 27 L. T. Rep. N. S. 572, 21 Wkly. Rep. 318.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 120.

But see Clopton *v.* Morris, 6 Leigh (Va.) 278.

If the cross demand has merely been borrowed for the purpose of set-off it will not be allowed. Cornell *v.* Donovan, 13 N. Y. St. 704; Russell *v.* Spear, 12 Phila. (Pa.) 230, 4 Wkly. Notes Cas. 476.

31. Sprigg *v.* Granneman, 36 Ill. App. 102.

32. Arnold *v.* Johnston, 28 How. Pr. (N. Y.) 249.

But where the principal debtor, to protect his sureties, assigns a judgment on condition that, if it can be set off in an action against the sureties, then the assignment is to be valid, and if not, then to be void, a set-off will be allowed; the principal being legally bound to protect the sureties. Cornell *v.* Donovan, 13 N. Y. St. 704.

33. Rumsey *v.* Robinson, 58 Iowa 225, 12 N. W. 243.

34. Everit *v.* Strong, 7 Hill (N. Y.) 585 [*affirming* 5 Hill 163].

35. Olmstead *v.* Scutt, 55 Conn. 125, 10 Atl. 519; Lewis *v.* Sheaman, 28 Ind. 427; Porter *v.* Davis, 2 How. Pr. (N. Y.) 30, holding that a judgment assigned in due form and a writing executed back to the assignor to the assignee, whereby the latter agrees to pay all moneys collected to the assignor, after deducting expenses of collection, do not create such an ownership in the judgment that the assignee can set it off against a judgment recovered against him by defendant in the judgment assigned. But see Graham *v.* Tilford, 1 Metc. (Ky.) 112, holding that defendant could plead as a set-off a claim against plaintiff belonging to a third person and assigned to defendant, under an agreement that defendant was to plead the claim as a set-off against plaintiff's debt and should account to the assignor for the amount he might be able to make in that way, and to reassign the balance that might remain.

In equity defendant will not be allowed to plead as a set-off a note assigned to enable the assignee to use it as a set-off, with the agreement that he should account for only so much as he should get the benefit of in the suit (Tinly *v.* Martin, 80 Ky. 463), or a claim for which he paid no consideration (Stone *v.* Buckner, 12 Sm. & M. (Miss.) 73).

36. Deavitt *v.* Eldridge, 73 Vt. 332, 50 Atl. 1057.

37. Foley *v.* Mason, 6 Md. 37; Clarke *v.* Magruder, 2 Harr. & J. (Md.) 77.

38. Young *v.* Miller, 7 B. Mon. (Ky.) 540.

39. Brackett *v.* Boering, 110 S. W. 276, 33 Ky. L. Rep. 292.

40. Proctor *v.* Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303, holding that a defendant who has paid a merely nominal consideration for a promissory note, and has agreed to pay a sum equal to one half of the proceeds that may be realized from the note, cannot make it available as a set-off to defeat an equitable assignee of the note, executed by such defendant to the maker of the note sought to be made available as a set-off.

41. Tinly *v.* Martin, 80 Ky. 463.

42. Stanberg *v.* Smythe, 13 Ohio St. 495.

3. Demands Acquired After Commencement of the Action.[43] Since the defense of set-off is regarded in the nature of a cross action,[44] it is almost universally held that a set-off can be made only of a demand existing and owned by defendant at the time of commencement of the action in which the set-off is sought to be interposed,[45] and claims acquired by defendant against plaintiff after commencement of the action cannot be interposed in an action by defendant as a set off,[46]

43. Proceedings constituting commencement of an action see Actions, 1 Cyc. 747.

44. See *supra*, I, B, 1.

45. *Alabama.*— Cox *v.* Cooper, 3 Ala. 256.

Connecticut.— Finch *v.* Ives, 28 Conn. 115, holding that where a judgment on which an action of debt was pending was pleaded in set-off in an action of assumpsit, and before the trial of the action in assumpsit a judgment was rendered in the action of debt for the amount or the original judgment, interest, and costs, the costs of the suit could not be set off with the rest of the judgment, but only the amount of the original judgment and interest.

Illinois.— Kelly *v.* Garrett, 6 Ill. 649.

Mississippi.— Carprew *v.* Canavan, 5 Miss. 370.

Pennsylvania.— Huling *v.* Hugg, 1 Watts & S. 418.

Canada.— Kent *v.* Monroe, 8 Ont. L. Rep. 723.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 121.

46. *Alabama.*— McDade *v.* Mead, 18 Ala. 214; Crayton *v.* Clark, 11 Ala. 787; Gross *v.* Van Wick, Minor 7.

Colorado.— Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

Georgia.— See Whitaker *v.* Pope, 48 Ga. 13.

Illinois.— Ellis *v.* Cothran, 117 Ill. 458, 3 N. E. 411; Pettis *v.* Westlake, 4 Ill. 535; Ewen *v.* Wilbor, 99 Ill. App. 132 [*affirmed* in 208 Ill. 492, 70 N. E. 575].

Indiana.— Balser *v.* Wood, 69 Ind. 122; Shannon *v.* Wilson, 19 Ind. 112; Bates *v.* Pritchett, 5 Ind. 22, 61 Am. Dec. 73.

Kansas.— Reynolds *v.* Thomas, 28 Kan. 810.

Massachusetts.— Jump *v.* Leon, 192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265.

Missouri.— Goza *v.* Sanford, 79 Mo. App. 95; Todd *v.* Crutsinger, 30 Mo. App. 145; Skaggs *v.* Given, 29 Mo. App. 612.

New Hampshire.— Hardy *v.* Corlis, 21 N. H. 356.

New Jersey.— Whitaker *v.* Turnbull, 18 N. J. L. 172.

New York.— Heidenheimer *v.* Wilson, 31 Barb. 636; Jefferson County Bank *v.* Chapman, 19 Johns. 322; Chambers *v.* Lewis, 11 Abb. Pr. 210 [*affirmed* in 28 N. Y. 454, 16 Abb. Pr. 433]; Johnson *v.* Comstock, 6 Hill 10; Carpenter *v.* Butterfield, 3 Johns. Cas. 145; Knapp *v.* Burnham, 11 Paige 330.

North Carolina.— Riddick *v.* Moore, 65 N. C. 382.

Ohio.— Straus *v.* Eagle Ins. Co., 5 Ohio St. 59; Johnson *v.* Spiegel, 4 Ohio Cir. Ct. 388, 2 Ohio Cir. Dec. 612.

Pennsylvania.— Speers *v.* Sterrett, 29 Pa. St. 192; Smith *v.* Ewer, 22 Pa. St. 116, 60 Am. Dec. 73; Pennell *v.* Grubb, 13 Pa. St. 552; Stewart *v.* U. S. Insurance Co., 9 Watts 126.

South Carolina.—Godley *v.* Barnes, 13 Rich. 161; Bishop *v.* Tucker, 4 Rich. 178 (holding that a defendant having in his possession at the commencement of the suit a note made by plaintiff, but not then assigned, cannot, although it be afterward and before trial assigned, set it off); Shepherd *v.* Turner, 3 McCord 249, 15 Am. Dec. 631 (holding that where defendant had made a conditional bargain for a note against plaintiff of a third person, but the agreement was not executed till after suit was brought, it was not available as a set-off).

England.— Eland *v.* Karr, 1 East 375; Elliott *v.* Crocker, 1 Ont. Pr. 13.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 121.

In Kentucky it is held that defendant may after suit brought purchase claims against plaintiff and set them off against plaintiff's cause of action. Overby *v.* Wells, 54 S. W. 955, 21 Ky. L. Rep. 1316. But a judgment obtained and assigned after commencement of a suit was in earlier decisions held to be not allowable in that suit. Hawthorn *v.* Roberts, Hard. 70; Caldwell *v.* Grundy, Ky. Dec. 224.

In Texas under Acts (1840), p. 62 (St. Feb. 5, 1840), defendant may plead in set-off any claim which he may have obtained before pleading it, but if he acquires such claim after suit brought plaintiff recovers costs of the action. Gaines *v.* Salmon, 16 Tex. 311; Thomas *v.* Young, 5 Tex. 253.

Under statute in Vermont the set-off must have been transferred and notice thereof given to plaintiff previous to the commencement of the action. Bragg *v.* Fletcher, 20 Vt. 351.

Presumption of ownership at commencement of action.— Where defendant uses a note payable to a third person, or bearer, as a set-off, the presumption is that defendant was the *bona fide* holder at the commencement of plaintiff's action, rendering such note available as a set-off. May *v.* Dorsett, 30 Ga. 116; Griffin *v.* Evans, 23 Ga. 438; Bates *v.* Pricket, 5 Ind. 22, 61 Am. Dec. 73. But see Kelly *v.* Garrett, 6 Ill. 649, holding that in case of set-off the law will not presume, merely from the priority of date of the notes to the day of suit, that defendant had held them from that date.

A defendant who has made a conditional bargain for a note against plaintiff in favor of a third person, but which agreement is not executed till after suit is brought, cannot set it off in that action. Shepherd *v.* Turner, 3 McCord (S. C.) 249, 15 Am. Dec. 631.

nor can such a claim be availed of by way of a counter-claim,[47] nor in compensation.[48]

4. Assigned Claim as Set-Off Against Assigned Cause of Action. In an action on an assigned demand defendant may set off a claim against plaintiff's assignor assigned to defendant before the assignment to plaintiff.[49]

5. Equitable Set-Off of Assigned Claim. In equity, as at law,[50] a claim against plaintiff purchased by defendant before suit may be set off against plaintiff's cause of action.[51] But a demand not owned by defendant at the commencement of the action cannot as a general rule be set off in equity;[52] and although plaintiff is insolvent a demand against him purchased with full knowledge of the insolvency does not afford equitable ground to deviate from the rule.[53]

N. Tendency to Defeat or Diminish Plaintiff's Claim. In some of the codes it is provided that a counter-claim must tend to diminish or defeat plaintiff's recovery,[54] and it is accordingly held under this provision that a counter-claim not so tending will be disallowed.[55] But a proposed counter-claim which shows

47. *Iowa.*— Morrison Mfg. Co. *v.* Rimerman, 127 Iowa 719, 104 N. W. 279.

Kansas.— Arkansas City First Nat. Bank *v.* Hasie, 57 Kan. 754, 48 Pac. 22, holding that a cause of action accruing from a conspiracy between defendant and another to bring an unjustifiable suit against him and the bringing of such suit in pursuance of the conspiracy cannot be set up as a counter-claim in the suit complained of.

New York.— John Church Co. *v.* Clarke, 77 Hun 467, 28 N. Y. Suppl. 870; Mayo *v.* Davidge, 44 Hun 342; Moody *v.* Steele, 11 N. Y. Civ. Proc. 205 [*reversing* 10 N. Y. Civ. Proc. 67].

North Carolina.— Russell *v.* Koonce, 104 N. C. 237, 10 S. E. 256.

South Carolina.— Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891.

South Dakota.— Kirby *v.* Jameson, 9 S. D. 8, 67 N. W. 854.

Wisconsin.— Rickard *v.* Kohl, 22 Wis. 506.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 121.

48. Bean *v.* Mississippi Union Bank, 5 Rob. (La.) 333.

49. Triplett *v.* Bradley, 6 T. B. Mon. (Ky.) 354; Phipps *v.* Shegogg, 30 Miss. 241; Barber *v.* Spencer, 11 Paige (N. Y.) 517 (where, although defendant had actually paid for the assigned claim before the assignment to plaintiff, the written assignment was not made till thereafter); McGowan *v.* Budlong, 79 Pa. St. 470. But see Parker *v.* Kendall, 3 Vt. 540, holding that the maker of a promissory note when sued by the indorsee will not be allowed an offset of notes which he has purchased against the payee of the note on which he is sued, unless he has perfected his right of action against the payee by giving him notice that he is the holder of said notes previous to the assignment to plaintiff.

50. See *supra*, V, M, 3.

51. Martin *v.* Mohr, 56 Ala. 221 (holding that a mortgagor of personal property after default in the payment of the secured debt, but before any action has been taken on account of such default, may lawfully procure by purchase and assignment from a third person a debt due from the mortgagee, who is insolvent; and if the mortgagee refuses to allow the assigned debt as a set-off, the mortgagor may come into equity to establish a set-off, and enjoin a sale under the mortgage); Bennett *v.* Hollis, 9 Tex. 437. But see Breen *v.* Seward, 11 Gray (Mass.) 118, holding that upon a suit in equity to redeem land from a mortgage given to secure negotiable promissory notes, brought against one to whom the notes were indorsed and the mortgage delivered before the notes became due, but to whom the mortgage was not assigned until afterward, plaintiff cannot set off against defendant claims upon the mortgagee, acquired by plaintiff after such indorsement and delivery and before maturity of the notes or assignment of the mortgage.

52. Knapp *v.* Burnham, 11 Paige (N. Y.) 330.

Unliquidated and disputed claims against plaintiff, purchased by defendant after suit commenced against him, will not, even in equity, be allowed in set-off. Dangerfield *v.* Rootes, 1 Munf. (Va.) 529.

53. Pond *v.* Harwood, 139 N. Y. 111, 34 N. E. 768; Enter *v.* Quesse, 30 S. C. 126, 8 S. E. 796, 14 Am. St. Rep. 891.

54. See the codes and statutes of the several states.

55. *California.*— Yorba *v.* Wade, 109 Cal. 107, 38 Pac. 48, 41 Pac. 793, holding that where the relief sought will not to any extent defeat, overcome, or affect plaintiff's cause of action, or lessen, or modify, or interfere with the relief to which plaintiff is entitled, it is not a counter-claim.

Colorado.— Bannerot *v.* McClure, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. N. S. 126.

Minnesota.— Memphis First Nat. Bank *v.* Kidd, 20 Minn. 234, holding that the allegation in the answer of a junior judgment creditor in an action to foreclose a mortgage that a portion of the mortgage debt is also secured by a mortgage on the property in another state not subject to the lien of his judgment, and to which plaintiff should first resort, does not constitute a counter-claim.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345; Babcock *v.* Maxwell, 21 Mont. 507, 54 Pac. 943, holding that an answer in

that plaintiff's alleged claim has not in fact any existence is held not to be a counter-claim.[56]

VII. Operation and Effect.

A. Compensation Between Cross Demands — 1. In General. Where defendant's set-off equals plaintiff's claim, plaintiff cannot recover;[57] if defendant's set-off falls short of plaintiff's claim plaintiff is defeated *pro tanto*, but may recover the difference;[58] and the same rule applies in the case of a counter-

replevin that plaintiff is estopped from claiming the goods because he permitted defendant to take possession thereof as assignee for the benefit of creditors of one claiming to be the owner and acquiesced in defendant's disposal thereof, as such assignee does not tend to defeat or diminish plaintiff's recovery, and is therefore not a counter-claim within Code Civ. Proc. § 691.

New York.— Lipman *v.* Jackson Architectural Iron-Works, 128 N. Y. 58, 27 N. E. 975 [*affirming* 13 N. Y. Suppl. 284] (holding that in a suit to foreclose a mortgage against which a mechanic's lien has been filed, under Code Civ. Proc. § 501, providing that a counter-claim must tend to defeat or diminish plaintiff's recovery, materialmen could not set up as a counter-claim the orders which the mortgagees had promised to pay on condition that their lien should be subordinated to that of the mortgagors); Nichols *v.* Riley, 118 N. Y. App. Div. 404, 103 N. Y. Suppl. 554; Hudson River Power Transmission Co. *v.* United Traction Co., 98 N. Y. App. Div. 568, 91 N. Y. Suppl. 179 [*affirming* 43 Misc. 205, 88 N. Y. Suppl. 448]; Sugden *v.* Magnolia Metal Co., 58 N. Y. App. Div. 236, 68 N. Y. Suppl. 809 [*affirmed* in 171 N. Y. 697, 64 N. E. 1126]; Eckert *v.* Gallien, 24 Misc. 485, 53 N. Y. Suppl. 879 [*reversed* on other grounds in 40 N. Y. App. Div. 525, 58 N. Y. Suppl. 85]; Drake *v.* Satterlee, 16 N. Y. Suppl. 334 (holding that an answer by a defendant, who was made a party as a claimant of a fund in court in which he asks no affirmative relief, but only that the fund be awarded to him, does not constitute a counter-claim within Code Civ. Proc. § 501, providing that a counter claim must tend to diminish or defeat plaintiff's recovery); Williams *v.* Williams, 11 N. Y. Suppl. 753, 25 Abb. N. Cas. 217 [*reversed* on other grounds in 12 N. Y. Suppl. 599] (holding that in an action to recover the entire estate left by a decedent under a contract by which decedent agreed to bequeath all his property to plaintiff, an answer which alleges that plaintiff was indebted to decedent at the time of the latter's death does not tend to diminish or defeat plaintiff's recovery, within Code Civ. Proc. § 501, defining counter-claims, since a debt due from plaintiff is a part of the estate, all of which is sued for).

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," §§ 71, 72.

A counter-claim must afford protection in some way against plaintiff's demand for judgment, either in whole or in part, and must therefore consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint; it must present an answer to plaintiff's demand for relief, must show that he is not entitled, according to law, or under the application of just principles of equity to judgment in his favor, or to judgment to the extent claimed in the complaint and must therefore contain not only the substance of what is necessary to sustain an action in favor of defendant against plaintiff, but it must also operate in some way to defeat, in whole or in part, plaintiff's right of recovery in the action. Mattoon *v.* Baker, 24 How. Pr. (N. Y.) 329.

It must be something that resists or modifies some state of facts in (Leavenworth *v.* Packer, 52 Barb. (N. Y.) 132), or which qualifies, at least in some degree (Dietrich *v.* Koch, 35 Wis. 618) plaintiff's cause of action.

56. Hudson River Power Transmission Co. *v.* United Traction Co., 98 N. Y. App. Div. 568, 91 N. Y. Suppl. 179 [*affirming* 43 Misc. 205, 88 N. Y. Suppl. 448]. And see *supra*, V, F.

A claim which cannot be proved till it is shown that plaintiff had no claim does not tend to defeat or diminish plaintiff's claim and is not a counter-claim, within Code Civ. Proc. § 501. Schenectady *v.* Furman, 61 Hun (N. Y.) 171, 15 N. Y. Suppl. 724 [*affirmed* in 145 N. Y. 482, 40 N. E. 221, 45 Am. St. Rep. 624].

57. Elliot *v.* Heath, 14 N. H. 131; Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. (Tenn.) 169.

58. Shreve *v.* Skeele, 31 Mo. 216 (holding that where plaintiff brought an action on an account amounting in the aggregate to a stated sum, but reduced by certain credits, and defendant filed a set-off amounting to a fixed sum, including items identical with corresponding items in plaintiff's credit, both accounts being admitted to be true, plaintiff was entitled to judgment, except so far as reduced by defendant's set-off, consisting of items not included in plaintiff's credits); Elliot *v.* Heath, 14 N. H. 131; Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. (Tenn.) 169.

Where the balance on book in a declaration in offset was found for the original plaintiff, that balance was applied in the original action and judgment rendered for the ultimate balance between the parties in the same manner as in a plea in set-off and replication in set-off in assumpsit. Cross *v.* Haskins, 13 Vt. 536.

claim,[59] and in reconvention,[60] and compensation;[61] and although there may be a finding in favor of each party, only one judgment is proper, and that for the difference between the amounts of the findings and for the party in whose favor is the greater amount, and for costs;[62] and a verdict for defendant on his cross demand does not of itself extinguish plaintiff's claim, but if both parties establish their claims judgment will be rendered in favor of the party establishing the greater claim.[63] Where plaintiff sues on a demand bearing interest, and defendant pleads a discount not drawing interest, plaintiff is entitled to calculate interest on his whole demand up to the time of the verdict.[64] Conversely, where plaintiff's demand does not bear interest, and defendant pleads a demand drawing interest, the jury must give interest on the set-off to the time the verdict is rendered in the action, and reduce plaintiff's demand by the amount of the set-off and such interest.[65] Reconvention may be pleaded in a supplemental petition, where defendant has set up a reconventional demand superior in amount to the sum claimed in the petition.[66]

2. Election of Defendant to Interpose Cross Demand or Bring Independent Action. Mutual cross-demands do not as a general rule extinguish each other by the mere operation of the law regulating set-offs, without the acts of the parties,[67] and a defendant holding a claim against plaintiff is not compelled to avail himself of it but has the option of pleading the same by way of set-off in an action against him, or of making it the ground of an independent action,[68]

Where, on appeal from a justice's court, the proof shows a larger sum due plaintiff than is claimed in his complaint, and defendant proves a set-off less than the amount of plaintiff's claim, the measure of recovery is the sum left after deducting the amount of the set-off from the amount claimed, and not from the greater amount proved to be due plaintiff. Long *v.* Bakefield, 48 Ala. 608.

Where defendant pleads a set-off, and makes a deposit in court as a tender of the amount of difference between plaintiff's claim and the amount of the set-off, plaintiff is entitled to recover the amount of his demand, less the amount of the set-off the jury may find to be due from him to defendant. Williamson *v.* Baley, 78 Mo. 636.

59. Moore *v.* Caruthers, 17 B. Mon. (Ky.) 669; Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479; Story *v.* Maclay, 3 Mont. 480.

A counter-claim need not equal plaintiff's demand to be a good counter-claim. Mostyn *v.* West Mostyn Coal, etc., Co., 1 C. P. D. 145, 45 L. J. C. P. 401, 34 L. T. Rep. N. S. 324, 24 Wkly. Rep. 401.

60. Payne *v.* Amos Kent Brick, etc., Co., 110 La. 750, 34 So. 763.

61. Stewart *v.* Harper, 16 La. Ann. 181.

62. Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512.

63. Langford *v.* Langford, 136 Cal. 507, 69 Pac. 235.

64. Rogers *v.* Russell, 1 Nott & M. (S. C.) 24.

65. Morse *v.* Ellerbe, 4 Rich. (S. C.) 600.

66. Parker *v.* Starkweather, 6 Mart. N. S. (La.) 609.

67. Small *v.* Strong, 2 Ark. 198; Nix *v.* Ellis, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111; Post *v.* Carmalt, 2 Watts & S. (Pa.) 70, 37 Am. Dec. 484; Hinckly *v.* Walters, 9 Watts (Pa.) 179, 8 Watts 260; Carmalt *v.* Post, 8 Watts (Pa.) 406; Himes *v.* Barnitz, 8 Watts (Pa.) 39. But see Moore *v.* Gould, 151 Cal. 723, 91 Pac. 616; Serhant *v.* Haker, 73 Ohio St. 250, 76 N. E. 943; Oliver *v.* Canan, 71 Ohio St. 360, 73 N. E. 466.

68. *Alabama.*— De Sylva *v.* Henry, 3 Port. 132.

California.— Stoddard *v.* Treadwell, 26 Cal. 294.

Illinois.— Quick *v.* Lemon, 105 Ill. 578; Farrow *v.* Flatt, 61 Ill. App. 118, holding that defendant is not bound to urge his claim of set-off when plaintiff's demand is presented, nor even when he is sued, he may bring a separate suit for his set-off, or he may use it as a cross demand in plaintiff's action, and the law raises no implication against him, because he does not interpose it when plaintiff's demand is presented.

Indiana.— Rankin *v.* Harper, 4 Ind. 585.

North Carolina.— Battle *v.* Thompson, 65 N. C. 406; Mizell *v.* Moore, 29 N. C. 255.

New York.— Fabbricotti *v.* Launitz, 3 Sandf. 743; Batterman *v.* Pierce, 3 Hill 171.

North Carolina.— Mizell *v.* Moore, 29 N. C. 255.

Pennsylvania.— Himes *v.* Barnitz, 8 Watts 39.

Virginia.— Trimyer *v.* Pollard, 5 Gratt. 460.

England.— Eastmure *v.* Laws, 2 Arn. 54, 5 Bing. N. Cas. 444, 7 Dowl. P. C. 431, 3 Jur. 460, 8 L. J. C. P. 236, 7 Scott 461, 33 E. C. L. 241; Brown *v.* Pigeon, 2 Campb. 594.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 133.

In New York, 2 Rev. St. p. 234, § 48, authorizes defendant in certain cases and under certain conditions to set off demands which

and the rule is the same in regard to recoupment,[69] and counter-claim; [70] and plaintiff has no option or power to require him to do so, or to apply the subject of the set-off as a payment on his demand, in the absence of any agreement authorizing such application; [71] but defendant having exercised the option cannot thereafter recede from his stand, and must abide by his choice,[72] and if he elects to bring the cross action he is bound thereby, at least till he abandons it by dismissing the suit,[73] and cannot thereafter sue for damages for the same injury.[74] Where a debtor has a set-off equally applicable to two defendants against him, it is not for him to elect which of the demands he will satisfy by his set-off; but the court will direct the application according to the equities between the parties.[75]

3. Admission of Plaintiff's Cause of Action. By interposing by way of cross-demand to plaintiff's cause of action and pleading a recoupment,[76] set-off,[77]

he had against plaintiff, and by section 55, if defendant neglects to plead or give notice of any set-off, which according to the preceding provisions might have been allowed to him under the trial of the court, he is forever after precluded from maintaining an action to recover the same or any part thereof. There is nothing in the code requiring a defendant to avail himself of a counter-claim in an action or in default thereof be precluded from maintaining an action. The Revised Statutes in the cases specified in it must govern this. Welch *v.* Hazelton, 14 How. Pr. 97.

Defendant is not required to plead his equitable set-offs at law, but may come into equity, after a judgment at law, to establish his set-offs and enjoin the judgment. De Sylva *v.* Henry, 3 Port. (Ala.) 132; Hall *v.* U. S. Insurance Co., 5 Gill (Md.) 484; Terry *v.* Wooding, 2 Patt. & H. (Va.) 178.

69. *Arkansas.*—Desha *v.* Robinson, 17 Ark. 228.

Delaware.— Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (1906) 62 Atl. 1054.

Indiana.— Rankin *v.* Harper, 4 Ind. 585.

Maine.— Winthrop Sav. Bank *v.* Jackson, 67 Me. 570, 24 Am. Rep. 56.

Michigan.— Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170; Ward *v.* Fellers, 3 Mich. 281.

New York.— Dunham *v.* Bower, 77 N. Y. 76, 33 Am. Rep. 570; Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355; Bellinger *v.* Craigue, 31 Barb. 534; Ogden *v.* Coddington, 2 E. D. Smith 317; Batterman *v.* Pierce, 3 Hill 171.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 133.

70. *California.*—Ayres *v.* Bensley, 32 Cal. 620, holding that, although Practice Act, §§ 46, 199, permits defendant to set out new matter in his answer constituting a counter-claim, he is not compelled to do so, but may make it a separate cause of action.

Illinois — Quick *v.* Lemon, 105 Ill. 578.

Kentucky.— Waller *v.* Bowles, 10 Ky. L. Rep. 875.

Michigan.— Baker *v.* Morehouse, 48 Mich. 334, 12 N. W. 170, holding, however, that the statute discourages the withholding of such demands by refusing to give costs in a subsequent independent suit thereon.

New York.— Gillespie *v.* Torrance, 25 N. Y. 306, 82 Am. Dec. 355 [*affirming* 4 Bosw. 36, 7 Abb. Pr. 462]; Miller *v.* Baillard, 124 N. Y. App. Div. 555, 108 N. Y. Suppl. 973; Inslee *v.* Hampton, 8 Hun 230; Peck *v.* Minot, 4 Rob. 323 [*affirmed* in 4 Transcr. App. 27]; Halsey *v.* Carter, 1 Duer 667; Lignot *v.* Redding, 4 E. D. Smith 285; John Douglass Co. *v.* Moler, 3 Misc. 373, 22 N. Y. Suppl. 1045, 30 Abb. N. Cas. 293; Potter *v.* Gates, 9 N. Y. Suppl. 87; Tuckerman *v.* Corbin, 66 How. Pr. 404; Welch *v.* Hazelton, 14 How. Pr. 97.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 133.

In actions before justices of the peace it is sometimes provided by statute that defendant must set off any claim he has against plaintiff, and failure to do so bars him from maintaining an action thereon (Felpel *v.* Hershour, 128 Pa. St. 587, 18 Atl. 419; Shoup *v.* Shoup, 15 Pa. St. 361; Stanton *v.* Gunther, 1 Lack. Leg. Rec. (Pa.) 404; Turk *v.* Shein, 55 W. Va. 466, 47 S. E. 253. See Inslee *v.* Hampton, 8 Hun (N. Y.) 230), or from setting up such set-off in a subsequent action (Serjeant *v.* Holmes, 3 Johns. (N. Y.) 428).

71. Wharton *v.* King, 69 Ala. 365.

72. Hunt *v.* Taft, 100 Mass. 91.

73. Rankin *v.* Harper, 4 Ind. 585.

74. McLane *v.* Miller, 12 Ala. 643; Brunson *v.* Martin, 17 Ark. 270; Britton *v.* Turner, 6 N. H. 481, 26 Am. Dec. 713.

75. Tallmadge *v.* Fishkill Iron Co., 4 Barb. (N. Y.) 382.

76. Jones *v.* Moore, 42 Mo. 413; Nichols *v.* Dusenbury, 2 N. Y. 283; Baker *v.* Nussbaum, 1 Hilt. (N. Y.) 549.

77. *Alabama.*— St. Louis, etc., Packet Co. *v.* McPeters, 124 Ala. 451, 27 So. 518.

Illinois.— Raymond *v.* Kerker, 81 Ill. 381.

Kentucky.— Taylor *v.* Weister, 1 Litt. 355.

Missouri.— Jones *v.* Moore, 42 Mo. 413.

New York.— Gregory *v.* Trainor, 4 E. D. Smith 58.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 127.

In Minnesota the former rule that a cause of action upon the contract set up in the complaint was admitted by the pleading of the counter-claim in the answer (Paine *v.* Sherwood, 21 Minn. 225; Paine *v.* Sherwood, 19 Minn. 315; Koempel *v.* Shaw, 13 Minn. 488; Whalon *v.* Aldrich, 8 Minn. 346; Mason *v.* Heyward, 3 Minn. 182) was abrogated by

counter-claim,[78] or reconvention,[79] defendant acknowledges the justice of plaintiff's demand; this leaves defendant to proof of his set-off;[80] and where defendant pleads a set-off as his only plea, and fails to prove the same, judgment must be for plaintiff's demand; [81] and while one pleading compensation may admit only part of his opponent's claim, and set up an offset against such portion,[82] if this is not done and a plea of compensation is made generally this admits the correctness of the demand sued on.[83]

4. Right to Judgment For Excess Over Plaintiff's Cause of Action — a. General Rules. Matter availed of by way of recoupment only goes in reduction of damages and cannot be made the ground for an affirmative judgment for damages in defendant's favor,[84] and defendant is barred from any other suit or recoupment

Laws (1883), c. 101, § 1, providing that "the pleading of a set-off or counter-claim by a defendant . . . shall not be held or construed to be an admission of any cause of action on the part of the plaintiff against such defendant" (Trainor *v.* Worman, 34 Minn. 237, 25 N. W. 401 [*overruling* on reargument Trainor *v.* Worman, 33 Minn. 484, 24 N. W. 297]).

A plea of set-off to a part of plaintiff's demand, and payment of the residue, is a good defense; the plea of set-off admitting the existence of plaintiff's debt, so that, when combined with the payment of the balance of plaintiff's demand, the defense to the action is complete. Taylor *v.* Weister, 1 Litt. (Ky.) 355.

In Pennsylvania it is held that notwithstanding Act (1705) (Purdon Dig. 668), which authorizes a plea of set-off only when defendant cannot gainsay the deed, bargain, or assumption on which he is sued, under the prevailing practice defendant, sued on a contract, may deny the contract and at the same time claim a set-off. Snyder *v.* Rainey, 31 Pittsb. Leg. J. N. S. 49.

78. Skinker *v.* Clute, 9 Nev. 342; Bush *v.* Hall, 95 N. C. 82.

79. Cole *v.* Bartlett, 4 La. 130, holding that a reconvention for damages for nondelivery of goods shipped by a consignee, when sued for freight, admits his ownership and authorizes personal judgment against him, under a prayer for general relief, on a claim to be satisfied out of the goods.

80. Gregory *v.* Trainor, 4 E. D. Smith (N. Y.) 58.

81. Raymond *v.* Kerker, 81 Ill. 381.

82. Dorwin *v.* Wiltz, 11 La. Ann. 514. See also Davis *v.* Stone, 9 La. Ann. 126.

83. Ashley *v.* Scholars, 22 La. Ann. 442; Dorvin *v.* Wiltz, 11 La. Ann. 514.

84. *Georgia.*— Lufburrow *v.* Henderson, 30 Ga. 482, holding that the comparatively modern doctrine of recoupment is but a liberal and beneficent improvement upon the old doctrine of failure of consideration, and looks through the whole contract, treating it as an entirety, and treating the things done, and stipulated to be done on each side, as the consideration for the things done, and stipulated to be done, on the other, and when either party seeks redress for the breach of stipulations in his favor, it sums up the grievances on each side, instead of plaintiff's side only, strikes a balance, and gives the difference to plaintiff, if it is in his favor, but it has not yet been carried so far as to give defendant the difference which may be found in his favor.

Illinois.— Waterman *v.* Clark, 76 Ill. 428; Streeter *v.* Streeter, 43 Ill. 155; Stow *v.* Yarwood, 14 Ill. 424; G. *v.* Brecht Butchers' Supply Co. *v.* Stern, 122 Ill. App. 437; Steinhoff *v.* Centralia Electric Light, etc., Co., 47 Ill. App. 454; Burlingame *v.* Davis, 13 Ill. App. 602.

Indiana.— Holcraft *v.* Mellott, 57 Ind. 539.

Michigan.— Ward *v.* Fellers, 3 Mich. 281.

Mississippi.— Fowler *v.* Payne, 52 Miss. 210; Fowler *v.* Payne, 49 Miss. 32.

New Hampshire.— Union Bank *v.* Blanchard, 65 N. H. 21, 18 Atl. 90, holding that where defendant, in an action for the price of goods, pleads by way of recoupment damages resulting from a breach by plaintiff of his contract as to the quality of the goods, he can only have judgment for costs, although his damages exceed the amount of plaintiff's claim.

New York.— Classen *v.* Leopold, 2 Sweeny 705 (holding that in an action *ex delicto* against an innkeeper by a guest for the recovery of damages for the loss of his goods, the innkeeper may recoup a claim for board due him by the guest against any damages the guest may recover; but he cannot have a balance certified in his favor); Boston Silk, etc., Mills *v.* Eull, 37 How. Pr. 299; Sickles *v.* Pattison, 14 Wend. 257, 28 Am. Dec. 527.

North Carolina.— Hurst *v.* Everett, 91 N. C. 399; Raisin *v.* Thomas, 88 N. C. 148; Francis *v.* Edwards, 77 N. C. 271.

Pennsylvania.— Henion *v.* Morton, 2 Ashm. 150.

Vermont.— Davenport *v.* Hubbard, 46 Vt. 200, 14 Am. Rep. 620.

West Virginia.— Natural Gas Co. *v.* Healy, 33 W. Va. 102, 10 S. E. 56.

United States.— Dushane *v.* Benedict, 120 U. S. 630, 7 S. Ct. 696, 30 L. ed. 810.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 130.

In Alabama under Code (1886), § 2683, on a plea of recoupment, if defendant's claim exceeds plaintiff's demand defendant may have judgment for the excess. Ewing *v.* Shaw, 83 Ala. 333, 3 So. 692.

In Minnesota under Comp. St. c. 57, § 24, a defense by way of recoupment may not only bar plaintiff's claim, but may also entitle

for such balance or excess over plaintiff's claim; [85] nor can defendant recoup his whole damages and, after applying them in the first place to plaintiff's demand, then recover an excess by way of set-off; [86] but defendant in set-off may recover the excess of his claim over plaintiff's demand,[87] and similarly, where defendant pleads and proves a counter-claim which exceeds plaintiff's demand, defendant should have judgment for the excess,[88] and the same rule applies to reconvention; [89] but it has been held that defendant under a counter-claim can recover the excess over plaintiff's recovery only where plaintiff succeeds as to some part of his claim.[90] Where defendant pleads a set-off, plaintiff cannot, by refusing to proceed with the case, defeat defendant's right to recover under his set-off,[91] or counter-claim; [92]

defendant to damages. Harlan *v.* St. Paul, etc., R. Co., 31 Minn. 427, 18 N. W. 147; Smith *v.* Dukes, 5 Minn. 373; Mason *v.* Hayward, 3 Minn. 182.

In Michigan the former rule was that the excess could not be recovered in recoupment (McHardy *v.* Wadsworth, 8 Mich. 349; Ward *v.* Fellers, 3 Mich. 281); but the benefits of recoupment have been so far extended by statute as to entitle defendant to recover the balance when the damages proved by him exceed the demand established in favor of plaintiff (Chandler *v.* Childs, 42 Mich. 128, 3 N. W. 297).

85. Edgemoor Iron Co. *v.* Brown Hoisting Mach. Co., (Del. 1906) 62 Atl. 1054.

Judgment on a set-off or counter-claim as a bar to an action for recovery of the balance see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 450; JUDGMENTS, 23 Cyc. 1201.

86. Ellsworth *v.* Brown, 55 N. H. 396.

Defendant cannot split up his claim and use part of it to extinguish plaintiff's demand and bring suit for the residue. Bellinger *v.* Craigue, 31 Barb. (N. Y.) 534.

87. *Georgia.*— Petit *v.* Teal, 57 Ga. 145.

Illinois.— Corcoran *v.* Lehigh, etc., Coal Co., 138 Ill. 390, 28 N. E. 759; Eddie *v.* Eddie, 61 Ill. 134; Holmes *v.* McKennan, 120 Ill. App. 320; Lloyd *v.* Manufacturers', etc., Warehouse Co., 102 Ill. App. 551; Steinhoff *v.* Electric Light, etc., Co., 47 Ill. App. 454.

Massachusetts.— Truesdell *v.* Wallis, 4 Pick. 63.

Michigan.— Lafferty *v.* Lorimer, 86 Mich. 591, 49 N. W. 586.

Missouri.— Hay *v.* Short, 49 Mo. 139.

Ohio.— Gordon *v.* Steinmetz, 71 Ohio St. 372, 73 N. E. 512.

Pennsylvania.— Jennings *v.* Hare, 104 Pa. St. 489; Good *v.* Good, 9 Watts 567; Chapman *v.* Erwin, 2 Lanc. L. Rev. 233. But see Bayne *v.* Gaylord, 3 Watts 301.

Tennessee.— Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169; Overton *v.* Phelan, 2 Head 445; McKernon *v.* Hall, 1 Yerg. 397.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 130.

In Tennessee the principle of set-off as originally introduced by statute was restricted in its operation to the abatement or extinguishment of plaintiff's demand as the case might be; it had no greater scope (Brazelton *v.* Nashville, etc., R. Co., 3 Head 570), but by the act of 1852, chapter 259, section 2, it was enacted that where the set-off exceeded plaintiff's claim the court should give judgment for excess (East Tennessee etc., R. Co. *v.* Galbraith, 1 Heisk. 482; Galbraith *v.* East Tennessee, etc., R. Co., 11 Heisk. 169; Brazelton *v.* Nashville, etc., R. Co., *supra*).

A debt due to one of several defendants, although it may be a good defense to the action, does not authorize a judgment in his favor for the excess of his set-off. Riddle *v.* McLester-Van Hoose Co., 145 Ala. 307, 40 So. 101; Locke *v.* Locke, 57 Ala. 473.

88. *Indiana.*— Love *v.* Oldham, 22 Ind. 51; Gordon *v.* George, 12 Ind. 408.

Kentucky.— Moore *v.* Caruthers, 17 B. Mon. 669.

Minnesota.— Mason *v.* Heyward, 3 Minn. 182.

Missouri.— Turney *v.* Baker, 103 Mo. App. 390, 77 S. W. 479; Hitchcock *v.* Baughan, 44 Mo. App. 42.

New York.— Grogan *v.* McMahon, 4 E. D. Smith 754, 6 Abb. Pr. 306; Ogden *v.* Coddington, 2 E. D. Smith 317; New York *v.* Wood, 4 Abb. Pr. N. S. 332.

North Carolina.— Hurst *v.* Everett, 91 N. C. 399; Raisin *v.* Thomas, 88 N. C. 148; McClenahan *v.* Cotten, 83 N. C. 332; Francis *v.* Edwards, 77 N. C. 271.

Ohio.— West *v.* Middock, 16 Ohio St. 417.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 130.

On a reference of a claim against a decedent under 2 Rev. St. p. 88, § 36, his representatives can only avail themselves of a set-off or counter-claim to the extent necessary to extinguish the claimant's demand. Mowry *v.* Peet, 88 N. Y. 453.

Where plaintiff's demand exceeds defendant's counter-claim defendant cannot have an affirmative judgment on the counter-claim. Hanson *v.* Skogman, 14 N. D. 445, 105 N. W. 90.

89. Zeringue *v.* Rixner, 14 La. 385; Innis *v.* Ware, 1 Mart. N. S. (La.) 643; Stewart *v.* Insall, 9 Tex. 397.

90. Kelsy *v.* Tremaine, 29 How. Pr. (N. Y.) 439; Baker *v.* Grigsby, 7 Heisk. (Tenn.) 627.

91. Simon *v.* Myers, 68 Ga. 74. But see Nordmanser *v.* Hitchcock, 40 Mo. 178, holding that where defendant answers and pleads set-off or counter-claim, he cannot, where plaintiff fails to appear at the trial, take a verdict and judgment for the amount of his counter-claim.

92. Gooch *v.* Isbell, (Tex. Civ. App. 1903) 77 S. W. 973.

but as to reconvention it has been held that where plaintiff takes a nonsuit, defendant's reconvention will be disregarded, if he be left as he was before the suit.[93] Where defendant in set-off proves a certain amount due him from plaintiff, and plaintiff fails to show a right of recovery on his alleged cause of action, defendant is entitled to judgment for the full amount of his claim;[94] but a certificate of the balance in favor of defendant pleading a set-off can only be had where the verdict is for defendant,[95] the amount defendant could recover in a cross action being the measure of what he can recover in set-off[96] or counter-claim.[97]

b. Necessity of Mutuality of Debts and Demands — Assigned Causes of Action. A set-off against plaintiff's action to authorize a balance in favor of defendant must be of a matter mutually subsisting between the parties,[98] and the same rule applies to a counter-claim;[99] and a party who has a defense by way of recoupment will not be permitted to seek affirmative relief by making another person in interest a party defendant, by way of subrogation.[1] In an action by an assignee a claim against the assignor can be allowed as a set-off,[2] counter-claim,[3] or reconvention,[4] only to the extent of the claim sued upon, and judgment cannot be rendered against the assignee for the excess. But the assignment of plaintiff's claim, after the commencement of the action and before trial, will not prevent defendant from entering judgment upon a verdict for a balance in his favor, where payment and a set-off were pleaded, and the trial was between the original parties to the record.[5]

B. Withdrawal or Abandonment of Cross Demand. A defendant who appears and files an answer of set-off and abandons his defense and does not appear at the trial waives his right in respect to the set-off in that action;[6] but

93. McDonough *v.* Hart, 3 La. 457.

94. Moore *v.* Wright, 4 Ill. App. 443; Snyder *v.* Rainey, 198 Pa. St. 356, 47 Atl. 998. See also Kelsy *v.* Tremaine, 29 How. Pr. (N. Y.) 439.

95. Hepburn *v.* Hoag, 4 Cow. (N. Y.) 57.

96. Overton *v.* Phelan, 2 Head (Tenn.) 445.

97. Akerly *v.* Vilas, 21 Wis. 88.

98. Locke *v.* Locke, 57 Ala. 473 (holding that a debt to one of several defendants by a sole plaintiff, although a good defense to the action, does not authorize judgment in favor of defendant against plaintiff for the excess); Scott *v.* Rivers, 1 Stew. & P. (Ala.) 19. See Jasper Mercantile Co. *v.* O'Rear, 112 Ala. 247, 20 So. 583.

99. Wells *v.* Boyd, 1 Duv. (Ky.) 366.

In an action by a trustee as such, only so much of a demand existing against the person whom plaintiff represents as will satisfy plaintiff's demand can be allowed as a counter-claim. U. S. Trust Co. *v.* Stanton, 139 N. Y. 531, 34 N. E. 1098.

1. Lyman *v.* Corwin, 27 Ark. 580.

2. *Indiana.*— Casad *v.* Hughes, 27 Ind. 141.

Kansas.— Leavenson *v.* Lafontane, 3 Kan. 523.

Minnesota.— Webb *v.* Michener, 32 Minn. 48, 19 N. W. 82.

New York.— Kast *v.* Kathern, 3 Den. 344.

Tennessee.— Gatewood *v.* Denton, 3 Head 380.

See 43 Cent. Dig. tit. "Set-Off and Counter-Claim," § 132.

But see Butler *v.* Mitchell, 128 Ga. 431, 57 S. E. 764, holding that where the holder of a note other than the payee sues thereon, and there is an issue between the parties as to the *bona fides* of the holder, or the payment of a valuable consideration for the note, and it is questionable whether defendant can set off the amount due under a contract against the amount claimed by plaintiff on the note, and plaintiff is the receiver of an insolvent bank, and defendant has another demand against the insolvent bank arising from tort, and he pleads both claims in a court of equity by way of set-off against plaintiff's demand, he is entitled to judgment for the excess.

Where a corporation holds the book-accounts of another corporation under a naked assignment, a set-off by the assignor to a debtor is available to the debtor against the assignee only to the extent of the assigned debt. Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. 872.

3. Norton *v.* Foster, 12 Kan. 44 (holding that the maker of a note who sets up a claim against the payee by way of a counter-claim in an action on the note by an assignee under an assignment after maturity is not entitled to an affirmative judgment in his favor and against the assignee for any excess of his demand over and above the amount of the note); Leavenson *v.* Lafontane, 3 Kan. 523; Price *v.* Gatliff, 110 S. W. 332, 33 Ky. L. Rep. 324; Nell *v.* Power, 107 S. W. 694, 32 Ky. L. Rep. 952; Stirn *v.* Hoffman House Co., 7 Misc. 241, 27 N. Y. Suppl. 271 [*affirmed* in 8 Misc. 246, 28 N. Y. Suppl. 724]; Levy *v.* Ash, 88 N. Y. Suppl. 131; Young *v.* Kitchin, 3 Ex. D. 127, 47 L. J. Exch. 579, 26 Wkly. Rep. 403.

4. Reese *v.* Teagarden, 31 Tex. 642.

5. Kline *v.* Gundrum, 11 Pa. St. 242.

6. Aston *v.* Wallace, 43 Ind. 468.

the fact that defendant set up an equitable set-off, but failed to appear at the trial of the action, so that the set-off was not considered, did not deprive him of the right to bring a separate action on the claim so set off,[7] and a defendant may before trial withdraw a set-off [8] or counter-claim,[9] without prejudice, and subsequently bring an action thereon; but withdrawal should be before a final submission of the case,[10] although defendant may, in analogy to suffering a nonsuit, withdraw the set-off where the evidence is found to be too weak to support it; [11] but a defendant who has set up affirmative matter in his answer cannot take a nonsuit as to a portion of the claim,[12] and a defendant withdrawing a set-off at one term has not the absolute right to reinstate it at another, but the question whether he shall be permitted to so reinstate rests in the discretion of the court.[13] Where defendant's answer contains only a counter-claim, upon withdrawal of the counter-claim judgment must be rendered for plaintiff.[14]

RECOURSE. As used in a note in reference to collaterals, a going back to or resort to them for the purpose of obtaining payment of the note.[1] (Recourse; Right of Assignee as Against Assignor, see ASSIGNMENTS, 4 Cyc. 84. Rights of Indorsee on Indorsement — In General, see COMMERCIAL PAPER, 7 Cyc. 791; Without Recourse, see COMMERCIAL PAPER, 7 Cyc. 809.)

RECOVER. To be successful in a suit; to obtain a favorable judgment; [2] to obtain by course of law; to succeed in a trial; [3] to obtain by course of law; to obtain by means of an action; to succeed in an action; [4] to get or obtain again; to get renewed possession of; to win back; to regain; [5] to recover by means of judicial

7. Wright *v.* Salisbury, 46 Mo. 26.

8. Crain *v.* Hilligross, 21 Ind. 210; Bowen *v.* Pickett, 26 Kan. 219; Theobald *v.* Colby, 35 Me. 179. But see People *v.* McCutcheon, 40 Mich. 244, holding that a set-off once asserted against a creditor's demand upon a decedent's estate cannot be withdrawn.

9. Proctor *v.* Johnson, 16 Ky. L. Rep. 60.

10. Miller *v.* McGannon, 79 Nebr. 609, 113 N. W. 170.

11. Muirhead *v.* Kirkpatrick, 5 Watts & S. (Pa.) 506; Gallagher *v.* Thomas, 2 Brewst. (Pa.) 531; Lawrin *v.* Hanks, 3 McCord (S. C.) 558.

12. Snell *v.* Harrison, 104 Mo. 158, 16 S. W. 152.

13. Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

14. Atlanta Mach. Works *v.* U. S., 114 Fed. 364.

1. Winkler *v.* Magdeburg, 100 Wis. 421, 429, 76 N. W. 332.

"'No recourse' means no access to, no return, no coming back upon, no assumption of any liability whatsoever, no looking to the party using the term for any reimbursement in case of loss, or damage, or failure of consideration in that which was the cause, the motive, the object, of the undertaking or contract." Lyons *v.* Fitzpatrick, 52 La. Ann. 697, 699, 27 So. 110.

2. Oxford *v.* Paris, 33 Me. 179, 181.

3. Burrill L. Dict. [*quoted* in Gawtry *v.* Adams, 10 Mo. App. 29, 33; Keiny *v.* Ingraham, 66 Barb. (N. Y.) 250, 257].

4. Kinney L. Dict. [*quoted* in Leslie *v.* York, 112 Ky. 712, 715, 66 S. W. 751, 23 Ky. L. Rep. 2076].

The term has a well-defined meaning in law and, under a statute giving an attorney a lien on money recovered, does not include defeating a judgment sought against his client so as to give him a lien on the sum in controversy. Atchison *v.* Owensboro, 114 Ky. 706, 714, 71 S. W. 864, 24 Ky. L. Rep. 1529.

The term when considered by itself is not the usual or apt word to indicate a voluntary payment or receipt of money for damages suffered. Best *v.* Seaboard Air Line R. Co., 72 S. C. 479, 483, 52 S. E. 223.

As used in a statute directing the distribution of fines, penalties, and forfeitures recovered for violation of the revenue laws, the term means recovered by operation of law. Lapham *v.* Almy, 13 Allen (Mass.) 301, 305.

As used in a statute providing that an attachment bond shall provide "to pay any claimant of any property seized or sold under or by virtue of said attachment all damages which he may recover in consequence of such seizure or sale," the term does not show that actual recovery in an independent suit must precede suit on the bond, but the claimant may, in the first instance, recover damages in an action on the bond. Totten *v.* Henry, 46 W. Va. 232, 233, 33 S. E. 119.

As used in a statute providing that "interest is payable on judgments recovered in the courts of this state at the rate of seven per cent per annum," the term implies that the judgment referred to is one obtained by way of compensation and in return for an injury or a debt, and will not include a judgment for a fine. People *v.* Sutter St. R. Co., 129 Cal. 545, 546, 62 Pac. 104, 79 Am. St. Rep. 137.

5. Webster Dict. [*quoted* in Leslie *v.* York, 112 Ky. 712, 715, 66 S. W. 751, 23 Ky. L. Rep. 2076].

proceedings.[6] (See Recoverable; Recovered; Recovery. See also Judgments, 23 Cyc. 623 *et seq.*

Recoverable. Susceptible of being regained; gotten back;[7] that which is able to be, or is capable of being, recovered; obtainable from a debtor or possessor as by legal process.[8] (See Recover; Recovery.)

Recovered. A term, which in its general sense, imports a payment compelled by judicial proceedings.[9] (See Recover; Recovery.)

Recovery. The actual possession of anything, or its value, by judgment of a legal tribunal;[10] the obtaining of anything by judgment or trial at law;[11] the obtaining of a thing by the judgment of a court, as the result of an action brought for the purpose;[12] the obtaining of right to something by a verdict and judgment of a court from an opposing party in a suit.[13] (Recovery: Absence of Amount of in Verdict, see Commercial Paper, 8 Cyc. 299 note 92. Grounds and Right, see Actions, 1 Cyc. 634. Measure of Amount, see Damages, 13 Cyc. 136. Of Claim Paid by County, see Counties, 11 Cyc. 597. Of Money or Property on Rescission of Contract, see Contracts, 9 Cyc. 433. Of Money Paid — As Attorney's Fee, see Attorney and Client, 4 Cyc. 987; As Bounty, see Bounties, 5 Cyc. 983; To State by County, see Counties, 11 Cyc. 517. Of Secret Preference, see Compositions With Creditors, 8 Cyc. 474. On Implied Acceptance of Commercial Paper, see Commercial Paper, 7 Cyc. 767. See also Recover; Recoverable.)

Recreation. Refreshment of the strength and spirits, after toil; amusement, diversion; relief from toil or pain; amusement, in sorrow or distress.[14] (See, generally, Sunday.)

Recrimination. See Divorce, 14 Cyc. 648.

Rectification. See Reformation of Instruments.

Rectifier. See Internal Revenue, 22 Cyc. 1632. *Compare* Distiller, 14 Cyc. 522.

Rectifying. Correcting; amending; refining by distillation; sublimation; adjusting.[15] (Rectifying: Written Instrument, see Reformation of Instruments.)

6. Abbott L. Dict. [*quoted* in Gawtry *v.* Adams, 10 Mo. App. 29, 33].

"'To recover' in law, is to 'recover anything, or the value thereof, by judgment; as if a man sue for any land or other thing, movable or immovable, and have a verdict or judgment for him." Jacob L. Dict. [*quoted* in Norton *v.* Winter, 1 Oreg. 47, 48, 62 Am. Dec. 297].

7. Peterson *v.* Nash, 112 Fed. 311, 314, 50 C. C. A. 260, 55 L. R. A. 344; McKey *v.* Lee, 105 Fed. 923, 926, 45 C. C. A. 127.

8. *In re* Oliver, 109 Fed. 784, 788.

9. Abbott L. Dict. [*quoted* in Gawtry *v.* Adams, 10 Mo. App. 29, 33].

10. Leslie *v.* York, 112 Ky. 712, 716, 66 S. W. 751, 23 Ky. L. Rep. 2076; Strohecker *v.* Farmers' Bank, 6 Pa. St. 41, 45; Fisher *v.* Mylius, 42 W. Va. 638, 639, 26 S. E. 309.

11. Hoover *v.* Clark, 7 N. C. 169, 171.

12. Burrill L. Dict. [*quoted* in Keiny *v.* Ingraham, 66 Barb. (N. Y.) 250, 257].

13. Webster Dict. [*quoted* in *In re* Hollister, 47 Hun (N. Y.) 413, 417].

In its general use the term means a recovery had by process and course of law, although in a special case it may mean collected or obtained without a suit. People *v.* Reis, 76 Cal. 269, 279, 18 Pac. 309. See also Friend *v.* Oggshaw, 3 Wyo. 59, 60, 31 Pac. 1047.

A "decree of foreclosure" is not "a decree . . . for the recovery of money." Hamburger Co. *v.* Glover, 157 Ill. 521, 522, 42 N. E. 46.

As meaning final judgment see Oxford *v.* Paris, 33 Me. 179, 181.

"Collection" as equivalent to recovery see Collection, 7 Cyc. 281 note 26.

In a statute regulating costs and fees the term may mean the recovery for damages, and does not include interest on the verdict for damages. Troy City Bank *v.* Grant, 1 How. Pr. (N. Y.) 135, 136. A recovery in favor of plaintiff, such as will entitle him to costs, means an affirmative finding, verdict, or judgment, and the term has the same meaning when applied to a defendant (Reilly *v.* Lee, 33 N. Y. App. Div. 201, 203, 53 N. Y. Suppl. 336); the decision must be on an issue of fact, and not a nonsuit (Burns *v.* Delaware, etc., R. Co., 63 Hun (N. Y.) 19, 22, 17 N. Y. Suppl. 415).

Previous possession not implied see Monterey County *v.* Cushing, 83 Cal. 507, 512, 23 Pac. 700.

14. Webster Dict. [*quoted* in Corey *v.* Bath, 35 N. H. 530, 538].

As used in statutes prohibiting recreation on Sunday the term has been held not to include "taking a ride for pleasure in a street car" (Horton *v.* Norwalk Tramway Co., 66 Conn. 272, 276, 33 Atl. 914); "traveling on Sunday to make a social visit" (Corey *v.* Bath, 35 N. H. 530, 531, 538).

15. Webster Dict. [*quoted* in State *v.*

RECTOR. As the word is understood by the canons of the Protestant Episcopal Church, a duly ordained clergyman of the church, in priest's orders, who has been elected to the rectorship by the vestry of the parish, agreeably to the canons of the church, and in whose call or invitation, or notification of election, there is no limitation of time specified when the engagement, or contract, is to cease.[16] (See CLERGYMAN. 7 Cyc. 189; CURATE, 12 Cyc. 994; PARISH, 29 Cyc. 1683; PARSON, 29 Cyc. 1693; and, generally, RELIGIOUS SOCIETIES.)

RECTORY. As known to the Church of England a glebe, tithes, and oblations established for the maintenance of a parson or rector to have cure of souls within the parish.[17] (See PARSONAGE, 29 Cyc. 1693; RECTOR; and, generally, RELIGIOUS SOCIETIES.)

RECTUS IN CURIA. Literally "Right in court." The condition of one who stands at the bar, against whom no one objects any offense.[18]

RECUPERATIO EST ALICUJUS REI IN CAUSAM ALTERIUS ADDUCTÆ PER JUDICEM ACQUISITIO. A maxim meaning "Recovery is the acquisition, by sentence of the judge, of anything adduced in the cause of another." [19]

RECURRENDUM EST AD EXTRAORDINARIUM QUANDO NON VALET ORDINARIUM. A maxim meaning "We must have recourse to what is extraordinary when what is ordinary fails." [20]

RECURRENT. Returning from time to time.[21]

RECUSATION. In the civil law, a species of exception or plea to a jurisdiction, to the effect that the particular judge is disqualified from hearing the cause by reason of interest or prejudice; the challenge of jurors; an act of what nature soever it may be, by which a strange heir, by deeds or words, declares he will not be heir.[22] (See DESCENT AND DISTRIBUTION, 14 Cyc. 188; JUDGES, 23 Cyc. 591, 612.)

REDDENDO SINGULA SINGULIS. Literally "By referring each to each; referring each phrase or expression to its appropriate object." A rule of construction.[23]

REDDENDUM. In conveyancing, rendering; yielding. The technical name of that clause in a conveyance by which the grantor creates or reserves some new thing to himself, out of what he had before granted; that clause in a lease in which a rent is reserved to the lessor, and which commences with the word "yielding." [24]

American Sugar-Refining Co., 51 La. Ann. 562, 585, 25 So. 447; Com. *v.* Giltinan, 64 Pa. St. 100, 105].

It is not a manufacturing process.— State *v.* American Sugar Refining Co., 51 La. Ann. 562, 585, 25 So. 447; Com. *v.* Giltinan, 64 Pa. St. 100, 105.

16. Bird *v.* St. Mark's Church, 62 Iowa 567, 569, 17 N. W. 747, where it was held that the suppression of a deposition by a bishop of the church, that the word was so understood, was erroneous, it being entirely competent to prove by the bishop the meaning of the word.

17. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 326, 3 L. ed. 735.

A conveyance of a rectory will in many instances convey land. Gibson *v.* Brockway, 8 N. H. 465, 470, 31 Am. Dec. 200.

18. Black L. Dict.

"In the due and orderly administration of justice through the courts it is the duty of an attorney at law to assist the court. If *rectus in curia*, he is by the same token *amicus curia*." State *v.* Standard Oil Co., 194 Mo. 124, 144, 91 S. W. 1062.

19. Peloubet Leg. Max. [*citing* Wharton L. Lex.].

20. Bouvier L. Dict.

21. Leache *v.* State, 22 Tex. App. 279, 313, 3 S. W. 539, 58 Am. St. Rep. 638, where the definition is applied to a form of insanity commonly known and denominated as "recurrent insanity."

22. Black L. Dict.

23. Black L. Dict.

Applied in: Wells *v.* State Bd. of Equalization, 56 Cal. 194, 198; Com. *v.* Jordan, 18 Pick. (Mass.) 228; Craig *v.* Craig, 9 N. J. L. 198; Hayes *v.* King, 37 N. J. Eq. 1, 2; Akers *v.* Akers, 23 N. J. Eq. 26, 31; Forster *v.* Civill. 20 Hun (N. Y.) 282, 284; Ludlow *v.* Bowne, 1 Johns. (N. Y.) 1, 15, 3 Am. Dec. 277; McIntire *v.* Ward, 3 Yeates (Pa.) 424, 426; Abbey's Estate, 13 Wkly. Notes Cas. (Pa.) 535, 536; Delaplane *v.* Crenshaw, 15 Gratt. (Va.) 457, 485; Wright *v.* Scott, 30 Fed. Cas. No. 18,092, 4 Wash. 16, 21; Edinburgh St. Tramways Co. *v.* Torbain, 3 App. Cas. 58, 70, 37 L. T. Rep. N. S. 288; Thornton *v.* Thornton, L. R. 20 Eq. 599, 604; *In re* Geening, L. R. 13 Eq. 388, 391, 41 L. J. Ch. 111, 25 L. T. Rep. N. S. 651, 20 Wkly. Rep. 87; *Ex p.* Rawlings, 1 De G. J. & S. 225, 251, 66 Eng. Ch. 174, 46 Eng. Reprint 89; Atty.-Gen. *v.* Sillem, 2 H. & C. 431, 532; Mitford *v.* Reynolds, 16 Sim. 130, 145, 39 Eng. Ch. 130, 60 Eng. Reprint 822; Clark *v.* Bonnycastle, 3 U. C. Q. B. O. S. 528, 555.

24. Black L. Dict. [*citing* 2 Blackstone Comm. 299].

(Reddendum: Construction and Operation — Of Clause in Lease, see LANDLORD AND TENANT, 24 Cyc. 914; Of Reservations in Conveyances in General, see DEEDS, 13 Cyc. 676. *Compare* HABENDUM, 21 Cyc. 353.)

REDDITUS CÆLUS EST SICCUS. A maxim meaning "Rent that is uncertain is dry rent." [25]

REDEEM.[26] To buy back; to liberate an estate by paying the debt for which it stood as security; to repurchase in a literal sense; [27] to purchase back; [28] to regain; to receive back by paying the obligation; [29] to regain possession by payment of a stipulated price; to repurchase.[30] (See REDEMPTION.)

REDEEMABLE. Liable to redemption.[31] (See REDEEM; REDEMPTION.)

REDELIVERY. A yielding and delivering back of a thing.[32] (Redelivery: Of Attached Property, see ATTACHMENT, 4 Cyc. 381. Of Bailed Goods, see BAILMENTS, 5 Cyc. 199. Of Deed, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 167; FRAUDS, STATUTE OF, 20 Cyc. 223. Of Gift, see GIFTS, 20 Cyc. 1200, 1227. Of Insurance Policy to Agent, see FIRE INSURANCE, 19 Cyc. 604 note 44. Of Old Note, Effect on Liability of Indorser, see COMMERCIAL PAPER, 7 Cyc. 892 note 40. Of Property on Termination of Receivership, see RECEIVERS. See also REDELIVERY BOND.)

REDELIVERY BOND. See ATTACHMENT, 4 Cyc. 677, 690, 694, 729, 738, 810; BANKRUPTCY, 5 Cyc. 316; DETINUE, 14 Cyc. 280; EXECUTIONS, 17 Cyc. 1124, 1129; GARNISHMENT, 20 Cyc. 1102, 1150; REPLEVIN; TAXATION.

REDEMPTION. A repurchase; a buying back.[33] By a mortgagor, a buying back of the legal estate after it has passed to the mortgagee.[34] (Redemption: Abatement and Revival of Proceeding For, see ABATEMENT AND REVIVAL, 1 Cyc. 90. Contract For, see FRAUDS, STATUTE OF, 20 Cyc. 232. Equitable Mortgage Created by, see MORTGAGES, 27 Cyc. 979. Equity of — Acquisition of as Mode of Acquiring Pauper Settlement, see PAUPERS, 30 Cyc. 1084 note 94; Extinguishment of on Sale of Mortgaged Property by Mortgagor to Mortgagee, see MORTGAGES, 27

25. Morgan Leg. Max. [*citing* Brediman's Case, 6 Coke 56*b*, 58*a*, 77 Eng. Reprint 339].

26. The word has a well-defined legal meaning.— Williams *v.* Hoffman, 39 Ind. App. 315, 76 N. E. 440, 443; Day *v.* Davis, 101 Md. 259, 263, 61 Atl. 576.

27. Black L. Dict. [*quoted* in Bunn *v.* Braswell, 142 N. C. 113, 115, 55 S. E. 85].

28. Miller *v.* Ratterman, 47 Ohio St. 141, 156, 24 N. E. 496; Maxwell *v.* Foster, 67 S. C. 377, 390, 45 S. E. 927 (dissenting opinion); Webster Dict. [*quoted* in Swearingen *v.* Roberts, 12 Nebr. 333, 335, 11 N. W. 325].

29. Miller *v.* Ratterman, 47 Ohio St. 141, 156, 24 N. E. 496.

30. Webster Dict. [*quoted* in Swearingen *v.* Roberts, 12 Nebr. 333, 335, 11 N. W. 325].

A synonym of "repurchase" see Pace *v.* Bartles, 47 N. J. Eq. 170, 174, 20 Atl. 352. See also Robinson *v.* Cropsey, 2 Edw. (N. Y.) 138, 146.

The term may imply the existence of a debt and negatives the idea of an absolute sale. Workman *v.* Greening, 115 Ill. 477, 483, 4 N. E. 385.

"Redeemed, if desired" see Allentown School-Dist. *v.* Derr, 115 Pa. St. 439, 445, 9 Atl. 55.

31. *In re* Chicago, etc., Granaries Co., [1898] 1 Ch. 263, 267, 67 L. J. Ch. 109, 77 L. T. Rep. N. S. 677.

"Redeemable rights" are "those rights which return to the conveyor or disposer of land, etc., upon payment of the sum for which such rights are granted." Jacob L. Dict. [*quoted* in Musgat *v.* Pumpelly, 46 Wis. 660, 665, 1 N. W. 410].

32. Black L. Dict.

A covenant by a lessee to "redeliver or restore [the property] to the lessor, in the same plight and condition, usual wear and tear excepted," does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss upon him. Levy *v.* Dyess, 3 Cent. L. J. (Miss.) 221, 222.

The redelivering a grant of real property or the cancellation of the grant does not operate to retransfer the title. Johnson *v.* Burnside, 3 S. D. 230, 233, 52 N. W. 1057.

33. Black L. Dict. See also Reed *v.* U. S. Express Co., 48 N. Y. 462, 469, 8 Am. Rep. 561; Robertson *v.* Tillman, 39 S. C. 298, 303, 17 S. E. 678; Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17.

The term implies that there is something to be redeemed, something lost to be gotten back. Webb *v.* Ritter, 60 W. Va. 193, 210, 54 S. E. 484.

The essential idea of redemption of currency is that the party issuing it is a debtor, and is called on to pay his debt by redeeming the notes presented. Reed *v.* U. S. Express Co., 48 N. Y. 462, 469, 8 Am. Rep. 561.

When equivalent to "payment" see Swasey *v.* North Carolina R. Co., 23 Fed. Cas. No. 13,679, 1 Hughes 17, 22.

34. Evans *v.* Kahr, 60 Kan. 719, 721, 57 Pac. 950, 58 Pac. 467.

Cyc. 1378; Levy of Attachment on, see ATTACHMENT, 4 Cyc. 561; Levy of Execution on, see EXECUTIONS, 17 Cyc. 961; Lien of Judgment on, see JUDGMENTS, 23 Cyc. 1371; Loss or Relinquishment of, see MORTGAGES, 27 Cyc. 1031; Rights of Assignee in Bankruptcy With Respect to, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 212; Rights of Assignee in Insolvency With Respect to, see INSOLVENCY, 22 Cyc. 1282 note 84; Stipulations in Mortgages Impairing Right, see MORTGAGES, 27 Cyc. 1098, 1275 note 45; Transfer of, see MORTGAGES, 27 Cyc. 1329, 1373; Validity of Sale of, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 877. Expiration of Period of, Effect on Insurable Interest of Mortgagor, see FIRE INSURANCE, 19 Cyc. 750 note 7, 696 note 48, 587 note 31. From Execution, see EXECUTIONS, 17 Cyc. 1335. From Mortgage, see MORTGAGES, 27 Cyc. 1832, 1846. From Sale Under Order, Judgment, or Decree, see JUDICIAL SALES, 24 Cyc. 68. From Tax-Sale, see MUNICIPAL CORPORATIONS, 28 Cyc. 1723; TAXATION. Limitation of Procuring, see LIMITATIONS OF ACTIONS, 25 Cyc. 1028. Mandamus in Aid of, see MANDAMUS, 26 Cyc. 351. Of Corporate Bond, see CORPORATIONS, 10 Cyc. 1177. Of County Warrant or Bond, see COUNTIES, 11 Cyc. 570, 542, 538. Of Coupon Bond, see COMMERCIAL PAPER, 8 Cyc. 137 note 62. Of Ground-Rents, see GROUND-RENTS, 20 Cyc. 1380. Of Insurance Policy, see LIFE INSURANCE, 25 Cyc. 776. Of Leasehold From Forfeiture, see LANDLORD AND TENANT, 24 Cyc. 1461, 1405, 1352 note 30. Of Mortgaged Property, see CHATTEL MORTGAGES, 7 Cyc. 83; MORTGAGES, 27 Cyc. 1799 *et seq.*; RAILROADS. Of Municipal Bond, see MUNICIPAL CORPORATIONS, 28 Cyc. 1593. Of Passenger Ticket, see CARRIERS, 6 Cyc. 574; COMMERCE, 7 Cyc. 447 note 81. Of Pledge — In General, see PLEDGES, 31 Cyc. 858; From Pawnbroker, see PAWNBROKERS, 30 Cyc. 1168. Of Property — Fraudulently Transferred as Security, see FRAUDULENT CONVEYANCES, 20 Cyc. 619; Set-Off on Extent on Execution, see EXECUTIONS, 17 Cyc. 1325 note 8. Of Property Sold — At Judicial Sale in General, see JUDICIAL SALES, 24 Cyc. 68; For Non-Payment of Taxes or Assessments, see INTERNAL REVENUE, 22 Cyc. 1611; JUDICIAL SALES, 24 Cyc. 63 note 57; LEVEES, 25 Cyc. 205; MORTGAGES, 27 Cyc. 1497 note 91; MUNICIPAL CORPORATIONS, 28 Cyc. 1723; TAXATION; Under Assignment For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 240 note 19; Under Execution, see EXECUTIONS, 17 Cyc. 1324; FRAUDULENT CONVEYANCES, 20 Cyc. 823; MUNICIPAL CORPORATIONS, 28 Cyc. 620; Under Order of Court by Guardian, see GUARDIAN AND WARD, 24 Cyc. 140. Of Property Sold on Foreclosure of — Mechanic's Lien, see MECHANICS' LIENS, 26 Cyc. 450; Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 84; MORTGAGES, 27 Cyc. 1799; RAILROADS, 33 Cyc. 609; Vendor's Lien, see VENDOR AND PURCHASER. Of Stock of Withdrawing Member of Building and Loan Association, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 129 note 73. Provision For in Judgment or Decree of Foreclosure of Mortgage, see MORTGAGES, 27 Cyc. 1658. Release of Right as Consideration, see CONTRACTS, 9 Cyc. 337. Reservation in Conveyance as Constituting Mortgage, see MORTGAGES, 27 Cyc. 997. Rights in Creditors' Suits, see CREDITORS' SUITS, 12 Cyc. 32. Right to Possession and to Rents and Profits During Period For, see EXECUTIONS, 17 Cyc. 1311, 1318; JUDICIAL SALES, 24 Cyc. 55; MORTGAGES, 27 Cyc. 1731, 1738. Right to Redeem — Of Assignee in Bankruptcy, see BANKRUPTCY, 5 Cyc. 383 note 22; Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 285.)

REDEMPTIONER. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.[35] (See REDEMPTION, and Cross-References Thereunder.)

REDHIBITION. See SALES.

REDISCOUNTED NOTE. A note held by a bank, which it indorses and procures another bank to discount.[36]

35. Cal. Code Civ. Proc. § 701 [*quoted* in Phillips *v.* Hagart, 113 Cal. 552, 555, 45 Pac. 843, 54 Am. St. Rep. 369]; Cal. Pr. Act, § 231 [*quoted* in Sharp *v.* Miller, 47 Cal. 82, 85]. See also Stocker *v.* Puckett, 17 S. D. 267, 268, 96 N. W. 91.

36. Dorsey *v.* U. S., 101 Fed. 746, 749, 41 C. C. A. 652.

REDISTRICT. To divide into new districts.[37] (See DISTRICT, 14 Cyc. 524.)

RED LEAD. See ORANGE MINERAL, 29 Cyc. 1508.

REDOUND. To conduce in the consequence; to contribute; to result.[38]

RED TAPE. Order carried to fastidious excess; system run out to trivial extremes.[39]

REDUCE. To restore; to replace; to bring to a certain condition;[40] to bring to a state or condition specified, usually inferior or weaker, sometimes indifferent; to bring to inferior state, with respect to rank, size, quality, value or the like; to diminish; to lower; to degrade or impair;[41] to bring to a former state; to restore; to bring into any state, but generally one of diminution, subordination or order.[42] (See REDUCTION.)

REDUCE TO POSSESSION. To change a right existing as an actionable claim into actual custody and enjoyment.[43] (See REDUCE; REDUCTION.)

REDUCTIO AD ABSURDUM. In logic, the method of disproving an argument by showing that it leads to an absurd consequence.[44]

REDUCTION. The act of reducing, or the state of being reduced.[45] (Reduction: Of Amount in Controversy, see APPEAL AND ERROR, 2 Cyc. 576; COURTS, 11 Cyc. 781. Of Bail — In Civil Action, see BAIL, 5 Cyc. 15; In Criminal Prosecution, see BAIL, 5 Cyc. 91. Of Capital Stock, see CORPORATIONS, 10 Cyc. 406. Of Compensation — For Carrying Mails, see POST-OFFICE, 31 Cyc. 995; For Fees of Public Officer, see OFFICERS, 29 Cyc. 1427 ; Of School Teacher, see SCHOOLS AND SCHOOL-DISTRICTS. Of Damages — By Person Injured, see DAMAGES, 13 Cyc. 71; For Wrongful Discharge of Servant, Effect of Other Employment or Opportunity Therefor, see MASTER AND SERVANT, 26 Cyc. 1013; In Action by Architect, see BUILDERS AND ARCHITECTS, 6 Cyc. 50; In Action For Fire Caused by Operation of Railroad, see RAILROADS, 33 Cyc. 1393; On Appeal From Justice's Court, Effect on Right and Costs, see COSTS, 11 Cyc. 246; Prayed For by Amendment, see PLEADING, 31 Cyc. 441. Of Punishment by Appellate Court, see CRIMINAL LAW, 12 Cyc. 938. Of Recovery, see APPEAL AND ERROR, 3 Cyc. 430; NEW TRIAL, 29

37. Webster Int. Dict. See also State *v.* Atherton, 19 Nev. 332, 344, 10 Pac. 901.

38. Mattingly *v.* Read, 3 Metc. (Ky.) 524, 526, 79 Am. Dec. 565, where the word is distinguished from "require."

39. Webster *v.* Thompson, 55 Ga. 431, 434.

40. Century Dict. [*quoted* in Klee *v.* Grant, 4 Misc. (N. Y.) 88, 96, 23 N. Y. Suppl. 855].

41. Webster Dict. [*quoted* in Hayward *v.* Loper, 147 Ill. 41, 48, 35 N. E. 225].

42. Worcester Dict. [*quoted* in Hayward *v.* Loper, 147 Ill. 41, 48, 35 N. E. 225].

"There are but few words in our language that have so many technical meanings as this one. In the medical profession, instructions to reduce a fracture would mean one thing; in the military world, to reduce a fort, quite another; to the mathematician, to reduce a problem, another; to the chemist, to reduce a substance, still another, and so on. But in each case it would be competent to show by parol evidence, if any exigency required it, just what the words 'to reduce' meant in the connection in which they are used, and that they clearly implied to any one in the business or trade in which the instructions were given just what means should be used and steps taken to accomplish the purpose intended." Halsey *v.* Adams, 63 N. J. L. 330, 335, 43 Atl. 708.

Synonym of "contract" see Universal Brush Co. *v.* Sonn, 146 Fed. 517, 520.

As used in the codicil of a will declaring that the shares of certain residuary legatees mentioned in the will should be reduced in certain specific amounts each, the term means that the legacies should be lessened, diminished or lowered by the amounts specified. It does not mean that there should be taken from the respective shares the amounts named; that is, that there should be excepted out of the residuary legacies the aggregate sum of the respective reductions. Hayward *v.* Loper, 147 Ill. 41, 48, 35 N. E. 225.

"Reduced" is applied to a regiment broken up and consolidated. Williams *v.* U. S., 137 U. S. 113, 127, 11 S. Ct. 43, 24 L. ed. 590.

"Reduced rate" in a contract for the carriage of goods presupposes the existence of a higher regular rate. Ficklin *v.* Wabash R. Co., 117 Mo. App. 221, 225, 93 S. W. 847.

43. Anderson L. Dict. [*quoted* in Klee *v.* Grant, 4 Misc. (N. Y.) 88, 90, 91, 23 N. Y. Suppl. 855, where "a right to reduce to possession" is distinguished from "a right to immediate possession"].

44. Black L. Dict. See also Rush *v.* Buckley, 100 Me. 322, 337, 61 Atl. 774, 70 L. R. A. 464 (dissenting opinion); Roller *v.* Roller, 37 Wash. 242, 245, 79 Pac. 788, 107 Am. St. Rep. 805, 68 L. R. A. 893; Griffin *v.* Fairmont Coal Co., 59 W. Va. 480, 488, 53 S. E. 24, 2 L. R. A. N. S. 1115; Truman *v.* London, etc., R. Co., 29 Ch. D. 89, 101; Rutledge *v.* McLean, 12 U. C. Q. B. 205, 208.

45. Century Dict.

Cyc. 1020. To Possession of Wife's Property, see HUSBAND AND WIFE, 21 Cyc. 1175.)

REDUNDANCY. See PLEADING, 31 Cyc. 76, 77.

REED. Natural aquatic grass, with hollow, jointed stems.[46]

REEF. In mining, a seam of quartz, or any substance containing gold.[47]

REËMPLOYMENT. The same service in which a person had formerly been employed.[48]

REËNTRY. At common law, the resumption of possession pursuant to a right reserved when the former possession was parted with.[49] (Reëntry: Breach of Condition in Deed, see DEEDS, 13 Cyc. 711. By Landlord, see LANDLORD AND TENANT, 24 Cyc. 1391, 1469. By Lessor in Oil, Gas, or Salt Lease, see MINES AND MINERALS, 27 Cyc. 737. By Lessor of Mining Property For Non-Payment of Rents or Royalties, see MINES AND MINERALS, 27 Cyc. 717. Covenant For as Constituting Lien For Rent, see LANDLORD AND TENANT, 24 Cyc. 1245. For Failure of Lessee to Repair, Sufficiency of, see LANDLORD AND TENANT, 24 Cyc. 1357 note 70. For Non-Payment of Ground-Rent, see GROUND-RENTS, 20 Cyc. 1389. Holding Over by Tenant After, see LANDLORD AND TENANT, 24 Cyc. 1016.)

REËSTABLISHMENT. The act of establishing again, or the state of being reëstablished; restoration.[50]

REËXAMINATION. See WITNESSES.

REËXCHANGE. See COMMERCIAL PAPER, 8 Cyc. 317 note 24.

REFER. A synonym of "allude."[51]

REFEREE. See REFERENCES, *post*, p. 770.

REFERENCE. One who or that which is referred to specifically; one of whom inquiries can be made as to the integrity, capability, and the like, of another.[52] (See, generally, REFERENCES, *post*, p. 770.)

46. Foppes *v.* Magone, 40 Fed. 570, 572, distinguishing "reeds, unmanufactured" from "reeds, manufactured."

47. Hollyman *v.* Noonan, 1 App. Cas. 595, 603, 45 L. J. P. C. 62.

48. Sax *v.* Detroit, etc., R. Co., 129 Mich. 502, 505, 89 N. W. 368, where this meaning is given to the term as used in a contract whereby a person employed by a railroad company as a spare brakeman agreed to release a claim for damages for personal injury against said railroad on condition of his reëmployment by said railroad for such time as his services and conduct shall be satisfactory.

49. Michaels *v.* Fishel, 169 N. Y. 381, 388, 62 N. E. 425, 32 N. Y. Civ. Proc. 310.

The term at common law simply invests the landlord with the right to maintain ejectment, and its use in a lease will not include a removal of a lessee by statutory summary proceedings. Michael *v.* Fishel, 169 N. Y. 381, 388, 62 N. E. 425, 32 N. Y. Civ. Proc. 310; McMahon *v.* Howe, 40 Misc. (N. Y.) 546, 548, 82 N. Y. Suppl. 984. But see Pannuto *v.* Foglia, 55 Misc. (N. Y.) 244, 246, 105 N. Y. Suppl. 495, where it is held that while the term has an ancient and technical meaning, it may also be used in a modern and popular sense and in a modern lease expressed in plain and ordinary language, free from quaint expressions, the term may include resumption of possession by summary proceedings. See also Anzolone *v.* Paskusz, 96 N. Y. App. Div. 188, 193, 89 N. Y. Suppl. 203.

The right of reëntry referred to in a statute providing that "when the right of reëntry is given to a lessor in a lease, such reëntry must be made at any time after the right has accrued, on three days' notice," is the right given to the landlord on some default of the tenant during the term, not the right which he has when the lease is for a fixed term, which has expired. Earl Orchard Co. *v.* Fava, 138 Cal. 76, 79, 70 Pac. 1073.

50. Century Dict.

The reëstablishment of a grade already established does not necessarily mean the alteration or changing of such grade. Seaman *v.* Washington Borough, 172 Pa. St. 467, 476, 33 Atl. 756.

51. State *v.* Moxley, 102 Mo. 374, 393, 14 S. W. 969, 15 S. W. 556.

52. Webster Dict. [*quoted* in Kinney *v.* McFaul, 122 Iowa 452, 454, 98 N. W. 276].

A synonym of "recommendation" see Kinney *v.* McFaul, 122 Iowa 452, 454, 98 N. W. 276.

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Appeal in General, see APPEAL AND ERROR, 2 Cyc. 474.

Appraisers in Execution Proceedings, see EXECUTIONS, 17 Cyc. 1105.

Arbitration Where No Suit Pending, see ARBITRATION AND AWARD, 3 Cyc. 568.

Establishment of Boundary by Submission to Arbitration, see BOUNDARIES, 5 Cyc. 944.

Master in Equity Suit, see EQUITY, 16 Cyc. 429.

Referee:

Mandamus Against, see MANDAMUS, 26 Cyc. 226.

Mistake of, see JUDGMENTS, 23 Cyc. 932 note 39.

Punishment of, see COSTS, 11 Cyc. 101, 104.

Reference:

As Affecting Operation of Statute of Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1284, 1341.

As Another Suit Pending, see ABATEMENT AND REVIVAL, 1 Cyc. 76.

Constitutionality of Statute Relating to, see CONSTITUTIONAL LAW, 8 Cyc. 823.

Costs, see COSTS, 11 Cyc. 101, 104, 127.

In Action By or Against Infant, see INFANTS, 22 Cyc. 693.

In Particular Action or Proceeding, see ADMIRALTY, 1 Cyc. 887; BUILDERS AND ARCHITECTS, 6 Cyc. 88; CERTIORARI, 6 Cyc. 790, 832; CREDITORS' SUITS, 12 Cyc. 54, 60; DIVORCE, 14 Cyc. 707; EMINENT DOMAIN, 15 Cyc. 883; EQUITY, 16 Cyc. 429; EXECUTIONS, 17 Cyc. 1102, 1427; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 504, 518; FIRE INSURANCE 19 Cyc. 948 note 20, 956; FRAUDULENT CONVEYANCES, 20 Cyc. 803; INFANTS, 22 Cyc. 571; INJUNCTIONS, 22 Cyc. 957, 1006, 1038; JUDICIAL SALES, 24 Cyc. 24 note 66; MARINE INSURANCE, 26 Cyc. 735; MARRIAGE, 26 Cyc. 916; MECHANICS' LIENS, 27 Cyc. 420; MORTGAGES, 27 Cyc. 1638, 1858; PARTITION, 30 Cyc. 253; PARTNERSHIP, 30 Cyc. 448, 517; RECEIVERS; SHERIFFS AND CONSTABLES; SPECIFIC PERFORMANCE; TAXATION; TRUSTS; WILLS.

In Particular Courts, see ADMIRALTY, 1 Cyc. 887; BANKRUPTCY, 5 Cyc. 271, 312; COURTS, 11 Cyc. 975; EQUITY, 16 Cyc. 429; JUSTICES OF THE PEACE, 24 Cyc. 586, 637, 700 note 50.

Jury Trial in, see JURIES, 24 Cyc. 115 note 95, 125 note 72, 166, 178, 192 note 24.

Mandamus to Compel, see MANDAMUS, 26 Cyc. 226.

Order For at Chambers, see JUDGES, 23 Cyc. 555.

Privilege From Arrest of Party Attending, see ARREST, 3 Cyc. 923 note 35.

Setting Apart Allowance to Surviving Wife, Husband, or Children by Appraiser, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 397.

Settlement of Controversy on Admitted Facts, see SUBMISSION OF CONTROVERSY.

I. GENERAL CONSIDERATIONS.

A. Definitions. A reference is a sending of a pending cause or some question therein by the court in which it is pending to a private person to hear and deter-

mine the cause or some question therein or to take evidence and report the same, with or without his opinion thereon, to the court.[1] Before there can be a reference there must be an action pending,[2] and generally only matters connected with the pending suit can be referred.[3] The person to whom the reference is made is usually termed a referee;[4] but various other names are given to such persons in different jurisdictions, there sometimes being, however, a difference between a referee and such other person.[5] The term auditor,[6] commissioner,[7]

1. Cyclopedic L. Dict.

At common law a reference was the sending of any matter by the court of chancery to a master, or by a law court to a prothonotary, to examine it. Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

A reference to assess the damages in an action is to be distinguished from a reference to an auditor to state accounts. Gorham *v.* Hall, 57 Me. 58.

The proceeding upon a confession of a judgment to be released upon payment on what a certain person shall say is due cannot be considered as a reference under Md. Acts (1778), c. 21. State *v.* Jones, 2 Gill (Md.) 49.

The appointment of a certain person to see whether certain work was according to contract does not constitute a reference. McKinney *v.* Page, 32 Me. 513.

A reference by the legislature of all matters pertaining to an excursion to a committee is too vague and uncertain to warrant the conclusion that thereby the committee was empowered to contract with plaintiff for food and drink to be furnished on this occasion. Russ *v.* Com., 210 Pa. St. 544, 60 Atl. 169, 105 Am. St. Rep. 825, 1 L. R. A. N. S. 409.

2. Gilmore *v.* Putnam County, 35 Ind. 344; Alexander *v.* Burton, 21 N. C. 469. *Compare* Wynn *v.* Bellas, 34 Pa. St. 160.

The filing of a claim against a county before the board of commissioners does not constitute an action, and there can be in such case no reference. Gilmore *v.* Putnam County, 35 Ind. 344.

3. Alexander *v.* Burton, 21 N. C. 469; Backman *v.* Reigart, 3 Penr. & W. (Pa.) 270. See also Blanchard *v.* Snider, 28 U. C. Q. B. 210. But see Remington *v.* Morris, 2 Grant (Pa.) 457; Henderson *v.* Walker, 2 Grant (Pa.) 36.

4. **It has been held** that a referee is a person to whom a cause pending in court is referred by the court to take the testimony, hear the parties, and report thereon to the court, and upon whose report, if confirmed, judgment is entered. Mills *v.* Miller, 3 Nebr. 87. However, this definition of a referee is too broad under the statutes in most of the states, inasmuch as a referee may be appointed under the statutory provisions in most jurisdictions merely to take evidence for the information of the court or to take evidence and report without deciding upon the questions of law.

5. **It is of little consequence** whether the official designation of the person charged with the investigation is that of "commissioner," "auditor," "accountant," "assessor," "examiner," "master," or "referee," although, as is well known, the ordinary designation in actions of law is that of "auditor," while in proceedings in equity it is that of "master." Fenno *v.* Primrose, 119 Fed. 801, 56 C. C. A. 313.

6. See AUDITOR, 4 Cyc. 1072; EQUITY, 16 Cyc. 429 note 15.

The purpose of the appointment of an auditor in most jurisdictions is to have an account made up so that the undisputed items on either side may be eliminated from the contest and the issues thereby narrowed to the points actually in dispute. Dwyer *v.* Kalteyer, 68 Tex. 554, 5 S. W. 75.

The term "auditor" is often used to designate an officer whose duties are properly those of a master and not of an auditor under the statute. Blain *v.* Patterson, 48 N. H. 151.

Commissioner as distinguished from auditor see Blain *v.* Patterson, 48 N. H. 151.

7. See EQUITY, 16 Cyc. 421.

In California court commissioners are regular officers having limited judicial powers, among which are to take proof and report conclusions as to issues of fact, except those of fact raised by the pleadings, upon which information is required by the court. An order, following the terms of an agreement between parties that the action be transferred to a named person, "court commissioner," for an accounting, said "court commissioner to report back . . . the evidence taken, and the balance found due on said accounting," the sole issue being a settlement of the account, is an order for a reference to the person named, and not an assignment to a commissioner, who, under Code Civ. Proc. § 259, subd. 2, has no power to hear issues raised by the pleadings. Jackson *v.* Puget Sound Lumber Co., 123 Cal. 97, 55 Pac. 788, (1898) 52 Pac. 838.

In Indiana a reference to a referee is to be distinguished from one to a master commissioner. Beard *v.* Hand, 88 Ind. 183. See also Lee *v.* State, 88 Ind. 256. A reference to one, by agreement, to examine into all the issues, take evidence thereon, and report his findings of fact and the evidence heard by him, and his rulings thereon, is a reference to a master commissioner, under Burns Annot. St. (1901) § 1462 *et seq.*, and not to a referee under sections 565–567. St. Joseph Mfg. Co. *v.* Hubbard, 36 Ind. App. 84, 75 N. E. 17.

In Missouri the code provides when a special or general commissioner may be appointed who shall have the powers and proceed as commissioner in chancery and also

arbitrator,[8] examiner, assessor,[9] etc., are often used. A referee is to be distinguished from a master who is appointed only in equity suits pursuant to the old equity practice,[10] although in some jurisdictions a referee in an equity suit appointed pursuant to statute is now termed a referee rather than a master. In so far as such officers perform the duties of a referee, the difference in title may be disregarded and the title of referee is therefore used generically throughout this article except where there is a difference of importance between the particular officer and a referee.

B. Distinguished From Arbitration. A reference is distinguished from an arbitration in that the latter is solely by consent where no lawsuit has been brought,[11] although in some jurisdictions a reference is generally called an arbitration without regard to whether it is in connection with a pending suit.[12]

C. Historical. The practice of referring matters to a master in suits in equity, independent of statute, which is treated of in another article in this work,[13] existed from early times, but generally the matters referred were merely incidental ones and the reference was only for the information of the court and not binding on it.[14] Gradually the practice of a reference in common-law actions of account came into use,[15] and this practice has been extended by statutes and the codes in various states so as to authorize a reference of the entire action where an account is involved.[16] In Pennsylvania the statutes authorize a reference of practically

separately provides when a referee may be appointed. The fact that an action would have been brought by a bill in equity before the code does not warrant the presumption that because a reference was made it was intended that it should be to a commissioner with the powers of a commissioner of chancery. A commissioner, who proceeds according to the rules of chancery practice, can, under the code, be appointed only when the parties do not agree upon a reference. Walton *v.* Walton, 17 Mo. 376.

In Ohio references in a suit in equity are to a master commissioner while a different statute regulates referees. Williams *v.* Stevens, 1 Cinc. Super. Ct. 176.

Allowance of claims against estate of deceased person by commissioners see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 504.

8. See ARBITRATION AND AWARD, 3 Cyc. 568.

9. Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

10. See EQUITY, 16 Cyc. 429.

"Referee" as not including master in chancery see Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. 684.

11. Abbott L. Dict. 394. See also ARBITRATION AND AWARD, 3 Cyc. 583 note 11.

A reference by consent is practically the same as an arbitration except that it is in a pending suit. Briggs *v.* Hiles, 87 Wis. 438, 58 N. W. 752.

In determining whether the submission is a reference under the statute or a general submission to arbitration, the fact that the submission gives the exclusive power to the referees or a majority of them to make a final decision to stand against the judgment of the court and not to be subject to appeal is sufficient to show that a statutory reference was not intended, inasmuch as such reference is merely to inform the court of the finding of facts and of law. Bollmann *v.* Bollmann, 6 S. C. 29.

12. See the statutes of the several states.

In North Carolina the term "arbitration" seems to refer to a reference of the entire action as distinguished from an interlocutory reference such as one to state an account. Hilliard *v.* Rowland, 68 N. C. 506. And there is a difference between a reference under the code and a common-law reference to arbitrators, their award to be a rule of court. Arbitrators are not bound to find the facts; they may choose an umpire; their findings of facts need not be stated separate from their conclusions of law; they are not bound to decide according to law, and their award may be general. Keener *v.* Goodson, 89 N. C. 273; Lusk *v.* Clayton, 70 N. C. 184.

A compulsory arbitration pending before an arbitrator named by a judge of the court of appeal is not a "reference by rule, order, or submission," within the meaning of section 49 of the act respecting arbitrations and references. *Re* Macpherson, 16 Ont. Pr. 230.

13. See EQUITY, 16 Cyc. 429.

14. See EQUITY, 16 Cyc. 453.

15. See Fenno *v.* Primrose, 119 Fed. 801, 56 C. C. A. 313.

The unquestioned power of courts to appoint auditors in a very limited class of cases has existed from an early period in England and in this country. It was at first exercised in England in the common-law action of account, where, according to Bacon, "the accounts be of a long and confused nature"; and the power has expanded, by statutory provisions and under the rules of the common law, as exigencies have arisen, so as to include other forms of action, and perhaps it may be said all forms of action where the accounts, and the issues in respect to the items thereof, are so numerous as to render a proper understanding of the controversy impossible by a jury until the issues have been simplified. Fenno *v.* Primrose, 119 Fed. 801, 56 C. C. A. 313.

16. See cases cited *infra*, this note.

all actions, whether or not an account is involved, and in this respect are in this country *sui generis*.[17]

D. Kinds of References. References are divisible into references by consent of the parties,[18] and compulsory references.[19] They are further divisible into: (1) References to hear and determine all the issues; (2) references to hear and determine part of the issues; (3) references merely to take and state an account; (4) references to report on a particular question of fact involved; and (5) references merely to take testimony.

II. When Authorized.

A. Reference by Consent.[20] The power of the court, with the consent of the parties, to refer a case pending before it is incident to all judicial administration where the right exists to ascertain the facts as well as to pronounce the law.[21] Except where otherwise provided by statute,[22] the rule is that any or all

In New York the practice came into use when it was a colony under the Dutch, and was continued after the conquest of the colony by the English as a more satisfactory mode of procedure for the investigation of matters of account than upon a trial by a jury. The Dutch referred all such matters of account to three persons called arbitrators, and this was continued for many years after New York became an English colony, these three persons being sometimes called arbitrators and sometimes referees. The charter of Liberties and Privileges of 1683, however, provided that all trials should be by the verdict of twelve men, which virtually abolished this mode of procedure and there was no way then by which a matter involving an account could be tried at common law except by an action of account. But the action of account was intricate in its course of procedure, dilatory, expensive, and moreover did not reach all cases of accounts so that a bill in equity for an accounting was preferable. This action therefore fell into disuse, and the practice arose of bringing assumpsit in place of it, as the remedy in equity was but imperfectly understood in the colony; and matters of account were tried in that form before a jury down to 1768, when the investigation of accounts before juries proved to be so inconvenient and unsatisfactory that a statute was passed in that year establishing the present mode of trial before referees. Magown *v.* Sinclair, 5 Daly 63.

Constitutionality of statutes.— Generally statutes providing for trial by referee have been held constitutional. Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539. See also Constitutional Law; Juries, 24 Cyc. 178.

Effect of amendment of statute.— Where, after the reference is ordered, but before any proceedings have been taken thereunder, the statute is amended so as to make such cases non-referable, the order of reference should be set aside. Gray *v.* White Mountains R. Co., 56 N. H. 182; McIntire *v.* Eastern R. Co., 55 N. H. 558.

17. See cases cited *infra*, this note.

When a question of law is to be submitted, the reference should be under the act of 1869, rather than act of 1836, as, if under the former act, where the referee must state the facts found by him and his conclusions of law separately, there is no difficulty in reviewing the law and correcting mistakes. Peters *v.* Shaner, 1 Del. Co. (Pa.) 252.

References in certain specified counties are governed by particular statutes applicable only to such counties. Scranton Bldg. Assoc. *v.* Ranck, 5 Pa. Co. Ct. 449; Lackawanna Iron, etc., Co. *v.* Fales, 5 Leg. Gaz. (Pa.) 14; Van Syckel *v.* Stewart, 10 Phila. (Pa.) 547.

18. See *infra*, II, A. See also Zelma Gold Min. Co. *v.* Hoskins, [1895] A. C. 100, 64 L. J. P. C. 45, 72 L. T. Rep. N. S. 32, 11 Reports 355.

As affected by choice of referee by third person.— A submission is none the less voluntary because by its terms a certain officer was to appoint the referees. Davis *v.* Forshee, 34 Ala. 107.

19. See *infra*, II, B.

Agreement as making reference not compulsory.—A rule was taken out under the compulsory arbitration act. On the day to which the arbitrators adjourned the hearing two of them were absent, whereupon the parties agreed to go on before the third as sole arbitrator. It was held that the agreement did not convert the submission into a voluntary one. Kosusky *v.* Husman, 4 Kulp (Pa.) 243.

20. **Form and sufficiency of consent** see *infra*, III, B.

Selection of referee see *infra*, VI, D.

Revocation of consent see *infra*, IV, I, 1.

Consent as waiver of right to jury trial see Juries, 24 Cyc. 157. See also Juries, 24 Cyc. 149 note 10, 174 note 32.

21. Newcomb *v.* Wood, 97 U. S. 581, 24 L. ed. 1085.

22. See the statutes of the several states.

Title to real estate.—A statute complaint for flowage was properly submitted to referees, under Rev. St. c. 108, unless it expressly appeared that the title to real estate was involved, or that the referees attempted to pass on such title. Quinn *v.* Besse, 64 Me. 366. N. H. Gen. Laws, c. 251, § 1, authorizing the submission to referees of all questions which may be the subject of personal actions, does not prohibit the combined

the issues in any pending action may be referred by the consent of the parties,[23] but generally the reference cannot extend to matters outside the suit.[24] In some jurisdictions, by statute, parties acting in a fiduciary capacity cannot agree to a reference.[25] The consent to a reference includes a consent to the proper exercise of all the powers possessed by the referee.[26]

B. Compulsory References — 1. In General.[27] Ordinarily the court has no power to order a compulsory reference to hear and determine all or any of the issues or questions of fact except where authorized so to do by statute.[28] Further-

submission of a controversy which would be the subject of a personal action and a question of title to real estate. Dorr *v.* Hill, 62 N. H. 506.

In North Carolina the amount of damages in an action for trespass on land cannot be referred for determination by stipulation of the parties without the consent of the court, the statute providing that trial by jury may be waived by the parties in actions on contract "and with the assent of the court in other actions." J. L. Roper Lumber Co. *v.* Elizabeth City Lumber Co., 137 N. C. 431, 49 S. E. 946, 135 N. C. 744, 47 S. E. 757.

23. *Indiana.*— Gilmore *v.* Putnam County, 35 Ind. 344.

Iowa.— Hobart *v.* Hobart, 45 Iowa 501.

New York.— Thurber *v.* Chambers, 4 Hun 721 [*affirmed* in 66 N. Y. 42]. See also Yates *v.* Russell, 17 Johns. 461.

Pennsylvania.— Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa. St. 395; Philadelphia County Com'rs *v.* Snowden, 2 Yeates 95. See also Primer *v.* Kuhn, 1 Dall. 452, 1 L. ed. 219.

South Carolina.— Chapman *v.* Lipscomb, 15 S. C. 470.

Wisconsin.— Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825.

United States.— Newcomb *v.* Wood, 97 U. S. 581, 24 L. ed. 1085.

See 42 Cent. Dig. tit. "References," § 5.

Compare Haynes *v.* Hayes, 68 Ill. 203.

In a suit on an official bond, the inquiry of damages, after an interlocutory judgment, may be submitted to referees by consent of the parties. Kintner *v.* State, 3 Ind. 86.

Question of law and fact.— Colo. Code Civ. Proc. § 185, authorizes a reference by the court, under stipulation of the parties, to determine questions of fact as well as law. Sartor *v.* Strassheim, 8 Colo. 185, 6 Pac. 215.

Consent as obtained by duress.— Where, on overruling a motion for continuance, the court gives the moving party an election to proceed to trial or consent to a reference, a consent so given cannot be said to have been under duress. Copper River Min. Co. *v.* McClellan. 138 Fed. 333, 70 C. C. A. 623.

Effect of consent.— Where a reference is made by consent, the parties cannot attack the validity of the proceedings on the ground that the referee was required merely to take and report the evidence, and not to make findings of fact and conclusions of law. Heald *v.* Yumisko, 7 N. D. 422, 75 N. W. 806.

Selection of referee must be communicated. — Where a buyer and a seller agreed to each nominate a referee on or before a certain day, who were to fix the price of the goods sold, a selection of a referee by one of the parties previous to the day fixed, but which was not communicated to the other party until after such day, was not a nomination, within the meaning of the agreement. Tew *v.* Harris, 11 Q. B. 7, 11, 11 Jur. 947, 17 L. J. Q. B. 1, 63 E. C. L. 7.

24. McCarthy *v.* Swan, 145 Mass. 471, 14 N. E. 635. See also *supra*, I, A.

25. Campbell *v.* Fayette County, 127 Pa. St. 86, 17 Atl. 882, county commissioner. But see Lummis *v.* Big Sandy Land, etc., Mfg. Co., 188 Pa. St. 27, 41 Atl. 319, holding statutory provision void. See also Thomas *v.* Leach, 2 Mass. 152, holding that an action in the name of a judge of probate on an administration bond cannot be referred, since the judge is a mere trustee and cannot consent thereto.

The phrase "parties acting in a fiduciary capacity," as used in the act of April 22, 1874, relating to the submission of cases to the decision of the court, and to the act of May 14, 1874, conferring authority on parties, except "parties acting in a fiduciary capacity," to refer cases to attorneys at law, is not to be confined to persons who are technical trustees under appointment by will or deed or by the court, but includes all public officials who have charge of public moneys, as well as private trustees clothed with authority over the property of others. Campbell *v.* Fayette County, 24 Wkly. Notes Cas. (Pa.) 107.

Power of infant to consent to reference see Infants, 22 Cyc. 693.

26. Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104].

27. **In actions before justices of the peace** see Justices of the Peace, 24 Cyc. 586.

Reference of questions of fact to commissioners in an admiralty suit see Admiralty, 1 Cyc. 887 *et seq.*

28. *California.*— Williams *v.* Benton, 24 Cal. 424; Geeseka *v.* Brannan, 2 Cal. 517; Benham *v.* Rowe, 2 Cal. 261.

Iowa.— State *v.* Inskeep, 12 Iowa 266. See also Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

Maine.— Hacker *v.* Johnson, 66 Me. 21.

Missouri.— Thornton *v.* Life Assoc. of America, 7 Mo. App. 544.

New Hampshire.— Brewster *v.* Edgerly, 13 N. H. 275.

New Jersey.— Tunison *v.* Snover, 56 N. J. L. 41, 28 Atl. 310; Paulison *v.* Halsey, 38 N. J. L. 488.

more a compulsory reference is not authorized in common-law actions where it infringes any constitutional right to a trial by jury.[29] In suits in equity, however, an order of reference has been held proper, although no statutory authority exists therefor, provided such a reference is not forbidden by statute.[30] While in some jurisdictions, by statute, a compulsory reference may be ordered in practically every form of action,[31] and in other jurisdictions a reference is proper in any action

New York.— Leland *v.* Smith, 3 Daly 309, 11 Abb. Pr. N. S. 231; Draper *v.* Day, 11 How. Pr. 439; Rathbun *v.* Rathbun, 3 How. Pr. 139.

South Carolina.— Sale *v.* Meggett, 25 S. C. 72.

Vermont.— American Can Co. *v.* Grimm, 79 Vt. 494, 65 Atl. 531.

Wisconsin.— Mead *v.* Walker, 17 Wis. 189.

See 42 Cent. Dig. tit. "References," § 6.

But it has been held that a circuit court of the United States has inherent power to appoint an auditor in any action at law, in the exercise of its discretion, where the issues or the items involved are so numerous or complex as to render a proper understanding of the controversy by the jury impossible until they have been simplified. Fenno *v.* Primrose, 119 Fed. 801, 56 C. C. A. 313.

Presumptions.— In the absence of showing to the contrary, it will be presumed that a case referred on default of a defendant was a referable case, for which his consent was not necessary. Schwartz *v.* Linington, 18 N. Y. Suppl. 879.

In New Hampshire, when the amount in controversy is less than one hundred dollars, the action may be referred without the consent of the parties. Russell *v.* Babbitt, 60 N. H. 373. Plaintiff may amend his writ in an action of tort before trial by reducing the *ad damnum* to one hundred dollars, so as to permit the action to be referred without the consent of the parties. Whitcomb *v.* Straw, 60 N. H. 117. The court may refer an action when plaintiff limits his demand to one hundred dollars, although the *ad damnum* in the writ exceeds that sum. Locke *v.* Barrington, 59 N. H. 530.

In Ohio, under the code, the courts in cases founded upon counts in equity have the same power to order a reference as courts of equity formerly possessed. Broadwell *v.* Dudry, 2 Ohio Dec. (Reprint) 388, 2 West. L. Month. 581.

The power to refer is not lost by a provision in the instrument sued on for a reference to arbitrators without suit. Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847.

29. *California.*— Joshua Hendy Mach. Works *v.* Pacific Cable Constr. Co., 99 Cal. 421, 33 Pac. 1084; Grim *v.* Norris, 19 Cal. 140, 79 Am. Dec. 206.

Idaho.— Russell *v.* Alt, 12 Ida. 789, 88 Pac. 416, 13 L. R. A. N. S. 146.

Iowa.—McMartin *v.* Bingham, 27 Iowa 234, 1 Am. Rep. 265.

Nebraska.— Mills *v.* Miller, 3 Nebr. 87.

North Carolina.— Pinchback *v.* Bessemer Min., etc., Mfg. Co., 137 N. C. 171, 49 S. E. 106.

Ohio.— Johnson *v.* Wallace, 7 Ohio, Pt. II, 392.

South Dakota.— Kelly *v.* Oksall, 17 S. D. 185, 95 N. W. 913; Betcher *v.* Grant County, 9 S. D. 82, 68 N. W. 163.

Wisconsin.— Mead *v.* Walker, 17 Wis. 189.

See 42 Cent. Dig. tit. References," § 6. See also JURIES, 24 Cyc. 178.

Where a party is entitled to a jury trial, inconvenience of witnesses, and length of time the case would take, if the testimony were taken before a jury, are not grounds for granting a compulsory reference. Wilson *v.* York Tp., 43 S. C. 299, 21 S. E. 82.

The right to trial by jury should not be denied by ordering a reference except in a case entirely clear of the constitutional guaranty of the right to trial by jury. Reiser *v.* Plath, 13 N. Y. Suppl. 272.

Mere silence or failure to object or except to the order will not constitute a waiver of a party's constitutional right to a trial by jury. Smith *v.* Kunert, (N. D. 1907) 115 N. W. 76.

30. Hanson *v.* Hanson, 78 Nebr. 584, 111 N. W. 368; McCrady *v.* Jones, 36 S. C. 136, 15 S. E. 430; Gilbank *v.* Stephenson, 31 Wis. 592. See also Hobart *v.* Hobart, 45 Iowa 501; State *v.* Orwig, 25 Iowa 280; Green *v.* Green, 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846. But see Caulk *v.* Blyth, 55 Mo. 293; Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

In New York, however, the court cannot order a compulsory reference to hear and determine issues in an equitable action unless the trial requires the examination of a long account. Roome *v.* Smith, 123 N. Y. App. Div. 416, 107 N. Y. Suppl. 1088; O'Reilley *v.* Kingston, 30 Hun 508; Avery *v.* Sand, 41 N. Y. Suppl. 53.

31. See cases cited *infra*, this note.

In Pennsylvania "either party to any civil suit or action" may enter a rule of reference. Danville, etc., R. Co. *v.* Ashton, 3 Wkly. Notes Cas. 281, holding, it seems, that a suit in equity cannot be referred. An action to recover a penalty for breach of the revenue laws has been held not a "civil" but a "criminal" suit and hence not referable (Buckwalter *v.* U. S., 11 Serg. & R. 193), but an action for a penalty imposed not to punish the act as an offense but for the compensation of the party aggrieved is a "civil" action and referable (Mevay *v.* Edmiston, 1 Rawle 457, action on statute of 1814 for taking illegal fees; Com. *v.* Bennett, 16 Serg. & R. 243, action for penalties for neglecting to serve notice under the arbitration act of 1810). An execution attachment is not a civil suit or action within the statute. Stranahan *v.* Stranahan, 146 Pa. St. 44, 23

where there is no right to trial by jury,[32] the statutory rule in most of the states confines a reference to hear and determine the issues, whether in a legal or equitable suit, to cases where the examination of a long account is involved.[33] Issues of law may be referred in some jurisdictions,[34] but not after a trial has been had.[35] Where the cause is removed to another state, the law of the latter state governs the right to a reference.[36]

2. Examination of Long Account — a. In General. In many jurisdictions the statutes provide that a compulsory reference may be ordered where the examination of a long account is involved.[37] Such statutory provisions have been held

Atl. 253. However, under the express provision of section 39 of the act of 1836, certain actions, such as actions upon bail-bonds and recognizances, etc., cannot be referred. Hersberger *v.* Venus, 3 Penr. & W. 395; Roop *v.* Meek, 6 Serg. & R. 542. But see Pettit *v.* Wingate, 25 Pa. St. 74. But a scire facias on a judgment may be referred (Hill *v.* Crawford, 8 Serg. & R. 477), or an action of ejectment (Harvey *v.* Snow, 1 Yeates 156; Austin *v.* Snow, 2 Dall. 157, 1 L. ed. 329; Reed *v.* Long, 10 Pa. Co. Ct. 253). But in a joint action against several defendants, it has been held that a rule of reference must be taken against all. Beltzhoover *v.* Com., 1 Watts 126.

32. Wooster *v.* Plymouth. 62 N. H. 193; Robison *v.* Cleveland City R. Co., 7 Ohio S. & C. Pl. Dec. 312, 5 Ohio N. P. 293.

33. Roome *v.* Smith, 123 N. Y. App. Div. 416, 107 N. Y. Suppl. 1088; Brennan *v.* Gale, 44 N. Y. App. Div. 396, 61 N. Y. Suppl. 6; Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739; Read *v.* Lozin, 31 Hun (N. Y.) 286; Barnes *v.* West, 16 Hun (N. Y.) 68; Dalzell *v.* Fahys Watch Case Co., 12 Misc. (N. Y.) 357, 33 N. Y. Suppl. 564; Jacquelin *v.* Manhattan R. Co., 12 Misc. (N. Y.) 330, 33 N. Y. Suppl. 655; Doyle *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 376, 20 N. Y. Suppl. 365 [*affirmed* in 136 N. Y. 505, 32 N. E. 1008]; Draper *v.* Day, 11 How. Pr. (N. Y.) 439; Hewitt *v.* Howell, 8 How. Pr. (N. Y.) 346; Smith *v.* Kunert, (N. D. 1908) 115 N. W. 76. See also Russell Hardware, etc., Mfg. Co. *v.* Utica Drop Forge, etc., Co., 112 N. Y. App. Div. 703, 98 N. Y. Suppl. 777. *Compare* Central Trust Co. *v.* New York, etc., R. Co., 18 Abb. N. Cas. (N. Y.) 64 [*modified* in 42 Hun 602, 18 Abb. N. Cas. 381, 25 N. Y. Wkly. Dig. 520].

Writ of entry.— In Massachusetts the supreme judicial and superior courts have power to appoint an auditor in a writ of entry as well as other actions at law. Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283.

34. Lange *v.* Stouffer, 16 Pa. St. 251. See also Yohe's Appeal, 55 Pa. St. 121, mixed question of law and fact.

35. Mann *v.* Alberti, 2 Binn. (Pa.) 195, construing the statute of 1809.

36. Alexandria Canal Co. *v.* Swann, 5 How. (U. S.) 83, 12 L. ed. 60.

37. *California.*— Williams *v.* Benton, 24 Cal. 424.

Colorado.— Barlow *v.* Hitzler, 40 Colo. 109, 90 Pac. 90; Huston *v.* Wadsworth, 5 Colo. 213.

Georgia.— Sirrine *v.* Southwestern R. Co., 47 Ga. 586.

Iowa.— Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Tufts *v.* Norris, 115 Iowa 250, 88 N. W. 367; Burt *v.* Harrah, 65 Iowa 643, 22 N. W. 910; Blair Town Lot, etc., Co. *v.* Walker, 50 Iowa 376.

Kansas.— Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249; Abbott *v.* Arkansas City Bldg., etc., Assoc., (1901) 66 Pac. 1041; Weakley *v.* Cherry Tp., (1901) 63 Pac. 433; Shore *v.* White City State Bank, 61 Kan. 246, 59 Pac. 263; Galbraith *v.* McCormick, 23 Kan. 706; Williams *v.* Elliott, 17 Kan. 523.

Louisiana.— Brooke *v.* Hamilton, 1 Mart. N. S. 632.

Minnesota.— Bond *v.* Welcome, 61 Minn. 43, 63 N. W. 3; Fair *v.* Stickney Farm Co., 35 Minn. 380, 29 N. W. 49.

Mississippi.—Marlar *v.* State, 62 Miss. 677.

Missouri.— Wentzville Tobacco Co. *v.* Walker, 123 Mo. 662, 27 S. W. 639; St. Louis Third Nat. Bank *v.* Owen, 101 Mo. 558, 14 S. W. 632; Edwardson *v.* Garnhart, 56 Mo. 81; Johnson *v.* Blell, 61 Mo. App. 37; Roemmich *v.* Wamsganz, 8 Mo. App. 576.

New Hampshire.— Doyle *v.* Doyle, 56 N. H. 567; Ford *v.* Porter, 32 N. H. 376; Putnam *v.* Goodall, 31 N. H. 419; King *v.* Hutchins, 28 N. H. 561; Jones *v.* Parker, 26 N. H. 20.

New York.— Rowland *v.* Rowland, 141 N. Y. 485, 36 N. E. 504 [*affirming* 75 Hun 585, 27 N. Y. Suppl. 606]; Camp *v.* Ingersoll, 47 N. Y. Super. Ct. 534 [*reversed* in 86 N. Y. 433, on the ground that the facts of the case did not bring it within the statute]; Harrington *v.* Bruce, 84 N. Y. 103; Starin *v.* Fonda, 107 N. Y. App. Div. 539, 95 N. Y. Suppl. 379; Boisnot *v.* Wilson, 95 N. Y. App. Div. 489, 88 N. Y. Suppl. 867; Ames *v.* French, 83 N. Y. App. Div. 452, 82 N. Y. Suppl. 452; Fisher *v.* Haines, 62 N. Y. App. Div. 66, 70 N. Y. Suppl. 787; Barnett *v.* Scribner, 78 Hun 270, 29 N. Y. Suppl. 262; O'Brien *v.* Catskill Mountain R. Co., 32 Hun 636; Tooker *v.* Rinaldo, 11 Hun 154, 2 Abb. N. Cas. 334 note; Cowden *v.* Teale, 6 Hun 532; Bensel *v.* Galt, 2 Hun 678, 5 Thomps. & C. 186; Ludlow *v.* American Exch. Bank, 59 Barb. 509; Shipman *v.* New York Bank, 3 Silv. Sup. 106, 6 N. Y. Suppl. 292; Degener *v.* Underwood, 57 N. Y. Super. Ct. 583, 7 N. Y. Suppl. 681; Van Orden *v.* Tilden, 13 Daly 396; Price *v.* Parker, 44 Misc. 582, 90 N. Y. Suppl. 98; Smith *v.* Smith, 31 Misc. 109, 64 N. Y. Suppl. 918; Smith

applicable to equitable as well as to legal actions,[38] and the right to order a reference is not affected by the fact that one of the parties is a receiver,[39] or an executor or administrator.[40] So it is no objection that the cause has been once tried by

v. New York Cent., etc., R. Co., 29 Misc. 439, 61 N. Y. Suppl. 934 [*affirmed* in 47 N. Y. App. Div. 634, 62 N. Y. Suppl. 1147]; Hibbard *v.* Commercial Alliance L. Ins. Co., 4 Misc. 422, 24 N. Y. Suppl. 332 [*affirmed* in 141 N. Y. 549, 36 N. E. 343]; Johnson *v.* Atlantic Ave. R. Co., 21 N. Y. Suppl. 1056; Brown *v.* Finch, 18 N. Y. Suppl. 551 [*affirmed* in 133 N. Y. 671, 31 N. E. 625]; Hong Kong, etc., Banking Co. *v.* Seely, 7 N. Y. St. 496; Hatch *v.* Wolfe, 1 Abb. Pr. N. S. 77, 30 How. Pr. 65; Lewis *v.* Irving F. Ins. Co., 15 Abb. Pr. 303 note; Masterton *v.* Howell, 10 Abb. Pr. 118; People *v.* Jones, 57 How. Pr. 315; Mills *v.* Thursby, 11 How. Pr. 113; Van Zant *v.* Cobb, 10 How. Pr. 348.

North Carolina.— Leak *v.* Covington, 87 N. C. 501.

Oregon.— Craig *v.* California Vineyard Co., 30 Oreg. 43, 46 Pac. 421; McDonald *v.* American Mortg. Co., 17 Oreg. 626, 21 Pac. 883; Tribou *v.* Strowbridge, 7 Oreg. 156.

South Carolina.— Greenwood Granite, etc., Co. *v.* Ware Shoals Mfg. Co., 78 S. C. 169, 58 S. E. 765; Montague *v.* Best, 65 S. C. 455, 43 S. E. 963.

Wisconsin.— Fowler *v.* Metzger Seed, etc., Co., 131 Wis. 633, 111 N. W. 677; Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Lyle *v.* Esser, 98 Wis. 234, 73 N. W. 1008; Brown County *v.* Van Stralen, 45 Wis. 675; Cairns *v.* O'Bleness, 40 Wis. 469.

United States.— Davis *v.* St. Louis, etc., R. Co., 25 Fed. 786.

England.— See Ormerod *v.* Todmorden Joint-Stock Mill Co., 8 Q. B. D. 664, 51 L. J. Q. B. 348, 46 L. T. Rep. N. S. 669, 30 Wkly. Rep. 805; Ward *v.* Pilley, 5 Q. B. D. 427, 49 L. J. Q. B. 705, 43 L. T. Rep. N. S. 301, 28 Wkly. Rep. 937; *In re* Leigh, 3 Ch. D. 292, 24 Wkly. Rep. 782; Goodred *v.* Seale, 2 F. & F. 382; National Assur., etc., Assoc. *v.* Best, 2 H. & N. 605, 27 L. J. Exch. 19, 6 Wkly. Rep. 78; Hamilton *v.* Merchants' Mar. Ins. Co., 58 L. J. Q. B. 544.

See 42 Cent. Dig. tit. "References," § 13.

Compare Day Bros. Lumber Co. *v.* Daniel, 62 S. W. 866, 23 Ky. L. Rep. 285.

The reason for requiring a reference where a long account is directly involved is because of the intrinsic difficulty of carrying on such an examination before a jury, where the testimony in respect to charges and credits may be conflicting or the inquiry complicated or intricate, making it exceedingly difficult for each of the jurors to keep in his mind every item and the testimony relating to it so as to enable the jury collectively to find a verdict which shall be accurate and in accordance with the proof. For this reason such an investigation is sent to a referee, who, in addition to having the witnesses before him, takes their testimony down in writing, and, after the evidence is given, has ample time to go over it carefully in respect to every disputed item; to examine and scrutinize accounts that may have been delivered, and letters, receipts, bills, and other papers that have passed between the parties, and in this way to arrive at a conclusion with a degree of care and deliberation that is impossible upon a jury trial. Magown *v.* Sinclair, 5 Daly (N. Y.) 63.

As dependent on multiplicity of issues.— In determining whether an action is a proper subject for reference, it is not the number of items, so much as the multiplicity of the issues, that the court regards. Schmidt *v.* Rose, 6 Mo. App. 579.

Effect of settlement of part of account.— That one of the parties to an account claims that a portion of the items embraced in it have been settled, which claim the other denies, will not prevent a reference and determination of all the dealings between the parties. Smith *v.* Scully, 66 Kan. 139, 71 Pac. 249.

Account of assignee.— Under Code Civ. Proc. § 639, authorizing a referee to try issues requiring the examination of a long account, the court may refer an account of the assignee of an insolvent. *In re* Raley, 123 Cal. 38, 55 Pac. 790.

Mandamus proceedings.—A compulsory reference may be ordered when the issues made upon the return and answer to a writ of alternative mandamus involve the examination of a long account, and there is nothing in apparently conflicting provisions of the code making the rule otherwise. People *v.* Wadsworth, 61 How. Pr. (N. Y.) 57.

To fix water rates.— Where an extensive examination of accounts is necessary for the court to fix reasonable water rates, as required by St. (1895) c. 488, the court has power to refer the matter in accordance with equity practice in such cases. *In re* Janvrin, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319.

In Oklahoma, under Civ. Code, § 304, where an issue of fact is joined upon an account pleaded on one side only, and it shall be made to appear that it is necessary that the party on the other side should be examined as a witness to prove the account, the court has the power to make a reference, without the consent of defendants; and defendants are not entitled, as a matter of right, to a trial by jury. Van Trees *v.* Territory, 7 Okla. 353, 54 Pac. 495.

38. National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, 35 N. Y. Suppl. 933 [*affirmed* in 148 N. Y. 581, 42 N. E. 1077]; Dane *v.* Liverpool, etc., Ins. Co., 21 Hun (N. Y.) 259; Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255 [*overruling* Druise *v.* Horter, 57 Wis. 644, 16 N. W. 14].

39. Durkin *v.* Sharp, 22 Hun (N. Y.) 132.

40. Malone *v.* St. Peter's, etc., Church, 172

a jury and no objection then taken to the account,[41] or that plaintiff is insolvent and will be unable to pay the fees of the referee and that the action is brought in bad faith.[42] On the other hand a reference should not be ordered on a new trial after reversal where the former trial shows the examination of a long account was not necessary and there is no reason to suppose that the new trial will differ from the former one.[43]

b. Mutual Accounts. In some jurisdictions a "mutual" account must be involved,[44] although where the statute does not otherwise provide the account may be that of one party only.[45]

c. What Constitutes an Account. The term "account," as used in the statutes, is an account in the ordinary acceptation of that term, that is, charges and credits between the parties.[46] It means an account in fact kept by one party or the other — a series of charges made at various times as the transactions occurred.[47] An account stated is not such an account,[48] nor is a bill of particulars.[49] So a claim to several items of damage arising from breach of contract or otherwise is not an account.[50] For instance, a question as to the value of the

N. Y. 269, 64 N. E. 961 [*reversing* 69 N. Y. App. Div. 420, 74 N. Y. Suppl. 1005].

41. Brown *v.* Bradshaw, 1 Duer (N. Y.) 635, 8 How. Pr. 43.

42. Walsh *v.* Waldron, 63 Hun (N. Y.) 315, 17 N. Y. Suppl. 829 [*affirmed* in 135 N. Y. 650, 32 N. E. 647]; Place *v.* Chesebrough, 4 Hun (N. Y.) 577 [*affirmed* in 63 N. Y. 315].

43. Betjemann *v.* Brooks, 52 Hun (N. Y.) 611, 4 N. Y. Suppl. 813.

44. Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498.

45. Simmons *v.* Morrison, 13 App. Cas. (D. C.) 161; Aronin *v.* Philadelphia Casualty Co., 54 Misc. (N. Y.) 630, 104 N. Y. Suppl. 810.

46. Silmser *v.* Redfield, 19 Wend. (N. Y.) 21; Ewart *v.* Kass, 17 S. D. 220, 95 N. W. 915; Betcher *v.* Grant County, 9 S. D. 82, 68 N. W. 163. See also *In re* Leigh, 3 Ch. D. 292, 24 Wkly. Rep. 782.

An account is a detailed statement of the mutual demands in the nature of a debt and credit between parties arising out of contract or some fiduciary relation. Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791; Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561, 11 S. W. 58 [*citing* Bouvier L. Dict.]. It relates to some matter of debt or credit between parties and implies that one is responsible to another because of a contract or some fiduciary relation. Whitwell *v.* Willard, 1 Metc. (Mass.) 216. An account between the parties is one made up of the dealings of the parties with one another. Aronin *v.* Philadelphia Casualty Co., 54 Misc. (N. Y.) 630, 104 N. Y. Suppl. 810; Dederick *v.* Richley, 19 Wend. (N. Y.) 108.

The determination of the amount of an assessment to which a member of a mutual association is liable, which requires merely an inspection of the by-laws and books of the association, does not require the examination of an account. Kelly *v.* Oksall, 17 S. D. 185, 95 N. W. 913, 17 S. D. 392, 97 N. W. 11.

Actions in which account held not involved see Seaman *v.* Mariani, 1 Cal. 336; Alford *v.* Buford, etc., Implement Co., 7 Kan. App. 754, 53 Pac. 530; Middleton *v.* Ames, 41 N. Y. App. Div. 498, 58 N. Y. Suppl. 645; Knope *v.* Nunn, 75 Hun (N. Y.) 287, 26 N. Y. Suppl. 1074; Miner *v.* Gardiner, 4 Hun (N. Y.) 132, 6 Thomps. & C. 343; Hall *v.* Craige, 65 N. C. 51; Betcher *v.* Grant County, 9 S. D. 82, 68 N. W. 163.

47. Druse *v.* Horter, 57 Wis. 644, 16 N. W. 14.

48. Cuming *v.* Whiting, 12 N. Y. Civ. Proc. 443; Rowell *v.* Giles, 53 How. Pr. (N. Y.) 244.

49. Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286.

50. Tunison *v.* Snover, 56 N. J. L. 41, 28 Atl. 310; Empire State Tel., etc., Co. *v.* Bickford, 142 N. Y. 224, 36 N. E. 881 [*reversing* 72 Hun 580, 25 N. Y. Suppl. 283]; Johnson *v.* Atlantic Ave. R. Co., 139 N. Y. 449, 34 N. E. 925 [*reversing* 21 N. Y. Suppl. 1056]; Untermyer *v.* Beihauer, 105 N. Y. 521, 11 N. E. 847; Morrison *v.* Benthuysen, 103 N. Y. 675, 9 N. E. 180; Camp *v.* Ingersoll, 86 N. Y. 433; Allentown Rolling Mills *v.* Dwyer, 26 N. Y. App. Div. 101, 49 N. Y. Suppl. 624; Bell *v.* New York, 11 Hun (N. Y.) 511; McDonnell *v.* Stevens, 9 Hun (N. Y.) 28; Sharp *v.* New York, 31 Barb. (N. Y.) 578, 9 Abb. Pr. 426, 18 How. Pr. 213; Childs *v.* Mayer, 1 Silv. Sup. (N. Y.) 335, 5 N. Y. Suppl. 340; Ross *v.* Combes, 37 N. Y. Super. Ct. 289; Aronin *v.* Philadelphia Casualty Co., 54 Misc. (N. Y.) 630, 104 N. Y. Suppl. 810; Brian *v.* Williams, 24 Misc. (N. Y.) 392, 53 N. Y. Suppl. 551; Deeves *v.* Metropolitan, etc., Co., 6 Misc. (N. Y.) 91, 26 N. Y. Suppl. 23 [*affirmed* in 141 N. Y. 587, 36 N. E. 739]; Blake *v.* Harrigan, 14 N. Y. Suppl. 663, 20 N. Y. Civ. Proc. 424; Cornell *v.* U. S. Illuminating Co., 16 N. Y. Suppl. 306; Goodfellow *v.* Wolcott, 12 N. Y. St. 620; Dewey *v.* Field, 13 How. Pr. (N. Y.) 437; McCullough *v.* Brodie, 13 How. Pr. (N. Y.) 346; Thomas *v.* Reab, 6 Wend. (N. Y.) 503; Ewart *v.* Kass, 17 S. D. 220, 95 N. W. 915; Andrus *v.* Home Ins. Co., 73 Wis. 642, 41 N. W. 956, 3 L. R. A. 271. See also Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791; Wiley

fee and the amount of the rental loss in land taken by a railroad company does not involve an account:[51] nor does the question of past damages in an action against a railroad company for injuries to abutting property caused by the operation of the railroad;[52] nor does the amount of damages in an action for specific performance where damages are awarded to plaintiff in lieu of a decree for specific performance.[53] Where there is but one transaction,[54] as where there is a single purchase consisting of many items,[55] or where services are all performed under one contract,[56] a long account is not involved so as to warrant a reference. So where the only question in dispute does not relate to the items of the account, a reference is not proper.[57]

d. When Account Is a Long Account. A "long account," as the term is used in the statutes, is not subject to any precise definition, but each case is to be determined on its own facts in the discretion of the court.[58] The only test seems to

v. Logan, 96 N. C. 510, 2 S. E. 598. *Contra*, see Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561, 11 S. W. 58; Chambers *v.* Appleton, 84 N. Y. 649; Pechner *v.* Phœnix Ins. Co., 6 Lans. (N. Y.) 411 [*affirmed* in 65 N. Y. 195] (holding that in an action on a fire policy, where defendants admit their liability, and the controversy relates solely to items of account and the amount of loss sustained by plaintiff, the court will refer the matter to referees for adjustment); Chicago, etc., R. Co. *v.* Faist, 87 Wis. 360, 58 N. W. 744.

Action on insurance policy.— The rule that items of damages do not constitute an account has been applied to actions on policies of insurance where there are many items of loss. Andrus *v.* Home Ins. Co., 73 Wis. 642, 41 N. W. 956, 3 L. R. A. 271. *Contra*, Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. (N. Y.) 321 [*affirmed* in 66 N. Y. 628]. *Compare* FIRE INSURANCE, 19 Cyc. 948 note 20. 956.

51. Doyle *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 376, 20 N. Y. Suppl. 865, 29 Abb. N. Cas. 272 [*affirmed* in 136 N. Y. 505, 32 N. E. 1008].

52. Jacquelin *v.* Manhattan R. Co., 12 Misc. (N. Y.) 330, 33 N. Y. Suppl. 655.

53. Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739.

54. Sartorius *v.* Gottlieb, 80 N. Y. App. Div. 112, 80 N. Y. Suppl. 159.

55. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Swift *v.* Wells, 2 How. Pr. (N. Y.) 79; Stewart *v.* Elwele, 3 Code Rep. (N. Y.) 139.

56. Russell *v.* McDonald, 125 N. Y. App. Div. 844, 110 N. Y. Suppl. 950; Smith *v.* London Assur. Corp., 114 N. Y. App. Div. 868, 100 N. Y. Suppl. 194; Leary *v.* Albany Brewing Co., 66 N. Y. App. Div. 407, 72 N. Y. Suppl. 657.

Actions by physicians for medical services see Simmons *v.* Bigelow, 3 Silv. Sup. (N. Y.) 344, 6 N. Y. Suppl. 435; Fowler *v.* Peck, 51 Misc. (N. Y.) 645, 99 N. Y. Suppl. 816.

57. Wilson *v.* Union Distilling Co., 16 Colo. App. 429, 66 Pac. 170; Bush *v.* Murphey, 113 Ga. 345, 38 S. E. 828; Kenneth Inv. Co. *v.* National Bank of Republic, 96 Mo. App. 125, 70 S. W. 173; Leary *v.* Albany Brewing Co., 66 N. Y. App. Div. 407, 72 N. Y. Suppl. 657; Nicoll *v.* Haas, 5 N. Y. App. Div. 206, 39 N. Y. Suppl. 205; Burt *v.* Nafis, 73 Hun (N. Y.) 574, 26 N. Y. Suppl. 184; Chu Pawn *v.* Irwin, 73 Hun (N. Y.) 182, 25 N. Y. Suppl. 871; Magown *v.* Sinclair, 5 Daly (N. Y.) 63; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Cumming *v.* Whiting, 9 N. Y. St. 830; Van Rensselaer *v.* Jewett, 6 Hill (N. Y.) 373, 41 Am. Dec. 750. But see U. S. Rolling Stock Co. *v.* Johnston, 67 Wis. 182, 30 N. W. 211, holding that a reference may be ordered where a long account is involved, under Rev. St. § 2864, even though defendant has pleaded a general denial of all liability. *Compare* Gopsill *v.* Hervey, 34 N. J. L. 435.

When the sole question is with respect to certain forgeries, there cannot be a compulsory reference ordered by the court, by virtue of Revision, p. 875, § 177, authorizing such reference when the controversy relates to accounts. American Saw Co. *v.* Trenton First Nat. Bank, 58 N. J. L. 438, 34 Atl. 1.

58. Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675; Mitchell *v.* Oregon Women's Flax-Fiber Assoc., 38 Oreg. 503, 63 Pac. 881; Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483.

Accounts held "long" accounts.— Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561, 11 S. W. 58 (ninety items); Mulloy *v.* Mulloy, 131 Mo. App. 654, 111 S. W. 843; Smith *v.* Haley, 41 Mo. App. 611 (twenty-eight items); Fransico *v.* Rowland, 14 Mo. App. 600 (forty-two items); Briscoe *v.* Kinealy, 8 Mo. App. 76 (twenty items); Welsh *v.* Darragh, 52 N. Y. 590 (twenty-six items); Cochrane Carpet Co. *v.* Howells, 86 Hun (N. Y.) 243, 33 N. Y. Suppl. 309; Canda *v.* Robbins, 5 Silv. Sup. (N. Y.) 6, 7 N. Y. Suppl. 895; Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 6 Abb. Pr. N. S. 240, 37 How. Pr. 399; Deeves *v.* Metropolitan Realty Co., 6 Misc. (N. Y.) 91, 26 N. Y. Suppl. 23 [*affirmed* in 141 N. Y. 587, 36 N. E. 739]; Shepard *v.* Eddy, 2 N. Y. Suppl. 534, 15 N. Y. Civ. Proc. 403; Bamberger *v.* Duden, 9 N. Y. St. 685 (sixteen items); Smith *v.* Kunert, (N. D. 1907) 115 N. W. 76; Sutton *v.* Wegner, 74 Wis. 347, 43 N. W. 167 (fifteen items); Turner *v.* Nachtsheim, 71 Wis. 16, 36 N. W. 637 (twenty items); Crocker *v.* Currier, 65 Wis. 662, 27 N. W. 825 (over one hundred items). Where only two items of an ac-

be whether the account is so long that the jury cannot keep the items in their minds and give each item its proper weight and application.[59]

e. What Constitutes "Examination" of Long Account. The term "examination of a long account" as used in the statutes does not mean the examination of it to ascertain the result or effect of it, but the proof by testimony of the correctness of the items composing it.[60] The mere fact that entries in books of account will be put in evidence does not make the action one necessarily requiring the examination of a long account.[61] So a reference will not be ordered where the account is not put in issue by the answer.[62]

f. Where Other Issues Involved — (i) *In General.* All the issues of fact in the action need not relate to an account to make the action referable as involving a long account.[63] And an action, in order to be referable as involving a long

count were disputed, but it appeared that one of the items was an aggregate of smaller bills, there was a long account. Williams *v.* Allen, 48 How. Pr. (N. Y.) 357. Where a complaint alleges an account which comprises seven items, and some of such items are composed of numerous articles and charges, the account is a long one. Marcile *v.* Saltzman, 6 N. Y. St. 48.

Accounts held not "long" accounts.— Kent *v.* Highleyman, 28 Mo. App. 614 (three items); Dooley *v.* Barker, 2 Mo. App. 325; Spence *v.* Simis, 137 N. Y. 616, 33 N. E. 554 [*reversing* 1 Misc. 384, 22 N. Y. Suppl. 76]; Martin *v.* Gould, 13 N. Y. Civ. Proc. 45 (three items, although one of them includes several items for services in one matter); Godfrey *v.* Williamsburgh City F. Ins. Co., 12 Abb. Pr. N. S. (N. Y.) 250; Harris *v.* Mead, 16 Abb. Pr. (N. Y.) 257 (seven items); Smith *v.* Brown, 3 How. Pr. (N. Y.) 9; Miller *v.* Hooker, 2 How. Pr. (N. Y.) 171 (eleven items); Parker *v.* Snell, 10 Wend. (N. Y.) 577 (four items).

59. Spence *v.* Simis, 137 N. Y. 616, 33 N. E. 554 [*reversing* on other grounds 1 Misc. 384, 22 N. Y. Suppl. 76]; Weidenfeld *v.* Woolfolk, 26 Misc. (N. Y.) 150, 56 N. Y. Suppl. 740; McQuade *v.* Cooper, 12 N. Y. Suppl. 836; Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675. See also Sargent *v.* Putnam, 58 N. H. 182.

60. Streat *v.* Rothschild, 12 Daly (N. Y.) 95; Magown *v.* Sinclair, 5 Daly (N. Y.) 63; Reiser *v.* Plath, 13 N. Y. Suppl. 272.

Contest as to correctness of charges.— The examination of a long account, which will warrant a compulsory reference, imports an actual contest as to the correctness of the different charges, or at least of several of them, a prolonged examination of witnesses on the issue, and a judicial inquiry and determination as to each one of numerous litigated items; and the necessity of making mere formal proof of the details of a claim is not sufficient to warrant such a reference. Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893; Ronalds *v.* Mechanics' Nat. Bank, 37 N. Y. Super. Ct. 208 (holding that where a plaintiff's right to claim interest does not depend upon an examination of accounts mentioned in the answer, but rests upon a question of fact determinable from evidence extrinsic of the accounts, the case is not one involving an examination of a long account, so as to deprive plaintiff of the right to a jury trial on the issue of his right to interest); Deeves *v.* Metropolitan Realty Co., 6 Misc. (N. Y.) 91, 26 N. Y. Suppl. 23 [*affirmed* in 141 N. Y. 587, 36 N. E. 739].

61. Streat *v.* Rothschild, 12 Daly (N. Y.) 95.

62. Van Ingen *v.* Herold, 19 N. Y. Suppl. 456.

63. Weber *v.* Hearn, 7 N. Y. App. Div. 306, 40 N. Y. Suppl. 273; National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, 35 N. Y. Suppl. 933 [*affirmed* in 148 N. Y. 581, 42 N. E. 1077]; Place *v.* Chesebrough, 4 Hun (N. Y.) 577 [*affirmed* in 63 N. Y. 315]; Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 6 Abb. Pr. N. S. 240, 37 How. Pr. 399; Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Goodyear *v.* Brooks, 2 Abb. Pr. N. S. (N. Y.) 296; Jordan *v.* Warner, 107 Wis. 539, 83 N. W. 946; Littlejohn *v.* State University, 71 Wis. 437, 37 N. W. 346. See also Ittner *v.* St. Louis Exposition, etc., Assoc., 97 Mo. 561, 11 S. W. 58; Dane County Sup'rs *v.* Dunning, 20 Wis. 210; Hurlbutt *v.* Barnett, [1893] 1 Q. B. 77, 62 L. J. Q. B. 1, 67 L. T. Rep. N. S. 818, 4 Reports 103, 41 Wkly. Rep. 33; Knight *v.* Coales, 19 Q. B. D. 296, 56 L. J. Q. B. 486, 35 Wkly. Rep. 679; Ward *v.* Pilley, 5 Q. B. D. 427, 49 L. J. Q. B. 705, 43 L. T. Rep. N. S. 301, 28 Wkly. Rep. 937; Birmingham, etc., Gas Co. *v.* Ratcliff, L. R. 6 Exch. 224, 40 L. J. Exch. 136, 19 Wkly. Rep. 776; Browne *v.* Emerson, 17 C. B. 361, 2 Jur. N. S. 190, 25 L. J. C. P. 104, 4 Wkly. Rep. 295, 84 E. C. L. 361; Martin *v.* Fyfe, 49 L. T. Rep. N. S. 107, 21 Wkly. Rep. 840; Reece *v.* Chaffers, 7 L. T. Rep. N. S. 781, 11 Wkly. Rep. 307. But see Wheeler *v.* Falconer, 7 Rob. (N. Y.) 45; Evans *v.* Kalbfleisch, 16 Abb. Pr. N. S. (N. Y.) 13; Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143; Clow *v.* Harper, 3 Ex. D. 198, 47 L. J. Exch. 393, 38 L. T. Rep. N. S. 269, 26 Wkly. Rep. 364.

Where the principal issues presented are questions of law not involving nor involved in an accounting, the court should not submit the whole case to a referee to hear and determine, but should refer the taking of any necessary account after such determination has been made by the court. However, where the primary purpose of the action is an accounting and the account must obviously be a long one, statutes usually confer the au-

account, need not necessarily be an action based on an account or an action for an accounting.[64] But in order to authorize a reference the account must be directly and not merely collaterally involved; [65] in other words the account must be the primary object of the action.[66]

(II) *Previous Determination of Facts or Issues.* The general rule, especially in suits in equity, is that where there is an issue the determination of which may render an accounting unnecessary, the reference should not be ordered until such issue is decided and an accounting found necessary; [67] but there is

thority to refer the whole case and in the court's discretion to submit to the referee all incidental questions of law arising therein. Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

Immaterial issue.—An order of reference on the trial of an action, one of the issues of which involves the examination of a long account, is not rendered erroneous on the suggestion that such issue is not a material issue. Lawless *v.* O'Mahoney, 9 Abb. Pr. N. S. (N. Y.) 44.

In New Jersey, where a reference is authorized by statute, where "matters of account are in controversy," the test is the character of the claim, in so far as the right to a reference is concerned, without regard to what may be the issue on the record. Tunison *v.* Snover, 56 N. J. L. 41, 28 Atl. 310; Gopsill *v.* Hervey, 34 N. J. L. 435.

64. National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, 35 N. Y. Suppl. 933 [*affirmed* in 148 N. Y. 581, 42 N. E. 1077]; New York *v.* Genet, 67 Barb. (N. Y.) 275; Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483.

Action to set aside fraudulent acts.—An action under a statute providing that any creditor of a deceased insolvent debtor having a claim in excess of the specified amount may sue to set aside all acts done in fraud of creditors by such deceased debtor may be referred where a long account is involved. National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, 35 N. Y. Suppl. 933 [*affirmed* in 148 N. Y. 581, 42 N. E. 1077]. But see Read *v.* Lozin, 31 Hun (N. Y.) 286.

Action to foreclose mechanic's lien.—A reference may be ordered in an action to foreclose a mechanic's lien where a long account is involved. Weber *v.* Hearn, 7 N. Y. App. Div. 306, 40 N. Y. Suppl. 273; Tooker *v.* Rinaldo, 11 Hun (N. Y.) 154, 2 Abb. N. Cas. 334 note. See also Mechanics' Liens, 27 Cyc. 420.

An action to recover upon an account stated, since no account is involved, is not referable (Cuming *v.* Whiting, 12 N. Y. Civ. Proc. 443, 9 N. Y. St. 830), although it has been held that the appointment of an auditor in such a case is not prejudicial error where the rights of the parties are not affected thereby (Loomis *v.* Stuart, (Tex. Civ. App. 1893) 24 S. W. 1078).

65. Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008 [*affirming* 1 Misc. 376, 20 N. Y. Suppl. 865, 29 Abb. N. Cas. 272]; Camp *v.* Ingersoll, 86 N. Y. 433; Smith *v.* London Assur. Corp., 114 N. Y. App. Div. 868, 100 N. Y. Suppl. 194; Bentz *v.* Carleton, etc., Co., 114 N. Y. App. Div. 865, 100 N. Y. Suppl. 206; Importers', etc., Nat. Bank *v.* Werner, 54 N. Y. App. Div. 435, 66 N. Y. Suppl. 996; C. & C. Electric Co. *v* Walker Co., 35 N. Y. App. Div. 426, 54 N. Y. Suppl. 810; Coit *v.* Goodhart, 5 N. Y. App. Div. 115, 39 N. Y. Suppl. 47; Mitchell *v.* Oliver, 56 Hun (N. Y.) 208, 9 N. Y. Suppl. 367; Keller *v.* Payne, 51 Hun (N. Y.) 316, 4 N. Y. Suppl. 227; Ronalds *v.* Mechanics' Nat. Bank, 37 N. Y. Super. Ct. 208; Turner *v.* Taylor, 2 Daly (N. Y.) 278; Lustgarten *v.* Harlam, 56 Misc. (N. Y.) 606, 107 N. Y. Suppl. 612; Aronin *v.* Philadelphia Casualty Co., 54 Misc. (N. Y.) 630, 104 N. Y. Suppl. 810; George F. Lee Coal Co. *v.* Meeker, 43 Misc. (N. Y.) 162, 88 N. Y. Suppl. 190; Morrison *v.* Crane, 21 N. Y. Suppl. 46; Reiser *v.* Plath, 13 N. Y. Suppl. 272; Continental Ins. Co. *v.* Phœnix Ins. Co., 8 N. Y. Suppl. 524; Streat *v.* Rothschild, 12 Abb. N. Cas. (N. Y.) 383; Kain *v.* Delano, 11 Abb. Pr. N. S. (N. Y.) 29; Bushnell *v.* Eastman, 2 Abb. Pr. N. S. (N. Y.) 411; Cameron *v.* Freeman, 10 Abb. Pr. (N. Y.) 333, 18 How. Pr. 310; Macgowan *v.* Sinclair, 9 Alb. L. J. (N. Y.) 161; Dreveskracht *v.* Balfour First State Bank, 16 N. D. 555, 113 N. W. 1032; Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483; Andrus *v.* Home Ins. Co., 73 Wis. 642, 41 N. W. 956, 3 L. R. A. 271.

Inconsistent relief.—A plaintiff will not be allowed a reference to ascertain the amount due to him for certain services, if inconsistent with the main relief sought by the complaint. Van Gelder *v.* Van Gelder, 77 N. Y. 446.

66. Aronin *v.* Philadelphia Casualty Co., 54 Misc. (N. Y.) 630, 104 N. Y. Suppl. 810.

67. Malone *v.* Sts. Peter and Paul's Church, 172 N. Y. 269, 64 N. E. 961; Hilton *v.* Hughes, 5 N. Y. App. Div. 226, 39 N. Y. Suppl. 204; Stokes *v.* Stokes, 87 Hun (N. Y.) 152, 33 N. Y. Suppl. 1024; Claflin *v.* Drake, 38 Hun (N. Y.) 144; Samble *v.* Mechanics' F. Ins. Co., 1 Hall (N. Y.) 560; Mitchell *v.* Stewart, 3 Abb. Pr. N. S. (N. Y.) 250; Keep *v.* Keep, 58 How. Pr. (N. Y.) 139; Graham *v.* Golding, 7 How. Pr. (N. Y.) 260; Duckworth *v.* Duckworth, 144 N. C. 620, 57 S. E. 396; Humble *v.* Mebane, 89 N. C. 410; Sloan *v.* McMahon, 85 N. C. 296; Price *v.* Eccles, 73 N. C. 162; Reager *v.* Chappelear, 104 Va. 14, 51 S. E. 170; Bresee *v.* Bradfield, 99 Va. 331, 38 S. E. 196; Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446. See also Atlantic, etc., R. Co. *v.* Morrison, 82 N. C. 141; Lascelles *v.* Butt, 2 Ch. D. 588, 35 L. T. Rep. N. S. 122.

considerable authority for the rule that where the action is one at law and must be tried by a jury if not referred, it is not ground for refusing a reference that issues outside the account are raised, the determination of which might preclude the necessity for an accounting.[68]

(III) *Effect of Joinder of Causes of Action.* Where several causes of action are joined in the complaint and only a part of them are referable, plaintiff is not entitled to an order of compulsory reference.[69] But a reference may be ordered where several alleged causes of action are set forth but in reality there is but one cause of action which is referable.[70]

(IV) *Counter-Claim or Defenses.* The fact that plaintiff is entitled to a reference as to the issues raised by the complaint and the defenses to it does not entitle him to a reference as to a counter-claim.[71] In at least one jurisdiction, the rule is that where the cause of action in the complaint is not referable, a reference of the entire action cannot be ordered on defendant's application because a counter-claim interposed is referable, where plaintiff's cause of action is not admitted;[72] although, in such a case, the action is referable if plaintiff's cause of action is admitted.[73] However, where a defense necessarily involving a long accounting is interposed, a reference may be ordered, although the cause of action set up in the complaint appears on its face to be non-referable.[74] Where the counter-claim is referable but the cause of action stated in the complaint is not, a general objection to a reference is properly overruled.[75] On the other hand

But see Vail *v.* Jacob, 10 Mo. App. 582 (holding that where a case is properly referable under the statute, the fact that defendant's liability as to many of the items of the account depends upon the question of notice does not render erroneous a reference of the cause before the question of notice is determined); Cumberland First Nat. Bank *v.* Parsons, 42 W. Va. 137, 24 S. E. 554 (holding that the court is not compelled, in an action to set aside a conveyance as in fraud of creditors, always to decide the question of fraud in advance, but may, if necessary, refer the case for the determination of certain facts before decreeing the conveyance void). *Compare* Day *v.* Jameson, 49 N. Y. Super. Ct. 373; Smith *v.* Dodd, 3 E. D. Smith (N. Y.) 348; Devlin *v.* New York, 54 How. Pr. (N. Y.) 50; Briggs *v.* Hiles, 79 Wis. 571, 48 N. W. 800.

Where a case involves both an account and the trial of an issue by a jury, it is not error to postpone the reference until the issue is passed upon. Cox *v.* Cox, 84 N. C. 138.

An issue in abatement cannot be sent to a referee for trial merely because the issue in bar involves a long account. Brown County *v.* Van Stralen, 45 Wis. 675.

68. Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67; Boisnot *v.* Grosman, 95 N. Y. App. Div. 489, 88 N. Y. Suppl. 867; Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 6 Abb. Pr. N. S. 240, 37 How. Pr. 399; Price *v.* Parker, 44 Misc. (N. Y.) 582, 90 N. Y. Suppl. 98; Hall *v.* U. S. Reflector Co., 14 N. Y. Wkly. Dig. 48 [*affirmed* in 95 N. Y. 641].

Affirmative defenses raising only questions of fact need not be determined by the court before ordering a reference. Brown *v.* Finch, 18 N. Y. Suppl. 551 [*affirmed* in 133 N. Y. 671, 31 N. E. 625]. See also Van Zant *v.* Cobb, 10 How. Pr. (N. Y.) 348.

69. Ross *v.* Combes, 37 N. Y. Super. Ct. 289; Peabody *v.* Cortado, 21 N. Y. Suppl. 680; Evans *v.* Kalbfleisch, 16 Abb. Pr. N. S. (N. Y.) 13. And see Hill *v.* Reynolds, 189 N. Y. 558, 82 N. E. 1127 [*reversing* 119 N. Y. App. Div. 689, 104 N. Y. Suppl. 303]. *Compare* McKinney *v.* London, 18 Misc. (N. Y.) 564, 42 N. Y. Suppl. 469.

70. Place *v.* Chesebrough, 63 N. Y. 315; Connor *v.* Jackson, 53 N. Y. App. Div. 322, 65 N. Y. Suppl. 693.

71. Hoffman House *v.* Hoffman House Café, 36 N. Y. App. Div. 176, 55 N. Y. Suppl. 763; McAleer *v.* Sinnott, 30 N. Y. App. Div. 318, 51 N. Y. Suppl. 956.

72. Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67; Kennedy *v.* Horikoshi, 82 N. Y. App. Div. 415, 81 N. Y. Suppl. 827; Irving *v.* Irving, 90 Hun (N. Y.) 422, 35 N. Y. Suppl. 744 [*affirmed* in 149 N. Y. 573, 43 N. E. 987]. See also Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143. But see Blackstone Nat. Bank *v.* Bogart, 41 N. Y. Super. Ct. 292; Maryott *v.* Thayer, 39 N. Y. Super. Ct. 417; Townsend *v.* Hendricks, 2 Sweeny (N. Y.) 503; Searle *v.* Davis, 14 N. Y. Suppl. 312. *Compare* Guaranty Trust Co. *v.* Robinson, 31 Misc. (N. Y.) 277, 64 N. Y. Suppl. 366.

73. Kindberg *v.* Chapman, 115 N. Y. App. Div. 154, 100 N. Y. Suppl. 686; Ames *v.* French, 83 N. Y. App. Div. 452, 82 N. Y. Suppl. 452; Irving *v.* Irving, 90 Hun (N. Y.) 422, 35 N. Y. Suppl. 744 [*distinguishing* Steck *v.* Colorado Fuel, etc., Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67]. See also Haig *v.* Boyle, 20 Misc. (N. Y.) 155, 45 N. Y. Suppl. 816.

74. Irving *v.* Irving, 90 Hun (N. Y.) 422, 35 N. Y. Suppl. 744 [*affirmed* in 149 N. Y. 573, 43 N. E. 987]. See also Ames *v.* French, 83 N. Y. App. Div. 452, 82 N. Y. Suppl. 452.

75. Brown *v.* Keith, 1 Nebr. (Unoff.) 649,

where plaintiff's case is referable, it cannot be made non-referable by defendant's answer.[76] Where only the counter-claim is referable and the counter-claim is stricken out, no reference should be ordered.[77]

g. Form and Nature of Action — (i) *In General.* The power to refer without the consent of the parties in a proper case applies equally to suits upon express and implied contracts.[78] However, in most jurisdictions, an action *ex delicto* cannot be compulsorily referred,[79] although the mere fact that fraud is incidentally involved in the examination of a long account does not preclude a reference.[80] On the other hand where the substantial issue involved is fraud a compulsory reference will not be ordered.[81]

96 N. W. 59. See also Hotaling *v.* Tecumseh Nat. Bank, 55 Nebr. 5, 75 N. W. 242.

76. State *v.* Colorado Fuel, etc., Co., 142 N. Y. 236, 37 N. E. 1, 25 L. R. A. 67; Ames *v.* French, 83 N. Y. App. Div. 452, 82 N. Y. Suppl. 452; Brooklyn, etc., R. Co. *v.* Reid, 21 Hun (N. Y.) 273; Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152, 12 N. Y. St. 66 [*affirmed* in 109 N. Y. 658, 17 N. E. 867]; Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413.

The character of an action is determined by the complaint; and, if the complaint is upon contract, the action is referable, although the answer sets up fraud in the transaction, and claims damages by way of recoupment or counter-claim. Welsh *v.* Darragh, 52 N. Y. 590.

77. Latimer *v.* Sullivan, 30 S. C. 111, 8 S. E. 639.

78. People *v.* Wood, 121 N. Y. 522, 24 N. E. 952.

79. Martin *v.* Hall, 26 Mo. 386; Willard *v.* Doran, etc., Co., 48 Hun (N. Y.) 402, 1 N. Y. Suppl. 345, 588; Wickham *v.* Frazee, 13 Hun (N. Y.) 431; Hoffman *v.* Sparling, 12 Hun (N. Y.) 83; Warner *v.* Western Transp. Co., 3 Rob. (N. Y.) 705; Thompson *v.* Finn, 9 Daly (N. Y.) 379; Reilly *v.* Byrne, 1 N. Y. Civ. Proc. 201; Wood *v.* Hope, 2 Abb. N. Cas. (N. Y.) 186; Ross *v.* New York, 2 Abb. Pr. N. S. (N. Y.) 266, 32 How. Pr. 164; Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143; McMaster *v.* Booth, 4 How. Pr. (N. Y.) 427, 3 Code Rep. 111; Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687; Dederick *v.* Richley, 19 Wend. (N. Y.) 108; Silmser *v.* Redfield, 19 Wend. (N. Y.) 21; Van Oss *v.* Synon, 85 Wis. 661, 56 N. W. 190; Stacy *v.* Milwaukee, etc., R. Co., 72 Wis. 331, 39 N. W. 532. But see Sheldon *v.* Wood, 3 Sandf. (N. Y.) 739, Code Rep. N. S. 118. *Compare* Boom *v.* Utica, 2 Barb. (N. Y.) 104. *Contra,* Salem Traction Co. *v.* Anson, 41 Oreg. 562, 67 Pac. 1015, 69 Pac. 675, holding that where a long account is involved, it is immaterial whether the action is *ex contractu* or *ex delicto.*

Action to recover penalty.—An action of debt against a constable for neglecting to return an execution is an action for a penalty, and cannot be referred, except by the consent of the parties. Beardsley *v.* Dygert, 3 Den. (N. Y.) 380. A compulsory reference cannot be ordered in an action to enforce a penal obligation, for example, the individual liability of a trustee in a manufacturing company, for failure of the company to file its annual report, although a long account is involved. Hyatt *v.* Roach, 1 Abb. N. Cas. (N. Y.) 125, 52 How. Pr. 115.

Actions held ex contractu rather than ex delicto see People *v.* Wood, 121 N. Y. 522, 24 N. E. 952; Vilmar *v.* Schall, 61 N. Y. 564; National Shoe, etc., Bank *v.* Baker, 90 Hun (N. Y.) 277, 35 N. Y. Suppl. 933 [*affirmed* in 148 N. Y. 581, 42 N. E. 1077]; Harden *v.* Corbett, 6 Hun (N. Y.) 522; Van Oss *v.* Synon, 85 Wis. 661, 56 N. W. 190; Littlejohn *v.* State University, 71 Wis. 437, 37 N. W. 346. Where a complaint for conversion does not allege it to have been wrongful or unlawful, the action is on contract, and therefore referable. Casgrain *v.* Hamilton, 92 Wis. 179, 66 N. W. 118. Where a complaint states that plaintiff waives the tort, and sues on the implied contract arising from the facts alleged, the action will be deemed to have been brought on a contract, and may be referred. Sage *v.* Shepard, etc., Lumber Co., 76 Hun (N. Y.) 134, 27 N. Y. Suppl. 559 [*affirmed* in 143 N. Y. 623, 37 N. E. 827].

80. Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152, 12 N. Y. St. 66 [*affirmed* in 109 N. Y. 658, 17 N. E. 867]; Verplanck *v.* Kendall, 45 N. Y. Super. Ct. 525; Kingsley *v.* Brooklyn, 1 Abb. N. Cas. (N. Y.) 108; Devlin *v.* New York, 54 How. Pr. (N. Y.) 50. See also Crosby *v.* Day, 81 N. Y. 242 [*affirming* 16 Hun 291]; Imhof *v.* Sutton, L. R. 2 C. P. 406, 36 L. J. C. P. 130, 15 L. T. Rep. N. S. 578; Insull *v.* Moojen, 3 C. B. N. S. 359, 27 L. J. C. P. 75, 6 Wkly. Rep. 126, 91 E. C. L. 359; Trickett *v.* Green, H. & R. 63, 11 Jur. N. S. 1037, 35 L. J. C. P. 69, 13 L. T. Rep. N. S. 405, 14 Wkly. Rep. 141. *Compare* Leigh *v.* Brooks, 5 Ch. D. 592, 46 L. J. Ch. 344, 25 Wkly. Rep. 401; Hoch *v.* Boor, 49 L. J. C. P. 665, 43 L. T. Rep. N. S. 425; Russell *v.* Harris, 65 L. T. Rep. N. S. 752.

Allegations of fraud in the complaint do not, where a long account is involved, prevent a reference. Harrington *v.* Bruce, 84 N. Y. 103; Sheldon *v.* Wood, 3 Sandf. (N. Y.) 739, Code Rep. N. S. 118; Atocha *v.* Garcia, 15 Abb. Pr. (N. Y.) 303, 24 How. Pr. 186; People *v.* Peck, 57 How. Pr. (N. Y.) 315 [*affirmed* in 77 N. Y. 630]. *Contra,* Townsend *v.* Hendricks, 40 How. Pr. (N. Y.) 143 [*reversing* 39 How. Pr. 475].

81. Morrison *v.* Horrocks, 40 Hun (N. Y.) 428; Bamberger *v.* New York Fire Assoc., 58

(II) *Actions by Attorneys.* The rule that a reference may be ordered where the examination of a long account is necessary is often applied by allowing a reference in an action by an attorney to recover for professional services,[82] but such references are not regarded with favor and will not be ordered where the case can be satisfactorily tried by a jury.[83] So a reference will not be ordered if the question involved is as to the value of the services,[84] nor if the services were rendered in a single action,[85] or under one general retainer,[86] nor if a gross charge is made for the entire services.[87]

h. Difficult Questions of Law.[88] In at least one state, by statute, the court

N. Y. Super. Ct. 244, 10 N. Y. Suppl. 229; McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Booss *v.* Mihan, 4 Misc. (N. Y.) 614, 24 N. Y. Suppl. 112; Quinn *v.* McDonald, 10 N. Y. Suppl. 855 [*affirmed* in 129 N. Y. 673, 29 N. E. 746]; Tapscott *v.* Knowlton, 6 N. Y. St. 539; Bushnell *v.* Eastman, 2 Abb. Pr. N. S. (N. Y.) 411; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687. See also Coit *v.* Goodhart, 5 N. Y. App. Div. 115, 39 N. Y. Suppl. 47.

82. Russell *v.* McDonald, 125 N. Y. App. Div. 844, 110 N. Y. Suppl. 950; Lewis *v.* Snook, 88 N. Y. App. Div. 343, 84 N. Y. Suppl. 634 [*affirmed* in 179 N. Y. 519, 71 N. E. 1133]; Clinch *v.* Henck, 49 N. Y. App. Div. 183, 62 N. Y. Suppl. 1058; Richards *v.* Stokes, 1 N. Y. App. Div. 305, 37 N. Y. Suppl. 246; Risley *v.* Jewett, 3 Silv. Sup. (N. Y.) 278, 6 N. Y. Suppl. 315; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Hale *v.* Swinburne, 17 Abb. N. Cas. (N. Y.) 381; Stebbins *v.* Cowles, 66 How. Pr. (N. Y.) 28; Perry *v.* Rollins, 56 How. Pr. (N. Y.) 242 [*affirmed* in 86 N. Y. 629]. See also Attorney and Client, 4 Cyc. 956 note 55, 1021 note 31.

83. Russell *v.* McDonald, 125 N. Y. App. Div. 844, 110 N. Y. Suppl. 950; Moyer *v.* Nelliston, 110 N. Y. App. Div 602, 96 N. Y. Suppl. 485; Hoff *v.* Reid, 110 N. Y. App. Div. 95, 97 N. Y. Suppl. 107; Stein *v.* New York News Pub. Co., 47 N. Y. App. Div. 550, 62 N. Y. Suppl. 579; Hedges *v.* Methodist Protestant Church, 23 N. Y. App. Div. 347, 48 N. Y. Suppl. 154 [*reversing* 21 Misc. 174, 47 N. Y. Suppl. 93]; Moar *v.* Wallace, 24 N. Y. App. Div. 161, 48 N. Y. Suppl. 748; Hedges *v.* Williamsburgh Methodist Protestant Church, 23 N. Y. App Div. 347, 48 N. Y. Suppl. 154; Abbott *v.* Corbin, 22 N. Y. App. Div. 584, 48 N. Y. Suppl. 103; Watson *v.* Cooney, 56 N. Y. Super. Ct. 247, 3 N. Y. Suppl. 211; Hassard *v* Warner, 32 Misc. (N. Y.) 771, 66 N. Y. Suppl. 474.

When long account involved.— In an action by attorneys for professional services, on a *quantum meruit*, the fact that the complaint shows that there were four retainers, and that as to each, plaintiffs have itemized the work done in their bill of particulars, does not justify a compulsory order of reference. Estes *v.* Dean, 1 N. Y. App. Div. 34, 36 N. Y. Suppl. 747. A compulsory reference cannot be ordered where the bill of particulars consisted of but three items of charges, notwithstanding one of them included several items of services in one matter. Martin *v.* Gould, 13 N. Y. Civ. Proc. 45. An itemized bill for services to defendant while the latter was acting as executrix of an estate, which consists of separate charges for consultations, writing of letters, and attendance on the court during the executorial accounting is not a long account. Feeter *v.* Arkenburgh, 147 N. Y. 237, 41 N. E. 518. An account consisting of ten items, seven for consultations, one for drawing a complaint, one for demanding property, and one for attendance, etc., was not a long account. Merritt *v.* Vigelius, 28 Hun (N. Y.) 420. An itemized bill containing about twenty-five separate items is not a long account. Angel *v.* Rae, 27 Misc. (N. Y.) 829, 57 N. Y. Suppl. 817. A counter-claim for attorney's services and disbursements in four different suits does not constitute a long account Spence *v.* Simis, 137 N. Y. 616, 33 N. E. 554. Where the performance of all the services, but not their value, was admitted, except as to two separate and distinct items, as to which the statute of limitations was pleaded, the trial of the issues did not require the examination of a long account. Dittenhoeffer *v.* Lewis, 5 Daly (N. Y.) 72.

84. Cantine *v.* Russell, 168 N. Y. 484, 61 N. E. 769; Randall *v.* Sherman, 131 N. Y. 669, 30 N. E. 589; Hoff *v.* Reid, 110 N. Y. App. Div. 95, 97 N. Y. Suppl. 107; Prentice *v.* Huff, 98 N. Y. App. Div. 111, 90 N. Y. Suppl. 780; Martin *v.* Windsor Hotel Co., 10 Hun (N. Y.) 304; Davis *v.* Walsh, 48 N. Y. Super. Ct. 515; Adams *v.* Utica, 6 N. Y. Civ. Proc. 294; Flanders *v.* Odell, 16 Abb. Pr. N. S. (N. Y.) 247; Hull *v.* Allen, 66 How. Pr. (N. Y.) 124; Fox *v.* Fox, 24 How. Pr. (N. Y.) 409; Haight *v.* Holcomb, 16 How. Pr. (N. Y.) 173.

85. Moyer *v.* Nellison, 110 N. Y. App. Div. 602, 96 N. Y. Suppl. 485; Abbott *v.* Corbin, 22 N. Y. App. Div. 584, 48 N. Y. Suppl. 103; Fitch *v.* Volker, etc., Mfg. Co., 70 Hun (N. Y.) 71, 23 N. Y. Suppl. 1103; Felt *v.* Tiffany, 11 Hun (N. Y.) 62; Hoes *v.* Allen, 28 Misc. (N. Y.) 450, 59 N. Y. Suppl. 191; Tracy *v.* Stearns, 61 How. Pr. (N. Y.) 265.

86. Cantine *v.* Russell, 168 N. Y. 484, 61 N. E. 769; Prentice *v.* Huff, 98 N. Y. App. Div. 111, 90 N. Y. Suppl. 780; Van Slyck *v.* Ingersoll, 13 N. Y. Civ. Proc. 48; Martin *v.* Gould, 13 N. Y. Civ. Proc. 45; Hull *v.* Allen, 66 How. Pr. (N. Y.) 124; Randall *v.* Kingsland, 53 How. Pr. (N. Y.) 512.

87. Martin *v.* Gould, 13 N. Y. Civ. Proc. 45.

88. Showing as to in motion papers see *infra*, III, C, 2, 3.

cannot order a reference, even where the examination of a long account is necessary, where there are difficult questions of law involved.[89] However, the questions of law must be ones of real difficulty,[90] but are not confined to those arising out of the facts presented by the issues in the case; they may grow out of their very character, and the evidence necessary to their investigation.[91]

3. Incidental Questions — a. In General.[92] In addition to the power conferred by the statutes to direct a trial by a referee of all or a part of the issues or to decide any particular question of fact where a long account is involved, the statutes in some jurisdictions authorize a reference of questions incidentally arising at any stage of the action.[93] And it appears that such references may be ordered in an equity suit without any statutory authority therefor, but merely by virtue of the authority of the court as a court of equity.[94] Such references are often termed interlocutory references as distinguished from references to hear and determine the issues. A reference may generally be ordered for the information of the court,[95] even after interlocutory judgment,[96] as where facts are desired in order to enable the court to form the proper decree in a suit in equity.[97] But a plaintiff is not entitled to a reference merely to obtain evidence to support the allegations of his complaint.[98]

b. Reference to Take Account.[99] A reference merely to take an account for the information of the court may be ordered in a proper case.[1] Authority is sometimes conferred by statute to direct a reference to take an account and report to the court thereon, either with or without testimony, after interlocutory or final judgment, or where it is necessary to do so for the information of the court.[2]

c. Questions of Fact Arising on Motion or Otherwise.[3] In some jurisdictions, by statute, the court has power to order a reference to determine and report upon

89. Goodyear *v.* Brooks, 4 Rob. (N. Y.) 682, 2 Abb. Pr. N. S. 296; Rochester *v.* New York, 9 N. Y. Civ. Proc. 226, 3 How. Pr. N. S. 527; Rathbun *v.* Rathbun, 3 How. Pr. (N. Y.) 139; Ives *v.* Vandewater, 1 How. Pr. (N. Y.) 168; Anonymous, 5 Cow. (N. Y.) 423; Adams *v.* Bayles, 2 Johns. (N. Y.) 374; Codwise *v.* Hacker, 2 Cai. (N. Y.) 251; De Hart *v.* Covenhoven, 2 Johns. Cas. (N. Y.) 402; Macgowan *v.* Sinclair, 9 Alb. L. J. (N. Y.) 161.

90. Anonymous, 5 Cow. (N. Y.) 423.

91. Goodyear *v.* Brooks, 4 Rob. (N. Y.) 682, 2 Abb. Pr. N. S. 296.

92. Assessment of damages: After inquisition on default or interlocutory judgment before referee see Damages, 13 Cyc. 221. On dissolution or modification of injunction see Injunctions, 22 Cyc. 1006, 1038. In eminent domain proceedings see Eminent Domain, 15 Cyc. 883.

Disputed claims against estate of deceased person see Executors and Administrators, 18 Cyc. 518, 861.

Where plea of another action pending is interposed, to ascertain whether both suits are for the same matter see Abatement and Revival, 1 Cyc. 45.

93. See the statutes of the several states.

94. Elnore *v.* Thomas, 7 Abb. Pr. (N. Y.) 70.

95. *Missouri.*— Vette *v.* Geist, 155 Mo. 27, 55 S. W. 871; State *v.* Johnson, 132 Mo. 108, 33 S. W. 781.

New York.— Ketchum *v.* Edwards, 6 N. Y. App. Div. 160, 39 N. Y. Suppl. 1012 [*affirmed* in 153 N. Y. 534, 47 N. E. 918]; People *v.* St. Louis, etc., R. Co., 44 Hun 552, 7 N. Y. St. 415; Matter of Mellen, 18 N. Y. Suppl. 515 [*affirmed* in 138 N. Y. 615, 33 N. E. 1083].

Pennsylvania.— Hodges *v.* Board of Revision, 3 L. T. N. S. 77.

West Virginia.— Core *v.* Wigner, 32 W. Va. 277, 9 S. E. 36.

United States.— Crowell *v.* U. S., 6 Ct. Cl. 23.

See 42 Cent. Dig. tit. "References," § 30.

96. Sutton *v.* Schonwald, 80 N. C. 20.

97. Elnore *v.* Thomas, 7 Abb. Pr. (N. Y.) 70.

98. Millhiser *v.* McKinley, 98 Va. 207, 35 S. E. 446.

99. Reference to take and state account of assignee for benefit of creditors see Assignments For Benefit of Creditors, 4 Cyc. 249.

In proceedings to compel guardian to account see Guardian and Ward, 21 Cyc. 164.

In proceedings to settle accounts of executors and administrators see Executors and Administrators, 18 Cyc. 1177.

1. See *infra*, VII, P.

2. Speakman *v.* Vest, 154 Ala. 412, 45 So. 667; Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008; Drexel *v.* Pease, 129 N. Y. 96, 29 N. E. 241 [*affirming* 59 Hun 626, 13 N. Y. Suppl. 774]; Salisbury *v.* Slade, 22 N. Y. App. Div. 346, 48 N. Y. Suppl. 55 [*reversed* on other grounds in 160 N. Y. 278, 54 N. E. 41]; Mundorff *v.* Mundorff, 1 Hun (N. Y.) 41. See also Crawford *v.* Waters, 46 How. Pr. (N. Y.) 210; Bond *v.* Wilson, 137 N. C. 145, 49 S. E. 89.

3. Reference on question of allowance of temporary alimony see Divorce, 14 Cyc. 756.

a question of fact arising at any stage of the action upon a motion or otherwise, except upon the pleadings.[4] Under such a statute a compulsory reference is authorized where a question of fact arises on a motion,[5] on application of a party or on the court's own motion,[6] and even after judgment;[7] but such a reference is not to hear or determine but merely to take testimony and report.[8] Furthermore, such a reference is not regarded with favor and should be ordered only in extraordinary cases where the court is unable to determine the facts from the motion papers.[9] Under such statutes, however, no question of fact arising "on the pleadings" can be compulsorily referred.[10]

d. Reference Merely to Take Testimony. While in some jurisdictions a reference merely to take testimony and report it is authorized in a suit in equity,[11]

4. See the statutes of the several states.

In New York Code Civ. Proc. § 1015, authorizes a reference in an equity case to determine and report on a question of fact arising at any stage of the action upon a motion or otherwise except upon the pleadings. Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008. The purpose of the statute was to authorize the court in its discretion to refer all disputed matters of fact not arising on the pleadings, such for instance, as whether an injunction has been violated or the party is in contempt for any cause alleged and the numerous questions which arise on motion and in relation to the execution of the orders, decrees, and process of the court and also upon petitions presented during the progress of the case. Flagg *v.* Munger, 3 Barb. (N. Y.) 9.

On motion to dissolve attachment see ATTACHMENT, 4 Cyc. 794.

5. Aldinger *v.* Pugh, 57 Hun (N. Y.) 181, 10 N. Y. Suppl. 684, 19 N. Y. Civ. Proc. 91 [*affirmed* in 132 N. Y. 403, 30 N. E. 745]; People *v.* St. Louis, etc., R. Co., 44 Hun (N. Y.) 552, 7 N. Y. St. 415; Swift *v.* Wylie, 5 Rob. (N. Y.) 680; Sullivan *v.* McCann, 124 N. Y. App. Div. 126, 108 N. Y. Suppl. 909; Neal *v.* Gilleran, 123 N. Y. App. Div. 639, 108 N. Y. Suppl. 118; People *v.* Erster Zloczower Kranken Unterstutzung Verein, 37 Misc. (N. Y.) 420, 75 N. Y. Suppl. 784; Nichtauser *v.* Lehmann, 15 Misc. (N. Y.) 447, 37 N. Y. Suppl. 208; Continental Store Service Co. *v.* Clark, 7 N. Y. Civ. Proc. 183, 1 How. Pr. N. S. 497; Kelly *v.* Charlier, 18 Abb. N. Cas. (N. Y.) 416; Riley *v.* Brown, 14 Abb. Pr. N. S. (N. Y.) 290 note, 44 How. Pr. 429; Meyer *v.* Lent, 7 Abb. Pr. (N. Y.) 225; Stelle *v.* Palmer, 7 Abb. Pr. (N. Y.) 181; Barron *v.* Sanford, 6 Abb. Pr. (N. Y.) 320 note, 14 How. Pr. 443; Jackson *v.* Clark First State Bank, 21 S. D. 484, 113 N. W. 876, in the absence of statutory inhibition. See also Saltus *v.* Pruyn, 18 How. Pr. (N. Y.) 512; German Nat. Ins. Co. *v.* Virginia State Ins. Co., 108 Va. 393, 61 S. E. 870; Auerbach *v.* Marks, 94 Wis. 668, 69 N. W. 1001. *Compare In re* Wool, 36 Mich. 299.

Where an objection has been raised that a pending action is fictitious, the court may order a reference to determine the question. Judson *v.* Flushing Jockey Club, 14 Misc. (N. Y.) 350, 36 N. Y. Suppl. 126.

6. Burnett *v.* Snyder, 41 N. Y. Super. Ct. 342.

In a summary proceeding to enforce payment under a judicial sale of land, which is resisted on the ground that the title is not marketable, the court need not, in the absence of a request made to it for that purpose, appoint a referee to take testimony. Wanser *v.* De Nyse, 188 N. Y. 378, 80 N. E. 1088, 117 Am. St. Rep. 871 [*reversing* on other grounds 116 N. Y. App. Div. 796, 102 N. Y. Suppl. 36].

7. Meyer *v.* Lent, 16 Barb. (N. Y.) 538.

8. Rovnianek *v.* Kossalko, 61 N. Y. App. Div. 486, 70 N. Y. Suppl. 36; Matter of Lord, 81 Hun (N. Y.) 590, 30 N. Y. Suppl. 1117. But see Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008.

9. Weinberger *v.* Metropolitan Traction Co., 63 N. Y. App. Div. 240, 71 N. Y. Suppl. 289; Wamsley *v.* Horton, 68 Hun (N. Y.) 549, 23 N. Y. Suppl. 85; Martin *v.* Hodges, 45 Hun (N. Y.) 38; Johnson *v.* Wellington Copper Min. Co., 58 Misc. (N. Y.) 353, 110 N. Y. Suppl. 1098; Huelet *v.* Reyns, 1 Abb. Pr. N. S. (N. Y.) 27. See also Weiss *v.* Schleimer, 86 N. Y. App. Div. 611, 83 N. Y. Suppl. 234.

Application of rule.— Where affidavits, in answer to a motion to punish for contempt, did not contradict any material fact upon which the application was made, an order of reference to determine the facts was erroneous. Matter of Hanlein, 65 N. Y. App. Div. 159, 72 N. Y. Suppl. 433. A provision in an order overruling a motion to vacate an attachment on the papers, with leave to renew, referring all the papers and affidavits to a referee, and giving each party the right to examine the affiants and to introduce other testimony, the same to be reported back by the referee, with his opinion thereon, is erroneous, there being no motion pending, and no question of fact referred. Woodward *v.* Musgrave, 14 N. Y. App. Div. 291, 43 N. Y. Suppl. 830.

10. Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008; Roome *v.* Smith, 123 N. Y. App. Div. 416, 107 N. Y. Suppl. 1088; Standard Fashion Co. *v.* Siegel-Cooper Co., 44 N. Y. App. Div. 121, 60 N. Y. Suppl. 739; Magennis *v.* Scheid, 92 Hun (N. Y.) 521, 36 N. Y. Suppl. 1030; Flagg *v.* Munger, 3 Barb. (N. Y.) 9.

11. People *v.* Marr, 88 N. Y. App. Div. 422, 84 N. Y. Suppl. 965; Central Nat. Bank *v.* Duncan, 77 S. C. 1, 57 S. E. 531; McSween *v.* McCown, 21 S. C. 371.

or by statutory provisions,[12] yet in at least one state a reference cannot be ordered merely to take testimony to be used on the trial,[13] although no objection can be urged where the parties have consented thereto.[14]

4. In Special Proceedings.[15] Under particular statutory provisions, a reference may be ordered in special proceedings, such as contempt proceedings,[16] mandamus proceedings,[17] habeas corpus proceedings,[18] application of creditors for removal of an assignee,[19] or special proceedings relating to attorneys.[20]

5. Reference of Part of Issues. The reference may be of all or only of a part of the issues,[21] and before or after the trial of other issues.[22] But it is improper to sever the facts of a demand made in the complaint, and enter final judgment for one portion, and make a reference to ascertain the amount of the other for a final judgment as to that portion.[23]

III. Application For Order.

A. In General — 1. Jurisdiction of Court.[24] Generally any trial court in which an action is pending has jurisdiction to order a reference in a proper case.[25]

12. See the statutes of the several states. See also Matter of Ferrigan, 42 N. Y. App. Div. 1, 58 N. Y. Suppl. 920 [*affirmed* in 160 N. Y. 689, 55 N. E. 1095]; People *v.* Feitner, 53 Misc. (N. Y.) 334, 104 N. Y. Suppl. 794 [*affirmed* in 120 N. Y. App. Div. 880, 881, 105 N. Y. Suppl. 1137].

In Idaho a reference "to take the testimony" in an action is authorized by statute where the parties are numerous and the convenience of the witnesses and the ends of justice will be thereby promoted. Boise Irr., etc., Co. *v.* Stewart, 10 Ida. 38, 77 Pac. 25, 321.

13. Doyle *v.* Metropolitan El. R. Co., 136 N. Y. 505, 32 N. E. 1008; Crumbie *v.* Manhattan R. Co., 83 Hun (N. Y.) 1, 31 N. Y. Suppl. 497; Farmers' Nat. Bank *v.* Houston, 44 Hun (N. Y.) 567; Waterman *v.* Waterman, 37 How. Pr. (N. Y.) 36. See Van Etten *v.* Hasbrouck, 4 N. Y. St. 803. But see Flagg *v.* Munger, 3 Barb. (N. Y.) 9.

The Anti-Monopoly Act (Laws (1899), c. 690), in so far as it authorized a justice of the supreme court to appoint a referee to take testimony which the legislature could authorize the judge himself to take out of court, is valid. *In re* Davies, 168 N. Y. 89, 61 N. E. 118, 56 L. R. A. 855, 32 N. Y. Civ. Proc. 163 [*reversing* 55 N. Y. App. Div. 245, 67 N. Y. Suppl. 492].

14. Roy *v.* Horsley, 6 Oreg. 382, 25 Am. Rep. 537.

15. **In bankruptcy proceedings** see Bankruptcy, 5 Cyc. 271 *et seq.*

In supplementary proceedings see Executions, 17 Cyc. 1427, 1437 *et seq.*

16. Davies *v.* Davies, 20 Abb. N. Cas. (N. Y.) 170. See also Contempt, 9 Cyc. 47.

17. People *v.* St. Louis, etc., R. Co., 44 Hun (N. Y.) 552, 7 N. Y. St. 415.

18. People *v.* Moss, 6 N. Y. App. Div. 414, 39 N. Y. Suppl. 690; Matter of Dixon, 11 Abb. N. Cas. (N. Y.) 118.

In South Carolina, however, in habeas corpus proceedings the court usually tries a case on the pleadings and affidavits in a summary manner, and respondent cannot demand reference as matter of right. *Ex p.* Cannon, 75 S. C. 214, 55 S. E. 325.

19. *In re* Mellen, 18 N. Y. Suppl. 515.

20. Doyle *v.* New York, 26 Misc. (N. Y.) 61, 56 N. Y. Suppl. 441; Taylor Iron, etc., Co. *v.* Higgins, 20 N. Y. Suppl. 746. See also Attorney and Client, 4 Cyc. 955 note 55, 979, 1021 note 30.

21. Huston *v.* Wadsworth, 5 Colo. 213; Bowman *v.* Sheldon, 11 N. Y. Leg. Obs. 219; Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483. But see Williams *v.* Benton, 24 Cal. 424, holding that only the issues involving the examination of accounts can be referred.

22. Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 6 Abb. Pr. N. S. 240, 37 How. Pr. 399, holding that whether the whole of the issues shall be referred or the taking of the account merely, and whether the account shall be taken before the trial of the other issues or after, are matters in the discretion of the court to be governed by the peculiar circumstances of each case.

In a suit by an attorney for professional services and disbursements, a reference may be ordered to ascertain the amount to which he would be entitled, provided he shall afterward, on the trial, establish his right to recover. Bowman *v.* Sheldon, 1 Duer (N. Y.) 607.

23. Depriest *v.* Patterson, 85 N. C. 376.

In an action at law, if for any reason the whole issues should not be so tried, the court has no power to refer a particular issue for trial by a referee, leaving the remainder of the issues to be tried by a jury. Claffy *v.* Madison Ave. Co., 124 N. Y. App. Div. 774, 109 N. Y. Suppl. 1.

24. **At chambers or in vacation** see Judges, 23 Cyc. 555.

25. Paulison *v.* Halsey, 38 N. J. L. 488 (holding that a reference of a suit pending in the supreme court cannot be made at the circuit); Cain *v.* Nicholson, 77 N. C. 411; Simms *v.* Phillips, 46 S. C. 149, 24 S. E. 97 (holding, however, that a particular statute precluded a circuit judge, at an extra term, from granting an order of reference in a case not docketed at the preceding regular term). See also Elting *v.* Dayton, 4 N. Y. St. 481.

But except where authority is granted by statute,[26] the federal courts cannot compulsorily order a reference to hear and determine a common-law action,[27] although they may make an order of reference where the parties consent thereto.[28] Ordinarily an appellate court cannot order a reference where it has no jurisdiction to hear cases *de novo*.[29]

2. Condition of Cause and Time For Application.[30] The time when an order of reference may be applied for differs in the several states.[31] Generally the order

Compare Williams *v.* Green, 3 Cai. (N. Y.) 129.

In Pennsylvania the act giving the common pleas court concurrent jurisdiction with the district court in cases under five hundred dollars extends the compulsory arbitration act to these cases. Fetters *v.* Scull, 1 Phila. 538.

In Texas the district courts are expressly authorized, by Rev. St. pp. 1471–1474, to appoint auditors, without limitation as to the character of the suits, when the investigation of accounts or examination of vouchers render it necessary. Wright *v.* Pate, (1886) 1 S. W. 661.

Appellate court where trial de novo.— Schmidt *v.* Rose, 6 Mo. App. 579.

Application at special term see Sands *v.* Harvey, 4 Abb. Dec. (N. Y.) 147.

26. Lawrence *v.* U. S., 6 Ct. Cl. 79.

Reference in federal court of claims see also Courts, 11 Cyc. 975.

27. Howe Mach. Co. *v.* Edwards, 12 Fed. Cas. No. 6,784, 15 Blatchf. 402, 7 Reporter 420, holding that the federal circuit court has no authority to refer a suit at common law to a referee for trial, without the consent of both parties, although, in the state court, such a suit is referable without consent.

28. Hecker *v.* Fowler, 2 Wall. (U. S.) 123, 17 L. ed. 759; Robinson *v.* Mutual Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194, 8 Reporter 613.

29. Wood *v.* Orser, 25 N. Y. 348; Blanding *v.* Sayles, 21 R. I. 211, 42 Atl. 872.

30. **Waiver of objections as to time of order** see *infra*, IV, G, 2.

31. See the statutes of the several states. See also Independent Steam Fire Engine Co. *v.* Richland Lodge, No. 39 A. F. M., 73 S. C. 533, 53 S. E. 993.

A receiver of an insolvent corporation may obtain a compulsory reference of a controversy between himself and a debtor of the corporation, although he has commenced an action at law to recover the debt. Crosby *v.* Day, 81 N. Y. 242.

In an action upon a penal bond for alleged breaches, when the answers raised pleas in bar, which if established would end the action, a compulsory order of reference cannot be properly ordered, until such pleas are decided. Tarboro Bank *v.* Maryland Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682.

In Pennsylvania, under the act of 1836, a rule for reference must be taken out within thirty days before the sitting of the court at which the case is set down to be tried. Anthony *v.* Unangst, 4 Pa. Dist. 303; McMahon *v.* Friend, 12 Pittsb. Leg. J. N. S. 255. See also Baker *v.* Rivers, 2 Tr. & H. Pr. 784. A declaration or statement must be filed before the rule to refer can be entered, but such rules may be based on statements only in cases where judgments are permitted to be taken on statements. Faries *v.* Weisel, 7 Wkly. Notes Cas. 213. See also Erie *v.* Tracy, 2 Grant 20. But in ejectment it is only necessary to file a præcipe. Reed *v.* Long, 10 Pa. Co. Ct. 253. If the rule is entered and the declaration filed on the same day, it is sufficient. Wright *v.* Guy, 10 Serg. & R. 227. The rule may be entered before service of the summons. Moore *v.* Wolcott, 2 Walk. 524; Flanegan *v.* Negley, 3 Serg. & R. 498. *Contra*, Fehr *v.* Reich, 36 Pa. St. 472; Jones *v.* Orum, 5 Rawle 249. Immediately after special bail is entered, in compliance with a notice, either party is entitled to enter a rule of arbitration, although before the return-day of the term of which the suit is docketed. Hertzog *v.* Ellis, 3 Binn. 209. But defendant has no right to enter a rule for arbitration before he has put in special bail. Nones *v.* Gelbaud, 11 Serg. & R. 9. A rule of reference cannot be entered more than ten years after the writ was issued and returned without being duly served where nothing was done during that period to continue the action. Jones *v.* Orum, *supra*. A cause pending in the supreme court may be referred to arbitrators. Carpentier *v.* Delaware Ins. Co., 2 Binn. 264. A rule of court cannot prevent a defendant from having a reference because he has not filed an affidavit of defense. Hickernell *v.* Carlisle First Nat. Bank, 62 Pa. St. 146. A judgment opened, and defendant let into his defense on the merits, is not an action pending, such as is subject to the provisions of the compulsory arbitration act. Lowrey *v.* Tracey, 6 Watts & S. 493. Where there is no action pending, a party to a contract, which provides that any disagreement should be submitted to arbitration, is not entitled to a compulsory rule of reference. Wintz *v.* Fiscio, 33 Wkly. Notes Cas. 220. But under the statute of 1810, "the entry of the suit" was held to be the entry on the docket of the prothonotary, and either party might take out a rule after such entry, although before service of the capias or summons. Herman *v.* Freeman, 8 Serg. & R. 9; Flanegan *v.* Negley, 3 Serg. & R. 498; Sharp *v.* Kilgore, 3 Serg. & R. 387; Frey *v.* Vanlear, 1 Serg. & R. 435; McEntire *v.* McElduff, 1 Serg. & R. 19; Massey *v.* Thomas, 6 Binn. 333; Brown *v.* Scheaffer, 6 Binn. 177; Hertzog *v.* Ellis, 3 Binn. 209; Clemson *v.* Beaumont, 2 Browne 215; Thomas *v.* Hopkins, 2 Browne 145; Paul *v.* Purcell, 2 Browne 20; Burke *v.* Matthews, 2 Phila. 282.

cannot be granted before issue is joined,[32] as to all the parties;[33] but a party need not wait the specified time within which the opposing party may serve an amended pleading as of course.[34] Generally a reference to hear and determine cannot be ordered after a jury has been sworn in,[35] nor in the midst of a trial,[36] nor after a trial by jury.[37] So laches in moving gives authority to the court, in the exercise of its discretion, to deny the order.[38] An adjudication of liability need not precede a reference to hear and determine;[39] but, in an action for an accounting, a reference cannot be ordered prior to the entry of an interlocutory judgment providing for an accounting.[40] So in some jurisdictions where defendant sets up a plea in bar in an action for an accounting the court cannot refer the cause without the consent of the parties before such plea is passed upon.[41] An order of reference is premature when granted where all the parties necessary for the proper adjudication of the case are not before the court.[42] It is not a fatal objection that an order referring a motion was made after the expiration of the time within which the court was required by statute to make its decision on the motion,[43] nor that an order was premature where at the time of the hearing of the objection such an order would be proper.[44]

B. Reference by Consent.[45] The consent to a reference must be in writing or entered upon the minutes.[46] Statutes requiring the consent to be in writing are complied with where the order of reference recites that both parties in open

32. Perret *v.* Keill, 15 La. 209; Kerr *v.* Hicks, 129 N. C. 141, 39 S. E. 797; Syme *v.* Bunting, 86 N. C. 175.

During or after demurrer.—A reference will not be granted during the pendency of a demurrer. Ritter *v.* The Olive Branch, 1 Wend. (N. Y.) 35; Jansen *v.* Tappen, 3 Cow. (N. Y.) 339. Under Clark's code, section 421, fixing the time at which reference may be ordered, a reference cannot be ordered after ruling on demurrer before further pleadings are filed, as the cause must first be at issue. Penn Lumber Co. *v.* McPherson, 133 N. C. 287, 45 S. E. 577.

33. Cochran *v.* Thurber, 4 N. Y. Suppl. 234.

34. Degener *v.* Underwood, 57 N. Y. Super. Ct. 583, 7 N. Y. Suppl. 681; Enos *v.* Thomas, 4 How. Pr. (N. Y.) 290, 2 Code Rep. 148.

35. Robson *v.* Lees, 6 H. & N. 258, 7 Jur. N. S. 244, 30 L. J. Exch. 235, 4 L. T. Rep. N. S. 516; Morgan *v.* Ainslie, 28 L. T. Rep. N. S. 120; Jeffries *v.* Lovell, 23 L. T. Rep. N. S. 782, 19 Wkly. Rep. 408. But see U. S. *v.* Rose, 27 Fed. Cas. No. 16,193, 2 Cranch C. C. 567.

36. Kellogg *v.* Costello, 93 Wis. 232, 67 N. W. 24.

37. Stockman *v.* Michell, 120 Mich. 293, 79 N. W. 480; Stevens *v.* Rolfe, 56 N. H. 183.

38. McLendon *v.* Frost, 57 Ga. 448 (holding that after the parties have announced ready for trial, it is too late for one of them to move for the appointment of an auditor, without showing some good excuse for not making the motion earlier); New York *v.* Genet, 67 Barb. (N. Y.) 275.

39. Governor *v.* Lassiter, 83 N. C. 38.

40. Gibson *v.* Widman, 106 N. Y. App. Div. 388, 94 N. Y. Suppl. 593; Knox *v.* Gleason, 63 N. Y. App. Div. 99, 71 N. Y. Suppl. 213; Brennan *v.* Gale, 44 N. Y. App. Div. 396, 61 N. Y. Suppl. 6. See also *supra*, II, B, 2, f, (II). But see Central Trust Co. *v.* New York City, etc., R. Co., 42 Hun (N. Y.) 602.

Findings as to facts admitted.— To justify an interlocutory judgment or an order of reference, authorized by the pleadings in an action for an accounting, it is not necessary that the court specifically find the facts admitted by the pleadings. Blun *v.* Mayer, 113 N. Y. App. Div. 242, 99 N. Y. Suppl. 22 [*affirmed* in 189 N. Y. 153, 81 N. E. 780].

41. Austin *v.* Stewart, 126 N. C. 525, 36 S. E. 37; Tarboro Bank *v.* Maryland Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Smith *v.* Goldsboro, 121 N. C. 350, 28 S. E. 479.

What constitutes plea in bar.—A plea of full and final settlement to a suit for an account against a tax-collector to surcharge his settlement for specifically alleged errors therein need not be disposed of before ordering a reference because such plea is not a bar. Iredell County *v.* White, 123 N. C. 534, 31 S. E. 670.

42. *Ex p.* Maurice, 24 S. C. 173.

43. Stafford *v.* Ambs, 8 Abb. N. Cas. (N. Y.) 237.

44. Avery *v.* Ryan, 74 Wis. 591, 43 N. W. 317.

45. What may be referred by consent see *supra*, II, A.

46. *California.*— Smith *v.* Pollock, 2 Cal. 92.

Indiana.— Shaw *v.* Kent, 11 Ind. 80.

Kentucky.— Grimes *v.* Grimes, 1 Dana 234.

New York.— Lanning *v.* Swarts, 9 How. Pr. 434; Leaycroft *v.* Fowler, 7 How. Pr. 259; People *v.* McGinnis, 1 Park. Cr. 387.

North Carolina.— Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754; White *v.* Utley, 86 N. C. 415.

See 42 Cent. Dig. tit. "References," § 40.

Entry on minutes.—An entry upon the minutes reciting that "the parties came by their attorneys, and defendant, by his attor-

court consented thereto and the correctness of such recital is not questioned,[47] or where it otherwise appears of record.[48] The agreement need not expressly provide that the submission be made a rule of court,[49] unless a contrary intent appears from the submission.[50] Consent may be implied from failure to object to a reference made at the request of the opposing party,[51] or from a motion that a case be consolidated with another which has been referred to a referee.[52]

C. Compulsory Reference — 1. On Court's Own Motion. It has been held that the court cannot of its own motion order a reference,[53] although other courts hold that where a long account is involved the court may refer the case of its own motion,[54] and it is generally so provided by statute.[55]

2. On Motion Papers. The power of the court to refer a case depends upon the pleadings,[56] and the fact that the action will involve the examination of a long account must appear on the face of the pleadings or be shown by affidavit.[57] If

ney, moved the Court that the cause be referred," shows that such reference was made on defendant's motion, "by oral consent, in open court, entered on the minutes," in one of the modes pointed out by law. Bates *v.* Vischer, 2 Cal. 355. An order of reference: "In this cause, the order of reference heretofore made herein, having been mislaid, it is agreed between the parties that D. Settle, Esq., the Clerk of this Court, proceed to take and state an account . . . and if not found, that an order be made, as of the last term, by consent, according," makes a reference by consent. Vaughan *v.* Lewellyn, 94 N. C. 472.

A verbal agreement, subsequently withdrawn, is not sufficient. Morrison *v.* Metropolitan El. R. Co., 26 N. Y. Suppl. 858.

In case of discrepancy between a submission to arbitration, and the entry made of it by the prothonotary, the former must prevail. Backman *v.* Reigart, 3 Penr. & W. (Pa.) 270.

Consent under seal.— Zelma Gold Min. Co. *v.* Hoskins, [1895] A. C. 100, 64 L. J. P. C. 45, 72 L. T. Rep. N. S. 32, 11 Reports 355.

47. Heald *v.* Yumisko, 7 N. D. 422, 75 N. W. 806.

Waiver of written consent see *infra*, IV, G, 2.

48. Smith *v.* Pollock, 2 Cal. 92; Leaycroft *v.* Fowler, 7 How. Pr. (N. Y.) 259; Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754; White *v.* Utley, 86 N. C. 415.

49. Manhattan L. Ins. Co. *v.* McLaughlin, 80 Pa. St. 53; McAdams *v.* Stillwell, 13 Pa. St. 90. But see Benjamin *v.* Benjamin, 5 Watts & S. (Pa.) 562.

Intent.— Where the agreement to refer expressly stipulates that the reference should be ordered under the statute providing for compulsory arbitration, the intent to make the reference a rule of court is sufficiently implied and such consent is to be presumed from the manifest intent to refer the action itself. Brendlinger *v.* Yeagley, 53 Pa. St. 464.

50. Brendlinger *v.* Yeagley, 53 Pa. St. 464, holding that when such intent does not appear, or where a contrary inference is manifest from the terms of the submission, the failure to provide in the submission that it shall be made a rule of court, where no rule of court has been issued, makes the proceedings irregular and void.

51. Harris *v.* Shaffer, 92 N. C. 30.

52. Eau Claire Fuel, etc., Co. *v.* Laycock, 92 Wis. 81, 65 N. W. 732.

53. Kinney *v.* Short, 2 Harr. (Del.) 357; Dougherty *v.* Jones, 37 Ga. 348; Vanduzer *v.* McMillan, 37 Ga. 299.

54. Galbraith *v.* McCormick, 23 Kan. 706; Williams *v.* Elliott, 17 Kan. 523; Hollands *v.* Wayne Cir. Judge, 117 Mich. 326, 75 N. W. 886; Francisco *v.* Rowland, 14 Mo. App. 600; Holmes *v.* Bennett, 28 How. Pr. (N. Y.) 289; Jackson *v.* De Forest, 14 How. Pr. (N. Y.) 81.

In New York it is held that it is not enough to justify a compulsory reference by the court upon its own motion or of one of the parties that the case may, by possibility, involve the examination of a long account. Enough must be alleged or shown to justify the inference that such will be the course of the trial. It is not necessary, however, that this proof shall appear by affidavit. It is sufficient if the fact clearly appears from the verified pleadings, that the examination of a long account will be involved in the trial of the issues. Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893 [*reversing* 2 Misc. 86, 20 N. Y. Suppl. 875].

55. See the statutes of the several states.

56. Jones *v.* Gardner, 57 Cal. 641; Johnson *v.* Blell, 61 Mo. App. 37. But see Brillion Lumber Co. *v.* Barnard, 131 Wis. 284, 111 N. W. 483.

57. Clarkson *v.* Hoyt, (Cal. 1894) 36 Pac. 382; Loverin *v.* Lenox Corp., 35 N. Y. App. Div. 263, 54 N. Y. Suppl. 724; Roberson *v.* Murray, 73 Hun (N. Y.) 490, 26 N. Y. Suppl. 480; Continental Bank Note Co. *v.* Industrial Exhibition Co., 1 Hun (N. Y.) 118, 3 Thomps. & C. 758; Simmons *v.* Bigelow, 3 Silv. Sup. (N. Y.) 344, 6 N. Y. Suppl. 435; Robinson *v.* New York, etc., R. Co., 55 N. Y. Super. Ct. 152, 12 N. Y. St. 66 [*affirmed* in 109 N. Y. 658, 17 N. E. 867]; Cornell *v.* U. S. Illuminating Co., 16 N. Y. Suppl. 306; Betts *v.* Eagleton Mfg. Co., 1 N. Y. St. 241, 10 N. Y. Civ. Proc. 218; Knips *v.* Stefan, 50 Wis. 286, 6 N. W. 877; Monitor Iron Works Co. *v.* Ketchum, 47 Wis. 177, 2 N. W. 80. But see La Coursier *v.* Russell, 82 Wis. 265, 52 N. W. 176, holding that it is not error to refer a case for trial on the ground that it involves the examination of a long account, although no such account is apparent from the plead-

the pleadings show that the examination of a long account is involved no other proof is necessary.[58] If the fact does not appear upon the face of the pleadings, it may be shown by affidavit,[59] although the order will not be granted merely on the affidavit without an inspection of the pleadings; [60] and the affidavit must state facts and not mere conclusions in regard thereto.[61] The affidavit must state that issue has been joined,[62] and show by satisfactory proof that the action is referable.[63] Furthermore, the pleadings or affidavits must show that the trial will "necessarily" involve the examination of a long account and not merely a possibility thereof.[64] In some jurisdictions, if the application is *ex parte*, it should state that no previous application has been made for the order.[65] On the other hand, it need not state the place of trial.[66] The affidavit should be made by the party and not by his attorney unless there is sufficient excuse therefor,[67] and where an affidavit is made by the attorney it must state the reason why not made by the party himself.[68] The moving party need not show that the trial will not require the examination of questions of law but such fact will be presumed and it is for the party opposing the reference to make it appear otherwise.[69] The

ings in the case, when plaintiff makes a claim for expenses, which the record shows to have comprised about one hundred and fifty items.

The experience of judges that proof, in mechanic's lien cases, of work done and material furnished, will generally require the examination of a long account, will not dispense with the necessity of proof of this fact; nor can the courts, from their experience, take judicial notice that the proof of such issues involves the examination of a long account. Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893.

58. Cassidy *v.* McFarland, 2 Misc. (N. Y.) 86, 20 N. Y. Suppl. 875 [*affirmed* on this point in 139 N. Y. 201, 34 N. E. 893].

59. Crawford *v.* Canary, 28 N. Y. App. Div. 135, 50 N. Y. Suppl. 874; Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N. Y.) 69.

60. Cuthbert *v.* Hutchins, 7 N. Y. App. Div. 251, 40 N. Y. Suppl. 277.

61. Knope *v.* Nunn, 75 Hun (N. Y.) 287, 26 N. Y. Suppl. 1074; Cornell *v.* U. S. Illuminating Co., 16 N. Y. Suppl. 306; C. B. Keogh Mfg. Co. *v.* Molten, 16 N. Y. Suppl. 65; Brown *v.* Miller, 1 Barb. (N. Y.) 24; Lord *v.* Connor, 48 How. Pr. (N. Y.) 95.

The affidavit must be such that, in connection with the pleadings, the court can itself see that the examination of a long account will be required, and where there is nothing in the pleading by which they can see that the account will require examination, an affidavit merely stating that the trial will involve the examination of a large number of items of account is not sufficient to warrant a reference. Evans *v.* Kalbfleisch, 16 Abb. Pr. N. S. (N. Y.) 13; Kain *v.* Delano, 11 Abb. Pr. N. S. (N. Y.) 29.

62. Dutcher *v.* Wilgus, 2 How. Pr. (N. Y.) 180; Jansen *v.* Tappen, 3 Cow. (N. Y.) 34.

63. McAleer *v.* Sinnott, 30 N. Y. App. Div. 318, 51 N. Y. Suppl. 956.

The burden is upon the party applying for a reference to show by satisfactory proof that the case is referable. Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 893; McAleer *v.* Sinnott, 30 N. Y. App. Div. 318, 51 N. Y. Suppl. 956.

Showing as to "long" account.— An affidavit that a certain number of items are contained in the copy of the account served "some of which will be disputed upon the trial" is insufficient, since not showing that any "long" account will necessarily be involved. McAleer *v.* Sinnott, 30 N. Y. App. Div. 318, 51 N. Y. Suppl. 956.

64. Malone *v.* St. Peter's, etc., Church, 172 N. Y. 269, 64 N. E. 961; Cassidy *v.* McFarland, 139 N. Y. 201, 34 N. E. 983 [*reversing* on other grounds 2 Misc. 86, 20 N. Y. Suppl. 875]; Spence *v.* Simis, 137 N. Y. 616, 33 N. E. 554; Thayer *v.* McNaughton, 117 N. Y. 111, 22 N. E. 562; Averill *v.* Emerson, 74 Hun (N. Y.) 157, 26 N. Y. Suppl. 650; Keeler *v.* Poughkeepsie, etc., Plank Road Co., 10 How. Pr. (N. Y.) 11; Dreveskracht *v.* Balfour First State Bank, 16 N. D. 555, 113 N. W. 1032; Ewart *v.* Kass, 17 S. D. 220, 95 N. W. 915.

65. Walter *v.* F. E. McAllister Co., 33 Misc. (N. Y.) 562, 68 N. Y. Suppl. 952.

66. Feeter *v.* Harter, 7 Cow. (N. Y.) 478; Cleveland *v.* Strong, 2 Cow. (N. Y.) 448.

67. Little *v.* Bigelow, 2 How. Pr. (N. Y.) 164; Mesick *v.* Smith, 2 How. Pr. (N. Y.) 7; Wood *v.* Crowner, 4 Hill (N. Y.) 548.

An affidavit as to the time of joining issue and the place of trial, not relied on to establish that the trial of the issues in the action would require the examination of a long account, may be made by the attorney instead of plaintiff. Holmes *v.* Bennett, 28 How. Pr. (N. Y.) 289.

68. Van Ingen *v.* Herold, 19 N. Y. Suppl. 456; Ross *v.* Beecher, 2 How. Pr. (N. Y.) 157.

69. Cassidy *v.* McFarland, 2 Misc. (N. Y.) 86, 20 N. Y. Suppl. 875 [*reversed* on other grounds in 139 N. Y. 201, 34 N. E. 893]; Barber *v.* Cromwell, 10 How. Pr. (N. Y.) 351. *Compare* Millen *v.* Fogg, 13 N. Y. Suppl. 614, holding that in order to show that there are no difficult questions of law involved, an affidavit of a party who is not a lawyer is sufficient.

affidavit upon which application for an issue before an auditor is based should clearly and definitely set forth the nature and character of the facts in dispute, so that the issue to be framed thereon may be directed to the trial of those facts.[70]

3. Counter Affidavits. If the opposing party insists that difficult questions of law are involved, they must be pointed out in such a manner as to enable the court to determine whether they are difficult, at least unless they appear on the face of the pleading.[71]

4. Notice of Motion to Refer. Reasonable notice of the motion for the reference must be given to the absent parties,[72] and the notice of motion is sometimes required to contain the names of the referees.[73]

5. Admissions to Prevent Reference. Where a reference is sought on the ground that the examination of a long account is involved, a stipulation not to dispute the items of the account as such requires a denial of the reference.[74] But such admissions or concessions after the case is referred are of no effect in so far as the right to the reference is concerned.[75]

6. Successive and Cross Applications. When both parties move for a reference, the motion of the party first giving notice is entitled to a preference.[76] A party who has acted under a rule of arbitration cannot enter a second rule until the first is discharged by order of the court.[77] Where one of two cross suits has been referred, the court will not refer the other where everything may be obtained in the original reference that can be gained by a reference in the latter action, especially where there is a possibility that by so doing injustice may be done in the matter of costs.[78]

7. Hearing and Determination — a. In General. Whether a trial will involve the examination of a long account is a question of fact to be determined summarily on the application for a reference,[79] but the validity of the account cannot be considered.[80] The trial court must assume that the testimony offered on the disputed account will take the fullest latitude embraced within the pleadings and not the narrow compass of the facts shown necessitated by the failure of the complaining party to offer proof on the allegations of his complaint or answer.[81]

b. Discretion of Court. The granting or refusal of an order of reference in a case which the court has power to refer is a matter within its discretion.[82] So

70. Dean *v.* Briggs, 3 C. Pl. (Pa.) 29.

71. Patterson *v.* Stettauer, 39 N. Y. Super. Ct. 413; Cass *v.* Cass, 61 Hun (N. Y.) 460, 16 N. Y. Suppl. 229; Geo. F. Lee Coal Co. *v.* Meeker, 43 Misc. (N. Y.) 162, 88 N. Y. Suppl. 190; Hibbard *v.* Commercial Alliance L. Ins. Co., 4 Misc. (N. Y.) 422, 24 N. Y. Suppl. 332 [*affirmed* in 141 N. Y. 549, 36 N. E. 343]; Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. (N. Y.) 321 [*affirmed* in 66 N. Y. 628]; Salisbury *v.* Scott, 6 Johns. (N. Y.) 329; Lusher *v.* Walton, 1 Cai. (N. Y.) 149. *Contra*, see Low *v.* Hallett, 3 Cai. (N. Y.) 82.

72. McCoun *v.* Rowley, 19 Wend. (N. Y.) 85. *Compare* Brookshire *v.* Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442; Nobles *v.* Hogg, 36 S. C. 322, 15 S. E. 359.

73. Gott *v.* Owen, 7 Hill (N. Y.) 155; Lusher *v.* Walton, 1 Cai. (N. Y.) 149; Bedle *v.* Willett, 1 Cai. (N. Y.) 7.

74. McAndrew *v.* Place, 5 Hun (N. Y.) 285; Seigel *v.* Heid, 36 How. Pr. (N. Y.) 506; Mullin *v.* Kelly, 3 How. Pr. (N. Y.) 12. See Kennedy *v.* Kenna, 49 How. Pr. (N. Y.) 308.

75. Father Matthew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliams, 84 Mo. 406 [*affirming* 12 Mo. App. 445]; Heman *v.* Britton, 14 Mo. App. 121.

76. Graham *v.* Wood, 1 Wend. (N. Y.) 15.

77. Barnet *v.* Hope, 5 Binn. (Pa.) 518.

78. Codwise *v.* Hacker, 2 Cai. (N. Y.) 251.

79. Dean *v.* Empire State Mut. Ins. Co., 9 How. Pr. (N. Y.) 69. See also *supra*, III, C, 2.

80. Sutton *v.* Wegner, 74 Wis. 347, 43 N. W. 167.

81. McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

In determining the propriety of the action of the court in directing a reference in the case of a long account, it is not to be considered in the light of the facts as developed upon the hearing before the referee, as the trial was actually conducted, but resort must be made to the pleadings upon which the trial court, at the time, had to look to determine whether upon the issues as joined, the examination of a long account would be the probable result of the trial. McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038; Johnson *v.* Blell, 61 Mo. App. 37.

82. *Georgia.*— Martin *v.* Foley, 82 Ga. 552, 9 S. E. 532.

Louisiana.— O'Donnell *v.* Henry, 44 La. Ann. 845, 11 So. 245; Guinault *v.* Le Carpen-

where it is necessary to take an account, it is in the discretion of the court to itself take the account or refer it to a referee to state the account.[83]

8. Waiver of Right. An order of reference is waived where thereafter a trial is had before a jury without setting aside such order.[84] But noticing a cause for trial at the jury term is not necessarily a waiver of the right to move for a reference.[85]

IV. Order or Rule.[86]

A. Necessity For.[87] In some jurisdictions the written consent to refer is sufficient without an order of reference,[88] although the contrary rule usually prevails.[89] However, the validity of the order is not affected by delay of the clerk in entering it.[90]

B. Form and Requisites. With regard to its form and requisites the rule or order of reference must state the purpose for which the referee is appointed,[91]

tier, 19 La. 239; Spraggins *v.* White, 4 Mart. N. S. 297; Caulker *v.* Banks, 3 Mart. N. S. 532.

Massachusetts.— Pierce *v.* Thompson, 6 Pick. 193.

Michigan.—Stockman *v.* Michell, 120 Mich. 293, 79 N. W. 480.

Missouri.— Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791; Fitzgerald *v.* Hayward, 50 Mo. 516; Bricker *v.* Stone, 47 Mo. App. 530; Kent *v.* Highleyman, 28 Mo. App. 614; Schmidt *v.* Rose, 6 Mo. App. 588.

New York.— Harrington *v.* Bruce, 84 N. Y. 103; Martin *v.* Windsor Hotel Co., 70 N. Y. 101; Maxwell *v.* Cattle, 72 Hun 529, 25 N. Y. Suppl. 635; Stebbins *v.* Cowles, 30 Hun 523, 66 How. Pr. 28; New York *v.* Genet, 67 Barb. 275; Batchelor *v.* Albany City Ins. Co., 1 Sweeny 346, 6 Abb. Pr. N. S. 240, 37 How. Pr. 399; Smith *v.* Dodd, 3 E. D. Smith 348; Harris *v.* Aktiebolaget Separator, 4 N. Y. Suppl. 126; Martin *v.* Gould, 13 N. Y. Civ. Proc. 45.

North Carolina.— Delafield *v.* Lewis Mercer Constr. Co., 118 N. C. 105, 24 S. E. 10.

Texas.—Robson *v.* Jones, 33 Tex. 324.

Wisconsin.— Hart *v.* Godkin, 122 Wis. 646, 100 N. E. 1057; McCormick *v.* Ketchum, 51 Wis. 323, 8 N. W. 208.

United States.— Farmers' L. & T. Co. *v.* Northern Pac. R. Co., 61 Fed. 546.

See 42 Cent. Dig. tit. "References," § 36.

Existence of long account.— It is within the discretion of the trial judge to say whether the examination of a long account is involved in an action on a contract. Whitaker *v.* Desfosse, 7 Bosw. (N. Y.) 678; Davis *v.* Coddington, 7 Alb. L. J. (N. Y.) 346.

After submission of issues to jury.— The refusal of the judge to order a reference for the purpose of taking testimony on matters of equity addressed to him after issues have been submitted to the jury, and the reference made in regard to other matters, is within his discretion. Fortune *v.* Watkins, 94 N. C. 304.

The exercise of such discretion is reviewable, where the order is objected to at the time and an exception is taken to the overruling of the objection. Creve Coeur Lake Ice Co. *v.* Tamm, 138 Mo. 385, 39 S. W. 791. Granting or refusing of order of reference as discretionary so as not to be reviewable on appeal see Appeal and Error, 3 Cyc. 331.

83. *Alabama.*— Chambers *v.* Wright, 52 Ala. 444.

California.— Emery *v.* Mason, 75 Cal. 222, 16 Pac. 894; Hidden *v.* Jordan, 28 Cal. 301.

District of Columbia.— U. S. *v.* Groome, 13 App. Cas. 460.

Illinois.— Montanye *v.* Hatch, 34 Ill. 394.

Kentucky.— Shipp *v.* Jameson, Litt. Sel. Cas. 190.

Massachusetts.— Pierce *v.* Thompson, 6 Pick. 193; Pomeroy *v.* Winship, 12 Mass. 514, 7 Am. Dec. 91.

New York.— Brennan *v.* Gale, 56 N. Y. App. Div. 4, 67 N. Y. Suppl. 382.

Pennsylvania.—Bailey *v.* Westcott, 6 Phila. 525.

Tennessee.— Gray *v.* State, 95 Tenn. 317, 32 S. W. 201; McLean *v.* State, 8 Heisk. 22.

United States.— Wheeler *v.* Billings, 72 Fed. 301, 18 C. C. A. 573; Jewett *v.* Cunard, 13 Fed. Cas. No. 7,310, 3 Woodb. & M. 277.

See 42 Cent. Dig. tit. "References," § 35.

Compare Anonymous, 10 N. J. L. 60.

A reference should not be directed where on the hearing the court can ascertain from the evidence the net amount of a fund and the rule for its distribution. U. S. *v.* Groome, 13 App. Cas. (D. C.) 460.

84. Seamans *v.* White, 8 Ala. 656.

85. Hong Kong, etc., Banking Co. *v.* Seely, 7 N. Y. St. 496.

86. **Order as appealable** see Appeal and Error, 2 Cyc. 612.

87. **Waiver of failure to enter rule of court** see *infra*, IV, G, 2.

88. Bewick *v.* Fletcher, 39 Mich. 25.

In Pennsylvania a voluntary submission of a pending suit, although not made formally under a rule of court, will be so treated unless a contrary intent appears. Brendlinger *v.* Yeagley, 53 Pa. St. 464; Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484, 18 Phila. 307.

89. Webster *v.* Powell, 43 Fla. 432, 30 So. 654; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Lazell *v.* Houghton, 32 Vt. 579.

90. Gilman *v.* Vaughan, 44 Wis. 646.

91. Mengas' Appeal, 19 Pa. St. 221.

Requiring report of evidence in writing.— An order of reference under Rev. St. (1893) c. 117, § 1, to take testimony and report in

and the matters submitted,[92] and comply with the statutory provisions relating thereto;[93] but it need not state the statute under which it is made,[94] nor, unless otherwise provided by statute, require that the witnesses who testify shall read over and subscribe their testimony.[95] It must be in writing,[96] although the mere entry upon the docket of the word "referred" has been held of itself sufficient.[97] The order is not vitiated by calling the referee an auditor,[98] or a court commissioner.[99] Where the order appears of record, it will be presumed to have been made by the written consent of the parties unless the contrary appears.[1] The court has no power in the same order to direct an amendment of the complaint and order a compulsory reference where the amendment raises an entirely new issue so that the order would take away the right to file a new answer which in effect would grant a reference before joinder of issue.[2]

C. Demand Annexed. In some jurisdictions, by statute, if a specific demand only is referred and not all the demands between the parties, the demand must be signed and annexed to the rule of submission.[3]

D. Conditions on Granting. The court, on granting a reference, may impose terms on the moving party,[4] such as the payment of proper costs.[5]

E. Service or Notice of.[6] As a general rule, the practice requires that a copy of the order or rule must be served upon the opposing party,[7] but, apply-

writing, etc., need not, in express terms, require the referees to report the evidence in writing, since that duty is sufficiently enjoined by the statute. Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

Order as too narrow.—An order directing a referee "to ascertain and report the amount of disbursements and expenses made with, or under the direction or authority of the court," by a receiver, is too narrow to do him justice, and should be so enlarged as to direct him to take evidence, and to report fully as to each item of the disbursements, the cause or services for which each was, and the reasonableness of the price charged. Adams *v.* Haskell, 6 Cal. 475.

92. Barnett *v.* Peck, 6 Vt. 456.

Matters outside suit.— If an order made in a pending suit extend to matters not embraced in the suit, it should be stated on the record what they are. Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227. A reference of "all matters in difference in the cause between the parties" should be construed to refer only to matters in dispute "in the cause" where such intention plainly appears from the whole reference. Blanchard *v.* Snider, 28 U. C. Q. B. 210.

93. See cases cited *infra*, this note.

In Pennsylvania, the provision of the act of 1810, regulating compulsory arbitration, that the rule contain a submission of "all matters in variance in such suit or action between the parties," is sufficiently complied with where the rule is of "all matters in variance between the parties in the above cause." Nicholas *v.* Wolfersberger, 5 Serg. & R. 167; Shoemaker *v.* Meyer, 4 Serg. & R. 452.

94. Mundorf *v.* Grier, 7 Pittsb. Leg. J. (Pa.) 164.

A mistake in the rule of reference as to the date of the statute under which the arbitration is taken is immaterial. Moulson *v.* Rees, 6 Binn. (Pa.) 32.

95. Copper River Min. Co. *v.* McClellan, 138 Fed. 333, 70 C. C. A. 623.

96. Stone *v.* Merrill, 43 Wis. 72.

When order is deemed to be in writing.— An entry in the clerk's minutes that at a term of court, and on a date named, a cause, described by its title and numbered, was reached in its regular order on the calendar, and, on the consent of both parties, it was ordered that it be referred to a person named, to hear, try, and determine, is an order in writing, as required by Code Civ. Proc. § 767, although no formal order was drawn up or filed, and is sufficient to give the referee jurisdiction. Gerity *v.* Seeger, etc., Co., 163 N. Y. 119, 57 N. E. 290.

97. Billington *v.* Sprague, 22 Me. 34.

98. Buchan *v.* Rintoul, 70 N. Y. 1.

99. Howard *v.* Hanson, 49 Wash. 314, 95 Pac. 265.

1. Cartee *v.* Spence, 24 S. C. 550; Dinsmore *v.* Smith, 17 Wis. 20.

2. Kimbel *v.* Mason, 61 Hun (N. Y.) 337, 16 N. Y. Suppl. 72.

3. Harmon *v.* Jennings, 22 Me. 240; Woodsum *v.* Sawyer, 9 Me. 15; Inman *v.* Wheeler, 1 Pick. (Mass.) 504; Skillings *v.* Coolidge, 14 Mass. 43; Jones *v.* Hacker, 5 Mass. 264. *Compare* Humphry *v.* Strong, 14 Mass. 262.

4. People *v.* McGinnis, 1 Park. Cr. (N. Y.) 387.

5. Fish *v.* Wright, 5 Cow. (N. Y.) 269; London, etc., Ins. Co. *v.* British American Assoc., 54 L. J. Q. B. 302, 52 L. T. Rep. N. S. 385. See also Schmitz *v.* Scheifele, (N. J. Ch. 1886) 3 Atl. 407.

6. See also *infra*, p. 807, text and note 2.

Notice of motion to refer see *supra*, III, C, 4.

Notice of trial or hearing see *infra*, VII, F, 2.

7. Moffat *v.* Judd, 1 How. Pr. (N. Y.) 193, holding, however, that service not necessary if he has notice. But see Andrews *v.* Elderkin, 24 Wis. 531, holding that under a stipulation that a cause may be referred to any person whom plaintiff may elect, no notice to defendant of his election or of the order

ing the general rule governing the place of service of process, etc., the order cannot be served outside the state.[8]

F. Modification and Amendment. The rule or order is amendable,[9] even after the filing of the report;[10] but the court has no power to enlarge the order of reference without the consent of the parties.[11] If an order to take the testimony in a cause does not give a party sufficient time, he should apply for an extension before the time given has expired; and where no such application is made it is not error for the court to refuse to receive further testimony offered on the hearing.[12]

G. Objections and Exceptions — 1. In General. Objections to the order of reference must generally be taken at the time the order is made,[13] and it is

of reference is necessary, other than notice of the trial before such referee.

In Pennsylvania, under the act of 1836, personal service of the rule was necessary if the party or his agents or attorney could be found. Jackson *v.* Wilson, 7 Watts & S. 249. Service must be on the party himself if he resides in the county. Finch *v.* Lamberton, 62 Pa. St. 370. Service on defendant's wife, defendant being absent temporarily from the state, was bad, as the same should have been served on his attorney of record. McCowen *v.* Stephens, 1 Luz. Leg. Obs. 3 [*following* Henry *v.* Norwood, 4 Watts 347]. See also Pedan *v.* Cox, 3 Serg. & R. 245. However, under the act of 1877, service may be made on the attorney of the opposing party. Wilcox *v.* Payne, 88 Pa. St. 154; Orr *v.* Lowenstein, 7 Kulp 35. In an action against several defendants, service must be upon all to render an award against any of them valid. Beltzhoover *v.* Com., 1 Watts 126; Ranck *v.* Becker, 12 Serg. & R. 412; Berentz *v.* Bishop, 5 Serg. & R. 179; Pedan *v.* Cox, 3 Serg. & R. 245; Oppenheimer *v.* Comly, 3 Serg. & R. 3; Scranton *v.* Millspaugh, 13 Lanc. Bar 104. So where notice of the rule to appoint arbitrators has been served on three defendants, plaintiff cannot proceed against two, and omit the other; and an award against two only is erroneous. Marshall *v.* Lowry, 6 Serg. & R. 281. A rule to arbitrate is "process," within the meaning of the acts of April 24, 1857 (Pamphl. Laws 318), and the act of April 8, 1868 (Pamphl. Laws 70), authorizing service of process upon an insurance company in any county in the state, where suit is brought in the county where the insurance is located. Charles *v.* Keystone Mut. Ben. Assoc., 3 Del. Co. 78. The copy served must show that the seal of the court was attached to the original. Stegman *v.* Wills, 3 Pa. Dist. 252. The copy must be a certified copy, and where such stated November 8 as the day for choosing arbitrators, when December 8 was meant, the rule of reference must be set aside, the opposite party not having acquiesced, although such an error might be waived by acquiescence. McCord *v.* Scott, 4 Watts 11; Orner *v.* Kamper, 1 Lehigh Val. L. Rep. 115. Under the act of 1836, a person entering a rule of reference who fails to serve notice as provided therein is liable for the statutory penalty (Dunlap *v.* McKee, 25 Pa. St. 84), even if no damage was occasioned by the neglect (Dunlap *v.* McKee, *supra*); and it is not sufficient that the parties had actual notice (Hottenstine *v.* Auten, 43 Pa. St. 323).

8. McKinney *v.* Strausser, 3 L. T. N. S. (Pa.) 42.

9. Errol *v.* Bragg, 64 N. H. 21, 4 Atl. 388; Keyes *v.* American Slate Co., 50 N. H. 21; Price *v.* Price, 2 N. Y. Suppl. 796, 22 Abb. N. Cas. 299; U. S. *v.* Church of Jesus Christ, etc., 6 Utah 9, 21 Pac. 503–524; Kendil *v.* Merrett, 18 C. B. 173, 2 Jur. N. S. 523, 25 L. J. C. P. 251, 4 Wkly. Rep. 594, 86 E. C. L. 173. See also Daniel *v.* Daniel, 6 Dana (Ky.) 98. *Compare* Barber *v.* Case, 12 How. Pr. (N. Y.) 351.

What constitutes amendment see Kerr *v.* Hicks, 129 N. C. 141, 39 S. E. 797.

10. Elliot *v.* Elliot, 1 Dall. (Pa.) 379, 1 L. ed. 185, where, after report, a rule of reference, in which the name of the referee was erroneously stated, was allowed to be amended.

To show reference was by consent.—A court may amend an order of reference, after the receipt and confirmation of the report, to show that the reference was made by agreement of the parties, instead of "upon motion of the court," as recited in the order. Delany *v.* Knight, 28 R. I. 82, 65 Atl. 607.

11. Taylor *v.* Peterson, 1 Ida. 513; Lazell *v.* Houghton, 32 Vt. 579; Baxter *v.* Thompson, 25 Vt. 505; Rice *v.* Clark, 8 Vt. 104.

An enlargement is in effect a new reference, and should be authenticated by a record or certificate to be made by the justice who issued the rule in the first instance. Lazell *v.* Houghton, 32 Vt. 579.

Taking of additional evidence.—After an order of reference, the court may order additional evidence taken, if the scope of the reference is not thereby enlarged. Davidson *v.* Copeland, 69 S. C. 47, 48 S. E. 33.

12. Copper River Min. Co. *v.* McClellan, 138 Fed. 333, 70 C. C. A. 623.

13. Walsh *v.* Tyler, 2 Indian Terr. 52, 47 S. W. 308; Blun *v.* Mayer, 113 N. Y. App. Div. 242, 99 N. Y. Suppl. 22 [*affirmed* in 189 N. Y. 153, 81 N. E. 780].

In North Carolina, where an order of reference was made where there were no pleadings, and consequently no plea in bar, an appeal would not lie therefrom, so that plaintiff's exception to the order was enough to entitle him thereafter to insist on his right to a jury trial. Kerr *v.* Hicks, 131 N. C. 90, 42 S. E. 532, 129 N. C. 141, 39 S. E. 797.

Effect.—A consent to the reference of an account by the court under sections 201 and

sometimes provided by statute that the objections to the rule or order of reference must be entered of record and not merely made in open court.[14]

2. WAIVER.[15] Where the parties either expressly consent to a reference before the referee or afterward appear without raising any objection to his appointment, authority, or jurisdiction, objections to the order of reference or irregularities therein will be deemed waived.[16] For instance, such conduct is a waiver of such

252 of the practice act is not an abandonment of exceptions, or a submission to arbitration, when the parties have expressed a different purpose by entering their dissent. Halsey *v.* Paulison, 37 N. J. L. 205 [*affirming* 38 N. J. L. 488].

Objections relating to reference not first urgable on appeal see APPEAL AND ERROR, 2 Cyc. 692.

14. Halsey *v.* Paulison, 36 N. J. L. 406.

To entitle party to jury trial.— Objection to an order of reference must be actually entered of record to entitle a party to a jury trial, and it is not sufficient that it was made in open court, and entered on the judge's book, as the statute requires that it shall be made a matter of the record "at the time of entering the reference." Nugent *v.* Downing, 10 N. J. L. J. 143.

15. **Appearance and participation of parties in proceedings** as waiver of objections in general see *infra*, VII, G, 2.

Reference as waiver of objection in general see *infra*, V.

Waiver of objections to report see *infra*, VIII, I, 5, h.

Waiver of right to reference see *supra*, III, C, 8.

16. *Alabama.*— Patillo *v.* Taylor, 83 Ala. 230, 3 So. 553.

California.—Shain *v.* Peterson, 99 Cal. 486, 33 Pac. 1085.

Colorado.— Terpening *v.* Holton, 9 Colo. 306, 12 Pac. 189.

Connecticut.— Andrews *v.* Wheaton, 23 Conn. 112.

Florida.— Gulf Lumber Co. *v.* Walsh, 49 Fla. 175, 38 So. 831.

Illinois.— See also Garrity *v.* Hamburger Co., (1891) 28 N. E. 743, 136 Ill. 499, 27 N. E. 11.

Indian Territory.— Walsh *v.* Tyler, 2 Indain Terr. 52, 47 S. W. 308.

Kansas.— Norton *v.* Huntoon, 43 Kan. 275, 22 Pac. 565.

Kentucky.— Holland *v.* Mers, 7 Ky. L. Rep. 360.

Louisiana.— Lecarpentier *v.* Delery, 4 Mart. 487.

Maine.— Harmon *v.* Jennings, 22 Me. 240; Billington *v.* Sprague, 22 Me. 34.

Michigan.— See Gray *v.* Franks, 86 Mich. 382, 49 N. W. 130.

Minnesota.— Bohles *v.* Boland, 44 Minn. 481, 47 N. W. 155.

Mississippi.— Regan *v.* Stone, 7 Sm. & M. 104.

Missouri.— Young *v.* Powell, 87 Mo. 128; Callahan *v.* Shotwell, 60 Mo. 398; Lee *v.* Dunn, 29 Mo. App. 467.

New York.— Knickerbocker Inv. Co. *v.* Voorhees, 121 N. Y. App. Div. 690, 106 N. Y. Suppl. 455; Elliott *v.* Lewis, 16 Hun 581; Garcie *v.* Sheldon, 3 Barb. 232; Griffin *v.* Miner, 54 N. Y. Super. Ct. 46; Quinn *v.* Lloyd, 7 Rob. 157; Watson *v.* Fitzsimmons, 5 Duer 629; McCall *v.* Moschcowitz, 14 Daly 16, 1 N. Y. St. 99, 10 N. Y. Civ. Proc. 107; Whalen *v.* Albany County, 6 How. Pr. 278; Green *v.* Patchin, 13 Wend. 293; Combs *v.* Wyckoff, 1 Cai. 147; Roosevelt *v.* Thurman, 1 Johns. Ch. 220.

North Carolina.— Johnston *v.* Haynes, 68 N. C. 509; Lattimore *v.* Dixon, 65 N. C. 664.

Ohio.— Averill Coal, etc., Co. *v.* Verner, 22 Ohio St. 372; Champaign County *v.* Norton, 1 Ohio 270.

Oregon.— Berry *v.* King, 15 Oreg. 165, 13 Pac. 772.

Pennsylvania.— Henneigh *v.* Kramer, 50 Pa. St. 530; Mitchell *v.* Wilhelm, 6 Watts 259; Stout *v.* Com., 2 Rawle 341; Bosler *v.* Poe, 13 Serg. & R. 231; Richards *v.* Miller, 11 Pa. Super. Ct. 228; Yarnell's Estate, 3 Leg. Chron. 201, 4 Luz. Leg. Reg. 304; Ludlam's Estate, 5 Pa. L. J. 276; Flanagan *v.* McAffee, 1 Phila. 75; Mundorf *v.* Greer, 7 Pittsb. Leg. J. 164. See also Fehr *v.* Reich, 36 Pa. St. 472; Perdue *v.* Deery, 1 Chest. Co. Rep. C. Pl. 561.

South Carolina.— Cudd *v.* Williams, 39 S. C. 452, 18 S. E 3.

South Dakota.— Jerauld County *v.* Williams, 7 S. D. 196, 63 N. W. 905; Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

Wisconsin.— Messenger *v.* Broom, 1 Pinn. 630. But see Stone *v.* Merrill, 43 Wis. 72, holding that appearing and going to trial without objection before a referee cannot cure the want of any order of appointment appearing in the record.

Canada.— Newman *v.* Niagara Mut. F. Assur. Co., 25 U. C. Q. B. 435.

See 42 Cent. Dig. tit. "References," § 62.

The fact that no rule of court has been entered upon the stipulation appointing the referee is waived by appearing before the referee and proceeding without objection. Whalen *v.* Albany County, 6 How. Pr. (N. Y.) 278.

Offer to set aside reference.— Error in referring a case for findings of fact and conclusions of law is waived where the party asserting the error, on the court's offering to set aside the reference, objected thereto, and insisted on a decision on the report. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

Written application.— The rule that an application for the appointment of an auditor must be in writing cannot be invoked by one who was present at the time of the appointment and concurred therein. *In re* Bentley, 13 Phila. (Pa.) 390.

Where an order of reference is consented to as a condition of securing an adjournment

objections as that the order of reference was premature,[17] or that the action was not one which may be referred,[18] or the want of a "written" consent to the reference.[19] So where representatives of a deceased party appear before the referee, they waive the right to object to the validity of the reference on the ground of the death of the party.[20] However, the want of jurisdiction of the court ordering the reference is not so waived but may be urged at any time.[21] Failure to object to an order setting aside the order of reference is a waiver thereof.[22] So where a report is set aside and the case referred back to the same referees, any error in referring it to the same referees is cured by the parties appearing and trying the matters before the referees.[23] Likewise error in refusing a reference on a counter-claim is waived by a withdrawal of the counter-claim and going to trial.[24]

H. Entry Nunc Pro Tunc. An omission to enter the order of reference is remedied in most jurisdictions by the statute of amendments.[25] An order of reference may be entered *nunc pro tunc* where a trial is duly had before a referee under a stipulation and the parties have omitted to enter the order.[26] So where judgment has been entered on the report but the order of reference was void because of the disqualification of the judge who made the order, but the referee had been previously agreed upon by the party and they had gone to trial before him and the decision had been rendered on the assumption that the order was valid, a *nunc pro tunc* entry of an order of reference may be made.[27] However, the order cannot be amended *nunc pro tunc* so as to enlarge the authority of the referee.[28]

I. Termination[29] **— 1. Revocation by Party.** A submission made a rule of court is ordinarily irrevocable by one party alone,[30] especially where the submis-

of an action, objection cannot afterward be made that the order was improper. Coston *v.* Morris, 4 N. Y. Suppl. 89.

Omissions in order.— Objections to an order of reference because of failure to include provisions regulating the taking of testimony are waived, where no objection is taken to the introduction of the evidence before the referee. Copper River Min. Co. *v.* McClellan, 138 Fed. 333, 70 C. C. A. 623.

17. *Illinois.*— Butler *v.* Cornell, 148 Ill. 276, 35 N. E. 767.

Indiana.— State *v.* Carrington, 19 Ind. 258.

Missouri.— Bader *v.* Schult, 118 Mo. App. 22, 94 S. W. 834.

North Carolina.— Wilson *v.* Pearson, 102 N. C. 290, 9 S. E. 707; McPeters *v.* Ray, 85 N. C. 462.

Pennsylvania.— Zehner *v.* Lehigh Coal, etc., Co., 20 Pa. Co. Ct. 29. *Compare* Jones *v.* Orum, 5 Rawle 249.

Washington.— Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

See 42 Cent. Dig. tit. "References," § 62.

18. Kimball *v.* Amesbury First Baptist Soc., 2 Gray (Mass.) 517; Moore *v.* Moore, 56 N. H. 512; Applegate *v.* Schureman, 3 N. J. L. 868; Bloore *v.* Potter, 9 Wend. (N. Y.) 480. But *compare* Crumbie *v.* Manhattan R. Co., 83 Hun (N. Y.) 1, 31 N. Y. Suppl. 497. *Contra*, Brink *v.* Republic F. Ins. Co., 2 Thomps. & C. (N. Y.) 550.

19. Taylor *v.* Michigan City First Congregational Church, etc., 7 Ind. App. 388, 34 N. E. 655; Leaycroft *v.* Fowler, 7 How. Pr. (N. Y.) 259; Keator *v.* Ulster, etc., Plank Road Co., 7 How. Pr. (N. Y.) 41; People *v.* McGinnis, 1 Park. Cr. (N. Y.) 387; Kelly *v.* State, 25 Ohio St. 567.

20. Chittenango Cotton Co. *v.* Stewart, 67 Barb. (N. Y.) 423; Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484, 18 Phila. 307.

21. Gracie *v.* Sheldon, 3 Barb. (N. Y.) 232; Stoy *v.* Yost, 12 Serg. & R. (Pa.) 385; Morrison *v.* Weaver, 4 Serg. & R. (Pa.) 190.

22. Casky *v.* January, Hard. (Ky.) 539; Trigg *v.* Shields, Hard. (Ky.) 168.

23. Brooke *v.* Bannon, 3 Watts & S. (Pa.) 382.

24. McCormick *v.* Ketchum, 51 Wis. 323, 8 N. W. 208.

25. Bewick *v.* Fletcher, 39 Mich. 25.

26. Scudder *v.* Snow, 29 How. Pr. (N. Y.) 95; Whalen *v.* Albany County, 6 How. Pr. (N. Y.) 278; Robinson *v.* Mutual Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194.

27. Owasco Lake Cemetery *v.* Teller, 110 N. Y. App. Div. 450, 96 N. Y. Suppl. 985.

28. Taylor *v.* Peterson, 1 Ida. 513.

29. Delay in making report as terminating reference see *infra*, VIII, B, 2.

Discharge of rule after setting aside of report see *infra*, VIII, I, 7, e.

Notice to end reference in case of delay in making report see *infra*, VIII, B, 2.

Voluntary dismissal after submission to reference see Dismissal and Nonsuit, 14 Cyc. 404.

30. *Massachusetts.*— Haskell *v.* Whitney, 12 Mass. 47.

New Hampshire.— Dexter *v.* Young, 40 N. H. 130.

New Jersey.— Ferris *v.* Munn, 22 N. J. L. 161.

New York.— Frets *v.* Frets, 1 Cow. 335;

sion is founded on a consideration.[31] However, the submission is revokable by mutual consent,[32] with the sanction of the court making the order.[33]

2. VACATING OR SETTING ASIDE ORDER.[34] The order of reference may be set aside for good cause,[35] but not otherwise,[36] where the motion is made at the proper time,[37] although the granting or refusing of the order is within the discretion of

Monroe Bank *v.* Widner, 11 Paige 529, 43 Am. Dec. 768.

Pennsylvania.— Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484, 18 Phila. 307. *Contra*, McKenna *v.* Lyle, 155 Pa. St. 599, 26 Atl. 777, 35 Am. St. Rep. 910.

Vermont.— Knapp *v.* Fisher, 49 Vt. 94. See also Sanders *v.* Rochester F. Dist. No. 1, 70 Vt. 561, 41 Atl. 502.

See 42 Cent. Dig. tit. "References," § 57. See also ARBITRATION AND AWARD, 3 Cyc. 611.

Parol revocation of submission by deed.— A submission to reference, made by deed, cannot be revoked by parol. Mullins *v.* Arnold, 4 Sneed (Tenn.) 262.

An entry upon the clerk's docket by the attorney of one of the parties, that "reference revoked June 7, 1875, before any report was filed," is no evidence of a revocation. Knapp *v.* Fisher, 49 Vt. 94.

31. Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484, 18 Phila. 307. See also ARBITRATION AND AWARD, 3 Cyc. 610.

32. Ferris *v.* Munn, 22 N. J. L. 161.

33. Phillips *v.* Shipley, 1 Bland (Md.) 516; Withers *v.* Haines, 2 Pa. St. 435.

34. Setting aside report see *infra*, VIII, I, 7.

Waiver of objections to setting aside order see *supra*, IV, G, 2.

35. *Kentucky.*— Harmon *v.* Stuart, 84 S. W. 524, 27 Ky. L. Rep. 101.

New Hampshire.— Dexter *v.* Young, 40 N. H. 130.

New Jersey.— Seamans *v.* Pharo, 4 N. J. L. 123.

North Carolina.— Patrick *v.* Richmond, etc., R. Co., 101 N. C. 602, 8 S. E. 172; Perry *v.* Tupper, 77 N. C. 413.

Pennsylvania.— Hoffman *v.* Locke, 19 Pa. St. 57 (holding that the court has power to strike off a rule to arbitrate where such rule will prevent plaintiff, under the act of April 3, 1851, from taking judgment for want of an affidavit of defense); Cooper *v.* Restenbalt, 1 Pearson 463.

England.— Brown *v.* Girard, 19 L. T. Rep. N. S. 324.

See 42 Cent. Dig. tit. "References," § 58.

Referee as interested person.— An order granting a reference to the attorney of one of the parties, without the consent of the other party, should be set aside as of course. Eason *v.* Billups, 65 N. C. 216.

Death of referees.— Where two of the referees are dead, and the cause is undecided, it is a matter of course to vacate the order of reference. Emmet *v.* Bowers, 23 How. Pr. (N. Y.) 300.

Failure to fix date for hearing within time stipulated.— An order entered on consent need not be vacated merely because the referee is unable to fix a day for hearing within the time specified in the stipulation which does not provide that the failure to fix a day shall vacate the order. Parkhurst *v.* Berdell, 87 N. Y. 145.

Miscellaneous grounds.— Failure to report within the time fixed is ground (Jeffers *v.* Hazen, 69 Vt. 456, 38 Atl. 86; Baxter *v.* Thompson, 26 Vt. 505. See also Murphy *v.* Cotton, 14 U. C. Q. B. 426), as is the refusal of part of the arbitrators to act (Patrick *v.* Richmond, etc., R. Co., 101 N. C. 602, 8 S. E. 172), or the failure of the arbitrator to appear at the time fixed for meeting (Hummel *v.* Foster, 2 Leg. Chron. (Pa.) 234), or the fact that the rule was entered through misapprehension and surprise (Bradley *v.* Wolff, 2 Yeates (Pa.) 343), or where the referee has heard and decided a prior case between the same parties involving a number of questions involved in the second case (Conley *v.* Petrie, 60 How. Pr. (N. Y.) 299).

Who may set aside.— An order of reference in a case within the jurisdiction of the judge making it cannot be held void by another judge before whom the case comes on special report of the referee. *In re* Thomas, 35 Fed. 337.

36. King *v.* Davidson, 69 Ga. 708; Hatch *v.* Judd, 23 Iowa 499; Axt *v.* Shankey, 5 Silv. Sup. (N. Y.) 235, 8 N. Y. Suppl. 803; Schermerhorn *v.* Wood, 4 Daly (N. Y.) 158; Marie *v.* Garrison, 7 N. Y. Civ. Proc. 40, 1 How. Pr. N. S. 32; Lumnis *v.* Big Sandy Land, etc., Mfg. Co., 188 Pa. St. 27, 41 Atl. 319, failure of trustee to consent to reference. See Rogers *v.* Kearns, 29 L. J. Exch. 328.

Amendment of answer and incorporation of a counter-claim is no ground for vacating. Degener *v.* Underwood, 57 N. Y. Super. Ct. 583, 7 N. Y. Suppl. 681.

Failure to pay costs.— A rule to arbitrate, under the Compulsory Arbitration Act (Act June 16, 1836, § 8) will not be stricken off because the costs on a former rule have not been paid. The party's remedy is to collect the costs by execution or attachment. Grant *v.* People's Mut. Aid Soc., 2 Leg. Rec. (Pa.) 190.

Mistake and poverty.— A motion to vacate a consent order will be denied where no fraud is shown and no objection is made to the referee, but the only objection is that plaintiff was unaware that she thereby waived a jury trial, and is too poor to pay the expenses of the reference. Winans *v.* Winans, 54 N. Y. Super. Ct. 542 [*affirmed* in 124 N. Y. 140, 26 N. E. 293].

37. See cases cited *infra*, this note.

After confirmation of report.— Where the reference is not warranted it may be set aside even after confirmation of the report. Crutchfield *v.* Mutual Gas-Light Co., (Tenn. 1886) 2 S. W. 658.

In Pennsylvania, it has been held that the

the court.[38] So the court may set aside the order of its own motion.[39] Notice of the motion must be given the opposing party.[40] Where the action is non-referable the remedy is to move to set aside the order of reference and not to move to set aside the report.[41] So if a party deny the existence of a submission to arbitration, he should apply to the court in which the action was entered to strike it off.[42] After a judge has revoked an order of reference, the case stands as if no such order had been made, and it is in his power to enter a second order of reference.[43] Where the trial is *de novo* in the appellate court an appeal vacates the report and the case stands for trial as if no reference had been made.[44] Where the referees have lost all power over a case by improper adjournments, plaintiff cannot proceed to trial at the circuit without first obtaining a revocation of the order of reference.[45]

3. Death of Party.[46] The death of a party will not vacate the order of reference,[47] except where the action abates,[48] especially where the representative of the deceased comes in voluntarily and proceeds with the suit.[49] But where one of plaintiffs has died pending the suit and an order of reference was thereafter entered by consent, in ignorance of his death, the order should be vacated.[50]

V. Operation and Effect of Reference.[51]

Consent to a reference waives the right to a jury trial,[52] or the want of, or

court has no authority, after arbitrators are appointed, to strike off the rule against the consent of either party. Hoffman *v.* Locke, 19 Pa. St. 57; Girard *v.* Hutchinson, 2 Serg. & R. 188. On the other hand it has been held that a rule to arbitrate, on which arbitrators have been chosen, cannot be stricken off until the day of meeting has gone by; and it was error to strike same off on day of meeting. Trimbly *v.* Maloney, 2 Luz. Leg. Reg. 223, 4 Pittsb. Leg. J. N. S. 152. Generally the order cannot be set aside after the report is filed. Albright *v.* Leiser, 2 Pennyp. 483; Oxley *v.* Oldden, 1 Dall. 430, 1 L. ed. 209. But see Campbell *v.* Fayette County, 127 Pa. St. 86, 17 Atl. 882. *Compare* Smith *v.* Stein, 1 Browne 347. A motion to set aside a reference during its pendency and before report, on the ground that one of the referees had been offered by plaintiff as a witness, is premature. The matter is examinable only after report made on exceptions. Riley *v.* Stratton, 2 Miles 39.

38. People *v.* Judge Osceola Cir. Ct., 30 Mich. 99; Bushee *v.* Surles, 79 N. C. 51.

Imposing terms on granting leave to answer see The Nineveh, 18 Fed. Cas. No. 10,276, 1 Lowell 400.

39. Dexter *v.* Young, 40 N. H. 130.

40. Seamans *v.* Pharo, 4 N. J. L. 123.

41. Silmser *v.* Redfield, 19 Wend. (N. Y.) 21.

42. Herman *v.* Freeman, 8 Serg. & R. (Pa.) 9.

43. Green *v.* McCarter, 64 S. C. 290, 42 S. E. 157.

44. Lawson *v.* Bissell, 7 Ohio St. 129.

45. Jackson *v.* Ives, 6 Hill (N. Y.) 260.

46. Death of referee see *infra*, VI, J.

Death of party after report as ground for abatement of action see Abatement and Revival, 1 Cyc. 76. See also 1 Cyc. 114 note 48.

47. *Massachusetts.*— Bacon *v.* Crandon, 15 Pick. 79.

New Jersey.— Freeborn *v.* Denman, 8 N. J. L. 116.

New York.— Moore *v.* Hamilton, 44 N. Y. 666 [*affirming* 48 Barb. 120]; Chittenango Cotton Co. *v.* Stewart, 67 Barb. 423.

Pennsylvania.— Ruston *v.* Dunwoody, 1 Binn. 42.

Vermont.— *In re* Powers, 65 Vt. 399, 26 Atl. 640; Newton *v.* Higgins, 2 Vt. 366; Williams *v.* Cook, Brayt. 112.

See 42 Cent. Dig. tit. "References," § 59. See also Arbitration and Award, 3 Cyc. 612, 613.

The death of both parties does not vacate the order. Price *v.* Tyson, 2 Gill & J. (Md.) 475.

Reference by consent.— In some states a reference by agreement of parties is revoked by the death of one of them. Whitfield *v.* Whitfield, 30 N. C. 163, 47 Am. Dec. 350; Marseilles *v.* Kenton, 17 Pa. St. 238.

48. Reynolds *v.* Reynolds, 5 Paige (N. Y.) 161.

49. Grimm *v.* Sarmiento, 2 Pa. Co. Ct. 484, 18 Phila. 307; Kessler *v.* Haupt, 9 Pittsb. Leg. J. N. S. (Pa.) 160.

50. Waters *v.* Manhattan R. Co., 66 Hun (N. Y.) 60, 20 N. Y. Suppl. 831.

51. As waiver of want of, or objections to, pleadings see Pleading, 31 Cyc. 724.

Stipulation for reference as constituting an appearance see Appearances, 3 Cyc. 510.

Costs of reference see Costs, 11 Cyc. 101, 104, 127.

Supervision and control of court over referees see *infra*, VII, R.

52. See Juries, 24 Cyc. 157. See also 24 Cyc. 115 note 95, 125 note 72, 166, 178, 192 note 24.

Where no reference.— But by consenting to refer to a particular referee named in the consent and in the order the parties do not waive the right to a trial either by the court or by the jury if for any reason, such as

objections to, pleadings.[53] So the submission by rule of court is a waiver of any previous irregularity in the action,[54] or the court's want of jurisdiction of the action,[55] and if plaintiff takes out a rule for arbitration before special bail is entered he waives the bail.[56] A reference under a rule of court is not a discontinuance of the cause.[57] The order of reference, where not expressly limited in its duration, continues in force until it is executed or revoked by act of law or discharged by the court.[58] A memorandum made out of court of an agreement to refer an action by rule of court is wholly superseded by an entry to refer upon the docket.[59] A reference to settle accounts does not deprive defendant of his right to rely upon any defenses arising in the case,[60] even where the reference is by consent.[61] Where the reference is of the case only and does not include other claims of the parties, it does not discharge bail nor dissolve an attachment.[62] The order of reference cannot be collaterally attacked.[63] A motion by plaintiff for a reference to examine and determine a long account constitutes an election to proceed *ex contractu*, where it is doubtful whether the complaint is based on a contract or tort.[64]

VI. THE REFEREE.[65]

A. In General. A referee is an officer of the court,[66] for a specific purpose,[67] exercising judicial powers and authority.[68] He may be a person chosen by the parties or by the court,[69] or one appointed as official or standing referee.[70]

B. Number of Referees.[71] The number of referees is generally to be determined by the court,[72] subject to statutory provisions fixing the num-

death, removal, or refusal of the referee to act, the reference agreed upon falls through, and in such case the court has not the right to order a new reference without the consent of the parties. Preston *v.* Morrow, 66 N. Y. 452.

53. See PLEADING, 31 Cyc. 724.

54. Adams *v.* Hill, 16 Me. 215; Forseth *v.* Shaw, 10 Mass. 253.

All questions as to form or variance are waived by a reference. Bachop *v.* Hill, 54 Vt. 507; Waterman *v.* Connecticut, etc., R. Co., 30 Vt. 610, 73 Am. Dec. 326.

Case not on calendar.— Whatever objections there may be on the ground that a case was not properly on the calendar, or that a continuance was refused by the court, are waived by the consent of the attorneys to a reference. Allis *v.* Day, 14 Minn. 516.

55. Reed *v.* Stockwell, 34 Vt. 206; Maxfield *v.* Scott, 17 Vt. 634.

56. Nones *v.* Gelbaud, 11 Serg. & R. (Pa.) 9; Johnson *v.* McCoy, 1 Miles (Pa.) 89.

57. *California.*— Gunter *v.* Sanchez, 1 Cal. 45.

District of Columbia.— Bailey *v.* District of Columbia, 4 App. Cas. 356, holding that a reference by consent will not operate as a discontinuance of the action, but only as a stay of proceedings, whether a rule of court be entered or not.

Massachusetts.— McCarthy *v.* Swan, 145 Mass. 471, 14 N. E. 635.

New Hampshire.— Weare *v.* Putnam, 56 N. H. 49.

Tennessee.— Bridges *v.* Vick, 2 Humphr. 516.

See 42 Cent. Dig. tit. "References," § 60.

58. Tyson *v.* Robinson, 25 N. C. 333.

59. Billington *v.* Sprague, 22 Me. 34.

60. Smith *v.* California Ins. Co., 87 Me. 190, 32 Atl. 872.

61. Hughes *v.* Christy, 26 Tex. 230.

62. Seavey *v.* Beckler, 132 Mass. 203, holding also that the reference by agreement and rule of court is not a waiver of plaintiff's right to a special judgment to enable him to proceed against sureties upon the bond given to dissolve the attachment.

63. State *v.* Johnson, 132 Mo. 105, 33 S. W. 781.

64. People *v.* Wood, 121 N. Y. 522, 24 N. E. 952 [*reversing* on other grounds 54 Hun 438, 7 N. Y. Suppl. 712].

65. Referee as witness see WITNESSES.

66. *In re* Hathaway, 71 N. Y. 238; Bohlman *v.* Coffin, 4 Oreg. 313; Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

An action against a referee to recover money in his hands cannot be brought without leave of court, he being an officer of the court. Higgins *v.* Wright, 43 Barb. (N. Y.) 461.

Liability for interest on funds in his hands See Kepler *v.* Merkle, 9 N. Y. Civ. Proc. 284.

67. Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

68. *In re* Hathaway, 71 N. Y. 238.

69. See *infra*, VI, D.

70. Chapman *v.* Lipscomb, 15 S. C. 470; McClure *v.* Brooke Tp., 5 Ont. L. Rep. 59, 1 Ont. Wkly. Rep. 835 [*reversing* 4 Ont. L. Rep. 97, 1 Ont. Wkly. Rep. 274], holding a drainage referee not an official referee.

71. Report by part of referees see *infra*, VIII, C.

Selection of new referee on failure of referee to qualify or act see *infra*, VI, G.

72. Reading Industrial Mfg. Co. *v.* Graeff, 64 Pa. St. 395, holding that a reference under the Arbitration Act of 1836 (Pamphl. Laws 715) may be made to one arbitrator.

ber.[73] Where there is a statutory provision for reference, the action cannot be referred within the statute to a greater or less number than that prescribed.[74] Generally additional referees cannot be appointed by the court after the order of reference.[75] Where the reference is to four arbitrators with power to call in an umpire, and three of the four agree, it is irregular to call an umpire afterward.[76]

C. Eligibility and Qualification.[77] Generally the referee must be an attorney duly admitted to the bar,[78] and an attorney may be referee even in an action by another attorney for professional services.[79] He must be a disinterested person,[80] and a judge cannot be appointed against the objection of a party.[81] Furthermore it has been held that the judge of the court in which the action is pending cannot be appointed referee even by consent of the parties,[82] although it is held that by consent the cause may be referred to the judge of another circuit than that where it is pending.[83] Likewise consent will not authorize a master in chancery to act as a referee at law.[84] A clerk of court cannot be appointed, without consent of the parties, under some statutes.[85] But the mere fact that a person was a referee in a prior action between the parties,[86] or that there is another

In Pennsylvania, under the arbitration law, the number of arbitrators must be fixed exclusively by the prothonotary where one party only attends to appoint. Feehrer *v.* Rudy, 7 Watts & S. 183; Mitchell *v.* Wilhelm, 6 Watts 259. If the record shows that one arbitrator was named by plaintiff, another by the prothonotary for defendant, and a third by plaintiff, the law requiring the prothonotary to fix the number is satisfied by the presumption that the number was fixed by him, arising from his not appointing more. Withers *v.* Haines, 2 Pa. St. 435. When a party does not attend the choosing of arbitrators, it must appear upon the record that the prothonotary fixed the number of arbitrators. Smith *v.* Bartolett, 18 Leg. Int. 110.

73. Chickering-Chase Bros. Co. *v.* De Voll, 55 Ill. App. 442 (holding that the court has no authority to refer a pending suit to one arbitrator, as the statute requires three); Dodge *v.* Waterbury, 8 Cow. (N. Y.) 136.

74. Halsey *v.* Paulison, 37 N. J. L. 205 [*affirmed* in 38 N. J. L. 488]; Rathbone *v.* Lownsbury, 2 Wend. (N. Y.) 595; Dodge *v.* Waterbury, 8 Cow. (N. Y.) 136.

75. Devlin *v.* New York, 63 How. Pr. (N. Y.) 206 [*reversing* 62 How. Pr. 260]. See also Barfield *v.* Hewlett, 6 Mart. N. S. (La.) 78.

76. Lockart *v.* Kidd, 2 Mill (S. C.) 217.

77. **Waiver of objections** see *infra*, VI, E. **Setting aside order of reference** for misconduct for disqualification of referee see *supra*, IV, I, 2.

Setting aside report because of disqualification or misconduct of referee see *infra*, VIII, I, 7, b, (IV).

78. Campbell *v.* Fayette County, 127 Pa. St. 86, 17 Atl. 882, 6 Pa. Co. Ct. 132.

79. Carr *v.* Berdell, 22 Hun (N. Y.) 130. But see Flanders *v.* Odell, 2 Hun (N. Y.) 664, holding that an action on an attorney's bill for services rendered should not ordinarily be referred to another attorney.

80. Fortunato *v.* New York, 31 N. Y. App. Div. 271, 52 N. Y. Suppl. 872; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17 (holding that where A was acting as referee in a case in which B was attorney B should not be appointed referee in a cause in which A was attorney); Cronon *v.* Avery, 42 Misc. (N. Y.) 1, 85 N. Y. Suppl. 539; Eason *v.* Billups, 65 N. C. 216 (holding that matters in controversy in a suit should not be referred to the attorney of one of the parties without the consent of the other party). *Compare In re* Yarnell's Estate, 3 Leg. Chron. (Pa.) 207, 4 Luz. Leg. Reg. 304.

Effect of consent of parties.—A reference may be made, by consent of the parties, to persons who are interested in the subject-matter of the suit. Allison *v.* Bryson, 65 N. C. 44. See also Story *v.* De Armond, 77 Ill. App. 74.

Matters considered.— Where an attorney who accepts the position of referee has such relation with one of the parties to the litigation as to make it improper that he should decide the question submitted to him, the fact that he is a man of high character is immaterial. Fortunato *v.* New York, 31 N. Y. App. Div. 27, 52 N. Y. Suppl. 872.

81. Puffer *v.* American Cent. Ins. Co., 48 Oreg. 475, 87 Pac. 523; Hills *v.* Passage, 21 Wis. 294.

An assistant to the surrogate cannot act as referee in a matter pending in the surrogate's court without the written consent of the parties. Matter of Shipman, 5 N. Y. Suppl. 559, 22 N. Y. Annot. Cas. 289, 1 Connoly Surr. 256.

82. Woodin *v.* Phœnix, 41 Mich. 655, 2 N. W. 923, 32 Am. Rep. 172; Rogers *v.* Woodmansie, 3 N. J. L. 954; Little *v.* Silverthorne, 3 N. J. L. 680; Crane *v.* Hand, 3 N. J. L. 414; Hills *v.* Passage, 21 Wis. 294 [*overruling* Dinsmore *v.* Smith, 17 Wis. 20]. *Contra*, Temple *v.* Myers, 16 Pa. Co. Ct. 232.

83. Andrews *v.* Elderkin, 24 Wis. 531.

84. Farmers' L. & T. Co. *v.* Central R. Co., 2 Fed. 656, 1 McCrary 332.

85. Standfast *v.* Crotty, 13 N. Y. Suppl. 584.

86. Clark *v.* Clark, 7 Rob. (N. Y.) 62. But see *In re* Bliss, 39 Hun (N. Y.) 594, holding that one who had acted as referee in a divorce suit and had found the wife

proceeding between the same parties before him,[87] does not disqualify him from acting as referee. The referee need not reside in the county in which the venue is laid.[88] A married or single woman may act as referee where the statute provides for the appointment of "persons." [89]

D. Selection and Appointment.[90] The referee must be appointed as provided for by statute, rule of court, or the local practice.[91] Even where the referee is agreed upon by the parties, an order appointing him as referee must be made.[92] The parties may agree on the referee in which case the court is usually required to appoint such person,[93] or the court may name a suitable person where the parties do not agree on any one.[94] Except where otherwise provided by

guilty of misconduct should not be appointed referee in habeas corpus proceedings brought by the mother to obtain the custody of the child.

87. Matter of Atkinson, 12 N. Y. St. 570.

88. O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636. *Contra,* see Chubb *v.* Berry, 7 Wend. (N. Y.) 483; Sherwood *v.* Tremper, 11 Johns. (N. Y.) 406.

89. Evans *v.* Ives, 1 Kulp (Pa.) 461, 15 Phila. 635.

90. On removal or discharge of referee see *infra,* VI, I.

On death of referee see *infra,* VI, J.

New referee on failure of referee to qualify or act see *infra,* VI, G.

91. Dickinson *v.* Earle, 31 N. Y. App. Div. 236, 52 N. Y. Suppl. 615.

In Pennsylvania arbitrators must be appointed in the presence of both parties. Shippen *v.* Bush, 1 Dall. 251, 1 L. ed. 123. After entering a rule to choose arbitrators, the party may, before notice given, alter the date for selection. Crawford *v.* Gable, 2 Pa. St. 444. Notice of the time and place for appointing arbitrators must be given to all the parties. Marshall *v.* Lowry, 6 Serg. & R. 281. When the notice to defendant calls the plaintiff "James B. W." when in fact his name is "John B. W.," the misnomer avoids the notice. Welsh *v.* Schall, 11 Pa. Co. Ct. 30. The party who enters the rule must serve a copy of the record of the appointment on the adverse party, if he reside in the county, although his attorney attends when the appointment is made. Henry *v.* Norwood, 4 Watts 347. But where a rule of reference is taken by plaintiff in an action, and defendant acknowledges service of the notice, the record need not show that notices of the arbitrators' appointment was proved. Kirk *v.* Eaton, 10 Serg. & R. 103. The arbitrators must be chosen within thirty days after a rule of reference is entered. Hewes *v.* Machinery Co., 2 Leg. Rec. 210; Grant *v.* People's Mut. Aid. Soc., 2 Leg. Rec. 190. When the prothonotary records that he acted for the absent defendant in choosing arbitrators, and does not tell all the particulars of how he did it, the presumption is that he did it in due form and according to law. Steele *v.* Herrington, 1 Grant 442.

Appointment in chambers see JUDGES, 23 Cyc. 555.

92. Morey *v.* Warrior Mower Co., 90 Ill. 307; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Litchfield *v.* Burwell, 5 How. Pr. (N. Y.) 341; Stevenson *v.* Beecker, 1 Johns. (N. Y.) 492; Miller *v.* Vaughan, 1 Johns. (N. Y.) 315. See also *supra,* IV, A. *Compare* Renouil *v.* Harris, 1 Code Rep. (N. Y.) 125 [*affirmed* in 2 Sandf. 641, 2 Code Rep. 71].

93. Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295; Haner *v.* Bliss, 7 How. Pr. (N. Y.) 246. See also Backus *v.* Smith, 3 Cow. (N. Y.) 344.

Agreement in writing.—An agreement by the parties that a certain person be nominated as referee must be in writing, and signed by the parties or their attorneys. Appointment of Referee, 13 How. Pr. (N. Y.) 346.

Statutory exception to rule.— Under N. Y. Code Civ. Proc. § 1012, requiring the courts to designate the referee where it grants a reference by consent in an action against a corporation for the appointment of a receiver and the distribution of its property, a reference to one not appointed by the court is absolutely void. Fallon *v.* Egberts Woolen-Mill Co., 24 Misc. (N. Y.) 304, 53 N. Y. Suppl. 672 [*affirmed* in 46 N. Y. App. Div. 630, 61 N. Y. Suppl. 1136].

94. Heath *v.* Waters, 40 Mich. 457. See also Ryan *v.* Atlantic Mut. Ins. Co., 50 How. Pr. (N. Y.) 321 [*affirmed* in 66 N. Y. 628]. *Compare* Samble *v.* Mechanics' F. Ins. Co., 1 Hall (N. Y.) 617.

Choice of one party.—A referee cannot be nominated by a party unless the other parties agree. Appointment of Referee, 13 How. Pr. (N. Y.) 346.

In Pennsylvania the appointment of arbitrators must be made according to the statute, requiring plaintiff and the prothonotary to nominate alternately one person, the prothonotary acting for defendant. Cave *v.* Crumley, 1 Pa. L. J. Rep. 312.

Waiver of right to agree on referee.— Where defendant interposed no objection to a referee when appointed, failed to allege such appointment as a ground for his motion to set aside the reference, and made no objection until after the referee had filed his report, he waived all right to agree on a suitable referee. Vette *v.* Geist, 155 Mo. 27, 55 S. W. 871. The only illegality in the first appointment of a referee being failure of the court to first afford the parties opportunity to agree on a referee, he may, on such opportunity being afforded them, and they fail-

statute,[95] the rule is that after referees are appointed others cannot be substituted without a further order of court and the consent of the parties,[96] consent alone being insufficient.[97] The order appointing the referee need be in no particular form,[98] but should either contain the referee's name or be accompanied by the written agreement designating a certain person as referee.[99] Where the cause is continued from term to term, an actual reappointment for each term is unnecessary.[1] A formal or written notice of the appointment need not be given to the referees where they actually meet and make an award.[2] Where arbitrators disagree and select an umpire it is not necessary, under some statutes, for the clerk to designate the time for the umpire to act under his appointment.[3] Ordinarily it is improper to provide in an order substituting a new referee that the testimony taken before the former referee shall stand.[4]

E. Objections to Referee. Objections to the appointment of a particular person as referee must be urged at the first opportunity or they will be deemed waived.[5]

F. Oath.[6] While in some jurisdictions referees need not be sworn,[7] yet in most states an oath is necessary unless waived by the parties.[8] The oath need

ing to agree, be again appointed. Sanguinett *v.* Webster, 153 Mo. 343, 54 S. W. 563.

95. Stiles *v.* Carlisle, etc., Turnpike Road, 10 Serg. & R. (Pa.) 286.

96. Hicks *v.* McDonell, 99 Mass. 459. See also Foltz *v.* Grubb, 2 Pa. L. J. Rep. 420; Douglass *v.* Brandon, 6 Baxt. (Tenn.) 58; Cooley *v.* Dill, 1 Swan (Tenn.) 313. And see *infra*, VI, G.

97. Norvell *v.* Gibson, 6 Mo. App. 581. *Contra*, see Manlove *v.* Thrift, 5 Munf. (Va.) 493.

98. Matter of Atkinson, 12 N. Y. St. 570, holding that an order directing a party to attend before another, describing the latter as referee, is a sufficient appointment of the latter as referee, as the words "hereby appointed" may be fully implied.

99. Appointment of Referee, 13 How. Pr. (N. Y.) 346.

1. Shaler, etc., Quarry Co. *v.* Campbell, 53 Conn. 327, 2 Atl. 755.

2. Allison *v.* Bryson, 65 N. C. 44.

3. McHugh *v.* Peck, 29 Tex. 141.

4. Heerdegen *v.* Loreck, 17 N. Y. App. Div. 515, 45 N. Y. Suppl. 585; Griffin *v.* Miner, 54 N. Y. Super Ct. 46. But see Lecocq *v.* Pottier, 65 Hun (N. Y.) 598, 20 N. Y. Suppl. 570; Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193, holding that where a referee "to take testimony," after partially performing his duties, was succeeded by a referee "to hear and determine all issues of fact," the testimony taken by the former was properly admitted in evidence by the latter. *Compare* Gee *v.* Humphries, 49 S. C. 253, 27 S. E. 101, holding that incompetent testimony taken on one reference is not rendered competent on a second reference against persons not parties to the first by a provision in the order of reference that the testimony taken on the first reference might be used.

Effect of stipulation.— Where it is stipulated that testimony taken before a former referee may be received before the one substituted, the latter's refusal to allow witnesses whose testimony is so received to be reëxamined is a matter of discretion, and is not reviewable. Griffin *v.* Miner, 3 N. Y. St. 521.

5. Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74]; Burnham *v.* Goffstown, 50 N. H. 560; Perry *v.* Moore, 2 E. D. Smith (N. Y.) 32, 3 Code Rep. 221; Goldberger *v.* Manhattan R. Co., 3 Misc. (N. Y.) 441, 23 N. Y. Suppl. 176; Eichberg *v.* Wickham, 21 N. Y. Suppl. 647. See also Pitts *v.* Langsdale, 32 Ind. 218. See also *supra*, VI, G, 2.

6. Waiver of objections by appearance and participation in proceedings see *infra*, VII, G, 2.

7. *California.*— Sloan *v.* Smith, 3 Cal. 406.

Illinois.— Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74]; Pardridge *v.* Ryan, 35 Ill. App. 230 [*affirmed* in 134 Ill. 247, 25 N. E. 627]. But see Gregory *v.* Healy, 61 Ill. 470.

Indiana.— Daggy *v.* Cronnelly, 20 Ind. 474; Dickerson *v.* Hays, 4 Blackf. 44.

Michigan.— Underwood *v.* McDuffee, 15 Mich. 361, 93 Am. Dec. 194.

Mississippi.— Benoit *v.* Brill, 24 Miss. 83.

See 42 Cent. Dig. tit. "Reference," § 68.

Compare Bradstreet *v.* Erskine, 50 Me. 407, holding that the law does not require that referees, whom the parties have agreed upon, should be sworn, notwithstanding the agreement to refer confers upon them the powers of commissioners, who by law must act and determine on their oaths.

8. *Delaware.*— Kinney *v.* Short, 2 Harr. 357.

Louisiana.— Mooney *v.* Cage, 6 Rob. 494; Locke *v.* Dakin, 15 La. 423; Nott *v.* Daunoy, 2 Mart. N. S. 1.

New York.— Matter of Vilmar, 10 Daly 15; Nason *v.* Ludington, 8 Daly 149; Browning *v.* Marvin, 5 Abb. N. Cas. 285; Exchange F. Ins. Co. *v.* Early, 4 Abb. N. Cas. 78, 54 How. Pr. 279; McGowan *v.* Newman, 54 How. Pr. 458.

Oklahoma.— Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476.

Pennsylvania.— Temple *v.* Myers, 16 Pa. Co. Ct. 232.

See 42 Cent. Dig. tit. "Reference," § 68.

not be in the precise language of the statute,[9] and generally may be administered by any one who may take an oath or affidavit or by one specially enumerated in the reference statute.[10] The common practice is for the report to recite the taking of the oath,[11] but it may be shown by intrinsic evidence,[12] and if the report does not show that the referee was sworn the presumption is that he took the necessary oath.[13] The oath may be expressly dispensed with by the parties,[14] and may also be waived by conduct.[15] So an irregularity in the swearing of referees occurring in the presence of the parties must be taken advantage of at once or the objection is waived.[16] If the referee is not sworn, the proper remedy is to move to recommit the report,[17] the omission not being jurisdictional,[18] nor ground for setting aside the judgment entered on the report.[19]

G. Failure to Qualify or Act.[20] Unless the stipulation otherwise provides,[21] the court may appoint another referee where the referee, or one or more of several referees, refuses to serve;[22] especially where it is so provided for by stipulation.[23] A referee cannot be substituted merely by agreement of the parties,[24] although

Reference to compute amount due on default.— But a referee appointed under Code Civ. Proc. § 1215, authorizing an appointment of a referee for the purpose of determining the amount for which a default judgment shall be entered, need not be sworn. McGowan *v.* Newman, 4 Abb. N. Cas. (N. Y.) 80, 54 How. Pr. 458. *Contra,* Exchange F. Ins. Co. *v.* Early, 4 Abb. N. Cas. (N. Y.) 78, 54 How. Pr. 279.

Time.—A report is good, although the experts were sworn after it was reduced to writing and by a justice of the peace. Nott *v.* Daunoy, 2 Mart. N. S. (La.) 1.

After recommittal of report.— Where an award is recommitted to the arbitrators for reconsideration, it is not necessary that the arbitrators should be resworn. Tomlinson *v.* Hammond, 8 Iowa 40.

9. Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476.

10. Super *v.* Mauger, 1 Leg. Rec. (Pa.) 125.

11. Swayze *v.* Ribble, 3 N. J. L. 660.

Recital as prima facie evidence.— The recital in a report that he had been "duly qualified" is *prima facie* evidence that he had been sworn as the statute requires. Edwardson *v* Garnhart, 56 Mo. 81.

Evidence in rebuttal.— The effect of a statement in a report that the referee took the proper oath is not overcome by the affidavit of the counsel of one party that he did not so do, testimony being taken by the referee without objection from either party. Bissell *v.* Warde, 129 Mo. 439, 31 S. W. 928.

Presumptions.— If an award state that the arbitrators were sworn before J S, it will be presumed that he had power to administer the oath to them. Shryock *v.* Morton, 2 A. K. Marsh. (Ky.) 561.

12. Sears *v.* Sellew, 28 Iowa 501; Rhodes *v.* Ward, 32 S. W. 950, 17 Ky. L. Rep. 875; Reed *v.* Talford, 10 Vt. 568. But see Curry *v.* Lilley, 9 Pa. Co. Ct. 590.

13. Young *v.* Young, 18 Minn. 90; Leyde *v.* Martin, 16 Minn. 38; Monitor Iron Works Co. *v.* Ketchum, 47 Wis. 177, 2 N. W. 80.

14. Graham *v.* Hamilton, 1 Binn. (Pa.) 461.

Evidence.— Upon hearing of exceptions to a statutory award, a report certifying that the parties had dispensed with the oath is *prima facie* evidence of the fact, the act of March 21, 1806, providing for oath unless "dispensed with by consent of parties." Brink *v.* Bell, 4 Yeates (Pa.) 491.

15. Pardridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627; Story *v.* De Armond, 77 Ill. App. 74; McGowan *v.* Newman, 4 Abb. N. Cas. (N. Y.) 80, 54 How. Pr. 458 [*reversing* 4 Abb. N. Cas. 78, 54 How. Pr. 279]. See also *infra,* VII, G, 2.

16. Vanwegen *v.* Davis, 4 Leg. Gaz. (Pa.) 222.

A statutory requirement that the oath must be subscribed may be waived by failure to object where the referee is merely sworn in open court in the presence of both parties. Vogt *v.* Butler, 105 Mo. 479, 16 S. W. 512.

17. Harrison *v.* Harrison, 115 Ga. 999, 42 S. E. 382; Matter of Vilmar, 10 Daly (N. Y.) 15.

18. People *v.* McGinnis, 1 Park. Cr. (N. Y.) 387.

19. Katt *v.* Germania F. Ins. Co., 26 Hun (N. Y.) 429.

20. See also *supra,* VI, D.

21. May *v.* Moore, 24 Hun (N. Y.) 351.

22. May *v.* Moore, 24 Hun (N. Y.) 351; My Laundry Co. *v.* Schmeling, 129 Wis. 597, 109 N. W. 540. *Compare* Lecocq *v.* Pottier, 65 Hun (N. Y.) 598, 20 N. Y. Suppl. 570.

Resignation as equivalent to refusal to serve.— The resignation of a referee after his appointment and service for a considerable time is a "refusal to serve," within the meaning of Code Civ. Proc. § 1011, requiring the court to appoint another referee where the referee named in the stipulation refuses to serve. Brooklyn Heights R. Co. *v.* Brooklyn City R. Co., 105 N. Y. App. Div. 88, 93 N. Y. Suppl. 849.

23. Noonan *v.* Orton, 22 Wis. 84.

24. Woodbury *v.* Proctor, 9 Gray (Mass.) 18. But see Snodgrass *v.* Armbrester, 90 Ala. 493, 7 So. 840, holding that when one of the arbitrators agreed on by the parties to a pending suit declines to act, and another is substituted by agreement, a memorandum of the substitution on the submission is not necessary, under code, section 3225, which

in at least one state the statute authorizes the arbitrators present at the hearing to appoint persons in place of absentees.[25] Where one of several referees declines to serve and another is appointed in his place, it will be presumed that the substitution was with the consent of the parties.[26]

H. Resignation or Disqualification.[27] Except where otherwise provided by statute,[28] a referee may resign. Where a referee resigns, a motion to appoint a new referee should ordinarily be addressed to the court which appointed him and not to one of the justices thereof.[29] Where a referee becomes disqualified by reason of his election as a judge and there has been no substitution, the court may, after the expiration of his term as judge, allow the parties to proceed with the reference on the evidence and proceedings as they stood when he was elected judge.[30]

I. Removal.[31] A referee is subject to removal by the court,[32] even where appointed by agreement of the parties,[33] but only for good and substantial reasons.[34] For instance the referee may be removed because of prejudice or bias,[35] or misconduct,[36] or the expression of an opinion on the facts before the hearing.[37] But where a new trial has been granted on the ground of newly discovered evidence, the referee should not be removed on the ground that he has fixed opinions as to the law and facts, where there is a suggestion of partiality, unfairness, or misconduct.[38] So where the parties knew all the facts at the time they consented to the appointment, such facts are not ground for removal.[39] He should not be removed because of alleged error in his rulings;[40] but he may be removed for unreason-

requires such memorandum in cases submitted when no suit is pending.

25. Stiles *v.* Carlisle, etc., Turnpike Road, 10 Serg. & R. (Pa.) 286, holding that an arbitrator who is present but declines to act may be considered as absent and a person appointed in his place.

Successive vacancies.—Arbitrators cannot, without consent of the parties, supply a vacancy in their number a second time. Mitchell *v.* Wilhelm, 6 Watts (Pa.) 259.

26. Browning *v.* McManus, 1 Whart. (Pa.) 177.

27. **As ground for setting aside report** see *supra*, IV, I, 2.

As ground for removal see *infra*, VI, I.

28. See the statutes of the several states.

In Louisiana the statute providing that arbitrators shall not be allowed to resign without a good cause applies only to judicial arbitrators appointed to decide a cause already pending and does not apply to arbitrators who have not taken their oaths. Lallande *v.* Bonn, 13 La. 462.

29. Brady *v.* Kennedy, 65 N. Y. App. Div. 190, 72 N. Y. Suppl. 507.

30. Countryman *v.* Norton, 21 Hun (N. Y.) 17.

31. **Appointment of new referee on setting aside report** see *infra*, VIII, I, 7, e.

32. Ford *v.* Ford, 53 Barb. (N. Y.) 525, 35 How. Pr. 321.

33. Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341, 17 N. Y. Suppl. 218.

34. Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341, 17 N. Y. Suppl. 218. See also Maicas *v.* Leony, 113 N. Y. 619, 20 N. E. 586.

35. Goldberger *v.* Manhattan R. Co., 3 Misc. (N. Y.) 441, 23 N. Y. Suppl. 176; *In re* Mellen, 18 N. Y. Suppl. 515, holding, however, that the fact that a referee charges an attorney for one of the parties with purposely delaying and obstructing proceedings before himself, the charge being true, is insufficient to justify the removal of a referee on the ground of prejudice. See also Caldwell *v.* Mutual Reserve Fund Life Assoc., 30 Misc. (N. Y.) 510, 63 N. Y. Suppl. 841.

How objection raised.—A referee cannot pass on a motion which presents the question of his own bias or prejudice, but such objection must be raised by a motion to the court to discharge the referee. Brewer *v.* Asher, 8 Okla. 231, 56 Pac. 714.

The fact that plaintiff's attorney and the referee were occupants of the same office is not of itself ground for removal where the objection was known to defendant when he consented to the appointment. Perry *v.* Moore, 2 E. D. Smith (N. Y.) 32, 3 Code Rep. 221.

36. Smith *v.* Dunn, 91 N. Y. App. Div. 200, 86 N. Y. Suppl. 307, holding that where a referee discussed facts connected with the matter referred to him with a witness who was to testify before him, in the absence of counsel for the respective parties, he was guilty of such misconduct as required his removal at the instance of one of the parties, although he had no improper motives in so doing.

37. Bowen *v.* Steere, 6 R. I. 251. But see Graves *v.* Fisher, 5 Me. 69, 17 Am. Dec. 203, holding that it is no objection to a report that one of them had formed a previous opinion upon the case submitted to them, if his mind appears to have been still open to conviction, and no imputation of unfairness rests upon him.

38. Klein *v.* Continental Ins. Co., 62 Hun (N. Y.) 341, 17 N. Y. Suppl. 218.

39. Goldberger *v.* Manhattan R. Co., 3 Misc. (N. Y.) 441, 23 N. Y. Suppl. 176; Eichberg *v.* Wickham, 21 N. Y. Suppl. 647.

40. Marie *v.* Garrison, 7 N. Y. Civ. Proc. 40, 1 How. Pr. N. S. 32.

able delay in proceeding with the reference,[41] or for failure to make his report within the time ordered by the court at the time of his appointment.[42] So if he is unwilling to accept the statutory compensation for his services and requests a stipulation for more, which is refused by one of the parties, he should be removed.[43]

J. Death. The death of a referee does not generally preclude the appointment of another referee.[44] Where he dies after making his report, but before, he has complied with an order to amend it, judgment may be entered on the report and the order for amendment may be vacated.[45] A new referee cannot be appointed during a time when the proceedings are stayed.[46] Where he dies before reporting the testimony, it may be thereafter filed if it can be clearly identified.[47] Where one of several referees dies after the filing of the report, the survivors may make up the minutes of the proceedings.[48]

K. Delegation of Authority. Referees cannot delegate their authority to others, or provide for the settlement of a future dispute by another tribunal, unless such power is conferred upon them by the agreement of the parties.[49] But a referee may employ a competent person to write down the testimony for him;[50] and, where the reference is for an accounting, may employ other persons to examine books.[51]

VII. PROCEEDINGS BEFORE REFEREE.[52]

A. General Considerations. The practice on a trial before a referee where the reference is a general one to hear and determine the issues, is largely the same as on a trial by the court without a jury.[53] Generally, where the reference is to hear and determine, the referee can exercise all the powers of a judge concerning the trial of the cause referred;[54] although the referee has not, in all

41. Forrest *v.* Forrest, 3 Bosw. (N. Y.) 650.

42. Rhodes *v.* Williams, 12 Nev. 20.

43. Smith *v.* Dunn, 94 N. Y. App. Div. 429, 88 N. Y. Suppl. 58; Devlin *v.* New York, 7 Daly (N. Y.) 466, 54 How. Pr. 383.

44. Devlin *v.* New York, 9 Daly (N. Y.) 334, 62 How. Pr. 163; Carpenter *v.* Shepardson, 46 Wis. 557, 1 N. W. 173. But see Berls *v.* Metropolitan El. R. Co., 15 N. Y. Suppl. 155; Girard *v.* Hutchinson, 2 Serg. & R. (Pa.) 188; Huggins *v.* Neill, 38 Wkly. Notes Cas. (Pa.) 467.

As dependent on whether reference is by consent.— Where a cause is referred by consent of parties, the death of the referee ends the reference. Otherwise where the reference is by order of court. In such case a new referee must be appointed, and the trial begun anew. Devlin *v.* New York, 9 Daly (N. Y.) 334, 62 How. Pr. 163.

Matters considered.—On motion to appoint a referee in place of a deceased referee, whose appointment has been confirmed on appeal, objections to the merits of the original application cannot be considered. Matter of Plumb, 54 Hun (N. Y.) 637, 7 N. Y. Suppl. 493.

45. Juliand *v.* Grant, 34 How. Pr. (N. Y.) 132.

46. Devlin *v.* New York, 9 Daly (N. Y.) 331, 62 How. Pr. 163.

47. Davidson *v.* Copeland, 69 S. C. 47, 48 S. E. 33.

48. Westbrook *v.* Dubois, 3 How. Pr. (N. Y.) 26.

49. Levezey *v.* Gorgas, 4 Dall. (Pa.) 71, 1 L. ed. 746.

The authority of a referee to administer oaths being given to him by the court cannot be delegated by him to another officer. Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. (N. Y.) 479.

50. Fairbanks *v.* Holliday, 59 Wis. 77, 17 N. W. 675.

51. Moore *v.* Barnett, 17 Ind. 349.

Irregularities as ground for setting aside report see *infra*, VIII, I, 7, b, (v).

52. **Mandamus** against referee in relation to reference see MANDAMUS, 26 Cyc. 226.

On recommittal of report see *infra*, VIII, I, 8, f.

Perjury in proceedings before referee see PERJURY, 30 Cyc. 1410.

53. See *infra*, VII, B–P.

Oath of referee see *supra*, VI, F.

The referee must be present during the progress of the trial. Metcalf *v.* Baker, 34 N. Y. Super. Ct. 10, 11 Abb. Pr. N. S. 431 [*affirmed* in 52 N. Y. 649], holding, however, that where a referee absents himself without objection of the parties during the progress of a trial, it is too late to object to such conduct on a motion to set aside the report for such cause. See Fairbanks *v.* Holliday, 59 Wis. 77, 17 N. W. 675.

Minutes.— The court cannot require referees to keep regular minutes of their meetings and adjournments. Mundorf *v.* Grier, 7 Pittsb. Leg. J. (Pa.) 164.

54. Plant *v.* Fleming, 20 Cal. 92; Palmer *v.* Palmer, 13 How. Pr. (N. Y.) 363. See Scott *v.* Thompson, 7 Manitoba 472.

Inspection and view.—The referee may himself compare writings to determine the genuineness of handwriting (Hunt *v.* Lawless, 7 Abb. N. Cas. (N. Y.) 113 [*affirmed* in 47 N. Y. Super. Ct. 540]), or use a magnifying

respects, such extensive powers as has the court on a trial without a jury.[55] Where there is no statute regulating the proceedings before the referee, the proceedings must be governed by the terms of the reference, the agreement of the parties, or the common-law practice.[56] But in the absence of proof to the contrary, the proceedings will be deemed to have been regular.[57]

B. Before Several Referees.[58] Except where otherwise provided by statute,[59] all the referees in a cause must meet and hear the allegations and proofs of the parties.[60]

glass in determining a question as to alterations, erasures, and tracings (Frank *v.* Chemical Nat. Bank, 45 N. Y. Super. Ct. 452 [*affirmed* in 84 N. Y. 209, 38 Am. Rep. 501]), or view the premises (Nutter *v.* Taylor, 78 Me. 424, 6 Atl. 835, holding that a view of the premises is discretionary with the referees, and their determination, honestly made, is final). In an action for the contract price of a building, a stipulation that the referee, with a person of his own selection, may examine the building, and may, in making his decision, consider what he discovers on the inspection, does not authorize the referee to render his decision on the unverified report of a person selected by him to make an examination of the building. Lewis *v.* Yagel, 77 Hun (N. Y.) 337, 28 N. Y. Suppl. 833. Where an auditor reported to the court that in his opinion a view was necessary to a decision of the case, and that it should be taken before the evidence was introduced, it was within the discretion of the court to authorize the auditor to take a view. Clark *v.* Baker, 192 Mass. 226, 78 N. E. 455. Where a party to an action in ejectment requests the auditor to whom the case has been referred to inspect the premises, he cannot afterward object to the impression produced on the mind of the auditor by such inspection. Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666.

Motions and other incidental proceedings before referee.—A referee has the same authority as a court to decide motions which may arise during the progress of the trial. Stimson *v.* Estes, 3 Oreg. 521. However, where a party refuses to obey an order of court to produce books and papers before the referee, an application for attachment against him must be made to the court. Higgins *v.* Bishop, 12 N. Y. Leg. Obs. 127.

Order to produce affiant as witness.—Where a reference is ordered on a motion, the court can compel a party to produce before the referee the individuals whose affidavits have been read for the purpose of revealing their identity and existence. Stubbs *v.* Ripley, 39 Hun (N. Y.) 620.

Signing exceptions.— Where the statute provides that it is the duty of the referees to sign any true exceptions taken to any decision by them and return them with their report, it is not the duty of the judge of the court to sign such exceptions. State *v.* Gaslin, 30 Nebr. 651, 46 N. W. 917.

Depositions.— Power of referee to entertain application for commission to take testimony see DEPOSITIONS, 13 Cyc. 860 note 45.

Power and duty to settle case or statement on appeal from judgment on report see APPEAL AND ERROR, 3 Cyc. 69.

Power to amend report see *infra*, VIII, E.

Power to award costs see COSTS, 11 Cyc. 148.

Power to grant extra allowance see COSTS, 11 Cyc. 141.

55. See cases cited *infra*, this note.

Administering oath to witnesses.—A referee cannot administer an oath except where the power to do so is conferred by statute or granted by the order of the court appointing him. Bonner *v.* McPhail, 31 Barb. (N Y.) 106.

Order to produce books.— The referee has no power to order a party to produce his books where such power is not given in the order of reference. Frazer *v.* Phelps, 3 Sandf. (N. Y.) 741, 1 Code Rep. N. S. 214; Dauvillier *v.* Myers, 17 Ch. D. 346, 29 Wkly. Rep. 535. But see *In re* Leigh, 4 Ch. D. 661, 46 L. J. Ch. 60, 25 Wkly. Rep. 56. A provision giving a referee power to compel the production of books and papers will not be inserted in an order of reference to be made in a common-law action. North *v.* Platt, 7 Rob. (N. Y.) 207. But it has been held that where an action against a trustee for an account is referred to a referee to determine the issues and take and state the account, the court will grant to the referee power to compel the production of books and papers. Frazer *v.* Phelps, 4 Sandf. (N. Y.) 682, Code Rep. N. S. 214.

Power to grant new trial.— Generally a referee has no power to grant a new trial. Murray *v.* School Dist. No. 3, 11 Nebr. 438, 9 N. W. 573; Allentown Sav. Inst. *v.* Delaware River Tel. Co., 8 Luz. Leg. Reg. (Pa.) 231. But see Mundee *v.* Freeman, 23 Fla. 529, 2 So. 153, holding that after a referee has filed in the clerk's office an order refusing a motion for a new trial, he has no power to grant a rehearing of such motion, or to permit an amendment of the original motion by adding a new ground to the same.

56. Francis *v.* Ames, 14 Ind. 251.

57. Vanlandingham *v.* Lowery, 2 Ill. 240; Bemus *v.* Clark, 29 Pa. St. 251.

58. **After recommittal of report** see *infra*, VIII, J, 8, f.

Number of referees required to be appointed see *supra*, VI, B.

Report of several referees see *infra*, VIII, C.

59. Blevins *v.* Morledge, 5 Okla. 141, 47 Pac. 1068.

60. *Maine.*— Braun *v.* Vassalboro, 50 Me. 64.

C. Authority as Determined by Rule, Order, or Interlocutory Decree.[61] The authority of a referee to act in any proceeding or with regard to a particular matter is determined by the scope of the order or rule of reference,[62] or

Massachusetts.— Walker *v.* Melcher, 14 Mass. 148; Short *v.* Pratt, 6 Mass. 496.

New Hampshire.— Eastman *v.* Burleigh, 2 N. H. 484; *In re* Farwell, 2 N. H. 123.

New Jersey.— Hoff *v.* Taylor, 5 N. J. L. 829.

New York.—McInroy *v.* Benedict, 11 Johns. 402; Brower *v.* Kingsley, 1 Johns. Cas. 334, holding that where two of three referees meet, without notice to the third, their report will be set aside as irregular.

Vermont.— Howard *v.* Conro, 2 Vt. 492.

See 42 Cent. Dig. tit. "References," § 81.

Compare Corrigan *v.* Rockefeller, 10 Ohio S. & C. Pl. Dec. 494, 8 Ohio N. P. 281; Mann *v.* Cahill, 1 Phila. (Pa.) 92.

But see Wells *v.* Scott, 1 Miles (Pa.) 125.

Agreement of parties.— Where an action was referred under a rule of court to five persons, on whose report, or that of a majority of them, judgment was to be entered, and, after due notice to all, only four met, and the parties then agreed upon another in place of the absent referee, and signed an agreement at the foot of the copy of the rule, an award signed by the referees so agreed to was good. Lattimore *v.* Martin, Add. (Pa.) 11.

Agreement on report while together.— The report of several referees, procured by the successful party to be signed by the referees separately, without their having come to any agreement on a report while together, is irregular, and should be set aside, although the party may have acted in good faith in procuring it. In causes referred to several referees, there must be a conference of all, and a substantial conclusion by a majority, embodied in a report made by them when they are together. Townsend *v.* Glen's Falls Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 277.

Where two persons are appointed by the court auditor in a suit pending in that court, the parties are not bound to submit to the action of one alone. Crone *v.* Daniels, 20 Conn. 331.

Presumptions.— Where a cause was referred to three persons who, or any two of them, were to report, and two only of the referees signed the report, which stated that "the subscribers," having heard the proofs, etc., find, etc., it was held that it should be presumed that all the referees met and heard the parties, nothing appearing to the contrary on the record. Yates *v.* Russell, 17 Johns. (N. Y.) 461.

In Pennsylvania, where one of the arbitrators does not attend, the record must show legal service upon him. Smith *v.* Bartolett, 18 Leg. Int. 110. Two arbitrators cannot, in the absence of the third, under the act of June 16, 1836, sections 19, 20, hear and determine the case unless such absence be, under the twenty-second section of the same act, caused by death, incapability, refusal to attend, or removal or departure from the country. Albright *v.* Coal, etc., Co., 2 Leg. Rec. Rep. 267. The fact that one of the arbitrators appointed failed to attend the hearing and the other two appointed a substitute, who served without having received the statutory notice fifteen days before the meeting, is not a fatal defect. Brown *v.* Brashier, 2 Penr. & W. 114.

61. **Report as within rule of reference** see *infra*, VIII, D, 2.

62. *California.*— Solomon *v.* Maguire, 29 Cal. 227.

Georgia.— McMahon *v.* Paris, 87 Ga. 660, 13 S. E. 572.

Idaho.—Idaho Placer Min. Co. *v.* Green, 14 Ida. 294, 94 Pac. 161.

Maine.— Fales *v.* Hemenway, 64 Me. 373 (holding that an unrestricted reference by rule of court of a suit pending upon a mortgage gives authority to the referee, if he finds plaintiff entitled to recover, to determine the amount of the conditional judgment); Buck *v.* Spofford, 35 Me. 526; Sweeny *v.* Miller, 34 Me. 388.

Massachusetts.— Electric Supply, etc., Co. *v.* Conway Electric Light, etc., Co., 186 Mass. 449, 71 N. E. 983; Holmes *v.* Turners Falls Lumber Co., 150 Mass. 535, 23 N. E. 305, 6 L. R. A. 283; Newton *v.* Rice, 118 Mass. 417; Lowe *v.* Pimental, 115 Mass. 44; Rich *v.* Jones, 9 Cush. 329; Locke *v.* Bennett, 7 Cush. 445; Barnard *v.* Stevens, 11 Metc. 297.

Missouri.— Farmers', etc., Bank *v.* McMullen, 85 Mo. App. 142, holding that where he is ordered merely to review the findings of his predecessor, he cannot hear the case anew on additional evidence.

New York.— Sternbach *v.* Friedman, 75 N. Y. App. Div. 418, 78 N. Y. Suppl. 318; Myers *v.* Cronk, 45 Hun 401 [*affirmed* in 113 N. Y. 608, 21 N. E. 984]; Derham *v.* Lee, 47 N. Y. Super. Ct. 174 [*affirmed* in 87 N. Y. 599].

North Carolina.— Cowan *v.* McNeeley, 32 N. C. 5.

Pennsylvania.— McGinn *v.* Benner, 180 Pa. St. 396, 36 Atl. 925; Prouty *v.* Prouty, etc., Boot, etc., Co., 155 Pa. St. 112, 25 Atl. 1001; Yoder's Appeal, 45 Pa. St. 394; Richter *v.* Chamberlin, 6 Binn. 34 (holding that in a submission to arbitration of an action for trespass *quare clausum fregit*, an award fixing the boundary line of lands is beyond the scope of the submission); *In re* Gossner, 6 Whart. 401; Gross *v.* Zorger, 3 Yeates 521; Matter of Williams, 5 Pa. L. J. 265.

South Carolina.— Loan, etc., Bank *v.* Miller, 39 S. C. 175, 17 S. E. 592.

South Dakota.— Betts *v.* Letcher, 1 S. D. 182, 46 N. W. 193.

Vermont.— American Can Co. *v.* Grimm, 79 Vt. 494, 65 Atl. 531; Meech *v.* Meech, 37 Vt. 414; Cook *v.* Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Fulton *v.* Wiley, 32 Vt. 762; Lazell *v.* Houghton, 32 Vt. 579.

interlocutory decree,[63] and he cannot go outside it in his investigation or determination. Where the order refers "the cause," [64] or "the action," [65] without more specific provisions, all of the issues are ordinarily deemed to be referred with power to hear and determine. But a reference to take proof of all the material facts in the pleadings and to report with the referee's opinion thereon confers no power to try the case or to hear and determine the issues.[66] So a referee appointed to take an account and report has no power to pass on and determine the basic issues in the case.[67]

D. Scope of Pleadings.[68] Generally the referee has no authority to hear or decide matters outside the issues raised by the pleadings.[69] For instance a

Virginia.— Robinett *v.* Robinett, 92 Va. 124, 22 S. E. 856.

Wisconsin.— McFarlane *v.* Cushman, 19 Wis. 357.

United States.— Alexandria Canal Co. *v.* Swann, 5 How. 83, 12 L. ed. 60.

Canada.—Cameron *v.* Winnipeg Electric R. Co., 17 Manitoba 475, holding that under Rules 27 and 29 of the Kings Bench Act, R. S. M. (1902) c. 40, the referee in chambers may exercise the power of ordering the trial of an action by a jury, given to a judge by subsection (b) of section 57 of the act.

See 42 Cent. Dig. tit. "Reference," § 75.

Order as controlling agreement to refer.— The authority of referees is derived from the order of reference and not from the agreement to refer. Frost *v.* Smith, 7 J. J. Marsh. (Ky.) 126.

Matters outside of cause.— Where the parties submit a pending cause to referees for final decision, they may stipulate to let them decide at the same time other disputes outside of the cause. Remington *v.* Morris, 2 Grant (Pa.) 457.

Findings as to judgment.— Under an order of reference requiring the referees to find the facts and reserve the questions of law, it is competent for them to find, as a conclusion from the facts found, in whose favor judgment should be entered. McLaughlin *v.* Old Colony R. Co., 166 Mass. 260, 44 N. E. 252.

As including all issues.— Upon a consent reference to try a cause, the questions as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties. Barrett *v.* Henry, 85 N. C. 321. But an agreement between the parties that an auditor may consider and report upon every item of the matters submitted to him according to his judgment does not confer upon him any additional powers. Flint *v.* Hubbard, 1 Allen (Mass.) 252.

Review of order refusing to dismiss complaint.— Where a referee was appointed to hear, try, and determine the issues raised by the pleadings in a certain case, he had no power to review a preliminary order denying defendant's motion to dismiss the complaint because of the refusal of plaintiff's attorney to testify as an adverse witness. Minnesota Eastern R. Co. *v.* Tuteur, 127 Wis. 382, 105 N. W. 1067.

63. Adams *v.* Bristol, 126 N. Y. App. Div. 660, 111 N. Y. Suppl. 231; Buffalo Third Nat. Bank *v.* Cornes, 5 N. Y. Suppl. 799; Bond *v.* Wilson, 137 N. C. 145, 49 S. E. 89.

64. Renouil *v.* Harris, 2 Sandf. (N. Y.) 641, 2 Code Rep. 71 [*affirming* 1 Code Rep. 125].

65. Illstad *v.* Arson, 2 N. D. 167, 49 N. W. 659. See also Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754.

66. Idaho Placer Min. Co. *v.* Green, 14 Ida. 294, 94 Pac. 161 (holding that in such a case the referee has no power to enter judgment on the pleadings); Sullivan *v.* Sullivan, 41 N. Y. Super. Ct. 519, 52 How. Pr. 453.

67. Parcher *v.* Dunbar, 118 Wis. 401, 95 N. W. 370; Best *v.* Pike, 93 Wis. 408, 67 N. W. 697, holding also that the referee's powers cannot be enlarged by implication or consent of the parties.

68. Conformity of report to pleadings see *infra*, VIII, D, 2.

69. Branger *v.* Chevalier, 9 Cal. 353; Smith *v.* Minnick, 88 Me. 484, 34 Atl. 274; O'Dougherty *v.* Remington Paper Co., 42 Hun (N. Y.) 192; Dunning *v.* Krotzer, 12 Lanc. Bar (Pa.) 64, 2 L. T. N. S. 183. See also Salisbury *v.* Matthews, 12 Gray (Mass.) 333. But see Van Buskirk *v.* Stow, 42 Barb. (N. Y.) 9, holding that in an action on a contract heard by a referee it is competent for him to decide upon a question of waiver, although that issue is not distinctly raised in the pleadings, if the facts are all before him and within the issue.

Disregarding amendable defects.—A reference of a pending action under a rule of court authorizes the referee to take into consideration only the subject-matter substantially shown by the declaration, but he may disregard all such formal defects as might be amended if the case were tried in court. Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28.

When an action requiring an investigation of accounts or an examination of vouchers has been referred to an auditor, his authority is not restricted to an examination and statement of what are strictly and technically matters of account, but he may rightfully consider and decide all questions incidental to or involved in an investigation of the actual indebtedness of the parties between themselves, under the pleadings, and embody the result of his investigations in his report to the court. Moulton *v.* Parker, 35 N. H. 92. But an auditor has no authority to pass on the account made before him by defend-

reference of a cause does not authorize the referee to hear and determine a cause of action other than the one referred.[70] In some jurisdictions, however, the suit is to be tried without strict regard to the pleadings in the case or the issues joined upon the record.[71]

E. Power to Pass on Law and Facts. Ordinarily, where the reference is a general one, the referee has power to pass upon the law as well as the facts.[72] Furthermore a referee, no matter how limited his powers, must sometimes necessarily decide questions of law which arise in the progress of the inquiry he is ordered to make.[73] But where the terms of the reference direct the referee to take testimony and report the same, he must confine himself to the direction, and he has no authority to determine issues of law and fact.[74] The decision of the court on a demurrer, being unreversed, is binding on the referee.[75]

F. Time and Place of Trial or Hearing — 1. In General.[76] The order of reference may itself fix the time and place for hearing.[77] But in the absence of any provision to the contrary, the referee has power to fix the time and place,[78] and it is his duty so to do.[79] While a referee cannot sit outside the county without authority derived from the court or the consent of the parties,[80] he may do so pursuant to an order of the court,[81] except where the court is one of special and limited jurisdiction.[82] Consent to an order appointing a referee and specify-

ant, unless it was filed in set-off in the court. Perry *v.* Chesley, 77 Me. 393. In an action to recover damages for an alleged unauthorized sale of stock, where the answer set up a counter-claim, and the case was referred, it was proper for the referee to state an account between the parties, and to give judgment in favor of defendant for any balance found due. Stewart *v.* Drake, 46 N. Y. 449.

70. Merrill *v.* Gold, 1 Cush. (Mass.) 457.

71. Morse *v.* Bishop, 55 Vt. 231; Phelps *v.* Hubbard, 51 Vt. 489; Cook *v.* Carpenter, 34 Vt. 121, 80 Am. Dec. 670; Spaulding *v.* Warren, 25 Vt. 316; Hicks *v.* Cottrill, 25 Vt. 80; Davis *v.* Campbell, 23 Vt. 236; Eddy *v.* Sprague, 10 Vt. 216. But see Blake *v.* Buchanan, 22 Vt. 548, holding that when a suit in which the general issue has been pleaded is referred under a rule of court, defendant cannot, upon the trial before the referee, avail himself of that which is mere matter of offset.

Matters which may be brought in by amendment.— When a case is referred, all that can be brought in by any proper amendment of the declaration may be tried by the referee. Laport *v.* Bacon, 48 Vt. 176; Sumner *v.* Brown, 34 Vt. 194; Briggs *v.* Bennett, 26 Vt. 146; Briggs *v.* Oaks, 26 Vt. 138.

72. *Maine.*— Whitmore *v.* Le Ballistier, 35 Me. 488; Sweetsir *v.* Kenney, 32 Me. 464.

Massachusetts.— Corbett *v.* Greenlaw, 117 Mass. 167; Austin *v.* Kimball, 12 Cush. 485.

New Hampshire.— Moulton *v.* Parker, 35 N. H. 92.

Ohio.— Williams *v.* Stevens, 1 Cinc. Super. Ct. 176.

Pennsylvania.— Barnum *v.* Backman, 5 Luz. Leg. Reg. 145.

Vermont.— Morse *v.* Beers, 51 Vt. 359.

See 42 Cent. Dig. tit. "Reference," § 78.

Compare Williams *v.* Freeman, 12 N. Y. Civ. Proc. 334; Chapman *v.* Lipscomb, 15 S. C. 470.

Where an auditor is appointed to investigate accounts, he does not exceed his powers in passing upon the legality of vouchers. Jones *v.* Smith, 64 Ga. 711.

73. Kennesaw Mills Co. *v.* Walker, 19 S. C. 104.

74. Jones *v.* Massey, 9 S. C. 376.

75. Sherman *v.* Jenkins, 70 Hun (N. Y.) 593, 24 N. Y. Suppl. 186.

76. **Waiver of objections** see *infra*, VII, G, 2.

77. Corbitt *v.* Nealy, 29 Iowa 445.

Holding meetings at different places.— In cross actions and cross applications for a reference, a joint reference will be made, and the referees authorized to hold their meetings at different places to accommodate both parties. Hart *v.* Trotter, 4 Wend. (N. Y.) 198.

78. Bray *v.* English, 1 Conn. 498.

79. Young *v.* Reynolds, 4 Md. 375; Stephens *v.* Strong, 8 How. Pr. (N. Y.) 339, holding that under 2 Rev. St. p. 384, § 43, which requires the referees to appoint a time and place for the hearing, it is not essential that referees should do so in writing.

Where parties disagree.—An alleged agreement as to view of the premises and place of hearing, made before the action was commenced, and not entered of record or embraced in the rule of court, is not binding upon the parties; and, when the parties do not agree upon the time and place of hearing, it is the duty of the referees to designate them, and their determination is final. Nutter *v.* Taylor, 78 Me. 424, 6 Atl. 835.

80. Brush *v.* Mullany, 12 Abb. Pr. (N. Y.) 344, holding that the objection that a referee proceeded to trial out of the proper county goes to his jurisdiction, and the irregularity cannot be disregarded. *Contra*, Newland *v.* West, 2 Johns. (N. Y.) 188; Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

81. O'Brien *v.* Catskill Mountain R. Co., 32 Hun (N. Y.) 636; Pierce *v.* Voorhees, 3 How. Pr. (N. Y.) 111.

82. Bonner *v.* McPhail, 31 Barb. (N. Y.) 106.

ing a place outside the territorial jurisdiction of the court at which he was to sit waives the objection.[83] In some jurisdictions the time within which the hearing must be had is fixed within certain limits and a different time for hearing cannot be appointed without the consent of all the parties.[84] The referees must meet on the day appointed; [85] but the common-law rule that the referees should be together and commence the hearing within an hour of the time noticed does not prevail in this country.[86] No hearing can be had after the lapse of the time within which the report was required to be filed or delivered.[87]

2. Notice of Trial or Hearing.[88] Generally a party is entitled to notice of the time and place of the trial or hearing before a referee,[89] which must be given by the referee; [90] but no notice is necessary where an account is to be stated from proofs already in the cause.[91] Where the time and place of hearing is fixed by the parties, the duty of giving notice is on the party taking the rule of reference and he cannot allege want of notice to himself of the hearing.[92] Where no notice has been given and the party has not appeared, he may set aside the report,[93] or the judgment entered upon the report.[94] Either party who has served the notice of trial may bring the case to trial and hence defendant, where he has noticed the cause, cannot charge delay or default upon plaintiff for not bringing

83. Gulf, etc., R. Co. *v.* Winder, 26 Tex. Civ. App. 263, 63 S. W. 1043.

84. Kirk *v.* Eaton, 10 Serg. & R. (Pa.) 103; Hewes *v.* Machine Co., 2 Leg. Rec. (Pa.) 210. *Compare* Bell *v.* Betton, 18 N. H. 43.

An equity rule requiring all testimony to be taken within three months after a cause is at issue, unless the time is enlarged by the court, has no application to a reference to take testimony as to the damages on an injunction bond, and a lapse of three years without any action by either party is no objection to proceeding under the reference. Coosaw Min. Co. *v.* Farmers' Min. Co., 67 Fed. 31.

In "absence of direction."—Where the parties to a reference stipulate that the referee should fix the day of hearing, there is not an "absence of direction," within Rev. St. § 3103, providing that, in the absence of a direction, the referee shall fix the hearing at ten days from the date of the order of reference. Corbitt *v.* Nealy, 29 Iowa 445.

85. Weir *v.* Johnston, 2 Serg. & R. (Pa.) 459, holding that where arbitrators do not meet on the day appointed their proceedings afterward are irregular, unless defendant appears and consents thereto.

86. Small *v.* Deforest, 2 How. Pr. (N. Y.) 176.

87. Peavy *v.* McDonald, 119 Ga. 865, 47 S. E. 203; Davis *v.* Caldwell, 100 Iowa 658, 69 N. W. 1037; Robinson *v.* O'Connor, 12 Nebr. 405, 11 N. W. 859; Robertson *v.* Consolidated Boat Store Co., 6 Ohio S. & C. Pl. Dec. 557, 4 Ohio N. P. 227. See also *infra*, VII, G, 2; VIII, B.

88. On recommittal of report see *infra*, VIII, I, 8, e.

89. Craig *v.* McKinney, 72 Ill. 305; Acme Copying Co. *v.* McLure, 41 Ill. App. 397; Poindexter *v.* La Roche, 7 Sm. & M. (Miss.) 699; Roberts *v.* Jordans, 3 Munf. (Va.) 488. See also Shenandoah Valley Nat. Bank *v.* Shirley, 26 W. Va. 563. *Compare* Fox *v.* Weckerly, 1 Phila. (Pa.) 320.

90. *Florida.*— Le Baron *v.* Overstreet, 39 Fla. 628, 23 So. 22.

Maryland.— Young *v.* Reynolds, 4 Md. 375.

Mississippi.— Wilkins *v.* Humphreys, 23 Miss. 311.

New Hampshire.— Abbe *v.* Norcott, 8 N. H. 51.

North Carolina.— Grimes *v.* Brown, 113 N. C. 154, 18 S. E. 87.

Pennsylvania.— See also Navel *v.* Elliot, 5 Wkly. Notes Cas. 35.

South Carolina.— Hubbard *v.* Camperdown Mills, 25 S. C. 496, 1 S. E. 5.

United States.— New York *v.* Du Bois, 86 Fed. 889.

See 42 Cent. Dig. tit. "Reference," § 83.

Party as to whom complaint dismissed.— Notice need not be given to one as to whom the complaint was dismissed. Jewett *v.* Schmidt, 108 N. Y. App. Div. 322, 95 N. Y. Suppl. 631.

Waiver of irregular notice.—A judgment entered on an award will not be stricken off on the ground that conflicting notices as to the place of arbitration were served, where the party complaining attended neither place, and did nothing to inform himself, and alleges no defense on the merits. Hagadorn *v.* Mangan, 1 Kulp (Pa.) 181.

91. Calvert *v.* Carter, 18 Md. 73.

92. Reesman *v.* Kittanning Ins. Co., 3 Pa. Co. Ct. 1.

Excuse for failure to serve.—A plaintiff entered a rule to refer. On the return of the rule the counsel of both parties met in the prothonotary's office, and entered into an agreement in writing, naming the persons to serve as arbitrators and the time and place where the trial should take place. It was held that the service of notice in accordance with the act of 1836 was not thereby rendered unnecessary. Navel *v.* Elliot, 5 Wkly. Notes Cas. (Pa.) 35.

93. Foltz *v.* Grubb, 4 Pa. L. J. 209.

94. Lochte *v.* Moeschler, 12 N. Y. St. 763; Glass-Edsall Paper Co. *v.* Telegram Pub. Co.,

on the hearing.[95] If the attorney receives notice of trial, he is bound to attend at the time and place of the hearing notwithstanding the referee has told him he had no appointment for such day.[96] The mode of service of the notice on a party is ordinarily governed by the rules relating to the service of process and papers in general,[97] and the general rule is that a party residing in the country must be served personally.[98] The number of days' notice to be given is sometimes fixed by statute,[99] but where not fixed by statute a reasonable notice must be given.[1] The giving of the notice need not appear of record.[2]

G. Appearance and Participation of Parties in Proceedings — 1. In General. Generally all the parties are entitled to appear and have an opportunity to be heard,[3] and the referee cannot hear the evidence in the absence of one of the parties.[4]

2. As Waiver of Objections.[5] By appearing and participating in the proceedings before the referee without objection, a party waives mere irregularities connected with the reference.[6] For instance a party thereby waives such objections

11 Ohio Dec. (Reprint) 899, 30 Cinc. L. Bul. 369.

95. Thompson *v.* Krider, 8 How. Pr. (N. Y.) 248. But see Mathews *v.* Jones, 1 E. D. Smith (N. Y.) 429; Holmes *v.* Slocum, 6 How. Pr. (N. Y.) 217, Code Rep. N. S. 380.

96. Sage *v.* Mosher, 17 How. Pr. (N. Y.) 367.

97. Wilcox *v.* Payne, 88 Pa. St. 154; Navel *v.* Elliot, 5 Wkly. Notes Cas. (Pa.) 35.

Where the door of an attorney's office is found locked, service of a notice of a hearing of a cause before referees cannot be made by unlocking the door and leaving the notice in the office, no person being there. Livingston *v.* Comstock, 1 How. Pr. (N. Y.) 253; Campbell *v.* Spencer, 1 How. Pr. (N. Y.) 199.

Service by publication see Marling *v.* Robrecht, 13 W. Va. 440.

98. Rivers *v.* Walker, 1 Dall. (Pa.) 81, 1 L. ed. 46; Henry *v.* Norwood, 4 Watts (Pa.) 347; Navel *v.* Elliot, 5 Wkly. Notes Cas. (Pa.) 35. But see —— *v.* Loomis, 19 Wend. (N. Y.) 641; McCandlish *v.* Edloe, 3 Gratt. (Va.) 330.

In Pennsylvania an attorney may waive, but not accept, service of notice. Mersereau *v.* Kohler, 2 Pearson 98.

99. Dickinson *v.* Earle, 31 N. Y. App. Div. 236, 52 N. Y. Suppl. 615, holding that an order of reference providing that the hearing may be brought on upon eight days' notice is improper; for, there being an issue to be tried, the code provision for fourteen days' notice of trial is applicable.

1. Le Baron *v.* Overstreet, 39 Fla. 628, 23 So. 22; Matter of Ferrigan, 42 N. Y. App. Div. 1, 58 N. Y. Suppl. 920 [*affirmed* in 160 N. Y. 689, 55 N. E. 1095] (ten days held reasonable); Parsons *v.* Able, 19 Tex. 447 (two days' notice not reasonable).

How objection raised.— Whether a referee gave sufficient notice of the hearing of a cause must be raised in the court to which the report is returned. Stevens *v.* Pearson, 5 Vt. 503.

2. Oppenheimer *v.* Comly, 3 Serg. & R. (Pa.) 3.

Where the record of a judgment of a referee shows no return of service of notice upon defendant, but a mere finding, "it appearing that defendant has been duly served with notice to appear," defendant's affidavit that notice was not served until after the time set for trial must prevail. Le Baron *v.* Overstreet, 39 Fla. 628, 23 So. 22.

Presumptions.— Where the parties to an action agree to submit the matter in dispute to arbitration, if the record does not show affirmatively, on appeal, that the parties had notice of the time and place of meeting of the arbitrators, the court will presume notice was given, in the absence of any exception being taken in the court below. McHugh *v.* Peck, 29 Tex. 141.

3. Billings *v.* Billings, 110 Mass. 225, holding that an award made without hearing one of the parties is void as to him, unless he has agreed that there shall be no hearing.

Leave to intervene.—A party to an action is entitled to notice of all proceedings in the action before a referee, and may appear and protect any interest he may have, affected by such proceedings, without obtaining leave to intervene from the court, so that a motion by him to be permitted to intervene is properly denied. Ingersoll *v.* Weld, 101 N. Y. App. Div. 365, 91 N. Y. Suppl. 1037.

4. Chandler *v.* Avery, 47 Hun (N. Y.) 9; Chaplin *v.* Kirwin, 1 Dall. (Pa.) 187, 1 L. ed. 93 (holding that referees have no right to examine a witness *ex parte*, although it would not be irregular to inquire abroad into the price of work or the truth of any other matter of a public nature); Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82; Hagner *v.* Musgrove, 1 Dall. (Pa.) 83, 1 L. ed. 46; New York *v.* Du Bois, 86 Fed. 889. See also Weakley *v.* Cherry Tp., (Kan. 1901) 63 Pac. 433; Small *v.* Trickey, 41 Me. 507, 66 Am. Dec. 255; Lazarus *v.* Commonwealth Ins. Co., 19 Pick. (Mass.) 81.

5. See also *infra*, VII, Q, 2.

Waiver of objections to reference or irregularities in order see *supra*, IV, G, 2.

6. See cases cited *infra*, this note.

Illustrations.— Where defendant, while at a hearing before arbitrators, discovers that, after the arbitrators were chosen, plaintiff

as the failure of the referee to be sworn,[7] irregularities in taking the oath,[8] the fact that the place of hearing was outside the county where the suit was pending [9] or at a place different from that at which notice was given that evidence would be taken,[10] that the referee resided outside the jurisdiction of the court,[11] that no rule of court was entered on the stipulation appointing the referee [12] or want of notice of the time and place of the hearing,[13] the insufficiency of the notice of hearing,[14] that the number of referees was more or less than required by the statute,[15] defects in the appointment of the referee,[16] the referee's allowance of amendments to pleadings,[17] or the absence of the referee during the examination of witnesses.[18] So partiality [19] or misconduct [20] of the referee, where known to a party before the

added a count to his *narr.*, but, without asking for a postponement, proceeds with the hearing, he waives any misconduct of the arbitrators in so hearing the case. Groff *v.* Good, Lanc. Bar (Pa.) Nov. 12, 1870 [*distinguishing* Garman *v.* Brandt, Lanc. Bar, Nov. 12, 1870]. An award, although defective on account of irregularity in the meeting of the referees, is cured by the subsequent appearance of the parties, although under a saving of exceptions. Dorman *v.* Turnpike Co., 3 Watts (Pa.) 126. A party to a reference cannot object to the report that he was surprised by a ground of defense taken at the hearing before the referees, and was unprepared to meet it by proof, if at the hearing he did not ask for delay, as by going on, notwithstanding his surprise, he will be deemed to have completely waived it. Bowen *v.* Steere, 6 R. I. 251. Where parties appear and try their case without objecting to the authority of an arbitrator appointed upon the death of the original arbitrator, such conduct is sufficient to warrant a finding that they consented to his appointment. Brigham *v.* Packard, 116 Mass. 195.

7. *Illinois.*— Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74]; Garrity *v.* Hamburger Co., (1891) 28 N. E. 743, 136 Ill. 499, 27 N. E. 11; Partridge *v.* Ryan, 134 Ill. 247, 25 N. E. 627.

Nebraska.— Atchison, etc., R. Co. *v.* Washburn, 5 Nebr. 117.

New York.— Matter of Vilmar, 10 Daly 15; Nason *v.* Luddington, 55 How. Pr. 342 [*affirmed* in 8 Daly 149, 56 How. Pr. 172]; Whalen *v.* Albany County, 6 How. Pr. 278.

Oklahoma.— Logan *v.* Brown, 20 Okla. 334, 95 Pac. 441.

Wisconsin.— Milwaukee County *v.* Ehlers, 45 Wis. 281.

United States.— Newcomb *v.* Wood, 97 U. S. 581, 24 L. ed. 1085.

See 42 Cent. Dig. tit. "Reference," § 85.

Waiver need not be express.— The omission of a referee to be sworn before hearing testimony, in compliance with the requirement of the statute, is a mere irregularity, and not a judicial defect, and, except in such cases as those of infants or absentees, may be waived by implication. The provision of the code, section 1016, that the oath may be "expressly" waived, does not affect this conclusion. Nason *v.* Luddington, 8 Daly (N. Y.) 149, 56 How. Pr. 172.

8. Atkinson *v.* Tabor, 11 Colo. 277, 17 Pac. 905.

9. Gulf Lumber Co. *v.* Walsh, 49 Fla. 175, 38 So. 831; Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193, 13 S. E. 461; Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626; *In re* Davenport, 37 Misc. (N. Y.) 179, 74 N. Y. Suppl. 940; Sharkey *v.* Candiani, 48 Oreg. 112, 85 Pac. 219, 7 L. R. A. N. S. 791.

10. Catlin *v.* Catlin, 2 Hun (N. Y.) 378, 4 Thomps. & C. 664.

11. Blake *v.* Lyon, etc., Mfg. Co., 77 N. Y. 626.

12. Whalen *v.* Albany County, 6 How. Pr. (N. Y.) 278.

13. Dickerson *v.* Hays, 4 Blackf. (Ind.) 44; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Hatch *v.* Watkins, 1 Mart. N. S. (La.) 154; Degener *v.* Underwood, 61 N. Y. Super. Ct. 451, 21 N. Y. Suppl. 107 [*affirmed* in 142 N. Y. 641, 37 N. E. 567]. But see Carter *v.* Slocum, 2 Phila. (Pa.) 401, holding that the statutory notice of the names of the arbitrators and the time and place of meeting must be served on defendant, although he appeared on the day fixed for the appointment of the arbitrators, and the time and place of meeting were then agreed on.

14. Wetter *v.* Schlieper, 7 Abb. Pr. (N. Y.) 92, holding that where a referee proceeds on only two days' notice a party appearing and asking and obtaining an adjournment, waives the irregularity of the notice.

15. Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

16. Quinn *v.* Lloyd, 7 Rob. (N. Y.) 157; Renouil *v.* Harris, 1 Code Rep. (N. Y.) 125 [*affirmed* in 2 Sandf. 641, 2 Code Rep. 71]; Manning *v.* Leighton, 66 Vt. 56, 28 Atl. 630.

The substitution by the court, without notice, of the name of another person in the order appointing a referee who has resigned is an irregularity for which the order may be vacated, but is waived by appearing before the referee without moving to vacate. Amberg *v.* Kramer, 56 Hun (N. Y.) 650, 10 N. Y. Suppl. 302.

17. Secor *v.* Law, 9 Bosw. (N. Y.) 163 [*affirmed* in 4 Abb. Dec. 188, 3 Keyes 525, 3 Transcr. App. 328].

18. Metcalf *v.* Baker, 34 N. Y. Super. Ct. 10, 11 Abb. Pr. N. S. 431 [*affirmed* in 52 N. Y. 649].

19. Fox *v.* Hazelton, 10 Pick. (Mass.) 275; Carroll *v.* Lufkins, 29 Hun (N. Y.) 17.

20. Duckworth *v.* Diggles, 139 Mass. 51, 29 N. E. 221.

hearing, is waived by permitting the hearing to proceed without objection. On the other hand the fact that a party produces evidence and consents to hearings beyond the time within which the referee was required to report does not waive the objection that the referee did not proceed within the time fixed.[21]

3. Failure to Appear.[22] In case of failure to appear at the time fixed for hearing, it has been held that the referee may dismiss the complaint,[23] or may proceed *ex parte*,[24] while other cases hold that a judgment as on a nonsuit or default cannot be rendered.[25] Failure to appear after service is not excused by a statement of the adverse party inducing the belief that no trial would be had at the time fixed for the hearing.[26] Failure to appear at the first meeting of the referee, after notice given, precludes the right to object to the failure to give notice of the adjournment made at the first meeting.[27]

H. Adjournments.[28] Except where the order of reference is limited in its terms,[29] the referee generally has power to grant a postponement of the hearing;[30] and the adjournment may be on a referee's own motion, where for a reasonable time, although the parties do not consent thereto.[31] The application for a post-

21. Davis *v.* Caldwell, 100 Iowa 658, 69 N. W. 1037; Goodale *v.* Case, 71 Iowa 434, 32 N. W. 414; Robertson *v.* Consolidated Boat Store Co., 6 Ohio S. & C. Pl. Dec. 557, 4 Ohio N. P. 227. *Contra*, Morris *v.* Haas, 54 Nebr. 579, 74 N. W. 828.

22. See also *infra*, VII, M.

23. Morange *v.* Meigs, 54 N. Y. 207.

24. Bray *v.* English, 1 Conn. 498; Bissell *v.* Lee, 16 Johns. (N. Y.) 45; Proctor *v.* Jarvis, 15 U. C. Q. B. 187.

Depriving opposing party of costs see Brown *v.* Brown, 12 Lanc. Bar (Pa.) 114.

25. Ray *v.* Austin, 56 N. H. 36; Holmes *v.* Slocum, 6 How. Pr. (N. Y.) 217, Code Rep. N. S. 380; Miller *v.* Miller, 5 Binn. (Pa.) 62. But see Whitney *v.* Pierce, 40 N. H. 114; Whiton *v.* Wiggin, 34 N. H. 215.

Report.— If plaintiff fails to attend on notice, the award should be that he has no cause of action. Miller *v.* Miller, 5 Binn. (Pa.) 62. Under N. H. Rev. St. c. 189, §§ 6, 7, as well as before such statute, the refusal of a party to appear must be an unreasonable refusal, before the auditor shall certify the matter in controversy to the court for judgment against such party, as on a nonsuit or default. Blodgett *v.* Shepard, 16 N. H. 379.

26. Washington County *v.* Jones, 45 Iowa 260.

27. Eckert *v.* Sheets, 6 Serg. & R. (Pa.) 275.

28. Refusal to grant as ground for setting aside report see *infra*, VIII, I, 7, b, (II).

29. Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 471, 42 Pac. 647, holding that under a reference to take testimony and report the same and findings of fact thereon, to commence on a certain day, plaintiff to have till a certain day to introduce his testimony and defendant till a certain day to introduce his, the referee has no power to grant a continuance.

30. Rickards *v.* Patterson, 5 Harr. (Del.) 235; Young *v.* Clute, 12 Nev. 31; Bivingsville Cotton Mfg. Co. *v.* Bivings, 7 Rich. Eq. (S. C.) 455. See also Matter of Ferrigan, 42 N. Y. App. Div. 1, 58 N. Y. Suppl. 920 [*affirmed* in 160 N. Y. 689, 55 N. E. 1095]; Grahams *v.* Morton, 6 Wend. (N. Y.) 552.

Two or more referees, in the absence of the third, have not power to adjourn the hearing to any particular day. Harris *v.* Norton, 7 Wend. (N. Y.) 534. However, it has also been held that it is not necessary that all the auditors should convene to adjourn. The chairman may give the notice, and, if one of the parties does not appear, a majority of the auditors may adjourn the hearing. Swinton *v.* Erwin, 8 Vt. 282.

Grounds.— It was proper for an auditor to refuse to suspend a hearing until the evidence of plaintiff was transcribed, so that defendant might make a motion of nonsuit, as an auditor cannot grant a nonsuit. Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193, 13 S. E. 461. To entitle a party to demand of referees further time to produce testimony, he must show them what it is, why he is not able then to produce it, and that he expects to be able to produce it in reasonable time. A naked allegation that he desires further time is not sufficient. Latimer *v.* Ridge, 1 Binn. (Pa.) 458. Where two actions between the same parties are referred to the same referee, and the same witnesses and similar questions of law are involved in both cases, and a hearing has been had on one, it is error for the referee to continue the second cause till the former shall be decided on appeal. Caldwell *v.* Mutual Reserve Fund L. Assoc., 30 Misc. (N. Y.) 510, 63 N. Y. Suppl. 841.

Notice.— Where the notice of hearing is served by the referee an unreasonably short time before the hearing and at the time fixed the hearing is adjourned without notice to a party not appearing, an *ex parte* hearing at that time is irregular and the proceedings may be set aside. La Baron *v.* Overstreet, 39 Fla. 628, 23 So. 22. Where arbitrators adjourned to a day on which they did not meet, but met at a later day, and then examined a witness in the absence of a party, and without having given him notice of the meeting, it was held to be error. Frey *v.* Vanlear, 1 Serg. & R. (Pa.) 435.

31. *Ex p.* Rutter, 3 Hill (N. Y.) 464.

ponement should be presented to the referee and not to the court,[32] but cannot be made after the report has been agreed upon.[33] The adjournment may be for a longer time than from day to day,[34] although it has been held that it cannot be beyond the term of the court.[35] Terms may be imposed as a condition of allowing the postponement.[36] The refusal to allow an adjournment cannot be relied upon where no prejudice has resulted therefrom.[37] So the fact that adjournments were not formally made from one hearing to the time of another does not render the proceedings irregular where both parties give all the testimony they desire and submitted the cause thereon.[38] The court will not ordinarily interfere with the discretion of the referee as to granting or refusing an adjournment.[39]

I. Parties.[40] In some jurisdictions the referee has the power to add or strike out the name of a party,[41] except where the reference is merely to take and report the testimony;[42] but he has no power to order a new party to be brought in by compulsory process.[43] Where parties have been brought in as defendants as necessary to the complete determination of the cause, they cannot be compelled to accept a referee who has already been appointed in the action, and to accept evidence which has been taken before him, although a right of cross-examination of the witnesses is secured to them.[44]

J. Pleadings[45] **— 1. In General.** Generally the referee has no authority to hold the complaint insufficient,[46] or to rule on a demurrer,[47] or to strike out an amendment to pleadings allowed by the court.[48] So he cannot permit a defendant in default to file an answer, except by consent.[49] Under some statutes, however, it has been held that he has power to award judgment on the pleadings.[50] Furthermore he may disregard all such formal defects in the pleadings as might be amended if the case was tried by the court.[51]

2. Amendments.[52] In most jurisdictions the referee has power on the trial to allow amendments to the pleadings,[53] subject to the exception that the cause of

32. Langley *v.* Hickman, 1 Sandf. (N. Y.) 681; Baker *v.* Lafitte, 4 Rich. Eq. (S. C.) 392. *Contra*, see Sudam *v.* Swart, 20 Johns. (N. Y.) 476; Combs *v.* Wyckoff, 1 Cai. (N. Y.) 147; Bird *v.* Sands, 1 Johns. Cas. (N. Y.) 394.

33. Coryell *v.* Coryell, 1 N. J. L. 385.

34. Vinton *v.* Lindsey, 68 Ga. 291.

35. Jackson *v.* Ives, 22 Wend. (N. Y.) 637.

If a party desire an adjournment beyond the term of the court leave should be asked of the court. *Ex p.* Rutter, 3 Hill (N. Y.) 464.

36. See cases cited *infra*, this note.

Payment of costs.— Referees may require the payment of costs as a condition to the postponement of a hearing. Sickles *v.* Fort, 12 Wend. (N. Y.) 199; Johnson *v.* Gay, 6 Cow. (N. Y.) 54.

37. Matter of Tyler, 71 Cal. 353, 12 Pac. 289, 13 Pac. 169; Tacoma Grocery Co. *v.* Draham, 8 Wash. 263, 36 Pac. 31, 30 Am. St. Rep. 907.

38. Accessory Transit Co. *v.* Garrison, 9 Abb. Pr. (N. Y.) 141, 18 How. Pr. 1.

39. Cooley *v.* Huntington, 16 Abb. Pr. (N. Y.) 384 note.

40. See, generally, Parties, 30 Cyc. 1.

41. Newman *v.* Marvin, 12 Hun (N. Y.) 236; Magovern *v.* Robertson, 14 N. Y. Suppl. 114; Perkins *v.* Berry, 103 N. C. 131, 9 S. E. 621. *Compare* Hawkins *v.* Avery, 32 Barb. (N. Y.) 551. *Contra*, Billings *v.* Baker, 6 Abb. Pr. (N. Y.) 213; Williams *v.* Justice, 113 N. C. 502, 18 S. E. 672.

42. Dixon *v.* Roessler, 76 S. C. 415, 57 S. E. 203.

43. Newman *v.* Marvin, 12 Hun (N. Y.) 236.

44. Wood *v.* Swift, 81 N. Y. 31, so holding, where the order bringing in the parties as defendants was granted in a case which could not be referred without consent of all the parties, and had been finally submitted to a referee for his decision upon the merits.

45. See, generally, Pleading, 31 Cyc. 1.

Amendment of pleading after submission to, or report of, referee see Pleading, 31 Cyc. 401.

Pleading limitations as defense before referee see Limitations of Actions, 25 Cyc. 1405.

46. Belmont Min., etc., Co. *v.* Costigan, 21 Colo. 471, 42 Pac. 647.

47. Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193, 13 S. E. 461.

48. Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42.

49. Jones *v.* Beaman, 117 N. C. 259, 23 S. E. 248.

50. Schuyler *v.* Smith, 51 N. Y. 309, 10 Am. Rep. 609.

51. Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28 [*affirmed* in 18 How. 246, 15 L. ed. 380].

52. Waiver of objections see *supra*, VII, G, 2.

53. *Florida.*— Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 327.

Nebraska.— Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32.

action cannot be changed or a new cause of action or defense added,[54] and in some jurisdictions that the referee has not the power in amending pleadings to do what the court may do, by statute, on or after judgment, in furtherance of justice.[55] He may allow an amendment of the bill of particulars,[56] or the substitution of a new bill,[57] or the amendment of the complaint by affixing a bill which had been served.[58] On the other hand the power to permit an amendment does not authorize him to allow a supplemental pleading to be filed.[59] Furthermore the allowance of amendments rests in the discretion of the referee.[60] In some jurisdictions

New York.— McLaughlin *v.* Webster, 141 N. Y. 76, 35 N. E. 1081; Price *v.* Brown, 98 N. Y. 388; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Patchin *v.* Peck, 38 N. Y. 39; Melvin *v.* Wood, 3 Abb. Dec. 272, 3 Keyes 533, 3 Transcr. App. 297, 4 Abb. Pr. N. S. 438; Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104]; Bullock *v.* Bemis, 40 Hun 623; Knapp *v.* Fowler, 26 Hun 200; Smith *v.* Rathbun, 13 Hun 47 [*reversed* on other grounds in 75 N. Y. 122]; Joslyn *v.* Joslyn, 9 Hun 388; Sinclair *v.* Neill, 1 Hun 80, 3 Thomps. & C. 74; Dunnigan *v.* Crummey, 44 Barb. 528; Woodruff *v.* Hurson, 32 Barb. 557; Dougherty *v.* Valloton, 38 N. Y. Super. Ct. 455; Woodruff *v.* Dickie, 5 Rob. 619, 31 How. Pr. 164; Secor *v.* Law, 9 Bosw. 163 [*affirmed* in 4 Abb. Dec. 188, 3 Keyes 525, 3 Transcr. App. 328]; Matter of Gearns, 27 Misc. 76, 58 N. Y. Suppl. 200; Clockey *v.* International Rubber Clothing, etc., Co., 22 Misc. 518, 49 N. Y. Suppl. 1014; Smith *v.* Pelott, 18 N. Y. Suppl. 301; Hall *v.* Abells, 10 N. Y. Suppl. 581; Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. 227; Union Bank *v.* Mott, 10 Abb. Pr. 372, 18 How. Pr. 506; Oregon Steamship Co. *v.* Otis, 59 How. Pr. 254. But see Holmes *v.* Slocum, 6 How. Pr. 217, Code Rep. N. S. 380.

North Carolina.— Blanton *v.* Bostic, 126 N. C. 418, 35 S. E. 1035.

Pennsylvania.— Wilmore *v.* Scranton, 4 L. T. N. S. 93.

South Carolina.— Mason *v.* Johnson, 13 S. C. 20.

Vermont.— See also Lamb *v.* Zundell, 78 Vt. 232, 62 Atl. 33.

Wisconsin.— Gilbank *v.* Stephenson, 31 Wis. 592.

See 42 Cent. Dig. tit. "Reference," § 90.

Contra.— De la Riva *v.* Berreyesa, 2 Cal. 195; Child *v.* Eureka Powder Works, 44 N. H. 354; Merrill *v.* Russell, 12 N. H. 74.

Amendment to conform to proof.—A referee may grant a motion to amend a pleading to conform to the proof, if such amendment does not substantially change the cause of action or defense. Chapin *v.* Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Perkins *v.* Storrs, 114 N. Y. App. Div. 322, 99 N. Y. Suppl. 849; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511; South Carolina R. Co. *v.* Barrett, 12 S. C. 173.

Amendment before trial.—A motion before a referee, for amendment of the complaint, being made on the day agreed on by the parties as the first day for hearing the reference, is to be regarded as made at the beginning of the trial, and not before it. Barnum *v.* Williams, 91 N. Y. App. Div. 464, 86 N. Y. Suppl. 821.

54. National Steamship Co. *v.* Sheahan, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782; Collins *v.* St. Lawrence Club, 123 N. Y. App. Div. 207, 108 N. Y. Suppl. 287; Barnum *v.* Williams, 91 N. Y. App. Div. 464, 86 N. Y. Suppl. 821; Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104]; Riley *v.* Corwin, 17 Hun (N. Y.) 597 (holding that the statute of limitations constitutes a distinct new defense, and cannot be set up by amendment in the first instance before a referee); Ford *v.* Ford, 53 Barb. (N. Y.) 525, 35 How. Pr. 321; Sinclair *v.* Neill, 3 Thomps. & C. (N. Y.) 74; Livermore *v.* Bainbridge, 44 How. Pr. (N. Y.) 357 [*affirmed* in 14 Abb. Pr. N. S. 227]. *Compare* Jacksonville, etc., R. Co. *v.* Lockwood, 33 Fla. 573, 15 So. 527; Mason *v.* Johnson, 13 S. C. 20, holding that a referee may allow defendant at the reference, before any testimony is taken, to amend his answer by setting up the statute of limitations.

Effect of consent to amendment.— Where defendant consents to the decision by a referee of a motion to amend the complaint, he cannot afterward contend that the amendment was such that it could only be allowed at special term. Perkins *v.* Storrs, 114 N. Y. App. Div. 322, 99 N. Y. Suppl. 849.

It is error to permit amendment of the complaint, at the trial of an action for non-delivery of goods alleging non-delivery of other goods, without giving defendant time to answer. Edwards *v.* Cheraw, etc., R. Co., 32 S. C. 117, 10 S. E. 822.

A reference to a vice-chancellor of a motion to dissolve an injunction does not empower him to authorize an amendment of the bill. Cowman *v.* Lovett, 10 Paige (N. Y.) 559.

55. Union Bank *v.* Mott, 10 Abb. Pr. (N. Y.) 372, 19 How. Pr. 114 [*modified* in 11 Abb. Pr. 42, 19 How. Pr. 267].

56. Williams *v.* Davis, 7 N. Y. Civ. Proc. 282.

57. Melvin *v.* Wood, 3 Abb. Dec. (N. Y.) 272, 3 Keyes 533, 3 Transcr. App. 297, 4 Abb. Pr. N. S. 438.

58. Albro *v.* Figuera, 60 N. Y. 630.

59. Lyon *v.* Isett, 34 N. Y. Super. Ct. 41, 11 Abb. Pr. N. S. 353, 42 How. Pr. 155.

60. Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294; Haight *v.* Littlefield, 71 Hun (N. Y.) 285, 24 N. Y. Suppl. 1097 [*affirmed* in 147 N. Y. 338, 41 N. E. 696]; Brett *v.* Brooklyn First Universalist Soc., 63 Barb.

a referee may grant an adjournment to allow a party to apply to the court for an amendment especially where the amendment is one which he has no power to allow.[61] But even the court cannot permit an amendment setting up new defenses after the report has been filed and confirmed.[62] Referees may impose terms on granting the amendment,[63] and may allow costs.[64] When leave to amend is granted, the amendment should be incorporated into the pleading and the amended pleading should be served on the adverse party.[65] Where an amendment has been allowed on condition that the opposing party be permitted to answer or demur to the amended complaint, such party is estopped from questioning the power of the referee to authorize the demurrer.[66] Generally the decision of a referee on an application to amend is reviewable only on appeal from the judgment,[67] and a motion before the court to set aside or strike out an amendment allowed by a referee is improper,[68] as is a motion before the court for leave to amend where the referee has refused the application.[69]

K. Dismissal of Action or Proceeding Before Hearing.[70] A referee has no jurisdiction to dismiss an action on the ground that the court appointing him had no jurisdiction of the cause.[71] In some jurisdictions the court may enter a default in the case referred where several years had elapsed since any action had been taken by an arbitrator.[72] But a statute providing for a dismissal of an action unless a declaration is filed within a specified time has been held not applicable during the time that the cause is before arbitrators.[73]

L. Reception of Evidence — 1. In General. The trial by a referee, in so

(N. Y.) 610; Hochstetter *v.* Isaacs, 44 How. Pr. (N. Y.) 495; Mason *v.* Johnson, 13 S. C. 20.

61. Ford *v.* Ford, 53 Barb. (N. Y.) 525, 35 How. Pr. 321; Hochstetter *v.* Isaacs, 44 How. Pr. (N. Y.) 495.

Estoppel.— Although plaintiff contended before the referee that his reply was sufficient to put certain allegations in issue, and this was decided against him, he is not thereby estopped to apply to the court for leave to amend, the referee having refused to entertain his application for leave to amend, and referred him to the court, and granted an adjournment to allow him to make such application to it. Woolsey *v.* Shaw, 34 N. Y. App. Div. 405, 53 N. Y. Suppl. 436.

62. Milner *v.* Mutual Ben. Bldg. Assoc., 104 Ga. 101, 30 S. E. 648.

63. Smith *v.* Rathbun, 75 N. Y. 122, holding that under a statute giving a referee the same power as the court to allow amendments, he may, on an application to amend the complaint on trial by inserting material allegations as to which no proof had been given, impose, as a condition, that defendant be permitted to answer or demur to the amended complaint.

64. Perry *v.* Levenson, 82 N. Y. App. Div. 94, 81 N. Y. Suppl. 586 [*affirmed* in 178 N. Y. 559, 70 N. E. 1104], holding that an allowance of fifty dollars' costs on an amendment which did not materially change the cause of action stated in the complaint was sufficiently liberal.

65. Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. (N. Y.) 227.

66. Smith *v.* Rathbun, 75 N. Y. 122.

67. Woodruff *v.* Dickie, 5 Rob. (N. Y.) 619, 31 How. Pr. 164.

68. Quimby *v.* Claflin, 77 N. Y. 270; Knapp *v.* Fowler, 26 Hun (N. Y.) 200. But see Ford *v.* Ford, 53 Barb. (N. Y.) 525, 35 How. Pr. 321.

69. Oregon Steamship Co. *v.* Otis, 59 How. Pr. (N. Y.) 254. See also Barnum *v.* Williams, 91 N. Y. App. Div. 464, 86 N. Y. Suppl. 821.

70. **Procedure on failure of party to appear** see *supra*, VII, G, 3.

Dismissal or nonsuit by referee on hearing see *infra*, VII, M.

Voluntary dismissal after submission to reference see DISMISSAL AND NONSUIT, 14 Cyc. 404.

71. Austin *v.* Stewart, 126 N. C. 525, 36 S. E. 37.

In Canada: (1) The referee in chambers has no power to rescind his own order not made *ex parte*. (2) An appeal will not lie from the refusal of the referee to rescind such an order. (3) The referee has no jurisdiction, under rule 440 of the King's Bench Act or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendant, after the action has been entered for trial. Such a judgment can then only be pronounced by a judge sitting in court. (4) The referee would have power, under rule 422 (d) of the act, to dismiss an action by the consent of the parties. (5) When the judgment entered in an action is unauthorized and unsupported by any order or pronouncement of the court, an appeal will lie from the refusal of the referee to set it aside on motion before him, although such motion also included an application to him to rescind his own order previously made not *ex parte* in the same action. Walker *v.* Robinson, 15 Manitoba 445.

72. Willey *v.* Durgin, 118 Mass. 64.

73. McCall *v.* Crousillat, 2 Serg. & R. (Pa.) 167.

far as it relates to the admission of evidence and the examination of witnesses, is ordinarily the same as if the trial was by the court or a jury.[74] There are cases, however, holding that referees are not bound by the strict laws of evidence,[75] especially where the reference is only an aid to the court and not to hear and determine,[76] at least unless limited by the agreement to refer and the rule of reference made thereon.[77] Furthermore, a referee appointed merely to take evidence should take all that is offered and leave it to the court to determine what is not competent.[78] Where the reference is merely to take and report the testimony,

74. *Alabama.*— Brady *v.* Brady, 144 Ala. 414, 39 So. 237.

California.— De la Riva *v.* Berreyesa, 2 Cal. 195, holding that referees should not admit testimony, which is objected to, to establish a demand barred by the statute of limitations.

Illinois.— Story *v.* De Armond, 77 Ill. App. 74.

New Hampshire.— Stevens *v.* Chase, 61 N. H. 340; Goodwin *v.* Scott, 61 N. H. 112, holding that whether a witness is qualified to judge of the value of property in litigation is a question of fact to be determined by the referees.

New York.— Swift *v.* Swift, 88 Hun 551, 34 N. Y. Suppl. 852; Terry *v.* McNiel, 58 Barb. 241 (holding that it is a matter within the discretion of a referee to allow questions to be put to a witness, with the object of testing his memory); Spear *v.* Myers, 6 Barb. 445 (holding that it is in the discretion of a referee to determine when the testimony respecting the character of witnesses shall cease, when it may be resumed, and, under some circumstances, which party shall close the examination; and the court will not interfere with the exercise of that discretion, unless it has been abused); McAllister *v.* Case, 14 Daly 385, 13 N. Y. St. 141 (holding that it is irregular and improper for a referee to receive any proof or hear any argument in a case, after the close of the trial, without notice to all of the parties). *Compare* Burnett *v.* Snyder, 41 N. Y. Super. Ct. 342.

Oregon.— Stimson *v.* Estes, 3 Oreg. 521.

Pennsylvania.— Passmore *v.* Pettit, 4 Dall. 271, 1 L. ed. 830, holding that a paper should not be admitted in evidence where the opposing party has had no opportunity to read or examine it.

Vermont.— Davis *v.* Campbell, 23 Vt. 236.

See 42 Cent. Dig. tit. "References," § 94.

An auditor, as distinguished from a referee, cannot receive, in a hearing before him, any but legal evidence. Silver *v.* Worcester, 72 Me. 322; Paine *v.* Maine Mut. Mar. Ins. Co., 69 Me. 568.

Examination of witnesses in absence of counsel.—Although the examination of a witness before referees, in the absence of counsel, was irregular, it was no ground of exception to the report, where such referees kept full and correct minutes, which were open to the inspection of counsel, and where such witness was, at a subsequent meeting, fully examined by him on the same subject-matter. Bollmann *v.* Bollmann, 6 S. C. 29.

Presumptions.— It will be presumed that referees properly rejected evidence where their reason for doing so does not appear in their report. Hogaboom *v.* Herrick, 4 Vt. 131.

Translating foreign document.— When letters in a foreign language are put in evidence, it is not the duty of a referee to have them translated, and his refusal to do so would not be cause for setting aside his award, where he testifies that with the aid of his dictionary he understood the purport of the letters. Frison *v.* De Peiffer, 83 Me. 71, 21 Atl. 746.

Certified copies of evidence.— When an original instrument is offered in evidence before a referee, and he makes a certified copy thereof, and files and returns the certified copy as an exhibit, such exhibit will not be disregarded, except in peculiar cases, there being no presumption that such copy is untrue. Bohlman *v.* Coffin, 4 Oreg. 313.

Effect of nature of reference.— Before a referee appointed to take testimony, only oral proofs are made, and written documents are provable at the subsequent hearing before the court. Baker *v.* Woodward, 12 Oreg. 3, 6 Pac. 173. An order of reference for an accounting, reserving to the court all the issues that properly arise in the case, does not prevent the master from determining objections to testimony, as provided by Code Civ. Proc. § 294. Devereux *v.* McGrady, 49 S. C. 423, 27 S. E. 467.

Refreshing memory from memoranda.— Peck *v.* Lake, 3 Lans. (N. Y.) 136; Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797.

75. Harding *v.* Wallace, 8 B. Mon. (Ky.) 536; Sanborn *v.* Paul, 60 Me. 325; Smith *v.* Gorman, 41 Me. 405; Livingston *v.* Combs, 1 N. J. L. 42; Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82.

Oath.— It is no objection to an award that the arbitrators examined witnesses not under oath, if it was done with the consent of the parties or their attorneys. Pierce *v.* Perkins, 17 N. C. 250.

By agreement the referee may be the final judge of all questions as to the admissibility of evidence. Waterman *v.* Merrow, 94 Me. 237, 47 Atl. 157.

76. People *v.* Rushford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891.

77. Melendy *v.* Spaulding, 54 Vt. 517.

78. Brotherton *v.* Brotherton, 14 Nebr. 186, 15 N. W. 347; Fox *v.* Moyer, 54 N. Y. 125; Jones *v.* Gilbert, 117 N. Y. App. Div. 775, 102 N. Y. Suppl. 983; Frost *v.* Reinach, 40 Misc. (N. Y.) 412, 81 N. Y. Suppl. 246;

documentary evidence need not be offered before the referee but may be first offered at the trial.[79] Affidavits are inadmissible where the witness can be sworn before the referee.[80] The order of proof is discretionary with the referee,[81] and the general rules as to offers of proof,[82] and the right to limit the number of expert witnesses,[83] are applicable. The parties to the suit are competent to testify,[84] as are persons interested in the event of the suit.[85]

2. Conditional Admission.[86] Unless the parties consent to the reservation,[87] the referee must ordinarily rule on objection to the admission of evidence at the time when made and not reserve his decision until the final disposition of the case.[88] However, the failure to rule on the objection until the close of the case is not necessarily fatal,[89] and the failure to object to a decision at such time may constitute a waiver.[90] So the irregularity cannot be relied on where the evidence is in fact admissible,[91] or the final decision is in favor of admitting the evidence,[92] or the evidence is not calculated to injure the objecting party.[93] The referee may admit testimony as to a written contract subject to a motion to strike it out if it varied or altered the contract.[94]

3. Striking Out or Disregarding Evidence. In making his decision the referee

Scott *v.* Williams, 14 Abb. Pr. (N. Y.) 70, 23 How. Pr. 393.

In New York, if the reference is to report the evidence with the opinion of the referee as distinguished from a reference merely to take testimony, the referee is not bound to take testimony which appears to him to be not relevant to the issue. Jones *v.* Gilbert, 117 N. Y. App. Div. 775, 102 N. Y. Suppl. 983.

79. Crown Point Gold Min. Co. *v.* Crismon, 39 Oreg. 364, 65 Pac. 87; Baker *v.* Woodward, 12 Oreg. 3, 6 Pac. 173.

80. Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. (N. Y.) 479.

81. Thayer *v.* Barney, 12 Minn. 502; Wood *v.* Missouri Staats-Zeitung Co., 3 Mo. App. 602; Spear *v.* Myers, 6 Barb. (N. Y.) 445; Gibson *v.* Pearsall, 1 E. D. Smith (N. Y.) 90.

82. Burnett *v.* Phalon, 12 Abb. Pr. (N. Y.) 186, 21 How. Pr. 100.

Conditional offer.—An offer, by a party complaining of surprise, to give rebutting evidence, should be absolute and not be made to depend upon a statement of the referees as to the effect on their minds of the evidence to be answered. Clapp *v.* Wilson, 5 Den. (N. Y.) 285.

Striking out offer.—It is within the discretion of a referee to strike out an offer of evidence, and require the party to put his questions to the witnesses, and have them ruled upon. Lehigh Stove, etc., Mfg. Co. *v.* Colby, 120 N. Y. 640, 24 N. E. 282.

83. Sizer *v.* Burt, 4 Den. (N. Y.) 426.

84. Wade *v.* Powell, 31 Ga. 1; Palmer *v.* Palmer, 38 N. H. 418; Tuttle *v.* Robinson, 33 N. H. 104; Chapin *v.* Walpole School Dist. No. 2, 30 N. H. 25; Smith *v.* Smith, 27 N. H. 244; Hoyt *v.* French, 24 N. H. 198; Huntoon *v.* Hazelton, 20 N. H. 388; Ramsay *v.* Bachelder, 18 N. H. 135; Mann *v.* Locke, 11 N. H. 246; Fuller *v.* Little, 7 N. H. 535. *Compare* Hoyt *v.* French, 24 N. H. 198 (holding that if it should appear that injustice has been done by the admission of a party to testify before the referee, the court may recommit his report); Lovering *v.* Lovering, 13 N. H. 513 (holding that where one of the parties to a reference is ill and unable to testify before an auditor, the auditor's refusal to permit the other party to testify is within his discretion, and not a cause for recommitting or rejecting the report). *Contra,* Fennimore *v.* Childs, 6 N. J. L. 386; Eyre *v.* Fennimore, 3 N. J. L. 932.

85. Fuller *v.* Wheelock, 10 Pick. (Mass.) 135; Hollingsworth *v.* Leiper, 1 Dall. (Pa.) 161, 1 L. ed. 82. *Contra,* McConnell *v.* Pike, 3 Vt. 595; Newton *v.* Higgins, 2 Vt. 366.

86. **Waiver of objection to conditional admission** see *infra,* VII, Q, 2.

87. Hopkins *v.* Clark, 90 Hun (N. Y.) 4, 35 N. Y. Suppl. 360.

88. Wagener *v.* Finch, 65 Barb. (N. Y.) 493; Smith *v.* Kobbe, 59 Barb. (N. Y.) 289; Peck *v.* Yorks, 47 Barb. (N. Y.) 131; Clussman *v.* Merkel, 3 Bosw. (N. Y.) 402. *Compare* Berrian *v.* Sanford, 1 Hun (N. Y.) 625, 4 Thomps. & C. 655. *Contra,* Bernhard *v.* Wyandotte, 33 Kan. 465, 6 Pac. 617.

Reservation as equivalent to overruling of objection.— Where a referee has refused to pass upon an objection to evidence at the time such evidence is offered, but has received the evidence, reserving the question of its admissibility until the close of the case, his action will be considered on appeal the same as if the objection has been overruled and exception taken. Lathrop *v.* Bramhall, 64 N. Y. 365.

89. Lathrop *v.* Bramhall, 64 N. Y. 365.

90. Clark *v.* Donaldson, 49 How. Pr. (N. Y.) 63 [*affirmed* in 64 N. Y. 631].

91. Kerslake *v.* Schoonmaker, 1 Hun (N. Y.) 436, 3 Thomps. & C. 524; Mercer *v.* Vose, 40 N. Y. Super. Ct. 218 [*affirmed* in 67 N. Y. 56].

92. Bihin *v.* Bihin, 17 Abb. Pr. (N. Y.) 19.

93. Mercer *v.* Vose, 40 N. Y. Super. Ct. 218 [*affirmed* in 67 N. Y. 56].

94. Case *v.* Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Suppl. 724, 19 N. Y. Civ. Proc. 373 [*reversed* on other grounds in 134 N. Y. 78, 31 N. E. 254].

cannot exclude from consideration evidence admitted on the hearing,[95] although where it was irrelevant and inadmissible no injury results therefrom.[96] So while the referee has the power to strike out evidence before the final submission of the cause,[97] he cannot do so after the case has been closed unless the right so to do has been specially reserved.[98] The direct testimony of a witness who dies during the examination can be stricken out only in so far as not covered by the cross-examination,[99] and then only when the opportunity to cross-examine is not lost through the fault of the moving party.[1] It has been held that the referee has no power to strike out the examination of a witness on his failure to appear for cross-examination where a good excuse is given.[2]

4. Reopening Case For Further Evidence.[3] A referee may, at any time before his report is filed or delivered,[4] reopen a case tried before him and hear further evidence;[5] but whether he will do so rests in his discretion,[6] which will not be

95. Monson *v.* Cooke, 5 Cal. 436; Smith *v.* Kirtland, 45 N. Y. App. Div. 25, 60 N. Y. Suppl. 812; Allen *v.* Way, 7 Barb. (N. Y.) 585, 3 Code Rep. 243; Meyers *v.* Betts, 5 Den. (N. Y.) 81. But see National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 56 N. E. 288.

96. Brown *v.* Colie, 1 E. D. Smith (N. Y.) 265.

97. Blashfield *v.* Empire State Tel., etc., Co., 147 N. Y. 520, 42 N. E. 2 [*reversing* on other grounds 71 Hun 532, 24 N. Y. Suppl. 1006], striking out as curing error in reception of evidence.

98. Blashfield *v.* Empire State Tel., etc., Co., 71 Hun (N. Y.) 532, 24 N. Y. Suppl. 1006 [*reversed* on other grounds in 147 N. Y. 520, 42 N. E. 2]; Bloss *v.* Morrison, 47 Hun (N. Y.) 218.

Where evidence is received over objections, subject to a motion to strike it out, and no motion to strike is made, the referee has no right after the submission of the case to strike out the evidence on his own motion. Gottlieb *v.* Dole, 109 N. Y. App. Div. 583, 96 N. Y. Suppl. 329.

99. Curtice *v.* West, 50 Hun (N. Y.) 47, 2 N. Y. Suppl. 507 [*affirmed* in 121 N. Y. 696, 24 N. E. 1099].

1. Forrest *v.* Kissam, 7 Hill (N. Y.) 463.

2. *In re* Crooks, 23 Hun (N. Y.) 696.

3. Newly discovered evidence as ground for setting aside report see *infra*, VIII, I, 7, b, (VIII).

4. Welles *v.* Harris, 31 Conn. 365; Ayrault *v.* Sackett, 9 Abb. Pr. (N. Y.) 154 note [*affirmed* in 17 How. Pr. 507]. But see Parker *v.* Knight, 3 N. J. L. J. 151, holding that where a referee has heard the evidence and made and signed his report, he has no further jurisdiction to open the case to hear further testimony without further order from the court.

5. *California.*— Marziou *v.* Pioche, 10 Cal. 545.

Connecticut.— Welles *v.* Harris, 31 Conn. 365.

Georgia.— Heavner *v.* Seager, 79 Ga. 471, 4 S. E. 767.

Minnesota.— Cooper *v.* Stinson, 5 Minn. 201.

New York.— Moissen *v.* Kloster, 114 N. Y. 638, 21 N. E. 1050; Fielden *v.* Lahens, 2 Abb. Dec. 111, 3 Transcr. App. 218, 6 Abb. Pr. N. S. 341; Dow *v.* Darragh, 42 N. Y. Super. Ct. 80; Duguid *v.* Ogilvie, 3 E. D. Smith 527, 1 Abb. Pr. 145; Decker *v.* O'Brien, 13 Misc. 94, 34 N. Y. Suppl. 81; Packer *v.* French, Lalor 103; Cleaveland *v.* Hunter, 1 Wend. 104.

Pennsylvania.— See *In re* Thoma, 76 Pa. St. 30.

See 42 Cent. Dig. tit. "References," § 96.

Moving papers.— On an application to a referee, after his report is drawn, but before its delivery, to open the case and allow defendant to testify, an affidavit which does not excuse the negligence in procuring the testimony, or show its character or its materiality, is insufficient. Cooper *v.* Stinson, 5 Minn. 201.

Duty to consider application.— Where a party discovered new testimony which would be material to his case on trial before a referee, and asked the referee to have the case reopened for the purpose of hearing the same before the case should be argued, it was the duty of the referee to consider the application, and, if it was meritorious, to open the case. Anthony *v.* Barnes, 11 Lanc. Bar (Pa.) 147.

After nonsuit.— The court will not reverse a judgment, because the referees before whom the cause was tried excluded an offer of further evidence on the part of plaintiffs, made after plaintiffs had rested and a nonsuit had been directed, unless the offer of such evidence showed at least the counsel's belief that the evidence, if admitted, would aid plaintiffs. Fielden *v.* Lahens, 9 Bosw. (N. Y.) 436.

6. New Mercer Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989; Domschke *v.* Metropolitan El. R. Co., 148 N. Y. 337, 42 N. E. 804; Williams *v.* Hayes, 20 N. Y. 58; Ocorr *v.* Little Falls, 77 N. Y. App. Div. 592, 79 N. Y. Suppl. 251 [*affirmed* in 178 N. Y. 622, 70 N. E. 1104]; Griffin *v.* Miner, 54 N. Y. Super. Ct. 46; Delafield *v.* De Grauw, 9 Bosw. (N. Y.) 1 [*affirmed* in 1 Abb. Dec. 500, 3 Keyes 467, 3 Transcr. App. 49]; Pearson *v.* Fiske, 2 Hilt. (N. Y.) 146; Trimble *v.* Stilwell, 4 E. D. Smith (N. Y.) 512; Maas *v.* McEntegart, 21 Misc. (N. Y.) 462, 47 N. Y. Suppl. 673; Rhinesmith's Case, 25 Pa. Super.

interfered with except where abused.[7] So the terms on which the case will be reopened are within his discretion.[8]

5. Effect of Error in Admission of Evidence. Error in the admission of improper evidence which is essentially material cannot be disregarded,[9] but the admission of improper evidence will not vitiate the report if there is sufficient evidence properly admitted to sustain the findings.[10] So the admission of irrelevant testimony is not fatal if the findings show that it was not taken into consideration in making the decision.[11] And where the report is merely advisory, the admission of improper evidence is not fatal, the court having power to reject the conclusions of the referee and draw its own conclusions from the legal evidence in the case.[12] The admission of evidence not within the pleadings is not cured by a subsequent order of the court allowing an amendment of the pleadings.[13] The agreement of all the parties present before the referee cannot make incompetent testimony valid against the rights of absent parties.[14]

6. Effect of Error in Exclusion of Evidence. Error in excluding material evidence generally invalidates the report.[15]

M. Dismissal or Nonsuit.[16] Where the reference is to hear and determine, the referee generally has the power to grant a nonsuit where the evidence shows no cause of action,[17] or where plaintiff abandons the case,[18] or for want of prosecution,[19] or to dismiss the action as not maintainable.[20] So where the referee has granted plaintiff leave to apply to the court to bring in a necessary party and

Ct. 300; Greenville *v.* Earle, 80 S. C. 321, 60 S. E. 1117.

When proper to refuse.— Where plaintiff had full opportunity to discover the facts which he subsequently proposed to prove, on the referee reopening the case after he had rested, and his adversary had departed for his place of business and residence in a distant country, it was a proper exercise of the discretion of the referee to refuse to open the case to admit further evidence. Dow *v.* Darragh, 42 N. Y. Super. Ct. 80.

7. Gottlieb *v.* Dole, 109 N. Y. App. Div. 583, 96 N. Y. Suppl. 329.

8. Page *v.* Methfessel, 71 Hun (N. Y.) 442, 25 N. Y. Suppl. 11 [*affirmed* in 145 N. Y. 602, 40 N. E. 164].

9. Clark *v.* Crandall, 3 Barb. (N. Y.) 612. *Compare* Cameron *v.* Decatur First Nat. Bank, 4 Tex. Civ. App. 309, 23 S. W. 334; Kinsey *v.* Archer, 80 Wis. 201, 49 N. W. 962.

10. Groth *v.* Kersting, 4 Colo. App. 395, 36 Pac. 156; Woodruff *v.* McGrath, 32 N. Y. 255; People *v.* Rushford, 81 N. Y. App. Div. 298, 80 N. Y. Suppl. 891; Kemeys *v.* Richards, 11 Barb. (N. Y.) 312; McGuire *v.* O'Hallaran, Lalor (N. Y.) 85; Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

11. Bee *v.* San Francisco, etc., R. Co., 46 Cal. 248. *Contra*, see Mason *v.* Knox, 66 N. H. 545, 27 Atl. 305.

12. Lewis *v.* Godman, 129 Ind. 359, 27 N. E. 563.

13. Johnson *v.* McIntosh, 31 Barb. (N. Y.) 267.

14. Sweeten's Estate, 4 Lanc. L. Rev. (Pa.) 54.

15. Severance *v.* Hilton, 32 N. H. 289; Bellows *v.* Ingham, 2 Vt. 575, holding that the report will be rejected where referees have refused to hear evidence of an agreement between the parties that they should exercise chancery powers if proper evidence was presented. But see Lowndes *v.* Campbell, 1 Hall (N. Y.) 659.

In Wisconsin the rejection of testimony by a referee is no ground for a new trial, if the testimony rejected is reported to the court. If a referee reports that he has sustained an objection to certain testimony reported by him, the court should consider the testimony and determine whether the referee's findings or decision of the cause should be modified in consequence thereof. Yates *v.* Shepardson, 27 Wis. 238.

16. Before hearing see *supra*, VII, K.

On failure of party to appear see *supra*, VII, G, 3.

17. Plant *v.* Fleming, 20 Cal. 92; McCormick *v.* Miller, 19 Minn. 443; Scofield *v.* Hernandez, 47 N. Y. 313; Myers *v.* Polhemus, 77 Hun (N. Y.) 587, 28 N. Y. Suppl. 1025. See also Metcalf *v.* Mattisons, 32 N. Y. 464.

When nonsuit proper see McCormick *v.* Miller, 19 Minn. 443; Scofield *v.* Hernandez, 47 N. Y. 313; Myers *v.* Polhemus, 77 Hun (N. Y.) 587, 28 N. Y. Suppl. 1025.

Whether dismissal a nonsuit or dismissal on the merits see Van Derlip *v.* Keyser, 68 N. Y. 443; Griffen *v.* Mechanics', etc., Bank, 61 N. Y. App. Div. 434, 75 N. Y. Suppl. 651 [*affirmed* in 171 N. Y. 665, 64 N. E. 1121]; Burt *v.* Oneida Community, 16 N. Y. Suppl. 289 [*affirmed* in 137 N. Y. 346, 33 N. E. 307, 19 L. R. A. 297].

18. Plant *v.* Fleming, 20 Cal. 92.

19. Morange *v.* Meigs, 54 N. Y. 207; Ellsworth *v.* Brown, 16 Hun (N. Y.) 1; Ellsworth *v.* Smith, 56 How. Pr. (N. Y.) 237. *Compare* Kimberly *v.* Parker, 34 How. Pr. (N. Y.) 275. *Contra*, see Holmes *v.* Slocum, 6 How. Pr. (N. Y.) 217, Code Rep. N. S. 380.

20. Erhard *v.* Kings County, 36 N. Y. Suppl. 656.

plaintiff refuses so to apply, the referee may dismiss the complaint.[21] But where a referee is appointed simply to take the testimony, he cannot consider a motion to dismiss the complaint.[22] So it has been held that where plaintiff refuses to testify, the referee should not dismiss the case but should merely report the facts to the court.[23]

N. Rulings on Weight and Sufficiency of Evidence.[24] Generally the referee is the exclusive judge of the weight and sufficiency of evidence,[25] and the court will only determine whether there is "any" evidence to support the finding.[26] However, the finding of a fact on incompetent testimony is an error of law rather than one of fact and hence reviewable.[27]

O. Arguments and Conduct of Counsel. Arguments of counsel should be in the presence of the opposing counsel.[28] The referee should decline to record unprofessional statements of counsel and scandalous objections,[29] but improper statements of counsel are not prejudicial error where apparently they had no effect upon the decision of the referee.[30] The referee may allow a reargument before making his report,[31] but not thereafter.[32]

P. Taking and Stating Account.[33] Where a case is referred to take and state an account the referee is a mere substitute for a master under the old chancery practice, and unless otherwise specially prescribed he must be governed by the rules which regulate such practice.[34] Except where the court decides the princi-

21. Peyser *v.* Wendt, 87 N. Y. 322.

22. People's Loan, etc., Bank *v.* Garlington, 54 S. C. 413, 32 S. E. 513, 71 Am. St. Rep. 800.

23. Coburn *v.* Tucker, 21 Mo. 219.

24. Report as equivalent to verdict of jury see *infra*, VIII, I, 3, b.

25. Smith *v.* Gorman, 41 Me. 405; Daly *v.* Timon, 47 Mo. 516; Forward *v.* Harris, 30 Barb. (N. Y.) 338; Cottrill *v.* Vanduzen, 22 Vt. 511; Wood *v.* Barney, 2 Vt. 369. See also Murphey *v.* Dart, 42 How. Pr. (N. Y.) 31.

The credibility of a witness is a question solely for the referee, and his decision cannot be supervised. Leach *v.* Kelsey, 7 Barb. (N. Y.) 466.

26. Speirs *v.* Union Drop Forge Co., 180 Mass. 87, 61 N. E. 825.

In an accounting, evidence that certain items were, in an effort to arbitrate, admitted to be substantially correct, is sufficient to sutain an allowance of them by a referee. Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741.

27. Gaffney *v.* Peeler, 21 S. C. 55.

28. Miller *v.* E. & W. V. R. Co., 2 C. Pl. (Pa.) 10.

29. Rae *v.* Rae, 53 Mich. 40, 18 N. W. 551.

30. Shepard *v.* New York El. R. Co., 15 N. Y. Suppl. 175.

31. Litch *v.* Brotherson, 16 Abb. Pr. (N. Y.) 384, 25 How. Pr. 407.

32. Craig *v.* Craig, 66 Hun (N. Y.) 452, 21 N. Y. Suppl. 241, holding that the report is "rendered" within the meaning of the statute when signed and the referee has notified the parties thereof, although it is not yet filed.

33. See also Accounts and Accounting, 1 Cyc. 414.

Report on reference to take account see *infra*, VIII, D, 6.

34. Ketchum *v.* Clark, 22 Barb. (N. Y.) 319; Milton *v.* Richardson, 21 Misc. (N. Y.) 380, 47 N. Y. Suppl. 735. See also Hale *v.* Hale, 3 Day (Conn.) 377; Halsted *v.* Tyng, 29 N. J. Eq. 86; Remsen *v.* Remsen, 2 Johns. Ch. (N. Y.) 495; De Mott *v.* Benson, 4 Edw. (N. Y.) 297; Munds *v.* Cassidey, 98 N. C. 558, 4 S. E. 353, 355; Turner *v.* Hughes, 45 N. C. 116; Loan, etc., Bank *v.* Miller, 39 S. C. 175, 17 S. E. 592; Kennedy *v.* Adickes, 37 S. C. 174, 15 S. E. 922; Peers *v.* Barnett, 12 Gratt. (Va.) 410; McCandlish *v.* Edloe, 3 Gratt. (Va.) 330; Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579.

Up to what time account stated.— The account is properly stated up to date, although including items incurred after the bringing of the suit. Tyler *v.* Willis, 35 Barb. (N. Y.) 213; Crosbie *v.* Leary, 6 Bosw. (N. Y.) 312; Neel's Appeal, 3 Pennyp. (Pa.) 66; Fox *v.* Weckerly, 1 Phila. (Pa.) 320; Moore *v.* Swanton Tanning Co., 60 Vt. 459, 15 Atl. 114.

Effect of judgment.—A general verdict for plaintiff, and judgment of *quod computet*, do not conclude defendant as to the dates and sums mentioned in the declaration; but the auditors may make the proper charges, and allow the proper credits, without regard to the verdict. Newbold *v.* Sims, 2 Serg. & R. (Pa.) 317.

Matters considered.—An auditor appointed to state accounts, and report thereon, can consider whether a particular individual was the authorized agent of one of the parties to purchase on his behalf the goods charged by the other in his account. Locke *v.* Bennett, 7 Cush. (Mass.) 445.

Delegation of authority.— The taking and reporting an account involves the exercise of the judgment and discretion of such referee, which he cannot delegate to another; and it is no proper exercise of his judgment and discretion when he simply adopts an account which has been stated by another, whether

ples on which the account shall be taken,[35] the method of determining the correctness of an account rests within the referee's discretion.[36] Usually a sworn account, including both debits and credits, must be exhibited by the parties;[37] and the referee may require the parties to exhibit in writing the items of their claims.[38] Witnesses and papers may be examined to ascertain the state of the account.[39] Where all the issues are referred in an action for an accounting, the referee may direct an interlocutory judgment and a subsequent accounting instead of proceeding with the trial and accounting to a point where he can direct a final judgment,[40] or he may, if he finds defendant liable to account, himself proceed with

the account so adopted has been taken in the same suit, or in some other. Larkins *v.* Murphy, 68 N. C. 381.

Following calculation by party.— Where one of the parties makes a calculation, and submits it to the auditor, the latter may adopt it, and, if it appears to be correct, it is immaterial who made it. Price *v.* Comer, 87 Ga. 468, 14 S. E. 122.

Allowing items.— Where, on an accounting, a referee found that certain items claimed by defendant were payments for things not charged in plaintiff's specification, such items were properly disallowed. Holt *v.* Howard, 77 Vt. 49, 58 Atl. 797. Commissioners properly allowed such claims as were undisputed, and rejected such claims as were disputed, with regard to which the pleader had the burden, and which were unsupported by proof. McBrayer *v.* Hanks, 72 S. W. 2, 24 Ky. L. Rep. 1699.

Defenses.— Sturgis *v.* Hull, 48 Vt. 302. After judgment to account, a party cannot discharge himself from accounting, by proof that he has before accounted, but he may show by his account that plaintiff has been paid, or that he owes him nothing. Lee *v.* Abrams, 12 Ill. 111.

Scope of reference see Wisner *v.* Wilhelm, 48 Md. 1; Calvert *v.* Carter, 18 Md. 73; Lyman *v.* Warren, 12 Mass. 412; Boyle *v.* Hardy, 28 Mo. 390; Petrick *v.* Ashcroft, 20 N. J. Eq. 198; Izard *v.* Bodine, 9 N. J. Eq. 309; Parkhurst *v.* Muir, 7 N. J. Eq. 555; Savage *v.* Sherman, 87 N. Y. 277; Fanning *v.* Consequa, 17 Johns. (N. Y.) 511, 8 Am. Dec. 442 [*reversing* 3 Johns. Ch. 587]; Harris *v.* Magee, 3 Call (Va.) 502; Dayton *v.* District of Columbia, 18 Ct. Cl. 13.

35. Smith *v.* Walker, 38 Cal. 385, 99 Am. Dec. 415; Mosier *v.* Norton, 83 Ill. 519; Hudson *v.* Trenton Locomotive, etc., Mfg. Co., 16 N. J. Eq. 475; Dunlap *v.* O'Dena, 1 Rich. Eq. (S. C.) 272. See also Cobb *v.* Jameson, 1 Tenn. Ch. 604. *Compare* Humphrey *v.* Foster, 13 Gratt. (Va.) 653.

36. Keokuk County *v.* Howard, 43 Iowa 354; Vanderwick *v.* Summerl, 28 Fed. Cas. No. 16,845, 2 Wash. 41. See also *In re* Taylor, 44 Ch. D. 128, 59 L. J. Ch. 803, 62 L. T. Rep. N. S. 754, 38 Wkly. Rep. 422.

37. Wiggin *v.* Gans, 4 Sandf. (N. Y.) 646; Myers *v.* Bennett, 3 Lea (Tenn.) 184; Hicks *v.* Chadwell, 1 Tenn. Ch. 251.

Admissions in statement.— Wilson *v.* Dowse, 140 Ill. 18, 29 N. E. 726 [*reversing* 39 Ill. App. 127].

Where one party makes a sworn statement of the account and the other offers no better evidence, the statement is properly accepted as true. Farwell *v.* Huling, 132 Ill. 112, 23 N. E. 438.

38. Story *v.* Brown, 4 Paige (N. Y.) 112. *Compare* McCartan *v.* Van Syckel, 10 Bosw. (N. Y.) 694.

May require written statement of disputed items.— Patterson *v.* Johnson, 113 Ill. 559.

Power to require attendance.— The master has no power to require the attendance within the jurisdiction of a defendant residing without, or to issue a commission naming himself as commissioner. Connolly *v.* Connor, 12 Ont. L. Rep. 304, 8 Ont. Wkly. Rep. 74.

Power to order filing of account.—A referee who, by an interlocutory judgment, is directed to take and state an account, has power to order that defendant file an account. Milton *v.* Richardson, 21 Misc. (N. Y.) 380, 47 N. Y. Suppl. 735.

The account presented must be specific.— Methodist Episcopal Church *v.* Jaques, 3 Johns. Ch. (N. Y.) 77 [*reversed* on other grounds in 17 Johns. 548, 8 Am. Dec. 541].

39. *Alabama.*— Kirkman *v.* Vanlier, 7 Ala. 217.

Connecticut.— Callender *v.* Colegrove, 17 Conn. 1.

Illinois.— Garrity *v.* Hamburger Co., 35 Ill. App. 309.

Massachusetts.— Jones *v.* Stevens, 5 Metc. 373.

New Jersey.— Jackson *v.* Jackson, 3 N. J. Eq. 96.

United States.— Story *v.* Livingston, 13 Pet. 359, 10 L. ed. 200.

See 42 Cent. Dig. tit. "References," § 106.

Compare Snebly *v.* Linnell, 13 Phila. (Pa.) 167; Aiken *v.* Smith, 21 Vt. 172.

Right of party to cross-examine witnesses. — Union Mut. L. Ins. Co. *v.* Slee, 123 Ill. 57, 12 N. E. 543, 13 N. E. 222; Townsend *v.* Hunter, 3 Can. L. T. Occ. Notes 310; Horlick *v.* Eschweiler, 11 Ont. L. Rep. 140, 7 Ont. Wkly. Rep. 43; Plenderleith *v.* Parsons, 10 Ont. L. Rep. 436, 6 Ont. Wkly. Rep. 399.

A party before an auditor has the right to the testimony of his adversary, but he cannot be required to testify unless he is present at the auditing or unless he has had reasonable notice from the other party that his testimony will be required; and a simple notice of the time and place of hearing, issued by the auditor, does not impose upon the party the duty of a personal attendance. Stetson *v.* Godfrey, 20 N. H. 227.

40. Bennet *v.* Bennet, 10 N. Y. App. Div. 550, 42 N. Y. Suppl. 435; Manning *v.* Manning, 87 Hun (N. Y.) 221, 33 N. Y. Suppl.

the accounting.[41] On the other hand, where the reference is merely to state an account, the referee has no authority to try and determine the whole issue.[42]

Q. Objections and Exceptions — 1. In General. Objections and exceptions must be taken the same as where the trial is before a court,[43] and in some jurisdictions they must be embodied in the report or certified by the referee.[44] They must be taken at the time of the occurrence of the alleged errors,[45] except where otherwise stipulated.[46] The referee must pass on objections to evidence offered,[47] but the failure to rule on an objection to the admission of evidence is not fatal where the evidence was in fact admissible.[48] Where a referee refuses to reopen a case, the party must wait until the report is made and then move for a recommittal.[49]

2. Waiver.[50] The failure to properly object to irregularities in the course of the proceedings before the referee constitutes a waiver thereof.[51] For instance the failure to object to testimony at the time of its introduction waives objections

1029; Mundorff *v.* Mundorff, 1 Hun (N. Y.) 41, 3 Thomps. & C. 171. *Contra,* Garczynski *v.* Russell, 75 Hun (N. Y.) 492, 27 N. Y. Suppl. 458.

41. Manning *v.* Manning, 87 Hun (N. Y.) 221, 33 N. Y. Suppl. 1029.

An interlocutory judgment that such an accounting was necessary need not, in such a case, be entered. Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643 [*affirming* 78 N. Y. App. Div. 633, 79 N. Y. Suppl. 536].

42. Bradshaw *v.* Morse, 20 Mont. 214, 50 Pac. 554.

43. Branger *v.* Chevalier, 9 Cal. 353; Phelps *v.* Peabody, 7 Cal. 50; Illstad *v.* Anderson, 2 N. D. 167, 49 N. W. 659. See also Matter of Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27 [*affirmed* in 165 N. Y. 643, 59 N. E. 1125].

44. Phelps *v.* Peabody, 7 Cal. 50.

Record.— Where evidence is offered before an auditor, and objected to, and it is desired to note the same for the opinion of the court, the auditor should distinctly state the offer and its purpose, and the objection thereto, together with his ruling thereon. Mengas' Appeal, 19 Pa. St. 221. In an action tried before a referee, who found that objection was taken by plaintiffs "in apt time" to any testimony of G concerning transactions with decedent, the fact that the referee entered the objection at the close of the testimony of G instead of attaching it to the utterances to which it was directed, did not make the objection unavailable. Armfield *v.* Colvert, 103 N. C. 147, 9 S. E. 461.

45. Simpson *v.* Gregg, 5 Nebr. 237. See also Steen *v.* Hendy, (Cal. 1894) 38 Pac. 718, objection as premature.

46. Johnson *v.* McIntosh, 31 Barb. (N. Y.) 267.

47. Credle *v.* Ayers, 126 N. C. 11, 35 S. E. 128, 48 L. R. A. 751 (holding that where the referee failed to pass on objections to evidence the judge was entitled to find the facts himself); Wallace *v.* Douglass, 103 N. C. 19, 9 S. E. 453. But see Lathrop *v.* Bramhall, 64 N. Y. 365, holding that where evidence is received competent as against one or more of several defendants, it is not error for the referee to refuse to decide, either at the time the evidence is received or at the close of the case, as to which of defendants the evidence is competent.

48. Spier *v.* Priest, 15 Mo. App. 591.

49. Schermerhorn *v.* Develin, 1 Code Rep. (N. Y.) 28.

50. **Waiver of objections in general by appearance and participation in proceedings** see *supra,* VII, G, 2.

51. *Kansas.*—Lannan *v.* Clavin, 3 Kan. 17.

New York.— Langdon *v.* New York, 133 N. Y. 628, 31 N. E. 98; Morris *v.* Husson, 8 N. Y. 204; Matter of Mellen, 56 Hun 553, 9 N. Y. Suppl. 929.

North Carolina.— Silver Valley Min. Co. *v.* Baltimore Gold, etc., Min., etc., Co., 99 N. C. 445, 6 S. E. 735.

Pennsylvania.— McCord *v.* Scott, 4 Watts 11.

Vermont.— Mattocks *v.* Owen, 5 Vt. 42.

United States.— Copper River Min. Co. *v.* McClellan, 138 Fed. 333, 70 C. C. A. 623; Bean *v.* Lambert, 77 Fed. 862.

See 42 Cent. Dig. tit. "References," § 98.

Failure to administer an oath to witnesses is waived by not objecting at the time. Sanborn *v.* Paul, 60 Me. 325.

Third person transcribing testimony.— Failure to object, during the reference, to the writing down of testimony by a person other than the referee in his absence, is a waiver thereof. Fairbanks *v.* Holliday, 59 Wis. 77, 17 N. W. 675.

Conditional reception of evidence.— Where a referee receives evidence provisionally, and defendant does not except to such provisional reception of the evidence, nor at the close of the case obtain a specific ruling thereon and then except, the report will not be set aside on the ground of such provisional reception. Brooks *v.* Christopher, 5 Duer (N. Y.) 216.

Ex parte hearings after submission of cause.— Where the referee in an action to foreclose a mechanic's lien takes testimony and hears arguments after the case is closed, without notice to the contractor, who was defendant in the action, the irregularity is waived by the latter's failure to object to it, he having notice thereof before the report was filed. McAllister *v.* Case, 14 Daly (N. Y.) 385, 13 N. Y. St. 141 [*affirmed* in 112 N. Y. 668, 20 N. E. 414].

thereto.[52] Where evidence is ruled to be inadmissible but the referee offers to take it subject to the objection, the party offering it waives the error, if any, in the ruling where he then refuses to produce the evidence.[53] Under some statutes the testimony before the referee must be subscribed by the witnesses,[54] but failure to comply therewith may be waived by not promptly insisting thereon.[55]

R. Supervision and Control by Court.[56] Generally the court does not, by directing a reference, lose its control of the case,[57] nor deprive itself of the power of making any order which may facilitate the reference,[58] and the parties may make motions in the action before the court pending the reference.[59] In other jurisdictions, however, the reference of a suit deprives the court in which it is pending of all power over it, while the agreement to refer is in force,[60] and it cannot while the suit is before the referee pass upon the validity of the claim involved in it,[61] nor authorize an auditor so to do.[62] Where referees fail to file all the papers of a case, as required by statute, the proper remedy is to apply to the court to have such defects supplied and, if necessary, for an enlargement of the time for

52. Hill *v.* Bailey, 8 Mo. App. 85; Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79; Leach *v.* Kelsey, 7 Barb. (N. Y.) 466; Armstrong *v.* Austin, 45 S. C. 69, 22 S. E. 763, 29 L. R. A. 772; Cardwell *v.* Brewer, 19 S. C. 602.

Evidence not within issues.— When a case has been tried before a referee without reference to any question whether the facts proved were within the pleadings, it is too late, after the decision, to raise an objection that the evidence was not warranted by the pleadings, provided it was otherwise competent. Commercial Bank *v.* Shuart, 46 Barb. (N. Y.) 371.

53. Holendyke *v.* Newton, 50 Wis. 635, 7 N. W. 558.

54. See the statutes of the several states. *Compare* Copper River Min. Co. *v.* McClellan, 138 Fed. 333, 70 C. C. A. 623.

55. Matter of Hirsch, 116 N. Y. App. Div. 367, 101 N. Y. Suppl. 893 [*affirmed* in 188 N. Y. 584, 81 N. E. 1165].

56. See also *supra*, V.

Power of court to amend findings see *infra*, VIII, E.

57. Schohmer *v.* Lynch, 11 Iowa 461. See Union Sugar Refinery *v.* Mathiesson, 24 Fed. Cas. No. 14,398, 3 Cliff. 146.

A referee is an officer of the court, and under its supervision, for the purpose of the accomplishment of justice in the matter which has been referred to him. State Bank *v.* Showers, 65 Kan. 431, 70 Pac. 332. The court may, on motion, in certain cases and for sufficient cause, pass on and control the acts and proceedings of a referee while the reference is pending. Barton *v.* Herman, 3 Daly (N. Y.) 320, 8 Abb. Pr. N. S. 399. The special term has power to set aside any order made by a referee, in the progress of a cause which he had not authority to make, and also the power to compel him to proceed to the trial of the issues referred to him for determination. Ford *v.* Ford, 53 Barb. (N. Y.) 525, 35 How. Pr. 321. But the court, on motion, will not compel a referee to reopen a case after plaintiff and defendant have both rested. Dow *v.* Darragh, 42 N. Y. Super. Ct. 80; Schermerhorn *v.* Develin, 1 Code Rep. (N. Y.) 28. An order of a supreme court commissioner staying proceedings before referees after the cause has been noticed for hearing before them is a nullity. Clute *v.* Tichenor, 2 How. Pr. (N. Y.) 87.

58. *In re* Leigh, 4 Ch. D. 661, 46 L. J. Ch. 60, 25 Wkly. Rep. 56. See also *Re* Palmer, 63 L. T. Rep. N. S. 302, holding that the court has jurisdiction to order the official referee to suspend proceedings.

59. Seavey *v.* Beckler, 132 Mass. 203; McNeill *v.* Lawton, 97 N. C. 16, 1 S. E. 493, holding that the court may grant leave to plaintiff to discontinue the action.

As taking case off docket.—A case referred to arbitrators under rule of court remains upon the docket until disposed of by the judgment of the court. Willey *v.* Durgin, 118 Mass. 64.

Dismissal of action for failure to prosecute. — An action is properly dismissed for failure to prosecute it for a period of five years during the life of plaintiff, and for fifteen years more by the administrator, although the latter had knowledge of the condition of the action; and there is no reason why the reference of the cause for trial and judgment, and its pendency before the referee, should deprive the court of its full power to order such dismissal for want of diligence in its prosecution before the referee. Saville *v.* Frisbie, 70 Cal. 87, 11 Pac. 502.

60. Christy *v.* Sill, 131 Pa. St. 492, 19 Atl. 295, 297. See also Blunt *v.* Whitney, 3 Sandf. (N. Y.) 4.

In Pennsylvania the entry of a rule to arbitrate does not of itself take the case out of the court (Camp *v.* Oswego Bank, 10 Watts 130; Heffner *v.* Confair, 1 Del. Co. 440), but the appointment of arbitrators after the rule puts the proceedings out of court (Wilcox *v.* Payne, 88 Pa. St. 154). When a rule has been entered, but the time to choose arbitrators has passed, judgment by default may be entered without striking off the rule. Heffner *v.* Confair, *supra*.

61. Christy *v.* Sill, 131 Pa. St. 492, 19 Atl. 295, 297.

62. Christy *v.* Sill, 131 Pa. St. 492, 19 Atl. 295, 297.

filing proper exceptions.[63] Where a referee settles a case as prescribed by statute, it is conclusive on the court and it cannot change it, but if mistake in engrossment is shown it should be sent back to the referee for correction.[64] The referee may apply to the court for directions,[65] but ordinarily the court will refuse to instruct the referee as to proper rulings or proceedings.[66] An injunction restraining plaintiff from proceeding with the reference does not prevent proceedings by the referee where an appeal has been taken from the order and a stay bond filed pending appeal.[67]

S. Decision or Opinion in General.[68] The referee may draw such conclusions from the facts proved or admitted to be true as it would be possible for a jury to draw.[69] It has been held that the referee may act partly on his own knowledge of the facts involved,[70] but while the knowledge which the referee may have acquired by experience may assist his judgment in determining the truth or falsity of what the witnesses testify to on that subject his decision must rest finally on the testimony alone.[71] Where an issue is submitted, it must be determined without reference to the case out of which it grows.[72] The referee may order a sum to be paid in instalments,[73] or may require one party to pay a certain sum and the other to tender a conveyance.[74] Where no question is raised before the referee as to the mode of trial, he must grant plaintiff any relief, legal or equitable, to which his allegations and proof entitle him.[75] In some jurisdictions the award is a lien on real estate.[76]

VIII. REPORT.[77]

A. Necessity. It is the duty of the referee to make a report, in writing,[78] within the time fixed by statute, rule of court, or the order of reference,[79] showing

63. Van Syckel *v.* Stewart, 10 Phila. (Pa.) 547.

64. Taylor *v.* Parker, 18 Minn. 79.

65. Bridge *v.* Niagara Ins. Co., 1 Hall (N. Y.) 467.

66. State *v.* Standard Oil Co., 194 Mo. 124, 91 S. W. 1062; Geyer *v.* Smith, 1 Dall. (Pa.) 347, 1 L. ed. 169.

67. Northern Cent. R. Co. *v.* Canton Co., 24 Md. 492.

68. On failure of party to appear see *supra*, VII, G, 3.

Essentials and requisites of report or award see *infra*, VIII, D.

69. Fall *v.* Betz, 22 Pa. Super. Ct. 418.

70. Straw *v.* Truesdale, 59 N. H. 109. But see Moore *v.* Moore, 56 N. H. 512, holding that it was proper for a referee to hear a case *de novo*, and not consider or act on any evidence given at a trial of the cause between the same parties several years before, when he had acted as judge.

Where defendant claimed a set-off for attorney's fees incurred, it was competent for the referee, who was a practising attorney, to pass upon the reasonableness of the fee claimed, from the record of the case in which the services were rendered, and from his own knowledge, without other evidence. Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100.

71. Radway *v.* Duffy, 79 N. Y. App. Div. 116, 80 N. Y. Suppl. 134.

72. McDonough *v.* Norris, 2 Phila. (Pa.) 266.

73. Geary *v.* Cunningham, 10 Serg. & R. (Pa.) 230; Beegle *v.* McGarry, 1 Lack. Leg. Rec. (Pa.) 131.

74. Nicholas *v.* Wolfersberger, 5 Serg. & R. (Pa.) 167; Kunckle *v.* Kunckle, 1 Dall. (Pa.) 364, 1 L. ed. 178.

75. Armitage *v.* Pulver, 37 N. Y. 494. See also Adams *v.* Symon, 6 N. Y. Suppl. 652, 22 Abb. N. Cas. 469.

In an action for the penalty of a contract under seal, the amount equitably due may be determined by a referee. Phœnix Mut. L. Ins. Co. *v.* Clark, 59 N. H. 561.

76. Dietrich's Appeal, 4 Watts (Pa.) 208; Evans *v.* Duncan, 4 Watts (Pa.) 24. *Compare* Hagenman *v.* Fichthorn, 1 Woodw. (Pa.) 442. See *infra*, p. 849, text and note 18.

77. As part of record on appeal see APPEAL AND ERROR, 2 Cyc. 1067, 1087 note 64.

As bearing interest see INTEREST, 22 Cyc. 1515.

Conformity of judgment to report see JUDGMENTS, 23 Cyc. 824.

Death of party after report see ABATEMENT AND REVIVAL, 1 Cyc. 76.

In particular references governed by special statutes see DIVORCE, 14 Cyc. 708; MORTGAGES, 27 Cyc. 1640; PARTITION, 30 Cyc. 253. In supplementary proceedings see EXECUTIONS, 17 Cyc. 1443.

Judgment on report see JUDGMENTS, 23 Cyc. 776, 847.

Necessity for bill of exceptions, case, or statement of facts on appeal from judgment on report see APPEAL AND ERROR, 2 Cyc. 1079.

Right of plaintiff to take nonsuit after delivery of report see DISMISSAL AND NONSUIT, 14 Cyc. 404.

78. See *infra*, VIII, D, 1.

79. See *infra*, VIII, B.

the result of his investigations; [80] but ordinarily the court has no power to compel a referee to deliver or file his report.[81]

B. Time For — 1. In General.[82] The time within which the report must be made is generally fixed either by the order of reference,[83] statutory provisions,[84] or by stipulation of the parties.[85] If no time is fixed, it has been held that the report must be returned to the next term of court,[86] although it has also been held that the report may be filed at any time before trial.[87] The time may be extended by the court,[88] or by stipulation of the parties.[89] A referee makes a report where he files it with the clerk of the court within the specified time,[90] or where he deliv-

80. Grayson *v.* Meredith, 17 Ind. 357.

Before payment of fees.— However, it has been held that he is not obliged to deliver his report until his fees have been paid (Little *v.* Lynch, 99 N. Y. 112, 1 N. E. 312; Fischer *v.* Raab, 58 How. Pr. (N. Y.) 221. *Compare* McCarthy's Estate, 4 Pa. Dist. 205, 36 Wkly. Notes Cas. 315, holding that an examiner to take testimony has no right to withhold the report to compel payment of the expenses of taking the testimony. *Contra*, Trail *v.* Somerville, 22 Mo. App. 308); but, in order to prevent a termination of the reference by notice, under some statutes, he must file it, in default of its delivery to the attorney for one of the parties, and he may thereupon have his action to recover such fees (Little *v.* Lynch, 99 N. Y. 112, 1 N. E. 312).

Failure to report as ground for setting aside order of reference see *supra*, IV, I, 2.

81. Matter of Kraus, 4 Dem. Surr. (N. Y.) 217. See also Coggshall *v.* Burling, 8 Cow. (N. Y.) 136. *Contra*, see Stafford *v.* Hesketh, 1 Wend. (N. Y.) 71; Thompson *v.* Parker, 3 Johns. (N. Y.) 260; Hawkins *v.* Bradford, 1 Cai. (N. Y.) 160.

82. Time for rendition of judgment on report see Judgments, 23 Cyc. 784.

83. Dietrich *v.* Lincoln, etc., R. Co., 13 Nebr. 43, 13 N. W. 13; Brooke *v.* Mitchell, 8 Dowl. P. C. 392, 4 Jur. 656, 9 L. J. Exch. 269, 6 M. & W. 473, holding that an award was published and ready to be delivered within the meaning of an order when it was executed by the referee in the presence of and attested by witnesses.

A supplemental report of a referee, based upon the conduct of defendants on the trial, cannot be objected to because not made within the thirty days prescribed for the original report. Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

84. See the statutes of the several states.

85. Davis *v.* Finney, 37 Kan. 165, 14 Pac. 460; Berry *v.* Sands, 60 Me. 99, holding that under a statutory submission, stipulating that the report of referees shall be made to the January term, 1871, the report cannot be made at the January term, 1872, although on Jan. 26, 1871, the parties stipulated that "in case the court should adjourn before the referees make up their report, when it is made up, it is to be entered on the docket of the term at which it is made returnable."

86. Minton *v.* Moore, 4 Blackf. (Ind.) 315; Jeffers *v.* Hazen, 69 Vt. 456, 38 Atl. 86. See Southwoth *v.* Bradford, 5 Mass. 524; Mott *v.* Anthony, 5 Mass. 489. *Contra*, Francisco *v.* Rowland, 14 Mo. App. 600.

87. Green *v.* Frank, 63 Ga. 78. See also Withers *v.* Haines, 2 Pa. St. 435, holding that an award under the compulsory arbitration law may be made while a demurrer is pending.

88. Norton *v.* Huntoon, 43 Kan. 275, 22 Pac. 565; Francisco *v.* Rowland, 14 Mo. App. 600; Clark *v.* Hennessey Bank, 14 Okla. 572, 79 Pac. 217.

89. Shore *v.* White City State Bank, 61 Kan. 246, 59 Pac. 263; Sproull *v.* Star Co., 45 N. Y. App. Div. 575, 61 N. Y. Suppl. 404 [*affirming* 27 Misc. 27, 56 N. Y. Suppl. 1001]; Thiesselin *v.* Rossett, 3 Abb. Pr. N. S. (N. Y.) 54 (holding that a report after the time extended by stipulation will not be set aside unless after expiration of the latter period the party objecting indicates by some positive act his intention to disaffirm the right of the referee to proceed); Livingston *v.* Gidney, 25 How. Pr. (N. Y.) 1 (holding that a verbal agreement by the parties made at the hearing before a referee to give him such further time as he may need to make his report is enforceable); Powell *v.* Ford, 4 Lea (Tenn.) 278; Oakes *v.* Halifax, 4 Can. Sup. Ct. 640.

What constitutes extension.— Where a referee is given such time as he desires to file a report, and neglects for five months to make the same, a joint note from the parties at the end of such period, to the effect that they expect a "decision in the near future," operates as a limited extension of time to the referee. Gill *v.* Clark, 31 Misc. (N. Y.) 337, 65 N. Y. Suppl. 406, 7 N Y. Annot. Cas. 422.

Presumption as to time when stipulation made.— Where it appears that there was a stipulation to enlarge the time for making an award, but the record does not show when the stipulation was made, it will be presumed that it was made before the rule of court; and the whole agreement, embracing the stipulation to extend the time, is to be considered as constituting a portion of the rule. Shriver *v.* State, 9 Gill & J. (Md.) 1.

90. Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

Withdrawal after filing.—A referee's report which is presented to the clerk and marked "Filed" within the time allowed for its filing, and then withdrawn and retained until after the expiration of such time in order to have it bound, is filed in time. Poole *v.* Poindexter, 72 Kan. 654, 83 Pac. 126.

ers it to a party within such time.[91] Statutory provisions prohibiting further proceedings in an action for thirty days after the death of an attorney for a party before judgment does not prevent the filing of the report within said thirty days.[92]

2. Effect of Delay in Making.[93] There are cases in which the failure of the referee to file or deliver his report in time has been held not to invalidate the report; [94] but in many jurisdictions the failure to report within the allotted time makes a subsequent report of no effect,[95] or at least precludes the right of the referee to further proceed with the investigation.[96] Generally the authority of the referee is terminated at the expiration of the time to report,[97] and if the report is not returned at that time, the cause may be tried as if no reference had been ordered.[98] In some states, by statute, either party may, where the report is not filed or delivered within the time fixed by statute, serve a notice electing to end the reference, in which case the action must proceed as if no reference had been

91. Healy *v.* Gilman, 6 Rob. (N. Y.) 479, holding that a report is "rendered," within the terms of the agreement for a reference fixing the time therefor, when it is delivered to the successful party.

92. Agricultural Ins. Co. *v.* Darrow, 70 N. Y. App. Div. 413, 75 N. Y. Suppl. 128.

93. Setting aside order of reference on failure to report see *supra*, IV, I, 2.

Removal of referee for failure to report within the required time see *supra*, VI, I.

94. *Indiana.*— Way *v.* Fravel, 61 Ind. 162, holding that the court ordering a reference may, in its discretion, especially where no objection is made, allow referees to file their report at a day subsequent to that which, by the order of reference, it should have been filed.

Kentucky.— Eifert *v.* Wolf, 41 S. W. 6, 19 Ky. L. Rep. 507.

Missouri.— Stacker *v.* Cooper Cir. Ct., 25 Mo. 401, holding that, where referees appointed by order of court fail to report at the appointed time, the time may be extended.

Nebraska.— Creedon *v.* Patrick, 3 Nebr. (Unoff.) 459, 91 N. W. 872 (holding that, although a referee has no power to proceed with a hearing or perform acts of a judicial nature after the expiration of the time fixed by the court for making his report, the filing of the report out of time is a mere irregularity, and does not preclude the court from acting thereon); Dietrich *v.* Lincoln, etc., R. Co., 13 Nebr. 43, 13 N. W. 13.

Nevada.— Rhodes *v.* Williams, 12 Nev. 20, holding that, although a referee fails to make his report within the time ordered by the court at the time of his appointment, his authority to decide a case does not expire until his removal.

New York.— Halsey *v.* Carter, 6 Rob. 535, holding that the court will refuse to set aside a referee's report merely upon the ground that it was not made within sixty days after the final submission of the case, and that defendant had given notice of his election to end the reference, where the effect of setting aside the report would be to inconveniently protract the suit.

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

Pennsylvania.— Shaw *v.* Pearce, 4 Binn. 485.

See 42 Cent. Dig. tit. "Reference," § 117.

Compare Leyde *v.* Martin, 16 Minn. 38.

Statute merely directory.— Keller *v.* Sutrick, 22 Cal. 471; Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621; James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

95. *Connecticut.*— Hall *v.* Hall, 3 Conn. 308. See also Belton *v.* Halsey, 1 Root 221.

Iowa.— Goodale *v.* Case, 71 Iowa 434, 32 N. W. 414.

Kansas.— De Long *v.* Stahl, 13 Kan. 558.

Maryland.— See Price *v.* Tyson, 2 Gill & J. 475.

Massachusetts.— Mott *v.* Anthony, 5 Mass. 489.

New Jersey.— White *v.* Kemble, 3 N. J. L. 461.

New York.— Brower *v.* Kingsley, 1 Johns. Cas. 334.

Oregon.— Hanner *v.* Coffin, 1 Oreg. 99.

Pennsylvania.— Abbott *v.* Pinchin, 1 Dall. 349, 1 L. ed. 170.

Wisconsin.— Hills *v.* Passage, 21 Wis. 294.

See 42 Cent. Dig. tit. "Reference," § 117.

Compare Lafon *v.* Riviere, 1 Mart. N. S. (La.) 130.

Failure to return an award to the next term of court, no time for making it having been fixed by the order of reference, will give plaintiff the right to have the cause tried as if no reference had been made. Minton *v.* Moore, 4 Blackf. (Ind.) 315.

96. See *supra*, VII, F, 1; VII, G, 2.

97. Manning *v.* Nelson, 107 Iowa 34, 77 N. W. 503; Smith *v.* Spencer, 1 McCord Eq. (S. C.) 92.

98. Minton *v.* Moore, 4 Blackf. (Ind.) 315.

Trial on testimony taken before referee.— In an action at law, where the parties have a right to have the case tried by a jury or by a referee, the failure of the referee to file his report within the allotted time, while it may authorize an order to file the report enforceable by attachment or an order of removal of the referee, does not authorize the court to order the testimony taken to be returned and himself try the case on such testimony without a jury. Puffer *v.* American Cent. Ins. Co., 48 Oreg. 475, 87 Pac. 523.

ordered;[99] but if neither party takes the necessary steps to terminate it, a report filed after the statutory time is valid.[1] Where the report of an auditor is filed after the time provided by the order of court referring the case to him, the remedy

99. Green *v.* Green, 69 N. C. 294; Maxwell *v.* Maxwell, 67 N. C. 383.

In New York, under Code Civ. Proc. § 1019, which is practically the same as section 273 of the old code, where the report is not delivered or filed within sixty days from the time the case is finally submitted, either party may thereafter, before it is filed or delivered, serve a notice upon the attorney for the adverse party that he elects to end the reference, whereupon the action must proceed as if the reference had not been directed and the referee is not entitled to any fees. Phipps *v.* Carman, 23 Hun 150 [*distinguishing* Waters *v.* Shepherd, 14 Hun 223]; Litch *v.* Brotherson, 16 Abb. Pr. 384, 25 How. Pr. 407. Such statutory provision is not retroactive. Trist *v.* De Cabezas, 2 Rob. (N. Y.) 708. It does not apply to references in special proceedings (Bennett *v.* Pittman, 48 Hun (N. Y.) 612, 1 N. Y. Suppl. 27, 21 Abb. N. Cas. 238; Doyle *v.* New York, 26 Misc. (N. Y.) 61, 56 N. Y. Suppl. 441), nor to a reference by a surrogate to take proof and report (*In re* Robinson, 53 Misc. (N. Y.) 171, 104 N. Y. Suppl. 588). The right to terminate where the referee fails to report within the sixty days is an absolute one (Morrow *v.* McMahon, 71 N. Y. App. Div. 171, 75 N. Y. Suppl. 534; Gregory *v.* Cryder, 10 Abb. Pr. N. S. (N. Y.) 289), and a party cannot be deprived of it against his will (Little *v.* Lynch, 99 N. Y. 112, 1 N. E. 312 [*affirming* 67 How. Pr. 1]; Geib *v.* Topping, 83 N. Y. 46; Morrow *v.* McMahon, *supra*, holding that the court had no power to order a party to take up and file a referee's report before the expiration of the sixty days, and thus deprive him of his right to terminate the reference without being liable for costs, in the event that the referee did not file the report within sixty days. The right to terminate may be exercised as well by executors and administrators as by persons acting in individual capacity. Morrow *v.* McMahon, *supra*. The notice must be given before the report is filed or delivered. O'Neill *v.* Howe, 16 Daly (N. Y.) 181, 9 N. Y. Suppl. 746. That the report is ready for delivery is not equivalent to a delivery (Little *v.* Lynch, 99 N. Y. 112, 1 N. E. 312 [*affirming* 67 How Pr. 1]), and the delivery must be unqualified (Douglas *v.* Smith, 65 Hun (N. Y.) 11, 19 N. Y. Suppl. 630). The notice need not come from the party himself instead of his attorney. Halsey *v.* Carter, 6 Rob. (N. Y.) 535. After notice has been given, all subsequent proceedings by or before the referee are a nullity. Matter of Santos, 31 Misc. (N. Y.) 76, 64 N. Y. Suppl. 572; Gregory *v.* Cryder, *supra*; Ballou *v.* Parsons, 67 Barb. (N. Y.) 19, 52 How. Pr. 164 [*affirmed* in 55 N. Y. 673]. Notice cannot be filed after an insufficient report has been returned. Parker *v.* Baxter, 19 Hun (N. Y.) 410 [*affirmed* in 86 N. Y. 586]; Tallmadge *v.* Lounsbury, 59 N. Y. Super. Ct. 131, 13 N. Y. Suppl. 602 [*affirmed* in 126 N. Y. 655, 27 N. E. 853]. *Contra,* Lederer *v.* Lederer, 108 N. Y. App. Div. 228, 95 N. Y. Suppl. 623. The sixty days commence to run when the cause is finally submitted. Genet *v.* Delaware, etc., Canal Co., 1 N. Y. App. Div. 631, 37 N. Y. Suppl. 610; Patterson *v.* Knapp, 83 Hun (N. Y.) 492, 32 N. Y. Suppl. 32, 24 N. Y. Civ. Proc. 251; Matter of Robinson, 53 Misc. (N. Y.) 171, 104 N. Y. Suppl. 588. The time to hand in briefs must have elapsed. Morrison *v.* Lawrence, 2 How. Pr. N. S. (N. Y.) 72. Where one of three referees dies and a stipulation was entered into that the two surviving referees might render a decision and sign findings, etc., with the same effect as the three referees originally appointed might have done, such stipulation constituted a new submission of the matter, and the sixty days begin to run from the time such stipulation was entered into. Berls *v.* Metropolitan El. R. Co., 15 N. Y. Suppl. 155. The case is not finally submitted so as to start the sixty days running before the proposed finding of fact and conclusions of law are submitted. Burritt *v.* Burritt, 53 Misc. (N. Y.) 26, 102 N. Y. Suppl. 477. The delivery or filing within sixty days may be waived by the parties (Merritt *v.* Merritt, 18 N. Y. App. Div. 313, 45 N. Y. Suppl. 833; Dwyer *v.* Hoffman, 39 Hun (N. Y.) 360 [*affirmed* in 102 N. Y. 725]); Matter of Robinson, *supra,* for a fixed period (Patterson *v.* Knapp, *supra*), or for an indefinite time (Ballou *v.* Parsons, *supra*; Gill *v.* Clark, 31 Misc. (N. Y.) 337, 65 N. Y. Suppl. 406, 7 N. Y. Annot. Cas. 422; Ballou *v.* Parsons, *supra*).

In North Carolina the statute applies only to cases in which the reference is by consent and not to compulsory references, nor to a reference to take an administration account made by order of court. Maxwell *v.* Maxwell, 67 N. C. 383. So the statute does not apply to a reference made by the court to take an account to be used in an action pending before it. Green *v.* Green, 69 N. C. 294.

1. Agricultural Ins. Co. *v.* Darrow, 70 N. Y. App. Div. 413, 75 N. Y. Suppl. 128; Matter of Robinson, 53 Misc. (N. Y.) 171, 104 N. Y. Suppl. 588; Lampman *v.* Smith, 7 N. Y. Suppl. 922, 17 N. Y. Civ. Proc. 19; Mantles *v.* Myle, 26 How. Pr. (N. Y.) 409; Cothran *v.* Knox, 17 S. C. 591. See also Bradford *v.* Cline, 12 Okla. 339, 72 Pac. 369, holding that where a report of a referee on the law and facts is filed after the time designated, and the party against whom judgment is rendered appears at the filing, and moves for new trial, and raises no question as to the time of filing of the report, it will be presumed that the objection was waived.

Practice under old New York code see Litch *v.* Brotherson, 16 Abb. Pr. 384, 25 How. Pr.

of the party objecting to the finding of the auditor has been held to be to file exceptions to the report in the court in which the case is being tried.[2]

C. Where Several Referees. Where there is more than one referee all must meet and hear the evidence of the parties,[3] and consult as to the report to be rendered;[4] but a report of a majority of them is valid,[5] especially where it is so agreed.[6] So, by agreement of the parties, a report may be received from one referee where there are more than one.[7] However, the report must be made by the original referees and not by one of them and other substitutes.[8] At any event failure of one of the referees to sign the report is amendable and the objection cannot be first urged on appeal.[9] Where the report is drawn up by counsel it is not sufficient that the referees sign it separately without meeting together.[10]

D. Form and Contents — 1. Formal Requisites. While it is absolutely necessary that the report, which the referee makes and renders to the court, should be in writing,[11] it need not be in the handwriting of the

407; Ballou *v.* Parsons, 67 Barb. 19, 52 How. Pr. 164 [*affirmed* in 55 N. Y. 673]; Niles *v.* Maynard, 28 How. Pr. 390.

2. Hart *v.* Manson, 120 Ga. 481 47 S. E. 929.

3. See *supra*, VII, B.

4. Townsend *v.* Glenns Falls Ins. Co., 33 N. Y. Super. Ct. 130, holding that after the hearing of a cause before three referees, and a consultation together, in which they, or any two of them, failed to agree upon any conclusion in the case or upon any findings of law or fact, but concluded they could not come to any satisfactory conclusion in the case, and so decided, it is irregular afterward to agree to conclusions of law and fact, and to make and sign a report in the case, without another meeting, conference, or consultation of all the referees.

5. *Indiana.*— Pitts *v.* Langsdale, 32 Ind. 218.

Massachusetts.— Walker *v.* Melcher, 14 Mass. 148; Short *v.* Pratt, 6 Mass. 496.

New Hampshire.— Eastman *v.* Burleigh, 2 N. H. 484; *In re* Farwell, 2 N. H. 123.

New York.— Clark *v.* Fraser, 1 How. Pr. 98; McInroy *v.* Benedict, 11 Johns. 402.

Ohio.— Wesleyan Cemetery *v.* Woodruff, 2 Disn. 216. *Contra*, see Rhodes *v.* Baird, 16 Ohio St. 573.

Oklahoma.— Blevins *v.* Morledge, 5 Okla. 141, 47 Pac. 1068, statute.

Pennsylvania.—Kunckle *v.* Kunckle, 1 Dall. 364, 1 L. ed. 178. But see Russell *v.* Gray, 6 Serg. & R. 145; Tetter *v.* Rapesnyder, 1 Dall. 293, 1 L. ed. 143.

Vermont.— Newel *v.* Keith, 11 Vt. 214; Howard *v.* Conro, 2 Vt. 492.

Virginia.— Coupland *v.* Anderson, 2 Call 106, holding that if there be a reference, by rule of court, to four arbitrators, or any three, and at a subsequent court two others be added, an award by two of the first-named arbitrators and one of the last is sufficient; a majority of the whole number not being required to act by the terms of the rule last entered.

United States.— Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,821, 1 Wash. 448. But see The Nineveh, 18 Fed. Cas. No. 10,276, 1 Lowell 400.

See 42 Cent. Dig. tit. "Reference," § 120.

Contra.— Anderson *v.* Farnham, 34 Me. 161; Reeves *v.* Goff, 2 N. J. L. 143; Sweet *v.* Mathewson, 1 R. I. 420.

Umpire.— Where there are two referees who are to choose an umpire in case they disagree and they do disagree and choose an umpire, his decision is conclusive, although it differs from both the referees. Bassett *v.* Cunningham, 9 Gratt. (Va.) 684. Where the parties agree to submit all differences to two who are to select an umpire in case of disagreement, but during the trial counsel agreed to a third referee and the striking out of the agreement as to an umpire, a report by such three is valid. State *v.* Rawson, 25 W. Va. 23.

6. Cartledge *v.* Cutliff, 21 Ga. 1.

Agreement of parties.— When three auditors are appointed to audit the book-accounts of parties, and two of them make report, parol evidence may be received that the parties agreed to proceed before the two in the absence of the third; and the report will be accepted. Booth *v.* Tousey, 1 Tyler (Vt.) 407.

Where matters in dispute were submitted to three referees and after their appointment it was agreed that two new referees should be agreed upon but the parties were unable to agree in relation to them, a report by the old referees is sufficient. Sweet *v.* Mathewson, 1 R. I. 420.

7. Wright *v.* Macey, 21 Ind. 301.

8. Foltz *v.* Grubb, 4 Pa. L. J. 209.

But if a cause be referred to certain arbitrators or a majority of them, an award made by a majority of the referees named will not be vitiated by other persons, not named in the rule of reference, joining in and signing the award. Carter *v.* Sams, 20 N. C. 321.

9. Newcomb *v.* Wood, 97 U. S. 581, 24 L. ed. 1085.

10. Moore *v.* Ewing, 1 N. J. L. 167, 1 Am. Dec. 195.

11. Watson *v.* Lockwood, 2 Harr. (Del.) 364; Steelman *v.* Stewart, 2 N. J. L. 316. But see Heist *v.* Kohler, 10 Lanc. L. Rev. (Pa.) 140.

A statement by one of the referees cannot be considered as part of the report, unless

referee,[12] and it is no objection that it was drawn up by the counsel for the prevailing party.[13] It should be entitled as of the court ordering the reference,[14] dated,[15] and signed.[16] It is not a fatal defect that the amount is left blank.[17] The report must be complete in itself and papers annexed thereto thereafter will not be considered.[18] Where the report states that it is made pursuant to the order attached, and two orders in different cases are appended, the referee will be presumed to have acted under the rule applying to the case to which the award relates.[19]

2. Sufficiency — a. In General. The report must be final;[20] certain;[21]

it is so made in the report. Wellman *v.* Bulkley, 6 Vt. 299.

A letter written by a referee in an action on a claim against the District of Columbia to an assistant attorney in the department of justice cannot be received in evidence as a referee's report on the case, when the letter was written to him in pursuance of his employment by the attorney-general of the United States, and not as referee. District of Columbia *v.* Talty, 182 U. S. 510, 21 S. Ct. 896, 45 L. ed. 1207.

12. Van Syckle *v.* Stewart, 10 Phila. (Pa.) 547; O'Niel *v.* Taylor, 59 W. Va. 370, 53 S. E. 471.

13. Moore *v.* Ewing, 1 N. J. L. 167, 1 Am. Dec. 195; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909.

14. Chicago Fourth Nat. Bank *v.* Neyhardt, 9 Fed. Cas. No. 4,991, 13 Blatchf. 393, holding, however, that error in entitling a referee's report in the United States district court, when the action was in the circuit court, is unimportant or amenable, where the report was filed and proceeded upon in the circuit court.

15. Eaton *v.* Cole, 10 Me. 137, holding, however, that a report is not void for want of a date, but that it will be presumed, in the absence of proof to the contrary, that it was made at the term when it was accepted, and judgment rendered on it.

16. Daggy *v.* Cronnelly, 20 Ind. 474.

Who must sign.— A referee's report need not be signed by a person chosen by the parties to advise and assist the referee. Daggy *v.* Cronnelly, 20 Ind. 474. The report of referees to whom issues of fact or law, or both, in a pending action, are referred, is not a statutory award, but stands as a special verdict, and need not be attested by a subscribing witness. Hedrick *v.* Judy, 23 Ind. 548.

17. Drath *v.* Deitz, 15 Iowa 436.

18. Newman *v.* Niagara Dist. Mut. F. Assur. Co., 25 U. C. Q. B. 435.

Findings not contained in the report cannot be considered. Bushe *v.* Wright, 118 N. Y. App. Div. 320, 103 N. Y. Suppl. 410 [*affirmed* in 195 N. Y. 509]; Elterman *v.* Hyman, 117 N. Y. App. Div. 519, 102 N. Y. Suppl. 613 [*reversed* on other grounds in 192 N. Y. 113, 84 N. E. 937].

19. Shaw *v.* Wise, 166 Mass. 433, 44 N. E. 345.

20. *District of Columbia.*— Strong *v.* Barbour, 1 Mackey 209.

North Carolina.— Cheek *v.* Davidson, 36 N. C. 68; Waugh *v.* Mitchell, 21 N. C. 510.

Pennsylvania.— See Koch *v.* Davis, 2 L. T. N. S. 80. See also Odenwelder *v.* Odenwelder, 1 Whart. 108.

Tennessee.— Cooley *v.* Dill, 1 Swan 313.

United States.— The Nineveh, 18 Fed. Cas. No. 10,276, 1 Lowell 400, holding that an award in a case of collision which decides the liability, but not the damages, is not valid, because not final.

England.— Eardley *v.* Steer, 1 C. M. & R. 327, 4 Dowl. P. C. 423, 4 L. J. Exch. 293; 5 Tyrw. 1071; Wrightson *v.* Bywater, 6 Dowl. P. C. 359, 1 H. & H. 50, 7 L. J. Exch. 83, 3 M. & W. 199; Harding *v.* Forshaw, 4 Dowl. P. C. 761, 1 M. & W. 415, 1 Tyrw. & G. 472; Clarke *v.* Owen, 2 Harr. & W. 324; Hancock *v.* Reede, 15 Jur. 1036, 21 L. J. Q. B. 78, 2 L. M. & P. 584; Sowdon *v.* Mills, 30 L. J. Q. B. 175, 3 L. T. Rep. N. S. 754; Wild *v.* Holt, 9 M. & W. 161.

See 42 Cent. Dig. tit. "Reference," § 122.

Referring to court what was submitted to referee.—A report is bad which refers to the court what was submitted to the referees, unless the submission provide for the reservation of the question. Kingston *v.* Kincaid, 14 Fed. Cas. No. 7,821, 1 Wash. 448.

Pending an action of ejectment, in pursuance of an agreement of parties to refer to arbitrators the value of the land in controversy, an order of court was made submitting to the referees all matters in dispute between the parties. The award only determined the value of the land, and the court held this to be a sufficient award. Clarke *v.* Reins, 12 Gratt. (Va.) 98.

Disposing of action.— Where a submission of a pending action provides that the award shall be entered up as the judgment of the court, the award need not in express terms dispose of the action. Forrer *v.* Coffman, 23 Gratt. (Va.) 871.

Failure to award costs.—An award in favor of plaintiff which gives damages to him is final, although nothing be said of the costs. Cloud *v.* Hughes, 3 B. Mon. (Ky.) 375.

21. *Georgia.*— Reynolds *v.* Martin, 55 Ga. 628.

Kentucky.— Harding *v.* Wallace, 8 B. Mon. 536; Orear *v.* Singleton, 2 Ky. Dec. 65.

Maryland.— Northern Cent. R. Co. *v.* Canton Co., 24 Md. 492; Garitee *v.* Carter, 16 Md. 309; Dorsey *v.* Dorsey, 11 Gill & J. 299.

New Hampshire.— Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

New Jersey.— Warder *v.* Whitall, 1 N. J. L. 84.

North Carolina.— Allen *v.* McMinn, 76 N. C. 395; Carson *v.* Carter, 64 N. C. 332;

within the scope of the order of reference;[22] must decide all of the matters

Harralson *v.* Pleasants, 61 N. C. 365; Miller *v.* Melchor, 35 N. C. 439; Gibbs *v.* Berry, 35 N. C. 388; Duncan *v.* Duncan, 23 N. C. 466; Carter *v.* Sams, 20 N. C. 321.

Pennsylvania.— Vansyckel *v.* Stewart, 77 Pa. St. 124; Wood *v.* Earl, 5 Rawle 44; Williams *v.* Landon, 14 Serg. & R. 338; Kitchen *v.* Funston, 14 Serg. & R. 337; Murray *v.* Bruner, 6 Serg. & R. 276; Sicard *v.* Peterson, 3 Serg. & R. 468; Kelly *v.* Dougherty, 1 Serg. & R. 434; Santee *v.* Keister, 6 Binn. 36; Richter *v.* Chamberlain, 6 Binn. 34 (holding that an award defining the boundary line of land, in a submission of an action for trespass *quare clausum fregit*, if found in defendants' favor, amounts to a finding of no cause of action); Young *v.* Reuben, 1 Dall. 119, 1 L. ed. 63; Bowen *v.* Mattison, 1 Luz. Leg. Reg. 45; Brown *v.* Long, 4 Pa. L. J. Rep. 436; McCullock *v.* Guetner, 5 Smith Laws 144; Sutphin *v.* Peters, 2 Tr. & H. Pr. 620.

South Carolina.— Coxe *v.* Gent, 1 McMull. 302, holding that an award for plaintiff for "the amount of the note" in controversy is sufficiently certain.

England.— Kendal *v.* Symonds, 3 C. L. R. 323; Nicholson *v.* Sykes, 2 C. L. R. 992, 9 Exch. 357, 23 L. J. Exch. 193; Crosbie *v.* Holmes, 3 D. & L. 566, 10 Jur. 139, 15 L. J. Q. B. 125, 1 Sandf. & C. 20; Lund *v.* Hudson, 1 D. & L. 236, 12 L. J. Q. B. 365; Pearson *v.* Archbold, 2 Dowl. P. C. N. S. 1018, 7 Jur. 447, 12 L. J. Exch. 308, 11 M. & W. 477.

See 42 Cent. Dig. tit. "Reference," § 122.

Application of rule.—An award in favor of one party for a certain sum of money, or that the other carry out his part of the contract, is bad. Henness *v.* Meyer, 4 Whart. (Pa.) 358. That the amount of the award is stated in figures instead of words is unobjectionable. Bozorth *v.* Pricket, 2 N. J. L. 268. An award that one of the parties shall pay a sum of money, without fixing the time from which the money is to bear interest, is void for uncertainty. Orear *v.* Singleton, Ky. Dec. 65. An award is not the less certain and final because the arbitrators refer to a report previously made by a commissioner in chancery, and declare, in general terms, their concurrence with it, instead of specifying the particulars or substance on the award itself, nor because they submit to the court the propriety of their award in point of law, and, as a guide for the court in deciding upon it, state the grounds and reasons thereof. Brickhouse *v.* Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528. A report of auditors to whom it is referred to state an account that plaintiff has no legal demand at present is not bad for uncertainty, but on the ground that the account is not stated therein. Couscher *v.* Tulam, 6 Fed. Cas. No. 3,287, 4 Wash. 442. An award of costs, although without calculating them, is reasonably certain and good. Short *v.* Kincaid, 1 Bibb (Ky.) 420. A report of a certain sum found to be due, and the testimony on which the decision is based is sufficiently certain, although it does not state the facts which the referees find or show what particular claims have been allowed or disallowed. Norton *v.* Rooker, 1 Pinn. (Wis.) 195. An award is sufficiently certain if the matters concluded by it can be ascertained by looking into the whole proceedings, as well before the reference as after. Blackledge *v.* Simpson, 3 N. C. 30, 2 Am. Dec. 614.

Imposing costs on plaintiff as equivalent to finding no cause of action.—A report of referees, finding that plaintiff shall pay the costs, sufficiently decides the suit, since it is equivalent to finding no cause of action. Buckland *v.* Conway, 16 Mass. 396; Traquair *v.* Redinger, 4 Yeates (Pa.) 282. See also Harding *v.* Wallace, 8 B. Mon. (Ky.) 536.

22. Bradley *v.* Clark, 1 Cush. (Mass.) 293; Duncan *v.* Duncan, 23 N. C. 466; Shaw *v.* Atkinson, 3 Yeates (Pa.) 48; York, etc., R. Co. *v.* Myers, 18 How. (U. S.) 246, 15 L. ed. 380. See also Smith *v.* Virgin, 33 Me. 148.

Applications of rule.— Where a pending action for damages was submitted by rule of court, an award in favor of plaintiff for a specific sum and costs to be taxed by the clerk was clearly within the submission. Garitee *v.* Carter, 16 Md. 309. Submission of an action of ejectment will not authorize an award that one party convey a part of the land to the other. Dicken *v.* Griffith, 7 T. B. Mon. (Ky.) 605. It is not improper for a referee, to whom is referred a real action by rule of court to determine which of the parties is entitled to the land, to set out in his report what constitutes the true division of the estate of the parties. Smith *v.* Folsom, 62 Me. 432.

Effect of stipulation.—An award of referees under a rule of court, extending to matters not within the rule, but referred to them by a written agreement, cannot be accepted as the basis of a judgment. Shearer *v.* Mooers, 19 Pick. (Mass.) 308.

Effect of partial invalidity.—A provision in an award "for the costs of the reference and award," not within the terms of the submission, does not vitiate an award good in other respects. Garitee *v.* Carter, 16 Md. 309.

Report of facts.—A referee has no authority to report to the court the facts found by him, unless he is so required by the order of reference; and not being required, if he should report them, they will not be deemed legitimately before the court. Thornburg *v.* Alleman, 17 Ind. 434; Royal *v.* Baer, 17 Ind. 332. If the reference is merely to report the facts together with the evidence, there should not be any conclusions of law. McNaught *v.* McAllister, 93 Ind. 114. But where the facts are to be reported it is not sufficient to merely return the testimony. Jefferson County *v.* Shannon, 51 Pa. St. 221.

It is no objection that the report goes outside the action where within the scope of the order of reference. Cleaveland *v.* Dixon, 4 J. J. Marsh. (Ky.) 226.

referred;[23] must be confined to the matters in issue between the parties;[24] and must not be in excess of the amount of plaintiff's claim.[25] It need not contain a statement of the fees of the referee,[26] although in some jurisdictions it must contain an award of the costs.[27] It may properly be in the alternative, based on the possibility of the conclusions of law being incorrect.[28] The authority under which the referee acts need not be stated.[29]

b. Direction of Judgment. Except where the statute otherwise provides,[30] a

Scope of order of reference as affecting referee's authority see *supra*, VII, C.

23. Pinsker *v.* Pinsker, 44 N. Y. App. Div. 501, 60 N. Y. Suppl. 902; Brown *v.* McFarland, 41 Pa. St. 129, 80 Am. Dec. 598; Heckers *v.* Fowler, 2 Wall. (U. S.) 123, 17 L. ed. 759, holding that a reference with direction "to hear and determine all the issues" in a case does not require the referee to report them all, but it is answered by his reporting the sum due after hearing all the issues.

Damages.— Where the referees find for defendant, as to the cause of action, it is unnecessary, in their report, to notice the special damages alleged by plaintiff. Fuller *v.* Wright, 10 Vt. 512.

Where the reference is of part of the issues, the report need not refer to a judgment on an issue of law rendered by the court before the reference. Breckenridge Co. *v.* Perkins, 14 N. Y. App. Div. 629, 43 N. Y. Suppl. 800.

Rulings on motions and evidence.— Where a cause not at issue is, by consent, referred to complete the issues, take the evidence, and report his conclusions, the report is not defective because it fails to show rulings upon demurrer to the pleadings. Beard *v.* Hand, 88 Ind. 183. In a reference case, there being no order made pursuant to section 32 of the act concerning arbitrations and references, requiring referee to report his decision in admitting or rejecting any witness, there is no necessity for such a report. State *v.* Petticrew, 19 Mo. 373.

24. Fountain *v.* Harrington, 3 Harr. (Del.) 22; Mathews *v.* Jones, 1 E. D. Smith (N. Y.) 429; Moore *v.* Martine, 107 N. Y. Suppl. 652.

Joint liability.—An award made against two defendants on a joint liability, which finds a certain sum due by one, and another sum due by the other, is erroneous. Soxman *v.* Soxman, 3 Penr. & W. (Pa.) 44.

An award against two, where the action is against one, is fatally erroneous. Stewart *v.* Abrams, 7 Watts (Pa.) 448.

Issues raised by pleadings.— The referee may find under a general reference as to any matter distinctly put in issue by the pleadings. Hanner *v.* McAdoo, 86 N. C. 370. Findings not relating to issues raised by the pleadings are immaterial. Perseverance Min. Co. *v.* Bisaner, 87 Ga. 193, 13 S. E. 461; Romeyn *v.* Sickles, 108 N. Y. 650, 15 N. E. 698; Simms *v.* Wallace, 46 Hun (N. Y.) 172; Barbeau *v.* Picotte, 13 N. Y. Suppl. 132; Sutton *v.* Clarke, 40 Oreg. 508, 67 Pac. 742. Such findings cannot be considered in the determination of the case. O'Brien *v.* St. Paul, 18 Minn. 176. A referee need not pass upon questions admitted by the pleadings. Brainard *v.* Hastings, 3 Minn. 45. An award may properly include an item for a claim mentioned in the declaration whereof plaintiff gave defendant no notice until long after the commencement of the suit. Weeden *v.* Berry, 10 R. I. 288. If the reference of a cause is general, it will be no valid objection to the report that the referee acted upon a view of the subject not strictly within the scope of the declaration, provided the declaration might legally have been so amended as to embrace the subject in that view. Clifford *v.* Richardson, 18 Vt. 620.

Accounts.— The report of a referee, in an action on an account, finding that several items thereof were furnished under a contract between the parties, is not objectionable on the ground that it finds on an issue not submitted to the referee, since it is competent to recover on an account, although the items thereof were furnished under a contract. Haywood *v.* Woods, 28 Iowa 563. So a referee appointed to determine the validity of a claim presented against a partnership, in a proceeding for its dissolution, cannot allow a greater sum than is specified in the claim, although the evidence shows that the claimant is entitled to a greater amount. Newhall *v.* Wyatt, 68 Hun (N. Y.) 1, 22 N. Y. Suppl. 828 [*reversed* on other grounds in 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712].

As affecting admissibility of report see *infra*, VIII, I, 4.

Authority of referees as affected by scope of pleadings see *supra*, VII, D.

25. Biggs *v.* Funk, 5 Watts (Pa.) 478. But see Sutton *v.* Dickinson, 9 Leigh (Va.) 142.

26. Smith *v.* Smith, 32 Me. 23.

27. See COSTS, 11 Cyc. 148.

28. Hudson *v.* Hudson, 98 Ga. 147, 26 S. E. 482.

29. Shaw *v.* Wise, 166 Mass. 433, 44 N. E. 345. But see Crisp *v.* Love, 65 N. C. 126 (holding that when two persons are appointed arbitrators, and it is provided in the submission that they may select an umpire, it must appear on the face of the award that the appointment of the umpire was the concurrent act of both arbitrators); Turner *v.* Moffett, 2 Wash. (Va.) 70 (where a judgment upon an award was reversed because the award was stated to be made in pursuance of an order of reference, the date of which was misrecited).

30. Gold *v.* Serrell, 2 Misc. (N. Y.) 224, 21 N. Y. Suppl. 1078 [*affirmed* in 6 Misc. 124, 26 N. Y. Suppl. 5]; Devlin *v.* New York, 13 N. Y. Suppl. 924, 27 Abb. N. Cas. 311

report made by a referee of the proceedings before him need not direct the judgment to be entered thereon.[31]

c. Where Several Actions or Cross Suits Are Referred. Where more than one action is referred, there must generally be separate reports,[32] although in some cases a single award has been held sufficient.[33] Where cross suits are referred, a single award that one of the parties is indebted to the other for a certain balance of account is sufficient;[34] but if cross suits be referred to the same referees, and they make up their report in each on the idea that the one shall be a set-off to the other, the court will set aside both, if the suits be for demands which cannot legally be set off.[35]

3. Findings of Fact and Conclusions of Law — a. In General. Where the reference is to hear and determine, the report ordinarily contains findings of fact and conclusions of law.[36] But except where a statute,[37] or the order of reference,[38]

[*affirmed* in 128 N. Y. 615, 28 N. E. 253]; Hinds *v.* Kellogg, 13 N. Y. Suppl. 922.

Sufficiency of compliance with statute.— A referee's report which makes evident the terms of the judgment to which the successful party is entitled is a sufficient compliance with Code Civ. Proc. § 1022, which required a referee's report to direct the judgment to be entered thereupon. Gold *v.* Serrell, 2 Misc. (N. Y.) 224, 21 N. Y. Suppl. 1078 [*affirmed* in 6 Misc. 124, 26 N. Y. Suppl. 5]. The referee need not formulate the judgment, but the court must be able to ascertain from the report the particular form and terms of the judgment to which the successful party is entitled. Devlin *v.* New York, 13 N. Y. Suppl. 924, 27 Abb. N. Cas. 311 [*affirmed* in 128 N. Y. 615, 28 N. E. 253]; Hinds *v.* Kellogg, 13 N. Y. Suppl. 922. Where a referee's report shows certain findings of fact and conclusions of law, and directs judgment according to the conclusions of law, after providing for a dismissal of the complaint as to defendant L, it is sufficient in form, and it is error to send back the report with directions to the referee to prescribe the form of the judgment to be entered against one of defendants other than L. Huffman *v.* Beever, 69 Hun (N. Y.) 557, 23 N. Y. Suppl. 1137.

31. Brown *v.* Cochran, 11 N. H. 199; Hancock *v.* Hancock, 22 N. Y. 568; Coope *v.* Bowles, 42 Barb. (N. Y.) 87, 18 Abb. Pr. 442, 28 How. Pr. 10; Longman *v.* East, 3 C. P. D. 142, 47 L. J. C. P. 211, 38 L. T. Rep. N. S. 1, 26 Wkly. Rep. 183.

32. Craig *v.* Craig, 9 N. J. L. 198; Groff *v.* Musser, 3 Serg. & R. (Pa.) 262. See also Todd *v.* Rough, 10 Serg. & R. (Pa.) 18.

Supplemental report.— Where a referee made one report in separate actions referred to him, and afterward filed a supplemental report, distinguishing the sum found in each action, the report will be set aside, as the referee had no power to consolidate. Hart *v.* James, 1 Dall. (Pa.) 355, 1 L. ed. 173.

33. Johnson *v.* Warren, 10 Ky. L. Rep. 36; Willard *v.* Bickford, 39 N. H. 536, holding that the most judicious course undoubtedly is for referees to make a separate award in each case, but if they err in this respect, and draw up an award embracing their decision in more than one case, their award will not be held invalid on that account, if it is clear, intelligible, and definite in reference to each case.

Where several actions between the same parties were referred to referees under a rule for each action, the referees having heard the actions together, with the consent of all parties concerned, a general report by them of the aggregate sum due on them all will not be set aside. Brown *v.* Scott, 1 Dall. (Pa.) 145, 1 L. ed. 74.

34. Coupland *v.* Anderson, 2 Call (Va.) 106.

35. Lyle *v.* Clason, 1 Cai. (N. Y.) 323.

36. See cases cited *infra*, this note.

What constitutes a finding.—A mere statement by an auditor that personal inspection of the property in dispute had considerable influence on his mind, and much of the evidence was unimportant in the proper adjudication of the question submitted, is not a finding by the auditor, and cannot be excepted to as such. Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666.

Whether finding is one of law or fact.— Blum *v.* Mayer, 189 N. Y. 153, 81 N. E. 780 [*affirming* 113 N. Y. App. Div. 242, 99 N. Y. Suppl. 22, 113 N. Y. App. Div. 247, 99 N. Y. Suppl. 25]. A finding that after the consolidation of the business of partners, a retainer of one of them was agreed to be partnership property, and that the partner receiving it should be charged therefor in his account, was a finding of fact and not a conclusion of law. Young *v.* Winkley, 191 Mass. 570, 78 N. E. 377. Findings that certain matters for which marks were applied were not waived, and that, until the use of the marks, defendant, by continuing to employ the servant with knowledge of his delinquencies, waived the same, were mere conclusions of law. Daniell *v.* Boston, etc., R. Co., 184 Mass. 337, 68 N. E. 337. Where the evidence is undisputed, a finding expressed as a finding of fact is in effect a conclusion of law. Mt. Sinai Hospital *v.* Hyman, 92 N. Y. App. Div. 270, 87 N. Y. Suppl. 276. When the facts which constitute a transaction are stated in detail in a referee's report, his finding as to their effect is a conclusion of law. Hotchkiss *v.* Mosher, 48 N. Y. 478.

37. See the statutes of the several states.

38. Gilmore *v.* Putnam County, 35 Ind.

otherwise provides, a general finding instead of specific findings is sufficient.[39] The referee need not give his reasons for his findings.[40] Where conflicting evidence raises a doubt in the referee's mind, he should find the facts adversely to the party holding the affirmative, and not report his inability to find them.[41] In some jurisdictions, where findings of law are reported, a brief reference to the authorities on which such findings are predicated must be embodied in the report.[42]

b. Facts and Conclusions to Be Found. The report, where the reference is to try all the issues, must ordinarily contain only what the findings of the court are required to include in case of a trial by the court without a jury.[43] It must include the facts found and the conclusions of law on those facts.[44] All material facts within the issues must be specifically found,[45] whether the evidence is conflicting

344; Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865.

39. McShane *v.* Gray, 13 Iowa 504; Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865. See also Hihn *v.* Peck, 30 Cal. 280; Pitts *v.* Langsdale, 32 Ind. 218.

Implied findings.— Where a referee sets out in his report that defendant is entitled to a discharge for certain amounts, he is to be taken as finding the facts necessary to support the particular item of discharge. Vest *v.* Cooper, 75 N. C. 519.

Arbitrators as distinguished from statutory referees are not required to find the facts. Ezzell *v.* Rowland Lumber Co., 130 N. C. 205, 41 S. E. 99; Keener *v.* Goodson, 89 N. C. 273; Lusk *v.* Clayton, 70 N. C. 184.

40. Newell *v.* Chesley, 122 Mass. 522; McMurphy *v.* Walker, 20 Minn. 382; Miller *v.* Pilling, 9 Q. B. D. 736, 51 L. J. Q. B. 481, 47 L. T. Rep. N. S. 536.

Where a party desires explanation as to how a referee has calculated the aggregate amount of a judgment, he should apply for an order requiring the referee to show how he arrived at the amount. Weed Sewing Mach. Co. *v.* Kaulback, 3 Thomps. & C. (N. Y.) 304.

41. Bradley *v.* McLaughlin, 8 Hun (N. Y.) 545.

42. Lackawanna Iron, etc., Co. *v.* Fales, 5 Leg. Gaz. (Pa.) 14.

43. Lundell *v.* Cheney, 50 Minn. 470, 52 N. W. 918.

44. Danaher *v.* Ward, 40 Mich. 300 (holding that a finding of a referee which fails to state a distinct conclusion or to set forth sufficient facts to lead to such a conclusion is incomplete); Weirich *v.* Cook, 39 Mich. 134 (holding that a referee's mere statement of his conclusions will not sustain a judgment, but there should also be such a statement of facts as to show that his conclusions are legitimate); Tilman *v.* Keane, 1 Abb. Pr. N. S. (N. Y.) 23; Deming *v.* Post, 1 Code Rep. (N. Y.) 121; Moore *v.* Johnson, 7 S. C. 303.

Questions of law.— Reports of auditors must present all the questions of law by them decided which the parties require to have examined by the court. Thompson *v.* Arms, 5 Vt. 546. But *compare* King *v.* Hutchins, 26 N. H. 139.

Report merely dismissing complaint.— Under N. Y. Code Civ. Proc. § 1022, directing the report of a referee on the trial of issues of fact to state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, a referee's report, stating that after hearing the cause, and considering and overruling objections to the evidence, he dismissed the complaint, is insufficient. Rowlands *v.* Young Men's Christian Assoc., 32 Misc. (N. Y.) 421, 66 N. Y. Suppl. 577 [*affirmed* in 54 N. Y. App. Div. 618, 66 N. Y. Suppl. 1143].

45. *California.*— Clark *v.* Hewitt, 136 Cal. 77, 68 Pac. 303; Pratalongo *v.* Larco, 47 Cal. 378, holding, however, that the referee need not find the facts proved in respect to each item of an account.

Iowa— Johnson *v.* Mantz, 69 Iowa 710, 27 N. W. 467; Haywood *v.* Woods, 28 Iowa 563, holding that the report, in an action on an account, finding that several items thereof were furnished under a contract between the parties, is not objectionable because it fails to give the precise terms of such contract, or to find as to each item embraced in a long account.

Kansas.— Walker *v.* Hosack, 56 Kan. 468, 43 Pac. 781.

Massachusetts.— McMahan *v.* O'Connor, 137 Mass. 216 (holding that in an action for conversion, a finding that defendant "owes the plaintiff upon the various items of the account the sum of money respectively opposite each item," setting forth a sum certain in respect to each, is a sufficient finding of the fact that the goods belonged to plaintiff); Preston *v.* Knight, 120 Mass. 5 (holding that a failure to find a material question of fact invalidates the report, although the referee has treated the question of fact as a question of law).

Michigan.— Danaher *v.* Ward, 40 Mich. 300.

Minnesota.— Bryant *v.* Lord, 19 Minn. 396 (holding that the omission to find on a material fact cannot be supplied by the court but the remedy is by application to the referee for a supplementary finding); Brainard *v.* Hastings, 3 Minn. 45. *Compare* Caldwell *v.* Arnold, 8 Minn. 265.

Missouri.— Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976.

New York.— Alcock *v.* Davitt, 179 N. Y. 9, 71 N. E. 264 [*reversing* 82 N. Y. Suppl. 1093]; Hudson, etc., R. Co. *v.* Wendel, 115 N. Y. App. Div. 168, 100 N. Y. Suppl. 737 (holding that it is not sufficient to file a

or uncontradictory;[46] but other facts need not be negatived in express terms since facts not found are negatived by implication.[47] Merely evidentiary facts need not be found,[48] nor references which may be drawn from facts already found,[49] nor need the effect of parts of the evidence be specifically found.[50] So where general findings of every material fact in issue are made, it is not necessary to answer numerous questions about minute details.[51]

c. Separate Statement of Findings of Fact and Conclusions of Law.[52] Findings of fact and conclusions of law are generally required to be stated separately.[53]

separate paper showing the facts found at the parties' request, since all the findings must be included in the report); Griscom *v.* New York, 12 N. Y. 586; Geneva Mineral Spring Co. *v.* Steele, 111 N. Y. App. Div. 706, 97 N. Y. Suppl. 996; La Grange *v.* Merritt, 88 N. Y. App. Div. 279, 84 N. Y. Suppl. 1092; Cable Flax Mills *v.* Early, 72 N. Y. App. Div. 213, 76 N. Y. Suppl. 191; Wright *v.* Sanders, 28 How. Pr. 395; Brown *v.* New York Cent. R. Co., 26 How. Pr. 32; Van Steenburgh *v.* Hoffman, 6 How. Pr. 492; Donohoe *v.* Champlin, Code Rep. N. S. 138 (holding that a report dismissing a complaint on an issue of law is a report on the whole issue). *Compare* Tomlinson *v.* New York, 23 How. Pr. 452 [*reversed* in 44 N. Y. 601].

Oregon.— Sutton *v.* Clarke, 40 Oreg. 508, 67 Pac. 742.

Pennsylvania.— Philadelphia Co. *v.* U. S. Improvement Co., 180 Pa. St. 235, 36 Atl. 742 (holding, however, that a specific finding of a fact by a referee not having been asked, his general findings equivalent thereto are sufficient); Sweigard *v.* Wilson, 106 Pa. St. 207; Lewis *v.* Mans, 4 Kulp 285 (holding, however, that it is not necessary to report specifically on every disputed item of testimony where no request therefor has been made); Tharpe's Estate, 2 Phila. 280; Stevens *v.* McAlpin, 4 Luz. Leg. Reg. 97.

Vermont.— Weeks *v.* Prescott, 53 Vt. 57.

See 42 Cent. Dig. tit. "Reference," § 135.

Failure to find concerning a counter-claim referred renders the report insufficient. La Grange *v.* Merritt, 88 N. Y. App. Div. 279, 84 N. Y. Suppl. 1092; Cable Flax Mills *v.* Early, 72 N. Y. App. Div. 213, 76 N. Y. Suppl. 191; Sutton *v.* Clarke, 40 Oreg. 508, 67 Pac. 742.

A report dismissing a complaint on an issue of law is a report on the whole issue. Donohue *v.* Champlin, Code Rep. N. S. (N. Y.) 138.

Issue as to which no evidence is produced. — But the referee need not report formally on issues as to which no evidence was introduced. Ingraham *v.* Gilbert, 20 Barb. (N. Y.) 151. See also Cook *v.* Stevenson, 30 Mich. 242. So where a referee is appointed to determine two questions, a report as to one and that no evidence was introduced as to the other is not incomplete. Montifiori *v.* Engels, 3 Cal. 431.

Where ownership is in issue before a referee, it should not be treated as a mixed question of law and fact, but the facts upon which the ownership depends should be set forth in his report. Reese *v.* Powell, 4 C. Pl. (Pa.) 70.

Findings as to abandoned part of cause of action.— Where plaintiff abandons part of the cause of action stated in his complaint, the referees are not required to report to the court the facts and their conclusions of law relative to the part so abandoned. Barnard *v.* Daggett, 68 Ind. 305.

It is not sufficient to say what the facts appear to be, but a finding must contain the facts as fully as a special verdict. Harris *v.* Hay, 111 Pa. St. 562, 4 Atl. 715.

An argument in support of the decision cannot take the place of the distinct or separate findings of fact and conclusions of law. Miller *v.* Dunlap, 10 Pa. Cas. 102, 13 Atl. 321.

46. Meacham *v.* Burke, 54 N. Y. 217.

47. Sermont *v.* Baetzer, 49 Barb. (N. Y.) 362; Nelson *v.* Ingersoll, 27 How. Pr. (N. Y.) 1.

48. Wilson *v.* Knapp, 42 N. Y. Super. Ct. 25 [*affirmed* in 70 N. Y. 596]; Lane *v.* Borst, 5 Rob. (N. Y.) 609.

49. Benjamin *v.* New York El. R. Co., 17 N. Y. Suppl. 908.

50. Lundell *v.* Cheney, 50 Minn. 470, 52 N. W. 918.

51. Republic County School-Dist. No. 3 *v.* Howell, 44 Kan. 285, 24 Pac. 365.

52. **Failure to state separately as ground for recommittal** see *infra*, VIII, I, 8, c, (1).

53. *California.*— Lambert *v.* Smith, 3 Cal. 408.

Indiana — Wabash, etc., Canal Trustees *v.* Huston, 12 Ind. 276. *Compare* Way *v.* Fravel, 61 Ind. 162; Gilmore *v.* Putnam County, 35 Ind. 344; Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

Kansas.— McMullen *v.* Schermerhorn, 48 Kan. 739, 30 Pac. 188; Oakes *v.* Jones, 11 Kan. 443.

Minnesota.— McMurphy *v.* Walker, 20 Minn. 382; Bazille *v.* Ullman, 2 Minn. 134.

New York.— Lederer *v.* Lederer, 108 N. Y. App. Div. 228, 95 N. Y. Suppl. 623; Roberts *v.* Carter, 28 Barb. 462; Snook *v.* Fries, 19 Barb. 313; Church *v.* Erben, 4 Sandf. 691; Matter of Havemeyer, 35 N. Y. Suppl. 480; 25 N. Y. Civ. Proc. 59; *In re* Harmony, etc., Ins. Co., 14 Abb. Pr. N. S. 292 note; Marston *v.* Johnson, 13 How. Pr. 93; Doke *v.* Peek, 1 Code Rep. 54. See also Matter of Schroeder, 113 N. Y. App. Div. 221, 99 N. Y. Suppl. 174.

North Carolina.— Earp *v.* Richardson, 75 N. C. 84; Klutts *v.* McKenzie, 65 N. C. 102.

Ohio.— Riley *v.* Coghill, 1 Cinc. Super. Ct. 241.

However, the report need not be paragraphed or arranged under appropriate subdivisions, since all that is needed is that the conclusions of fact and law be separately stated somewhere in the report and that they be not so blended as to render it impossible to distinguish the one from the other.[54] Furthermore, it is no objection that findings of fact are classified as conclusions of law or *vice versa*.[55]

d. Requisites and Sufficiency. The findings must be specific,[56] definite,[57] and embrace all the material questions referred.[58] A mere detail of the testimony of the witnesses is no finding of facts within the meaning of the law.[59] So the findings must be consistent with each other,[60] and the conclusions of law must be supported by the findings of fact.[61] Findings of the facts and conclusions must be such that a judgment can be rendered thereon.[62] But it is not the duty of a referee to set forth the processes by which he arrived at his findings of fact.[63] Ordinarily the referee should not report in the first instance questions as to the admissibility of evidence, but should himself decide them.[64] Findings based on testimony directly bearing on the point cannot be objected to by defendant where the evidence clearly preponderates in favor of plaintiff.[65] Where there are a

Pennsylvania.— Marr *v.* Marr, 103 Pa St. 463; Reese *v.* Powell, 4 C. Pl. 70; Weil *v.* Frauenthal, 2 Luz. Leg. Reg. 96.

See 42 Cent. Dig. tit. "Reference," § 134.

To what references statute applicable.— The statute requiring the referee to state separately the facts found and the conclusions of law is applicable only to references to hear and determine all issues of fact. Jones *v.* Gilbert, 117 N. Y. App. Div. 775, 102 N. Y. Suppl. 983; Moore *v.* Martine, 107 N. Y. Suppl. 652. Where the reference is only an incident to the proceedings, and not the trial of the "whole issues of fact," the referee is not bound to separately state the facts found. Teale *v.* Tilyou, 127 N. Y. App. Div. 287, 111 N. Y. Suppl. 165.

Application of rule.— The report of a referee reciting that he finds that plaintiff has failed to establish the facts necessary to sustain his complaint, and that defendant is therefore entitled to a judgment dismissing the complaint with costs, is a mere general conclusion that the complaint should be dismissed, and is insufficient for failing to state findings of fact and conclusions of law separately. Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385.

54. Young *v.* Scoville, 99 Iowa 177, 68 N. W. 670.

55. Ferris *v.* Quimby, 41 Mich. 202, 2 N. W. 9; Sherman *v.* Hudson River R. Co., 64 N. Y. 254; Wright *v.* Loud, 39 N. Y. App. Div. 270, 56 N. Y. Suppl. 959; Evans *v.* Howell, 75 Hun (N. Y.) 199, 27 N. Y. Suppl. 46.

56. *Kansas.*— McMullen *v.* Schermerhorn, 48 Kan. 739, 30 Pac. 188.

Michigan.— Neib *v.* Hinderer, 42 Mich. 451, 4 N. W. 159.

New York.— Buckingham *v.* Payne, 36 Barb. 81, holding that the report of a referee must exhibit findings upon the facts as explicitly and distinctly as the special verdict of a jury.

North Carolina.— Lanning *v.* Transylvania County, 106 N. C. 505, 11 S. E. 622.

Pennsylvania.— Blackman *v.* Smith, 3 Kulp 140.

South Carolina.— Zimmerman *v.* Autley, 6 S. C. 379.

See 42 Cent. Dig. tit. "Reference," § 135.

57. Matter of Baldwin, 87 Hun (N. Y.) 372, 34 N. Y. Suppl. 435, 25 N. Y. Civ. Proc. 6; Fairman *v.* Brush, 60 Hun (N. Y.) 442, 15 N. Y. Suppl. 44, 21 N. Y. Civ. Proc. 155, 27 Abb. N. Cas. 197. See also Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

58. See *supra*, VIII, D, 3, b.

59. Walton *v.* Walton, 17 Mo. 376.

60. Dickenson *v.* Moore, 117 Ga. 887, 45 S. E. 240; Stevens *v.* Fellows, 70 N. H. 148, 47 Atl. 135; Larkins *v.* Maxon, 103 N. Y. 680, 9 N. E. 56; Ketchum *v.* Herrington, 18 N. Y. Suppl. 429; Smith *v.* Paul, 17 N. Y. Suppl. 420; Studer *v.* Bleistein, 1 N. Y. Suppl. 187; Williams *v.* Moulsdale, 4 Jur. 1038, 10 L. J. Exch. 2, 7 M. & W. 134.

Findings held not inconsistent.—A finding, in an action on a building contract, that defendant, by reason of his knowledge of a variation from the contract and failure to object, assented to the variation, is not inconsistent with a finding that no agreement to vary was proved. Danforth *v.* Freeman, 69 N. H. 466, 43 Atl. 621.

61. Bevier *v.* Wright, 30 Mich. 484; Field *v.* Field, 73 N. Y. 588; Jarvis *v.* Jarvis, 66 Barb. (N. Y.) 331; Baltzer *v.* Nicolay, 35 N. Y. Super. Ct. 203 [*reversed* on other grounds in 53 N. Y. 467]; Stephens *v.* Hall, 2 Rob. (N. Y.) 674; Rogers *v.* Beard, 20 How. Pr. (N. Y.) 282. *Compare* Robinson *v.* Hooker, 174 Mass. 490, 55 N. E. 178, holding that where a case is sent to an auditor, it is not necessary that the specific findings in his report should be full enough to justify the conclusion reached, unless the conclusion purports to be on those findings and no others.

62. Reid *v.* State, 58 Ind. 406.

63. Dolan *v.* Merritt, 18 Hun (N. Y.) 27.

64. Dougherty's Estate, 14 Phila. (Pa.) 288.

65. Heim *v.* Link, 52 N. Y. Super. Ct. 547.

large number of independent causes of action, there should be separate findings for each cause of action.[66]

e. Reservation of Questions of Law For Court. In some jurisdictions a referee authorized to decide questions of law and fact may in his report leave to the court the decision of questions of law arising in his investigation.[67]

f. Requests For Findings. In some jurisdictions either party may present to the referee requests for particular findings of fact and conclusions of law.[68] If no requests are presented it has been held that special findings need not be made,[69] and the failure to find particular facts is not preserved for review.[70] Statutory provisions as to the time when the requests must be submitted,[71] the form and contents of the request,[72] and the manner in which the ruling thereon should be noted [73] should be strictly followed. Upon request, the referee must find a material

66. State *v.* Peterson, 142 Mo. 526, 39 S. W. 453, 40 S. W. 1094.

67. Hooper *v.* Taylor, 39 Me. 224; Barnard *v.* Spofford, 31 Me. 39; Cullen *v.* Sears, 112 Mass. 299; Knight *v.* Wilder, 2 Cush. (Mass.) 199, 48 Am. Dec. 660; Barnet *v.* Smith, 30 N. H. 256, 64 Am. Dec. 290; Darby *v.* St. Albans First Nat. Bank, 57 Vt. 370. *Contra*, Sutton *v.* Horn, 7 Serg. & R. (Pa.) 228; Hoffman *v.* Walborn, 1 Pearson (Pa.) 18.

When question is referred.— The interpretation of a written contract sued on, given by a referee under a general reference, is final; and no intention to submit to the court any question of law thereon is to be inferred from his stating in detail the grounds of his decision. Rogers *v.* Mayer, 151 Mass. 279, 23 N. E. 836.

68. Matter of Mellen, 56 Hun (N. Y.) 553, 9 N. Y. Suppl. 929. And see the statutes of the several states.

Request to report facts found.—A referee appointed to decide a matter in issue in a pending suit may report the facts found by him if so requested. Ware *v.* Adams, 12 Ind. 359.

In Michigan there is no general rule requiring a referee to supplement his general findings with special findings in answer to particular requests. Odd Fellows *v.* Morrison, 42 Mich. 521, 4 N. W. 739.

Interrogatories to be answered yes or no.— A submission of a list of interrogatories, to be answered "yes," or "no," by the referee, was properly refused. Breitkreutz *v.* Holton Nat. Bank, 70 Kan. 698, 79 Pac. 686.

69. Hanley *v.* Crowe, 50 Hun (N. Y.) 605, 3 N. Y. Suppl. 154; Graff *v.* Ross, 47 Hun (N. Y.) 152; Budlong *v.* Lewis, 25 Hun (N. Y.) 310; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. (N. Y.) 411; Philadelphia Co. *v.* United Gas Imp. Co., 180 Pa. St. 235, 36 Atl. 742.

70. Stewart *v.* Morss, 79 N. Y. 629; Ashley *v.* Marshall, 29 N. Y. 494; Grant *v.* Morse, 22 N. Y. 323; Mosher *v.* Hotchkiss, 3 Abb. Dec. (N. Y.) 326, 2 Keyes 589, 3 Keyes 161; Carroll *v.* Staten Island R. Co., 65 Barb. (N. Y.) 32; Kemple *v.* Darrow, 39 N. Y. Super. Ct. 447; Bishop *v.* Empire Transp. Co., 37 N. Y. Super. Ct. 12; Torrey *r.* Standish, 16 N. Y. Suppl. 5; Clark *v.* Swift, 14 N. Y. Suppl. 61; Burchell *v.* Osborne, 5 N. Y. Suppl. 404; Loonam *v.* Myers, 1 N. Y. St. 276; Morgan *v.* Skidmore, 3 Abb. N. Cas. (N. Y.) 92; New York Car Oil Co. *v.* Richmond, 10 Abb. Pr. (N. Y.) 185, 19 How. Pr. 505; Rouse *v.* Bowers, 111 N. C. 360, 16 S. E. 684.

Refusal to find as a ruling upon a question of law.— Under Code Civ. Proc. § 993, providing that, upon the trial of an issue of fact by a referee, a refusal to make any finding whatever upon a question of fact, where a request to find is made, or a finding without any evidence tending to sustain it, is a ruling upon a question of law, it is not necessary that a party request a finding of fact, in order to have the finding, as made, reviewed, as to the sufficiency of evidence to sustain it. Raabe *v.* Squier, 148 N. Y. 81, 42 N. E. 516 [*reversing* 5 Misc. 220, 25 N. Y. Suppl. 463].

In New Hampshire particular facts proved need not be found where the order requires it only upon request and neither party makes a request so to find. Janvrin *v.* Janvrin, 58 N. H. 144.

71. Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79 (holding that a request for special findings of fact is not seasonably made, when it is sent to the referee two days after he files his report); Moyer *v.* New York Cent., etc., R. Co., 88 N. Y. 351 (holding, however, that, although requests for findings be not within the code, section 1023, presented to the referee before he has made his report, yet if no objection be then made, and they appear in the record, the appellate court will regard them as properly there).

72. Davis *v.* Leopold, 87 N. Y. 620.

In New York proper practice requires that a request to find either facts or law should be plainly stated in a single proposition, the whole of which can be granted or refused. Steubing *v.* New York El. R. Co., 138 N. Y. 658, 34 N. E. 369; Davis *v.* Leopold, 87 N. Y. 620. Where a request to find embraces several propositions, some of which the party making the request is entitled to have found and some not, a refusal of the request as a whole is not error. Steubing *v.* New York El. R. Co., *supra*.

73. McCulloch *v.* Dobson, 133 N. Y. 114, 30 N. E. 641.

Time.— The referee may note his rulings on requests, after the delivery or filing of

fact of which there is legal proof and no proof to the contrary, nor proof of facts or circumstances showing its improbability;[74] but a request to find an immaterial fact,[75] or facts not within the issues,[76] or merely incidental matters of fact,[77] or a fact which has been already substantially covered by the findings embodied in the report,[78] or a fact which is but a link in the chain of propositions logically leading to a contrary result to the finding which is sustained by evidence,[79] should be denied. Refusing to make particular findings is harmless where no prejudice results.[80]

g. Defects and Errors.[81] Where the referee exceeds his authority by reporting conclusions in addition to the facts the court may reject the former and find the issues on the facts reported;[82] but if judgment is rendered on the report, where conclusions of law have been returned where not called for, the report is not invalid unless prejudice is shown by the act of the referee.[83] Erroneous conclusions of law upon an immaterial or unimportant question do not of themselves vitiate the report nor require it to be set aside.[84] Mistakes in the report, when immaterial, are not fatal.[85]

4. Report of Evidence. Except where so required by the order of reference,[86] or where so required by the provisions of the statute controlling the reference,[87]

the report, where the failure to pass them was due to inadvertence. Friedman *v.* Bierman, 43 Hun (N. Y.) 387.

Including in report.—A proposed finding of fact marked "Found" by a referee, but not incorporated in his report, is ineffectual for any purpose. Holmes *v.* Seaman, 117 N. Y. App. Div. 381, 102 N. Y. Suppl. 616 [*affirmed* in 191 N. Y. 512, 84 N. E. 1114].

74. Beck *v.* Sheldon, 48 N. Y. 365.

Conflicting evidence.— But the refusal to make findings asked is not error where it appears that the evidence bearing on such finding was conflicting. Robinson *v.* Smith, 3 Silv. Sup. (N. Y.) 490, 7 N. Y. Suppl. 38.

75. Keokuk County *v.* Howard, 42 Iowa 29; Robinson *v.* Smith, 3 Silv. Sup. (N. Y.) 490, 7 N. Y. Suppl. 38. *Compare* Livingston *v.* Manhattan R. Co., 138 N. Y. 76, 33 N. E. 732 [*reversing* 60 N. Y. Super. Ct. 31, 17 N. Y. Suppl. 486, 21 N. Y. Civ. Proc. 309, 27 Abb. N. Cas. 411].

Immaterial facts, although found as requested, need not be included in the report. Livingston *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 31, 17 N. Y. Suppl. 486, 21 N. Y. Civ. Proc. 309, 27 Abb. N. Cas. 411 [*reversed* on other grounds in 138 N. Y. 76, 33 N. E. 732].

76. Keokuk County *v.* Howard, 42 Iowa 29; Wiltsie *v.* Eaddie, 4 Abb. Dec. (N. Y.) 624, 4 Transcr. App. 481, 4 Abb. Pr. N. S. 392.

77. Stanley *v.* New York El. R. Co., 17 N. Y. Suppl. 931.

78. Livingston *v.* Manhattan R. Co., 60 N. Y. Super. Ct. 31, 17 N. Y. Suppl. 486, 21 N. Y. Civ. Proc. 309, 27 Abb. N. Cas. 411 [*reversed* on other grounds in 138 N. Y. 76, 33 N. E. 732].

79. Crim *v.* Starkweather, 136 N. Y. 635, 32 N. E. 701 [*affirming* 12 N. Y. Suppl. 791].

80. Thompson *v.* Vroman, 66 Hun (N. Y.) 245, 21 N. Y. Suppl. 179; Woodman *v.* Penfield, 2 Silv. Sup. (N. Y.) 246, 6 N. Y. Suppl. 803.

81. **Grounds for recommittal of report** see *infra*, VIII, I, 8, c, (I).

82. Stebbins *v.* Waterhouse, 58 Conn. 370, 20 Atl. 480.

83. Shindler *v.* Luke, 43 Iowa 89.

84. Yates *v.* Kinney, 19 Nebr. 275, 27 N. W. 132.

85. Wiley *v.* Logan, 96 N. C. 510, 2 S. E. 598.

86. Wilgus *v.* Gettings, 21 Iowa 177.

In Iowa it is held that claims upon which there is conflicting evidence ought not to be referred without requiring the referee to preserve and report the evidence. The court ought not to delegate its powers so as to cut off all opportunity to review his actions. Goodale *v.* Case, 71 Iowa 434, 32 N. W. 414. But the referee should not be required to certify up the evidence after the confirmation of his report and entry of judgment thereon, where several months have intervened since the filing of his report. Smith *v.* Harlan, 49 Iowa 101.

87. Walton *v.* Walton, 17 Mo. 376; Pope *v.* Perault, 22 Hun (N. Y.) 468; Matter of Albrecht, 4 N. Y. Suppl. 462, 1 Connoly Surr. 12 [*affirmed* in 10 N. Y. Suppl. 388]; Security F. Ins. Co. *v.* Martin, 15 Abb. Pr. (N. Y.) 479; Barcroft *v.* Roberts, 91 N. C. 363; State *v.* Magnin, 85 N. C. 114; Cain *v.* Nicholson, 77 N. C. 411; Green *v.* Castlebury, 70 N. C. 20.

What constitutes compliance with statute. — Dak. Laws, c. 112, § 3, which requires referees to report their findings, "together with all the evidence taken by them, and all exceptions taken on the hearing," is mandatory, but is substantially complied with when all the evidence is before the court when the report is confirmed and judgment entered, although the exceptions to the report were made and filed some time before that. Kent *v.* Dakota F. & M. Ins. Co., 2 S. D. 300, 50 N. W. 85.

Presumptions.— Where no application is made to the court to require a referee to

the referee in making his report of the proceedings, had under the rule or order of reference, is not required to, and should not, report the evidence.[88]

5. Report on Reference to Take Testimony. Where the reference is merely to take and report testimony, the referee should not state his findings of fact,[89] nor conclusions of law.[90] But where the order directs the taking of proof and reporting the same together with the testimony, a referee has authority to find the facts as well as to report the testimony.[91] Where a referee is appointed in the place of a deceased referee, the former may state on information and belief what was

report all the evidence taken, and the trial court has acted upon the exceptions to his report, based on the evidence, as though it were all reported, it will be presumed, in the absence of anything to the contrary, that the referee has reported it all, and an exception based on his supposed partial report thereof is not available. Perkins *v.* Berry, 103 N. C. 131, 9 S. E. 621.

Supplying omissions.— Where exception is taken to the failure of a referee to report evidence, the omission may be supplied by an order for its production, if it has been preserved in writing. State *v.* Magnin, 85 N. C. 114.

Brief of evidence.—An auditor may file with his report, as a brief of the oral evidence, the questions and answers as transcribed from the stenographer's notes. Linder *v.* Whitehead, 125 Ga. 115, 53 S. E. 588.

In North Carolina the evidence in writing must accompany the report so that the party excepting may have the findings of the referee reviewed or that he may file exceptions before the court if they have not been taken before the referee. Cain *v.* Nicholson, 77 N. C. 411.

In South Dakota a report must include all material evidence offered on matters excepted to before the referee in order to authorize a review of his rulings thereon. Sutterfield *v.* Magowan, 12 S. D. 139, 80 N. W. 180.

88. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92; Mahone *v.* Williams, 39 Ala. 202.

Connecticut.— Goodman *v.* Jones, 26 Conn. 264.

Delaware.— Allen *v.* Miles, 4 Harr. 234.

Georgia.— Camp *v.* Mayer, 47 Ga. 414.

Illinois.— Prince *v.* Cutler, 69 Ill. 267.

Indiana.— McClure *v.* McClure, 19 Ind. 185; Wabash, etc., Canal *v.* Huston, 12 Ind. 276. *Compare* Borchus *v.* Huntington Bldg. Loan, etc., Assoc., 97 Ind. 180.

Maine.— Howard *v.* Kimball, 65 Me. 308; Barnard *v.* Spofford, 31 Me. 39.

Massachusetts.— Gurley *v.* Reed, 190 Mass. 509, 77 N. E. 642; Newell *v.* Chesley, 122 Mass. 522.

Minnesota.— McMurphy *v.* Walker, 20 Minn. 382.

New Hampshire.— Roberts *v.* Barker, 63 N. H. 332.

New York.— Avery *v.* Foley, 4 Hun 415; Jarvis *v.* Jarvis, 66 Barb. 331; Comey *v.* Andrews, 14 Daly 437, 14 N. Y. St. 672 [*affirmed* in 124 N. Y. 623, 26 N. E. 758]; Dorr *v.* Noxon, 5 How. Pr. 29. See also Curtis *v.* Staring, 4 Wend. 198.

North Carolina.— Ezzell *v.* Rowland Lumber Co., 130 N. C. 205, 41 S. E. 99; Barbee *v.* Green, 92 N. C. 471; Allison *v.* Bryson, 65 N. C. 44.

Pennsylvania.—Matter of Killion, 3 Brewst. 235; Harper's Estate, 1 Brewst. 471; Paul *v.* Weinberg, 5 Leg. & Ins. Rep. 108; Howell *v.* Roberts, 3 Leg. & Ins. Rep. 9; Church *v.* Church, 5 Phila. 358; Haines *v.* Burr, 1 Phila. 52.

Tennessee.— Powell *v.* Riley, 15 Lea 153.

Texas.— Richie *v.* Levy, 69 Tex. 133, 6 S. W. 685; Whitehead *v.* Perie, 15 Tex. 7.

Vermont.— Hoyt *v.* Clark, 39 Vt. 87; Hitt *v.* Slocum, 37 Vt. 524; Kimball *v.* Baxter, 27 Vt. 628; Swift *v.* Raymond, 11 Vt. 317; Walsh *v.* Pierce, 11 Vt. 32; Shaw *v.* Shaw, 6 Vt. 69; Strong *v.* McConnel, 5 Vt. 338; Eddy *v.* Hine, 3 Vt. 389; Fry *v.* Slyfield, 3 Vt. 246; Skinner *v.* Conant, 2 Vt. 453, 21 Am. Dec. 554.

See 42 Cent. Dig. tit. "Reference," § 145.

But see Goodrich *v.* Marysville, 5 Cal. 430; Byington *v.* Hampton, 13 Iowa 23.

Must prepare bill of exceptions.—A party desiring to have the evidence taken before a referee reviewed for any purpose, or any of the proceedings before the referee prior to filing his report, must, within the proper time, prepare a bill of exceptions embracing so much of the evidence and such parts of the proceedings as he desires made a part of the record and present the same to the referee for allowance and signing before he files his report with the court. Iralson *v.* Stang, 18 Okla. 423, 90 Pac. 446.

89. Sanders *v.* Rhewbottom, 7 N. Y. St. 167.

Effect of agreements.— Where a commissioner was appointed to take testimony in a particular case, and the parties to the suit agreed to allow him also to "report the facts to the court with his opinion," the agreement did not make the commissioner a referee or a tribunal to dispose of the case, so that his finding would warrant the court in ordering the satisfaction of a judgment. Riddle's Appeal, 104 Pa. St. 171.

Stating account.— Where the referee is directed to take the testimony necessary to state a true and correct account, and to report the testimony and accounts, and so does, an objection to the report that the stating of the account was a finding of facts which he was not authorized to make will be overruled. White *v.* Magann, 65 Wis. 86, 26 N. W. 260.

90. Taylor *v.* Peterson, 1 Ida. 513.

91. Goodridge *v.* New, 18 How. Pr. (N. Y.) 189.

done by his predecessor and thus avoid the necessity of a new proceeding.[92] The testimony of the witnesses need not be read over or signed by them where the matter is otherwise regulated by a special order of the court.[93]

6. Reference to Take Account. The report of a referee to state an account must be within the scope of the order of reference.[94] The referee's report in such a case must be full and certain;[95] it is necessary that the report should show each item allowed and disallowed, time of payment, rates, and mode of computation.[96]

92. Maybee *v.* Maybee, 6 N. Y. Suppl. 575, 22 Abb. N. Cas. 465.

93. Leach *v.* Leach, (N. J. Ch. 1907) 66 Atl. 595.

94. Coker *v.* Ropes, 125 Mass. 577 (holding that it is no ground of objection to the report of an auditor that, for the purpose of determining the issues submitted to him, he construes a contract, the construction of which is involved in such determination); Gould *v.* Norfolk Lead Co., 9 Cush. (Mass.) 338, 57 Am. Dec. 50; Lee *v.* Tillotson, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; Odenwelder *v.* Odenwelder, 1 Whart. (Pa.) 108 (holding that where an action is referred to persons "to state an account, and hear and determine all matters in variance," etc., it is not a valid exception to the referees' report that it includes matters not cognizable in account render); Potter *v.* Thompson, 64 Vt. 427, 25 Atl. 430, holding that where referees appointed to consider certain matters involving accounts make only a general report, without stating the facts, and the accounts are attached merely to show that the matters considered are within a certain jurisdictional limit, and not as presenting the grounds of the decision, such accounts cannot be urged against the report, to show that the matters were not within the submission. See also Butler *v.* Cornwall Iron Co., 22 Conn. 335; Fordyce *v.* Shriver, 115 Ill. 530, 5 N. E. 87.

95. See cases cited *infra*, this note.

Illustrations of rule.—A report that defendant had fully accounted is bad. Spencer *v.* Usher, 2 Day (Conn.) 116. Auditors may report a balance in favor of defendant. Dickerson *v.* Whittlesey, 2 Root (Conn.) 121. A report that defendant shall pay a sum to plaintiff, without finding how much he owed, is bad. Thomas *v.* Alsop, 2 Root (Conn.) 12.

Two or more actions.— Where two suits were brought at the same time between the same parties — one at law and the other in chancery — and the same order was entered in both cases, referring each to an arbitrator "to take and settle all accounts between the plaintiff and defendant, and finally to determine their claims in full against each other," an award on the matters involved in one case only was invalid. Bean *v.* Bean, 25 W. Va. 604.

Up to what time account stated.— Where the case is referred to auditors to state an account, all items since the suit was brought are to be included in the report, down to the final estimate. Couscher *v.* Tulam, 6 Fed. Cas. No. 3,287, 4 Wash. 442; Day *v.* Lockwood, 24 Conn. 185; Tutton *v.* Addams, 45 Pa. St. 67.

Annexing account.— The auditor must append copies of the accounts of the parties to his report. Flower Brook Mfg. Co. *v.* Buck, 16 Vt. 290. But it is no objection to the report that the account of a party against whom the auditor reported was not appended, unless it appear affirmatively that such account was presented before him at the hearing. Hill *v.* Hogaboom, 13 Vt. 141.

Items allowed on account.— It is no objection to an auditor's report that items of account, existing prior to a settlement between the parties, are allowed by the auditors, provided it is found that those items were not included in the settlement, and, whether included or not, is a fact for the auditors to find. Newel *v.* Keith, 11 Vt. 214.

Grounds of decision.—Auditors should report the grounds of their decision on every question of law raised before them, in case they are requested so to do. McConnell *v.* Pike, 3 Vt. 595. Where auditors refuse on request to report their reasons in allowing or disallowing an item of account, such refusal tends to show unfairness or corruption on the auditor's part. Macks *v.* Brush, 5 Vt. 70.

An auditor may properly state what his report would be in case evidence which has been excluded by him had been admitted. Mengas' Appeal, 19 Pa. St. 221.

In surrogate's court see *In re* Niles, 47 Hun (N. Y.) 348.

96. Gage *v.* Arndt, 121 Ill. 491, 13 N. E. 138; Harrison *v.* Faulk, 16 La. 358; McMicken *v.* Ficklin, 11 La. 310.

Items must be shown.— McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349; Craig *v.* McKinney, 72 Ill. 305; Copeland *v.* Crane, 9 Pick. (Mass.) 73; Montgomery *v.* Burge, 13 Serg. & R. (Pa.) 112; Wright *v.* Guy, 10 Serg. & R. (Pa.) 227; Green *v.* Lanier, 5 Heisk. (Tenn.) 662; Whitehead *v.* Perie, 15 Tex. 7; Herrick *v.* Belknap, 27 Vt. 673; Park *v.* Mighell, 3 Wash. 737, 29 Pac. 556; Reed *v.* Jones, 15 Wis. 40; Ransom *v.* Winn, 18 How. (U. S.) 295, 15 L. ed. 388; Burrard *v.* Calisher, 51 L. J. Ch. 223, 45 L. T. Rep. N. S. 793, 30 Wkly. Rep. 321. See also McElroy *v.* Whitney, 12 Ida. 512, 88 Pac. 349. But see Hewitt *v.* Egbert, 34 Iowa 485 (holding that a referee, in the absence of instructions, is not bound to report his finding on each of the items composing an account); Lannan *v.* Clavin, 3 Kan. 17; McDaniels *v.* McDaniels, 40 Vt. 340, 94 Am. Dec. 408 (holding that no objection can be taken to the omission of a referee to state the items allowed or disallowed in his report, he not having been requested so to do); Bent *v.* Manning, 10 Vt. 225; Myers *v.* York, etc.,

The evidence, however, need not be stated or incorporated in the report,[97] nor generally even the facts themselves.[98]

E. Amended, Additional, or Supplemental Report.[99] The referee may change or modify his report at any time before it is delivered or filed,[1] but after the report is filed or delivered by the referee his powers and duties are at an end.[2] He cannot thereafter amend the report,[3] or file an additional or supplemental report,[4] except where authorized so to do by the court. However, the court may permit or require an amendment,[5] or the filing of an additional or supple-

R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28 [*affirmed* in 18 How. 246, 15 L. ed. 380], holding that a general award of a specific sum, without specifying the items of which it is composed, is good in point of form.

Reasons.—Auditors should state, in their report, what items they allowed and disallowed, but need not state their reasons. Macks *v.* Brush, 5 Vt. 70.

97. See *supra*, VIII, D, 4.

98. Closson *v.* Means, 40 Me. 337; Mengas' Appeal, 19 Pa. St. 221. But see Swift *v.* Raymond, 11 Vt. 317.

99. **Recommittal of report for amendment or additional findings** see *infra*, VIII, I, 8, c, (II)–(III).

1. Ayrault *v.* Sackett, 9 Abb. Pr. (N. Y.) 154 note [*affirmed* in 17 How. Pr. 507].

2. See *infra*, VIII, H.

3. Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Arn *v.* Coleman, 11 Kan. 460; Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368; Niles *v.* Price, 23 How. Pr. (N. Y.) 473; Shearman *v.* Justice, 22 How. Pr. (N. Y.) 241; Patton *v.* Baird, 42 N. C. 255. See also Martin *v.* Henry, 4 Lanc. Bar (Pa.) Feb. 15, 1873. *Compare* Egbert *v.* Smith, 3 N. J. L. 923, holding that where referees reported, and afterward informed the justice that they had made a mistake in calculating, two of the referees could not amend the report in the absence of the third, although he had been notified to be present. *Contra*, Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. 316.

4. *California.*— Headley *v.* Reed, 2 Cal. 322.

Indiana.— Conklin *v.* Morton, 40 Ind. 76.

Iowa.— *In re* Malvin, 93 Iowa 169, 61 N. W. 420.

Louisiana.—Harrison *v.* Faulk, 16 La. 358.

New York.— Voorhis *v.* Voorhis, 50 Barb. 119 [*affirmed* in 39 N. Y. 463, 100 Am. Dec. 458].

Vermont.— Stevens *v.* Pearson, 5 Vt. 503. *Compare* May *v.* Corlew, 4 Vt. 12, holding that auditors having made and signed a report may afterward make an additional statement explanatory of their views in the case.

See 42 Cent. Dig. tit. "Reference," §§ 128, 144.

But see Door *v.* Hill, 62 N. H. 508, holding that the rule that referees can correct no error after the return of their report does not prevail in New Hampshire.

Where a party desires a referee to find additional facts, he should file a motion for a further report. State *v.* Lancaster County, 20 Nebr. 419, 30 N. W. 538. An order which grants a party leave to apply for a further report to a referee is not irregular for failing to specify the points upon which a report is desired. Union Bank *v.* Mott, 13 Abb. Pr. (N. Y.) 247.

A referee cannot make new findings either of law or fact after he has decided the cause and delivered his report. Bame *v.* Neuss, 2 N. Y. Civ. Proc. 185; Nelson *v.* Ingersoll, 27 How. Pr. (N. Y.) 1.

5. *Delaware.*— Gardner *v.* Mason, 5 Harr. 286.

Iowa.— Quick *v.* Cox, 38 Iowa 568, holding that an amendment to a referee's report, showing by the clerk's affidavit that he had been duly sworn, is properly allowed.

Maine.— Fales *v.* Hemenway, 64 Me. 373, holding that it is competent for the referee, by permission of the presiding judge, to amend the form of his report so as to make its meaning plain, after it has been opened and filed in court, without a formal order of recommitment for that purpose.

Massachusetts.— Noyes *v.* Noyes, 1 Pick. 269.

New York.— Renouil *v.* Harris, 2 Sandf. 641; Matter of Harmony F. & M. Ins. Co., 14 Abb. Pr. 292 note; Cooley *v.* Decker, 47 How. Pr. 188. *Compare* Livingston *v.* Manhattan R. Co., 16 N. Y. Suppl. 110, 21 N. Y. Civ. Proc. 100, 27 Abb. N. Cas. 200 [*affirmed* in 60 N. Y. Super. Ct. 31, 17 N. Y. Suppl. 486, 21 N. Y. Civ. Proc. 309, 27 Abb. N. Cas. 411 (*reversed* in 138 N. Y. 76, 33 N. E. 732)].

Vermont.— Smith *v.* Sprague, 40 Vt. 43.

See 42 Cent. Dig. tit. "Reference," §§ 127, 143.

Notice to counsel.—A referee may, without notice to counsel, make changes and corrections in his report directed to be made by the trial and reviewing courts. Cothran *v.* Knox, 17 S. C. 591.

Successive amendments.—A party, moving to homologate a report after certain amendments, cannot ask for any others. St. Romain *v.* Robeson, 12 Rob. (La.) 194.

Imposing terms on granting motion.—Where a report is in favor of plaintiffs generally, and one count in plaintiffs' declaration is substantially bad, and is abandoned, an order to amend the referee's report may be granted on payment of costs of motion in arrest and costs of opposing motion. Borst *v.* Spelman, 2 How. Pr. (N. Y.) 198.

Sufficiency of moving papers.—An affidavit of defendants' attorney that the referee had stated that he had decided the case on the merits, and that it was by an inadvertence his report did not state that the complaint

mental report,[6] after the return of the report. Furthermore the court may itself correct mere informalities in the report,[7] but cannot materially change or modify it.[8]

F. Filing or Delivery and Notice Thereof.[9] Generally the report must be filed,[10] but in some jurisdictions the referee may instead deliver it to one of the

was dismissed on the merits, no affidavit by the referee himself being filed, will not warrant an order directing the amendment of his report so as to show a direction for judgment on the merits. Deagan *v.* King, 83 N. Y. App. Div. 428, 82 N. Y. Suppl. 422.

Signature by only part of referees.— Where a report of three referees is signed by only two of them, and does not show that the other acted, it will be remanded to the referees for amendment. Hawkins *v.* Hall, 4 Pennew. (Del.) 291, 55 Atl. 4.

6. Cafferty *v.* Keeler, 12 Wend. (N. Y.) 291; Wheeler *v.* Ralph, 4 Wash. 617, 30 Pac. 709.

Time for filing.—A referee's second report made more than sixty days after the filing of an opinion of the reviewing court directing certain corrections to be made in the report, but within sixty days of the filing of the remittitur, is in time. Cothran *v.* Knox, 17 S. C. 591.

Further report to state facts found and conclusions separately.— Under the statute requiring the facts found and the conclusions of law to be separately stated, an order will be granted, on application of either party, that the referee make a further report and correct an omission to comply with said statute. Snook *v.* Fries, 19 Barb. (N. Y.) 313.

The party not satisfied with the facts found by a referee and desiring other findings of fact in addition thereto must move the court before the time for excepting has expired to send the case back to the referee to have him find one way or the other upon the other material facts in issue and not passed upon. Foster *v.* Voigtlander, 36 Kan. 572, 13 Pac. 777; Brainerd *v.* Dunning, 30 N. Y. 211; Lefler *v.* Field, 50 Barb. (N. Y.) 407 [*affirmed* in 52 N. Y. 621]. See also Quincy *v.* Young, 53 N. Y. 504 [*affirming* 5 Daly 44]. Where the findings of a referee are insufficient, the denial of a motion to set aside the report, or for such other or further order as should be proper, does not necessarily dispose of the right of plaintiff to further findings. Van Slyke *v.* Hyatt, 46 N. Y. 259.

Moving papers.— Where a party seeks by a motion to obtain further findings from a referee, he should clearly specify the point on which he desires the referee to pass. He should show that the finding on such point is material to the determination of the case, and that, if found in his favor, such finding would necessarily affect the judgment, and that there is evidence on which the referee, if he had deemed the point material, might justly have found the fact in his favor. Tallman *v.* Bresler, 58 N. Y. 123.

7. Currie *v.* Cowles, 7 Rob. (N. Y.) 3; *In re* Smith, 4 N. Y. Suppl. 467 (holding, however, that it is not good practice to amend the referee's report, either in respect of any ambiguity in the language used, or for a clerical error, but it should be referred back to him for correction); Kent *v.* Dakota F. & M. Ins. Co., 2 S. D. 300, 50 N. W. 85 (failure to separately state findings of fact and conclusions of law).

8. Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368; Refowich *v.* Rice, 4 Pennyp. (Pa.) 449; Conger *v.* James, 2 Swan (Tenn.) 213; Stevenson *v.* Walker, 5 W. Va. 427. See also Wyatt *v.* Lynchburg, etc., R. Co., 110 N. C. 245, 14 S. E. 683. *Compare* Bannister *v.* Patty, 35 Wis. 215.

The court cannot make additional findings. — Geary *v.* New Haven, 76 Conn. 84, 55 Atl. 584.

Ordinarily the court in acting upon a report has no power to correct either the findings of fact or conclusions of law (Union Bag, etc., Co. *v.* Allen Bros. Co., 94 N. Y. App. Div. 595, 88 N. Y. Suppl. 368; Shrady *v.* Van Kirk, 77 N. Y. App. Div. 261, 79 N. Y. Suppl. 79; Deming *v.* Post, 1 Code Rep. (N. Y.) 121), except where authorized so to do by statute (Wade *v.* Peacock, 121 Ga. 816, 49 S. E. 826, holding that a judge of the superior court, in framing his decree on an auditor's report, may correct any error of law apparent on the face of the report, although exceptions to the report have been withdrawn; Lack *v.* Brecht, 166 Mo. 242, 65 S. W. 976; Ely *v.* Ownby, 59 Mo. 437; Kent *v.* Dakota F. & M. Ins. Co., 2 S. D. 300, 50 N. W. 85).

9. **Time for filing report** see *supra*, VIII, B.

10. Dickerson *v.* Hays, 4 Blackf. (Ind.) 44; French *v.* Moseley, 1 Litt. (Ky.) 247. But see Regnier *v.* Fairbanks, 57 N. H. 377, holding that, under the reference law of 1874, it is within the discretion of the circuit court to order either party to put the report on file.

When filed.— The report of a referee is not to be treated as filed until the postea is also filed. Halsey *v.* Paulison, 36 N. J. L. 406.

Under a statute requiring the report to be delivered by one of the referees to the court, it must be delivered personally and not by counsel. Morey *v.* Hardy, 50 N. H. 24 note.

Report complete when filed.—An award cannot be attacked in equity on the ground that no judgment has been entered thereon, it being completed when signed and filed. Graham *v.* Bates, (Tenn. Ch. App. 1898) 45 S. W. 465.

Publication.—A report is published by reading and filing it in court. Pancoast *v.* Curtis, 6 N. J. L. 415.

Duty of party to file.— It is the duty of a party taking up an award of arbitrators to file it in the prothonotary's office without unnecessary delay; being a court record, neither party to the suit has any right to

parties or their attorney.[11] When the report is delivered, returned to the court, or filed, it is ordinarily necessary that notice thereof be given to the parties.[12] In some jurisdictions the statutes require copies of the report to be delivered to the parties.[13]

hold the award adversely. Mortimore *v.* O'Reagan, 6 Leg. Gaz. (Pa.) 334.

Filing after hearing of motion for new trial.— Where a referee appointed under McClellan Dig. p. 858, § 4, reduces his findings to writing, and signs and dates them on the same day on which the judgment is rendered by him, it is not reversible error that he does not file them until after he passes on a motion for new trial. Arnau *v.* State First Nat. Bank, 36 Fla. 398, 18 So. 786.

Filing as condition precedent to right to make motion founded on report.—A motion founded on a report of a referee appointed to determine a question of fact arising on a motion cannot be made until the report has been filed. Riley *v.* Brown, 14 Abb. Pr. N. S. (N. Y.) 290, 44 How. Pr. 429.

The authority of the arbitrators is not terminated until their award is actually returned into court. French *v.* Moseley, 1 Litt. (Ky.) 247.

11. See the statutes of the several states.

In New York, under Code Civ. Proc. § 1019, the report must be either filed or "delivered to the attorney for one of the parties" within the time specified. Notifying the parties in whose favor the report is made that it is ready for delivery is not equivalent to a delivery. Phipps *v.* Carman, 23 Hun 150 [*affirmed* in 84 N. Y. 650]. Especially is this so where the offer to deliver it to such party is conditioned on a payment of the referee's fees. Bishop *v.* Bishop, 24 N. Y. Suppl. 888, 30 Abb. N. Cas. 296. Formerly, however, notice that the report was ready for delivery was equivalent to a delivery. Thornton *v.* Thornton, 66 How. Pr. 119; Quackenbush *v.* Johnson, 55 How. Pr. 94.

12. *Florida.*— Robinson *v.* Hemstreet, 21 Fla. 342; Stewart *v.* Mathews, 19 Fla. 752.

New Hampshire.— Morey *v.* Hardy, 50 N. H. 24 note.

New York.— Hendricks *v.* Bloodgood, 18 Wend. 670. See also Bantes *v.* Brady, 8 How. Pr. 216. *Contra*, Van Steenburgh *v.* Hoffman, 6 How. Pr. 492; Watson *v.* Morton, 1 How. Pr. 166.

Oklahoma.— Clark *v.* Hennessey Bank, 14 Okla. 572, 79 Pac. 217.

Pennsylvania.— Tennery *v.* Dickerson, 3 Wkly. Notes Cas. 158. But see Eyster *v.* McCulla, 3 Wkly. Notes Cas. 219, holding that a rule of court providing for notice of filing of a report of a referee, under the act of May 14, 1874, does not apply to reference by agreement under that act.

See 42 Cent. Dig. tit. "Reference," § 129.

To whom notice given.— Notice of filing a report of referees may be given to the known attorney of the party. Dunkin *v.* Calbraith, 1 Browne (Pa.) 14. Notice of filing of the referee's report, appointed under the act of June 22, 1871, regulating the reference of civil actions in Lackawanna county, must be given to defendant personally as therein provided; and the notice to his attorney after his death is not sufficient. Scranton Bldg. Assoc. *v.* Ranck, 5 Pa. Co. Ct. 449.

Oral notice.— Where the referee orally informed one of defendant's attorneys of the filing of his report, no other notice being given, a judgment entered thereon will be set aside. Young *v.* Carpenter, 1 How. Pr. (N. Y.) 53.

What constitutes notice.— Where, after the completion of a referee's report, counsel indorse thereon their acceptance of service of notice that it will be filed on a given day, the actual notice that such report is filed, required by statute to be given by the prothonotary, is unnecessary. Allison *v.* Gilton, (Pa. 1889) 16 Atl. 734. Under Ga. Civ. Code, § 4589, requiring that the auditor give notice of the filing of his report, and within twenty days either party may file exceptions, a written notice signed by the auditor, deposited in the mail, directed to counsel at his place of business, and actually delivered there to his clerk, is a sufficient compliance with the statute. Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755.

Notice that the report is ready for filing.— In Pennsylvania judgment cannot be entered on the report until after the referee has notified the parties that it is ready for filing. Wall *v.* Knapp, 134 Pa. St. 53, 19 Atl. 436; Baxter *v.* Hurlburt, 7 Pa. Super. Ct. 187, 42 Wkly. Notes Cas. 164.

Evidence that notice given.—A motion for a new trial before a referee is sufficient evidence that the party making it had notice of the filing by the referee of his judgment. St. Johns, etc., R. Co. *v.* Ransom, 33 Fla. 406, 14 So. 892; St. Johns, etc., R. Co. *v.* Shalley, 33 Fla. 397, 14 So. 890.

Excuses for failure to give notice.— Under a rule of court requiring written notice to defendant of an arbitrators' award against him, and allowing him four days to file exceptions, actual knowledge of such judgment by defendant will not excuse failure to give notice. Building Assoc. *v.* Taylor, 1 Del. Co. (Pa.) 378.

Effect of agreement.—An arbitrator's unperformed agreement to notify party when the award was filed is no legal excuse for failure to appeal within the statutory period, so as to permit entry of the appeal *nunc pro tunc*, the opposite party having in no way contributed to the preventing of the appeal. Kaier Co. *v.* Stevens, 9 Kulp (Pa.) 520.

Effect of failure to give notice.— In the absence of a showing that any substantial right was prejudiced thereby, a report will not be stricken from the files because of failure of the referee to give the necessary notice of the filing of his report. Clark *v.* Hennessey Bank, 14 Okla. 572, 79 Pac. 217.

Failing to give notice as ground for recommittal see *infra*, VIII, I, 8, c, (I).

13. Carson *v.* Carson, 1 Metc. (Ky.) 434;

G. Taking Up Report. The court cannot compel a party to take up the report and pay the fees of the referee.[14]

H. Operation and Effect.[15] The report is not a judgment,[16] and an action cannot be brought upon it as in case of an award.[17] In some jurisdictions, however, it is a lien on the real property of the person against whom it is rendered.[18] The filing of the report terminates the authority of the referee.[19] It follows that generally only one report can be made,[20] although generally the referee may be reinvested with general or limited power where the report is recommitted to him for correction or further consideration.[21] Where money is awarded to be paid on one side and certain other things to be done on the other, if the court cannot enforce both it will enforce neither.[22]

I. Review and Disposition — 1. In General.[23] The procedure after the report is filed or delivered, including confirmation, recommittal, setting aside, or other method of review, differs to a considerable extent in the various jurisdictions.[24] Where the reference is to hear and determine the whole action, judg-

Adams *v.* Hammon, 10 B. Mon. (Ky.) 5; Harding *v.* Wallace, 8 B. Mon. (Ky.) 536.

Waiver.— When a party appears in court at the return of an award, and files objection to it, the fact that the arbitrators had not furnished him with a copy before the first term cannot be objected to at the succeeding term. Cleaveland *v.* Dixon, 4 J. J. Marsh. (Ky.) 226.

14. Geib *v.* Topping, 83 N. Y. 46. *Compare* Richmond *v.* Hamilton, 9 Abb. Pr. (N. Y.) 71 note; Richards *v.* Allen, 11 N. Y. Leg. Obs. 159.

15. Review and disposition of report see *infra*, VIII, I.

16. Gilman *v.* Cate, 63 N. H. 278.

Necessity for judgment.—The report stands as a general finding by a court, or as the special verdict of a jury, and the finding in the one case, and the verdict in the other, must be followed by a judgment thereon, or they will amount to nothing. Gilmore *v.* Putnam County, 35 Ind. 344. Where there is a reference to a master or referee to try an action and dispose of the costs, a motion to the court for judgment on his report is necessary. Murphy *v.* Corry, 12 Ont. L. Rep. 120, 7 Ont. Wkly. Rep. 574.

Not res judicata.—A report upon which no judgment has been entered cannot operate as an estoppel. Greenleaf *v.* Pasquotank County, 123 N. C. 30, 31 S. E. 264; Kennedy *v.* Luhman, 19 Pa. Co. Ct. 306. See also Judgments, 23 Cyc. 1123.

17. Harris *v.* Bradshaw, 18 Johns. (N. Y.) 26.

18. Turner *v.* Whitson, 15 Pa. Co. Ct. 484. See also *supra*, p. 830 text and note 76.

19. Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227; Trufant *v.* Merrill, 1 Sweeny (N. Y.) 462, 6 Abb. Pr. N. S. 462, 37 How. Pr. 531; Devlin *v.* New York, 6 Daly (N. Y.) 486; Patton *v.* Baird, 42 N. C. 255; Sturgis *v.* Rue, 6 Pa. L. J. 77, 3 Pa. L. J. Rep. 499. See also Smith *v.* Smith, 28 Ill. 56; Jeffersonville R. Co. *v.* Mounts, 7 Ind. 669; Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Lansdale *v.* Kendall, 4 Dana (Ky.) 613; French *v.* Moseley, 1 Litt. (Ky.) 247; Aldrich *v.* Jessiman, 8 N. H. 516. And see *supra*, VIII, E.

20. See cases cited *infra*, this note.

Disregarding report as superfluous.— If a referee makes one report merely finding a certain sum due and another special report containing findings and conclusions and an award of the same sum as due, the former should be disregarded as superfluous. Niles *v.* Battershall, 2 Rob. (N. Y.) 146, 18 Abb. Pr. 161, 27 How. Pr. 381 [*reversing* 26 How. Pr. 93].

21. See *infra*, VIII, I, 8.

22. Kunckle *v.* Kunckle, 1 Dall. (Pa.) 364, 1 L. ed. 178.

23. Judgment on report as appealable see Appeal and Error, 2 Cyc. 613, 615 note 89.

Presumptions on appeal in support of judgment see Appeal and Error, 3 Cyc. 296, 297 note 89.

Questions presented for review by record on appeal see Appeal and Error, 3 Cyc. 162.

24. See Peck *v.* Alexander, 40 Colo. 392, 91 Pac. 38 (review only by motion for new trial); Stebbins *v.* Waterhouse, 58 Conn. 370, 20 Atl. 480; Walton *v.* Walton, 17 Mo. 376; Simpson *v.* Gregg, 5 Nebr. 237 (holding that in order to have a review of the decisions of a referee under the code, a motion for a new trial must be filed); Cummings *v.* Swepson, 124 N. C. 579, 32 S. E. 966; Kilduff *v.* John A. Roebling's Sons Co., 150 Fed. 240; Robinson *v.* Mutual Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194, 8 Reporter 613.

Practice in federal courts.— The practice of moving for new trials in causes in federal courts heard by referee has practically fallen into disuse since the creation of the circuit courts of appeals, and, while the right to make such motions remains, the court, in considering the same, will not retry the case, nor consider any question which may be brought before the circuit court of appeals by writ of error, nor will it substitute its conclusions on conflicting proofs for those of the referee. Atlantic Trust Co. *v.* Osgood, 155 Fed. 700.

Review as to costs.— The decision of a referee awarding costs in accordance with his conclusions of law is reviewable only on appeal, and not by motion at special term for retaxation of costs. Kennedy *v.* McKone, 10 N. Y. App. Div. 97, 41 N. Y. Suppl. 577. So

ment may be entered on the report;[25] and after judgment has been entered upon the report, generally the only mode of review is by an appeal from the judgment.[26]

2. CONSTRUCTION. The report will be so construed, if possible, that it will stand;[27] and it is not to be construed as strictly as a special verdict at common

where an issue is referred, the report cannot be reviewed on motion at special term for the purpose of allowing costs, where he has failed to do so. Stevens *v.* Weiss, 25 Misc. (N. Y.) 457, 55 N. Y. Suppl. 562. The exercise of the referee's discretion in awarding or denying costs is not reviewable on a motion at special term to strike the costs out of the judgment but only upon appeal. McBride *v.* Chamberlain, 26 N. Y. Suppl. 94 [*affirmed* in 145 N. Y. 641, 41 N. E. 89].

Dismissal of complaint.— Where a court at special term refers all the issues in a case to a referee, his action therein in dismissing the complaint as on a nonsuit is reviewable only on appeal. Albany Brass, etc., Co. *v.* Hoffman, 30 N. Y. App. Div. 76, 51 N. Y. Suppl. 779.

When reference becomes arbitration.— Where a cause cannot be referred to any number less than three, but it is referred to less, by consent and rule of court, it is a case of mere arbitration, and the court cannot review the proceedings of the referees on motion. Dodge *v.* Waterbury, 8 Cow. (N. Y.) 136.

Motion to modify.— Objections to a referee's conclusions of law cannot be made by motion to modify, but errors therein must be taken advantage of by exception before the referee or in the trial court. McCutchen *v.* McCutchen, 141 Ind. 697, 41 N. E. 324.

Review of ruling allowing amendment.— The court at special term has no power to review, on motion, the action of the referee in allowing an amendment of the complaint. Barnum *v.* Williams, 91 N. Y. App. Div. 464, 86 N. Y. Suppl. 821; Knapp *v.* Fowler, 26 Hun (N. Y.) 200.

Extrinsic proof.—A patent ambiguity in the report cannot be obviated by proof of the meaning of the referees. Stanley *v.* Southwood, 5 Leg. & Ins. Rep. (Pa.) 4.

The only matters reviewable are those appearing upon the face of the report including all bills of exceptions taken before the referee. Moore *v.* Barnett, 17 Ind. 349.

Place of hearing.—A party cannot have the report reviewed in a county other than that in which the action is pending. McNeill *v.* Hodges, 99 N. C. 248, 6 S. E. 127.

Matters happening subsequent to report.— Kendall *v.* New England Carpet Co., 13 Conn. 383; Dignan *v.* Dignan, (N. J. Ch. 1889) 17 Atl. 546; Williams *v.* Batchelor, 90 N. C. 364.

25. See JUDGMENTS, 23 Cyc. 776.

26. Ward *v.* Bronson, 126 N. Y. App. Div. 508, 110 N. Y. Suppl. 335; Bates *v.* Norris, 55 N. Y. Super. Ct. 269, 13 N. Y. Civ. Proc. 395; Enos *v.* Thomas, 5 How. Pr. (N. Y.) 361. See also Graham *v.* Walker, 2 Leg. Chron. (Pa.) 55.

In New York a motion for a rehearing after judgment was formerly permitted by statute. Haight *v.* Prince, 2 Sandf. 723, 2 Code Rep. 95; Leggett *v.* Mott, 2 Sandf. 720; Crist *v.* New York Dry Dock Co., 3 Code Rep. 118; Mucklethwaite *v.* Weiser, 1 Code Rep. 61. This procedure, however, was abolished by the statute of 1851. Simmons *v.* Johnson, 6 How. Pr. 489; Church *v.* Rhodes, 6 How. Pr. 281. The special term cannot, on a motion to vacate a judgment, review the decision of the referee on which the judgment was entered, as such remedy is only by appeal. Jones *v.* Jones, 71 Hun 519, 24 N. Y. Suppl. 1031.

27. Adams *v.* Brown, 7 Cush. (Mass.) 220; Carter *v.* Sams, 20 N. C. 321.

The rule that every reasonable intendment will be made in favor of the awards of referees only applies where every proper facility is afforded to all parties to appear and be heard. Cummings *v.* Tute, 50 N. H. 22.

A general conclusion of a referee that a defendant is entitled to judgment for the possession of certain premises will be held to embrace whatever finding of fact is essential to it. Gibson *v.* Stetzer, 3 Hun (N. Y.) 539.

Construction of particular reports see Freeman *v.* Burnham, 36 Conn. 469; Grundy Center First Nat. Bank *v.* Moore, 83 Iowa 740, 48 N. W. 1072; Smith *v.* White, 1 B. Mon. (Ky.) 16; Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455; Boyd *v.* Davis, 7 Mass. 359; McKeen *v.* Converse, 68 N. H. 173, 39 Atl. 435; Andrews *v.* Foster, 4[illegible] N. H. 376; Waugh *v.* Seaboard Bank, 115 N. Y. 42, 21 N. E. 679 [*reversing* 54 N. Y. Super. Ct. 283]; Smith *v.* Devlin, 23 N. Y. 363 [*affirming* 6 Bosw. 1]; Doyle *v.* Halpin, 33 N. Y. Super. Ct. 352; Clarke *v.* Acosta, 9 Bosw. (N. Y.) 158; Hoyt *v.* Hoyt, 8 Bosw. (N. Y.) 511; Leonard *v.* Smith, 162 Pa. St. 284, 29 Atl. 915; Greenville *v.* Earle, 80 S. C. 321, 60 S. E. 1117; Briggs *v.* Briggs, 46 Vt. 571; Houghton *v.* Carpenter, 40 Vt. 588; Roth *v.* Colvin, 32 Vt. 125; Way *v.* Way, 27 Vt. 625; Bowden *v.* Parrish, 86 Va. 67, 9 S. E. 616. 19 Am. St. Rep. 873; Dogge *v.* Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889. A report that one of the parties is entitled to a certain sum implies that he is not entitled to interest thereon. Keokuk County *v.* Howard, 43 Iowa 354. Where findings do not expressly negative an allegation of fraud in the complaint, and an inference that the referee has found on it affirmatively would contradict and destroy the whole theory on which he has determined the case, such an inference cannot be made. Stowell *v.* Haslett, 5 Lans. (N. Y.) 380. Under a plea of tender, followed by payment of the amount tendered into court, an award in favor of plaintiff, even for a less amount, imports a finding against the tender. Berkheimer *v.* Geise, 82 Pa. St. 64.

law.[28] Special findings of fact control general ones,[29] and where there are two or more reports they should be construed together.[30] Where the report is against one of two or more coparties, it amounts to a finding in favor of the others.[31] Findings of facts in an action against two defendants will not support a judgment against both where they show a separate liability of only one defendant.[32] Where certain items are allowed and others are not referred to, the failure to allow those not mentioned is an adjudication against them.[33] The court may examine accounts and documents presented before the referee to ascertain the grounds of his decision.[34]

3. Conclusiveness — a. In General.[35] No general rule can be laid down as to the conclusiveness of a report, so much depending on the nature of the reference, the terms of the order of reference, and the practice and statutory provisions in the particular jurisdiction.[36] Ordinarily the findings are not conclusive where

28. Carman *v.* Pultz, 21 N. Y. 547.

29. Gillis *v.* Cobe, 177 Mass. 584, 59 N. E. 455; Bennett *v.* Buchan, 76 N. Y. 386.

30. Hazeltine *v.* Smith, 3 Vt. 535.

31. Lentz *v.* Stroh, 6 Serg. & R. (Pa.) 34.

32. Ives *v.* O'Brien, 33 Mich. 175.

33. Griffiths *v.* Reimert, 24 Kan. 226; Suit *v.* Suit, 78 N. C. 272.

34. Hurst *v.* Hurst, 12 Fed. Cas. No. 6,930, 1 Wash. 56.

35. **Effect of failure to except** see *infra*, VIII, I, 5, g.
Report as evidence see *infra*, VIII, I, 4.
Jury trial after rendition of report see *infra*, VIII, I, 5, f, (1).

36. See the following cases:

Louisiana.— Tourne *v.* Riviere, 1 La. Ann. 380; Babin *v.* Nolan, 6 Rob. 508; Harrison *v.* Faulk, 16 La. 358; McMicken *v.* Ficklin, 11 La. 310; Millaudon *v.* Percy, 5 Mart. N. S. 551; Merieult *v.* Austin, 3 Mart. 318; Segur *v.* Brown, 1 Mart. 266.

Maine.— Piscataquis Sav. Bank *v.* Herrick, 100 Me. 494, 62 Atl. 214; Frison *v.* De Peiffer, 83 Me. 71, 21 Atl. 746; Deering *v.* Saco, 68 Me. 322; Plummer *v.* Stone, 65 Me. 410 (holding that when a cause is referred to be decided upon legal principles, and the referee neither reports nor is requested to report the facts, or the questions of law arising thereon, his award is final); Mitchell *v.* Dockray, 63 Me. 82; Hatch *v.* Hatch, 57 Me. 283; Hall *v.* Decker, 51 Me. 31.

Mississippi.— Anding *v.* Levy, 60 Miss. 487.

Nebraska.— Citizens' Bank *v.* Stockslager, 1 Nebr. (Unoff.) 799, 96 N. W. 591.

New Hampshire.— Dodge *v.* Stickney, 62 N. H. 330.

New York.— People *v.* Westchester County, 53 N. Y. App. Div. 339, 65 N. Y. Suppl. 707; Lowndes *v.* Campbell, 1 Hall 598.

North Carolina.— Gudger *v.* Baird, 66 N. C. 438. See also Wellborn *v.* Simonton, 88 N. C. 266.

Ohio.— Benedict *v.* Cincinnati, 7 Ohio Dec. (Reprint) 261, 2 Cinc. L. Bul. 33; Williams *v.* Stevens, 1 Cinc. Super. Ct. 176, reference to master commissioner.

Pennsylvania.— Chew's Appeal, 45 Pa. St. 228; Large *v.* Passmore, 5 Serg. & R. 51; *In re* McFadden, 7 Pa. Super. Ct. 368, 42 Wkly. Notes Cas. 230; *In re* Harper, 1 Brewst. 417; *In re* Sheperdson, 3 Del. Co. 376; Myers *v.* Fichtner, 10 Kulp 45; Kessinger's Estate, 1 Leg. Gaz. 83; Stowers *v.* Crawley, 8 Luz. Leg. Reg. 76; Barnum *v.* Backman, 5 Luz. Leg. Reg. 145; Field *v.* Oberteuffer, 2 Phila. 271; Haines *v.* Burr, 1 Phila. 52. Findings of fact cannot be disturbed except for mistake or fraud. Riddle *v.* Witcraft, 3 Kulp 186. See also Stewart *v.* Bowen, 49 Pa. St. 245; Little *v.* Stanton, 32 Pa. St. 299.

South Carolina.— Gregory *v.* Cohen, 50 S. C. 502, 27 S. E. 920; Griffith *v.* Charlotte, etc., R. Co., 23 S. C. 25, 55 Am. Rep. 1; Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1; Askew *v.* Kennedy, 1 Bailey 46.

South Dakota.— Geddis *v.* Folliett, 16 S. D. 610, 94 N. W. 431.

Texas.— Farley *v.* Ward, 1 Tex. 646.

Vermont.— Smith *v.* Brandon Kaolin, etc., Co., 52 Vt. 469; Riley *v.* Noyes, 44 Vt. 455; Bacon *v.* Vaughn, 34 Vt. 73.

Wisconsin.— Learmonth *v.* Veeder, 11 Wis. 138.

United States.— Kleine *v.* Catara, 14 Fed. Cas. No. 7,869, 2 Gall. 61, holding that a general award cannot be impeached collaterally, or by evidence *aliunde*, for mistake of law or of fact, for the judgment of the referees is conclusive in both respects, unless there be fraud or misbehavior.

England.— *In re* Simmons, 33 Wkly. Rep. 706.

See 42 Cent. Dig. tit. "Reference," § 150.

Where no motion made to set aside report. — Where a case is tried before a referee, who reports his findings of fact and conclusions of law, and no motion is made to set aside the report, the findings of fact become conclusive as to the facts of the case. Martsolf *v.* Barnwell, 15 Kan. 612.

Where no issue raised before referee.— The report of an auditor in an action of account is conclusive where no issue is raised before and reported by him. Black *v.* Nichols, 68 Me. 227; Closson *v.* Means, 40 Me. 337.

The findings are final only as to facts litigated and decided, which relate to the issue before the court or referee for trial, and the determination of which was necessary to the determination of that particular issue. Hoffman House *v.* Hoffman House Café, 33 Misc. (N. Y.) 423, 67 N. Y. Suppl. 601.

In federal courts.— Since state statutes au-

the reference is merely advisory and not to hear and determine the case.[37] So generally the conclusions of law are not final but may be rejected by the court ordering the reference.[38]

b. Findings of Fact.[39] The findings of fact made by a referee in the report

thorizing and regulating referees have no application to federal courts, such courts will not entertain questions on the referee's report, but will regard and treat it as an award by arbitration. Denny *v.* Brown, 7 Fed. Cas. No. 3,805.

Incorrect statement of testimony.—An entry made by a referee in the minutes in his report, of certain matters in controversy, is not conclusive, if it appears to be an incorrect statement of testimony reported therein. Ballard *v.* Burrowes, 2 Rob. (N. Y.) 206.

Findings outside scope.—An auditor's findings upon matters not within the scope of his appointment are not conclusive upon persons not represented. *In re* Schwab, 22 Pa. Co. Ct. 218.

Recital of matters of record.— The recital, in an award, of matters of record is of no weight to prove that the facts stated were really matters of record. Hall *v.* Little, 11 Tex. 404.

Nature of mistake.—An award is not affected by a mistake unless such mistake materially affects the interest of the parties. Alwyn *v.* Perkins, 3 Desauss. (S. C.) 297.

37. *Kansas.*— Bethell *v.* Chicago Lumber Co., 39 Kan. 230, 17 Pac. 813.

Montana.—Murphy *v.* Patterson, 24 Mont. 575, 63 Pac. 375.

New York.— Marshall *v.* Meech, 51 N. Y. 140, 10 Am. Rep. 572; Matter of Jones, 117 N. Y. App. Div. 775, 102 N. Y. Suppl. 983; Frost *v.* Reinach, 40 Misc. 412, 81 N. Y. Suppl. 246. But see Brown *v.* Marrigold, 50 How. Pr. 248.

North Carolina.— Williams *v.* Wood, 12 N. C. 82.

England.— Walmsley *v.* Mundy, 13 Q. B. D. 807, 53 L. J. Q. B. 304, 50 L. T. Rep. N. S. 317, 32 Wkly. Rep. 602.

See 42 Cent. Dig. tit. "Reference," § 150 *et seq.*

Reference to take testimony and state account.— The report is merely advisory where the reference is to take testimony and state an account. Murphy *v.* Patterson, 24 Mont. 575, 63 Pac. 375; Bradshaw *v.* Morse, 20 Mont. 214, 50 Pac. 554.

Failure to file exceptions.—A special master to whom is referred a question of damages in an action at law is appointed in aid of the court, which is not bound by his findings, although no exceptions are filed thereto. Terry *v.* Naylor, 125 Fed. 804.

Where a collateral question, not made an issue by the pleadings, is referred to a referee, his findings of facts does not take the place of a special verdict as provided in code, section 187, and is not binding on the court until adopted by it. Harris *v.* San Francisco Sugar Refining Co., 41 Cal. 393.

38. *Arkansas.*— Greenhaw *v.* Combs, 74 Ark. 336, 85 S. W. 768.

Missouri.— Moniteau Nat. Bank *v.* Miller, 73 Mo. 187; Kansas City Hydraulic Press Brick Co. *v.* Pratt, 114 Mo. App. 643, 93 S. W. 300; Goetz *v.* Piel, 26 Mo. App. 634.

New Hampshire.— Hale *v.* Brown, 58 N. H. 323.

Pennsylvania.— Hindman's Appeal, 85 Pa. St. 466; Monaghan *v.* Ferry Co., 9 Wkly. Notes Cas. 368. *Compare* Stowers *v.* Crawley, 8 Luz. Leg. Reg. 76.

South Carolina.— Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1.

Vermont.— Hayden *v.* Johnson, 26 Vt. 768; Johns *v.* Stevens, 3 Vt. 308. But see Spear *v.* Stacy, 26 Vt. 61, holding that where a case has been referred under a general rule of reference, no questions of law are before the court except such as are saved by the referee.

Wisconsin.— Learmonth *v.* Veeder, 11 Wis. 138.

See 42 Cent. Dig. tit. "Reference," § 152. See also *infra*, VIII, I, 10.

But see Brown *v.* Clay, 31 Me. 518 (holding that where an action, referred by rule of court, contained no restriction on the powers of the referee, his award on the law as well as on the facts is conclusive); Roosevelt *v.* Thurman, 1 Johns. Ch. (N. Y.) 220 (holding that where a cause is referred, by consent of parties, to referees, two of whom are lawyers, it seems that the court will not interfere with their award upon a question of law, unless in case of gross and palpable mistake); Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28.

Contra.— Frison *v.* De Peiffer, 83 Me. 71, 21 Atl. 746; Hall *v.* Decker, 51 Me. 31.

By the terms of the order of reference, the referee's findings of law may be conclusive. Electric Supply, etc., Co. *v.* Conway Electric Light, etc., Co., 186 Mass. 449, 71 N. E. 983; Com. *v.* Roxbury, 9 Gray (Mass.) 451; Bigelow *v.* Newell, 10 Pick. (Mass.) 348; Morse *v.* Beers, 51 Vt. 359.

Where referee did not intend to decide according to rules of law.— Questions of law, decided by a referee, cannot be revised, if it does not appear from his report that he intended to decide according to the rules of law, and he was not required by the rule of reference to do so. Cutting *v.* Stone, 23 Vt. 571. See also White *v.* White, 21 Vt. 250.

Striking out costs.—Arbitrators having found for plaintiff a sum less than one hundred dollars with costs of suit, and such finding not having been appealed from, the court has no power to strike off the costs and enter judgment for amount of award exclusive of costs. Post *v.* Sweet, 8 Serg. & R. (Pa.) 391; Bradley *v.* Wenger, 10 Lanc. Bar (Pa.) 144.

39. See also *supra*, VIII, D, 3.

As conclusive on appeal see APPEAL AND ERROR, 3 Cyc. 372.

of the proceedings had before him, where the reference is to hear and determine the action, have the effect of a verdict of a jury,[40] or the decision of the court where the trial is without a jury;[41] and where the reference is merely to report the facts it has the effect of a special verdict.[42] It follows that where the testimony is conflicting the findings of fact will not be set aside unless they are clearly against the weight of testimony or there is no evidence to support them.[43] Of

40. *Arkansas.*— Greenhaw *v.* Combs, 74 Ark. 336, 85 S. W. 768.

California.— Harris *v.* San Francisco Sugar Refining Co., 41 Cal. 393 (holding that, where a referee reports his decision on the whole case, his report stands as the decision of the court; and, if he reports the facts only, his report is a special verdict); Walton *v.* Minturn, 1 Cal. 362; Bernard *v.* Sloan, 2 Cal. App. 737, 84 Pac. 232.

Colorado.— Crater *v.* McCormick, 4 Colo. 196.

Florida.— Marshall *v.* Bumby, 25 Fla. 619, 6 So. 480.

Georgia.— Clements *v.* Painter, 46 Ga. 486.

Illinois.— Thorpe *v.* Starr, 17 Ill. 199; Butler *v.* Randall, 25 Ill. App. 586.

Indiana.— Gilmore *v.* Putnam County Com'rs, 35 Ind. 344; Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49; Dickerson *v.* Hays, 4 Blackf. 44, holding that an award of referees in plaintiff's favor cures the same defects in the declaration which would be cured by a verdict.

Iowa.— Dunn *v.* Starkweather, 6 Iowa 466.

Kansas.—Campbell *v.* Phillips, 28 Kan. 753.

Minnesota.— See also Vose *v.* Stickney, 19 Minn. 367.

Missouri.— Feeney *v.* Chapman, 89 Mo. App. 371; McCreery *v.* Ellis, 60 Mo. App. 144; Dunlap *v.* Elks' Social Club, 25 Mo. App. 180; Kennard *v.* Peck, 19 Mo. App. 342; Francisco *v.* Rowland, 14 Mo. App. 600; Stewart *v.* Curtis, 12 Mo. App. 590.

New Jersey.— Runyon *v.* Hodges, 46 N. J. L. 359.

New York.— Darling *v.* Brewster, 55 N. Y. 667; Thurber *v.* Chambers, 4 Hun 721 [*affirmed* in 66 N. Y. 42]; Sinclair *v.* Tallmadge, 35 Barb. 602; Woodin *v.* Foster, 16 Barb. 146; Hoogland *v.* Wight, 7 Bosw. 394, 20 How. Pr. 70. But see Nason *v.* Ludington, 13 Abb. N. Cas. 301 [*affirmed* in 82 N. Y. 626], holding that a referee's conclusions as to the weight to be given to conflicting testimony do not bind a court, as do similar conclusions of a jury.

North Carolina.— Ballard *v.* Mitchell, 53 N. C. 153.

Oklahoma.— Shannon *v.* Petherbridge, 17 Okla. 507, 87 Pac. 668; Erisman *v.* Kerwin, 8 Okla. 92, 56 Pac. 858.

Pennsylvania.— Harris' Appeal, 2 Grant 304; Duer *v.* Boyd, 1 Serg. & R. 203; Williams *v.* Craig, 1 Dall. 313, 1 L. ed. 153; Davis *v.* Wood, 1 Del. Co. 382; Myers *v.* Fichtner, 10 Kulp 45; Meredith *v.* Thomas, 4 Kulp 505; Garrahan *v.* Randall, 4 Kulp 360; Lackawanna Iron, etc., Co. *v.* Fales, 5 Leg. Gaz. 14; Jones *v.* Jones, 11 Phila. 559.

South Carolina.— Perry *v.* Sullivan Mfg. Co., 6 S. C. 310.

See 42 Cent. Dig. tit. "Reference," § 154.

But see Lucas County *v.* Fulton County, 3 Ohio S. & C. Pl. Dec. 159, 2 Ohio N. P. 47.

Report as conditional verdict.— In an action of ejectment for purchase-money, a referee, under the act of April 6, 1869 (Pamphl. Laws 726), may file a report having the same effect as a conditional verdict. Heath *v.* Gardner, 10 Wkly. Notes Cas. (Pa.) 495.

In New Jersey, where a reference is ordered by the court with the consent of the parties, the report of the referee will be controlled as the verdict of a jury would be, and set aside if unsupported by the evidence (Harper Mach. Co. *v.* Sinclair, (Sup. 1908) 68 Atl. 890; Beattie *v.* David, 40 N. J. L. 102; Potts *v.* Excelsior Carpet Lining Co., 36 N. J. L. 301; Nugent *v.* Downing, 10 N. J. L. J. 292); at least where there is no statement in the rule of reference that the report is to have the effect of an arbitration (Harper Mach. Co. *v.* Sinclair, *supra*).

Limitation of rule.— The rule that, on a motion to set aside the report of a referee, it is to be treated as equivalent to the verdict of a jury in respect of the facts involved, can only be applied when the grounds of the report are explicitly stated by the referee, or from the nature of the controversy are apparent upon the face of the report. Scranton *v.* Baxter, 4 Sandf. (N. Y.) 5.

Findings on question of credibility.— The finding is not conclusive on a question of credibility, as would be the finding of a jury, where witnesses are directly in conflict. Nason *v.* Ludington, 19 Alb. L. J. (N. Y.) 179 [*affirming* 13 Abb. N. Cas. 401].

Effect of stipulation.— By stipulation of the parties to an action at law, the case was referred to a referee, the stipulation providing that his findings of fact should have the same force and effect as the verdict of a jury. It was held that the referee's findings of fact were equivalent, under such stipulation, to a special verdict, and could not be modified by the court or reviewed, except in so far as to determine whether they were supported by any evidence. U. S. Projectile Co. *v.* Sharpless, 115 Fed. 996.

Where the evidence is not set out, the referee's decision will be sustained (Dunbar *v.* Bittle, 7 Wis. 143), although plaintiff duly excepted (Lipsky *v.* Heller, 199 Mass. 310, 85 N. E. 453).

41. Thompson *v.* Patterson, 54 Cal. 542.

42. Gilmore *v.* Putnam County, 35 Ind. 344. *Compare* Lawrence *v.* Hyman, 79 N. C. 209; Green *v.* Jones, 78 N. C. 265; Armfield *v.* Brown, 70 N. C. 27; Green *v.* Castlebury, 70 N. C. 20.

43. *California.*— Noonan *v.* Hood, 49 Cal.

course findings of fact may be conclusive and final in effect, because of a

293; Cappe *v.* Brizzolara, 19 Cal. 607; Knowles *v.* Joost, 13 Cal. 620.

Illinois.— Scott *v.* Maxwell, 18 Ill. App. 72.

Iowa.— Cooley *v.* Osborne, 50 Iowa 526.

Kansas.— Chandler *v.* Dye, 37 Kan. 765, 15 Pac. 925; Owen *v.* Owen, 9 Kan. 91.

Massachusetts.— Paddock *v.* Commercial Ins. Co., 104 Mass. 521.

Missouri.— Walton *v.* Walton, 17 Mo. 376; Father Matthew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliam, 12 Mo. App. 445; Conklin *v.* Cabanne, 9 Mo. App. 579; Hoyt *v.* Clark, 8 Mo. App. 566; Murphy *v.* Jones, 7 Mo. App. 570; Brooks *v.* West, 3 Mo. App. 582.

Nebraska.— Brown *v.* O'Brien, 4 Nebr. 195.

New Jersey.—Fitch *v.* Archibald, 29 N. J. L. 160.

New York.— Ball *v.* Loomis, 29 N. Y. 412; Bearss *v.* Copley, 10 N. Y. 93; Butler *v.* Truslow, 55 Barb. 293; Smith *v.* McCluskey, 45 Barb. 610; Watson *v.* Campbell, 28 Barb. 421; Smith *v.* Schanck, 18 Barb. 344; Durkee *v.* Mott, 8 Barb. 423; Carley *v.* Wilkins, 6 Barb. 557; Wilson *v.* Allen, 6 Barb. 542; Quackenbush *v.* Ehle, 5 Barb. 469; Baker *v.* Martin, 3 Barb. 634; Green *v.* Brown, 3 Barb. 119; Sackett *v.* New York, etc., R. Co., 8 Bosw. 228; New York Car Oil Co. *v.* Richmond, 6 Bosw. 213; Woodruff *v.* Commercial Mut. Ins. Co., 2 Hilt. 130; Moran *v.* Bogert, 16 Abb. Pr. N. S. 303; Train *v.* Brown, 12 Abb. Pr. 217, 21 How. Pr. 93; Doyle *v.* St. James' Church, 7 Wend. 178; Allard *v.* Mouchon, 1 Johns. Cas. 280. *Compare* Murray *v.* Barney, 34 Barb. 336.

North Carolina.— Perry *v.* Hardis, 99 N. C. 21, 5 S. E. 230; Usry *v.* Suit, 91 N. C. 406.

Oregon.— Fahie *v.* Lindsay, 8 Oreg. 474.

Pennsylvania.— Selser's Estate, 8 Pa. Co. Ct. 254; Lackawanna Iron, etc., Co. *v.* Fales, 5 Leg. Gaz. 14; Finch *v.* Heermans, 5 Luz. Leg. Reg. 125; Snyder *v.* Rainey, 31 Pittsb. Leg. J. N. S. 49; Henne's Estate, 2 Woodw. 352. See also *In re* Johns, 2 Chest. Co. Rep. 281. *Compare* Davison *v.* Order of Hibernians, 9 Kulp 356.

South Carolina.— Fields *v.* Hurst, 20 S. C. 282.

Vermont.— Harris *v.* Howard, 56 Vt. 695; Hodges *v.* Hosford, 17 Vt. 615; Putnam *v.* Dutton, 8 Vt. 396. *Compare* Bull *v.* Griffith, 30 Vt. 273.

West Virginia.— Fry *v.* Feamster, 36 W. Va. 454, 15 S. E. 253.

Wisconsin.— Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022; Remington *v.* Eastern R. Co., 109 Wis. 154, 84 N. W. 898; Johnson *v.* Goult, 106 Wis. 247, 82 N. W. 139 [*overruling* Briggs *v.* Hiles, 87 Wis. 438, 58 N. W. 752], holding that findings of fact may be set aside where against the clear preponderance of evidence, although there is some evidence to support them.

See 42 Cent. Dig. tit. "Reference," §§ 153, 193.

Palpable error.—A fact found by an auditor must be taken as true, unless the error be palpable. Robinett's Appeal, 36 Pa. St. 174; White's Appeal, 36 Pa. St. 134; Whiteside's Appeal, 23 Pa. St. 114.

In case of a common-law reference, if it appears that the referee has exercised his honest and incorrupt judgment in finding the facts, after a full and fair hearing of the parties, the court cannot decline to accept the report upon the ground that the referee has erred in his judgment. U. S. *v.* Ramsey, 158 Fed. 488.

Plain mistake.— Findings of fact cannot be set aside except for plain mistake by the referee, or in cases where the referee distorts the evidence in reaching his conclusions. Hibbs *v.* Woodward, 7 Luz. Leg. Reg. (Pa.) 77.

Where a referee finds a material fact, in the absence of such evidence as would, under like circumstances, authorize a judge to submit the question to the jury, the finding is not conclusive. Putnam *v.* Hubbell, 42 N. Y. 106.

Credibility of witnesses.— It is within the sound discretion of the court to set aside the report on the ground that it is founded on the testimony of a witness whose credibility was impeached before the referees. *Ex p.* Bassett, 2 Cow. (N. Y.) 458. Where the award rested on the testimony of a single witness, and that being liable to great distrust as to its accuracy, the court set aside the judgment on the award, and ordered a new trial by a jury. Kennedy *v.* New York, etc., R. Co., 3 Duer (N. Y.) 69.

In Michigan, however, the circuit court cannot set aside a report as against the weight of evidence, and order a new trial. People *v.* Wayne Cir. Judge, 18 Mich. 483.

In case of doubt.— The trial court may, in its discretion, vacate the report and order a new trial before itself, when it is unable to determine from the evidence reported by the referee whether the facts found by him are established by the proofs. Sullivan *v.* Sullivan, 122 Wis. 326, 99 N. W. 1022; Fairbanks *v.* Holliday, 59 Wis. 77, 17 N. W. 675.

Facts deduced from other facts.—An auditor's report, if of facts directly proved by the witnesses, is entitled to great weight; to less, if merely a deduction therefrom. Hindman's Appeal, 85 Pa. St. 466. The report of an auditor is not to be set aside, if he comes to the result by inferring a fact which he might legitimately infer from the evidence. Kent *v.* Hancock, 13 Vt. 519. But a report will be set aside where it was made upon inferences from the facts that the law will not warrant. Parker *v.* Avery, Kirby (Conn.) 353.

Findings from undisputed facts.— If a referee's finding is a deduction from undisputed facts, or from uncontradicted and credible evidence, such finding is given no greater weight than the court's findings at law, since the referee has no greater facilities than the court for reaching a correct conclusion. Grauel *v.* Wolfe, 185 Pa. St. 83, 39 Atl. 819;

stipulation or agreement of the parties to that effect upon the submission by them of the matter to arbitration.[44]

4. Report as Evidence.[45] In some jurisdictions, where a trial is had after the reference and the return of a report, the report is admissible in evidence.[46] But such portions of the report as are outside of the order of reference or pleadings cannot be considered as evidence by the jury.[47] However, the report need not

McConomy *v.* Reed, 152 Pa. St. 42, 25 Atl. 176; Fidelity Ins., etc., Co. *v.* Earle, 9 Pa. Dist. 198, 23 Pa. Co. Ct. 449.

44. Leighton *v.* Meserve, 117 Mass. 52; McCracken *v.* Clarke, 31 Pa. St. 498 (holding, however, that an agreement, in the submission of a pending cause to arbitration, that the award shall be final and conclusive, is subject to the implied condition that the award be made according to the submission); Gallup *v.* Reynolds, 8 Watts (Pa.) 424; Meek *v.* Sancowicz, 4 Kulp (Pa.) 85; Thompson *v.* Warner, 62 Vt. 186, 20 Atl. 596; Morse *v.* Beers, 51 Vt. 359; Griffin *v.* Champlain Mut. F. Ins. Co., 50 Vt. 460 (holding that the rule of reference cannot supersede the agreement whereon it is founded; and the award is final if so agreed, whether the rule so stated or not). See also Goodridge *v.* Dustin, 5 Metc. (Mass.) 363; Whalen *v.* Brennan, 34 Nebr. 129, 51 N. W. 759; Noonan *v.* Orton, 22 Wis. 84.

45. See also *infra*, VIII, I, 5, f, (II).

46. Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169; Leverone *v.* Arancio, 179 Mass. 439, 61 N. E. 45 (holding that objections to an auditor's report cannot be taken at the trial by a motion to strike out certain portions thereof); Connolly *v.* Sullivan, 173 Mass. 1, 53 N. E. 143; Peaslee *v.* Ross, 143 Mass. 275, 9 N. E. 657; Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181; Pickering *v.* Frink, 62 N. H. 342 (holding that on a trial by jury of a cause which has been heard by an auditor, defendant cannot prevent the admission in evidence of the auditor's report by confessing a part of plaintiff's claim); Blodgett *v.* Cummings, 60 N. H. 115; Shepardson *v.* Perkins, 60 N. H. 76 (holding that a referee's report is admissible before the jury, even though it contain erroneous conclusions of law); Lumpkin *v.* Jaquess, 31 Tex. Civ. App. 10, 71 S. W. 618; Moore *v.* Waco Bldg. Assoc., 9 Tex. Civ. App. 404, 28 S. W. 1033; Barry *v.* Barry, 2 Fed. Cas. No. 1,060, 3 Cranch C. C. 120 (holding that only so much of the report of an auditor is admissible as states the items claimed by either party and objected to by the other). See also Buck *v.* Hall, 170 Mass. 419, 49 N. E. 658; Paulison *v.* Halsey, 38 N. J. L. 488; Dean *v.* Susade, 37 N. J. L. 50, effect of failure to bring case to trial. *Compare* Flower *v.* Downs, 12 Rob. (La.) 101; Bradford *v.* Wright, 5 R. I. 338.

An agreement to refer a case to an auditor is not an agreement that his report may be used as evidence in the trial of the case to the jury, if the provision of the statute making it evidence is void. Francis *v.* Baker, 11 R. I. 103, 23 Am. Rep. 424.

Discretion of court.— Where the court rejects the report of an auditor, and submits the case to a jury, it is within its discretion to refuse to permit the report to be read in evidence. Robson *v.* Jones, 33 Tex. 324. When a case involving an inquiry into accounts is referred to an auditor as an ordinary step preliminary to the trial, on the filing of the auditor's report it is discretionary with the court to hear and settle the case either with or without the aid of a jury. Moore *v.* Jacobs, 182 Mass. 482, 65 N. E. 847.

As dependent on court in which action tried. — The report of an auditor appointed by any court in which an action is pending follows the case wherever it goes, and, when pertinent to the issue on trial, is admissible in whatever court the trial takes place. Collins *v.* Poole, 190 Mass. 599, 77 N. E. 484.

Objections to admissibility.— Where parties agree that an auditor may state the evidence on which he founds his report, and he states in his report only the substance of the evidence, his report may be used as evidence, on the trial, by the party in whose favor it is made. The other party, if he suppose any material evidence to be omitted in the report, should apply to the auditor, before the trial, to supply the omission. Com. *v.* Cambridge, 4 Metc. (Mass.) 35. The objection that the conclusions of an auditor's report are based upon incompetent evidence cannot be made for the first time at the trial, but must be raised by motion to recommit. Winthrop *v.* Soule, 175 Mass. 400, 56 N. E. 575. It is no ground of exception to the admission in evidence that the auditor appointed a time and place for the hearing which were not convenient to the counsel of the party excepting, as the counsel of the other party knew. Cheshire *v.* Howland, 13 Gray (Mass.) 321.

A minority report, made by one of three auditors to whom a cause was referred, is not admissible in evidence on the trial of the action. Lincoln *v.* Taunton Copper Mfg. Co., 9 Allen (Mass.) 181.

Depositions as part of report.— Where a cause has been referred to an auditor under Mich. Comp. Laws, § 4197, depositions taken by the auditor and returned into court with his report, but not attached to or forming a part of it, cannot be used as evidence on the trial of the cause in the circuit court, the account stated, and nothing else, being made evidence by the statute. Beard *v.* Spalding, 12 Mich. 309.

Practice in New Hampshire see Maleham *v.* Cook, 55 N. H. 450; Norton *v.* Hazleton, 45 N. H. 240; Dole *v.* Erskine, 37 N. H. 316; Chesley *v.* Chesley, 37 N. H. 229; King *v.* Hutchins, 26 N. H. 139.

47. Flint *v.* Hubbard, 1 Allen (Mass.) 252; Bartlett *v.* Trefethen, 14 N. H. 427 (holding

be introduced in evidence except where the court so requires,[48] although it has been held that the court has authority to require it to be read at the trial, although against the objection of the parties.[49] When introduced in evidence, it is *prima facie* but not conclusive evidence of the findings and facts contained therein.[50] Either party may impeach it,[51] either by new evidence outside that reported,[52] or by the evidence reported by the referee.[53] The burden of proof is not shifted,[54]

that an auditor's report, including other matters than a statement of the account between the parties, is not competent evidence); Barkley *v.* Tarrant County, 53 Tex. 251.

Effect of amendment of pleadings.—An auditor's report is competent evidence of facts stated in it which are objected to before him as not admissible under the answer, if the answer, after the return of the report, and before trial, is amended by leave of court, so as to meet the objection. Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

48. Chesley *v.* Chesley, 37 N. H. 229.

Reading all of report.—A party who introduced an auditor's report at the trial and relies on any part of it as evidence may be properly required to read the whole report, but is not thereby precluded from controlling by other evidence the *prima facie* case made by the auditor's report in other respects. Fogg *v.* Farr, 16 Gray (Mass.) 396.

49. Clark *v.* Fletcher, 1 Allen (Mass.) 53.

50. *Georgia.*—Arthur *v.* Gordon County, 67 Ga. 220; Roberts *v.* Summers, 47 Ga. 434; Camp *v.* Mayer, 47 Ga. 414.

Maine.— Howard *v.* Kimball, 65 Me. 308.

Massachusetts.— Anderson *v.* Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706; Carroll *v.* Carroll, 188 Mass. 558, 74 N. E. 913; Phillips *v.* Cornell, 133 Mass. 546; Ford *v.* Burchard, 130 Mass. 424; Lyons *v.* Ricker, 128 Mass. 452; Newell *v.* Chesley, 122 Mass. 522; Hutchison *v.* Tucker, 121 Mass. 402; Lowe *v.* Pimental, 115 Mass. 44; Nolan *v.* Collins, 112 Mass. 12; Peru Steel, etc., Co. *v.* Whipple File, etc., Mfg. Co., 109 Mass. 464; Crafts *v.* Crafts, 13 Gray 360; Leathe *v.* Bullard, 8 Gray 545 (holding that the report of an auditor is *prima facie* evidence of the facts found by him, even if he reports the evidence in detail on which his finding is based); Rich *v.* Jones, 9 Cush. 329; Barnard *v.* Stevens, 11 Metc. 297; Paine *v.* Ball, 3 Mass. 235.

Missouri.— Rall *v.* McCrary, 45 Mo. App. 365.

New Hampshire.— Shepardson *v.* Perkins, 60 N. H. 76; Lull *v.* Cass, 43 N. H. 62; Stone *v.* Aldrich, 43 N. H. 52; Shoutee *v.* Swindles, 37 N. H. 559; Mathes *v.* Bennett, 21 N. H. 188; Bellows *v.* Woods, 18 N. H. 305.

New Jersey.— Boody *v.* Pratt, 64 N. J. L. 281, 45 Atl. 598.

Texas.— Eagle Mfg. Co. *v.* Hanaway, 90 Tex. 581, 40 S. W. 13; Moore *v.* Waco Bldg. Assoc., 9 Tex. Civ. App. 404, 28 S. W. 1033.

West Virginia.—State *v.* Barnes, 52 W. Va. 85, 43 S. E. 131.

See 42 Cent. Dig. tit. "Reference," § 156.

Compare Gagnet *v.* New Orleans, 23 La. Ann. 207.

Statutory provisions.— Ga. Code, § 3097, providing that an auditor's report is *prima facie* evidence of the truth, does not apply where the report is made after hearing but one side. Cutliff *v.* Boyd, 72 Ga. 302. Under Mass. Gen. St. c. 121, § 40, making the report of an auditor *prima facie* evidence upon the matters referred to in such report, it is *prima facie* evidence both of the result of the accounts and of the facts and inferences stated, even though including a finding upon the general question of defendant's liability. Holmes *v.* Hunt, 122 Mass. 505, 23 Am. Rep. 381.

Inferences of fact.— Where specific findings of fact are made by an auditor, the court has the right to draw inferences of fact contrary to those drawn by the auditor. Wirth *v.* Kuehn, 191 Mass. 51, 77 N. E. 641.

51. Johnson *v.* Kimball, 172 Mass. 398, 52 N. E. 386; Kendall *v.* Weaver, 1 Allen (Mass.) 277.

52. Keaton *v.* Mayo, 71 Ga. 649; Fletcher *v.* Powers, 131 Mass. 333 (holding that in suit for the conversion of chattels, plaintiff is not precluded from putting in evidence of their value by the fact that he offered no evidence on this point before an auditor to whom the case had been referred); Somers *v.* Wright, 114 Mass. 171 (holding that in an action to recover for goods sold and delivered which had been referred to an auditor for report, the introduction of the auditor's report cannot exclude other competent evidence, whether received before such auditor or not, although the report shows that the evidence was rejected by the auditor at the hearing before him); Allen *v.* Hawks, 11 Pick. (Mass.) 359; Com. *v.* Cambridge, 4 Metc. (Mass.) 35; Shepardson *v.* Perkins, 60 N. H. 76; Lull *v.* Cass, 43 N. H. 62 (holding that a party reading in evidence on the trial an auditor's report previously made may introduce evidence in addition to it, and prove items not allowed by the auditor). See Morris *v.* Lemp, 13 Ida. 116, 88 Pac. 761.

53. Keaton *v.* Mayo, 71 Ga. 649; Com. *v.* Cambridge, 4 Metc. (Mass.) 35.

Restatement of rule.— Where an auditor's report in favor of one party states particular facts from which a conclusion in favor of either party may be inferred, the jury, from those facts, without other evidence, may give a verdict against the conclusion of the auditor. Emerson *v.* Patch, 129 Mass. 299. An auditor's general finding, although *prima facie* evidence warranting a verdict in accordance therewith, may be overcome by the particular facts and the evidence stated in his report and justifying a different conclusion. Blackington *v.* Johnson, 126 Mass. 21.

54. Wyman *v.* Whicher, 179 Mass. 276, 60 N. E. 612; Lonergan *v.* Peck, 136 Mass. 361;

although if no evidence is introduced to rebut the report the verdict must be for the party in whose favor the report was rendered.[55] Proper instructions should be given the jury as to the use and effect of the report, especially where it has been excepted to and the whole report has been read in evidence.[56] An instruction that the report is not entitled to great weight is properly refused.[57] So where evidence is introduced by both parties, it is error to instruct that there is a presumption of fact that the report is correct.[58] But an instruction that it must be assumed that the referee, as an officer of the court acting in a judicial capacity, had acted in a proper manner, is not erroneous.[59] The court may instruct that if there is not sufficient evidence to support a finding the verdict should be in favor of the exception thereto.[60] On the trial it is sufficient if plaintiff makes out a case by facts outside of the referee's report, although he is not entitled to recover on the facts and evidence stated in the report.[61]

5. Objections and Exceptions and Hearing Thereof in General — a. Nature and Scope.[62] Generally the report is reviewed by means of exceptions thereto filed by the party against whom the report is rendered.[63] However, only errors

Morgan *v.* Morse, 13 Gray (Mass.) 150; Bradford *v.* Stevens, 10 Gray (Mass.) 379; Blodgett *v.* Cummings, 60 N. H. 115. But see Taunton Iron Co. *v.* Richmond, 8 Metc. (Mass.) 434; Jones *v.* Stevens, 5 Metc. (Mass.) 373.

55. Bradford *v.* Stevens, 10 Gray (Mass.) 379.

56. Flair *v.* Manhattan Ins. Co., 112 Mass. 320; Kendall *v.* May, 10 Allen (Mass.) 59; Taunton Iron Co. *v.* Richmond, 8 Metc. (Mass.) 434; Allen *v.* Hawks, 11 Pick. (Mass.) 359.

Where there are some items in the report not excepted to, the report is admissible before the jury but the court must, by instructions, eliminate from the consideration of the jury that part of the report containing items excepted to and charge that the issue as to such items must rest upon evidence irrespective of the report. Hill *v.* Dons, (Tex. Civ. App. 1896) 37 S. W. 638.

57. Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847.

58. Wyman *v.* Whicher, 179 Mass. 276, 60 N. E. 612.

59. Hunneman *v.* Phelps, 199 Mass. 15, 85 N. E. 169.

60. Dickenson *v.* Moore, 117 Ga. 887, 45 S. E. 240.

61. Paul *v.* Wilbur, 189 Mass. 48, 75 N. E. 63.

62. **Assignments of errors on appeal** see Appeal and Error, 2 Cyc. 996.

63. *Georgia.*— Peavy *v.* McDonald, 119 Ga. 865, 47 S. E. 203 (holding that a point that the auditor, at the time of filing his report, has lost all control over the case, may be raised by way of exception, although the better practice is to move to disregard it, on the ground that it was a mere nullity); Walker *v.* Walker, 25 Ga. 65.

Indiana.— Gauntt *v.* State, 81 Ind. 137.

Maine.— Thompson *v.* Mason, 92 Me. 98, 42 Atl. 314, holding that where a referee awards costs, and in his report specifically designates the items, whether the award is erroneous is a question of law, and exceptions will lie, as a matter of right, to the acceptance of the report.

Maryland.—Woods *v.* Matchett, 47 Md. 390 (holding that a party may except to the confirmation of an award on the ground of usury in the computation, although no such defense was made before the arbitrator); Northern Cent. R. Co. *v.* Baltimore Canton Co., 24 Md. 500.

Massachusetts.— See also Keith *v.* Marcus, 182 Mass. 320, 65 N. E. 421.

New York.— Quimby *v.* Claflin, 77 N. Y. 270; Shaw *v.* Bryant, 65 Hun 57, 19 N. Y. Suppl. 618; Forrest *v.* Forrest, 5 Bosw. 672 [*affirmed* in 24 How. Pr. 609 note]. See also Bates *v.* Holbrook, 41 Misc. 129, 83 N. Y. Suppl. 929.

North Carolina.— State *v.* McKenzie, 65 N. C. 102, holding also that neither party has the right to require that the facts shall be passed upon by a jury.

Virginia.— See Simmons *v.* Simmons, 33 Gratt. 451; Brewer *v.* Hastie, 3 Call 22, holding that on a bill for an account, if the answer admit sundry dealings, and the commissioner report a balance due, without exception before him or in the court of chancery, defendant cannot object, in the court of appeals, that there was no evidence of the debt.

See 42 Cent. Dig. tit. "Reference," § 158.

Where the reference is not to hear and determine but to take evidence and report it to the court with the referee's opinion thereon, exceptions to the report are unavailing, but they must be the decision of the court based on the report. Winfield *v.* Stacom, 40 N. Y. App. Div. 95, 57 N. Y. Suppl. 563; Doremus *v.* Doremus, 76 Hun (N. Y.) 337, 27 N. Y. Suppl. 1039.

Exclusive mode.— Where a referee reports the facts and his conclusions thereon, such conclusions may be questioned only by exception thereto. Gauntt *v.* State, 81 Ind. 137.

Erroneous findings.— Exceptions to the report of a court commissioner are proper only where the commissioner has come to an erroneous conclusion of law or fact on the evidence before him touching the reference. Emerson *v.* Atwater, 12 Mich. 314.

Who may file.—Assistant counsel, retained after the arbitrators to whom the cause was submitted had made their award, could not

apparent on the face of the report can be reached, in some jurisdictions, by means of exceptions.[64] The proceedings before the referee,[65] such as his rulings on the admissibility of evidence,[66] are generally not the subject of an exception to the report.[•] Nor has the court power on exceptions to review the evidence; this can only be done on a motion for a new trial, as in case of a finding by the court or the verdict of a jury.[67] So mere defects or omissions in the report are ordinarily not the subject of exceptions, but can only be raised by motion to recommit the report.[68] In some jurisdictions, where the report is conclusive on the facts, exceptions can only be taken to conclusions of law.[69]

b. Necessity.[70] Generally objections to the report can be urged only in so far as covered by the exceptions filed thereto.[71] It has been held, however, that

be permitted to file exceptions to the report which the attorney of record was, by his conduct and admissions during the trial, precluded from taking. Bollmann *v.* Bollmann, 6 S. C. 29.

Where the report is filed after the time provided by the order of court, the remedy of the party objecting to the findings is to file exceptions. Hart *v.* Manson, 120 Ga. 481, 47 S. E. 929.

New grounds of defense not set forth in the pleadings cannot be urged by way of exceptions. Davis *v.* Foley, Walk. (Miss.) 43.

In Illinois the statute enabling a party to raise questions of law by exceptions to the report dispenses with the necessity of submitting propositions of law in cases heard before a referee. Western Union Cold-Storage Co. *v.* Bankers' Nat. Bank, 176 Ill. 260, 52 N. E. 30 [*affirming* 73 Ill. App. 410]; Chicago Sanitary Dist. *v.* Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369 [*affirming* 67 Ill. App. 286].

64. Thompson *v.* White, 4 Serg. & R. (Pa.) 135; Whipple *v.* Whipple, 13 R. I. 534. See also U. S. *v.* Ramsey, 158 Fed. 488.

Matters not appearing on the record which took place in the proceeding before the arbitrators during the time in which the cause was out of court, from the time when the jurisdiction became vested in the arbitrators to the time when the award was entered, can be reviewed only by appeal. Thompson *v.* White, 4 Serg. & R. (Pa.) 135.

65. Duffy *v.* Duncan, 32 Barb. (N. Y.) 587 [*affirmed* in 35 N. Y. 187]; Van Syckle *v.* Stewart, 10 Phila. (Pa.) 547 (holding that an exception that the legal arbitrator, appointed under the act of April 6, 1870, providing for legal arbitration in designated counties of the state, did not duly reflect on the case, being insusceptible of proof, will be dismissed); Abbott *v.* Myers, 5 Phila. (Pa.) 451; Read *v.* Winston, 4 Hen. & M. (Va.) 450. See also State *v.* Scott, 84 N. C. 184.

Failure of the referee to be sworn according to law is not ground for an exception of fact to his report but the proper remedy is by a motion to recommit. Harrison *v.* Harrison, 115 Ga. 999, 42 S. E. 382.

66. Allwright *v.* Skillings, 188 Mass. 538, 74 N. E. 944; Collins *v.* Wickwire, 162 Mass. 143, 38 N. E. 365; Briggs *v.* Gilman, 127 Mass. 530. See also Dean *v.* Roesler, 1 Hilt. (N. Y.) 420. *Contra*, see Geary *v.* New Haven, 76 Conn. 84, 55 Atl. 584; Guarantee Gold Bond Loan, etc., Co. *v.* Edwards, 7 Indian Terr. 297, 104 S. W. 624, by statute.

An objection to the testimony offered cannot be taken by exception to the report where not urged before the referee. *In re* Little, 47 N. Y. App. Div. 22, 62 N. Y. Suppl. 27.

67. U. S. *v.* Ramsey, 158 Fed. 488.

68. Fricker *v.* Americus Mfg., etc., Co., 124 Ga. 165, 52 S. E. 65; Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; Weldon *v.* Hudson, 120 Ga. 699, 48 S. E. 130; Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166 (holding that failure of an auditor to classify and state his rulings and findings, and report his conclusions upon the law and facts, as required by law, is ground for a motion to recommit, and not for an exception of law to his report); Mason *v.* Scio Fractional School Dist. No. 1, 34 Mich. 228; Tilley *v.* Bivens, 110 N. C. 343, 14 S. E. 920 (holding that the fact that the referee failed to find certain facts was no ground for exception but may be ground for a motion to recommit); Grant *v.* Bell, 90 N. C. 558; Bollmann *v.* Bollmann, 6 S. C. 29 (holding that an exception to the report of referees for want of conformity to the requirement of Code Civ. Proc. § 296, that such report "must state the facts found and the conclusions of law separately," is untenable, as such provision is merely directory, and not mandatory).

Refusal of request to find.— Exceptions to the refusal of a referee to find additional facts will not lie, but the party must move for an order sending back the report, with instructions to add findings on such questions. Rogers *v.* Wheeler, 52 N. Y. 262. Where there is conflicting evidence on a question of fact, a request by one of the parties that the referee find as claimed by him, and a refusal of the referee so to find, is not the ground of an exception. Potter *v.* Carpenter, 71 N. Y. 74.

69. Abbott *v.* Mathews, 26 Mich. 176; Roe *v.* Roe, 14 Hun (N. Y.) 612.

70. **To preserve questions for review on appeal** see APPEAL AND ERROR, 2 Cyc. 733–737.

71. *Alabama.*— Waldrop *v.* Carnes, 62 Ala. 374.

Illinois.— Singer, etc., Co. *v.* Steele, 125 Ill. 426, 17 N. E. 751.

Iowa.— Bauder *v.* Hinckley, 60 Iowa 185, 14 N. W. 228.

Kentucky.—Payne *v.* Payne, 8 Ky. L. Rep. 591.

no exception is necessary where the reference is merely to take evidence and report,[72] nor where the report presents a question of law to the court for its decision,[73] nor where the court has no jurisdiction over the matter passed on.[74] So a party interested in the distribution of a fund may be heard, although no exceptions are filed, where his equity was not one of the subjects referred.[75]

c. Time. Exceptions to the report made by a referee of the proceedings under the order must be filed within the time fixed by statute or rules of court,[76] or by order

New Mexico.— Neher *v.* Armijo, 11 N. M. 67, 66 Pac. 517.

New York.— Coe *v.* Coe, 37 Barb. 232, 14 Abb. Pr. 86; Honlahan *v.* Sackett's Harbor, etc., R. Co., 24 How. Pr. 155. But see Mandeville *v.* Marvin, 30 Hun 282; People *v.* Colgate, 9 Hun 708 [*affirmed* in 67 N. Y. 512].

North Carolina.— Chard *v.* Warren, 122 N. C. 75, 29 S. E. 373; Smith *v.* Kron, 109 N. C. 103, 13 S. E. 839; Green *v.* Castleberry, 70 N. C. 20; Southerland *v.* Mallett, 2 N. C. 461. See also Depriest *v.* Patterson, 94 N. C. 519.

Pennsylvania.— Mengas' Appeal, 19 Pa. St. 221. See also Southern Maryland R. Co. *v.* Moyer, 23 Wkly. Notes Cas. 554.

Texas.— Hamm *v.* J. Stone, etc., Live Stock Co., 18 Tex. Civ. App. 241, 45 S. W. 330.

Wisconsin.— Yates *v.* Shepardson, 39 Wis. 173, holding that the report of a referee before whom the case is tried is final as to any fact found by him to which no exception was taken.

See 42 Cent. Dig. tit. "Reference," § 157.

But see Headley *v.* Reed, 2 Cal. 322, holding that where the report is not made immediately after the close of the testimony, it is, by section 191 of the Practice Act, deemed excepted to.

Excuses for not excepting.— The fact that a referee's report is filed in vacation constitutes no sufficient reason for not excepting thereto. Roberts *v.* Cass, 27 Iowa 225.

72. Price *v.* Hicks, 14 Fla. 565; Martin *v.* Hodges, 45 Hun (N. Y.) 38; Frost *v.* Reinach, 40 Misc. (N. Y.) 412, 81 N. Y. Suppl. 246; Atty.-Gen. *v.* Continental L. Ins. Co., 64 How. Pr. (N. Y.) 93; Schulz *v.* Schulz, 128 Wis. 28, 107 N. W. 302.

Report under interlocutory decree.—A formal exception to a referee's report under an interlocutory decree is not necessary, and an objection that the exceptions were not sufficiently specific cannot be made. Evertson *v.* Givan, 16 How. Pr. (N. Y.) 25.

73. Curtis *v.* Portland, 59 Me. 483; Sargeant *v.* Sargeant, 18 Vt. 330.

74. Matter of Conklin, 7 N. Y. St. 280.

75. Butler *v.* Butler, 67 S. C. 211, 45 S. E. 184.

76. *Iowa.*— *In re* Malvin, 93 Iowa 169, 61 N. W. 420.

Kansas.— Grayson *v.* Hinkle, 29 Kan. 277.

Missouri.— Reinecke *v.* Jod, 56 Mo. 386; Gibson *v.* Jenkins, 97 Mo. App. 27, 70 S. W. 1076 (holding that the statutory requirement that exceptions must be filed within four term-days does not include days in vacation); Dallas *v.* Brown, 60 Mo. App. 493.

New York.— *In re* Leffingwell, 30 Hun 528 (holding that the rules of court apply to references ordered by the surrogate); Catlin *v.* Catlin, 2 Hun 378, 4 Thomps. & C. 664; Cowen *v.* West Troy, 43 Barb. 48; Bailey *v.* Carter, 34 Misc. 270, 69 N. Y. Suppl. 616; New York *v.* Erben, 24 How. Pr. 358 [*affirmed* in 38 N. Y. 305]; Brewer *v.* Isish, 12 How. Pr. 481.

Pennsylvania.— Moore *v.* Hunter, 4 Yeates 358, 3 Binn. 475 note; Shewell *v.* Wycoff, 1 Dall. 312, 1 L. ed. 152; Warner *v.* Sax, 4 Luz. Leg. Reg. 7.

South Carolina.— Brown *v.* Rogers, 71 S. C. 512, 51 S. E. 257, holding that where a referee in an accounting has filed his report, and thereafter files a second report on a supplemental matter not in dispute, such second report is not merged in the first, so as to authorize exceptions to the first to be filed within twenty days after filing of notice of second report.

Vermont.— Cummings *v.* Fullam, 15 Vt. 787, holding that a party will be entitled to the usual time, under the rule, for filing exceptions to a report of auditors, after a motion to recommit the report has been disposed of.

Canada.— See Colchester South Tp. *v.* Valad, 24 Can. Sup. Ct. 622.

See 42 Cent. Dig. tit. "Reference," § 159. See also Appeal and Error, 2 Cyc. 703.

Statute as mandatory.— Ga. Civ. Code, § 4589, requiring the auditor to give notice of the filing of his report, and allowing either party twenty days within which to file exceptions, is mandatory; and hence exceptions cannot be filed after the expiration of twenty days, although counsel was prevented by sickness from filing the exceptions. Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755. In Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055, it is said to be doubtful whether, after the expiration of the twenty days allowed by law for filing exceptions, a new and distinct exception can be added to those already filed by way of amendment. If it can be done at all, such an amendment is not a matter of course, but some good and sufficient reason must be shown for its allowance.

When time begins to run.— Until a referee files the testimony taken before him the filing is incomplete; and the time within which exceptions to the report must be filed and served does not begin to run. Pope *v.* Perault, 22 Hun (N. Y.) 468. To limit the time to except to conclusions of law, after a trial by judge or referee, a copy of the decision or report must be served with notice of filing. Schwartz *v.* Weber, 18 Abb. N. Cas. (N. Y.) 60. The time to serve exceptions cannot be

of court,[77] or by the agreement of the parties.[78] Where no time is fixed, exceptions may be filed at any time before judgment is entered,[79] although where a jury trial is had findings must be objected to before trial before the jury,[80] and generally exceptions cannot be filed after the confirmation of the report.[81] Generally the exceptions to the findings need not be taken before the report is signed.[82] While the failure to file exceptions within the required time precludes the right to insist on their consideration as a matter of right,[83] yet the court has power to permit the serving of exceptions after the time limited has expired.[84] So the time may

limited, even when the report has been filed and the judgment entered by the exceptant himself, except by serving upon him of a copy of the report, with notice of filing, and a copy of the judgment with notice of entry. Sommers *v.* Ditmar, 20 Misc. (N. Y.) 511, 46 N. Y. Suppl. 667. Under the rule of court requiring notice to the opposite party of the filing of a report of referees in the prothonotary's office, it is not necessary that notice should be given of reading the report in court. It is sufficient if the notice is given that the report is filed, and the four days within which exceptions may be filed run from the time of such notice. Dunkin *v.* Calbraith, 1 Browne (Pa.) 14.

In North Carolina, exceptions to a referee's report may be filed, as a matter of right, at the term to which the report is made. The filing of exceptions after that term is in the discretion of the judge, and from the exercise of such discretion no appeal lies. McNeill *v.* Hodges, 105 N. C. 52, 11 S. E. 265; Wittkowsky *v.* Logan, 86 N. C. 540; Long *v.* Logan, 86 N. C. 535; State *v.* Peebles, 67 N. C. 97. See also Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384; Green *v.* Castlebury, 70 N. C. 20.

In South Carolina under Code Civ. Proc. (1902) § 195, providing that the court may in its discretion allow an answer or reply to be made or other act to be done, after the time limited by the code or by an order enlarging such time, etc., the court has discretionary power to permit the filing of exceptions to a referee's report after the expiration of ten days from notice of filing. Odom *v.* Newton, 81 S. C. 76, 61 S. E. 1071.

77. Singer Mfg. Co. *v.* Williamson, 100 N. C. 83, 6 S. E. 92.

78. Strong *v.* District of Columbia, 4 Mackey (D. C.) 53.

79. Holland *v.* Mers, 7 Ky. L. Rep. 360. See also Calvert *v.* Carter, 18 Md. 73. But see Conoway *v.* Short, 3 Harr. (Del.) 342; Harrison *v.* Faulk, 16 La. 358.

Where order of reference fixes no time.— Under Ga. Code, § 4203, where the order referring a case to an auditor does not prescribe any time within which exceptions to the report may be filed, the report is subject to exceptions for such time as the court may allow. Poullain *v.* Poullain, 76 Ga. 420, 4 S. E. 92.

80. Kendall *v.* May, 10 Allen (Mass.) 59, holding that the finding of an auditor that an insane party to an action is competent to testify, and his consequent admission of the other party to testify in his own favor, can only be controverted upon hearing before the judge, previous to the trial before the jury.

81. Riffe *v.* Roberts, 9 Ky. L. Rep. 399; Gratz *v.* Phillips, 3 Binn. (Pa.) 474; Bollmann *v.* Bollmann, 6 S. C. 29; Dinsmore *v.* Smith, 17 Wis. 20.

82. Hodgin *v.* Toler, 70 Iowa 21, 30 N. W. 1, 59 Am. Rep. 435; Edwards *v.* Cottrell, 43 Iowa 194.

83. Grayson *v.* Hinkle, 29 Kan. 277; Bailey *v.* Carter, 34 Misc. (N. Y.) 270, 69 N. Y. Suppl. 616; Shields *v.* McNeill, 118 N. C. 590, 24 S. E. 413; Riegel's Estate, 133 Pa. St. 38, 59 Atl. 313 (holding that where a party neglects to file his exceptions to an auditor's report within five days after receiving notice that the report is ready for filing, as required by rule of court, he cannot appeal from a decree confirming the report); Shoemaker *v.* Smith, 2 Binn. (Pa.) 239; Lloyd's Appeal, 3 Pa. Cas. 517, 6 Atl. 915; Kaub *v.* Ziegler, 11 Wkly. Notes Cas. (Pa.) 433.

But if referees themselves certify to the court that they have committed a plain mistake, the court will hear exceptions, although not filed until after the four days, but the party filing the exceptions will be confined to the errors alleged by the referees. Davis *v.* Schuylkill, etc., Nav. Co., 4 Binn. (Pa.) 296.

84. *Missouri.*— McPike *v.* McPike, 111 Mo. 216, 20 S. W. 12, holding that it is not an abuse of judicial discretion to refuse to strike out objections to a referee's report because the objections are filed one day after the time limited therefor by order of court.

New York.— Gallagher *v.* Grand Trunk R. Co., 6 N. Y. Suppl. 581 [*affirmed* in 127 N. Y. 684, 29 N. E. 149]; Spitz *v.* Tousey, 14 N. Y. St. 871; Gade *v.* Gade, 14 Abb. N. Cas. 510; Sheldon *v.* Wood, 14 How. Pr. 18.

North Carolina.— Kerr *v.* Hicks, 131 N. C. 90, 42 S. E. 532 [*reversing* on other grounds 129 N. C. 141, 39 S. E. 797]; Long *v.* Gooch, 86 N. C. 709.

Pennsylvania.— Diller's Estate, 9 Lanc. Bar 2.

South Carolina.— Brown *v.* Rogers, 71 S. C. 512, 51 S. E. 257.

Wisconsin.— Smith *v.* Smith, 19 Wis. 522. See 42 Cent. Dig. tit. "Reference," § 159.

Contra.— Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755.

When motion denied.—A motion for leave to file exceptions *nunc pro tunc* to the report of the referee will be denied where it appears that the moving party was represented on the hearing of the motion to confirm the re-

be extended by agreement of the parties.[85] Objections to proceedings *pendente lite* before the referee and exceptions to adverse rulings thereon must be taken at the time when the question is raised or the ruling is made.[86] Where a report of the evidence is made up from memory some time after first filing the report, an opportunity for objecting should be given.[87]

d. Form and Sufficiency — (i) *Formal Requisites.* Exceptions must strictly conform to the statutes in so far as they provide for their form and contents.[88] Except where otherwise provided by statute or rule of court,[89] the exceptions need not be in writing.[90] On the other hand exceptions taken before the referee must generally be reduced to writing and with the ruling thereon filed with the report.[91] Exceptions not appearing to be in writing will be presumed to have been oral.[92] It has been held that exceptions apparent on the face of the record need not be verified or signed by counsel,[93] although in some jurisdictions exceptions will not be received unless accompanied by affidavits as to facts which do not appear on the face of the proceedings.[94]

(ii) *Specificness.* The exceptions to report must be specific and definite and not general.[95] For instance an exception that the finding is against the evi-

port, and opposed the confirmation, although he had filed no exceptions thereto. Bloom *v.* National United Ben. Sav., etc., Co., 78 Hun (N. Y.) 553, 29 N. Y. Suppl. 536.

85. Brown *v.* Rogers, 71 S. C. 512, 51 S. E. 257, holding that the marking of a case "heard" by the judge on the calendar in open court was not an agreement in writing not to require exceptions to referee's report to be filed within ten days.

86. *Georgia.*— Price *v.* Comer, 87 Ga. 468, 14 S. E. 122.

Indiana.—Way *v.* Fravel, 61 Ind. 162 (holding that failure of referee to make separate findings of facts and conclusions of law on the request of one of the parties must be excepted to at the time); Wabash, etc., Canal Trustees *v.* Huston, 12 Ind. 276.

Maine.— Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456.

New York.— Tremain *v.* Rider, 13 How. Pr. 148.

Ohio.— Cincinnati *v.* Cameron, 33 Ohio St. 336.

Pennsylvania.— Butterfield *v.* Lathrop, 71 Pa. St. 225; Moore *v.* Hunter, 3 Binn. 475 note, 4 Yeates 358; Crousillat *v.* McCall, 1 Browne 262 [*affirmed* in 5 Binn. 433, and *approved* in Little *v.* Stanton, 32 Pa. St. 299].

South Carolina.— Bollmann *v.* Bollmann, 6 S. C. 29, holding that where no objection was made to the examination of a party to the action, as a witness before referees, it cannot be raised by exception to their report.

See 42 Cent. Dig. tit. "Reference," § 159.

In Mississippi, however, exceptions may be filed in a probate court after the bringing in of the report by the auditors. Benoit *v.* Brill, 24 Miss. 83; Smith *v.* Hurd, 8 Sm. & M. 682.

87. Smith *v.* Harlan, 49 Iowa 101.

88. Huntington *v.* Mullins, 16 Lea (Tenn.) 738.

89. See the statutes of the several states.

90. Zoit *v.* Millaudon, 4 Mart. N. S. (La.) 470; Buckley *v.* Durant, 1 Dall. (Pa.) 129, 1 L. ed. 67, holding that where the exceptions arise from the face of the report, and depend upon construction of law, they need not be filed in writing.

91. Green *v.* Castlebury, 70 N. C. 20.

92. St. Joseph Mfg. Co. *v.* Hubbard, 36 Ind. App. 84, 75 N. E. 17.

93. Price *v.* Thomas, 4 Md. 514.

94. Pearce *v.* Shaw, 1 Serg. & R. (Pa.) 365.

95. *Alabama.*— Vaughan *v.* Smith, 69 Ala. 92; Royall *v.* McKenzie, 25 Ala. 363.

Connecticut.— Maples *v.* Avery, 6 Conn. 20.

District of Columbia.— Smith *v.* American Bonding, etc., Co., 12 App. Cas. 192.

Georgia.— Griffin *v.* Collins, 125 Ga. 159, 53 S. E. 1004; Phillips *v.* Collinsville Granite Co., 123 Ga. 830, 51 S. E. 666; Green *v.* Valdosta Guano Co., 121 Ga. 131, 48 S. E. 984; Ross *v.* Battle, 113 Ga. 742, 39 S. E. 287; Mason *v.* De Kalb County Road, etc., Com'rs, 104 Ga. 35, 30 S. E. 513; Arthur *v.* Gordon County Com'rs, 67 Ga. 220; White *v.* Reviere, 57 Ga. 386; Roberts *v.* Summers, 47 Ga. 434.

Illinois.— Snell *v.* Deland, 138 Ill. 55, 27 N. E. 707.

Indiana.— St. Joseph Mfg. Co. *v.* Hubbard, 36 Ind. App. 84, 75 N. E. 17.

Iowa.— Bolton *v.* Kitsman, 80 Iowa 343, 45 N. W. 876.

Louisiana.— King *v.* Wartelle, 14 La. Ann. 740.

Maine.— Bucksport *v.* Buck, 89 Me. 320, 36 Atl. 456.

Maryland.— Title Guarantee, etc., Co. *v.* Burdette, 104 Md. 666, 65 Atl. 341; Calvert *v.* Carter, 18 Md. 73; Scrivener *v.* Scrivener, 1 Harr. & J. 743.

Missouri.— Cahill *v.* McCornish, 74 Mo. App. 609; Dallas *v.* Brown, 60 Mo. App. 493; Smith *v.* Haley, 41 Mo. App. 611.

New Jersey.— Merritt *v.* Jordan, 65 N. J. Eq. 772, 60 Atl. 183.

New York.— Moyer *v.* New York Cent., etc., R. Co., 88 N. Y. 351; Ledoux *v.* Grand Trunk R. Co., 61 N. Y. 613; Graham *v.* Chrystal, 2 Abb. Dec. 263, 2 Keyes 21, 37 How. Pr. 279 [*affirming* 1 Abb. Pr. N. S 121, 32 How. Pr. 287]; Loomis *v.* Loomis, 51

dence,[96] or against the law,[97] or merely to "each of the conclusions of law," [98] is too general. So where requests to find are refused, a general exception is not sufficient.[99] And a general exception to the whole finding of the referee and every part thereof is insufficient where the entire finding is not erroneous.[1] In

Barb. 257; Jones *v.* Bridge, 2 Sweeny 431; *In re* Plumb, 24 Misc. 249, 53 N. Y. Suppl. 558; Miller *v.* Altieri, 13 Misc. 220, 34 N. Y. Suppl. 236; Lawrence *v.* Fowler, 20 How. Pr. 407; Underhill *v.* Pomeroy, 2 Hill 603 [*affirmed* in 7 Hill 388]. *Compare* Petrie *v.* Hamilton College, 158 N. Y. 458, 53 N. E. 216 [*reversing* on other grounds 8 N. Y. App. Div. 371, 40 N. Y. Suppl. 781].

North Carolina.— Neuse Falls Mfg. Co. *v.* Brooks, 106 N. C. 107, 11 S. E. 456; Avent *v.* Arrington, 105 N. C. 377, 10 S. E. 991; Battle *v.* Mayo, 102 N. C. 413, 9 S. E. 384; Young *v.* Kennedy, 95 N. C. 265; Cooper *v.* Middleton, 94 N. C. 86; Currie *v.* McNeill, 83 N. C. 176; Morrison *v.* Baker, 81 N. C. 76; Suit *v.* Suit, 78 N. C. 272; State *v.* Foy, 71 N. C. 527; Allison *v.* Bryson, 65 N. C. 44.

Pennsylvania.— *In re* Burke, 144 Pa. St. 190, 22 Atl. 752; Van Syckle *v.* Stewart, 10 Phila. 547.

Tennessee.— Loveman *v.* Taylor, 85 Tenn. 1, 2 S. W. 29; Ridley *v.* Ridley, 1 Coldw. 323; Green *v.* Lanier, 5 Heisk. 662; Powell *v.* Ford, 4 Lea 278; Elliott *v.* Bass, 4 Baxt. 354.

Texas.— Whitehead *v.* Perie, 15 Tex. 7; Hunt *v.* Ullibari, (Civ. App. 1896) 35 S. W. 298.

Wisconsin.— Carroll *v.* Little, 73 Wis. 52, 40 N. W. 582; Reed *v.* Jones, 15 Wis. 40.

United States.— Sandford *v.* Embry, 151 Fed. 977, 81 C. C. A. 167.

See 42 Cent. Dig. tit. "Reference," § 160.

Exceptions "to the findings of fact and to the conclusions of law of the referee herein" are too general to raise any question for review on appeal. Dallas *v.* Brown, 60 Mo. App. 493; Thompson *v.* Hazard, 120 N. Y. 634, 24 N. E. 278; Ward *v.* Craig, 87 N. Y. 550; Wheeler *v.* Billings, 38 N. Y. 263.

No particular form required.— Exceptions to a report, which definitely indicate what findings of fact and conclusions of law are excepted to, and give notice to the respondent of the questions that will be presented, are sufficient, whatever the form employed. Matter of MacFarlane, 65 N. Y. App. Div. 93, 72 N. Y. Suppl. 723 [*affirmed* in 169 N. Y. 608, 62 N. E. 1097].

What constitutes an exception.—A mere request for a finding of fact or law, with an adverse finding by the referee, is not an exception, nor does it take the place of an exception. Warner *v.* Sax, 4 Luz. Leg. Reg. (Pa.) 7.

Construction.— Where an auditor is required to find, as a matter of fact, whether certain houses were "trimmed out," and he finds they were not, and so reports, an exception to the effect that he should have found they were substantially trimmed out amounts to an admission of the correctness of the finding. Smith *v.* American Bonding, etc., Co., 12 App. Cas. (D. C.) 192.

In North Carolina, an exception to a referee's report, reserving the right to a jury trial, must contain a specific demand for the trial of the issue of fact raised by the pleading and passed upon by the referee in the finding excepted to, and point out the precise issue on which testimony would be offered. Keystone Driller Co. *v.* Worth, 118 N. C. 746, 24 S. E. 517.

96. Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602.

Necessary allegations.—An objection that the finding is against the weight of evidence must specify the particular findings objected to and the distinct grounds of objection. Whiting *v.* Crandall, 78 Mo. 593; Hornblower *v.* Crandall, 78 Mo. 581 [*affirming* 7 Mo. App. 220]. It has been held, however, that it is error to strike, on the ground that it is indefinite, an exception of fact to an auditor's report assigning a specified finding as contrary to evidence or without evidence to support it. Anderson *v.* Blair, 121 Ga. 120, 48 S. E. 951.

97. Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602.

98. Newell *v.* Doty, 33 N. Y. 83; Lefler *v.* Field, 50 Barb. (N. Y.) 407 [*affirmed* in 52 N. Y. 621]; Hepburn *v.* Montgomery, 5 N. Y. Civ. Proc. 244. *Compare* Wilson *v.* Allen, 3 How. Pr. (N. Y.) 368.

99. Daniels *v.* Smith, 130 N. Y. 696, 29 N. E. 1098 [*affirming* 54 Hun 639, 8 N. Y. Suppl. 128] (holding that an exception "to the refusal of the referee to find each of the several seventeen conclusions submitted to the referee by the said defendant so far as the referee's conclusions are not in conformity therewith" is not sufficiently definite); Brooks *v.* Van Every, 3 Keyes (N. Y.) 27, holding that where a referee refuses to find certain facts, an exception to such refusal, stating that he refuses to find otherwise than as above decided, a general finding in favor of plaintiff is too general.

Requests improper in part.—Where the referee refuses a finding of fact as a whole, and defendants except to it as a whole, the latter cannot complain of error in its refusal unless the entire request is proper. Steubing *v.* New York El. R. Co., 138 N. Y. 658, 34 N. E. 369. A general objection to refusal of a referee to adopt a set of conclusions of fact will not avail the party offering them, if any of the conclusions were rightfully rejected. Breitkreutz *v.* Holton Nat. Bank, 70 Kan. 698, 79 Pac. 686.

1. Crawford *v.* Everson, 68 N. Y. 624; Hepburn *v.* Montgomery, 5 N. Y. Civ. Proc. 244; Worthy *v.* Brower, 93 N. C. 344; Boogher *v.* New York L. Ins. Co., 103 U. S. 90, 26 L. ed. 310.

A general exception to the conclusions of law made by a referee in his report is not available unless all the rules embraced in

some jurisdictions the exceptions must contain all the facts and rulings necessary to show prejudicial error and not compel the court to search through the record for them.[2] An exception should not refer to other exceptions to show the matter objected to.[3]

e. Additional or Amended Exceptions. A defective exception is generally amendable by leave of court,[4] the application being addressed to the sound discretion of the court.[5] So the party excepting may be allowed to file new or additional exceptions after the limited time has passed where the facts were not discovered before,[6] but not where no cause for the delay in offering them is shown.[7]

f. Hearing — (i) *In General.*[8] The practice is considerably different in the several states as to the manner in which exceptions are heard. In some states the hearing is before the court in connection with a motion to confirm or set aside the report,[9] while in other states the exceptions of fact are tried by jury.[10] The

them are erroneous. Riley *v.* Sexton, 32 Hun (N. Y.) 245.

2. Armstrong *v.* Winter, 122 Ga. 869, 50 S. E. 997; Hudson *v.* Hudson, 119 Ga. 637, 46 S. E. 874; Richmond *v.* Phillips, 48 Ga. 542; Barnesville Mfg. Co. *v.* Caldwell, 48 Ga. 421; Huntington *v.* Mullins, 16 Lea (Tenn.) 738.

Setting forth evidence or reference to where it is to be found.—An exception complaining of the admission of evidence should set forth the evidence objected to. Griffin *v.* Collins, 125 Ga. 159, 53 S. E. 1004. So where the exceptions otherwise involve a consideration of the evidence, such evidence must be set forth. Linder *v.* Whitehead, 125 Ga. 115, 53 S. E. 588. But exceptions need not set forth any of the evidence where the auditor himself has reported all the evidence, and thus made it part of the record. White *v.* Reviere, 57 Ga. 386. However, an exception complaining of the ruling on evidence must disclose the substance of the evidence, or point out where in the brief of evidence it can be found. Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666; Weldon *v.* Hudson, 120 Ga. 699, 48 S. E. 130. The neglect of a party excepting to an auditor's report on matters of fact or on matters of law depending for their decision on the evidence to point out by appropriate reference to the auditor's brief of evidence, or to attach as exhibits to his exceptions those portions of the evidence relied on to support the exceptions, is a sufficient reason in an equity case for refusing to approve the exceptions of fact and overruling the exceptions of law. Armstrong *v.* Winter, 122 Ga. 869, 50 S. E. 997; Perkins *v.* Castleberry, 122 Ga. 294, 50 S. E. 107.

3. Bouknight *v.* Brown, 16 S. C. 155.

4. Moss *v.* Chappell, 126 Ga. 196, 54 S. E. 968 (holding that, although a defective exception to an auditor's report, filed within twenty days after the report is filed, is not amendable after twenty days, the allowance of the amendment is in effect a judgment that the exception is amendable at that time, and as long as it stands unreversed the exception is to be treated as duly filed); Fleetwood *v.* Bibb, 113 Ga. 618, 38 S. E. 980; Tumlin *v.* Virginia Home Ins. Co., 48 Ga. 26; Stockton State Bank *v.* Showers, 65 Kan. 431, 70 Pac. 332. See also Virginia Home Ins. Co. *v.* Gray, 61 Ga. 515; Cool *v.* Snover, 38 Mich. 562.

5. Fleetwood *v.* Bibb, 113 Ga. 618, 38 S. E. 980.

6. Thelasson *v.* Crammond, 23 Fed. Cas. No. 13,877, 1 Wash. 319.

7. Tippin *v.* Perry, 122 Ga. 120, 50 S. E. 35; Mohr-Weil Lumber Co. *v.* Russell, 109 Ga. 579, 34 S. E. 1005; Arthur *v.* Gordon County, 67 Ga. 220.

8. **On motion to set aside report** see *infra*, VIII, I, 7, c, (II).

9. See cases cited *infra*, this note.

Reargument.— On the vacation and reëntry of a judgment on a report the party is not entitled to reargue his exceptions. Mellinger *v.* Von Behren, 53 Iowa 374, 5 N. W. 563.

Branch of court in which hearing held.— The rule of the supreme court requiring exceptions to the referee's report to be heard in the first instance at the special term does not apply to a reference of the issues in proceedings for foreclosure of mechanics' liens. Schaettler *v.* Gardiner, 4 Daly (N. Y.) 56, 41 How. Pr. 243.

10. McCullough *v.* Groff, 2 Mackey (D. C.) 361; Malette *v.* Wright, 120 Ga. 735, 48 S. E. 229; Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885; Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680; Culver *v.* Hood, 97 Ga. 550, 25 S. E. 344; Williams *v.* Adams, 94 Ga. 270, 21 S. E. 526; Mayo *v.* Keaton, 78 Ga. 125, 2 S. E. 687; Yelverton *v.* Coley, 101 N. C. 248, 7 S. E. 672; North Carolina Gold Amalgamating Co. *v.* North Carolina Ore Dressing Co., 79 N. C. 48; Boggs *v.* State, 46 Tex. 10; Farmer *v.* Cloudt, (Tex. Civ. App. 1900) 59 S. W. 614; Bupp *v.* O'Conner, 1 Tex. Civ. App. 328, 21 S. W. 619. See Smith *v.* Hicks, 108 N. C. 248, 12 S. E. 1035, holding that, although the court can submit a question of fact to the jury to aid itself in revising the findings of fact by a referee, yet such submission is erroneous where it is made because the court considers the reference compulsory instead of by consent, and that therefore the party is entitled to a jury trial.

In Georgia, in actions at law, exceptions of fact to the report must be submitted to the jury (Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885; Weaver *v.* Cosby, 109 Ga. 310, 34 S. E. 680; Hudson *v.* Hudson, 98 Ga. 147, 26 S. E. 482. See also Juries, 24 Cyc. 140), unless the right to a jury trial is waived (Weaver *v.* Cosby, *supra*). But exceptions of fact in an equity suit need not be

time for the hearing may be fixed by stipulation,[11] but the court cannot by stipulation of the parties be ousted of its jurisdiction conferred by statute to hear exceptions.[12]

(II) *EVIDENCE.* Generally the burden of showing error is on the party excepting.[13] Extrinsic evidence to sustain or defeat the exceptions is ordinarily admissible,[14] although evidence which could have been but was not produced before the referee has been held not admissible.[15] The testimony or admissions of the referee is not admissible to contradict or impeach his report,[16] except where

submitted to the jury unless the judge approves them and whether they should be approved is a matter in his discretion. Collinsville Granite Co. *v.* Phillips, 123 Ga. 830, 51 S. E. 666; Weed *v.* Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885; Rusk *v.* Hill, 117 Ga. 722, 45 S. E. 42; Byrom *v.* Gunn, 102 Ga. 565, 31 S. E. 560. See also Austin *v.* Southern Home Bldg., etc., Assoc., 122 Ga. 439, 50 S. E. 382. The burden is on the party excepting and he has the right to open and close. Arthur *v.* Gordon County, 67 Ga. 220. Where both sides filed exceptions, the opening and conclusion of the argument was properly allowed to that party against whom the report as a whole bore the more heavily, and against whom a judgment, in effect overruling such party's most important exceptions, would have resulted from a general approval of the report. Byrom *v.* Gunn, *supra*; Culver *v.* Hood, 97 Ga. 550, 25 S. E. 344. On the trial evidence other than that introduced before the auditor is admissible. Roberts *v.* Summers, 47 Ga. 434.

In New Jersey a statute authorizing a reference of all actions in which matters of account are in controversy provides that the parties at the time of such reference may enter their dissent therefrom, and, at the term when the report is filed, demand a trial by jury of exceptions to the report; but where the parties by agreement consent to a reference and make that consent a rule of court, they cannot enter a dissent to the report and demand a trial by jury, since they have chosen their own tribunal and must abide by the decision. Children's Home Assoc. *v.* Hall, 47 N. J. L. 152; Beattie *v.* David, 40 N. J. L. 102; Paulison *v.* Halsey, 38 N. J. L. 488; Dean *v.* Susade, 37 N. J. L. 50.

In North Carolina, where a report is made under a compulsory reference and exceptions are filed and issues made by such exceptions, either party has the right to have the issues tried by a jury (State *v.* Brown, 70 N. C. 27; Green *v.* Castlebury, 70 N. C. 20), although where the reference is by consent, the rule seems to be otherwise (Green *v.* Castlebury, *supra*).

11. Davis *v.* Finney, 37 Kan. 165, 14 Pac. 460.

12. Horton *v.* Stanley, 1 Miles (Pa.) 418.

13. *California.*— Blair *v.* Wallace, 21 Cal. 317.

Georgia.— White *v.* Reviere, 57 Ga. 386; Brinson *v.* Wessolowsky, 57 Ga. 142 (holding, however, that where, on the trial of exceptions to an auditor's report, upon questions of fact, no evidence is introduced to support the exceptions, the report will be sustained; but the rule is otherwise where the exceptions are on questions of law); Camp *v.* Mayer, 47 Ga. 414.

Maine.— Nutter *v.* Taylor, 78 Me. 424, 6 Atl. 835; Rawson *v.* Hall, 56 Me. 142.

New Hampshire.— Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79.

Pennsylvania.— Williams *v.* Craig, 1 Dall. 313, 1 L. ed. 153. But see Gruver *v.* Benedict, 9 Kulp 157, holding that where an attorney files exceptions to the report of a referee or auditor, and afterward fails to appear for argument, it is the duty of the court to examine the exceptions, and to dispose of them on their merits.

See 42 Cent. Dig. tit. "Reference," § 165.

Compare Morgan *v.* Morse, 13 Gray (Mass.) 150; Oertel *v.* Hogan, 7 Mo. App. 591.

14. Buckwalter *v.* Whipple, 115 Ga. 484, 41 S. E. 1010; Thompson *v.* Parrent, 12 La. Ann. 183; Benoit *v.* Brill, 24 Miss. 83; Kendall *v.* Hackworth, 66 Tex. 499, 18 S. W. 104.

Ex parte affidavits.— The county court may receive affidavits, taken *ex parte*, to show that an account was or was not presented before an auditor, to determine whether a report should be accepted or recommitted. Hill *v.* Hogaboom, 13 Vt. 141.

Testimony of deceased witness.— The examination of a witness before a referee, which was taken in the presence of the parties to the suit and signed by the witness who has since died, may be read as evidence on the trial of the suit in which such examination was taken. Nutt *v.* Thompson, 69 N. C. 548.

Affidavit of referee.—A referee's sworn statement that one of the parties was not his employee may be sustained, although he had signed a printed certificate to the law institute that the party was an employee to enable him to obtain books from the institute. Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74].

15. *Illinois.*— Cox *v.* Pierce, 120 Ill. 556, 12 N. E. 194.

Pennsylvania.— *In re* Harlan, 3 Pa. L. J. 116.

South Carolina.— Griffin *v.* Griffin, 20 S. C. 486.

Tennessee.— White *v.* Cox, 4 Hayw. 213.

United States.— Barton *v.* Anthony, 2 Fed. Cas. No. 1,084, 1 Wash. 317.

See 42 Cent. Dig. tit. "Reference," § 165.

16. Daggy *v.* Cronnelly, 20 Ind. 474; Packard *v.* Reynolds, 100 Mass. 153; Monk *v.* Beal, 2 Allen (Mass.) 585; Bond *v.* Olden, 4 Yeates (Pa.) 243; Thompson *v.* Arms, 5 Vt. 546, holding that no affidavits or state-

the charge is his misconduct, prejudice, or the like.[17] So a witness before the referees cannot be introduced on the hearing of exceptions to prove that the referees had misapprehended his meaning.[18] Where exceptions are filed, the referee must furnish a party on request all the evidence relating to such exceptions.[19]

(III) *MATTERS CONSIDERED.* What will be considered upon the hearing depends largely upon the local practice.[20] Generally objections based on matters not contained in the report cannot be considered.[21] So exceptions to the findings of fact and conclusions of law of the court do not raise questions as to rulings of the referee during the trial,[22] nor the question whether there was any evidence to sustain the complaint.[23]

(IV) *DETERMINATION AND DISPOSITION.*[24] The court cannot summarily dispose of exceptions by overruling and confirming the report without reviewing and passing upon them judicially.[25] Where the report is apparently founded on a decree, it will be presumed that such decree was introduced in evidence before the referee.[26] Where the referee's findings of fact are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law.[27] Technical and formal objections will be disregarded,[28] as will trifling [29] or harmless [30] errors. It is proper to over-

ments of auditors not incorporated in their report can be heard in objection to accepting the same, unless it be to show misconduct on the part of the auditors, or that they refused to state the facts so as to present the questions of law, or for the purpose of showing newly discovered evidence. See also Wade *v.* Gallagher, 1 Yeates (Pa.) 77.

17. Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74]; Thompson *v.* Arms, 5 Vt. 546.

18. Howard *v.* Salter, 1 Browne (Pa.) 90.

19. Mahone *v.* Williams, 39 Ala. 202.

20. Michael *v.* Tracy, 15 Colo. App. 312, 62 Pac. 1048; Spencer *v.* Usher, 2 Day (Conn.) 116 (holding that the proceedings of auditors, appointed in an action on account, may be inquired into on remonstrance for the purpose of showing that they mistook the law as applicable to the facts before them); Williams *v.* Welles, 1 Root (Conn.) 261 (holding that the court will not consider on a remonstrance to the return of auditors any error in making certain allowances, the remedy being a petition for a new trial); Morse *v.* Morse, 62 Me. 443; King *v.* Hutchins, 26 N. H. 139.

How issues determined.— When filed, the exceptions and amended pleading upon the same subject should be considered together in determining what issues are raised by the exceptions. Moore *v.* Waco Bldg. Assoc., 9 Tex. Civ. App. 404, 28 S. W. 1033.

Allowance of interest.— Where an auditor's report charges a given sum against one of the parties, with interest from a certain date, an exception to the allowance of the sum awarded raises the question as to whether the interest was allowed from the proper date. Marmion *v.* McClellan, 11 App. Cas. (D. C.) 467.

Amount of recovery.— Where a referee finds, as a legal conclusion, that one party is entitled to recover of the other a specified sum, an exception thereto raises the question whether the successful party is entitled to recover the entire sum. Briggs *v.* Boyd, 56 N. Y. 289.

An objection to the insufficiency of findings of a referee can be considered on a motion to recommit, but not on final submission of his report. State *v.* Graham, 23 Nebr. 68, 36 N. W. 372.

21. Wabash, etc., Canal Co. *v.* Huston, 12 Ind. 276; Morse *v.* Morse, 62 Me. 443; Gould *v.* Ward, 4 Pick. (Mass.) 104.

In passing upon exceptions of law to rulings alleged to have been made by an auditor, the court cannot look to the exceptions alone to ascertain what those rulings were. The grounds upon which the exceptions are based must be verified by reference to the auditor's report; and, if the report affords no means of verification, the exceptions, it has been held, cannot be considered, unless otherwise certified by the auditor. Waycross Air-Line R. Co. *v.* Offerman, etc., R. Co., 119 Ga. 983, 47 S. E. 582.

22. Brown *v.* New York, 9 Hun (N. Y.) 587, 11 Hun 21.

23. Van Derlip *v.* Keyser, 68 N. Y. 443.

24. **Costs on exceptions to report** see COSTS, 11 Cyc. 65.

25. Miller *v.* Groome, 109 N. C. 148, 13 S. E. 840.

26. *In re* Heath, 58 Iowa 36, 11 N. W. 723.

27. Bonnell *v.* Griswold, 89 N. Y. 122; Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415.

28. Barnum *v.* Backman, 5 Luz. Leg. Reg. (Pa.) 145.

29. Anderson *v.* De Braekeleer, 25 Misc. (N. Y.) 343, 55 N. Y. Suppl. 721, 28 N. Y. Civ. Proc. 306.

30. Jones *v.* Nolan, 120 Ga. 588, 48 S. E. 166; Billington *v.* Sprague, 22 Me. 34; Leach *v.* Leach, (N. J. Ch. 1907) 66 Atl. 595.

An exception to the original report is immaterial, where such report was recommitted and the referee adopted a different rule in his supplemental report. Bakshian *v.* Hassanoff, 186 Mass. 255, 71 N. E. 555.

rule exceptions which are immaterial,[31] or not substantiated by the facts.[32] So if the reason given is wrong but the conclusion is correct, the exception will not be sustained.[33] If the exceptions were improperly filed, the court may strike them out.[34] The report may be affirmed, modified, or reversed.[35] Merely sustaining exceptions is equivalent to setting aside the report.[36] If exceptions are sustained the case may be again referred.[37] But a second referee cannot be appointed to review the findings and report of the first, since that is a non-delegable duty of the court.[38]

g. Effect of Failure to Except or Object.[39] The failure to file any exceptions makes the report conclusive upon the parties.[40] Where an attorney, in the exer-

31. Murphy *v.* Harper, 84 N. C. 189.

32. Murphy *v.* Harper, 84 N. C. 189.

33. Hains *v.* Moyer, 1 Woodw. (Pa.) 171. See also Brackett *v.* Gilliam, 125 N. C. 380, 34 S. E. 444.

34. Underwood *v.* Greenwich Ins. Co., 45 Misc. (N. Y.) 62, 90 N. Y. Suppl. 832, holding, however, that motion to strike was premature.

Improper classification of exceptions.— Where an exception of law to an auditor's report is improperly classified as an exception of fact, and there is a motion to dismiss the exception for this reason, the motion is properly sustained when no offer is made to amend it by classifying it as an exception of law. Griffin *v.* Collins, 125 Ga. 159, 53 S. E. 1004; Tippin *v.* Perry, 122 Ga. 120, 50 S. E. 35.

35. Meetze *v.* Charlotte, etc., R. Co., 23 S. C. 1.

Trial of exceptions without a jury.—Where by consent a case presenting issues of fact made by exceptions to an auditor's report is tried without a jury, it is not essential that the judge, before rendering final judgment, should, in a formal order, specify which, if any, exceptions are approved. Russell *v.* Mohr-Weil Lumber Co., 115 Ga. 35, 41 S. E. 275.

Correcting errors.— Upon sustaining an exception to the report going to a single item of the account which should have been, but was not, allowed, the chancellor may make the correction, thereupon state the account, and render a decree accordingly, without further reference. McCurdy *v.* Middleton, 90 Ala. 99, 7 So. 655.

Report varying from submission.— If referees chosen by the parties in open court under the act of 1705 report upon a matter totally distinct from the one submitted, showing a plain deviation from the original intention of the parties, the exceptions thereto must be sustained. Horton *v.* Stanley, 1 Miles (Pa.) 418.

Discretion of court.—An objection to a report stating that the rule of reference allowed a major part of the referees to report, whereas the agreement was to refer to all the referees, is addressed to the discretion of the court. Wellman *v.* Bulkley, 6 Vt. 299.

The court will not sustain exceptions where the referees have in good faith decided all matters intended to be submitted, although it is manifest it would have decided them differently. Horton *v.* Stanley, 1 Miles (Pa.) 418.

What constitutes ruling on exceptions.— Where, in considering exceptions to an auditor's report, the judge refers to the auditor particular questions in a case, his action is not an approval or disapproval of the exceptions, but simply a re-reference of the matters embraced in the order. Sanford *v.* Tanner, 114 Ga. 1005, 41 S. E. 668.

36. McGlue *v.* Philadelphia, 105 Pa. St. 236.

37. Farmers, etc., Bank *v.* McMullen, 85 Mo. App. 142.

38. Farmers, etc., Bank *v.* McMullen, 85 Mo. App. 142.

39. **Failure to request findings** see *supra*, VIII, D, 3, f.

Waiver of objections or exceptions see *infra*, VIII, I, 5, h.

40. *Maine.*— Piscataquis Sav. Bank *v.* Herrick, 100 Me. 494, 62 Atl. 214.

Massachusetts.—Lipsky *v.* Heller, 199 Mass. 310, 85 N. E. 453; Lyman *v.* Warren, 12 Mass. 412.

Michigan.— Eddy *v.* Lamb, 150 Mich. 624, 113 N. W. 282; Amboy, etc., R. Co. *v.* Byerly, 13 Mich. 439.

Nebraska.— McMurtry *v.* Brown, 6 Nebr. 368.

New York.— Wolcott *v.* Merchant's Gargling Oil Co., 45 N. Y. App. Div. 379, 60 N. Y. Suppl. 862; Sutherland *v.* Rose, 47 Barb. 144; Ketchum *v.* Clark, 22 Barb. 319. See also Dwight *v.* St. John, 25 N. Y. 203. *Compare* Martin *v.* Hodges, 45 Hun 38.

Oklahoma.— Burchett *v.* Hamil, 5 Okla. 300, 47 Pac. 1053.

Texas.— Whitehead *v.* Perie, 15 Tex. 7; Harper *v.* Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044; Herbert *v.* Harbert, (Civ. App. 1900) 59 S. W. 594; Hamm *v.* J. Stone, etc., Live Stock Co., 18 Tex. Civ. App. 241, 45 S. W. 330.

Wisconsin.— Dinsmore *v.* Smith, 17 Wis. 20.

See 42 Cent. Dig. tit. "Reference," § 163.

Findings of fact.— Where a case is tried by referees, and no exceptions to their report are filed within the time limited for that purpose, the findings of fact stand as an unchallenged verdict, on which it is the duty of the court to pronounce judgment. Carter *v.* Jackson, 115 Ga. 676, 42 S. E. 46; Chicago Lumber Co. *v.* Bancroft, 64 Nebr. 176, 89 N. W. 780, 57 L. R. A. 910; State *v.* Stand-

cise of his judgment, fails to file exceptions, the judgment will not be opened in order to permit him to file them.[41]

h. Waiver of Objections.[42] Objections which might have been urged to the report may be waived by a party by failure to seasonably raise them or by his inconsistent conduct,[43] as by failure to raise the objection before the referee where it relates to proceedings before him.[44] So the objection that the report was not

ard Oil Co., 63 Nebr. 95, 88 N. W. 175. *Compare* James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

But if a commissioner fails entirely to make any report on a matter referred to him, the court should refer the matter to him again to be reported upon, and this should be done, although no one except to such report. No one's right can be regarded as abandoned or prejudiced by his failure to except to such report because of such omission. Childs *v.* Hurd, 32 W. Va. 66, 9 S. E. 362.

Items not excepted to.—An auditor's report is conclusive between the parties as to the items therein not excepted to. Whitehead *v.* Perie, 15 Tex. 7; Lone Star Salt Co. *v.* Blount, (Tex. Civ. App. 1908) 107 S. W. 1163; Hill *v.* Dons, (Tex. Civ. App. 1896) 37 S. W. 638.

41. Com. *v.* Schooley, 5 Kulp (Pa.) 53.

42. **Objections to order of reference** see *supra*, IV, G, 2.

Objections to referees and their conduct of proceedings see *supra*, VII, G, 2.

Objections to order setting aside report see *infra*, VIII, I, 7, d.

43. *Indiana.*— Ross *v.* Helton, 4 Ind. 273.

Maine.— Smith *v.* Gorman, 41 Me. 405.

Missouri.— Buxton *v.* Debrecht, 95 Mo. App. 599, 69 S. W. 616.

Oregon.— State *v.* Frost, 48 Oreg. 236, 86 Pac. 177.

South Dakota.— Hulst *v.* Benevolent Hall Assoc., 9 S. D. 144, 68 N. W. 200.

West Virginia.— Johnson *v.* Young, 20 W. Va. 614.

United States.—Mason Lumber Co. *v.* Buchtel, 101 U. S. 633, 25 L. ed. 1072.

See 42 Cent. Dig. tit. "Reference," § 168.

Compare Gresham *v.* Harcourt, 33 Tex. Civ. App. 196, 75 S. W. 808, holding that an exception to the report of the auditor in an action for a partnership accounting, embodied in a pleading entitled "plaintiff's first amended supplemental petition," was not waived by the filing of another amended supplemental petition which did not include any exceptions to the auditor's report.

Objection that report not within scope of submission.— Where accounts are investigated at length before an auditor, without any objection to the scope of the investigation, the parties cannot, after the report has been on file for seven months, for the first time raise the objection that the pleadings were not broad enough to cover certain matters reported upon. U. S. *v.* Fitzsimmons, 50 Fed. 381.

Failure to move to recommit.— Exceptions to the report of a referee that he failed to find certain facts are waived by failure to move for a recommitment of the report. Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99, 14 S. E. 501.

Failure to move to suppress report.—A party who excepts to the conclusions of law in a referee's report and makes no motion to suppress it waives all objections to irregularities in the reference proceedings. Abbott *v.* Mathews, 26 Mich. 176.

Failure to include conclusions of law.— Where a reference is to take evidence and report the same with conclusions of law on the law and fact, and he reports his conclusions on fact only, the omission is waived unless a motion is made for a rule requiring the master to comply with the order of reference. Gleason, etc., Mfg. Co. *v.* Hoffman, 168 Ill. 25, 48 N. E. 143 [*affirming* 63 Ill. App. 294].

Waiver of jury trial.— By assenting to a reference a party does not waive a jury trial but does waive all objection to the law, and to the course of proceeding prescribed by it, including the use of the referee's report as evidence in the jury trial. Smith *v.* Fellows, 58 N. H. 169; Parker *v.* Burns, 57 N. H. 602.

Waiver of right to file exceptions.— The failure of the surety of an assignee for the benefit of creditors to appear before the referee on the final accounting of the assignee does not deprive it of the right to file exceptions to such referee's report. Matter of Kautsky, 56 N. Y. App. Div. 440, 67 N. Y. Suppl. 882.

New report.— Exceptions cannot be taken to a referee's report, reformed in accordance with an order to which no objection was made. Cowles *v.* Curry, 96 N. C. 331, 4 S. E. 769. Where a party excepts to the referee's report because he fails to find on a particular matter as a fact, and the report is recommitted to the referee to pass on this matter, he cannot be allowed to except to the second report on the ground that it is a mixed question of law and fact, where he did not object thereto on the return of the report. Tyson *v.* Tyson, 92 N. C. 288.

Where only part of referee's act.— Crone *v.* Daniels, 20 Conn. 331.

44. *Illinois.*— Pardridge *v.* Ryan, 35 Ill. App. 230 [*affirmed* in 134 Ill. 247, 25 N. E. 627].

Kansas.— Seiker *v.* Pracht, 39 Kan. 521, 18 Pac. 718; Lannan *v.* Clavin, 3 Kan. 17.

Maine.— Deering *v.* Saco, 68 Me. 322.

Nebraska.— Moline, etc., Co. *v.* Walter A. Wood Mowing, etc., Mach. Co., 49 Nebr. 869, 69 N. W. 405, holding that a party who appears before a referee at the time fixed for trial, and treats the order of reference as embracing all the issues, and requests findings on all controverted questions, cannot

filed in time is waived by failure to urge it,[45] or by inconsistent conduct.[46] So the delivery of a report during a time while proceedings are stayed by statute is merely an irregularity which is waived by failure to promptly object thereto.[47] Of course no objections can be urged to proceedings had with the consent of the objecting party,[48] and an agreement not to file exceptions is binding.[49] The filing of exceptions to the report waives all objections to the assumption and exercise of jurisdiction in disposing of them as matter involved in the case.[50] So the action of the court in rejecting a report is waived by proceeding with the trial and failure to appeal therefrom.[51] In some jurisdictions the failure to object to an order of reference at the time it is made is a waiver of the right to a jury trial of issues raised by exceptions to the report.[52] The exceptions to the report form no part of defendant's answer, although he refers to them therein, and the fact that a second amended answer makes no reference to the exceptions does not constitute a waiver.[53]

assail the findings, on the coming in of the report, as being unauthorized by the order of reference.

New Hampshire.— Ireland *v.* Drown, 61 N. H. 638.

New York.— Matter of Kautsky, 56 N. Y. App. Div. 440, 67 N. Y. Suppl. 882; Belmont *v.* Smith, 1 Duer 675.

North Carolina.— Overby *v.* Fayetteville Bldg., etc., Assoc., 81 N. C. 56.

Vermont.— Newel *v.* Keith, 11 Vt. 214.

See 42 Cent. Dig. tit. "Reference," § 168.

Matters of defense to a suit on a policy not pleaded to the action, brought up on reference thereof to arbitrators, and not directly put in issue and insisted on before the arbitrators, cannot be urged as exceptions to the award. Virginia Home Ins. Co. *v.* Gray, 61 Ga. 515.

Technical objections to the form of the report not made before the referee will be regarded as waived. St. Louis Nat. Stockyards *v.* Himrod, 88 Ill. 38.

Referee as improper person.—A party, after having permitted the reference to proceed and taken the chances of success with full knowledge of the existence of the relation, cannot move to set aside an adverse report on the ground that each of the two attorneys appearing for different parties interested in two different actions, in each of which a reference was ordered, had the cause of the client of the other in his hands to decide as a referee. Carroll *v.* Lufkins, 29 Hun (N. Y.) 17. The same rule applies where the objection is the failure of mental vigor of the arbitrator appointed, during the trial of the case. Van Syckle *v.* Stewart, 10 Phila. (Pa.) 547.

Admissions.—A case was submitted to a referee after the summing up of counsel, "the defendants' counsel admitting that the defendants were liable to the plaintiff for the payment of the bill, Exhibit A." It was held that the correctness of the referee's allowance of this bill could not be called in question, and that defendants could not retract their submission, made at or before the actual submission of the cause, by afterward handing in written points denying the right of recovery for this bill. Kohler *v.* Wright, 7 Bosw. (N. Y.) 318.

45. Seiker *v.* Pracht, 39 Kan. 521, 18 Pac. 718; Foster *v.* Bryan, 26 How. Pr. (N. Y.) 164; Livingston *v.* Gidney, 25 How. Pr. (N. Y.) 1.

46. Bewick *v.* Fletcher, 39 Mich. 25 (holding that a party by opposing the motion to set aside the report waived an objection for the delay in making the report); Thiesselin *v.* Rossett, 3 Abb. Pr. N. S. (N. Y.) 54; Bradford *v.* Cline, 12 Okla. 339, 72 Pac. 369.

47. Agricultural Ins. Co. *v.* Darrow, 70 N. Y. App. Div. 413, 75 N. Y. Suppl. 128.

48. Bemus *v.* Quiggle, 7 Watts (Pa.) 362 (holding that if parties agree to consolidate actions, and thus combine different causes of action, and refer the whole to referees, neither party can afterward except to the award on the ground of uncertainty); Brown *v.* Scott, 1 Dall. (Pa.) 145, 1 L. ed. 74 (holding that a report will not be set aside because the referees consolidated the different actions referred, where the consent of the parties thereto can be implied from the whole proceedings). *Compare* Flower Brook Mfg. Co. *v.* Buck, 16 Vt. 290, holding that where an auditor inquired, in presence of the defendant, whether it was necessary to report copies of the accounts of the parties, and plaintiff's counsel replied that it was not, there was no waiver on the part of defendant of his right to have the copies returned with the report.

49. Bocleau *v.* Phillips, 1 Ashm. (Pa.) 92; Keystone Bank *v.* Ashton, 12 Phila. (Pa.) 188. See also Jolly *v.* Pittsburgh, etc., R. Co., 28 Pittsb. Leg. J. N. S. (Pa.) 376.

What constitutes such agreement.—An agreement to submit all matters in variance in an action to referees, to waive all objections arising upon legal grounds, and to let the referees determined justly, honestly, and equitably their report to be final and conclusive does not preclude either party from filing exceptions to the report. Mussina *v.* Hertzog, 5 Binn. (Pa.) 387.

50. Long *v.* Fitzgerald, 97 N. C. 39, 1 S. E. 844.

51. Vance *v.* Carle, 7 Me. 164.

52. Belvin *v.* Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655; Driller Co. *v.* Worth, 117 N. C. 515, 23 S. E. 427.

53. Kendall *v.* Hackworth, 66 Tex. 499, 18 S. W. 104.

6. Confirmation[54] — **a. In General.** A motion to confirm the report generally follows its filing,[55] and a party who moves to confirm cannot thereafter attack the report.[56] Such a motion is generally necessary,[57] except where the report is not intended to be made the foundation of any further discretionary act of the court,[58] or where the reference is to hear and determine all the issues in the case.[59]

b. Time. The time when the motion to confirm may be made is generally fixed by statutes or rules of court.[60] Where there is no statute or rule of court, the confirmation may be at any time before the entry of the decree.[61] Confirmation may be delayed until the determination of another action,[62] and should not be made before a reasonable opportunity is given to file exceptions to the report.[63]

c. Grounds For Rejection. The court properly refuses to confirm the report where it contains the evidence instead of the facts found,[64] where material findings of facts are not sustained by any evidence,[65] where it is apparent from the face of the report that the decision on the facts found is erroneous,[66] where the case is one in which a reference should not be ordered,[67] or where there are other irregularities in matter of form and procedure.[68] On the other hand, it is not ground for refusing to confirm that the referee refused to open the case and hear further testimony, where it could not have materially affected the result,[69] nor that incorrect conclusions of law are contained in a paper not made a part of the report.[70] In some jurisdictions it seems that the confirmation of the report can be refused only where the grounds are sufficient to authorize its being set aside.[71]

d. Procedure. The procedure on the motion to confirm is governed by the nature of the reference and the local practice.[72] The order of confirmation need

54. **Judgment on report of referee** see Judgments, 23 Cyc. 784, 824, 847.

55. *Connecticut.*— Spalding *v.* Dunlap, 1 Root 413; State *v.* Worthington, 1 Root 137.

Maryland.— Lee *v.* Boteler, 12 Gill & J. 228.

Massachusetts.— McKim *v.* Titus, 182 Mass. 393, 65 N. E. 806.

Pennsylvania.— Rue *v.* Gentner, 4 Pa. Cas. 526, 7 Atl. 592; Stuart *v.* Ralston, 2 Miles 257.

South Carolina.— Shiver *v.* Ross, 1 Brev. 293, holding that on a motion to confirm an award the court will not grant leave to examine the arbitrators to discover whether they have made a mistake, or why a discount was rejected.

Virginia.— Newberry *v.* Stuart, 86 Va. 965, 11 S. E. 880.

See 42 Cent. Dig. tit. "Reference," § 181.

Inclusion of matters outside submission.— Where an action is referred under a rule of court, and the award includes matters outside the submission, the award cannot be accepted unless it enables the court, by inspecting it, to separate what was, from what was not, awarded within the submission. Myers *v.* York, etc., R. Co., 17 Fed. Cas. No. 9,997, 2 Curt. 28.

56. White *v.* Anderson, 13 La. Ann. 577.

57. McNair *v.* Gourrier, 40 La. Ann. 353, 4 So. 310; Dement *v.* Stonestreet, 1 Md. 116; Elmore *v.* Thomas, 7 Abb. Pr. (N. Y.) 70; Griffing *v.* Slate, 5 How. Pr. (N. Y.) 205, 3 Code Rep. 213; Clark *v.* Andrews, 1 Code Rep. (N. Y.) 4; Parker *v.* Parker, 5 N. C. 295, holding that an action will not lie on an award, under a reference by rule of the court of chancery, until it is confirmed by the court.

58. Griffing *v.* Slate, 5 How. Pr. (N. Y.) 205, 3 Code Rep. 213.

Reference to take testimony and report concerning disputed facts.— Ordinarily it is not necessary to make a formal motion to confirm the report where the reference is merely to take testimony and report concerning disputed facts upon a motion. Frost *v.* Reinach, 40 Misc. (N. Y.) 412, 81 N. Y. Suppl. 246.

59. Stevens *v.* Weiss, 25 Misc. (N. Y.) 457, 55 N. Y. Suppl. 562.

60. Martin *v.* Hodges, 45 Hun (N. Y.) 38; Riley *v.* Brown, 14 Abb. Pr. N. S. (N. Y.) 290 note, 44 How. Pr. 429.

Before filing of exceptions.— A motion to confirm the report, upon a reference other than for the trial of issues, is required only if exceptions to the report are filed; and such a motion, made before the filing of exceptions, is premature and should be denied. James *v.* Horn, 19 N. Y. App. Div. 259, 46 N. Y. Suppl. 187.

61. Pitman *v.* Thornton, 65 Me. 95.

62. Taacks *v.* Schmidt, 18 Abb. Pr. (N. Y.) 307.

63. Equitable L. & T. Co. *v.* Smith, 65 S. W. 609, 23 Ky. L. Rep. 1567.

64. Wabash, etc., Canal Co. *v.* Huston, 12 Ind. 276.

65. Jones *v.* Franks, 33 Kan. 497, 6 Pac. 789.

66. Smith *v.* Crews, 2 Mo. App. 269.

67. Randlet *v.* Herren, 20 N. H. 538.

68. *In re* Turner, 2 N. Brunsw. Eq. 318.

69. Welles *v.* Harris, 31 Conn. 365.

70. Morse *v.* Morse, 62 Me. 443.

71. Sawyer *v.* Doane, 1 Aik. (Vt.) 138.

72. Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450; Savage *v.* Sherman, 87 N. Y.

not itself make separate findings,[73] but it should confirm or reject every part of the report.[74] Generally notice of the motion must be given,[75] and parties in interest are entitled to be heard on any question adjudicated in the report.[76] The order of confirmation may be modified on motion for final judgment.[77] In some jurisdictions, by statute, the report in certain courts is deemed to be confirmed as of course, after a specified time, where no exceptions are filed, upon the entry of a decree to that effect after the lapse of such time.[78] The overruling of exceptions to the report is equivalent to a confirmation.[79]

e. Modification. The court may modify the report,[80] and confirm it only in part.[81] Surplusage may be rejected.[82] Where one party moves to confirm and the other to set aside, an order modifying the report sufficiently disposes of both motions.[83] Where the amount allowed is excessive, a remittitur may be entered and the report then confirmed.[84]

f. Effect of. The confirmation of the report generally precludes further investigation by the court into the matters decided by it.[85] If the reference is to hear and determine, judgment is properly entered upon the report itself after its confirmation;[86] but not if the reference is merely an interlocutory one.[87] An order confirming a report is in effect a denial of the motion to set the report aside.[88] Confirmation of the report in some jurisdictions constitutes the findings of the court.[89]

g. Exceptions After. Where a report has been confirmed without any exceptions taken thereto, one wishing to except should obtain a rehearing of the original motion to confirm the report.[90] Filing exceptions to a report providing that

277; Griffing *v.* Slate, 3 Code Rep. (N. Y.) 213, 5 How. Pr. 205; *In re* May, 10 Lanc. Bar (Pa.) 22.

In New York the motion is generally required to be made at special term. Boegler *v.* Eppley, 40 Hun 523; Belmont *v.* Smith, 1 Duer 675. *Compare* Hinman *v.* Devlin, 40 N. Y. App. Div. 234, 57 N. Y. Suppl. 1037.

In New Jersey, a confirmation of a referee's report can be moved for at bar, subject to a demand for a trial by jury, at the same term in which the report is filed, or such motion can be made before the circuit justice, if no demand for a trial by jury has been made. Halsey *v.* Paulison, 36 N. J. L. 406.

73. Colin *v.* Colin, 24 S. C. 596.

74. Raines *v.* Lumpee, 80 Mo. App. 203.

75. Sproull *v.* Star Co., 27 Misc. (N. Y.) 27, 56 N. Y. Suppl. 1001.

Notice by opposing party.—A party may be heard as to setting aside the report of a referee as based on an erroneous principle, on the motion to confirm the report, and such party need not give notice of motion. Fraser *v.* Kaye, 25 Nova Scotia 102.

To whom notice given.—Notice of an application for the confirmation of the report of a referee, appointed pursuant to the terms of an interlocutory judgment, and for the entry of final judgment thereon, need not be given to an infant defendant as to whom the complaint was dismissed by the interlocutory judgment. Jewett *v.* Schmidt, 108 N. Y. App. Div. 322, 95 N. Y. Suppl. 631 [*affirmed* in 185 N. Y. 553, 77 N. E. 1189].

76. Winfield *v.* Stacom, 40 N. Y. App. Div. 95, 57 N. Y. Suppl. 563.

77. Smith *v.* Gilliatt, 22 Misc. (N. Y.) 246, 49 N. Y. Suppl. 614.

78. *In re* Clark, 168 N. Y. 427, 61 N. E. 769 [*reversing* 61 N. Y. App. Div. 337, 70 N. Y. Suppl. 353]; James *v.* Horn, 19 N. Y. App. Div. 259, 46 N. Y. Suppl. 187.

79. Pomeroy *v.* Benton, 77 Mo. 64.

80. Krapp *v.* Aderholt, 42 Kan. 247, 21 Pac. 1063.

81. Merieult *v.* Austin, 3 Mart. (La.) 318; Smith *v.* Paris, 70 Mo. 615; Woglam *v.* Burnes, 1 Binn. (Pa.) 109.

82. Pardridge *v.* Ryan, 35 Ill. App. 230 [*affirmed* in 134 Ill. 247, 25 N. E. 627].

83. Lemke *v.* Daegling, 52 Wis. 498, 9 N. W. 399.

84. Smith *v.* Brush, 11 Conn. 359; Rodney *v.* Warrington, 1 Houst. (Del.) 148.

85. Thompson *v.* Parrent, 12 La. Ann. 183; Berger *v.* Clendinen, 88 Md. 151, 40 Atl. 705; Taylor *v.* State, 73 Md. 208, 20 Atl. 914, 11 L. R. A. 852; Thruston *v.* Devecmon, 30 Md. 210. See also People *v.* Ouderkirk, 120 N. Y. App. Div. 650, 105 N. Y. Suppl. 134; Anders *v.* Anders, 31 N. C. 214. But see Cochran *v.* Lynah, Bailey Eq. (S. C.) 514; Wallace *v.* Harrington, 34 Nova Scotia 1.

86. O'Reilly *v.* Cleary, 8 Mo. App. 186; Saal *v.* Brooklyn R. Co., 122 N. Y. App. Div. 364, 106 N. Y. Suppl. 996.

Unless exceptions to the referee's report are allowed, the report should be affirmed, and judgment entered thereon, in the same manner, and with like effect, as on a special verdict, and the case should not be set down for re-trial by the court. Reinecke *v.* Jod, 56 Mo. 386.

87. Sullivan *v.* Sullivan, 52 How. Pr. (N. Y.) 453.

88. Houghton *v.* Milburn, 54 Wis. 554, 11 N. W. 517, 12 N. W. 23.

89. Bourgeois *v.* Schrage, 69 Wis. 316, 34 N. W. 96.

90. Rust *v.* Hauselt, 46 N. Y. Super. Ct. 22.

a party shall tender a deed or pay a sum of money waives the right of the party to elect, where the report is confirmed.[91]

7. Setting Aside[92] **— a. In General.** In a proper case the general rule is that the court may, on motion, set aside the report,[93] although the reference was by consent of the parties,[94] but only for good cause,[95] the power being sometimes limited to cases where the error relied on appears on the face of the report.[96] A motion to set aside is the proper remedy where there are substantial errors of law or fact.[97] But ordinarily where the report is subject to correction the motion should not be to set aside, but to recommit.[98] It has been held that the court

91. Brown *v.* Young, 1 Yeates (Pa.) 76.

92. Modification of report by court see *supra*, VIII, E.

Report as equivalent to verdict on motion to set aside see *supra*, VIII, I, 3, b.

Setting aside order of reference see *supra*, IV, I, 2.

Waiver of objections see *supra*, VIII, I, 5, h.

93. *Illinois.*— Curyea *v.* Beveridge, 94 Ill. 424; Leitch *v.* Campbell, 27 Ill. 138.

Kansas — Owen *v.* Owen, 9 Kan. 91.

New Jersey.— Harper Mach. Co. *v.* Sinclair, (1908) 68 Atl. 890 (holding further that the application may be made to the supreme court without first applying to the judge or justice of the court which ordered the reference); Den *v.* Brands, 15 N. J. L. 465.

New York.— Barton *v.* Herman, 3 Daly 320, 8 Abb. Pr. N. S. 399; *In re* Quin, 5 N. Y. Suppl. 261, 1 Connoly Surr. 381; Watervliet Bank *v.* Clark, 1 How. Pr. 144; People *v.* New York Super. Ct., 19 Wend. 68.

North Carolina.— Wilson *v.* Abrams, 70 N. C. 324.

Pennsylvania.— Mackie *v.* Pleasants, 2 Binn. 363. See Burns *v.* Smith, 2 Lack. Leg. N. 78. But see Brooke *v.* Bannon, 3 Watts & S. 382.

Tennessee.—Baird *v.* Crutchfield, 6 Humphr. 171.

Vermont.— Woodbridge *v.* Addison, 6 Vt. 204.

England.— Harding *v.* Wickham, 2 Johns. & H. 676, 4 L. T. Rep. N. S. 738, 9 Wkly. Rep. 652, 70 Eng. Reprint 1230.

See 42 Cent. Dig. tit. "Reference," § 188 *et seq.*

Right of party in contempt to move.— Where a plaintiff purges himself of the contempt committed by refusing to testify before referees, the court may properly set aside such referee's report, wherein it appears that plaintiff's petition has been rejected because of his contempt. Coburn *v.* Tucker, 21 Mo. 219.

Second report.—A second report on substantially the same evidence, and containing the same findings, as a former report, which has been set aside by the appellate court, will also be set aside. Bellows *v.* Folsom, 4 Rob. (N. Y.) 43.

94. Field *v.* Holland, 6 Cranch (U. S.) 8, 3 L. ed. 136. But see Stevenson *v.* Felton, 99 N. C. 58, 5 S. E. 399, holding that under Code, § 420, which provides that the issues of any action, except to annul a marriage or for divorce, may, on consent of parties, be referred, after such reference had on a stipulation signed by the attorneys for both parties, either party may insist on a judgment on the report, and it is error to set aside the report and order a jury trial.

95. Goodrich *v.* Marysville, 5 Cal. 430; Neeley *v.* Roberts, 17 S. D. 161, 95 N. W. 921.

Where the cause of action is not referable the report will not be set aside on motion. Beardsley *v.* Dygert, 3 Den. (N. Y.) 380; Johnson *v.* Parmely, 17 Johns. (N. Y.) 129.

96. Goodrich *v.* Marysville, 5 Cal. 430; Grayson *v.* Guild, 4 Cal. 122; Headley *v.* Reed, 2 Cal. 322; Tyson *v.* Wells, 2 Cal. 122; Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130. But see *In re* Harland, 5 Rawle (Pa.) 323.

97. *California.*— Branger *v.* Chevalier, 9 Cal. 353.

New Jersey.— Runyon *v.* Hodges, 46 N. J. L. 359.

New York.— La Wall *v.* Grigg, 5 How. Pr. 158, 3 Code Rep. 141; Denning *v.* Smith, 2 Wend. 303. See also Marston *v.* Johnson, 13 How. Pr. 93. *Compare* Dana *v.* Howe, 13 N. Y. 306; Hassler *v.* Turnbull, 55 N. Y. Super. Ct. 300; Donohue *v.* Champlin, Code Rep. N. S. 138, holding that a report of a referee dismissing a complaint on an issue of law is to be reviewed by appeal, and not by motion to set aside.

Pennsylvania.— Van Syckle *v.* Stewart, 10 Phila. 547.

South Dakota.— Neeley *v.* Roberts, 17 S. D. 161, 95 N. W. 921.

See 42 Cent. Dig. tit. "Reference," § 196.

Compare Gibbs *v.* Berry, 35 N. C. 388.

An alleged overcharge for the fees of the referee is not ground for setting aside but the question must be raised on a taxation of costs. Williams *v.* Danziger, 91 Pa. St. 232.

98. Califf *v.* Hillhouse, 3 Minn. 311; Van Slyke *v.* Hyatt, 9 Abb. Pr. N. S. (N. Y.) 58 (holding that if a referee states only a general conclusion, without specifying the issues upon which he finds, the remedy of the party aggrieved is by a motion to refer back the cause for a further finding and not by a motion to set aside the report as irregular); Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385, (holding that where the report fails to state separately findings of fact and conclusions of law, the proper remedy is to move to send the case back to the referee to pass specifically on the material questions of law which he has failed to pass on, or to resettle his report, and not by motion to set aside the report).

Changes in minutes.— It is not ground for

may act of its own motion,[99] in setting aside the report of a referee, although there is authority to the contrary.[1]

b. Grounds — (I) *In General.* The grounds for setting aside a report differ somewhat in the various jurisdictions.[2] In some jurisdictions a report can be set aside only on the grounds authorizing the setting aside of the award of an arbitrator,[3] or the verdict of a jury.[4]

(II) *Errors and Irregularities in General.* The report will be set aside only for a clear and decisive error by which the party objecting has been injured.[5] The following have been held grounds for setting aside: Improper refusal to allow an adjournment;[6] absence of authority to order reference;[7] errors in reception of evidence or examination of witnesses;[8] want or insufficiency of notice of reference;[9] want or insufficiency of notice of hearing.[10] On the other hand the following have been held not grounds for setting aside: Report different from the conclusion orally announced;[11] awarding and taxing the costs of the reference;[12] failure to report all the testimony on which a fact was found, no request so to do having been made;[13] immaterial variance between the original rule of reference and the copy presented to the referee;[14] inaccuracies in immaterial findings;[15] report in excess of amount named in the several counts but not in excess of the amount in the *ad damnum* clause of the declaration;[16] unreasonableness of report where no misconduct or corruption on the part of the referee;[17] failure to give notice of the particular day the referee would file his report;[18] report in fact prepared by another person acting as clerk and doing merely the

setting aside the report that changes have been made in the minutes of the reference in regard to certain evidence. The remedy in such case is to correct the minutes of the evidence given before the referee in accordance with the actual facts. Duffy *v.* Hickey, 68 Wis. 380, 32 N. W. 54.

99. McCurdy *v.* Middleton, 90 Ala. 99, 7 So. 655.

Ordering new reference as in effect setting report aside.—After the making of a referee's report, and motions, by both parties, for judgment thereon, the court may order a new reference; such order having the effect to set aside the first report. Cairns *v.* O'Bleness, 40 Wis. 469.

1. Neeley *v.* Roberts, 17 S. D. 161, 95 N. W. 921.

2. See *infra*, VIII, I, 7, b, (II)–(VIII).

"Undue means."—An award is obtained by "undue means" where plaintiff, owing to representations by defendant made without dishonest intent, did not appear before the arbitrators. Alexander *v.* Bank, 3 Lanc. Bar (Pa.) 354.

3. Headley *v.* Reed, 2 Cal. 322.

4. McHenry *v.* Moore, 5 Cal. 90; Hogan *v.* Gates, 26 Nova Scotia 85.

5. Ludington *v.* Taft, 10 Barb. (N. Y.) 447. See also Learned *v.* Bellows, 8 Vt. 79.

Any error committed by the referee cannot be corrected by collateral attack. Becker *v.* Studeman, 180 N. Y. 548, 73 N. E. 1119 [*affirming* 86 N. Y. App. Div. 94, 83 N. Y. Suppl. 538].

6. Caryell *v.* Coryell, 1 N. J. L. 385; Jessup *v.* Cook, 1 N. J. L. 124; Forbes *v.* Frary, 2 Johns. Cas. (N. Y.) 224; Passmore *v.* Pettit, 4 Dall. (Pa.) 271, 1 L. ed. 830.

7. Williams *v.* Green, 3 Cai. (N. Y.) 129.

8. McAllister *v.* Case, 14 Daly (N. Y.) 385, 13 N. Y. St. 141 (holding that where a referee receives the proof or hears an argument in the case after the close of the trial without notice to all of the parties, ordinarily such irregularity will furnish sufficient ground for setting aside the report and vacating the reference); Chaplin *v.* Kirwan, 1 Dall. (Pa.) 187, 1 L. ed. 93 (examination of witness *ex parte*); Hagner *v.* Musgrove, 1 Dall. (Pa.) 83, 1 L. ed. 46 (where a report was set aside because the referees had ordered the parties to withdraw, and examined the witnesses separately out of their hearing).

9. Share *v.* Becker, 8 Serg. & R. (Pa.) 239; Simpson *v.* Brown, 1 Pittsb. (Pa.) 143, holding that the award must be set aside where it appears that the rule of reference was served on a party residing in the county by merely leaving a copy at his boarding-house, the statute requiring service "on the opposite party," his agent, or attorney.

10. Meredith *v.* Sanborn, 5 Harr. (Del.) 249; Le Baron *v.* Overstreet, 39 Fla. 628, 23 So. 22; Glass-Edsall Paper Co. *v.* Telegram Pub. Co., 11 Ohio Dec. (Reprint) 899, 30 Cinc. L. Bul. 369; Share *v.* Becker, 8 Serg. & R. (Pa.) 239. But see Brown *v.* Brashier, 2 Penr. & W. (Pa.) 114.

11. Gray *v.* Fisk, 12 Abb. Pr. N. S. (N. Y.) 213, 42 How. Pr. 135 [*affirmed* in 53 N. Y. 630].

12. Fuller *v.* Wright, 10 Vt. 512.

13. Downer *v.* Downer, 11 Vt. 395.

14. Westcott *v.* Somers, 9 N. J. L. 99.

15. Sizer *v.* Melton, 129 Ga. 143, 58 S. E. 1055.

16. Graham *v.* Walker, 2 Leg. Chron. (Pa.) 55.

17. Parker *v.* Avery, Kirby (Conn.) 353.

18. Davis *v.* Finney, 37 Kan. 165, 14 Pac. 460.

mechanical part of the work.[19] Where a report can be understood it will not be set aside for informalities, although upon request it might have been recommitted for correction.[20]

(III) *Rulings, Instructions, and Conduct of Trial.* The improper admission [21] or rejection [22] of evidence is ground for setting aside the report. But the admission of evidence on an immaterial issue is not ground,[23] nor is the admission of evidence of unimportant facts not prejudicial to the objecting party and admissible for another purpose.[24] Statements of improper facts by counsel is not ground where it is apparent that the report was according to the evidence.[25] The report should be set aside where a paper or *ex parte* affidavit was produced before the referee that one party had no opportunity of reading or examining,[26] or where certain tests are made by a party before the referee in the absence of the opposing party.[27]

(IV) *Misconduct or Disqualification of Referee.*[28] Misconduct of the referee is ground for setting aside his report,[29] and the misconduct may con-

19. King *v.* Seeton, 21 Nova Sotia 20 [*affirmed* in 18 Can. Sup. Ct. 712].

20. Bubb *v.* Sandusky, 2 Pa. Dist. 279.

21. Parker *v.* Avery, Kirby (Conn.) 353; Doolittle *v.* Stone, 55 Hun (N. Y.) 604, 8 N. Y. Suppl. 605, holding that unless the evidence is so clear and indisputable that there could be no hesitancy in reaching the same conclusion if the incompetent evidence had not been introduced, its reception is reversible error; and especially should a referee's report be set aside when his written opinion is largely based on the objectionable testimony.

The examination of a party as witness in chief, before an auditor, is no cause for setting aside the report, unless it was under such circumstances as show that injustice had properly been done. Fuller *v.* Little, 7 N. H. 535.

Objections not urged before a referee.—A motion for the rejection of an award on the ground of the admission of improper testimony by the referees must show that such testimony was objected to by the party moving for the rejection. Patten *v.* Hunnewell, 8 Me. 19. See also *supra*, VIII, I, 5, h.

In New Hampshire, where the referees do not undertake to decide according to law, the improper admission of evidence is not ground for setting aside the report. Chesley *v.* Chesley, 10 N. H. 327.

22. Stettmische *v.* Lamb, 23 Nebr. 747, 37 N. W. 644; Severance *v.* Hilton, 32 N. H. 289; Bellows *v.* Ingham, 2 Vt. 575. See also Meyers *v.* Betts, 5 Den. (N. Y.) 81. But see Brown *v.* Colie, 1 E. D. Smith (N. Y.) 265, holding that where testimony, irrelevant and inadmissible in substance, has been received by a referee upon the hearing, its exclusion from his consideration after the cause is submitted, is no ground for setting aside the report.

23. Tripp *v.* Forsaith Mach. Co., 69 N. H. 233, 45 Atl. 746; Atlantic Trust Co. *v.* Osgood, 155 Fed. 700, holding that the admission of improper evidence on a trial before the court without a jury, or before a referee, is of no moment, and not ground for a new trial, unless such evidence was necessary to support the finding of facts. See also Booth *v.* Ratté, 21 Can. Sup. Ct. 637.

24. Kendrick *v.* Tarbell, 27 Vt. 512.

25. George *v.* Fellows, 60 N. H. 398.

26. Passmore *v.* Pettit, 4 Dall. (Pa.) 271, 1 L. ed. 830.

27. Smith *v.* Roberts, 45 Leg. Int. (Pa.) 454.

28. **As ground for removal of referee** see *supra*, VI, I.

29. Walls *v.* Wilson, 28 Pa. St. 514; Lackawanna Iron, etc., Co. *v.* Falls, 5 Leg. Gaz. (Pa.) 14; Graham *v.* Pence, 6 Rand. (Va.) 529.

Facts constituting misconduct authorizing setting aside of report.—Demand of more than statutory fees after case closed and before delivery of report. Greenwood *v.* Marvin, 29 Hun (N. Y.) 99. Advice by referee to one party, in the absence of other, to compromise, suggesting terms. Livermore *v.* Bainbridge, 14 Abb. Pr. N. S. (N. Y.) 227, 47 How. Pr. 350 [*affirming* 44 How. Pr. 357, and *affirmed* in 56 N. Y. 72, 15 Abb. Pr. N. S. 436, 47 How. Pr. 354]. Preparing opinion and submitting it to the attorney before deciding the case, and giving a decision after being assured by the attorney that no judgment would be entered on it. Dorlon *v.* Lewis, 9 How. Pr. (N. Y.) 1. Where referee assured defendants that he should decide in their favor and received his fees, and afterward suspended his decision, and then assured the other party that the decision would be for him, and finally promised both parties that he would reëxamine the case. Roosa *v.* Saugerties, etc., Turnpike Road Co., 12 How. Pr. (N. Y.) 297. Where, pending the reference, he solicited favors of defendant, which defendant refused to grant, and the report was adverse to defendant. Burrows *v.* Dickinson, 35 Hun (N. Y.) 492.

Facts held not to constitute misconduct.—Statement in referee's presence, after the hearing, of anxiety about the case, where referee refused to say anything or hear anything said about the case. Adams *v.* Bushey, 60 N. H. 290. Referee, after settlement of principles of report, sending for plaintiff and asking him whether he would agree that

sist of any indiscreet action from which improper inferences can be drawn.[30] For instance, where there is a dispute as to the fees of the referee and thereafter he changes his report in favor of the party paying the fees;[31] or where the referee hears evidence or talks with witnesses of a party,[32] or views the premises,[33] in the absence of the moving party; or where the referee agrees with the stenographer for a division of the fees of the latter,[34] the report will be set aside. So where the referee was, or became, during the reference, the attorney of one of the parties;[35] was one of a law firm appearing for one of the parties;[36] was acting as counsel in another case before a referee who acted as counsel before him;[37] or was a secret partner of a party[38] the report should be set aside. On the other hand the mere fact that one of the referees chosen by the parties was the landlord of one of the parties has been held not ground.[39] Prejudice on the part of a referee is ground,[40] as is the expression of an opinion upon the facts in the case before his appointment unknown to the party at the time of his appointment.[41] A ground may, however, be waived, and where prejudice,[42] relationship,[43] or misconduct[44] is not urged when discovered, but the moving party takes the chance of a favorable report, it will not be set aside. So the moving party cannot complain of improper transactions between the referee and himself.[45] If it is claimed that the mind of the referee was impaired at the time he signed his report, the facts must be clearly shown.[46]

(v) *Irregularities or Defects in Report.* The report of the referee's proceedings may be set aside because of irregularities or defects therein,[47] such as

certain rent accruing after the action brought should be taken into the settlement. Innes *v.* Miller, 1 Dall. (Pa.) 188, 1 L. ed. 93. Referee asking third person whether defendant could pay a certain sum if decision was against him. Rheem *v.* Allison, 2 Serg. & R. (Pa.) 113. Giving written argument and suggestions to referee after the hearing was closed, where papers were submitted to the other party before sent to the referee. Dodge *v.* Stickney, 60 N. H. 461.

Ground as exclusive.— Wynn *v.* Bellas, 34 Pa. St. 160; Bollmann *v.* Bollmann, 6 S. C. 29.

30. Reynolds *v.* Moore, 1 N. Y. App. Div. 105, 37 N. Y. Suppl. 72.

31. New York Bank Note Co. *v.* Hamilton Bank Note Engraving, etc., Co., 71 N. Y. App. Div. 611, 75 N. Y. Suppl. 520; Dickinson *v.* Earle, 63 N. Y. App. Div. 134, 71 N. Y. Suppl. 227 [*affirming* 35 Misc. 235, 71 N. Y. Suppl. 755]; Reynolds *v.* Moore, 1 N. Y. App. Div. 105, 37 N. Y. Suppl. 72, 14 Misc. 571, 35 N. Y. Suppl. 1115, 37 N. Y. Suppl. 1030.

32. Dorlon *v.* Lewis, 9 How. Pr. (N. Y.) 1; Shabach *v.* Hoover, 4 Pittsb. Leg. J. N. S. (Pa.) 104; Rhoads *v.* Thoads, 2 Tr. & H. Pr. (Pa.) 798. See also Garman *v.* Brandt, 2 Lanc. Bar (Pa.), Nov. 12, 1870.

33. Yale *v.* Gwinits, 4 How. Pr. (N. Y.) 253. But see Adams *v.* Bushey, 60 N. H. 290, holding that a report will not be set aside because after hearing he took a second view of the premises alone; the court finding that the fairness of the trial was not affected by such view.

34. Dickinson *v.* Earle, 63 N. Y. App. Div. 134, 71 N. Y. Suppl. 227 [*affirming* 35 Misc. 235, 71 N. Y. Suppl. 755].

35. Fortunato *v.* New York, 31 N. Y. App. Div. 271, 52 N. Y. Suppl. 872 [*reversing* 23 Misc. 82, 50 N. Y. Suppl. 429]; Stebbins *v.* Brown, 65 Barb. (N. Y.) 272; Fortunato *v.* New York, 31 N. Y. App. Div. 271, 52 N. Y. Suppl. 872.

36. Cronon *v.* Avery, 42 Misc. (N. Y.) 1, 85 N. Y. Suppl. 539.

37. Carroll *v.* Lufkins, 29 Hun (N. Y.) 17; Cronon *v.* Avery, 42 Misc. (N. Y.) 1, 85 N. Y. Suppl. 539.

38. Connor *v.* Simpson, 44 Leg. Int. (Pa.) 241.

39. Fisher *v.* Towner, 14 Conn. 26.

40. Nolan *v.* Colorado Cent. Consol. Min. Co., 63 Fed. 930, 12 C. C. A. 585.

41. Fay *v.* Green, 2 Aik. (Vt.) 386.

42. Story *v.* De Armond, 77 Ill. App. 74; Matter of Koch, 33 Misc. (N. Y.) 153, 68 N. Y. Suppl. 375.

43. Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974.

44. Noyes *v.* Gould, 57 N. H. 20; Robinson *v.* Robinson, 35 L. T. Rep. N. S. 337, 24 Wkly. Rep. 675.

45. Gray *v.* Fisk, 33 N. Y. Super. Ct. 484, 12 Abb. Pr. N. S. 213, 42 How. Pr. 135 [*affirmed* in 53 N. Y. 630].

46. McCulloch *v.* Dobson, 15 N. Y. Suppl. 602.

47. Bulson *v.* Lampman, 1 Kan. 324 (holding that where an issue of law was referred on consent of parties under code, section 292, and the finding of the referees was on the facts only, the report should have been set aside on motion of one of the parties); Burke *v.* Turner, 89 N. C. 246; Stehman's Appeal, 5 Pa. St. 413 (holding that very clear and satisfactory proof is necessary to set aside the report of an auditor, of the errors of which the party excepting complains, unless the errors appear on the face of the report itself).

Failure to award damages, where the dam-

uncertainty,[48] or failure to state the facts found,[49] or the failure to separately state the findings of fact or conclusions of law.[50] In some jurisdictions, however, the court will not set aside the report for informalities where it furnishes the information required,[51] nor for any defects which may be cured by amendment.[52] A mistake in stating the date of the order of reference, where there was but one order and the parties attended the hearing, is not ground.[53]

(VI) *Report Contrary to Law or Evidence.* Generally the report may be set aside where the findings are supported by no evidence or are clearly against the weight of evidence,[54] or where the conclusions of law are erroneous.[55] So where the award is clearly excessive in amount, it may be set aside,[56] unless the successful party remits the excess.[57] But a report will not be set aside as contrary to the evidence except in a very clear case.[58] The report will be set aside where

ages are merely nominal, is not ground. Harvey *v.* Snow, 1 Yeates (Pa.) 156.

Non-prejudicial errors are not ground. Currie *v.* Cowles, 7 Rob. (N. Y.) 3.

Taking account.— Where the report does not present the account taken in detail, and gives as a reason that the parties kept no books, and that the affidavits relating thereto were voluminous and contradictory, an omission to present a detail of the accounts is no ground for setting aside the report, the report being full as to the grounds of its conclusions. Lannan *v.* Clavin, 3 Kan. 17. Where an auditor appointed to state the items of an account fails to do so, his report will, on motion, be set aside. Whitehead *v.* Perie, 15 Tex. 7. Where, on an accounting before a referee, the parties enter into a stipulation as to what matters shall be passed upon by him, his report will be set aside if he disregards the stipulation. Hatch *v.* Burbank, 17 Minn. 231.

48. Doyle *v.* Reilly, 18 Iowa 108, 85 Am. Dec. 582; Walsh *v.* Pierce, 11 Vt. 32. *Contra*, Eshelman *v.* Heist, 6 Lanc. L. Rev. (Pa.) 79.

Failure to state all the items of account.— A report which does not state all the items of account between the parties should be set aside for indefiniteness. McCampbell *v.* McClung, 75 N. C. 393.

49. Harlan County School Dist. No. 1 *v.* Bishop, 46 Nebr. 850, 65 N. W. 902; Wright *v.* Sanders, 28 How. Pr. (N. Y.) 395; Peck *v.* Yorks, 14 How. Pr. (N. Y.) 416, holding that if the report is defective, in omitting to state the facts found, and a further report cannot be had, for example, where two of the referees have left the state, the court should set it aside on motion.

50. Maicas *v.* Leony, 113 N. Y. 619, 20 N. E. 586; Leffler *v.* Field, 33 How. Pr. (N. Y.) 385.

51. Gulley *v.* Macy, 89 N. C. 343.

52. Ladd *v.* Lord, 36 Vt. 194.

53. Daniel *v.* Daniel, 6 Dana (Ky.) 98.

54. See *supra*, VIII, I, 3, b.

55. Thompson *v.* White, 4 Serg. & R. (Pa.) 135; Pringle *v.* McClenachan, 1 Dall. (Pa.) 486, 1 L. ed. 235; Williams *v.* Craig, 1 Dall. (Pa.) 313, 1 L. ed. 153; Whitehead *v.* Perie, 15 Tex. 7; Brennan *v.* Booth, 78 Wis. 180, 47 N. W. 271.

Conclusions inconsistent with facts.—A referee's conclusions of law on the facts found will be overruled if inconsistent with the facts. Weitnauer *v.* Weitnauer, 117 Iowa 578, 91 N. W. 815; Foote *v.* Valentine, 48 Hun (N. Y.) 475, 1 N. Y. Suppl. 410, 14 N. Y. Civ. Proc. 332.

56. Eastman *v.* New York, 5 Rob. (N. Y.) 389; Rank *v.* Rank, (Pa. 1888) 13 Atl. 829; Breneman's Estate, 1 Lanc. Bar (Pa.) Dec. 11, 1869; Jolly *v.* Pittsburgh, etc., R. Co., 28 Pittsb. Leg. J. N. S. (Pa.) 376. See also Melendy *v.* Barbour, 78 Va. 544. *Compare* Rudd *v.* Jones, 4 Dana (Ky.) 229; Nutter *v.* Taylor, 78 Me. 424, 6 Atl. 835.

57. Locke *v.* Barrington, 59 N. H. 530; Rank *v.* Rank, (Pa. 1888) 13 Atl. 829; Bassett *v.* Cunningham, 9 Gratt. (Va.) 684.

58. *Nebraska.*— State *v.* Omaha Elevator Co., (1906) 110 N. W. 874.

New Hampshire.— Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79; Free *v.* Buckingham, 59 N. H. 219, holding that a report will not be set aside as against the evidence, when the conflict is so strong that the court cannot say that the referee was influenced by passion or prejudice, or unwittingly fell into a plain mistake.

New York.— Anderson *v.* De Braekeleer, 25 Misc. 343, 55 N. Y. Suppl. 721, 28 N. Y. Civ. Proc. 306; Matter of Friend, 23 Misc. 300, 50 N. Y. Suppl. 954; Matter of Odell, 4 N. Y. Suppl. 463, 1 Connoly Surr. 94; Matter of Fithian, 3 N. Y. Suppl. 193, 1 Connoly Surr. 187.

Oklahoma.— Jakson *v.* Thornton, 8 Okla. 331, 58 Pac. 951; Erisman *v.* Kerwin, 8 Okla. 92, 56 Pac. 858.

Oregon.— Merchants' Nat. Bank *v.* Pope, 19 Oreg. 35, 26 Pac. 622.

Pennsylvania.— Ansley *v.* Scranton, 218 Pa. St. 131, 67 Atl. 51 (holding that it is error to set aside a report, and direct a finding for defendant, unless the trial court would have been bound to direct a compulsory nonsuit had the case been tried before a jury); Conner's Estate, 9 Pa. Dist. 172; Reynolds *v.* Williams, 9 Kulp 380.

Wisconsin.— Erickson *v.* McGee Constr. Co., 107 Wis. 49, 82 N. W. 694; Leasia *v.* Penokee Lumber Co., 103 Wis. 304, 79 N. W. 224; Brand *v.* James, 67 Wis. 541, 30 N. W. 934.

United States.— Fidelity, etc., Co. *v.* St. Matthews Sav. Bank, 104 Fed. 858, 44 C. C. A. 225.

See 42 Cent. Dig. tit. "Reference," § 193.

the referee passes on matters not embraced in the suit.[59] If the objection is that the report is not sustained by the evidence, the evidence must be before the court on the hearing; [60] but where the evidence is before the court, it is error to overrule the objection without any examination of the evidence.[61]

(VII) *Mistake of Law or Fact.* The report will be set aside in case the referee has made a clear mistake of law or fact,[62] if the mistake appears from the record,[63] or, in some jurisdictions, from affirmative evidence.[64]

(VIII) *Newly Discovered Evidence.* Generally a report will not be set aside because of newly discovered evidence.[65]

c. Application and Hearing — (I) *Time For Motion.* The time to move to set aside the report depends to some extent upon the nature of the reference.[66] In the absence of a statutory provision otherwise prescribing, the motion may generally be made at any time before judgment is entered upon the report,[67] but not

Where evidence is documentary.— Where a case has been referred to a commissioner, and the evidence consists of depositions taken by the commissioner, or in his presence, the court is not bound by the findings, but may review and weigh the evidence, and, if not satisfied with the findings, overrule them. Tatum *v.* Tatum, 101 Va. 77, 43 S. E. 184.

59. Elliott *v.* Quimby, 13 N. H. 181.

60. Drown *v.* Hamilton, 68 N. H. 23, 44 Atl. 79; Iralson *v.* Stang, 18 Okla. 423, 90 Pac. 446; Province *v.* Lovi, 4 Okla. 672, 47 Pac. 476. See also Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

Where all the evidence on which the finding of fact is based is not presented in the record, the court does not err in refusing to overrule such finding. Oliver *v.* Townsend, 16 Iowa 430.

Where no provision is made for preserving testimony taken before the referee, the proper procedure is to except to its admissibility, or to the finding of facts, and to have the evidence relating to such exception set out in a bill of exceptions. McDonald *v.* Saginaw Valley, etc., R. Co., 16 Fed. Cas. No. 8,766, holding that evidence not so brought into the record by a bill of exceptions will not be considered, although it is filed.

61. Jones *v.* Van Horn, 28 Colo. 126, 63 Pac. 307; Holt *v.* Johnson, 128 N. C. 67, 38 S. E. 250; Benedict *v.* Cincinnati, 7 Ohio Dec. (Reprint) 261, 2 Cinc. L. Bul. 33.

62. Allen *v.* Miles, 4 Harr. (Del.) 234; Strong *v.* District of Columbia, 4 Mackey (D. C.) 242; Miller *v.* E., etc., R. Co., 2 C. Pl. (Pa.) 10; Bell *v.* McCall, 1 Browne (Pa.) 128; Krieder *v.* Binder, 1 Ashm. (Pa.) 13 (holding, however, that, although the court may set aside where referees have committed a plain and obvious mistake in point of law or fact, a mere difference of opinion between the court and referees is not a sufficient ground); Snodgrass *v.* Morrison, 16 Lanc. L. Rev. (Pa.) 158. But see Wilson *v.* King, 2 C. & M. 689, 3 L. J. Exch. 212, 4 Tyrw. 997; Imperial Royal Chartered Aziende Assicuratrice *v.* Funder, 27 L. T. Rep. N. S. 637, 21 Wkly. Rep. 116. *Contra*, Wynn *v.* Bellas, 34 Pa. St. 160; Forney *v.* Morrison, 1 Leg. Rev. (Pa.) 85; Brown *v.* Gallagher, 13 Pittsb. Leg. J. N. S. (Pa.) 305.

Mistake of law.—Skiff *v.* Johnson, 57 N. H. 475; Cushman *v.* Wooster, 45 N. H. 410; Johnson *v.* Noble, 13 N. H. 286, 38 Am. Dec. 485; Williams *v.* Craig, 1 Dall. (Pa.) 313, 1 L. ed. 153; Happer *v.* Thomas, 5 Pa. Dist. 182; Sturgis *v.* Rue, 6 Pa. L. J. 77, 3 Pa. L. J. Rep. 499; Nance *v.* Thompson, 1 Sneed (Tenn.) 321; Needham *v.* Holt, 54 Vt. 326; Downer *v.* Downer, 11 Vt. 395; Johns *v.* Stevens, 3 Vt. 308. But see Alwyn *v.* Perkins, 3 Desauss Eq. (S. C.) 297. But before an award can be set aside for mistake of law on the part of the arbitrator, it must appear that he would not have made such an award had he known what the law was. Alexanders *v.* Goodwin, 54 N. H. 423. And in Massachusetts an award, made in pursuance of a reference under a rule of court, will not be set aside for alleged mistakes of law on the part of the referees, unless they have themselves been misled, or unless they refer questions of law to the court. Fairchild *v.* Adams, 11 Cush. (Mass.) 549. So in some jurisdictions a report will not be set aside for a mistake in law unless it appears that the referee was required and intended to follow the law. Alexanders *v.* Goodwin, *supra*; Park *v.* Pratt, 38 Vt. 545; Steen *v.* Wardsworth, 17 Vt. 297; Bliss *v.* Rollins, 6 Vt. 529.

63. Hagar *v.* New England Mut. Mar. Ins. Co., 63 Me. 502; Hains *v.* Moyer, 1 Woodw. (Pa.) 171; Pleasants *v.* Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449; Hodge *v.* Burgess, 3 H. & N. 293; Saulter *v.* Carruthers, 20 U. C. Q. B. 560; Read *v.* Weir, 20 U. C. Q. B. 544.

64. *In re* Harland, 5 Rawle (Pa.) 323; *In re* Harlan, 3 Pa. L. J. 116.

The testimony, affidavit, or bare suggestion of a referee, if uncontradicted, is receivable to establish the existence of a plain mistake, either in law or fact, committed by himself and his co-referees in making up their award in the case submitted to their arbitrament. Sturgis *v.* Rue, 6 Pa. L. J. 77, 3 Pa. L. J. Rep. 499.

65. Holmes *v.* Evans, 59 N. Y. Super. Ct. 121, 13 N. Y. Suppl. 610; Aubel *v.* Ealer, 2 Binn. (Pa.) 582 note, 1 Browne 105 note; Webber *v.* Ives, 1 Tyler (Vt.) 441.

66. Peabody *v.* Phelps, 9 Cal. 213.

67. Pitman *v.* Thornton, 65 Me. 95; Dyke *v.* Cannell, 11 Q. B. D. 180, 47 L. T. Rep.

thereafter.[68] However, the failure to move promptly may authorize a denial of the motion.[69] If the time is fixed by statute or rule of court,[70] or by stipulation,[71] the motion must be made within the time fixed.

(II) *HEARING.* No new evidence can be admitted,[72] but all the evidence that was before the referee must be before the court where a consideration thereof is necessary.[73] Generally the court cannot consider affidavits as to proceedings before the referee,[74] nor an affidavit of a party admitting the report to be just,[75] although it may look into the whole case.[76] The right to a hearing is not precluded by the failure to file the report,[77] nor because a judgment has in form been entered.[78] The burden is on the party seeking to set aside the report.[79] The term of court, trial or special, at which the hearing must be had is governed by the local practice,[80] as is the time of the hearing.[81]

d. Determination and Order.[82] Failure to appear and prosecute the motion warrants a denial thereof.[83] Where a motion is made after entry of judgment the court may, on granting the motion, set aside the judgment.[84] An order setting aside the report, where there is no provision to the contrary, sets it aside as to the facts as well as to the law; [85] but where the ruling only affects the conclusion of law the findings of fact remain in force.[86] Where certain errors affect the whole proceedings before the referee, the court need not correct such errors, but may set aside the whole report and again refer it.[87] Generally the determination will not be again reviewed by the same court on exceptions,[88] and an order denying the motion precludes its renewal on the same ground before another

N. S. 174, 31 Wkly. Rep. 747; Bedborough *v.* Army, etc., Hotel Co., 53 L. J. Ch. 658, 50 L. T. Rep. N. S. 173.

68. Macpherson *v.* Ronner, 40 N. Y. Super. Ct. 448; Comstock *v.* Rathbone, 1 Johns. (N. Y.) 138. But see Peabody *v.* Phelps, 9 Cal. 213; Cochrane *v.* Halsey, 25 Minn. 52; Mersereau *v.* Pearsall, 6 How. Pr. (N. Y.) 293.

69. Patterson *v.* Graves, 11 How. Pr. (N. Y.) 91, holding a delay of seven months to move to set aside the report of a referee for irregularity is fatal.

70. Cooke *v.* Newcastle, etc., Water Co., 10 Q. B. D. 332, 52 L. J. Q. B. 337; Forrest *v.* Todd, 76 L. T. Rep. N. S. 500. *Compare* Murphy *v.* Cotton, 14 U. C. Q. B. 426.

Enlarging time.— Wilder *v.* Wheeler, 1 How. Pr. (N. Y.) 114; Clark *v.* Clark, 12 Wend. (N. Y.) 239.

Particular circumstances will induce the court to hear motions to set aside reports of referees, although exceptions have not been filed in time. Hamilton *v.* Gallagher, 4 Yeates (Pa.) 202.

71. Michael *v.* Longman, 42 Iowa 484.

72. Hurst *v.* Hurst, 12 Fed. Cas. No. 6,930, 1 Wash. 56. See Smith *v.* Smith, 32 Me. 23.

73. Iralson *v.* Stang, 18 Okla. 423, 90 Pac. 446; Adams *v.* Hubbard, 25 Gratt. (Va.) 129.

74. Belmont *v.* Smith, 1 Duer (N. Y.) 675.

75. Hopkins *v.* Banks, 7 Cow. (N. Y.) 650.

76. Raynor *v.* Laux, 28 Hun (N. Y.) 35; Clark *v.* Fairchild, 22 Wend. (N. Y.) 576. But see Thompson *v.* White, 4 Serg. & R. (Pa.) 135, holding that only such proceedings before the arbitrators as are required by law to be done to confer jurisdiction upon the arbitrators may be inquired into by the court on a motion to set aside the award.

77. Thompson *v.* Tompkins, 1 Johns. Cas. (N. Y.) 238.

78. Schreyer *v.* Holborrow, 26 Hun (N. Y.) 468, 63 How. Pr. 228.

79. Martin *v.* Wells, 43 Vt. 428.

80. See cases cited *infra*, this note.

In New Hampshire, a report may be set aside at trial term. Free *v.* Buckingham, 59 N. H. 219. The report of a referee in a probate appeal being returnable to the law term, a motion to set aside the report as against the evidence may be considered at the law term. Dodge *v.* Stickney, 60 N. H. 461.

In New York the motion may generally be made at special term. Brush *v.* Mullany, 12 Abb. Pr. 344. *Compare* Tracy *v.* Talmadge, 1 Abb. Pr. 460.

81. See cases cited *infra*, this note.

Enumerated motion.—A motion to set aside a report on the merits, being an enumerated motion, cannot be heard on a day designated to hear non-enumerated motions. Clinton *v.* Elmendorf, 3 Johns. (N. Y.) 143; Remsen *v.* Isaacs, 1 Cai. (N. Y.) 22, Col. & C. Cas. 158.

82. **Order as appealable** see APPEAL AND ERROR, 2 Cyc. 613.

83. Frank *v.* Doane, 15 Cal. 302.

84. Cochrane *v.* Halsey, 25 Minn. 52.

85. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

86. Ramsey *v.* Browder, 136 N. C. 251, 48 S. E. 651.

87. Hidden *v.* Jordan, 32 Cal. 397.

88. Holman *v.* Manning, 65 N. H. 92, 18 Atl. 746.

judge.[89] The order may be amended to recite all the papers on which it was made.[90] Terms may be imposed,[91] the question of costs being within the discretion of the court.[92]

e. Effect of Setting Aside. Upon setting aside the report the case may be again referred,[93] or a new trial should be granted and the case tried as if there had been no reference.[94] Generally the court need not again refer a question of fact but may itself decide it.[95] After setting aside, the court cannot enter a judgment without a further trial or a re-reference.[96] If the order of reference is not set aside and the order merely grants a new trial, the same referee may proceed *de novo*.[97] Error in setting aside the report without sufficient cause is not waived by the moving party joining in a trial before a jury instead of standing on his exceptions.[98] A decision setting aside virtually disposes of all subsequent motions concerning the report.[99]

8. Recommittal[1] — a. Jurisdiction and Power to Recommit. Generally the court has power to recommit the report for correction or further consideration.[2]

89. Henry *v.* Hilliard, 120 N. C. 479, 27 S. E. 130.

90. Matter of Post, 14 N. Y. Suppl. 205 [*modifying* 9 N. Y. Suppl. 449, 2 Connoly Surr. 243].

91. *In re* Davenport, 37 Misc. (N. Y.) 179, 74 N. Y. Suppl. 940, holding that the court has power, as condition for opening the report of a referee, to limit the party objecting as to time in the matter of examining and cross-examining the witnesses to appear before the referee.

92. Wentworth *v.* Candee, 17 How. Pr. (N. Y.) 405.

93. Lyons *v.* Harris, 73 Iowa 292, 34 N. W. 864; Walton *v.* Walton, 17 Mo. 376.

In some jurisdictions, however, where the report has been wholly set aside, a motion to discharge the rule of reference and send the case to the court for trial is the proper course. Baxter *v.* Thompson, 25 Vt. 505.

Where the reference is by consent, it has been held that the setting aside the report does not revoke the order of reference and a new trial may be ordered before the same referee, although a party does not consent to the second trial. Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 554. The weight of authority, however, is to the contrary. Daverkosen *v.* Kelley, 43 Cal. 477; Robinson *v.* Shanks, 118 Ind. 125, 20 N. E. 713; Harryman *v.* Harryman, 43 Md. 140. Where an action not strictly referable is referred by consent, there is not a discontinuance of the action, and on the report being set aside the case remains in court for further proceedings. Messenger *v.* Broom, 1 Pinn. (Wis.) 630.

94. Lyons *v.* Harris, 73 Iowa 292, 34 N. W. 864. See also Smith *v.* Smith, 28 Ill. 56.

Trial by court.— Where a case is referred for findings of fact and conclusions of law, and the court, on motion, sets aside the report, it has no jurisdiction to try the issues of fact, and must either again refer the case, if the parties so agree, or submit the issues to a jury. Stroup *v.* Bridger, 124 Iowa 401, 100 N. W. 113.

Using evidence.—After setting aside the report the court may, in some jurisdictions, use the evidence taken by the referee in determining the issues. Gibson *v.* Gibson, 24 Nebr. 394, 39 N. W. 450.

95. Hottenstein's Appeal, 2 Grant (Pa.) 301.

96. Lyons *v.* Harris, 73 Iowa 292, 34 N. W. 864; Rice *v.* Benedict, 18 Mich. 75.

97. Shuart *v.* Taylor, 7 How. Pr. (N. Y.) 251.

98. Tingley *v.* Dolby, 13 Nebr. 371, 14 N. W. 146.

99. Etter *v.* Edwards, 4 Watts (Pa.) 63.

1. **Appointment of new referee on recommittal** see *infra*, VIII, I, 9.

2. *Illinois.*— Story *v.* De Armond, 179 Ill. 510, 53 N. E. 990 [*affirming* 77 Ill. App. 74]; Lee *v.* Abrams, 12 Ill. 111.

Indiana.— Reid *v.* State, 58 Ind. 406.

New Hampshire.— Cummings *v.* Tute, 50 N. H. 22.

New York.— Fairman *v.* Brush, 60 Hun 442, 15 N. Y. Suppl. 44, 21 N. Y. Civ. Proc. 155, 27 Abb. N. Cas. 197; Schultheis *v.* McInerny, 13 N. Y. Suppl. 684. *Compare* Morgan *v.* Taylor, 15 Daly 302, 5 N. Y. Suppl. 922.

North Carolina.— Turner *v.* Haughton, 71 N. C. 370. *Contra*, Ezzell *v.* Rowland Lumber Co., 130 N. C. 205, 41 S. E. 99.

Pennsylvania.— Kingston Bldg. Assoc. *v.* McDonough, 2 Kulp 335; Shiffer *v.* Boradhead, 24 Wkly. Notes Cas. 44.

South Carolina.— Watkins *v.* Lang, 17 S. C. 13, holding that the trial judge may confirm a referee's report as to some of the findings, and recommit it for further investigation as to others.

Vermont.— Potter *v.* Thompson, 64 Vt. 427, 25 Atl. 430. *Compare* Hutchinson *v.* Onion, 24 Vt. 654.

United States.— Camac *v.* Francis, 4 Fed. Cas. No. 2,329, 3 Wash. 108.

See 42 Cent. Dig. tit. "Reference," § 170.

Compare Smith *v.* Warner, 14 Mich. 152, holding that the circuit court cannot send back a report of a referee, made with all the requisites of the statute, to the referee for a reconsideration upon a part of the case.

Contra.— Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 227.

Statutory provisions.— The Pennsylvania act of 1836, section 7, authorizing a court to

This power exists at any time before the rendition of judgment on the report,[3] but not thereafter,[4] nor after the death of the referee.[5]

b. Discretion of Court. The recommittal of the report is usually a matter of discretion with the court.[6]

c. Nature and Scope of Remedy and Grounds — (i) *In General.*[7] Recommittal is the proper remedy where there are omissions in the report,[8] but not where the cause was not referable.[9] The following have also been held grounds for recommittal: Reporting evidence instead of facts;[10] failure to give opportunity to settle a bill of exceptions;[11] inclusion of matters not referred;[12] mistake;[13]

recommit a case to arbitrators, if they appear to have made a "mistake in fact or in law," does not apply to a case where the award is not according to the submission. Coleman *v.* Lukens, 3 Watts & S. (Pa.) 37.

Duty of court to recommit of its own motion.— The court need not on its own motion recommit the report because of its failure to show what evidence was admitted and what was rejected and to clearly state all the rulings made and findings and conclusions of law, where, as a matter of fact, it disclosed with due certainty the rulings made as to the evidence and the findings of law and fact. Trentham *v.* Bluthenthal, 118 Ga. 530, 45 S. E. 421.

Where order has been served terminating reference.— However, where the time within which the referee may make his report has expired and notice has been served terminating the reference, the cause cannot be sent back to the referee on his report being held insufficient but the parties must submit to a new trial. Rowlands *v.* Young Men's Christian Assoc., 32 Misc. (N. Y.) 421, 66 N. Y. Suppl. 577 [*affirmed* in 54 N. Y. App. Div. 618, 66 N. Y. Suppl. 1143].

3. Pitman *v.* Thornton, 65 Me. 95; Mayberry *v.* Morse, 39 Me. 105.

4. McMurphy *v.* Walker, 20 Minn. 382.

5. Weil *v.* Frauenthal, 2 Luz. Leg. Reg. (Pa.) 96.

6. *Illinois.*— Pape *v.* People, 19 Ill. App. 24. See also Beale *v.* Beale, (1885) 2 N. E. 65.

Iowa.— Jewell *v.* Reddington, 57 Iowa 92, 10 N. W. 306.

Maine.— Walker *v.* Sanborn, 8 Me. 288.

Massachusetts.— Gurley *v.* Reed, 190 Mass. 509, 77 N. E. 642; Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361; Craig *v.* French, 181 Mass. 282, 63 N. E. 893.

New Hampshire.— Cummings *v.* Tute, 50 N. H. 22; Adams *v.* Adams, 8 N. H. 82.

New York.— See also Brown *v.* New York Cent. R. Co., 26 How. Pr. 32.

North Carolina.— Johnson *v.* Loftin, 111 N. C. 319, 16 S. E. 179. But see Foushee *v.* Beckwith, 119 N. C. 178, 25 S. E. 866.

South Carolina.— Halk *v.* Stoddard, 62 S. C. 564, 40 S. E. 957; Watkins *v.* Lang, 17 S. C. 13. See also Bivingville Mfg. Co. *v.* Bivings, 7 Rich. Eq. 455.

Tennessee.— See McAlister *v.* Olmstead, 1 Humphr. 210.

Vermont.— Morse *v.* Beers, 51 Vt. 359.

See 42 Cent. Dig. tit. "Reference," § 170.

Exceptions to rule.— The rule that a motion to recommit a report is addressed to the discretion of the presiding judge and that his ruling is not subject to exception does not apply where the rule to the auditor provides that his findings on matters of fact are to be final. Allwright *v.* Skillings, 188 Mass. 538, 74 N. E. 944; Tripp *v.* Macomber, 187 Mass. 109, 72 N. E. 361.

7. **Nature and scope of exceptions and objections** see *supra*, VIII, I, 5, a.

Remedy by setting aside report see *supra*, VIII, I, 7.

8. Bazille *v.* Ullman, 2 Minn. 134; State *v.* Spartanburg, etc., R. Co., 8 S. C. 129. See also Lefler *v.* Field, 47 N. Y. 407. *Compare* Pratt *v.* Stiles, 9 Abb. Pr. (N. Y.) 150, 17 How. Pr. 211.

Where a referee fails to report the evidence, the proper course is to move to recommit or to require the referee to produce the evidence. Williams *v.* Whiting, 92 N. C. 683.

Illustrations.— Exceptions to the report of a judge, to whom was referred the taking of an account, that he has not found the facts on which he bases his report, and that no legal notice was given exceptant of the time when the account would be taken, the report delivered, or judgment rendered, should be taken in the form of a motion to recommit; no questions of law being presented for the consideration of an appellate court. Scroggs *v.* Stevenson, 100 N. C. 354, 6 S. E. 111. Where a referee's report fails to state all rulings made by, and all exceptions taken before, him, or all material evidence offered on a matter excepted to, the remedy is by motion to require him to supply the defects, and not by motion for a new trial. Sutterfield *v.* Magowan, 12 S. D. 139, 80 N. W. 180.

When the evidence is not certified, and the unsuccessful party desires to take exceptions to the findings, the whole report, upon a proper motion being made, should be recommitted, that all needed latitude may be given to the referee, and the evidence certified to positively, and not merely as being the evidence according to the recollection of the referee. Smith *v.* Harlan, 49 Iowa 101.

9. Jones *v.* Parker, 26 N. H. 20.

10. Wabash, etc., Canal Co. *v.* Huston, 12 Ind. 276; Kempton *v.* Stewart, 31 Me. 566.

11. Runnels *v.* Moffat, 73 Mich. 188, 41 N. W. 224.

12. Wright *v.* Cobleigh, 21 N. H. 339.

13. Berry *v.* Callet, 6 N. J. L. 179. But see Straight *v.* Com., 7 Pittsb. Leg. J. (Pa.) 140.

Mistake in calculating loss.— Objections to the report of an auditor to whom had been

failure to rule on an objection after reserving decision;[14] too strict a ruling, resulting from too narrow a construction of his commission;[15] failure to return evidence;[16] conclusions of law based on facts not found;[17] filing of report prior to time stipulated for submission of briefs;[18] amendments of pleadings requiring further consideration of case;[19] improper distribution of expenses of reference;[20] and the denial of a motion to adjourn the reference until the party can receive personal notice of the hearing.[21] On the other hand a recommittal has been refused in the following cases: Where ground of recommittal involved only a trifling amount;[22] where finding against the evidence;[23] amendment of complaint where no excuse for failure to file amendment before report;[24] newly discovered evidence;[25] excessiveness of damages where there is no allegation of corruption or prejudice;[26] and failure of referee to take oath.[27] Where the whole report is void, it will not be recommitted.[28] So where a question is not raised on a trial before referees, it cannot be taken advantage of as a ground to have the case recommitted.[29] Where the report was made by three referees, only one of whom was of the three originally appointed, the report may be recommitted to the original three.[30] Where the referees certified to the court that they have inadvertently overlooked a certain circumstance and request a recommittal, the court may set aside the report and recommit it.[31] So the court will send back a report, if necessary, to hear the grounds for the award given.[32]

(II) *Additional Proof or Findings.*[33] Except where it is otherwise provided by statute,[34] a report may be recommitted for further findings,[35] or to hear further proof,[36] as where the referee fails to make a finding as to a material ques-

referred an action on a fire policy, that he had exceeded his powers in stating the amount claimed by plaintiff, and had erred in calculating the loss, should be taken by motion to recommit the report. Fair *v.* Manhattan Ins. Co., 112 Mass. 320.

Statutory provisions.— Rank *v.* Rank, (1888) 13 Atl. 829; McGlue *v.* Philadelphia, 105 Pa. St. 236.

14. Berrian *v.* Sanford, 1 Hun (N. Y.) 625, 4 Thomps. & C. 655.

15. W. R. Lynn Shoe Co. *v.* Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

16. Wake *v.* Magnin, 85 N. C. 114.

17. Lindsay *v.* Waymart Water Co., 4 Pa. Dist. 765.

18. Mercantile Nat. Bank *v.* Sire, 100 N. Y. App. Div. 491, 91 N. Y. Suppl. 419.

19. McConnell *v.* Stubbs, 124 Ga. 1038, 53 S. E. 698; Learmonth *v.* Veeder, 11 Wis. 138.

20. Hewett *v.* Bowley, 27 Me. 125.

21. Cummings *v.* Tute, 50 N. H. 22.

22. Congdon *v.* Darcy, 46 Vt. 478.

23. Sheppard *v.* Atwater Mfg. Co., 43 Conn. 448.

24. Newell *v.* Mahaska County Sav. Bank, 51 Iowa 178, 1 N. W. 480. See also Nutter *v.* De Rochemont, 46 N. H. 80.

25. Nutter *v.* De Rochemont, 46 N. H. 80; Sanborn *v.* Davis, 5 N. H. 389.

26. Ezzell *v.* Rowland Lumber Co., 130 N. C. 205, 41 S. E. 99.

27. McConnell *v.* Stubbs, 124 Ga. 1038, 53 S. E. 698.

28. Adams *v.* Adams, 8 N. H. 82.

29. Danvers *v.* Com., 184 Mass. 502, 69 N. E. 320.

30. Foltz *v.* Grubb, 4 Pa. L. J. 209.

31. Brittingham *v.* Stevens, 1 Hall (N. Y.) 421.

32. Stafford *v.* Bacon, 6 Hill (N. Y.) 264.

33. **Power of referee to file additional or supplemental report** see *supra*, VIII, E.

34. McCready *v.* Farmers' L. & T. Co., 79 Hun (N. Y.) 241, 29 N. Y. Suppl. 361; Gardiner *v.* Schwab, 34 Hun (N. Y.) 582; Lakin *v.* New York, etc., R. Co., 11 How. Pr. (N. Y.) 412. See also Matter of Bayer, 54 Hun (N. Y.) 189, 7 N. Y. Suppl. 566.

35. Stockton State Bank *v.* Showers, 65 Kan. 431, 70 Pac. 332; Grotte *v.* Nagle, 50 Nebr. 363, 69 N. W. 973 (holding that where plaintiff, after the referee's report has been filed, is allowed to amend his petition, it is not error to return the case to the referee for a further finding in respect to the items affected by the amendment); *In re* Stine, 16 Pa. Super. Ct. 12; Finch *v.* Heermans, 5 Luz. Leg. Reg. (Pa.) 125.

In settling the interlocutory judgment to be entered upon a referee's report, the court may direct a further hearing before the same or another referee. Maicas *v.* Leony, 50 Hun (N. Y.) 178, 2 N. Y. Suppl. 831, 22 Abb. N. Cas. 1 [*affirmed* in 113 N. Y. 619, 20 N. E. 586]; Seymour *v.* Spring Forest Cemetery Assoc., 19 N. Y. Suppl. 94 [*affirmed* in 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859].

36. *Nebraska.*— State *v.* Omaha Elevator Co., (1906) 110 N. W. 874.

North Carolina.—Tharington *v.* Tharington, 99 N. C. 118, 5 S. E. 414. But see Ezzell *v.* Rowland Lumber Co., 130 N. C. 205, 41 S. E. 99, holding that an award of arbitrators, fixing damages for injury to land, cannot be recommitted to consider other evidence as to damages, where there is no complaint that the arbitrators refused to examine any witness offered by either party.

South Carolina.— Halk *v.* Stoddard, 67 S. C. 147, 45 S. E. 140; Lowndes *v.* Miller, 25 S. C. 119.

tion of fact.[37] But recommittal for a finding on an immaterial point is not necessary.[38] So where delay in discovering additional evidence, and a failure to produce it, are inexcusable, a request to introduce the additional evidence and to re-refer the case will not be granted.[39] So the report will not be recommitted for special findings which will not change the effect of the general finding,[40] nor for findings outside the scope of the reference;[41] nor outside the issues raised by the pleadings;[42] nor for findings once refused to which an exception has been taken;[43] nor, in some jurisdictions, for findings not requested at the hearing.[44] And of course, where there can be no findings of fact, as where the complaint is dismissed for lack of evidence to prove the allegations thereof, the report will not be recommitted for such findings.[45]

Vermont.— Warden *v.* Johnson, 11 Vt. 455.

West Virginia.— Ward *v.* Ward, 21 W. Va. 262.

See 42 Cent. Dig. tit. "Reference," § 177.

Evidence to support amendment.— But where an action at law has been referred to a referee, and the court finds that his conclusions of fact and law are correct, and overrules all the exceptions to his report, it is error to recommit the report to enable the losing party to introduce testimony to sustain new issues to be raised by an amendment of his answer, especially where he might have amended at the hearing, but made no effort to do so, being of opinion that no amendment was necessary. Clayton *v.* Mitchell, 31 S. C. 199, 9 S. E. 814, 10 S. E. 390.

To prove same facts by other witnesses.— Where defendant's whole case depended on the action of the court on exceptions to the report of a commissioner authorized to hear the whole proof, defendant, on the court's finding that some of her witnesses were incompetent, could not object to the determination of the whole case on such exceptions and claim the right to a resubmission to enable defendant to prove the same facts by other competent witnesses. Foley *v.* Dillon, 105 S. W. 461, 32 Ky. L. Rep. 222.

37. *Idaho.*— Robinson *v.* Nelson, 4 Ida. 567, 43 Pac. 64.

Iowa.— Sage *v.* Nichols, 51 Iowa 44, 50 N. W. 491.

Massachusetts.— Preston *v.* Knight, 120 Mass. 5.

New Hampshire.— March *v.* Putney, 56 N. H. 226.

New York.— Parker *v.* Baxter, 19 Hun 410 [*affirmed* in 86 N. Y. 586] (holding that an order sending back a case to a referee in order that he might determine the liability for costs was proper); Schultheis *v.* McInerny, 13 N. Y. Suppl. 684, 21 N. Y. Civ. Proc. 157, 27 Abb. N. Cas. 193; Brown *v.* New York Cent. R. Co., 26 How. Pr. 32.

Vermont.— Ferrisburg *v.* Martin, 60 Vt. 330, 14 Atl. 88; Needham *v.* Holt, 54 Vt. 326.

Wisconsin.— Baehr *v.* Buell, 133 Wis. 119, 113 N. W. 433.

United States.— Kleine *v.* Catara, 14 Fed. Cas. No. 7,869, 2 Gall. 61.

See 42 Cent. Dig. tit. "Reference," § 174.

Where the referee reports only the evidence, and no finding thereon, the report will be recommitted to find the facts. Cleaveland *v.* Dinsmore, 59 Vt. 436, 8 Atl. 279.

Technical or clerical omissions.— The practice of sending a report back to the referee to supply alleged omissions should be only to supply some mere technical or clerical omissions and not to reinvest such officer with judicial functions touching the case theretofore submitted for his decision, and hence it is improper to recommit with instructions to decide and determine whether costs should be allowed and if so to which party. West Troy First Nat. Bank *v.* Levy, 41 Hun (N. Y.) 461.

Stating accounts.— Where a report furnishes data from which an account can be stated, the court will not set it aside and order a re-reference on the ground that the referee has failed to pass on certain matters involved in the account. Grant *v.* Edwards, 92 N. C. 442.

Where the referee has found it impossible to ascertain a principal fact in dispute, the report may be recommitted with direction to take further evidence on that point. Shiffer *v.* Broadhead, 126 Pa. St. 260, 17 Atl. 592.

Where two actions against different defendants were referred to the same arbitrators, who made only one award, the court refused to send it back for amendment, and set it aside. Com. *v.* Maris, 4 Serg. & R. (Pa.) 81.

To determine intention of parties.— Where the question before the court is as to the intention of parties, such intention may be inferred by the court from the facts reported by the auditor, without recommitting the report for it to be done by him. Emery *v.* Tichout, 13 Vt. 15.

38. Fowler *v.* Davis, 120 Ga. 442, 47 S. E. 951; Da Silva *v.* Turner, 166 Mass. 407, 44 N. E. 532; Quincey *v.* White, 63 N. Y. 370 [qualifiedly *reversing* 5 Daly 327]; Lakin *v.* New York, etc., R. Co., 11 How. Pr. (N. Y.) 412.

39. Murphey *v.* Shepardson, 60 Wis 412, 19 N. W. 356.

40. Riley *v.* Farnum, 62 N. H. 42.

41. Drury *v.* Amoskeag F. Ins. Co., 65 N. H. 111, 18 Atl. 1109.

42. Marston *v.* Johnson, 13 How. Pr. (N. Y.) 93.

43. People *v.* Bank of North America, 13 Hun (N. Y.) 434.

44. Peterborough R. Co. *v.* Wood, 61 N. H. 418.

45. Lugar *v.* Byrnes, 21 N. Y. Suppl. 753, 29 Abb. N. Cas. 280.

(III) *For Amendment or Correction.*[46] Where the report is defective in form or a clerical error is made therein, it may be recommitted.[47] For instance, where the findings of fact and conclusions of law are not separately stated, a recommittal is proper to correct the error.[48] So where the report contains other matters than a statement of the account, the report should be recommitted with instructions to the auditor to strike out the extraneous matter.[49] Where the amount awarded is excessive, the court is not bound to recommit if the prevailing party accepts a reduction, but an order may be made reducing the amount of the award.[50] Where the findings of law are erroneous, the court may correct them or commit the report again to the referee.[51]

(IV) *General or Indefinite Findings.* A report which is too general may be recommitted for a more specific finding.[52]

d. Motion. The motion papers must show the objection complained of,[53] the necessity for recommittal,[54] and a compliance by the moving party with all acts on his part required to authorize a recommittal.[55] Under some statutes notice of the motion must be given.[56] A motion cannot be made where a judgment entered upon the report remains unvacated,[57] and in some jurisdictions there is a fixed time within which the motion must be made.[58]

46. **Amendment without recommittal** see *supra*, VIII, E.

47. *Indiana.*— Moore *v.* Barnett, 17 Ind. 349.

Maine.— Atkinson *v.* Crooker, 35 Me. 135.

Michigan.— Bryant *v.* Hendee, 40 Mich. 543; Bewick *v.* Fletcher, 39 Mich. 25.

Minnesota.— Griffin *v.* Jorgenson, 22 Minn. 92; Bazille *v.* Ullman, 2 Minn. 134.

New Hampshire.— Yeaton *v.* Brown, 52 N. H. 14. *Compare* Adams *v.* Adams, 8 N. H. 82.

New York.— See also Berdell *v.* Allen, 54 N. Y. Super. Ct. 38 [*affirmed* in 116 N. Y. 661, 22 N. E. 1099].

North Carolina.— Topping *v.* Windley, 99 N. C. 4, 5 S. E. 14; Turner *v.* Haughton, 71 N. C. 370.

Pennsylvania.— Gunn *v.* Bowers, 126 Pa. St. 552, 17 Atl. 893; Heslop *v.* Bush, 80 Pa. St. 70; Stewart *v.* Bowen, 49 Pa. St. 245; Shaw *v.* Pearce, 4 Binn. 485; Snyder *v.* Hoffman, 1 Binn. 43; Thompson *v.* Warder, 4 Yeates 336; Ruland *v.* Krapp, 2 Leg. Reg. 389.

Wisconsin.— Cairns *v.* O'Bleness, 40 Wis. 469.

See 42 Cent. Dig. tit. "Reference," § 175.

Where a report of the majority of referees is recommitted for the specific purpose of having them certify that the disagreeing referee acted with them in the trial of the case, but refused to sign the report, they may thus amend their report, without the knowledge or presence of their dissenting associate. Brann *v.* Vassalboro, 50 Me. 64.

48. Runnels *v.* Moffat, 73 Mich. 188, 41 N. W. 224; Califf *v.* Hillhouse, 3 Minn. 311; Snook *v.* Fries, 19 Barb. (N. Y.) 313 (holding that the court will, of its own motion, send the case back for a further report); Bouknight *v.* Brown, 16 S. C. 155.

Correcting clerical mistakes.— When a case is referred back to the referee for the purpose of having the conclusions of law and fact separately stated, and of giving an opportunity to settle a bill of exceptions, the referee may correct a clerical mistake in the computation of the amount found to be due. Runnels *v.* Moffat, 73 Mich. 188, 41 N. W. 224.

49. Green *v.* Pickering, 28 N. H. 360; Bartlett *v.* Trefethen, 14 N. H. 427.

50. Rank *v.* Rank, 21 Wkly. Notes Cas. (Pa.) 399.

51. Lackawanna Iron, etc., Co. *v.* Fales, 5 Leg. Gaz. (Pa.) 14.

52. *New Hampshire.*—Andrews *v.* Green, 61 N. H. 639. See also Crawford *v.* Forristall, 57 N. H. 102.

New York.— Parsons *v.* Suydam, 3 E. D. Smith 276.

Pennsylvania.— Bowers *v.* Worrell, 1 Browne 170; Blackman *v.* Smith, 3 Kulp 140.

Vermont.— West *v.* Cutting, 19 Vt. 536.

Wisconsin.— Mast *v.* Lockwood, 59 Wis. 48, 17 N. W. 543.

See 42 Cent. Dig. tit. "Reference," § 176.

53. St. Joseph Mfg. Co. *v.* Hubbard, 36 Ind. App. 84, 75 N. E. 17; Dunn *v.* Starkweather, 6 Iowa 466.

54. Petrie *v.* Hamilton College, 92 Hun (N. Y.) 81, 36 N. Y. Suppl. 636; Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385.

55. Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385, holding that a party moving the court to send the case back to the referee to pass specifically on the material questions of fact and law, which he has failed to pass on, must show that he requested the referee at the trial or before the submission of the case to him to specifically find such facts and conclusions of law.

56. Burrard *v.* Calisher, 19 Ch. D. 644, 51 L. J. Ch. 510, 46 L. T. Rep. N. S. 341, 30 Wkly. Rep. 540; Graves *v.* Taylor, 27 Wkly. Rep. 412.

57. Ferguson *v.* Bruckman, 16 N. Y. App. Div. 67, 44 N. Y. Suppl. 812.

58. Fleetwood *v.* Bibb, 113 Ga. 618, 38 S. E. 980; Littleton *v.* Patton, 112 Ga. 438, 37 S. E. 755. *Compare* Cross *v.* Clement, 70 Me. 502.

e. Order.[59] The order sending back a report to a referee is sufficient notice to the party excepting to such report that it has been recommitted.[60] Where the order requires the referee to separately state his findings and conclusions, it must instruct him as to the questions on which he is required to make findings.[61] The order may impose conditions.[62] An order must not deprive the parties of the right to except to the report for any errors which may be contained therein,[63] nor put the referee in the place of the court to render judgment.[64] So it is erroneous where it provides that the case shall be heard on the report made by the first referee and the additional evidence taken.[65]

f. Proceedings by Referee After. The powers and duties of the referee after recommittal necessarily depend on the terms of the order of recommittal and the referee cannot go outside the order.[66] Where the recommittal is general, the referee may hear evidence and arguments in respect to alleged errors in the first report.[67] Both parties generally have a right to be heard,[68] but if the report is sent back merely for amendment in matter of form, the referee need not give notice to or hear the parties.[69] Generally additional evidence offered should be admitted,[70] and new items of indebtedness then first brought forward may be included.[71] But it is not competent for two of three referees, in the absence of the third, to revise the report on the merits of the case.[72]

g. Report After. After recommittal, the referee must file a report which is, except as otherwise provided for by the order of recommittal, governed largely by the same rules relating to the original report.[73] The report need not be made

59. Order as appealable see APPEAL AND ERROR, 2 Cyc. 613.

60. Herring *v.* Murphy, 70 N. C. 164.

61. Gove *v.* Hammond, 48 How. Pr. (N. Y.) 385.

62. Ferguson *v.* Bruckman, 18 N. Y. App. Div. 358, 46 N. Y. Suppl. 23 [*reversed* on other grounds in 164 N. Y. 481, 58 N. E. 661].

63. Brumble *v.* Brown, 73 N. C. 476.

64. Long *v.* Cole, 74 N. C. 267; Brumble *v.* Brown, 73 N. C. 476.

65. Davidson *v.* Copeland, 69 S. C. 47, 48 S. E. 33.

66. O'Neil *v.* Capelle, 62 Mo. 202; Landis' Estate, 6 Lanc. Bar (Pa.) 57; *In re* Moffett, 11 Phila. (Pa.) 109; *In re* Emig, 11 York Leg. Rec. (Pa.) 178; Cunningham *v.* Cauthen, 44 S. C. 95, 21 S. E. 800, holding that when the testimony has been reported by a referee, to whom the cause is remanded for the purpose of correcting some of his former conclusions, additional testimony is inadmissible.

Reassessment of damages.—An assessor, to whom a case is recommitted to reassess the damages according to a rule laid down by the court, may proceed to assess the damages without a rehearing, if the case was previously fully heard before him. Gardner *v.* Field, 5 Gray (Mass.) 600.

67. Shearman *v.* Akins, 4 Pick. (Mass.) 283.

68. Bowers *v.* Worrell, 1 Browne (Pa.) 212.

69. Webber *v.* Orne, 15 Gray (Mass.) 351; Baxter *v.* Thompson, 25 Vt. 505. See also *In re* Donnelly, 3 Phila. (Pa.) 18; Potter *v.* Thompson, 64 Vt. 427, 25 Atl. 430.

70. Roberts *v.* White, 73 N. Y. 375; Goulard *v.* Castillon, 12 Barb. (N. Y.) 126; Leach *v.* Shepard, 5 Vt. 363. But see Runnels *v.* Moffat, 73 Mich. 188, 41 N. W. 224.

71. Maner *v.* Wilson, 16 S. C. 469.

72. Cumberland *v.* North Yarmouth, 4 Me. 459.

73. See cases cited *infra*, this note.

Reference to prior report.—An award by referees after a recommittal is not objectionable because referring to an account annexed to a prior award on file in the same case, instead of having it attached. Shaw *v.* Wise, 166 Mass. 433, 44 N. E. 345.

New claims.—Although an auditor make report at the third term, yet if the report is referred back to him, he may properly include in it the demand of a creditor not exhibited to him until after the report had been referred back. Taylor *v.* Woodward, 10 N. J. L. 1.

Time when judgment may be entered.—Where a referee reports in favor of plaintiff, but states that before a final judgment can be entered an accounting must be had, and an order is then entered referring it back to the referee to take and state the account, judgment cannot be entered until the accounting has taken place. McMahon *v.* Allen, 27 Barb. (N. Y.) 335.

Exceptions to report.—McMahon *v.* Paris, 87 Ga. 660, 13 S. E. 572; Rogers *v.* Oxford Bank, 108 N. C. 574, 13 S. E. 245; *In re* Moffetts, 11 Phila. (Pa.) 109.

Grounds for rejection.—Where the report of auditors is set aside by reason of their neglect to report copies of the account of the parties, and the cause is recommitted to them, their refusal to go into the evidence on the whole merits furnishes no reason for rejecting their report a second time. Leach *v.* Shepard, 5 Vt. 363.

Contents.—Where a case was recommitted on agreement of the parties to take further testimony, a report of all the testimony taken

within the time specified in the original submission,[74] and where recommitted for correction in form only it may be returned in a new draft or in the original draft containing the corrections.[75] So if the referees are satisfied with the correctness of the report, they are not obliged to alter it, but may again return it without hearing the parties.[76] Generally the second report cannot be treated as an amendment of the first.[77] Where the report is referred back for additional findings, the referee can make findings only on matters specified in the order of the court.[78]

9. Appointment of New Referee. Ordinarily, after a report is set aside, the matter may be referred to a new referee,[79] and in some cases it is held improper to send the case to the same referee.[80] But where there is no suggestion of misconduct on the part of the referee, it has been held that the case should be remitted to the same referee,[81] or at least that it may be remitted to him.[82] Except where there is a statutory provision to the contrary,[83] a reference by consent should be

before him, as well on the issues formed by the original pleadings as on the new issue raised by an amended answer, with his findings of fact and conclusions of law thereon, was proper. Fairbank *v.* Newton, 50 Wis. 628, 7 N. W. 543. An order recommitting a report for more specific findings as to certain matters, and for the statement of and reference to all the evidence on which the findings were based, was substantially complied with by a supplemental report containing a copy of the testimony which was stated to be all the evidence from which the master found any facts. Phelps *v.* Root, 78 Vt. 493, 63 Atl. 941.

Effect of motion to confirm first report.— Plaintiff moved to confirm the referee's report in his case. On defendant's motion the report was recommitted, and returned by the referee with only one item changed. It was held that, although plaintiff, by his motion, did not technically estop himself from challenging the report, yet, as against him, it should be deemed correct, unless for error clearly shown. Campbell *v.* Phillips, 28 Kan. 753.

74. Hickey *v.* Veazie, 59 Me. 282.

75. Atkinson *v.* Crooker, 35 Me. 135.

76. May *v.* Haven, 9 Mass. 325.

77. Johnson *v.* Long, 72 Mo. 210. But see Beebe *v.* Dudley, 30 N. H. 34.

78. Sage *v.* Nichols, 51 Iowa 44, 50 N. W. 491.

The presumption is that the referees conformed to the directions of the court in making the corrections. Atkinson *v.* Crooker, 35 Me. 135.

79. Masten *v.* Budington, 18 Hun (N. Y.) 105.

Discretion of court.— Whether a referee shall be retained or a new one appointed, when a new trial is ordered, is a question addressed to the discretion of the court. Sharp *v.* New York, 31 Barb. (N. Y.) 578, 9 Abb. Pr. 243, 19 How. Pr. 193 [*affirmed* in 31 Barb. 584].

Where part of the questions submitted are not determined, a new referee may be appointed to complete the original order of reference. Mundorff *v.* Mundorff, 1 Hun (N. Y.) 41, 3 Thomps. & C. 171; Trufant *v.* Merrill, 1 Sweeny (N. Y.) 462, 6 Abb. Pr. N. S. 462, 37 How. Pr. 531.

80. Sharp *v.* New York, 31 Barb. (N. Y.) 578 [*affirmed* in 19 How. Pr. 193]; Schermerhorn *v.* Van Allen, 13 How. Pr. (N. Y.) 82 (holding that where a new trial is granted upon an appeal from a judgment founded on the report of a referee, if either party desires it, the cause should be tried before a new referee); Union Pac. R. Co. *v.* Wilson, 1 Wyo. 307 (holding that where the report of one referee is not responsive to the issues, the case should be referred to another, or tried by jury).

81. Pinsker *v.* Pinsker, 44 N. Y. App. Div. 501, 60 N. Y. Suppl. 902.

Where the judgment on the report is reversed and a new trial is granted, the order of reference is not vacated and the new trial must be had before the same referee unless otherwise specially provided. Catlin *v.* Adirondack County, 81 N. Y. 379 [*affirming* 19 Hun 389].

82. Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295. See also Walton *v.* Walton, 17 Mo. 376.

Recommittal.— Where a referee, to whom a cause is referred, reports in favor of plaintiff, and afterward defendant asks to recommit the cause for further proofs, and for leave to amend his answer, so that a new issue is raised thereby, the court may properly refer the cause again to the same referee. Fairbank *v.* Newton, 50 Wis. 628, 7 N. W. 543. It is a matter of practice to recommit an informal report to the same referees, although against the consent of the adverse party. Thompson *v.* Warder, 4 Yeates (Pa.) 336. Where judgment on a referee's report has been reversed for failure of such report to state the items allowed and disallowed, it is proper to re-refer the case to the same referee, to find the facts on the evidence formerly taken before him, none other being offered on either side. Park *v.* Mighell, 7 Wash. 304, 35 Pac. 63.

83. See the statutes of the several states.

In New York, where a new trial is granted, the trial court must name a new referee unless the stipulation otherwise provides, where the reference is one by consent. Brown *v.* Root Mfg. Co., 148 N. Y. 294, 42 N. E. 720 [*affirming* 76 Hun 159, 27 N. Y. Suppl. 551]; Mitchell *v.* White Plains, 9 N. Y. App. Div.

remitted to the same referee unless the parties consent to the appointment of a new referee.[84]

10. Different Decisions or Findings by Court.[85] While in some jurisdictions the court may disregard the findings of fact of the referee and make new findings on the evidence reported, or modify or change the facts as found,[86] the general rule is that the court has no such power.[87] But if the conclusions of law are erroneous and not warranted by the evidence, the court may disregard them and render a judgment according to law upon the facts as found by the referee.[88] Where the referee makes findings outside his powers the court may proceed to make its own findings upon the evidence.[89]

11. Appeals Under Pennsylvania Arbitration Laws — a. Right of Review and Nature and Form of Remedy. In Pennsylvania either party may appeal from an award to the court in which the cause was pending at the time the rule of reference was entered,[90] and an appeal has been held the exclusive remedy to review

258, 41 N. Y. Suppl. 496; Lennon *v.* Smith, 18 N. Y. Suppl. 213, 22 N. Y. Civ. Proc. 22; Carter *v.* Wallace, 3 How. Pr. N. S. (N. Y.) 350. This provision does not apply where the report is incomplete and unsatisfactory to each of the parties, who appear to concede the necessity of further and more definite findings, in which case the reference is properly ordered for a further hearing before the same referee. Southard *v.* Franco-American Trading Co., 1 N. Y. Suppl. 603, 15 N. Y. Civ. Proc. 112.

84. Smith *v.* Warner, 14 Mich. 152; Billings *v.* Vanderbrek, 15 How. Pr. (N. Y.) 295. See also Flemming *v.* Roberts, 77 N. C. 415, holding that where a cause is referred by agreement, a re-reference to the same referee cannot be objected to by one of the parties. *Compare* Meredith *v,* Sanborn, 5 Harr. (Del.) 249.

85. See also *supra,* VIII, E.

86. McHenry *v.* Moore, 5 Cal. 90; Wentzville Tobacco Co. *v.* Walker, 123 Mo. 662, 27 S. W. 639; Calvert *v.* Nickles, 26 S. C. 304, 2 S. E. 116. *Compare* Smith *v.* Smith, 123 N. C. 229, 31 S. E. 471.

Trial de novo.— Where the court sets aside the report in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury. Merchants' Nat. Bank *v.* Pope, 19 Oreg. 35, 26 Pac. 622.

In Missouri, where the reference is compulsory or a compulsory reference could have been awarded, the court is not bound by the findings of fact but may reject them and make its own finding. Utley *v.* Hill, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323; State *v.* Hurlstone, 92 Mo. 327, 5 S. W. 38; Kansas City Hydraulic Press Brick Co. *v.* Pratt, 114 Mo. App. 643, 93 S. W. 300; West *v.* Caruthersville Bank, 110 Mo. App. 490, 85 S. W. 601; Gibson *v.* Jenkins, 97 Mo. App. 27, 70 S. W. 1076; Raines *v.* Lumpee, 80 Mo. App. 203; Cahill *v.* McCornish, 74 Mo. App. 609; Bond *v.* Finley, 74 Mo. App. 22; St. Louis Steam Heating, etc., Co. *v.* Bissell, 41 Mo. App. 426; Holt *v.* Simmons, 16 Mo. App. 97; Heman *v.* Britton, 14 Mo. App. 121. See also Smith *v.* Paris, 70 Mo. 615. But the finding of facts in an action at law not involving a long account has the same effect as the finding of a jury, and is binding on the court unless for good cause set aside. Clark *v.* Phillips, 99 Mo. 550, 11 S. W. 53; Caruth-Byrnes Hardware Co. *v.* Wolter, 91 Mo. 484, 3 S. W. 865; Kansas City Hydraulic Press Brick Co. *v.* Pratt, *supra*; Goetz *v.* Piel, 26 Mo. App. 634.

87. *Colorado.*— Little Pittsburg Con. Min. Co. *v.* Little Chief Consol. Min. Co., 11 Colo. 223, 17 Pac. 760, 7 Am. St. Rep. 226.

Connecticut.—Coburn *v.* Raymond, 76 Conn. 484, 57 Atl. 116, 100 Am. St. Rep. 1000; Brady *v.* Barnes, 42 Conn. 512.

Idaho.— Walker *v.* Campbell, 2 Ida. 757, 26 Pac. 123.

New Hampshire.— Foster *v.* Hill, 36 N. H. 526.

North Carolina.— Holt *v.* Johnson, 128 N. C. 67, 38 S. E. 250.

Pennsylvania.— Reynolds *v.* Creveling, 177 Pa. St. 267, 35 Atl. 686; Gunn *v.* Bowers, 126 Pa. St. 552, 17 Atl. 893.

Vermont.— Vilas Nat. Bank *v.* Strait, 58 Vt. 448, 3 Atl. 541; Fuller *v.* Adams, 44 Vt. 543.

See 42 Cent. Dig. tit. "Reference," § 206.

88. *California.*— Calderwood *v.* Pyser, 31 Cal. 333.

Indiana.— Roush *v.* Emerick, 80 Ind. 551.

Massachusetts.— Beers *v.* Wardwell, 198 Mass. 236, 84 N. E. 306; Livingston *v.* Hammond, 162 Mass. 375, 38 N. E. 968; Hamilton *v.* Boston Port, etc., Aid Soc., 126 Mass. 407; Meserve *v.* Andrews, 104 Mass. 360; Morrill *v.* Keyes, 14 Allen 222; Com. *v.* Roxbury, 9 Gray 451.

Missouri.— O'Neill *v.* Capelle, 62 Mo. 202.

Nebraska.— Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632.

New York.— Austin *v.* Ahearne, 61 N. Y. 6; Beach *v.* Cooke, 28 N. Y. 508, 86 Am. Dec. 260.

Wisconsin.— Learmonth *v.* Veeder, 11 Wis. 138.

See 42 Cent. Dig. tit. "Reference," § 206.

89. Best *v.* Pike, 93 Wis. 408, 67 N. W. 697.

90. Com. *v.* La Fitte, 2 Serg. & R. (Pa.)

errors of law not apparent of record.[91] In a proper case a writ of error lies,[92] as where the award has become a judgment by entry,[93] where the judgment has become absolute by a failure to appeal,[94] or where the award is set aside on the ground that the declaration contains no cause of action.[95] The remedy is by appeal and not by writ of error where the judgment is to be reviewed and not the award,[96] or where the arbitrators award more than is due.[97] No appeal or writ of error lies where the parties have agreed that the award shall be final.[98] Such agreement, however, must be in writing.[99] Failure to present evidence before the arbitrators does not forfeit the right to appeal.[1]

b. Parties. Any person having a direct interest in the matter in controversy may appeal from the award,[2] and hence a taxpayer may appeal from the award against a municipality.[3] On the other hand one having no direct interest cannot appeal.[4] A co-party may appeal alone,[5] or in the name of, or for, all.[6] But an appeal by one of two or more is not an appeal for all unless such is clearly shown to have been the intention.[7] Where an appeal is taken by one without the author-

106; Sherman *v.* Andreas, 3 Luz. Leg. Reg. (Pa.) 87. *Compare* Kimmel *v.* Shank, 1 Serg. & R. (Pa.) 24, holding that a reference of matters in dispute to certain persons "on whose decision, or a majority of them, judgment to be entered by the prothonotary" is to be taken to have been entered under the act of 1705, and no appeal lies.

Under the act of April 6, 1870, relative to arbitrations in certain counties, no appeal lies from the award. Cutler *v.* Richley, 151 Pa. St. 195, 25 Atl. 96; Spratt *v.* Raymond, 149 Pa. St. 258, 24 Atl. 292.

91. Thompson *v.* White, 4 Serg. & R. (Pa.) 135.

92. Taggart *v.* McGinn, 14 Pa. St. 155 (holding that irregularities in the proceedings, when apparent on the record, may be corrected by writ of error, but those irregularities made apparent by extrinsic proof can be corrected only by the court below); Allen *v.* Myers, 5 Rawle (Pa.) 335 [*following* Wilson *v.* Com., 3 Penr. & W. (Pa.) 531].

An error of law committed by arbitrators, whose award was not appealed from, cannot be assigned for error. Berg *v.* Moore, 7 Pa. St. 94.

Refusal to dismiss appeal.— Error does not lie on the refusal of the court below to strike off an appeal from an award, no final judgment being entered. Kendrick *v.* Overstreet, 3 Serg. & R. (Pa.) 357.

Who may grant.— Under the Compulsory Arbitration Act, an application for a writ of error should be addressed to the court of common pleas, and need not be taken to the supreme court. Sheets *v.* Rudebaugh, 2 Rawle (Pa.) 149.

93. Ebersoll *v.* Krug, 3 Binn. (Pa.) 528.

94. Frantz *v.* Kazer, 3 Serg. & R. (Pa.) 395; Zeigler *v.* Zeigler, 2 Serg. & R. (Pa.) 286; Lewis *v.* England, 4 Binn. (Pa.) 5.

When premature.—A writ of error to a judgment on an award of arbitrators, issued and delivered before the expiration of the time allowed for appeal, is improvident. Robinson *v.* Bulkly, 5 Rawle (Pa.) 227; Frantz *v.* Kaser, 3 Serg. & R. (Pa.) 395.

95. Orlady *v.* McNamara, 9 Watts (Pa.) 192.

96. Sullivan *v.* Weaver, 9 Pa. St. 223.

97. Taggart *v.* McGinn, 14 Pa. St. 155.

98. Sargeant *v.* Clark, 108 Pa. St. 588; Watson *v.* Wetter, 91 Pa. St. 385; Wynn *v.* Bellas, 34 Pa. St. 160; Gans *v.* Drew, 2 Walk. (Pa.) 418; Cuncle *v.* Dripps, 3 Penr. & W. (Pa.) 291, 23 Am. Dec. 84; Andrews *v.* Lee, 3 Penr. & W. (Pa.) 99; Dawson *v.* Condy, 7 Serg. & R. (Pa.) 366; Rheem *v.* Allison, 2 Serg. & R. (Pa.) 113; Kerr *v.* Smith, 2 Browne (Pa.) 99.

Nothing but an express agreement can waive the right of appeal from an award under a compulsory arbitration. McClain *v.* Boyer, 84 Pa. St. 417.

99. Dawson *v.* Condy, 7 Serg. & R. (Pa.) 366.

1. Greenwood *v.* Philadelphia, etc., R. Co., 3 Del. Co. (Pa.) 415.

2. Watson *v.* Willard, 9 Pa. St. 89; Huntingdon, etc., Turnpike Road Co. *v.* McAnulty, 2 Watts & S. (Pa.) 293; Gaslight Co. *v.* Scranton, 2 L. T. N. S. (Pa.) 43.

3. Gaslight Co. *v.* Scranton, 2 L. T. N. S. (Pa.) 43.

4. Morris *v.* Garrison, 27 Pa. St. 266; Weiler *v.* Leng, 13 Pa. Co. Ct. 632.

5. Anderson *v.* Levan, 1 Watts & S. (Pa.) 334; Hartman *v.* Stahl, 2 Penr. & W. (Pa.) 223; Davison *v.* Clifford, 3 Pa. Co. Ct. 452; Cresswell *v.* Baker, 1 Browne (Pa.) 225.

6. Bonner *v.* Campbell, 48 Pa. St. 286; Rush *v.* Good, 14 Serg. & R. (Pa.) 226, holding that if one defendant enter a rule for all, and after an award against all he appeals in the name of all, the appeal will be good, although no authority appear from the others, unless some one of the other defendants come in and deny the right of appealing for him, and support the denial at least by his own affidavit.

Mistake of officer.— One of two defendants requested an appeal for both from an award of arbitrators, but through a mistake of the prothonotary the appeal was not entered for both. It was held a mistake of the officer, for which the court would grant relief. Mohrman *v.* Jennings, 1 Kulp (Pa.) 244.

7. Rice *v.* Foster, 2 Watts & S. (Pa.) 58.

Parol evidence of intention.— In the case

ity of the other co-party there is a severance.[8] Where one of several defendants appeals for all he cannot thereafter withdraw his appeal as to his co-defendants.[9] So where one of two defendants appeals, no proceeding can be had against the co-defendant pending the appeal.[10]

c. Procedure in Taking of Appeal — (I) *In General.* Filing a recognizance, paying the costs, and making the proper affidavit constitutes an appeal without filing a declaration of intention to appeal.[11] The common pleas may make a rule requiring notice of the appeal to be given,[12] and where the required notice is not given the appeal may be dismissed.[13] If a record exhibits a defective appeal, it cannot be cured by parol evidence of what occurred when the appeal was granted.[14] Where both parties consent to trial and judgment is entered for plaintiff, defendant cannot afterward object that the appeal was not properly taken.[15]

(II) *Time of Taking Proceedings.* The appeal must be entered and the costs paid and the recognizance filed within twenty days after the day of the entry of the award on the docket,[16] and it is immaterial that the appellant is a

of an award against two defendants and an appeal by one, it cannot be made an appeal by both defendants, by parol evidence that it was intended to have been an appeal for both, unless the imperfection can be charged to the fraud or default of the officer who took the appeal. Sterrett *v.* Ramsay, 2 Watts (Pa.) 91.

If one makes the affidavit and the recognizance is for all, the appeal will stand for all. Jones *v.* Backus, 114 Pa. St. 120, 6 Atl. 335; La Fitte *v.* La Fitte, 2 Serg. & R. (Pa.) 107.

8. Monohan *v.* Lloyd, 2 Kulp (Pa.) 140. See also La Fitte *v.* La Fitte, 2 Serg. & R. (Pa.) 107.

A disavowal of an appeal from an award, made by one of several defendants, is in the nature of a judgment of severance, which is substantially taken when defendant disavowing comes in and desires that the appeal may be struck off. Gallagher *v.* Jackson, 1 Serg. & R. (Pa.) 492; Franklin *v.* Leib, 10 Lanc. Bar (Pa.) 73.

9. Bonner *v.* Campbell, 48 Pa. St. 286.

10. Guhr *v.* Chambers, 8 Serg. & R. (Pa.) 157; Mohrman *v.* Jennings, 1 Kulp (Pa.) 244.

11. Jones *v.* Badger, 5 Binn. (Pa.) 461.

Failure of clerk to enter facts on continuance docket.— Where appellant complies with the conditions essential to a valid appeal from an award of arbitrators, the appeal is not affected by the failure of the prothonotary to enter the facts on the continuance docket before the time for appealing expires. Flannery *v.* Susquehanna Mut. F. Ins. Co., 3 Pa. Dist. 777, 15 Pa. Co. Ct. 185, 7 Kulp 362.

A justice of the peace has no jurisdiction to entertain and allow an appeal by defendant from an award in an action originally commenced and prosecuted to an arbitration and award in the court of common pleas, nor to take a recognizance of bail on such appeal. By the act of assembly of April 14, 1834, this power is expressly conferred upon the prothonotary of the court of common pleas. Columbia Bank *v.* Blotz, Lanc. Bar (Pa.) Feb. 10, 1872.

Entry of appeal.— Where the entry of an appeal was thus, and no more, "The plaintiff appeals; John Cunningham and Daniel Link tent. in one hundred dollars, *coram* William Sample," it was insufficient, and the appeal invalid. Donaldson *v.* Cunningham, 13 Serg. & R. (Pa.) 243.

12. Barry *v.* Randolph, 3 Binn. (Pa.) 277.

13. Sherborne *v.* Eneu, 1 Browne (Pa.) 137.

14. Shortle *v.* Stockton, 7 Watts (Pa.) 526.

15. Hopkins *v.* Wells, 1 Chest. Co. Rep. (Pa.) 543.

16. Harker *v.* Addis, 4 Pa. St. 515; Clark *v.* Wallace, 3 Penr. & W. (Pa.) 441; Sims *v.* Hampton, 1 Serg. & R. (Pa.) 411; Deckman *v.* Herald Printing, etc., Co., 5 Pa. Dist. 357; Hampton *v.* Erenzeller, 2 Browne (Pa.) 18; Broomall *v.* Root, 1 Chest. Co. Rep. (Pa.) 471; Upland Borough *v.* New Chester Water Co., 4 Del. Co. (Pa.) 241; Brinzer *v.* Anderson, 2 Lanc. L. Rev. (Pa.) 233; Mortimore *v.* O'Reagan, 6 Leg. Gaz. (Pa.) 334 (holding that where a party to a suit wilfully retains the award in his own possession over twenty days, and files it only after application of the other party to court, he loses the right to appeal by reason of his own default); Arms *v.* Leaman, 6 Pa. L. J. 518, 4 Pa. L. J. Rep. 84; Smaltz *v.* Lake, 2 Phila. (Pa.) 245.

Entry of appeal nunc pro tunc.— Where a defendant, against whom an award had been made, applied to the prothonotary, on the last day allowed for an appeal therefrom, after night and shortly after the office was shut, to enter an appeal, and the prothonotary then refused to enter the appeal, it was the duty of the court at the next term to have ordered the appeal to be entered at the time of the application *nunc pro tunc.* Clark *v.* Wallace, 3 Penr. & W. (Pa.) 441. But where appellant omitted to comply with requirements in an essential feature, the appeal cannot after such time be amended *nunc pro tunc* to supply the omission. Dale *v.* Elder, 10 Pa. Cas. 458, 14 Atl. 258.

Effect of fraud.— Residuary legatees will be allowed to appeal from an arbitrator's

pauper.[17] But the delay may be waived by laches in moving to quash the appeal.[18] The day of entry of the award is to be excluded in computing the twenty days.[19]

(III) *Affidavit or Oath.* The appellant must make oath or affirmation that "it is not for the purpose of delay such appeal is entered but because he firmly believes injustice has been done." [20] The affidavit need not be in writing.[21] It may be made by an agent,[22] attorney,[23] one of two or more joint appellants,[24] a nominal party,[25] or by the party to whose use the action is brought.[26] A sequestrator may make the oath on an appeal against the company.[27] The affidavit may be made before a justice of the peace,[28] or a deputy prothonotary,[29] or even before an alderman in another county.[30] Failure of the officer to attest the jurat does not invalidate the affidavit where the record shows that the oath was taken;[31] but where such fact is not shown by the record the defect cannot be supplied by parol evidence.[32] The irregularity of appealing without an affidavit is waived by the other party taking the costs out of court.[33]

(IV) *Payment of Fees or Costs.* The appellant or his agent or attorney must pay all the costs that have accrued in the suit or action as a condition precedent to the right to appeal, and such payment must be made within the twenty days after the entry of the award.[34] This rule does not apply, however, to appeals

award, although the time of appeal has passed, when the award and judgment thereon were permitted to be obtained by the fraud of the executors. Broomall *v.* Root, 1 Chest. Co. Rep (Pa.) 471.

When time begins to run.— The contention that the twenty days allowed by law for an appeal from an award does not begin to run until the defeated party has notice of the entry of the award is untenable, there being no provision in the statute for notice. Deckman *v.* Herald Printing, etc., Co., 5 Pa. Dist. 357, 17 Pa. Co. Ct. 507.

17. Finkle *v.* Rosback, 10 Pa. Co. Ct. 186.

18. Mayes *v.* Jacoby, 8 Serg. & R. (Pa.) 526.

19. Sims *v.* Hampton, 1 Serg. & R. (Pa.) 411; Smaltz *v.* Lake, 2 Phila. (Pa.) 245. See also Frantz *v.* Kaser, 3 Serg. & R. (Pa.) 395. *Contra*, Hampton *v.* Erenzeller, 2 Browne (Pa.) 18.

20. Dale *v.* Elder, 10 Pa. Cas. 458, 14 Atl. 258.

"Firmly."— The affidavit must contain the word "firmly," or something equal to it in substance, as "verily." Thompson *v.* White, 4 Serg. & R. (Pa.) 135; Bradley *v.* Eccles, 1 Browne (Pa.) 258. An affidavit which states that affiant "believes that injustice has been done him," omitting the word "firmly," cannot be amended after the time for appeal has expired. Yerger *v.* Griffith, 1 Chest. Co. Rep. (Pa.) 260.

Rule applies to appeals by municipal corporations.— Under the act of June 16, 1836, requiring the party appealing from an award of arbitrators to file an affidavit that the appeal is not for the purpose of delay, but because injustice is firmly believed to have been done, a municipal corporation so appealing must file such affidavit, although by virtue of another section of the statute the municipality is not required to pay costs or enter into recognizance. Monaghan *v.* Philadelphia, 28 Pa. St. 207; Watson *v.* Chester, 2 Del. Co. (Pa.) 382.

21. Ross *v.* Dysart, 24 Pa. St. 395; Watson *v.* Chester, 2 Del. Co. (Pa.) 382; Lauman *v.* Farmers' Bank, 1 Woodw. (Pa.) 283; Treichler *v.* Bower, 1 Woodw. (Pa.) 219.

22. Wickizar *v.* Blair, 7 Luz. Leg. Reg. (Pa.) 153, 9 Pittsb. Leg. J. N. S. 7; Lauman *v.* Farmers' Bank, 1 Woodw. (Pa.) 283.

23. Anderson *v.* Filter, 3 Serg. & R. (Pa.) 1; Montgomery *v.* Nicholas, 9 Lanc. Bar (Pa.) 49.

24. Bensell *v.* Boyd, 2 Miles (Pa.) 296.

25. Dale *v.* Oliver, 2 Browne (Pa.) 91.

26. Conway *v.* Fire Ins. Co., Brightly (Pa.) 64, 3 Pa. L. J. 303, holding that the *cestui que use* is competent to make the affidavit.

27. Huntingdon, etc., Turnpike Road Co. *v.* McAnulty, 4 Watts & S. (Pa.) 293.

28. Gakel *v.* Gletz, 9 Lanc. Bar (Pa.) 6.

29. Davison *v.* Clifford, 3 Pa. Co. Ct. 452.

30. Duffie *v.* Black, 1 Pa. St. 388.

31. Pottsville *v.* Curry, 32 Pa. St. 443; Morahan *v.* Osthaus, 2 C. Pl. (Pa.) 224; Treichler *v.* Bower, 1 Woodw. (Pa.) 219.

Depositions may be taken, to aid ambiguous language of the record, to show that the oath was made. Lauman *v.* Farmers' Bank, 1 Woodw. (Pa.) 283.

32. Shortle *v.* Stockton, 7 Watts (Pa.) 526.

33. Beidman *v.* Vanderslice, 2 Rawle (Pa.) 334.

34. Schrenkeisen *v.* Kishbaugh, 162 Pa. St. 45, 29 Atl. 284; Rice *v.* Constein, 89 Pa. St. 477; Palmer *v.* Wilkinson, 73 Pa. St. 339; Carr *v.* McGovern, 66 Pa. St. 457; Williams *v.* Hazlep, 14 Pa. St. 157; Merrit *v.* Smith, 2 Pa. St. 161; Stewart *v.* Jewell, 11 Serg. & R. (Pa.) 359; Seely *v.* Barton, 5 Serg. & R. (Pa.) 390; Fraley *v.* Nelson, 5 Serg. & R. (Pa.) 234; Flannery *v.* Susquehanna Mut. F. Ins. Co., 3 Pa. Dist. 777, 15 Pa. Co. Ct. 185, 7 Kulp 362; Richardson *v.* Caledonian Ins. Co., 23 Pa. Co. Ct. 96; Dall *v.* Norris, 2 Pa. Co. Ct. 666; McCulla *v.* Opple, 1 Pearson (Pa.) 150; McKeown *v.* Boudinot, 1 Browne (Pa.) 150; Morris *v.* Sickler, 3 Kulp

by an executor or administrator or other person suing or sued in a representative capacity,[35] nor to appeals by a municipal or public corporation.[36] Taking the costs out of court after an appeal waives any defect or irregularity in the appeal.[37]

(v) *Proceedings In Forma Pauperis.* An appeal *in forma pauperis* may be taken by a party providing the rule to arbitrate was not taken out by him,[38] where leave is granted by the court.[39] But such an appeal will not be allowed where the party has financial means,[40] nor where appellant's co-parties are able to pay.[41] Notice of the application must be given,[42] and evidence must be produced to show poverty.[43] On the hearing the court may inquire whether the party has a cause of action or defense as the case may be.[44] The court may impose terms.[45]

(Pa.) 167; Columbia Bank *v.* Bletz, 8 Lanc. Bar (Pa.) 53, 2 Luz. Leg. Reg. 219; Crider *v.* Sheetz, Lanc. Bar (Pa.) Oct. 8, 1870; McCulla *v.* Opple, 3 Luz. Leg. Obs. (Pa.) 87; Hill *v.* Thomas, 1 Tr. & H. Pr. (Pa.) 666, 2 Tr. & H. Pr. 403; Flannery *v.* Wise, 2 Woodw. (Pa.) 431; Lutz *v.* Weidner, 1 Woodw. (Pa.) 385.

The arbitration acts of 1870 and 1873 being silent as to costs on appeal, an appeal from the award of a legal arbitrator lies without payment of costs. Walbridge *v.* Barhite, 7 Pa. Co. Ct. 353.

Exception to rule.— Where plaintiff in an original action in the common pleas, in which the amount is within the justice's jurisdiction, enters a rule to arbitrate, defendant may appeal from the award without payment of costs. Kerbaugh *v.* Curry, 2 Phila. (Pa.) 206.

What constitutes the accrued costs see Fisher *v.* Pennsylvania R. Co., 126 Pa. St. 293, 17 Atl. 607; Schneider *v.* New York, etc., Gas, etc., Co., 98 Pa. St. 470; Williams *v.* Hazlep, 14 Pa. St. 157; Walter *v.* Bechtol, 5 Rawle (Pa.) 228; Stewart *v.* Jewell, 11 Serg. & R. (Pa.) 359; Fraley *v.* Nelson, 5 Serg. & R. (Pa.) 234; Flannery *v.* Susquehanna Ins. Co., 15 Pa. Co. Ct. 185, 7 Kulp 362; Drake *v.* Parker, 1 Pa. Co. Ct. 675; Wise *v.* Pennsylvania Hard-Vein Slate Co., 3 Pa. Dist. 564; Morris *v.* Sickler, 3 Kulp (Pa.) 167; Schooley *v.* Turner, 3 Kulp (Pa.) 150; Columbia Nat. Bank *v.* Bletz, 8 Lanc. Bar (Pa.) 53, 5 Luz. L. Reg. 219; Crider *v.* Scheetz, 2 Lanc. Bar (Pa.) 19; Glessner *v.* Patterson, 6 York Leg. Rec. (Pa.) 17.

Medium of payment.— The payment must be in money and not by check or draft. Walker *v.* Graham, 74 Pa. St. 35; Lagen *v.* Cadwell, 1 Walk. (Pa.) 175; Hopkins *v.* Frothingham, 2 Lack. Leg. N. (Pa.) 133; Burns *v.* Smith, 2 Lack. Leg. N. (Pa.) 78; Richter *v.* Cummings, 1 Leg. Chron. (Pa.) 49. Payment partly in cash and partly by the filing of receipts of the witnesses of the opposite party is not sufficient. Carr *v.* McGovern, 66 Pa. St. 457; Lewis *v.* Signor, 3 Pa. Dist. 455; Myers *v.* Brown, 1 C. Pl. (Pa.) 73; Richter *v.* Cummings, 1 Leg. Chron. (Pa.) 49. However, where a check is given and paid within the twenty days the appeal will not be dismissed. Rice *v.* Constein, 89 Pa. St. 477. Nor where, although the check is not paid within the twenty days, the prothonotary accepts and treats it as a payment in cash. Wilson *v.* Getty, 10 Pittsb. Leg. J. N. S. (Pa.) 128. An appeal will be dismissed, where the prothonotary, instead of receiving the costs in cash, charges the same against the appellant's attorney, although at the time of such charge the prothonotary was owing the attorney a balance exceeding the amount of such costs. Lagen *v.* Cadwell, 1 Walk. (Pa.) 175.

Direction as to application.— Where appellant is required to pay the costs as a condition precedent, the fact that the officer was directed to keep the money in his hands, and not to pay it over to the opposite party, is not a sufficient reason to quash the appeal; the direction being a nullity. McCulla *v.* Opple, 1 Pearson (Pa.) 150.

Waiver.—An appeal will not be quashed on the ground that costs were not paid where three terms have passed and issue has been joined between the parties. Brown *v.* Jones, 7 Watts (Pa.) 433.

35. Murray *v.* Sharp, 72 Pa. St. 360; Foulk *v.* Brown, 2 Watts (Pa.) 209; Insurance Co. of Pennsylvania *v.* Hewes, 5 Binn. (Pa.) 508; Grambs *v.* Lynch, 3 L. T. N. S. (Pa.) 200.

Assignee in bankrupcy.— Morss *v.* Gritmann, 10 Phila. (Pa.) 573.

36. Pottsville *v.* Curry, 32 Pa. St. 443; Robinson *v.* Jefferson County, 6 Watts & S. (Pa.) 16 (county); Wagenhurst *v.* Delaware Tp., 4 Pa. Co. Ct. 533; Mercer *v.* Dyberry School Dist., 4 Pa. Co. Ct. 530 (school-district); City *v.* Wheaton, 1 Del. Co. (Pa.) 3.

37. Good *v.* Royal Ins. Co., 4 Lanc. Bar (Pa.) Feb. 1, 1873.

38. Cowan *v.* Chester, 2 Del. Co. (Pa.) 234.

39. Wendell *v.* Simpson, 7 Wkly. Notes Cas. (Pa.) 31.

40. Ashcraft *v.* Mathewson, 5 Pa. Co. Ct. 80.

41. Grant *v.* Barton, 2 L. T. N. S. (Pa.) 197.

42. Dorman *v.* McGovern, 2 Leg. Rec. (Pa.) 223.

43. Boyer *v.* Winters, 3 Kulp (Pa.) 29.

44. Greenwood *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 245, 3 Del. Co. 415.

45. Greenwood *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 245, 3 Del. Co. 415.

(VI) *Recognizance.* The appellant must enter into a recognizance,[46] which must be in the form prescribed by statute,[47] although the precise language of the statute need not be used.[48] However, the United States,[49] a municipality,[50] and an executor or administrator acting as such [51] are relieved from the duty of filing a recognizance or giving security for costs. So a private corporation is only required to give security for costs.[52] The appellant need not join in the recognizance with his surety,[53] although his so joining does not invalidate the recognizance.[54] The recognizance may be taken before a deputy prothonotary,[55] or before the commissioner of bail in the supreme court.[56] The time for filing bail may be extended for good cause.[57] Notice of giving the recognizance must be given by the appellant.[58] Thereafter the bail must justify where objected to,[59] and the

46. Huntingdon, etc., Turnpike Road Co. *v.* McAnulty, 4 Watts & S. (Pa.) 293, holding that a sequestrator may enter into the recognizance required on appeal from an award against a turnpike company.

Allowing an appeal in forma pauperis does not relieve the appellant from entering into a recognizance. Noyes *v.* Brooks, 174 Pa. St. 632, 34 Atl. 285, 450; Gorman *v.* Falkler, 2 Pearson (Pa.) 316. But see Greenwood *v.* Philadelphia, etc., R. Co., 5 Pa. Co. Ct. 245, 3 Del. Co. 415.

47. Ross *v.* Dysart, 24 Pa. St. 395; Shuff *v.* Morgan, 7 Pa. St. 125 (holding that a recognizance by an appellant from an award, since the statute of 1845, with the condition prescribed by the statute of 1836, is void); Ayres *v.* Fisher, 14 Serg. & R. (Pa.) 112; Bolton *v.* Robinson, 13 Serg. & R. (Pa.) 193; Witman *v.* Ely, 4 Serg. & R. (Pa.) 260; Clarke *v.* McAnulty, 3 Serg. & R. (Pa.) 364.

48. Witman *v.* Ely, 4 Serg. & R. (Pa.) 260.

49. U. S. *v.* Barber, 17 Serg. & R. (Pa.) 348.

50. Wagenhurst *v.* Delaware Tp., 4 Pa. Co. Ct. 533; Chester City *v.* Wheaton, 1 Del. Co. (Pa.) 3; Rose *v.* Lancaster, 5 Leg. Op. (Pa.) 48.

51. Murray *v.* Sharp, 72 Pa. St. 360; Foulk *v.* Brown, 2 Watts (Pa.) 209; Insurance Co. of Pennsylvania *v.* Hewes, 5 Binn. (Pa.) 508; Grambs *v.* Lynch, 3 L. T. N. S. (Pa.) 200.

Where sued on their personal promise, however, although named as executors, they cannot appeal without entering into a recognizance. Pugh *v.* Ottenkirk, 3 Watts & S. (Pa.) 170; Masterson *v.* Masterson, 5 Rawle (Pa.) 137.

52. See cases cited *infra*, this note.

Statutory provisions.— Under the statute of 1809, a corporation was not required to enter into a recognizance (Carpentier *v.* Delaware Ins. Co., 2 Binn. (Pa.) 264), but under the acts of 1816 and 1836, the rule was otherwise (Schuylkill Nav. Co. *v.* Thomas, 13 Serg. & R. (Pa.) 431). Under the statutes of 1845 and 1850, it is held that bail absolute need be given for costs only. Erhard *v.* Clearfield Creek Coal Co., 5 Pa. Dist. 611; O'Connell *v.* New York, etc., R. Co., 5 Pa. Dist. 105, 17 Pa. Co. Ct. 125; Rush *v.* Home Mut. Life Assoc., 4 Pa. Co. Ct. 523; Throop *v.* Susquenhanna Mut. F. Ins. Co., 2 Pearson (Pa.) 306; Good *v.* Royal Ins. Co., 4 Lanc. Bar (Pa.) Feb. 1, 1873; Erie, etc., R. Co. *v.* Atlantic, etc., R. Co., 3 Pittsb. (Pa.) 232; Rush *v.* Life Assoc., 1 Wilcox (Pa.) 13. But see Catasauqua Mfg. Co. *v.* Leigh Car Mfg. Co., 14 Phila. (Pa.) 644. *Contra*, Pinks *v.* Rimersburg Gas Co., 18 Pa. Co. Ct. 339.

53. Boyce *v.* Wilkins, 5 Serg. & R. (Pa.) 329; Montgomery *v.* Nicholas, 9 Lanc. Bar (Pa.) 49; Wilbur *v.* Bemy, 2 Leg. Rec. (Pa.) 225; Arms *v.* Leaman, 6 Pa. L. J. 518, 4 Pa. L. J. Rep. 84.

54. Jones *v.* Badger, 5 Binn. (Pa.) 461.

55. Davison *v.* Clifford, 3 Pa. Co. Ct. 452.

56. Jones *v.* Badger, 5 Binn. (Pa.) 461.

57. Stone *v.* Eisman, 1 L. T. N. S. (Pa.) 123.

58. Dilworth *v.* Jones, 1 Browne (Pa.) 318.

59. Means *v.* Trout, 16 Serg. & R. (Pa.) 349 (holding that if the recognizance given on appeal from the award of arbitrators be defective, the appellant should be called upon to perfect bail within a given period, or, in default thereof, to have his appeal dismissed); Jones *v.* Badger, 5 Binn. (Pa.) 461 (holding that the rule of court requiring bail to justify in open court, either by affidavit made before a commissioner, or one of the judges, does not apply to bail on appeal from an award of arbitrators).

Practice.— The bail on an appeal from the award of arbitrators, under the Compulsory Arbitration Act, is not subject to the practice in reference to special bail. When the appellee is dissatisfied with the bail, his course is to apply to the court for a rule for additional bail, and the opinion of the court that the bail is sufficient is conclusive. He cannot treat it as a nullity, and issue execution. Snyder *v.* Zimmerman, 1 Penr. & W. (Pa.) 293. Where bail on an appeal was entered within sixteen days, and no exception was taken until seven days afterward, and, as soon as the appellant knew of the exception, he offered unexceptional additional bail, which the opposite party refused to receive, but issued an execution, it was held that the execution was erroneous. Davis *v.* Black, 12 Serg. & R. (Pa.) 327.

Where an attorney improperly becomes bail for an appeal from an award of arbitrators, the appeal is not void; and appellant ought to have a reasonable time, after

justification must be in the presence of the opposing party.[60] If the recognizance is defective, the proper remedy is to rule the appellant to perfect his bail or have his appeal dismissed,[61] and quashing the appeal without first taking such a rule is improper.[62] Objections to the recognizance may be waived by failure to promptly object thereto,[63] or by the acts of the appellee such as filing a declaration.[64]

d. Supersedeas. The appeal acts as a supersedeas.[65]

e. Procedure on Appeal — (i) *In General.* The trial is *de novo*,[66] and hence the party is not bound by his concessions before the arbitrators.[67] Where a party has not filed the requisite pleadings on appeal, summary judgment may be entered against him in accordance with a rule of court.[68] Plaintiff may amend his pleadings where no new cause of action is introduced,[69] and defendant may amend his plea where no material change in the defense is made.[70] An award of no cause of action makes an affidavit of defense unnecessary.[71] And where defendant appeals and makes affidavit that the appeal is not taken for delay, judgment cannot be entered for want of an affidavit of defense.[72] The award is not admissible as evidence,[73] nor is evidence impeaching the character or conduct of the arbitrators.[74] So, by statute, documentary evidence withheld from the arbitrators is not admissible.[75] Plaintiff cannot submit to a voluntary nonsuit, in the absence of special circumstances,[76] and on the allowance of a nonsuit the

objection made, to enter proper bail. Short *v.* Rudolph, 1 Pittsb. (Pa.) 50.

60. Havelin *v.* McFall, 1 Browne (Pa.) 230.

61. Davison *v.* Clifford, 3 Pa. Co. Ct. 452.

62. Davison *v.* Clifford, 3 Pa. Co. Ct. 452.

63. Clarke *v.* McAnulty, 3 Serg. & R. (Pa.) 364; Zeigler v. Fowler, 3 Serg. & R. (Pa.) 238; Weidner *v.* Matthews, 2 Am. L. J. (Pa.) 94.

The bail may be dispensed with altogether, and suffering a term to pass without objection on the part of the appellee dispenses with it. Snyder *v.* Zimmerman, 1 Penr. & W. (Pa.) 293.

Motion to compel amendment.—A defect in a recognizance is waived by the appellee's omission to rule the appellant to amend it. Walter *v.* Bechtol, 5 Rawle (Pa.) 228.

64. Cameron *v.* Montgomery, 13 Serg. & R. (Pa.) 128; Zeigler *v.* Fowler, 3 Serg. & R. (Pa.) 238.

65. Sterrett *v.* Ramsay, 2 Watts (Pa.) 91 (holding that in the case of an appeal by one of two defendants against whom an award was made, a fieri facias shall not issue against defendant who did not appeal, until the determination of the appeal by the other defendant); Monaghan *v.* Ferry Co., 9 Wkly. Notes Cas. (Pa.) 368. See also Wray *v.* Tammany, 13 Pa. St. 394, holding that an attachment execution under the statute of June 16, 1836, is in substance, if not in form, an execution, and cannot issue on an award of arbitrators, before the expiration of the twenty days allowed for appealing. See Church *v.* Finn, 1 Lack. Leg. N. (Pa.) 113.

66. Allum *v.* Carroll, 67 Pa. St. 68.

Statements as to result of arbitration.— A new trial was granted because the counsel, on trial of an appeal, stated to the jury that the arbitrators had decided in favor of his client. Hyslop *v.* Crozier, 1 Miles (Pa.) 267.

67. Pedan *v.* Hopkins, 13 Serg. & R. (Pa.) 45.

68. Green *v.* Hallowell, 9 Pa. St. 53; Sharff *v.* Stump, 2 Woodw. (Pa.) 441.

Failure to file affidavit of defense.— Defendant having appealed from an award by default, plaintiff entered rule on defendant to file his affidavit of defense, and afterward entered judgment for want of such affidavit. It was held that such judgment should be stricken off; plaintiffs not having filed a copy of their claim pursuant to rule 1, section 6. Lock Co. *v.* Dolphin, 5 L. T. N. S. (Pa.) 76.

69. Getty *v.* Shearer, 20 Pa. St. 12; Reeside *v.* Hadden, 12 Pa. St. 243; Mechanics', etc., Ins. Co. *v.* Spang, 5 Pa. St. 113; Robinson *v.* Taylor, 4 Pa. St. 242; Winder *v.* Northampton Bank, 2 Pa. St. 446; Reitzel *v.* Franklin, 5 Watts & S. (Pa.) 33; Tryon *v.* Miller, 1 Whart. (Pa.) 11; Fairchild *v.* Dennison, 4 Watts (Pa.) 258.

70. Union Type Foundry *v.* Kittanning Ins. Co., 138 Pa. St. 137, 20 Atl. 841; Keeler *v.* Vantuyle, 6 Pa. St. 250.

71. Gregg *v.* Meeker, 4 Binn. (Pa.) 428.

72. Lusk *v.* Garrett, 6 Watts & S. (Pa.) 89.

73. Humphreys *v.* Kelly, 4 Rawle (Pa.) 305; Stryker *v.* Ross, 7 Pa. Cas. 452, 11 Atl. 510. *Compare* Bell *v.* Hamilton, 1 Browne (Pa.) 254.

74. Bell *v.* Hamilton, 1 Browne (Pa.) 254.

75. Pearce *v.* Theological Seminary, 2 Watts (Pa.) 340; Barclay *v.* Hughes, 1 Miles (Pa.) 19.

Voluntary act.— The appellant from an award cannot produce on the trial any books or papers which he withheld from the arbitrators; but, to come within the provision, he must have had the evidence in his actual possession at the time of the arbitration, and he must have voluntarily withheld it. Brisbane *v.* Mitchell, 8 Serg. & R. (Pa.) 423; Estanson *v.* Dupuy, 2 Browne (Pa.) 100.

76. Girard Bank *v.* Schuylkill Bank, 8 Watts & S. (Pa.) 242.

award falls.[77] Where defendant appeals, plaintiff may recover on a cause of action not mentioned before the arbitrators when the evidence is admissible under the original pleadings.[78]

(II) *Dismissal, Withdrawal, or Abandonment.* The appeal may be dismissed where taken in violation of an agreement that the award shall be final and without appeal,[79] or where the surety justifies in the absence of the opposing party and without giving any notice.[80] And where an appeal is dismissed for failure of the bail to justify the appeal will not be reinstated after the lapse of several years where the appellants have not exercised due diligence.[81] Where the sole surety is an improper person, the remedy is not to move to dismiss the appeal, but to require appellant to perfect his bail within a specified time.[82] When an appeal is withdrawn the award becomes an absolute judgment.[83]

IX. Compensation of Referee.

A. Right to Compensation.[84] A referee is entitled to compensation for his services,[85] which is usually fixed by statute, agreement, or order of court. Failure to file a report within the time fixed by statute may preclude the right of the referee to recover any fees,[86] although in some jurisdictions it is sufficient if the report is filed before notice by either party of an election to terminate the reference.[87]

B. Amount — 1. As Fixed by Statute. The amount which a referee may charge for his services is usually fixed by statute.[88] Under statutes fixing compensation at a certain sum for each day spent in the business of the reference, it has been held that the *per diem* rate can be charged only for days "necessarily"

77. Dubois *v.* Bigler, 95 Pa. St. 203.

78. McConnell *v.* Micheltree, 4 Pa. St. 197.

79. Wynn *v.* Bellas, 34 Pa. St. 160.

80. Havelin *v.* McFall, 1 Browne (Pa.) 230.

81. Rau *v.* Ott, 1 Lehigh Val. L. Rep. (Pa.) 191.

82. Kerr *v.* Martin, 122 Pa. St. 436, 15 Atl. 860.

83. Swan *v.* Scott, 11 Serg. & R. (Pa.) 155.

84. Fees in references before clerk see Clerks of Courts, 7 Cyc. 209 note 76.

Fees of referee appointed to sell real estate see Judicial Sales, 24 Cyc. 14, 76 note 72.

Fees of stenographer see Courts, 11 Cyc. 721.

Fees taxable as costs see Costs, 11 Cyc. 104.

85. See Fitzsimmons' Appeal, 4 Pa. St. 248, holding that auditors are entitled to fees for distributing a fund paid into court, although such fee is not expressly authorized by statute.

Defenses.— The right of a referee to compensation is not affected by the fact that the court on appeal disagrees with the conclusions reached by him. Russell *v.* Lyth, 66 N. Y. App. Div. 290, 72 N. Y. Suppl. 615.

Death of referee before report.—A statutory provision that the fees of the referee shall be taxed upon the coming in of the report does not prevent the allowance of the fees of a referee who died pending the hearing and made no report, but such fees are taxable upon the coming in of his successor's report. Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

86. Bottome *v.* Neeley, 124 N. Y. App. Div. 600, 109 N. Y. Suppl. 120 [*affirming* 54 Misc. 258, 104 N. Y. Suppl. 429, and *affirmed* in 194 N. Y. 575, 88 N. E. 1115]; Honet *v.* Godfried, 3 Kulp (Pa.) 10.

A stipulation between the parties at the commencement of a reference that each shall pay half of the referee's fees will not entitle the referee to any fees, unless he complies with the requirement as to filing or delivering the report. Bishop *v.* Bishop, 24 N. Y. Suppl. 888, 30 Abb. N. Cas. 296.

87. Nealis *v.* Meyer, 21 Misc. (N. Y.) 344, 47 N. Y. Suppl. 156.

88. *In re* Gilman, 12 N. Y. Civ. Proc. 179; Kepler *v.* Merkle. 9 N. Y. Civ. Proc. 284; Chichester *v.* Mt. Pleasant State Prison, 1 Hill (N. Y.) 665; Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82; *In re* Fielemeyer, 4 Pa. Co. Ct. 205; Com. *v.* Weaver, 9 Lanc. Bar (Pa.) 161; Evans *v.* School Board, 9 Lanc. Bar (Pa.) 102; Moffett's Estate, 11 Phila. (Pa.) 79; *In re* Heiney, 4 Phila. (Pa.) 178; Thompson *v.* Thompson, 6 S. C. 279. And see the statutes of the several states.

Fee for taking testimony.—A referee's fee of twenty cents per folio for taking testimony, as allowed by the code, section 514, is not increased by the employment of a stenographer and typewriter to act as amanuensis to the referee. Park *v.* Mighell, 3 Wash. 737, 29 Pac. 556.

Charge for services of third person.—A referee, it has been held, is not entitled to charge for services of a third person before whom the parties by stipulation agree to proceed with the reference in the referee's absence. Shultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. 471.

so spent,[89] including the time properly occupied in preparing the report,[90] but not for meetings before organization,[91] nor for days when they adjourned of their own motion without sufficient cause.[92] However, a day when the referee attended but an adjournment was taken on application of a party is to be included,[93] but not days when he did not attend because previously notified that the parties had consented to a postponement.[94] The fact that the hearing was protracted and held at unusual hours does not entitle the referee to more than the statutory *per diem* rate,[95] while on the other hand the referee is entitled to charge for each day engaged in the work without reference to the number of hours.[96] No charge is allowable for examining testimony and exhibits in addition to compensation for general study of the case.[97] Where two cases, involving the same question, between the same parties, are tried together, only one fee can be charged;[98] but where the parties are different a separate charge can be made in each case,[99] except where the order of reference otherwise provides.[1]

2. As Fixed by Agreement. The statutory rate of compensation may generally be changed by agreement of the parties fixing a different rate of compensation.[2] Under some statutes authorizing such agreements, they must be in writing or entered in the referee's minutes pursuant to an oral agreement made at the commencement of the trial,[3] and must definitely fix the compensa-

89. Brush *v.* Kelsey, 47 N. Y. App. Div. 270, 62 N. Y. Suppl. 214; Fay *v.* Muhlker, 13 Daly (N. Y.) 314; Matter of Piatti, 26 Misc. 434, 56 N. Y. Suppl. 132; Finkel *v.* Kohn, 24 Misc. 367, 53 N. Y. Suppl. 694; Goldzier *v.* Rosebault, 84 N. Y. Suppl. 240.

In Pennsylvania, the act of March 22, 1877, allowing compensation to arbitrators "for each day necessarily employed in the duties of their appointment," covers any meeting which, although foreign to their actual organization as a board, they were compelled to attend in the performance of their duties as arbitrators. Corcoran *v.* Hetzel, 9 Pa. Co. Ct. 82.

90. Jones *v.* Newton, 58 Hun (N. Y.) 604, 11 N. Y. Suppl. 510 (holding, however, that a charge for fifteen days for examination of evidence and preparation of report upon evidence offered at only two hearings is excessive); Finkel *v.* Kohn, 24 Misc. (N. Y.) 367, 53 N. Y. Suppl. 694; Nealis *v.* Meyer, 21 Misc. (N. Y.) 244, 47 N. Y. Suppl. 156; Hassinger *v.* Diver, 2 Miles (Pa.) 411.

Ten days is a reasonable time for a referee to master an action for specific performance, where the testimony consists of but one hundred and fifty typewritten pages. Finkel *v.* Kohn, 24 Misc. (N. Y.) 367, 53 N. Y. Suppl. 694.

91. Baker *v.* Hunter, 1 Miles (Pa.) 357.

92. Baker *v.* Hunter, 1 Miles (Pa.) 357.

93. Brush *v.* Kelsey, 47 N. Y. App. Div. 270, 62 N. Y. Suppl. 214; Kecler *v.* Bell, 48 Misc. (N. Y.) 427, 95 N. Y. Suppl. 841; Blank *v.* Spies, 31 Misc. (N. Y.) 19, 62 N. Y. Suppl. 1039; Landis' Estate, 11 Lanc. Bar (Pa.) 133. But see *In re* Clark, 36 Hun (N. Y.) 301; Finkel *v.* Kohn, 24 Misc. (N. Y.) 367, 53 N. Y. Suppl. 694; Von Prochazka *v.* Von Prochazka, 2 N. Y. City Ct. 400. *Contra,* Funk's Estate, 1 Pa. Co. Ct. 430; Deacy *v.* Scranton, 3 C. Pl. (Pa.) 81.

94. Mead *v.* Tuckerman, 105 N. Y. 557, 12 N. E. 64.

95. Matter of Bieber, 36 Misc. (N. Y.) 341, 73 N. Y. Suppl. 552.

96. Goldzier *v.* Rosebault, 84 N. Y. Suppl. 240.

97. Finkel *v.* Kohn, 24 Misc. (N. Y.) 367, 53 N. Y. Suppl. 694; Jones *v.* Newton, 11 N. Y. Suppl. 510.

98. Girard *v.* Hutchinson, 4 Serg. & R. (Pa.) 81; Butcher *v.* Scott, 2 Pa. L. J. 287, 1 Pa. L. J. Rep. 311; Moore *v.* Hollenbach, 2 Woodw. (Pa.) 60. But see Holmes, etc., Mfg. Co. *v.* Morse, 19 N. Y. Suppl. 190, 28 Abb. N. Cas. 133.

99. Evans *v.* Hart, 10 Lanc. Bar (Pa.) 77; Com. *v.* Weaver, 2 Lanc. Bar (Pa.) Nov. 12, 1870. But see Brown *v.* Sears, 23 Misc. (N. Y.) 559, 52 N. Y. Suppl. 792.

1. Moore *v.* Hollenbach, 2 Woodw. (Pa.) 60, where reference was to be tried as "one case only."

2. Brown *v.* Windmuller, 36 N. Y. Super. Ct. 75; Wolff *v.* Horn, 9 Misc. (N. Y.) 100, 29 N. Y. Suppl. 75 (holding that a stipulation by parties to pay referee larger fees than the law fixes will not be disregarded by the court in the absence of fraud, collusion, or deceit); Malone *v.* Roby, 62 Wis. 459, 22 N. W. 575.

Construction of agreement.—A matter in controversy was submitted to a referee, by a written stipulation which declared that the fees of the referee should be twenty dollars per day "for every hearing." It was held that, under such stipulation, the referee could not collect fees for days appointed for a hearing, but on which no hearing was had, and when, in advance of the days appointed, the parties agreed upon a postponement, and so notified the referee. Mead *v.* Tuckerman, 105 N. Y. 557, 12 N. E. 64.

3. Griggs *v.* Day, 135 N. Y. 469, 32 N. E. 238; Townsend *v.* Peyser, 14 Abb. Pr. N. S. (N. Y.) 324, 45 How. Pr. 211; Philbin *v.* Patrick, 22 How. Pr. (N. Y.) 1. *Contra,* Cooperstown First Nat. Bank *v.* Tamajo, 77

tion.[4] A judge acting as a referee is not entitled to any fees irrespective of any stipulation between the parties in regard thereto.[5]

3. As Fixed by Court. In some states by statute, the fees of the referee are to be fixed by the court in the exercise of its discretion.[6] In other jurisdictions statutes authorize the court to allow referees, besides the regular fees, such additional compensation as is deemed proper.[7] Where the amount is fixed by the court, the sum allowed must be fair and reasonable.[8] Even where the parties give authority to referees to fix their own compensation, it may be inquired into by

N. Y. 476; Chase *v.* James, 16 Hun (N. Y.) 14.

An oral agreement that the word "hearing" should be deemed to include "appointments of hearings" cannot be admitted to vary such stipulation, in the face of section 3296 of the code, which requires any change in the compensation of a referee, as fixed by law, to be manifested in writing. Mead *v.* Tuckerman, 105 N. Y. 557, 12 N. E. 64.

4. New York Mut. Sav., etc., Assoc. *v.* Westchester F. Ins. Co., 98 N. Y. App. Div. 285, 90 N. Y. Suppl. 719; Griggs *v.* Day, 61 N. Y. Super. Ct. 25, 18 N. Y. Suppl. 796, 22 N. Y. Civ. Proc. 146 [*affirmed* in 135 N. Y. 469, 32 N. E. 238]; Matter of Hurd, 6 Misc. (N. Y.) 171, 26 N. Y. Suppl. 893, 31 Abb. N. Cas. 109, Pow. Surr. 547; Griggs *v.* Guinn, 21 N. Y. Suppl. 451, 23 N. Y. Civ. Proc. 46, 29 Abb. N. Cas. 144. See also Dickinson *v.* Earle, 63 N. Y. App. Div. 140, 71 N. Y. Suppl. 231. *Contra*, Burt *v.* Oneida Community, 59 Hun (N. Y.) 234, 12 N. Y. Suppl. 806, 20 N. Y. Civ. Proc. 167.

A stipulation that the referee may charge such fees "as he deems proper" does not fix a definite rate. Griggs *v.* Day, 61 N. Y. Super. Ct. 25, 18 N. Y. Suppl. 796, 22 N. Y. Civ. Proc. 146 [*affirmed* in 135 N. Y. 469, 32 N. E. 238]. So a stipulation that the referee may charge and be paid "a reasonable compensation for the services performed" is invalid because not fixing the rate of compensation to be paid. New York Mut. Sav., etc., Assoc. *v.* Westchester F. Ins. Co., 98 N. Y. App. Div. 285, 90 N. Y. Suppl. 710.

5. Hills *v.* Passage, 21 Wis. 294.

6. Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

7. Wiest *v.* Koons, 2 Pa. Co. Ct. 317; Krause *v.* Stiles, 9 Phila. (Pa.) 127.

8. *California.*—Treadwell *v.* Treadwell, 134 Cal. 158, 66 Pac. 197.

Kansas.— Jordan *v.* Western Union Tel. Co., 69 Kan. 140, 76 Pac. 396, allowance of two thousand five hundred and fifty dollars to a referee for services for thirty days reduced to one thousand dollars.

Louisiana.— Powell *v.* Sinnott, 7 La. 450.

Mississippi.— Barton *v.* Parker, 57 Miss. 144.

Missouri.— O'Reilly *v.* Cleary, 8 Mo. App. 186, holding that unless the allowance to a referee is clearly excessive, an appellate court will not interfere to reduce it.

North Carolina.— Cobb *v.* Rhea, 137 N. C. 295, 49 S. E. 161.

Pennsylvania.— Bracken's Estate, 138 Pa. St. 104, 22 Atl. 20; Vandermark's Estate, 4 Pa. Dist. 628, 16 Pa. Co. Ct. 542, 8 Kulp 63; Sailor's Estate, 2 Pa. Dist. 489; Bordman's Estate, 1 Phila. 384, holding that an excessive charge by auditors will be corrected when the matter is called to the court's attention.

Wisconsin.— Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

United States.— St. Louis Electric Light, etc., Co. *v.* Edison Gen. Electric Co., 64 Fed. 997, two thousand dollars for seven weeks' services reduced to one thousand two hundred dollars.

See 42 Cent. Dig. tit. "Reference," § 112.

Discretion of court.— Under N. C. Code, § 583, an allowance made to referees for their services is within the discretion of the trial court. Worthy *v.* Brower, 93 N. C. 492. Where parties agreed that the determination of a cause should be left to auditors, whose report should be final, and not liable to exception, the compensation of the auditors was in the sound discretion of the court, and to such a case the Pennsylvania act of March, 1819, providing for the compensation of auditors did not apply. Porter's Appeal, 30 Pa. St. 496. The amount of the auditor's fee is not in the first instance to be determined by either the auditor or the court. Under the rule of practice it is to be designated by the party liable to pay same before any amount shall be named by the auditor. If the amount named be not satisfactory, the auditor should report to the court, who will then determine the compensation. Moffett's Estate, 11 Phila. (Pa.) 109.

Compensation for correction of report.— A referee may receive additional compensation for the correction of his report in the discretion of the court. Nicholson *v.* Luzerne County, 7 Kulp (Pa.) 109.

Effect of setting aside judgment.— Where the entry of a final judgment with award of execution concludes with an allowance to a referee, the setting aside of that judgment and entry of one for a different amount, with no reference to the referee's allowance, does not affect the latter, the allowance not being inseparable from the judgment. Conroy *v.* Frost, 38 Mo. App. 351.

Items of expense.—Where a hearing before a referee required the use of a large number of exhibits, some of which were very valuable, the employment of a bailiff to care for the exhibits was proper. Where convenience requires a referee may hold sittings at a place where the evidence is located so as to authorize charging of his traveling and hotel expenses for such purpose as costs. Winnebago County *v.* Dodge County, 125 Wis. 42, 103 N. W. 255.

the court where the charges are claimed to be excessive.[9] Objections to charges made by a referee on the ground of excessiveness must be made promptly.[10]

C. Persons Liable. The question as to who is liable for the fee of the referee is largely governed by local practice,[11] or by agreement between the parties.[12] Generally each of the parties to the action are liable for the fees of the referee,[13] including the party who protested against the reference.[14] But the rule is not so inflexible that it cannot be varied by express contract or by stipulation.[15] Where the fees are to be taxed by the court or judge they may be divided equally between the parties,[16] or otherwise in the discretion of the court.[17] In some jurisdictions the fees are to be paid by the county, at least under certain circumstances.[18]

D. Collection — 1. In General. The court has no power to order a party to pay the referee's fees and take up the report.[19] An action at law lies to recover

9. Kelly *v.* Lynchburg, etc., R. Co., 110 N. C. 431, 15 S. E. 200, 16 L. R. A. 514.

10. Marsh's Estate, 5 Pa. Co. Ct. 159, holding that an exception to an auditor's fees, which would have been sustained if filed to his first report, may be disallowed when filed to a supplemental report, as it should have properly been filed to the first report.

11. Sloan's Estate, 9 Pa. Dist. 498, 24 Pa. Co. Ct. 288 (holding that where a respondent submits his testimony before an examiner appointed at the instance of petitioner he is liable, in the first instance, to such examiner for the latter's fees and costs); Sock *v.* Smith, 4 Hayw. (Tenn.) 35 (holding that an examination of accounts not within the order of reference nor the pleadings shall be paid for by the party producing them).

Liability as between receivers.—A receiver, who has been removed, applied for an allowance of certain claims, which application was referred to a referee. It was held that the applicant was bound to pay the referee's fees, and that the latter could not collect them from the new receiver. Atty.-Gen. *v.* Continental L. Ins. Co., 27 Hun (N. Y.) 524.

In Louisiana auditors are to be paid by the party cast at the determination of the suit. Lobdell *v.* Bushnell, 27 La. Ann. 394; *In re* New Orleans, 19 La. Ann. 382.

12. New York *v.* DuBois, 86 Fed. 889, holding that where referees were appointed and entered upon their duties, under a stipulation between the parties which provided that their fees should be a stipulated sum for each session between certain hours, to be paid by the successful and taxed against the losing party, the successful party cannot recover from the losing party for fees paid the referees, in the absence of proof as to the number or length of sessions held, or that any fees were taxed against defendant.

A stipulation, at the beginning of a reference, by the parties, to pay each one half of the referee's fees, will be enforced. Brick *v.* Fowler, 61 How. Pr. (N. Y.) 153.

13. Bottome *v.* Neeley, 124 N. Y. App. Div. 600, 109 N. Y. Suppl. 120 [*affirming* 54 Misc. 258, 104 N. Y. Suppl. 429, and *affirmed* in 194 N. Y. 575, 88 N. E. 1115]; Russell *v.* Lyth, 66 N. Y. App. Div. 290, 72 N. Y. Suppl. 615; Keeler *v.* Bell, 48 Misc. (N. Y.) 427, 95 N. Y. Suppl. 841; Malone *v.* Roby, 62 Wis. 459, 22 N. W. 575. See also Standfast *v.* Crotty, 13 N. Y. Suppl. 584. But see Butman *v.* Abbott, 2 Me. 361, holding that an action by an arbitrator to recover compensation for his services cannot be maintained against the parties to the submission jointly, but must be brought against the person who is demandant before the arbitrators.

Agreement between parties.— The original liability of parties to a referee for his fees is not affected by the manner in which the expense of the reference is or may be finally adjusted as between themselves. Thompson *v.* Rich, 28 Misc. (N. Y.) 265, 59 N. Y. Suppl. 819.

14. Bottome *v.* Neeley, 124 N. Y. App. Div. 600, 109 N. Y. Suppl. 120 [*affirming* 54 Misc. 258, 104 N. Y. Suppl. 429, and *affirmed* in 194 N. Y. 575, 88 N. E. 1115]; Russell *v.* Lyth, 66 N. Y. App. Div. 290, 72 N. Y. Suppl. 615.

15. Bottome *v.* Neeley, 124 N. Y. App. Div. 600, 109 N. Y. Suppl. 120 [*affirming* 54 Misc. 258, 104 N. Y. Suppl. 429, and *affirmed* in 194 N. Y. 575, 88 N. E. 1115].

16. Moore *v.* Dickenson, 117 Ga. 887, 45 S. E. 241.

In claim and delivery to recover a crop, where plaintiff recovered only part of it, he was chargeable with only one half the fees of a referee appointed by consent to fix the value of the crop. Field *v.* Wheeler, 120 N. C. 264, 26 S. E. 812.

17. Cobb *v.* Rhea, 137 N. C. 295, 49 S. E. 161, order is final, subject to review by appeal and cannot be changed by a coördinate judge.

Practice in federal courts.— Where the state practice in respect to the compensation of an auditor is such that it cannot be followed by a federal court, as where a statute provides for his payment by the county, the court may direct the expense of the auditor trial to be borne by either or both the parties, in its discretion, as in case of masters in chancery, having regard to all the circumstances of the particular case. Fenno *v.* Primrose, 119 Fed. 801, 56 C. C. A. 313.

18. Dodge *v.* Stickney, 61 N. H. 607.

19. Geib *v.* Topping, 83 N. Y. 46; Fischer *v.* Raab, 81 N. Y. 235; Robinson *v.* Cummins, (Okla. 1894) 37 Pac. 1064.

If a referee is entitled to his fees before filing his report, the party interested in it cannot compel the adverse party to advance the money by making affidavit of his own inability to pay the fees. King *v.* Whiton, 15 Wis. 690.

the compensation fixed by statute,[20] and the referee need not prove an express promise to pay.[21] Ordinarily the delivery or filing of the report is a condition precedent to the right to recover.[22] An order may provide for the payment of the fees from a fund.[23] Where a referee is ordered to state an account, an order for his fees will not be made until report has been made.[24] In some jurisdictions the allowance for fees may be enforced by attachment or execution.[25] Where the compensation is to be fixed by the court it has been held that the allowance must be taxed as costs where the court is not provided by law with any official funds of its own for such expenses.[26]

2. Proof of Rendition of Services. The time necessarily spent by the referee must be shown by affidavit before his fees can be taxed as disbursements,[27] or allowed by the court.[28] And where the amount is not fixed by statute but is to be fixed by the court, it has been held that the report should contain all the facts necessary to enable the court to reach a proper conclusion as to the amount of the fees.[29]

20. Russell *v.* Lyth, 66 N. Y. App. Div. 290, 72 N. Y. Suppl. 615; Goldzier *v.* Rosebault, 84 N. Y. Suppl. 240. See Butman *v.* Abbott, 2 Me. 361, holding that an action by a referee to recover compensation for his services cannot be maintained against the parties to the submission jointly, but must be brought against the person or persons making the demand.

Admissibility of evidence.— Evidence is not admissible as to the nature of the services and their value. Riddle *v.* Cram, 62 How. Pr. (N. Y.) 493. The referee's sworn assertion as to the time necessarily spent by him is not conclusive, and hence evidence as to what questions were involved was admissible, as bearing on the length of time necessary to be spent in determining them. Goldzier *v.* Rosebault, 84 N. Y. Suppl. 240.

Referees need not join in an action to recover compensation for their services. Butman *v.* Abbott, 2 Me. 361.

21. Keeler *v.* Bell, 48 Misc. (N. Y.) 427, 95 N. Y. Suppl. 841; Nealis *v.* Meyer, 21 Misc. (N. Y.) 344, 47 N. Y. Suppl. 156; Hinman *v.* Hapgood, 1 Den. (N. Y.) 188, 43 Am. Dec. 663.

22. Keeler *v.* Bell, 48 Misc. (N. Y.) 427, 95 N. Y. Suppl. 841.

But where the parties themselves terminate the action by a stipulation, and enter a judgment without the knowledge or consent of the referee, and plaintiff is the prevailing party, the cause of action for fees may be enforced against plaintiff where defendant is insolvent, without the filing or delivery of the report. Clark *v.* Mayor, 4 N. Y. 338, 53 Am. Dec. 379; Keeler *v.* Bell, 48 Misc. (N. Y.) 427, 95 N. Y. Suppl. 841.

23. Douglas *v.* Smith, 65 Hun (N. Y.) 11, 19 N. Y. Suppl. 630, holding that an interlocutory judgment, ordering a reference, and directing that the fees of the referee be paid out of the funds in the hands of one of the parties, "unless otherwise directed by the court or said referee," does not directly require payment of the referee's fees out of such funds, but merely provides that the judgment to be entered on the referee's report should so require.

Funds of estate.— Where a referee is appointed to hear objections to the account of one acting in a fiduciary capacity, the court may order his fees to be paid from the funds of the estate. Matter of Hurd, 6 Misc. (N. Y.) 171, 26 N. Y. Suppl. 893, 31 Abb. N. Cas. 109 [*distinguishing* Geib *v.* Topping, 83 N. Y. 46].

Funds in hands of receiver.—A motion by one not a party to the action to compel a receiver to pay out of funds in his hands the fees of a referee will be refused as premature where the order of reference expressly provides that the question of its expense shall be left until the coming in and confirmation of the report. Sounier *v.* Barnum, 31 Misc. (N. Y.) 357, 65 N. Y. Suppl. 414.

The fees of a referee appointed to take the accounts of a receiver may be ordered paid out of the fund, but it is a matter of discretion whether the power shall be exercised. Clapp *v.* Clapp, 38 Hun (N. Y.) 540.

24. Clapp *v.* Clapp, 38 Hun (N. Y.) 540.

Need not be paid from day to day.— Gallagher *v.* Moncton, 37 Can. L. J. N. S. 670, 2 N. Brunsw. Eq. 269.

25. Jones *v.* Morehead, 3 B. Mon. (Ky.) 377.

26. Schawacker *v.* McLaughlin, 139 Mo. 333, 40 S. W. 935.

27. Matter of Piatti, 26 Misc. (N. Y.) 434, 56 N. Y. Suppl. 132.

Affidavit of referee.— Where objection is made to the charge of a referee, the proper proof of the time actually spent by him is his affidavit thereto. Shultz *v.* Whitney, 9 Abb. Pr. (N. Y.) 71, 17 How. Pr. 471.

28. Gilbert *v.* Deshon, 16 N. Y. Suppl. 36, holding that it is error to allow the amount claimed as compensation by a referee when he does not state the number of days he was engaged, and offers no evidence to warrant fixing his compensation at the amount claimed.

Counter affidavits.— Where the amount claimed as compensation by a referee is not justified by the time occupied in the reference and defendant's attorneys file affidavits to that effect, the court should require the referee to submit a statement showing the basis of his claim. Gilbert *v.* Deshon, 16 N. Y. Suppl. 36.

29. Fielemeyer's Estate, 4 Pa. Co. Ct. 205.

3. Refunding. A referee who has collected as fees more than the court allows him on the taxation of costs may be required, by an order made in the action, to refund the excess.[30]

Referendum. A method of submitting an important legislative measure to a direct vote of the whole people.[1] (Referendum: Submitting to Public Vote — Of Adoption of Local Option Law Relating to Sale of Intoxicating Liquors, see Intoxicating Liquors, 23 Cyc. 95; Of Adoption of Stock Law, see Animals, 2 Cyc. 439; Fences, 19 Cyc. 488; Of Construction, Improvement, or Repair of County Buildings, see Counties, 11 Cyc. 461; Of Creation, Alteration, or Abolition of County or Municipal Corporation, see Counties, 11 Cyc. 351; Municipal Corporations, 28 Cyc. 209; Schools and School-Districts; Of Levy of Tax, see Municipal Corporations, 28 Cyc. 1662; Of Location or Removal of County-Seat, see Counties, 11 Cyc. 367, 374; Of Making or Aiding Public Improvements, Incurring Indebtedness, or Issue of Bonds by County, City, or Other Municipal Corporation, see Counties, 11 Cyc. 522; Municipal Corporations, 28 Cyc. 957, 1558; Schools and School-Districts; Towns; Of Question of Adoption of Constitution or Amendment of Constitution, see Constitutional Law, 8 Cyc. 723; Statement in Ballot of Question or Proposition, see Elections, 15 Cyc. 350; Votes Necessary to Determination, see Elections, 15 Cyc. 388.)

Refiling. See Chattel Mortgages, 6 Cyc. 1092; Mortgages, 27 Cyc. 1161; Pleading, 31 Cyc. 591.

Refined Coal or Earth Oil. A term which has been held to include gasolene;[2] kerosene;[3] naptha; benzine or benzole.[4] (See Fire Insurance, 19 Cyc. 738. See also 14 Cyc. 1133 note 97.)

Refined Sugar. Such sugar as has assumed, at some time, the form of white refined loaf or lump sugar;[5] sugar known in the market as loaf and lump.[6]

Refinement. The verbiage which is frequently found in indictments, in setting forth what is not essential to the constitution of the offense, and therefore not required to be proved on the trial.[7]

Refinery. See Oil, 29 Cyc. 1474 note 37.

Reflect. To bring reproach; to reflect on; to cast censure or reproach.[8]

30. Duhrkop *v.* White, 13 N. Y. App. Div. 293, 43 N. Y. Suppl. 190.

What constitutes payment.— Where an attorney, on paying over to a referee the amount of his fees, exacted from him a stipulation to refund said amount in case of reversal of an order to commit the client for contempt in refusing to pay the fees, and such order was reversed, and an action by the attorney against the referee on the stipulation was settled by the referee's retaining only a part of the fees, there was not a payment of the fees except *pro tanto*. Dinkel *v.* Wehle, 63 How. Pr. (N. Y.) 298.

1. Black L. Dict.

2. Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590, 598. See 20 Cyc. 1180.

3. Bennett *v.* North British, etc., Ins. Co., 81 N. Y. 273, 275, 37 Am. Rep. 501; Morse *v.* Buffalo F., etc., Ins. Co., 30 Wis. 534, 536, 11 Am. Rep. 587. See 24 Cyc. 794.

4. Morse *v.* Buffalo F., etc., Ins. Co., 30 Wis. 534, 536, 11 Am. Rep. 587. See 5 Cyc. 683; 29 Cyc. 278.

5. Barlow *v.* U. S., 7 Pet. (U. S.) 404, 410, 8 L. ed. 728.

6. U. S. *v.* Eighty-five Hogheads of Sugar, 25 Fed. Cas. No. 15,037, 2 Paine 54.

Does not include "bastard sugar" see Barlow *v.* U. S., 7 Pet. (U. S.) 404, 410, 8 L. ed. 728.

As used in act of congress imposing a duty on all sugar refined within the United States after a certain date, the term refers to a particular process in preparing the sugar for sale, which is terminated before the sugar is put into molds. The act of refining is completed when the sugar is fit to be granulated. U. S. *v.* Pennington, 27 Fed. Cas. No. 16,026, Pet. C. C. 113.

7. State *v.* Gallimon, 24 N. C. 372, 377.

An objection that an indictment did not set out the constituents of the offense, made after verdict, is a "refinement" within the meaning of a statute providing that judgments on indictments shall not be stayed by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the court to proceed to judgment. State *v.* Peak, 130 N. C. 711, 714, 41 S. E. 887.

8. Webster Dict. [*quoted* in Cooper *v.* Greely, 1 Den. (N. Y.) 347, 360].

"When it is said in ordinary language, that a person has published a 'libelous' and 'scandalous' paper 'reflecting' upon a body

REFLECTION. A term which according to common usage, refers to past time, and although it may be properly used with reference to present time, we think we would not be justified in considering it so used in the present instance.[9]

REFORM. To create; to make anew; to rectify.[10] (See REFORMATION; and, generally, REFORMATION OF INSTRUMENTS, *post*, p. 899.)

REFORMATION. The act of reforming what is defective or evil, or the state of being reformed; correction or amendment, as of life or manners; or of a government.[11] (Reformation: Ground For Refusing Divorce, see DIVORCE, 14 Cyc. 643. Of Offender, see INFANTS, 22 Cyc. 521; REFORMATORIES, *post*, p. 1002; VAGRANCY. Of Written Instruments, see REFORMATION OF INSTRUMENTS, *post*, p. 899.)

of persons, the word 'reflecting,' coupled with the context, must be understood to mean 'injuriously' and 'contumeliously reflecting,' reflecting in a defamatory manner." Burdett *v.* Abbot, 14 East 1, 153, 4 Taunt. 401, 12 Rev. Rep. 450.

9. McLure *v.* Colclough, 17 Ala. 89, 101.

10. Rapalje & L. L. Dict. [*quoted* in McCorquodale *v.* State, (Tex. Cr. App. 1906) 98 S. W. 879, 887; McCorquodale *v.* Texas, 211 U. S. 432, 435, 29 S. Ct. 146].

11. Century Dict.

Permanent reformation, upon which a court will restore to one, who has been adjudged an habitual drunkard and incapable of managing his affairs, his property, is the total abstinence from all alcoholic liquors for a period of one year. It must be a voluntary abandonment and not an abandonment which is the result of constraint or of the want of means to procure them. *In re* Hoag, 7 Paige (N. Y.) 312, 313.

REFORMATION OF INSTRUMENTS

By George L. Reinhard* and Walter Myers†

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*Former justice of the Indiana Appellate Court; late dean of the Indiana University School of Law; and author of "A Treatise on the Law of Agency."

Judge Reinhard, prior to his death, which occurred at his home in Bloomington, Ind., July 13, 1906, had not completed the whole of this article. The unfinished portion of the article was written by Mr. Myers. An announcement of Judge Reinhard's death and a brief summary of his life's work appears in 37 Ind. App. xxxiii.

†Author of "Prisons," 32 Cyc. 312.

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CROSS-REFERENCES

For Matters Relating to:

Alteration of Instrument, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 137.

Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

Correcting or Curing Defective Acknowledgment, see ACKNOWLEDGMENTS, 1 Cyc. 606.

Fraud in Other Aspects, see FRAUD, 20 Cyc. 1, and Particularly Cross-References Thereunder.

Mistake in Other Aspects, see MISTAKE, 27 Cyc. 827, and Particularly Cross-References Thereunder.

Mistake of Fact Defined, see MISTAKE OF FACT, 20 Cyc. 809.

Mistake of Law Defined, see MISTAKE OF LAW, 20 Cyc. 809.

For Matters Relating to — (*continued*)
Reformation:
Affected by:
Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 279.
Statute of Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1058, 1178 text and note 16, 1196 text and note 20.
Election Between Suit For and Action on Contract, see ELECTION OF REMEDIES, 16 Cyc. 259.
Joinder of Suit For and Action For Damages, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 420.
Of Award, see ARBITRATION AND AWARD, 3 Cyc. 756.
Of Policy, see FIRE INSURANCE, 19 Cyc. 651; LIFE INSURANCE, 25 Cyc. 738; MARINE INSURANCE, 26 Cyc. 616.
Of Tax Deed, see TAXATION.
Of Will, see WILLS.
Right to Trial by Jury in Suit For, see JURIES, 24 Cyc. 117.

I. MEANING OF TERM.

Reformation is that remedy in equity[1] by means of which a written instrument is made or construed so as to express or conform to the real intention of the parties when some error or mistake has been committed.[2] This rule is usually limited to mistakes of fact, although relief has been granted because of a mistake of law.[3]

II. NATURE AND SCOPE OF REMEDY.[4]

A. In General. The power of equity to reform written instruments is an extraordinary one, and its exercise must be carefully guarded and granted only in a clear case.[5] Reformation is not a primary right, but operates indirectly, that primary rights may be conserved and protected.[6] To enforce agreements, fairly and legally made, is one of the peculiar branches of equity jurisprudence.[7] Now then, if an instrument, intended as the execution of an agreement, from some cause is insufficient for that purpose, the agreement remains as much unexecuted as if the parties thereto had refused to comply with it, and equity will carry out

1. In code states where the distinction between suits at law and actions in equity has been abolished a suit for reformation, which would, under the former system, have been a suit in equity, is a civil action under the code. Clayton *v.* Freet, 10 Ohio St. 544, 546.

2. Adams *v.* Stevens, 49 Me. 362, 366 [*citing* Lumbert *v.* Hill, 41 Me. 475, 482]; Anderson L. Dict.; Bispham Eq. § 31; Bouvier L. Dict.; Pomeroy Eq. Jur. §§ 112, 870. See also Walker *v.* Armstrong, 8 De G. M. & G. 531, 542, 2 Jur. N. S. 959, 25 L. J. Ch. 738, 4 Wkly. Rep. 770, 57 Eng. Ch. 411, 44 Eng. Reprint 495.

3. See *infra*, III.

4. Form of remedy see *infra*, XI, A.
Relief awarded see *infra*, XVI, B.

5. Miller *v.* Stuart, (Md. 1907) 63 Atl. 273. See also *infra*, text and note 17.

6. Pomeroy Eq. Jur. § 171.
Reformation may operate concurrently with a primary right. O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428.

7. See SPECIFIC PERFORMANCE.
Reformation compared with specific performance.—An action to reform a written instrument is in the nature of an action for the specific performance of a contract. Adams *v.* Wheeler, 122 Ind. 251, 254, 23 N. E. 760. See also Nicholson *v.* Tarpey, 89 Cal. 617, 26 Pac. 1101, where this analogy is also noted.
Specific performance instead of reformation. — A deed executed by a husband and wife, which although otherwise complete fails through a misdescription to convey the land intended, being the grantor's homestead, must be treated as an executory contract by the husband to convey, which equity will enforce after the homestead right ceases, against the husband or against the heirs after his death intestate, although not against his widow. Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395 [*approved* in Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035, and *distinguishing* Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565, holding that an action will not lie to reform such a deed against the wife, even after the land ceases to be a homestead]. See also *infra*, p. 961 note 45.
Cancellation instead of reformation see *infra*, III, D, 2.

the intention of the parties when clearly shown.[8] Equity looks to the substance not to the form of the transaction, and gives effect, not to the mere words which the parties may have used, but to their actual intention, and enforces the agreement which the parties really made, not that which they had not made, but seemed to have made.[9] It is wholly immaterial from what cause the defective execution of the intent originated.[10] The correction of an instrument does not affect the agreement itself. It merely makes the written evidence of the agreement correspond to the understanding of the parties.[11] And it must always be borne in mind that, although equity may grant relief from a mistake in a contract where there is fraud, or the mistake is mutual, a contract which the parties intended to make, but did not make, cannot be set up in place of one which they did make, but did not intend to make.[12]

B. Right of Reformation in General.[13] As a rule the right of a party seeking reformation must rest on an equity superior to that of him against whom it is sought.[14] It is a right which exists independently of statutory enactment,[15] except in states where equity jurisdiction is expressly conferred.[16] The power is exercised with great caution and in the absence of definite allegations and certain proof that there is an existing superior equity, the remedy is not authorized.[17]

8. Wyche *v.* Greene, 16 Ga. 49; Adams *v.* Stevens, 49 Me. 362; Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 5 L. ed. 589; Townshend *v.* Stangroom, 6 Ves. Jr. 328, 5 Rev. Rep. 312, 31 Eng. Reprint 1076; Henkle *v.* Royal Exch. Assur. Co., 1 Ves. 317, 27 Eng. Reprint 1055; Simpson *v.* Vaughan, 2 Atk. 31, 26 Eng. Reprint 415; Udale *v.* Halfpenny, 9 Mod. 56, 88 Eng. Reprint 313, 2 P. Wms. 151, 24 Eng. Reprint 677; Lawson *v.* Jones, 40 Nova Scotia 303.

Equity broader than law.—A written contract will be opened up to let in an equity arising from facts perfectly distinct from the construction of the instrument itself. Tucker *v.* Madden, 44 Me. 206.

9. Lockwood *v.* Geier, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245.

10. Wyche *v.* Greene, 16 Ga. 49.

11. Boyce *v.* Hamburg-Bremen F. Ins. Co., 24 Pa. Super. Ct. 589.

12. Reagan *v.* Bruff, (Tex. Civ. App. 1908) 108 S. W. 185. See *infra*, text and note 63.

13. **Conditions precedent** see *infra*, VII.

Grounds for: Reformation see *infra*, III. Refusing reformation see *infra*, IV, B, C; VIII.

Invalidity of contract see *infra*, IV, C.

Objections to relief see *infra*, VIII.

Persons entitled see *infra*, IX.

Against whom reformation may be had see *infra*, X.

Statute of frauds precluding reformation see FRAUDS, STATUTE OF, 20 Cyc. 279.

14. *California.*— Ross *v.* Williams, (1887) 15 Pac. 47.

Georgia.— Ellis *v.* Hunnicutt, 71 Ga. 637.

Iowa.— Parker *v.* Schaller Sav. Bank, 98 Iowa 246, 67 N. W. 245.

Kentucky.— Noel *v.* Gill, 84 Ky. 241, 1 S. W. 428, 8 Ky. L. Rep. 229.

Missouri.— Henderson *v.* Dickey, 35 Mo. 120.

New Hampshire.— Hitchins *v.* Pettingill, 58 N. H. 386.

North Carolina.— Braddy *v.* Parker, 39 N. C. 430.

Utah.— McClure *v.* Little, 15 Utah 379, 49 Pac. 298, 62 Am. St. Rep. 938.

United States.— Tilghman *v.* Tilghman, 23 Fed. Cas. No. 14,045, Baldw. 464.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 2.

"He who seeks equity must do equity."— Hence if a party seeking reformation fails to do equity, he must be dismissed without relief. Conaway *v.* Gore, 21 Kan. 725; Jones *v.* Flannoy, (Tex. Civ. App. 1896) 37 S. W. 236.

After an equitable interest or estate has vested, interference is warranted, even to the extent of enjoining an action at law. Stevens *v.* Hertzler, 114 Ala. 563, 22 So. 121.

15. Schettiger *v.* Hopple, 3 Grant (Pa.) 54.

16. See the statutes of the several states. See also Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Canedy *v.* Marcy, 13 Gray (Mass.) 373; Salisbury *v.* Miller, 14 Mich. 160.

17. *Alabama.*— Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911; Teakle *v.* Teakle, 29 Ala. 403, 405, where it is said: "Regarding only so much of the bill as is sustained by the proof, the complainant's claim to relief rests on the single fact, that he and a coterminous land-holder had fallen into a mutual mistake as to the line dividing their freeholds, and had cleared, fenced and cultivated accordingly, for a period of four or five years. Land titles cannot be lost and won by so simple a process." See also *supra*, text and note 5.

Georgia.—Stricker *v.* Tinkham, 35 Ga. 176, 89 Am. Dec. 280.

Maryland.— Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273.

Minnesota.— Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

New Jersey.— Van Houten *v.* Van Houten, 68 N. J. Eq. 358, 59 Atl. 555; Aller *v.* Crouter, 64 N. J. Eq. 381, 54 Atl. 426.

Where all the parties are willing to reform, an action will be entertained, although in the same action it is sought to establish the priority of the lien of a deed over that of defendant's judgment.[18]

C. Necessity For Reformation.[19] It sometimes happens that reformation becomes necessary to protect a right or to complete a remedy.[20]

D. Inadequacy of Remedy at Law — 1. In General. Where an action arises upon an instrument which, from mutual mistake, or mistake on one side and fraud or inequitable conduct on the other,[21] fails to express the actual agreement, it is a matter peculiarly within the jurisdiction of a court of equity to reform such contract and grant relief in accordance with the intention of the parties because there is no adequate remedy at law,[22] parol evidence being inadmissible to vary a written instrument.[23] Jurisdiction to reform is established whenever the remedy at law is inadequate.[24] On the other hand, when the remedy at law is plain and adequate, clearly there is no need for reformation.[25] Thus there is a remedy at law for mere clerical errors,[26] or the matter sought to be reformed may come within the scope of a statute.[27]

2. Choice of Remedies. Where law and equity have concurrent power to grant relief by their respective remedies, but the remedy afforded by the law court is doubtful, less adequate, or less specific than a reformation of the instrument would insure, equity is not ousted by the concurrent remedy at law.[28] Nor will

Ohio.— Webster *v.* Harris, 16 Ohio 490.

Texas.— Clack *v.* Wood, 14 Tex. Civ. App. 400, 37 S. W. 188.

United States.— Willard *v.* Davis, 122 Fed. 363.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 2.

18. Brocking *v.* Straat, 17 Mo. App. 296.

19. **Lack of necessity** see *infra*, VIII, B.

20. See cases cited *infra*, this note.

Thus, where a deed conveyed by mistake more land than was intended and an action was brought to recover the part included by mistake, the deed had to be reformed before plaintiff could recover the land. Popijoy *v.* Miller, 133 Ind. 19, 32 N. E. 713. Also where a written contract was intended to evidence a previous oral one, but by mutual mistake failed to contain the terms intended, the court could not render judgment by reference only to the original oral contract, without reforming the written one. Linton *v.* Unexcelled Fire-Works Co., 128 N. Y. 672, 28 N. E. 580 [*reversing* 13 N. Y. Suppl. 495].

21. See *infra*, III, B–E.

22. *Illinois.*— Hawley *v.* Simons, (1887) 14 N. E. 7.

Iowa.— Fitchner *v.* Fidelity Mut. Fire Assoc., (1896) 68 N. W. 710.

New Jersey.— Chelsea Nat. Bank *v.* Smith, (Ch. 1908) 69 Atl. 533.

New York.— Many *v.* Beekham Iron Co., 9 Paige 188.

Oregon.— Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12.

Pennsylvania.— Schettiger *v.* Hopple, 3 Grant 54.

Tennessee.— Hardwick *v.* Beard, 10 Heisk. 659.

Texas.— Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109.

23. See Evidence, 17 Cyc. 567 *et seq.* *Compare* Merritt *v.* Coffin, 152 Ala. 474, 44 So. 622, holding that where a written contract for the sale of iron contemplated payment by credit on a debt owing by the seller to the buyer, but by mutual mistake a provision that payment should be so made until the indebtedness was satisfied was omitted, the buyer was entitled to have the contract reformed, although the defect might have been aided by parol and the provision made available at law.

But parol evidence is admissible at law to identify chattels mortgaged; equity will therefore not take jurisdiction merely to correct a misdescription in such an instrument. Spaulding *v.* Mozier, 57 Ill. 148.

24. Loyd *v.* Phillips, 123 Wis. 627, 101 N. W. 1092; Western Assur. Co. *v.* Ward, 75 Fed. 338, 21 C. C. A. 378.

An objection that the purpose of a suit is to try title, and that therefore plaintiff has an adequate remedy at law, is untenable where the complaint avers mutual mistake as to boundaries, since such averment confers jurisdiction. Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12.

25. Craft *v.* Dickens, 78 Ill. 131; Loomis *v.* Freer, 4 Ill. App. 547; Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Bowman *v.* Poppenberg, 53 Misc. (N. Y.) 373, 103 N. Y. Suppl. 245; Commercial Bank *v.* Philadelphia County F. Ins. Co., 84 Wis. 12, 54 N. W. 109.

26. Carr *v.* Williams, 10 Ohio 305, 36 Am. Dec. 87. But *compare* Chelsea Nat. Bank *v.* Smith, (N. J. Ch. 1908) 69 Atl. 533.

27. Brainerd *v.* Arnold, 27 Conn. 617.

Where, by statute, the cutting of timber by a lessee for a term of years is waste, it would be unnecessary to correct a lease by the insertion of a provision against such waste. Brainerd *v.* Arnold, 27 Conn. 617.

28. *Alabama.*— Merritt *v.* Coffin, 152 Ala. 474, 44 So. 622.

Connecticut.— Montville *v.* Haughton, 7 Conn. 543.

jurisdiction in equity be denied simply because the action was brought at law first.[29]

E. Discretion of Court. The remedy by suit in equity to reform a written instrument is not absolute; it is discretionary with the court whether under all the circumstances the remedy is necessary to complete the ends of justice.[30]

III. Grounds For Reformation.[31]

A. In General. If an instrument fails to embody the actual agreement made, or transaction determined upon by the parties thereto, reformation is the proper remedy, when a case is made out by proper proof;[32] but the instrument sought to be corrected must fail to express the real agreement or transaction because of mistake common to both parties,[33] or because of mistake on one side and fraud or inequitable conduct on the other.[34] A mere misunderstanding of the facts is not sufficient ground for asking reformation.[35] It is only necessary that the instru-

Georgia.— Wall *v.* Arrington, 13 Ga. 88.

Illinois.— Braithwaite *v.* Henneberry, 124 Ill. App. 407 [*affirmed* in 222 Ill. 50, 78 N. E. 34].

Iowa.— Roberts *v.* Taliaferro, 7 Iowa 110.

Maryland.— Delaware State F. & M. Ins. Co. *v.* Gillett, 54 Md. 219; Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212; Newcomer *v.* Kline, 11 Gill & J. 457, 37 Am. Dec. 74.

New York.— Gallup *v.* Bernd, 1 N. Y. Suppl. 478.

North Carolina.— Williams *v.* Burnett, 45 N. C. 209.

Wisconsin.— Loyd *v.* Phillips, 123 Wis. 627, 101 N. W. 1092.

United States.— Western Assur. Co. *v.* Ward, 75 Fed. 338, 21 C. C. A. 378; Hancock *v.* Cossett, 45 Fed. 754.

The mere fact that a remedy at law exists does not exclude the jurisdiction of equity to reform. Braithwaite *v.* Henneberry, 124 Ill. App. 407 [*affirmed* in 222 Ill. 50, 78 N. E. 34].

That a motion to reform a mortgage, decree, and certificate of sale for misdescription of lots could be maintained in a foreclosure suit does not preclude an independent equitable action for the same purpose. Busey *v.* Moraga, 130 Cal. 586, 62 Pac. 1081.

Election of remedies see 15 Cyc. 259.

29. Lorraine *v.* Long, 6 Cal. 452 (even though complainant could there have set up equitable defense asking reformation); Hawley *v.* Simons, (Ill. 1887) 14 N. E. 7; Gump's Appeal, 65 Pa. St. 476.

The pendency of an action at law will not prevent a party from maintaining a suit in equity to reform a contract, as where the change from one forum to another will not increase plaintiff's right, but may deprive defendant of a cross action on a warranty. Providence Steam Engine Co. *v.* Hathaway Mfg. Co., 79 Fed. 512.

30. Hunter *v.* Bilyeu, 30 Ill. 228; Schwickerath *v.* Cooksey, 53 Mo. 75; Henderson *v.* Dickey, 35 Mo. 120; Welles *v.* Yates, 44 N. Y. 525.

Ohio Const. (1870) art. 2, § 28, provides that the general assembly may authorize courts to carry into effect on such terms as shall be just and equitable the manifest intention of the parties by correcting omissions, defects, and errors in instruments. In pursuance of this section act March 10, 1859, provides that it shall be competent for the courts of the state to give full effect, according to the manifest intention of the parties, to instruments in which there are omissions, defects, or errors. This act was interpreted to be permissive only, and not mandatory. See Hout *v.* Hout, 20 Ohio St. 119.

31. Grounds for refusing reformation see *infra*, VIII.

32. *Arkansas.*— Tillar *v.* Wilson, 79 Ark. 256, 96 S. W. 381.

Illinois.— School Inspectors *v.* Tyng, 135 Ill. App. 571.

Kentucky.— Pickett *v.* Taylor, 96 S. W. 1111, 29 Ky. L. Rep. 1219.

Maryland.— Cohen *v.* Numsen, 104 Md. 676, 65 Atl. 432.

Missouri.— Moran Bolt, etc., Mfg. Co. *v.* St. Louis Car Co., 210 Mo. 715, 109 S. W. 47.

Texas.— Laufer *v.* Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109.

West Virginia.— Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

United States.— Carrell *v.* McMurray, 136 Fed. 661.

England.— Wilkinson *v.* Nelson, 7 Jur. N. S. 480, 9 Wkly. Rep. 393; Worsley *v.* Granville, 2 Ves. 333, 28 Eng. Reprint 214.

Canada.— Lawson *v.* Jones, 40 Nova Scotia 303.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 68.

33. See *infra*, III, D, 1.

34. See *infra*, III, E, 1.

A contract made without fraud or mistake may not be modified in equity to give either party a better bargain while he retains all the benefits of the original trade. Gatch *v.* Burnes, 137 Fed. 781 [*affirming* 132 Fed. 485], *dictum*. See also Johnson *v.* Austin, 86 Ark. 446, 111 S. W. 455.

35. Whitworth *v.* Lowell, 178 Mass. 43, 59 N. E. 760; Story *v.* Conger, 36 N. Y. 673, 93 Am. Dec. 546. See also *infra*, text and notes 48, 70, 79.

ment substantially speaks the intention and adequately expresses the agreement of the parties.[36]

B. Mistake of Fact[37] **— 1. In General.** It is settled by a host of authorities that when, because of a mistake of fact, an instrument does not express the agreed intention of the parties, equity will correct such mistake[38] unless the right of third parties intervene.[39]

36. *Alabama.*— Robertson *v.* Walker, 51 Ala. 484

Connecticut.— Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 16.

Iowa.— Chicago Title, etc., Co. *v.* Smyth, 94 Iowa 401, 62 N. W. 792.

Maryland.— McEldery *v.* Shipley, 2 Md. 25, 56 Am. Dec. 703.

New York.— Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 68 N. Y. Suppl. 781 [*affirmed* in 171 N. Y. 671, 64 N. E. 1126].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 68.

37. "Mistake of fact" defined see 20 Cyc. 809.

Knowledge of contents of instrument as precluding reformation see *infra*, VIII, C.

38. *Alabama.*— Clopton *v.* Martin, 11 Ala. 187.

Arkansas.— See Mitchell Mfg. Co. *v.* Kempner, 84 Ark. 349, 105 S. W. 880.

California.— Los Angeles, etc., R. Co. *v.* Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029.

Florida.— Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

Georgia.— Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Ward *v.* Allen, 28 Ga. 74; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Reese *v.* Wyman, 9 Ga. 430; Trout *v.* Goodman, 7 Ga. 383.

Illinois.— Home Ins., etc., Co. *v.* Myer, 93 Ill. 271.

Indiana.— Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833; Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112.

Iowa.— Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843; Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Warburton *v.* Lauman, 2 Greene 420. See also Fullerton *v.* Des Moines, (1908) 115 N. W. 607.

Kentucky.— Anderson *v.* Bacon, 1 A. K. Marsh. 48; Dean *v.* Hall, 105 S. W. 98, 31 Ky. L. Rep. 1306.

Maine.— National Traders' Bank *v.* Ocean Ins. Co., 62 Me. 519; Peterson *v.* Grover, 20 Me. 363.

Maryland.— National F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289.

Massachusetts.— Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212, 84 N. E. 449.

Minnesota.— Croakston Imp. Co. *v.* Marshall, 57 Minn. 333, 59 N. W. 294, 47 Am. St. Rep. 612.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Moran Bolt, etc., Mfg. Co. *v.* St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

New Jersey.— Graham *v.* Berryman, 19 N. J. Eq. 29; Firmstone *v.* De Camp, 17 N. J. Eq. 309.

New York.— Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; Prior *v.* Williams, 3 Abb. Dec. 624, 2 Keyes 530, 3 Keyes 231; Pennell *v.* Wilson, 2 Rob. 505; Titus *v.* Perry, 13 N. Y. St. 237; Witthaus *v.* Schack, 57 How. Pr. 310; Humphreys *v.* Hurtt, 50 How. Pr. 291.

North Carolina.— Braddy *v.* Parker, 39 N. C. 430.

Ohio.— Thompson *v.* Thompson, 18 Ohio St. 73; Graham *v.* Fireman's Ins. Co., 2 Disn. 255.

Pennsylvania.— Kastenbader *v.* Peters, 80 Pa. St. 438.

South Dakota.— Hughes *v.* Payne, (1908) 117 N. W. 363.

Tennessee.— Cromwell *v.* Winchester, 2 Head 389; King *v.* Doolittle, 1 Head 77; Helm *v.* Wright, 2 Humphr. 72; Mayfield *v.* Seawell, Cooke 437.

West Virginia.— Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856; Allen *v.* Yeater, 17 W. Va. 128.

Wyoming.— Weltner *v.* Thurman, (1908) 98 Pac. 590, (1909) 99 Pac. 1128.

England.— Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363; Walsh *v.* Trevanion, 12 Jur. 344, 16 Sim. 178, 39 Eng. Ch. 178, 60 Eng. Reprint 841; Exeter *v.* Exeter, 2 Jur. 535, 7 L. J. Ch. 240, 3 Myl. & C. 321, 14 Eng. Ch. 321, 40 Eng. Reprint 949; Towers *v.* Moor, 2 Vern. Ch. 98, 23 Eng. Reprint 673; Willan *v.* Willan, 16 Ves. Jr. 72, 33 Eng. Reprint 911; Townshend *v.* Stangroom, 6 Ves. Jr. 328, 5 Rev. Rep. 312, 31 Eng. Reprint 1076. The rule is stated as a *dictum* in Langley *v.* Brown, 2 Atk. 196, 26 Eng. Reprint 521, and Gordon *v.* Hertford, 2 Madd. 106, 17 Rev. Rep. 195, 56 Eng. Reprint 274.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 69.

Restatement of rule.— In Ivinson *v.* Hutton, 98 U. S. 79, 25 L. ed. 66, Clifford, J., said: "If through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded." With this general doctrine the cases are in accord.

A mistake evident from the face of the instrument will be reformed. Mississippi Valley Trust Co. *v.* McDonald, 146 Mo. 467, 48 S. W. 483. *Compare In re* De la Touche, L. R. 10 Eq. 59, 40 L. J. Ch. 85. But *compare supra*, text and notes 25–27.

39. Burke *v.* Anderson, 40 Ga. 535; Dil-

2. What Constitutes — a. In General. As a ground for reformation, such mistake of fact exists when the parties under some erroneous conviction of law [40] or fact [41] include within the written evidence of the agreement something which should not be there,[42] or omit from such instrument something which should be there,[43] or so express their agreement that it sets forth something different from what was intended,[44] all of which they would not have done but for the erroneous

lard *v.* Jones, 229 Ill. 119, 82 N. E. 206; Boone *v.* Graham, 215 Ill. 511, 74 N. E. 559; Blackie *v.* Clark, 15 Beav. 595, 22 L. J. Ch. 377, 51 Eng. Reprint 669.

40. King *v.* Doolittle, 1 Head (Tenn.) 77. See also cases cited *infra*, notes 42, 43. *Compare infra*, III, C, 2.

A mistake in one state as to the laws of another state is a mistake of fact. Sampson *v.* Mudge, 13 Fed. 260.

41. American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377. See also cases cited *infra*, notes 42, 43.

42. *California.*— San Jose Ranch Co. *v.* San Jose Land, etc., Co., 132 Cal. 582, 64 Pac. 1097, holding that a mistake of fact as ground for reformation is provided in Cal. Civ. Code, §§ 3399–3402.

Illinois.— Chandler *v.* Morey, 96 Ill. App. 278 [*affirmed* in 195 Ill. 596, 63 N. E. 512]. See also Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206.

Indiana.— Hileman *v.* Wright, 9 Ind. 126; Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901.

Iowa.— Barry *v.* Rownd, 119 Iowa 105, 93 N. W. 67; Hansbrandt *v.* Hofler, 117 Iowa 103, 90 N. W. 494; Jones *v.* Price, (1901) 86 N. W. 219.

Kentucky.— Welch *v.* Lefler, 66 S. W. 619, 23 Ky. L. Rep. 2024.

Michigan.— Eberle *v.* Heaton, 124 Mich. 205, 82 N. W. 820.

Nebraska.— Shelby *v.* Creighton, (1902) 96 N. W. 382, 383, where it is said: "It is a principle of not infrequent application that where a contract is so broad in its language as to cover matters of which the parties were ignorant, equity may confine its application to the real purposes of the bargain."

New Hampshire.— Winnipisseogee Lake Cotton, etc., Mfg. Co. *v.* Perley, 46 N. H. 83.

North Carolina.— Southern Finishing, etc., Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

North Dakota.— Benesh *v.* Travelers' Ins. Co., 14 N. D. 39, 103 N. W. 405.

Texas.— American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

Washington.— Lord *v.* Horr, 30 Wash. 477, 71 Pac. 23.

Wyoming.— See Weltner *v.* Thurmond, (1908) 98 Pac. 590, (1909) 99 Pac. 1128.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 69.

Compare Moore *v.* Tate, 114 Ala. 582, 21 So. 820 [*explained* in Orr *v.* Echols, 119 Ala. 340, 24 So. 357, 358].

43. *Arkansas.*— Perry *v.* Sadler, 76 Ark. 43, 88 S. W. 832.

District of Columbia.— Manogue *v.* Bryant, 15 App. Cas. 245.

Georgia.— Kitchens *v.* Usry, 121 Ga. 294, 48 S. E. 945.

Illinois.— Wiemer *v.* Himmel, 200 Ill. 374, 65 N. E. 680.

Kentucky.— Thomas *v.* Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084, 24 Ky. L. Rep. 1630, 25 Ky. L. Rep. 169.

Missouri.— Epperson *v.* Epperson, 161 Mo. 577, 61 S. W. 853; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

New Jersey.— Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692.

New York.— Waterloo First Nat. Bank *v.* Bacon, 113 N. Y. App. Div. 612, 98 N. Y. Suppl. 717 [*affirmed* in 189 N. Y. 533, 82 N. E. 1126].

Pennsylvania.— Hallett *v.* Pollock, 31 Pittsb. Leg. J. N. S. 232.

Washington.—Land Mortg. Bank of Northwestern America *v.* Nicholson, 24 Wash. 258, 64 Pac. 156.

Wisconsin.— Auer *v.* Mathews, 129 Wis. 143, 108 N. W. 45.

United States.— Chicago, etc., R. Co. *v.* Green, 114 Fed. 676.

England.— Cordeaux *v.* Fullerton, 41 L. T. Rep. N. S. 651, 28 Wkly. Rep. 320.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 69.

Subsequent alteration of contract by parol. — Where an agreement respecting the conveyance of land is made in writing, and afterward it is altered or a new contract is substituted therefor in parol, and in the conveyance under the parol agreement a mistake of omission is made, the party against whom it is made may have the same corrected and a conveyance executed according to the parol modification. Forest *v.* McIntosh, 4 Iowa 596. *Compare* Queens Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620.

If an agreement to sell land is made with a reservation, but such reservation is omitted from the instrument representing the agreement through mistake, reformation will be allowed. Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833; Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837, 61 Nebr. 336, 85 N. W. 285; Haslett *v.* Stephany, 55 N. J. Eq. 68, 36 Atl. 498; Pinchback *v.* Bessemer Min., etc., Co., 137 N. C. 171, 49 S. E. 106.

No remedy for a "hard bargain" caused by omission.— Reformation was refused a complainant who sought to have a mortgage cover one hundred and twenty-five lots whereas it only covered eighty-six, as the mortgage was a deed and defeasance, and the time for redemption had passed, so that the transaction was a "hard bargain." Ackerman *v.* Begrisch, (N. J. Ch. 1901) 50 Atl. 673. See also *infra*, text and note 57.

44. Wieneke *v.* Deputy, 31 Ind. App. 621,

conviction;[45] but the agreement itself in all cases should be a definite agreement.[46] In all cases the mistake against which reformation is sought must relate to something within the contemplation of the parties in making their contract, to something agreed upon, but not written out as agreed upon, and therefore not covered, but intended to be covered, by the written instrument.[47] A mistake in judgment is not a mistake of fact.[48] Nor is a mistake as to the efficacy of words used to express the intent of the parties a mistake of facts such as to be ground for reformation.[49] Failure of the minds to meet, so that one party believes the contract means one thing, and the other party believes it means another, is not a mistake of fact, such as to be remedied by reformation.[50] A mistake will not be corrected if the fact be unknown to both parties, or if each has equal and adequate means of information in regard to it, the parties, in such cases, having acted in good faith.[51]

b. Mistake by Scrivener or Draftsman — (i) *In General.* Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, but which by mistake of the draftsman or scrivener, either as to law[52] or fact,[53] does not fulfil the intention, but violates it, there is ground

68 N. E. 921; Prescott *v.* Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291; Green *v.* Dempster Mill Mfg. Co., (Iowa 1900) 82 N. W. 483; Nutall *v.* Nutall, 82 S. W. 377, 26 Ky. L. Rep. 671; Pictet Spring Water Ice Co. *v.* Citizens' Ins. Co., 71 S. W. 514, 24 Ky. L. Rep. 1461; Cook *v.* Westchester F. Ins. Co., 60 Nebr. 127, 82 N. W. 315.

45. See cases cited *supra*, notes 40–44.

46. Auer *v.* Mathews, 129 Wis. 143, 108 N. W. 45.

47. *Illinois.*— Queen Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620.

Iowa.— Hausbrandt *v.* Hofler, 117 Iowa 103, 90 N. W. 494.

Missouri.— Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

Nebraska.— Shelby *v.* Creighton, 2 Nebr. (Unoff.) 264, 267, 96 N. W. 382.

New York.—Curtis *v.* Albee, 167 N. Y. 360, 60 N. E. 660; Kilmer *v.* Smith, 77 N. Y. 226, 33 Am. Rep. 613; Jackson *v.* Andrews, 59 N. Y. 244; Garvey *v.* New York Bldg. Loan Banking Co., 57 N. Y. App. Div. 193, 68 N. Y. Suppl. 317.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 69.

An attempt to supersede a written agreement with the parol negotiations which preceded and induced it cannot succeed under the form of a suit in equity to reform this contract. Queen Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620. *Compare* Forest *v.* McIntosh, 4 Iowa 596.

A contract with the federal government for imprinting revenue stamps will not be reformed by incorporating clauses in a prior communication from the commissioner of internal revenue to contractors then engaged in that work, stating certain requirements, when there is no evidence that the contract was not drawn just as the government intended; although, when executing the contract, the contractor was assured, that the only changes from a former contract were those contained in the commissioner's letter. Milliken Imprinting Co. *v.* U. S., 40 Ct. Cl. 81 [*reversed* in 202 U. S. 168, 26 S. Ct. 572, 50 L. ed. 980].

48. Durant *v.* Bacot, 13 N. J. Eq. 201. *Compare* White *v.* Williams, 48 Barb. (N. Y.) 222 [*reversed* in 48 N. Y. 344]. See also *supra*, text and note 35; *infra*, notes 70, 79.

Where parties, on the advice of counsel, deliberately adopted a mortgage to express their agreement for a deed subject to a right to repurchase, equity will afford them no relief by way of reformation. Rogers *v.* Smith, (Tenn. Ch. App. 1898) 48 S. W. 700. See *infra*, text and note 70.

49. Marshall *v.* Westrope, 98 Iowa 324, 67 N. W. 257; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

50. Rowley *v.* Flannelly, 30 N. J. Eq. 612; Avery *v.* Equitable L. Assur. Soc., 117 N. Y. 451, 23 N. E. 3; Paine *v.* Jones, 75 N. Y. 593; Wilson *v.* Deen, 74 N. Y. 531; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Kent *v.* Manchester, 29 Barb. (N. Y.) 595; Curtis *v.* Giles, 7 Misc. (N. Y.) 590, 28 N. Y. Suppl. 489; Stapylton *v.* Scott, 13 Ves. Jr. 425, 33 Eng. Reprint 353; Calverley *v.* Williams, 10 Ves. Jr. 210, 1 Rev. Rep. 118, 30 Eng. Reprint 306.

Cancellation instead of reformation see *infra*, III, D, 2.

51. Wood *v.* Patterson, 4 Md. Ch. 335; Westinghouse *v.* Remington Salt Co., 116 N. Y. App. Div. 123, 911, 101 N. Y. Suppl. 303 [*affirmed* in 189 N. Y. 515, 81 N. E. 766].

52. Canedy *v.* Marcy, 13 Gray (Mass.) 373, 377 (where it is said: "It is the mistake of the parties to the deeds which we are to inquire into; and if they were misled by a misplaced confidence in the skill of the scrivener, it can hardly be said to be a mistake of law and not of fact on their part"); Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Lawson *v.* Jones, 40 Nova Scotia 303.

53. *Connecticut.*— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112.

Iowa.— Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058; Nowlin *v.* Pyne, 47 Iowa 293.

Kentucky.— Thomas *v.* Conrad, 114 Ky. 841, 71 S. W. 903, 74 S. W. 1084, 24 Ky. L. Rep. 1630, 25 Ky. L. Rep. 169; Kentucky

to correct the mistake by reforming the instrument, and enforcing a specific performance of the original contract according to the real intention of the parties.[54]

(II) *UNSKILFULNESS OR IGNORANCE.* It is immaterial whether the mistake arose from the unskilfulness or ignorance of the draftsman, so long as the true agreement of the parties is not expressed.[55]

c. Mistake Subsequently Developed. The mistake must have been as to the intention of the parties at the time the instrument was executed, and not as affected or developed by subsequent events or by the consequences resulting from the instrument as executed, in order to justify reformation on the ground of mistake.[56] Error in making a bargain or failure to realize as much as was anticipated is beyond the reach of chancery.[57]

C. Mistake of Law[58] **— 1. IN GENERAL.** It has been frequently asserted that a mistake of law is not a ground for reformation,[59] but of late years the disposition of the courts seems to be to qualify that proposition by many exceptions,[60] so that there is much contrariety of opinion as to a general rule. The most broadly

Citizens' Bldg., etc., Assoc. *v.* Lawrence, 106 Ky. 88, 49 S. W. 1059, 20 Ky. L. Rep. 1700; Scales *v.* Ashbrook, 1 Metc. 358; Inskoe *v.* Proctor, 6 T. B. Mon. 311.

Massachusetts.— Wilcox *v.* Lucas, 121 Mass. 21.

Missouri.— Smith *v.* St. Louis Beef Canning Co., 14 Mo. App. 522.

Nebraska.— Story *v.* Gammell, 68 Nebr. 709, 94 N. W. 982.

New York.— Linton *v.* Unexcelled Fire-Works Co., 128 N. Y. 672, 28 N. E. 580; Hebler *v.* Brown, 18 Misc. 395, 41 N. Y. Suppl. 441; Smith *v.* Howard, 20 How. Pr. 151.

North Carolina.— Clemmons *v.* Drew, 55 N. C. 314.

Ohio.— Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

Pennsylvania.— Baab *v.* Houser, 203 Pa. St. 470, 53 Atl. 344; Huss *v.* Morris, 63 Pa. St. 367.

Texas.— Glisson *v.* Craig, 1 Tex. App. Civ. Cas. § 42.

Vermont.— Hoyt *v.* Hoyt, 77 Vt. 244, 59 Atl. 845.

West Virginia.— Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Ferrell *v.* Ferrell, 53 W. Va. 515, 44 S. E. 187; Lough *v.* Michael, 37 W. Va. 679, 17 S. E. 181, 470; Troll *v.* Carter, 15 W. Va. 567.

Wisconsin.— Silbar *v.* Ryder, 63 Wis. 106, 23 N. W. 106.

United States.— Hunt *v.* Rousmanier, 1 Pet. 1, 7 L. ed. 27; Sampson *v.* Mudge, 13 Fed. 260.

England.— Hunburn *v.* Curtis, Fitzg. 118, 94 Eng. Reprint 680.

Canada.— Lawson *v.* Jones, 40 Nova Scotia 303.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 70.

Under Mass. St. (1856) c. 38, the court has jurisdiction to reform a deed of real estate, on clear oral evidence that it was not written according to the intention of the parties, although the scrivener used the words which he intended. Canedy *v.* Marcy, 13 Gray 373.

When the mistake works no detriment the rule may be inapplicable. Miller *v.* Savage, 62 N. J. Eq. 746, 48 Atl. 1004.

54. Nutall *v.* Nutall, 82 S. W. 377, 26 Ky. L. Rep. 671.

Mistake of law of draftsman see *infra*, III, C, 2, d.

55. Larkins *v.* Biddle, 21 Ala. 252; Slack *v.* Craft, (N. J. Ch. 1904) 57 Atl. 1014; Huson *v.* Pitman, 3 N. C. 331; Hoyt *v.* Hoyt, 77 Vt. 244, 59 Atl. 845.

Where the meaning of an instrument is conjectural, apart from its effect according to the ordinary rules of construction, the court cannot take upon itself to declare that the mistake arose from the ignorance of the draftsman. Williams *v.* Houston, 57 N. C. 277.

56. Turner *v.* Kelly, 70 Ala. 85; Kennedy *v.* Umbaugh, Wright (Ohio) 327. *Compare* McAdow *v.* Wright, 128 Mo. App. 358, 107 S. W. 421.

57. Kennedy *v.* Umbaugh, Wright (Ohio) 327. See *supra*, note 43.

58. **"Mistake of law"** defined see 20 Cyc. 809.

59. Heavenridge *v.* Mondy, 49 Ind. 434; Baldwin *v.* State Ins. Co., 60 Iowa 497, 15 N. W. 300; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Greene *v.* Smith, 13 N. Y. App. Div. 459, 43 N. Y. Suppl. 610 [*affirmed* in 160 N. Y. 533, 55 N. E. 210]; Kent *v.* Manchester, 29 Barb. (N. Y.) 595; Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85, 25 L. ed. 52.

That equitable relief, by way of reformation, is the exception rather than the rule and depends upon peculiar circumstances see Newell *v.* Stiles, 21 Ga. 118; Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27.

60. *Alabama.*—Orr *v.* Echols, 119 Ala. 340, 24 So. 357.

Connecticut.— Haussman *v.* Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74; Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

District of Columbia.— Marshall *v.* Lane, 27 App. Cas. 276, holding that an admitted or clearly established misapprehension of the law in the execution of a conveyance creates a basis for the interference of courts of equity, resting on discretion, to be exercised only in the most unquestionable and flagrant cases.

accepted doctrine, however, appears to be that a mere naked mistake of law, unattended by any special circumstances, furnishes no ground for relief by reformation;[61] but if the mistake involves fact as well as law, or is attended by special circumstances, equity will relieve if the mistake is mutual,[62] so long as the power is not extended to the making of a new contract for the parties.[63]

2. WHAT CONSTITUTES — a. In General. A mistake of law exists when the parties labor under an erroneous conviction as to the legal import and effect of

Indiana.— Radebaugh *v.* Scanlon, 41 Ind. App. 109, 82 N. E. 544.

Iowa.— Bonbright *v.* Bonbright, 123 Iowa 305, 98 N. W. 784; Hopwood *v.* McCausland, 120 Iowa 218, 94 N. W. 469; Reed *v.* Root, 59 Iowa 359, 13 N. W. 323.

Michigan.— Fleming *v.* Wheeler, 153 Mich. 331, 116 N. W. 1085.

Minnesota.— Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

New Jersey.— Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165.

Ohio.— McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731.

Oregon.— Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333.

West Virginia.— Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499.

Wisconsin.— Wisconsin M. & F. Ins. Co. Bank *v.* Mann, 100 Wis. 596, 76 N. W. 777; Whitmore *v.* Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 72; and cases cited *infra*, notes 68, 69.

Compare Lawson *v.* Jones, 40 Nova Scotia 303.

Thus a mistake of law in thinking that a deed signed and acknowledged by the owner of land and his wife, without the wife's name appearing in the body of the deed, was sufficient to convey all their title and estate, authorizes a correction, as would a mistake of fact arising from the supposition that the name did appear therein. Radebaugh *v.* Scanlon, 41 Ind. App. 109, 82 N. E. 544.

Term "law" explained.— The rule that equity will not reform a deed on the ground of mistake where the mistake is one of law applies only where the word "law" is used in the sense of general law, or law of the country, and does not apply where it is used in the sense of a private right, for in such case the mistake is really one of fact. Marshall *v.* Lane, 27 App. Cas. (D. C.) 276.

61. *Arkansas.*— Tillar *v.* Wilson, 79 Ark. 256, 96 S. W. 381.

California.— Loftus *v.* Fischer, 106 Cal. 616, 39 Pac. 1064.

Indiana.— Easter *v.* Severin, 78 Ind. 540; Allen *v.* Anderson, 44 Ind. 395.

Kentucky.— Dever *v.* Dever, 44 S. W. 986, 19 Ky. L. Rep. 1988.

Missouri.— Norton *v.* Highleyman, 88 Mo. 621.

New York.— Greene *v.* Smith, 160 N. Y. 533, 55 N. E. 210 [*affirming* 13 N. Y. App. Div. 459, 43 N. Y. Suppl. 610]; Western Union Tel. Co. *v.* Shepard, 49 N. Y. App. Div. 345, 63 N. Y. Suppl. 435 [*affirming* 27 Misc. 101, 57 N. Y. Suppl. 357]; Wemple *v.* Hauenstein, 19 N. Y. App. Div. 552, 46 N. Y. Suppl. 288.

North Carolina.— Morehead Banking Co. *v.* Morehead, 124 N. C. 622, 32 S. E. 967, 122 N. C. 318, 30 S. E. 331; Sandlin *v.* Ward, 94 N. C. 490.

Pennsylvania.— Clapp *v.* Hoffman, 159 Pa. St. 531, 28 Atl. 362.

South Carolina.— Dendy *v.* Waite, 36 S. C. 569, 15 S. E. 712.

Texas.— Bexar Bldg., etc., Assoc. *v.* Seebe, (Civ. App. 1897) 40 S. W. 875.

England.—Lansdowne *v.* Lansdowne, 2 Jac. & W. 205, 37 Eng. Reprint 605.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 72.

Ga. Civ. Code, § 3978, provides that ignorance of the law, where the facts are known, and there is no misplaced confidence and no deception or fraud, either to induce a mistake of law or prevent its correction, will not authorize reformation in equity. So construed in Atlanta Trust, etc., Co. *v.* Nelms, 116 Ga. 915, 43 S. E. 380.

When the mistake was made with full knowledge of the facts and without fraud equity will not reform a contract because of mistake of law. Deseret Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215. "[Yet] where the means of knowledge are equal, and no undue advantage was taken, such court will not interpose its powers when the effect of a decree would be to give to one litigant, and take from another, something of value not in contemplation by the parties at the time of the contract, without any consideration being paid therefor." Jeakins *v.* Frazier, 64 Kan. 267, 67 Pac. 854 [*reversing* 9 Kan. App. 850, 62 Pac. 354]. See also *infra*, VIII, C.

62. Griffith *v.* Townley, 69 Mo. 13, 33 Am. Rep. 476; Marsh *v.* McNair, 48 Hun (N. Y.) 117. Also see cases cited *supra*, note 60.

Mistake as to a well-settled principle of law.—A contract was made in good faith to convey a valid title to property, but by operation of a well-settled principle of law, of which both parties were ignorant, the title failed. Relief was granted. King *v.* Doolittle, 1 Head (Tenn.) 77.

In several states the courts are inclined to correct mistakes of law the same as mistakes of fact. Bonbright *v.* Bonbright, 123 Iowa 305, 98 N. W. 784; Reed *v.* Root, 59 Iowa 359, 13 N. W. 323; Evants *v.* Strode, 11 Ohio 480, 38 Am. Dec. 744; McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731; Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499.

63. Casady *v.* Woodbury County, 13 Iowa 113. See also *supra*, text and note 12.

known facts as put into an instrument.[64] Where one misconstrues his contract as written,[65] or insists that he knows the legal effect of the terms used,[66] the mistake is of law and not reformable. An expression of the intention of the parties, omitted by mistake of law, will not be supplied.[67] Where, however, equities affect the case, and it appears that defendant avails himself of opportunities afforded by the mistake, or takes unconscionable advantage of plaintiff, the latter, when blameless, is entitled to reformation, although the mistake was of law; [68] also although the mistake may be attributable to the agent of the party now seeking to take advantage of it.[69] But a mistake or misapprehension of the law by the attorney of one of the parties to the agreement is not sufficient to warrant reformation.[70]

b. As to Legal Operation and Effect of Instrument. Where there is a mistake as to the legal effect of the instrument, that is, a making of the instrument which grew out of a misconception or misapprehension as to the legal scope or effect of known facts, no ground to reform exists.[71] This rule has been applied to mistakes as to the legal effect of contracts in general,[72] bonds,[73] deeds,[74] negoti-

64. Pomeroy Eq. Jur. § 845.

65. Sibert *v.* McAvoy, 15 Ill. 106. See also Tillar *v.* Wilson, 79 Ark. 256, 96 S. W. 381.

66. Atherton *v.* Roche, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591.

67. Allen *v.* Anderson, 44 Ind. 395; Western Union Tel. Co. *v.* Shepard, 49 N. Y. App. Div. 345, 63 N. Y. Suppl. 435.

68. Allen *v.* Elder, 76 Ga. 674, 2 Am. St. Rep. 63; Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816; Ackerman *v.* Begrisch, (N. J. Ch. 1901) 50 Atl. 673; Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165.

69. Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165; Biggs *v.* Bailey, 49 W. Va. 188, 38 S. E. 499; Bailey *v.* American Cent. Ins. Co., 13 Fed. 250, 4 McCrary 221; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183.

70. Garnar *v.* Bird, 57 Barb. (N. Y.) 277; Gilbert *v.* Gilbert, 9 Barb. (N. Y.) 532; Pennell *v.* Wilson, 2 Rob. (N. Y.) 505. *Compare supra*, notes 35, 48, 79.

Where an attorney in fact exceeded his authority in making a sale of realty, the mistake of the parties as to the effect and validity of the deed is a mistake of law, and insufficient to warrant reformation. Morton *v.* Morris, 27 Tex. Civ. App. 262, 66 S. W. 94.

A mistake through the ill advice of a notary was corrected in Whitmore *v.* Hay, 85 Wis. 240, 55 N. W. 708, 39 Am. St. Rep. 838.

The fact that the attorney-general accepted a deed, which conveyed less than was intended, and decided that it was sufficient, even if he knew what the deed was intended to convey, is not such a mistake of law as to prevent the state from obtaining a reformation. State *v.* Lorenz, 22 Wash. 289, 60 Pac. 644.

71. *Alabama.*—Orr *v.* Echols, 119 Ala. 340, 24 So. 357; Larkins *v.* Biddle, 21 Ala. 252.

Iowa.— Corning *v.* Grohe, 65 Iowa 328, 21 N. W. 662.

Kentucky.—Overstreet *v.* Mouser, 14 Ky. L. Rep. 480.

New York.— Arthur *v.* Arthur, 10 Barb. 9; Hall *v.* Reed, 2 Barb. Ch. 500.

Wisconsin.— Neff *v.* Rains, 33 Wis. 689.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 61.

Compare Lawson *v.* Jones, 40 Nova Scotia 303.

Such a mistake induced by the act of the other party, however, has been held to be reformable. Heert *v.* Cruger, 14 Misc. (N. Y.) 508, 35 N. Y. Suppl. 1063.

Exceptions to general rule see cases cited *supra*, note 60.

72. Rector *v.* Collins, 46 Ark. 167, 55 Am. Dec. 571; Loftus *v.* Fischer, 106 Cal. 616, 39 Pac. 1064; Wood *v.* Price, 46 Ill. 439; Broadwell *v.* Broadwell, 6 Ill. 599; Wolsey *v.* Neeley, 46 Ill. App. 387; Calverly *v.* Harper, 40 Ill. App. 96; Helm *v.* Wright, 2 Humphr. (Tenn.) 72.

A bill cannot be sustained by one of the parties to reform a contract on the ground that he understood its effect to be different from the legal one. And the fact that witnesses present misunderstood the legal effect of the writing, or that each of the parties gave a peculiar interpretation to it, does not afford a presumption of mistake. Coffing *v.* Taylor, 16 Ill. 457.

For another view of the subject see Brown *v.* Bonner, 8 Leigh (Va.) 1, 31 Am. Dec. 637; Travelers' Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390; Hooe *v.* Alexandria, 12 Fed. Cas. No. 6,667, 1 Cranch C. C. 98, *dictum*.

73. Glenn *v.* Statler, 42 Iowa 107, holding that ignorance of the legal effect does not afford grounds for equitable relief. But in McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731, the opposite conclusion was reached.

74. *Alabama.*— Kelly *v.* Turner, 74 Ala. 513.

California.— Burt *v.* Wilson, 28 Cal. 632, 87 Am. Dec. 142.

Illinois.— Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670; Goltra *v.* Sanasack, 53 Ill. 456; Gordere *v.* Downing, 18 Ill. 492; Oswald *v.* Sproehnle, 16 Ill. App. 368.

Indiana.— Nelson *v.* Davis, 40 Ind. 366.

Maine.— Farley *v.* Bryant, 32 Me. 474.

able instruments and indorsements thereon,[75] and powers of attorney.[76] The doctrine has been carried so far as to hold that a grantee who relied upon the recital in a deed of the number of acres conveyed as a guaranty of quantity, thereby mistaking the legal effect of the instrument, cannot obtain any relief by way of reformation.[77] It appears, however, that the courts are inclined to be more lenient when the mistake is as to the legal effect of technical language, such as is necessary to the proper conveyance of real property.[78] But, because by mistake of judgment a deed will not effect the desired object, that does not warrant the interference of equity.[79]

c. In Reducing Agreement to Writing. Where, after making an agreement, in the process of reducing it to writing, through mistake of law, the instrument fails to express the agreement actually made, there is ground to reform to the same extent as if the failure of the instrument to express the contract was caused by mistake of fact, since such mistake of law prevents the real contract from being embodied in the instrument.[80] This includes a mistake arising from ignorance or misapprehension of the parties as to the legal effect of the words or language used to express their intention.[81]

New Hampshire.— Mullin *v.* Eaton, (1889) 19 Atl. 371.

New Jersey.—Durant *v.* Bacot, 13 N. J. Eq. 201.

Ohio.— Thompson *v.* Thompson, 18 Ohio St. 73.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 63.

Contra.— Goodell *v.* Field, 15 Vt. 448; Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193.

Effect of judicial decisions.— Where at the time a deed was made there were several contemperaneous decisions as to the effect of such deed, which were in opposition to previous decisions, and which were subsequently overruled, the mistake of the parties to the deed was one of law, which could not be corrected. Kelly *v.* Turner, 74 Ala. 513.

75. Hicks *v.* Coody, 49 Ark. 425, 5 S. W. 714. *Contra,* Clayton *v.* Bussey, 30 Ga. 946, 76 Am. Dec. 680; Stafford *v.* Fetters, 55 Iowa 484, 8 N. W. 322; Womack *v.* Eacker, 62 N. C. 161.

76. Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27 [*affirming* 12 Fed. Cas. No. 6,897, 3 Mason 294].

77. Martin *v.* Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

78. *Connecticut.*—Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637; Blakeman *v.* Blakeman, 39 Conn. 320.

Iowa.— Crum *v.* Loud, 23 Iowa 219.

Kentucky.— Lear *v.* Prather, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699; Worley *v.* Tuggle, 4 Bush 168.

Missouri.— Corrigan *v.* Tiernay, 100 Mo. 276, 13 S. W. 401.

New York.— Uihlein *v.* Matthews, 93 N. Y. App. Div. 57, 86 N. Y. Suppl. 924 [*affirmed* in 183 N. Y. 563, 76 N. E. 1111]; Brown *v.* Brown, 79 Hun 44, 29 N. Y. Suppl. 652.

South Carolina.— Brock *v.* O'Dell, 44 S. C. 22, 21 S. E. 976.

Tennessee.— Cromwell *v.* Winchester, 2 Head 389.

United States.— Pascault *v.* Cochran, 34 Fed. 358.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 61 *et seq.*

But see Fowler *v.* Black, 136 Ill. 363, 26 N. E. 596, 11 L. R. A. 670.

A stipulation contrary to the real intention of the parties having been inserted in a conveyance through a misapprehension as to its effect, a party can have the conveyance rectified, where it would be against equity and good conscience for the other party to retain the benefit. Lawson *v.* Jones, 40 Nova Scotia 303. *Compare* Moore *v.* Tate, 114 Ala. 582, 21 So. 820 [*explained* in Orr *v.* Echols, 119 Ala. 340, 24 So. 357]. Where, because the parties thought the law required it, a reservation was inserted in a mortgage, whereas the entire interest and all the land was intended to be mortgaged, the mortgage will be corrected. Lear *v.* Prather, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699.

79. Durant *v.* Bacot, 13 N. J. Eq. 201.

80. *Connecticut.*— Haussman *v.* Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74.

Georgia.— Wyche *v.* Greene, 11 Ga. 159.

Iowa.— Bonbright *v.* Bonbright, 123 Iowa 365, 98 N. W. 784; Reed *v.* Root, 59 Iowa 359, 13 N. W. 323.

Kentucky.— Lear *v.* Prather, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699.

New York.— Marsh *v.* McNair, 48 Hun 117.

Ohio.— Evants *v.* Strode, 11 Ohio 480, 38 Am. Dec. 744.

Virginia.— Brown *v.* Bonner, 8 Leigh 1, 31 Am. Dec. 637.

Wisconsin.— Wisconsin M. & F. Ins. Co Bank *v.* Mann, 100 Wis. 596, 76 N. W. 777.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 72. See also *supra,* text and note 47.

81. *Alabama.*— Orr *v.* Echols, 119 Ala. 340, 24 So. 357.

Iowa.— Hopwood *v.* McCausland, 120 Iowa 218, 94 N. W. 469.

Kentucky.—Welch *v.* Welch, 13 Ky. L. Rep. 639.

Minnesota.— Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

d. Mistake by Scrivener or Draftsman. The mistake of a scrivener, although it be a mistake of law, in drawing up an instrument, whereby he fails to carry out the previous agreement of the parties, may be corrected.[82]

D. Mutuality of Mistake[83] **— 1. In General.** A unilateral mistake is not a ground for reformation. An instrument which agrees with the intention of one party, although under mistake as to the other, cannot be reformed.[84] Before equity will reform a written instrument, it must appear that there was a valid agreement[85] sufficiently expressing the real intent of the parties, and that the written instrument failed to express such intent, and that this failure was due to mutual mistake.[86] On the other hand where all these elements exist, that is

Mississippi.—Barataria Canning Co. *v.* Ott, 88 Miss. 771, 41 So. 378.

Nebraska.— Lansing *v.* Commercial Union Assur. Co., 4 Nebr. (Unoff.) 140, 93 N. W. 756.

New York.— Pitcher *v.* Hennessey, 48 N. Y. 415; Brown *v.* Brown, 79 Hun 44, 29 N. Y. Suppl. 652 [*affirmed* in 150 N. Y. 574, 44 N. E. 1121].

Oregon.— Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333.

Canada.— Lawson *v.* Jones, 40 Nova Scotia 303.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 72.

See also *supra*, III, C, 2, b.

Rule restated.— The court said in Abraham *v.* North German Ins. Co., 40 Fed. 717, 722: "If, however, in a given case, the parties actually mistake or misunderstand the principle of law applicable to the subject-matter of the contract, and reach an agreement relying upon this mistake of the law, there is no ground upon which a court of equity can reform the contract. The court cannot know whether the parties, if they had correctly understood the law, would have entered into any contract on the subject, or what terms they might have reached touching the same. . . . When, however, the mistake lies, not in a misunderstanding of the principles of the law as controlling the subject of the contract, or the rights of the parties connected therewith, but merely in the terms proper to be used in defining the actual contract of the parties, such a mistake, though in one sense a mistake of law, is one that a court of equity will correct."

82. Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637; Collier *v.* Lanier, 1 Ga. 238; Rogers *v.* Atkinson, 1 Ga. 12; Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27; Sampson *v.* Mudge, 13 Fed. 260; Hearn *v.* Equitable Safety Ins. Co., 7 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398]. *Compare* Lawson *v.* Jones, 40 Nova Scotia 303.

Mistake of fact by draftsman see *supra*, III, B, 2, b, (I).

83. **Mistake and fraud** see *infra*, III, E.

84. Mills *v.* Lewis, 55 Barb. (N. Y.) 179, 37 How. Pr. 422; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301. *Compare* Moffett, etc., Co. *v.* Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 L. ed. 1108 [*reversing* 91 Fed. 28, 33 C. C. A. 319 (*reversing* 82 Fed. 255)]. See also cases cited *supra*, note 82; Thompson *v.* Whitmore, 1 Johns. & H. 268, 3 L. T. Rep. N. S. 845, 9 Wkly. Rep. 297, 70 Eng. Reprint 748, and cases cited *infra*, notes 89, 99. *Compare* Gun *v.* McCarthy, L. R. 13 Ir. 304.

85. See *infra*, IV, C.

Chancery will not make a new contract under the pretext of correcting a mistake (McMinn *v.* Patton, 92 N. C. 371; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301), for where there is no meeting of the minds, there is no contract capable of reformation (Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534; Ordway *v.* Chace, 57 N. J. Eq. 478, 42 Atl. 149). See also text and notes 12, 63.

86. *Alabama.*— Folmar *v.* Lehman-Durr Co., 147 Ala. 472, 41 So. 750.

Arkansas.— Varner *v.* Turner, 83 Ark. 131, 102 S. W. 1111.

Connecticut.— Brainerd *v.* Arnold, 27 Conn. 617.

Florida.— Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

Georgia.— Quiggle *v.* Vining, 125 Ga. 98, 54 S. E. 74; Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813; Newell *v.* Stiles, 21 Ga. 118.

Idaho.— Houser *v.* Austin, 2 Ida. (Hasb.) 204, 10 Pac. 37.

Illinois.— Kyner *v.* Ball, 182 Ill. 171, 54 N. E. 925; Emery *v.* Mohler, 69 Ill. 221; Keith *v.* Henkleman, 68 Ill. App. 623; Douglas *v.* Grant, 12 Ill. App. 273.

Indiana.— Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114; Wood *v.* Deutchman, 75 Ind. 148; Welshbillig *v.* Dienhart, 65 Ind. 94; Buck *v.* Steffey, 65 Ind. 58; Baldwin *v.* Kerlin, 46 Ind. 426; Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645.

Iowa.— Fullerton *v.* Des Moines, (1908) 115 N. W. 607; Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Conner *v.* Baxter, 124 Iowa 219, 99 N. W. 726; Montgomery *v.* Mann, 120 Iowa 609, 94 N. W. 1109; Turpin *v.* Gresham, 106 Iowa 187, 76 N. W. 680; Heaton *v.* Ainley, (1898) 74 N. W. 766; Marshall *v.* Westrope, 98 Iowa 324, 67 N. W. 257; Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533.

Kansas.— Cox *v.* Beard, 75 Kan. 369, 89 Pac. 671; Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482.

Kentucky.— Graves *v.* Mattingly, 6 Bush 361; East Jellica Coal Co. *v.* Carter, 97 S. W. 768, 30 Wkly. Rep. 174; Hill *v.* Pettit, 66 S. W. 188, 23 Ky. L. Rep. 2001; Stockhoff *v.*

a valid agreement between the parties and an instrument failing to adequately

Brannin, 14 Ky. L. Rep. 717; Reeder *v.* Lewis, 7 Ky. L. Rep. 373.

Maine.— Young *v.* McGown, 62 Me. 56.

Maryland.— Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273; Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024; Renshaw *v.* Lefferman, 51 Md. 277; Dulany *v.* Rogers, 50 Md. 524.

Massachusetts.— Gaylord *v.* Pelland, 169 Mass. 356, 47 N. E. 1019.

Michigan.— Kenyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675; Burns *v.* Caskey, 100 Mich. 94, 58 N. W. 642; Darling *v.* Jewell, 96 Mich. 187, 55 N. W. 610; Ludington *v.* Ford, 33 Mich. 123.

Minnesota.— Fritz *v.* Fritz, 94 Minn. 705, 102 N. W. 705; Martini *v.* Christensen, 60 Minn. 491, 62 N. W. 1127.

Mississippi.— Miles *v.* Miles, 84 Miss. 624, 37 So. 112; Phœnix F. Ins. Co. *v.* Hoffheimer, 46 Miss. 645; Dunbar *v.* Newman, 46 Miss. 231; Simmons *v.* North, 3 Sm. & M. 67.

Missouri.— Redding *v.* Badger Lumber Co., 127 Mo. App. 625, 106 S. W. 557; Steinberg *v.* Phœnix Ins. Co., 49 Mo. App. 255; Grand Lodge A. O. U. W. *v.* Slater, 44 Mo. App. 445; Allen *v.* Carter, 8 Mo. App. 585; Bobb *v.* Bobb, 7 Mo. App. 501.

Nebraska.— Clark *v.* Mossman, 58 Nebr. 87, 78 N. W. 399; Beach *v.* Reed, 55 Nebr. 605, 76 N. W. 22.

New Jersey.— Chelsea Nat. Bank *v.* Smith, (Ch. 1908) 69 Atl. 533; Slack *v.* Craft, (Ch. 1904) 57 Atl. 1014; Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692; Gough *v.* Williamson, 62 N. J. Eq. 526, 50 Atl. 323; Ocean Beach Assoc. *v.* Trenton Trust, etc., Co., (Ch. 1901) 48 Atl. 559; Dougherty *v.* Greenwich Ins. Co., (Ch. 1895) 33 Atl. 295; Doniol *v.* Commercial F. Ins. Co., 34 N. J. Eq. 30.

New York.— Avery *v.* Equitable L. Assur. Co., 117 N. Y. 451, 23 N. E. 3; Whittemore *v.* Farrington, 76 N. Y. 452; Paine *v.* Jones, 75 N. Y. 593; Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453; Jackson *v.* Andrews, 59 N. Y. 244; Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; Fox *v.* Coggeshall, 95 N. Y. App. Div. 410, 88 N. Y. Suppl. 676; Drachler *v.* Foote, 88 N. Y. App. Div. 270, 84 N. Y. Suppl. 977; Kelly *v.* Root, 74 N. Y. App. Div. 499, 77 N. Y. Suppl. 431 [*affirming* 37 Misc. 207, 75 N. Y. Suppl. 163]; McCoubray *v.* St. Paul F. & M. Ins. Co., 50 N. Y. App. Div. 416, 64 N. Y. Suppl. 112 [*affirmed* in 169 N. Y. 590, 62 N. E. 1097]; Perrior *v.* Peck, 39 N. Y. App. Div. 390, 57 N. Y. Suppl. 377 [*affirmed* in 167 N. Y. 582, 60 N. E. 1118]; Miaghan *v.* Hartford F. Ins. Co., 12 Hun 321; Phillips *v.* Gallant, 1 Hun 528, 3 Thomps. & C. 618 [*affirmed* in 62 N. Y. 256]; Smith *v.* Mackin, 4 Lans. 41; Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. 72 [*affirmed* in 55 N. Y. 657]; Mills *v.* Lewis, 55 Barb. 179, 37 How. Pr. 418; New York Ice Co. *v.* North Western Ins. Co., 31 Barb. 72; Kent *v.* Manchester, 29 Barb. 595; Wemple *v.* Stuart, 22 Barb. 154; Lanier *v.* Wyman, 5 Rob. 147; O'Donnel *v.* Harmon, 3 Daly 424; Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Suppl. 885 [*affirmed* in 105 N. Y. App. Div. 376, 94 N. Y. Suppl. 235]; Dougherty *v.* Lion F. Ins. Co., 41 Misc. 285, 84 N. Y. Suppl. 10; Halliday *v.* White, 21 N. Y. Suppl. 878; Ranney *v.* McMullen, 5 Abb. N. Cas. 246; Heelas *v.* Slevin, 53 How. Pr. 356; Humphreys *v.* Hurtt, 50 How. Pr. 291; McHugh *v.* Imperial F. Ins. Co., 48 How. Pr. 230; Lyman *v.* United Ins. Co., 17 Johns. 373.

North Carolina.— Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740; McMinn *v.* Patton, 92 N. C. 371.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Oregon.— Smith *v.* Interior Warehouse Co., (1908) 95 Pac. 499; South Portland Land Co. *v.* Munger, 36 Oreg. 457, 54 Pac. 815, 60 Pac. 5; Mitchell *v.* Holman, 30 Oreg. 280, 47 Pac. 616; Kleinsorge *v.* Rohse, 25 Oreg. 51, 34 Pac. 874; Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73; Evarts *v.* Steger, 5 Oreg. 147.

Pennsylvania.— Graham *v.* Carnegie Steel Co., 217 Pa. St. 34, 66 Atl. 103; Cooper *v.* Farmers' Mut. F. Ins. Co., 50 Pa. St. 299, 88 Am. Dec. 544; Schettiger *v.* Hopple, 3 Grant 54; Boyce *v.* Hamburg-Bremen F. Ins. Co., 24 Pa. Super. Ct. 589; Bierman *v.* Lebanon Valley College, 20 Pa. Super. Ct. 133.

Rhode Island.— Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

Utah.— Desert Nat. Bank *v.* Dinwoodey, 17 Utah 43, 53 Pac. 215.

West Virginia.— Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856.

Wisconsin.— Kruse *v.* Koelzer, 124 Wis. 536, 102 N. W. 1072; St. Clara Female Academy *v.* Delaware Ins. Co., 93 Wis. 57, 66 N. W. 1140; Ledyard *v.* Hartford F. Ins. Co., 24 Wis. 496.

Wyoming.— Stoll *v.* Nagle, 15 Wyo. 86, 86 Pac. 26.

United States.— Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537; Travelers Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390; Durham *v.* Fire, etc., Ins. Co., 22 Fed. 468, 10 Sawy. 326; Spare *v.* Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. 148; Harvey *v.* U. S., 13 Ct. Cl. 322.

England.— Paget *v.* Marshall, 28 Ch. D. 255, 49 J. P. 85, 54 L. J. Ch. 575, 33 Wkly. Rep. 608; Heneage *v.* Hunloke, 2 Atk. 456, 26 Eng. Reprint 676; Bentley *v.* Mackay, 31 Beav. 143, 54 Eng. Reprint 1092 [*affirmed* in 4 De G. F. & J. 279, 8 Jur. N. S. 1001, 7 L. T. Rep. N. S. 143, 10 Wkly. Rep. 873, 65 Eng. Ch. 216, 45 Eng. Reprint 1191]; Bradford *v.* Romney, 30 Beav. 431, 8 Jur. N. S. 403, 31 L. J. Ch. 497, 6 L. T. Rep. N. S. 208, 10 Wkly. Rep. 414, 54 Eng. Reprint 956; Metropolitan Counties Assur. Soc. *v.* Brown, 26 Beav. 454, 5 Jur. N. S. 378, 28 L. J. Ch. 581, 7 Wkly. Rep. 303, 53 Eng.

express the same, and the mutual mistake is shown, reformation is authorized.[87]

Reprint 973; Hartopp *v.* Hartopp, 21 Beav. 259, 2 Jur. N. S. 794, 25 L. J. Ch. 471, 52 Eng. Reprint 858; Murray *v.* Parker, 19 Beav. 305, 52 Eng. Reprint 367; Fowler *v.* Fowler, 4 De G. & J. 250, 61 Eng. Ch. 196, 45 Eng. Reprint 97; Walker *v.* Armstrong, 8 De G. M. & G. 531, 2 Jur. N. S. 959, 25 L. J. Ch. 738, 4 Wkly. Rep. 770, 57 Eng. Ch. 411, 44 Eng. Reprint 495; Sells *v.* Sells, 1 Dr. & Sm. 42, 29 L. J. Ch. 500, 8 Wkly. Rep. 327, 62 Eng. Reprint 294; Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363; Fallon *v.* Robins, 16 Ir. Ch. 422; Halfpenny *v.* Udale, 9 Mod. 56, 88 Eng. Reprint 313, 2 P. Wms. 151, 24 Eng. Reprint 677; Watt *v.* Grove, 2 Sch. & Lef. 492.

Canada.— Feidel *v.* Zwicker, 31 Nova Scotia 232.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 74.

Rule well stated.—A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution; and also must be able to show exactly and precisely the form to which the deed ought to have been brought. To reform a contract, and then enforce it in its new shape, calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual. Coppes *v.* Keystone Paint, etc., Co., 36 Pa. Super. Ct. 38.

Mistakes in a deed must be mutual.— Greenhaw *v.* Combs, 74 Ark. 336, 85 S. W. 768; McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52; Wilson *v.* Byers, 77 Ill. 76; Sherwood *v.* Johnson, 28 Ind. App. 277, 62 N. E. 645; Montgomery *v.* Marm, 120 Iowa 609, 94 N. W. 1109; Darling *v.* Jewell, 96 Mich. 187, 55 N. W. 610; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301; Kruse *v.* Koelzer, 124 Wis. 536, 102 N. W. 1072; Harter *v.* Christoph, 32 Wis. 245.

A deed of gift will not be given an effect contrary to the intention of the grantor. Meeks *v.* Stillwell, 54 Ohio St. 541, 44 N. E. 267.

87. *Arkansas.*— Stephenson *v.* Garner, (1907) 105 S. W. 572.

California.— Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112.

Illinois.— Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206; Gray *v.* Merchants Ins. Co., 113 Ill. App. 537; Dunn *v.* O'Neara, 70 Ill. App. 609.

Indiana.—Webb *v.* Hammond, 31 Ind. App. 613, 68 N. E. 916; Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943; Phillip Zorn Brewing Co. *v.* Malott, (1897) 46 N. E. 23.

Iowa.— Nielander *v.* Chicago, etc., R. Co., 114 Iowa 420, 87 N. W. 285.

Kansas.— Huber Mfg. Co. *v.* Claudel, 71 Kan. 441, 80 Pac. 960; German Ins. Co. *v.* Kirkendall, 64 Kan. 884, 67 Pac. 443.

Kentucky.— Bush *v.* Starks, 65 S. W. 589, 23 Ky. L. Rep. 1560.

Massachusetts.— Fowle *v.* Pitt, 183 Mass. 351, 67 N. E. 343; Moore *v.* Bigelow, 158 Mass. 60, 32 N. E. 900.

Michigan.— Smith *v.* Wakeman, 114 Mich. 611, 72 N. W. 599.

Missouri.— Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099; Henderson *v.* Beasley, 137 Mo. 199, 38 S. W. 950.

New Jersey.— Sloss-Sheffield Steel, etc., Co. *v.* Ætna L. Ins. Co., (Ch. 1908) 70 Atl. 380; Wirsching *v.* Grand Lodge F. & A. M., 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119.

New York.— Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83, 45 N. Y. Suppl. 460 [*affirmed* in 160 N. Y. 697, 55 N. E. 1098]; Woolf *v.* Barnes, 46 Misc. 169, 93 N. Y. Suppl. 219; Ranalli *v.* Zeppetelli, 94 N. Y. Suppl. 561.

Oregon.— Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333.

Texas.— Kelley *v.* Ward, (Civ. App. 1900) 58 S. W. 207 [*affirmed* in 94 Tex. 289, 60 S. W. 311].

Utah.— Griffin *v.* Salt Lake City, 18 Utah 132, 55 Pac. 383.

Washington.— Jones *v.* New England Mortg. Security Co., 38 Wash. 637, 80 Pac. 796; Dennis *v.* Northern Pac. R. Co., 20 Wash. 320, 55 Pac. 210.

West Virginia.— See Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902.

Wisconsin.— Rowell *v.* Smith, 123 Wis. 510, 102 N. W. 1.

United States.— Brown *v.* Cranberry Iron, etc., Co., 82 Fed. 351.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 74.

A clerical mistake by one party shared in by the other at execution is ground for reformation. Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. 46.

A contract containing an inadvertent, but not mutual, mistake will only be reformed to conform to the views of both parties. Humphreys *v.* Hurtt, 20 Hun (N. Y.) 398 [*affirmed* in 85 N. Y. 642].

Mutual mistakes in deeds will be reformed. Kelly *v.* Galbraith, 87 Ill. App. 63 [*affirmed* in 186 Ill. 593, 58 N. E. 431]; Ladd *v.* Judson, 71 Ill. App. 283 [*affirmed* in 169 Ill. 73, 48 N. E. 174]; Drummond *v.* Krebs, 8 Kan. App. 180, 55 Pac. 478; Smith *v.* Wakeman, 114 Mich. 611, 72 N. W. 599; Henderson *v.* Beasley, 137 Mo. 199, 38 S. W. 950; Wirsching *v.* Grand Lodge, F. & A. M., 67 N. J. Eq. 711, 56 Atl. 713, 63 Atl. 1119. Where defendant in good faith sold and attempted to convey to plaintiff by warranty deed the land within a certain inclosure, but did not have full title to it, and her deed did not cover a portion of the land, plaintiff's remedy would be an action to reform

That one party has failed to notice a stipulation contained in an instrument, which was not induced by fraud or misrepresentation on behalf of the other contracting party, is not ground for relief.[88]

2. Cancellation Although no Reformation. While equity will not reform an instrument for the mistake of one party alone so as to impose on the other party obligations which he did not intend to assume,[89] it will cancel an instrument for such mistake.[90] But where the reformation has the effect of cancellation the other party cannot complain that the instrument has been reformed for the mistake of one party alone.[91]

3. What Constitutes Mutual Mistake. Mutual mistake for the purpose of

the deed. Hoffman *v.* Kirby, 136 Cal. 26, 68 Pac. 321. See also cases cited *supra*, this note.

88. Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 24 N. Y. App. Div. 172, 48 N. Y. Suppl. 1083, 31 N. Y. App. Div. 630, 53 N. Y. Suppl. 1102 [*affirmed* in 161 N. Y. 605, 56 N. E. 145].

Effect of a bad bargain.— If an executing party misconceives his liability, or makes a contract which subsequently proves to be unfortunate, that alone does not give jurisdiction to reform the contract in equity. Moran *v.* McLarty, 75 N. Y. 25. See *supra*, text and notes 43, 57.

The fact that the grantee knew of the existence of a railroad over land conveyed to him with the usual covenants of warranty will not entitle the grantor to a reformation of the deed excepting such encumbrance. Gerald *v.* Elley, 45 Iowa 322.

89. *Arkansas.*— Greenhaw *v.* Combs, 74 Ark. 336, 85 S. W. 768.

Georgia.— Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813.

Illinois.— Morgan *v.* Owens, 228 Ill. 598, 81 N. E. 1135.

Kansas.— Reeder *v.* Gorsuch, 55 Kan. 553, 40 Pac. 897.

Kentucky.— Royer Wheel Co. *v.* Miller, 50 S. W. 62, 20 Ky. L. Rep. 1831.

Nebraska.— Farmers' L. & T. Co. *v.* Suydam, 69 Nebr. 407, 95 N. W. 867.

New Jersey.— Herron *v.* Mullen, 56 N. J. Eq. 839, 42 Atl. 1016.

New York.— Miller *v.* Carpenter, 68 N. Y. App. Div. 346, 74 N. Y. Suppl. 231; Hall *v.* Reed, 2 Barb. Ch. 500.

Oregon.— King *v.* Holbrook, 38 Oreg. 452, 63 Pac. 651.

United States.— New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532.

England.— See Paget *v.* Marshall, 28 Ch. D. 255, 49 J. P. 85, 54 L. J. Ch. 575, 51 L. T. Rep. N. S. 351, 33 Wkly. Rep. 608; Garrard *v.* Frankel, 30 Beav. 445, 8 Jur. N. S. 985, 31 L. J. Ch. 604, 54 Eng. Reprint 961.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 74.

For example where a grantor intends a mortgage debt "to be assumed," but the grantee thinks he buys "subject to" the mortgage, the grantee has no action to reform. Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 600. *Compare* Albany City Sav. Inst. *v.* Burdick, 20 Hun (N. Y.) 104 [*reversed* in 87 N. Y. 40].

90. Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813; Morgan *v.* Owens, 228 Ill. 598, 81 N. E. 1135; Youngstown Electric Light Co. *v.* Butler County Poor Dist., 21 Pa. Super. Ct. 95. See Cancellation of Instruments, 6 Cyc. 282.

For a unilateral mistake the remedy is not rectification, but rescission. Werner *v.* Rawson, 89 Ga. 619, 15 S. E. 813; Morgan *v.* Owens, 228 Ill. 598, 81 N. E. 1135; Chelsea Nat. Bank *v.* Smith, (N. J. Ch. 1908) 69 Atl. 533; Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363.

Mistake as to a material inducement.— Where the parties have contracted under a mutual mistake as to any fact which is a material inducement to the contract, such mistake is not ground for reforming the contract, although it might give a right to rescind. Farmers' L. & T. Co. *v.* Suydam, 69 Nebr. 407, 95 N. W. 867.

Instead of rescission defendant, however, may have the option of taking what plaintiff meant to give. Paget *v.* Marshall, 28 Ch. D. 255, 49 J. P. 85, 54 L. J. Ch. 575, 51 L. T. Rep. N. S. 351, 33 Wkly. Rep. 608; Bloomer *v.* Spittle, L. R. 13 Eq. 427, 41 L. J. Ch. 369, 26 L. T. Rep. N. S. 272, 20 Wkly. Rep. 435. *Compare* Roberts *v.* Kingsly, 1 Ves. 238, 27 Eng. Reprint 1005. A signed an agreement to take from B a lease of a house, at the rent of £230, and on the terms of a lease on which the agreement was written, which erroneously stated the rental to be £130. A lease was afterward executed, in which the rent was erroneously stated to be £130. The error on the part of the lessor was proved, and the court considered that the lessee must have perceived the discrepancy between the amount of rent previously stated by B and specified in the agreement, and that reserved by the lease. It was held that B was not entitled to have the lease reformed, but that the proper relief was to give the lessee the option of taking the reformed lease or of rejecting it, paying, in the latter case, a rental for the past occupation, and a mortgage on the lease created by such lessee. Garrard *v.* Frankel, 30 Beav. 445, 8 Jur. N. S. 985, 31 L. J. Ch. 604, 54 Eng. Reprint 961.

91. Pritchett *v.* Frisby, 63 S. W. 10, 23 Ky. L. Rep. 433; Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

reformation consists in a misunderstanding reciprocal and common to both the contracting parties, when each alike labored under the same misconception in respect to the terms of a written instrument.[92] By mutuality is not meant that both parties must agree on the hearing that the mistake was in fact made, but the evidence of the mutuality of the mistake must relate to the time of the execution of the instrument, and show that at that particular time the parties intended to say a certain thing and by mistake expressed another.[93] The mistake having been shown to be common and reciprocal, it is of no consequence that the instrument was read by the parties at the time of signing.[94] In all cases it is necessary to make clear the mutuality of the mistake,[95] as reformation is not the remedy for mistakes not participated in by both parties.[96] The facts showing mutuality may appear by admission of the parties,[97] or from the face of the instrument which it is sought to have reformed.[98]

4. Who Must Be Mistaken. It is enough if the mistake is mutual between the real parties in interest.[99] If the mistake affects merely an interest, it must be common as between the parties to such interest.[1]

5. Effect of Agency. The mistake of a person acting as agent for both parties

92. *Connecticut.*— Bishop *v.* Clay F. & M. Ins. Co., 49 Conn. 167.

Georgia.— Wyche *v.* Greene, 11 Ga. 159.

Indiana.— St. Clair *v.* Marquell, 161 Ind. 56, 67 N. E. 693.

Iowa.— Worsley *v.* Burlington Ins. Co., 74 Iowa 464, 38 N. W. 161.

Kentucky.— Hill *v.* Pettit, 66 S. W. 188, 23 Ky. L. Rep. 2001; Bush *v.* Starks, 65 S. W. 589, 23 Ky. L. Rep. 1560.

Massachusetts.— Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152.

Nevada.— Wilson *v.* Wilson, 23 Nev. 267, 45 Pac. 1009.

New York.— Botsford *v.* McLean, 45 Barb. 478.

Oklahoma.— Hope *v.* Bourland, 21 Okla. 864, 98 Pac. 580.

South Dakota.— MacVeagh *v.* Burns, 2 S. D. 83, 48 N. W. 835.

England.— Murray *v.* Parker, 19 Beav. 305, 52 Eng. Reprint 367.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 75.

93. Matthews *v.* Whitethorn, 220 Ill. 36, 77 N. E. 89; Hope *v.* Bourland, 21 Okla. 864, 98 Pac. 580.

Common error must have existed at the time of the execution of the instrument. Cleghorn *v.* Zumwalt, 83 Cal. 155, 23 Pac. 294.

A decree reforming a contract fixing the boundary between adjoining landowners, on the ground of mutual mistake, is sustained by findings that when the contract was made neither party knew the location of the true dividing line, that it had been previously obliterated, but was located more than one hundred feet in plaintiff's favor from the line as fixed in the contract, and that the parties believed that the contract line was correct, although there were no words in the contract which the parties did not intend to include, and none were omitted which they intended to include. Phillip Zorn Brewing Co. *v.* Malott, (Ind. 1897) 46 N. E. 23.

Failure to show an agreement, and a departure from it in the execution of the instrument precludes reformation because the alleged mistake is wanting. Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259; Haddon *v.* Neighbarger, 9 Kan. App. 529, 58 Pac. 568.

94. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015; Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83, 45 N. Y. Suppl. 460 [*affirmed* in 160 N. Y. 697, 55 N. E. 1098].

Failure to read as negligence see *infra*, VIII, D, 2, b.

95. Hertzler *v.* Stevens, 119 Ala. 333, 24 So. 521; Clark *v.* St. Louis Transfer R. Co., 127 Mo. 255, 30 S. W. 121; Kelley *v.* Root, 37 Misc. (N. Y.) 207, 75 N. Y. Suppl. 163 [*affirmed* in 74 N. Y. App. Div. 499, 77 N. Y. Suppl. 431]; Hope *v.* Bourland, 21 Okla. 864, 98 Pac. 580.

Weight and sufficiency of evidence see *infra*, XV, C.

96. Bancharel *v.* Patterson, 64 Minn. 454, 67 N. W. 356; Carey Mfg. Co. *v.* Merchants' Ins. Co., 25 Misc. (N. Y.) 18, 54 N. Y. Suppl. 398; Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301; Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797. See *supra*, III, D, 1, 2.

Misapprehension of one of the parties is not alone sufficient. See Quiggle *v.* Vining, 125 Ga. 98, 54 S. E. 74. See *supra*, text and notes 35, 48, 70, 79.

97. Turner *v.* Wabash R. Co., 114 Mo. App. 539, 90 S. W. 391. *Compare* Woolf *v.* Barnes, 46 Misc. (N. Y.) 169, 93 N. Y. Suppl. 219.

98. Reep *v.* Lyman, 27 Ohio Cir. Ct. 293.

Evidence of mistake see *infra*, XV.

Mistake shown by reference to another document.— Where a deed recites that land described is conveyed in trust for interurban railway purposes pursuant to a written option and proposal, and when read in connection with such option discloses a mutual mistake, a court of equity will grant a reformation. Hartman *v.* Midland Traction Co., 27 Ohio Cir. Ct. 664.

99. Murray *v.* Sells, 53 Ga. 257; Reeder *v.* Lewis, etc., R. Co., 7 Ky. L. Rep. 373.

1. Ward *v.* Waterman, 85 Cal. 488, 24 Pac. 930.

to a contract may be mutual so as to warrant correction;[2] but the mistake of an agent of one principal dealing with another principal,[3] or with the agent of another principal,[4] will not authorize reformation, unless the mistake is clearly shown to be a mutual one.[5]

E. Fraud or Inequitable Conduct — 1. In General. The foregoing has shown that, whether a mistake is of fact or of law, to be reformable it must be mutual.[6] The other ground which will warrant the reformation of an instrument is where there is ignorance or mistake on one side, and fraud or inequitable conduct on the other.[7] While mere ignorance of law is ordinarily not

2. Warrick *v.* Smith, 137 Ill. 504, 27 N. E. 709; Trump *v.* Paul, 78 Ill. App. 165; Sanner *v.* Smith, 51 Ill. App. 671; Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058; Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791; House *v.* Wechsler, 104 N. Y. App. Div. 124, 93 N. Y. Suppl. 593. *Compare* Gun *v.* McCarthy, L. R. 13 Ir. 304.

Mistake of draftsman see *supra,* III, B. 2, b; III, C, 2, d.

Mistake of a conveyancer acting by the direction of one party is not reformable. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099; Brocking *v.* Straat, 17 Mo. App. 296. *Compare* McAdow *v.* Wight, 128 Mo. App. 358, 107 S. W. 421.

Mistake of third person.—A contract will be reformed where the parties agreed on certain modifications, and one of them read a list of agreed changes, while a third person undertook to make the proper erasures in the proposed contract, but did not do so correctly, and the parties signed the contract as changed without reading it. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

3. Barry *v.* Rownd, 119 Iowa 105, 93 N. W. 67; Morris *v.* Penrose, 38 N. J. Eq. 629; Graham *v.* Carnegie Steel Co., 217 Pa. St. 34, 66 Atl. 103. See also Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099; Bracking *v.* Straat, 17 Mo. App. 296. *Compare* McAdow *v.* Wight, 128 Mo. App. 358, 107 S. W. 421, where defendant contracted in writing to sell land in controversy to B. for five hundred and fifty dollars, payable in instalments, B to pay taxes after 1902. The property was somewhat improved thereafter, and in 1905 plaintiff purchased it for one thousand two hundred dollars cash from an agent who procured a deed direct from defendant to plaintiff, and paid defendant the balance of the price owed by B, which deed defendant claimed by mistake failed to except the taxes after 1902 from the covenant of warranty. It was held that the agent in making such sale was the agent of B, and not of defendant, and hence defendant was entitled to have the deed reformed to conform to the contract between himself and W.

4. Mills *v.* Lewis, 37 How. Pr. (N. Y.) 418; Barker *v.* Pullman Palace Car Co., 124 Fed. 555 [*affirmed* in 134 Fed. 70, 67 C. C. A. 196].

5. McCain *v.* Columbia Finance, etc., Co., 97 S. W. 343, 29 Ky. L. Rep. 1292.

Mistake of insurance agent.— The mistake of an insurance agent in dealing with the husband of plaintiff in writing a policy in the name of the husband instead of in the name of the wife, and his subsequent delay in changing it on return by the husband, was reformable after a loss. McCoubray *v.* St. Paul F. & M. Ins. Co., 50 N. Y. App. Div. 416, 64 N. Y. Suppl. 112 [*affirmed* in 169 N. Y. 590, 62 N. E. 109]. See also Mead *v.* Westchester F. Ins. Co., 64 N. Y. 453.

Mode of executing contract.— Where plaintiff, acting only as agent for the manufacture of a gas engine, contracted for the sale thereof to defendant, signing the contract in its individual name, and the contract would have been correctly set forth, but for plaintiff's misapprehension as to the effect upon its liability of the language employed by it in the contract, plaintiff having mistaken the form of signature as an execution of the contract by which its principal, rather than itself, became bound, the error constituted a mistake of fact, against which equity would grant relief, and not a mistake of law. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212, 84 N. E. 449.

6. See *supra,* III, D.

7. *Georgia.*— Dannelly *v.* Cuthbert Oil Co., 131 Ga. 694, 63 S. E. 257; Venable *v.* Barton, 129 Ga. 537, 59 S. E. 253; Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. 706; Wyche *v.* Greene, 26 Ga. 415; Reese *v.* Wyman, 9 Ga. 430.

Illinois.— Bergen *v.* Ebey, 88 Ill. 269; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Smith *v.* Rust, 112 Ill. App. 84.

Indiana.— Koons *v.* Blanton, 129 Ind. 383, 27 N. E. 334.

Iowa.— Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Hausbrandt *v.* Hofler, 117 Iowa 103, 90 N. W. 494; Williams *v.* Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. Rep. 475. *Compare* Fullerton *v.* Des Moines, (1908) 115 N. W. 607.

Kansas.— Cox *v.* Beard, 75 Kan. 369, 89 Pac. 671; Taylor *v.* Deverell, 43 Kan. 469, 23 Pac. 628.

Kentucky.—Gregory *v.* Copeland, 107 S. W. 768, 32 Ky. L. Rep. 1153; Dean *v.* Hall, 105 S. W. 98, 31 Ky. L. Rep. 1306; Pickett *v.* Taylor, 96 S. W. 1111, 29 Ky. L. Rep. 1219.

Massachusetts.— Metcalf *v.* Putnam, 9 Allen 97.

Michigan.— Burchard *v.* Frazer, 23 Mich. 224.

Minnesota.— Cookston Imp. Co. *v.* Marshall, 57 Minn. 333, 59 N. W. 294, 47 Am. St. Rep. 612, *dictum* as to the general doctrine.

Missouri.— Moran Bolt, etc., Mfg. Co. *v.*

relievable,[8] where, on account of misplaced confidence, or because of artifice and deception practised upon him by the opposite party, one is fraudulently misled there is ground for relief by way of reformation.[9]

2. What Constitutes — a. In General. When there is a mistake on one side, if it is not mutual, in order to be ground for reformation, the fraud of the other party must be clearly shown;[10] and such fraud may be actual or constructive.[11] Fraud, to be the basis of reformation of contract, must be fraud in the execution thereof, and, when it is attempted to annex to the writing a parol conditional stipulation, it must appear that it was omitted from the writing at the time of execution through fraud, accident, or mistake.[12] Inequitable conduct, to warrant relief by way of reformation, has been held to consist in doing acts, or omitting to do acts, which the court finds to be unconscionable; as, in taking advantage by one party of the other party's illiteracy,[13] in abusing confidence,[14] in concealing what of right should have been disclosed,[15] or in taking advantage of a mistake of the other party, known or suspected at the time,[16] or the result of

St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Dameron *v.* Jamison, 4 Mo. App. 299.

New Jersey.—Sloss-Sheffield Steel, etc., Co. *v.* Ætna L. Ins. Co., (Ch. 1908) 70 Atl. 380; Chelsea Nat. Bank *v.* Smith, (Ch. 1908) 69 Atl 533; Lloyd *v.* Hulick, (Ch. 1906) 63 Atl. 616; Gebel *v.* Weiss, 42 N. J. Eq. 521, 8 Atl. 889; Cubberly *v.* Cubberly, 39 N. J. Eq. 514.

New York.—Welles *v.* Yates, 44 N. Y. 525; De Peyster *v.* Hasbrouck, 11 N. Y. 582; Simpkins *v.* Taylor, 81 Hun 467, 31 N. Y. Suppl. 169; Kirtland *v.* Schanck, 61 Barb. 348; Kilmer *v.* Smith, 43 N. Y. Super. Ct. 461 [*affirmed* in 77 N. Y. 226, 33 Am. Rep. 613]; Brioso *v.* Pacific Mut. Ins. Co., 4 Daly 246; Gallup *v.* Bernd, 1 N. Y. Suppl. 478; Witthaus *v.* Schack, 57 How. Pr. 310.

North Carolina.— Sykes *v.* Virginia L. Ins. Co., 148 N. C. 13, 61 S. E. 610; Scott *v.* Duncan, 16 N. C. 403.

Ohio.— Graham *v.* Firemen's Ins. Co., 2 Disn. 255.

West Virginia.— Crislip *v.* Cain, 19 W. Va. 438. *Compare* Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793.

United States.— Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532; Trenton Terra Cotta Co. *v.* Clay Shingle Co., 80 Fed. 46.

England.— Clark *v.* Girdwood, 7 Ch. D. 9, 47 L. J. Ch. 116, 37 L. T. Rep. N. S. 614, 26 Wkly. Rep. 90. See also Paget *v.* Marshall, 28 Ch. D. 255, 49 J. P. 85, 54 L. J. Ch. 575, 51 L. T. Rep. N. S. 351, 33 Wkly. Rep. 608; Hartopp *v.* Hartopp, 21 Beav. 259, 2 Jur. N. S. 794, 25 L. J. Ch. 471, 52 Eng. Reprint 858; Watt *v.* Grove, 2 Sch. & Lef. 492.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 80.

Compare Feindel *v.* Zwicker, 31 Nova Scotia 232.

Where there has been part performance of an oral contract to convey, fraud and mistake are sufficient grounds to reform a deed delivered under such contract. Place *v.* Johnson, 20 Minn. 219.

8. See *supra*, III, C, 1. And see Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. 706; Pickett *v.* Taylor, 96 S. W. 1111, 29 Ky. L. Rep. 1219; Monne *v.* Ayer, 52 N. Y. Super. Ct. 139; Sykes *v.* Virginia L. Ins. Co., 148 N. C. 13, 61 S. E. 610.

Plaintiffs having the same means of knowledge as to the legal effect of words used in a contract sought to be avoided as defendant cannot, because of their ignorance of the meaning of the words, in the absence of misrepresentation on part of defendant, obtain relief on the ground of fraud, from their own negligence in signing the agreement. Marshall *v.* Westrope, 98 Iowa 324, 67 N. W. 257.

9. See cases cited *supra*, note 7.

10. Snyder *v.* Ash, 30 N. Y. App. Div. 183, 51 N. Y. Suppl. 772; Duecker *v.* Goeres, 104 Wis. 29, 80 N. W. 91. See also Fullerton *v.* Des Moines, (Iowa 1908) 115 N. W. 607.

In the absence of evidence of fraud or undue influence, reformation is improper. Johnson *v.* Austin, 86 Ark. 446, 111 S. W. 455; Mitchell Mfg. Co. *v.* Kempner, 84 Ark. 349, 105 S. W. 880; Weinhard *v.* Summerville, 46 Wash. 127, 89 Pac. 490, 13 L. R. A. N. S. 1089.

11. Revels *v.* Revels, 64 S. C. 256, 42 S. E. 111, although not so stated in the opinion, the facts show that constructive fraud will be relieved against.

12. Capps *v.* Edwards, 130 Ga. 146, 60 S. E. 455.

13. Kinney *v.* Ensminger, 87 Ala. 340, 6 So. 72; Williams *v.* Hamilton, 104 Iowa 423, 73 N. W. 1029, 65 Am. St. Rep. 475; Pickett *v.* Taylor, 96 S. W. 1111, 29 Ky. L. Rep. 1219; Archer *v.* California Lumber Co., 24 Oreg. 341, 33 Pac. 526.

14. Daly *v.* Simonson, 126 Iowa 716, 102 N. W. 780; Archer *v.* California Lumber Co., 24 Oreg. 341, 33 Pac. 526.

No relation of trust or confidence being shown to exist between the parties, the complainant is not entitled to have a written contract reformed. Kleinsorge *v.* Rohse, 25 Oreg. 51, 34 Pac. 874.

15. Chelsea Nat. Bank *v.* Smith, (N. J. Ch. 1908) 69 Atl. 533; Cook *v.* Liston, 192 Pa. St. 19, 43 Atl. 389; McCormick *v.* Ratcliffe, (Tenn. Ch. App. 1901) 64 S. W. 332.

16. Webb *v.* Morrison, 157 N. Y. 712, 53

importunity.[17] Equity will also interpose, where not to correct, would be to perpetrate a fraud on the other party.[18]

b. Misrepresentation. Misrepresentation is one form of fraud.[19] Hence mistake on one side and misrepresentation, whether wilful or accidental, on the other is ground for reformation when the party deceived has relied on the misrepresentations of the party seeking to bind him, and when the misrepresentation was of a material fact in which the party deceived placed confidence.[20] Unless there are peculiar circumstances of contrivance and abuse of confidence, the mere expression of an opinion, however, is not enough;[21] nor is it sufficient if plaintiff did not rely on the misrepresentation.[22]

F. Reliance Upon Contemporaneous Promise, Etc. When there is no fraud or mistake in the preparation of an instrument,[23] and it appears that the party signing understood its language and purport, it cannot be reformed on the faith of a contemporaneous oral promise which was not kept.[24]

N. E. 1133 [*affirming* 37 N. Y. Suppl. 449]; Gillett *v.* Borden, 6 Lans. (N. Y.) 219; Carrell *v.* McMurray, 136 Fed. 661.

Cal. Civ. Code, § 3399, provides for the correction of a contract when, through mutual mistake, or a mistake of one party known or suspected by the other, it does not truly express the intention of the parties. Holt *v.* Holt, 120 Cal. 67, 52 Pac. 119. Under the same provision where weakness of plaintiff's mind and inadequacy of consideration is alleged, it was only necessary to show the mistake of plaintiff, and that defendant knew it. Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85. Relief was granted where, at the time of the execution of a contract of sale by plaintiff to defendant of all her interest in certain lands, both parties supposed that plaintiff's interest was less than it really was, but defendant learned the true state of the case before the execution of the deed. Cleghorn *v.* Zumwalt, 83 Cal. 155, 23 Pac. 294. See also Ward *v.* Yorba, 123 Cal. 447, 56 Pac. 58, (1898) 54 Pac. 80. It is not necessary that the mistake should have been mutual to entitle a party to a reformation. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057; Higgins *v.* Parsons, 65 Cal. 280, 3 Pac. 881. Section 3402 provides that a contract may be revised and then specifically enforced. These two sections were construed together in Chapin *v.* Ross, 2 Cal. App. 433, 84 Pac. 53. See also Eva *v.* McMahon, 77 Cal. 467, 19 Pac. 872.

17. Bowen *v.* Wolff, 23 R. I. 56, 49 Atl. 395.

18. Durham *v.* Taylor, 29 Ga. 166; Turpin *v.* Gresham, 106 Iowa 187, 76 N. W. 680; Renshaw *v.* Gans, 7 Pa. St. 117. See also Blair *v.* Kingman Implement Co., (Nebr. 1908) 117 N. W. 773.

19. See FRAUD, 20 Cyc. 1.

20. *Montana.*— Sanford *v.* Gates, 21 Mont. 277, 53 Pac. 749.

Nebraska.— See Blair *v.* Kingman Implement Co., (1908) 117 N. W. 773.

New Jersey.— Larter *v.* Canfield, 59 N. J. Eq. 461, 45 Atl. 616.

New York.— Monne *v.* Ayer, 52 N. Y. Super. Ct. 139.

North Carolina.— Sykes *v.* Virginia L. Ins. Co., 148 N. C. 13, 61 S. E. 610.

Ohio.— Harris *v.* Columbiana County Mut. Ins. Co., 18 Ohio 116, 51 Am. Dec. 448; Monnett *v.* Columbus, etc., R. Co., 26 Ohio Cir. Ct. 469.

Pennsylvania.— Tyson *v.* Passmore, 2 Pa. St. 122, 44 Am. Dec. 181 (*dictum*); Bartle *v.* Vosbury, 3 Grant 277.

Rhode Island.— Fehlberg *v.* Cosine, 16 R. I. 162, 13 Atl. 110.

Tennessee.— Graham *v.* Guinn, (Ch. App. 1897) 43 S. W. 749.

Texas.— Pioneer Sav., etc., Co. *v.* Baumann, (Civ. App. 1900) 58 S. W. 49.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 79.

Thus where a person by mistake, induced by the misrepresentations of an insurance agent, contracted to take out policies of insurance, believing that they provided for life insurance for a term of years and the subsequent repayment of premiums with interest, when they in fact provided no substantial benefits except in case of death, and the contract was carried out only to the extent of furnishing the insurance for the stipulated term, the policies, as the written evidence of the contract, might be reformed and specifically enforced. Austin *v.* Virginia L. Ins. Co., 148 N. C. 24, 61 S. E. 614; Sykes *v.* Virginia L. Ins. Co., 148 N. C. 13, 61 S. E. 610.

21. Fitzpatrick *v.* Ringo, 5 S. W. 431, 9 Ky. L. Rep. 503; Zentmyer *v.* Mittower, 5 Pa. St. 403.

22. Comer *v.* Lehman, 87 Ala. 362, 6 So. 264. See also *infra*, III, F.

If it does not appear that complainant believed or had reason to believe that the representations made were embodied in the instrument, his ground for relief is taken away. Gelpcke *v.* Blake, 15 Iowa 387, 83 Am. Dec. 418; Consolidated Electric Storage Co. *v.* Atlantic Trust Co., 24 N. Y. App. Div. 172, 48 N. Y. Suppl. 1083.

23. See *supra*, III, E.

24. *Illinois.*— Smith *v.* Rust, 112 Ill. App. 84.

Iowa.— Brintnall *v.* Briggs, 87 Iowa 538, 54 N. W. 531; Butcher *v.* Buchanan, 17 Iowa 81.

Montana.— Sanford *v.* Gates, 21 Mont. 277, 53 Pac. 749.

IV. Instruments Which May Be Reformed.

A. In General. What kinds of instruments are subject to reformation will best be seen: (1) By examining particular instruments which have been reformed,[25] (2) by observing the result when a voluntary conveyance is in question,[26] (3) by comparing executed contracts with those which are executory;[27] and (4) by noting the effect if the instrument is void or invalid.[28]

B. Particular Instruments[29] **— 1. Deeds.** A deed is an instrument of the most solemn character,[30] yet when the proper grounds are shown equity will reform it so as to express the true intention of the parties.[31] The reformation of

New York.— Wilson *v.* Deen, 74 N. Y. 531.

United States.— Olmstead *v.* Michels, 36 Fed. 455, 1 L. R. A. 840.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 68.

Compare Capps *v.* Edwards, 130 Ga. 146, 60 S. E. 455.

Contract made on faith in the other party. — Where the party executing the instrument knew that it did not express the contract that he intended to make, but chose to rely on the mere conjecture of his own that the other party would not require performance as set forth in the writing, there was no ground to reform. Bonds *v.* Bonds, 102 Ga. 163, 29 S. E. 218.

25. See *infra*, IV, B.

26. See *infra*, IV, D.

27. See *infra*, IV, E.

28. See *infra*, IV, C.

29. Matters of description in particular instruments see *infra*, V, D.

30. See Deeds, 13 Cyc. 505 *et seq.*

31. Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206; Jones *v.* Levy, 92 Miss. 551, 46 So. 825; Beall *v.* Martin, 48 Nebr. 479, 67 N. W. 433; Graham *v.* Berryman, 19 N. J. Eq. 29, *dictum*. *Compare* Walker *v.* Armstrong, 8 De G. M. & G. 531, 2 Jur. N. S. 959, 25 L. J. Ch. 738, 4 Wkly. Rep. 770, 57 Eng. Ch. 411, 44 Eng. Reprint 495. See *supra*, notes 86, 87.

In North Carolina before the adoption of the constitution, art. 10, § 6, permitting conveyances between husband and wife, a deed from a husband to his wife was void at law, and sustainable in equity only on proof of a meritorious consideration. Hence equity refused to reform a deed, executed before the act, from a husband to his wife, by an insertion of the word "heirs," although omitted through the inadvertence of the draftsman, unless the deed is supported by a meritorious consideration other than the marital relation. McLamb *v.* McPhail, 126 N. C. 218, 35 S. E. 426.

Deed of executor or administrator.— Ordinarily equity has no original jurisdiction to correct a misdescription of lands in the deed of an executor or administrator. But Ala. Code, §§ 3840, 3841, expressly confers such jurisdiction when, by proper allegations and proof, it is made to appear that the price paid was reasonable, that the vendee was a *bona fide* purchaser, that the money has been paid to the proper person, or appropriated for the benefit of the estate, and that the parties have received regular notice, as provided by law, of such sale or probate proceedings. Vaughn *v.* Hudson, 129 Ala. 176, 30 So. 75; Woodstock Iron Co. *v.* Fullenwider, 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73; Comer *v.* Hart, 79 Ala. 389; Ganey *v.* Sikes, 76 Ala. 421, 84 Ala. 348, 4 So. 869].

Sheriff's deed.—A sheriff who misdescribes land in a deed may, under the supervision of the court from which it issued, make a new deed which will, as to all parties, privies, and purchasers having notice, relate back to the time of the sale; but a decree to reform cannot be entered because equity cannot aid the execution of a statutory power. Griffin *v.* Durfee, 29 Ind. App. 211, 64 N. E. 237; Ware *v.* Johnson, 55 Mo. 500, 66 Mo. 662; Mason *v.* White, 11 Barb. (N. Y.) 173. Ala. Code (1876), § 3207, authorizing the court, in case a sheriff has died or vacated his office without making a conveyance of lands he has sold under order of the court, to order his successor to execute the conveyance does not authorize the court to order the reformation of a defective conveyance. McCall *v.* White, 73 Ala. 562. See also Executions, 17 Cyc. 1345, 1350.

Application of caveat emptor doctrine.—A purchaser at a sheriff's sale or a commissioner's sale being a purchaser *in invitum*, and the doctrine of *caveat emptor* applying in its full force cannot have his deed reformed in chancery. Wells *v.* Gay, (Miss. 1908) 46 So. 497.

Tax deed.—A mistake in a tax deed does not warrant reformation because the mistake cannot be mutual, the owner not being a party to the sale. Keepfer *v.* Force, 86 Ind. 81. See also Taxation. Equity has no jurisdiction to reform a sheriff's deed executed pursuant to a sale under a tax judgment; but the remedy is that prescribed by Rev. St. (1899) § 3218 [Annot. St. (1906) p. 1826], authorizing a proceeding to obtain a proper deed from a sheriff. Dixon *v.* Hunter, 204 Mo. 382, 102 S. W. 970.

The court is not prohibited by the Fines and Recoveries Act (3 & 4 Wm. IV, c. 74) from exercising its jurisdiction to rectify on the ground of mistake, a deed of resettlement which has been enrolled as a disentailing assurance under the provisions of the act. Hall-Dare *v.* Hall-Dare, 31 Ch. D. 251, 55 L. J. Ch. 154, 54 L. T. Rep. N. S. 120, 34 Wkly. Rep. 82.

a deed, absolute on its face, into a mortgage or simple security, stands on the same footing with that of the reformation of any other instrument.[32]

2. Mortgages, Etc., and Foreclosure Papers.[33] The general rule is that where a mortgage or deed of trust misdescribes property intended to be mortgaged the mistake may be corrected.[34] But such remedy must be applied for by proper proceedings before foreclosure, or in an action to foreclose; for when the mistake has been carried into the decree of foreclosure and subsequent proceedings, an action to correct the mortgage and decree, the subsequent proceedings and the sheriff's deed cannot be maintained because a judicial sale has intervened.[35] In several states the rule has been relaxed and modified to such an extent that the mortgage may be reformed and then foreclosed as reformed.[36]

3. Wills and Instruments Intended as Wills. There is no jurisdiction to reform a will or correct the mistake of a testator because equity never aids a volunteer except in case of fraud.[37] After a will has been admitted to probate,

32. Chaires *v.* Brady, 10 Fla. 133. See also V, D, 3.

Whether the deed is of bargain and sale or of gift, the principle remains the same. Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38.

33. See *infra*, X, E; XVIII, B, 2.

34. Bunker *v.* Anderson, 32 N. J. Eq. 35; McMillan *v.* New York Water Proof Paper Co., 29 N. J. Eq. 610; Strang *v.* Beach, 11 Ohio St. 283, 78 Am. Dec. 308; Davenport *v.* Sovil, 6 Ohio St. 459; Harper *v.* Combs, 61 W. Va 561, 56 S. E. 902. See *infra*, V, D, 5; and Mortgages, 27 Cyc. 1093.

Deed of trust and trustee's deed thereunder. — A deed of trust for a debt on three tracts of land by mutual mistake includes a certain tract when another was intended. The trustee sold the tracts and made a deed to the purchaser, who was a creditor. It was held that the deed of trust, but not the trustee's deed, could be reformed at the suit of the creditor. Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902. It is competent for a court of equity to reform a conveyance by a trustee under a trust deed, so as to make it conform to the trust deed and the advertisement of sale thereunder. Jones *v.* Levy, 92 Miss. 551, 46 So. 825.

A trust mortgage to secure creditors will be reformed.— Where a mortgage is executed to a trustee for certain creditors of an insolvent corporation, but the word "successors" is omitted so that it does not transfer a title in fee, reformation will be granted as against the receiver of the insolvent company. So held in Miller *v.* Savage, 60 N. J. Eq. 204, 46 Atl. 632.

35. *Alabama.*— Stewart *v.* Wilson, 141 Ala. 405, 37 So. 550, 109 Am. St. Rep. 33; Stephenson *v.* Harris, 131 Ala. 470, 31 So. 445.

Indiana.— Angle *v.* Speer, 66 Ind. 488; Miller *v.* Kolb, 47 Ind. 220.

Missouri.— Schwickerath *v.* Cooksey, 53 Mo. 75.

New Jersey.— Waldron *v.* Letson, 15 N. J. Eq. 126.

Utah.— Marks *v.* Taylor, 23 Utah 152, 470, 63 Pac. 897.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 9.

See also *infra*, V, D, 5, a, (III)–(IV); X, E; XVIII, B, 2.

36. See cases cited *infra*, this note.

The California doctrine is that when a mistake in the mortgage has been carried into the decree and sheriff's deed, equity will go back to the original transaction and reform all instruments so as to make them conform to the real intention of the parties. Quivey *v.* Baker, 37 Cal. 465.

In Indiana in Conyers *v.* Mericles, 75 Ind. 443, 448, referring to Miller *v.* Kolb, 47 Ind. 220, and Angle *v.* Speer, 66 Ind. 488, Best, C., said: "These cases establish the proposition, that when an incorrect description of lands intended to be embraced in a mortgage is carried into the judgment, order of sale, notice and sheriff's deed, such proceedings can not be corrected either at the instance of the mortgagee or the purchaser at such sale, but they do not decide that such mistake can not be corrected by reforming the mortgage and foreclosing it as reformed." To the same effect see McCasland *v.* Ætna L. Ins. Co., 108 Ind. 130, 9 N. E. 119.

In Vermont in Blodgett *v.* Hobart, 18 Vt. 414, it was held that "if the mistake was mutual, and be not discovered until after a decree of foreclosure has been obtained upon the mortgage and the time fixed by the decree for the payment of the mortgage debt has expired, and the mortgage be then ordered to be reformed, the decree of foreclosure will be opened, so as to permit the mortgagor to redeem the entire premises by payment of the entire sum due upon the mortgage."

37. *Alabama.*— Machem *v.* Machem, 28 Ala. 374.

Illinois.— Bingel *v.* Volz, 142 Ill. 214, 31 N. E. 13, 34 Am. St. Rep. 64, 16 L. R. A. 321.

Missouri.— Goode *v.* Goode, 22 Mo. 518, 66 Am. Dec. 630.

Texas.— Hunt *v.* White, 24 Tex. 643.

Wisconsin.—Sherwood *v.* Sherwood, 45 Wis. 357, 30 Am. Rep. 757.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 10. See also Wills.

Insertion of name of devisee or legatee.— The name of a legatee cannot be struck out, and that of another person inadvertently omitted by the drawer or copyist inserted. Yates *v.* Cole, 54 N. C. 110, 59 Am. Dec. 602.

such probate is the judgment of the court that the instrument just as written is the last will of the testator,[38] and a court of equity has no right to reform such a will, even to the extent of filling up a blank, or restoring a bequest alleged to have been fraudulently obliterated from the will by the executor or some other person before probate;[39] but where the mistake is apparent on the face of the instrument, such reformation may be made as is essential to valid construction.[40] If an instrument was intended as a will, but through mistake of the testator was wrongly executed, no reformation can cause it to be construed as a will.[41]

4. Insurance Policies. Abundant authority establishes the fact that insurance policies are subject to correction when grounds therefor have been plainly made out.[42]

5. Marriage Settlements. In England the remedy of correction is principally

Nor can the name of a devisee, alleged to have been omitted by mistake, be inserted. Engelthaler *v.* Engelthaler, 196 Ill. 230, 63 N. E. 669.

Where the testator had mistaken the christian name of the legatee, the error was corrected. Wood *v.* White, 32 Me. 340, 52 Am. Dec. 654.

N. Y. Code Civ. Proc. § 1866, which provides that "the validity, construction or effect, under the laws of the State, of a testamentary disposition of real property . . . which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined" refers to the validity of a disposition of real property, but not to the validity of a will, and does not authorize an action to reform a paper signed by the testator, thinking he was signing what he intended as his will. Nelson *v.* McDonald, 61 Hun (N. Y.) 406, 16 N. Y. Suppl. 273.

38. Polsey *v.* Newton, 199 Mass. 450, 85 N. E. 574; Sherwood *v.* Sherwood, 45 Wis. 357, 30 Am. Rep. 757. See also Wills.

39. Trexler *v.* Miller, 41 N. C. 248.

40. *Indiana.*— Grimes *v.* Harmon, 35 Ind. 198, 9 Am. Rep. 690.

Kentucky.— Jackson *v.* Payne, 2 Metc. 567.

New Jersey.— Snyder *v.* Warbasse, 11 N. J. Eq. 463.

Tennessee.— Eatherly *v.* Eatherly, 1 Coldw. 461, 78 Am. Dec. 499.

Virginia.— Effinger *v.* Hall, 81 Va. 94.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 10.

41. Alters' Appeal, 67 Pa. St. 341, 5 Am. Rep. 433; *In re* Goods of ——, 14 Jur. 402.

A husband and wife, intending to make their wills in favor of each other, had them drawn alike, mutatis mutandis, and executed them supposing they had done all properly. On the husband's death it was found that each had signed the other's will. The paper signed by the husband was held not to be intended as his will, and could not be reformed. Nelson *v.* McDonald, 61 Hun (N. Y.) 406, 16 N. Y. Suppl. 273.

42. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

Illinois.— German F. Ins. Co. *v.* Gueck, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835 [*affirming* 31 Ill. App. 151]; Keith *v.* Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 634.

Indiana.— Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833.

Iowa.— Thomason *v.* Capital Ins. Co., 92 Iowa 72, 61 N. W. 843; Esch *v.* Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443; Longhurst *v.* Star Ins. Co., 19 Iowa 364.

Kentucky.— Fireman's Ins. Co. *v.* Powell, 13 B. Mon. 311.

Louisiana.— Davega *v.* Crescent Mut. Ins. Co., 7 La. Ann. 228.

Michigan.— Balen *v.* Hanover F. Ins. Co., 67 Mich. 179, 34 N. W. 654.

Minnesota.— Spurr *v.* Home Ins. Co., 40 Minn. 424, 42 N. W. 206.

Missouri.— Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293.

New York.— Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige 278, 19 Am. Dec. 431.

Texas.— Home Ins., etc., Co. *v.* Lewis, 48 Tex. 622.

West Virginia.— Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

United States.— Providence Washington Ins. Co. *v.* Brummelkamp, 58 Fed. 918; Fink *v.* Queen Ins. Co., 24 Fed. 318; Spare *v.* Home Mut. Ins. Co., 17 Fed. 568, 9 Sawy. 142; Bailey *v.* American Cent. Ins. Co., 13 Fed. 250, 4 McCrary 221; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183.

England.— Motteux *v.* London Assur. Co., 1 Atk. 545, 26 Eng. Reprint 343; Collett *v.* Morrison, 9 Hare 162, 21 L. J. Ch. 878, 41 Eng. Ch. 162, 68 Eng. Reprint 458, 12 Eng. L. & Eq. 171.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 11. See also Fire Insurance, 19 Cyc. 642; Life Insurance, 25 Cyc. 738; Marine Insurance, 26 Cyc. 613.

Where a member of a benefit association contracts for and pays the amount necessary to obtain a certificate for only one thousand dollars, but by the mistake and inadvertence of both parties, or by the mistake of the association, with knowledge on the part of the member, a certificate for two thousand dollars is issued and accepted, the association is entitled to a reformation in an action by the beneficiary upon the certificate. Gray *v.* Supreme Lodge K. H., 118 Ind. 293, 20 N. E. 833.

known as "rectification," and its most frequent application is made in the case of error in marriage settlements,[43] including also post-nuptial settlements,[44] and family settlements.[45]

6. Other Instruments. Among the other instruments to which the equitable remedy of reformation has been applied are bonds,[46] contracts for sale of real estate,[47] leases,[48] assignments for indemnity,[49] settlements of accounts,[50] a bill of sale for a vessel,[51] a power of attorney [52] when third parties have acquired rights so that the principal cannot revoke it,[53] plats of land,[54] an attachment affidavit,[55] and contracts of a city.[56]

C. Invalidity of Instrument — 1. In General. Where an instrument is

43. Cogan *v.* Duffield, 2 Ch. D. 44, 45 L. J. Ch. 307, 34 L. T. Rep. N. S. 593, 24 Wkly. Rep. 905; Tomlison *v.* Leigh, 11 Jur. N. S. 962, 13 L. T. Rep. N. S. 516, 14 Wkly. Rep. 121; Naylor *v.* Wright, 3 Jur. N. S. 1090, 5 Wkly. Rep. 770.

The doctrine in respect of such instruments is somewhat broader than the American doctrine in that where the settlement purports to be in pursuance of articles of settlement, but is not in conformity therewith, that is ground for correction. Cogan *v.* Duffield, 2 Ch. D. 44, 45 L. J. Ch. 307, 34 L. T. Rep. N. S. 593, 24 Wkly. Rep. 905; Partyn *v.* Roberts, Ambl. 315, 27 Eng. Reprint 213; Pritchard *v.* Quinchant, Ambl. 147, 27 Eng. Reprint 95; Bold *v.* Hutchinson, 5 De G. M. & G. 558, 2 Jur. N. S. 97, 25 L. J. Ch. 598, 4 Wkly. Rep. 3, 54 Eng. Ch. 441, 43 Eng. Reprint 986 [*affirming* 20 Beav. 250, 3 Eq. Rep. 743, 1 Jur. N. S. 365, 24 L. J. Ch. 285, 52 Eng. Reprint 599]; Langley *v.* Furlong, Dick. 315, 21 Eng. Reprint 290; Neal *v.* Cust, Dick. 513, 21 Eng. Reprint 369; King *v.* King-Harman, Ir. R. 7 Eq. 446; Honor *v.* Honor, 1 P. Wms. 123, 24 Eng. Reprint 321, 2 Vern. Ch. 658, 23 Eng. Reprint 1028; Randall *v.* Willis, 5 Ves. Jr. 263, 5 Rev. Rep. 40, 31 Eng. Reprint 577; Payne *v.* Collier, 1 Ves. Jr. 170, 30 Eng. Reprint 285. *Compare* Richards *v.* Fitzgerald, 9 Ir. Eq. 486. See also Smith *v.* Iliffe, L. R. 20 Eq. 666, 44 L. J. Ch. 755, 33 L. T. Rep. N. S. 200, 23 Wkly. Rep. 851 [*criticized* in Tucker *v.* Bennet, 57 L. J. Ch. 507, 38 Ch. D. 1, 53 L. T. Rep. N. S. 650].

Deed executed under protest.—A marriage settlement was drawn, as the intended husband alleged, in a manner contrary to the agreement; but before the marriage, he knew its contents and executed it under protest, and reserved his right to set it aside. After marriage he could not sustain a suit to rectify the settlement. Eaton *v.* Bennett, 34 Beav. 196, 55 Eng. Reprint 610.

44. Koonce *v.* Bryan, 21 N. C. 227. See also *In re* Hoare, 4 Giffard 254, 9 Jur. N. S. 167, 7 L. T. Rep. N. S. 523, 1 New Rep. 161, 11 Wkly. Rep. 181, 66 Eng. Reprint 700.

That a post-nuptial settlement was rectified in accordance with an unexecuted ante-nuptial settlement shows the broad scope of the remedy in this class of instruments. *In re* Hoare, 4 Giffard 254, 9 Jur. N. S. 167, 7 L. T. Rep. N. S. 523, 1 New Rep. 161, 11 Wkly. Rep. 181, 66 Eng. Reprint 700.

45. Fane *v.* Fane, L. R. 20 Eq. 698, holding that a family settlement will not be supported if founded on a mistake of either party to which the other party is accessary, although such mistake may have been innocently made.

46. *Iowa.*— Nourse *v.* Weitz, 120 Iowa 708, 95 N. W. 251.

Missouri.— State *v.* Frank, 51 Mo. 98.

New Jersey.— Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33.

New York.— Clute *v.* Knies, 102 N. Y. 377, 7 N. E. 181.

Ohio.— Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

England.— Simpson *v.* Vaughan, 2 Atk. 31, 26 Eng. Reprint 415; Hodgkinson *v.* Wyatt, 9 Beav. 566, 50 Eng. Reprint 462; Taylor *v.* Rudd [*cited* in Burt *v.* Barlow, 3 Bro. Ch. 451, 454, 29 Eng. Reprint 638]; D'Olliffe *v.* South Sea Co. [*cited* in Barstow *v.* Kilvington, 5 Ves. Jr. 593, 601, 31 Eng. Reprint 755]; Burn *v.* Burn, 3 Ves. Jr. 573, 30 Eng. Reprint 1162.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 12.

47. Hughes *v.* Payne, (S. D. 1908) 117 N. W. 363.

48. Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363.

49. Askew *v.* Odenheimer, 2 Fed. Cas. No. 587, Baldw. 380.

50. Gill *v.* Clagett, 4 Md. Ch. 470. See Compromise and Settlement, 8 Cyc. 499.

Where a settlement of mutual accounts was based on a statement which showed an erroneous addition, it was reformed. McMullen *v.* Lockwood, 4 Del. Ch. 568.

51. Sprague *v.* Thurber, 17 R. I. 454, 22 Atl. 1057.

52. Olson *v.* Erickson, 42 Minn. 440, 44 N. W. 317.

53. Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277.

54. Rice *v.* Kelset, 42 Minn. 511, 44 N. W. 535.

55. Seay *v.* Ferguson, 1 Tenn. Ch. 287.

56. McManus *v.* Philadelphia, 211 Pa. St. 394, 60 Atl. 1001.

A lease of city property was reformed. See Bronk *v.* Standard Mfg. Co., 141 Mich. 680, 105 N. W. 33. *Compare*, however, Moffett, etc., Co. *v.* Rochester, 91 Fed. 28, 33 C. C. A. 319 [*reversing* 82 Fed. 255, and *reversed* in 178 U. S. 373, 20 S. Ct. 957, 44 L. ed. 1108].

immoral in its tendency, or for some fundamental reason is void, reformation would amount to the making of a new contract and is therefore never granted.[57] Thus reformation is barred where a deed is void for insufficient descriptions,[58] or where there is a non-compliance with a statutory requirement.[59]

2. Statute of Frauds. The right to reform an instrument is not abrogated, although the contract contained in such instrument would be invalid if not in writing.[60] Where courts have full equity jurisdiction, the fact that a contract specified in the instrument to be reformed is within the statute of frauds is of itself no sufficient reason to refuse to reform when the parties thereto intended to comply with the requirements, but were prevented from so doing through fraud, accident, or mistake.[61]

57. *Alabama.*— Montgomery *v.* Perryman, 147 Ala. 207, 41 So. 838; Day *v.* Shiver, 137 Ala. 185, 33 So. 831; Martin *v.* Dollar, 32 Ala. 422.

Arkansas.— Dunnivan *v.* Hughes, 86 Ark. 443, 111 S. W. 271.

Illinois.— Strayer *v.* Dickerson, 205 Ill. 257, 68 N. E. 767.

New York.— Marcy *v.* Dunlap, 5 Lans. 365.

Oregon.— Evarts *v.* Steger, 6 Oreg. 55.

Tennessee.— Ottenheimer *v.* Cook, 10 Heisk. 309.

United States.—Brazoria County *v.* Youngstown Bridge Co., 80 Fed. 10, 25 C. C. A. 306; Lemmons *v.* Flanakin, 15 Fed. Cas. No. 8,239*b*, Hempst. 32.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 20.

The deed of a sheriff for land sold under execution, which is void on its face, cannot be reformed where the execution and proceedings thereunder contain the same imperfection. Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672; Russell *v.* Williamson, 67 Ark. 80, 53 S. W. 561; Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885.

Where land other than that intended was levied on and sold under attachment, the proceedings were void and beyond the jurisdiction of the chancery court to reform so as to relate to the land intended. Dunnivan *v.* Hughes, 86 Ark. 443, 111 S. W. 271.

Where defendants had no title to land which their deed purported to convey and which plaintiffs agreed to accept, but they owned lots of less value in the same vicinity, defendants are not entitled to reformation on the ground that they described the wrong land. Crowe *v.* Lewin, 95 N. Y. 423.

Effect of part performance.— In Place *v.* Johnson, 20 Minn. 219, although the agreement to convey was void for want of the husband's assent, going into possession under the agreement was part performance, and it was held that the deed should be reformed to correct a misdescription, or a decree for the conveyance of the remainder of the tract should be entered.

58. Lewis *v.* Owen, 64 Ind. 446; Bowers *v.* Andrews, 52 Miss. 596. See also *infra*, V, D.

Where a deed was void for a patent ambiguity, the court suggested reformation as a proper remedy in Jennings *v.* Brizeadine, 44 Mo. 332, and Campbell *v.* Johnson, 44 Mo. 247.

59. Gebb *v.* Rose, 40 Md. 387; Jewett *v.* Davis, 10 Allen (Mass.) 68; Potter *v.* Greenwich, 26 Hun (N. Y.) 326 [*affirmed* in 92 N. Y. 662]. See also *infra*, X, F, G.

A voluntary instrument of conveyance, invalid for want of a seal, will not be reformed by compelling a seal to be affixed. Eaton *v.* Eaton, 15 Wis. 259.

A mortgage which was void because executed by a married woman contrary to law was reformed on showing of mutual mistake, where all persons had acted upon the security as if it were valid. Kennard *v.* George, 44 N. H. 440.

Under the Arkansas constitution of 1874, authorizing married women to devise and convey their lands as if unmarried, the deeds of a married woman of her own land may be reformed. Mills *v.* Driver, 72 Ark. 534, 81 S. W. 1058.

In Ohio a deed executed by a married woman which is defective in that it does not contain words sufficient to pass the legal estate, and is not properly acknowledged, may be corrected by proceedings under the act of March 27, 1849, and the act of April 17, 1857, amendatory thereof. Purcell *v.* Goshorn, 2 Disn. (Ohio) 90 [*affirmed* in 11 Ohio St. 641].

60. Prior *v.* Williams, 3 Abb. Dec. (N. Y.) 624, 2 Keyes 530, 3 Keyes 231. See cases cited *infra*, note 61.

61. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328; Blackburn *v.* Randolph, 33 Ark. 119; Dutch *v.* Boyd, 81 Ind. 146. See also cases cited *infra*, this note.

Scope and extent of rule.— Through mistake or accident an instrument within the statute of frauds may include subject-matter, as lands, which should have been omitted, or it may omit subject-matter which should have been included. No other ground for reformation exists within the statute. As to the first case the authorities agree that reformation does not conflict with the statute of frauds because an instrument already made is merely narrowed down. Worley *v.* Tuggle, 4 Bush (Ky.) 168; Hendrickson *v.* Ivins, 1 N. J. Eq. 562; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559. As to the second a distinct conflict of authorities exists among the American decisions. The minority of courts, not having full equity jurisdiction, hold that a contract within the statute may not be reformed so as to extend the contract beyond what its terms import. Elder *v.*

D. Voluntary Conveyances — 1. In General. In view of the fact that a voluntary conveyance is not supported by a consideration, the general rule is that an instrument representing such a conveyance cannot be reformed,[62] unless there is at least a meritorious consideration,[63] or unless all the parties consent.[64]

2. As Between Grantor and Grantee or Volunteer. No consideration having passed, and no right having vested, a correction of a voluntary conveyance will not be made on the application of the grantee or volunteer as against the grantor or his heirs,[65] or against his creditors.[66] But where a grantee in a deed, given

Elder, 10 Me. 80, 25 Am. Dec. 205; Glass *v.* Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Dwight *v.* Pomeroy, 17 Mass. 303, 9 Am. Dec. 148. This also seems to be the English view. Alderson, B., remarked in Atty.-Gen. *v.* Sitwell, 5 L. J. Exch. 86, 93, 1 Y. & C. Exch. 559: "I cannot help feeling that, in the case of an executory agreement, first, to reform it on the ground of mistake and, then, to decree an execution of it, would be virtually to repeal the Statute of Frauds." The majority of courts which have full equity jurisdiction hold that equitable relief by way of reformation may be applied without restriction because the purpose of the statute was to promote justice and prevent wrong, and not to hinder justice. See Murphy *v.* Rooney, 45 Cal. 78; Morrison *v.* Collier, 79 Ind. 417; Moale *v.* Buchanan, 11 Gill & J. (Md.) 314; Smith *v.* Greeley, 14 N. H. 378; Tilton *v.* Tilton, 9 N. H. 385; De Peyster *v.* Hasbrouck, 11 N. Y. 582; Gouverneur *v.* Titus, 6 Paige (N. Y.) 347; Wiswall *v.* Hall, 3 Paige (N. Y.) 313; Gower *v.* Sterner, 2 Whart. (Pa.) 75; Flagler *v.* Pleiss, 3 Rawle (Pa.) 345; Blodgett *v.* Hobart, 18 Vt. 414. See also Frauds, Statute of, 20 Cyc. 279.

62. *Arkansas.*— Smith *v.* Smith, 80 Ark. 458, 97 S. W. 439.

Illinois.— Finch *v.* Green, 225 Ill. 304, 80 N. E. 318.

Michigan.— Shears *v.* Westover, 110 Mich. 505, 68 N. W. 266.

New York.— Minturn *v.* Seymour, 4 Johns. Ch. 497.

North Carolina.— Dawson *v.* Dawson, 16 N. C. 93, 18 Am. Dec. 573.

England.— Brown *v.* Kennedy, 33 Beav. 133, 9 Jur. N. S. 1163, 33 L. J. Ch. 71, 9 L. T. Rep. N. S. 302, 12 Wkly. Rep. 224, 55 Eng. Reprint 317 [*affirmed* in 4 De G. J. & S. 217, 10 Jur. N. S. 141, 33 L. J. Ch. 342, 9 L. T. Rep. N. S. 736, 12 Wkly. Rep. 360, 69 Eng. Ch. 169, 46 Eng. Reprint 901]; Phillipson *v.* Kerry, 32 Beav. 628, 11 Wkly. Rep. 1034, 55 Eng. Reprint 247; Bonham *v.* Newcomb, 2 Vent. 365, 86 Eng. Reprint 488; Lee *v.* Henley, 1 Vern. Ch. 37, 23 Eng. Reprint 292. *Compare* Lister *v.* Hodgson, L. R. 4 Eq. 30, 15 Wkly. Rep. 547.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 21.

A voluntary conveyance by a husband to his wife will not be reformed in equity so as to include land omitted by mistake, and the contract will not be enforced as to such land. Smith *v.* Smith, 80 Ark. 458, 97 S. W. 439.

63. Crawley *v.* Crafton, 193 Mo. 421, 91 S. W. 1027; Hutsell *v.* Crewse, 138 Mo. 1, 39 S. W. 449; Wright *v.* Englefield, Ambl. 468, 474, 27 Eng. Reprint 308, 2 Eden 239, 28 Eng. Reprint 890.

64. Redding *v.* Rozell, 59 Mich. 476, 26 N. W. 677. See also Phillipson *v.* Kerry, 32 Beav. 628, 11 Wkly. Rep. 1034, 55 Eng. Reprint 247.

65. *California.*— Enos *v.* Stewart, 138 Cal. 112, 70 Pac. 1005.

Georgia.— Turner *v.* Newell, 129 Ga. 89, 58 S. E. 657; Powell *v.* Powell, 27 Ga. 36, 73 Am. Dec. 724.

Illinois.— Henry *v.* Henry, 215 Ill. 205, 74 N. E. 126; Strayer *v.* Dickerson, 205 Ill. 257, 68 N. E. 767; Lynn *v.* Lynn, 135 Ill. 18, 25 N. E. 634 [*reversing* 33 Ill. App. 299].

Indiana.— Froman *v.* Froman, 13 Ind. 317.

Iowa.— Else *v.* Kennedy, 67 Iowa 376, 25 N. W. 290.

Massachusetts.— Richardson *v.* Adams, 171 Mass. 447, 50 N. E. 941.

Minnesota.— Sharpe *v.* Rogers, 12 Minn. 174.

Missouri.— Mudd *v.* Dillon, 166 Mo. 110, 65 S. W. 973.

New Jersey.— Mulock *v.* Mulock, 31 N. J. Eq. 594.

Wisconsin.— Willey *v.* Hodge, 104 Wis. 81, 80 N. W. 75, 76 Am. St. Rep. 852.

England.— Brown *v.* Kennedy, 33 Beav. 133, 9 Jur. N. S. 1163, 33 L. J. Ch. 71, 9 L. T. Rep. N. S. 302, 12 Wkly. Rep. 224, 55 Eng. Reprint 317 [*affirmed* in 4 De G. J. & S. 217, 10 Jur. N. S. 141, 33 L. J. Ch. 342, 9 L. T. Rep. N. S. 736, 12 Wkly. Rep. 360, 69 Eng. Ch. 169, 46 Eng. Reprint 901].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 21.

Rights of a volunteer as against a settlor. — A volunteer under a settlement declaring the trusts of property placed in the hands of trustees was entitled to file a bill to have the error rectified. Thompson *v.* Whitmore, 1 Johns. & H. 268, 3 L. T. Rep. N. S. 845, 9 Wkly. Rep. 297, 70 Eng. Reprint 748.

66. See cases cited *infra*, this note.

As against lien of judgment creditor of grantor.—A mistake in the description in a voluntary deed will not be reformed where before proceedings to reform it had been brought a judgment had been obtained against the grantor which created a lien on the grantor's property not conveyed in favor of a judgment creditor. Turner *v.* Newell, 129 Ga. 89, 58 S. E. 657.

As between creditors.—A voluntary deed will not be reformed so as to express a valuable consideration, and thereby give the grantee, a creditor of the grantor, a prefer-

for love and affection only, went into possession of land and made improvements, and thereafter mortgaged the premises for a valuable consideration, a bill by the mortgagee for a correction of a mistake in the deed was maintained against the grantor and his heirs;[67] also defects in a conveyance to a charitable use were supplied where money had been advanced and labor and materials furnished on the strength of the promise of the donor.[68] Reformation, however, will be granted on the application of the grantor against the grantee,[69] even after the death of the donor.[70]

3. As Between Volunteers. Nothing prevents reformation between volunteers claiming under the same deed, when the grantor has no interest in the controversy.[71]

4. Intent of Parties Apparent. Where the nature of the deed and the context of some portion of it in which words of inheritance usually belong clearly shows an intention to convey an estate in fee, but the prescribed technical words have been omitted through mistake or oversight, such instrument will be corrected, even though it is voluntary.[72]

5. What Conveyances Are Voluntary. A conveyance is voluntary so as not to permit of reformation, when there is no consideration, valuable or meritorious,[73] and a consideration will not be implied from a seal.[74] But the slightest value will give rise to a consideration so that the conveyance cannot be called voluntary,[75] as where there is a consideration of one dollar,[76] services performed by the grantee for the grantor,[77] an existing debt,[78] benefits received from religious

ence over another creditor, when the deed has been assailed by such creditor. Stoltz *v.* Vanatta, 5 Ohio S. & C. Pl. Dec. 34, 32 Cinc. L. Bul. 100.

Voluntary release by creditors.— Where creditors of an insolvent debtor, on being separately applied to by the debtor, and without previous agreement among themselves, signed an instrument in the form of a release of their debts, but omitted to affix their seals, the court refused to aid the defect, no consideration for the instrument being shown. Minturn *v.* Seymour, 4 Johns. Ch. (N. Y.) 498.

67. Cummings *v.* Freer, 26 Mich. 128. *Compare* Teakle *v.* Teakle, 29 Ala. 403.

68. Price *v.* School Directors, 58 Ill. 452.

69. Crockett *v.* Crockett, 73 Ga. 647; Mitchell *v.* Mitchell, 40 Ga. 11; Deischer *v.* Price, 148 Ill. 383, 36 N. E. 105; Randall *v.* Ghent, 19 Ind. 271; Andrews *v.* Andrews, 12 Ind. 348; James *v.* Couchman, 29 Ch. D. 212, 54 L. J. Ch. 838, 52 L. T. Rep. N. S. 344, 33 Wkly. Rep. 452.

Power of revocation was supplied in favor of the grantor in Welman *v.* Welman, 15 Ch. D. 570, 49 L. J. Ch. 736, 43 L. T. Rep. N. S. 145. *Compare* Jackson *v.* Pennsylvania L. Ins., etc., Co., 2 Pa. Dist. 225. But see Lee *v.* Frick, 2 Wkly. Notes Cas. (Pa.) 11, holding that a failure to insert of power of revocation in a voluntary deed of gift did not entitle the grantor to reformation.

The courts will hesitate, however, to rectify a voluntary settlement at the instance of the settlors, merely on their own evidence as to their intention, unsupported by other evidence. Bonhote *v.* Henderson, [1895] 1 Ch. 742, 64 L. J. Ch. 556, 72 L. T. Rep. N. S. 556, 13 Reports 523, 43 Wkly. Rep. 502 [*affirmed* in [1895] 2 Ch. 202, 72 L. T. Rep. N. S. 814, 13 Reports 529 note, 43 Wkly. Rep. 580].

70. McMecham *v.* Warburton, [1896] 1 Ir. 435.

71. Adair *v.* McDonald, 42 Ga. 506.

72. Rackley *v.* Chestnutt, 110 N. C. 262, 14 S. E. 750; Moore *v.* Quince, 109 N. C. 85, 13 S. E. 872; Vickers *v.* Leigh, 104 N. C. 248, 10 S. E. 308; Huss *v.* Morris, 63 Pa. St. 367; *In re* Bird, 3 Ch. D. 214.

73. Powell *v.* Morisey, 98 N. C. 426, 4 S. E. 185, 2 Am. St. Rep. 343.

A meritorious consideration of itself has been held insufficient, and reformation was accordingly denied. Lynn *v.* Lynn, 33 Ill. App. 299 [*reversed* on other grounds in 135 Ill. 18, 25 N. E. 634].

A promise to pay alimony is voluntary.— Moon *v.* Baum, 58 Ind. 194.

74. Sharpe *v.* Rogers, 12 Minn. 174.

75. A deed founded partly on love and affection and partly on a binding promise by the grantee to pay off all the existing indebtedness of the grantor is not one based on a purely voluntary consideration and may be reformed. Smith *v.* Barksdale, 110 Ga. 278, 34 S. E. 582.

A mortgage reciting that it had been agreed to be given by defendant to secure notes held by plaintiff is not voluntary and without consideration so as to preclude reformation. Toronto Bank *v.* Irwin, 28 Grant Ch. (U. C.) 397. *Compare* Bastin *v.* Schafer, 15 Okla. 607, 85 Pac. 349.

76. Mason *v.* Moulden, 58 Ind. 1, where the deed recited a consideration "of the sum of one dollar, and natural love and affection." But see Powell *v.* Morisey, 98 N. C. 426, 4 S. E. 185, 2 Am. St. Rep. 343, where a deed expressing the same consideration was held to be voluntary.

77. Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112.

78. Comstock *v.* Coon, 135 Ind. 640, 35 N. E. 909.

instruction,[79] provision for the security of a loan,[80] and a consideration to pay a third party for labor expended on premises conveyed together with care and support of the grantor.[81]

E. Executed and Executory Agreements. Where the elements that warrant reformation exist, it is immaterial whether the agreement contained in the instrument is executed or executory; equity has jurisdiction to reform.[82]

F. Instruments Executed Under Power Conferred by Statute. It is doubted whether equity will under any circumstances exercise its peculiar powers to reform a deed of conveyance executed pursuant to a power conferred by statute, and not pursuant to a voluntary agreement,[83] such as a sheriff's deed [84] or the like; [85] most assuredly not when such deeds are void, as for a failure to comply with the statutory requirements.[86] The proper remedy in such cases is to compel either the sheriff or his successor to execute another deed, correcting the defects.[87]

V. MATTERS OF REFORMATION.

A. Terms and Conditions of Writings — 1. In General. Where in an instrument there are terms and conditions which one party was under no legal or moral obligation to make, and which the other party in good conscience has no right to insist upon, and which the parties never intended should be so expressed, interference to reform is proper.[88] The mere use of repugnant terms, after a suf-

A preëxisting debt was a sufficient consideration to entitle the mortgagee to correction of a mutual mistake as against the mortgagor and a subsequent purchaser with notice. Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259.

79. Visitors M. E. Church *v.* Town, 47 N. J. Eq. 400, 20 Atl. 488.

80. Hunt *v.* Frazier, 59 N. C. 90.

81. Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837, 85 N. W. 285.

82. *Georgia.*— Wyche *v.* Greene, 11 Ga. 159.

Missouri.— Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137.

New York.— Paine *v.* Upton, 87 N. Y. 327, 41 Am. Rep. 371; Gallup *v.* Bernd, 1 N. Y. Suppl. 478.

United States.— Travelers' Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390; Dean *v.* Equitable F. Ins. Co., 7 Fed. Cas. No. 3,705, 4 Cliff. 575.

England.— Jenkins *v.* Quinchant [*cited* in Barstow *v.* Kilvington, 5 Ves. Jr. 593, 596 note, 31 Eng. Reprint 755].

Where neither party has parted with or done anything beyond signing an executory agreement, and there being no equitable circumstances requiring correction, a bill to make a contract apply to lands which have been omitted will be dismissed. Climer *v.* Hovey, 15 Mich. 18.

83. Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672; Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478; note to Bartlett *v.* Judd, 78 Am. Dec. 136; Freeman Ex. § 332; 1 Story Eq. pp. 165–179. See also *infra*, X, F, G.

Lease by infant prepared by master.— Where a lease, beneficial to an infant, was prepared by a master and deliberately entered into and executed by the lessees, one of whom was the infant's guardian, a bill by the lessees to rectify the lease by excluding machinery and other things from it, which it was alleged did not belong to the infant at the time of the lease, was dismissed with costs. Seaton *v.* Staniland, 4 Giffard 61, 9 Jur. N. S. 69, 7 L. T. Rep. N. S. 347, 66 Eng. Reprint 620.

84. Bright *v.* Boyd, 4 Fed. Cas. No. 1,875, 1 Story 478. See cases cited *infra*, this note; and also *infra*, V, D, 3, d.

That a sheriff's deed cannot be reformed for mistake see McCall *v.* White, 73 Ala. 562; Martin *v.* Dollar, 32 Ala. 422; Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672; Russell *v.* Williamson, 67 Ark. 80, 53 S. W. 561; Tatum *v.* Croom, 60 Ark. 487, 30 S. W. 885; Bowen *v.* Wickersham, 124 Ind. 404, 24 N. E. 983, 19 Am. St. Rep. 106; Connor *v.* Wells, 91 Ind. 197; Keepfer *v.* Force, 86 Ind. 81; Lewis *v.* Owen, 64 Ind. 446; Rogers *v.* Abbott, 37 Ind. 138; Griffin *v.* Durfee, 29 Ind. App. 211, 64 N. E. 237; Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372; Ware *v.* Johnson, 55 Mo. 500; Moreau *v.* Detchemendy, 18 Mo. 522; Mason *v.* White, 11 Barb. (N. Y.) 173; Fisher *v.* Owens, 132 N. C. 686, 44 S. E. 369; Dickey *v.* Beatty, 14 Ohio St. 389.

For defects other than misdescription of the land conveyed a sheriff's deed cannot be reformed see Landon *v.* Morris, 75 Ark. 6, 86 S. W. 672; Hall *v.* Klepzig, 99 Mo. 83, 12 S. W. 372; Moreau *v.* Detchemendy, 18 Mo. 522; Fisher *v.* Owens, 132 N. C. 686, 44 S. E. 369. Correction as to misdescriptions see *infra*, V, D, 3, d.

85. See *infra*, V, D, 3, d.

86. See *supra*, IV, C; *infra*, V, D, 3, b; X, F, G.

87. Kruse *v.* Wilson, 79 Ill. 233; Maxey *v.* Clabaugh, 6 Ill. 26; Ware *v.* Johnson, 55 Mo. 500; Thornton *v.* Miskimmon, 48 Mo. 219; Adams *v.* Thomas, 6 Binn. (Pa.) 254.

88. *Illinois.*— Savage *v.* Berry, 3 Ill. 545.

Iowa.— Schafer *v.* Wilson, 113 Iowa 475, 85 N. W. 789; Zack *v.* Krall, 64 Iowa 88, 19 N. W. 858.

ficiently accurate description of property, is relievable,[89] as are also mistakes as to the condition of one's title, or the correctness and regularity of antecedent proceedings, which are properly classed with mistakes of fact.[90]

2. Erroneously Inserted. It is pretty well settled that where something has been put into an instrument which should not be there, equity will rectify.[91] Thus, where terms or conditions to assume a mortgage,[92] to release the purchase-money in a bill of sale,[93] to grant an absolute fee instead of a reversion,[94] or to do some other act which the parties never intended [95] have been erroneously inserted in an instrument, reformation will lie, no estoppel having arisen in favor of a third party and the applicant's failure to discover the insertion being satisfactorily accounted for.[96]

3. Erroneously Omitted. Where terms and conditions have been omitted from instruments, such as deeds,[97] mortgages,[98] leases,[99] marriage settlements,[1]

Kansas.— Burton Land, etc., Co. *v.* Handy, 54 Kan. 13, 37 Pac. 108.

Kentucky.— Harrison *v.* Jameson, 3 J. J. Marsh. 232; Parcels *v.* Gohegan, 2 J. J. Marsh. 133.

Massachusetts.— Gould *v.* Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501.

Michigan.— Norris *v.* Sargeant, 126 Mich. 557, 85 N. W. 1113; Hoard *v.* Stone, 58 Mich. 578, 26 N. W. 141.

Minnesota.— Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

Wisconsin.— Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 24.

Compare Beauchamp *v.* Winn, L. R. 6 H. L. 223, 22 Wkly. Rep. 193, and Daniell *v.* Sinclair, 6 App. Cas. 181, 50 L. J. P. C. 50, 44 L. T. Rep. N. S. 257, 29 Wkly. Rep. 569.

Mistake in subject-matter, not in terms.— Where one agrees to purchase the interest of his copartner in a firm, and to pay the liabilities of the firm, a mistake in the firm assets and liabilities, whether mutual or not, being in the subject-matter and not in the terms of the contract, is not a ground for reformation. De Voin *v.* De Voin, 76 Wis. 66, 44 N. W. 839.

89. Post *v.* Springfield First Nat. Bank, 138 Ill. 559, 28 N. E. 978. See also *infra*, V, D.

90. Lovell *v.* Wall, 31 Fla. 73, 12 So. 659.

Mistake of fact see *supra*, III, B.

91. Teel *v.* Dunnihoo, 230 Ill. 476, 82 N. E. 844; Keeley *v.* Sayles, 217 Ill. 589, 75 N. E. 567; King *v.* Hobbs, 139 N. C. 170, 51 S. E. 911; Stock *v.* Vining, 25 Beav. 235, 53 Eng. Reprint 626; Walsh *v.* Trevanion, 12 Jur. 344, 16 Sim. 178, 39 Eng. Ch. 178, 60 Eng. Reprint 841; Exeter *v.* Exeter, 2 Jur. 535, 7 L. J. Ch. 240, 3 Myl. & Cr. 321, 14 Eng. Ch. 321, 40 Eng. Reprint 949. *Compare* Pittsburgh Amusement Co. *v.* Ferguson, 115 N. Y. App. Div. 241, 101 N. Y. Suppl. 217 [*affirmed* in 193 N. Y. 635, 86 N. E. 1131]; Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363.

92. Adams *v.* Wheeler, 122 Ind. 251, 23 N. E. 760; Rogers *v.* Castle, 51 Minn. 428, 53 N. W. 651; Kilmer *v.* Smith, 77 N. Y. 226, 33 Am. Rep. 613.

93. Collett *v.* Frazier, 56 N. C. 80.

94. Schrieber *v.* Goldsmith, 39 Misc. (N. Y.) 381, 79 N. Y. Suppl. 846.

Where the words "her bodily heirs" were inserted by mistake in a deed after the name of the grantee, thereby vesting in the grantee only a life-estate in the land, which was not the intention of the parties, the grantee could sue to have the deed corrected by striking out these words. Teel *v.* Dunnihoo, 230 Ill. 476, 82 N. E. 844.

95. Le Roy *v.* Lowber, 1 Abb. Pr. (N. Y.) 67.

96. Real Estate Trust Co. *v.* Balch, 45 N. Y. Super. Ct. 528.

Estoppel see *infra*, VI.

Excuses for delay see *infra*, XI, C, 3.

97. *California.*— Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Murphy *v.* Rooney, 45 Cal. 78.

Kentucky.— Wood *v.* Porter, 4 Ky. L. Rep. 361.

Michigan.— Anderson Carriage Co. *v.* Pungs, 128 Mich. 49, 87 N. W. 105.

New Hampshire.— Tilton *v.* Tilton, 9 N. H. 385.

New Jersey.— Holme *v.* Shinn, 62 N. J. Eq. 1, 49 Atl. 151.

Oklahoma.— Marshall *v.* Homier, 13 Okla. 264, 74 Pac. 368.

Wisconsin.— Stanley *v.* Goodrich, 18 Wis. 505; Newton *v.* Holley, 6 Wis. 592.

England.— White *v.* White, L. R. 15 Eq. 247, 42 L. J. Ch. 288, 27 L. T. Rep. N. S. 752.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 26.

Hotch-pot clauses have been inserted in deeds where the omission was properly shown. Killick *v.* Gray, 46 L. T. Rep. N. S. 583. But the intention of the parties was held not to have been properly shown in Lees *v.* Lees, Ir. R. 5 Eq. 549.

Reservation omitted.— Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029.

98. Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294, 671; Stephenson *v.* Elliott, 53 Kan. 550, 36 Pac. 980.

99. Newcomb *v.* Ketteltas, 19 Barb. (N. Y.) 608; Silbar *v.* Ryder, 63 Wis. 106, 23 N. W. 106.

1. Bedford *v.* Abercorn, 5 L. J. Ch. 230, 1 Myl. & C. 312, 13 Eng. Ch. 312, 40 Eng.

contracts,[2] bills of sale,[3] bonds,[4] notes,[5] and a voluntary trust settlement made without professional advice,[6] by mistake, it is competent for equity to supply the omissions so far as it is right and proper. Such power, however, does not extend to the reformation of an omission of a release of homestead in a conveyance of land, such release being a statutory requirement;[7] nor where a forfeiture would necessarily result from the operation of the decree of reformation.[8]

4. Recital of Consideration. Where a consideration has been agreed upon in a contract, and incorrectly expressed in the instrument embodying the same, as between the original parties, a decree to reform is proper.[9]

B. Defective Execution — 1. In General. Where an intention fails of expression because of a defective execution of an instrument, equity will reform when there is no countervailing right,[10] unless the execution is so defective as to

Reprint 394; Cordeaux *v.* Fullerton, 41 L. T. Rep. N. S. 651, 28 Wkly. Rep. 320.

An omission of a provision in case of bankruptcy of the husband was supplied to a marriage settlement when such an intention was established. Higginson *v.* Kelly, 1 Ball & B. 252, 12 Rev. Rep. 28. See also *Ex p.* Verner, 1 Ball & B. 260.

2. Waterloo First Nat. Bank *v.* Zartman, 189 N. Y. 533, 82 N. E. 1126 [*affirming* 113 N. Y. App. Div. 612, 98 N. Y. Suppl. 717]; Hughes *v.* Payne, (S. D. 1908) 117 N. W. 363; Glisson *v.* Craig, 1 Tex. App. Civ. Cas. § 42; Waterman *v.* Dutton, 6 Wis. 265. In Miner *v.* Miner, 91 Mich. 44, 51 N. W. 702, these facts appeared: Complainants, husband and wife, by absolute deed conveyed the wife's farm to the husband's son and wife in consideration of care and support. Before execution of the deed defendants took possession and made many improvements. Later, after conveyance, an altercation arose and complainants left the farm. Defendants continued support, but finally refused to provide further unless complainants would return to the farm. A bill filed to set aside the conveyance was met by a cross bill, and the contract was reformed so as to give defendants possession and control of the property received under the deed and contract so long as they performed their obligations to the complainants.

A contract for the sale of real estate which shows that the vendor on a specified date agreed to sell to the purchaser land described, and that the vendor received a specified sum on account of the contract, may be reformed by adding to the terms thereof the price to be paid and the time and manner of making payment, where the same were omitted by mistake. Hughes *v.* Payne, (S. D. 1908) 117 N. W. 363.

3. Nelson *v.* Spence, 125 Ga. 35, 58 S. E. 697.

4. Foley *v.* Hamilton, 89 Iowa 686, 57 N. W. 439; State *v.* Frank, 51 Mo. 98; Darmour *v.* Chapman, 2 N. Y. App. Div. 112, 37 N. Y. Suppl. 674; Gray *v.* Rumph, 2 Hill Eq. (S. C.) 6.

5. *Kentucky.*—German Nat. Bank *v.* Louisville Butchers' Hide, etc., Co., 97 Ky. 34, 29 S. W. 882, 16 Ky. L. Rep. 881.

New York.— MacGowan *v.* Gein, 13 N. Y. St. 421.

North Carolina.— Womack *v.* Eacker, 62 N. C. 161.

Ohio.— Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354.

Tennessee.— Talley *v.* Courtney, 1 Heisk. 715.

Texas.— Gammage *v.* Moore, 42 Tex. 170.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 26.

6. Jackson *v.* Pennsylvania L., Ins., etc., Co., 2 Pa. Dist. 225.

7. Stodalka *v.* Novotny, 144 Ill. 125, 33 N. E. 534. See *supra*, IV, F; *infra*, X, G.

8. Mills *v.* Evansville Seminary, 47 Wis. 354, 2 N. W. 550. See *infra*, text and note 32.

9. Higgins *v.* Parsons, 65 Cal. 280, 3 Pac. 881; Hallam *v.* Corlett, 71 Iowa 446, 32 N. W. 449; Stafford *v.* Big Sandy R. Co., 105 S. W. 389, 32 Ky. L. Rep. 154.

A contract to provide "vegetables," where to provide the entire table and fuel was intended, will be reformed. Neuenberger *v.* Neuenberger, 29 S. W. 617, 16 Ky. L. Rep. 710.

An arithmetical miscalculation whereby the consideration has been placed too large will be reformed. Boyce *v.* Wilson, 32 Md. 122; Cortland Howe Ventilating Stove Co. *v.* Howe, 92 Hun (N. Y.) 113, 36 N. Y. Suppl. 701; Bayrhoff *v.* Rohde, 16 N. Y. Suppl. 851; Linton *v.* Unexcelled Fire Works Co., 13 N. Y. Suppl. 495.

A statement in a lease of a "semi-annual rent of $300," instead of three hundred dollars per year, payable semiannually, will be relieved against. Snyder *v.* May, 19 Pa. St. 235.

10. Beardsley *v.* Knight, 10 Vt. 185, 33 Am. Dec. 193; Spedden *v.* Sykes, 51 Wash. 267, 98 Pac. 752.

Although an instrument executed by a corporation, which recited that the corporation mortgaged and warranted to plaintiffs certain property, named and described, to secure the payment of two promissory notes executed by it, was not in the exact form suggested by the code, and did not state the amount of the debt, and was not acknowledged as the act of the corporation, but of its officers, it was capable of being reformed in equity, and was not void as between the parties. Spedden *v.* Sykes, 51 Wash. 267, 98 Pac. 752.

show no meeting of the minds,[11] or unless the defect consists in not making the execution according to statutory requirements.[12]

2. Omission of Seal or Scroll. Where a seal or scroll by mistake is omitted from an instrument which purports to be under seal, chancery will supply the defect,[13] even though the omission resulted from a mutual mistake of law.[14] Where, however, a sheriff's deed is not sealed, it seems that the imperfect execution cannot be aided.[15]

3. Defective Acknowledgment. The acknowledgment of instruments is usually a matter prescribed by statute, and equity has no power to remedy a defect resulting from a failure to follow a statute. Hence a married woman cannot be compelled to correct a deed which she has defectively acknowledged;[16] and likewise a mistake in the certificate of acknowledgment of a deed,[17] of a release of homestead, although made by the officer acknowledging it,[18] or of the assignment of a tax certificate[19] will not be remedied.

4. Lack of Proper Witnesses. If by mistake a deed is attested by an incompetent witness it will be established as against the grantor,[20] and a defect in the execution of a mortgage, as where there is but one witness when there should be more, may be remedied against the mortgagor and those acquiring from him without notice.[21] But the mistake of a testator in not having the requisite number of subscribing witnesses to his will is beyond equitable relief.[22]

C. Defect of Parties — 1. In General. It is altogether probable that mistakes will occur in instruments by way of misnomer, the mistaken use of a name

A defective execution of a valid power will be reformed in favor of a grantee when there is no countervailing equity. Gerdes *v.* Moody, 41 Cal. 335; Segee *v.* Thomas, 21 Fed. Cas. No. 12,633, 3 Blatchf. 11.

Where trustees of a township sign promissory notes intending to bind the township, but actually bind themselves individually, when sued individually, the trustees are entitled to have the notes reformed so as to bind the township. Western Wheeled Scraper Co. *v.* Stickleman, 122 Iowa 396, 98 N. W. 139.

11. Kaster *v.* Mason, 13 N. D. 107, 99 N. W. 1083.

12. McBryde *v.* Wilkinson, 29 Ala. 662 (where a relinquishment of dower was defectively executed); Smith *v.* Bowes, 38 Md. 463 (where a mistake of the clerk of the court in putting down "18th day of July" for "7th day of June" in a supersedeas was made).

13. *Connecticut.*— Montville *v.* Haughton, 7 Conn. 543.

Illinois.— Henkleman *v.* Peterson, 154 Ill. 419, 40 N. E. 359 [*reversing* 50 Ill. App. 601].

Massachusetts.— Gaylord *v.* Pelland, 169 Mass. 356, 47 N. E. 1019; Springfield Five Cents Sav. Bank *v.* Springfield South Cong. Soc., 127 Mass. 516.

Missouri.— Michel *v.* Tinsley, 69 Mo. 442.

New York.— Grandin *v.* Hernandez, 29 Hun 399.

Rhode Island.— Bullock *v.* Whipp, 15 R. I. 195, 2 Atl. 309.

South Carolina.— Wadsworthville Poor School *v.* Bryson, 34 S. C. 401, 13 S. E. 619; Pope *v.* Montgomery, 24 S. C. 594.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 29.

In North Carolina under the new constitution, since the adoption of the code of civil procedure, a civil action may be brought on a note without seal, an allegation being made that the note was intended to be under seal, but that the seal was omitted by accident or mistake, and on sufficient proof it may be corrected. McCown *v.* Sims, 69 N. C. 159.

Where a married woman is authorized to direct her trustee to sell property settled on her for her separate use by writing under seal, and she executes a writing with only a scroll, not recognized as a seal in the body of the instrument, the defective execution was remedied. Freeman *v.* Eacho, 79 Va. 43.

14. Allen *v.* Elder, 76 Ga. 674, 2 Am. St. Rep. 63.

15. Moreau *v.* Detchemendy, 18 Mo. 522.

Sheriff's deed see *supra*, IV, B, 2; *infra*, V, D, 3, d.

16. Barrett *v.* Tewksbury, 9 Cal. 13. See *infra*, X, F.

17. Lindley *v.* Smith, 58 Ill. 250. But *compare* Spedden *v.* Sykes, 51 Wash. 267, 98 Pac. 752, defectively acknowledged corporate instrument.

The Ohio act of April 17, 1857, extends to the reformation of a mistake in an acknowledgment in the deed of a husband and wife. Kilbourn *v.* Fury, 26 Ohio St. 153. As revised in 75 Ohio Laws, p. 783, div. 7, c. 16, § 6. See Dengenhart *v.* Cracraft, 36 Ohio St. 549.

18. Johnston *v.* Dunavan, 17 Ill. App. 59. See *infra*, X, G.

19. Williamson *v.* Hitner, 79 Ind. 233.

20. Carter *v.* Champion, 8 Conn. 549, 21 Am. Dec. 695.

21. Ross *v.* Worthington, 11 Minn. 438, 83 Am. Dec. 95.

22. Nutt *v.* Nutt, Freem. (Miss.) 128.

or erroneous omission. As will be seen in the several kinds of instruments below, these mistakes may be remedied so long as the remedy does not create a new contract.[23]

2. Parties to Contracts in General. A court of equity cannot add parties or substitute other parties for those appearing on the face of a contract since the effect would be to make a new contract.[24] But the mistaken use of names of parties appearing in the contract may be rectified in order to carry out the real agreement of the contractors.[25]

3. Parties to Contracts to Convey. The general principle as above applies to contracts to convey land.[26]

4. Parties to Deeds — a. In General. A bill will lie to correct an alleged mistake wherein the grantor is named as grantee;[27] to strike out the grantee's husband's name from a deed conveying title to them jointly, whereas the wife alone made the purchase;[28] to reform a conveyance to a husband and his heirs when a father intended to convey to his married daughter and her bodily heirs, even after the death of both the grantor and grantee;[29] to insert the name of the wife when land is conveyed to the husband alone, instead of to the husband and wife;[30] to supply the erroneous omission of the names of the grantor or grantors;[31] or to right a misnomer.[32] Also where an attorney in fact, authorized by the

23. See *infra*, V, C, 2–7.

24. Mabb *v.* Merriam, 129 Cal. 663, 62 Pac. 212.

One dealing with a limited partnership association is bound to take notice of the statutory requirements for the valid execution of contracts; and if he makes a contract with an agent of the association, which is reduced to writing and signed by only one manager, instead of two, as required by law, he cannot on the ground of mistake maintain a bill in equity against the association for the reformation of the instrument by compelling the execution by two managers. Andrews Bros. Co. *v.* Youngstown Coke Co., 39 Fed. 353.

25. Smith *v.* Watson, 88 Iowa 73, 55 N. W. 68.

Agent signing individually.— Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212, 84 N. E. 449.

Parties to leases.— When a lease of real estate belonging to a bank is executed in the name of the assistant commissioner, and the rent due thereby is to be paid to the bank, equity will decree a reformation of the contract and decree a reformation of the lease and a specific performance against the bank. Douglass *v.* Mobile Branch Bank, 19 Ala. 659. Leases of corporations wherein their names are mistaken by themselves may be reformed in chancery. Anonymous, Cary 31, 21 Eng. Reprint 17.

26. Clark *v.* Blumenthal, 53 N. Y. Super. Ct. 211, holding that if the holder of the legal title to land has signed a contract to convey it, another cannot be substituted in his stead, although the signer is in fact only the agent of such other, there having been neither mistake of fact nor fraud.

27. Bohanan *v.* Bohanan, 3 Ill. App. 502.

28. Courtright *v.* Courtright, 63 Iowa 356, 19 N. W. 255.

29. Mattingly *v.* Speak, 4 Bush (Ky.) 316.

30. Haack *v.* Weicken, 118 N. Y. 67, 23 N. E. 133.

Where the wife was in possession and the husband was dead she was deemed the sole owner as against the heirs of the husband and a mortgagee with notice of her possession to whom one of the heirs had executed a mortgage. Mastin *v.* Mastin, 1 N. Y. Suppl. 746.

31. Parish *v.* Camplin, 139 Ind. 1, 37 N. E. 607.

In conveyances of the wife's land.— In conveying land belonging to the wife the husband's name alone appeared in the granting clause, but the wife released all her interest "by way of dower or otherwise," signed, attested, and acknowledged the instrument. The grantee, believing the title to be in the husband, took possession. The grantee was entitled to a correction since the grantors must have intended to convey something, although the deed as written was wholly inoperative, the wife having no dower and the statute then in force not being complied with so as to convey the husband's curtesy. Poag *v.* Shaw, 10 Ohio Cir. Ct. 448, 6 Ohio Cir. Dec. 523. Where a statute required the husband and wife to join in a conveyance of the wife's land, the omission of the name of the husband as grantor cannot be remedied, although the deed was signed and acknowledged by both parties. Cannon *v.* Beatty, 19 R. I. 524, 34 Atl. 1111. In Ohio the failure of a husband to join in a deed executed by his wife, attempting to convey her land, was not an "omission" within the meaning of Const. art. 2, § 28, providing that the general assembly may authorize courts to carry into effect the manifest intention of the parties to a contract by curing "omissions," errors and defects in the instrument, therefore that the conveyance was not cured by a judgment rendered in accordance with the provision of the act of April 17, 1857. Miller *v.* Hine, 13 Ohio St. 565 [*following* Goshorn *v.* Purcell, 11 Ohio St. 646].

32. Rankin *v.* Miller, 43 Iowa 11.

owner to convey lands, subscribed his own name alone to a deed to a third party through whom he transferred to himself, reformation by way of correcting the defect of parties was denied.[33]

b. Deeds of Trust. A deed of trust will be reformed by inserting the name of an omitted trustee so that the intent of the maker manifest on the face of it may be carried out.[34] A mistake in the names of beneficiaries will also be rectified,[35] even to the extent of preventing former creditors embraced as beneficiaries by mistake from claiming to the prejudice of the wife and children.[36]

5. Parties to Mortgages. When a mortgage itself supplies the means of correcting an omission as to parties, it will be reformed.[37] Officers who have executed a deed of trust in their own names for a corporation, instead of in the name of the corporation, have their remedy in reformation.[38] The insertion of a wrong name is reached in the same way.[39]

6. Parties to Negotiable Instruments. A note executed by the officers of a corporation for a debt of the company, but by mutual mistake made their own obligation instead of the company's, will be reformed,[40] as will also a mistake whereby a party is made a payee instead of a drawer in a bill of exchange.[41] And a complainant whose agent takes notes in his own name instead of in the name of his principal, and neglects to make a transfer, will be entitled to reform the notes so that they may be deemed to belong to the principal.[42]

7. Parties to Bonds. The insertion of a wrong name through a clerical error, as where a bond has been made payable to a constable who levied the execution instead of to the execution plaintiff,[43] or a misnomer of the obligee,[44] will be rectified, even where the obligor repeatedly assented to liability before and after changes, and the obligees consented to change in the membership of a firm, relying on the validity of the bond. The new parties in the business will be protected.[45]

D. Matters of Description — 1. In General. The effect of a false description in an instrument, occasioned by mutual mistake, or mistake on one side and fraud on the other, is not to express what the parties intended by the execution of the instrument. Generally then such misdescription is reformable,[46] provided

33. Pensonneau *v.* Bleakley, 14 Ill. 15; Bonvillain *v.* Bodenheimer, 117 La. Ann. 793, 42 So. 273.

34. Brewton *v.* Smith, 28 Ga. 442.

Filling up of blanks when the name of the trustee is omitted see Burnside *v.* Wayman, 49 Mo. 356.

35. Sydnor *v.* Palmer, 29 Wis. 226.

36. McCann *v.* Letcher, 8 B. Mon. (Ky.) 320.

A declaration of trust in favor of the settlor's "widow, if any," may be reformed so as to apply only to his wife living at the time the trust was created. Minot *v.* Tilton, 64 N. H. 371, 10 Atl. 682.

37. Hitsman *v.* Donnel, 40 Ohio St. 287.

For instance when it shows on its face that the consideration moved from a certain person, but his name as mortgagee is omitted, equity will reform by supplying the omission (Collins *v.* Cornwell, 131 Ind. 20, 30 N. E. 796; Parlin *v.* Stone, 48 Fed. 808), also where a note is executed to one person, and a deed of trust securing it is executed to another, the latter may be corrected in equity on a bill to reform (Sporrer *v.* Eifler, 1 Heisk. (Tenn.) 633).

Where a mortgage was taken in the agent's name on the sale of property of the principal, the latter may declare his ownership of the security and reform as against the agent's assignment for creditors. Wait *v.* Axford, 63 Mich. 227, 29 N. W. 692.

38. Denver Brick, etc., Co. *v.* McAllister, 6 Colo. 261; West *v.* Madison County Agricultural Bd., 82 Ill. 205.

39. See cases cited *infra*, this note.

Thus the putting in of the name of the grantee where the name of the grantor should be (Miller *v.* Davis, 10 Kan. 541) or the making of a debt secured by a deed of trust due the trustee instead of the beneficiary (Exchange Bank *v.* Russell, 50 Mo. 531) is subject to correction.

40. Denver Brick, etc., Co. *v.* McAllister, 6 Colo. 261; Fisher *v.* Barnett, 56 Ill. App. 649; Lee *v.* Percival, 85 Iowa 639, 52 N. W. 543.

Where nothing appears on the face of the note to show a corporation back of the officers, reformation will not be decreed. San Bernardino Nat. Bank *v.* Anderson, (Cal. 1893) 32 Pac. 168.

41. Scales *v.* Ashbrook, 1 Metc. (Ky.) 358.

42. Wait *v.* Axford, 63 Mich. 227, 29 N. W. 693.

43. Bell *v.* Tanguy, 46 Ind. 49.

44. Gayle *v.* Hudson, 10 Ala. 116.

45. Smith *v.* Wainwright, 24 Vt. 97.

46. Park *v.* Blodgett, etc., Co., 64 Conn. 28, 29 Atl. 133; Silliman *v.* Taylor, 35 Tex. Civ. App. 490, 80 S. W. 651. See also Dil-

the correction is made without prejudice to innocent grantees of the title.[47] It will be seen in the kinds of instruments following [48] to what extent the correction of descriptions may be carried.

2. **In Contracts to Convey.** Where by mutual mistake a wrong description, whether of location,[49] or of quantity,[50] is put into a contract to convey land, equity will reform, and especially where the description was a material inducement to the purchase.[51]

3. **In Deeds — a. In General.** In general a misdescription in a deed will be corrected,[52] and without hesitation where the mistake is apparent on the face of the deed.[53] The rule has been applied not only where the description includes land not intended to be conveyed or fails to include land intended to be conveyed,[54] but also where the description fails to identify the land intended to be conveyed,[55]

lard *v.* Jones, 229 Ill. 119, 82 N. E. 206; Carter *v.* Barnes, 26 Ill. 454.

47. Fallon *v.* Paris, 14 Montg. Co. Rep. (Pa.) 56.

Bona fide purchasers see *infra*, X, E, 2.

48. See *infra*, V, D, 2–6.

49. Bass *v.* Gilliland, 5 Ala. 761; Trout *v.* Goodman, 7 Ga. 383; Olson *v.* Erickson, 42 Minn. 440, 44 N. W. 317; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

It would be useless to reform where the facts permit only the recovery of a money judgment. Wolke *v.* Watts, 125 Iowa 321, 101 N. W. 76.

Where the mistake is of an extrinsic fact, and not in the instrument, as where a purchaser mistook the lot upon which a mill was located, a decree to reform is not proper. Webster *v.* Stark, 10 Lea (Tenn.) 406.

50. Jackson *v.* Magbee, 21 Fla. 622; Jordan *v.* Walters, (Iowa 1899) 80 N. W. 530.

51. Goff *v.* Jones, 70 Tex. 572, 8 S. W. 525, 8 Am. St. Rep. 619. *Compare* Gavin *v.* Murphy, 25 Minn. 142. See also Webb *v.* Morrison, 92 Hun (N. Y.) 605, 37 N. Y. Suppl. 449 [*affirmed* in 157 N. Y. 712, 53 N. E. 1133].

52. *Alabama.*—Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864; Fields *v.* Clayton, 117 Ala. 538, 23 So. 530, 67 Am. St. Rep. 189; Houston *v.* Faul, 86 Ala. 232, 5 So. 433.

Arkansas.— Knight *v.* Glasscock, 51 Ark. 390, 11 S. W. 580.

Illinois.— Henderson *v.* McKernan, 151 Ill. 273, 37 N. E. 867; Mills *v.* Lockwood, 42 Ill. 111; Worden *v.* Williams, 24 Ill. 67.

Indiana.— McCasland *v.* Ætna L. Ins. Co., 108 Ind. 130, 9 N. E. 119; Robbins *v.* Magee, 76 Ind. 381; Figart *v.* Halderman, 75 Ind. 564.

Iowa.— Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058.

Louisiana.— Coleman *v.* Thibodaux, 119 La. 474, 44 So. 269; Penn *v.* Rodriguez, 115 La. 174, 38 So. 955.

Mississippi.— Leonard *v.* Austin, 2 How. 888.

Ohio.— Toledo *v.* Schultens, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

Wisconsin.— Dane *v.* Derber, 28 Wis. 216.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 44.

The intention of the parties must control in determining what land is actually bought and sold, and, when that intention is clearly shown, any mistake in the description contained in the deed should be corrected, and the same made to conform to the intention of the parties. Laufer *v.* Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109.

Where the description in a deed is so defective that for such reason it is void, no suit for breach of covenant can be maintained without showing mistake and seeking reformation. Gordon *v.* Goodman, 98 Ind. 269.

In quitclaim deeds.— If the grantor has received a consideration, a misdescription in a conveyance will be corrected, although the deed is but a quitclaim and has no covenants. Deford *v.* Mercer, 24 Iowa 118, 92 Am. Dec. 460.

53. Wagenblast *v.* Washburn, 12 Cal. 208; Cummings *v.* Steele, 54 Miss. 647; Hutsell *v.* Crewse, 138 Mo. 1, 39 S. W. 449.

A conveyance which omits the county and state in which the lands to be conveyed are situated may be reformed. Greene *v.* Dickson, 119 Ala. 346, 24 So. 422, 72 Am. St. Rep. 920.

54. *Arkansas.*— Stephenson *v.* Garner, (1907) 105 S. W. 572.

Connecticut.— Bunnell *v.* Read, 21 Conn. 586; Stedwell *v.* Anderson, 21 Conn. 139.

Kentucky.— Gregory *v.* Copeland, 107 S. W. 768, 32 Ky. L. Rep. 1153.

Massachusetts.— Wilcox *v.* Lucas, 121 Mass. 21.

Ohio.— Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

Vermont.— Abbott *v.* Flint, 78 Vt. 274, 62 Atl. 721.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 44; and cases cited *supra*, note 52.

Compare Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112.

55. *Alabama.*— Tillis *v.* Smith, 108 Ala. 264, 19 So. 374; Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

Indiana.— Merchants', etc., Bldg. Assoc. *v.* Scanlan, 144 Ind. 11, 42 N. E. 1008; Comstock *v.* Coon, 135 Ind. 640, 35 N. E. 909.

Maine.— Burr *v.* Hutchinson, 61 Me. 514.

Mississippi.— Moore *v.* Crump, 84 Miss. 612, 37 So. 109.

Nebraska.— Gwyer *v.* Spaulding, 33 Nebr. 573, 50 N. W. 681; Cox *v.* Ellsworth, 18 Nebr. 664, 26 N. W. 460, 53 Am. Rep. 827.

or where the parties believed that the boundaries actually corresponded with the land intended to be conveyed, when in fact they did not.[56] The case is strengthened where the grantee has gone into possession under the deed containing the erroneous description.[57]

b. Extent of Property — (i) *In General.* Subject to a sufficient showing of mutual mistake,[58] or of mistake on one side and fraud or inequitable conduct on the other,[59] where it appears that an agreement was made with reference to a certain designated piece of land, reformation will be decreed if the misdescription in the deed includes more land than ought to be included,[60] or contains less land

Texas.— Lilley *v.* Equitable Securities Co., (Civ. App. 1898) 43 S. W. 1082.

Washington.— Elwood *v.* Stewart, 5 Wash. 736, 32 Pac. 735, 1000.

56. *Connecticut.*— Sherwood *v.* Whiting, 54 Conn. 350, 8 Atl. 80, 1 Am. St. Rep. 116.

Indiana.— Morrison *v.* Collier, 79 Ind. 417.

New Hampshire.— Smith *v.* Greeley, 14 N. H. 378.

New York.— Bush *v.* Hicks, 60 N. Y. 298 [*affirming* 2 Thomps. & C. 356].

Wisconsin.— James *v.* Cutler, 54 Wis. 172, 10 N. W. 147.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 44.

Where on one side a strip is included, and on the other side a strip is omitted, equity will reform. Critchfield *v.* Kline, 39 Kan. 721, 18 Pac. 898; Brennan *v.* Thompson, 46 Misc. (N. Y.) 317, 94 N. Y. Suppl. 684; Blessing *v.* Beatty, 1 Rob. (Va.) 287.

Gores.— Where a piece of land, part of a larger tract, is surveyed and run off by definite metes and bounds, but one of the lines of definite and fixed location varies from the division line of the original tract so as to leave a gore, and was called the "division line" by mistake of the selling agent, a reformation of the deed is not justified since the calls of the deed are satisfied and the description creates no uncertainty and works no injury. Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798.

57. Broadwell *v.* Phillips, 30 Ohio St. 255.

58. See *supra*, III, A–D.

An insolvent owned a mining interest at Silver Cliff, Colo., and certain other mining interests, about two miles distant, known as the "Royal Gold Mining Company," and inventoried the same as "Item No. 14, a mining interest at Silver Cliff, Colorado." The receiver had no evidence of the ownership, and no knowledge of the nature of the interest, and conveyed the same at a sale at auction by the description in the inventory. A purchaser at such sale under such description was not entitled to reformation of the conveyance, so as to include the R. G. Mining Company property. Joswich *v.* Faber, 93 Minn. 387, 101 N. W. 614.

Where land is sold by metes and bounds, a mistake as to the number of acres will not be corrected in the absence of fraud. Dalton *v.* Rust, 22 Tex. 133. **The boundaries in a deed included land of an adjoining proprietor. The grantee took possession and occupied such land as the grantor before him occupied. This mistake in description was corrected.** Keyton *v.* Brawford, 5 Leigh (Va.) 39. **Where realty is sold as being forty-five feet wide by a conveyance containing no reference to existing monuments, and the lot is actually only forty-four and one-half feet in width, and the seller owns the adjoining property, he cannot reform the conveyance so as to limit it to the smaller quantity.** Rothschild *v.* Bell, 10 Ohio Dec. (Reprint) 176, 19 Cinc. L. Bul. 137. **Although a description by metes and bounds in a deed conveys the legal title to all land embraced thereby, regardless of the acreage specified, such description does not preclude a court of equity from reforming the deed so as to express the true intent of the parties.** Home, etc., Co. *v.* Frietas, 153 Cal. 680, 96 Pac. 308.

Where the deed includes land of another.— Where the vendor of a lot by mistake staked it out so as to include land of an adjoining owner, and later conveys by a deed which describes the lot as bounded by the land of the adjoining owner, which both parties believe to describe the staked lot, the deed will be reformed to conform to the lot as pointed out in order to enable the vendee to maintain an action for the breach of the covenants of warranty. Butler *v.* Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273.

59. See *supra*, III, E.

60. *Arkansas.*— Stinson *v.* Ray, 79 Ark. 592, 96 S. W. 141.

California.— Home, etc., Co. *v.* Freitas, 153 Cal. 680, 96 Pac. 308.

Iowa.— Pierce *v.* Houghton, 122 Iowa 477, 98 N. W. 306; Herring *v.* Peaslee, 92 Iowa 391, 60 N. W. 650.

Kentucky.— Cotton *v.* Ward, 3 T. B. Mon. 304; Savage *v.* Yellman, 4 Ky. L. Rep. 991.

Maine.— Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166.

Michigan.— Stapleton *v.* Schaffer. 146 Mich. 346, 109 N. W. 665; Davis *v.* Benedict, 122 Mich. 657, 81 N. W. 576; West *v.* Mahaney, 86 Mich. 121, 48 N. W. 709.

Missouri.— Judson *v.* Mullinax, 145 Mo. 630, 47 S. W. 565.

New York.— Johnson *v.* Taber, 10 N. Y. 319.

North Carolina.— Phaar *v.* Russell, 42 N. C. 222; Watson *v.* Cox, 36 N. C. 389; Pugh *v.* Brittain, 17 N. C. 34.

Texas.— Elder *v.* Galveston First Nat. Bank, 91 Tex. 423, 44 S. W. 62.

Wisconsin.— Fuchs *v.* Treat, 41 Wis. 404.

than the parties agreed upon.[61] It is of no consequence whether the sale is in gross or by the acre.[62]

(II) *"More or Less."* Where land is described as containing a specified number of acres "more or less," whether the deed will be reformed in turn depends upon whether the words "more or less" cover a reasonable excess or deficit.[63]

c. Estate or Interest Created. Subject to a sufficient showing of mutual mistake,[64] or of mistake on one side and fraud or inequitable conduct on the other,[65] the failure through mistake to insert certain technical words of inheritance where an estate in fee simple is intended to be conveyed may be remedied.[66] So if the estate or interest intended to be conveyed is enlarged,[67] curtailed,[68] or vests in a different manner from what the parties thereto intended that it should vest,[69]

United States.— Yates *v.* Little, 30 Fed. Cas. No. 18,128, 6 McLean 508.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 45.

61. *Alabama.*— Blackburn *v.* Perkins, 138 Ala. 305, 35 So. 250.

Connecticut.— Cake *v.* Peet, 49 Conn. 501.

Kentucky.— Noel *v.* Gill, 84 Ky. 241, 1 S. W. 428, 8 Ky. L. Rep. 229.

Michigan.— Probett *v.* Walters, 70 Mich. 437, 38 N. W. 320.

New Hampshire.—Tilton *v.* Tilton, 9 N. H. 385.

New York.— See White *v.* Williams, 48 N. Y. 344 [*reversing* 48 Barb. 222]. See also Wendell *v.* People, 8 Wend. 183.

Oregon.— Ramsey *v.* Loomis, 6 Oreg. 367.

Virginia.— Long *v.* Israel, 9 Leigh 556.

Wisconsin.— Cordes *v.* Coates, 78 Wis. 641, 47 N. W. 949.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 45.

62. Grundy *v.* Grundy, 12 B. Mon. (Ky.) 269.

63. Thomas *v.* Perry, 23 Fed. Cas. No. 13,908, Pet. C. C. 49. See also Hill *v.* Kuhlman, 87 Fed. 498, 31 C. C. A. 87.

Unreasonable deficits.—A deficiency of fifteen acres in a deed of forty-five acres warrants reformation. Clark *v.* Roots, 50 Ark. 179, 6 S. W. 728, 8 S. W. 569. Also a deficiency of eighteen acres in a conveyance of thirty acres. Hasleton *v.* Dickinson, 51 Iowa 244, 1 N. W. 550.

Unreasonable excess.—A deed to land described as "containing one hundred acres, more or less," but in fact embracing two hundred and forty-one acres, should be reformed. Counts *v.* Kitchen, 6 Ky. L. Rep. 216.

Reasonable deficits.—A deficiency of six acres in a deed describing a farm by metes and bounds, and as containing "about one hundred and fifteen acres" is not enough to warrant reformation. Weart *v.* Rose, 16 N. J. Eq. 290. A deed of land for two hundred acres "estimated" may be corrected to include three hundred and seventy-five acres, where the deed itself furnishes the means of correction. Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. ed. 1063.

64. See *supra*, III, A–D.

A devisee of property for life had power to sell as much as may be necessary for her comfortable support. She executed a deed the effect of which was to convey a life-estate. There was no reference to her power of sale under the will and the deed contained nothing to show an intention to act under it. Such a deed will not be reformed on the ground that it was to convey a fee under the power. Brown *v.* Phillips, 16 R. I. 612, 18 Atl. 249.

A testator conveys to his daughter, by way of advancement, a life-estate, with remainder to her children. Her ignorance of its contents does not warrant a reformation, taking away the remainder from the children, and giving the fee to the grantee. Graziana *v.* Graziana, 36 S. W. 175, 18 Ky. L. Rep. 286.

65. See *supra*, III, E.

66. Chamberlain *v.* Thompson, 10 Conn. 243, 26 Am. Dec. 390; Visitors Cape Island M. E. Church *v.* Town, 47 N. J. Eq. 400, 20 Atl. 488; Trusdell *v.* Lehman, 47 N. J. Eq. 218, 20 Atl. 391; Springs *v.* Harven, 56 N. C. 96; Rutledge *v.* Smith, 45 N. C. 283. *Compare* Wright *v.* Delafield, 23 Barb. (N. Y.) 498 [*reversed* in 25 N. Y. 9].

67. Clayton *v.* Freet, 10 Ohio St. 544; Hancock *v.* Dodd, (Tenn. Ch. App. 1896) 36 S. W. 742; Green Bay, etc., Canal Co. *v.* Hewitt, 62 Wis. 316, 21 N. W. 216, 22 N. W. 588. See Condor *v.* Secrest, 149 N. C. 201, 62 S. E. 921, holding that if parties, in drawing a deed intending to convey a life-estate, placed the words of limitation in the habendum instead of the premises, under the impression that it was immaterial in which part they appeared, their error was a mistake of law which a court of equity will correct to effectuate the intention of the parties.

68. Felton *v.* Leigh, 48 Ark. 498, 3 S. W. 638; Kirk *v.* Zell, 1 MacArthur (D. C.) 116; Parish *v.* Camplin, 139 Ind. 1, 37 N. E. 607; Barnes *v.* Barnes, 15 S. W. 1, 12 Ky. L. Rep. 708; Rousseau *v.* Lambert, 7 S. W. 923, 10 Ky. L. Rep. 23; Brown *v.* McConn, 6 Ky. L. Rep. 362.

69. Barnes *v.* Barnes, 15 S. W. 1, 12 Ky. L. Rep. 708; Rousseau *v.* Lambert, 7 S. W. 923, 10 Ky. L. Rep. 23; Brown *v.* Cranberry Iron, etc., Co., 84 Fed. 930, 28 C. C. A. 567 [*affirming* 82 Fed. 351].

Tenancy by entirety where tenancy in common was intended corrected in Marshall *v.* Lane, 27 App. Cas. (D. C.) 276.

Where indemnity was intended, not a mort-

such misdescriptions will be corrected. The mistaken description of a reservation will be righted,[70] and if a trust is not properly declared in a deed the *cestui que trust* is entitled to correction.[71]

d. Deeds of Sheriffs, Commissioners, Etc. As to the correction of misdescriptions in a sheriff's deed, or a deed given by an administrator, commissioner, or the like, the authorities are not uniform. Some courts hold that, where error is carried through all the proceedings into the deed, the misdescription will not be corrected for the reason that in the one case a judicial sale has intervened and the sheriff acts in the execution of a statutory power,[72] and in the other case the administrator, commissioner, or like officer sells the land in pursuance of an order of the court.[73] Other courts, and perhaps with a better show of reason, hold that a sheriff's deed,[74] a commissioner's deed,[75] a guardian's deed,[76] or the

gage, the instrument was reformed in Toler *v.* Pender, 21 N. C. 445.

70. *Connecticut.*— Hartford, etc., Ore Co. *v.* Miller, 41 Conn. 112.

Illinois.— Purvines *v.* Harrison, 151 Ill. 219, 37 N. E. 705.

Massachusetts.— Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290.

Missouri.— Owens *v.* Carthage, etc., R. Co., 110 Mo. App. 320, 85 S. W. 987.

New York.— Le Roy *v.* Platt, 4 Paige 77.

Wisconsin.— Sawyer *v.* Hanson, 48 Wis. 611, 4 N. W. 765.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 45.

71. Bunn *v.* Mitchell, 27 N. J. Eq. 54; Walden *v.* Skinner, 101 U. S. 577, 25 L. ed. 963.

A fee simple is indispensable to the execution of a trust to sell lands, and a trust deed may be reformed so as to convey a fee to the trustee in order to carry out the intention of the parties. Fish *v.* New York Water-Proof Paper Co., 29 N. J. Eq. 16.

72. Henderson *v.* Hosfeldt, 124 Ala. 391, 27 So. 415; Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Angle *v.* Speer, 66 Ind. 488; Miller *v.* Kolb, 47 Ind. 220; Rogers *v.* Abbott, 37 Ind. 138. See *supra*, IV, F.

A sheriff's deed in foreclosure proceedings, where the decree of foreclosure does not correctly describe the property intended to be conveyed, cannot be reformed. McCall *v.* White, 73 Ala. 562; Bowen *v.* Wickersham, 124 Ind. 404, 24 N. E. 983, 19 Am. St. Rep. 106; Runnels *v.* Kaylor, 95 Ind. 503; Keepfer *v.* Force, 86 Ind. 81; Lewis *v.* Owen, 64 Ind. 446; Miller *v.* Kolb, 47 Ind. 220. But see Zingsem *v.* Kidd, 29 N. J. Eq. 516, where a deed on foreclosure was reformed for omitting part of the premises described in the mortgage. See *infra*, V, D, 5, a, (III)–(IV); XVIII, B, 2.

When the description is void for uncertainty, the deed of a sheriff will not be reformed. Lewis *v.* Owen, 64 Ind. 446.

Estoppel.— Where, however, the execution defendant was present at the sale, and the purchaser and his privies have been in possession ever since, such defendant is estopped. Thomas *v.* Dockins, 75 Ga. 347.

73. Hull *v.* Calkins, 137 Cal. 84, 69 Pac. 838 (holding that a commissioner's deed executed under foreclosure of a trust deed, and an assignment to the trustee of a contract, cannot be reformed by inserting the contract in the commissioner's deed, which by mistake was omitted from the decree); Ward *v.* Brewer, 19 Ill. 291, 68 Am. Dec. 596 (holding that if an administrator conveys on one piece of land, having in mind another, and gives a deed therefor there is no such mistake as the court can reform); Walton *v.* Cox, 67 Ind. 164.

74. Greeley *v.* De Cottes, 24 Fla. 475, 5 So. 239; Zingsem *v.* Kidd, 29 N. J. Eq. 516; Butler *v.* Clark, 66 Hun (N. Y) 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413 [*affirmed* in 142 N. Y. 636, 37 N. E. 566].

Similar to deed at private sale.— Where the defect is such that it might have been corrected had the deed resulted from a private sale, it has been held that a sheriff's deed may be corrected in equity. Vanderbeck *v.* Perry, 28 N. J. Eq. 367.

Where the proceedings leading up to the deed were regular a mistake in a sheriff's deed has been corrected on reformation Gilbreath *v.* Dilday, 152 Ill. 207, 38 N. E. 572.

75. Neal *v.* Louisville, 3 Ky. L. Rep. 614 (holding that a mistake in describing lots sold by a commissioner under a decree to pay taxes may be corrected); Cosby *v.* Wickliffe, 12 B. Mon. (Ky.) 202 (to conform to his actual intention, although at variance with his report to the court); Houx *v.* Bates County, 61 Mo. 391 (where a commissioner's deed in a sale of land, under a statutory power, was reformed by substituting the word "blocks" for the word "lots," the court holding that where the only error in the deed of a county commissioner is a misdescription, the doctrine that equity will not relieve the defective execution of a statutory power does not apply, the provisions of the statute having been otherwise complied with).

So where a surveyor made an error in locating and marking a line dividing a body of land in partition proceedings and a corresponding error appeared in the commissioner's deed referring thereto, all who purchased with reference to the line as actually located and marked have a right to have the error corrected. Wilson *v.* Jasper, 90 Ky. 211, 13 S. W. 885, 12 Ky. L. Rep. 80.

76. Scott *v.* Queen, 94 N. C. 462, where a

like [77] is subject to equitable correction just as any other instrument, especially where such mistake consists merely in a misdescription of the land intended to be conveyed [78] and the rights of creditors are not thereby affected.[79] Moreover it has been repeatedly held that equity has jurisdiction to correct misdescriptions in instruments conveying property, under decree of court, when the proof is clear and the rights of innocent third parties have not intervened, even though the mistake runs through the entire judicial proceedings.[80]

4. In Leases. A misdescription in a lease may be reformed,[81] unless the effect would be to work an injustice,[82] or unless the subject-matter to be corrected was not a material inducement to the making of the lease.[83]

5. In Mortgages [84] — a. Of Realty — (i) *In General.* Equity will reform a mortgage when it so misdescribes the property mortgaged as to include lands not intended to be included,[85] or to omit a part of the lands which should have been embraced within the mortgage.[86] A description of the wrong piece of property,[87]

guardian conveyed land belonging to his two wards to them in moieties, and one ward's share should have been greater than that of the other.

77. See cases cited *infra*, this note.

A mistake in a description of a master's deed has been corrected where the property was properly described in the mortgage and in the advertisement of sale. Foster *v.* Clark, 79 Ill. 225.

Errors in the description of property sold in partition proceedings may be corrected in equity. Pulliam *v.* Wilkerson, 7 Baxt. (Tenn.) 611.

78. *Arkansas.*— Steward *v.* Pettigrew, 28 Ark. 372.

Georgia.— Thomas *v.* Dockins, 75 Ga. 347.

Kentucky.— Miller *v.* Craig, 83 Ky. 623, 4 Am. St. Rep. 179.

Mississippi.— Wise *v.* Brooks, 69 Miss. 891, 13 So. 836.

New Jersey.— Zingsem *v.* Kidd, 29 N. J. Eq. 516.

New York.— Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Butler *v.* Clark, 66 Hun 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413 [*affirmed* in 142 N. Y. 636, 37 N. E. 566].

Ohio.— Stites *v.* Wiedner, 35 Ohio St. 555.

79. Bartlett *v.* Judd, 23 Barb. (N. Y.) 262.

80. *Illinois.*— Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206.

Iowa.— Snyder *v.* Ives, 42 Iowa 157.

Missouri.— Dodson *v.* Lomax, 113 Mo. 555, 21 S. W. 25.

New Jersey.— Zingsem *v.* Kidd, 29 N. J. Eq. 516; Loss *v.* Obry, 22 N. J. Eq. 52; Waldron *v.* Letson, 15 N. J. Eq. 126.

New York.— Gillespie *v.* Moon, 2 Johns. Ch. 585, 7 Am. Dec. 559.

Ohio.— Gill *v.* Pelkey, 54 Ohio St. 348, 43 N. E. 991.

Oregon.— Smith *v.* Butler, 11 Oreg. 46, 4 Pac. 517.

Pennsylvania.— Clarion First Nat. Bank *v.* Brenneman, 114 Pa. St. 315, 7 Atl. 910.

South Carolina.— Howlett *v.* Garner, 50 S. C. 1, 27 S. E. 533.

Virginia.— See Fore *v.* Foster, 86 Va. 104, 9 S. E. 497.

West Virginia.— Baxter *v.* Tanner, 35 W. Va. 60, 12 S. E. 1094.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 47½.

81. Murray *v.* Dake, 46 Cal. 644; Le Comte *v.* Freshwater, 56 W. Va. 336, 49 S. E. 238; Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363. *Compare* Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029.

As to quantity of land demised.—A lease which contained a larger quantity of land than was intended to be demised was decreed to be rectified as to the overplus. Mortimer *v.* Shortall, 1 C. & L. 417, 2 Dr. & War. 363.

82. Morris *v.* Kettle, 56 N. J. Eq. 826, 34 Atl. 376 [*affirmed* in (1898) 42 Atl. 1117].

83. Coast *v.* McCaffery, 46 N. Y. App. Div. 436, 61 N. Y. Suppl. 881.

84. See *supra*, IV, B, 2; *infra*, V, D, 5, a, (II), (III); IX, E; X, E; XVIII, B, 2.

85. Dunbar *v.* Newman, 46 Miss. 231; Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911.

86. Stevens *v.* Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216; De Jarnatt *v.* Cooper, 59 Cal. 703; Blodgett *v.* Hobart, 18 Vt. 414.

87. *Florida.*— Peck *v.* Osteen, 37 Fla. 427, 20 So. 549.

Illinois.— Way *v.* Roth, 159 Ill. 162, 42 N. E. 321 [*affirming* 58 Ill. App. 198].

Iowa.— Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784; Sowler *v.* Day, 58 Iowa 252, 12 N. W. 297.

Kentucky.— Tichenor *v.* Yankey, 89 Ky. 508, 12 S. W. 947, 11 Ky. L. Rep. 712.

Washington.— Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 52.

Description vague and uncertain.— Where a mortgage purports to convey eight hundred acres, but by a misdescription of government numbers conveys three hundred and twenty acres to which the mortgagor had and claimed no title, it is uncertain what lands were intended to be conveyed instead of those described by mistake, and reformation was properly refused. Alexander *v.* Caldwell, 55 Ala. 517.

or a faulty description of the right piece,[88] warrants relief when the mistake is clearly and satisfactorily proved and it can be corrected without prejudice to the rights of an innocent purchaser[89] or of creditors and subsequent mortgagees without notice.[90] The remedy also extends to the correction of the mortgage of a homestead duly executed and acknowledged.[91] A mistake in describing the quantity of estate mortgaged may be rectified [92] to the extent of supplying technical words of inheritance.[93]

(II) *INDEBTEDNESS CREATED.* A mistake in describing the indebtedness covered by a mortgage will be reformed,[94] so as to release a creditor beneficiary bound as surety,[95] or so as to cover a note, signed by a principal and surety as such, instead of being signed by a maker and indorsed by an indorser.[96] Where a note is set out in a mortgage given to secure it, but, through clerical error, the time of payment was wrongly stated, the mortgage may be made to correspond to the note.[97]

(III) *BEFORE FORECLOSURE.*[98] Where the mortgage misdescribes the property intended to be mortgaged, upon sufficient ground shown the mistake may of course be corrected prior to foreclosure.[99]

(IV) *AFTER FORECLOSURE.*[1] After foreclosure, however, it has been held that, where the mistake in description of the premises mortgaged has run through the foreclosure proceedings, such mistake in the mortgage, in the decree, and in the deed cannot be corrected by reformation.[2] On the other hand, under the more liberal rule already referred to,[3] it has been held that equity may go back to the original mistake and reform the mortgage in order to conform the instrument and proceedings to the original and actual intention of the parties.[4] And it seems that equity always has jurisdiction upon a proper showing made to correct the description in the original mortgage and to order another sale by the proper description.[5]

88. *Alabama.*— Houston *v.* Faul, 86 Ala. 232, 5 So. 433; McGehee *v.* Lehman, 65 Ala. 316.

Florida.—Greeley *v.* De Cottes, 24 Fla. 475, 5 So. 239.

Indiana.— Whipperman *v.* Dunn, 124 Ind. 349, 24 N. E. 166, 1045; Burkam *v.* Burk, 96 Ind. 270; McKay *v.* Wakefield, 63 Ind. 27.

Kansas.— Keys *v.* Lardner, 59 Kan. 545, 53 Pac. 758; Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794.

United States.— Fisher *v.* Porter, 23 Fed. 162.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 52.

89. Dozier *v.* Mitchell, 65 Ala. 511.

90. German Nat. Bank *v.* Bode, 24 Ohio Cir. Ct. 662; Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

91. Witherington *v.* Mason, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41. See *infra*, X, G.

In a mortgage containing a waiver of homestead, property incorrectly described may be reformed. Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526.

Cal. Civ. Code, § 3399, authorizes the reformation of a misdescription in a mortgage on homestead. Stevens *v.* Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216.

92. Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346.

93. McMillan *v.* Fish, 29 N. J. Eq. 610; Wanner *v.* Sisson, 29 N. J. Eq. 141.

94. Exchange Bank *v.* Russell, 50 Mo. 531; Bastin *v.* Schafer, 15 Okla. 607, 85 Pac. 349, holding that a description in the mortgage of the obligation incurred is a mere recital of the debt, and if the terms of the instrument wrongly describe such indebtedness, it may be corrected.

95. Trapp *v.* Moore, 21 Ala. 693.

96. *In re* Clarke, 5 Fed. Cas. No. 2,843, 2 Hughes 405, 10 Nat. Bankr. Reg. 21.

97. Tarke *v.* Bingham, 123 Cal. 163, 55 Pac. 759.

98. See *supra*, IV, B, 2; *infra*, X, E; XVIII, B, 2.

99. See *supra*, V, D, 5, a, (I).

1. See *supra*, IV, B, 2; V, D, 3, d; *infra*, X, E; XVIII, B, 2.

2. Stephenson *v.* Harris, 131 Ala. 470, 31 So. 445; Conyers *v.* Mericles, 75 Ind. 443; Angle *v.* Speer, 66 Ind. 488; Miller *v.* Kolb, 47 Ind. 220; Davenport *v.* Sovil, 6 Ohio St. 459. See also *supra*, V, D, 3, d.

3. See *supra*, V, D, 3, d.

4. *California.*— Quivey *v.* Baker, 37 Cal. 465.

Florida.— Greeley *v.* De Cottes, 24 Fla. 475, 5 So. 239.

Nebraska.— Parker *v.* Starr, 21 Nebr. 680, 33 N. W. 424.

New Jersey.— Waldron *v.* Letson, 15 N. J. Eq. 126.

Utah.— Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 52.

5. Armstrong *v.* Short, 95 Ind. 326; Con-

b. Of Personalty. A chattel mortgage may be reformed so as to correct a wrong description and include property intended by the parties to be covered.[6]

6. In Other Instruments. Other instruments in which misdescriptions have been remedied are marriage settlements,[7] antenuptial agreements,[8] bills of sale,[9] deeds of gift,[10] and bonds.[11]

VI. Ratification, Estoppel, or Waiver.[12]

Where grounds for reformation exist the party in whom the right of action is may expressly ratify the instrument, or he may do such acts as, with a full knowledge of the facts, will amount to an adoption of the instrument.[13] If a party has accepted benefits, or done such acts, or omitted to do acts whereby he shows that he must have known and understood the instrument as written when he received it, and accepted the same without objection,[14] or contributes to the mistake by

yers *v.* Mericles, 75 Ind. 443. See *supra*, IV, B, 2.

6. Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919; Willis *v.* Munger Improved Cotton Mach. Mfg. Co., 13 Tex. Civ. App. 677, 36 S. W. 1010.

7. Garner *v.* Garner, 1 Desauss. Eq. (S. C.) 437; Heneage *v.* Hunloke, 2 Atk. 456, 26 Eng. Reprint 676; Udale *v.* Halfpenny, 9 Mod. 56, 88 Eng. Reprint 313, 2 P. Wms. 151, 24 Eng. Reprint 677.

8. Love *v.* Graham, 25 Ala. 187.

9. McCloskey *v.* McCormick, 44 Ill. 336; Menomonee Locomotive Mfg. Co. *v.* Langworthy, 18 Wis. 444.

10. Harrington *v.* Harrington, 2 How. (Miss.) 701.

11. Smith *v.* Allen, 1 N. J. Eq. 43, 21 Am. Dec. 33; Johnson *v.* Phillips, (Tenn. Ch. App. 1898) 51 S. W. 990; Simpson *v.* Vaughan, 2 Atk. 31, 26 Eng. Reprint 415; Burn *v.* Burn, 3 Ves. Jr. 573, 30 Eng. Reprint 1162; Taylor *v.* Rudd [*cited* in Burt *v.* Barlow, 3 Bro. Ch. 451, 454, 29 Eng. Reprint 638].

12. Estoppel generally see Estoppel, 16 Cyc. 671.

13. Okes *v.* Insurance Co., 2 Pa. Dist. 747; Van Beck *v.* Milbrath, 118 Wis. 42, 94 N. W. 657.

A previous suit on the contract as written effected a ratification in Steinbach *v.* Relief F. Ins. Co., 77 N. Y. 498.

Accepting money on an insurance policy and retaining it for fifteen years barred the action in Avery *v.* Equitable L. Assur. Soc., 117 N. Y. 451, 23 N. E. 3 [*reversing* 52 Hun 392, 5 N. Y. Suppl. 278].

In order to make the ratification effective it is necessary to show that the party intended such a result with full knowledge of the facts and that he ratified the instrument as it was, not as he thought it was. Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430; Elliott *v.* Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. ed. 678.

Subsequent agreement.— Complainant purchased lands of defendant, and after discovery of an alleged mistake in description made an oral agreement to purchase the additional land intended to have been included in the original purchase, and thereafter began building a porch thereon in the faith of the agreement, without defendant's objection. It was held that after a year's possession under the new agreement, it could not be repudiated in order to obtain specific performance of the alleged original parol agreement of purchase by having the deed corrected to include the land in question. Urich *v.* Watts, 69 N. J. Eq. 604, 66 Atl. 432.

Ratification by receiver.— Contracts entered into by the directors of street railroad companies with a third party at a time when the companies were in the hands of receivers affecting rights which were in the receivers cannot be reformed by a court of equity on the ground of mistake at suit of the companies or their stock-holders, where such contracts were subsequently ratified and signed by the receivers pursuant to an order of the court, made with full knowledge of the facts, and where the companies accepted benefits and claimed rights thereunder after knowledge of the facts. North Chicago St. R. Co. *v.* Chicago Union Traction Co., 150 Fed. 612.

14. *Iowa.*— Baldwin *v.* State Ins. Co., 60 Iowa 497, 15 N. W. 300.

Kentucky.— J. G. Mattingly Co. *v.* Mattingly, 96 Ky. 430, 27 S. W. 985, 31 S. W. 279, 17 Ky. L. Rep. 1.

Missouri.— Young *v.* Marion-Sims Medical College, 91 Mo. App. 214.

New Jersey.— Brown *v* Balen, 33 N. J. Eq. 469.

Ohio.— McNaughten *v.* Partridge, 11 Ohio 223, 38 Am. Dec. 731.

Texas.— Wittbecker *v.* Walters, 69 Tex. 470, 6 S. W. 788.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 82.

Acts and declarations of the party bringing suit which from their very nature operate to work an estoppel or waiver may be set up by the other party, and will constitute a good defense. Busey *v.* Moraga, 130 Cal. 586, 62 Pac. 1081.

Acceptance and payment of purchase-money.— Where an agent of a corporation prepares a deed and sends it to the officers of the company, who insert in the deed a building restriction, and then execute it, and the grantee accepts the deed and pays over the purchase-money after he has had a full opportunity of examining the deed, he cannot afterward have the building restriction

his own wrong,[15] he is estopped to seek reformation on the ground of mistake or fraud. No estoppel is created when the situation of the party in whose favor the estoppel is claimed to operate is no different from what it otherwise would have been.[16] But such acts or declarations must be such as in law will operate as a valid waiver or estoppel.[17] Acts or declarations of one not authorized to make them,[18] or induced by misrepresentation or fraud,[19] or through delay because of ignorance of the facts,[20] do not necessarily operate to work an estoppel. The fact that a mortgage in which there is a mistake has been foreclosed does not preclude reformation thereof.[21] And negligence alone does not preclude reforma-

stricken from the deed, on the ground that he had accepted the deed and paid the purchase-money without knowledge of the insertion of the restriction. Coppes *v.* Keystone Paint, etc., Co., 36 Pa. Super. Ct. 38.

Estoppel by previous adjudications and legal proceedings.—Adjudication on the instrument in a court of law estops the parties from going into equity for reformation. Sibert *v.* McAvoy, 15 Ill. 106; Steinbach *v.* Relief F. Ins. Co., 12 Hun (N. Y.) 640 [*affirmed* in 77 N. Y. 498, 53 Am. Rep. 655]. Mere filing of suit does not operate as estoppel. McCloskey *v.* McCormick, 44 Ill. 336; Neuenberger *v.* Neuenberger, 29 S. W. 617, 16 Ky. L. Rep. 710. Proceedings on an order in pursuance of a petition later held void will not estop. Mills *v.* Lockwood, 42 Ill. 111. A surrogate's determination of the effect of an instrument does not preclude the supreme court from entertaining an application to reform. Saltus *v.* Pruyn, 18 How. Pr. (N. Y.) 512.

Where a party remains silent when he should have spoken he was estopped. Roszell *v.* Roszell, 109 Ind. 354, 10 N. E. 114.

Where grantees in a deed were present at the execution, accepted the same, acquiesced in its provisions and went into possession, thereby leading their grantors to change their position on the faith of the deed, reformation is estopped. Kruse *v.* Koelzer, 124 Wis. 536, 102 N. W. 1072.

Where parties slept on their rights and hence could not recover see Weathers *v.* Hill, 92 Ala. 492, 9 So. 412; Elam *v.* Haden, (Ky. 1899) 51 S. W. 455.

15. Riegel *v.* Ormsby, 111 Iowa 10, 82 N. W. 432.

16. Detweiler *v.* Swartley, 74 Kan. 855, 86 Pac. 141.

Even though the complainant has accepted money payments. McCain *v.* Columbia Finance, etc., Co., 97 S. W. 343, 29 Ky. L. Rep. 1292. See also Delaware Ins. Co. *v.* Pennsylvania Ins. Co., 126 Ga. 380, 55 S. E. 330.

17. McCain *v.* Columbia Finance, etc., Co., 97 S. W. 343, 29 Ky. L. Rep. 1292.

Where an administrator conveyed certain land in pursuance of a judicial sale, believing that the description in the deed only covered twelve acres of land, which belief he also held when he assigned purchase-money notes and a mortgage given for the land, the fact that such notes and mortgage were assigned to a third person, who foreclosed the same, did not estop the estate from maintaining a suit to reform the deed on the ground that the description included, by mutual mistake, more land than was intended to be conveyed. Pierce *v.* Vansell, 35 Ind. App. 525, 74 N. E. 554.

Where an agent, in drawing a contract for the sale of realty, makes a mistake in the writing thereof, such mistake is not negligence of the principal, estopping him from having the contract reformed in equity. McCain *v.* Columbia Finance, etc., Co., 97 S. W. 343, 29 Ky. L. Rep. 1292.

The fact that a married woman claiming a remainder interest in land, which was sold in fee by the alleged life-tenant, her parent resided at one time within two miles, but most of the time within five miles, of the property while it was occupied and improved by the purchaser, and asserted no right therein for nearly twenty-five years, would not estop her to afterwards assert her claim to the land. Teague *v.* Sowder, (Tenn. 1908) 114 S. W. 484.

18. Decorah First Nat. Bank *v.* Manning, 37 Iowa 610.

19. Parker *v.* Benjamin, 53 Ill. 255; Ætna Ins. Co. *v.* Brannon, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. N. S. 548; Kyle *v.* Fehley, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866.

"He who seeks equity must do equity" is a rule that must be considered in judging of an estoppel. Cummings *v.* Freer, 26 Mich. 128; Morisey *v.* Swinson, 104 N. C. 555, 10 S. E. 754, 106 N. C. 221, 10 S. E. 1103.

20. Burge *v.* Burge, 45 Ga. 301; Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333.

Payment under protest on an instalment in a mortgage does not operate as an estoppel. Andrews *v.* Gillespie, 47 N. Y. 487.

Ignorance of remedy.—A defendant relying solely on his legal title, in an action to recover the possession of realty, and failing, is not estopped to maintain an action to correct mistakes in the deed when his defense constituted a counter-claim. Witte *v.* Lockwood, 39 Ohio St. 141.

21. Burkam *v.* Burk, 96 Ind. 270; Sanders *v.* Farrell, 83 Ind. 28; Jones *v.* Sweet, 77 Ind. 187. See Armstrong *v.* Snort, 95 Ind. 326, *dictum*. See *supra*, IV, B, 2; V, D, 5, a, (IV).

Assignment to a third person and subsequent foreclosure does not estop.— Where an administrator conveyed certain land in pursuance of a judicial sale, believing that the description in the deed covered only twelve acres of land, which belief he also had when

tion if the other party has not been prejudiced,[22] and if there has been no neglect of legal duty.[23] Neglect to seek correction for an unreasonable time, when the right clearly exists, may also result in estoppel.[24]

VII. CONDITIONS PRECEDENT.

A. In General. The equitable maxim that "he who seeks equity must do equity" renders it necessary that a complainant seeking reformation must be willing and ready at all times to do all in his power to fulfil his part of the obligations entailed by the agreement, as a condition precedent to his remedy,[25] or he must be able and willing to restore the other party to his original position.[26] Furthermore where defendant has committed a fraud, plaintiff is not bound to return money received as a condition precedent to bringing suit.[27]

B. Demand. Before a suit to reform is instituted plaintiff must request of defendant a correction of the instrument or allege an excuse for his failure to do so,[28]

he assigned purchase-money notes and a mortgage given for the land, the fact that such notes were assigned to a third person who foreclosed the same did not estop the estate from maintaining a suit to reform the deed on the ground that the description included more land than was intended to be conveyed through mutual mistake. Pierce *v.* Vansell, 35 Ind. App. 525, 74 N. E. 554.

22. Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943; Southern Finishing, etc., Co. *v.* Ozmend, 132 N. C. 839, 44 S. E. 681. See *infra*, VIII, D.

Neglect to ascertain an agent's authority did not lead the other party to prejudice himself. See Eberle *v.* Heaton, 124 Mich. 205, 82 N. W. 820.

23. Benesh *v.* Travelers' Ins. Co., 14 N. D. 39, 103 N. W. 405. See *infra*, VIII, D.

24. August *v.* Seeskind, 6 Coldw. (Tenn.) 166. See also *infra*, VIII, D; XI, C.

25. *Alabama.*— Connor *v.* Armstrong, 86 Ala. 262, 5 So. 449; Billingsley *v.* Billingsley, 37 Ala. 425.

Georgia.— Boyce *v.* Watson, 20 Ga. 517.

Kansas.— Conaway *v.* Gore, 21 Kan. 725.

Michigan.— Champion *v.* Grand Rapids, etc., R. Co., 145 Mich. 676, 108 N. W. 1078.

Missouri.— Williams *v.* Husky, 192 Mo. 533, 90 S. W. 425.

United States.— Adams *v.* Henderson, 168 U. S. 573, 18 S. Ct. 179, 42 L. ed. 584 [*affirming* 11 Utah 480, 40 Pac. 720].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 83.

Compare White *v.* Glazier, 106 S. W. 289, 32 Ky. L. Rep. 570.

The purchaser of property is not necessarily required to be in possession of the premises in order to obtain correction of a mistake in a prior deed to a portion of the premises executed by her grantor to another. Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38.

An actual payment of the consideration must be shown by evidence outside the recitals in a deed when a purchaser files a bill to correct an alleged mistake in description. Wait *v.* Smith, 92 Ill. 385.

A deed is given to correct an erroneous description in a prior deed, and by mistake was drawn so as to describe the whole of the first land conveyed whereas it was only a part. The correction of the mistake by cross bill cannot be made conditional on the correction of the mistake in the first deed, consisting of an omission of a restriction against building on the boundary line of that part of the land described in the second deed. Slater *v.* Cobb, 153 Mass. 22, 26 N. E. 410.

26. Youngstown Electric Light Co. *v.* Butler County Poor Dist., 21 Pa. Super. Ct. 95. *Compare* Keeley *v.* Sayles, 217 Ill. 589, 75 N. E. 567.

Where the complainant has been guilty of such breaches of the real contract as to substantially deprive the other party of all its benefits reformation will be made only on condition that the parties be put as far as possible *in statu quo*, as by a return of all moneys received by the complainant under the contract. Cassidy *v.* Metcalf, 66 Mo. 519.

27. Conn *v.* Hagan, 93 Tex. 334, 55 S. W. 323.

For instance where the parties make a deed cover a larger tract of land than was intended, no consideration having been paid for such excess, in a suit to reform the grantor need not offer to put the grantee *in statu quo*. Keeley *v.* Sayles, 217 Ill. 589, 75 N. E. 567.

28. Black *v.* Stone, 33 Ala. 327; Brainerd *v.* Arnold, 27 Conn. 617; Popijoy *v.* Miller, 133 Ind. 19, 32 N. E. 713.

Defendant having refused to reconvey to plaintiff land deeded to him by mistake on the ground that no mistake was made cannot complain that a demand for reformation was necessary before plaintiff could sue to reform its deed to defendant. Home, etc., Co. *v.* Freitas, 153 Cal. 680, 96 Pac. 308.

Where a pledgor had become a bankrupt, a demand for reformation of the contract of pledge was not required to be made either on the pledgor or his trustee in bankruptcy prior to the institution of a suit for such relief. Waterloo First Nat. Bank *v.* Bacon, 113 N. Y. App. Div. 612, 98 N. Y. Suppl. 717 [*affirmed* in 189 N. Y. 533, 82 N. E. 1126], for the reason that neither the bankrupt nor his trustee could comply with the demand.

unless such suit to reform is incidental to some other action; then no prior demand is necessary.[29]

VIII. DEFENSES AND OBJECTIONS TO RELIEF.[30]

A. In General. In an action to reform it is a good defense that the general equities of the whole transaction between the parties are against the complainant.[31] Thus the objections that a reformation of the instrument would work a forfeiture,[32] that the party seeking correction is guilty of making a false representation, whether knowingly or not,[33] that the original intention of the parties is doubtful,[34] and that the effect would be to put in writing the verbal agreement and permit its use as evidence,[35] have been sustained as valid defenses. But it is not a good defense if the equities are too remote, irrelevant, or disconnected from the real action.[36] It is no bar then that a deed to be corrected was executed while property was being held adversely,[37] that a contemporaneous agreement has been broken,[38] that the debt secured by a trust deed has outlawed,[39] that the erroneous instru-

29. Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864; Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38; Braithwaite *v.* Henneberry, 124 Ill. App. 407 [*affirmed* in 222 Ill. 50, 78 N. E. 34]; Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259; Walls *v.* State, 140 Ind. 16, 38 N. E. 177; Lucas *v.* Labertue, 88 Ind. 277; Axtel *v.* Chase, 83 Ind. 546; Nichols, etc., Co. *v.* Berning, 37 Ind. App. 109, 76 N. E. 776; Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180; Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901.

The rule is laid down in Sparta School Tp. *v.* Mendell, 138 Ind. 188, 195, 37 N. E. 604. "Where the only relief sought is the reformation, a previous demand is essential, but where, in addition to the reformation, a recovery is asked, no prior demand is necessary."

In ejectment defendant, who seeks to obtain title to the west of three adjoining acres of which he is in possession, relying on a mistake in the description in his deed which described the middle instead of the west of the three acres as that conveyed — plaintiff's deed, subsequently executed by the same grantor, having described the west acre — should tender plaintiff a deed to the middle acre, or otherwise disclaim any interest therein as a condition of relief. Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921.

30. Estoppel, ratification, or waiver as defense see *supra*, VI.

31. Ray *v.* Ferrell, 127 Ind. 570, 27 N. E. 159; Redding *v.* Rozell, 59 Mich. 476, 26 N. W. 677; Hogencamp *v.* Ackerman, 10 N. J. Eq. 267; Grantham *v.* Bizzel, 10 N. C. 196. *Compare* Turner *v.* Newell, 129 Ga. 89, 58 S. E. 657; North Chicago St. R. Co. *v.* Chicago Union Traction Co., 150 Fed. 612 [*affirmed* in 162 Fed. 1007, 87 C. C. A. 679].

32. Morris *v.* Kettle, 56 N. J. Eq. 826, 34 Atl. 376; Mills *v.* Evansville Seminary, 52 Wis. 669, 9 N. W. 925. See *supra*, p. 932 text and note 8; *infra*, VIII, B.

33. Allen *v.* Brown, 6 R. I. 386; Cushman *v.* New England F. Ins. Co., 65 Vt. 569, 27 Atl. 426. See *supra*, III, E, 2, b.

34. Thallman *v.* Thomas, 102 Fed. 935. *Compare* Drovers' Live Stock Commission Co. *v.* Custer County State Bank, 19 Okla. 302, 91 Pac. 850, holding that in an action on a bond given to release property attached, a prayer to reform the bond so as to bind the principal and the sureties "to pay any judgment that might be rendered in the case" instead of "against it," meaning defendant, will not be granted where, if the property attached actually belonged to the principal, the bond was in proper form, and if it was in fact the property of other parties, plaintiff should have so stated in its original petition.

35. Van Vleet *v.* Sledge, 45 Fed. 743. *Compare supra*, p. 905 note 11.

36. Foster *v.* Winchester, 92 Ala. 497, 9 So. 83; Berry *v.* Webb, 77 Ala. 507; Day *v.* Preskett, 40 Ala. 624; Farmers', etc., Bank *v.* Detroit, 12 Mich. 445.

A quitclaim deed given for the purpose of preventing a reformation, and in fraud of the rights of those entitled to it, is not a good defense in a suit to correct a deed. Taber *v.* Shattuck, 55 Mich. 370, 21 N. W. 371.

The fact that defendants offered to compromise, but refused to comply with plaintiff's claim, does not prevent plaintiff from standing on his rights under the contract. Gillis *v.* Arringdale, 135 N. C. 295, 47 S. E. 429.

Attachment by creditors as a defense.— Where a mortgage of saloon fixtures included by mistake a stock in trade, and the mortgagors continued the business, the mortgagees were entitled to have the error stricken out of the mortgage, although meanwhile attachments by other creditors had been sued out on the ground that the mortgage was fraudulent because of the insertion. Wright *v.* Market Bank, (Tenn. Ch. App. 1900) 60 S. W. 623.

37. Thompson *v.* Marshall, 36 Ala. 504, 76 Am. Dec. 328.

38. Tillis *v.* Smith, 108 Ala. 264, 19 So. 374; Alabama Midland R. Co. *v.* Brown, 98 Ala. 647, 13 So. 70.

39. Travelli *v.* Bowman, 150 Cal. 587, 89 Pac. 347, holding that a trust deed is not a

ment, if not under seal, would be barred by limitations,[40] that the adverse party misapprehended the transaction,[41] that there has been a material alteration in a lease when it does not appear that the complainant is chargeable,[42] that an erroneous deed was conveyed to a school-board by one of its directors,[43] or that a contract for the sale of land was oral, and therefore within the statute of frauds.[44]

B. Relief Unnecessary or Ineffectual. A court will not reform an instrument merely for the sake of reforming it, and it is a good defense to point out, whether on demurrer or by answer, that the reformation would be useless and of no effect.[45] There is no necessity for reformation where the party against whom action is brought is willing to rectify,[46] or where the legal construction put on the instrument would be the same as before reformation.[47] Furthermore, reforma-

mortgage, but conveys the title to the trustee for the purposes of the trust, and the fact that the debt secured has outlawed does not affect the title of the trustee, and will not prevent a court of equity from reforming the deed on the ground that the reformation would be a vain act.

40. Allen *v.* Elder, 76 Ga. 764, 2 Am. St. Rep. 63. See *infra*, XI, C.

41. Wooden *v.* Haviland, 18 Conn. 101. See *supra*, III, A; III, B, 2, a; III, C, 2, b.

42. Rose Clare Lead Co. *v.* Madden, 54 Ill. 260.

43. Rich *v.* School Trustees, 158 Ill. 242, 41 N. E. 924. See *supra*, IV, C, 1.

44. Conaway *v.* Gore, 24 Kan. 389. See *supra*, IV, C, 2.

45. *Florida.*— Evans *v.* Summerlin, 19 Fla. 858.

Indiana.— Ray *v.* Ferrell, 127 Ind. 570, 27 N. E. 159; Parker *v.* Teas, 79 Ind. 235.

Iowa.— Burner *v.* Higman, etc., Co., 133 Iowa 315, 110 N. W. 580; Daugherty *v.* Curtis, (1903) 97 N. W. 67.

New Jersey.— Rue *v.* Meirs, 43 N. J. Eq. 377, 12 Atl. 369.

New York.— Heert *v.* Cruger, 14 Misc. 508, 35 N. Y. Suppl. 1063; Many *v.* Beekman Iron Co., 9 Paige 188.

Oklahoma.— Drovers' Live Stock Commission Co. *v.* Custer County State Bank, 19 Okla. 302, 91 Pac. 850.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 85.

Compare Travelli *v.* Bowman, 150 Cal. 587, 89 Pac. 347.

Restatement of rule.— In Thompson *v.* Phœnix Ins. Co., 25 Fed. 296, 298, the court says: "The court will not reform an instrument merely for the sake of reforming it, but only to enable a party to assert some right thereunder."

A bill was filed against the heirs of a grantor who accidentally omitted the word "heirs" in the conveyance to plaintiff, alleging that by mistake the deed conveyed a life-estate instead of a fee, and seeking to have such mistake corrected. Defendant's demurrer was overruled, for if they did not intend to avail themselves of the accidental omission of the word "heirs" in the conveyance to plaintiff, they ought to have disclaimed all title. Williams *v.* Burnett, 45 N. C. 209.

A petition should show that the party against whom correction is sought is not only able to take an unconscionable advantage, but is designing it. Brainerd *v.* Arnold, 27 Conn. 617; Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 16.

When a sale is a nullity, because the judgment under which it was made was void, equity will not reform a sheriff's deed. Martin *v.* Dollar, 32 Ala. 422.

Reformation useless.— It is useless to reform a deed, when it appears that the grantor, when he made it, had no title to the property conveyed. Denson *v.* McElroy, 31 Ga. 536; Daggett *v.* Ayer, 65 N. H. 82, 18 Atl. 169.

46. Beck *v.* Simmons, 7 Ala. 71.

47. *Alabama.*— McCrary *v.* Williams, 127 Ala. 251, 28 So. 695; Gardner *v.* Knight, 124 Ala. 273, 27 So. 298.

Connecticut.— Tyrrell *v.* Comstock, 18 Conn. 210.

Iowa.— Burner *v.* Higman, etc., Co., 133 Iowa 315, 110 N. W. 580; Smith *v.* Griswold, 95 Iowa 684, 64 N. W. 624.

New Hampshire.— Sherman *v.* Hanno, 66 N. H. 160, 28 Atl. 18.

New York.— Pittsburgh Amusement Co. *v.* Ferguson, 115 N. Y. App. Div. 241, 101 N. Y. Suppl. 217 [*affirmed* in 193 N. Y. 635, 86 N. E. 1131]; Fairchild *v.* Lynch, 42 N. Y. Super. Ct. 265, 46 N. Y. Super. Ct. 1.

North Carolina.— British, etc., Mortg. Co. *v.* Long, 113 N. C. 123, 18 S. E. 165.

Oregon.— Hilts *v.* Hilts, 37 Oreg. 414, 61 Pac. 855.

Pennsylvania.— Liggett *v.* Shira, 159 Pa. St. 350, 28 Atl. 218.

Rhode Island.— Cranston Print Works *v.* Dyer, 19 R. I. 208, 32 Atl. 922.

Wisconsin.— Gilbert *v.* Auster, 135 Wis. 581, 116 N. W. 177; Schmitz *v.* Schmitz, 19 Wis. 207, 88 Am. Dec. 681.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 85.

Thus where a contract for a lease provided that the agreement was made to insure the execution of the lease, which, "when executed," should be subject to the approval of the attorneys of the parties, the contract should be construed as providing for approval by the attorneys "before execution thereof," so that no reformation was required to substitute the words "before execution thereof" for the words "when executed." Pittsburgh Amusement Co. *v.* Ferguson, 115

tion of an instrument in equity should not be granted when it would introduce disorder and confusion, unsettle rights or interests, or injuriously affect security for obligations; certainly not when it would or might destroy mutuality, and render the instrument, and others forming part of the same agreement, of doubtful validity.[48]

C. Knowledge or Intent of Parties — 1. In General. Where an instrument is executed according to the intention and understanding of the parties at the time of execution, and with full knowledge of the facts, such knowledge and execution will operate to defeat an action to reform in that it negatives mutual mistake.[49] It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were.[50] A mistake of judgment in that one party relied upon the honor [51] or contemporary oral promise of the other, instead of reducing the same to writing,[52] affords no relief, both parties knowing of the omission. To set up a true understanding by one

N. Y. App. Div. 241, 101 N. Y. Suppl. 217 [*affirmed* in 193 N. Y. 635, 86 N. E. 1131].

Complainant is not compelled to risk a construction.— If a respondent insists on a different construction, complainant should not be obliged to risk his case on what construction a court of law would give his deed, but should be allowed a reformation. Green *v.* Morris, etc., R. Co., 12 N. J. Eq. 165. But the accidental omission of a single word is not sufficient reason to reform. Atlanta, etc., R. Co. *v.* Speer, 32 Ga. 550, 79 Am. Dec. 305.

In the English courts reformation sometimes takes the form of construction. Pearce *v.* Verbeke, 2 Beav. 333, 4 Jur. 117, 9 L. J. Ch. 203, 17 Eng. Ch. 333, 48 Eng. Reprint 1209; Naylor *v.* Wright, 3 Jur. N. S. 1090, 5 Wkly. Rep. 770; Doran *v.* Ross, 1 Ves. Jr. 57, 30 Eng. Reprint 228.

48. North Chicago St. R. Co. *v.* Chicago Union Traction Co., 150 Fed. 612 [*affirmed* in 162 Fed. 1007, 87 C. C. A. 679 (*distinguishing* Bybee *v.* Oregon, etc., R. Co., 139 U. S. 663, 11 S. Ct. 641, 35 L. ed. 305)], holding that a contract which is based wholly on the ownership by one of the parties of the stock of a corporation, without which it could not perform the contract on its part, will not be reformed by a court of equity so as to give the other party the right to attack such ownership.

49. *Indiana.*—Armstrong *v.* Short, 95 Ind. 326; Hobbs *v.* Lagrange County Com'rs, 3 Ind. 183.

Minnesota.— St. Anthony Falls Water-Power Co. *v.* Merriman, 35 Minn. 42, 27 N. W. 199.

New Hampshire.— Bradford *v.* Bradford, 54 N. H. 463.

New York.— Treacy *v.* Hecker, 51 How. Pr. 69.

Texas.— Lott *v.* Kaiser, 61 Tex. 665.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 86.

In the case of a sheriff's deed a different holding seems to have been adopted see Ehleringer *v.* Moriarty, 10 Iowa 78.

Notice of mistake.— In a conveyance describing land as bounded by a street, the fact that the house stood partly in the street was not notice to purchasers that such description was a mistake. Eureka *v.* Gates, 137 Cal. 89, 69 Pac. 850.

When the intention is apparent from its terms an instrument should not be altered. Lake Shore, etc., R. Co. *v.* Richards, 126 Ill. 448, 18 N. E. 794; Harm *v.* Voss, (Iowa 1900) 82 N. W. 753; Annesley *v.* Annesley, L. R. 31 Ir. 457; *Ex p.* Symonds, 1 Cox Ch. 200, 29 Eng. Reprint 1128. *Compare* Laufer *v.* Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109.

When the mistake is plain on the face of the instrument.—A clause in a sentence was inserted repugnant to the sense in a marriage settlement, and which led to a highly improper result. The fund, however, was distributed as if the clause had not been inserted. *In re* De la Touche, L. R. 10 Eq. 599, 40 L. J. Ch. 85.

50. Wise *v.* Brooks, 69 Miss. 891, 13 So. 836.

Where both parties neglected to acknowledge an instrument for the conveyance of land, and the proof shows that both parties thought it unnecessary and said nothing about acknowledgment, it is error for the court to decree that the notary append a certificate of acknowledgment. Stodalka *v.* Novotny, 144 Ill. 125, 33 N. E. 534.

51. Betts *v.* Gunn, 31 Ala. 219.

52. Ligon *v.* Rogers, 12 Ga. 281; Andrew *v.* Spurr, 8 Allen (Mass.) 412; Braun *v.* Wisconsin Rendering Co., 92 Wis. 245, 66 N. W. 196. The opposite is held in Lippincott *v.* Whitman, 83 Pa. St. 244. See *supra*, text and note 41.

A deliberate departure from the terms of a contract in that certain stipulations were thought unnecessary, and omitted, with no other assurance than that of the agent of a railroad company, that the essential requirements would be fulfilled, will defeat an action to reform so as to include those stipulations. Meade *v.* Norfolk, etc., R. Co., 89 Va. 296, 15 S. E. 497 [*following* Shenandoah Valley R. Co. *v.* Dunlop, 86 Va. 346, 10 S. E. 239]. *Compare* Martin *v.* New York, etc., R. Co., 36 N. J. Eq. 109, in which a different conclusion was reached.

party to an instrument, and thereby show lack of mutuality, is always a good defense.[53] After money has been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all the parties is barred.[54]

2. Of Agent or Representative. Although generally the acts of an agent are the acts of the principal, a principal is entitled to reformation when his agent has made an instrument contain terms not contemplated by the parties, although the agent thought such terms were intended and intentionally included them therein.[55]

D. Negligence — 1. Rule Stated. Against a party seeking reformation, broadly speaking, it is a good defense to set up and prove that the mistake charged was due to the complaining party's own negligence.[56] Yet, although carelessness, ignorance, negligence, or forgetfulness, in themselves, are not grounds for reformation,[57] equity will not always refuse reformation merely because the mistake was the result of carelessness, ignorance, negligence, or forgetfulness.[58] Nevertheless

53. Norris *v.* Colorado Turkey Honestone Co., 22 Colo. 162, 43 Pac. 1024; Ellison *v.* Fox, 38 Minn. 454, 38 N. W. 358; Roemer *v.* Conlon, 45 N. J. Eq. 234, 19 Atl. 664; Henderson *v.* Stokes, 42 N. J. Eq. 586, 8 Atl. 718. But see Dulo *v.* Miller, 112 Ala. 687, 20 So. 981, where the court held that a grantor was entitled to have a mistake in a deed corrected without regard to whether the grantee knew, at the time the deed was delivered, that it contained a greater estate than was bargained for.

54. Caird *v.* Moss, 33 Ch. D. 22, 5 Aspin. 565, 55 L. J. Ch. 854, 55 L. T. Rep. N. S. 453, 35 Wkly. Rep. 52. *Compare* Fenton *v.* Fenton, Dr. & Wal. 66.

55. Linton *v.* Unexcelled Fire-works Co., 128 N. Y. 672, 28 N. E. 580 [*reversing* 13 N. Y. Suppl. 495]. *Compare* McClain *v.* Columbia, etc., Trust Co., 97 S. W. 343, 29 Ky. L. Rep. 1292; Abraham *v.* North German Ins. Co., 40 Fed. 717. See *supra*, III, D, 5.

56. *Illinois.*— Emery *v.* Mohler, 69 Ill. 221; Johnston *v.* Dunavan, 17 Ill. App. 59.

Indiana.— Toops *v.* Snyder, 70 Ind. 554; Centreville First Nat. Bank *v.* Gough, 61 Ind. 147.

Iowa.— Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Reid *v.* Bradley, 105 Iowa 220, 74 N. W. 896; Murphy *v.* Cedar Falls First Nat. Bank, 95 Iowa 325, 63 N. W. 702; Glenn *v.* Statler, 42 Iowa 107.

Kentucky.— Fitzpatrick *v.* Ringo, 5 S. W. 431, 9 Ky. L. Rep. 503.

Maine.— Young *v.* McGown, 62 Me. 56.

New Jersey.—Voorhis *v.* Murphy, 26 N. J. Eq. 434; Graham *v.* Berryman, 19 N. J. Eq. 29.

Oregon.— Banfield *v.* Banfield, 24 Oreg. 571, 34 Pac. 659.

Pennsylvania.— Coppes *v.* Keystone Paint, etc., Co., 36 Pa. Super. Ct. 38. *Compare* Gailey *v.* New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

South Carolina.—See Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669.

Texas.— Clack *v.* Wood, 14 Tex. Civ. App. 400, 37 S. W. 188.

Utah.— Rushton *v.* Hallett, 8 Utah 277, 30 Pac. 1014.

Wyoming.— Grieve *v.* Grieve, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. N. S. 1211.

United States.— Pope *v.* Hoopes, 84 Fed. 927.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 88.

The doctrine is well stated in Susquehanna Mut. F. Ins. Co. *v.* Swank, 102 Pa. St. 17, 23, which says: "An instrument may be reformed in case of fraud, accident or mistake, but where the mistake was the result of the supine negligence of a party who sleeps upon his rights until other duties and responsibilities have grown up, the law will not help him." See also Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Coppes *v.* Keystone Paint, etc., Co., 36 Pa. Super. Ct. 38.

In Georgia, under Code, § 3126, providing that "if a party, by reasonable diligence, could have knowledge of the truth, equity will not relieve," where a note is given a bank by a partner in his individual name, and indorsed by him in the firm name, and the bank thereafter twice renews part of the amount by taking his individual note without the indorsement, equity will not give relief against the partnership. Davenport *v.* Lowry, 78 Ga. 89, 91.

Care required of prudent person.—Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence which may fairly be expected from a prudent and reasonable person. Gailey *v.* New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

Where an agent made a mistake, such mistake was not negligence of the principal, estopping him from having the contract reformed. McCain *v.* Columbia Finance, etc., Co., 97 S. W. 343, 29 Ky. L. Rep. 1292. See *supra*, VI; VIII, C, 2.

57. Moore *v.* Graves, 97 Iowa 4, 65 N. W. 1008; Curtis *v.* Albee, 167 N. Y. 360, 60 N. E. 660; Friend *v.* Osborn, 8 Ohio S. & C. Pl. Dec. 697, 37 Cinc. L. Bul. 195; Insurance Co. of North America *v.* Union Canal Co., Brightly 48, 2 Pa. L. J. 65.

58. *Iowa.*— Barry *v.* Rownd, 119 Iowa 105, 93 N. W. 67.

the mistake must have been shared in by all the parties and not be attributable solely to the negligence of complainant.[59]

2. What Is Negligence — a. Breach of Legal Duty. Such neglect, it has been held, must be so gross as to amount to a violation of positive legal duty.[60]

b. Failure to Read Instrument. A man who can read and does not read an instrument which he signs is as a general rule guilty of negligence, and so is he if, being unable to read, he neglects to exercise ordinary prudence in requiring the instrument to be read to him.[61] But applying the rule that the negligence must

Maryland.— Boulden *v.* Wood, 96 Md. 332, 53 Atl. 911.

Missouri.— Schwear *v.* Haupt, 49 Mo. 225.

New York.— Jamaica Sav. Bank *v.* Taylor, 72 N. Y. App. Div. 567, 76 N. Y. Suppl. 790.

United States.— Shields *v.* Mongollon Exploration Co., 137 Fed. 539, 70 C. C. A. 123; Baldwin *v.* National Hedge, etc., Co., 73 Fed. 574, 19 C. C. A. 575.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 72.

But see Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269, where it is said: "As between the parties, no claim of innocent third parties intervening, such correction of the mistake will not be refused on the ground of negligence on the part of the grantee when it is more than likely that negligence lies at the bottom of most of such mistakes. The theory of equity is that the thing which the parties themselves intended to do, shall by the court be ordered done."

The doctrine of "mutual mistake" necessarily involves the proposition that one man may confide in the honor and integrity of another, and act upon his representations, without putting every act and word to the test of careful scrutiny. Mr. Pomeroy, in his work on Equity Jurisprudence (vol. 2, § 856), expresses the doctrine in this language: "As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It will be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend to a great extent upon its own circumstances." This text is well sustained by authority. San Antonio Nat. Bank *v.* McLane, 96 Tex. 48, 55, 70 S. W. 201.

When ignorance is a material fact.— If a mistake exists in the agreement itself, and is shown to have been produced by ignorance of a material fact, equity will relieve according to the equity of the case. Insurance Co. of North America *v.* Union Canal Co., Brightly (Pa.) 48, 2 Pa. L. J. 65.

59. Mitchell *v.* Holman, 30 Oreg. 280, 47 Pac. 616; Pope *v.* Hoopes, 90 Fed. 451, 33 C. C. A. 595.

60. Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Robinson *v.* Glass, 94 Ind. 211; Snyder *v.* Ives, 42 Iowa 157. See Essex *v.* Day, 52 Conn. 483, 1 Atl. 620 (for circumstances under which the complainant, a municipal corporation, was held not to be negligent in having omitted from certain municipal bonds a provision as to the time of redemption); Beard *v.* Hubble, 9 Gill (Md.) 420; Vail *v.* Reynolds, 51 Hun (N. Y.) 468, 4 N. Y. Suppl. 322; Banfield *v.* Banfield, 24 Oreg. 571, 34 Pac. 659; Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669; and cases cited *supra*, note 56; *infra*, notes 62, 64.

Illustration.— A lease, having attached thereto a plat of the premises, contained an option for sale, on the exercise of which the plat and lease were sent to an abstract company by the grantor's attorney with instructions to prepare a certificate of title, and also a description for insertion in the deed. The description written on a slip of paper was returned to the attorney, but, in some unexplained manner an exception or reservation mentioned in the lease was not inserted in such description, and with this mistake it was copied into the deed by the typist. It was held that the negligence was not so gross as to constitute a neglect of legal duty, or forfeit the right of either party to relief from the mistake by reformation of the deed. Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029.

Failure to search the record of a deed back far enough is not such negligence as to preclude relief. Conlin *v.* Masecar, 80 Mich. 139, 45 N. W. 67.

That one who accepts a mortgage with a wrong description of the land cannot be said as a matter of law to render him guilty of such negligence as to forfeit all rights to relief in chancery. Keister *v.* Myers, 115 Ind. 312, 17 N. E. 161; Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112.

The omission of an attorney to examine a decree of the court after handing it to the clerk for filing and before execution is not such a violation of legal duty as to preclude correction of the clerk's mistake. Snyder *v.* Ives, 42 Iowa 157.

61. *Indiana.*— Robinson *v.* Glass, 94 Ind. 211.

Kentucky.— Fitzpatrick *v.* Ringo, 5 S. W. 431, 9 Ky. L. Rep. 503.

New York.— See Vail *v.* Reynolds, 51 Hun 468, 4 N. Y. Suppl. 322.

Oregon.— See Banfield *v.* Banfield, 24 Oreg. 571, 34 Pac. 659.

consist in the breach of some legal duty,[62] it has been repeatedly held that the fact that a person accepts or signs an instrument without reading the same is not of itself a conclusive barrier to suit,[63] particularly where defendant is not injured and cannot be prejudiced by the reformation;[64] and the same is true where defendant is endeavoring to work a fraud,[65] or where the other party has relied on a misplaced confidence.[66] Where both parties to a written contract are mistaken as to the effect of their writing and ignorant of a misstatement, the failure of one to understand, through omission to read the instrument or to give sufficient attention to its contents, cannot avail the other equally at fault as a defense.[67]

IX. PERSONS ENTITLED TO REFORMATION.

A. In General. To entitle a person to reformation it should appear that he is a party or privy to the transaction in question and has a substantial interest therein; a less standing does not warrant the remedy.[68] One who has parted with all interest cannot maintain an action.[69] But a party, although stranger to a

Pennsylvania.— Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198; Coppes *v.* Keystone Paint, etc., Co., 36 Pa. Super. Ct. 38.

South Carolina.— See Kennerty *v.* Etiwan Phosphate Co., 21 S. C. 226, 53 Am. Rep. 669.

Texas.— Clack *v.* Wood, 14 Tex. Civ. App. 400, 37 S. W. 188.

Wyoming.— Weltner *v.* Thurmond, (1908) 98 Pac. 590, (1909) 99 Pac. 1128; Grieve *v.* Grieve, 15 Wyo. 358, 89 Pac. 569, 9 L. R. A. N. S. 1211.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 88.

62. See *supra*, VIII, D, 2, a.

63. *Connecticut.*— West *v.* Suda, 69 Conn. 60, 36 Atl. 1015.

Indiana.— Schautz *v.* Keener, 87 Ind. 258; Nichols, etc., Co. *v.* Berning, 37 Ind. App. 109, 76 N. E. 776.

Iowa.— Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Snyder *v.* Ives, 42 Iowa 157; Glenn *v.* Statler, 42 Iowa 107.

Kentucky.— Miller *v.* Small, 10 S. W. 810, 10 Ky. L. Rep. 859.

New Jersey.— Lloyd *v.* Hulick, 69 N. J. Eq. 784, 63 Atl. 616, 115 Am. St. Rep 624.

New York.— Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40 [*reversing* 20 Hun 104].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 88.

64. Nielander *v.* Chicago, etc., R. Co., 114 Iowa 420, 87 N. W. 285; Paisley *v.* Casey, 18 N. Y. Suppl. 102.

65. Dannelly *v.* Cuthbert Oil Co., 131 Ga. 694, 63 S. E. 257; Hitchins *v.* Pettingill, 58 N. H. 3; Albany City Sav. Inst. *v.* Burdick, 87 N. Y. 40 [*reversing* 20 Hun 104].

Failure to have her spectacles and consequent failure to read a mortgage containing an agent's misrepresentation was not such negligence as to deprive a woman of her right to reformation. Conn *v.* Hagan, 93 Tex. 334, 55 S. W. 323.

Inability to understand English.— If the complainants are unable to understand English and therefore rely on the false statements of the defendants as to the meaning of the document, the mutuality of the mistake is destroyed. Fehlberg *v.* Cosine, 16 R. I. 162, 13 Atl. 110.

In California a suit to reform cannot be defended on the ground that the mistaken party was negligent in not reading the contract, if it appears that the other party at the time of its execution knew of the mistake. Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85.

66. Durham *v.* Taylor, 29 Ga. 166; Purvines *v.* Harrison, 151 Ill. 219, 37 N. E. 705; Koons *v.* Blanton, 129 Ind. 383, 27 N. E. 334; Robinson *v.* Glass, 94 Ind. 211; Sutton *v.* Risser, 104 Iowa 631, 74 N. W. 23.

If a husband and wife agreed that the husband should make to the wife a deed conveying an estate in property as long as they should reside in a certain place, and she fraudulently instructed the scrivener to so draw the deed as to convey the title absolutely to her and her children, reserving to the husband only a life-estate, it was held that equity would afford the husband relief by reformation, where he was illiterate and deaf, and also placed reliance upon his wife's honesty and fidelity. Carbine *v.* McCoy, 85 Ga. 185, 11 S. E. 651.

67. Kelley *v.* Ward, (Tex. Civ. App. 1900) 58 S. W. 207 [*affirmed* in 94 Tex. 289, 60 S. W. 311].

68. *Alabama.*— Jackson *v.* Lucas, (1908) 47 So. 224.

California.— Stonesifer *v.* Kilburn, 122 Cal. 659, 55 Pac. 587.

Georgia.— Cook *v.* Walker, 21 Ga. 370, 68 Am. Dec. 461.

Michigan.— Ballentine *v.* Clark, 38 Mich. 395 [*analyzed* in Tillis *v.* Smith, 108 Ala. 264, 19 So. 374].

Minnesota.— Minazek *v.* Libera, 78 Minn. 151, 80 N. W. 866.

Mississippi.— Miles *v.* Miles, 84 Miss. 624, 37 So. 112.

Missouri.— Henderson *v.* Dickey, 35 Mo. 120.

New York.— Willis *v.* Sanders, 51 N. Y. Super. Ct. 384.

North Carolina.— Crossland *v.* Shober, 60 N. C. 562.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 91.

69. Husted *v.* Van Ness, 1 N. Y. App.

deed, was decreed relief where his own interests were directly curtailed and jeopardized.[70] A grantee under a voluntary deed, however, never has standing to reform in a court of equity for, never having paid a consideration, he is deprived of nothing if mistake does exist.[71]

B. Assignee of Contract. The assignee of a contract acting under the same mistake as his assignor is a privy and may maintain action.[72]

C. Vendor or Successor in Interest. A vendor may sue to have an instrument reformed for mutual mistake,[73] although he quitclaims land as a gift to his children,[74] and even though the vendor has no title to the land not intended to be embraced in the instrument.[75] In the absence of intervening and controlling equities, relief will be decreed successors in interest the same as between the original parties.[76]

D. Vendee or Successor in Interest. A vendee is subrogated to all the rights of his vendor in property, even though they are not expressly conveyed, and may have mistakes in deeds of conveyance corrected.[77] When the mistake

Div. 120, 36 N. Y. Suppl. 1043 [*affirmed* in 158 N. Y. 104, 52 N. E. 645].

70. Hileman *v.* Wright, 9 Ind. 126; White *v.* Shaffer, 97 Md. 359, 54 Atl. 974. *Compare* Fischer *v.* Laack, 85 Wis. 280, 55 N. W. 398.

71. McWhorter *v.* O'Neal, 123 Ga. 247, 51 S. E. 288; Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505; Mulock *v.* Mulock, 31 N. J. Eq. 594; White *v.* Campbell, 80 Va. 180; Turner *v.* Collins, L. R. 7 Ch. 329, 41 L. J. Ch. 558, 25 L. T. Rep. N. S. 779, 20 Wkly. Rep. 305; Lister *v.* Hodgson, L. R. 4 Eq. 30, 15 Wkly. Rep. 547; Phillipson *v.* Kerry, 32 Beav. 628, 11 Wkly. Rep. 1034, 55 Eng. Reprint 247; Brown *v.* Kennedy, 9 Jur. 1166, 33 Beav. 133, 33 L. J. Ch. 71, 9 L. T. Rep. N. S. 302, 12 Wkly. Rep. 224, 55 Eng. Reprint 317 [*affirmed* in 4 De G. J. & S. 217, 10 Jur. N. S. 141, 33 L. J. Ch. 342, 9 L. T. Rep. N. S. 736, 12 Wkly. Rep. 360, 69 Eng. Ch. 169, 46 Eng. Reprint 901].

Reformation of voluntary instrument see *supra*, IV, D.

Cal. Civ. Code, § 3399, provides that in a case where by reason of mutual mistake a written contract does not truly express the intention of the parties, it may be revised on the application of the "party aggrieved." A grantee in a voluntary defective deed is not a "party aggrieved" within such statute. Enos *v.* Stewart, 138 Cal. 112, 70 Pac. 1005.

Where a part of the consideration of the conveyance of certain land to plaintiffs was the purchase of an interest in the grantor's estate, plaintiffs were not mere volunteers, precluding them from procuring a reformation of the deed. Miles *v.* Miles, 84 Miss. 624, 37 So. 112.

72. Bentley *v.* Smith, 1 Abb. Dec. (N. Y.) 126, 2 Keyes 342. See also Pittsburg Amusement Co. *v.* Ferguson, 100 N. Y. App. Div. 453, 91 N. Y. Suppl. 666.

73. Lucas *v.* Labertue, 88 Ind. 277; Arend *v.* Lanig, 79 Hun (N. Y.) 203, 29 N. Y. Suppl. 537.

A grantor is entitled to have a deed, executed in pursuance of an option contained in a lease, corrected. Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029; Gwyer *v.* Spaulding, 33 Nebr. 573, 50 N. W. 681.

In Alabama a wife who has joined with her husband in a deed simply to release her dower, under Code (1896), § 1514, is not bound by a warranty therein, and hence is not entitled to maintain a bill to reform the deed and enjoin an action at law on the warranty. Miller *v.* Morris, 123 Ala. 164, 27 So. 401.

74. Los Angeles, etc., R. Co. *v.* New Liverpool Salt Co., 150 Cal. 21, 87 Pac. 1029.

75. Dean *v.* Hall, 105 S. W. 98, 31 Ky. L. Rep. 1306, holding that a grantor in a warranty deed, which, either by fraud or mistake, embraces lands not intended to be conveyed, has the right to have the deed corrected, and this is true even though the grantor has no title to such lands, for the law will not impose upon him the hardship of defending the title to lands which he did not own and which were improperly included in the deed.

76. Hagman *v.* Shaffner, 88 Mo. 24.

77. Jones *v.* McNealy, 139 Ala. 379, 35 So. 1022, 101 Am. St. Rep. 38; Stewart *v.* Brand, 23 Iowa 477; Hagman *v.* Shaffner, 88 Mo. 24; Michleson *v.* Hyde, 34 Nebr. 60, 51 N. W. 311; Gwyer *v.* Spaulding, 33 Nebr. 573, 50 N. W. 681.

Under Ala. Code, §§ 3840, 3841, conferring jurisdiction in equity to correct a misdescription in a deed of decedent's lands, made by an administrator under probate authority, before relief is granted, it must be shown that the price paid was reasonable, and that the vendee was a *bona fide* purchaser. Ganey *v.* Sikes, (1884) 4 So. 868.

It is asserted that a grantee, not in possession, actual or constructive, is not entitled to reformation in Kilpatrick *v.* Strozier, 67 Ga. 247.

Against bona fide second grantee of grantor.—A grantee in a trust deed which calls for a tract of one hundred acres, but by its description by boundaries and distances not designating so large a tract, acquires no right because of the discrepancy in acreage to have his deed reformed so as to include

occurs in a series of conveyances, the last vendee may have the deeds corrected.[78] A purchaser for value without notice from a grantee who has received an erroneous deed from his grantor can maintain a bill against a judgment creditor of the original grantor and correct the error.[79]

E. Mortgagee. A mortgagee stands in the shoes of a purchaser for value [80] and is entitled to reformation, but not after the mortgage has been foreclosed.[81]

F. Other Persons. Other persons entitled to reformation are: Purchasers at execution sale;[82] the obligee of a bond, although the consideration of the bond proceeds from a third party, who is acting in the name and for the benefit of the obligee,[83] and *cestuis que trustent.*[84] A trustee, since he holds merely the legal title without any beneficial interest, is wanting in equity, and a bill by him for correction should be dismissed.[85] If a married woman files a declaration of homestead upon community property, which is not acknowledged and certified as required by statute, a homestead is not created, and after an execution sale and a sheriff's deed thereunder, it is too late for her, in an action by the grantor in such deed to recover possession of the property, to ask for a reformation of the acknowledgment.[86]

part of a tract held by one who purchased of the grantor in the trust deed, in good faith, for value and without notice of any right the grantee in the trust deed might have to the tract. Reid *v.* Rhodes, 106 Va. 701, 56 S. E. 722. Land was erroneously described in a mortgage; but after foreclosure, at which the mortgagees became the purchasers, they conveyed by a proper description to one who by the same description conveyed to plaintiff. After the foreclosure the mortgagor conveyed to defendant. It was held that there was not such privity between the parties as would sustain a bill by plaintiff against the mortgagor and his grantee to reform the mortgage. Jackson *v.* Lucas, (Ala. 1908) 47 So. 224.

78. Blackburn *v.* Randolph, 33 Ark. 119; Greeley *v.* De Cottes, 24 Fla. 475, 5 So. 239; May *v.* Adams, 58 Vt. 74, 3 Atl. 187; Elwood *v.* Stewart, 5 Wash. 736, 32 Pac. 735, 1000.

Illustration.— Where a purchaser bought a lot by title bond, and after erecting a house received a deed for it, the description in the bond being correct, but that in the deed being wrong, a subsequent owner of the property may have the deed reformed to correct the description on the ground of mistake, it appearing that the bond had been lost previous to drawing the deed, in which the description was drawn from memory. Hill *v.* Clark, 106 S. W. 805, 32 Ky. L. Rep. 595.

A deed by husband and wife of a homestead misdescribed the land by mistake, and the grantee thereafter conveyed it to a third person, using the same description, but it was not shown that there was any mistake as between the first grantee and the second. The first grantee was the proper party to sue for reformation of the first deed. Tillis *v.* Smith, 108 Ala. 264, 19 So. 374.

The right as personal to the grantee.— Norris *v.* Colorado Turkey Honestone Co., 22 Colo. 162, 43 Pac. 1024, holds that a grantee's cause of action against a grantor for conveying, through mutual mistake, land other than was intended to be conveyed, is personal to the grantee and will not pass to a purchaser from the grantee under a deed which merely describes the same land described in the deed to the grantor.

79. *Alabama.*— Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185.

Georgia.— Wall *v.* Arrington, 13 Ga. 88.

Indiana.— White *v.* Wilson, 6 Blackf. 448, 39 Am. Dec. 437.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721; Simmons *v.* North, 3 Sm. & M. 67.

New York.— Gouverneur *v.* Titus, 6 Paige 347.

England.— Burgh *v.* Francis, 1 Eq. Cas. Abr. 320, 21 Eng. Reprint 1074.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 94.

80. Kennard *v.* George, 44 N. H. 440; Brocking *v.* Straat, 17 Mo. App. 296; Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

Assignee of a debt secured by a mortgage can institute proceedings for its reformation and foreclosure in the same manner as his assignor could have done. Denver Brick, etc., Co. *v.* McAllister, 3 Colo. 261.

Purchaser at a sale by the mortgagee buys at his peril and is not entitled to reformation of the mortgage deed. Haley *v.* Bagley, 37 Mo. 363.

81. Williams *v.* Hatch, 38 Ala. 338.

Reformation before and after foreclosure see *supra*, IV, B, 2; V, D, 5, a, (III), (IV); XVIII, B, 2.

82. Bradshaw *v.* Atkins, 110 Ill. 323; Vanderbeck *v.* Perry, 28 N. J. Eq. 367.

The opposite view is taken in Conner *v.* Wells, 91 Ind. 197.

83. Nevins *v.* Dunlap, 33 N. Y. 676.

84. Sullivan *v.* Bruhling, 66 Wis. 472, 29 N. W. 211.

85. Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185.

86. Burbank *v.* Kirby, 6 Ida. 210, 214, 55 Pac. 295, 96 Am. St. Rep. 260, where it is said: "If the title to the property passes from the owner by due and proper proceedings in the course of law, he cannot, after such title has vested in another, defeat it by establishing a homestead *nunc pro tunc.*

X. Persons as to Whom Reformation May Be Had.

A. In General. It is well settled that the equitable remedy of reformation will not only be granted against original parties and their heirs, but also as against their assignees, creditors, purchasers with notice, and all others standing in privy.[87] But correction will not be decreed to the prejudice of innocent third parties[88] without notice.[89] The fact that a pledgor becomes a bankrupt prior to the institution of suit does not prevent the granting of relief against the bankrupt and his trustee.[90] Nor will reformation be denied merely because a successor in interest will be affected.[91]

B. Creditors — 1. In General. The jurisdiction to reform or rectify may be exercised as well against creditors as between immediate parties.[92] Although

87. *Connecticut.*— Holabird *v.* Burr, 17 Conn. 556; Stedwell *v.* Anderson, 21 Conn. 139.

Illinois.— Evans *v.* Aldrich, 63 Ill. 226.

Iowa.— Burner *v.* Higman, 133 Iowa 315, 110 N. W. 580.

Maine.— Adams *v.* Stevens, 49 Me. 362.

Missouri.— Sicher *v.* Rambousek, 193 Mo. 113, 91 S. W. 68.

Nebraska.— Austin *v.* Brown, 75 Nebr. 305, 106 N. W. 30.

Nevada.— Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799.

New Jersey.— Slack *v.* Craft, (Ch. 1904) 57 Atl. 1014.

New York.— Cady *v.* Potter, 55 Barb. 463.

Pennsylvania.— Snyder *v.* May, 19 Pa. St. 235.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 101. See also *infra*, X, B-I.

Courts of equity can interfere only as between the original parties or those claiming under them in privity. Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799.

88. *Indian Territory.*— Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Terr. 680, 43 S. W. 957.

Kentucky.— Barbee *v.* Northern Bank, 3 Ky. L. Rep. 57.

Louisiana.— Sentell *v.* Randolph, 52 La. Ann. 52, 26 So. 797.

Ohio.— Goldsmith *v.* Cincinnati, 14 Ohio Cir. Ct. 342, 7 Ohio Cir. Dec. 712.

Tennessee.— Harlan *v.* Central Phosphate Co., (Ch. App. 1901) 62 S. W. 614.

Vermont.— Tabor *v.* Cilley, 53 Vt. 487.

United States.— U. S. *v.* Munroe, 27 Fed. Cas. No. 15,835, 5 Mason 572.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 101 *et seq.*

Compare Burner *v.* Higman, 133 Iowa 315, 110 N. W. 580, which was an action against a lessee of a part of a building and the owner for injuries received by an employee of a dray line while in the building to remove a third person's goods kept in storage there for hire by the lessee, in consequence of falling into an unguarded freight elevator shaft, the owner prayed for the reformation of the lease by striking out the provision that the lessor should have the right in common with other tenants of the building to the use of the freight elevator therein. It was held that the court properly struck out the answer, for the employee was not bound by the lease, and a reformation thereof would not deprive him of the right to prove by parol that the owner was in control of the elevator, nor deprive the owner of the right to show the contrary, notwithstanding the lease.

Against bona fide purchaser see *infra*, X, E, 2.

89. See cases cited *infra*, this note.

Where an instrument was recorded, and a vendee assigned the same to an innocent assignee for value, and without notice of the mistake, such assignee was not protected from the claim of plaintiff to have the instrument reformed, either by the recording act or by general principles of equity. Klatt *v.* Dummert, 70 Minn. 467, 73 N. W. 404. See also Austin *v.* Brown, 75 Nebr. 345, 106 N. W. 30.

Where one corporation purchased all the property, assets, and good-will of another, paying therefor with an issue of its own stock, the same being distributed among the stock-holders of the second company, which thereupon dissolved, and, as a part of the transaction, assumed and agreed to perform all of the contracts of the selling company, and satisfy and discharge all of its indebtedness and liabilities, of any and every kind, a party to an existing contract with the selling company may maintain a suit against the purchasing company for its reformation on the ground of mutual mistake, whether or not defendant had knowledge of the mistake. Barker *v.* Pullman's Palace Car Co., 124 Fed. 555 [*affirmed* in 134 Fed. 70, 67 C. C. A. 196].

90. Waterloo First Nat. Bank *v.* Bacon, 113 N. Y. App. Div. 612, 98 N. Y. Suppl. 717 [*affirmed* in 189 N. Y. 533, 82 N. E. 1126].

91. Penfield *v.* New Rochelle, 18 N. Y. App. Div. 83, 45 N. Y. Suppl. 460 [*affirmed* in 160 N. Y. 697, 55 N. E. 1098].

92. Bobe *v.* Rankin, 16 Ohio Cir. Ct. 634, 9 Ohio Cir. Dec. 192; Mauzy *v.* Sellars, 26 Gratt. (Va.) 641; Alexander *v.* Newton, 2 Gratt. (Va.) 266.

A creditor who has in no way accepted and adopted a promise by a third party, in a contract between him and the debtor to pay the debt, has no legal interest in the promise which will entitle him to contest an action

under some circumstances a debtor may prefer one creditor over others, if, in consequence of a mistake of law, the parties select and make use of an instrument which does not effectuate their intention of preference, the court will not correct to the prejudice of the general creditors.[93] Likewise a reformation of an assignment for the benefit of creditors will not be made as against the beneficiaries so as to conform to the intention of the immediate parties, if the beneficiaries will lose valuable rights and not be placed *in statu quo*,[94] and "equity never interferes to aid one creditor against another on the ground of mistake."[95]

2. Lien Creditor. A specific equitable lien takes precedence over, and may be enforced against, a subsequent lien-holder, chargeable with notice of such equities,[96] and a chattel mortgage was reformed so as to include an omitted article, even as against one who held a prior vendor's lien.[97] Equity will not rectify so as to prejudice the rights of a lien-holder where such lien-holder has acquired rights in land by legal proceedings.[98] Also a vendor's lien omitted by mistake will not be supplied where it will prejudice the rights of another lien-holder whose debt was contracted on the faith of the vendor's ownership of the property conveyed by the deed of record in which such lien was not reserved.[99]

3. Attachment Creditor. Attachment creditors cannot be protected as *bona fide* creditors, against an equity of a grantee to have a deed reformed so as to show a valuable consideration.[1] Mistakes will be rectified against attaching creditors of a mortgagor.[2]

4. Judgment Creditor. It is settled law that judgment creditors are in no sense purchasers, being simply general lien-holders upon whatever interest the judgment party may have in the land, and hence their rights do not stand in the way of the reformation of prior deeds and mortgages.[3] But a defectively executed

by the promisor for a reformation of the contract by striking out the promise on the ground of mistake. Wheat *v.* Rice, 97 N. Y. 296.

93. Anderson *v.* Tydings, 8 Md. 427, 63 Am. Dec. 708. *Compare* Stoltz *v.* Vanatta, 5 Ohio S. & C. Pl. Dec. 34, 32 Cinc. L. Bul. 100.

94. Cottrell *v.* Citizens' Sav. Bank, 53 Minn. 201, 54 N. W. 1111.

95. Smith *v.* Turrentine, 55 N. C. 253; Stoltz *v.* Vanatta, 5 Ohio S. & C. Pl. Dec. 34, 32 Cinc. L. Bul. 100.

96. Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

A bill in equity will stand as against the parties to a prior deed of trust on the same premises, which was not recorded for over a year subsequent to the record of conveyance of the last deed of trust, to correct a mistake therein. Fenwick *v.* Bruff, 1 MacArthur (D. C.) 107.

97. Willis *v.* Munger Improved Cotton Mach. Mfg. Co., 13 Tex. Civ. App. 677, 36 S. W. 1010.

98. Goodbar *v.* Dunn, 61 Miss. 618.

99. Lough *v.* Michael, 37 W. Va. 679, 17 S. E. 181, 470.

1. Berry *v.* Sowell, 72 Ala. 14.

2. Bush *v.* Bush, 33 Kan. 556, 6 Pac. 794; Strang *v.* Beach, 11 Ohio St. 283, 78 Am. Dec. 308.

3. *Alabama.*—Early *v.* Owens, 68 Ala. 171; Baskins *v.* Calhoun, 45 Ala. 582; Stone *v.* Hale, 17 Ala. 557, 52 Am. Dec. 185.

Arkansas.—Blackburn *v.* Randolph, 33 Ark. 119; Brewster *v.* Clamfit, 33 Ark. 72; Allen *v.* McGaughey, 31 Ark. 252.

District of Columbia.— Manogue *v.* Bryant, 15 App. Cas. 245.

Georgia.— Lowe *v.* Allen, 68 Ga. 225; Wall *v.* Arrington, 13 Ga. 88; Wyche *v.* Greene, 11 Ga. 159.

Indiana.— Boyd *v.* Anderson, 102 Ind. 217, 1 N. E. 724; Morrison *v.* Collier, 79 Ind. 417; White *v.* Wilson, 6 Blackf. 448, 39 Am. Dec. 437.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721; Simmons *v.* North, 3 Sm. & M. 67.

New York.— Gouverneur *v.* Titus, 6 Paige 347.

Ohio.— Strang *v.* Beach, 11 Ohio St. 283, 78 Am. Dec. 308.

England.— Burgh *v.* Francis, 1 Eq. Cas. Abr. 320, 21 Eng. Reprint 1074.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 106.

A judgment creditor is not protected by a statute requiring record of conveyance from the reformation by equity of a mistaken description in a recorded mortgage. Bailey *v.* Timberlake, 74 Ala. 221.

Under the act of congress of April 29, 1878, making conveyances of real estate valid as against creditors, and subsequent purchasers for a valuable consideration, without notice, only from the date that the same are acknowledged and recorded, a mistake in the description of property in a recorded deed will not be corrected by a court of equity to the prejudice of the rights of *bona fide* judgment creditors of the grantee having a lien upon the property. Ruppert *v.* Haske, 5 Mackey (D. C.) 262.

In Indiana where a judgment has been sold

mortgage was not permitted to be reformed so as to defeat a subsequent judgment lien.[4]

C. Heirs and Personal Representatives. Heirs and personal representatives stand in the place of their decedents, and equity will correct mistakes against them whenever the same would be proper between the original parties.[5]

D. Devisees, Legatees, and Voluntary Grantees. Devisees, legatees, and voluntary grantees are not prejudiced by the correction of a mistake because they have expended no valuable consideration; hence equity will reform as against them.[6]

E. Purchasers and Mortgagees — 1. In General. The rights of purchasers and mortgagees depends upon whether or not such purchasers or mortgagees have had notice. Generally a mutual mistake or a mistake induced by the fraud or inequitable conduct of the parties can be corrected, and one purchasing land with knowledge of mistake in a deed, stands in no better position than if he had been an original party.[7] It is immaterial to the rights of a pur-

and assigned to one ignorant of the mistake in a mortgage, the judgment being rendered after the execution of the mortgage, the mortgagee could not have his mortgage reformed and corrected as against such judgment creditors who expended his money upon the faith of the parties. Wainwright *v.* Flanders, 64 Ind. 306; Flanders *v.* O'Brien, 46 Ind. 284.

4. White *v.* Denman, 16 Ohio 59 [*affirmed* in 1 Ohio. St. 110].

5. Wall *v.* Arrington, 13 Ga. 88.

Mistakes have been corrected: As against personal representatives. Wyche *v.* Greene, 11 Ga. 159. As between the mortgagee and heirs, and administrator of the mortgagor. Morris *v.* Stern, 80 Ind. 227. As between two *bona fide* purchasers from the grantee without notice of fraud or mistake, and the heirs and administrators of the grantor. Quirk *v.* Thomas, 6 Mich. 76. As against an executor *de son tort.* Gray *v.* Roden, 24 Miss. 667. As against the heir of the mother. Barstow *v.* Kilvington, 5 Ves. Jr. 593, 31 Eng. Reprint 755. As against the devisee of the father. Jenkins *v.* Quichant [*cited* in 5 Ves. Jr. 593, 596 note, 31 Eng. Reprint 755]. By the mortgagee as against the widow and heir of the grantor. Brinson *v.* Perry, (Miss. 1890) 7 So. 322.

6. Wyche *v.* Greene, 11 Ga. 159. See also Wall *v.* Arrington, 13 Ga. 88.

As against one to whom lands have reverted for abandonment of a trust for which they were donated to the mortgagor, where the deed of gift, by a like mistake of the donor, described the same tract as the mortgage, and authorized it to be mortgaged, and the donor participated in the negotiation of the loan for which the mortgage was given, the mortgagee is entitled to reformation. Jenkins *v.* Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785.

Reformation of voluntary instrument see *supra,* IV, D.

7. *Alabama.*— Whitehead *v.* Brown, 18 Ala. 682.

Connecticut.— Watson *v.* Wells, 5 Conn. 468.

Georgia.— Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75.

Illinois.— Preston *v.* Williams, 81 Ill. 176.

Indiana.— Smith *v.* Schweigerer, 129 Ind. 363, 28 N. E. 696.

Iowa.— Haynes *v.* Seachrest, 13 Iowa 455.

Maine.— Adams *v,* Stevens, 49 Me. 362.

Massachusetts.—Rumrill *v.* Shay, 110 Mass. 170.

Michigan.— Perkins *v.* Canine, 113 Mich. 72, 71 N. W. 457; Hoyt *v.* Gooding, 99 Mich. 71, 58 N. W. 41.

Minnesota.— Benson *v.* Markoe, 37 Minn. 30, 33 N. W. 38, 5 Am. St. Rep. 816.

Nebraska.— Carpenter Paper Co. *v.* Wilcox, 50 Nebr. 659, 70 N. W. 228.

New Hampshire.— Herbert *v.* Odlin, 40 N. H. 267; Prescott *v.* Hawkins, 16 N. H. 122.

Oregon.— Kraushaar *v.* Hauk, 27 Oreg. 92, 39 Pac. 539; Savage *v.* McCorkle, 17 Oreg 42, 21 Pac. 444.

Tennessee.— Johnson *v.* Johnson, 8 Baxt. 261.

Texas.— Mattox *v.* Davis, (Civ. App. 1907) 106 S. W. 169; Milby *v.* Regan, 16 Tex. Civ. App. 352, 41 S. W. 372; Balfour *v.* Cleveland, (Civ. App. 1897) 41 S. W. 143; Yarzombeck *v.* Grier, (Civ. App. 1895) 32 S. W. 236.

Vermont.— May *v.* Adams, 58 Vt. 74, 3 Atl. 187.

Wisconsin.— See Ingles *v.* Merriman, 96 Wis. 400, 71 N. W. 368.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 111.

A conveyed to B certain land to avoid his debts, and afterward conveyed to C, informing him of the fact and agreeing to get a deed from B, who accordingly executed a deed, but made a mistake in giving the boundaries. B afterward conveyed a part of the land to D. C filed a bill to have the deed reformed, stating these facts. D demurred. The demurrer was overruled, and it was held that C was entitled to have the mistake corrected. Parish *v.* Scott, 10 Heisk. (Tenn.) 438.

A deed from which by mutual mistake a reservation of merchantable pine timber was omitted will be reformed in equity as against the grantee, and also as against a third person who purchased the timber with notice of the mistake. Mattox *v.* Davis, (Tex. Civ. App. 1907) 106 S. W. 169.

chaser that his immediate grantor had no notice of the mistake.[8] By the principle of relative equities, a subsequent mortgagee is subject to all prior equities of which he had notice, and a mistake can therefore be reformed as against such a party.[9] In any of the above cases the notice may be actual[10] or constructive.[11] The assignee of a mortgage acquires no better title than that of his assignor and is subject to defenses, legal or equitable, which might have been set up against the assignor. Hence an instrument may be reformed against him as well as against the mortgagee himself.[12] The same is true of one who agrees to assume the mortgage, and takes the land charged with it.[13]

2. Bona Fide Purchaser — a. In General. A *bona fide* innocent purchaser for value and without notice is the peculiar favorite of a court of equity, and the authorities unite on the proposition that a mistake in a written instrument will not be corrected against such a party, whether the mistake occurs in a deed,[14] a

An instrument not executed agreeably to the requisitions of the statutes, in that the name of a subscribing witness was omitted, passes no interest and will not be reformed against a third person who acquires title by conveyance from the owner, nor against the tenant in possession, although they took subsequent to the record of such defective instrument and with knowledge thereof. Langmede *v.* Weaver, 65 Ohio St. 17, 60 N. E. 992.

In the absence of clear proof that such was the intent of both parties, as against her grantee and his grantees, a court of equity will not reform a deed by a wife of all her homestead estate, so as to convey merely her life-interest therein. Frederick *v.* Henderson, 94 Mo. 98, 7 S. W. 186.

8. Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75.

9. *California.*— Woodworth *v.* Guzman, 1 Cal. 203. See also Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112.

Colorado.— Smith *v.* Brunk, 14 Colo. 75, 23 Pac. 325.

Connecticut.— Sumner *v.* Rhodes, 14 Conn. 135.

Illinois.— Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Indiana.— Pence *v.* Armstrong, 95 Ind. 191.

Maine.— Cross *v.* Bean, 81 Me. 525, 17 Atl. 710.

Michigan.— Ford *v.* Daniells, 71 Mich. 77, 38 N. W. 708.

Minnesota.— Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Mississippi.— Brinson *v.* Perry, (1890) 7 So. 322.

Missouri.— Mississippi Valley Trust Co. *v.* McDonald, 146 Mo. 467, 48 S. W. 483.

Nevada.— Ruhling *v.* Hackett, 1 Nev. 360.

New Jersey.— Gale *v.* Morris, 29 N. J. Eq. 222 [*affirmed* in 30 N. J. Eq. 285].

New York.—Crippen *v.* Baumes, 15 Hun 136.

South Dakota.— Peters *v.* Fell, 15 S. D. 391, 89 N. W. 1014.

Vermont.— Blodgett *v.* Hobart, 18 Vt. 414.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 111.

Where the date and name of the payee of a note mentioned in the conditions of a mortgage deed were misdescribed, through mistake, in a bill of foreclosure stating such mistake, there may be a correction, not only as between the parties to the deed, but as between the mortgagor and a subsequent mortgagee with notice. Peters *v.* Goodrich, 3 Conn. 146.

Where the beneficiary in a mortgage in which land is misdescribed sues to reform, making the holder of a subsequent mortgage covering the same land a co-defendant with the mortgagor, alleging that the latter mortgagee took with knowledge of the mistake in the description in the first mortgage, and asking that the lien of the first mortgage be declared prior to that in the second, if the evidence sustains the allegations, equity will declare the lien of the first mortgage prior to that of the second. Cox *v.* Esteb, 81 Mo. 393.

10. See cases cited *supra*, notes 7–9.

11. See cases cited *infra*, this note.

Actual, open, and visible possession of land is equivalent to notice of the title, rights, and equities of the occupant. Thalheimer *v.* Lockert, 76 Ark. 25, 88 S. W. 591.

A provision that trustees may convey in fee is notice of the quantity of estate intended to be conveyed because a trustee cannot convey an estate different from that vested in him. Randolph *v.* New Jersey West Line R. Co., 28 N. J. Eq. 49.

The recording of a mortgage deed affords constructive notice to subsequent encumbrancers. Peters *v.* Goodrich, 3 Conn. 146; Mississippi Valley Trust Co. *v.* McDonald, 146 Mo. 467, 48 S. W. 483. Or notice of a prior conveyance, however it may be, is enough. Preston *v.* Williams, 81 Ill. 176.

12. Andrews *v.* Gillespie, 47 N. Y. 487; Adlard *v.* Stockstill, 5 Ohio S. & C. Pl. Dec. 493, 5 Ohio N. P. 487.

13. Lebanon Sav. Bank *v.* Hollenback, 29 Minn. 322, 13 N. W. 145.

14. *Arkansas.*— Davidson *v.* Davidson, 42 Ark. 362.

Georgia.— Kilpatrick *v.* Strozier, 67 Ga. 247; Boardman *v.* Taylor, 66 Ga. 638; Wall *v.* Arrington, 13 Ga. 88; Ligon *v.* Rogers, 12 Ga. 281. See also Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697.

Louisiana.— Adams *v.* Drew, 110 La. 456, 34 So. 602.

Maine.— Farley *v.* Bryant, 32 Me. 474; Whitman *v.* Weston, 30 Me. 285.

Michigan.— Dart *v.* Barbour, 32 Mich. 267.

Mississippi.— Kilpatrick *v.* Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79.

mortgage,[15] or any other instrument.[16] A stronger statement of the rule involved is that where the party seeking relief committed the mistake and is in default, and defendant is an innocent purchaser and is in no default, when one of the two parties must suffer, the loss must fall upon him who is in default.[17] Consequently it has been held that a bill against a purchaser was defective because it failed to allege that he purchased with notice.[18] Where a person relies upon the principle that he is a *bona fide* purchaser, it is always proper for the other side to show that he acted with a knowledge of the mistake sought to be corrected.[19] Where a

Missouri.— Brown *v.* Gwin, 197 Mo. 499, 95 S. W. 208. See also Frederick *v.* Henderson, 94 Mo. 98, 7 S. W. 186.

Tennessee.— Teague *v.* Sowder, (1908) 114 S. W. 484; Lally *v.* Holland, 1 Swan 396.

Texas.— See Horwitz *v.* La Roche, (Civ. App. 1908) 107 S. W. 1148.

Virginia.—See Reid *v.* Rhodes, 106 Va. 701, 56 S. E. 722.

Washington.—Seward *v.* Spurgeon, 9 Wash. 74, 37 Pac. 303.

West Virginia.— Robinson *v.* Braiden, 44 W. Va. 183, 28 S. E. 798.

United States.— Reeves *v.* Vinacke, 20 Fed. Cas. No. 11,663, 1 McCrary 213.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 112.

A dictum in Jamaica Sav. Bank *v.* Taylor, 72 N. Y. App. Div. 567, 76 N. Y. Suppl. 790, asserts that where a contract for the sale of land, owing to a mistake of the scrivener, describes a larger tract than was intended, the seller may have reformation against a purchaser for value and in good faith of the vendee's rights, in the absence of any conduct on the part of the vendor calculated to mislead the vendee. It seems to be unsupported by authority.

No reformation was allowed as against a purchaser without notice of the remaining interest of the grantor at sheriff's sale, the description not being impossible or repugnant. See U. S. *v.* Payson, 27 Fed. Cas. No. 16,016.

For example where land which was sold from A to C under a mistaken description was afterward conveyed by the same owner to B by a proper deed for a valuable consideration, and without notice of the mistake, a bill to reform the deed to C would not lie against either A or B. Sealey *v.* Brumble, 59 N. C. 295.

A deed of settlement of land on a wife by her husband, in which no boundaries are given, and no landmarks, natural or artificial, are mentioned will not be reformed as against a subsequent purchaser for value. Adams *v.* Edgerton, 48 Ark. 419, 3 S. W. 628.

Admission of counsel that notice could not be proved.— Where it is sought to reform a deed by adding a provision omitted from it as made and recorded, and the contest was with a subsequent purchaser for value, on admission by counsel for complainant that they could not show any notice to the purchaser of the alleged mistake on the part of the scrivener, evidence of such mistake was inadmissible. Boardman *v.* Taylor, 66 Ga. 638.

Tender back of purchase-money.— Where an owner of two lots is deceived by a third person, believing that his deed is for but one lot, whereas it is for both, and the purchaser, without knowledge of the deception, in good faith intends to buy the two lots, before the owner is entitled to any relief he must tender back to the purchaser the money paid and notes given under the deed. Horwitz *v.* La Roche, (Tex. Civ. App. 1908) 107 S. W. 1148.

15. *Indiana.*— Pence *v.* Armstrong, 95 Ind. 191; Vitito *v.* Hamilton, 86 Ind. 137.

Nebraska.— Carter *v.* Leonard, 65 Nebr. 670, 91 N. W. 574.

New Jersey.—Rutgers *v.* Kingsland, 7 N. J. Eq. 178 [*affirmed* in 7 N. J. Eq. 658].

New York.— Casler *v.* Sitts, 6 Hun 659.

Ohio.— Youtz *v.* Julliard, 10 Ohio Dec. (Reprint) 298, 20 Cinc. L. Bul. 26.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 112.

Illustration.— On complaint to reform a mortgage and foreclose, a subsequent purchaser answered that he became bail for the mortgagor under the belief that the latter's land was unencumbered, save as appeared from plaintiff's mortgage; that plaintiff knew of the mistake but failed to have it corrected, and that subsequently defendant purchased the land at a sale by an assignee in bankruptcy of the mortgagor. Reformation would destroy defendant's whole security and was not granted. Hewitt *v.* Powers, 84 Ind. 295.

Where a mortgage created two classes of creditors, and preferred one, it was not reformed so as to destroy the preference against the *bona fide* purchaser of a note belonging to the preferred class. Dunham *v.* Steele Packing, etc., Co., 100 Mich. 75, 58 N. W. 627.

It was error to quash sequestration proceedings upon motion of persons claiming to be *bona fide* purchasers for value of mortgaged property in the absence of evidence that they were such. McLain *v.* Vandyke, (Tex. Civ. App. 1894) 26 S. W. 459.

16. Stevens *v.* Wadleigh, 6 Ariz. 351, 57 Pac. 622.

After the assignment of a bond, erroneously written, to a third party without notice, equity would not interfere. Foster *v.* Kingsley, 67 Me. 152.

The defense is personal and can only be made or relied upon by such purchaser, or someone deraigning title through him. Haynes *v.* Whitsett, 18 Oreg. 454, 22 Pac. 1072.

17. Henry *v.* Smith, 76 N. C. 311.

18. Sickmon *v.* Wood, 69 Ill. 329.

19. Memphis Loan, etc., Assoc. *v.* Arnett, 169 Mo. 201, 69 S. W. 365.

mutual mistake is made in the description of property in a first mortgage, it may be corrected without prejudice to the mortgagee in the second mortgage.[20] A subsequent *bona fide* vendee without notice from a purchaser with notice is protected.[21]

b. Who Deemed Bona Fide Purchaser. To constitute a *bona fide* purchaser it is necessary that such purchaser must have parted with value,[22] and that he must have taken without notice, actual or constructive.[23] If, however, there be circumstances which, in the exercise of common reason and prudence, ought to put a man on particular inquiry, he will be presumed to have made that inquiry, and will be charged with notice of every fact which that inquiry would have given him.[24] A third person to whom another conveys land in trust to pay his debts is a purchaser for value, but takes the land subject to the equities which have attached to it in the hands of his grantor.[25] As between a *bona fide* purchaser and a subsequent purchaser of the inchoate title to land, the latter must stand or fall by the case of him from whom he purchased.[26] In a suit to reform a deed

20. Herring *v.* Fitts, 43 Fla. 54, 30 So. 804, 99 Am. St. Rep. 108.

A mistake existed in a second mortgage and prior mortgage contained the same mistake, and on its foreclosure some seventeen years after the execution of the second mortgage the mistake appeared. Shortly after the decree for sale under the first mortgage, without having before made any claim for reformation, the second mortgagee filed his bill, but meanwhile the mortgagor had conveyed to a *bona fide* purchaser. Remedy was denied. Toll *v.* Davenport, 74 Mich. 386, 42 N. W. 63.

21. Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75. In Peters *v.* Fell, 15 S. D. 391, 89 N. W. 1014, under the peculiar circumstances of the case, reformation was decreed against the second vendee on condition that such vendee be paid back his consideration.

22. See Bona Fide Purchaser, 5 Cyc. 719.

If a mortgage is given merely to secure an antecedent debt, that does not constitute the mortgagee a purchaser for value so as to preclude reformation. Burns *v.* Caskey, 100 Mich. 94, 58 N. W. 642. *Compare* Busenbrake *v.* Ramey, 53 Ind. 499.

Filing of a declaration of homestead does not constitute the party filing it a *bona fide* purchaser for value without notice, or entitled to protection as such. See note to Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799.

23. Rhodes *v.* Outcalt, 48 Mo. 367; Piatt *v.* Sinton, 5 Ohio Dec. (Reprint) 547, 6 Am. L. Rec. 483; Lockwood *v.* White, 65 Vt. 466, 26 Atl. 639; Fischer *v.* Laack, 85 Wis. 280, 55 N. W. 398.

The record may charge with notice a subsequent purchaser or mortgagor. Bent *v.* Coleman, 89 Ill. 364; Leedy *v.* Nash, 67 Ind. 311; Clark *v.* Stout, 32 Iowa 213. *Compare* Peters *v.* Fell, 15 S. D. 391, 89 N. W. 1014. It is no defense that the subsequent mortgagee examined the record and believed that a lot in question was not embraced in property mortgaged to him. Bowen *v.* Wood, 35 Ind. 268.

Land was conveyed under an incorrect description and afterward mortgaged by the grantee under the same description to different persons at different times.— One of the later mortgagees had the description corrected by decree and foreclosure. The land was sold to a stranger. In an action by a prior mortgagee to correct, the stranger was bound by what the records disclosed as to the title under which he purchased and could not defend on the ground that he was a *bona fide* purchaser. Dwight *v.* Tyler, 49 Mich. 614, 14 N. W. 567. When the description in a record is ambiguous or too indefinite, notice is not afforded to a subsequent *bona fide* purchaser. Bright *v.* Buckman, 39 Fed. 243. A description in the record which is defective, but may be rendered certain by averments, should put persons on inquiry. Hence all parties will be charged with notice. Pence *v.* Armstrong, 95 Ind. 191.

In an action to reform a deed which had been recorded and the original lost, and under which subsequent purchasers held the property, because of an alleged clerical error in recording, affecting the estate conveyed, declarations of the grantor as to his intention in making the deed, made at the time of its execution, and unexecuted deeds by the same grantor to the same grantees subsequent in date to the one on record, were inadmissible, the subsequent purchasers of the property having the right to rely upon the deed as recorded. Teague *v.* Sowder, (Tenn. 1908) 114 S. W. 484.

The grantee of part of a tract of land by an unrecorded deed is not entitled to have a subsequent deed from the grantor to a third person reformed on the ground of mutual mistake, so as to have the portion sold to him excluded from the later deed. Carroll *v.* Rogers, 2 N. Brunsw. Eq. 159.

24. Durant *v.* Crowell, 97 N. C. 367, 2 S. E. 541.

Possession as notice.— Where a party is in possession of land, it should put subsequent purchasers on inquiry. Baynard *v.* Norris, 5 Gill (Md.) 468, 46 Am. Dec. 647. Removal of the house from a tract of land is not abandonment of possession, where the tract remains inclosed, and the owner gathers fruit yearly from an orchard on the same. White *v.* White, 105 Ill. 313.

25. Day *v.* Day, 84 N. C. 408.

26. Flynn *v.* Herye, 4 Mo. App. 360. In

a defendant who interposes the defense of being a *bona fide* purchaser must allege of what estate his grantor was seized and in possession.[27]

3. Purchasers at Execution Sale. The rights of a purchaser at an execution sale will not preclude reformation by a grantee whose claim is prior in time.[28]

F. Married Women[29] **— 1. In General.** Although the courts have entertained different views as to whether or not a suit to reform will lie as against a married woman, it is now pretty well settled that, in the absence of power conferred by statute putting a married woman on an equal with *feme soles* as respects property or capacity to contract, a mistake in a written instrument will not be reformed as against them.[30] Even a misdescription in a release of dower cannot be rectified.[31] But where a conveyance to trustees, for the benefit of a *feme covert*, and her execution of a mortgage on the property were defective, the conveyances were corrected in order to give effect to a mortgage which was given for the wife's benefit.[32] And a mistake as to the description of premises in the deed of a single woman may be corrected after her subsequent marriage.[33]

2. Under Modern Statutes. At the present time, however, most states have put married women on an equality with *feme soles* as respects property and capacity to contract, and therefore mistakes may be reformed as against them just as against any other person.[34]

this case H was the *bona fide* purchaser of a lot and made improvements on it. Subsequently F bought a three-sevenths' interest in the property and in partition discovered a mistake which affected H's lot. F held under a deed which purported to pass "all the right, title, and interest" of the alienor. The court decreed that whether or not F had notice of the mistake at the time of purchase, H had an equity against him to have the deed reformed.

27. Hyland *v.* Hyland, 19 Oreg. 51, 23 Pac. 811.

28. Carver *v.* Lassallerte, 57 Wis. 232, 15 N. W. 162. But see Nugent *v.* Priebatsch, 61 Miss. 402, where equity would not correct a mistake in the description in a deed against one who, having actual notice at the time of his purchase, bought the land at an execution sale founded on a judgment rendered in favor of one who had notice of the mistake when he recovered the judgment.

29. See also *supra*, V, D, 5, a, (I); *infra*, X, G.

30. *Arkansas.*— Holland *v.* Moon, 39 Ark. 120.

California.— Leonis *v.* Lazzarovich, 55 Cal. 52.

Illinois.—Hutchings *v.* Huggins, 59 Ill. 29; Martin *v.* Hargandine, 46 Ill. 322; Moulton *v.* Hurd, 20 Ill. 137, 71 Am. Dec. 257.

Iowa.— Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Maryland.— Gebb *v.* Rose, 40 Md. 387.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

Missouri.— Meier *v.* Blume, 80 Mo. 179; Shroyer *v.* Nickell, 55 Mo. 264.

Montana.— Montana Nat. Bank *v.* Schmidt, 6 Mont. 609, 13 Pac. 382.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 114.

In a deed executed by husband and wife, the names of the grantors were omitted in the granting clause. The mistake was not rectified against the wife. Carr *v.* Williams, 10 Ohio 305, 36 Am. Dec. 87.

In Indiana a contract of suretyship by a wife for her husband is void.— Hence a mistake in a mortgage executed by a married woman and her husband to secure his debt will not be corrected. Merchants, etc., Bldg. Assoc. *v.* Scanlan, 144 Ind. 11, 42 N. E. 1008.

Where a husband and wife join in a conveyance of the wife's land, but the deed is so worded as to purport to convey only a dower interest, and the deed is properly executed and acknowledged, the deed cannot be reformed to convey the fee. Bowden *v.* Bland, 53 Ark. 53, 13 S. W. 420, 22 Am. St. Rep. 179.

31. Martin *v.* Hagardine, 46 Ill. 322; Purcell *v.* Goshorn, 17 Ohio 105, 49 Am. Dec. 448.

Although a deed might be corrected upon the death of the husband, the widow could not be deprived of dower unless it was clearly shown that the mistake was hers as well as the husband's. Sieben *v.* Franks, 52 Iowa 642, 3 N. W. 676.

32. Desell *v.* Casey, 3 Desauss. Eq. (S. C.) 84.

33. Evans *v.* Aldrich, 63 Ill. 226.

34. *Alabama.*— Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52; Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454.

California.— Stevens *v.* Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216; Savings, etc., Soc. *v.* Meeks, 66 Cal. 371, 5 Pac. 624.

Florida.— Herring *v.* Fitts, 43 Fla. 54, 30 So. 804, 99 Am. St. Rep. 108.

Illinois.— Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; Edwards *v.* Schoeneman, 104 Ill. 278; Knox *v.* Brady, 74 Ill. 476.

Indiana.— Hewitt *v.* Powers, 84 Ind. 295; Dunn *v.* Tousey, 80 Ind. 288; Eichbredt *v.* Angerman, 80 Ind. 208; Styers *v.* Robbins, 76 Ind. 547; Wilson *v.* Stewart, 63 Ind. 294;

3. NON-COMPLIANCE WITH STATUTORY REQUIREMENTS. In no case will a defective compliance with statutory requirements be mended.[35]

G. Homestead Claimants.[36] A mortgage or conveyance of a homestead executed and acknowledged in strict compliance with the requirements of homestead law is subject to reformation in equity for mutual mistake[37] or

Carper *v.* Munger, 62 Ind. 481; Hamar *v.* Medsker, 60 Ind. 413.

Kentucky.— Wood *v.* Porter, 4 Ky. L. Rep. 361.

Minnesota.—Christman *v.* Colbert, 33 Minn. 509, 24 N. W. 301.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 114.

A contention that specific performance of an agreement to mortgage cannot be enforced against a married woman is not applicable to a suit for the reformation of a mistake in the description of the premises mortgaged. Lewis *v.* Ferris, (N. J. Ch. 1901) 50 Atl. 630.

In California the statute, requiring a mortgage on the homestead to be signed and acknowledged by the wife in statutory form, relates merely to the execution of the instrument, and will not prevent the reformation of a mortgage on the homestead, properly signed and acknowledged, which by mistake of the mortgagee did not include all the land which the parties had agreed that it should cover, on the theory that the mortgage, as reformed, would not be so acknowledged by the wife. Stevens *v.* Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216.

In Illinois by the act of March 27, 1869, providing that a married woman above the age of eighteen, joining with her husband in any conveyance of real estate, should be bound as if she were sole, mistakes in such conveyances will be corrected. Bradshaw *v.* Atkins, 110 Ill. 323.

In Washington under 1 Hill Code, § 1410, providing that a contract may be enforced against a wife as if she were unmarried, equity will reform a mortgage by a married woman, which, by mutual mistake, contains an erroneous description of the property. Murdoch *v.* Leonard, 15 Wash. 142, 45 Pac. 751.

Swan & C. St. Ohio, p. 694, authorizes relief where a husband and wife execute a deed intending to convey the entirety of the land owned by them as tenants in common, but by mistake the form of the deed conveys only the husband's undivided interest and the wife's right of dower. Smith *v.* Turpin, 20 Ohio St. 478.

35. *Alabama.*— Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454.

California.— Leonis *v.* Lazzarovich, 55 Cal. 52; Wedel *v.* Herman, 59 Cal. 507.

Connecticut.— Dickinson *v.* Glenney, 27 Conn. 104.

Iowa.— Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336.

Massachusetts.— See Townsley *v.* Chapin, 12 Allen 476.

Missouri.— Shroyer *v.* Nickell, 55 Mo. 264.

New York.—Knowles *v.* McCamly, 10 Paige 342; Martin *v.* Dwelly, 6 Wend. 9, 21 Am. Dec. 245.

Wisconsin.— See Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035; O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702; Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395; Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 114.

In South Carolina where a wife neglects to relinquish "inheritance" as required by the act of 1795 equity cannot supply the omitted words upon the principle that that shall be considered as done which was intended to be done. Williams *v.* Cudd, 26 S. C. 213, 2 S. E. 14, 4 Am. St. Rep. 714.

Where land intended to be conveyed by a husband and wife was not her separate property, and she could only convey her interest in the manner prescribed by statute, a deed defectively executed by her, or which does not describe the land, cannot be corrected by proceedings in equity, although she received and retains the consideration therefor. McReynolds *v.* Grubb, 150 Mo. 352, 51 S. W. 822, 73 Am. St. Rep. 448.

36. See *supra*, V, D, 5, a, (I); X, F.

37. Tillis *v.* Smith, 108 Ala. 264, 19 So. 374; Parker *v.* Parker, 88 Ala. 365, 6 So. 741; Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52; Witherington *v.* Mason, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41; Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454; Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; Denison *v.* Gambill, 81 Ill. App. 170; Lear *v.* Prather, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699; Beyschlag *v.* Van Wagoner, 46 Mich. 91, 8 N. W. 693.

Holding as tenants in common.— Equity may correct a misdescription in a deed made by mutual mistake and executed by a husband and his wife conveying property held by them as tenants in common, and constituting part of their homestead, if it appears that the purchaser paid full value and the conveyance was otherwise sufficient to pass the wife's interest. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

Where a mortgage expressly reserves to the mortgagor a "homestead," this, nothing else appearing, will be treated as the reservation of one thousand dollars' worth of land from the operation of the mortgage, without regard to whether the conditions exist which are necessary to entitle the debtor to the exemption of a homestead under the statute. But if the reservation was merely intended to express what was supposed by mistake to be the legal right of the debtor, when in fact he was not entitled, under the statute, to the exemption of a homestead, the mortgage may, as against the husband at least, be so re-

fraud [38] with respect to the misdescriptions of the premises conveyed, in like manner as other mortgages or conveyances, the conveyance being otherwise sufficient to pass the wife's interest,[39] especially if it appears that the purchaser paid full value [40] and the reformation merely seeks to correct an admitted error in the designation or description of the property,[41] and even though the wife was ignorant that she was part-owner of the land conveyed.[42] On the other hand, a mortgage cannot be reformed so as to include the homestead, although intended to be embraced therein, if the statutory requirements as to execution, signature, acknowledgment, etc., of the wife have not been complied with;[43] and this rule has been applied notwithstanding the fact that before suit was brought the husband had died, and the widow by her answer assented to such reformation;[44] nor will such a conveyance be reformed against the wife after the husband's death [45] or after the land

formed as to include the homestead; but to entitle the mortgagor to this relief he must allege and prove that all the land that was subject to mortgage was intended to be mortgaged, and that but for the mistaken belief that the homestead was not subject to the mortgage it would have been included. Lear *v.* Prather, 89 Ky. 501, 12 S. W. 946, 11 Ky. L. Rep. 699.

The husband's heirs may reform such a mortgage against the wife. Snell *v.* Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526.

38. Stevens *v.* Holman, 112 Cal. 345, 44 Pac. 670, 53 Am. St. Rep. 216 (holding that where a husband and wife agreed to mortgage their homestead, but executed a mortgage which they both knew did not include the whole of such homestead, but which they both knew was accepted by the mortgagor believing that it did include all of such homestead, the mortgage might be reformed in equity so as to include all the land agreed to be mortgaged); Denison *v.* Gambill, 81 Ill. App. 170.

39. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

40. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

41. Witherington *v.* Mason, 86 Ala. 345, 5 So. 679, 11 Am. St. Rep. 41; Gardner *v.* Moore, 75 Ala. 394, 51 Am. Rep. 454. See Beyschlag *v.* Van Wagoner, 46 Mich. 91, 92, 8 N. W. 693, where the court holding that such a mortgage of a homestead, executed and signed by the husband and wife, may be reformed where the description is merely imperfect and not a description of another parcel of land entirely, said: "We do not understand that the constitutional provision requiring a mortgage of a homestead to be signed by the wife of the owner, requires such a mortgage to be construed on principles different from those which govern other conveyances similarly signed. After the parties have executed a mortgage which was meant to cover their homestead, they have bound the homestead if the description is not so defective as to make it beyond the power of the courts to identify and apply it."

42. Parker *v.* Parker, 88 Ala. 362, 6 So. 740, 16 Am. St. Rep. 52.

43. O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702; Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565. *Compare* Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035, where in an action against the grantor and his wife to reform a deed the grantor died pending an appeal. After judgment and prior to his death the grantor conveyed all his title and interest in the land affected to his wife. It was contended, on appeal, that the wife had only signed the deed in that capacity, that she had received no consideration therefor, and that the law would not reform the deed so as to bar her dower in land which she had never conveyed nor agreed to convey, and for which she had received no part of the consideration. It was held insufficient, since the record showed: (1) There was neither pleading nor proof that the wife had received no part of the consideration; (2) that by accepting the deed of the fee the wife's inchoate estate in dower was merged in the fee.

44. O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702 [*following* Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565].

45. Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035; O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702 [*following* Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565]. In O'Malley *v.* Ruddy, *supra* [*following* Petesch *v.* Hambach, *supra*], Lyon, J., comparing the O'Malley case and the Petesch case, said: "We seldom find two cases, entirely independent of each other, so essentially alike in their facts. It is quite true that the decision in Petesch *v.* Hambach, *supra*, was by an equally divided court, but until overruled it is authority in this court. . . . In Petesch *v.* Hambach, *supra*, an attempt was made by husband and wife to mortgage their homestead, but by mistake the homestead lot was not included in the mortgage. The husband afterward died, and his widow succeeded to his estate, including such homestead, as heir or devisee. The lot remained the homestead of the parties until the husband's death, and of the wife from that time until the date of the judgment. . . . Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395, is not in conflict with Petesch *v.* Hambach, *supra*. In Conrad *v.* Schwamb, *supra*, the mistake occurred in a deed which was intended to convey a homestead, but which failed to do so. The purchaser went into possession of the homestead under the deed, and the grantors and their family removed to Minnesota, where the husband died eight years later. The widow and the family continued

has ceased to be the homestead.[46] Again, it has been held that equity cannot reform a mistake in a mortgage on community property executed by the husband, as against his wife, who has filed a declaration of homestead on such property without notice of the defective mortgage.[47]

H. Principals. A principal is responsible for the acts of his agent, and a mistake of such agent in a written instrument will be corrected as against the principal.[48]

I. Sureties. Where a mistake exists in an instrument with sureties, it will be corrected against them just the same as against the principals.[49]

XI. Matters Affecting Proceedings and Remedy in General.

A. Form of Remedy. The proper remedy for the correction of a mutual mistake, or the mistake of one party, accompanied by fraud or inequitable conduct of the other party, is by a suit in equity.[50] It should always be shown that complainant rests his suit upon a superior equity,[51] and the relief must not be

to reside in that state. . . . The controlling difference between these two cases is that in one of them the homestead intended to be mortgaged remained a homestead from the execution of the mortgage until the trial, while in the other the premises permanently ceased to be a homestead on the execution of the deed. Because the homestead character continued in the one case, as it does in this case [the O'Malley case], reformation of the mortgage was denied, and because it had terminated in the other case the deed was reformed as to the heirs. It is manifest that there is no conflict in the cases."

46. Conrad *v.* Schwamb, 53 Wis. 372, 10 N. W. 395 [*distinguished* in O'Malley *v.* Ruddy, 79 Wis. 147, 48 N. W. 116, 24 Am. St. Rep. 702, *supra*, note 45]; Petesch *v.* Hambach, 48 Wis. 443, 4 N. W. 565.

47. Adams *v.* Baker, 24 Nev. 162, 51 Pac. 252, 77 Am. St. Rep. 799, holding that she is not affected with notice of a prior mortgage executed by her husband and misdescribing the property, nor by the fact that the parties to the mortgage intended to embrace therein the property covered by the declaration of homestead. But consult note to this case, 77 Am. St. Rep. 799, 806, where the learned editor of the American State Reports, in criticizing this case, says: "No reason is perceived why the rule maintaining the right to reform a deed to, or mortgage of, a homestead where the only defect is a mistake in description therein, is not equally applicable when the homestead declaration is filed subsequently to the execution of such mortgage, especially if it is recorded, or if the party filing the declaration has actual notice of the mortgage."

48. Basserman *v.* Staten Island Belt Line R. Co., 57 N. Y. Super. Ct. 521, 8 N. Y. Suppl. 548.

49. *Connecticut.*— Olmsted *v.* Olmsted, 38 Conn. 309.

Maryland.— Newcomer *v.* Kline, 11 Gill & J. 457, 37 Am. Dec. 74.

Missouri.— State *v.* Frank, 51 Mo. 98.

New York.— Prior *v.* Williams, 3 Abb. Dec. 624.

North Carolina.— Butler *v.* Durham, 38 N. C. 589; Armistead *v.* Bozman, 36 N. C. 117; Huson *v.* Pitman, 3 N. C. 331.

Ohio.— Neininger *v.* State, 50 Ohio St. 394, 34 N. E. 633, 40 Am. St. Rep. 674.

England.— Crosby *v.* Middleton, Prec. Ch. 309, 24 Eng. Reprint 146.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 116.

Compare School Trustees *v.* Otis, 85 Ill. 179 (where an official bond was not reformed as against the sureties therein for a mistake in failing to state fully who were the payees of said bond. But by a later decision an injunction bond reciting execution under seal was reformed against sureties by adding the seals); Henkleman *v.* Peterson, 154 Ill. 419, 40 N. E. 359 [*reversing* 50 Ill. App. 601].

50. Elofrson *v.* Lindsay, 90 Wis. 203, 63 N. W. 89. See also *supra*, II, A, B; *infra*, XI, B, 1, 3.

Where a bill is filed to enforce rights as passing by a deed, the court will not treat it as a bill to reform the instrument. Williams *v* Houston, 57 N. C. 277.

Circumstances may make it immaterial whether a petition is to be regarded as one for specific performance of a contract, or as one for reformation of an instrument, plaintiff being entitled to judgment in either case. Gray *v.* Hornbeck, 31 Mo. 400. See *supra*, p. 904, note 7.

In New Jersey where complainant sued to reform a deed of gift executed by the original grantor to complainant's children for a valuable consideration paid by complainant, on the ground that complainant's solicitor, by mistake, failed to insert a provision authorizing the complainant to revoke the deed during his life, the cause of action was within the original jurisdiction of the court of chancery and not within 3 Gen. St. p. 3486, providing for the determination of claims to real estate and to quiet title. Van Houten *v.* Van Houten, 68 N. J. Eq. 358, 59 Atl. 555. The same case holds that it was not material that the bill contained the special allegations prescribed by such statute and was indorsed as a bill to quiet title.

51. McFadden *v.* Rogers, 70 Mo. 421.

Superior equity see *supra*, II, B.

sought in a collateral way, but by a direct proceeding or by way of answer as a defense asking affirmative relief.[52] If the remedy sought is reformation of a contract, the parties thereto must have been capable of making a valid contract.[53] Even though the distinction between actions in equity and suits at law has been abolished by the codes of procedure in some states, the distinguishing features between the two classes of remedies — legal and equitable — are, it seems, still observed.[54] When reformation is incidental to some other remedy,[55] the facts upon which the relief is based must be specially pleaded,[56] and a mistake cannot be reformed in a suit which is not between parties to the instrument.[57]

B. Jurisdiction[58] and Venue[59] — 1. At Common Law. At common law a written instrument can be construed and enforced or set aside altogether for adequate cause in a law court, but there is no power to reform for fraud or mistake.[60] Such power rests in equity alone,[61] subject to statutory modifications.[62]

2. In Admiralty. Likewise admiralty cannot entertain an action, or take

52. Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791; Fisher *v.* Owens, 132 N. C. 686, 44 S. E. 369.

Intervener.—A mortgagee need not bring a direct suit to correct an error in the description of the property in the mortgage, where another, claiming the property, is seeking to enjoin the execution of the mortgage, but said error may be inquired into and corrected on the intervention of the mortgagee in the injunction suit, the petition of intervention containing proper allegations to admit proof of the error. Lake Bisteneau Lumber Co. *v.* Mims, 50 La. Ann. 619, 23 So. 890.

53. McReynolds *v.* Grubb, 150 Mo. 352, 51 S. W. 822, 73 Am. St. Rep. 448.

54. See Tautphœus *v.* Harbor, etc., Bldg., etc., Assoc., 104 N. Y. App. Div. 451, 93 N. Y. Suppl. 916 [*reversed* on the facts in 185 N. Y. 308, 78 N. E. 69]. See *supra*, p. 904, note 1.

55. See cases cited *infra*, this note. See also *infra*, notes 56, 57.

Formal reformation of a written contract need not be had before enforcement. Huber Mfg. Co. *v.* Claudel, 71 Kan. 441, 80 Pac. 960. See also *infra*, notes 56, 57; XVI, B, 4.

56. Cooper *v.* Newton, 68 Ark. 150, 56 S. W. 867; Fisher *v.* Owens, 132 N. C. 686, 44 S. E. 369.

57. Cole *v.* Fickett, 95 Me. 265, 49 Atl. 1066. *Compare* Cooper *v.* Newton, 68 Ark. 150, 56 S. W. 867.

58. **Jurisdiction** generally see Courts, 11 Cyc. 633; Equity, 16 Cyc. 30.

59. **Venue** generally see Venue.

60. Cunningham *v.* Wrenn, 23 Ill. 64; Eagle F. Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 609; Munson *v.* Herzog, 109 Ill. App. 302; Preston *v.* Travelers' Ins. Co., 58 N. H. 76; Comparree *v.* Brockway, 11 Humphr. (Tenn.) 355; Wood *v.* Goodrich, 9 Yerg. (Tenn.) 266; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. ed. 66.

Nor was there any process by which it could be done. Stockbridge Iron Co. *v.* Hudson Iron Co., 102 Mass. 45.

61. Lyle *v.* Williamson, 6 T. B. Mon. (Ky.) 142; Imeson *v.* Newport, 5 Ky. L. Rep. 687; Adams *v.* Stevens, 49 Me. 362; Wallace *v.* Tice, 32 Oreg. 283, 51 Pac. 733.

Where there is nothing on the face of an insurance policy to suggest that it bore the wrong date, it cannot be reformed as to date, in an action thereon in a court that has no power to grant affirmative equitable relief. Fowler *v.* Preferred Acc. Ins. Co., 100 Ga. 330, 28 S. E. 398. The same principle appears in English *v.* Thorn, 96 Ga. 557, 23 S. E. 843.

62. **The supreme judicial court of Maine** by Rev. St. (1841) c. 96, § 10, and c. 77, § 8, clause fourth, has jurisdiction in cases of accident and mistake, where the parties have not a plain and adequate remedy at law. Adams *v.* Stevens, 49 Me. 362; Tucker *v.* Madden, 44 Me. 206.

The supreme judicial court of Massachusetts has not the general power of rectifying contracts as a distinct branch of equity jurisprudence. Babcock *v.* Smith, 22 Pick. (Mass.) 61; Leach *v.* Leach, 18 Pick. (Mass.) 68.

In the court of claims.—A petition for the reformation of a contract with the federal government, and for damages for the breach of such contract as reformed, is within the jurisdiction of the court of claims, under the act of March 3, 1887, c. 359 (24 U. S. St. at L. 505, c. 359, § 1 [U. S. Comp. St. (1901) p. 752]), which defines such jurisdiction as extending to all claims founded "upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." U. S. *v.* Milliken Imprinting Co., 202 U. S. 168, 174, 26 S. Ct. 572, 50 L. ed. 980.

In England where a plaintiff sued on a written contract and defendant pleaded in defense matter which he was in equity precluded from setting up by a term of the contract, not stated in the written instrument, a court of law was allowed, under the Common Law Procedure Act 1854, to give equitable relief without the instrument having been first reformed. Wood *v.* Dwarris, 11 Exch. 493, 25 L. J. Exch. 129, 4 Wkly. Rep. 262.

cognizance of a defense, which requires the reformation of a contract, even though it be a maritime contract.[63]

3. Under the Codes — a. In General. Since the adoption of the codes abolishing all distinctions between actions at law and suits in equity, the right of a party to reformation may be prosecuted as an equitable remedy, or it may be set up in defense to an action at law,[64] except in courts to which jurisdiction has not been extended by statute.[65]

b. Action In Personam. An action to reform a deed is an action *in personam* and may be brought where the person sued resides, although the land lies in another state.[66]

C. Limitations[67] and Laches[68] — 1. In General. It is unquestionably the law that a party must assert his rights to reformation without unreasonable delay.[69] The objection that the demand is stale is not removed by the fact that

63. Meyer *v.* Pacific Mail Steamship Co., 58 Fed. 923; Andrews *v.* Essex F. & M. Ins. Co., 1 Fed. Cas. No. 374, 3 Mason 6. See also The Eclipse, 135 U. S. 599, 34 L. ed. 269; Williams *v.* Providence Washington Ins. Co., 56 Fed. 159; Admiralty, 1 Cyc. 825, note 21.

The marine court of New York with its limited statutory jurisdiction adopted the same rule. Lynch *v.* Dowling, 1 N. Y. City Ct. 163.

64. Rhode *v.* Green, 26 Ind. 83; Claypoole *v.* Houston, 12 Kan. 324.

In Indiana under Burns Rev. St. (1908) § 281, authorizing plaintiff in all actions to join such other matters in his complaint as may be necessary to a complete remedy, where complainant sued for the value of natural gas delivered under a contract, and claimed that, by reason of a mutual mistake of the parties and of the scrivener who wrote the contract, it did not limit plaintiff's obligation in furnishing gas to three particular furnaces operated by defendant according to agreement, and asked a reformation of the contract, the suit was properly brought in equity, which court could award whatever relief the proof showed plaintiff entitled to, although it proved to be but a money judgment. Palmer Steel, etc., Co. *v.* Heat, etc., Co., 160 Ind. 232, 66 N. E. 690.

Since the adoption of the code of 1852, in a suit for a breach of a written contract, a mistake in the instrument may be corrected. Rhode *v.* Green, 26 Ind. 83.

65. See cases cited *infra*, this note.

In New York the jurisdiction conferred on county courts by Code Civ. Proc. § 348, of actions to foreclose mortgages on real property, does not give such courts jurisdiction to reform a mortgage. Thomas *v.* Harmon, 122 N. Y. 84, 25 N. E. 257 [*affirming* 46 Hun 75]; Avery *v.* Willis, 24 Hun 548. Nor is an action to reform a mortgage an action "to procure a judgment requiring the specific performance of a contract relating to real estate" within Code Civ. Proc. § 340, giving county courts jurisdiction. Thomas *v.* Harmon, *supra*.

66. Gordon *v.* Goodman, 98 Ind. 269; Bethell *v.* Bethell, 92 Ind. 318.

A covenant of seizin is a personal one, and a deed may be reformed as to that, although the land lies in another state. Bethell *v.* Bethell, 92 Ind. 318.

Where a mortgage on realty situate in Georgia was executed in New York before a commissioner of deeds only, without any other witness, a court of chancery in Georgia entertained jurisdiction to reform and foreclose the mortgage. McCrary *v.* Austell, 46 Ga. 450.

While the courts of Wisconsin cannot reach and modify a recorded deed in the proper county in a sister state, yet the courts of Wisconsin may, on plaintiff appearing therein to enforce a right under such deed, compel its reformation so as to express the agreement actually made. Lyndon Lumber Co. *v.* Sawyer, 135 Wis. 525, 116 N. W. 255.

67. Limitations generally see Limitations of Actions, 25 Cyc. 963 *et seq.*

Limitation of action for reformation see Limitations of Actions, 25 Cyc. 1059.

68. Laches generally see Equity, 16 Cyc. 150 *et seq.*

69. *California.*— Barfield *v.* Price, 40 Cal. 535.

Illinois.—Queen Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620; Wood *v.* Calland, 86 Ill. App. 42.

Iowa.—St. Paul F. & M. Ins. Co. *v.* Sharer, 76 Iowa 282, 41 N. W. 19.

Michigan.—Lowry *v.* Lowry, 135 Mich. 305, 97 N. W. 726.

Missouri.— Davidson *v.* Mayhew, 169 Mo. 258, 68 S. W. 1031.

Ohio.— Brockschmidt *v.* Archer, 64 Ohio St. 502, 60 N. E. 623.

Pennsylvania.— See Gailey *v.* New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

Texas.— Lubbock *v.* Binns, 20 Tex. Civ. App. 407, 50 S. W. 584; Mathews *v.* Benevides, 18 Tex. Civ. App. 475, 45 S. W. 31.

Vermont.— Barker *v.* Belknap, 27 Vt. 700.

United States.— Sharp *v.* Behr, 117 Fed. 864.

England.— Bloomer *v.* Spittle, 13 Eq. 427, 41 L. J. Ch. 369, 26 L. T. Rep. N. S. 272, 20 Wkly. Rep. 435; McCormack *v.* McCormack, L. R. 1 Ir. 119, Ir. R. 11 Eq. 130; Bell *v.* Cundall, Ambl. 101, 27 Eng. Reprint 63.

Canada.— McFatridge *v.* Griffin, 27 Nova Scotia 421.

See 42 Cent. Dig. tit. "Reformation of In-

the mistake did not become a cloud until after a refusal to rectify, as where the grantors in a deed refused to correct shortly before suit.[70] There is no rule of law which fixes the period within which a person must discover that an instrument does not express a contract or intention which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations. It is a question of discretion in the court, whether, under all the circumstances of time, repeated applications and refusals, the conditions, knowledge, expectations and hopes of the parties, the relief should be granted.[71] In the absence of substantial change of condition, or prejudice to third parties, mere delay is not a bar.[72] Statutes of limitation vary in their provisions according to jurisdiction; [73] but in all cases the statute begins to run only from the dis-

struments," § 119. And see, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 963.

No trust relation is formed where a deed conveys other land than that intended, and the rule that an equitable title does not become stale so long as recognized by the trustee does not apply where the grantors' successors have for twenty-five years known that the deed conveyed the wrong land, during which time their claim to the land intended to be conveyed had been recognized by the grantors. Mathews *v.* Benevides, 18 Tex. Civ. App. 475, 45 S. W. 31.

In Indiana a suit by an administrator to reform a deed for mutual mistake is not a suit to recover real property sold by him as administrator, and is not therefore within the five years' statute of limitations. Pierce *v.* Vansell, 35 Ind. App. 525, 74 N. E. 554.

In Texas, in a suit to reform a bond, the case being one of mutual mistake, and no excuse for delay in bringing the suit being shown, it was barred under Sayles Rev. Civ. St. art. 3358, requiring all actions for which no limitation is otherwise prescribed to be brought within four years next after the right to bring the same shall have accrued. Waters *v.* East, 23 Tex. Civ. App. 412, 56 S. W. 939.

70. Mathews *v.* Benevides, 18 Tex. Civ. App. 475, 45 S. W. 31.

71. *Connecticut.*—Allis *v.* Hall, 76 Conn. 322, 56 Atl. 637.

Illinois.— Keeley *v.* Sayles, 217 Ill. 589, 75 N. E. 567.

Indiana.— Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259.

Iowa.— Goodrich *v.* Fogarty, 130 Iowa 223, 106 N. W. 616.

Maine.— Farley *v.* Bryant, 32 Me. 474.

Michigan.— Bronk *v.* Standard Mfg. Co., 141 Mich. 680, 105 N. W. 33.

New York.— Welles *v.* Yates, 44 N. Y. 525; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263.

Tennessee.— Owen *v.* Williams, (Ch. App. 1899) 55 S. W. 18; Graham *v.* Guinn, (1897) 43 S. W. 749.

England.—Money *v.* Money, 3 Drew. 256, 3 Eq. Rep. 996, 24 L. J. Ch. 684, 3 Wkly. Rep. 425, 61 Eng. Reprint 901.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 119.

Where it does not appear that the delay has resulted in the loss of material evidence, a reasonable excuse being shown, equity will not refuse reformation. Wabash R. Co. *v.* Lumley, 96 Fed. 773, 37 C. C. A. 584. It is asserted in Wyche *v.* Greene, 11 Ga. 159, that right to relief may be forfeited by unreasonable delay; but when lapse of time would not constitute a good statutable bar at law, it cannot be set up as a defense in equity.

72. *Illinois.*— Lindsay *v.* Davenport, 18 Ill. 375.

Indiana.— Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901.

Minnesota.— Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

Nebraska.— Carter *v.* Leonard, 65 Nebr. 670, 91 N. W. 574.

New York.—See Arnstein *v.* Bernstein, 127 N. Y. App. Div. 550, 111 N. Y. Suppl. 987.

Ohio.— Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

United States.— Providence Steam-Engine Co. *v.* Hathaway Mfg. Co., 79 Fed. 512.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 119.

Where a debt secured by a trust deed is barred by limitations, a reformation of the deed will not be granted. Galloway *v.* Kerr, (Tex. Civ. App. 1901) 63 S. W. 180 [*reversed* on other grounds in 94 Tex. 641, 64 S. W. 858].

73. See the statutes of the several states.

In California, under Code Civ. Proc. § 338, subd. 4, an action for relief on the ground of mistake must be brought within three years after the discovery of the facts constituting the mistake. Such an action brought seven years after discovery is barred. Eureka *v.* Gates, 137 Cal. 89, 69 Pac. 850.

In Iowa, knowing of a mistake in the description of a deed and remaining silent for nearly sixteen years bars suit by Code, §§ 3447, 3448, limiting actions founded on written contracts and those brought for the recovery of real property to ten years. Garst *v.* Brutsche, 129 Iowa 501, 105 N. W. 452.

In Kentucky, section 2519 of the statute provides that no action for mistake shall be brought ten years after the time of making the contract. A mistake in an insurance policy cannot be corrected after the lapse of ten years from the date of the policy. Webb *v.* Webb, 64 S. W. 839, 23 Ky. L. Rep. 1057.

In Minnesota there is no statute of limitations affecting reformations. Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

In Nebraska the statute of limitations

covery of the mistake, or of such facts as would put a person of ordinary intelligence and prudence on inquiry and which, if pursued, would tend to such discovery.[74] To bar a right the statute of limitations must be pleaded, and a demurrer to the pleading asking for reformation is insufficient to interpose the defense.[75]

2. What Constitutes Laches. Laches consists in undue and unaccounted for delay, and what constitutes delay sufficient to bar reformation must be determined by the facts of each case and the principles of equity.[76] If, relying on the instru-

relative to actions on written contracts applies to a suit in equity to reform a fire insurance policy so as to express consent on concurrent insurance and to recover on the instrument as so reformed. Grand View Bldg. Assoc. *v.* Northern Assur. Co., 73 Nebr. 149, 102 N. W. 246.

In New York the statute of limitations is no defense to an action by a grantee in possession of real estate to have his deed reformed. Brennan *v.* Thompson, 46 Misc. 317, 94 N. Y. Suppl. 684.

In Texas reformation is barred under Sayles Rev. Civ. St. art. 3358, requiring all actions for which no limitation is otherwise prescribed to be brought within four years next after the right to bring the same shall have accrued. Waters *v.* East, 23 Tex. Civ. App. 412, 56 S. W. 939.

74. *Alabama.*— Harold *v.* Weaver, 72 Ala. 373; Black *v.* Stone, 33 Ala. 327. See also Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864.

California.— See Travelli *v.* Bowman, 150 Cal. 587, 89 Pac. 347; Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112.

Georgia.— See Venable *v.* Burton, 129 Ga. 537, 59 S. E. 253.

Indian Territory.— Byrne *v.* Ft. Smith Nat. Bank, 1 Indian Terr. 680, 43 S. W. 957.

Iowa.— Garst *v.* Brutsche, 129 Iowa 501, 105 N. W. 452.

Minnesota.— Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688.

Nebraska.— Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837.

New York.— De Forest *v.* Walters, 153 N. Y. 229, 47 N. E. 294 [*affirming* 78 Hun 611, 28 N. Y. Suppl. 831].

Ohio.—Ormsby *v.* Longworth, 11 Ohio St. 653. See also Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

Texas — Silliman *v.* Taylor, 35 Tex. Civ. App. 490, 80 S. W. 651; American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

Washington.— State *v.* Lorenz, 22 Wash. 289, 60 Pac. 644.

Wisconsin.— Kropp *v.* Kropp, 97 Wis. 137, 72 N. W. 381.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 119.

Compare Detweiler *v.* Swartley, 74 Kan. 855, 86 Pac. 141, where a grantee died without knowledge of the mistake and his heirs did not learn of it till after action had been instituted against them by one of the grantors for a share of the land.

Constructive notice.— That the holder of a mortgage which by mistake set out an incorrect copy of the note it was given to secure had possession of the mortgage does not import such a lack of diligence as would bar an action for reformation in three years from its date, instead of three years from the discovery of the mistake as provided by Code Civ. Proc. § 338, subd. 4. Tarke *v.* Bingham, 123 Cal. 163, 55 Pac. 759. Recording of a mortgage does not put the mortgagor on inquiry to discover the mistake. American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

75. Swinebroad *v.* Wood, 123 Ky. 664, 97 S. W. 25, 29 Ky. L. Rep. 1202.

76. *Alabama.*— Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864.

Georgia.— Wall *v.* Arrington, 13 Ga. 88, forty-four years was laches.

Illinois.— McIntosh *v.* Saunders, 68 Ill. 128 (twenty-two years was not laches); Calverly *v.* Harper, 40 Ill. App. 96 (seventeen years was not laches).

Iowa.— Goodrich *v.* Fogarty, 130 Iowa 223, 106 N. W. 616 (four months was not laches); Hurto *v.* Grant, 90 Iowa 414, 57 N. W. 899 (ten years was laches).

Kansas.—Parsons First Nat. Bank *v.* Wentworth, 28 Kan. 183, four years was not laches.

Maine.— Norris *v.* Laberee, 58 Me. 260, twenty years was laches.

Michigan.— Hoard *v.* Stone, 58 Mich. 578, 26 N. W. 141, ten years was laches.

New Hampshire.— Daggett *v.* Ayer, 65 N. H. 82, 18 Atl. 169, twelve years was laches.

Ohio.— Piatt *v.* Sinton, 5 Ohio Dec. (Reprint) 547, 6 Am. L. Rec. 483, twenty-seven years was laches.

Rhode Island.— Middletown *v.* Newport Hospital, 16 R. I. 319, 15 Atl. 800, one hundred and thirty years was laches.

South Carolina.— Dennis *v.* Dennis, 4 Rich. Eq. 307, thirty years was laches.

Tennessee.— Teague *v.* Sowder, (1908) 114 S. W. 844, where failure to assert a right for twenty-five years did not estop a party from setting up a claim to the land.

Texas.— Tevis *v.* Armstrong, 71 Tex. 59, 9 S. W. 134 (twenty-five years was laches); Lubbock *v.* Binns, 20 Tex. Civ. App. 407, 50 S. W. 584 (forty years was laches).

See 42 Cent. Dig. tit. "Reformation of Instruments," § 120.

Laches shown see Beard *v.* Hubble, 9 Gill (Md.) 420; Gailey *v.* New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

Laches not shown see Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864; Travelli *v.* Bowman, 150 Cal. 587, 89 Pac. 347; Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112;

ment containing the mistake, others have acted upon the worth of it, a very short delay may constitute laches.[77]

3. Excuses For Delay. Laches may sometimes be equitably explained. Thus where a party has been in possession of land under a deed which failed to properly describe the premises, laches will not be imputed until an opposing claim is set up.[78] The same is true where both parties have relied upon the erroneous instrument with discovery of the mistake.[79]

XII. PARTIES.

A. Necessary Parties — 1. In Reforming Contract in General. The general doctrine as to parties in reformation is, that all persons whose interests in the subject-matter, legal or equitable, will be affected by the decree, are necessary parties. If they do not appear as parties plaintiff, they should then be joined as parties defendant.[80] Thus the other party to a contract is always a necessary party,[81] and a party whose name is not mentioned in an instrument cannot maintain suit, if his complaint does not connect him with the parties to it.[82]

2. In Reforming Deed — a. In General. A party who has or claims such an interest in land as to render it necessary or desirable that such interest be adjudicated is a necessary party.[83] Hence it is essential that grantors and grantees or

Venable *v.* Burton, 129 Ga. 537, 59 S. E. 253; Carbine *v.* McCoy, 85 Ga. 185, 11 S. E. 651; Arnstein *v.* Bernstein, 127 N. Y. App. Div. 550, 111 N. Y. Suppl. 987; Toledo *v.* Schulters, 11 Ohio Cir. Ct. 528, 5 Ohio Cir. Dec. 269.

The fact that plaintiff's attorney, who did not know that a certain trust deed was among his papers, did not examine it is not evidence of any laches that would defeat an action to reform the description in the deed. Travelli *v.* Bowman, 150 Cal. 587, 89 Pac. 347.

77. Diman *v.* Providence, etc., R. Co., 5 R. I. 130.

78. White *v.* White, 105 Ill. 313; Hutson *v.* Fumas, 31 Iowa 154; Stith *v.* McKee, 87 N. C. 389.

Possession as an excuse.— Where a party is in possession, and affirmative action has never become necessary within the period of limitations (Harris *v.* Ivey, 114 Ala. 363, 21 So. 422; Epperson *v.* Epperson, 161 Mo. 577, 61 S. W. 853), or where a bill is filed after the intention to disturb his possession is disclosed (Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38), limitation is not a bar to a correction of his deed in an action of ejectment against him.

79. Canedy *v.* Marcy, 13 Gray (Mass.) 373; Stines *v.* Hays, 36 N. J. Eq. 364 [*affirmed* in 38 N. J. Eq. 654].

80. **Parties** generally see Parties, 30 Cyc. 1 *et seq.*

In Massachusetts in a suit to reform a written contract of sale for a mistake as to the party intended to be bound, plaintiff claiming that it acted merely as agent of the manufacturer, a non-resident corporation, and had no intention of binding itself personally in accordance with the written contract, plaintiff was required to join such non-resident corporation as a party and make such service on it as the court should order under equity rule 5, and then, if the corporation did not appear, or if it appeared and moved to dismiss for want of jurisdiction, the court could administer appropriate relief as between the remaining parties. Eustis Mfg. Co. *v.* Saco Brick Co., 198 Mass. 212, 84 N. E. 449.

81. Hellman *v.* Schneider, 75 Ill. 422.

82. Pape *v.* Kaough, 23 Ind. App. 525, 55 N. E. 775.

83. Getzelman *v.* Blazier, 112 Ill. App. 648; Pierce *v.* Faunce, 47 Me. 507; Norris *v.* Hurd, Walk. (Mich.) 102; Center Creek Water, etc., Co. *v.* Lindsay, 21 Utah 192, 60 Pac. 559. See also Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315; Wells *v.* Gay, (Miss. 1908) 46 So. 497.

A claimant, on his own motion, should be admitted as a party where it appears that he was necessary. Getzelman *v.* Blazier, 112 Ill. App. 648.

Who have adjudicable interests.—An intermediary and his wife through whom the title to lands was conveyed by a tenant by the curtesy to his wife by incorrect descriptions are necessary parties. Vanderbeck *v.* Perry, 28 N. J. Eq. 367. Original grantors, remainder-men, beneficiaries of a fund under the husband's will, a purchaser at the sale are necessary parties to a suit by the personal representative of the wife to reform a deed so as to create tenancy in common and defeat the right of the husband as survivor to an estate by interests, and for an accounting of half the proceeds of its sale. Thiefes *v.* Mason, (N. J. Ch. 1897) 36 Atl. 946.

Foreclosure deed.— A bill which alleges that B, owning lots 1 and 2, in block 4, sold the same to E, but by mistake conveyed lots 1 and 2, in block 1; that E executed a mortgage on lots 1 and 2, in block 1, to complainant; that it was the intention to mortgage lots 1 and 2, in block 4; that there was a foreclosure; that the error in the descrip-

their representatives [84] and owners [85] should be joined to have their interests adjudicated. If such parties are dead, their heirs, or those claiming under them, should be joined.[86] It is unnecessary, however, to join those not affected by the mistake immediately or consequentially,[87] such as, a scrivener or attorney,[88] the recorder who copied the deed,[89] or the wife of a judgment debtor, who was a party to the suit in which the judgment was rendered under which the land was sold.[90]

b. Sheriff s Deed. The general rule applies that parties directly or consequentially affected are necessary parties.[91] The sheriff, or the person who acted in his stead, is not a necessary party,[92] but the execution debtor should always be joined.[93]

3. In Reforming Mortgage — a. Of Realty. The mortgagee [94] and the assignee or purchaser of a mortgage or their representatives are necessary parties in a suit to reform a mortgage.[95] But the assignee is not a necessary party, if on the coming in of the answer notice is given, and the future management of the suit is offered him, so that a judgment will be binding on him as respects the mistake.[96]

b. Of Personalty. A chattel mortgage cannot be reformed when the mortgagees are not made parties to the action.[97]

4. In Reforming Lease. In a bill by the assignee of the sublessee, an inaccuracy of description will not be corrected without making the sublessee a party.[98]

5. In Reforming Trust Deed. Grantors, purchasers at a trustee's sale, and

tion ran through the foreclosure suit, and entered into the decree and the deed to complainant; that B, after E's purchase, and before the foreclosure, sold lots 1 and 2, in block 4, to G, who leased to W, and which prays that complainant be decreed the equitable owner of lots 1 and 2, in block 4, must make B and E parties defendant. Gates *v.* Union Naval Stores Co., 92 Miss. 227, 45 So. 979.

84. Oliver *v.* Clifton, 59 Ark. 187, 26 S. W. 817; De Groot *v.* Wright, 9 N. J. Eq. 55. Especially where the claim is derived by deeds of warranty. Indian River Mfg. Co. *v.* Wooten, 48 Fla. 271, 278, 37 So. 731; Davis *v.* Rogers, 33 Me. 222; Cramer *v.* Benton, 4 Lans. (N. Y.) 291, 60 Barb. 216. See also Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315; Bonvillain *v.* Bodenheimer, 117 La. 793, 42 So. 273.

Where the title has been acquired without warranty parties from whom such title was acquired are not necessary. Indian River Mfg. Co. *v.* Wooten, 48 Fla. 271, 278, 37 So. 731; Farmers', etc., Bank *v.* Detroit, 12 Mich. 445.

85. Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

86. Overly *v.* Tipton, 68 Ind. 410, holding also that a grantee's administrator need not be made a party.

87. See cases cited *infra*, this note.

Land was purchased by a husband with the understanding that title was to rest in him and his wife jointly.— The wife procured a deed from the vendor without her husband's knowledge to her sole and separate use. After her death in an action by the husband against the wife's heirs, to reform, the vendor is not a necessary party, since he made no claim to the land. Owen *v.* Williams, (Tenn. Ch. App. 1899) 55 S. W. 18.

The common grantee of plaintiff and defendant of a dominant and servient tenement is not a necessary party. Grossbach *v.* Brown, 72 Wis. 458, 40 N. W. 494.

A deed which conveyed a life-estate with remainder to the heirs of the grantee, but which was intended to convey the fee simple to the grantee, was corrected in a proceeding to which the heirs were not parties. Afterward complainant, to whom the land was conveyed in fee by the grantee, was dispossessed by defendants, claiming under the heirs. It was held, in an action in which complainant prayed the court to adjudge that the decree reforming the deed concluded the heirs, or that the court decree that the title acquired by defendants was acquired in trust for complainant, that the original grantor, and one to whom the land was conveyed in trust for the original grantee, were not necessary parties. Chaffin *v.* Hull, 39 Fed. 887.

88. Kenney *v.* Parks, (Cal. 1898) 54 Pac. 251.

89. King *v.* Bales, 44 Ind. 219.

90. Power *v.* Burd, 18 Mont. 22, 43 Pac. 1094.

91. See Gates *v.* Union Naval Stores Co., 92 Miss. 227, 45 So. 979.

92. Reddick *v.* Long, 124 Ala. 260, 27 So. 402; Butler *v.* Clark, 66 Hun (N. Y.) 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413.

93. Roberts *v.* Chamberlain, 30 Kan. 677, 2 Pac. 838; Butler *v.* Clark, 66 Hun (N. Y.) 444, 21 N. Y. Suppl. 444, 29 Abb. N. Cas. 413.

94. Haley *v.* Bagley, 37 Mo. 363.

95. Cumberland Trust Co. *v.* Padgett, 70 N. J. Eq. 349, 61 Atl. 837; Ryshpan *v.* Goldberg, 8 Misc. (N. Y.) 442, 28 N. Y. Suppl. 657.

96. Andrews *v.* Gillespie, 47 N. Y. 487.

97. Jewell *v.* Simpson, 38 Kan. 368, 17 Pac. 463.

98. Boyle *v.* Peabody Heights Co., 46 Md. 623.

lien-holders, being materially interested, are necessary parties in a suit to reform a trust deed.[99]

6. In Reforming Insurance Policy. It is necessary to join the assignor of the the policy, as such contract was made by him.[1]

7. In Reforming Assignment For Creditors. All the creditors of the assignor, provided for in the assignment, joint and individual, must appear plaintiffs or defendants, and the instrument will not be reformed when such persons are not parties.[2]

8. In Reforming Official Bond. In action by a private party for breach of the conditions of the official bond of a county officer, the county need not be made a party.[3]

9. In Reforming Contract to Pay Debts of Partnership. Where a person contracts with a firm generally to pay all its debts, and creditors subsequently sue on notes made by the firm and on a contract to compel payment of the notes, if the members of the firm have not been made parties, there can be no reformation.[4]

10. In Reforming County Warrant. The trustees who issued the warrants, or their successors, shall be brought before the court in a suit to reform county warrants.[5]

B. Proper Parties — 1. In General. Every person is a proper party who is interested in the suit indirectly or who could thereafter be interested as claimants under the original parties.[6]

2. In Reforming Deed — a. In General. In conformity with the above general rule every person who has an interest in the property in dispute, or who could acquire an interest therein, is a party proper to be joined in a suit to reform a deed.[7] It is needless, however, to join persons whose existence is doubtful,[8] or who could in nowise be affected by the decree; [9] and it logically follows that a person without an interest in the land in question cannot maintain a suit to reform.[10] But a co-vendee or surety on the purchase-money,[11] executors in possession as well as legatees and devisees claiming under a will,[12] or the wife of a grantee having an inchoate right of dower [13] are parties properly joined.

99. Brodie *v.* Skelton, 11 Ark. 120; Horner *v.* Bramwell, 23 Colo. 238, 47 Pac. 462.

1. Georgia Trust Co. *v.* Scottish Union, etc., Ins. Co., 119 Ga. 672, 46 S. E. 855; Sykora *v.* Forest City Mut. Ins. Co., 7 Ohio Dec. (Reprint) 372, 2 Cinc. L. Bul. 223.

By N. Y. Code Civ. Proc. § 449, one who insures his life stands in the relation of the trustee of an express trust to the assignee of the interest of the beneficiaries and may maintain an action to reform a policy as to premiums to be paid. Hunt *v.* Provident Sav. L. Assur. Soc., 77 N. Y. App. Div. 338, 79 N. Y. Suppl. 74.

Where a fire policy is made conditionally payable to a mortgagee, whose debt is less than the amount of the policy, the mortgagee or his personal representatives are necessary parties. Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887.

2. Smith *v.* Howard, 20 How. Pr. (N. Y.) 151.

3. Stewart *v.* Carter, 4 Nebr. 564.

4. Durham *v.* Bischof, 47 Ind. 211.

5. Goldsmith *v.* Stewart, 45 Ark. 149.

6. See Parties, 30 Cyc. 1 *et seq.* See also Griffin *v.* Stewart, 101 Ga. 720, 29 S. E. 29.

Trustee in bankruptcy.— Where, after a corporation had failed to perform a contract for the sale of iron in payment of a creditor's claim, the corporation became a bankrupt, and plaintiff brought suit to reform the contract for mistake and to have his damages because of the breach ascertained, etc., the corporation's trustee in bankruptcy was a proper, if not necessary, party defendant. Merritt *v.* Coffin, 152 Ala. 474, 44 So. 622.

7. Griffin *v.* Stewart, 101 Ga. 720, 29 S. E. 29; Silliman *v.* Taylor, 35 Tex. Civ. App. 490, 80 S. W. 651.

8. Rosser *v.* Georgia Pac. R. Co., 102 Ga. 164, 29 S. E. 171.

A decree reforming a deed will not be set aside merely because there was no attempt to make parties defendant alleged heirs of the deceased grantor whose very existence was in considerable doubt, whose whereabouts was unknown, who had not been heard from for years, and who had no interest in the result. Rosser *v.* Georgia Pac. R. Co., 102 Ga. 164, 29 S. E. 171.

9. Lytle *v.* Sandefur, 93 Ala. 396, 9 So. 260; Wieneke *v.* Deputy, 31 Ind. App. 621, 68 N. E. 921; Lyon *v.* Page, 21 Mo. 104.

10. Thiefes *v.* Mason, (N. J. Ch. 1897) 36 Atl. 946.

11. Kinney *v.* Ensminger, 87 Ala. 340, 6 So. 72.

12. Kenney *v.* Parks, (Cal. 1898) 54 Pac. 251.

13. Damm *v.* Moon, 48 Mich. 510, 12 N. W. 679.

b. Sheriff's Deed. Under the same general rule above stated, the sheriff who has wrongly described land sold by him under mortgage foreclosure, has an interest both as an individual and as trustee of an express trust, and to prevent injury to himself and to the grantor in the mortgage, is a proper party to bring suit.[14] Purchasers at execution, judgment debtors, and the husband of the ancestor of the judgment debtors who has been made a party as tenant by the curtesy and administrator of her estate are also proper parties who should be brought before the court.[15]

3. In Reforming Mortgage. The same principle of adjusting all interests makes it proper to join the holder of a second mortgage.[16]

4. In Reforming Lease. The lessee who had assigned the lease was properly joined with his assignee as a party defendant.[17]

C. Joinder of Parties. Where plaintiffs have a common interest in the subject of the suit and the liability of the defendants is common in respect to all of them thereto, joinder is warranted.[18] But parties asserting several and distinct rights to reform cannot unite as plaintiffs in the same suit.[19]

D. Defect of Parties. A court of equity should not undertake to reform a written instrument without having before it all the parties to be affected by the proposed reformation.[20]

XIII. Process and Appearance.

The general rules governing the serving of process[21] and the appearance[22] of parties apply in the reformation of instruments which apply generally in other equity proceedings.[23]

XIV. Pleading.[24]

A. Bill, Complaint, or Petition — 1. Cause of Action. The usual and customary rules regulating the pleading of a case in equity govern the pleading of a cause in reformation.[25] The material facts constituting the cause of action

14. Dodson *v.* Lomax, 113 Mo. 555, 21 S. W. 25.

A sheriff having gone out of office, the present incumbent of the sheriff's office is properly a party where a portion of the relief is to have declared void a subsequent execution sale of the same property under another judgment against the same judgment debtor, and to restrain the execution of a certificate of sale or a deed based on such sale. Butler *v.* Clark, 66 Hun (N. Y.) 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413, Van Brunt, P. J., dissenting.

15. Butler *v.* Clark, 66 Hun (N. Y.) 444, 21 N. Y. Suppl. 415, 29 Abb. N. Cas. 413.

16. Scott *v.* Gordon, 109 Mo. App. 695, 83 S. W. 550.

The indorsement of a policy of insurance by the company on its assignment to a mortgagee, making it payable to him in case of loss, will not render the company a proper party defendant to an action brought against the mortgagor after destruction by fire, for reformation of the mortgage in respect of a misdescription. Newman *v.* Home Ins. Co., 20 Minn. 422.

17. Hackett *v.* View, 109 N. Y. App. Div. 351, 95 N. Y. Suppl. 675.

18. See Parties, 30 Cyc. 1 *et seq.* See also Hudspeth *v.* Thomason, 46 Ala. 470.

19. Dod *v.* Paul, 42 N. J. Eq. 154, 7 Atl. 670.

20. Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. 315.

For example an alleged latent misdescription in a deed forming a link in a chain of title cannot be corrected when a vendor in such conveyance has not been made a party to the suit, in which a reformation of the instrument is sought. Bonvillian *v.* Bodenheimer, 117 La. 793, 42 So. 273.

This includes all persons having a legal or equitable interest in the subject-matter of the suit, and if those having interest identical with the complainant refuse to join as such, they must be made defendants. Wyche *v.* Green, 32 Ga. 341.

Hence if parties having essential interest, as plaintiffs or defendants, have not been made parties, the bill is defective and it will be dismissed. Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509; Daggett *v.* Ayer, 65 N. H. 82, 18 Atl. 169.

21. Process generally see Process, 32 Cyc. 500.

22. Appearance generally see Appearances, 3 Cyc. 500.

23. See Equity, 16 Cyc. 269 *et seq.*

Thus the want of validity in the notice served upon the agent of a foreign insurance company is waived by its subsequent appearance and pleading. Franklin Ins. Co. *v.* McCrea, 4 Greene (Iowa) 229.

24. Prayer for relief see *infra*, XIV, A, 3.

Relief incidental or additional see *infra*, XVI, B, 4, c.

25. See Equity, 16 Cyc. 216 *et seq.*; Pleading, 31 Cyc. 1 *et seq.*

should be set forth in clear and concise language.[26] And at all times the allegation should be specific, and not general.[27] If a complaint alleges facts which constitute a good cause of action at law, but shows no case for equitable relief, such complaint will be dismissed.[28] A complaint to reform an instrument and enforce it as reformed states but a single cause of action.[29] It is not a misjoinder to unite an action to correct a mortgage with one to foreclose,[30] or to ask for a correction and the recovery of a money judgment, because the reformation is a necessary incident to the other actions.[31] But where a petition seeks to reform an instrument between the parties and also to enforce it, the allegations must be sufficient for both purposes.[32]

2. MATERIAL ALLEGATIONS — a. In General. In order to make out a good cause of action, the bill, complaint, or petition should show every element necessary to entitle the complainant to equitable relief,[33] with especial reference to the

26. Pearson *v.* Dancer, 144 Ala. 427, 39 So. 474; Langmede *v.* Weaver, 65 Ohio St. 17, 60 N. E. 992; Hawkins *v.* Jackson, 2 Hall & T. 301, 47 Eng. Reprint 1677, 19 L. J. Ch. 451, 2 Macn. & G. 372, 48 Eng. Ch. 287, 42 Eng. Reprint 144.

In a suit against one J and the bank to reform plaintiff's indorsement on a note, transferred by P to J, averments that J was and still is cashier of the bank and that said note is held "either by J, or by said bank with full notice of the facts" do not constitute a cause of action against the bank. Leidersdorf *v.* Second Ward Sav. Bank, 50 Wis. 406, 7 N. W. 306.

A bill was filed to reform a warrant, drawn on a city treasurer in favor of complainant but by mistake designating the wrong fund out of which it was to be paid. It failed to aver money in the hands of the treasurer or a tax levy against which the warrant could be drawn at the time of issue. The bill was held to be fatally defective. East St. Louis *v.* L. M. Rumsey Mfg. Co., 34 Ill. App. 458.

27. Kent *v.* Snyder, 30 Cal. 666; Gould *v.* Glass, 120 Ga. 50, 47 S. E. 505; Baldwin *v.* Kerlin, 46 Ind. 426.

Uncertainty in description and amount of property claimed in a complaint makes it bad. Center Creek Water, etc., Co. *v.* Lindsay, 21 Utah 192, 60 Pac. 559.

28. Walker *v.* Leland, 4 N. Y. St. 395, where the complaint alleged that a deed conveyed with covenants of seizin, of warranty, of quiet possession, etc., and the relief demanded was for reformation. *Compare* Prater *v.* Bennett, 98 Ga. 413, 25 S. E. 510.

29. Pope *v.* Kelly, 24 Misc. (N. Y.) 508, 53 N. Y. Suppl. 904. See also Gooding *v.* McAlister, 9 How. Pr. (N. Y.) 123.

A bill to reform is not rendered multifarious because it seeks to recover damages in the same action. Prater *v.* Bennett, 98 Ga. 413, 25 S. E. 510.

Enforcement of a contract may be sought together with reformation of the same in the same bill. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823; Franklin Ins. Co. *v.* McCrea, 4 Greene (Iowa) 229; McClurg *v.* Phillips, 49 Mo. 315; Meyer *v.* Van Collem, 7 Abb. Pr. (N. Y.) 222; Gilbranson *v.* Squier, 5 Wash. 99, 31 Pac. 423. See also Esch *v.* Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443; Newcomer *v.* Kline, 11 Gill & J. (Md.) 457, 37 Am. Dec. 74.

In Indiana Burns Rev. St. § 280, provides that a written instrument may be corrected in any action, when essential to a complete remedy. Where complaint is sufficient both for reformation and possession, and the statute permits the issues to be tendered in the same action, there was no need on demurrer to determine whether one issue or the other would control, save only in so far as delay in bringing the action was concerned. Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901.

Specific performance may be asked for in the same bill with prayer for reformation. Waterman *v.* Dutton, 6 Wis. 265.

30. Hutchinson *v.* Ainsworth, 63 Cal. 286; Allen *v.* Elder, 76 Ga. 674, 2 Am. St. Rep. 63.

A complaint to reform and foreclose a mortgage states but one cause of action. See Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Omission of a seal supplied in a suit to foreclose.—A prayer in a bill to foreclose a mortgage that the omission of the seal from the mortgage by mistake may be supplied does not constitute a distinct cause of action. McClurg *v.* Phillips, 49 Mo. 315.

31. Stewart *v.* Carter, 4 Nebr. 564.

Damages for breach may be joined with prayer for reformation. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015; Butler *v.* Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273; Prater *v.* Bennett, 98 Ga. 413, 25 S. E. 510; Cameron *v.* White, 74 Wis. 425, 43 N. W. 155, 5 L. R. A. 493; Harrison *v.* Juneau Bank, 17 Wis. 340. See also JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 420.

In Connecticut under Gen. St. § 877, which permits courts to administer legal and equitable remedies in favor of either party in one and the same suit, a vendee of land may join an action for the reformation of a deed with one for breach of the covenants of warranty contained in the deed. Butler *v.* Barnes, 60 Conn. 170, 21 Atl. 419, 12 L. R. A. 273.

32. Delaware Ins. Co. *v.* Pennsylvania F. Ins. Co., 126 Ga. 380, 55 S. E. 330.

33. *Alabama.*— Peacock *v.* Bethea, 151

following: (1) The grounds of reformation; (2) the agreement actually made; and (3) the agreement which the parties intended to make.[34]

b. Description of Instrument as Made and as Intended — (i) *In General.* It should appear from the allegations in the bill seeking a reformation of the instrument what the real agreement was, what the agreement as reduced to writing was, and wherein the writing fails to embody the real agreement.[35] The

Ala. 141, 43 So. 864; Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766.

California.— Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112, holding that an allegation that the grantors sold the plant and land in order to secure payment of a debt due them from the owners of the plant, it sufficiently alleged the receipt of a consideration for the conveyance to render the complaint for reformation impervious to a general demurrer.

Indiana.— Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180; Webb *v.* Hammond, 31 Ind. App. 613, 68 N. E. 916; Smelser *v.* Pugh, 29 Ind. App. 614, 64 N. E. 943. See Radebaugh *v.* Scanlan, 41 Ind. App. 109, 82 N. E. 544, for allegations held to be sufficient.

New York.— Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. 430; Avery *v.* Equitable L. Assur. Soc., 52 Hun 392, 5 N. Y. Suppl. 278 [*reversed* on other grounds in 117 N. Y. 451, 23 N. E. 3].

North Carolina.— Webb *v.* Borden, 145 N. C. 188, 58 S. E. 1083.

Oregon.— Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73.

Utah.— Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897, 23 Utah 470, 65 Pac. 203.

West Virginia.— Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902.

Wisconsin.— Grossbach *v.* Brown, 72 Wis. 458, 40 N. W. 494.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 141.

A trustee in a trust deed cannot maintain an action to reform so as to include other lands, without showing that the debt secured has not been paid. Dessart *v.* Bonynge, (Ariz.) 85 Pac. 723.

Averments of extrinsic facts are amendable, and upon a motion to dismiss for want of equity, these amendments must be considered as made. Greene *v.* Dickson, 119 Ala. 346, 24 So. 422, 72 Am. St. Rep. 920. See MOTIONS, 28 Cyc. 1. In Greene *v.* Dickson, *supra*, in a bill to reform a conveyance which omits the county and state, and fails to state which part of a quarter section it conveys, an averment that when it ws executed the property belonged to grantors who were in possession, and in course of the transaction they pointed out the boundaries to grantee, dispenses with an averment that grantors owned no other land in the quarter section in question.

Averment of notice to third person.— Where a deed of trust included a wrong tract of land, and the debtor conveyed to a third party the tract which should have been included in the trust, a bill to reform the deed of trust must charge notice against such third party of the mistake. Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902.

There is no ambiguity prejudicial to defendant where complaint to reform a deed, so as to convey a fee, instead of a life-estate, alleges in one place that both parties were misled by the reading of the deed by the attorney while in another place it charges that the grantor and attorney, knowing that the grantee believed the deed to convey a fee, did not disclose the fact. Kenney *v.* Parks, (Cal. 1898) 54 Pac. 251.

When the written instrument and the actual contract are both set out in the complaint, defective allegations in regard thereto may be treated as surplusage. Gardner *v.* California Gurantee Inv. Co., 137 Cal. 71, 69 Pac. 844. The same case holds that the contract, being to purchase shares in defendant's investment fund, such fund need not be described nor need the by-laws of the corporation be set out, and an allegation that it was according to the modes of business of building and loan associations sufficiently describes the conduct of the business.

Where a deed expresses a consideration of love and affection, and a bill to reform alleges that the truth of the consideration was part payment of a debt, giving its amount, it is not demurrable for not alleging what part of the debt was paid by the conveyance. Orr *v.* Echols, 119 Ala. 340, 24 So. 357.

Under Cal. Code Civ. Proc. §§ 1614, 1615, an agreement for the sale of land need not recite an adequate consideration. The fact of a consideration need not be pleaded therefore in a suit to reform a contract for the sale of land. Peasley *v.* McFadden, 68 Cal. 611, 10 Pac. 179.

Where the court holds that a bond is sufficiently certain and needs no reformation, in a suit on a bond to discharge a defendant from arrest, it is error to overrule a demurrer to the count seeking such reformation. Reeg *v.* Adams, 113 Wis. 175, 87 N. W. 1067.

34. See cases cited *supra*, note 33.

35. *Alabama.*— Kilgore *v.* Redmill, 121 Ala. 485, 25 So. 766.

Arkansas.— Fuller *v.* Hawkins, 60 Ark. 304, 30 S. W. 34.

Connecticut.— Thompsonville Scale Mfg. Co. *v.* Osgood, 26 Conn. 16.

Florida.— Horne *v.* J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016.

Georgia.— Delaware Ins. Co. *v.* Pennsylvania F. Ins. Co., 126 Ga. 380, 55 S. E. 330.

Indiana.— Baldwin *v.* Kerlin, 46 Ind. 426; Webb *v.* Hammond, 31 Ind. App. 613, 68 N. E. 916.

terms, not the effect, of the contract intended to be entered into by and between the parties must be pleaded.[36]

(II) *Description of Land.* Where the instrument to be reformed employs descriptive terms with respect to land, the pleadings must describe the premises so as to render certain the location and the boundaries; and a failure so to do renders the bill, complaint, or petition demurrable for uncertainty.[37] Material descriptions well pleaded, however, will render the bill good against demurrer.[38]

(III) *Contradictory Statements.* If the bill alleges contradictory statements, as to the contract made and intended, it will be construed most strongly against the pleader.[39]

(IV) *Exhibits.* A pleading filed for reformation should also state the contract in full with all material exhibits.[40]

c. Performance of Conditions Precedent or Readiness to Perform. Generally it should be alleged that a demand to correct the mistake has been made on defendant, and that such demand was followed by a refusal.[41] A prior request and refusal need not be averred, however, when the facts alleged show that it would have been vain and useless.[42] But where reformation is sought as an incident to some other action, a demand and refusal to correct is not necessary. So there need be no allegation of demand where the bill alleges that defendant had already

Mississippi.— Chambliss *v.* Person, 77 Miss. 806, 28 So. 21.

Missouri.— Able *v.* Union Ins. Co., 26 Mo. 56.

New York.— Coles *v.* Bowne, 10 Paige 526.

Oregon.— Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12; Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73; Lewis *v.* Lewis, 5 Oreg. 169.

West Virginia.— Anderson *v.* Jarrett, 43 W. Va. 246, 27 S. E. 348.

Wisconsin.— James *v.* Cutler, 54 Wis. 172, 10 N. W. 147.

United States.— Durham *v.* Fire, etc., Ins. Co., 22 Fed. 468, 10 Sawy. 526. *Compare* Willard *v.* Davis, 122 Fed. 363.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 142.

36. Stephens *v.* Murton, 6 Oreg. 193. *Compare* Willard *v.* Davis, 122 Fed. 363. See also Horne *v.* J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016. In Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901, 904, the court said: "In pleading the antecedent contract it is only necessary to plead its terms positively and with certainty, so that nothing will be left to inference."

37. Satterfield *v.* Speir, 112 Ga. 84, 37 S. E. 211; Center Creek Water, etc., Co. *v.* Lindsay, 21 Utah 192, 60 Pac. 559.

For example a declaration showing that plaintiff and a deceased person had been common owners of a certain tract, and that, while the latter was in life, defendant, by fraudulently causing a misdescription to be inserted in a deed to himself from deceased, conveying a portion of the land, acquired possession of and color of title to more of the land than he really bought, and in consequence was holding adversely to plaintiff land of which she owned an undivided half, alleging that plaintiff "set forth no facts which would show title in her in or to the property sued for, or any part thereof," was good against demurrer. Prater *v.* Bennett, 98 Ga. 413, 25 S. E. 510.

38. Ezzell *v.* Brown, 121 Ala. 150, 25 So. 832; Walls *v.* State, 140 Ind. 16, 38 N. E. 177; Schautz *v.* Keener, 87 Ind. 258.

39. Marshall *v.* Drawhorn, 27 Ga. 275.

40. Plowman *v.* Shidler, 36 Ind. 484. *Compare* Overly *v.* Tipton, 68 Ind. 410.

The contract should be set forth in the petition or attached thereto as an exhibit, so that from it and the allegations it may appear that it does not conform to the real contract. Delaware Ins. Co. *v.* Pennsylvania F. Ins. Co., 126 Ga. 380, 55 S. E. 330.

Setting forth the true description intended, and the one actually given in the deed, and averring the mistake, is sufficient, as pleading, to warrant reforming a deed, without setting forth a copy of the prior engagement of sale. Ramsey *v.* Loomis, 6 Oreg. 367.

41. Lamkin *v.* Reese, 7 Ala. 170; Beck *v.* Simmons, 7 Ala. 71; Long *v.* Brown, 4 Ala. 622; Axtel *v.* Chase, 77 Ind. 74 [*citing* Bishop *v.* Brown, 51 Vt. 330].

Where a bill for reformation of a deed by a subsequent purchaser of the property does not allege want of notice of the mistake, construing it most strongly against the pleader, she must be held to have known of the mistake when she acquired her rights. Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38.

42. Robbins *v.* Battle House Co., 74 Ala. 499 [*criticizing* Beck *v.* Simmons, 7 Ala. 71; Long *v.* Brown, 4 Ala. 622; Lamkin *v.* Reese, 7 Ala. 170].

When defendant had instituted ejectment against complainant's tenant, it is not necessary that a bill for correction of a mistake in a deed allege that complainant made a request to defendant to correct the mistake. Jones *v.* McNealy, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38.

begun to trespass on land in dispute,[43] or where a bill averred that possession of land had been demanded, that defendant had refused to give possession, and a decree *pro confesso* had been taken against one of them.[44]

d. Grounds For Reformation — (I) *IN GENERAL.* The grounds for reformation are mutual mistake,[45] or mistake on one side and fraud or inequitable conduct on the other,[46] and to constitute a good cause of action, the grounds upon which it is based must be alleged.[47]

(II) *MUTUAL MISTAKE.* It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that the mutuality may appear.[48] In all cases the mutual mistake or circumstances from which the same can be readily inferred should be alleged with precision and clearness,[49] although averments substantially showing mutuality have been held good;[50]

43. Weathers *v.* Hill, 92 Ala. 492, 9 So. 412.

44. Lester *v.* Johnston, 137 Ala. 194, 33 So. 880.

45. See *supra*, II, A–D; *infra*, XIV, A, 2, d, (II).

46. See *supra*, II, E; XIV, A, 2, d, (III).

47. **Fraud or mistake is indispensable** as a ground in a suit to reform, and if there is no allegation or averment to that effect the case is groundless. Dunham *v.* New Britain, 55 Conn. 378, 11 Atl. 354; Comer *v.* Himes, 49 Ind. 482; Baldwin *v.* Kerlin, 46 Ind. 426; White *v.* Port Huron, etc., R. Co., 13 Mich. 356; Anthony *v.* Rockefeller, 102 Mo. App. 326, 76 S. W. 491; Gaffney Mercantile Co. *v.* Hopkins, 21 Mont. 13, 52 Pac. 561; Leavitt *v.* Palmer, 3 N. Y. 19, 51 Am. Dec. 333; Trotter *v.* Brevoort, 60 N. Y. App. Div. 562, 69 N. Y. Suppl. 1028; Crossland *v.* Shober, 60 N. C. 562; Grubb's Appeal, 90 Pa. St. 228.

An objection by demurrer to a petition to reform a written contract is well taken when it is sought to make the contract include certain provisions which were omitted therefrom without fraud or mistake. Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

48. *Alabama.*— Miller *v.* Morris, 123 Ala. 164, 27 So. 401.

Florida.— Horne *v.* J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016.

Georgia.— Delaware Ins. Co. *v.* Pennsylvania F. Ins. Co., 126 Ga. 380, 55 S. E. 330; Gamble *v.* Knott, 40 Ga. 199.

Idaho.— Christensen *v.* Hollingsworth, 6 Ida. 87, 53 Pac. 211.

Indiana.— Keister *v.* Meyers, 115 Ind. 312, 17 N. E. 161; Jones *v.* Sweet, 77 Ind. 187; Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180. See also Radebaugh *v.* Scanlan, 41 Ind. App. 109, 82 N. E. 544.

Kansas.— Wendt *v.* Diemer, 6 Kan. App. 481, 58 Pac. 1003.

Maryland.— White *v.* Shaffer, 97 Md. 359, 54 Atl. 974.

New York.— Maher *v.* Hibernia Ins. Co., 67 N. Y. 283.

Oregon.— Nolan *v.* Hughes, (1908) 93 Pac. 362, 94 Pac. 504; Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73; Lewis *v.* Lewis, 5 Oreg. 169.

Tennessee.— Harding *v.* Egin, 2 Tenn. Ch. 39.

Virginia.— Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7.

England.— Barstow *v.* Kilvington, 5 Ves. Jr. 593, 31 Eng. Reprint 755.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 144.

A relation of trust and confidence need not be averred and proved to exist between plaintiff and defendant where the ground for reformation is mutual mistake. Sellwood *v.* Henneman, 36 Oreg. 575, 60 Pac. 12 [*distinguishing* Hawkins *v.* Hawkins, 50 Cal. 558; Rider *v.* Kelso, 53 Iowa 367, 5 N. W. 509; Kleinsorge *v.* Rohse, 25 Oreg. 51, 34 Pac. 874; Archer *v.* California Lumber Co., 24 Oreg. 341, 33 Pac. 526].

If by fair and reasonable intendment the facts alleged or inferences to be drawn therefrom show mutual mistake, it is sufficient. So held in Arlt *v.* Whitlock, 65 N. Y. App. Div. 246, 72 N. Y. Suppl. 522. Where, in an action on a lease, defendant pleaded mutual mistake, and there was no counter-claim for rectification, the court was entitled on the pleadings and the evidence to treat the lease as reformed by substituting 1888 for 1898. Borrowes *v.* Delaney, L. R. 24 Ir. 503.

49. *Florida.*— Horne *v.* J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016.

Louisiana.— Davega *v.* Crescent Mut. Ins. Co., 7 La. Ann. 228.

Oregon.— Lewis *v.* Lewis, 5 Oreg. 169.

Pennsylvania.— Hollenback's Appeal, 121 Pa. St. 322, 15 Atl. 616.

Texas.— Ætna Ins. Co. *v.* Brannon, (Civ. App. 1906) 91 S. W. 614.

50. Seegelken *v.* Corey, 93 Cal. 92, 28 Pac. 849; Newton *v.* Hull, 90 Cal. 847, 27 Pac. 429; Union Ice Co. *v.* Doyle, 6 Cal. App. 284, 92 Pac. 112; Murdoch *v.* Leonard, 15 Wash. 142, 45 Pac. 751. See also Noland *v.* Hughes, (Oreg. 1908) 93 Pac. 362, 94 Pac. 504.

Although it does not specifically allege that the mistake was mutual, the bill is good against a demurrer. Koch *v.* Streuter, 218 Ill. 546, 75 N. E. 1049, 2 L. R. A. N. S. 210. *Compare* Hotaling *v.* Tecumseh Nat. Bank, 55 Nebr. 5, 75 N. W. 242.

Because exact language omitted is not set out, a complaint is not insufficient. State *v.* Lorenz, 22 Wash. 289, 60 Pac. 644. Averments that both parties intended that it should, and understood that a contract of

otherwise a demurrer will be sustained.[51] In the absence of demurrer, having answered, every reasonable inference will be made in favor of the complaint.[52]

(III) *Mistake on One Side and Fraud on the Other.* What has been said about mutual mistake applies equally well when the ground of reformation is mistake on one side and fraud or inequitable conduct on the other; that is, the facts and circumstances constituting fraud should be set forth with particularity, clearness, and precision.[53] A general allegation of fraud is not enough.[54] A complaint which contains, along with averments of mistake on one side, allegations of illiteracy and collusion of complainant's agent with defendant,[55] of the fraudulent insertion of provisions,[56] or of the overvaluations of insured property[57] on the other side will be held good as against demurrer.

e. Agent's Authority. If it appears from the petition that the contract was made by an agent, and that he had no authority to make the contract in the form in which it is sought to be reformed, the petition is properly dismissed on demurrer.[58]

f. Discovery or Knowledge of Mistake. The better practice requires the bill for reformation to set forth the discovery of the mistake, or fraud and mistake, relied upon,[59] when the discovery was made,[60] and why it was not made sooner.[61]

sale of land did, include certain lands, and that such land was omitted by forgetfulness, was held sufficient. Peasley *v.* McFadden, 68 Cal. 611, 10 Pac. 179.

A bill to correct a mistake, not as to the agreement, but in reducing it to writing need not allege mutuality. Born *v.* Schrenkeisen, 110 N. Y. 55, 17 N. E. 339.

In view of the meaning of the words "sold," "attempt," and "convey," a complaint to correct a deed of R and wife to G, from the body of which her name was omitted, contains, as required by Burns Annot. St. (1901) §§ 341, 379, such allegations that a person of common understanding would know from them that the pleader intended to charge that R and wife had contracted, for a valuable consideration, to transfer to G all their title and estate in the property, and that they signed the deed meaning and intending thereby to effectually convey their title and estate in the property to G, and so is sufficient; it alleging that R owned the land, and on a certain day he and his wife sold and attempted to convey it to G, that the deed was duly signed and acknowledged by them, but that by the mutual mistake of the parties and the notary, the notary failed to insert the name of the wife in the body of the deed. Radebaugh *v.* Scanlan, 41 Ind. App. 109, 82 N. E. 544.

51. Arter *v.* Cairo Democrat Co., 72 Ill. 434; Jones *v.* Sweet, 77 Ind. 187; Dowell *v.* Caffron, 68 Ind. 196; Schoonover *v.* Dougherty, 65 Ind. 463; New York Trust Co. *v.* Universal Talking Mach. Co., 90 N. Y. App. Div. 207, 86 N. Y. Suppl. 60.

To be good against demurrer a bill should allege that the mistake was mutual or facts showing the same. Schoonover *v.* Dougherty, 65 Ind. 463; Nicholson *v.* Caress, 59 Ind. 39; Lyons *v.* Lyons, 25 R. I. 494, 56 Atl. 680.

52. Osborn *v.* Ketchum, 25 Oreg. 352, 35 Pac. 972; Hagenah *v.* Geffert, 73 Wis. 636, 41 N. W. 967; James *v.* Cutler, 54 Wis. 172, 10 N. W. 147. *Compare* Hyland *v.* Hyland, 19 Oreg. 51, 23 Pac. 811.

53. Kent *v.* Snyder, 30 Cal. 666; New *v.* Wambach, 42 Ind. 456; Johnson *v.* Sherwood, 34 Ind. App. 490, 73 N. E. 180.

Facts showing fraud.— Where a demurrer to a petition to enforce a contract for the sale of land was sustained by reason of the fact that the contract was void for insufficiency of description, it was not error for the court to refuse to permit plaintiff to file an amended petition alleging a verbal contract for the sale of land sufficiently described, and charging that the written contract was prepared by defendant and his attorney, which failed to charge that the omission of the description in the written contract was the result of fraud of defendant or his attorney, or mutual mistake of both parties. Cammack *v.* Prather, (Tex. Civ. App. 1903) 74 S. W. 354.

Where mutual mistake was alleged, but the proof showed mistake of one party and fraud of the other, plaintiff was held to be entitled to relief. McCormick Harvesting Mach. Co. *v.* Woulph, 11 S. D. 252, 76 N. W. 939; James *v.* Cutler, 54 Wis. 172, 10 N. W. 147.

54. Kent *v.* Snyder, 30 Cal. 666; Cammack *v.* Prather, (Tex. Civ. App. 1903) 74 S. W. 354.

55. Kinney *v.* Ensminger, 87 Ala. 340, 6 So. 72.

56. Prater *v.* Bennett, 98 Ga. 413, 25 S. E. 510; Koons *v.* Blanton, 129 Ind. 383, 27 N. E. 334.

57. Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681.

58. Vardeman *v.* Penn Mut. L. Ins. Co., 125 Ga. 117, 54 S. E. 66.

59. Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902.

60. Harper *v.* Combs, 61 W. Va. 561, 56 S. E. 902. But see Jones *v.* McNealy, 139 Ala. 379, 35 So. 1022, where under the circumstances it was held that a failure to allege the time when discovery of the mistake was made is not fatal.

61. Harper *v.* Combs, 61 W. Va. 561, 56

Where the bill is silent as to the time of discovery, it must be taken to have been known to all parties interested from the time the instrument was made.[62] As against subsequent purchasers, actual notice of the mistake or fraud must be averred.[63]

g. Negativing Negligence of Complainant. It is good practice, and in some jurisdictions necessary pleading, to aver facts showing that the mistake occurred without negligence on the part of the complainant;[64] but when no negligence of complainant is shown, the bill is not demurrable for want of equity.[65] The averments of the bill or complaint may negative accident or mistake.[66]

3. Prayer For Relief.[67] If the evident object of a pleading, as shown by its averments, is reformation, it is not bad on demurrer because of the lack of a prayer to that effect.[68] But in such case reformation must be made an issue by the pleadings.[69]

S. E. 902, holding that a mere general allegation of ignorance at one time and knowledge at another is insufficient to show want of laches.

62. Mathews *v.* Benevides, 18 Tex. Civ. App. 475, 45 S. W. 31.

Where a bill for reformation of a deed by a subsequent purchaser of the property does not allege her want of notice of the mistake, construing it most strongly against the complainant, she must be held to have known of the mistake when she acquired her rights. Jones *v.* McNealy, 139 Ala. 379, 35 So. 1022.

63. Easter *v.* Severin, 64 Ind. 375. But see Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863, holding that where a bill to reform a deed was based on an alleged mutual mistake, it was not demurrable, although it failed to allege notice to a purchaser for value; for a mutual mistake in a deed on the part of antecedent parties will not affect a purchaser for value and without notice.

64. Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864; Pearson *v.* Dancer, 144 Ala. 427, 39 So. 474; Meier *v.* Kelly, 20 Oreg. 86, 25 Pac. 73; Lewis *v.* Lewis, 5 Oreg. 169.

Pleading want of contributory negligence see Negligence, 29 Cyc. 575.

Necessity of allegation in terms.— In an action for the reformation of a deed, it is not necessary for the complainant to allege, in terms, freedom from negligence, when the facts stated show that no negligence was imputable to them. Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864.

65. Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833.

66. Clark *v.* Hart, 57 Ala. 390. See also Irnham *v.* Child, 1 Bro. Ch. 92, 28 Eng. Reprint 1006, Dick. 554, 21 Eng. Reprint 386.

Lack of essential averments may produce the same result. Barnes *v.* Bartlett, 47 Ind. 98.

It is not necessary for plaintiff to allege and prove that the mistake was such as he could not have obtained a knowledge of by the exercise of reasonable diligence when he was put on inquiry. Monroe *v.* Skelton, 36 Ind. 302.

To allege in terms freedom from negligence is not necessary where the facts stated show that no negligence was imputable to plaintiff. Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864.

67. **Other relief sought** see *supra*, XIV, A, 1.

Other relief granted see *infra*, XVI, B, 4.

68. *Colorado.*— Drake *v.* Pueblo Nat. Bank, (1908) 96 Pac. 999.

Indiana.— Dehority *v.* Wright, 101 Ind. 382. *Compare* Mason *v.* Mason, 102 Ind. 38, 26 N. E. 124.

Mississippi.— Moore *v.* Crump, 84 Miss. 612, 37 So. 109. *Compare* Jones *v.* Levy, 92 Miss. 551, 46 So. 825.

New York.— Caswell *v.* West, 3 Thomps. & C. 383.

North Carolina.— Gwyn-Harper Mfg. Co. *v.* Cloer, 140 N. C. 128, 52 S. E. 305.

Texas.— Ætna Ins. Co. *v.* Brannon, 99 Tex. 391, 89 S. W. 1057, 2 L. R. A. N. S. 548.

England.— See Breslauer *v.* Barwick, 36 L. T. Rep. N. S. 52, 24 Wkly. Rep. 901.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 145.

Prayer in cross bill.— Where a cross bill based on a mistake in a deed concluded with a prayer for general relief, the chancellor should have decreed that the cross complainants were, as to the cross defendants, the owners of the property in question, where the proof showed such to be the case, although the cross bill did not seek the reformation of the deeds. Moore *v.* Crump, 84 Miss. 612, 37 So. 109.

Reformation may be granted in an action to cancel see Grafton *v.* Nemsen, 16 How. Pr. (N. Y.) 32. Where the court found no fraud, but did find innocent mistake, under the prayer for general relief, reformation was given instead of cancellation as specially prayed for. Hardy *v.* La Dow, 72 Kan. 174, 83 Pac. 401. *Compare* Fitchner *v.* Fidelity Mut. Fire Assoc., 103 Iowa 276, 72 N. W. 530.

Where reformation is not prayed for in the complaint, asserting a different cause of action, a court cannot reform a mortgage so as to essentially change the description. Morgan *v.* Meuth, 60 Mich. 238, 27 N. W. 509.

69. Thomson *v.* Peake, 38 S. C. 440, 17 S. E. 45, 725.

In a suit to foreclose mortgages, defendant set up in defense a receipt, purporting to

4. Defects and Objections — a. In General. If a defect in the pleading has been waived, as by answering to the merits instead of demurring, it cannot be taken advantage of by objection.[70] An omitted stipulation cannot be added to the petition by parol evidence.[71] Also an objection cannot be taken on a ground not applicable to the pleading.[72] The averments of the bill itself may be such as to rebut a defect which would otherwise arise.[73]

b. Hypothetical Form of Allegation. The fact that an allegation is in hypothetical form will not justify a court in refusing a remedy.[74]

c. Surplusage. If the necessary allegations are present, a party is entitled to relief and defective allegations may be treated as surplusage,[75] even though the complaint is vague and uncertain.[76]

B. Cross Bill, Cross Complaint, or Counter-Claim For Reformation. Reformation at the instance of a defendant should be made by alleging the mistake and asking affirmative relief by a cross bill,[77] cross petition,[78] or counter-claim,[79] and in such pleading the same rules as to the sufficiency of allegations apply as in the case of a bill or complaint.[80] Relief cannot be had, however, without setting up facts upon which the equitable jurisdiction depends.[81]

C. Plea or Answer — 1. In General. A plea or answer must set forth

be in full. To warrant reformation of the receipt, the mistake need not be set up and reformation asked for in the complaint, the action not being founded on the receipt and plaintiff not being bound to anticipate the defense. Meyer *v.* Lathrop, 73 N. Y. 315.

70. Hyland *v.* Hyland, 19 Oreg. 51, 23 Pac. 811; Hagenah *v.* Geffert, 73 Wis. 636, 41 N. W. 967.

71. Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

72. Avery *v.* Equitable L. Assur. Soc., 52 Hun (N. Y.) 392, 5 N. Y. Suppl. 278 [*reversed* on other grounds in 117 N. Y. 451, 23 N. E. 3].

The objection that the bill states a case of unilateral mistake cannot be made where grounds for reformation are alleged. Providence Steam-Engine Co. *v.* Hathaway Mfg. Co., 79 Fed. 512.

73. White *v.* Shaffer, 97 Md. 359, 54 Atl. 974.

74. Conner *v.* Baxter, 124 Iowa 219, 99 N. W. 726.

75. Fly *v.* Brooks, 64 Ind. 50.

76. Fly *v.* Brooks, 64 Ind. 50.

77. King *v.* Enterprise Ins. Co., 45 Ind. 43; Conger *v.* Parker, 29 Ind. 380.

Cross bill for reformation in suit between strangers see Equity, 16 Cyc. 329 note 14.

78. Farr *v.* Ricker, 46 Ohio St. 265, 21 N. E. 354. See also Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099.

79. Conyers *v.* Mericles, 75 Ind. 443; National Gum, etc., Co. *v.* MacCormack, 124 N. Y. App. Div. 569, 109 N. Y. Suppl. 286; Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

80. See *supra*, XIV, A. See also McCusker *v.* Spier, 72 Conn. 628, 45 Atl. 1011; Moore *v.* Crump, 84 Miss. 612, 37 So. 109; Gassert *v.* Black, 11 Mont. 185, 27 Pac. 791; Gwyn-Harper Mfg. Co. *v.* Cloer, 140 N. C. 128, 52 S. E. 305.

Illustration.— For a further defense, defendants alleged that when the agreement was executed the parties agreed that the notes referred to in the first paragraph thereof were to be paid, as provided in the third paragraph, out of the net proceeds; that no other claim was made until the action was commenced; that since the commencement of the action one of plaintiffs, as alleged assignor of a note given in renewal of the notes specified in the first paragraph of the agreement, recovered judgment against the paper company, claiming that the agreement was not ambiguous, and that the notes were payable absolutely at maturity; that up to such time no such claim had ever been made. This was followed by a prayer that the agreement be reformed so as to express the true intent of the parties; that the notes should be paid out of the surplus proceeds, and not otherwise. It was held that since the reformation of a contract may be set up as a counter-claim in an action founded on the contract, and inasmuch as the facts were set forth, and affirmative judgment prayed for asking reformation of the contract, such part of the answer might be treated as a counter-claim. National Gum, etc., Co. *v.* MacCormack, 124 N. Y. App Div. 569, 109 N. Y. Suppl. 286.

Mutuality of mistake of scrivener.—A pleading, praying for the reformation of a deed on the ground of mistake, which alleges that the scrivener made a mistake in drawing the deed, is fatally bad for failing to aver that he acted under the directions of both parties, so as to show that the mistake was their mutual mistake. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099.

The word "heirs" being omitted from a deed, a cross complaint is insufficient which contains no averment that the grantor and grantee were ignorant of the precise contents of the deed and such omission at the time of execution and delivery. Nicholson *v.* Caress, 59 Ind. 39.

81. Buchanan *v.* Harrington, 141 N. C. 39, 53 S. E. 478.

facts which will excuse or justify the cause of action sued on in the bill or complaint,[82] or put in issue the allegations thereof.[83]

2. Asking For Reformation. On proper averments mistake may be set up by way of defense and reformation of the instrument may be asked in the plea or answer.[84] But such mistake must be properly and formally pleaded.[85] The fact that a note sued on is not due is matter in abatement, and if this can be made apparent only by facts involving reformation of the note, the answer must contain a prayer for reformation.[86]

D. Reply. To ask in the reply for reformation of an instrument that has been declared on in the complaint is a departure from the cause of action.[87] But where an erroneous instrument is set up in answer to the cause of action declared on, plaintiff is entitled to allege mistake in such instrument and pray reformation.[88]

E. Demurrer. A demurrer admits the truth of all facts well pleaded. Hence if the allegation shows the case with clearness, the pleading demurred to will entitle its pleader to correction.[89]

82. Kreitz *v.* Frost, 5 Abb. Pr. N. S. (N. Y.) 277.

Defenses, that the deed expresses the contract, and if it does not, that there was such a mutual mistake as would authorize decision, are not inconsistent, and both may be relied upon. Lord *v.* Horr, 30 Wash. 477, 71 Pac. 23.

Insufficient answers.—An answer that, if applied to, defendant "would have corrected any mistake in said lease" is not equivalent to an admission of the specified mistake and an offer to correct it. Robbins *v.* Battle House Co., 74 Ala. 499. An answer setting up that "defendant has conveyed all the land that he agreed to convey" is not a sham pleading. Young *v.* Phifer, 72 N. C. 529. Liability of a plaintiff for the misapplication of trust funds or for neglect of duty is no defense to a suit to reform notes executed by trustees in their personal capacity so as to render them payable only from the trust at stake, nor do such facts constitute an estoppel. Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333.

Disclaimer insufficient.— Plaintiff alleged that he owned two tracts of land for which he obtained patents; that defendant purchased from the heirs of H, one of whom was plaintiff's wife, all lands owned by H at the time of his death; that plaintiff, to enable his wife to convey, joined in the deed, and that by mistake plaintiff's tracts, which were not owned or claimed by H, were included in the deed. Defendant denied the allegations, except the execution of the deed, and affirmatively alleged that he purchased all lands owned by H at the time of his death, and that he disclaimed any title to the tracts of plaintiff under or by virtue of the patents issued to plaintiff. It was held that the disclaimer was insufficient to warrant judgment for defendant, as it left in issue H's ownership of the tracts in question at the time of his death. Dean *v.* Hall, 105 S. W. 98, 31 Ky. L. Rep. 1306.

83. See cases cited *infra*, this note.

Action by the indorsee to reform a promissory note, which recited that it was given in part for the purchase-money of land. Complaint alleged a mistake in the description of the land. Defendant's answer admitted "the execution of the note mentioned in said complaint," but stated "that the same was executed for the real estate therein described, and for no other consideration whatever," and denied "every allegation in said complaint not specifically admitted herein." On demurrer it was held that the alleged mistake and indorsement are neither admitted nor denied by the answer and that the answer was good. McIntosh *v.* Robison, 68 Ind. 120.

A plea which merely sets out deeds in plaintiff's chain of title and denies by such deeds plaintiff acquired title to the interests in the suit fails to put in issue the allegations of the bill and will be overruled. Cranston Print Works *v.* Dyer, 18 R. I. 526, 30 Atl. 460.

84. Hanna *v.* Wright, 116 Iowa 275, 89 N. W. 1108; Hook *v.* Craighead, 32 Mo. 405; Leitensdorfer *v.* Delphy, 15 Mo. 160, 55 Am. Dec. 137; Shields *v.* Mongollon Exploration Co., 137 Fed. 539, 70 C. C. A. 123.

Mass. Rev. Laws, p. 1554, c. 173, § 128, authorizes a defendant to allege in defense any facts which would entitle him in equity to be absolutely relieved against plaintiff's claim. This entitles defendant to set up reformation in his answer. Fowle *v.* Pitt, 183 Mass. 351, 67 N. E. 343.

85. Anderson *v.* Logan, 105 N. C. 266, 11 S. E. 361.

86. Scott *v.* Norris, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227; Norris *v.* Scott, 6 Ind. App. 18, 32 N. E. 103, 865.

The fact that, if reformation were denied, the plea in abatement will be useless, furnishes no objection to this manner of pleading on the ground that it would compel a party to cut up his defenses, as the note itself would show that it is not due. Scott *v.* Norris, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

87. Wood *v.* Deutchman, 75 Ind. 148; Cox *v.* Ætna Ins. Co., 29 Ind. 586.

88. Turner *v.* Wabash R. Co., 114 Mo. App. 539, 90 S. W. 391.

89. Moore *v.* Munn, 69 Ill. 591. See also Pleading, 31 Cyc. 269 *et seq.*

F. Amendments. It is error to strike out a trial amendment alleging mutual mistake and asking reformation,[90] or to refuse leave to amend by alleging mutual mistake and adding a prayer for reformation.[91]

G. Issues, Proof, and Variance. A complainant must recover on a case made out on his bill. A variance between the allegations and proof is fatal,[92] although a good case may appear in the evidence.[93] But if the proof supports the issue sufficiently to make out a good case for reformation, it is immaterial that the proof did not support one of the allegations which might have helped the suit.[94] Failure to prove a collateral averment, however, is not fatal;[95] nor will the decree be disturbed because of variance between the proof and the decree.[96] If an issue is raised on allegations which might have been excepted to admission of evidence is justified.[97] The reformation of a deed is an issue fairly within a prayer for general or other relief.[98]

XV. EVIDENCE.[99]

A. Presumptions and Burden of Proof. There is a presumption of law that a written instrument truly expresses its contents, and if it be a contract, that it expresses the agreement and intention of the parties.[1] A variance between

90. Keating *v.* McCutchen, 14 Tex. Civ. App. 150, 36 S. W. 597.

91. Fery *v.* Pfeiffer, 18 Wis. 510.

92. Norris *v.* Smith, 41 Ala. 340; Lockhart *v.* Cameron, 29 Ala. 355; Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738.

Illustration.—A complaint alleged that by mistake of plaintiff the deed did not contain a reservation in favor of plaintiff, to which, under the prior contract between the parties, he was entitled, and that defendants well knew all of the facts, but fraud was not charged in words. Relief was granted. Welles *v.* Yates, 44 N. Y. 525.

That a bill to reform a deed alleged that by mistake of the scrivener a husband was named therein as grantee instead of the wife, while the evidence showed that the husband directed the deed to be made to him, without the wife's authority, does not preclude an error of the wife from having the deed reformed in that suit. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105.

Under Cal. Code Civ. Proc. § 469, variance is fatal when it actually leads the adverse party to his prejudice. Hence a bill setting forth facts within Code Civ. Proc. § 3399. was held good. Holt *v.* Holt, 120 Cal. 67, 52 Pac. 119.

93. Norris *v.* Smith, 41 Ala. 340; Easterwood *v.* Linton, 36 Ala. 175; Adams *v.* Gill, 158 Ill. 190, 41 N. E. 738.

94. Siling *v.* Hendrickson, 193 Mo. 365, 92 S. W. 105.

95. Blackburn *v.* Perkins, 138 Ala. 305, 35 So. 250.

96. Thalheimer *v.* Lockert, 76 Ark. 25, 88 S. W. 591.

97. Norris *v.* W. C. Belcher Land Mortg. Co., 98 Tex. 176, 82 S. W. 500, 83 S. W. 799. See also Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697.

98. Haslett *v.* Stephany, 55 N. J. Eq. 68, 36 Atl. 498. *Compare* Breslauer *v.* Barwick, 36 L. T. Rep. N. S. 52, 24 Wkly. Rep. 901.

99. Evidence generally see EVIDENCE, 16 Cyc. 821; 17 Cyc. 1.

1. Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Meredith *v.* Holmes, 105 Mo. App. 343, 80 S. W. 61; Duke *v.* Stuart, 45 Misc. (N. Y.) 120, 91 N. Y. Suppl. 885 [*affirmed* in 105 N. Y. App. Div. 376, 94 N. Y. Suppl. 235]; Halliday *v.* White, 21 N. Y. Suppl. 878; Boardman *v.* Davidson, 7 Abb. Pr. N. S. (N. Y.) 439; Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902; Gray *v.* Chicago, etc., R. Co., 140 Fed. 337, 72 C. C. A. 301.

Consideration for an instrument is not presumed from the seal. Sharpe *v.* Rogers, 12 Minn. 174.

Presumption as to ignorance of law.—Every man is presumed to know the law, and therefore chancery cannot make a decree reforming a contract between the parties on the ground of complainant's ignorance of the law, where the allegation of ignorance is denied by the answer, however it might ordinarily be in the case of a mistake of law. Hall *v.* Reed, 2 Barb. Ch. (N. Y.) 500.

Presumption in favor of a married woman.—A woman and her husband on the eve of marriage were induced by her brothers to sign a marriage contract by which her property was to be conveyed to trustees in such manner as to deprive her of the right to dispose of the rents and profits from the property and the property itself, both during coverture and afterward, if she survived and remainder was given to her heirs; she at the time being of an age which rendered her having children very improbable. The court held that such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the woman, would be reformed so as to give her the use of the property during coverture and the right to dispose of it by will, and, if she should survive her husband, to determine the trust. Sanderlin *v.* Robinson, 59 N. C. 155.

Because previous leases have provided for future renewals it cannot be inferred that

a written contract and a previous one by parol will be presumed to have arisen, in the absence of fraud, accident, or mistake from a change of intention, and the last agreement will be presumed to express the final purpose of the parties.[2] Also, the contrary not being alleged, it is presumed that a purchaser is a purchaser for value.[3] These presumptions stand until overcome or rebutted, and the burden of proof is on the party assailing; in case of reformation the burden of proof is on the party asking correction.[4] But where a bill for reform is answered, and a contract different from that alleged in the bill is set up as representing the real intention of the parties, the burden is on defendant to establish his allegations by independent evidence.[5]

B. Admissibility — 1. In General. The usual rules of evidence govern as to competency, materiality, relevancy, and such other qualifications as make facts admissible in proof.[6] Anything which shows the intention or actual contract of the parties is material,[7] and any evidence which goes to show the real intention of the parties is admissible,[8] whether it be by way of conduct,[9] or docu-

from a lease not so providing the covenant was omitted by accident or mistake, and that therefore the lease should be reformed. Syms *v.* New York, 50 N. Y. Super. Ct. 289.

2. See cases cited *infra*, this note.

This presumption holds where a deed made under a prior executory contract varies therefrom. Whitney *v.* Smith, 33 Minn. 124, 22 N. W. 181; Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

Where the testimony of the parties is in direct conflict and there is no evidence of fraud, the presumption that the contract as made expresses the true agreement must prevail. Pope *v.* Hoopes, 90 Fed. 451, 33 C. C. A. 595.

3. Easter *v.* Severin, 64 Ind. 375.

4. *Alabama.*— Patterson *v.* Hannan, 150 Ala. 189, 43 So. 192; Smith *v.* Allen, 102 Ala. 406, 14 So. 760.

Florida.— Griffin *v.* Société Anonyme la Floridienne, 53 Fla. 801, 44 So. 342.

Iowa.— Holmes *v.* Rogers, (1899) 80 N. W. 522; Tufts *v.* Larned, 27 Iowa 330.

Missouri.— Moran Bolt, etc., Mfg. Co. *v.* St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Meredith *v.* Holmes, 105 Mo. App. 343, 80 S. W. 61.

New Jersey.— Flaacke *v.* Jersey City, 28 N. J. Eq. 110; Vreeland *v.* Bramhall, 28 N. J. Eq. 85.

New York.— Duke *v.* Stuart, 45 Misc. 120, 91 N. Y. Suppl. 885 [*affirmed* in 105 N. Y. App. Div. 376, 94 N. Y. Suppl. 235]; Boardman *v.* Davidson, 7 Abb. Pr. N. S. 439; Berringer *v.* Schaefer, 52 How. Pr. 69; Coles *v.* Bowne, 10 Paige 526.

Washington.— Heffron *v.* Fogel, 40 Wash. 698, 82 Pac. 1003.

West Virginia.— Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902.

England.— Mignan *v.* Parry, 31 Beav. 211, 8 Jur. N. S. 634, 31 L. J. Ch. 819, 7 L. T. Rep. N. S. 88, 10 Wkly. Rep. 812, 54 Eng. Reprint 1119; Wright *v.* Goff, 22 Beav. 207, 2 Jur. N. S. 481, 25 L. J. Ch. 803, 4 Wkly. Rep. 522, 52 Eng. Reprint 1087.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 154.

The burden of proving that a provision suspending a delivery of a deed until after the grantor's death, etc., was inserted by mistake is on the party inserting such mistake. Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455.

In showing that a purchaser for value had notice the burden is on the complainants. Snyder *v.* Grandstaff, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863.

5. Busby *v.* Littlefield, 33 N. H. 76. In this case plaintiff filed a bill to reform a deed, alleging that the deed conveyed one hundred feet, whereas it should have conveyed thirty only. Defendant in his answer admitted his mistake, but "affirmed" that the deed should have been for thirty-two feet. It was held that defendant was bound to establish allegations by independent evidence. *Compare* Harbidge *v.* Wogan, 5 Hare 258, 10 Jur. 703, 15 L. J. Ch. 281, 26 Eng. Ch. 258, 67 Eng. Reprint 909, where a brother of a wife in a marriage settlement in which it was sought to be reformed answered.

6. See Evidence, 16 Cyc. 821 *et seq.*, 17 Cyc. 1 *et seq.*

7. See cases cited *infra*, this note.

It was not error to permit one of the parties to tell all that was said at the time that the contract was made between the parties and also to state incidentally what was said by a third party, who assisted in making the contract, although his interest therein does not appear. Wendt *v.* Diemer, 9 Kan. App. 481, 58 Pac. 1003.

The fact that a seal was affixed by someone after the delivery of an alleged mortgage and before it came into the hands of plaintiff assignee does not render incompetent evidence that it was the intention of the mortgagor at the time of the execution that there should be a seal opposite his name. Gaylord *v.* Pelland, 169 Mass. 356, 47 N. E. 1019.

Representations made by the vendors to the vendee, as to the boundaries and quantities of land and abstracts of title thereto, are admissible. Place *v.* Johnson, 20 Minn. 219.

8. Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897, 23 Utah 470, 65 Pac. 203; Allen *v.* Hutchinson, 45 Wis. 259.

9. Farley *v.* Bryant, 32 Me. 474.

mentary in nature.[10] It is not permissible, however, to show the intentions of one party, unless it appears that they were understood by the other party.[11] Where it is sought to reform the acknowledgment of the deed of a husband and wife, defective in failing to show a separate examination of the wife, acts and declarations of the wife, at the time of and after the execution of the deed, in relation thereto, are admissible.[12] Inadequacy of price, not material in itself, in connection with other facts, may amount to proof of fraud and in such cases is admissible.[13] Where a witness cannot be brought before the court, it may be shown by evidence, other than by his own testimony, how he acted and how he seemed to believe, about a description of land.[14] But extrinsic proof is not admissible in the absence of some legitimate predicate upon which to rest its admission.[15] Evidence must not be too remote, however, but in support of the issue.[16] It should also be contemporaneous with, or anterior to, the instrument intended to be reformed,[17] and there is a vast difference between the competency of evidence intended to destroy an instrument, and evidence intended to reform it.[18] Questions calling for mere opinions or conclusions are always open to objection.[19] It is competent to prove the mistake by admissions of the parties, original instructions, and the testimony of the attorneys connected with the execution of the instrument.[20]

2. **Parol Evidence.** It is a general rule that parol evidence is not admissible to vary a written instrument.[21] In England the doctrine of the chancery courts

Thus in determining whether a deed should be reformed, it is of great importance to inquire whether the grantees and their assigns have or have not in the management of the land conducted themselves as if considering the disputed part of the land to have been yet unconveyed by the deed under which they claim. Farley *v.* Bryant, 32 Me. 474.

10. See cases cited *infra*, this note.

It was not error to admit a certain deed to another person, made by defendant three years later, in which a private road was referred to as a boundary, where plaintiff claimed in an action to reform a deed that the center line of a certain private road had been agreed on by the owners of adjoining lands as the division line between them and that through mutual mistake a different line was designated. Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057.

Letters written by the parties during negotiations for the purchase of premises were admitted in Knapp *v.* White, 23 Conn. 529.

A lease containing an agreement to sell demised premises is admissible in evidence in an action to reform the deed given in pursuance of such an agreement, although the agreement is void, where the objection is made, not to the contract of sale, but to the lease as a whole. Place *v.* Johnson, 20 Minn. 219.

A concurrently executed agreement whereby the grantee agreed to convey on certain conditions is properly admitted in an action to have a deed declared a mortgage. Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507.

Forms of an insurance policy admitted.— In an action to reform a policy by striking out a printed condition, where a plaintiff testifies that the policy was to be made according to the form of a certain other company, the form of the policy of such other company is admissible to show that it contained no such printed conditions. Van Tuyl *v.* Westchester F. Ins. Co., 55 N. Y. 657.

11. Bobb *v.* Bobb, 7 Mo. App. 501. The syllabus to Bowers *v.* New York L. Ins. Co., 68 Fed. 785, lays down that a statement made by a deceased beneficiary in an insurance policy issued two years before, as to his understanding of the terms of the policy, is not admissible to show mistake.

12. Kilbourn *v.* Fury, 26 Ohio St. 153.

13. Baldwin *v.* National Hedge, etc., Co., 73 Fed. 574, 19 C. C. A. 575.

14. Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901.

15. O'Neil *v.* Teague, 8 Ala. 345.

16. Huyck *v.* Andrews, 113 N. Y. 81, 20 N. E. 581, 10 Am. St. Rep. 432, 3 L. R. A. 789 [*affirming* 1 N. Y. St. 597].

Declarations by his mother, in defendant's absence, that the contract embraced the lands in controversy, are inadmissible, as being hearsay. French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

17. Williamson *v.* Carpenter, 205 Pa. St. 164, 54 Atl. 718; Bradford *v.* Rumny, 30 Beav. 431, 8 Jur. N. S. 403, 31 L. J. Ch. 497, 6 L. T. Rep. N. S. 208, 10 Wkly. Rep. 414, 54 Eng. Reprint 956. See also Irwin *v.* Shoemaker, 8 Watts & S. (Pa.) 75, *dictum*.

18. Irwin *v.* Shoemaker, 8 Watts & S. (Pa.) 75.

19. Allen *v.* Hutchinson, 45 Wis. 259.

A statement made by the agents of an insurance company at the time he delivered the policy that it was all right and would stand in any court is admissible on issue of complainant's evidence in failing to read the policy at the time it was delivered. Nor is the statement objectionable as a conclusion. Ætna Ins. Co. *v.* Brannon, (Tex. Civ. App. 1906) 91 S. W. 614.

20. Hamil *v.* White, 3 J. & L. 695.

21. See Evidence, 17 Cyc. 567.

is that parol evidence is not admissible for the purpose of reforming an executory contract, whether it be within the statute of frauds or not.[22] Relying on this authority several American courts have refused to admit parol evidence when the writing comes within the statute of frauds.[23] But the great mass of authorities construe the effect of the statute of frauds differently;[24] and for the reformation of instruments, both in this country and in England, the general rule at present seems to be that parol evidence is admissible to show mistake[25] or

22. Jordan *v.* Sawkins, 3 Bro. Ch. 388, 29 Eng. Reprint 600, 1 Ves. Jr. 402, 30 Eng. Reprint 407; Martin *v.* Pycroft, 2 De G. M. & G. 785, 16 Jur. 1125, 22 L. J. Ch. 94, 1 Wkly. Rep. 58, 51 Eng. Ch. 615, 42 Eng. Reprint 1079; Manser *v.* Buck, 6 Hare 443, 31 Eng. Ch. 443, 67 Eng. Reprint 1239; Clinan *v.* Cooke, 1 Sch. & Lef. 22; Higginson *v.* Clowes, 15 Ves. Jr. 516, 10 Rev. Rep. 112, 33 Eng. Reprint 850; Woollam *v.* Hearn, 7 Ves. Jr. 211, 6 Rev. Rep. 113, 32 Eng. Reprint 86; Rich *v.* Jackson [*cited* in Townshend *v.* Stangroom, 6 Ves. Jr. 328, 334, 31 Eng. Reprint 1076]; Atty.-Gen. *v.* Sitwell, 5 L. J. Exch. 86, 93, 1 Y. & C. Exch. 559. *Compare* Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810.

23. Osborn *v.* Phelps, 19 Conn. 63, 48 Am. Dec. 133.

Thus parol proof was held inadmissible to vary a contract to convey land and to decree specific performance of the contract as reformed. Elder *v.* Elder, 10 Me. 80, 25 Am. Dec. 205. *Compare* this with the later decision in Farley *v.* Bryant, 32 Me. 474. Again oral testimony was held inadmissible to show that defendant by word of mouth agreed to sell a piece of land, and complainant to purchase the same, and that by mutual mistake, the agreement, as written and signed, did not include the whole tract. Maccomber *v.* Peckham, 16 R. I. 485, 17 Atl. 910.

To warrant reformation of a will the mistake must be apparent on its face, for, since the statute of frauds, parol evidence is not admissible to vary or control its terms. Eatherly *v.* Eatherly, 1 Coldw. (Tenn.) 461, 78 Am. Dec. 499.

24. See cases cited *infra*, notes 25–28.

The statute of frauds and perjuries does not stand in the way of the reformation of the written instrument by parol, on the ground of fraud or mistake, although the effect would be to pass an estate by parol; for the statute must be construed so as to prevent frauds, and not to promote them. This is the holding in Schettiger *v.* Hopple, 3 Grant (Pa.) 54. *Compare* McLennan *v.* Johnston, 60 Ill. 306. "Whether a plaintiff, seeking affirmative relief, can thus reform and then enforce a written contract, on the strength of parol proof alone, and against an answer denying the alleged mistake, is a question in reference to which, it must be admitted, there is a decided and irreconcilable conflict of authorities. In the affirmative, we have the opinions of those eminent chancellors, Kent and Story, given after mature and repeated deliberation (Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144; Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; Story Eq. Jur. § 153 *et seq.*). The correctness of these opinions seems also to have been uniformly held or recognized in Ohio (McLouth *v.* Rathbone, 19 Ohio 21, 24; Young *v.* Miller, 10 Ohio 85, 90; Hunt *v.* Freeman, 1 Ohio 490), and we may fairly infer that this holding has commended itself to legislative approval . . . (Swan St. 314)" (Davenport *v.* Sovil, 6 Ohio St. 459, 462).

25. *California.*— Murray *v.* Dake, 46 Cal. 644; Pierson *v.* McCahill, 21 Cal. 122, 23 Cal. 249.

Georgia.— Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Greer *v.* Caldwell, 14 Ga. 207, 58 Am. Dec. 553; Wall *v.* Arrington, 13 Ga. 88.

Illinois.— Ewing *v.* Sandoval Coal, etc., Co., 110 Ill. 290; McCornack *v.* Sage, 87 Ill. 484.

Iowa.— Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327.

Kentucky.— Inskoe *v.* Proctor, 6 T. B. Mon. 311; Nutall *v.* Nutall, 82 S. W. 377, 26 Ky. L. Rep. 671; Wood *v.* Porter, 4 Ky. L. Rep. 361.

Maine.— Farley *v.* Bryant, 32 Me. 474.

New Hampshire.— Busby *v.* Littlefield, 31 N. H. 193.

New York.— Meyer *v.* Lathrop, 73 N. Y. 315; Pennell *v.* Wilson, 2 Rob. 505; Titus *v.* Perry, 13 N. Y. St. 237.

North Carolina.— Newsom *v.* Bufferlow, 16 N. C. 379.

North Dakota.— Forester *v.* Van Auken, 12 N. D. 175, 96 N. W. 301.

Ohio.— Davenport *v.* Sovil, 6 Ohio St. 459; Williams *v.* Williams, 2 Ohio Dec. (Reprint) 478, 3 West. L. Month. 258.

Pennsylvania.— Huss *v.* Morris, 63 Pa. St. 367; Fisher *v.* Deibert, 54 Pa. St. 460; Grubb *v.* Matlack, 2 Chest. Co. Rep. 408; North, etc., Branch R. Co. *v.* Swank, 14 Wkly. Notes Cas. 444.

South Carolina.— Hampton *v.* Blakely, 3 McCord 469.

South Dakota.— Hughes *v.* Payne, (1908) 117 N. W. 363; Tossini *v.* Donahoe, (1908) 117 N. W. 148.

Tennessee.— Barnes *v.* Gregory, 1 Head 230.

Texas.— Golf *v.* Jones, 70 Tex. 572, 8 S. W. 525, 8 Am. St. Rep. 619; Hughes *v.* Delaney, 44 Tex. 529.

Vermont.— Barry *v.* Harris, 49 Vt. 392; Goodell *v.* Field, 15 Vt. 448.

Virginia.— French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

West Virginia.— Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856.

United States.—Ivinson *v.* Hutton, 98 U. S. 79. 25 L. ed. 66; Sampson *v.* Mudge, 13 Fed. 260.

England.— Olley *v.* Fisher, 34 Ch. D. 367, 56 L. J. Ch. 208, 55 L. T. Rep. N. S. 807, 35

fraud.[26] It has been admitted to the extent of showing what the real contract was.[27] But the parol evidence must be introduced in a direct action to reform, for in an

Wkly. Rep. 301; McCormack *v.* McCormack, L. R. 1 Ir. 119, Ir. R. 11 Eq. 130; Bradford *v.* Romney, 30 Beav. 431, 8 Jur. N. S. 403, 31 L. J. Ch. 497, 6 L. T. Rep. N. S. 208, 10 Wkly. Rep. 414, 54 Eng. Reprint 956; Barrow *v.* Barrow, 18 Beav. 529, 52 Eng. Reprint 208 [*varied* on appeal, 5 De G. M. & G. 782, 3 Eq. Rep. 149, 24 L. J. Ch. 267, 3 Wkly. Rep. 122, 54 Eng. Ch. 614, 43 Eng. Reprint 1073]; Rogers *v.* Earl, Dick. 294, 21 Eng. Reprint 282; Lackersteen *v.* Lackersteen, 6 Jur. N. S. 1111, 30 L. J. Ch. 5, 3 L. T. Rep. N. S. 581; Alexander *v.* Crosbie, Ll. & G. t. S. 145, 11 Eng. Ch. 145.

Canada.— Toronto Bank *v.* Irwin, 28 Grant Ch. (U. C.) 397.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 156.

The American doctrine proceeds on the theory adopted by Chancellor Kent in Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585, 596, 7 Am. Dec. 559, decided in 1817. "The rule in the Courts of law is, that the written instrument does, in contemplation of law, contain the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties, than any that can be supplied by parol. . . . I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract, in writing, founded in mistake or fraud. The mistake may be shown by parol proof, and the relief granted to the injured party, whether he sets up the mistake affirmatively by bill, or as a defense." In support he cites Langley *v.* Brown, 2 Atk. 196, 203, 26 Eng. Reprint 521; Simpson *v.* Vaughan, 2 Atk. 31, 26 Eng. Reprint 415; Taylor *v.* Rudd [*cited* in Burt *v.* Barlow, 3 Bro. Ch. 451, 454, 29 Eng. Reprint 638]; Shelburne *v.* Inchiquin, 1 Bro. Ch. 338, 341, 28 Eng. Reprint 1166; Irnham *v.* Child, 1 Bro. Ch. 92, 94, 28 Eng. Reprint 1006, Dick. 554, 21 Eng. Reprint 386; Townshend *v.* Stangroom, 6 Ves. Jr. 328, 5 Rev. Rep. 312, 31 Eng. Reprint 1076; Baker *v.* Paine, 1 Ves. 456, 457, 27 Eng. Reprint 1140, quoting Lord Hardwicke's observation: "How can a mistake in an agreement be proved but by parol evidence? It is not read to contradict the face of the instrument but to prove a mistake therein."

The doctrine applied.— In Noble *v.* Noble, 2 Molloy 403, parol evidence was allowed to the extent of showing the loss of a letter and then what it contained. In Lee *v.* Percival, 85 Iowa 639, 52 N. W. 543, it was admitted to show that a signature importing personal obligation was intended to bind the corporation of which the signer was an officer; and in Western Wheeled Scraper Co. *v.* Stickleman, 122 Iowa 396, 98 N. W. 139, to show the signer intended to bind the township of which he was trustee. It is admissible as well on the part of plaintiff who seeks reformation and to have it enforced as on the part of defendant who seeks to have it enforced. Bellows *v.* Stone, 14 N. H. 175.

In Oregon Code, § 682, providing for the corrections of imperfections and mistakes in the writing, is not at variance with the rule excluding for parol evidence to vary the terms of written contract. Lee *v.* Summers, 2 Oreg. 260.

26. *Illinois.*— Hunter *v.* Bilyeu, 30 Ill. 228.

Minnesota.— Smith *v.* Jordan, 13 Minn. 264, 97 Am. Dec. 232.

New York.— Fishell *v.* Bell, Clarke 37.

Ohio.— Harris *v.* Columbiana County Mut. Ins. Co., 18 Ohio 116, 51 Am. Dec. 448.

Pennsylvania.— Spring Garden Ins. Co. *v.* Scott, 1 Walk. 181; Bartle *v.* Vosbury, 3 Grant 277.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 156.

However, parol evidence that a part of the land agreed to be included in a written contract was omitted therefrom fraudulently is inadmissible, when offered solely for the purpose of reforming a contract. Davis *v.* Ely, 104 N. C. 16, 10 S. E. 138, 17 Am. St. Rep. 667, 5 L. R. A. 810.

27. Cotton State L. Ins. Co. *v.* Carter, 65 Ga. 228; McCormack *v.* McCormack, L. R. 1 Ir. 119, Ir. R. 11 Eq. 130.

Where, in an answer to a bill to reform a deed for mistake, defendant does not answer frankly as to what he understood was conveyed by it, and the draftsman proves by his instructions that by his error the deed as drawn conveyed in law a larger interest than was intended, equity will reform the deed on parol proof. Cooke *v.* Husbands, 11 Md. 492.

In contracts for the sale of land.— Parties being on a lot made an oral contract of sale. The area was known by both, and one line was marked by a board fence. The deed made pursuant thereto called for one thousand and thirty-one square feet beyond the fence. The vendor was allowed to prove the original contract by parol, and have the deed reformed in accordance therewith. Goode *v.* Riley, 153 Mass. 585, 28 N. E. 228. A preliminary parol agreement for the sale of land is competent in a suit to correct a deed executed in pursuance of such agreement. Lehew *v.* Hewett, 138 N. C. 6, 50 S. E. 459.

In an action to reform a fire insurance policy, evidence of a conversation between the agent of the assured and the underwriter in relation to the object of the policy, etc., was admissible. Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119. Likewise a contemporaneous parol agreement concerning notes to be reformed is admissible. Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740.

In ejectment, based on a lease from defend-

action at law such evidence is not competent.[28] Parol evidence is not admissible, however, to show a mistake in law;[29] nor can it be admitted in the absence of fraud, mistake, or surprise at or prior to the time of the written instrument.[30]

C. Weight and Sufficiency — 1. In General. The courts are not entirely uniform as to what amount of evidence is sufficient to warrant reformation. In the language of some courts "a preponderance of the evidence is all that is required" as in any other civil action;[31] but many cases have held that a mere preponderance of the evidence is insufficient.[32] Still other courts require the proof to be established "beyond a reasonable doubt."[33] The majority of cases, however, seem to agree on the proposition that the evidence must be clear, convincing, and satisfactory.[34] What constitutes such clear, satisfactory, and sufficient

ant to plaintiff, evidence is admissible that there was a verbal misunderstanding that the demanded premises were not to be included in the lease, provided that defense is set up and reformation is asked. Murray *v.* Dake, 46 Cal. 644.

28. Newcomer *v.* Kline, 11 Gill & J. (Md.) 457, 37 Am. Dec. 74; Bush *v.* Tilley, 49 Barb. (N. Y.) 599.

Since the adoption of the code of civil procedure an equitable defense may be interposed to an action begun at law. Hence, in an action in ejectment for land claimed to have been conveyed by a sheriff's deed, parol evidence is admissible to show that the sheriff at the sale expressly excepted land out of a larger tract offered by him for sale, and the deed may be reformed. Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131 [*affirming* 23 Barb. 262].

29. Wheaton *v.* Wheaton, 9 Conn. 96.

30. Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

31. Fitch *v.* Vatter, 143 Mich. 568, 107 N. W. 106; Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31; Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911. See also Evidence, 17 Cyc. 775.

A mere preponderance is sufficient in a case where the oath of the defendant, to his answer, is waived. Fishell *v.* Bell, Clarke (N. Y.) 37.

Where the mistake is admitted, preponderance is sufficient.

Indiana.— Gray *v.* Woods, 4 Blackf. 432.

Michigan.— Tripp *v.* Hasceig, 20 Mich. 254, 2 Am. Rep. 388.

Missouri.— Bunse *v.* Agee, 47 Mo. 270.

Vermont.— Lyman *v.* Little, 15 Vt. 576; Griswold *v.* Smith, 10 Vt. 452.

England — *Compare* Randal *v.* Randal, 2 P. Wms. 464, 24 Eng. Reprint 816.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157.

32. *Arkansas.*— Turner *v.* Todd, 85 Ark. 62, 107 S. W. 181; Davenport *v.* Hudspeth, 81 Ark. 166, 98 S. W. 699; Tillar *v.* Wilson, 79 Ark. 256, 96 S. W. 381; Rector *v.* Collins, 46 Ark. 167, 55 Am. Rep. 571; Carnall *v.* Wilson, 14 Ark. 482.

Illinois.— Smith *v.* Rust, 112 Ill. App. 84.

Iowa.— Merchants Nat. Bank *v.* Murphy, 125 Iowa 607, 101 N. W. 441; Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60; Stroupe *v.* Bridger, (1902) 90 N. W. 704; Schrimper *v.* Chicago, etc., R. Co., 115 Iowa 35, 82 N. W. 916; Simpson *v.* Kane, 98 Iowa 271, 67 N. W. 247.

Kentucky.— Royer Wheel Co. *v.* Miller, 50 S. W. 62, 20 Ky. L. Rep. 1831.

Michigan.— Kinyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675.

Minnesota.— Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705.

Missouri.— Brown *v.* Gwin, 197 Mo. 499, 95 S. W. 208.

North Carolina.— Ely *v.* Early, 94 N. C. 1.

Ohio.—Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797; Potter *v.* Potter, 27 Ohio St. 84.

United States.—Northwestern Mut. L. Ins. Co. *v.* Nelson, 103 U. S. 544, 26 L. ed. 436

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157; and Evidence, 17 Cyc. 775.

33. *Kansas.*— Schaefer *v.* Mills, 69 Kan. 25, 76 Pac. 436; Brundige *v.* Blair, 43 Kan. 364, 23 Pac. 482; Bodwell *v.* Heaton, 40 Kan. 36, 18 Pac. 901; McCormick Harvesting Mach. Co. *v.* Hayes, 7 Kan. App. 141, 53 Pac. 70.

Kentucky.— Royer Wheel Co. *v.* Miller, 50 S. W. 62, 20 Ky. L. Rep. 1831.

Michigan.— Vary *v.* Shea, 36 Mich. 388.

Pennsylvania.— Highlands *v.* Philadelphia, etc., R. Co., 209 Pa. St. 286, 58 Atl. 560; Boyerstown Nat. Bank *v.* Hartman, 147 Pa. St. 558, 23 Atl. 842, 30 Am. St. Rep. 759.

Utah.— Deseret Nat. Bank *v.* Burton, 17 Utah 43, 53 Pac. 215.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157; and Evidence, 17 Cyc. 771 note 24 *et seq.*

Especially against an answer denying a mistake, it is required to have "the most demonstrative proof" according to Lyman *v.* United Ins. Co., 2 Johns. Ch. (N. Y.) 630 [*affirmed* in 17 Johns. 373].

34. *Alabama.*— Sellers *v.* Grace, 150 Ala. 181, 43 So. 716; Folmar *v.* Lehman-Durr, 147 Ala. 472, 41 So. 750; Hinton *v.* Citizens' Mut. Ins. Co., 63 Ala. 488; Alexander *v.* Caldwell, 55 Ala. 517.

Arkansas.— Mitchell Mfg. Co. *v.* Kempner, 84 Ark. 349, 105 S. W. 880; Varner *v.* Turner, 83 Ark. 131, 102 S. W. 1111; Arkansas Mut. F. Ins. Co. *v.* Witham, 82 Ark. 226, 101 S. W. 721; Davenport *v.* Hudspeth, 81 Ark. 166, 98 S. W. 699; Carnall *v.* Wilson, 14 Ark. 482.

evidence as to make the case go one way or the other, depends upon the character of the testimony, the coherency of the entire case, and the force of documents,

California.—Home, etc., Co. *v.* Freitas, 153 Cal. 680, 96 Pac. 308; Cox *v.* Woods, 67 Cal. 317, 7 Pac. 722.

Colorado.— Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121, 51 Pac. 170.

Connecticut.— Bishop *v.* Clay F. & M. Ins. Co., 49 Conn. 167.

Florida.— Indian River Mfg. Co. *v.* Wooten, 55 Fla. 745, 46 So. 185; Horne *v.* J. C. Turner Cypress Lumber Co., 55 Fla. 690, 45 So. 1016; Griffin *v.* Société Anonyme la Floridienne, 53 Fla. 801, 44 So. 342; Jacobs *v.* Parodi, 50 Fla. 541, 39 So. 833; Franklin *v.* Jones, 22 Fla. 526.

Georgia.— Wall *v.* Arrington, 13 Ga. 88; Ligon *v.* Rogers, 12 Ga. 281; Wyche *v.* Greene, 11 Ga. 159.

Idaho.— Houser *v.* Austin, 2 Ida. (Hasb.) 240, 10 Pac. 37.

Illinois.— Sapp *v.* Phelps, 92 Ill. 588; Moore *v.* Munn, 69 Ill. 591; Sutherland *v.* Sutherland, 69 Ill. 481; Miner *v.* Hess, 47 Ill. 170; Queen Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620; Fosler *v.* Miller, 132 Ill. App. 464; Gray *v.* Merchants Ins. Co., 113 Ill. App. 537; Smith *v.* Rust, 112 Ill. App. 84; Douglas *v.* Grant, 12 Ill. App. 273; Hamlon *v.* Sullivant, 11 Ill. App. 423.

Indiana.— Linn *v.* Barkey, 7 Ind. 69.

Iowa.— Bushert *v.* A. W. Stevenson Co., (1907) 113 N. W. 916; Pyne *v.* Knight, 130 Iowa 113, 106 N. W. 505; Wilcox *v.* Swecker, 129 Iowa 151, 105 N. W. 392; Bowman *v.* Besley, 122 Iowa 42, 97 N. W. 60; Wold *v.* Newgard, (1903) 94 N. W. 859; Jurgensen *v.* Carlsen, 97 Iowa 627, 66 N. W. 877; Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14; Fritzler *v.* Robinson, 70 Iowa 500, 31 N. W. 61; Cummins *v.* Monteith, 61 Iowa 541, 16 N. W. 591; Wachendorf *v.* Lancaster, 61 Iowa 509, 14 N. W. 316, 16 N. W. 533; Clute *v.* Frasier, 58 Iowa 268, 12 N. W. 327; Strayer *v.* Stone, 47 Iowa 333; Tufts *v.* Larned, 27 Iowa 330.

Kentucky.— Morgan *v.* Combs, 111 S. W. 294, 33 Ky. L. Rep. 817, 108 S. W. 272, 32 Ky. L. Rep. 1205; Fuson *v.* Chestnut, 109 S. W. 1192, 33 Ky. L. Rep. 249; Crabtree *v.* Sisk, 99 S. W. 268, 30 Ky. L. Rep. 572, 101 S. W. 886, 31 Ky. L. Rep. 206; French *v.* Asher Lumber Co., (1897) 41 S. W. 261.

Maryland.— Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273; Coggins *v.* Carey, 106 Md. 204, 66 Atl. 673, 124 Am. St. Rep. 468, 10 L. R. A. N. S. 1191; Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024; Ellinger *v.* Crowl, 17 Md. 361; National F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289.

Massachusetts.— Sawyer *v.* Hovey, 3 Allen 331, 81 Am. Dec. 659.

Michigan.— Kinyon *v.* Cunningham, 146 Mich. 430, 109 N. W. 675; Case *v.* Peters, 20 Mich. 298.

Minnesota.— Fritz *v.* Fritz, 94 Minn. 264, 102 N. W. 705; Mikiska *v.* Mikiska, 90 Minn. 258, 95 N. W. 910; Humphreys *v.* Shellenberger, 89 Minn. 327, 94 N. W. 1083; Wall *v.* Meilke, 89 Minn. 232, 94 N. W. 688; Guernsey *v.* American Ins. Co., 17 Minn. 104.

Mississippi.— Dochterman *v.* Marshall, 92 Miss. 747, 46 So. 542; Jones *v.* Jones, 88 Miss. 784, 41 So. 373; Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

Missouri.— Moran Bolt, etc., Co. *v.* St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Cunningham *v.* Edsall, 200 Mo. 192, 98 S. W. 545; Sweet *v.* Owens, 109 Mo. 1, 18 S. W. 928; Turner *v.* Shaw, 96 Mo. 22, 8 S. W. 897, 9 Am. St. Rep. 319; Zeilda Forsee Investment Co. *v.* Ozenberger, 132 Mo. App. 409, 112 S. W. 22; Meredith *v.* Holmes, 105 Mo. App. 343, 80 S. W. 61; Downing *v.* McHugh, 3 Mo. App. 594.

Nebraska.— Baker *v.* Montgomery, 78 Nebr. 98, 110 N. W. 695; Topping *v.* Jeanette, 64 Nebr. 834, 90 N. W. 911.

New Hampshire.— Tilton *v.* Tilton, 9 N. H. 385.

New Jersey.— Seitz Brewing Co. *v.* Ayres, 60 N. J. Eq. 190, 46 Atl. 535; Rowley *v.* Flannelly, 30 N. J. Eq. 612; Flaacke *v.* Jersey City, 28 N. J. Eq. 110; Vreeland *v.* Bramhall, 28 N. J. Eq. 85; Graham *v.* Berryman, 19 N. J. Eq. 29.

New York.— Southard *v.* Curley, 134 N. Y. 148, 31 N. E. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561; Ford *v.* Joyce, 78 N. Y. 618; White *v.* Williams, 48 Barb. 222; Pennell *v.* Wilson, 2 Rob. 505; Roussel *v.* Lux, 39 Misc. 508, 80 N. Y. Suppl. 341; Sternbach *v.* Friedman, 23 Misc. 173, 50 N. Y. Suppl. 1025; Curtis *v.* Giles, 7 Misc. 590, 28 N. Y. Suppl. 489; Humphreys *v.* Hurtt, 50 How. Pr. 291; Lyman *v.* United Ins. Co., 17 Johns. 373.

North Carolina.— Giles *v.* Hunter, 103 N. C. 194, 9 S. E. 549.

Ohio.— Stewart *v.* Gordon, 60 Ohio St. 170, 53 N. E. 797; Markey *v.* Waldo, 18 Ohio Cir. Ct. 849, 9 Ohio Cir. Dec. 762; Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Oregon.—Smith *v.* Interior Warehouse Co., (1908) 94 Pac. 508, 95 Pac. 499; Bower *v.* Bowser, 49 Oreg. 182, 88 Pac. 1104; Stein *v.* Phillips, 47 Oreg. 545, 84 Pac. 793; Newsom *v.* Greenwood, 4 Oreg. 119; Shively *v.* Welch, 2 Oreg. 288.

Pennsylvania.— Graham *v.* Carnegie Steel Co., 217 Pa. St. 34, 66 Atl. 103; Thayer *v.* Seep, 168 Pa. St. 414, 31 Atl. 1072; Sylvius *v.* Kosek, 117 Pa. St. 67, 11 Atl. 392, 2 Am. St. Rep. 645; Snyder *v.* Phillips, 25 Pa. Super. Ct. 648.

South Dakota.— Tossini *v.* Donahoe, (1908) 117 N. W. 148.

Tennessee.—Eatherly *v.* Eatherly, 1 Coldw 461, 78 Am. Dec. 499; Rogers *v.* Smith, (Ch. App. 1898) 48 S. W. 700; Ferring *v.* Fleischman, (Ch. App. 1896) 39 S. W. 19.

Texas.—Abbott *v.* International Bldg., etc., Assoc., 86 Tex. 467, 25 S. W. 620; Waco Tap R. Co. *v.* Shirley, 45 Tex. 355.

circumstances, and facts introduced.[35] There is no ground to reform where proof

Vermont.— Abbott *v.* Flint, 78 Vt. 274, 62 Atl. 721.

West Virginia.—Isner *v.* Nydegger, 63 W. Va. 677, 60 S. E. 793; Smith *v.* Owens, 63 W. Va. 60, 59 S. E. 762; Koen *v.* Kerns, 47 W. Va. 575, 35 S. E. 902; Jarrell *v.* Jarrell, 27 W. Va. 743.

Wisconsin.— Harter *v.* Christoph, 32 Wis. 245; Newton *v.* Holley, 6 Wis. 592.

Wyoming.— Stoll *v.* Nagle, 15 Wyo. 86, 86 Pac. 26.

United States.— Western Loan, etc., Co. *v.* Thibodeau, 159 Fed. 370, 86 C. C. A. 370; Dean *v.* Equitable F. Ins. Co., 7 Fed. Cas. No. 3,705, 4 Cliff. 575.

England.— Bradford *v.* Romney, 30 Beav. 431, 8 Jur. N. S. 403, 31 L. J. Ch. 497, 6 L. T. Rep. N. S. 208, 10 Wkly. Rep. 414, 54 Eng. Reprint 956; Naylor *v.* Wright, 3 Jur. N. S. 1090, 5 Wkly. Rep. 770; Rooke *v.* Kensington, 2 Jur. N. S. 755, 2 Kay & J. 753, 25 L. J. Ch. 795, 4 Wkly. Rep. 829, 69 Eng. Reprint 986; Breadalbane *v.* Chandos, 7 L. J. Ch. 28, 2 Myl. & C. 711, 14 Eng. Ch. 711, 40 Eng. Reprint 811.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157; and EVIDENCE, 17 Cyc. 775.

Another statement of rule.—"When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act upon the conviction," is the expression of the rule in Leitensdorfer *v.* Delphy, 15 Mo. 160, 167, 55 Am. Dec. 137.

35. *Alabama.*— Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911; Hough *v.* Smith, 132 Ala. 204, 31 So. 500; Moore *v.* Tate, 114 Ala. 582, 21 So. 820; Burnell *v.* Morris, 106 Ala. 349, 18 So. 82; Rumbly *v.* Stainton, 24 Ala. 712.

Arkansas.— Phœnix Ins. Co. *v.* State, 76 Ark. 180, 88 S. W. 917; Black *v.* Baskins, 75 Ark. 382, 87 S. W. 647; McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52.

California.— Busey *v.* Moraga, 130 Cal. 586, 62 Pac. 1081; Choate *v.* Hyde, 129 Cal. 580, 62 Pac. 118; Capelli *v.* Dondero, 123 Cal. 324, 55 Pac. 1057; Giselman *v.* Starr, 106 Cal. 651, 40 Pac. 8; Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Georgia.— Caudell *v.* Caudell, 127 Ga. 1, 55 S. E. 1028.

Illinois.— Rundle *v.* Bohrer, 222 Ill. 475, 78 N. E. 831; Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58; Rexroat *v.* Vaughn, 181 Ill. 167, 54 N. E. 917; Harms *v.* Coryell, 177 Ill. 496, 53 N. E. 87; Schwass *v.* Hershey, 125 Ill. 653, 18 N. E. 272; Goltra *v.* Sanasack, 53 Ill. 456; Queen Ins. Co. *v.* John Spry Lumber Co., 138 Ill. App. 620.

Indiana.— Habbe *v.* Viele, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1; Wieneke *v.* Deputy, 31 Ind. App. 631, 68 N. E. 921.

Iowa.— Kemmerer *v.* Owens, 91 Iowa 737, 60 N. W. 36; Smith *v.* Watson, 88 Iowa 73, 55 N. W. 68; Eggspieler *v.* Nockles, 58 Iowa 649, 12 N. W. 708.

Kansas.— Rice *v.* Poynter, 15 Kan. 263.

Kentucky.— Swinebroad *v.* Wood, 123 Ky. 664, 97 S. W. 25, 29 Ky. L. Rep. 1202; Moye *v.* Lane, (1889) 12 S. W. 154; Karl *v.* Conner, 97 S. W. 1111, 30 Ky. L. Rep. 238; Coleman *v.* Illinois L. Ins. Co., 82 S. W. 616, 26 Ky. L. Rep. 900; Hutchinson *v.* Nichols, 53 S. W. 661, 21 Ky. L. Rep. 949; Christian *v.* Rose, 22 S. W. 553, 15 Ky. L. Rep. 145.

Louisiana.— Ker *v.* Evershed, 41 La. Ann. 15, 6 So. 566.

Maine.— Strout *v.* Lewis, 104 Me. 65, 71 Atl. 137; Perry *v.* Knight, 85 Me. 184, 27 Atl. 96; Linscott *v.* Linscott, 83 Me. 384, 22 Atl. 253.

Maryland.—Atlantic, etc., Consol. Coal Co. *v.* Maryland Coal Co., 62 Md. 135; Coale *v.* Merryman, 35 Md. 382; Showman *v.* Miller, 6 Md. 479.

Massachusetts.— German-American Ins. Co. *v.* Davis, 131 Mass. 316.

Michigan.— Fitch *v.* Vatter, 143 Mich. 568, 107 N. W. 106; Newland *v.* Bellevue First Baptist Church Soc., 137 Mich. 335, 100 N. W. 612; Johnson *v.* Wilson, 111 Mich. 114, 69 N. W. 149; Fero *v.* H. M. Loud, etc., Lumber Co., 101 Mich. 310, 59 N. W. 603; Osterhout, etc., Lumber Co. *v.* Rice, 93 Mich. 353, 53 N. W. 540; Gordon *v.* McGinnis, 92 Mich. 97, 52 N. W. 455; Strickland *v.* Barber, 76 Mich. 310, 43 N. W. 449; Damm *v.* Moon, 48 Mich. 510, 12 N. W. 679; Kinyon *v.* Young, 44 Mich. 339, 6 N. W. 835.

Minnesota.— Kelly *v.* Citizens Mut. F. Assoc., 96 Minn. 477, 105 N. W. 675; Mikiska *v.* Mikiska, 90 Minn. 258, 95 N. W. 910; Diebold *v.* Ferch, 81 Minn. 53, 83 N. W. 489.

Mississippi.— Miles *v.* Miles, 84 Miss. 624, 37 So. 112; Hawkins *v.* Blair, (1904) 36 So. 246; Crofton *v.* New South Bldg., etc., Assoc., 77 Miss. 166, 26 So. 362.

Missouri.— Williamson *v.* Brown, 195 Mo. 313, 93 S. W. 791; Griffin *v.* Miller, 188 Mo. 327, 87 S. W. 455; Davidson *v.* Mayhew, 169 Mo. 258, 68 S. W. 1031; Parker *v.* Vanhoozer, 142 Mo. 621, 44 S. W. 728; Fanning *v.* Doan, 139 Mo. 392, 41 S. W. 742; Harding *v.* Wright, 138 Mo. 11, 39 S. W. 456; Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31.

Nebraska.— Blair *v.* Kingman Implement Co., (1908) 117 N. W. 773; Grand View Bldg. Assoc. *v.* Northern Assur. Co., 73 Nebr. 149, 102 N. W. 246; Nebraska L. & T. Co. *v.* Ignowski, 54 Nebr. 398, 74 N. W. 852; Hale *v.* Young, 24 Nebr. 464, 39 N. W. 406.

New Jersey.— Anderson *v.* Anderson Food Co., 66 N. J. Eq. 209, 57 Atl. 489; Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692; Dougherty *v.* Greenwich Ins. Co., (Ch. 1895) 33 Atl. 295; Wanner *v.* Sisson, 29 N. J. Eq. 141; Flaacke *v.* Jersey City, 28 N. J. Eq. 110; Loss *v.* Obry, 22 N. J. Eq. 52.

New York.— Jamaica Sav. Bank *v.* Taylor, 72 N. Y. App. Div. 567, 76 N. Y. Suppl. 790; Everett *v.* Jones, 14 N. Y. Suppl. 395; Dunworth *v.* Dunworth, 13 N. Y. Suppl. 489; Stryker *v.* Schuyler, 3 N. Y. Suppl. 513.

North Carolina.— Condor *v.* Secrest, 149

of the mistake is wanting.[36] The evidence should also show in what the mistake

N. C. 201, 62 S. E. 921; Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744; Lehew *v.* Hewett, 138 N. C. 6, 50 S. E. 459; Helms *v.* Helms, 135 N. C. 164, 47 S. E. 415, 137 N. C. 206, 49 S. E. 110; Southern Finishing, etc., Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681; Baker *v.* Mitchell, 123 N. C. 337, 31 S. E. 700.

Ohio.— Elstner *v.* Cincinnati Equitable Ins. Co., 1 Disn. 412, 12 Ohio Dec. (Reprint) 703; Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367.

Oregon.— Bower *v.* Bowser, 49 Oreg. 182, 88 Pac. 1104; Coughanour *v.* Hutchinson, 41 Oreg. 419, 69 Pac. 68; Osborn *v.* Ketchum, 25 Oreg. 352, 35 Pac. 972; Epstein *v.* State Ins. Co., 21 Oreg. 179, 27 Pac. 1045.

Pennsylvania.— Highlands *v.* Philadelphia, etc., R. Co., 209 Pa. St. 286, 58 Atl. 560; Williamson *v.* Carpenter, 205 Pa. St. 164, 54 Atl. 718; Martinsburg Bank *v.* Central Pennsylvania Tel., etc., Co., 150 Pa. St. 36, 24 Atl. 754; Mifflin County Nat. Bank *v.* Thompson, 144 Pa. St. 393, 22 Atl. 714; Breneiser *v.* Davis, 141 Pa. St. 85, 21 Atl. 508; Hollenback's Appeal, 121 Pa. St. 322, 15 Atl. 616; Ahlborn *v.* Wolff, 118 Pa. St. 242, 11 Atl. 799.

South Carolina.— Sullivan *v.* Latimer, 38 S. C. 417, 17 S. E. 221.

Tennessee.— Rogers *v.* Smith, (Ch. App. 1898) 48 S. W. 700.

Texas.— Laufer *v.* Moppins, 44 Tex. Civ. App. 472, 99 S. W. 109; Galloway *v.* Kerr, (Civ. App. 1901) 63 S. W. 180 [*reversed* on other grounds in 94 Tex. 641, 64 S. W. 858]; Westchester F. Ins. Co. *v.* Wagner, (Civ. App. 1896) 38 S. W. 214.

Utah.— Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897, 23 Utah 470, 65 Pac. 203.

Vermont.— Shattuck *v.* Gay, 45 Vt. 87.

Virginia.— Pulaski Iron Co. *v.* Palmer, 89 Va. 384, 16 S. E. 275; French *v.* Chapman, 88 Va. 317, 13 S. E. 479; Fudge *v.* Payne, 86 Va. 303, 10 S. E. 7.

Washington.— Preston *v.* Hill-Wilson Shingle Co., 50 Wash. 377, 97 Pac. 293; Clutter *v.* Strange, 41 Wash. 86, 82 Pac. 1028; Murdoch *v.* Leonard, 15 Wash. 142, 45 Pac. 751; Seward *v.* Spurgeon, 9 Wash. 74, 37 Pac. 303; Phillips *v.* Port Townsend Lodge No. 6 F. & A. M., 8 Wash. 529, 36 Pac. 476.

Wisconsin.— Scheuer *v.* Chloupek, 130 Wis. 72, 109 N. W. 1035; Meier *v.* Bell, 119 Wis. 482, 97 N. W. 186; Kropp *v.* Kropp, 97 Wis. 137, 72 N. W. 381; Meiswinkel *v.* St. Paul F. & M. Ins. Co., 75 Wis. 147, 43 N. W. 669, 6 L. R. A. 200; Wells *v.* Ogden, 30 Wis. 637.

Wyoming.— Stoll *v.* Nagle, 15 Wyo. 86, 86 Pac. 26.

United States.—Baldwin *v.* National Hedge, etc., Co., 73 Fed. 574, 19 C. C. A. 575 [*reversing* 67 Fed. 853]; Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862; Spare *v.* Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. 148; Turner *v.* Hart, 1 Fed. 295; North American Ins. Co. *v.* Whipple, 18 Fed. Cas. No. 10,315, 2 Biss. 418.

England.— Elwes *v.* Elwes, 3 De G. F. & J. 667, 7 Jur. N. S. 747, 4 L. T. Rep. N. S. 500, 9 Wkly. Rep. 820, 64 Eng. Ch. 521, 45 Eng. Reprint 1036; White *v.* Anderson, 1 Ir. Ch. 419; Rooke *v.* Kensington, 2 Jur. N. S. 755, 2 Kay & J. 753, 25 L. J. Ch. 795, 4 Wkly. Rep. 829, 69 Eng. Reprint 986; Alexander *v.* Crosbie, Ll. & G. t. S. 145, 11 Eng. Ch. 145.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157; and EVIDENCE, 17 Cyc. 775.

Contracts to support parents.— In these cases a more liberal scope as to evidence is given. See Kessel *v.* Kessel, 79 Wis. 289, 48 N. W. 382; Hartstein *v.* Hartstein, 74 Wis. 1, 41 N. W. 721.

36. *Arkansas.*— Goerke *v.* Rodgers, 75 Ark. 72, 86 S. W. 837.

Georgia.— Caudell *v.* Caudell, 127 Ga. 1, 55 S. E. 1028; Bell *v.* Americus, etc., R. Co., 76 Ga. 754.

Illinois.— Crilly *v.* Chicago Bd. of Education, 54 Ill. App. 371.

Indiana.— Fox *v.* Allensville, etc., Turnpike Co., 46 Ind. 31.

Iowa.— Nicholson *v.* Aney, 127 Iowa 278, 103 N. W. 201; Breja *v.* Pryne, 94 Iowa 755, 64 N. W. 669; Chicago Title, etc., Co. *v.* Smyth, 94 Iowa 401, 62 N. W. 792; George *v.* Howard, 56 Iowa 646, 10 N. W. 212; Ritter *v.* Doerr, 25 Iowa 121.

Kentucky.— Long *v.* Long, 15 S. W. 853, 12 Ky. L. Rep. 883.

Maine.— Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166; Fessenden *v.* Ockington, 74 Me. 123.

Maryland.— Conner *v.* Groh, 90 Md. 674, 45 Atl. 1024; McElderry *v.* Shipley, 2 Md. 25, 56 Am. Dec. 703.

Massachusetts.— Whitworth *v.* Lowell, 178 Mass. 43, 59 N. E. 760.

Missouri.— Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451; Robinson *v.* Nolan, 152 Mo. 560, 54 S. W. 469; Scheer *v.* Scheer, 148 Mo. 447, 50 S. W. 111; Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108.

Nebraska.— Beach *v.* Reed, 55 Nebr. 605, 76 N. W. 22.

New York.— Potter *v.* Greenwich, 92 N. Y. 662 [*affirming* 26 Hun 326]; Husted *v.* Van Ness, 1 N. Y. App. Div. 120, 36 N. Y. Suppl. 1043; Roberts *v.* Derby, 68 Hun 299, 23 N. Y. Suppl. 34; Herrick *v.* Starkweather, 54 Hun 532, 8 N. Y. Suppl. 145; Hirschbach *v.* Schmalz, 3 Silv. Sup. 554, 7 N. Y. Suppl. 377.

North Carolina.— Ray *v.* Durham County, 110 N. C. 169, 14 S. E. 646.

Ohio.— Miller *v.* Milligan, 6 Ohio Dec. (Reprint) 1000, 9 Am. L. Rec. 419; Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Pennsylvania.— Bierman *v.* Lebanon Valley College, 20 Pa. Super. Ct. 133.

Tennessee.— Gholson *v.* Finney, (Ch. App. 1898) 46 S. W. 345.

West Virginia.— Null *v.* Elliott, 52 W. Va. 229, 43 S. E. 173.

United States.— Shipman *v.* District of Columbia, 119 U. S. 148, 704, 7 S. Ct. 134, 30 L. ed. 337; Sharp *v.* Behr, 117 Fed. 864;

consists and that it was mutual.[37] The averments of grounds for reformation may not be supported by the proof [38] or the defects may be shown to have been impliedly understood [39] or intentional.[40] The denial by defendant of the existence of mutual mistake is not sufficient to defeat the claim of the party, although in such case evidence of mutuality must be stronger.[41]

2. CONFLICT OF EVIDENCE. Where the proof is confused, conflicting, and contradictory, relief will not be granted,[42] except the mistake appear clearly and positively in spite of the conflict and justice requires correction.[43]

Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537. See Thallmann *v.* Thomas, 111 Fed. 277, 49 C. C. A. 317, *dictum*.

England.— Bonhote *v.* Henderson, [1895] 1 Ch. 742, 64 L. J. Ch. 556, 72 L. T. Rep. N. S. 556, 13 Reports 523, 43 Wkly. Rep. 502 [*affirmed* in [1895] 2 Ch. 202, 72 L. T. Rep. N. S. 814, 13 Reports 529 note, 43 Wkly. Rep. 580]; Lloyd *v.* Cocker, 19 Beav. 140, 1 Jur. N. S. 174, 24 L. J. Ch. 84, 52 Eng. Reprint 302; Fowler *v.* Fowler, 4 De G. & J. 250, 61 Eng. Ch. 196, 45 Eng. Reprint 97; Daniel *v.* Arkwright, 2 Hem. & M. 95, 10 Jur. N. S. 764, 11 L. T. Rep. N. S. 18, 4 New Rep. 418, 71 Eng. Reprint 396.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157; and EVIDENCE, 17 Cyc. 775.

37. Hochstein *v.* Berghauser, 123 Cal. 681, 56 Pac. 547; White *v.* Williams, 48 Barb. (N. Y.) 222; Bower *v.* Bowser, 49 Oreg. 182, 88 Pac. 1104; Kleinsorge *v.* Rohse, 25 Oreg. 51, 34 Pac. 874; Spare *v.* Home Mut. Ins. Co., 19 Fed. 14, 9 Sawy. 148.

To show the mutuality of a mistake in a written instrument sufficient to authorize equity to reform it, the agreement preceding the written instrument must be shown. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. 1099.

38. Craven *v.* Butterfield, 80 Ind. 503; Nagel *v.* Schneider, 83 Mich. 407, 47 N. W. 318.

39. Roundy *v.* Kent, 75 Iowa 662, 37 N. W. 146.

40. Leonard *v.* Wills, 24 Kan. 231.

41. Nevius *v.* Dunlap, 33 N. Y. 676; Fulton *v.* Colwell, 112 Fed. 831, 50 C. C. A. 537. See also American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

42. *Alabama.*— Hough *v.* Smith, 132 Ala. 204, 31 So. 500; Lockhart *v.* Cameron, 29 Ala. 355.

Arkansas.— Marquette Timber Co. *v.* Chas. T. Abeles Co., 81 Ark. 420, 99 S. W. 685; Webb *v.* Nease, 66 Ark. 155, 49 S. W. 1081.

Illinois.— Goltra *v.* Sanasack, 53 Ill. 456.

Iowa.— Chapman *v.* Dunwell, 115 Iowa 533, 88 N. W. 1067; Hoyer *v.* King, 101 Iowa 363, 70 N. W. 695; Des Moines County Agricultural Soc. *v.* Tubbessing, 87 Iowa 138, 54 N. W. 68; Stewart *v.* McArthur, 77 Iowa 162, 41 N. W. 604.

Kentucky.— Coleman *v.* Illinois L. Ins. Co., 82 S. W. 616, 26 Ky. L. Rep. 900. *Compare* Wathen *v.* Lee, 8 Ky. L. Rep. 357.

Maine.— Linscott *v.* Linscott, 83 Me. 384, 22 Atl. 253.

Missouri.— Miller *v.* St. Louis, etc., R. Co., 162 Mo. 424, 63 S. W. 85; Bartlett *v.* Brown, 121 Mo. 353, 25 S. W. 1108; Bobb *v.* Bobb, 7 Mo. App. 501.

New Jersey.— Green *v.* Stone, 54 N. J. Eq. 387, 34 Atl. 1099, 55 Am. St. Rep. 577.

New York.— Drachler *v.* Foote, 88 N. Y. App. Div. 270, 84 N. Y. Suppl. 977; New York Ice Co. *v.* North Western Ins. Co., 31 Barb. 72, 10 Abb. Pr. 34, 20 How. Pr. 424.

Oregon.— Epstein *v.* State Ins. Co., 21 Oreg. 179, 27 Pac. 1045.

Pennsylvania.— Kennett Square Nat. Bank *v.* Shaw, 218 Pa. St. 612, 67 Atl. 875; Smith *v.* Ewing, 151 Pa. St. 256, 25 Atl. 62; Mifflin County Nat. Bank *v.* Thompson, 144 Pa. St. 393, 22 Atl. 714; Thompson *v.* Christie, 138 Pa. St. 230, 20 Atl. 934, 11 L. R. A. 236; Ahlborn *v.* Wolff, 118 Pa. St. 242, 11 Atl. 799; Replogle *v.* Singer, 19 Pa. Super. Ct. 442; Kenny *v.* McClellan, 7 Phila. 655.

Washington.— Heffron *v.* Fogel, 40 Wash. 698, 82 Pac. 1003; Seward *v.* Spurgeon, 9 Wash. 74, 37 Pac. 303.

United States.— Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157.

Unsupported oath.— If there is but the unsupported oath of one of the parties to an instrument on the one side, and the opposing contradictory oath of the other party, together with the words of the instrument on the other side, such unsupported oath is not sufficient to justify reformation, and the evidence should not be submitted to the jury. Jackson *v.* Payne, 114 Pa. St. 67, 6 Atl. 340.

The uncorroborated testimony of a single witness has also been held insufficient. *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943, especially where the writing is corroborated by defendant's testimony and that of one witness. Gehres *v.* Crawford, 6 Pa. Cas. 378, 9 Atl. 508.

That the case should not be submitted to the jury without binding instructions as to its insufficiency, if the evidence is not such as would move a chancellor to reform the contract, is the ruling in Phillips *v.* Meily, 106 Pa. St. 536.

The failure of a complainant to call as a witness a disinterested party who was present and took part in the original negotiations weighs against his claim when the testimony is conflicting. Pope *v.* Hoopes, 84 Fed. 927.

43. *Arkansas.*— McGuigan *v.* Gaines, 71 Ark. 614, 77 S. W. 52.

California.— Home, etc., Co. *v.* Freitas, 153 Cal. 680, 96 Pac. 308; Sullivan *v.* Moorhead, 99 Cal. 157, 33 Pac. 796; Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85; Hutch-

3. CORROBORATION — a. In General. There is no absolute rule that in no case can a decree for reformation be made upon the uncorroborated evidence of an interested party; but it is the duty of the court to act upon such evidence with extreme caution.[44] Unless the circumstances are unusual, the complainant should be corroborated by the testimony of at least one competent witness besides himself,[45] although reformation has been granted on the uncorroborated, but uncontradicted, evidence of one party,[46] or by facts and circumstances which confirm and support his statement.[47] Thus, it has been held, inability to read or

inson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

Maryland.— Coale *v.* Merryman, 35 Md. 382.

Missouri.— Harding *v.* Wright, 138 Mo. 11, 39 S. W. 456.

New York.— Jenkins *v.* Lefaiver, 9 N. Y. Suppl. 19.

Pennsylvania.—Clement's Appeal, 2 Pennyp. 313.

Texas.— Ætna Ins. Co. *v.* Brannon, (Civ. App. 1906) 91 S. W. 614; Galloway *v.* Kerr, (Civ. App. 1901) 63 S. W. 180 [*reversed* on other grounds in 94 Tex. 641, 64 S. W. 858].

United States.—Baldwin *v.* National Hedge, etc., Co., 73 Fed. 574, 19 C. C. A. 575.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157.

Testimony of the mortgagor that it was agreed that there should be designated as his homestead and excluded from his mortgage (the drawings of both of which were intrusted to the mortgagee) a certain number of acres, which included the land cultivated and used by him as a homestead, is sufficient, if believed, although denied by mortgagee, to authorize reformation for mistake. American Freehold Land Mortg. Co. *v.* Pace, 23 Tex. Civ. App. 222, 56 S. W. 377.

44. See Lovesy *v.* Smith, 15 Ch. D. 655, 49 L. J. Ch. 809, 43 L. T. Rep. N. S. 240, 28 Wkly. Rep. 979.

Voluntary settlement.— The court will not hesitate to rectify a voluntary settlement at the instance of the settlors, merely on their own evidence as to their intention, unsupported by other evidence such as written instructions. Bonhote *v.* Henderson, [1895] 1 Ch. 742, 64 L. J. Ch. 556, 72 L. T. Rep. N. S. 556, 13 Reports 523, 43 Wkly. Rep. 502 [*affirmed* in [1895] 2 Ch. 202, 72 L. T. Rep. N. S. 814, 13 Reports 529 note, 43 Wkly. Rep. 580].

45. *Arkansas.*— Marquette Timber Co. *v.* Chas. T. Abeles Co., 81 Ark. 420, 99 S. W. 685.

District of Columbia.— O'Connell *v.* Koob, 16 App. Cas. 161.

Indiana.— Hamilton County *v.* Owens, 138 Ind. 183, 37 N. E. 602.

Iowa.— Kemmerer *v.* Owens, 91 Iowa 737, 60 N. W. 36; West *v.* West, 90 Iowa 41, 57 N. W. 639.

Missouri.— Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451; Zeilda Forsee Inv. Co. *v.* Ozenberger, 132 Mo. App. 409, 112 S. W. 22.

Nebraska.— Hale *v.* Young, 24 Nebr. 464, 39 N. W. 406.

New York.— Moran *v.* McLarty, 75 N. Y. 25 [*affirming* 11 Hun 66]; Stryker *v.* Schuyler, 3 N. Y. Suppl. 513.

Pennsylvania.— *In re* Sutch, 201 Pa. St. 305, 50 Atl. 943.

Texas.— Jackson *v.* Martin, (Civ. App. 1903) 73 S. W. 832.

Vermont.— Shattuck *v.* Gay, 45 Vt. 87.

Virginia.— French *v.* Chapman, 88 Va. 317, 13 S. E. 479.

United States.— American Mortg. Co. *v.* O'Harra, 56 Fed. 278, 5 C. C. A. 502.

England.— Tomlinson *v.* Leigh, 11 Jur. N. S. 962, 13 L. T. Rep. N. S. 516, 14 Wkly. Rep. 121.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 157.

46. Hanley *v.* Pearson, 13 Ch. D. 545, 41 L. T. Rep. N. S. 673; Smith *v.* Iliffe, L. R. 20 Eq. 666, 44 L. J. Ch. 755, 33 L. T. Rep. N. S. 200, 23 Wkly. Rep. 851; Cook *v.* Fearn, 48 L. J. Ch. 63, 39 L. T. Rep. N. S. 348, 27 Wkly. Rep. 212.

Where a bill was filed by a married woman against her trustee and certain judgment creditors of her husband to reform a deed alleged to have been intended to convey the property in trust for her sole and separate use, and to appoint another trustee, and decrees *pro confesso* were taken against all the defendants, except the trustee, who answered that he knew nothing about the alleged mistake, the clear and direct testimony of one witness was sufficient to authorize reformation. Godwin *v.* Yonge, 22 Ala. 553.

47. *Alabama.*— Keith *v.* Woodruff, 136 Ala. 443, 34 So. 911.

Illinois.— Shay *v.* Pettes, 35 Ill. 360.

Kentucky.— Hutchinson *v.* Nichols, 53 S. W. 661, 21 Ky. L. Rep. 949.

Maine.— Perry *v.* Knight, 85 Me. 184, 27 Atl. 96.

Michigan.— Damm *v.* Moon, 48 Mich. 510, 12 N. W. 679.

New York.— Stryker *v.* Schuyler, 3 N. Y. Suppl. 513.

Pennsylvania.— North, etc., Branch R. Co. *v.* Swank, 14 Wkly. Notes Cas. 444.

South Dakota.— Littlejohn *v.* County Line Creamery Co., 14 S. D. 312, 85 N. W. 588.

See 42 Cent. Dig. tit. "Reformation of Instruments." § 157.

The evidence of one party need not necessarily be corroborated by another person. His testimony may be corroborated by documentary evidence, such as letters and memoranda. Jenner *v.* Jenner, 2 Giffard 232, 6 Jur. N. S. 669, 8 Wkly. Rep. 537, 66 Eng. Reprint 97 [*affirmed* in 2 De G. F. & J. 359, 6 Jur. N. S.

write,[48] experience in business,[49] and professional advice [50] are circumstances to be considered in weighing the testimony, for such circumstances will corroborate or contradict the testimony of the principal witnesses. Even acting on the terms of the written instrument has been held to be a controlling circumstance in favor of the validity of such instrument.[51]

b. By the Instrument in Suit. Where the mistake to be reformed consists in a defect in execution or acknowledgment, it may appear from the rest of the instrument. Thus, the terms of the instrument may show that a seal was required; and such a circumstance will corroborate a witness testifying to the omission by mistake.[52] But where there is a square contradiction with no other corroborating circumstances to throw light on the material facts, a decree against reformation is proper.[53]

4. Lapse of Time. Especial caution ought to be exercised in altering the provisions of a written instrument where it has been in force a long time before an attempt is made to reform it, for the circumstances attending the transaction may have faded from the memory, and a change in conditions may render a change in the terms of the instrument of vital importance to the parties thereto. For these reasons where reformation is sought after many years, equity requires a mistake to be made out by the most explicit and unequivocal proof, and often beyond a reasonable doubt.[54] The mere lapse of time, however, will not operate

1314, 30 L. J. Ch. 201, 3 L. T. Rep. N. S. 488, 9 Wkly. Rep. 109, 63 Eng. Ch. 280, 45 Eng. Reprint 660]; Milner *v.* Milner, 8 Ir. Eq. 488; Gilchrist *v.* Herbert, 26 L. T. Rep. N. S. 381, 20 Wkly. Rep. 348. *Compare* White *v.* Anderson, 1 Ir. Ch. 419, where a memorandum of instructions as to the preparation of an antenuptial settlement was not sufficient. So a recital in a deed taken in connection with an admission was held to justify reformation. Reid *v.* Cook, 88 Iowa 717, 54 N. W. 353; Harris *v.* Calmes, 100 Ky. 272, 38 S. W. 6, 18 Ky. L. Rep. 754.

48. Wilson *v.* Moriarty, 88 Cal. 207, 26 Pac. 85; Jenkins *v.* Cohen, 138 Ill. 634, 28 N. E. 792 [*affirming* 37 Ill. App. 256]. *Compare* Rensink *v.* Wiggers, 99 Iowa 39, 68 N. W. 569, and Kessel *v.* Kessel, 79 Wis. 289, 48 N. W. 382.

49. Vaughn *v.* Digman, 43 S. W. 251, 19 Ky. L. Rep. 1340; Vary *v.* Shea, 36 Mich. 388; Whelen *v.* Osgoodby, 62 N. J. Eq. 571, 50 Atl. 692.

50. Chapman *v.* Dunwell, 115 Iowa 533, 88 N. W. 1067.

51. George *v.* Howard, 56 Iowa 646, 10 N. W. 212.

52. Sullivan *v.* Latimer, 38 S. C. 417, 17 S. E. 221.

A defective certificate of acknowledgment or mortgage was reformed on the testimony of the notary who acknowledged the deed, that he observed all the requisites to a valid acknowledgment, but made a mistake in attaching the defective certificate. Hutchinson *v.* Ainsworth, 73 Cal. 452, 15 Pac. 82, 2 Am. St. Rep. 823.

A deed concluding that the words, "I have hereunto set my hand and seal," and signed without a seal, was held to furnish on its face sufficient testimony that the seal was omitted from mere accident and that the instrument should be rectified. Colchester *v.* Culver, 29 Vt. 111. Likewise were the words "grant, bargain and sell" or their equivalents appeared in a deed which contained words of warranty, a seal was supplied without parol testimony. Michel *v.* Tinsley, 69 Mo. 442.

In Pennsylvania, the act of May 25, 1878, empowers the common pleas, when it is satisfactorily shown that "a certificate of acknowledgment defective in form was in fact really and properly acknowledged in due form of law," to make a decree reforming the certificate in accordance with the facts, and provide that the proceeding shall be by a bill in equity, as in other cases for the reformation of the written instrument. It was held that in an action to reform a certificate of acknowledgment of a mortgage by a married woman, which failed to show that the officer taking it made known to her the full contents of the mortgage, etc., where plaintiff alone testified to facts which would establish its validity, and the wife and husband squarely contradicted him, and there were no corroborating circumstances which threw light on the material facts, a decree for defendants was proper. Spencer *v.* Reese, 165 Pa. St. 158, 30 Atl. 722.

53. Hand *v.* Weidner, 151 Pa. St. 362, 25 Atl. 38.

54. *Georgia.*— Wyche *v.* Greene, 11 Ga. 159.

Illinois.— Nicoll *v.* Mason, 49 Ill. 358.

Iowa.— Logan First Presb. Church *v.* Logan, 77 Iowa 326, 42 N. W. 310.

Kentucky.— Yocum *v.* Foreman, 14 Bush 494.

Maryland.— Stiles *v.* Willis, 66 Md. 552, 8 Atl. 353; Keedy *v.* Nally, 63 Md. 311.

Michigan.— Harrington *v.* Brewer, 56 Mich. 301, 22 N. W. 813.

Missouri.— Bobb *v.* Bobb, 89 Mo. 411, 4 S. W. 511.

Ohio.— Whitney *v.* Denton, 7 Ohio Dec. (Reprint) 547, 3 Cinc. L. Bul. 870.

to deny relief, for circumstances may have evolved which corroborate the material testimony.[55] How much time must have elapsed in order to justify a higher standard of sufficiency of proof is for the good judgment of the court.[56]

XVI. Trial, Relief, Decree, and Appeal.

A. Trial or Hearing — 1. In General. Reformation being an action in equity, the trial or hearing must proceed according to the general rules of equity.[57]

2. Findings of Court. If the findings of the court are sufficient to support a decree, they are conclusive;[58] but if a special finding is outside of the issue, it is a mere nullity and can give no support to a conclusion of law based thereon.[59]

3. Trial by Jury — a. In General. The parties have no absolute right to a jury trial,[60] although in the exercise of its discretion the court may call to its aid the offices of a jury by framing issues of fact for the latter to decide.[61]

b. Where Equitable and Legal Causes Are Joined. Where a complaint contains two distinct causes of action, the one equitable for reformation of an instrument, and the other legal for recovery under the instrument, the correct practice

Pennsylvania.— Hunter's Estate, 147 Pa. St. 549, 23 Atl. 973; Bierman *v.* Lebanon Valley College, 20 Pa. Super. Ct. 133.

Virginia.— Persinger *v.* Chapman, 93 Va. 349, 25 S. E. 5.

United States.— Travelers' Ins. Co. *v.* Henderson, 69 Fed. 762, 16 C. C. A. 390.

England.— Bloomer *v.* Spittle, L. R. 13 Eq. 427, 41 L. J. Ch. 369, 26 L. T. Rep. N. S. 272, 20 Wkly. Rep. 435; Bentley *v.* Mackay, 31 Beav. 143, 54 Eng. Reprint 1092 [*affirmed* in 4 De G. F. & J. 279, 8 Jur. N. S. 1001, 7 L. T. Rep. N. S. 143, 10 Wkly. Rep. 873, 65 Eng. Ch. 216, 45 Eng. Reprint 1191].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 193.

Commenting on the use of parol evidence to rectify a mistake in a deed, the court said, in Durant *v.* Bacot, 15 N. J. Eq. 411, that conversation should not prevail over a deed itself, for "it would be substituting memory, in its frailest form, for the highest and most reliable evidence known to the law."

The death of parties interested before suit to reform is brought makes it necessary to adduce the strongest evidence of the mistake. Hupsch *v.* Resch, 45 N. J. Eq. 657, 18 Atl. 372; Campbell *v.* Foster, 2 Tenn. Ch. 402; Beaumont *v.* Branley, Turn. & R. 41, 12 Eng. Ch. 41, 37 Eng. Reprint 1009.

55. *Iowa.*— Logan First Presby. Church *v.* Logan, 77 Iowa 336, 42 N. W. 310.

Kentucky.— Miller *v.* Small, 10 S. W. 810, 10 Ky. L. Rep. 859.

New Jersey.— Dod *v.* Paul, 43 N. J. Eq. 302, 11 Atl. 817.

Ohio.— Skerrett *v.* Presbyterian Soc., 41 Ohio St. 606.

United States.— Kellogg *v.* Chapman, 30 Fed. 882.

56. It has been fixed as low as six years. Paulison *v.* Van Iderstine, 29 N. J. Eq. 594. *Compare* Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450, where the parties acted on the instrument two years before asking rectification. But on the other hand reformation has been decreed after fifty years have elapsed, the proof warranting it. Skerrett *v.* Presbyterian Soc., 41 Ohio St. 606.

57. See Equity, 16 Cyc. 407 *et seq.* See also *infra*, XVI, A, 2, 3.

58. Jenner *v.* Brooks, 77 Conn. 384, 59 Atl. 508.

Findings see Newton *v.* Hull, 90 Cal. 487, 27 Pac. 429; Walls *v.* State, 140 Ind. 16, 38 N. E. 177; Drummond *v.* Krebs, 8 Kan. App. 180, 55 Pac. 478.

Where a bill in equity praying for relief against a mistake in a deed was referred to a committee, who, on the hearing, received certain evidence of the allegations contained in the bill, the findings of such committee were held to be conclusive, and could not be reviewed by the court. Knapp *v.* White, 23 Conn. 529.

Findings by the court on motion.— Where defendant resisted an action to reform a mortgage on the ground that he had purchased the property in controversy without notice that it was intended to be included in the mortgage, and certain questions were submitted to the jury, but the question whether defendant was an innocent purchaser was not answered by them, the court had authority, on motion of plaintiff, to make findings on the testimony adduced, and to determine the question. Land Mortg. Bank of Northwestern America *v.* Nicholson, 24 Wash. 258, 64 Pac. 156.

59. Citizens' Nat. Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259.

Effect of inconsistent finding see Higgins *v.* Parsons, 65 Cal. 280, 3 Pac. 881.

60. Loftus *v.* Fischer, 113 Cal. 286, 45 Pac. 328; Gray *v.* Hornbeck, 31 Mo. 400; Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. 482; Ellsworth *v.* Holcomb, 28 Ohio St. 66. See also Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. (N. Y.) 72 [*affirmed* in 55 N. Y. 657], *dictum*. See also Juries, 24 Cyc. 117.

61. Ross *v.* New England Mut. Ins. Co., 120 Mass. 113; Kenny *v.* McClellan, 7 Phila. (Pa.) 655; Kammermeyer *v.* Hilz, 116 Wis. 313, 92 N. W. 1107.

Advisory action.— The action of the jury if revoked in such cases is only advisory in aid of the conscience of the court. Kenny *v.* McClellan, 7 Phila. (Pa.) 655.

is to try the equitable cause first, and the legal cause afterward.[62] Hence, if the action proceeds to trial by jury, without the equitable cause being specially ordered to be so tried, there is no submission of that cause to the jury, even though the parties did not object.[63]

c. Submission of Issues and Instructions. The issue of reformation generally must be sufficiently comprehensive,[64] and on trial by jury the issue should be clearly presented in the instructions.[65] There being no such thing as technical nonsuit in a strictly equitable action,[66] if a cause is being tried by a jury, the evidence should be submitted to it, if it shows even a tendency to make out a case.[67] But the evidence may be submitted with binding instructions as to its insufficiency [68] or with an instruction that to authorize a verdict for plaintiff the proof must be clear and strong.[69] The question of mutual mistake presenting an issue of fact, and not an issue of law,[70] its submission to the jury means that it shall

In Wisconsin the cause of action for reformation is for the trial by the court unless formally submitted to a jury in the manner prescribed by Rev. St. c. 132, § 6. Harrison *v.* Juneau Bank, 17 Wis. 340.

62. Guernsey *v.* American Ins. Co., 17 Minn. 104; New York Ice Co. *v.* Northwestern Ins. Co., 31 Barb. (N. Y.) 72, 10 Abb. Pr. 34, 20 How. Pr. 424; Cameron *v.* White, 74 Wis. 425, 43 N. W. 355, 5 L. R. A. 493; Hammel *v.* Queen Ins. Co., 50 Wis. 240, 6 N. W. 805. *Compare* Lestrade *v.* Barth, 19 Cal. 660.

Under N. Y. Code Civ. Proc. § 974, which provides that the trial of an issue raised by a counter-claim, wherein defendant demands affirmative relief, shall be in the same mode as if it arose in an action brought by defendant, defendant, in an action on an insurance policy, is entitled to have an equitable issue raised by his counter-claim, in which he asks for reformation of the policy, tried at the special term, before the trial at the circuit of the legal issue raised by the complaint and answer. Colville *v.* Chubb, 14 N. Y. Suppl. 433, 26 Abb. N. Cas. 372.

63. Harrison *v.* Juneau Bank, 17 Wis. 340.

64. See EQUITY, 16 Cyc. 416. See also cases cited *infra*, this note.

An issue was framed as to whether "plaintiff's testatrix and the defendant make an oral agreement prior to the execution of the deed whereby [she] was to buy and [he] to sell only what he owned east of the wall, and did they attempt to embody said agreement in said deed." The mistake was set up in defense to an action for breach of covenants in the deed. It was held that the issue, standing alone, would not support a verdict for defendant in that it did not state whether the land was to be described by metes and bounds in a deed containing the usual covenants of a warranty deed, or whether there was a misunderstanding as to the land to be conveyed. Page *v.* Higgins, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152.

The grantee of a deed not being entitled to have it corrected if it were a mere gratuity, and there being an issue whether defendant was under obligation to convey any lot, and instruction ignoring this, and making plaintiff's right depend solely on whether the parties were, at the time of the execution of the deed, under the impression that it conveyed other property is erroneous. Metcalfe *v.* Lowenstein, 35 Tex. Civ. App. 619, 81 S. W. 362. *Compare* Southern Finishing, etc., Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 681.

65. See Fitschen *v.* Thomas, 9 Mont. 52, 22 Pac. 450. See also cases cited *infra*, this note.

For a good instruction as to the quality and quantity of evidence required to support the issue see Schotte *v.* Meredith, 197 Pa. St. 496, 47 Atl. 844.

Instructions as to mistake see Wyche *v.* Green, 26 Ga. 415.

An instruction that a deed cannot be reformed, except on clear and convincing evidence of a mistake of the vendor and both the vendees, is not inconsistent with an instruction that both vendees need not have been present at the time the agreement of sale was made, if it appears that the vendee who was present was conducting the negotiation for the purchase, since in that case his actions would bind the other vendee as well as himself. Stafford *v.* Giles, 135 Pa. St. 411, 19 Atl. 1028.

The word "impression" is equivalent to that of "mistake" in an instruction stating that plaintiffs were entitled to a verdict, if the parties were at the time of the execution of the deed, under the "impression" that the deed described other property. Metcalfe *v.* Lowenstein, 35 Tex. Civ. App. 619, 81 S. W. 362.

66. Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507.

Where plaintiff's evidence failed to sustain the allegations of the complaint, plaintiff may, if he chooses, at the close of plaintiff's case, submit the cause to the court for decision. Morrison *v.* Jones, 31 Mont. 154, 77 Pac. 507.

67. Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744; Jones *v.* Warren, 134 N. C. 390, 46 S. E. 740.

68. Sylvius *v.* Kosek, 117 Pa. St. 67, 11 Atl. 392, 2 Am. St. Rep. 645.

69. Lehew *v.* Hewett, 130 N. C. 22, 40 S. E. 769. *Compare* Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290.

70. Tooley *v.* Chase, 26 Oreg. 600, 37 Pac. 908.

find the facts proved, and that it is for the court to say whether the facts found establish fraud or mutual mistake.[71]

d. Verdict. While the effect of a verdict of a jury is merely advisory,[72] it has been held that a general verdict is insufficient.[73]

B. Relief Awarded — 1. In General. If the pleadings and proof establish a right to correction the complaining party should be given all relief to which he may be entitled either at law or in equity.[74]

2. Based on the Pleadings and Proof. Relief is given in accordance with the allegations in the pleadings which are supported by cogent evidence, and the decree is based on the facts proved.[75] The case made out by the pleadings and the facts proved always determines a measure of relief which the court may award.[76]

3. Necessity of Performance of Conditions Precedent. If the equities of the case demand it, correction will not be decreed until necessary conditions precedent have been carried out.[77]

4. Extent and Form of Relief — a. In General. The form of granting relief is not material,[78] but the relief awarded should of course conform generally to the particular equities involved in the case under consideration.[79] Ordering the

71. Schettiger *v.* Hopple, 3 Grant (Pa.) 54.

72. Kenny *v.* McClellan, 7 Phila. (Pa.) 655.

73. See Equity, 16 Cyc. 422.

A verdict—"we, the jury, find for complainant, and recommend that the deed be reformed," without specifying what reformation shall be made, was held so uncertain that a new trial was ordered. Payne *v.* Elyea, 50 Ga. 395.

74. See cases cited *infra*, this note.

Illustration.—An old, infirm, and illiterate widow requested her brother-in-law to assist her in purchasing a home. A lot was found on which were two houses, but, as the price was too large, he agreed to take a half on which one of the houses was situated. He told her that a double privy vault and a stable near the center of the lot would be for the use of both. In reality the vault was about ten feet from the middle line, and entirely on his part, as was also the largest portion of the stable. He conducted all the negotiations and directed how the deed should be made out. Two deeds were executed, and the widow's deed was read in her presence. After they had been in possession for some time, he denied her the use of the vault, and pulled down the stable and sold the lumber. It was held that she was entitled to have quitclaimed to her so much of his part of the lot as would give her one half of the lot; she was likewise entitled to one half of the value of the timber taken from the stable. Murray *v.* Roach, 72 S. W. 807, 24 Ky. L. Rep. 2013.

For a further application of the principle where a full relief was given see Jones *v.* McNealy, 139 Ala. 379, 35 So. 1022, 101 Am. St. Rep. 38; Briegel *v.* Moeller, 82 Ill. 257; Hurst *v.* Beaver, 50 Mich. 612, 16 N. W. 165; Norris *v.* Hurd, Walk. (Mich.) 102; Sawyer *v.* Hanson, 48 Wis. 611, 4 N. W. 765.

That the mortgagor owned but an undivided interest in land was found by the court, and did not justify refusal of a decree of reformation, except on condition that the reform mortgage should show that it covered only the mortgagor's fractional interest. Jenkins *v.* Bailey, 75 Ark. 524, 87 S. W. 1180.

75. Goodrich *v.* Fogarty, 130 Iowa 223, 106 N. W. 616; Foster *v.* Schmeer, 15 Oreg. 363, 15 Pac. 626. See also Foster *v.* Winchester, 92 Ala. 497, 9 So. 83; Casady *v.* Woodbury County, 13 Iowa 113.

Relief not asked for.—A deed provided that defendant's creamery should be forfeited to plaintiff, the owner of the ground on which it was located, if defendant ceased to operate it during the proper season for operating the same. Defendant set up in answer that the deed did not express the agreement of the parties, and asked to have it reformed. It was error to correct the deed since no such relief was asked, and since it was not necessary to protect defendant's rights. Littlejohn *v.* County Line Creamery Co., 14 S. D. 312, 85 N. W. 588.

The decree must be within the issues see *infra*, XVI, C, 1.

76. Bourland *v.* Schulz, 39 Tex. Civ. App. 572, 87 S. W. 1167.

77. Champion *v.* Grand Rapids, etc., R. Co., 145 Mich. 676, 108 N. W. 1078.

The question of restoring parties to the status in quo is not involved where, by mutual mistake, land not intended to be conveyed is included, contrary to a prior agreement. Peacock *v.* Bethea, 151 Ala. 141, 43 So. 864.

78. See cases cited *infra*, notes 80–82.

79. See cases cited *infra*, this and note 80 *et seq.*

Reformation of a supersedeas bond should go no farther than to make it a complete statutory instrument unless there is evidence of an express agreement between the parties as to the conditions thereof. Nourse *v.* Weitz, 120 Iowa 708, 95 N. W. 251.

Under a prayer for the reformation of a conveyance the court is justified in requiring that the deed should be sealed, although plaintiff makes no claim that the deed is invalid, and although he has a good title by adverse possession. Jenner *v.* Brooks, 77 Conn. 384, 59 Atl. 508.

execution by a proper person [80] of a new instrument in lieu of and to take the place of the one sought to be reformed,[81] or the execution of sufficient releases,[82] may constitute a proper mode of granting relief.

b. Alternative Relief. If a bill is filed solely to correct a mistake in an instrument, and relief on that ground is refused, it will not be decreed on some other ground; [83] but where other relief is asked in the proceeding for reformation the rule is different.[84] Even if a plaintiff seeks to reform a contract, and recover on it as reformed, recovery may be had if the contract will support it, although there is no proof of right to reform.[85]

c. Additional or Incidental Relief.[86] Having acquired jurisdiction to reform an instrument, equity will retain it in order that full and proper relief may be granted,[87] although incidental relief has been denied when the remedy at law was

80. See cases cited *infra*, this note.

Defendant under supervision of the register may be directed to execute a new deed. Weathers *v.* Hill, 92 Ala. 492, 9 So. 412.

The grantor, or a commissioner appointed by the court, may be required to execute a proper deed. King *v.* Bales, 44 Ind. 219.

Where parties are under disability, or those who are able to convey refuse to do so, the court may direct a commissioner to execute the proper instruments for such parties. Vincent *v.* Collins, 32 S. W. 1096, 17 Ky. L. Rep. 920; Barnes *v.* Barnes, 15 S. W. 1, 12 Ky. L. Rep. 708.

81. Weathers *v.* Hill, 92 Ala. 492, 9 So. 412; Pierson *v.* Pierson, 5 Del. Ch. 11; Vincent *v.* Collins, 32 S. W. 1096, 17 Ky. L. Rep. 920; Barnes *v.* Barnes, 15 S. W. 1, 12 Ky. L. Rep. 708; Burr *v.* Hutchinson, 61 Me. 514. See also Read *v.* Cramer, 2 N. J. Eq. 277, 34 Am. Dec. 204.

Thus when a mistake in a deed has been reformed, the proper way to correct an incidental error in the record is to cause the new deed to be executed by the grantor or a commissioner, and then have such new deeds recorded and referred to by a note in the margin of the record of the old deed. Toops *v.* Snyder, 47 Ind. 91; King *v.* Bales, 44 Ind. 219.

If too large an estate has been conveyed by mistake, a reconveyance may be ordered. Pullen *v.* Mullen, 12 Leigh (Va.) 434.

82. Andrews *v.* Andrews, 81 Me. 337, 17 Atl. 166.

Mistake in the date of a certificate of record of a deed should be rectified, not by changing the certificate, but by compelling a release by those claiming on account of it. Hiatt *v.* Calloway, 7 B. Mon. (Ky.) 178.

In New Hampshire it is held that a reformation for mistake on account of a misdescription should be granted by injunctions and orders for necessary and proper releases, rather than by making erasures and interlineations. Busby *v.* Littlefield, 31 N. H. 193, 33 N. H. 76; Craig *v.* Kittredge, 23 N. H. 231; Smith *v.* Greeley, 14 N. H. 378.

83. Getman *v.* Beardsley, 2 Johns. Ch. (N. Y.) 274.

The only question submitted being in equity the court has no jurisdiction to retain the case for the trial of a legal question. New York Ice Co. *v.* North Western Ins. Co., 31 Barb. (N. Y.) 72, 10 Abb. Pr. 34, 20 How. Pr. 424. See also Grantham *v.* Bizzel, 10 N. C. 196.

Directing a rescission, unless a new instrument is executed in accordance with the decree of reformation, may be proper. Harris *v.* Calmes, 100 Ky. 272, 38 S. W. 6, 18 Ky. L. Rep. 754.

84. See cases cited *infra*, this note.

Prayer for all proper relief.— Plaintiff asked for a reformation of a deed on the ground of mistake in failing to provide a right of way and "for all proper relief." Instead of reforming the deed the court adjusted the way. This mode of granting relief, while not the better, the court held not to be prejudicial. Wood *v.* Porter, 4 Ky. L. Rep. 361.

Prayer for foreclosure.—A complaint to correct a supposed mistake in the description in a mortgage, and to foreclose the same, will not be held bad on demurrer, merely because its allegations as to the mistake are not sufficient to entitle plaintiff to reformation. Parker *v.* Teas, 79 Ind. 235.

85. Coverdill *v.* Seymour, (Tex. Civ. App. 1900) 56 S. W. 221 [*reversed* on other grounds in 94 Tex. 1, 57 S. W. 37]. *Compare* Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569.

Where, however, all the parties agree that mutual mistake exists, correction may be had before damages are assessed. Lewiston *v.* Gagne, 89 Me. 395, 36 Atl. 629, 56 Am. St. Rep. 432.

86. **Joinder of causes of action** see *supra*, XIV, A, 1.

Prayer for relief see *supra*, XIV, A, 3.

87. *Alabama.*— Bieler *v.* Dreher, 129 Ala. 384, 30 So. 22; Houston *v.* Faul, 86 Ala. 232, 5 So. 433; Williams *v.* Mitchell, 30 Ala. 299.

Delaware.— McMullen *v.* Lockwood, 4 Del. Ch. 568.

Illinois.— McCloskey *v.* McCormick, 44 Ill. 336.

Ohio.— Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393.

Wisconsin.—Fischer *v.* Laack, 85 Wis. 280, 55 N. W. 398.

Relief incidental to reformation.—Attachment proceedings have been enjoined, and a writ of attachment annulled. Bieleh *v.* Dreher, 129 Ala. 384, 30 So. 22. Proceedings at law have been enjoined. Love *v.* Graham, 25 Ala. 187; Lansing *v.* Commercial Union Assur. Co., 4 Nebr. (Unoff.) 140. 93 N. W.

adequate.[88] Where, however, reformation is sought as preliminary to some other principal relief, if such principal relief is denied, the ancillary relief of reformation will not be granted.[88a] The rights of parties are usually measured by the instrument as reformed. Thus, after reforming a contract, specific performance of it may be decreed,[89] or the contract may be enforced in the same action;[90] a mistake in an

756. Dower has been allotted and statutory provisions for family apportionment made. Johnson *v.* Crutcher, 48 Ala. 368. And where a decree for correction of a mistake in a bond should be rendered, a purchaser was permitted, either to proceed with his action at law on condition that if he did proceed with such action, it should be considered in all respects an action on the bond as reformed, or to dismiss it and institute proceedings for a rescission. Reese *v.* Kirk, 29 Ala. 406. Where, on a bill filed to rectify a written agreement, all matters charged outside of the written agreement are denied in the answer, an injunction granted on the filing of the bill must be dissolved. Edmundson *v.* Jones, 19 Ga. 19. Defendant may be enjoined from taking advantage of the instrument or any mistake therein which is sought to be reformed. Burr *v.* Hutchinson, 61 Me. 514; Farley *v.* Bryant, 32 Me. 474. But see McMullen *v.* Lockwood, 4 Del. Ch. 568. Injunction restraining defendant may issue under proper circumstances until the instrument is brought into court for the purpose of reformation. See Menomonee Locomotive Mfg. Co. *v.* Langworthy, 18 Wis. 444.

Not only the instrument in which the mistake occurred, but all subsequent instruments which have perpetuated such mistake, will, it seems, be reformed so as to administer a full measure of relief and avoid circuity of action. Marks *v.* Taylor, 23 Utah 152, 63 Pac. 897, 23 Utah 470, 65 Pac. 203.

In an action to reform a deed executed in performance of two separate contracts to convey land, the answer alleged mutual mistake and prayed for permission to rescind and return the purchase-money as to both tracts. A rescission and return as to one tract, and reformation as to the other was decreed. Lord *v.* Horr, 30 Wash. 477, 71 Pac. 23.

88. Red Jacket Tribe No. 43 I. O. R. M. *v.* Hoff, 33 N. J. Eq. 441.

Reformation being refused, plaintiff raised the question as to the construction of the contract, insisting that the true meaning as expressed in the original contract would thereby be given. This was a question of law not incidental to the equitable action and could not be passed upon. Oakville Co. *v.* Double-Pointed Tack Co., 105 N. Y. 658, 11 N. E. 839.

88a. Goodbar *v.* Bloom, (Tex. Civ. App. 1906) 96 S. W. 657.

89. *California.*— Kee *v.* Davis, 137 Cal. 456, 70 Pac. 294, 671; Murphy *v.* Rooney, 45 Cal. 78.

Illinois.— McCornack *v.* Sage, 87 Ill. 484.

Indiana.— Monroe *v.* Skelton, 36 Ind. 302. See also Adams *v.* Wheeler, 122 Ind. 251, 254, 23 N. E. 760.

Iowa.— Flynn *v.* Finch, 137 Iowa 378, 114 N. W. 1058; Ring *v.* Ashworth, 3 Iowa 452.

Kentucky.— Nutall *v.* Nutall, 82 S. W. 377, 26 Ky. L. Rep. 671.

Maryland.— O'Keefe *v.* Irvington Real Estate Co., 87 Md. 196, 39 Atl. 428.

Mississippi.— Mosby *v.* Wall, 23 Miss. 81, 55 Am. Dec. 71.

New Jersey.— Cubberly *v.* Cubberly, 39 N. J. Eq. 514.

New York.— Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Laub *v.* Buckmiller, 17 N. Y. 620.

Ohio.— Davenport *v.* Sovil, 6 Ohio St. 459. See also Columbus, etc., R. Co. *v.* Steinfeld, 42 Ohio St. 449.

South Dakota.— Hughes *v.* Payne, (1908) 117 N. W. 363.

Tennessee.— Kelley *v.* McKinney, 5 Lea 164.

West Virginia.— Creigh *v.* Boggs, 19 W. Va. 240.

England.— Olley *v.* Fisher, 34 Ch. D. 367, 56 L. J. Ch. 208, 55 L. T. Rep. N. S. 807, 35 Wkly. Rep. 301, also holding that damages may be collected in the same action for breach of the contract as rectified.

Canada.— See Carroll *v.* Erie County Natural Gas, etc., Co., 29 Can. Sup. Ct. 591, 594.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 197.

Under Cal. Civ. Code, § 3402, a written contract may, in the same action, be first reformed and then specifically enforced. Messer *v.* Hibernia Sav., etc., Soc., 149 Cal. 122, 84 Pac. 835.

90. Avery *v.* Equitable L. Assur. Soc., 52 Hun (N. Y.) 392, 5 N. Y. Suppl. 278; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Roberts *v.* Elmore, 3 Ohio Dec. (Reprint) 208, 4 Wkly. L. Gaz. 393; Fishack *v.* Ball, 34 W. Va. 644, 12 S. E. 856; Brugger *v.* State Inv. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304, 7 Reporter 616.

An insurance policy may be reformed and recovered upon in the same action. Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212; Lansing *v.* Commercial Union Assur. Co., 4 Nebr. (Unoff.) 140, 93 N. W. 756; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Steinbach *v.* Prudential Ins. Co., 62 N. Y. App. Div. 133, 70 N. Y. Suppl. 809.

Instrument should be enforced as reformed, when such enforcement is part of the relief prayed for in the proceedings. Franklin Ins. Co. *v.* McCrea, 4 Greene (Iowa) 229.

Taxes paid by a vendor in order to protect his security for deferred payments will be paid back with lawful interest to a vendor on reformation of the contract. Hale *v.* Young, 24 Nebr. 464, 39 N. W. 406.

assignment for the benefit of creditors may be rectified, and an accounting by the assignee asked for in the same action; [91] and in the same action a mortgage may be reformed and then foreclosed.[92] In an action for rectification of a contract plaintiff may be awarded damages.[93] But on a bill filed to correct a formal defect in an instrument constituting a link in a chain of title, the court will not pass upon the validity of the title itself.[94]

5. Relief to Party Opposing Reformation. It is elementary that relief should consist in adjusting the equities of all parties concerned, and, although not decided in so many words, the obvious deduction from the cases is that it will not operate as a prejudice to his rights, if a party has opposed reformation.[95] Thus right

Where the obligee to a bond is not properly named by mistake, he need not first bring a separate action to reform the instrument before suing thereon. He may have reformation and recovery in the same action. State *v.* Delaney, 122 Mo. App. 239, 99 S. W. 1.

In Indiana, under 2 Gavin & H. Rev. St. p. 98, providing that mistakes in written instruments may be corrected in any other action, a mistake in a note as to the amount may be reformed, and judgment rendered for the amount due in one and the same action. Rigsbee *v.* Trees, 21 Ind. 227.

Where reformation is refused.— Where on a bill to reform a contract for the sale of realty and for its specific enforcement as reformed, the prayer for reformation is refused, the relief of specific performance of the contract as found to be proved may be granted under the prayer for general relief, inasmuch as it is relief of the same general nature as that specially prayed. Gough *v.* Williamson, 62 N. J. Eq. 526, 50 Atl. 323. If the evidence does not justify decree for reformation, specific performance cannot be enforced. Frey *v.* Camp, 131 Iowa 109, 107 N. W. 1106.

91. Garner *v.* Wright, 28 How. Pr. (N. Y.) 92.

92. *Alabama.*—Alexander *v.* Rea, 50 Ala. 450.

Idaho.— Christensen *v.* Hollingsworth, 5 Ida. 87, 53 Pac. 211.

Illinois.— Citizens' Nat. Bank *v.* Dayton, 116 Ill. 257, 4 N. E. 492; Willis *v.* Henderson, 5 Ill. 13, 38 Am. Dec. 120.

Kansas.— Miller *v.* Davis, 10 Kan. 541.

New Jersey.— Chancellor *v.* Bell, 45 N. J. Eq. 538, 17 Atl. 684.

Ohio.—Davenport *v.* Sovil's Widow, 6 Ohio St. 459.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 197.

If the lands had been sold under a power given by the mortgage, and bought in by the mortgagee, and the mortgagor does not impugn the fairness of the sale, or ask to have it set aside, the court may confirm the sale. McGehee *v.* Lehman, 65 Ala. 316.

Where two mortgages are taken in succession under orders of the court to secure the same fund, the interest of which is directed to be paid to a widow during her lifetime, and the mortgages are made payable to the chancellor and his assigns, the word "successors" being omitted from both, and the first one has been foreclosed without reformation there is no objection to ordering a reformation of both, upon a proper bill being filed for that purpose, and also to foreclose the second in order to perfect the title, since the rights of no one can be prejudiced. Chancellor *v.* Bell, 45 N. J. Eq. 538, 17 Atl. 684.

93. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015; State *v.* Delaney, 122 Mo. App. 239, 99 S. W. 1; Gilbranson *v.* Squier, 5 Wash. 99, 31 Pac. 423; Carroll *v.* Erie County Natural Gas, etc., Co., 29 Can. Sup. Ct. 591.

Since the Judicature Act of 1873, the court has jurisdiction, in any case in which the statute of frauds is not a bar, in one and the same action, to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed. Olley *v.* Fisher, 34 Ch. D. 367, 56 L. J. Ch. 208, 55 L. T. Rep. N. S. 802, 35 Wkly. Rep. 301.

In Illinois under Injunction Act, § 12, proving that the court of chancery, after dissolving an injunction, shall, before finally disposing of the suit, assess such damages as the nature of the suit may require, damages may be assessed to the persons entitled thereto on a bill to reform an injunction bond filed previous to the final determination of the suit in which the injunction was issued. Keith *v.* Henkleman, 173 Ill. 137, 50 N. E. 692.

94. American Freehold Land Mortg. Co. *v.* Walker, 31 Fed. 103.

95. *Arkansas.*— Hicks *v.* Coody, 49 Ark. 425, 5 S. W. 714.

Florida.— McRae *v.* McMinn, 17 Fla. 876.

Minnesota.— Dorr *v.* Steichen, 18 Minn. 26.

New Jersey.— Weston *v.* Wilson, 31 N. J. Eq. 51.

Virginia.— Keyton *v.* Brawford, 5 Leigh 39.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 198.

Under the rule that he who seeks equity must do equity, it was proper to reform a deed to conform to the whole contract between the parties, although defendant did not allege in his answer that a portion of such agreement set up by him was omitted from the deed by mistake or fraud. White *v.* Glazer, 106 S. W. 289, 32 Ky. L. Rep. 570.

Waiver of forfeiture.— Where, by the terms of a contract for the conveyance of real estate, as reformed by the court at the re-

may be ordered to be secured before a decree is entered,[96] and compensation for permanent improvements on land may be made to a party opposing reformation, but not for temporary or movable improvements.[97]

C. Judgment or Decree.[98] A judgment or decree reforming an instrument must be responsive to the issues presented,[99] must be supported by sufficient evidence,[1] and proper findings.[2] The decree should express the true intent of the parties.[3] The decree should show on its face what is done without referring those who may be investigating to what is prayed for in the pleadings;[4] although on appeal the court may look to the bill and answer for the proper construction of the decree.[5] A decree which orders a remedy, as though the instrument was reformed, is equivalent to a judgment for reformation.[6] A decree may embrace more than a mere reformation of the instrument, all depending on the facts which have been proved to the court.[7]

quest of the vendor, the purchaser had forfeited, not only his rights under the contract, but the amount expended in permanent improvements on the premises, the vendor should be required to waive the forfeiture as a condition to the reformation. Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

Where a mortgage had been ordered to be reformed, the decree of foreclosure was opened so as to permit the mortgagor to redeem the entire premises by payment of the entire sum due on the mortgage. Blodgett *v.* Hobart, 18 Vt. 414.

96. Coleman *v.* Woolley, 3 Dana (Ky.) 486.

Counter equities.—A deed will not be reformed without securing to the bargainor such counter equities as may arise in his favor out of the transaction. Coleman *v.* Coleman, 62 N. C. 43.

97. Griffith *v.* Sebastian County, 49 Ark. 24, 3 S. W. 886; Hale *v.* Young, 24 Nebr. 464, 39 N. W. 406. *Compare* Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

98. **Judgment or decree** generally see EQUITY, 16 Cyc. 471; JUDGMENTS, 23 Cyc. 623.

Time of taking effect see *infra*, XVIII, B.

99. Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451.

The decree must conform to prayer of bill. Wooden *v.* Haviland, 18 Conn. 101.

Pleadings and proof as the basis of relief see *supra*, XVI, B, 2.

Matters not within the issue.— In an action to reform a deed given by a divorced husband to his former wife pursuant to a decree of divorce, that part of the judgment reforming the deed which decrees the parties to be each the owner of an undivided half of the property is not within the issue, but as the wife claimed in her answer to be the owner of the whole she was not injured thereby. Holt *v.* Holt, 120 Cal. 67, 52 Pac. 119.

1. Parker *v.* Thomson, 21 Oreg. 523, 28 Pac. 502, holding that the evidence must be precise, accurate, and definite enough to enable the court to make the decree sought.

A bill was taken pro confesso which alleged a mistake in a deed of conveyance and prayed correction. The alleged mistake was considered as admitted, and a decree of correction was entered. Pullen *v.* Mullen, 12 Leigh (Va.) 434.

Weight and sufficiency of evidence generally see *supra*, XV, C.

2. Husted *v.* Van Ness, 158 N. Y. 104, 52 N. E. 645 [*affirming* 1 N. Y. App. Div. 120, 36 N. Y. Suppl. 1043], holding that a judgment reforming an instrument must have for its support a finding that such instrument does not express the agreement of the parties because of mutual mistake, or mistake of one party and fraud of the other.

3. Kessel *v.* Kessel, 79 Wis. 289, 48 N. W. 382; Sawyer *v.* Hanson, 48 Wis. 611, 4 N. W. 765. See also Holt *v.* Holt, 120 Cal. 67, 52 Pac. 119; Essex *v.* Day, 52 Conn. 483, 1 Atl. 620.

4. Gray *v.* Merchants' Ins. Co., 125 Ill. App. 370; Underwood *v.* Cave, 176 Mo. 1, 75 S. W. 451.

5. Burging *v.* McDowell, 30 Gratt. (Va.) 236.

6. Lardner *v.* Williams, 98 Wis. 514, 74 N. W. 346.

7. Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

Damages for breach of contract as reformed may be awarded. West *v.* Suda, 69 Conn. 60, 36 Atl. 1015. And the judgment need not recite that such damages were awarded "by way of equitable relief." West *v.* Suda, *supra*.

A decree expressly finding that plaintiff is entitled to the relief demanded, and further finding that defendant is unable to carry out his agreement, which then proceeds to assess a money judgment, necessarily includes the granting of the prayer for reformation. Conner *v.* Baxter, 124 Iowa 219, 99 N. W. 726.

Provision for lien.—An owner contracted to convey half of a tract of land reserving a life-estate, and requiring the purchaser to support him for life. The contract, by mistake, omitted the agreement as to support, and the court at the request of the owner reformed it by inserting the agreement. It was held that the provision as to support was not a condition, but a covenant, performance of which should be secured by declaring it a charge on the purchaser's interest in the premises, enforceable in a manner determined by the court. Cuthbertson *v.* Morgan, 149 N. C. 72, 62 S. E. 744.

D. Appeal and Error.[8] Every presumption is in favor of the validity of the court's decree.[9] The general rule is that a finding at the trial below is conclusive on appeal,[10] even though the finding was based on conflicting evidence.[11] When, however, the rules as to sufficiency of proof have been disregarded, the reviewing court may, on error, reverse a judgment based on such findings.[12] And the true construction of the instrument is before the court as well as the sufficiency of proof of the mistake.[13]

XVII. Costs.

The allowance and apportionment of costs is a power within the legal discretion of the court and should be exercised with regard to all the equities of the case.[14] What is an abuse of discretion depends upon the facts of the case.[15] Generally the costs should be put upon the party by whose error the suit was occasioned and the litigation caused.[16] Thus where a defendant has been fully apprised of

8. **Appeal and error** generally see Appeal and Error, 2 Cyc. 474 *et seq.*

9. Meyer *v.* Lathrop, 73 N. Y. 315.

A finding may be presumed for the purpose of sustaining the decree entered upon a report of a referee, where there is evidence in the case to justify a finding that there were mistakes sufficient to reform. Meyer *v.* Lathrop, 73 N. Y. 315.

A rule for judgment in favor of plaintiff was construed to be a finding of all the necessary facts in an action brought to have a bond and mortgage reformed so as to conform to a parol contract, where there was no finding that there was any fraud or mistake of fact on the part of defendant as to the terms of the instrument. Rider *v.* Powell, 28 N. Y. 310, 4 Abb. Dec. 63.

Where a contract has been executed, and its effect as reformed has passed into judgment, the failure of the trial court in reforming it to agree with a verbal contract and to make it read in the exact language of that contract before entering judgment is a mere irregularity. Wisconsin M. & F. Ins. Co. Bank *v.* Mann, 100 Wis. 596, 76 N. W. 777.

10. See Appeal and Error, 3 Cyc. 172.

11. Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. (N. Y.) 72 [*affirmed* in 55 N. Y. 657].

12. Potter *v.* Potter, 27 Ohio St. 84.

13. Fryer *v.* Patrick, 42 Md. 51.

14. See Costs, 11 Cyc. 32 *et seq.* See also Sealey *v.* Brumble, 59 N. C. 295; Bloomer *v.* Spittle, L. R. 13 Eq. 427, 41 L. J. Ch. 369, 26 L. T. Rep. N. S. 272, 20 Wkly. Rep. 435.

Where, by reason of a clerical error in a mortgage, other creditors of the mortgagor attached the property on grounds of fraud in the mortgage, and the court gave judgment to the mortgagee, correcting the mortgage, but gave costs to the attaching creditors because of the mortgagee's negligence, the attaching creditors were not entitled on the same grounds to costs on appeal. Wright *v.* Market Bank, (Tenn. Ch. App. 1900) 60 S. W. 623.

15. See Costs, 11 Cyc. 32 *et seq.*

For example in a suit to reform a deed, in which it is decreed, adversely to plaintiff's claim, that the deed be reformed, and also that complainant pay defendant a certain sum, there was no abuse of discretion in requiring two thirds of the costs to be paid by defendant. Stanley *v.* Marshall, 206 Ill. 20, 69 N. E. 58.

16. Miller *v.* Stuart, 107 Md. 23, 68 Atl. 273; Murray *v.* Parker, 19 Beav. 305, 52 Eng. Reprint 367; Hodgkinson *v.* Wyatt, 9 Beav. 566, 50 Eng. Reprint 462.

Where relief was granted according to the claims of both parties, it was proper that each should be required to pay his own costs. White *v.* Glazer, 106 S. W. 289, 32 Ky. L. Rep. 570.

Plaintiff had no equitable claim for costs where a married woman made a mortgage of lands purchased by her, her husband not joining therein, and all parties supposing her deed alone to be valid; where the mortgagee brought his bill in equity without having first asked a correction of the error; and where, before a refusal to pay the mortgage debt or any doubt suggested by the mortgagor of the validity of the mortgage, the husband and wife joined in a new mortgage. Brown *v.* Gliner, 42 N. H. 160.

Liability of solicitor who made the mistake. — When a suit for the rectification of a marriage settlement has been rendered necessary by the neglect of the solicitor employed to prepare it, the court has no jurisdiction to make the solicitor pay the costs of the suit, when he has not been guilty of any fraud. Clark *v.* Girdwood, 7 Ch. D. 9, 47 L. J. Ch. 116, 37 L. T. Rep. N. S. 614, 26 Wkly. Rep. 575. The remedy against the solicitor in such a case is by action for damages. Clark *v.* Girdwood, *supra.* But where an omission in the settlement arose from the mistake of the solicitor who prepared the deed, and who was also a trustee under it, the court refused to allow him his costs. Barrow *v.* Barrow, 18 Beav. 529, 52 Eng. Reprint 208 [*modified* on appeal, 5 De G. M. & G. 782, 3 Eq. Rep. 149, 24 L. J. Ch. 267, 3 Wkly. Rep. 122, 54 Eng. Ch. 614, 43 Eng. Reprint 1073].

Where it was necessary that plaintiff should make a tender of a sufficient deed to defendant, failure to make such tender before action brought defeats the right to recover costs. Ingals *v.* Merriman, 96 Wis. 400, 71 N. W. 368.

all the material facts in a suit for reformation, and with knowledge thereof refuses to correct the mistake, and persistently defends the suit, such a party should pay the costs.[17] In case of a settlement where there is no blame imputable to any of the parties, the costs should be payable out of the fund.[18]

XVIII. Effect of Reformation.

A. In General. The reformation of an instrument has the effect of making it express the real intention of the parties.[19] The rights of the parties are measured by the instrument as originally intended,[20] and the effect of the reformation as a whole should be to give to all the parties all the rights to which they are equitably entitled under the instrument which they intended to execute.[21] The fact that a decree restrains the party from prosecuting an action on an instrument as executed does not deprive the party of a remedy on the instrument as reformed.[22]

B. On Rights of Parties or Third Persons — 1. In General. Except as to *bona fide* purchasers without notice and those standing in similar relations,[23] upon the reformation of an instrument the general rule is that it relates back to and takes effect from the time of its original execution,[24] especially as between

17. Meserole *v.* Leary, (N. J. Ch. 1892) 23 Atl. 1074; Loss *v.* Obry, 22 N. J. Eq. 52.

18. Smith *v.* Iliffe, L. R. 20 Eq. 666, 44 L. J. Ch. 755, 33 L. T. Rep. N. S. 200, 23 Wkly. Rep. 851; *In re* De la Touche, L. R. 10 Eq. 599, 40 L. J. Ch. 85; Stock *v.* Vining, 25 Beav. 235, 53 Eng. Reprint 626.

19. Kessel *v.* Kessel, 79 Wis. 289, 48 N. W. 382; Sawyer *v.* Hansen, 48 Wis. 611, 4 N. W. 765.

20. State *v.* Hall, 70 Miss. 678, 13 So. 39; Franklin *v.* Cunningham, 187 Mo. 184, 86 S. W. 79.

In Tennessee Shannon's Code, § 6301, provides that a decree may divest title as effectively as a conveyance. Section 6302 authorizes the appointment of a commissioner to execute the necessary conveyance. Section 6303 declares that, if the "party against whom the decree is rendered" fails to execute the required conveyance, the decree itself operates as a conveyance. A decree was rendered against a grantor in a suit for the reformation of a deed, and the court appointed a commissioner to execute the proper deed, which he failed to do. The grantee in the conveyance conveyed the property described in the decree by a mortgage and a deed to persons who had no notice of an adverse claim. It was held that the decree vesting the title in the grantee in the conveyance reformed by virtue of section 6303, upon the commissioner's failure to make the deed as directed, such commissioner being a "party" to the suit within the meaning of the statute, the mortgagee and purchaser were innocent purchasers as against minor children of defendant thereafter suing out writ of error. Behrn *v.* White, 108 Tenn. 392, 67 S. W. 810.

21. See *infra*, XVIII, B, C.

Relief awarded generally see *supra*, XVI, B.

22. Richmond *v.* Ogden St. R. Co., 44 Oreg. 48, 74 Pac. 333; Pullen *v.* Mullen, 12 Leigh (Va.) 434.

23. Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206.

As against one not a party to the suit and not charged with notice of the mistake a decree of reformation takes effect as from the day of rendition. Chapman *v.* Fields, 70 Ala. 403.

As between the mortgagee and a subsequent bona fide vendee who has taken the property in payment of a preëxisting debt, a mortgage corrected by decree of court so that the notary's certificate should set forth separate examination of a married woman takes effect only from the time of correction. Clements *v.* Doerner, 40 Ohio St. 632.

24. *Alabama.*— Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304; Chapman *v.* Field, 70 Ala. 403.

Arkansas.— Ft. Smith Mill Co. *v.* Mikles, 61 Ark. 121, 32 S. W. 493.

Georgia.— Nelson *v.* Spence, 129 Ga. 35, 58 S. E. 697; Wyche *v.* Greene, 11 Ga. 159.

Illinois.— Dillard *v.* Jones, 229 Ill. 119, 82 N. E. 206, holding that where the rights of innocent third parties have not intervened, reformation may relate back and run through the entire judicial proceedings under which the instrument reformed was executed.

Iowa.— See McKissick *v.* Mill Owners' Mut. F. Ins. Co., 50 Iowa 116.

Kentucky.— Smoot *v.* Boyd, 87 Ky. 642, 9 S. W. 829, 10 Ky. L. Rep. 615.

Minnesota.— See Christman *v.* Colbert, 33 Minn. 509, 24 N. W. 301.

Mississippi.— State *v.* Hall, 70 Miss. 678, 13 So. 39.

Missouri.— Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735; Michigan Buggy Co. *v.* Woodson, 59 Mo. App. 550.

Ohio.— Adams *v.* Stutzman, 6 Ohio Dec. 612, 7 Am. L. Rec. 76.

See 42 Cent. Dig. tit. "Reformation of Instruments," § 202. See also Story Eq. Jur. §§ 139, 165.

As against a conditional sale of goods, which has not been acknowledged or recorded, a second deed of trust executed to supply the defeasance clause omitted by mistake of the draftsman from the first deed will constitute a valid lien. Michigan Buggy Co. *v.* Wood-

the parties themselves [25] and as to creditors at large and purchasers with notice; [26] although under some circumstances the equitable rights of the parties or of third persons may qualify or prevent the strict application of this rule,[27] as in the case of the lien of a judgment creditor which has attached after the execution of the mortgage but before its reformation.[28] And even where all the persons in interest have been made parties, and the instrument is reformed so as to conform to the intention of the parties thereto, the reformation will not affect the probate of or vary the terms of wills executed in the meantime making devises of the property involved.[29]

2. REFORMATION OF MORTGAGE AFTER FORECLOSURE. The reformation of a mort-

son, 59 Mo. App. 550. But see Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919.

Deed to plaintiff with remainder to her children, reformed to operate as an absolute conveyance, should supersede prior proceedings by the guardian of the children for the sale of their interests. Smoot *v.* Boyd, 87 Ky. 642, 9 S. W. 829, 10 Ky. L. Rep. 615.

A mortgagor's wife, who becomes such after the making of the mortgage, is within the rule stated. Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304. But *compare* cases cited *infra*, note 27.

25. See cases cited *supra*, note 24.

"As between the immediate parties to a contract executed in mistake, and afterward reformed . . . it takes effect as of the day of its first execution, for many purposes." Chapman *v.* Field, 70 Ala. 403, 404. So a decree reforming a deed of trust so as to include the homestead of the grantor was held to speak, as between the parties, from the date of the execution of the deed of trust. Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735.

26. See cases cited *supra*, note 24.

Creditors at large or purchasers with notice can assert no rights which they could not have asserted if there had been no mistake and the instrument truly set forth the contract to be made. Chapman *v.* Field, 70 Ala. 403. Although it has been held that a defective mortgage when reformed will not affect the rights which general creditors have acquired. Straman *v.* Rechtine, 58 Ohio St. 443, 51 N. E. 44; Van Thorniley *v.* Peters, 26 Ohio St. 471.

The lien of a purchaser with notice at an execution sale is likewise subsequent to the lien of the mortgage. Ft. Smith Mill Co. *v.* Mikles, 61 Ark. 123, 32 S. W. 493, holding that Sandel & H. Dig. Ark. § 5090, providing that all mortgages shall be acknowledged and recorded, and that the lien shall not attach until the filing in the recorder's office, relates solely to the proof, acknowledgment, and recording of mortgages and does not affect the doctrines of equity that the lien of one purchaser at execution sale of land omitted by mistake from a recorded mortgage, with knowledge of the mistake, is subsequent to the lien of the mortgage after reformation.

A receiver of an insolvent's property takes the property subject to the equity of a chattel mortgagee to have the description in his mortgage reformed so as to include all the property intended, although Pub. St. c. 176, § 9, makes a chattel mortgage invalid, as against any other person than the parties thereto, unless the mortgage be recorded. Ryder *v.* Ryder, 19 R. I. 188, 32 Atl. 919.

27. *Alabama.*— Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304; Chapman *v.* Fields, 70 Ala. 403.

Iowa.— Provost *v.* Rebman, 21 Iowa 419.

New Jersey.— Wheeler *v.* Kirtland, 23 N. J. Eq. 13.

Ohio.— Clements *v.* Doerner, 40 Ohio St. 632; Van Thorniley *v.* Peters, 26 Ohio St. 471; Davenport *v.* Sovil, 6 Ohio St. 459.

Vermont.— Blodgett *v.* Hobart, 18 Vt. 414 [*approved* in Davenport *v.* Sovil, 6 Ohio St. 459].

See 42 Cent. Dig. tit. "Reformation of Instruments," § 202.

Compare Ft. Smith Mill Co. *v.* Mikles, 61 Ark. 123, 32 S. W. 493; Horner *v.* Bramwell, 23 Colo. 238, 47 Pac. 462; Wilson *v.* Davis, 37 Ind. 141; White *v.* Shaffer, 97 Md. 359, 54 Atl. 974.

If a wife had a right of dower at the time of the execution of the mortgage by her husband alone, the reformation as regards her dower would have effect from the date of the decree. Hawkins *v.* Pearson, 96 Ala. 369, 11 So. 304; Chapman *v.* Field, 70 Ala. 403, holding that as against the widow of a deceased mortgagor claiming dower in lands which were omitted from the mortgage by mistake, a decree correcting the mistake and foreclosing the mortgage, she not being a party to the suit and not being charged with notice of the mistake, takes effect only from the date on which the decree of reformation is rendered. *Compare* Davenport *v.* Sovil, 6 Ohio St. 459.

Mortgagees of land, with constructive notice of the intention of the parties to the deed to the mortgagor to convey the land subject to a roadway, are entitled to be protected from any loss arising from a reformation of the deed so as to change the location of the roadway. White *v.* Shaffer, 97 Md. 359, 54 Atl. 974.

28. Wheeler *v.* Kirtland, 23 N. J. Eq. 13; Van Thorniley *v.* Peters, 26 Ohio St. 471. *Contra*, Adams *v.* Stutzman, 6 Ohio Dec. (Reprint) 612, 7 Am. L. Rec. 76, holding that a mortgage in its reformed state will attach as a lien from the date of its execution, and not from the date of its reformation, and judgment liens attaching on the premises, between the dates of the execution and reformation, will be postponed.

29. Christman *v.* Colbert, 33 Minn. 509, 24 N. W. 301.

gage after its foreclosure, by correcting a mistake in the original instrument so as to make the reformed instrument describe property not embraced in the original instrument, has the effect of reviving the right of the mortgagor to redeem,[30] unless by stipulation or otherwise the mortgagor has waived or forfeited this right.[31]

30. Carrigg *v.* Mechanics' Sav. Bank, 136 Iowa 261, 111 N. W. 329; Provost *v.* Rebman, 21 Iowa 419; Blodgett *v.* Hobart, 18 Vt. 414, holding that if the mistake was mutual and not discovered until after a decree of foreclosure obtained and the time fixed by the decree for the payment of the mortgage debt expired, and the mortgage was then ordered to be reformed, the decree of foreclosure will be opened so as to permit the mortgagor to redeem the entire premises by payment of the sum due upon the mortgage, notwithstanding the fact that the mistake in the description of the land was as to a part only, and not as to the whole of the premises described in the mortgage.

It seems settled that in such a case there must be another foreclosure and sale; for to create a mortgage and to cut off the equity of redemption at a single stroke is so inequitable that a court of equity will not so decree. Carrigg *v.* Mechanics' Sav. Bank, 136 Iowa 261, 111 N. W. 329; Provost *v.* Rebman, 21 Iowa 419 [*distinguished* in McKessick *v.* Mill Owners' Mut. F. Ins. Co., 50 Iowa 116]; Blodgett *v.* Hobart, 18 Vt. 411.

Similarly where one who with his wife executed a mortgage to another to secure a debt, and then died; and where on condition broken the mortgagee proceeding against the widow and the heirs of the mortgagor obtained a decree for sale, bid in the premises under a sale, which was confirmed, and took a deed thereunder for the premises described in the mortgage; and where it was then first discovered that by mutual mistake of the parties the description in the mortgage did not embrace the land intended to be mortgaged and which the mortgagor did own, but embraced other land which the mortgagor did not and never claimed to own, it was held that the mortgage upon reformation was not merged in the former decree, and that as the original mistake infected all the subsequent proceedings, such proceedings were baseless, unsubstantial, and nugatory. Davenport *v.* Sovil, 6 Ohio St. 459 [*approving* Blodgett *v.* Hobart, 18 Vt. 414]; Blodgett *v.* Hobart, *supra*, presents an analogous question to that presented in Davenport *v.* Sovil, *supra*, except that in the former there was a decree of absolute foreclosure instead of a decree for sale of the mortgaged premises as in the latter case, and also that in the former the description went to a part only instead of to the whole of the mortgaged premises.

Resale under reformed trust deed.— Where it appears that all the land intended to have been included in a trust deed could have been sold to a better advantage in its entirety, a sale under the trust deed of the land actually included, which embraced some not intended to be included, should, on suit being brought to reform the deed so as to embrace land omitted by mistake, be set aside, and a resale had. Horner *v.* Bramwell, 23 Colo. 238, 47 Pac. 462.

31. Provost *v.* Rebman, 21 Iowa 419.

REFORMATORIES

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Asylum, see ASYLUMS, 4 Cyc. 362.

Convict, see CONVICTS, 9 Cyc. 869.

Custody and Protection of Juvenile Delinquent or Vagrant, see INFANTS, 22 Cyc. 521.

Custody and Support of Pauper, see PAUPERS, 30 Cyc. 1058.

Disqualification of Inmate to Testify, see WITNESSES.

Habeas Corpus to Determine Custody of Infant, see HABEAS CORPUS, 21 Cyc. 332.

Prison in General, see PRISONS, 32 Cyc. 312.

Right to Jury Trial, see JURIES, 24 Cyc. 147.

I. DEFINITION.

The term "reformatory" includes all institutions and places in which efforts are made either to cultivate the intellect, instruct the conscience, or improve the conduct; places in which persons voluntarily assemble to receive instruction and submit to discipline, or are detained therein for either of these purposes by force.[1]

1. Hughes *v.* Daly, 49 Conn. 34, 35. Another definition is: "An institution for confinement and instruction in legal or proper moral conduct." English L. Dict.

II. ESTABLISHMENT.[2]

A. Power of State. The right of a state to establish reformatories and to provide for the commitment therein of minors rests upon the principle that the parental authority is limited to what is for the benefit of the child, and then when parental authority is exercised beyond that limit, a supereminent authority of the public to interpose exists.[3]

B. Compelling by Mandamus. Whenever the statute requires a given inferior judicial tribunal to erect or provide a reformatory distinct from the common jail, mandamus will lie to compel the performance of such duty.[4]

C. Use of Jail as Substitute. If the statute provides that a jail may be used as a reformatory where no other is provided, upon the adoption of certain measures, such jail cannot be considered a reformatory within the meaning of the statute unless the prescribed measures were actually adopted.[5]

III. OFFICERS IN CONTROL.

A. Election. Where by reason of a failure to hold an election the terms of all the members of the board of control have expired, and all are holding over, the general council of a city vested with supervisory control over the institution has a right to elect an entirely new board.[6]

B. Powers — 1. To Remove Inferior Officers — a. In General. The power vested in the board of control of a reformatory to remove for cause an officer thereof confers the right to remove for incapacity and want of diligence.[7]

b. Restraining Removal. Equity has no jurisdiction, in the absence of a statute conferring it, to restrain the board of control from removing one of the officers of the reformatory, the remedy being in a court of law.[8]

2. To Contract For Services of Inmates. Where the board of control is a corporation with specially limited powers and duties, and has not the power to make a contract with an individual for the use of the services of the inmates of the institution, a special contract therefor made by the board is void.[9]

3. To Take Lease of Land. Under a statute authorizing the board of control to receive and hold property, real and personal, in the name of the corporation, such trustees have power to take a lease of land binding on their successors in office.[10]

In a certain sense a reformatory is a penal institution employed as a substitute for a jail or penitentiary, its scheme being to not only punish, but, at the same time, to discipline and reform, the young of both sexes who have committed small offenses or are likely to become outcasts in society. McAndrews *v.* Hamilton County, 105 Tenn. 399, 58 S. W. 483.

"Almshouse" defined see 2 Cyc. 135.

"House of correction" defined see 21 Cyc. 1116.

"House of industry" defined see Hebrew Benev., etc., Asylum *v.* New York, 11 Hun (N. Y.) 116, 118; Church Charity Foundation *v.* People, 11 N. Y. St. 704, 705, 6 Dem. Surr. 154.

"House of refuge" defined see 21 Cyc. 1116.

Penitentiary distinguished see CRIMINAL LAW, 12 Cyc. 971.

"Poorhouse" defined see 31 Cyc. 914. See also PAUPERS, 30 Cyc. 1075.

"Prison" defined see PRISONS, 32 Cyc. 315. Distinguished see JURIES, 24 Cyc. 147 note 94.

"Workhouse" defined see Farmer *v.* St. Paul, 65 Minn. 176, 179, 67 N. W. 990, 33 L. R. A. 199; State *v.* Ellis, 26 N. J. L. 219, 220; Bedfordshire *v.* Bedford Imp. Com'rs, 21 L. J. M. C. 224, 225, 14 Eng. L. & Eq. 424.

"Juvenile delinquent" defined see 24 Cyc. 791.

2. Statutory provisions see *infra*, XI.

3. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248. See also JURIES, 24 Cyc. 148 text and note 97.

4. Com. *v.* Hampden County, 19 Mass. 414.

5. Taunton *v.* Westport, 12 Mass. 355. *Compare infra*, note 40.

"Jail" defined see 23 Cyc. 372.

6. Louisville Industrial School of Reform *v.* Louisville, 12 S. W. 710, 11 Ky. L. Rep. 567.

7. Fuller *v.* Ellis, 98 Mich. 96, 57 N. W. 33.

8. Marshal *v.* State Reformatory, 201 Ill. 9, 66 N. E. 314.

9. Clement *v.* State Reform School, 84 Ill. 311.

10. Harvey *v.* Whittier State School, 142 Cal. 391, 75 Pac. 1086.

4. To Divert Fund Dedicated to Particular Uses. The fact that the board of control of a reformatory is, by the act establishing it, constituted a body corporate and politic, with the right to exercise all the powers usually belonging to such corporations, does not authorize them to divert funds dedicated to particular uses to some entirely different use.[11]

IV. Requisites For Admission as Inmates.

A. In General. Before a person will be received as an inmate of a reformatory, there must be a commitment from legal authority, and it must be in the form prescribed by law.[12]

B. Age. An act providing that juvenile delinquents under a given age may be sentenced to the reformatory requires that the delinquent be under the prescribed age at the time of trial as well as the time of the alleged offense.[13]

C. Discretion of Board of Control Regarding. Discretion is usually vested by statute in the board of control to decide, after other and independent bodies have adjudged a juvenile infant to be a proper subject, whether they will or will not receive it.[14]

V. Proceedings to Commit to Reformatories.[15]

A. In General. The provisions of a statute regulating the commitment of juvenile delinquents to a reformatory must be strictly complied with.[16]

B. Jurisdiction. Jurisdiction of a judicial officer to commit a person to a reformatory does not exist except when expressly conferred by statute.[17]

11. Mitchell *v.* Colgan, 122 Cal. 296, 54 Pac. 905.

12. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

13. Aikins *v.* State, 49 Tex. Cr. 229, 91 S. W. 790.

Under an act authorizing commitment to the reformatory of persons of a given age, a person over that age committed cannot be received at such reformatory. *In re* Kruse, 2 Cinc. Super. Ct. 71.

14. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

15. Commitment not a criminal proceeding see Juries, 24 Cyc. 147 note 95.

Commitment without trial by jury see Juries, 24 Cyc. 147.

Regularity of proceedings as affecting compensation see *infra*, VIII, A.

16. Hibbard *v.* Bridges, 76 Me. 324.

17. *In re* Silverthorn, 73 Mich. 644, 41 N. W. 834. See also *Ex p.* Flood, 64 Cal. 251, 30 Pac. 437.

Jurisdiction conferred by statute.— Under Cal. Const. (1879) art. 22, § 1, Retaining Act, April 1, 1877, § 3, which provides that, in certain courts, persons who might be sentenced to state prison may be sentenced to the house of correction, and under Const. art. 22, § 3, abolishing the courts named and creating the superior court of San Francisco as their successor, with similar powers, the superior court of San Francisco has jurisdiction to sentence a defendant to the house of correction instead of to the state prison. *Ex p.* Flood, 64 Cal. 251, 30 Pac. 437. The fact that the act of March 11, 1889, creating the Preston school as a reformatory for minors guilty of criminal offenses, provides for the transfer thereto from any state prison of minors under eighteen years of age on recommendation of the prison directors and the approval of the governor, and gives such minors, when discharged from the school, the benefits and immunities of its other inmates, does not make the school a state prison, and hence preclude a justice of the peace from sending a minor thereto. *Ex p.* Nichols, 110 Cal. 651, 43 Pac. 9. Minn. Gen. St. (1878) c. 35, § 44, and the acts amendatory thereof, which confers on justices of the peace power to commit infants, in consequence of incorrigibly vicious conduct, to the care and guardianship of the board of managers of the state reform school for terms exceeding a period of three months, are not repugnant to Const. art. 6, § 7, relating to the jurisdiction of probate courts, or to section 8 relating to the jurisdiction of justices of the peace; and hence the municipal court under the statute conferring on it the powers of a justice may commit infants to the reformatory. State *v.* Brown, 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691. Under Cal. St. (1877–1878) p. 953, authorizing the city criminal court or the municipal criminal court of the city and county of San Francisco, in any case where a prisoner might be sentenced to the county jail or the state prison, instead thereof to commit the prisoner to the house of correction, such person not being over twenty-five years of age, and Const. art. 22, § 3, abolishing said courts and art. 6, § 5, vesting jurisdiction in cases amounting to felony in the superior court, the latter court has authority to commit to the house of correction in felony cases. *Ex p.* Williams, 87 Cal. 78, 24 Pac. 602, 25 Pac. 248.

A contract for the maintenance in the Detroit house of correction of persons convicted of state prison offenses is necessary to

C. Complaint or Information. The complaint must contain every allegation necessary to bring the case clearly within the statute so as to confer jurisdiction.[18] A complaint containing the averments necessary to bring the case within the statute is not vitiated because it also contains statements that are trifling and ridiculous.[19] If the statute prescribes no special formality, it is immaterial that the complaint was made by a person in his official capacity.[20]

D. Notice to Parent or Person Standing in the Parental Relation — 1. Necessity — a. In General. Unless the statute expressly provides therefor,[21] it is not essential to give notice to parents, or others standing in the parental relation, to infants,[22] at least where the statute itself, as well as the provisions relating to habeas corpus, provide an adequate and complete remedy.[23]

b. Waiver of. Whenever notice to the parents is required by statute, and a parent who, although not duly notified, appears at the examination, notice as to the parent so appearing is deemed to be waived.[24]

2. Sufficiency. Under a statute providing for notice to the parent of an infant, notice should be given to the one who is the infant's natural guardian and custodian, which is the situation of the father if he be living.[25]

E. Sentence — 1. Discretion of Court Regarding. The sending of offenders to a reformatory is by statute usually discretionary with the court passing sentence.[26]

2. Approval by Judge — a. Necessity. In some jurisdictions it is essential to the validity of the sentence that it be approved by a certain judge after a review of the proceedings and testimony taken or had at the trial.[27]

b. Sufficiency. It must appear from the certificate of approval required by such a statute that the judge approving the sentence actually reviewed the proceedings and testimony taken at the trial, or that he was present at the trial.[28]

3. Repronouncing. A prisoner having been sentenced and committed to a

authorize them to be confined therein by courts outside of Wayne county. Humphrey *v.* People, 39 Mich. 207; Dorsey *v.* People, 37 Mich. 382.

18. People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435. See also State *v.* Kinmore, 54 Minn. 135, 55 N. W. 830, 40 Am. St. Rep. 305.

No offense described.— A complaint which fails to describe an offense under any existing statute is defective and confers no jurisdiction. Lewiston *v.* Fairchild, 47 Me. 481.

19. Jarard *v.* State, 116 Ind. 98, 17 N. E. 912.

20. Reynolds *v.* Howe, 51 Conn. 472.

21. *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10; Goodchild *v.* Foster, 51 Mich. 599, 17 N. W. 74; People *v.* Carpenter, 123 N. Y. 640, 25 N. E. 1044; People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435; People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177; Matter of Heery, 51 Hun (N. Y.) 372, 4 N. Y. Suppl. 428; People *v.* Baker, 3 N. Y. Suppl. 536. See also Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197; Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

22. People *v.* Catholic Protectory, 61 How. Pr. (N. Y.) 445.

23. Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197 (holding, however, that a parent or guardian or custodian of the infant should, if practical, be given notice); Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

24. *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10.

25. People *v.* Carpenter, 123 N. Y. 640, 25 N. E. 1044; People *v.* New York Catholic Protectory, 106 N. Y. 604, 13 N. E. 435, both holding further that the presence of the infant's mother at the examination does not satisfy the statutory requirement as to notice to the parent.

26. *Ex p.* Walker, 8 Ohio Dec. (Reprint) 480, 8 Cinc. L. Bul. 480; State *v.* Wilson, 4 Ohio S. & C. Pl. Dec. 328.

27. *In re* Pierce, 74 Mich. 239, 41 N. W. 908; *In re* Amidon, 40 Mich. 628; *In re* O'Leary, 25 Mich. 144; State *v.* Brown, 47 Minn. 472, 50 N. W. 920.

The assistant judge of the common pleas of Alleghany county has power to examine and approve the records of a commitment to the house of refuge of Western Pennsylvania as required by the act of April 22, 1850, as the act of March 26, 1859, under which he was elected, provides that he shall have the same power, authority, and jurisdiction as the president judge of the court. House of Refuge *v.* Indiana County, 4 Brewst. (Pa.) 112.

28. *In re* Pierce, 74 Mich. 239, 41 N. W. 908.

The approval is ineffective where it appears that the commitment only was submitted for approval (*In re* O'Leary, 25 Mich. 144), or that no part of the testimony of certain witnesses examined on the trial was reduced to writing, so that it was impossible for the judge who approved the sentence to examine the testimony of such witnesses (State *v.* Brown, 47 Minn. 472, 50 N. W. 920).

reformatory as under a given age, the court, in sentencing him, cannot, on the ground of a mistake as to the prisoner's age, proceed to give a new sentence.[29]

4. Delay in Executing. Execution of a sentence to a reformatory during minority may be delayed such reasonable time as the court deems proper, as such delay will only shorten the term of imprisonment.[30]

F. Commitment — 1. In General. The commitment must be by some tribunal acting under precise and defined powers, and must be in the form prescribed by law.[31]

2. Reciting Jurisdictional Facts. A commitment failing to recite the jurisdictional facts required by the statute is invalid.[32]

3. Prescribing Period of Imprisonment.[33] That the commitment prescribe the period of imprisonment is not necessary where such period is fixed by the statute under which the commitment was made.[34]

4. Alteration of. If it is necessary to the validity of the commitment that it be approved by a certain judicial officer,[35] such commitment cannot be altered after such approval.[36]

G. Term of Imprisonment[37]**— 1. When Not Prescribed by Statute.** If the statute under which a juvenile or infant was committed merely authorizes a commitment and does not say it shall be absolute, final, or unconditional, the commitment to a reformatory is governed as to the terms of imprisonment by the charter and rules of the institution.[38]

2. When Prescribed by Statute — a. Excessive Sentence. Whenever the statute prescribes the term of imprisonment, the court has no power to sentence longer than the period prescribed.[39]

b. For Offense Only Punishable by Imprisonment in Jail. Under an act providing that commitments to a given reformatory can be made only for offenses punishable by imprisonment in a county jail, the term of imprisonment in such reformatory must not exceed that allowed in the county jail for the same offense.[40]

c. Uncertainty. If the act under which a prisoner was sentenced provides that the imprisonment shall not exceed the maximum term provided by law for a crime for which the prisoner was convicted, the fact that by the provisions

29. *In re* Mason, 8 Mich. 70.

30. O'Malia *v.* Wentworth, 65 Me. 129.

31. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

32. People *v.* Baker, 3 N. Y. Suppl. 536. See also Hibbard *v.* Bridges, 76 Me. 324.

Commitment reciting necessary jurisdictional facts.— A commitment to a reformatory which recites that the person committed was shown to the magistrate's satisfaction to be over twelve years of age, that she was found in a certain reputed house of prostitution, and that she was in danger of becoming morally depraved is sufficient, under a statute providing that whenever a female over the age of twelve years shall be brought before a committing magistrate, and it shall be proved to his satisfaction that such female was found in a reputed house of prostitution, or associating with thieves, prostitutes, etc., and is in danger of becoming morally depraved, the magistrate may commit such female to a reformatory institution. Matter of Nichols, 19 Abb. N. Cas. (N. Y.) 138.

Age of prisoner.— Where the statute contemplates a finding as to the age of the prisoner, based on testimony taken under oath before the committing magistrate, no mere recitation in the mittimus that the jury found the prisoner to be over the prescribed age will satisfy the requirement of the statute. *In re* Gates, 93 Mich. 644, 53 N. W. 914.

33. **Term of imprisonment** generally see *infra*, V, G.

34. People *v.* Degnen, 54 Barb. (N. Y.) 105.

35. See *supra*, V, E, 2.

36. *In re* Amidon, 40 Mich. 628.

37. **Prescribing period of imprisonment** in commitment see *supra*, V, F, 3.

38. People *v.* New York Catholic Protectory, 101 N. Y. 195, 4 N. E. 177.

39. Lewiston *v.* Fairfield, 47 Me. 481.

40. Shepherd *v.* Com., 2 Metc. (Mass.) 419; Elliott *v.* People, 13 Mich. 365.

Reformatory substitute for county jail.— Where, by statute, a convict liable to be punished by solitary imprisonment and confinement to hard labor in the state prison for three years or more may be sentenced to the reformatory for a term not exceeding three years, although he is not liable to be sentenced in the county jail for the same offense for a term exceeding two years, the reformatory is deemed to be a substitute for the state prison and not for the county jail. Stevens *v.* Com., 4 Metc. (Mass.) 360. See also Lane *v.* Com., 161 Mass. 120, 36 N. E. 755. *Compare supra*, II, C.

of the act the prisoner may be sooner discharged by the order of the court on recommendation of the managers of the reformatory, or by pardon or commutation of the governor, does not render the sentence void for uncertainty.[41]

d. Correction. A commitment to a reformatory, irregular because without an alternative sentence, can be corrected only by proceedings instituted directly for that purpose, and not upon habeas corpus.[42]

H. Review or Collateral Attack — 1. In General. Where an infant has been committed to a reformatory, and the commitment appears to be in the form prescribed by the statute creating that institution, the court will not in a collateral proceeding inquire into the legality, regularity, or sufficiency of the proceedings before the examining magistrate which resulted in such commitment.[43]

2. As to Age of Person Committed. Where the question of the age of the accused is one of fact to be determined by the committing magistrate upon the proof submitted to him, the question can be reëxamined only in direct proceedings provided for review,[44] such as appeal[45] or certiorari,[46] and not collaterally by habeas corpus;[47] and it does not matter what was the grade of the court determining the question of age.[48] Where an infant under a given age has been arraigned for a violation of the criminal law of the state, and it appears that the trial court, under a statutory provision, has arrested the proceedings and committed the accused to the reformatory, the appellate court will presume, where the record shows nothing to the contrary, that the action was had with his consent, as required by the statute.[49]

VI. Custody and Control of Inmates.

A. In General. Under an act providing that where an infant is committed to a reformatory, its parents shall have no right or custody over it, the authority of the officers of such reformatory continues during the minority of the infant unless sooner relinquished by their voluntary act, and is superior to the rights of a guardian previously or subsequently appointed.[50]

B. Binding Out to Service. Under a statute giving the board of control power to place inmates during their minority at employment suitable to their years and capacities, there being no limitation as to the place of employment, such board of control may bind out inmates to persons residing out of the state.[51]

VII. Liability to Inmates For Torts.

A. Reformatory Associations. A reformatory association managed by its own officials and invested with all the rights and privileges of corporations is not exempt from liability to inmates for its own torts on the ground that it is a public corporation, although its objects are of a benevolent character and it is required to make annual reports to the legislature.[52]

41. People *v.* State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139.

42. State *v.* Shattuck, 45 N. H. 205.

43. Buchanan *v.* Mallalieu, 25 Nebr. 201, 41 N. W. 152; People *v.* New York Juvenile Asylum, 12 Abb. Pr. (N. Y.) 92, holding further that, in that particular case, the forum provided by the act creating the reformatory is the board of directors. See also State *v.* Shattuck, 45 N. H. 205.

44. State *v.* Shattuck, 45 N. H. 205.

45. Buchanan *v.* Mallalieu, 25 Nebr. 201, 41 N. W. 152.

Appeal generally see Appeal and Error, 2 Cyc. 474.

46. People *v.* Superintendent House of Refuge, 8 Abb. Pr. N. S. (N. Y.) 112.

Certiorari generally see Certiorari, 6 Cyc. 730.

47. *In re* Mason, 8 Mich. 70; Buchanan *v.* Mallalieu, 25 Nebr. 201, 41 N. W. 152; People *v.* Protestant Episcopal House of Mercy, 133 N. Y. 207, 30 N. E. 853; People *v.* Superintendent House of Refuge, 8 Abb. Pr. N. S. (N. Y.) 112. See Habeas Corpus, 21 Cyc. 294.

48. People *v.* Protestant Episcopal House of Mercy, 133 N. Y. 207, 30 N. E. 853.

49. Lindsey *v.* State, 82 Ind. 7.

50. Armstrong *v.* State Public School, 88 Minn. 382, 93 N. W. 3.

51. People *v.* House of Refuge, 18 How. Pr. (N. Y.) 409.

52. Trevett *v.* Prison Assoc., 98 Va. 332, 36 S. E. 373, 81 Am. St. Rep. 727, 50 L. R. A. 564.

Liability of charitable corporation for tort see Charities, 6 Cyc. 975.

B. Municipalities Building Reformatories. A municipality which originally built a reformatory is not liable for the tort of the officers of the institution, unless some relation of agency service existed between such officers and the municipality at the time the tort was committed.[53]

C. Officers of Reformatories. A prisoner confined in a reformatory, and while there put into solitary confinement for refractory conduct, in accordance with rules established for such purpose, cannot maintain an action against the warden thereof for neglect to provide for him sufficient food, clothing, and fires, if he is kept in one of the usual cells, and there is no evidence of express malice, or of such gross negligence as to authorize an inference of malice.[54]

VIII. Compensation for Maintenance of Inmates.

A. Regularity of Commitment or Proceedings. Defects in the commitment,[55] or in the proceedings resulting in the committal,[56] do not affect the right of a reformatory to recover for the maintenance of an inmate thereof.

B. Discretion of Judicial Officer. Where a discretion is by law conferred on the committing officer to order the cost of maintenance of a prisoner in a reformatory to be paid from a particular fund, such officer must exercise that discretion personally.[57]

C. Strict Compliance in Other Respects With Law Giving Right to Compensation. The right of a reformatory to maintain an action to recover for the maintenance of inmates does not depend on the strict exercise in other respects, by the officers charged with that duty, of the law giving the right of recovery.[58]

D. Requiring Action Brought in Name of Reformatory. Where the statute provides that an action to recover for the maintenance of an inmate shall be brought in the name of the reformatory, such action is not maintainable in the name of the state establishing the reformatory.[59]

IX. Transfer of Inmates to Prison.

The transfer of an inmate, made by the board of control, to a penitentiary, on the ground of discipline, as contemplated by the law under which the inmate was committed, is not a judicial act subject to review by habeas corpus.[60] But the rule is otherwise in a jurisdiction where the advantages of the reformatory over the penitentiary is confined to minors who cannot be sentenced directly to the penitentiary instead of to the reformatory, so that the provision of law authorizing the officers of the reformatory to transfer to the penitentiary an inmate on the ground of discipline is deemed to be unconstitutional.[61]

X. Discharge of Inmates.

A. Persons Under Indeterminate Sentence. In some jurisdictions discretion is lodged in the board of control to terminate an imprisonment author-

53. Detroit *v.* Laughna, 34 Mich. 402.
Torts of municipality generally see Municipal Corporations, 28 Cyc. 1256 *et seq.*

54. Williams *v.* Adams, 3 Allen (Mass.) 171.

55. People *v.* Dickson, 57 Hun (N. Y.) 312, 10 N. Y. Suppl. 604 [*affirmed* in 123 N. Y. 639, 25 N. E. 953].
Commitment generally see *supra*, V, F.

56. State *v.* Hollis, 59 N. H. 390.
Proceedings to commit see *supra*, V.

57. Boys', etc., Aid Soc. *v.* Reis, 71 Cal. 627, 12 Pac. 796.

58. Wade *v.* Salem, 7 Pick. (Mass.) 333.

59. State *v.* Hollis, 59 N. H. 390, adding, however, that this objection may be avoided by an amendment.

60. *In re* Murphy, 62 Kan. 422, 63 Pac. 428. See also State *v.* Clark, 60 Kan. 450, 56 Pac. 767. *Compare In re* Dumford, 7 Kan. App. 89, 53 Pac. 92, which proceeds on the theory that sentence to and confinement in a reformatory does not deprive the prisoner of his civil rights, or render him infamous, and that the officers of the reformatory cannot do so by transferring him on the ground of discipline, to a penitentiary.

61. People *v.* Mallary, 195 Ill. 582, 63 N. E. 508, 88 Am. St. Rep. 212, holding

ized by the indeterminate sentence law before the maximum time prescribed by the statute under which the sentence was pronounced.[62] This discretion of the board to shorten the term of imprisonment is not subject to interference by the courts.[63]

B. Juvenile Delinquents — 1. Before Attaining Majority. In some jurisdictions the discharge of a minor inmate of a reformatory, prior to attaining his majority, is by statute made discretionary with the board of control.[64] This discretion of the board of control is not subject to the supervision or control of the courts,[65] at least where the minor has been regularly and properly committed for some fault of his own.[66] It has been held, however, that the court may, upon a proper showing, interfere where the commitment of the minor, although regular, was for some fault of his parents or of persons standing in the parental relation.[67] But an act conferring exclusive authority upon the board of control to discharge inmates does not interfere with the power of the court invested by the constitution with jurisdiction in habeas corpus to inquire into the cause of a person's detention and to discharge him if he was irregularly or improperly committed.[68]

2. Not Within Statutory Age at Time of Committal. The board of control, under authority vested in them to discharge an inmate whenever it shall appear that such inmate is not a proper subject for their care, may, when it appears to their satisfaction that an inmate not within the statutory limits as to age has been committed, discharge him.[69]

C. Conditional Discharge — 1. Effect of. An inmate of a reformatory whose discharge therefrom is conditioned on good behavior remains legally an inmate of the institution and is subject to its discipline.[70]

2. Rearrest For Violation of Condition. Under a statute providing that an inmate of a reformatory may, upon violating the condition of a discharge conditioned on his good conduct, be rearrested and confined for a term equal to the unexpired term, such rearrest and conviction may take place even after the expiration of the original term.[71]

XI. STATUTORY PROVISIONS.

A. Construction. A law authorizing the commitment to a reformatory of a juvenile delinquent is quasi-criminal, to say the least of it, and must be strictly construed; and hence those who execute the law must find their powers in the law or they do not exist.[72] An act authorizing punishment by imprisonment in a reformatory, and expressly requiring that its provisions shall apply to a given county, does not authorize imprisonment of persons convicted in any other county.[73]

B. Constitutionalty — 1. Restraining Personal Liberty. A statute under

further that a contention that the transfer was a voluntary escape and hence there was no authority to place the prisoner in the reformatory is without merit, the doctrine of voluntary escape having no application to criminal cases.

62. Terry *v.* Byers, 161 Ind. 360, 68 N. E. 596; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *In re* Murphy, 62 Kan. 422, 63 Pac. 428.

63. Terry *v.* Byers, 161 Ind. 360, 68 N. E. 596.

64. *Massachusetts.*— *In re* Kennedy, 108 Mass. 492.

Minnesota.—Armstrong *v.* State Public School, 87 Minn. 382, 93 N. W. 3.

New York.— *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699; Matter of Cohn, 28 Misc. 658, 59 N. Y. Suppl. 1028; People *v.* New York Juvenile Asylum, 12 Abb. Pr. 92.

Ohio.— *In re* Kruse, 2 Cinc. Super. Ct. 71.

Pennsylvania.— Davenport *v.* House of Refuge, 11 Phila. 458.

See 42 Cent. Dig. tit. "Reformatories," § 17.

65. Armstrong *v.* State Public School, 88 Minn. 382, 93 N. W. 3; Davenport *v.* House of Refuge, 11 Phila. (Pa.) 458.

66. Matter of Cohn, 28 Misc. (N. Y.) 658, 59 N. Y. Suppl. 1028.

67. *In re* Knowack, 158 N. Y. 482, 53 N. E. 676, 44 L. R. A. 699; *In re* Kruse, 2 Cinc. Super. Ct. 71.

68. *In re* Kruse, 2 Cinc. Super. Ct. 71.

69. People *v.* Protestant Episcopal House of Mercy, 133 N. Y. 207, 30 N. E. 853.

70. *Ex p.* Cassidy, 13 R. I. 143.

71. People *v.* Coon, 17 Misc. (N. Y.) 261, 40 N. Y. Suppl. 33.

72. Com. *v.* McKeagy, 1 Ashm. (Pa.) 248.

73. *In re* Weinrich, 20 Mich. 14.

which a minor, without having been committed or charged with any crime, is committed to the reformatory is not unconstitutional as being in restraint of personal liberty in violation of the bill of rights.[74]

2. Other Objections. The validity of statutes providing for the commitment and retention in reformatories of minors charged and convicted of crime has frequently been tested.[75] Such statutes have been sustained as constitutional against the objection that they provide unequal punishments for the same offense,[76] that they deprive parents of the rights to the earnings and custody of their children,[77] and as against other objections.[78]

C. Repeal. The repeal of a law which directs that the surplus profits of the labor of inmates of a reformatory shall be paid to them on their discharge takes away the authority to pay the proceeds of labor done before the repeal to those who are not discharged until after the repeal.[79]

REFRACTORY. Noting earths or metals that are infusible, or require an extraordinary degree of heat to fuse them.[1]

REFRESHING MEMORY. See WITNESSES.

74. *Connecticut.*— Reynolds *v.* Home, 51 Conn. 472.

Illinois.— McLean County *v.* Humphreys, 104 Ill. 378; *In re* Ferrier, 103 Ill. 367, 42 Am. Rep. 10; People *v.* Turner, 55 Ill. 280, 8 Am. Rep. 645.

Indiana.— See Jarrard *v.* State, 116 Ind. 98, 17 N. E. 912.

Maryland.— Roth *v.* House of Refuge, 31 Md. 329.

Ohio.—Cincinnati House of Refuge *v.* Ryan, 37 Ohio St. 197; Prescott *v.* State, 19 Ohio St. 184, 2 Am. Rep. 388.

Pennsylvania.— *Ex p.* Crouse, 4 Whart. 9.

Wisconsin.— Milwaukee Industrial School *v.* Milwaukee County Sup'rs, 40 Wis. 328, 22 Am. Rep. 702.

See 42 Cent. Dig. tit. "Reformatories," § 1. See also CONSTITUTIONAL LAW, 8 Cyc. 1093.

But a statute authorizing a magistrate to commit a minor, upon a complaint charging him with the commission of a crime of which the magistrate has only jurisdiction to require him to recognize for his appearance at the supreme court, is in violation of the bill of rights. Com. *v.* Horregan, 127 Mass. 450. See also State *v.* Ray, 63 N. H. 406, 56 Am. Rep. 529.

The object is not punishment, but reformation and education. See JURIES, 24 Cyc. 147 text and note 96.

75. *In re* Marlow, 75 N. J. L. 400, 68 Atl. 171. See also cases cited *infra*, note 76 *et seq.*

Legislation of a similar character has been uniformly sustained. George *v.* People, 167 Ill. 447, 47 N. E. 741; People *v.* State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; Miller *v.* State, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; Murphy *v.* Com., 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

76. See cases cited *infra*, this note.

Providing unequal punishments.— An act providing for the detention in a reformatory of minors guilty of criminal offenses until majority, which may be a longer period than the term of imprisonment in a county jail provided for such offenses, is not unconstitutional as providing unequal punishments for the same offense. *Ex p.* Nichols, 110 Cal. 651, 43 Pac. 9; Bartley *v.* People, 156 Ill. 234, 40 N. E. 831; People *v.* State Reformatory, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139. See also *In re* Marlow, 75 N. J. L. 400, 68 Atl. 171.

77. People *v.* Masten, 79 Hun (N. Y.) 580, 29 N. Y. Suppl. 891. See also Matter of Ewer, 70 Hun (N. Y.) 239, 24 N. Y. Suppl. 500 [*affirmed* in 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794].

78. Boys', etc., Aid Soc. *v.* Reis, 71 Cal. 627, 12 Pac. 796.

Taking money for benefit of institutions not under state control.— A statute authorizing courts to commit a minor accused of crime to the reformatory, the expense to be borne from the funds of the county where the criminal proceeding is pending, is not in conflict with a constitutional prohibition against the payment of money from the state treasury for the benefit of an institution not under the exclusive control of the state as a state institution. Boys', etc., Aid Soc. *v.* Reis, 71 Cal. 627, 12 Pac. 796, construing Cal. Pen. Code, § 1388.

Appropriating money for support of school not under exclusive control of officers of public schools.— Nor does such a statute conflict with a constitutional prohibition against an appropriation of public money for the support of a school not under the exclusive control of the officers of public schools, such provision having reference to schools, as such, in the ordinary acceptation of the term. Boys', etc., Aid Soc. *v.* Reis, 71 Cal. 627, 12 Pac. 796.

79. Williams *v.* Middlesex County, 4 Metc. (Mass.) 76.

1. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519, 5 Fish. Pat. Cas. 433.

REFRESHMENT. A term which may include intoxicating liquors.[2] (See Refreshment Saloon.)

REFRESHMENT SALOON. A room or rooms fitted up for purposes similar to those of a restaurant.[3] (See, generally, Innkeepers, 22 Cyc. 1069.)

REFRIGERATOR CAR. A car built for the purpose of carrying freight and provided with appliances for using ice in order to preserve its contents.[4]

REFUND. To repay or restore; to return money had by one party of another.[5] (Refund: Accrual of Right of Action on Implied Contract to Refund Overpayment by Mistake, see Limitations of Actions, 25 Cyc. 1112. Bond — In Distribution of Decedent's Estate, see Executors and Administrators, 18 Cyc. 611; On Dissolution of Preliminary or Temporary Injunction Against Judgment, see Judgments, 23 Cyc. 1039; On Taking of Decree Pro Confesso Against Absent Defendant Not Personally Served, see Equity, 16 Cyc. 494. Liability of Legatees and Distributees to Refund — On Deficiency of Assets, see Executors and Administrators, 18 Cyc. 670; Overpayment, see Executors and Administrators, 18 Cyc. 634. Limitation of Amount by Refunding Bond, see Municipal Corporations, 28 Cyc. 1583. Of Assessments For Benefits From Public Improvements, see Municipal Corporations, 28 Cyc. 1204. Of County Indebtedness, Issue of Bonds For, see Counties, 11 Cyc. 561. Of Insurance Premiums or Assessments, see Fire Insurance, 19 Cyc. 609; Life Insurance, 25 Cyc. 791; Marine Insurance, 26 Cyc. 606. Of Internal Revenue Taxes Paid, see Internal Revenue, 22 Cyc. 1611, 1671. Of License Fees and Taxes — In General, see Licenses, 25 Cyc. 631; On Liquor Traffic, see Intoxicating Liquors, 23 Cyc. 152. Of Money Paid by Purchaser at Illegal Sale of Land For Assessment and Special Taxes For Public Improvements, see Municipal Corporations, 28 Cyc. 1248. Of Municipal Indebtedness — Issue of Bonds For, see Municipal Corporations, 28 Cyc. 1581; Of Taxes Paid, see Municipal Corporations, 28 Cyc. 1707. Of Mutual Benefit Insurance, Dues, and Assessments Paid, see Mutual Benefit Insurance, 29 Cyc. 103. Of Overpayment of Claims Against Estates of Insolvent Decedents, see Executors and Administrators, 18 Cyc. 870. Of Payment — In General, see Payments, 30 Cyc. 1298; Made by Executor or Administrator, see Executors and Administrators, 18 Cyc. 588; Made by Trustee in Assignments For Benefit of Creditors, see Assignments For Benefit of Creditors, 4 Cyc. 272 note 69. Of Purchase-Money — By Guardian Under Order of Court, see Guardian and Ward, 21 Cyc. 146; By United States on Filing Bill to Cancel Patents For Public Lands, see Public Lands, 32 Cyc. 1057. Payment of Legatee or Distributee Without Requirement of Refunding Bond, see Executors and Administrators, 18 Cyc. 613.)

2. Rhone *v.* Loomis, 74 Minn. 200, 204, 77 N. W. 31.

"Entertainment" as qualifying meaning of "refreshment" see Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 393, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly. Rep. 897. See also 15 Cyc. 1053 note 67.

"Places of refreshment" may be employed to include a place where intoxicating liquors are sold as a beverage. Rhone *v.* Loomis, 74 Minn. 200, 204, 97 N. W. 31.

"Refreshment house" see Howes *v.* Board of Inland Revenue, 1 Ex. D. 385, 388, 46 L. J. M. C. 15, 35 L. T. Rep. N. S. 584, 24 Wkly Rep. 897.

3. State *v.* Hogan, 30 N. H. 268, 272, where it is said that, although spirituous liquors are frequently kept in such place, they do not necessarily form an element in the definition.

Not a synonym of "eating-house" and has also been held not to include a shop which is used for the manufacture and sale of tobacco, snuff, and cigars. State *v.* Hogan, 30 N. H. 268, 272.

4. Gulf, etc., R. Co. *v.* Lone Star Salt Co., 26 Tex. Civ. App. 531, 534, 63 S. W. 1025, where it is said that the appliances for ice constitute the only material difference between such car and an ordinary freight car, hence where the railroad commissioners' order required every railroad company operating in the state to receive every loaded car tendered to it, the fact that a car tendered was a refrigerator car not suitable or usually used for the transportation of the kind of freight loaded therein was no defense to an action for refusal to receive the car.

5. Black L. Dict.

In strictness the term means "to pour back" and is a synonym of "paid." Maynard *v.* Mechanics' Nat. Bank, 1 Brewst. (Pa.) 483, 484.

Under a statute providing that where a town pays the burial expenses of a veteran of the Civil war, the state shall "refund" the

REFUSAL. The act of refusing; denial of anything demanded, solicited, or offered for acceptance;[6] denial of anything demanded; solicited, etc.[7] In the sense of option, an understanding that nothing will be done with the subject to which it relates, until the person to whom the refusal is given shall give some positive answer in regard to it.[8] (Refusal: Of Appraisal or Arbitration — As Condition Precedent to Action on Policy, see FIRE INSURANCE, 19 Cyc. 902 note 47; In Adjustment of Losses Under Policy, see FIRE INSURANCE, 19 Cyc. 880. Of Carrier to Transport Goods, see CARRIERS, 6 Cyc. 374. Of Clerk of Court to Produce Records and Papers, see CLERKS OF COURT, 7 Cyc. 245 note 55. Of Demand as Condition Precedent to Mandamus, see MANDAMUS, 26 Cyc. 182. Of Highway Officers to Survey, see STREETS AND HIGHWAYS. Of Judge to Act on Account of Disqualification, see JUDGES, 23 Cyc. 590. Of Judgment Debtor to Make Discovery, see CONTEMPT, 9 Cyc. 17. Of Liquor License, see INTOXICATING LIQUORS, 23 Cyc. 134. Of Payment of Mutual Benefit Insurance, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 178. Of Purchaser to Comply With Bid — At Auction Sale, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1050; At Foreclosure Sale, see MORTGAGES, 27 Cyc. 1703; At Partition Sale, see PARTITION, 30 Cyc. 323 note 66. Of Witness — To Answer, see CONTEMPT, 9 Cyc. 58 note 19; To Be Sworn, see CONTEMPT, 9 Cyc. 58 note 19, 17 note 69; To Testify or Produce Evidence, see CONTEMPT, 9 Cyc. 17. To Assist in Execution of Process, see OBSTRUCTING JUSTICE, 29 Cyc. 1331, 1335. To Elect Between Causes of Action or Defenses, see PLEADING, 31 Cyc. 657. To Furnish Blanks, as Constituting Implied Waiver by Insurer of Proof of Loss, see FIRE INSURANCE, 19 Cyc. 862 note 26. To Obey Order to Separate and Number Causes of Action or Defenses, see PLEADING, 31 Cyc. 651. To Receive — Proofs of Loss, see FIRE INSURANCE, 19 Cyc. 861; Service of Process, see PROCESS, 32 Cyc. 460. To Retract, see LIBEL AND SLANDER, 25 Cyc. 500. To Return For Correction Proofs of Loss, see FIRE INSURANCE, 19 Cyc. 863. See also REFUSE.)

REFUSE. As a noun, left as worthless when the rest is taken; worthless; waste;[9] that which is refused or rejected; waste or useless matter; the worst or meanest part; rubbish.[10] As a verb, to decline the acceptance of something offered,

amount paid by the town, the term implies a payment to the town of money previously paid by the town. Rackliffe *v.* Greenbush, 93 Me. 99, 105, 44 Atl. 375.

In a declaration of trust, declaring that the trustee holds a sum in trust, and that he will refund it, the word "refund," when disposal of the fund itself is meant, is used in the sense of "restore." Tucker *v.* Linn, (N. J. Ch. 1904) 57 Atl. 1017, 1019; Gutch *v.* Fosdick, 48 N. J. Eq. 353, 356, 22 Atl. 590, 27 Am. St. Rep. 473.

6. Webster Dict. [*quoted* in Duffy *v.* State, 60 Nebr. 812, 825, 84 N. W. 264].

7. Webster Dict. [*quoted* in Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 747, 63 Atl. 705].

Distinguished from "failure" see Cape Elizabeth *v.* Boyd, 86 Me. 317, 318, 29 Atl. 1062.

In its derivative and intrinsic meaning the term includes the idea of absolute rejection. Brooklyn Heights R. Co. *v.* Brooklyn City R. Co., 105 N. Y. App. Div. 88, 89, 93 N. Y. Suppl. 849.

The term implies some request; it is more than omission or neglect. Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 747, 63 Atl. 705. There can be no refusal without demand or request. Brought *v.* Cherokee Nation, 4 Indian Terr. 462, 470, 69 S. W. 937; Mitchell *v.* Baring, 10 B. & C. 4, 10, 21 E. C. L. 12, 4 C. & P. 35, 19 E. C. L. 395, 8 L. J. K. B. O. S. 18, M. & M. 381.

In reference to the payment of money, the term means failure to pay money when demanded and differs from neglect which is the failure to pay money which the party is bound to pay without demand. Kimball *v.* Rowland, 6 Gray (Mass.) 224, 225.

8. Hosford *v.* Carter, 10 Abb. Pr. (N. Y.) 452, 453.

A lease providing that after the termination of the term, the lessee should have the "'refusal' of the premises" for three years longer, meant that he should have an option for renting the premises for three years longer at the same terms. Tracy *v.* Albany Exch. Co., 7 N. Y. 472, 474, 57 Am. Dec. 538.

9. State *v.* Howard, 72 Me. 459, 465.

10. Century Dict. [*quoted* in Haley *v.* Boston, 191 Mass. 291, 294, 77 N. E. 888, 5 L. R. A. N. S. 1005, where the term is held to include ashes].

"Refuse matter."—As used in a city ordinance empowering the board of health to contract for the removal of all such refuse matter as accumulates in the preparation of food for the table the term "refuse matter" can only extend to matter which is in fact noisome, or which has been refused and rejected by the owner as worthless. State *v.* Orr, 68 Conn. 101, 109, 35 Atl. 770, 34 L. R. A. 279.

or to fail to comply with some requirement;[11] to decline to do what is solicited, claimed, or commanded;[12] to deny a request, demand,[13] invitation, or command;[14] to deny, as a request, demand, or invitation; to decline to accept; reject;[15] to deny, as a request, demand, invitation, or command; to decline to do or grant;[16] not to comply with.[17] (See REFUSAL.)

REGALIA. A term sometimes used in Spanish law to indicate a right which the sovereign has over anything in which a subject has a right of property or "propiedad."[18]

REGARD. As a noun, attention, as to a matter of importance or interest; heed; consideration.[19] As a verb, to look upon; observe; notice with some particularity; pay attention to.[20]

REGIA DIGNITAS EST INDIVISIBILES, ET QUÆLIBET ALIA DERIVATIVA DIGNITAS EST SIMILITER INDIVISIBILIUS. A maxim meaning "The kingly power is indivisible, just as every other derivative power is indivisible."[21]

REGION. Neighborhood; vicinity; district; quarter or ward.[22]

REGIS AD EXEMPLUM TOTUS COMPONITUR ORBIS. A maxim meaning "The whole earth is fashioned after the pattern of the king."[23]

REGIS CURIA ET CURIA POPULI SIVE PARLIAMENTUM NON EX SCRIPTO, SED EX COMMUNI, LEGE SUNT. A maxim meaning "Courts, whether of the king, or of the people, or of parliament, are established not by written, but by common, law."[24]

REGISTER. As a noun, an official record;[25] also as defined by statute in reference to the records of the clerk of a court, a book in which the clerk is to enter the title of the action, with brief notes under it from time to time of all papers filed

11. People *v.* Perkins, 85 Cal. 509, 511, 26 Pac. 245.

12. Webster Dict. [*quoted* in Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 747, 63 Atl. 705].

13. Burns *v.* Fox, 113 Ind. 205, 206, 14 N. E. 541; Webster Dict. [*quoted* in Beckhard *v.* Rudolph, 68 N. J. Eq. 740, 747, 63 Atl. 705].

14. Shaler *v.* Van Wormer, 33 Mo. 386, 388, where it is said: "Proof of the refusal to pay necessarily involves the proof of a previous demand." See also Davis *v.* Lumpkin, 106 Ga. 582, 586, 32 S. E. 626; Merrifield *v.* Cobleigh, 4 Cush. (Mass.) 178, 185.

15. Century Dict. [*quoted* in Bowen *v.* Young, 37 Misc. (N. Y.) 547, 550, 75 N. Y. Suppl. 1027].

16. Webster Dict. [*quoted* in Duffy *v.* State, 60 Nebr. 812, 825, 84 N. W. 264].

17. Webster Dict. [*quoted* in Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 713, 49 S. E. 991].

Distinguished from "neglect" see People *v.* Perkins, 85 Cal. 509, 511, 26 Pac. 245; Gallemore *v.* Gallemore, 115 Mo. App. 179, 191, 91 S. W. 406.

"Refuse is literally to pour back, i. e., to send back." Brooklyn Heights R. Co. *v.* Brooklyn City R. Co., 105 N. Y. App. Div. 88, 89, 93 N. Y. Suppl. 849.

"Refuse the payment of," as used in a condition in a mortgage authorizing certain proceedings if the mortgagee shall refuse the payment of any of its notes, means something more than a mere neglect to pay by the day. Parish *v.* Wheeler, 22 N. Y. 494, 514.

"'Fail' and 'refuse,'" in a statute providing that if any person shall fail and refuse to make discovery relative to allegations of usury set up in the plea defendant might make affidavit in writing which could be used on trial, mean substantially the same thing. Persons *v.* Hight, 4 Ga. 474, 497.

"Refuses or neglects" see Thompson *v.* Tinkcom, 15 Minn. 295, 299.

"Refusing to comply" ordinarily means the same as "failing to comply." Smith *v.* Hance, 11 N. J. L. 244, 251. See also Virginia, etc., Wheel Co. *v.* Harris, 103 Va. 708, 714, 49 S. E. 991; Taylor *v.* Mason, 9 Wheat. (U. S.) 325, 344, 6 L. ed. 101.

18. Hart *v.* Burnett, 15 Cal. 530, 566.

19. Century Dict.

A direction by the court to referees that, in deciding the matter submitted to them for decision, "regard should be had to the law," is construed as directory, and leaves the judgment of the referees conclusive as to the law. Walker *v.* Simpson, 80 Me. 143, 150, 13 Atl. 580.

20. Century Dict.

The clause "shall regard the wishes" in a will, if taken in its natural import, is equivalent to "shall be governed by the wishes." Allen's Appeal, 69 Conn. 702, 707, 38 Atl. 701.

21. Morgan Leg. Max. [*citing* 4 Inst. 243].

22. Cheetham *v.* Atty.-Gen., 38 Wkly. Notes Cas. (Pa.) 124, 126, where it is held that, under a statute authorizing application of process against railroad companies by two reputable citizens, resident in the "region" traversed by the railroad, on the ground that it had issued stock contrary to law, the term properly applied to the territory traversed by a street railway company.

23. Morgan Leg. Max. [*citing* 7 Inst. 193].

24. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.]

25. Reck *v.* Phenix Ins. Co., 7 N. Y. Suppl. 492.

and proceedings had therein.[26] As a verb, to enter in a register; to record formally and distinctly; to enroll; to enter in a list.[27] (Register: In Bankruptcy, see BANKRUPTCY, 5 Cyc. 272 note 93. In Chancery — In General, see CLERKS OF COURTS, 7 Cyc. 193; Authority to Take Oath, see OATHS AND AFFIRMATIONS, 29 Cyc. 1300. Of Deeds, see REGISTERS OF DEEDS. Of Ships, see SHIPS AND SHIPPING. Of Wills, see WILLS. See also REGISTRATION, *post*, p. 1026.)

REGISTERED. Listed, entered, or recorded.[28] (See REGISTER.)

26. Wolters *v.* Rossi, 126 Cal. 644, 649, 59 Pac. 143.

27. Reck *v.* Phenix Ins. Co., 7 N. Y. Suppl. 492.

Distinguished from "enrolment" in admiralty law see The Mohawk, 3 Wall. (U. S.) 566, 571, 18 L. ed. 67.

"Registered," on a label which has been registered in the patent office, is not synonymous with the word "copyright" so as to impart to an alleged infringer of the copyright constructive notice of the fact that the label is copyrighted. Higgins *v.* Keuffel, 30 Fed. 627, 628.

"Registered provisionally" see Reg. *v.* Whitmarsh, 14 A. & E. 803, 814, 68 E. C. L. 803.

28. Chalmers *v.* Funk, 76 Va. 717, 719.

According to the connection in which it is employed, the word "registered" has, in its popular acceptation, several definitions. Chalmers *v.* Funk, 76 Va. 717, 719.

"Registered bond" is one which is a simple certificate of indebtedness, in favor of a particular individual, payable at a day named, with interest at days named. Benwell *v.* Newark, 55 N. J. Eq. 260, 263, 36 Atl. 668. "The name of the payee is entered on the books of the corporation debtor — municipal or private — as the registered owner, or, if it be a government bond, on the register of the government." Benwell *v.* Newark, 55 N. J. Eq. 260, 263, 36 Atl. 668.

"Registered tonnage," in reference to a ship, is the cubical contents of the ship expressed in tons, or the amount of weight which she will carry as entered upon some official record (Reck *v.* Phenix Ins. Co., 7 N. Y. Suppl. 492); the capacity that has been ascertained and registered as provided by law (Wheaton *v.* Weston, 128 Fed. 151, 153). The term refers to the ship's carrying capacity as stated in the ship's papers under which she is sailing. Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 164, 29 N. E. 137.

"Registered votes" and "registered voters" see Chalmers *v.* Funk, 76 Va. 717, 719.

REGISTERS OF DEEDS

EDITED BY JOHN H. BURFORD*

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CROSS-REFERENCES

For Matters Relating to:
Officer in General, see OFFICERS, 29 Cyc. 1356.
Recording of Instrument, see RECORDS, *ante*, p. 587, and Cross-References Thereunder.
Register:
Of Land-Office, see PUBLIC LANDS, 32 Cyc. 1603.
Of Will, see WILLS.

I. DEFINITION AND NATURE OF OFFICE.

A. Definition. A register of deeds is a public officer authorized and required by law to keep records of instruments in writing, especially instruments affecting the title to real property.[1]

B. Nature. Notwithstanding the performance of his duties requires, to some extent, the exercise of judgment and discretion,[2] the office of register of deeds is essentially a ministerial one.[3]

II. CREATION AND ABOLITION OF OFFICE.

A. Creation. The office of register of deeds may be created and exist by clear implication of law, although there is no statutory provision expressly creating such office.[4]

B. Abolition. The power of the legislature to create the office of register of

1. See Bouvier L. Dict., where it is said that a register or registrar is "an officer authorized by law to keep a record called a register or registry: as, the register for the probate of wills."

A registry of deeds is the system or organized mode of keeping a public record of deeds, mortgages, and other instruments affecting title to real property. Black L. Dict.

"Recorder of deeds" see Mechem Pub. Off. § 733 [*quoted* in Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826].

2. Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826.

3. Dancy *v.* Clark, 24 App. Cas. (D. C.) 487; Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826; People *v.* Fromme, 35 N. Y. App. Div. 459, 54 N. Y. Suppl. 833.

4. Duvall *v.* Diehl, 1 Okla. 66, 30 Pac. 368.

Power to create as separate office.—Notwithstanding the fact that the duties of the office of register have by the legislature been devolved upon the clerk of the court, the legislature may create it as a separate office, provide for the election of an incumbent, and

deeds carries with it, as a necessary incident, the power to modify, limit, or abolish such office.[5]

III. Appointment or Election to Office.

A. In General. The time and manner of appointment or election to the office of register of deeds depend upon constitutional or statutory provisions.[6]

B. To Fill Vacancy. Under a statute authorizing a public body to fill a vacancy in the office of register, such body cannot, in any manner whatever, create a vacancy, but may declare when such vacancy occurs and make an appointment to supply it.[7] Mandamus will lie to compel a public body to perform a duty imposed upon it by law to declare when a vacancy exists in the office of register and to appoint a time for filling the same by election.[8]

C. Qualification — 1. In General. Matters relating to the qualification and induction into office of registers of deeds depend for the most part upon particular constitutional or statutory provisions.[9]

2. Essential as Election. Where the constitution prescribes the qualifications that a register elect must possess, qualification is as essential as election to his right to hold the office.[10]

3. Giving Official Bond — a. Necessity. In the absence of statutory provision to the contrary,[11] a register of deeds is not required to give an official bond.[12]

b. Granting Time to Perfect. Under a statute requiring a public body to meet on a given date and take and approve the official bond of the register of deeds, it is discretionary with the body to refuse or allow further time to a register elect to perfect his official bond.[13]

c. Validity. If the official bond of a register exceeds the amount directed by the act under which it was given, it is good for that amount, and void only for the residue.[14]

d. Effect of Failure to Give. The failure of a register of deeds to file his official bond as required by statute vacates his office.[15]

D. Effect of Assuming Duties in Advance. The right of one regularly elected to the office of register for a given term, to hold such office during that term, is not affected by his assumption of his duties in advance of the commencement of the term.[16]

IV. Tenure of Office.

A. In General. The terms of persons elected or appointed to the office of register of deeds are generally governed by statutory or constitutional provisions.[17]

transfer to one elected thereto the duties and emoluments of the office. State *v.* McDaniel, 19 S. C. 114.

Imposing additional duties is not creating a new office. Colorado Act of April 11, 1903 (Sess. Laws (1903), p. 316, c. 139, § 9), commonly known as the "Torrens Land Law," provides that county clerks and recorders of the several counties shall be registrars of titles in their respective counties. Const. art. 14, § 8, provides that there shall be elected in each county a county clerk, who shall be *ex officio* recorder of deeds. It was held that section 9 does not create a new county office (that of registrar of titles), which is neither filled by appointment, as required by Const. art. 4, § 6, nor by election or appointment, as provided by art. 14, § 12. People *v.* Crissman, 41 Colo. 450, 92 Pac. 949.

5. State *v.* McDaniel, 19 S. C. 114. See also State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092, 3 L. R. A. N. S. 887.

6. Rose *v.* Knox County Com'rs, 50 Me. 243; State *v.* Benedict, 15 Minn. 198; Rhodes *v.* Lewis, 80 N. C. 136; Com. *v.* Swift, 4 Whart. (Pa.) 186.

7. Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116.

8. Rose *v.* Knox County Com'rs, 50 Me. 243.

9. Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. 600.

10. Hannon *v.* Grizzard, 96 N. C. 293, 2 S. E. 600.

11. Hubbard *v.* Crawford, 19 Kan. 570; State *v.* Metheny, 7 Kan. 327; Roberts *v.* Calvert, 98 N. C. 580, 4 S. E. 127; State *v.* Patterson, 97 N. C. 360, 2 S. E. 262.

12. Logan County *v.* Harvey, 6 Okla. 629, 52 Pac. 402.

13. State *v.* Patterson, 97 N. C. 360, 2 S. E. 262.

14. McCaraher *v.* Com., 5 Watts & S. (Pa.) 21, 39 Am. Dec. 506.

15. Hubbard *v.* Crawford, 19 Kan. 570; State *v.* Metheny, 7 Kan. 327.

16. Van Wye *v.* Clark, 41 Kan. 744, 21 Pac. 802.

17. *Dakota.*— Territory *v.* Hauxhurst, 3

B. For Unexpired Term of Predecessor. Under some statutes a person elected or appointed to fill a vacancy in the office of register of deeds is entitled to serve out only the unexpired term of his predecessor,[18] or until the next general election.[19] But under other statutes the appointee is entitled to the office for a full term.[20]

C. Until Successor Qualifies. In some jurisdictions a register of deeds is, by express provision of law, not entitled to hold over until his successor qualifies, but his term expires by limitation at the end of the term for which he was appointed or elected.[21] In other jurisdictions, however, the incumbent is entitled to hold after the expiration of his term until his successor qualifies.[22]

D. Change During Incumbency. In the absence of any constitutional prohibition, or affirmative provision, fixing the term of the office of register of deeds, the legislature may change such term, and such change of term will apply as well to one holding the office as to one to be thereafter elected.[23] However, a legislature having no power to elect or appoint a register of deeds cannot extend the term of his office, since that would virtually be an appointment to the office during the period of extension.[24]

V. REMOVAL.

Under statute in one jurisdiction at least the court has power to remove a register of deeds, when under indictment or information against that officer he is found guilty of misconduct in office.[25]

Dak. 205, 14 N. W. 432, holding that under a statute providing that the term of a register of deeds shall expire by limitation at the end of the term for which he was elected or appointed, he is regarded as a usurper if he retains the office after the expiration of the term.

Kansas.— Van Wye *v.* Clark, 41 Kan. 744, 21 Pac. 802; Hubbard *v.* Crawford, 19 Kan. 570.

Minnesota.— State *v.* Benedict, 15 Minn. 198.

Missouri.— Priest *v.* Lawrence, 16 Mo. App. 409.

Nebraska.— See State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092, 3 L. R. A. N. S. 887.

Tennessee.— Powers *v.* Hurst, 2 Humphr. 24.

18. *In re* Opinion of Justices, 64 Me. 596; State *v.* Benedict, 15 Minn. 198; People *v.* Coutant, 11 Wend. (N. Y.) 132 [*affirmed* in 11 Wend. 511]; Tatum *v.* Rivers, 7 Baxt. (Tenn.) 295.

19. Hedley *v.* Franklin County, 4 Blackf. (Ind.) 116.

20. Power *v.* Hurst, 2 Humphr. (Tenn.) 24.

Reëlection during term for which appointed. — Where a person by virtue of his appointment to fill a vacancy in the office of register is entitled to hold the same for a full term of three years, his reëlection to the office during the term for which appointed is void and does not justify him in holding the office longer than three years in the whole. People *v.* Coutant, 11 Wend. (N. Y.) 132 [*affirmed* in 11 Wend. 511].

21. Territory *v.* Hauxhurst, 3 Dak. 205, 14 N. W. 432.

22. Hubbard *v.* Crawford, 19 Kan. 570 (holding further that under Kan. Const. art. 9, § 3), providing that county officers shall hold over until their successors are qualified, if a newly elected register of deeds delays for some months to qualify, although, because of delay in the canvass of the votes, the previous incumbent continues in office meantime, he, and not the newly elected one, is entitled to the fees and emoluments of the office *ad interim*); Rose *v.* Knox County Com'rs, 50 Me. 243; State *v.* Benedict, 15 Minn. 198; Priest *v.* Lawrence, 16 Mo. App. 409.

23. Douglas County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

24. State *v.* Plasters, 74 Nebr. 652, 105 N. W. 1092, 3 L. R. A. N. S. 887.

25. State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172.

An indictment of a register of deeds under Me. Rev. St. (1857) c. 7, § 15, for misconduct in office, in that he issued a certificate of title as free from encumbrances which was false by reason of the existence of an attachment against the property, which he failed to certify, need not set out the writ and attachment. State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172.

Admissibility of evidence.— On the trial of a register of deeds for issuing a certificate of title as free from encumbrances which was false in that it failed to show the levy of an attachment issued and the writ are admissible, even where the return by the officer, which was filed in the register's office, contained an erroneous middle initial of the attaching creditor's name. State *v.* Leach, 60 Me. 58, 11 Am. Rep. 172. On the trial of a register of deeds for issuing a false certificate of title with intent to defraud, the history of the certificate and the uses made of it in obtaining a loan by the holder is admissible. State *v.* Leach, *supra*.

VI. Rights, Duties, and Liabilities.

A. Rights.[26] An act prohibiting registers of deeds from practising law does not violate a constitutional provision declaring that every person of good moral character shall be entitled to practise law, since a register of deeds takes his office *cum onere*.[27]

B. Duties — 1. In General. A register of deeds can be compelled to perform only such duties or services as the statute imposes upon him.[28]

2. To Perform Acts Left Undone by Predecessor. In the absence of statutory provision [29] it is not the duty of a register of deeds to perform a particular duty which should have been performed by his predecessor.[30]

3. To File or Record Instruments. The duty of the register is to receive and file, or receive and record, as the case may be, such instruments as by the laws of the state are entitled to be filed or recorded, and whether in the making or execution of such instruments the parties thereto have made valid instruments is not his province to determine.[31]

4. To Provide Indexes For Books of Record. In the absence of statutory provision to the contrary,[32] it is not the duty of a register to prepare and keep an index for the books of record used for recording instruments affecting title to real estate.[33] But a direction to prepare a general index,[34] or an index in the first instance,[35] demands the same measure of care and accuracy in its execution as does a statutory direction to keep the books of record.

5. To Note Discharge of Mortgages. When a certificate of a discharge of a mortgage is presented, a register is not bound, before performing his statutory duty of entering the discharge on the record, to search for assignments of the mortgage.[36]

6. To Search Title. A register of deeds need not search a title unless furnished with such information as to its status as will enable him to ascertain it by

26. **Compensation** see *infra*, VIII.

27. McCracken *v.* State, 27 Ind. 491.

28. State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131, holding further that it is no part of the official duty of a register to search the records to ascertain whether persons signing a petition to obtain a liquor license are freeholders.

29. Garrett *v.* Boone County, 92 Ind. 518; Hunt *v.* Nance, 122 Ky. 274, 92 S. W. 6, 28 Ky. L. Rep. 1188.

30. Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941. See also Davis *v.* Thompson, 1 Nev. 17.

31. People *v.* Fromme, 35 N. Y. App. Div. 459, 54 N. Y. Suppl. 833. But see Dancy *v.* Clark, 24 App. Cas. (D. C.) 487, holding that while a register of deeds is a ministerial officer without jurisdiction to pass on the validity of an instrument presented to him for record, he is not wholly without discretion to determine whether a given instrument shall be admitted to record; and whether his action in a given case falls within the scope of authority vested in him is to be determined by the court according to the principles of law applicable to the facts.

Recording deed lodged with predecessor.— Under Ky. St. (1903) §§ 510, 511, it is the duty of a register to record a deed when lodged in his office for record, if acknowledged and certified according to law, without regard to whether such deed was or was not lodged in the register's office during the term of office of his predecessor. Hunt *v.* Nance, 122 Ky. 274, 92 S. W. 6, 28 Ky. L. Rep. 1188.

Recording in order of time and place.— Under the provisions of the statute the register can in no case delay or refuse to record an instrument presented to him for that purpose, but must do it in the order of time and place, without leaving any blank spaces. Florence *v.* Mercier, 2 La. 487.

Entering description on record.— Where the law so provides, it is the duty of the register when a conveyance of real estate is presented to him for record, to enter on the record a description of the real estate as described in such conveyance. Keene Syndicate *v.* Denney, 9 Kan. App. 599, 58 Pac. 242.

32. *Alabama.*— Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841.

New York.— New York Mut. L. Ins. Co. *v.* Dake, 87 N. Y. 257; People *v.* Nash, 62 N. Y. 484 [*affirming* 3 Hun 535].

Ohio.— Green *v.* Garrington, 16 Ohio St. 548, 91 Am. Dec. 103; Matter of Holliday, 13 Ohio Cir. Ct. 672, 6 Ohio Cir. Dec. 751.

Texas.— Morton *v.* Smith, (Civ. App. 1898) 44 S. W. 683.

Vermont.— Hunter *v.* Windsor, 24 Vt. 327.

33. Hunter *v.* Windsor, 24 Vt. 327.

34. Hunter *v.* Windsor, 24 Vt. 327.

35. Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841.

36. State *v.* Parker, 57 N. J. L. 677, 32 Atl. 260.

simple inspection of the record.[37] Nor is he under obligation to certify that a description certified by him includes part only of the premises described in the requisition.[38] But he must mention in his certificate all instruments recorded, and has no discretion as to the validity of the instruments so recorded.[39]

7. To Account For Moneys Received. Under a statute providing that a register shall pay over all fees received by him after deducting his salary, all moneys received for duties performed in his official capacity must be accounted for and paid over by the register,[40] notwithstanding the duties were performed outside of regular office hours;[41] and it makes no difference whether a statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the register and the person for whom he performed the duties.[42] But no duty rests upon a register of deeds to account for and pay over moneys received by him for extra official services.[43]

C. Liabilities[44] — 1. In General — a. Rule Stated. A register of deeds is personally liable to the party aggrieved for the damages resulting from an omission to perform a duty imposed on him by law,[45] or from a performance of such duty in a negligent manner.[46] But it must appear that the damages resulted

37. State *v.* Deacon, 44 N. J. L. 559.

A requisition is sufficiently specific where it calls upon the register to search the title of a deed to lands described, and the register is bound to comply on payment of the fees. Townshend *v.* Register of Deeds, 7 How. Pr. (N. Y.) 318.

38. State *v.* Deacon, 44 N. J. L. 559.

39. Sacerdotte *v.* Duralde, 1 La. 482.

Mention of mortgages considered as surplusage.— Certain mortgages were recorded against an insolvent after his failure. The syndic made a sale and applied to the register for certificate of the mortgages against the property in the insolvent's name. The register gave a certificate, including the mortgages subsequent to the failure. It was held that the mention in the certificate of the subsequent mortgages might be regarded as surplusage. Dorsey *v.* His Creditors, 6 La. Ann. 385.

40. State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131; State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891; State *v.* Kelly, 30 Nebr. 574, 46 N. W. 714; State *v.* Sovereign, 17 Nebr. 173, 22 N. W. 353.

41. State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891.

42. State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131.

43. State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131; Shepard *v.* Easterling, 61 Nebr. 882, 86 N. W. 941.

44. Criminal responsibility see Officers, 29 Cyc. 1449.

45. *Indiana.*— Reeder *v.* State, 98 Ind. 114.

Iowa.— Sutherland First Nat. Bank *v.* Clements, 87 Iowa 542, 54 N. W. 197.

Louisiana.— Baker *v.* Lee, 49 La. Ann. 874, 21 So. 588.

Missouri.—Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

North Carolina.— State *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

See 42 Cent. Dig. tit. "Registers of Deeds," § 12.

46. *Connecticut.*— Welles *v.* Hutchinson, 2 Root 85.

Georgia.— Luther *v.* Banks, 111 Ga. 374, 36 S. E. 826, holding, however, that where a mortgagor presented to the clerk of the superior court the original of a recorded mortgage, together with an order to the clerk, purporting to be signed by the mortgagee, to cancel such mortgage on the record, and the clerk had no knowledge of the invalidity of the order, nor any reason to suspect it, his act of recording the order did not render him liable to a person injured by such entry, notwithstanding the order was forged, since the possession of the original mortgage by the mortgagor was sufficient to relieve the clerk of all imputation of neglect, in the absence of circumstances charging him with the duty of making inquiry.

Indiana.— State *v.* Davis, 117 Ind. 307, 20 N. E. 159; Reeder *v.* State, 98 Ind. 114; Mechanics' Bldg. Assoc. *v.* Whitacre, 92 Ind. 547.

Iowa.— Sutherland First Nat. Bank *v.* Clements, 87 Iowa 542, 54 N. W. 197.

Louisiana.— Gordon *v.* Stanley, 108 La. 182, 32 So. 531; Chige *v.* Landreaux, 2 La. Ann. 606; Sauvinet *v.* Landreaux, 1 La. Ann. 219; Falconer's Succession, 4 Rob. 5.

Missouri.— State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115.

New York.— Hartwell *v.* Riley, 47 N. Y. App. Div. 154, 62 N. Y. Suppl. 317; Van Schaick *v.* Sigel, 58 How. Pr. 211 [*affirmed* in 9 Daly 383, 60 How. Pr. 122, 11 N. Y. Wkly. Dig. 117].

Pennsylvania.— Peabody Bldg., etc., Assoc. *v.* Houseman, 89 Pa. St. 261, 33 Am. Rep. 757; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Schell *v.* Stein, 76 Pa. St. 398, 18 Am. Rep. 416.

See 42 Cent. Dig. tit. "Registers of Deeds," § 12.

Instances.— Failure to properly index a *lis pendens.* Hartwell *v.* Riley, 47 N. Y. App. Div. 154, 62 N. Y. Suppl. 317. Or a mortgage. Reeder *v.* State, 98 Ind. 114; State *v.* Grizzard, 117 N. C. 105, 23 S. E. 93. Furnishing incorrect information as to encumbrances upon land. Van Schaick *v.* Sigel, 58

from the register's official default, and not from any fault or laches of the party damnified.[47]

b. To Whom. The liability of a register for breach of official duty inures only in favor of the person to whom the duty was owed [48] and who was prejudiced by the breach thereof.[49]

c. When Liability Accrues. A right of action against a register for breach of official duty involving individual rights does not accrue until the happening of a consequential injury resulting proximately from the breach.[50]

d. Proceedings to Enforce — (I) *PLEADINGS.* In a suit against a register of deeds for breach of official duty, it is essential to aver that defendant was at the time such register,[51] and that the breach of duty was the cause of the damage sustained by plaintiff.[52]

(II) *DAMAGES* — (A) *Nature.* There can be no recovery in an action for breach of duty on the part of a register of deeds unless the damage sustained is the natural and reasonable necessary consequence of such default.[53]

(B) *Measure.* In some jurisdictions it is provided by statute that a register

How. Pr. (N. Y.) 211 [*affirmed* in 9 Daly 383, 60 How. Pr. 122, 11 N. Y. Wkly. Dig. 117]; Gordon *v.* Stanley, 108 La. 182, 32 So. 531. Noting payment on the margin of the wrong mortgage. Mechanics' Bldg. Assoc. *v.* Whitacre, 92 Ind. 547. Negligently permitting the release of record of a mortgage. State *v.* Green, 112 Mo. App. 108, 90 S. W. 403.

The fact that one making a requisition for a certificate of search designated the clerk whom he desired should make the search does not so render such clerk the applicant's agent as to absolve the register from liability for a certificate erroneously stating that the premises were clear of encumbrance. Van Schaick *v.* Sigel, 58 How. Pr. (N. Y.) 211 [*affirmed* in 9 Daly 383, 60 How. Pr. 122, 11 N. Y. Wkly. Dig. 117].

Wilfulness.— Where a register of deeds fails to index properly a trust deed, through inexcusable neglect, it is presumed that he acted wilfully, although a wilful purpose to injure cannot be shown. Maxwell *v.* Stuart, 99 Tenn. 409, 42 S. W. 34.

Misinterpretation of certificate as to title. — A register's certificate that the title to certain land is in two grantees does not imply that each grantee holds an undivided moiety of the land, so as to make the clerk liable to one who makes a loan to one of the grantees relying on such interpretation of the certificate. Tripp *v.* Hopkins, 13 R. I. 99.

The presumptive knowledge of a purchaser of land of the law will not relieve a register of deeds of liability resulting to the purchaser from this entry by the register, with the purchaser's knowledge, of satisfaction of a prior mortgage without the production of the notes secured or an affidavit that they had been paid. State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115.

47. Wacek *v.* Frink, 51 Minn. 282, 53 N. W. 633, 38 Am. St. Rep. 502; Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533; Lyman *v.* Edgerton, 29 Vt. 305, 70 Am. Dec. 415. See also Palfrey *v.* Marigny, 10 La. Ann. 283, holding that the register of conveyances is not liable in damages to a purchaser at sheriff's sale, on account of his false certificate that the title to the land sold was in defendant in execution, when his own chain of title afforded him the means of knowing that he held a title good as against the one sold.

A mortgagee who sustained a loss through the failure of a former register to perform his duty in respect to indexing the *lis pendens* is not chargeable with negligence because he relied on the search made by the register, who believed, as he had a right to do, that his predecessor had done his duty, and hence did not discover the mistake. Hartwell *v.* Riley, 47 N. Y. App. Div. 154, 62 N. Y. Suppl. 317.

48. Morano *v.* Shaw, 23 La. Ann. 379; Smith *v.* Moore, 9 Rob. (La.) 65; Day *v.* Reynolds, 23 Hun (N. Y.) 131; Houseman *v.* Girard Mut. Bldg., etc., Assoc., 81 Pa. St. 256; Com. *v.* Harmer, 6 Phila. (Pa.) 90.

49. Watkins *v.* Wilhoit, (Cal. 1894) 35 Pac. 646. See also State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115.

The presumption that a register of deeds knows the laws and the duties incumbent upon him, and that he will execute them in accordance with his special knowledge of the proper performance of the duties of his office, arises in favor of one who is dealing with such officer. State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115.

50. State *v.* Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244 (holding, however, that in that particular case the injury resulted as soon as the error had been committed); Owen *v.* Western Sav. Fund, 97 Pa. St. 47, 39 Am. Rep. 794; State *v.* McClellan, 113 Tenn. 616, 85 S. W. 267. But see Daniel *v.* Grizzard, 117 N. C. 105, 23 S. E. 93.

51. George *v.* Vaughan, 55 Tex. 129.

52. Hunter *v.* Windsor, 24 Vt. 327.

Form of petition in action against a register of deeds for negligence see State *v.* Green, 112 Mo. App. 108, 110, 90 S. W. 403.

Form of answer to petition against register of deeds for negligence see State *v.* Green, 112 Mo. App. 108, 112, 90 S. W. 403.

53. Chase *v.* Bennett, 59 N. H. 394; Kimball *v.* Connolly, 33 How. Pr. (N. Y.) 247.

of deeds shall be liable for double [54] or treble [55] the amount of damages occasioned by his official default. For official default of a register plaintiff cannot recover more than nominal damages,[56] unless he proves an actual loss.[57]

2. On Official Bond — a. In General. The sureties on the bond are liable for resulting substantial damages to the party suing whenever it appears that the register has failed to perform a duty imposed on him by law [58] or that he has performed it in a negligent manner.[59] But no liability exists on the official bond of a register, notwithstanding a breach thereof, unless substantial damages are shown.[60] Nor can liability exist on the official bond of a register for the negligent performance of a duty not imposed on him by law,[61] or where plaintiff participated in and directly contributed to the negligent act which caused the injury.[62]

b. Proceedings to Enforce — (i) *Nature.* The action on the official bond of a register of deeds is one *ex contractu.*[63]

(ii) *Pleading.* Unless the law authorizes such provision in the official bond of a register, it is unnecessary that the complaint in an action thereon allege the recovery of a judgment against the register and his failure to pay it.[64]

(iii) *Defenses.* It is no defense to an action on the official bond of a register for damages resulting from a failure of official duty by the deputy register, that the consent of the sureties was not given to the appointment of the deputy.[65]

54. Bishop *v.* Schneider, 46 Mo. 472, 2 Am. Rep. 533.

55. Watkins *v.* Wilhoit, (Cal. 1894) 35 Pac. 646.

56. State *v.* Davis, 117 Ind. 307, 20 N. E. 159.

57. Welles *v.* Hutchinson, 2 Root (Conn.) 85.

A register is, for erroneously erasing a mortgage, liable to the mortgagee only for the damages resulting from his recourse against the property being rendered more difficult and expensive, and to the purchaser for any loss caused by the error. Macarty *v.* Landreaux, 8 Rob. (La.) 130.

Incorrect certificate of search.— Where a mortgage was taken on land, then subject to a mortgage that was recorded, on the reliance of a certificate of search that the land was free from encumbrance, the register is liable to the second mortgagee to the amount his security is impaired by the prior mortgage. Van Schaick *v.* Sigel, 58 How. Pr. (N. Y.) 211 [*affirmed* in 9 Daly 383, 60 How. Pr. 122, 11 N. Y. Wkly. Dig. 117].

58. People *v.* Stewart, 6 Ill. App. 62; State *v.* Atkisson, 17 Ind. 26; Brigham *v.* Bussey, 26 La. Ann. 676; Treasurer *v.* De Saussure, 2 Speers (S. C.) 186.

Instances.— Failure to reinscribe a certain judgment within the proper time. Brigham *v.* Bussey, 26 La. Ann. 676. Failure to account for fees received in official capacity. People *v.* Stewart, 6 Ill. App. 62.

59. *Illinois.*— Lusk *v.* Carlin, 5 Ill. 395.

Indiana.— State *v.* Davis, 96 Ind. 539.

Louisiana.— Fox *v.* Thibault, 33 La. Ann. 32.

Missouri.— State *v.* Green, 112 Mo. App. 108, 90 S. W. 403.

New Jersey.— Appleby *v.* State, 45 N. J. L. 161.

Pennsylvania.—McCaraher *v.* Com., 5 Watts & S. 21, 39 Am. Dec. 506.

Texas.— Morton *v.* Smith, (Civ. App. 1898) 44 S. W. 683.

See 42 Cent. Dig. tit. "Registers of Deeds," §§ 12, 15.

Instances.— Giving incorrect information as to encumbrances upon land. Lusk *v.* Carlin, 5 Ill. 395; Fox *v.* Thibault, 33 La. Ann. 32; McCaraher *v.* Com., 5 Watts & S. (Pa.) 21, 39 Am. Dec. 506. Recording a deed in which the grantee agreed to pay a given sum as a part of a mortgage debt, with an agreement to pay a less sum. State *v.* Davis, 96 Ind. 539. Wrongfully noting the cancellation of a mortgage. Appleby *v.* State, 45 N. J. L. 161.

Duty not covered by conditions of bond.— It has been held that an action will not lie on a register's official bond for negligence in performing a duty not covered by the conditions of the bond. Holt *v.* McLean, 75 N. C. 347; Moretz *v.* Ray, 75 N. C. 170.

Wilfulness.— Under a statute authorizing recovery of damages sustained by the negligence of a register in performing the duties pertaining to his office, a register is liable on his official bond for such negligence, although it is not wilful or so gross as to imply wilfulness. State *v.* McClellan, 113 Tenn. 616, 85 S. W. 267.

60. State *v.* Green, 112 Mo. App. 108, 90 S. W. 403.

61. Temple *v.* People, 6 Ill. App. 378.

62. State *v.* Green, 112 Mo. 108, 90 S. W. 403. *Compare* State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115, for facts which did not constitute participation in the negligence of the register, such as to constitute a valid defense in an action against him for negligence.

Where the register promises to perform a special duty, the failure of the promisee to go afterward to see that the register has done his duty is not such contributory negligence as will bar recovery. Brigham *v.* Bussey, 26 La. Ann. 676.

63. Fox *v.* Thibault, 33 La. Ann. 32; Brigham *v.* Bussey, 26 La. Ann. 676.

64. Joyner *v.* Roberts, 112 N. C. 111, 16 S. E. 917.

65. Brigham *v.* Bussey, 26 La. Ann. 676.

(IV) *DAMAGES.* The official bond of a register being a bond of indemnity,[66] the measure of damages is the actual loss which has been sustained by reason of the breach.[67]

VII. VALIDITY OF ACTS.

A. Of De Facto Officer. The well-established principle that the acts of a *de facto* public officer are valid as respects third persons who have an interest in them and as concerns the public applies to the acts of a *de facto* register of deeds.[68]

B. As Affected by Interest. The act of admitting an instrument to record is of a ministerial character, and hence can be performed by the register, even though he is a party thereto or has an interest thereunder.[69]

VIII. COMPENSATION.

A. Who Liable. In the absence of express statutory provision,[70] the public is not liable for the compensation of a register of deeds.[71] Usually the person

66. State *v.* Green, 112 Mo. App. 108, 90 S. W. 403.

67. Johnson *v.* Brice, 102 Wis. 575, 78 N. W. 1086. See also Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841 (holding that plaintiff is entitled to recover nominal damages and such actual damages as proximately result from the official default, regardless of the motive of the register); State *v.* Green, 124 Mo. App. 80, 100 S. W. 1115 (for measure of damages in an action against a register of deeds for negligence in releasing the record of a deed of trust); State *v.* Green, 112 Mo. App. 108, 90 S. W. 403 (holding that the measure of liability on the bond of a recorder of deeds for negligently permitting a trust deed to be falsely marked "Satisfied" cannot exceed the amount due on the trust deed at the date of the entry of satisfaction).

Instances.— A register of deeds who neglected to notice a mortgage on the tract index as required by law is liable on his bond to the purchaser of such land in reliance on the index, for the damages, where the purchaser had bought up the mortgage, enforced it so far as it covered other property, and exhausted his remedies against his vendor and the maker of the mortgage note. Johnson *v.* Brice, 102 Wis. 575, 78 N. W. 1086. A lender who has advanced money on faith of a certificate of non-alienation of property supposed to belong to the borrower, who mortgages the property to secure the debt, has a right of action on the register's bond to recover the loss sustained, where such property has in fact been aliened, on proof of the actual loss with reasonable certainty. Gordon *v.* Stanley, 108 La. 182, 32 So. 531. A register is liable on his official bond for the amount of money loaned on the faith of a certificate that certain land was free from encumbrances, when in fact the land was mortgaged for more than its value and the lender, consequently, lost his money. Fox *v.* Thibault, 33 La. Ann. 32. Under an act requiring a register to minute in the margin of the mortgage record its satisfaction, his surety is liable for his mistake in noting a mortgage satisfied, to one who examined the minute and purchased the premises, for the amount he was actually compelled to pay to relieve the property from the mortgage. Appleby *v.* State, 45 N. J. L. 161. In an action against a register and his sureties on his official bond, where the breach alleged was that the register failed to keep up and continue the index of deeds recorded by him during his continuance in office, the board of commissioners is entitled to recover only such reasonable sum as they may have paid his successor to index the deeds recorded during his term. State *v.* Atkisson, 17 Ind. 26.

68. Maley *v.* Tipton, 2 Head (Tenn.) 403, holding further that where the office of register becomes vacant by the removal of the incumbent, and his deputy continues to act, the registration of an instrument by such deputy is, upon the principle stated in the text, valid and effectual. See also Cook *v.* Hall, 6 Ill. 575, holding that a person delivering an instrument entitled to record to one who is in custody of the records and who is acting as register is not required to ascertain whether he is register *de jure*.

69. Paul *v.* Baugh, 85 Va. 955, 9 S. E. 329.

70. *Indiana.*— Garrett *v.* Boone County, 92 Ind. 518; Hand *v.* Tippecanoe County, 26 Ind. 179; La Grange County *v.* Kromer, 8 Ind. 446; Hubler *v.* Cass County, 19 Ind. App. 464, 49 N. E. 832.

Louisiana.— State *v.* Clinton, 25 La. Ann. 285; Southworth *v.* New Orleans, 24 La. Ann. 312.

Michigan.— Beekman *v.* Eaton County, 85 Mich. 584, 48 N. W. 615; Roulo *v.* Wayne County, 74 Mich. 129, 41 N. W. 879.

Minnesota.— Mapes *v.* Olmstead County, 11 Minn. 367; Hough *v.* Ramsey County, 9 Minn. 23.

Ohio.— Matter of Holliday, 13 Ohio Cir. Ct. 672, 6 Ohio Cir. Dec. 751.

Pennsylvania.— Pierie *v.* Philadelphia, 139 Pa. St. 573, 21 Atl. 90; Russell *v.* Luzerne County, 7 Kulp 425.

See 42 Cent. Dig. tit. "Registers of Deeds," § 8.

71. Maricopa County *v.* Osborn, 4 Ariz. 331, 40 Pac. 313; Nordin *v.* Kandiyohi County, 23 Minn. 171.

for whom the register renders a particular service is liable to him for his compensation.[72]

B. Amount — 1. Regulated by Statute — a. In General. For performing the duties pertaining to his office a register of deeds is entitled to only such compensation as is specifically prescribed by statute, either in the form of fees [73] or of a salary.[74] And in the application of this rule as to amount of compensation it matters not that the duty was performed outside of regular office hours,[75] or

72. State *v.* Phillips, 157 Ind. 481, 62 N. E. 12; Davis *v.* Thompson, 1 Nev. 17, holding that, although a newly elected register may not be bound to record deeds found in the office, and for the recording of which his predecessor has been paid, a necessity to record them is imposed on him for the proper conduct of the business of his office, and as such recording inures to the benefit of his predecessor the law raises an implied request on his part to record them, and an implied promise to pay therefor.

73. *Alabama.*— Tillman *v.* Wood, 58 Ala. 578.

Colorado.— Henderson *v.* Pueblo County, 4 Colo. App. 301, 35 Pac. 880.

Louisiana.— State *v.* Recorder of Conveyances, 33 La. Ann. 223.

Maryland.— Peter *v.* Prettyman, 62 Md. 566.

Nebraska.— State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131; Blaco *v.* State, 58 Nebr. 557, 78 N. W. 1056; Heald *v.* Polk County, 46 Nebr. 28, 64 N. W. 376; State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891; State *v.* Kelly, 30 Nebr. 574, 46 N. W. 714; Bayha *v.* Webster County, 18 Nebr. 131, 24 N. W. 457; State *v.* Sovereign, 17 Nebr. 173, 22 N. W. 353; State *v.* Silver, 9 Nebr. 85, 2 N. W. 215.

New York.— People *v.* Dutchess County, 24 Wend. 181.

See 42 Cent. Dig. tit. "Registers of Deeds," § 8.

Only remedy legislative intervention.— If the method of doing a particular service subjects the register to unusual trouble and expense and greater than the statute contemplated, then his only remedy is legislative intervention in his behalf. Peter *v.* Prettyman, 62 Md. 566.

Fees for particular services.— The fee given by statute "for searching and certifying the title, to and encumbrances upon, real property, for each year for which the search is made" cannot be multiplied by the number of lots or parcels covered by the same requisition. Matter of Parsons, 54 N. Y. Super. Ct. 451, 7 N. Y. St. 74. A block of land containing several lots owned by one person, which is used as one tract of land, may be described in a deed of conveyance as a block, and shall be transferred by the county clerk on demand on payment of the fee provided for a block. Keene Syndicate *v.* Denney, 9 Kan. App. 599, 58 Pac. 242. Under a statute providing that the register shall receive for recording a chattel mortgage and for indexing the same the sum of six cents for each party thereto, for filing a chattel mortgage made to a partnership in the firm-name, the register is entitled to charge for each name in the firm style capable of being indexed. State *v.* Anderson, 9 Ohio Dec. (Reprint) 691, 16 Cinc. L. Bul. 356. A register who records the abstracts of inventories of the property of minors is only entitled to charge for one registry of such abstract, under the act of 1870, allowing him the same fees as "for similar services," although such abstract may contain several mortgages. Southworth *v.* New Orleans, 24 La. Ann. 312. Under an act requiring the register of each county, where the same has not been done, to make out a complete general and double index of all deeds, etc., in his office, and directing the board of county commissioners to allow a given sum for each one hundred words therein contained, and providing further that after their completion it shall be the duty of the register to keep up such indices, as deeds and mortgages shall, from time to time, be recorded, without any compensation except the fees allowed by law for recording such deeds and mortgages, the indexing of such deeds as were filed for record after the passage of the act must be considered as part of recording and the fee therefor as included in the fee for the record. Wabash County *v.* Sheets, 17 Ind. 22. Registration of decrees is governed by the latter clause of the Tennessee act of 1871, namely, seventy-five cents for the first three hundred words and ten cents for each additional one hundred. Lee *v.* Damron, 1 Lea (Tenn.) 131. That the Indiana act of March 9, 1891, provides a salary for the register of every county but Shelby does not invalidate the section of the act providing that the registers of all the counties in the state shall be entitled to a fee of one dollar for recording a mortgage. State *v.* Krost, 140 Ind. 41, 39 N. E. 46.

74. *California.*— Los Angeles County *v.* Lamb, 61 Cal. 196.

Colorado.— Henderson *v.* Pueblo County, 4 Colo. App. 301, 35 Pac. 880.

Illinois.—People *v.* Stewart, 6 Ill. App. 62.

Louisiana.— State *v.* Recorder of Conveyances, 33 La. Ann. 223.

Pennsylvania.— Von Bonnhorst *v.* Allegheny County, 163 Pa. St. 588, 30 Atl. 123.

See 42 Cent. Dig. tit. "Registers of Deeds," § 8.

From what moneys payable.— Sometimes the statute prescribing the compensation of a register in the form of a salary also prescribes that such salary shall be payable from the fees received by him for performing the duties pertaining to his office. People *v.* Stewart, 6 Ill. App. 62; State *v.* Kelly, 30 Nebr. 574, 46 N. W. 714.

75. State *v.* Hazelet, 41 Nebr. 257, 59 N. W. 891.

that in performing a certain duty the register voluntarily did more than his duty.[76]

b. Change During Incumbency. In the absence of any constitutional prohibition or affirmative provision fixing the compensation of a register of deeds, the legislature may change such compensation at will,[77] and such change will apply to an incumbent of the office as well as to one thereafter to be elected.[78] Where, however, a statute increases the duties of a register of deeds by the addition of other duties germane to his office, he must perform them without extra compensation, unless such compensation is provided for in the statute.[79]

2. Fixed by Contract. For a service which is no part of the duties of his office,[80] or for an extraordinary necessary service not covered by the statute prescribing compensation only in the form of fees,[81] a register may, by contract with the party for whom the service is to be performed, fix the rate of his compensation therefor.

C. Prepayment — 1. In General. In the absence of statutory provision to the contrary, the register may demand payment in advance of his fees for performing a given service.[82]

2. Waiver Regarding. A register to whom personally belongs the statutory fee for performing a given duty may waive his right to prepayment thereof.[83]

3. Compelling Service Without. Mandamus will not lie to compel a register to perform a duty pertaining to his office without payment of his fee therefor in advance, even though the fee demanded is claimed to be excessive, where it appears that relator is able to pay the fee and can recover the alleged excess by ordinary action.[84]

D. Actions Therefor. The fee of a register for recording an instrument may be recovered from the party for whom the service is rendered in an ordinary action for work and labor performed.[85]

REGISTRATION. The act of making a list, or catalogue, or schedule, or register;[1] entering in a book a statement or memorandum of facts to serve as memorials or evidence.[2] In election laws the method of proof prescribed for ascertaining the electors who are qualified to cast votes.[3] (Registration: In General, see Records, *ante*, p. 577. Acts, Constitutionality of, see Constitutional Law, 8 Cyc. 891, 908. As Including Delivery, see Acknowledgments, 1 Cyc. 592 note 48. As Prerequisite to Practice of Medicine, see Physicians and Surgeons, 30 Cyc. 1554. Constitutional and Statutory Provisions as to Board of Registration, see Municipal Corporations, 28 Cyc. 582. Lack of or Defective Registration Cured, see Constitutional Law, 8 Cyc. 1027. Lis Pendens as Equivalent of, see Lis Pendens, 25 Cyc. 1483 note 92. Of Animal, see Animals, 2 Cyc. 331 note 13, 387. Of Chattel Mortgage, see Chattel Mortgages, 6 Cyc. 1062. Of Chinese Resident,

76. People *v.* Dutchess County, 24 Wend. (N. Y.) 181.

77. Douglass County *v.* Timme, 32 Nebr. 272, 49 N. W. 266. See also Turpen *v.* Tipton County, 7 Ind. 172.

78. Douglass County *v.* Timme, 32 Nebr. 272, 49 N. W. 266.

79. Broaddus *v.* Pawnee County, 16 Okla. 473, 88 Pac. 250.

80. Brockway *v.* Cook County, 15 Ill. App. 560; State *v.* Holm, 70 Nebr. 606, 97 N. W. 821, 64 L. R. A. 131.

81. Leavenworth County Com'rs *v.* Keller, 6 Kan. 510.

82. People *v.* Chase, 70 Ill. App. 42; People *v.* Bristol, 35 Mich. 28; Parrish *v.* Mahany, 10 S. D. 276, 73 N. W. 97, 66 Am. St. Rep. 715.

83. People *v.* Bristol, 35 Mich. 28; Parrish *v.* Mahany, 10 S. D. 276, 73 N. W. 97, 66 Am. St. Rep. 715.

84. People *v.* Chase, 70 Ill. App. 42.

85. Tillman *v.* Wood, 58 Ala. 578.

1. *In re* Election Supervisors, 1 Fed. 1, 5.

2. Fisher *v.* Jones, 82 Ala. 117, 122, 3 So. 13, where it was held, under a statute requiring the registration of transfers of stock on the books of the company, and providing that such transfers should be void as to *bona fide* creditors and subsequent purchasers, without notice, unless this was done within a certain time, that a written memorandum would as well answer the purposes intended by the provisions of the statute as a formal record.

3. People *v.* Bell, 119 N. Y. 175, 181, 23 N. E. 533; People *v.* Carlton, 41 Misc. (N. Y.) 523, 524, 85 N. Y. Suppl. 22.

see ALIENS, 2 Cyc. 127. Of Claim Against County, see COUNTIES, 11 Cyc. 605. Of Contract of Conditional Sale, see SALES. Of Copyright, see COPYRIGHT, 9 Cyc. 916. Of County Bond, see COUNTIES, 11 Cyc. 572 note 50. Of Deed, see DEEDS, 13 Cyc. 594. Of Druggist, see DRUGGISTS, 14 Cyc. 1079. Offenses Against Registration Laws Relating to License, see LICENSES, 25 Cyc. 636, 637. Of Foreign Insurance Company, see FOREIGN CORPORATIONS, 19 Cyc. 1261. Of Lien For Repairs on Levy, see LEVIES, 25 Cyc. 193. Of Marriage, see MARRIAGE, 16 Cyc. 860. Of Marriage Settlement, see HUSBAND AND WIFE, 21 Cyc. 1252, 1257. Of Mortgage, see MORTGAGES, 27 Cyc. 1155. Of Motor Vehicles, see MOTOR VEHICLES, 28 Cyc. 32. Of Municipal Bond, see MUNICIPAL CORPORATIONS, 28 Cyc. 1608. Of Pledge, see PLEDGES, 31 Cyc. 799. Of Sale of Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 165, 241 note 51. Of Sheriff's Deed, see EXECUTIONS, 17 Cyc. 1347. Of Stock-Holder Applying For Mandamus to Examine Books of Corporation, see MANDAMUS, 26 Cyc. 343 note 28. Of Trade-Mark or Trade-Name, see TRADE-MARKS AND TRADE-NAMES. Of Transfer of Corporate Stock on Corporate Books — In General, see CORPORATION, 10 Cyc. 595; By-Law Requiring Fee For, see CORPORATIONS, 10 Cyc. 579. Of Transfer of Corporate Stock With County Clerk, see CORPORATIONS, 10 Cyc. 639 note 99. Of Vessel, see COMMERCE, 7 Cyc. 463; MARINE INSURANCE, 26 Cyc. 554 note 23; SHIPPING. Of Vital Statistics, see HEALTH, 21 Cyc. 387 note 30. Of Voters — In General, see ELECTIONS, 15 Cyc. 302; Control by Mandamus, see MANDAMUS, 26 Cyc. 271. On Sunday, see SUNDAY. See also REGISTER, *ante*, p. 1014.)

REGISTRY. A register, or book authorized or recognized by law, kept for the recording or registration of facts or documents.[4] (See REGISTER, *ante*, p. 1014; REGISTRATION.)

REGNANDI CAUSA MALUM CORAM NON JUDICE. A maxim meaning "Since courts are the ruler himself sitting in justice, the courts can not try the ruler's title to the throne which he occupies." [5]

REGNUM NON EST DIVISIBILE. A maxim meaning "The kingdom is not divisible." [6]

REGRATING. See MONOPOLIES, 27 Cyc. 891 note 9.

REGRET. Grief or trouble caused by the want or loss of something formerly possessed; a painful sense of loss; desire for what is gone; sorrowful longing.[7]

REGULA EST, JURIS QUIDEM IGNORANTIAM CUIQUE NOCERE FACTI VERO IGNORANTIAM NON NOCERE. A maxim meaning "The rule is, that ignorance of the law does not excuse, but that ignorance of a fact may excuse a party from the legal consequences of his conduct." [8]

REGULA EST QUÆ REM QUÆ EST BREVITER ENARRAT, NON UT EX REGULA JUS SUMATUR, SED EX JURE QUOD EST REGULA FIAT. PER REGULAM IGITUR BREVIS RERUM NARRATIO EST, QUÆ SIMUL CUM IN ALIQUO VITIATA EST PERDIT OFFICIUM SUUM. A maxim meaning "A rule of law is a maxim inferred from several cases depending on the same legal principle. The rule is formed from the law that governs the cases, and not the law from the rule. The

4. Black L. Dict.

"The word is the same in Spanish and in English.— Both derive it from the Latin — *liber rerum gestarum* — which the Roman lawyers contracted into *registrum*. To register a thing is to write it in a book." Castillero *v.* U. S., 2 Black (U. S.) 17, 109, 17 L. ed. 360.

The words "enrolment," "registry," or "record," in a statute making it criminal to deface any registry or record, are not confined to records of courts of justice. Every registry or enrolment directed by law and preserved for the use of the public is embraced by this act of assembly. It extends without doubt to the public books in the land office. Ream *v.* Com., 3 Serg. & R. (Pa.) 207, 209.

5. Morgan Leg. Max. [*citing* Godfrey].

6. Black L. Dict. [*citing* Coke Litt. 165].

7. Century Dict.

"Regret indicates no greater degree of mental suffering than does disappointment. Both are of very frequent occurrence in the lives of most men, and with some scarcely disturb their mental poise." Hancock *v.* Western Union Tel. Co., 137 N. C. 497, 501, 49 S. E. 952, 69 L. R. A. 403.

8. Peloubet Leg. Max. [*citing* Dig. 22, 6, 9].

rule must be applied duly to the proper cases; otherwise, it loses its force, and is of no significance." [9]

REGULA PRO LEGE, SI DEFICIT LEX. A maxim meaning "In default of the law, the maxim rules." [10]

REGULAR.[11] Agreeable to an established rule, law, or principle; to a prescribed mode; or according to established customary forms;[12] agreeable to an established rule, law, type, or principle, to a prescribed mode, or to established customary form;[13] comformable to a rule;[14] conformable to an established rule, law, or principle;[15] conformed to, or made in accordance with a rule;[16] conformed to a rule; methodical; periodical.[17] (See REGULAR INDORSEMENT; REGULARLY.)

9. Morgan L. Max.

10. Bouvier L. Dict.

11. Derived from regula a rule see Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83, 85, 2 Code Rep. 13.

12. Webster Dict. [*quoted* in Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83, 85, 2 Code Rep. 13].

13. Century Dict. [*quoted* in Wise *v.* State Veterinary Bd., 138 Mich. 428, 432, 101 N. W. 562].

14. Webster Dict. [*quoted* in Myers *v.* Rasback, 4 How. Pr. (N. Y.) 83, 85, 2 Code Rep. 13].

15. State *v.* Cobb 2 Kan. 32, 54.

16. Century Dict. [*quoted* in Wise *v.* State Veterinary Bd., 138 Mich. 428, 432, 101 N. W. 562].

"Regular intervals" are intervals that conform to a prescribed rule. Hanifen *v.* Armitage, 117 Fed. 845, 850.

17. Webster Dict. [*quoted* in Zulich *v.* Bowman, 42 Pa. St. 83, 87].

Applied to elections synonymous with "general."— People *v.* Babcock, 123 Cal. 307, 311, 55 Pac. 1017; Doan *v.* Logan County, 3 Ida. 38, 46, 26 Pac. 167; State *v.* Conrades, 45 Mo. 45, 47; Rodwell *v.* Rowland, 137 N. C. 617, 629, 50 S. E. 319.

Not a synonym of "reputable" see Wise *v.* State Veterinary Bd., 138 Mich. 428, 432, 101 N. W. 562.

Used in connection with other words.— "Regular and uniform" see Hamlen *v.* Keith, 171 Mass. 77, 79, 50 N. E. 462. "Regular assistant" see U. S. *v.* Brent, 24 Fed. Cas. No. 14,640. "Regular ballot" see Roller *v.* Truesdale, 26 Ohio St. 586, 592. "Regular business" see Cromwell *v.* Willis, 96 Md. 260, 266, 53 Atl. 1116. "Regular channel" see Egbert *v.* St. Paul F., etc., Ins. Co., 71 Fed. 739, 742. "Regular clerk" see People *v.* New York Fire Com'rs, 86 N. Y. 149, 151 [*affirming* 23 Hun 317, 319]; People *v.* McAdoo, 113 N. Y. App. Div. 770, 771, 99 N. Y. Suppl. 324. "Regular clerkship" see Matter of Dunn, 43 N. J. L. 359, 360, 39 Am. Rep. 600. "Regular coal dealers" see Sanford *v.* People, 121 Ill. App. 619, 643. "Regular course of business" see Roberts *v.* Hall, 37 Conn. 205, 212, 9 Am. Rep. 308. "Regular dealer" see Jackson *v.* Stanfield, 137 Ind. 592, 607, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588. "'Regular' depot" see Cook *v.* Georgia Cent. R., etc., Co., 67 Ala. 533, 542; Land *v.* Wilmington, etc., R. Co., 104 N. C. 48, 55, 10 S. E. 80; Kellogg *v.* Suffolk, etc., R. Co., 100 N. C. 158, 160, 5 S. E. 379. "Regular document" see The Miranda, 51 Fed. 523, 525, 2 C. C. A. 362. "Regular election" see Ward *v.* Clark, 35 Kan. 315, 317, 10 Pac. 827; Matthews *v.* Shawnee County, 34 Kan. 606, 611, 9 Pac. 765; People *v.* Wilson, 72 N. C. 155, 161; Banton *v.* Wilson, 4 Tex. 400, 408. "Regular hotels" see Lederer *v.* State, 5 Ohio Cir. Ct. 623, 624, 3 Ohio Cir. Dec. 303. "Regular jurors" see State *v.* Second Judicial Dist. Ct., 31 Mont. 428, 436, 78 Pac. 769. "Regular market price" see Santa Monica Lumber, etc., Co. *v.* Hege, 119 Cal. 376, 380, 51 Pac. 555. "Regular meeting" see Molyneux *v.* Grimes, (Kan. 1908) 98 Pac. 278, 280; State *v.* Wilkesville Tp., 20 Ohio St. 288, 293. "Regular ministers of the Gospel" see State *v.* Bray, 35 N. C. 289, 291. "Regular panel" see Stone *v.* Saunders, 106 Ky. 904, 905, 51 S. W. 788, 21 Ky. L. Rep. 534; Barr *v.* Kansas City, 121 Mo. 22, 29, 25 S. W. 562. "Regular passenger trains" see Cleveland, etc., R. Co. *v.* People, 175 Ill. 359, 365, 51 N. E. 842; Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 448, 33 N. E. 173, 19 L. R. A. 119; Chicago, etc., R. Co. *v.* People, 105 Ill. 657, 659; Ohio, etc., R. Co. *v.* People, 29 Ill. App. 561, 566; Phillips *v.* Chicago, etc., R. Co., 64 Wis. 475, 481, 25 N. W. 544. "Regular physician" see Bradbury *v.* Bardin, 35 Conn. 577, 581. "Regular place of stated worship" see Wood *v.* Moore, 1 Chest. Co. Rep. (Pa.) 265, 266; Erie County *v.* Bishop, 13 Phila. (Pa.) 509, 510. "Regular policemen" see Hagerstown St. Com'rs *v.* Williams, 96 Md. 232, 237, 53 Atl. 923. "Regular rates" see Martinsburg Bank *v.* Central Pennsylvania Tel., etc., Co., 150 Pa. St. 36, 39, 24 Atl. 754. "Regular real estate business" see Davis *v.* Darling, 80 Hun (N. Y.) 299, 300, 30 N. Y. Suppl. 321. "Regular session" see Harpswell *v.* Cumberland County Com'rs, 78 Me. 100, 103, 2 Atl. 880; Waterville *v.* Kennebec County Com'rs, 59 Me. 80, 89; Harkness *v.* Waldo County Com'rs, 26 Me. 353, 356. "Regular station" see Illinois Cent. R. Co. *v.* Latimer, 128 Ill. 163, 171, 21 N. E. 7; Land *v.* Wilmington, etc., R. Co., 104 N. C. 48, 55, 10 S. E. 80; Kellogg *v.* Suffolk, etc., R. Co., 100 N. C. 158, 160, 5 S. E. 379. "Regular survey" see Janney *v.* Columbia Ins. Co., 10 Wheat. (U. S.) 411, 417, 6 L. ed. 354; Dorr *v.* Pacific Ins. Co., 7 Wheat. (U. S.) 581, 612, 5 L. ed. 528. "Regular term" see Matkins *v.* Marengo County, 137 Ala. 155, 166, 34 So. 171; Wightman *v.* Karsner, 20 Ala. 446, 452; Crowell *v.* Lambert, 9 Minn. 267, 271.

REGULAR INDORSEMENT. An indorsement in blank of a third person under the name of the payee.[18] (See COMMERCIAL PAPER, 7 Cyc. 658. See also INDORSEMENT, 22 Cyc. 496.)

REGULARITER NON VALET PACTUM DE RE MEA NON ALIENANDA. A maxim meaning "Regularly a contract not to alienate my property is not valid." [19]

REGULARLY. Constituted, appointed, or conducted in the proper manner; conformable to law or custom; duly authorized;[20] in a regular manner; in a way or method accordant to rule or established mode; in uniform order; methodically; in due order;[21] in uniform order; at certain intervals or periods.[22] (See REGULAR.)

REGULATE.[23] To adjust;[24] to adjust by rule;[25] to adjust by rule, or established mode;[26] to adjust by rule, method, or established mode;[27] to adjust by rule or regulation;[28] to adjust by rules or method;[29] to conduct;[30] to control, restrict, and direct;[31] to direct;[32] to direct by rule or restriction;[33] to direct or manage according to certain standards or laws;[34] to direct the mode in which a transaction shall be conducted;[35] to dispose of;[36] to fix or adjust;[37] to govern;[38]

"Regular turns of loading" see Leidmann *v.* Schultz, 14 C. B. 38, 50, 2 C. L. R. 87, 18 Jur. 42, 23 L. J. C. P. 17, 78 E. C. L. 38.

18. Bellows Falls Bank *v.* Dorset Marble Co., 61 Vt. 106, 108, 17 Atl. 42, 2 L. R. A. 428.

19. Peloubet Leg. Max. [*citing* Coke Litt. 223*a*].

20. Matter of McCusker, 23 Misc. (N. Y.) 446, 450, 51 N. Y. Suppl. 281.

21. Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 183, 38 N. E. 584, 26 L. R. A. 681, where it is said: "Such is the signification attached to the word in its common and ordinary use."

22. Webster Dict. [*quoted* in Zulich *v.* Bowman, 42 Pa. St. 83, 87].

In the phrase "until an election can be regularly held," the adverb "regularly" qualifies the word "held" and refers not so much to the time as to the manner of holding the election, that is, according to the prescribed method or rule. Rodwell *v.* Rowland, 137 N. C. 617, 639, 50 S. E. 319.

Used in connection with other words.—"Regularly called for trial" see Union Pac. R. Co. *v.* Horney, 5 Kan. 340, 346. "Regularly employed" see Chase *v.* Philadelphia, etc., R. Co., 135 Mass. 347, 349; Wilson *v.* Gray, 127 Mass. 98, 99. "Regularly given in for taxes" see Macon, etc., R. Co. *v.* Little, 45 Ga. 370, 383. "Regularly incorporated" see U. S. *v.* Payne, 20 App. Cas. (D. C.) 606, 615. "Regularly issued" see Smeltzer *v.* White, 92 U. S. 390, 392, 23 L. ed. 508. "Regularly laid out" see Missouri, etc., R. Co. *v.* Long, 27 Kan. 684, 695.

23. Derived from the Latin word *rego*, signifying to guide or direct, through the noun *regula*, a rule. See Conlin *v.* San Francisco, 114 Cal. 404, 411, 46 Pac. 279, 33 L. R. A. 752.

24. Standard Dict. [*quoted* in Butte *v.* Paltrovich, 30 Mont. 18, 22, 75 Pac. 521, 104 Am. St. Rep. 698].

25. People *v.* Blue Mountain Joe, 129 Ill. 370, 377, 21 N. E. 923.

26. Marion *v.* Candler, 6 Ala. 899, 902.

27. Higgins *v.* Mitchell County, 6 Kan. App. 314, 51 Pac. 72, 73; Century Dict. [*quoted* in Savanna *v.* Robinson, 81 Ill. App. 471, 480]; Webster Dict. [*quoted* in Otto Gas-Engine Works *v.* Hare, 64 Kan. 78, 82, 67 Pac. 444; State *v.* Ream, 16 Nebr. 681, 683, 21 N. W. 398; State *v.* McCann, 4 Lea (Tenn.) 1, 13].

28. Hroneck *v.* People, 134 Ill. 139, 144, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

29. Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

30. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 225, 30 Am. Rep. 545; Perry *v.* Salt Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446.

31. Perry *v.* Salt Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446.

32. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 225, 30 Am. Rep. 545; Perry *v.* Salt Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446; Century Dict. [*quoted* in Savanna *v.* Robinson, 81 Ill. App. 471, 480]; Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

33. Kraus *v.* Lehman, 170 Ind. 408, 416, 83 N. E. 714, 84 N. E. 769; Higgins *v.* Mitchell County, 6 Kan. App. 314, 51 Pac. 72, 73; Bouvier L. Dict. [*quoted* in Newton County *v.* State, 161 Ind. 616, 620, 69 N. E. 442]; Webster Dict. [*quoted* in Otto Gas-Engine Works *v.* Hare, 64 Kan. 78, 82, 67 Pac. 444; State *v.* Ream, 16 Nebr. 681, 683, 21 N. W. 398; People *v.* Brooklyn Bd. of Excise, 16 N. Y. Suppl. 798, 799; State *v.* McCann, 4 Lea (Tenn.) 1, 13].

34. Standard Dict. [*quoted* in Butte *v.* Paltrovich, 30 Mont. 18, 22, 75 Pac. 521, 104 Am. St. Rep. 698].

35. Conlin *v.* San Francisco, 114 Cal. 404, 411, 46 Pac. 279, 33 L. R. A. 752.

36. Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

37. Dougherty *v.* Austin, 94 Cal. 601, 604, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

The title "an act to regulate the fees and salaries of certain public officers" describes a law, the purpose of which was to control, adjust, and limit the sums the officers named were thereafter to receive for their services as officials. Com. *v.* Bailey, 81 Ky. 395, 396.

38. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 225, 30 Am. Rep. 545; Otto Gas-

to govern by rule;[39] to govern by or subject to certain rules or restrictions;[40] to lay down the rule by which a thing shall be done;[41] to prescribe a rule for acting;[42] to provide for;[43] to put in good order;[44] to put or keep in order;[45] to restrict within certain rules and limitations;[46] to rule;[47] to subject to governing principles[48] or laws;[49] to subject to rules or restrictions;[50] to subject to rules, restrictions, or governing principles.[51] (See REGULATION.)

Engine Works *v.* Hare, 64 Kan. 78, 81, 67 Pac. 444; Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 120, 43 N. Y. Suppl. 320; Perry *v.* Salt Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446; Webster Dict. [*quoted* in Fisher *v.* Brower, 159 Ind. 139, 148, 64 N. E. 614]; Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

39. Standard Dict. [*quoted* in Butte *v.* Paltrovich, 30 Mont. 18, 22, 75 Pac. 521, 104 Am. St. Rep. 698].

40. Century Dict. [*quoted* in Savanna *v.* Robinson, 81 Ill. App. 471, 480; Rochester *v.* West, 29 N. Y. App. Div. 125, 130, 51 N. Y. Suppl. 482].

The term implies a power of restriction or restraint. Cronin *v.* People, 82 N. Y. 318, 321, 37 Am. Rep. 564; Rochester *v.* West, 29 N. Y. App. Div. 125, 130, 51 N. Y. Suppl. 482. See also *Ex p.* Byrd, 84 Ala. 17, 20, 4 So. 397, 5 Am. St. Rep. 328; Minden *v.* Silverstein, 36 La. Ann. 912, 913; Dillon *v.* Erie R. Co., 19 Misc. (N. Y.) 116, 120, 43 N. Y. Suppl. 320.

41. Anderson L. Dict. [*quoted* in State *v.* Lowry, 166 Ind. 372, 389, 77 N. E. 728, 4 L. R. A. N. S. 528].

42. Conlin *v.* San Francisco, 114 Cal. 404, 411, 46 Pac. 279, 33 L. R. A. 752.

43. *Ex p.* Bell, 19 Fla. 608, 614.

44. Marion *v.* Chandler, 6 Ala. 899, 902; Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

The term ordinarily implies not so much the establishment of a new thing as the arrangement in proper order of such as already exist. U. S. *v.* Harris, 26 Fed. Cas. No. 15,315, 1 Sumn. 21.

45. Century Dict. [*quoted* in St. Anthony *v.* Brandon, 10 Ida. 205, 77 Pac. 322, 325; Savanna *v.* Robinson, 81 Ill. App. 471, 480].

46. People *v.* Blue Mountain Joe, 129 Ill. 370, 377, 21 N. E. 923.

The meaning of the term is not limited to the imposition of restrictions but is of far broader meaning and includes all directions by rule of the subject-matter. Newark *v.* Mt. Pleasant Cemetery Co., 58 N. J. L. 168, 172, 33 Atl. 396.

47. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 225, 30 Am. Rep. 545; Perry *v.* Salt, Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446; Webster Dict. [*quoted* in Fisher *v.* Brower, 159 Ind. 139, 148, 64 N. E. 614]; Worcester Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 284].

48. People *v.* Blue Mountain Joe, 129 Ill. 370, 377, 21 N. E. 923; Webster Dict. [*quoted* in Fisher *v.* Brower, 159 Ind. 139, 148, 64 N. E. 614].

49. Higgins *v.* Mitchell County, 6 Kan. App. 314, 51 Pac. 72, 73; Webster Dict. [*quoted* in Otto Gas-Engine Works *v.* Hare, 64 Kan. 78, 82, 67 Pac. 444; State *v.* Ream, 16 Nebr. 681, 683, 21 N. W. 398; State *v.* McCann, 4 Lea (Tenn.) 1, 13].

50. Marion *v.* Chandler, 6 Ala. 899, 902; Webster Dict. [*quoted* in Duckwall *v.* New Albany, 25 Ind. 283, 285].

51. Standard Dict. [*quoted* in Butte *v.* Paltrovich, 30 Mont. 18, 22, 75 Pac. 521, 104 Am. St. Rep. 698].

The power to regulate implies a continued existence of the matter to be regulated. State *v.* Clarke, 54 Mo. 17, 34, 14 Am. Rep. 471; State *v.* McCann, 4 Lea (Tenn.) 1, 13. See also People *v.* Coughtry, 58 Hun (N. Y.) 245, 246, 12 N. Y. Suppl. 259.

Implying power to prohibit.— While the power to regulate the use of streets implies the power to prohibit the use of them under certain circumstances (Atty.-Gen. *v.* Boston, 142 Mass. 200, 203, 7 N. E. 722), the terms "regulate" and "prohibit" have different and distinct meanings (Miller *v.* Jones, 80 Ala. 89, 96. See also *In re* Hauck, 70 Mich. 396, 407, 38 N. W. 269; People *v.* Gadway, 61 Mich. 285, 291, 28 N. W. 101, 1 Am. St. Rep. 578, holding that the terms are not synonymous). And in the following cases it is held that the power to regulate does not include the power to prohibit: Miller *v.* Jones, 80 Ala. 89, 96 (sale of intoxicating liquors); Mernaugh *v.* Orlando, 41 Fla. 433, 438, 27 So. 34 (sale of intoxicating liquors); Sweet *v.* Wabash, 41 Ind. 7, 11 (sale of intoxicating liquors); Duckwall *v.* New Albany, 25 Ind. 283, 285 (running of ferries); Thousand Islands Park Assoc. *v.* Tucker, 173 N. Y. 203, 210, 65 N. E. 975, 60 L. R. A. 786; Andrews *v.* State, 3 Heisk. (Tenn.) 165, 180, 8 Am. Rep. 8 (wearing of arms); *Ex p.* Patterson, 42 Tex. Cr. 256, 260, 58 S. W. 1011, 51 L. R. A. 654 (bowling alleys). An ordinance to regulate and control the driving of cattle through the streets of a city did not imply that the driving of cattle should be prohibited. McConvill *v.* Jersey City, 39 N. J. L. 38, 44. But see Cantini *v.* Tillman, 54 Fed. 969, 975, where it is said: "Regulating a thing is the prohibition of it, except in accordance with certain rules." Thus authority to regulate may imply power to prohibit the bartering or giving away of liquors without license (Vinson *v.* Monticello, 118 Ind. 103, 104, 19 N. E. 734), or to prohibit the giving of liquor to minors and persons in the habit of becoming intoxicated (Williams *v.* State, 48 Ind. 306, 308). *Compare* 32 Cyc. 594.

The power to regulate may include the power to: Control (Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 163, 3 N. E. 448; State *v.* Ream, 16 Nebr. 681, 683, 21 N. W. 398); designate location of livery-stables

REGULATION.[52] Any rule for the ordering of affairs, public or private;[53] a rule of law by which some right is to be exercised;[54] a rule or order prescribed for management or government; prescription; a regulating principle; a governing direction; precept; law;[55] a rule or order prescribed by a superior for the management of some business, or for the government of a company or society;[56]

(St. Louis *v.* Russell, 116 Mo. 248, 253, 22 S. W. 470, 20 L. R. A. 721); exempt from taxation (Newark *v.* Mt. Pleasant Cemetery Co., 58 N. J. L. 168, 172, 33 Atl. 396); grant exclusive use of a portion of the street to a telephone or telegraph company on condition of its contributing something toward the expense of opening and improving the street (St. Louis *v.* Western Union Tel. Co., 149 U.S. 465, 469, 13 S. Ct. 990, 37 L. ed. 810. See also McWethy *v.* Aurora Electric Light, etc., Co., 202 Ill. 218, 226, 67 N. E. 9; State *v.* Murphy, 134 Mo. 548, 561, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 56 Am. St. Rep. 515, 34 L. R. A. 369); license (Russellville *v.* White, 41 Ark. 485, 486; Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 225, 30 Am. Rep. 545; St. Johnsbury *v.* Thompson, 59 Vt. 300, 307, 9 Atl. 571, 59 Am. Rep. 731; Laundry License Case, 22 Fed. 701, 703); prescribe punishment for violation of regulation (Hronek *v.* People, 134 Ill. 139, 144, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837); punish vagrants (St. Louis *v.* Bentz, 11 Mo. 61, 62); refuse license (People *v.* Brooklyn Bd. of Excise, 16 N. Y. Suppl. 798, 799; Perry *v.* Salt Lake City, 7 Utah 143, 148, 25 Pac. 739, 998, 11 L. R. A. 446); require bond by applicant for license (*In re* Schneider, 11 Oreg. 288, 298, 8 Pac. 289); or tax (Smith *v.* Bohler, 72 Ga. 546, 553). A power to regulate the running of cars includes an authority to regulate the power by which they are driven. Buffalo, etc., R. Co. *v.* Buffalo, 5 Hill (N. Y.) 209, 211; Matter of Wright, 63 How. Pr. (N. Y.) 345, 347. The power conferred by a city charter to make regulations for licensing carries with it the power to require the license to be taken out. *Ex p.* Mount, 66 Cal. 448, 449, 6 Pac. 78.

The power to regulate has been held not to include power to: Grant exclusive ferry franchises (Minturn *v.* Larue, 23 How. (U. S.) 435, 436, 16 L. ed. 574); impose a tax for revenue (Ottumwa *v.* Zekind, 95 Iowa 622, 625, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734; Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364, 367, 36 Am. Dec. 518); license disorderly houses (*Ex p.* Garza, 28 Tex. App. 381, 385, 13 S. W. 779, 19 Am. St. Rep. 845. But see *contra*, State *v.* Clarke, 54 Mo. 17, 33, 14 Am. Rep. 471); or license sale of intoxicating liquors (Keokuk *v.* Dressell, 47 Iowa 597, 599; Burlington *v.* Bumgardner, 42 Iowa 673, 674). Nor does it mean to "create" or "ordain" (Taylor *v.* Lambertville, 43 N. J. Eq. 107, 112, 10 Atl. 809), or to extinguish (Worthley *v.* Steen, 43 N. J. L. 542, 543; Tiger *v.* Morris, 42 N. J. L. 631, 633).

To "regulate and equalize" see State *v.* McCann, 4 Lea (Tenn.) 1, 13.

"Regulating county business" see Mode *v.* Beasley, 143 Ind. 306, 316, 42 N. E. 727.

"Regulating the internal affairs of towns and counties" see Pell *v.* Newark, 40 N. J. L. 71, 75, 29 Am. Rep. 266.

"Regulating the rate of interest on money" see McChesney *v.* People, 99 Ill. 216, 218. The power vested by the federal constitution in congress, to coin money and regulate the value thereof, has no reference, and by no possibility can have any reference to the rate of interest to be charged for money loaned. Beach *v.* Peabody, 188 Ill. 75, 78, 58 N. E. 679.

"Regulating the use" of water for irrigation is not confined to the forbidding of injustice in the distribution, the prevention of waste or the apportionment in times of scarcity; it is broad enough to include the frustration of unfair exactions, and the fixing of reasonable rates. Golden Canal Co. *v.* Bright, 8 Colo. 144, 149, 6 Pac. 142.

52. **Distinguished** from: "Confiscation" or "taking without just compensation" see Spring Valley Water Works *v.* San Francisco, 82 Cal. 286, 307, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756. "Discrimination" see Hedding *v.* Gallagher, 69 N. H. 650, 662, 45 Atl. 96, 76 Am. St. Rep. 204. "Instruction" see Landram *v.* U. S., 16 Ct. Cl. 74, 86. See also Christopher *v.* New York, 13 Barb. (N. Y.) 567, 573. "Prohibition" see Richards *v.* Bayonne, 61 N. J. L. 496, 498, 39 Atl. 708. "Restriction" see Curry *v.* Marvin, 2 Fla. 411, 415.

53. Kepner *v.* Com., 40 Pa. St. 124, 129.

The term is of broad signification and as used in a state constitution providing "all power to grant divorces is vested in the district courts, subject to regulation by law"; in the absence of restrictive words, the power granted must be regarded as plenary over the entire subject. Durland *v.* Durland, 67 Kan. 734, 736, 74 Pac. 274, 63 L. R. A. 959.

The term implies a rule or a general course of action and does not apply to a case in which specific instructions are to be given applicable to that case alone. Christopher *v.* New York, 13 Barb. (N. Y.) 567, 573.

"A regulation of an executive department" of the federal government refers to rules and regulations relating to the subjects on which a department acts made by the head of such department, and does not include an order of the president or secretary. Harvey *v.* U. S., 3 Ct. Cl. 38, 42.

54. Donovan *v.* Territory, 3 Wyo. 91, 94, 2 Pac. 532.

55. Webster Dict. [*quoted* in *In re* State Lands, 18 Colo. 359, 364, 32 Pac. 986].

"Rules and regulations in a legal sense mean laws. . . . A divorce is not a rule or regulation." Higbee *v.* Higbee, 4 Utah 19, 26, 5 Pac. 693.

56. Webster Dict. [*quoted* in Curry *v.* Marvin, 2 Fla. 411, 415].

a rule or order prescribed for management or government.[57] The term may be employed as the equivalent of ordinance, rule, or by-law.[58] (Regulation: By Carrier, see CARRIERS, 6 Cyc. 545. Municipal Regulation — Forbidding Owner of Damaged Building to Repair or Rebuild, see FIRE INSURANCE, 19 Cyc. 835; Under Police Power, see MUNICIPAL CORPORATIONS, 28 Cyc. 692; Violating Constitutional Right of Trial by Jury, see JURIES, 24 Cyc. 175. Relating to — Admission to Bar, see ATTORNEY AND CLIENT, 4 Cyc. 900; Asylum, see ASYLUMS, 4 Cyc. 363; Bank, see BANKS AND BANKING, 5 Cyc. 433; Bridge, see BRIDGES, 5 Cyc. 1089; Building, see BUILDERS AND ARCHITECTS, 6 Cyc. 52; Canal, see CANALS, 6 Cyc. 276; Cemetery, see CEMETERIES, 6 Cyc. 708; Commerce, see COMMERCE, 7 Cyc. 432; Compensation of County Officer, see COUNTIES, 11 Cyc. 428; Druggist, see DRUGGISTS, 14 Cyc. 1079; Election, see ELECTIONS, 15 Cyc. 280; Electric Light Companies, see ELECTRICITY, 15 Cyc. 468; Explosive, see EXPLOSIVES, 19 Cyc. 3; Factor or Broker, see FACTORS AND BROKERS, 19 Cyc. 116, 187; Fence, see FENCES, 19 Cyc. 488; Ferry, see FERRIES, 19 Cyc. 506; Fish or Game, see FISH AND GAME, 19 Cyc. 1006; Food and Violation Thereof, see FOOD, 19 Cyc. 1085, 1091; Foreign Building and Loan Company, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 123; Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1251; Foreign Insurance Company, see INSURANCE, 22 Cyc. 1391; Gas Company, see GAS, 20 Cyc. 1162; Hawker or Peddler, see HAWKERS AND PEDDLERS, 21 Cyc. 365; Health, see HEALTH, 21 Cyc. 387; Hospital, see HOSPITALS, 21 Cyc. 1107, 1110; Innkeeper, see INNKEEPERS, 22 Cyc. 1072; Inspection of Merchandise, see INSPECTION, 22 Cyc. 1364; Insurance Company in General, see INSURANCE, 22 Cyc. 1386; Intercourse With Indian, see INDIANS, 22 Cyc. 140; Internal Revenue, see INTERNAL REVENUE, 22 Cyc. 1653, 1657; License For Occupation or Privilege, see LICENSES, 25 Cyc. 603; Liquor Traffic, see INTOXICATING LIQUORS, 23 Cyc. 161; Livery-Stable Keeper, see LIVERY-STABLE KEEPERS, 25 Cyc. 1505, 1515; Lottery, see LOTTERIES, 25 Cyc. 1641; Mutual Benefit Insurance, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 11; Mutual Insurance, see INSURANCE, 22 Cyc. 1411; Navigation, see COLLISION, 7 Cyc. 319; Pawnbroker, see PAWNBROKERS, 30 Cyc. 1165; Pilot, see PILOTS, 30 Cyc. 1609; Postal Service, see POST-OFFICE, 31 Cyc. 974; Practice and Professional Conduct of Physician or Surgeon, see PHYSICIANS AND SURGEONS, 30 Cyc. 1547; Prison, see PRISONS, 32 Cyc. 318; Procedure of Court, see COURTS, 11 Cyc. 739; Production and Use of Steam, see STEAM; Public Mill, see MILLS, 27 Cyc. 514; Railroad, see RAILROADS, 33 Cyc. 43; School, see SCHOOLS AND SCHOOL-DISTRICTS; Seaman, see SEAMEN; Shipping, see SHIPPING; Sleeping or Palace Car, see CARRIERS, 6 Cyc. 657; Street or Highway, see STREETS AND HIGHWAYS; Street Railroad, see STREET RAILROADS; Telegraph or Telephone Company, see TELEGRAPHS AND TELEPHONES; Theater, see THEATERS AND SHOWS; Towage, see TOWAGE; Trade-Mark, see TRADE-MARKS AND TRADE-NAMES; Turnpike Company, see TOLL-ROADS; Wages, see MASTER AND SERVANT, 26 Cyc. 1025; Warehouseman, see WAREHOUSEMEN; Water or Waterworks Company, see

57. Webster Dict. [*quoted* in St. Louis *v.* Howard, 119 Mo. 41, 46, 24 S. W. 770, 41 Am. St. Rep. 630]. See also Finlen *v.* Heinze, 27 Mont. 107, 116, 69 Pac. 829, 70 Pac. 517; Bullion, etc., Min. Co. *v.* Eureka Hill Min. Co., 5 Utah 182, 185, 12 Pac. 660.

Used in reference to railroads, the term embraces two ideas: One is the mere control of the operation of the railroads, prescribing the rules for the management thereof — matters which affect the convenience of the public in their use. But within the scope of the word as commonly used is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof. Ames *v.* Union Pac. R. Co., 64 Fed. 165, 178.

58. Hunt *v.* Lambertville, 45 N. J. L. 279, 282; Taylor *v.* Lambertville, 43 N. J. Eq. 107, 112, 10 Atl. 809.

A by-law giving to a national bank a lien on its stock as against indebted stock-holders is not a regulation of the business of the bank under the National Banking Act providing that the articles of association must specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with the provision of the act, which the associations may see fit to adopt for the regulation of its business and the conduct of its affairs. Bullard *v.* National Eagle Bank, 18 Wall. (U. S.) 589, 596, 21 L. ed. 923.

An order establishing the grade of a street may be deemed a regulation. Meyer *v.* Fromm, 108 Ind. 208, 9 N. E. 84.

Waters; Wharf, see Wharves; Woods and Forests, see Woods and Forests. See also Regulate.)

Rehearing. A new hearing, and a new consideration of the case by the court in which the suit was originally heard, and upon the pleadings and depositions already in the case;[59] a second hearing before the same judge or court, on application of a party supposing himself injured by the decision made after the first hearing.[60] Sometimes used in the sense of a new trial.[61] (Rehearing: In General, see Criminal Law, 12 Cyc. 882; New Trial, 29 Cyc. 1082. Authority of Lower Court to Rehear After Decision of Appellate Court, see Appeal and Error, 3 Cyc. 494. Before Commissioners or Other Like Officers, see Eminent Domain, 15 Cyc. 912; Streets and Highways. Before Umpire or Third Arbitrator, see Arbitration and Award, 3 Cyc. 660. Effect of Application For on — Limitation of Time For Appeal, see Appeal and Error, 2 Cyc. 793; Power of Court to Amend Judgment After Term, see Judgments, 23 Cyc. 862. In Action — For Infringement of Patent, see Patents, 30 Cyc. 1053; For Injunction, see Injunctions, 22 Cyc. 956; To Foreclose Mortgage, see Mortgages, 27 Cyc. 1641. In Admiralty, see Admiralty, 1 Cyc. 890. In Appellate Court After Remand, see Appeal and Error, 3 Cyc. 212. In Certiorari Proceedings, see Certiorari, 6 Cyc. 819. In Equity, see Equity, 16 Cyc. 504. In Mandamus Proceedings, see Mandamus, 26 Cyc. 482. In Proceedings to Probate, Establish, or Annul Will, see Wills. In Quo Warranto Proceedings, see Quo Warranto, 32 Cyc. 1463. Interference by Appellate Court With Discretionary Power of Trial Court in Granting or Refusing, see Appeal and Error, 3 Cyc. 343. Mandamus — As Remedy to Compel, see Mandamus, 26 Cyc. 208; To Set Aside Order Granting or Refusing Rehearing, see Mandamus, 26 Cyc. 209 notes 30, 31. Necessity of Motion For Appellate Court to Modify Its Own Judgment, see Appeal and Error, 3 Cyc. 474. New Facts After Decision, see Courts, 11 Cyc. 918. Objections to Grant First Raised on Appeal, see Appeal and Error, 2 Cyc. 732. Of Application For Preliminary or Interlocutory Injunction, see Injunctions, 22 Cyc. 956. Of Disputed Claim Against Decedent's Estate, see Executors and Administrators, 18 Cyc. 535. Of Motion — In General, see Motions, 28 Cyc. 16; For New Trial, see New Trial, 29 Cyc. 1028; To Dissolve Attachment, see Attachment, 4 Cyc. 799. On Appeal or Writ of Error, see Appeal and Error, 3 Cyc. 212. On Preliminary Examination of Accused, see Criminal Law, 12 Cyc. 313. On Reference, see References, *ante*, p. 878. Petition For as Part of Record on Appeal, see Appeal and Error, 2 Cyc. 1074. Power of Trial Court to Grant Pending Appeal, see Appeal and Error, 2 Cyc. 975. Questions Considered on Appeal From Order Denying, see Appeal and Error, 3 Cyc. 232. Sufficiency of Record to Present Grounds For Review, see Appeal and Error, 3 Cyc. 175.)

Rehypothecation. See Hypothecation, 21 Cyc. 1720; Pledges, 31 Cyc. 787.

Rei depositæ prorietas apud deponentem manet, sed et possessio. A maxim meaning "The property in a thing deposited and the possession thereof remains in the depositor."[62]

Reimburse. To pay back;[63] to pay back; to make return or restoration of an equivalent for something paid; expended or lost; to indemnify; to make whole;[64] to replace in a treasury or purse, as an equivalent for what

59. Read *v.* Patterson, 44 N. J. Eq. 211, 219, 14 Atl. 490, 6 Am. St. Rep. 877.

60. Emerson *v.* Davies, 8 Fed. Cas. No. 4,437, 1 Woodb. & M. 21, 22.

Technically speaking, the term was appropriate only to the proceeding in chancery by which a certain class of errors in a decree or decretal order could, before enrolment, be corrected. But it had no application to orders made upon mere motion. Belmont *v.* Erie R. Co., 52 Barb. (N. Y.) 637, 651.

In England the term is often applied to what would be considered an appeal here. Emerson *v.* Davies, 8 Fed. Cas. No. 4,437, 1 Woodb. & M. 21, 22.

61. Kimple *v.* Conway, 69 Cal. 71, 72, 10 Pac. 189.

62. Morgan Leg. Max. [*citing* Trayner Leg. Max].

63. Philadelphia Trust, etc., Co. *v.* Audenreid, 83 Pa. St. 257, 264.

64. Black L. Dict.; Webster L. Dict. [both

has been taken, lost, or expended; to refund; to pay back; to restore.[65] (See Reimbursement.)

Reimbursement. The act of reimbursing or refunding; repayment.[66] (Reimbursement: Contract For, see Money Paid, 27 Cyc. 840. For Improvements on Land Ineffectively Advanced, see Descent and Distribution, 14 Cyc. 180 note 15. For Support of Pauper, see Paupers, 30 Cyc. 1151. Indemnity in General, see Indemnity, 22 Cyc. 78. Limitation of Action For, see Limitations of Actions, 25 Cyc. 1093. Of Agent For Advances, Expenses, and Losses, see Principal and Agent, 31 Cyc. 1532. Of Assignee — For Benefit of Creditors, see Assignments For Benefit of Creditors, 4 Cyc. 251; Of Bankrupt's Estate, see Bankruptcy, 5 Cyc. 389; Or Trustee in Insolvency For Advances, see Insolvency, 22 Cyc. 1304. Of Attorney For Expenditures, see Attorney and Client, 4 Cyc. 981 note 12. Of Auctioneer For Expenditures, see Auctions and Auctioneers, 4 Cyc. 1051 note 72. Of Bailee For Expenditures, see Bailments, 5 Cyc. 192. Of Broker For Advances, Expenses, or Losses, see Factors and Brokers, 19 Cyc. 229. Of Carrier For Freight Advanced, see Carriers, 6 Cyc. 495. Of Child For Support of Parent, see Parent and Child, 29 Cyc. 1620. Of County by City For Damages From Public Improvement, see Municipal Corporations, 28 Cyc. 1086. Of Defeated Purchaser at Judicial Sale, see Judicial Sales, 24 Cyc. 70. Of Executor or Administrator For Expenditures and Advances, see Executors and Administrators, 18 Cyc. 265, 617. Of Expenses Incurred by School Tax Collector, see Schools and School-Districts. Of Factor For Advances, Expenses, or Losses, see Factors and Brokers, 19 Cyc. 153. Of Finder of Lost Goods For Expenses, see Finding Lost Goods, 19 Cyc. 541. Of Fraudulent Grantee For Consideration Paid and Expenditures, see Fraudulent Conveyances, 20 Cyc. 636. Of Guardian For Expenditures on Behalf of Ward, see Guardian and Ward, 21 Cyc. 97. Of Heirs For Unauthorized Use or Disposal of Community Property of Surviving Spouse, see Husband and Wife, 21 Cyc. 1711. Of Joint Adventurer For Advances and Expenses, see Joint Adventures, 23 Cyc. 457. Of Judgment Debtor on Enjoining Judgment, see Judgments, 23 Cyc. 990 note 36. Of Municipal Officer For Expenditures, see Municipal Corporations, 28 Cyc. 454. Of Parent From Child's Separate Estate For Support and Education, see Infants, 22 Cyc. 669 note 63; Parent and Child, 29 Cyc. 1616. Of Partner For Expenses and Losses, see Partnership, 30 Cyc. 450. Of Payments — And Advances in Action For Partition, see Partition, 30 Cyc. 233; For Taxes, Insurance, and Other Expenses on Foreclosure of Mortgage, see Mortgages, 27 Cyc. 1767. For Taxes Paid by Occupying Claimant, see Ejectment, 15 Cyc. 223. Of Public Officer For Expenditures, see Sheriffs and Constables. Of Purchase-Money in Action to Confirm or Try Tax Title, see Taxation. Of Purchaser — At Execution Sale on Failure of Title, see Executions, 17 Cyc. 1320; Of Invalid Tax Title by Owner of Property, see Taxation. Of Receiptor in Attachment Proceedings, see Attachment, 4 Cyc. 666. Of Surety — By Cosurety, see Principal and Surety, 32 Cyc. 276; By Principal, see Principal and Surety, 32 Cyc. 250. Of Surviving Partners For Payment of Firm Debts or Debts of Deceased Partner, see Partnership, 30 Cyc. 630. Of Surviving Spouse For Separate Paraphernal or Dotal Property, see Husband and Wife, 21 Cyc. 1707. Of Trustee For Expenditures on Behalf of Beneficiary, see Trusts. Of Widow Redeeming Husband's Mortgaged Property, see Dower, 14 Cyc. 921. See also Reimburse.)

quoted in Woerz *v.* Schumacher, 161 N. Y. 530, 536, 56 N. E. 72, where it is said that such is the primary meaning of the word].

65. Webster Dict. [*quoted* in State *v.* Moore, 40 Nebr. 854, 765, 59 N. W. 755, 25 L. R. A. 774, dissenting opinion].

The primary meaning of the word is to be imputed to it where that meaning is not controlled by contract stipulations. Philadelphia Trust, etc., Co. *v.* Audenreid, 83 Pa. St. 257, 264.

66. Century Dict.

Used in an agreement by which certain persons were to receive a certain sum each as reimbursement for money paid by them, respectively, into a former business, the term implies that it had not been withdrawn. Fuller *v.* Atwood, 13 R. I. 316.

REINCORPORATION. See CORPORATIONS, 10 Cyc. 288; MUNICIPAL CORPORATIONS, 28 Cyc. 236.

REINSCRIPTION. See MORTGAGES, 27 Cyc. 1161, 1204 note 34, 1214.

REINSTATE. To restore to a state from which one has been removed.[67] (See REINSTATEMENT.)

REINSTATEMENT. The act of reinstating; restoration to a former position, office, or rank; reëstablishment.[68] (Reinstatement: Of Appeal — In General, see APPEAL AND ERROR, 3 Cyc. 202; From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 716; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 880, 882. Of Attachment After Dissolution, see ATTACHMENT, 4 Cyc. 811. Of Attorney — After Disbarment, see ATTORNEY AND CLIENT, 4 Cyc. 917; As Subject of Mandamus, see MANDAMUS, 26 Cyc. 201. Of Cause — After Dismissal, see COSTS, 11 Cyc. 189; DISMISSAL AND NONSUIT, 14 Cyc. 422, 459; EQUITY, 16 Cyc. 462; As Subject of Mandamus, see MANDAMUS, 26 Cyc. 206. Of Dissolved Injunction, see INJUNCTIONS, 22 Cyc. 1003. Of Entry Canceled by General Land-Office, see PUBLIC LANDS, 32 Cyc. 1017. Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 231 note 70. Of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 211. Of Insured or Forfeited Insurance Policy, see ACCIDENT INSURANCE, 1 Cyc. 243; LIFE INSURANCE, 25 Cyc. 847; MUTUAL BENEFIT INSURANCE, 29 Cyc. 183. Of Member — Of Association, see ASSOCIATIONS, 4 Cyc. 303; Of Corporation or Association, Mandamus as Remedy, see MANDAMUS, 26 Cyc. 343. Of Mortgage, see MORTGAGES, 27 Cyc. 1433. Of Municipal Agent or Employee, see MUNICIPAL CORPORATIONS, 28 Cyc. 598. Of Officer of Army or Navy, see ARMY AND NAVY, 3 Cyc. 824, 827 note 80. Of Order of Court Vacated, see ORDERS, 29 Cyc. 1521. Of Policeman, see MUNICIPAL CORPORATIONS, 28 Cyc. 522. Of Teacher or Pupil, Mandamus as Remedy, see MANDAMUS, 26 Cyc. 283, 284. See also REINSTATE.)

REINSURANCE. See FIRE INSURANCE, 19 Cyc. 638; LIFE INSURANCE, 25 Cyc. 781; MARINE INSURANCE, 26 Cyc. 711.

REINSURANCE RESERVE. A fund which must equal in amount at all times the aggregate policy liabilities at their then present value.[69]

REIPUBLICÆ INTEREST VOLUNTATES DEFUNCTORUM EFFECTUM SORTIRI. A maxim meaning "It concerns the state that the wills of the dead should have their effect."[70]

REISSUE. A second or renewed issue.[71] (Reissue: Of Commercial Paper, see COMMERCIAL PAPER, 7 Cyc. 1027. Of County Warrant, see COUNTIES, 11 Cyc. 542. Of Execution — In General, see EXECUTIONS, 17 Cyc. 1041; From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 623. Of Mortgage, see MORTGAGES, 27 Cyc. 1333, 1434. Of Patent For Invention — In General, see PATENTS, 30 Cyc. 919; Rights of Assignee Under, see PATENTS, 30 Cyc. 950.)

REI TURPIS NULLUM MANDATUM EST. A maxim meaning "The mandate of an immoral thing is void."[72]

REJECT. To throw away; to discard; to refuse to receive; to refuse to grant.[73] (See REJECTION.)

67. Webster Dict. [*quoted* in South *v.* Sinking Fund Com'rs, 86 Ky. 186, 190, 5 S. W. 567, 9 Ky. L. Rep. 478].

Reinstated in title see O'Neale *v.* Caldwell, 18 Fed. Cas. No. 10,515, 3 Cranch C. C. 312.

68. Century Dict.

As used in the by-laws of an insurance company providing for "reinstatement," of those whose policies are forfeited, on certain conditions, the term does not imply "reinsurance," the granting or making of a new policy, a new contract of insurance; it fairly implies placing the insured in respect and relation to the company, the policy, the whole contract of insurance, in the same condition that he occupied and sustained toward them next before the forfeiture was incurred. Lovick *v.* Provident L. Assoc., 110 N. C. 93, 97, 14 S. E. 506.

69. New Haven Trust Co. *v.* Gaffney, 73 Conn. 480, 485, 47 Atl. 760.

70. Bouvier L. Dict.

71. Century Dict.

72. Black L. Dict. [*citing* Dig. 17, 1, 6, 3].

73. Webster Dict. [*quoted* in Preston *v.* Fidelity Trust, etc., Co., 94 Ky. 295, 302, 22 S. W. 318, 15 Ky. L. Rep. 130].

In reference to jurors the term is synonymous with "challenge." Zimmerly *v.* Road Com'rs, 25 Pa. St. 134, 136.

"Rejected" with reference to the disposition of claims is synonymous with "disal-

REJECTION. A failure to accept; repudiation of the offer.[74] (Rejection: Of Claim Against — County, see COUNTIES, 11 Cyc. 598; Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 1752. See also REJECT.)

REJOINDER. See PLEADING, 31 Cyc. 267.

REJOINING GRATIS. A term meaning that defendant will rejoin without putting the plaintiff to the necessity of obtaining a rule to rejoin.[75]

RELATE. A term sometimes synonymous with "involve."[76]

RELATED BY CONSANGUINITY. See CONSANGUINITY, 8 Cyc. 582.

RELATING TO. In reference to; in respect to; in regard to.[77]

RELATIO EST FICTIO JURIS ET INTENTA AD UNUM. A maxim meaning "Relation is a fiction of law, and intended for one thing."[78]

RELATION. That principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period.[79] (Relation: Operation by Relation Back — Of Acknowledgment of Deed, see ACKNOWLEDGMENTS, 1 Cyc. 560; Of Appearance, see APPEARANCES, 3 Cyc. 511 note 73; Of Delivery of Deed Deposited in Escrow, see ESCROWS, 16 Cyc. 588; Of Judgment, see JUDGMENTS, 23 Cyc. 1106; Of Order Establishing Stock-Law District, see ANIMALS, 2 Cyc. 442 note 47; Of Patent For Land, see PUBLIC LANDS, 32 Cyc. 1036; Of Ratification of Act of Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1283; Of Statute, see STATUTES; Of Wrongful Act as Constituting Trespass Ab Initio, see TRESPASS. See also RELATIVE.)

RELATIONSHIP. Kindred, affinity, or other alliance.[80] (Relationship: Allegation of in Pleading, see PLEADING, 31 Cyc. 59. As Affecting — Application of Statute of Frauds to Promises to Answer For Debt of Another, see FRAUDS, STATUTE OF, 20 Cyc. 170, 184; Competency or Bias of Witness, see WITNESSES; Consideration For Conveyance, see DEEDS, 13 Cyc. 529; MORTGAGES, 27 Cyc. 1054; Validity of Conveyance, see DEEDS, 13 Cyc. 588; Validity of Conveyance as Against Creditors of Guarantor, see FRAUDULENT CONVEYANCES, 20 Cyc. 451, 601, 793; Validity of Lease, see LANDLORD AND TENANT, 24 Cyc. 907 note 24. As Affecting Qualification of — Arbitrator, see ARBITRATION AND AWARD, 3 Cyc. 618; Commissioner or Other Officer in Highway Proceedings, see STREETS AND HIGHWAYS; Grand Juror, see GRAND JURIES, 20 Cyc. 1302; Judge, see JUDGES, 23 Cyc. 583; Juror, see JURIES, 24 Cyc. 273; Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 490; Officer to Take Deposition, see DEPOSITIONS, 13 Cyc. 853. As Element of — Insurable Interest, see LIFE INSURANCE, 25 Cyc. 703; Offense of Incest, see INCEST, 22 Cyc. 45; Right of Action For Causing Death, see DEATH, 13 Cyc. 331. Between Addressee of Telegraph Message and Person Named Therein as Ill or Dead, as Affecting Liability For Damages For Mental Anguish, see TELEGRAPHS AND TELEPHONES. Establishment and Determination of, see DESCENT AND DISTRIBUTION, 14 Cyc. 34. Evidence of — In General, see EVIDENCE, 16 Cyc. 1126; In Proceeding by Intervener, see ATTACHMENT, 4 Cyc. 746; In Prosecution For Incest, see INCEST, 22 Cyc. 55. Ground For Appointment — Of Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 86; Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 35; Of Guardian Ad Litem or Next Friend, see INFANTS, 22 Cyc. 650. Of Juror to Prosecutor as Ground For New Trial, see CRIMINAL LAW, 12 Cyc. 714. Of Parties as Showing Intention

lowed." Brown *v.* District of Columbia, 127 U. S. 579, 589, 8 S. Ct. 1314, 32 L. ed. 262.

74. Orth *v.* Zion's Co-operative Mercantile Inst., 5 Utah 419, 423, 16 Pac. 590.

75. Adkins *v.* Anderson, 10 M. & W. 12, 14.

76. See 23 Cyc. 353 note 99.

77. Webster Dict. [*quoted* in Com. *v.* Mathues, 210 Pa. St. 372, 407, 59 Atl. 961].

78. Black L. Dict. [*citing* Butler's Case, 3 Coke 25*a*, 28*b*, 76 Eng. Reprint 684]. See also Alabama Consol. Coal, etc., Co. *v.* Heald, 154 Ala. 580, 603, 45 So. 686; Nelson *v.* Montgomery First Nat. Bank, 139 Ala. 578, 588, 36 So. 707, 101 Am. St. Rep. 52.

79. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 100, 20 L. ed. 534; Peyton *v.* Desmond, 129 Fed. 1, 11, 63 C. C. A. 651; McCune *v.* Essig, 118 Fed. 273, 276.

While the doctrine is of equitable origin, it has a well recognized application to proceedings at law. Peyton *v.* Desmond, 129 Fed. 1, 11, 63 C. C. A. 651.

80. Esty *v.* Clark, 101 Mass. 36, 38, 3 Am. Rep. 320.

to Make Contract, see CONTRACTS, 9 Cyc. 273, 274 note 72. Raising Presumption of Gift, see GIFTS, 20 Cyc. 1220. Words of, in Will as Words of Donation or of Limitation, see WILLS. See also RELATIVE.)

RELATIO SEMPER FIAT UT VALEAT DISPOSITIO. A maxim meaning "Reference should always be made so that the disposition may have effect." [81]

RELATIVE or **RELATION.** As an adjective, arising from relation; not absolute.[82] As a noun, in its broadest sense a person connected by consanguinity or affinity;[83] a person connected by blood or affinity;[84] one connected with another by blood or affinity;[85] a kinsman or kinswoman;[86] in the construction of wills, one connected with the testator by blood; a blood relation;[87] next of kin.[88] (Relative or Relation: Competency of as Attesting Witness to Mortgage,

In accurate language, the term does not imply an interest. McKeen *v.* Gammon, 33 Me. 187, 190.

"**Relationship by marriage**" in the by-laws of a beneficial association see Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 332, 45 Atl. 111.

81. Peloubet Leg. Max. [*citing* Curson's Case, 6 Coke 75*b*, 76*b*, 77 Eng. Reprint 369].

82. Webster Int. Dict.

"**Relative amount**" as meaning "ratio" see Matter of Klock, 30 N. Y. App. Div. 24, 41, 51 N. Y. Suppl. 897.

"**Relative proportion**" see Com. *v.* Newburyport, 103 Mass. 129, 134. See PROPORTION, 32 Cyc. 681.

"**Relative value**" see Drhew *v.* Altoona City, 121 Pa. St. 401, 418, 15 Atl. 636.

83. Esty *v.* Clark, 101 Mass. 36, 38, 3 Am. Rep. 320; Webster Dict. [*quoted* in De Graffenreid *v.* Iowa Land, etc., Co., 20 Okla. 687, 714, 95 Pac. 624].

84. Bennett *v.* Van Riper, 47 N. J. Eq. 563, 565, 22 Atl. 1055, 24 Am. St. Rep. 416, 14 L. R. A. 342.

85. Bouvier L. Dict. [*quoted* in De Graffenreid *v.* Iowa Land, etc., Co., 20 Okla. 687, 714, 95 Pac. 624].

The term includes all persons connected with another by blood or affinity however remote the connection. Snow *v.* Durgin, 70 N. H. 121, 122, 47 Atl. 89.

86. Bouvier L. Dict.; Webster Dict. [both *quoted* in De Graffenreid *v.* Iowa Land, etc., Co., 20 Okla. 687, 714, 95 Pac. 624].

"**Family**" defined see 19 Cyc. 454.

"**Kin**" defined see 24 Cyc. 803.

"**Kindred**" defined see 24 Cyc. 804.

The terms are very general and take in any kind of connection, but their most common use is to express some sort of kindred either by blood or affinity, though properly by blood. Esty *v.* Clark, 101 Mass. 36, 38, 3 Am. Rep. 320; Ennis *v.* Pentz, 3 Bradf. Surr. (N. Y.) 382, 385; Davies *v.* Baily, 1 Ves. 84, 27 Eng. Reprint 906. See also Lewis *v.* Mynatt, 105 Tenn. 508, 512, 58 S. W. 857; Cleaver *v.* Cleaver, 39 Wis. 96, 99, 20 Am. Rep. 30; Worseley *v.* Johnson, 3 Atk. 758, 761, 26 Eng. Reprint 1235.

In their widest extent the terms embrace persons of every degree of consanguinity, and when not restricted in meaning by other words they extend to all persons who are descended from the same common ancestor. They are synonymous with "kindred" and expressed also by the word "family" in its largest sense. Huling *v.* Fenner, 9 R. I. 410, 411. See also Cruwys *v.* Colman, 9 Ves. Jr. 319, 324, 7 Rev. Rep. 210, 32 Eng. Reprint 626.

In its most general sense the term "relative" is very indefinite. Com. *v.* Metz, 17 Pa. Co. Ct. 541, 542.

"**Relatives**" **and** "**next of kin**" **are not** convertible terms. The former is more comprehensive. Public Administrator *v.* Peters, 1 Bradf. Surr. (N. Y.) 100, 102.

The term may include: Brother-in-law see *In re* Davis, 106 Cal. 453, 455, 39 Pac. 756. Husband or wife see Marcus *v.* Leake, 4 Nebr. (Unoff.) 354, 94 N. W. 100, 101.

87. Elliot *v.* Fessenden, 83 Me. 197, 205, 22 Atl. 115, 13 L. R. A. 37.

88. Keniston *v.* Adams, 80 Me. 290, 294, 14 Atl. 203; Drew *v.* Wakefield, 54 Me. 291, 298; Thompson *v.* Thornton, 197 Mass. 273, 276, 83 N. E. 880; Snow *v.* Durgin, 70 N. H. 121, 122, 47 Atl. 89; Varrell *v.* Wendell, 20 N. H. 431, 435; Gallagher *v.* Crooks, 132 N. Y. 338, 343, 30 N. E. 746; McNeilledge *v.* Barclay, 11 Serg. & R. (Pa.) 103, 106; Com. *v.* Metz, 17 Pa. Co. Ct. 541, 543; Hibbert *v.* Hibbert, L. R. 15 Eq. 372, 375, 42 L. J. Ch. 383, 28 L. T. Rep. N. S. 397, 21 Wkly. Rep. 506; Crossly *v.* Clare, Ambl. 397, 27 Eng. Reprint 264; Edge *v.* Salisbury, Ambl. 70, 71, 27 Eng. Reprint 42; Green *v.* Howard, 1 Bro. Ch. 31, 33, 28 Eng. Reprint 967; Pope *v.* Whitcombe, 3 Meriv. 689, 690, 17 Rev. Rep. 171, 686, 36 Eng. Reprint 264; Anonymous, 1 P. Wms. 327, 24 Eng. Reprint 410; Wright *v.* Atkyns, 1 Turn. & R. 143, 161, 12 Eng. Ch. 143, 37 Eng. Reprint 1051; Smith *v.* Campbell, 19 Ves. Jr. 400, 403, 13 Rev. Rep. 224, 34 Eng. Reprint 566.

"**Next of kin**" defined see 29 Cyc. 1044.

In connection with wills and statutes relating thereto the terms have been held not to include marriage connections. *In re* Pfuelb, 48 Cal. 643, 644; Stoff *v.* McGinn, 178 Ill. 46, 53, 52 N. E. 1048; Elliot *v.* Fessenden, 83 Me. 197, 205, 22 Atl. 115, 13 L. R. A. 37; Keniston *v.* Adams, 80 Me. 290, 294, 14 Atl. 203; Horton *v.* Earle, 162 Mass. 448, 450, 38 N. E. 1135; Kimball *v.* Story, 108 Mass. 382, 385; Bramell *v.* Adams, 146 Mo. 70, 89, 47 S. W. 931; Bennett *v.* Van Riper, 47 N. J. Eq. 563, 565, 22 Atl. 1055, 24 Am. St. Rep. 416, 14 L. R. A. 342; Supreme Council O. C. F. *v.* Bennett, 47 N. J. Eq. 39, 43, 19 Atl. 785; Blossom *v.* Sidway, 5 Redf. Surr. (N. Y.) 389, 390; Ennis *v.* Pentz, 3 Bradf. Surr. (N. Y.) 382, 385; Storer *v.* Wheatley, 1 Pa.

see Chattel Mortgages, 6 Cyc. 1006 note 33. Designation of in Will, see Wills. Duties and Liabilities of — As to Support of Insane Person, see Insane Persons, 22 Cyc. 1162; As to Support of Pauper, see Paupers, 30 Cyc. 1122. Implied Contract to Pay For Services Rendered Between, see Work and Labor. Incapacity of to Marry, see Marriage, 26 Cyc. 845. Inheritance by, see Descent and Distribution, 14 Cyc. 34. Notice to in Proceedings For Appointment of Guardian, see Guardian and Ward, 21 Cyc. 40. Preference of as Affecting Validity of Conveyance as Against Creditors, see Fraudulent Conveyances, 20 Cyc. 597. Preference of Parents Against in Habeas Corpus to Determine Custody of Child, see Habeas Corpus, 21 Cyc. 331. Privilege of Communications Between or to, see Libel and Slander, 25 Cyc. 397; Witnesses. Right of Guardian to Custody and Control of Ward's Person as Against, see Guardian and Ward, 21 Cyc. 62.)

Relative Confession. Where the accused confesseth and appealeth others thereof, thereby to become an approver.[89] (See Approvement, 3 Cyc. 565; Approver, 3 Cyc. 565; Confession, 8 Cyc. 562.)

Relativorum, Cognito Uno, Cognoscitur et Alterum. A maxim meaning "Of relatives, one being known, the other also is known."[90]

Relator. The person upon whose complaint, or at whose instance, an information or writ of quo warranto is filed, and who is quasi the plaintiff in the proceeding.[91] (See Bastards, 5 Cyc. 650; Certiorari, 6 Cyc. 774; Habeas Corpus, 21 Cyc. 311; Mandamus, 26 Cyc. 395; Prohibition, 32 Cyc. 625; Quo Warranto, 32 Cyc. 1440.)

Relay. To lay again; to lay a second time.[92] (See Lay, 25 Cyc. 168.)

St. 506; Cleaver *v.* Cleaver, 39 Wis. 96, 100, 20 Am. Rep. 30; Worseley *v.* Johnson, 3 Atk. 758, 761, 26 Eng. Reprint 1235; Maitland *v.* Adair, 3 Ves. Jr. 231, 232, 30 Eng. Reprint 984.

It does not include: An illegitimate child (see Lavigne *v.* Ligue des Patriotes, 178 Mass. 25, 28, 59 N. E. 674, 86 Am. St. Rep. 460, 54 L. R. A. 814) or stepchildren (see Kimball *v.* Story, 108 Mass. 382, 385; Tepper *v.* Supreme Council R. A., 59 N. J. Eq. 321, 332, 45 Atl. 111. But see Simcoke *v.* Grand Lodge A. O. U. W., 84 Iowa 383, 387, 51 N. W. 8, 15 L. R. A. 114).

89. 2 Hale P. C. [*quoted* in State *v.* Willis, 71 Conn. 293, 309, 41 Atl. 820].

90. Morgan Leg. Max. [*citing* Godfrey *v.* Dixon, Cro. Jac. 539, 79 Eng. Reprint 462].

91. Black L. Dict.

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RELEASE

By Clarence K. Bowie

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CROSS-REFERENCES

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Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 305.

Composition With Creditors, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 409.

Compromise and Settlement, see COMPROMISE AND SETTLEMENT, 8 Cyc. 499.

Conveyance by Way of Release, see DEEDS, 13 Cyc. 525.

Discharge by Operation of Law:

Generally, see DISCHARGE, 14 Cyc. 294, and Particularly Cross-References Thereunder.

Bankrupt Law, see BANKRUPTCY, 5 Cyc. 390.

Insolvent Law, see INSOLVENCY, 22 Cyc. 1337.

Payment, see PAYMENT, 30 Cyc. 1173.

Reformation of Release, see REFORMATION OF INSTRUMENTS, *ante*, p. 899.

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Release by Particular Classes of Persons:

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Release of Particular Rights and Interests in Personal Property:

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Maritime Lien, see MARITIME LIENS, 26 Cyc. 791.

Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 74.

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Release of Particular Rights and Interests in Real Property:

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Guardian, see GUARDIAN AND WARD, 21 Cyc. 169.
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I. DEFINITIONS.

A. Release. A release is a discharge, under seal or by contract, of an existing obligation or right of action by the person in whom the obligation or right is vested to the person against whom it exists.[1]

B. Covenant Not to Sue. A covenant not to sue is a covenant by one who has a right of action at the time of making it against another person or persons

1. See cases cited *infra*, this note.

Other definitions are: "The act or writing by which some claim or interest is surrendered to another person." Anderson L. Dict. [*quoted* in Jaqua *v.* Shewalter, 10 Ind. App. 234, 37 N. E. 1072, 1074]. And see Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173, 186 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

"The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced." Bouvier L. Dict. [*quoted* in National Bank of Commerce *v.* Guthrie, 11 S. D. 517, 520, 78 N. W. 995; Smith *v.* Cantrel, (Tex. Civ. App. 1899) 50 S. W. 1081, 1085]. And see Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173, 186 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

"A remission of some right or claim by which the releasor remits the same, and estops himself from again setting up his claim." Burrill L. Dict. [*quoted* in Power *v.* Lester, 17 How. Pr. (N. Y.) 413, 416].

"A surrender of a right; a remission of a claim in such form as to estop the grantor from asserting it again. An instrument by which a creditor or lienor discharges the debt or lien, or frees a particular person or property therefrom, irrespective of whether payment or satisfaction has been actually made. Hence usually it implies a sealed instrument." Century Dict. [*quoted* in Swain *v.* McMillan, 30 Mont. 433, 440, 76 Pac. 943].

"When a man quits or renounces that which he before had." 7 Com. Dig. "Release" A [*quoted* in Stinson *v.* Moody, 48 N. C. 53, 56].

"The giving or discharging of the right of action which a man hath, or may have or claim, against another man, of that which is his." Sheppard Touchst. 320 [*quoted* in Field *v.* Columbet, 9 Fed. Cas. No. 4,764, 4 Sawy. 523, 527].

"A setting free, a deliverance, a liberation, a relinquishment, a discharge." Parker *v.* U. S., 22 Ct. Cl. 100, 104.

"A discharge of a debt by act of the party." Baker *v.* Baker, 28 N. J. L. 13, 20, 75 Am. Dec. 243.

An instrument which, "by its own operation, extinguishes a preëxisting right." Sherburne *v.* Goodwin, 44 N. H. 271, 276.

A release by deed is a release by a written instrument under seal. Jackson *v.* Security Mut. L. Ins. Co., 233 Ill. 161, 84 N. E. 198 [*affirming* 135 Ill. App. 86].

Technical release; seal.— The word "release," when not interpreted by the context, has a technical meaning which presupposes a seal; but it is also an apt word to express the general idea of discharge or deliverance. Burgiss *v.* Westmoreland, 38 S. C. 425, 427, 17 S. E. 56. Necessity of seal see *infra*, II, B.

To release.— While the word "release" is sometimes used in conveyancing to transfer a title, its general meaning is to surrender a right or to discharge a liability; and, when it is used in connection with the word "claims," it never has any other meaning than that of waiver, surrender, or relinquishment. Amherst College *v.* Ritch, 151 N. Y. 282, 338, 45 N. E. 876, 37 L. R. A. 305. And see Groh *v.* Eckert, 3 Brewst. (Pa.) 116.

Extinguishment distinguished.—A release is a discharge of a debt by act of the party, in contradistinction from an extinguishment, which is a discharge by operation of law. Baker *v.* Baker, 28 N. J. L. 13, 20, 75 Am. Dec. 243.

Satisfaction distinguished.—The word "release," when applied to the release of a cause of action for tort, differs from the word "satisfaction," in that the former may be given, although no part of the damage has been paid, and a technical release to one not a joint tort-feasor does not release another who

whereby he agrees not to sue one or more of such persons to enforce the right of action.[2] To avoid circuity of action, a covenant, unlimited in time and scope, not to sue the party liable to the covenantor on a specified right of action operates as a release;[3] but the rule is otherwise in respect of a covenant not to sue less

may have had some connection with the wrong, while a satisfaction, by whomsoever made, if accepted as such, is a bar to future proceedings on the same cause of action. Miller *v.* Beck, 108 Iowa 575, 582, 79 N. W. 344. See Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Long *v.* Long, 57 Iowa 497, 10 N. W. 875; Turner *v.* Hitchcock, 20 Iowa 310; Knapp *v.* Roche, 94 N. Y. 329; Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

Assignment distinguished.—A release terminates not only the releasor's interest in the claim in question, but also the claim itself, while an assignment terminates the claim only as far as the releasor is concerned, leaving it in full force as to the party charged by it. Darragh *v.* Stevenson, 183 Pa. St. 397, 39 Atl. 37. *Compare* Colton *v.* Field, 131 Ill. 398, 22 N. E. 545 (holding that the word "release" quite frequently imports a conveyance, but never when used in connection with the word "from"); Cates *v.* Wacter, 2 Hill (S. C.) 442; Bowen *v.* Holly, 38 Vt. 574. Whether an instrument is an assignment or a release of a right is a question of intention. While the word "release" is sometimes used in conveyancing to transfer a title, its general meaning is to surrender a right or to discharge a liability, and when it is used in connection with the word "claims" . . . it never has any other meaning than that of waiver, surrender, or relinquishment. No right of action can pass by a release of all causes of action. Amherst College *v.* Ritch, 151 N. Y 282, 338, 45 N. E. 876, 37 L. R. A. 305.

Release as a form of conveyance see DEEDS, 13 Cyc. 525.

Kinds of release.—According to Pothier there are two kinds of release: One called a real release, and the other a personal discharge. A real release is where the creditor declares that he considers the debt as acquitted. It is equivalent to a payment, and renders the thing no longer due, and consequently it liberates all the debtors of it, as there can be no debtors without something due. A personal release merely discharges the debtor from his obligation and extinguishes the debt indirectly, where the debtor to whom it is granted was a sole principal, because there can be no debt without a debtor. But, if there are two or more debtors *in solido*, a discharge of one of them does not extinguish the debt. It only liberates the person to whom it is given. The debt is extinguished, however, as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder. Booth *v.* Kinsey, 8 Gratt. (Va.) 560, 568 [*citing* Pothier, c. 3, art. 2, §§ 1, 11].

2. See 11 Cyc. 1034.

Novation operates as a complete release of the original debtor, and cannot be construed as a mere covenant not to sue him. Commercial Bank *v.* Jones, [1893] A. C. 313, 57 J. P. 644, 62 L. J. P. C. 104, 68 L. T. Rep. N. S. 776, 1 Reports 367, 42 Wkly. Rep. 256.

The giving of an indemnity bond to the covenantee conditioned on saving him harmless from breach of the covenant not to sue does not change such a covenant into a release. Robertson *v.* Trammell, 37 Tex. Civ. App. 53, 83 S. W. 258 [*affirmed* in 98 Tex. 364, 83 S. W. 1098].

In case of doubt an instrument will be construed as a covenant not to sue rather than a release. Russell *v.* Adderton, 64 N. C. 417. To avoid circuity of action, a covenant not to sue may be pleaded as a release; but it must be a covenant between those parties only, and, if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable, and unless, too, it was the intention of the parties that the last instrument should defeat the first. Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 218, 6 Call (Va.) 308.

3. *Alabama.*— Flinn *v.* Carter, 59 Ala. 364.

Connecticut.— Jones *v.* Quinnipiack Bank, 29 Conn. 25, in equity.

Illinois.— Guard *v.* Whiteside, 13 Ill. 7.

Indiana.— Harvey *v.* Harvey, 3 Ind. 473 (*semble*); Reed *v.* Shaw, 1 Blackf. 245.

Kentucky.— See Arnold *v.* Park, 8 Bush 3; Peddicord *v.* Hill, 4 T. B Mon. 370; Bruce *v.* Halbert, 3 T. B. Mon. 66.

Maryland.— Clopper *v.* Union Bank, 7 Harr. & J. 92, 16 Am. Dec. 294.

Massachusetts.— Foster *v.* Purdy, 5 Metc. 442; Whitaker *v.* Salisbury, 15 Pick. 534; Shed *v.* Pierce, 17 Mass. 623; Sewall *v.* Sparrow, 16 Mass. 24; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

Mississippi.— Stebbins *v.* Niles, 25 Miss. 267.

New Jersey.— Line *v.* Nelson, 38 N. J. L. 358; Crane *v.* Alling, 15 N. J. L. 423.

New York.— Phelps *v.* Johnson, 8 Johns. 54; Harrison *v.* Close, 2 Johns. 448, 3 Am. Dec. 444; Cuyler *v.* Cuyler, 2 Johns. 186.

North Carolina.— Stinson *v.* Moody, 48 N. C. 53.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

Wisconsin.— Millett *v.* Hayford, 1 Wis. 401, *semble*.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

England.—Aylff *v.* Scrimsheire, 1 Show. 46, 89 Eng. Reprint 438. And see Hodges *v.* Smith, Cr. Eliz. 623, 78 Eng. Reprint 864; Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289,

than all the parties liable,[4] or not to sue for a limited time,[5] or of limited scope.[6]

C. Agreement to Release. Releases are to be distinguished from agreements to release. An agreement to release is a contract to give a release *in futuro*,[7]

16 Rev. Rep. 619, 1 E. C. L. 618; Smith *v.* Mapleback, 1 T. R. 441, 1 Rev. Rep. 247.

See 42 Cent. Dig. tit. "Release," § 7.

So a bond of indemnity against a debt will, under some circumstances, bar an action by the obligor on the debt. McNeal *v.* Blackburn, 7 Dana (Ky.) 170; Richards *v.* Fisher, 2 Allen (Mass.) 527; Whitaker *v.* Salisbury, 15 Pick. (Mass.) 534; Clark *v.* Bush, 3 Cow. (N. Y.) 151.

Likewise a covenant to dismiss a suit then pending and to surrender the bond on which the action was brought. Stinson *v.* Moody, 48 N. C. 53.

Also a covenant not to levy execution.—See Legrand *v.* Baker, 6 T. B. Mon. (Ky.) 235.

However, a covenant by one of three joint obligees not to sue the sole debtor was not allowed to be pleaded in bar of a suit brought by all three obligees to recover the debt from the covenantee. Emerson *v.* Baylies, 19 Pick. (Mass.) 55.

An agreement not to sue is an agreement for legal consideration by one who has a right of action at the time of making it against another person, by which he agrees not to sue to enforce such right of action. These agreements are given by the courts the same effect as covenants not to sue (Robinson *v.* Godfrey, 2 Mich. 408), which they have superseded in those states where the common-law efficiency of seals has been abolished (see *infra*, II, B).

4. Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165; Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Robertson *v.* Tramwell, 37 Tex. Civ. App. 53, 83 S. W. 258 [*affirmed* in 98 Tex. 364, 83 S. W. 1098]; Lacy *v.* Kinnaston, Holt K. B. 178, 90 Eng. Reprint 996, 1 Ld. Raym. 688, 91 Eng. Reprint 1359, 12 Mod. 548, 88 Eng. Reprint 1510, Salk. 575, 91 Eng. Reprint 484; Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289, 16 Rev. Rep. 619, 1 E. C. L. 618; Fitzgerald *v.* Trant, 11 Mod. 254, 88 Eng. Reprint 1022; Dean *v.* Newhall, 8 T. R. 168.

An agreement with part of the joint makers of a joint and several note to sue only the other makers and to assign the judgment recovered to the promisees to avoid the necessity of suits for contribution was not a release of the obligors not sued. Carter *v.* Long, 125 Ala. 280, 28 So. 74.

5. **A covenant not to sue within a limited time** is neither a release, nor can it be pleaded in bar of an action, but it is a distinct agreement, for the violation of which an action may be maintained.

Illinois.— Guard *v.* Whiteside, 13 Ill. 7.

Indiana.— Thalman *v.* Barbour, 5 Ind. 178; Lowe *v.* Blair, 6 Blackf. 282; Mendenhall *v.* Lenwell, 5 Blackf. 125, 33 Am. Dec. 458; Berry *v.* Bates, 2 Blackf. 118.

Kentucky.— Lane *v.* Owings, 3 Bibb 247.

Massachusetts.— Foster *v.* Purdy, 5 Metc. 442 (until the specified contingency happens); Greely *v.* Dow, 2 Metc. 176; Perkins *v.* Gilman, 8 Pick. 229; Dow *v.* Tuttle, 4 Mass. 414, 3 Am. Dec. 226.

New York.— Winans *v.* Huston, 6 Wend. 471; Chandler *v.* Herrick, 19 Johns. 129.

Rhode Island.— Thurston *v.* James, 6 R. I. 103.

Wisconsin.— See Millett *v.* Hayford, 1 Wis. 401.

England.— Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852; Morley *v.* Frear, 6 Bing. 547, 8 L. J. C. P. O. S. 176, 4 M. & P. 305, 31 Rev. Rep. 489, 19 E. C. L. 248; Ray *v.* Jones, 19 C. B. N. S. 416, 11 Jur. N. S. 812, 34 L. J. C. P. 306, 12 L. T. Rep. N. S. 737, 13 Wkly. Rep. 1018, 115 E. C. L. 416; Deux *v.* Jefferies, Cro. Eliz. 352, 78 Eng. Reprint 600; Thimbleby *v.* Barrow, 7 L. J. Exch. 128, 3 M. & W. 210; Ayliff *v.* Scrimsheire, 1 Show. 46, 89 Eng. Reprint 438. *Compare* Burgh *v.* Preston, 8 T. R. 483, where the agreement not to sue during the life of the obligor was enforced, because made contemporaneously with the execution of the bond on which suit was agreed not to be brought. See, however, Newington *v.* Levy, L. R. 5 C. P. 607, 39 L. J. C. P. 334, 23 L. T. Rep. N. S. 70, 18 Wkly. Rep. 1198 [*affirmed* in L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473]; Slater *v.* Jones, L. R. 8 Exch. 186, 42 L. J. Exch. 122, 29 L. T. Rep. N. S. 56, 21 Wkly. Rep. 815; Walker *v.* Nevill, 3 H. & C. 403, 11 Jur. N. S. 246, 34 L. J. Exch. 73, 11 L. T. Rep. N. S. 774, 13 Wkly. Rep. 523.

See 42 Cent. Dig. tit. "Release," § 7.

Contra.— Morgan *v.* Bittlerfield, 3 Mich. 615; Robinson *v.* Godfrey, 2 Mich. 408.

Condition of release.— Where the agreement not to sue during a limited period contains a condition of release in case of its violation, it will be a bar. White *v.* Dingley, 4 Mass. 433; Millett *v.* Hayford, 1 Wis. 401; Gibbons *v.* Vouillon, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J. C. P. 74, 65 E. C. L. 483.

Injunction.— It seems that the breach of a covenant not to sue for a limited time may be restrained by injunction. Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294; Reed *v.* Stoddard, 100 Mass. 425.

6. Parker *v.* Holmes, 4 N. H. 97, holding that where a note is given for an advance secured by a mortgage on land, an agreement to look only to the land cannot be pleaded in bar to a suit thereon, because to construe the covenant not to sue as a release would extinguish the debt and hence destroy the mortgage, which was not what the parties intended. And see Millett *v.* Hayford, 1 Wis. 401.

7. *Georgia.*— Chamblee *v.* Davie, 88 Ga. 205, 14 S. E. 195.

and differs from a release, which operates *in præsenti*.[8] The one is a contract to give the other.

D. Receipt. A receipt is a written admission or acknowledgment of the fact of payment or performance made by the creditor to the debtor.[9]

II. Formal Requisites.

A. In General. Originally, at common law, a release had to be under seal,[10] but to-day no particular form or set of words is essential to its validity either at law or in equity,[11] provided that the intention of the releasor to release is manifest,[12] that the parties are sufficiently described to identify them,[13] and that, in the case of an unsealed release, the support of an adequate consideration exists.[14] The release need not be in an instrument separate from the obligation released.[15]

B. Necessity of Seal. A seal is an essential requisite of a "release," in the technical sense of that word as known to the common law;[16] but the tendency

Indiana.— Terre Haute, etc., R. Co. *v.* Flanigan, 94 Ind. 336.

New York.— Dambmann *v.* Schulting, 12 Hun 1.

Pennsylvania.— McNutt *v.* Loney, 153 Pa. St. 281, 25 Atl. 1088.

England.— Taylor *v.* Manners, L. R. 1 Ch. 48, 11 Jur. N. S. 986, 35 L. J. Ch. 128, 15 L. T. Rep. N. S. 388, 14 Wkly. Rep. 154; Wood *v.* Rowe, 2 Bligh 596, 21 Rev. Rep. 119, 4 Eng. Reprint 459.

See 42 Cent. Dig. tit. "Release," § 4.

Construction.—A debtor surrendered all his property for the use of his creditors, and in consideration thereof they covenanted that "they will receive the same in full satisfaction of their demands, and will forever release and discharge him from all other claims," etc. It was held that it must be construed as a present release. Tuckerman *v.* Newhall, 17 Mass. 581.

8. See *infra*, V, B, 3; V, F, 1.

9. *Minnesota.*— Thompson *v.* Layman, 41 Minn. 295, 42 N. W. 1061.

Missouri.— The Missouri *v.* Webb, 9 Mo. 193.

New York.— Ryan *v.* Ward, 48 N. Y. 204, 8 Am. Rep. 539.

Pennsylvania.— Sargeant *v.* National L. Ins. Co., 189 Pa. St. 341, 41 Atl. 351.

South Carolina.— Dobbin *v.* Perry, 1 Rich. 32.

See 42 Cent. Dig. tit. "Release," § 8. And see Payment, 30 Cyc. 1223 *et seq.*

A receipt is a mere evidence of a fact, and differs from a release, which extinguishes a preëxisting right. Equitable Securities Co. *v.* Talbert, 49 La. Ann. 1393, 22 So. 762.

A receipt in full may be explained and disputed, but a release under seal estops and concludes forever. Crane *v.* Alling, 15 N. J. L. 423; Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729; Graves *v.* Key, 3 B. & Ad. 313, 23 E. C. L. 143; Skaife *v.* Jackson, 3 B. & C. 421, 5 D. & R. 290, 10 E. C. L. 196; Bowes *v.* Foster, 2 H. & N. 779, 4 Jur. N. S. 95, 27 L. J. Exch. 262, 6 Wkly. Rep. 257. And see Payment, 30 Cyc. 1224 *et seq.* *Contra*, Alner *v.* George, 1 Campb. 392.

Intent.— The only effect of Code (1896), § 1805, providing that receipts must have effect according to the parties' intention, is to render unnecessary a formal release under seal, and give effect to the receipt of release according to the intention. Jordan *v.* McDonnell, 151 Ala. 279, 44 So. 101.

10. See *infra*, II, B.

11. Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260; Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474; Gabe *v.* McGinnis, 68 Ind. 538; Develin *v.* Riggsbee, 4 Ind. 464; Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346; Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606]; Gray *v.* McCune, 23 Pa. St. 447.

"It would be well to make use of the most appropriate words, such as *remisisse, relaxasse, et quietam clamasse*, but these are not indispensable. The words *renunciare, acquietare*, &c., will answer as well. If one acknowledge himself satisfied, and discharge a debt, this is a good release." Gray *v.* McCune, 23 Pa. St. 447, 450. So while the use of the word "release" is always advisable, yet the words "remise," "quit-claim," "renounce," "acquit," "relinquish," "discharge," and their synonyms, will have the same effect when used with like intention apparent on the face of the instrument. Grand Lodge I. I. O. M. A. *v.* Peiffer, 129 Ill. App. 208; Southwick *v.* Hopkins, 47 Me. 362; Flynn *v.* Butler, 189 Mass. 377, 75 N. E. 730; Stinson *v.* Moody, 48 N. C. 53. See Mitchell *v.* Pratt, 17 Fed. Cas. No. 9,668, Taney 448.

12. Power *v.* Lester, 17 How. Pr. (N. Y.) 413; Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528, 22 L. ed. 406.

13. Webster *v.* Ela, 5 N. H. 540 (holding that while they need not be expressly named, there must be something in the instrument itself or in the nature of the transaction clearly and unambiguously to show who the parties are); Matter of Torkington, 79 Hun (N. Y.) 128, 29 N. Y. Suppl. 433.

14. See *infra*, III, A, 1.

15. Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561.

16. *Alabama.*— Governor *v.* Daily, 14 Ala. 469.

of modern legislation and judicial decision is to abolish the common-law efficacy of the seal,[17] in consequence of which an unsealed instrument may operate as a release,[18] provided that it rests on a sufficient consideration.[19] An exception to the modern rule exists at common law in those cases where the obligation sought to be discharged was created by deed, for, it has been said, the instrument of release must be of as high a nature as the instrument creating the obligation, so long as the obligation remains executory and unbroken;[20] but this exception, like the technical common-law rule, is disappearing under the latter-day tendency of the legislatures and the courts to abrogate the common-law efficacy of the seal.[21]

Illinois.— Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260.

Iowa.— Frentress *v.* Markle, 2 Greene 553.

Kentucky.— Dillingham *v.* Estill, 3 Dana 21. *Compare* Gibson *v.* Weir, 1 J. J. Marsh 446.

Maine.—Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Ripley *v.* Crooker, 47 Me 370, 74 Am. Dec. 491; Dennett *v.* Lamson, 30 Me. 223; Lunt *v.* Stevens, 24 Me. 534.

Maryland.— Blackburn *v.* Beall, 21 Md. 208.

Massachusetts.—Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248.

Nevada.— Davis *v.* Bowker, 1 Nev. 487.

North Carolina.— Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

Oregon.— Olston *v.* Oregon Water Power, etc., Co., (1908) 96 Pac. 1095, 97 Pac. 538.

South Carolina.— Burgiss *v.* Westmoreland, 38 S. C. 425, 17 S. E. 56; Corbett *v.* Lucas, 4 McCord 323.

United States.— Mitchell *v.* Pratt, 17 Fed. Cas. No. 9,668, Taney 448.

See 42 Cent. Dig. tit. "Release," § 13.

Release before and after breach of contract.—A parol contract may be released by parol before breach, but not after breach. Hotchkiss *v.* Downs, 2 Conn. 136; Young *v.* Power. 41 Miss. 197.

17. See SEALS.

Under statutory provisions, receipts, releases, and discharges in writing, and settlements in compromise of debts, whether under seal or not, if made in good faith, are valid and operative according to the intention of the parties (Code, §§ 3039, 3040); but they may nevertheless be shown to have been given under a mistake of fact, or obtained by surprise, undue influence, misrepresentation, or concealment of material facts, or avoided for any cause sufficient in equity to invalidate and set aside a contract. Cleere *v.* Cleere, 82 Ala. 581, 3 So. 107, 60 Am. Rep. 750.

18. *Colorado.*— Heckman *v.* Manning, 4 Colo. 543.

Illinois.— Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Leviston *v.* Junction R. Co., 7 Ind. 597; Develin *v.* Riggsbee, 4 Ind. 464.

Massachusetts.— Dunham *v.* Branch, 5 Cush. 558.

Missouri.— Robinson *v.* McFaul, 19 Mo. 549; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

Montana.— Collier *v.* Field, 1 Mont. 612.

New York.— Farmers' Bank *v.* Blair, 44 Barb. 641. See Meyers *v.* Stix, 13 N. Y. Suppl. 301 [*reversing* 9 N. Y. Suppl. 805].

See 42 Cent. Dig. tit. "Release," § 13. And see cases cited *infra*, note 21.

19. *Connecticut.*— Palmer *v.* Green, 6 Conn. 14.

Illinois.— Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474; Murphy *v.* Halleran, 50 Ill. App. 594.

Indiana.— Leviston *v.* Junction R. Co., 7 Ind. 597.

Maine.— Lunt *v.* Stevens, 24 Me. 534.

Massachusetts.— Dunham *v.* Branch, 5 Cush. 558; Bender *v.* Sampson, 11 Mass. 42.

Mississippi.— Young *v.* Power, 41 Miss. 197.

Montana.— Collier *v.* Field, 1 Mont. 612.

New York.— Dambmann *v.* Schulting, 75 N. Y. 55; Farmers' Bank *v.* Blair, 44 Barb. 641.

Pennsylvania.—Albert *v.* Ziegler, 29 Pa. St. 50; Miller *v.* Hemler, 5 Watts & S. 486.

Tennessee.— Smith *v.* Harris, 3 Sneed 553.

See 42 Cent. Dig. tit. "Release," § 13.

Necessity of consideration see *infra*, III, A, 1.

20. *Arkansas.*— Levy *v.* Very, 12 Ark. 148; Miller *v.* Hemphill, 9 Ark. 488.

Connecticut.— Smith *v.* Lewis, 24 Conn. 624, 63 Am. Dec. 180.

Indiana.— See Develin *v.* Riggsbee, 4 Ind. 464; Woodruff *v.* Dobbins, 7 Blackf. 582; Sinad *v.* Patterson, 3 Blackf. 353.

Michigan.— See Barton *v.* Gray, 57 Mich. 622, 24 N. W. 638.

New Hampshire.— See McMurphy *v.* Garland, 47 N. H. 316.

New York.—Delacroix *v.* Bulkley, 13 Wend. 71.

United States.— Culbertson *v.* Stillinger, 6 Fed. Cas. No. 3,463, Taney 75.

See 42 Cent. Dig. tit. "Release," § 14.

21. *Alabama.*— Thomason *v.* Dill, 30 Ala. 444; Wallis *v.* Long, 16 Ala. 738. See Teague *v.* Russell, 2 Stew. 420.

Illinois.— White *v.* Walker, 31 Ill. 422, 434, where the court says: "It was an old maxim of the common law, that an obligor could only be released by an instrument of as high dignity as that by which he was bound — being obligated by a seal, he could be released only by an instrument under seal. Technically, this may be the rule of modern times, but practically it is not enforced."

Indiana.— Dickerson *v.* Ripley County, 6 Ind. 128, 63 Am. Dec. 373.

C. Necessity of Writing; Implied Release. In the absence of statute, releases are not required to be in writing;[22] and they may be express as well as implied from the acts of the parties and the circumstances of the case.[23]

D. Execution, Acceptance, and Recordation. It has been held that a release under seal need not be signed,[24] but it must be delivered to the person in whose favor it was executed, or to a third person in his behalf,[25] and be accepted

Massachusetts.— Tuson *v.* Crosby, 172 Mass. 478, 52 N. E. 744. See also Hastings *v.* Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462.

Michigan.— See Blagborne *v.* Hunger, 101 Mich. 375, 59 N. W. 657.

Missouri.— Lancaster *v.* Elliot, 55 Mo. App. 249, 42 Mo. App. 503.

New Hampshire.— See Nealey *v.* Cilley, 5 N. H. 26.

New York.— Dearborn *v.* Cross, 7 Cow. 48; Lattimore *v.* Harsen, 14 Johns. 330. See McIntosh *v.* Minor, 37 N. Y. App. Div. 483, 55 N. Y. Suppl. 1074.

Pennsylvania.—Anners *v.* Price, 2 Pa. L. J. 347.

England.— See Steeds *v.* Steeds, 22 Q. B. D. 537, 58 L. J. Q. B. 302, 60 L. T. Rep. N. S. 318, 37 Wkly. Rep. 378.

See 42 Cent. Dig. tit. "Release," § 14.

22. *Alabama.*— Hand Lumber Co. *v.* Hall, 147 Ala. 561, 41 So. 78.

Maine.— Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Dennett *v.* Lamson, 30 Me. 223.

Massachusetts.— Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 206.

New York.— Beach *v.* Endress, 51 Barb. 570. See Meyers *v.* Stix, 13 N. Y. Suppl. 301 [*reversing* 9 N. Y. Suppl. 805].

North Carolina.— Burton *v.* Stamper, 41 N. C. 14.

South Dakota.— Pierre Nat. Bank of Commerce *v.* Guthrie, 11 S. D. 517, 78 N. W. 995.

Tennessee.— Nashville First Nat. Bank *v.* Shook, 100 Tenn. 436, 45 S. W. 338.

See 42 Cent. Dig. tit. "Release," § 5.

Writing as dispensing with consideration see *infra*, III, A, 1.

23. Hand Lumber Co. *v.* Hall, 147 Ala. 561, 41 So. 78 (where A sent a check to B, accompanied by a voucher stating that acceptance of the check was in full satisfaction of B's rights against A; and B indorsed and collected the check, but retained the voucher without signing it; and the court implied a release by B of A); Beach *v.* Endress, 51 Barb. (N. Y.) 570 (holding that from the voluntary surrender by a creditor to the debtor of the evidence of the claim for its cancellation, the law will imply the release and discharge of any right of action of the creditor thereupon).

Facts held not to show a release.— Mere refusal to pay steamboat fare does not release the steamboat company from liability for injuries negligently caused to a passenger. Northwestern Union Packet Co. *v.* Clough, 20 Wall. (U. S.) 528, 22 L. ed. 406. Mere refusal to accept payment does not release the debt. Cupit *v.* Jackson, McClell. 495, 28 Rev. Rep. 735, 13 Price 721, 27 Rev. Rep. 722. Writing a letter to a railroad company, upon its failure to perform its contract to exchange lands with the writer, asking when it would move its tracks from his land and settle for its use, to which the company answered requesting time for decision, without ever replying further, does not show a release of the company from the contract. Union Pac. R. Co. *v.* McAlpine, 129 U. S. 305, 9 S. Ct. 286, 32 L. ed. 673. One having a joint demand against two does not release either by a mere verbal acquiescence, unaccompanied by a positive assent on sufficient consideration, in an arrangement by which it is agreed between the two liable that one shall discharge it. Drake *v.* Reed, 4 Stew. & P. (Ala.) 192. Likewise the mere assent of a creditor that his debtor may make an assignment for the benefit of creditors. Howlett *v.* Mills, 22 Ill. 341. The presentation by a creditor, at the suggestion of the debtor, of an account from which certain claims have been omitted for the purpose of avoiding litigation, does not release the debtor from liability on the omitted claims, where debtor refuses to pay the claims shown by the account. Morrison *v.* Leeds, 6 La. 591. Where, to a letter from B requesting that C substitute him, B, as his debtor instead of A, C replies that he has received B's letter and "noted the contents," A is not thereby discharged. Wildes *v.* Fessenden, 4 Metc. (Mass.) 12.

24. Taunton *v.* Pepler, 6 Madd. 166, 56 Eng. Reprint 1055. See, however, Simpson *v.* Moore, 6 Baxt. (Tenn.) 371.

However, if the clear intention of the parties is that the release shall not be effective until signed, such intention will prevail. Ambler *v.* Whipple, 20 Wall. (U. S.) 546, 22 L. ed. 403.

Contemporaneous agreement.— A release discharging a carrier from all claim for personal injuries cannot be repudiated on the ground that, when the agent obtained it, he agreed that at the time of delivering it to the carrier he would obtain a writing stating that, if the injuries proved more than of a merely trivial character, an additional amount would be paid, and that the agent delivered the release, but did not obtain the agreement for the additional amount. Smith *v.* Georgia R. etc., Co., 131 Ga. 470, 62 S. E. 673.

25. Burtch *v.* Thorn, 7 Ind. 508; Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561; Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107; Goodrich *v.* Walker, 1 Johns. Cas. (N. Y.) 250.

The delivery may be actual or constructive; it need not be formal, if there is an intent to deliver, and any act evincing such intent;

by the person released or a third person acting for him.[26] Recording acts generally do not require the recording of a release of a mere personal obligation.[27]

III. CONSIDERATION.[28]

A. Necessity — 1. In General. A release must either be under the seal of the releasor [29] or be supported by a sufficient consideration; otherwise it is *nudum pactum* and void; [30] and the same is true of agreements not to sue.[31] Mere voluntary declarations made by a creditor that a debtor is discharged or released do not bind him; [32] and a mere written receipt in full of all demands does not

it may even be implied from the nature of the writing itself if it was actually executed as a release and intended by the parties to have that effect. Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561; Fitch *v.* Forman, 14 Johns. (N. Y.) 172, 175; Goodrich *v.* Walker, 1 Johns. Cas. (N. Y.) 250.

26. Burtch *v.* Thorn, 7 Ind. 508; Buck *v.* Sanders, 1 Dana (Ky.) 187; Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107.

27. Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240.

28. Consideration in general see CONTRACTS, 9 Cyc. 308.

29. See *infra*, III, A, 2.

30. *Alabama.*— Mobile, etc., R. Co. *v.* Owen, 121 Ala. 505, 25 So. 612; Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Pounds *v.* Richards, 21 Ala. 424; Goodman *v.* Griffin, 3 Stew. 160. But see Caldwell *v.* Gillis, 2 Port. 526.

California.— Upper San Joaquin Canal Co. *v.* Roach, 78 Cal. 552, 21 Pac. 304; Wheelock *v.* Pacific Pneumatic Gas Co., 51 Cal. 223.

Colorado.— Heckman *v.* Manning, 4 Colo. 543.

Georgia.— Stamper *v.* Hoyes, 25 Ga. 546; Bruton *v.* Wooten, 15 Ga. 570.

Illinois.— Davidson *v.* Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; Wilson *v.* Keller, 9 Ill. App. 347.

Indiana.— Pope *v.* Vajen, 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688; Carter *v.* Zenblin, 68 Ind. 436; Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

Iowa.— Fagg *v.* Hambel, 21 Iowa 140, 89 Am. Dec. 561; Frentress *v.* Markle, 2 Greene 553 [*criticizing* Dillingham *v.* Estill, 3 Dana (Ky.) 21].

Kentucky.— Lemaster *v.* Burckhart, 2 Bibb 25.

Massachusetts.— Dunham *v.* Branch, 5 Cush. 558.

Michigan.— See Knights of Columbus *v.* McInerney, 153 Mich. 574, 117 N. W. 166, 126 Am. St. Rep. 541, holding that where, by force of the provisions of a benefit certificate, the widow and children of a deceased member are entitled to the insurance, though the mother of deceased was designated as beneficiary in the certificate, a release, given by the widow without consideration, to the mother, of her claim to the fund, did not deprive of her of the right to the fund, where no action was taken on the release, and the money was still in the hands of the insurance company, which interpleaded the parties.

Mississippi.— Young *v.* Power, 41 Miss. 197.

Montana.— Collier *v.* Field, 1 Mont. 612.

New Hampshire.— Goodrich *v.* Foster, 20 N. H. 177.

New York.— Gallo *v.* New York, 15 N. Y. App. Div. 61, 44 N. Y. Suppl. 143; Farmers' Bank *v.* Blair, 44 Barb. 641; Foersch *v.* Blackwell, 14 Barb. 607; Meyers *v.* Stix, 13 N. Y. Suppl. 301; Irvine *v.* Milbank, 14 Abb. Pr. N. S. 408; Jackson *v.* Stackhouse, 1 Cow. 122, 13 Am. Dec. 514; Seymour *v.* Minturn, 17 Johns. 169, 8 Am. Dec. 380.

Ohio.— Yanney *v.* Hine, 13 Ohio Cir. Ct. 585, 5 Ohio Cir. Dec. 301.

Pennsylvania.— Codding *v.* Wood, 112 Pa. St. 371, 3 Atl. 455; Kidder *v.* Kidder, 33 Pa. St. 268; Albert *v.* Ziegler, 29 Pa. St. 50; Schuylkill Nav. Co. *v.* Harris, 5 Watts & S. 28; Whitehill *v.* Wilson, 3 Penr. & W. 405, 24 Am. Dec. 326; Mannerbach *v.* Keppleman, 2 Woodw. 137.

Rhode Island.— Collyer *v.* Moulton, 9 R. I. 90, 98 Am. Dec. 370.

Vermont.— Wright *v.* Allen, 4 Vt. 572.

See 42 Cent. Dig. tit. "Release," § 18.

31. Muller *v.* Swanton, 140 Cal. 249, 73 Pac. 994; Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Commercial, etc., Nat. Bank *v.* McCormick, 97 Md. 703, 55 Atl. 439; Harrison *v.* Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444.

32. *Illinois.*— Wilson *v.* Keller, 9 Ill. App. 347.

Kentucky.— Nelson *v.* Cartmel, 6 Dana 7.

New Jersey.— Irwin *v.* Johnson, 36 N. J. Eq. 347 [*overruling* Leddel *v.* Starr, 20 N. J. Eq. 274], holding that there is no distinction between releases at law and equitable releases.

New York.— Doty *v.* Wilson, 5 Lans. 7.

Texas.— Dugan *v.* McDonald, 2 Tex. 355.

England.— De Bussche *v.* Alt, 8 Ch. D. 286, 3 Aspin. 384, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370; Lodge *v.* Dicas, 3 B. & Ald. 611, 22 Rev. Rep. 497, 5 E. C. L. 352; Harris *v.* Goodwyn, 9 Dowl. P. C. 409, 10 L. J. C. P. 62, 2 Man. & G. 405, 2 Scott N. R. 459, 40 E. C. L. 664; Peace *v.* Hains, 11 Hare 151, 17 Jur. 1091, 45 Eng. Ch. 151, 68 Eng. Reprint 1226 (writing by creditor in an account book opposite the entry of a debt "not to be enforced" does not release the indebtedness); Cross *v.* Sprigg, 6 Hare 552, 13 Jur. 785, 18 L. J. Ch. 204, 31 Eng. Ch. 552, 67 Eng. Reprint 1283; Jorden *v.*

operate as a release from liability unless under seal.[33] However, by statute in some of the states, written releases have been extended the efficacy accorded at common law to releases under seal, that is, no consideration is necessary to support them.[34]

2. Releases Under Seal. A release under seal is good without consideration of any kind whatever.[35] It is sometimes said that a seal imports consideration or that the use of the seal creates a conclusive presumption of consideration,[36] but the fact is that at common law a seal obviated the necessity of any consideration whatever.[37] By statute, in many states of this country, the common-law efficacy of seals has been abolished,[38] so that adequate legal consideration is essential to the support of all releases.[39]

Money, 5 H. L. Cas. 185, 23 L. J. Ch. 865, 10 Eng. Reprint 868; *In re* Hancock, 57 L. J. Ch. 793, 59 L. T. Rep. N. S. 197, 36 Wkly. Rep. 710; Cupit *v.* Jackson, McClell. 495, 28 Rev. Rep. 735, 13 Price 721, 27 Rev. Rep. 722; Tufnell *v.* Constable, 8 Sim. 69, 8 Eng. Ch. 69, 59 Eng. Reprint 28; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921; Byran *v.* Godfrey, 4 Ves. Jr. 6, 31 Eng. Reprint 3. *Compare* Yeomans *v.* Williams, L. R. 1 Eq. 184, 35 Beav. 130, 35 L. J. Ch. 283, 55 Eng. Reprint 844.

See 42 Cent. Dig. tit. "Release," § 18.

33. *Alabama.*— Willoughby *v.* Hannon, (1908) 47 So. 241.

Arkansas.— Reynolds *v.* Reynolds, 55 Ark. 369, 18 S. W. 377.

Connecticut.— Warren *v.* Skinner, 20 Conn. 559.

Georgia.— Stamper *v.* Hayes, 25 Ga. 546.

Illinois.— Bingham *v.* Browning, 197 Ill. 122, 64 N. E. 317.

Maine.—Auburn First Nat. Bank *v.* Marshall, 73 Me. 79; Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 491; Dennett *v.* Lamson, 30 Me. 223.

Maryland.— Prudential Ins. Co. of America *v.* Cottingham, 103 Md. 319, 63 Atl. 359; Snowden *v.* Reid, 67 Md. 130, 8 Atl. 661, 10 Atl. 175.

Massachusetts.— Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 206; Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248.

England.— Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729; Foster *v.* Dawber, 6 Exch. 839, 20 L. J. Exch. 385.

See 42 Cent. Dig. tit. "Release," § 18.

Contra.— Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47, 95 Am. St. Rep. 444; Green *v.* Langdon, 28 Mich. 221; Carpenter *v.* Soule, 88 N. Y. 251, 42 Am. Rep. 248; Ferry *v.* Stephens, 66 N. Y. 321; Gray *v.* Bartin, 55 N. Y. 68, 14 Am. Rep. 181. The Michigan and New York decisions reach the result they do on the ground that such a receipt, showing an intention to accept a less sum in discharge of the whole, amounts to a valid gift.

34. Rogers *v.* Kimball, (Cal. 1897) 49 Pac. 719; Miller *v.* Fox, 111 Tenn. 336, 76 S. W. 893, 895; Williams *v.* Hitchings, 10 Lea (Tenn.) 326; Warren *v.* Gentry, 21 Tex. Civ. App. 151, 50 S. W. 1025.

35. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Colorado.— Tiger *v.* Lincoln, 1 Colo. 394.

Florida.— Union Bank *v.* Call, 5 Fla. 409.

Illinois.— Mills *v.* Larrance, 186 Ill. 635, 58 N. E. 219.

Maine.— Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 418, 47 Atl. 905; Staples *v.* Wellington, 62 Me. 9.

Maryland.— Ingersoll *v.* Martin, 58 Md. 67, 42 Am. Rep. 322.

Missouri.— Saunders *v.* Blythe, 112 Mo. 1, 20 S. W. 319; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

New Jersey.— Waln *v.* Waln, 58 N. J. L. 640, 34 Atl. 1068; Braden *v.* Ward, 42 N. J. L. 518.

New York.— Ham *v.* Van Orden, 84 N. Y. 257; Finch *v.* Simon, 61 N. Y. App. Div. 139, 70 N. Y. Suppl. 361; Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792; Stearns *v.* Tappin, 5 Duer 294.

North Carolina.— Barnes *v.* Ward, 45 N. C. 93, 57 Am. Dec. 590.

Pennsylvania.— Schuylkill Nav. Co. *v.* Harris, 5 Watts & S. 28; Tyson *v.* Dorr, 6 Whart. 256; Benson *v.* Mole, 9 Phila. 66.

South Carolina.— Sheer *v.* Austin, 2 Rich. 330.

United States.— Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222.

England.— *In re* Hancock, 57 L. J. Ch. 793, 59 L. T. Rep. N. S. 197, 36 Wkly. Rep. 710; Preston *v.* Christmas, 2 Wils. C. P. 86.

See 42 Cent. Dig. tit. "Release," § 19.

36. *Colorado.*— Tiger *v.* Lincoln, 1 Colo. 394.

Illinois.— Mills *v.* Larrance, 186 Ill. 635, 58 N. E. 219.

Missouri.— Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

Vermont.— Brown *v.* Marsh, 7 Vt. 320.

England.— *In re* Hancock, 57 L. J. Ch. 793, 59 L. T. Rep. N. S. 197, 36 Wkly. Rep. 710.

See 42 Cent. Dig. tit. "Release," § 19.

37. See cases cited *supra*, note 35.

38. See Seals.

39. See cases cited *infra*, this note.

A seal is made only presumptive evidence of consideration by statute in some states. Green *v.* Langdon, 28 Mich. 221; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606]; Wabash Western R. Co. *v.* Brow, 65 Fed. 941, 13 C. C. A. 222. In other states such statutes have been construed not to include

B. What Constitutes — 1. In General. Consideration as relating to releases may be defined as some detriment to the releasee or some benefit to the releasor, moving from the releasee or some one in his behalf.[40] To support a parol release there must be a legal or valuable consideration as distinguished from a good or meritorious consideration, which is one based on blood relationship or love and affection.[41] An executory promise on the part of the releasee may afford a legal consideration for a release.[42] A consideration for a release moving from a third person on behalf of the releasee to the releasor or from the releasee to a third person at the request or by the acquiescence of the releasor is as adequate as a consideration moving directly from the releasee to the releasor.[43]

2. Payment of Disputed Claim. Where there is a *bona fide* dispute as to the existence or the amount of indebtedness, the payment by the debtor of less than the whole amount of the creditor's claim constitutes consideration for his release

sealed releases. Waln *v.* Waln, 58 N. J. L. 640, 34 Atl. 1068; Braden *v.* Ward, 42 N. J. L. 518; Finch *v.* Simon, 61 N. Y. App. Div. 139, 70 N. Y. Suppl. 361; Homans *v.* Tyng, 56 N. Y. App. Div. 383, 67 N. Y. Suppl. 792.

40. Walther *v.* Briggs, 69 Minn. 98, 71 N. W. 909; Rucker *v.* Bolles, 80 Fed. 504, 513, 25 C. C. A. 600, where the court says: "If one party to a contract agrees to release the opposite party therefrom in consideration of his doing some act which he is under no obligation to do, the doing of that act is a sufficient consideration for the release, although it was not beneficial to the first party." See Contracts, 9 Cyc. 308. *Compare* Rockefeller *v.* Wedge, 149 Fed. 130, 79 C. C. A. 36.

41. See Contracts, 9 Cyc. 319. *Compare* Arnold *v.* Park, 8 Bush (Ky.) 3 (where sufficient legal consideration was in fact present); Landon *v.* Hutton, 50 N. J. Eq. 500, 25 Atl. 953 (holding that a writing not under seal, by which a father undertakes to release a portion of a debt due from his deceased son-in-law, in order to aid the daughter in liquidating the indebtedness of her husband, is not supported by such a meritorious consideration as will entitle it to be enforced in equity).

42. Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423; Smith *v.* St. Paul, etc., R. Co., 60 Minn. 330, 62 N. W. 392 (holding that a contract by which an employee, in consideration of an agreement by his employer to give him work as long as he is able to perform it, releases the claim for prior injuries alleged to have resulted from the employer's negligence, is not void for lack of mutuality); Meyers *v.* Stix, 13 N. Y. Suppl. 301 [*reversing* 9 N. Y. Suppl. 805] (holding that a release resulting from an offer of a creditor to release his debtor upon certain conditions, which are performed before the offer to release is withdrawn, cannot be objected to for lack of mutuality). See Contracts, 9 Cyc. 323 *et seq.*

43. *Indiana.*— Scott *v.* Scott, 105 Ind. 584, 5 N. E. 397; Hunt *v.* Dederick, 105 Ind. 555, 5 N. E. 710; Woodberry *v.* Duvall, 15 Ind. 160; Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082.

Kentucky.— Conn *v.* Hord, 1 B. Mon. 83.

Maryland.— Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

Michigan.—Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

Missouri.— Strode *v.* St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851.

New York.— Backus *v.* Fobes, 20 N. Y. 204; Compton *v.* Elliott, 48 N. Y. Super. Ct. 211.

United States.— Indianapolis Rolling Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639.

See 42 Cent. Dig. tit. "Release," § 22.

Illustrations.—An undertaking by a bankrupt at request of A to pay a stated amount to the creditors other than A and to procure a dismissal of the proceedings in bankruptcy is sufficient to support A's release of his claim. Scott *v.* Scott, 105 Ind. 584, 5 N. E. 397. The selling to the continuing partner by the retiring partner of his interest in the firm assets at an agreed price sustains his release by firm creditors of liability to them for firm debts. Jones *v.* Austin, 26 Ind. App. 399, 59 N. E. 1082. Likewise where the value of the outgoing partner's interest is fixed by arbitration. Backus *v.* Fobes, 20 N. Y. 204. Release by A of his claim against B in consideration of B's buying a house from C see Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381. Part payment by C of A's claim against B for a release of the whole claim see Indianapolis Rolling-Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639. Release of a street railroad company by A, the driver of B's wagon when a collision occurred with a street car, in consideration of the payment of a specified sum to B, binds A. Strode *v.* St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851. The release of a railroad company by an employee from liability for personal injuries in consideration of a payment to him by the railroad's relief organization, of which he was a member, is valid. Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

The release, however, must be a release of the debtor and not a promise to the person from whom the consideration moves to release the debtor. Low *v.* Foss, 121 Mass. 531.

from the entire sum,[44] or for the release also of other claims of the creditor which are either unliquidated, honestly disputed, or, if liquidated and undisputed, aggregate less than the entire sum paid.[45]

3. Performance of Legal Obligation — a. In General. A release of a legal obligation for which the consideration is the performance by the releasee of some other undisputed legal duty owing by him to the releasor [46] or to a third person [47] is invalid for want of consideration. So the full performance of one obligation is not consideration for the discharge of that obligation and the release of a second obligation.[48]

b. Part Payment. The authorities are numerous and uniform in holding that a payment in money on the day the same is due and payable by the debtor, at the place where he was bound to make it, of a sum less than the whole of an undisputed liquidated indebtedness, affords no legal consideration for an agreement of the creditor to discharge the liability of the debtor for the residue.[49] Of course

44. Bingham *v.* Browning, 197 Ill. 122, 64 N. E. 317; Wenz *v.* Meyersohn, 59 N. Y. App. Div. 130, 68 N. Y. Suppl. 1091; Higginson *v.* New York Second Nat. Bank, 59 Hun (N. Y.) 183, 13 N. Y. Suppl. 443.

However, if the debtor is not acting in good faith, but denies the indebtedness merely to vex and harass the creditor and to delay collection of the debt, a release for less than the entire indebtedness is no bar to the creditor. Fitzgerald *v.* Smith, 1 Ind. 310; Rauen *v.* Prudential L. Ins. Co., 129 Iowa 725, 106 N. W. 198; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606]; Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860. *Compare* Prudential Ins. Co. *v.* Cottingham, 103 Md. 319, 63 Atl. 359.

45. The Cayuga, 59 Fed. 483, 8 C. C. A. 188.

46. *Georgia.*— Richmond, etc., R. Co. *v.* Walker, 92 Ga. 485, 17 S. E. 604 (holding that where a railroad company negligently injures one of its employees, and has him treated by its surgeon, a payment made by the company to the surgeon, even at the employee's request, is no consideration for a release by the employee for all damages caused by the injury, since the company is liable for the expenses of the treatment); Carlton *v.* Western, etc., R. Co., 81 Ga. 531, 7 S. E. 623 (holding that an agreement by one injured while in the employ of another to receive in satisfaction of his claim for both wages and damages the wages to which he is entitled by his contract of hiring, and concerning which there is no dispute, is, as to the claim for damages, without consideration).

Iowa.— Early *v.* Burt, 68 Iowa 716, 28 N. W. 35.

Kentucky.— Brayden *v.* Goulman, 1 T. B. Mon. 115.

Massachusetts.— Petty *v.* Allen, 134 Mass. 265.

Minnesota.— Hale *v.* Dressen, 76 Minn. 183, 78 N. W. 1045, holding that a release from personal liability of the guarantor of mortgage notes for his promise after he became owner of the property to care for the property without charge, to collect the rents and apply them to the payment of interest, taxes, insurance, and repairs until sale of the premises, is *nudum pactum.*

South Carolina.— Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768.

United States.— Hanson *v.* Fowle, 11 Fed. Cas. No. 6,042, 1 Sawy. 539.

See 42 Cent. Dig. tit. "Release," § 22.

Compare Lattimore *v.* Harsen, 14 Johns. (N. Y.) 330.

The release of a tort-feasor for the conversion of chattels for his return of part of them is without consideration (Fitzgerald *v.* Smith, Smith (Ind.) 162; Puff *v.* Puff, 104 S. W. 332, 31 Ky. L. Rep. 939; Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768), unless he delivers them to the owner at his request at some place other than the place of conversion (Petty *v.* Allen, 134 Mass. 265).

47. Low *v.* Foss, 121 Mass. 531, holding that the promise of a debtor to a creditor to pay all his creditors other than A is no consideration for A's release of him.

48. Knights Templars, etc., L. Indem. Co. *v.* Crayton, 110 Ill. App. 648 [*affirmed* in 209 Ill. 550, 70 N. E. 1066]; Siewing *v.* Tackle, 112 Mo. App. 414, 86 S. W. 1103; Harrison *v.* Murray Iron Works Co., 96 Mo. App. 348, 70 S. W. 261; Swaggard *v.* Hancock, 25 Mo. App. 596; Woodall *v.* Pacific Mut. L. Ins. Co., (Tex. Civ. App. 1904) 79 S. W. 1090. *Compare* Chicago, etc., R. Co. *v.* Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. ed. 1099 [*reversing* 92 Fed. 968, 35 C. C. A. 120].

49. *Illinois.*— Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303; Murphy *v.* Halleran, 50 Ill. App. 594.

Indiana.— Fensler *v.* Prather, 43 Ind. 119; Zuelly *v.* Casper, 37 Ind. App. 186, 76 N. E. 646.

Iowa.— Rauen *v.* Prudential L. Ins. Co., 129 Iowa 725, 106 N. W. 198; Bender *v.* Been, 78 Iowa 283, 43 N. W 216, 5 L. R. A. 596. *Compare* Langworthy *v.* Woodworth, 13 Iowa 530.

Maine.— Lee *v.* Oppenheimer, 32 Me. 253; Bailey *v.* Day, 26 Me 88.

Maryland.— Prudential Ins. Co. *v.* Cottingham, 103 Md. 319, 63 Atl. 359; Commercial, etc., Nat. Bank *v.* McCormick, 97 Md. 703, 55 Atl. 439; Emmittsburg R. Co. *v.* Donoghue,

the release will be valid if it be sealed,[50] or if the creditor accepts such a payment from a third person not acting in making same as the agent of the debtor,[51] or if, besides the part payment, additional collateral consideration, however slight, be present.[52]

4. Promise to Give or Giving Employment. A promise by the releasee to employ the releasor for a definite time or for a period which may be made certain may be a valid consideration for a release of the employer by the employee of a claim for personal injuries.[53] The contrary has been held, however, where, at the time

67 Md. 383, 10 Atl. 233, 1 Am. St. Rep. 396; Maddux *v.* Bevans, 39 Md. 499; Booth *v.* Campbell, 15 Md. 569, 8 Md. 107; Gurley *v.* Hiteshue, 5 Gill 222.

Massachusetts.— Tyler *v.* Odd Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360; Bemis *v.* Hoseley, 16 Gray 63; Smith *v.* Bartholomew, 1 Metc. 276, 35 Am. Dec. 365.

Missouri.— Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606].

Nebraska.— Fitzgerald *v.* Fitzgerald. etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

North Carolina.— Jones *v.* Mizell, 104 N. C. 9, 10 S. E. 79.

Pennsylvania.— See Bixler *v.* Kunkle, 17 Serg. & R. 298; Evesson *v.* Ziegfeld, 22 Pa. Super. Ct. 79.

Texas.— Woodall *v.* Pacific Mut. L. Ins. Co., (Civ. App. 1904) 79 S. W. 1090.

Washington.— Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

Wisconsin.— Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922.

United States.— Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860; U. S. *v.* Bostwich, 94 U. S. 53, 67, 24 L. ed. 65.

England.— Foakes *v.* Beer, 9 App. Cas. 605, 54 L. J. Q. B. 130, 51 L. T. Rep. N. S. 833, 33 Wkly. Rep. 233; Pinnel's Case, 5 Coke 117*a*, 77 Eng. Reprint 237; Fitch *v.* Sutton, 5 East 230, 1 Smith K. B. 415.

See 42 Cent. Dig. tit. "Release," § 25.

Illustrations see Hayes *v.* Massachusetts Mut. L. Ins. Co., 125 Ill. 626, 18 N. E. 322, 1 L. R. A. 303 (payment of less than the face value of a matured life insurance policy); Fensler *v.* Prather, 43 Ind. 119 (holding that payment by a retired member of a partnership, who held an indemnity against the old firm's debts given to him by the continuing partners, of one half the face of a firm note is no consideration for a promise of the payee to him to look to firm assets for the balance of the note); Tyler *v.* Odd-Fellows' Mut. Relief Assoc., 145 Mass. 134, 13 N. E. 360 (where it appeared that the son of a member of a mutual relief association who was in fact entitled to the whole of the fund payable on his father's death, on making claim therefor, was informed by the president that only a part of the fund was due to him, and that the balance belonged to another person, who had been named as a beneficiary; that he, in good faith, without disputing this, accepted the smaller sum, and signed a release in full; and that the remainder of the money was then paid to the person supposed to be entitled thereto; and it was held that the receipt of a part of the sum due was not a consideration sufficient to support a release executed by him to the insurance association in full satisfaction of the entire sum due). If the claim is unliquidated this rule does not apply. Baird *v.* U. S., 96 U. S. 430, 24 L. ed. 703.

50. See *supra*, III, A, 2.

51. Wilks *v.* Slaughter, 49 Ark. 235, 4 S. W. 766; Gordon *v.* Moore, 44 Ark. 349, 51 Am. Rep. 606; Lee *v.* Oppenheimer, 32 Me. 253; Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 [*affirmed* in 160 Mo. 159, 61 S. W. 606]; Indianapolis Rolling-Mill Co. *v.* St. Louis, etc., R. Co., 120 U. S. 256, 7 S. Ct. 542, 30 L. ed. 639.

52. Prudential Ins. Co. *v.* Cottingham, 103 Md. 319, 63 Atl. 359; Jones *v.* Wilson, 104 N. C. 9, 10 S. E. 79 (refraining from bidding at a mortgage sale); Herman *v.* Schlesinger, 114 Wis. 382, 90 N. W. 460, 91 Am. St. Rep. 922 (where, in addition to part payment, the debtor gave the creditor absolute title to property held by the creditor as collateral and waived his right to take advantage of the federal bankruptcy law).

For instance, if part payment be made at a different place or an earlier time, or in other species of property. Warren *v.* Skinner, 20 Conn. 559; Burch *v.* Hubbard, 48 Ill. 164; Brooks *v.* White, 2 Metc. (Mass.) 283, 37 Am. Dec. 95; Nashville First Nat. Bank *v.* Shook, 100 Tenn. 436, 45 S. W. 338 (holding that payment made by one of several co-obligors on a note of his proportion thereof before maturity is sufficient consideration to support an oral release to him by the obligee); Kirchoff *v.* Voss, 67 Tex. 320, 3 S. W. 548 (where A was liable to B on two notes aggregating three hundred and fifty dollars, and before either note was due he paid him one hundred dollars, and gave B his note for one hundred and fifteen dollars, payable at an earlier date than the later maturing of the original notes); Fire Ins. Assoc. *v.* Wickham, 141 U. S. 564, 12 S. Ct. 84, 35 L. ed. 860.

53. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289 ("steady and permanent employment"); Hobbs *v.* Brush Electric Light Co., 75 Mich. 550, 42 N. W. 965 ("steady work"); Smith *v.* St. Paul, etc., R. Co., 60 Minn. 330, 62 N. W. 392 (promise to give releasor work

of signing the release, the releasor was already in the releasee's employ in the same capacity and on the same terms and conditions.[54]

5. Mutual Releases. Mutual releases of the respective obligations that each of two releasors owes to the other in consideration the one for the other are both supported by sufficient consideration.[55]

C. Adequacy in General. The same principles of adequacy of consideration govern unsealed releases which apply to other simple contracts.[56] When a releasor receives all he contracts for, the courts will not hold the price inadequate and avoid his release on that ground, for the contracting parties, not the courts, must fix the *quid pro quo*.[57]

so long as he should be able to perform it); Quebe *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. 442 [*affirmed* in 98 Tex. 6, 81 S. W. 20]; Texas Midland R. Co. *v.* Morris, 29 Tex. Civ. App. 491, 69 S. W. 102 (during releasor's lifetime or so long as he might desire). And see Gulf, etc., R. Co. *v.* Winter, 38 Tex. Civ. App. 8, 85 S. W. 477.

Term of service.—A release of claim for personal injuries by a servant in consideration of being permitted to remain in the service of the master "under the same terms of employment as existed before the accident to him, to wit, employment by the month, and subject to the right of defendant to discontinue his services at any time for any cause" is without consideration. Texas Cent. R. Co. *v.* Johnson, (Tex. Civ. App. 1908) 111 S. W. 1098. But see Texas Midland R. Co. *v.* Sullivan, 20 Tex. Civ. App. 50, 48 S. W. 598. A promise to employ for such time as shall be "satisfactory" to the releasee affords no consideration (Missouri, etc., R. Co. *v.* Smith, 98 Tex. 47, 81 S. W. 22, 66 L. R. A. 741, 107 Am. St. Rep. 607; Gulf, etc., R. Co. *v.* Winter, 38 Tex. Civ. App. 8, 85 S. W. 477; Carroll *v.* Missouri, etc., R. Co., 30 Tex. Civ. App. 1, 69 S. W. 1004; Gulf, etc., R. Co. *v.* Winton, 7 Tex. Civ. App. 57, 26 S. W. 770. And see Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245. *Contra*, Forbs *v.* St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562), and the release is not validated by the fact that the releasor performs some service under the promise and is paid therefor (Missouri, etc., R. Co. *v.* Smith, *supra*).

54. Potter *v.* Detroit, etc., R. Co., 122 Mich. 179, 81 N. W. 80, 82 N. W. 245; Purdy *v.* Rome, etc., Co., 125 N. Y. 209, 26 N. E. 255, 21 Am. St. Rep. 736 [*affirming* 52 Hun 267, 5 N. Y. Suppl. 217]. And see Texas, etc., R. Co. *v.* Johnson, (Tex. Civ. App. 1908) 111 S. W. 1098.

55. Miller *v.* Morrison, 43 Kan. 446, 23 Pac. 612; Ambler *v.* Whipple, 20 Wall. (U. S.) 546, 22 L. ed. 403 (*semble*); Green *v.* Chicago, etc., R. Co., 92 Fed. 873, 35 C. C. A. 68.

56. See Rogers *v.* Kimball, (Cal. 1897) 49 Pac. 719; and Contracts, 9 Cyc. 365 *et seq.*

57. *Connecticut.*— Allen *v.* Ruland, 79 Conn. 405, 65 Atl. 138, holding that where a release is given extinguishing a demand wholly unliquidated, whether the sum received for the release is large or small is immaterial.

Illinois.— Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956.

Indiana.— Cleveland, etc., R. Co. *v.* Hilligoss, (1908) 86 N. E. 485 (holding that one releasing a person from liability for injuries cannot complain of the inadequacy of the consideration, and whatever consideration he accepts in satisfaction is adequate); Scott *v.* Scott, 105 Ind. 584, 5 N. E. 397.

Kansas.— Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066, holding that if a passenger who is injured in a railroad wreck executes a release of the company from all liability, although the consideration for the release be a trifle in sum, if the same be executed understandingly, he will be bound thereby.

Kentucky.— Louisville Veneer Mills Co. *v.* Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106.

Minnesota.— Hale *v.* Dressen, 76 Minn. 183, 78 N. W. 1035; Walther *v.* Briggs, 69 Minn. 98, 71 N. W. 909.

Missouri.—Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393.

Nebraska.— Deering *v.* Walter, 2 Nebr. (Unoff.) 361, 96 N. W. 517.

New York.— Ludington *v.* Bell, 77 N. Y. 138, 33 Am. Rep. 601 [*reversing* 43 N. Y. Super. Ct. 557] (giving note for part of debt); German-American Bank *v.* Schwinger, 75 N. Y. App. Div. 393, 78 N. Y. Suppl. 38 [*affirmed* in 178 N. Y. 569, 70 N. E. 1099]; Parsons *v.* Rhodes, 22 Hun 80.

Texas.— Ralston *v.* Aultman, (Civ. App. 1894) 26 S. W. 746; International Bldg., etc., Assoc. *v.* Fortassain, (Civ. App. 1893) 23 S. W. 496.

Virginia.— Chesapeake, etc., R. Co. *v.* Mosby, 93 Va. 93, 24 S. E. 916.

United States.— Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600; Barker *v.* Northern Pac. R. Co., 65 Fed. 460.

See 42 Cent. Dig. tit. "Release," § 20.

Thus extension of maturity of a debt (Deering *v.* Walter, 2 Nebr. (Unoff.) 361, 96 N. W. 517), the right to insist on a settlement (German-American Bank *v.* Schwinger, 75 N. Y. App. Div. 393, 78 N. Y. Suppl. 38 [*affirmed* in 178 N. Y. 569, 70 N. E. 1099]), or the substitution of the obligation of a third person (Ralston *v.* Aultman, (Tex. Civ. App. 1894) 26 S. W. 746) are sufficient considerations for releases.

D. Failure of Consideration[58]— **1. Total Failure.** Where there is a total failure of the consideration for a release it may be disregarded, for it constitutes no defense to a suit brought on the original cause of action.[59] The same principle applies to covenants and agreements not to sue,[60] and also an agreement to execute a release *in futuro*.[61]

2. Partial Failure. Partial failure of consideration does not avoid a release, although it may give the releasor a right of action against the releasee for the damage he may suffer by reason of such breach.[62]

IV. VALIDITY.

A. In General. Releases may be invalid for lack of proper formality,[63] for want of legal consideration,[64] for incapacity of the releasor to execute,[65] by reason of the absence of real consent thereto,[66] or owing to illegality.[67] On the other hand a release is not invalid because improvidently executed,[68] or because the releasor needed the money paid as consideration therefor to avert financial ruin.[69]

B. Mental Incapacity.[70] A release may be avoidable because of the mental incapacity of the releasor.[71] Mental incapacity may result from disease or physi-

58. See Contracts, 9 Cyc. 369.

59. Illinois Cent. R. Co. *v.* Keebler, 84 S. W. 1167, 27 Ky. L. Rep. 305. And see Kirby Lumber Company *v.* Chambers, 41 Tex. Civ. App. 632, 95 S. W. 607.

This applies to sealed releases also. Benson *v.* Mole, 9 Phila. (Pa.) 66, where the important distinction is made that a failure of consideration is a good defense to a release under seal, although a want of consideration could not be shown.

Actual and nominal consideration.— The rule stated in the text is true where the actual consideration for the release, such as employment of the releasor for a reasonable time, fails, even though in addition the release recites a nominal consideration. Illinois Cent. R. Co. *v.* Keebler, 84 S. W. 1167, 27 Ky. L. Rep. 305.

Effect as to bona fide purchasers.— It has been held, however, that where a release is once regularly executed and delivered, it cannot afterward be avoided at law for nonperformance by the releasee of the consideration thereof, so as to impair the rights of a *bona fide* purchaser from the releasee, and that the only remedy of the releasor is an action against the releasee for breach of his promise. Fitzsimmons *v.* Ogden, 7 Cranch (U. S.) 2, 3 L. ed. 249.

Where, however, the entire consideration for the release is given, but the releasee fails to live up to certain allusions to future employment of the releasor made by his agent during the course of the negotiation for the release, there is no failure of consideration. Atchison, etc., R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113.

60. Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

61. Stone *v.* Welling, 14 Mich. 514.

62. Kingsley *v.* Kingsley, 20 Ill. 203 (notes of B tendered without C's indorsement, which had been promised); Spitz *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378 (holding that where A agreed to execute a release of B and C for a sum to be paid by B, and upon receipt of said sum he executed the release, he cannot avoid it as to C because C failed to perform entirely a contract to contribute to the support of B, and which was one of the inducements relied on by A at the time he entered into his original agreement with B); De Marco *v.* Williams, (Miss. 1893) 12 So. 552 (promise to deliver a piano and pay certain indebtedness thereon; the former done, but non-performance of the latter); Cory *v.* Chicago, etc., R. Co., 100 Mo. 282, 13 S. W. 346 (employment for less than time promised). *Compare* Illinois Cent. R. Co. *v.* Keebler, 84 S. W. 1167, 27 Ky. L. Rep. 305; Saeger *v.* Runk, 148 Pa. St. 77, 23 Atl. 1006.

Failure of nominal consideration does not invalidate a release. Gourley *v.* West Chicago St. R. Co., 96 Ill. App. 68.

63. See *supra*, II.

64. See *supra*, III.

65. See *infra*, IV, B; V, D, 2, a.

66. See *infra*, IV, C.

67. See *infra*, IV, D.

68. Barker *v.* Northern Pac. R. Co., 65 Fed. 460, 461, where it is said: "Courts of equity cannot, any more than courts of law, relieve parties from the bonds of improvident, hasty, or illy-considered agreements."

69. Louisville Veneer Mills Co. *v.* Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106; McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

70. See also *infra*, V, D, 2, a.

71. *Kansas.*—Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722, 54 Pac. 1055.

Missouri.— State *v.* Stuart, 111 Mo. App. 478, 86 S. W. 471.

New York.— Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65.

Texas.— Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003.

See 42 Cent. Dig. tit. "Release," § 1.

cal injury, nervous shock, the use of opiates, or physical or mental pain.[72] To render a release void on this ground, however, it should appear that the releasor did not possess at the time of the execution of the release sufficient understanding to know the nature of the act and its effect.[73] The fact that the releasee or third persons are ignorant of the releasor's mental incompetency is immaterial.[74]

C. Reality of Consent — 1. In General. Releases depend for their validity upon the consent of the releasor. His mere formal consent thereto is not sufficient. His mind must coöperate. Formal consent may be unreal because of mental incapacity,[75] or because of mistake,[76] misrepresentation,[77] fraud,[78] duress,[79] or undue influence.[80]

2. Mistake[81] — a. Nature of Invalidating Mistake. Where releasor can show that the release was executed by mutual mistake of an existing fact,[82] or by mistake on his part and fraud on the part of the releasee,[83] he may avoid the same. A mere unilateral mistake in the absence of other equitable consideration is insufficient to invalidate the release.[84]

b. Effect of Signing Written Release — (i) *In General.* It is the duty of a releasor, having the ability and opportunity, to inform himself of the contents of the release before he executes it.[85] Hence he will not be allowed to avoid the

72. *Illinois.*— Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357.

Kansas.—Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722, 54 Pac. 1055.

Missouri.— State *v.* Stuart, 111 Mo. App. 478, 86 S. W. 471.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

Tennessee.— Byers *v.* Nashville, etc., R. Co., 94 Tenn. 345, 29 S. W. 128.

Texas.— Missouri, etc., R. Co. *v.* Craig, (Civ. App. 1908) 114 S. W. 850; Johnson *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197; Missouri, etc., R. Co. *v.* Brantley, 26 Tex. Civ. App. 11, 62 S. W. 94.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003.

See 42 Cent. Dig. tit. "Release," § 30.

73. *Georgia.*— Smith *v.* Georgia R., etc., Co., 131 Ga. 470, 62 S. E. 673.

Illinois.— Chicago West Div. R. Co. *v.* Mills, 105 Ill. 63; Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357.

Kansas.— Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Mississippi.— Jones *v.* Alabama, etc., R. Co., 72 Miss. 22, 16 So. 379, 73 Miss. 110, 19 So. 105, 55 Am. St. Rep. 488.

New York.— Gould *v.* John Hancock Mut. L. Ins. Co., 114 N. Y. App. Div. 312, 99 N. Y. Suppl. 833.

North Carolina.— Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

Texas.— Johnson *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003; Barker *v.* Northern Pac. R. Co., 65 Fed. 460.

74. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Johnson *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197.

75. See *supra*, IV, B; *infra*, V, D, 2, a.

76. See *infra*, IV, C, 2.

77. See *infra*, IV, C, 3.

78. See *infra*, IV, C, 4.

79. See *infra*, IV, C, 5.

80. See *infra*, IV, C, 6.

81. See Contracts, 9 Cyc. 388 *et seq.*

82. St. Louis, etc., R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; Chapman *v.* Allen, 56 Conn. 152, 14 Atl. 780; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104; Davis *v.* District of Columbia, 20 Ct. Cl. 157. See, however, Baker *v.* Baker, 28 N. J. L. 13, 19, 75 Am. Dec. 243.

83. See *infra*, IV, C, 2, b, (III); IV, C, 4.

84. Sherburne *v.* Goodwin, 44 N. H. 271, 277; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y 182, 31 N. E. 1104; Kane *v.* Chester Traction Co., 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. Rep. 846. And see White *v.* Richmond, etc., R. Co., 110 N. C. 456, 15 S. E. 197.

85. Shaffer *v.* Cowden, 88 Md. 394, 400, 41 Atl. 786, where the court says: "Failure to read [a release] proves, not fraud on the part of the appellee, but carelessness on her own part. It would lead to endless confusion and uncertainty in all business transactions, if a person who executes without coercion or undue influence or persuasion, a solemn release under seal, can subsequently impeach it on the ground of her own carelessness, though at the very time of its execution she might, had she seen fit, have advised herself fully as to the nature and effect of the act she was doing. She cannot invoke her own heedlessness to impeach her solemn release, and then call that heedlessness some one else's fraud. If she did not know what she was signing it was her plain duty to use her eyes and ascertain."

Fraud.— Failure to read the release does not preclude the releasor from showing that it was procured by fraudulent representations.

effect of the release by showing that he was ignorant of its contents, or that he failed to read it or to ask to have it read to him.[86]

(II) *Persons Unable to Read.* Where the releasor is illiterate or ignorant of the language in which the release is written, and the releasee or his agent undertakes to interpret or explain the contents and effect of the instrument to the releasor, he must do so fully;[87] and where the releasor's inability to read the release or otherwise inform himself of its contents is due to prostration or pain and suffering, his failure so to do is not prejudicial to his rights.[88]

(III) *Fraud.* If the releasee or his agent induces the releasor to sign the release without reading it and to rely upon his statement of its contents or effect, and such statement is fraudulent, the releasor may avoid the instrument.[89] It

International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

86. *California.*— Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84.

Illinois.— Hartley *v.* Chicago, etc., R. Co., 214 Ill. 78, 73 N. E. 398 [*affirming* 116 Ill. App. 277].

Indiana.— Hoerger *v.* Citizens' St. R. Co., 36 Ind. App. 662, 76 N. E. 328.

Kansas.— Atchison, etc., R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113, where it was held that the releasor was not excused because he was somewhat hurried.

Maryland.— Shaffer *v.* Cowden, 88 Md. 394, 41 Atl. 786; Spitze *v.* Baltimore R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. St. Rep. 378.

Massachusetts.— McNamara *v.* Boston El. R. Co., 197 Mass. 383, 83 N. E. 878; Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107.

Missouri.— Mateer *v.* Missouri Pac. R. Co., 105 Mo. 320, 16 S. W. 839.

Nebraska.— Osborne *v.* Missouri Pac. R. Co., 71 Nebr. 180, 98 N. W. 685.

New York.— Duane *v.* Paige, 82 Hun 139, 31 N. Y. Suppl. 310; Schmidt *v.* Herfurth, 5 Rob. 124; Williams *v.* Wilson, 18 Misc. 42, 40 N. Y. Suppl. 1132 (where releasor's glasses were mislaid); Schenfeld *v.* Hochman, 100 N. Y. Suppl. 1020.

Pennsylvania.— Laird *v.* Traction Co., 208 Pa. St. 574, 57 Atl. 987; De Douglas *v.* Union Traction Co., 198 Pa. St. 430, 48 Atl. 262; Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198.

Texas.— Missouri, etc., R. Co. *v.* Craig, 44 Tex. Civ. App. 583, 98 S. W. 907; Chicago R. Co. *v.* Williams, 37 Tex. Civ. App. 198, 83 S. W. 248, where releasor's glasses were not conveniently at hand.

Washington.— Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

West Virginia.— Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240.

United States.— Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003; Simpson *v.* Pennsylvania R. Co., 159 Fed. 423, 86 C. C. A. 403; Barker *v.* Northern Pac. R. Co., 65 Fed. 460.

See 42 Cent. Dig. tit. "Release," § 31.

87. Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84; Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640; Burik *v.* Dundee Woolen Co., 66 N. J. L. 420, 49 Atl. 442; *In re* Fischer, 189 Pa. St. 179, 42 Atl. 8.

88. Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84; Lusted *v.* Chicago, etc., R. Co., 71 Wis. 391, 36 N. W. 857; Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003.

89. *Alabama.*—Alabama Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997, representation by agent of releasee that the instrument was a written statement that releasor bore no ill-will to releasee.

Arkansas.— St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884, representation by agent of releasee that paper covered only inconveniences and medical expenses and not personal injuries.

California.— Meyer *v.* Haas, 126 Cal. 560, 58 Pac. 1042; Smith *v.* Occidental, etc., Steamship Co., 99 Cal. 462, 34 Pac. 84, representation by physician, agent of releasee, that instrument included only lost time, and excluded right of action for personal injuries.

Connecticut.— See Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546.

District of Columbia.— Chesapeake, etc., R. Co. *v.* Howard, 14 App. Cas. 262.

Illinois.— Jackson *v.* Security Mut. L. Ins. Co., 233 Ill. 161, 84 N. E. 198 [*affirming* 135 Ill. App. 86]; Indiana, etc., R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158 [*affirming* 103 Ill. App. 565]; Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864 (representation by agent of releasee that instrument was merely a request for a doctor); Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245 (representation by attending physician, agent of releasee, that the instrument signed was merely an acknowledgment that releasor's agents had expended certain money in his behalf); Gourley *v.* West Chicago St. R. Co., 96 Ill. App. 68; National Syrup Co. *v.* Carlson, 47 Ill. App. 178 (representation that the instrument signed was merely a voucher).

Indiana.— See Gipe *v.* Pittsburgh, etc., R. Co., 41 Ind. App. 156, 82 N. E. 471.

Kentucky.— Louisville Veneer Mills Co. *v.* Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106.

Massachusetts.— Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504, representation that instrument comprehended damage to clothing and did not include damages for personal injuries, which in fact it did. See also McNamara *v.* Boston El. R. Co., 197 Mass. 383, 83 N. E. 878; Rosenberg *v.* Doe, 148 Mass.

is noteworthy that in nearly all the cases so holding the releasor was either illiterate or incapable of reading the paper signed, and some decisions go to the length that a releasor cannot avoid his release on this ground where, being able and in condition to read and understand the paper for himself, he relies on the statement of the agent of the releasee as to its contents.[90] Obviously, for the releasor to avoid the release for this reason, he must have been deceived.[91]

c. Mistake of Law. For a mutual mistake of law either party may in some jurisdictions have the release set aside;[92] but under exceptional circumstances only will a release be annulled on account of a unilateral mistake of law, for it has long been a settled general rule that ignorance of the law will excuse no one.[93] The general rule is particularly applicable where, in the absence of fraud, the

560, 20 N. E. 176; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747.

Michigan.— Gilchrist *v.* Manning, 54 Mich. 210, 19 N. W. 959, representation by attorney of releasee that terms of release were narrower than in fact.

Minnesota.— Erickson *v.* Northwest Paper Co., 95 Minn. 356, 104 N. W. 291 (statement to illiterate releasor that paper signed was only a receipt); Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640.

Missouri.— Robertson *v.* Fuller Constr. Co., 115 Mo. App. 456, 92 S. W. 130 (statement by agent of releasee that it was a receipt); Austin *v.* St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450. *Compare* Bennett *v.* Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808.

Nebraska.— New Omaha Thomson-Houston Electric Light Co. *v.* Rombold, 68 Nebr. 54, 93 N. W. 966, 97 N. W. 1030, paper misread by releasor to releasee. But see Osborne *v.* Missouri Pac. R. Co., 71 Nebr. 180, 98 N. W. 685.

New Jersey.— Martin *v.* Righter, 10 N. J. Eq. 510, representation by releasee that instrument was a special whereas it was a general release.

New York.— Kelly *v.* New York, 16 N. Y. App. Div. 296, 44 N. Y. Suppl. 628; Cohen *v.* Schreiber, 60 Misc. 114, 111 N. Y. Suppl. 702; Markowitz *v.* Metropolitan St. R. Co., 32 Misc. 751, 65 N. Y. Suppl. 784 (representation that paper was a receipt); Cleary *v.* Municipal Electric Light Co., 19 N. Y. Suppl. 951 [*affirmed* in 139 N. Y. 643, 35 N. E. 206].

North Carolina.— Hayes *v.* Atlanta, etc., Air Line R. Co., 143 N. C. 125, 55 S. E. 437.

Ohio.— Lake Shore, etc., R. Co. *v.* Ehlert, 25 Ohio Cir. Ct. 37, 1 Ohio Cir. Ct. N. S. 418.

Pennsylvania.— *In re* Fisher, 189 Pa. St. 179, 42 Atl. 8, representation that paper was only a receipt

Texas.— International, etc., R. Co. *v.* Harris, (Civ. App. 1901) 65 S. W. 885 [*affirmed* in 95 Tex. 346, 67 S. W. 315] (representation by agent of releasee that releasor was signing only a hospital regulation); Houston, etc., R. Co. *v.* Milam, (Civ. App. 1900) 58 S. W. 735 (representation that paper was a receipt). *Compare* Missouri, etc., R. Co. *v.* Smith, 28 Tex. Civ. App. 565, 68 S. W. 543.

Wisconsin.—Albrecht *v.* Milwaukee, etc., R. Co., 94 Wis. 397, 69 N. W. 63.

United States.— Great Northern R. Co. *v.* Kasischke, 104 Fed. 440, 43 C. C. A. 626 (statement by agent that it was a receipt); Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 12 C. C. A. 598.

See 42 Cent. Dig. tit. "Release," § 32.

90. *Iowa.*—Wallace *v.* Chicago, etc., R. Co., 67 Iowa 547, 25 N. W. 772.

Maryland.— Shaffer *v.* Cowden, 88 Md. 394, 41 Atl. 786.

Nebraska.— Osborne *v.* Missouri Pac. R. Co., 71 Nebr. 180, 98 N. W. 685.

Ohio.— Baltimore, etc., R. Co. *v.* Bryant, 9 Ohio Cir. Ct. 332, 6 Ohio Cir. Dec. 418.

Wyoming.— Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221.

United States.— Heck *v.* Missouri Pac. R. Co., 147 Fed. 775.

So held on the ground that where the releasor is able and in condition to read and understand, and is not prevented by fraud from reading the instrument signed, but fails so to do, relying on the releasee's statement of its effect, he is estopped by his own negligence from denying his knowledge of the terms of the release. Osborne *v.* Missouri Pac. R. Co., 71 Nebr. 180, 98 N. W. 685; Baltimore, etc., R. Co. *v.* Bryant, 9 Ohio Cir. Ct. 332, 6 Ohio Cir. Dec. 418; Heck *v.* Missouri Pac. R. Co., 147 Fed. 775.

Principle applied even though the releasor be blind see Pacific Mut. L. Ins. Co. *v.* Webb, 157 Fed. 155, 84 C. C. A. 603, where the court said that the fact that the releasor was blind and not able to read affords no legal protection to the releasor. If she could not read the release, it was as much her duty to procure some reliable person to read and explain it to her before she signed it, as it would have been to read it, before she signed it, if she had been able to do so; and her failure to obtain a reading and explanation of it is such negligence as will estop her from avoiding it on the ground that she was ignorant of its contents.

91. St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884.

92. Whitehill *v.* Dacus, 49 S. C. 273, 27 S. E. 200. But see Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956 (where the court said that mutual ignorance of husband and wife that marriage of woman operated to revoke her contemplated will would not avoid post-nuptial contract with husband); Parmelee *v.* Lawrence, 44 Ill. 405.

93. See CONTRACTS, 9 Cyc. 403.

provisions of a release being clear and unambiguous, the releasor seeks to escape from the effects, in whole or in part, of his agreement by merely showing that he misunderstood the legal import and effect of the terms used; this he cannot do.[94] However, where there is a mistake of law on one side, and either positive fraud on the other, or inequitable, unfair, and deceptive conduct which tends to confirm the mistake and conceal the truth, or surprise, or unconscionable advantage obtained, the release may be avoided.[95] A mistake as to the law of a foreign country[96] or a sister state[97] is a mistake of fact, not a mistake of law.

d. Mistake of Fact. A mistake of fact may occur on the part of one or both of the parties to a release. A unilateral mistake of fact, unmixed with any elements of fraud or duress, is not sufficient ground for the avoidance of a release;[98] but where a mistake exists on one side known to and taken advantage of by the releasee, or fraud by the releasee, relief will be granted in the absence of negligence on the part of the releasor.[99] A release may, however, be avoided for a mutual mistake of a past or present fact, material to the agreement;[1] but such an effect is not produced by a mistake in prophecy, or in opinion, or by mistake in belief relative to an uncertain future event, as for instance the probable developments from and permanency of a known injury.[2] Nor does conscious

94. *Colorado.*— Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Georgia.— Jossey *v.* Georgia Southern, etc., R. Co., 109 Ga. 439, 34 S. E. 664.

Illinois.— Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; Parmelee *v.* Lawrence, 44 Ill. 405.

Massachusetts.— Squires *v.* Amherst, 145 Mass. 192, 13 N. E. 609.

Minnesota.— Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640.

New York.— Schmidt *v.* Herfurth, 5 Rob. 124.

United States.— Joy *v.* Wurtz, 13 Fed. Cas. No. 7,555, 2 Wash. 266, where releasor was unaware that a release of one of two joint obligors releases both.

England.— Brooks *v.* Stuart, 9 A. & E. 854, 8 L. J. Q. B. 184, 1 P. & D. 615, 36 E. C. L. 445; Cocks *v.* Nash, 9 Bing. 341, 2 L. J. C. P. 17, 4 Moore & S. 162, 23 E. C. L. 607, in both of which cases a releasor was not allowed to prove an agreement made contemporaneously with the execution of a release of one of two joint and several debtors that the other should continue liable. *Compare* Phelps *v.* Amcott, 21 L. T. Rep. N. S. 167.

See 42 Cent. Dig. tit. "Release," § 31.

See also cases cited *supra*, note 86.

Compare Hearn *v.* Hearn, 24 R. I. 328, 53 Atl. 95.

Release by corporation see CORPORATIONS, 10 Cyc. 217, note 24.

95. *District of Columbia.*— Rockwell *v.* Capital Traction Co., 25 App. Cas. 98.

Illinois.— Parmelee *v.* Lawrence, 44 Ill. 405, 410, where the court said: "If A receives a contract or other instrument from B, knowing that it was designed by B to bear a particular interpretation and to be used only for a specific purpose, then A has no right to give it a different interpretation, or to use it for a different purpose, though such new purpose may be consistent with the language of the instrument. To permit A to pervert the instrument from the purpose for which he knew it was intended by B, would be to permit him to commit a fraud."

Iowa.— Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198.

Massachusetts.— See Rosenberg *v.* Doe, 148 Mass. 560, 20 N. E. 176.

Minnesota.— Christianson *v.* Chicago, etc., R. Co., 67 Minn. 94, 69 N. W. 640.

Montana.— Collier *v.* Field, 2 Mont. 205.

New York.— Haviland *v.* Willets, 141 N. Y. 35, 35 N. E. 958 [*reversing* 67 Hun 89, 21 N. Y. Suppl. 1112]; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

England.— Ramsden *v.* Hylton, 2 Ves. 304, 28 Eng. Reprint 196.

See 42 Cent. Dig. tit. "Release," § 31.

96. Leslie *v.* Baillie, 7 Jur. 77, 12 L. J. Ch. 153, 2 Y. & Coll. 91, 21 Eng. Ch. 91, 63 Eng. Reprint 40. See *infra*, IV, C, 4, c, note 30.

97. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198.

98. Duff *v.* Hutchinson, 57 Hun (N. Y.) 152, 10 N. Y. Suppl. 857; Blackmer *v.* Wright, 12 Vt. 377. But see Letts *v.* Letts, 73 Mich. 138, 41 N. W. 99.

99. Skilbeck *v.* Hilton, L. R. 2 Eq. 587.

1. Chapman *v.* Allen, 56 Conn. 152, 14 Atl. 780; Great Northern R. Co. *v.* Fowler, 136 Fed. 118, 69 C. C. A. 106, 197 U. S. 624, 25 S. Ct. 800, 49 L. ed. 911; Davis *v.* District of Columbia, 20 Ct. Cl. 157; *In re* Garnett, 31 Ch. D. 1; Hore *v.* Becher, 6 Jur. 93, 11 L. J. Ch. 153, 12 Sim. 465, 35 Eng. Ch. 393, 59 Eng. Reprint 1211. See also Currier *v.* Bilger, 149 Pa. St. 109, 24 Atl. 168, and cases cited *infra*, note 2.

2. *Kansas.*—Atchison, etc., R. Co. *v.* Bennett, 63 Kan. 781, 66 Pac. 1018.

Minnesota.— Nelson *v.* Minneapolis St. R. Co., 61 Minn. 167, 63 N. W. 486; Doty *v.* Chicago, etc., R. Co., 49 Minn. 499, 52 N. W. 135.

Mississippi.—Alabama, etc., R. Co. *v.* Turnbull, 71 Miss. 1029, 16 So. 346.

ignorance of a fact amount to mistake.[3] A release set aside for mistake must be set aside as an entirety and cannot be affirmed in part and repudiated in part;[4] and the right to relief may be lost by laches.[5]

3. Innocent Misrepresentation.[6] An innocent misrepresentation by the releasee of a material fact, intended to be acted upon by the releasor and relied upon by him, is as effective to avoid a release induced thereby as a mutual mistake.[7]

Missouri.— Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629, 31 S. W. 903.

Pennsylvania.— Kane *v.* Chester Traction Co., 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. Rep. 846; Seeley *v.* Citizens' Traction Co., 179 Pa. St. 334, 36 Atl. 229; Currier *v.* Bilger, 149 Pa. St. 109, 24 Atl. 168.

Texas.— Quebe *v.* Gulf, etc., R. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734; Houston, etc., R. Co. *v.* McCarty, 94 Tex. 298, 60 S. W. 429, 86 Am. St. Rep. 854, 53 L. R. A. 507 [*reversing* 21 Tex. Civ. App. 568, 54 S. W. 421], mutual mistake as to the existence of internal injuries, but the parties dealt at arm's length and a full settlement and discharge was agreed upon, the releasor exercising independent reasonable care to ascertain the extent of his injuries and not relying upon any examination or statement of releasee's physician.

Wisconsin.— Kowalke *v.* Milwaukee Electric R., etc., Co., 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877; Continental Nat. Bank *v.* McGeoch, 92 Wis. 286, 66 N. W. 606; Klauber *v.* Wright, 52 Wis. 303, 8 N. W. 893.

United States.— Chicago, etc., R. Co. *v.* Wilcox, 116 Fed. 913, 914, 54 C. C. A. 147, where the court said: "A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this [invalidating] effect, because these future happenings are not facts, and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so."

England.— Rideal *v.* Great Western R. Co., 1 F. & F. 706. *Compare* Roberts *v.* Eastern Counties R. Co., 1 F. & F. 460; Lyall *v.* Edwards, 6 H. & N. 337, 30 L. J. Exch. 193.

See 42 Cent. Dig. tit. "Release," § 31.

Otherwise where the erroneous opinion was recklessly given to the releasor by defendant's physician, and had a tendency to deceive and mislead, and was made for the purpose of inducing a settlement. Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663.

Compare and distinguish the following cases, where there was a mutual mistake as to the nature of the injury itself: Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452; Great Northern R. Co. *v.* Fowler, 136 Fed. 118, 69 C. C. A. 106, 197 U. S. 624, 25 S. Ct. 800, 49 L. ed. 911; Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60. See also Meyer *v.* Haas, 126 Cal. 560, 58 Pac. 1042; Houston, etc., R. Co. *v.* Brown, (Tex. Civ. App. 1902) 69 S. W. 651.

Character of fraudulent statement see *infra*, IV, C, 4, c.

3. Seeley *v.* Citizens' Traction Co., 179 Pa. St. 334, 36 Atl. 229; Kowalke *v.* Milwaukee Electric R., etc., Co., 103 Wis. 472, 476, 79 N. W. 762, 74 Am. St. Rep. 877, where the court said: "Where a party enters into a contract, ignorant of a fact, but meaning to waive all inquiry, or waives an investigation after his attention has been called to it, he is not in mistake in the legal sense."

4. Skilbeck *v.* Hilton, L. R. 2 Eq. 587; Pritt *v.* Clay, 6 Beav. 503, 49 Eng. Reprint 920.

5. Millar *v.* Craig, 6 Beav. 433, 49 Eng. Reprint 893, holding that where a release has been executed, and the parties have, for a long lapse of time, acquiesced in it, the mere proof of errors will not, in the absence of fraud, induce the court either to set it aside, or to give leave to discharge and falsify, but the principle must be taken with this qualification, that the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question whether the release was fairly obtained.

6. See Contracts, 9 Cyc. 408 *et seq.*

7. *Kentucky.*— Shackelford *v.* Hendley, 1 A. K. Marsh. 496, 10 Am. Dec. 753.

Pennsylvania.— People's Natural Gas Co. *v.* Millbury, 2 Mona. 145.

Texas.— Houston, etc., R. Co. *v.* Brown, (Civ. App. 1902) 69 S. W. 651, where the release was executed in reliance upon the statement of the physician acting for the railroad company, made for the purpose of inducing the execution of the same, that the bones of the broken arm had knit together, and that the arm would be as good as ever, and it was held that the release was not binding upon the employee, even though the statement of the physician was made in good faith.

United States.— Great Northern R. Co. *v.* Fowler, 136 Fed. 118, 69 C. C. A. 106, 197 U. S. 624, 25 S. Ct. 800, 49 L. ed. 911.

England.— See Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729.

See 42 Cent. Dig. tit. "Release," § 32.

Contra.— Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905 (where releasee reasonably believed the misrepresentation to be true); Kelly *v.* Pioneer Press Co., 94 Minn. 448, 103 N. W. 330; Lesson *v.* Massachusetts Ben. Assoc., 3 Misc. (N. Y.) 415, 23 N. Y. Suppl. 294.

4. Fraud [8] — a. Elements. To entitle a releasor to avoid a release on the ground of fraud he must have been induced in making the release to have acted to his damage upon the truth of a statement of a material fact known by its maker to be false or recklessly uttered regardless of its truth, made by the releasee or another in his behalf, with the intention that it should be acted upon by the releasor in the execution of the release.[9]

b. Reliance on Fraudulent Statement. The releasor has the right to rely upon those statements of the releasee which a reasonably prudent man would rely upon. In the application of this test the releasor undoubtedly has the right to rely upon the releasee's material statements of fact,[10] but he has no right to rely on the usual chaffering opinions of the releasee;[11] and a conflict of authority exists as to whether a releasor who is mentally and physically capable of reading a release executed by him has a right to rely upon statements by the releasee or his agent as to its contents.[12] The weight of authority sustains the right of the releasor to rely upon professional opinions furnished him by the adverse party, and this is especially true of professional medical opinions, and if they are fraudulent the release is voidable.[13] However, it is not enough that the statement be made and that the releasor have the right to rely thereon; he must in

8. See CONTRACTS, 9 Cyc. 411 *et seq.*

9. *District of Columbia.*—Rockwell *v.* Capital Traction Co., 25 App. Cas. 98.

Illinois.— Indiana, etc., R. Co. *v.* Fowler, 103 Ill. App. 565 [*affirmed* in 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158].

Iowa.— Kilmartin *v.* Chicago, etc., R. Co., 137 Iowa 64, 114 N. W. 522; Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198.

Maine.— Valley *v.* Boston, etc., R. Co., 103 Me. 106, 68 Atl. 635; Larrabee *v.* Sewall, 66 Me. 376.

Massachusetts.— Barnard *v.* Crosby, 6 Allen 327.

Missouri.— Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668.

New Hampshire.— Hoitt *v.* Holcomb, 23 N. H. 535, provided the information is not equally in the knowledge or open to the knowledge of both parties.

New York.—Smith *v.* Irvin, 102 N. Y. App. Div. 614, 92 N. Y. Suppl. 1146 [*affirming* 45 Misc. 262, 92 N. Y. Suppl. 170].

Pennsylvania.— Silk *v.* Mutual Reserve Fund Life Assoc., 159 Pa. St. 625, 28 Atl. 445.

Washington.— Bjorklund *v.* Seattle Electric Co., 35 Wash. 439, 77 Pac. 727.

Wisconsin.— Wells *v.* McGeoch, 71 Wis. 196, 35 N. W. 769.

United States.— Union Pac. R. Co. *v.* Harris, 63 Fed. 800, 12 C. C. A. 598.

See 42 Cent. Dig. tit. "Release," § 32. See also cases cited *infra*, note 10 *et seq.*

10. Silk *v.* Mutual Reserve Fund Life Assoc., 159 Pa. St. 625, 28 Atl. 445.

11. Valley *v.* Boston, etc., R. Co., 103 Me. 106, 110, 68 Atl. 635 (where the court, in deciding that a release could not be set aside because in obtaining it the claim agent of the releasee told the releasor that he had no cause of action, said: "They were expressions of opinion from the agent of a corporation whose interests were known to be directly hostile to the plaintiff and as a prudent man he ought not to have relied upon them"); Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283 (holding that insured has no right to rely on statement of insurance company adjuster that his claim was not enforceable at law, as such representation being mere legal opinion, its truth could have been ascertained by ordinary diligence). *Compare* Conner *v.* Dundee Chemical Works, (N. J. Ch. 1889) 17 Atl. 975; Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452.

12. See *supra*, IV, C, 2, b, (I). See also Gipe *v.* Pittsburgh, etc., R. Co., 41 Ind. App. 156, 82 N. E. 471 (where it is said that misrepresentation as to the legal effect of a release does not amount to fraud, because every person is presumed to know the contents of the agreement which he signs, and has therefore no right to rely on the statements of the other party as to its legal effect. This is an exception to the general rule that the false representations of the other party may be set up in bar to a release); Heck *v.* Missouri Pac. R. Co., 147 Fed. 775.

13. Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066 (*semble*); International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189; Jones *v.* Gulf, etc., R. Co., 73 S. W. 1082, 32 Tex. Civ. App. 198, 199, where the court said: "On account of their special knowledge it was reasonable that the plaintiff and his wife should believe the representations of the physicians. 'While it is true that a person can not assert an estoppel based upon a representation which under the circumstances he ought not to have believed and acted upon, it is we think equally true that where one states a fact which is or should be within his knowledge, intending that it be believed and acted on as true, he should not ordinarily be heard to say that the other party ought not to have believed him, there being nothing to show to such other the falsity of the representations.'" See also Gulf, etc., R. Co. *v.* Huyett, (Tex. Civ. App. 1905) 89 S. W. 1118 [*reversed* on another ground in 99 Tex. 630, 92 S. W. 454, 5 L. R. A. N. S. 669]; Chicago, etc., R. Co. *v.* Wilcox, 116

fact rely to his damage on the fraudulent statement in executing the release.[14] Hence he is not entitled to relief if he does not believe the statement to be true,[15] or if he would have acted in the same manner even though the statement had not been made.[16] However, the releasor is not required to possess an unquestioning belief in its truth, provided that it was the inducing cause to the execution of the release;[17] and the fraudulent statement, if the substantial, need not be the sole, inducement for the execution of the release.[18]

c. Character of Fraudulent Statement. The statement must be a representation of a material fact,[19] not an opinion[20] or a prophecy or promise to be performed in the future.[21] However, every opinion, however erroneous in fact, contains a representation that, when expressed, it is honestly held by its giver;[22] and a promise includes a declaration that the promisor intends to perform his promise.[23] Each of these representations, being as to the existence of a present state of mind, constitutes a statement of fact, and if it be fraudulent and the releasor has the right to rely thereon, the release thereby induced is voidable.[24] The repetition to the releasor by the releasee of a fraudulent statement made to him by his agent, who knew it to be false, although the releasee believed it to be true, is a fraud, not a misrepresentation.[25] Unless a duty to disclose or a con-

Fed. 913, 54 C. C. A. 147; Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60. *Compare* Doty *v.* Chicago, etc., R. Co., 49 Minn. 499, 52 N. W. 135.

14. Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066; Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905; Kane *v.* Chester Traction Co., 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. Rep. 846; Wagner *v.* National L. Ins. Co., 90 Fed. 395, 406, 33 C. C. A. 121, where it is said: "To entitle a plaintiff to sue for a misrepresentation made to him, it is not enough to show that it was followed by damage to him; he must show that the one was the cause of the other; he must establish that, in doing the act whereby he suffered damage, he was *adhibens fidem*, relying upon the representation being true."

15. Stevens *v.* Reed, 60 N. Y. Suppl. 726.

16. Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121.

17. Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066; Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 514, 39 N. W. 485 (where the court said: "Although her own opinion had been that she would never fully recover from her injuries, and that, notwithstanding the alleged opinion of her physician, she still had doubts about it, yet, in view of his supposed superior knowledge of her case, she so far relied upon his opinion, and was so far influenced by it, that it was the inducing cause of her signing the release"); Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663.

18. Powell *v.* Adams, 98 Mo. 598, 12 S. W. 295; International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189 (holding that where one who had been injured while a passenger executed a release of the railroad company from liability for her injuries — her action being influenced partly by a fraudulent representation of the company's employees as to the extent of her injuries, and partly by the fact that she was alone and in need of funds — the release was subject to cancellation, notwithstanding the representation was not the sole inducement); Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663; Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121.

19. Conner *v.* Dundee Chemical Works, (N. J. Ch. 1889) 17 Atl. 975; Kane *v.* Chester Traction Co., 186 Pa. St. 145, 40 Atl. 320, 65 Am. St. Rep. 846.

If the statement is substantially, although not literally, true, the releasor cannot complain. McNamara *v.* Boston El. R. Co., 197 Mass. 383, 83 N. E. 878.

20. Chicago, etc., R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147.

21. See Texas, etc., R. Co. *v.* Burke, 1 Tex. App. Civ. Cas. § 945; Cross *v.* Spring 6 Hare 552, 13 Jur. 785, 1 L. J. Ch. 204, 31 Eng. Ch. 552, 67 Eng. Reprint 1283; Jorden *v.* Money, 5 H. L. Cas. 185, 23 L. J. Ch. 865, 10 Eng. Reprint 868.

22. Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663 (especially where the relation of physician and patient is once established between the parties); Hirschfeld *v.* London, etc., R. Co., 2 Q. B. D. 1, 46 L. J. Q. B. 94, 35 L. T. Rep. N. S. 473. See also Stewart *v.* Great Western R. Co., 2 De G. J. & S. 319, 11 Jur. N. S. 627, 13 L. T, Rep. N. S. 79, 13 Wkly. Rep. 907, 67 Eng. Ch. 251, 46 Eng. Reprint 399.

A representation that a legal or medical opinion has been given is one of fact, and, if fraudulent, ground for avoidance of the release. Hoitt *v.* Holcomb, 32 N. H. 185; Fleming *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 110, 88 N. Y. Suppl. 732; Silk *v.* Mutual Reserve Fund Life Assoc., 159 Pa. St. 625, 28 Atl. 445.

23. Rapid Transit R. Co. *v.* Smith, (Tex. Civ. App. 1904) 82 S. W. 788 [*reversed* on another ground in 98 Tex. 553, 86 S. W. 322].

24. See cases cited *supra*, notes 22, 23.

25. Gould *v.* Cayuga County Nat. Bank, 56 How. Pr. (N. Y.) 505.

fidential relation exists, silence as to material facts does not constitute fraud,[26] provided that the non-disclosure is not equivalent to an actual falsehood,[27] or that concealment does not so color the statement made as to produce a misleading false impression in regard to a material fact, which would be as vicious as an express falsehood.[28] It is not necessary that the statement shall be known to be false; it is sufficient if it is made recklessly without regard to the truth.[29] A false representation of law, not being a matter of fact, does not generally vitiate a release;[30] nor do false representations as to the legal effect of a release, as the releasor is presumed to know the contents of the instruments signed by him, and has no right to rely upon the representations of the other party as to its legal effect.[31] This rule is not applicable, however, where the releasee induces the releasor to rely upon his superior knowledge,[32] nor probably where the legal effect of the release is not disclosed on the face of the release, as where the release of one of several parties under a joint liability releases all,[33] nor where the releasor is himself unable to determine the true nature and effect of the release.[34]

d. Culpability of Releasee. A release may be avoided for the fraudulent statement of the releasee, or of his agents acting in the scope of their employment,[35]

26. Reznor *v.* Maclary, 4 Houst. (Del.) 241; Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50 (holding that the existence of a confidential relation is not to be inferred from the fact that the officer and agent of the releasee visited the releasor on hearing of the sudden death of her husband (in consequence of injuries received in the employ of the releasee), who had been long a trusted employee, nor from the fact that he offered in behalf of the releasee to pay, and did pay, the funeral expenses; nor from the fact that he offered to accompany the releasor to the surrogate's office to take out letters of administration, which offer was not accepted); Harbeck *v.* Pupin, 145 N. Y. 70, 39 N. E. 722; Dambmann *v.* Schulting, 75 N. Y. 55 [*reversing* 12 Hun 1 (*affirming* 54 How. Pr. 289)], 85 N. Y. 622.

A duty of disclosure held to exist see Purslow *v.* Jackson, 93 Iowa 694, 62 N. W. 12; O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688 (employee, benefit fund, and employer); Toomey *v.* Whitney, 94 N. Y. App. Div. 154, 88 N. Y. Suppl. 216 (prospective administrator and next of kin); Cunningham's Appeal, 122 Pa. St. 464, 15 Atl. 868; Carter *v.* Connell, 1 Whart. (Pa.) 392; Womack *v.* Austin, 1 S. C. 421 (guardian and ward).

27. Dobinson *v.* McDonald, 92 Cal. 33, 27 Pac. 1098; Clark *v.* Taylor, 68 Iowa 519, 27 N. W. 493; Hart *v.* Gould, 62 Mich. 262, 28 N. W. 831; Barnhardt *v.* Smith, 86 N. C. 473.

28. Larrabee *v.* Sewall, 66 Me. 376; Haviland *v.* Willets, 141 N. Y. 35, 35 N. E. 958 [*reversing* 67 Hun 89, 21 N. Y. Suppl. 1112].

29. Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663.

30. See Upton *v.* Tribilcock, 91 U. S. 45, 23 L. ed. 203.

But as the laws of sister and foreign states are regarded as facts, misrepresentations as to them are misrepresentations of fact. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; Leslie *v.* Baillie, 7 Jur. 77, 12 L. J. Ch. 153, 2 Y. & Coll. 91, 21 Eng. Ch. 91, 63 Eng. Reprint 40. See *supra*, IV, C, 2, c.

31. Jackson *v.* Pennsylvania R. Co., 69 N. J. L. 79, 82, 54 Atl. 532 ("It is well settled that a [fraudulent] misrepresentation as to the legal effect of a written instrument will not avoid the instrument, except where there exists a relation of trust or confidence between the parties"); Heck *v.* Missouri Pac. R. Co., 147 Fed. 775. See cases cited *supra*, IV, C, 2, b, (III), note 90, and IV, C, 4, b, note 12. *Contra*, St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884; Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729 (*semble*); Hirschfield *v.* London, etc., R. Co., 2 Q. B. D. 1, 46 L. J. Q. B. 94, 35 L. T. Rep. N. S. 473. See also Haviland *v.* Willetts, 141 N. Y. 35, 25 N. E. 958 [*reversing* 67 Hun 89, 21 N. Y. Suppl. 1112]; and cases cited *supra*, IV, C, 2, b, (III), note 89.

32. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609. See cases cited *supra*, IV, C, 2, b, (III).

33. Colter *v.* Morgan, 12 B. Mon. (Ky.) 278. See also cases cited, IV, C, 2, b, (III).

34. Indiana, etc., R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394 [*affirming* 103 Ill. App. 565].

35. See cases cited *passim*, IV, C, 2, b, (III); IV, C, 4.

Fraud of servant acting outside scope of employment affects validity of release no more than fraud of stranger. Gulf, etc., R. Co. *v.* Huyett, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. N. S. 669.

Fraud of physician.— The releasee is not bound or affected by statements made by its physician sent to ascertain the nature of the releasor's injuries and report the result of his examination to the claim agent, and without any authority to settle the claim or advise the releasor, for such statements are outside the scope of the agency, and relied on

or of one of several joint releasees; [36] but it is unaffected by the fraud of a stranger,[37] unless the stranger procured the release,[38] or unless such fraud was known to the releasee or his agent at the obtention by the latter of the release.[39]

e. Intent. To constitute fraud, the releasee must intend that the fraudulent representation shall be acted upon by the releasor in the execution of the release. But where a fraudulent statement is made to the releasor, who acts thereon, and the statement itself is reasonably calculated to induce such action, a rebuttable presumption arises that the consequence was intended by the releasee. This presumption may be rebutted, for instance, by proof that the releasee by his false statement intended to prevent the execution of the release.[40] Where the misrepresentation has been made by the releasee with knowledge of its falsity and with intent that it should be acted upon by the releasor, who has in fact acted thereon, the release is avoidable for fraud, even in the absence of a corrupt motive or a specific intent to defraud.[41]

f. Inadequacy of Consideration and Other Special Circumstances. Improvidence [42] or mere inadequacy of consideration where the parties stand on an equal footing [43] is not sufficient to establish fraud or mental incapacity, nor to set aside the release even in equity, but they constitute circumstances which may be considered in connection with the other facts of the case to determine the existence *vel non* of fraud. Likewise where the releasor is inexperienced or possesses a subnormal mind (nevertheless having the capacity to contract), and is taken advan-

by the releasor on her own responsibility. Nelson *v.* Minneapolis St. R. Co., 61 Minn. 167, 63 N. W. 486. *Compare* IV, C, 4, b, note 13.

36. Pelberg *v.* Gorham, 23 Cal. 349.

37. Atchison, etc., R. Co. *v.* Bennett, 63 Kan. 781, 66 Pac. 1018; Pugsley *v.* Sumner, 14 Daly (N. Y.) 427, 14 N. Y. St. 691; Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607. *Compare* Bedell *v.* Bedell, 37 Hun (N. Y.) 419.

38. Perea *v.* Barela, 5 N. M. 458, 23 Pac. 766; Stewart *v.* Great Western R. Co., 2 De G. J. & S. 319, 11 Jur. N. S. 627, 13 L. T. Rep. N. S. 79, 13 Wkly. Rep. 907, 67 Eng. Ch. 251, 46 Eng. Reprint 399.

39. Gulf, etc., R. Co. *v.* Huyett, 99 Tex. 630, 92 S. W. 454, 5 L. R. A. N. S. 669, *semble*.

40. Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501 (holding that opinions of releasee as to its legal liability, which would not pass unquestioned by a reasonably prudent releasor, are not within the rule); Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 405, 33 C. C. A. 121 (where the releasor made application to the company for additional life insurance, which was rejected on the ground that he had a heart affection. Thereupon the releasor proposed to surrender the life insurance policy he already had in that company, but their physician advised him not to surrender the policy and release the company because he was not likely to live more than a year, when as a matter of fact the physician believed that his death was imminent. Despite this advice he surrendered the policy and released the company. In a few days thereafter his death occurred. The court decided that his executrix could not avoid the release on account of the false statements of the company's physician, saying: "Where the person acting on the statement is the person to whom it is addressed, and the statement taken by itself is reasonably calculated to induce such action, of course the presumption is that the result was intended by the maker. But this presumption can certainly be rebutted by other circumstances showing that the statements were made with the best motives, and for an entirely different purpose, and that such action as that taken was not intended, but, on the contrary, was in the presence of the deceived party, in good faith deprecated").

41. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747; Warder *v.* Tucker, 7 Mass. 449, 5 Am. Dec. 62; Conner *v.* Dundee Chemical Works, (N. J. Ch. 1889) 17 Atl. 975. See, however, Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 405, 33 C. C. A. 121, where it is said: "It is true that there are many cases in which the principle is broadly stated that the motive of one in deceiving another to the latter's damage is not material, but they are all cases in which the deceiver intended the deceived person to take the action he did take, and sought to escape liability for it on the ground that he intended no injury to the deceived person or benefit to himself from such induced action."

42. Chesapeake, etc., R. Co. *v.* Mosby, 93 Va. 93, 24 S. E. 916; Barker *v.* Northern Pac. R. Co., 65 Fed. 460.

43. Mattoon Gas Light, etc., Co. *v.* Dolan, 111 Ill. App. 333; Kansas City, etc., R. Co. *v.* Chiles, 86 Miss. 361, 38 So. 498; Rose *v.* West Philadelphia R. Co., 9 Pa. Cas. 313, 12 Atl. 78; Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205; St. Louis, etc., R. Co. *v.* Phillips, 66 Fed. 35, 13 C. C. A. 315. But *compare* Russell *v.* Dayton Coal, etc., Co., 109 Tenn. 43, 70 S. W. 1 (where a corporation settled an action in which it was liable

tage of by the releasee or his agent;[44] also the absence of the counsel of the releasor,[45] or the facts that the releasor is in great distress or pain and *inops consilii*,[46] and the presence of unusual clauses in releases has a tendency to excite suspicion of fraud.[47]

g. Effect. Where the execution of a release has been obtained by trick or fraud, as for instance, by the substitution of another paper, and hence to which the releasor did not intentionally assent, the release is absolutely void; but where the release was executed intentionally, although the consent to its execution was induced by fraudulent misrepresentations of fact unconnected with the execution, it is not void but voidable, and is valid and binding and operates as a bar to any proceeding on the cause of action released,[48] until it is rescinded or annulled; and where the effect of the release of the debt is to discharge a lien the rescission or cancellation of the release for fraud will restore the lien,[49] unless the rights of *bona fide* purchasers have intervened, for where the equities are equal the legal title prevails.[50] If a misrepresentation amounting to fraud is made as to any matter embraced in the release the instrument is vitiated as a whole, and not merely as to the matter to which the misrepresentation relates.[51]

5. Duress.[52] A release will be voidable in equity where given under duress.[53] A release, however, is not necessarily voidable because given under restraint, but to have this effect the restraint must have been illegal.[54] So imprisonment by order of law is not duress, unless for an improper purpose without just cause,

for the wrongful death of a miner between forty and forty-five years of age, in good health, and a strong, hard-working man, for one hundred and twenty-five dollars, and it was held that such sum was so shockingly inadequate that the release would be set aside); Williams *v.* Smith, 7 L. J. Ch. O. S. 129 (where, combining the ignorance and unprotected state of the releasees, their pecuniary distress, and their total want of all knowledge or information as to the methods or habits of business, with the great inadequacy of price, a court of equity set aside releases).

44. Kelly *v.* Chicago, etc., R. Co., 138 Iowa 273, 114 N. W. 536 (where it is said that a release obtained from one who, by reason of inexperience or weakness of body or mind, or of lack of independent counsel, is not in condition to deal on equal terms with the party seeking the release, will be scrutinized with care, and any release thus unfairly obtained will be set aside, although it is the policy of the courts to encourage the amicable settlement of controversies); Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79.

This doctrine will not be extended to dealings between two corporations the affairs of which are managed by a president and board of directors. Thorn Wire Hedge Co. *v.* Washburn, etc., Mfg. Co., 159 U. S. 423, 16 S. Ct. 94, 40 L. ed. 205.

Circumstances of particular case.— In International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 260, 81 S. W. 1189, the court says: "No definite rule of law can be laid down as to what condition of mind or degree of mental imbecility is sufficient to avoid a contract made with a party taking advantage of it. As in the case of fraud itself, each case will depend upon its own circumstances, and the state of mind must be taken in connection with the other facts of the transaction, to determine whether or not the contract may be avoided."

45. Kansas City, etc., R. Co. *v.* Chiles, 86 Miss. 361, 38 So. 498; Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668; Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452, where it is said that we think no release obtained from a plaintiff, after an action has been commenced and counsel employed, in the absence of plaintiff's counsel, and without his consent or knowledge, can bind him, unless the utmost good faith is shown on the part of defendant in obtaining the same; this is at least wholesome doctrine.

46. Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79.

47. Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79, 84, where the release contained this unusual clause: "He agrees to this deliberately, and of his own free will, and without any undue influence from anybody."

48. See *infra*, IV, C, 2. *Compare* Hagan *v.* Sartwell, 146 Mass. 33, 15 N. E. 102.

49. Wright *v.* Walter, MacArthur & M. (D. C.) 343; South Fork Canal Co. *v.* Gordon, 6 Wall. (U. S.) 561, 18 L. ed. 894.

50. See Chattel Mortgages, 6 Cyc. 980; Mortgages, 27 Cyc. 916; Pledges, 31 Cyc. 779; Sales; Vendor and Purchaser.

51. Newell *v.* New York, 61 Hun (N. Y.) 356, 15 N. Y. Suppl. 911.

52. See Contracts, 9 Cyc. 443 *et seq.*

53. Dundee Chemical Co. *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50; Brainard *v.* Van Dyke, 71 Vt. 359, 365, 45 Atl. 758, where it is said: "Duress is but a species of fraud, and contracts induced by it are not void, but voidable, and may be affirmed or repudiated in the same manner, and subject to the same conditions, that control when the contract is induced by fraud." And see cases cited *infra*, note 54 *et seq.*

54. Buzzard's Estate, 13 Lanc. Bar (Pa.)

or, if for a just cause, then without lawful authority, or, if for a just cause and under proper authority, then for an improper purpose;[55] but even under such circumstances, if the release be fully and voluntarily given, it will be valid.[56] Mere threats of criminal prosecution do not constitute duress where there is no reasonable sense of impending danger.[57] Personal violence or reasonable apprehensions of personal violence may constitute duress.[58] And where the parties are not on an equal footing, but one of them is in a position to dictate, a release obtained by threats of injury to or withholding of personal property of the releasor may be invalidated by duress.[59]

6. Undue Influence.[60] A release, like other deeds and contracts, will be voidable if obtained by undue influence.[61] To constitute undue influence the will of the releasor must be so overborne that voluntary action on his part is prevented.[62] Furthermore the undue influence, to invalidate the release, must have been exercised to benefit the releasee or to wrong the releasor in the former's interest.[63] The doctrine of undue influence is not limited to cases where a fiduciary or family relation exists between the parties, but it applies to all circumstances where one party has acquired this peculiar influence over the mind of another.[64] Where such a relation does exist between the releasor and the releasee, however, a duty rests upon the latter to exercise the utmost fairness and good faith, to conceal nothing, but to see that all is open, fair, voluntary, and well understood.[65]

7. Ratification — a. In General. A voidable release may be ratified or confirmed either expressly or by implication from the conduct of the releasor.[66] The doctrine of ratification applies alike to releases voidable for fraud, mistake, undue influence, duress, or temporary mental incapacity.[67] In order to ratify,

127; Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961.

55. See Contracts, 9 Cyc. 444. And see Watkins *v.* Baird, 6 Mass. 506, 4 Am. Dec. 170; Guilleaume *v.* Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758; Kelsey *v.* Hobby, 16 Pet. (U. S.) 269, 10 L. ed. 961; Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

56. Stono *v.* Weiller, 128 N. Y. 655, 3 Silv. App. 556, 28 N. E. 653 [*affirming* 10 N. Y. Suppl. 828]. And see Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

57. Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905.

58. Mitchell *v.* Pratt, 17 Fed. Cas. No. 9,668, Taney 448.

59. Puff *v.* Puff, 104 S. W. 332, 31 Ky. L. Rep. 939; San Antonio, etc., R. Co. *v.* Barnett. (Tex. Civ. App. 1894) 27 S. W. 676; Whitney *v.* Eager, 29 Fed. Cas. No. 17,584, Crabbe 422, refusal to pay seaman wages until release for tort executed.

60. See Contracts, 9 Cyc. 454 *et seq.*

61. Henes *v.* Henes, 5 Ind. App. 100, 31 N. E. 832; Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663, 39 Pac. 189; Puff *v.* Puff, 104 S. W. 332, 31 Ky. L. Rep. 939.

Hardship and oppression may avoid a release. Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546. See, however, Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50.

62. *In re* Rockey, 155 Pa. St. 453, 26 Atl. 656. But *compare* Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663, 39 Pac. 189.

The facts that the releasor acts on bad advice of a stranger, and also lacks any considerable business ability, do not invalidate the release. Carroll *v.* People, 13 Ill. App. 206; Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50.

63. Carroll *v.* People, 13 Ill. App. 206.

64. Fowler *v.* Wyatt, 24 Beav. 232, 53 Eng. Reprint 347.

However, unless a confidential relation is shown to exist, no presumption of undue influence can arise. Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50.

65. Wellborn *v.* Rogers, 24 Ga. 558 (trustee and *cestui que trust*); Traphagen *v.* Voorhees, 44 N. J. Eq. 21, 12 Atl. 895; Triplett *v.* Woodward, 98 Va. 187, 35 S. E. 455 (attorney and client); Adams *v.* Cowen, 177 U. S. 471, 20 S. Ct. 668, 44 L. ed. 851 [*affirming* 80 Fed. 448, 25 C. C. A. 547] (executor and legatee). See, however, Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50, where it was held that such a relation does not arise from disparity in business capacity and relative bargaining skill of the releasor and releasee, nor from the representation by the agent of the releasee, a skilled lawyer, believed by him to be true, that his principal (the releasee) was not liable.

66. Seymour *v.* Mackay, 21 Ill. App. 449; Van Rensselaer *v.* Akin, 22 Wend. (N. Y.) 549; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

67. See cases cited *passim*, IV, B; IV, C.

Duress see Cammarata *v.* Pennsylvania Coal Co., 86 N. Y. Suppl. 787; Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

Mental incapacity see Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30

the releasor must have knowledge of the facts creating the validity,[68] but no new consideration is necessary.[69] The acceptance and retention of benefits under a release operates as a ratification.[70] A voidable release is ordinarily valid and binding until rescinded or repudiated by the releasor,[71] and as a rule repudiation of it must occur within a reasonable time after the removal of the releasor's disability or the discovery of the invalidating facts, else the releasor will be held to have ratified it.[72] Ratification cures the invalidity, and when once made is irrevocable.[73]

b. By Retention of Consideration.[74] As a releasor is entitled to the consideration of the release only in the event that the release is valid, his retention and use of it as his own for an unreasonable length of time [75] after the removal of his disability [76] or the discovery of the invalidating facts [77] is consistent only, except in rare cases, with an intention to ratify the release.[78] Similarly the acceptance

Atl. 308, 44 Am. St. Rep. 586; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403; Chicago, etc., R. Co. *v.* Pierce, 64 Fed. 293, 12 C. C. A. 110.

68. Rockwell *v.* Capital Traction Co., 25 App. Cas. (D. C.) 98; Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668.

69. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

70. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

Acceptance of benefits under another contract unrelated to the release has no such effect. Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108.

Nor is this principle applicable where, in consideration of a release of itself and the parent railroad company, a relief society which has agreed to pay specified benefits for a fixed period stops payment after less than one half the period has elapsed. Pennsylvania Co. *v.* Chapman, 220 Ill. 428, 77 N. E. 248 [*affirming* 118 Ill. App. 201].

71. Walker *v.* Collier, 37 Ill. 362.

72. Carroll *v.* People, 13 Ill. App. 206 (holding that the defrauded party must rescind as soon as circumstances permit, and must not go on with the contract after the discovery of the fraud so as to increase the injury necessarily caused to the fraudulent party by the rescission. In other words, if he rescinds on the ground of fraud he must do so promptly on discovery of the fraud. The mere lapse of time, if it be considerable, goes far to establish the waiver of the right to rescind, and if it be connected with the obvious ability on the part of the defrauded person to discover the fraud at a much earlier period by the exercise of ordinary care and intelligence, it would be almost conclusive); Aaron *v.* Mendel, 78 Ky. 427, 39 Am. Rep. 248.

What constitutes a reasonable time is a question of fact and varies with the situation and relation of the parties, the circumstances and change of position of the parties, and other elements. Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

Failure to return or offer to return consideration as ratification see *infra*, IV, C, 7, b.

73. Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403; Chicago, etc., R. Co. *v.* Pierce, 64 Fed. 293, 12 C. C. A. 110, where it is said that having once by his conduct affirmed the release, he could not afterward disaffirm it. A party cannot play fast and loose with the contract of settlement, affirming it to-day and disaffirming it to-morrow.

74. **Restoration of consideration as condition precedent to avoidance of release** see *infra*, IV, C, 8, d, (I).

75. **Retention for a reasonable time** is not conclusive of ratification. Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128; Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403; Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

Retention for an unreasonable time generally amounts to ratification. Kelly *v.* Louisville, etc., R. Co., 154 Ala. 573, 45 So. 906 (holding that where a plea in a personal injury action informed plaintiff of a release relied upon by defendant and claimed by plaintiff to have been obtained while he was incapacitated by intoxication, he could not wait three years, and then attempt to rescind the release by offering to repay the money when the case came up for trial the second time); Carroll *v.* People, 13 Ill. App. 206; Shaw *v.* Delaware, etc., R. Co., 126 N. Y. App. Div. 210, 110 N. Y. Suppl. 362; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Memphis St. R. Co. *v.* Giardino, 116 Tenn. 368, 92 S. W. 855; Lumley *v.* Wabash R. Co., 71 Fed. 21.

76. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

77. See CONTRACTS, 9 Cyc. 435, 436.

Retention of the money with knowledge from whom it came but without knowledge that it was obtained by his signing a release while mentally incapacitated is not a ratification. Abrahams *v.* Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216.

78. *Illinois.*—Carroll *v.* People, 13 Ill. App. 206. *Compare* Pennsylvania Co. *v.* Chapman, 220 Ill. 428, 77 N. E. 248.

Iowa.— Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315. *Compare* Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108.

Kentucky.— Louisville, etc., R. Co. *v.* Car-

of benefits may by previous agreement of the parties operate as a release of a cause of action accruing in the interim to the releasor.[79] Thus the acceptance of benefits from the employer's relief department may of itself, by precontract by the employee with his employer or the relief association, operate as a discharge of his claim for injuries received through the employer's negligence.[80]

8. Remedies — a. Affirming Release and Suing For Damages. A defrauded releasor is not limited to his action to set aside the release, but he may affirm the same and sue for damages;[81] and such a suit may be brought without returning or offering to return the consideration for the release.[82]

b. As Defense to Plea of Release. By the early common law if the fraud inhered in the execution of the sealed release, it might be shown in an action at law under a replication of *non est factum*, but if the releasor intended to execute the instrument he in fact executed, although he was induced so to do by a misrepresentation or fraudulent representation as to collateral facts, or as to the nature and value of the consideration, he could secure relief only in equity.[83] A

ter, 66 S. W. 508, 23 Ky. L. Rep. 2017. See also Louisville, etc., R. Co. *v.* McElroy, 100 Ky. 153, 37 S. W. 844, 18 Ky. L. Rep. 730.

Michigan.— Crippen *v.* Hope, 38 Mich. 344. And see Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

Minnesota.— Peterson *v.* Chicago, etc., R. Co., 36 Minn. 399, 31 N. W. 515.

New York.— Cammarata *v.* Pennsylvania Coal Co., 86 N. Y. Suppl. 787.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Diskin *v.* Greenwood Coal Co., 6 Lack. Leg. N. 54.

United States.— Chicago, etc., R. Co. *v.* Pierce, 64 Fed. 293, 12 C. C. A. 110.

See 42 Cent. Dig. tit. "Release," § 38.

It makes no difference that the consideration was money. Carroll *v.* People, 13 Ill. App. 206; and cases cited *passim*, IV, C, 7, b.

Refusal to accept tender.—Use of the money after rescission of the release for fraud and after a refusal by the releasee to accept a return of same does not operate as a ratification. Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

Use of a small part of the consideration is not conclusive of ratification. Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603. See, however, Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

Avoidance for fraud and for mental incapacity distinguished.— Where there is a disaffirmance of the contract because of fraud, the injured party may, in some cases, bring his action without repaying, or offering to repay, the money received on the fraudulent contract. In such case the money is retained, not as part of the consideration of a contract he denies, but as part indemnity for the fraud perpetrated on him. As he was deceived into accepting it by a falsehood or fraud, there is no admission that it was a consideration for a contract, and there is, consequently, no obligation on him to return it. But the case is wholly different when he seeks to avoid a contract solely because of a temporary incapacity when he made it; an incapacity of which he gave no sign, and which was unknown to the other party to the contract. His conduct in keeping the money, in accepting payment of all his bills at the hospital, after restoration to complete mental health, with the undoubted knowledge as to where the money came from, and as to who paid his bills, and why, is only consistent with an intention to affirm the contract. It is conclusive evidence of affirmance. Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586.

79. See cases cited *infra*, note 80.

80. *Indiana.*— Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

Nebraska.— Chicago, etc., R. Co. *v.* Bell, 44 Nebr. 44, 62 N. W. 314.

Pennsylvania.— Ringle *v.* Pennsylvania R. Co., 164 Pa. St. 529, 30 Atl. 492, 44 Am. St. Rep. 628; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854.

United States.— Martin *v.* Baltimore, etc., R. Co., 41 Fed. 125; State *v.* Baltimore, etc., R. Co., 36 Fed. 655; Owens *v.* Baltimore, etc., R. Co., 35 Fed. 715, 1 L. R. A. 75. *Contra*, Miller *v.* Chicago, etc., R. Co., 65 Fed. 305.

England.— Clements *v.* London, etc., R. Co., [1894] 2 Q. B. 482, 58 J. P. 818, 63 L. J. Q. B. 837, 70 L. T. Rep. N. S. 896, 9 Reports 641, 42 Wkly. Rep. 663.

See 42 Cent. Dig. tit. "Release," § 38.

81. Talbot *v.* Cruger, 72 Hun (N. Y.) 30, 25 N. Y. Suppl. 285.

82. Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919.

Necessity of returning or tendering consideration where release is attacked see *infra*, IV, C, 8, d, (1).

83. O'Donnell *v.* Clinton, 145 Mass. 461, 462, 14 N. E. 747, per Holmes, J., saying: "In the old books it is said that a deed which is misread to an illiterate man, although by his friend and without fraud, does not bind him. Schuylkill County *v.* Copley, 67 Pa. St. 386, 389, 5 Am. Rep. 441; Foster *v.* Mackinnon, L. R. 4 C. P. 704, 711, 38 L. J. C. P. 310, 20 L. T. Rep. N. S. 887, 17 Wkly. Rep. 1105; Thoroughgood's Case, 2 Coke 9, 76 Eng. Reprint 48; Com. Dig. Fait. B. 2. And the proper mode of pleading the facts was *non est factum*, because, as was said, 'the matter proves that it never was his deed.' Mullen *v.* Old Colony

like rule seems to apply to mistake and duress.[84] Consequently the authorities unanimously allow fraud touching the execution of a sealed release to be applied as a defense to a plea of release in an action at law on the right released.[85] The most frequently recurring application of this doctrine is where the execution of a release is procured under the fraudulent representation that it is a receipt, a

R. Co., 127 Mass. 86, 90, 34 Am. Rep. 349; White *v.* Graves, 107 Mass. 325, 328, 9 Am. Rep. 38; Somes *v.* Brewer, 2 Pick. (Mass.) 184, 204; Pigot's Case, 11 Coke 26*b*, 27*b*, 77 Eng. Reprint 1177; 1 Gilb. Ev. (6 Ed.) 144; 9 Hen. VI. 59, pl. 8; 9 Hen. V. 15, pl. 2; Keilwey, 70*b*, pl. 6; Lib. Ass. 292, pl. 30, 44 Edw. III. 23, pl. 28; Plowden 66; 2 Roll. Abr. 28; Y. B. 30 Edw. III. 31, 32. Whereas an ordinary case, of fraud or duress could not be pleaded in this way, because the delivery was not void. Plowden, *ubi supra*, 1 Chit. Pl. (7 ed.) 511." And see Olston *v.* Oregon Water Power, etc., Co., (Oreg. 1908) 96 Pac. 1095, 97 Pac. 538.

Exception to rule.— A court of law has no jurisdiction to set aside a release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release, where it would be a manifest fraud on a third party seeking to enforce a demand against defendant, and where defendant himself is a party to the fraud. Crook *v.* Stephen, 5 Bing. N. Cas. 688, 9 L. J. C. P. 209, 7 Scott 848, 35 E. C. L. 368; Herbert *v.* Pigott, 2 Cromp. & M. 384, 2 Dowl. P. C. 392, 3 L. J. Exch. 79, 4 Tyrw. 285; Phillips *v.* Claggett, 2 Dowl. P. C. N. S. 1004, 12 L. J. Exch. 275, 11 M. & W. 84; Wild *v.* Williams, 9 L. J. Exch. 277, 6 M. & W. 490; Arton *v.* Booth, 4 Moore C. P. 192, 21 Rev. Rep. 740, 16 E. C. L. 373; Jones *v.* Herbert, 7 Taunt. 421, 18 Rev. Rep. 520, 2 E. C. L. 428; Hickey *v.* Burt, 7 Taunt. 118, 17 Rev. Rep. 440, 2 E. C. L. 254. And see Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121.

"**There are two kinds of fraud,** for which . . . a release . . . may be impeached. Where a party, signing such an instrument, is induced to execute it by a misrepresentation . . . as to collateral matters, or as to the nature and value of the consideration, resort must be had to a court of equity for relief. In such cases, the party fully understands what he is signing, and is aware of the nature and character of the instrument executed by him, but is deceived by fraudulent representations as to facts outside of the instrument itself. There is another kind of fraud, however, for which a release may be impeached, and that is fraud, which inheres in the execution of the instrument; that is to say, where the signer of the instrument is deceived into signing it by the belief that he is signing something other than that which he does really sign. Cases of this kind arise where the instrument is misread to the party signing, or where there is a surreptitious substitution of one paper for another, or where, by some trick or device, a party is made to sign an instrument which he did not intend to execute; and, where this is the case, the nature of the instrument signed is not fully understood by the party signing it. Where fraud of the latter kind exists, that is, fraud in the execution of the instrument itself, it may be shown in an action at law." Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 176, 72 N. E. 195. And see Jackson *v.* Security Mut. L. Ins. Co., 233 Ill. 161, 84 N. E. 198 [*affirming* 135 Ill. App. 86].

84. **Mistake** see Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357; Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003; H. B. Claflin Co. *v.* Dacus, 59 Fed. 998; Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. 529.

Duress see Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758; O'Donnell *v.* Clinton, 145 Mass. 461, 463, 14 N. E. 747.

85. *Alabama.*— Willoughby *v.* Hannon, (1908) 47 So. 241; Alabama Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997.

Arkansas.— St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884; St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

District of Columbia.— Lyons *v.* Allen, 11 App. Cas. 543.

Illinois.— Jackson *v.* Security Mut. L. Ins. Co., 233 Ill. 161, 84 N. E. 198 [*affirming* 135 Ill. App. 86]; Spring Valley Coal Co. *v.* Buzis, 213 Ill. 341, 72 N. E. 1060; Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Eagle Packet Co. *v.* Defries, 94 Ill. 598, 34 Am. Rep. 245; Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593; National Syrup Co. *v.* Carlson, 47 Ill. App. 178.

Massachusetts.— Larson *v.* Metropolitan Stock Exch., 200 Mass. 367, 86 N. E. 940; McNicholas *v.* Prudential Ins. Co., 191 Mass. 304, 77 N. E. 756; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747. And see Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116; Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; Squires *v.* Amherst, 145 Mass. 192, 13 N. E. 609; Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349.

Missouri.— Girard *v.* St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648, 45 Am. St. Rep. 556, 25 L. R. A. 514 [*cited* in Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442]; Dwyer *v.* Wabash R. Co., 66 Mo. App. 335.

New Hampshire.— Hoitt *v.* Holcomb, 23 N. H. 535; Webb *v.* Steele, 13 N. H. 230.

New York.— Creshkoff *v.* Schwartz, 53 Misc. 576, 103 N. Y. Suppl. 782.

Tennessee.—Memphis St. R. Co. *v.* Giardino, 116 Tenn. 368, 92 S. W. 855.

Texas.— Galveston, etc., R. Co. *v.* Cade, (Civ. App. 1906) 93 S. W. 124; Houston, etc., R. Co. *v.* Burns, (Civ. App. 1901) 63 S. W. 1035.

voucher, a release of a part of the cause of action, and the like, the releasor not being barred by his negligence from setting up this defense.[86] There is a decided conflict of decision, however, as to whether fraud as to collateral facts or as to the consideration of a sealed release may be made the basis of an attack on the release in such an action at law. By a preponderance of authority on one ground or another, however, such an attack is allowed, and resort to equity for cancellation is not necessary.[87] This lack of harmony prevails chiefly among jurisdictions retaining the original distinction between law and equity,[88] and not in

United States.— De Lamar *v.* Herdeley, 167 Fed. 530 (holding that even though releasor admits he signed the paper, yet if he denies that he executed it as a release, he may attack the release at law); Pacific Mut. L. Ins. Co. *v.* Webb, 157 Fed. 155, 84 C. C. A. 603; Heck *v.* Missouri Pac. R. Co., 147 Fed. 775; Stephenson *v.* Supreme Council A. L. H., 130 Fed. 491; Such *v.* New York State Bank, 127 Fed. 450; Hill *v.* Northern Pac. R. Co., 104 Fed. 754 [*affirmed* in 113 Fed. 914, 51 C. C. A. 544]; Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. 606.

86. See cases cited *supra*, note 85; *infra*, note 88 *et seq.*

87. See cases cited *infra*, note 88 *et seq.*

88. **Attack allowed at law** see the following cases:

District of Columbia.— Rockwell *v.* Capital Traction Co., 25 App. Cas. 98.

Massachusetts.— Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116 [*cited* in Wagner *v.* National L. Ins. Co., 90 Fed. 395, 403, 33 C. C. A. 121], *semble.*

Michigan.—Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381 (*semble*); Stone *v.* Chicago, etc., R. Co., 66 Mich. 76, 33 N. W. 24 (*semble*) [both *cited* in Wagner *v.* National L. Ins. Co., 90 Fed. 395, 403, 33 C. C. A. 121]; O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688.

Tennessee.—Memphis St. R. Co. *v.* Giardino, 116 Tenn. 368, 92 S. W. 855; Brundige *v.* Nashville, etc., R. Co., 112 Tenn. 526, 81 S. W. 1248.

Texas.— Galveston, etc., R. Co. *v.* Cade, (Civ. App. 1906) 93 S. W. 124.

Attack not allowed at law see Jackson *v.* Security Mut. L. Ins. Co., 233 Ill. 161, 84 N. E. 198 [*affirming* 135 Ill. App. 86]; Hartley *v.* Chicago, etc., R. Co., 214 Ill. 78, 73 N. E. 398; Papke *v.* G. H. Hammond Co., 192 Ill. 631, 61 N. E. 910; Quincy Horse R., etc., Co. *v.* Omer, 109 Ill. App. 238; Connor *v.* Dundee Chemical Works, 50 N. J. L. 257, 12 Atl. 713; Wilson *v.* Wilson, 17 N. C. 181, as to which last case, however, see *infra*, note 89.

The federal cases are in conflict. The supreme court apparently has not passed on the question. Many of the lower courts adhere to the early technical rule. Pacific Mut. L. Ins. Co. *v.* Webb, 157 Fed. 155, 84 C. C. A. 603; Heck *v.* Missouri Pac. R. Co., 147 Fed. 775; Stephenson *v.* Supreme Council A. L. H., 130 Fed. 491; Such *v.* New York State Bank, 127 Fed. 450; Hill *v.* Northern Pac. R. Co., 104 Fed. 754 [*affirmed* in 113 Fed. 914, 51 C. C. A. 544]; Kosztelnik *v.* Bethlehem Iron Co., 91 Fed. 606; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54; Shampeau *v.* Connecticut River Lumber Co., 42 Fed. 760. And see H. B. Claflin *v.* Dacus, 59 Fed. 998; Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. 529, both declaring a similar rule as to mistake. Accordingly it has been held that U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684], requiring the practice in the federal courts in actions at law to conform as nearly as may be to the state practice, does not render a state statute permitting equitable issues to be litigated in an action at law applicable to the federal court in such states, which maintain the distinction between actions at law and suits in equity, nor is the rule different because a suit has been removed from a state court. Pacific Mut. L. Ins. Co. *v.* Webb, *supra*; Hill *v.* Northern Pac. R. Co., *supra.* By what is thought to be the better authority, however, an attack at law is allowed and a prior resort to equity is not necessary. Wagner *v.* National L. Ins. Co., 90 Fed. 395, 404, 33 C. C. A. 121 (where the court says, however: "Of course, cases may be conceived where the avoiding of a release may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations and the like, and thus present issues which only a chancellor, with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity. But, where the issue is simply one of fraudulent misrepresentation, it may be as well tried to a jury as to a court of equity, for fraud is an issue of which courts of law and equity, from time immemorial, have had concurrent jurisdiction"); Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60, *semble.*

In England the act of 1854, permitting equitable replications at law, and the Judicature Act of 1873, giving the courts of law full equitable jurisdiction have freed the English courts from a previously existing conflict on this point. See Wagner *v.* National L. Ins. Co., 90 Fed. 395, 399, 33 C. C. A. 121 [*citing* Hirschfeld *v.* London, etc., R. Co., 2 Q. B. D. 1, 46 L. J. Q. B. 94, 35 L. T. Rep. N. S. 473; Wild *v.* Williams, 9 L. J. Exch. 277, 6 M. & W. 490, as tending to support the allowance of an attack in an action at law].

Where seals have been abolished, the same rule is applicable to sealed and unsealed releases. Hill *v.* Northern Pac. R. Co., 104 Fed. 754 [*affirmed* in 113 Fed. 914, 51 C. C. A. 544]; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

those states which have adopted the code system of civil procedure under which equitable defenses are permitted in actions at law.[89] The technical common-law rule does not apply where the issue is whether the releasor had sufficient mental capacity to execute the release,[90] or where the releasor denies the receipt of any consideration for the release.[91] Nor does the rule apply to receipts in full.[92]

c. Cancellation.[93] Where a release is invalid because of mistake, fraud, duress, or undue influence not inhering in its execution, it may, upon proper application, be canceled by a court of equitable jurisdiction.[94]

The action at law may be suspended by leave of court while the releasor brings an independent action in equity to rescind the release on the ground of fraud. Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54.

89. **Attack allowed at law** see the following cases:

Arkansas.— St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293.

Georgia.— Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668, *semble*, mistake.

Iowa.— Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425.

Kansas.— Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Kentucky.— Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292, 22 S. W. 323, 15 Ky. L. Rep. 129, *semble*, mistake.

Missouri.—Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 39 N. W. 485 [*cited* in Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121].

New York.— Fleming *v.* Brooklyn Heights R. Co., 95 N. Y. App. Div. 110, 88 N. Y. Suppl. 732.

North Carolina.— Bean *v.* Western North Carolina, 107 N. C. 731, 12 S. E. 600, unilateral mistake as to legal effect combined with other equitable considerations.

Oregon.— Olston *v.* Oregon Water Power, etc., Co., (1908) 96 Pac. 1095, 97 Pac. 538.

Washington.— Bjorklund *v.* Seattle Electric Co., 35 Wash. 439, 77 Pac. 727; Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

Wisconsin.— Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878; Lusted *v.* Chicago, etc., R. Co., 71 Wis. 391, 36 N. W. 857 [*cited* in Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121] (mistake); Bussian *v.* Milwaukee, etc., R. Co., 56 Wis. 325, 14 N. W. 452; Fuller *v.* Madison Mut. Ins. Co., 36 Wis. 599 [*cited* in Wagner *v.* National L. Ins. Co., *supra*].

In Missouri the cases are in conflict, some allowing the attack (Homuth *v.* Metropolitan St. R. Co., 129 Mo. 629, 31 S. W. 903), others not (Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Dwyer *v.* Wabash R. Co., 66 Mo. App. 335). To settle this conflict the legislature in 1899 adopted a law allowing fraud to be pleaded in actions at law. Rev. St. (1899) § 654.

Abatement.— In jurisdictions where law and equity are administered in different forums, the institution of a suit in equity to cancel the release after commencing an action at law on the original cause of action does not abate the latter nor bar the right to proceed to the trial of the action, where the right of plaintiff to sue at law for the injury and to show that the release was procured by fraud is complete. St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884.

90. *Illinois.*— Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621; Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357.

Missouri.— Girard *v.* St. Louis Car Wheel Co., 123 Mo. 358, 27 S. W. 648, 45 Am. St. Rep. 556, 25 L. R. A. 514; Dwyer *v.* Wabash R. Co., 66 Mo. App. 335.

New York.— Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65.

Pennsylvania.— Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586, holding that a releasor may avoid the release at law where from the effects of anesthetics his intellectual faculties were in a state of paralysis, so complete that he had no knowledge of the contents of the paper, or that he was signing any instrument whatsoever, for such a release can no more bar legal recovery than if it never had had legal existence."

United States.— St. Louis, etc., R. Co. *v.* Phillips, 66 Fed. 35, 13 C. C. A. 315, *semble*.

91. Vindicator Consol. Gold Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313.

92. Such *v.* New York State Bank, 127 Fed. 450; Hirschfeld *v.* London, etc., R. Co., 2 Q. B. D. 1, 46 L. J. Q. B. 94, 35 L. T. Rep. N. S. 473, *semble*. And see Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207.

93. See, generally, CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

Reformation of release see REFORMATION OF INSTRUMENTS, *ante* p. 899.

94. *Illinois.*— Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560], *semble*.

Kansas.— Reid *v.* Beyle, 39 Kan. 559, 18 Pac. 614, partial cancellation.

Kentucky.— Davis *v.* Morgan, 1 Dana 20.

Missouri.— Blair *v.* Chicago, etc., R. Co., 89 Mo. 383, 1 S. W. 350; Jenkins *v.* Covenant L. Ins. Co., 79 Mo. App. 55; Dwyer *v.* Wabash R. Co., 66 Mo. App. 335.

New York.— Smith *v.* Irvin, 45 Misc. 262, 92 N. Y. Suppl. 170 [*reversed* on other grounds in 108 N. Y. App. Div. 218, 95 N. Y. Suppl. 731]; Bedell *v.* Bedell, 10 N. Y. St. 328, fraud of a third person.

Texas.— Galveston, etc., R. Co. *v.* Cade, 93 S. W. 124.

Washington.— See Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

d. Conditions Precedent to Attacking Release — (I) *Restoration of Consideration* [95] — (A) *In General.* It is generally held that if a person enters into a release and afterward seeks to avoid the effect of it on any ground that will entitle him to rescind it, he must first restore what he has received,[96] although

United States.— Kelsey *v.* Hobby, 16 Pet. 269, 10 L. ed. 961.

England.— Stewart *v.* Great Western R. Co., 2 De G. J. & S. 319, 11 Jur. N. S. 627, 13 L. T. Rep. N. S. 79, 13 Wkly. Rep. 907, 67 Eng. Ch. 251, 46 Eng. Reprint 399; Williams *v.* Smith, 7 L. J. Ch. O. S. 129.

See 42 Cent. Dig. tit. "Release," § 42 *et seq.*

Compare Chestnut Hill Reservoir Co. *v.* Chase, 14 Conn. 123.

Remedy at law.— It has been held that equity has no jurisdiction to cancel a receipt in full which, through fraud or mistake, is more comprehensive in its terms than the agreement of the parties, the remedy at law being adequate. Hirschfeld *v.* London, etc., R. Co., 2 Q. B. D. 1, 46 L. J. Q. B. 94, 35 L. T. Rep. N. S. 473. See, however, Stewart *v.* Great Western R. Co., 2 De G. J. & S. 319, 11 Jur. N. S. 627, 13 L. T. Rep. N. S. 79, 13 Wkly. Rep. 907, 67 Eng. Ch. 251, 46 Eng. Reprint 399, holding that the jurisdiction of equity to cancel a release for fraud, mistake, and the like is not ousted by the passage of a statute permitting replications on equitable grounds at law.

Necessity of resort to equity to avoid release see *supra*, IV, C, 8, b.

95. Retention of consideration as ratification of release see *supra*, IV, C, 7, b.

96. *Alabama.*— Rabitte *v.* Alabama Great Southern R. Co., (1908) 47 So. 573; Kelly *v.* Louisville, etc., R. Co., 154 Ala. 573, 45 So. 906; Harrison *v.* Alabama Midland R. Co., 144 Ala. 246, 40 So. 394; Stephenson *v.* Allison, 123 Ala. 439, 26 So. 290.

District of Columbia.— Lyons *v.* Allen, 11 App. Cas. 543.

Georgia.— Harley *v.* Riverside Mills, 129 Ga. 214, 58 S. E. 711; Strodder *v.* Southern Granite Co., 94 Ga. 626, 19 S. E. 1022; East Tennessee, etc., R. Co. *v.* Hayes, 83 Ga. 558, 10 S. E. 350.

Indiana.— Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984.

Kentucky.— Louisville, etc., R. Co. *v.* McElroy, 100 Ky. 153, 37 S. W. 844, 18 Ky. L. Rep. 730; Bain *v.* Wilson, 1 J. J. Marsh. 202; Wells *v.* Royer Wheel Co., (1908) 114 S. W. 737; Illinois Cent. R. Co. *v.* Vaughn, 111 S. W. 707, 33 Ky. L. Rep. 906.

Maine.— Valley *v.* Boston, etc., R. Co., 103 Me. 106, 68 Atl. 635; Potter *v.* Monmouth Mut. F. Ins. Co., 63 Me. 440.

Massachusetts.— Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116; Brown *v.* Hartford F. Ins. Co., 117 Mass. 479; Estabrook *v.* Swett, 116 Mass. 303; Coolidge *v.* Brigham, 1 Metc. 547.

Michigan.— Pangborn *v.* Continental Ins. Co., 67 Mich. 683, 35 N. W. 814; Crippen *v.* Hope, 38 Mich. 344.

Minnesota.— Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628.

Missouri.— Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Lomax *v.* Southwest Missouri Electric R. Co., 119 Mo. App. 192, 95 S. W. 945; Retzer *v.* Jacob Dold Packing Co., 58 Mo. App. 264.

New York.— Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; Ambellan *v.* Barcalo Mfg. Co., 118 N. Y. App. Div. 547, 102 N. Y. Suppl. 993; Kibbe *v.* Bowen, 50 N. Y. Super. Ct. 422; Kreuzen *v.* Forty-Second St. M., etc., R. Co., 13 N. Y. Suppl. 588; Burton *v.* Stewart, 3 Wend. 236, 20 Am. Dec. 692.

Oregon.— Wells *v.* Neff, 14 Oreg. 66, 12 Pac. 84, 88.

South Carolina.— Levister *v.* Southern R. Co., 56 S. C. 508, 35 S. E. 207. *Compare* Austin *v.* Piedmont Mfg. Co., 67 S. C. 122, 45 S. E. 135.

Tennessee.— Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094.

Vermont.— Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758; Town *v.* Waldo, 62 Vt. 118, 20 Atl. 325.

United States.— Mahr *v.* Union Pac. R. Co., 170 Fed. 699; Heck *v.* Missouri Pac. R. Co., 147 Fed. 775; Price *v.* Connors, 146 Fed. 503, 77 C. C. A. 17; Hill *v.* Northern Pac. R. Co., 113 Fed. 914, 51 C. C. A. 544 [*affirming* 104 Fed. 754]; Barker *v.* Northern Pac. R. Co., 65 Fed. 460; Vandervelden *v.* Chicago, etc., R. Co., 61 Fed. 54 (in equity); Johnson *v.* Merry Mount Granite Co., 53 Fed. 569, *semble.*

See 42 Cent. Dig. tit. "Release," § 45.

In Illinois it is held, with doubtful propriety, that in case of actual fraud in the procurement of the release the instrument is void, and it is unnecessary to restore or tender the consideration (Indiana, etc., R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158 [*affirming* 103 Ill. App. 565]; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Litchfield, etc., R. Co. *v.* Shuler, 134 Ill. App. 615; Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357); but that in case the release is merely voidable, as for mental incapacity (see *infra*, IV, C, 8, d, (I), (E)), restoration or tender is necessary (Pawnee Coal Co. *v.* Royce, *supra*; Litchfield, etc., R. Co. *v.* Shuler, *supra*).

A conditional tender is not sufficient. Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75.

The identical money received need not be returned, for one dollar currency is as good as any other dollar. Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603; Michigan Cent. R. Co. *v.* Dunham, 30 Mich. 128.

In a bill in equity to cancel a release on ground of fraud it is sufficient in the bill to offer to return the consideration received therefor, for rescission may be decreed on condition that the *status quo* shall be re-

there is some authority to the effect that such restoration or tender need not be made, and that it is sufficient to credit the amount paid with interest on the judgment recovered.[97]

(B) *Amount.* It is clear of course that where there is a duty to restore the consideration the amount to be returned will at least be equal to the amount received. If the consideration be money, there is authority to the effect that interest from date of receipt to tender of the consideration need not be included,[98] although the general and the safer practice is to include interest. It has been held that under some circumstances the releasor is not required to include in the sum of money restored or tendered expenditures made by the releasee for medical attendance, nursing, and hospital maintenance, and the like.[99] Nor need the amount restored include the consideration for the release of another right, although one receipt was given for both sums.[1] Furthermore, it is sufficient if the consideration relied on in the answer be restored.[2]

(C) *Time.* Undoubtedly no duty exists to return the consideration until the fraud or other invalidity is discovered.[3] Beyond this the authorities are in conflict as to when the restoration of consideration or tender thereof must be made. Some cases, in many of which cancellation of the release is asked in the complaint or statement of claim, decide that such return or tender must be made before the releasor institutes suit on the cause of action released.[4] Other decisions take the view that a credit on the verdict is sufficient, and hence no actual tender is apparently required at any time.[5] Furthermore, authority is not lacking for the statement that restoration or tender at any time during the pendency of the suit is early enough.[6] But the clearest and soundest rule is that no restoration or tender need be made until an attack is made on the release. Such attack generally occurs when the ground of invalidity, as fraud, is replied in avoidance to a plea of the release to the original right.[7]

stored. Jenkins *v.* Covenant L. Ins. Co., 79 Mo. App. 55. But such an action cannot be maintained if the bill contains no offer to return the money received and the evidence shows that the releasor is entirely incapable of making such return. Duff *v.* Hutchinson, 57 Hun (N. Y.) 152, 10 N. Y. Suppl. 857.

Necessity of restoration in action for fraud in procuring release see *supra*, IV, C, 8, a.

97. *Iowa.*— O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425, probably.

Kansas.—Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066; Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663, 39 Pac. 189; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58.

Mississippi.— Jones *v.* Alabama, etc., R. Co., 72 Miss. 22, 16 So. 379.

North Carolina.— Hayes *v.* Atlanta, etc., R. Co., 143 N. C. 125, 55 S. E. 437.

South Dakota.— See Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31.

Texas.— Galveston, etc., R. Co. *v.* Cade, (Civ. App. 1906) 93 S. W. 124; International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189.

See 42 Cent. Dig. tit. "Release," § 45.

98. Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603. See also Galveston, etc., R. Co. *v.* Cade, (Tex. Civ. App. 1906) 93 S. W. 124.

99. Colorado City *v.* Liafe, 28 Colo. 468, 65 Pac. 630; Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603.

1. Jenkins *v.* Covenant L. Ins. Co., 79 Mo. App. 55.

2. Louisville, etc., R. Co. *v.* Faylor, 126 Ind. 126, 25 N. E. 869.

3. Kelly *v.* Louisville, etc., R. Co., 154 Ala. 573, 45 So. 906; St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621 (holding that the rescission and offer to restore must be made at the earliest practicable moment, which in some instances may not be until after suit brought, as for example where he does not know of the existence or nature of the contract); Roberts *v.* Central Lead Co., 95 Mo. App. 581, 69 S. W. 630 (holding that the refund of the consideration should be made with reasonable diligence after discovery of the invalidity).

4. See cases cited *supra*, IV, C, 8, d, (I), (A), note 96.

5. See cases cited *supra*, IV, C, 8, d, (I), (A), note 97.

6. Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58. See also Chesapeake, etc., R. Co. *v.* Howard, 178 U. S. 153, 20 S. Ct. 880, 44 L. ed. 1015; Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 15 S. Ct. 843, 39 L. ed. 1003.

Distinguish Snow *v.* Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119, holding that where the consideration was a mere promissory note, it need not be tendered back until trial, because it is of no intrinsic value.

7. Rockwell *v.* Capital Traction Co., 25

(D) *Person.* The restoration or tender must be made to the releasee or some agent of his who is properly authorized to accept the same.[8]

(E) *Exceptions.* When a releasor who is himself free from negligence is deceived as to the nature of the instrument executed by him,[9] as for instance where the release is represented to be a receipt for a gratuity,[10] or for expenses,[11] for loss of time,[12] for wages,[13] to indicate absence of any ill-will,[14] or that it was a partial release,[15] as that it was a release for damages to clothing or property and in fact included personal injuries,[16] the consideration received need not be restored or tendered. Likewise, according to some cases, where the releasor was mentally incapable of executing the release.[17] Nor is a releasor required to return that which in any event he would be entitled to retain either by virtue

App. Cas. (D. C.) 98; Street R. Co. *v.* Giardino, 116 Tenn. 368, 92 S. W. 855. *Compare* Lyons *v.* Allen, 11 App. Cas. (D. C.) 543.

8. Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603, where authority of an agent to receive such tender was implied from the general scope of his employment, the agent being the person who was in charge of the releasee's principal office in the county.

Employers' liability insurance company.— Where an insurance company had obligated itself to protect an employer from loss on account of injury sustained by a servant, and its agent, on account of this obligation, had paid money to the servant, receiving a release of the employer's liability, it was proper for such servant, on rescinding the release, to tender the amount paid to the general agent of such company, and on the refusal of such agent to accept, the servant, by paying the sum into court, did all that was necessary. Louisville Veneer Mills Co. *v.* Clemonts, 109 S. W. 308, 33 Ky. L. Rep. 106.

Where the consideration is received from an employees' relief society for the release of such association and its parent, the employer corporation, the restoration or tender thereof should more properly be made to the benefit association. Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315, *semble.*

9. Meyer *v.* Haas, 126 Cal. 560, 58 Pac. 1042; Indiana, etc., R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621; Chicago Union Traction Co. *v.* Mommsen, 107 Ill. App. 353; Chicago, etc., R. Co. *v.* Lewis, 13 Ill. App. 166; Jaques *v.* Sioux City Traction Co., 124 Iowa 257, 99 N. W. 1069; O'Brien *v.* Chicago, etc., R. Co., 89 Iowa 644, 57 N. W. 425; Sobieski *v.* St. Paul, etc., R. Co., 41 Minn. 169, 42 N. W. 863.

10. *Alabama.*— Alabama Western R. Co. *v.* Arnett, 137 Ala. 414, 34 So. 997.

Indiana.— Stewart *v.* Chicago, etc., R. Co., 141 Ind. 55, 40 N. E. 67.

Kentucky.— Ingram *v.* Covington, etc., R. Co., 89 S. W. 541, 28 Ky. L. Rep. 508.

Massachusetts.— Mullen *v.* Old Colony R. Co., 127 Mass. 86, 34 Am. Rep. 349 [*cited* in Carroll *v.* People, 13 Ill. App. 206].

New York.— Shaw *v.* Webber, 79 Hun 307, 29 N. Y. Suppl. 437 [*affirmed* in 151 N. Y. 655, 46 N. E. 1151]; Cleary *v.* Municipal Electric Light Co., 19 N. Y. Suppl. 951 [*affirmed* in 139 N. Y. 643, 35 N. E. 206].

See 42 Cent. Dig. tit. "Release," § 45.

11. St. Louis, etc., R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120. And see *supra*, IV, C, 8, d, (I), (B).

12. St. Louis, etc., R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884 (inconvenience and delay); Illinois Cent. R. Co. *v.* Vaughn, 111 S. W. 707, 33 Ky. L. Rep. 906.

13. *Connecticut.*— Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546.

Georgia.— Butler *v.* Richmond, etc., R. Co., 88 Ga. 594, 15 S. E. 668.

Kentucky.— Illinois Cent. R. Co. *v.* Edmonds, 111 S. W. 331, 33 Ky. L. Rep. 933.

New York.— Cleary *v.* Municipal Electric Light Co., 19 N. Y. Suppl. 951 [*affirmed* in 139 N. Y. 643, 35 N. E. 206].

Washington.— Bjorklund *v.* Seattle Electric Co., 35 Wash. 439, 77 Pac. 727.

See 42 Cent. Dig. tit. "Release," § 45.

14. St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884.

15. Wells *v.* Royer Wheel Co., (Ky. 1908) 114 S. W. 737; Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116; Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

16. Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747; Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 729 [*citing* Roberts *v.* Eastern Counties R. Co., 1 F. & F. 460].

17. St. Louis, etc., R. Co. *v.* Sandidge, (Ark. 1907) 99 S. W. 68; St. Louis, etc., R. Co. *v.* Brown, 73 Ark. 42, 83 S. W. 332; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58. To the same effect see Harkey *v.* Mechanic's, etc., Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295. *Contra*, Kelly *v.* Louisville, etc., R. Co., 154 Ala. 573, 45 So. 906; Strodder *v.* Southern Granite Co., 94 Ga. 626, 19 S. E. 1022; Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621; Litchfield, etc., R. Co. *v.* Shuler, 134 Ill. App. 615; Drohan *v.* Lake Shore, etc., R. Co., 162 Mass. 435, 38 N. E. 1116; Morris *v.* Great Northern R. Co., 67 Minn. 74, 69 N. W. 628; Johnson *v.* Merry Mount Granite Co., 53 Fed. 569.

of the release itself or of the original liability, but credit must be given on the judgment.[18] Furthermore, the releasor is entitled to retain the consideration received by him from the releasee by virtue of a transaction independent of the release.[19] It has been held that if the releasor be an infant, he may repudiate his release without restoring or tendering the consideration.[20] Where the entire consideration moved to a third person, the releasor having nothing in his hands or under his control to return, the rule requiring restoration or tender does not apply.[21] Likewise where the entire consideration moved to the releasor from a relief society of a railroad company in whose service the releasor was when his cause of action arose against his employer.[22] No tender is required if it is clear from the conduct of the releasee that it would be useless.[23] The rule requiring restoration or tender does not apply where the consideration received was worthless,[24] or of course where none was received.[25] Another exception to the rule exists, it seems, in some cases where the releasor is unable to restore the consideration,[26] or where the court has it within its power fully to protect the interest of the releasee.[27] The releasee may waive the necessity of a restoration or tender.[28]

(II) *OTHER REQUIREMENTS.* The releasor will be barred by laches,[29] by an intervening ratification of the release,[30] or by the intermediate accrual of rights of innocent purchasers for value and the like.[31] A releasor may rescind before

18. *Illinois.*— Farmers', etc., Life Assoc. *v.* Caine, 224 Ill. 599, 79 N. E. 956 [*affirming* 123 Ill. App. 419].

Massachusetts.— McNicholas *v.* Prudential Ins. Co., 191 Mass. 304, 77 N. E. 756.

Missouri.— Jenkins *v.* Covenant L. Ins. Co., 79 Mo. App. 55; Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79, the only decision applying the doctrine to a case where releasor's claim was unliquidated.

New York.— Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104 [*reversing* 16 N. Y. Suppl. 761]; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; Kley *v.* Healy, 127 N. Y. 555, 28 N. E. 593; Fisher *v.* Bishop, 108 N. Y. 25, 15 N. E. 331, 2 Am. St. Rep. 357; Price *v.* Stout, 84 N. Y. App. Div. 334, 82 N. Y. Suppl. 935.

Texas.— The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Washington.— Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

Wisconsin.— Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

See 42 Cent. Dig. tit. "Release," § 45.

19. Coles *v.* Union Terminal R. Co., 124 Iowa 48, 99 N. W. 108. And see *supra*, IV, C, 8, d, (I), (B).

20. St. Louis, etc., R. Co. *v.* Higgins, 44 Ark. 293. *Contra*, Brown *v.* Hartford F. Ins. Co., 117 Mass. 479; Lane *v.* Dayton Coal, etc., Co., 101 Tenn. 581, 48 S. W. 1094. *Compare* Martin *v.* Baltimore, etc., R. Co., 41 Fed. 125.

21. Averill *v.* Wood, 78 Mich. 342, 44 N. W. 381.

22. O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688. *Compare* Pennsylvania Co. *v.* Chapman, 220 Ill. 428, 77 N. E. 248 [*affirming* 118 Ill. App. 201].

23. Rabitte *v.* Alabama Great Southern R. Co., (Ala. 1908) 47 So. 573. See Girard *v.* St. Louis Car-Wheel Co., 123 Mo. 358, 27 S. W. 648, 45 Am. St. Rep. 556, 25 L. R. A. 514; Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

24. Rabitte *v.* Alabama Great Southern R. Co., (Ala. 1908) 47 So. 573.

25. Vindicator Consol. Gold. Min. Co. *v.* Firstbrook, 36 Colo. 498, 86 Pac. 313. And see Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357, 363.

26. Strodder *v.* Southern Granite Co., 94 Ga. 626, 19 S. E. 1022 (where it is said that if any exception to the general rule results from inability, by reason of poverty, to restore the money, it is only where the fraud is not discovered, or the mental disability continues, as the case may be, until after the money has been expended or otherwise put beyond the power and control of plaintiff); Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758. But see Duff *v.* Hutchinson, 57 Hun (N. Y.) 152, 10 N. Y. Suppl. 857.

27. Price *v.* Connors, 146 Fed. 503, 77 C. C. A. 17.

28. Rabitte *v.* Alabama Great Southern R. Co., (Ala. 1908) 47 So. 573; Knoxville, etc., R. Co. *v.* Acuff, 92 Tenn. 26, 20 S. W. 348, holding that joining issue on a replication setting up fraud as a defense to a plea of release waives a failure to tender.

29. Maine *v.* Chicago, etc., R. Co., 109 Iowa 260, 70 N. W. 630, 80 N. W. 315; Galveston, etc., R. Co. *v.* Cade, 100 Tex. 37, 94 S. W. 219.

30. Pawnee Coal Co. *v.* Royce, 184 Ill. 402, 56 N. E. 621; and *supra*, IV, C, 7.

31. Lee *v.* Page, 2 S. W. 503, 8 Ky. L. Rep. 602 (holding that the releasor under such circumstances cannot set up want of consideration for the release, but she may set up that she was a married woman and therefore incapable of making the contract); O'Donnell *v.* Clinton, 145 Mass. 461, 464, 14 N. E. 747 (*semble*). *Contra*, Moore *v.* Vail, 13 N. J. Eq. 295. *Compare* Hart *v.* Sharpton, 124 Ala. 638, 27 So. 450, to the effect that a releasor of a mortgage debt is not estopped

he has positive knowledge of the fraud, as his right depends upon the existence of the fraud.[32]

D. Illegality. An illegal release will not be enforced and is void. The illegality may exist in the matter of consideration as expressed in the release, or in the object sought to be accomplished thereby. The same general principles of illegality which govern deeds and contracts apply to releases.[33] An agreement whereby the employee absolutely binds himself, if injured while in the master's service, to accept benefits from a relief association created by his employer in lieu and discharge of any claim for damages he might thereafter have on account thereof against the master has been considered contrary to public policy and void.[34] However, if the employee does not bind himself irrevocably, but contracts that if he is injured in the future and then accepts such benefits the effect of such acceptance shall be to release his right of action against the employer, the contract is generally sustained.[35]

V. Construction, Operation, and Effect.

A. Construction in General — 1. At Law and in Equity. It has been held that the rules as to the construction and meaning of a release are the same at law and in equity.[36]

2. Intention of Parties — a. General Rule. The primary rule of construction of all contracts and deeds, including releases, is that the intention of the parties must govern.[37] This intention must, however, be collected from the words used in the instrument and not from matters *dehors* the writing.[38]

b. Preliminary Negotiations. The effect of a release is not necessarily limited to the subjects considered in the preliminary discussion of which the release was the culmination.[39]

from showing that the recital therein of the payment of such debt was false by the fact that a *bona fide* purchaser from the mortgagor relied thereon.

32. Peterson *v.* Chicago, etc., R. Co., 38 Minn. 511, 39 N. W. 485.

33. See Contracts, 9 Cyc. 465; Deeds, 13 Cyc. 590.

A release of a claim for tort in consideration of the promise of the releasee to use his best efforts to produce an executive pardon for the releasor, a convict, is not against public policy. Timothy *v.* Wright, 8 Gray (Mass.) 522.

Right to show illegality.— A releasor who has executed a release which on its face appears to be entirely legal will not be allowed to avoid it by showing that it was intended to effectuate an illegal purpose, i. e., corruptly and wrongfully to influence the electors to vote for a public official. Harvey *v.* Tama Co., 53 Iowa 228, 5 N. W. 130.

34. Lake Shore, etc., R. Co. *v.* Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833.

Similarly where the contract is between the next of kin of the employee and the railroad company. Tarbell *v.* Rutland R. Co., 73 Vt. 347, 51 Atl. 6, 87 Am. St. Rep. 734, 56 L. R. A. 656. *Contra*, Western, etc., R. Co. *v.* Bishop, 50 Ga. 465; International, etc., R. Co. *v.* Hinzie, 82 Tex. 623, 18 S. W. 681; Griffiths *v.* Dudley, 9 Q. B. D. 357, 46 J. P. 711, 51 L. J. Q. B. 543, 47 L. T. Rep. N. S. 10, 30 Wkly. Rep. 797.

35. *District of Columbia.*— Brown *v.* Baltimore, etc., R. Co., 6 App. Cas. 237.

Illinois.—Pennsylvania Co. *v.* Chapman, 220 Ill. 428, 77 N. E. 248; Eckman *v.* Chicago, etc., R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750.

Indiana.— Pittsburgh, etc., R. Co. *v.* Moore, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638; Lease *v.* Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423.

Maryland.— Fuller *v.* Baltimore, etc., Employees' Relief Assoc., 67 Md. 433, 10 Atl. 237, *semble*, holding that the beneficiary, the mother of insured, of an insurance policy of such an association containing a provision that no liability should arise thereunder until the next of kin released the company from all liability for the death of insured cannot recover thereon where the next of kin, the wife and child of insured, refuse to execute such release and sue the company for damages.

Ohio.— Baltimore, etc., R. Co. *v.* Bryant, 9 Ohio Cir. Ct. 332, 6 Ohio Cir. Dec. 418.

Pennsylvania.— Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854.

See 42 Cent. Dig. tit. "Release," §§ 35, 36.

36. Lemaster *v.* Burckhart, 2 Bibb (Ky.) 25.

37. Jordan *v.* McDonnell, 151 Ala. 279, 44 So. 101; Tryon *v.* Hart, 2 Conn. 120; Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956; Colton *v.* Field, 131 Ill. 398, 22 N. E. 545; Matlack's Appeal, 7 Watts & S. (Pa.) 79.

38. Sherburne *v.* Goodwin, 44 N. H. 271; Hoes *v.* Van Hoesen, 1 Barb. Ch. (N. Y.) 379; Brooks *v.* Stuart, 9 A. & E. 854, 8 L. J. Q. B. 184, 1 P. & D. 615, 36 E. C. L. 445; Butcher *v.* Butcher, 1 B. & P. N. R. 113.

39. Kirchner *v.* New Home Sewing Mach.

c. Whole Instrument to Be Examined. In construing a release, the intention is to be gathered from the entire instrument, and not from detached sections of it.[40]

d. Nature and Object of Agreement, and Situation of Parties. A release should be construed from the standpoint of the parties at the time of its execution, and extrinsic evidence is admissible to show their surrounding circumstances, and the nature of the transaction to which it was intended to apply; and the particular purpose for which it was executed should be kept in mind and given effect to, if it can be done without adding or subtracting anything from the words used by the parties to the instrument.[41]

e. Recitals as Limiting General Words. Ordinarily general words in a release are to be limited and restrained to the particular words in the recital.[42]

f. Construction Against Party Using Words. Where other rules of construc-

Co., 135 N. Y. 182, 31 N. E. 1104, holding that if the parties intentionally embraced in the instrument demands not previously suggested, or all subsisting causes of action when only certain of them had been discussed, it would be operative according to its tenor and be unassailable; that releases and other deeds and written contracts do not differ in this respect; and that all preliminary negotiations are presumed to be merged in them, and from the time of their execution they must be deemed to be the only competent evidence of the agreement of the parties upon the subjects to which they relate, unless avoided by fraud, mistake, duress, or some other cause.

40. *In re* Perkins, [1898] 2 Ch. 182, 67 L. J. Ch. 454, 78 L. T. Rep. N. S. 666, 5 Manson 193, 14 T. L. R. 464, 46 Wkly. Rep. 595. And see Colton *v.* Field, 131 Ill. 398, 22 N. E. 545.

41. Rowe *v.* Rand, 111 Ind. 206, 12 N. E. 377; Sherburne *v.* Goodwin, 44 N. H. 271.

42. *Connecticut.*— Tryon *v.* Hart, 2 Conn. 120.

Iowa.— Seymour *v.* Butler, 8 Iowa 304.

Massachusetts.— Reed *v.* Tarbell, 4 Metc. 93; Rich *v.* Lord, 18 Pick. 322; Lyman *v.* Clark, 9 Mass. 234. See, however, Dunbar *v.* Dunbar, 5 Gray 103.

New Hampshire.— Sherburne *v.* Goodwin, 44 N. H. 271.

New York.— Eisert *v.* Bowen, 117 N. Y. App. Div. 488, 102 N. Y. Suppl. 707 [*affirmed* in 191 N. Y. 544, 85 N. E. 1109]; Hoes *v.* Van Hoesen, 1 Barb. Ch. 379 [*affirmed* in 1 N. Y. 120]; Jackson *v.* Stackhouse, 1 Cow. 122, 13 Am. Dec. 514. See, however, Murphy *v.* New York, 190 N. Y. 413, 83 N. E. 39; Slayton *v.* Hemken, 91 Hun 582, 36 N. Y. Suppl. 249.

Pennsylvania.— Matlack's Appeal, 7 Watts & S. 79.

United States.— Texas, etc., R. Co. *v.* Dashiell, 198 U. S. 521, 25 S. Ct. 737, 49 L. ed. 1150; Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60; Union Pac. Co. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581.

England.— Stonehewer *v.* Farrar, 6 Q. B. 730, 9 Jur. 203, 14 L. J. Q. B. 122, 51 E. C. L. 730; Ramsden *v.* Hylton, 2 Ves. 304, 28 Eng. Reprint 196.

See 42 Cent. Dig. tit. "Release," § 48.

And see Jersey Island Dredging Co. *v.* Whitney, 149 Cal. 269, 86 Pac. 509, 691, holding that where a bill for services was dated Sept. 17, 1900, and contained a claim for seven hundred and twenty-one dollars and thirty-five cents, purporting to be for work to and including September 13, and across the face of the bill was written a statement that six hundred and fifty dollars was received in full satisfaction of all claims, such writing, although treated as a release, instead of a mere receipt, was *prima facie* effective only as a discharge of the services itemized in the bill.

See, however, Chicago Union Traction Co. *v.* O'Connell, 224 Ill. 428, 79 N. E. 622, 8 L. R. A. N. S. 1034; Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956.

Compare Quebe *v.* Gulf, etc., R. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734.

"**The general words of the release, however,** may be limited to particular demands, when it appears, by the consideration, by the recital, or by the nature and circumstances of the several demands, that they were intended so to be united. Averill *v.* Lyman, 18 Pick. (Mass.) 346; Rich *v.* Lord, 18 Pick. (Mass.) 322; Thorpe *v.* Thorpe, 1 Ld. Raym. 235, 91 Eng. Reprint 1054, 2 Rolle Abr. 409. a, 1; Tayler *v.* Homersham, 4 M. & S. 423, 16 Rev. Rep. 516. And upon the other hand it would seem that such general words might be enlarged in a similar way, when read in the light of surrounding circumstances. Indeed, a release, by its own operation, extinguishes a preëxisting right, and cannot be controlled or explained by parol. Chitty Contr. 792; Stearns *v.* Tapping, 5 Duer (N. Y.) 294; Pierson *v.* Hooker, 3 Johns. (N. Y.) 68, 3 Am. Dec. 467; Brooks *v.* Stuart, 9 A. & E. 854, 8 L. J. Q. B. 184, 1 P. & D. 615, 36 E. C. L. 445; Butcher *v.* Butcher, 1 B. & P. N. R. 113. A release therefore shall be held to include all demands embraced by its terms, whether particularly contemplated or not; and parol evidence is not admissible to show that a certain claim was not in the minds of the parties. Hyde *v.* Baldwin, 17 Pick. (Mass.) 303, 307; Deland *v.* Amesbury Woolen, etc., Mfg. Co., 7 Pick. (Mass.) 244." Sherburne *v.* Goodwin, 44 N. H. 271, 275.

tion fail, the well settled rule is that ambiguous words will be interpreted most strongly against the party using them.[43]

g. Ordinary Meaning of Words. There are many cases construing particular words and expressions, which are given their ordinary meaning, unless the context indicates their use in a different sense.[44]

B. Operation and Effect in General — 1. As Estoppel and Discharge — a. In General. A valid release as conclusively estops the parties from reviving and litigating the claim released as a final judgment,[45] and it forever extinguishes a personal right of action.[46] It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release;[47] and this is true even though the releasee fails fully to perform a promise which was the consideration for the release, unless the operation of the release was based on full performance.[48] Furthermore, even if invalid, it is binding upon the parties until attacked in a proper manner and set aside.[49] The rule that damages resulting from one and the same cause of action must be sued for and recovered once for all is merely a rule of procedure, and does not prevent a recovery for part of the damages after the giving of a release for the other part.[50]

b. Conditional Release. A release may be subject to the occurrence of a condition precedent, and the release cannot be pleaded in bar of the right until

43. Tryon *v.* Hart, 2 Conn. 120 (*semble*); Rowe *v.* Reed, 111 Ind. 206, 12 N. E. 377 (*semble*); Matlock's Appeal, 7 Watts & S. (Pa.) 79 (*semble*).

44. Sherburne *v.* Goodwin, 44 N. H. 271 ("all actions"); Emerson *v.* Ziegfeld, 22 Pa. Super. Ct. 79 ("in full of all demands of every name and nature"); U. S. *v.* William Cramp, etc., Ship, etc., Bldg. Co., 206 U. S. 118, 27 S. Ct. 676, 51 L. ed. 983 ("all claims of any kind or description under or by virtue of said contract").

45. Chicago, etc., R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147.

46. See Tyson *v.* Door, 6 Whart. (Pa.) 256.

47. *Illinois.*— G. H. Hammond Co. *v.* Papke, 91 Ill. App. 563; Chicago, etc., Coal Co. *v.* Paterson, 39 Ill. App. 114.

Missouri.— Retzer *v.* Jacob Dold Packing Co., 58 Mo. App. 264.

New York.— Kibbe *v.* Bowen, 50 N. Y. Super. Ct. 422; Pratt *v.* Crocker, 16 Johns. 270.

Pennsylvania.— Bradley *v.* Grosh, 8 Pa. St. 45.

Texas.— Chouquette *v.* McCarthy, (Civ. App. 1900) 56 S. W. 958.

United States.— Perkins *v.* Fourniquet, 14 How. 313, 14 L. ed. 435; Hazard *v.* Durant, 25 Fed. 26; Citizens' Bank *v.* Nantucket Steamboat Co., 5 Fed. Cas. No. 2,730, 2 Story 16.

See 42 Cent. Dig. tit. "Release," § 51.

A release terminates effectually the subject-matter not only as to the obligee but also as to the obligor. Darragh *v.* Stevenson, 183 Pa. St. 397, 39 Atl. 37.

"According to Pothier there are two kinds of release, one called 'a real release,' and the other a 'personal discharge.' A real release is where the creditor declares that he considers the debt as acquitted, it is equivalent to a payment, and renders the thing no longer due; 'consequently it liberates all the debtors of it, as there can be no debtors without something due.' A personal release merely discharges the debtor from his obligation, and extinguishes the debt indirectly where the debtor to whom it is granted was the sole principal, because there can be no debt without a debtor. 'But if there are two or more debtors *in solido*, a discharge to one of them does not extinguish the debt; it only liberates the person to whom it is given and not his co-debtor; the debt is extinguished however as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder." Booth *v.* Kinsey, 8 Gratt. (Va.) 560, 568 [*citing* Pothier, p. 111, c. 3, art. 11, §§ 1, 11].

Rescission.—A person injured by a railroad having executed a release, and having received a sum in satisfaction of her demand, her subsequent and voluntary delivery of the sum to even an agent of the railroad company does not destroy the contract for release. Rabitte *v.* Alabama Great Southern R. Co., (Ala. 1908) 47 So. 573.

48. Petty *v.* Brunswick, etc., R. Co., 109 Ga. 666, 35 S. E. 82; Johnson *v.* Charleston, etc., R. Co., 58 S. C. 488, 36 S. E. 851.

Conditional release see *infra*, V, B, 1, b.

Failure of consideration see *supra*, III, D.

49. See *supra*, IV, C, 8, b; and Jessup *v.* Chicago, etc., R. Co., 99 Iowa 189, 68 N. W. 673; Hancock *v.* Blackwell, 139 Mo. 440, 41 S. W. 205; Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768.

50. Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504; O'Donnell *v.* Clinton, 145 Mass. 461, 14 N. E. 747; Texas, etc., R. Co. *v.* Dashiell, 198 U. S. 521, 25 S. Ct. 737, 49 L. ed. 1150; Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60; Lee *v.* Lancashire, etc., R. Co., L. R. 6 Ch. 527, 25 L. T. Rep. N. S. 77, 19 Wkly. Rep. 727; Rideal *v.* Great Western R. Co., 1 F. & F. 706.

the happening of the event specified.[51] Likewise there are decisions sustaining conditions subsequent.[52]

2. As Admission of Liability. The acceptance or procuring of a release is no admission by the releasee of the existence of a liability on his part.[53]

3. Time of Taking Effect. Where a release is executed to have effect on a date subsequent to the trial, it cannot be received in evidence to affect the matters in controversy.[54] Where the releasor makes an absolute delivery of the release to take effect upon the happening of a contingency, it becomes, when such event occurs, absolute as the releasor's deed by relation from the first delivery.[55] Ordinarily a release operates prospectively, not retroactively.[56]

C. Conflict of Laws. The same principles of the conflict of laws which apply to contracts and deeds govern releases.[57] The nature of the release, for instance, whether it is to be regarded as a sealed or unsealed instrument, is determined by the *lex loci contractus*.[58] The effect of a release is properly determined by the law controlling the discharge of the obligation sought to be released.[59] In the absence of proof to the contrary, the presumption is that the common law is in force in the place of making, if a common-law jurisdiction, but there is no presumption that a statute of the forum exists at the *lex loci contractus*.[60] A release will be given the same effect in the forum as it would have at the place of making.[61] The presumption of knowledge of law has no reference to law of another state or country.[62]

51. *Indiana.*— Terre Haute, etc., R. Co. *v.* Flanigan, 94 Ind. 336.

New Jersey.— Crane *v.* Alling, 15 N. J. L. 423.

Pennsylvania.— Keiser's Appeal, 2 Wkly. Notes Cas. 515.

Texas.— Kirby Lumber Co. *v.* Chambers, 41 Tex. Civ. App. 632, 95 S. W. 607.

England.— Corner *v.* Sweet, L. R. 1 C. P. 456, Harr. & R. 405, 12 Jur. N. S. 413, 35 L. J. C. P. 151, 14 Wkly. Rep. 584; Gibbons *v.* Vouillon, 8 C. B. 483, 7 D. & L. 266, 14 Jur. 66, 19 L. J. C. P. 74, 65 E. C. L. 483.

See 42 Cent. Dig. tit. "Release," § 11.

The primary question is always one of construction. Did the parties intend the release to be absolute or subject to a condition precedent? Rogers *v.* Kimball, (Cal. 1897) 49 Pac. 719; Davison *v.* Tams, 30 Misc. (N. Y.) 156, 63 N. Y. Suppl. 828.

52. Hall *v.* Levy, L. R. 10 C. P. 154, 44 L. J. C. P. 89, 31 L. T. Rep. N. S. 727, 23 Wkly. Rep. 393; Newington *v.* Levy, L. R. 6 C. P. 180, 40 L. J. C. P. 29, 23 L. T. Rep. N. S. 595, 19 Wkly. Rep. 473; Slater *v.* Jones, L. R. 8 Exch. 186, 42 L. J. Exch. 122, 29 L. T. Rep. N. S. 56, 21 Wkly. Rep. 815. Also see Major *v.* Major, 1 Drew. 165, 61 Eng. Reprint 414; Aston *v.* Pye, 5 Ves. Jr. 350 note, 31 Eng. Reprint 624. *Compare* Luxmore *v.* Clifton, 17 L. T. Rep. N. S. 460, 16 Wkly. Rep. 265. *Contra*, Tyson *v.* Dorr, 6 Whart. (Pa.) 256, where the condition subsequent was held void, and the release absolute, because a personal action once suspended is extinguished forever.

"There seems difficulty in this result, however. It was a settled doctrine of the common law that a cause of action once discharged was gone forever. If such a release can be successfully pleaded to the action before the condition subsequent happens, a court of law must give judgment for the defendant, and if after the condition subsequent has happened an action is again brought on the same cause of action, the plea of *res judicata* seems unanswerable." See Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852. "The intention of the parties can be effectuated in great measure, however, by construing the so-called condition subsequent as a promise to pay the released claim in a given event. The creditor's right of action on the happening of that event would then be on the new promise contained in the release, not on the original cause of action. But consideration would be essential." Williston Wald Poll. Contr. 814.

53. Crawford *v.* McLeod, 64 Ala. 240; Baldwin *v.* New York Cent., etc., R. Co., 56 N. Y. Super. Ct. 607, 2 N. Y. Suppl. 481 [*affirmed* in 121 N. Y. 684, 24 N. E. 1098].

54. Wolcott *v.* Coleman, 1 Conn. 375; Rosenthal *v.* Rudnick, 84 N. Y. App. Div. 611, 82 N. Y. Suppl. 1004.

55. Timothy *v.* Wright, 8 Gray (Mass.) 522.

56. Parker *v.* U. S., 22 Ct. Cl. 100.

57. See Contracts, 9 Cyc. 308, 575, 582, 690; Deeds, 13 Cyc. 526.

58. Waln *v.* Waln, 53 N. J. L. 429, 22 Atl. 203; Pacific Mut. L. Ins. Co. *v.* Webb, 157 Fed. 155, 84 C. C. A. 603.

59. Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66, where the release was made in New York and was intended to discharge a contract made and performed in the same state.

60. Waln *v.* Waln, 53 N. J. L. 429, 22 Atl. 203. And see Common Law, 8 Cyc. 387.

61. Holdridge *v.* Farmers', etc., Bank, 16 Mich. 66, unless to give it such effect would violate some fundamental law of public policy of the state, or injuriously affect the rights of the citizens of the forum.

62. Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198. See also Schneider *v.*

D. Persons Concluded [63] — **1. In General.** An executor is barred by a release executed by his decedent,[64] and a release of the executor estops the residuary legatees.[65] A release by a party under an assumed name may conclude him from enforcing rights acquired by him in his real name against the same releasee; [66] but obviously a release by A or B cannot discharge claims of C against B,[67] unless C derived his right through A.[68]

2. Capacity and Authority to Release — a. In General. To render a release binding it must be executed by one having the legal capacity to contract. A limited class of persons is by our law totally, and another class partially, incapable of contracting.[69] The only party who can execute an effectual release is the one in whom the right is vested or to whose control or authority it is legally subject.[70]

Schneider, 125 Iowa 15, 98 N. W. 159; Norton *v.* Marden, 15 Me. 45, 32 Am. Dec. 132; King *v.* Doolittle, 1 Head (Tenn.) 77; Morgan *v.* Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

63. **Release after assignment** see Assignments, 4 Cyc. 79 *et seq.*; Bonds, 5 Cyc. 787.

64. Sterling *v.* Chapin, 102 N. Y. App. Div. 589, 92 N. Y. Suppl. 904; Dibble *v.* New York, etc., R. Co., 25 Barb. (N. Y.) 183.

65. Sherburne *v.* Goodwin, 44 N. H. 271.

66. Klopot *v.* Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596.

67. Gould *v.* Stanton, 16 Conn. 12; Gimbel *v.* Smidth, 7 Ind. 627.

Release by firm as binding partner individually.— Under Mo. Rev. St. (1899) § 889 (Annot. St. (1906) p. 828), making all joint contracts joint and several, a release executed to a railroad company of liability for fire on its granting permission to erect a building on its right of way, although in the name of a partnership, is a release from the partner who owned the property so as to bar a claim by him. Equitable F. & M. Ins. Co. *v.* St. Louis, etc., R. Co., 114 S. W. 546, 134 Mo. App. 48.

68. See *infra*, V, D, 2.

69. McNamara *v.* Boston El. R. Co., 197 Mass. 383, 83 N. E. 878. And see Aliens, 2 Cyc. 88; Convicts, 9 Cyc. 870 *et seq.*; Corporations, 10 Cyc. 1096 *et seq.*; Counties, 11 Cyc. 486; Drunkards, 14 Cyc. 1103 *et seq.*; Husband and Wife, 21 Cyc. 1322; Infant, 22 Cyc. 536, 598; Insane Persons, 22 Cyc. 1196; Joint Stock Companies, 23 Cyc. 466; Municipal Corporations, 28 Cyc. 55; Spendthrifts; States; Towns; United States.

A statute prohibiting employees to waive the benefit thereof construed not to apply to accrued causes of action see Fleming *v.* Southern R. Co., 131 N. C. 476, 42 S. E. 905, 132 N. C. 714, 44 S. E. 551.

Inexperience see Kilmartin *v.* Chicago, etc., R. Co., 137 Iowa 64, 114 N. W. 522; Dundee Chemical Works *v.* Connor, 46 N. J. Eq. 576, 20 Atl. 50.

Mental incapacity see Abrahams *v.* Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216; Chicago, etc., R. Co. *v.* Lewis, 109 Ill. 120; Pawnee Coal Co. *v.* Royce, 79 Ill. App. 469; Chicago, etc., R. Co. *v.* Doyle, 18 Kan. 58; Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Conney *v.* Lincoln, 21 R. I. 246, 42 Atl. 867, 79 Am. St. Rep. 799. And see *supra*, IV, B. Adjudication of mental incompetency eight months after execution of a release is evidence only of incompetency as of the date of the adjudication and not before. Abrahams *v.* Los Angeles Traction Co., *supra*.

70. See Phœnix Bank *v.* Bumstead, 18 Pick. (Mass.) 77; Goff *v.* Oberteuffer, 3 Phila. (Pa.) 71.

A stock-holder in a corporation cannot release a debt due to the corporation. Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372. See Corporations, 10 Cyc. 374, note 1.

It has been held that a debt due to the state bank could be released by the state. Ernst *v.* Ernst, 1 Ill. 316.

One joint owner cannot enter into an agreement to waive the right of his coöwner to set up title to the property. Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768.

Release of indemnitee.— Insured steamers having been driven ashore, a wrecking company contracted with the underwriters to release the vessels for a specified sum and to commence work as soon as they could assemble the plant, and guaranteed to complete the same before a certain date. It was held that, the owners of the vessels not being parties to such contract, the underwriters had power to release the wrecking company from any liability for damages sustained by reason of their failure to comply with such agreement. Klauck *v.* Federal Ins. Co., 60 Misc. (N. Y.) 170, 111 N. Y. Suppl. 1037.

The general agent of a corporation, having power to employ and discharge men, has the power on behalf of such corporation to enter into a contract with an injured employee for the release of such employee's claim for damages. American Quarries Co. *v.* Lay, 37 Ind. App. 386, 73 N. E. 608, *semble*. See also O'Neil *v.* Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688.

Where a contract has been made for the benefit of a third person, who has knowledge of and assented thereto, the original promisee cannot release the third person's right. Etscheid *v.* Baker, 112 Wis. 129, 88 N. W. 52.

Release after assignment see Assignments, 4 Cyc. 79 *et seq.*; Bonds, 5 Cyc. 787.

b. Release of Liability For Death. Liability for negligence causing the death of another is solely a creature of statute. The statutes give the right and prescribe to what party it shall run. Such party, so designated, whether the decedent's personal representative, or next of kin, or widow and children, or dependents within certain degrees, as the case may be, being the owner of the right, solely possesses the power to release the same.[71] Consequently, if the right is bestowed upon the widow, the executor cannot release it,[72] and conversely,[73] even though the deceased so agreed.[74] A release for personal injuries given by the person injured bars a recovery for his subsequent death resulting from such injuries.[75]

3. Release by Less Than All Joint Obligees or Joint Tort-Feasees. A release by one of two joint obligees is in law a discharge by both.[76] Likewise one tenant in common may release a trespasser from all liability for a trespass on the land owned in common,[77] but this doctrine does not seem to extend to tenants in common of personalty.[78]

Release by: Attorney see Attorney and Client, 4 Cyc. 949. *Cestui que trust*, see Commercial Paper, 7 Cyc. 1044, note 29; Trusts, Corporate Officers see Corporations, 10 Cyc. 765, note 88; 1202. Government in behalf of private claimant against foreign state, see International Law, 22 Cyc. 1738.

71. See Olston *v.* Oregon Water Power, etc., Co., (Oreg. 1908) 96 Pac. 1095, 97 Pac. 538.

72. See Stewart *v.* United Electric Light, etc., Co., 104 Md. 332, 65 Atl. 49, 8 L. R. A. N. S. 384.

73. See cases cited *infra*, note 74.

However, even though the executor is given the right, if the person or persons for whom he would hold the entire amount recovered release the tort-feasor, the executor can at most recover only nominal damages. Mattoon Gas Light, etc., Co. *v.* Dolan, 105 Ill. App. 1, 111 Ill. App. 333. It has been held that such a release absolutely bars a suit by the administrator. Stuebing *v.* Marshall, 10 Daly (N. Y.) 406. But a release by the widow does not bar a suit by her as administratrix for the benefit of the children. Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120.

74. Maney *v.* Chicago, etc., R. Co., 49 Ill. App. 105; Chicago, etc., R. Co. *v.* Wymore, 40 Nebr. 645, 58 N. W. 1120.

75. Bruns *v.* Welte, 126 Ill. App. 541; Thompson *v.* Ft. Worth, etc., R. Co., 97 Tex. 590, 80 S. W. 990.

76. *Maine.*— Hall *v.* Gray, 54 Me. 230.

Massachusetts.— See Osborn *v.* Martha's Vineyard R. Co., 140 Mass. 549, 5 N. E. 486; Myrick *v.* Dame, 9 Cush. 248.

New York— Bulkley *v.* Dayton, 14 Johns. 387; Fitch *v.* Forman, 14 Johns. 172.

Ohio.— Weakly *v.* Hall, 13 Ohio 167, 42 Am. Dec. 194.

Vermont.— Braynard *v.* Burpee, 27 Vt. 616.

See 42 Cent. Dig. tit. "Release," § 55.

Compare Harris *v.* Swanson, 67 Ala. 486, holding otherwise where the release was executed without the consent of the coöbligee.

Release as severing cause of action see Consolidation and Severance of Actions, 8 Cyc. 611, note 39; 614.

77. *Maine.*— Bradley *v.* Boynton, 22 Me. 287, 39 Am. Dec. 582.

New Hampshire.— Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

New York.— Decker *v.* Livingston, 15 Johns. 479; Austin *v.* Hall, 13 Johns. 286, 7 Am. Dec. 376. *Compare* Decker *v.* Livingston, 15 Johns. 479, 482 (where it is said: "If two tenants in common make a lease of their tenement, for a term of years, rendering rent, if the rent be behind, they shall have an action of debt against the lessee, and not divers actions, for the action is in the personalty. (Co. Lit. sec. 316, 198b.) But in an avowry for the rent, they ought not to be joined, for this is in the realty, (Co. Lit. s. 317); and this distinction between debt for rent and an avowry, appears to have been uniformly recognized. (1 Chitty, 544) The reason is, that the avowry savors of the realty; but until the distress and avowry, the rent is in the personalty, and then it can be released by one of the tenants in common"); Jacobson *v.* Fountain, 2 Johns. 170 (holding that where all the inhabitants of a place have a common right annexed to the inhabitancy, a release of his right by one is inoperative and does not prevent him from exercising the right, because such right does not belong to him as an individual, but as an inhabitant arising exclusively out of his place of residence).

Ohio.— Upjohn *v.* Ewing, 2 Ohio St. 13 [*reversing* 10 Cinc. L. Bul. 155], holding, however, that although such a release may have this operation at law, it does not follow that it will have the same effect in equity.

Vermont.— James *v.* Aiken, 47 Vt. 23.

See 42 Cent. Dig. tit. "Release," § 55.

Compare Lumberman's Ins. Co. *v.* Preble, 50 Ill. 332, holding that, in order that a release shall have this effect, it must be the intention of the parties that it shall so operate, without any fraud upon the rights of those obligees who did not join in the execution of the release.

78. Lansing *v.* Bliss, 86 Hun (N. Y.) 205, 33 N. Y. Suppl. 310.

E. Persons Released — 1. Joint or Joint and Several Obligors — a. General Rules. At common law a release of one of two or more joint debtors or joint and several debtors releases all, because the debt is entire and when once released can no longer be enforced against any party to it.[79] Therefore, if the liability is not joint, even though the creditor is limited to one satisfaction, he may release one of the parties from whom he is entitled to satisfaction without

79. *Alabama.*— Carroll *v.* Corbitt, 57 Ala. 579; Elliott *v.* Holbrook, 33 Ala. 659.

Arkansas.—Vandever *v.* Clark, 16 Ark. 331, release under seal upon part payment.

Colorado.— Heckman *v.* Manning, 4 Colo. 543.

Connecticut.— Abel *v.* Forgue, 1 Root 502, release from imprisonment of one joint debtor.

Illinois.— Benjamin *v.* McConnel, 9 Ill. 536, 46 Am. Dec. 474, *semble.*

Iowa.— Taylor *v.* Galland, 3 Greene 17, *semble.*

Kentucky.— Williamson *v.* McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561; Blakey *v.* Blakey, 2 Dana 460 (*semble*); Hunt *v.* Terril, 7 J. J. Marsh. 67 (*semble*).

Maine.— Merritt *v.* Bucknam, 90 Me. 146, 37 Atl. 885 (holding that where two of three joint promisors in a note enter into a composition agreement under seal with creditors, to which the holder of the note becomes a party, and thereby secure a release from further liability on the note, the other promisor also is discharged, there being nothing to show an intention on the part of the holder of the note to reserve any rights against him); Drinkwater *v.* Jordan, 46 Me. 432 (*semble*); Houston *v.* Darling, 16 Me. 413.

Maryland.—Booth *v.* Campbell, 15 Md. 569, *semble.*

Massachusetts.— Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; Wiggin *v.* Tudor, 23 Pick. 434 (sealed release of rent); Goodnow *v.* Smith, 18 Pick. 414, 29 Am. Dec. 600 (*semble*); Averill *v.* Lyman, 18 Pick. 346; American Bank *v.* Doolittle, 14 Pick. 123; Tuckerman *v.* Newhall, 17 Mass. 581; Ward *v.* Johnson, 13 Mass. 148 (*semble*).

Missouri.— McAllister *v.* Dennin, 27 Mo. 40, *semble.*

Montana.— Collier *v.* Field, 2 Mont. 205; Collier *v.* Field, 1 Mont. 612.

Nebraska.— Scofield *v.* Clark, 48 Nebr. 711, 67 N. W. 754.

New Hampshire.— Durell *v.* Wendell, 8 N. H. 369 (*semble*); Gould *v.* Gould, 4 N. H. 173 (release of one joint debtor from arrest).

New Jersey.— Munyan *v.* French, 60 N. J. L. 12, 36 Atl. 771 (holding that where one of the obligors of a joint bond makes a statutory assignment for the benefit of his creditors, the obligee, by presenting his claim growing out of the bond to the assignee, forfeits his right to sue on the bond, and thereby releases all the obligors); Crane *v.* Alling, 15 N. J. L. 423 (*semble*).

New York.— Cornell *v.* Masten, 35 Barb. 157; Katz *v.* Schwab, 9 N. Y. St. 494; Bouchaud, *v.* Dias, 3 Den. 238; Catskill Bank *v.* Messenger, 9 Cow. 37, *semble.*

Ohio.— Westcott *v.* Price, Wright 220, *semble.*

Oregon.— Crawford *v.* Roberts, 8 Oreg. 324.

Pennsylvania.— Burson *v.* Kincaid, 3 Penr. & W. 57.

West Virginia.— Rutherford *v.* Rutherford, 55 W. Va. 56, 47 S. E. 240; Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

United States.— Joy *v.* Wurtz, 13 Fed. Cas. No. 7,555, 2 Wash. 266; U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614.

England.— Clayton *v.* Kynaston, Salk. 573, 91 Eng. Reprint 483, *semble.* And see Nicholson *v.* Revill, 4 A. & E. 675, 1 Harr. & W. 756, 5 L. J. K. B. 129, 6 N. & M. 192, 31 E. C. L. 300, where it is held that the erasure of a joint and several maker of a promissory note for a part payment before maturity operates to discharge him, and therefore all.

See 42 Cent. Dig. tit. "Release," § 57. And see Commercial Paper, 7 Cyc. 1016; Contracts, 9 Cyc. 654; Fire Insurance, 19 Cyc. 894.

This rule is declared by statute in some states. McCarter *v.* Turner, 49 Ga. 309 (holding, however, that Code, § 2862, making a creditor's release of one of two joint debtors operate a release of the other, does not extend to discharge one on the ground that the other, not being sued, has been discharged by the statute); Orr *v.* Hamilton, 36 La. Ann. 790; Lynch *v.* Leathers, 17 La. Ann. 118 (holding that the provision of the code that the remission or conventional discharge in favor of one of two or more co-debtors discharges all the others applies where there is a solidarity as between the co-debtors, and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged).

Hence a release of one partner discharges his copartner also. Elliott *v.* Holbrook, 33 Ala. 659; Gray *v.* Brown, 22 Ala. 262; Williamson *v.* McGinnis, 11 B. Mon. (Ky.) 74, 52 Am. Dec. 561.

Other reasons given for the rule.— Because otherwise a debtor, after paying the creditor, might sue the debtor who had been released for contribution, and so in effect he would not be released at all. Carroll *v.* Corbitt, 57 Ala. 579. However, if a releasee agrees to accept such a release, this reason would hardly justify relieving him in face thereof at the expense of the releasor. Another and perhaps better reason is that a creditor is entitled to one satisfaction only; that a seal imports consideration, and therefore satisfaction, and the creditor, having by the execution of such a formal instrument acknowledged satisfaction of the debt, cannot be allowed to gainsay his act. Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475. The difficulty

discharging the others.[80] Moreover, the reason of the rule would apply only to releases under seal, and the great preponderance of authority has so limited it.[81] As the rule is one of law and not of construction, it is operative in the teeth of an express intention of the releasor to the contrary, as where the releasor expressly reserves his right against all the debtors other than the releasee, for, it is said, such a purpose is repugnant to the nature of the instrument and void.[82] However, if the releasee's coöbligors agree prior to the execution of the release that the release shall not affect their liability, they are not discharged

with this reason is that it rests upon a fiction, and often upon a fiction of fact, and is historically untrue.

Release pro tanto.— Part payment of a liquidated claim by one debtor discharges neither debtor *in toto* — only *pro tanto*. Hatzel *v.* Moore, 120 Fed. 1015. And see Hager *v.* McDonald, 65 Fed. 200. So a release by a creditor of a corporation of a stock-holder's liability for debt by an instrument under seal discharges the corporation and the other stock-holders to the same extent as the one to whom the release is executed is discharged. Thus if the release be of the releasee's proportion of the indebtedness of the corporation, the corporation and other stock-holders are only released *pro tanto*. Prince *v.* Lynch, 38 Cal. 528, 99 Am. Dec. 427.

Release after judgment against one debtor. — It has been held that if a judgment is recovered against one debtor on a joint and several obligation, a subsequent release of the other debtor does not release the judgment debtor, but otherwise if a joint judgment is obtained. U. S. *v.* Thompson, 28 Fed. Cas. No. 16,487, Gilp. 614.

Right of unreleased debtor to contribution see CONTRIBUTION, 9 Cyc. 795.

80. Nabors *v.* Camp, 14 Ala. 460 (release of surety does not discharge principal, *semble*); McBeth *v.* McIntyre, 57 Cal. 49; McKeon *v.* Whitney, 3 Den. (N. Y.) 452 (holding that a release of the original lessee of a term of years does not discharge his assignee from liability to the lessor for rent accrued prior to execution of the release, for the original lessee is liable on the contract, but his assignee is liable because of the privity of estate). *Compare* Merrick *v.* Giddings, 1 Mackey (D. C.) 394.

81. *California.*— Armstrong *v.* Hayward, 6 Cal. 183.

Kentucky.— See Williamson *v.* McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561, assuming the rule to be so at common law, but holding a seal to be no longer necessary because of statute.

Maine.— Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461; McAllester *v.* Sprague, 34 Me. 296.

Massachusetts.— Bemis *v.* Hoseley, 16 Gray 63; Smith *v.* Bartholomew, 1 Metc. 276, 35 Am. Dec. 365; Shaw *v.* Pratt, 22 Pick. 305.

New Hampshire.— Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584.

New Jersey.— Line *v.* Nelson, 38 N. J. L. 358.

New York.— De Zeng *v.* Bailey, 9 Wend. 336; Dewey *v.* Derby, 20 Johns. 462. See, however, Cornell *v.* Masten, 35 Barb. 157. *Compare* Honegger *v.* Wettstein, 47 N. Y. Super. Ct. 125.

Pennsylvania.— See Burke *v.* Noble, 48 Pa. St. 168 [*affirming* 5 Phila. 526]; Schock *v.* Miller, 10 Pa. St. 401 [*overruling* Milliken *v.* Brown, 1 Rawle 391]. *Compare* Greenwald *v.* Kaster, 86 Pa. St. 45, 5 Wkly. Notes Cas. 140.

South Carolina.— Massey *v.* Brown, 4 S. C. 85.

Tennessee.— Harvey *v.* Sweasy, 4 Humphr. 449. It is now otherwise by statute. Evans *v.* Pigg, 3 Coldw. 395.

Texas.— Lancaster *v.* Brown, 20 Tex. 154; Bridges *v.* Phillips, 17 Tex. 128.

Vermont.— Seely *v.* Spencer, 3 Vt. 334.

United States.— Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308. *Contra*, Joy *v.* Wurtz, 13 Fed. Cas. No. 7,555, 2 Wash. 266.

See 42 Cent. Dig. tit. "Release," § 61.

But see Campbell *v.* Brown, 20 Ga. 415; Collier *v.* Field, 1 Mont. 612.

82. *Alabama.*— Gray *v.* Brown, 22 Ala. 262.

Colorado.— Heckman *v.* Manning, 4 Colo. 543, *semble*.

Illinois.— Rice *v.* Webster, 18 Ill. 331; Benjamin *v.* McConnel, 9 Ill. 545, 46 Am. Dec. 474. See, however, Parmelee *v.* Lawrence, 44 Ill. 405.

Montana.— Collier *v.* Field, 1 Mont. 612.

England.— Bower *v.* Swadlin, 1 Atk. 294, 26 Eng. Reprint 188; Cheatham *v.* Ward, 1 B. & P. 630; Lacy *v.* Kinnaston, Holt K. B. 178, 90 Eng. Reprint 996, 1 Ld. Raym. 688, 91 Eng. Reprint 1359, 12 Mod. 548, 88 Eng. Reprint 1510, Salk. 575, 91 Eng. Reprint 484. See, however, *Ex p.* Good, 5 Ch. D. 46, 46 L. J. Bankr. 65, 36 L. T. Rep. N. S. 338, 25 Wkly. Rep. 422.

See 42 Cent. Dig. tit. "Release," §§ 59, 60.

See, however, Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475.

Parol evidence of intent.—An intention to reserve rights against the releasee's co-debtors cannot be shown by parol. Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475; Tuckerman *v.* Newhall, 17 Mass. 581.

A dormant partner unknown to the creditor is discharged by a release of all the members of the firm (Harbeck *v.* Pupin, 145 N. Y. 70, 39 N. E. 722), or a release of the ostensible partner (Willings *v.* Consequa, 30 Fed. Cas. No. 17,767, Pet. C. C. 301).

Statutory changes in rule see *infra*, this section, text and notes.

thereby.[83] Moreover, the rule applies alike to joint and to joint and several obligations.[84] As this technical rule often defeats the avowed intent of the releasor and frequently gives an undeserved windfall to his debtors, the courts show a very decided tendency to defeat its operation by construing such instruments as covenants not to sue,[85] and in some states this common-law rule has been changed by statute.[86]

b. Effect of Receipt. A receipt, even if in full, to one joint debtor, given upon payment of less than an entire liquidated, undisputed or *mala fide* disputed indebtedness, being *nudum pactum*, does not operate as a complete discharge of such debtor, and *a fortiori* does not release his co-debtors;[87] but otherwise if under seal without the expression of any intent to reserve the creditors' rights

83. Collier *v.* Field, 2 Mont. 205 (relief being granted in equity); Rogers *v.* Hosack, 18 Wend. (N. Y.) 319; Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565; Burson *v.* Kincaid, 3 Penr. & W. (Pa.) 57; Massey *v.* Brown, 4 S. C. 85.

However, a partial payment by one of three joint debtors in consideration of his release from the debt inures to the benefit of all, notwithstanding a reservation of the creditor's rights against the others, who agree that such release shall not be construed to operate as a discharge of their liability for the debt. Goldbeck *v.* Kensington Nat. Bank, 147 Pa. St. 267, 23 Atl. 565.

84. Tuckerman *v.* Newhall, 17 Mass. 581; Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437; Bacon Abr. "Release," (G.). And see cases cited *supra*, note 79. *Contra*, Burson *v.* Kincaid, 3 Penr. & W. (Pa.) 57.

85. See *infra*, V, E, 1, c.

86. See the statutes of the different states. And see the following cases in which such statutes have been construed and enforced:

Arizona.— Starr *v.* Stiles, 2 Ariz. 436, 19 Pac. 225.

Missouri.— Baker *v.* Hunt, 88 Mo. 405; Hill *v.* Alexander, 77 Mo. 296; Grant *v.* Holmes, 75 Mo. 109.

New York.— Harbeck *v.* Pupin, 123 N. Y. 115, 25 N. E. 311 [*affirming* 55 Hun 335, 8 N. Y. Suppl. 695 (*affirming* 23 Abb. N. Cas. 190, 7 N. Y. Suppl. 168)]; Bolen *v.* Crosby, 49 N. Y. 183; Commercial Nat. Bank *v.* Taylor, 64 Hun 499, 19 N. Y. Suppl. 533; Bennett *v.* Buchan, 53 Barb. 578; Irvine *v.* Milbank, 14 Abb. Pr. N. S. 408. See, however, Hoffman *v.* Dunlop, 1 Barb. 185 (holding that a release of one of three joint covenantors unconditionally, without any reference to the statute of 1838 to relieve partners and joint debtors, does not come within that statute, and is a release of all the covenantors); Abbott *v.* Royce, 3 N. Y. Suppl. 503 (holding that a receipt to one of two joint and several debtors, acknowledging the payment of money, and stating that it constitutes the payer's "one-half of our account" against the joint debtors, does not purport to exonerate such payer from liability, within the meaning of the statute, and such effect cannot be given to the receipt by evidence *aliunde*).

Ohio.— Sprague *v.* Childs, 16 Ohio St. 107.

South Dakota.— Central Banking, etc., Co. *v.* Pussey, 116 N. W. 1126.

United States.— Hager *v.* McDonald, 65 Fed. 200, construing the Kansas statute.

See 42 Cent. Dig. tit. "Release," § 58.

The intent of the parties controls by statute in some states. Carroll *v.* Corbitt, 57 Ala. 579; Williams *v.* Hitchings, 10 Lea (Tenn.) 326.

Extraterritorial operation.—A release to one partner of his *pro rata* liability on a firm obligation enforceable in this state, executed under a statute of a foreign state declaring that a release of one partner of his *pro rata* liability on a partnership obligation may be made without affecting the *pro rata* liability of his copartners, will operate in this state as a release of all the partners. Seymour *v.* Butler, 8 Iowa 304.

Rescission of contract.— N. Y. Code Civ. Proc. § 1942, providing that a joint debtor may compromise with his creditors so as not to release the other debtors, does not apply where several persons jointly agree to purchase personal property within a certain time, and, before such time expires, the vendor delivers part of the property to one of the buyers, and releases him from all liability, the relation of debtor and creditor not then existing. Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36, 57 N. Y. Suppl. 534.

87. *Arkansas.*— Heaslet *v.* Spratlin, 54 Ark. 185, 15 S. W. 461.

California.— Armstrong *v.* Hayward, 6 Cal. 183.

Connecticut.—Palmer *v.* Green, 6 Conn. 14; Andrus *v.* Andrus, 1 Root 72.

Iowa.— Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198.

Kentucky.— Moore *v.* Gatewood, 5 Ky. L. Rep. 777.

Maine.— Ripley *v.* Crooker, 47 Me. 370, 74 Am. Dec. 49; Dennett *v.* Lamson, 30 Me. 223.

Maryland.— Commercial, etc., Nat. Bank *v.* McCormick, 97 Md. 703, 55 Atl. 439; Middleton Valley Sav. Bank *v.* Mercer, 97 Md. 458, 55 Atl. 435; Campbell *v.* Booth, 8 Md. 107, even if the receipt be filed in court and entered upon the docket.

Massachusetts.— Gold Medal Sewing Mach. Co. *v.* Harris, 124 Mass. 206; Sigourney *v.* Sibley, 21 Pick. 101, 32 Am. Dec. 248.

Mississippi.—Young *v.* Power, 41 Miss. 197.

Missouri.— McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038.

New Jersey.— Shotwell *v.* Miller, 1 N. J. L. 81.

against the co-debtors.[88] Moreover, a parol release may be supported by sufficient consideration, and in such case it is a question of intention whether such consideration was given and accepted in full discharge of the liability.[89] In Louisiana a receipt to a debtor *in solido* for his part severs the obligation and extinguishes it as to him.[90]

c. Effect of Covenant or Agreement Not to Sue. A covenant or agreement not to sue one joint or joint and several debtor does not release the other debtors, and is not pleadable in bar,[91] because such an instrument neither extinguishes

New York.— Buckingham *v.* Oliver, 3 E. D. Smith 129; Rowley *v.* Stoddard, 7 Johns. 207. And see Schermerhorn *v.* Loines, 7 Johns. 311.

See 42 Cent. Dig. tit. "Release," § 62.

Necessity and sufficiency of consideration see *supra*, III.

88. Hale *v.* Spaulding, 145 Mass. 482, 14 N. E. 534, 1 Am. St. Rep. 475.

Where an officer of a court affixes a seal to an instrument of release without the authority of the appointing court, the instrument is treated by the court as an unsealed release. Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583.

89. Booth *v.* Campbell, 15 Md. 569; McCormick *v.* St. Louis, 166 Mo. 315, 65 S. W. 1038; *In re* E. W. A., [1901] 2 K. B. 642, 70 L. J. K. B. 810, 85 L. T. Rep. N. S. 31, 8 Manson 250, 49 Wkly. Rep. 642.

A promise of satisfaction may be sufficient, if such is the intention of the parties, to operate as an accord and satisfaction and thereby discharge a co-debtor of the promisor. *In re* Pearse, [1905] Vict. L. Rep. 446.

90. Benton *v.* Roberts, 1 Rob. (La.) 101; Baldwin *v.* Gray, 4 Mart. N. S. (La.) 192; 16 Am. Dec. 169.

91. *Arkansas.*— Bozeman *v.* State Bank, 7 Ark. 328, 40 Am. Dec. 291.

California.— Matthey *v.* Gally, 4 Cal. 62, 60 Am. Dec. 595.

Georgia.— Kendrick *v.* O'Neil, 48 Ga. 631, covenant to indemnify. See, however, Campbell *v.* Brown, 20 Ga. 415.

Illinois.— Parmelee *v.* Lawrence, 44 Ill. 405.

Indiana.— Mullendore *v.* Wertz, 75 Ind. 431, 39 Am. Rep. 155 (where the agreement was not to sue for a limited time); Aylesworth *v.* Brown, 31 Ind. 270.

Kentucky.— Williamson *v.* McGinnis, 11 B. Mon. 74, 52 Am. Dec. 561; Mason *v.* Jouett, 2 Dana 107; Lane *v.* Owings, 3 Bibb 247.

Maine.— McLellan *v.* Cumberland Bank, 24 Me. 566 (covenant not to levy execution); Walker *v.* McCulloh, 4 Me. 421.

Massachusetts.— Goodnow *v.* Smith, 18 Pick. 414, 29 Am. Dec. 600; Shed *v.* Pierce, 17 Mass. 623; Tuckerman *v.* Newhall, 17 Mass. 581; Sewall *v.* Sparrow, 16 Mass. 24, holding that a written unsealed contract not to levy execution on a judgment against one of two joint judgment debtors constitutes an equitable defense only, owing to fact that a judgment is of higher nature than a parol agreement.

Michigan.— Seligman *v.* Pinet, 78 Mich. 50, 43 N. W. 1091.

Missouri.— Carondelet *v.* Desnoyer, 27 Mo. 36.

Montana.— Collier *v.* Field, 2 Mont. 320.

New Hampshire.— Benton *v.* Mullen, 61 N. H. 125 (holding that a covenant by a creditor to save one of several joint debtors from further payment does not discharge the others, nor does it operate as a release of the covenantee, even if apt and technical words of release are used, it appearing that a release of the whole debt was not intended); Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584 (general bond of indemnity against debts); Durell *v.* Wendell, 8 N. H. 369.

New Jersey.— Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360 (even though it provides that if suit be brought against the covenantee, the covenant shall become a good bar thereto and operate as an absolute release, where it is expressly stipulated that it was not to discharge the other obligors); Line *v.* Nelson, 38 N. J. L. 358; Crane *v.* Alling, 15 N. J. L. 423 (where the creditor, upon payment by a joint debtor of half the debt, gave him bond of indemnity against the other half); Shotwell *v.* Miller, 1 N. J. L. 81 (bond of indemnity).

New York.— Frink *v.* Green, 5 Barb. 455 (agreement to exonerate debtor); Couch *v.* Mills, 21 Wend. 424 (covenant executed by plaintiff after commencement of suit that he will not sue or levy on the property of one of several makers of the note, and in case any proceeding be had, continued, or prosecuted, that the covenant shall be deemed to all intents and purposes a release to such maker of the note, held a mere covenant not to sue which cannot be pleaded as a release in bar of a recovery against all the makers); Chenango Bank *v.* Osgood, 4 Wend. 607; Catskill Bank *v.* Messenger, 9 Cow. 37; Phelps *v.* Johnson, 8 Johns. 54 (covenant to procure and cancel a note); Rowley *v.* Stoddard, 7 Johns. 207; Harrison *v.* Close, 2 Johns. 448, 3 Am. Dec. 444; Miller *v.* Fenton, 11 Paige 18 (agreement not to collect debt out of property of debtor).

North Carolina.— Sandlin *v.* Ward, 94 N. C. 490; Winston *v.* Dalby, 64 N. C. 299.

Pennsylvania.— Gregg *v.* Hilsen, 12 Phila. 348.

Texas.— Bates *v.* Wills Point Bank, 11 Tex. Civ. App. 73, 32 S. W. 339, agreement not to levy execution.

Vermont.— Pinney *v.* Bugbee, 13 Vt. 623; Brown *v.* Marsh, 7 Vt. 320; Spencer *v.* Williams, 2 Vt. 209, 19 Am. Dec. 711.

Virginia.— Ward *v.* Johnson, 6 Munf. 6, 8 Am. Dec. 729.

the obligation and therefore does not bar a suit to recover it, nor does it affect the right of subrogation, except *pro tanto* for the consideration received, for a covenant or agreement by C not to sue A contains no promise that C will not proceed against B.[92] If an action is brought by the creditor in violation of his agreement, the covenantee may sue on the covenant for damages.[93] However, such a covenant or agreement not to sue a sole debtor or obligor or all the joint debtors or obligors will be given, even at law, to avoid circuity of action, the effect of a release under seal.[94] But to have this effect the covenant must be perpetual in time and be in all points equal to the obligation.[95] Covenants not to sue containing a provision that if suit be brought it shall be a bar and operate as a release have generally been construed as covenants not to sue.[96] Likewise releases of one joint debtor wherein the creditor reserved his right against the others have been construed as covenants not to sue in order to effectuate the intention of the parties.[97] The two instances just given are illustrative of the

United States.— Ferson *v.* Sanger, 8 Fed. Cas. No. 4,752, 1 Woodb. & M. 138; Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308; Tuthill *v.* Babcock, 24 Fed. Cas. No. 14,275, 2 Woodb. & M. 298.

England.—Walmesley *v.* Cooper, 11 A. & E. 216, 10 L. J. Q. B. 49, 3 P. & D. 149, 39 E. C. L. 136; Solly *v.* Forbes, 2 B. & B. 38, 4 Moore C. P. 448, 22 Rev. Rep. 641, 6 E. C. L. 27; Lacy *v.* Kinnaston, Holt K. B. 178, 90 Eng. Reprint 996, 1 Ld. Raym. 688, 91 Eng. Reprint 1359, 12 Mod. 548, 88 Eng. Reprint 1510, Salk. 575, 91 Eng. Reprint 484; Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289, 16 Rev. Rep. 619, 1 E. C. L. 618; Dean *v.* Newhall, 7 T. R. 168.

See 42 Cent. Dig. tit. "Release," § 63. And see COMMERCIAL PAPER, 7 Cyc. 1048.

No distinction whether obligation joint or joint and several.— The distinction between a covenant not to sue one of several covenantors where the obligation is joint and several, and when joint only, was noticed and repudiated in Hatton *v.* Eyre, 6 Taunt. 289. The latter was considered as standing upon equally solid reasons with the former. Couch *v.* Mills, 21 Wend. (N. Y.) 424.

However, a covenant to cancel a joint note amounts to a release because performance of the covenant discharges the obligation. Phelps *v.* Johnson, 8 Johns. (N. Y.) 54.

92. Lacy *v.* Kinnaston, Holt K. B. 178, 90 Eng. Reprint 996, 1 Ld. Raym. 688, 91 Eng. Reprint 1359, 12 Mod. 548, 88 Eng. Reprint 1510, Salk. 575, 91 Eng. Reprint 484, per Holt, C. J.

93. Matthey *v.* Gally, 4 Cal. 62, 60 Am. Dec. 595; McAllester *v.* Sprague, 34 Me. 296; Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92, 16 Am. Dec. 294.

94. McAllester *v.* Sprague, 34 Me. 296; Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852. *Compare* Clopper *v.* Union Bank, 7 Harr. & J. (Md.) 92 (holding that an agreement upon proper consideration, made by A with B, not to sue C for three years may be used by C as a bar to an action of assumpsit against him, especially where the cause of action may be sustained under the general count for money had and received; in such action the defendant is at liberty to place himself upon such defenses as will show *ex aequo et bono*, plaintiff is not entitled to recover); Morley *v.* Frear, 6 Bing. 547, 8 L. J. C. P. O. S. 176, 4 M. & P. 305, 31 Rev. Rep. 489, 19 E. C. L. 248 (where the assignee of an obligee who had covenanted not to sue the obligor during his life was permitted to bring an action on the bond in the name of the obligee during the life of the obligor).

The argument of circuity of action is not applicable in a suit against joint obligors other than the covenantee. Garnett *v.* Macon, 10 Fed. Cas. No. 5,245, 2 Brock. 185, 6 Call (Va.) 308.

95. Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584 (holding that it will never be construed as a release unless it give the covenantee a right of action which will precisely countervail that to which he is liable, and unless it was the intention of the parties that the last instrument should defeat the first); Webb *v.* Spicer, 13 Q. B. 886, 7 D. & L. 324, 14 Jur. 33, 19 L. J. Q. B. 34, 66 E. C. L. 886; Ford *v.* Beech, 11 Q. B. 852, 5 L. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852; Foley *v.* Fletcher, 3 H. & N. 769, 5 Jur. N. S. 342, 28 L. J. Exch. 100, 7 Wkly. Rep. 141; Thimbleby *v.* Barrow, 7 L. J. Exch. 128, 3 M. & W. 210.

96. Crane *v.* Alling, 15 N. J. L. 423; Dean *v.* Newhall, 8 T. R. 168.

97. Ward *v.* New Zealand Nat. Bank, 8 App. Cas. 755, 52 L. J. P. C. 65, 49 L. T. Rep. N. S. 315; Rice *v.* Reed, [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, 81 L. T. Rep. N. S. 410; Duck *v.* Mayeu, [1892] 2 Q. B. 511, 57 J. P. 23, 62 L. J. Q. B. 69, 67 L. T. Rep. N. S. 547, 4 Reports 38, 41 Wkly. Rep. 56; North *v.* Wakefield, 13 Q. B. 536, 13 Jur. 731, 18 L. J. Q. B. 214, 66 E. C. L. 536; Bateson *v.* Gosling, L. R. 7 C. P. 9, 41 L. J. C. P. 53, 25 L. T. Rep. N. S. 570, 20 Wkly. Rep. 98; Solly *v.* Forbes, 2 B. & B. 38, 4 Moore C. P. 448, 22 Rev. Rep. 641, 6 E. C. L. 27; Willis *v.* De Castro, 4 C. B. N. S. 216, 27 L. J. C. P. 243, 6 Wkly. Rep. 500, 93 E. C. L. 216; Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 82 E. C. L. 760; Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289, 16 Rev. Rep. 619, 1 E. C. L. 618; Dean *v.* Newhall, 8 T. R. 168.

modern tendency to construe instruments in the form of releases as covenants not to sue in order to carry out the intention of the parties as appearing from the context and the surrounding circumstances.[98]

2. Joint Tort-Feasors — a. General Rules. A release under seal of one joint tort-feasor releases him and all his joint wrong-doers, because a sealed release operates to extinguish the cause of action.[99] Moreover it has been held that

98. Bradford *v.* Prescott, 85 Me. 482, 27 Atl. 461; Line *v.* Nelson, 38 N. J. L. 358; Solly *v.* Forbes, 2 B. & B. 38, 4 Moore C. P. 448, 22 Rev. Rep. 641, 6 E. C. L. 27; Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 82 E. C. L. 760; Kearsley *v.* Cole, 16 L. J. Exch. 115, 16 M. & W. 128.

99. *Alabama.*— Smith *v.* Gayle, 58 Ala. 600, *semble*.

California.— Chetwood *v.* California Nat. Bank, 113 Cal. 414, 45 Pac. 704 (*semble*); Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165.

Colorado.— Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Iowa.— Atwood *v.* Brown, 72 Iowa 723, 32 N. W. 108; Long *v.* Long, 57 Iowa 497, 10 N. W. 875 (*semble*); Turner *v.* Hitchcock, 20 Iowa 310.

Louisiana.— Orr *v.* Hamilton, 36 La. Ann. 790, by statute.

Maine.— Gilpatrick *v.* Hunter, 24 Me. 18, 41 Am. Dec. 370.

Maryland.— Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583; Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

Massachusetts.—Brewer *v.* Casey, 196 Mass. 384, 82 N. E. 45; Aldrich *v.* Parnell, 147 Mass. 409, 18 N. E. 170; Leddy *v.* Barney, 139 Mass. 394, 1 N. E. 107; Goss *v.* Ellison, 136 Mass. 503 (*semble*); Stone *v.* Dickinson, 7 Allen 26; Stone *v.* Dickinson, 5 Allen 29, 81 Am. Dec. 727 (*semble*); Brown *v.* Cambridge, 3 Allen 474 (*semble*).

Michigan.— Sunlin *v.* Skutt, 133 Mich. 208, 94 N. W. 733; McBride *v.* Scott, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416, 61 L. R. A. 445.

Missouri.— Chicago Herald Co. *v.* Bryan, 195 Mo. 574, 92 S. W. 902; Hubbard *v.* St. Louis, etc., R. Co., 173 Mo. 249, 72 S. W. 1073.

New Hampshire.— Snow *v.* Chandler, 10 N. H. 92, 34 Am. Dec. 140.

New Jersey.— Spurr *v.* North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582, *semble*.

New York.— Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623; Morgan *v.* Smith, 70 N. Y. 537; Irvine *v.* Millbank, 56 N. Y. 635; Barrett *v.* Third Ave. R. Co., 45 N. Y. 628; Johanson *v.* New York, 71 N. Y. App. Div. 561, 76 N. Y. Suppl. 119; Delong *v.* Curtis, 35 Hun 94; Parsons *v.* Hughes, 9 Paige 591. See also Baker *v.* Secor, 4 N. Y. Suppl. 303.

North Carolina.— Burns *v.* Wonble, 131 N. C. 173, 42 S. E. 573.

Ohio.— Ellis *v.* Bitzer, 2 Ohio 89, 15 Am. Dec. 534.

Pennsylvania.— Williams *v.* Le Bar, 141 Pa. St. 149, 21 Atl. 525; Seither *v.* Philadelphia Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54. *Contra*, Derosa *v.* Hamil, 3 Pa. Dist. 404, 14 Pa. Co. Ct. 307.

Texas.— McGehee *v.* Shafer, 15 Tex. 198.

Vermont.— Robinson *v.* St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 Atl. 814, 9 L. R. A. N. S. 1249; Dufur *v.* Boston, etc., R. Co., 75 Vt. 165, 53 Atl. 1068; Eastman *v.* Grant, 34 Vt. 387; Brown *v.* Marsh, 7 Vt. 320.

Virginia.— Ruble *v.* Turner, 2 Hen. & M. 38.

Washington.— Abb *v.* Northern Pac. R. Co., 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864.

West Virginia.— Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

United States.— The St. Cuthbert, 157 Fed. 799; Carey *v.* Bilby, 129 Fed. 203, 63 C. C. A. 361.

England.— Thurman *v.* Wild, 11 A. & E. 453, 3 P. & D. 289, 39 E. C. L. 252; Phillips *v.* Claggett, 2 Dowl. P. C. N. S. 1004, 12 L. J. Exch. 275, 11 M. & W. 84.

Canada.— Cadieux *v.* Laplante, 14 Quebec Super. Ct. 446.

See 42 Cent. Dig. tit. "Release," § 64. And see 6 Bacon Abr. tit. "Release," (G); Coke Litt. 232.

Reason for rule.— It is sometimes said that the reason for the rule is that an injured person is entitled to only one satisfaction, and, as a consideration is always implied in release under seal, although not expressed on its face, such a release implies satisfaction. Gunther *v.* Lea, 45 Md. 60, 24 Am. Rep. 504. This reason is historically inaccurate because of the fact that sealed releases were valid long anterior to the existence of any theory of consideration. But if it be the correct reason, it would merge this branch of the law of release into that of satisfaction, quite despite the fact that it has never been so treated by courts nor by learned writers on the law, and in the teeth of the further fact that pleas of release were allowed at law before pleas of accord and satisfaction.

It must be a technical sealed release in order to have this effect (Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583; Irvine *v.* Milbank, 56 N. Y. 635; Schramm *v.* Brooklyn Heights R. Co., 35 N. Y. App. Div. 334, 54 N. Y. Suppl. 945; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Ingels *v.* Mast, 13 Fed. Cas. No. 7,033, 6 Fish. Pat. Cas. 415), unless it is based on a sufficient consideration received in full satisfaction of the claim (see *infra*, this note).

Implied release.— The release must expressly state the cause of action to be discharged without conditions or exceptions. No

a reservation of the rights of the injured party against the releasee's co-tort-feasors is repugnant to the nature of the instrument and void, for the right of action cannot be extinct as to one tort-feasor and alive as to his fellow wrong-doers, and having been destroyed as to one, it is extinguished for the benefit of all.[1] The logical and legal soundness of this rule, however harsh its application may be in the particular case, is undoubted, provided the sealed instrument is once construed to be a release, but to escape the application of this principle where it would work injustice and defeat the evident intention of the parties the modern tendency of the courts is to construe, if possible, such instruments as covenants not to sue, which accordingly do not release the coöbligors.[2] Moreover, the common law has been altered in some jurisdictions by statute.[3]

release will be allowed by implication. Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752. And see Sharpe *v.* Williams, 41 Kan. 56, 20 Pac. 497.

Necessity for consideration.— It has been held, to the contrary of the general rule, that a release of one joint tort-feasor does not discharge the others unless it is supported by a consideration so as to render it a satisfaction. Cleveland, etc., R. Co. *v.* Hilligoss, (Ind. 1908) 86 N. E. 485.

Part satisfaction.— Neither the reception of money directly from one wrong-doer nor the securing thereof from the sale of a judgment against such wrong-doer would, in the absence of a release or of an accord and satisfaction, discharge or release another joint wrong-doer, except *pro tanto*. Brennan *v.* Electrical Installation Co., 120 Ill. App, 461; Bailey *v.* Delta Electric Light, etc., Co., 86 Miss. 634, 38 So. 354; Robertson *v.* Trammell, 37 Tex. Civ. App. 53, 83 S. W. 258 [writ of error *denied* in 98 Tex. 364, 83 S. W. 1098]; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752. And see *infra*, this note.

A person injured by co-trespassers may sue either one. He is not bound to prosecute all, and neither the omission to sue all, nor, if all are sued, the dismissal of one of them from the suit can be pleaded by the others in bar. Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752. A dismissal as to one defendant on his paying a sum in part satisfaction and without prejudice to plaintiff's right to pursue the other defendant does not release the latter. Louisville, etc., Mail Co. *v.* Barnes, 117 Ky. 860, 79 S. W. 261, 25 Ky. L. Rep. 2036, 111 Am. St. Rep. 273, 64 L. R. A. 574; Nagle *v.* Hake, 123 Wis. 256, 101 N. W. 409. Dismissal on consideration received in full satisfaction see *infra*, this note.

Complete satisfaction received from one person in consideration of his release operates to discharge all who are liable therefor, whether they be joint and several wrong-doers or several wrong-doers. Allen *v.* Ruland, 79 Conn. 405, 65 Atl. 138; Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154; Cleveland, etc., R. Co. *v.* Hilligoss, (Ind. 1908) 86 N. E. 485; Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344; Bailey *v.* Delta Electric Light, etc., Co., 86 Miss. 634, 38 So. 354; Dulaney *v.* Buffum, 173 Mo. 1, 73 S. W. 125; El Paso, etc., R. Co. *v.* Darr, (Tex. Civ. App. 1906) 93 S. W. 166; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

Criminal prosecution of one joint tort-feasor is not an election of remedies or a settlement. Home Sav. Bank *v.* Otterback, 135 Iowa 157, 112 N. W. 769, 124 Am. St. Rep. 267.

Whether marriage of plaintiff with one of several joint wrong-doers discharges all by operation of law see Turner *v.* Hitchcock, 20 Iowa 310.

1. *Maryland.*— Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583; Gunther *v.* Lee, 45 Md. 60, 24 Am. Rep. 504.

Michigan.— McBride *v.* Scott, 132 Mich. 176, 93 N. W. 243, 102 Am. St. Rep. 416, 61 L. R. A. 445.

Pennsylvania.— Seither *v.* Pennsylvania Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54.

Virginia.— Ruble *v.* Turner, 2 Hen. & M. 38.

Washington.— Abb *v.* Northern Pac. R. Co., 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293.

United States.— Doepfner *v.* Michaelis, 144 Fed. 1021, 74 C. C. A. 680; O'Shea *v.* New York, etc., R. Co., 105 Fed. 559, 44 C. C. A. 601.

See 42 Cent. Dig. tit. "Release," § 64.

2. *Illinois.*— Parmelee *v.* Lawrence, 44 Ill. 405.

Kansas.— Coats *v.* Fletcher, (1908) 98 Pac. 787; Edens *v.* Fletcher, (1908) 98 Pac. 784.

New Hampshire.— Berry *v.* Gillis, 17 N. H. 9, 43 Am. Dec. 584.

New York.— Gilbert *v.* Finch, 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807 [*followed* in Walsh *v.* Hanan, 93 N. Y. App. Div. 580, 87 N. Y. Suppl. 930; Hirschfield *v.* Alsberg, 47 Misc. 141, 93 N. Y. Suppl. 617], where the New York cases are reviewed, the conflict therein noted, and the rule finally settled as stated in the text.

Texas.— El Paso, etc., R. Co. *v.* Darr, (Civ. App. 1906) 93 S. W. 166.

Wisconsin.— Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

England.— Duck *v.* Mayeu, [1892] 2 Q. B. 511, 57 J. P. 23, 62 L. J. Q. B. 69, 67 L. T. Rep. N. S. 547, 4 Reports 38, 41 Wkly. Rep. 56; Price *v.* Barker, 3 C. L. R. 927, 4 E. & B. 760, 1 Jur. N. S. 775, 24 L. J. Q. B. 130, 82 E. C. L. 760.

See 42 Cent Dig. tit. "Release," § 64. And see *infra*, V, E, 2, d.

3. See the statutes of the different states. And see Smith *v.* Gayle, 58 Ala. 600.

b. Existence of Joint Liability. The rule discussed in the preceding section does not apply unless the person released and the person claiming the benefit of the release are jointly liable for the wrong.[4] If the release is given on a consideration received in complete satisfaction of the injury, then of course it is immaterial that the releasee was not a guilty party, nor even claimed to be such. In any event an action against the real tort-feasor is barred, since a person injured is entitled to but one satisfaction.[5] In applying this latter rule a class of cases arises where several persons are implicated in perpetrating a wrong on another and yet are not joint tort-feasors. If, in such a case, the facts are such that the injured person has an election to sue one or more of the wrong-doers severally, his acceptance of satisfaction from one discharges the others also.[6] But if the wrong con-

4. Kentucky, etc., Bridge Co. *v.* Hall, 125 Ind. 220, 25 N. E. 219; Turner *v.* Hitchcock, 20 Iowa 310; Pickwick *v.* McCauliff, 193 Mass. 70, 78 N. E. 730.

Who are joint tort-feasors.— Where several upper owners of land bordering on a stream of water contaminate it or so use it that a lower abutter is damaged, such wrong-doers, if not acting in concert, are several and not joint tort-feasors. Western Tube Co. *v.* Zang, 85 Ill. App. 63; Valparaiso *v.* Moffit, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; Gallagher *v.* Kemmerer, 144 Pa. St. 509, 22 Atl. 970, 27 Am. St. Rep. 673. Where creditors of a debtor employed the same attorney, and separate attachments on their debtor's property are levied on the creditors' claims, neither creditor being in any way interested in the other's claim or its prosecution, they are not joint tort-feasors, where the attachments were improperly levied, so that a release as to one of them would discharge the other as against a claim for damages by the attachment debtor. Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344. If several parties sell intoxicating liquors to another, by means of which he becomes intoxicated, and inflicts injuries upon persons or property, each of the sellers is liable for all the injuries, although there can be but one satisfaction therefor. Kearney *v.* Fitzgerald, 43 Iowa 580. The directors of an insurance company who used the corporate assets to purchase an interest in a mutual insurance company of the surviving directors thereof, although it had no assets or good-will, are not joint wrong-doers with the directors of the selling corporation, who divided the proceeds among themselves, as to the waste thus committed by the purchasing directors. Gilbert *v.* Finch, 72 N. Y. App. Div. 38, 76 N. Y. Suppl. 143 [*affirmed* on other grounds in 173 N. Y. 455, 66 N. E. 133, 93 Am. St. Rep. 623, 61 L. R. A. 807]. A wrong-doer who excavates or obstructs the public highway and the municipality which allows same to exist are joint wrong-doers if injury result to a third person. Johanson *v.* New York, 71 N. Y. App. Div. 561, 76 N. Y. Suppl. 119; Brown *v.* Louisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677. The release of an auctioneer who used fraud to enhance the price of property sold at auction does not discharge the vendor, "for their accountability was separate and resting on different grounds; his (the auctioneer's) on actual falsehood, theirs (the vendors) on the adoption of the benefits of it and the accountability thus arising for it." Veazie *v.* Williams, 8 How. (U. S.) 134, 12 L. ed. 1018. A stevedore who knowingly uses a defective and unsafe appliance furnished by a vessel is a joint wrong-doer with the vessel furnishing such appliance, if injury result to one of his servants by reason of such user. The St. Cuthbert, 157 Fed. 799. Where plaintiff, a railroad brakeman, was injured by coming in contact with a trolley or guy wire belonging to a street car company and alleged to have been negligently permitted to remain in a dangerously low position over a railroad crossing, and the only act of negligence with which the railroad company could be charged was in omitting to warn plaintiff of the presence of the wire or in itself requiring the street car company to raise it, the railroad company and the street car company were not joint tort-feasors, so that the latter was not relieved from liability by a release executed by plaintiff to the railroad company. Pittsburgh R. Co. *v.* Chapman, 145 Fed. 886, 76 C. C. A. 418 [*affirming* 140 Fed. 784].

5. *California.*— Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165.

Indiana.— Cleveland, etc., R. Co. *v.* Hilligoss, (1908) 86 N. E. 485.

Massachusetts.—Brewer *v.* Casey, 196 Mass. 384, 82 N. E. 45; Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107.

Minnesota.— Hartigan *v.* Dickson, 81 Minn. 284, 83 N. W. 1091.

Missouri.— Hubbard *v.* St. Louis, etc., R. Co., 173 Mo. 249, 72 S. W. 1073.

Pennsylvania.— Seither *v.* Philadelphia Traction Co., 125 Pa. St. 397, 17 Atl. 338, 11 Am. St. Rep. 905, 4 L. R. A. 54. But see Thomas *v.* New Jersey Cent. R. Co., 194 Pa. St. 511, 45 Atl. 344.

See 42 Cent. Dig. tit. "Release," § 66.

Contra.— Wagner *v.* Union Stock Yards, etc., Co., 41 Ill. App. 408; Wardell *v.* McConnell, 25 Nebr. 558, 41 N. W. 548; Iddings *v.* Citizens' State Bank, 3 Nebr. (Unoff.) 750, 92 N. W. 578; Atlantic Dock Co. *v.* New York, 53 N. Y. 64; Wilson *v.* Reed, 3 Johns. (N. Y.) 175.

6. Stanley *v.* Leahy, 87 Ill. App. 465; Chapin *v.* Chicago, etc., R. Co., 18 Ill. App. 47; Miller *v.* Beck, 108 Iowa 575, 79 N. W. 344; Aldrich *v.* Parnell, 147 Mass. 409, 18 N. E. 170; Chicago Herald Co. *v.* Bryan, 195 Mo. 574, 92 S. W. 902.

sists not of one tort alone, for which the parties are severally liable, but of separate and distinct, although closely connected, torts, for which the parties are respectively liable, then the acceptance of satisfaction from one in respect to his part in the wrong-doing does not discharge the others from liability for their respective shares in the transaction.[7]

c. Effect of Unsealed Releases and Receipts. Unsealed releases supported by a valuable consideration are generally given by the courts an effect similar to that accorded covenants not to sue, if such effect is consonant with the terms of the instrument, which cannot be varied by parol, and with the intent of the parties as therein expressed,[8] subject to the limitation that the consideration received must be applied *pro tanto* to reduce plaintiff's claim for the benefit of all the co-wrong-doers.[9] The intention of the parties is most frequently expressed by a reservation of a right of action against the tort-feasors other than the releasee.[10] A mere receipt does not operate as a release to extinguish the cause of action, nor yet as a covenant or agreement not to sue, being merely evidence of a payment,[11] and it is a question of fact whether the payment was made in partial or total satisfaction of the injury,[12] and a question of law as to the operation and effect of such a settlement.[13] A seal is said to add nothing to a mere receipt.[14] A receipt in full payment or satisfaction is more than a receipt; it is a bar to all action against the receiptee and also against the other tort-feasors, oral evidence being inadmissible to show that the sum received was intended to be accepted as part and not as full payment.[15] Statutory provisions touching the operation

7. *Iowa.*— Jewett *v.* Wanshura, 43 Iowa 574.

Missouri.— Carson *v.* Smith, 133 Mo. 606, 34 S. W. 855.

New York.— Townsend *v.* Hoppock, 6 Duer 499.

Ohio.— Strabler *v.* Toledo Bridge Co., 11 Ohio Cir. Dec. 87.

Pennsylvania.— Ceraline Mfg. Co. *v.* Anthracite Beer Co., 25 Pa. Super. Ct. 94.

See 42 Cent. Dig. tit. "Release," § 66.

Compare Fox *v.* Michigan Cent. R. Co., 138 Mich. 433, 101 N. W. 624, 68 L. R. A. 336; Joyner *v.* Denny, 45 N. C. 175; Pecos, etc., R. Co. *v.* Lovelady, 39 Tex. Civ. App. 239, 87 S. W. 710.

8. Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583 (where the damages can be accurately ascertained); Matthews *v.* Chicopee Mfg. Co., 3 Rob. (N. Y.) 711; Morris *v.* North American Mercantile Agency Co., 53 Misc. (N. Y.) 574, 103 N. Y. Suppl. 761; Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Carey *v.* Bilby, 129 Fed. 203, 63 C. C. A. 361; Ingels *v.* Mast, 13 Fed. Cas. No. 7,033, 6 Fish. Pat. Cas. 415. *Contra*, Ayer *v.* Ashmead, 31 Conn. 447, 83 Am. Dec. 154. But *compare* Mitchell *v.* Allen, 25 Hun (N. Y.) 543, where the release operated as an accord and satisfaction as to all of several joint tort-feasors.

A seal affixed by an officer of a court without its authority is regarded as a nullity, and the instrument to which it is attached is treated as an unsealed instrument. Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583 (receiver); Winter *v.* Kansas City Cable R. Co., 73 Mo. App. 173 (curator).

9. Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583; Snow *v.* Chandler, 10 N. H. 92, 34 Am. Dec. 140; Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

10. See cases cited *supra*, note 8.

11. Tucker *v.* Baldwin, 13 Conn. 136, 33 Am. Dec. 384.

12. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271.

13. **A compromise with one joint tort-feasor,** containing an express reservation of the right to prosecute the other defendant for a balance in excess of the amount so received, will operate to release the latter if the action be for unliquidated damages. Where, however, the damages are measured under fixed rules of law, and it is therefore easy to determine whether or not the amount paid is full compensation and satisfaction for the injury complained of, whether such agreement will discharge the other tort-feasor only *pro tanto*, *quære*. Gilbert *v.* Timms, 28 Ohio Cir. Ct. 107.

Receipt of money in settlement does not discharge all unless accepted in full satisfaction. Pogel *v.* Meilke, 60 Wis. 248, 18 N. W. 927. And see Murphy *v.* Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. Rep. 583.

14. Gross *v.* Diller, 33 Minn. 424, 23 N. W. 837.

15. *Illinois.*— Illinois Cent. R. Co. *v.* Welch, 52 Ill. 183, 4 Am. Rep. 593.

Iowa.— Snyder *v.* Mutual Tel. Co., 135 Iowa 215, 112 N. W. 776, 14 L. R. A. N. S. 3.

Maine.— Gilpatrick *v.* Hunter, 24 Me. 18, 41 Am. Dec. 370.

Massachusetts.— Goss *v.* Ellison, 136 Mass. 503.

Michigan.— Perry *v.* Michigan Alkali Co., 150 Mich. 537, 114 N. W. 315.

Missouri.— Dulaney *v.* Buffum, 173 Mo. 1, 73 S. W. 125, even though rights be reserved against the others.

and effect of releases and receipts have been passed in quite a number of the states.[16]

d. Effect of Covenant or Agreement Not to Sue. An absolute covenant not to sue one or less than all of several joint tort-feasors never operates as a release, and not even the covenantee can plead it as a defense, for such a covenant does not extinguish the cause of action,[17] but he must seek his remedy in an action on his covenant.[18] *A fortiori* a limited covenant would not so operate.[19] However, an absolute covenant not to sue a sole tort-feasor, is, in order to avoid circuity of action, given effect to even at law as a release;[20] but otherwise if the covenant is limited in its scope.[21] The same principle applies to agreements not to sue.[22] However, whatever consideration is received for the agreement or covenant not to sue must be applied to the payment *pro tanto* of the recovery against the other wrong-doers.[23]

F. Scope and Extent — 1. In General. The scope and extent of a release depend as a rule upon the intent of the parties as expressed in the terms of the particular instrument.[24] A general release ordinarily includes all claims and demands then due and within the contemplation of the parties.[25] A particular

New York.— Coon *v.* Knap, 8 N. Y. 402, 59 Am. Dec. 502.

See 42 Cent. Dig. tit. "Release," § 70.

16. See the statutes of the different states. And see Jordan *v.* McDonnell, 151 Ala. 279, 44 So. 101; Home Tel. Co. *v.* Fields, 150 Ala. 306, 43 So. 711; Smith *v.* Gayle, 58 Ala. 600; Valley *v.* Boston, etc., R. Co., 103 Me. 106, 68 Atl. 635.

17. *Arkansas.*—Texarkana Tel. Co. *v.* Pemberton, 86 Ark. 329, 111 S. W. 257.

California.— Tompkins *v.* Clay St. R. Co., 66 Cal. 163, 4 Pac. 1165.

Illinois.— Chicago, etc., R. Co. *v.* Averill, 224 Ill. 516, 79 N. E. 654 [*affirming* 127 Ill. App. 275]; Chicago *v.* Smith, 95 Ill. App. 335.

Missouri.— Arnett *v.* Missouri Pac. R. Co., 64 Mo. App. 368.

New Hampshire.— Snow *v.* Chandler, 10 N. H. 92, 34 Am. Dec. 140.

New York.— Miller *v.* Fenton, 11 Paige 18.

Ohio.— Bailey *v.* Berry, 3 Ohio Dec. (Reprint) 483, 8 Am. L. Reg. N. S. 270.

Pennsylvania.— Gregg *v.* Hilsen, 12 Phila. 348.

Texas.— Robertson *v.* Trammell, 98 Tex. 364, 83 S. W. 1098 [*denying* writ of error to 37 Tex. Civ. App. 53, 83 S. W. 258], holding that where, pending suit against two joint tort-feasors, plaintiff, in consideration of a certain sum, contracted not to sue one of them, the fact that plaintiff executed a bond to such defendant to indemnify it against all claim by reason of the cause of action alleged did not change the character of the transaction from a covenant not to sue to a release discharging the other tort-feasor.

Vermont.— Sloan *v.* Herrick, 49 Vt. 327; Chamberlin *v.* Murphy, 41 Vt. 110; Brown *v.* Marsh, 7 Vt. 320.

England.— Hutton *v.* Eyre, 1 Marsh. 603, 6 Taunt. 289, 16 Rev. Rep. 619, 1 E. C. L. 618.

See 42 Cent. Dig. tit. "Release," § 71.

18. Russell *v.* Adderton, 64 N. C. 417.

19. See cases cited *supra*, note 17.

20. Ford *v.* Beech, 11 Q. B. 852, 5 D. & L. 610, 12 Jur. 310, 17 L. J. Q. B. 114, 63 E. C. L. 852.

21. See cases cited *supra*, notes 17, 20.

22. *Illinois.*— Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271; Chicago, etc., R. Co. *v.* Averill, 127 Ill. App. 275 [*affirmed* in 224 Ill. 516, 79 N. E. 654].

New York.— See Knapp *v.* Roche, 94 N. Y. 329.

Texas.— Robertson *v.* Trammell, 98 Tex. 364, 83 S. W. 1098.

West Virginia.—Bloss *v.* Plymale, 3 W. Va. 393, 100 Am. Dec. 752.

Wisconsin.— Ellis *v.* Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830.

See 42 Cent. Dig. tit. "Release," § 71.

23. Miller *v.* Fenton, 11 Paige (N. Y.) 18.

24. See *supra*, V, A, 2.

25. *Alabama.*— Scruggs *v.* Bibb, 33 Ala. 481.

Connecticut.— Drake *v.* Starks, 45 Conn. 96; Fuller *v.* Burrel, 2 Root 296; Howel *v.* Seaman, 1 Root 383, holding that a release of all debts, dues, and demands discharges a note given for the interest of another note, although the note for the principal was excepted in the release.

Illinois.— See Martin *v.* Rhea, 32 Ill. App. 636.

Massachusetts.—Clark *v.* Roberts, 180 Mass. 259, 62 N. E. 253.

Mississippi.— Dunlap *v.* Petrie, 35 Miss. 590.

Pennsylvania.— Derrickson *v.* Cady, 7 Pa. St. 27.

See 42 Cent. Dig. tit. "Release," § 74.

General release as including demand for property.—A release from all claims and demands of every name and nature will cover all articles of property known by the releasor at the time to be held and claimed by the releasee as his own. Little Rock, etc., R. Co., *v.* Page, 35 Ark. 304; Moss *v.* Moss, 95 Ill. 449. And see Sawyer *v.* Haley, 6 Gray (Mass.) 243. But see Naglee's Estate, 10 Pa. Co. Ct. 525, where claimant executed to decedent a release of a claim for services as housekeeper; also "any other account, matter or thing

release includes the particular claims specified;[26] and as a rule none others.[27]

whatsoever," and it was held not to preclude claimant from setting up a claim against decedent's estate for stock belonging to her, but standing in his name.

26. *Alabama.*— Murphy *v.* Black, (1906) 41 So. 877.

Connecticut.— Allen *v.* Ruland, 79 Conn. 405, 65 Atl. 138; Rowan *v.* Sharp's Rifle Mfg. Co., 31 Conn. 1.

Illinois.— Gourley *v.* West Chicago St. R. Co., 96 Ill. App. 68.

Indiana.— Hoerger *v.* Citizens' St. R. Co., 36 Ind. App. 662, 76 N. E. 328.

Iowa.— Nason *v.* Chicago, etc., R. Co., (1908) 118 N. W. 751.

Kentucky.—Illinois Cent. R. Co. *v.* Vaughn, 111 S. W. 707, 33 Ky. L. Rep. 906.

Louisiana.— Kelly *v.* Homer Compress Co., 110 La. 983, 35 So. 256.

Michigan.— See Loth *v.* Friederick, 95 Mich. 598, 55 N. W. 369.

New Jersey.— Zdancewicz *v.* Burlington County Traction Co., (Sup. 1908) 71 Atl. 123.

New York.— Conlon *v.* Hearn, 96 N. Y. App. Div. 608, 88 N. Y. Suppl. 570.

Texas.— Missouri, etc., R. Co. *v.* Chumlea, (Civ. App. 1901) 61 S. W. 524.

United States.— U. S. *v.* William Cramp, etc., Ship, etc., Bldg. Co., 206 U. S. 118, 27 S. Ct. 676, 51 L. ed. 984 [*reversing* 41 Ct. Cl. 164].

See 42 Cent. Dig. tit. "Release," § 78.

Effect of release on other obligations.—A father devised a home to one of his daughters, subject to a mortgage held by his brother. The latter, who desired to provide for his brother's family, required his wife, in making a disposition of his property in her favor, to execute a bond to pay to this daughter two thousand dollars, and the balance due on the mortgage. Thereafter, when the daughter knew nothing of the existence of the bond, the uncle's wife executed a release of the mortgage. The uncle had never sought to collect the mortgage. On the death of his wife her administrator paid the two thousand dollars. It was held that the release, as it effected the purpose of the uncle, discharged the obligation in the bond to pay the balance due on the mortgage. Harris *v.* Dodge, 72 Md. 186, 19 Atl. 597. Where a condition was to pay to the obligee fifty dollars within a year or to save him harmless from a certain note, a release from liability in respect of the note was a discharge of the liability to pay the money. Smith *v.* Durell, 16 N. H. 344, 41 Am. Dec. 732.

Conditions of release.— Where plaintiff executed a valid contract of release for injuries, and accepted benefits thereunder, he released defendant from liability for the injuries, although full tender of the payments due under the contract was not made. Johnson *v.* Charleston, etc., R. Co., 58 S. C. 488, 36 S. E. 851. An action against an insurance company for damages sustained through its fraudulent representations, inducing a release of liability for a loss, is in affirmance of the release, and hence does not violate a provision therein that plaintiff will warrant and defend the payment made thereunder against any and all claimants whatsoever. Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919. Plaintiff, having a claim against defendant for personal injuries, executed a written release, in which defendant agreed to employ plaintiff so long as it saw fit, but did not deliver it, but went to work on defendant's oral agreement to employ him for life, and thereafter delivered the release. It was held that, as the written agreement was not complete till delivery, it was subsequent to the oral agreement, and superseded it, so that plaintiff had no rights under the latter. Boggs *v.* Pacific Steam Laundry Co., 171 Mo. 282, 70 S. W. 818. Where, in consideration of wages "during disability," necessary nurse hire and doctor's bills resulting from present disability, and employment when recovered, plaintiff released defendant from liability for an injury sustained, which comsisted of a broken leg, making plaintiff a cripple, the term, "during disability," was not limited to the time that a nurse and doctor were required. American Quarries Co. Lay, 37 Ind. App. 386, 73 N. E. 608.

27. *Arkansas.*— St. Louis Southwestern R. Co. *v.* Stringer, 74 Ark. 425, 86 S. W. 280.

Maryland.— Spalding *v.* Brent, 3 Md. Ch. 411.

New Jersey.— Seymour *v.* Long Dock Co., 20 N. J. Eq. 396 (release of damages for breach of contract held not a release of claim for extra work); Cooper *v.* Cooper, 9 N. J. Eq. 566.

New York.— Noble *v.* Kelly, 40 N. Y. 415; Robinson *v.* Passavant, 73 Hun 138, 26 N. Y. Suppl. 128 [*affirmed* in 147 N. Y. 714, 42 N. E. 725]; Rosboro *v.* Peck, 48 Barb. 92 (holding that a release of a person from "all claims and demands on account of our late partnership" does not bar an action by the releasor against the releasee to recover back the sum of money alleged to have been paid by mistake on a sale by the latter to the former of his interest in a copartnership); Dakin *v.* Williams, 17 Wend. 447 [*affirmed* in 22 Wend. 201].

Pennsylvania.— Reigart *v.* Ellmaker, 14 Serg. & R. 121; Epley *v.* Witherow, 7 Watts 163.

South Carolina.— Sims *v.* Sims, 2 Hill Eq. 61.

United States.— Texas, etc., R. Co. *v.* Dashiell, 198 U. S. 521, 25 S. Ct. 737, 49 L. ed. 1150.

See 42 Cent. Dig. tit. "Release," § 78.

Release of future claims does not release claims already accrued. Sweeney *v.* Montana Cent. R. Co., 25 Mont. 543, 65 Pac. 912. And see MASTER AND SERVANT, 26 Cyc. 1097, note 20.

Effect of release on other obligations.— When two execute a bond for titles, and the obligee afterward accepts a deed executed by

A release executed *pendente lite* ordinarily releases the demand in suit.[28] The release of a claim *ex contractu* does not release an allied claim in tort.[29] A release cannot operate to discharge a promise of which it was the consideration.[30]

2. Demands Not Known or Contemplated. A release ordinarily covers only such claims as were within the contemplation of the parties.[31] Consequently a demand of which the parties were ignorant when the release was given is not as a rule embraced therein.[32] If, however, a demand falls within the fair terms of the release it is discharged thereby, whether or not it was contemplated by the parties,[33] and whether or not they were aware of its existence.[34]

3. Demands Subsequently Accruing or Maturing. Demands originating at the time a release is given[35] or subsequently,[36] and demands subsequently matur-

one of them and a third person, and subsequently releases the obligor who executed the deed from all the covenants therein contained, the release does not affect the liability of the obligors on their bond. Johnson *v.* Collins, 20 Ala. 435. A bond and mortgage were given plaintiff to secure firm debts. After the death of a partner plaintiff compromised with the surviving partner, and gave to him a sealed instrument releasing and discharging him from all several liability on account of the bond and mortgage and all other dealings whatsoever, and from all joint liability on account thereof, and notes and other dealings in connection with the firm, or for any cause whatever, jointly with the decedent or otherwise, but not intending to affect or discharge the liability of the decedent or his estate, or to affect or discharge any other security for any of the demands other than the personal liability of the survivor. After the execution of the bond and mortgage a company purchased a portion of the premises covered thereby, receiving a warranty deed. Thereafter it released the surviving partner and the personal representatives of the decedent from liability on the covenants in the deed. It was held that such release from liability on the covenants in the deed did not release the grantors from their liability to pay the mortgage, and prevent the company from recovering from them any amount which it might be compelled to pay to relieve the land from the lien thereof. Murray *v.* Fox, 39 Hun (N. Y.) 108 [*affirmed* in 104 N. Y. 382].

28. *Indiana.*— Thomas *v.* Wilson, 6 Blackf. 203.

Massachusetts.— Klopot *v.* Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596.

New Hampshire.— See Grafton *v.* Follansbee, 16 N. H. 450, 41 Am. Dec. 736, holding that the vote of a town releasing "from his liabilities to the town in his official capacity relative to the suit" the person who brought it in the name of the town exempts him from all claim for costs therein.

North Carolina.— Stinson *v.* Moody, 48 N. C. 53.

Oregon.—Thomas *v.* Booth-Kelly Co., (1908) 97 Pac. 1078.

Texas.— Chouquette *v.* McCarthy, (Civ. App. 1900) 56 S. W. 956.

See 42 Cent. Dig. tit. "Release," §§ 74, 78.

But see Learned *v.* Bellows, 8 Vt. 79, holding that a receipt "in full of all demands, notes, and accounts, up to this date," executed pending a suit, does not operate as a release proper of such suit; that it will be construed according to the intention of the parties, explained by testimony *aliunde*.

29. Davis *v.* Diamond Carriage, etc., Co., 146 Cal. 59, 79 Pac. 596; Bigbee *v.* Coombs, 64 Mo. 529; Hanson *v.* Fowle, 11 Fed. Cas. No. 6,042, 1 Sawy. 539; Payne *v.* Allen, 19 Fed. Cas. No. 10,855, 1 Sprague 304.

30. Allen *v.* Frisbee, 2 Root (Conn.) 76; Hill *v.* Whidden, 158 Mass. 267, 33 N. E. 526. And see Drake *v.* Starks, 45 Conn. 96.

31. McColl *v.* Jackson Iron Co., 98 Mich. 482, 57 N. W. 578; Grumley *v.* Webb, 44 Mo. 444, 100 Am. Dec. 304; Van Brunt *v.* Van Brunt, 3 Edw. (N. Y.) 14; McIntyre *v.* Williamson, 1 Edw. (N. Y.) 34; Naglee's Estate, 10 Pa. Co. Ct. 525.

32. Cottrell's Estate, 11 Phila. (Pa.) 93; Gist *v.* Gist, Bailey Eq. (S. C.) 343; Church Cooperage Co. *v.* Pinkney, 163 Fed. 653 [*reversed* on other grounds in 170 Fed. 266].

Rule applied to personal injuries subsequently appearing see Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; Texas, etc., R. Co. *v.* Dashiell, 198 U. S. 521, 25 S. Ct. 737, 49 L. ed. 1150 [*affirming* 128 Fed. 23, 62 C. C. A. 531]; Lumley *v.* Wabash R. Co., 76 Fed. 66, 22 C. C. A. 60; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581. And see Ellen *v.* Great Northern R. Co., 17 T. L. R. 338, 49 Wkly. Rep. 395.

33. Palmer *v.* Corbin, 1 Root (Conn.) 271; Sherburne *v.* Goodwin, 44 N. H. 271.

34. Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104; Slayton *v.* Hemken, 91 Hun (N. Y.) 582, 36 N. Y. Suppl. 249; Quebe *v.* Gulf, etc., R. Co., 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734 [*affirming* (Civ. App. 1903) 77 S. W. 442]; Hoffmann *v.* Eastern Wisconsin R., etc., Co., 134 Wis. 603, 115 N. W. 383.

35. Drake *v.* Starks, 45 Conn. 96. And see cases cited *supra*, note 30.

36. *Colorado.*— Mouat *v.* Hildebrand, 15 Colo. 382, 24 Pac. 1042.

Connecticut.—Drake *v.* Starks, 45 Conn. 96.

Illinois.— Ramey *v.* Baltimore, etc., R. Co., 235 Ill. 502, 85 N. E. 639; Lucas *v.* Driver, 17 Ill. 109.

Kentucky.— Limestone Bank *v.* Penick, 2 T. B. Mon. 98, 15 Am. Dec. 136.

Massachusetts.— West *v.* Morris, 98 Mass. 353; Francis *v.* Boston, etc., Milling Corp., 4 Pick. 365; Gibson *v.* Gibson, 15 Mass. 106, 8

ing,[37] are not as a rule discharged by the release, unless expressly embraced therein or falling within the fair import of the terms employed.[38]

4. CONTINGENT OR EXPECTANT INTERESTS. A release given by an heir, devisee, distributee, or legatee is valid, and operates as an extinguishment of his interest in the estate,[39] although the rule was subject to some qualification at common

Am. Dec. 94; Hastings *v.* Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

Mississippi.—Yazoo, etc., R. Co. *v.* Smith, 90 Miss. 44, 43 So. 611, 10 L. R. A. N. S. 1202.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 68 N. J. L. 399, 53 Atl. 449, 1079; Valentine *v.* New Jersey Cent. R. Co., 29 N. J. L. 60.

New York.— New York Nat. Bank *v.* Helm-Campbell Co., 109 N. Y. Suppl. 673.

Pennsylvania.— Robeson *v.* Schuylkill Nav. Co., 3 Grant 186; Evesson *v.* Ziegfeld, 22 Pa. Super. Ct. 79.

Tennessee.— Cocke *v.* Stuart, 7 Peck 137.

See 42 Cent. Dig. tit. "Release," §§ 76, 79.

37. Law *v.* Bentley, 25 Ill. 52; Hatfield *v.* Followay, (Ky.) 113 S. W. 853.

38. *Georgia.*— New *v.* Southern R. Co., 116 Ga. 147, 42 S. E. 391, 59 L. R. A. 115, where a father's release of future claim for injury to child was held to include future claim for death resulting from injury.

Illinois.— Illinois Cent. R. Co. *v.* Allen, 39 Ill. 205.

Kansas.— Kansas City, etc., R. Co. *v.* Hicks, 30 Kan. 288, 1 Pac. 396.

Massachusetts.— Merrifield *v.* Baker, 11 Allen 43.

Missouri.— Equitable F. & M. Ins. Co. *v.* St. Louis, etc., R. Co., 134 Mo. App. 48, 114 S. W. 546.

New York.—Van Rensselaer *v.* Albany, etc., R. Co., 3 Thomps. & C. 620 [*affirmed* in 62 N. Y. 65]; Vedder *v.* Vedder, 1 Den. 257.

Oregon.— Thomas *v.* Booth-Kelly Co., (1908) 97 Pac. 1078.

Pennsylvania.— Currier *v.* Bilger, 149 Pa. St. 109, 24 Atl. 168 (holding that the acceptance of fifteen dollars "in full" for "damage sustained by bull hooking horse" is a bar to an action to recover the value of the horse upon his subsequent death); Updegrove *v.* Pennsylvania, etc., R. Co., 132 Pa. St. 540, 19 Atl. 283, 7 L. R. A. 213; Hoffeditz *v.* South Pennsylvania R., etc., Co., 129 Pa. St. 264, 18 Atl. 125; Henniss *v.* Page, 3 Whart. 275; Pennsylvania R. Co. *v.* Friday, 4 Pennyp. 158; Davis *v.* Wheeling, etc., R. Co., 26 Pa. Super. Ct. 364.

South Carolina.—Kennerty *v.* Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607.

Texas.— Gulf, etc., R. Co. *v.* Thornton, (Civ. App. 1908) 109 S. W. 220.

See 42 Cent. Dig. tit. "Release," §§ 76, 79.

Demands subsequently maturing.—A contract between lessor and lessee, by which they "release and relieve one another from all the terms and obligations" of the lease, "and the same are to stand for naught from this time," releases an obligation of the lessee to pay taxes not then due or payable, although previously assessed. Henry *v.* Chrisinger, 76 Iowa 126, 40 N. W. 121. In a release the words "I acquit him of every demand," discharge the whole debt, as well that part that is to fall due at a future date as that which is past due. Arnold *v.* Park, 8 Bush (Ky.) 3. The principal in a note incurs an obligation to indemnify the surety, which the latter's release to the principal may bear upon as a present right to take effect in the future. Limestone Bank *v.* Penick, 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136. A receipt, for a small sum, "in full of all demands to this date," operates as a discharge from the payment of an existing promissory note, although a present right of action thereon has not accrued. Cash *v.* Freeman, 35 Me. 483.

39. *Illinois.*—Crum *v.* Sawyer, 132 Ill. 443, 24 N. E. 956.

Louisiana.— Haydel *v.* Roussel, 1 La. Ann. 35, holding that a receipt given by an heir for a certain sum, "in full payment of the principal and interest coming to him from a particular succession," will be considered, in the absence of any evidence of a contrary intention, as extending to all his claims as heir of the deceased.

Maine.— Curtis *v.* Curtis, 40 Me. 24, 63 Am. Dec. 651.

Massachusetts.— Daniels *v.* Pratt, 143 Mass. 216, 10 N. E. 166 (holding that the release by an adopted daughter of the testator of any and all claims against his estate is a release of any and all claims against the interest of the testator in the endowment fund of mutual benefit associations of which he was a member); Trull *v.* Eastman, 3 Metc. 121, 37 Am. Dec. 126 (holding that a release of "all the right, title or interest" which the releasor "has, or may have in or unto the estate of his father, whether the same may fall to him by will or heirship," includes further rights to be acquired by the releasor). See, however, Frost *v.* Brigham, 139 Mass. 43, 29 N. E. 217 (holding that a release to an executor by an heir and devisee of "all my right, title, and interest as heir at law . . . or as devisee or legatee" under the will, does not include a note given by the testator to the heir); Lyman *v.* Clark, 9 Mass. 235 (where a distributee, having a demand on an executor for a legacy of £50, and another demand for twenty-five dollars, being her distributive share of a legacy given to her deceased sister, executed a release, with the others entitled to like distributive shares, in which, after reciting that they had received of the executor twenty-five dollars each "as her proportion," etc., they acquit and discharge the executor from all demands on him, and it was held that the release discharged merely the demand mentioned, and not the legacy of £50).

Minnesota.— Taylor *v.* Horst, 52 Minn. 300, 54 N. W. 734.

law, where a release of a possibility is void and a release can operate only on a vested right.[40]

5. Releasor or Releasee Acting in Representative Capacity. A general release given by a person individually does not ordinarily include demands held by him in a representative capacity.[41] On the other hand a release given by a person in his representative capacity does not include demands due him personally.[42]

6. Release of Debt as Affecting Security. The release of a debt ordinarily discharges all collateral securities.[43]

VI. PROCEDURE.

A. Pleading — 1. Anticipating Defense. A release is a matter of defense and should not be pleaded in the complaint in anticipation of defense, but if it is, such allegations may be regarded as surplusage and will not render the complaint bad on demurrer;[44] but if a release is something more than a receipt, and is of such character that only equity can correct or conceal it, plaintiff may anticipate the affirmative defense to be made out by the instrument, and in a separate count ask for its correction or cancellation, or may in his reply raise the issue of fraud, mistake, or surprise.[45]

2. Necessity of Specially Pleading Release — a. Rule Stated. As a general rule a release of a cause of action is not available as a defense unless specially pleaded;[46] but a release need not be specially pleaded in an action on the

New York.— Miller *v.* Emans, 19 N. Y. 384 [*overruling* Edwards *v.* Varick, 5 Den. 664; Jackson *v.* Waldron, 13 Wend. 178; Pelletreau *v.* Jackson, 11 Wend. 110]; Duryea *v.* Messenger, 2 Thomps. & C. 677.

Pennsylvania.— Power's Appeal, 63 Pa. St. 443; Stump's Estate, 2 Woodw. 162. See, however, Dampf's Appeal, 97 Pa. St. 371; Rapp *v.* Rapp, 6 Pa. St. 45; Shepley *v.* Lytle, 6 Watts 500 (holding that a release of a legacy cannot be construed to embrace a release of a devise of real estate, although the money received was in amount greater than the legacy); Reilly *v.* Daly, 2 Pa. Super. Ct. 540 (holding that a release by distributees of the balances determined on the accounting does not release a promise by the executor to pay them certain moneys outside of such balances).

South Carolina.— *Ex p.* Johnson, 25 S. C. 106, holding that where, by a compromise approved by judgment of the circuit court, plaintiff released and discharged all her interest in her father's estate, a fund derived and held by one of the executors as trustee for her under her father's will was also released.

See 42 Cent. Dig. tit. "Release," §§ 3, 81. And see Assignments, 4 Cyc. 15; Deeds, 13 Cyc. 529; Descent and Distribution, 14 Cyc. 131.

40. Crawford *v.* Lockwood, 9 How. Pr. (N. Y.) 547, holding that a release cannot operate on a contingent right or mere possibility.

Assignment of expectancies or mere possibilities see Assignments, 4 Cyc. 15.

41. Wiggins *v.* Norton, R. M. Charlt. (Ga.) 15; Ege's Appeal, 3 Watts (Pa.) 495.

It may do so, however. Sherburne *v.* Goodwin, 44 N. H. 271.

Release by personal representative see also Executors and Administrators, 18 Cyc. 229.

42. Trow *v.* Shannon, 78 N. Y. 446; Hicks *v.* Kenan, 139 N. C. 337, 51 S. E. 941.

43. Smith *v.* Durell, 16 N. H. 344, 41 Am. Dec. 732; Atwater *v.* Underhill, 22 N. J. Eq. 599 (so holding as to collateral security given by a third person); Blodgett *v.* Wadhams, Lalor (N. Y.) 65; National Mut. Bldg., etc., Assoc. *v.* Blair, 98 Va. 490, 36 S. E. 513. And see Pledges, 31 Cyc. 853; Mortgages, 27 Cyc. 1404.

Otherwise if the parties so intend. Pierce *v.* Sweet, 33 Pa. St. 151.

44. Hedlun *v.* Holy Terror Min. Co., 16 S. D. 261, 92 N. W. 31; Trotter *v.* Mutual Reserve Fund Life Assoc., 9 S. D. 596, 70 N. W. 843, 62 Am. St. Rep. 887. And see Gould *v.* Gould, 36 Barb. (N. Y.) 270.

45. Cardwell *v.* Stuart, 92 Mo. App. 586, 111 Mo. App. 478, 86 S. W. 471.

46. *California.*—Grunwald *v.* Freese, (1893) 34 Pac. 73; Coles *v.* Soulsby, 21 Cal. 47.

Florida.— See Punta Gorda Bank *v.* St. Meade State Bank, 52 Fla. 399, 42 So. 846, holding that the defense of a discharge from a contract cannot be raised by demurrer to the declaration where the allegations of the declaration are inconsistent with the discharge, but under such circumstances, the discharge, to be available, must be pleaded.

Louisiana.— Consolidated Fruit Jar Co. *v.* Navra, 33 La. Ann. 995.

Missouri.— Cooke *v.* Kansas City, etc., R. Co., 57 Mo. App. 471.

Montana.— Collier *v.* Field, 2 Mont. 320.

New York.— Rosenthal *v.* Rudnick, 84 N. Y. App. Div. 611, 82 N. Y. Suppl. 1004 (holding that a general release, purporting to discharge defendants from liability under an agreement involved in suit, is not admissible in the absence of any averment of payment or

case,[47] and although a release may be pleaded specially in assumpsit,[48] it may also be given in evidence under a plea of *non assumpsit*.[49]

b. Necessary Averments. An averment that the releasor,[50] or his agent,[51] released the releasee is a mere conclusion of law, and the answer is not good unless the facts are pleaded showing a release. Defendant must set out the consideration upon which the release was made,[52] fully and with certainty,[53] and there must be an averment that the release embraced the matter in controversy,[54]

discharge in the answer); Horton *v.* Horton, 83 Hun 213, 31 N. Y. Suppl. 588; Hitchcock *v.* Carpenter, 9 Johns. 344.

Pennsylvania.— Johnson *v.* Kerr, 1 Serg. & R. 25.

Texas.— Marley *v.* McAnelly, 17 Tex. 658. See 42 Cent. Dig. tit. "Release," § 87.

But in an action by one member of a firm, if the complaint contains averments tending to show that there had been an unauthorized settlement with the other member of the firm, and plaintiff introduces in evidence a release executed by the other member to defendant, plaintiff cannot object that the release has not been pleaded by defendant, who by virtue thereof seeks relief from liability. Hawn *v.* Seventy-Six Land, etc., Co., 74 Cal. 418, 16 Pac. 196.

Where there are joint promisors, a release of one must be pleaded by the party wishing to discharge himself by such act. Harvey *v.* Sweasy, 4 Humphr. (Tenn.) 449. And see Wall *v.* Galvin, 80 Ind. 447, holding that an action by the joint obligees on a bond against the joint obligors will not be dismissed upon the filing by one of the obligees of a motion to dismiss as to himself, and a release by him of one of the obligors, and the other obligors, to avail themselves thereof, must set up the release by answer.

Where a release was given to a trustee of all grantor's interest in the trust fund, it inured to the benefit of the *cestuis que trustent*, and not the trustee individually, and hence the trustee was not obliged to plead or rely on the release in an action between himself and parties claiming an interest in the trust fund. Davison *v.* Tams, 30 Misc. (N. Y.) 156, 63 N. Y. Suppl. 828.

Waiver of failure to plead.— Failure of a plea to set forth the body of the release or its exact words is waived by plaintiff's joining issue thereon. Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440.

47. Brown *v.* Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 237; Mattoon Gas Light, etc., Co. *v.* Dolan, 105 Ill. App. 1 (holding that in actions *ex delicto*, all evidence tending to show that there is no cause of action may be given under the general issue, and this includes a release); Chicago, etc., Coal Co. *v.* Peterson, 45 Ill. App. 507; Shafer *v.* Stonebraker, 4 Gill & J. (Md.) 345; Johnson *v.* Philadelphia, etc., R. Co., 163 Pa. St. 127, 29 Atl. 854 (holding that, although the legislature has termed all actions *ex officio* trespass, and limited the plea to not guilty, with notice as to special matter or equitable defenses, still, in an action which formerly was trespass on the case, a release is admissible under the general issue).

48. See ASSUMPSIT, ACTION OF, 4 Cyc. 350 text and note 68.

49. Barr *v.* Perry, 3 Gill (Md.) 313. And see ASSUMPSIT, ACTION OF, 4 Cyc. 354 text and note 98.

In Michigan, in an action of assumpsit, where the general issue was pleaded before the adoption of circuit court rule 7, providing that an affirmative defense, such as release, must be plainly set forth in a notice attached to defendant's plea, evidence of a release of defendant, executed for a valuable consideration before the commencement of the action, was admissible. Cleveland *v.* Rothschild, 132 Mich. 625, 94 N. W. 184.

50. Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Renihan *v.* Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514 (holding that where the answer set forth certain acts of defendants in relation to the subject-matter of the complaint, and alleged that the same were "taken and received" by plaintiffs in full and perfect satisfaction of all wrongs and injuries incident thereto, there being no averment that plaintiffs agreed to accept such acts in satisfaction, a demurrer should be sustained to this part of the answer, as a statement of a mere conclusion); Kelso *v.* Fleming, 104 Ind. 180, 3 N. E. 830; Glasscock *v.* Hamilton, 62 Tex. 143.

A plea of release to a bill for an account should contain an averment that an account has been rendered and payment made, where those facts are denied in the bill, although the release recites an account and payment. Fish *v.* Miller, 5 Paige (N. Y.) 26.

51. Marshall *v.* Mathers, 103 Ind. 458, 3 N. E. 120.

52. Maness *v.* Henry, 96 Ala. 454, 11 So. 410; Swan *v.* Benson, 31 Ark. 728; Franklin Bank *v.* Severin, 124 Ind. 317, 24 N. E. 977; Cameron *v.* Warbritton, 9 Ind. 351 (holding that where, in an action by a surety against the principals in a promissory note, to recover money paid to their use, one of defendants pleads a release by the surety, a release importing a consideration must be set forth); Hale *v.* Grogan, 99 Ky. 170, 35 S. W. 282, 18 Ky. L. Rep. 46.

In setting up a verbal release, the pleader must set out its terms and consideration that the court may judge of its validity. Hosier *v.* Eliason, 14 Ind. 523.

If the consideration was executory the releasee must plead facts showing that he has complied with his agreement. Scott *v.* Scott, 105 Ind. 584, 5 N. E. 397.

53. Chicago, etc., R. Co. *v.* Miller, 76 Fed. 439, 22 C. C. A. 264.

54. Voiles *v.* Beard, 58 Ind. 510; Hale *v.* Grogan, 99 Ky. 170, 35 S. W. 282, 18 Ky.

and an affidavit of defense setting up a release is insufficient unless either a copy of the release is annexed, or its contents are disclosed, or there are some particulars from which its applicability can be determined.[55] In those states in which a seal is necessary to a release,[56] in pleading a release it is held that it must be alleged to be under seal.[57] It is not necessary to allege in the answer that the release was obtained freely and without fraud, unless the bill contains allegations of fraud which, if true, would avoid the release.[58]

c. Release After Action Brought. It is held to be a general rule that a release of a party to a suit, made during its pendency and after the issues are joined, cannot operate as a defense, unless it be pleaded specially *puis darrein* continuance,[59] alleging the place where the release was made, and the day of the last continuance;[60] but a general release given after the commencement of a suit need not be pleaded *puis darrein* continuance, unless a plea has been before filed in the action, nor need it be pleaded in bar of the further maintenance of the suit, but may be pleaded in bar generally,[61] and in like manner as a release need not be spe-

L. Rep. 46; Armour *v.* Edison Electric Illuminating Co., 115 N. Y. App. Div. 57, 100 N. Y. Suppl. 609, holding that in an action by a consumer of electricity against the electric company to recover sums paid by plaintiff in excess of the charges made by defendant to others for similar service, an allegation of the answer that prior to the action plaintiff settled and adjusted all accounts of defendant against plaintiff was insufficient as an allegation of a release. But see Cleveland, etc., R. Co. *v.* Hilligoss, (Ind. 1908) 86 N. E. 485 (holding that an answer in an action against a steam railway company for injuries to a street car conductor in a collision with his car at a grade-crossing, which alleges that the accident resulted from the joint negligence of the street railway company and the steam railway company, and that plaintiff for a valuable consideration released the street railway company from liability, and which sets forth the release which recites that plaintiff in consideration of the agreement of the street railway company to re-employ him released the street railway company from all liability, shows at least the semblance of a right of action in favor of plaintiff against the street railway company, and bars the action as against a demurrer); Mandt Wagon Co. *v.* Fuller, etc., Mfg. Co., 120 Wis. 258, 97 N. W. 958.

55. Reilly *v.* Daly, 159 Pa. St. 605, 28 Atl. 493.

56. See *supra*, II, B.

57. Griggs *v.* Voorhies, 7 Blackf. (Ind.) 561 (holding that in debt on a written obligation a plea of release should allege that the release was under seal); Bender *v.* Sampson, 11 Mass. 42. But see Illinois Cent. R. Co. *v.* Read, 37 Ill. 484, 87 Am. Dec. 260, holding that a release *ex vi termini* imports a seal which need not therefore be pleaded.

58. McClane *v.* Shepherd, 21 N. J. Eq. 76.

Where a bill charges misrepresentation and fraud in procuring a release, and defendant puts in a plea and answer, and in his plea insists on the release in bar, without noticing the allegation of fraud, although in the answer it was fully answered and denied, the plea is bad. Allen *v.* Randolph, 4 Johns. Ch. (N. Y.) 693.

On a bill to set aside a release for fraud in the procurement of it, a plea of the release must be supported by an answer denying directly and issuably the circumstances of fraud charged, but in the case of negative averments as to matters not alleged to be the act of the releasee, or where from the nature of the case he cannot be supposed to have any personal knowledge of the subject it is sufficient for him to deny the facts charged, upon his belief only. Bolton *v.* Gardner, 3 Paige (N. Y.) 273.

59. Smithwick *v.* Ward, 52 N. C. 64, 75 Am. Dec. 453.

A motion to dismiss is an improper mode of raising the defense of a release after defendant has answered. Miller *v.* Fenton, 11 Paige (N. Y.) 18.

Under a statute abolishing special pleading, a general release of an action given after the commencement of the action need not be pleaded specially, but may be set forth in a brief statement. Wisheart *v.* Legro, 33 N. H. 177.

60. Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237.

61. Wisheart *v.* Legro, 33 N. H. 177 (holding that where defendant pleaded the general issue he might file therewith a brief statement, setting forth a general release and settlement of the action since the last continuance, it appearing that no plea had been previously filed); Kimball *v.* Wilson, 3 N. H. 96, 14 Am. Dec. 342.

Costs as condition to order allowing supplemental answer alleging release.—An order allowing defendant to file a supplemental answer alleging a release of the cause of action after issue joined, and after the case has been on the trial calendar, and continued, is a proper exercise of discretion (Guliano *v.* Whitenack, 3 Misc. (N. Y.) 54, 22 N. Y. Suppl. 560), and under some circumstances its refusal may be improper, even after the case has been opened to the jury (Seehorn *v.* Big Meadows, etc., Wagon Road Co., 60 Cal. 240, holding that where, after a case had been opened to the jury, defendant's counsel sought to file a supplemental pleading, setting up a

cially pleaded in case[62] or assumpsit,[63] so a release obtained after suit brought can be given in evidence on the plea of *non assumpsit*, without the necessity of filing a plea *puis darrein* continuance,[64] and in an action on the case matter occurring after issue joined on the plea of the general issue may be shown in evidence as constituting a release, without a plea *puis darrein* continuance.[65] Although a term has intervened between the time of the giving of the release and the time of pleading it, a plea *puis darrein* continuance, pleading the release, may nevertheless be filed;[66] and a release given by a party after the first decision of the case and a review of it in the court above may be set up by an amended answer, and taken advantage of on a subsequent hearing in the court below;[67] but when a plea of release *puis darrein* continuance is adjudged bad on demurrer, a repleader on terms is discretionary with the court.[68]

3. Effect of Pleading Release. The pleading and filing of a release of an alleged debt by the alleged debtor constitutes an admission that the debt existed when the release was executed.[69]

4. Reply or Demurrer to Answer. A plea of release of a debt sued on, which avoids the action, and which plaintiff is not bound to prove in the first instance, is new matter, and, if set forth in the answer, must be met by reply or demurrer,[70] unless another mode of meeting it, as by affidavit, is provided by statute,[71] and

release made since the last continuance without the knowledge of either plaintiff's or defendant's attorneys, but which the latter learned of on the preceding day, the refusal of the presiding judge to allow the release to be pleaded was erroneous, and that such exercise of his discretion would be reversed and set aside), but such an order should be conditioned on the payment of costs to the date of the order (Guliano *v.* Whitenack, *supra*).

62. See *supra*, VI, A, 2, a.

63. See *supra*, VI, A, 2, a.

64. Nettles *v.* Sweazea, 2 Mo. 100; Lyon *v.* Marclay, 1 Watts (Pa.) 271.

65. Chicago *v.* Babcock, 143 Ill. 358, 32 N. E. 271 [*reversing* 41 Ill. App. 238 (*followed* in Ryan *v.* Baltimore, etc., R. Co., 60 Ill. App. 612)]; G. H. Hammond Co. *v.* Papke, 91 Ill. App. 563 [*affirmed* in 192 Ill. 631, 61 N. E. 910] (holding that an action on the case for personal injuries is an exception to the general rule of the common law that a matter of defense which arises after suit brought and after plea is filed, and either before replication or after issue joined, must be pleaded *puis darrein* continuance; and hence a release for such injuries, although not specially pleaded, may be given in evidence under the general issue); Lyon *v.* Marclay, 1 Watts (Pa.) 271.

66. Nettles *v.* Sweazea, 2 Mo. 100; Lyon *v.* Marclay, 1 Watts (Pa.) 271.

67. Hennings *v.* Connor, 4 Bibb (Ky.) 298.

68. Field *v.* Cappers, 81 Me. 36, 16 Atl. 328, 10 Am. St. Rep. 237; Augusta *v.* Moulton, 75 Me. 551.

69. Bement *v.* Ohio Valley Banking, etc., Co., 99 Ky. 109, 35 S. W. 139, 18 Ky. L. Rep. 37, 59 Am. St. Rep. 445.

70. Hoeger *v.* Citizens' St. R. Co., 36 Ind. App. 662, 76 N. E. 328; Cordner *v.* Roberts, 58 Mo. App. 440. But see Simeoli *v.* Derby Rubber Co., 81 Conn. 423, 71 Atl. 546 (holding that in a servant's action for injuries, plaintiff was not required to plead the invalidity of a release of damages pleaded on a hearing in damages after default); Dambaum *v.* Schulting, 4 Hun (N. Y.) 50, 6 Thomps. & C. 251 (holding that a reply is not necessary to enable plaintiff to show that a release of the claim sued on, set up in the answer, was fraudulently procured).

Where a partner signs a general release to a debtor of the firm, and such release is pleaded in an action brought by partners for their joint demands, and they intend to show that it applied only to the separate demands of the subscribing partner, they must allege such fact. Emerson *v.* Knower, 8 Pick. (Mass.) 63.

Verification of replication — Rejoinder — Similiter.—A replication to a plea setting up a release, which charges fraud and covin in obtaining the same, should conclude with a verification rather than to the country; and in order that issue be formally made thereon, a rejoinder should be interposed by defendant and a similiter added by plaintiff. Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560].

Confession of execution.—A reply in avoidance of a release set up in the answer must confess the execution of such release, and that directly and not hypothetically, and a reply alleging that "if" the release was given it was obtained by fraud, etc., is bad. Heck *v.* Missouri Pac. R. Co., 147 Fed. 775.

Reply sufficiently pleading denial of execution of release see Indiana Union Traction Co. *v.* McKinney, 39 Ind. App. 86, 78 N. E. 203.

71. Petersen *v.* Taylor, (Cal. 1893) 34 Pac. 724, decided under Code Civ. Proc. § 448, and holding that failure to deny the execution of the release by affidavit admits the genuineness and due execution of the release, and it must be taken to be what it appears to be on its face.

In Arkansas, Kirby Dig. § 3108, which provides that where a writing purporting to have been executed by one of the parties is referred

the replication must be special to entitle plaintiff to assail it for fraud or duress, or to show *non est factum*.[72] An averment in a replication against the express words of a written discharge, as that they do not mean what they say, is bad on demurrer;[73] but a reply that the release was without consideration is good,[74] as is also a reply alleging that the release was obtained by fraud,[75] even without setting out the particulars of the fraud, according to some cases;[76] and a reply which, while not expressly alleging fraud in procuring the release, shows matter sufficient to base such an inference upon, is good.[77] But to a plea of release under seal, a replication setting up fraud is bad, since such fraud, if it induced plaintiff to sign a paper different from the one he intended to sign, may be shown under a replication of *non est factum*, while, if it merely deceived plaintiff as to his rights, it constitutes no legal defense;[78] and where an answer alleges that plaintiff, before the action was brought, released all causes of action which he might have against

to in and filed with the pleading, it may be read as genuine against such party unless he denies its genuineness by affidavit before trial begun, is held to merely establish a rule of evidence and not to bar plaintiff from contesting the genuineness of a release pleaded as a defense to the action, although he fails to file an affidavit denying the same. St. Louis, etc., R. Co. *v.* Smith, 82 Ark. 105, 100 S. W. 884.

72. Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440; Denniston *v.* Mudge, 4 Barb. (N. Y.) 243 (holding that a party to a release, who means to deny it when it is set up by the other party as a defense, must reply *non est factum*; and if he puts in a replication denying that the legal operation and effect of the release are such as to discharge defendants, the replication is demurrable); Chouquette *v.* McCarthy, (Tex. Civ. App. 1900) 56 S. W. 956.

Plaintiff need not first deny its execution under oath, in order to show that the release was executed through fraud or mistake, where it was pleaded generally, without stating whether it was in writing. O'Maley *v.* Garriott, (Tex. Civ. App. 1899) 49 S. W. 108.

73. Fuller *v.* Burrel, 2 Root (Conn.) 296.

74. Harris *v.* Boone, 69 Ind. 300.

Non-responsive reply of want of consideration.—An answer to a suit for conversion, that the property had been assigned and delivered to defendants in the lifetime of the decedent, and that he had executed releases to them, is not met by a reply that the releases were without consideration. Gerard *v.* Jones, 78 Ind. 378.

75. Wells *v.* Morrison, 91 Ind. 51.

Replication of fraud held sufficiently definite and certain see Olston *v.* Oregon Water Power, etc., Co., (Oreg. 1908) 96 Pac. 1095, 97 Pac. 538; International, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1901) 65 S. W. 885 [*affirmed* in 95 Tex. 346, 67 S. W. 315].

On a bill for an account to which a release is pleaded, the issue of fraud cannot be raised by special replication, but the proper practice is held to be to permit complainant to amend the bill, in case he wishes to raise the issue of fraud, by inserting allegations which will raise such issue, and to require defendant to answer them. McClane *v.* Shepherd, 21 N. J. Eq. 76.

Such replication admits the execution of the release, and plaintiff's intention in executing the same is immaterial, and the effect thereof can only be overcome by proof of facts and circumstances surrounding the execution which show such fraud and covin as will vitiate its legal effect. Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560].

Release set aside for misrepresentation and fraud under prayer for general relief see Williams *v.* Smith, 7 L. J. Ch. O. S. 129.

76. Hoitt *v.* Holcomb, 23 N. H. 535; McHenry *v.* McHenry, 14 Leg. Int. (Pa.) 292, holding that where defendant in assumpsit set up an accord and satisfaction and a release as a defense, a replication that the satisfaction and the release were obtained by fraud is sufficient without averring the particulars, the fraud in obtaining the instrument being a complete defense. *Contra*, Friedburg *v.* Knight, 14 R. I. 585; Harris *v.* Bottum, 81 Vt. 346, 70 Atl. 560.

A reply alleging fraud of defendant's agent in obtaining the release, which fails to particularly designate the agents, is insufficient. Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

77. Bean *v.* Western North Carolina R. Co., 107 N. C. 731, 12 S. E. 600.

Insufficient averment of fraud.—A replication to a plea setting up a release is not sufficient, where its material averment is that such release was signed in reliance on alleged false and fraudulent representations that such instrument was nothing more than a receipt for a specific sum, inasmuch as such averment is not the equivalent of an allegation that plaintiff would not have signed such instrument, had he known that it was something more than a simple receipt. Miller *v.* Mutual Reserve Fund Life Assoc., 113 Ill. App. 481, holding that a replication to a plea, setting up a release, to be good should aver facts from which it can be inferred that plaintiff's signature was obtained by means of a trick or device, by which he was led to sign the paper, which he did not intend at the time to execute; and such replication likewise should show that the signature was obtained by fraud, without negligence of the signer.

78. Shampeau *v.* Connecticut River Lumber Co., 42 Fed. 760.

defendant, including the cause of action sued on, a reply that such release related to a certain cause of action other than the one in suit, of which plaintiff was ignorant at the time, is not sufficient to limit the legal effect of the release, since plaintiff, for that purpose, must show either mutual mistake, or mistake on his part and fraud on the part of defendant.[79] Plaintiff cannot reply both fraud and *non est factum*.[80]

5. Issues, Proof, and Variance. The general rules relating to issues,[81] proof,[82] and variance,[83] apply to the pleading of a release, and this proof must correspond to the issues and support the allegations.[84]

B. Evidence — 1. Presumptions and Burden of Proof. As in other cases of affirmative defense,[85] the burden of proving a release is upon defendant,[86] which is sustained by proving the consideration, plaintiff's signature to the release, and its delivery to defendant.[87] If after defendant has established this *prima facie* defense, or after execution and delivery of the release are admitted by plaintiff,[88] plaintiff would avoid the operation and effect of the release as a defense,

Setting up fraud by replication to plea of release in action at law see *supra*, IV, C, 8, b.

79. Walbourn *v.* Hingston, 86 Hun (N. Y.) 63, 33 N. Y. Suppl. 117.

80. Wright *v.* Wilmington City R. Co., 2 Marv. (Del.) 141, 42 Atl. 440.

81. See Pleading, 31 Cyc. 670.

In partition by the children of decedent's first wife against the second wife and her children of land left by decedent, an intestate, where defendants answered that in a settlement between plaintiffs and decedent he had conveyed to them certain lands in discharge of all other interest in the estate, and that the second wife had joined in the conveyance of her one-third interest therein, and plaintiffs replied, admitting the agreement and deed, but alleged that the second wife had exercised undue influence over decedent, and that by such deed they received but a small part of the estate, an issue was presented which should be determined on the evidence. Brown *v.* Brown, 139 Ind. 653, 39 N. E. 152.

Proof of execution.— If, in a personal injury action, the release pleaded by defendant came within Ala. Code 1896, § 1802, making it unnecessary to prove the execution of an instrument pleaded in bar unless plaintiff puts the execution in issue, the section was inapplicable to plaintiff's replications, which did not deny the execution of the release, but merely set up plaintiff's incapacity at the time of the alleged execution. Kelly *v.* Louisville, etc., R. Co., 154 Ala. 573, 45 So. 906.

82. See Pleading, 31 Cyc. 674.

83. See Pleading, 31 Cyc. 700.

84. Willett *v.* White, 141 Mass. 61, 7 N. E. 160, holding that in an action on a note given in consideration of an outstanding claim to real estate conveyed to the payee, a release of the claim offered at the trial is not competent, unless the pleadings allege an agreement by plaintiff to accept such release. See Christianson *v.* Chicago, etc., R. Co., 61 Minn. 249, 63 N. W. 639; Webb *v.* Steele, 13 N. H. 230 (holding that where defendant pleaded a release from plaintiff since the last continuance, and the replication averred that the release was obtained by the fraud and covin of defendants, and upon this issue was joined, it was competent under this issue to show that the action was prosecuted for the benefit of third persons, and that plaintiff's release was a fraud on them); Anderson *v.* Johnson, 3 Sandf. (N. Y.) 1 (holding that where defendant pleaded a release in bar, and plaintiff by replication alleged that the release was obtained from plaintiff by fraud, plaintiff could only prove fraud in its execution, such as a fraudulent reading or substitution of papers, and he could not prove that the release was obtained from him in fraud of the rights of his attorney, who was equitably entitled to the demand released).

An allegation that plaintiff duly released and discharged defendant is supported by proof of an instrument and acts which work an estoppel, although they do not amount to a technical release. Cornell *v.* Masten, 35 Barb. (N. Y.) 157.

Under the replication of non est factum to the plea of a release, plaintiff cannot give evidence of fraud in obtaining the release. Bradley *v.* Grosh, 8 Pa. St. 45. *Contra*, Michigan Mut. L. Ins. Co. *v.* Vierra, 116 Ill. App. 476.

If the answer sets up a release under seal, and the release is introduced in evidence, plaintiff may show that the release was obtained by fraud, although he filed no replication. Lyon *v.* Manning, 133 Mass. 439.

85. See, generally, Evidence, 16 Cyc. 929.

86. Brooks *v.* Rogers, 101 Ala. 111, 13 So. 386 (holding that where, in trover for trees cut by a tenant, the tenant claims that the landlord has released the cause of action, the burden of proving the same is on the tenant); Perry *v.* O'Neil, 78 Ohio St. 200, 85 N. E. 41. And see Scovel *v.* Gill, 30 La. Ann. 1207.

A mere discharge signed by both husband and wife, when the latter acknowledges the receipt of a sum of money, is not sufficient to shift the onus of a negative proof on the wife. Breaux *v.* Le Blanc, 16 La. Ann. 145.

87. Perry *v.* O'Neil, 78 Ohio St. 200, 85 N. E. 41.

Necessity of consideration for release see *supra*, III, A.

88. Hawes *v.* Burlington, etc., R. Co., 64 Iowa 315, 20 N. W. 717 (holding that where a release pleaded as an affirmative defense is

the burden is upon him to prove the facts rendering it void, such as fraud in its execution or procuring,[89] want of consideration,[90] or mental incapacity of the releasor,[91] and having executed and delivered the release, the releasor is presumed to have done so with knowledge of its contents and import, and the burden is on him to prove that at the time he signed the release he did not understand the effect of it.[92] Where the release is in writing consideration,[93] delivery,[94] and

admitted by plaintiff, but he pleads matter which, if true, avoids it, it is error to instruct the jury that the burden of proof is on defendant, and the error is not cured by another instruction that as to the release the jury must find for defendant unless plaintiff established that it had been procured by fraud); Wright *v.* Northampton, etc., R. Co., 125 N. C. 1, 34 S. E. 70; Perry *v.* O'Neil, 78 Ohio St. 200, 85 N. E. 41 (holding that if the execution and delivery of a release of a claim for personal injuries are admitted, the burden of proving it void is upon the releasor).

89. *Illinois.*— Davis *v.* Weatherly, 119 Ill. App. 238; Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560]; St. Louis, etc., Electric R. Co. *v.* Erlinger, 112 Ill. App. 506; Coates *v.* Miller, 99 Ill. App. 227; East St. Louis Packing, etc., Co. *v.* Hightower, 9 Ill. App. 297.

Kansas.— See Scandinavian Coal, etc., Co. *v.* Whitaker, 40 Kan. 123, 19 Pac. 330, holding that where, in an action of tort, defendand pleaded a settlement, payment, and release of all damages, setting forth a copy of the receipt, and plaintiff admitted the execution of the receipt, and alleged that it had been procured by fraud and misrepresentation, but his reply was not verified, without offering some evidence to break the *prima facie* force of the receipt, he could not recover.

New York.— Pugsley *v.* Sumner, 14 Daly 427, 14 N. Y. St. 691, holding that in an action to set aside a conveyance as procured by fraud, where the defense set up is a release executed by plaintiff for which she received a valuable consideration and under which she rested for four years, the burden is on plaintiff to show that the release was procured by fraud.

Ohio.— Perry *v.* O'Neil, 78 Ohio St. 200, 85 N. E. 41.

Texas.— Houston, etc., R. Co. *v.* Milam, (Civ. App. 1900) 58 S. W. 735. (1901) 60 S. W. 591.

See 42 Cent. Dig. tit. "Release," § 100.

90. Davis *v.* Weatherly, 119 Ill. App. 238; St. Louis, etc., Electric R. Co. *v.* Erlinger, 112 Ill. App. 506; Missouri, etc., R. Co. *v.* Pennington, (Tex. Civ. App. 1895) 32 S. W. 706.

91. Chicago, etc., R. Co. *v.* Mills, 91 Ill. 39; Staples *v.* Wellington, 58 Me. 453 (holding that one attempting to avoid the effect of a written release, on the ground that the releasor was subject to a temporary delusion at the time it was executed, must show its existence at such time, and that it affected his capacity to make the release); Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403 (holding that, in an action for personal injuries, plaintiff having executed a release, but contending that he was mentally incapacitated at the time, an instruction that the burden of proving, by a preponderance of evidence, that the release was invalid, is on plaintiff, is correct, and it is not error to refuse to charge that the law presumes the release valid, and that, unless plaintiff establishes its invalidity, the jury should find for defendant; as sanity is a presumption of fact, and not of law).

92. Davis *v.* Weatherly, 119 Ill. App. 238; Atchison, etc., R. Co. *v.* Vanordstrand, 67 Kan. 386, 73 Pac. 113 (holding that one who without reading it signs a written release will be presumed to have executed the instrument with full knowledge of its contents, his only execuse for not reading it being that he was somewhat hurried); Addyston Pipe, etc., Co. *v.* Copple, 94 Ky. 292, 22 S. W. 323, 15 Ky. L. Rep. 129; Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; Crossley *v.* The Louis, 6 Fed. Cas. No. 3,436, 4 Ben. 510.

That the releasor could not read or understand its contents is not of itself sufficient to avoid the release, since his signing, in such case, raises the presumption of gross negligence, which he has the burden to disprove. Albrecht *v.* Milwaukee, etc., R. Co., 87 Wis. 105, 58 N. W. 72, 41 Am. St. Rep. 30.

93. Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. 244; Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712, holding also that the court is not bound to believe an interested witness as against such a presumption if the latter satisfies his mind.

But the mere fact that a scroll was placed after releasor's name does not raise a presumption of consideration which cannot be rebutted by evidence that he received no consideration. Boutten *v.* Wellington, etc., R. Co., 128 N. C. 337, 38 S. E. 920.

In New York the presumption of a sufficient consideration attached to the release from liability for rent, under seal, cannot be rebutted, not being within the Code Civ. Proc. § 840, providing that a seal on an executory instrument is only presumptive evidence of a sufficient consideration. Finch *v.* Simon, 61 N. Y. App. Div. 139, 70 N. Y. Suppl. 361.

94. Fitch *v.* Forman, 14 Johns. (N. Y.) 172, holding that where a writing under seal indorsed on the original agreement releasing the covenantor from the performance within the time mentioned in the agreement, it was no objection to such release that it was indorsed on the agreement, and remained after its execution with the covenantor; since, if

acceptance [95] of the release are presumed, and a writing, purporting to be a release, is presumed to be technically so; but that presumption may be rebutted by positive proof.[96] Defendant who relies upon a release executed by an agent has the burden of proving the authority of the agent to execute it; [97] and where there is an agency between the releasor and releasee involving an element of trust, the bare proof of the relation raises a presumption adverse to the release, casting the burden upon the releasee to show that the release was procured without fraud and undue influence,[98] and the same rule has been held to apply to other relations of trust between the parties raising a presumption of fraud; [99] but the mere fact that a party to the release has sustained a confidential relation to the other party in transactions to which the release had reference does not subject him to the burden of proving that the instrument was executed in good faith.[1] Where defendant pleads a release by agreement under seal, making profert, and plaintiff replies that the agreement was delivered in escrow to a third person conditioned upon the payment of a sum of money by defendant, which defendant did not pay, whereby the agreement became void, the burden is on defendant to prove execution of the agreement, and it is not necessary for plaintiff to show conditional delivery as part of his case;[2] but where an instrument purporting to release a claim was actually delivered, the burden of proving that it was delivered with the intent that it should not take effect absolutely rests on the party attacking it.[3] Each of several joint obligees who unite in a common acquittance is presumed to have received his share according to the contract.[4]

2. Admissibility. The general rules of the law of evidence relating to admissibility of evidence [5] apply on an issue whether plaintiff released his claim against defendant. The evidence must be relevant,[6] and as a general rule plaintiff may

a formal delivery was necessary, it would be presumed to have been made.

Delivery on the day of the date of the release is presumed, and the presumption is not affected by the fact that the acknowledgment annexed to it was taken on a subsequent day, it not appearing that the releasor was then in possession thereof. Crager *v.* Reis, 16 Daly (N. Y.) 450, 12 N. Y. Suppl. 729.

95. Lee *v.* Ferguson, 5 La. Ann. 532.

96. Dillingham *v.* Estill, 3 Dana (Ky.) 21.

97. Knoche *v.* Whiteman, 86 Mo. App. 568, holding that evidence that an attorney executing a release was attorney merely for collection of the debt, or that he was in possession of the evidence of indebtedness, will not show authority to release without payment of the debt.

98. Ferris *v.* Ferris, 34 N. Y. App. Div. 144, 54 N. Y. Suppl. 523, holding that a son claiming under a release executed by his mother, discharging him from all liability for funds received by him while acting as her agent in managing her deceased husband's estate, has the burden of showing that the release was procured without fraud or undue influence.

99. Sears *v.* Shafer, 1 Barb. (N. Y.) 408 [*affirmed* in 6 N. Y. 268], holding that where decedent willed a farm to his three sons generally without words of limitation, and left other property to his daughter, and thereafter the daughter executed a release of the farm to each of the brothers, reciting that the parties believed that decedent intended to devise in fee, on a bill to set aside the release for fraud and undue influence, the fact that the release was prepared at the instance of one of the brothers, and that the daughter knew nothing about it until it was presented for execution, raised a presumption of fraud, although the presumption might be rebutted by proof.

1. Pugsley *v.* Sumner, 14 Daly (N. Y.) 427, 14 N. Y. St. 691.

A release by a legatee of his interest in the estate to the executor for an apparently adequate consideration does not raise a presumption of fraud. Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. 784 [*affirming* 69 Hun 115, 23 N. Y. Suppl. 200].

The act of executors in procuring a release of dower from the widow, who is also an executrix, will not be presumed to be fraudulent, in an action to set aside the release, where they had no personal interest in the matter and were not trustees for her. Ferris *v.* Ferris, 10 Misc. (N. Y.) 320, 30 N. Y. Suppl. 982.

2. Light *v.* Woodstock, etc., R., etc., Co., 13 U. C. Q. B. 216.

3. Davison *v.* Tams, 30 Misc. (N. Y.) 156, 63 N. Y. Suppl. 828.

4. Marty *v.* His Creditors, 5 Rob. (La.) 193.

5. See Evidence, 16 Cyc. 821 *et seq.*

6. See cases cited *infra*, this note.

Evidence held irrelevant.— On an issue as to whether plaintiff released his claim against defendant corporation for salary in consideration of the purchase by certain persons of stock in the corporation, evidence as to what price was paid for the stock by such persons, what amount was still owing thereon, and to whom payment was made, and whether they

prove any fact tending to impeach the alleged release.[7] Upon an issue of delivery the release itself is admissible;[8] but not evidence of private instructions given to the notary taking the acknowledgment of the release, as to the terms of its delivery.[9] While it is a general rule that parol evidence is not admissible to vary or contradict a written release,[10] and while parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of executing the release to be embraced in the transaction,[11] parol evidence is admissible which, while not changing the nature of the contract, shows the reason of the execution of the release and points out its use and application, as that it was intended for defendant's benefit and was supported by a consideration;[12] and where a promise to give plaintiff employment, with a payment of money, formed the consideration for plaintiff's release, the fact that the written release executed by him recites only the money consideration does not prevent plaintiff from proving the parol contract for employment;[13] but it is held that to render such evidence admissible the mistake in admitting the additional consideration must be alleged in the answer.[14] Where fraud is alleged, a broad latitude is given the party alleging it, and the mental condition of the party alleged to have signed a release, and the representations and inducements held out to him by the adverse party, may be examined into, and all testimony and all evidence of the circumstances connected with the transaction should be admitted;[15] but in

agreed to pay corporate debts, and what such debts were. Florence Cotton, etc., Co. *v.* Field, 104 Ala. 471, 16 So. 538. On an issue as to the validity of a release of plaintiff's injuries, evidence by plaintiff's attorney that he had no knowledge of the release prior to the filing of defendant's answer, and did not know that defendant claimed a release. Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506.

7. Christianson *v.* Chicago, etc., R. Co., 61 Minn. 249, 63 N. W. 639, holding that where upon the trial defendant gave in evidence a written release signed by plaintiff, who, in rebuttal, testified that he knew the name, but not the paper, and that he never saw the release until it was produced at the trial, and offered to prove that he never settled or released his cause of action, or ever talked about it with any of defendant's agents; that defendant had made him a present of twenty-five dollars, because of his poverty, and asked him to sign a receipt for the same; and that such receipt was the only paper he ever signed, the evidence was admissible. O'Meara *v.* Brooklyn City R. Co., 16 N. Y. App. Div. 204, 44 N. Y. Suppl. 721; Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

Admissibility of evidence of release of dower see DOWER, 14 Cyc. 993.

8. Porter *v.* Metcalf, 84 Tex. 468, 19 S. W. 696.

But the certificate of an acknowledgment of a release, made by a notary public under his notarial seal, is not evidence of the release. Hill *v.* Norris, 2 Ala. 640.

9. Porter *v.* Metcalf, 84 Tex. 468, 19 S. W. 696.

10. See EVIDENCE, 17 Cyc. 635.

Release under seal cannot be controlled by parol evidence. Leddy *v.* Barney, 139 Mass. 394, 2 N. E. 107. So in a petition disclosing that the real cause of complaint is the supplementing of a complete written release by an additional parol promise will not be saved from demurrer by reason of other allegations that at the time plaintiff executed the release she was prostrated by the injury, that it was necessary to administer opiates to alleviate her pain, that "the effect of all this was to totally unfit her for the transaction of any business," and that she proposed to delay the settlement, but the agent of the carrier urged it. Smith *v.* Georgia R., etc., Co., 131 Ga. 470, 62 S. E. 673.

11. Frost *v.* Brigham, 139 Mass. 43, 29 N. E. 217.

Effect of mistake of fact in federal court.— In an action at law in a federal court evidence is not admissible to show that a release, which, on its face, constitutes a complete bar to the action, was given under a mistake of fact, such as, in equity, would require its rescission or cancellation. Messinger *v.* New England Mut. L. Ins. Co., 59 Fed. 529.

12. Scott *v.* Bennett, 8 Ill. 243.

13. Pennsylvania Co. *v.* Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

14. Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603.

15. New Omaha Thomson-Houston Electric Light Co. *v.* Rombold, 73 Nebr. 259, 102 N. W. 475, 106 N. W. 213. And see Keefe *v.* Norfolk Suburban St. R. Co., 185 Mass. 247, 70 N. E. 46.

Inadequacy of consideration, although not alone sufficient to vitiate a release (see *supra*, III, C), is proper evidence to be considered on an issue of fraud in obtaining it (Dorsett *v.* Clemen-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612).

The alleged fraudulent acts of a third person in obtaining the release is inadmissible when no evidence has been adduced tending to prove that he was acting by defendant's authority. Meka *v.* Brown, 84 Iowa 711, 45 N. W. 1041, 50 N. W. 46.

such a case the party may be compelled to specify the evidence on which he intends to rely.[16]

3. WEIGHT AND SUFFICIENCY. The rules relating to the weight and sufficiency of evidence in civil actions generally [17] apply to actions involving a release.[18] One repudiating a release on the ground that he was mentally incapable of understanding the effect of the execution thereof need only establish the fact by a preponderance of evidence, and is not required to establish it by clear, precise,

Evidence held admissible to show fraud.— Where, in an action for negligent death, defendant pleaded a settlement with the administratrix of the decedent, and the replication alleged that the settlement was fraudulent and that the administratrix was incompetent, the testimony of a witness that defendant had, before the settlement, offered to settle with the witness, as attorney, for a much larger sum, which fact was communicated to the administratrix before the settlement, was admissible to prove the averments of the replication. Loveman *v.* Birmingham R., etc., Co., 149 Ala. 515, 43 So. 411. Where a release was executed to a railroad company by an injured employee, proof that the recitals as to the consideration were false, by showing that the amounts named therein were already due according to the custom of the company in dealing with disabled employees, was admissible, as establishing that the release was fraudulent. Hot Springs R. Co. *v.* McMullin, 76 Ark. 88, 88 S. W. 846.

On an issue whether a person injured signed the release while in his right mind and without imposition, proof of his weakened condition, his state of mind, his anxiety to return to work, his unwillingness to believe that he was permanently injured, the inequality of the position of the parties to the transaction, and the manner and words of the agent of the party liable, were admissible in evidence. Illinois Cent. R. Co. *v.* Vaughn, 111 S. W. 707, 33 Ky. L. Rep. 906. But releases of prior injuries are incompetent for the purpose of showing that plaintiff knew what he was signing when he executed the release interposed as a bar, claimed by him to have been obtained by fraud and misrepresentation. Illinois Steel Co. *v.* Ferguson, 129 Ill. App. 396.

The mere opinion of witnesses in regard to what they believed the location of the road would be previous to the execution of the release was not admissible where plaintiff alleged that a release of damages due him by the railroad company for the location of its road on his land was obtained by fraudulent representations in regard to the location of the road. Ohio, etc., R. Co. *v.* Bath, 11 Ind. 538.

16. Com. *v.* Brenneman, 1 Rawle (Pa.) 311.

17. See EVIDENCE, 17 Cyc. 753 *et seq.*

18. Bliss *v.* New York Cent., etc., R. Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

Evidence held sufficient to prove that a disputed claim was not settled by the release (see Richards *v.* Angell, 21 N. Y. Suppl. 646); that plaintiff was bound by a written release, although he could not read (see Hicks *v.* Harbison-Walker Co., 212 Pa. St. 437, 61 Atl. 958); that plaintiff did not execute the release (see Buckley *v.* Earle, etc., Express Co., 22 R. I. 358, 48 Atl. 7); that a chattel mortgage on a colt was released in consideration of a horse delivered by the mortgagor to the mortgagee (see Baker *v.* Ufford, 63 Vt. 133, 21 Atl. 426); that a release of a cause of action for injuries was supported by a consideration, and was executed by libellant, without fear of imprisonment (see Naretti *v.* Scully, 133 Fed. 828); and that an alleged compromise and release included plaintiff's cause of action (see Cornell Steamboat Co. *v.* The H. L. Dayton, 38 Fed. 927).

Evidence held insufficient to prove that an agent who had guaranteed certain notes given by customers had after the guaranty been relieved by the principal from payment of interest (see Deering *v.* Porter, 42 Ill. App. 120); and that a release was given from a *cestui que trust* to her trustee (see Walker's Appeal, 140 Pa. St. 124, 21 Atl. 311).

Evidence held insufficient to overcome the recital of consideration in the release see Stolenburg *v.* Diercks, 117 Iowa 25, 90 N. W. 525.

Recitals in receipts given to some of joint judgment debtors that the judgment creditors agreed to give to the party making the payment a receipt in full for his *pro rata* share on payment of twenty-five dollars are not inconsistent with an arrangement between the parties for each to pay his *pro rata* share, and do not show any agreement by such creditors to release each on payment by him of a part only of the judgment. Bowdon *v.* Robinson, 4 Tex. Civ. App. 626, 23 S. W. 816.

Release of partner.— The transferring, by a creditor, of his book-account against a partnership to the private account of one of the partners, on a deposit made, or security given, by such partner, is not sufficient evidence of an agreement to hold him alone liable for the demand, especially if the transfer were made without the request of the partners, or without any particular consideration; but if the creditor relinquished his security, as he may, he may retransfer his charges to the partnership account. Barker *v.* Blake, 11 Mass. 16.

Evidence of execution of release held sufficient see Livesley *v.* Pier, 11 Wash. 268, 39 Pac. 660.

Evidence held to show that releasor understood what he was doing when he executed a release and claim for personal injuries received see St. Louis, etc., R. Co. *v.* Campbell, 85 Ark. 592, 109 S. W. 539; Borchardt *v.* People's Ice Co., 106 Minn. 134, 118 N. E.

and convincing evidence,[19] and where a plaintiff attempts to avoid a release for mistake as to extent of his injuries, the burden is of establishing the facts by fair preponderance of evidence.[20] But to establish such fraud or mistake as will warrant the avoidance of a written release, the proof must be clear, unequivocal, and convincing,[21] and there must appear such words and acts upon the part of such defendant as induce a reasonable belief upon the part of the jury that the

359; McLaughlin *v.* Syracuse Rapid Transit Co., 115 N. Y. App. Div. 774, 101 N. Y. Suppl. 196.

19. Galveston, etc., R. Co. *v.* Green, (Tex. Civ. App. 1906) 91 S. W. 380.

Evidence held to show mental incapacity at the time of executing release see Chicago City R. Co. *v.* McClain, 211 Ill. 589, 71 N. E. 1103; Bertrand *v.* St. Louis Transit Co., 108 Mo. App. 70, 82 S. W. 1089; Galveston, etc., R. Co. *v.* Green, (Tex. Civ. App. 1906) 91 S. W. 380.

Evidence held to show sufficient mental capacity at time of signing release see Lake Shore, etc., R. Co. *v.* Vogelson, 23 Ohio Cir. Ct. 361.

20. McCarty *v.* Houston, etc., R. Co., 21 Tex. Civ. App. 568, 54 S. W. 421.

21. *Missouri.*— Lomax *v.* Southwest Missouri Electric R. Co., 119 Mo. App. 192, 95 S. W. 945.

Pennsylvania.— Bierer's Appeal, 92 Pa. St. 265, holding that a release of a widow to her husband's executors will not be impeached for fraud, except on clear, precise, and indubitable eveidence, and that the consideration was inadequate is not enough.

Washington.— Pederson *v.* Seattle Consol. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

Wyoming.— Wallace *v.* Skinner, 15 Wyo. 233, 88 Pac. 221.

United States.— Chicago, etc., R. Co. *v.* Wilcox, 116 Fed. 913, 54 C. C. A. 147 (holding that a mere preponderance of evidence is not sufficient); The Annie L. Mulford, 107 Fed. 525 (holding that where plaintiff averred that he was tricked into signing the release by the way the paper was read to him, although admitting that he was able to read the same, to be relieved from the effect of his carelessness in not insisting on the right to read it himself, he must clearly show that he was defrauded; and there being nothing to corroborate his own testimony, which was positively contradicted by the company's agent, the libel should be dismissed).

See 42 Cent. Dig. tit. "Release," § 108.

Evidence held sufficient to show fraud in procuring release see St. Louis, etc., R. Co. *v.* Hambright, 87 Ark. 614, 113 S. W. 803; Capital F. Ins. Co. *v.* Montgomery, 81 Ark. 508, 99 S. W. 687; St. Louis, etc., R. Co. *v.* Brown, 73 Ark. 42, 83 S. W. 332; Chicago, etc., R. Co. *v.* Jennings, 217 Ill. 494, 75 N. E. 560; Wheeler, etc., Mfg. Co. *v.* Barr, 131 Ill. App. 653; Kelly *v.* Chicago, etc., R. Co., 138 Iowa 273, 114 N. W. 536; Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198; Southern R. Co. *v.* Brewer, 108 S. W. 936, 32 Ky. L. Rep. 1374; Louisville, etc., R. Co. *v.* Helm, 121 Ky. 645, 89 S. W. 709, 28 Ky. L. Rep. 603; Schus *v.* Powder-Simpson Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887; Wheeler *v.* Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754; Gulf, etc., R. Co. *v.* Huyett, (Tex. Civ. App. 1908) 108 S. W. 502; Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682; International, etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189; International, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1901) 65 S. W. 885 [*affirmed* in 95 Tex. 346, 67 S. W. 315].

Evidence held insufficient to prove that release was obtained by fraud see Nason *v.* Chicago, etc., R. Co., (Iowa 1908) 118 N. W. 751; Spitze *v.* Baltimore, etc., R. Co., 75 Md. 162, 23 Atl. 307, 32 Am. Rep. 378; McCall *v.* Bushnell, 41 Minn. 37, 42 N. W. 545; McFarland *v.* Missouri Pac. R. Co., 125 Mo. 253, 28 S. W. 590; Hoboken Ferry Co. *v.* Baldwin, 58 N. J. Eq. 36, 43 Atl. 417; Shaw *v.* Delaware, etc., R. Co., 126 N. Y. App. Div. 210, 110 N. Y. Suppl. 362; Myers *v.* Metropolitan L. Ins. Co., 62 N. Y. App. Div. 572, 71 N. Y. Suppl. 157; Dorwin *v.* Westbrook, 86 Hun (N. Y.) 363, 33 N. Y. Suppl. 449; Williams *v.* Wilson, 18 Misc. (N. Y.) 42, 40 N. Y. Suppl. 1132 [*reversing* 17 Misc. 317, 40 N. Y. Suppl. 350; Chicago, etc., R. Co. *v.* Williams, 44 Tex. Civ. App. 168, 99 S. W. 141; Southwestern Tel., etc., Co. *v.* James, 41 Tex. Civ. App. 560, 91 S. W. 654; Probate Court *v.* Enright, 79 Vt. 416, 65 Atl. 530; Shook *v.* Illinois Cent. R. Co., 115 Fed. 57, 52 C. C. A. 651.

Evidence held sufficient to show that a release was obtained without fraud see Ferris *v.* Ferris, 34 N. Y. App. Div. 144, 54 N. Y. Suppl. 523.

Evidence in a suit by a widow to set aside her release of all interest in her husband's estate because procured by fraud, held to show that the person perpetrating the fraud, although previously her agent, was at the time acting for heirs adversely interested see Mullaney *v.* Mullaney, 65 N. J. Eq. 384, 54 Atl. 1086.

Mere incapacity to appreciate and understand the act of executing a release does not render it void, and will not establish of itself the contention of fraud in procurement. Litchfield, etc., R. Co. *v.* Shuler, 134 Ill. App. 615.

That expressions of professional opinion by a surgeon in the employ of one liable for a personal injury made to the injured person to induce the settlement of his claim therefor were fraudulent representations, justifying the setting aside of a release of liabilities for the injury, is not sufficiently shown merely by the fact that the opinion has been proved incorrect. Nason *v.* Chicago, etc., R. Co., (Iowa 1908) 118 N. W. 751.

But where there is gross inadequacy of the compensation paid by an employer to an

mind of plaintiff was overpersuaded, and the execution of such release obtained by fraud upon the part of defendant.[22]

C. Trial — 1. Province of Court and Jury. The course and conduct of trials in actions involving the execution and validity of a release is governed by the rules of trial applicable to civil actions in general.[23] Issues of fact are ordinarily for the determination of the jury under proper instructions from the court,[24] and where either party presents evidence which, although slight, would justify a finding by the jury in his favor, the question should be submitted to the jury, and it is error to nonsuit or direct a verdict;[25] but where the evidence is so slight that a finding based thereon would not be sustained, the matter should not be submitted to the jury.[26] In accordance with these rules the court will not ordinarily upon motion set aside a plea of release on the ground that it was collusively obtained,[27] for all questions of fraud, collusion, and misrepresentation in the obtaining or execution of a release are for the jury,[28] as is also the question whether a

employee sustaining a permanent injury in consideration of the employee releasing his claim therefor, only slight additional evidence of fraud on the part of the employer to procure the release is necessary to overturn the settlement. Illinois Cent. R. Co. *v.* Vaughn, 111 S. W. 707, 33 Ky. L. Rep. 906.

22. Chicago, etc., R. Co. *v.* Jennings, 114 Ill. App. 622 [*affirmed* in 217 Ill. 494, 75 N. E. 560].

23. See Trial.

24. Gulf, etc., R. Co. *v.* Winter, 38 Tex. Civ. App. 8, 85 S. W. 477, holding that where, in an action for injuries to an employee, there is evidence that the release pleaded by defendant was executed by plaintiff on defendant's agreement to pay him for his time lost on account of the injuries, the refusal to withdraw that issue from the jury was proper.

25. Rockwell *v.* Capital Traction Co., 25 App. Cas. (D. C.) 98; Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455 (whether plaintiff executed the release); Indiana, etc., R. Co. *v.* Fowler, 201 Ill. 152, 66 N. E. 394, 94 Am. St. Rep. 158 [*affirming* 103 Ill. App. 565] (whether a release of all claims for damages was fairly obtained by the party liable, and whether the party excusing it knew and understood its contents, and knew he was releasing his right of action for damages); Lusk *v.* Throop, 189 Ill. 127, 59 N. E. 529 [*affirming* 89 Ill. App. 509] (whether taking of notes and mortgages amounted to a release); Chicago Union Traction Co. *v.* Ludlow, 108 Ill. App. 357 (whether a release from damages is legally obtained from a party under circumstances which estop); Rauen *v.* Prudential Ins. Co., 129 Iowa 725, 106 N. W. 198 (whether the release for a nominal consideration of a claim on a liquidated demand was a compromise of a doubtful claim, and valid); Richardson *v.* McLemore, 5 Baxt. (Tenn.) 586 (whether according to the intention of the parties the effect of a release of the obligor in an instrument was to discharge a coöbligor entirely, or to discharge one from the joint liability for his coöbligor's half of the obligation).

Evidence held sufficient to warrant submission to the jury of the issue of fraud in the procurement of the release see International, etc., R. Co. *v.* Harris, (Tex. Civ. App. 1901) 65 S. W. 885 [*affirmed* in 95 Tex. 346, 67 S. W. 315].

The question of the validity of a release of damages executed by plaintiff, where it is claimed that it was not his free act, is for the jury. Dixon *v.* Brooklyn City, etc., R. Co., 100 N. Y. 170, 3 N. E. 65; Detwiler *v.* Graham, 17 Phila. (Pa.) 300.

26. Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. 472, 91 Am. St. Rep. 445 (holding that where plaintiff sued a railroad company for injuries sustained while in its employ, and defendant pleaded a release by acceptance of benefits from a relief fund established by the company, and plaintiff alleged that when he began to read the application the medical examiner told him to sign it as a matter of form, but failed to state that an acceptance of benefits for the injuries would operate as a release, it appearing that plaintiff could read and write, and that the agreement was printed in plain type, and he had been furnished with a book containing a copy of his application for aid, two months before the happening of the accident, and of the regulations of the relief fund, the direction of a verdict for defendant was not error); Denver, etc., R. Co. *v.* Sullivan, 21 Colo. 302, 41 Pac. 501.

Evidence held insufficient to go to the jury on the question whether release pleaded by defendant in an action for personal injuries was obtained by fraud or deceit see Zdancewicz *v.* Burlington County Traction Co., (N. J. Sup. 1908) 71 Atl. 123.

Where defendant pleaded estoppel predicated upon the express agreement of plaintiff to release his claim, but the evidence tended to show that plaintiff, if estopped to assert his claim, was estopped by his conduct, refusal to submit the issue of a release was not erroneous. Missouri, etc., R. Co. *v.* Schroeder, 44 Tex. Civ. App. 47, 100 S. W. 808.

27. Eastman *v.* Wright, 6 Pick. (Mass.) 316; Loring *v.* Brackett, 3 Pick. (Mass.) 403.

28. *Illinois.*— Spring Valley Coal Co. *v.* Buzis, 213 Ill. 341, 72 N. E. 1060; Chicago City R. Co. *v.* McClain, 211 Ill. 589, 71 N. E. 1103; Pioneer Cooperage Co. *v.* Romanowicz,

release of plaintiff's claim was obtained by defendant in good faith, with a full understanding on plaintiff's part of his legal rights.[29] Questions of execution and delivery of the release,[30] ratification,[31] negligence or mistake,[32] genuineness of signature,[33] consideration,[34] and mental competency of the releasor[35] are for the jury. But the construction of the release is for the court.[36]

2. Instructions. The parties are on request entitled to full instructions correctly stating the law.[37] Instructions must be applicable to the issues, and

85 Ill. App. 407 [*affirmed* in 186 Ill. 9, 57 N. E. 864].

Kentucky.— Glisson *v.* Paducah R., etc., Co., 87 S. W. 305, 27 Ky. L. Rep. 965.

Maryland.— Ryan *v.* Gross, 68 Md. 377, 12 Atl. 115, 16 Atl. 302.

Massachusetts.— Eastman *v.* Wright, 6 Pick. 316; Loring *v.* Brackett, 3 Pick. 403.

Missouri.— Girard *v.* St. Louis Car-Wheel Co., 46 Mo. App. 79.

New York.— Cohen *v.* Schreiber, 60 Misc. 114, 111 N. Y. Suppl. 702.

North Carolina.— Dorsett *v.* Clement-Ross Mfg. Co., 131 N. C. 254, 42 S. E. 612.

Pennsylvania.— Clayton *v.* Consolidated Traction Co., 204 Pa. St. 536, 54 Atl. 332; Ettinger *v.* Jones, 139 Pa. St. 218, 21 Atl. 137.

South Carolina.—Griffin *v.* Southern R. Co., 66 S. C. 77, 44 S. E. 562.

Texas.— Chicago, etc., R. Co. *v.* Williams, 37 Tex. Civ. App. 198, 83 S. W. 248.

See 42 Cent. Dig. tit. "Release," § 109 *et seq.*

Where the court charged that the evidence of fraud was too slight to authorize the jury to set aside the release, but left the question of fraud to them upon the evidence, this was error, and the case should have been withdrawn from the jury. Pennsylvania R. Co. *v.* Shay, 82 Pa. St. 198.

Where no evidence was given to connect defendant with the fraudulent acts, it was proper to direct a verdict for defendant. Meka *v.* Brown, 84 Iowa 711, 45 N. W. 1041, 50 N. W. 46.

Where plaintiff signed a release under the belief that he was signing a receipt for something else, the question whether the release was obtained unfairly was for the jury. Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195.

Fraud of the releasee's agents or representatives is for the jury. Freedley *v.* French, 154 Mass. 339, 28 N. E. 272; Austin *v.* St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450; Hidden *v.* Exeter, etc., R. Co., 72 N. H. 422, 57 Atl. 333; Gulf, etc., R. Co. *v.* Johnson, 43 Tex. Civ. App. 237, 95 S. W. 720; Galveston etc., R. Co. *v.* Cade, (Tex. Civ. App. 1906) 93 S. W. 124 (whether plaintiff was induced to sign the release through fraudulent representations of defendant's surgeon); Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682; Viallet *v.* Consolidated R., etc., Co., 30 Utah 260, 84 Pac. 496, 5 L. R. A. N. S. 663; Bjorklund *v.* Seattle Electric Co., 35 Wash. 439, 77 Pac. 727 (whether the release was obtained by fraudulent representations of defendant's physician and representatives).

29. Kansas City, etc., R. Co. *v.* Chiles, 86 Miss. 361, 38 So. 498.

30. Sargent Co. *v.* Baublis, 215 Ill. 428, 74 N. E. 455; Cleveland *v.* Rothschild, 132 Mich. 625, 94 N. W. 184; Clark *v.* Lehigh Valley R. Co., 24 Pa. Super. Ct. 609.

31. Merrill *v.* Pike, 94 Minn. 186, 102 N. W. 393; Jones *v.* Alabama, etc., R. Co., 72 Miss. 22, 16 So. 379.

What is a reasonable time in which to repudiate a release obtained by fraud and duress is a question for the jury. Brainard *v.* Van Dyke, 71 Vt. 359, 45 Atl. 758.

32. Sundvall *v.* Interstate Iron Co., 104 Minn. 499, 116 N. W. 1118; Chicago, etc., R. Co. *v.* Williams, 37 Tex. Civ. App. 198, 83 S. W. 248; Sheanon *v.* Pacific Mut. L. Ins. Co., 83 Wis. 507, 53 N. W. 878.

33. Castor *v.* Bernstein, 2 Cal. App. 703, 84 Pac. 244.

34. Stevens *v.* Hathorne, 12 Allen (Mass.) 402; Bennett *v.* Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808; Hawkins *v.* Collins, 61 S. C. 537, 39 S. E. 768.

35. Butler *v.* New England Structural Co., 191 Mass. 397, 77 N. E. 764; Gibson *v.* Western New York, etc., R. Co., 164 Pa. St. 142, 30 Atl. 308, 44 Am. St. Rep. 586; Shook *v.* Illinois Cent. R. Co., 115 Fed. 57, 52 C. C. A. 651, issue as to releasor's sanity at the time he executed the release, and, if he was mentally sound, whether certain injuries were in the contemplation of the parties.

But where there was no evidence of want of sufficient mental capacity to execute a release that question should not be left to the jury. Och *v.* Missouri, etc., R. Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442.

36. Murphy *v.* Black, (Ala. 1906) 41 So. 877; Quebec *v.* Gulf, etc., R. Co., (Tex. Civ. App. 1903) 77 S. W. 442 [*affirmed* in 98 Tex. 6, 81 S. W. 20, 66 L. R. A. 734].

But where a release of a claim for negligent death was ambiguous, and it was doubtful whether decedent's estate was bound thereby, the question whether it was bound was for the jury. Olston *v.* Oregon Water Power, etc., Co., (Oreg. 1908) 96 Pac. 1095, 97 Pac. 538.

37. Missouri Pac. R. Co. *v.* Brazzil, 72 Tex. 233, 10 S. W. 403; Missouri, etc., R. Co. *v.* Craig, 44 Tex. Civ. App. 583, 98 S. W. 907 (holding that where, in an action for injuries to a passenger, defendant pleaded a release which plaintiff claimed he was induced to sign without sufficient mental capacity to know what he was doing, it was error to refuse to instruct to return a verdict for defendant unless the jury believed that when plaintiff made the settlement and executed the

to the facts which there is evidence tending to prove,[38] and must be considered

release he was mentally incapable of understanding the nature and effect thereof); St. Louis, etc., R. Co. *v.* Demsey, 40 Tex. Civ. App. 398, 89 S. W. 786 (holding that in an action for injuries to a servant, where a release was pleaded by defendant and the execution thereof was denied by plaintiff, a requested charge that the release was a bar to the action unless it was not executed by plaintiff, that it was executed by him if his name was signed thereto by another, and he made his mark by touching the pen with which the mark was made, and that unless the release was not in fact executed by plaintiff the jury should return a verdict for defendant, should have been given); Gulf, etc., R. Co. *v.* Winter, 38 Tex. Civ. App. 8, 85 S. W. 477 (holding that where a part of plaintiff's testimony tending to show that he accepted defendant's offer of one dollar, payment for lost time, and future employment, in consideration of his release of damages for personal injuries, defendant was entitled to a special instruction that, if plaintiff did accept such offer, he could not recover).

Instructions held correct see Georgia Cent. R. Co. *v.* Goodwin, 120 Ga. 83, 47 S. E. 641 (fraudulent misrepresentations); Pioneer Cooperage Co. *v.* Romanowicz, 186 Ill. 9, 57 N. E. 864 [*affirming* 85 Ill. App. 407] (intent to release); Freedley *v.* French, 154 Mass. 339, 28 N. E. 272; Robertson *v.* Fuller Constr. Co., 115 Mo. App. 456, 92 S. W. 130 (that if the release was signed by plaintiff when he was in such a mental condition through pain and sickness that he could not and did not comprehend its contents, and that if defendant's agent took advantage of plaintiff's condition to induce him to sign the paper without understanding its contents, intending thereby to defraud plaintiff, the release was no defense to the action); International, etc., R. Co. *v.* Brazzil, 78 Tex. 314, 14 S. W. 609 (ratification); Galveston, etc., R. Co. *v.* Cade, (Tex. Civ. App.) 93 S. W. 124 (that releasor must have relied upon false statements to invalidate release); Chicago, etc., R. Co. *v.* Cain, 37 Tex. Civ. App. 531, 84 S. W. 682; Galloway *v.* San Antonio, etc., R. Co., (Tex. Civ. App. 1903) 78 S. W. 32 (an instruction that a release of a claim for injuries was binding on plaintiff unless, when he executed it, he did not and could not understand its contents, and that a release of a claim for injury is binding on plaintiff, unless defendant concealed its real meaning, and falsely represented that it was simply a receipt for money); Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117 (when release should have been repudiated).

Instructions held incorrect or misleading see Adams *v.* Neu, 108 Ill. App. 50 (holding that an instruction that a receipt reciting that it is a receipt in full must be taken to be in full of all matters which were claimed, unless it appears from a preponderance of the evidence that some item or matter of claim was omitted by mistake of the parties or by the fraud of the person taking the receipt, is misleading, where there is no evidence and no claim that any item or matter or claim had been omitted from the receipt, either by mistake or fraud); Chicago Union Traction Co. *v.* Mommsen, 107 Ill. App. 353 (consideration); Shanley *v.* Laclede Gaslight Co., 63 Mo. App. 123 (instruction that, in order to make a release binding on plaintiff, he must have understood it, where it was plainly written, and there was no evidence of fraud); Fleming *v.* Southern R. Co., 131 N. C. 476, 42 S. E. 905, 132 N. C. 714, 44 S. E. 551 (an instruction that a contract of an employee of a railroad company to waive the benefit of an action which he may have against it for injuries, as calculated to mislead by giving the impression that a proper settlement after injury); Linck *v.* MacMillan, 160 Pa. St. 553, 28 Atl. 850; Chicago, etc., R. Co. *v.* Williams, 37 Tex. Civ. App. 198, 83 S. W. 248 (an instruction that if defendant made a settlement with plaintiff by releasing defendant from all demands, and defendant paid plaintiff the amount agreed on, and plaintiff executed to defendant the release in evidence, plaintiff could not recover, as excluding the question of fraud, alleged to have induced the execution of the release); Johnson *v.* Gulf, etc., R. Co., 36 Tex. Civ. App. 487, 81 S. W. 1197 (that mental incapacity should not be inferred from any enfeebled condition of the mind and body, as the state of one's health may be considered in determining the question of mental capacity to transact business, and that the validity of the release depended solely on the question of plaintiff's mental capacity at the time it was executed, thereby eliminating the question of fraud in procuring the release).

On an issue as to the validity of a release of damages for injuries sustained, an instruction that if one plaintiff executed the release when he was ignorant of its contents or was in such mental condition that he did not know what he was doing, he was not bound thereby, was objectionable as calculated to mislead the jury to believe that ignorance alone of the contents of the instrument at the time of signing was sufficient to avoid it. Missouri, etc., R. Co. *v.* Craig, 44 Tex. Civ. App. 583, 98 S. W. 907.

38. Tainter *v.* Lombard, 54 Me. 554.

Instructions held inapplicable to issues and facts see Houston, etc., R. Co. *v.* Tierney, 72 Tex. 312, 12 S. W. 586; Gulf, etc., R. Co. *v.* Johnson, 43 Tex. Civ. App. 237, 95 S. W. 720, an instruction that the release was not a defense, in case the jury should find that its execution was induced by false representations made by the physician and the claim agent, or either of them, there being no evidence of fraud.

There being no evidence to show that a release was invalid, the only controversy being whether it was delivered, a charge that it did not operate as a relinquishment of a lien and satisfaction of an indebtedness, as expressed in the release, was properly refused. Porter *v.* Metcalf, 84 Tex. 468, 19 S. W. 696.

as a whole, and thus it is not error to refuse an instruction adequately covered by other instructions.[39]

3. VERDICT AND FINDINGS. The rules governing findings in actions involving releases are the same as those that apply to civil actions in general.[40] A special finding must be supported by the evidence,[41] and an interrogatory for a special finding must call for facts provable within the issues.[42]

D. Review. Questions not urged in the lower court and not properly preserved for review will not be noticed on appeal.[43] Errors upon the trial to work a reversal upon review must have been prejudicial to the complaining party.[44]

RELEASED. Delivered or surrendered;[1] exemption from a common-law liability as an insurer.[2] (See, generally, RELEASE, *ante*, p. 1039.)

RELET. A new letting for a fixed and definite term.[3] (See LANDLORD AND TENANT, 24 Cyc. 1164, 1375.)

RELEVANCY. That which conduces to prove a pertinent theory in a case, or one which influences or controls the case;[4] that which conduces to the proof of a pertinent hypothesis.[5] (Relevancy: Of Evidence — In Civil Action, see

39. International,. etc., R. Co. *v.* Brazzil, 78 Tex. 314, 14 S. W. 609 (holding that an instruction that a release of damages for injuries received on a railroad was void if the passenger was unconscious, or not in his right mind, when it was given, is not erroneous because the effect of an alleged ratification was not stated in the same connection, the jury having been fully instructed on that point); Galveston, etc., R. Co. *v.* Green, (Tex. Civ. App. 1905) 91 S. W. 380.

40. See TRIAL.

Construction of verdicts see Hardt *v.* Schulting, 85 N. Y. 624 (holding that a finding that a release from the claim of a creditor was obtained by means of material misrepresentations on the part of the debtor is equivalent to a finding that the creditors relied on such representations); International etc., R. Co. *v.* Shuford, 36 Tex. Civ. App. 251, 81 S. W. 1189 (holding that where a railroad company settled with one who had been injured while a passenger, and subsequently, in an action by the passenger for the injuries, the court instructed that if plaintiff was not defrauded into making the settlement, and she entered into it of her own free will, the jury should find for defendant, and that, if they did not find for plaintiff on such issue of fraud, they should return a verdict in favor of defendant, and a verdict was rendered for a specified sum, less the sum which plaintiff had received, such verdict and the judgment thereon amounted to an adjudication that the release was procured by fraud).

41. Merchants' Nat. Bank *v.* McAnulty, (Tex. Civ. App. 1895) 32 S. W. 376.

42. American Quarries Co. *v.* Lay, 37 Ind. App. 386, 73 N. E. 608, holding that, in an action on a contract releasing defendant from liability to plaintiff, a special interrogatory asking the jury to find whether it gave plaintiff damages on account of the written contract set out in the first two paragraphs of the complaint, or on the oral contract set out in the third paragraph, did not call for any fact provable within the issue, and was correctly refused.

43. New Orleans Gas Light, etc., Co. *v.* Hudson, 5 Rob. (La.) 486 (holding that a plea of release, not made in the court below, will be presumed to have been waived); Price *v.* Richmond, etc., R. Co., 38 S. C. 199, 17 S. E. 732 (holding that a contention that the alleged invalidity of a release, pleaded in an action for personal injuries on the ground of duress, being purely equitable in character, could not be considered in a law case for damages, and cannot be considered when raised for the first time on appeal).

44. Girard *v.* St. Louis Car-Wheel Co. 123 Mo. 358, 27 S. W. 648, 45 Am. St. Rep. 556, 25 L. R. A. 514; Bluefields Banana Co. *v.* Wollfe, (Tex. Civ. App. 1893) 22 S. W. 269 (holding that where, in an action for wrongful discharge, a writing which defendant contends is a release from liability does not on its face purport to be such release, but only a receipt for money paid for services rendered, an instruction submitting the construction of such writing to the jury, if erroneous, is not prejudicial to defendant).

1. Hicks *v.* Mendenhall, 17 Minn. 475, 483.

2. Morganton Mfg. Co. *v.* Ohio, etc., R. Co., 121 N. C. 514, 517, 28 S. E. 474, 61 Am. St. Rep. 679, so understood when placed on the face of the bill of lading by the agent of a common carrier.

"Released on bail," as used in the criminal practice act, implies that the person so released is not imprisoned after such release, though for some purposes it is true that a person released on bail in a civil proceeding is still in the custody of the law, but he cannot be said to be so in custody in a criminal proceeding. *Ex p.* Jones, 41 Cal. 209, 210.

3. Moseley *v.* Allen, 138 Mass. 81, 83.

4. Levy *v.* Campbell, (Tex. 1892) 20 S. W. 196.

5. Ward *v.* Young, 42 Ark. 542, 554; Seller *v.* Jenkins, 97 Ind. 430, 438; Nickerson *v.* Gould, 82 Me. 512, 514, 20 Atl. 86; State *v.* Withan, 72 Me. 531, 537; State *v.* O'Neil, 13 Oreg. 183, 187, 9 Pac. 284.

"Legal relevancy" includes logical relevancy, but has a higher evidentiary force.

Evidence, 16 Cyc. 941, 1110; In Criminal Prosecution, see Criminal Law, 12 Cyc. 390. Of Newly-Discovered Evidence, see New Trial, 29 Cyc. 898. See Relevant.)

Relevant. As applied to testimony, a term which is said to mean that which directly touches upon the issue which the parties have made by their pleadings, so as to assist in getting at the truth of it;[6] a term which, as applied to any two facts, is said to mean that they are so related to each other that according to the ordinary course of events, either taken by itself or in connection with other facts, proves or renders possible the past, present, or future existence or non-existence of the other.[7] (See Relevancy.)

Reliance. Dependence; confidence; trust; repose of mind upon what is deemed sufficient support or authority.[8] (Reliance: On Adverse Party as Affecting Estoppel, see Estoppel, 16 Cyc. 734. On False Pretenses as Element of Offense, see False Pretenses, 19 Cyc. 604. On Fraudulent Representations, see Fraud, 20 Cyc. 39.)

Relict. The survivor of the union of married people.[9] (See, generally, Husband and Wife, 21 Cyc. 1701.)

Reliction. Land added to a front tract by the permanent uncovering of the waters, the laying bare of the bottom by the retirement of the waters, as contradistinguished from a filling up of the bottom by deposits causing the water to recede;[10] the term applied to land made by the recession of the water by which it was previously covered.[11] (See Navigable Waters, 29 Cyc. 349; Waters.)

Relief. The assistance or support, pecuniary or otherwise, granted to indigent persons by the proper administrators of the poor laws;[12] a term which is said to relate to the mode in which aid is given in equity.[13] (Relief: By Decree or Judgment, see Equity, 16 Cyc. 471; Judgments, 23 Cyc. 623. Equitable — By Decree, see Equity, 16 Cyc. 471; Dependent on Inadequacy of Remedy at Law, see Equity, 16 Cyc. 30. From Forfeiture — In General, see Forfeitures, 19 Cyc. 1365; Of Bail, see Bail, 5 Cyc. 131; Of Lease, see Landlord and Tenant, 24 Cyc. 1364. Identity of, and Subject-Matter, see Abatement and Revival, 1 Cyc. 27. Of Pauper, see Paupers, 30 Cyc. 1064, 1122. Prayer For — In Bill in Equity, see Equity, 16 Cyc. 224, 483; In Pleading, see Judgments, 23 Cyc. 816; Pleading, 31 Cyc. 110.)

Relief Association. See Accident Insurance, 1 Cyc. 294; Associations, 4 Cyc. 299; Mutual Benefit Associations, 29 Cyc. 1.

Relief Fund. A fund made up of contributions of the members of the lodges of a fraternal order.[14] (See, generally, Mutual Benefit Insurance, 29 Cyc. 50.)

Cole *v.* Boardman, 63 N. H. 580, 581, 4 Atl. 572. See also 25 Cyc. 175.

6. Moran *v.* Abbey, 58 Cal. 163, 168; Platner *v.* Platner, 78 N. Y. 90, 95; Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 215, 41 N. Y. Suppl. 507. See also Evidence, 16 Cyc. 847.

7. Stephen Ev. 3d ed. [*quoted* in Moody *v.* Peirano, 4 Cal. App. 411, 418, 88 Pac. 380; Plumb *v.* Curtis, 66 Conn. 154, 166, 33 Atl. 998; Seller *v.* Jenkins, 97 Ind. 430, 438; Buckwalter *v.* Arnett, 34 S. W. 238, 241, 17 Ky. L. Rep. 1233; Cole *v.* Boardman, 63 N. H. 580, 581, 4 Atl. 572; Lamprey *v.* Donacour, 58 N. H. 376, 377; Kemble *v.* Rondout Nat. Bank, 94 N. Y. App. Div. 544, 546, 88 N. Y. Suppl. 246; Strickland *v.* Phillips, 75 S. C. 264, 265, 55 S. E. 453].

Any circumstance is relevant which makes more probable the hypothesis set up. Walls *v.* Walls, 170 Pa. St. 48, 57, 32 Atl. 649.

8. Webster Int. Dict.

9. Spitler *v.* Heeter, 42 Ohio St. 100, 101, where it is said to be not simply the survivor of the decedent individually.

10. Sapp *v.* Frazier, 51 La. Ann. 1718, 1723, 26 So. 378, 72 Am. St. Rep. 493.

11. Hammond *v.* Shepard, 186 Ill. 235, 242, 57 N. E. 867, 78 Am. St. Rep. 274.

"Dereliction" defined see 13 Cyc. 1044.

12. Black L. Dict.

"Aid and relief" in resolutions by a town making provision for families of volunteer soldiers, implies want, need or necessity on the part of the applicants, and indicates that provision there made was charitable, and did not tend to give the applicant any vested right as under a contract. Russell *v.* Providence, 7 R. I. 566, 574.

13. Utah Constr. Co. *v.* Montana R. Co., 145 Fed. 981, 987.

"Relief, order, or direction" are words applicable to equity proceeding only. Holme *v.* Guy, 5 Ch. D. 901, 906, 46 L. J. Ch. 648, 36 L. T. Rep. N. S. 600, 25 Wkly. Rep. 547.

14. Lady Lincoln Lodge *v.* Faist, 52 N. J.

RELIEVE. A word said to be synonymous with REMOVE,[15] *q. v.*

RELIGION. A term said to refer to one's views of his obligations to his Creator and to the obligations they impose of reverence for His being and character and of obedience to His will;[16] morality with a sanction drawn from a future state of rewards and punishments;[17] some system of faith and practice resting on the idea of the existence of one God, the creator and ruler, to whom His creatures owe obedience and love.[18] Any system of faith and worship.[19] (Religion: In General, see RELIGIOUS SOCIETIES. Crimes Against, see BLASPHEMY, 5 Cyc. 710; DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 539. Gifts For Promotion of, see CHARITIES, 6 Cyc. 913. Interference With, see DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 540. Source of Common Law, see COMMON LAW, 8 Cyc. 371. Sunday Law, see CONSTITUTIONAL LAW, 8 Cyc. 885; SUNDAY.)

RELIGIOUS ASSEMBLY. A phrase which has been said to mean nothing more than an assembly of religious persons.[20] (See, generally, DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 540.)

RELIGIOUS BELIEF. (Religious Belief: As Affecting — Competency as Witness, see HOMICIDE, 21 Cyc. 991; WITNESSES; Qualification of Grand Juror, see GRAND JURIES, 20 Cyc. 1299; Qualification to Hold Office, see OFFICERS, 29 Cyc. 1378. As Disqualification of Juror, see JURIES, 24 Cyc. 199. By Child as Fixing or Determining Right to Custody and Control, see PARENT AND CHILD, 29 Cyc. 1585. In Polygamous Marriage, as Defense in Prosecution For Bigamy, see BIGAMY, 5 Cyc. 695.)

RELIGIOUS BOOKS. Those books which tend to promote religion taught by the Christian dispensation.[21]

RELIGIOUS CORPORATION. See RELIGIOUS SOCIETIES, *post*, p. 1112.

RELIGIOUS CREED. See CREED, 12 Cyc. 865.

RELIGIOUS DENOMINATION. See RELIGIOUS SECT.

RELIGIOUS EDUCATION. See CHARITIES, 6 Cyc. 919.

RELIGIOUS INSTITUTIONS. See RELIGIOUS SOCIETIES, *post*, p. 1112.

RELIGIOUS LIBERTY. In this country the full and free right to entertain any religious belief, to practice any religious principle, and teach any religious doctrine which does not violate the laws or morality and which does not infringe personal rights.[22] (Religious Liberty: Constitutional Guaranty of, see CONSTI-

Eq. 510, 512, 28 Atl. 555. See also New York Nat. Park Bank *v.* Clark, 92 N. Y. App. Div. 262, 264, 87 N. Y. Suppl. 185.

15. Kennedy *v.* School Dist. No. 1, 20 Wash. 399, 402, 55 Pac. 567, where it was so used in a contract employing teachers, reserving the right to relieve one of the number on certain conditions.

16. Davis *v.* Beason, 133 U. S. 333, 342, 10 S. Ct. 299, 33 L. ed. 637, where it is distinguished from "*cultus*" or form of worship of a particular sect.

17. McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 350, 6 Am. Dec. 458.

18. *In re* Knight, 159 Pa. St. 500, 502, 28 Atl. 303, where it is said that religion in its broadest sense comprehends all systems of belief in the existence of beings superior to and capable of exercising an influence for good or evil on the human race.

19. Webster Dict. [*quoted* in *In re* Walker, 200 Ill. 566, 572, 66 N. E. 144].

In its primary sense (from *religare*, to rebind, bind back), it imports, as applied to moral questions, only a recognition of a conscientious duty to obey the restraining principles of conduct. *In re* Hinckley, 58 Cal. 457, 512.

As used in the Ohio constitution the word has been defined as the religion of all mankind and not the religion of any class of men. *In re* Walker, 200 Ill. 566, 572, 66 N. E. 144 [*citing* Cincinnati Bd. of Education *v.* Minor, 23 Ohio St. 211, 241, 13 Am. Rep. 233].

The practice of polygamy cannot be justified as being embraced within the religion of the offender, since the guarantee of the federal constitution against the establishment of religion or any interference with the free exercise thereof does not authorize the commission of acts contrary to the criminal law of any country as being sanctioned by the tenets of a religious sect. Reynolds *v.* U. S., 98 U. S. 145, 165, 25 L. ed. 244.

20. State *v.* Fisher, 25 N. C. 111, 114. *Compare* State *v.* Ramsey, 78 N. C. 448, 453.

21. Simpson *v.* Welcome, 72 Me. 496, 500, 39 Am. Rep. 349.

22. Watson *v.* Jones, 13 Wall. (U. S.) 679, 728, 20 L. ed. 666.

Does not include the right to introduce and carry out every scheme or purpose which persons see fit to claim as a part of their religious system, so that no one can stretch his own liberty so as to interfere with that of his neighbors and to violate peace and

TUTIONAL LAW, 8 Cyc. 884. Question of Impairment, see COURTS, 11 Cyc. 934.)

RELIGIOUS PRINCIPLES. Those sentiments concerning the relation between God and man which may influence human conduct.[23]

RELIGIOUS SECT. People believing in the same religious doctrines who are more or less closely associated or organized to advance such doctrines and increase the number of believers therein;[24] a body or number of persons united in tenets but constituting a distinct organization or party by holding sentiments or doctrines different from those of other sects or people.[25] (See, generally, RELIGIOUS SOCIETIES, *post*, p. 1112.)

good order. *In re* Frazee, 63 Mich. 396, 405, 30 N. W. 72, 6 Am. St. Rep. 310. To the same effect see Reynolds *v.* U. S., 98 U. S. 145, 166, 25 L. ed. 244.

Bill of Rights, art. 5, guaranteeing to every person religious liberty and freedom, etc., does not mean a license to engage in acts having a tendency to disturb public peace under the form of religious worship, nor does it include the right to disregard those regulations which the legislature has deemed reasonably necessary for the security of public order. State *v.* White, 64 N. H. 48, 50, 5 Atl. 828.

23. State *v.* Powers, 51 N. J. L. 432, 434, 17 Atl. 969, 14 Am. St. Rep. 693.

24. State *v.* Edgerton School Dist. No. 8, 76 Wis. 177, 192, 44 N. W. 967, 20 Am. St. Rep. 41, 7 L. R. A. 330.

25. State *v.* Hallock, 16 Nev. 373, 385.

Religious denomination.— See Reg. *v.* Dickout, 24 Ont. 250, 251, holding the Reorganized Church of Jesus Christ of Latter Day Saints to be.

"**Religious sect, order or denomination**" as used in the Mo. Const. (1865) art. 1, § 13, providing that a religious "sect, order or denomination" was capable of receiving a devise, etc., is not to be limited in meaning to such religious bodies as are composed of many local congregations linked together by rules of the sect, order or congregation, so that what property one holds belongs in some sense to the whole but includes a local congregation uncontrolled by any general ecclesiastical organization. Boyce *v.* Christian, 69 Mo. 492, 495.

RELIGIOUS SOCIETIES

By Alexander Karst,* Edward C. Ellsbree,† and Stanley A. Hackett

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* Author of "Real Actions," 33 Cyc. 1541.
† Author of "Inspection," 22 Cyc. 1363; "Novation," 29 Cyc. 1129; "Obscenity," 29 Cyc. 1314; "Piracy," 30 Cyc. 1626; "Postoffice," 31 Cyc. 970.

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CROSS-REFERENCES

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Association in General, see ASSOCIATIONS, 4 Cyc. 300.

Burning of Church as Arson, see ARSON, 3 Cyc. 789.

Club in General, see CLUBS, 7 Cyc. 258.

Competency of Juror as Affected by Religious Belief, see JURIES, 24 Cyc. 306.

Constitutional Guaranty of Religious Liberty, see CONSTITUTIONAL LAW, 8 Cyc. 884.

Corporation in General, see CORPORATIONS, 10 Cyc. 1.

Dedication of Property For Religious Uses, see DEDICATION, 13 Cyc. 446.

Disturbance of Religious Meeting, see DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 540.

Gift For Religious Purposes, see CHARITIES, 6 Cyc. 913.

Judicial Notice of Matters of Religion, see EVIDENCE, 16 Cyc. 853, 879.

Landlord and Tenant, see LANDLORD AND TENANT, 24 Cyc. 1064.

Libel or Slander of Clergyman, see LIBEL AND SLANDER, 25 Cyc. 335.

For Matters Relating to — (*continued*)

Privileged Communications in Church or Society Proceedings, see LIBEL AND SLANDER, 25 Cyc. 390, 411.

School or School-District, see SCHOOLS AND SCHOOL-DISTRICTS.

Subscription For Religious Society, see SUBSCRIPTIONS.

Taxation of Property of Religious Society, see MUNICIPAL CORPORATIONS, 28 Cyc. 1690; TAXATION.

Transaction of Business on Sunday, see SUNDAY.

Use of Street by Salvation Army, see MUNICIPAL CORPORATIONS, 28 Cyc. 908, 909.

I. NATURE AND ORGANIZATION.*

A. Religious Society Defined. A religious society is an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction.[1] The term includes all religious societies or congregations met for public worship, without regard to their being incorporated,[2] and may or may not include a church or spiritual body.[3]

1. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95 [*affirmed* in 11 N. Y. 243]; Ohio, etc., R. Co. *v.* Delhi Tp., 11 Ohio 24, 28.

Other definitions are: "A voluntary association of individuals or families, united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, &c." Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 301; Church *v.* Bullock, (Tex. 1908) 109 S. W. 115, 117.

"A body of persons associated together for the purpose of maintaining religious worship only, omitting the sacraments." Silsby *v.* Barlow, 16 Gray (Mass.) 329, 330.

In English ecclesiastical law and in the New England states the term is synonymous with "parish" or "precinct," and designates an incorporated society created and maintained for the support of public worship. Weld *v.* May, 9 Cush. (Mass.) 181. See also Riffe *v.* Proctor, 99 Mo. App. 601, 74 S. W. 409; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296.

A religious sect or denomination is one having a common system of faith, written or traditional. State *v.* Township 9, 7 Ohio St. 58.

Various churches, sects, and beliefs defined: Congregational Church see 2 Cyc. 578; Congregational Persuasion and Society see 8 Cyc. 579; Free Baptist see 20 Cyc. 842; Healers see 21 Cyc. 381; Latitudinarians see 25 Cyc. 62.

Church defined see 7 Cyc. 128.

2. State *v.* Stuth, 11 Wash. 423, 39 Pac. 665.

As used in a statute, the term "religious society" generally has reference to an incorporated religious society. St. Monica's Church *v.* New York, 119 N. Y. 91, 23 N. E. 294, 7 L. R. A. 592; Nesqually Catholic Bishop *v.* Gibbon, 1 Wash. 592, 21 Pac. 315.

Benevolent charitable institutions.— The term is not limited to religious societies, organized as incorporated churches, but includes a society whose organization and objects are of a benevolent, charitable, or missionary character, as falling within the general sense of the term "religious," as contradistinguished from private and sectarian institutions. Hebrew Free School Assoc. *v.* New York, 4 Hun (N. Y.) 446.

3. Silsby *v.* Barlow, 16 Gray (Mass.) 329, 330; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64, 95 [*affirmed* in 11 N. Y. 243].

Parish and town organization.— In the early history of the New England states every town was considered to be a parish as well as a town until a separate parish was formed within it (Jewett *v.* Thames Bank, 16 Conn. 511; Brunswick First Parish *v.* Dunning, 7 Mass. 445), and the duties of a parish were required of the town, which was obliged to maintain and support public religious worship, and perform all parish duties (Jewett *v.* Burroughs, 15 Mass. 464; Cochran *v.* Camden, 15 Mass. 296; Dillingham *v.* Snow, 5 Mass. 547), and where one or more parishes were set off from a town, the remaining part constituted a distinct parish and was considered as the first parish (Richardson *v.* Brown, 6 Me. 355; Brunswick First Parish *v.* Dunning, *supra*; Minot *v.* Curtis, 7 Mass. 441). Parishes had no powers except those given by statute, and these extended only to the settlement of ministers and building houses of public worship and to the charges arising from and necessarily connected with those objects. Dillingham *v.* Snow, *supra*; Bangs *v.* Snow, 1 Mass. 181. To defray the expenses arising from the execution of these powers, they might raise money, by assessing it on the polls and estates of the inhabitants, and by collecting it, for which purpose the parish collector was invested with authority to compel payment (Dillingham *v.* Snow, *supra*), but although a second parish was organized in a town which had managed its parochial affairs, without organizing itself as a parish, the town might still assess a tax for parochial

* By Edward C. Ellsbree.

B. Religious Corporation Defined. A religious corporation is one whose purposes are directly and manifestly ancillary to divine worship or religious teaching.[4] It is not necessarily a church, in the common acceptation of the term, or even a religious society.[5]

C. Right to Incorporate and Effect Thereof — 1. In General. In many states the right to incorporate is expressly conferred upon religious societies by statute; [6] but where constitutional provisions exist restricting the establishment of religious corporations, the right to incorporate is governed thereby.[7]

2. Proceedings — a. In General. The necessary steps to be taken to effect

purposes (Ashby *v.* Wellington, 8 Pick. (Mass.) 524). It was competent for towns, before they became divided into parishes, to conduct their parochial business at meetings distinct from those of the towns (Jewett *v.* Burroughs, *supra*); but generally towns thus situated transacted their parochial concerns at town meetings, making no difference in their forms when acting upon those subjects or upon matters of mere municipal or political concern (Richardson *v.* Brown, *supra*; Austin *v.* Thomas, 14 Mass. 333). Several parishes were often incorporated within the limits of a town, and sometimes a single parish embraced parts of different towns, but when a parish was invested with all the municipal powers of a town, it did not thereupon *ipso facto* cease to be a parish; and the new corporation was distinct from the parish, and was not a successor to it. Dillingham *v.* Snow, *supra*.

4. *In re* St. Louis Christian Science Inst., 27 Mo. App. 633, 637.

A Young Men's Christian Association is not a religious corporation within the meaning of N. Y. Laws (1895), c. 723, art. 1, § 2, defining a religious corporation as a corporation created for religious purposes. *In re* Watson, 171 N. Y. 256, 261, 63 N. E. 1109 [*reversing* 70 N. Y. App. Div. 623, 75 N. Y. Suppl. 1134 (*affirming* 36 Misc. 504, 73 N. Y. Suppl. 1058)]; *In re* Fay, 37 Misc. (N. Y.) 532, 534, 76 N. Y. Suppl. 62.

A corporation organized to provide churches for seamen is a religious corporation within the above definition. Matter of Prall, 78 N. Y. App. Div. 301, 304, 79 N. Y. Suppl. 971.

A corporation established for purely academic purposes, for education in literature and in the arts and sciences, is in no sense a religious corporation, even though it be given into the care and under the management of a religious body. State *v.* Westminster College, 175 Mo. 52, 56, 74 S. W. 990.

5. *In re* St. Louis Christian Science Inst., 27 Mo. App. 633, 637.

6. See Howard *v.* Hayward, 10 Metc. (Mass.) 408; Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103; *In re* St. Luke's M. E. Church, 17 Phila. (Pa.) 261; Tunstall *v.* Wormley, 54 Tex. 476.

Where the purpose of a proposed corporation imports a system for the treatment of disease which does not conform to the Pennsylvania act of March 24, 1877, regulating the practice of medicine and surgery, the courts will refuse to charter it as a church or religious body. *In re* First Church of Christ Scientist, 6 Pa. Dist. 745, 20 Pa. Co. Ct. 241, 41 Wkly. Notes Cas. 259. If a schismatical body within a church desires incorporation, it should be permitted to have the aid of the law in doing so; but this must be done openly, and with due announcement of the schismatical character of the body, and not under the guise of being an offshoot of the true one. It cannot be permitted to appropriate the name, and with it the appearance of regularity, which belongs to the duly established organization. *In re* Charter Church of Mother of God Czenstochowa, 5 Lack. Leg. N. (Pa.) 128.

Such a statute is not mandatory but permissive.— Smith *v.* Bonhoof, 2 Mich. 115, holding also that a society cannot become incorporated if the power conferred by the statute on the corporators is by the constitution and usages of the churches lodged in another body.

Foreign associations are not embraced within such a statute unless they undertake to exercise their peculiar functions or corporate franchises within the state. *In re* Ticknor, 13 Mich. 44.

7. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32; Catholic Church *v.* Tobbein, 82 Mo. 418.

Corporation held prohibited by such constitutional provision.— An institute of "christian science," whose charter powers are to be used in aid of the propagation and practice of a religious belief. *In re* St. Louis Christian Science Inst., 27 Mo. App. 633.

Corporations held not prohibited by such constitutional provision.— An association for the purpose of establishing colonies of persons of a particular religious belief. St. Louis Colonization Assoc. *v.* Hennessy, 11 Mo. App. 555. A benevolent business corporation, with a capital stock, chartered for the purpose of maintaining an institution in which indigent women connected with designated religious denominations might be provided with a comfortable home. Jordan *v.* Richmond Home for Ladies, 106 Va. 710, 56 S. E. 730. The trustees of the General Assembly of the Presbyterian Church in the United States. Guthrie *v.* Guthrie, (Va. 1889) 10 S. E. 327; Presbyterian Church Gen. Assembly *v.* Guthrie, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321. The trustees of the presbyterian committee of publication.

the incorporation of a religious society as prescribed by statute, which should be substantially followed,[8] are in general public notice given at a stated meeting, the election of trustees, and the execution of the certificate.[9]

b. Certificate and Charter. The certificate of incorporation must be executed in compliance with the statutes,[10] and the statutory requirements as to the contents of the certificate of incorporation and charter must be substantially fol-

Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

8. Ferraria *v.* Vasconcelles, 23 Ill. 456; Kulinski *v.* Dambrowski, 29 Wis. 109.

9. St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323; Kulinski *v.* Dambrowski, 29 Wis. 109.

Notice.— Unless required by statute the notice need not be given by any particular person. Kulinski *v.* Dambrowski, 29 Wis. 109. The reading of a notice by a church member, after the minister has refused to do so, immediately after the benediction, and before any of the congregation has left, is sufficient. West Koshkonong Congregation *v.* Ottesen, 80 Wis. 62, 49 N. W. 24. When the incorporators are not members of a religious society, but desire to organize a corporation in connection with a church of their own peculiar tenets, to be associated therewith, no notice of an intent to organize, or of the time or place of forming the organization, is necessary. Franke *v.* Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856.

Stated meeting.— It is of the substance of the proceedings that the meeting be held at the church meeting-house, or other place where the congregation statedly meet for divine worship. Kulinski *v.* Dambrowski, 29 Wis. 109. A meeting of the minority faction of a church, held at the regular time and at the regular church edifice, and which all the members are free to attend, is a "stated" meeting at which notice of the organization of a corporation can lawfully be given, and the corporation organized in pursuance of such notice is duly organized, although no further notice is given at a regular meeting of the majority faction of the church held at a private residence. St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323; Spiritual, etc., Temple *v.* Vincent, 127 Wis. 93, 105 N. W. 1026. The fact that one faction of a religious society takes no part in the proceedings for its incorporation cannot affect them where due notice is given to all. Spiritual, etc., Temple *v.* Vincent, *supra*; West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62, 49 N. W. 24. A meeting at which the organization is perfected is not illegal where the certificate shows that it was composed of the male members of a congregation, although the female members were entitled to participate, it not appearing that the latter were excluded. Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402.

Application for incorporation.— It is not necessary in the incorporation of a religious society that all of the members should sign the petition. North St. Louis Christian Church *v.* McGowan, 62 Mo. 279. But an application which does not set forth the names and residences of the subscribers thereto is fatally defective. *In re* United Brethren Hebrew Cong., 11 York Leg. Rec. (Pa.) 89.

10. See cases cited *infra*, this note.

Requisites of execution of certificate.— Such a certificate must be under seal (Ferraria *v.* Vasconcelles, 23 Ill. 456. But see St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323, holding that the accidental loss of the seal from the certificate of incorporation will not prevent the corporation from taking effect as such), acknowledged or proved (Ferraria *v.* Vasconcelles, *supra*; Summit Reformed Dutch Church *v.* Harder, 12 N. Y. Suppl. 297 [*affirmed* in 126 N. Y. 646, 27 N. E. 853]; First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605), and recorded (Ferraria *v.* Vasconcelles, *supra*); but failure to record the certificate of incorporation does not prevent the society from proving its corporate existence by evidence of acts of user (Washington Fifth Baptist Church *v.* Baltimore, etc., R. Co., 5 Mackey (D. C.) 269).

Before whom acknowledgment to be taken. — If the statute designates the officer before whom the certificate of incorporation shall be acknowledged, an acknowledgment before any other officer is insufficient. First Baptist Soc. *v.* Rapalee, 16 Wend. (N. Y.) 605. But where a statute provides that a certificate of incorporation may be acknowledged before "any officer authorized to take acknowledgments or proofs of conveyances of real estate," a commissioner of deeds may properly take such acknowledgment. Greenwich Second M. E. Church *v.* Humphrey, 21 N. Y. Suppl. 89 [*affirmed* in 142 N. Y. 137, 36 N. E. 812].

Time of making certificate.— The certificate of incorporation is usually required to be made immediately after the meeting held for the purpose of incorporation. *In re* Cutchogue Cong. Church, etc., 131 N. Y. 1, 30 N. E. 43 [*affirming* 13 N. Y. Suppl. 140], holding, however, that a certificate bearing date a month later than such meeting is valid.

An error in recording the certificate of incorporation does not invalidate the organization of a religious society. St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323; Matter of Arden, 4 N. Y. Suppl. 177, 1 Connoly Surr. 159.

Such certificate is the proper evidence of the fact of incorporation.— Jackson *v.* Leggett, 7 Wend. (N. Y.) 377, holding that the record of the certificate is not sufficient. And a certificate regular in form is *prima facie* evidence of the truth of its recitals, where subsequent user of the corporate rights is shown, as by holding religious meetings. Summit Reformed Dutch Church *v.* Harder,

lowed.[11] But no provision is necessary in a charter, concerning any matter provided for by statute,[12] nor should a charter contain anything which is properly the subject of regulation by a by-law.[13]

c. Name. Statutes providing for the incorporation of religious societies do not usually require the corporation to bear the same name as was borne by the unincorporated society; but such name as the parties controlling the matter may agree upon, and which is reasonably appropriate for the purpose, may be chosen,[14] and a religious corporation has inherently the same power to change its name as

12 N. Y. Suppl. 297 [*affirmed* in 126 N. Y. 646, 27 N. E. 853].

Collateral inquiry.— Inquiry into the validity of the charter of a religious society cannot be made in a collateral proceeding. Dubs *v.* Egli, 167 Ill. 514, 47 N. E. 766.

11. Ferraria *v.* Vasconcelles, 23 Ill. 456.

Among the essentials of such a certificate usually required is a distinct statement of the name of the corporation (Ferraria *v.* Vasconcelles, 23 Ill. 456; Lynch *v.* Pfeiffer, 110 N. Y. 33, 17 N. E. 402; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261), the purpose for which it is formed (Matter of St. Luke's M. E. Church, *supra*), the place where the business is to be transacted (*In re* Christ's Evangelical Lutheran Church, 5 Pa. Co. Ct. 121; Matter of St. Luke's M. E. Church, *supra*), the term for which it is to exist (Matter of St. Luke's M. E. Church, *supra*), the number of its trustees (*In re* Christ's Evangelical Lutheran Church, *supra*; Matter of St. Luke's M. E. Church, *supra*; *In re* Evangelical Lutheran Cong., 6 Phila. (Pa.) 64), and the date of their election or appointment, and the length of term for which they were elected or appointed (Ferraria *v.* Vasconcelles, *supra*; Matter of St. Luke's M. E. Church, *supra*).

In Pennsylvania the charter should contain a provision securing the control and disposition of the property of the corporation to the lay members of the same (*In re* Alexander Presby. Church, 30 Pa. St. 154; *In re* St. Paul's Church, 30 Pa. St. 152; *In re* German Mut. Evangelical Protestant St. John's Church, 5 Pa. Co. Ct. 124 note; *In re* Christ's Evangelical Lutheran Church, 5 Pa. Co. Ct. 121; Matter of St. Luke's M. E. Church, 17 Phila. 261; *In re* Church of Holy Communion, 14 Phila. 126; *In re* West Park Ave. M. E. Church, 12 Phila. 518; *In re* Reformed Episcopal Church of Covenant, 12 Phila. 516), a provision limiting the value of the real and personal estate of the corporation (*In re* Christ's Church Charter, 8 Pa. Co. Ct. 28. But see *In re* Charter, 1 Leg. Rec. 133, holding that under the Pennsylvania act of April 29, 1874, the charter of a corporation organized for religious and educational purposes need contain no limitation on the amount of real estate to be held by the corporation as that is limited by the act itself), a limit on yearly income other than from real estate (*In re* Mary Elizabeth Patterson Memorial Church, 17 Phila. 306; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261; *In re* West Park Ave. M. E. Church, *supra*), and a prohibition against the diversion of the funds of the original donors from their destination, and against the admission of members not of the religious sect of the incorporators (*In re* Charter, *supra*).

Form of worship.— A charter of a proposed corporation for the support of public worship should clearly state the kind or form of worship proposed, and distinctly name the kind of church government it is to be subject to. *In re* Charter, 1 Del. Co. (Pa.) 415.

The acceptance of a charter by a religious society must be by an act of the society, as a body, at a meeting regularly held for the purpose and the individual assent thereto by each member, evidenced by his signature, is not sufficient. Shortz *v.* Unangst, 3 Watts & S. (Pa.) 45.

Change and amendment of charter.— A religious corporation may at any time surrender its charter and accept a new one with other and different provisions (Atty.-Gen. *v.* Society for Relief, etc., 10 Rich. Eq. (S. C.) 604), and may obtain an amendment of its charter (Sawer *v.* Gosser, 1 Wkly. Notes Cas. (Pa.) 55; Atty.-Gen. *v.* Society for Relief, etc., 10 Rich. Eq. (S. C.) 604, amendment authorizing it to apply its surplus fund to other purposes than those for which the corporation was originally established), provided such amendment does not alter the original principles or violate the fundamental law of the church (Com. *v.* Cornish, 13 Pa. St. 288; Matter of Walnut St. Presb. Church, 3 Brewst. (Pa.) 277; Matter of Hebron Evangelical Lutheran Church, 9 Phila. (Pa.) 609, holding that a charter of a church will not be amended so as to alter its original principles, even if asked by a majority of the congregation, where the minority object).

12. *In re* Charter, 1 Leg. Rec. (Pa.) 133; Matter of St. Luke's M. E. Church, 17 Phila. (Pa.) 261; *In re* United Brethren Hebrew Cong., 11 York Leg. Rec. (Pa.) 89.

The duties of officers and members, where the same are indicated and enjoined by law, should not be specifically provided for in the charter. *In re* Christ's Evangelical Lutheran Church, 5 Pa. Co. Ct. 121.

13. *In re* Christ's Evangelical Lutheran Church, 5 Pa. Co. Ct. 121.

14. Spiritual, etc., Temple *v.* Vincent, 127 Wis. 93, 105 N. W. 1026.

A name so similar to that of an existing corporation as to lead to confusion will not be approved by the courts. *In re* Harrisburg First Presb. Church, 2 Grant (Pa.) 240; *In re* St. Francis Polish Nat. Catholic Church, 31 Pa. Super. Ct. 87. *Compare In*

it had at first to fix it.[15] Such a change of name does not affect the identity of the corporation so as to prevent its holding the corporate property previously acquired.[16]

3. Constitution and Changes Thereof. A religious association owes its existence to the compact between the members composing it, and when a written constitution is adopted it is the embodiment of the terms of the compact, by virtue of which the association was formed and by which it is to be conducted,[17] and such a constitution acquiesced in and recognized by a religious society is valid and binding,[18] although never legally adopted.[19] Under the constitutional provision of a church that there shall be no alteration of the constitution unless by the request of two thirds of the whole society, the request need not originate with the members of the society; but a proposed change may be laid before the society by its highest church judiciary, and, after the society has expressed its wish for such change, it may be made by such judiciary,[20] and in such case, two thirds of

re Bloomfield First Presb. Church, 111 Pa. St. 156, 2 Atl. 574.

15. Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481.

This right is sometimes specifically granted by statute, and the procedure regulated. See the statutes of the several states. And see Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654]; *In re* Bloomfield First Presby. Church, 111 Pa. St. 156, 2 Atl. 574.

An order changing the name of a religious corporation may be revoked, although there is no statutory provision giving the court that power; and where it appears that a religious body other than the petitioner claims to be the real corporation, and to be entitled exclusively to the name proposed to be changed, an order making the change should be vacated, with leave to renew on notice to all parties interested. *In re* Abyssinian Baptist Church, 13 N. Y. Suppl. 919.

16. Trinity Church *v.* Hall, 22 Conn. 125; Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Meyer *v.* German Evangelical Lutheran Emmanuel Church, 37 Minn. 241, 33 N. W. 786.

17. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

Notice of adoption.— If the notice of the adoption of a constitution by a religious society is defective, the adoption is irregular. Ehrenfeldt's Appeal, 101 Pa. St. 186.

18. *Illinois.*— Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343.

Michigan.— Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

Missouri.— Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542.

Oregon.— Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

Pennsylvania.— Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161.

See 42 Cent. Dig. tit. "Religious Societies," § 15.

19. Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

The constitution can be changed or amended only in the manner provided therein (Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615; Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542; Rottmann *v.* Bartling, 22 Nebr. 375, 35 N. W. 126. *Compare* Smith *v.* Nelson, 18 Vt. 511), or by the rules and by-laws of such society (Rottmann *v.* Bartling, 22 Nebr. 375, 35 N. W. 126).

Notice.— When the constitution provides for notice of any proposed change in the constitution, a change effected without giving such notice is invalid and of no effect. Rottmann *v.* Bartling, 22 Nebr. 375, 35 N. W. 126; Brundage *v.* Deardorf, 55 Fed. 839. But notice of the time of an election to vote on a revision of the constitution and confession of faith to be held "during the month of Nov., 1888," the date being fixed by the custom of the society, is sufficient. Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

20. *Illinois.*— Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343.

Missouri.— Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542, holding that a provision in the original constitution of a religious society that there shall be no alteration of the constitution unless by request of two thirds of the whole society, which prescribed no method of obtaining consent or of proposing amendments, is substantially complied with by the preparation of an amended constitution by a commission pursuant to resolution of the general conference, and its submission to a vote of the members under methods adopted by the commission, and by a report of the vote, and its adoption by the general conference, and its proclamation by the presiding bishop as the constitution of the church.

Ohio.— Rike *v.* Floyd, 6 Ohio Cir. Ct. 80, 3 Ohio Cir. Dec. 359.

Oregon.— Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

Pennsylvania.— Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161.

United States.— Brundage *v.* Deardorf, 55 Fed. 839.

See 42 Cent. Dig. tit. "Religious Societies," § 16.

But see Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

the members voting upon such proposition constitute two thirds of the whole society within the meaning of such constitution.[21] A constitutional provision that no rule or ordinance shall at any time be passed to change or do away with the confession of faith does not prohibit changes in the interest of clearness of expression, or fulness of statement, of the accepted doctrines of the church.[22]

4. Effect of Incorporation. The statutes relating to the incorporation of religious societies differ in the various states. In some states a large majority of such societies are incorporated,[23] while in others the societies themselves are unincorporated bodies with certain officers on whom is conferred by statute a corporate succession, for the purpose of holding the legal title to the property,[24] the society itself not becoming incorporated, but only its trustees.[25] In other cases the society itself is incorporated, and the previous voluntary association merged in the corporation, so far as its secular affairs merely are concerned, the trustees not being the body corporate itself, but merely its officers, to whom is committed the custody of its property, and the management of its concerns, and the members of the association form the constituent body, the legal entity of which is represented by the trustees.[26] Under the statutes of some states a religious society which incorporates in the manner prescribed becomes thereby a civil corporation as distinguished from an ecclesiastical corporation, and is subject to the principles of the common law applicable to corporations under the general incorporation laws so far as they are applicable;[27] but under other statutes

21. *Illinois.*— Kuns *v.* Robertson, 154 Ill. 394, 40 N E. 343.

Indiana.— Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518.

Missouri.— Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542.

Ohio.—Rike *v.* Floyd, 6 Ohio Cir. Ct. 80, 3 Ohio Cir. Dec. 359.

Oregon.— Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

Pennsylvania.— Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161.

See 42 Cent. Dig. tit. "Religious Societies," § 16.

But see Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615.

22. Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542; Rike *v.* Floyd, 6 Ohio Cir. Ct. 80, 3 Ohio Cir. Dec. 359; Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161.

23. See cases cited *infra*, this section.

24. Bailey *v.* Freeport M. E. Church, 71 Me. 472; Nason *v.* First Bangor Christian Church, 66 Me. 100; Anderson *v.* Brock, 3 Me. 243; Hamblett *v.* Bennett, 6 Allen (Mass.) 140; Weld *v.* May, 9 Cush. (Mass.) 181; Earle *v.* Wood, 8 Cush. (Mass.) 430; Bean *v.* South Danbury Christian Church, 61 N. H. 260.

25. Stubbs *v.* St. John's Church, 96 Md. 267, 53 Atl. 917; Tarter *v.* Gibbs, 24 Md. 323; African Methodist Bethel Church *v.* Carmack, 2 Md. Ch. 143; Holmes *v.* Wesley M. E. Church, (N. J. Ch. 1898) 41 Atl. 102. See also Enos *v.* St. John The Baptist Church, 187 Mass. 40, 72 N. E. 253; Worrell *v.* Millstone First Presby. Church, 23 N. J. Eq. 96.

In presbyterian and methodist denominations the corporation consists of the trustees and does not include the congregation. Fair *v.* Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 Atl. 166.

26. Gram *v.* Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Robertson *v.* Bullions, 11 N. Y. 243; Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654]; Burrell *v.* Seneca Associate Reformed Church, 44 Barb. (N. Y.) 282; Madison Ave Baptist Church *v.* Oliver St. Baptist Church, 31 N. Y. Super. Ct. 109; Miller *v.* Gable, 2 Den. (N. Y.) 492; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

27. Horst *v.* Traudt, 43 Colo. 445, 96 Pac. 259; Calkins *v.* Cheney, 92 Ill. 463; Robertson *v.* Bullions, 11 N. Y. 243 [*affirming* 9 Barb. 64]; Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654]. Where a religious society holds a new election of trustees for the purpose of being reincorporated, if the object of the new election and certificate is to preserve, and not to change or dissolve, the old corporation, the new corporation is a continuance of the old. Miller *v.* English, 21 N. J. L. 317.

Such a society, when incorporated, has no denominational character, and none can be ingrafted upon it. That portion of the members of the corporation organized into a separate body, called the church, may belong to a peculiar denomination, but the church, as such, cannot impress its distinctive character upon the corporation, so as to prevent a majority of the corporators from changing it. Petty *v.* Tooker, 21 N. Y. 267 [*affirming* 29 Barb. 256]; Van Buren *v.* Gansevoort Reformed Church, 62 Barb. (N. Y.) 495; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243].

The "corporation" and the "church" are distinct bodies, the objects of one being temporal, those of the other spiritual, the former

an incorporated religious society acquires the rights and powers of a corporation for certain limited purposes, without losing its sectarian and denominational characteristics.[28]

D. De Facto Corporation. A religious society which has, in good faith, attempted to legally organize as a corporation, and has long claimed and exercised the rights and powers of a corporation, is a corporation *de facto*, although its incorporation is technically defective.[29] Such a *de facto* corporation has power to sue,[30] and may be sued,[31] and may acquire,[32] and convey property.[33]

II. MEMBERSHIP.*

A. What Constitutes. Who are members of a religious society must as a general rule be determined by reference to the rules, constitution, or by-laws of the society,[34] and by reference to the statutes governing such bodies in the various

only being recognized by the municipal law. Petty *v.* Tooker, 21 N. Y. 267 [*affirming* Bellport Parish *v.* Tooker, 29 Barb. 256].

28. Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82, holding that under the acts of 1819 and 1827, religious sects or denominations of christians were alone authorized to form religious societies, and the limited corporate powers that were conferred upon them did not in any way take away or change their character as sectarian or denominational societies. And see York First Reformed Presb. Church *v.* Bowden, 14 Abb. N. Cas. (N. Y.) 356, holding that since Laws (1875), c. 79, requiring the trustees of a religious corporation to administer its temporalities according to the discipline and usage of the denomination to which the church members belong, the rule that such corporations formed under N. Y. Act (1813), c. 60, § 3, have no denominational character, is no longer tenable, and courts must now recognize their denominational character when asked to enjoin the diversion of the temporalities from the uses of the denomination.

29. Willard *v.* Rockville Centre M. E. Church, 66 Ill. 55; Stoker *v.* Schwab, 56 N. Y. Super. Ct. 122, 1 N. Y. Suppl. 425; All Saints Church *v.* Lovett, 1 Hall (N. Y.) 213; Chittenden *v.* Chittenden, 1 Am. L. Reg. (N. Y.) 538; Franke *v.* Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784.

Loss of church records as presumptive evidence of incorporation.— Where it is not shown that a church society has complied with the requirements of the statute for organization of religious corporation, or has ever assumed to act as a corporation, the fact that some of the early records of the church and of the county are missing does not raise a presumption that the society was incorporated. Alden *v.* St. Peter's Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232.

What constitutes a religious corporation de facto.— To show such a body to be a corporation *de facto*, as against persons with whom it has dealt in a corporate capacity, two things are necessary: (1) The existence of a charter, or some law under which a corporation, with the powers assumed, might lawfully be created; (2) a use, by the party to the suit, of the rights claimed to be conferred by such charter or law. Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Van Buren *v.* Gansevoort Reformed Church, 62 Barb. (N. Y.) 495.

Mere user, however, or the assumption of corporate capacity, is not sufficient to establish a corporation *de facto* (Methodist Episcopal Union Church *v.* Pickett, 19 N. Y. 482; Van Buren *v.* Gansevoort Reformed Church, 62 Barb. (N. Y.) 495), although it is sometimes provided by statute that whenever any religious society or corporation shall have exercised the franchises and privileges of a corporation for a specified term of years, it shall be presumed to have been legally organized in pursuance of the laws of the state (see Ionia Cong. Church *v.* Webber, 54 Mich. 571, 20 N. W. 542; Newark M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207); but the acts relied upon must be something particularly pertaining to corporate powers, and a religious organization may, without raising a presumption of incorporation, maintain regular worship, contract debts in its own name, be represented in the annual conference, receive members to its communion, and try and expel them for misconduct (Newark M. E. Church *v.* Clark, *supra*).

Capability of being corporation de jure.— In order to be a corporation *de facto*, it must be possible to be a corporation *de jure*. Evenson *v.* Ellingson, 67 Wis. 634, 31 N. W. 342.

30. Willard *v.* Methodist Episcopal Church, 66 Ill. 55; Douglas Reformed Methodist Soc. *v.* Draper, 97 Mass. 349; Franke *v.* Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 11 S. Ct. 185, 34 L. ed. 784.

31. Congregational Church *v.* Webber, 54 Mich. 571, 20 N. W. 542.

32. Chittenden *v.* Chittenden, 1 Am. L. Reg. (N. Y.) 538.

33. Stoker *v.* Schwab, 56 N. Y. Super. Ct. 122, 1 N. Y. Suppl. 425.

34. East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42

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states,[35] and religious societies, when not restricted by their charters or articles of association, may make by-laws declaring what shall constitute membership applicable to existing as well as to future members.[36] The essence of the relation of membership in a religious society is held to be the agreement of the parties,[37]

Minn. 503, 44 N. W. 663; American Primitive Soc. *v.* Pilling, 24 N. J. L. 653.

35. See the statutes of the several states. And see cases cited *infra*, this section.

Where a statute incorporating a parish directed elections to be made in the customary manner, and the ancient law, which fixed that manner, allowed all persons residing in the parish, or paying taxes therein, to vote at elections, a by-law of the parish that every person should pay fifty dollars in order to be entitled to the privileges of membership is a violation of the charter, and a nullity. St. Luke's Church *v.* Mathews, 4 Desauss. Eq. (S. C.) 578, 6 Am. Dec. 619.

Construction of private act of the legislature.— Where, by a private act of the legislature, several persons, together with their polls and estates, were set off from the town in which they lived, and annexed to a parish in another town, to which parish it was declared in the act "they shall forever thereafter be considered as belonging, there to do duty and enjoy parish privileges," it was determined that the effect of such act was permanently to alter the boundaries of the parish so far as to include therein the lands, and to make every person afterward living upon those lands, or upon any part of them, members of such parish, and entitled to the privileges and liable to the duties, although, as to municipal duties and rights, they would be members of the town in which the lands were situated. Colburn *v.* Ellis, 7 Mass. 89.

Membership in parish under early statutes. — Under the earlier statutes it was held that every resident of full age within the limit of a territorial parish, if otherwise qualified, was *ipso facto* a member of the parish unless regularly united as a member to some poll parish, and on ceasing to be a member of such poll parish he became forthwith a member of the territorial parish within which he resided, unless such secession was fraudulent (Lord *v.* Chamberlain, 2 Me. 67. But see Bradford *v.* Cary, 5 Me. 339); and persons who came to reside within the limits of a territorial parish, and did not belong to any other religious society, thereby became members of such parish without application for admission or acceptance (Osgood *v.* Bradley, 7 Me. 411); and the sons of members of a parish, on coming of age and continuing to reside within the limits of the parish, became *ipso facto* members of the parish (Osgood *v.* Bradley, *supra*); and on ceasing to be members of such parish became forthwith members of the territorial parish within which they resided, unless such secession was fraudulent (Lord *v.* Chamberlain, 2 Me. 67; Oakes *v.* Hill, 10 Pick. (Mass.) 333). But under other and later statutes the inhabitants of a town were not necessarily and of course members of a parish included within its limits (Dillingham *v.* Snow, 3 Mass. 276, holding that quakers, for instance, and others exempted in conformity to their religious scruples and opinions, although members of a town, are not members of a parish comprehended by the same boundaries); and the relation of a member to a parish was held to be founded on contract, and no person became a member until his written application has been acted upon (Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148, holding that no person can be made or become a member of any religious society without its consent, and that too evidenced by a written application; and on the other hand, no person can thrust himself into any such body against its will, the authority to prescribe the mode of admitting members necessarily implying the power of determining whether they shall be admitted or not, which power may be exercised by a direct vote of the parish).

Necessity of filing certificate of membership.— Where a person is admitted to be a member of a parish by vote and attends subsequent meetings and votes as a member, he is a member, although he may not have filed a certificate in accordance with St. (1823) c. 106 (Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163), and that statute does not repeal St. (1811) c. 6, and does not require a certificate of membership to be filed by the member, but only by his authority or subsequent ratification (Fisher *v.* Whitman, 13 Pick. (Mass.) 350).

Certification to a copy of membership.— A membership certificate is a document of which the clerk of an ecclesiastical society can give an official copy, and such a copy is sufficiently formal if made by a clerk signing his name, with the addition of "clerk" only. Price *v.* Lyon, 14 Conn. 279.

36. Taylor *v.* Edson, 4 Cush. (Mass.) 522.

37. Leavitt *v.* Truair, 13 Pick. (Mass.) 111.

Membership in church and church corporation distinguished.— The character of persons as members of a church corporation, under the statutes, is distinct from their character as members of the church, and a decision of an ecclesiastical tribunal, excluding such persons from "the church," does not affect their rights as to the management of the temporal concerns of the corporation (Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223), and under a statute authorizing the incorporation of trustees of religious societies and defining their powers, persons affiliating with a society so incorporated merely as members have no rights as members of the corporation, and hence such members have no standing in court to restrain the trustees from changing the language in which the services shall be conducted, in the absence of allegation as to what the particular denomination has required in respect to the language to be used.

and there must generally be a profession of its faith and a submission to its government,[38] and every person entering into a religious society impliedly, if not expressly, covenants to conform to its rules and to submit to its authority and discipline.[39]

B. Liabilities of Member — 1. For Debts of Society. By the usage and practice in some of the New England states, inhabitants of a parish were liable for the debts of the parish;[40] but the general rule now is that private property of members of a religious society cannot be taken to satisfy a debt of the society, unless it be so subjected by the provisions of the charter,[41] and a member of the incorporated religious society, not founded for the purpose of gain or pecuniary profit, is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified the same.[42] But the members of a voluntary unincorporated religious society who through their trustees and priest enter into contracts are individually liable thereon.[43]

in the services (Shaeffer *v.* Klee, 100 Md. 264, 59 Atl. 850), and the pastor of a church is not *ipso facto* an officer of the church corporation in such a way as to bind it by his acts (Allen *v.* North Des Moines M. E. Church, 127 Iowa 96, 102 N. W. 808, 109 Am. St. Rep. 366, 69 L. R. A. 255), and a religious corporation, having nothing to do with the church represented by it, except as it provides for its temporal wants, no action can be maintained against the corporation for an expulsion of a member from the church (Hardin *v.* Baptist Church, 51 Mich. 137, 16 N. W. 311, 47 Am. Rep. 555).

The criterion of parish membership was held to be liability to taxation. Oakes *v.* Hill, 10 Pick. (Mass.) 333.

38. Day *v.* Bolton, 12 N. J. 206 [*cited* and *approved* in Cammeyer *v.* United German Lutheran Church, 2 Sandf. Ch. (N. Y.) 186]; Cape *v.* Plymouth Cong. Church, 130 Wis. 174, 109 N. W. 928. See Com. *v.* Morrison, 13 Phila. (Pa.) 135.

39. Lucas *v.* Case, 9 Bush (Ky.) 297; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421. And see *infra*, X, A, B.

Authority of members to act for church or society.— The male members of a congregation incorporated under an act which empowers them to elect trustees to manage its property are invested with no visitorial or controlling power over the ministers or trustees or interest in the property of the corporation, or with any authority except in the case of selling or leasing, or in amending the articles when the consent of two thirds is required. Tartar *v.* Gibbs, 24 Md. 323. And where a member of a church expended money and rendered services in procuring the suspension of the pastor of the church for immoral conduct, although the rules of the church gives any member power to prosecute charges against the pastor, no authority to act for the church can be inferred from the nature of the services rendered by the member. Parshley *v.* Third M. E. Church, 4 Misc. (N. Y.) 302, 24 N. Y. Suppl. 106 [*affirmed* in 147 N. Y. 583, 42 N. E. 15, 30 L. R. A. 574].

Religious societies are regarded by the civil authority as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs, and principles which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs as so many stipulations of a contract between them. Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252.

40. Fernald *v.* Lewis, 6 Me. 264.

Execution might be levied on the property of a member of the parish (Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163); but the remedy for satisfaction of a judgment against a parish by levy on the property of its members could be pursued against those only who were members at the time of the rendition of judgment, or, at furthest, at the time of commencement of the action (Fernald *v.* Lewis, 6 Me. 264), and it was held that execution could not be levied on the property of one who was a member at the time of the rendition of judgment and ceased to be a member before the levy (Chase *v.* Merrimack Bank, 19 Pick. (Mass.) 564, 31 Am. Dec. 163), and the rule was held to be further limited to members of territorial parishes not incorporated poll parishes (Richards *v.* Butterfield, 6 Cush. (Mass.) 191).

41. Jewett *v.* Thames Bank, 16 Conn. 511 (holding that the members of an ecclesiastical society without local limits, formed by voluntary association, pursuant to a statute relating to religious societies, are not individually liable for the debts of such society); Richardson *v.* Butterfield, 6 Cush. (Mass.) 191.

But a court of equity will decree against individual members if necessary to prevent a failure of justice. Bigelow *v.* Middletown Cong. Soc., 15 Vt. 370, 11 Vt. 283.

Creditors of a church corporation are not creditors of the members of the church, and have no right of action against them as such. Allen *v.* North Des Moines M. E. Church, 127 Iowa 96, 102 N. W. 808, 109 Am. St. Rep. 366, 69 L. R. A. 255.

42. Clark *v.* O'Rourke, 111 Mich. 108, 69 N. W. 147, 66 Am. St. Rep. 389; Plattsmouth First Nat. Bank *v.* Rector, 59 Nebr. 77, 80 N. W. 269.

43. Sheehy *v.* Blake, 72 Wis. 411, 39 N. W. 479, 77 Wis. 394, 46 N. W. 537, 9 L. R. A. 564.

2. TAXES AND ASSESSMENTS. Under earlier statutes support of public worship was compulsory and taxes were levied therefor, but these statutes and the cases construing them are now of little more than historical interest.[44] But the members of a religious society are liable to assessments for support of the church and its debts in like manner as members of non-religious societies,[45] and the right to levy the assessments and the manner of enforcing them are governed by the charter, constitution, and by-laws of the association.[46] The fact that some individuals in a society are assessed who are not liable to the tax does not vitiate the assessment as regards those who are liable.[47]

C. Withdrawal and Expulsion — 1. MANNER AND GROUNDS. The continuance of a member with a religious society is purely voluntary, and he may withdraw when he wishes,[48] and the essence of the relation being the agreement of the parties,[49] the relation can be terminated in like manner as other agreements;[50] and where neither the charter nor by-laws of a corporation prescribe any particular form in which the members may resign their rights of membership, and their resignation be accepted, such resignation and acceptance may be implied from the acts of the parties.[51] Where religious societies, not restricted by their charters

Members of a church adding "trustees" to their names are liable on an agreement to pay a certain sum used in building a parsonage house, and the use of the term "trustees" indicates rather that the legal interest is in them than that they act as mere agents. Chick *v.* Trevett, 20 Me. 462, 37 Am. Dec. 68.

If members of a voluntary religious association agree to hire a minister, and maintain a place of public worship, all contracts with such minister or with each other are binding, and they cannot discharge themselves from the obligations of a contract to pay for the support of the preaching by changing their religious sentiments, but only be discharged by vote of the society, appearing of record. Woodstock First Cong. Soc. *v.* Swan, 2 Vt. 222.

44. **Early statutes construed** in Lord *v.* Marvin, 1 Root (Conn.) 330; Hosford *v.* Lord, 1 Root (Conn.) 325; Dall *v.* Kimball, 6 Me. 171; Ware *v.* Sherburne First Parish, 8 Cush. (Mass.) 267; Sherburne First Parish *v.* Fiske, 8 Cush. (Mass.) 264, 54 Am. Dec. 755; Dow *v.* Sudbury First Parish, 5 Metc. (Mass.) 73; Goodell Mfg. Co. *v.* Trask, 11 Pick. (Mass.) 514; Oakes *v.* Hill, 10 Pick. (Mass.) 333; Inglee *v.* Bosworth, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; Holbrook *v.* Holbrook, 1 Pick. (Mass.) 248; Whittemore *v.* Smith, 17 Mass. 347; Amesbury Nail Factory Co. *v.* Weed, 17 Mass. 53; Coburn *v.* Richardson, 16 Mass. 213; Turner *v.* Burlington Parish, 16 Mass. 208; Adams *v.* Howe, 14 Mass. 340, 7 Am. Dec. 216; Sanger *v.* Roxbury Third Parish, 8 Mass. 265; Lovell *v.* Byfield Parish, 7 Mass. 230; Turner *v.* Brookfield Second Precinct, 7 Mass. 60; Kendall *v.* Kingston, 5 Mass. 524; Thaxter *v.* Jones, 4 Mass. 570; Montague *v.* Dedham First Parish, 4 Mass. 269; Washburn *v.* West Springfield Fourth Parish, 1 Mass. 32; Muzzy *v.* Wilkins, Smith (N. H.) 1; Ebaugh *v.* Hendel, 5 Watts (Pa.) 43, 30 Am. Dec. 291.

A parish could not maintain an action in its own name to recover the price of a pew therein, which had been sold by its treasurer, under the statute, for non-payment of taxes assessed for the support of public worship. West Newbury First Parish *v.* Dow, 3 Allen (Mass.) 369.

45. Mayberry *v.* Mead, 80 Me. 27, 12 Atl. 635.

46. Perrin *v.* Granger, 30 Vt. 595.

One taking an assignment of a pew for a debt is not personally liable to the vestry for taxes thereon. Mauro *v.* St. John's Parish, 16 Fed. Cas. No. 9,313, 4 Cranch C. C. 116.

47. Inglee *v.* Bosworth, 5 Pick. (Mass.) 498, 16 Am. Dec. 419.

Officers who assess taxes on non-members are liable to an action for trespass (Gage *v.* Currier, 4 Pick. (Mass.) 399), and a person compelled to pay taxes for the support of public worship in a parish or religious society of which he is not a member may maintain an action of assumpsit against such parish or society, to recover the money so paid (Sumner *v.* Dorchester First Parish, 4 Pick. (Mass.) 361).

48. Fernald *v.* Lewis, 6 Me. 264.

What amounts to a voluntary withdrawal of members from a religious association is a question of law, and the exclusion of evidence upon which the legal inference might be based is error. Perry *v.* Tupper, 74 N. C. 722.

A certificate of the clerk of a religious society that a member at his own request had ceased to be a member was sufficient to show that his connection therewith was dissolved. Oakes *v.* Hill, 10 Pick. (Mass.) 333.

If the minority of a church withdraw voluntarily, they lose their rights as corporators, but not if they are compelled to leave by the majority. Gordon *v.* Williams, 3 Leg. Gaz. (Pa.) 113.

49. See *supra*, II, A.

50. Leavitt *v.* Truair, 13 Pick. (Mass.) 111; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

51. State *v.* Ancker, 2 Rich. (S. C.) 245.

Resignation may be by parol. — State *v.* Ancker, 2 Rich. (S. C.) 245.

A withdrawal by an inferior ecclesiastical corporation which had been connected with

or articles of association, make by-laws declaring what shall operate as a forfeiture of membership, failure to abide by the by-laws will forfeit membership,[52] and a person who withdraws from a church does not continue a member thereof simply because he holds the same religious faith with the members of that church.[53] But there may be a division in a church as distinguished from a division from a church, and the members of either faction do not *ipso facto* forfeit their membership.[54] When a vote of excommunication from a church has been passed, and

and subject to the superior jurisdiction of the church, from all connection with such church, does not affect the property rights of the seceding body, so as to deprive any person of membership, until some action is taken in the matter by the superior church authorities. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653.

But a pretended and colorable secession from a religious society or parish, although apparently legal, yet, if done with the fraudulent intent to transfer its property to others, operates no change of membership, but is ineffectual and void. Lord *v.* Chamberlain, 2 Me. 67.

Withdrawal from parish.— In New England, under the earlier statutes, any person might separate from one religious society and join another, either of the same or of a different denomination, by filing with the clerk of the society left a certificate or written notice of the fact (Jones *v.* Cary, 6 Me. 448; Gage *v.* Currier, 4 Pick. (Mass.) 399); but statutory provisions relating to the manner of withdrawal from parish membership were held not to prohibit a withdrawal in a manner other than prescribed therein (Leavitt *v.* Truair, 13 Pick. (Mass.) 111; Oakes *v.* Hill, 10 Pick. (Mass.) 333. But see Jones *v.* Cary, *supra*), although the filing of a certificate prescribed by statute might be necessary in order to secure an exemption from taxation (Leavitt *v.* Truair, *supra*).

Acts operating as withdrawal.— The association between a religious corporation and its corporators may be dissolved by their withdrawing from attendance on its worship, omitting to contribute to its support, and uniting in the establishment of another like incorporation. Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

An attempt to create a suspension of membership, there being no provision in the by-laws authorizing such a suspension, is ineffectual, and the members attempting to suspend remain members. Marks *v.* Congregation Daruch Amuno, 5 Daly (N. Y.) 8.

Effect of incorporation on parish membership.— Where, in a town consisting of one or more parishes, a religious society is incorporated, consisting of individuals from the parshes already existing, the members of this new society cease, from the time of their incorporation, to be members of the respective parishes within the limits of which they may reside. Sutton First Parish *v.* Cole, 8 Mass. 96.

52. Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Taylor *v.* Edson, 4 Cush. (Mass.) 522.

In whom the power to expel lies.— The deacons of an unincorporated church, governed wholly through its congregation, authorized as the constituted authority of the church to control the use of its property, which was conveyed to trustees in trust for the church, have authority to exclude those members who refuse to recognize the authority of the regular organization. Fulbright *v.* Higginbotham, 133 Mo. 668, 34 S. W. 875. Under the rules and usages of the denomination of general baptists the exclusive power to admit and exclude members is in the local congregations, and the associations have no power to review their action. Igleheart *v.* Rowe, 47 S. W. 575, 20 Ky. L. Rep. 821.

53. Den *v.* Bolton, 12 N. J. L. 206 [*cited* and *approved* in Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186].

Evidence of the number of members.— The schedule of the members of a religious society, as copied from its records, is not conclusive evidence for the selectmen making distribution of such among the different societies, of the number of the real members of the society. Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.

The federal and state constitutions declaring freedom of worship according to conscience do not give a church member the right to repudiate the faith and doctrine on which the church was founded, and at the same time insist on his right to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws on which the church is established. Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

54. West Koshkonong Cong. *v.* Otteson, 80 Wis. 62, 49 N. W. 24.

But where a minority of the members of a church exclude the majority from the possession and enjoyment of the church property, and attempt to attach it to another denomination against the will of such majority, the acts of such minority are nullities, and the individual members engaged in such wrongs still constitute a part of the original church, in the absence of having been excluded from the membership by any authoritative act of the church or power having such authority. Deaderick *v.* Lampson, 11 Heisk. (Tenn.) 523.

Where there arise honest differences of opinion as to doctrine, and the constitution is silent as to such matter of interpretation, and provides no mode for determining the differences, the civil courts will not hold that adherence to either interpretation dissolves

the offender thereby declared to be no longer a member, the sentence may nevertheless be promulgated, by being read in the presence of the congregation, by the pastor, and will not support the prosecution of an action for libel;[55] but excommunication whether with or without authority cannot affect the expelled person's civil rights.[56]

2. Rights of Member After Expulsion. Where a member of a religious society has been expelled therefrom, his rights are to be determined by its constitution and charter.[57] As a general rule the rights of a member are dependent on his membership, and when he ceases to be a member his rights and beneficial interest in the property of the association ceases,[58] and thus excommunicated or expelled members have no such beneficial interest in the church property as will authorize them to sue in relation thereto.[59]

III. Meetings and Elections.*

A. Necessity. The wishes of the members of a religious society cannot be regarded, unless expressed in a valid form, in conformity with the by-laws and charter at a regularly conducted meeting.[60] Thus officers must be elected in

ipso facto a member's connection with the congregation, so that he ceases to be a member of the corporation it has formed to hold and control its property. St. Cloud German Evangelical Soc. *v.* Henschell, 48 Minn. 494, 51 N. W. 477; East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663.

A conditional separation of the members into two bodies, with the consent and approval of a majority, and founded upon a contemplated division of the church property — the members still continuing to exercise their rights in the corporation — is not a secession. Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31.

That members of a religious society met in another building than the church edifice for worship and church business does not show they have withdrawn from membership. Perry *v.* Tupper, 74 N. C. 722.

The formation of a society, distinct from the rest of the congregation, for the instruction of a portion of it in the doctrines of the same church, in another language, is not *per se* a separation from the original congregation, although such society has a minister and officers of its own; but it is a circumstance for the consideration of the jury. Weckerly *v.* Geyer, 11 Serg. & R. (Pa.) 35. Nor does the fact that certain members of a church society withdrew, and organized another society, and then returned to their former society, raise a presumption that they forfeited their membership of the church to which both societies belonged. Peterson *v.* Samuelson, 42 Nebr. 161, 60 N. W. 347.

Effect of secession of members on obligations of religious societies.— The validity of obligations of a religious corporation is not affected by the fact that the majority of the members seceded from the corporation after the execution of the obligations by the corporation. Wanner *v.* Emanuel Church of Evangelical Assoc., 174 Pa. St. 466, 34 Atl. 188.

55. Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412.

56. Fitzgerald *v.* Robinson, 112 Mass. 371.

Where members are expelled in pursuance of a fraudulent scheme to obtain control of the property of the church and divert it from its original purpose to the use and benefit of the perpetrators of the scheme, the expulsion is void, and the members so expelled have the right to maintain an action for the protection of the church property. Hendryx *v.* People's United Church, 42 Wash. 336, 84 Pac. 1123, 4 L. R. A. N. S. 1154.

57. Grosvenor *v.* Believers United Soc., 118 Mass. 78; German Reformed Church *v.* Com., 3 Pa. St. 282.

58. St. John's Church *v.* Hanns, 31 Pa. St. 9; Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

59. Burke *v.* Roper, 79 Ala. 138; Brunnenmeyer *v.* Buhre, 32 Ill. 183; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

60. German Evangelical Cong. *v.* Pressler, 14 La. Ann. 799; McAuley's Appeal, 77 Pa. St. 397. But see West Springfield Fourth Parish *v.* Root, 18 Pick. (Mass.) 318.

A meeting of the church members and pewholders, as such, is not a meeting of the incorporated society, and it cannot instruct the trustees in their duties, or assume any power over them. Pittsburg Baptist Cong. *v.* Scannel, 3 Grant (Pa.) 48. And see German Evangelical Cong. *v.* Pressler, 14 La. Ann. 799.

In Massachusetts, under early statutes, a justice of the peace could call a meeting of a religious society on the application of five or more of the qualified voters where there were no assessors or committee qualified to call a meeting, or where they unreasonably refused to call such meeting, and these were conditions precedent to his authority (Sudbury First Parish *v.* Sterns, 21 Pick. 148); but

* By Alexander Karst.

accordance with and in the manner prescribed by the rules, regulations, or discipline of the church.[61]

B. Organization and Conduct — 1. In General. A religious society having power to make rules and by-laws for the government of the congregation may make by-laws regulating the mode of conducting elections and the forms of ballots;[62] and where such by-law has not been adopted, a long established usage will govern.[63] But a statute having pointed out the manner in which the election of church officers shall be made, a by-law made by the vestry of a church, varying the manner of election by requiring from electors a property qualification, is invalid.[64] The vote of a religious society, assembled at its annual meeting for the election of officers, and having no power over the election of officers at the next succeeding annual meeting, that the officers shall be always chosen by ballot, does not invalidate an election of officers by hand vote at a subsequent annual meeting;[65] and the election, by hand vote, of officers of a religious society in which each proprietor has a vote for every pew which he owns cannot be objected to upon the ground of the inherent difficulty of thus ascertaining the result, after the election has

the meeting called by the justice on such application was held to be properly called and was a legal meeting, although it was not stated in the application or recited in the warrant, that there were no assessors or parish committee (Ladd *v.* Clements, 4 Cush. 476), and the statute was held to apply to a parish that had once been legally organized, but which, for the want of officers or any other cause, was unable to assemble in the usual manner (Wood *v.* Cushing, 6 Metc. 448).

Evidence of the date of a meeting of a faction of the congregation after its division is inadmissible to prove a custom as to the holding of annual meetings before the division, where there are no by-laws or meetings provided for by the religious society. Firestone *v.* First Slavish Roman Catholic Greek Rite Church, 215 Pa. St. 8, 63 Atl. 1038.

61. San Francisco First African M. E. Zion Church *v.* Hillery, 51 Cal. 155.

Annual election held on movable holiday.— Where the trustees of a church were required by statute to be divided into three classes, and the seats of one class were to be vacated at the expiration of every year, and the statute provided that one third should be annually chosen, and that the time of the annual election should be at least six days before the vacancies should occur, and the annual election was held on a movable holiday, by which means in some years the election would not be at least six days before the happening of the vacancies, such election was valid. People *v.* Runkle, 9 Johns. (N. Y.) 147.

62. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

Where the charter is silent as to the mode of conducting annual elections of officers, the corporation may provide by a by-law for the mode of their performance. Juker *v.* Com., 20 Pa. St. 484.

Rule that pastor shall be moderator.— Where the requirement of the form of government of the church expressly directs that the pastor shall always be the moderator of the session, a meeting of the session for the election of elders is invalid where the pastor was not present and no one was appointed by him to preside. Dayton *v.* Carter, 206 Pa. St. 491, 56 Atl. 30.

63. Juker *v.* Com., 20 Pa. St. 484.

Quorum.— The rule of the common law seems to be that, where a body is composed of an indefinite number of persons, a quorum, for the purposes of elections and voting upon other questions which require the sanction of the members, consists of those who assemble at any meeting regularly called and warned, although such number may be a minority of the whole, in which case a majority of those who assemble may elect, unless there is a different rule established by statute or by a valid by-law. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 5 Rob. (N. Y.) 649, 2 Abb. Pr. N. S. 254 [*reversed* on other grounds in 46 N. Y. 131]; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417. And under a constitution providing for a majority rule the fact that it also provided that the management of affairs should be vested in the "whole congregation" did not require the assent of every member to every vote, such provision being construed merely to refer to action at a meeting which all the members were entitled and had no opportunity to attend. Duessel *v.* Proch, 78 Conn. 343, 62 Atl. 152, 3 L. R. A. N. S. 854. But under a statute requiring a majority of the vestrymen to be present, the majority of that body must not only exist at the time when any act is to be done by them, but a majority of them must attend the assembly where the act is to be done. Moore *v.* St. Thomas Church, 4 Abb. N. Cas. (N. Y.) 51. Where the charter required two thirds to form a quorum, and it was stated on the minutes that on the notice the corporators met, and it was not usual to mention the names or number of those present, this was equivalent to a statement that two thirds were present. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

64. St. Luke's Church *v.* Matthews, 4 Desauss. Eq. (S. C.) 578, 6 Am. Dec. 619.

65. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

taken place and the result has been declared;[66] but a rude and unwarrantable act on the part of the rector in arrogating to himself the right to preside at a general meeting of a religious society for the annual election of the wardens and vestrymen confers no claim of right or color of title on such a meeting.[67] Where a majority of a religious society protest against the election of a proposed candidate to office, and do not propose another candidate, the minority may elect their candidate.[68]

2. Powers and Duties of Election Inspector. In religious corporations the election inspectors must finally determine upon the qualification of an elector when he offers his vote, and before he casts it; after they have received it they cannot throw it out on the ground that he was not qualified,[69] and the only duty that then remains for them to perform is to count the ballots and return the number of votes received and the names of those having the greatest number.[70]

C. Notice, Time, and Place of Holding. To constitute a valid election notice should be given in conformity to the charter, constitution, and by-laws,[71] which should as a general rule contain notice of such matters as will come before the meeting;[72] but the object of the notice being that the voters may be fully apprised of the election and may attend and exercise their rights where all the

66. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

67. State *v.* Stewart, 6 Houst. (Del.) 359, holding that the rector of a protestant episcopal church has no right, by virtue of his office, to act as chairman of the meeting for the annual election of wardens and vestrymen, and his usurpation of such right, against the wishes of the majority of the meeting, as already expressed by the election of another chairman, will vitiate the election conducted by him where only a majority of the qualified voters acted.

A clergyman or preacher in a baptist church is not an elder, within the meaning of the statute providing that at elections of trustees two of the elders or churchwardens must preside, and if there be no such officers, then two of the members may preside. People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

But the election of the moderator of a parish meeting will be valid, although the meeting was called to order and the votes were received and declared by a private parishioner, who assumed that authority to himself. Jones *v.* Cary, 6 Me. 448.

68. Hendrickson *v.* Shotwell, 1 N. J. Eq. 577; Dayton *v.* Carter, 206 Pa. St. 491, 56 Atl. 30.

69. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. 321; People *v.* White, 11 Abb. Pr. (N. Y.) 168.

70. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. 321; People *v.* White, 11 Abb. Pr. (N. Y.) 168.

71. Smith *v.* Erb, 4 Gill (Md.) 437.

If rules provide for election on a certain day upon specified notice, an election on a different day without notice (San Francisco M. E. Zion Church *v.* Hillery, 51 Cal. 155), or without notice given at the time provided for (Dahl *v.* Palache, 68 Cal. 248, 9 Pac. 94), is void.

Where the constitution prescribes that meetings shall be called by the clerk upon a warrant of the trustees by a certified notice published before the meeting, and posted at the regular place of meeting, or at the place mentioned in the warrant, a meeting held at a special time and a place other than the regular place is invalid. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740, holding also that, in the absence of a showing in the society's records of a compliance with the constitutional requirements, there is no presumption of any acquiescence on the part of the society or of the members refusing to take part in the meeting.

If a statute requires notice a meeting held without notice is void (Hicock *v.* Hoskins, 4 Day (Conn.) 62), although a practice of so holding meetings has been established for a number of years (Hicock *v.* Hoskins, *supra*), and the society has no power to dispense with such notice (Bethany Cong. Soc. *v.* Sperry, 10 Conn. 200), and notice must be given by the person or committee provided for by statute (Bethany Cong. Soc. *v.* Sperry, *supra*).

The legality of a parish meeting is sufficiently proved by showing that it was notified and warned, in due form, by those claiming to act as the legally qualified officers of the preceding year. Tuttle *v.* Cary, 7 Me. 426.

72. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740.

Where the constitution of an incorporated religious society requires notice to be given, with the reason for calling the meeting, the proceedings of a meeting called by a notice which omits to state such reason are invalid. Weber *v.* Zimmerman, 22 Md. 156 (holding that a pastor removed at such a meeting may be restored by mandamus); Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135, 21 N. E. 294.

A meeting held to depose a minister held without notice is void. Baum *v.* Wicklein, 2 Woodw. (Pa.) 242.

An amendment of the charter of a religious society cannot be made at a meeting without a notice that the amendment would be pro-

voters are present, and the time of the meeting is well understood and has been the same for many years, an election is good, although the requirements of the statute in respect to notice of such election have not been complied with, provided the election was fairly conducted.[73] The election must be held at the usual place of meeting,[74] unless the usual place of meeting has been changed, in which case an election at the old place of meeting is invalid.[75]

D. Persons Entitled to Vote — 1. General Rules. As a general rule every member of a religious society of full age is entitled to vote until he voluntarily withdraws or is expelled from the society,[76] although under the charter

posed at the meeting. *In re* African M. E. Union Church, 28 Pa. Super. Ct. 193.

Evidence of notice.— The return of the proper officer on the back of the notice of the meeting is the only proper evidence that the meeting was legally noticed. Tuttle *v.* Cary, 7 Me. 426.

The vestry of a protestant episcopal church have authority to call meetings of the proprietors, and a warrant of the vestry may be signed by the chairman and clerk only. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

Parish meeting.— No matter can be legally acted upon in a town, parish, or proprietors' meeting unless the vote be authorized by the proper article in the warrant for calling the meeting. Tuttle *v.* Cary, 7 Me. 426.

Waiver of objections to legality of meeting.— If the constable's return is defective in not showing the manner in which a parish meeting was warned, it does not follow that the proceedings of inhabitants at the meeting are necessarily void to all intents, since, in some cases, the objection may be lost on the ground of waiver or estoppel. Tuttle *v.* Cary, 7 Me. 426. And where a committee, claiming to be authorized by the inhabitants of a town, invited a person to become the minister of that town, which invitation he accepted, and continued to officiate in that office for more than thirty years, the town all the time paying the stipulated salary, the town had waived its right, if any ever existed, to set up objections to the legality of the meeting at which the invitation was authorized. Bucksport *v.* Spofford, 12 Me. 487.

73. People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

Defective notice cannot be objected to by one who gave it and participated in the meeting held in consequence of it. Helbig *v.* Rosenberg, 86 Iowa 159, 53 N. W. 111.

Waiver of notice must be clearly shown (Hicock *v.* Hoskins, 4 Day (Conn.) 62), and before one can be charged with acquiescence in or recognition of an illegal election and its consequences, it must appear that he had knowledge or means of knowledge at the time of such illegality (Com. *v.* McCutchen, 2 Pars. Eq. Cas. (Pa.) 205).

74. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653 (holding that the meeting of a religious society for the election of trustees must be held in the meeting-house, and if the meeting-house is locked, and the key not to be had, the meeting should be held at the door, or the nearest practicable place); Miller *v.* English, 21 N. J. L. 317.

75. Miller *v.* English, 21 N. J. L. 317.

76. Keith *v.* Howard, 24 Pick. (Mass.) 292; Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31, holding that where the right to vote "upon all matters, touching the interests of the corporation" is secured by the charter to "each member," a further provision giving to pew owners the privileges of membership does not restrict the right of voting to them, but it belongs to every one admitted into the society by a majority of the members of the corporation.

Conversely, persons who are not members cannot vote (Com. *v.* Cain, 5 Serg. & R. (Pa.) 510), nor members of a different religious persuasion (Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302).

A minor cannot vote, although he has paid for a sitting. McIlvain *v.* Christ Church, 2 Woodw. (Pa.) 293, 8 Phila. 507.

The meaning of the word "belonged" in a statute providing that the electors of episcopal churches shall consist "of all who shall have belonged to such church," is a mixed question of law and fact which must in each case be left to the jury. People *v.* Keese, 27 Hun (N. Y.) 483.

Denominational character of corporation affecting qualification of voters.— Members of a religious corporation who possess the statutory qualifications of voters at corporate elections do not lose their right to vote at an election of trustees by reason of having seceded from the religious faith or ecclesiastical organization, and an election of trustees of a religious corporation at which members possessing the statutory qualifications of voters at such elections are prohibited from voting on the ground that they are seceders from the religious belief or ecclesiastical organization is illegal, and trustees who have been duly elected by a majority of members possessing the statutory qualifications of voters at such elections are rightful trustees as against trustees subsequently elected by a minority, although the majority and the trustees elected by them had seceded from the religious faith or ecclesiastical organization, and the minority adhered thereto, as the corporation as such has no denominational character. Petty *v.* Tooker, 21 N. Y. 267 [*affirming* 29 Barb. 256].

The phrase "have the casting vote," as used in a statute providing for the call and induction into office of a rector by the churchwardens and vestrymen of religious corporations, must be construed as authorizing the chairman to give a casting vote, in

and by-laws of some religious societies only those may vote who are communicants or have contributed their proportion to the necessary expenses of the church, by renting a pew or otherwise,[77] for a stated period prior to the election,[78] and contributions cannot be made at the election merely for the purpose of entitling the subscriber to vote.[79] Stated attendance at divine worship in the church congregation is also often held to be a necessary qualification of a voter.[80] But the reception of illegal votes does not invalidate the election if it does not affect the result.[81]

2. Action For Rejecting Vote. An action will lie against the presiding officer of a religious meeting for wilfully refusing to receive the vote of a qualified voter;[82]

the case of a tie, after having before voted with the rest on the question, or giving him a double vote in such case. People *v.* Church of Atonement, 48 Barb. (N. Y.) 603.

Excommunicated church members are not entitled to vote at an election of trustees. Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

The opinion of a witness that certain voters were not legal voters furnishes no evidence of their disqualification in an action to determine the validity of the election of wardens and vestrymen of an episcopal church. People *v.* Lacoste, 37 N. Y. 192.

Where the fellowship of an independent religious society has been withdrawn from a member at a regular meeting of the church conference, he is no longer a member, and has no vote at a subsequent meeting. Gipson *v.* Morris, 31 Tex. Civ. App. 645, 73 S. W. 85.

Estoppel to deny right to vote.—Where the members of a parent church for several years permitted the members of certain chapels organized and conducted by the church to vote concerning questions relating to dispositions of current funds to which such members had contributed, and members of such chapels were permitted without challenge to vote on a resolution increasing the salaries of the pastors of such chapels, a member of the parent church was estopped to maintain a suit in equity to enjoin the carrying out of the resolution adopted by the vote of such members on the ground that they had no legal right to vote. Davie *v.* Heal, 86 N. Y. App. Div. 517, 83 N. Y. Suppl. 723 [*affirmed* in 180 N. Y. 545, 73 N. E. 1123].

The right to vote depends on a connection with the particular society, and not with the denomination at large. Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654].

77. Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230; State *v.* Crowell, 9 N. J. L. 390; People *v.* Tuthill, 31 N. Y. 550; Weckerly *v.* Geyer, 11 Serg. & R. (Pa.) 35. See Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302.

A resolution by the vestry to receive no further contributions from a contributor does not affect his right to vote under such a statute. Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230.

Under early New England statutes, being assessed in the last parish tax to the amount required by the statute, was the only evidence of a right to vote in a parish meeting. Osgood *v.* Bradley, 7 Me. 411. See Sparrow *v.* Wood, 16 Mass. 457.

78. McIlvain *v.* Christ Church, 2 Woodw. (Pa.) 293, 8 Phila. 507; Com. *v.* Morrison, 6 Wkly. Notes Cas. (Pa.) 346.

Contributions must be of a vital and substantial character.— People *v.* Tuthill, 31 N. Y. 550.

The words "annual subscriber" as used in the canon of the protestant episcopal church prescribing as a qualification to the right to vote for wardens and vestrymen that a person shall be an annual subscriber to the support of the minister of the church, means one who subscribes an annual sum to such support, and not one who occasionally or otherwise contributes to such support. State *v.* Stewart, 6 Houst. (Del.) 359.

A by-law prohibiting a member whose pew rent was in arrear for more than two years from voting, is valid. Com. *v.* Cain, 5 Serg. & R. (Pa.) 510.

79. Juker *v.* Com., 20 Pa. St. 484.

80. People *v.* Tuthill, 31 N. Y. 550, holding that two things must concur to qualify a person to become a voter at an election held by an incorporated religious society; stated attendance on divine worship in the church congregation or society for the term of one year previous to such election, and contribution to the support of such church; and that persons attending the religious meetings of the society but a few times in the course of a year, or only occasionally, although regular contributors to its support, are not voters, within the meaning of the act for the incorporation of religious societies.

Stated attendance is interpreted to mean the personal presence of the voter statedly at the religious meetings of the society. The regular attendance of the wife or other member of the family is not sufficient. People *v.* Tuthill, 31 N. Y. 550.

81. Christ Church *v.* Pope, 8 Gray (Mass.) 140; People *v.* Tuthill, 31 N. Y. 550; Com. *v.* Morrison, 6 Wkly. Notes Cas. (Pa.) 346.

The presence of strangers does not vitiate the proceedings unless they voted and their votes were necessary to carry the resolution. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 2 Abb. Pr. N. S. (N. Y.) 254 [*reversed* on other grounds in 46 N. Y. 131].

82. Oakes *v.* Hill, 10 Pick. (Mass.) 333, holding that where one who had been a member of a voluntary religious society demanded permission to vote at a meeting of

but the refusal must be malicious,[83] and officers of a religious society who preside at its elections and are authorized to decide on the qualifications of voters are not liable for refusing a qualified vote through error of judgment, but in good faith,[84] and a voter cannot object if, when his vote was challenged, he yielded to the challenge and his vote was not in fact rejected.[85] A suit by an expelled member, to compel restoration to a church membership on the ground that such restoration is necessary to enable him to enjoy the right of sepulture, acquired by him as a member, is premature.[86]

IV. OFFICERS.*

A. Election, Qualification, and Tenure — 1. ELIGIBILITY. It has been held that the trustees of a church need not be members thereof,[87] nor residents of the state.[88]

2. ELECTION OR APPOINTMENT — a. General Rules. The rules of the church or denomination control in the appointment or election of a trustee or other officer of a religious society,[89] except where there are statutory provisions on the subject, in which event the latter are mandatory,[90] and a compliance therewith clothes

the first parish in the town where he resided, and produced to the presiding officer a certificate of the clerk of the voluntary society that he had ceased to be a member thereof, an action by him would lie against the presiding officer for refusing to receive his vote; he being otherwise a qualified voter.

83. Weckerly *v.* Geyer, 11 Serg. & R. (Pa.) 35, holding that by malice, which will render an officer of an election liable for rejecting a qualified vote, is meant the refusal of a vote from improper motives, and contrary to his own opinion.

84. Weckerly *v.* Geyer, 11 Serg. & R. (Pa.) 35, holding that election inspectors of a congregation may exercise a sound discretion in deciding whether a person offering to vote has lost his membership and right to vote by a voluntary separation from the congregation, although he has not been proceeded against and disfranchised under church regulations applying to cases of delinquency and not to a voluntary separation.

85. Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018.

86. State *v.* Hebrew Cong., etc., 31 La. Ann. 205, 33 Am. Rep. 217.

87. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402; Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

Other authorities take a different view.— Laight St. Baptist Church *v.* Noe, 12 How. Pr. (N. Y.) 497. And see Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Ross *v.* Crockett, 14 La. Am. 811; Miller *v.* Eschbach, 43 Md. 1.

Whether a minister is eligible to the office of trustee seems to be a matter of doubt. See Kulinski *v.* Dambrowski, 29 Wis. 109.

88. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402.

An English statute requires churchwardens to reside within the parish. Reg. *v.* Cree, 57 J. P. 72, 67 L. T. Rep. N. S. 556.

89. First Soc. M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207; Simmons *v.* Allison, 118 N. C. 763, 24 S. E. 716; Long *v.* Harvey, 177 Pa. St. 473, 35 Atl. 869, 34 L. R. A. 169, 55 Am. St. Rep. 733.

A long continued custom and usage of the church, as to the nomination and election of its officers, is in the nature of a by-law, and, when not inconsistent with the charter of incorporation, is equally binding and obligatory. Miller *v.* Eschbach, 43 Md. 1.

Construction given to various English statutes and customs relating to selection of churchwardens see Bremmer *v.* Hull, L. R. 1 C. P. 748, Harr. & R. 800, 12 Jur. N. S. 648, 35 L. J. C. P. 332, 15 L. T. Rep. N. S. 352, 14 Wkly. Rep. 964; Campbell *v.* Maund, 5 A. & E. 865, 2 Harr. & W. 457, 6 L. J. M. C. 145, 1 N. & P. 558, 31 E. C. L. 859; Rex *v.* St. James' Parish, 5 A. & E. 391, 2 Harr. & W. 253, 31 E. C. L. 660; Rex *v.* Wix, 2 B. & Ad. 197, 1 L. J. M. C. 36, 22 E. C. L. 90; Gibbs *v.* Flight, 3 C. B. 581, 11 Jur. 19, 16 L. J. M. C. 73, 54 E. C. L. 581; *In re* Barlow, 30 L. J. Q. B. 271, 5 L. T. Rep. N. S. 289.

Official bond.— Where the act of incorporation provides that the trustees, before entering upon the duties of their office, shall give bond, with sureties approved by a designated court, the approval of the bond is a condition precedent to their exercising the duties of the office. Nolde's Appeal, (Pa. 1888) 15 Atl. 777.

Filling of vacancies.— Vacancies caused by a judgment of ouster, as well as vacancies caused by removal or death, must be filled by a new election. People *v.* Fleming, 59 Hun (N. Y.) 518, 13 N. Y. Suppl. 715; People *v.* Hart, 13 N. Y. Suppl. 903 [*affirming* 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669-675, 25 Abb. N. Cas. 230].

90. State *v.* Getty, 69 Conn. 286, 37 Atl. 687; Kulinski *v.* Dambrowski, 29 Wis. 109; Green *v.* Reg., 1 App. Cas. 513, 35 L. T. Rep. N. S. 495.

The trustees of a Roman catholic church are a self-perpetuating body, and the members of the church or congregation have no

* By Stanley A. Hackett.

the person so appointed or elected with title to the office.[91] The statutes of some jurisdictions are so framed as to allow the churches to select their officers according to their own usages and laws.[92] Officers cannot be lawfully appointed or elected by a minority,[93] or by individual members not acting as a church or society.[94]

b. Certificate of Election. Where there are statutory provisions relating to elections in religious societies, the certificate of election must show that the election was held in compliance with the statute ;[95] but in the absence of statutory provisions, a certificate of election in strict conformity to the discipline of the church is sufficient,[96] and it has been held that the omission to furnish one does not disqualify a person duly elected.[97]

c. De Facto Officers. To constitute one a *de facto* officer of a religious society he must be acting as such under color of having been rightfully elected or appointed,[98] and under these circumstances he will be recognized and treated as such by the courts,[99] during the term for which he is elected,[1] and one who has contracted with him is estopped to deny his authority to contract.[2]

3. Duration of Office. Where his term of office is not limited in time, an officer of a religious society continues in office until he is duly removed,[3] or another is appointed to succeed him,[4] and unless they resign officers or committees elected or appointed for a stated term continue in office, not only until the expiration of their terms,[5] but until their successors are selected and qualified.[6] The subsequent ouster or removal of their successors does not, however, entitle the old officers to hold over.[7] An unlimited term of office may become limited

voice in their selection. People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408.

In England admission of churchwardens cannot be prevented by ecclesiastical authority. Rex *v.* Sowter, [1901] 1 K. B. 66, 70 L. J. Q. B. 87, 83 L. T. Rep. N. S. 584, 17 T. L. R. 47, 49 Wkly. Rep. 170 [*following* Rex *v.* Simpson, Str. 609].

91. Wall Street M. E. Church *v.* Johnson, 140 Ind. 445, 39 N. E. 251.

92. Roanoke Presb. Church *v.* Horton, 50 Ind. 223; Pulis *v.* Iserman, 71 N. J. L. 408, 58 Atl. 554; Day *v.* Bolton, 12 N. J. L. 206; Doremus *v.* Dutch Reformed Church, English Neighborhood, 3 N. J. Eq. 332.

93. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402.

94. Scott *v.* Curle, 9 B. Mon. (Ky.) 17.

95. Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. 321; Kulinski *v.* Dambrowski, 29 Wis. 109.

Results need not be certified immediately after the election.— People *v.* Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

96. First Soc. M. E. Church *v.* Clark, 41 Mich. 730, 3 N. W. 207.

97. Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171.

The certificate is prima facie, but not conclusive, evidence of the election of the persons named therein. People *v.* Lacoste, 37 N. Y. 192; Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. 321.

98. First African M. E. Zion Church *v.* Hillery, 51 Cal. 155; East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663. See Bray *v.* Somer, 2 B. & S. 374, 8 Jur. N. S. 716, 31 L. J. M. C. 135, 6 L. T. Rep. N. S. 49, 10 Wkly. Rep. 354, 110 E. C. L. 574.

99. *Michigan.*— Cicotte *v.* Anciaux, 53 Mich. 227, 18 N. W. 793.

New York.— Bellport Parish *v.* Tooker, 29 Barb. 256 [*affirmed* in 21 N. Y. 267]; Berrian *v.* New York Methodist Soc., 4 Abb. Pr. 424; Jackson *v.* Nestles, 3 Johns. 115.

Ohio.— Gallipolis First Presb. Soc. *v.* Smithers, 12 Ohio St. 248.

Pennsylvania.— Nolde's Appeal, (1888) 15 Atl. 777.

South Carolina.— St. Luke's Church *v.* Mathews, 4 Desauss. Eq. 578, 6 Am. Dec. 619.

England.— Turner *v.* Baynes, 2 H. Bl. 559, 3 Rev. Rep. 506. See Ganvill *v.* Utting, 9 Jur. 1081.

See 42 Cent. Dig. tit. "Religious Societies," § 50.

1. Smith *v.* Erb, 4 Gill (Md.) 437.

2. Skinner *v.* Richardson, 76 Wis. 464, 45 N. W. 318.

3. Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

4. Zion Church of Evangelical Assoc. of North America *v.* Light, 7 Pa. Super. Ct. 223, 42 Wkly. Notes Cas. 251.

5. Bristor *v.* Burr, 12 N. Y. St. 638.

6. Bethany Cong. Soc. *v.* Sperry, 10 Conn. 200; Brenner *v.* Hull, L. R. 1 C. P. 748, 1 Harr. & R. 800, 12 Jur. N. S. 648, 35 L. J. C. P. 332, 15 L. T. Rep. N. S. 352, 14 Wkly. Rep. 964; Bray *v.* Somer, 2 B. & S. 374, 8 Jur. N. S. 716, 31 L. J. M. C. 135, 6 L. T. Rep. N. S. 49, 10 Wkly. Rep. 354, 110 E. C. L. 374.

7. People *v.* Fleming, 59 Hun (N. Y.) 518, 13 N. Y. Suppl. 715.

by reason of a subsequent order of a superior church body providing for a stated term.[8]

4. Termination of Authority and Removal. The right of trustees or committees to exercise their office is terminated by their withdrawal from the church or society,[9] and their union with a church of another denomination,[10] or by their becoming organizers and incorporators of a new church.[11] Church trustees who violate their trust may be removed by proper proceedings,[12] conducted in compliance with the rules and discipline of the church;[13] but they are not removable in a summary manner,[14] nor by the election of others in their places before the expiration of their term.[15]

5. Determination of Title to Office. It is well settled that the title of an officer of a church or religious society is not subject to attack in a collateral proceeding,[16] and a bill in equity will not lie to restrain his alleged illegal acts;[17] but the proper remedy to test his right to exercise the office is by proceedings in quo warranto.[18]

8. Currier *v.* Trinity Soc. M. E. Church, 109 Mass. 165.

9. York First Reformed Presb. Church *v.* Bowden, 10 Abb. N. Cas. (N. Y.) 1 [*affirmed* in 14 Abb. N. Cas. 356]; Laight St. Baptist Church *v.* Noe, 12 How. Pr. (N. Y.) 497. But see Doremus *v.* Dutch Reformed Church, English Neighborhood, 3 N. J. Eq. 332.

Letters of dismission are not conclusive evidence of an entire withdrawal. Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252; Laight St. Baptist Church *v.* Noe, 12 How. Pr. (N. Y.) 497.

A committee of the vestry ceases to be such upon its members ceasing to be vestrymen. People *v.* Blackhurst, 60 Hun (N. Y.) 63, 15 N. Y. Suppl. 114.

A churchwarden, by ceasing to reside in the parish, does not *ipso facto* lose his office. Ganvill *v.* Utting, 9 Jur. 1081.

10. Ross *v.* Crockett, 14 La. Ann. 811.

11. *In re* Court St. M. E. Soc., 51 Hun (N. Y.) 104, 4 N. Y. Suppl. 723; York First Reformed Presby. Church *v.* Bowden, 10 Abb. N. Cas. (N. Y.) 1 [*affirmed* in 14 Abb. N. Cas. 356]; Laight St. Baptist Church *v.* Noe, 12 How. Pr. (N. Y.) 497.

12. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402.

13. Long *v.* Harvey, 177 Pa. St. 473, 35 Atl. 869, 55 Am. St. Rep. 733, 34 L. R. A. 169.

14. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402; Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

15. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653.

Wrongful expulsion.— Where the discipline of a church permits the minister to expel members only for offenses against religion and immoral conduct, an expulsion of trustees for refusal to manage the property according to the wishes of the bishop and minister is void. Com. *v.* Oliver, 2 Pars. Eq. Cas. (Pa.) 420.

16. *Illinois.*— Lawson *v.* Kolbenson, 61 Ill. 405.

Michigan.— Cicotte *v.* Anciaux, 53 Mich. 227, 18 N. W. 793.

New York.— Concord Soc. *v.* Stanton, 38 Hun 1; Reformed Dutch Church *v.* Brandow, 52 Barb. 228; Berrian *v.* Methodist Soc., 4 Abb. Pr. 424; Jackson *v.* Nestles, 3 Johns. 115. *Compare* Bellport Parish *v.* Tooker, 29 Barb. 256 [*affirmed* in 21 N. Y. 267].

Ohio.— Gallipolis Tp. First Presb. Soc. *v.* Smithers, 12 Ohio St. 248.

Pennsylvania.— Zion Church of Evangelical Assoc. *v.* Light, 7 Pa. Super. Ct. 223, 42 Wkly. Notes Cas. 251.

See 42 Cent. Dig. tit. "Religious Societies," § 55.

Mandamus to restore officers wrongfully removed see Mandamus, 26 Cyc. 382.

17. North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171; Hartt *v.* Harvey, 32 Barb. (N. Y.) 55, 10 Abb. Pr. 321; Messinger *v.* Trinity Church, 8 Ohio Dec. (Reprint) 227, 6 Cinc. L. Bul. 390; Trinity Church *v.* Wardens, etc., 3 Ohio Dec. (Reprint) 524; Nolde *v.* Madlem, 4 Lanc. L. Rev. (Pa.) 347 [*affirmed* in (1888) 15 Atl. 777]; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84. But see Nelson *v.* Benson, 69 Ill. 27.

In Canada the title to a church office may be investigated in a court of chancery, as the objection to the jurisdiction of that court has been removed by statute. Tully *v.* Farrell, 23 Grant Ch. (U. C.) 49.

The old court of chancery in New York possessed no power to remove the trustee of a religious corporation regularly elected in pursuance of the statutory provisions. Robertson *v.* Bullions, 11 N. Y. 243 [*affirming* 9 Barb. 64, and *disapproving* Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439].

18. *Delaware.*— State *v.* Stewart, 6 Houst. 359.

Illinois.— Nelson *v.* Benson, 69 Ill. 27; Lawson *v.* Kolbenson, 61 Ill. 405.

New York.— North Baptist Church *v.* Parker, 36 Barb. 171; Bellport Parish *v.* Tooker, 29 Barb. 256 [*affirmed* in 21 N. Y. 267].

Ohio.— Gallipolis First Presb. Soc. *v.* Smithers, 12 Ohio St. 248; Messinger *v.* Trinity Church, 8 Ohio Dec. (Reprint) 227, 6 Cinc. L. Bul. 390; Trinity Church *v.* Wardens, etc., 3 Ohio Dec. (Reprint) 524.

Pennsylvania.— Com. *v.* Graham, 64 Pa. St. 339; Com. *v.* Arrison, 15 Serg. & R. 127,

B. Powers, Duties, and Liabilities — 1. In General. The general powers of church officers are not materially different from those exercised by the managing officers and directors of private corporations and associations.[19] They are mere agents or legal instruments to execute the will of the corporators,[20] intrusted with the care and management of all the temporalities of the parish or society over which they exercise jurisdiction,[21] with powers coextensive with that of the corporation,[22] and with the territorial jurisdiction conferred upon them by the canons of the church made in conformity to the laws of the state,[23] and they are responsible to the congregation for the proper performance of their duties.[24] Officers must restrict themselves to their own duties and powers and must not interfere with other officers empowered to act in other matters;[25] but where the church increases the number of officers, the rights and powers of the former officers are not affected until the additional officers are chosen.[26] Under the statutes of some states, the trustees are the only persons authorized to act in behalf of, and bind, the corporation;[27] but a statute which vests in the trustees of a church the

16 Am. Dec. 531; Nolde *v.* Madlem, 4 Lanc. L. Rev. 347 [*affirmed* in (1888) 15 Atl. 777].

Wisconsin.—Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

See 42 Cent. Dig. tit. "Religious Societies," § 56.

But see *In re* Barlow, 30 L. J. Q. B. 271, 5 L. T. Rep. N. S. 289; Rex *v.* Shepherd, 4 T. R. 381, 2 Rev. Rep. 416.

But officers purely ecclesiastical, created by an unincorporated ecclesiastical body, and filled by election by a body which possesses no corporate powers or functions, are held not to be "officers" within the purview of a statute authorizing the filing of an information in the nature of a quo warranto. Atty.-Gen. *v.* Geerlings, 55 Mich. 562, 22 N. W. 89.

The burden of proof is upon the relators to establish that they have a better right to the office than the respondents. People *v.* Nappa, 80 Mich. 484, 45 N. W. 355; People *v.* Lacoste, 37 N. Y. 192; People *v.* Farrington, 22 How. Pr. (N. Y.) 294.

A judgment of ouster against part of the trustees of a religious corporation does not invalidate the title to the office of the remaining trustees. People *v.* Fleming, 59 Hun (N. Y.) 518, 13 N. Y. Suppl. 715.

The question is not determinable by a submission and award.— Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

19. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

In England churchwardens and parish clerks are, for all substantial purposes, temporal officers. Rex *v.* Sowter, [1901] 1 K. B. 66, 70 L. J. Q. B. 87, 83 L. T. Rep. N. S. 584, 17 T. L. R. 47, 49 Wkly. Rep. 170; Lawrence *v.* Edwards, [1891] 1 Ch. 144, 60 L. J. Ch. 336, 64 L. T. Rep. N. S. 77, 39 Wkly. Rep. 411.

The office of parish clerk is a hereditament (Stephenson *v.* Raine, 2 C. L. 234, 2 E. & B. 744, 18 Jur. 176, 23 L. J. Q. B. 62, 2 Wkly. Rep. 77, 75 E. C. L. 744), and is not assignable (Nichols *v.* Davis, L. R. 4 C. P. 80, 38 L. J. C. P. 127, 17 Wkly. Rep. 291).

20. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740; Worrell *v.* Millstone First Presb. Church, 23 N. J. Eq. 96; Morgan *v.* Rose, 22 N. J. Eq. 583; Miller *v.* Church, 4 Phila. (Pa.) 48; Kulinski *v.* Dambrowski, 29 Wis. 109.

21. St. Francis, etc., Roman Catholic Church *v.* Martin, 4 Rob. (La.) 62; Matter of Walnut St. Presb. Church, 3 Brewst. (Pa.) 277, 7 Phila. 310; Mason *v.* Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131.

The relation is purely one of trust.— Morgan *v.* Rose, 22 N. J. Eq. 583; United Brethren Church *v.* Vandusen, 37 Wis. 54.

The legal rights of a bishop, in regard to the temporalities of a church, are not prescribed by the municipal law, and must arise, if at all, from the relations created by ecclesiastical law, which must be shown in evidence. Leahey *v.* Williams, 141 Mass. 345, 6 N. E. 78.

Subsidiary educational institution.—A religious society which has founded an educational institution is divested of the power of management, by the incorporation of a board of trustees under a charter which confers on them the power to hold the property and to manage the school in all of its affairs. Union Baptist Assoc. *v.* Huhn, 7 Tex. Civ. App. 249, 26 S. W. 755.

22. People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408.

23. Mason *v.* Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131 [*affirming* 16 Fed. Cas. No. 9,247, 2 Cranch C. C. 274].

24. Scott *v.* Thompson, 21 Iowa 599; St. Francis etc., Roman Catholic Church *v.* Martin, 4 Rob. (La.) 62.

Parishioners have no general right to inspect churchwarden's books.— Reg. *v.* Daventry Parish, 5 Jur. N. S. 940, 7 Wkly. Rep. 445.

25. Tartar *v.* Gibbs, 24 Md. 323; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Matter of Walnut St. Presb. Church, 3 Brewst. (Pa.) 277, 7 Phila. 310.

26. Christ Church *v.* Pope, 8 Gray (Mass.) 140.

27. Little *v.* Bailey, 87 Ill. 239; Chicago Heights First Presb. Church *v.* McColly, 126 Ill. App. 333; People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 7 N. E. 408; Constant *v.* St. Albans Church, 4 Daly (N. Y.) 305; Cammeyer *v.* United

exclusive power of management and control does not constitute the trustees the corporation.[28]

2. Use and Possession of Church Property. By virtue of their office, trustees or other officers are entitled to possession of all the church property,[29] and every use of the property must be sanctioned by them,[30] and they have a right to remove any person from the church building who has not a superior right,[31] and may use the force necessary to remove a person who is disturbing a meeting of the society in violation of its rules;[32] but the presiding officer of a religious meeting cannot expel a person present at the meeting who is conducting himself peaceably and who claims that he is lawfully entitled to be present and has an apparent right,[33] and church officers have no power to close the building against the wishes of the congregation.[34] Where an officer withdraws from the church, his successor is entitled to possession of the property as against a committee appointed, to call the officer to account.[35]

3. Care and Management of Funds. The officer having charge of the funds of the society is liable for a diversion thereof either to his own uses,[36] or the unau-

German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

The different provisions of the New York statute giving rights and powers to the trustees are general and apply to all denominations alike, although variations in the election of trustees are accorded to different denominations. Watkins *v.* Wilcox, 4 Hun 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654].

28. People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408.

Churchwardens are not a corporation in the full sense of the word, but are annual officers merely. Fell *v.* Charity Lands, [1898] 2 Ch. 44, 62 J. P. 805, 67 L. J. Ch. 385, 78 L. T. Rep. N. S. 474, 14 T. L. R. 376.

29. Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228; Forsyth St. German Reformed Church *v.* Busche, 5 Sandf. (N. Y.) 666; People *v.* Runkle, 9 Johns. (N. Y.) 147; Vincent *v.* Eyton, [1897] P. 1 (military colors presented to church); Jackson *v.* Adams, 2 Bing. N. Cas. 402, Hodges 339, 5 L. J. C. P. 79, 2 Scott 599, 29 E. C. L. 591 (bell-ropes). But see Ritchings *v.* Cordingley, L. R. 3 A. & E. 113, 19 L. T. Rep. N. S. 26.

Constructive possession is all that results from their having the right of possession, but having the key of the church is *prima facie* evidence of actual possession. People *v.* Runkle, 8 Johns. (N. Y.) 464.

The rule includes church records and corporate seal.— Mitchell *v.* Milholland, 106 Ill. 175; Sawyer *v.* Baldwin, 11 Pick. (Mass.) 492; Maclury *v.* Hart, 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669, 25 Abb. N. Cas. 230 [*reversed* on other grounds in 121 N. Y. 636, 24 N. E. 1013]; Moss *v.* Thorneley, 4 Wkly. Rep. 514.

Churchwardens have no rights over proprietary chapel.— Bosanquet *v.* Heath, 3 L. T. Rep. N. S. 290, 9 Wkly. Rep. 35.

30. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51; Com. *v.* Dougherty, 107 Mass. 243; Forsyth St. German Reformed Church *v.* Busche, 5 Sandf. (N. Y.) 666.

Acquiescence in the occupation of a manse by a pastor who moved into it in pursuance of a resolution of the parish meeting employing him for a year with the privilege of occupying the manse does not constitute a breach of trust on the part of the trustees, although the session has failed to act on the matter. Everett *v.* Asbury Park First Presb. Church, 53 N. J. Eq. 500, 32 Atl. 747.

In England the authority of churchwardens over property is held to be exercisable only under the control of the ordinary. Ritchings *v.* Cordingley, L. R. 3 A. & E. 113, 19 L. T. Rep. N. S. 26.

31. Hamblett *v.* Bennett, 6 Allen (Mass.) 140.

32. McLain *v.* Matlock, 7 Ind. 525, 65 Am. Dec. 746; Wall *v.* Lee, 34 N. Y. 141, holding that the disturber may be removed, although the interruption be not wilful. See Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403.

Officers of the congregation may expel a member from the building if he interrupts the services, without rendering themselves liable to an action for assault and battery. Wall *v.* Lee, 34 N. Y. 141; Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403; Reid *v.* Inglis, 12 U. C. C. P. 191, holding, however, that the mere fact that a member of the congregation insists on sitting on a camp stool in the aisle when there is room for him in a pew does not justify his expulsion from the building by force.

Disturbance of religious meetings as a crime see Disturbance of Public Meetings, 14 Cyc. 540.

33. Walsh *v.* Montreal, 10 Quebec Super. Ct. 49 [*affirming* 8 Quebec Super. Ct. 123].

34. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740; Morgan *v.* Rose, 22 N. J. Eq. 583. See St. George's Church *v.* Cougle, 12 N. Brunsw. 620, holding that, although there was no rector, the churchwardens had no right to close the church against other members of the corporation, or to prevent public worship being held.

35. Page *v.* Crosby, 24 Pick. (Mass.) 211.

36. Scott *v.* Thompson, 21 Iowa 599.

thorized use of other persons.[37] While the court has no authority to control the discretion of the officers of the church in the management of its funds, so long as the charter is not violated,[38] the statutes of some states permit the officers to apply to the court for aid and direction in respect to the investment of its funds.[39] A bequest of money made to a church without designating the particular officer to whom payment shall be made is payable to the one who ordinarily receives and keeps the funds of the church.[40]

4. Contracts and Indebtedness — a. In General. It has been held that the trustees of an incorporated religious society are the only persons who have power to represent it in making contracts,[41] but they or other officers empowered to enter into contracts must act officially and keep within the scope of their authority in order to bind the society and the other contracting party,[42] although their

The treasurer of a subsidiary organization is liable to the church.— Church of Redeemer *v.* Crawford, 43 N. Y. 476 [*reversing* 28 N. Y. Super. Ct. 100]; Franklindale First Baptist Church *v.* Pryor, 23 Hun (N. Y.) 271.

Churchwardens cannot be compelled to account by the bishop. Fabrique de St. Jean *v.* Chouinard, 2 Rev. De Légis. 276.

37. Bethel Presby. Church *v.* Donnom, 1 Desauss. Eq. (S. C.) 154.

A churchwarden who has received dues and paid them over to the treasurer of the trustees is not liable for them. Horsfall *v.* Handley, 2 Moore C. P. 5, 8 Taunt. 136, 4 E. C. L. 78.

38. Christ Church Parish Episcopal Church *v.* Barksdale, 1 Strobh. Eq. (S. C.) 197.

39. Methodist Episcopal Soc. *v.* Harriman, 54 N. H. 444.

40. Johnson *v.* Mayne, 4 Iowa 180.

41. Little *v.* Bailey, 87 Ill. 239; Baptist Cong. *v.* Scannel, 3 Grant (Pa.) 48. See Beckwith *v.* McBride, 70 Ga. 642.

The secretary of a religious corporation possesses no inherent power to bind the corporation by entering into a contract in its name and behalf. Thomasson *v.* Grace M. E. Church, 113 Cal. 558, 45 Pac. 838.

Authority of rector.—In the absence of any evidence of the usual functions of the presidents of vestries of episcopal churches, the rector of such a church who is president of the vestry has no implied authority to bind the church by a contract with architects for plans for a church edifice. Cann *v.* Church of Redeemer, 111 Mo. App. 164, 85 S. W. 994.

Where the trustees' power to contract is dependent on statute, evidence of the custom of a particular church that they could not make a certain contract is not admissible in a suit against them. McCrary *v.* McFarland, 93 Ind. 466.

The trustees or committee must act officially and as a board, and the individual, unauthorized, acts of part or all of the officers is not binding (Thomasson *v.* Grace M. E. Church, 113 Cal. 558, 45 Pac. 838; New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305; Chicago Heights First Presb. Church *v.* McColly, 126 Ill. App. 333; Ross *v.* Crockett, 14 La. Ann. 811; Kupfer *v.* Augusta South Parish, 12 Mass. 185; Thompson *v.* West, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337 [*distinguishing* Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528, 15 N. W. 891]; Landers *v.* Frank St. M. E. Church, 114 N. Y. 626, 21 N. E. 420; People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408; Hart *v.* Congregation Shearith Israel, 49 N. Y. Super. Ct. 523; Constant *v.* St. Albans Church, 4 Daly (N. Y.) 305; United Brethren Church *v.* Vandusen, 37 Wis. 54; Dennison *v.* Austin, 15 Wis. 334), and their acts are official only when there is a legal quorum present (Rittenhouse's Estate, 140 Pa. St. 172, 21 Atl. 254), and the meeting is an authorized one, held in pursuance to a call addressed to all the members of the board (State *v.* Ancker, 2 Rich. (S. C.) 245; United Brethren Church *v.* Vandusen, 37 Wis. 54).

Presumption of power of trustees.— Where there is no evidence as to the manner in which a church contracts debts and executes contracts, and it appears that there are trustees, it will be presumed that the trustees are empowered to make contracts and incur indebtedness on account of the church property. St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305.

In Canada the churchwardens, in their corporate capacity, have power to make reasonable agreements beneficial to the parish (*In re* Kirby, 24 Can. L. T. Occ. Notes 358, 8 Ont. L. Rep. 385, 4 Ont. Wkly. Rep. 142), and the churchwarden of an incorporated church may bind his successors by contract (Maynard *v.* Gamble, 13 U. C. C. P. 56, 467; Carry *v.* Wallace, 12 U. C. C. P. 372); but the churchwardens of an unincorporated church may not (Anderson *v.* Worters, 32 U. C. C. P. 659).

42. *Connecticut.*— Consociated Presb. Soc. *v.* Staples, 23 Conn. 544.

Illinois.— St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 25 Am. Rep. 305.

Kansas.— Klopp *v.* Moore, 6 Kan. 27.

Maine.— Adams *v.* Hill, 16 Me. 215.

Massachusetts.— Child *v.* Christian Soc., 144 Mass. 473, 11 N. E. 664.

Ohio.— Purcell *v.* Kuehn, 8 Ohio Dec. (Reprint) 73, 5 Cinc. L. Bul. 442.

Oklahoma.— Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

See 42 Cent. Dig. tit. "Religious Societies," § 69.

unauthorized contracts like other contracts are subject to ratification,[43] and it is held to be competent for the board or committee to delegate to one of its members power to enter into contracts.[44]

b. Individual Liability. The trustees or other officers of a religious society are not as a general rule personally liable on obligations incurred by them while acting in behalf of the society within the scope of their authority;[45] but trustees

But see Tull *v.* Kingston M. E. Church, 75 N. C. 424.

Allowance of claim barred by statute of limitations.— The trustees of a religious society will not be permitted to allow claims against the society which are barred by the statute of limitations. *In re* Orthodox Cong. Church, 6 Abb. N. Cas. (N. Y.) 398.

Restriction of authority by contract.—A contract between the vestrymen of a church and architects which requires the latter to draw plans for a proposed church to the satisfaction of the vestrymen restricts any authority in the rector of the church to bind the church, by his agreement with the architects relative to the plans which the law might otherwise have implied from the rector's position as president of the rectory. Cann *v.* Church of Redeemer, (Mo. 1905) 85 S. W. 994.

Their acts must conform to the rules and discipline of the general organization.— Morgan *v.* Jones, 9 Kulp (Pa.) 503.

Authority to execute, indorse, or accept commercial paper.— Where the management of the temporal affairs of a religious corporation is vested in its trustees, it is bound by the execution, indorsement, or acceptance of commercial paper only when done by them (People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408 [*affirming* 39 Hun 498]), or by their authority (Cattron *v.* Manchester First Universalist Soc., 46 Iowa 106; Packard *v.* Quincy First Universalist Soc., 10 Metc. (Mass.) 427; Columbia Bank *v.* Gospel Tabernacle Church, 127 N. Y. 361, 28 N. E. 29 [*affirming* 57 N. Y. Super. Ct. 149, 6 N. Y. Suppl. 537, and *following* People's Bank *v.* St. Anthony's Roman Catholic Church, 109 N. Y. 512, 17 N. E. 408]), and within the scope of their authority (Gladstone Baptist Church *v.* Scott, 74 S. W. 1075, 25 Ky. L. Rep. 237; Owens *v.* Caraway, (Tex. Civ. App. 1908) 110 S. W. 474). But a religious society is not bound by a promissory note fraudulently executed by the trustees in furtherance of their own adverse interests (New London United Brethren Church *v.* Vandusen, 37 Wis. 54), and it is held that the officers of an unincorporated religious society have no power to bind the other members by a promissory note (Teed *v.* Parsons, 202 Ill. 455, 66 N. E. 1044 [*reversing* 100 Ill. App. 342]. But see Bushong *v.* Taylor, 82 Mo. 660.

Implied power of trustees.— The action of trustees of a religious society in giving their note for a debt incurred in rebuilding the meeting-house, being for a necessary legitimate object, is within the implied powers of the trustees, and the society is liable for money had and received, although no such authority was actually granted to the trustees. Erie First Baptist Church *v.* Caughey, 85 Pa. St. 271.

Acting as council instead of board.— The fact that a majority of the trustees, together with other persons, were present at a meeting, acting as a council, did not make the resolution of the council the act of the board of trustees. Cammeyer *v.* United German Lutheran Church, 2 Sandf. Ch. (N. Y.) 186.

43. New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892; Donnelly *v.* St. John's Protestant Episcopal Church, 26 La. Ann. 738; Peckham *v.* Haverhill North Parish, 33 Mass. 274. But see Thompson *v.* West, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337.

Facts held not to amount to a ratification see Teed *v.* Parsons, 202 Ill. 455, 66 N. E. 1044 [*reversing* 100 Ill. App. 342]; Parshley *v.* Brooklyn Third M. E. Church, 147 N. Y. 583, 42 N. E. 15, 30 L. R. A. 574 [*affirming* 4 Misc. 302, 24 N. Y. Suppl. 106].

44. New Ebenezer Assoc. *v.* Gress Lumber Co., 89 Ga. 125, 14 S. E. 892 (holding that the burden of proving that that authority has been delegated is on the party asserting the validity of the contract); St. Patrick's Roman Catholic Church *v.* Gavalon, 82 Ill. 170, 35 Am. Rep. 305; Cann *v.* Church of Holy Redeemer, 121 Mo. App. 201, 98 S. W. 781.

Oral authority has been held sufficient for this purpose. Cann *v.* Church of Holy Redeemer, 121 Mo. App. 201, 98 S. W. 781.

45. *Connecticut.*— Hewitt *v.* Wheeler, 22 Conn. 557.

Illinois.— Neill *v.* Spencer, 15 Ill. App. 461.

Iowa.— Emonds *v.* Termehr, 60 Iowa 92, 14 N. W. 197.

Maryland.— Vincent *v.* Chapman, 10 Gill & J. 279, holding also that the subsequent manifestation by the officers, of their own impression that they are liable, without any act to fix the liability, does not render them liable.

Michigan.— Rose *v.* Vertin, 46 Mich. 457, 9 N. W. 491, 41 Am. Rep. 174.

New York.— Stanton *v.* Camp, 4 Barb. 274; Paddock *v.* Brown, 6 Hill 530.

Pennsylvania.— McGhee *v.* Lose, 22 Pa. Co. Ct. 371, holding that an agreement made in the names of the trustees of the church and signed by them as individuals, which is subsequently merged in another agreement made in the names of the trustees and signed by them as such, is not binding on any of the trustees individually.

West Virginia.— Johnson *v.* Welch, 42 W. Va. 18, 24 S. E. 585.

England.— Veley *v.* Pertwee, L. R. 5 Q. B. 573, 39 L. J. Q. B. 195, 22 L. T. Rep. N. S.

have been held personally liable on bonds executed by them in their individual capacity with their official designations superadded,[46] and also where they did not expressly limit the extent of their obligations.[47]

C. Compensation and Reimbursement of Expenses. In the absence of an express contract, the right of a trustee or other officer to compensation for his services depends upon the by-laws and customs of the society.[48]

V. POWERS AND LIABILITIES.*

A. In General. As a general rule a church or religious society has power to manage all its temporal affairs through its proper officers, and, like other corporations or associations, is liable for the acts of its officers done in its behalf within the scope of their authority,[49] and in the absence of fraudulent conduct on the part of its officers, the acts of the society are not subject to rescission by members of the society.[50] When incorporated, repairs and improvements of the church property are within its corporate powers,[51] and when unincorporated, it has a right to keep the organization intact, and is not at the mercy of a minority

713, 18 Wkly. Rep. 1024; Sprott *v.* Powell, 3 Bing. 478, 4 L. J. C. P. O. S. 161, 11 Moore C. P. 398, 28 Rev. Rep. 665, 11 E. C. L. 236. But see Hopkinson *v.* Puncher, 3 Exch. 95, 18 L. J. Ex. 6.

Canada.— Daw *v.* Ackerill, 25 Ont. App. 37 [*affirming* 28 Ont. 452]; Beaty *v.* Gregory, 24 Ont. App. 325 [*affirming* 28 Ont. 60]; Maynard *v.* Gamble, 13 U. C. C. P. 56, 467.

See 42 Cent. Dig. tit. "Religious Societies," § 73.

But see Burton *v.* Grand Rapids School Furniture Co., 10 Tex. Civ. App. 270, 31 S. W. 91, holding that deacons of an unincorporated church, by signing in their official capacity a note for church furniture, bound themselves, but not the church.

Conversely they are liable if their acts are without authority. Klopp *v.* Moore, 6 Kan. 27; Dennison *v.* Austin, 15 Wis. 334; Northwaite *v.* Bennett, 2 Cromp. & M. 316, 3 L. J. M. C. 31, 4 Tyrw. 236; Furnival *v.* Coombs, 7 Jur. 399, 12 L. J. C. P. 265, 5 M. & G. 736, 6 Scott N. R. 522, 44 E. C. L. 384; Ruitz *v.* Roman Catholic Episcopal Corp., 30 U. C. Q. B. 269.

Refusal to assign charge.— No action lies in favor of a Roman catholic priest against his bishop for salary or support during a period for which the bishop refused to assign him a charge. Tuigg *v.* Sheehan, 101 Pa. St. 363, 47 Am. Rep. 727.

Liability of one officer for another's obligations.— One officer cannot be made personally liable for independent obligations incurred by another officer. Leahey *v.* Williams, 141 Mass. 345, 6 N. E. 78; Devoss *v.* Gray, 22 Ohio St. 159; Le Saint *v.* Fisler, 8 Ohio Dec. (Reprint) 216, 6 Cinc. L. Bul. 337; Freeport Bank *v.* Egan, 146 Pa. St. 106, 23 Atl. 390.

46. Dayton *v.* Warne, 43 N. J. L. 659; Taft *v.* Brewster, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280.

Liability on official bond.— The treasurer of a religious society, together with his sureties, is liable on his official bond for defalcations. Father Matthew Young Men's Total Abstinence, etc., Soc. *v.* Fitzwilliam, 12 Mo. App. 445 [*affirmed* in 84 Mo. 406].

47. Cruse *v.* Jones, 3 Lea (Tenn.) 66.

48. Cicotte *v.* Catholic, etc., Church Corp., 60 Mich. 552, 27 N. W. 682; Barksdale *v.* Christ Church Parish Episcopal Church, 1 Strobh. Eq. (S. C.) 197.

The liability of a church to a sexton for his services is not in any way dependent upon the observance or non-observance of the by-laws in employing him, or upon the fact that an auxiliary society has agreed to contribute part of his salary. East St. Louis St. Patrick's Roman Catholic Church *v.* Abst, 76 Ill. 252.

An officer who makes expenditures and disbursements in good faith and with reasonable prudence should be reimbursed (Bradbury *v.* Birchmore, 117 Mass. 569; Nicholson *v.* Masters, 4 Vin. Abr. 529 pl. 9. *Compare* French *v.* Dear, 5 Ves. Jr. 547, 31 Eng. Reprint 731); but he, or his personal representatives after his death, are not entitled to a lien on the church property (French *v.* Griswold College, 60 Iowa 482, 15 N. W. 273).

Against whom actions for services maintainable.—An action for services is as a general rule maintainable only against the person who appointed the officer, who incurred the obligation upon which suit is brought. Chiniquy *v.* Deliere, 37 Ill. 237.

49. See *supra*, IV, B.

Liability for trespass or negligence of officer or employee.—A religious society is not liable for the trespass of its trustees, unless the act was duly authorized (Chicago Heights First Presb. Church *v.* McColly, 126 Ill. App. 333), nor is it liable for the negligence of an employee, where due care was used in his selection (Haas *v.* Most Holy Redeemer Missionary Soc., 6 Misc. (N. Y.) 281, 26 N. Y. Suppl. 868).

50. Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582.

51. First Presb. Church *v.* McKallor, 35 N. Y. App. Div. 98, 54 N. Y. Suppl. 740.

* By Stanley A. Hackett.

who desire to break up the church.[52] But a religious corporation has, in the absence of permission in its charter, no power to engage in commercial enterprises.[53] Religious organizations have the right to prescribe such rules and regulations for the conduct of their own affairs as they may think proper, if not inconsistent with the constitution and law of the land; and, subject to this qualification, the courts will give effect to such rules and regulations.[54]

B. Contracts and Indebtedness. Religious societies and corporations are bound, in regard to making of contracts and incurring debts, by the same general rules that govern secular bodies. Thus the power of a religious corporation to contract is limited by its charter and the statutes under which it is authorized, and contracts not therein authorized are *ultra vires*.[55] Where the society is a corporation aggregate, and has a board of trustees to manage its affairs, it can contract only through the aggregate body by vote, or through the board of trustees by vote, or through an agent authorized by vote of one body or the other,[56]

52. Le Blanc *v.* Lemaire, 105 La. 539, 30 So. 135.

53. Huber *v.* United Protestant Evangelical German Cong., 16 Ohio St. 371, such as a bank. See Hall *v.* Franklin, 1 H. & H. 8, 12 Jur. 97, 7 L. J. Exch. 110, 3 M. & N. 259.

But when it owns shares in a building association it may vote such shares by proxy at an election for directors. State *v.* Rohlffs, (N. J. Sup. 1890) 19 Atl. 1099.

54. *Indiana.*— McLain *v.* Matlock, 7 Ind. 525, 65 Am. Dec. 746.

Missouri.— Prickett *v.* Wells, 117 Mo. 502, 24 S. W. 52.

Oklahoma.— Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

Pennsylvania.— McGinnis *v.* Watson, 41 Pa. St. 9 (holding that independent churches have their law in their own separate institutions; associated churches theirs in their own rules and in those of the associated organism); *In re* Charter, 1 Del. Co. 415.

Texas.— Alexander *v.* Bowers, (Civ. App. 1904) 79 S. W. 342.

If a religious society be composed of several bodies or branches, whether coördinate or subordinate, the rules of the society for the management of its internal affairs, and for the adjustment of the relations between its branches, constitute the rules by which they should be governed. Harrison *v.* Hoyle, 24 Ohio St. 254.

55. Bailey *v.* Freeport M. E. Church, 71 Me. 472; Greene *v.* Malden First Parish, 10 Pick. (Mass.) 500.

A religious society may by its constitution limit the amount of debt which its trustees may create without the vote or sanction of the society. Wyncoop *v.* Bellevue Cong. Soc., 10 Iowa 185.

A church incorporated as such cannot engage in commerce or transportation and cannot enter into contracts to that end, but must derive its income not from the conduct of any worldly business but from such property as it may own and from voluntary contributions (Harrimon *v.* First Bryan Baptist Church, 63 Ga. 186, 36 Am. Rep. 117); but when it engages in secular matters it is subject to the same rules and principles governing other corporations, and having made an *ultra vires* contract it cannot accept the benefit of it and escape the burdens (Moore *v.* First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 N. W. 492, holding that where a church contracted for the erection of an edifice, and thereafter accepted the same, it was not entitled to defend on the ground that the contract was *ultra vires*).

A voluntary religious association is incapable of making a contract, and its members or agents are individually as joint promisors or partners. Thurmond *v.* Cedar Spring Baptist Church, 110 Ga. 816, 36 S. E. 221; Phœnix Ins. Co. *v.* Burkett, 72 Mo. App. 1. See Males *v.* Murray, 23 Ohio Cir. Ct. 396, holding that the real debtors, in the finding of an amount due from a congregation of an incorporated church, are the members of the church at the time the debt was contracted, who can be shown to have in some way sanctioned or acquiesced in its creation. *Compare* Riffe *v.* Proctor, 99 Mo. App. 601, 74 S. W. 409, holding that, although the members of a voluntary association contracting in its behalf become jointly liable, yet, where a preacher contracting with the members of an incorporated religious society for employment knows that the expenses of the church are raised by assessment on a voluntary contribution by the entire membership, the members are not liable *in solido*.

A building contract signed in the name of the church or a religious denomination as a corporation, by one subscribing himself "president of the board of trustees," such church or religious denomination not being in fact a corporation, will be treated as the contract of such trustees if labor is performed or material furnished thereunder by their authority and direction. Lunsford *v.* Wren, 64 W. Va. 458, 63 S. E. 308.

56. Miller *v.* Milligan, 6 Ohio Dec. (Reprint) 1000, 9 Am. L. Rec. 419 (holding that while the trustees of any organized religious body have power to bind the body upon all contracts within the scope of its corporate powers or its necessities, no one member, nor all the members of the body together, have power to create any legal obligation against the body, but the acts of the body, to be legal and binding, must emanate from chosen trustees, and when attempted to be done by the members, it is merely an individual act, binding, if at all, only upon the member act-

and like other corporations is generally bound by the acts of its agent, acting within the apparent scope of his authority,[57] but not by the acts of a volunteer,[58] unless it subsequently ratifies his act;[59] but it cannot repudiate the authority of an agent and still retain the benefit of the alleged unauthorized acts.[60]

VI. SUPERIOR, ASSOCIATED, OR REPRESENTATIVE BODIES AND OFFICERS.*

A. Relation to Church in General. There being no law requiring a church to be connected with a religious society, it may exist without such connection;[61] but where it has once attached itself to a particular denomination, in order to maintain its status as a church of that denomination it must preserve an ecclesiastical connection with and subordination to the superior bodies, as prescribed by the proper standards,[62] and, in the absence of proof to the contrary, it is presumed to have no right to sever the connection, except by mutual consent,[63] and where the church is an integral part of the general organization, and has a direct,

ing in his individual capacity); Sun Prairie M. E. Church *v.* Sherman, 36 Wis. 404.

A corporation organized to hold title to a college building and property erected and maintained by a religious denomination is bound by contracts made by the synod of the denomination for the erection of the building; the synod being a shifting, unincorporated body, which, however, controls the denomination. McLaughlin *v.* Concordia College, 20 Mo. App. 42.

Minority bound by acts of majority.— When a church and society are an existing organized association, acting in a collective quasi-corporate character, an agreement of compromise of a suit by a majority of the members is binding upon the minority. Horton *v.* Chester Baptist Church, etc., 34 Vt. 309.

57. Moore *v.* First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 N. W. 492.

A vestry authorized to borrow is authorized to give the necessary evidence of indebtedness. Miller *v.* Childs, 120 Mich. 639, 79 N. W. 924.

Facts held sufficient to establish the assent of the corporation to contract by rector see Condon *v.* St. Augustine's Church, 112 N. Y. App. Div. 168, 98 N. Y. Suppl. 253.

Delegation of authority.— If a vestry of a church, having a right to reject plans which are not satisfactory, delegate control of the matter to an agent, the corporation is bound by the agent's act. Cann *v.* Church of Holy Redeemer, 121 Mo. App. 201, 98 S. W. 781.

58. East Baltimore Lumber Co. *v.* K'Nessett Israel Aushe S'Phard Cong., 100 Md. 125, 59 Atl. 180.

Burden of proving lack of authority.— Where a church contends that its trustees had no authority to contract or to change a contract, the burden is upon it to prove the fact. Moore *v.* First Ruthven Cir. M. E. Church, 117 Iowa 33, 90 N. W. 492.

The mutilation of the minute book of a church by removing therefrom the pages containing a resolution of the congregation authorizing the trustees to execute a note does not affect the validity of the resolution. Gladstone Baptist Church *v.* Scott, 74 S. W. 1075, 25 Ky. L. Rep. 237.

59. Wojciechowski *v.* Johnkowski, 16 Pa. Super. Ct. 444, holding that a person who has loaned money to a priest to pay a note due by the church of the priest to a bank, and the money loaned has been so used, may recover from the church the amount of the loan, although the priest had no authority to borrow the money.

Ratification is a question for the jury.— Norwegian Evangelical Lutheran Bethlehem Cong. *v.* U. S. Fidelity, etc., Co., 81 Minn. 32, 83 N. W. 487.

Acts held to amount to ratification see Christian Church *v.* Cox, 78 Ill. App. 219.

Where the priest of a church advances funds before the church corporation is organized, and the church property on which the funds were expended is sold under a decree to satisfy the lien of the priest, a decree ought not to be rendered against the church corporation for the deficiency, the church after incorporation never having assumed any personal liability for the debt. St. Patrick's Catholic Church *v.* Daly, 116 Ill. 76, 4 N. E. 241.

60. Wilson *v.* Tabernacle Baptist Church, 28 Misc. (N. Y.) 268, 59 N. Y. Suppl. 148. But see Montgomery *v.* Walton, 111 Ga. 840, 36 S. E. 202, holding that the trustees of a church are not as such liable for the price of lumber sold and delivered to the pastor on his individual account, when in making the purchase he neither acted as agent of the trustees nor had authority to do so, although the lumber was with their knowledge used in improving the property of the church.

61. Trinitarian Cong. Soc. *v.* Union Cong. Soc., 61 N. H. 384; Holt *v.* Downs, 58 N. H. 170. But see Baker *v.* Fales, 16 Mass. 488.

Connection is inferable from circumstances, positive agreement being unnecessary. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653.

62. Louisville First Presb. Church *v.* Wilson, 14 Bush (Ky.) 252.

63. Vasconcellos *v.* Ferraria, 27 Ill. 237.

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inherent, and organic interest in that body, it is forever a part of it, except where its rights are forfeited by a regular judicial decree;[64] but where the connection is shown to be purely voluntary, and there is no provision to the contrary in the church rules, it may be severed by the church without the consent of the superior body.[65]

B. Powers. The superior body has power to provide means for the amendment of the constitution and confession of faith,[66] and to either divide or to submit a plan for the division of the church into two parts,[67] to elect trustees of a subsidiary institution according to the terms of an endowment or statute;[68] to recognize one of two rival factions;[69] and to depose officers of local churches,[70] except where the local church has severed its connection,[71] and, when acting within the scope of its authority, its orders and judgments are binding on subordinate bodies.[72] Proceedings had without authority by an intermediate church organiza-

64. Kerr's Appeal, 89 Pa. St. 97; McAuley's Appeal, 77 Pa. St. 397.

65. Lawson *v.* Kolbenson, 61 Ill. 405; Pulis *v.* Iserman, 71 N. J. L. 408, 58 Atl. 554; Bartholomew *v.* Lutheran Cong., 35 Ohio St. 567; Heckman *v.* Mees, 16 Ohio 583; Skilton *v.* Webster, Brightly (Pa.) 203. See Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654].

Especially where the superior organization is merely an advisory body to a confederation of local self-governing churches. Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84.

Action of majority binding as to suspension.— It has been held that, in determining matters of faith and a change or suspension of ecclesiastical connections, the action of the majority binds the whole congregation (Schradi *v.* Dornfield, 52 Minn. 465, 55 N. W. 49; Petty *v.* Tooker, 21 N. Y. 267 [*affirming* 29 Barb. 256]; Watkins *v.* Wilcox, 4 Hun (N. Y.) 220, 6 Thomps. & C. 539 [*affirmed* in 66 N. Y. 654]; Burrell *v.* Seneca Associate Reformed Church, 44 Barb. (N. Y.) 282); but there is respectable authority to the contrary (Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138, 49 N. W. 81, 13 L. R. A. 198; Gordon *v.* Williams, 3 Leg. Gaz. (Pa.) 113).

Power granted in the church charter to the majority to unite with any other christian denomination is exhausted by union with one denomination and does not extend to a dissolution of the connection. Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503, 3 Grant 336.

66. Brundage *v.* Deardorf, 92 Fed. 214, 34 C. C. A. 304.

67. Humphreys *v.* Burnside, 4 Bush (Ky.) 215; Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481; Reeves *v.* Walker, 8 Baxt. (Tenn.) 277; Brooke *v.* Shacklett, 13 Gratt. (Va.) 301; Smith *v.* Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [*reversing* 22 Fed. Cas. No. 13,112, 5 McLean 369].

Resolution held not to constitute authorization of withdrawal.—A resolution adopted by the general conference of a religious society that if any church or circuit had decided to withdraw from the connection, the conference bade them God-speed, and prayed that their newer association might bring them greater opportunities, does not constitute a consent, authorization, or approval of any withdrawal. Cape *v.* Plymouth Cong. Church, 130 Wis. 174, 109 N. W. 928.

68. Kinkead *v.* McKee, 9 Bush (Ky.) 535.

69. Rodgers *v.* Burnett, 108 Tenn. 173, 65 S. W. 408.

70. Dayton *v.* Carter, 206 Pa. St. 491, 56 Atl. 30.

71. Pulis *v.* Iserman, 71 N. J. L. 408, 58 Atl. 554.

72. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841; Bonacum *v.* Harrington, 65 Nebr. 831, 91 N. W. 886; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421, holding that disobedience justifies expulsion from the organization.

Its authority is confined to spiritual affairs and church government.— St. Francis of Point Coupeé Roman Catholic Church *v.* Martin, 4 Rob. (La.) 62.

Power of synod of presbyterian church.— In the exercise of its legislative power, the synod of a presbyterian church may erect new presbyteries (Smith *v.* Nelson, 18 Vt. 511), and dissolve an old presbytery and assign its churches to some other presbytery (Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841; McAuley's Appeal, 77 Pa. St. 397. But see Smith *v.* Nelson, *supra*), but only after a proper trial (Kerr's Appeal, 89 Pa. St. 97).

Power during recess.— Under the constitution and discipline of the methodist protestant church, the president of the conference has power, during the recess of the conference, to employ and station a minister to fill a vacancy without the consent of the church. Robinson *v.* Cocheu, 18 N. Y. App. Div. 325, 46 N. Y. Suppl. 55.

English bishops possess the power of visitation.— Reg. *v.* Rochester, 17 Q. B. 1, 15 Jur. 920, 20 L. J. Q. B. 467, 79 E. C. L. 1; Reg. *v.* Chester, 15 Q. B. 513, 15 Jur. 10, 19 L. J. Q. B. 485, 69 E. C. L. 513; Phillpotts *v.* Boyd, L. R. 6 P. C. 435, 44 L. J. Eccl. 44, 32 L. T. Rep. N. S. 73, 23 Wkly. Rep. 491; Harrison *v.* Dublin, 2 Bro. P. C. 199, 1 Eng. Reprint 885; Kildare *v.* Dublin, 2 Bro. P. C. 179, 1 Eng. Reprint 872.

tion may be ratified and validated by the supreme body, provided the latter body does not violate the discipline of the church.[73]

C. Meetings — 1. Conduct in General. Although a bishop presides at a conference, he is not a necessary part of the body and it may sit without him, and his presence cannot confer authority upon those who, without him, would be without authority.[74] And the duty devolving on the bishops and a general conference of appointing a place for the next meeting is administrative and may be delegated.[75]

2. Delegates and Representatives. The status of a lay representative to a synod is not a civil but an ecclesiastical one.[76] After a church body has been exscinded by a superior church body, its representatives have no right to participate in the proceedings of the latter organization,[77] and a congregation is not chargeable with the acts of its delegates to the higher bodies, when, under the rules of the denomination, it has no voice in their election.[78]

VII. MINISTERS.*

A. Definition. A minister is one who, having been ordained to the ministry, undertakes to perform certain services for another.[79] The term includes every

73. Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476.

74. Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476.

75. Schweiker *v.* Husser, 146 Ill. 399, 34 N. E. 1022 [*affirming* 44 Ill. App. 566]; Auracher *v.* Yerger, 90 Iowa 558, 58 N. W. 893; State *v.* Esher, 6 Ohio Cir. Ct. 312, 3 Ohio Cir. Dec. 468; Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476.

Authority of oldest conference to appoint time and place for meeting.—A provision in the discipline that, on the failure of the bishops and conference to appoint the time and place for the next meeting, the oldest annual conference may do so, confers no special rights on the oldest conference, and it is only authorized to act on the happening of the contingency mentioned and not under any other circumstances. Schweiker *v.* Husser, 146 Ill. 399, 34 N. E. 1022 [*affirming* 44 Ill. App. 566]; Auracher *v.* Yerger, 90 Iowa 558, 58 N. W. 893; State *v.* Esher, 6 Ohio Cir. Ct. 312, 3 Ohio Cir. Dec. 468.

A superior body has power to suspend a rule relating to the time of the selection of its clerk. Earle *v.* Wood, 8 Cush. (Mass.) 430.

76. Dunnet *v.* Forneri, 25 Grant Ch. (U. C.) 199.

77. Com. *v.* Green, 4 Whart. (Pa.) 531.

78. McAuley's Appeal, 77 Pa. St. 397.

79. Perry First Presb. Church *v.* Myers, 5 Okla. 809, 825, 50 Pac. 70, 38 L. R. A. 687.

An English definition is: "The functionary, whatever title he may bear, who for the time being has the cure of the parish as principal." Pinder *v.* Barr, 2 C. L. R. 1613, 4 E. & B. 105, 115, 1 Jur. N. S. 205, 24 L. J. Q. B. 30, 2 Wkly. Rep. 589, 82 E. C. L. 114, 28 Eng. L. & Eq. 235.

Distinguished from "pastor" in Perry First Presb. Church *v.* Myers, 5 Okla. 809, 825, 50 Pac. 70, 38 L. R. A. 687.

A stated minister is an ordained minister, who has been engaged by two societies in one town to preach to them alternately. Com. *v.* Spooner, 1 Pick. (Mass.) 235, 236. **But a** minister ordained over an unincorporated religious society composed of individuals resident in different towns is not a stated minister. Ligonia *v.* Buxton, 2 Me. 102, 108, 11 Am. Dec. 46.

A settled minister is one ordained over some particular society, either incorporated or unincorporated, who shall be entitled to his services, and obligated to him for his support. Ruggles *v.* Kimball, 12 Mass. 337, 338. See Kidder *v.* French, Smith (N. H.) 155, 164. He is a person authorized to perform ministerial functions, and particularly, the celebration of marriage; resident in the county where he performs them; and who has charge of a particular church and congregation. Kibbe *v.* Antram, 4 Conn. 134, 140. An itinerant minister is not "settled." Goshen *v.* Stonington, 4 Conn. 209, 219, 10 Am. Dec. 121. But all that is necessary to be shown is a certain fixed connection between the minister and the society. Baldwin *v.* McClinch, 1 Me. 102, 108; Gridley *v.* Clark, 2 Pick. (Mass.) 403, 410.

Ordained minister defined see Ordained Minister, 29 Cyc. 1509.

Pastor defined see Pastor, 30 Cyc. 802.

"Minister of the gospel" has been held to include any minister of religion (Matter of Reinhart, 9 Ohio S. & C. Pl. Dec. 441, 444, 6 Ohio N. P. 438), a bishop (Read *v.* Lincoln, 14 P. D. 148), all clergymen of every denomination and faith (Haggin *v.* Haggin, 35 Nebr. 375, 379, 53 N. W. 209), and a teacher of piety, religion, and morality (Baker *v.* Fales, 16 Mass. 488, 509).

"Minister of religion" has been held to include a minister belonging to a sect of religionists who perform ministerial labor gratuitously and rely on secular employment

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person duly appointed in his respective church to officiate and minister in its interest and is not limited to christianity.[80]

B. Creation of Relation. The rules and usages of the church itself, if it is an independent organization or of the denomination to which it belongs, if it is connected with a general organization, control in the selection of its minister,[81] except where they conflict with the constitution or statutes of the state in which the church is located,[82] and where the denomination has no rule for the appoint-

as a means of subsistence. *Ex p.* Cain, 39 Ala. 440, 441.

"Minister of any church or chapel" as employed in 5 & 6 Wm. IV, c. 76, § 68, includes the lecturer of a church whose duties, with a few exceptions, are similar to those performed by the minister or incumbent. Reg. *v.* Liverpool, 8 A. & E. 176, 35 E. C. L. 540.

80. Matter of Reinhart, 9 Ohio S. & C. Pl. Dec. 441, 6 Ohio N. P. 438, holding that the term may embrace a learned and reverend Jewish rabbi and many other ministers of religion who are not christian in name.

It is a comprehensive term, of uncertain signification.— Kidder *v.* French, Smith (N. H.) 155.

81. Independent Presb. Church *v.* Proctor, 66 Ill. 11; Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874; Johnson *v.* Glen, 26 Grant Ch. (U. C.) 162.

In methodist episcopal and evangelical churches, the itineracy of the clergy and the absolute power of the bishops over the appointments of the preachers for the various churches is a distinctive feature of the discipline. The trustees and congregation of a local church have no power in regard to the selection of its pastor, and they cannot lawfully close the church against the regular appointee. Fuchs *v.* Meisel, 102 Mich. 357, 60 N. W. 773, 32 L. R. A. 92; Whitecar *v.* Michenor, 37 N. J. Eq. 6; People *v.* Steele, 2 Barb. (N. Y.) 397; People *v.* Connelly, 3 N. Y. St. 372; Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476. And see Com. *v.* Cornish, 13 Pa. St. 288. Although the power of appointment is lodged in the presiding bishop of the annual conference, from a practical necessity he acts with the advice of his council of presiding elders assembled at the annual conference. Henderson *v.* Hunter, 59 Pa. St. 335.

Presbyterian church.— According to the usage and form of government of the presbyterian church, a call made by the congregation does not become effective until it is placed in the hands of the minister to whom it is addressed (Perry First Presb. Church *v.* Myers, 5 Okla. 809, 50 Pac. 70, 38 L. R. A. 687), and the formal sanction of the presbytery is essential to the consummation of the pastoral relation (West *v.* St. Paul Presb. Church, 41 Minn. 94, 42 N. W. 922, 4 L. R. A. 692; Perry First Presb. Church *v.* Myers, *supra*; Woodside's Appeal, 4 Pennyp. (Pa.) 124). The selection of a stated supply is made by the presbytery. Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

Baptist church.— It has been held that in New England baptist worshipers are divided into two organizations, the church and the society, and that each organization must concur in calling and settling a minister. However, if the church has formally voted to settle the minister, the concurrence of the society may be shown by records recognizing him as filling that office, coupled with proof that he actually performed the duties thereof. Leicester *v.* Fitchburg, 7 Allen (Mass.) 90. The rule of the particular or Calvinistic baptists is that the minister shall be appointed by the congregation and not by the trustees. Perry *v.* Shipway, 4 De G. & J. 353, 5 Jur. N. S. 1015, 28 L. J. Ch. 660, 7 Wkly. Rep. 574, 61 Eng. Ch. 277, 45 Eng. Reprint 136.

In England a rector has the common-law right of nominating a curate. Arnold *v.* Bath, 5 Bing. 316, 15 E. C. L. 600, 7 L. J. C. P. O. S. 120, 2 M. & P. 550, 30 Rev. Rep. 613.

82. Bartlett *v.* Hipkins, 76 Md. 5, 23 Atl. 1089, 24 Atl. 532.

Jus patronatus abrogated.— The right of owners of parochial churches to nominate a curate, the *jus patronatus* of the Spanish law, has been abrogated in Louisiana. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

Where the legislature has conferred on the church corporation unconditionally the power of disposing of the right of presentation, any by-law passed in the exercise of that power is valid, regardless of how unwise or inexpedient it may be. Atty.-Gen. *v.* Lauder, 9 Grant Ch. (U. C.) 461.

Power of trustees to fill the pulpit.— It was formerly held in New York that, as the trustees were invested by statute with the management of the temporal affairs of the corporation, they had the power of determining who should occupy the pulpit. Petty *v.* Tooker, 21 N. Y. 267 [*affirming* 29 Barb. 256]. But in accordance with subsequent statutory provisions that the officers of a religious corporation should administer the temporalities thereof according to the rules of the church or denomination to which the corporation belongs, it is held that the trustees cannot lawfully maintain in office a minister who had been deposed by a superior body of the denomination (Isham *v.* Fullager, 14 Abb. N. Cas. (N. Y.) 363; Isham *v.* Dunkirk First Presb. Church, 63 How. Pr. (N. Y.) 465), nor refuse to receive a minister lawfully appointed by a bishop of the methodist church (People *v.* Connelly, 3 N. Y. St. 372).

Effect of Massachusetts Declaration of Rights.— In New England it was the custom in early times for a church to first nominate a minister and then submit the nomination to the parish for approval. Bisbee *v.* Evans, 4 Me. 374; Burr *v.* Sandwich First Parish, 9 Mass. 277. But, it is provided in the Massachusetts Declaration of Rights that the town,

ment of ministers or priests, and the society is incorporated, its board of trustees is the proper body to exercise the power of appointment.[83] In the absence of a positive ecclesiastical rule, the entire absence of any ceremony of induction does not affect the right of a rector or minister to his position.[84]

C. Authority, Rights, and Privileges[85] — **1. In General.** A minister has the right to enter the church edifice for the purpose of conducting religious services,[86] regardless of whether the church is incorporated or holds title to the building,[87] but is not ordinarily an officer of the church so that he can bind it by his acts,[88] although his official acts, when not contrary to statute, and when called in question incidentally, are as valid as the official acts of other persons.[89] He can delegate no more authority than he possesses.[90]

2. Salary, Support, and Fees. A minister is entitled to recover his salary or compensation when he has performed all the duties which the church or society allowed him to perform,[91] or has at all times exhibited readiness and ability to

parishes, and other religious societies shall have the exclusive right of electing their public teachers, and when this right is insisted upon, it supersedes the ancient usage and renders unnecessary the concurrence of the church in the choice of a minister. Baker *v.* Fales, 16 Mass. 488; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

A religious society which has no power to tax its members for the support of a minister is held to possess no power to contract for his employment. Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135, 21 N. E. 294.

83. Papaliou *v.* Manusos, 113 Ill. App. 316.

84. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Necessity of reordination.— Where a minister has been once regularly ordained, it is no ground of objection to his settlement as a pastor of a church that there is no new ceremony of installation or induction into office. Leicester *v.* Fitchburg, 7 Allen (Mass.) 90 [*following* Bellingham *v.* West Boylston, 4 Cush. (Mass.) 553]. And ordained ministers of the protestant episcopal church may be received into a presbytery of the presbyterian church without a reordination. Ritchie *v.* Widdemer, 59 N. J. L. 290, 35 Atl. 825.

Where the election of a minister by a congregation is invalid, his subsequent ordination does not vest him with title to the office. Perry *v.* Shipway, 4 De G. & J. 353, 5 Jur. N. S. 1015, 28 L. J. Ch. 660, 7 Wkly. Rep. 574, 61 Eng. Ch. 277, 45 Eng. Reprint 136. *Compare* Martyn *v.* Hind, Cowp. 437, 98 Eng. Reprint 1174.

Ordination defined see Ordination, 29 Cyc. 1526.

Exercise of the power of appointment for a pecuniary consideration is not permissible. Combe *v.* Brazier, 2 Desauss. Eq. (S. C.) 431.

85. **Authority of minister to solemnize marriages** see Marriage, 26 Cyc. 856.

86. Lynd *v.* Menzies, 33 N. J. L. 162; Griffin *v.* Dighton, 5 B. & S. 93, 33 L. J. Q. B. 181, 9 L. T. Rep. N. S. 814, 12 Wkly. Rep. 441, 117 E. C. L. 93.

The incumbent is entitled to custody of church keys.— Ritchings *v.* Cordingley, L. R. 3 A. & E. 113, 19 L. T. Rep. N. S. 26; Redhead *v.* Wait, 6 L. T. Rep. N. S. 580.

87. Lynd *v.* Menzies, 33 N. J. L. 162. But see Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281.

88. Allen *v.* North Des Moines M. E. Church, 127 Iowa 96, 102 N. W. 808, 109 Am. St. Rep. 366, 69 L. R. A. 255.

A pastor authorized to solicit subscriptions for paying off the indebtedness of the church possesses no authority to accept a subscription. Sun Prairie M. E. Church *v.* Sherman, 36 Wis. 404.

Where it is a rule of the denomination that a pastor shall not contract debts in the name or for the benefit of the church without the written permission of the bishop, such written permission cannot be evidence that debts contracted under it are the legal debts of the bishop. Leahey *v.* Williams, 141 Mass. 345, 6 N. E. 78.

89. State *v.* Winkley, 14 N. H. 480.

A priest cannot forcibly remove a person from the room of a sick person, to whom he is about to administer an office of his religion. Cooper *v.* McKenna, 124 Mass. 284, 26 Am. Rep. 667.

90. Leahey *v.* Williams, 141 Mass. 345, 6 N. E. 78.

91. Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281; Thompson *v.* Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469; Martyn *v.* Hind, Cowp. 437, 98 Eng. Reprint 1174.

A pastor who has never accepted the written call extended to him cannot recover for his services on a *quantum meruit,* although he has acted as pastor. Neill *v.* Spencer, 5 Ill. App. 461.

Waiver of forfeiture of right to compensation.— The acts and omissions of a minister which might have forfeited his right to compensation are waived by the act of the society in requesting his resignation. Whitney *v.* Brooklyn First Eccleciastical Soc., 5 Conn. 405.

Although a parish and a society join in the calling of a minister, the contract will be construed as several as to the payment of salary, where each has agreed to pay different amounts. Peckham *v.* North Parish, 16 Pick. (Mass.) 274.

Right to salary a property right.— Where there is an express contract of employment, the right of the minister to be paid the salary

perform,[92] and a church is obligated to pay a just compensation for the services of a stated supply or a minister acting temporarily.[93] While it has been held that to support an action to recover his salary, it is not necessary for the minister to show that the trustees have acted as a corporation in engaging his services,[94] the stipulated salary is not recoverable when it is shown that the minister entered into the contract with knowledge that the officers with whom he was contracting were not legally elected,[95] or where the officers exceeded the power conferred upon them by statute in making the contract,[96] and where the minister, at the time of entering into the contract, knows that his salary is to be paid from voluntary contributions, he cannot recover an amount in excess of the contributions actually received,[97] provided the society uses due diligence in procuring and collecting subscriptions; [98] but although a priest or minister receives no specified salary and his income is derived from pew rents and voluntary offerings, the court is equally zealous in protecting his rights.[99] A deposed minister cannot compel a

stipulated therein is a valuable property right. Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

Right of churchwardens to withhold salary. — It has been held that churchwardens who are authorized by statute to provide for the salary of ministers have the right to withhold the salary of a curate appointed by the bishop. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

Reimbursement for advances.— It has been held that a priest who has advanced money for the erection or improvement of church property is not only entitled to recover interest on such advances, but has an equitable lien on the property. St. Patrick's Catholic Church *v.* Daly, 116 Ill. 76, 4 N. E. 241. But see Tuigg *v.* Treacy, 104 Pa. St. 493, holding that he cannot even recover the principal, in the absence of proof of any rule or custom of the denomination making reimbursement obligatory.

92. Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405; Albany Dutch Church *v.* Bradford, 8 Cow. (N. Y.) 457.

A minister rightfully dismissed before the commencement of his second year of service under a new contract cannot recover for the refusal of the society to permit him to act during that year. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

93. West *v.* St. Paul First Presb. Church, 41 Minn. 94, 42 N. W. 922, 4 L. R. A. 692; Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874. And see Dakins *v.* Searman, 6 Jur. 783, 11 L. J. Exch. 274, 9 M. & W. 777, holding that an incumbent is liable to an unlicensed curate for temporary services.

94. Miller *v.* Allowaystown Baptist Church, etc., 16 N. J. L. 251.

95. St. Luke's Church *v.* Mathews, 4 Desauss. Eq. (S. C.) 578, 6 Am. Dec. 619.

96. Peckham *v.* North Parish Ministerial Fund, 19 Pick. (Mass.) 559.

Statutory power to fix salary exclusive.— The power conferred by an act of incorporation upon churchwardens of fixing the salary of the parish priest was exclusive, and no such power could be lawfully exercised by the pope or any bishop. St. Francis Roman Catholic Church Cong. *v.* Martin, 4 Rob. (La.) 62.

A statute vesting the power of fixing the compensation of the minister in the society or congregation is not in conflict with the usage and discipline of the presbyterian church which is to the effect that the call of the congregation for the services of a regular pastor does not become obligatory until accepted by the minister and sanctioned by the presbytery. West *v.* St. Paul First Presb. Church, 41 Minn. 94, 42 N. W. 922, 4 L. R. A. 692.

Statutory method of ascertaining salary exclusive.—A statute which provides that the salary of a minister shall be ascertained by a majority of the persons entitled to elect trustees of the church prescribes an exclusive mode of determining the compensation to be paid, and no recovery may be had for a salary fixed in any other manner or by any other body. Landers *v.* Frank St. M. E. Church, 97 N. Y. 119, 114 N. Y. 626, 21 N. E. 420. And see Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243]. *Compare* Pendleton *v.* Waterloo Baptist Church, 49 Hun (N. Y.) 596, 2 N. Y. Suppl. 383, holding that where the amount or compensation is not determined in the required manner, recovery may be had on the contract, as for services rendered, limited by the amount actually received by the church applicable to such payment. The statute has been held not to apply to churches of the protestant episcopal denomination. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49; Humbert *v.* St. Stephens Protestant Episcopal Church, 1 Edw. (N. Y.) 308.

97. Riffe *v.* Proctor, 99 Mo. App. 601, 74 S. W. 409; Daw *v.* Ackerill, 25 Ont. App. 37 [*affirming* 28 Ont. 452].

When a salary is stipulated for, equal to that of ministers in other parishes, and no reference is made to the income from a devise for the support of a minister, it will be presumed that the minister intended to look to the society and not the fund for payment. Thompson *v.* Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469.

98. Myers *v.* Jamaica Baptist Soc., 38 Vt. 614.

99. O'Hara *v.* Stack, 90 Pa. St. 477. And

donation,[1] and, on the other hand, he cannot be enjoined from receiving voluntary contributions.[2] A provision of the church discipline that a claim for deficiency may be presented to the conference does not prevent the minister recovering whatever salary the congregation has contracted to pay him.[3]

3. Exemptions.[4] Under the statutes of some states, ministers are exempt from taxation.[5] They are not exempt from patrol duty required by a city ordinance.[6]

D. Termination of Relation — 1. Right of Church to Terminate and Power of Removal. A church which has employed a pastor for a definite period has the power to discharge him before the expiration of that time, so as to deprive him of the right to occupy the pulpit,[7] although it may be liable for his salary in case the dismissal was without cause;[8] and the appointment of a rector or minister is at will and terminable upon reasonable notice when he was not chosen for a definite term, neither the statute nor charter prescribing the duration of his term,[9] or where the government of the church permits of his summary dismissal by the congregation,[10] but not where the constitution, rules, and usages of the church enter into and form a part of the contract, and these do not provide for a summary dismissal.[11] The court will not dissolve the pastoral relation at the instance of persons who are not parties to the contract.[12] A rector called per-

see Nicholson *v.* Daniel, 152 Pa. St. 461, 25 Atl. 1022, holding that a clergyman, who has been very successful in securing contributions for a mission and who has turned over the greater part of the amount collected to the proper officials, will be allowed to retain the remainder, although the amount is in excess of that received by regularly salaried missionaries of his denomination.

A Roman catholic priest, whose fees are derived from pew rents and collections, is not accountable for the excess of the collections over church expenses. St. Patrick's Catholic Church *v.* Daly, 116 Ill. 76, 4 N. E. 241.

Right to participate in fund.— Where one of the rules governing the distribution of a fund for the benefit of clergymen is that no clergyman whose income exceeds a certain amount shall be entitled to participate, a clergyman whose income is less than the amount stated is not debarred from participation in the fund by reason of the fact that the salary paid to his curate, where added to his own salary, exceeds the amount specified. Nova Scotia Diocesan Synod *v.* Ritchie, 18 Can. Sup. Ct. 705 [*affirming* 21 Nova Scotia 309].

1. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

2. Calkins *v.* Cheney, 92 Ill. 463.

3. Jones *v.* Mt. Zion Cong., 30 La. Ann. 711.

4. **Exemption of ministers from jury duty** see Juries, 24 Cyc. 205.

5. Baldwin *v.* McClinch, 1 Me. 102, holding that a local preacher who has the right to administer all the ordinances except the communion comes within the exemption; that it is sufficient for the minister to be settled over a religious society, although it be composed of members resident in several towns; and that it is not necessary that the society be under any legal obligation to pay the minister any fixed salary. And see, generally, Taxation.

In England clergymen are exempted from arrest while in a chapel (*Ex p.* Dakin, 16 C. B. 77, 3 C. L. R. 602, 1 Jur. N. S. 378, 24 L. J. C. P. 131, 3 Wkly. Rep. 369, 81 E. C. L. 77), or while attending a visitation (McGeath *v.* Geraghty, 15 Wkly. Rep. 127). They are also exempt from the payment of toll on a turnpike road when attending to their parochial duties. Layard *v.* Ovey, L. R. 3 Q. B. 415, 37 L. J. M. C. 148, 18 L. T. Rep. N. S. 632, 16 Wkly. Rep. 896; Temple *v.* Dickinson, 1 E. & E. 34, 5 Jur. N. S. 363, 27 L. J. M. C. 10, 7 Wkly. Rep. 13, 102 E. C. L. 34. They are liable, however, in like manner as other persons, to be adjudged bankrupts. *Ex p.* Maymot, 1 Atk. 196, 26 Eng. Reprint 127.

6. Elizabeth City Corp. *v.* Kenedy, 44 N. C. 89.

7. Conway *v.* Carpenter, 80 Hun (N. Y.) 428, 30 N. Y. Suppl. 315.

8. Conway *v.* Carpenter, 80 Hun (N. Y.) 428, 30 N. Y. Suppl. 315; Children of Israel Cong. *v.* Peres, 2 Coldw. (Tenn.) 620.

9. Stubbs *v.* St. John's Church, 96 Md. 267, 53 Atl. 197.

10. Morris St. Baptist Church *v.* Dart, 67 S. C. 338, 45 S. E. 753, 100 Am. St. Rep. 727, holding further that while the church is liable for arrears of salary it has contracted to pay it is not a condition precedent to his removal that he be paid in full.

11. Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

Episcopal minister.— Unless something to the contrary is distinctly expressed in the call or settlement, an episcopal minister cannot, according to the rules of the church, be dismissed without his consent, except by the bishop. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

Questions of law and of fact.— Matters relating to the rules and usages of the society are to be determined as questions of fact and not of law. Gibbs *v.* Gilead Ecclesiastical Soc., 38 Conn. 153; Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

12. Smith *v.* Nelson, 18 Vt. 511.

manently continues to hold his place for an indefinite period and until one of the contracting parties desires to terminate the connection upon fair terms and with the approval of ecclesiastical authorities;[13] but the rule is otherwise and the contract is for life, capable of being terminated only by death, for cause, or by mutual consent, when a settlement is conferred on the pastor.[14] Where the contract is terminable at will, the church should give the pastor reasonable notice of its termination.[15] The officers of a church have no right to indirectly remove its pastor by reducing his salary as fixed at the time of his election.[16] The persons vested with the power of appointment possess the power of removal,[17] except where the power is conferred upon others by the charter of the corporation;[18] and it has been held that a board of trustees has power to dismiss a priest by virtue of a by-law which placed in its hands the control and direction of the association and church.[19]

2. Grounds. A pastor has been held to be removable when he ceases to possess the necessary qualifications to serve, such as membership in the synod,[20] or for an essential change of doctrine,[21] wilful neglect of duty,[22] and immoral or criminal conduct.[23] In an action by a minister for his salary defendants will not be permitted to set up causes of forfeiture on the part of the minister which they did not set up when voting to dismiss him.[24]

3. Proceedings — a. In General. The relation of a minister to the church cannot be dissolved against the will of both contracting parties by an ecclesiastical tribunal;[25] but when either party desires a dissolution of the pastoral relation and the parties are unable to agree, they may call to their assistance a council mutually chosen,[26] or chosen by the aggrieved party in case the parties fail to agree upon a mutual choice.[27] An application to a minister to join with his society

13. Perry *v.* Wheeler, 12 Bush (Ky.) 541. *Compare* Martyn *v.* Hind, Cowp. 437, 98 Eng. Reprint 1174.

14. Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405; Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281; Burr *v.* Sandwich First Parish, 9 Mass. 277; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105. And see Packham *v.* Haverhill North Parish, 16 Pick. (Mass.) 274.

15. Stubbs *v.* St. John's Church, 96 Md. 267, 53 Atl. 917.

16. Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

17. Stubbs *v.* St. John's Church, 96 Md. 267, 53 Atl. 917.

18. African M. E. Church *v.* Clark, 25 La. Ann. 282.

19. Papaliou *v.* Manusos, 113 Ill. App. 316, 108 Ill. App. 272.

20. Helbig *v.* Rosenberg, 86 Iowa 159, 53 N. W. 111.

The secession of the pastor, together with the congregation, from the church does not dissolve the pastoral relation or create a cause for its dissolution, where it is shown that secession is an established principle in the church. Smith *v.* Nelson, 18 Vt. 511, a leading case.

21. Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281; Burr *v.* Sandwich First Parish, 9 Mass. 277.

Acts held insufficient to warrant removal. — It is no cause for removal that the church, at a meeting of which the minister was moderator, declared certain claims of the consociated churches, with which that church was connected, to be unscriptural. South Farms Ecclesiastical Soc. *v.* Beckwith, Kirby (Conn.) 91.

22. Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281.

23. Sheldon *v.* Easton Cong. Parish, 24 Pick. (Mass.) 281; Ash *v.* Methodist Church, 27 Ont. App. 602. And see Smith *v.* Nelson, 18 Vt. 511.

Construction of "immorality." — The word "immorality" as used in a church canon which names the grounds for the annulment of a minister's license is to receive its natural and grammatical meaning. Halliwell *v.* Ontario Synod, 7 Ont. 67.

"Immorality" defined see 21 Cyc. 1736.

Immoralities must be gross to justify dismissal. — Thompson *v.* Rehoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469. False statements do not constitute dishonesty or immoral conduct so as to justify the dismissal of the minister making them. *Ex p.* Little, 33 N. Brunsw. 210. And improper words, actions, or temper which contain no element of an indictable offense are not cause for dismissal. Pounder *v.* Ashe, 36 Nebr. 564, 54 N. W. 847.

24. Whitmore *v.* Plymouth Fourth Cong. Soc., 2 Gray (Mass.) 306; Thompson *v.* Rohoboth Catholic Cong. Soc., 5 Pick. (Mass.) 469.

25. Smith *v.* Nelson, 18 Vt. 511.

26. Burr *v.* Sandwich First Parish, 9 Mass. 277; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

27. Thompson *v.* Rehoboth Catholic Cong. Soc., 5 Pick (Mass.) 469 (holding, however, that a mutual council should always be offered before an *ex parte* one is called); Burr *v.* Sandwich First Parish, 9 Mass. 277;

in calling a council to consider the expediency of removing him for misconduct should state substantially the charges against him,[28] and, where the council recommends a dissolution of the contract, it should specify which of the charges were proved;[29] but in the absence of evidence of intention of the parties to clothe the council with power to make a binding award, the decision of the council is merely advisory and does not bind a party who rejects it, its only effect being to operate as a justification of the party adopting it and conforming to it,[30] although the rule is otherwise, and the decision of the church tribunal is binding on both parties, where the rules of the denomination, authorizing the deposition of pastors by ecclesiastical tribunals, form part of the contract.[31]

b. Actions Concerning Right to Office — (i) *BY MINISTER.* Equity will interfere to protect a minister in the enjoyment of his office only when his contract and relations with the church are such as to confer on him a property right in the office.[32] Upon this ground, however, it has been held that an injunction will lie to prevent an unwarranted removal of a priest by a bishop;[33] to restrain the governing body from hindering a minister wrongfully removed, in the exercise of his office;[34] and to enjoin the trustees of a church from refusing to receive the regularly appointed minister and from denying him the use of the church edifice.[35]

(ii) *AGAINST MINISTER.* To justify a court of equity in interfering with the occupancy of a pulpit, a clear case should be made out;[36] but this having been

Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

An unreasonable refusal on the part of the minister to join in calling a council justifies the society in calling one. Thompson *v.* Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

28. Thompson *v.* Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

29. Thompson *v.* Rhoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

30. Hollis St. Meeting House *v.* Pierpont, 7 Metc. (Mass.) 495; Stearns *v.* Bedford First Parish, 21 Pick. (Mass.) 114; Burr *v.* Sandwich First Parish, 9 Mass. 277. *Compare* Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

Continued operation of bond.— Where it appeared that an ecclesiastical council recommended a dissolution of the pastoral relation but that the parish did not accept the recommendation, the relation continued to exist as before, and a bond given by the minister and sureties, conditioned to supply the desk of the parish, remained in full force. Bacon *v.* Lane, 21 Pick. (Mass.) 130 note.

31. Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Albany Dutch Church *v.* Bradford, 8 Cow. (N. Y.) 457; Ash *v.* Methodist Church, 27 Ont. App. 602.

The decision of the highest tribunal reversing the decision of a lower tribunal prevails until new proceedings are instituted in the lower tribunal and that body again obtains jurisdiction over the minister. Dieffendorf *v.* Reformed Calvinist Church, 20 Johns. (N. Y.) 12.

In Canada it has been held that by virtue of a canon of the diocese of Ontario of the united church of England and Ireland passed in pursuance of authority conferred by parliament, a bishop has no power to cancel and annul the license of a minister for immorality without a trial by the diocesan court. Halliwell *v.* Ontario Synod, 7 Ont. 67.

32. Schweiker *v.* Husser, 146 Ill. 399, 34 N. E. 1022; Travers *v.* Abbey, 104 Tenn. 665, 58 S. W. 247, 51 L. R. A. 260; Porter *v.* Clarke, 2 Sim. 520, 29 Rev. Rep. 158, 2 Eng. Ch. 520, 57 Eng. Reprint 882.

Right to perform civil acts as ground for equitable interference.— On a motion for an injunction to restrain a bishop from passing sentence against a priest, the only ground on which the court can exercise any jurisdiction is that the threatened action of the bishop may affect the civil rights of the priest, such as exemption from taxation and the right to perform certain civil acts. Walker *v.* Wainwright, 16 Barb. (N. Y.) 486.

The rector of a protestant episcopal church has not such a vested right in his office and in the salary and emoluments as will authorize the civil courts to restrain an ecclesiastical court in his trial for an offense against the canons and discipline of the church. Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.

33. O'Hara *v.* Stack, 90 Pa. St. 477 [*affirming* 5 Leg. Gaz. 97].

Scope of inquiry by court.— The court will only inquire into the question whether the bishop is acting within the scope of his power, and not whether he is acting rightly. Walker *v.* Wainwright, 16 Barb. (N. Y.) 486.

The church corporation should be made a party to a suit against the trustees to prevent them from ejecting the clergyman. Lawyer *v.* Cipperly, 7 Paige (N. Y.) 281.

34. Daugars *v.* Rivaz, 28 Beav. 233, 6 Jur. N. S. 854, 29 L. J. Ch. 685, 8 Wkly. Rep. 225, 54 Eng. Reprint 355.

35. Fuchs *v.* Meisel, 102 Mich. 357, 60 N. W. 773, 32 L. R. A. 92; Whitecar *v.* Michenor, 37 N. J. Eq. 6; People *v.* Connelly, 3 N. Y. St. 372.

36. Independent Presb. Church *v.* Proctor, 66 Ill. 11.

done it has been held that an injunction will issue to prevent the election of a minister who has not been regularly licensed,[37] to prevent a person not duly selected as minister from officiating in the church,[38] and to enjoin a deposed minister from continuing to officiate in a particular church and to use the church property;[39] but not to eject a clergyman, once regularly settled, merely because the vestry desire to turn him out,[40] nor to restrain the trustees from intruding on the office of the minister, at the instance of male members of the congregation, when the consent of two thirds of the members of the corporation is required by the act under which the church is incorporated.[41]

4. Right of Deposed Minister to Use Church Property. A minister who has been dismissed is no longer entitled to use or occupy any property belonging to the church;[42] but the refusal of a minister to leave the parsonage on his suspension from ministerial service and church privileges, subject to the action of the next annual conference, will not render him a trespasser so as to justify the trustees of the local church in evicting him therefrom by violence without the aid of legal process.[43]

5. Reinstatement. A minister who has actual notice of the time and place of his trial on charges affecting his right to continue in the ministry cannot compel his reinstatement on the ground of irregularities in the notice,[44] or on the ground of incidental irregularities of the trial.[45] A deposed minister is not estopped from having his dismissal declared unlawful by his voluntary withdrawal from the church division of which his congregation was a member;[46] but where he has already sued for his salary, the court will not determine in another action whether he could be dismissed only by a two-thirds vote of the society.[47]

VIII. Property and Funds.

A. Acquisition and Title*—1. Capacity to Acquire and Hold—a. In General. Mere voluntary religious associations are incapable of taking and holding real property in their society name;[48] but it may be held for their use and benefit

37. Milligan *v.* Mitchell, 1 Myl. & K. 446, 7 Eng. Ch. 446, 39 Eng. Reprint 750.

38. First Cong. Church *v.* Stewart, 43 Ill. 81; Woodside's Appeal, 4 Pennyp. (Pa.) 124.

39. Bonacum *v.* Harrington, 65 Nebr. 831, 91 N. W. 886; Pounder *v.* Ash, 44 Nebr. 672, 63 N. W. 48.

40. Youngs *v.* Ransom, 31 Barb. (N. Y.) 49.

41. Tartar *v.* Gibbs, 24 Md. 323.

42. Hatchett *v.* Mt. Pleasant Baptist Church, 46 Ark. 291; Duessel *v.* Proch, 78 Conn. 343, 62 Atl. 152, 3 L. R. A. N. S. 854; Chatard *v.* O'Donovan, 80 Ind. 20, 41 Am. Rep. 782; Bonacum *v.* Harrington, 65 Nebr. 831, 91 N. W. 886.

43. Bristor *v.* Burr, 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710.

44. Dempsey *v.* Wesleyan Methodist Connection of America, 98 Mich. 444, 57 N. W. 267.

Mandamus to compel reinstatement see Mandamus, 26 Cyc. 382.

45. Dempsey *v.* Wesleyan Methodist Connection of America, 98 Mich. 444, 57 N. W. 267.

46. Wallace *v.* United Presb. Church, 201 Pa. St. 292, 50 Atl. 762.

47. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740.

48. *Alabama.*— Stewart *v.* White, 128 Ala. 202, 30 So. 526, 55 L. R. A. 211.

Louisiana.— Hardesty's Succession, 22 La. Ann. 332.

Massachusetts.— *In re* New South Meeting-House, 13 Allen 497.

New York.— Betts *v.* Betts, 4 Abb. N. Cas. 317.

Oregon.— Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133.

Texas.— Tunstall *v.* Wormley, 54 Tex. 476.

United States.—Goesele *v.* Bimeler, 10 Fed. Cas. No. 5,503, 5 McLean 223 [*affirmed* in 14 How. 589, 14 L. ed. 554].

See 42 Cent. Dig. tit. "Religious Societies," § 103 *et seq.*

In Massachusetts under the statutes providing that unincorporated religious societies shall have like power as incorporated societies to manage, use, and employ, according to its terms and conditions, any gift or grant made to them, a voluntary religious society possesses, for the purpose of taking, holding, and transmitting property, all the qualifying attributes of a duly organized corporation. Sharon First Baptist Church *v.* Harper, 191 Mass. 196, 77 N. E. 778; Glendale Union Christian Soc. *v.* Brown, 109 Mass. 163; Weld *v.* May, 9 Cush. 181; Plymouth Christian Soc. *v.* Macomber, 5 Metc. 155; Fisher *v.* Whitman, 13 Pick. 350; Sawyer *v.* Baldwin,

* By Edward C. Elsbree.

through the intervention of a trustee.[49] Because of this disability religious societies are frequently made corporate bodies by statute with capacity to take and hold property, both real and personal,[50] the power being conferred upon the congregation at large, or upon trustees,[51] and unless restricted by statute, a religious corporation itself has power to hold property as a trustee, for any of the purposes for which the society was incorporated.[52]

b. Mode of Acquisition — (i) *ADVERSE POSSESSION.* Although as a general rule an unincorporated religious society cannot acquire title by adverse possession,[53] its officers can for its benefit;[54] and if a corporation is afterward organized, the prior possession may be tacked to its own, to establish its title under the statute of limitations,[55] it being very generally held that a religious corporation may obtain a title to land by adverse possession,[56] although its entry and occupation is not authorized by authority under seal,[57] and although the corporation is incapable of holding real estate, it cannot, after holding land for the period necessary to establish title by adverse possession, be ousted by the real owner, but on the contrary has itself the power of actual ouster as against him,[58] and although a conveyance to a religious corporation is void because in contravention of a declaration of rights, the entry into possession by the corporation after the conveyance, and continuance of such possession for the statutory period, perfects the title against all persons not under legal disabilities.[59]

11 Pick. 492; Stebbins *v.* Jennings, 10 Pick. 172. See Congregational Unitarian Soc. *v.* Hale, 29 N. Y. App. Div. 396, 51 N. Y. Suppl. 704, construing the Massachusetts statutes.

Pennsylvania act of April 26, 1855, confirms in unequivocal terms to every religious society incorporated or unincorporated, the absolute ownership of its property subject only to the condition that it shall not divert it from the uses and trusts to which it may have been lawfully dedicated. Krauczunas *v.* Hoban, 221 Pa. St. 213, 70 Atl. 740. But an unincorporated camp meeting association is not a religious denomination or society within the statutes authorizing such societies to lease lands. O'Neill *v.* Patterson, 10 Pittsb. Leg. J. N. S. 189.

Church of England.— By the common law, the church of England in its aggregate description is not deemed a corporation, and cannot receive a donation *eo nomine*; but a grant to a church of a particular place is good, by that law, and vests the fee in the parson and his successors. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

49. Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84; Goesele *v.* Bimeler, 10 Fed. Cas. No. 5,503, 5 McLean 223 [*affirmed* in 14 How. 589, 14 L. ed. 554].

The trustee may be a natural or artificial person.— Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133.

50. See the statutes of the several states. And see Church of Redemption *v.* Grace Church, 68 N. Y. 570 [*affirming* 6 Hun 166]; Toronto Church Soc. *v.* Crandell, 8 Grant Ch. (U. C.) 34.

51. Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; St. James Parish *v.* Bagley, 138 N. C. 384, 50 S. E. 841, 70 L. R. A. 160.

52. Levy *v.* Levy, 33 N. Y. 97; Waterford First Presb. Church *v.* McKallor, 35 N. Y. App. Div. 98, 54 N. Y. Suppl. 740; Tucker *v.* St. Clement's Church, 3 Sandf. (N. Y.) 242 [*affirmed* in 8 N. Y. 558 note]; Miller *v.* Lerch, 17 Fed. Cas. No. 9,579, 1 Wall. Jr. 210.

Capacity of corporation to act as trustee of a charity see CHARITIES, 6 Cyc. 932 *et seq.*

53. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134 [*reversing* 5 Lans. 206].

In Massachusetts, under statute, an unincorporated religious society can acquire and hold property in the same manner as if incorporated and therefore can acquire a title to real estate by adverse possession. Sharon First Baptist Church *v.* Harper, 191 Mass. 196, 77 N. E. 778.

54. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134 [*reversing* 5 Lans. 206].

55. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134 [*reversing* 5 Lans. 206].

56. *Connecticut.*— Camp *v.* Camp, 5 Conn. 291, 13 Am. Dec. 60.

Kentucky.— Curd *v.* Wallace, 7 Dana 190, 32 Am. Dec. 85.

Massachusetts.— Rehoboth Second Precinct *v.* Carpenter, 23 Pick. 131.

New York.— People *v.* Trinity Church, 22 N. Y. 44.

United States.— Harpending *v.* Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029.

See 42 Cent. Dig. tit. "Religious Societies," § 109½.

57. Rehoboth Second Precinct *v.* Rehoboth Catholic Cong. Church, etc., 23 Pick. (Mass.) 139 note; Rehoboth Second Precinct *v.* Carpenter, 23 Pick. (Mass.) 131; Milton *v.* Milton First Cong. Parish, 10 Pick. (Mass.) 447.

58. Humbert *v.* Trinity Church, 24 Wend. (N. Y.) 587.

59. Dickerson *v.* Kirk, 105 Md. 638, 66 Atl. 494; State University *v.* Calvary M. E. Church, 104 Md. 635, 65 Atl. 398; Zion Church *v.* Hilken, 84 Md. 170, 35 Atl. 9; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977.

Possession of a church by a religious society, for the purpose of religious worship, is an actual possession, as much as a residence on the premises by an individual.[60]

(II) *DEVISE.* A religious corporation cannot take land by devise, unless expressly authorized to do so by its charter or by statute.[61] In some states such enabling statutes exist,[62] while in others religious corporations are expressly forbidden to take by devise.[63] A corporation having authority to take by devise only for its own use cannot take for any other use.[64]

c. Statutory Limitations and Restrictions. In many states statutes exist limiting the amount of property which religious societies may hold,[65] the time

60. Macon *v.* Sheppard, 2 Humphr. (Tenn.) 335; Randolph *v.* Meek, Mart. & Y. (Tenn.) 58.

61. Greene *v.* Dennis, 6 Conn. 293, 16 Am. Dec. 58; Levy *v.* Levy, 33 N. Y. 97; Goddard *v.* Pomeroy, 36 Barb. (N. Y.) 546; King *v.* Rundle, 15 Barb. (N. Y.) 139; Jackson *v.* Hammond, 2 Cai. Cas. (N. Y.) 337. But see Brown *v.* Langdon, Smith (N. H.) 178.

The word "conveyance" in a statute authorizing the conveyance of land for the residence of a minister does not include a devise of land, and *a fortiori* it does not authorize a bequest of money. American Bible Soc. *v.* Pendleton, 7 W. Va. 79. But see Baker *v.* Clark, 7 U. C. Q. B. 44.

Power to take and hold "subscriptions or contributions in money or otherwise" does not embrace the power to take by will. Brown *v.* Thompkins, 49 Md. 423.

62. See the statutes of the several states. And see Smith *v.* Methodist Church, 16 Ont. 199.

Missouri Const. (1865) art. 1, § 13, permits a devise of land, not exceeding one acre, to a religious society upon which to erect a church, but a bequest of money to such a society for the purpose of building a church or for the support of a minister is prohibited. First Baptist Church *v.* Robberson, 71 Mo. 326. Within the meaning of this section a local congregation uncontrolled by any general ecclesiastical organization is a "religious sect, order, or denomination" capable of receiving a devise. Boyce *v.* Christian, 69 Mo. 492.

N. Y. Laws (1813), c. 60, permit a religious corporation to take by devise, and a corporation formed under such act is not affected, with reference to such rights, by Laws (1848), c. 319, § 6, declaring invalid a devise to such a corporation not made and executed at least two months before the death of the testator, nor is a church incorporated under such act affected by the general corporation law, religious corporation law, or the membership corporation law, with reference to its right to take property by will. Matter of Foley, 27 Misc. 77, 58 N. Y. Suppl. 201.

Foreign corporations are entitled to take devises and legacies under the will of a resident of another state, whenever, by the laws under which they are incorporated, such corporations have authority to acquire property by will, unless such devises or legacies are repugnant to the laws of such other state. *In re* Ticknor, 13 Mich. 44; Bullock's Estate, 11 N. Y. St. 700, 6 Dem. Surr. 335; Methodist Episcopal Church Missionary Soc. *v.* Calvert, 32 Gratt. (Va.) 357; Reorganized Church of Jesus Christ, etc., *v.* Church of Christ, 60 Fed. 937. But a religious society incorporated by another state can by comity have no better title to take property by devise than domestic corporations. Levy *v.* Levy, 33 N. Y. 97; Miller *v.* Ahrens, 150 Fed. 644.

63. See the statutes of the several states. And see *In re* Wright, Myr. Prob. (Cal.) 213; State *v.* Bates, 2 Harr. (Del.) 18; Ferguson *v.* Hedges, 1 Harr. (Del.) 524.

A devise of the proceeds of real estate is held to be the same as a devise of real estate and thus a statute prohibiting the one prohibits the other. State *v.* Bates, 2 Harr. (Del.) 18.

64. Levy *v.* Levy, 33 N. Y. 97. And see *infra*, VIII, A, 1, c.

65. See the statutes of the several states. And see St. Peter's Roman Catholic Cong. *v.* Germain, 104 Ill. 440; Gilmer *v.* Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. ed. 734.

History and object of the legislation.— This practice was announced in Magna Charta and continued by many enactments of parliament designed to meet the evasions and contrivances of the church for escaping the laws. It has been the settled policy in this country, as shown by the statutes of several states, and a quarter of a century ago congress limited the amount of real estate that any church might hold in any of the territories. It has been the settled design of such statutes to confine church holdings to the amount that is necessary simply for church purposes, and the observance of such laws has been secured by forfeiture, which seems the most appropriate and effectual method. U. S. *v.* Church of Jesus Christ, etc., 5 Utah 361, 15 Pac. 473 [*affirmed* in 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481], holding also that where a religious corporation holds property largely in excess of the limit fixed, it is sufficient to authorize the appointment of a receiver for the corporation.

Such a statute does not apply to benevolent or missionary societies, the only corporations intended to be restricted in the ownership of land are those formed for the purpose of religious worship. Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556 (holding that a Young Men's Christian Association is not a corporation formed for the purpose of religious worship, so as to be within the statutory restriction); Gilmer *v.* Stone, 120 U. S. 586, 7 S. Ct. 689, 30 L. ed. 734.

during which,[66] and the purposes for which it may be held.[67] Such a statutory restriction applies to a single religious society, not to the denomination,[68] and it cannot be extended by implication to apply to unincorporated religious societies,[69] and a devise or conveyance to a religious society in trust to be applied by it to a charitable purpose is not within the purpose of such a statute.[70] But it has been held that the statute cannot be evaded by devising real estate to a trustee for a church to be by him sold for its benefit, and the fact that the trustee has by a sale converted the realty into personalty will not validate the trust, or render it enforceable in equity.[71]

In Maryland, Declaration of Rights (1776), art. 34, which declared that every gift, sale, or devise of land to a religious body, without leave of the legislature, should be void, except a gift, sale, or devise of not more than two acres, to be used for a meeting-house or burial-ground, imposed no restriction on the power of the legislature in granting such leave, but authorized it to declare limitations or not, in its discretion, both as to the extent and quality of the estate to be purchased, and the purposes for which it should be used. Baltimore Catholic Cathedral Church *v.* Manning, 72 Md. 116, 19 Atl. 599. But the legislature has no power to declare that an association incapable of taking the bequest at the time the will took effect, because unincorporated, should, on subsequent incorporation, be capable of taking it. State *v.* Warren, 28 Md. 338. And the sanction of the legislature contemplated and required must be expressly given to each particular devise or bequest in order to render it valid. Rogers *v.* St. Joseph Sisters of Charity, 97 Md. 550, 55 Atl. 318; Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362. But this is not necessary when the title has been conveyed by deed; in such an instance a prior or subsequent general sanction without particularizing the grants is all that is needed. Rogers *v.* St. Joseph Sisters of Charity, *supra*; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977; Baltimore Catholic Cathedral Church *v.* Manning, *supra*, holding also that where the legislature has granted to a religious corporation authority to purchase land, without restricting it as to the quality of the estate to be acquired, but limiting the purpose for which it shall be used, a fee-simple estate may be acquired and held; but a subsequent legislature has power, with consent of the corporation, to change or abrogate altogether the restrictions as to the use of the land.

Such restrictions cannot be taken advantage of collaterally by private persons, but only in a direct proceeding by the state (Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Hanson *v.* Little Sisters of Poor, 79 Md. 434, 32 Atl. 1052, 32 L. R. A. 293; Church of Redemption *v.* Grace Church, 68 N. Y. 570; Bogardus *v.* Trinity Church, 4 Sandf. Ch. (N. Y.) 633; Jones *v.* Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. ed. 401; Reorganized Church of Jesus Christ, etc. *v.* Church of Christ, 60 Fed. 937 [*reversed* on other grounds in 70 Fed. 179, 17 C. C. A. 387]; Miller *v.* Lerch, 17 Fed. Cas. No. 9,579, 1 Wall. Jr. 210. But see St. Peter's Roman Catholic Cong. *v.* Germain, 104 Ill. 440), unless the party complaining is in a position to claim an interest in the property, if it is adjudged that the corporation may not (Church of Redemption *v.* Grace Church, 68 N. Y. 570); but the heir at law has a right to object, when a corporation claims to take and hold by devise a larger quantity of property than the law authorizes (De Camp *v.* Dobbins, 31 N. J. Eq. 671; Betts *v.* Betts, 4 Abb. N. Cas. (N. Y.) 317. See also Miller *v.* Lerch, 17 Fed. Cas. No. 9,579, 1 Wall. Jr. 210).

66. *Re* Naylor, 5 Ont. L. Rep. 153, 1 Ont. Wkly. Rep. 809, holding that the seven years during which a religious society may hold land after its acquisition, under Ont. Rev. St. (1877) c. 216, § 19, does not commence to run in the case of a devise of a reversion dependent upon a life-estate until the expiration of the life-estate.

67. Miller *v.* Chittenden, 2 Iowa 315; Thompson *v.* West, 59 Nebr. 677, 82 N. W. 13, 49 L. R. A. 337; Quaker Soc. *v.* Dickenson, 12 N. C. 189.

A devise to a church of a parsonage, library, and other personal property is not within a statute authorizing religious societies to take gifts of land for purposes of public worship. Reeves *v.* Reeves, 5 Lea (Tenn.) 644.

In Maryland, under Declaration of Rights, art. 38, prohibiting conveyances to religious societies without the sanction of the legislature except for certain purposes, a conveyance, not sanctioned by the legislature, and not showing that it was for any of the purposes named in the exception, is void. Dickerson *v.* Kirk, 105 Md. 638, 66 Atl. 494; State University *v.* Calvary M. E. Church South, 104 Md. 635, 65 Atl. 398; Zion Church *v.* Hilken, 84 Md. 170, 35 Atl. 9; Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977.

Removal of restriction.—After limiting the purposes for which land may be held, the legislature may remove the limitation. Gump *v.* Sibley, 79 Md. 165, 28 Atl. 977.

68. Morgan *v.* Leslie, Wright (Ohio) 144, where it is said that the word "society" has a restricted meaning; it is applicable to that religious congregation for whose use the land is wanted, or to that society who meet for worship in any one place.

69. Alden *v.* St. Peter's Parish, 158 Ill. 631, 42 N. E. 392, 30 L. R. A. 232.

70. Kinney *v.* Kinney, 86 Ky. 610, 6 S. W. 593, 9 Ky. L. Rep. 753; Rogers *v.* St. Joseph Sisters of Charity, 97 Md. 550, 55 Atl. 318.

71. Miller *v.* Ahrens, 163 Fed. 870. But see Chambers *v.* Higgins, 49 S. W. 436, 20

d. Public Aid. Constitutional or statutory provisions in some states secure to every denomination of religious societies, in each township, an equal participation, according to their number of adherents, of the profits arising from the land granted by congress for the support of religion.[72] This fund is intended for the support of religion in the township in which the land is located from which it is derived, and cannot be appropriated for any other purpose, or for the support of religion in any other place;[73] but before any claim can be made upon the fund, the sect or denomination claiming must have formed themselves into a society, given themselves a name, and must have appointed an agent, who must be furnished with a certified list of the number and names of the members of the society, upon the production of which to the trustees of the fund, the society is entitled to its share.[74]

2. Right, Title, or Interest Acquired — a. Construction and Operation of Deeds, Donations, and Grants. Where neither the constitution nor the statutes of a state regulate the titles to property dedicated to pious uses, all deeds, gifts, or grants to religious societies must be governed by the common law.[75] A deed

Ky. L. Rep. 1425; Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362.

72. See the constitutions and statutes of the several states. And see cases cited *infra*, this section.

All religious denominations are entitled to a share of the fund in proportion to their numbers. State *v.* Delhi Tp., Section 29, 11 Ohio 24 (holding also that in ascertaining numbers, all actually belonging or adhering to each society of the age of fifteen years or more, are to be taken into account, provided they are citizens of the township); State *v.* Trustees Section 29, Wright (Ohio) 560 (holding also that the trustees of the lands have no right to sit in judgment on the faith of the society).

Determination of numbers judicial function. — The duty of the selectmen of a town, in making distribution to the different religious societies of the rents of lands granted to the use of the ministry, involves necessarily functions of a judicial character in determining the number of members belonging to the respective societies, and they cannot be held liable for error in admitting or excluding evidence on which to form their judgment, provided they act in good faith, and with reasonable diligence. Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.

Where the claim of a society is erroneously rejected, and the proceeds divided among others, such claim cannot be charged upon the proceeds of a subsequent year. State *v.* Warren County, 2 Ohio 108.

Effect of repeal of statute.—A repeal of the law authorizing towns to vote and grant money for the settlement, maintenance, and support of the ministry did not deprive them of the right of appropriating property previously acquired for religious purposes, to the uses for which it was designed, by granting it to religious societies within their limits. Candia *v.* French, 8 N. H. 133.

73. State *v.* Delhi Tp., Section 29, 11 Ohio 24.

Purpose of formation.— The society thus formed must be for religious, and not for mere secular, purposes. State *v.* Ohio Co.'s Purchase, 7 Ohio St. 58.

74. State *v.* Ohio Co.'s Purchase, 7 Ohio St. 58; State *v.* Delhi Tp., Section 29, 11 Ohio 24.

List not conclusive.— Neither the list of members, as furnished by the clerk of the society, nor its records, are conclusive evidence of the number of its members. Fletcher First Universalist Soc. *v.* Leach, 35 Vt. 108.

The proof of the appointment of the agent must be verified by something more than his own statement. State *v.* Delhi Tp., Section 29, 11 Ohio 24.

75. Wilton Baptist Soc. *v.* Wilton, 2 N. H. 508; Union Baptist Soc. *v.* Candia, 2 N. H. 20.

By the common law, as the church was not a body corporate capable of holding an estate in lands, the rector was deemed to represent it (New Market *v.* Smart, 45 N. H. 87; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650); to take upon himself the person of the church, and as such when inducted into office became seized of the church property, including the glebe, the church edifice, tithes, and oblations, but he was seized only in right of the church, and had no power of alienation beyond the time of his ministry, and therefore on his resignation, death, or deprivation, the freehold was said to be in abeyance until his successor was inducted into office (New Market *v.* Smart, 45 N. H. 87).

Grants or reservations in royal charters see Cilley *v.* Cayford, Smith (N. H.) 150; People *v.* Trinity Church, 22 N. Y. 44; Victory *v.* Wells, 39 Vt. 488; Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

Other decisions construing special provisions in deeds, gifts, and grants to religious societies see Ebbinghaus *v.* Killian, 1 Mackey (D. C.) 247; Christ Church *v.* Savannah, 82 Ga. 656, 9 S. E. 537; Brown *v.* Monroe, 80 Ky. 443; Hamblett *v.* Bennett, 6 Allen (Mass.) 140; Howard *v.* Hayward, 10 Metc. (Mass.) 408; Fourth Parish *v.* Root, 18 Pick. (Mass.) 318; Upper Nyack M. E. Church *v.* Bennett 73 Hun (N. Y.) 585, 26 N. Y. Suppl. 341; Atty.-Gen. *v.* Reformed Protestant Dutch Church, 33 Barb. (N. Y.) 303 [*affirmed* in

to the trustees of a religious society and their successors, for the use of the society, is good,[76] and whether the trustees are a corporation or not is immaterial so long as they are a legal body capable of taking estates by grant.[77] But a deed conveying real estate to certain named individuals, not as trustees of any incorporated religious society, nor to their successors in office, does not pass the title to parties who claim to be such successors.[78] Under some statutes where the legal corporation consists of the trustees and does not include the congregation, the trustees hold the legal title to the church property in trust for the congregation,[79] and each member of the church becomes entitled to a beneficial interest in the prop-

36 N. Y. 452]; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243]; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186; Read *v.* St. Ambrose Church, 137 Pa. St. 320, 20 Atl. 1002, 11 L. R. A. 727; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly (Pa.) 346.

76. Judd *v.* Woodruff, 2 Root (Conn.) 298.

77. Judd *v.* Woodruff, 2 Root (Conn.) 298.

Deeds, donations, and grants to towns and parishes.— In Massachusetts and others of the New England states it was formerly held that lands granted to a town for the use of the ministry vested in the town in its parochial capacity. Richardson *v.* Brown, 6 Me. 355; New Market *v.* Smart, 45 N. H. 87. And land given to a town for the use of the ministry might, with the leave of the legislature and consent of all parties interested, be appropriated to the support of several ministers settled over distinct portions of the inhabitants of the town (Lanesborough Cong. Soc. *v.* Curtis, 22 Pick. (Mass.) 320; Humphrey *v.* Whitney, 3 Pick. (Mass.) 158), and upon the erection or incorporation of the first parish in the town, the lands vested in the parish, which succeeded to the parochial rights and duties before belonging to the town (Sedgwick *v.* Pierce, 2 Root (Conn.) 431; Wells *v.* Heath, 10 Gray (Mass.) 17; Medford First Parish *v.* Medford, 21 Pick. (Mass.) 199; Shrewsbury First Parish *v.* Smith, 14 Pick. (Mass.) 297; Milton *v.* Milton First Cong. Parish, 10 Pick. (Mass.) 447; Newmarket *v.* Smart, *supra*). Where lands were held by the town in its parochial capacity, the proceeds of the sale of such lands were also held by the town in like capacity; and upon the separate organization of a parish, the parish succeeded to all the parochial property of the town (Winthrop *v.* Winthrop, 1 Me. 208; Tobey *v.* Wareham Bank, 13 Metc. (Mass.) 440; Ludlow *v.* Sikes, 19 Pick. (Mass.) 317), and a poll parish was held to be within the rule (Sutton First Parish *v.* Cole, 8 Mass. 96). The first parish, which was the successor of a town in its parochial capacity, might maintain trespass against a stranger for plowing up land used for purposes incidental to the place of worship, such land having been appropriated for the purpose by the town (Shrewsbury First Parish *v.* Smith, *supra*). Real estate originally granted to a parish, upon the subsequent incorporation of the parish into a town, passed to and was held by the new corporation (Lakin *v.* Ames, 10 Cush. (Mass.) 198), unless prior to such incorporation a new religious society was formed therein, recognized by statute as an independent organization and its members therefore exempted from taxation in the original parish (Essex *v.* Low, 5 Allen (Mass.) 595). If the town was subsequently divided into parishes, such property reverted to the original parish unless in the meantime it had been exclusively appropriated to the use of the town in its municipal capacity, but property held by the town in its municipal capacity remained still that of the town after the separation of the parish (Lakin *v.* Ames, *supra*), and after a grant of land to a town for the use of the ministry, if the town was divided, and such land fell within the boundaries of the new town, the title to the land still remained in the old town (Union Baptist Soc. *v.* Candia, 2 N. H. 20). Lands thus given and appropriated were held by the minister of the parish as an estate in fee simple in him and his successors (Bucksport *v.* Spofford, 12 Me. 487; Brown *v.* Porter, 10 Mass. 93; Brunswick First Parish *v.* Dunning, 7 Mass. 445; Weston *v.* Hunt, 2 Mass. 500), the first appointed minister and his successors taking the same, upon a regular settlement and ordination (Bucksport *v.* Spofford, *supra*; Brown *v.* Porter, *supra*; Williams *v.* North Hero, 46 Vt. 301; Dow *v.* Hinesburgh, 2 Aik. (Vt.) 18; Sheldon *v.* Goodsel, 1 Aik. (Vt.) 225. See also Bisbee *v.* Evans, 4 Me. 374; Williams *v.* North Hero, 46 Vt. 301), as a sole corporation (Bucksport *v.* Safford, *supra*; Emerson *v.* Wiley, 10 Pick. (Mass.) 317; Brown *v.* Porter, *supra*; Brunswick First Parish *v.* Dunning, *supra*; Weston *v.* Hunt, *supra*). But he held the lands in the right of the parish or church, and on his resignation or death the fee was in abeyance until there was a successor, the parish or church, during the vacancy, having the custody, and being entitled to the profits of the parsonage. Boothbay First Parish *v.* Wylie, 43 Me. 387; Cheever *v.* Pearson, 16 Pick. (Mass.) 266; Brunswick First Parish *v.* Dunning, *supra*; Brown *v.* Porter, *supra*; Weston *v.* Hunt, *supra*; Terrett *v.* Taylor, 9 Cranch (U. S.) 43, 3 L. ed. 650. This tenure might be changed by alienation, which might be made effectual by the minister, with the assent of his town or parish. Bucksport *v.* Spofford, *supra*.

78. Isaac *v.* Emory, 64 Md. 333, 1 Atl. 713.

79. Brunnenmeyer *v.* Buhre, 32 Ill. 183; Fair *v.* Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 Atl. 166.

erty of the church so long as his or her connection or membership continues.[80] Under others, incorporated religious societies are aggregate corporations, and whatever property they acquire, whether it be real or personal, is vested in interest in the body corporate;[81] and while the officers have it under their control or dominion, whatever possession they have, is the possession of the artificial person whose agents they are.[82] Where the statute provides that the trustees and their successors can acquire and hold lands only in the name of the corporation, a deed to several individuals by name, trustees of the corporation, vests the title of the premises in the trustees individually, and not in the corporation;[83] but where a conveyance is made to trustees without naming them the title vests in the corporation named in the deed.[84] In the absence of a declared, or at least clearly implied, trust, the trustees of an incorporated religious society do not hold the property for any church in general, nor for the benefit of any peculiar doctrines or tenets of faith and practice in religious matters, but solely for the society or congregation whose officers they are.[85]

b. Conditions and Reversion Upon Breach. A gift or grant to a religious society may be conditional if the condition be not inconsistent with the gift or grant and its avowed object,[86] and breach of a condition works a forfeiture of the estate, and the grantor has a right to enter or to bring his action to recover the estate.[87] But the right to enter for condition broken is a right which can be exercised only by the grantor or his heirs, and if he alienates the right the condition is gone,[88] and, in the absence of a provision to that effect in a deed or grant to a religious society, it is held that no subsequent violation of the trust upon which the property is held will revest either the legal or equitable title in the donors or grantors,[89] although a palpable breach of trust may form a proper ground for

80. Brunnenmeyer *v.* Buhre, 32 Ill. 183; Ferraria *v.* Vasconcellos, 31 Ill. 25; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

81. People *v.* Fulton, 11 N. Y. 94; Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

A bequest to the consistory of the Dutch reformed church is in effect a bequest to the church corporation itself. Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228.

By the statutes of Massachusetts and Pennsylvania religious societies have many of the capacities of corporations, and a grant to the members of such a society, where the purpose is to promote the charity for which the society was organized, is a grant to the society itself. Hamblett *v.* Bennett, 6 Allen 140; Krauczunas *v.* Hoban, 221 Pa. St. 213, 70 Atl. 740; Brown *v.* Lutheran Church, 23 Pa. St. 495.

82. People *v.* Fulton, 11 N. Y. 94.

Although called trustees, they do not hold property in trust for the corporation or the religious society; the name is simply the title of their office, and their position respecting the corporate property would be the same if they were denominated directors or managers. Their right to intermeddle is an authority, and not an estate or title. People *v.* Fulton, 11 N. Y. 94.

83. Cairns *v.* Hay, 21 N. J. L. 174.

But a court of equity will construe the property to be held in trust for the religious society. Visitors M. E. Church *v.* Town, 47 N. J. Eq. 400, 20 Atl. 488.

84. Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32.

85. Calkins *v.* Cheney, 92 Ill. 463; Harper *v.* Straws, 14 B. Mon. (Ky.) 48.

86. Tomlin *v.* Blunt, 31 Ill. App. 234, holding that a condition in a conveyance of property to trustees of a certain denomination for "church purposes" that the church building is to be open "to all evangelical orders of Christians" when not in use by said denomination is not repugnant to the grant.

The words "upon condition" are appropriate words for creating a condition, but they do not of necessity create such an estate, and may import a trust. Neely *v.* Hoskins, 84 Me. 386, 24 Atl. 882; Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

The words "in trust nevertheless, and upon condition always" to use the premises for public worship, in a deed of land to a religious society, do not necessarily create a condition, although they may import a trust. Sohier *v.* Boston Trinity Church, 109 Mass. 1.

If the condition is a condition subsequent, the title vests at once in the society, subject to be divested if the condition is not performed. Tappan's Appeal, 52 Conn. 412; Van Horne's Petition, 18 R. I. 389, 28 Atl. 341.

If the condition is a continuing one, the fund will be retained in court, and the income paid over to the society as long as the condition is complied with. *In re* Robinson, [1892] 1 Ch. 95, 61 L. J. Ch. 17, 66 L. T. Rep. N. S. 81, 40 Wkly. Rep. 137.

87. Scott *v.* Stipe, 12 Ind. 74.

88. Craig *v.* Franklin County, 58 Me. 479.

89. Goode *v.* McPherson, 51 Mo. 126; Garden St. Reformed Protestant Dutch Church *v.*

application to a court of equity, on the part of the parties interested, to compel a due execution of the trust;[90] but where land is deeded in trust for the use of a church so long as used for that purpose, and no longer, it revests in the grantor upon a breach of the trust,[91] and in some states it is held that a grant of land to a church society for the use and purpose of a church is a grant for that special purpose, and when that fails the land reverts to the donor or his heirs.[92]

c. Trusts — (i) *In General.* Grantees of property for the use of an unincorporated religious society are trustees only as the trust deed makes them such. They have a freehold estate in the premises of such a duration as is necessary to effect the purposes of the trust.[93] A gift of lands made to trustees to the use of a certain religious society, and such as may succeed them, forever, holding the same principles, is not merely to the society then existing; but if that ceases to exist, or to be of the same faith, the gift is then to any other society holding the same faith, which may succeed them.[94] A deed to a bishop for the benefit of the church, "and to his successors and assigns forever," vests a fee-simple title in such bishop, in trust for the church, in the absence of any condition subsequent, either expressed or implied;[95] but the trust attaches to the office of bishop, and not to the person, and therefore passes to his successor.[96] Where property has been given in trust for a church not incorporated, it is competent for any person belonging to that church on behalf of himself and others entitled to the use of the property, to come into a court of equity to enforce the execution of the trust,[97] and if the church consists of various congregations, any one or more

Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Gabert *v.* Olcott, (Tex. Civ. App. 1893) 22 S. W. 286; Strong *v.* Doty, 32 Wis. 381.

90. Strong *v.* Doty, 32 Wis. 381.

91. Henderson *v.* Hunter, 59 Pa. St. 335.

Where land on which a meeting-house stands is conveyed for that use, total abandonment of such use will be a breach of the trust, although the house continues to stand, and has been put to no other use. Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

Long continued delay to rebuild a church or to take any measures to do so is strong evidence of a discontinuance of the intended use, but not conclusive. Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282, holding that lack of repairs is evidence of the same character but still less conclusive.

Evidence held not to show abandonment of premises by society see Summit Reformed Dutch Church *v.* Harder, 12 N. Y. Suppl. 297.

92. Newington Cong. Soc., etc. *v.* Newington, 53 N. H. 595; Gumbert's Appeal, 110 Pa. St. 496, 1 Atl. 437.

93. Burrows *v.* Holt, 20 Conn. 459; Craig *v.* Franklin County, 58 Me. 479; Warner *v.* Bowdoin Square Baptist Soc., 148 Mass. 400, 19 N. E. 403; Maverick Cong. Soc. *v.* Lovejoy, 6 Allen (Mass.) 183; Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1; Little *v.* Willford, 31 Minn. 173, 17 N. W. 282; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

Necessity of writing in creation of trust.— Under the statute of frauds no special trust concerning church lands can be proved by parol, no trust having been declared in writing. Hennessey *v.* Walsh, 55 N. H. 515. But the statute applies only to express trusts and not to trusts resulting from, or created by, operation of law. Fink *v.* Umscheid, 40 Kan. 271, 19 Pac. 623, 2 L. R. A. 146. And it has been held that the reënactment of an act for the incorporation of religious societies, without reënacting the statute of frauds, may be regarded as a modification or amendment of the statute of frauds, so far as to make a use or trust in favor of a religious society an exception to the provision of the statute of frauds, which requires that declarations of trust shall be in writing. Church of Redemption *v.* Grace Church, 6 Hun (N. Y.) 166 [*modified* in 68 N. Y. 570]; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135.

Construction of instrument creating charity see CHARITIES, 6 Cyc. 949 *et seq.*

Effect of dissolution of society see *infra*, XII.

94. Potter *v.* Thornton, 7 R. I. 252. See Newman *v.* Proctor, 10 Bush (Ky.) 318.

95. Antones *v.* Eslava, 9 Port. (Ala.) 527; Georgetown Methodist Soc. *v.* Bennett, 39 Conn. 293; Church of Redemption *v.* Grace Church, 6 Hun (N. Y.) 166; Olcott *v.* Gabert, 86 Tex. 121, 23 S. W. 985 [*affirming* (Civ. App. 1893) 22 S. W. 286].

A deed of land to a bishop, and his heirs and assigns forever, and not to him and his successors, "in trust for the Catholic community, for the purpose of a free burial ground," operates to give him an estate in fee; and he may therefore maintain a writ of entry for the land against the *cestuis que trustent.* Fitzpatrick *v.* Fitzgerald, 13 Gray Mass. 400.

96. Beckwith *v.* St. Philip's Parish, 69 Ga. 564; Moore *v.* Gross, 54 Iowa 248, 6 N. W. 290; Scott *v.* Thompson, 21 Iowa 599.

97. Newburgh Associate Reformed Church *v.* Princeton Theological Seminary, 4 N. J. Eq. 77; Liggett *v.* Ladd, 17 Oreg. 89, 21 Pac. 133; Beaver *v.* Filson, 8 Pa. St. 327.

of such congregations being incorporated, may in like manner enforce the execution of the trust.[98]

(II) *Construction.* The intention of the donors is the criterion by which to determine the purposes to which the property of a church has been dedicated,[99] and in ascertaining the intention the language of the conveyance, if clear and unequivocal, is conclusive;[1] but if the language is indefinite, extrinsic evidence, such as the faith of the donor, or that actually taught by his donees, and the circumstances under which the gift was made, is admissible in ascertaining the intention.[2]

(III) *Effect of Subsequent Incorporation* — (A) *In General.* The English statute of uses[3] does not apply to trusts for religious purposes; and by the subsequent incorporation of the beneficiary the legal title is not divested from the trustees and vested in the corporation.[4] But in some states the statute of uses has been repealed and in lieu thereof statutes have been enacted providing in substance that where property has been conveyed for the use of an unincorporated religious society, and such society is afterward incorporated, the legal title to such property shall become vested in the corporation, the effect of such a statute being to place in the corporation itself the title to all property conveyed to trustees for its use.[5] So where the design is simply to have property held in trust until

98. Newburgh Associate Reformed Church *v.* Princeton Theological Seminary, 4 N. J. Eq. 77; Carskadon *v.* Torreyson, 17 W. Va. 43.

99. People *v.* Steele, 2 Barb. (N. Y.) 397; Miller *v.* Gable, 2 Den. (N. Y.) 492.

1. People *v.* Steele, 2 Barb. (N. Y.) 397; Miller *v.* Gable, 2 Den. (N. Y.) 492.

2. Miller *v.* Gable, 2 Den. (N. Y.) 492.

The religious tenets of a donor in trust to a religious corporation may be shown, as well as other circumstances, to aid in the construction of ambiguous provisions. Robertson *v.* Bullions, 11 N. Y. 243; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. (N. Y.) 439.

The circumstances surrounding the making and accepting of the conveyance may be inquired into for the purpose of ascertaining the object of the trust. Iowa City First Constitutional Presb. Church *v.* Iowa City Cong. Soc., 23 Iowa 567.

The corporate or denominational name in connection with the contemporaneous acts of the corporators may be resorted to, in order to limit and define the trust in respect to doctrines usually considered fundamental, such as those in dispute between trinitarians and unitarians (Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; People *v.* Steele, 2 Barb. (N. Y.) 397; Miller *v.* Gable, 2 Den. (N. Y.) 492), but not as to lesser shades of doctrine (Atty.-Gen. *v.* Dublin, 38 N. H. 459; Miller *v.* Gable, 2 Den. (N. Y.) 492).

Parol evidence is admissible to point out what the donee intended. Ayres *v.* Weed, 16 Conn. 291.

3. St. 27 Henry VIII.

4. Beckwith *v.* St. Philip's Parish, 69 Ga. 564. But see Craig *v.* Franklin County, 58 Me. 479.

Abeyance.— Land may be granted at common law to pious uses before there is a grantee in being competent to take it; and in the meantime the fee is in abeyance. Miller *v.* Chittenden, 2 Iowa 315; Shapleigh *v.* Pilsbury, 1 Me. 271 (holding that if lands be granted for pious uses to a corporation not *in esse*, the right to the possession and custody remains in the grantor until the corporation intended shall come into existence, and if, in the meantime, there be a disseizin, the grantor may maintain a writ of entry counting upon his own seizin; but cannot resume the grant nor alienate the lands without such consent as is necessary for the alienation of church property); Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

5. Sand Creek Christian Church *v.* Church of Christ, 219 Ill. 503, 76 N. E. 703; Dubs *v.* Egli, 167 Ill. 514, 47 N. E. 766; Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515, 14 N. W. 502; Newmarket *v.* Smart, 45 N. H. 87; Atty.-Gen. *v.* Dublin, 38 N. H. 459; Robertson *v.* Bullions, 11 N. Y. 243 [*affirming* 9 Barb. 64]; Van Deuzen *v.* Ft. Edward Presb. Church, 4 Abb. Dec. (N. Y.) 465, 3 Keyes 550, 3 Transcr. App. 39; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58; Summit Reformed Dutch Church *v.* Harder, 12 N. Y. Suppl. 297; Garden St. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; South Baptist Church *v.* Yates, Hoffm. (N. Y.) 142; Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch. (N. Y.) 186.

If a grant is made to individuals for the use of an unincorporated church, the persons to whom the grant is made stand seized to the use, and when the church receives legal capacity to take and hold the real estate, the statute executes the possession to the use, and the estate vests. Miller *v.* Chittenden, 4 Iowa 252; Schenectady Dutch Church *v.* Veeder, 4 Wend. (N. Y.) 494.

A subscription made at the formation of a religious society, but before its incorporation, for the use and benefit of the society, and to carry out its objects, is presumed legal, in the

an ascertained society, religious in character, shall become a corporate entity, capable of taking it, the purposes of the trust are accomplished by the conveyance to the corporation and the trust terminates.[6]

(B) *Conveyance by Trustees.* Where one becomes trustee of property conveyed for the use of an unincorporated religious society, which afterward becomes incorporated, he will be compelled to execute a conveyance to the corporation,[7] notwithstanding a claim by the trustee against the society.[8] But on a bill to compel conveyance, debts incurred by the trustees in good faith and in the exercise of reasonable prudence should be allowed them.[9] Under a statute which vests in the corporation itself title to all property conveyed to trustees for its use, a bill in equity to compel the conveyance of the land to the corporation is unnecessary;[10] but, if only for the convenience of a recorded title, the court may properly be applied to for the purpose of procuring a conveyance from the trustee.[11]

(IV) *APPOINTMENT AND REMOVAL OF TRUSTEES.* Where a person conveys land in fee, to persons whom he names, for the use of a particular unincorporated religious body, the trustees are not removable at the will of the *cestuis que trustent* and without cause shown.[12] If the consideration was paid by the church, a court of equity will, upon proper application, fill vacancies in the board of trustees by appointing such persons as the church may select;[13] but if paid by the trustees, the legal title is in them, and no appointment is necessary.[14] If the conveyance provides that vacancies shall be filled in a certain manner, such provision is the law of the trust, and must be complied with.[15] In some states the appointment, change, and removal of church trustees is provided for by statute.[16]

B. Control, Use, and Disposition — 1. CONTROL AND USE.*[17] The majority of the members or corporators of a religious society or corporation may as a general

absence of evidence to the contrary; and upon the subsequent incorporation of the society, under Laws (1813), c. 60, § 4, the trustees became vested with the right to collect the subscription. Westfield Reformed Protestant Dutch Church *v.* Brown, 4 Abb. Dec. (N. Y.) 31, 24 How. Pr. 76 [*affirming* 29 Barb. 335, 17 How. Pr. 287].

Possession of corporation presumed.— Land deeded to trustees of a church society will, on the society becoming incorporated, and a church edifice being erected thereon, and used for religious services, be presumed to be in the possession of the corporation, although control is not assumed by any formal act or resolution. Sanchez *v.* Grace M. E. Church, 114 Cal. 295, 46 Pac. 2.

6. Centenary M. E. Church *v.* Parker, 43 N. J. Eq. 307, 12 Atl. 142.

7. Earle *v.* Wood, 8 Cush. (Mass.) 430.

8. Beatty *v.* Henry, 10 Phila. (Pa.) 35; Fourth Universalist Parish *v.* Wensley, 5 Wkly. Notes Cas. (Pa.) 273. See also Newmyer's Appeal, 72 Pa. St. 121.

9. Bradbury *v.* Birchmore, 117 Mass. 569.

10. Dearborn First Evangelical Lutheran Church *v.* Rechlin, 49 Mich. 515, 14 N. W. 502.

11. South Baptist Church *v.* Yates, Hoffm. (N. Y.) 142.

Presumption as to conveyance.—After lapse of time, trustees holding lands for a religious society which was subsequently incorporated for the purpose of holding the lands in question, which lands, by the charter, were also confirmed in the church, will be presumed to have conveyed to the incorporated church those lands, it having always enjoyed and possessed them. Garden St. Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

12. Peabody *v.* Lynn Eastern Methodist Soc., 5 Allen (Mass.) 540; Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

Evidence held insufficient to justify removal see Determann *v.* Luehrsmann, 74 Iowa 275, 37 N. W. 330.

13. Draper *v.* Minor, 36 Mo. 290.

14. Draper *v.* Minor, 36 Mo. 290.

15. Savage *v.* Fortner, 2 Chest. Co. Rep. (Pa.) 271.

16. See the statutes of the several states. And see Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Wade *v.* Hancock, 76 Va. 620.

Where the trusts specified in the trust deed are inoperative, persons appointed trustees of a religious society to fill supposed vacancies obtain no right or title to the property conveyed. Carskadon *v.* Torreyson, 17 W. Va. 43.

Collateral inquiry into validity of appointment.— The legality and validity of the appointment of trustees by the court on said question cannot be drawn in question collaterally in an action of ejectment by them, against the former trustees removed, to recover the trust property. Kreglo *v.* Fulk, 3 W. Va. 74.

17. **As affected by division or schism of society** see *infra*, VIII, B, 4.

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rule direct or control the disposition of its property,[18] unless the terms of the trust deed or bequest are so explicit as to control this right; [19] but the acts of such majority, to be binding, must be conformable to the laws and principles of the church or to the charter of the corporation, or they are of no effect against a dissenting minority.[20] The society, or its trustees, has the right to regulate the

18. Hubbard *v.* German Catholic Cong., 34 Iowa 31; St. Andrew's Church *v.* Shaughnessy, 63 Nebr. 792, 89 N. W. 261; Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; *In re* Reformed Dutch Church, 16 Barb. (N. Y.) 237; Dunkle *v.* Dries, 1 Woodw. (Pa.) 114; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

The majority of a church society having a congregational form of government, without any judicatory with revisory power, is ordinarily entitled to rule, with respect to church property. Poynter *v.* Phelps, 111 S. W. 699, 33 Ky. L. Rep. 887; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666.

Under the form of government applicable to baptist churches, it seems that the control of the church property is lodged in the congregation or trustees of the church, and not in the deacons. Drew *v.* Hogan, 26 App. Cas. (D. C.) 55.

Under the rules of the presbyterian church the custody and care of the property pertain to the trustees for the uses and purposes for which they hold the trust. Chief among these is the maintenance of public worship by the congregation, and in so far as that purpose is concerned, the trustees should respect the wishes and action of the session as to the use and occupation of the house of worship. Dayton *v.* Carter, 206 Pa. St. 491, 56 Atl. 30.

Where the members of the society constitute the corporation, a majority of such members control the property. Burrell *v.* Associate Reformed Church, 44 Barb. (N. Y.) 282; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 1 Abb. Pr. N. S. (N. Y.) 214.

Where the legal corporation consists of the trustees and does not include the congregation, the trustees hold the church property in trust for the congregation, and subject to its disposition, so far as the congregation acts in accordance with the church discipline. Fair *v.* Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 Atl. 166.

In Massachusetts, under statute, no persons but the trustees have any part or voice in the corporate doings. A vote duly passed by the trustees is a vote of the corporation. No other communicant or member of the congregation can take part in the corporate action. Enos *v.* St. John the Baptist Church, 187 Mass. 40, 72 N. E. 253.

Rights of distinct organizations as joint owners or occupants.— Where two or more religious societies, by agreement or under the terms of a particular bequest, jointly use and occupy a single church edifice, the extent of their rights depends upon the terms of the agreement or conveyance. Sharp *v.* Benton, 64 S. W. 636, 23 Ky. L. Rep. 876. Thus where two congregations had built a church for their joint use in divine service, and one of them, against the protest of the other, and their articles of association, introduced a Sabbath school into the church, equity has jurisdiction to restrain the latter congregation, as the conducting of the Sunday school is not "divine service," within the meaning of such agreement. Gass' Appeal, 73 Pa. St. 39, 13 Am. Rep. 726. But see Keiffer *v.* Emrick, 2 Leg. Op. (Pa.) 168, holding that prayer meetings are "divine service," within the meaning of a contract between two incorporated religious societies who had jointly erected a church, providing that each association shall be allowed to hold "divine services" therein. In such a case one corporation will be enjoined against bringing in another society as a distinct corporation, although they will be permitted to hire a preacher in their own language, and to bring in individuals to increase the number of their congregation. Cammeyer *v.* United German Lutheran Churches, 4 Edw. (N. Y.) 223. The society holding the legal title to the church edifice is the proper custodian thereof, and is entitled to reasonable notice of the time when other denominations desire to use the building, and may determine the right to its use as between several applicants who have selected the same time for its use, and may also require that other denominations using the building shall make reasonable contributions to keep it in repair. Sharp *v.* Benton, *supra.* Where the constitution and by-laws of a church corporation composed of members of two nationalities provide for alternate use of the church property for separate services by members of either nationality, members of one nationality are entitled to such use of the church property without application to the corporate board of trustees by any organized portion of the corporate stock-holders or members. Peterson *v.* Christianson, 18 S. D. 470, 101 N. W. 40.

19. Smith *v.* Nelson, 18 Vt. 511.

20. *Illinois.*— Brunnenmeyer *v.* Buhre, 32 Ill. 183.

Indiana.— Yanthis *v.* Kemp, (App. 1908) 85 N. E. 976, 86 N. E. 451.

Michigan.— Fuchs *v.* Meisel, 102 Mich. 357, 60 N. W. 773, 32 L. R. A. 92.

New Jersey.— Fair *v.* Bloomingdale First M. E. Church, 57 N. J. Eq. 496, 42 Atl. 166.

Pennsylvania.— Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. 64.

Texas.— Clark *v.* Brown, (Civ. App. 1908) 108 S. W. 421.

See 42 Cent. Dig. tit. "Religious Societies," §§ 124, 126.

Under some statutes, however, a majority of the corporators, without regard to their religious tenets, have the entire control over the property and revenue of the corporation. Gram *v.* Prussia Emigrated Evangelical Lu-

use of the church edifice, to make repairs, alterations, and improvements,[21] or to change its location, and erect a new edifice elsewhere;[22] but where the legal title to the church edifice is vested in another person or body, the congregation have no right to tear it down for the purpose of repairing or rebuilding it, without the consent of such other person or body.[23] Where real estate is conveyed to a society or congregation in its corporate capacity, and not in trust for the benefit of the religious denomination to which it belongs, it is not subject to the control of any ecclesiastical judicatory.[24]

2. Alienation and Encumbrance* — a. Power to Convey or Mortgage — (i) *General Rules.* In the absence of a charter of incorporation, the individuals composing the congregation are, as natural persons, competent to convey their property;[25] or, if there are trustees in whom it is vested, they, with the consent of the individuals constituting the congregation, may convey,[26] and in some

theran German Soc., 36 N. Y. 161; Petty *v.* Tooker, 21 N. Y. 267.

If members are improperly excluded from the use of the church property, they must apply to the courts for redress, or appeal to the congregation. Fulbright *v.* Higginbotham, 133 Mo. 668, 34 S. W. 875. They cannot resort to acts of trespass to gain entrance to the church, and if they do so they are liable as trespassers. Tilden *v.* Metcalf, 2 Day (Conn.) 259; Central Park Baptist Church *v.* Patterson, 9 Misc. (N. Y.) 452, 30 N. Y. Suppl. 248, 24 N. Y. Civ. Proc. 79 (holding that where the minority of the members of a church who have left the building in the possession of the majority, on the next Sunday, force the locks, in order to hold services therein, such entry is forcible, although they are aided by the police); People *v.* Runkel, 9 Johns. (N. Y.) 147; Unangst *v.* Shortz, 5 Whart. (Pa.) 506; Com. *v.* Oliver, 2 Pars. Eq. Cas. (Pa.) 420. But a trustee of a religious society cannot be sued by his co-trustees as trespasser in relation to the property of the society, as his possession is the possession of his co-trustees, and his rights equal to those of the other. Pultney M. E. Church *v.* Stewart, 27 Barb. (N. Y.) 553, where it is said that a majority of the trustees cannot, by any rule or resolution which they may adopt, exclude one of their number, and so divest him of his rights as to make his subsequent act of obtaining possession of the trust property a tort.

21. Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

Change of church edifice as affecting pew-holder's rights see *infra*, IX, A, 2.

22. Cushman *v.* Good Shepherd Church, 162 Pa. St. 280, 29 Atl. 872; Wagner *v.* Christ Episcopal Church, 9 Rich. Eq. (S. C.) 155.

Necessity of corporate meeting.—Although a legal expression of the will of the corporators can only be obtained at a corporate meeting regularly called, still, it being clearly established that a majority of the corporators are in favor of the removal of the church edifice, equity will not interfere to restrain such removal. Kulinski *v.* Dambrowski, 29 Wis. 109.

This power is sometimes expressly conferred by statute.— See the statutes of the several states. And see Chicago First M. E. Church *v.* Dixon, 178 Ill. 260, 52 N. E. 887 (holding further that the power to reërect or repair a church, conferred by special act, is not a continuous power, but is exhausted by its exercise); Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135 [*affirmed* in 17 Barb. 103]; Wagner *v.* Christ Episcopal Church, 9 Rich. Eq. (S. C.) 155.

This right may be limited by the trust upon which the property is held. Cushman *v.* Church of Good Shepherd, 162 Pa. St. 280, 29 Atl. 872.

23. Tigard *v.* Moffitt, 13 Nebr. 565, 14 N. W. 534; Heiss *v.* Vosburg, 59 Wis. 532, 18 N. W. 463.

24. Calkins *v.* Cheney, 92 Ill. 463; Harper *v.* Straws, 14 B. Mon. (Ky.) 48; Miller *v.* Gable, 2 Den. (N. Y.) 492.

25. Sohier *v.* Trinity Church, 109 Mass. 1; Feiner *v.* Reiss, 98 N. Y. App. Div. 40, 90 N. Y. Suppl. 568; Burton's Appeal, 57 Pa. St. 213; Bridges *v.* Wilson, 11 Heisk. (Tenn.) 458.

The proper method of ascertaining the will of the majority of the members of the church is that prescribed in its charter or by-laws with reference to the transaction of its secular business. Nelson *v.* Solomon, 112 Ga. 188, 37 S. E. 404.

The vestrymen of a parish of the protestant episcopal church have no authority to mortgage lands, without the bishop's knowledge or consent, which he holds in trust for the wardens, vestry, and congregation of an unincorporated parish. Hill Estate Co. *v.* Whittlesey, 21 Wash. 142, 57 Pac. 345.

26. Hubbard *v.* German Catholic Cong., 34 Iowa 31; Feiner *v.* Reiss, 98 N. Y. App. Div. 40, 90 N. Y. Suppl. 568; South Kenton Union Sunday School Assoc. *v.* Epsy, 17 Ohio Cir. Ct. 524, 9 Ohio Cir. Dec. 695; Burton's Appeal, 57 Pa. St. 213.

Notice of meeting to authorize alienation or mortgage.— To effect a valid sale of the property of a religious society it is essential that all the requirements of the statute re-

* By Edward C. Ellsbree.

jurisdictions, instead of such assent of the congregation or religious body, it is made sufficient for the validity of any conveyance if the sale be sanctioned by the court.[27] At common law every religious corporation had, in the absence of a prohibition in its charter, power to alien or encumber its real[28] and personal property;[29] but it was usual in England to restrain the power of sale of religious corporations and a similar policy has been adopted in some of the United States in reference to the real estate of such corporations,[30] although in other states, by express statutory provision, a religious corporation is given a much freer control over its property and is made competent to convey or mortgage such real and personal estate as the purpose of the corporation may require.[31] This

specting notice should be complied with (Wiggin *v.* Lowell First Freewill Baptist Church, 8 Metc. (Mass.) 301; *Re* East Presb. Church, 16 Ont. 30); but in the absence of statutory requirements as to notice, due notice given in accordance with the rules of the church is all that is necessary (Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 31 N. Y. Super. Ct. 109), and a sale of church property and an appropriation of the proceeds may be lawfully ordered at a regular annual meeting of the corporation, without special notice (Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31, holding also that an adjourned session is but a lawful prolongation of the annual meeting for this purpose). Where due notice of the meeting was given, the meeting fairly conducted, no lawful vote excluded, and no unlawful vote admitted, the objection that the vote was illegal for want of a proper register is of no force. *In re* Buffalo First Presb. Soc., 106 N. Y. 251, 12 N. E. 626.

Notice held sufficient see Hubbard *v.* German Catholic Cong., 34 Iowa 31.

Quorum.— Under a statute providing that no board of trustees of a religious corporation shall be competent to transact any business unless at least a majority of the vestrymen be present, there must be at least a majority of the legal number of vestrymen present to constitute a legal meeting to authorize the execution of a mortgage. A majority of the number actually in office is insufficient. Moore *v.* St. Thomas, 4 Abb. N. Cas. (N. Y.) 51.

The trustees of a baptist church have authority to convey real estate when authorized to do so by a vote of the church, evidenced by an extract from the minutes of the church. Macon *v.* Dasher, 90 Ga. 195, 16 S. E. 75; Calvary Baptist Church *v.* Dart, 68 S. C. 221, 47 S. E. 66.

Surviving trustees.—Where church property was deeded to three trustees, two survivors may, on the death of one of the trustees, execute a valid conveyance of the property. McCallister *v.* Ross, 155 Mo. 87, 55 S. W. 1027.

Communities in the civil law are considered as under a perpetual nonage, and those who administer their estate cannot alienate it without special license. Jacob *v.* Ursuline Nuns, 2 Mart. (La.) 268.

The archdeacon of a church to which property is bequeathed cannot mortgage it without authority from the church or the law. Levasseur *v.* Martin, 11 La. Ann. 684.

Conveyance or lease of ministerial or parsonage lands see Emerson *v.* Wiley, 10 Pick. (Mass.) 317; Lakin *v.* Ames, 10 Cush. (Mass.) 198; Austin *v.* Thomas, 14 Mass. 333; Brown *v.* Nye, 12 Mass. 285; Brown *v.* Porter, 10 Mass. 93; Weston *v.* Hunt, 2 Mass. 500; Lemington *v.* Stevens, 48 Vt. 38; Williams *v.* Goddard, 8 Vt. 492.

Disposition of colonial grants and glebe lands see Jackson *v.* Nestles, 3 Johns. (N. Y.) 115; Williams *v.* North Hero, 46 Vt. 301; Bush *v.* Whitney, 1 D. Chipm. (Vt.) 369; Selden *v.* Loudoun Overseers of Poor, 11 Leigh (Va.) 127; Cheatham *v.* Burfoot, 9 Leigh (Va.) 580; Turpin *v.* Locket, 6 Call (Va.) 113; Claughton *v.* Macnaughton, 2 Munf. (Va.) 513; Mason *v.* Muncaster, 9 Wheat. (U. S.) 445, 6 L. ed. 131 [*affirming* 16 Fed. Cas. No. 9,247, 2 Cranch C. C. 274].

27. *Re* Wansley, 21 Ont. 34. And see *infra*, VIII, B, 2, a, (II).

28. Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126; Magie *v.* Newark German Evangelical Dutch Church, 13 N. J. Eq. 77; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 31 N. Y. Super. Ct. 109; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613; Burton's Appeal, 57 Pa. St. 213; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64; Trelawny *v.* Winchester, 1 Burr. 219, 97 Eng. Reprint 281, 1 Ld. Ken. 256, 96 Eng. Reprint 985.

29. Walrath *v.* Campbell, 28 Mich. 111.

30. See the statutes of the several states. And see Walrath *v.* Campbell, 28 Mich. 111.

In New Jersey the common-law right of alienation by religious corporations has not been restrained by statute. Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126.

Statute of Elizabeth as forming part of common law of New York see Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131.

31. See the statutes of the several states. And see Keith, etc., Coal Co. *v.* Bingham, 97 Mo. 196, 10 S. W. 32.

Where the trustees constitute the corporation, the power of alienation is conferred upon them and not upon the congregation or society

power of alienation is, however, necessarily limited by the trusts upon which the legal title is held.[32]

(II) *SANCTION OF COURT.* Under the laws of some states a religious corporation is not authorized to sell or mortgage any of its real estate without leave of court.[33] Such a statute applies only to a case where the corporation is disposing of or mortgaging its own[34] real property,[35] for the purpose of raising money for some proper object,[36] and the granting of the land is the act to which the statutory restraint is directed, for the statute does not prohibit a religious corporation from making, without such consent, an executory contract of sale preliminary to conveyance; and it is sufficient if the consent be obtained after the contract, and before the time of conveying the property,[37] nor was it the purpose

at large. Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126.

Trustees, with consent of congregation, church, or society, may convey. Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018; Sterling Zion Church *v.* Mensch, 178 Ill. 225, 52 N. E. 858; Feiner *v.* Reiss, 98 N. Y. App. Div. 40, 90 N. Y. Suppl. 568; Irving *v.* McLachlan, 5 Grant Ch. (U. C.) 625.

Rector, wardens, and vestrymen of the protestant episcopal church, with the consent of the bishop and standing committee of the diocese, may convey. Lane *v.* Calvary Church, 59 N. J. Eq. 409, 45 Atl. 702.

A mortgage is not a sale or conveyance, within the meaning of a statute which provides that the trustees of a religious society shall not sell or convey real estate belonging to the society unless authorized by a two-thirds vote at a meeting called for the purpose. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528, 15 N. W. 891.

Consent of vault owners.— Where a religious corporation grants in fee, and for long lease, lots of ground in the churchyard, for the construction of burial vaults, such grantees hold a title in the land, and the corporation cannot sell the church and grounds without consent of the owners of the vaults. Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

Where property is granted to trustees for the use of a local society, the general conference has no authority to convey the property. Boxwell *v.* Affleck, 79 Va. 402.

32. Jones *v.* Sacramento Ave. M. E. Church, 198 Ill. 626, 64 N. E. 1018; *In re* New South Meeting-house, 13 Allen (Mass.) 497; Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31; Griffits *v.* Cope, 17 Pa. St. 96; Langolf *v.* Seiberlitch, 2 Pars. Eq. Cas. (Pa.) 64.

Leases held not breaches of trust.— See Hollywood *v.* Brockton First Parish, 192 Mass. 269, 78 N. E. 124; Hayes *v.* Franklin, 141 N. C. 599, 54 S. E. 432; Catholic Inst. *v.* Gibbons, 7 Ohio Dec. (Reprint) 516, 3 Cinc. L. Bul. 581; Dunkle *v.* Dries, 1 Woodw. (Pa.) 114.

33. See the statutes of the several states. And see Lombard *v.* Chicago Sinai Cong., 64 Ill. 477; Francestown Trinitarian Cong. Soc. *v.* Francestown Union Cong. Soc., 61 N. H. 384; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Matter of Church of Messiah, 12 N. Y. Suppl. 489, 25 Abb. N. Cas. 354; Reformed Protestant Dutch Church *v.* Mott, 7 Paige (N. Y.) 77, 32 Am. Dec. 613.

Such sales are against public policy unless authorized by the proper tribunal. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134.

Under the earlier statutes in New York a religious corporation might make a mortgage, as distinguished from a sale, without leave of court. Manning *v.* Moscow Presb. Soc., 27 Barb. (N. Y.) 52; Albany South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35; Matter of Canaan Second Baptist Soc., 20 How. Pr. (N. Y.) 324.

34. Edelstein *v.* Hays, 50 Misc. (N. Y.) 130, 100 N. Y. Suppl. 403, holding that leave of court is unnecessary where the society is a mere instrument for the conveyance of the title to the equitable owner, and no consideration passes to it.

What constitutes "sale."— To constitute a sale of the real property of a religious corporation within the meaning of the statute, there must be a valuable consideration inuring to the corporation as such; and hence an order authorizing a conveyance of such real estate, granted on a petition which shows the only consideration to be benefits resulting to the individual members from the transaction, is without jurisdiction and a deed in pursuance of it is void. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 73 N. Y. 82; Wheaton *v.* Gates, 18 N. Y. 395.

The statute applies only to an incorporated religious society.— Feiner *v.* Reiss, 98 N. Y. App. Div. 40, 90 N. Y. Suppl. 568.

35. Beach *v.* Allen, 7 Hun (N. Y.) 441.

36. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Edelstein *v.* Hayes, 50 Misc. (N. Y.) 130, 100 N. Y. Suppl. 403.

37. Bowen *v.* Irish Presb. Cong., 6 Bosw. (N. Y.) 245; Beth Elohim Cong. *v.* Central Presb. Church, 10 Abb. Pr. N. S. (N. Y.) 484.

The better practice is to negotiate and agree upon the terms of the sale first, and then lay the agreement before the court for its sanction. Bowen *v.* Irish Presb. Church, 6 Bosw. (N. Y.) 245; Madison Ave. Baptist

of these enactments to confer upon the court any original power to control or manage the property of religious societies,[38] and the court can only ratify or veto a sale made by a religious corporation, of its property, and has no power to direct or require the corporation to sell, against its will, or to control it in the disposition of its property.[39] The court may, however, for sufficient reasons, withhold its assent to a sale, and thus compel the corporation to retain the property; but this is the extent of its power.[40] The order granting leave to sell or mortgage usually directs the application of the proceeds;[41] but the mere fact that the order does not expressly direct the application of the proceeds of the sale is no objection to its validity.[42] In the absence of any restrictions upon their power in respect to such an application, or of any requirement that there should be a vote of the congregation to sanction their action, the vestry or trustees of a church may apply to the court to be allowed to sell or mortgage its real estate.[43]

(iii) *Repudiation and Ratification.* An unauthorized conveyance of a religious corporation may be repudiated.[44] On the other hand a religious society that has power to direct its trustees to sell or mortgage property has power to ratify irregular action taken by the trustees,[45] and the ratification need not be by a direct proceeding with an express intent to ratify, but may be effected indirectly, and by acts of recognition or acquiescence, or acts inconsistent with repudiation or disapproval.[46]

b. Voluntary and Involuntary Sale For Payment of Debts. A religious society may dispose of its property to pay its debts when necessary for that purpose;[47] and if the society or its trustees refuse to sell, a court of equity will, in the absence of a statutory prohibition, enforce the sale,[48] and, unless exempted by statute, a church edifice is subject to a mechanic's lien, and to seizure and sale

Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455.

38. Wheaton *v.* Gates, 18 N. Y. 395.

The object of the statute is that the court may control the disposition of the proceeds and prevent a misapplication of trust funds. Albany South Baptist Soc. *v.* Clapp, 18 Barb. (N. Y.) 35; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Beth Elohim Cong. *v.* Central Presb. Church, 10 Abb. Pr. N. S. (N. Y.) 484.

39. *In re* Saugerties Reformed Dutch Church, 16 Barb. (N. Y.) 237. *Compare* De Ruyter *v.* St. Peter's Church, 3 N. Y. 238.

The order is permissive not mandatory.—Bowen *v.* Irish Presb. Church, 6 Bosw. (N. Y.) 245.

40. *In re* Saugerties Reformed Dutch Church, 16 Barb. (N. Y.) 237.

41. Matter of Church of Messiah, 12 N. Y. Suppl. 489, 25 Abb. N. Cas. 354.

42. Madison Ave. Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455; Matter of Brick Presb. Church, 3 Edw. (N. Y.) 155.

43. Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131 [*affirming* 1 Sweeny 109]; Matter of St. Ann's Church, 23 How. Pr. (N. Y.) 285; Matter of Canaan Second Baptist Soc., 20 How. Pr. (N. Y.) 324. *Compare* Wyatt *v.* Benson, 23 Barb. (N. Y.) 327.

44. Macon, etc., R. Co. *v.* Riggs, 87 Ga. 158, 13 S. E. 312; Madison Ave Baptist Church *v.* Oliver St. Baptist Church, 73 N. Y. 82, holding also that it cannot be held valid merely because it has been executed and delivered, the purchaser put in possession, and the consideration paid, but that when the corporation seeks to repudiate the conveyance and recover the possession, it will be required to restore to the purchaser all he has paid upon faith of the supposed title and of the enjoyment of the property.

45. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528, 15 N. W. 891 (as without prior direction or assent); East Norway Lake Church *v.* Froislie, 37 Minn. 447, 35 N. W. 260 (meeting held without proper notice).

Ratification relates to the date of the act ratified, if no rights have intervened which would be prejudiced. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528, 15 N. W. 891.

46. Scott *v.* Jackson First Free Methodist Church, 50 Mich. 528, 15 N. W. 891; McCallister *v.* Ross, 155 Mo. 87, 55 S. W. 1027.

As by taking advantage of the act.—Roundtree *v.* Blount, 129 N. C. 25, 39 S. E. 631; French *v.* Barre, 58 Vt. 567, 5 Atl. 568.

47. Eggleston *v.* Doolittle, 33 Conn. 396.

Assignment for benefit of creditors.—A religious society may assign its property in trust for the payment of its debts unless restrained by its charter or by statute. De Ruyter *v.* St. Peter's Church, 3 N. Y. 238 [*affirming* 3 Barb. Ch. 119].

48. Bushong *v.* Taylor, 82 Mo. 660; Linn *v.* Carson, 32 Gratt. (Va.) 170.

A church site and edifice may be sold to pay the salary of the pastor. Lyons *v.* Planters' Loan, etc., Bank, 86 Ga. 485, 12 S. E. 882, 12 L. R. A. 155.

on execution.[49] Where, after the sale of the property of a church for the payment of its debts, a surplus remains, that surplus is held as the whole fund or property was held, and no other or different condition can be attached to it.[50]

3. Diversion[51] ***— a. General Rules.** It may be stated generally that property or funds held by a religious society, or its officers, in trust for certain specified purposes, must be applied to those purposes. Any diversion thereof is unauthorized,[52] unless power to use the property for other purposes is conferred by statute.[53] The use or transfer for secular purposes of property held in trust for religious purposes is unauthorized and invalid,[54] as is the transfer of the property of a church belonging to a particular denomination to another denomination or a branch of the same denomination holding different doctrines.[55] However, the conversion of trust property into a new form does not amount to a diversion, where the property in its new form is devoted to the same general purposes and there is nothing in the deed of trust prohibiting such conversion.[56]

b. Effect of Change of Doctrine or Discipline. The constituted authorities, or the majority of a church, who change its doctrines and discipline by abandoning the old faith, either becoming independent or uniting with another denomination, cannot take with them the trust property of the church, and the right to use such property remains in those who adhere to the original doctrine and dis-

49. Harrisburg Lumber Co. *v.* Washburn, 29 Oreg. 150, 44 Pac. 390.

Waiver of formalities in execution.— Legal formalities in the execution may be waived. St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219. But an accounting warden and a vestryman of a church corporation have no authority as such to sign a waiver of inquisition of the church real estate for the purpose of sale under execution. St. Bartholomew's Church *v.* Wood, 80 Pa. St. 219 [*affirming* 4 Leg. Gaz. 18], holding, however, that such a corporation will nevertheless be bound by a waiver of inquisition, on a fieri facias to which it was a party defendant, although executed without authority, as against an innocent purchaser for value without notice.

50. Harper *v.* Straws, 14 B. Mon. (Ky.) 48.

51. Diversion of property as ground for equitable relief see *infra*, VIII, B, 3, c.

52. *Georgia.*— Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184.

Illinois.— Brunnenmeyer *v.* Buhre, 32 Ill. 183.

Louisiana.—*In re* Immanuel Presb. Church, 112 La. 348, 36 So. 408.

Maryland.— Baltimore Second Universalist Soc. *v.* Dugan, 65 Md. 460, 5 Atl. 415.

New Jersey.— Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582.

New York.— Field *v.* Field, 9 Wend. 394.

Ohio.— Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 2 L. R. A. 753, 15 Am. St. Rep. 562.

Texas.— Clark *v.* Brown, (Civ. App. 1908) 108 S. W. 421.

Wisconsin.— Cape *v.* Plymouth Cong. Church, 130 Wis. 174, 109 N. W. 928; Franke *v.* Mann, 106 Wis. 118, 81 N. W. 1014, 48 L. R. A. 856.

See 42 Cent. Dig. tit. "Religious Societies," §§ 144–146.

The property of a free church cannot legally be diverted from the uses to which it was intended to be devoted by its donors, to the support of a church under denominational control. Stokes *v.* Dale, 14 N. Y. St. 901.

A division of the trust fund, or the income thereof, contrary to the terms and conditions imposed by the donor, is invalid. Orford Union Cong. Soc. *v.* West Cong. Soc., 55 N. H. 463; Hendrickson *v.* Shotwell, 1 N. J. Eq. 577; *Ex p.* Shoup, 9 Ohio Dec. (Reprint) 648, 16 Cinc. L. Bul. 71.

Return to donor.—A society which has accepted a fund on the condition that it should be a permanent fund has no right to destroy it by restoring it to the donors. Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113.

53. Davis *v.* Syracuse First Cong. Soc., 65 N. Y. 278; Cincinnati M. E. Church *v.* Gamble, 26 Ohio Cir. Ct. 295.

Amendment of charter.—A religious corporation may apply for and obtain an amendment of its charter, authorizing it to apply surplus funds to other purposes than those for which the charity was originally established. Atty.-Gen. *v.* Society for Relief, etc., 10 Rich. Eq. (S. C.) 604.

54. Chicago First M. E. Church *v.* Dixon, 178 Ill. 260, 52 N. E. 887 [*reversing* 77 Ill. App. 166]; Scott *v.* Stipe, 12 Ind. 74.

55. Park *v.* Chaplin, 96 Iowa 55, 64 N. W. 674, 59 Am. St. Rep. 353, 31 L. R. A. 141; Kinkead *v.* McKee, 9 Bush (Ky.) 535; Busby *v.* Mitchell, 23 S. C. 472 (holding that no portion of land, conveyed in trust for the erection of a church and academy, for the benefit of a Lutheran congregation, could be transferred to others than Lutherans for an academy). And see Watson *v.* Avery, 2 Bush (Ky.) 332.

56. Kilpatrick *v.* Graves, 51 Miss. 432; *In re* Buffalo First Presb. Soc., 106 N. Y. 251, 12 N. E. 626; Burton's Appeal, 57 Pa. St. 213; Griffitts *v.* Cope, 17 Pa. St. 96; Hardy *v.* Wiley, 87 Va. 125, 12 S. E. 233.

* By Stanley A. Hackett.

cipline, no matter how small in number they may be.[57] But the rule does not apply where the trust under which the property is held is not limited to the support of any particular form of worship or the teachings of any one denomination,[58] or where the change is merely one of synodical connections,[59] or where the change

57. *California.*— Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764.

Georgia.— Bates *v.* Houston, 66 Ga. 198; Godfrey *v.* Walker, 42 Ga. 562.

Illinois.— Ferraria *v.* Vasconcellos, 31 Ill. 25.

Indiana.— Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

Iowa.— Iowa City First Constitutional Presb. Church *v.* Congregational Soc., 23 Iowa 567.

Kentucky.— Louisville First Presb. Church *v.* Wilson, 14 Bush 252.

Mississippi.— Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488, 30 So. 714.

Pennsylvania.—Dochkus *v.* Lithuanian Ben. Soc., 206 Pa. St. 25, 55 Atl. 779; Greek Catholic Church *v.* Orthodox Greek Church, 195 Pa. St. 425, 46 Atl. 72; McAuley's Appeal, 77 Pa. St. 397; Roshi's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275; Schnorr's Appeal, 67 Pa. St. 138, 5 Am. Rep. 415; Winebrenner *v.* Colder, 43 Pa. St. 244; Garrett *v.* Nace, 5 Pa. Super. Ct. 475, 40 Wkly. Notes Cas. 576; Jones *v.* Wadsworth, 11 Phila. 227; Trexler *v.* Mennig, 2 Wkly. Notes Cas. 677.

South Carolina.— Combe *v.* Brazier, 2 Desauss. Eq. 431.

Texas.— Peace *v.* McGregor First Christian Church, 20 Tex. Civ. App. 85, 48 S. W. 534.

Virginia.— Finley *v.* Brent, 87 Va. 103, 12 S. E. 228, 11 L. R. A. 214.

Wisconsin.— Cape *v.* Plymouth Cong. Church, 130 Wis. 174, 109 N. W. 928.

England.—Atty.-Gen. *v.* Pearson, 3 Meriv. 353, 17 Rev. Rep. 100, 36 Eng. Reprint 135.

Canada.—Atty.-Gen. *v.* Christie, 13 Grant Ch. (U. C.) 495.

See 42 Cent. Dig. tit. "Religious Societies," § 146.

In New York under an early statute the rule was held to be otherwise (Gram *v.* Prussia Emigrated Evangelical Lutheran German Soc., 36 N. Y. 161; Petty *v.* Tooker, 21 N. Y. 267; Robertson *v.* Bullions, 11 N. Y. 243; Burrel *v.* Seneca Associate Reformed Church, 44 Barb. 282; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439), but is now held to be as stated in the text (Isham *v.* Dunkirk First Presb. Church, 63 How. Pr. 465).

A congregation which voluntarily and unanimously changes its ecclesiastical connections may still continue to use the church property (Harper *v.* Straws, 14 B. Mon. (Ky.) 48), provided the deed of trust under which the property is held does not limit its use to the maintenance of a particular form of faith and worship (Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1).

Immaterial changes of doctrine and belief not amounting to diversion see Church of Christ *v.* Hammond Christian Church, 193 Ill. 144, 61 N. E. 1119; Calkins *v.* Cheney, 92 Ill. 463; Bennett *v.* Morgan, 112 Ky. 512, 66 S. W. 287, 23 Ky. L. Rep. 1824; Schradi *v.* Dornfeld, 52 Minn. 465, 55 N. W. 49; Burrel *v.* Seneca Associate Reformed Church, 44 Barb. (N. Y.) 282; Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68; Jarrell *v.* Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84; Itter *v.* Howe, 23 Ont. App. 256; Dorland *v.* Jones, 12 Ont. App. 543.

Who may set up forfeiture.— Even though a congregation has forfeited its rights to trust property by a change of ecclesiastical connection, that fact cannot be taken advantage of by former members of the congregation (Pine Hill Lutheran Cong. *v.* St. Michael's Evangelical Church, 48 Pa. St. 20), nor can it be set up as a defense in an action by the corporation to recover rent (Swedish Evangelical Lutheran Church *v.* Shivers, 16 N. J. Eq. 453), and where the remainder in fee of an estate has been devised to the rector and wardens of a certain church and their successors, for certain uses and purposes and before the determination of the life-estate, the church had changed its discipline and form of worship, a stranger in possession cannot question the title of the minister and wardens *de facto*. Only the heirs of the devisor can avail themselves of a forfeiture (King's Chapel *v.* Pelham, 9 Mass. 501). And see *supra*, VIII, A, 2, b.

Forfeiture of legacy.—A legacy to a church and society, "so long as they maintain their present essential doctrines and principles of faith and practice," which were then unitarian, is forfeited by a change to a trinitarian system of faith and practice. Princeton *v.* Adams, 10 Cush. (Mass.) 129.

The unlawful change of the constitution and confession of faith by a general conference does not authorize a new use of the property. Those who adhere to the original constitution and confession of faith are entitled to the use of the property. Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615 [*followed* in Lemp *v.* Raven, 113 Mich. 375, 71 N. W. 627].

58. Wilson *v.* Livingstone, 99 Mich. 594, 58 N. W. 646; Watkins *v.* Wilcox, 66 N. Y. 654 [*affirming* 4 Hun 220, 6 Thomps. & C. 539]; Miller *v.* Gable, 2 Den. (N. Y.) 492; Organ Meeting House *v.* Seaford, 16 N. C. 453; Brundage *v.* Deardorf, 92 Fed. 214, 34 C. C. A. 304. And see Lee *v.* U. S. Methodist Episcopal Church, 193 Mass. 47, 78 N. E. 646.

59. Lawson *v.* Kolbenson, 61 Ill. 405; Gartin *v.* Penick, 5 Bush (Ky.) 110; Schradi *v.* Dornfeld, 52 Minn. 465, 55 N. W. 49; Pine Hill Lutheran Cong. *v.* St. Michael's Evangelical Church, 48 Pa. St. 20; Suter *v.* Spangler, 4 Phila. (Pa.) 331.

is lawfully made or authorized by the highest legislative body in the denomination or sect.[60]

c. Jurisdiction of Equity to Prevent. A court of equity will aid the lawfully elected trustees of a religious society in the administration of their trust and protect them from interference by other persons,[61] and conversely equity may be resorted to for the purpose of compelling the trustees, or other officers holding property or funds of the society in trust, to use and apply such property and funds to the purpose for which the trust was created and of restraining them from applying the property to other purposes;[62] but to justify the interposition of a

Unless forbidden in the deed of trust.— McBride *v.* Porter, 17 Iowa 203; Rodgers *v.* Burnett, 108 Tenn. 173, 65 S. W. 408.

The complete severance of the voluntary connection between an independent church and a synod has no effect upon the property rights of the church (Miller *v.* Gable, 2 Den. (N. Y.) 492; Heckman *v.* Mees, 16 Ohio 583), and the persons composing the majority of an unincorporated congregation do not forfeit their interests in the trust property by refusing to acknowledge the authority of either of two conflicting judicatories (English Presb. Cong. *v.* Johnston, 1 Watts & S. (Pa.) 9).

The union of one church with another, whose doctrines and teachings are substantially the same, and which is authorized by its constitution, does not constitute a diversion of its trust property (Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184), although the rule has been held to be otherwise where the union is not authorized by its constitution (Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421).

60. *California.*— Horsman *v.* Allen, 129 Cal. 131, 61 Pac. 796.

Kentucky.—Gibson *v.* Armstrong, 7 B. Mon. 481.

Ohio.— Griggs *v.* Middaugh, 10 Ohio Dec. (Reprint) 643, 22 Cinc. L. Bul. 367.

Pennsylvania.— McGinnis *v.* Watson, 41 Pa. St. 9 [*followed* in Ramsey's Appeal, 88 Pa. St. 60].

United States.— Brundage *v.* Deardorf, 92 Fed. 214, 34 C. C. A. 304.

See 42 Cent. Dig. tit. "Religious Societies," § 146.

61. *Kentucky.*— Curd *v.* Wallace, 7 Dana 190, 32 Am. Dec. 85.

Louisiana.— Lafayette German Evangelical Cong. *v.* Pressler, 17 La. Ann. 127.

New York.— Reis *v.* Rohde, 34 Hun 161.

Wisconsin.— Lutheran Evangelical Church *v.* Gristgau, 34 Wis. 328; New Elm German Evangelical Cong. *v.* Hoessli, 13 Wis. 348.

Canada.— Dorland *v.* Jones, 12 Ont. App. 543 [*reversing* 7 Ont. 17].

See 42 Cent. Dig. tit. "Religious Societies," §§ 154, 155.

Compelling conveyance.—A court of equity has jurisdiction to compel a conveyance to overseers of a quaker's monthly meeting of real and personal property held by persons who are not such overseers, but who hold it in trust for such monthly meeting. Earle *v.* Wood, 8 Cush. (Mass.) 430.

A trespass upon a burying ground for the purpose of making burials, and which constitutes no serious or irreparable injury, is not ground for the interposition of a court of equity. Miller *v.* English, 6 N. J. Eq. 304.

Where no interference with the use of church property is threatened and the sole question relates to the rights of two sets of trustees, equity will not interfere, but will leave the parties to settle the legal title by information in the nature of a quo warranto. Harris *v.* Pounds, 64 Ga. 121.

62. *Illinois.*— Nelson *v.* Benson, 69 Ill. 27; Brunnenmeyer *v.* Buhre, 32 Ill. 183 (holding that a statute which authorizes the members of churches to remove refractory trustees does not oust the jurisdiction of a court of equity); Tomlin *v.* Blunt, 31 Ill. App. 234.

Indiana.— Perry *v.* McEwen, 22 Ind. 440; Scott *v.* Stipe, 12 Ind. 74.

Massachusetts.— Weld *v.* May, 9 Cush. 181; Fisher *v.* Ellis, 3 Pick. 322.

Nebraska.— See Avery *v.* Baker, 27 Nebr. 388, 43 N. W. 174, 20 Am. St. Rep. 672.

New Hampshire.—Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

New Jersey.— Holmes *v.* Wesley M. E. Church, 58 N. J. Eq. 327, 42 Atl. 582; Whitecar *v.* Michenor, 37 N. J. Eq. 6.

New York.— Robertson *v.* Bullions, 9 Barb. 64 [*affirmed* in 11 N. Y. 243]; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103]; People *v.* Connelly, 3 N. Y. St. 372; Isham *v.* Fullager, 14 Abb. N. Cas. 363; Isham *v.* Dunkirk First Presb. Church, 63 How. Pr. 465; Miller *v.* Gable, 2 Den. 492 [*affirming* 10 Paige 627]; Hartford First Baptist Church *v.* Witherell, 3 Paige 296, 24 Am. Dec. 223; Kniskern *v.* Lutheran Churches, 1 Sandf. Ch. 439; Bowden *v.* McLeod, 1 Edw. 588.

Pennsylvania.— Skilton *v.* Webster, Brightly 203; Christ Church *v.* Holy Communion Church, 14 Phila. 61.

South Carolina.— Wilson *v.* John's Island Presb. Church, 2 Rich. Eq. 192.

England.— Shore *v.* Wilson, 9 Cl. & F. 355, 8 Eng. Reprint 450.

Canada.— Brewster *v.* Hendershot, 27 Ont. App. 232; Sanson *v.* Mitchell, 6 Grant Ch. (U. C.) 582.

See 42 Cent. Dig. tit. "Religious Societies," § 155.

Where discretion is vested in trustees as to the distribution of a trust fund, or the income thereof, it will not be interfered with by the court, so long as it is honestly exercised. Hawes Place Cong. Soc. *v.* Hawes Fund, 5 Cush. (Mass.) 454; Pulpress *v.* African M. E. Church, 48 Pa. St. 204.

court of equity, it is necessary to show the creation of a valid trust,[63] and a real and substantial departure from the purposes thereof.[64] Another ground for equitable relief is the failure of two factions of a church to agree on the proper use of the church property. In such case equity will take jurisdiction and protect the party entitled to possession, regardless of whether it constitutes a majority or minority.[65]

4. Division of Society* — a. Effect in General. The separation or secession of part of the members from a church does not destroy the identity of the church nor lessen the rights of those adhering to the organization,[66] but members seceding

Limitations.— Where there is no statute of limitations applicable to such action, the open and adverse use of church property for a form of worship other than that for which it is held in trust for twenty years or more bars a suit in equity to enforce the trust. Atty.-Gen. *v.* Federal St. Meeting House, 3 Gray (Mass.) 1.

63. Follett *v.* Badeau, 26 Hun (N. Y.) 253. And see Suter *v.* Spangler, 4 Phila. (Pa.) 331.

64. Miller *v.* Gable, 2 Den. (N. Y.) 492; Ehrenfeldt's Appeal, 101 Pa. St. 186; Fadness *v.* Braunborg, 73 Wis. 257, 41 N. W. 84; Itter *v.* Howe, 23 Ont. App. 256.

A long-continued acquiescence in the application of a trust fund to the support of certain religious doctrines will not be interfered with unless the donor plainly expressed an intention that the fund should be applied to the support of different doctrines. Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

Removal of memorial windows.— Equity will not enjoin the destruction of a church by the vestrymen because of interference with memorial windows, where it is shown that it is their intention to remove certain memorial windows, and place them in a new church to be built at another place. Cushman *v.* Church of Good Shepherd, 188 Pa. St. 438, 41 Atl. 616.

65. *Georgia.*— Bates *v.* Houston, 66 Ga. 198.

Iowa.— Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138, 49 N. W. 81, 13 L. R. A. 198.

Kansas.— Hackney *v.* Vawter, 39 Kan. 615, 18 Pac. 699.

Kentucky.—Hadden *v.* Chorn, 8 B. Mon. 70.

Mississippi.— Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488, 30 So. 714.

Missouri.— Fulbright *v.* Higginbotham, 133 Mo. 668, 34 S. W. 875.

Pennsylvania.— Henry *v.* Dietrich, 84 Pa. St. 286; Kisor's Appeal, 62 Pa. St. 428.

Tennessee.— Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; Deaderick *v.* Lampson, 11 Heisk. 523.

Canada.—Atty.-Gen. *v.* Christie, 13 Grant Ch. (U. C.) 495.

See 42 Cent. Dig. tit. "Religious Societies," § 155.

Actual diversion necessary.—As in the case of an alleged diversion by trustees, a substantial departure from the purposes of the trust must be shown before equity will interfere. Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Lawson *v.* Kolbenson, 61 Ill. 405; Happy *v.* Morton, 33 Ill. 398. Thus it has been held that the leasing with reasonable restrictions of a German reformed church building by a vote of the church to another protestant denomination is not an inconsistent appropriation of the property, restrainable by a bill in equity by a minority. Dunkle *v.* Dries, 1 Woodw. (Pa.) 114.

Instances of equitable interference.— It has been held that equity will restrain the violation of the charter of the society by the majority of the corporation (Sarver's Appeal, 81* Pa. St. 183; Sawer *v.* Gosser, 1 Wkly. Notes Cas. (Pa.) 55); enjoin the unauthorized interference with the church property by a faction which refuses to abide by proper adjudications of the duly authorized church tribunals (Rike *v.* Floyd, 6 Ohio Cir. Ct. 80, 3 Ohio Cir. Dec. 359 [*affirmed* in 33 Cinc. L. Bul. 351]); restrain one of two congregations jointly using a church edifice from introducing a Sabbath school into the church without the consent of the other congregation (Gass' Appeal, 73 Pa. St. 39, 13 Am. Rep. 726); and decree a division of the property of an independent church organization which is split by irreconcilable differences (Immanuel's Gemeinde *v.* Keil, 8 Kan. App. 405, 54 Pac. 800. *Compare* Swoyer *v.* Schaeffer, 2 Pa. Dist. 749, 13 Pa. Co. Ct. 346, holding that equity has no jurisdiction to decree partition of church property owned in common by two congregations).

Rule where trust is general.— Where a religious society holds land in fee, subject to no use except its general purposes, the majority may control the use of it at their pleasure, and no supposed error of doctrine will authorize the interference of a court of equity. Keyser *v.* Stansifer, 6 Ohio 363. In such a case the court will do no more than award the possession of the property to the legal board of trustees in whom the title is vested. Fort *v.* Paris First Baptist Church, (Tex. Civ. App. 1899) 55 S. W. 402.

66. *Kentucky.*—Hadden *v.* Chorn, 8 B. Mon. 70, holding, however, that a seceding minority who, while in possession of the church, made necessary repairs in good faith, have a valid claim for the value of the improvements.

Massachusetts.— Page *v.* Crosby, 24 Pick. 211 (holding that the fact that the minister also secedes does not alter the rule); Sawyer *v.* Baldwin, 11 Pick. 492; Stebbins *v.* Jennings, 10 Pick. 172.

* By Stanley A. Hackett.

from a church thereby forfeit all rights to the church property,[67] and the courts, when called upon, will award the property, and all rights pertaining thereto, to those who continue to adhere to the doctrine, tenets, and rules of the church as they existed before the division, or, in case it is a denominational church, to those recognized by the highest judicatory of the denomination, as being the church or congregation.[68] In some cases, however, a distinction based upon the form

New Jersey.— Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

Pennsylvania.— Landis' Appeal, 102 Pa. St. 467.

Tennessee.— Deaderick *v.* Lampson, 11 Heisk. 523.

See 42 Cent. Dig. tit. "Religious Societies," § 147 *et seq.*

The secession of a whole church from a parish is to all civil purposes an extinction of the church; and the members of the parish may institute a new church, which will succeed to all the rights of the old one. Baker *v.* Fales, 16 Mass. 488.

Effect of incorporation of faction.—As there can be but one incorporation for the same society, the incorporation of one faction incorporates the entire church and vests in it the title to the temporalities. The subsequent incorporation of the other faction does not divest it of the title. Sand Creek Christian Church *v.* Church of Christ, 219 Ill. 503, 76 N. E. 703; North St. Louis Christian Church *v.* McGowan, 62 Mo. 279; St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323; Holm *v.* Holm, 81 Wis. 374, 51 N. W. 579 [*following* West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62, 49 N. W. 24]. See also Merwin *v.* Camp, 3 Conn. 35. But a minority who incorporate contrary to the wishes of the majority acquire no right to the management of the property. Happy *v.* Morton, 33 Ill. 398; Henry *v.* Deitrich, 84 Pa. St. 286 [*reversing* 7 Lanc. Bar 185]. But see St. Jacob's Lutheran Church *v.* Bly, 73 N. Y. 323.

The word "division" imports no more than a separation of the society into two parts without any change of faith or ulterior relations (McKinney *v.* Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360), and is to be distinguished from secession in that the action of the supreme body of a denominational church in providing for the separation of the church into two distinct organizations creates a division and not a secession (Smith *v.* Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [*reversing* 22 Fed. Cas. No. 13,112]), and from a schism, which is used to indicate a separation in a church or denomination of christians occasioned by diversity of opinions on religious subjects (Nelson *v.* Benson, 69 Ill. 27; McKinney *v.* Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360. But see Poynter *v.* Phelps, 33 Ky. L. Rep. 887, 111 S. W. 699, where it was held that the separation of a religious society on questions of church government created a schism or division, the court making no distinction between the two terms.

67. *Kansas.*— Venable *v.* Ebenezer Baptist Church, 25 Kan. 177.

Kentucky.— Brown *v.* Monore, 80 Ky. 443; Lewis *v.* Watson, 4 Bush 228; Harper *v.* Straws, 14 B. Mon. 48; Shannon *v.* Frost, 3 B. Mon. 253.

Missouri.— McRoberts *v.* Moudy, 19 Mo. App. 26.

Nebraska.—Rottmann *v.* Bartling, 22 Nebr. 375, 35 N. W. 126.

New Hampshire.—Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; Atty.-Gen. *v.* Dublin, 38 N. H. 459.

New Jersey.—Newburgh Associate Reformed Church *v.* Princeton Theological Seminary, 4 N. J. Eq. 77.

New York.— Isham *v.* Dunkirk First Presb. Church, 63 How. Pr. 465.

Ohio.— Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31; Cincinnati M. E. Church *v.* Wood, 5 Ohio 283; Cincinnati M. C. *v.* Wood, Wright 12; *Ex p.* Shoup, 9 Ohio Dec. (Reprint) 648, 16 Cinc. L. Bul. 71.

Pennsylvania.— Skilton *v.* Webster, 1 Brightly 203; Gordan *v.* Williams, 3 Leg. Gaz. 113.

South Carolina.— Bethel Presb. Church *v.* Donnom, 1 Desauss. Eq. 154.

Tennessee.— Rodgers *v.* Burnett, 108 Tenn. 173, 65 S. W. 408.

Texas.— Clark *v.* Brown, (Civ. App. 1908) 108 S. W. 421.

See 42 Cent. Dig. tit. "Religious Societies," § 150.

The mere assemblage in another place of a majority of a congregation, forcibly and illegally excluded by a minority from the church edifice, the majority thus excluded maintaining still the old church organization, is not a relinquishment of the property rights. Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

Trustees who have seceded from the society are no longer entitled to any rights in regard to the church property. Nace's Appeal, 11 York Leg. Rec. (Pa.) 41. But see Brewster *v.* Hendershot, 27 Ont. App. 232, holding that the trustees are entitled to possession of the property, but that they must administer it in accordance with the terms of the trust.

The members of a new society, composed of expelled members from an old society, and which has made an arrangement with the old society for the ultimate use of the meeting-house, have no rights under the arrangement, after the dissolution of the new society. Berryman *v.* Reese, 11 B. Mon. (Ky.) 287.

Seceders who form a new organization cannot acquire any right to the church property by adopting the name of the original organization. Venable *v.* Coffman, 2 W. Va. 310.

68. *Illinois.*—Sand Creek Christian Church *v.* Church of Christ, 219 Ill. 503, 76 N. E. 703.

of the church government has been made, and it has been held that where the church is independent and self-governing, and where the trust under which the property is held does not require the observance of any particular form of worship or the teaching of any particular doctrine, the control of the property belongs to the majority, regardless of any change of religious views or teachings.[69] But where there is attached to the property a trust, either express or implied, that certain doctrines shall be taught or a particular form of worship observed, those who adhere to the purpose of the trust are entitled to the property, even though they constitute a minority and the church is independent in government.[70]

b. Partition of Property. In general the factions of a church are not entitled to a partition and division of the property, where it is lawfully applied to the purpose of the trust and none of the members are prevented from participation in its use and enjoyment;[71] but it has been held that they are entitled to a division

Indiana.— Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Hadley White Lick Quarterly Meeting of Friends *v.* Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136.

Iowa.— McBride *v.* Porter, 17 Iowa 203.

Kentucky.— Louisville First Presb. Church *v.* Wilson, 14 Bush 252; Harper *v.* Straws, 14 B. Mon. 48; Gibson *v.* Armstrong, 7 B. Mon. 481.

Massachusetts.— See Brown *v.* Porter, 10 Mass. 93.

Missouri.— See St. Louis African Baptist Church *v.* St. Louis Transfer Co., 98 Mo. 412, 11 S. W. 990.

New Hampshire.— Holt *v.* Downs, 58 N. H. 170.

New Jersey.— Paramus True Reformed Dutch Church *v.* Iserman, 64 N. J. L. 506, 45 Atl. 771; Day *v.* Bolton, 12 N. J. L. 206.

Oregon.— Philomath College *v.* Wyatt, 27 Oreg. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

Pennsylvania.— Bose *v.* Christ, 193 Pa. St. 13, 44 Atl. 240; Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476; Fernstler *v.* Seibert, 114 Pa. St. 196, 6 Atl. 165; Roshi's Appeal, 69 Pa. St. 462, 8 Am. Rep. 275 [*following* App *v.* Lutheran Cong., 6 Pa. St. 201]; Winebrenner *v.* Colder, 43 Pa. St. 244; McGinnis *v.* Watson, 41 Pa. St. 9; Trustees *v.* Sturgeon, 9 Pa. St. 321; Jones *v.* Wadsworth, 11 Phila. 239.

South Carolina.— Wilson *v.* John's Island Presb. Church, 2 Rich. Eq. 192.

Tennessee.— Rodgers *v.* Burnett, 108 Tenn. 173, 65 S. W. 408; Reeves *v.* Walker, 8 Baxt. 277.

Virginia.— Hoskinson *v.* Pusey, 32 Gratt. 428.

United States.— Reorganized Church of Jesus Christ, etc. *v.* Church of Christ, 60 Fed. 937 [*reversed* on other grounds in 70 Fed. 179, 17 C. C. A. 387].

See 42 Cent. Dig. tit. "Religious Societies," § 151.

Qualification of rule.— The rule stated is subject to the qualification that church judicatories may make such changes in the law and customs as they may by their laws be authorized to make, or which are not fundamental departures from the general plan and purposes of the organization. Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

Neither of two new societies, which bear no relation whatever to the old society, are entitled to the trust property of the old organization. Cox *v.* Walker, 26 Me. 504.

Estoppel to assert title.—Although the title to the land upon which a church building was erected was in one faction, it is estopped to assert it, where it stood by and allowed the other faction to build the church building upon it. St. Paul's Reformed Church *v.* Hower, 191 Pa. St. 306, 43 Atl. 221.

69. *Iowa.*— Dressen *v.* Brameier, 56 Iowa 756, 9 N. W. 193.

Kentucky.— Poynter *v.* Phelps, 111 S. W. 699, 33 Ky. L. Rep. 887.

Pennsylvania.— *In re* Aitken, 158 Pa. St. 541, 27 Atl. 1102.

Texas.— Paris First Baptist Church *v.* Fort, 93 Tex. 215, 54 S. W. 892, 49 L. R. A. 617 [*affirming* in part (Civ. App. 1899) 55 S. W. 402]; Jarrell *v.* Sproles, 20 Tex. Civ. App. 387, 49 S. W. 904.

United States.— Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666.

See 42 Cent. Dig. tit. "Religious Societies," §§ 150, 151.

70. Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666. But see Turpin *v.* Bagby, 138 Mo. 7, 39 S. W. 455.

71. Schradi *v.* Dornfeld, 52 Minn. 465, 55 N. W. 49.

Division by agreement.— Where the old organization conveyed an undivided half of the church property to the new organization, and the division was acquiesced in for three years, each organization using the church edifice on alternate Sundays, the court will not disturb such arrangement. Wicks *v.* Nedrow, 28 Nebr. 386, 44 N. W. 457. A difficulty growing out of an illegal election of trustees and their exclusion of the majority from the use of the church is not such a schism as will entitle the faction to a division of the property under the terms of an agreement, entered into at the time of the purchase of the property, that there should be a fair division of the property in case of a schism. Nelson *v.* Benson, 69 Ill. 27.

of the property in proportion to their respective numbers, where the society is irreconcilably divided and neither faction has abandoned the tenets and doctrines of the church or done any act to cause a forfeiture of its rights;[72] or where the church has been lawfully divided into two distinct organizations by the proper superior or supreme ecclesiastical body.[73] Under the statutes of some states, where the circumstances are such as to cause a schism or division, each party is entitled to use the church a part of the time, proportioned to the number of members of each party.[74]

C. Actions to Determine Rights to Property* — 1. Jurisdiction. It is well settled that, while civil courts will not interfere in purely ecclesiastical matters,[75] they will take jurisdiction of and determine controverted claims to the title, use or possession of church property.[76] Where however, the rights to church property are dependent upon the rules and discipline of the church or denomination, together with the decisions of the church tribunals, the civil courts will give effect to such rules and decisions,[77] when not inconsistent with the constitu-

Division by legislature.— It seems that the legislature may authorize a religious corporation to divide its real estate and vest a portion thereof in a part of the congregation set off from the parent organization. Gallupville Reformed Church *v.* Schoolcraft, 65 N. Y. 134; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 46 N. Y. 131), but a resolution of the legislature dividing a religious society, passed against the protest of the society, is ineffectual so far as it attempts to give the new society any part of the funds on property of the old one (Portland Second Ecclesiastical Soc. *v.* Portland First Ecclesiastical Soc., 23 Conn. 255).

The incorporation of the church presents no obstacle to the division of its property among the members (Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841; Immanuel's Gemeinde *v.* Keil, 61 Kan. 65, 58 Pac. 973. But see Dressen *v.* Brameier, 56 Iowa 756, 9 N. W. 193), nor does the fact that the majority of a religious society after their withdrawal from connection with a presbytery elected trustees, and the minority made themselves a corporation, and also elected trustees, change the right of the opposing factions to share in the common property (Ferraria *v.* Vasconcellos, 31 Ill. 25).

72. Niccolls *v.* Rugg, 47 Ill. 47, 95 Am. Dec. 462; Ferraria *v.* Vasconcellos, 31 Ill. 25; Immanuel's Gemeinde *v.* Keil, 61 Kan. 65, 58 Pac. 973 (holding that the privilege of purchasing the property should be reserved to the two factions in order that the property may not be diverted from the religious purpose to which it was dedicated); Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82.

73. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841; Weddell *v.* Collier, 26 Pittsb. Leg. J. N. S. (Pa.) 309; Smith *v.* Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [*reversing* 22 Fed. Cas. No. 13,112, 5 McLean 369]; Bascom *v.* Lane, 2 Fed. Cas. No. 1,089, Brunn. Col. Cas. 348.

74. See the statutes of the several states. And see McKinney *v.* Griggs, 5 Bush (Ky.) 401, 96 Am. Dec. 360; Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Poynter *v.* Phelps, 111 S. W. 699, 33 Ky. L. Rep. 887; Igleheart *v.* Rowe, 47 S. W. 575, 20 Ky. L. Rep. 821.

In Maine, under statute, before an action can be maintained for a division of the time of occupying a house of worship there must exist a house of worship owned by persons of different denominations, and an organized society or its members must own at least five pews therein. Leeds First Baptist Soc. *v.* Grant, 59 Me. 245.

75. See *infra*, X, A.

76. *Illinois.*— Ferraria *v.* Vasconcellos, 31 Ill. 25.

Kentucky.— Gartin *v.* Penick, 5 Bush 110.

Louisiana.— German Evangelical Cong. *v.* Pressler, 17 La. Ann. 127.

Mississippi.— Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488, 30 So. 714.

Missouri.— Prickett *v.* Wells, 117 Mo. 502, 24 S. W. 52.

New York.— Robertson *v.* Bullions, 9 Barb. 64 [*affirmed* in 11 N. Y. 243].

Pennsylvania.— Schlichter *v.* Keiter, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161; McIlvain *v.* Christ Church, 8 Phila. 507, 2 Woodw. 293.

Canada.— Itter *v.* Howe, 23 Ont. App. 256.

See 42 Cent. Dig. tit. "Religious Societies," §§ 154–157. And see *infra*, X, A.

Where the real question in issue is one of religious doctrine, the courts will decline to interfere, although property rights are involved. Moseman *v.* Heitchousen, 50 Nebr. 420, 69 N. W. 957.

Multiplicity of parties.—An action against an unincorporated religious society, whose property is held in common and whose members are numerous and constantly changing, may properly be brought in equity, as the remedy at law would be inadequate. Pleasant Hill Shakers' Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632.

77. *Connecticut.*— Trinity M. E. Church *v.* Harris, 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636.

Georgia.— Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184.

* By Stanley A. Hackett.

tion and laws of the state,[78] and will inquire only as to what are the rules and decisions of the church and its tribunals, and what parties or factions adhere to them, without questioning their wisdom or propriety.[79] Although the equitable powers of the court are most frequently appealed to in actions of this nature, remedies at law, such as ejectment, are available.[80]

2. Persons Entitled to Sue. Actions involving the title or control of church property are properly brought in the name of the church, if incorporated,[81] and the trustees are the persons *prima facie* entitled to institute the litigation,[82] and they are undoubtedly the proper parties to sue when the church is incorporated,[83]

Illinois.— Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 394.

Indiana.— Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Kansas.— Hackney *v.* Vawter, 39 Kan. 615, 18 Pac. 699.

Nebraska.— Pounder *v.* Ashe, 44 Nebr. 672, 63 N. W. 48; Rottmann *v.* Bartling, 22 Nebr. 375, 35 N. W. 126.

Ohio.— Harrison *v.* Hoyle, 24 Ohio St. 254; Rike *v.* Floyd, 6 Ohio Cir. Ct. 80, 3 Ohio Cir. Dec. 359; Griggs *v.* Middaugh, 10 Ohio Dec. (Reprint) 643, 22 Cinc. L. Bul. 367.

United States.— Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666.

See 42 Cent. Dig. tit. "Religious Societies," § 157.

78. Prickett *v.* Wells, 117 Mo. 502, 24 S. W. 52.

79. *Indiana.*— Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

Kentucky.— Gartin *v.* Penick, 5 Bush 110.

Minnesota.— East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663, a well considered case.

Nebraska.— Pounder *v.* Ashe, 36 Nebr. 564, 54 N. W. 847.

New Jersey.—German Evangelical Lutheran Church *v.* Maschop, 10 N. J. Eq. 57; Rainier *v.* Howell, 9 N. J. Eq. 121; Hendrickson *v.* Shotwell, 1 N. J. Eq. 577.

United States.— Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666.

See 42 Cent. Dig. tit. "Religious Societies," § 157.

80. Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Yanthis *v.* Kemp, (Ind. App. 1908) 86 N. E. 451; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Skilton *v.* Webster, Brightly (Pa.) 203; Kutz *v.* Hepler, 1 Leg. Rec. (Pa.) 357; Humphreys *v.* Hunter, 20 U. C. C. P. 456.

81. McConnell *v.* Gardner, Morr. (Iowa) 272; German Evangelical Cong. *v.* Hoessli, 13 Wis. 348.

Insertion of corporate name by amendment. — Trustees suing in their individual names may amend at the trial by striking out their names and substituting the name of the corporation. Ainleyville Cong. *v.* Grewer, 23 U. C. C. P. 533.

A town and the selectmen are neither proper nor necessary parties to actions involving rights to church property. Raynham First Cong. Soc. *v.* Raynham Cong. Ministers Fund, 23 Pick. (Mass.) 148; Colchester *v.* Hill, Brayt. (Vt.) 65.

82. Bates *v.* Houston, 66 Ga. 198. And see Dunkle *v.* Dries, 1 Woodw. (Pa.) 114.

83. Attica First M. E. Church *v.* Filkins, 3 Thomps. & C. (N. Y.) 279. And see White *v.* Miller, 71 N. Y. 118, 27 Am. Rep. 13, holding that while a statute which conferred upon shaker societies the authority to have their property held by trustees in perpetual succession did not necessarily constitute such a society or its trustees a corporation, in a full and unrestricted sense, it did constitute the trustees a corporate body in the sense that they may sue and be sued as such.

In Canada trustees may sue in a quasi-corporate name. Franklin Church *v.* Maguire, 23 Grant Ch. (U. C.) 102; Toronto Berkeley St. Cong. *v.* Stevens, 37 U. C. Q. B. 9; Ainleyville Cong. *v.* Grewer, 23 U. C. C. P. 533; Humphreys *v.* Hunter, 20 U. C. C. P. 456.

When title to office is disputed and both plaintiffs and defendants claim to be the legal trustees, and defendants are in possession of the church property, plaintiffs cannot maintain their action to recover the possession and control of the property, until their title to the office is first determined by quo warranto or other proper proceedings. Staten Island North Baptist Church *v.* Parker, 36 Barb. (N. Y.) 171. But see Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Trustees claiming authority under a statute, which authorizes them to dispose of a fund belonging to the corporation for other than corporate purposes, must be made parties to an action brought to test its constitutionality. Davis *v.* Syracuse First Cong. Soc., 65 N. Y. 278.

One trustee may sue in the name of the corporation to restrain his co-trustees from diverting the revenues of the church to unauthorized uses. York First Reformed Presb. Church *v.* Bowden, 14 Abb. N. Cas. (N. Y.) 356.

An irregularly appointed trustee may not sue.— Scott *v.* Curle, 9 B. Mon. (Ky.) 17.

Trustees de facto of an unincorporated religious society cannot, on the ground that they truly represent the religious faith of those who took the deed of the land and erected the meeting-house thereon, maintain an action to recover possession of the property against persons who are in actual possession, claiming that they represent a cor-

or the title of the property is vested in them in trust,[84] and in general no right to sue in behalf of the church or society is vested in other officers of the church,[85] or in the minister.[86] But suit may be brought by one or more members of the society in behalf of all when the society is unincorporated,[87] or the object of the suit is to prevent a diversion of the trust property by the trustees or other officers.[88]

3. PLEADING. A complaint or petition which sets up facts showing the right of plaintiff to sue and to maintain or recover the possession and control of the property in question, together with facts showing the wrongful possession or diversion of defendants, is sufficient.[89] Where the title to the property is admitted

poration that owns the same. Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31.

84. Cahill *v.* Bigger, 8 B. Mon. (Ky.) 211; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85 (holding that trustees having title to a moiety only of the trust property may sue); Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135. And see Doe *v.* Bain, 3 U. C. Q. B. 198.

The dissent of one of two trustees of church lands does not render bad a suit brought in the name of both, where the dissenting trustee has been indemnified for the costs. Unangst *v.* Shortz, 5 Whart. (Pa.) 506.

85. See cases cited *infra*, this note.

The session of the presbyterian church, or the elders or individual members thereof, have no standing in court, either in their own right or as representing the church or congregation. McConnell *v.* Gardner, Morr. (Iowa) 272; Everett *v.* Asbury Park First Presb. Church, 53 N. J. Eq. 500, 32 Atl. 747; Westminster Presb. Church *v.* Findley, 44 Misc. (N. Y.) 173, 89 N. Y. Suppl. 801.

A Roman catholic bishop can maintain no action to determine rights to church property unless he can show some right in himself to the property in question. Eis *v.* Croze, 149 Mich. 62, 112 N. W. 943; Blair *v.* Odin, 3 Tex. 288.

The consistory of the reformed Dutch church has been held to constitute a separate and independent body in reference to charitable funds, having unlimited control thereof, and to have the capacity of suing and being sued. Prattsville Reformed Dutch Church *v.* Brandow, 52 Barb. (N. Y.) 228.

Commissioners appointed by a division of the methodist episcopal church may maintain a bill in equity, for a division of property against the trustees of the common property (Bascom *v.* Lane, 2 Fed. Cas. No. 1,089, Brunn. Col. Cas. 348), or against the book concern belonging to the general church at the time of the separation (Smith *v.* Swormstedt, 16 How. (U. S.) 288, 14 L. ed. 942 [*reversing* 22 Fed. Cas. No. 13,112, 5 McLean 369]).

86. Clark *v.* Quincy Evangelical Soc., 12 Gray (Mass.) 17.

But the minister may be joined as a party plaintiff when the subject-matter of the suit is the refusal of the trustees to pay him his salary from a fund held in trust for his support. Raynham First Cong. Soc. *v.* Raynham Cong. Ministers Fund, 23 Pick. (Mass.) 148.

87. *Iowa.*— McConnell *v.* Gardner, Morr. 272.

Kansas.— Fink *v.* Umscheid, 40 Kan. 271, 19 Pac. 623, 2 L. R. A. 146.

New Jersey.— Newburgh Associate Reformed Church *v.* Princeton Theological Seminary, 4 N. J. Eq. 77.

Ohio.— Mannix *v.* Purcell, 46 Ohio St. 102, 19 N. E. 572, 15 Am. St. Rep. 562, 2 L. R. A. 753.

United States.— Beatty *v.* Kurtz, 2 Pet. 566, 7 L. ed. 521; Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135, acting trustee.

See 42 Cent. Dig. tit. "Religious Societies," § 159.

88. *California.*— Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764.

New York.— Isham *v.* Fullager, 14 Abb. N. Cas. 363.

North Carolina.—Nash *v.* Sutton, 117 N. C. 231, 23 S. E. 178.

Ohio.— Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31.

Canada.— Boulton *v.* Toronto Church Soc., 15 Grant Ch. (U. C.) 450.

See 42 Cent. Dig. tit. "Religious Societies," § 159.

A non-member of the church or society cannot maintain an action to regulate the use of the church property, even though he was one of the original grantors (Strong *v.* Doty, 32 Wis. 381), or was formerly a member of the society (Shannon *v.* Frost, 3 B. Mon. (Ky.) 253; Smith *v.* Bowers, 57 N. Y. App. Div. 252, 68 N. Y. Suppl. 169 [*affirmed* in 171 N. Y. 669, 64 N. E. 1125]; Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801).

Contributors to a trust fund may sue to prevent a perversion of the trust (Ludlam *v.* Higbee, 11 N. J. Eq. 342), and for this purpose it is not necessary that all be joined (Avery *v.* Baker, 27 Nebr. 388, 43 N. W. 174, 20 Am. St. Rep. 672). However, an action based upon a contract cannot be maintained by persons who are not subscribers to the agreement, and who are not the successors or legal representatives of the society for whose benefit the contract was made. Manning *v.* Gloucester Fifth Parish, 6 Pick. (Mass.) 6.

A minority of the society who are not pewholders and who have paid no part of the purchase-money cannot maintain a bill in equity to restrain the society from reconveying a trust estate to the former trustees, discharged of the trust. Clark *v.* Quincy Evangelical Soc., 12 Gray (Mass.) 17.

89. Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764 (holding further that a complaint which

to be in third persons, a petition praying that plaintiffs be put in possession and that defendants be restrained from interfering therewith is one for an injunction, and not in ejectment.[90]

4. EVIDENCE. The burden of proving a better right to the property in question is on defendants where plaintiffs are members or trustees adhering to the established organization,[91] but it is on plaintiffs where defendants have been adjudged the duly elected trustees.[92] It is error to exclude evidence which bears directly on the issues of the case and is otherwise unobjectionable;[93] but irrevelant and immaterial evidence, such as the adherence of members to certain doctrines when that question is not in issue, should be excluded.[94] On a question of change or departure from faith, detached sentences from the sermon of the minister should not be given too much weight,[95] and the opinion of an elder should not be allowed to overweigh the decision of several ecclesiastical tribunals.[96] A finding of title in plaintiff is justified by evidence showing the acquisition of title by adverse possession.[97]

5. TRIAL. The authorities are not agreed as to whether secession from a church or religious society is a question of law or fact. Thus while it has been held a question of law for the court,[98] other cases hold it to be a question of fact for the jury,[99] and still others consider it a mixed question of law and fact.[1] How-

alleges that plaintiffs accepted one doctrinal standard and defendants another is sufficiently definite, although it does not show the difference between the two confessions of faith); Yanthis *v.* Kemp, (Ind. App. 1908) 85 N. E. 976, 86 N. E. 451.

Insufficient allegation of want of authority.—A demurrer lies to a petition which does not allege that the acts complained of were done without authority or contrary to the doctrine of the church. Messinger *v.* Trinity Church, 8 Ohio Dec. (Reprint) 227, 6 Cinc. L. Bul. 397.

Sufficient allegation of expulsion.—An allegation in a bill to restrain the use of certain property, against certain expelled members of a religious society, that they were expelled after full and mature deliberation by the church, is sufficient, as it shows the expulsion to have been made by the church, and it will be presumed that everything necessary and proper was done. Berryman *v.* Reese, 11 B. Mon. (Ky.) 287.

In Missouri under statute, defendants, who charge in their answers that plaintiff trustees are holding the church property in violation of their trust, must assert this claim in an action to try title or be forever barred from asserting it. Bredell *v.* Alexander, 8 Mo. App. 110.

90. Simmons *v.* Allison, 118 N. C. 763, 24 S. E. 716.

91. Igleheart *v.* Rowe, 47 S. W. 575, 20 Ky. L. Rep. 821; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421. *Compare* McAuley's Appeal, 77 Pa. St. 397, where it is held that if plaintiffs allege secession by defendants, the burden of proof is cast on them.

That congregations conduct themselves in an orderly manner and according to the rules and usages of deliberative bodies will be presumed. Gibson *v.* Morris, 36 Tex. Civ. App. 593, 83 S. W. 226.

92. African Baptist Church *v.* White, 69 S. W. 757, 24 Ky. L. Rep. 646.

93. Perry *v.* Tupper, 74 N. C. 722; Dochkus *v.* Lithuanian Ben. Soc., 206 Pa. St. 25, 55 Atl. 779.

A document identified by members of an incorporated religious society as the constitution and by-laws used by the society is admissible in a suit to determine rights to property claimed by contending factions, although no vote of the society, adopting it as such, is shown. Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764.

Counsel will be permitted to read in argument extracts from writings of a person learned in theological matters which are merely argumentative, but not extracts from opinions of scientific witnesses which would be inadmissible as evidence. Jones *v.* Little Blue River Regular Baptist Church, Smith (Ind.) 47.

94. Baker *v.* Ducker, 79 Cal. 365, 21 Pac. 764; Field *v.* Field, 9 Wend. (N. Y.) 394.

On an issue as to how the members voted at a church meeting which fixed the status of the parties, it is proper to permit a witness to state how many persons were present at the meeting, but not to give a list of the members comprising the minority faction. Gibson *v.* Morris, 36 Tex. Civ. App. 593, 83 S. W. 226.

95. Happy *v.* Morton, 33 Ill. 398.

96. Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

97. Penny *v.* Central Coal, etc., Co., 138 Fed. 769, 71 C. C. A. 135.

98. Perry *v.* Tupper, 74 N. C. 722.

99. Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82; Gibson *v.* Morris, 28 Tex. Civ. App. 555, 67 S. W. 433.

1. Wiswell *v.* Cincinnati First Cong. Church, 14 Ohio St. 31. And see Stamford First Baptist Church *v.* Rouse, 21 Conn. 160, holding that the circumstances of that case were not so decisive in their character as to permit the court to pronounce a conclusion of law upon

ever, it is settled that it is for the court to determine whether a certain meeting of the church was a legal one,[2] and that it is for the jury to determine whether plaintiffs are the duly elected trustees so as to be entitled to sue, when that question is raised by answer and not by demurrer.[3] The failure of the court to name all plaintiffs and defendants in his charge to the jury does not constitute prejudicial error.[4]

6. JUDGMENT, RELIEF, AND COSTS. In general the court will grant such relief to either or both parties, as the circumstances of the case requires.[5] It is proper for the court to order that rival factions shall alternate in the use and possession of the church, pending the decision of the question of their rights by the church tribunals,[6] but not when the question is pending in the civil courts.[7] A judgment against the trustees will not bind the real estate, or the proceeds of a sale thereof, where the statutes from which they derive their authority confer no power upon them to alien or encumber the real estate of their own volition.[8] It has been held that a parish for whose benefit a suit is defended ought to defray the expenses of the suit,[9] and that a trustee who has wrongfully refused to execute his trust is properly charged with the costs of the proceeding brought to compel him to do so.[10]

IX. PEWS.

A. Estate, Interest, or Rights of Pewholder* — 1. GENERAL RULES.

A pew[11] is not absolute but qualified and conditional property,[12] the pewholder

them, and hence the question was one for the jury.

2. Gibson *v.* Morris, 28 Tex. Civ. App. 555, 67 S. W. 433.

3. Gallipolis Tp. First Presb. Soc. *v.* Smithers, 12 Ohio St. 248.

4. Gibson *v.* Morris, 36 Tex. Civ. App. 593, 83 S. W. 226.

5. Bartholomew *v.* Lutheran Cong., 35 Ohio St. 567; Bouldin *v.* Alexander, 103 U. S. 330, 26 L. ed. 308.

The parties are controlled by a statute limiting relief, accordingly as they seek or do not seek relief under it. Hadden *v.* Chorn, 8 B. Mon. (Ky.) 70; Curd *v.* Wallace, 7 Dana (Ky.) 190, 32 Am. Dec. 85.

A decree of sale of the church property and a division of the proceeds among the members may properly be made, where the organization is an independent one and the members are nearly equally divided by irreconcilable differences. Immanuels Gemeinde *v.* Keil, 61 Kan. 65, 58 Pac. 973 [*modifying* 8 Kan. App. 405, 54 Pac. 800].

The court will not decree the delivery of contributions, voluntarily made for the specific purpose of paying the salary of one pastor, to another pastor, even though the latter is regularly appointed. Bliem *v.* Schultz, 170 Pa. St. 563, 33 Atl. 337.

Appointment of trustees.— Where the decision of the court creates a vacancy in the board of trustees, it is proper for the court to appoint persons to fill the vacancies. Nash *v.* Sutton, 117 N. C. 231, 23 S. E. 178; Jones *v.* Wadsworth, 11 Phila. (Pa.) 239. But the court will not commit the execution of the trust to persons claiming to be trustees, but whose election is shown to have been secured by improper and illegal means. Smith *v.* Nelson, 18 Vt. 511.

Plaintiff will be given no more than he asks in his bill.— Bouldin *v.* Alexander, 103 N. S. 330, 26 L. ed. 308.

6. Bowden *v.* McLeod, 1 Edw. (N. Y.) 588.

7. Newhart *v.* Sampsel, 2 Pa. Dist. 647, 13 Pa. Co. Ct. 161.

8. Globe Furniture Co. *v.* Jerusalem Baptist Church, 103 Va. 559, 49 S. E. 657.

9. Dillingham *v.* Snow, 5 Mass. 547.

10. Newmyer's Appeal, 72 Pa. St. 121.

11. Pew defined see 30 Cyc. 1536.

Derivation of word "pew."— The word "pew" is derived from "puye" signifying an inclosed seat in a church. Brumfitt *v.* Roberts, L. R. 5 C. P. 224, 1 Hopw. & C. 387, 39 L. J. C. P. 95, 22 L. T. Rep. N. S. 301, 18 Wkly. Rep. 678.

12. Sohier *v.* Trinity Church, 109 Mass. 1; Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347; Daniel *v.* Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223, holding that the grant of a church pew in perpetuity does not operate to give the owner an absolute unqualified right of property, as in the case of a grant of land in fee, but only a right to sit therein.

It is in the nature of a mere usufruct.— Gamble's Succession, 23 La. Ann. 9; Sohier *v.* Trinity Church, 109 Mass. 1; Freligh *v.* Platt, 5 Cow. (N. Y.) 494; White *v.* Methodist Episcopal Church, 3 Lans. (N. Y.) 477.

An incorporeal immovable.— Gamble's Succession, 23 La. Ann. 9.

Similarly in England the interest of a pewholder in his pew is held to be of merely an incorporeal nature, or in the nature of an easement or right or privilege in the lands of another, and a pewholder is not the owner

*By Alexander Karst.

having no title to the soil on which the edifice stands, nor to the edifice itself, these being the property of the society, and the seizin and possession in the trustees,[13] but merely a right to use the pew, subject to and limited by the rights and powers of the corporation or trustees and all the conditions and limitations incident to such property, and subject to the superior title included in the ownership of the house,[14] and the pewholder's right is limited to an exclusive occupancy of a certain part of the meeting-house for the purpose of attending upon public worship, during the time that the church is open for church purposes,[15] subject

of that part of the church covered by the pew. Brumfitt *v.* Roberts, L. R. 5 C. P. 224, 1 Hopw. & C. 387, 39 L. J. C. P. 95, 22 L. T. Rep. N. S. 301, 18 Wkly. Rep. 678; Hinde *v.* Charlton, L. R. 2 C. P. 104, 12 Jur. N. S. 1008, 36 L. J. C. P. 79, 15 L. T. Rep. N. S. 472, 15 Wkly. Rep. 226; Mainwaring *v.* Giles, 5 B. & A. 356, 24 Rev. Rep. 417, 7 E. C. L. 198; Gully *v.* Exeter, 4 Bing. 290, 5 L. J. C. P. O. S. 178, 12 Moore C. P. 591, 29 Rev. Rep. 565, 13 E. C. L. 508.

Pew tenancy is as accurate a description as pew ownership.— Jones *v.* Towne, 58 N. H. 462, 42 Am. Rep. 602.

13. *In re* New South Meeting-House, 13 Allen (Mass.) 497; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray (Mass.) 1; Newark Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325; Woodworth *v.* Payne, 74 N. Y. 196, 30 Am. Rep. 298; Wheaton *v.* Gates, 18 N. Y. 395; *In re* Saugerties Reformed Dutch Church, 16 Barb. (N. Y.) 237; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103]; Abernethy *v.* Puritans' Church Soc., 3 Daly (N. Y.) 1; Heeney *v.* St. Peter's Church, 2 Edw. 608; *In re* Brick Presb. Church, 3 Edw. (N. Y.) 155; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; Church *v.* Wells, 24 Pa. St. 249.

Nor does the pew owner own the space above the pew, for there may be other pews above in the gallery. Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159.

The owners of pews are not owners of the fee, but have simply an easement in the freehold. Hartland Union Meeting-House *v.* Rowell, 66 Me. 400.

Pew owners are not tenants in common of land on which the edifice stands. Craig *v.* Franklin County, 58 Me. 479.

Builders of a church paid by permitting them to sell the pews at auction, with the right to retain such as should be unsold, to be sold or locked up at their election, took no title to the church edifice or the premises, but merely the right to sell for such price and on such terms as they might see fit, and their right did not extend to pews which the corporation might put in at its own expense, by way of repair or reconstruction, many years afterward. White *v.* M. E. Church First Soc., 3 Lans. (N. Y.) 477.

A pew can hardly be said to be property at all in a strict sense, being a mere easement enjoyed for a particular purpose. Curry *v.* Erie First Presb. Cong., 2 Pittsb. (Pa.) 40.

In a free church there is no renting of pews, but the habit of a person of sitting in a particular seat is a license, so that he cannot be removed without first being requested to go from that seat; but the trustees of a free church may assign seats, and forcibly remove one from a seat occupied without authority. Sheldon *v.* Vail, 28 Hun (N. Y.) 354.

14. *Maine.*— Leeds First Baptist Soc. *v.* Grant, 59 Me. 245.

Massachusetts.— Kimball *v.* Rowley Second Cong. Parish, 24 Pick. 347; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159, holding that were this not so the rights of the parish over the meeting-house could not be exercised on the most urgent occasion without interfering with the rights of each pewholder.

New Hampshire.— Colby *v.* Northfield, etc., Cong. Soc., 63 N. H. 63; Jones *v.* Towne, 58 N. H. 462, 42 Am. Rep. 602.

New York.— Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. 222 (holding that the rights of a pew owner not being absolute, but subject to that of trustees to alter the church, no constitutional question arises when the pew is destroyed from necessity or for the purposes of expediency or convenience); Voorhees *v.* Amsterdam Presb. Church, 17 Barb. 103 [*affirming* 8 Barb. 135, 5 How. Pr. 58]; Erwin *v.* Hurd, 13 Abb. N. Cas. 91; Bronson *v.* St. Peter's Church, 7 N. Y. Leg. Obs. 361; Shaw *v.* Beveridge, 3 Hill 26, 38 Am. Dec. 616.

Vermont.— Perrin *v.* Granger, 33 Vt. 101; Kellogg *v.* Dickinson, 18 Vt. 266.

See 42 Cent. Dig. tit. "Religious Societies," § 168 *et seq.*

15. *Louisiana.*— Gamble's Succession, 23 La. Ann. 9.

Massachusetts.— Sohier *v.* Trinity Church, 109 Mass. 1; *In re* New South Meeting-House, 13 Allen 497; Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray 1; Kimball *v.* Rowley Second Cong. Parish, 24 Pick. 347; Wentworth *v.* Canton First Parish, 3 Pick. 344; Daniel *v.* Wood, 1 Pick. 102, 11 Am. Dec. 151; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159.

New Jersey.— Newark Third Presb. Church *v.* Andruss, 21 N. J. L. 325.

New York.— Wheaton *v.* Gates, 18 N. Y. 395; White *v.* Syracuse M. E. Church First Soc., 3 Lans. 477; Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. 222; *In re* Reformed Dutch Church, 16 Barb. 237; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103]; Abernethy *v.* Puritans' Church Soc., 3 Daly 1; Erwin *v.* Hurd, 13 Abb. N. Cas. 91; Shaw

to the right of the society to have the meeting-house in such a place as will best accommodate the whole.[16] The pewholder cannot remove the pew,[17] nor convert it to other use, and can do nothing which may interfere with or impair the use of the building for the purpose for which it is used.[18] The right is limited too as to time, for if the house is burnt or destroyed by time the right is gone;[19] but the right extends so long as the pew remains or to the limit of the term of purchase,[20] and the pew owner cannot be despoiled of his property, and in some respects his rights are superior to those of the church, and they must exercise their general ownership in subordination to them, and be restricted to the general purposes for which the church was created.[21] In some states pew rights are in the nature of realty,[22] while in others they are personalty.[23]

v. Beveridge, 3 Hill 26, 38 Am. Dec. 616; Freligh *v.* Platt, 5 Cow. 494; Hartford First Baptist Church *v.* Witherell, 3 Paige 296, 24 Am. Dec. 223.

Pennsylvania.— Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; Curry *v.* Erie First Presb. Cong., 2 Pittsb. 40.

Vermont.— Howe *v.* Stevens, 47 Vt. 262; O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653; Perrin *v.* Granger, 33 Vt. 101; Kellogg *v.* Dickinson, 18 Vt. 266.

England.— Brumfitt *v.* Roberts, L. R. 5 C. P. 224, 1 Hopw. & C. 387, 39 L. J. C. P. 95, 22 L. T. Rep. N. S. 301, 18 Wkly. Rep. 678; Mainwaring *v.* Giles, 5 B. & A. 356, 24 Rev. Rep. 417, 7 E. C. L. 198; Gully *v.* Exeter, 4 Bing. 290, 5 L. J. C. P. O. S. 178, 12 Moore C. P. 591, 29 Rev. Rep. 565, 13 E. C. L. 508.

Canada.— Ridout *v.* Harris, 17 U. C. C. P. 88.

See 42 Cent. Dig. tit. "Religious Societies," § 168 *et seq.*

Mode of use.— Where a meeting-house is conveyed to trustees for the use of a certain church and society, for a place of public religious worship for such church and society, and for no other use, intent, or purpose whatsoever, and in the deeds of the pews in such house, which are given to an individual, the provisions of the conveyance of the house are referred to, and recognized, the pew owner has a right to the sole use of his pews on all occasions when the house is occupied, although it be opened for purposes different from those mentioned in the conveyance thereof, and he has a right to exclude all others from his pews on such occasions, by fastening the pew doors, or otherwise, in such manner as not to interrupt or annoy those who may occupy other pews; and any person who enters such pews, knowing the facts, is a trespasser, and liable to an action by the owner; and so, if the owner of such pews cover them in an offensive manner for the purpose of excluding others, and any person, in removing the offensive covering, do any unnecessary injury to the pew or its fixtures, he is liable to the owner in an action of trespass. Jackson *v.* Rounseville, 5 Metc. (Mass.) 127.

A corporation may hold a pew.— Reg. *v.* Warwick, 8 Q. B. 926, 10 Jur. 962, 15 L. J. Q. B. 306, 55 E. C. L. 926.

16. Antrim First Presb. Soc. *v.* Bass, 68 N. H. 333, 44 Atl. 485; Johnson *v.* Towne, 58 N. H. 462, 42 Am. Rep. 602; Fisher *v.* Glover, 4 N. H. 180; Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126.

17. Jones *v.* Towne, 58 N. H. 462, 42 Am. Rep. 602.

18. Daniel *v.* Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151; Freligh *v.* Platt, 5 Cow. (N. Y.) 494; Curry *v.* Erie First Presb. Church, 2 Pittsb. (Pa.) 40; Kellogg *v.* Dickinson, 18 Vt. 266.

The pewholder cannot change or decorate the pew to his fancy, nor cut it down and carry it away. Church *v.* Wells, 24 Pa. St. 249.

19. Voorhees *v.* Amsterdam First Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103]; Abernethy *v.* Puritans Church Soc., 3 Daly (N. Y.) 1; Freligh *v.* Platt, 5 Cow. (N. Y.) 494.

20. White *v.* Syracuse M. E. Church First Soc., 3 Lans. (N. Y.) 477.

21. Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

Withdrawal of hand of fellowship, although probably equivalent to excommunication, has no effect on the member's right to attend divine worship or to a seat in the edifice. Sheldon *v.* Vail, 28 Hun (N. Y.) 354; Morgan *v.* Curtis, 3 M. & R. 389.

22. Severance *v.* Whittier, 24 Me. 120; Newark Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325; St. Paul's Church *v.* Ford, 34 Barb. (N. Y.) 16; Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103; Vielie *v.* Osgood, 8 Barb. (N. Y.) 130; Ithaca First Baptist Church *v.* Bigelow, 16 Wend. (N. Y.) 28; O'Hear *v.* De Groesbriand, 33 Vt. 593, 80 Am. Dec. 653; Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422; Hodges *v.* Green, 28 Vt. 358; Kellogg *v.* Dickinson, 18 Vt. 266. See Gamble's Succession, 23 La. Ann. 9.

23. Antrim First Presb. Soc. *v.* Bass, 68 N. H. 333, 44 Atl. 485; Church *v.* Wells, 24 Pa. St. 249. See Gamble's Succession, 23 La. Ann. 9.

In Massachusetts pews were formerly real estate except in the city of Boston, under statute. Atty.-Gen. *v.* Federal St. Meeting-House, 3 Gray 1; Jackson *v.* Rounseville, 5 Metc. 127; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159. But now they are by statute personalty throughout the state. Locke *v.* Belmont Cong. Soc., 157 Mass. 589, 32 N. E. 949.

2. Alteration, Removal, or Destruction of Pew or Church Edifice, and Compensation For Pew. The church society may pull down and rebuild the meeting-house, make repairs, alterations, and improvements, and determine when it shall give place to a new one,[24] or may remodel the pew and alter the internal structure of the building, or enlarge or remove it, or sell the edifice and rebuild elsewhere;[25] and when these changes are necessary, and the pew is removed, the title is gone,[26] and its owner is not entitled to compensation;[27] but neither the society nor a majority of the congregation can, for mere purposes of embel-

Notes for rent of a pew are personalty.— Gamble's Succession, 23 La. Ann. 9.

24. Sohier *v.* Trinity Church, 109 Mass. 1; Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347; Wentworth *v.* Canton First Parish, 3 Pick. (Mass.) 344; Daniel *v.* Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151; Jones *v.* Towne, 58 N. H. 462, 42 Am. Rep. 602; White *v.* Methodist Episcopal Church First Soc., 3 Lans. (N. Y.) 477; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103]; Erwin *v.* Hurd, 13 Abb. N. Cas. (N. Y.) 91; Church *v.* Wells, 24 Pa. St. 249.

Injunction to restrain alteration, destruction, or sale of pew or church.—A court of equity will not enjoin the pulling down, rebuilding, or alteration of a church building when necessary, there being an adequate remedy at law. Van Horn *v.* Talmage, 8 N. J. Eq. 108; *In re* Brick Presb. Church, 3 Edw. (N. Y.) 155; Heeney *v.* St. Peter's Church, 2 Edw. (N. Y.) 608. Nor will it enjoin the trustees from removing and changing the pews of the church. Solomon *v.* Congregation B'nai Jeshurun, 49 How. Pr. (N. Y.) 263, holding that, where a statute expressly gives the trustees of a religious society power to regulate and order the renting of pews, an injunction will not lie to restrain the society from removing and changing pews of the church, the action of the society being ratified by the board of trustees. But it has been held that the fact that an illegal sale of a church pew, under an attachment, would interfere with the owner's use, and outrage his religious feelings, is sufficient to give a court of equity jurisdiction to enjoin such illegal sale, since the owner could have no adequate remedy at law. Deutsch *v.* Stone, 11 Ohio Dec. (Reprint) 436, 27 Cinc. L. Bul. 20. But see Abernethy *v.* Puritans Church Soc., 3 Daly (N. Y.) 1, holding that, since a pew owner has no legal interest in the church edifice, but only a right to occupy his pew during divine service, an injunction against the sale of a pew by trustees of a religious society for non-payment of assessments thereon cannot be granted on the ground that he will be deprived by such sale of his proportion of the proceeds of the sale of the church edifice at the expiration of the lease of the land on which it stands. And equity may restrain a school-district from converting a meeting-house into a schoolhouse. Howe *v.* Jericho School Dist. No. 3, 43 Vt. 282.

Certiorari to review action of church officials.— The control of church officials over the pews of a church being entirely discretionary, certiorari will not lie to review the action of the officals in relation thereto, in the absence of any contract with the prosecutor, for the occupation of his pew. Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230.

The corporation may change pews into slips without the assent of each pew owner. Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

25. Sohier *v.* Trinity Church, 109 Mass. 1.

26. White *v.* Methodist Episcopal Church First Soc., 3 Lans. (N. Y.) 477; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103], holding that if from decay or other injury the house has to be rebuilt, the right of the pewholder is gone.

If there is a malicious abuse of the power by a majority of the members by which the pews of the minority may be destroyed, the latter have a remedy to the extent of the injury received. Wentworth *v.* Canton First Parish, 3 Pick. (Mass.) 344; Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103].

A pewholder cannot recover for a temporary interruption for necessary repairs. Van Houten *v.* Totowa First Reformed Dutch Church, 17 N. J. Eq. 126. See Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirming* 17 Barb. 103].

A pewholder cannot maintain an action to recover possession of the pew formerly occupied, where such pew was removed in the making of alterations in the church. Voorhees *v.* Amsterdam Presb. Church, 8 Barb. (N. Y.) 135, 5 How. Pr. 58 [*affirmed* in 17 Barb. 103].

27. Fassett *v.* Boylston First Parish, 19 Pick. (Mass.) 361; Howard *v.* North Bridgewater First Parish, 7 Pick. (Mass.) 138; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222; Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103 [*affirming* 8 Barb. 135, 5 How. Pr. 58] (holding that where a church edifice having become so dilapidated as to be dangerous for the society to worship in, the corporation owning it substantially rebuilt it, except the walls, remodeling the inside so that the pulpit occupied the place of plaintiff's pew, plaintiff was not entitled to compensation for his pew); Howe *v.* Stevens, 47 Vt. 262; Kellogg *v.* Dickinson, 18 Vt. 266.

lishment or improvement, deprive the pew owner of his property without compensation, and if in taking down or rebuilding a church or meeting-house the pews are destroyed for a merely useful or convenient purpose, an indemnity must be provided for the pewholder,[28] who, it has been held, can be deprived of his pew without compensation, only when the meeting-house has become so old, decayed, or ruinous as to be unfit for use, and when in fact the pew has ceased to be of any use or value as a pew;[29] under which circumstances the materials may be worked into a new house or may be sold and the proceeds put into the treasury to aid in rebuilding, and the individual pewholders cannot claim a share in the materials or proceeds.[30] But it has been held that where a religious edifice is sold, and a new one erected with the proceeds, it is the duty of the trustees to tender to a pewholder a pew in the new edifice corresponding in location to that which he owned in the old building, on the payment of such a sum as, in equity, he ought to pay, if the cost of the new structure exceeds the proceeds of the sale of the old property, together with the sums in the treasury of the society, and if they fail to allot him a pew he is entitled to damages for his loss;[31] and where, with the assent of a religious society owning a meeting-house, repairs and alterations changing the location of the pews are made by the pewholders, an equitable assignment of the new pews among the pewholders by a committee of the pewholders, acting with their implied assent and in pursuance of a vote of the society, is valid.[32] The action of church trustees in making repairs inter-

28. Aylward *v.* O'Brien, 160 Mass. 118, 35 N. E. 313, 22 L. R. A. 206; Fassett *v.* Boylston First Parish, 19 Pick. (Mass.) 361; Howard *v.* North Bridgewater First Parish, 7 Pick. (Mass.) 138; Daniel *v.* Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151; Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Voorhees *v.* Amsterdam Presb. Church, 17 Barb. (N. Y.) 103 [*affirming* 8 Barb. 135, 5 How. Pr. 58]; Kellogg *v.* Dickinson, 18 Vt. 266.

If reconstruction of the edifice is unnecessary but a mere matter of taste or fancy, and the owner of a pew is dissatisfied with the change, it seems that he may refuse to accept the pew erected in the place of it and call upon the church to refund him to price paid for the original pew or whatever damages he suffered in consequence of the unnecessary destruction of his pew. Curry *v.* Erie First Presb. Cong., 2 Pittsb. (Pa.) 40, holding, however, that where a member of a church was the owner of a pew in the church building, for which he paid a tax of a certain amount, and the church was remodeled, and he chose a pew at a higher price, his acceptance of the new pew amounted to an abandonment of the old one, and a waiver of all the conditions and stipulations contained in his deed.

Where pews are destroyed to repair and improve the meeting-house the pews must be appraised and the pewholders duly indemnified for the loss of their property. Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

The proprietors may tender the owner the value, and thereby bar his action for damages, where after taking all preliminary legal steps a pew is removed from the church. Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347.

29. Gorton *v.* Hadsell, 9 Cush. (Mass.) 508 (holding that unless a meeting-house at the time it was torn down by a vote of the proprietors is not only unfit for public worship, but so old and ruinous as to render its entire demolition necessary, a pewholder is entitled to indemnity for the destruction of his pew); Kimball *v.* Rowley Second Cong. Parish, 24 Pick. (Mass.) 347. But see Fassett *v.* Boylston First Parish, 19 Pick. (Mass.) 361, holding that if a parish abandons its meeting-house as a place of public worship, although it continues to be fit for that purpose, and erect a new one on a different site, it does not thereby subject itself to any liability to the proprietor of a pew in the old meeting-house; it not appearing that the parish acted wantonly, or with any intention to injure him.

30. Wentworth *v.* Canton First Parish, 3 Pick. (Mass.) 344; Kellogg *v.* Dickinson, 18 Vt. 266.

Effect on pew of failure to repair meeting-house.— Where a meeting-house was built upon land with the permission of the owner, who subsequently conveyed the land to trustees in trust, to be occupied for a meeting-house common, or green, and for the continuation of a meeting-house thereon; and, when it ceased to be occupied for that purpose, to revert to the grantor, the failure to keep the house in such repair that it could be occupied for public worship would not of itself terminate the right of a pewholder to his pew, nor leave him without right to maintain an action for injury done thereto by a stranger; but would only make his right thereto less valuable, and therefore lessen the amount he could recover. Howe *v.* Stevens, 47 Vt. 262.

31. Samuels *v.* Congregation Kol Israel Anshi Poland, 52 N. Y. App. Div. 287, 65 N. Y. Suppl. 192; Mayer *v.* Temple Beth El, 23 N. Y. Suppl. 1013.

32. Colby *v.* Northfield, etc., Cong. Soc., 63 N. H. 63.

fering with or destroying pews is presumed to accord with the wishes of a majority of the society.[33]

B. Assignment and Conveyance. Religious societies may make such reasonable by-laws and regulations respecting the sale and purchase of pews as they think their interests as a religious society may require,[34] so as to exclude persons holding obnoxious opinions, and thus prevent a change in the society by an influx of persons of a different faith,[35] and the doctrine that conditions

33. Cooper *v.* Sandy Hill First Presb. Church, 32 Barb. (N. Y.) 222.

34. French *v.* Old South Soc., 106 Mass. 479; Atty.-Gen. *v.* Federal St. Meeting-house, 3 Gray (Mass.) 1.

35. French *v.* Old South Soc., 106 Mass. 479; Atty.-Gen. *v.* Federal St. Meeting-house, 3 Gray (Mass.) 1 (holding that otherwise, if it were free to anybody to purchase pews without restraint, a number of people of another denomination, finding pews low, might purchase them and become a majority and thus turn the proper congregation out of their own house); Petty *v.* Tooker, 21 N. Y. 267 [*affirming* 29 Barb. 256].

Breach of condition held continuous.— Where a pew was held on condition that it should be forfeited if the owner left the church without offering it to the society for a certain price, and the owner left without making the offer, and four years afterward the forfeiture was declared and the member excluded from the meetings of the corporation, and three years thereafter they took possession of the pew to enforce the forfeiture, but up to the time of entry they permitted the member to receive the rent of the pew and collected the pew tax from him, and on the day after the date of entry collected from him the pew tax for the preceding quarter, the breach of the condition was continuous and was not waived, and the forfeiture was complete. Crocker *v.* Old South Soc., 106 Mass. 489.

A conveyance of a pew to a non-member is void where a by-law of the society prohibits sales of pews to non-members. Price *v.* Lyon, 14 Conn. 279.

In assumpsit for the price of a pew sold at auction, plaintiff is not bound to prove his title to enable him to recover. Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227.

In England.— The assignment and tenure of pews in England was discussed at length in Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230. As is there shown, before the Reformation, no separate seats were allowed in churches, the body of the church being common to all parishioners; but after the Reformation a practice arose to assign particular seats to individuals, and this assignment of seats was made by the bishop or ordinary, by a grant called a faculty which was a mere license, and was personal to the licensee; and all disputes concerning it were determined in the spiritual courts (Newark Third Presb. Cong. *v.* Andruss, 21 N. J. L. 325; 1 Burn Eccl. L. 358, "Church" VII. The disposal of seats in the nave of the church appertained to common right to the bishop of the diocese, "so that he may place and displace whomsoever he pleaseth" (Boothly *v.* Baily, Hob. 69, 80 Eng. Reprint 218; 1 Burn Eccl. L. 359; Comyns Dig. tit. "Eglise" 3), and the ordering of it was a matter merely spiritual (Corven's Case, 12 Coke 105, 77 Eng. Reprint 1380; Hool Church Dict. tit. "Pews"). The discretionary power of ordering the seats in the church which, by the common law, was vested in the ordinary, by custom was exercised by the churchwardens, who were the representatives of the ordinary in that respect, and whose assignment of seats was presumed to have been made with the approbation and consent of the ordinary. 2 Bacon Abr. 242; 1 Burn Eccl. 359; "Church Warden" II; Wood Inst. 88, 90. Consequently it has become the settled law of the English courts that churchwardens have a discretionary power to appropriate the pews in the church, subject only to the control of the ordinary. Reynolds *v.* Monkton, 2 M. & R. 384; *Re* St. Columb Cathedral Church, 8 L. T. Rep. N. S. 861. In England the right to a pew can be acquired only by a faculty, which is personal to the grantee, and cannot of itself be given a transmissible or heritable quality (Stocks *v.* Booth, 1 T. R. 428, 1 Rev. Rep. 244; Clifford *v.* Wicks, 1 B. & Ald. 498, 19 Rev. Rep. 364), or by prescription, which will not arise from a possession, however long, unless it be annexed to a house, and it also be shown that the pew was repaired by the claimant and those under whom he claims for the prescriptive period (Boothly *v.* Baily, *supra*; Stocks *v.* Booth, *supra*), or by a grant which, creating an incorporeal interest in lands, must be in writing and under seal; or by a letting for a limited period by the proper authorities of the church (Livingston *v.* Trenton Trinity Church, *supra*), and in an action for disturbance in the enjoyment of the right, plaintiff must prove a prescriptive right or a faculty and must claim it in the declaration as appurtenant to a messuage in the parish (Mainwaring *v.* Giles, 5 B. & A. 356, 24 Rev. Rep. 417, 7 E. C. L. 198; Stocks *v.* Booth, *supra*; Brumfitt *v.* Roberts, L. R. 5 C. P. 232, 1 Hopw. & C. 387, 39 L. J. C. P. 95, 22 L. T. Rep. N. S. 301, 18 Wkly. Rep. 678), for the grant of a pew to any person without regard to a messuage or inhabitancy within the parish is void by the general law (Mainwaring *v.* Giles, *supra*; Stocks *v.* Booth, *supra*; Brumfitt *v.* Roberts, *supra*), and it is only a legal right of possession acquired by some one of these methods that can be made the foundation of legal proceedings for its protection in a court of law; otherwise, the disturbance of the possession is a matter of ecclesiastical cognizance only (Stocks *v.* Booth,

against alienation in a conveyance in fee simple are void has never been held applicable to conveyance of pews.[36] Where a pew is considered real estate,[37] an instrument conveying it must have the solemnities required by law for the transfer of real estate by deed.[38] Where the charter of a church declared that the purchasers of pews in fee simple shall hold them forever, free from any liability for debts, and that they shall never be susceptible of any species of mortgage, the pews are a distinct property, and when owned by an individual are not liable to be seized for his debts.[39]

C. Taxes, Rents, and Forfeitures. Where no mode of taxation is prescribed by the act of incorporation, a religious society may adopt any mode which is not prohibited by law, and may, with the assent of all the proprietors, tax the pews in the meeting-house and regulate the proceedings therefor by its by-laws,[40] and may let or sell the pews in the meeting-house on condition that the lessee or grantee should pay a certain sum yearly or such taxes as may be lawfully assessed thereon.[41] But where the constitution of the society regulates the matter in order to justify the sale of a pew for non-payment of an assessment laid by the society owning the church, it is requisite that the assessment and forfeiture or sale be in conformity with the provisions of the constitution and by-laws of the

supra; Mainwaring *v.* Giles, *supra*). The English ecclesiastical law governing pew rights forms the basis of the law regulating the affairs of the episcopal church in this country, and is in force except so far as it has been modified and changed by statute and by the usages and canons of the church. Livingston *v.* Trenton Trinity Church, *supra*; Lynd *v.* Menzies, 33 N. J. L. 162.

36. French *v.* Old South Soc., 106 Mass. 479, holding also that a condition prescribed by a by-law in the deeds of pews by an incorporated religious society, which owns its meeting-house in fee simple, and is composed exclusively of the successive pewholders, that the grantee shall forfeit the pew if he leave the meeting-house without first offering it to the society for a certain price, is not invalid as being repugnant to the grant.

37. See *supra*, text and note 22.

38. Price *v.* Lyon, 14 Conn. 279, holding that an instrument in writing, in the form of a bill of sale, and unacknowledged, is not sufficient to convey an interest in a pew.

Construction of contract for deed of pew see Foote *v.* West, 1 Den. (N. Y.) 544.

An assignment of a certificate of ownership, in the manner provided by the by-laws of the society, will not protect the assignee against an attachment creditor of the former owner without notice of the assignment. Barnard *v.* Whipple, 29 Vt. 401, 70 Am. Dec. 422.

Defenses to action on note for purchase of pew.—A note given in consideration of a sale of pews to defendant followed by possession cannot be avoided on the ground that the vendor refused to convey, the remedy being a suit for specific performance. Freligh *v.* Platt, 5 Cow. (N. Y.) 494. And it is no defense to a suit on a note given for a deed to a pew in a meeting-house, which by statute is held to be real estate, that the consideration had failed because of prior encumbrances on the building under which the same was sold, where it appears that he had used and occupied the pew under the deed for nearly three years before the ouster. There must be a total failure of consideration; if anything passed by the conveyance a note given for the consideration is recoverable, and if there be a partial failure of consideration the grantee is remitted to his covenants, if there be any, for his remedy. Severance *v.* Whittier, 24 Me. 120.

Where judgment is given and execution levied on a pew, everything necessary for a statute title must be made matter of record. Sargent *v.* Peirce, 2 Metc. (Mass.) 80, holding that if the execution be not recorded on the parish books it is a defect fatal to the title.

39. New Orleans City Bank *v.* McIntyre, 8 Rob. (La.) 467.

40. Mussey *v.* Bulfinch St. Soc., 1 Cush. (Mass.) 148 (holding also that proprietors of pews consent to the taxation of their pews by receiving deeds expressly authorizing the levy and assessment of taxes thereon, and that one who purchased a pew and thereby became a member of the corporation subsequent to the change of name and received a deed from the society under its new name was estopped from calling in question the validity of the proceeding in regard to the change of name); Abernethy *v.* Puritans Church Soc., 3 Daly (N. Y.) 1 (holding that where a deed of a pew in a church edifice is conditioned that the grantee shall pay annually a sum equal to ten per cent of the original appraised value of the pew and whatever else shall be assessed thereon, and provides for a forfeiture and sale of the pew in case of failure of payment of the assessment, it is not a violation of the contract with the grantee that the pew is forfeited and sold on his failure to pay an assessment of fifteen per cent of the original appraised value of the pew).

41. Mussey *v.* Bulfinch St. Soc., 1 Cush. (Mass.) 148, holding also that on the forfeiture of a pew for the non-payment of the taxes due thereon for a year, according to the condition in the deeds, the corporation may deduct and retain from the proceeds all the

society.[42] A tax assessed upon a pew by a religious corporation in part for purposes not specifically named in a deed of the pew, which alone gives the power to make such assessment, and which strictly defines and limits such power, is invalid *in toto*;[43] but a pewholder in a church whose deed from the society before it was incorporated expressly subjected his pew to all rates and taxes imposed thereon by the trustees for expenses and repairs cannot object to the repeal, without his assent, of a clause in the charter subsequently obtained, which requires the assent of a majority of the pewholders to the imposition by the trustees of any pew tax, where the general assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure.[44]

D. Actions For Violation of Pewholder's Right. A pewholder has an exclusive right to an undisturbed occupancy of his pew, and he can maintain trespass, ejectment or a writ of entry, or an action on the case against any one who improperly disturbs him in the legitimate exercise of his legal right to use the pew during divine service,[45] even against the society or person in whom the

taxes then due, as well those which had been due less, as those which had been due more, than a year.

42. Perrin *v.* Granger, 33 Vt. 101, 30 Vt. 595.

Constitution held not to authorize sale or forfeiture of pew.—A provision in the constitution of an association for the erection and maintenance of a meeting-house for religious worship, authorizing the members to tax themselves for the purpose of making repairs to the building, does not authorize a sale or forfeiture of the pews of the delinquent members, by the association, for non-payment of taxes against them. Perrin *v.* Granger, 30 Vt. 595.

Executors of a pew owner are not bound to pay pew rent accruing after the owner's death. The remedy of the church in such case is by sale of the pew. Church *v.* Wells, 24 Pa. St. 249. See Christ Church *v.* Simons, 2 Rich. (S. C.) 368.

Right to tax pew as affected by proceeding to compel society to purchase.— The right of a religious society to tax a pew is not affected by the commencement of a statutory proceeding to compel the society to purchase the pew, where such proceedings are abandoned before the tax is levied. Curtis *v.* Quincy First Cong. Soc., 108 Mass. 147, holding that where the owner of a pew applied to the society under authority for the purpose of having the society purchase the pew, and appraisers were appointed, but failed to agree, and for more than ten years plaintiff took no further steps to cause the purchase to be completed, and the parish never exercised any ownership over the pew, or interfered with the possession of plaintiff, who occupied it thereafter, there was sufficient evidence of abandonment of the application, and the society might tax the pew.

Where pews were by vote sold at auction, free of rent, for the purpose of raising money to complete the building, the trustees have no power to levy assessments laid by the corporation on the pews in order to defray the salary of the minister, and purchaser of a pew is not liable therefor personally, unless some contract or promise to pay is shown. Hebron First Presb. Cong. *v.* Quackenbush, 10 Johns. (N. Y.) 217.

Statute not retroactive.—A statute giving the power to assess pews for the support of a minister, to any corporation, for religious purposes, in any meeting-house which they may thereafter erect, does not apply to such a corporation whose church was erected before the passage of the act. Downs *v.* Bowdoin Square Baptist Soc., 149 Mass. 135, 21 N. E. 294, holding also that where afterward another statute was passed by which corporations which had erected their meeting-houses before the passage of the first act were allowed to assess pews, a corporation not complying with its conditions could not have the benefit of the second act.

43. Fall River First M. E. Soc. *v.* Brayton, 9 Allen (Mass.) 248.

44. Bailey *v.* Power St. M. E. Church, 6 R. I. 491, holding also that notice to a pewholder of the pendency of a petition to the general assembly for a repeal of a clause in the church charter requiring the assent of a majority of the voters to the imposition by the trustees of any pew tax is not necessary to give validity to an act of repeal.

45. Gay *v.* Baker, 17 Mass. 435, 9 Am. Dec. 159; Shaw *v.* Beveridge, 3 Hill (N. Y.) 26, 38 Am. Dec. 616; Hartford First Baptist Church *v.* Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653 (holding that where subscribers for the erection of a Roman catholic church contracted for the purchase of a site, but no grantee was named, and after the edifice was erected, and the pews allotted, the land was conveyed to the bishop of the diocese, he holds the legal title as trustee for the subscribers, who may maintain trespass for the destruction of their pews by him); Perrin *v.* Granger, 33 Vt. 101; Kellogg *v.* Dickinson, 18 Vt. 266 (holding that a pew owner may sustain an action of trespass on the case against one who unlawfully disturbs him in the possession of his pew).

A tenant in common with others of a meeting-house may maintain trespass for injuring one of the pews, against the person having no title either in the pew or in the house. Murray *v.* Cargill, 32 Me. 517.

One who had a loose seat or bench which had been standing for ten or eleven years in

title to the land and building is vested,[46] and although others may have so far obtained possession of a meeting-house as to oust the society, yet a pewholder may maintain trespass for the first invasion of his individual right to his pew after such ouster;[47] but trespass will not lie for a destruction of a pew by pulling down the meeting-house, in order to rebuild it by order of the parish;[48] and a pewholder cannot maintain trespass for the mere breaking and entry of the meeting-house in which his pew is situate; but he may for the destruction of his pew, although he sue for the entry with it, the destruction of the pew being the gist of the action;[49] and a collector who makes a sale of a pew under an unauthorized assessment for repairs is jointly liable in an action of case with the purchaser under the sale who alone actually disturbs the owner, both being principals.[50]

X. CHURCH TRIBUNALS AND JUDICIAL OR LEGISLATIVE SUPERVISION.*

A. General Rules. When a person becomes a member of a church, he does so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction he has no right to invoke the supervisory power of a civil court, so long as none of his civil rights are involved,[51] and all questions relating to faith, practice, doctrine, and discipline of the church and its members belong to the ecclesiastical tribunal to which they have voluntarily subjected themselves, and their decisions are final,[52] for

the place assigned it by the trustees, and used by him as a seat during services, did not have seizin or possession as a pewholder, entitling him to maintain trespass for breaking and entering his close; but if he wished to test the trustee's right to convert the church into a schoolhouse, his remedy was by action on the case for a disturbance of his general rights as a member of the society, or by suit to restrain the proceedings of the trustees. Niebuhr *v.* Piersdorff, 24 Wis. 316.

46. Howe *v.* Stevens, 47 Vt. 262; O'Hear *v.* De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653.

47. Howe *v.* Stevens, 47 Vt. 262.

48. Daniel *v.* Wood, 1 Pick. (Mass.) 102, 11 Am. Dec. 151.

49. Howe *v.* Stevens, 47 Vt. 262.

50. Perrin *v.* Granger, 33 Vt. 101.

51. *Illinois.*— Ferraria *v.* Vasconcellos, 31 Ill. 25.

Indiana.— Hadley White Lick Quarterly Meeting of Friends *v.* Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [*quoted* and *followed* in O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462]; Gaff *v.* Greer, 88 Ind. 122, 45 Am. Rep. 449.

Kentucky.— Gibson *v.* Armstrong, 7 B. Mon. 481; Shannon *v.* Frost, 3 B. Mon. 253.

Massachusetts.— Farnsworth *v.* Storrs, 5 Cush. 412 (holding that churches have authority, to which every member by entering into the church covenant submits, to deal with their members for immoral and scandalous conduct; and for that purpose to hear complaints, to take evidence, to decide, and, upon conviction, to administer punishment by way of rebuke, censure, suspension, and excommunication); Remington *v.* Congdon, 2 Pick. 310, 13 Am. Dec. 431.

Mississippi.— Dees *v.* Moss Point Baptist Church, (1895) 17 So. 1.

Missouri.— State *v.* Farris, 45 Mo. 183.

New York.— Robertson *v.* Bullions, 9 Barb. 64 [*affirmed* in 11 N. Y. 243]; McGuire *v.* St. Patrick's Cathedral, 3 N. Y. Suppl. 781 [*affirmed* in 54 Hun 207, 7 N. Y. Suppl. 345].

Pennsylvania.— Heidelberg German Reformed Church *v.* Com., 3 Pa. St. 282.

See 42 Cent. Dig. tit. "Religious Societies," § 93.

State's legislatures cannot pass laws interfering with matters of religious faith or worship or the doctrine or discipline of a church. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

52. *Georgia.*— Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184, holding that the general assembly of the Cumberland presbyterian church, under the constitution of that organization, has authority to determine whether the teaching, doctrines, and form of government of another organization are in accord with it, and, if found so, to unite it with such organization upon such terms and under such name as the judgment of the general assembly shall dictate.

Illinois.— Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620]; Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.

Louisiana.— State *v.* Hebrew Cong., etc., 31 La. Ann. 205, 33 Am. Rep. 217.

Maryland.— Tartar *v.* Gibbs, 24 Md. 323, holding that the question whether or not devotional singing, forming a part of the public worship of a particular religious society, should be accompanied with instrumental music, must be determined by those who administer the discipline of the church to which they belong.

New Hampshire.—Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82, holding that it is not

* By Alexander Karst.

over the church as such, or its officers, the legal tribunals do not profess to any jurisdiction, except where temporal rights are involved,[53] and the decisions of

the province of courts of justice to decide or to inquire what system of religious faith is most consistent, or what religious doctrines are true or what are false, in any case, and it seldom becomes necessary for courts to discuss or to examine the creeds or confessions or systems of faith of the different religious sects, in determining questions of law, except in cases where they are called upon to see that a trust or charity is administered according to the intention of the original founders.

New Jersey.— Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230; Den *v.* Bolton, 12 N. J. L. 206.

New York.— Baxter *v.* McDonnell, 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765; Hartford First Baptist Church *v.* Witherell, 3 Paige 296, 24 Am. Dec. 223.

Whether the religious teachings faith and church polity of various synods differ, in essential particulars, is a question for ecclesiastical tribunals, not for the civil courts. Wehmer *v.* Fokenga, 57 Nebr. 510, 78 N. W. 28. See Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184.

Liability in civil court no bar to ecclesiastical proceeding.— The liability of a clergyman to indictment and conviction in the civil courts for offenses charged in an ecclesiastical proceeding against him in a diocesan court forms no part of the proceeding in the latter court. Satterlee *v.* U. S., 20 App. Cas. (D. C.) 393, holding that the general convention of the church has the power to make and enforce the canon providing that every minister of the church shall be liable to presentment and trial for certain offenses including that of crime or immorality, there being nothing in the provisions of the canon violative of or in conflict with personal civil rights of those liable to be tried therein.

The constitutional guaranty of freedom of religious worship forbids judicial control of proceedings of ecclesiastical bodies which do not violate civil or property rights. Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620]; Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95 [*quoted* and *followed* in O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462].

53. *Illinois.*— Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620]; Sand Creek Christian Church *v.* Church of Christ, 219 Ill. 503, 76 N. E. 703 (holding that the courts have no jurisdiction to determine which faction of a congregation is in practices and beliefs correct from an ecclesiastical standpoint, except so far as property rights are involved); Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.

Indiana.— Hadley White Lick Quarterly Meeting of Friends *v.* Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [*quoted* and *followed* in O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462] (holding that civil courts in this country have no ecclesiastical jurisdiction and cannot revise or question ordinary acts of church discipline, and can interfere in church controversy only where civil rights or the rights of property are involved); Grimes *v.* Harmon, 35 Ind. 198, 254, 9 Am. Rep. 690 [*quoted* and *followed* in O'Donovan *v.* Chatard, *supra*] (holding that over the church, as such, legal tribunals do not have any jurisdiction, except to protect the civil rights of others and to preserve the peace, and all the questions relating to the faith and practice of the church and its members, belong to the church judicature to which they have voluntarily subjected themselves, and the civil courts will interfere to determine questions of faith and practice of a church only when rights of property and civil rights are involved); Yanthis *v.* Kemp, (App. 1908) 85 N. E. 976 (holding that civil courts cannot determine questions of a purely ecclesiastical nature, and all such controversies should be settled, as far as possible, by the organizations themselves, although, when such questions become facts on which property rights depend, the civil courts may decide them).

New Jersey.— Jennings *v.* Scarborough, 56 N. J. L. 401, 28 Atl. 559; Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230.

New York.— Baxter *v.* McDonnell, 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765; Westminster Presb. Church *v.* Findley, 44 Misc. 173, 89 N. Y. Suppl. 801; Hartford First Baptist Church *v.* Witherell, 3 Paige 296, 24 Am. Dec. 223.

Ohio.— Messinger *v.* Trinity Church, 8 Ohio Dec. (Reprint) 227, 6 Cinc. L. Bul. 397, holding that civil courts will not interfere with the conduct of church officers, although it is alleged that their conduct is resulting in dividing the church into factions, depreciating its property, reducing its revenues, and emptying its pews, unless it is shown that their acts are illegal, since the courts have no jurisdiction, if no violation of trust or property rights are involved.

South Carolina.—Morris St. Baptist Church *v.* Dart, 67 S. C. 338, 45 S. E. 753, 100 Am. St. Rep. 727.

See 42 Cent. Dig. tit. "Religious Societies," § 93 *et seq.*

The sufficiency of a presentment to an ecclesiastical court in respect to the specifications of time, place, and circumstances will not be inquired into by a secular court, but must be determined by the spiritual court before which the cause is to be tried. Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.

The division of a local presbyterian church into two organizations by the act of a presbytery, according to the recognized ecclesiastical law of the presbyterian church, is binding upon the local church, and upon the civil courts whenever material to pending litigation. Wheelock *v.* Los Angeles First Presb. Church, 119 Cal. 477, 51 Pac. 841.

[X, A]

competent church tribunals upon purely ecclesiastical matters are binding, conclusive, and not reviewable by the civil courts,[54] and where a civil right or the

Courts will not compel an individual to attend worship in any place, nor remain connected with any church, nor to receive any one as his pastor. Feizel *v.* Wyandotte City M. E. Church First German Soc., 9 Kan. 592.

Union between religious bodies.— It is no part of the duty of civil courts to pass on the issue of expediency of any union between religious bodies, and it is the right of property alone that the courts are called on to decide. Trinity M. E. Church *v.* Harris, 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636 (holding that where, according to the book of discipline of the methodist episcopal church, as construed by its bishops and its ecclesiastical authorities, the bishop who presides at the annual conference has the power to consolidate two or more churches into one church, and the trustees of the church thereby become in the law of the church the successors of the trustees of the churches whose existences were terminated, and such construction is the common understanding and practice of the church, and has never been called in question, it is binding on the courts); Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

Civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions and all matters which concern doctrines and disciplines. Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Hadley White Lick Quarterly Meeting of Friends *v.* Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136; East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663, holding that civil courts never assume to determine the abstract truth or falsity of any religious doctrine.

The general court of Virginia had jurisdiction, as an ecclesiastical tribunal, to punish or depose a regularly ordained minister of the church of England. Godwin *v.* Lunan, Jeff. (Va.) 96.

54. *Connecticut.*—Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

Illinois.— Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620]; Kuns *v.* Robertson, 154 Ill. 394, 40 N. E. 343; Schweiker *v.* Husser, 146 Ill. 399, 34 N. E. 1022 [*affirming* 44 Ill. App. 566].

Indiana.— O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462.

Iowa.— Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

Kentucky.— Perry *v.* Wheeler, 12 Bush 541; Shannon *v.* Frost, 3 B. Mon. 253.

Minnesota.—East Norway Lake Norwegian Evangelical Lutheran Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663, holding that when the contract of association of a religious body provides, or by implication contemplates, that what is according to or consistent with a particular doctrine shall be determined by some religious judicatory, the determination of such judicatory, duly made, when the matter is properly brought before it, is conclusive on the civil courts.

Missouri.— State *v.* Farris, 45 Mo. 183, holding that the general assembly of the presbyterian church, commonly known as the "old school," combines within itself all the branches, executive, legislative, and judicial, of a complete government, and possesses extensive original appellate jurisdiction; and its action in matters of purely ecclesiastical concern cannot be revised, modified, or impaired by the civil courts.

Nebraska.— Bonacum *v.* Harrington, 65 Nebr. 831, 91 N. W. 886 (holding that courts will not review the judgments or acts of the governing authorities of a religious organization with reference to its internal affairs, for the purpose of ascertaining their regularity or accordance with the discipline and usages of such organization; and it makes no difference in the application of the rule whether the governing authority is confided to one person, or to synod or conference, nor whether the mode of procedure is in accord with the ordinary course of investigations or trials); Wehmer *v.* Fokenga, 57 Nebr. 510, 78 N. W. 28 (holding that the decision of an ecclesiastical tribunal of the church as to a question of faith and church polity is conclusive in a court of law on an issue between contending factions of a congregation to determine their rights as members); Pounder *v.* Ashe, 44 Nebr. 672, 63 N. W. 48 (holding that where a local church organization is a member of an association of congregations having general rules and government, the decisions of the association are binding on the local organization, so far as they relate to the church government, and will be so regarded by civil courts which will not review proceedings of church tribunals on questions involving church discipline).

New York.— Baxter *v.* McDonnell, 155 N. Y. 83, 49 N. E. 667, 40 L. R. A. 670 [*reversing* on other grounds 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765] (holding that when a plaintiff brings an action founded upon a custom or law of the church to which he belongs, it is a good defense thereto that he has already submitted his claim to an ecclesiastical court, which has passed upon it adversely); Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 (holding that where ecclesiastical tribunals have jurisdiction, the civil courts cannot interfere where they have proceeded according to the laws and usages of their church, whether they have decided correctly or not, but their decisions are final on the parties and the courts); Robertson *v.* Bullions, 9 Barb. 64 [*affirmed* in 11 N. Y. 243] (holding that the civil courts cannot, upon the merits, review the decisions of ecclesiastical judicatories in matters properly within their province).

right of property depends upon some ecclesiastical matter, such as doctrine, discipline, or church government, the civil court, where the question may arise, will take the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, accepting those decisions as matters adjudicated by another juris-

Ohio.— Harrison *v.* Hoyle, 24 Ohio St. 254, holding that where public policy, or the positive law of the land, is not contravened, the decisions and orders of a religious society, when made in conformity to its polity, should have the same effect, in civil courts, which the society intended should be awarded to them when pronounced by its own judicatories.

Pennsylvania.— Irvine *v.* Elliott, 206 Pa. St. 152, 55 Atl. 859; Krecker *v.* Shirey, 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476 (holding that the decision of the general conference, established by the ecclesiastical body in its book of discipline as the supreme court of law in the church on the meaning and effect of the provisions of the book of discipline, if not in violation of any law or usage of the church, is binding on the ecclesiastical body and will be followed in a court of law); Skilton *v.* Webster, Brightly 203 (holding that the decisions of ecclesiastical tribunals on questions of doctrine, order, and discipline are conclusive on the courts); Gordon *v.* Williams, 3 Leg. Gaz. 113.

United States.— Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666 (holding that it is of the essence of religious societies, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeal as the organism itself provides); Brundage *v.* Deardorf, 92 Fed. 214, 34 C. C. A. 304 (as to which, however, see Brundage *v.* Deardorf, 55 Fed. 839, on a former demurrer to the bill [*distinguishing* Watson *v.* Jones, *infra*], holding that the decisions of the supreme judicatory of a religious denomination of the associated class, having a constitution and governed by local, district, state, and national bodies, are not conclusive upon the courts, when they are in open and avowed defiance, and in express violation, of the constitution of such body).

See 42 Cent. Dig. tit. "Religious Societies," § 93 *et seq.*

In Vermont a contrary doctrine has been laid down, and it is held that the proceedings of the synod of a church, as a court of the last resort, are not to be held conclusive and absolute, when they come in question, whether directly or collaterally, in courts of law; but the regularity and effect of their proceedings may be examined and be determined in courts of justice upon the same principles which subject the proceedings, either of inferior courts or voluntary associations, to inquiry and adjudication, and that, although religious denominations, in Vermont, may form constitutions, enact canons, laws, or ordinances, establish courts, or make any decisions, decrees, or judgments, yet they can have only a voluntary obedience, cannot affect any civil rights, immunities, or contracts, or alter or dissolve any relations or obligations arising from contracts. Obedience to their requirements may be exacted under the penalty of spiritual censures; but, whether one submits to or defies their proceedings depends upon his conviction of their regularity or irregularity, they can only affect his conscience. When their proceedings are to be examined by ordinary tribunals of justice, they can receive no other consideration than the regulations of any other voluntary associations. Smith *v.* Nelson, 18 Vt. 511. This is, however, against the great weight of American decisions and was expressly rejected in Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551.

Even though a church association has only advisory powers in matters relating to an individual church, yet, where both factions submit their claim to it on their own statement and version of the controversy, seeking its recognition, the decision of the association is entitled to very great weight as to which faction is the real and true church; and, while not conclusive on courts, its decision, composed, as it is, of delegates from all the churches in the association, a majority of whom in council have decided the same way, would be a safer guide for civil courts on questions of religious doctrine, faith, and practice than any judgment such courts might form contrary thereto. Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

Although the authority of the church tribunal is doubtful the civil judiciary will be slow to interfere. Gibson *v.* Armstrong, 7 B. Mon. (Ky.) 481.

"Ecclesiastical matter" defined.—An ecclesiastical matter is one that concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all of such matters are within the province of church courts and their decisions will be respected by civil tribunals. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

Courts of equity will not supplement the rules of a church by supplying a remedy for the regulation of purely church affairs (Powers *v.* Budy, 45 Nebr. 208, 63 N. W. 476), and will not review the decisions or proceedings of ecclesiastical judicatures in matters properly within their province under the laws and regulations of the church (Travers *v.* Abbey, 104 Tenn. 665, 58 S. W. 247, 51 L. R. A. 260, holding also that there is no waiver of the jurisdiction of a re-

diction;[55] and until an ecclesiastical tribunal having final jurisdiction to decide the question has determined it, the civil court will not assume to do so.[56] But the jurisdiction of ecclesiastical tribunals is limited by the law under which they act and by the constitution and by-laws of the religious organization,[57] and ques-

ligious society to adjudicate its own matters by answering and setting up a defense in a court of equity, since the jurisdiction is of the subject-matter, and objection may be raised at any time), and, where no property rights are involved, will not interfere to quell religious disturbances (Papailiou *v.* Manusos, 108 Ill. App. 272), and thus a bill to enjoin proceedings of an ecclesiastical body which fails to show that property rights will be affected thereby is demurrable (Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620]). But it has been held that a court of equity may interfere in an ecclesiastical controversy so far as to ascertain if the governing body has acted within the scope of its authority. Batterson *v.* Thompson, 8 Phila. (Pa.) 251.

Where a presbytery decides that members of a presbyterian church have seceded, the decision binds the civil courts and the seceders, although a majority lose their rights to the church property. Gaff *v.* Greer, 88 Ind. 122 [*followed* in Trinity M. E. Church *v.* Harris, 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636].

Questions of procedure — certiorari.—Irregularity under the canons of the church in the organization of the diocesan court and refusal of such court to entertain a challenge by a clergyman on trial before it to one of the members of the court, and supposed insufficiency of the evidence upon which the accused could be convicted under the provisions of a certain canon, are questions of procedure where they involve construction of the canons of the church, and depend upon the judgment of the ecclesiastical court over which the civil court can exercise no power of revision, or control. There is no power or jurisdiction in the civil courts of common-law jurisdiction to review and correct by certiorari supposed errors in the proceedings and judgments by a diocesan court in matters of ecclesiastical cognizance, such as charges of crime or immorality, against a clergyman of the church and because by deposition from his office a clergyman of the church, as the result of a sentence by a diocesan court, is deprived of the right or power to exercise the power or functions of a minister of the church and of the right to earn his salary as such minister, a property right is not thereby involved which will give the civil courts jurisdiction to review by certiorari the action of such diocesan court, there being no vested property right in a clergyman to exercise the functions of his office to the end that he may earn and have a salary. Satterlee *v.* U. S., 20 App. Cas. (D. C.) 393.

55. *Georgia.*— Mack *v.* Kime, 129 Ga. 1, 58 S. E. 184.

Indiana.— Hadley White Lick Quarterly Meeting of Friends *v.* Mendenhall White Lick Quarterly Meeting of Friends, 89 Ind. 136 [*quoted* and *followed* in O'Donovan *v.* Chatard, 97 Ind. 421, 49 Am. Rep. 462].

Mississippi.— Mt. Helm Baptist Church *v.* Jones, 79 Miss. 488, 30 So. 714, holding that the supreme court exercises no ecclesiastical jurisdiction, but accepts what the highest ecclesiastical authority in each church promulgates as the faith and practice of that church, and will not determine for itself what that faith or creed is, in order to establish the rights of respective factions in the church to the church property."

New York.— Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551; Baxter *v.* McDonnell, 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765.

Ohio.— Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156.

South Carolina.— Harmon *v.* Preher, Speers Eq. 87.

United States.— Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666.

See 42 Cent. Dig. tit. "Religious Societies," § 93 *et seq.*

But see Livingston *v.* Trenton Trinity Church, 45 N. J. L. 230.

56. Wehmer *v.* Fokenga, 57 Nebr. 510, 78 N. W. 28, holding that, in the absence of a showing that an ecclesiastical tribunal having final jurisdiction to decide a question as to church doctrine has determined it in favor of complainant, or that such an ecclesiastical tribunal exists having jurisdiction to decide the question, the court will not determine whether the tenets of faith and practice of one synod of the Lutheran church differ in essential particulars from the tenets of another synod, and that a majority of a religious congregation, or the trustees thereof, will not, at the suit of a minority, be enjoined from employing a pastor professing the same organic creed professed by the congregation, on the ground that such minister teaches doctrines and practises a certain church polity not taught and practised by the minority, nor by the original founders of the congregation.

Civil courts follow the construction of church courts upon church matters. Fussell *v.* Hail, 233 Ill. 73, 84 N. E. 42 [*affirming* 134 Ill. App. 620].

57. Watson *v.* Avery, 2 Bush (Ky.) 332 (holding that the higher courts of the presbyterian church have not original jurisdiction of matters pertaining to the immediate government of a congregation, such government being primarily intrusted to "the session"); Day *v.* Bolton, 12 N. J. L. 206; Smith *v.* Nelson, 18 Vt. 511.

By the laws and customs of the Roman catholic church in the United States, a priest is liable to be removed from the charge of a congregation at the pleasure of his bishop, without trial. O'Donovan *v.* Chatard, 97

tions of civil rights and rights of property of persons, whatever may be their relation to church organization, are subject of adjudication in civil tribunals exclusively, and church courts have no power to make decisions upon such matters which will be binding on the civil courts, and if the church courts, exceed their jurisdiction in this respect their decisions are subject to revision by the civil courts.[58]

B. Application of Rules — 1. Admission, Expulsion, and Rights of Member. Civil courts have no jurisdiction to review the action of competent church authority in expelling a member,[59] nor to review the judgments of the general assembly of a church, cutting off synods of the church,[60] nor is the action of a religious society in admitting or rejecting members subject to control by the courts,[61]

Ind. 421, 49 Am. Rep. 462; Stack *v.* O'Hara, 98 Pa. St. 213, holding, however, that he cannot be suspended from his priestly functions and ministerial duties without specific accusation and trial.

No church judiciary can sequester the temporalities of the church, society, or corporation, because of the deposition of the minister, nor, where the society has been incorporated, supply the pulpit temporarily, or otherwise, against the will of the trustees. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243].

Delegation of authority.— The synod of a church have no power to appoint a commission to receive the submission of a presbytery, which has been on trial before the synod, and to restore or dissolve the presbytery, as the commissioners may think proper. This is a delegation of judicial power not warranted by any known rules of discipline in the "Associate Church." Smith *v.* Nelson, 18 Vt. 511.

58. *Illinois.*— Chase *v.* Cheney, 58 Ill. 509, 11 Am. Rep. 95.

Indiana.— Yanthis *v.* Kemp, (App. 1908) 85 N. E. 976.

Iowa.— Bird *v.* St. Mark's Church, 62 Iowa 567, 17 N. W. 747.

Kentucky.— Watson *v.* Avery, 2 Bush 332; Shannon *v.* Frost, 2 B. Mon. 253.

Massachusetts.— Sheldon *v.* Easton Cong. Parish, 24 Pick. 281; Avery *v.* Tyringham, 3 Mass. 160, 3 Am. Dec. 105.

Missouri.— Watson *v.* Garvin, 54 Mo. 353.

New Jersey.— Lynd *v.* Menzies, 33 N. J. L. 162.

New York.— Baxter *v.* McDonnell, 18 N. Y. App. Div. 235, 45 N. Y. Suppl. 765; Westminister Presb. Church *v.* Findley, 44 Misc. 173, 89 N. Y. Suppl. 801 (holding that the civil courts will interfere in ecclesiastical matters where there are conflicting claims as to church property or funds, or their use, or where civil rights are involved); Miller *v.* Gable, 2 Den. 492.

Pennsylvania.— O'Hara *v.* Stack, 90 Pa. St. 477; Gordon *v.* Williams, 3 Leg. Gaz. 113; Batterson *v.* Thompson, 8 Phila. 251.

See 42 Cent. Dig. tit. "Religious Societies," § 93 *et seq.*

But civil courts adjudicate ecclesiastical matters with extreme reluctance.— East Norway Lake Church *v.* Halvorson, 42 Minn. 503, 44 N. W. 663.

59. *Iowa.*— Helbig *v.* Rosenberg, 86 Iowa 159, 53 N. W. 111.

Kentucky.— Shannon *v.* Frost, 3 B. Mon. 253.

Massachusetts.— Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740 (holding that the action of a religious society, empowered to expel any member acting against its interest, in expelling members for such reason upon a proper hearing, is final, and is not reviewable by a court on the ground that the evidence on which the expulsion was based was insufficient; and hence exceptions to a master's report that a society's expulsion of members was ineffectual on the ground of insufficient evidence will be sustained); Grosvenor *v.* United Soc. of Believers, 118 Mass. 78 (holding that the ministers and elders of the society of believers, commonly called "shakers," have the power to expel members of the society, and where they expel a member for entertaining opinions and promulgating doctrines within the society at variance with the established belief and subversive of the organization, the courts have no power or jurisdiction in an action of tort for such expulsion to determine whether or not the opinions and doctrines of such expelled member were in fact inconsistent with the society's established belief).

Mississippi.— Dees *v.* Moss Point Baptist Church, (1895) 17 So. 1.

Nebraska.— Bonacum *v.* Murphy, 71 Nebr. 463, 98 N. W. 1030, 104 N. W. 180.

United States.— Bouldin *v.* Alexander, 15 Wall. 131, 21 L. ed. 69.

Rule applied to congregational churches.— When persons have voluntarily associated themselves into a society of christians, recognizing no ecclesiastical tribunal with authority to revise its final determination, such a church is what is denominated congregational, and has the exclusive right to deal with its defaulting members, and the courts cannot supervise or control that jurisdiction. Lucas *v.* Case, 9 Bush (Ky.) 297.

Mandamus to restore to membership see Mandamus, 26 Cyc. 382.

If a consistory expel a member without the consent of the congregation, his remedy is by appeal to a higher tribunal of the church, not to the civil courts. German Reformed Church *v.* Com., 3 Pa. St. 282.

60. Com. *v.* Green, 4 Whart. (Pa.) 531.

61. Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187.

and even in equity the judgments of religious associations, bearing upon their own members, are not examinable, except where they affect civil rights,[62] and equity has no jurisdiction to compel a faction of a religious body to cease worshiping in its church because of an abandonment of the faith, laws, usages, and customs of the church.[63] It is held, however, that civil courts may inquire whether the expulsion was the act of the church or of persons who were not the church, and who consequently had no right to excommunicate any one,[64] and that the ecclesiastical tribunal of a denomination will be enjoined from expelling a member of a local congregation for alleged spiritual offenses, when it appears that such tribunal has not been organized in conformity with the organic law of the church;[65] and where a member of a religious society is expelled, and he deems himself aggrieved in his rights of property thereby, the courts will examine the judgment of expulsion to see if it has been regularly made on due notice and a hearing, and if not will disregard it and give proper relief.[66]

2. Deposition, Discharge, or Removal of Minister. The deposition or removal of a minister is purely an ecclesiastical act, and the civil courts will not review the decision of competent ecclesiastical tribunals in regard thereto,[67] and as the

The action of a synod rejecting a minister's application for membership is final until set aside by a proper ecclesiastical tribunal, and the court has no authority to investigate the causes which led to such action. Helbig *v.* Rosenberg, 86 Iowa 159, 53 N. W. 111.

Whether a person died in the faith of the Roman Catholic Church, so as to be entitled to interment in a Roman Catholic cemetery, is not a question within the jurisdiction of the civil courts, but may be decided by the ecclesiastical authorities. McGuire *v.* St. Patrick's Cathedral, 3 N. Y. Suppl. 781 [*affirmed* in 54 Hun 207, 7 N. Y. Suppl. 345].

Refusal to admit to membership cannot be controlled or restrained by an injunction of the court. The right of admission to membership is voluntary and mutual between the society and individuals desiring to become members. No one can be compelled to join the society or remain a member in it against his wish, nor can the society be compelled to admit any one against its will, fairly expressed at a regular meeting by a majority vote. Richardson *v.* Francestown Union Cong. Soc., 58 N. H. 187.

62. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243] (holding that a court of equity has no power to disfranchise a member of a religious society by declaring that he does not possess the necessary qualifications); Harmon *v.* Dreher, Speers Eq. (S. C.) 87; Nance *v.* Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801 (holding that where the relation between an independent baptist church and its members is not contractual, and no property or civil rights depend on membership, a court of equity, having jurisdiction in ecclesiastical matters only as an incident to the ascertainment of civil rights, cannot determine whether the excommunication of members of such church was conducted in accordance with the usages and laws of the church).

63. Smith *v.* Charles, (Miss. 1899) 24 So. 968.

64. Smith *v.* Pedigo, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838 (holding that the members of a church having divided into two factions on account of a difference in religious belief and faith, each claiming that its faith is that on which the church was founded, the action of the majority faction, in deciding in its own favor and expelling the members of the other faction, is not conclusive but, such majority faction having in fact departed from the faith, its action was not that of the church, but was nugatory); Bouldin *v.* Alexander, 15 Wall. (U. S.) 131, 21 L. ed. 69.

65. Hatfield *v.* De Long, 156 Ind. 207, 59 N. E. 483.

66. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740 (holding that where the trustees and certain members of a religious society closed the society's church, held in trust for its members, against the wishes of other members desirous of continuing worship there in accordance with the constitutional object of the society, and expelled those members without a proper motion and hearing, the court, on the petition of the society, will restrain such trustees and members from closing the church against religious services held by members in accordance with the society's object); Watson *v.* Garvin, 54 Mo. 353 [*disapproving* Watson *v.* Jones, 13 Wall. (U. S.) 679, 20 L. ed. 666, a case involving the same dispute]. But see Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156, holding that a decision of a church tribunal as to the status and rights of a member thereof with regard to his membership is conclusive on the civil courts, although such decision involves such member's right to participate in the use and enjoyment of its property and funds.

67. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241 (holding that where a mutual council was authorized by congregational usage to investigate the conduct of a minister prior to and during his pastorate to determine his fitness for the ministry, and whether he had conducted the church affairs according to approved congregational usage, his exception to its taking ac-

civil contract between a congregation and its minister, for the services of the latter, is a conditional one, dependent upon the existence of the ecclesiastical relation, the civil courts have jurisdiction over such contract during its continuance only, and its dissolution by the proper ecclesiastical authorities must be regarded as conclusive,[68] and even a court of equity will not consider the question involved until all ecclesiastical remedies have been exhausted.[69] But civil courts may adjudicate questions relating to the effect of the deposition or removal upon civil rights,[70] and upon the ground that a rector has a vested contractual right in his office, as well as a canonical property right in the church edifice, and can only be deprived against his will by canonical proceedings, it has been held that proceedings for his deprivation, had before the bishop and standing committee of his diocese, from whom there is no ecclesiastical appeal, are reviewable by the civil courts on certiorari, as to their regularity under the diocesan canonical law.[71]

3. Amendment or Change of Constitution. The decision of the general conference of a religious society upon a proposed revision, amendment, or change of constitution or faith is binding upon civil courts; [72] but the action of the general conference of the church in adopting the report of the committee that the amended constitution as submitted to vote had become the organic law of the church has been held to be merely legislative, and not an adjudication binding upon civil courts.[73]

tion against him was properly overruled, and that where it was doubtful whether the letter calling a mutual council to investigate the conduct of a minister laid foundation for the admission of evidence that the real cause of the trouble in the church was certain conduct of one of the aggrieved parties, the refusal of the council to consider it is conclusive in view of a finding by the trial court that the hearing was properly conducted); Watson *v.* Garvin, 54 Mo. 353; Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243]; St. James' Church *v.* Huntington, 82 Hun (N. Y.) 125, 31 N. Y. Suppl. 91 (holding that the vestry of an episcopal church cannot be relieved by the civil courts from an order of the bishop, made in accordance with the rules and canons of the church, forbidding a clergyman to officiate as rector of such church); Isham *v.* Fullager, 14 Abb. N. Cas. (N. Y.) 363 (holding that the civil courts have no jurisdiction to decide whether a presbytery of the presbyterian church acted unwisely or unjustly in deposing a minister); Ash *v.* Methodist Church, 27 Ont. App. 602. But see O'Hara *v.* Stack, 90 Pa. St. 477.

What acts or omissions create a forfeiture of the office of pastor is not within the province of a court of law to determine, it being exclusively within the cognizance of an ecclesiastical tribunal. Whitney *v.* Brooklyn First Ecclesiastical Soc., 5 Conn. 405.

That the church was not a consociated one does not invalidate the action of a mutual council called to investigate a minister's conduct advising his dismissal by the church and withdrawal from the ministry. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

Where the minority of a church claim that the pastor does not teach the faith of the church, they must appeal to the supervising tribunals of the church, and their decision the state courts will take as final, and, if necessary and proper, enforce. Wehmer *v.* Fokenga, 57 Nebr. 510, 78 N. W. 28.

In Canada certiorari will issue to review the finding of a church tribunal regarding the deposition of a minister (*Ex p.* Little, 33 N. Brunsw. 210), and prohibition to prevent its acting in excess of jurisdiction (*Ex p.* Currie, 26 N. Brunsw. 403).

68. Connitt *v.* New Prospect Reformed Protestant Dutch Church, 54 N. Y. 551 [*affirming* 4 Lans. 339].

69. Buettner *v.* Frazer, 100 Mich. 179, 58 N. W. 834.

70. Robertson *v.* Bullions, 9 Barb. (N. Y.) 64 [*affirmed* in 11 N. Y. 243].

71. Jennings *v.* Scarborough, 56 N. J. L. 401, 28 Atl. 559.

72. Lamb *v.* Cain, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518; Russie *v.* Brazzell, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542. But see Bear *v.* Heasley, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615, holding that the resolution of a general conference that constitutional prohibitions of any change in the existing confession of faith or in the constitution, unless by request of two thirds of the society, are impracticable; and their consequent proceedings, in disregard thereof, to effect material changes, do not, by confirmation of such conference, conclude a civil court as to the ownership of the society's realty, the conference's jurisdiction not being affirmatively and conclusively shown.

On appeal from a decree of common pleas amending the charter of a church the only question reviewable in the supreme court is the regularity of the proceedings as shown by the record brought up by the certiorari. *In re* African M. E. Union Church, 28 Pa. Super. Ct. 193.

73. Philomath College *v.* Wyatt, 27 Oreg.

4. Election of Officers. The question who are the officers of a religious society is to be determined according to the discipline of that society,[74] and civil courts will not review the decision of a competent ecclesiastical body upon a question involving the election of officers.[75]

C. Procedure. The conduct of the trial before an ecclesiastical tribunal depends upon the articles and by-laws of the society or congregation,[76] as does also the question whether a member on trial is entitled to counsel;[77] but where the church organization has no rules regulating the expulsion of members, those of the common law prevail; and, before a member can be expelled, notice must be given him to answer the charge made against him, and an opportunity offered to make his defense, and an order of expulsion without such notice and opportunity is void,[78] and it is a broad general rule that a member or officer cannot be deprived of his rights and privileges without a hearing or trial upon adequate notice,[79] and the courts are unwilling to construe charters, by-laws, or rules as depriving members of membership without a hearing.[80] But church tribunals are not required to conform to all the rules applicable to courts of public justice and are not governed by strict rules of legal evidence,[81] and evidence may be referred to

390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68.

74. Earle *v.* Wood, 8 Cush. (Mass.) 430.

A statute to prevent fraudulent elections by incorporated companies does not confer upon the civil courts power to determine the validity of an election of the trustees of a religious incorporated society. *In re* Bethany Baptist Church, 60 N. J. L. 88, 36 Atl. 701.

75. Earle *v.* Wood, 8 Cush. (Mass.) 430 (holding that the decision of a yearly meeting of quakers, formed according to their discipline, is conclusive on the question as to who were the rightful overseers of the monthly meeting even in a suit in equity, brought prior to the yearly meeting by one set of overseers of the monthly meeting against another set to obtain a conveyance of the property belonging to the monthly meeting); Day *v.* Bolton, 12 N. J. L. 206 (holding that the civil courts will give full effect to the decision of the classis as to the validity of an election of officers). See Gordon *v.* Williams, 3 Leg. Gaz. (Pa.) 113.

76. Gibbs *v.* Gilead Ecclesiastical Soc., 38 Conn. 153; Jennings *v.* Scarborough, 56 N. J. L. 401, 28 Atl. 559.

77. Gibbs *v.* Gilead Ecclesiastical Soc., 38 Conn. 153, holding that whether a minister, who is before the consociation congregation on an *ex parte* call to be heard relative to his dismissal, is entitled to a hearing by counsel or not, depends on the by-laws of the consociation, if any; and if not it is a question of fairness or unfairness dependent on the partcular circumstances of the case; and hence where no charges are made, and no contest at issue is to be tried, it cannot be said as a matter of law that he is entitled to counsel.

78. Jones *v.* State, 28 Nebr. 495, 44 N. W. 658, 7 L. R. A. 325.

79. Canadian Religious Assoc. *v.* Parmenter, 180 Mass. 415, 62 N. E. 740; Jennings *v.* Scarborough, 56 N. J. L. 401, 28 Atl. 559; McAuley's Appeal, 77 Pa. St. 397; Smith *v.* Nelson, 18 Vt. 511, holding that where a complaint is preferred to the synod, against a presbytery, it is irregular for the synod to attempt to pass upon the matter, or give any opinion in the case, without giving the presbytery notice to appear before them; and if they do thus proceed, their authority to sit in the case, after this, might, with the strictest propriety and according to the rules of justice, be declined.

Waiver of examination by elders.— Where the discipline of a church provided that if a bishop be accused of immoral conduct three of the elders are to meet and examine the bishop, the obligation of the elders to go to his home to meet him is dispensed with where the bishop informed the elders that he would not submit to their examination. Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156.

80. Gray *v.* Christian Soc., 137 Mass. 329, 50 Am. Rep. 310, holding that where a by-law of a religious society provided that any member ceasing to worship or failing to contribute for a year should be dropped a member could be dropped only by a vote of the society after a hearing.

The action of one faction of a congregation in declaring without notice, hearing, or evidence the members of the other faction withdrawn or suspended, will, in a civil action involving property rights, be considered as of no effect. West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62, 49 N. W. 24.

81. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241, holding that there was no impropriety in the refusal of a mutual council called to investigate the conduct of a minister to allow any cross-examination of witnesses, the rule being applied alike to those of each party and the trial having been fairly conducted according to the usages of the denomination.

Hearsay evidence admitted with caution and reserve and in accordance with the usages of the denomination is not such a departure from the fundamental principles which should govern such hearing as to vitiate the decision unanimously reached, dismissing a

a committee for its findings,[82] and one hearing is not a bar to another hearing upon the same charge,[83] and while the constitution of the church may provide that no one who participated in the trial by which a member was expelled shall sit in the appellate tribunal,[84] the fact that the church meeting which voted to accept the decision of a mutual council as to the disqualifications of their minister, and to dismiss him, was composed almost entirely of the aggrieved members of the church, at whose request the mutual council had been called to investigate his conduct, did not disqualify them.[85]

XI. CONSOLIDATION.*

It is held to be within the inherent right of one church organization corporately organized to unite with another church organization of the same faith where such unition is not in specific disregard of charter powers, and will, in the judgment of the governing body of the church, seeking to form such union, tend to the general advancement, growth, and prosperity of the united church,[86] and it is generally held under the statutes that religious corporations, like other corporations,[87] may consolidate into one corporation by agreement between the several consolidating bodies, upon complying with the statute.[88] But the incor-

minister. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

Statutes of limitations do not ordinarily apply. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

82. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

83. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241.

A preliminary hearing is not a bar to another hearing nor to a trial. Sampsell *v.* Escher, 11 Ohio Dec. (Reprint) 351, 26 Cinc. L. Bul. 156.

84. Hatfield *v.* De Long, 31 Ind. App. 210, 67 N. E. 551.

85. Arthur *v.* Norfield Parish Cong. Church Soc., 73 Conn. 718, 49 Atl. 241. But see Thompson *v.* Rehoboth Catholic Cong. Soc., 7 Pick. (Mass.) 160.

86. Fussell *v.* Hail, 134 Ill. App. 620 [*affirmed* in 233 Ill. 73, 84 N. E. 42].

87. See, generally, CORPORATIONS, 10 Cyc. 288 *et seq.*

88. Neale *v.* St. Paul's Church, 8 Gill (Md.) 116 (holding that under Acts (1802), c. 111, authorizing the incorporation of churches, two different denominations may form one congregation or corporation); MacLaury *v.* Hart, 121 N. Y. 636, 24 N. E. 1013 [*reversing* on other grounds 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669-675, 25 Abb. N. Cas. 230]; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 3 Rob. (N. Y.) 570, 1 Abb. Pr. N. S. 214, 30 How. Pr. 455, under 2 Rev. Laws (1813), p. 212.

Order for consolidation discretionary.— Under the prevailing New York statute regulating the consolidation of religious societies and providing that the supreme court may, if it deems proper, make an order for consolidation, it was in the discretion of the court to make the order, although the contract and petitions for consolidation were duly executed. Court St. M. E. Soc. *v.* Perry, 51 Hun (N. Y.) 104, 4 N. Y. Suppl. 723, holding also that it is a sufficient reason for exercising the discretion by denying an order consolidating two religious organizations that, at the date of the execution of the consolidation agreement, the certificate of incorporation of one of them had not been proved or recorded. And the consolidation of a religious with another corporation, even if otherwise valid, is void, if the assent of the supreme court is not obtained, and the trustees of the religious corporation do not approve the course pursued, even though all its members assent. Chevra Bnai Israel Aushe Yanove und Motal *v.* Chevra Bikur Cholim Aushe Rodof Sholem, 24 Misc. (N. Y.) 189, 52 N. Y. Suppl. 712. And it is held that religious corporations have no common law or statutory authority merely by a mutual agreement to consolidate their assets and members under a name slightly different from that of one of them, although they may merge and form a new corporation under Laws (1895), c. 723, § 12, and c. 559, § 7. Davis *v.* Congregation Beth Tephila Israel, 40 N. Y. App. Div. 424, 57 N. Y. Suppl. 1015.

Statute construed as forbidding consolidation of free and denominational church see Stokes *v.* Phelps Mission, 47 Hun (N. Y.) 570, holding also that a consolidation effected by the trustees of a free church and a religious society is invalid, where one of the trustees is also the pastor of the religious society.

Injunction to restrain church tribunal from passing upon agreement of consolidation.— Under a statute which provides that two religious corporations may consolidate by making an agreement so to do; but in the case of episcopal churches their agreement must be approved by the bishop and the standing committee of the diocese, and then by the supreme court, which may demand that all parties appear before it, the statute

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poration of the congregations of two churches as one church, each to retain its individual character with respect to its property, and the enforcement of the payment of moneys due to it, the selection of pastors, and other administrative matters, is not allowed, the preservation of the autonomy of each church in the respects desired being inconsistent with the legal requisites of a corporation,[89] and a synod of a church prohibited by its constitution from doing any act or making any regulation interfering with the established order of the church has no authority to consolidate with the general assembly of a church of a different denomination;[90] nor do the general assembly and presbyteries of a religious denomination, consisting of local churches, presbyteries, synods, and general assembly, possess the implied power to form a union with another religious denomination following the same doctrines and form of church government,[91] and it is held that the officers of a religious association have no power as managing officers to consolidate the association with another without the consent of every member thereof.[92] Endowments made to a religious organization are not improp-

having provided a tribunal to pass on the agreement, an injunction will not lie to restrain proceedings by it on the ground that the agreement was made unlawfully. MacLaury *v.* Hart, 121 N. Y. 636, 24 N. E. 1013 [*reversing* 10 N. Y. Suppl. 125, 11 N. Y. Suppl. 669–675, 25 Abb. N. Cas. 230].

Authority to retain counsel to compel church to affix seal to consolidation agreement.— In an action by a church corporation to compel another church corporation to affix its corporate seal to an agreement for the consolidation of the two corporations, it appearing that the committee of defendant's vestry appointed in the consolidation proceedings had been declared fraudulently elected, and had been ousted from their offices as vestrymen, the members of defendant's vestry who remained in office, although not a sufficient number to constitute a quorum, had authority to retain counsel to represent defendant, and an appearance by the counsel retained by such committee before their ouster would be set aside as unauthorized. Holy Trinity Church *v.* St. Stephen's Church, 15 N. Y. Suppl. 117.

Consolidation of a religious corporation with a membership corporation is not authorized by the statutes of New York. Chevra Bnai Israel Aushe Yanove und Motal *v.* Chevra Bikur Cholim Aushe Rodof Sholem, 24 Misc. (N. Y.) 189, 52 N. Y. Suppl. 712.

Right of secession from consolidation.— Where a congregation of one denomination forms a union with another, belonging to a different denomination, which had an established form of church government, that congregation is bound by the rules of the denomination which it has joined, and cannot afterward secede therefrom by a vote of the majority of its members. Sutter *v.* First Reformed Dutch Church, 42 Pa. St. 503.

Where two religious corporations made an oral consolidation, without any attempt to observe the statutory provision relating to consolidation of such corporations, the consolidation was ineffective to transfer any of plaintiff's property to the new society, and was *ultra vires* and void. Erste Sokolower Cong. Anshe Yosher *v.* First United Royatiner Sokolower Verein, 32 Misc. (N. Y.) 269, 66 N. Y. Suppl. 356; Chevra Medrash Auschei Makaver *v.* Makower Chevra Aucchei Poland, 66 N. Y. Suppl. 355. Either party to such an attempted consolidation may sue to set aside the consolidation as *ultra vires*. Chevra Medrash Auschei Makaver *v.* Makower Chevra Aucchei Poland, 66 N. Y. Suppl. 355, holding also that a prior request from members is not necessary.

89. *In re* German Lutheran, etc., Church, 9 Pa. Co. Ct. 12; Evenson *v.* Ellingson, 72 Wis. 242, 39 N. W. 330, 67 Wis. 634, 31 N. W. 342.

In New York there is held to be no statute authorizing the formation of a religious corporation for the sole purpose of consolidating it with another for the ultimate end of acquiring the property of the other and applying it to the maintenance of a church with a different polity and with a somewhat different faith. Nor were the consolidation statutes designed to authorize the consolidation of an existing religious corporation with one organized solely for the purpose of consolidation, but they were designed to enable existing religious corporations, organized in good faith for the advancement of religious interests, and for a time carried on for such purpose, to consolidate, when it becomes apparent that such interests can be better advanced by the union of the corporations. Court St. M. E. Soc. *v.* Perry, 51 Hun (N. Y.) 104, 4 N. Y. Suppl. 723.

90. Newburgh Associate Reformed Church *v.* Princeton Theological Seminary, 4 N. J. Eq. 77; Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

91. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421.

92. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421, holding also that where a religious denomination, consisting of churches, presbyteries, synods, and general assembly, adopted the creed and constitution of another denomination, and the temporal organization of the first denomination was the result of an agreement among the individuals forming the association by which they organized for certain purposes, and it was distinct from the

erly affected by a union of such organization with another religious organization of the same faith, unless the endowments in question expressly restrict or limit the grant so as to prohibit such a union.[93]

XII. DISSOLUTION AND REORGANIZATION.*

A religious society having discharged all its liabilities may by its own act cause its dissolution. This may be done by the unanimous act of the society, for every individual may withdraw and leave none to sustain the corporate powers,[94] and the society may be dissolved by a vote called at a meeting, upon notice, declaring the society dissolved,[95] or by abandonment and non-user.[96] But a mere resolution by an inferior ecclesiastical corporation to secede from the superior church body does not dissolve the former corporation, in the absence of any action by the superior body,[97] and the fact that a religious corporation attempts to effect a consolidation with another, which is in fact void, and from which it almost immediately withdraws, does not import its dissolution.[98] In some states statutes provide for the dissolution of religious societies by the court.[99] Under a statute

organization constituting the other denomination, the officers of the former religious denomination could not unite with the other denomination in such a manner as to terminate the temporal organization of the former religious denominations.

93. Fussell *v.* Hail, 134 Ill. App. 620 [*affirmed* in 233 Ill. 73, 84 N. E. 42].

94. Oakes *v.* Hill, 14 Pick. (Mass.) 442. **The omission of a parish for one year to elect parish officers** does not necessarily operate as a dissolution of the parish; and, if it did, the parish property would not therefore vest in the town, although the town held the property, in its parochial capacity, before the parish was separately organized. Tobey *v.* Wareham Bank, 13 Metc. (Mass.) 440.

Acts of congress annulling charter granted by territory.— Congress having plenary and supreme legislative power over the territories of the United States and their inhabitants, an act of congress abrogating the charter of a church granted by the legislature of Utah, and dissolving the corporation, was a valid exercise of such power, and the corporation ceased to have any existence as a civil body. Church of Jesus Christ, etc. *v.* U. S., 136 U. S. 1, 10 S. Ct. 792, 34 L. ed. 481 [*affirming* 5 Utah 361, 15 Pac. 473, which held also that Act Cong. July 1, 1862, § 2, annulling certain portions of the charter, did not, by excepting a portion of the act, make such excepted portions, in effect, a law of the United States].

Disposition of property upon dissolution.— On dissolution of a religious corporation, it is held that the surplus fund derived from a legacy should be disposed of in the manner the court believes to be most in harmony with the will of the contributors to the fund, could they have foreseen the event. Matter of Union Village Orthodox Cong. Church, 6 Abb. N. Cas. (N. Y.) 398. But see Jones *v.* Renshaw, 130 Pa. St. 327, 18 Atl. 651. And where a church organized in subordination to an incorporated general conference, whose charter provides that property of a church which should become extinct should vest in said conference upon the church becoming extinct, the conference is entitled to the proceeds of the property. Scranton First Methodist Protestant Church's Appeal, 16 Wkly. Notes Cas. (Pa.) 245.

95. Easterbrooks *v.* Tillinghast, 5 Gray (Mass.) 17, holding that where a testator devised real estate in trust to apply the income to the maintenance of a pastor or elder in a church of a certain faith and practice in the town where the testator resided, so long as the members of that church or their successors should maintain the visibility of the church of such faith and order, and afterward the only two members of the church, at a meeting called by public notice, voted and resolved that they would no longer endeavor to maintain the appearance of a visible church, and declared the church dissolved and extinct, that the church was thereby dissolved, and ceased to be a visible church, and that the trustee held the estate as a resulting trust for the testator's heirs at law.

96. Miller *v.* Riddle, 227 Ill. 53, 81 N. E. 48.

97. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653.

98. Chevra Bnai Israel Aushe Yanove und Motal *v.* Chevra Bikur Cholim Aushe Rodof Sholem, 24 Misc. (N. Y.) 189, 52 N. Y. Suppl. 712.

99. See the statutes of the several states. And see Matter of Brooklyn Third M. E. Church, 67 Hun (N. Y.) 86, 21 N. Y. Suppl. 1105 [*affirmed* in 142 N. Y. 638, 37 N. E. 567], holding that Laws (1872), c. 424, authorizing a dissolution by the court of any religious society which has ceased to act in its corporate capacity, and keep up services, on application of a majority of the trustees, renders unnecessary a meeting of the board to authorize the application, and that the fact that the dissolution is contrary to, or unauthorized by, church discipline, makes no

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providing for the reincorporation of the religious society of any religious corporation which has been dissolved by means of any non-user, or neglect to exercise any of the powers necessary for its preservation, a formal dissolution is not required to precede such reincorporation, but it may be had where a corporation has become practically dissolved by a neglect to elect trustees,[1] and the identity of a religious corporation is not changed merely by reincorporation, but the question is one of intention.[2]

XIII. ACTIONS.*

A. By Society or Members. In some states an unincorporated religious society may sue on a contract made with it in its associate capacity, and for the legitimate purposes of its association, although no persons are named as trustees or committeemen on behalf of the society, such associations being recognized as having in law an associate and quasi-corporate existence,[3] and if the common-law forms are insufficient for such cases it is held that courts will permit the infusion into the law of the equity principle that allows a committee of voluntary societies to sue and be sued as representative of the whole,[4] and a part of the persons belonging to a voluntary religious society, and having a common interest, may sue in behalf of themselves and others having the like interest, as part of the same society for purposes, common to all, and beneficial to all,[5]

difference, as to granting the dissolution, as church discipline cannot supersede the state law.

In Massachusetts it is held that the court has no power to decree a dissolution of a religious corporation, organized as such by statute passed in 1803, against the protest of a minority of the members of the religious body, and that even if it had such authority evidence of a want of property, or of the inexpediency of continuing a present location of a building, belonging to a religious corporation, which has been organized as such by statute, would not warrant its use. *In re* New South Meeting-House, 13 Allen 497.

Appointment of receiver incidental to dissolution.—A district court is without jurisdiction to take the property of a religious corporation out of the hands of a regular board of trustees and place it in the hands of receivers, as an incidental proceeding in a suit by the state for the forfeiture of the corporation's charter. State *v.* Immanuel Presb. Church, 52 La. Ann. 1311, 27 So. 806.

1. Irving M. E. Church First Soc. *v.* Brownell, 5 Hun (N. Y.) 464.

Reorganization held not fraudulent against creditors see Allen *v.* North Des Moines M. E. Church, 127 Iowa 96, 102 N. W. 808, 109 Am. St. Rep. 366, 69 L. R. A. 255.

2. Irving M. E. Church First Soc. *v.* Brownell, 5 Hun (N. Y.) 464.

3. Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708; Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64, holding that a church, which can have no corporate existence, but is recognized as a legal organization capable of holding property, can sue to collect a debt.

Information will not lie by the attorney-general, on relation of trustees of an incorporated religious society, to recover funds donated for erection or repair of the church building, since such society is a definite body, capable, under Mass. Pub. St. c. 39, § 9, of maintaining suit itself for the right to hold and use gifts in the manner intended by the donors. Atty.-Gen. *v.* Clark, 167 Mass. 201, 45 N. E. 183.

Trover or replevin may be maintained in the name of a parish for the recovery of the parish records. Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148.

Actions by and against unincorporated associations in general see ASSOCIATIONS, 4 Cyc. 312.

4. Phipps *v.* Jones, 20 Pa. St. 260, 59 Am. Dec. 708.

5. *Connecticut.*— Bailey *v.* Lewis, 3 Day 450; Tilden *v.* Metcalf, 2 Day 259, holding that a resolution of the general assembly authorizing part of a society to meet, choose officers, levy taxes, and repair a meeting-house gives them a right to sue for the destruction of such house after its repair.

Iowa.— See McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509.

Kentucky.—Berryman *v.* Reese, 11 B. Mon. 287.

Pennsylvania.— *In re* Maguire, 13 Phila. 244.

Virginia.— Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64.

United States.— Beatty *v.* Kurtz, 2 Pet 566, 7 L. ed. 521.

See 42 Cent. Dig. tit. "Religious Societies," § 199 *et seq.*

A member of an unincorporated religious society, who sues other members on a note in which there is a clause pledging the property of the church in payment, is not entitled to a personal judgment against the defendant members, nor to a decree declaring the debt a lien, but there must be a reference to the cause of an accounting and a finding as to the circumstances under which the church property was bound for the debt. Meyer *v.*

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and a committee of a church, appointed for that purpose, may bring suit in their own names.[6] But in other cases it has been held that in order to give an organization for public worship legal rights such as to sue and to impose upon it legal obligations as a corporate body, there must be either a special law declaring its existence, or an incorporation under the provisions of the general law relating to religious societies,[7] and in the absence of any statute authorizing actions in favor of a religious corporation, the president of such corporation cannot maintain an action therefor in his own name, and designating himself as president in his pleadings is a mere description of the person.[8] But for the purpose of an

Lipski, 10 Ohio S. & C. Pl. Dec. 95, 7 Ohio N. P. 366.

The trustees and agents of a church society may bring an action in behalf of themselves and other members, all having a like interest in the subject-matter. White *v.* Rice, 112 Mich. 403, 70 N. W. 1024.

6. Bennett *v.* Morgan, 112 Ky. 512, 66 S. W. 287, 23 Ky. L. Rep. 1824 (holding that, independent of a statute, a committee appointed by a church for that purpose may bring suit to enjoin trespasses upon the church property); Humphrey *v.* Burnside, 4 Bush (Ky.) 215 (holding that a committee appointed by a church or denomination of christians may maintain an action to protect the congregation from a disturbance of its rights); Shannon *v.* Frost, 3 B. Mon. (Ky.) 253.

A committee appointed to collect debts has implied power to sue therefor. Arts *v.* Guthrie, 75 Iowa 674, 37 N. W. 395.

The members of the committee need not be members of the congregation, and need produce no other evidence of their authority than the entry of their appointment on the record kept by the secretary. Humphrey *v.* Burnside, 4 Bush (Ky.) 215.

The trustees of a religious association may, for and in behalf of all the members, sue to establish a will making it a devise (Lilly *v.* Tobbein, (Mo. 1890) 13 S. W. 1060); and one of several trustees can sue in behalf of the society, where it cannot bring the action because the acts complained of are those of the other trustees (Stokes *v.* Phelps Mission, 47 Hun (N. Y.) 570); and where the trustees sue on a contract, which the complaint alleges they made, but which the contract attached shows was made by their predecessors, in their individual names, the latter need not be joined in the suit (Skinner *v.* Richardson, 76 Wis. 464, 45 N. W. 318). But it has been held that trustees of religious societies cannot sue, as such, except by their corporate name or title. Bundy *v.* Birdsall, 29 Barb. (N. Y.) 31. But see Skinner *v.* Richardson, 76 Wis. 464, 45 N. W. 318, holding that where the trustees of a religious society constitute an incorporated body with power to sue and be sued, they may now under statute sue in their individual names, and the society need not be joined in its corporate name.

Trustees of an unincorporated religious association have capacity to sue in equity in behalf of such association, if not as trustees as members thereof. Callsen *v.* Hope, 75 Fed. 758.

Action on the case for nuisance.—An action on the case by the trustee of a religious society against a railroad company for disturbance during worship on the Sabbath by the noise made by defendants in the use of their road will not lie by the trustees, but must be brought by the society worshiping in the church, they being the persons molested. Schenectady First Baptist Church *v.* Utica, etc., R. Co., 6 Barb. (N. Y.) 313.

Substitution of parties.— In a suit to establish a will making a devise to a voluntary religious association, afterward incorporated, brought by the church as a corporation, the trustees, for and in behalf of the members, may be substituted as plaintiffs by amendment. Lilly *v.* Tobbein, (Mo. 1890) 13 S. W. 1060.

A pastor suing in their behalf must allege and prove sufficient authority from the members to that end. St. Patrick's Church *v.* Consumers' Ice Co., 44 La. Ann. 1021, 11 So. 682.

In Illinois religious societies incorporated under Rev. St. (1845) and the act of 1855, relating to such bodies, can only be sued by their trustees and be reached by suit only through their trustees. As a church they cannot sue or be sued; but actions by or against them must be brought by or against the trustees. Ada St. M. E. Church *v.* Garnsey, 66 Ill. 132.

In Indiana it was held under the prevailing statute that a church organization could sue only in the name of "Wardens and Vestrymen of ———— Church ————," or in the name of "Trustees of ————, Church ————" Drumheller *v.* Pierceton First Universalist Church, 45 Ind. 275.

7. New York Mut. L. Ins. Co. *v.* Inman Park Presb. Church, 111 Ga. 677, 36 S. E. 880; Van Buren *v.* Gansevoort Reformed Church, 62 Barb. (N. Y.) 495; Tunstall *v.* Wormley, 54 Tex. 476.

Conversely it has been held that an unincorporated church cannot be sued as an organization. Burton *v.* Grand Rapids School Furniture Co., 10 Tex. Civ. App. 270, 31 S. W. 91.

Suit on a non-negotiable note, payable to a religious association by name, must be brought in the name of the association, if incorporated; otherwise, it should be brought by its members as partners. Jones *v.* Watson, 63 Ga. 679.

8. Lowenthall *v.* Wiseman, 56 Barb. (N. Y.) 490. And see Barnes *v.* Perine, 9 Barb. (N. Y.) 202 [*affirmed* in 12 N. Y. 18].

action by a religious corporation it is immaterial that its first meeting for the election of officers was not called as provided for by statute, it being held sufficient that it has *de facto* officers,[9] and the fact that a religious corporation has not, previous to the commencement of a suit, caused certificates of incorporation to be filed in the office of the secretary of state does not debar it from access to the courts in protecting a previously vested estate,[10] and in a proceeding by an incorporated religious society to compel payment of a legacy to itself, the objection cannot be made that the society has lost its corporate existence by non-user or failure to keep up its church organization,[11] and if a devise be made to officers of a religious corporation capable of taking, and their successors in office, for the use of the corporation, the officers *de facto* of such corporation may recover against one not claiming under the devisor, and showing no title, although the original corporation has become extinct, or has incurred a forfeiture of the devise by an alteration in its discipline or rules of government for if by any alteration in their doctrines, worship or discipline the corporation incurred a forfeiture only the devisors or their heirs can avail themselves of it.[12] A conveyance in trust to the trustees of a religious corporation, for the use of the corporation vests a title in the corporation without previous conveyance from the trustees which will support an action of ejectment by it,[13] and where a conveyance is made to certain persons as trustees for a church, who have not, however, been appointed trustees according to statute, the title vested in them is sufficient to enable them to support an action of trespass in their natural capacity, the term "trustees" being regarded as surplusage.[14]

B. Against Society or Members. A church if incorporated must be sued by its corporate name,[15] and one desiring to establish his claim to be a corporator

9. West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62, 49 N. W. 24.

A vacancy in the office of curate of the church corporation does not impair the corporation's right to sue; the curate, being an *ex officio* member of the board of wardens, having but one vote, like any other member of the board. St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

10. Probst *v.* Domestic Missions, 3 N. M. 237, 5 Pac. 702 [*reversed* on other grounds in 129 U. S. 182, 9 S. Ct. 263, 32 L. ed. 642].

Statute requiring the filing of a certificate of incorporation with the secretary of state construed in Mora *v.* Murphy, 83 Cal. 12, 23 Pac. 63, as not affecting the right of a corporation to sue in ejectment.

11. *In re* Cutchogue Cong. Church, etc., 131 N. Y. 1, 30 N. E. 43 [*affirming* 13 N. Y. Suppl. 140); Matter of Arden, 1 Connoly Surr. (N. Y.) 159, 4 N. Y. Suppl. 177, holding that the fact that an incorporated church has forfeited its charter and lost its legal existence can be taken advantage of only by direct proceeding against it for the purpose of declaring the forfeiture, and cannot be set up in the contest of a will in which the church is a legatee.

In an action of unlawful detainer by trustees against one who has leased church property from them, for recovery of possession, he cannot set up that the church holds the lot in violation of a statute limiting the ownership of real estate by a church to so much as may be necessary as a place of public worship, or burial place, or residence of a minister, since none but the state can attack such ownership, as violating the statute. Wheeling First English Evangelical Lutheran Church *v.* Arkle, 49 W. Va. 92, 38 S. E. 486.

Presumption of lawful incorporation.— Nothing appearing to the contrary, plaintiffs, who sue in their individual names as trustees of a named church, are presumed to have been lawfully incorporated (Skinner *v.* Richardson, 76 Wis. 464, 45 N. W. 318), and in an action against a religious society who have acted for many years as a corporation, plaintiff is not bound to prove a formal acceptance by defendants of their act of incorporation, and a legal organization under it, if not denied in the answer (Whitmore *v.* Plymouth Fourth Cong. Soc., 2 Gray (Mass.) 306).

12. King's Chapel *v.* Pelham, 9 Mass. 501.

13. Van Deuzen *v.* Presb. Cong., 4 Abb. Dec. (N. Y.) 465, 3 Keyes 550, 3 Transcr. App. 39.

14. Walker *v.* Fawcett, 29 N. C. 44.

In an action to require the executor to perform the provisions of a will, providing that a certain sum of money shall be set aside to build a fence around a chapel cemetery, the trustees of such chapel are the proper parties plaintiff. Cabe *v.* Vanhook, 127 N. C. 424, 37 S. E. 464.

15. Keller *v.* Tracy, 11 Iowa 530; Tartar *v.* Gibbs, 24 Md. 323, holding that a religious corporation, organized under Acts (1802), c. 3, can only be sued in its corporate name, and a suit against the trustees individually, designating them as trustees of the corporation, omitting part of the corporate name, is not a suit against the corporate body; the designation superadded being merely *descriptio personæ*.

or to preach in the church of the corporation, or to have a receiver appointed to take charge of the corporate property, cannot secure such relief in an action against individuals merely.[16] If unincorporated, the individual members may be sued collectively, or, if too numerous to admit of all being brought before the court, one or more may be sued, and may defend for the whole,[17] and a religious community may be sued in the name of its trustees.[18] The bishop of a church in whom is the legal title, having possession and control of the property of the church which is being laid out for use as a cemetery, is the proper defendant to a suit to restrain the use of the land for such purpose as a nuisance.[19]

C. Process and Appearance. Upon whom process against religious corporations may be served depends upon the statutes under which they are organized.[20] Under some statutes service must be made on the president, or at the office of the corporation, if it holds such in permanence, by delivery to some of its agents,[21] while under other statutes it is held that trustees of a religious corporation and officers appointed by them, whose elections and appointments were in conformity with the statute, and who are acting as such, are officers *de facto*, upon whom alone process can be served.[22] A statute authorizing service in a particular name upon an unincorporated business corporation does not apply to an unincorporated religious association.[23]

D. Procedure. Actions and proceedings by or against religious societies and other ecclesiastical organizations are governed by the same rules of pleading,[24]

Where a complaint described property as in the possession of rectors, churchwardens, and vestrymen of trinity church, and did not allege that they were not entitled to these offices, their possession and acts were those of the corporation, and the corporation should have been made a party. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302.

16. Groesbeeck *v.* Dunscomb, 41 How. Pr. (N. Y.) 302.

Trustees are the proper parties to a bill in equity averring that the general assembly ousted complainant from his pulpit in violation of the laws of the church, and wrongfully deprived him of his living, and praying equitable relief. Wallace *v.* United Presb. Church Gen. Assembly, 194 Pa. St. 178, 45 Atl. 84.

In proceedings to subject trust property of a church to a debt due by it, the trustees are the only necessary parties defendant. Kelsey *v.* Jackson, 123 Ga. 113, 50 S. E. 951.

17. Keller *v.* Tracy, 11 Iowa 530, holding that where the church is catholic, the bishop holding the legal title should be made a party. And see Moore *v.* Stemmons, 94 Mo. App. 475, 68 S. W. 224.

In Georgia in order for a church to be sued as an entity it must have been incorporated, or else certificates of appointment of trustees must have been filed as provided by Civ. Code (1895), § 2355. Kelsey *v.* Jackson, 123 Ga. 113, 50 S. E. 951; Thurmond *v.* Cedar Spring Baptist Church, 110 Ga. 816, 36 S. E. 221. But if trustees hold title to property for a church which has not been incorporated, and where no certificate has been filed as provided by the statute, nevertheless the trust property may be subjected to a debt for which it is liable. Kelsey *v.* Jackson, 123 Ga. 113, 50 S. E. 951.

18. Davis *v.* Bradford, 58 N. H. 476, holding that a shaker community, whose property is held and whose contracts are made by trustees, may be held liable on such contracts in suits brought against the trustees.

19. Jung *v.* Neraz, 71 Tex. 396, 9 S. W. 344.

20. See the statutes of the several states. And see cases cited *infra*, this section.

Amendment of writ.— In trespass *quare clausum*, plaintiffs were permitted to amend their writ, which charged defendant for an injury to their own property, by setting forth that they sued as deacons and overseers of a society of shakers. Anderson *v.* Brock, 3 Me. 243. Similarly, where an action of trespass *de bonis asportatis* was brought in the name of the elder and deacons of a church, and it appeared that the deacons alone constituted the corporation with respect to such property, in whose name the action should have been brought, the writ might be amended by striking out the words "elder and." Lowell First Freewill Baptist Church *v.* Bancroft, 4 Cush. (Mass.) 281.

21. New Orleans *v.* Christ Church, 3 La. Ann. 453, holding also that a sheriff's return on a citation against a corporation, that the writ was served by leaving it with its agent, without any proof as to such agency, is insufficient.

22. Berrian *v.* New York Methodist Soc., 4 Abb. Pr. (N. Y.) 424.

In mandamus to restore petitioner to his rights as member of a church corporation, the accounting warden of the church, appointed by *de facto* officers thereof, may appear and file a return to the alternative writ. Woodward *v.* Church, 14 Wkly. Notes Cas. (Pa.) 240.

23. Hicks *v.* Methodist Episcopal Church, 4 Ohio Dec. (Reprint) 85, 1 Clev. L. Rep. 14.

24. See cases cited *infra*, this note.

Set-off.— In an action between a baptist

evidence,[25] and trial[26] that govern actions against other associations,[27] or corporations.[28] Judgment against trustees of a religious community, rendered in an action on contracts made in behalf of the community, may be satisfied out of property belonging to the community.[29]

RELIGIOUS TEACHER. A term said to be synonymous with MINISTER,[1] *q. v.* (See, generally, RELIGIOUS SOCIETIES, *ante*, p. 1115.)

RELIGIOUS USES. See CHARITIES, 6 Cyc. 913.

RELIGIOUS WORSHIP. The act of paying honors to the Supreme Being; religious reverence and homage; adoration paid to God, or a Being viewed as God.[2] (See DISTURBANCE OF PUBLIC MEETINGS, 14 Cyc. 540; RELIGIOUS SOCIETIES, *ante*, p. 1115.)

church and its pastor, where the court adjudges costs to be paid by the pastor, it cannot set off against such costs the amount due on his salary. Morris St. Baptist Church *v.* Dart, 67 S. C. 338, 45 S. E. 753, 100 Am. St. Rep. 727.

Insufficient allegation of incorporation.— An allegation, in a pastor's suit for salary, that defendants were members "of a religious society," is not an allegation of incorporation. Riffe *v.* Proctor, 99 Mo. App. 601, 74 S. W. 409.

A declaration in replevin in which plaintiffs describe themselves as "trustees of the Colored Zion Baptist Church of Denver, who sue for the use and benefit of said church," is good on demurrer, whether the beneficiary is a corporation, or a mere voluntary association. Shipton *v.* Norrid, 1 Colo. 404.

25. See cases cited *infra*, this note.

Sufficiency of evidence.— In an action by architects against a church to recover for their services in drawing plans for a proposed church edifice, evidence considered, and held insufficient to show that the rector was given any authority by the vestry to bind the church by contracting with the architects. Cann *v.* Church of Redeemer, 111 Mo. App. 164, 85 S. W. 994.

Admission in answer of membership rendering evidence thereof unnecessary see Sheehy *v.* Blake, 77 Wis. 394, 46 N. W. 537, 9 L. R. A. 564.

26. See cases cited *infra*, this note.

Questions of fact for jury.— In an action for the value of plans for a church prepared under the direction of the rector, the question whether the rector had been given proper authority to bind the vestry with reference to the preparation and acceptance of the plans was for the jury. Cann *v.* Church of Holy Redeemer, 121 Mo. App. 201, 98 S. W. 781. Where, in an action for the erection of a church, it was claimed that the trustees acted beyond their authority, yet there was evidence tending to show a ratification of the acts by the church, it was error to direct a verdict for defendant but the question should have been submitted to the jury. Moore *v.* First Ruthven Circuit M. E. Church, 117 Iowa 33, 90 N. W. 492.

Finding of court based on sufficient averments.— Where a complaint alleged that the action of a certain ecclesiastical court on appeal in sustaining a certain other ecclesiastical court was without authority and null and void, and the answer averred that the appeal to the latter court was in accordance with the procedure of the church courts, a finding that the proceeding on appeal was so irregular as to render the judgment null and void is not erroneous, as based on insufficient averments. Wallace *v.* United Presb. Church Gen. Assembly, 201 Pa. St. 292, 50 Alt. 762.

Specification of defense.— In an action against a religious society, described in the writ as "a body corporate for certain purposes," if defendant would deny its existence or organization as a corporation, it must give notice of intention to do so in a specification of defense. Townsend *v.* Lowell First Freewill Baptist Church, 6 Cush. (Mass.) 279.

Appointment of receiver.—A law vesting in the county courts jurisdiction, on the application of any religious corporation, to make an order for the sale of real estate belonging to it, and to direct the application of the proceeds to such uses as the corporation, with the court's consent, shall conceive to be best for the society, confers no jurisdiction on a county court to appoint a receiver of the effects of a religious corporation. Wheaton *v.* Gates, 18 N. Y. 395.

27. See, generally, ASSOCIATIONS, 4 Cyc. 312 *et seq.*

28. See, generally, CORPORATIONS, 10 Cyc. 1331.

29. Davis *v.* Bradford, 58 N. H. 476.

Money deposited in bank by the pastor of a church from general contributions is not the property of the church in such a sense that it can be taken in satisfaction of an execution against the church. People's Bank *v.* St. Anthony's Roman Catholic Church, 38 Hun (N. Y.) 330.

1. Pfeiffer *v.* Detroit Bd. of Education, 118 Mich. 560, 565, 77 N. W. 250, 42 L. R. A. 536.

2. Webster Dict. [*quoted* in Hamsher *v.* Hamsher, 132 Ill. 273, 285, 23 N. E. 1123, 8 L. R. A. 556].

In an instruction the court defined "religious society" as "where a congregation has assembled for the purpose of performing acts of adoration to the Supreme Being, or to perform religious service in the recognition of God as an object of worship, love, and obedience"; according to the rites and services of any system of faith entertained with respect to the Deity. Green *v.* State,

RELINQUISHMENT. A forsaking, abandoning, renouncing, or giving over a right.[3] (Relinquishment: Of Claim by Government, see INTERNATIONAL LAW, 23 Cyc. 1738. Of Mining Claim, see MINES AND MINING, 27 Cyc. 596. Of Possession, Loss of Possessory Lien by, see ATTORNEY AND CLIENT, 4 Cyc. 1012. Of Right of Dower, see DESCENT AND DISTRIBUTION, 14 Cyc. 82. Of Rights in Public Lands, see PUBLIC LANDS, 32 Cyc. 856. See also ABANDONMENT, 1 Cyc. 3; RELEASE, *ante*, p. 1111.)

RELOAN. The act of loaning money a second time, or oftener.[4] (See LOAN, 25 Cyc. 1530.)

RELOCATION. A second location.[5] (Relocation: Of Boundary, see BOUNDARIES, 5 Cyc. 874. Of Bridge, see BRIDGES, 5 Cyc. 1064. Of Easement, see EASEMENTS, 14 Cyc. 1205. Of Ferry, see FERRIES, 19 Cyc. 494 note 10. Of Highway, see RAILROADS, 33 Cyc. 288; STREETS AND HIGHWAYS. Of Lost Monument, see BOUNDARIES, 5 Cyc. 870. Of Mining Claim, see MINES AND MINERALS, 27 Cyc. 590 note 54, 600. Of Railroad, see EMINENT DOMAIN, 15 Cyc. 577; RAILROADS, 33 Cyc. 142.)

RELUCTANT. Disinclined to yield to some demand or requirement; unwilling;[6] striving against; opposed in desire; unwilling; disinclined; or disinclined to yield.[7]

RELYING. A word which when used in a will is said not to be an imperative expression since it neither commands nor imposes a duty, but at most indicates the faith of the person using it in the honor or honesty or affection of the person addressed.[8] (See, generally, WILLS.)

REM. See IN REM, 22 Cyc. 1102.

REMAIN. To continue;[9] to continue in a fixed place;[10] to continue unchanged;[11] to stay; to be left; to be left after another or others are gone;[12] to stay behind after others have withdrawn; to continue unchanged in place; to abide; to stay; to endure; to last.[13]

(Tex. Cr. App. 1900) 56 S. W. 915, 916; Wood *v.* State, 11 Tex. App. 318, 321.

3. Black L. Dict.

"Relinquish," as used in an agreement by which, for a certain consideration, the obligor bound himself to "relinquish" a certain annuity, did not necessarily mean a release of the annuity by deed; but abstaining from demanding, and receiving the annuity was a relinquishment. Home *v.* Booth, 3 Man. & G. 709, 742, 42 E. C. L. 371.

4. Spurgeon *v.* Smitha, 114 Ind. 453, 455, 17 N. E. 105.

5. Webster Int. Dict.

An implied admission of the validity of the former location see Jackson *v.* Prior Hill Min. Co., 19 S. D. 453, 457, 104 N. W. 207.

6. Standard Dict. [*quoted* in Georgia Cent. R. Co. *v.* Harden, 113 Ga. 453, 456, 38 S. E. 949].

7. Webster Dict. [*quoted* in Georgia Cent. R. Co. *v.* Harden, 113 Ga. 453, 456, 38 S. E. 949].

8. Willets *v.* Willets, 35 Hun (N. Y.) 401, 405.

9. Beard *v.* Smith, 6 T. B. Mon. (Ky.) 430, 489; Century Dict.; Webster Dist. [both *quoted* in State *v.* Fowler, 66 Conn. 294, 300, 32 Atl. 162, 33 Atl. 1005].

10. Webster Dict. [*quoted* in Wilkinson *v.* Wilson, 26 Ont. 213, 215].

11. Harris *v.* Wright, 118 N. C. 422, 426, 24 S. E. 751.

12. Century Dict.; Webster Dict. [both *quoted* in State *v.* Fowler, 66 Conn. 294, 300, 32 Atl. 162, 33 Atl. 1005].

13. Webster Dict. [*quoted* in Tinkle *v.* Sweeney, 97 Tex. 190, 192, 77 S. W. 609].

"Remain 'inviolate,'" as used in a state constitution providing that the right of trial by jury shall remain inviolate, means that it shall be preserved as it existed at common law at the time of the adoption of the constitution. Gribble *v.* Wilson, 101 Tenn. 612, 614, 49 S. W. 736.

"Remains unexpended," as used in a will, construed see Annin *v.* Vandoren, 14 N. J. Eq. 135, 143.

"That may remain at the time of her death, to dispose of as she may see proper." — Construction of, in will see Downey *v.* Borden, 36 N. J. L. 460, 468.

"What remains," construction of, as used in disposing of property in wills see State *v.* Smith, 52 Conn. 557, 564; Coulson *v.* Alpaugh, 163 Ill. 298, 303, 45 N. E. 216; Foote *v.* Sanders, 72 Mo. 616, 621; Jackson's Estate, 179 Pa. St. 77, 83, 36 Atl. 156.

"Remaining" in connection with other words: "Remaining at my wife's death" see Robertson *v.* Hardy, (Va. 1895) 23 S. E. 766, 767. "Remaining collector" see State *v.* Fowler, 66 Conn. 294, 300, 32 Atl. 162, 33 Atl. 1005. "'Remaining' interest" see Eaton *v.* Trowbridge, 38 Mich. 454, 460. "Remaining on the land" see Langmaid *v.* Mickle, 16 Ont. 111, 114. "Remaining property" see Russell *v.* Werntz, 88 Md. 210, 214, 44 Atl. 219. "Remaining unpaid" see Fowler *v.* Hoffman, 31 Mich. 215, 219. "Remaining untried" see Preston *v.* Englert, 5 Binn. (Pa.) 390. "Interest on the principal sum remain-

REMAINDER. The survivor;[14] whatever may be left.[15] (See, generally, WILLS.)

REMAINDER-MAN. See ESTATES, 16 Cyc. 648; WILLS.

REMAINDERS. See ESTATES, 16 Cyc. 648.

REMAND. After a preliminary or partial hearing before a court or magistrate, to send a prisoner back to the custody, to be kept until the hearing is resumed or the trial comes on;[16] to remit or send back a cause to the court from which it was removed, appealed, or transferred into another court, in order that some further action may be taken upon it in the original form.[17] (Remand: For Settlement as to Evidence, see APPEAL AND ERROR, 3 Cyc. 72 note 35. Judgment on, see JUDGMENTS, 23 Cyc. 817 note 51. Of Cause, by Appellate Court — On Decision, see ADMIRALTY, 1 Cyc. 906 note 82; APPEAL AND ERROR, 3 Cyc. 453; CERTIORARI, 6 Cyc. 835; CRIMINAL LAW, 12 Cyc. 312; JUSTICES OF THE PEACE, 24 Cyc. 784; On Division of Opinion, see APPEAL AND ERROR, 3 Cyc. 405. Of Cause Removed — From State Court, see REMOVAL OF CAUSES, *post*, p. 1320; To Another Court by Change of Venue, see CRIMINAL LAW, 12 Cyc. 254; VENUE. Of Prisoner — On Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 335 note 91; On Preliminary Examination, see CRIMINAL LAW, 12 Cyc. 312; On Reversal on Appeal, see CRIMINAL LAW, 12 Cyc. 932. Of Record on Appeal For Amendment or Correction, see APPEAL AND ERROR, 3 Cyc. 458. See also COMMITMENT, 8 Cyc. 336; MANDATE, 26 Cyc. 514.)

REMANETS. The causes of which the trial is deferred from one term to another, or from one sitting to another.[18] (See, generally, TRIAL.)

REMANIT. A substance made from silk rags, some of which may contain an admixture of cotton and wool; the rags being placed in a large drum which is charged with various acids, the purposes being to destroy the cotton and wool by the process known as carbonization. The carbonized silk thus obtained is bound together with metal threads and made in the form of ropes about 1¼ inches thick, or into mats, as may be desired.[19]

REMARK. The mention of that which is worthy of notice or attention.[20]

REMARRIAGE. See DIVORCE, 14 Cyc. 729; MARRIAGE, 26 Cyc. 849 note 57.

REMATE. Closing.[21]

REMEDIAL ACT. See REMEDIAL STATUTE, *post*, p. 1201.

REMEDIAL ACTION. An action brought by the party injured.[22] (See, generally, ACTIONS, 1 Cyc. 700; PENAL ACTION, 30 Cyc. 1329.)

REMEDIAL CASES. A term used in the Minnesota constitution, of limited

ing due at each payment" see Hall *v.* Brown, 15 U. C. Q. B. 419, 420.

"Remaining," construction of, in wills, generally, see Chase *v.* Cartright, 53 Ark. 358, 365, 14 S. W. 90, 22 Am. St. Rep. 207; Scholl's Appeal, 1 Pa. Cas. 392, 2 Atl. 538.

14. Nelson *v.* Combs, 18 N. J. L. 27, 35, so used in a clause of a will which recited that if one of two persons should die, or either of them, the remainder to enjoy the other's property.

15. Baumgras *v.* Baumgras, 5 Misc. (N. Y.) 8, 12, 13, 24 N. Y. Suppl. 767, as used in a will, giving decedent's wife an estate and providing that "on her decease the remainder thereof, if any, I give and devise to my said children."

"Remainder of the aforesaid children," in a will directing testator's estate to be divided among his six children, and, if any should die without lawful issue, then their portion to be equally divided among the remainder of the aforesaid children, is not equivalent to the phrase "survivors of my children," but naturally means the rest, the others of my children. Presley *v.* Davis, 7 Rich. Eq. (S. C.) 105, 108, 62 Am. Dec. 396.

16. Black L. Dict.

17. Black L. Dict.

"Dismiss" and "remand" distinguished see Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339, 341, 9 Sawy. 348.

18. Black L. Dict. [*citing* 1 Archbold Pr. 375].

19. U. S. *v.* Brace, 143 Fed. 703.

20. Webster Dict. [*quoted* in U. S. *v.* Dorr, 2 Philippine 269, 286].

21. *In re* Henderson, 35 Ch. D. 704, 711, discussing and describing a "remote judgment." See also *In re* Henderson, 37 Ch. D. 244, 57 L. J. Ch. 367, 58 L. T. Rep. N. S. 242.

22. O'Keefe *v.* Weber, 14 Oreg. 55, 56, 12 Pac. 74, where it is distinguished from "penal action" which is defined to be an action brought by a common informer.

signification, referring to the original jurisdiction of the supreme court in certain matters.[23] (See COURTS, 11 Cyc. 825.)

REMEDIAL RIGHT. A new right which accrues in favor of the servant against the master to recover damages for the breach of the contract, where the master wrongfully discharges the servant from his service under a contract for a definite period.[24]

REMEDIAL STATUTE. A statute made to supply defects or abridge superfluities in the law;[25] a statute such as may be made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, or from change of circumstances, from mistake or any other cause;[26] a statute which has for its object either to redress some existing grievance or to introduce some regulation or proceeding conducive to the public good;[27] a statute which seeks to supply a public need and to remedy a public evil;[28] one designed to cure a mischief or remedy a defect in existing laws, common or statutory, however arising;[29] one which gives a remedy for an injury, against him by whom it is committed, to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained;[30] one which is required in consequence of errors in human judgments, or which is rendered necessary by the various changes which are constantly taking place as the community enlarges and its concerns increase;[31] one which is made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfections in human laws, from change of time and circumstances, or from the mistakes and unadvised determination of unlearned judges (or learned), or from other causes whatsoever.[32] (See CONSTITUTIONAL LAW, 8 Cyc. 810; STATUTES.)

REMEDY. A mode prescribed by law to enforce a duty or redress a wrong;[33] damages that courts dealing practically with the practical affairs of life, in all cases for personal injuries, can find to be certain and measurable from the evidence, the source of which is open to both parties and the nature not transcendental;[34] that which gives relief to the party aggrieved;[35] the means by which the obligation or the corresponding action is effectuated;[36] the means employed to enforce a right or redress an injury;[37] the mode of procedure by which the liability of property to the satisfaction of a debt is enforced;[38] the particular result to obtain which an action is brought;[39] the means employed to enforce a right or redress an injury;[40] the action or means given by law for the recovery of a right.[41] (Remedy:

23. State *v.* St. Paul, etc., R. Co., 35 Minn. 222, 28 N. W. 245. See also State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 216, 41 N. W. 1020, 3 L. R. A. 510; Warren *v.* St. Paul, etc., R. Co., 18 Minn. 384, 394.

24. Tiffin Glass Co. *v.* Stoehr, 54 Ohio St. 157, 164, 43 N. E. 279.

25. O'Connor *v.* State, (Tex. Civ. App. 1902) 71 S. W. 409, 411.

26. Western Travelers' Acc. Assoc. *v.* Taylor, 62 Nebr. 783, 793, 87 N. W. 950; Buckmaster *v.* McElroy, 20 Nebr. 556, 564, 31 N. W. 76, 57 Am. Rep. 843.

27. Baylies *v.* Curry, 30 Ill. App. 105, 109; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304, 310.

28. Lovejoy *v.* Isbell, 70 Conn. 557, 562, 40 Atl. 531.

29. Montpelier *v.* Senter, 72 Vt. 112, 47 Atl. 392.

30. Boice *v.* Gibbons, 8 N. J. L. 324, 330.

31. Gray *v.* Bennett, 3 Metc. (Mass.) 522, 527.

32. 1 Blackstone Comm. 87 [*quoted* in People *v.* Hays, 4 Cal. 127, 137; Freeland *v.* McCullough, 1 Den. (N. Y.) 414, 422, 43 Am. Dec. 685].

33. U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482, 501, where it is said not to be an "obligation to guaranty a right, or to indemnify against a wrong."

34. Western Union Tel. Co. *v.* Ferguson, 157 Ind. 64, 69, 60 N. E. 674, 1080, 54 L. R. A. 846.

35. Com. *v.* Kelley, 31 Pa. Co. Ct. 337, 338; Com. *v.* A——, 30 Pa. Co. Ct. 554, 556, in both of which cases the word is distinguished from "penalty."

36. Frost *v.* Witter, 132 Cal. 421, 426, 64 Pac. 705, 84 Am. St. Rep. 53, where "cause of action" is distinguished.

37. State *v.* Barlow, 70 Ohio St. 363, 375, 71 N. E. 726.

38. Johnson *v.* Fletcher, 54 Miss. 628, 631, 28 Am. Rep. 388.

39. Wildman *v.* Wildman, 70 Conn. 700, 707, 41 Atl. 1.

40. Bouvier L. Dict. [*quoted* in *In re* Cooper, 22 N. Y. 67, 87; Methodist Episcopal Missionary Soc. *v.* Ely, 56 Ohio St. 405, 407, 47 N. E. 537; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 644, 20 S. Ct. 824, 44 L. ed. 921].

41. Jacob L. Dict. [*quoted* in Gutierres *v.* Pino, 1 N. M. 392, 394].

Matters pertaining to the "remedy" have

Abatement of — Action, see ABATEMENT AND REVIVAL, 1 Cyc. 10; Nuisance, see HEALTH, 21 Cyc. 396; INTOXICATING LIQUORS, 23 Cyc. 302; NUISANCES, 29 Cyc. 1214; Obstruction of Highway, see STREETS AND HIGHWAYS; Private Right of Way, see EASEMENTS, 14 Cyc. 1185. Accord or Other Agreement Between Parties, see ACCORD AND SATISFACTION, 1 Cyc. 311; COMPOSITION WITH CREDITORS, 8 Cyc. 409; COMPROMISE AND SETTLEMENT, 8 Cyc. 499; RELEASE, *ante*, p. 1111. Accounting, and Remedies on Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 471; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 246; BANKRUPTCY, 5 Cyc. 339; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1104; GUARDIAN AND WARD, 21 Cyc. 150; INSANE PERSONS, 22 Cyc. 1149; INSOLVENCY, 22 Cyc. 1325; MORTGAGES, 27 Cyc. 1835; PARTNERSHIP, 30 Cyc. 701; PRINCIPAL AND AGENT, 31 Cyc. 1470; TRUSTS. Acknowledgment or Proof of Execution of Written Instrument, see ACKNOWLEDGMENTS, 1 Cyc. 506. Action, see ACTIONS, 1 Cyc. 643, 700; ASSUMPSIT, ACTION OF, 4 Cyc. 317; COVENANT, ACTION OF, 11 Cyc. 1022; DEBT, ACTION OF, 13 Cyc. 402; ENTRY, WRIT OF, 15 Cyc. 1057; FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1108; REAL ACTIONS, 33 Cyc. 1541; REPLEVIN; TRESPASS; TRESPASS TO TRY TITLE; TROVER AND CONVERSION; WASTE. Admeasurement of Dower, see DOWER, 14 Cyc. 996. Administration of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1. Adoption of Children, see ADOPTION OF CHILDREN, 1 Cyc. 914. Affidavit, see AFFIDAVITS, 2 Cyc. 1. Affiliation, see BASTARDS, 5 Cyc. 632. Against Corporation Committing Fraud, see CORPORATIONS, 10 Cyc. 1221. Against Directors Obtaining Unlawful Preference, see CORPORATIONS, 10 Cyc. 806. Agreed Case For — Review on Appeal or Writ of Error, see APPEAL AND ERROR, 3 Cyc. 74; Submission or Trial of Cause, see SUBMISSION OF CONTROVERSY; TRIAL. Alimony, see DIVORCE, 14 Cyc. 742. Allotment of — Dower, see DOWER, 14 Cyc. 996; Exempt Property, see EXEMPTIONS, 18 Cyc. 1482; Homestead, see HOMESTEADS, 21 Cyc. 482. Allowance Additional to Costs, see COSTS, 11 Cyc. 134. Alteration of, see CONSTITUTIONAL LAW, 8 Cyc. 995. Amercement, see SHERIFFS AND CONSTABLES. Amicable Action, see SUBMISSION OF CONTROVERSY. Amnesty, see PARDON, 29 Cyc. 1560. Amotion of Corporate Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 432. Annulment of — Marriage, see MARRIAGE, 26 Cyc. 899; Patent, see PATENTS, 30 Cyc. 911. Appeal, see APPEAL AND ERROR, 2 Cyc. 507, 521; CRIMINAL LAW, 12 Cyc. 792; JUSTICES OF THE PEACE, 24 Cyc. 638. Application of — Ex Post Facto Law to, see CONSTITUTIONAL LAW, 8 Cyc. 828; Payments, see PAYMENT, 30 Cyc. 1227. Appropriation of Property For Public Use, see EMINENT DOMAIN, 15 Cyc. 578. Arbitration, see ARBITRATION AND AWARD, 3 Cyc. 568. Arrest and Bail, see ARREST, 3 Cyc. 867; BAIL, 5 Cyc., 1. Arrest of Judgment, see JUDGMENTS 23 Cyc. 1427. Assessment of Damages, see DAMAGES, 13 Cyc. 220. Assignment — For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 258, 282; Of Errors, see APPEAL AND ERROR, 2 Cyc. 980; CRIMINAL LAW, 12 Cyc. 874; JUSTICES OF THE PEACE, 24 Cyc. 711. Assistance, see ASSISTANCE, WRIT OF, 4 Cyc. 289. Assumpsit, see ASSUMPSIT, ACTION OF, 4 Cyc. 317. Attachment, see ATTACHMENT, 4 Cyc. 368. Audita Querela, see AUDITA QUERELA, 4 Cyc. 1058. Bail, see BAIL, 5 Cyc. 1. Bastardy Proceeding, see BASTARDS, 5 Cyc. 644. Betterment Proceeding, see EJECTMENT, 15 Cyc. 218; IMPROVEMENTS, 22 Cyc. 1. Bill of Exceptions, see APPEAL AND ERROR, 3 Cyc. 23. Book-Account or Book-Debt, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 364. Boundary Proceeding, see BOUNDARIES, 5 Cyc. 951. Cancellation of — Instruments, in General, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282; Insurance Policies, see FIRE INSURANCE, 19 Cyc. 642; LIFE INSURANCE, 25 Cyc. 784; Patents, see PATENTS, 30 Cyc. 912. Case

been defined to be such matters as the character and form of action, the admissibility of evidence, procedure, the mode of redress, limitations, execution of judgments, and the like. Thomas *v.* Western Union Tel. Co., 25 Tex. Civ. App. 398, 400, 61 S. W. 501.

Limited to actions and special proceedings see Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668, 671.

Does not include: Contempt proceedings. See State *v.* Davis, 2 N. D. 461, 464, 51 N. W. 942. Mechanic's lien. See Atkins *v.* Little, 17 Minn. 342, 357.

"Obligation of contract" distinguished see Wood *v.* Malin, 10 N. J. L. 208, 209.

"Substantive right" distinguished see Dexter *v.* Edmands, 89 Fed. 467, 468.

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1369; Homesteads, 21 Cyc. 448. Exhaustion of Against Maker of Note, see Commercial Paper, 8 Cyc. 132, 177. Exoneration of Bail, see Bail, 5 Cyc. 28. Expatriation, see Aliens, 2 Cyc. 110; Citizens, 7 Cyc. 144. Expulsion of — Aliens in General, see Aliens, 2 Cyc. 119; Chinese, see Aliens, 2 Cyc. 124. Extent of — Adoption and Application of Common Law, see Common Law, 8 Cyc. 377; Execution, see Executions, 17 Cyc. 1076. Extradition, see Extradition (International), 19 Cyc. 50; Extradition (Interstate), 19 Cyc. 84. Factorizing Process, see Garnishment, 20 Cyc. 978. Fictitious Action, see Appeal and Error, 2 Cyc. 533; Dismissal and Nonsuit, 14 Cyc. 432. Filiation, see Bastards, 5 Cyc. 632. Fine and Recovery, see Estates, 16 Cyc. 612. Fines, see Fines, 19 Cyc. 543. Following Trust Fund or Other Property, see Trusts. Forcible Entry or Forcible Detainer, see Forcible Entry and Detainer, 19 Cyc. 1108. Foreclosure of — Liens, see Liens, 25 Cyc. 681; also Agriculture, 2 Cyc. 66; Mechanics' Liens, 27 Cyc. 317; Municipal Corporations, 28 Cyc. 1209; Railroads, 33 Cyc. 562; Taxation; Vendor and Purchaser; Mortgages, see Mortgages, 27 Cyc. 1511; also Building and Loan Societies, 6 Cyc. 145; Chattel Mortgages, 7 Cyc. 92; Railroads, 33 Cyc. 562. Foreign Attachment, see Attachment, 4 Cyc. 406, 460; Garnishment, 20 Cyc. 1036. Forfeiture, Enforcement in General, see Forfeitures, 19 Cyc. 1359. Forfeiture For Violation of — Customs Laws, see Customs Duties, 12 Cyc. 1170; Internal Revenue Laws, see Internal Revenue, 22 Cyc. 1689; Laws Relating to Intoxicating Liquors, see Intoxicating Liquors, 23 Cyc. 299. For Infringement of Copyright, see Copyright, 9 Cyc. 951. Formedon, see Real Actions, 33 Cyc. 1548. Forthcoming Bond, see Attachment, 4 Cyc. 759; Executions, 17 Cyc. 1228; Replevin. Friendly Suit, see Submission of Controversy. Garnishment, see Garnishment, 20 Cyc. 969. General Average, see Shipping. Guardianship, see Guardian and Ward, 21 Cyc. 1; Infants, 22 Cyc. 519, 634; Insane Persons, 22 Cyc. 1120; Spendthrifts. Habeas Corpus, see Habeas Corpus, 21 Cyc. 279. Highway Proceeding, see Streets and Highways. Homestead Exemption, see Homesteads, 21 Cyc. 448. Hotchpot, see Descent and Distribution, 14 Cyc. 174. Impeachment, see Judges, 23 Cyc. 523; Officers, 29 Cyc. 1413. Imprisonment, see Arrest, 3 Cyc. 867; Bail, 5 Cyc. 1; Criminal Law, 12 Cyc. 954; Prisons, 32 Cyc. 312. In Admiralty, see Admiralty, 1 Cyc. 797. In Bankruptcy, see Bankruptcy, 5 Cyc. 227. Indemnity, see Indemnity, 22 Cyc. 78. Indictment, see Indictments and Informations, 22 Cyc. 127. In Equity — Generally, see Equity, 16 Cyc. 1; To Recover Dividend, see Corporations, 10 Cyc. 567. In Forma Pauperis, see Costs, 11 Cyc. 200. Information — As Criminal Accusation, see Indictments and Informations, 22 Cyc. 186; In Nature of Quo Warranto, see Quo Warranto, 32 Cyc. 1410; To Enforce Penalty or Forfeiture in Admiralty, see Admiralty, 1 Cyc. 855; To Enforce Penalty or Forfeiture in Revenue Cases, see Customs Duties, 12 Cyc. 1179; Internal Revenue, 22 Cyc. 1683. In Insolvency, see Insolvency, 22 Cyc. 1249. Injunctions, see Injunctions, 22 Cyc. 724. In Personam, see Admiralty, 1 Cyc. 867; Equity, 16 Cyc. 134. Inquest or Inquisition of — Coroner, see Coroners, 9 Cyc. 985; Homicide, 21 Cyc. 994; Damages, see Damages, 13 Cyc. 220; Damages in Condemnation Proceedings, see Eminent Domain, 15 Cyc. 872 ; Incapacity From Drunkenness, see Drunkards, 14 Cyc. 1096; Insanity, see Insane Persons, 22 Cyc. 1123. Inquiry, Writ of, see Damages, 13 Cyc. 225. In Rem, see Admiralty, 1 Cyc. 868; Equity, 16 Cyc. 134; Judgments, 23 Cyc. 1406; Mechanics' Liens, 27 Cyc. 322; Mortgages, 27 Cyc. 1512; Vendor and Purchaser. Interpleader, see Interpleader, 23 Cyc. 1. Interrogatories to Adverse Party — In Admiralty, see Admiralty, 1 Cyc. 857; In Equity, see Equity, 16 Cyc. 378; On Examination Before Trial, see Discovery, 14 Cyc. 352; To Jury, see Trial; To Witnesses on Taking Depositions, see Depositions, 13 Cyc. 894. Jail Liberties, see Arrest, 3 Cyc. 963 note 47; Executions, 17 Cyc. 1535; Prisons, 32 Cyc. 336. Judicial — Sale, see Judicial Sales, 24 Cyc. 1; Separation, see Divorce, 14 Cyc. 556. Legislative Divorce, see Divorce, 14 Cyc. 574. Legitimation of Children, see Bastards, 5 Cyc. 632. Letters Rogatory, see Depositions, 13 Cyc. 920. Limitation of

Liability of Owner of Vessel, see ADMIRALTY, 1 Cyc. 839; COLLISION, 7 Cyc. 383; SHIPPING. Limited Divorce, see DIVORCE, 14 Cyc. 710. Lis Pendens, see LIS PENDENS, 25 Cyc. 1447. Mandamus, see MANDAMUS, 26 Cyc. 125. Mandate, see APPEAL AND ERROR, 2 Cyc. 816; CRIMINAL LAW, 12 Cyc. 297; MANDAMUS, 26 Cyc. 125. Mandatory Injunction, see INJUNCTIONS, 22 Cyc. 742. Marshaling Assets or Securities, see MARSHALING ASSETS AND SECURITIES, 26 Cyc. 927. Motion, see MOTIONS, 28 Cyc. 1. Naturalization, see ALIENS, 2 Cyc. 110. Ne Exeat, see NE EXEAT, 29 Cyc. 382. New Trial, see NEW TRIAL, 29 Cyc. 707. Notice of Pendency of Action, see LIS PENDENS, 25 Cyc. 447; PROCESS, 32 Cyc. 412. Of Bondholders, see CORPORATIONS, 10 Cyc. 1179. Of Common Law, see COMMON LAW, 8 Cyc. 382. Of Defrauded Shareholder Against Corporation, see CORPORATIONS, 10 Cyc. 437. Offer of Judgment, see COSTS, 11 Cyc. 71; JUDGMENTS, 23 Cyc. 729. Of Innocent Subscriber to Fraudulent Overissue of Stock, see CORPORATIONS, 10 Cyc. 444. On Contracts of Individuals and Private Corporations, see CONSTITUTIONAL LAW, 8 Cyc. 998. Orders of Court, see MOTIONS, 28 Cyc. 1. Pardon, see PARDONS, 29 Cyc. 1559. Partition, see PARTITION, 30 Cyc. 145. Payment Into Court, see COSTS, 11 Cyc. 71; TENDER. Penal Action, see PENALTIES, 30 Cyc. 1343. Perpetuation of Testimony, see DEPOSITIONS, 13 Cyc. 854. Petitory Action, see REAL ACTIONS, 33 Cyc. 1541. Physical Examination of Party, see DAMAGES, 13 Cyc. 207; DISCOVERY, 14 Cyc. 364. Possessory — Action, see REAL ACTIONS, 33 Cyc. 1541; Warrant, see POSSESSORY WARRANT, 31 Cyc. 955. Presentment, see GRAND JURIES, 20 Cyc. 1335; INDICTMENTS AND INFORMATIONS, 22 Cyc. 174. Prison Bounds, see ARREST, 3 Cyc. 968; EXECUTIONS, 17 Cyc. 1531; PRISONS, 32 Cyc. 337. Processioning, see BOUNDARIES, 5 Cyc. 945. Production of Documents, see DISCOVERY, 14 Cyc. 337; EVIDENCE, 17 Cyc. 457. Prohibition, see PROHIBITION, 32 Cyc. 596. Quieting Title, see QUIETING TITLE, 32 Cyc. 1296. Qui Tam Action, see PENALTIES, 30 Cyc. 1346. Quo Warranto, see QUO WARRANTO, 32 Cyc. 1410. Real Action, see REAL ACTIONS, 33 Cyc. 1541. Receiver, see RECEIVERS, *ante*, p. 1. Recordari, see JUSTICES OF THE PEACE, 24 Cyc. 762. Recoupment, see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM, *ante*, p. 618. Redelivery, see ATTACHMENT, 4 Cyc. 666; EXECUTIONS, 17 Cyc. 1124; REPLEVIN. Redemption, see CHATTEL MORTGAGES, 7 Cyc. 83; EXECUTIONS, 17 Cyc. 1324; JUDICIAL SALES, 24 Cyc. 68; MECHANICS' LIENS, 27 Cyc. 450; MORTGAGES, 27 Cyc. 1799; PLEDGES, 28 Cyc. 857; TAXATION. Redhibitory Action, see SALES; VENDOR AND PURCHASER. Reference, see REFERENCES, *ante*, p. 770. Reformation of Instrument, see REFORMATION OF INSTRUMENTS, *ante*, p. 899. Removal of Cause, see REMOVAL OF CAUSES, *post*, p. 1211; Removal of Cloud From Title, see QUIETING TITLE, 32 Cyc. 1314. Replevin, see REPLEVIN. Report and Case-Made For Review on Appeal, see APPEAL AND ERROR, 3 Cyc. 74. Reprieve, see Pardons, 29 Cyc. 1561. Rescission of Contracts or Conveyances, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 283; CONTRACTS, 9 Cyc. 433; DEEDS, 13 Cyc. 722; FIRE INSURANCE, 19 Cyc. 651; LIFE INSURANCE, 25 Cyc. 788; MUTUAL BENEFIT INSURANCE, 28 Cyc. 92; SALES; VENDOR AND PURCHASER. Restitution — Of Real Property to Owner or Occupant, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1122; LANDLORD AND TENANT, 24 Cyc. 1391; On Reversal on Appeal or Writ of Error, see APPEAL AND ERROR, 3 Cyc. 362; On Reversal on Certiorari, see CERTIORARI, 6 Cyc. 836. Retaxation of Costs, see COSTS, 11 Cyc. 170. Review — Of Judgment or Other Decision or Ruling on Appeal or Writ of Error, see APPEAL AND ERROR, 2 Cyc. 538; On Bill of Review or Other Equitable Proceeding, see EQUITY, 16 Cyc. 517; JUDGMENTS, 23 Cyc. 1054; On Motion in Same Court, see JUDGMENTS, 23 Cyc. 886; NEW TRIAL, 29 Cyc. 707; On Writ of Audita Querela, see AUDITA QUERELA, 4 Cyc. 1058; On Writ of Certiorari, see CERTIORARI, 6 Cyc. 830; On Writ of Review, or Petition, or Action For Review, see REVIEW. Revival — Of Judgment, see JUDGMENTS, 23 Cyc. 1436; On Abatement of Cause, see ABATEMENT AND REVIVAL, 1 Cyc. 82. Revivor in Equity, see EQUITY, 16 Cyc. 363. Rights of Annuitants, see ANNUITIES, 2 Cyc. 469. Right, Writ of, see REAL ACTIONS, 33 Cyc. 1541. Rules to Show Cause, see MOTIONS, 28 Cyc. 10. Salvage, see SALVAGE. Scire Facias, see SCIRE FACIAS; also BAIL, 5 Cyc. 139; JUDGMENTS.

23 Cyc. 1448; Mortgages, 27 Cyc. 1514; Recognizances, *ante*, p. 562. Search Warrant, see Searches and Seizures; also Intoxicating Liquors, 23 Cyc. 87. Seizure, see Searches and Seizures; also Customs Duties, 12 Cyc. 1176; Forfeitures, 19 Cyc. 1359; Internal Revenue, 22 Cyc. 1684; Intoxicating Liquors, 23 Cyc. 87. Self-Defense or Defense of Another or of Property, see Assault and Battery, 3 Cyc. 1070, 1073; Homicide, 21 Cyc. 791. Sequestration, see Sequestration. Set-Off, see Recoupment, Set-Off, and Counter-Claim, *ante*, p. 618, Specific Performance, see Specific Performance. Statutes With Respect to, see Constitutional Law, 8 Cyc. 822. Statutory, see Actions, 1 Cyc. 706; Statutes. Stoppage In Transitu, see Sales. Submission to — Arbitrators or Referees, see Arbitration and Award, 3 Cyc. 588; Court, see Submission of Controversy. Subrogation, see Subrogation. Substitution of Parties in Action, see Interpleader, 23 Cyc. 1; Sheriffs and Constables. Suit, see Actions, 1 Cyc. 634; Admiralty, 1 Cyc. 809; Equity, 16 Cyc. 1. Summary Proceedings — For Collection of Taxes and Assessments, see Municipal Corporations, 28 Cyc. 1224; Taxation; For Recovery of Costs, see Costs, 11 Cyc. 254; For Recovery of Possession of Demised Premises by Landlord, see Landlord and Tenant, 24 Cyc. 1406; On Bonds or Recognizances, see Appeal and Error, 2 Cyc. 961; Attachment, 4 Cyc. 701; Certiorari, 6 Cyc. 843; Criminal Law, 12 Cyc. 948; Executors and Administrators, 18 Cyc. 1279; Garnishment, 19 Cyc. 1151; Guardian and Ward, 21 Cyc. 240; Injunctions, 22 Cyc. 1039; Recognizances, *ante*, p. 536; Replevin; To Enforce Contribution Among Cosureties, see Principal and Surety, 32 Cyc. 294; To Enforce Liability of Principal to Surety, see Principal and Surety, 32 Cyc. 238; To Enforce Lien of Landlord, see Landlord and Tenant, 24 Cyc. 1276; To Enforce Right of Exemption, see Exemptions, 18 Cyc. 1487; Homesteads, 21 Cyc. 633; To Punish Contempt, see Contempt, 9 Cyc. 33. Summary Remedies of Client, see Attorney and Client, 4 Cyc. 975. Supersedeas, see Supersedeas; also Appeal and Error, 2 Cyc. 836; Certiorari, 6 Cyc. 800; Criminal Law, 12 Cyc. 830; Executions, 17 Cyc. 1135. Supplementary Proceedings on Execution Against Property, see Executions, 17 Cyc. 1402. Surcharge of Account, see Accounts and Accounting, 1 Cyc. 459. Surrender by — Bail, of Principal, see Bail, 5 Cyc. 44, 126; Tenant of Demised Premises, see Landlord and Tenant, 24 Cyc. 1366. Survey of Boundaries, see Boundaries, 5 Cyc. 944. Taxation of Costs, see Costs, 11 Cyc. 154. Tax-Sale, see Taxation. Tender, see Tender. To Collect "Labor Debts," see Corporations, 10 Cyc. 692. To Restore Expelled Corporation Director, see Corporations, 10 Cyc. 747. Trespass — In General, see Trespass; To Try Title, see Trespass to Try Title. Trial of — Right to Property Levied on, see Attachment, 4 Cyc. 724; Executions, 17 Cyc. 1190; Tax Title, see Taxation. Trover, see Trover and Conversion. Trustee Process, see Garnishment, 20 Cyc. 978. Unlawful Detainer, see Forcible Entry and Detainer, 19 Cyc. 1108; Landlord and Tenant, 24 Cyc. 1394. Vested Right in, see Constitutional Law, 8 Cyc. 916. Warning Order, see Process, 32 Cyc. 481 note 44.)

REMEDY OVER. A person who is primarily liable or responsible, but who, in turn, can demand indemnification from another, who is responsible to him, is said to have a "remedy over." [42] (Remedy Over: Against Person Primarily Liable, In General, see Indemnity, 22 Cyc. 78. Of Insurer Against Person Causing Loss, see Fire Insurance, 19 Cyc. 893; Life Insurance, 25 Cyc. 903; Marine Insurance, 26 Cyc. 710. Of Surety Against Principal, see Principal and Surety, 32 Cyc. 250. Right of Contribution Among Debtors Jointly Liable — In General, see Contribution, 9 Cyc. 794, 804; Officers and Stock-Holders of Corporation, see Corporations, 10 Cyc. 897; Sureties, see Principal and Surety, 32 Cyc. 276. Substitution of Third Person Paying Debt to Rights of Creditor Against Debtor, see Subrogation.)

42. Black L. Dict. [*citing* 2 Black Jud. § 575], where it is said: "For example, a city being compelled to pay for injuries caused by a defect in the highway, has a 'remedy over' against the person whose act or negligence caused the defect, and such person is said to be 'liable over' to the city."

REMEMBRANCE. A term sometimes used in wills.[43]

REMISE. See RELEASE, *ante*, p. 1111.

REMISSION. A release of a debt; at common law the act by which a forfeiture or penalty is forgiven.[44] (Remission: Effect of, see BAIL, 5 Cyc. 136. Of Costs — Improperly Taxed, see EJECTMENT, 15 Cyc. 200; In Criminal Case, see COSTS, 11 Cyc. 269 note 27. Of Debt, see RELEASE, *ante*, p. 1111. Of Excess of Damages, see DAMAGES, 13 Cyc. 134. Of Fine — In General, see PARDONS, 29 Cyc. 1568; By Building and Loan Society, see BUILDING AND LOAN SOCIETIES, 6 Cyc. 136. Of Forfeiture — In General, see FORFEITURES, 19 Cyc. 1365; For Violation of Customs Laws, see CUSTOMS DUTIES, 12 Cyc. 1188; Of Bail-Bond, see BAIL, 5 Cyc. 131. Of Part of Demand to Confer Jurisdiction — In General, see COURTS, 11 Cyc. 781; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 474; On Appeal or Other Proceedings For Review, see APPEAL AND ERROR, 2 Cyc. 575, 3 Cyc. 478; JUSTICES OF THE PEACE, 24 Cyc. 648. Of Penalty — In General, see PENALTIES, 30 Cyc. 1341; For Violation of Revenue Laws, see INTERNAL REVENUE, 22 Cyc. 1693. Pardon and Effect as Remission of Fine, Penalty, or Forfeiture, see PARDONS, 29 Cyc. 1556. See also Cross-References under REMITTITUR.)

REMISSIUS IMPERANTI MELIUS PARETUR. A maxim meaning "One commanding not too strictly is better obeyed."[45]

REMISSNESS. A term, as used in a contract by a telegraph company exempting it from liability for any delay, error, or remissness, implies a sending or delivering of the message, but in a tardy, negligent, or careless manner.[46]

REMIT. To forgive, to pardon, to release from punishment or penalty;[47] to send back;[48] to transmit, forward, or send.[49] (See REMITTITUR.)

REMITTANCE. Money sent by one person to another either in specie, bill of exchange, check, or otherwise.[50] (Remittance: By Mail as Payment, see PAYMENT, 30 Cyc. 1186.)

REMITTED. A word, as applicable to a crime, which has been said to mean pardoned.[51] (See PARDONS, 29 Cyc. 1558.)

REMITTER. A word, which when technically used, refers to a person procuring a foreign bill of exchange.[52] (See COMMERCIAL PAPER, 7 Cyc. 527.)

REMITTITUR. See REMITTITUR DAMNA; REMITTITUR OF RECORD.

REMITTITUR DAMNA. An entry made on record, in cases where a jury has given greater damages than a plaintiff has declared for.[53] (Remittitur Damna: As Cure of Errors, see APPEAL AND ERROR, 3 Cyc. 435. Authority of Attorney to Enter, see ATTORNEY AND CLIENT, 4 Cyc. 941. Entry of Upon Excessive Verdict Rendered, see JURIES, 24 Cyc. 191 note 14. Of Damages or Part of Recovery — In General, see DAMAGES, 13 Cyc. 252; JUDGMENTS, 23 Cyc. 786 note 51; As Affecting Excessive Verdict, see APPEAL AND ERROR, 3 Cyc. 382; As Affecting Jurisdictional Amount of Appellate Court, see APPEAL AND ERROR, 2 Cyc. 575; As Affecting Right to Costs on Appeal, see COSTS, 11 Cyc. 215; As

43. Bubb *v.* Yelverton, L. R. 13 Eq. 131, 132, 20 Wkly. Rep. 164. See also Read *v.* Devaynes, 3 Bro. Ch. 95, 29 Eng. Reprint 429; Burgess *v.* Burgess, 1 Coll. 367, 6 Jur. 660, 28 Eng. Ch. 367, 63 Eng. Reprint 458.

44. Black L. Dict.

Distinguished from "pardon" see U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209, 237.

45. Peloubet Leg. Max. [*citing* 3 Inst. 233].

46. Baldwin *v.* U. S. Telegraph Co., 54 Barb. (N. Y.) 505, 515, 6 Abb. Pr. N. S. 405.

47. Cook *v.* Middlesex County, 26 N. J. L. 326, 328.

48. Colvin *v.* U. S. Mutual Acc. Assoc., 66 Hun (N. Y.) 543, 545, 21 N. Y. Suppl. 734.

49. Hollowell *v.* Virginia L. Ins. Co., 126 N. C. 398, 402, 35 S. E. 616.

To remit a cause is to send it back to the same court from which it has been removed by appeal or otherwise, for the purpose of retrying the cause when judgment has been reversed, or of issuing execution when it has been affirmed. Irvine *v.* Marshall, 3 Minn. 72, 76.

50. Black L. Dict.

51. Webster Dict. [*quoted* in Gibson *v.* People, 5 Hun (N. Y.) 542, 543].

52. Boston Steel, etc., Co. *v.* Steuer, 183 Mass. 140, 144, 66 N. E. 646, 97 Am. St. Rep. 426.

53. Black L. Dict. [*citing* 2 Tidd Pr. 896].

Of the nature of a discontinuance and is governed by the same rules. Gayden *v.* Louisville, etc., R. Co., 39 La. Ann. 269, 271, 1 So. 792.

Condition of Refusing New Trial, see New Trial, 29 Cyc. 1021; As Ground For Affirmance by Appellate Court, see Appeal and Error, 2 Cyc. 937 note 14; Scope and Extent of Review on Appeal From Judgment After Remittitur, see Appeal and Error, 3 Cyc. 220. Of Pact of Demand to Confer Jurisdiction, see Courts, 11 Cyc. 781; also Appeal and Error, 2 Cyc. 650 note 68; Justices of the Peace, 24 Cyc. 649 note 53, 761 note 3. On Assumpsit, see Assumpsit, Action of, 4 Cyc. 360 note 32. See also Remittitur of Record.)

Remittitur of Record. The returning or sending back by a court of appeal of the record and proceedings in a cause, after its decision thereon, to the court whence the appeal came, in order that the cause may be tried anew, (where it is so ordered,) or that judgment may be entered in accordance with the decision on appeal, or execution be issued, or any other necessary action be taken in the court below.[54] (See Appeal and Error, 2 Cyc. 1031 note 4; 3 Cyc. 478.)

Remnants and Surplusses. A technical term, said to mean the remainder of the proceeds from the sale of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, after the satisfaction of such claims.[55]

Remonstrance. Expostulation; showing of reasons against something proposed; a representation made to a court or legislative body wherein certain persons unite in urging that a contemplated measure be not adopted or passed.[56] (Remonstrance: Against — Annexation of Territory to Municipality, see Municipal Corporations, 28 Cyc. 188, 205; Establishment of Drain, see Drains, 14 Cyc. 1036; Establishment of Highway, see Streets and Highways; Grant of Liquor License, see Intoxicating Liquors, 23 Cyc. 129; Location of Schoolhouse, see Schools and School-Districts; Public Improvements, see Municipal Corporations, 28 Cyc. 989; Removal of County-Seat, see Counties, 11 Cyc. 372; Use of Highway For Railroad Right of Way, see Railroads, 33 Cyc. 198. Vacation of Highway, see Streets and Highways.)

Remonstrate. To present and urge reasons in opposition to an act, measure, or any course of proceeding.[57] (See Remonstrance.)

Remote. Removed.[58] (See Customs Duties, 12 Cyc. 1125.)

Remote Cause. A cause the connection between which and the effect is uncertain, vague, or indeterminate;[59] improbable cause;[60] one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn;[61] that cause of which some indefinite force merely took advantage to accomplish something not the probable or natural effect thereof;[62] that which

54. Black L. Dict.

The filing and docketing of a transcript of a judgment of the supreme court in any county of the state, for the purpose of issuing an execution, is not a remittitur, under supreme court rule 29. La Crosse, etc., Packet Co. *v.* Reynolds, 12 Minn. 213, 215.

55. China Mut. Ins. Co. *v.* Force, 142 N. Y. 90, 99, 36 N. E. 874, 40 Am. St. Rep. 576.

56. Black L. Dict.

Within the meaning of the liquor license law, is one "for or against a single or particular application." *In re* Mercer County License Applications, 3 Pa. Co. Ct. 43, 45.

57. Webster Dict. [*quoted* in Girvin *v.* Simon, 127 Cal. 491, 494, 59 Pac. 945].

58. Webster Dict. [*quoted* in Pennsylvania R. Co. *v.* Kerr, 62 Pa. St. 353, 366, 1 Am. Rep. 431].

As used in Tariff Act of 1883, in enumerating wools of the first class as "wools of merino blood, near or remote," means within the limit of merino blood requisite to characterize the wool as possessing merino qualities and adding to its value. U. S. *v.* Midgley, 42 Fed. 668, 669.

59. Seifter *v.* Brooklyn Heights R. Co., 169 N. Y. 254, 259, 62 N. E. 349; Laidlaw *v.* Sage, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216.

60. Missouri Malleable Iron Co. *v.* Dillon, 206 Ill. 145, 157, 69 N. E. 12; Armour *v.* Golkowska, 202 Ill. 144, 148, 66 N. E. 1037; Wright *v.* Illinois Cent. R. Co., 119 Ill. App. 132, 135; Cavanaugh *v.* Centerville Block Coal Co., 131 Iowa 700, 707, 109 N. W. 303, 7 L. R. A. N. S. 907; Stephenson *v.* Corder, 71 Kan. 475, 479, 80 Pac. 938, 114 Am. St. Rep. 500, 69 L. R. A. 246.

61. Seifter *v.* Brooklyn Heights R. Co., 169 N. Y. 254, 259, 62 N. E. 349; Laidlaw *v.* Sage, 158 N. Y. 73, 99, 52 N. E. 679, 44 L. R. A. 216; McGovern *v.* Degnon-McLean Contracting Co., 120 N. Y. App. Div. 524, 527, 105 N. Y. Suppl. 408; Hoey *v.* Metropolitan R. Co., 70 N. Y. App. Div. 60, 63, 74 N. Y. Suppl. 1113; Marks *v.* Rochester R. Co., 41 N. Y. App. Div. 66, 76, 58 N. Y. Suppl. 210.

62. Mallen *v.* Waldowski, 203 Ill. 87, 90 67 N. E. 409; Atchison, etc., R. Co. *v.* Dickens, 7 Indian Terr. 16, 103 S. W. 750,

may have happened, and yet no injury have occurred notwithstanding that no injury could have occurred if it had not happened.[63] (Remote Cause: Consequences of Injury and Effect on Right to Compensatory Damages, see Damages, 13 Cyc. 25, 35. Of Injury, see Negligence, 29 Cyc. 490. Of Loss, Death, or Injury as Applied to Insurance, see Accident Insurance, 1 Cyc. 273; Marine Insurance, 26 Cyc. 725.)

Remote damages. Such as are the unusual and unexpected result, not reasonably to be anticipated from an accidental or unusual combination of circumstances — a result beyond and over which the negligent party has no control.[64] (See Damages, 13 Cyc. 25, 35.)

Remoteness of evidence. When the fact or facts proposed to be established as a foundation from which indirect evidence may be drawn, by way of inference, have not a visible, plain, or necessary connection with the proposition eventually to be proved, such evidence is rejected for "remoteness." [65] (Remoteness of Evidence: In Actions For Malicious Prosecution, see Malicious Prosecution, 26 Cyc. 88. In Civil Action, see Evidence, 16 Cyc. 1113. In Criminal Prosecution, see Criminal Law, 12 Cyc. 390. In Prosecution For Homicide, see Homicide, 21 Cyc. 930.)

Remoto impedimento, actio emergit. A maxim meaning "The obstacle being removed, the right of action emerges." [66]

Removable. Admitting of, liable to or intended for removal.[67]

Removal. The act of removing, or the state of being removed.[68] (Removal: From Domicile or Residence — In General, see Domicile, 14 Cyc. 855; As Affecting Right to Exemptions, see Exemptions, 18 Cyc. 1459. From Homestead, see Homesteads, 21 Cyc. 599, 605, 621. From State, Effect on Limitations, see Limitations of Actions, 25 Cyc. 1228. From State or District as Creating Vacancy in Office, see Officers, 29 Cyc. 1377, 1400. Of Appointee by County Board, see Counties, 11 Cyc. 404. Of Assignee — For Benefit of Creditors, see Assignments For Benefit of Creditors, 4 Cyc. 230; In Bankruptcy, see Bankruptcy, 5 Cyc. 338; In Insolvency, see Insolvency, 22 Cyc. 1279. Of Building as Extinguishing Mechanic's Lien, see Mechanics' Liens, 27 Cyc. 287. Of Building — Mechanics' Liens For, see Mechanics' Liens, 27 Cyc. 36; On Mortgaged Premises, see Mortgages, 27 Cyc. 1145. Of Causes, see Removal of Causes, *post*, p. 1211. Of Cloud on Title, see Quieting Title, 32 Cyc. 1296. Of Commissioner to Sell Land, see Judicial Sales, 24 Cyc. 13. Of Corporate Officer, In General, see Corporations, 10 Cyc. 935. Of County Officer, see Counties, 11 Cyc. 426. Of County-Seat — In General, see Counties, 11 Cyc. 369; As Subject of Protection and Relief by Injunction, see Injunctions, 22 Cyc. 882. Of Court Attendant, see Courts, 11 Cyc. 724. Of Court Stenographer, see Courts, 11 Cyc. 722. Of Crops — In General, see Crops, 12 Cyc. 981; On Leased Premises, see Landlord and Tenant, 24 Cyc. 1473. Of Disability of — Coverture, see Husband and Wife, 21 Cyc. 1306; Infant, see Infants, 22 Cyc. 516. Of Disqualification of — Judge, see Judges, 23 Cyc. 598; Juror, see Juries, 24 Cyc. 199. Of Executor or Administrator, see Executors and Administrators, 18 Cyc.

755; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 405, 11 C. C. A. 253, 27 L. R. A. 583.

63. Troy *v.* Cape Fear, etc., R. Co., 99 N. C. 298, 306, 6 S. E. 77, 6 Am. St. Rep. 521.

In the law of negligence it has been said not to mean remote in point of time, but merely in connection with the primary cause. Maryland Steel Co. *v.* Marney, 88 Md. 482, 42 Atl. 60, 71 Am. St. Rep. 441, 42 L. R. A. 842.

Term said not to be capable of abstract definition see Cleveland *v.* Bangor, 87 Me. 259, 268, 32 Atl. 892, 47 Am. St. Rep. 326.

64. Champion Chemical Works *v.* Postal Tel.-Cable Co., 123 Ill. App. 20, 24.

65. Black L. Dict. [*citing* 2 Wharton Ev. § 1226 note].

66. Morgan Leg. Max. [*citing* Tray. 535].

67. Standard Dict.

"Removable fastening" as used in an application for a patent consisting of a contrivance for attaching a metallic top to a lantern by a "removable fastening" or "spring-catch" covers "every conceivable device applicable to lanterns and adapted to connect one edge of the lid with the top of the lantern or guard or to disconnect it." Adams *v.* Bellaire Stamping Co., 141 U. S. 539, 540, 12 S. Ct. 66, 35 L. ed. 849.

68. Webster Int. Dict.

159. Of Fences, see Fences, 19 Cyc. 480. Of Fixture, see Fixtures, 19 Cyc. 1067. Of Guardian, see Guardian and Ward, 21 Cyc. 237; Insane Persons, 22 Cyc. 1145. Of Guardian Ad Litem or Next Friend of Infant, see Infants, 22 Cyc. 670. Of Hospital Officer, see Hospitals, 21 Cyc. 1108. Of Husband as Trustee For Wife, and Her Rights Thereupon, see Husband and Wife, 21 Cyc. 1413. Of Ice and Snow, see Municipal Corporations, 28 Cyc. 856. Of Improvements — In General, see Improvements, 22 Cyc. 9; By Tenant, see Landlord and Tenant, 24 Cyc. 110. Of Internal Revenue Officer, see Internal Revenue, 22 Cyc. 1665. Of Joint Executor of Power, see Powers, 31 Cyc. 1110. Of Maker or Accepter of Commercial Paper, see Commercial Paper, 7 Cyc. 1113. Of Member of County Board, see Counties, 11 Cyc. 385. Of Mortgaged Property, see Chattel Mortgages, 6 Cyc. 1088. Of National Bank Officer, see Banks and Banking, 5 Cyc. 578. Of Obstructions of — Easement, see Easements, 14 Cyc. 1214; Navigable Stream, see Navigable Waters, 29 Cyc. 303, 311; Street or Highway, see Streets and Highways. Of Officer, see Officers, 29 Cyc. 1406. Of Particular Classes of Officers — In General, see Clerks of Courts, 7 Cyc. 204; Judges, 23 Cyc. 522; Justices of the Peace, 24 Cyc. 413; Notaries, 29 Cyc. 1074; Officers, 29 Cyc. 1406; Prosecuting and District Attorneys, 32 Cyc. 693; Registers of Deeds, *ante*, p. 1019; Sheriffs and Constables; Building Inspector, see Municipal Corporations, 28 Cyc. 539; Court Officer, see Courts, 11 Cyc. 722; Fireman or Fire Commissioner, see Municipal Corporations, 28 Cyc. 545; Health Officer, see Municipal Corporations, 28 Cyc. 537; Highway Officer, see Streets and Highways; Municipal Officer in General, see Municipal Corporations, 28 Cyc. 432; Policeman, see Municipal Corporations, 28 Cyc. 487; Prison Officer, see Prisons, 32 Cyc. 319; Railroad Commissioner, see Railroads, 33 Cyc. 49; Referee, see References, *ante*, p. 809; State Officer, see States; United States Officer, see United States. Of Party-Wall, see Party-Walls, 30 Cyc. 781. Of Passenger From Railroad Train, see Carriers, 6 Cyc. 549. Of Pauper, see Paupers, 30 Cyc. 1111. Of Property or Goods — As Affecting Insurance, see Fire Insurance, 19 Cyc. 665; As Affecting Landlord's Lien, see Landlord and Tenant, 24 Cyc. 1245, 1258; As Affecting Right to Distrain, see Landlord and Tenant, 24 Cyc. 1284; As Ground of Attachment, see Attachment, 4 Cyc. 436; By Guardian, see Guardian and Ward, 21 Cyc. 54; By Mortgagor, see Chattel Mortgages, 6 Cyc. 1025; By Tenant as Giving Right of Immediate Distress, see Landlord and Tenant, 24 Cyc. 1284; Duty of Consignee to Remove, see Carriers, 6 Cyc. 447; Injunction Against, see Injunctions, 22 Cyc. 824; Subject to Lien, see Liens, 25 Cyc. 680. Of Public — Bridge, see Bridges, 5 Cyc. 1064; Notice, see Notice, 29 Cyc. 1126. Of Public Officer — In General, see Officers, 29 Cyc. 1406; Executive Power, see Constitutional Law, 8 Cyc. 857; Mandamus to Procure, see Mandamus, 26 Cyc. 255; Quo Warranto to Procure, see Quo Warranto, 32 Cyc. 1424. Of Railroad Crossing, see Railroads, 33 Cyc. 290. Of Railroad Station, see Railroads, 33 Cyc. 142. Of Receiver — In General, see Receivers, *ante*, pp. 158, 174; Of Railroad, see Railroads, 33 Cyc. 621. Of Record, see Records. Of Support — By Adjoining Landowner, see Adjoining Landowners, 1 Cyc. 782; In Mines, Liability For Injuries, see Mines and Minerals, 27 Cyc. 787. Of Teacher, see Schools and School-Districts. Of Timber From Public Lands, see Public Lands, 32 Cyc. 778. Of Trespasser — From Indian Reservation, see Indians, 22 Cyc. 141; From Railroad Train, see Carriers, 6 Cyc. 545. Of Trustee — In General, see Trusts; Under Mortgages Executed by Railroad Company, see Railroads, 33 Cyc. 507. To Another Justice or Jurisdiction, see Criminal Law, 12 Cyc. 304.)

REMOVAL OF CAUSES

By Roger Foster*

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CROSS-REFERENCES

For Matters Relating to:
Change of Venue:
In Civil Actions, see VENUE.
In Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 242.
Transfer of Cause From One Court to Another:
For Disqualification of Judge, see JUDGES, 23 Cyc. 594.
In Civil Actions, see COURTS, 11 Cyc. 992.
In Criminal Prosecutions, see CRIMINAL LAW, 12 Cyc. 222.

I. PURPOSE, CONSTITUTIONALITY, HISTORY, AND LIMITATIONS OF RIGHT OF REMOVAL.

A. Purpose and Constitutionality of Right of Removal. The purpose of the creation of the right to remove a case from a state to a federal court was to enable a defendant to have claims against him under the federal constitution or federal statutes adjudicated in the first instance by a federal tribunal; and to enable him to obtain freedom from local prejudice or influence, when sued in the courts of a state of which he is not a citizen. This right is unknown to the com-

mon law and is the creature of statute.[1] Statutes which provide for such removals are authorized by the constitution of the United States.[2]

B. History of Right of Removal. The right of removal was first granted by the Judiciary Act of September 24, 1789.[3] It was continuously extended by the act of March 2, 1833, passed during the attempt at nullification by South Carolina,[4] and by the acts of March 3, 1863;[5] April 9, 1866;[6] May 11, 1866;[7] July 13, 1866;[8] July 27, 1866;[9] February 5, 1867;[10] March 2, 1867;[11] July 27, 1868;[12] May 31, 1870;[13] February 28, 1871;[14] and March 30, 1872.[15] All of these are incorporated in the Revised Statutes of 1873.[16] The right was further extended by the first act of March 3, 1875, an appropriation bill, which included a clause upon the subject;[17] and by the second act, known as the Judiciary Act of March 3, 1875, which was intended to extend the same to the full extent authorized by the constitution of the United States.[18] The right of removal was restricted by the act of March 3, 1887.[19] The enrolment of this last act contained a few clerical errors which were corrected by a statute reënacting the same, approved August 13, 1888.[20] The act of February 8, 1894,[21] repealed so much of the former statutes as gave a right of removal to an officer of the United States engaged in the enforcement of the act to regulate congressional elections.[22] The statutes now in force

1. Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524; Manley *v.* Olney, 32 Fed. 708; Hubbard *v.* Northern R. Co., 12 Fed. Cas. No. 6,818, 3 Blatchf. 84, 25 Vt. 715. See also Pittsburgh, etc., R. Co. *v.* Wood, (Ind. App. 1908) 84 N. E. 1009, holding that the right of removal of a cause of action from a state to a federal court is premised on the fact that the state court does have jurisdiction of the action, but by reason of a federal question being involved the party against whom such question is raised has the privilege, at his election, at the proper time, of having the cause removed.

The right of removal is not a vested right of property, which may not be taken away after it has once accrued; and such a right, which has come into existence, but has not been exercised, before the repeal of the statute under which it arose, has been held to be lost upon such repeal. Birdseye *v.* Shaeffer, 37 Fed. 821; Manley *v.* Olney, 32 Fed. 708.

2. *Indiana.*— Burson *v.* New York Park Bank, 40 Ind. 173, 13 Am. Rep. 285; McCormick *v.* Humphrey, 27 Ind. 144.

Nevada.— Meadow Valley Min. Co. *v.* Dodds, 7 Nev. 143, 8 Am. Rep. 709.

Ohio.— State *v.* Fairfield County Ct. C. Pl., 15 Ohio St. 377.

Pennsylvania.— Hodgson *v.* Millward, 3 Grant 412.

Wisconsin.— Goodman *v.* Oshkosh, 45 Wis. 355.

United States.—Strauder *v.* West Virginia, 100 U. S. 303, 25 L. ed. 664; Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648; Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 22 L. ed. 68; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. 270, 20 L. ed. 571; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 68; San Mateo County *v.* Southern Pac. R. Co., 13 Fed. 145; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362; Johnson *v.* Monell, 13 Fed. Cas. No. 7,399, Woolw. 390; Murray *v.* Patrie, 17 Fed. Cas. No. 9,967, 5 Blatchf. 343.

See 42 Cent. Dig. tit. "Removal of Causes," § 3.

3. 1 U. S. St. at L. 79, c. 20, § 12.
4. 4 U. S. St. at L. 633, c. 57, § 3.
5. 12 U. S. St. at L. 756, c. 81, § 5.
6. 14 U. S. St. at L. 27, c. 31, § 3.
7. 14 U. S. St. at L. 46, c. 80, §§ 3, 5.
8. 14 U. S. St. at L. 171, c. 184, § 67.
9. 14 U. S. St. at L. 306, c. 288.
10. 14 U. S. St. at L. 385, c. 27.
11. 14 U. S. St. at L. 558, c. 196.
12. 15 U. S. St. at L. 227, c. 255, § 2.
13. 16 U. S. St. at L. 144, c. 114, §§ 16, 18.
14. 16 U. S. St. at L. 438, c. 99, § 16.
15. 17 U. S. St. at L. 44, c. 72.
16. U. S. Rev. St. (1878) §§ 639, 640, 641, 642, 643, 644, 645, 646, 647.

The removal acts of 1789, 1866, and 1867 were repealed by the Revised Statutes, and the Judiciary Act of March 3, 1875. Jones *v.* Amazon Ins. Co., 8 Leg. Gaz. (Pa.) 59.

The act of March 2, 1867, was repealed by the Revised Statutes. Baltimore, etc., R. Co. *v.* New Albany, etc., R. Co., 53 Ind. 597.

17. 18 U. S. St. at L. 401, c. 130, § 8.
18. 18 U. S. St. at L. 471, c. 137, § 3.
19. 24 U. S. St. at L. 552, c. 373.
20. 25 U. S. St. at L. 433, c. 866.
21. 28 U. S. St. at L. 36, c. 25 [U. S. Comp. St. (1901) p. 1272].
22. 28 U. S. St. at L. 36, c. 25 [U. S. Comp. St. (1901) p. 1272].

Subsections 1 and 2 of U. S. Rev. St. (1878) § 639, were repealed by the general repealing section of the Judiciary Act of 1875 (18 U. S. St. at L. 473, c. 137, § 10 [U. S. Comp. St. (1901) p. 514]). O'Conor *v.* Texas, 202 U. S. 501, 26 S. Ct. 726, 50 L. ed. 1120; Baltimore, etc., R. Co. *v.* Bates, 119 U. S. 464, 467, 7 S. Ct. 285, 30 L. ed. 436; Ayres *v.* Watson, 113 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093; Holland *v.* Chambers, 110 U. S. 59, 3 S. Ct. 427, 28 L. ed. 70; King *v.* Cornell, 106 U. S. 395, 398, 1 S. Ct. 312, 27 L. ed. 60; Hyde *v.* Ruble, 104 U. S. 407, 26 L. ed. 823; Foster Fed. Judiciary Acts 56.

upon the subject are the act of August 13, 1888;[23] sections 4, 5, 6, 7, 8, and 9 of the Judiciary Act of March 3, 1875;[24] the section in the appropriation act of March 3, 1875, for the benefit of the officers of either house of congress;[25] and the provisions of the Revised Statutes of the United States for the protection of civil rights,[26] and for the benefit of revenue officers, and of persons claiming rights or defenses under the revenue laws of the United States.[27]

C. Limitations of Right of Removal — 1. Power of States. The states have no power to restrict or to impair the right of removal.[28] But a state may revoke the authority of a foreign corporation, not engaged in interstate commerce, to transact business within its jurisdiction, because of the removal by such corporation of a suit which has been brought against it.[29]

Subsection 3 of U. S. Rev. St. (1878) § 639, was repealed by the general repealing clause of the Judiciary Act of March 3, 1887. 24 U. S. St. at L. 555, c. 373, § 6, which repeal was reënacted by the act of Aug. 13, 1888; 25 U. S. St. at L. 436, c. 866, § 6 [U. S. Comp. St. (1901) p. 515]. Hanrick *v.* Hanrick, 152 U. S. 192, 14 S. Ct. 835, 38 L. ed. 685; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 35 L. ed. 1080; *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; Foster Fed. Judiciary Acts 33, 57; Foster Fed. Pr. (4th ed.) § 386, p. 938.

U. S. Rev. St. (1878) § 644, has been repealed by the general repealing clause of the Judiciary Act of March 3, 1875 (18 U. S. St. at L. 473, c. 137, § 10 [U. S. Comp. St. (1901) p. 514]) so far as the same is not included in section 2 of that statute, as amended by the Judiciary Act of 1887 (24 U. S. St. at L. 552, c. 373, § 1), as reënacted on Aug. 13, 1888 (25 U. S. St. at L. 433, c. 866, § 1 [U. S. Comp. St. (1901), p. 514]). See Fisk *v.* Henarie, 142 U. S. 459, 466, 12 S. Ct. 207, 28 L. ed. 1117; O'Conor *v.* Texas, 202 U. S. 501, 507, 26 S. Ct. 726, 50 L. ed. 1120.

U. S. Rev. St. (1878) § 640, was expressly repealed by the Judiciary Act of March 3, 1887 (24 U. S. St. at L. 555, c. 373, § 6, as reënacted by the act of Aug. 13, 1888; 25 U. S. St. at L. 436, c. 866, § 6 [U. S. Comp. St. (1901) p. 515]).

U. S. Rev. St. (1878) § 645, was repealed so far as the same was not reënacted by the Judiciary Act of 1875 (18 U. S. St. at. L. 472, c. 137, § 7 [U. S. Comp. St. (1901) p. 512].

U. S. Rev. St. (1878) § 646, has been repealed by the Judiciary Act of 1875, § 9, so far as the same is not included in section 4 of the same act (18 U. S. St. at L. 473, c. 137 [U. S. Comp. St. (1901) p. 513]). O'Conor *v.* Texas, 202 U. S. 501, 507, 26 S. Ct. 726, 50 L. ed. 1120; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 28 L. ed. 1117.

U. S. Rev. St. (1878) § 647, has been repealed by section 10 of the Judiciary Act of March 3, 1875 (18 U. S. St. at L. 473, c. 137 [U. S. Comp. St. (1901) p. 514]), so far as the same is not included in section 1 of this statute, as amended by the act of March 3, 1887 (24 U. S. St. at L. 552, c. 373, § 1), as reënacted Aug. 13, 1888 (25 U. S. St. at L. 433, c. 866, § 1 [U. S. Comp. St. (1901) p. 514]); O'Conor *v.* Texas, 202 U. S. 501, 507, 26 S. Ct. 726, 50 L. ed. 1120; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 28 L. ed. 1117.

23. 25 U. S. St. at L. 433, c. 866 [U. S. Comp. St. (1901) p. 514]. Section 639 of the Revised Statutes was repealed by the Judiciary Acts of 1875 and 1887 and 1888. O'Conor *v.* Texas, 202 U. S. 501, 26 S. Ct. 726, 55 L. ed. 1120; Hanrick *v.* Hanrick, 152 U. S. 192, 14 S. Ct. 835, 38 L. ed. 685; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 28 L. ed. 1117; *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; Baltimore, etc., R. Co. *v.* Bates, 119 U. S. 464, 7 S. Ct. 285, 30 L. ed. 436.

24. 18 U. S. St. at L. 470, c. 137 [U. S. Comp. St. (1901) p. 511].

25. 18 U. S. St. at L. 401, c. 130, § 8.

26. U. S. Rev. St. (1878) §§ 641, 642 [U. S. Comp. St. (1901) pp. 520, 521].

27. U. S. Rev. St. (1878) § 643.

This, as amended by the act of Feb. 8, 1894, protects only revenue officers of the United States and persons claiming rights under the federal revenue laws. 28 U. S. St. at L. 36, c. 25 [U. S. Comp. St. (1901) p. 521].

28. Jones *v.* Amazon Ins. Co., 8 Leg. Gaz. (Pa.) 59; Brown *v.* Crippin, 4 Hen. & M. (Va.) 173; Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915; Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445; Ashe *v.* Union Cent. L. Ins. Co., 115 Fed. 234; Hulbert *v.* Russo, 64 Fed. 8.

A state court cannot enjoin the removal of a case. Blydenstein *v.* New York Security, etc., Co., 59 Fed. 12.

A state statute, creating a cause of action, and providing that the same shall only be enforced in the state courts, or in a specified state court, will not prevent the removal of such a suit to a court of the United States. Clark *v.* Bever, 139 U. S. 96, 11 S. Ct. 468, 35 L. ed. 88 [*affirming* 31 Fed. 670]; Hess *v.* Reynolds, 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Kirby *v.* Chicago, etc., R. Co., 106 Fed. 551; Warren *v.* Wisconsin Valley R. Co., 29 Fed. Cas. No. 17,204, 6 Biss. 425.

29. Security Mut. L. Ins. Co. *v.* Prewitt, 202 U. S. 246, 26 S. Ct. 619, 50 L. ed. 1013; Doyle *v.* Continental Ins. Co., 94 U. S. 535,

2. Waiver of Right of Removal. An agreement by a corporation not to remove into a court of the United States any suit brought against it within a state is void.[30] A stipulation not to remove a specified suit is valid.[31] The right to remove a particular case may also be waived by the conduct of defendant.[32] The right is not waived by a previous objection to the jurisdiction of the state court or by proceedings founded upon such objection,[33] such as the trial of a plea in abatement;[34] nor by an appeal from an order denying a motion to set aside the service of the summons, and a motion to stay proceedings pending such appeal;[35] nor by opposition to an application for any interlocutory remedy, or a proceeding to dissolve such a remedy,[36] as an attachment,[37] an injunction,[38] or a receiver;[39] nor by a voluntary appearance in the state court;[40] nor by the filing of a demurrer,[41] an answer,[42] or a plea in abatement;[43] nor by argument in oppo-

24 L. ed. 148. And see Foreign Corporations, 19 Cyc. 1251.

30. Com. *v.* East Tennessee Coal Co., 97 Ky. 238, 30 S. W. 608, 17 Ky. L. Rep. 139; Erie R. Co. *v.* Stringer, 32 Ohio St. 468; Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208; Hartford R. Pass. Assur. Co. *v.* Pierce, 27 Ohio St. 155; Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572; Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 95; Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365; Ashe *v.* Union Cent. L. Ins. Co., 115 Fed. 234; Rowland *v.* Empire State L. Ins. Co., 20 Fed. Cas. No. 12,097. See also Chicago, etc., R. Co. *v.* Swanger, 157 Fed. 783.

31. Hanover Nat. Bank *v.* Smith, 11 Fed. Cas. No. 6,035, 13 Blatchf. 224.

A defendant may waive his right to insist upon a removal to a federal court by his stipulation to try it in the state court in consideration of being permitted to file an answer after default, there being no question of jurisdiction. Smithson *v.* Chicago Great Western R. Co., 71 Minn. 216, 73 N. W. 853.

32. *Massachusetts.*— Amy *v.* Manning, 144 Mass. 153, 10 N. E. 737.

New York.— Dart *v.* Arnis, 19 How. Pr. 429.

Ohio.— Pollock *v.* Cohen, 32 Ohio St. 514.

Oklahoma.— Choctaw, etc., R. Co. *v.* Burgess, 21 Okla. 110, 95 Pac. 606.

Wisconsin.— Wadleigh *v.* Standard L., etc., Ins. Co., 76 Wis. 439, 45 N. W. 109.

United States.— Rosenthal *v.* Coates, 148 U. S. 142, 13 S. Ct. 576, 37 L. ed. 399; Schneider *v.* Eldredge, 125 Fed. 638; West Virginia *v.* King, 112 Fed. 369; Hudson River R., etc., Co. *v.* Day, 54 Fed. 545; Gaffney *v.* Gillette, 9 Fed. Cas. No. 5,168, 4 Dill. 264 note; Hanover Nat. Bank *v.* Smith, 11 Fed. Cas. No. 6,035, 13 Blatchf. 224.

See 42 Cent. Dig. tit. "Removal of Causes," § 10.

33. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Donahue *v.* Calumet Fire-Clay Co., 94 Fed. 23; Baumgardner *v.* Bono Fertilizer Co., 58 Fed. 1; Lockhart *v.* Memphis, etc., R. Co., 38 Fed. 274.

34. Lockhart *v.* Memphis, etc., R. Co., 38 Fed. 274.

35. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959.

36. Cella *v.* Brown, 136 Fed. 439.

Discharge from arrest.— Held that the right of a defendant to remove a cause to the United States circuit court is lost, where he moves in the state court for the discharge of an order for his arrest. Such motion amounts to an entry of appearance. Dart *v.* Arnis, 19 How. Pr. (N. Y.) 429.

37. Cella *v.* Brown, 136 Fed. 439.

The filing and procurement of the approval of a bond to dissolve an attachment is not a waiver of the right of removal. Southern Pac. Co. *v.* Stewart, 88 Ga. 13, 13 S. E. 824; Whiteley Malleable Castings Co. *v.* Sterlingworth R. Supply Co., 83 Fed. 853; Purdy *v.* Muller, 81 Fed. 513. So the appearance by a defendant, to contest the validity of an attachment, affecting his individual liability only, does not deprive him of his right, as a member of a partnership, to remove the case because it involves a controversy between citizens of different states. Calderhead *v.* Downing, 103 Fed. 27.

38. Franklin *v.* Wolf, 78 Ga. 446, 3 S. E. 696; Cella *v.* Brown, 136 Fed. 439; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930; Garrard *v.* Silver Peak Mines, 76 Fed. 1.

Where a temporary injunction is allowed upon petition and affidavit, an appeal therefrom to the state supreme court, taken previous to the filing of a petition for removal, bars the right of defendant to remove the cause to a United States circuit court. Chicago, etc., R. Co. *v.* Minnesota, etc., R. Co., 29 Fed. 337.

39. Franklin *v.* Wolf, 78 Ga. 446, 3 S. E. 696; Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381; Freeman *v.* Butler, 39 Fed. 1.

40. Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Conner *v.* Skagit Cumberland Coal Co., 45 Fed. 802; Stevens *v.* Richardson, 9 Fed. 191, 20 Blatchf. 53; Healy *v.* Prevost, 11 Fed. Cas. No. 6,297, 8 Reporter 103, 6 Wkly. Notes Cas. (Pa.) 579.

41. Whiteley Malleable Castings Co. *v.* Sterlingworth R. Supply Co., 83 Fed. 853; Conner *v.* Skagit Cumberland Coal Co., 45 Fed. 802; Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545.

42. Donahue *v.* Calumet Fire-Clay Co., 94 Fed. 23; Gavin *v.* Vance, 33 Fed. 84.

43. Lockhart *v.* Memphis, etc., R. Co., 38 Fed. 274.

sition to a motion to strike out his pleading, at least when the same does not affect the merits of the controversy;[44] nor, it has been held, by his consent to the appointment of an auditor,[45] provided the time to file the petition has not expired;[46] nor by any subsequent proceedings taken in the state court after the right of removal has been denied,[47] such as a motion for a continuance,[48] or, it has been held, a stipulation to plead and try the case at the next term,[49] or, by defending upon a trial;[50] nor by argument in opposition to an appeal from the order of removal,[51] nor by appealing to a higher state court from an order refusing the removal.[52]

3. Assignments Which Prevent Removal. An assignment of a cause of action to a citizen of the same state as defendant, although made to prevent the removal of a suit thereupon to the federal court, will prevent the same unless a federal question is involved, or the parties claim the same lands under grants from different states.[53]

II. Controversies Which Are the Subject of Removal.

A. Statutory Provisions Concerning Removal — 1. Judiciary Act of 1887 as Amended in 1888. Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section,[54] which may now

44. Richards *v.* Rock Rapids, 31 Fed. 505.

45. Stone *v.* Sargent, 129 Mass. 503. Or of arbitrators. Thorne *v.* Tonawanda Tanning Co., 15 Fed. 289.

Consent to a reference of the issues is such a waiver. Hanover Nat. Bank *v.* Smith, 11 Fed. Cas. No. 6,035, 13 Blatchf. 224.

46. See *infra*, VIII.

47. Texarkana Tel. Co. *v.* Bridges, 75 Ark. 116, 86 S. W. 841; Pennsylvania Co. *v.* Leeman, 160 Ind. 16, 66 N. E. 48; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68; Richards *v.* Rock Rapids, 31 Fed. 505.

Where, after application for removal to a federal court had been denied, defendant presented an amendment to his pleadings previously filed, which the court allowed, and thereafter prosecuted in the state court of appeals a writ of prohibition, to compel the inferior court to proceed with the cause in a particular manner; it was held that such subsequent proceedings constituted a waiver of his right to removal, and, the cause having been subsequently docketed by him in the federal court, was subject to remand. West Virginia *v.* King, 112 Fed. 369.

48. Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170. See also Waters *v.* Central Trust Co., 126 Fed. 469, 62 C. C. A. 45.

49. Waite *v.* Phœnix Ins. Co., 62 Fed. 769.

50. Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68; McMullen *v.* Northern Pac. R. Co., 57 Fed. 16; State *v.* Sullivan, 50 Fed. 593; Richards *v.* Rock Rapids, 31 Fed. 505.

51. Mecke *v.* Valley Town Mineral Co., 89 Fed. 209.

52. Richards *v.* Rock Rapids, 31 Fed. 505.

After the transcript has been filed the case cannot be remanded by consent. Lawton *v.* Blitch, 30 Fed. 641. But a removal may be withdrawn and the right waived, by a notice to that effect, after the petition and bond have been filed, but before the transcript has been sent to the circuit court of the United States. Wadleigh *v.* Standard L., etc., Ins. Co., 76 Wis. 439, 45 N. W. 109.

53. Hawley *v.* Chicago, etc., R. Co., 71 Iowa 717, 29 N. W. 787; Vimont *v.* Chicago, etc., R. Co., 69 Iowa 296, 22 N. W. 906, 28 N. W. 612; Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Goodnow *v.* Litchfield, 67 Iowa 691, 25 N. W. 882; Vimont *v.* Chicago, etc., R. Co., 64 Iowa 513, 17 N. W. 31, 21 N. W. 9; Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778, 7 S. Ct. 777, 30 L. ed. 816; Oakley *v.* Goodnow, 118 U. S. 43, 6 S. Ct. 944, 30 L. ed. 61; Provident Sav. L. Assur. Soc. *v.* Ford, 114 U. S. 635, 5 S. Ct. 1104, 29 L. ed. 261. But see Goodnow *v.* Litchfield, 47 Fed. 753.

54. This section is as follows: "The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or

be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.

Whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of

value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law." 25 U. S. St. at L. 434.

said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State; and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.[55]

2. Unamended Sections of Judiciary Act of March 3, 1875. When any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

If, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act,

55. 25 U. S. St. at L. 434.

Where the language of this statute is the same as that in section 2, clause 2 of the Judiciary Act of 1875, it is given the same construction. New York Constr. Co. v. Simon, 53 Fed. 1.

the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just.

The circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

In all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action, or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court. And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action, or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

When in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the

hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State; Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

Whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.[56]

3. Statutes Authorizing Removal of Civil Rights Cases. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending.[57]

56. 18 U. S. St. at L. 471.

57. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

This statute does not authorize the removal of a case where the constitution or laws of the state do not discriminate against the accused. Kentucky *v.* Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. ed. 633; Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567. So a case cannot be removed under this statute, because of an unjust discrimination against a defendant before the trial (Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; California *v.* Chue Fan, 42 Fed. 865), or upon the trial (Kentucky *v.* Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. ed. 633; Murray *v.* Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. ed. 87), which is not based upon a provision in the constitution or laws. A civil suit by a state against one of its own citizens cannot, for that reason, be removed. See Foster Fed. Pr. (4th ed.) p. 1577, § 389 [*citing* in support of this proposition Alabama *v.* Wolffe, 18 Fed. 86].

Exclusion of colored men from jury.— The remedy where it is the custom to exclude colored men from grand juries is by a motion to quash the indictment, which can be reviewed by a writ of error from the supreme court of the United States to the final judgment of the highest state court. Smith *v.* Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. ed. 1082; Gibson *v.* Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. ed. 1075; U. S. *v.* Gale, 109 U. S. 65, 3 S. Ct. 1, 27 L. ed. 857; Neal *v.* Delaware, 103 U. S. 370, 26 L. ed. 567.

4. Statutes Authorizing Removal of Proceedings Against Revenue Officers and Other Persons, Whose Defense Is Based Upon a Revenue Law. When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant.[58]

5. Clause in Appropriation Law of March 3, 1875, Authorizing Removal of Actions Against Officers of a House of Congress. In any action now pending, or which may be brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the district attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer; and all provisions of the eighth section of the act of July twenty-eighth, eighteen hundred and sixty-six, entitled "An act to protect the revenue, and for other purposes," and also all provisions of the sections of former acts therein referred to, so far as the same relate to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States, shall become applicable to such action and to all proceedings and matters whatsoever connected therewith,

58. U. S. Rev. St. (1878) § 643, as amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521]. See also Venable *v.* Richards, 28 Fed. Cas. No. 16,913, 1 Hughes 326 [*affirmed* in 105 U. S. 636, 26 L. ed. 1196].

This statute is constitutional. Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648. In the case of criminal prosecutions it is not restricted to those where an attempt is made by a state legislature to nullify a law of the United States. Findley *v.* Satterfield, 9 Fed. Cas. No. 4,792, 3 Woods 504.

It covers a criminal prosecution for murder or assault, by a deputy marshal (Carico *v.* Wilmore, 51 Fed. 196), or by a posseman appointed by a marshal or a deputy marshal (Davis *v.* South Carolina, 107 U. S. 597, 2 S. Ct. 636, 27 L. ed. 574; Com. *v.* De Hart, 119 Fed. 626), a suit to recover taxes illegally exacted by a collector of internal revenue (Brainard *v.* Hubbard, 12 Wall. (U. S.) 1, 20 L. ed. 272), a proceeding to punish a collector of internal revenue for contempt, in refusing to permit a sheriff to enter a bonded warehouse (McCullough *v.* Large, 20 Fed. 309), a proceeding under a writ of foreign attachment, issued in a suit between private citizens upon the property of defendant, which was in the possession of a collector of customs (Fischer *v.* Daudistal, 9 Fed. 145), an action for slander because of remarks by a collector of customs, while in the discharge of his official duty, and explanatory of the same (Buttner *v.* Miller, 4 Fed. Cas. No. 2,254, 1 Woods 620), and a suit against a postmaster for his refusal to deliver a letter (Warner *v.* Fowler, 29 Fed. Cas. No. 17,182, 4 Blatchf. 311, 3 Wkly. L. Gaz. 246; Black's Dillon Removal Causes, § 41. But see Bryant Bros. Co. *v.* Robinson, 149 Fed. 321, 79 C. C. A. 259). It gives the right of removal to a corporation constructing a building under the authority of the secretary of the treasury. Ward *v.* Congress Constr. Co., 99 Fed. 598, 39 C. C. A. 669. The acts of congress imposing direct taxes on the states are revenue laws, within the meaning of the removal act of 1833. Peyton *v.* Bliss, 19 Fed. Cas. No. 11,055, Woolw. 170. It does not authorize the removal of an action against a United States commissioner, to recover money alleged to have been illegally exacted by him as costs and fees, in a criminal proceeding for a violation of the revenue law (Benchley *v.* Gilbert, 3 Fed. Cas. No. 1,291, 8 Blatchf. 147), of a suit against an officer of the United States to recover the value of United States bonds, the possession of which plaintiff had permitted defendant to take, and which the latter had retained on the ground that they were the property of a state (Victor *v.* Cisco, 28 Fed. Cas. No. 16,934, 5 Blatchf. 128), nor of a suit against an express company for a refusal to accept goods tendered for transportation, based on a claim of the right to require the shipper to furnish or pay for the receipt stamp required by the revenue laws (Johnson *v.* Wells, 98 Fed. 3). A defendant who holds a liquor license from the United States cannot for that reason remove a criminal prosecution for selling liquor in violation of a state statute. State *v.* Elder, 54 Me. 381; Com. *v.* Casey, 12 Allen (Mass.) 214.

and the defense of such action shall thenceforth be conducted under the supervision and direction of the Attorney General.[59]

B. Nature of Cases Which Are the Subject of Removal — 1. In General. The Judiciary Act of 1887 authorizes the removal of those cases only, of which the circuit courts of the United States are given original jurisdiction by the same.[60] It is no objection to the removal, that the case involves claims and defenses in both law and equity, which cannot be united in a suit in the federal court.[61]

2. Criminal Proceedings and Proceedings in Their Nature Criminal. Except in cases arising under the Civil Rights Act,[62] or where there is a defense under the revenue laws,[63] or defendant is an officer of a house of congress,[64] no criminal proceeding,[65] nor proceeding in its nature criminal,[66] can be removed.

59. Act of March 3, 1875; 18 U. S. St. at L. 401, c. 130, § 8; 1 U. S. Rev. St. Suppl. 76. The Act of July 28, 1866, and other acts to which this statute refers, are incorporated in U. S. Rev. St. (1878) § 629, par. 12, §§ 643, 645, 646, 827, 834, 989.

60. See *supra*, II, A, 1. And see Blunt *v.* Southern R. Co., 155 Fed. 499.

Cases which may be removed.—A judicial proceeding which is of such a character, owing to its procedure, that it could not be commenced in the federal courts, can be removed when the controversy presents every element mentioned in the first section of the Judiciary Act, namely, that it is a suit of a civil nature, at common law or in equity, which involves two thousand dollars, exclusive of interest and costs; and arises only between citizens of different states, or else arises under the constitution or a law of the United States, or between citizens of the same state, claiming land under grants of different states. *In re* Stutsman County, 88 Fed. 337. See Wilson *v.* Smith, 66 Fed. 81. A proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, is considered as purely administrative in its character, and not in any just sense a suit; but an appeal from the decision in such a proceeding may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and if there are parties litigant to contest the case on the one side and the other. Upshur County *v.* Rich, 135 U. S. 467, 10 S. Ct. 651, 34 L. ed. 196; Delaware County *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674. A proceeding under the Idaho statute relating to the appropriation of water from a stream after an appeal has been taken to the district court is removable. Waha-Lewiston Land, etc., Co. *v.* Lewiston-Sweetwater Irr. Co., 158 Fed. 137. A suit against an assignee for the benefit of creditors, brought under the Ohio statute for an adjudication upon a claim against the estate, may be removed. Claflin *v.* Robbins, 5 Fed. Cas. No. 2,776, 1 Flipp. 603. An action, pending before a Nebraska justice of the peace, is removable when the requisite difference of citizenship exists, and the matter in controversy exceeds the jurisdictional amount. Katz *v.* Herschel Mfg. Co., 150 Fed. 684. A suit arising under the postal law, the institution of which in a state court was authorized by the Revised Statutes, may be removed into a federal court upon the ground that it arose under a law of the United States. New Orleans Nat. Bank *v.* Merchant, 18 Fed. 841.

Cases which may not be removed.—A creditor's bill brought under a state statute by one who is not a judgment creditor to set aside a conveyance as fraudulent (Parkersburg First Nat. Bank *v.* Prager, 91 Fed. 689, 34 C. C. A. 51) or, to reach and apply, in payment of a debt, property of a debtor, which cannot be attached or taken under execution, in an action at law (Mathews Slate Co. *v.* Mathews, 148 Fed. 490) cannot be removed. A suit against a partnership by the firm-name, under a state statute, which authorizes in such case judgment to be entered against the firm, only to be enforced against the partnership property, or upon all such members as have appeared or been served with notice, cannot be removed. Ralya Market Co. *v.* Armour, 102 Fed. 530. A suit which might have been removed from the court of first instance cannot be removed when pending in an appellate court. Williams *v.* Lowe, 4 Nebr. 382; Miller *v.* Finn, 1 Nebr. 254. A suit brought in a territorial court cannot be removed, when, after answer, it has passed into the jurisdiction of a state court upon the admission of the territory into a state. Ames *v.* Colorado Cent. R. Co., 1 Fed. Cas. No. 325, 4 Dill. 260.

Must be "suit."— Before a suit is pending in a state court, for the purposes of the removal act, it must be a suit within the meaning of the state law, and the mere filing of a petition of intervention, without the issuing or service of notice or process of any kind, does not constitute a suit within the meaning of the law of Iowa. *In re* Iowa, etc., Constr. Co., 6 Fed. 799.

The decision of a state court of last resort that a special statutory proceeding is not a civil suit does not control the federal court on the question of right of removal. *In re* Jarnecke Ditch, 69 Fed. 161.

61. Tarver *v.* Ficklin, 60 Ga. 373; Ketchum *v.* Black River Lumber Co., 4 Fed. 139.

62. See *supra*, II, A, 3.

63. See *supra*, II, A, 4.

64. See *supra*, II, A, 5.

65. New Hampshire *v.* Grand Trunk R. Co., 3 Fed. 887.

66. Chicago, etc., R. Co. *v.* Iowa, 145 U. S.

3. **Mandamus.** An application for the writ of mandamus is not removable under the Judiciary Act of 1887,[67] except perhaps when it is ancillary to proceedings previously pending in the federal court.[68]

4. **Quo Warranto.** An action in the nature of a quo warranto, even if it is begun by information, may be removed when it arises under the constitution or laws of the United States.[69]

5. **Habeas Corpus.** A proceeding upon an application for the writ of habeas corpus cannot be removed under the Judiciary Act of 1887.[70]

6. **Probate Proceedings.** An application for probate of a will is not "a suit of a civil nature at law or in equity" and is not removable, either originally,[71]

631, 12 S. Ct. 978, 36 L. ed. 856; Dey *v.* Chicago, etc., R. Co., 45 Fed. 82; Texas *v.* Day Land, etc., Co., 41 Fed. 228; Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322; Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 3 L. R. A. 554, appeal dismissed.

Illustrations.—An action by a state or by a public officer to recover a penalty is criminal, not civil, in its nature; and consequently cannot be removed under the Judiciary Act of 1887. Southern R. Co. *v.* State, (Ind. App. 1904) 72 N. E. 174; Chicago, etc., R. Co. *v.* Iowa, 145 U. S. 631, 12 S. Ct. 978, 36 L. ed. 857; Indiana *v.* Alleghany Oil Co., 85 Fed. 870; Dey *v.* Chicago, etc., R. Co., 45 Fed. 82; Texas *v.* Day Land, etc., Co., 41 Fed. 228; Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322; Iowa *v.* Chicago, etc., R. Co., 37 Fed. 497, 3 L. R. A. 554. This is true even where the state statute declares it to be a civil action (Indiana *v.* Alleghany Oil Co., 85 Fed. 870) or where a count for the penalty is joined with another count for damages (Texas *v.* Day Land, etc., Co., 49 Fed. 593). So an information in equity by a state attorney-general to enjoin the violation of an anti-trust law is not removable. Moloney *v.* American Tobacco Co., 72 Fed. 801. And an action on a recognizance for good behavior cannot be removed. Respublica *v.* Cobbet, 3 Dall. (Pa.) 467, 1 L. ed. 683. But a suit by state commissioners to enjoin a railroad company from violating a state statute, and their order concerning rates (Missouri, etc., R. Co. *v.* Hickman, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78 [*reversing* 151 Mo. 644, 52 S. W. 351]; Hickman *v.* Missouri, etc., R. Co., 97 Fed. 113), a proceeding to punish a revenue collector for contempt of court (McCullough *v.* Large, 20 Fed. 309), an action by the state to enjoin a federal receiver from destroying a railroad (State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915), a statutory summary proceeding by a landlord to eject a tenant (Gallatin *v.* Sherman, 77 Fed. 337), a proceeding for the collection of delinquent taxes under a statute of North Dakota (*In re* Stutsman County, 88 Fed. 337. But see Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124), and an action by the personal representative of a decedent to recover damages for causing his death (Brisenden *v.* Chamberlain, 53 Fed. 307), although the act also provides for a fine, payable to the personal representative, after conviction upon an indictment (Malloy *v.* American Hide, etc., Co., 148 Fed. 482; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193) may be removed.

67. Western Union Tel. Co. *v.* State, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. N. S. 153; State *v.* Texas, etc., R. Co., 52 La. Ann. 1850, 28 So. 284; State *v.* Johnson, 29 La. Ann. 399; Rosenbaum *v.* Bauer, 120 U. S. 450, 7 S. Ct. 633, 30 L. ed. 743; Kelly *v.* Grand Circle W. W., 129 Fed. 830; Indiana *v.* Lake Erie, etc., R. Co., 85 Fed. 1; Ohio *v.* Columbus, etc., R. Co., 48 Fed. 626. *Contra*, People *v.* Colorado Cent. R. Co., 42 Fed. 638 (under act of 1877); Washington Imp. Co. *v.* Kansas Pac. R. Co., 29 Fed. Cas. No. 17,242, 5 Dill. 489 (under act of 1875).

68. See *infra*, II, B, 13.

69. Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 721. But see State *v.* Gleason, 12 Fla. 190, holding that a proceeding in the nature of quo warranto to try respondent's title to the office of lieutenant-governor, on the ground that he had not been a resident of the state for the time required by the constitution, is not removable to the United States circuit court under the act of congress called the "civil rights bill" and the habeas corpus acts of March 3, 1863, and May 11, 1866.

An action to determine defendant's title to office in a corporation organized under the laws of the state in which the suit is brought is not removable, because of difference in citizenship, when the relator is a citizen of that state, and defendant a citizen of another state. Place *v.* Illinois, 69 Fed. 481, 16 C. C. A. 300.

70. *In re* Burrus, 136 U. S. 586, 10 S. Ct. 850, 34 L. ed. 1500. To the same effect see Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458.

71. Hargroves *v.* Redd, 43 Ga. 142; Copeland *v.* Bruning, 72 Fed. 5. In McDonnell *v.* Jordan, 178 U. S. 229, 20 S. Ct. 886, 44 L. ed. 1048, the court, without passing upon the question whether a contest upon the admission of a will in the probate court could be removed, intimated that in such a case the proponent of the will was plaintiff, and could not obtain the removal.

A statutory proceeding to set aside the probate of a will in the same court cannot be removed. Reed *v.* Reed, 31 Fed. 49. But an appeal from such proceedings may be. Brodhead *v.* Shoemaker, 44 Fed. 518, 11 L. R. A. 567.

or upon appeal.[72] But it has been held that a suit in equity to establish a lost will may be removed.[73]

7. Proceedings For Administration of a Decedent's Assets. As a circuit court has no jurisdiction to undertake the general administration of a decedent's estate,[74] such a proceeding cannot be removed.[75] But a proceeding in a court of probate against the administrator, to compel payment of a debt owed by the decedent during his life,[76] an action to recover a legacy;[77] an application by an illegitimate child to be permitted to share in a decedent's estate because of the alleged acknowledgment of the petitioner's paternity in accordance with the state statute;[78] a special proceeding by an administrator for leave to sell the land of his decedent for the payment of debts;[79] and a suit by one executor against another, who was also the surviving partner of the decedent, to compel an account of his administration of the partnership assets,[80] may be removed.

8. Divorce Suits. A suit for divorce cannot be removed, although plaintiff demands alimony and counsel fees.[81]

9. Condemnation Proceedings. Proceedings for the condemnation of land, when instituted by a state for its exclusive benefit, are not removable, if no federal question is involved.[82] When instituted by or for the benefit of a corporation,

72. Wahl *v.* Franz, 100 Fed. 680, 40 C. C. A. 638, 49 L. R. A. 62 [*reversing* 81 Fed. 9]; *In re* Aspinwall, 83 Fed. 851 [*affirmed* in 90 Fed. 675, 33 C. C. A. 217]; *In re* Cilley, 58 Fed. 977; *In re* Frazer, 9 Fed. Cas. No. 5,068, 6 Reporter 357, 18 Alb. L. J. (N. Y.) 353.

73. Southworth *v.* Adams, 4 Fed. 1, 9 Biss. 521.

A bill in equity brought to annul a will as a muniment of title, and to limit the operation of the decree admitting the same to probate, is removable. Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524. See also Southworth *v.* Howard, 11 Reporter 46.

74. Byers *v.* McAuley, 149 U. S. 608, 13 S. Ct. 906, 37 L. ed. 867, holding, however, that a circuit court of the United States has original jurisdiction of a bill in equity, which prays that defendant be directed to pay a certain portion of the assets in his hands, to the complainants, who are part of his next of kin; but in such case a decree cannot be entered directing that citizens of the same state as defendant receive a similar share of such estate. And see Comstock *v.* Herron, 55 Fed. 803, 5 C. C. A. 266, holding that a circuit court of the United States has original jurisdiction of a suit by a residuary legatee, who has been bequeathed an annuity, for an accounting, and for the payment of such annuity, and for the distribution of the residuary estate, when ascertained, between herself and the other residuary legatees, all of whom apparently, as well as the complainant, were citizens of different states from that of defendant trustees and executors.

75. Clark *v.* Guy, 114 Fed. 783; *In re* Foley, 80 Fed. 949; *In re* Foley, 76 Fed. 390; Foley *v.* Hartley, 72 Fed. 570.

Illustrations.—A proceeding in a Connecticut probate court for the settlement of the accounts of an executor (Clark *v.* Guy, 114 Fed. 783. But see Craigie *v.* McArthur, 6 Fed. Cas. No. 3,341, 4 Dill. 474, 15 Alb. L. J. (N. Y.) 121), a proceeding by a widow in a district court of Nevada for a partial distribution of the estate of a decedent, and for a determination that part of the same was separate property, and the rest annuity property (*In re* Foley, 80 Fed. 949), an application by a widow for an heir's support under the statute of Georgia (McElmurray *v.* Loomis, 31 Fed. 395), and a proceeding in Louisiana for the removal of an executor and the appointment of his successor (Burnside's Succession, 34 La. Ann. 728) cannot be removed.

76. Hess *v.* Reynolds, 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927; Schneider *v.* Eldredge, 125 Fed. 638. But see Du Vivier *v.* Hopkins, 116 Mass. 125, 17 Am. Rep. 141, holding that a claim against the insolvent estate of a deceased person, pending in the superior court on appeal from the decision of the probate commissioners, cannot be removed to the circuit court of the United States under the acts of 1867, chapter 196.

77. Wilson *v.* Smith, 66 Fed. 81.

78. *In re* Foley, 76 Fed. 390.

79. Elliott *v.* Shuler, 50 Fed. 454.

80. Filer *v.* Levy, 17 Fed. 609.

81. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984; Bowman *v.* Bowman, 30 Fed. 849; Johnson *v.* Johnson, 13 Fed. 193.

82. Madisonville Traction Co. *v.* St. Bernard Min. Co. 130 Fed. 789.

Proceedings upon a petition filed with the state railroad commissioners, praying their consent to the taking of certain lands by condemnation proceedings to be subsequently instituted, cannot be removed. New York, etc., R. Co. *v.* Cockcroft, 46 Fed. 881.

The initial proceeding for the appraisal by commissioners, at least when the application for their appointment is made *ex parte*, is usually considered to be purely administrative in its nature and not to be a suit which can be removed. Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415; Texas, etc., R. Co. *v.* Kirk, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206.

After their appraisal, when process is is-

between whom and the respondent the requisite difference of citizenship exists,[83] or when the proceeding arises under the constitution or laws of the United States,[84] they may be removed. The existence of a controversy as to the right to condemn the lands, which is distinct from that of the amount of damages to be awarded, does not prevent a removal.[85]

10. Assessments and Tax Proceedings. A statutory appeal from an assessment of taxes to "a county court," which in respect to such proceeding acts, not as a judicial body, but as a board of commissioners without judicial power, and which is only authorized to determine questions of quantity, proportion, and value, is not a suit which can be removed to a federal court.[86]

11. County Claims. Proceedings upon a claim presented to a board of county officers cannot be removed while they are pending before such board.[87]

12. Creditors' Bills. A creditor's bill, founded upon a judgment of a state or federal court, may be removed, when the requisite difference of citizenship exists.[88]

sued by the court which appointed them directing the owners to show cause why their report should not be confirmed, a removal may be had, even though there is a subsequent appeal upon which all the matters decided can be retried. Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 [*affirming* 130 Fed. 789]. So when after the appraisal by commissioners, a trial by jury can be had upon demand, the proceedings can be removed at or before the time when such demand is made. Minneapolis, etc., R. Co. *v.* Nestor, 50 Fed. 1. And when there is no such proceeding in the court of first instance, the removal may take place after an appeal to another court, where the question as to the amount of damages to be awarded can be retried. Myers *v.* Chicago, etc., R. Co., 118 Iowa 312, 91 N. W. 1076; Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415; Texas, etc., R. Co. *v.* Kirk, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206; Kirby *v.* Chicago, etc., R. Co., 106 Fed. 551; Terre Haute *v.* Evansville, etc., R. Co., 106 Fed. 545; Hudson River R., etc., Co. *v.* Day, 54 Fed. 545; Warren *v.* Wisconsin Valley R. Co., 29 Fed. Cas. No. 17,204, 6 Biss. 425.

When the application is upon notice and may be opposed, the proceedings are removable. Union Terminal R. Co. *v.* Chicago, etc., R. Co., 119 Fed. 209; Postal Tel. Cable Co. *v.* Southern R. Co., 88 Fed. 803; Sugar Creek, etc., R. Co. *v.* McKell, 75 Fed. 34; Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 37 Fed. 3; Banigan *v.* Worcester, 30 Fed. 392; Colorado Midland R. Co. *v.* Jones, 29 Fed. 193; Mineral Range R. Co. *v.* Detroit, etc., Cotton Co., 25 Fed. 515; Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339. But see Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415; Hartford, etc., R. Co. *v.* Montague, 94 Fed. 227.

83. Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462 [*affirming* 130 Fed. 789]; Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415; Mississippi, etc., Boom Co. *v.* Patterson, 98 U. S. 403, 25 L. ed. 206. But see Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812, holding that a foreign corporation cannot institute proceedings in the United States courts to condemn the land of a citizen of the state for the use of the corporation, and proceedings of that nature instituted in the state courts cannot be removed to the federal courts.

84. Texas, etc., R. Co. *v.* Kirk, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; Helena Power Transmission Co. *v.* Spratt, 146 Fed. 310.

85. Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462; Searl *v.* Lake County School Dist. No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. ed. 415; Helena Power Transmission Co. *v.* Spratt, 146 Fed. 310; Sugar Creek, etc., R. Co. *v.* McKell, 75 Fed. 34.

86. Upshur County *v.* Rich, 135 U. S. 467, 10 S. Ct. 651, 34 L. ed. 196.

Proceedings in a court with full judicial powers under the Illinois statute, to assess real estate for the cost of a sewer, in proportion to the benefits derived from the same, are not removable. *In re* Chicago, 64 Fed. 897 [*criticized* in *In re* Stutsman County, 88 Fed. 337]. But proceedings under the Indiana statutes for the establishment of a drain and the assessment of benefits and damages (*In re* Jarnecke Ditch, 69 Fed. 161) and under the laws of North Dakota to collect delinquent taxes (*In re* Stutsman County, 88 Fed. 337) may be removed.

87. Fuller *v.* Colfax County, 14 Fed. 177, 4 McCrary 535; Gurnee *v.* Brunswick, 11 Fed. Cas. No. 5,872, 1 Hughes 270.

An appeal to a court of record from the decision of a county board upon such a claim may be removed. Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Fuller *v.* Colfax County, 14 Fed. 177, 4 McCrary 535. In such a case, the claimant is considered to be plaintiff, although the appeal had been taken by a taxpayer from a decision allowing the claim. Tullock *v.* Webster County, 40 Fed. 706.

88. Kalamazoo Wagon Co. *v.* Snavely, 34 Fed. 823.

A bill in equity to enforce the lien of an attachment by plaintiff, having a simple contract debt or claim for unliquidated damages,

13. Ancillary Litigation. A suit, which is ancillary and supplemental to one previously brought in a state court, and which is so connected with the original suit as to form an incident thereto, and to be substantially a continuation thereof, cannot be removed into a circuit court of the United States, unless the original suit has been previously or may be simultaneously removed.[89] "There is no

may be removed. Craddock *v.* Fulton, 140 Fed. 426.

A garnishee proceeding, after judgment, is to be considered as a new suit, which may be removed by the garnishee, when his citizenship is different from that of the original plaintiff and defendant. Baker *v.* Duwamish Mill Co., 149 Fed. 612.

Reduction of claim to judgment.—A creditor's bill, when plaintiff has not reduced his claim to judgment, cannot be removed, although the state practice authorizes such a suit. Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 37 L. ed. 804; Parkersburg First Nat. Bank *v.* Pragler, 91 Fed. 689, 34 C. C. A. 51.

89. Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 60, 35 L. ed. 870; Barrow *v.* Hunton, 99 U. S. 80, 82, 25 L. ed. 407; Kalamazoo Wagon Co. *v.* Snavely, 34 Fed. 823; Wolcott *v.* Aspen Min., etc., Co., 34 Fed. 821; Richmond, etc., R. Co. *v.* Findley, 32 Fed. 641; Hospes *v.* Northwestern Mfg., etc., Co., 22 Fed. 565; Flash *v.* Dillon, 22 Fed. 1; Poole *v.* Thatcherdeft, 19 Fed. 49; Buford *v.* Strother, 10 Fed. 406, 3 McCrary 253; Buell *v.* Cincinnati, etc., Co., 9 Fed. 351, 10 Biss. 555; Chapman *v.* Barger, 5 Fed. Cas. No. 2,603, 4 Dill. 557; Webber *v.* Humphreys, 29 Fed. Cas. No. 17,326, 5 Dill. 223.

Illustrations.— Statutory proceedings supplementary to execution (Flash *v.* Dillon, 22 Fed. 1; Poole *v.* Thatcherdeft, 19 Fed. 49; Buford *v.* Strother, 10 Fed. 406, 3 McCrary 253; Webber *v.* Humphreys, 29 Fed. Cas. No. 17,326, 5 Dill. 223. See also Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 350), an application for the appointment of a receiver in supplementary proceedings (Cœur d'Alene R., etc., Co. *v.* Spalding, 93 Fed. 28, 35 C. C. A. 295), an application by claimants of property which has been seized under execution (Hochstadter *v.* Harrison, 71 Ga. 21; Alexandria First Nat. Bank *v.* Turnbell, 16 Wall. (U. S.) 190, 21 L. ed. 296; Flash *v.* Dillon, 22 Fed. 1), a suit for an injunction against the sale under execution of land (Besser *v.* Munford, 63 Ga. 446; Ralston *v.* British, etc., Mortg. Co., 37 La. Ann. 193; Calhoun *v.* Levy, 33 La. Ann. 1296; Watson *v.* Bondurant, 30 La. Ann. 1; Goodrich *v.* Hunton, 29 La. Ann. 372; Edwards Mfg. Co. *v.* Sprague, 76 Me. 53; Rodgers *v.* Rodgers, 1 Paige (N. Y.) 683; Lawrence *v.* Morgan's Louisiana, etc., R., etc., Co., 121 U. S. 634, 7 S. Ct. 1013, 30 L. ed. 1018) or chattels (Kelly *v.* Sioux Nat. Bank, 81 Fed. 3), proceedings by or against strangers to the original suit, in connection with garnishee process (Poole *v.* Thatcherdeft, 19 Fed. 49; Buford *v.* Strother, 10 Fed. 406, 3 McCrary 253; Pratt *v.* Albright, 9 Fed. 634, 10 Biss. 511), or attachment (King *v.* Shepherd, 20 Fed. 337. But see Burnham *v.* Leoti First Nat. Bank, 53 Fed. 163, 3 C. C. A. 486; Fischer *v.* Dandistal, 9 Fed. 145), a suit in equity by a tenant to set up a defense to an action of ejectment, which, by the state practice, he might have pleaded in that action (see Johnson *v.* Christian, 125 U. S. 642, 8 S. Ct. 989, 31 L. ed. 820; Cable *v.* Ellis, 110 U. S. 389, 4 S. Ct. 85, 28 L. ed. 186; Richmond, etc., R. Co. *v.* Findley, 32 Fed. 641), a petition, merely ancillary to an ejectment suit already passed to judgment, to have unsuccessful defendant's improvements valued and allowed to him, under the occupying claimant's law (Chapman *v.* Barger, 5 Fed. Cas. No. 2,603, 4 Dill. 557), a proceeding by plaintiff after a decree establishing his right to the products of a mine, to enforce his rights under such decree against defendant to the original suit and a third person who claims a superior title by purchase (Wolcott *v.* Aspen Min., etc., Co., 34 Fed. 821), a proceeding under a state statute to charge with liability to the extent of corporate assets in their hands the directors of a railway company, which has passed out of existence, pending a suit against it (Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455. See also Hospes *v.* Northwestern Mfg., etc., Co., 22 Fed. 565), a bill in equity setting up a prior judgment for damages for a nuisance, and an action pending at law for the same purpose, which prays consolidation, a perpetual injunction and damages subsequent to the beginning of the pending action at law (Ladd *v.* West, 55 Fed. 353), and a bill of review for errors apparent upon the face of the record (Ranlett *v.* Collier White Lead Co., 30 La. Ann. 56; Goodrich *v.* Hunton, 29 La. Ann. 372; Jackson *v.* Gould, 74 Me. 564; Barrow *v.* Hunton, 99 U. S. 80, 25 L. ed. 407), or for fraud (Caswell *v.* Caswell, 24 Ill. App. 548 [*affirmed* in 120 Ill. 377, 11 N. E. 342]), without showing that the facts constituting the fraud were not within the knowledge of the complainants before the rendition of the decree, or could not have been discovered in time to bring them in some appropriate mode to the attention of the state court while the decree was within its control (Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870; Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; Nougue *v.* Clapp, 101 U. S. 551, 25 L. ed. 1026), are not removable. But it has been held that the following cases are removable: A bill in equity, such as one to reform an insurance policy, which is filed in aid of a court of law, and seeks to prevent a party from availing himself of an inequitable suit or defense in a pending suit in a common-law court, when the relief prayed could not have been obtained in the pending action (Charter Oak F. Ins. Co. *v.* Star Ins. Co., 5 Fed. Cas. No. 2,623, 6 Blatchf. 208); a bill to set aside a judgment or decree of a state court for mis-

language in any removal statute which justifies removal of a cause from a state court to a federal court on the ground that it is ancillary to a suit in a federal court." [90]

14. Where State Courts Have No Jurisdiction. A federal court cannot acquire jurisdiction by removal of proceedings of which the state courts had no jurisdiction.[91]

III. Value of Matter in Dispute.[92]

A. In General. Except in three classes of cases,[93] the value of the matter

take (Pelzer Mfg. Co. *v.* Hamburg-Bremen F. Ins. Co., 62 Fed. 1) or fraud (Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870; Arrowsmith *v.* Gleason, 129 U. S. 86, 9 S. Ct. 237, 32 L. ed. 630; Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547; Carver *v.* Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9; Stackhouse *v.* Zunts, 15 Fed. 481, 4 Woods 171; *In re* Iowa, etc., Constr. Co., 10 Fed. 401, 3 McCrary 310. See also Withers *v.* John Hopkins Place Sav. Bank, 104 Ga. 89, 30 S. E. 766), which mistake or fraud could not with the exercise of reasonable diligence have been discovered before the decree passed beyond the control of the state court; a creditor's bill founded on a state judgment (Kalamazoo Wagon Co. *v.* Snavely, 34 Fed. 823); a proceeding to enforce a judgment purporting to have been entered by confession (Lockhart *v.* Morey, 31 Fed. 497 [*affirmed* in 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68]); a bill filed by a stranger to a previous suit and decree, in order to prevent the execution of such decree by a levy upon property of which the complainant was the owner, before the former suit was brought (Bondurant *v.* Watson, 103 U. S. 281, 26 L. ed. 447); an action of replevin against a sheriff, who had levied a writ of execution on chattels claimed by a stranger to the writ (Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354); a suit by a second mortgagee to redeem property from a foreclosure in a suit to which he was not a party (Title Guarantee, etc., Co. *v.* Studebaker, 100 Fed. 358); a proceeding to enforce an attorney's lien (Pettus *v.* Georgia R., etc., Co., 19 Fed. Cas. No. 11,048, 3 Woods 620); a proceeding to enjoin a stranger from violating a decree previously entered (Ward *v.* Congress Constr. Co., 99 Fed. 598, 39 C. C. A. 669; Kalamazoo Wagon Co. *v.* Snavely, 34 Fed. 823; Hatch *v.* Preston, 11 Fed. Cas. No. 6,208, 1 Biss. 19. And see Garrett *v.* Bonner, 30 La. Ann. 1305; Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318); a suit in which a state court has appointed a receiver (*In re* Iowa, etc., Constr. Co., 10 Fed. 401, 3 McCrary 310); a suit for the appointment of a receiver ancillary to one previously appointed by a court in another suit (Shinney *v.* North American Sav., etc., Co., 97 Fed. 9); a suit by bondholders to foreclose a lien paramount to the rights of the stock-holders, who had procured an order of a state court placing trustees in possession of the property (Scott *v.* Clinton, etc., R. Co., 21 Fed. Cas. No. 12,527, 6 Biss. 529); a feigned issue in Pennsylvania to try the validity of a judgment obtained by a creditor, which is attacked as fraudulent (Fuller *v.* Wright, 23 Fed. 833); and a motion under Mo. Rev. St. § 2517, for an execution against a stock-holder after judgment and return of execution against his corporation (Lackawanna Coal, etc., Co. *v.* Bates, 56 Fed. 737 [*overruling* Webber *v.* Humphreys, 29 Fed. Cas. No. 17,326, 5 Dill. 223, 8 Reporter 66]).

90. Per Taft, J., in Gillmore *v.* Herrick, 93 Fed. 525. See also State Trust Co. *v.* Kansas City, etc., R. Co., 110 Fed. 10; Pitkin *v.* Cowen, 91 Fed. 599; Ray *v.* Pierce, 81 Fed. 881. But see Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Sullivan *v.* Barnard, 81 Fed. 886; Carpenter *v.* Northern Pac. R. Co., 75 Fed. 850.

91. National Acc. Soc. *v.* Spiro, 164 U. S. 281, 17 S. Ct. 996, 41 L. ed. 435; Wabash Western R. Co. *v.* Brow, 164 U. S. 271, 17 S. Ct. 126, 41 L. ed. 431; Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 539, 39 L. ed. 517; Crowley *v.* Southern R. Co., 139 Fed. 851; Cady *v.* Associated Colonies, 119 Fed. 420; Auracher *v.* Omaha, etc., R. Co., 102 Fed. 1; Summers *v.* White, 71 Fed. 106, 17 C. C. A. 631.

Illustrations.— It was so held, where an action was brought in a state court upon a cause of action of which the federal courts had exclusive jurisdiction, namely, to recover overcharges under the interstate commerce law (Sheldon *v.* Wabash R. Co., 105 Fed. 785; Auracher *v.* Omaha, etc., R Co., 102 Fed. 1), where it was instituted in what was supposed to be a state court, but in one which the supreme court of the state subsequently held had no legal existence (Crowley *v.* Southern R. Co., 139 Fed. 851). And this was said to be the case where the state court had a limited jurisdiction, and the suit sought to be removed was not within the same. Fidelity Trust Co. *v.* Gill Car Co., 25 Fed. 737.

After the removal of a suit by a party who has filed no general appearance in the state or federal court, a motion may be made by defendant to set aside the service of process upon him and the case may be then dismissed for that reason. National Acc. Soc. *v.* Spiro, 164 U. S. 281, 17 S. Ct. 996, 41 L. ed. 435; Wabash Western R. Co. *v.* Brow, 164 U. S. 271, 17 S. Ct. 126, 41 L. ed. 431; Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; Cady *v.* Associated Colonies, 119 Fed. 420.

92. As to allegation of value in petition for removal see *infra*, X, A, 3, d.

93. The following classes of cases may be removed irrespective of the value of the matter in dispute: Any civil suit or crimi-

in dispute must exceed the sum of two thousand dollars, exclusive of interest and costs.[94]

B. Basis of Estimate — 1. Pecuniary Standard of Value. The matter in dispute must be of such a nature as to be capable of being reduced to a pecuniary standard of value.[95]

2. Contingent Loss or Damage. No contingent loss or damage which one of the parties may sustain by a decision against him is to be taken into consideration in the estimate of the value of the matter in dispute. Thus, it has been held that the reason that, on account of its probative force, the judgment may operate as an estoppel in a subsequent proceeding;[96] or that it may affect a party's

nal prosecution against any person who is denied or who cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520]. Any civil suit or criminal prosecution against any revenue officer of the United States, or against any person acting under or by authority of any such officer on account of any act done under color of his office, or of any revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or against any person holding property or estate, by title derived from any such officer, when the suit or prosecution affects the validity of any such revenue law. U. S. Rev. St. (1878) § 643. No other action arising under the revenue laws of the United States can be removed, where the matter in dispute is below the jurisdictional amount, although the federal court might have taken original jurisdiction of the same. Bierbower *v.* Miller, 30 Nebr. 161, 46 N. W. 431, 47 N. W. 1, 9 L. R. A. 228; *Ex p.* Pennsylvania Co., 137 U. S. 451, 457, 11 S. Ct. 141, 143, 34 L. ed. 738, 741; Johnson *v.* Wells, 98 Fed. 3; Johnson *v.* Wells, 91 Fed. 1; Tod *v.* Cleveland, etc., R. Co., 65 Fed. 145; Roraback *v.* Pennsylvania Co., 42 Fed. 420; Malone *v.* Richmond, etc., R. Co., 35 Fed. 625. An action against any person for or on account of anything done by him while an officer of either house of congress in discharge of his official duty. 18 U. S. St. at. L. 401, c. 130, § 8 (1 U. S. Rev. St. Suppl. 77).

94. See *supra*, II, A, 1.

Amendment.— Where, in an action for injuries, the complaint alleged damages amounting to two thousand forty dollars and fifty cents, but prayed for judgment only in the sum of one thousand nine hundred and eighty-two dollars, it was not an abuse of the trial court's discretion, after the filing of a petition for the removal of the cause to the federal courts, to permit plaintiff to amend his complaint so as to conform the allegations to the demand for damages. Stark *v.* Port Blakely Mill Co., 44 Wash. 309, 87 Pac. 339.

95. Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458. See also Whitney *v.* Dick, 202 U. S. 132, 26 S. Ct. 584, 50 L. ed. 963; Perrine *v.* Slack, 164 U. S. 452, 17 S. Ct. 79, 41 L. ed. 510; *In re* Burrus, 136 U. S. 586, 10 S. Ct. 850, 34 L. ed. 1500; Snow *v.* U. S., 118 U. S. 346, 6 S. Ct. 1059, 30 L. ed. 207; Clifford *v.* Williams, 131 Fed. 100; *In re* Barry, 42 Fed. 113, 136 U. S. 597, 34 L. ed. 503 note; *Ex p.* Everts, 8 Fed. Cas. No. 4,581, 1 Bond 197.

Divorce and alimony.— In a suit for a divorce, where plaintiff prays alimony charging that defendant is the owner of valuable real estate and property interests, and also receives a yearly income of not less than ten thousand dollars; it does not appear that the value of the matter in dispute exceeds the sum of two thousand dollars; since it is uncertain what amount of alimony the court may allow, and the alimony is only an incident to the right to a divorce. Bowman *v.* Bowman, 30 Fed. 849. The same rule has been applied to a suit to set aside a decree of divorce. Caswell *v.* Caswell, 120 Ill. 377, 11 N. E. 342.

Habeas corpus.—An application for the writ of habeas corpus cannot be removed. Kurtz *v.* Moffitt, 115 U. S. 487, 6 S. Ct. 148, 29 L. ed. 458. The same rule would be applied to applications for the writ of habeas corpus to determine the right to the custody of a child. Perrine *v.* Slack, 164 U. S. 452, 17 S. Ct. 79, 41 L. ed. 510; *In re* Burrus, 136 U. S. 586, 10 S. Ct. 850, 34 L. ed. 1500; Clifford *v.* Williams, 131 Fed. 100; *In re* Barry, 42 Fed. 113, 136 U. S. 597, 34 L. ed. 503 note; *Ex p.* Everts, 8 Fed. Cas. No. 4,581, 1 Bond 197.

Probate of will.—Although the value in money of a right to appeal from the probate of a will cannot be appraised with exactness, yet where the right of plaintiff in the estate, if intestate, is more than the jurisdictional amount, as that might depend directly upon upon the power to bring the question of the validity of the will before a court, the pecuniary value of the matter in dispute is, upon removal, sufficient to bring the case within the jurisdiction of the circuit court. Erwin *v.* Walsh, 27 Fed. 579, 23 Blatchf. 535.

96. New England Mortg. Security Co. *v.*

rights against a stranger to the litigation, does not increase the value of the matter in dispute.[97]

3. Action For Damages. Where the suit is brought upon a demand, on which the law liquidates the damages for a default, the amount of the damages as liquidated by the law, not the amount named in plaintiff's pleading, is the value of the matter in dispute.[98] But where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which plaintiff demands judgment must alone be considered,[99] unless it clearly appears that the amount named is merely colorable, and beyond the amount of a reasonable expectation of recovery.[1] Where the complaint or declaration contains several counts or

Gay, 145 U. S. 123, 12 S. Ct. 815, 36 L. ed. 646; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 6 S. Ct. 849, 29 L. ed. 990; Elgin *v.* Marshall, 106 U. S. 578, 1 S. Ct. 484, 27 L. ed. 249; Baltimore *v.* Postal Tel. Cable Co., 62 Fed. 500. *Contra*, Anderson *v.* Gerding, 1 Fed. Cas. No. 356, 3 Woods 487.

Prospective damages which can be recovered in the action, or which the bill is filed to prevent, should, however, be considered (Draper *v.* Skerrett, 116 Fed. 206), when they are alleged with sufficient certainty (Oregon R., etc., Co. *v.* Shell, 125 Fed. 979).

In a suit by the state treasurer to recover a balance less than the jurisdictional amount of unpaid taxes, where the defense was that defendant had tendered in payment of all the taxes assessed against him, coupons for more than the jurisdictional amount, it was held that the matter in dispute was the right to tender all those coupons, and that the case had been properly removed. Green *v.* Brooks, 28 Fed. 215.

Where defendant before the removal admitted plaintiff's claim, but disputed the validity of an attachment, issued by the state courts, and made no formal claim for damages, sufficient does not appear to show that the matter in dispute exceeds the jurisdictional amount, although the property attached is more than that sum. Keith *v.* Levi, 2 Fed. 743, 1 McCrary 343.

97. Smith *v.* Adams, 130 U. S. 167, 9 S. Ct. 566, 32 L. ed. 895.

Where relief is prayed in the alternative, it seems that that which involves the larger amount is the test of jurisdiction. Shappirio *v.* Goldberg, 192 U. S. 232, 24 S. Ct. 259, 48 L. ed. 419; Greenfield *v.* U. S. Mortgage Co., 133 Fed. 784; Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438.

98. Battle *v.* Atkinson, 191 U. S. 559, 24 S. Ct. 845, 48 L. ed. 302 [*affirming* 115 Fed. 384]; North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. ed. 1061; Vance *v.* W. A. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. ed. 1111; Barry *v.* Edmunds, 116 U. S. 550, 6 S. Ct. 501, 29 L. ed. 729; Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655; Barataria Canning Co. *v.* Louisville, etc., R. Co., 143 Fed. 113, 74 C. C. A. 307; Wines *v.* Cobb Real Estate Co., 128 Fed. 198; Bergman *v.* Inman, 91 Fed. 293; Baltimore *v.* Postal Tel. Cable Co., 62 Fed. 500; Cabot *v.* McMaster, 61 Fed. 129.

A cause is not removable, when the prayer for relief asks for "$2,000 and all other proper relief," if, under the pleadings, no other relief can be granted. Baltimore, etc., R. Co. *v.* Worman, 12 Ind. App. 494, 40 N. E. 751.

Where the state practice allows no greater damage than that prayed, the value of the matter in dispute will be considered to be the amount stated in plaintiff's prayer for relief, although the body of the complaint contains allegations showing greater damages. Lake Erie, etc., R. Co. *v.* Juday, 19 Ind. App. 436, 49 N. E. 843; Smith *v.* Northern Pac. R. Co., 3 N. D. 17, 53 N. W. 173; Barber *v.* Boston, etc., R. Co., 145 Fed. 52; Swann *v.* Mutual Reserve Fund Life Assoc., 116 Fed. 232; Simmons *v.* Mutual Reserve Fund Life Assoc., 114 Fed. 785.

99. Gorman *v.* Havird, 141 U. S. 206, 11 S. Ct. 943, 35 L. ed. 717; Barry *v.* Edmunds, 116 U. S. 550, 5 S. Ct. 501, 29 L. ed. 729; Smith *v.* Greenhow, 109 U. S. 669, 3 S. Ct. 421, 27 L. ed. 1080; Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655; Southern Cash Register Co. *v.* National Cash Register Co., 143 Fed. 659, 143 Fed. 700; Eisele *v.* Oddie, 128 Fed. 941; Yarde *v.* Baltimore, etc., R. Co., 57 Fed. 913; Green *v.* Brooks, 28 Fed. 215; Stanley *v.* Albany County, 15 Fed. 483, 21 Blatchf. 249; Judson *v.* Macon County, 14 Fed. Cas. No. 7,568, 2 Dill. 213. See also Stark *v.* Port Blakely Mill Co., 44 Wash. 309, 87 Pac. 339.

Exemplary damages.— In an action for the denial of the right to vote (Wiley *v.* Sinkler, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84), for false imprisonment (Hynes *v.* Briggs, 41 Fed. 468), for assault and battery, or in any other case in which exemplary damages may properly be awarded, the law prescribes no limitation to the amount that can be recovered, and the amount claimed by plaintiff is the sole criterion, to which resort can be had in settling the question of jurisdiction (Barry *v.* Edmunds, 116 U. S. 550, 6 S. Ct. 501, 29 L. ed. 729; Wilson *v.* Daniel, 3 Dall. (U. S.) 401, 1 L. ed. 655).

In an action upon a bond, where the penal sum exceeded the jurisdictional amount, and the damages prayed were the whole penalty, the circuit court has jurisdiction, although the breach assigned shows less damages. Victor Sewing-Mach. Co. *v.* Mingus, 28 Fed. Cas. No. 16,936, 5 Reporter 518. But see Cabot *v.* McMaster, 61 Fed. 129 [*distinguishing* Postmaster-Gen. *v.* Cross, 19 Fed. Cas. No. 11,306, 4 Wash. 326].

1. Bowman *v.* Chicago, etc., R. Co., 115

causes of action, the aggregate amount of the damages claimed in each is the value of the matter in dispute, subject to the rules already stated,[2] unless it appears that each is founded upon the same state of facts.[3] It makes no difference, so far as the right of removal occurs, if the claims have been assigned, and no one of them is equal to the jurisdictional amount.[4]

4. Ejectment and Other Suits to Obtain Possession of Land. In ejectment the value of the matter in dispute is that of the interest in the land, to recover which the suit was brought, although defendant claims a less interest,[5] or only

U. S. 611, 6 S. Ct. 192, 29 L. ed. 502; Smith *v.* Greenhow, 109 U. S. 669, 3 S. Ct. 421, 27 L. ed. 1080; Lee *v.* Watson, 1 Wall. (U. S.) 337, 17 L. ed. 557; Greene County Bank *v.* J. H. Teasdale Commission Co., 112 Fed. 801; Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; Shields *v.* McCandlish, 73 Fed. 318; Arapahoe Bank *v.* Bradley, 72 Fed. 867, 19 C. C. A. 206; Baltimore *v.* Postal Tel. Cable Co., 62 Fed. 500.

2. Davis *v.* Mills, 99 Fed. 39; Bergman *v.* Inman, 91 Fed. 293; Weaver *v.* Norway Tack Co., 80 Fed. 700; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; Chase *v.* Sheldon Roller-Mills Co., 56 Fed. 625; Bernheim *v.* Birnbaum, 30 Fed. 885; Hammond *v.* Cleaveland, 23 Fed. 1, 10 Sawy. 621; Stanley *v.* Albany County, 15 Fed. 483, 21 Blatchf. 249; Judson *v.* Macon County, 14 Fed. Cas. No. 7,568, 2 Dill. 213.

Separate suits, where the same plaintiff against the same defendant, which involve the same federal question, cannot be removed, unless the matter in dispute, in each of them, exceeds the jurisdictional amount. Texas, etc., R. Co. *v.* Cushny, (Tex. Civ. App. 1901) 64 S. W. 795.

If the claims are multifarious, it might perhaps be held that for that reason the case could not be removed. Judson *v.* Macon County, 14 Fed. Cas. No. 7,568, 2 Dill. 213. See, however, Fitchett *v.* Blows, 74 Fed. 47, 20 C. C. A. 286.

3. Pooser *v.* Western Union Tel. Co., 137 Fed. 1001, in which the complaint in form stated two causes of action, each being for the failure to deliver a telegram, and each alleging damages in the sum of one thousand nine hundred dollars, the only difference between them being that in one it was alleged that the telegram was addressed to Mrs. P and in the other that it was addressed to Mr. P, it appeared that the telegram was the same and that plaintiff's counsel was uncertain from the manuscript as to which of the two was the party to whom the telegram was addressed. It was held that the cause could not be removed because the amount involved was only one thousand nine hundred dollars. See also Baltimore, etc., R. Co. *v.* Ryan, 31 Ind. App. 597, 68 N. E. 923. But see Thompson *v.* Southern R. Co., 116 Fed. 890; Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; Platt *v.* Phœnix Assur. Co., 37 Fed. 730.

Where it clearly appears that the different causes of action alleged consist merely of the common counts, the value of the matter in dispute is to be determined by the amounts named in the bill of particulars. Healy *v.* Prevost, 11 Fed. Cas. No. 6,297, 8 Reporter 103.

4. Brigham-Hopkins Co. *v.* Gross, 107 Fed. 769; Davis *v.* Mills, 99 Fed. 39; Bergman *v.* Inman, 91 Fed. 293; Bowden *v.* Burnham, 59 Fed. 752, 8 C. C. A. 248; Chase *v.* Sheldon Roller-Mill Co., 56 Fed. 625; Bernheim *v.* Birnbaum, 30 Fed. 885; Hammond *v.* Cleaveland, 23 Fed. 1, 10 Sawy. 621.

It must appear in the complaint, or petition for removal, that the requisite difference of citizenship exists between defendants and the assignors as well as between defendants and plaintiffs, or that a federal question is involved. Otherwise the case cannot be removed. North American Transp., etc., Co. *v.* Morrison, 178 U. S. 262, 20 S. Ct. 869, 44 L. ed. 1061 [*reversing* 85 Fed. 802]; Chase *v.* Sheldon Roller-Mills Co., 56 Fed. 625.

5. Way *v.* Clay, 140 Fed. 352. See Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 10 S. Ct. 728, 34 L. ed. 95; Dupree *v.* Leggette, 140 Fed. 776.

A bill to recover an interest in lands alleging "that complainants are informed and believe that the whole of said lands are worth $12,000 and the amount demanded by them herein is more than $2,000," is argumentative, since it leaves the court to make a calculation, and is insufficient to show the jurisdiction. Dupree *v.* Leggette, 140 Fed. 776. *Contra*, Thompson *v.* Kendrick, 5 Hayw. (Tenn.) 113. See Jones *v.* Rowley, 73 Fed. 286. So an averment that defendant has expended certain money upon land is insufficient to show that the value of the land is equal to the sum so expended, unless it is also averred that such expenditure has enhanced the value of the same to that amount. Back *v.* Sierra Nevada Consol. Min. Co., 46 Fed. 673. And condemnation proceedings cannot be removed, where the petition for the condemnation avers that the value of the land sought to be taken and of the resulting damages does not exceed two thousand dollars, although the respondent offers proof that the damages will exceed such sum. Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902. In an action of unlawful detainer in Arkansas, in the absence of an allegation of special damages, the value of the matter in dispute will be held to be no more than the amount of two years' rents, or the rental value for two years of the property in question, irrespective of its fee value. Battle *v.* Atkinson, 115 Fed. 384 [*affirmed* in 191 U. S. 559, 24 S. Ct. 845, 48 L. ed. 302].

Trespass to land.— Where a plaintiff in a

an easement [6] in the same, together with any special damages that are alleged, and can be recovered in the suit.[7]

5. Action to Recover Possession of Personal Property. In an action or proceeding to recover the possession of personal property, it seems that the value of the property sought by plaintiff or by the claimant of the same, is that of the matter in dispute.[8]

6. Foreclosure. In a suit to foreclose a mortgage or other lien, the amount in dispute, for the purpose of determining the jurisdiction, is the amount sought to be recovered through the lien,[9] together with any damages not covered by the lien, for which judgment is prayed.[10]

7. Suit to Redeem. In a suit to redeem land, the value of the equity of redemption is the value of the matter in dispute.[11]

8. Suit to Quiet Title. In a suit to quiet title or to remove a cloud therefrom, the value of the matter in controversy is that of so much of plaintiff's property as is affected by the adverse claim.[12]

state court alleges title to real estate and a trespass thereon by defendant, and prays for damages and for general relief, as may be done under the state practice, and his title is put in issue by the answer, this is a part of the matter in dispute. the value of which is to be taken into account in determining the right of removal. Porter *v.* Northern Pac. R. Co., 161 Fed. 773.

Where, in an action involving the title to land, the plaintiff claimed the same without making a payment of two thousand two hundred dollars demanded by one of defendants, the action was one involving more than two thousand dollars, and was removed to the United States courts. Withers *v.* John Hopkins Place Sav. Bank, 104 Ga. 89, 30 S. E. 766.

Where the manner in which the land is used enhances its value to defendant, that fact must be taken into consideration in the estimate. King *v.* Southern R. Co., 119 Fed. 1016. So in ejectment against a railway company using a street charged to have been built by the city without authority through plaintiff's land, the pecuniary test of the jurisdiction is the whole value of the land used for the street, not merely the value of the land necessary for the tracks and for the posts supporting the electric wires. Greene *v.* Tacoma, 53 Fed. 562.

6. Butters *v.* Carney, 127 Fed. 622; Greene *v.* Tacoma, 53 Fed. 562. See Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 10 S. Ct. 728, 34 L. ed. 95.

7. Way *v.* Clay, 140 Fed. 352.

Where no special acts of damage are pleaded, only nominal damages can be recovered, and the amount alleged in general language cannot affect the value of the matter in dispute. Way *v.* Clay, 140 Fed. 352.

8. Gibson *v.* Shufeldt, 122 U. S. 27, 7 S. Ct. 1066, 30 L. ed. 1083; Peyton *v.* Robertson, 9 Wheat. (U. S.) 527, 6 L. ed. 151; Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397; Hoover *v.* Columbia Straw-Paper Co., 68 Fed. 945.

It is not enlarged by a claim of special damages for injury to plaintiff's business, when the state practice would not allow the recovery of the same. Vance *v.* W. A. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. ed. 1111 [*reversing* 80 Fed. 786].

In an action to recover a claim of less than two thousand dollars, begun by an attachment of property worth more and claimed by a receiver who removed the cause, the value of the whole property is that of the matter in dispute. Hoover *v.* Columbia Straw-Paper Co., 68 Fed. 945.

In replevin to collect rent by distress, the sum claimed as rent, if less than the value of the property replevied, is the matter in dispute; but where replevin is brought as a means of trying the title to property, then the value of the whole is the pecuniary test of jurisdiction. Peyton *v.* Robertson, 9 Wheat. (U. S.) 527, 6 L. ed. 151 [*approved* in Gibson *v.* Shufeldt, 122 U. S. 27, 29, 7 S. Ct. 1066, 30 L. ed. 1083].

In a suit to compel the issue to complainant of a certificate for corporate stock, and the cancellation of a certificate previously issued to another, the par value of the stock was held to be the value of the subject-matter. Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397.

9. Gibson *v.* Shufeldt, 122 U. S. 27, 7 S. Ct. 1066, 30 L. ed. 1083; Wakeman *v.* Throckmorton, 124 Fed. 1010; Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68.

In a suit to foreclose a mortgage securing the sum of two thousand dollars, the bill alleged that plaintiff advanced an additional two dollars and twenty-five cents to pay the fee for recording the mortgage, "for which defendant is liable to him." It was held that the averment of liability was a mere conclusion of law, and that the bill therefore failed to show that more than two thousand dollars was involved. Less *v.* English, 85 Fed. 471, 29 C. C. A. 275.

10. Lilienthal *v.* McCormick, 117 Fed. 89, 54 C. C. A. 475.

It is not limited by the value of the property subject to the lien or mortgage. Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68.

11. Carne *v.* Russ, 152 U. S. 250, 14 S. Ct. 578, 38 L. ed. 428.

12. Building, etc., Assoc. *v.* Cunningham,

9. Injunction Suit. In a suit for an injunction, the value of the matter in dispute is that of the object of the bill,[13] namely, the value to plaintiff of the right for which he prays protection,[14] or the value to defendant of the acts of which plaintiff prays prevention,[15] together with the amount of the damages which

92 Tex. 155, 47 S. W. 714; Parker *v.* Merrill, 106 U. S. 1, 1 S. Ct. 14, 27 L. ed. 72; Hyde *v.* Victoria Land Co., 125 Fed. 970; Cowell *v.* City Water Supply Co., 121 Fed. 53, 57 C. C. A. 393 [*reversing* 96 Fed. 769]; Woodside *v.* Ciceroni, 93 Fed. 1, 35 C. C. A. 177; Felch *v.* Travis, 92 Fed. 210; Riggs *v.* Clark, 71 Fed. 560, 18 C. C. A. 242; Simon *v.* House, 46 Fed. 317; Lehigh Zinc, etc., Co. *v.* New Jersey Zinc, etc., Co., 43 Fed. 545. See also Oregon R., etc., Co. *v.* Shell, 125 Fed. 979.

Allegations in a complaint for the cancellation of a lease and to enjoin the lessees from using the premises, that the value of the leased premises is ten thousand dollars, and that the rental value of the property is two thousand four hundred dollars a year, are sufficient to give jurisdiction to the federal court. Reese *v.* Zinn, 103 Fed. 97.

In a suit to cancel a paper purporting to be a marriage contract, which, if valid, gave the alleged wife an interest in the property of plaintiff, the amount of the provision which the woman would be entitled to receive, were the contract held binding, is the value of the matter in dispute. Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572.

Where plaintiff sued to quiet title and to set aside a deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest, and costs, the amount involved, for the purpose of determining the jurisdiction of the federal circuit court, is the value of the land, and not the amount required to redeem. Greenfield *v.* U. S. Mortgage Co., 133 Fed. 784. So in suits to set aside as clouds upon the title to lands a tax (Douglas County *v.* Stone, 191 U. S. 557, 24 S. Ct. 843, 48 L. ed. 301 [*affirming* 110 Fed. 812]; Purnell *v.* Page, 128 Fed. 496), an assessment for a street improvement (Eachus *v.* Hartwell, 112 Fed. 564), and to cancel certain street improvement certificates (Shewalter *v.* Lexington, 143 Fed. 161), the amount of the tax, assessment, and certificates, respectively, are the value of the matters in dispute, not the value of the lands affected.

13. Western Union Tel. Co. *v.* Charleston, 56 Fed. 419 [*affirmed* in 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 781, and *citing* with approval as to the proposition of the text. Foster Fed. Pr. § 16].

It is not limited by the amount of damages claimed by plaintiff to have already accrued. Scott *v.* Donald, 165 U. S. 107, 17 S. Ct. 262, 41 L. ed. 648; American Fisheries Co. *v.* Lennen, 118 Fed. 869; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65; Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183; Whitman *v.* Hubbell, 30 Fed. 81.

In a suit to enjoin the use of a trade-mark and to compel an account of the profits, the value of the matter in dispute is the value of the trade-mark; not the amount of profits which defendant has derived from its use. Symonds *v.* Greene, 28 Fed. 834. See also Draper *v.* Skerrett, 116 Fed. 206; Hennessy *v.* Herrmann, 89 Fed. 669. But in a suit to enjoin an unlawful use of complainant's trade-name, where it was not alleged that the acts complained of would destroy the value of said name, the value thereof was held not to be that of the matter in dispute. Winchester Repeating Arms Co. *v.* Butler, 128 Fed. 976.

14. State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915; McNeill *v.* Southern R. Co., 202 U. S. 543, 26 S. Ct. 722, 50 L. ed. 1142; Railroad Commission *v.* Texas, etc., R. Co., 144 Fed. 68, 75 C. C. A. 226; McKee *v.* Chautauqua Assembly, 124 Fed. 808; Cowell *v.* City Water Supply Co., 121 Fed. 53, 57 C. C. A. 393 [*reversing* 96 Fed. 769]; American Fisheries Co. *v.* Lennen, 118 Fed. 869; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689; Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353; Maffet *v.* Quine, 95 Fed. 199, 93 Fed. 347; Humes *v.* Ft. Smith, 93 Fed. 857; Von Schrœder *v.* Brittan, 93 Fed. 9; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65; Lanning *v.* Osborne, 79 Fed. 657; Dickinson *v.* Union Mortg., etc., Co., 64 Fed. 895; Texas, etc., R. Co. *v.* Kuteman, 54 Fed. 547; Herbert *v.* Rainey, 54 Fed. 248; Clapp *v.* Spokane, 53 Fed. 515; Oleson *v.* Northern Pac. R. Co., 44 Fed. 1.

In a bill by the owner to enjoin a trespass which it was alleged would entirely destroy the use of certain land, the value of the land is the test. Sheriff *v.* Turner, 119 Fed. 231; Northern Pac. R. Co. *v.* Cunningham, 103 Fed. 708; Smith *v.* Bivens, 56 Fed. 352. But see Hagge *v.* Kansas City Southern R. Co., 104 Fed. 391.

In a suit to enjoin the unlawful use of market quotations posted in plaintiff's exchange, the value of the exclusive right to the same is the test. Chicago Bd. of Trade *v.* Cella Commission Co., 145 Fed. 28, 76 C. C. A. 28.

In suits by a railway company to enjoin the scalping or resale of non-transferable tickets, the value of the business sought to be protected was held to be the test. Bitterman *v.* Louisville, etc., R. Co., 207 U. S. 205, 28 S. Ct. 91, 52 L. ed. 171 [*affirming* 144 Fed. 34]; Delaware, etc., R. Co. *v.* Frank, 110 Fed. 689.

15. State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915; Mississippi, etc., R. Co. *v.* Ward, 2 Black (U. S.) 485, 17 L. ed. 311; Memphis *v.* Postal Tel. Cable Co., 145 Fed.

plaintiff claims that he has already sustained and prays to have awarded to him.[16]

10. Taxpayers' Bills. In a suit to enjoin the collection of a tax, the amount of the tax, not the value of the property, which defendant threatens to seize,[17] nor of that, the title to which is clouded,[18] is the test of jurisdiction. The cases conflict as to whether in a suit to enjoin a municipality from issuing bonds or otherwise incurring indebtedness, the pecuniary test of the jurisdiction is the amount of the tax to which the complainant would be thereby subjected, or the whole debt, the creation of which complainant seeks to prevent.[19]

11. Creditors' Bills. Upon a creditor's bill, the value of the complainant's claim, not the value of the property sought to be reached,[20] nor the value of the claim, payment of which he seeks to enjoin,[21] is that of the matter in dispute when the creditor sues in his own right alone; but when the creditor sues on

602, 76 C. C. A. 292; Amelia Milling Co. *v.* Tennessee Coal, etc., R. Co., 123 Fed. 811; Cowell *v.* City Water Supply Co., 121 Fed. 53, 57 C. C. A. 393 [*reversing* 96 Fed. 769]; Maffet *v.* Quine, 95 Fed. 199; Rainey *v.* Herbert, 55 Fed. 443, 5 C. C. A. 183; Oleson *v.* Northern Pac. R. Co., 44 Fed. 1; Whitman *v.* Hubbell, 30 Fed. 81.

In a suit to enjoin defendants from continuing a business in violation of a contract with complainant, the court has jurisdiction, where the value of the plant owned and operated by them, and the amount of their annual business, exceeds two thousand dollars. American Fisheries Co. *v.* Lennen, 118 Fed. 869.

Where there is no allegation of the value of the structures sought to be abated, which are obstructions to navigation, and the damages alleged to have been suffered because of the same, prior to the beginning of the suit, are less than two thousand dollars, the jurisdiction does not appear. Kenyon *v.* Knipe, 46 Fed. 309.

16. Scott *v.* Donald, 165 U. S. 107, 115, 17 S. Ct. 262, 41 L. ed. 648.

17. Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 232, 13 S. Ct. 64, 36 L. ed. 951; Field *v.* Barber Asphalt Paving Co., 117 Fed. 925; Eachus *v.* Hartwell, 112 Fed. 564; Linehan Railway Transfer Co. *v.* Pendergrass, 70 Fed. 1, 16 C. C. A. 585; King *v.* Wilson, 14 Fed. Cas. No. 7,810, 1 Dill. 555.

Upon a bill to enjoin the collection of a land tax filed by a corporation claiming an exemption, the amount of the tax claimed to be already due is the sole test; since it cannot be assumed that the assessment for subsequent years would be for a like amount. Citizens' Bank *v.* Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451.

Where an injunction is sought against the collection of an annual tax or license-fee, imposed upon a franchise or upon the right to exercise a certain occupation, resistance to the payment of which would result in the destruction of plaintiff's business, the value of the right to exemption, including the threatened damage to that business, not the amount of the tax or license fee which has accrued, is to be considered. Hutchinson *v.* Beckham, 118 Fed. 399, 55 C. C. A. 333; Southern Express Co. *v.* Emsley, 116 Fed. 756; Humes *v.* Ft. Smith, 93 Fed. 857; Western Union Tel Co. *v.* Charleston, 56 Fed. 419 [*affirmed* in 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871]; American Fertilizing Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179.

18. Douglas County *v.* Stone, 191 U. S. 557, 24 S. Ct. 843, 48 L. ed. 801 [*affirming* 110 Fed. 812]; Purnell *v.* Page, 128 Fed. 496; Eachus *v.* Hartwell, 112 Fed. 564.

Income tax.— Upon a bill to enjoin an income tax upon a salary annexed to an office claimed to be exempt, the specific tax sought to be enforced, not the right to exemption, is the test. Purnell *v.* Page, 128 Fed. 496.

19. In the following cases the amount of plaintiff's tax was held to be the test. Colvin *v.* Jacksonville, 158 U. S. 456, 15 S. Ct. 866, 39 L. ed. 1053; El Paso Water Co. *v.* El Paso, 152 U. S. 157, 14 S. Ct. 494, 38 L. ed. 396; Murphy *v.* East Portland, 42 Fed. 308; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, 1 Kan. 627.

In a suit to enjoin a municipality from issuing bonds to an amount charged to be in excess of the constitutional limit of its indebtedness, the value of the power of the city to issue such bonds, not the tax to which the complainant would be thereby subjected, was held to be the value of the matter in dispute. Ottumwa *v.* City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604. See Brown *v.* Trousdale, 138 U. S. 389, 11 S. Ct. 308, 34 L. ed. 987.

Upon a taxpayer's bill to enjoin the execution of a contract for a public work, the value of the contract and not the amount of the tax complainant may be required to pay in consequence is the amount in dispute. Johnston *v.* Pittsburg, 106 Fed. 753.

20. Cowell *v.* City Water-Supply Co., 121 Fed. 53, 57 C. C. A. 393 [*reversing* 96 Fed. 769]; Alkire Grocery Co. *v.* Richesin, 91 Fed. 79; Werner *v.* Murphy, 60 Fed. 769. See Handley *v.* Stutz, 137 U. S. 366, 11 S. Ct. 117, 34 L. ed. 706; Estes *v.* Gunter, 121 U. S. 183, 7 S. Ct. 854, 30 L. ed. 884; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 6 S. Ct. 849, 29 L. ed. 990.

21. Smithson *v.* Hubbell, 81 Fed. 593. And see *supra*, III, B, 10.

behalf of himself and the other creditors for the administration of a trust fund, the amount of such fund determines the question of jurisdiction.[22]

12. Stock-Holders' Bills. Upon stock-holders' bills to enforce causes of action belonging to corporations,[23] or to enjoin actions which are *ultra vires*,[24] or for the appointment of a receiver of the corporate assets,[25] the value of the matter in dispute is that of the corporate right sought to be enforced, or of the amount of loss which the corporation would suffer from the threatened unlawful action, or the value of the assets of the corporation, as the case may be, not the value of plaintiff's stock.

13. Joint Plaintiffs. Where a number of plaintiffs, claiming under the same title, and having a joint or a common and undivided interest in the relief sought, unite in a suit, the adverse party having no interest in the apportionment or distribution of the amount recovered among them, the value of their united interests is that of the matter in dispute; at least when they are all indispensable parties.[26]

14. Joint Defendants. Where two or more defendants are joined by the same plaintiff in one suit, the pecuniary test of jurisdiction is ordinarily the joint

22. Putnam *v.* Timothy Dry-Goods, etc., Co., 79 Fed. 454. See Jones *v.* Mutual Fidelity Co., 123 Fed. 506. But see Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 6 S. Ct. 849, 29 L. ed. 990.

23. Hill *v.* Glasgow R. Co., 41 Fed. 610. *Contra*, Harvey *v.* Raleigh, etc., R. Co., 89 Fed. 115; Massa *v.* Cutting, 30 Fed. 1.

24. McKee *v.* Chautauqua Assembly, 124 Fed. 808.

In a suit to compel the issue to complainant of a certificate of corporate stock, and the cancellation of one issue to another, the value of the matter in dispute was at least the par value of the stock, where there were circumstances tending to show that the defendants had valued it at a higher sum. Ryan *v.* Seaboard, etc., R. Co., 89 Fed. 397.

25. Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449; Robinson *v.* West Virginia Loan Co., 90 Fed. 770; Towle *v.* American Bldg., etc., Soc., 60 Fed. 131.

26. Thornton *v.* Tison, 95 Ala. 589, 10 So. 639; Davies *v.* Corbin, 112 U. S. 36, 5 S. Ct. 4, 28 L. ed. 627; Crawford *v.* Haller, 111 U. S. 796, 4 S. Ct. 697, 28 L. ed. 602; Washington Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. ed. 782; Shields *v.* Thomas, 17 How. (U. S.) 3, 15 L. ed. 93; Jones *v.* Mutual Fidelity Co., 123 Fed. 506; Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 56 Fed. 378, 5 C. C. A. 524 [*reversing* 44 Fed. 151, 11 L. R. A. 623]; Herbert *v.* Rainey, 54 Fed. 248 [*affirmed* in 55 Fed. 443, 5 C. C. A. 183]; Lovett *v.* Prentice, 44 Fed. 459; Prince *v.* Towns, 33 Fed. 161.

The consolidation, after answer, of two actions upon different contracts, brought by the same plaintiff against the same defendant, which aggregate more than the jurisdictional amount, but neither of which is separately equal thereto, does not render the consolidated cause removable as a single action, although the defense to each is the same. Holmes *v.* U. S. Fire Ins. Co., 142 Fed. 863.

Where two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained as to those whose claims exceed the jurisdictional amount. Wheless *v.* St. Louis, 180 U. S. 379, 21 S. Ct. 402, 45 L. ed. 583 [*affirming* 96 Fed. 865]; Ogden City *v.* Armstrong, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444 [*affirming* 12 Utah 476, 43 Pac. 119]; Miller *v.* Clark, 138 U. S. 223, 11 S. Ct. 300, 34 L. ed. 966; Eaton *v.* Hoge, 141 Fed. 64, 72 C. C. A. 74; Hagge *v.* Kansas City Southern R. Co., 104 Fed. 391; Auer *v.* Lombard, 72 Fed. 209, 19 C. C. A. 72; Putney *v.* Whitmire, 66 Fed. 385; Holt *v.* Bergevin, 60 Fed. 1; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225; Schulenberg-Boeckeler Lumber Co. *v.* Hayward, 20 Fed. 422; King *v.* Wilson, 14 Fed. Cas. No. 7,810, 1 Dill. 555.

Where a suit is brought by one or more for themselves and all others of a class jointly interested for the relief of the whole class, the aggregate interest of the whole class constitutes the matter in dispute. Brown *v.* Trousdale, 138 U. S. 389, 11 S. Ct. 308, 34 L. ed. 987; McKee *v.* Chautauqua Assembly, 124 Fed. 808; Jones *v.* Mutual Fidelity Co., 123 Fed. 506; Ottumwa *v.* City Water Supply Co., 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604; Taylor *v.* Decatur Mineral, etc., Co., 112 Fed. 449; Johnston *v.* Pittsburg, 106 Fed. 753; Putnam *v.* Timothy Dry-Goods Co., 79 Fed. 454; Towle *v.* American Bldg., etc., Soc., 60 Fed. 131; Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. 621; Hill *v.* Glasgow R. Co., 41 Fed. 610. But such a suit, where the class is similarly situated, but not jointly interested, can only be maintained by a plaintiff whose individual interest exceeds the jurisdictional amount. Colvin *v.* Jacksonville, 158 U. S. 456, 15 S. Ct. 866, 39 L. ed. 1053; El Paso Water Co. *v.* El Paso, 152 U. S. 157, 14 S. Ct. 494, 38 L. ed. 396; Adams *v.* Douglas County, 1 Fed. Cas. No. 52, 1 Kan. 627. The bill or petition must show the pecuniary interest of the parties on whose behalf the suit is brought. Sioux Falls Nat. Bank *v.* Swenson, *supra*; Adams *v.* Douglas County, *supra*. See also *supra*, III, B, 10–12.

or several character of their liability. If their liability is joint, the value of the matters in controversy between plaintiff and them all is that of the matter in dispute.[27]

C. Interest. The interest excluded from the computation includes interest accrued on the demand before the suit was brought, and which is collected only as an incident of the principal,[28] but not interest which is the subject of a separate contract as a coupon, and which might be the subject of a separate suit.[29] The face value of coupons due before the suit may be added to the principal named in the bond, when the jurisdictional amount is determined,[30] except where the day of payment named in the bond has not yet arrived but by its terms it becomes due on the non-payment of a coupon for interest.[31]

D. Costs. Notarial fees for the presentment and protest of a note in suit, although paid before the action was brought, are considered to be costs, not damages, and are to be excluded from the computation of the jurisdictional amount.[32]

E. Defense Apparent in Plaintiff's Pleading. The fact that plaintiff's pleading shows a sufficient defense to part of his claim to reduce it below the

27. Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870 [*reversing* 39 La. Ann. 325, 1 So. 612]; Virginia-Carolina Chemical Co. *v.* Home Ins. Co., 113 Fed. 1, 51 C. C. A. 21; Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327; Western Union Tel. Co. *v.* Norman, 77 Fed. 13.

If the liability is several, ordinarily the suit can only be sustained as against those whose respective controversies with plaintiff involve matters exceeding, as regards each, the jurisdictional amount. Trotier *v.* St. Louis, etc., R. Co., 180 Ill. 471, 54 N. E. 487; Texas, etc., R. Co. *v.* Dishman, 38 Tex. Civ. App. 277, 85 S. W. 319; Chamberlin *v.* Browning, 177 U. S. 605, 20 S. Ct. 820, 44 L. ed. 906; Citizens' Bank of Louisiana *v.* Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451; Fishback *v.* Western Union Tel. Co., 161 U. S. 96, 16 S. Ct. 506, 40 L. ed. 630; Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 13 S. Ct. 650, 37 L. ed. 494; Keels *v.* Central R. Co., 147 U. S. 374, 13 S. Ct. 350, 37 L. ed. 206; Walter *v.* Northeastern R. Co., 147 U. S. 370, 13 S. Ct. 348, 37 L. ed. 206; Wisconsin Cent. R. Co. *v.* Phœnix Ins. Co., 123 Fed. 989; McDaniel *v.* Traylor, 123 Fed. 338; Cooper *v.* Preston, 105 Fed. 403; Stemmler *v.* McNeill, 102 Fed. 660 [*distinguishing* Bates *v.* Carpentier, 98 Fed. 452]; Busey *v.* Smith, 67 Fed. 13. But in some cases, in the nature of bills of peace, when defendants had committed or threatened separate infringements of the same right of plaintiff, the value of that right is the test. Illinois Cent. R. Co. *v.* Adams, 180 U. S. 28, 21 S. Ct. 251, 45 L. ed. 410; Estes *v.* Gunter, 121 U. S. 183, 30 L. ed. 884; Corbin *v.* Black Hawk County, 105 U. S. 659, 26 L. ed. 1136; Louisville, etc., R. Co. *v.* Bitterman, 144 Fed. 34, 75 C. C. A. 192; Louisville, etc., R. Co. *v.* Smith, 128 Fed. 1, 63 C. C. A. 1; Morris *v.* Bean, 123 Fed. 618; Pacific Live-Stock Co. *v.* Hanley, 98 Fed. 327; Nashville, etc., R. Co. *v.* McConnell, 82 Fed. 65; Western Union Tel. Co. *v.* Norman, 77 Fed. 13.

28. Gilson *v.* Mutual Reserve Fund Life Assoc., 129 Fed. 1003; Simmons *v.* Mutual Reserve Fund Life Assoc., 114 Fed. 785; Moore *v.* Edgefield, 32 Fed. 498.

Where the relief sought does not include interest, as such, together with a principal to which it is incidental, but a calculation of interest is used as an instrumentality in determining the amount of damages caused by a breach of warranty, such interest is a part of the jurisdictional amount. Brown *v.* Webster, 156 U. S. 328, 15 S. Ct. 377, 39 L. ed. 440.

Where the bill claims payment of a sum as the amount of a debt for an advance by a building and loan association, the court cannot arbitrarily assume that it is usurious interest, cloaked with that name. Dakota Bldg., etc., Assoc. *v.* Cunningham, (Tex. 1898) 47 S. W. 714; Dakota Bldg., etc., Assoc. *v.* Price, 169 U. S. 45, 18 S. Ct. 251, 42 L. ed. 655; Turner *v.* Southern Home Bldg., etc., Assoc., 101 Fed. 308, 41 C. C. A. 379.

29. Edwards *v.* Bates County, 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155 [*overruling* Howard *v.* Bates County, 43 Fed. 276].

In a suit to foreclose a mortgage, insurance premiums paid by the mortgagee, when claimed in the bill, are considered to be a part of the jurisdictional amount. Coolidge *v.* Ray, 75 Fed. 39.

30. Edwards *v.* Bates County, 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155.

Interest which has accrued upon bonds and coupons after their maturity cannot be considered. Greene County *v.* Kortrecht, 81 Fed. 241, 26 C. C. A. 381.

31. Home, etc., Inv., etc., Co. *v.* Ray, 69 Fed. 657, where the court said: "The coupons cannot be considered as interest for the purpose of maturing the debt, and as separate, distinct obligations for the purpose of giving this court jurisdiction."

32. Baker *v.* Howell, 44 Fed. 113.

An attorney's fee for collection in case of a default, stipulated for in a note, is not costs; but a part of the jurisdictional amount. Rogers *v.* Riley, 80 Fed. 759.

jurisdictional amount does not divest the court of jurisdiction;[33] unless perhaps it is apparent that that part of the claim was not made in good faith, but was manifestly fictitious,[34] or else that the court has no jurisdiction of such part.[35]

F. Counter-Claims. Whether the amount of a counter-claim pleaded by defendant should be added to that of plaintiff's claim, to determine the jurisdictional amount, has been the subject of conflicting adjudications.[36] Where the counter-claim belongs to a class, which by the state statute is barred, unless pleaded in the suit, it must be added to the sum demanded by plaintiff, when determining the jurisdictional amount.[37]

G. Effect of Admissions by Defendant. Whether an admission or disclaimer in defendant's answer, which makes the subsequent matter in dispute less than the jurisdictional amount, will defeat the right of removal, has not yet been authoritatively decided.[38]

33. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 13 S. Ct. 416, 37 L. ed. 255 [*following* Upton *v.* McLaughlin, 105 U. S. 640, 26 L. ed. 1197; Gaines *v.* Fuentes, 92 U. S. 10, 23 L. ed. 524, and *distinguishing* Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 6 S. Ct. 192, 29 L. ed. 502]; Kearny County *v.* Vandriss, 115 Fed. 866, 53 C. C. A. 192; Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621; Waterfield *v.* Rice, 111 Fed. 625, 49 C. C. A. 504; Interstate Bldg., etc., Assoc. *v.* Edgefield Hotel Co., 109 Fed. 692; Arapahoe Bank *v.* Bradley, 72 Fed. 867, 19 C. C. A. 206; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471; Hardin *v.* Cass County, 42 Fed. 652; Johnston *v.* Straus, 26 Fed. 57.

34. Edwards *v.* Bates County, 55 Fed. 436 [*reversed* on another point in 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155]; Chicago Cheese Co. *v.* Fogg, 53 Fed. 72.

35. Coulter *v.* Fargo, 127 Fed. 912, 62 C. C. A. 444.

36. **May be added.**— Clarkson *v.* Manson, 60 How. Pr. (N. Y.) 45 [*reversing* 59 How. Pr. 480]; Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 24 S. Ct. 619, 48 L. ed. 911; Lovell *v.* Cragin, 136 U. S. 130, 10 S. Ct. 1024, 34 L. ed. 372; Stinson *v.* Dousman, 20 How. (U. S.) 461, 15 L. ed. 966; Price *v.* Ellis, 129 Fed. 482; Lee *v.* Continental Ins. Co., 74 Fed. 424; Wolcott *v.* Sprague, 55 Fed. 545; Walcott *v.* Watson, 46 Fed. 529; Carson, etc., Lumber Co. *v.* Holtzclaw, 39 Fed. 578; Clarkson *v.* Manson, 4 Fed. 257, 18 Blatchf. 443. And see Champion *v.* Grand Rapids, etc., R. Co., 145 Mich. 676, 108 N. W. 1078.

May not be added.— McKown *v.* Kansas, etc., Coal Co., 105 Fed. 657; Industrial, etc., Guaranty Co. *v.* Electrical Supply Co., 58 Fed. 732, 7 C. C. A. 471; Bennett *v.* Devine, 45 Fed. 705; La Montagne *v.* T. W. Harvey Lumber Co., 44 Fed. 645; Falls Wire Mfg. Co. *v.* Broderick, 6 Fed. 654, 2 McCrary 489. And see West *v.* Aurora, 6 Wall. (U. S.) 139, 18 L. ed. 819; Sturgeon River Boom Co. *v.* W. H. Sawyer Lumber Co., 89 Fed. 113; McGinnity *v.* White, 16 Fed. Cas. No. 8,802, 3 Dill. 350.

An adjudication sustaining a set-off, counter-claim, or partial defense, so as to reduce the recovery below the jurisdictional amount, something still being allowed plaintiff, is no reason for a dismissal or remand, provided that it does not appear that the original claim was exaggerated in bad faith. Washington County *v.* Williams, 111 Fed. 801, 49 C. C. A. 621; Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68; Wheeler Bliss Mfg. Co. *v.* Pickham, 69 Fed. 419; Peeler *v.* Lathrop, 48 Fed. 780, 1 C. C. A. 93; Lozano *v.* Wehmer, 22 Fed. 755.

The filing of a cross bill by one defendant against another does not deprive him of the right of removal. Pearson *v.* Louisville Southern R. Co., 60 Fed. 113. *Contra*, Bennett *v.* Devine, 45 Fed. 705.

The pleading by the original defendant of a counter-claim or demand in reconvention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant, so that he can remove the case. Smithers *v.* Smith, 35 Tex. Civ. App. 508, 80 S. W. 646 [*affirmed* in 98 Tex. 83, 81 S. W. 283]; McKown *v.* Kansas, etc., Coal Co., 105 Fed. 657; Waco Hardware Co. *v.* Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511. *Contra*, Price *v.* Ellis, 129 Fed. 482.

Where the suit was one appealed from a justice to the state circuit court, and defendant filed there a plea of set-off, claiming three thousand dollars against plaintiff, but under the state statute he could recover no more than five hundred in that court, it was held that that sum was "the matter in dispute," and the federal court could have no jurisdiction by removal under the act of 1875. Bennett *v.* Forrest, 69 Fed. 421; New York I. & P. Co. *v.* Milburn Gin, etc., Co., 35 Fed. 225.

37. Lee *v.* Continental Ins. Co., 74 Fed. 424.

38. **A decision of a state court** seems to hold that it will defeat the right of removal. Thompson *v.* Kendrick, 5 Hayw. (Tenn.) 113. See Cooper *v.* Preston, 105 Fed. 403. But see *supra*, III, B, 4.

Such an admission will not divest the federal court of jurisdiction of a suit begun there by plaintiff (Stillwell-Bierce, etc., Co. *v.* Williamston Oil, etc., Co., 80 Fed. 68; Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163), provided at least that when the suit was begun there was a substantial dispute about the part admitted (Jones *v.* Rowley, 73 Fed. 286).

IV. Suits Arising Under the Constitution, Laws, and Treaties of the United States.

A. In General. A suit arises under the constitution or a law of the United States whenever its correct decision depends on the construction of either.[39] The right of removal of a suit involving a federal question is not affected by the fact that the supreme court has laid down in previous decisions on entirely different states of facts general principles which will probably control the decision.[40] The

39. New Orleans *v.* Seixas, 35 La. Ann. 36; State *v.* Southern Pac. R. Co., 23 Oreg. 424, 31 Pac. 960; McKee *v.* Brooks, 64 Tex. 255; Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1897) 41 S. W. 157; Swafford *v.* Templeton, 185 U. S. 487, 22 S. Ct. 783, 46 L. ed. 1005; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. ed. 144; Wiley *v.* Sinker, 179 U. S. 58, 21 S. Ct. 17, 45 L. ed. 84; *Ex p.* Lennon, 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110; Southern Pac. R. Co. *v.* California, 118 U. S. 109, 6 S. Ct. 993, 30 L. ed. 103; Starin *v.* New York City, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482; Feibelman *v.* Packard, 109 U. S. 421, 3 S. Ct. 289, 27 L. ed. 984; Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648; Little York Gold Washing, etc., Co. *v.* Keyes, 96 U. S. 199, 24 L. ed. 656; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 379, 5 L. ed. 259; Oregon *v.* Three Sisters Irr. Co., 158 Fed. 346; Lewis Pub. Co. *v.* Wyman, 152 Fed. 200; Tift *v.* Southern R. Co., 123 Fed. 789; Washington *v.* Island Lime Co., 117 Fed. 777; South Carolina *v.* Virginia-Carolina Chemical Co., 117 Fed. 727; Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62 [*affirming* 62 Fed. 24]; Dinsmore *v.* Southern Express Co., 92 Fed. 714; People *v.* Rock Island, etc., R. Co., 71 Fed. 753; South Carolina *v.* Port Royal, etc., R. Co., 56 Fed. 333; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812; South Carolina *v.* Coosaw Min. Co., 45 Fed. 804; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241; Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476; Willard *v.* Mueller, 23 Fed. 209; McFadden *v.* Robinson, 22 Fed. 10, 10 Sawy. 398.

A cause involving the question whether an express company or its customer must furnish the stamp required by the War Revenue Act of 1898 to be affixed to a receipt given by the company is one arising under a law of the United States. Crawford *v.* Hubbell, 89 Fed. 1. See, however, Atty.-Gen. *v.* American Express Co., 118 Mich. 682, 77 N. W. 317.

The nature of the action, and not the character of the defense to it, constitutes the test of the determination, whether it arises under the laws of the United States; and if the case made by the complaint arises under an act of congress, the right of removal by the defendant is not lost by insufficient denials in the answer (Miller *v.* Tobin, 18 Fed. 609, 9 Sawy. 401), or by the interposition of a good defense (North Dakota Guaranty Co. *v.* Hanway, 104 Fed. 369, 44 C. C. A. 312). The appearance of a federal question in defendant's answer (Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Mitchell Engineering, etc., Co. *v.* Worthington, 140 Fed. 947; Mayo *v.* Dockery, 108 Fed. 897; Ralya Market Co. *v.* Armour, 102 Fed. 530; Broadway Ins. Co. *v.* Chicago Great Western R. Co., 101 Fed. 507; Lincoln *v.* Lincoln St. R. Co., 77 Fed. 658), petition for removal (Lincoln *v.* Lincoln St. R. Co., *supra*), or in his demurrer (Shields *v.* Boardman, 98 Fed. 455; Indiana *v.* Alleghany Oil Co., 85 Fed. 870), in plaintiff's pleading in reply or rebuttal (Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 20 S. Ct. 545, 44 L. ed. 673 [*reversing* (Tex. Civ. App. 1897) 41 S. W. 157]. See also Smith *v.* Greenhow, 109 U. S. 669, 3 S. Ct. 421, 27 L. ed. 1080), or in a bill of repleader by plaintiff (Cella *v.* Brown, *supra*) is insufficient. The court will, however, take judicial notice of the fact that a defendant corporation was incorporated by an act of congress, although plaintiff has averred that it was incorporated under the state laws; and such a case may be removed. Spokane Falls, etc., R. Co. *v.* Ziegler, 167 U. S. 65, 17 S. Ct. 728, 42 L. ed. 79; Texas, etc., R. Co. *v.* Barrett, 166 U. S. 617, 17 S. Ct. 707, 41 L. ed. 1136; Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132; Scott *v.* Choctaw, etc., R. Co., 112 Fed. 180. See, however, Oregon Short Line, etc., R. Co. *v.* Skottowe, 162 U. S. 490, 16 S. Ct. 869, 40 L. ed. 1048. *Contra*, Texas, etc., R. Co. *v.* Hightower, 12 Tex. Civ. App. 41, 33 S. W. 541.

"When a proposition has once been decided by the supreme court [of the United States] it can no longer be said that in it there still remains a federal question." Per Brewer, J., in Kansas *v.* Bradley, 26 Fed. 289, 290. See also Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052 [*reversing* 90 Fed. 379, 33 C. C. A. 113]; Harris *v.* Rosenberger, 145 Fed. 449; Myrtle *v.* Nevada, etc., R. Co., 137 Fed. 193; Arkansas *v.* Choctaw, etc., R. Co., 134 Fed. 106; People *v.* Brown's Valley Irr. Dist., 119 Fed. 535; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241.

40. Mallon *v.* Hyde, 76 Fed. 388.

The decisions of the supreme court in cases from the circuit courts, and those on writ of error to a state court, are equally instructive in determining when there is a federal question, such as to support the jurisdiction of the circuit court originally or upon removal. Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168.

federal question in the case must be substantial and not merely colorable.[41] The existence in the case of other questions than that arising under the constitution

Disclaimer of interest.— A federal court loses jurisdiction of a suit originally brought there, and the same will be dismissed upon defendant's filing a disclaimer of any interest in the matters concerning which plaintiff claims title, under the laws of the United States, and denying that it has made any claim to the same. Crystal Springs Land, etc., Co. *v.* Los Angeles, 82 Fed. 114 [*affirmed* in 177 U. S. 169, 20 S. Ct. 573, 44 L. ed. 720].

41. Montana Catholic Missions *v.* Missoula County, 200 U. S. 118, 26 S. Ct. 197, 50 L. ed. 398; O'Callahan *v.* O'Brien, 199 U. S. 89, 25 S. Ct. 727, 50 L. ed. 101; Sloan *v.* U. S., 193 U. S. 614, 24 S. Ct. 570, 48 L. ed. 814; Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 24 S. Ct. 553, 48 L. ed. 795; Barney *v.* New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. ed. 737; New York Underground R. Co. *v.* New York, 193 U. S. 416, 24 S. Ct. 494, 48 L. ed. 733; Bankers' Mut. Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 24 S. Ct. 325, 48 L. ed. 484; Cummings *v.* Chicago, 188 U. S. 410, 23 S. Ct. 472, 47 L. ed. 525; Swafford *v.* Templeton, 185 U. S. 487, 494, 22 S. Ct. 783, 44 L. ed. 1005; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052; McCain *v.* Des Moines, 174 U. S. 168, 19 S. Ct. 644, 43 L. ed. 936; St. Josephs, etc., R. Co. *v.* Steele, 167 U. S. 659, 17 S. Ct. 925, 42 L. ed. 315; New Orleans *v.* Benjamin, 153 U. S. 411, 14 S. Ct. 905, 38 L. ed. 764; Southern Pac. R. Co. *v.* California, 118 U. S. 109, 6 S. Ct. 993, 30 L. ed. 103; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388; Harris *v.* Rosenberger, 145 Fed. 449, 76 C. C. A. 225, 13 L. R. A. N. S. 762; St. Louis, etc., R. Co. *v.* Davis, 132 Fed. 629; Blue Bird Min. Co. *v.* Largey, 49 Fed. 289.

A suit does not arise under the constitution or laws of the United States unless the federal question appears clearly, not merely by inference (Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 20 S. Ct. 867, 44 L. ed. 1052; Hanford *v.* Davies, 163 U. S. 273, 16 S. Ct. 1051, 41 L. ed. 157; Myrtle *v.* Nevada, etc., R. Co., 137 Fed. 193) on the face of plaintiff's initial pleading in his statement of his own case (Darton *v.* Sperry, 71 Conn. 339, 41 Atl. 1052; Mills *v.* New Jersey Cent. R. Co., 7 N. J. L. J. 230; State *v.* Port Royal, etc., R. Co., 45 S. C. 413, 23 S. E. 363; Texas, etc., R. Co. *v.* Caples, (Tex. Civ. App. 1896) 36 S. W. 516; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 24 S. Ct. 598, 48 L. ed. 870 [*reversing* 123 Fed. 692]; Third St., etc., R. Co. *v.* Lewis, 173 U. S. 457, 19 S. Ct. 451, 43 L. ed. 766; Galveston, etc., R. Co. *v.* Texas, 170 U. S. 226, 18 S. Ct. 603, 42 L. ed. 1017; Walker *v.* Collins, 167 U. S. 57, 17 S. Ct. 738, 42 L. ed. 76; Oregon Short Line, etc., R. Co. *v.* Skottowe, 162 U. S. 490, 16 S. Ct. 869, 40 L. ed. 1048; East Lake Land Co. *v.* Brown, 155 U. S. 488, 15 S. Ct. 357, 39 L. ed. 233; Postal Tel. Cable Co. *v.* Alabama, 155 U. S. 482, 15 S. Ct. 192, 39 L. ed. 231; Chappell *v.* Waterworth, 155 U. S. 102, 15 S. Ct. 34, 39 L. ed. 85; Tennessee *v.* Union, etc., Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; Wichita *v.* Missouri, etc., Tel. Co., 122 Fed. 100; South Carolina *v.* Virginia-Carolina Chemical Co., 117 Fed. 727; Dewey Min. Co. *v.* Miller, 96 Fed. 1; Florida *v.* Charlotte Harbor Phosphate Co., 74 Fed. 578, 20 C. C. A. 538; Wichita Nat. Bank *v.* Smith, 72 Fed. 568, 19 C. C. A. 42; Caples *v.* Texas, etc., R. Co., 67 Fed. 9; Haggin *v.* Lewis, 66 Fed. 199; Lowry *v.* Chicago, etc., R. Co., 46 Fed. 83; Iowa *v.* Chicago, etc., R. Co., 33 Fed. 391 [*affirmed* in 145 U. S. 632, 12 S. Ct. 978, 36 L. ed. 857]), and in a necessary allegation in such pleading (McLane *v.* Leicht, 69 Iowa 401, 29 N. W. 327; Filhiol *v.* Torney, 119 Fed. 974 [*affirmed* in 194 U. S. 356, 24 S. Ct. 698, 48 L. ed. 1014]; Henuy *v.* La Compagnie Générale Transatlantique, etc., 96 Fed. 497; California Oil, etc., Co. *v.* Miller, 96 Fed. 12; Wise *v.* Nixon, 78 Fed. 203). An averment by plaintiff that defendant will set up a defense based upon a federal statute or the constitution of the United States (Devine *v.* Los Angeles, 202 U. S. 313, 26 S. Ct. 652, 50 L. ed. 1046; Filhiol *v.* Torney, 194 U. S. 356, 24 S. Ct. 698, 48 L. ed. 1014 [*affirming* 119 Fed. 974]; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626, 188 U. S. 645, 23 S. Ct. 440, 47 L. ed. 634 [*affirming* 93 Fed. 274, 35 C. C. A. 1]; Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486; City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557, 17 S. Ct. 653, 41 L. ed. 1114; Peabody Gold Min. Co. *v.* Gold Hill Min. Co., 111 Fed. 817, 49 C. C. A. 637; Montana Ore-Purchasing Co. *v.* Boston, etc., Consol. Copper, etc., Min. Co., 93 Fed. 274, 35 C. C. A. 1; Kansas *v.* Atchison, etc., R. Co., 77 Fed. 339. But see Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341; Cox *v.* Gilmer, 88 Fed. 343), or based upon a state statute repugnant to the federal constitution (Devine *v.* Los Angeles, *supra*; Cox *v.* Gilmer, *supra*. But see Green *v.* Oemler, 151 Fed. 936; South Carolina *v.* Coosaw Min. Co., 45 Fed. 804), will not bring the case within the federal jurisdiction; even though plaintiff sues to quiet his own title, which does not depend upon a federal statute (Devine *v.* Los Angeles, *supra*; Boston, etc., Consol. Copper, etc., Min. Co. *v.* Montana Ore Purchasing Co., 188 U. S. 632, 23 S. Ct. 434, 47 L. ed. 626 [*affirming* 93 Fed. 274, 35 C. C. A. 1]; California Oil, etc., Co. *v.* Miller, *supra*). The rule that a cause is not removable, as one arising under the constitution or laws of the United States, unless such fact appears from plaintiff's pleading, applies only to cases in which the federal question is one inherent in the controversy itself, so that if raised by defendant, and determined against

or laws of the United States does not impair the right of removal.[42] A federal question first raised by defendant must be tried by the state court subject to the review of the supreme court of the United States, by writ of error.[43]

B. Suits Arising Under the Constitution of the United States. A suit arises under the constitution of the United States when plaintiff's cause of action depends upon the violation of a right under the same by an individual who does not act under color of any statutory authority;[44] where his cause of action depends

him by the state court, he may remove it for review by appeal or writ of error to the supreme court. Such rule cannot be so extended as to permit a plaintiff to prevent the removal of a suit against a receiver of a federal court by omitting to state in his pleadings by what court defendant was appointed receiver. Such an omission when relied upon to prevent the removal of the cause may fairly be considered as a fraud upon the jurisdiction of the federal court, whether so intended or not. Winters *v.* Drake, 102 Fed. 545. See Washington *v.* Island Lime Co., 117 Fed. 777.

42. New Orleans, etc., R. Co. *v.* Mississippi, 2 Ky. L. Rep. 137; Hall *v.* Chicago, etc., R. Co., 149 Fed. 564; Mastin *v.* Chicago, etc., R. Co., 123 Fed. 827; Manigault *v.* Ward, 123 Fed. 707; People *v.* Chicago Sanitary Dist., 98 Fed. 150; Kentucky Bank *v.* Stone, 88 Fed. 383; Illinois *v.* Illinois Cent. R. Co., 16 Fed. 881; Connor *v.* Scott, 6 Fed. Cas. No. 3,119, 4 Dill. 242; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,828, 8 Blatchf. 243, 9 Fed. Cas. No. 4,827, 6 Blatchf. 362.

Removal of part of actions.— The clause of the Removal Act of 1887 and 1888 authorizing the removal of civil suits arising under the constitution or laws of the United States relates only to the entire action, and does not permit the removal of a part thereof when the rest is not removable. Texas *v.* Day Land, etc., Co., 49 Fed. 593.

43. Tennessee *v.* Union, etc., Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511.

44. Bishop *v.* State, 149 Ind. 223, 48 N. E. 1038, 63 Am. St. Rep. 270, 39 L. R. A. 278; State *v.* Bowen, 8 S. C. 382; Barney *v.* New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. ed. 737; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. ed. 144 [*reversing* 96 Fed. 353]; Wiley *v.* Sinkler, 179 U. S. 58, 31 S. Ct. 17, 45 L. ed. 84; Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 17 S. Ct. 925, 42 L. ed. 315; Knight *v.* Shelton, 134 Fed. 423; St. Louis, etc., R. Co. *v.* Davis, 132 Fed. 629; Anthony *v.* Burrow, 129 Fed. 783; Huntington *v.* New York, 118 Fed. 683 [*affirmed* in 193 U. S. 441, 24 S. Ct. 505, 48 L. ed. 741]; Southern R. Co. *v.* North Carolina Corp. Commission, 97 Fed. 513; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241.

A suit to enjoin action by or under a state authority within the jurisdiction conferred by a state statute, which action is alleged, with some reasonable foundation for the position, to take the complainant's property without process of law (Norwood *v.* Baker, 172 U. S. 269, 19 S. Ct. 187, 43 L. ed. 443; San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 90 Fed. 516. See Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560); to deny him the equal protection of the laws (Douglas Park Jockey Club *v.* Grainger, 146 Fed. 414; St. Louis, etc., R. Co. *v.* Davis, 132 Fed. 629; Southern R. Co. *v.* North Carolina Corp. Commission, 97 Fed. 513), or, when the action is legislative in its nature, to impair the obligation of a contract that he holds (Walla Walla *v.* Walla Walla Water Works Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341 [*affirming* 60 Fed. 957]), arises under the constitution of the United States. Such a suit, when there is no color for the contention that defendants act under a statute of the state, does not. Huntington *v.* New York, 193 U. S. 441, 24 S. Ct. 505, 48 L. ed. 741 [*affirming* 118 Fed. 683]; Barney *v.* New York, 193 U. S. 430, 24 S. Ct. 502, 48 L. ed. 737; St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 17 S. Ct. 925, 42 L. ed. 315; St. Louis, etc., R. Co. *v.* Davis, 132 Fed. 629; Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864; Kiernan *v.* Multnomah County, 95 Fed. 849. So a suit arises under the constitution of the United States, when brought to enjoin the enforcement of an order by a county board, which fixes the water rates to be received by complainant so low as to be unprofitable (San Joaquin, etc., Canal, etc., Co. *v.* Stanislaus County, 90 Fed. 516), or to enjoin state or county officers from assessing the complainant's property for taxation, at a higher rate than other property in the state (Western Union Tel. Co. *v.* Norman, 77 Fed. 13; Western Union Tel. Co. *v.* Poe, 61 Fed. 449); but not when the state constitution ordains uniformity of taxation (St. Louis, etc., R. Co. *v.* Davis, *supra*. See Chicago Union Traction Co. *v.* State Bd. of Equalization, 112 Fed. 607). And a suit to enjoin an assessment which plaintiff alleges was made in violation of his right to an exemption because of the ownership of United States bonds arises under the constitution of the United States. People's Sav. Bank *v.* Layman, 134 Fed. 635. So a suit for malicious prosecution or false imprisonment arises under a law of the United States, where the illegality of which complaint is made depends upon a right granted by a statute of the United States. Peters *v.* Malin, 111 Fed. 244. But a controversy as to the right to the custody of an Indian child does not arise under the constitution or laws of the United States under ordinary circumstances. *In re* Celestine, 114 Fed. 551. And an issue whether full force and

upon the unconstitutionality of an act of congress,[45] or the repugnancy of a state statute to the federal constitution;[46] where it depends upon a statute which defendant contends in good faith, to be in violation of the same, and there is ground for a reasonable doubt as to the soundness of the contention,[47] or the complaint shows that plaintiff's claim would be defeated by a construction of the federal constitution, as to which there is room for a reasonable doubt.[48]

C. Suits Arising Under Treaties. A suit arises under a treaty of the United States when its decision depends upon a construction or the determination of the validity of the same.[49] The rule is otherwise, however, where the validity

effect had been given to the judgment of a state court has been held not to involve the construction of the constitution of the United States. Gibbs *v.* Crandall, 120 U. S. 105, 7 S. Ct. 497, 30 L. ed. 590; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 1 S. Ct. 614, 27 L. ed. 636 [*affirming* 11 Fed. 381, 3 McCrary 609]; Merritt *v.* American Steel-Barge Co., 75 Fed. 813, 21 C. C. A. 525.

The pleadings need not state what particular clause of the constitution is in question. Crystal Springs Land, etc., Co. *v.* Los Angeles, 76 Fed. 148.

45. Patton *v.* Brady, 184 U. S. 608, 22 S. Ct. 493, 46 L. ed. 713; Corbus *v.* Alaska Treadwell Gold Min. Co., 99 Fed. 334.

46. Stone *v.* Kentucky Bank, 174 U. S. 408, 19 S. Ct. 881, 43 L. ed. 1187 [*affirming* 88 Fed. 383]; McCain *v.* Des Moines, 174 U. S. 168, 19 S. Ct. 644, 43 L. ed. 936 [*affirming* 84 Fed. 726]; New York Underground R. Co. *v.* New York, 116 Fed. 952; Union, etc., Bank *v.* Memphis, 111 Fed. 561, 49 C. C. A. 455; People *v.* Chicago Sanitary Dist., 98 Fed. 150; Nashville, etc., R. Co. *v.* Taylor, 86 Fed. 168; Pittsburg Third Nat. Bank *v.* Mylin, 76 Fed. 385; Crystal Springs Land, etc., Co. *v.* Los Angeles, 76 Fed. 148; South Carolina *v.* Port Royal, etc., R. Co., 56 Fed. 333; San Mateo County *v.* Southern Pac. R. Co., 13 Fed. 145. See also Covington, etc., Turnpike Road Co. *v.* Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560; Green *v.* Oemler, 151 Fed. 936. But see Devine *v.* Los Angeles, 202 U. S. 313, 26 S. Ct. 652, 50 L. ed. 1046.

47. Schmidt *v.* Cobb, 119 U. S. 286, 7 S. Ct. 1373, 30 L. ed. 321; Southern Pac. R. Co. *v.* California, 118 U. S. 109, 6 St. Ct. 993, 30 L. ed. 103; Minnesota *v.* Duluth, etc., R. Co., 87 Fed. 497; Stewart *v.* Virginia, 117 U. S. 612, 6 S. Ct. 922, 29 L. ed. 1006; New Jersey Cent. R. Co. *v.* Mills, 113 U. S. 249, 5 S. Ct. 456, 28 L. ed. 949 [*affirming* 20 Fed. 449]; Ames *v.* Kansas, 111 U. S. 449, 4 S. Ct. 437, 28 L. ed. 482; New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 26 L. ed. 96; Pacific Electric Co. *v.* Los Angeles, 118 Fed. 746; Illinois *v.* Illinois Cent. R. Co., 33 Fed. 721; Mahin *v.* Preiffer, 27 Fed. 892; Kessinger *v.* Hinkhouse, 27 Fed. 883; Virginia Coupon Cases, 25 Fed. 666; Illinois *v.* Chicago, etc., R. Co., 16 Fed. 706; Illinois *v.* Chicago, etc., R. Co., 12 Fed. Cas. No. 7,006, 6 Biss. 107. *Contra*, Kentucky *v.* Chicago, etc., R. Co., 123 Fed. 457.

Municipal ordinances.— Where a bill is filed to enjoin the enforcement of a municipal ordinance (Mercantile Trust, etc., Co. *v.* Columbus, 203 U. S. 311, 27 S. Ct. 83, 51 L. ed. 198; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 19 S. Ct. 77, 43 L. ed. 341 [*affirming* 60 Fed. 957]; Des Moines City R. Co. *v.* Des Moines, 151 Fed. 854; Riverside, etc., R. Co. *v.* Riverside, 118 Fed. 736; American Waterworks, etc., Co. *v.* Home Water Co., 115 Fed. 171; Anoka Water Works, etc., Power Co. *v.* Anoka, 109 Fed. 580; Mercantile Trust, etc., Co. *v.* Collins Park, etc., R. Co., 99 Fed. 812; Kimball *v.* Cedar Rapids, 99 Fed. 130; Iron Mountain R. Co. *v.* Memphis, 96 Fed. 113, 37 C. C. A. 410; Consolidated Water Co. *v.* San Diego, 93 Fed. 849, 35 C. C. A. 631; Michigan Tel. Co. *v.* Charlotte, 93 Fed. 11; Consolidated Water Co. *v.* San Diego, 84 Fed. 369; Indianapolis Gas Co. *v.* Indianapolis, 82 Fed. 245), or resolution of a city council, which has the effect of an ordinance (Des Moines City R. Co. *v.* Des Moines, *supra*), or to prevent the passage of one (Vicksburg *v.* Vicksburg Waterworks Co., 202 U. S. 453, 26 S. Ct. 660, 50 L. ed. 1102; Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 22 S. Ct. 585, 46 L. ed. 808; Farmers L. & T. Co. *v.* Meridian, 139 Fed. 673; Elkins *v.* Chicago, 119 Fed. 957), which will violate an existing contract with the complainant, the case arises under the constitution of the United States, provided that the ordinance is otherwise within the powers of the municipality. A municipal ordinance, not passed in accordance with legislative authority, is not a law of the state; and a suit to enjoin its enforcement does not arise under the constitution of the United States. Louisville *v.* Cumberland Tel., etc., Co., 155 Fed. 725; Savannah *v.* Holst, 132 Fed. 901, 65 C. C. A. 449 [*reversing* 131 Fed. 931]. So the mere refusal of a municipal corporation to perform a contract, even though that refusal is expressed in an ordinance containing a direction that the other party to the contract perform some act which the contract does not require but imposing no penalty for disobedience (St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 21 S. Ct. 575, 45 L. ed. 788) does not present a case arising under the constitution of the United States (Dawson *v.* Columbia Ave. Sav. Fund, etc., Co., 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713; St. Paul Gaslight Co. *v.* St. Paul, *supra*).

48. Minnesota *v.* Duluth, etc., R. Co., 87 Fed. 497.

49. Muse *v.* Arlington Hotel Co., 168 U. S. 430, 18 S. Ct. 109, 42 L. ed. 531.

or construction of the treaty is not drawn in question, although the suit is brought to protect rights claimed under it.[50]

D. Federal Corporations — 1. In General. When either party is a corporation chartered by congress, the case is one arising under the constitution and laws of the United States; and except in the case of national banks,[51] a circuit court of the United States may take jurisdiction of the same, either originally,[52] or by removal.[53] The fact that other defendants, who are natural persons, are joined with such a corporation, does not prevent the removal, provided that all joined in the petition.[53]

2. National Banking Associations. Suits to which national banks are parties are exempted from the operation of this rule [54] by the act of March 3, 1887.[55]

E. Patent and Copyright Cases. Where the bill prays an injunction

An action by a tribal Indian for false imprisonment under process of a state court because of the violation of a state law from which he claims exemption arises under the laws and treaties of the United States. Peters *v.* Malin, 111 Fed. 244.

50. Muse *v.* Arlington Hotel Co., 168 U. S. 430, 18 S. Ct. 109, 42 L. ed. 531; Borgmeyer *v.* Idler, 159 U. S. 408, 16 S. Ct. 34, 40 L. ed. 199. See Gill *v.* Oliver, 11 How. (U. S.) 529, 545, 13 L. ed. 799.

Where both parties claim under Mexican grants, confirmed and patented in accordance with a provision of a treaty, and plaintiff claims certain water rights thereunder, which defendant disputes, the suit does not arise under a treaty of the United States. Crystal Springs Land, etc., Co. *v.* Los Angeles, 177 U. S. 169, 20 S. Ct. 573, 44 L. ed. 720 [*affirming* 82 Fed. 114].

A complaint in ejectment against private individuals alleging that plaintiff was ousted in violation of the provisions of the treaty with France, of Oct. 21, 1803, for the protection of the inhabitants of the ceded territory, in the enjoyment of their property, does not show a case arising under a treaty of the United States, there being no assertion in any right, title, privilege or immunity derived from such treaty as against defendants, and no charge that they took possession by direction of the government of the United States. Filhiol *v.* Maurice, 185 U. S. 108, 22 S. Ct. 560, 46 L. ed. 827.

51. See *infra*, IV, D, 2.

52. Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 12 S. Ct. 740, 36 L. ed. 596; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 823, 6 L. ed. 204; U. S. Freehold Land, etc., Co. *v.* Gallegos, 89 Fed. 769, 32 C. C. A. 470.

It is not the domicile of a corporation created by an act of congress which confers jurisdiction on the federal courts of suits to which it is a party, but the fact that it was so created, and that any suit by or against it arises under a law of the United States. Supreme Lodge K. P. *v.* England, 94 Fed. 369, 36 C. C. A. 298.

53. Union Pac. R. Co. *v.* McComb, 58 How. Pr. (N. Y.) 478; Choctaw, etc., R. Co. *v.* Hendricks, 21 Okla. 135, 95 Pac. 970; Texas, etc., R. Co. *v.* Watson, (Tex. Civ. App. 1908) 43 S. W. 1060; Texas, etc., R. Co. *v.* Kirk, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319 [*reversing* 16 Fed. 292, 3 McCrary 578]; Supreme Lodge K. P. W. *v.* Hill, 76 Fed. 468, 22 C. C. A. 280; Allen *v.* Texas, etc., R. Co., 25 Fed. 513; Cruikshank *v.* Fourth Nat. Bank, 16 Fed. 888, 21 Blatchf. 322.

Charter from territorial statute.— This is not the rule when the sole corporate party derives its charter from a territorial statute. Maxwell *v.* Federal Gold, etc., Co., 155 Fed. 110, 83 C. C. A. 570; Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77. See also Oregon Short Line, etc., R. Co. *v.* Skottowe, 162 U. S. 490, 16 S. Ct. 869, 40 L. ed. 1048 [*affirming* 22 Oreg. 430, 30 Pac. 222, 16 L. R. A. 593, *approving* Conlon *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 462, 28 Pac. 501].

If a federal corporation is actually interested in the controversy (Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Co., 160 U. S. 77, 16 S. Ct. 231, 40 L. ed. 355 [*affirming* 60 Fed. 981, 9 C. C. A. 303]. But see Seattle, etc., R. Co. *v.* State, 52 Fed. 594 [*distinguishing* Union Pac. R. Co. *v.* Kansas, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319]), the joinder of another defendant, even if he is a receiver of the other, will not prevent the removal (Texas, etc., R. Co. *v.* Bloom, 85 Tex. 279, 20 S. W. 133; Washington, etc., R. Co. *v.* Cœur D'Alene R., etc., Nav. Co., *supra*; Martin *v.* St. Louis Southwestern R. Co., 134 Fed. 134; Lund *v.* Chicago, etc., R. Co., 78 Fed. 385. *Contra*, Hazard *v.* Durant, 9 R. I. 602; Texas, etc., R. Co. *v.* Huber, 33 Tex. Civ. App. 75, 75 S. W. 547; Scott *v.* Choctaw, etc., R. Co., 112 Fed. 180).

53a. *In re* Dunn, 212 U. S. 374, 29 S. Ct. 299.

54. See *supra*, IV, D, 1.

55. 25 U. S. St. at L. 436, c. 866, § 4 [U. S. Comp. St. (1901) p. 514], which provides that for the purpose of all suits by or against national banks they shall be deemed citizens of the state in which they are respectively located; that in such cases the circuit court shall have no jurisdiction other than such as they would have between individual citizens of the same state; but that the provisions of this section shall not affect the jurisdiction of the courts of the United States in cases commenced by the United States or by the direction of any officer thereof, or in cases for winding up the affairs of any such bank. And see *Ex p.*

against the infringement of a patent or copyright, the suit arises under the laws of the United States, although defendant does not dispute the validity of the patent or copyright, but rests his defense upon a license or other contract giving him a right to use the same,[56] and although other relief is prayed,[57] except when

Jones, 164 U. S. 691, 17 S. Ct. 222, 41 L. ed. 601, Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778, 7 S. Ct. 777, 30 L. ed. 816 [*affirming* 29 Fed. 161]; Thomas *v.* D. O. Mills Nat. Bank, 106 Fed. 438, 45 C. C. A. 407.

The circuit courts have jurisdiction of a suit for the appointment of a receiver of a national bank (Snohomish County Bank *v.* Puget Sound Nat. Bank, 81 Fed. 518; Lake Nat. Bank *v.* Wolfeborough Sav. Bank, 78 Fed. 517, 24 C. C. A. 195); or suits against the agents appointed by the shareholders of national banks in pursuance of the statutes of the United States (International Trust Co. *v.* Weeks, 203 U. S. 264, 27 S. Ct. 69, 51 L. ed. 224; Weeks *v.* International Trust Co., 125 Fed. 370, 60 C. C. A. 236 [*reversing* 116 Fed. 898]; Guarantee Co. of North Dakota *v.* Harway, 104 Fed. 369, 44 C. C. A. 312; Snohomish County *v.* Puget Sound Nat. Bank, 81 Fed. 518), of a suit to charge a national bank with liability as a stock-holder in another corporation, where the power of defendant to hold such stock is disputed (California Nat. Bank *v.* Kennedy, 167 U. S. 362, 17 S. Ct. 831, 42 L. ed. 198), of a suit by a national bank upon the bond of its cashier conditioned upon the performance of his duties "according to the law and the by-laws of the bank" (Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421), of a suit by a national bank against its officers to recover the amount of loans made in violation of the Revised Statutes of the United States (Abbott *v.* National Bank of Commerce, 20 Wash. 552, 56 Pac. 376; National Bank of Commerce *v.* Wade, 84 Fed. 10), of a suit by a creditor to recover money loaned to a national bank, where it is alleged that plaintiff was deceived and defrauded by a violation of the acts of congress (Bailey *v.* Mosher, 63 Fed. 488, 11 C. C. A. 304), of a suit by a creditor of a national bank against a stock-holder of the same to enforce a statutory liability created by U. S. Rev. St. (1878) § 5151 (U. S. Comp. St. (1901) p. 3465] (Wyman *v.* Wallace, 201 U. S. 230, 26 S. Ct. 495, 50 L. ed. 738), of a suit in which there is a question as to the validity of tax on a shareholder in a national bank (Richards *v.* Rock Rapids, 72 Iowa 77, 33 N. W. 372), but not where his pleading makes no reference to such statutes (Stuart *v.* Staplehurst Bank, 57 Nebr. 569, 78 N. W. 298), of a suit by a depositor for false representations in advertisements, statements, and reports (Prescott *v.* Haughey, 65 Fed. 653).

56. Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 22 S. Ct. 681, 46 L. ed. 910 [*reversing* 109 Fed. 497, 48 C. C. A. 349]; White *v.* Rankin, 144 U. S. 628, 12 S. Ct. 768, 36 L. ed. 569; Victor Talking Mach. Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; Atherton Mach. Co. *v.* Atwood-Morrison Co., 102 Fed. 949, 43 C. C. A. 72 [*reversing* 99 Fed. 113]; Young Reversible Lock-Nut Co. *v.* Young Lock-Nut Co., 72 Fed. 62; Dunham *v.* Bent, 72 Fed. 60; Moyes *v.* Stirling Co., 71 Fed. 433; Elgin Wind Power, etc., Co. *v.* Nichols, 65 Fed. 215, 12 C. C. A. 578; Walter A. Wood Harvester Co. *v.* Minneapolis-Easterly Harvester Co., 61 Fed. 256. But see Holt *v.* Silver, 169 Mass. 435, 48 N. E. 837; McMullen *v.* Bowers, 102 Fed. 494, 42 C. C. A. 470; Silver *v.* Holt, 84 Fed. 809.

Illustrations.—A dispute as to the assignability of a license to use a patent arises under the laws of the United States. Walter A. Wood Harvester Co. *v.* Minneapolis-Easterly Harvester Co., 61 Fed. 256. But suits to determine the title to a patent which are not founded upon U. S. Rev. St. (1878) § 4915 [U. S. Comp. St. (1901) p. 3392] (Bernardin *v.* Northall, 77 Fed. 849) do not arise under the laws of the United States (Montgomery Palace Stock-Car Co. *v.* St. Stable-Car Line, 43 Fed. 329). Suits to compel the assignment of a patent (Merrill *v.* Miller, 28 Mont. 134, 72 Pac. 423; Pliable Shoe Co. *v.* Bryant, 81 Fed. 521; American Solid Leather Button Co. *v.* Empire State Nail Co., 47 Fed. 741) or copyright (Hoyt *v.* Bates, 81 Fed. 641), and to enforce by a judgment for royalties (Rhodes *v.* Ashurst, 176 Ill. 351, 52 N. E. 118 [*affirming* 71 Ill. App. 242]; Felix *v.* Scharnweber, 125 U. S. 54, 8 S. Ct. 759, 31 L. ed. 687; Dale Title Mfg. Co. *v.* Hyatt, 125 U. S. 46, 8 S. Ct. 756, 31 L. ed. 683; Albright *v.* Teas, 106 U. S. 613, 1 S. Ct. 550, 27 L. ed. 295. But see St. Paul Plow Works *v.* Starling, 127 U. S. 376, 8 S. Ct. 1327, 32 L. ed. 251) or otherwise (Marsh *v.* Nichols, 140 U. S. 344, 11 S. Ct. 798, 35 L. ed. 413. See Beavers *v.* Spinks, 77 Miss. 346, 26 So. 930; Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 18 S. Ct. 62, 42 L. ed. 458), or to set aside (Wade *v.* Lawder, 165 U. S. 624, 17 S. Ct. 425, 41 L. ed. 851; Hartell *v.* Tilghman, 99 U. S. 547, 25 L. ed. 357; Wilson *v.* Sanford, 10 How. (U. S.) 99, 13 L. ed. 344; Cely *v.* Griffin, 113 Fed. 981; Kurtz *v.* Straus, 106 Fed. 414, 45 C. C. A. 366; McMullen *v.* Bowers, 102 Fed. 494, 42 C. C. A. 470; Kurtz *v.* Strauss, 100 Fed. 800; Standard Dental Mfg. Co. *v.* National Tooth Co., 95 Fed. 291), a contract for the use of a patent or copyright, such as a license, at least where the validity of the patents and copyrights is not disputed, and there is no prayer for an injunction against infringement, do not arise under the laws of the United States.

57. Harrington *v.* Atlantic, etc., Tel. Co., 143 Fed. 329.

the complaint or defendant's answer clearly shows that the suit is in reality brought to enforce a contract.[58]

F. Trade-Mark Cases. A suit to enjoin the imitation of a trade-mark does not arise under the laws of the United States, unless the bill shows that the trade-mark is duly registered, and that it is used on goods intended to be transported to a foreign country or to be used in lawful trade with an Indian tribe.[59]

G. Land and Mining Cases. Where plaintiff's pleading shows that the decision of the case depends upon the construction of the land or mining laws, the suit arises under the laws of the United States; and if the matter in dispute exceeds the jurisdictional amount, a circuit court of the United States may take jurisdiction of the same, either originally,[60] or upon removal.[61] It seems that

58. Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 22 S. Ct. 681, 46 L. ed. 910; Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 18 S. Ct. 62, 42 L. ed. 458. And see Herzog *v.* Heyman, 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646 [*affirming* 8 Misc. 27, 28 N. Y. Suppl. 74].

59. Ryder *v.* Holt, 128 U. S. 525, 9 S. Ct. 145, 32 L. ed. 529; U. S. *v.* Steffens, 100 U. S. 82, 25 L. ed. 550; Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496 [*affirming* 87 Fed. 589].

A suit to restrain unfair competition and trade, where the complainant seeks no protection for a registered trade-mark, does not present a federal question. A. Leschen, etc., Rope Co. *v.* Broderick, etc., Rope Co., 134 Fed. 571, 67 C. C. A. 418; Illinois Watch-Case Co. *v.* Elgin Nat. Watch Co., 94 Fed. 667, 35 C. C. A. 237 [*affirmed* in 179 U. S. 665, 21 S. Ct. 270, 45 L. ed. 365]; Allen B. Wrisley Co. *v.* George E. Rouse Soap Co., 90 Fed. 5, 32 C. C. A. 496 [*affirming* 87 Fed. 589]; Burt *v.* Smith, 71 Fed. 161, 17 C. C. A. 573.

Where the requisite difference of citizenship exists, the circuit court may take jurisdiction, either originally or upon removal, of a bill to enjoin the infringement of any trade-mark, whether registered or not. Edison *v.* Thomas A. Edison, Jr., Chemical Co., 128 Fed. 1013.

60. Northern Pac. R. Co. *v.* Soderberg, 188 U. S. 526, 23 S. Ct. 365, 47 L. ed. 575 [*affirming* 104 Fed. 425, 43 C. C. A. 620]; Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486; Nevada Sierra Oil Co. *v.* Miller, 97 Fed. 681; Linkswiler *v.* Schneider, 95 Fed. 203; Florida Cent., etc., R. Co. *v.* Bell, 87 Fed. 369, 31 C. C. A. 9; Gillis *v.* Downey, 85 Fed. 483, 29 C. C. A. 286; Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 25 C. C. A. 531; Pierce *v.* Molliken, 78 Fed. 196; Jones *v.* Florida, etc., R. Co., 41 Fed. 70; Chessman *v.* Shreeve, 37 Fed. 36.

61. Spokane Falls, etc., R. Co. *v.* Ziegler, 167 U. S. 65, 17 S. Ct. 728, 42 L. ed. 79; Mitchell *v.* Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. ed. 442; McCune *v.* Essig, 118 Fed. 273 [*affirmed* in 122 Fed. 588, 59 C. C. A. 429]; Southern Pac. R. Co. *v.* Townsend, 62 Fed. 161; Walker *v.* Richards, 55 Fed. 129; Dunton *v.* Muth, 45 Fed. 390; Miller *v.* Wattier, 24 Fed. 49.

Illustrations.—An action of ejectment (Bonin *v.* Gulf Co., 198 U. S. 115, 25 S. Ct. 608, 49 L. ed. 970; Washington *v.* Island Lime Co., 117 Fed. 777; Los Angeles Farming, etc., Co. *v.* Hoff, 48 Fed. 340), of trespass (Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657; Argonaut Min. Co. *v.* Kennedy Min., etc., Co., 84 Fed. 1; *In re* Helena, etc., Smelting, etc., Co., 48 Fed. 609), or a bill to quiet title (Hoadley *v.* San Francisco, 94 U. S. 4, 24 L. ed. 34), where plaintiff rests his title upon a land or mining patent of the United States, the validity of which defendant does not dispute, does not so arise. Nor does a suit to set aside a land patent solely on account of fraud (Holland *v.* Hyde, 41 Fed. 897. *Contra*, Cates *v.* Producers', etc., Oil Co., 96 Fed. 7); a suit by a homestead entryman to secure his protection while making the improvements required by the acts of congress from interference by parties who claim the land under the Town Site Act, but whose claims have been rejected by the secretary of the interior (Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 20 S. Ct. 726, 44 L. ed. 864; Blackburn *v.* Portland Gold-Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 296; King *v.* Lawson, 84 Fed. 209; Butler *v.* Shafer, 67 Fed. 161. But see Jones *v.* Florida, etc., R. Co., 41 Fed. 70); nor a suit in support of an adverse claim to a land or mining patent under U. S. Rev. St. (1878) § 2326 [U. S. Comp. St. (1901) p. 1430], unless its decision turns upon a disputed construction of the federal constitution, a treaty, or a federal statute (Shoshone Min. Co. *v.* Rutter, *supra*; Blackburn *v.* Portland Gold Min. Co., *supra*; Larned *v.* Jenkins, 109 Fed. 100, 48 C. C. A. 252). The questions of fact: As to what is a "vein," "lode," or "ledge" (Blackburn *v.* Portland Gold Min. Co., *supra*; Colorado Cent. Consol. Min. Co. *v.* Turck, 150 U. S. 138, 14 S. Ct. 35, 37 L. ed. 1030; Montana Ore-Purchasing Co. *v.* Boston, etc., Copper, etc., Min. Co., 85 Fed. 867, 29 C. C. A. 462); Blue Bird Min. Co. *v.* Largey, 49 Fed. 289); as to what is the top or apex of a vein or lode within the meaning of U. S. Rev. St. (1878) §§ 2320, 2322, 2325 (Blackburn *v.* Portland Gold Min. Co., *supra*; Colorado Cent. Consol. Min. Co. *v.* Turck, *supra*; Blue Bird Min. Co. *v.* Largey, *supra*); and as to what are the boundaries mentioned in a mining patent or land grant (Robinson *v.* Anderson, 121 U. S. 522, 7 S. Ct.

this is always the case, where the complaint shows that the validity of a land or mining patent is in dispute.[62]

H. Cases Arising Under Laws Relating to Navigable Waters. Cases arise under the constitution and laws of the United States, where plaintiff by his complaint asserts a right under the federal constitution and certain acts of congress, to maintain a dock on a navigable stream;[63] where a suit is brought to enjoin an obstruction upon a navigable stream, such as a bridge[64] or a log boom,[65] and plaintiff claims that the same is forbidden by an act of congress,[66] or by a federal official acting under lawful authority;[67] or where the court takes judicial notice of an act of congress under which defendant contends that such an obstruction is authorized;[68] and where plaintiff claims the right to accretions along a river front under letters patent of the United States, issued in pursuance of an act of congress, and the construction of the act under which the patent was issued, is in question.[69]

I. Suits on Judicial and Official Bonds. Actions upon bonds required by the orders of the federal courts, such as supersedeas bonds,[70] injunction bonds,[71] bonds in support of attachments by the federal courts,[72] receivers' bonds,[73] and

1011, 30 L. ed. 1021; Joy *v.* St. Louis, 122 Fed. 524; Los Angeles Farming, etc., Co. *v.* Hoff, 48 Fed. 340. *Contra*, Green *v.* Valley, 101 Fed. 882); the boundaries of a state, as prescribed by the act of congress admitting it to the Union (Moore *v.* McGuire, 205 U. S. 214, 27 S. Ct. 483, 51 L. ed. 776), as to the priority of the location (Peabody Gold-Min. Co. *v.* Gold Hill Min. Co., 97 Fed. 657; Dewey Min. Co. *v.* Miller, 96 Fed. 1; Wise *v.* Nixon, 76 Fed. 3. *Contra*, Nevada Sierra Oil Co. *v.* Miller, 97 Fed. 681) do not involve federal questions. Questions as to what are the rights recognized by the local laws, rules, regulations, customs, and decisions, which the statutes of the United States direct shall be enforced, do not arise under the constitution and laws of the United States. Telluride Power Transmission Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 20 S. Ct. 245, 44 L. ed. 305 [*affirming* 16 Utah 125, 51 Pac. 146]; Trafton *v.* Nougues, 24 Fed. Cas. No. 14,134, 4 Sawy. 178. An allegation in a declaration of ejectment that plaintiff was ousted in violation of a specified treaty, and of the fifth amendment to the federal constitution, is insufficient to support the jurisdiction. Filhiol *v.* Maurice, 185 U. S. 108, 22 S. Ct. 560, 46 L. ed. 827. But where the complaint charges a continuing trespass, demanding a lump sum as damages, plaintiff claiming under a series of titles to the same land, the adjudication of one of which alone involved a federal question, the whole case may be removed. Evans *v.* Durango Land, etc., Co., 80 Fed. 433, 25 C. C. A. 531. And where the complaint shows that the controversy arises under the land laws of the United States, a court of equity may entertain and determine all incidental questions between the respective parties arising out of their conflicting claims, and may grant an injunction or appoint a receiver, where such a course is proper. Nevada Sierra Oil Co. *v.* Miller, 97 Fed. 681.

62. Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486; Mitchell *v.* Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. ed. 442; McCune *v.* Essig, 122 Fed. 588, 59 C. C. A. 429 [*affirming* 118 Fed. 273]; Pierce *v.* Molliken, 78 Fed. 196.

63. Kenyon *v.* Squire, 1 Wash. 9, 24 Pac. 28; Calumet Grain, etc., Co. *v.* Chicago, 188 U. S. 431, 23 S. Ct. 477, 47 L. ed. 532; Cummings *v.* Chicago, 188 U. S. 410, 23 S. Ct. 472, 47 L. ed. 525.

Defendants cannot obtain a writ of error to review a judgment of a state court granting an injunction against their interference with plaintiff's possession of lands claimed in the complaint under an act of congress, when the defense was that they had acquired by priority of possession rights to the use of the water which had vested and accrued, were recognized and acknowledged by the local customs, laws, and decisions as provided in section 2339 of the Revised Statutes of the United States. Telluride Power Transmission Co. *v.* Rio Grande Western R. Co., 175 U. S. 639, 20 S. Ct. 245, 44 L. ed. 305 [*affirming* 16 Utah 125, 51 Pac. 146]; *In re* Helena, etc., Smelting, etc., Co., 48 Fed. 609.

64. New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 26 L. ed. 96; E. A. Chatfield Co. *v.* New Haven, 110 Fed. 788.

65. U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437 [*reversing* 81 Fed. 658, 26 C. C. A. 547].

66. U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211, 20 S. Ct. 343, 44 L. ed. 437 [*reversing* 81 Fed. 658, 26 C. C. A. 547], where the statute permitted such a suit, when the obstruction was not affirmatively authorized by law, whether state or federal, and the only question for consideration was whether the obstruction was authorized by a state statute.

67. E. A. Chatfield Co. *v.* New Haven, 110 Fed. 788.

68. New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 26 L. ed. 96.

69. King *v.* St. Louis, 98 Fed. 641.

70. Crane *v.* Buckley, 105 Fed. 401.

71. Leslie *v.* Brown, 90 Fed. 171, 32 C. C. A. 556; Lamb *v.* Ewing, 54 Fed. 269.

72. Files *v.* Davis, 118 Fed. 465.

73. U. S. *v.* Douglas, 113 N. C. 190, 18 S. E. 202.

suits upon the bonds of deputy collectors,[74] United States marshals,[75] cashiers of national banks,[76] clerks of federal courts,[77] and other federal officers,[78] arise under the laws of the United States.

J. Suits By and Against Officers of the United States. Suits brought by officers of the United States in the exercise of their official functions arise under the laws of the United States and are removable.[79] Suits against officers of the United States for acts done by virtue of or under color of their office arise under the laws of the United States and may be removed.[80]

K. Suits By and Against Receivers — 1. Receivers of National Banks. A suit by the receiver of a national bank appointed by the controller of the currency arises under the laws of the United States and may be removed by defendant

74. Crawford *v.* Johnson, 6 Fed. Cas. No. 3,369, Deady 457; Orner *v.* Saunders, 18 Fed. Cas. No. 10,584, 3 Dill. 284, 1 N. Y. Wkly. Dig. 383.

75. Bachrack *v.* Norton, 132 U. S. 337, 10 S. Ct. 106, 33 L. ed. 377; Feibelman *v.* Packard, 109 U. S. 421, 3 S. Ct. 289, 27 L. ed. 984; McKee *v.* Brooks, 64 Tex. 255; Lawrence *v.* Norton, 13 Fed. 1, 4 Woods 383. *Contra*, Phillips *v.* Edelstein, 2 Tex. App. Civ. Cas. § 449.

76. Walker *v.* Windsor Nat. Bank, 56 Fed. 76, 5 C. C. A. 421.

77. Howard *v.* U. S., 184 U. S. 676, 22 S. Ct. 543, 46 L. ed. 754 [*affirming* 102 Fed. 77, 42 C. C. A. 169].

78. U. S. *v.* Belknap, 73 Fed. 19.

Suits by materialmen upon the bonds of contractors with the federal government do not arise under the constitution and laws of the United States. Burrell *v.* U. S., 147 Fed. 44, 77 C. C. A. 308; U. S. *v.* Barrett, 135 Fed. 189; U. S. *v.* O'Brien, 120 Fed. 446; U. S. *v.* Sheridan, 119 Fed. 236; U. S. *v.* Henderlong, 102 Fed. 2. *Contra*, U. S. *v.* Churchyard, 132 Fed. 82.

Trustee in bankruptcy.— The district court of the United States has jurisdiction of a suit brought by a trustee in bankruptcy to enforce the bond of his predecessor. U. S. *v.* Union Surety, etc., Co., 118 Fed. 482.

79. Johnson *v.* Rankin, (Tex. Civ. App. 1906) 95 S. W. 665. But see Setzer *v.* Douglass, 91 N. C. 426, holding that an action by a United States marshal against his deputy, to recover according to contract a part of fees collected, is not removable.

80. Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492; Beck *v.* Perkins, 139 U. S. 628, 11 S. Ct. 677, 35 L. ed. 314; Cleveland, etc., R. Co. *v.* McClung, 119 U. S. 454, 7 S. Ct. 262, 30 L. ed. 465 [*affirming* 15 Fed. 905]; Bryant Bros. Co. *v.* Robinson, 149 Fed. 321, 79 C. C. A. 259; Woods *v.* Root, 123 Fed. 402, 59 C. C. A. 206; Eighmy *v.* Poucher, 83 Fed. 855; Gallatin *v.* Sherman, 77 Fed. 337; Wood *v.* Drake, 70 Fed. 881; Drake *v.* Paulhamus, 66 Fed. 895, 14 C. C. A. 162; Front St. Cable R. Co. *v.* Drake, 65 Fed. 539; Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399; Van Zandt *v.* Maxwell, 28 Fed. Cas. No. 16,884, 2 Blatchf. 421; Warner *v.* Fowler, 29 Fed. Cas. No. 17,182, 4 Blatchf. 311.

Illustrations.—A suit against a marshal of the United States for an abuse of federal process against defendant to the writ (Wood *v.* Drake, 70 Fed. 881; Front St. Cable R. Co. *v.* Drake, 65 Fed. 539), or for levying under a writ upon property claimed by a stranger to the suit, but which the marshal claims belonged to defendant to the writ (Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492; Bock *v.* Perkins, 139 U. S. 628, 11 S. Ct. 677, 35 L. ed. 314 [*affirming* 28 Fed. 123]; Drake *v.* Paulhamus, 66 Fed. 895, 14 C. C. A. 162; Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399), arises under the laws of the United States, and, when plaintiff's initial pleading shows that defendant's acts, of which complaint is made, were done in his official capacity (Walker *v.* Coleman, 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254; Rothschild *v.* Matthews, 22 Fed. 6. But see Howard *v.* Stewart, 34 Nebr. 765, 52 N. W. 714; Wood *v.* Drake, 70 Fed. 881; Ellis *v.* Norton, 16 Fed. 4, 4 Woods 399) is removable. And an action against private individuals for wrongfully causing a United States marshal to levy execution on plaintiff's chattels is a case arising under the laws of the United States and may be removed. Hurst *v.* Cobb, 61 Fed. 1. So a suit may be removed, which is brought to enjoin the postmaster-general from forbidding the transmission of a magazine through the mails as second class matter. Lewis Pub. Co. *v.* Wyman, 152 Fed. 200. But a suit against a marshal for a levy upon goods which he does not claim to be the property of the person named in the writ does not, and is not removable. McKee *v.* Coffin, 66 Tex. 304, 1 S. W. 276; Buck *v.* Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257; Kelsey *v.* Dallon, 14 Fed. Cas. No. 7,678. And see for a somewhat similar holding Upham *v.* Scoville, 40 Ark. 170. The fact that a private individual is made a co-defendant with the marshal in the suit does not divest the court of jurisdiction. Sonnentheil *v.* Christian Moerlein Brewing Co., 172 U. S. 401, 19 S. Ct. 233, 43 L. ed. 492. But see St. Luke's Church *v.* Sowles, 51 Fed. 609.

As to suits against receivers of national banks and receivers appointed by the federal courts see *infra*, IV, K.

As to suits against revenue officers and officers of either house of congress see *supra*, II, A, 4, 5.

when it involves the jurisdictional amount.[81] A suit against a receiver of a national bank similarly appointed arises under the laws of the United States and may be removed,[82] if the matter in dispute exceeds the statutory limit.[83]

2. Receivers Appointed by Federal Courts. Where either party to a suit is the receiver of a corporation created by an act of congress, the suit arises under the laws of the United States.[84]

L. Suits By and Against Trustees in Bankruptcy.[85] In a suit between the trustee of a bankrupt and another, when the requisite difference of citizenship exists between the bankrupt and such other party, and the matter in dispute exceeds the jurisdictional amount, the suit may be removed by defendant whether the suit is brought by [86] or against [87] the trustee.

M. Suits Arising Out of Litigation in Federal Courts. Cases, growing

81. Johnson *v.* Rankin, (Tex. Civ. App. 1906) 95 S. W. 665. See McCartney *v.* Earle, 115 Fed. 462, 53 C. C. A. 392; Thompson *v.* German Ins. Co., 76 Fed. 892; Short *v.* Hepburn, 75 Fed. 113, 21 C. C. A. 252; Fisher *v.* Yoder, 53 Fed. 565; Yardley *v.* Dickson, 47 Fed. 835; Stephens *v.* Bernays, 44 Fed. 642; McConville *v.* Gilmour, 36 Fed. 277, 1 L. R. A. 498; Armstrong *v.* Trautman, 36 Fed. 275; Armstrong *v.* Ettlesohn, 36 Fed. 209.

82. Gilbert *v.* McNulta, 96 Fed. 83; Auburn Sav. Bank *v.* Hayes, 61 Fed. 911; Hot Springs Independent School Dist. No. 10 *v.* Hot Springs First Nat. Bank, 61 Fed. 417. See Auten *v.* U. S. National Bank, 174 U. S. 125, 19 S. Ct. 628, 43 L. ed. 920; Merrill *v.* Jacksonville Nat. Bank, 173 U. S. 131, 19 S. Ct. 360, 43 L. ed. 640; McDonald *v.* Nebraska, 101 Fed. 171, 41 C. C. A. 278; Bartley *v.* Hayden, 74 Fed. 913; Witters *v.* Sowles, 42 Fed. 701. *Contra*, Tehan *v.* Auburn First Nat. Bank, 39 Fed. 577; Bird *v.* Cockrem, 3 Fed. Cas. No. 1,429, 2 Woods 32.

A receiver cannot intervene and remove a suit instituted against the bank before his appointment, unless the bank might have removed the case. Speckart *v.* German Nat. Bank, 98 Fed. 151, 38 C. C. A. 682 [*reversing* 85 Fed. 12]; Wichita Nat. Bank *v.* Smith, 72 Fed. 568, 19 C. C. A. 42 [*affirmed* in 18 S. Ct. 946, 42 L. ed. 1214].

A bill against a receiver of a national bank and an executor to recover a legacy, where some of the decedent's assets were deposited in the bank, was dismissed at circuit as not arising under the laws of the United States. St. Luke's Church *v.* Sowles, 51 Fed. 609.

83. Follett *v.* Tillinghast, 82 Fed. 241.

84. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 12 S. Ct. 905, 36 L. ed. 829.

Cause of action arising before appointment. — A suit by a receiver appointed by a federal court, which is brought to enforce a cause of action vested before his appointment in the corporation which he represents, does not ordinarily arise under the laws of the United States, and consequently cannot be removed where the requisite difference of citizenship does not exist. Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 19 S. Ct. 500, 43 L. ed. 814; Pepper *v.* Rogers, 128 Fed. 987.

Where the validity of the order or decree of a federal court appointing a receiver, or the construction of such an order or decree, is in question, the suit arises under the laws of the United States, whether the receiver is a plaintiff (Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 581, 19 S. Ct. 500, 43 L. ed. 814), or defendant (State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915; Shinney *v.* North American Sav., etc., Co., 97 Fed. 9; Van Wert County *v.* Peirce, 90 Fed. 764).

A suit against a receiver appointed by a federal court to recover damages for his negligence or that of his employees does not arise under the laws of the United States. Chesapeake, etc., R. Co. *v.* Smith, 42 S. W. 538, 19 Ky. L. Rep. 1826; Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 21 S. Ct. 171, 45 L. ed. 220; Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 19 S. Ct. 500, 43 L. ed. 814; Bausman *v.* Dixon, 173 U. S. 113, 19 S. Ct. 316, 43 L. ed. 633; Gableman *v.* Peoria, etc., R. Co., 101 Fed. 1, 41 C. C. A. 160; Pitkin *v.* Cowen, 91 Fed. 599; Ray *v.* Peirce, 81 Fed. 881.

The court will take judicial notice of the fact that a defendant is a receiver, although there is no allegation to that effect in plaintiff's pleading. Pitkin *v.* Cowen, 91 Fed. 599.

The joinder of other defendants with a receiver will not deprive him of a right of removal, to which he would have been entitled had he been sued alone. Landers *v.* Felton, 73 Fed. 311. *Contra*, Rupp *v.* Wheeling, etc., R. Co., 121 Fed. 825, 58 C. C. A. 161; Marrs *v.* Felton, 102 Fed. 775; Schearman *v.* Trumbell, 75 Fed. 33.

85. **The Bankruptcy Law** provides: That "the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." 30 U. S. St. at L. 552, c. 541, § 23 [U. S. Comp. St. (1901) p. 3431].

86. Corbitt *v.* Farmers' Bank, 113 Fed. 417.

87. Bush *v.* Elliott, 202 U. S. 477, 26 S. Ct. 668, 50 L. ed. 1114.

out of litigation in the federal courts, may arise under the constitution and laws of the United States, and may be removed when the matter in dispute exceeds the jurisdictional amount.[88]

V. DIFFERENCE OF CITIZENSHIP.

A. In General. There can be no removal because the parties are citizens of different states, unless plaintiff in the action or suit is a resident of the district where the suit is brought,[89] and defendant is a non-resident of that district.[90] The circuit courts of the United States can take no jurisdiction, either originally or by removal of a cause, because of diversity of citizenship, of a suit to which a citizen of the District of Columbia,[91] a citizen of a territory,[92] or a tribal

88. Thus a suit where plaintiff's pleading shows that he contests the validity of a writ, order, judgment, or decree, of a federal court (Johnson *v.* New Orleans Nat. Banking Assoc., 33 La. Ann. 479; Ceredo First Nat. Bank *v.* Savings Soc., 80 Fed. 581, 25 C. C. A. 466; Connor *v.* Scott, 6 Fed. Cas. No. 3,119, 4 Dill. 242. See Houser *v.* Clayton, 12 Fed. Cas. No. 6,739, 3 Woods 273), a suit for malicious prosecution or false imprisonment upon a charge of a violation of a law of the United States (Ma-ka-ta-wah-qua-twa *v.* Rebok, 111 Fed. 12), and a suit where there was a dispute as to how far a state statute concerning liens upon land applied to a judgment of a court of the United States (Cooke *v.* Avery, 147 U. S. 375, 13 S. Ct. 340, 37 L. ed. 209; Sowles *v.* Witters, 46 Fed. 497) may be removed. And a suit arises under the laws of the United States when brought against a private person for wrongfully causing a marshal to levy a federal execution upon plaintiff's property, which defendants claimed to belong to the judgment debtor. Hurst *v.* Cobb, 61 Fed. 1.

The following cases do not arise under the laws of the United States: A suit upon a judgment recovered in a court of the United States (Metcalf *v.* Watertown, 128 U. S. 586, 9 S. Ct. 173, 32 L. ed. 543; Provident Sav. L. Assur. Soc. *v.* Ford, 114 U. S. 635, 5 S. Ct. 1104, 29 L. ed. 261); a suit in which either party claims title under a sale made under the order, judgment, or decree of a federal court, when the validity and construction of that order is not in question (Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Gay *v.* Lyons, 10 Fed. Cas. No. 5,281, 3 Woods 56); a bill by a discharged bankrupt, to enjoin a levy under a judgment, previous to his discharge, upon land which the court has set apart to him as exempt under the state homestead laws (King *v.* Neill, 26 Fed. 721); and an action by an attorney for damages caused by his disbarment by a state court because of language spoken in a court of the United States (Green *v.* Elbert, 63 Fed. 308, 11 C. C. A. 207; Green *v.* Rogers, 56 Fed. 220). So a case does not arise under the laws of the United States simply because a federal court has decided in another suit the questions of law which were involved. Leather Manufacturers' Nat. Bank *v.* Cooper, 120 U. S. 778, 7 S. Ct. 777, 30 L. ed. 816 [*affirming* 29 Fed. 161]; Berger *v.* Douglas County, 5 Fed. 23, 2 McCrary 483. And an issue, whether full force and effect had been given to the judgment of a state court, does not involve the construction of the constitution of the United States. Merritt *v.* American Steel-Barge Co., 75 Fed. 813, 21 C. C. A. 525. The construction of orders and decrees of a federal court, according to their true meaning, does not involve a federal question. U. S. *v.* Douglas, 113 N. C. 190, 18 S. E. 202. And the purchaser at a federal foreclosure sale, who had assumed as part of the price all liabilities incurred by the receivers, is not entitled to remove a suit to enforce such liability. Reed *v.* Northern Pac. R. Co., 86 Fed. 817.

89. *Ex p.* Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 564; Niblock *v.* Alexander, 44 Fed. 306. *Contra*, Alley *v.* Edward Hines Lumber Co., 64 Fed. 903.

A suit may be removed, when plaintiff is a citizen of the state where it is brought, and each of defendants is a citizen of another state from that of plaintiff and the other defendant. Pitkin County Min. Co. *v.* Markell, 33 Fed. 386.

90. Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602; Parkinson *v.* Barr, 105 Fed. 81; Wichita Nat. Bank *v.* Smith, 72 Fed. 568, 19 C. C. A. 436.

A party who has been substituted for an original defendant, either because of his death (Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237; Goodnow *v.* Dolliver, 26 Fed. 469), or for another reason (Ohlquist *v.* Farwell, 13 Fed. 305, 4 McCrary 401), cannot remove the case, if the original defendant did not have that right.

91. Hooe *v.* Jamieson, 166 U. S. 395, 17 S. Ct. 994, 41 L. ed. 1049; Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132; Hepburn *v.* Ellzey, 2 Cranch (U. S.) 445, 2 L. ed. 332; New Mexico Land Co. *v.* Elkins, 20 Fed. 545; Barney *v.* Baltimore, 2 Fed. Cas. No. 1,029, 1 Hughes 118; Cissel *v.* McDonald, 5 Fed. Cas. No. 2,729, 16 Blatchf. 150, 7 Reporter 553, 57 How. Pr. (N. Y.) 175; Wescott *v.* Fairfield Tp., 29 Fed. Cas. No. 17,418, Pet. C. C. 45.

92. Kansas City Southern R. Co. *v.* McGinty, 76 Ark. 356, 88 S. W. 1001; Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132; New Orleans *v.* Winter, 1 Wheat. (U. S.) 91, 4 L. ed. 44; Maxwell *v.* Federal

Indian,[93] is a party, even if other parties to the controversy are citizens of different states.[94] Nor can jurisdiction be taken of a controversy between a state and one of its own citizens,[95] or a citizen of another state,[96] unless it arises under the constitution or laws of the United States.[97] The diversity of citizenship must exist at the time when the suit is begun, as well as when it is removed.[98]

B. Parties to Controversy — 1. In General. A controversy between citizens of different states is one in which every party upon one side is a citizen of a different state from that of every party upon the other.[99] In determining

Gold, etc., Co., 155 Fed. 110, 83 C. C. A. 570; Snead *v.* Sellers, 66 Fed. 371, 13 C. C. A. 518; Chapman *v.* Chapman, 28 Fed. 1; Darst *v.* Peoria, 13 Fed. 561.

Porto Rico.—An action against defendants, some of whom are citizens of Porto Rico, is not removable on the ground of diversity of citizenship. Healy *v.* McCormick, 157 Fed. 318.

93. Elk *v.* Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. ed. 643; Paul *v.* Chilsoquie, 70 Fed. 401. See *Ex p.* Reynolds, 20 Fed. Cas. No. 11,719, 5 Dill. 394.

An Indian woman who marries a citizen of a state of the United States and who resides apart from her tribe becomes a citizen of the state where she resides. Hatch *v.* Ferguson, 57 Fed. 959.

94. Watson *v.* Bonfils, 116 Fed. 157, 53 C. C. A. 535.

95. People *v.* Southern Pac. R. Co., 65 Cal. 553, 4 Pac. 568; Minnesota *v.* Guaranty Trust, etc., Co., 73 Fed. 914.

96. Com. *v.* Ayer, etc., Tie Co., 117 Ky. 161, 77 S. W. 686, 79 S. W. 290, 25 Ky. L. Rep. 1068, 2061; Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124; U. S. *v.* Douglas, 113 N. C. 190, 18 S. E. 202; State *v.* Adams, 9 Ohio Cir. Ct. 21, 6 Ohio Cir. Dec. 46; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 22 S. Ct. 47, 46 L. ed. 144; Postal Tel. Cable Co. *v.* Alabama, 155 U. S. 482, 15 S. Ct. 192, 39 L. ed. 231; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; West Virginia *v.* King, 112 Fed. 369; Minnesota *v.* Guaranty Trust, etc., Co., 73 Fed. 914; Indiana *v.* Tolleston Club, 53 Fed. 18; Grinnell *v.* Johnson, 28 Fed. 2; Alabama *v.* Wolffe, 18 Fed. 836.

97. See *supra*, IV.

98. Tapley *v.* Martin, 116 Mass. 275; Dart *v.* Walker, 4 Daly (N. Y.) 188; Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Stevens *v.* Nichols, 130 U. S. 230, 9 S. Ct. 518, 32 L. ed. 914; Smith *v.* Akers, 117 U. S. 97, 6 S. Ct. 669, 29 L. ed. 888; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455; Gibson *v.* Bruce, 108 U. S. 561, 2 S. Ct. 873, 27 L. ed. 825; Dalton *v.* Germania Ins. Co., 118 Fed. 936; Foster *v.* Paragould Southeastern R. Co., 74 Fed. 273; Laskey *v.* Newtown Min. Co., 56 Fed. 628; Camprelle *v.* Balbach, 46 Fed. 81. But see Hammond *v.* Buchanan, 68 Ga. 728.

The right to removal does not depend upon whether defendants are actually controverting or disputing the relief sought, provided plaintiff's pleading shows a case justifying a judgment at law or a decree in equity. Memphis Sav. Bank *v.* Houchens, 115 Fed. 96, 52 C. C. A. 176.

99. *Connecticut.*— Miller *v.* Lynde, 2 Root 444, 1 Am. Dec. 86.

Illinois.— Wabash R. Co. *v.* Keeler, 127 Ill. App. 265.

Louisiana.— New Orleans *v.* Seixas, 35 La. Ann. 36; Tesson *v.* Gusman, 26 La. Ann. 248.

Massachusetts.— Florence Sewing Mach. Co. *v.* Grover, etc., Sewing Mach. Co., 110 Mass. 70, 14 Am. Rep. 579.

New York.— Fisk *v.* Chicago, etc., R. Co., 53 Barb. 472; Fairchild *v.* Durand, 8 Abb. Pr. 305; North River Steam Boat Co. *v.* Hoffman, 5 Johns. Ch. 300.

Ohio.— Ludlow *v.* Kidd, 3 Ohio 48.

United States.— Shainwald *v.* Lewis, 108 U. S. 158, 2 S. Ct. 385, 27 L. ed. 691 [*affirming* 5 Fed. 510, 6 Sawy. 585]; Blake *v.* McKim, 103 U. S. 336, 26 L. ed. 563; Ayers *v.* Chicago, 101 U. S. 184, 25 L. ed. 838; Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. 172, 20 L. ed. 179; Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. ed. 130; Louisville, etc., R. Co. *v.* Letson, 2 How. 497, 11 L. ed. 353; Connolly *v.* Taylor, 2 Pet. 556, 7 L. ed. 518; New Orleans *v.* Winter, 1 Wheat. 91, 4 L. ed. 44; Strawbridge *v.* Curtiss, 3 Cranch 267, 2 L. ed. 435; Consolidated Water Co. *v.* Babcock, 76 Fed. 243; Oxley Stave Co. *v.* Coopers' International Union of North America, 72 Fed. 695; Covert *v.* Waldron, 33 Fed. 311; Saginaw Gas-Light Co. *v.* Saginaw, 28 Fed. 529; Hazard *v.* Robinson, 21 Fed. 193; Walser *v.* Memphis, etc., R. Co., 19 Fed. 152; Holland *v.* Ryan, 17 Fed. 1, 5 McCrary 296; Ouachita, etc., River Packet Co. *v.* Aiken, 16 Fed. 890, 4 Woods 208; Mitchell *v.* Tillotson, 12 Fed. 737, 11 Biss. 325; Karns *v.* Atlantic, etc., R. Co., 10 Fed. 309; Walsh *v.* Memphis, etc., R. Co., 6 Fed. 797; Dormitzer *v.* Illinois, etc., Bridge Co., 6 Fed. 217; Bissell *v.* Horton, 3 Fed. Cas. No. 1,448, Brunn. Col. Cas. 53, 3 Day (Conn.) 281; Hubbard *v.* Northern R. Co., 12 Fed. Cas. No. 6,818, 3 Blatchf. 84; Ketchum *v.* Farmers' L. & T. Co., 14 Fed. Cas. No. 7,736, 4 McLean 1; Lovejoy *v.* Washburne, 15 Fed. Cas. No. 8,550, 1 Biss. 416; Petterson *v.* Chapman, 19 Fed. Cas. No. 11,042, 13 Blatchf. 395; Teal *v.* Walker, 23 Fed. Cas. No. 13,812, 5 Reporter 202; Tuckerman *v.* Bigelow, 24 Fed. Cas. No. 14,228, Brunn. Col. Cas. 631. *Contra*, Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397.

See 42 Cent. Dig. tit. "Removal of Causes," § 69.

between whom the controversy exists, the court is not bound by the title of the cause or the form of the pleadings; but should examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the same, according to the facts, no matter what their technical place as plaintiffs or defendants may be.[1]

1. Miller *v.* Lynde, 2 Root (Conn.) 444, 1 Am. Dec. 86; Hutton *v.* Bancroft, 8 Del. Ch. 55, 67 Atl. 972; Evers *v.* Watson, 156 U. S. 527, 15 S. Ct. 430, 39 L. ed. 520; Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Carson *v.* Hyatt, 118 U. S. 279, 6 S. Ct. 1050, 30 L. ed. 167; Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514; Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Mirabile Corp. *v.* Purvis, 143 Fed. 920; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Reese *v.* Zinn, 103 Fed. 97; Hutton *v.* Bancroft, 77 Fed. 481; Oberlin College *v.* Blair, 70 Fed. 414; Cilley *v.* Patten, 62 Fed. 498; Pittsburgh, etc., R. Co. *v.* Baltimore, etc., R. Co., 61 Fed. 705, 10 C. C. A. 20; Mangels *v.* Donau Brewing Co., 53 Fed. 513; Brown *v.* Murray, 43 Fed. 614; Anderson *v.* Bowers, 40 Fed. 708; Sayer *v.* La Salle, etc., Gas-Light, etc., Co., 14 Fed. 69, 9 Biss. 372; Marvin *v.* Ellis, 9 Fed. 367; Burke *v.* Flood, 1 Fed. 541, 6 Sawy. 220; Dodge *v.* Perkins, 7 Fed. Cas. No. 3,954, 4 Mason 435; Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397.

Illustrations.— In a suit by taxpayers against county officers and bondholders, to enjoin payment of the bonds, defendant officers were presumed to be on the same side of the controversy as the taxpayers. Harter Tp. *v.* Kernochan, 103 U. S. 562, 26 L. ed. 411; Anderson *v.* Bowers, 40 Fed. 708. And see Missouri *v.* New Madrid County, 73 Fed. 304; May *v.* St. John, 38 Fed. 770. In a suit by the trustee of a mortgage to enforce a right of action held by the mortgagor (Dawson *v.* Columbia Ave. Sav. Fund, etc., Co., 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713) or to protect the mortgaged property from injury (Old Colony Trust Co. *v.* Atlanta R. Co., 100 Fed. 798; Boston Safe-Deposit, etc., Co. *v.* Racine, 97 Fed. 817; Consolidated Water Co. *v.* Babcock, 76 Fed. 243), the mortgagor will be considered to be on the same side of the controversy as the complainant, unless it clearly appears that he is actively opposed to the relief prayed (Dawson *v.* Columbia Ave. Sav. Fund, etc., Co., 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713). In a stock-holder's suit to enforce a right of his corporation where it is shown that the corporation is under the control of the other defendants, it will be treated as upon the same side of the controversy that they are, for the purpose of determining the jurisdiction. Doctor *v.* Harrington, 196 U. S. 579, 25 S. Ct. 355, 49 L. ed. 606; Dodge *v.* Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Groel *v.* New Jersey United Electric Co., 132 Fed. 252; Mills *v.* Chicago, 127 Fed. 731; Redfield *v.* Baltimore, etc., R. Co., 124 Fed. 929; MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648; De Neufville *v.* New York, etc., R. Co., 81 Fed. 10, 26 C. C. A. 306. In a suit by a bondholder or other *cestui que trust* to enforce a right, after his trustee has refused to sue upon the same, defendant trustee is considered to be upon the same side of the controversy as plaintiff (Swann *v.* Myers, 79 N. C. 101; Dunn *v.* Waggoner, 3 Yerg. (Tenn.) 59; Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932; Chattanooga First Nat. Bank *v.* Radford Trust Co., 80 Fed. 569, 26 C. C. A. 1; Kildare Lumber Co. *v.* National Bank of Commerce, 69 Fed. 2, 16 C. C. A. 107; Bowdoin College *v.* Merritt, 63 Fed. 213; Shipp *v.* Williams, 62 Fed. 4, 10 C. C. A. 247; Reinach *v.* Atlantic, etc., R. Co., 58 Fed. 33; Needham *v.* Wilson, 47 Fed. 97; Barry *v.* Missouri, etc., R. Co., 27 Fed. 1. But see Hack *v.* Chicago, etc., R. Co., 23 Fed. 356), unless the latter seeks some relief antagonistic to the other beneficiaries of the trust (Chattanooga First Nat. Bank *v.* Radford Trust Co., *supra*; Kildare Lumber Co. *v.* National Bank of Commerce, 69 Fed. 2, 16 C. C. A. 107; Rust *v.* Brittle Silver Co., 58 Fed. 611, 7 C. C. A. 389), or when plaintiff claims some substantial relief against the trustee (Bell *v.* Ohio L. Ins. Co., 3 Fed. Cas. No. 1,261). Where one of the parties is made a defendant merely because he has refused to join as a party plaintiff, he is considered to be on the same side of the controversy as plaintiff, when the jurisdiction is determined (Menefee *v.* Frost, 123 Fed. 633; Einstein *v.* Georgia Southern, etc., R. Co., 120 Fed. 1008; Joseph Dry Goods Co. *v.* Hecht, 120 Fed. 760, 57 C. C. A. 64; Johnson *v.* Ford, 109 Fed. 501; Missouri *v.* Alt, 73 Fed. 302; Edgerton *v.* Gilpin, 8 Fed. Cas. No. 4,280, 3 Woods 277. See also Blacklock *v.* Small, 127 U. S. 96, 8 S. Ct. 1096, 32 L. ed. 70; Oberlin College *v.* Blair, 70 Fed. 414; Megibben *v.* Perin, 49 Fed. 183 [*approved* as to this point upon reversal, 53 Fed. 86, 3 C. C. A. 443]; Woodrum *v.* Clay, 33 Fed. 897; Bland *v.* Fleeman, 29 Fed. 669), unless there is a substantial dispute between him and plaintiff, as to the division of the proceeds, or some other question involved in the suit, in which case he is on the side of the controversy opposite to such plaintiff (Wood *v.* Deskins, 141 Fed. 500, 72 C. C. A. 558; Everett *v.* Rock Rapids Independent School Dist., 109 Fed. 697). In a suit for a partition where all the defendants were citizens of different states from that of plaintiffs' citizenship, there should be no realignment of parties to defeat the jurisdiction because there were disputed questions in the case between plaintiffs, which did not appear in the bill, although they might subsequently arise and be determined in the suit. German Sav., etc., Soc. *v.* Tull, 136 Fed. 1, 69 C. C. A. 1. See

2. Formal Parties. The citizenship of formal parties with no real interest in the controversy does not affect the jurisdiction.[2]

also Reavis *v.* Reavis, 98 Fed. 145. Where the validity of a mortgage is in question, the mortgagor is presumed to be on the same side of the controversy as the other parties who attack the mortgage. U. S. Mortgage Co. *v.* McClure, 42 Oreg. 190, 70 Pac. 543; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288 [*reversing* 128 Fed. 608]; Wolcott *v.* Sprague, 55 Fed. 545. But see Springer *v.* Sheets, 115 N. C. 370, 20 S. E. 469. In a garnishee proceeding, after judgment, the judgment debtor is on the same side of the controversy as the judgment creditor. Baker *v.* Duwamish Mill Co., 149 Fed. 612. In an action for damages, under the Kansas statute, because plaintiff's cattle caught Texas fever from cattle driven into the state, in violation of the law, where the importer of the Texan cattle, and those to whom he had sold the same, under a contract, whereby they assumed his liability to plaintiff, were joined as defendants, the importer's interest is not so adverse to that of his vendees as to justify his classification as a plaintiff, and thereby give such vendees a right of removal, on the ground of diverse citizenship. Woodrum *v.* Clay, 33 Fed. 897. In a suit by an attaching creditor to set aside judgments obtained against the debtor by confession, other attaching creditors, whom he had joined as defendants, are on the same side of the controversy as plaintiff. Pollok *v.* Louchheim, 19 Fed. 465.

2. *Georgia.*— Louisville, etc., R. Co. *v.* Newman, 128 Ga. 283, 57 S. E. 515; Withers *v.* John Hopkins Place Sav. Bank, 104 Ga. 89, 30 S. E. 766; Steiner *v.* Mathewson, 77 Ga. 657.

Kentucky.— Harper *v.* Gaitheman, 1 Ky. L. Rep. 419.

Massachusetts.— Danvers Sav. Bank *v.* Thompson, 133 Mass. 182.

North Carolina.— Calloway *v.* Ore Knob Copper Co., 74 N. C. 200. And see Blackwell's Durham Tobacco Co. *v.* American Tobacco Co., 144 N. C. 352, 57 S. E. 5, 9 L. R. A. N. S. 270.

Ohio.— Hadley *v.* Dunlap, 10 Ohio St. 1; Smith *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 542, 7 Ohio N. P. 145.

United States.—*Ex p.* Nebraska, 209 U. S. 436, 28 S. Ct. 581, 52 L. ed. 876; Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69; Corbin *v.* Van Brunt, 105 U. S. 576, 26 L. ed. 1176; Harter Tp. *v.* Kernochan, 103 U. S. 562, 26 L. ed. 411; Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Wood *v.* Davis, 18 How. 467, 15 L. ed. 460; Wormley *v.* Wormley, 8 Wheat. 421, 5 L. ed. 651; Rogers *v.* Penobscot Min. Co., 154 Fed. 606, 83 C. C. A. 380; Johnston R. Frog, etc., Co. *v.* Buda Foundry, etc., Co., 148 Fed. 883; Wirgman *v.* Persons, 126 Fed. 449, 62 C. C. A. 63 [*affirming* 116 Fed. 877]; Ban *v.* Columbia Southern R. Co., 117 Fed. 21, 54 C. C. A. 407 [*reversing* 109 Fed. 499]; Title Guarantee, etc., Co. *v.* Studebaker, 100 Fed. 358; Garrard *v.* Silver Peak Mines, 76 Fed. 1; Carver *v.* Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9; New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770; Gudger *v.* Western North Carolina R. Co., 21 Fed. 81; Bates *v.* New Orleans, etc., R. Co., 16 Fed. 294; Taylor *v.* Holmes, 14 Fed. 498; Deford *v.* Mehaffy, 14 Fed. 181; Foss *v.* Denver First Nat. Bank, 3 Fed. 185, 1 McCrary 474; Chicago, etc., R. Co. *v.* McComb, 5 Fed. Cas. No. 2,670, 17 Blatchf. 371, 9 Reporter 569; Edgerton *v.* Gilpin, 8 Fed. Cas. No. 4,280, 3 Woods 277; Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397; Hervey *v.* Illinois Midland R. Co., 12 Fed. Cas. No. 6,434, 7 Biss. 103; Taylor *v.* Rockefeller, 23 Fed. Cas. No. 13,802, 6 Reporter 226, 7 N. Y. Wkly. Dig. 3, 6 Wkly. Notes Cas. (Pa.) 283.

See 42 Cent. Dig. tit. "Removal of Causes," § 71.

Persons who are formal parties.— The following persons are mere formal parties: The husband of a married woman when made a party to a suit affecting her separate estate (Wormley *v.* Wormley, 8 Wheat. (U. S.) 421, 5 L. ed. 651; First Nat. Bank *v.* Bridgeport Trust Co., 117 Fed. 969); a party who sues for the use of another (Wortsman *v.* Wade, 77 Ga. 651, 4 Am. St. Rep. 102; Southern R. Co. *v.* State, (Ind. App. 1904) 72 N. E. 174; U. S. *v.* Douglas, 113 N. C. 190, 18 S. E. 202; Indiana *v.* Glover, 155 U. S. 513, 15 S. Ct. 186, 39 L. ed. 243; Maryland *v.* Baldwin, 112 U. S. 490, 5 S. Ct. 278, 28 L. ed. 822; Huff *v.* Hutchinson, 14 How. (U. S.) 586, 14 L. ed. 553; McNutt *v.* Bland, 2 How. (U. S.) 9, 11 L. ed. 159; Browne *v.* Strode, 5 Cranch (U. S.) 303, 3 L. ed. 108; Missouri *v.* Bowles Milling Co., 80 Fed. 161; New Chester Water Co. *v.* Holly Mfg. Co., 53 Fed. 19, 3 C. C. A. 399 [*affirming* 48 Fed. 879]; Wade *v.* Wortsman, 29 Fed. 754; Dimmock *v.* Doolittle, 29 Fed. 545. But see U. S. Fidelity, etc., Co. *v.* U. S., 204 U. S. 349, 27 S. Ct. 381, 51 L. ed. 516 [*affirming* 132 Fed. 82]; Jack *v.* Williams, 113 Fed. 823), such as a state officer who sues to collect a penalty for the benefit of the state (Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322. See also Missouri, etc., R. Co. *v.* Hickman, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78 [*reversing* 151 Mo. 644, 52 S. W. 351]; Hickman *v.* Missouri, etc., R. Co., 97 Fed. 113); an agent (Wood *v.* Davis, 18 How. (U. S.) 467, 15 L. ed. 460; Carothers *v.* McKinley Min., etc., Co., 122 Fed. 305; Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. 577; Brown *v.* Murray, 43 Fed. 614; New York *v.* New Jersey Steam-Boat Transp. Co., 24 Fed. 817; Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145); attorney (Brown *v.* Murray, *supra*); the officer of a corporation, when made defendant in a suit

3. Unnecessary Parties. The citizenship of defendants who are deemed against it, seeking no relief against him (Lamm *v.* Parrott Silver, etc., Co., 111 Fed. 241; New York *v.* New Jersey Steamboat Transp. Co., 24 Fed. 817; Lyndon Nat. Bank *v.* Wells River Mfg. Co., 7 Fed. 750; Pond *v.* Sibley, 7 Fed. 129, 19 Blatchf. 189; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105. But see Cabaniss *v.* Reco Min. Co., 116 Fed. 318, 54 C. C. A. 190), or director (Geer *v.* Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 1122; Politz *v.* Wabash R. Co., 153 Fed. 941; Pond *v.* Sibley, 7 Fed. 129, 19 Blatchf. 189. But see Fox *v.* Mackay, 60 Fed. 4; Seddon *v.* Virginia, etc., Iron Co., 36 Fed. 6, 1 L. R. A. 108) and public officers against whom no relief is sought, except an injunction against their official action in aid of an act of another defendant which the bill also seeks to enjoin (Hyde *v.* Victoria Land Co., 125 Fed. 970; Carver *v.* Jarvis-Conklin Mortg. Trust Co., 73 Fed. 9; Sioux City, etc., R. Co. *v.* Chicago, etc., R. Co., 27 Fed. 770; Aroma Tp. *v.* Auditor of Public Accounts, 2 Fed. 33. But see Nye *v.* Nightingale, 6 R. I. 439; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 656). In a controversy as to the priority of different liens upon mortgaged land, the mortgagor is a formal party, when the validity of neither of the liens is disputed. Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593. But see Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577; Thompson *v.* Dixon, 28 Fed. 5. So is the lessor of a railroad when the lease is for more than ninety years, and the lessee has assumed all the lessor's obligations. Chase *v.* Beech Creek R. Co., 144 Fed. 571; Olanta Coal Min. Co. *v.* Beech Creek R. Co., 144 Fed. 150; Seaboard Air Line R. Co. *v.* North Carolina R. Co., 123 Fed. 629. *Contra*, Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Washington *v.* Columbus, etc., R. Co., 53 Fed. 673. Defendants sued by fictitious names are always treated as formal parties whose presence on the record does not affect the right of removal. Loop *v.* Winters, 115 Fed. 362; Parkinson *v.* Barr, 105 Fed. 81. A garnishee is not considered to be a party to the suit, when determining the right of removal. Corbitt *v.* Farmers' Bank, 113 Fed. 417; Cook *v.* Whitney, 6 Fed. Cas. No. 3,166, 3 Woods 715.

Persons who are not formal parties.— The following persons are not mere formal parties, and their citizenship must be considered, when the jurisdiction is determined: A party against whom a decree is essential to the relief in equity sought by the suit (Carneal *v.* Banks, 10 Wheat. (U. S.) 181, 6 L. ed. 297; Wormley *v.* Wormley, 8 Wheat. (U. S.) 421, 5 L. ed. 651; Post *v.* Buckley, 119 Fed. 249; Ward *v.* Arredondo, 29 Fed. Cas. No. 17,148, 1 Paine 410); a stakeholder in the possession of property to recover which the suit is brought (Massachusetts, etc., Constr. Co. *v.* Cane Creek Tp., 155 U. S. 283, 15 S. Ct. 91, 39 L. ed. 152; Wilson *v.* Oswego Tp., 151 U. S. 56, 14 S. Ct. 259, 38 L. ed. 70; First Nat. Bank *v.* Bridgeport Trust Co., 117 Fed. 969; Scoutt *v.* Keck, 73 Fed. 900, 20 C. C. A. 103. But see Bacon *v.* Rives, 106 U. S. 99, 27 L. ed. 69; Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. ed. 932; New York Constr. Co. *v.* Simon, 53 Fed. 1; Reeves *v.* Corning, 51 Fed. 774); an administrator with the will annexed in a suit for a construction of the will (Security Co. *v.* Pratt, 64 Fed. 405. And see Schneider *v.* Eldredge, 125 Fed. 638); a tenant in possession with a leasehold interest and an equity for improvements, when joined with the landlord in a suit for ejectment (Cleveland *v.* Cleveland, etc., R. Co., 147 Fed. 171, 77 C. C. A. 467; Beardsley *v.* Torrey, 2 Fed. Cas. No. 1,190, 4 Wash. 286. *Contra*, Doe *v.* Harmer, 4 Ohio 435; Texas *v.* Lewis, 12 Fed. 1); a corporation in a stock-holder's suit to cancel a contract, which it has made (East Tennessee, etc., R. Co. *v.* Grayson, 119 U. S. 240, 7 S. Ct. 190, 30 L. ed. 382. But see Higgins *v.* Baltimore, etc., R. Co., 99 Fed. 640); a corporation in a suit by its mortgagee to cancel a contract made by it with another, although it was alleged that its assets were insufficient to pay the mortgage (Consolidated Water Co. *v.* Babcock, 76 Fed. 243. See Dawson *v.* Columbia Ave. Sav. Fund, etc., Co., 197 U. S. 178, 25 S. Ct. 420, 49 L. ed. 713; Wellman *v.* Howland Coal, etc., Works, 19 Fed. 51); a corporation in a suit to compel the transfer of stock, the certificates for which were held or claimed by another defendant (Crump *v.* Thurber, 115 U. S. 56, 5 S. Ct. 1154, 29 L. ed. 328; Patterson *v.* Farmington St. R. Co., 111 Fed. 262; Rogers *v.* Van Nortwick, 45 Fed. 513. But see Lucas *v.* Milliken, 139 Fed. 816; Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161). And in a suit in support of an adverse claim to a land patent the original applicant is not a formal party, although he has assigned his claim to another person joined in the suit. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276. So a defendant who has disclaimed an interest in the controversy (Goodnow *v.* Litchfield, 47 Fed. 753; Dow *v.* Bradstreet Co., 46 Fed. 824; Hax *v.* Caspar, 31 Fed. 499; New Jersey Zinc Co. *v.* Trotter, 18 Fed. Cas. No. 10,167. See Wetherby *v.* Stinson, 62 Fed. 173, 10 C. C. A. 243. *Contra*, Day *v.* Oatis, 85 Miss. 128, 37 So. 559; Reed *v.* Hardeman County, 77 Tex. 165, 13 S. W. 1024; Wirgman *v.* Persons, 126 Fed. 449, 62 C. C. A. 63; Frazer Lubricator Co. *v.* Frazer, 23 Fed. 305), or who has made a default in appearance or pleading (Brooks *v.* Clark, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; Putnam *v.* Ingraham, 114 U. S. 57, 5 S. Ct. 746, 29 L. ed. 65; Lederer *v.* Sire, 105 Fed. 529; Park *v.* New York, etc., R. Co., 70 Fed. 641. *Contra*, Judah *v.* Iowa Barb-Wire Co., 32 Fed. 561), is not considered as a formal party, and his citizenship may prevent a removal. And in an action against a principal and a surety, the surety cannot be considered as a merely formal party. Mutual Reserve

proper but not necessary and indispensable parties to the controversies may be disregarded.[3]

4. Improper Parties — a. Plaintiffs. Where it appears on the face of the bill that a person has been improperly joined with others as a plaintiff his citizenship may be disregarded when determining the rights of defendants to a removal.[4]

Fund Life Assoc. *v.* Farmer, 77 Fed. 929, 23 C. C. A. 574.

3. Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514; Politz *v.* Wabash R. Co., 153 Fed. 941; Cella *v.* Brown, 136 Fed. 439; Corbin *v.* Boies, 18 Fed. 3; Deford *v.* Mehaffy, 14 Fed. 181; Ruckman *v.* Ruckman, 1 Fed. 587.

Illustrations.— Such it has been held are the mortgagor in a suit to determine the ownership of the bond and mortgage (Ruckman *v.* Ruckman, 1 Fed. 587); defendants who have been made parties to a suit merely because they are alleged to be indebted to the principal defendant (Deford *v.* Mehaffy, 14 Fed. 181); in a suit for an accounting of lands sold by a corporation, the stockholders and incorporators of the same, who have procured the conveyance to it of the lands, in which plaintiffs claimed an interest (Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514); the debtor in a suit by a creditor to set aside a judgment against him which is alleged to have been obtained by fraud (Corbin *v.* Boies, 18 Fed. 3); the agent for another defendant in a suit for the specific performance of a contract made by the latter with the complainant, and for the delivery of securities in pursuance of the same, although such agent claimed an interest in such securities (Cella *v.* Brown, 136 Fed. 439); in a stock-holder's suit to enjoin the exchange by his corporation of debentures for new mortgage bonds with a stock bonus, the individual directors, the registrar of the stock, the depositary of the debentures, the trustees of the mortgage, and a committee representing the debenture holders in the transaction (Politz *v.* Wabash R. Co., 153 Fed. 941); and a person for whose benefit a corporation was organized in a suit to enjoin such corporation from operating a ferry (New York *v.* New Jersey Steamboat Transp. Co., 24 Fed. 817). The following persons are necessary parties to the respective controversies between their co-defendants and plaintiff, and the suits in which such controversies are litigated are not removable: A lessor corporation in a suit by its stock-holders to set aside a lease which it has made (New Jersey Cent. R. Co. *v.* Mills, 113 U. S. 249, 5 S. Ct. 456, 28 L. ed. 949 [*affirming* 20 Fed. 449]); a lessee in a suit to set aside his lessor's title (Miller *v.* Sharp, 37 Fed. 161); the mortgagor who has transferred the mortgaged land, in a suit to foreclose the mortgage, where it is sought to charge him with a deficiency (Coney *v.* Winchell, 116 U. S. 227, 6 S. Ct. 366, 29 L. ed. 610 [*affirming* 24 Fed. 865]); a judgment creditor who had transferred orders by the debtor for the payment of the same, in a suit to cancel the judgments (Rock Rapids Independent Dist. *v.* Rock Rapids Bank, 48 Fed. 2); a party who has acquired the right to redeem certain securities pledged by another, in a suit to foreclose the right of redemption thereof (Danvers Sav. Bank *v.* Thompson, 130 Mass. 490); in a suit to recover a deposit in a savings bank, the bank after it has brought in another claimant to the deposit as an additional party defendant, when the money has not yet been paid into court (Bailey *v.* New York Sav. Bank, 2 Fed. 14); and any person whose interest is so bound up with the others that his legal presence as a party is an absolute necessity (New Orleans *v.* Seixas, 35 La. Ann. 36; Nulton *v.* Isaacs, 30 Gratt. (Va.) 726; Blackburn *v.* Portland Gold-Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276; Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907; Watson *v.* Evers, 13 Fed. 194; First Nat. Bank *v.* Smith, 6 Fed. 215). So an action by a resident against a resident and a non-resident is not removable to the federal court on the application of the non-resident, where the resident defendant is a proper, if not a necessary, party to the determination of the controversy. Wilson *v.* Big Joe Block Coal Co., 135 Iowa 531, 113 N. W. 348.

The fact that a defendant is pecuniarily irresponsible, so that a judgment against him would be of no value, does not make him a formal party. Deere *v.* Chicago, etc., R. Co., 85 Fed. 876.

4. Jarvis *v.* Crozier, 98 Fed. 753; Over *v.* Lake Erie, etc., R. Co., 63 Fed. 34; McHenry *v.* New York, etc., R. Co., 25 Fed. 65.

Illustrations.— Where it appears on the face of the bill that one of a number of plaintiffs is not entitled to relief, and that the others are the real parties litigant his joinder does not prevent a removal. McHenry *v.* New York, etc., R. Co., 25 Fed. 65. Where, in a suit for a partition, plaintiff sues in his own right, and also as the next friend of two infants, to whom he is in nowise related, those infants being citizens of the same state as defendants, and of a different state from that of plaintiff, the infants are improperly joined as plaintiffs, are to be considered as defendants, and such misjoinder does not prevent a removal. Jarvis *v.* Crozier, 98 Fed. 753. Where the legal owner of a cause of action, and the equitable assignees of different parts of the same, join in an action at law, the citizenship of plaintiff having the legal cause of action alone can affect the right of removal. Over *v.* Lake Erie, etc., R. Co., 63 Fed. 34. So the institution of a fictitious action in a court of the state of which plaintiff is a citizen, for the purpose of bringing two defendants of diverse citizenship — one being a non-resident — into such court, to enable the resident defendant to litigate a cause of action against the non-

b. Defendants. Where persons are made defendants against whom no relief is prayed, and their presence is not essential to a complete disposition of the controversy,[5] where plaintiff's pleading states no cause of action against defendants against whom relief is prayed, and it manifestly appears that they were joined in the suit for the purpose of preventing a removal; [6] or, where it is alleged in the petition for removal, and is proved to the satisfaction of the circuit court upon a motion to remand that parties against whom relief is prayed in fact have no connection therewith, the allegations in plaintiff's pleading to that effect being intentionally false;[7] the action may be removed if the requisite difference of citizenship exists between plaintiff and the remaining defendants. Where there is no federal question, an action cannot be removed, however, where one of defendants is a citizen of the same state as that of plaintiff, and either the complaint shows a cause of action

resident defendant in that court, and to prevent the non-resident defendant from removing such cause into the federal court, is a fraud upon the jurisdiction of the federal court and upon the non-resident defendant, and upon a seasonable application by the non-resident defendant the sham plaintiff should be disregarded and the real controversy removed to the federal court. Boatmen's Bank *v.* Fritzlen, 75 Kan. 479, 89 Pac. 915. But where one of several plaintiffs is properly joined, but his presence is not indispensable to the maintenance of a bill, his citizenship must be considered, when the right of removal is determined. James *v.* Thurston, 6 R. I. 428; Florida Cent., etc., R. Co. *v.* Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L. ed. 486; Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195. So the voluntary joinder of a number of complainants in enforcing a common liability of defendants, upon which they might have sued separately, has the same effect on the right of removal because of difference of citizenship, as if they had been compelled to unite. Florida Cent., etc., R. Co. *v.* Bell, *supra*; Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, *supra*; Peninsular Iron Co. *v.* Stone, 121 U. S. 631, 7 S. Ct. 1010, 30 L. ed. 1020. And where it is alleged in the petition for removal, and proved to the satisfaction of the federal court, that one of plaintiffs has no interest in the controversy, the removal will be allowed. McHenry *v.* New York, etc., R. Co., 25 Fed. 65.

5. Chattanooga, etc., R. Co. *v.* Cincinnati, etc., R. Co., 44 Fed. 456; Arapahoe County *v.* Kansas Pac. R. Co., 1 Fed. Cas. No. 502, 4 Dill. 277.

6. Slaughter *v.* Nashville, etc., R. Co., 91 S. W. 744, 28 Ky. L. Rep. 1195; Eastin *v.* Texas, etc., R. Co., 99 Tex. 654, 92 S. W. 838 [*reversing* (Civ. App. 1905) 89 S. W. 440]; Chicago, etc., R. Co. *v.* Stepp, 151 Fed. 908; Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446; Curtis *v.* Cleveland, etc., R. Co., 140 Fed. 777; Axline *v.* Toledo, etc., R. Co., 138 Fed. 169; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Henry *v.* Illinois Cent. R Co., 132 Fed. 715; Bryce *v.* Southern R. Co., 122 Fed. 709; Carothers *v.* McKinley Min., etc., Co., 122 Fed. 305; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381; Loop *v.* Winters, 115 Fed. 362; Mahon *v.* Somers, 112 Fed. 174; Prince *v.* Illinois Cent. R. Co., 98 Fed. 1; Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745; Rivers *v.* Bradley, 53 Fed. 305; Chattanooga, etc., R. Co. *v.* Cincinnati, etc., R. Co., 44 Fed. 456; Nelson *v.* Hennessey, 33 Fed. 113. See also St. Louis Southwestern R. Co. *v.* Adams, (Ark. 1908) 112 S. W. 186.

The fact that the complaint is as to one of the defendants demurrable is in itself insufficient to justify a removal by the other. Riser *v.* Southern R. Co., 116 Fed. 215; Evans *v.* Felton, 96 Fed. 176.

7. Southern R. Co. *v.* Edwards, 115 Ga. 1022, 42 S. E. 375; Davis *v.* Chesapeake, etc., R. Co., 116 Ky. 144, 75 S. W. 275, 25 Ky. L. Rep. 342; Cincinnati, etc., R. Co. *v.* Robertson, 115 Ky. 858, 74 S. W. 1061, 25 Ky. L. Rep. 265; Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 27 S. Ct. 184, 51 L. ed. 430; McGuire *v.* Great Northern R. Co., 153 Fed. 434; Dishon *v.* Cincinnati, etc., R. Co., 133 Fed. 471, 66 C. C. A. 345; Crawford *v.* Illinois Cent. R. Co., 130 Fed. 395; Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85; Boatner *v.* American Express Co., 122 Fed. 714; Bryce *v.* Southern R. Co., 122 Fed. 709; Free *v.* Western Union Tel. Co., 122 Fed. 309; Carothers *v.* McKinley Min., etc., Co., 122 Fed. 305; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Ross *v.* Erie R. Co., 120 Fed. 703; Union Terminal R. Co. *v.* Chicago, etc., R. Co., 119 Fed. 209; Diday *v.* New York, etc., R. Co., 107 Fed. 565; McCormick *v.* Illinois Cent. R. Co., 100 Fed. 250; Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745; Shepherd *v.* Bradstreet Co., 65 Fed. 142; Dow *v.* Bradstreet Co., 46 Fed. 824; Collins *v.* Wellington, 31 Fed. 244.

Evidence of fraudulent joinder.— The fact that plaintiff has previously sued upon the same cause of action, defendant seeking the removal alone, and that upon the removal of the former suit he discontinued the same and brought the present one, joining another defendant, is a circumstance tending to show that the joinder is fraudulent. Warax *v.* Cincinnati, etc., R. Co., 72 Fed. 637; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165. But if the fraud is denied, this has been held not to be sufficient, in the absence of other evidence, to justify a removal. Chesapeake, etc., R. Co. *v.* Hendricks, 88 Tenn. 710, 13

against all the defendants which is both joint and several, whether upon tort or contract, and plaintiff has elected to make the same joint;[8] where according to the law of the state in the courts in which the suit was brought the liability charged was joint, although the law as enforced in the federal courts might be to the contrary,[9] or where there is reasonable ground for doubt as to the question of the joint liability which plaintiff alleges, and it does not appear that the parties were fraudulently joined for the purpose of preventing a removal.[10] A suit cannot be removed which is brought to recover damages for the alleged joint negligence, whether by act or omission, of a railway company and its engineer and conductor, or other employee, when the sole ground of the liability of the corporation which is alleged is the responsibility as a principal for the conduct of its servants, although not personally present, nor directing, and not charged with any concurrent act of negligence,[11] unless there is a federal question in the case.[12] When a lessor and lessee,[13] or a corporation and its receiver,[14] are sued jointly for an injury caused by negligence, the

S. W. 696, 14 S. W. 488; Warax *v.* Cincinnati, etc., R. Co., *supra*.

8. Brooks *v.* Clark, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; Little *v.* Giles, 118 U. S. 596, 7 S. Ct. 32, 30 L. ed. 269; Plymouth Consol. Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. ed. 331; St. Louis, etc., R. Co. *v.* Wilson, 114 U. S. 60, 5 S. Ct. 738, 29 L. ed. 66; Louisville, etc., R. Co. *v.* Ide, 114 U. S. 52, 5 S. Ct. 735, 29 L. ed. 63; Knuth *v.* Butte Electric R. Co., 148 Fed. 73; Thomas *v.* Great Northern R. Co., 147 Fed. 83, 77 C. C. A. 255; Charman *v.* Lake Erie, etc., R. Co., 105 Fed. 449. In Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745, 750, Taft, J., said: "If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the federal court. Where he has reasonable ground for a *bona fide* belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to evade the jurisdiction of the federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal." Weller *v.* J. B. Pace Tobacco Co., 32 Fed. 860; Anderson *v.* Appleton, 32 Fed. 855; Shaver *v.* Hardin, 30 Fed. 801; Wilson *v.* Union Sav. Assoc., 30 Fed. 521; Boyd *v.* Gill, 19 Fed. 145, 21 Blatchf. 543.

A statement in a petition for the removal of a cause to the federal court that certain resident defendants were fraudulently joined for the purpose of preventing a removal is of no importance, the plaintiff's motive being immaterial if he had a right to bring the joint action. Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898.

9. Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 26 S. Ct. 166, 50 L. ed. 448; Thomas *v.* Great Northern R. Co., 147 Fed. 83, 77 C. C. A. 255.

10. Alabama Great Southern R. Co. *v.* Thompson, 200 U. S. 206, 26 S. Ct. 161, 50 L. ed. 441; Knuth *v.* Butte Electric R. Co., 148 Fed. 73; Evans *v.* Felton, 96 Fed. 176; Doremus *v.* Root, 94 Fed. 760.

11. *Georgia.*— Southern R. Co. *v.* Grizzle, 124 Ga. 735, 53 S. E. 244, 110 Am. St. Rep. 191.

Kentucky.— Illinois Cent. R. Co. *v.* Coley, 121 Ky. 385, 89 S. W. 234, 28 Ky. L. Rep. 336, 1 L. R. A. N. S. 370.

Missouri.— Lanning *v.* Chicago Great Western R. Co., 196 Mo. 647, 94 S. W. 491.

South Carolina.— Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962.

Tennessee.— Louisville, etc., R. Co. *v.* Vincent, 116 Tenn. 317, 95 S. W. 179.

United States.— Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 26 S. Ct. 166, 50 L. ed. 448; Alabama Great Southern R. Co. *v.* Thompson, 200 U. S. 206, 26 S. Ct. 161, 50 L. ed. 441; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Chicago, etc., R. Co. *v.* Stepp, 151 Fed. 908 [*affirmed* in 164 Fed. 785, 95 C. C. A. 431]; Atlantic Coast Line R. Co. *v.* Bailey, 151 Fed. 891; Knuth *v.* Butte Electric R. Co., 148 Fed. 73; Thomas *v.* Great Northern R. Co., 147 Fed. 83, 77 C. C. A. 255; Heffelfinger *v.* Choctaw, etc., R. Co., 140 Fed. 75; Davenport *v.* Southern R. Co., 135 Fed. 960, 68 C. C. A. 444; Henry *v.* Illinois Cent. R. Co., 132 Fed. 715; Roberts *v.* Shelby Steel Tube Co., 131 Fed. 729, 65 C. C. A. 589; American Bridge Co. *v.* Hunt, 130 Fed 302; Fogarty *v.* Southern Pac. Co., 123 Fed. 973.

See 42 Cent. Dig. tit. "Removal of Causes," § 69 *et seq.*

12. See *supra*, IV.

13. Keller *v.* Kansas City, etc., R. Co., 135 Fed. 202; Person *v.* Illinois Cent. R. Co., 118 Fed. 342; Central Ohio R. Co. *v.* Mahoney, 114 Fed. 732, 52 C. C. A. 364. See Curtis *v.* Cleveland, etc., R. Co., 140 Fed. 777. *Contra*, Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943; Williard *v.* Spartanburg, etc., R. Co., 124 Fed. 796; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Spangler *v.* Atchison, etc., R. Co., 42 Fed. 305.

14. Whitcomb *v.* Smithson, 175 U. S. 635,

case cannot be removed because of difference of citizenship when either of defendants is a citizen of the same state as that of plaintiff, unless it clearly appears that one of them was fraudulently made a party for the sake of preventing the removal.[15]

5. ALIENS. The circuit courts of the United States can obtain no jurisdiction, originally or by removal, by reason of a diversity of citizenship: When the controversy is between two aliens;[16] when a citizen of the same state as that of the opposite party is on the same side of the controversy as an alien;[17] nor when a state and an alien are parties.[18]

6. TRUSTEES AND OTHER REPRESENTATIVES. The doctrine is well settled by many authorities that where a party sues or is sued as a trustee,[19]

20 S. Ct. 248, 44 L. ed. 303; Rupp *v.* Wheeling, etc., R. Co., 121 Fed. 825, 58 C. C. A. 161; Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73. *Contra*, Chamberlain *v.* New York, etc., R. Co., 71 Fed. 636.

15. Curtis *v.* Cleveland, etc., R. Co., 140 Fed. 777; Axline *v.* Toledo, etc., R. Co., 138 Fed. 169; Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943; Keller *v.* Kansas City, etc., R. Co., 135 Fed. 202; Williard *v.* Spartanburg, etc., R. Co., 124 Fed. 796; Diday *v.* New York, etc., R. Co., 107 Fed. 565; Hukill *v.* Maysville, etc., R. Co., 72 Fed. 745.

16. Orosco *v.* Gagliardo, 22 Cal. 83; Barrowcliffe *v.* La Caisse Generale des Assurance, 58 How. Pr. (N. Y.) 131, 1 N. Y. City Ct. 151; King *v.* Cornell, 106 U. S. 395, 1 S. Ct. 312, 27 L. ed. 60; Montalet *v.* Murray, 4 Cranch (U. S.) 46, 2 L. ed. 545; Mossman *v.* Higginson, 4 Dall. (U. S.) 12, 1 L. ed. 720; Pooley *v.* Luco, 72 Fed. 561; Hinckley *v.* Byrne, 12 Fed. Cas. No. 6,510, Deady 224; Petrocokino *v.* Stuart, 19 Fed. Cas. No. 11,041, 9 Reporter 167, 9 N. Y. Wkly. Dig. 371, 14 Phila. (Pa.) 412; Prentiss *v.* Brennan, 19 Fed. Cas. No. 11,385, 2 Blatchf. 162; Rateau *v.* Bernard, 20 Fed. Cas. No. 11,579, 3 Blatchf. 244; Walton *v.* McNeil, 29 Fed. Cas. No. 17,134. *Contra*, Liverpool, etc., Nav. Co. *v.* Agar, 14 Fed. 615, 4 Woods 201.

When an alien is joined as defendant with a citizen of a different state from that of plaintiff, they may jointly remove the case if the jurisdictional amount is involved. Roberts *v.* Pacific, etc., R., etc., Co., 121 Fed. 785, 58 C. C. A. 61 [*affirming* 104 Fed. 577]; Ballin *v.* Lehr, 24 Fed. 193. *Contra*, Hackett *v.* Kuhne, 157 Fed. 317; Tracy *v.* Morel, 88 Fed. 801. A non-resident alien defendant may remove a suit, involving the jurisdictional amount, when all the parties on the other side of the controversy are citizens of the same state of the United States. Cooley *v.* McArthur, 35 Fed. 372. A resident alien cannot, when no federal question is involved. Eddy *v.* Casas, 118 Fed. 363; Walker *v.* O'Neill, 38 Fed. 374; Cudahy *v.* McGeoch, 37 Fed. 1; Cooley *v.* McArthur, 35 Fed. 372. When the sole defendant to an action brought by an alien is a citizen of a different state from that where the case is brought, he may have a removal if the subject-matter is of sufficient value. Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446; Morris *v.* Clark Constr. Co., 140 Fed. 756; Creagh *v.* U. S. Equitable L. Assur. Soc., 83 Fed. 849; Stalker *v.* Pullman's Palace-Car Co., 81 Fed. 989; Sherwood *v.* Newport News, etc., Co., 55 Fed. 1. See Hinckley *v.* Bryne, 11 Fed. Cas. No. 6,510, Deady 224. *Contra*, Knickerbocker L. Ins. Co. *v.* Gerbach, 70 Pa. St. 150; Harold *v.* Iron Silver Min. Co., 33 Fed. 529; Petrocokino *v.* Stuart, 19 Fed. Cas. No. 11,041. A suit brought in a state court by an alien against a non-resident citizen of another state (Uhle *v.* Burnham, 42 Fed. 1; Sherwood *v.* Newport News, etc., Tel. Co., 55 Fed. 1. But see Wallenburg *v.* Missouri Pac. R. Co., 159 Fed. 217) or against a corporation incorporated by another state (Stalker *v.* Pullman Palace-Car Co., 81 Fed. 989) can be removed by defendant.

17. People *v.* Hager, 20 Cal. 167; Davis *v.* Cook, 9 Nev. 134; Watson *v.* Evers, 13 Fed. 194; Hervey *v.* Illinois Midland R. Co., 12 Fed. Cas. No. 6,434, 7 Biss. 103. But see Bell *v.* Ohio L. Ins. Co., 3 Fed. Cas. No. 1,261.

18. O'Conor *v.* Texas, 202 U. S. 501, 26 S. Ct. 726, 50 L. ed. 1120 [*affirming* 96 Tex. 404, 73 S. W. 1041]; New Jersey *v.* Babcock, 18 Fed. Cas. No. 10,163, 4 Wash. 344.

19. Goodnow *v.* Oakley, 68 Iowa 25, 25 N. W. 912; Dodge *v.* Tulleys, 144 U. S. 451, 12 S. Ct. 728, 36 L. ed. 501; Susquehanna, etc., R., etc., Co. *v.* Blatchford, 11 Wall. (U. S.) 172, 20 L. ed. 179; Bonnafee *v.* Williams, 3 How. (U. S.) 574, 11 L. ed. 732; Chappedelaine *v.* Dechenaux, 4 Cranch (U. S.) 306, 2 L. ed. 629; Morris *v.* Lindauer, 54 Fed. 23, 4 C. C. A. 162; Earp *v.* Coleman, 28 Fed. 340; Glenn *v.* Walker, 27 Fed. 577; Adams *v.* White, 1 Fed. Cas. No. 68; Gill *v.* Stebbins, 10 Fed. Cas. No. 5,431, 2 Paine 417. But see Mead *v.* Walker, 15 Wis. 499.

Where the holder of the equitable title is a party to the suit, a dry trustee, or passive trustee, or one who merely holds the legal title without any power over the property in question, is generally considered to be a formal party. Boon *v.* Chiles, 8 Pet. (U. S.) 532, 8 L. ed. 1034; Banigan *v.* Worcester, 30 Fed. 392. But see Dunn *v.* Waggoner, 3 Yerg. (Tenn.) 59. But where the trust is active and the trustee has a power over the property, he is usually considered to be a necessary party to the suit, whose citizenship must be considered in determining the jurisdiction. Peper *v.* Fordyce, 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435 [*reversing* 16 Fed. 516, 5 McCrary 221]; Thayer *v.* Life Assoc. of America, 112 U. S. 717, 5 S. Ct. 355, 28

receiver,[20] executor or administrator,[21] or as the representative of a class,[22] and none of the persons whom he represents is named in the title of the cause,[23] nor appears to have an interest hostile to such representative;[24] his citizenship, not that of his beneficiaries, nor of those whom he represents, nor the location of the trust estate,[25] is alone to be considered. The citizenship of the next friend or guardian *ad litem* of an infant,[26] of a lunatic,[27] or of a married woman [28] is disregarded. But where the guardian of an infant,[29] or the curator or committee of a lunatic, sues in his own name under the authority of a state statute, his citizenship, not that of his ward, is the test of the right of removal.[30]

C. Determination of Citizenship — 1. Natural Persons. A citizen of the United States is a citizen of the state in which he permanently resides and has his domicile.[31] A husband and wife who are not living apart under a legal sepa-

L. ed. 864. See also Knapp *v.* Troy, etc., R. Co., 20 Wall. (U. S.) 117, 22 L. ed. 328; Rust *v.* Brittle Silver Co., 58 Fed. 611, 7 C. C. A. 389; Teal *v.* Walker, 23 Fed. Cas. No. 13,812. *Contra,* Chester *v.* Wellford, 5 Fed. Cas. No. 2,622, 2 Flipp. 347.

20. Pepper *v.* Rogers, 128 Fed. 987; Snead *v.* Sellers, 66 Fed. 371, 13 C. C. A. 518; Brisenden *v.* Chamberlain, 53 Fed. 307; Davies *v.* Lathrop, 12 Fed. 353, 20 Blatchf. 397; Farlow *v.* Lea, 8 Fed. Cas. No. 4,649.

21. *Mississippi.*— Hill *v.* Henderson, 6 Sm. & M. 351.

New Hampshire.— Geyer *v.* John Hancock Mut. L. Ins. Co., 50 N. H. 224, 9 Am. Rep. 185.

North Dakota.— Miller *v.* Sunde, 1 N. D. 1, 44 N. W. 301.

Pennsylvania.— Middleton *v.* Middleton, 7 Wkly. Notes Cas. 144.

United States.— Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380; Blake *v.* McKim, 103 U. S. 336, 26 L. ed. 563; Rice *v.* Houston, 13 Wall. 66, 20 L. ed. 484; Bonnafee *v.* Williams, 3 How. 574, 11 L. ed. 732; Childress *v.* Emory, 3 Wheat. 642, 5 L. ed. 705; Bishop *v.* Boston, etc., R. Co., 117 Fed. 771; Cincinnati, etc., R. Co. *v.* Thiebaud, 114 Fed. 918, 52 C. C. A. 538; Popp *v.* Cincinnati, etc., R. Co., 96 Fed. 465; Bangs *v.* Loveridge, 60 Fed. 963; Harper *v.* Norfolk, etc., R. Co., 36 Fed. 102; McElmurray *v.* Loomis, 31 Fed. 395; Browne *v.* Browne, 4 Fed. Cas. No. 2,035, 1 Wash. 429; Carter *v.* Treadwell, 5 Fed. Cas. No. 2,480, 3 Story 25; Dodge *v.* Perkins, 7 Fed. Cas. No. 3,954, 4 Mason 435.

See 42 Cent. Dig. tit. "Removal of Causes," § 75.

Notwithstanding a state statute providing that a non-resident could not act as administrator, it was held that an administrator there appointed was not estopped from showing, upon an application for a removal, that he was a citizen of another state. McDuffie *v.* Montgomery, 128 Fed. 105.

22. Omaha Hotel Co. *v.* Wade, 97 U. S. 13, 24 L. ed. 917; International Trust Co. *v.* T. B. Townsend Brick, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Putnam *v.* Timothy Dry-Goods, etc., Co., 79 Fed. 454; Jackson, etc., Co. *v.* Burlington, etc., R. Co., 29 Fed. 474.

When a mortgage bondholder sued for a foreclosure, in behalf of himself and all the other bondholders, only one hundred and twenty bonds having been issued, and the latter, who had not been made parties, the complaint alleging that some, but not all, were unknown to plaintiff, intervened and prayed the same relief, all such bondholders were indispensable parties, and in determining the jurisdiction of the court were considered to be upon the same side as plaintiff, thus compelling a dismissal of the suit. Mangels *v.* Donau Brewing Co., 53 Fed. 513 [*distinguishing* Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329].

23. U. S. *v.* Myers, 27 Fed. Cas. No. 15,844, 2 Brock. 516. See also Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907, which was an action for the assignment of dower, brought in a state court by a citizen of Illinois, and it appeared that of two defendants, who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his co-defendant, a citizen of Illinois, although it did not appear that he was authorized to represent his interests in the property for the purposes of the suit. It was held that the beneficiary was a necessary party, and, being a citizen of the same state as plaintiff, was not entitled to a removal; and that, the controversy not being separable, the trustee, although the citizen of another state, could not sustain a petition for removal.

24. See *supra,* V, C, 1.

25. Shirk *v.* La Fayette, 52 Fed. 857.

26. Voss *v.* Neineber, 68 Fed. 947; Dodd *v.* Ghiselin, 27 Fed. 405; Woolridge *v.* McKenna, 8 Fed. 650; Williams *v.* Ritchey, 29 Fed. Cas. No. 17,734, 3 Dill. 406. *Contra, In re* McClean, 26 Fed. 49.

27. Wilcoxen *v.* Chicago, etc., R. Co., 116 Fed. 444; Wiggins *v.* Bethune, 29 Fed. 51.

28. Mead *v.* Walker, 15 Wis. 499; Ruckman *v.* Palisade Land Co., 1 Fed. 367.

29. Mexican Cent. R. Co. *v.* Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. ed. 245.

30. Stout *v.* Rigney, 107 Fed. 545, 46 C. C. A. 459; Wiggins *v.* Bethune, 29 Fed. 51.

31. Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360; Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; McDonald *v.* Salem Capital Flour Mills Co., 31 Fed. 577, 12 Sawy. 492; Winn *v.* Gilmer, 27 Fed. 817; Kemna *v.* Brockhaus, 5 Fed. 762, 10 Biss.

ration cannot be citizens of different states.[32] A minor cannot acquire a separate domicile from that of his father during the latter's life, except by emancipation and a complete surrender of the parental control, as to the choice of domicile.[33] The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the state of his residence to vote and hold office there.[34]

128; Burnham *v.* Rangeley, 4 Fed. Cas. No. 2,176, 1 Woodb. & M. 7; Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101; Cooper *v.* Galbraith, 6 Fed. Cas. No. 3,193, 3 Wash. 546.

Evidence of citizenship.— The exercise of the right of suffrage by a citizen of the United States is conclusive evidence of his citizenship. Caldwell *v.* Firth, 91 Fed. 177, 33 C. C. A. 439; McDonald *v.* Salem Capital Flour Mills Co., 31 Fed. 577, 12 Sawy. 492; State Sav. Assoc. *v.* Howard, 31 Fed. 433; Sanger *v.* Seymour, 25 Fed. 289; Rabaud *v.* D'Wolf, 20 Fed. Cas. No. 11,519, 1 Paine 580. But voting in a party primary, and membership in a local political committee, are not conclusive evidence of citizenship. Gaddie *v.* Mann, 147 Fed. 955 [*reversed* on other grounds in 158 Fed. 42, 88 C. C. A. 1]. The exercise of the right of suffrage is not indispensable to prove citizenship. Shelton *v.* Tiffin, 6 How. (U. S.) 163, 12 L. ed. 387; Marks *v.* Marks, 75 Fed. 321. Residence alone, which is not shown to be permanent, is not conclusive of citizenship. Stoker *v.* Leavenworth, 7 La. 390; Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 480, 28 S. E. 909; Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360; Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. ed. 837; Shelton *v.* Tiffin, *supra*; Corel *v.* Chicago, etc., R. Co., 123 Fed. 452; Adams *v.* Shirk, 117 Fed. 801, 55 C. C. A. 25; Illinois L. Ins. Co. *v.* Shenehon, 109 Fed. 674; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Blair *v.* Silver Peak Mines, 93 Fed. 332, 84 Fed. 737; Nichols *v.* Nichols, 92 Fed. 1; Caldwell *v.* Firth, 91 Fed. 177, 33 C. C. A. 439; Alabama, etc., R. Co. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207; Chiatovich *v.* Hanchett, 78 Fed. 193; Brisenden *v.* Chamberlain, 53 Fed. 307; Rivers *v.* Bradley, 53 Fed. 305; McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Sanger *v.* Seymour, 25 Fed. 289; Woolridge *v.* McKenna, 8 Fed. 650; Kemna *v.* Brockhaus, 5 Fed. 762, 10 Biss. 128; Butler *v.* Farnsworth, 4 Fed. Cas. No. 2,240, 4 Wash. 101; Pond *v.* Vermont Valley R. Co., 19 Fed. Cas. No. 11,265, 12 Blatchf. 280. A statement in a document signed by him that a person is "of" a specified state is evidence that he is a citizen of the same (Rucker *v.* Bolles, 80 Fed. 504, 25 C. C. A. 600), but does not estop him from proving the contrary (Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360; Illinois L. Ins. Co. *v.* Shenehon, 109 Fed. 674).

A citizen of Cuba is an alien, and may sue in a circuit court of the United States, or may remove to such court a suit brought against him, in the cases in which an alien might so sue or remove. Betancourt *v.* Mutual Reserve Fund L. Assoc., 101 Fed. 305.

Change of residence.— The fact that a plaintiff has changed his residence and citizenship for the purpose of bringing suit in the federal court does not divest jurisdiction, if the change has been actually made (Robertson *v.* Carson, 19 Wall. (U. S.) 94, 106, 22 L. ed. 178; Wiemer *v.* Louisville Water Co., 130 Fed. 244; Briggs *v.* French, 4 Fed. Cas. No. 1,871, 2 Sumn. 251; Case *v.* Clarke, 5 Fed. Cas. No. 2,490, 5 Mason 70; Catlett *v.* Pacific Ins. Co., 5 Fed. Cas. No. 2,517, 1 Paine 594; Cooper *v.* Galbraith, 6 Fed. Cas. No. 3,193, 3 Wash. 546), without any intention to return (Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Alabama, etc., R. Co. *v.* Carroll, 84 Fed. 772, 28 C. C. A. 207; Chambers *v.* Prince, 75 Fed. 176; Allen *v.* Southern California R. Co., 70 Fed. 370; Kingman *v.* Holthaus, 59 Fed. 305; King *v.* U. S., 59 Fed. 9).

32. Nichols *v.* Nichols, 92 Fed. 1; Hatch *v.* Ferguson, 57 Fed. 959; Poppenhauser *v.* India-Rubber Comb Co., 14 Fed. 707. See Jenns *v.* Landes, 85 Fed. 801; Comitis *v.* Parkerson, 56 Fed. 556, 22 L. R. A. 148. *Contra*, Gordon *v.* Yost, 140 Fed. 79; Water-Town *v.* Greaves, 112 Fed. 183, 50 C. C. A. 172, 56 L. R. A. 865.

Upon the insanity of a husband and his confinement in an asylum his wife becomes the head of the family, and may change the place of residence and citizenship to another state, although her husband remains in confinement in the state where they formerly were citizens, and were domiciled. McKnight *v.* Dudley, 148 Fed. 204, 78 C. C. A. 162.

33. Woolridge *v.* McKenna, 8 Fed. 650, where the father, after the mother's death, had placed the child in question under the permanent care of her aunt at the latter's residence in another state.

34. Orosco *v.* Gagliardo, 22 Cal. 83; Creagh *v.* Equitable L. Assur. Soc., 88 Fed. 1; Maloy *v.* Duden, 25 Fed. 673; Baird *v.* Bryne, 2 Fed. Cas. No. 757, 3 Wall. Jr. 1; Lanz *v.* Randall, 14 Fed. Cas. No. 8,080, 4 Dill. 425, 14 Alb. L. J. (N. Y.) 363, 3 N. Y. Wkly. Dig. 307.

The marriage in the United States, of a citizen thereof, to a foreign subject, with whom she lived in the United States until his death, did not make her an alien, although her husband was never naturalized. Comites *v.* Parkerson, 56 Fed. 556, 22 L. R. A. 148.

When a naturalized citizen took an oath of allegiance to the sovereign of a foreign country, of whom he had never been a subject, and accepted from that king an appointment as consul, but continued to reside in the United States, it was held that he remained

2. Corporations. A corporation, which is defendant to a case where the necessary difference of citizenship exists, may remove the same.[35] For the purposes of the jurisdiction of the federal court, either originally or upon removal, a corporation is treated as if it were a citizen of the state by or under the laws of which it was chartered, or as is generally said, it is conclusively presumed to be composed of the citizens of such state.[36] Where a corporation, originally created in one state, afterward becomes compulsorily a corporation of another state for some purpose, in order to extend its powers, and it is engaged in interstate commerce, it should be treated, for the purpose of jurisdiction, as composed of citizens of the state which first gave it corporate existence;[37] but unless the case arises

an American citizen, and could not remove a case because of alienage. Fish *v.* Stoughton, 2 Johns. Cas. (N. Y.) 407.

35. *Indiana.*— Western Union Tel. Co. *v.* Dickinson, 40 Ind. 444, 13 Am. Rep. 295.

Missouri.— Stanley *v.* Chicago, etc., R. Co., 62 Mo. 508.

New York.— Barrowcliffe *v.* La Caisse Generale des Assurance, 58 How. Pr. 131, 1 N. Y. City Ct. 151.

Ohio.— Shelby *v.* Hoffman, 7 Ohio St. 450.

Pennsylvania.— Fox *v.* American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. Ct. 207.

United States.— Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078; Butler Bros. Shoe Co. *v.* U. S. Rubber Co., 156 Fed. 1, 84 C. C. A. 167; Purcell *v.* British Land, etc., Co., 42 Fed. 465; Barney *v.* Globe Bank, 2 Fed. Cas. No. 1,031, 5 Blatchf. 107; Terry *v.* Imperial F. Ins. Co., 23 Fed. Cas. No. 13,838, 3 Dill. 408.

See 42 Cent. Dig. tit. "Removal of Causes," § 64.

36. Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078; St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802; National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497, 11 L. ed. 353.

The same presumption exists as regards a corporation chartered by or under the laws of a foreign country. Barrowcliffe *v.* La Caisse Generale des Assurance, 58 How. Pr. (N. Y.) 131, 1 N. Y. City Ct. 151; Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195; Purcell *v.* British Land, etc., Co., 42 Fed. 465; Terry *v.* Imperial F. Ins. Co., 23 Fed. Cas. No. 13,838, 3 Dill. 408. Where, however, stock-holders in a corporation are themselves joined with or against it as parties to a suit, the presumption does not extend to them in their individual capacity, although it still exists so far as the corporation is concerned. Doctor *v.* Harrington, 196 U. S. 579, 25 S. Ct. 355, 49 L. ed. 606; Utah-Nevada Co. *v.* De Lamar, 133 Fed. 113, 66 C. C. A. 179; Dodd *v.* Louisville Bridge Co., 130 Fed. 186; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Bacon *v.* Robertson, 18 How. 480, 15 L. ed. 499; Dodge *v.* Woolsey, 18 How. 331, 15 L. ed. 401. The location of the principal or usual place of business of the corporation is immaterial (U. S. *v.* S. P. Shotter Co., 110 Fed. 1; Phinizy *v.* Augusta, etc., R. Co., 56 Fed. 273), even if all of its business is transacted, and all of its offices and places of business are situated outside of the state where it was chartered (Pacific R. Co. *v.* Missouri Pac. R. Co., 23 Fed. 565), and although it was organized for the purpose of doing business in other states (Baughman *v.* National Water-Works Co., 46 Fed. 4). No such presumption exists in the case of a *de facto* corporation, which never acquired a legal existence. Gastonia Cotton Mfg. Co. *v.* W. L. Wells Co., 128 Fed. 369, 63 C. C. A. 111 [*reversing* 118 Fed. 190, but *reversed* on other grounds in 198 U. S. 177, 25 S. Ct. 640, 49 L. R. A. 1003].

A municipal corporation is considered to be a citizen of the state within which it is situated. New Orleans *v.* Sheppard, 10 La. Ann. 268; Mercer County *v.* Cowles, 7 Wall. (U. S.) 118, 19 L. ed. 87; Loeb *v.* Columbia Tp., 91 Fed. 37; Ysleta *v.* Canada, 67 Fed. 6.

A national banking association, so far as the jurisdiction of the federal courts is concerned, stands in the same position as a citizen of the state in which it is located. 24 U. S. St. at L. 554; Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 12 S. Ct. 325, 35 L. ed. 1144; Farmers' Nat. Bank *v.* McElhinney, 42 Fed. 801; Grand Haven First Nat. Bank *v.* Forest, 40 Fed. 705.

37. Illinois Cent. R. Co. *v.* Hibbs, 78 S. W. 1116, 25 Ky. L. Rep. 1899; Lewis *v.* Maysville, etc., R. Co., 76 S. W. 526, 25 Ky. L. Rep. 948; Wilson *v.* Southern R. Co., 64 S. C. 162, 36 S. E. 701, 41 S. E. 971 [*overruling* Matthis *v.* Southern R. Co., 53 S. C. 246, 31 S. E. 240]; Calvert *v.* Southern R. Co., 64 S. C. 139, 36 S. E. 750, 41 S. E. 963; Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078 [*reversing* 129 N. C. 336, 40 S. E. 91]; Louisville, etc., R. Co. *v.* Louisville Banking Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802; Goodwin *v.* Boston, etc., R. Co., 127 Fed. 986; Walters *v.* Chicago, etc., R. Co., 104 Fed. 337; Taylor *v.* Illinois Cent. R. Co., 89 Fed. 119; Stephens *v.* St. Louis, etc., R. Co., 47 Fed. 530, 14 L. R. A. 184; Callahan *v.* Louisville, etc., R. Co., 11 Fed. 536. But see remarks of Lowell, J., in Goodwin *v.* New York, etc., R. Co., 124 Fed. 358.

under the constitution and laws of the United States, the federal court cannot adjudicate its rights or liabilities as a corporation of a state, citizens of which are upon the other side of the controversy.[38] In case of a consolidation of corporations chartered by different states, if the consolidation creates a new corporate entity and is made under the laws of a single state, it seems that the new company must be treated as a citizen of that state alone.[39] A general law enabling foreign corporations of a certain class to transact business in a state upon compliance with certain conditions, or a special enabling law to such effect, does not prevent a corporation which complies with the same from removing a suit against it because of a difference of citizenship between it and a citizen of such a state.[40]

Otherwise, where a corporation is chartered by two or more states; it should be treated, for the purpose of jurisdiction, as composed of citizens of the state where the suit was brought. Horne *v.* Boston, etc., R. Co., 62 N. H. 454; Alleghany County *v.* Cleveland, etc., R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Patch *v.* Wabash R. Co., 207 U. S. 277, 28 S. Ct. 80, 52 L. ed. 204; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Goodwin *v.* Boston, etc., R. Co., 127 Fed. 986; Goodwin *v.* New York, etc., R. Co., 124 Fed. 358; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Walters *v.* Chicago, etc., R. Co., 104 Fed. 337; Smith *v.* New York, etc., R. Co., 96 Fed. 504; Taylor *v.* Illinois Cent. R. Co., 89 Fed. 119; Phinizy *v.* Augusta, etc., R. Co., 56 Fed. 273; Page *v.* Fall River, etc., R. Co., 31 Fed. 257; Union Trust Co. *v.* Rochester, etc., R. Co., 29 Fed. 609; Colglazier *v.* Louisville, etc., R. Co., 22 Fed. 568; Horne *v.* Boston, etc., R. Co., 18 Fed. 50; Minot *v.* Philadelphia, etc., R. Co., 17 Fed. Cas. No. 9,645, 2 Abb. 323, 7 Phila. (Pa.) 555 [*affirmed* in 18 Wall. 206, 21 L. ed. 888]; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 21 Fed. Cas. No. 12,237, 9 Biss. 144, 9 Reporter 103. The rule may be different where the cause of action arose in another state from that in which the suit is brought. Patch *v.* Wabash R. Co., 207 U. S. 277, 28 S. Ct. 80, 52 L. ed. 204.

Where the foreign corporation, subsequent to the injury which caused the suit, became a citizen of the state where the injury was done, it was held that for the purposes of the suit it would be treated as a foreign corporation. Mowery *v.* Southern R. Co., 129 N. C. 351, 40 S. E. 88.

38. Louisville, etc., R. Co. *v.* Louisville Banking Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081.

39. Westheider *v.* Wabash R. Co., 115 Fed. 840. See Staton *v.* Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794; Winn *v.* Wabash R. Co., 118 Fed. 55.

If such consolidation is made under the laws of both the states, the consolidated corporation is to be treated as a citizen of both, and when sued in either state by a citizen thereof, it has no right of removal. Wasley *v.* Chicago, etc., R. Co., 147 Fed. 608; Goodwin *v.* Boston, etc., R. Co., 127 Fed. 986; Goodwin *v.* New York, etc., R. Co., 124 Fed. 358; Paul *v.* Baltimore, etc., R. Co., 44 Fed. 513; Johnson *v.* Philadelphia, etc., R. Co., 9 Fed. 6; Chicago, etc., R. Co. *v.* Lake Shore, etc., R. Co., 5 Fed. 19, 10 Biss. 122. But see Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363, holding that in such a case the corporation may sue in a federal court a citizen of the state where such court is situated. The circuit court has jurisdiction of a suit against it in one of those states by a citizen of another. Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Wasley *v.* Chicago, etc., R. Co., 147 Fed. 608; Winn *v.* Wabash R. Co., 118 Fed. 55; Smith *v.* New York, etc., R. Co., 96 Fed. 504; Missouri Pac. R. Co. *v.* Meeh, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Williamson *v.* Krohn, 66 Fed. 655, 13 C. C. A. 668; Wheeling *v.* Baltimore, 29 Fed. Cas. No. 17,502, 1 Hughes 90.

Where there is a merger, one corporation remaining in existence and the other being absorbed in the same, the company continues to be a citizen of the same state as that of the former. Lee *v.* Atlantic Coast Line R. Co., 150 Fed. 775.

40. Morton *v.* New York Mut. L. Ins. Co., 105 Mass. 141, 7 Am. Rep. 505; Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 472; Newhall *v.* Atlantic F. & M. Ins. Co., 8 Phila. (Pa.) 106; Goodloe *v.* Tennessee Coal, etc., Co., 117 Fed. 348; Amsden *v.* Norwich Union F. Ins. Soc., 44 Fed. 515; Scott *v.* Texas Land, etc., Co., 41 Fed. 225; Owen *v.* New York L. Ins. Co., 18 Fed. Cas. No. 10,631, 1 Hughes 322.

Acts not preventing removal.—The appointment of an attorney in a foreign state with a consent that process served upon him shall bind the corporation (Morton *v.* New York Mut. L. Ins. Co., 105 Mass. 141, 7 Am. Rep. 505; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 472; Fox *v.* American Casualty Ins., etc., Co., 2 Pa. Dist. 158, 12 Pa. Co. Ct. 207; Newhall *v.* Atlantic F. & M. Ins. Co., 8 Phila. (Pa.) 106; Amsden *v.* Norwich Union F. Ins. Soc., 44 Fed. 515; Scott *v.* Texas Land, etc., Co., 41 Fed. 225; Fales *v.* Chicago, etc., R. Co., 32 Fed. 673; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105; Lee *v.* Ætna Ins. Co., 14 Fed. Cas. No.

3. Unincorporated Stock Companies. There is no presumption, as regards the citizenship of members of unincorporated joint stock companies, even where the law under which they were organized authorizes them to sue and be sued in the name of one or more of their officers; and a case where one of them is a party cannot be removed, because of diverse citizenship, unless all the members of such company are citizens of different states from those of all the parties on the opposite side of the controversy.[41]

4. Partnerships. There is no presumption that the members of a partnership, whether general or limited, are citizens of the state where it was organized; and the citizenship of all its members must be considered, when a removal is sought in a suit to which it is a party, even when the state law authorizes them to sue and be sued in the firm-name.[42]

D. Assignees of Rights of Citizens of the Same Citizenship, as Defendant. Under the Judiciary Act of 1875 it was held that the exception of suits by assignees, which could not have been there instituted by the assignors, from the original jurisdiction of the circuit courts of the United States, did not

8,181; Owen *v.* New York L. Ins. Co., 18 Fed. Cas. No. 10,631, 1 Hughes 322), the operation of a railroad in another state under a lease (Treadway *v.* Chicago, etc., R. Co., 21 Iowa 351; Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; Willson *v.* Winchester, etc., R. Co., 99 Fed. 642, 41 C. C. A. 215 [*affirming* 82 Fed. 15]; Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. 353; Crane *v.* Chicago, etc., R. Co., 20 Fed. 402 [*affirmed* in 113 U. S. 424, 5 S. Ct. 578, 28 L. ed. 1064]; Callahan *v.* Louisville, etc., R. Co., 11 Fed. 536), or under a purchase from a domestic corporation (Morgan *v.* East Tennessee, etc., R. Co., 48 Fed. 705; Conn *v.* Chicago, etc., R. Co., 48 Fed. 177 [*distinguishing* Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812]; Chicago, etc., R. Co. *v.* Dakota County, 28 Fed. 219; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46; Williams *v.* Missouri, etc., R. Co., 29 Fed. Cas. No. 17,728, 3 Dill. 267), the filing in the office of the secretary of state of duly authenticated copies of its charter and by-laws (Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078 [*reversing* 129 N. C. 336, 40 S. E. 91]; St. Louis, etc., R. Co. *v.* Indianapolis, etc., R. Co., 118 U. S. 630, 7 S. Ct. 24, 30 L. ed. 284; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Chicago, etc., R. Co. *v.* Minnesota, etc., R. Co., 29 Fed. 337), the subsequent acceptance of a paper described as a charter issued by the secretary of state and reciting a merger, union, and consolidation of a domestic with a foreign corporation (Lee *v.* Atlantic Coast Line R. Co., 150 Fed. 775), legislative recognition of the existence within a state of a corporation chartered elsewhere (Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Markwood *v.* Southern R. Co., 65 Fed. 817; Chapman *v.* Alabama Great Southern R. Co., 59 Fed. 370; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170 [*following* Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354]; Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161; Moore *v.* Chicago, etc., R. Co., 21 Fed. 817; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46), or even the legislative grant of a charter making it a domestic corporation, when such grant is not accepted (Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 136 U. S. 356, 10 S. Ct. 1004, 34 L. ed. 363; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83), do not make a foreign corporation a citizen of such other state and cut off its right of removal.

41. Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. ed. 800; Dinsmore *v.* Philadelphia R. Co., 7 Fed. Cas. No. 3,921, 11 Phila. (Pa.) 483. *Contra*, Saunders *v.* Adams Express Co., 136 Fed. 494; Whitman *v.* Hubbell, 30 Fed. 81; Baltimore, etc., R. Co. *v.* Adams Express Co., 22 Fed. 404; Fargo *v.* Louisville, etc., R. Co., 6 Fed. 787, 10 Biss. 273; Maltz *v.* American Express Co., 16 Fed. Cas. No. 9,002, 1 Flipp. 611. But see Boatner *v.* American Express Co., 122 Fed. 714, where the treasurer of such a joint stock association was allowed to remove a suit brought against him under section 25 of the Kentucky civil code of practice, authorizing one or more of numerous parties to sue or defend for the benefit of all.

42. Great Southern Fireproof Hotel Co. *v.* Jones, 177 U. S. 449, 20 S. Ct. 690, 44 L. ed. 842 [*reversing* 86 Fed. 370, 30 C. C. A. 108, and *overruling* Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. 585, 30 C. C. A. 293; Carnegie *v.* Hulbert, 53 Fed. 10, 3 C. C. A. 391; Bushnell *v.* Park, 46 Fed. 209]; Fred Macey Co. *v.* Macey, 135 Fed. 725, 68 C. C. A. 363; Jewish Colonization Assoc. *v.* Solomon, 125 Fed. 994.

Where a copartnership was sued alone by its firm-name, under section 3468 of the Iowa code, authorizing a suit to be brought either against a partnership or its members or both, the members of the firm not being named in plaintiff's petition, which alleged defendant to be a corporation; it was held that the suit could not be removed by the members of the firm, who were citizens of a different state from that of plaintiff. Ralya Market Co. *v.* Armour, 102 Fed. 530.

affect the right of removal; and that the right of a defendant to remove was not affected by the citizenship of his assignor.[43] Whether this exception extends to removal cases, under the act of 1887, has not been authoritatively decided.[44]

VI. SEPARABLE CONTROVERSIES.

A. In General. The Judiciary Act of 1887, as originally enacted, and as amended in 1888, provides that if, "in any suit [which would otherwise be removable] there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." [45] It is usually although not universally held that this refers to a case in which there are two controversies, one of which is separable from the other.[46] The removal

43. Leutze *v.* Butterfield, 7 Daly (N. Y.) 24, 1 Abb. N. Cas. 367, 52 How. Pr. 376; Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 L. ed. 76; Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 724; Bell *v.* Noonan, 19 Fed. 225; Rosenblatt *v.* Reliance Lumber Co., 18 Fed. 705; Waterbury *v.* Laredo, 29 Fed. Cas. No. 17,252, 3 Woods 371.

Where by the state practice the assignee of a cause of action sued in his own name, but by the practice of the federal courts the action could only be sustained in the name of his assignor, and the latter was a citizen of the same state as defendant, it was held that there could be no removal. Anderson *v.* Manufacturers' Bank, 14 Abb. Pr. (N. Y.) 436.

44. Flynn *v.* Fidelity, etc., Co., 145 Fed. 265; Sharkey *v.* Port Blakely Mill Co., 92 Fed. 425. *Compare Ex p.* Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264.

45. 25 U. S. St. at L. p. 434.

46. Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055; Fletcher *v.* Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. ed. 679; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455; Blackburn *v.* Blackburn, 142 Fed. 90; Huntington *v.* Pinney, 126 Fed. 237; Yarnell *v.* Felton, 102 Fed. 369; Mutual Reserve Fund Life Assoc. *v.* Farmer, 77 Fed. 929, 23 C. C. A. 574; Watson *v.* Asbury Park, etc., St. R. Co., 73 Fed. 1; Thompson *v.* Chicago, etc., R. Co., 60 Fed. 773; Rogers *v.* Van Nortwick, 45 Fed. 513; Arkansas Valley Smelting Co. *v.* Cowenhoven, 41 Fed. 450; Sexton *v.* Seelye, 39 Fed. 705; Western Union Tel. Co. *v.* Brown, 32 Fed. 337. *Contra*, Hunter *v.* Conrad, 85 Fed. 803; Garner *v.* Providence Second Nat. Bank, 66 Fed. 369; Stanbrough *v.* Cook, 38 Fed. 369, 3 L. R. A. 400; Grindrod *v.* Crine, 22 Fed. 257; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. 85, 22 Blatchf. 334; Arapahoe County *v.* Kansas Pac. R. Co., 1 Fed. Cas. No. 502, 4 Dill. 277.

The separable controversy must be real and substantial, and not a mere fanciful claim which has no support in the allegations of the bill. MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648. See Snow *v.* Smith, 88 Fed. 657. Where there are separate remedies against the several parties, upon the same cause of action, there is no separable controversy. Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195; Ayers *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693; Winchester *v.* Loud, 108 U. S. 130, 2 S. Ct. 311, 27 L. ed. 677; Gudger *v.* Western North Carolina R. Co., 21 Fed. 81. And see Blunt *v.* Southern R. Co., 155 Fed. 499. Matters which are mere incidents to the principal subject-matter of the suit do not present a separable controversy. Republic F. Ins. Co. *v.* Keogh, 23 Hun (N. Y.) 644; Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. ed. 528; Shainwald *v.* Lewis, 108 U. S. 158, 2 S. Ct. 385, 27 L. ed. 691 [*affirming* 5 Fed. 510, 6 Sawy. 585]; MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648; Wilder *v.* Virginia, etc., Steel, etc., Co., 46 Fed. 676; New York *v.* New Jersey Steam-Boat Transp. Co., 24 Fed. 817. *Contra*, Langdon *v.* Fogg, 18 Fed. 5, 21 Blatchf. 392. But see Campbell *v.* Milliken, 119 Fed. 981. Collateral issues connected with the case do not destroy the right of removal. Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330.

There is a clear distinction between separable controversies as contemplated by the statute and separate and wholly distinct controversies only joined in one proceeding by express statutory permission; and in the latter class of cases nothing will be removed, except the controversy between the removing party and plaintiff. Deepwater R. Co. *v.* Western Pocahontas Coal, etc., Co., 152 Fed. 824.

The case must be separable into parts, so that in one of them a controversy will be presented wholly between citizens of different states, which can be fully determined, without the presence of the other parties.

Georgia.— Carter *v.* Scott, 82 Ga. 297, 8 S. E. 421.

Iowa.— Burch *v.* Davenport, etc., R. Co., 46 Iowa 449, 26 Am. Rep. 150.

takes the whole case, not merely the separable controversy, into the federa court.[47]

B. Determination by Plaintiff's Pleading. The separability of the controversy must be determined on plaintiff's pleading alone,[48] at least when no cross bill or counter-claim has been interposed.[49]

C. Parties to Controversy. A separable controversy to which an alien is a party cannot be thus removed; whether the alien is a plaintiff,[50] or a defendant.[51]

Louisiana.— Townsend *v.* Sykes, 38 La. Ann. 410.

New Jersey.—National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71 [*affirmed* in 52 N. J. Eq. 590, 33 Atl. 50].

United States.— Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. ed. 528; Winchester *v.* Loud, 108 U. S. 130, 2 S. Ct. 311, 27 L. ed. 677; Fraser *v.* Jennison, 106 U. S. 191, 1 S. Ct. 171, 27 L. ed. 131; Yulee *v.* Vose, 99 U. S. 539, 25 L. ed. 355; Gardner *v.* Brown, 21 Wall. 36, 22 L. ed. 527; Snow *v.* Smith, 88 Fed. 657; Scoutt *v.* Keck, 73 Fed. 900, 20 C. C. A. 103; McNulty *v.* Connecticut Mut. L. Ins. Co., 46 Fed. 305; Capital City Bank *v.* Hodgin, 22 Fed. 209; Gudger *v.* Western North Carolina R. Co., 21 Fed. 81; New Jersey Zinc, etc., Co. *v.* Trotter, 18 Fed. 337; Connell *v.* Utica, etc., R. Co., 13 Fed. 241; Maine *v.* Gilman, 11 Fed. 214; Bixby *v.* Couse, 3 Fed. Cas. No. 1,451, 8 Blatchf. 73.

See 42 Cent. Dig. tit. "Removal of Causes," § 94.

47. Barney *v.* Latham, 3 Ky. L. Rep. 144; Swan *v.* Mansfield, etc., R. Co., 7 Ohio Dec. (Reprint) 669, 4 Cinc. L. Bul. 898; Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514; Atlantic, etc., Fertilizing Co. *v.* Carter, 88 Fed. 707; Corbin *v.* Boies, 18 Fed. 3; Sheldon *v.* Keokuk Northern Line Packet Co., 1 Fed. 789, 9 Biss. 307; Carraher *v.* Brennan, 5 Fed. Cas. No. 2,441, 7 Biss. 497; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 8 Fed. Cas. No. 4,665, 9 Biss. 133; Girardey *v.* Moore, 10 Fed. Cas. No. 5,462, 3 Woods 397; Hervey *v.* Illinois Midland R. Co., 12 Fed. Cas. No. 6,434, 7 Biss. 103. See St. Louis, etc., R. Co. *v.* Ransom, 29 Kan. 298. But see Manufacturers' Commercial Co. *v.* Brown Alaska Co., 148 Fed. 308.

48. Southern R. Co. *v.* Sittasen, (Ind. App. 1905) 74 N. E. 898; Illinois Cent. R. Co. *v.* Harris, 85 Miss. 15, 38 So. 225; National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71 [*affirmed* in 52 N. J. Eq. 590, 33 Atl. 50]; Blunt *v.* Southern R. Co., 155 Fed. 499; Thomas *v.* Great Northern R. Co., 147 Fed. 83, 77 C. C. A. 255; Harley *v.* Home Ins. Co., 125 Fed. 792; Fogarty *v.* Southern Pac. Co., 123 Fed. 973; Dougherty *v.* Yazoo, etc., R. Co., 122 Fed. 205, 58 C. C. A. 651; Union Terminal R. Co. *v.* Chicago, etc., R. Co., 119 Fed. 209; MacGinnis *v.* Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648; Riser *v.* Southern R. Co., 116 Fed. 215; Ames *v.* Chicago, etc., R. Co., 39 Fed. 881. See also Stratton Cripple Creek Min., etc., Co. *v.* Ellison, 42 Colo. 498, 94 Pac. 303; Staton *v.* Atlantic Coast Line R. Co., 144 N. C. 135, 56 S. E. 794.

Allegations in the petition for removal of the cause are immaterial. Fogarty *v.* Southern Pac. Co., 123 Fed. 973; Hazard *v.* Robinson, 21 Fed. 193. See also St. Louis Southwestern R. Co. *v.* Adams, (Ark. 1908) 112 S. W. 186.

The pleading by defendant, either by cross bill, counter-claim, or otherwise, of a separate claim, which is purely a matter of defense, or is directly connected with plaintiff's original pleading, or the answer, does not present a separable controversy. Wilson *v.* Oswego Tp., 151 U. S. 56, 14 S. Ct. 259, 38 L. ed. 70; Maish *v.* Bird, 48 Fed. 607; Shaver *v.* Hardin, 30 Fed. 801; Rumsey *v.* Call, 28 Fed. 769; Brande *v.* Gilchrist, 18 Fed. 465; Donohoe *v.* Mariposa Land, etc., Co., 7 Fed. Cas. No. 3,989, 5 Sawy. 163. The interposition of separate defenses by answers will not make a case removable (Louisville, etc., R. Co. *v.* Wangelin, 132 U. S. 599, 10 S. Ct. 203, 33 L. ed. 473; Little *v.* Giles, 118 U. S. 596, 7 S. Ct. 34, 30 L. ed. 269 [*reversing* 13 Fed. 100, 2 McCrary 370]; Plymouth Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232; Core *v.* Vinal, 117 U. S. 347, 6 S. Ct. 767, 29 L. ed. 912; Sloane *v.* Anderson, 117 U. S. 275, 6 S. Ct. 730, 29 L. ed. 899; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388 [*affirming* 21 Fed. 593, 22 Fed. 801]; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1061, 29 L. ed. 331; Putnam *v.* Ingraham, 114 U. S. 57, 5 S. Ct. 746, 29 L. ed. 65; Louisville, etc., R. Co. *v.* Ide, 114 U. S. 52, 5 S. Ct. 735, 29 L. ed. 63; American Bridge Co. *v.* Hunt, 130 Fed. 302, 64 C. C. A. 548; Robbins *v.* Ellenbogen, 71 Fed. 4, 18 C. C. A. 83; Thurber *v.* Miller, 67 Fed. 371, 14 C. C. A. 432; Arrowsmith *v.* Nashville, etc., R. Co., 57 Fed. 165; O'Harrow *v.* Henderson, 52 Fed. 769; Patchin *v.* Hunter, 38 Fed. 51), even though one of them, in which all the defendants are not interested, arises under the constitution or laws of the United States (Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055).

49. See Hack *v.* Chicago, etc., R. Co., 23 Fed. 356.

50. Creagh *v.* Equitable L. Assur. Soc., 88 Fed. 1; Deakin *v.* Lea, 7 Fed. Cas. No. 3,695, 11 Biss. 27. *Contra*, Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446.

51. Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195; King *v.* Cornell, 106 U. S. 395, 1 S. Ct. 312, 27 L. ed. 60; Tracy *v.* Morel, 88 Fed. 801; Insurance Co. of North America *v.* Delaware Mut. Ins.

Nor can a separable controversy to which a state is a party be removed.[52] A plaintiff cannot remove a separable controversy in any case.[53] A defendant who is a resident of the state where the suit is brought cannot remove a separable controversy in the same.[54] An intervener,[55] or a party brought in on the motion of plaintiff,[56] or defendant,[57] may remove a separable controversy, when the necessary difference of citizenship exists between him and the party on the opposite side thereof, provided he presents some new and independent interest or question; otherwise not.[58] There can be no removal when an indispensable party to the

Co., 50 Fed. 243; Woodrum *v.* Clay, 33 Fed. 897.

52. Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907; Texas *v.* Day Land, etc., Co., 49 Fed. 593.

53. Western Union Tel. Co. *v.* Brown, 32 Fed. 337.

54. Thurber *v.* Miller, 67 Fed. 371, 14 C. C. A. 432. *Contra*, Stanbrough *v.* Cook, 38 Fed. 369, 3 L. R. A. 400.

The citizenship of a defendant who may be a proper, but who is not an indispensable, party to the controversy will not prevent such a removal. Stewart *v.* Mordecai, 40 Ga. 1, 2 Am. Rep. 55; Geer *v.* Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 1122; Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514, 3 Ky. L. Rep. 144; Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288; Taylor County Ct. *v.* Baltimore, etc., R. Co., 35 Fed. 161; Stevens *v.* Richardson, 9 Fed. 191, 20 Blatchf. 53; Chester *v.* Wellford, 5 Fed. Cas. No. 2,662, 2 Flipp. 347. The fact that one of defendants has made a default in appearing or pleading (Fairchild *v.* Durand, 8 Abb. Pr. (N. Y.) 305; Brooks *v.* Clark, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; Fletcher *v.* Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. ed. 679 [*affirming* 24 Fed. 305]; Putnam *v.* Ingraham, 114 U. S. 57, 5 S. Ct. 746, 29 L. ed. 65; Hax *v.* Caspar, 31 Fed. 499. But see Robert *v.* Pineland Club, 139 Fed. 1001), or has appeared and disclaimed (Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Goodnow *v.* Litchfield, 47 Fed. 753; Dow *v.* Bradstreet Co., 46 Fed. 824; Hax *v.* Caspar, 31 Fed. 499; New Jersey Zinc Co. *v.* Trotter, 18 Fed. Cas. No. 10,167), or that judgment has been entered against one of them before another was served with process (Brooks *v.* Clark, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482) does not make a separable controversy, as regards the other, which will justify a removal. That no process has been served upon one of two or more defendants does not create a separable controversy. Brown *v.* Trousdale, 138 U. S. 389, 11 S. Ct. 308, 34 L. ed. 987; Patchin *v.* Hunter, 38 Fed. 51. *Contra*, Tremper *v.* Schwabacher, 84 Fed. 413; Wormser *v.* Dahlman, 30 Fed. Cas. No. 18,048, 16 Blatchf. 319, 7 Reporter 740, 57 How. Pr. (N. Y.) 286.

Any one or more of the non-resident defendants interested in a separable controversy may remove it. Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907; Grindrod *v.* Crine, 22 Fed. 257; Greene *v.* Klinger, 10 Fed. 689; Field *v.* Lownsdale, 9 Fed. Cas. No. 4,769, Deady 288; Fields *v.* Lamb, 9 Fed. Cas. No. 4,775, Deady 430; Lewis *v.* White, 15 Fed. Cas. No. 8,335; McGinnity *v.* White, 16 Fed. Cas. No. 8,802, 3 Dill. 350. A defendant not interested therein cannot. Rand *v.* Walker, *supra*. Where defendants are interested in separate parts of the same subject-matter, no separable controversy is presented. *In re* Chicago, 64 Fed. 897; Rock Rapids Independent Dist. *v.* Rock Rapids Bank, 48 Fed. 2; Freidler *v.* Chotard, 19 Fed. 227; Merchants' Nat. Bank *v.* Thompson, 4 Fed. 876; Temple *v.* Smith, 4 Fed. 392, 2 McCrary 226. Where a several liability is sought to be enforced against different defendants, a separable controversy exists between each of them and plaintiff. Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417; Manufacturers' Commercial Co. *v.* Brown Alaska Co., 148 Fed. 308; Youtsey *v.* Hoffman, 108 Fed. 693; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516. See also Stimson *v.* United Wrapping Mach. Co., 156 Fed. 298.

55. Mitchell *v.* Smale, 140 U. S. 406, 11 S. Ct. 819, 840, 35 L. ed. 442 [*distinguished* in Chicago, etc., R. Co, *v.* Martin, 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055]; Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337; American Nat. Bank *v.* National Ben., etc., Co., 70 Fed. 420; Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 25 Fed. 115; Hack *v.* Chicago, etc., R. Co., 23 Fed. 356; Snow *v.* Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394; Burdick *v.* Peterson, 6 Fed. 840, 2 McCrary 135.

Previous cases hold: That a landlord cannot intervene in an ejectment suit. Allin *v.* Robinson, 1 Fed. Cas. No. 249, 1 Dill. 119; *Ex p.* Girard, 10 Fed. Cas. No. 5,457, 3 Wall. Jr. 263; *Ex p.* Turner, 24 Fed. Cas. No. 14,245, 3 Wall. Jr. 258. That a person becoming interested in the land in controversy cannot intervene in and remove an action of trespass to try title. Farmers', etc., Nat. Bank *v.* Schuster, 86 Fed. 161, 29 C. C. A. 649. That indemnitors cannot remove. Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535, 7 S. Ct. 1265, 30 L. ed. 1235; Olds Wagon Works *v.* Benedict, 67 Fed. 1, 14 C. C. A. 285; Burnham *v.* Leoti First Nat. Bank, 53 Fed. 163, 3 C. C. A. 486; Ohlquist *v.* Farwell, 13 Fed. 305, 4 McCrary 401.

56. Jackson, etc., Co. *v.* Pearson, 60 Fed. 113.

57. Greene *v.* Klinger, 10 Fed. 689.

58. Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883; Davis *v.* Montgomery, 36 La. Ann. 874; Hebert *v.* Lefevre, 31 La. Ann. 363; Gudger *v.* Western North Carolina R. Co., 87 N. C. 325; Sifford *v.* Beaty, 12 Ohio St. 189; Kid-

controversy is a citizen of the same state as any party on the side opposite to him.[59] Where the parties are sued jointly and severally, it seems that a separable controversy exists.[60]

D. Particular Suits — 1. In General. If, in a particular suit, a separable controversy is presented, there may be a removal to a federal court.[61]

der *v.* Northwestern Mut. L. Ins. Co., 117 Fed. 997; Turnbull Wagon Co. *v.* Linthicum Carriage Co., 80 Fed. 4; Watson *v.* Asbury Park, etc., St. R. Co., 73 Fed. 1; Olds Wagon Works *v.* Benedict, 67 Fed. 1, 14 C. C. A. 285; Hakes *v.* Burns, 40 Fed. 33; Bronson *v.* St. Croix Lumber Co., 35 Fed. 634; Weller *v.* J. B. Pace Tobacco Co., 32 Fed. 860; Ellerman *v.* New Orleans, etc., R. Co., 8 Fed. Cas. No. 4,382, 2 Woods 120. *Contra*, Beecher *v.* Gillett, 3 Fed. Cas. No. 1,225, 1 Dill. 308.

One who intervenes for the purpose of asserting a lien prior to that of the original plaintiff occupies the attitude of an intervening plaintiff, and cannot remove the case on the ground that there is a separate controversy between him and the original plaintiff. *In re* San Antonio, etc., R. Co., 44 Fed. 145. *Contra*, Snow *v.* Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394.

A person who has been denied permission to intervene cannot obtain a removal. Bertha Zinc, etc., Co. *v.* Carico, 61 Fed. 132.

59. Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195 [*affirming* 91 Tenn. 537, 19 S. W. 755]; St. Louis, etc., R. Co. *v.* Wilson, 114 U. S. 60, 5 S. Ct. 738, 29 L ed. 66 [*affirming* 22 Fed. 3]; Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693. *Contra*, Barth *v.* Coler, 60 Fed. 466, 9 C. C. A. 81; Rogers *v.* Van Nortwick, 45 Fed. 513; Vinal *v.* Continental Constr., etc., Co., 35 Fed. 673; Perrin *v.* Lepper, 26 Fed. 545; Lyddy *v.* Gano, 26 Fed. 177; Burke *v.* Flood, 1 Fed. 541, 6 Sawy. 220.

60. Boyd *v.* Gill, 19 Fed. 145, 21 Blatchf. 543; Langdon *v.* Fogg, 18 Fed. 5, 21 Blatchf. 392. But see Louisville, etc., R. Co. *v.* Gollihur, 40 Ind. App. 480, 82 N. E. 492.

Joint tort-feasors.—A plaintiff may sue tort-feasors jointly or severally, and, if he elects to sue them jointly, he has the right to have the case tried as for a joint tort, and no separable controversy is presented. White *v.* Southern R. Co., 146 N. C. 340, 59 S. E. 1042. See also Davis *v.* Rexford, 146 N. C. 418, 59 S. E. 1002.

61. **Controversies that are separable.**—The following cases present separable controversies and consequently may be removed: A suit for a conveyance of an undivided interest in lands held by a corporation together with an accounting by such corporation of a similar proportion of the proceeds of lands by it sold, and also for an accounting by individual defendants for the proceeds of the sale of lands acquired under the same title and sold by them before title was acquired by defendant corporation (Barney *v.* Latham, 103 U. S. 205, 26 L. ed. 514); a suit to establish an indebtedness against an insolvent corporation and for judgment against a second defendant which has assumed the indebtedness of the first corporation (Mecke *v.* Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151 [*affirming* 89 Fed. 209]. But see Lewis *v.* Weidenfeld, 76 Fed. 145) a suit by remainder-men against the life-tenant and a company which has insured the property, plaintiffs alleging that the former had settled a claim under the policy for less than the amount of the loss, and praying that she be charged, as a trustee, of the fund, to hold for herself for life, and the remainder to plaintiffs; and that the insurance company be obliged to pay the whole face value of the policy; a bill charging one of several defendants with failure to perform his contract, to transfer a patent to the complainant; and that the others, with knowledge of his default, had bought machines of him, for the use of which they should account (Nesmith *v.* Calvert, 18 Fed. Cas. No. 10,123, 2 Robb Pat. Cas. 311, 1 Woodb. & M. 34); a suit to recover the possession of town bonds when the party in possession disclaims all interest in them except a lien for storage and counsel fees, while one of the depositors of the bonds and the township disputes the right of plaintiff to possession and claims that the bonds were void (Wilson *v.* Union Sav. Assoc., 30 Fed. 521. But see Bailey *v.* New York Sav. Bank, 2 Fed. 14, 18 Blatchf. 77); a suit to set aside a franchise against the assignee of the same and his mortgagee; where the mortgagee claims that plaintiff is estopped by its representation when the mortgage was executed that the franchise was valid (Galesburg *v.* Galesburg Water Co., 27 Fed. 321); a suit by a mortgagor to remove one of the trustees under the mortgage and to restrain it from foreclosing the same against the wishes of the other trustee and of a majority of the bondholders (Lake St. El. R. Co. *v.* Farmers' L. & T. Co., 72 Fed. 804. But see Winchester *v.* Loud, 108 U. S. 130, 2 S. Ct. 311, 27 L. ed. 677); a suit to enjoin the sale of land by a defendant claiming title to part of the same under a deed of trust to secure the payment of certain promissory notes, in which the title of the trustee defendant depends upon the question whether the notes had been paid, and two of the other defendants, each of who claims an interest in the land hostile to each other, depending upon the question whether these notes were paid (Snow *v.* Smith, 88 Fed. 657, 4 Hughes 204); a suit to cancel a promissory note, where fraud by one defendant is charged, and there is no allegation that the other, as indorsee, was cognizant of such fraud (New York Constr. Co. *v.* Simon, 53 Fed. 1. But see Burgunder *v.* Browne, 59 Fed. 497); and a suit by the beneficiary under a will, against the executors, the testamentary trustees, and a loss of part of the trust estate; where the com-

2. ACCOUNTING. Where an accounting is prayed against one or more, but not all, of defendants, and there is an actual controversy between the remainder

plaint prays that the executors may complete the trust fund for plaintiff's benefit by conveying real estate to the trustees; that the trustees pay to her whatever may be due for interest on said trust fund; and also pay to her for her benefit, out of the estate, other moneys which she claims; that the trustees be enjoined from charging against her certain moneys which the estate has paid, and from paying to trustees of certain residuary trusts, any moneys which may be in or may hereafter come into their hands; and that the rent of the part of the trust held by them, which may become due under the lease to the remaining defendant, be paid to plaintiff (Stevens *v.* Richardson, 9 Fed. 191, 20 Blatchf. 53). And where a suit is brought against two corporations and the directors of one of them, to set aside a conveyance made by this to the other, for an injunction against the directors as managing the affairs of the corporation, and for the appointment of a receiver thereof, the controversy between the complainant and the directors is separable from that between him and the two corporations, and the latter may remove the suit. Geer *v.* Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 1122. But see Campbell *v.* Milliken, 119 Fed. 981. The contracts and liabilities of the maker and the indorsers of a promissory note are separate and distinct from each other; when they are joined as defendants there is a separable controversy between plaintiff and each of the indorsers. Manufacturers' Commercial Co. *v.* Brown Alaska Co., 148 Fed. 308; Sheldon *v.* Keokuk Northern Line Packet Co., 1 Fed. 789, 9 Biss. 307. Upon a bill of interpleader, the controversy between the two defendants is separable from that between them and the complainant and will justify a removal. First Nat. Bank *v.* Bridgeport Trust Co., 117 Fed. 969. *Contra*, New York Mut. L. Ins. Co. *v.* Allen, 134 Mass. 389; Republic F. Ins. Co. *v.* Keogh, 23 Hun (N. Y.) 644; George *v.* Pilcher, 28 Gratt. (Va.) 299, 26 Am. Rep. 350. Where remainder-men sued to set aside a settlement by the life-tenant with an insurance company, for a less amount than the face value of the policy, charging that the life-tenant held the insurance impressed with the trust for plaintiffs' benefit, and praying judgment against both defendants for the face value of the policy, with interest, and that they be required to pay the same into court, to be invested for the benefit of plaintiffs and the life-tenant, interest only to be paid the latter during her life, it was held that there was a separable controversy between the insurance company and plaintiffs. Harley *v.* Home Ins. Co., 125 Fed. 792. Where plaintiff sues upon two similar claims, one of which has been assigned to him, there is a separable controversy as regards the claim to which he had an original right. Sharkey *v.* Port Blakely Mill Co., 92 Fed. 425. Where a suit is brought against an employee of plaintiff, who is charged with embezzlement, and the surety upon the bond guaranteeing plaintiff against loss by any of the acts of such employee, a separable controversy exists between plaintiff and the surety. Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446. Where exemplary damages upon special facts are claimed against one of two defendants, sued upon a joint obligation, there is a separable controversy, which may be removed. Feibleman *v.* Edmonds, 69 Tex. 334, 6 S. W. 417.

Controversies that are not separable.— In a suit to prevent one corporation from obtaining and exercising control over another, there is no separable controversy between plaintiff and the former. MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., 119 Fed. 96, 55 C. C. A. 648 [*overruling* Lamm *v.* Parrott Silver, etc., Co., 111 Fed. 241]. In a suit to compel a corporation to transfer to plaintiff stock standing in the name of any defendant, the controversy is not separable. St. Louis, etc., R. Co. *v.* Wilson, 114 U. S. 60, 5 S. Ct. 738, 29 L. ed. 66 [*affirming* 22 Fed. 3]. A suit by a stock-holder of a domestic corporation against the same and a foreign corporation praying the cancellation and surrender of shares of the capital stock of the former, held by the latter; an injunction against the voting by the latter upon any of said shares, and against its exercising any control over the officers, agents, property, or business of the former; an injunction against the former from allowing any transfer of the said shares upon its books, and from permitting any of them to be voted by the latter company; and an injunction against the directors of the former from acting as directors or officers thereof does not present a separable controversy, which can be removed by the foreign corporation. MacGinniss *v.* Boston, etc., Consol. Copper, etc., Min. Co., *supra* [*overruling* Lamm *v.* Parrott Silver, etc., Co., *supra*]. In a stock-holder's suit to set aside a contract by his corporation, the controversy between him and the contractor is not separable from that to which the corporation is a party. Douglas *v.* Richmond, etc., R. Co., 106 N. C. 65, 10 S. E. 1048; Hanover Nat. Bank *v.* Credits Commutation Co., 118 Fed. 110; Wilder *v.* Virginia Steel, etc., Co., 46 Fed. 676; Cape Girardeau, etc., R. Co. *v.* Winston, 5 Fed. Cas. No. 2,390. See also Shumway *v.* Chicago, etc., R. Co., 4 Fed. 385. In a suit by stockholders and creditors, for an accounting by directors, of funds of a corporation, which the latter have unlawfully appropriated, the fact that plaintiffs hold stock of different classes and claims of different kinds does not make the controversy separable, although they might have severally prosecuted the suit which they properly brought jointly. Wilder *v.* Virginia Steel, etc., Co., 46 Fed. 676. In a suit to enforce the right of subrogation to

and plaintiff,[62] where the complaint prays separate accountings by different

several fire insurance policies upon the same property, and to collect losses upon them, resulting from the same fire, there is no separable controversy between plaintiff and defendant insurance companies. Merchants' Cotton-Press, etc., Co. *v.* Insurance Co. of North America, 151 U. S. 368, 14 S. Ct. 367, 38 L. ed. 195 [*affirming* 91 Tenn. 537, 19 S. W. 755, and *overruling* Insurance Co. of North America *v.* Delaware Mut. Ins. Co., 50 Fed. 243]. In a suit by an insurance company to enforce its right of subrogation, and to collect the claim of the insured against a person who caused the loss, the controversy between the insurance company and such wrong-doer is not separable from that to which the insured is an indispensable party. Broadway Ins. Co. *v.* Chicago Great Western R. Co., 101 Fed. 507; Green Bay First Presby. Soc. *v.* Goodrich Transp. Co., 7 Fed. 257, 10 Biss. 312. Where plaintiffs sue to enforce a common right, which they might have asserted in separate actions, there is no separable controversy, even though their rights depend upon different circumstances. Wilder *v.* Virginia, etc., Steel, etc., Co., 46 Fed. 676; Reineman *v.* Ball, 33 Fed. 692. See also *In re* McClean, 26 Fed. 49. There is no separable controversy between defendants against whom plaintiff seeks to establish a joint liability alone, either in contract (Fusz *v.* Trager, 38 La. Ann. 173; O'Kelly *v.* Richmond, etc., R. Co., 89 N. C. 58; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; Lathrop, etc., Co. *v.* Pittsburg, etc., R. Co., 135 Fed. 619; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 C. C. A. 146; Mutual Reserve Fund Life Assoc. *v.* Farmer, 77 Fed. 929, 23 C. C. A. 574; Woodrum *v.* Clay, 33 Fed. 897; Western Union Tel. Co. *v.* Brown, 32 Fed. 337; Folsom *v.* Continental Nat. Bank, 14 Fed. 497, 4 Woods 521), or in tort (Plymouth Consol. Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232; Core *v.* Vinal, 117 U. S. 347, 6 S. Ct. 767, 29 L. ed. 912; Sloane *v.* Anderson, 117 U. S. 275, 6 S. Ct. 730, 29 L. ed. 899; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. ed. 331; Davenport *v.* Southern R. Co., 135 Fed. 960, 68 C. C. A. 444 [*reversing* 124 Fed. 983]; American Bridge Co. *v.* Hunt, 130 Fed. 302, 64 C. C. A. 548; Fogarty *v.* Southern Pac. Co., 123 Fed. 973; Dougherty *v.* Yazoo, etc., R. Co., 122 Fed. 205, 58 C. C. A. 651; Hoye *v.* Great Northern R. Co., 120 Fed. 712; Person *v.* Illinois Cent. R. Co., 118 Fed. 342; Riser *v.* Southern R. Co., 116 Fed. 215; Ward *v.* Franklin, 110 Fed. 794; Marrs *v.* Felton, 102 Fed. 775; Evans *v.* Felton, 96 Fed. 176; Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73; Deere *v.* Chicago, etc., R. Co., 85 Fed. 876; Brown *v.* Coxe, 75 Fed. 689; O'Harrow *v.* Henderson, 52 Fed. 769; Dow *v.* Bradstreet Co., 46 Fed. 824; Kaitel *v.* Wylie, 38 Fed. 865; Southworth *v.* Reid, 36 Fed. 451; Tuedt *v.* Carson, 13 Fed. 353, 4 McCrary 426. *Contra*, Kerling *v.* Cotzhausen, 16 Fed. 705, 11 Biss. 582; Clark *v.* Chicago, etc., R. Co., 11 Fed. 355, 3 McCrary 591), although the liability of defendants is joint and several (Core *v.* Vinal, 117 U. S. 347, 6 S. Ct. 767, 29 L. ed. 912; Sloane *v.* Anderson, 117 U. S. 275, 6 S. Ct. 730, 29 L. ed. 899; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. ed. 331; Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73; Brown *v.* Coxe, 75 Fed. 689; Kaitel *v.* Wylie, 38 Fed. 865; Tuedt *v.* Carson, 13 Fed. 353, 4 McCrary 426. *Contra*, Kerling *v.* Cotzhausen, 16 Fed. 705, 11 Biss. 582; Clark *v.* Chicago, etc., R. Co., 11 Fed. 355, 3 McCrary 591), even when a state statute permits judgment to be entered for or against one or more of plaintiffs, and for or against one or more of defendants (Louisville, etc., R. Co. *v.* Ide, 114 U. S. 52, 5 S. Ct. 735, 29 L. ed. 63), or when plaintiff sues less than all of those who are jointly and severally liable (Core *v.* Vinal, 117 U. S. 347, 6 S. Ct. 767, 29 L. ed. 912; Sloane *v.* Anderson, 117 U. S. 275, 6 S. Ct. 730, 29 L. ed. 899; Pirie *v.* Tvedt, 115 U. S. 41, 5 S. Ct. 1034, 1161, 29 L. ed. 331; Fox *v.* Mackay, 60 Fed. 4; Kaitel *v.* Wylie, 38 Fed. 865; Tuedt *v.* Carson, 13 Fed. 353, 4 McCrary 426. *Contra*, Kerling *v.* Cotzhausen, 16 Fed. 705, 11 Biss. 582; Clark *v.* Chicago, etc., R. Co., 11 Fed. 355, 3 McCrary 591), provided the allegations in the bill do not clearly show that the liability is several. The same is true of a suit to compel the joint performance of a duty by mandamus or otherwise (Ohio *v.* Columbus, etc., R. Co., 48 Fed. 626), to enjoin them all from the performance of the same act (National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71 [*affirmed* in 52 N. J. Eq. 590, 33 Atl. 50]; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388 [*affirming* 21 Fed. 593]; McMillan *v.* Noyes, 146 Fed. 926; Yearian *v.* Horner, 36 Fed. 130; New York *v.* New Jersey Steam-Boat Transp. Co., 24 Fed. 817), or of acts directly connected with each other (Anderson *v.* Orient F. Ins. Co., 88 Iowa 579, 55 N. W. 348; Vulcan Detinning Co. *v.* American Can Co., 130 Fed. 635; Davis *v.* Randolph County Ct., 88 Fed. 705; Anderson *v.* Bowers, 40 Fed. 708.

62. Geer *v.* Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. ed. 1122, which was a suit to set aside a contract between two corporations, to enjoin its directors from any further disposition of its property, for a reconveyance of the same, and an accounting by the grantee for the damages caused by the transfer, with which was joined a prayer that defendants, who were directors of the grantor, should account for their actions in the premises and be required to make good all allowance and damage caused by their wrongful conduct. But see Campbell *v.* Milliken, 119 Fed. 981.

A creditors' bill, brought by several on be-

defendants [63] who are not jointly liable nor interested in the accounts of the others, in which last case the controversy between them and plaintiff is not separable; [64] and where it prays a joint and several accounting by trustees for the fraudulent misappropriation of trust funds,[65] the case presents separate controversies, any one of which may be removed in a proper case.

3. CONDEMNATION PROCEEDINGS. A separate controversy exists between the petitioner and each of the lot owners in a proceeding to condemn different lots of land for a public use, when the only question in dispute is the amount of damages, and the respondents have no joint interest in any of the parcels to be condemned, nor in the damages to be awarded,[66] except when the state statute directs that the proceedings against all of the respondents shall be tried together, and that a single finding be made including all the awards and all the assessments for benefits, in which case no separable controversy can exist.[67]

4. CREDITORS' BILLS. Upon a creditor's bill for the collection and preservation of the debtor's assets and their distribution *pro rata* among the creditors, there is no separate controversy between plaintiff and defendants, who claim a prior lien upon the assets; [68] nor between him and defendants who he contends should be excluded from participating in the distribution;[69] nor between him and

half of the rest, to enforce a statutory liability of stock-holders under a Colorado statute, by requiring them each to pay the full amount of the same to a master, to be applied upon the debts *pro rata*, together with such sums as might be collected from other stock-holders, the remainder to be returned, does not present a separate controversy between plaintiff and any one of defendants. Miller *v.* Clifford, 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. N. S. 49.

63. Vinal *v.* Continental Constr., etc., Co., 34 Fed. 228; Langdon *v.* Fogg, 18 Fed. 5, 21 Blatchf. 392. See Golden *v.* Bruning, 72 Fed. 2.

64. Campbell *v.* Milliken, 119 Fed. 981; German Sav., etc., Soc. *v.* Dormitzer, 116 Fed. 471, 53 C. C. A. 639; Fox *v.* Mackay, 60 Fed. 4; Sexton *v.* Seelye, 39 Fed. 705; Chicago, etc., R. Co. *v.* New York, etc., R. Co., 24 Fed. 516; Burke *v.* Flood, 1 Fed. 541, 6 Sawy. 220.

65. Boyd *v.* Gill, 19 Fed. 145, 21 Blatchf. 543; Langdon *v.* Fogg, 18 Fed. 5, 21 Blatchf. 392.

66. Texas, etc., R. Co. *v.* Kirk, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319 [*affirming* 19 Fed. 150]; Deep Water R. Co. *v.* Western Pocahontas Coal, etc., Co., 152 Fed. 824; South Dakota Cent. R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 578, 73 C. C. A. 176; New York, etc., R. Co. *v.* Cockcroft, 46 Fed. 881; Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339, 9 Sawy. 348; Chicago *v.* Hutchinson, 15 Fed. 129, 11 Biss. 484.

One of two or more respondents to such a proceeding, who hold different interests in the same lot, cannot remove the case, since there is no separable controversy as regards them. Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Helena Power Transmission Co. *v.* Spratt, 146 Fed. 310; Washington *v.* Columbus, etc., R. Co., 53 Fed. 673; Seattle, etc., R. Co. *v.* State, 52 Fed. 594.

A party who has leased the property to another for the term of ninety-nine years is indispensable to the controversy between his lessee and the person who institutes the condemnation proceeding (Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Washington *v.* Columbus, etc., R. Co., 53 Fed. 673; Le Mars *v.* Iowa Falls, etc., R. Co., 48 Fed. 661), even where such lessor files a disclaimer (Washington *v.* Columbus, etc., R. Co., 53 Fed. 673). Where only a part of the land was leased there is a separate controversy as regards that not leased, between the lessor and the lessee. Sugar Creek, etc., R. Co. *v.* McKell, 75 Fed. 34.

Where there is a dispute concerning the right of the petitioner to condemn all the property, there is but a single controversy between him and all of those who dispute his right. Perkins *v.* Lake Superior, etc., R. Co., 140 Fed. 906; *In re* Jarnecke Ditch, 69 Fed. 161. Where the right to condemn only a part of the controversy is disputed, there is a separable controversy between the owners of that part and the petitioner, to which the owners of the other parts sought to be condemned are not parties. South Dakota Cent. R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 578, 73 C. C. A. 176.

67. Kansas City *v.* Hennegan, 152 Fed. 249.

68. Peters *v.* Peters, 41 Ga. 242; State *v.* Adams, 9 Ohio Cir. Ct. 21, 6 Ohio Cir. Dec. 46; Rosenthal *v.* Coates, 148 U. S. 142, 13 S. Ct. 576, 37 L. ed. 399; Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. ed. 528; Graves *v.* Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. ed. 462 [*reversing* 34 Fed. 692]; Fidelity Ins., etc., Co. *v.* Huntington, 117 U. S. 280, 6 S. Ct. 733, 29 L. ed. 898; Turnbull Wagon Co. *v.* Linthicum Carriage Co., 80 Fed. 4. *Contra*, Hack *v.* Chicago, etc., R. Co., 23 Fed. 356; Corbin *v.* Boies, 18 Fed. 3.

The same principle has been applied to a bill by a judgment creditor for his own benefit. Palmer *v.* Inman, 122 Ga. 226, 50 S. E. 86.

69. Burts *v.* Loyd, 45 Ga. 104, 12 Am. Rep. 574; Graves *v.* Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. ed. 462 [*reversing* 34 Fed.

a party who is alleged in the bill to have assumed the obligations of the insolvent debtor.[70]

5. Damages For Negligence. Separable controversies exist in an action to recover damages for negligence, when the negligence charged against the different defendants is different and not concurrent,[71] even when charges of concurrent negligence are joined with a distinct charge of negligence against one defendant;[72] and also where plaintiff sues to recover damages for a personal injury and bases his cause of action against each of two defendants upon a separate contract.[73]

6. Mortgages. In a suit to foreclose a mortgage or other lien, a defendant who is alleged to be personally liable for a deficiency has no separable controversy from that between plaintiff and the owner of the equity of redemption;[74] and

692]; Colburn *v.* Hill, 101 Fed. 500, 41 C. C. A. 467.

70. Mecke *v.* Valleytown Mineral Co., 122 N. C. 790, 29 S. E. 781.

The same principles apply to similar suits by an administrator (Burts *v.* Loyd, 45 Ga. 104, 12 Am. Rep. 574; Peters *v.* Peters, 41 Ga. 242. See State *v.* Adams, 9 Ohio Cir. Ct. 21, 6 Ohio Cir. Dec. 46), by an assignee for the benefit of creditors (Rosenthal *v.* Coates, 148 U. S. 142, 13 S. Ct. 576, 37 L. ed. 399), or by a partner for a dissolution and the distribution of the assets of the firm (Shainwald *v.* Lewis, 108 U. S. 158, 2 S. Ct. 385, 27 L. ed. 691).

71. Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943; Coker *v.* Monaghan Mills, 110 Fed. 803; Hartshorn *v.* Atchison, etc., R. Co., 77 Fed. 9; Fergason *v.* Chicago, etc., R. Co., 63 Fed. 177.

But not in a joint action against the owner of an engine and cars and the owner of the tracks upon which they ran. Haire *v.* Rome R. Co., 57 Fed. 321.

There is no separable controversy in an action to recover damages for the alleged joint negligence, by act or omission, of a railroad company, and its engineer, conductor, or other employee, when the sole ground alleged for the liability of the corporation is its responsibility as principal for the conduct of its servant, although not personally present nor directing, and not charged with any specific concurrent act of negligence (Able *v.* Southern R. Co., 73 S. C. 173, 52 S. E. 962; Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 26 S. Ct. 166, 50 L. ed. 448; Alabama Great Southern R. Co. *v.* Thompson, 200 U. S. 206, 26 S. Ct. 161, 50 L. ed. 441; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Knuth *v.* Butte Electric R. Co., 148 Fed. 73; Thomas *v.* Great Northern R. Co., 147 Fed. 83, 77 C. C. A. 255; Heffelfinger *v.* Choctaw, etc., R. Co., 140 Fed. 75; Davenport *v.* Southern R. Co., 135 Fed. 960, 68 C. C. A. 444; Lathrop, etc., Co. *v.* Pittsburg, etc., R. Co., 135 Fed. 619; Roberts *v.* Shelby Steel Tube Co., 131 Fed. 729, 65 C. C. A. 589; American Bridge Co. *v.* Hunt, 130 Fed. 302, 64 C. C. A. 548; Dougherty *v.* Atchison, etc., R. Co., 126 Fed. 239; Fogarty *v.* Southern Pac. R. Co., 123 Fed. 973), nor where a lessor and lessee (Curtis *v.* Cleveland, etc., R. Co., 140 Fed. 777; Keller *v.* Kansas City, etc., R. Co., 135 Fed. 202; Person *v.* Illinois Cent. R. Co., 118 Fed. 342; Central Ohio R. Co. *v.* Mahoney, 114 Fed. 732, 52 C. C. A. 364. *Contra*, Yeates *v.* Illinois Cent. R. Co., 137 Fed. 943; Williard *v.* Spartanburg, etc., R. Co., 124 Fed. 796; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Spangler *v.* Atchison, etc., R. Co., 42 Fed. 305), or a corporation and its receiver (Whitcomb *v.* Smithson, 175 U. S. 635, 20 S. Ct. 248, 44 L. ed. 303; Dougherty *v.* Atchison, etc., R. Co., 126 Fed. 239; Moore *v.* Los Angeles Iron, etc., Co., 89 Fed. 73. *Contra*, Chamberlain *v.* New York, etc., R. Co., 71 Fed. 636), are sued jointly for an injury caused by their concurrent negligence.

72. Southern R. Co. *v.* Edwards, 115 Ga. 1022, 42 S. E. 375; Henry *v.* Illinois Cent. R. Co., 132 Fed. 715; McIntyre *v.* Southern R. Co., 131 Fed. 985.

73. Batey *v.* Nashville, etc., R. Co., 95 Fed. 368.

74. Union Iron, etc., Co. *v.* Sonnefield, 113 La. 436, 37 So. 20; U. S. Mortgage Co. *v.* McClure, 42 Oreg. 190, 70 Pac. 543; Lewis *v.* Weidenfeld, 76 Fed. 145; Ames *v.* Chicago, etc., R. Co., 39 Fed. 881.

A prayer for the reformation of the mortgage is incidental to the foreclosure suit, and does not create a separable controversy. Winchell *v.* Coney, 27 Fed. 482. See Gates Iron Works *v.* Pepper, 98 Fed. 449. And in a suit to cancel a mortgage there is no separable controversy between plaintiff and defendants, mortgagor and mortgagee. Oakes *v.* Yonah Land, etc., Co., 89 Fed. 243. The same rule prevails in a suit by a mortgagor against the different lien-holders upon his property, for the adjustment of their rights, although separate suits might have been brought for the same purpose against the different mortgagees. Springer *v.* Sheets, 115 N. C. 370, 20 S. E. 469. There is no separable controversy in a suit to enjoin a foreclosure sale and to redeem a mortgage, when the right of the complainant in the equity of redemption is disputed by the person in whose name the title stands, and who is joined as defendant with the mortgagee. Faison *v.* Hardy, 114 N. C. 429, 19 S. E. 701. And in a suit to establish an interest in land in the possession of a mortgagor, the mortgagor and mortgagee are interested in the same controversy with plaintiff. Chester *v.* Chester, 7 Fed. 1.

Where there is a dispute as to the amount of land covered by the mortgage, there is a separable controversy between plaintiff, mort-

defendants charged to be junior encumbrancers cannot remove a suit because their controversy with the mortgagee is separate from that of the mortgagor,[75] although they contest the validity or priority of the mortgage, and the mortgagor does not.[76]

7. Probate and Administration Proceedings. In proceedings upon an application for the admission of a will to probate,[77] to contest the validity of the same,[78] in an action to establish a will,[79] or in a suit to determine the construction thereof,[80] there is no separable controversy.

8. Quieting Title. A suit to quiet title contains separate controversies, when defendants do not claim under a common right or through a common source.[81]

9. Setting Aside Conveyance. In an action to set aside a conveyance, to which the grantor and the grantee are defendants, there is no separable controversy between plaintiff and grantee.[82]

gagee, and those of defendants who are interested in the disputed portion of the property. New England Water Works Co. *v.* Farmers' L. & T. Co., 136 Fed. 521, 69 C. C. A. 297. And since a prior mortgagor or other encumbrancer is not a necessary party to a suit to foreclose a junior lien, when he is joined the controversy between plaintiff and owner of the equity of redemption is removable. St. Louis Boatmen's Bank *v.* Fritzlen, 135 Fed. 650, 68 C. C. A. 288 [*reversing* 128 Fed. 608]; Snow *v.* Texas Trunk R. Co., 16 Fed. 1, 4 Woods 394. *Contra*, Foster *v.* Chesapeake, etc., R. Co., 47 Fed. 369.

75. Flynn *v.* Des Moines, etc., R. Co., 63 Iowa 490, 19 N. W. 312; Springer *v.* Sheets, 115 N. C. 370, 20 S. E. 469; Northwestern, etc., Bank *v.* Suksdorf, 15 Wash. 475, 46 Pac. 1027; Maher *v.* Tower Hotel Co. 90 Fed. 225; Robbins *v.* Ellenbogen, 71 Fed. 4, 18 C. C. A. 83; Sweeney *v.* Grand Island, etc., R. Co., 61 Fed. 3; Donohoe *v.* Mariposa Land, etc., Co., 7 Fed. Cas. No. 3,989, 5 Sawy. 163; Manhattan First Nat. Bank *v.* King Wrought-Iron Bridge Co., 9 Fed. Cas. No. 4,803. *Contra*, Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330. See also Bybee *v.* Hawkett, 5 Fed. 1, 6 Sawy. 593.

A suit to foreclose a mortgage, in which subsequent encumbrancers are defendants, may be removed by the mortgagor, upon the ground that a separable controversy exists between it and plaintiff. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513. And where a complaint in a foreclosure suit alleged that a defendant claimed an interest in the mortgaged property, without stating the nature of the same, and it subsequently appeared that the latter's claim was to a title paramount to that of the mortgagor and mortgagee, which would make the controversies in the suit multifarious, it was held that the cause could be remanded. California Safe-Deposit, etc., Co. *v.* Cheney Electric Light, etc., Co., 56 Fed. 257. See also Thompson *v.* Dixon, 28 Fed. 5.

76. Thurber *v.* Miller, 67 Fed. 371, 14 C. C. A. 432; Marsh *v.* Atlanta, etc., R. Co., 53 Fed. 168; Bissell *v.* Canada, etc., R. Co., 39 Fed. 225. *Contra*, California Safe-Deposit, etc., Co. *v.* Cheney Electric Light, etc., Co., 56 Fed. 257; Foster *v.* Chesapeake, etc., R. Co., 47 Fed. 369 [*distinguishing* Fidelity Ins., etc., Co. *v.* Huntington, 117 U. S. 280, 6 S. Ct. 733, 29 L. ed. 898]. But see Capital City Bank *v.* Hodgin, 22 Fed. 209.

77. Fraser *v.* Jennison, 106 U. S. 191, 1 S. Ct. 171, 27 L. ed. 131.

78. Reed *v.* Reed, 31 Fed. 49.

79. Anderson *v.* Appleton, 32 Fed. 855.

80. Security Co. *v.* Pratt, 64 Fed. 405.

81. Carothers *v.* McKinley Min., etc., Co., 116 Fed. 947; Bates *v.* Carpentier, 98 Fed. 452; Illinois *v.* Illinois Cent. R. Co., 16 Fed. 881; Field *v.* Lownsdale, 9 Fed. Cas. No. 4,769, Deady 288; Goodenough *v.* Warren, 10 Fed. Cas. No. 5,534, 5 Sawy. 494; Steinkul *v.* York, 22 Fed. Cas. No. 13,356, 2 Flipp. 376. But see Smedley *v.* Smedley, 110 Fed. 255.

This is true where the bill alleges that all of the defendants make some claim under a certain deed, but does not limit the controversy to the validity of such deed (Bacon *v.* Felt, 38 Fed. 870), but not when defendants are charged with being joined in a conspiracy to cloud the complainants' title and to defraud them of their property (Little *v.* Giles, 118 U. S. 596, 7 S. Ct. 32, 30 L. ed. 269 [*reversing* 13 Fed. 100, 2 McCrary 370]), nor, when one of two defendants holds the legal title as trustee for the other (Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907), nor, in any case in which defendants claim a joint or common right, or through a common source, with no difference between their titles, which affects the controversy in suit (*In re* Foley, 80 Fed. 949).

A proceeding to recover the possession of land may be removed under similar circumstances. Laidly *v.* Huntington, 121 U. S. 179, 7 S. Ct. 855, 30 L. ed. 883; Cleveland *v.* Cleveland, etc., R. Co., 147 Fed. 171, 77 C. C. A. 467; Forsyth Mfg. Co. *v.* Putnam, 139 Fed. 1007, 71 C. C. A. 684; Knight *v.* Lutcher, etc., Lumber Co., 136 Fed. 404, 69 C. C. A. 248, 139 Fed. 1007, 71 C. C. A. 684; Stanbrough *v.* Cook, 38 Fed. 369, 3 L. R. A. 400; Anderson *v.* Appleton, 32 Fed. 855; Collins *v.* Wellington, 31 Fed. 244; Sharp *v.* Whiteside, 19 Fed. 150. But not a suit for a partition, where one of defendants claims to own plaintiff's undivided share of the land. Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. ed. 528.

82. German Sav., etc., Soc. *v.* Dormitzer,

10. Specific Performance. In a suit for specific performance, against the vendor and his grantee of the land, there is a separable controversy between plaintiff and such grantee.[83]

VII. Suits Between Citizens of Same State, Claiming Land Under Grants of Different States.

The federal courts have jurisdiction of suits between citizens of the same state, claiming land under grants of different states, although both grants were founded upon warrants issued by the same state,[84] and where at the time of the first grant the two states were not separated and one of them was not created.[85]

VIII. Time of Removal.

A. In General. In suits or criminal prosecutions against revenue officers,[86] officers of either house of congress,[87] persons claiming rights under the revenue laws,[88] or against persons who seek protection under the Civil Rights Law,[89] a removal may be had "at any time before the trial or final hearing." Removals for prejudice or local influence of controversies between citizens of different states,[90] and removals of suits between citizens of the same state claiming land under grants of different states,[91] must be made "before the trial" thereof.[92]

116 Fed. 471, 53 C. C. A. 639; Reineman *v.* Ball, 33 Fed. 692; Winnemans *v.* Edgington, 27 Fed. 324; Moore *v.* North River Constr. Co., 19 Fed. 803.

83. Elkins *v.* Howell, 140 Fed. 157.

84. Colson *v.* Lewis, 2 Wheat. (U. S.) 377, 4 L. ed. 266; Massie *v.* Watts, 6 Cranch (U. S.) 148, 3 L. ed. 181.

A removal was denied by a state court, where the grant issued by one state, Tennessee, was founded upon a contract with the other state, North Carolina, "to perfect titles, which, before the separation, were inaccurate and imperfect"; and the former state was said consequently not to act by virtue of its sovereignty as a state. Thompson *v.* Kendrick, 5 Hayw. (Tenn.) 113.

85. Pawlet *v.* Clark, 9 Cranch (U. S.) 292, 3 L. ed. 735.

86. U. S. Rev. St. (1878) § 643, as amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521].

87. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602].

88. U. S. Rev. St. (1878) § 643, as amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521].

89. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

90. 25 U. S. St. at L. 435, c. 866, § 2 [U. S. Comp. St. (1901) p. 509].

91. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

92. Time of removal.— According to the preponderance of authority, the removal may take place during a vacation of the state court. Mecke *v.* Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151; State *v.* Coosaw Min. Co., 45 Fed. 804, 811; Brown *v.* Murray, 43 Fed. 614; Burck *v.* Taylor, 39 Fed. 581; Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330. See Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Johnson *v.* Computing Scale Co., 139 Fed. 339; Monroe *v.* Williamson, 81 Fed. 977. *Contra*, Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Fox *v.* Southern R. Co., 80 Fed. 945; Williams *v.* Massachusetts Ben. Assoc., 47 Fed. 533; Scott *v.* Otis, 21 Fed. Cas. No. 12,543. A case is properly removed if the petition and bond are duly filed, although they are not actually presented to the court until the time to plead has expired. Texas, etc., R. Co. *v.* Bloom, 85 Tex. 279, 20 S. W. 133; Burck *v.* Taylor, 39 Fed. 581 [*affirmed* in 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578]. It is sufficient if the papers are actually filed in the clerk's office in time, although they are not then indorsed by the clerk as "filed." Waite *v.* Phœnix Ins. Co., 62 Fed. 769. A defendant may remove the case before an attempt has been made to serve him with process. Parkinson *v.* Barr, 105 Fed. 81. A corporation, not a party to the record, which has refused to enter itself as a defendant, cannot. Bertha Zinc, etc., Co. *v.* Carico, 61 Fed. 132. An irregularity in the filing of the removal papers, before the entry of an order making the remover a party, is cured by the subsequent entry of an order making him a party and reciting the filing of the removal papers. Sheffield First Nat. Bank *v.* Merchants' Bank, 37 Fed. 657, 2 L. R. A. 469. A case may be removed before defendant has filed any pleading. Memphis Sav. Bank *v.* Houchens, 115 Fed. 96, 52 C. C. A. 176; Creagh *v.* Equitable L. Assur. Soc., 83 Fed. 849; Egan *v.* Chicago, etc., R. Co., 53 Fed. 675; Bailey *v.* American Cent. Ins. Co., 8 Fed. 686, 2 McCrary 413; Hodson *v.* Lake Shore, etc., R. Co., 12 Fed. Cas. No. 6,571*a*, 12 Reporter 41. But see Kerille *v.* Phœnix L. Ins. Co., 3 Thomps. & C. (N. Y.) 788. A case cannot be removed after it has been dismissed. New England Mortg. Security Co. *v.* Aughe, 12 Nebr. 504, 11 N. W. 753. Nor after a stipulation has been filed by defendant admitting plaintiff's claim, and there is no other contro-

B. Removal Before Time to Plead Expires. A removal of a suit where there is a controversy between citizens of different states, and there is no claim of prejudice or local influence, and of an ordinary suit arising under the constitution or laws of the United States or treaties made under their authority must be made "at the time or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." [93] It seems that such a

versy in the suit. Keith *v.* Levi, 2 Fed. 743, 1 McCrary 343.

Extension of time.—After the time to remove a case has expired, it cannot be extended by the court (Daugherty *v.* Western Union Tel. Co., 61 Fed. 138; Gibson *v.* Johnson, 10 Fed. Cas. No. 5,397, Pet. C. C. 44; Ward *v.* Arredondo, 29 Fed. Cas. No. 17,148, 1 Paine 410. But see Livingston *v.* Frick, 76 Ga. 839), even though defendant's attorney was prevented by inevitable accident from reaching the court-house until after the last day on which the petition and bond were filed (Daugherty *v.* Western Union Tel. Co., 61 Fed. 138. But see Livingston *v.* Frick, 76 Ga. 839). When the time to remove an action of ejectment has expired, and that case has been tried, a subsequent cross action of ejectment cannot be removed. Evans *v.* Smith, 21 Fed. 1.

Second removal.— If a case has been remanded for failure to file a transcript, it cannot again be removed upon the same grounds (St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703), nor upon other grounds, such as local prejudice, when he does not show that such ground did not exist at the time of the first removal (Pope *v.* Cheney, 22 Fed. 177).

Waiver of objections.— The objection that the petition was filed too late may be waived by taking a subsequent proceeding in the federal court, without raising it. Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311 [*affirming* 41 Fed. 125]; French *v.* Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Collins *v.* Scott, 76 Fed. 613; Newman *v.* Schwerin, 61 Fed. 865, 10 C. C. A. 129; Knight *v.* International, etc., R. Co., 61 Fed. 87, 9 C. C. A. 376 [certiorari *dismissed* in 17 S. Ct. 995, 41 L. ed. 1187].

93. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

See also the following cases construing state statutes or rules of court.

California.— Case *v.* Olney, 106 Fed. 433; MacNaughton *v.* Southern Pac. R. Co., 19 Fed. 881.

Connecticut.—Head *v.* Selleck, 110 Fed. 786.

Georgia.— Southern Pac. Co. *v.* Steward, 88 Ga. 13, 13 S. E. 824; Stafford *v.* Hightower, 68 Ga. 394.

Indiana.— Amsden *v.* Norwich Union F. Ins. Co., 44 Fed. 515; Browning *v.* Reed, 39 Fed. 625; McKeen *v.* Ives, 35 Fed. 801.

Iowa.— Wilson *v.* Big Joe Block Coal Co., 135 Iowa 531, 113 N. W. 348.

Kansas.— Burnham *v.* Leoti First Nat. Bank, 53 Fed. 163, 3 C. C. A. 486; Van Allen *v.* Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598.

Kentucky.— Fidelity Trust, etc., Co. *v.* Newport News, etc., Co., 70 Fed. 403.

Maine.— Craven *v.* Turner, 82 Me. 383, 19 Atl. 864.

Massachusetts.— Frink *v.* Blackinton, 80 Fed. 306; Olds *v.* City Trust, etc., Surety Co., 180 Mass. 1, 61 N. E. 223; American Finance Co. *v.* Bostwick, 151 Mass. 19, 23 N. E. 656.

Michigan.— Detroit *v.* Detroit City R. Co., 54 Fed. 1.

Missouri.— Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286.

Nevada.— Wedekind *v.* Southern Pac. Co., 36 Fed. 279, 13 Sawy. 475.

New Hampshire.— Mt. Washington R. Co. *v.* Coe, 50 Fed. 637.

New York.— Mayer *v.* Ft. Worth, etc., R. Co., 93 Fed. 601; Doyle *v.* Beaupre, 39 Fed. 289; Woolf *v.* Chisolm, 30 Fed. 881.

North Carolina.—Williams *v.* Southern Bell Tel., etc., Co., 116 N. C. 558, 21 S. E. 298.

North Dakota.— Minneapolis, etc., R. Co. *v.* Nestor, 50 Fed. 1; State *v.* Barnes, 5 N. D. 350, 65 N. W. 688.

Pennsylvania.— Overholt *v.* German-American Ins. Co., 155 Fed. 488; Garrett First Nat. Bank *v.* Appleyard, 138 Fed. 939; McHenry *v.* New York, etc., R. Co., 25 Fed. 65.

South Carolina.— Tenney *v.* American Pipe Mfg. Co., 96 Fed. 919.

South Dakota.— South Dakota Cent. R. Co. *v.* Chicago, etc., R. Co., 141 Fed. 578, 73 C. C. A. 176.

Tennessee.— Turner *v.* Illinois Cent. R. Co., 55 Fed. 689; Lockhart *v.* Memphis, etc., R. Co., 38 Fed. 274; Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545; Gavin *v.* Vance, 33 Fed. 84; Deford *v.* Mehaffy, 13 Fed. 481. And see Yarnell *v.* Felton, 102 Fed. 369.

Vermont.— Sowles *v.* Witters, 43 Fed. 700.

Virginia.— Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Mays *v.* Newlin, 143 Fed. 574; Mahoney *v.* New South Bldg., etc., Assoc., 70 Fed. 513.

West Virginia.— Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15.

See 42 Cent. Dig. tit. "Removal of Causes," § 141.

A removal cannot be made after the time to demur has expired, although a demurrer has been overruled with leave to answer. Winkler *v.* Chicago, etc., R. Co., 108 Fed. 305; Maher *v.* Tower Hotel Co., 94 Fed. 225; Frink *v.* Blackinton, 80 Fed. 306; McDonald *v.* Hope Min. Co., 48 Fed. 593; Delbanco *v.* Singletary, 40 Fed. 177. Nor after the time to file the first pleading has expired, although defendant has the right to amend, as of course, within a specified time. Doyle

case cannot be removed after the time to plead in abatement has expired, although

v. Beaupre, 39 Fed. 289; Woolf *v.* Chisolm, 30 Fed. 881. The federal court will not take notice of a rule of the state court limiting the time for pleading, unless such rule is brought to its attention by a pleading or an affidavit. Randall *v.* New England Order of Protection, 118 Fed. 782; Yarnell *v.* Felton, 102 Fed. 369. Where the state statute does not fix the time within which the pleadings must be filed it is the duty of the state court to fix the time; and this having been done, the time so fixed is the limit for the removal. Van Allen *v.* Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598. Where defendant made a default in pleading, after service of a summons without a complaint, and the default was opened, the case may be removed. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Dancel *v.* Goodyear Shoe Mach. Co., 106 Fed. 551. But see Quilhot *v.* Hamer, 158 Fed. 188. A removal may be had after the opening of a judgment, taken by default against a defendant, who had not been properly served. State *v.* Barnes, 5 N. D. 350, 65 N. W. 688; Smith *v.* America L. Assoc., 76 Va. 380; Harter Tp. *v.* Kernochan, 103 U. S. 562, 26 L. ed. 411; Tortat *v.* Hardin Min., etc., Co., 111 Fed. 426; Detroit *v.* Detroit City R. Co., 54 Fed. 1. Where there are two defendants, and but one controversy, and the time for removal has expired as to one, it is too late for the other to remove the case, although he has not been previously served, provided he was named as a party in plaintiff's original pleading. Fletcher *v.* Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. ed. 679; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455; Calderhead *v.* Downing, 103 Fed. 27; Davis *v.* Tillotson, 48 Fed. 606; Rogers *v.* Van Nortwick, 45 Fed. 513; Hakes *v.* Burns, 40 Fed. 33. But see Mutual L. Ins. Co. *v.* Champlin, 21 Fed. 85. An intervener cannot remove the case when his intervention takes place after the expiration of the original defendant's time to remove. Kidder *v.* Northwestern Mut. L. Ins. Co., 117 Fed. 997; Hakes *v.* Burns, 40 Fed. 33. But see Jackson *v.* Stiles, 4 Johns. (N. Y.) 493. Where, however, after the expiration of the time of the original defendant, others are brought in by amendment, they may remove the case because of a federal question that appeared in plaintiff's original pleading (Green *v.* Valley, 101 Fed. 882), or because of a difference of citizenship; in which case defendant whose time has expired joined with them in the application (Green *v.* Valley, 101 Fed. 882. See Robert *v.* Pineland Club, 139 Fed. 1001). The time to remove the case is not shortened by the pleading of defendant before his time to plead has expired (Atlanta, etc., R. Co. *v.* Southern R. Co., 131 Fed. 657, 66 C. C. A. 601; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930; Whiteley Malleable Castings Co. *v.* Sterlingworth R. Supply Co., 83 Fed. 853; Brisenden *v.* Chamberlain, 53 Fed. 307; Conner *v.* Skagit Cumberland Coal Co., 45 Fed. 802; Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545; Gavin *v.* Vance, 33 Fed. 84. See Evans *v.* Dillingham, 43 Fed. 177; Burck *v.* Taylor, 39 Fed. 581. *Contra*, Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Duncan *v.* Associated Press, 81 Fed. 417), by the denial of a motion to take the bill off the file (Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545), by his appearance and argument against a motion for an injunction (Cella *v.* Brown, 136 Fed. 439; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930), a receiver (Sidway *v.* Missouri Land, etc., Co., 116 Fed. 381), or any other provisional remedy (Cella *v.* Brown, *supra*; Sidway *v.* Missouri Land, etc., Co., *supra*; Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930; Garrard *v.* Silver Peak Mines, 76 Fed. 1), even though an appeal has been taken to a higher state court from the decision upon such a motion (Sidway *v.* Missouri Land, etc., Co., *supra*; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 8 Fed. Cas. No. 4,665, 9 Biss. 133), nor by overruling a demurrer (Garrard *v.* Silver Peak Mines, *supra*; Tennessee Coal, etc., Co. *v.* Waller, *supra*. But see Case *v.* Olney, 106 Fed. 433; Delbanco *v.* Singletary, 40 Fed. 177). But the time to answer runs while the demurrer is pending. Martin *v.* Carter, 48 Fed. 596. A cause cannot be removed after the cause has been set down for trial, without objection by defendant, who had previously answered. American Bonding Co. *v.* Mills, 152 Fed. 107, 81 C. C. A. 325. See Case *v.* Olney, *supra*. Where plaintiff's original pleading does not present a removable case, but he consents to a discontinuance or to a nonsuit or voluntary dismissal as regards those defendants who are citizens of the same state as himself, the remaining defendant, who is a citizen of another state, may remove the cause as soon as he is notified of such dismissal or discontinuance (Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673 [*affirming* 65 Fed. 129]; Fogarty *v.* Southern Pac. Co., 121 Fed. 941; Cookerly *v.* Great Northern R. Co., 70 Fed. 277), although defendants thus dismissed appear to be necessary parties to the suit (Cuyler *v.* Smith, 78 Ga. 662, 3 S. E. 408), and even when the discontinuance or voluntary dismissal takes place upon the trial of the action (Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673). This is true when plaintiff elected to proceed to trial against a foreign defendant, without having served process on the one who was a citizen of his own state. Berry *v.* St. Louis, etc., R. Co., 118 Fed. 911. Where plaintiff sued a citizen of his own state and a citizen of another state, jointly in tort, and having failed to serve the former when the case was called for trial, refused to continue it for such service, but elected to proceed against the citizen of the other state alone, it was

defendant has further time in which to plead or to answer to the merits. The

held that this should be treated as an election and severance of the suit, and that it was thereupon removable by defendant, who had been served. Berry *v.* St. Louis, etc., R. Co., 118 Fed. 911. Where an action of ejectment had been succeeded by a suit against plaintiffs by some of defendants therein, to determine the title to a patent for the same land, as to which the latter had made an adverse claim, and after judgment in favor of plaintiffs in the first suit, which had been vacated upon the payment by defendants of the costs and their demand for a new trial, the second suit had been dismissed as to some of defendants upon plaintiffs' request, thus making the remainder of the parties on opposite sides citizens of different states, it was held to be too late to remove this second suit. Evans *v.* Smith, 21 Fed. 1. Where an action was brought against several defendants jointly, some of whom were citizens of the same state as plaintiff, and after a dismissal as to all, the state court of appeals affirmed such judgment of dismissal, except as regards a citizen of another state, it was held that there was thus a severance of the action, and that the remaining defendant might remove the same. Yulee *v.* Vose, 99 U. S. 539, 25 L. ed. 355 [*reversing* 64 N. Y. 449 (*affirming* 4 Hun 628)]. Where, in a suit upon a joint cause of action against a domestic and a foreign corporation, judgment had been entered against the latter upon substituted service by default, and upon a trial the domestic corporation secured a judgment in its favor, from which plaintiff appealed, it was held that until the final disposition of the appeal the foreign corporation could not apply for a removal. Lathrop, etc., Co. *v.* Interior Constr., etc., Co., 143 Fed. 687. Where, in a joint action against two defendants, a peremptory instruction is given upon the trial, in favor of the one who is a citizen of plaintiff's state, or plaintiff is dismissed as against him, this does not entitle the other, although a citizen of another state, to remove the case. Illinois Cent. R. Co. *v.* Harris, 85 Miss. 15, 38 So. 225; Howe *v.* Northern Pac. R. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; Southern R. Co. *v.* Carson, 194 U. S. 136, 24 S. Ct. 609, 48 L. ed. 907 [*affirming* 68 S. C. 55, 46 S. E. 525]; Kansas City Suburban Belt R. Co. *v.* Herman, 187 U. S. 63, 23 S. Ct. 24, 47 L. ed. 76; Whitcomb *v.* Smithson, 175 U. S. 635, 20 S. Ct. 248, 44 L. ed. 303. See also Cincinnati, etc., R. Co. *v.* Evans, 110 S. W. 844, 33 Ky. L. Rep. 596. The resignation of a trustee who is a citizen of the same state as the complainant does not make the cause removable by the remaining defendants. Ruohs *v.* Jarvis-Conklin Mortg. Trust Co., 84 Fed. 513.

Extension of time.— The preponderance of authority supports the proposition that if defendant's time to plead or answer has been, before its expiration, extended by an order of the state court (Russell *v.* Harriman Land Co., 145 Fed. 745; Sanderlin *v.* People's Bank, 140 Fed. 191; Dancel *v.* Goodyear Shoe Mach. Co., 106 Fed. 551; Lord *v.* Lehigh Valley R. Co., 104 Fed. 929; Mayer *v.* Ft. Worth, etc., R. Co., 93 Fed. 601; Tracy *v.* Morel, 88 Fed. 801; Chiatovich *v.* Hanchett, 78 Fed. 193; Allmark *v.* Platte Steamship Co., 76 Fed. 614; Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929; People's Bank *v.* Ætna Ins. Co., 53 Fed. 161; Rycroft *v.* Green, 49 Fed. 177; Sowles *v.* Witters, 43 Fed. 700; Wedekind *v.* Southern Pac. Co., 36 Fed. 279, 13 Sawy. 475; Simonson *v.* Jordon, 30 Fed. 721; Winberg *v.* Berkeley Co. R., etc., Co., 29 Fed. 721. *Contra*, Bryson *v.* Southern R. Co., 141 N. C. 594, 54 S. E. 434; Mecke *v.* Valley Town Mineral Co., 122 N. C. 790, 29 S. E. 781; Fox *v.* Southern R. Co., 80 Fed. 945; Ruby Canyon Gold Min. Co. *v.* Hunter, 60 Fed. 305; Rock Island Nat. Bank *v.* J. S. Keator Lumber Co., 52 Fed. 897; Martin *v.* Carter, 48 Fed. 596; Spangler *v.* Atchison, etc., R. Co., 42 Fed. 305; Velie *v.* Manufacturers' Acc. Indemnity Co., 40 Fed. 545; Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476; Dixon *v.* Western Union Tel. Co., 38 Fed. 377. See also Pullman Palace Car Co. *v.* Speck, 113 U. S. 84, 5 S. Ct. 374, 28 L. ed. 925; Daugherty *v.* Western Union Tel. Co., 61 Fed. 138; Delbanco *v.* Singletary, 40 Fed. 177; Kaitel *v.* Wylie, 38 Fed. 865), or by a stipulation authorized by a state statute or court rule (Tevis *v.* Palatine Ins. Co., 149 Fed. 560; Russell *v.* Harriman Land Co., 145 Fed. 745; Sanderlin *v.* People's Bank, 140 Fed. 191; Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Mayer *v.* Ft. Worth, etc., R. Co., 93 Fed. 601; Tracy *v.* Morel, 88 Fed. 801; Chiatovich *v.* Hanchett, 78 Fed. 193; Allmark *v.* Platte Steamship Co., 76 Fed. 614; People's Bank *v.* Ætna Ins. Co., 53 Fed. 161, 62 Fed. 222. But see Pullman Palace Car Co. *v.* Speck, 113 U. S. 84, 5 S. Ct. 374, 28 L. ed. 925. *Contra*, Schipper *v.* Consumer Cordage Co., 72 Fed. 803; Ruby Canyon Gold Min. Co. *v.* Hunter, 60 Fed. 305; Martin *v.* Carter, 48 Fed. 596; Velie *v.* Manufacturers' Acc. Indemnity Co., 40 Fed. 545; Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476; Dixon *v.* Western Union Tel. Co., 38 Fed. 377), his time to remove is likewise extended. An *ex parte* order of extension (Hurd *v.* Gere, 38 Fed. 537), or an oral stipulation (Disbrow *v.* Driggs, 8 Abb. Pr. (N. Y.) 305 note, 16 How. Pr. 346; Price *v.* Lehigh Valley R. Co., 65 Fed. 825; Dwyer *v.* Peshall, 32 Fed. 497), not authorized by the state practice, will not extend the time of removal. After the time to plead in a case, which plaintiff's pleading previously showed to be removable, has once expired, it cannot be extended by an order opening the default and allowing him to plead (Williams *v.* Southern Bell Tel., etc., Co., 116 N. C. 558, 21 S. E. 298; Price *v.* Lehigh Valley R. Co., 65 Fed. 825; Rock Island Nat. Bank *v.* J. S. Keator Lumber Co., 52 Fed. 897; Hurd *v.* Gere, 38 Fed. 537. See Berrian *v.* Chetwood, 9 Fed. 678; McCallon *v.* Waterman, 15 Fed. Cas. No. 8,675,

right of removal cannot be claimed except within the time and in the manner prescribed by statute.[94]

C. Removal Before Trial. The act of 1887 provides: That removals for prejudice or local influence,[95] and removals of actions between citizens of the same

1 Flipp. 651, 4 N. Y. Wkly. Dig. 382), although the right to have the default opened is given defendant by statute (Davis *v.* Harris, 124 Fed. 713). The omission to enter judgment by default does not extend the time. Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. ed. 963. The time is not extended by the filing of a plea to the jurisdiction of the state court. Olds *v.* City Trust, etc., Co., 114 Fed. 975. The fact that defendant's attorney was prevented by inevitable accident from filing his petition (Daugherty *v.* Western Union Tel. Co., 61 Fed. 138), and that there was an oral understanding that no default should be taken (Price *v.* Lehigh Valley R. Co., 65 Fed. 825) will not enlarge the time. Where plaintiff's original pleading does not present a removable case, but an amendment thereto, by omitting some of the original parties (Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673. See Robert *v.* Pineland Club, 139 Fed. 1001), by a new allegation concerning the value of the matter in dispute (Northern Pac. R. Co. *v.* Austin, 135 U. S. 315, 10 S. Ct. 758, 34 L. ed. 218; Barber *v.* Boston, etc., R. Co., 145 Fed. 52; Enders *v.* Lake Erie, etc., R. Co., 101 Fed. 202; Huskins *v.* Cincinnati, etc., R. Co., 37 Fed. 504, 3 L. R. A. 545), or by showing that the case arises under the constitution or laws of the United States (North Dakota Guarantee Co. *v.* Hanway, 104 Fed. 369, 44 C. C. A. 312; Bailey *v.* Mosher, 95 Fed. 223; Speckart *v.* German Nat. Bank, 85 Fed. 12. But see Houston, etc., R. Co. *v.* State, (Tex. Civ. App. 1896) 39 S. W. 390 [*affirmed* in 95 Tex. 507, 68 S. W. 777]) brings it within the removal act; the time to remove is extended until defendant must plead to the amended pleading. The same rule applies where the amendment presents an entirely new case (Phœnix Mut. L. Ins. Co. *v.* Walrath, 117 U. S. 365, 6 S. Ct. 768, 29 L. ed. 924 [*affirming* 16 Fed. 161, 11 Biss. 432]; Edrington *v.* Jefferson, 111 U. S. 770, 4 S. Ct. 683, 28 L. ed. 594; Youtsey *v.* Hoffman, 108 Fed. 693; Mecke *v.* Valley Town Mineral Co., 89 Fed. 209; Mattoon *v.* Reynolds, 62 Fed. 417; Evans *v.* Dillingham, 43 Fed. 177; Wehl *v.* Wald, 29 Fed. Cas. No. 17,356, 17 Blatchf. 342), but not otherwise (Beyer *v.* Soper Lumber Co., 76 Wis. 145, 44 N. W. 750, 833; Painter *v.* New River Mineral Co., 98 Fed. 544; Gregory *v.* Boston Safe-Deposit, etc., Co., 88 Fed. 3; Kaitel *v.* Wylie, 38 Fed. 865). Where a subsequent pleading by the plaintiff, such as a reply, shows that there is a separate controversy in the case, which did not appear upon the original pleading; the case may then be removed, although the removing defendant's time to answer has expired. Fritzlen *v.* Boatmen's Bank, 212 U. S. 364, 29 S. Ct. 366.

"If the time fixed by the rule of the state court to answer or plead to an amended complaint, is so short as to deny to the defendant a reasonable time within which to prepare and file a petition and bond, such rule, it would seem, ought not to defeat the right of removal, if exercised with reasonable promptness." Enders *v.* Lake Erie, etc., R. Co., 101 Fed. 202, 203, per Baker, J. See Jones *v.* Mosher, 107 Fed. 561, 46 C. C. A. 471.

94. Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Garrett First Nat. Bank *v.* Appleyard, 138 Fed. 939; New York Fidelity, etc., Co. *v.* Hubbard, 117 Fed. 949; Olds *v.* City Trust, etc., Co., 114 Fed. 975; First Littleton Bridge Corp. *v.* Connecticut River Lumber Co., 71 Fed. 225; Chicago *v.* Hutchinson, 15 Fed. 129, 11 Biss. 484; Gurnee *v.* Brunswick, 11 Fed. Cas. No. 5,872, 1 Hughes 270. But see Wilson *v.* Winchester, etc., R. Co., 82 Fed. 15; Mahoney *v.* New South Bldg., etc., Assoc., 70 Fed. 513; Lockhart *v.* Memphis, etc., R. Co., 38 Fed. 274.

95. 25 U. S. St. at L. 435, c. 866, § 2 [U. S. Comp. St. (1901) p. 509].

Illustrations.—A removal for prejudice or local influence must be made before the first trial of the cause. McDonnell *v.* Jordan, 178 U. S. 229, 20 S. Ct. 886, 44 L. ed. 1048; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 35 L. ed. 1080 [*reversing* 32 Fed. 417, 13 Sawy. 38, 35 Fed. 230, 13 Sawy. 318]. A mistrial because of a disagreement of the jury (McDonnell *v.* Jordan, *supra*; Farmers' etc., Nat. Bank *v.* Schuster, 86 Fed. 161, 29 C. C. A. 649; Davis *v.* Chicago, etc., R. Co., 46 Fed. 307) or an order for a new trial (Fisk *v.* Henarie, *supra*), does not enlarge the time. Such a removal must be made before the first step in the trial is taken. Fleming *v.* Philadelphia Fire Assoc., 76 Ga. 678; Adams' Express Co. *v.* Trego, 35 Md. 47; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682; Anglo-American Provision Co. *v.* Evans, 34 Nebr. 44, 51 N. W. 310; Strong *v.* Black, 5 Alb. L. J. (N. Y.) 214; Watt *v.* White, 46 Tex. 338; Manning *v* Amy, 140 U. S. 137, 11 S. Ct. 707, 35 L. ed. 386 [*affirming* 144 Mass. 153, 10 N. E. 737]; Maysville Bank *v.* Claypool, 120 U. S. 268, 7 S. Ct. 545, 30 L. ed. 632; Davis *v.* Chicago, etc., R. Co., 46 Fed. 307; Lewis *v.* Smythe, 15 Fed. Cas. No. 8,333, 2 Woods 117; Waggener *v.* Cheek, 28 Fed. Cas. No. 17,035, 2 Dill. 560. It is too late after a jury has been accepted, but not sworn (Anglo-American Provision Co. *v.* Evans, *supra*); after the case has been called and a motion by defendant for a continuance has been made and overruled (Fleming *v.* Philadelphia Fire Assoc., *supra*); after plaintiff has answered ready and time granted defendant to present an application for a continu-

state claiming land under grants of different states,[96] must be made "before the trial." It has been said that the statute requires, in the case of removals because of prejudice or local influence, the application to remove to be filed before or at the term at which the cause could first be tried and before the trial thereof." [97]

D. Removal Before Trial or Final Hearing. In suits or criminal prosecutions against revenue officers,[98] officers of either house of congress,[99] or persons claiming rights under the revenue laws,[1] or against persons who seek protection under the Civil Rights Law [2] a removal may be had "at any time before the trial or final hearing." [3]

ance (Watt *v.* White, *supra*); after an hour's time allowed defendant for the procurement of counsel (Fleming *v.* Philadelphia Fire Assoc., *supra*); or after defendant has, after his motion for a postonement was denied, consented to a reference in order to prevent an immediate trial (Hanover Nat. Bank *v.* Smith, 11 Fed. Cas. No. 6,035, 13 Blatchf. 224). It is not too late, when upon the cause being called for trial, objections were made that it was not ready and it was sent to another part of the court, for the hearing of a motion to vacate an order extending the time to amend the answer (Maloy *v.* Duden, 25 Fed. 673), nor when an attempt has been made to begin the trial of a case before it is properly triable in the regular course of procedure (Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593). The preponderance of authority holds that the argument of a general demurrer is a trial within the meaning of the statute. St. Louis, etc., R. Co. *v.* Weaver, 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Miller *v.* Kent, 60 How. Pr. (N. Y.) 451; Laidly *v.* Huntington, 121 U. S. 179, 7 S. Ct. 855, 30 L. ed. 883; Gregory *v.* Hartley, 113 U. S. 742, 5 S. Ct. 743, 28 L. ed. 1150; Scharff *v.* Levy, 112 U. S. 711, 5 S. Ct. 360, 28 L. ed. 825; Alley *v.* Nott, 111 U. S. 472, 4 S. Ct. 495, 28 L. ed. 491; Winkler *v.* Chicago, etc., R. Co., 108 Fed. 305; Lookout Mountain R. Co. *v.* Houston, 32 Fed. 711; Wilson *v.* Rock Island Paper Co., 20 Fed. 705; Boyd *v.* Gill, 19 Fed. 145, 21 Blatchf. 543. *Contra*, Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65. And see Meyer *v.* Norton, 9 Fed. 433. The hearing and decision of a motion for an injunction and a temporary receiver is not a trial. Franklin *v.* Wolf, 78 Ga. 446, 3 S. E. 696. *Contra*, Lehigh Coal, etc., Co. *v.* Central R. Co., 15 Fed. Cas. No. 8,213, 4 Wkly. Notes Cas. (Pa.) 187. Where the court of ordinary has made a decree admitting a will to probate, and an appeal has been taken to a court of record, which has the right to try the question anew, it is not too late to remove the case under the act of 1887, for prejudice or local influence. Brodhead *v.* Shoemaker, 44 Fed. 518, 11 L. R. A. 567. But see *In re* Frazer, 9 Fed. Cas. No. 5,068, 6 Reporter 357, 18 Alb. L. J. (N. Y.) 353, 7 N. Y. Wkly. Dig. 129. After the decree of a court of probate upon a petition by an administratrix for final accounting and for a distribution, in which she claimed to be the sole heir at law of the decedent, the cause cannot be removed upon an appeal to a court of record, where the questions thus decided could be tried anew. Craigie *v.* McArthur, 6 Fed. Cas. No. 3,341, 4 Dill. 474, 15 Alb. L. J. (N. Y.) 121. It is not too late to remove a case pending an appeal from an award of arbitrators under the Pennsylvania statute (Thorne *v.* Towanda Tanning Co., 15 Fed. 289), after the report of commissioners, to whom a claim has been referred by a probate court under the Michigan statute (Hess *v.* Reynolds, 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927), upon an appeal from the decision of a board of county commissioners upon a claim against their county (Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674), nor upon an appeal from an appraisal by commissioners in a condemnation proceeding, when their proceeding was purely administrative in its nature (Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319 [*reversing* 16 Fed. 292, 3 McCrary 578).

96. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

97. McDonnell *v.* Jordan, 178 U. S. 229, 239, 20 S. Ct. 886, 44 L. ed. 1048, per Fuller, C. J. But see Parker *v.* Vanderbilt, 136 Fed. 246; Detroit *v.* Detroit City R. Co., 54 Fed. 1; Huskins *v.* Cincinnati, etc., R. Co., 37 Fed. 504, 3 L. R. A. 545 [*affirmed* in 154 U. S. 506, 14 S. Ct. 1147, 38 L. ed. 1076].

The trial court is under no obligation to delay the trial of the cause in order to enable a party to prepare an application for a removal. U. S. Savings Inst. *v.* Brockschmidt, 72 Ill. 370.

98. U. S. Rev. St. (1878) § 643, as amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521].

99. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602].

1. U. S. Rev. St. (1878) § 643, as amended by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 521].

2. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

3. **Illustrations.**—A prosecution begun by information before a justice of the peace for a misdemeanor, which is not the subject of indictment, may be thus removed. Virginia *v.* Bingham, 88 Fed. 561. No removal of a case, however, can be had before indictment or information in the state court. Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386.

Under previous statutes authorizing removals in other cases "before trial or final

IX. Parties Who May Remove.

A. In General — 1. Infants. Where the necessary jurisdictional facts exist, an infant defendant may remove a case through his next friend or guardian *ad litem*, in the same manner and under the same circumstances as any other defendant.[4]

2. Husband in Suit to Which Wife Is Party. A husband may join the wife in an application for the removal of a suit affecting property, which belonged to her before the marriage, and has not yet been reduced to possession.[5]

3. Receivers. A receiver, authorized to sue and be sued in his own name, may, when the necessary jurisdictional facts exist, remove a suit to which he is defendant.[6]

4. Interveners and Substituted Parties. An intervener, who presents some new and independent interest or question, may remove a case under circumstances which would warrant such a removal by the original defendant.[7]

hearing," or "before final hearing or trial," it was held that a removal might be made after a new trial had been ordered (Brayley *v.* Hedges, 53 Iowa 582, 5 N. W. 748; Dart *v.* Walker, 4 Daly (N. Y.) 188; Rosenfield *v.* Condict, 44 Tex. 464; Baltimore, etc., R. Co. *v.* Bates, 119 U. S. 464, 7 S. Ct. 285, 30 L. ed. 436; Virginia *v.* Bingham, 88 Fed. 561; Sutherland *v.* Jersey City, etc., R. Co., 22 Fed. 356; Melendy *v.* Currier, 22 Fed. 129, 22 Blatchf. 503; Dart *v.* McKinney, 7 Fed. Cas. No. 3,583, 9 Blatchf. 359; Kellogg *v.* Hughes, 14 Fed. Cas. No. 7,662, 3 Dill. 357; Minnett *v.* Milwaukee, etc., R. Co., 17 Fed. Cas. No. 9,636, 3 Dill. 460, 13 Alb. L. J. 254; Sims *v.* Sims, 22 Fed. Cas. No. 12,894, 17 Blatchf. 369), or after the unsuccessful party had performed all the conditions precedent to obtain the right to a new trial (Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68), that defendants were not bound to take affirmative action in case of a reversal, until the complainants had caused the case to be redocketed on notice to them (Pettilon *v.* Noble, 19 Fed. Cas. No. 11,044, 7 Biss. 449), that a removal might be had after a jury had disagreed (Burson *v.* New York Nat. Park Bank, 40 Ind. 173, 13 Am. Rep. 285; Clark *v.* Delaware, etc., Canal Co., 11 R. I. 36; Osborn *v.* Osborn, 5 Fed. 389, 2 McCrary 455), after a general demurrer had been overruled (Field *v.* Williams, 24 Fed. 513), after the appellate court had reversed an order for a reference to hear and determine, and had ordered issues to be framed for trial in the court below (Douglas *v.* Caldwell, 65 N. C. 248), and that the language construed meant a final hearing or trial on the merits (Akerly *v.* Vilas, 24 Wis. 165, 1 Am. Rep. 166); but that there could be no removal pending a motion for a new trial, which had not been decided (Bryant *v.* Rich, 106 Mass. 180, 8 Am. Rep. 311; Vannevar *v.* Bryant, 21 Wall. (U. S.) 41, 22 L. ed. 476), pending an appeal which had not been decided (Meaux *v.* Pittman, 32 La. Ann. 405; Williams *v.* Williams, 24 La. Ann. 55; Miller *v.* Finn, 1 Nebr. 254; Whittier *v.* Hartford F. Ins. Co., 55 N. H. 141, 20 Am. Rep. 185; Beery *v.* Irick, 22 Gratt. (Va.) 484, 12 Am. Rep. 539; Lowe *v.* Williams, 94 U. S. 650, 24 L. ed. 216; Stevenson *v.* Williams, 19 Wall. 572, 22 L. ed. 162; Brice *v.* Somers, 4 Fed. Cas. No. 1,856, 1 Flipp. 574, 2 N. Y. Wkly. Dig. 478), after the appellate court had directed a reversal and a new trial, but the time allowed for a rehearing had not expired and subsequent to the attempted removal a rehearing was granted and the judgment affirmed (Chicago, etc., R. Co. *v.* McKinley, 99 U. S. 147, 25 L. ed. 272 [*affirming* 44 Iowa 314, 24 Am. Rep. 748]), after the court of review had directed the court below to enter a decree in conformity with its opinion (Darst *v.* Peoria, 13 Fed. 561), nor after the appellate court had ordered an accounting before a master (Jifkins *v.* Sweetser, 102 U. S. 177, 26 L. ed. 129).

4. Woolridge *v.* McKenna, 8 Fed. 650, holding, however, that this cannot be done until the infant has been served with process, or otherwise subjected to the jurisdiction of the state court, in accordance with the law of the state. But see Kingsbury *v.* Kingsbury, 14 Fed. Cas. No. 7,817, 3 Biss. 60.

5. Carswell *v.* Schley, 59 Ga. 17.

6. American Nat. Bank *v.* National Ben. etc., Co., 70 Fed. 420.

Corporation in the hands of receivers.—A New York corporation, over whose property receivers have been appointed by the supreme court of New York and the chancellor of New Jersey, may, without the consent of those receivers, remove a suit begun by the levy of a writ of foreign attachment in a New Jersey court. Paterson Second Nat. Bank *v.* New York Silk Mfg. Co., 11 Fed. 532.

7. Chase *v.* Beech Creek R. Co., 144 Fed. 571; Jackson, etc., Sharp Co. *v.* Pearson, 60 Fed. 113; Hack *v.* Chicago, etc., R. Co., 23 Fed. 356.

An intervener, who is substituted in the place of another defendant or who comes in because he has succeeded to such other's rights, cannot remove a cause, which the original defendant could not have removed. Baltimore, etc., Tel. Co. *v.* Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883; Howard *v.* Stewart, 34 Nebr. 765, 52 N. W. 714; Jefferson *v.* Driver, 117 U. S. 272, 6 S. Ct. 729, 29 L. ed. 897; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28

B. Plaintiffs or Defendants — 1. In General. A suit between citizens of the same state, claiming lands under grants by different states, may be removed by any one or more of plaintiffs or defendants.[8] In every other case a defendant only may procure a removal,[9] except where parties have been joined as plaintiffs, who are on the same side of the controversy as the defendants, when, it might be held, that they could join with the other defendants in the petition.[10]

2. Who Are Defendants — a. Where There Are Cross Bills or Counter-Claims. The pleading by the original defendant of a cross bill, a counter-claim, or a demand in reconvention, which exceeds the jurisdictional amount, does not put the original plaintiff in the position of a defendant, so that he can remove the cause,[11] nor debar defendant of his right to remove.[12]

b. Condemnation Proceedings. Upon the removal of a condemnation proceeding, pending an appeal from the decision of the commissioners, the landowner, who was the respondent below, is usually regarded as a defendant.[13]

c. Appeals in Probate Proceedings. Upon an appeal from an application for the probate of a will the party opposing the probate is considered as defendant.[14]

d. Appeals From Decisions Upon County Claims. Upon an appeal from a decision of a board of county commissioners upon a county claim, the claimant must be considered to be plaintiff, and he cannot remove the cause, although he is the respondent upon such appeal.[15]

e. Cases Arising Under Insolvent Assignments. It has been held that a claimant against an assignee for the benefit of creditors who has filed his claim, and subsequently a reply to the exceptions filed by the assignee, must be considered to be a plaintiff, and has no right to remove the cause.[16]

L. ed. 455; Cable *v.* Ellis, 110 U. S. 389, 4 S. Ct. 85, 28 L. ed. 186; United Electric Securities Co. *v.* Louisiana Electric Light Co., 68 Fed. 673; Olds Wagon Works *v.* Benedict, 67 Fed. 1, 14 C. C. A. 285; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237; Burnham *v.* Leith First Nat. Bank, 53 Fed. 163, 3 C. C. A. 486; *In re* San Antonio, etc., R. Co., 44 Fed. 145; Richmond, etc., R. Co. *v.* Findley, 32 Fed. 641; Goodnow *v.* Dolliver, 26 Fed. 469; Shirley *v.* Waco Tap R. Co., 13 Fed. 705, 4 Woods 411; Ohlquist *v.* Farwell, 13 Fed. 305, 4 McCrary 401; Ellis *v.* Sisson, 11 Fed. 353, 11 Biss. 187. But see Greene *v.* Klingler, 10 Fed. Cas. No. 5,767. Where the party whose place he takes might still remove the case if he had remained in the suit and the intervener's citizenship is the same, the latter may have a removal. Howard *v.* Stewart, 34 Nebr. 765, 52 N. W. 714. It has been intimated that an intervener, who asserts rights prior to that of plaintiff, must be treated as a new plaintiff rather than as a defendant, and cannot remove the case. Nash *v.* McNamara, 145 Fed. 541; *In re* San Antonio, etc., R. Co., 44 Fed. 145. A party who has been wrongfully denied the right of intervention may remove a case. Hack *v.* Chicago, etc., R. Co., 23 Fed. 356. *Contra*, Bertha Zinc, etc., Co. *v.* Carico, 61 Fed. 132. One who has not applied for leave to intervene cannot. State *v.* Barnes, 5 N. D. 350, 65 N. W. 688.

As to the right of interveners to remove a separable controversy see *supra*, VI, C.

8. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

9. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984; McKown *v.* Kansas, etc., Coal Co., 105 Fed. 657; Waco Hardware Co. *v.* Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511; Campbell *v.* Collins, 62 Fed. 849; La Montagne *v.* T. W. Harvey Lumber Co., 44 Fed. 645; Western Union Tel. Co. *v.* Brown, 32 Fed. 337.

10. Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593.

11. Chappell *v.* Chappell, 86 Md. 532, 39 Atl. 984; Smithers *v.* Smith, 35 Tex. Civ. App. 508, 80 S. W. 646 [*affirmed* in 98 Tex. 83, 81 S. W. 283]; West *v.* Aurora City, 6 Wall. (U. S.) 139, 18 L. ed. 819 [*affirming* 25 Ind. 148]; McKown *v.* Kansas, etc., Coal Co., 105 Fed. 657; Waco Hardware Co. *v.* Michigan Stove Co., 91 Fed. 289, 33 C. C. A. 511; La Montagne *v.* T. W. Harvey Lumber Co., 44 Fed. 645. *Contra*, Price *v.* Ellis, 129 Fed. 482; Carson, etc., Lumber Co. *v.* Holtzclaw, 39 Fed. 578.

12. La Montagne *v.* T. W. Harvey Lumber Co., 44 Fed. 645; Meissner *v.* Buek, 28 Fed. 161.

13. Mason City, etc., R. Co. *v.* Boynton, 204 U. S. 570, 27 S. Ct. 321, 51 L. ed. 629; Hudson River R., etc., Co. *v.* Day, 54 Fed. 545; Mt. Washington R. Co. *v.* Coe, 50 Fed. 637. But see Myers *v.* Chicago, etc., R. Co., 118 Iowa 312, 91 N. W. 1076; Kirby *v.* Chicago, etc., R. Co., 106 Fed. 551. *Contra*, White *v.* Philadelphia, 8 Phila. (Pa.) 241.

14. Brodhead *v.* Shoemaker, 44 Fed. 518, 11 L. R. A. 567.

15. Delaware County Com'rs *v.* Diebold Safe, etc., Co., 133 U. S. 473, 10 S. Ct. 399, 33 L. ed. 674; Tullock *v.* Webster County, 40 Fed. 706.

16. Hill *v.* Graham, 11 Colo. App. 536, 53 Pac. 1060.

C. Joinder of Parties — 1. Proceedings Against Revenue Officers, Officers of Either House of Congress, and Persons Having Defenses Under the Revenue Laws. It seems that civil suits or criminal prosecutions against revenue officers or persons having defenses under the revenue laws may be removed by such a defendant alone, although other parties not having such a defense have been joined with him;[17] and that actions against any person for or on account of anything done by him while an officer of either house of congress, in the discharge of his official duty, may be similarly removed.[18]

2. Proceedings Against Persons Having Defenses Under the Civil Rights Laws. It seems that civil suits or criminal prosecutions where any defendant is denied or cannot enforce his rights, secured by the civil rights laws, or where any defendant has a defense under the civil rights laws, may be removed by such defendant, although his co-defendants do not join in his petition.[19]

3. Suits Between Citizens of the Same State Claiming Land Under Grants of Different States. Suits between citizens of the same state claiming land under grants of different states may be removed by any one or more of the plaintiffs or defendants.[20]

4. Suits Arising Under the Constitution or Laws or Treaties of the United States. Suits arising under the constitution or laws or treaties of the United States, except those previously specified,[21] cannot be removed unless all defendants join in the petition, even though some of them are not interested in the controversy.[22]

5. Difference of Citizenship — a. Suits to Which Aliens Are Parties. It seems that suits to which an alien is a party cannot be removed, unless all the parties on the opposite side of the controversy to that of plaintiff join in the application.[23]

b. Controversies Between Citizens of Different States — (i) *In General.* Where the sole ground of the removal is that the only controversy in the suit is between citizens of different states, the preponderance of authority supports the proposition that all the parties named in plaintiff's pleading, who are on the opposite side of the controversy to him, must join in the application.[24]

17. U. S. Rev. St. (1878) § 643.

18. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602].

19. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

20. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

21. See *supra*, IX, C, 1, 2, 3.

22. Chicago, etc., R. Co. *v.* Martin, 59 Kan. 437, 53 Pac. 461; Texas, etc., R. Co. *v.* Young, (Tex. Civ. App. 1894) 27 S. W. 145; Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055; Helfelfinger *v.* Choctaw, etc., R. Co., 140 Fed. 75; Scott *v.* Choctaw, etc., R. Co., 112 Fed. 180; Yarnell *v.* Felton, 104 Fed. 161.

23. 25 U. S. St. at L. 434, c. 866, § 2 [U. S. Comp. St. (1901) p. 509]. And see cases cited *infra*, note 30.

24. Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 20 S. Ct. 854, 44 L. ed. 1055; Fletcher *v.* Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. ed. 679; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455; International, etc., R. Co. *v.* Hoyle, 149 Fed. 180, 79 C. C. A. 128; Blackburn *v.* Blackburn, 142 Fed. 901; Huntington *v.* Pinney, 126 Fed. 237; Yarnell *v.* Felton, 102 Fed. 369; Thompson *v.* Chicago, etc., R. Co., 60 Fed. 773; Arkansas Valley Smelting Co. *v.* Cowenhoven, 41 Fed. 450. *Contra*, Munford Rubber Tire Co. *v.* Consolidated Rubber Tire Co., 130 Fed. 496; Hunter *v.* Conrad, 85 Fed. 803; Boston Safe-Deposit, etc., Co. *v.* Mackay, 70 Fed. 801; Garner *v.* Providence Second Nat. Bank, 66 Fed. 369; Mutual L. Ins. Co. *v.* Champlin, 21 Fed. 85.

The fact that one of defendants has not been served (Brown *v.* Trousdale, 138 U. S. 389, 11 S. Ct. 308, 34 L. ed. 987; Patchin *v.* Hunter, 38 Fed. 51. *Contra*, Tremper *v.* Schwabacher, 84 Fed. 413; Wormser *v.* Dahlman, 30 Fed. Cas. No. 18,048, 16 Blatchf. 319, 7 Reporter 740, 57 How. Pr. (N. Y.) 286), has made default (Fairchild *v.* Durand, 8 Abb. Pr. (N. Y.) 305; Fletcher *v.* Hamlet, 116 U. S. 408, 6 S. Ct. 426, 29 L. ed. 679 [*affirming* 24 Fed. 305]; Brooks *v.* Clark, 119 U. S. 502, 7 S. Ct. 301, 30 L. ed. 482; Putnam *v.* Ingraham, 114 U. S. 57, 5 S. Ct. 746, 29 L. ed. 65; Hax *v.* Caspar, 31 Fed. 499), that judgment was entered against one before service upon the other (Brooks *v.* Clark, *supra*), or that one has appeared and disclaimed (Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Goodnow *v.* Litchfield, 47 Fed. 753; Dow *v.* Bradstreet Co., 46 Fed. 824; Hax *v.* Caspar, *supra*; New Jersey Zinc Co. *v.* Trotter, 18 Fed. Cas. No. 10,167) will not obviate the necessity of his joinder in the application for the removal of the suit to the federal court.

(II) *When Defendants are Unknown.* Defendants who are described in plaintiff's pleading as unknown need not join in the petition for removal.[25]

(III) *Formal Parties.* Formal parties need not join in the petition.[26]

(IV) *Unnecessary and Improper Parties.* Unnecessary and improper parties need not join in the petition.[27]

(V) *Separable Controversies.* Where there are two controversies in the case, and one of them is removable, any one or more of the non-resident defendants interested in that controversy may remove the cause.[28]

(VI) *Removals For Prejudice or Local Influence.* Where a case is removable for prejudice or local influence, the petition may be filed by any one of defendants who has the right of removal without the joinder of his co-defendants.[29]

D. Residence as Affecting Right of Removal. A removal because of alienage,[30] or because the parties to the controversy are citizens of different states,[31] can only be made by parties who are non-residents of the state where the suit is brought.

X. PRACTICE ON REMOVAL.

A. Removal in Ordinary Cases — 1. In General. Where the sole ground of removal is a difference of citizenship, whether or not there is a separable controversy in the case and in ordinary suits arising under the constitution or laws or treaties of the United States, the practice upon removals is the same. The party entitled to remove must make and file [32] in the state court a petition [33] for

25. Walker *v.* Richards, 55 Fed. 129.

26. Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386; Henderson *v.* Cabell, 43 Fed. 257.

27. Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452.

28. Rand *v.* Walker, 117 U. S. 340, 6 S. Ct. 769, 29 L. ed. 907; Grindrod *v.* Crine, 22 Fed. 257; Greene *v.* Klinger, 10 Fed. 689; Field *v.* Lownsdale, 9 Fed. Cas. No. 4,769, Deady 288; Fields *v.* Lamb, 9 Fed. Cas. No. 4,775, Deady 430; Lewis *v.* White, 15 Fed. Cas. No. 8,335; McGinnity *v.* White, 16 Fed. Cas. No. 8,802, 3 Dill. 350.

The joinder of a party who has no right of removal does not affect the removal by the other. Snow *v.* Smith, 88 Fed. 657.

29. 25 U. S. St. at L. 434, c. 866, § 2 [U. S. Comp. St. (1901) p. 509]; Haire *v.* Rome R. Co., 57 Fed. 321; Detroit *v.* Detroit City R. Co., 54 Fed. 1; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65; Fisk *v.* Henarie, 32 Fed. 417, 13 Sawy. 38 [*reversed* upon another point in 142 U. S. 459, 12 S. Ct. 207, 35 L. ed. 1080].

30. Eddy *v.* Casas, 118 Fed. 363; Walker *v.* O'Neill, 38 Fed. 374; Cudahy *v.* McGeoch, 37 Fed. 1; Cooley *v.* McArthur, 35 Fed. 372.

31. Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602; Wichita Nat. Bank *v.* Smith, 72 Fed. 568, 19 C. C. A. 42.

Neither party resident of district.— The circuit courts of the United States have no original jurisdiction, on the ground of diversity of citizenship, of a suit wherein neither party is a resident of the district in which the suit is brought; and hence cannot acquire jurisdiction of such a case by removal (*Ex p.* Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264; Baxter, etc., Constr. Co. *v.* Hammond Mfg. Co., 154 Fed. 992), unless that objection is waived (*Ex p.* Moore, 209 U. S. 490, 28 S. Ct. 585, 706, 52 L. ed. 904).

Where there are several defendants, all of whom are citizens of a different state from plaintiff, and one of whom only is a resident of the state where the suit is brought, there can be no removal. Parkinson *v.* Barr, 105 Fed. 81.

32. Place of filing.— In the supreme court of New York, the papers must be filed in the clerk's office of the county in which the venue is laid. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Johnson *v.* Computing Scale Co., 139 Fed. 339; Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Loop *v.* Winters, 115 Fed. 362; Noble *v.* Massachusetts Ben. Assoc., 48 Fed. 337. The approval by the presiding justice of another county in the same district, when there was no court in session in the county where the case was pending, does not cure this error. Noble *v.* Massachusetts Ben. Assoc., *supra.*

Notice.— The proceedings are *ex parte,* and no notice to plaintiff is required (Southern R. Co. *v.* Hudgins, 107 Ga. 334, 33 S. E. 442; Ficklin *v.* Tarver, 59 Ga. 263; Louisiana State Bank *v.* Morgan, 4 Mart. N. S. (La.) 344; Crotts *v.* Southern R. Co., 90 Fed. 1; Creagh *v.* Equitable L. Assur. Soc., 83 Fed. 849; Chiatovich *v.* Hanchett, 78 Fed. 193; Stevens *v.* Richardson, 9 Fed. 191, 20 Blatchf. 53; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,828, 8 Blatchf. 243, 3 Alb. L. J. (N. Y.) 156; Wehl *v.* Wald, 29 Fed. Cas. No. 17,356, 17 Blatchf. 342; Wormser *v.* Dahlman, 30 Fed. Cas. No. 18,048, 16 Blatchf. 319, 7 Reporter 740, 57 How. Pr. (N. Y.) 286), except perhaps when the removal is sought because of prejudice or local influence (see *infra,* X, B, 6).

33. See *infra,* X, A, 3.

the removal of the suit into the circuit court to be held in the district where the suit is pending; and he must "make and file therewith a bond,[34] with good and sufficient surety, for his or their entering in such circuit court, on the first day of its next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requested therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit." [35] A case cannot be removed by stipulation or consent, where the record does not show the jurisdiction.[36]

2. Presentment of Petition and Bond. It is the usual and the safer practice to present the petition and bond to a judge of a state court, where the suit is pending, and to obtain the formal acceptance of the same by that court; [37] but some authorities hold that when they are filed in the clerk's office this is unnecessary.[38]

3. Petition — a. In General. The petition must state the facts which justify the removal and give jurisdiction to the circuit court of the United States.[39] And

34. See *infra*, X, A, 4.

35. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

36. People's Bank *v.* Winslow, 102 U. S. 256, 26 L. ed. 101; Parkersburg First Nat. Bank *v.* Prager, 91 Fed. 689, 34 C. C. A. 51; Kingsbury *v.* Kingsbury, 14 Fed. Cas. No. 7,817, 3 Biss. 60.

37. Sanderlin *v.* People's Bank, 140 Fed. 191; Noble *v.* Massachusetts Ben. Assoc., 48 Fed. 337.

The bond as well as the petition must be presented. Roberts *v.* Carrington, 2 Hall (N. Y.) 694.

Filing in vacation.—According to the preponderance of authority, the petition and bond may be filed during a vacation of the state court. Mecke *v.* Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151; South Carolina *v.* Coosaw Min. Co., 45 Fed. 804; Brown *v.* Murray, 43 Fed. 614; Burck *v.* Taylor, 39 Fed. 581; Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330. See Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Johnson *v.* Computing Scale Co., 139 Fed. 339; Monroe *v.* Williamson, 81 Fed. 977. *Contra*, Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Fox *v.* Southern R. Co., 80 Fed. 945; Williams *v.* Massachusetts Ben. Assoc., 47 Fed. 533; Scott *v.* Otis, 21 Fed. Cas. No. 12,543, 5 N. Y. Wkly. Dig. 264. When the time expires during vacation, it is the better practice to present the petition and bond for removal to the state judge in chambers, if that is practicable, and to file the petition and bond in the clerk's office. Mecke *v.* Valleytown Mineral Co., 93 Fed. 697, 35 C. C. A. 151.

Marking papers.— It is not essential to the removal that the clerk should mark the papers "filed," provided they actually are filed in his office. Waite *v.* Phœnix Ins. Co., 62 Fed. 769. The indorsement by the clerk of an erroneous file-mark (Wills *v.* Baltimore, etc., R. Co., 65 Fed. 532), or the omission of any file-mark, will not affect the validity of the proceedings (Waite *v.* Phœnix Ins. Co., 62 Fed. 769).

Where, after the petition and bond had been filed, a motion was made in the state court for a removal, which was denied as premature, and defendant's counsel then asked leave to withdraw his motion for the time being, which was granted, it was held that the removal did not take effect, and that the state court retained jurisdiction until a subsequent motion was made and granted. Mays *v.* Newlin, 143 Fed. 574.

38. North American L. & T. Co. *v.* Colonial, etc., Mortg. Co., 3 S. D. 590, 54 N. W. 659; Wills *v.* Baltimore, etc., R. Co., 65 Fed. 532; Brown *v.* Murray, 43 Fed. 614; Miller *v.* Tobin, 18 Fed. 609, 9 Sawy. 401; Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330. *Contra*, Tunstall *v.* Madison Parish, 30 La. Ann. 471; Rhode Island Horse Shoe Co. *v.* Goodenough Horse Shoe Co., 1 Abb. N. Cas. (N. Y.) 11, 52 How. Pr. 111; Mays *v.* Newlin, 143 Fed. 574; Fox *v.* Southern R. Co., 80 Fed. 945; La Page *v.* Day, 74 Fed. 977; Hall *v.* Chattanooga Agricultural Works, 48 Fed. 599; Roberts *v.* Chicago, etc., R. Co., 45 Fed. 433 [*affirmed* in 141 U. S. 690, 12 S. Ct. 123, 35 L. ed. 902]; Shedd *v.* Fuller, 36 Fed. 609.

39. Missouri, etc., R. Co. *v.* Hollan, (Tex. Civ. App. 1908) 107 S. W. 642; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Pittsburgh, etc., R. Co. *v.* Ramsey, 22 Wall. (U. S.) 322, 22 L. ed. 823; People's U. S. Bank *v.* Goodwin, 160 Fed. 727; Fife *v.* Whittell, 102 Fed. 537.

These facts must be stated positively; not on information and belief (Wolff *v.* Archibald, 14 Fed. 369, 4 McCrary 581. *Contra*, New York, etc., Land Co. *v.* Martin, (Tex. Civ. App. 1894) 25 S. W. 475; Carlisle *v.* Sunset Tel., etc., Co., 116 Fed. 896), and specifically (Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Little York Gold Washing, etc., Co. *v.* Keyes, 96 U. S. 199, 24 L. ed. 656). Allegations of inferences will be disregarded. Dodd *v.* Louisville Bridge Co., 130 Fed. 186.

Allegation as to controversy.— It is the safer practice specifically to state in the petition that there is a controversy between the

for this purpose it has been uniformly held that general allegation in the language

parties; and in that case the petition need not be accompanied by any pleading. Wilcoxen *v.* Chicago, etc., R. Co., 116 Fed. 444. An averment in the petition for the removal that the "matter and amount in dispute" exceeded two thousand dollars is sufficient to show that a "controversy existed." Egan *v.* Chicago, etc., R. Co., 53 Fed. 675.

Allegation as to filing suit in state court.— The petition must aver that the suit was duly filed in the state court. Wilson *v.* Giberson, 124 Fed. 701.

Allegation as to time to plead.— It is the safer practice to state in the petition that the time has not arrived at which defendant must answer or plead. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Aldrich *v.* Crouch, 10 Fed. 305, 11 Biss. 180. But it seems that a general allegation, in the language of the statute, is a sufficient allegation of this matter. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959.

Form of a petition approved in Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959:

"Supreme Court of the State of New York, County of Jefferson.

"Hiram Remington,
Plaintiff,
against
"Central Pacific Railroad Company,
Defendant.

"To the honorable the supreme court of the State of New York:

"The petition of the Central Pacific Railroad Company, appearing specially and for the sole and single purpose of presenting this petition respectfully showeth:

"That heretofore and on or about the 10th day of April, 1903, the above entitled suit which is a suit of civil nature was brought in this court by Hiram Remington against your petitioner as defendant. That your petitioner, at the time of the commencement of said suit, was and has ever since been and still is a foreign corporation organized and created under the laws of the State of California, and at all such times was and still is a citizen and resident of the State of California and a non-resident of the State of New York.

That the plaintiff, at the time of the commencement of said suit, was and has ever since been and still is a citizen and resident of the State of New York.

"That said suit is a suit of a civil nature in which there is a controversy between citizens of different States and that the matter in dispute in such suit exceeds, exclusive of interest and costs, the sum of $2,000.

"That said suit is pending undetermined in this court; and that the time has not yet arrived at which the defendant is required by the laws of the State of New York, or the rules of the supreme court of the State of New York, in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for upon this petition.

"Wherefore your petitioner prays for the removal of said suit into the circuit court of the United States, to be held in the district where such suit is pending, viz.: the circuit court of the United States in and for the northern district of New York, and makes and files with this petition a bond with good and sufficient surety for its entering in such circuit court on the first day of its next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail court shall hold that such suit was wrongfully requisite therein, and your petitioner will ever pray, etc.

"CENTRAL PACIFIC RAILROAD COMPANY, Defendant,

"PURCELL, WALKER & BURNS,
"Attorneys for Defendant, 15 Washington St., Watertown, N. Y.

"State of New York, } ss.:
Jefferson County, }

"Henry Purcell, being duly sworn, on oath says that he is one of the attorneys for the defendant in the above entitled cause and of the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof, and the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

"And affiant further says that the said petitioner is absent from and is a non-resident of the county of Jefferson, State of New York, in which said suit is brought, and that affiant makes this affidavit for the reason that the defendant is absent from and is a non-resident of the said county of Jefferson, in which said suit is brought, and none of its officers are within the said county.

"HENRY PURCELL.

"Sworn to before me, this 26th day of October, 1903.

"WATSON M. ROGERS, J. S.C.

"(Endorsed:) Read on application, Oct. 26, 1903. W. M. R., J. S. C."

A conditional application, in which the petition requests a removal, in case a pending motion should be denied or a plea in abatement not sustained, is bad. Manning *v.* Amy, 140 U. S. 137, 11 S. Ct. 707, 35 L. ed. 386.

A petition is not fatally defective, when it contains the jurisdictional allegations, but refers in its prayer to a wrong statute (Stanley *v.* Chicago, etc., R. Co., 62 Mo. 508; Dart *v.* Walker, 4 Daly (N. Y.) 188; Canal, etc., Sts. R. Co. *v.* Hart, 114 U. S. 654, 5 S. Ct. 1127, 29 L. ed. 226; Meyer *v.* Delaware R.

of the statute is insufficient.[40] An omission from the petition of a jurisdictional fact will be cured, if the same appears in an accompanying affidavit,[41] or in the record in the state court.[42] It is the better practice to verify the petition,[43] but this is unnecessary;[44] except when the removal is for prejudice or local influence,[45] or the suit is between citizens of the same state claiming land under grants of different states,[46] or the proceedings are instituted against revenue officers of the United States,[47] against persons who are or have been officers of either house of congress, for acts done by them in the discharge of their official duties,[48] or against persons having defenses under the revenue laws,[49] or perhaps when fraudulent misjoinder is charged.[50] The petition may be signed by either the petitioner or his attorney in fact or in law.[51]

Constr. Co., 100 U. S. 457, 25 L. ed. 593; Norris *v.* Mineral Point Tunnel, 7 Fed. 272, 19 Blatchf. 201) or is based upon an erroneous ground (Canal, etc., Sts. R. Co. *v.* Hart, *supra*; Meyer *v.* Delaware R. Constr. Co., *supra*; Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339, 9 Sawy. 348; Norris *v.* Mineral Point Tunnel, *supra*; Merchants' Nat. Bank *v.* Thompson, 4 Fed. 876. See Sharkey *v.* Port Blakely Mill Co., 92 Fed. 425). An irregularity in the prayer, by limiting the relief sought to the petitioners, will not prevent a removal of the whole case, when the averments authorize it. Northern Pac. Terminal Co. *v.* Lowenberg, *supra*. So where the petition prayed for removal to a division of the district, which did not exist, but correctly designated the city where the court in one of the divisions was held, it was held that the defect was immaterial and would be disregarded. Hodge *v.* Chicago, etc., R. Co., 121 Fed. 48, 57 C. C. A. 388. And where no petition or bond was filed in the state court, but the formal papers for a removal of a suit against a revenue officer were filed in the federal court, and the state court entered an order for a removal, it was held that since plaintiff's pleading showed that the cause arose under the constitution and laws of the United States, there should be no remand, although it was doubtful whether a removal could be sustained upon the former ground. Bryant Bros. Co. *v.* Robinson, 149 Fed. 321, 79 C. C. A. 259. But that where the petition was based upon a difference of citizenship, the removal would not be sustained because the record showed that the case arose under the constitution or laws of the United States. Woolridge *v.* McKenna, 8 Fed. 650.

40. Lalor *v.* Dunning, 56 How. Pr. (N. Y.) 209; Pacific Express Co. *v.* Needham, (Tex. Civ. App. 1906) 94 S. W. 1070; Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132; Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Little York Gold-Washing, etc., Co. *v.* Keyes, 96 U. S. 199, 24 L. ed. 656; Jones *v.* Adams Express Co., 129 Fed. 618; Smith *v.* Horton, 7 Fed. 270.

41. Bixby *v.* Blair, 56 Iowa 416, 9 N. W. 318; Yulee *v.* Vose, 99 U. S. 539, 25 L. ed. 355.

Curing objections.—An allegation in an amended complaint, filed after a remand, does not cure a defect in the original petition. Jones *v.* Mosher, 107 Fed. 561, 46 C. C. A. 471.

42. Hayes *v.* Todd, 34 Fla. 233, 15 So. 752; Goodsell *v.* Delta, etc., Pine Land Co., 72 Miss. 580, 18 So. 452; Baltimore, etc., R. Co. *v.* Pittsburg, etc., R. Co., 17 W. Va. 812; Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Jumeau *v.* Brooks, 109 Fed. 353, 48 C. C. A. 397; Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386; Chambers *v.* McDougal, 42 Fed. 694. *Contra*, Sherman *v.* Windsor Mfg. Co., 11 Fed. 852, 19 Blatchf. 314.

Where the record contains a reference to a person with the same name as plaintiff, it will be presumed that plaintiff is thereby intended, although there is no statement in the record to that effect. Hoge *v.* Canton Ins. Office, 103 Fed. 513.

43. Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. ed. 963; Porter *v.* Northern Pac. R. Co., 161 Fed. 773; Offner *v.* Chicago, etc., R. Co., 148 Fed. 201, 78 C. C. A. 359; Houser *v.* Clayton, 12 Fed. Cas. No. 6,739, 3 Woods 273.

A verification by the attorney for defendant, made on belief, is sufficient, especially where defendant is a corporation. Porter *v.* Northern Pac. R. Co., 161 Fed. 773.

44. Porter *v.* Northern Pac. R. Co., 161 Fed. 773; Harley *v.* Home Ins. Co., 125 Fed. 792; Connor *v.* Scott, 6 Fed. Cas. No. 3,119, 4 Dill. 242; Houser *v.* Clayton, 12 Fed. Cas. No. 6,739, 3 Woods 273; Osgood *v.* Chicago, etc., R. Co., 18 Fed. Cas. No. 10,604, 6 Biss. 330; Sweeney *v.* Coffin, 23 Fed. Cas. No. 13,686, 1 Dill. 73. See Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319; Canal, etc., St. R. Co. *v.* Hart, 114 U. S. 654, 5 S. Ct. 1127, 29 L. ed. 226. *Contra*, Goddard *v.* Bosson, 21 Kan. 139.

45. See *infra*, X, B, 5.

46. See *infra*, X, F.

47. U. S. Rev. St. (1878) § 643. See *infra*, X, C.

48. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602]. See *infra*, X, D.

49. U. S. Rev. St. (1878) § 643. See *infra*, X, C.

50. Offner *v.* Chicago, etc., R. Co., 148 Fed. 201, 78 C. C. A. 359.

51. Guinault *v.* Louisville, etc., R. Co., 42

b. Allegations Concerning Difference of Citizenship — (i) *In General.* When the removal is based upon difference of citizenship, the petition must show that the difference of citizenship existed at the time of the beginning of the suit,[52]

La. Ann. 52, 7 So. 62; Fisk *v.* Fisk, 4 Mart. N. S. (La.) 676; Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138; Vandevoort *v.* Palmer, 4 Duer (N. Y.) 677; Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683; Wormser *v.* Dahlman, 30 Fed. Cas. No. 18,048, 16 Blatchf. 319, 57 How. Pr. (N. Y.) 286.

An omission to sign the petition is waived, unless objection upon this ground is made in the state court. Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452.

52. *Illinois.*— People *v.* Chicago Super. Ct., 34 Ill. 356.

New Hampshire.— Laird *v.* Connecticut, etc., R. Co., 55 N. H. 375, 20 Am. Rep. 215.

New York.— Tugman *v.* National Steamship Co., 76 N. Y. 207 [*affirming* 13 Hun 332]; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1, 7 Am. Rep. 287; Pechner *v.* Phœnix Ins. Co., 6 Lans. 411 [*affirmed* in 65 N. Y. 195].

North Carolina.— Herndon *v.* Ætna Ins. Co., 107 N. C. 194, 12 S. E. 240, 10 L. R. A. 53.

United States.— Mattingly *v.* Northwestern Virginia R. Co., 158 U. S. 53, 15 S. Ct. 725, 39 L. ed. 894; Kellam *v.* Keith, 144 U. S. 568, 12 S. Ct. 922, 36 L. ed. 544; La Confiance Compagnie D'Assurance Contre L'Incendie *v.* Hall, 137 U. S. 61, 11 S. Ct. 5, 34 L. ed. 573; Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Stevens *v.* Nichols, 130 U. S. 230, 9 S. Ct. 518, 32 L. ed. 914; Smith *v.* Akers, 117 U. S. 97, 6 S. Ct. 669, 29 L. ed. 888; Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. ed. 462; Houston, etc., R. Co. *v.* Shirley, 111 U. S. 358, 4 S. Ct. 472, 28 L. ed. 455; Gibson *v.* Bruce, 108 U. S. 561, 2 S. Ct. 878, 27 L. ed. 825; Phœnix Ins. Co. *v.* Pechner, 95 U. S. 183, 24 L. ed. 427; Dalton *v.* Germania Ins. Co., 118 Fed. 936; Foster *v.* Paragould, etc., R. Co., 74 Fed. 273; Laskey *v.* Newton Min. Co., 56 Fed. 628; Craswell *v.* Belanger, 56 Fed. 529, 6 C. C. A. 1; Camprelle *v.* Balbach, 46 Fed. 81; Seddon *v.* Virginia, etc., Steel, etc., Co., 36 Fed. 6, 1 L. R. A. 108; Hone *v.* Dillon, 29 Fed. 465; Endy *v.* Commercial F. Ins. Co., 24 Fed. 657; Carrick *v.* Landman, 20 Fed. 209; MacNaughton *v.* South Pac. R. Co., 19 Fed. 881; Ferry *v.* Merrimack, 18 Fed. 657; Brinkerhoff *v.* Morris Canal, etc., Co., 18 Fed. 97; Kaeiser *v.* Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187; Beede *v.* Cheeney, 5 Fed. 388; Rawle *v.* Phelps, 20 Fed. Cas. No. 11,588, 2 Flipp. 471.

See 42 Cent. Dig. tit. "Removal of Causes," § 172.

Sufficiency of allegations.—Where the complaint averred that, at certain specified dates, which were before the commencement of the action, the diversity of citizenship existed and the petition for removal stated that the diversity then existed, it was held that the case must be remanded, since it did not sufficiently appear that the diversity existed at the time of the commencement of the action. Craswell *v.* Belanger, 56 Fed. 529, 6 C. C. A. 1. But a petition for removal by an intervener, which is filed simultaneously with his petition of intervention, is sufficient, if it aver the citizenship of the parties in the present tense. Burdick *v.* Peterson, 6 Fed. 840, 2 McCrary 135. The citizenship of each defendant should be separately alleged. Thomas *v.* Ohio State University, 195 U. S. 207, 25 S. Ct. 24, 49 L. ed. 160; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Laden *v.* Meck, 130 Fed. 877, 65 C. C. A. 361. It is insufficient to allege merely the residence and citizenship of plaintiff, the residence of defendants, and that none of the petitioners are residents and citizens of plaintiff's state (Laden *v.* Meck, *supra*); to present a petition in the name of a copartnership, stating that the firm, without naming the members individually, was a citizen of a certain state (Fred Macey Co. *v.* Macey, 135 Fed. 725, 68 C. C. A. 363; Van Horn *v.* Kittitas County, 112 Fed. 1; Adams *v.* May, 27 Fed. 907); to allege "that said plaintiffs as such executors are citizens of" a specified state (Amory *v.* Amory, 95 U. S. 186, 24 L. ed. 428. But see Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452); and that the board of trustees of a state institution, which is made a defendant by that name, is a citizen of a specified state without averring the citizenship of its different members, although the constitution of the state provides that no person shall be elected or appointed to office unless he is a citizen of the state (Thomas *v.* Ohio State University, 195 U. S. 207, 25 S. Ct. 24, 49 L. ed. 160). An allegation that the state of which a party is a resident is unknown is insufficient to show that his citizenship is different from that of another. Tracy *v.* Morel, 88 Fed. 801; Tug River Coal, etc., Co. *v.* Brigel, 67 Fed. 625, 14 C. C. A. 577. An allegation of residence in a certain state, without an allegation of citizenship, is insufficient (Pechner *v.* Phœnix Ins. Co., 6 Lans. (N. Y.) 411 [*affirmed* in 65 N. Y. 195]; Herndon *v.* Ætna Ins. Co., 107 N. C. 194, 12 S. E. 240, 10 L. R. A. 53; Neel *v.* Pennsylvania Co., 157 U. S. 153, 15 S. Ct. 589, 39 L. ed. 654; Pennsylvania Co. *v.* Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Parker *v.* Overman, 18 How. (U. S.) 137, 15 L. ed. 318; Mohican Tp. *v.* Johnson, 133 Fed. 524, 66 C. C. A. 592; Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. 732; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237; Craswell *v.* Belanger, 56 Fed. 529, 6 C. C. A. 1; South-

and also at the time when the petition is filed,[53] unless these facts appear in the pleadings, or elsewhere on the record.[54]

(II) *CORPORATIONS.* Where a corporation is a party, the petition should state that it was organized or created by, or under, the laws of a specified state or foreign government.[55]

western Tel., etc., Co. *v.* Robinson, 48 Fed. 769, 1 C. C. A. 91; Kelly *v.* Houghton, 23 Fed. 417; Merchants' Nat. Bank *v.* Brown, 17 Fed. 161, 4 Woods 263; Overman *v.* Parker, 18 Fed. Cas. No. 10,623, Hempst. 692), unless it is alleged that plaintiff is a citizen of the United States and a resident of one of those states, in which case it has been held that under the fourteenth amendment it will be presumed that he is a citizen of the state also (Clausen *v.* American Ice Co., 144 Fed. 723). If one of the parties is an alien, it is sufficient for the petitioner to allege that he is, and when the suit was brought was, a citizen or subject of a specified foreign state. C. H. Nichols Lumber Co. *v.* Franson, 203 U. S. 278, 27 S. Ct. 102, 51 L. ed. 181; Hennessy *v.* Moise, 189 U. S. 35, 23 S. Ct. 534, 47 L. ed. 698; Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 23 S. Ct. 532, 47 L. ed. 697. See Stuart *v.* Easton, 156 U. S. 46, 15 S. Ct. 268, 39 L. ed. 341; Jennes *v.* Landes, 84 Fed. 73; Wilson *v.* City Bank, 30 Fed. Cas. No. 17,797, 3 Sumn. 422. *Contra,* Von Voight *v.* Michigan Cent. R. Co., 130 Fed. 398. So is a mere description of a party as "of" a specified state (Carswell *v.* Schley, 59 Ga. 17; Dinet *v.* Delavan, 117 Fed. 978; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237), of a certain county (Carswell *v.* Schley, *supra*), city, or town, in a specified state (Dinet *v.* Delavan, *supra*; Grand Trunk R. Co. *v.* Twitchell, *supra*), or that a party "lives" or "lived" in a specified city and state (Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. 732). The petition should also state the non-residence of defendant, at the time both when the action was begun (Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602; De la Montanya *v.* De la Montanya, 158 Fed. 117; Fife *v.* Whittell, 102 Fed. 537; Camprelle *v.* Balbach, 46 Fed. 81; Freeman *v.* Butler, 39 Fed. 1. *Contra,* Zebert *v.* Hunt, 108 Fed. 449) and when the petition was filed (Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602. *Contra,* Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866, 67 C. C. A. 38). It is the safer practice to allege the residence of plaintiff within the district at both those times. *Ex p.* Wisner, 203 U. S. 51, 27 S. Ct. 150, 51 L. ed. 264. *Contra,* Baltimore, etc., R. Co. *v.* Doty, 133 Fed. 866, 67 C. C. A. 38. It seems that an averment that a party is "of" a specified place is equivalent to the statement that he is a resident thereof. Hennessy *v.* Moise, 189 U. S. 35, 23 S. Ct. 534, 47 L. ed. 698; Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 23 S. Ct. 532, 47 L. ed. 697.

Nominal defendant.— Where a removal petition based entirely on diversity of citizenship was filed by one of defendants alone, and wholly failed to disclose the fact that the other defendant was merely a nominal or formal party to the action, and such fact did not sufficiently appear elsewhere in the record, the petition was fatally defective, since, for the purpose of removal, the parties must be considered collectively. Santa Clara County *v.* Goldy Mach. Co., 159 Fed. 750.

Where plaintiff is the assignee of the cause of action, it is the safer practice to state the citizenship of his assignor, at the time of the assignment, and also at the times when the suit was begun and the petition for removal made. Flynn *v.* Fidelity, etc., Co., 145 Fed. 265. See *supra,* V, D.

53. Gibson *v.* Bruce, 108 U. S. 561, 2 S. Ct. 873, 27 L. ed. 825 [*affirming* 9 Fed. 540]; Foster *v.* Paragould South Eastern R. Co., 74 Fed. 273. *Contra,* Houser *v.* Clayton, 12 Fed. Cas. No. 6,739, 3 Woods 273.

54. Bondurant *v.* Wilson, 103 U. S. 281, 26 L. ed. 447.

The omission from plaintiff's writ (Ladd *v.* Tudor, 14 Fed. Cas. No. 7,975, 3 Woodb. & M. 325) or pleading (Ysleta *v.* Canda, 67 Fed. 6) of any allegation of diversity of citizenship is immaterial, provided the same is duly alleged in the petition of removal.

55. Sun Printing, etc., Assoc. *v.* Edwards, 194 U. S. 377, 24 S. Ct. 696, 48 L. ed. 1027; Alexandria Nat. Bank *v.* Bates, 160 Fed. 839, 87 C. C. A. 643; Mathieson Alkali Works *v.* Mathieson, 150 Fed. 241, 80 C. C. A. 129; Knight *v.* Lutcher, etc., Lumber Co., 136 Fed. 404, 69 C. C. A. 248; Dalton *v.* Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Winkler *v.* Chicago, etc., R. Co., 108 Fed. 305; Continental Wall-Paper Co. *v.* Voight, 106 Fed. 550; Robertson *v.* Scottish Union, etc., Ins. Co., 68 Fed. 173; De Loy *v.* Travelers' Ins. Co., 59 Fed. 319; Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386; Frisbie *v.* Chesapeake, etc., R. Co., 57 Fed. 1; Ward *v.* Blake Mfg. Co., 56 Fed. 437, 5 C. C. A. 538; Lonergan *v.* Illinois Cent. R. Co., 55 Fed. 550. See Southern R. Co. *v.* Hudgins, 108 Ga. 524, 33 S. E. 1011.

Sufficiency of allegations.— The allegation that it is a citizen of a certain state is insufficient, although it has a company name. Thomas *v.* Ohio State University, 195 U. S. 207, 25 S. Ct. 24, 49 L. ed. 160; Knight *v.* Lutcher, etc., Lumber Co., 136 Fed. 404; Dalton *v.* Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Winkler *v.* Chicago, etc., R. Co., 108 Fed. 305; American Sugar Refining Co. *v.* Johnson, 60 Fed. 503, 9 C. C. A. 110; De Loy *v.* Travelers' Ins. Co., 59 Fed. 319; Frisbie *v.* Chesapeake, etc., R. Co., 57 Fed. 1; Lonergan *v.* Illinois Cent. R. Co., 55 Fed. 550. *Contra,* Oakey *v.* Commercial, etc., Bank, 14 La. 515; Guarantee Co. of North America *v.* Lynchburg First Nat. Bank, 95 Va. 489, 28 S. E. 909. An allegation that a corporation is "duly established by law, and

(III) *SEPARABLE CONTROVERSY.* When the removal is because of a separable controversy, the petition should show how the controversy arises and should name the parties to the same, in addition to the other jurisdictional allegations.[56]

(IV) *FRAUDULENT MISJOINDER.* Where a defendant who is a citizen of the same state as the plaintiff is joined with another who is a citizen of a different state, and a removal is sought because of his fraudulent misjoinder, the petition or its accompanying affidavits must state specifically the facts which show the fraud,[57] except perhaps when this is manifest upon the face of plain-

having its principal place of business" in a specified state is insufficient. New York, etc., R. Co. *v.* Hyde, 56 Fed. 188, 5 C. C. A. 461. It is insufficient to allege that defendant "claims to be" a corporation, organized under the laws of a specified state as a company of a specified character. Lownsdale *v.* Gray's Harbor Boom Co., 117 Fed. 983. Where the corporation is chartered by several states, the facts which show the difference of citizenship, such as the name of the state which first gave it its charter, must be specifically pleaded. Dodd *v.* Louisville Bridge Co., 130 Fed. 186. It is insufficient to allege merely the residence (Cleveland, etc., R. Co. *v.* Doerr, 41 Ill. App. 530; Winkler *v.* Chicago, etc., R. Co., 108 Fed. 305) or the location (Germania F. Ins. Co. *v.* Francis, 11 Wall. (U. S.) 210, 20 L. ed. 77) of the corporation, even if it is a national bank (Thomas *v.* D. O. Mills Nat. Bank, 106 Fed. 438, 45 C. C. A. 407). It is unnecessary to aver the citizenship of the corporation, when its creation or organization by the laws of a specified state or foreign country are sufficiently pleaded. Lee *v.* Atlantic Coast Line R. Co., 150 Fed. 775; Continental Wall-Paper Co. *v.* Voight, 106 Fed. 550; Block *v.* Standard Distilling, etc., Co., 95 Fed. 978; Robertson *v.* Scottish Union, etc., Ins. Co., 68 Fed. 173; Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386. It is unnecessary to aver that a corporation, created by or under the laws of another state, or of a foreign country, is not a resident of the state and district where the suit is brought (Koshland *v.* Hartford Nat. F. Ins. Co., 31 Oreg. 205, 49 Pac. 845; Baltimore R. Co. *v.* Doty, 133 Fed. 866, 67 C. C. A. 38; Roberts *v.* Pacific, etc., R., etc., Nav. Co., 104 Fed. 577; Howard *v.* Georgia Gold Reefs, 102 Fed. 657; Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929 [*affirmed* in 65 Fed. 628, 13 C. C. A. 58]; Shattuck *v.* North British, etc., Ins. Co., 58 Fed. 609, 7 C. C. A. 386; Myers *v.* Murray, 43 Fed. 695, 11 L. R. A. 216. *Contra,* Guinault *v.* Louisville, etc., R. Co., 41 La. Ann. 571, 6 So. 850; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. 577; Hirschl *v.* J. I. Case Threshing-Mach. Co., 42 Fed. 803); nor that defendant corporation had the same citizenship at the time of the commencement of the suit as when the petition was filed (National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Continental Wall-Paper Co. *v.* Voight, 106 Fed. 550; Roberts *v.* Pacific, etc., R., etc., Co., 104 Fed. 577. *Contra,* Dalton *v.* Germania Ins. Co., 118 Fed. 936), although the fact that plaintiff's citizenship at the time when the suit was brought was the same as when the petition was filed must be alleged when the corporation removes the case (Foster *v.* Paragould Southeastern R. Co., 74 Fed. 273; Laskey *v.* Newtown Mine Co., 56 Fed. 628). But it is the safer practice to allege both those facts. Where plaintiff, a citizen of Nebraska, averred that defendant was a corporation under the laws of the state of New York, and defendant in the petition for removal of the cause alleged and in its answer admitted that it was a corporation organized under the laws of New York, the citizenship of defendant in that state sufficiently appeared from the pleading. Adams Express Co. *v.* Adams, 159 Fed. 62, 86 C. C. A. 252.

56. Laden *v.* Meck, 130 Fed. 877, 65 C. C. A. 361; Gates Iron Works *v.* Pepper, 98 Fed. 449. See Connell *v.* Smiley, 156 U. S. 335, 341, 15 S. Ct. 353, 39 L. ed. 443.

57. Eastin *v.* Texas, etc., R. Co., 99 Tex. 654, 92 S. W. 838 [*reversing* (Civ. App. 1905) 89 S. W. 440]; Offner *v.* Chicago, etc., R. Co., 148 Fed. 201, 78 C. C. A. 359, where the allegations that one of defendants "was not a party to the alleged negligence" and "was fraudulently joined as a party defendant solely for the purpose of defeating your petitioner's right to remove this cause" were held to be insufficient, since the declaration charged facts sufficient to establish a cause of action against that defendant. See Clinger *v.* Chesapeake, etc., R. Co., 109 S. W. 315, 33 Ky. L. Rep. 86, 15 L. R. A. N. S. 998; Hall *v.* Chattanooga Agricultural Works, 48 Fed. 599.

Forms of petition alleging fraudulent misjoinder in whole, in part, or in substance are set out in Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 180, 27 S. Ct. 184, 51 L. ed. 430; Dishon *v.* Cincinnati, etc., R. Co., 133 Fed. 471, 473, 66 C. C. A. 345; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286, 289.

Sufficiency of allegations.—A mere denial in the petition of the joint negligence alleged in the complaint is insufficient to raise the issue of fraudulent joinder (Shane *v.* Butte Electric R. Co., 150 Fed. 801; Union Terminal R. Co. *v.* Chicago, etc., R. Co., 119 Fed. 209), or that the purpose of the joinder of defendants was to prevent a removal (Hough *v.* Southern R. Co., 144 N. C. 692, 57 S. E. 469; Tobacco Co. *v.* American Tobacco Co., 144 N. C. 352, 57 S. E. 5; Gustafson *v.* Chicago, etc., R. Co., 128 Fed. 85).

tiff's pleading, a matter which is considered and discussed elsewhere in this article.[58]

c. Allegations Showing That Suit Arises Under the Constitution or Laws or Treaties of the United States. Where a removal is claimed upon the ground that the suit arises under the constitution and laws of the United States, the petition must state the facts showing that such is the case, unless they appear in pleadings previously filed or served.[59]

d. Allegations of Value of Matter in Dispute. The petition for a removal should show that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars,[60] unless this appears elsewhere in the

So is the naked allegation that the resident defendant has no interest in the controversy. Union Terminal R. Co. *v.* Chicago, etc., R. Co., 119 Fed. 209. An averment that the resident defendant is without means, when coupled with a denial of the allegations of joint negligence, has been held to be insufficient. Shane *v.* Butte Electric R. Co., *supra*. Where the suit is brought for an injunction, it will ordinarily be sufficient to aver, in general language in the petition, that the value of the right sought to be thereby protected exceeds the jurisdictional amount. State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915; Evenson *v.* Spaulding, 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904 [*affirming* 149 Fed. 913]; Butchers', etc., Stock Yards Co. *v.* Louisville, etc., R. Co., 67 Fed. 35, 14 C. C. A. 290.

Verification.— It is the better practice in such a case to have the petition verified. Offner *v.* Chicago, etc., R. Co., 148 Fed. 201, 78 C. C. A. 359.

58. See *supra*, X, A, 3, a; and *infra*, X, F.

The allegations in plaintiff's pleading upon this point are not conclusive. Wecker *v.* National Enameling, etc., Co., 204 U. S. 176, 27 S. Ct. 184, 51 L. ed. 430; Dishon *v.* Cincinnati, etc., R. Co., 133 Fed. 471, 66 C. C. A. 345; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286; Mackaye *v.* Mallory, 6 Fed. 743, 19 Blatchf. 165.

59. Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Little York Gold Washing, etc., Co. *v.* Keyes, 96 U. S. 199, 24 L. ed. 656; People's United States Bank *v.* Goodwin, 160 Fed. 727; State *v.* Three Sisters Irr. Co., 158 Fed. 346; New Castle *v.* Postal Telegraph-Cable Co., 152 Fed. 572; Trafton *v.* Nougues, 24 Fed. Cas. No. 14,134, 4 Sawy. 178.

Where it does not appear in plaintiff's pleading that defendant is a corporation incorporated by an act of congress (Texas, etc., R. Co. *v.* Cody, 166 U. S. 606, 17 S. Ct. 703, 41 L. ed. 1132), or that defendant is a receiver appointed by the federal court (Winters *v.* Drake, 102 Fed. 545), it is the safer practice to allege in the petition such fact, if it exists. When it is claimed that plaintiff has fraudulently omitted from his pleading a material allegation, which would show that the case arose under the constitution or a law or treaty of the United States, that fact must be alleged in the petition for the removal. Winters *v.* Drake, 102 Fed. 545. See Washington *v.* Island Lime Co., 117 Fed. 777.

Where the petition was based upon a difference of citizenship, the removal will not be sustained, although the record shows that the case arose under the constitution or laws of the United States. Woolridge *v.* McKenna, 8 Fed. 650.

60. Banigan *v.* Worcester, 30 Fed. 392; Keith *v.* Levi, 2 Fed. 743, 1 McCrary 343. See also Sturgeon River Boom Co. *v.* W. H. Sawyer Lumber Co., 89 Fed. 113.

Failure to allege value in complaint.— In a suit in a state court for an injunction, based upon a law of the United States, where the value in controversy is not shown by the complainant's pleading, for the purpose of removal of the cause, it may be shown in the petition for removal. Order of R. Telegraphers *v.* Louisville, etc., R. Co., 148 Fed. 437.

Sufficiency of allegations.—An allegation that the "amount in dispute" (Blackburn *v.* Portland Gold-Min. Co., 175 U. S. 571, 20 S. Ct. 222, 44 L. ed. 276. See also Waha-Lewiston Land, etc., Co. *v.* Lewiston-Sweetwater Irr. Co., 158 Fed. 137) or the "amount involved" (State *v.* Frost, 113 Wis. 623, 88 N. W. 912, 89 N. W. 915) in the suit exceeds the jurisdictional amount is ordinarily sufficient, unless the record shows the contrary. A petition is not defective because it states the matter in controversy "is of the sum and value of over two thousand dollars, as petitioner is informed and verily believes." New York, etc., Land Co. *v.* Martin, (Tex. Civ. App. 1894) 25 S. W. 475. In an action on an account, where the complaint shows the original indebtedness, the payments thereon, and the balance due, which is less than two thousand dollars, and the petition for removal merely alleges in general terms that the petitioner is defendant in the cause, which is a suit of a civil nature involving a controversy between citizens of different states, involving more than two thousand dollars, exclusive of interest and costs, but there are no facts stated controverting the complaint as to the amount in controversy, no issue of fact is raised, and an order for removal is properly denied; the petitioner for removal being bound to show by the record a case within the statute. Gibbes Mach. Co. *v.* Santee River Cypress Lumber Co., 79 S. C. 201, 60 S. E. 689. It is the better practice to aver in a petition

record. Under these circumstances, it would seem, the court will not remand the cause.[61]

e. Amendment of Petition. If the jurisdictional facts are not set forth in the petition or the accompanying papers or elsewhere on the record of the state court, an amendment stating them cannot be allowed by the federal court.[62] An amend-

for the removal that the matter in dispute exceeded the jurisdictional amount at the time when the suit was begun, as well as at the time when the petition is filed. Huntington *v.* Pinney, 126 Fed. 237; Strasburger *v.* Beecher, 44 Fed. 209. Where the relief sought was the conveyance of a tract of land, the value of which appeared to be in excess of two thousand dollars, it was held to be unnecessary to insert in the petition an allegation that the amount involved exceeded that sum, exclusive of interest and costs. Weber *v.* Travelers' Ins. Co., 45 Fed. 657. Where a suit is brought to enjoin the collection of taxes for certain years and there is no allegation as to the amount of the tax for more than one of such years, it will not be presumed, in order to make up the jurisdictional amount, that a like tax was assessed for each of the other years. Citizens' Bank *v.* Cannon, 164 U. S. 319, 17 S. Ct. 89, 41 L. ed. 451.

61. Chambers *v.* McDougal, 42 Fed. 694.

62. Security Co. *v.* Pratt, 65 Conn. 161, 32 Atl. 396; Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Crehore *v.* Ohio, etc., R. Co., 131 U. S. 240, 9 S. Ct. 797, 33 L. ed. 144; Santa Clara County *v.* Goldy Mach. Co., 159 Fed. 750; Wallenburg *v.* Missouri Pac. R. Co., 159 Fed. 217; Healy *v.* McCormick, 157 Fed. 318; Dalton *v.* Milwaukee Mechanics' Ins. Co., 118 Fed. 876; Dinet *v.* Delavan, 117 Fed. 978; Fife *v.* Whittell, 102 Fed. 537; Murphy *v.* Payette Alluvial Gold Co., 98 Fed. 321; Frisbie *v.* Chesapeake, etc., R. Co., 59 Fed. 369, 57 Fed. 1; De Loy *v.* Traveler's Ins. Co., 59 Fed. 319; Brigham *v.* C. C. Thompson Lumber Co., 55 Fed. 881; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812.

Leave to amend was denied: When there had been an omission to allege diversity of citizenship (Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Crehore *v.* Ohio, etc., R. Co., 131 U. S. 240, 9 S. Ct. 692, 33 L. ed. 144; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237; Endy *v.* Commercial F. Ins. Co., 24 Fed. 657; McNaughton *v.* South Pac. C. R. Co., 19 Fed. 881. But see Roberts *v.* Pacific, etc., R., etc., Co., 104 Fed. 577), or non-residence (Camprelle *v.* Balbach, 46 Fed. 81; Freeman *v.* Butler, 39 Fed. 1), at the time when the action was begun, although diversity and non-residence, when the case was removed, were properly pleaded; when there was no allegation of the non-residence of defendant at any time (Fife *v.* Whittell, 102 Fed. 537); when there was no allegation of diversity of citizenship at any time (Dinet *v.* Delavan, 117 Fed. 978; Brigham *v.* C. C. Thompson Lumber Co., 55 Fed. 881), although the non-residence of defendant was alleged in the petition, and the residence of plaintiff appeared in the record (Dinet *v.* Delavan, *supra*); when the petition of removal originally alleged diversity of citizenship between plaintiff and one only of two defendants, coupled with an averment that the other was fraudulently joined, and the removing defendant wished to add an averment that such other was also a citizen of a different state from that of plaintiff (Shane *v.* Butte Electric R. Co., 150 Fed. 801); when defendant, which was a corporation, alleged that it was a citizen of a certain state, but did not state that it was organized under the laws thereof (Kinney *v.* Columbia Sav., etc., Assoc., 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Dalton *v.* Milwaukee Mechanics' Ins. Co., 118 Fed. 876; De Loy *v.* Traveler's Ins. Co., 59 Fed. 319; Frisbie *v.* Chesapeake, etc., R. Co., 57 Fed. 1, 59 Fed. 369); and when the original petition prayed a removal for prejudice or local influence, and defendant asked leave to show the existence of a separable controversy (Carson, etc., Lumber Co. *v.* Holtzclaw, 44 Fed. 785. See Winnemans *v.* Edgington, 27 Fed. 324).

Leave to amend was allowed: Where the petition of removal stated "that the controversy in said suit is between citizens of different states," and then alleged the residence and citizenship of defendant only (Kinney *v.* Columbia Sav., etc., Assoc., 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Stadlemann *v.* White Line Towing Co., 92 Fed. 209; Johnson *v.* F. C. Austin Mfg. Co., 76 Fed. 616; Woolridge *v.* McKenna, 8 Fed. 650. See also Tremper *v.* Schwabacher, 84 Fed. 413. *Contra*, Dalton *v.* Milwaukee Mechanics' Ins. Co., 118 Fed. 876); where it appeared by the pleadings that the husband of plaintiff's assignor was a citizen and resident of a different state from that of defendant's residence and citizenship, at a date a few months prior to the commencement of the action, but there was no averment as to her residence and citizenship when the suit was brought, nor when the petition for a removal was filed (Flynn *v.* Fidelity, etc., Co., 145 Fed. 265); where the petition showed a diversity of citizenship, but, through misinformation, erroneously alleged the citizenship of plaintiff as of a different state from that where the suit was brought, he in fact being a citizen of that state and defendant a citizen of a third state (Wilbur *v.* Red Jacket Consol. Coal, etc., Co., 153 Fed. 662); where the petition averred that two defendants, who were citizens of the same state, had been fraudulently and improperly joined as parties defendant, for the sole purpose of defeating the petitioner's right to remove the cause, that the suit as to them had been dismissed, and that it was now pending against the removing defendant alone, omitting by mis-

ment will not be allowed in the supreme court [63] or in the circuit court of appeals; [64] except by consent, when it may be permitted.[65] Where the removal was unauthorized, the circuit court has no power to amend the pleadings or make a change of the parties to the suit, so as to retain the jurisdiction.[66]

4. Bond — a. In General. The act of 1887 requires that the party who files a petition for a removal "shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail [67] in such suit if special bail was originally requisite therein." [68] A bond is sufficient which follows substantially the language of the

take all reference to a fourth defendant, a citizen of the same state as plaintiff, as to whom the case had also been dismissed (Powers *v.* Chesapeake, etc., R. Co., 65 Fed. 129 [*affirmed* in 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673]); when the petition averred that the case arose under the constitution and laws of the United States, without specifying the facts showing this to be the case (Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992); and even when there was no allegation in the petition or the record showing that the value of the matter in dispute exceeded the jurisdictional amount, but that fact had been often stated to the court by counsel on both sides (Carr *v.* Fife, 45 Fed. 209 [*affirmed* in 156 U. S. 494, 15 S. Ct. 427, 39 L. ed. 508]). A petition may be amended in the federal circuit court, so as to correct a mistake, through which defendant prayed a removal to the district court of the United States (Hadfield *v.* Northwestern L. Assur. Co., 105 Fed. 530), and also where the prayer asked for a removal only as to the petitioners, and not of the whole case (Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339, 9 Sawy. 348). So when the jurisdictional facts are stated informally (Gerling *v.* Baltimore, etc., R. Co., 151 U. S. 673, 14 S. Ct. 533, 38 L. ed. 311; Ayers *v.* Watson, 113 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093; Glover *v.* Shepperd, 15 Fed. 833, 11 Biss. 572. See Robertson *v.* Scottish Union, etc., Ins. Co., 68 Fed. 173. *Contra*, Dinet *v.* Delavan, 117 Fed. 978; Brigham *v.* C. C. Thompson Lumber Co., 55 Fed. 881), or in the form of conclusions of law (Kinney *v.* Columbia Sav., etc., Assoc., 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Stadlemann *v.* White Line Towing Co., 92 Fed. 29; Johnson *v.* F. C. Austin Mfg. Co., 76 Fed. 616. See also Tremper *v.* Schwabacher, 84 Fed. 413), in the petition, or in an accompanying affidavit (Hall *v.* Chattanooga Agricultural Works, 48 Fed. 599), or in the record in the state court (Kinney *v.* Columbia Sav., etc., Assoc., 191 U. S. 78, 24 S. Ct. 30, 48 L. ed. 103; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Flynn *v.* Fidelity, etc., Co., 145 Fed. 265; Kaeiser *v.* Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187) and, according to a recent decision, an amendment may be allowed by the federal court, even it seems after judgment (Mexican Cent. R. Co. *v.* Duthie, 189 U. S. 76, 23 S. Ct. 610, 47 L. ed. 715. But see Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. 577. See also Roberts *v.* Pacific, etc., R., etc., Co., 104 Fed. 577; Winnemans *v.* Edgington, 27 Fed. 324; Kaeiser *v.* Illinois Cent. R. Co., 6 Fed. 1, 2 McCrary 187). Where a removal petition was defective in alleging that, when the action was commenced and when petition was filed, petitioner was a resident of New York, instead of alleging that he was a non-resident of the state in which the action was brought, but it also alleged that petitioner was a citizen of the republic of France, such allegation, coupled with the allegation of non-residence in the state, gave petitioner the right to remove, and hence entitled him to amend the removal petition so as to correct the allegation of non-residence. De la Montanya *v.* De la Montanya, 158 Fed. 117.

An answer filed by defendant may be treated as an amendment to the petition. Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992. But a petition subsequently presented to the state court cannot be treated as an amendment. Waite *v.* Phœnix Ins. Co., 62 Fed. 769.

63. Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132.

A denial of an application for leave to amend the petition by removal made by the state court after a remand cannot be reviewed by the supreme court of the United States upon writ of error. Carr *v.* Nichols, 157 U. S. 370, 15 S. Ct. 640, 39 L. ed. 736 [*affirming* 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514].

64. Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237.

65. Kansas City Southern R. Co. *v.* Prunty, 133 Fed. 13, 66 C. C. A. 163.

66. Walser *v.* Memphis, etc., R. Co., 19 Fed. 152.

67. **Where special bail is given,** and the bail wished to surrender the principal after the removal, such surrender must be made in open court, and not by his summary seizure and commitment to jail, according to the state law; but when a party was so committed, the circuit court of the United States, upon the petition of the bail, granted a writ of habeas corpus to bring him into court for surrender, in discharge of his bail. Holbrook *v.* Seagraves, 12 Fed. Cas. No. 6,593, 1 Story 546.

68. 25 U. S. St. at L. 435, c. 866, § 3

statute.[69] The bond which is required upon a removal for prejudice or local

[U. S. Comp. St. (1901) p. 510]. See also Alexandria Nat. Bank *v.* Willis C. Bates Co., 160 Fed. 839, 87 C. C. A. 643.

Time of filing.— The bond must be filed at or before the time to answer expires. Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476. See also Wilcox, etc., Sewing-Mach. Co. *v.* Follett, 29 Fed. Cas. No. 17,643, 2 Flipp. 263. But see Campbell *v.* Wallen, Mart. & Y. (Tenn.) 266. An order cannot be made thereafter, allowing the bond to be filed *nunc pro tunc* as of the date of filing the petition. Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476. If the bond is presented and filed before the time to remove expires, the fact that this was done before the presentment and filing of the petition is immaterial. Campbell *v.* Wallen, Mart. & Y. (Tenn.) 266. But see Best *v.* New York L. Ins. Co., 2 Cinc. Super. Ct. (Ohio) 329; Kirkpatrick *v.* Hopkins, 2 Miles (Pa.) 277.

69. Ellis *v.* Atlantic, etc., R. Co., 134 Mass. 338; Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452.

Form of bond is set out in Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 463, 25 L. ed. 593.

Sufficiency of bond.—A bond conditioned simply that the petitioner should file in the circuit court "copies of all process" is insufficient. Burdick *v.* Hale, 4 Fed. Cas. No. 2,147, 7 Biss. 96. The bond must provide for the payment of costs in case of a remand. Sheldrick *v.* Cockcroft, 27 Fed. 579; Webber *v.* Bishop, 13 Fed. 49; Torrey *v.* Grant Locomotive Works, 24 Fed. Cas. No. 14,105, 14 Blatchf. 269. But see Deford *v.* Mehaffy, 13 Fed. 481; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683. And a bond defective in this respect is not cured by a provision that the removing parties shall "do such other appropriate acts as by the act of congress in that behalf are required." Harrold *v.* Arrington, 64 Tex. 233. But see Hayes *v.* Todd, 34 Fla. 233, 15 So. 752; Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452. Where special bail was not originally required in the state court, the bond need contain no condition for the entry of such bail in the federal court. Preston *v.* McNeil Lumber Co., 143 Fed. 555; Burck *v.* Taylor, 39 Fed. 581 [*affirmed* in 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578]. But see Bell *v.* Bell, 3 W. Va. 183. The provision for special bail in the bond must be made as an undertaking for the personal appearance of a party, not a delivery bond for property attached in the state court. Ramsey *v.* Coolbaugh, 13 Iowa 164. When only one of several defendants has been served, the bond need not be conditioned for the appearance of any defendant, except the one served. Vandevoort *v.* Palmer, 4 Duer (N. Y.) 677. A bond is not fatally defective because it provides for the entry of defendant's appearance in the "district court" of the United States (Hayes *v.* Todd, 34 Fla. 233, 15 So. 752), where it provides for the filing of the transcript in the circuit court of the United States for the wrong division of the same (Hodge *v.* Chicago, etc., R. Co., 121 Fed. 48, 57 C. C. A. 388), nor where, after naming the proper circuit court of the United States, it is conditioned that the petitioner "shall enter in such Circuit Court, on the first day of its session next after the granting of such petition, a copy of the record" (Ellis *v.* Atlantic, etc., R. Co., 134 Mass. 338). It is the proper practice to insert in the bond a specified sum as the penalty for a failure to comply with the condition. Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424; Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Johnson *v.* F. C. Austin Mfg. Co., 76 Fed. 616; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241; Foster Fed. Pr. (4th ed.) § 385*c*. A penalty of five hundred dollars is sufficient, when defendant has not been held to bail. Croton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Kentucky *v.* Louisville Bridge Co., 42 Fed. 241. And see Blanchard *v.* Dwight, 12 Wend. (N. Y.) 192. Where the amount of the penalty is left in blank, the bond is insufficient. Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476; Burdick *v.* Hale, 4 Fed. Cas. No. 2,147, 7 Biss. 96. An omission of any penalty from the bond is not a ground for remand (Johnson *v.* F. C. Austin Mfg. Co., 76 Fed. 616), but the state court may for this reason refuse its approval of the bond (Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424). The bond must be conditioned that the petitioning party will take the necessary steps to effect the removal; and a bond conditioned that one not a party to the suit will perform the required acts is insufficient. Clippinger *v.* Missouri Valley L. Ins. Co., 26 Ohio St. 404. The obligee should be plaintiff and not the people. Grow *v.* Wiman, 3 N. Y. St. 281. Where the name of the obligee is misspelled and the bond contains interlineations not properly authenticated, the bond, although not void, is properly rejected by the state court. Greacen *v.* Beam, 15 N. J. L. 460. The bond must be joint and several (Roberts *v.* Carrington, 2 Hall (N. Y.) 694; Hazard *v.* Durant, 9 R. I. 602), but it need not be executed by the petitioner, provided it have a principal and a sufficient surety (People's Bank *v.* Ætna Ins. Co., 53 Fed. 161; Public Grain, etc., Exch. *v.* Western Union Tel. Co., 16 Fed. 289, 11 Biss. 568; Stevens *v.* Richardson, 9 Fed. 191, 20 Blatchf. 53. *Contra*, Rough *v.* Booth, (Cal. 1884) 3 Pac. 91; Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666]; Weed Sewing-Mach. Co. *v.* Smith, 71 Ill. 204). A formal defendant who is a nominal party who has not joined in the petition and whose citizenship does not affect the jurisdiction can be a surety. Steiner *v.* Mathewson, 77 Ga. 657. It is the better practice to have the bond sealed by the principal and surety. Foster Fed. Pr. (4th ed.) § 385*c*; Speer

influence is the same as that in ordinary cases of removal for difference of citizenship.[70]

b. Approval of Bond. It is the regular and the safer practice to procure the approval of the bond by the state court.[71]

c. Amendment of Bond. Technical defects in the form of the bond may, it

Removal Causes 119. A scrawl seal without wax, or an impression on the paper, will be sufficient at least in a state, by the law of which such scrawl or impression is equivalent to a seal (Loop *v.* Winters, 115 Fed. 362; U. S. *v.* Stephenson, 27 Fed. Cas. No. 16,386, 1 McLean 462), and when the state statute makes a bond valid without a seal (G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633), or provides that an omission of a seal shall not affect the validity of any document, the bond is sufficient, although no formal seal is affixed to the same (Loop *v.* Winters, 115 Fed. 362). Where the state statutes so provide the initial letters "L. S." or the word "Seal" are a sufficient substitute for the affixture of a formal seal. G. V. B. Min. Co. *v.* Hailey First Nat. Bank, 95 Fed. 23, 36 C. C. A. 633. When the petitioner is named as principal, the bond may be executed in his name by his attorney at law (Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683), and an execution of the same by him, without his client's authority, may be ratified by the client at any time before an order for a remand (Ashe *v.* Union Cent. L. Ins. Co., 115 Fed. 234). Where the surety is a corporation, an affidavit by the subscribing witness that he saw the corporate seal affixed to the bond, and that he saw the signer "attorney in fact of said" corporation sign the same, is sufficient proof of the authority of the attorney, although no copy of the power of attorney is annexed. New York Mut. L. Ins. Co. *v.* Langley, 145 Fed. 415. An attorney at law is a sufficient surety, if he is accepted by the state court, although a rule of the practice of such court disqualifies him. Probst *v.* Cowen, 91 Fed. 929. It is the safer practice to add to the bond an affidavit of a surety that he has sufficient property, subject to execution in the district and over and above all other debts and liabilities, to meet the penalty of the bond. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666]; Cleveland, etc., R. Co. *v.* Monaghan, 140 Ill. 474, 30 N. E. 869 [*affirming* 41 Ill. App. 498]; Weed Sewing-Mach. Co. *v.* Smith, 71 Ill. 204; Goddard *v.* Bosson, 21 Kan. 139. Where a removal bond was signed "Willis C. Bates Company, by Willis C. Bates, Treasurer," but it did not appear that Willis C. Bates as treasurer had any authority to execute the bond, and the corporate seal was not attached, and it was not shown that the person signing the bond had authority to attach the seal, the bond was void. Alexandria Nat. Bank *v.* Willis C. Bates Co., 160 Fed. 839, 87 C. C. A. 643.

Waiver of objections.— The objection that there is no evidence of the sufficiency of the sureties is waived if not made at the time when the bond is presented to the state court (Western Union Tel. Co. *v.* Horack, 9 Ill. App. 309; Terre Haute, etc., R. Co. *v.* Abend, 9 Ill. App. 304; Stone *v.* Sargent, 129 Mass. 503; Bates *v.* Baltimore, etc., R. Co., 39 Ohio St. 157) as the sureties are not bound to justify until a rule or order to that effect has been made (Empire Transp. Co. *v.* Richards, 88 Ill. 404). And by taking subsequent steps in the case, without moving to remand, defects in the form of the bond (Grow *v.* Wiman, 3 N. Y. St. 281; Hervey *v.* Illinois Midland R. Co., 3 Fed. 707) or in the sufficiency of the sureties (Probst *v.* Cowen, 91 Fed. 929) are waived.

70. Baltimore, etc., R. Co. *v.* Bates, 119 U. S. 464, 7 S. Ct. 285, 30 L. ed. 436 [*reversing* 39 Ohio St. 157, and *overruling* Gutwillig *v.* Zuberbier, 28 Fed. 721].

71. Foster Fed. Pr. (4th ed.) § 385*c*, p. 1553.

The state court has the power to determine whether the bond is sufficient in substance and form. Mix *v.* Andes Ins. Co., 74 N. Y. 53, 30 Am. Rep. 260. See State *v.* Woodson, 164 Mo. 440, 64 S. W. 774; Henen *v.* Baltimore, etc., R. Co., 17 W. Va. 881. Its rejection cannot be arbitrary. Taylor *v.* Shew, 54 N. Y. 75. The determination of the sufficiency of the sureties is largely within the discretion of the state court, to which the bond is presented. Fitz *v.* Hayden, 4 Mart. N. S. (La.) 653; Bell *v.* Lycoming Ins. Co., 3 Hun (N. Y.) 409, 6 Thomps. & C. 54. The refusal to approve the bond, at least when not based upon the insufficiency of the sureties, may be reviewed by the circuit court of the United States, when a motion for a remand is made (New York Mut. L. Ins. Co. *v.* Langley, 145 Fed. 415; Groton Bridge, etc., Co. *v.* American Bridge Co., 137 Fed. 284; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683; Fiske *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362), or by the supreme court of the United States, upon writ of error to the final judgment in the case by the state court of last resort (Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593). The objection that the signatures to the bond were not properly acknowledged or proved, if not raised in the state court, is waived. Cooke *v.* Seligman, 7 Fed. 263, 17 Blatchf. 452.

The presence of defendant in court at the time when the bond is presented is unnecessary. Brown *v.* Crippin, 4 Hen. & M. (Va.) 173. If the surety is present, the bond itself need not be presented to the state court, but may be filed after his acceptance. Tunstall *v.* Madison Parish, 30 La. Ann. 471.

Where the state court had denied and refused the petition without assigning any reason for the same, the federal court refused to remand the cause because there was no

is very generally held, be cured by amendment, after the time for a removal has expired.[72]

d. Liability on Bond. The damages for which the sureties are liable cannot exceed the costs awarded upon the remand.[73]

B. Removal For Prejudice or Local Influence — 1. In General. The practice on the removal of cases for prejudice or local influence is prescribed by the Judiciary Act of 1887, as amended in 1888, as follows: "Where a suit is now pending,[74] or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant,[75] being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause; Provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State

sufficient surety to the bond, when the principals were amply responsible. Chambers *v.* McDougal, 42 Fed. 694.

72. Loop *v.* Winters, 115 Fed. 362; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. 577; Harris *v.* Delaware, etc., R. Co., 18 Fed. 833; Deford *v.* Mehaffy, 13 Fed. 481; Beede *v.* Cheeney, 5 Fed. 388.

Defects amendable.— The omission of a seal (Loop *v.* Winters, 115 Fed. 362; Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. 577), a mistake in the name of the obligee (Harris *v.* Delaware, etc., R. Co., 18 Fed. 833), and an omission of a penal clause (Johnson *v.* F. C. Austin Mfg. Co., 76 Fed. 616) may be cured by amendment.

Defects not amendable.— Where there is a penal clause, an omission of the amount of the penalty (Austin *v.* Gagan, 39 Fed. 626, 5 L. R. A. 476; Burdick *v.* Hale, 4 Fed. Cas. No. 2,147, 7 Biss. 96), or an omission of a provision for the payment of costs in case of a remand (Webber *v.* Bishop, 13 Fed. 49; Torrey *v.* Grant Locomotive Works, 24 Fed. Cas. No. 14,105, 14 Blatchf. 269. *Contra,* Deford *v.* Mehaffy, 13 Fed. 481) cannot be cured by amendment.

The court need not postpone the trial in order to allow a party time to amend his bond. Harrold *v.* Arrington, 64 Tex. 233.

The state court cannot reject a bond because of a technical objection, without affording the applicant an opportunity to correct the error. Taylor *v.* Shew, 54 N. Y. 75; Grow *v.* Wiman, 3 N. Y. St. 281.

73. Hale *v.* Fallon, 4 N. J. L. J. 308.

Time of suit.— No suit can be brought upon the same, until after the cause has been remanded. A dismissal of the case that has been removed upon a failure of defendant to appear and put in special bail will prevent a suit against the surety. Welch *v.* Thorn, 16 La. 188.

Necessity of suit.— In the absence of any stipulation in the removal bond that judgment may be entered upon the same in case of a breach, without the necessity of any new action on the bond, no such judgment can be entered, and the surety is not liable until after judgment in an independent action. Colburn *v.* Hill, 103 Fed. 340, 43 C. C. A. 253. But the circuit court of the United States, upon a remand, has jurisdiction to enter judgment for costs, including the attorney's docket fee against plaintiff. Pellett *v.* Great Northern R. Co., 105 Fed. 194.

The penal sum named in the bond is a penalty, and not liquidated damages. Henry *v.* Louisville, etc., R. Co., 91 Ala. 585, 8 So. 343.

74. The clause divesting the court of jurisdiction over pending causes was held to be constitutional, although the removing party, after the removal and before the approval of the Judiciary Act of 1887, had expended a considerable sum of money in taking testimony in the circuit court of the United States, which was not admissible in the state court, to which the case was remanded. Birdseye *v.* Shaeffer, 37 Fed. 821.

75. **Right of plaintiff to remove.**—A plaintiff cannot remove a case for prejudice or local influence (Campbell *v.* Collins, 62 Fed. 849) except perhaps when a counter-claim has been pleaded by defendant; in which case, when plaintiff was a citizen of another state and such defendant a citizen of the state where the suit was brought, it was held that the former might remove the same (Walcott *v.* Watson, 46 Fed. 529; Carson, etc., Lumber Co. *v.* Holtzclaw, 39 Fed. 578. But see *supra,* IX, B, 2, a).

Upon a taxpayer's appeal from the decision of a board, allowing a claim against a county, the claimant was considered to be a plaintiff, and was consequently denied the right of removal. Kirby *v.* Chicago, etc., R.

court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff, that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto." [76] A suit to which an alien [77] or a citizen of a territory or of the District of Columbia [78] is a party cannot be thus removed.

2. What Is Prejudice or Local Influence. "The prejudice or local influence which the law meant to make the grounds of removal may relate to the person of the litigant or the subject-matter of the litigation; but in either case there must exist improper bias, partiality, unreasonable predilection, or hostility in the local community or courts, which will work injustice, or prevent the party seeking a removal from obtaining justice." [79] It is not necessary, that the federal court

Co., 106 Fed. 551; Tullock *v.* Webster County, 40 Fed. 706.

76. 18 U. S. St. at L. 470, c. 137, § 2, as amended by 24 U. S. St. at L. 552, 25 U. S. St. at L. 434 [U. S. Comp. St. (1901) p. 509].

These acts have repealed U. S. Rev. St. (1878) § 639, as appears from quite a number of authorities. Hanrick *v.* Hanrick, 153 U. S. 192, 14 S. Ct. 835, 38 L. ed. 685; Fisk *v.* Henarie, 142 U. S. 459, 12 S. Ct. 207, 35 L. ed. 1080; *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738. See Foster Fed. Judiciary Acts, pp. 35, 56–58; Foster Fed. Pr. (4th ed.) § 386.

Any one of several defendants who is a citizen and resident of another state may remove the case for prejudice or local influence (Cochran *v.* Montgomery County, 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182; Parker *v.* Vanderbilt, 136 Fed. 246), but only when all the parties on his side of the controversy are citizens of a different state from that of all plaintiffs (Cochrane *v.* Montgomery County, 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182 [*reversing* 116 Fed. 985]; Weldon *v.* Fritzlen, 128 Fed. 608 [*reversed* in 135 Fed. 650, 68 C. C. A. 288]; Campbell *v.* Milliken, 119 Fed. 982; Terre Haute *v.* Evansville, etc., R. Co., 106 Fed. 545; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Wilder *v.* Virginia, etc., Steel, etc., Co., 46 Fed. 676; Anderson *v.* Bowers, 43 Fed. 321. But see Parker *v.* Vanderbilt, 136 Fed. 246), and when all the plaintiffs are citizens of the state where the suit is brought (Gann *v.* Northeastern R. Co., 57 Fed. 417; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Niblock *v.* Alexander, 44 Fed. 306; Rike *v.* Floyd, 42 Fed. 247; Thouron *v.* East Tennessee, etc., R. Co., 38 Fed. 673). A defendant who is a citizen of another state cannot remove a cause because of prejudice or local influence, in favor of other defendants, citizens of the state where the suit is brought, with whom he has a controversy, when he and some of plaintiffs are citizens of the same state. Hanrick *v.* Hanrick, 153 U. S. 192, 14 S. Ct. 835, 38 L. ed. 685.

An intervener may remove a case upon this ground, under proper circumstances (*In re* Iowa, etc., Constr. Co., 10 Fed. 301, 3 McCrary 310), but not unless all the parties on his side of the controversy are citizens of a different state from all those upon the other (Martin *v.* Coons, 24 La. Ann. 169; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836).

Suits by assignees.— It is doubtful whether the restriction as to suits by assignees applies to removals for prejudice or local influence. Barclay *v.* Levee Com'rs, 2 Fed. Cas. No. 977, 1 Woods 254. See Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 3 count of prejudice or local influence. *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738.

Amount in controversy.—A case in which the value of the matter in dispute, exclusive of interest and costs, does not exceed two thousand dollars, cannot be removed on account of prejudice or local influence. *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738.

The difference of citizenship must have existed at the time of the commencement of the suit as well as when the petition is filed. Martin *v.* Coons, 24 La. Ann. 169; Young *v.* Ewart, 132 U. S. 267, 10 S. Ct. 75, 33 L. ed. 352; Schnadig *v.* Flescher, 29 Fed. 465; Frelinghuysen *v.* Baldwin, 19 Fed. 49; Miller *v.* Chicago, etc., R. Co., 17 Fed. 97, 3 McCrary 460; Goodnow *v.* Grayson, 15 Fed. 1, 5 McCrary 16.

77. Dahlonega Co. *v.* Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237; Cohn *v.* Louisville, etc., R. Co., 39 Fed. 227.

78. Dahlonega Co. *v.* Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473.

79. Per Jackson, J., in Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836, 844, where it was further said: "The term 'local influence,' if not synonymous with 'prejudice,'

should be satisfied from the evidence presented, that the judge of the court in which the case was begun; and all the other judges of the state courts, who can be called to hear and decide the case, are so far affected by prejudice and local influence as to be incapable of rendering a fair decision.[80] Where defendant has the right to move for a change of venue, and it does not appear that the same prejudice or local influence exists in the counties to which the change can be made,[81] or that the motion for such change will be denied,[82] it seems that there can be no removal.[83]

3. Time of Removal. The removal may be had at any time before the trial of the suit in the state court.[84]

4. Presentation and Filing of Petition. The petition and other motion

manifestly refers to an improper influence exerted by or existing in favor of one side, or against the other, which will prevent the latter from obtaining justice in the state courts." See also Montgomery County *v.* Cochran, 116 Fed. 985; Neale *v.* Foster, 31 Fed. 53, 12 Sawy. 424.

Illustrations.— The fact that the decisions of the state courts upon the question in controversy differ from those of the federal courts does not constitute prejudice or local influence. *In re* Breckinridge, 31 Nebr. 489, 48 N. W. 142; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836. But the fact that the grand jury of a county recommended that one of defendants make no opposition to the suit is strong evidence of local prejudice. Montgomery County *v.* Cochran, 116 Fed. 985 [*reversed* on another point in 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182]. Proceedings at a public meeting of citizens of the community, where defendant was denounced, and its attorney interrupted and shouted down and a message of the mayor, in which he criticized defendant, are also evidence of prejudice and local influence. Detroit *v.* Detroit City R. Co., 54 Fed. 1. Evidence that defendant had no acquaintence in the county in which the state court would be held, that plaintiff was well known there as a lawyer and a politician, having lived and practised law at the county-seat for many years, and having been a candidate for the office of state attorney-general, was held to be insufficient. Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92; Amy *v.* Manning, 38 Fed. 536, 868; Denison *v.* Brown, 38 Fed. 535; Short *v.* Chicago, etc., R. Co., 33 Fed. 114. In a suit by a foreign corporation, evidence that defendant, who is a resident of the county, had a large and influential business acquaintance in that and the adjoining counties, and that such county and the adjoining counties had had more or less litigation in their corporate capacities, which had excited a prejudice against non-resident foreign corporations, was held to be insufficient. Carson, etc., Lumber Co. *v.* Holtzclaw, 39 Fed. 885. Evidence that the county newspapers had denounced defendant for alleged fraudulent transactions, and that the judge of the court of common pleas, when a motion was heard for the appointment of a receiver of defendant, had said, "We will see to it that they are not allowed to carry this property out of the county," was held to be insufficient. Turnbull Wagon Co. *v.* Linthicum Carriage Co., 80 Fed. 4. The decisions of the state courts refusing to allow attorney's fees to plaintiff, in an action upon a mortgage or promissory note, which provided for such an allowance, does not constitute prejudice or local influence. *In re* Breckenridge, 31 Nebr. 489, 48 N. W. 142. For other illustrations see the following cases: Tacoma *v.* Wright, 84 Fed. 836; Herndon *v.* Southern R. Co., 76 Fed. 398; Hall *v.* Chattanooga Agricultural Works, 48 Fed. 599; Smith *v.* Crosby Lumber Co., 46 Fed. 819 [*affirmed* in 51 Fed. 63, 2 C. C. A. 97].

The existence of the right of appeal upon the facts to an unprejudiced state court of review is no objection to the removal. Detroit *v.* Detroit City R. Co., 54 Fed. 1.

The waiver of a jury trial, and the fact that the case will be tried before a judge alone, does not prevent a removal. Montgomery County *v.* Cochran, 116 Fed. 985 [*reversed* on another point in 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182]. Nor does the fact that the federal judge who will try the cause is a member of the community where the prejudice or local influence exists. Montgomery County *v.* Cochran, 116 Fed. 985 [*reversed* on another point in 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182]. See also Detroit *v.* Detroit City R. Co., 54 Fed. 1.

80. Tacoma *v.* Wright, 84 Fed. 836. See also Walcott *v.* Watson, 46 Fed. 529; Cooper *v.* Richmond, etc., R. Co., 42 Fed. 697, 8 L. R. A. 366; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65.

81. Walcott *v.* Watson, 46 Fed. 529. But see Detroit *v.* Detroit City R. Co., 54 Fed. 1.

Where the judge who would regularly sit in the counties where the prejudice and local influence were shown to exist was authorized to hold court in any county of the state, and might have presided at the trial in any county to which the venue could be changed, it was held that the case could be removed to the circuit court of the United States. Walcott *v.* Watson, 46 Fed. 529.

82. Smith *v.* Crosby Lumber Co., 46 Fed. 819 [*affirmed* in 51 Fed. 63, 2 C. C. A. 97].

83. New London Water Com'rs *v.* Robbins, 125 Fed. 656; Rike *v.* Floyd, 42 Fed. 247; Robison *v.* Hardy, 38 Fed. 49; Southworth *v.* Reid, 36 Fed. 451.

84. 25 U. S. St. at L. 434, c. 866, § 2 [U. S. Comp. St. (1901) p. 509]. See also *supra*, VIII, C.

papers must be presented to the federal court and filed in the clerk's office of the same.[85]

5. Petition and Affidavit. The motion papers must contain in a verified petition or an affidavit, a statement of the facts which show that the prejudice or local influence exists. A statement in the language of the statute is insufficient.[86]

6. Notice of Application. Notice of the application should be given to plaintiff.[87]

85. Rome, etc., Constr. Co. *v.* Smith, 84 Ga. 238, 10 S. E. 728; Mason *v.* Interstate Consol. St. R. Co., 170 Mass. 382, 49 N. E. 645; Williams *v.* Southern Bell Tel., etc., Co., 116 N. C. 558, 21 S. E. 298; Baird *v.* Richmond, etc., R. Co., 113 N. C. 603, 18 S. E. 698; Blackwell *v.* Lynchburg, etc., R. Co., 107 N. C. 217, 12 S. E. 133; Bellaire *v.* Baltimore, etc., R. Co., 146 U. S. 117, 13 S. Ct. 16, 36 L. ed. 910; Bonner *v.* Meikle, 77 Fed. 485; Kaitel *v.* Wylie, 38 Fed. 865; Malone *v.* Richmond, etc., R. Co., 35 Fed. 625. But see Short *v.* Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225, holding that the affidavit may be filed in the state court and a certified copy in the circuit court of the United States.

It is the better practice also to file a certified copy of the same in the office of the clerk of the state court. Baird *v.* Richmond, etc., R. Co., 113 N. C. 603, 18 S. E. 698; Short *v.* Chicago, etc., R. Co., 33 Fed. 114.

86. *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; Collins *v.* Campbell, 62 Fed. 850; Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92; Hall *v.* Chattanooga Agricultural Works, 48 Fed. 599; Minnick *v.* Union Ins. Co., 40 Fed. 369; Hakes *v.* Burns, 40 Fed. 33; Goldworthy *v.* Chicago, etc., R. Co., 38 Fed. 769; Amy *v.* Manning, 38 Fed. 536, 38 Fed. 868; Malone *v.* Richmond, etc., R. Co., 35 Fed. 625; Short *v.* Chicago, etc., R. Co., 33 Fed. 114, 34 Fed. 225.

Form of petition and affidavit is set out in Montgomery County *v.* Cochran, 116 Fed. 985, 986.

Sufficiency of petition and affidavit.— The petition may be verified by an agent of the petitioner. The petitioner's own affidavit is not required when the facts are proved by the affidavits of parties who state that they have personal knowledge of the same (Parker *v.* Vanderbilt, 136 Fed. 246; Bonner *v.* Meikle, 77 Fed. 485; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683), although one contained the additional averment "that affiant knows the facts of such prejudice and local influence, and makes this affidavit from such knowledge (Niblock *v.* Alexander, 44 Fed. 306). "The amount and manner of proof required in each case must be left to the discretion of the court itself." *Ex p.* Pennsylvania Co., 137 U. S. 451, 457, 11 S. Ct. 141, 34 L. ed. 738. Affidavits containing nothing but general allegations in the language of the statute are insufficient. Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92; Niblock *v.* Alexander, 44 Fed. 306; Amy *v.* Manning, 38 Fed. 536, 38 Fed. 868; Malone *v.* Richmond, etc., R. Co., 35 Fed. 625; Short *v.* Chicago, etc., R. Co., 33 Fed. 114. See *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; Collins *v.* Campbell, 62 Fed. 850. *Contra*, Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Cooper *v.* Richmond, etc., R. Co., 42 Fed. 697, 8 L. R. A. 366. An affidavit was held to be sufficient, which averred the prejudice and local influence positively, and then alleged, upon information and belief, the facts which were evidence of the same. Detroit *v.* Detroit City R. Co., 54 Fed. 1. The affidavit should show that the same prejudice or local influence exists in all the counties in the state to which the venue could be changed. Parker *v.* Vanderbilt, 136 Fed. 246; New London Water Com'rs *v.* Robbins, 125 Fed. 656; Robison *v.* Hardy, 38 Fed. 49; Southworth *v.* Reid, 36 Fed. 451. The papers should show that the necessary difference of citizenship existed at the time when the suit was begun (Martin *v.* Coons, 24 La. Ann. 169; Young *v.* Ewart, 132 U. S. 267, 10 S. Ct. 75, 33 L. ed. 352; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Schnadig *v.* Flescher, 29 Fed. 465; Frelinghuysen *v.* Baldwin, 19 Fed. 49; Miller *v.* Chicago, etc., R. Co., 17 Fed. 97, 3 McCrary 460), and also at the time when the application is made (Cochran *v.* Montgomery County, 199 U. S. 260, 273 [*reversing* 116 Fed. 985]; Weldon *v.* Fritzlen, 128 Fed. 608 [*reversed* in 135 Fed. 650, 68 C. C. A. 288]; Campbell *v.* Milliken, 119 Fed. 982; Terre Haute *v.* Evansville, etc., R. Co., 106 Fed. 545; Wilder *v.* Virginia, etc., Steel, etc., Co., 46 Fed. 676; Anderson *v.* Bowers, 43 Fed. 321; Rike *v.* Floyd, 42 Fed. 247). Under the Revised Statutes an affidavit, sworn to before a suit was brought, which correctly described the same by its title and by the number subsequently given to the same, was held to be sufficient. Canal, etc., Sts. R. Co. *v.* Hart, 114 U. S. 654, 5 S. Ct. 1127, 29 L. ed. 226. If made without the state, it is the proper practice to have the proof of the authority of the officer taking the same authenticated in the manner that is required by the state statutes. Bowen *v.* Chase, 3 Fed. Cas. No. 1,720, 7 Blatchf. 255. If made within the state it has been held that the state statute concerning the form of the certificate to the jurat by the officer must be followed. Sutherland *v.* Jersey City, etc., R. Co., 22 Fed. 356.

When the date of the affidavit was more than a year prior to its presentation to the court, it was held that it would not be presumed that the local prejudice still existed. Metropolitan L. Ins. Co. *v.* Ethier, 44 Mich. 144, 6 N. W. 201.

87. Bonner *v.* Meikle, 77 Fed. 485; Hern-

7. Hearing and Rehearing. It is the usual and the better practice to allow a hearing to both sides, upon the application for the removal for prejudice or local influence.[88] When the original application was *ex parte*, the court may, in its discretion, allow a rehearing on affidavits by plaintiff. Ordinarily, however, a rehearing will be refused [89] "unless it is clearly made to appear that the court has been imposed upon or misled." [90]

8. Order Upon Removal For Prejudice or Local Influence. An order of the federal court, granting or denying the application, must be obtained and filed in the state court.[91] The state court does not lose jurisdiction until this is done.[92]

C. Removal of Proceedings Against Revenue Officers and Persons Having Defenses Under the Revenue Laws. The practice upon the removal of suits or proceedings against revenue officers and persons having defenses under the revenue laws is thus prescribed by the Revised Statutes, as amended: "When any civil suit or criminal prosecution [93] is commenced in any court of a

don *v.* Southern R. Co., 73 Fed. 307; Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92. See also Reeves *v.* Corning, 51 Fed. 774, 776, where it was said: "The better, as well as the safer, practice would ordinarily be for the court to decline to hear the application until proper notice of the hearing had been given." And see Malone *v.* Richmond, etc., R. Co., 35 Fed. 625, 629, where it was said: "Although such investigation or examination is not required, by any expressed words of the statute, to be had upon notice to the party against whom the removal is asked, such notice will best accomplish the object which congress had in view." The following cases hold that notice is not required. Montgomery County *v.* Cochran, 116 Fed. 985 [*reversed* on another point in 199 U. S. 260, 26 S. Ct. 58, 50 L. ed. 182]; Crotts *v.* Southern R. Co., 90 Fed. 1; Reeves *v.* Corning, 51 Fed. 774; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Carpenter *v.* Chicago, etc., R. Co., 47 Fed. 535; Amy *v.* Manning, 38 Fed. 868; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65.

Where a notice was served three days before the appointed time two weeks additional time was given to the party opposing the removal. Carson, etc., Lumber Co. *v.* Holtzclaw, 39 Fed. 578.

88. Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92; Reeves *v.* Corning, 51 Fed. 774.

Controverting affidavits.— The court may, in its discretion, refuse to allow the affidavit of defendant to be controverted. Reeves *v.* Corning, 51 Fed. 774; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Carpenter *v.* Chicago, etc., R. Co., 47 Fed. 535; Brodhead *v.* Shoemaker, 44 Fed. 518, 11 L. R. A. 567; Cooper *v.* Richmond, etc., R. Co., 42 Fed. 697, 8 L. R. A. 366; Huskins *v.* Cincinnati, etc., R. Co., 37 Fed. 504, 3 L. R. A. 545; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65. *Contra*, Ellison *v.* Louisville, etc., R. Co., 112 Fed. 805, 50 C. C. A. 530; Maher *v.* Tower Hotel Co., 94 Fed. 225; Schwenk *v.* Strang, 59 Fed. 209, 8 C. C. A. 92.

A plea in abatement is not indispensable to raise an issue upon the allegations in the petition. Short *v.* Chicago, etc., R. Co., 34 Fed. 225.

A plea to the petition, which simply denies the allegations as to the petitioner's belief, but not the allegations as to the existence of prejudice or local influence, does not raise an issue. Taylor County Ct. *v.* Baltimore, etc., R. Co., 25 Fed. 161.

89. Reeves *v.* Corning, 51 Fed. 774; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836; Carpenter *v.* Chicago, etc., R. Co., 47 Fed. 535. *Contra*, Ellison *v.* Louisville, etc., R. Co., 112 Fed. 805, 50 C. C. A. 530; Short *v.* Chicago, etc., R. Co., 34 Fed. 225.

Leave to move for a rehearing must be obtained, even though the first application was *ex parte*. Carpenter *v.* Chicago, etc., R. Co., 47 Fed. 535.

90. Reeves *v.* Corning, 51 Fed. 774.

91. Pennsylvania Co. *v.* Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod *v.* Cleveland, etc., R. Co., 65 Fed. 145, 12 C. C. A. 521.

An entry of a finding of the jurisdictional facts in the record or docket or journal of the circuit court is not sufficient. Pennsylvania Co. *v.* Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod *v.* Cleveland, etc., R. Co., 65 Fed. 145, 12 C. C. A. 521.

The transcript, including a copy of the order, must be subsequently filed in the federal court. Pennsylvania Co. *v.* Bender, 148 Fed. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod *v.* Cleveland, etc., R. Co., 65 Fed. 145, 12 C. C. A. 521.

92. Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. 391; Pennsylvania Co. *v.* Bender, 148 U. S. 255, 13 S. Ct. 591, 37 L. ed. 441; Tod *v.* Cleveland, etc., R. Co., 65 Fed. 145, 12 C. C. A. 521.

When there are two separable controversies in the case, the circuit court may remand to the state court such one of them as does not affect defendant who procured the removal. Otherwise the whole case remains in the federal court. 18 U. S. St. at L. 470, c. 137, § 2, as amended by 24 U. S. St. at L. 552, 25 U. S. St. at L. 434 [U. S. Comp. St. (1901) p. 509]. See Haire *v.* Rome R. Co., 57 Fed. 321; Whelan *v.* New York, etc., R. Co., 35 Fed. 849, 1 L. R. A. 65.

93. The removal may be had when the complaint or information has been filed with a state justice of the peace and a warrant

State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition[94] of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said circuit court, if in session, or if it be not, to the clerk[95] thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the circuit court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or another process except capias, the clerk of the circuit court shall issue a writ of certiorari[96] to the State

issued by him in a prosecution for a misdemeanor which is not the subject of indictment. Virginia *v.* Bingham, 88 Fed. 561. But otherwise the removal cannot be had before an indictment or an information in the state court. Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386.

94. **A petition** by a revenue officer is sufficient, if it avers, in general language, that the suit or prosecution in the state court, which it describes, was brought against him for and on account of an act done by him under a revenue law of the United States, without specifying the facts. Tennessee *v.* Davis, 100 U. S. 257, 25 L. ed. 648; Illinois *v.* Fletcher, 22 Fed. 776; Abranches *v.* Schell, 1 Fed. Cas. No. 21, 4 Blatchf. 256. See also Kain *v.* Texas Pac. R. Co., 14 Fed. Cas. No. 7,596; Reding *v.* Texas, etc., R. Co., 20 Fed. Cas. No. 11,630*a*. But see Skeen *v.* Huntington, 25 Ind. 510; Salem, etc., R. Co. *v.* Boston, etc., R. Co., 21 Fed. Cas. No. 12,249. Where, however, the petitioner, in addition to the general averment in the statutory language, sets forth the specific facts of the case, and it appears that they do not fall within the statute, the case will be remanded. Illinois *v.* Fletcher, 22 Fed. 776. The petition need not contain allegations of local prejudice. Virginia *v.* Felts, 133 Fed. 85.

The truth of the allegations in the petition may be put in issue by any appropriate pleading; the filing of a plea to the jurisdiction being the better practice. The issue thus raised should be tried by a jury, subject to the right of the court to direct a verdict, when proper, the burden of proof on the issue resting upon the petitioner. Virginia *v.* Felts, 133 Fed. 85.

95. When the petition is filed during vacation and the clerk is absent, his deputy may issue the proper writ. North Carolina *v.* Sullivan, 50 Fed. 593. *Contra*, State *v.* Sullivan, 110 N. C. 513, 14 S. E. 796.

Where there are several clerk's offices in the district, the petition should regularly be filed at the place where the next session of the circuit court is to be held, but the filing of the petition in another clerk's office is not a ground for remanding the cause. Virginia *v.* Felts, 133 Fed. 85.

96. The writ need not in all respects conform to the writ of certiorari at common law. It is sufficient if it informs the state court of proper grounds upon which the federal circuit court assumes jurisdiction and notifies the state court to make return of the record. It need not show that the clerk of the federal court has adjudged the petition sufficient, nor need it state the grounds of the authority of the federal court, nor the purpose of the writ. North Carolina *v.* Sullivan, 50 Fed. 593. The address of the writ of certiorari to the United States marshal of the district, commanding him to make known to the clerk of the state court the removal of the cause, and that such court is required to send a transcript of the record to the circuit court of the United States, is equivalent to the address of the writ to the state court. North Carolina *v.* Sullivan, 50 Fed. 593. *Contra*, State *v.* Sullivan, 110 N. C. 513, 14 S. E. 796.

An order of the federal court directing a removal cannot be substituted for these writs, which are specified in the statute. Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386.

court, requiring it to send to the circuit court the record and proceedings in the cause. When it is commenced by capias, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus *cum causa*, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the circuit court, and any further proceedings, trial, or judgment therein in the State court shall be void.[97] And if the defendant in the suit or prosecution be in actual custody [98] or mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus *cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the circuit court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the circuit court that no copy of the record and proceedings therein in the State court [99] can be obtained, the circuit court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant."[1]

97. State *v.* Davis, 12 S. C. 528; North Carolina *v.* Kirkpatrick, 42 Fed. 689.

The state court does not lose jurisdiction until after service upon it, or its clerk, of the writ of certiorari or habeas corpus *cum causa*. State *v.* Davis, 12 S. C. 528; Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386. But see State *v.* Circuit Judge, 33 Wis. 127, holding that the state court has jurisdiction to determine whether the case falls within the statute.

After the removal, it is the duty of the state prosecuting attorney to continue the prosecution, and the duty of the United States district attorney to defend the suit. Delaware *v.* Emerson, 8 Fed. 411. The accused is called upon to answer to the offense as defined by the laws of the state, not to the crime as defined by a federal statute. North Carolina *v.* Gosnell, 74 Fed. 734; Georgia *v.* O'Grady, 10 Fed. Cas. No. 5,352, 3 Woods 496. Since no procedure is prescribed by the statute, and the offense as charged is against the state law and prosecuted by the state, the state practice should be followed, at least in prosecutions for felony, in all substantive matters, such as the impaneling and charging of the jury, the number of challenges allowed, ruling upon the competency of witnesses, and the confinement of the jurors during the trial. Virginia *v.* Felts, 133 Fed. 85. Where the state fails or refuses to prosecute after its removal, the proper course is for the federal court to impanel a jury and direct a verdict of not guilty. Virginia *v.* Felts, *supra*. Inasmuch as defendant is prosecuted for an offense against the state law, it follows, in cases of conviction, that the state should execute the sentence. If the verdict and sentence be that defendant be hanged, the order should direct that he be delivered to the sheriff of the county from which the case came for execution of sentence. If the sentence be imprisonment, the order should direct the marshal to deliver defendant to the sheriff for transporation to jail or the state penitentiary, as the case may be. If the state authorities decline to receive the convict, an order should be made directing the marshal to liberate him. If the jury merely imposes a fine on defendant, and it is not paid, he should be delivered to the sheriff of the proper county. If the fine should be forthwith paid by defendant, the clerk of the federal court should receive it, and pay the sum to the clerk of the court from which the prosecution was removed, reserving, however, so much of the sum as represents the costs in the federal court, if the costs be adjudged against the defendant. Virginia *v.* Felts, 133 Fed. 85.

98. When the officer or other person is under arrest, the writ of habeas corpus *cum causa* should issue. Virginia *v.* Felts, 133 Fed. 85.

When defendant has been arrested and has given bail, the writ of habeas corpus *cum causa* may be addressed to the marshal with a direction that a duplicate be served upon the clerk of the state court. Virginia *v.* Felts, 133 Fed. 85. But see North Carolina *v.* Sullivan, 50 Fed. 593, to the effect that when no application for the writ of habeas corpus *cum causa* has been made the writ of certiorari may be issued.

99. The indictment is the only record, the procurement of which is necessary, and it is immaterial whether the original or a certified copy is transmitted. Virginia *v.* Felts, 133 Fed. 85.

If the petitioner is unable to pay the fees of the clerk of the state court, the best course would be to supply the contents of the indictment by affidavit. Virginia *v.* Felts, 133 Fed. 85.

1. U. S. Rev. St. (1878) § 643, as amended

D. Removal of Actions Against Officers of Either House of Congress. The removal of an action against a person, for or on account of anything done by him while an officer of either house of congress in the discharge of his official duty in executing any order of such house is made in the same manner as the removal of proceedings against revenue officers and persons having defenses under the revenue laws.[2]

E. Removal of Cases Where the Defense Depends Upon the Civil Rights Laws. The Revised Statutes provide: "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights, of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition [3] all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleading, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the circuit court, and the said court shall

by 28 U. S. St. at L. 36 [U. S. Comp. St. (1901) p. 1273].

No order of the state or of the federal court is necessary for a removal under this statute. Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386.

If the indictment is for any reason dismissed after the removal, the federal court has no jurisdiction to find a new indictment for the offense against the state law. Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354.

2. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602]. See *supra*, X, C.

The district attorney of the United States for the district within which the action is brought, on being thereby requested by the officer sued, must enter an appearance in behalf of such officer. 18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602].

3. The mere presentation of a petition for a removal, under color of the statute, is not sufficient to arrest the jurisdiction of the state court when the petitioner states no valid ground for the removal. *Ex p.* State, 71 Ala. 363; *Ex p.* Wells, 29 Fed. Cas. No. 17,386, 3 Woods 128. See Stommel *v.* Timbrel, 84 Iowa 336, 51 N. W. 159. But the federal court has the right to reëxamine the petition, and, if found sufficient, to issue a writ of certiorari or other proper writ to remove the cause. *Ex p.* State, 71 Ala. 363; *Ex p.* Wells, 29 Fed. Cas. No. 17,386, 3 Woods 128.

The proper practice is for the state court to order all proceedings suspended, except those which support the removal, until the federal court has passed upon the question. State *v.* Dunlap, 65 N. C. 491, 6 Am. Rep. 746.

In case of an erroneous removal, under color of this statute, the remedy of the state is an application to the supreme court of the United States for the writ of mandamus, to compel the remand of the prosecution and the restoration of the custody of the accused to the state court (Kentucky *v.* Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. ed. 633; Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386; *Ex p.* Virginia, 100 U. S. 313, 25 L. ed. 667), and also an appeal to the same court from the order of the circuit court granting the writ of habeas corpus *cum causa*, which appeal is founded upon a want of jurisdiction (Kentucky *v.* Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. ed. 633).

then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed." [4]

"When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus *cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said circuit court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ." [5]

F. Removal of Suits Between Citizens of the Same State Claiming Land Under Grants of Different States. The statute regulating the removals of suits in which there is a controversy between citizens of the same state claiming land under grants of different states, is as follows: "If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond,[6] as herein before mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim." [7]

G. Order of State Court Upon Removal. No order of the state court is necessary upon a removal.[8]

4. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

5. U. S. Rev. St. (1878) § 642 [U. S. Comp. St. (1901) p. 521].

After the circuit court of the United States has quashed an indictment it has no jurisdiction to find a new indictment; but it may remand the prisoner to the custody of the state court, which may then find a new indictment. Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354.

6. See *supra*, X, A, 2.

7. 18 U. S. St. at L. 470, c. 137, § 3, as amended by 25 U. S. St. at L. 435 [U. S. Comp. St. (1901) p. 510].

8. *Massachusetts.*— Duff *v.* Hildreth, 183 Mass. 440, 67 N. E. 356.

Michigan.— Le Roux *v.* Bay Cir. Judge, 46 Mich. 189, 9 N. W. 154.

Minnesota.— Scheffer *v.* National L. Ins. Co., 25 Minn. 534; St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682.

South Dakota.— Richards *v.* Modern Woodmen of America, 14 S. D. 440, 85 N. W. 999.

United States.— Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354; Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 22 L. ed. 68; New York Mut. L. Ins. Co. *v.* Langley, 145 Fed. 415;

H. Federal Court to Which Suit Is Removed. The circuit court of the United States, to which the suit is properly removed, is that held in the district, within the boundaries of which the suit is pending in the state court.[9]

XI. FILING OF TRANSCRIPT.

A. In General. The filing of the transcript[10] of the proceedings in the state courts, in suits removed because of a difference of citizenship, or because they arise under the constitution, laws, or treaties of the United States,[11] in cases where the defense depends upon the civil rights laws,[12] and in proceedings against revenue officers or persons having defenses under the revenue laws, or persons who are or have been, officers of either house of congress,[13] is regulated by statute.

Eisenmann *v.* Delemar's Nevada Gold-Min. Co., 87 Fed. 248; La Page *v.* Day, 74 Fed. 977; Wilson *v.* Western Union Tel. Co., 34 Fed. 561; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105; Petrie *v.* Pennsylvania R. Co., 19 Fed. Cas. No. 11,040*a*.

See 42 Cent. Dig. tit. "Removal of Causes," § 198.

An order by a state court denying the prayer for a removal has been said to be a breach of judicial comity. Chambers *v.* McDougal, 42 Fed. 694. Such an order, upon a petition which set forth the jurisdictional facts, should not be subsequently set aside by the court that made it. Chamberlain *v.* American Nat. Life, etc., Co., 11 Hun (N. Y.) 370. Such an order is always disregarded by the federal courts, which consider the question *de novo*, upon a motion for a remand. Atlantic Coast Line R. Co. *v.* Bailey, 151 Fed. 891.

9. *Ex p.* Groom, 40 Ala. 731; *Ex p.* State Ins. Co., 18 Wall. (U. S.) 417, 21 L. ed. 904; Burck *v.* Taylor, 39 Fed. 581 [*affirmed* in 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578]; Cobb *v.* Globe Mut. L. Ins. Co., 5 Fed. Cas. No. 2,921, 3 Hughes 452, 6 Reporter 515; Knowlton *v.* Congress, etc., Spring Co., 14 Fed. Cas. No. 7,902, 13 Blatchf. 170. See also Hill *v.* Woodland Amusement Co., 158 Fed. 530, holding that an action pending in a state court in Delaware, where the matter in dispute exclusive of interest and costs exceeds two thousand dollars, brought by a citizen of Pennsylvania against a citizen and resident of New Jersey, is not removable to the circuit court of the United States for Delaware.

This is ordinarily that held in the district, within the limits of which process was served upon defendant, although the cause of action arose in another district (Suydam *v.* Smith, 1 Den. (N. Y.) 263; Burck *v.* Taylor, 39 Fed. 581 [*affirmed* in 152 U. S. 634, 14 S. Ct. 696, 38 L. ed. 578]); but if the suit at the time of the removal is pending in another district from that within which it was first brought, the circuit court of the United States held, within the district where it is pending when the petition is filed, is the one to which the case should be removed (Hess *v.* Reynolds, 113 U. S. 73, 5 S. Ct. 377, 28 L. ed. 927). Suits between citizens of the same state claiming land under grants of different states (25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510]), where defendants are revenue officers of the United States, sued for official acts, or persons claiming defenses under the revenue laws (U. S. Rev. St. (1878) § 643), or officers of either house of congress, sued because of acts done in the discharge of their official duty (18 U. S. St. at L. 401, c. 130, § 8 [U. S. Comp. St. (1901) p. 602]), or cases where the defense depends upon the civil rights laws (U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520]) shall be removed to the next circuit court, to be held in the district where the suit is pending. In the case of prosecutions against revenue officers, this direction is not mandatory. The petition may be filed in any circuit court within the district. Virginia *v.* Felts, 133 Fed. 85. It need not then be filed at the place where the next session of the circuit court is held after the indictment, where there are several places for holding that court within the district. Virginia *v.* Felts, *supra*. A petition and an order for a removal because of difference of citizenship, into the circuit court for another district than that where the case is pending, although such district is in the same state, are void. *Ex p.* Groom, 40 Ala. 731; *Ex p.* State Ins. Co., 18 Wall. (U. S.) 417, 21 L. ed. 904. Where the petition prays for a removal to a division of the district which did not exist, but correctly designates the city where the court in one of the divisions thereof is held, the defect is immaterial and will be disregarded. Hodge *v.* Chicago, etc., R. Co., 121 Fed. 48, 57 C. C. A. 388. A prayer for a removal to the district instead of the circuit court of the United States for the proper district may be cured by an amendment. Hadfield *v.* Northwestern L. Assur. Co., 105 Fed. 530.

10. **A formal motion to docket the cause,** after the transcript has been filed, is not necessary. Glover *v.* Shepperd, 15 Fed. 833, 11 Biss. 572.

11. 18 U. S. St. at L. 470 [U. S. Comp. St. (1901) p. 508].

12. U. S. Rev. St. (1878) § 641 [U. S. Comp. St. (1901) p. 520].

13. U. S. Rev. St. (1878) § 643.

B. Party Who Should File Transcript. The transcript should be regularly filed by the petitioner for the removal,[14] even when he is a revenue officer.[15]

C. Contents of Transcript. The transcript should contain copies of the pleadings in the cause;[16] of all depositions on file in the state court;[17] of all ancillary proceedings, such as garnishee proceedings in another county in the state;[18] and also, it has been said, of all entries in the journals of the state courts.[19]

D. Place of Filing Transcript. Where the circuit court has sessions in different places in the district, the record should be filed in the clerk's office at that place where the suit was pending in the State court, or in the nearest and most convenient place thereto.[20]

E. Time of Filing Transcript. The regular time for filing the transcript is the first day of the term of the circuit court, to which the case is removable, which is held next after the filing of the petition.[21] If, however, such term begins

14. Hatcher *v.* Wadley, 84 Fed. 913.

Any party may, however, file the transcript, by leave from the circuit court of the United States (Hartford, etc., R. Co. *v.* Montague, 94 Fed. 227; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172; Mahony Min. Co. *v.* Bennett, 16 Fed. Cas. No. 8,969, 5 Sawy. 141, 6 Reporter 99. *Contra*, Hamilton *v.* Fowler, 83 Fed. 321; Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9), or even without such leave (Cœur d'Alene R., etc., Co. *v.* Spalding, 93 Fed. 280, 35 C. C. A. 295; Thompson *v.* Chicago, etc., R. Co., 60 Fed. 773; Mills *v.* Newell, 41 Fed. 529; Anderson *v.* Appleton, 32 Fed. 855. See Delbanco *v.* Singletary, 40 Fed. 177), at least when immediate action in the case, to protect his interests, is required. It is not the duty of the clerk of the state court to file the transcript. Hatcher *v.* Wadley, 84 Fed. 913.

15. Virginia *v.* Felts, 133 Fed. 85.

16. McBratney *v.* Usher, 15 Fed. Cas. No. 8,661, 1 Dill. 367.

17. Miller *v.* Tobin, 18 Fed. 609, 9 Sawy. 401.

18. Woodward Lumber Co. *v.* Vizard, 144 Fed. 982.

19. Probst *v.* Cowen, 91 Fed. 929.

An omission of a small part of the record is not a ground for a remand, but may be cured upon a suggestion of a diminution of the record. Probst *v.* Cowen, 91 Fed. 929.

20. Cobb *v.* Globe Mut. L. Ins. Co., 5 Fed. Cas. No. 2,921, 3 Hughes 452, 6 Reporter 515. *Contra*, Hatcher *v.* Wadley, 84 Fed. 913, holding that it should be filed at the place where the first session is held. See Henderson *v.* Cabell, 43 Fed. 257.

The filing of the record in another office of the clerk of the federal court, if made in due time, is not a ground for a remand. Henderson *v.* Cabell, 43 Fed. 257.

21. 25 U. S. St. at L. 435, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

If the federal court has terms at different places within the district, it is the safer practice to file the transcript before the first one, wherever the same may be held. Hatcher *v.* Wadley, 84 Fed. 913. But see Cobb *v.* Globe Mut. L. Ins. Co., 5 Fed. Cas. No. 2,921, 3 Hughes 452, 6 Reporter 515, holding that it is sufficient if the record is filed before the first term held in that place in the district nearest to the clerk's office of the state court.

Defendant is not in default because he postpones filing his transcript, while he is awaiting the action of the state court upon his petition, although in consequence the filing is not made until after the statutory time. Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286. See Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643. *Contra*, Cobb *v.* Globe Mut. L. Ins. Co., 5 Fed. Cas. No. 2,921, 3 Hughes 452, 6 Reporter 515.

If a reasonable excuse for the delay exists, leave is usually given to file a transcript after the statutory time. St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703; Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; Lucker *v.* Phœnix Assur. Co., 66 Fed. 161; McGregor *v.* McGillis, 30 Fed. 388; Rowell *v.* Hill, 28 Fed. 433; Winchell *v.* Coney, 27 Fed. 482; Hall *v.* Brooks, 14 Fed. 113, 21 Blatchf. 167; Woolridge *v.* McKenna, 8 Fed. 650; Kidder *v.* Featteau, 2 Fed. 616, 1 McCrary 323; Bright *v.* Milwaukee, etc., R. Co., 4 Fed. Cas. No. 1,877, 14 Blatchf. 214. Under a previous statute it was said that the question whether defendant had a reasonable excuse for his delay in filing the transcript rested in the discretion of the circuit court and would not be reviewed by appeal or writ of error. McLean *v.* St. Paul, etc., R. Co., 16 Fed. Cas. No. 8,892, 16 Blatchf. 309, 8 Reporter 69, 20 Alb. L. J. (N. Y.) 78 [*affirmed* in 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703]. Misinformation from the clerk of the federal court as to the time when the record should be filed was held to be a sufficient excuse. Burgunder *v.* Browne, 59 Fed. 497. Where but two terms of the federal court had elapsed subsequent to the removal and the only excuse for the delay was an affidavit by the defendants' counsel that they and defendants had paid the clerk for the record and understood that it was the clerk's duty to transmit the same, it was held that the laches was inexcusable, and that the cause must be remanded. Hatcher *v.* Wadley, 84 Fed. 913.

Waiver.— If the removing party is forced by his adversary to remain in the state court, such adversary waives the statutory requirement as to the time of filing the record until

within twenty days after the filing of the petition and the bond, then the petitioner has twenty days from the date of his application to file the copy of the record, and to enter his appearance in the circuit court.[22]

XII. PROCEEDINGS IN STATE COURT AFTER REMOVAL.

A. In General. The state court has the power to examine the petition and bond, in order to ascertain whether they are sufficient. If they are insufficient, it may disregard them and proceed with the suit.[23] If the petition and bond are

the state court lets go of its jurisdiction. Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286. *Contra*, Hatcher *v.* Wadley, 84 Fed. 913.

Where an act changing the time of holding a term of court was passed too late to permit the holding of a term at the substituted time, and a special term in lieu thereof was called, it was held that the transcript might be filed before such special term, and that a motion to remand may be made thereat. Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9.

22. 18 U. S. St. at L. p. 472, c. 137, § 7 [U. S. Comp. St. (1901) p. 512].

Where there is a term of the federal court in session at the time of the removal, defendant is not obliged to file the transcript within twenty days, but he may wait until the next term. Goldberg *v.* German Ins. Co., 152 Fed. 831.

23. *Alabama.*— *Ex p.* Mobile, etc., R. Co., 63 Ala. 349; *Ex p.* Grimball, 61 Ala. 598.

Colorado.— Colorado Fuel, etc., Co. *v.* Four Mile R. Co., 29 Colo. 90, 66 Pac. 902.

Georgia.— Carswell *v.* Schley, 59 Ga. 17. See Brodhead *v.* Shoemaker, 85 Ga. 728, 11 S. E. 845.

Indiana.— McWhinney *v.* Brinker, 64 Ind. 360; Indianapolis, etc., R. Co. *v.* Risley, 50 Ind. 60.

Iowa.— See Wilson *v.* Big Joe Block Coal Co., 135 Iowa 531, 113 N. W. 348.

Louisiana.— State *v.* Murray, 47 La. Ann. 1424, 17 So. 832; State *v.* Johnson, 29 La. Ann. 399.

Mississippi.— Jackson *v.* Alabama Great Southern R. Co., 58 Miss. 648.

Missouri.— Hickman *v.* Missouri, etc., R. Co., 151 Mo. 644, 52 S. W. 351.

Nebraska.— Stuart *v.* Staplehurst Bank, 57 Nebr. 569, 78 N. W. 298; Trester *v.* Missouri Pac. R. Co., 23 Nebr. 242, 36 N. W. 502; Blair *v.* West Point Mfg. Co. 7 Nebr. 146.

New Hampshire.— See Robertson *v.* Kettell, 64 N. H. 430, 14 Atl. 78.

New Jersey.— National Docks, etc., Connecting R. Co. *v.* Pennsylvania R. Co., 52 N. J. Eq. 58, 28 Atl. 71.

New York.— Tierney *v.* Helvetia Swiss F. Ins. Co., 126 N. Y. App. Div. 446, 110 N. Y. Suppl. 613.

North Carolina.— Debnam *v.* Southern Bell Tel., etc., Co., 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915; Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778; Bradley *v.* Ohio River, etc., R. Co., 119 N. C. 744, 26 S. E. 169; Lawson *v.* Richmond, etc., R. Co., 112 N. C. 390, 17 S. E. 169.

Oregon.— State *v.* Southern Pac. Co., 23 Oreg. 424, 31 Pac. 960.

Tennessee.— Williams *v.* Adkins, 6 Coldw. 615.

Texas.— Texas, etc., R. Co. *v.* McAllister, 59 Tex. 349.

West Virginia.— White *v.* Holt, 20 W. Va. 792.

United States.— Tennessee *v.* Bank of Commerce, 152 U. S. 454, 14 S. Ct. 654, 38 L. ed. 511; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; Gregory *v.* Hartley, 113 U. S. 742, 5 S. Ct. 743, 28 L. ed. 1150; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Yulee *v.* Vose, 99 U. S. 539, 25 L. ed. 355; Amory *v.* Amory, 95 U. S. 186, 24 L. ed. 428.

See 42 Cent. Dig. tit. "Removal of Causes," § 192.

An acceptance and approval of the bond and petition cannot be reviewed by another judge, except upon a motion to set the same aside. Occum Co. *v.* A. & W. Sprague Mfg. Co., 35 Conn. 496.

It is the duty of the court, and not of the clerk, to determine the sufficiency of the bond. Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168.

The state court's decision is subject to the review of the federal court.

Georgia.— Brodhead *v.* Shoemaker, 85 Ga. 728, 11 S. E. 845.

Louisiana.— Louisiana State Bank *v.* Morgan, 4 Mart. N. S. 344.

Michigan.— Forncrook Mfg. Co. *v.* Barnum Wire Works, 54 Mich. 552, 20 N. W. 582.

Mississippi.— Jackson *v.* Alabama Great Southern R. Co., 58 Miss. 648.

New Jersey.— National Union Bank *v.* Dodge, 42 N. J. L. 316.

New York.— Bell *v.* Dix, 49 N. Y. 232; Chamberlain *v.* American Nat. L., etc., Co., 11 Hun 370.

Wisconsin.— Northern Pac. R. Co. *v.* McMullen, 86 Wis. 501, 56 N. W. 629.

United States.— Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354; Postal Tel. Cable Co. *v.* Southern R. Co., 88 Fed. 803; Walker *v.* O'Neill, 38 Fed. 374; Traders' Bank *v.* Tallmadge, 9 Fed. 363, 20 Blatchf. 39; Field *v.* Lownsdale, 9 Fed. Cas. No. 4,769, Deady 288; Taylor *v.* Rockefeller, 23 Fed. Cas. No. 13,802, 6 Reporter 226, 7 N. Y. Wkly. Dig. 3, 6 Wkly. Notes Cas. (Pa.) 283; U. S. *v.* Judges, 26 Fed. Cas. No. 15,501.

See 42 Cent. Dig. tit. "Removal of Causes," § 192.

Where, after the petition and bond had been filed, a motion was made in the state

sufficient, it is divested of jurisdiction over the case.[24] The state court has no

court for a removal, which was denied as premature, and defendant's counsel then asked leave to withdrew his motion for the time being, which was granted, it was held that the removal did not take effect, and that the state court retained jurisdiction until a subsequent motion was made and granted. Mays *v.* Newlin, 142 Fed. 574.

24. *California.*— Francisco *v.* Manhattan Ins. Co., 36 Cal. 283.

Indiana.— Risley *v.* Indianapolis, etc., R. Co., Wils. 572.

Louisiana.— Rosenfield *v.* Adams Express Co., 21 La. Ann. 233.

Missouri.— Powell *v.* Chicago, etc., R. Co., 64 Mo. 544; Beery *v.* Chicago, etc., R. Co., 64 Mo. 533; Stanley *v.* Chicago, etc., R. Co., 62 Mo. 508.

Nebraska.— Blair *v.* West Point Mfg. Co., 7 Nebr. 146.

New Jersey.— National Union Bank *v.* Dodge, 42 N. J. L. 316.

New York.— Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138; Bell *v.* Dix, 49 N. Y. 232; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Tierney *v.* Helvetia Swiss F. Ins. Co., 126 N. Y. App. Div. 446, 110 N. Y. Suppl. 613; Benedict *v.* Dixon, 47 N. Y. Super. Ct. 477; Bushnell *v.* Parker, 13 N. Y. Suppl. 695; Erisman *v.* Pidcock, 62 How. Pr. 327.

North Carolina.— Winslow *v.* Collins, 110 N. C. 119, 14 S. E. 512; State *v.* Dunlap, 65 N. C. 491, 6 Am. Rep. 746.

Ohio.— Richardson *v.* Jenks, 56 Ohio St. 422, 47 N. E. 49; Shelby *v.* Hoffman, 7 Ohio St. 450.

Oregon.— Hall *v.* Stevenson, 19 Oreg. 153, 23 Pac. 887, 20 Am. St. Rep. 803.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Tennessee.— Williams *v.* Adkins, 6 Coldw. 615.

Texas.— Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168.

Wisconsin.— Ashland *v.* Whitcomb, 120 Wis. 549, 98 N. W. 531.

United States.— Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Kern *v.* Huidekoper, 103 U. S. 485, 26 L. ed. 354; Postal Tel. Cable Co. *v.* Southern R. Co., 88 Fed. 803; Monroe *v.* Williamson, 81 Fed. 977; Wills *v.* Baltimore, etc., R. Co., 65 Fed. 532; Shepherd *v.* Bradstreet Co., 65 Fed. 142; North Carolina *v.* Sullivan, 50 Fed. 593; McCullough *v.* Large, 20 Fed. 309; Wellman *v.* Howland Coal, etc., Works, 19 Fed. 51; Missouri *v.* Tiedermann, 10 Fed. 20, 3 McCrary 399; Matthews *v.* Lyall, 16 Fed. Cas. No. 9,285, 6 McLean 13; U. S. *v.* Judges, 26 Fed. Cas. No. 15,501.

See 42 Cent. Dig. tit. "Removal of Causes," § 192.

Entry of judgment for costs.— The state court has not even the power to enter judgment for the costs of an appeal to the state appellate courts and of a writ of error from the supreme court of the United States, which resulted in a reversal of its order denying the removal. National Steamship Co. *v.* Tugman, 82 Fed. 246, 27 C. C. A. 116.

Review of order relating to removal.— A state court cannot review, by appeal or writ of error, an order granting a removal.

Iowa.— Sunberg *v.* Babcock, 61 Iowa 601, 16 N. W. 716.

Louisiana.— *Contra*, State *v.* Judge Thirteenth Judicial Dist., 23 La. Ann. 29, 8 Am. Rep. 583.

Massachusetts.— *Contra*, Stone *v.* Sargent, 129 Mass. 503.

Michigan.— Forncrook Mfg. Co. *v.* Barnum Wire Works, 54 Mich. 552, 20 N. W. 582.

Nevada.— *Contra*, State *v.* Curler, 4 Nev. 445.

New York.— Fargo *v.* McVicker, 55 Barb. 437, 38 How. Pr. 1.

Tennessee.— Kendrick *v.* McQuary, Cooke 480.

Texas.— Durham *v.* Southern L. Ins. Co., 46 Tex. 182.

United States.— Akerly *v.* Vilas, 1 Fed. Cas. No. 119, 1 Abb. 284, 2 Biss. 110; Ellerman *v.* New Orleans, etc., R. Co., 8 Fed. Cas. No. 4,382, 2 Woods 120.

See 42 Cent. Dig. tit. "Removal of Causes," § 200.

No state court has power, by appeal or otherwise, to review an order of the federal court granting or denying a motion to remand.

Arkansas.— May *v.* State Nat. Bank, 59 Ark. 614, 28 S. W. 431.

Idaho.— Cœur D'Alene R., etc., Co. *v.* Spalding, 6 Ida. 97, 53 Pac. 107.

Iowa.— Ryan *v.* Mathews, 64 Iowa 250, 20 N. W. 174.

Michigan.— Lewis *v.* Weidenfeld, 114 Mich. 581, 72 N. W. 604.

Minnesota.— Smithson *v.* Chicago Great Western R. Co., 71 Minn. 216, 73 N. W. 853.

Nebraska.— Fitzgerald *v.* Fitzgerald, etc., Constr. Co., 44 Nebr. 463, 62 N. W. 899.

Pennsylvania.— Jifkins *v.* Sweetzer, 2 Wkly. Notes Cas. 591.

Texas.— Pioneer Sav., etc., Co. *v.* Peck, 20 Tex. Civ. App. 111, 49 S. W. 160; Talbott *v.* Planters Oil Co., 12 Tex. Civ. App. 49, 33 S. W. 745.

Utah.— Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

United States.— Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536.

See 42 Cent. Dig. tit. "Removal of Causes," § 192.

A refusal by a state court to allow a cause to be removed can, when the federal court has not remanded the same, usually be reviewed by such state court of appeal as has jurisdiction over the other questions in the

power to try questions of fact arising upon the petition; but must accept the

cause, upon an appeal from the final decree; but not by a direct appeal from such interlocutory order.

California.— Brooks *v.* Calderwood, 19 Cal. 124.

Georgia.— Southern R. Co. Hudgins, 107 Ga. 334, 33 S. E. 442; Western Union Tel. Co. *v.* Griffith, 104 Ga. 56, 30 S. E. 420.

Illinois.— Peirce *v.* Walters, 164 Ill. 560, 45 N. E. 1068; Merchants' Despatch Transp. Co. *v.* Joesting, 89 Ill. 152; Cromie *v.* Nortwick, 56 Ill. 353; Hartford F. Ins. Co. *v.* Vanduzor, 49 Ill. 489.

Indiana.—American Carbon Co. *v.* Jackson, 24 Ind. App. 390, 56 N. E. 862.

Michigan.— Schwab *v.* Coots, 48 Mich. 116, 11 N. W. 832.

Minnesota.— St. Anthony Falls Water Power Co. *v.* King Wrought Iron Bridge Co., 23 Minn. 186, 23 Am. Rep. 682.

Nevada.— State *v.* Curler, 4 Nev. 445.

North Carolina.— Howard *v.* Southern R. Co., 122 N. C. 944, 29 S. E. 778.

Ohio.— Shelby *v.* Hoffman, 7 Ohio St. 450.

Tennessee.—Campbell *v.* Wallen, Mart. & Y. 266.

Texas.— Texas, etc., R. Co. *v.* Davis, (Civ. App. 1899) 54 S. W. 381 [*reversed* on other grounds in 93 Tex. 378, 55 S. W. 562].

United States.— Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870; Chesapeake, etc., R. Co. *v.* White, 111 U. S. 134, 4 S. Ct. 353, 28 L. ed. 378; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. *v.* Dunn, 19 Wall. 214, 22 L. ed. 68.

See 42 Cent. Dig. tit. "Removal of Causes," § 207.

If the state court continues to act in a case that has been properly removed, its final judgment may be reversed by a writ of error from the supreme court of the United States, after it has been affirmed by the highest court of the state in which a decision in the suit can be had (U. S. Rev. St. (1878) § 709; State Jumel *v.* Johnson, 29 La. Ann. 399; Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 26 S. Ct. 166, 50 L. ed. 448; Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078; Missouri, etc., R. Co. *v.* Hickman, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Burlington, etc., R. Co. *v.* Dunn, 121 U. S. 182, 7 S. Ct. 1114, 30 L. ed. 885; Oakley *v.* Goodnow, 118 U. S. 43, 6 S. Ct. 944, 30 L. ed. 61; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354; Kimball *v.* Evans, 93 U. S. 320, 23 L. ed. 920; Kanouse *v.* Martin, 14 How. (U. S.) 23, 14 L. ed. 310, 15 How. 198, 14 L. ed. 660; Gordon *v.* Longest, 16 Pet. (U. S.) 97, 10 L. ed. 900), or the proceedings may be stayed by an injunction of the circuit court of the United States (Kern *v.* Huidekoper, 103 U. S. 494, 26 L. ed. 497; French *v.* Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Abeel *v.* Culberson, 56 Fed. 329; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170; Wagner *v.* Drake, 31 Fed. 849; Warren *v.* Ives, 29 Fed. Cas. No. 17,197, 1 Flipp. 356. *Contra*, Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362; Penrose *v.* Penrose, 19 Fed. Cas. No. 10,958, 17 Blatchf 332), even when the state is plaintiff (Abeel *v.* Culberson, *supra*). Such a motion will not ordinarily be granted before a motion to remand the cause has been decided, unless the right of removal is beyond dispute. Sinclair *v.* Pierce, 50 Fed. 851; Frishman *v.* Insurance Cos., 41 Fed. 449. The supreme court of the United States will not grant a writ of prohibition to prevent a state court from proceeding in a suit after its removal. Chesapeake, etc., R. Co. *v.* White, 111 U. S. 134, 4 S. Ct. 353, 28 L. ed. 378.

Waiver of right to removal.— Defendant does not waive his right to a removal when the state court has claimed a right still to retain its jurisdiction by making a motion for a continuance or adjournment in the state court (Southern Pac. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170), by then consenting to plead and try the case at the next term of such court (Waite *v.* Phœnix Ins. Co., 72 Fed. 769), by consenting to try the case before a referee (National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87), by defending upon a subsequent trial (Stix *v.* Keith, 90 Ala. 121, 7 So. 423; Little Rock, etc., R. Co. *v.* Iredell, 50 Ark. 388, 8 S. W. 21; Upham *v.* Scoville, 40 Ark. 170; Herryford *v.* Ætna Ins. Co., 42 Mo. 148; Erie R. Co. *v.* Stringer, 32 Ohio St. 468; Northern Pac. R. Co. *v.* McMullen, 86 Wis. 501, 56 N. W. 629; Meyer *v.* Delaware R. Constr. Co., 100 U. S. 457, 25 L. ed. 593; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214, 22 L. ed. 68; Kirby *v.* Chicago, etc., R. Co., 106 Fed. 551; McMullen *v.* Northern Pac. R. Co., 57 Fed. 16; North Carolina *v.* Sullivan, 50 Fed. 593; Richards *v.* Rock Rapids, 31 Fed. 505. *Contra*, Home Ins. Co. *v.* Curtis, 32 Mich. 402; Marckwald *v.* Oceanic Steam Nav. Co., 11 Hun (N. Y.) 462; Wausau First Nat. Bank *v.* Conway, 67 Wis. 210, 30 N. W. 215), nor by the argument, in opposition to an appeal from an order of removal by the state court, which was reversed (Garrett *v.* Bonner, 30 La. Ann. 1305; Mecke *v.* Valley Town Mineral Co., 89 Fed. 209). But where defendant had applied to the judge of the state court for an order of removal, which was denied, and had appealed from such denial to the state supreme court, which affirmed the same, it was said that that decision must stand until it was reversed by the supreme court of the United States. Springer *v.* Howes, 69 Fed. 849 [*approving* Springer *v.* Howes, 115 N. C. 370, 20 S. E. 469]. The right to a removal was waived, when contemporaneously with his petition, the party obtained from the state supreme court a certiorari to remove the record thereto for review (Hudson River R.,

facts therein alleged as true.[25] It cannot take a default,[26] grant a motion to dismiss, which is already pending;[27] nor even, it has been held, grant a stay of proceedings.[28] No state court will issue a writ of mandamus to compel the state court of first instance to proceed in a cause, which it has unlawfully ordered to be removed,[29] or to allow the removal of a cause, the removal of which it has improperly denied.[30] According to the preponderance of authority, if the state court proceeds in a cause, notwithstanding an attempted removal, and the case is subsequently remanded because of want of jurisdiction, the intervening proceedings in the state court are valid.[31] But in such a case, where the circuit

etc., Co. *v.* Day, 54 Fed. 545), and where subsequent to a removal, which the state court refused to recognize, the defendant pleaded and recovered judgment upon counter-claim. Texas, etc., R. Co. *v.* Eastin (214 U. S. 153, 29 S. Ct. 564).

25. *Alabama.*— Stix *v.* Keith, 90 Ala. 121, 7 So. 423.

Arkansas.— St. Louis Southwestern R. Co. *v.* Adams, (1908) 112 S. W. 186.

Georgia.— Southern R. Co. *v.* Hudgins, 107 Ga. 334, 33 S. E. 442; Horan *v.* Strachan, 82 Ga. 566, 9 S. E. 429.

Illinois.—Western Union Tel. Co. *v.* Horack, 9 Ill. App. 309.

Iowa.— Byson *v.* McPherson, 71 Iowa 437, 32 N. W. 418; Van Horn *v.* Litchfield, 70 Iowa 11, 29 N. W. 783. But see Burch *v.* Davenport, etc., R. Co., 46 Iowa 449, 26 Am. Rep. 150; Delaware R. Constr. Co. *v.* Davenport, etc., R. Co., 46 Iowa 406.

Kentucky.— Hardwick *v.* Kean, 95 Ky. 563, 26 S. W. 589, 16 Ky. L. Rep. 110.

Louisiana.— Guinault *v.* Louisville, etc., R. Co., 42 La. Ann. 52, 7 So. 62.

Maine.— Craven *v.* Turner, 82 Me. 383, 19 Atl. 864.

Minnesota.— Roberts *v.* Chicago, etc., R. Co., 48 Minn. 521, 51 N. W. 478. But see Dunn *v.* Burlington, etc., R. Co., 35 Minn. 73, 27 N. W. 448.

New Hampshire.— Monroe *v.* Connecticut River Lumber Co., 66 N. H. 628, 32 Atl. 152.

New York.— Miller *v.* Kent, 60 How. Pr. 451. But see Clark *v.* Opdyke, 10 Hun 383; Levy *v.* O'Neil, 14 Abb. Pr. N. S. 63; Disbrow *v.* Driggs, 8 Abb. Pr. 305 note, 16 How. Pr. 346.

Texas.— See Southern Pac. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168.

United States.— Kansas City, etc., R. Co. *v.* Daughtry, 138 U. S. 298, 11 S. Ct. 306, 34 L. ed. 963 [*affirming* 88 Tenn. 721, 13 S. W. 698; Burlington, etc., R. Co. *v.* Dunn, 122 U. S. 513, 7 S. Ct. 1262, 30 L. ed. 1159; Shane *v.* Butte Electric R. Co., 150 Fed. 801; Fidelity Trust, etc., Co. *v.* Newport News, etc., Co., 70 Fed. 403; Powers *v.* Chesapeake, etc., R. Co., 65 Fed. 129 [*affirmed* in 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673]; Sinclair *v.* Pierce, 50 Fed. 851.

Compare Orosco *v.* Gagliardo, 22 Cal. 83.

See 42 Cent. Dig. tit. "Removal of Causes," § 193.

26. Mattoon *v.* Hinkley, 33 Ill. 208; Stoker *v.* Leavenworth, 7 La. 390.

27. Chambers *v.* Illinois Cent. R. Co., 104 Iowa 238, 73 N. W. 593. *Contra*, Edgarton *v.* Webb, 41 Ga. 417, holding that a motion to dismiss a writ of error takes precedence over an application for a removal.

28. Bell *v.* Dix, 49 N. Y. 232. See Vose *v.* Yulee, 64 N. Y. 449 [*reversed* on other grounds in 99 U. S. 539, 25 L. ed. 355].

Proceedings in a state court, under an order for a removal, are stayed by an appeal therefrom to a state court of review and the taking of such steps as would procure a stay of proceedings upon other appeals. Bragg *v.* Tibbs, 44 Ga. 294; Burson *v.* New York Nat. Park Bank, 40 Ind. 173, 13 Am. Rep. 285. *Contra*, Ellerman *v.* New Orleans, etc., R. Co., 8 Fed. Cas. No. 4,382, 2 Woods 120.

A defendant may raise, by answer, the question of a loss of jurisdiction by a state court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the state court void. Shaft *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 544, 23 Am. Rep. 138.

29. Francisco *v.* Manhattan Ins. Co., 36 Cal. 283. *Contra*, Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249; White *v.* Holt, 20 W. Va. 792.

30. *Alabama.*— See *Ex p.* State Ins. Co., 50 Ala. 464.

Michigan.—People *v.* Judge Wayne Cir. Ct., 21 Mich. 372.

Nevada.— State *v.* Curler, 4 Nev. 445.

New York.— People *v.* Judges New York C. Pl., 2 Den. 197.

Ohio.— Shelby *v.* Hoffman, 7 Ohio St. 450.

Contra.— Brown *v.* Crippen, 4 Hen. & M. 173.

See 42 Cent. Dig. tit. "Removal of Causes," § 207.

31. *Connecticut.*— Darton *v.* Sperry, 71 Conn. 339, 41 Atl. 1052; Winchell *v.* Coney, 54 Conn. 24, 5 Atl. 354.

Georgia.— Dahlonega Co. *v.* Frank W. Hall Merchandise Co., 88 Ga. 339, 14 S. E. 473; Hunter *v.* Colquitt, 73 Ga. 44; Edgarton *v.* Webb, 41 Ga. 417.

Minnesota.— Roberts *v.* Chicago, etc., R. Co., 48 Minn. 521, 51 N. W. 478.

New Jersey.— National Union Bank *v.* Dodge, 42 N. J. L. 316; Johnson *v.* Gelston, 3 N. J. L. 668.

Ohio.— Hadley *v.* Dunlap, 10 Ohio St. 1. But see Bruce *v.* Gibson, 8 Ohio Dec. (Reprint) 319, 7 Cinc. L. Bul. 94.

court of the United States has denied a motion for a remand and entered final judgment; that judgment until reversed is binding upon the courts of the state; and a subsequent judgment to the contrary, which is affirmed by the highest court of the state that has jurisdiction to review the same, will be reversed by the supreme court of the United States, irrespective of the validity of the removal.[31a]

B. After Discontinuance or Dismissal Without Prejudice. When a case, subsequent to its removal, has been discontinued or dismissed by plaintiff,[32] or dismissed without prejudice, or some other final disposition thereof made, which is not upon the merits,[33] a new suit may be brought in the state court upon the same cause of action for the same amount;[34] or for a less sum, which is below the jurisdictional amount.[35]

C. After Remand. Upon the remand of a case, the state court takes complete jurisdiction of the same.[36] The state court has power to determine: Whether

South Carolina.— State *v.* Port Royal, etc., R. Co., 45 S. C. 413, 23 S. E. 363.

Tennessee.— Greenlaw *v.* Williams, 2 Lea 533.

West Virginia.— White *v.* Holt, 20 W. Va. 792. But see Parker *v.* Clarkson, 39 W. Va. 184, 19 S. E. 431.

United States.— Johnson *v.* Wells, 91 Fed. 1; Manhattan First Nat. Bank *v.* King Wrought Iron Bridge Co., 9 Fed. Cas. No. 4,803.

Compare Tucker *v.* Inter-States L. Assoc., 112 N. C. 796, 17 S. E. 532.

But see Texas, etc., R. Co. *v.* Davis, 93 Tex. 378, 55 S. W. 562; Seeligson *v.* Texas Transp. Co., 70 Tex. 198, 7 S. W. 708.

See 42 Cent. Dig. tit. "Removal of Causes," § 212.

31a. Chesapeake, etc., R. Co. *v.* McCabe, 213 U. S. 207, 29 S. Ct. 430.

32. *Georgia.*— McIver *v.* Florida Cent., etc., R. Co., 110 Ga. 223, 36 S. E. 775.

Illinois.— Cleveland, etc., R. Co. *v.* Reese, 93 Ill. App. 657.

Kentucky.— Stephenson *v.* Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. L. Rep. 442.

Missouri.— Krueger *v.* Chicago, etc., R. Co., 84 Mo. App. 358.

Texas.— Texas, etc., R. Co. *v.* Maddox, 26 Tex. Civ. App. 297, 63 S. W. 134.

United States.— Gassman *v.* Jarvis, 100 Fed. 146.

Contra.— Baltimore, etc., R. Co. *v.* Fulton, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520.

See 42 Cent. Dig. tit. "Removal of Causes," § 206.

When a criminal prosecution has, after its removal, been dismissed by the federal court for want of jurisdiction, the state court has power to declare a forfeiture of a recognizance. Hunter *v.* Colquitt, 73 Ga. 44.

When a receiver was appointed by the federal court after a removal and the case subsequently dismissed for want of jurisdiction, his bond could not be enforced in the state court. Early *v.* Beecher, 7 Lea (Tenn.) 256. See Doane *v.* Corbin, 44 Ill. App. 463.

33. Swift *v.* Hoblewetz, 10 Kan. App. 48, 61 Pac. 969. *Contra*, Baltimore, etc., R. Co. *v.* Fulton, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520.

34. Gassman *v.* Jarvis, 100 Fed. 146. *Contra*, Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446; Baltimore, etc., R. Co. *v.* Fulton, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520.

The same case cannot be prosecuted in the state court. Stephenson *v.* Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. L. Rep. 442; Texas, etc., R. Co. *v.* Huber, (Tex. Civ. App. 1906) 95 S. W. 568. But see Seeligson *v.* Texas Transp. Co., 70 Tex. 198, 7 S. W. 708.

Where a new suit for the same cause of action was begun in the state court after the removal and before the disposition of the former case, it was held that a plea of *lis pendens* should be sustained. Hollingsworth *v.* Southern R. Co., 57 S. C. 453, 35 S. E. 739.

35. Young *v.* Southern Bell Tel., etc., Co., 75 S. C. 326, 55 S. E. 765, 7 L. R. A. N. S. 501; Hooper *v.* Atlanta, etc., R. Co., 106 Tenn. 28, 60 S. W. 607; Texas Cotton Products Co. *v.* Starnes, 128 Fed. 183 [*affirmed* in 133 Fed. 1022, 66 C. C. A. 673].

36. *Georgia.*— Thatcher *v.* McWilliams, 47 Ga. 306.

Minnesota.—Floody *v.* Chicago, etc., R. Co., 104 Minn. 132, 116 N. W. 111.

Mississippi.— Jackson *v.* Alabama Great Southern R. Co., 58 Miss. 648; Germania F. Ins. Co. *v.* Francis, 52 Miss. 457, 24 Am. Rep. 674.

New Jersey.—Johnson *v.* Gelston, 3 N. J. L. 668.

Oregon.— Knahtla *v.* Oregon Short Line, etc., R. Co., 21 Oreg. 136, 27 Pac. 91.

Texas.— Kleiber *v.* McManus, 66 Tex. 48, 17 S. W. 249.

United States.— Birdseye *v.* Shaeffer, 37 Fed. 821 [*affirmed* in 140 U. S. 672, 11 S. Ct. 1017, 35 L. ed. 403].

See 42 Cent. Dig. tit. "Removal of Causes," § 235.

The fact that an appeal which is not accompanied by a supersedeas has been taken from the order of remand does not prevent the state court from assuming jurisdiction. Stommel *v.* Timbrel, 84 Iowa 336, 51 N. W. 159. It was held that a subsequent order of the federal court revoking the remand does not divest the state court of jurisdiction. Empire Min. Co. *v.* Propeller Towboat Co., 59 S. C. 549, 38 S. E. 156. But see Empire

to recognize pleadings that are filed in the federal court,[37] or testimony,[38] or other proceedings there taken before the remand.[39]

XIII. PROCEEDINGS IN FEDERAL COURT AFTER REMOVAL.

A. In General. The Judiciary Act of 1875, which in this respect is still in force, provides "that the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal;" [40] and "that when any suit shall be removed from a

Min. Co. *v.* Propeller Tow-Boat Co., 108 Fed. 900.

Removal after remand.—After a remand, a second removal upon the same ground has been denied, although defects in the petition had been corrected so as to show the jurisdiction.

Kansas.— Bodley *v.* Emporia Nat. Bank, 38 Kan. 59, 16 Pac. 88.

Missouri.— Nichols *v.* Stevens, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

Nebraska.— See Gerner *v.* Mosher, 58 Nebr. 135, 78 N. W. 384, 46 L. R. A. 244.

Texas.— See Michigan Stove Co. *v.* Waco Hardware Co., 22 Tex. Civ. App. 293, 54 S. W. 357.

United States.— St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703 [*affirming* 16 Fed. Cas. No. 8,893, 17 Blatchf. 363, 21 Alb. L. J. (N. Y.) 47]; Smith *v.* Travelers' Ins. Co., 73 Fed. 513; Frisbie *v.* Chesapeake, etc., R. Co., 59 Fed. 369; Brigham *v.* C. C. Thompson Lumber Co., 55 Fed. 881; Johnston *v.* Donvan, 30 Fed. 395. *Contra*, Freeman *v.* Butler, 39 Fed. 1.

See 42 Cent. Dig. tit. "Removal of Causes," § 236.

Where a cause is erroneously removed from a state court to the circuit court of the United States and thereafter remanded to the state court, all orders made in the case by the United States court, except the one remanding the case, are void for want of jurisdiction. Floody *v.* Chicago, etc., R. Co., 104 Minn. 132, 116 N. W. 111.

When the federal court had set aside its order of remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order with the state court and obtained a judgment there, which was affirmed on appeal by the supreme court of the state, it was held that a motion by plaintiff in the federal court to strike the cause from its docket would not be decided until defendant had an opportunity to bring the judgment of the state court before the supreme court of the United States for review. Empire Min. Co. *v.* Propeller Tow-Boat Co., 108 Fed. 900.

The better practice is to present to the state court a certified copy of the order of the federal court remanding the cause. Seeligson *v.* Texas Transp. Co., 70 Tex. 198, 7 S. W. 708.

37. Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693.

38. Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693; Broadway Ins. Co. *v.* Chicago Great Western R. Co., 101 Fed. 507.

39. Doane *v.* Corbin, 44 Ill. App. 463.

40. 18 U. S. St. at L. 472, c. 137, § 6 [U. S. Comp. St. (1901) p. 512].

A removal is analogous to a change of venue; not to an appeal. Davis *v.* St. Louis, etc., R. Co., 25 Fed. 786.

After the removal, the case can be dismissed for a defect in the service of process (Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; National Acc. Soc. *v.* Spiro, 164 U. S. 281, 17 S. Ct. 996, 41 L. ed. 435; Wabash Western R. Co. *v.* Brow, 164 U. S. 271, 17 S. Ct. 126, 41 L. ed. 431; Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; Mecke *v.* Valleytown Mineral Co., 89 Fed. 114), although the time allowed by the state practice for such objection has expired (Greenleaf *v.* Railway Postal Clerks Nat. Assoc., 130 Fed. 209). A defendant, after removal, can plead a defense based upon a federal statute, which the state court could not have entertained. Lehigh Valley R. Co. *v.* Rainey, 99 Fed. 596. The jurisdiction of the federal court, after a removal, dates back to the time of the original service of process. Owens *v.* Ohio Cent. R. Co., 20 Fed. 10. The objection that defendant, who was properly served with process within the state, was not served within the federal district, cannot be sustained. Friezen *v.* Allemania F. Ins. Co., 30 Fed. 349. The practice after the removal must be substantially in accordance with the modes of procedure followed in the federal courts in original cases. Henning *v.* Western Union Tel. Co., 40 Fed. 658; Toucey *v.* Bowen, 24 Fed. Cas. No. 14,107, 1 Biss. 81. If the action is at common law, the practice in the state courts will be followed as near as may be except in cases regulated by a federal statute. U. S. Rev. St. (1878) § 914 [U. S. Comp. St. (1901) p. 684]; Foster Fed. Pr. c. XXVII. If in equity, the practice will be in accordance with that in the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, except as modified by the federal statutes and local equity rules. Eq. Rule 94; Thomson *v.* Wooster, 114 U. S. 104, 5 S. Ct. 788, 29 L. ed. 105; Lewis *v.* Shainwald, 48 Fed. 492, 7 Sawy. 403; Taylor *v.* Life Assoc. of America, 13 Fed. 493; Boat-

State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." [41]

B. Time to Proceed and Plead in Federal Court. Since the statute says that the copy of the record in the state court "being entered as aforesaid in said circuit court of the United States, the case shall then proceed in the same manner as if it had been originally commenced in the said circuit court," [42] it is

men's Sav. Bank *v.* Wagenspack, 12 Fed. 66, 4 Woods 130; 1 Foster Fed. Pr. 1.

A cause improperly removed under the Removal Act cannot be retained by the federal court on the ground that it is an action against revenue officers of the United States which might have been brought into that court by certiorari. People's U. S. Bank *v.* Goodwin, 160 Fed. 727.

Consent to jurisdiction.— Plaintiff must be deemed to have consented to accept the jurisdiction of a federal circuit court over a suit removed from a state court on defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the federal court, signed a stipulation giving time to defendant to answer, and entered with defendant into successive stipulations for continuances provided that there is an actual difference of citizenship between the parties to the controversy, although neither of them resides within the district. *In re* Moore, 209 U. S. 490, 28 S. Ct. 585, 706, 52 L. ed. 904. See also Proctor Coal Co. *v.* U. S. Fidelity, etc., Co., 158 Fed. 211; Louisville, etc., R. Co. *v.* Fisher, 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. N. S. 926. But where the sole ground for the removal is alleged to be that the cause arises under the constitution and laws of the United States; the objection that it does not so arise cannot be waived. *In re* Winn, 213 U. S. 458, 29 S. Ct. 515.

Same jurisdiction as state court.— Except perhaps in cases arising under the constitution or laws or a treaty of the United States (Goldstein *v.* New Orleans, 38 Fed 626; Kelly *v.* Virginia Protection Ins. Co., 14 Fed. Cas. No. 7,677, 3 Hughes 449, 6 Reporter 738), the federal court only acquires such jurisdiction over the parties as the state court had (Goldstein *v.* New Orleans, 38 Fed. 626; Simpkins *v.* Lake Shore, etc., R. Co., 19 Fed. 802, 21 Blatchf. 554).

Interstate commerce act.— The federal court can take no jurisdiction, in a suit brought in a state court under the federal interstate commerce law, which has been removed because of a difference of citizenship. Swift *v.* Philadelphia, etc., R. Co., 58 Fed. 858.

Waiver of objections.—A removal is a waiver of the objection that the suit was brought in the wrong county of the state. Hinds *v.* Keith, 57 Fed. 10, 6 C. C. A. 231. A general appearance and the filing of an answer, subsequent to the removal, waives an objection to the service of process (Callahan *v.* Hicks, 90 Fed. 539) unless that objection has been previously raised and decided against him (Mecke *v.* Valley Town Mineral Co., 89 Fed. 114). A motion, after the removal, to require plaintiff to give security for costs does not. Peterson *v.* Morris, 98 Fed. 48.

41. 18 U. S. St. at L. 471, c. 137, § 4 [U. S. Comp. St. (1901) p. 511].

"The provisions of sections 4 and 6 of the act of March 3, 1875, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course, and the ultimate results aimed at in the litigation." Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501, 507, per Dyer, J.

Pleadings after removal.— The last clause of the Revised Statutes, section 639, taken from the act of July 27, 1866, enacting that, on the removal of a cause to the federal court, "the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such State if the cause had remained in the State court," has been repealed by the act of March 3, 1875. Whittenton Mfg. Co. *v.* Memphis, etc., R. Co., 19 Fed. 273.

42. 25 U. S. St. at L. 433, c. 866, § 3 [U. S. Comp. St. (1901) p. 510].

Time to plead.— In the second (Heidecker *v.* Red Star Line Steamship Co., 32 Fed. 706) and the fourth (Bryce *v.* Southern R. Co., 129 Fed. 966; Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 40 Fed. 185. *Contra*, Wilcox, etc., Guano Co. *v.* Phœnix Ins. Co., 60 Fed. 929) circuit, it has been said that the time for pleading in equity and at common law is suspended until the record is filed, and then begins to run again, computing with it the time which had passed in the state court before the removal. But in the fourth circuit, it has been held that where, before removal, the time to plead has been extended to a fixed day, which occurs pre-

doubtful whether any proceeding can be taken in the federal court until the transcript has been filed.[43]

C. Repleader and Amendments. If the suit in the state court is in its nature an action at common law, and a pleading was duly served or filed before the removal, no repleader is necessary thereafter.[44] When the suit is in its nature equitable, but the complaint follows the practice authorized by a state statute, it is the better practice for plaintiff to replead in accordance with the federal

vious to the filing of the record, defendant should be ordered to plead on the day when he files the record. Phenix Ins. Co. *v.* Charleston Bridge Co., 65 Fed. 628, 13 C. C. A. 58. In the sixth circuit the rule seems to be that the running of the time to plead is suspended until the time fixed by the statute for the filing of the record, although the record is filed by order of the court before the statutory time. Torrent *v.* S. K. Martin Lumber Co., 37 Fed. 727. In the third circuit, it was held that the state statute, that of Pennsylvania, prescribing the number of terms which must elapse before a default was taken, should be followed and the terms considered to be those of such state courts, which were more frequent than those of the federal courts; such default, however, not being ordered in that case until sometime after the transcript had been filed. Dunn *v.* Duncan, 8 Fed. Cas. No. 4,175, 2 Wkly. Notes Cas. (Pa.) 480. In the districts of Indiana, in the seventh circuit, at common law, a pleading is in time if filed before the time fixed by a rule of the state court, whether general or special. Amsden *v.* Norwich Union F. Ins. Soc., 44 Fed. 515. In the eighth circuit, if the suit is of an equitable nature, defendant's right to plead does not expire until the second rule day after his appearance, although his answer was due when the petition for removal was filed. Webster *v.* Crothers, 29 Fed. Cas. No. 17,334, 1 Dill. 301. In the same circuit it has been held that the rule of the United States circuit court for the district of Minnesota gave defendant until the fifth day of the next term to plead (Judge *v.* Anderson, 19 Fed. 885), and upon the removal of a condemnation proceeding, where the Missouri statute provided that the summons should give the landowner ten days' notice of the hearing, and the cause was removed on the return-day of the summons, that the appointment of commissioners was a proceeding in the cause which should not be made before the next regular term after the removal (Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9). In the districts of New York, in the second circuit, a removed cause may, as soon as issue is joined, be placed upon the trial calendar of the term during which the transcript is filed. U. S. C. C. S. D. N. Y. Rule, Oct. 1, 1883. It seems that the same rule prevails in the district of Minnesota, in the eighth circuit. Judge *v.* Anderson, 19 Fed. 885. In the districts of Georgia, in the fifth circuit, this cannot be done until the second term after the beginning of the suit. Knoblock *v.* Southern R. Co., 112 Fed. 926. The special rules of the different circuit courts may regulate the subject and should be consulted. If plaintiff refuses to plead in the federal court when a pleading is required (Abranches *v.* Schell, 1 Fed. Cas. No. 21, 4 Blatchf. 256), or to comply with the rules concerning bringing the case on for trial, his case may be dismissed (McMullen *v.* Northern Pac. R. Co., 57 Fed. 16).

43. Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 40 Fed. 185. But see Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930.

As to time of filing transcript see *supra*, XI, E.

After the record is filed, the federal court has jurisdiction to remand the case (Ryder *v.* Bateman, 93 Fed. 16; Thompson *v.* Chicago, etc., R. Co., 60 Fed. 773; Mills *v.* Newell, 41 Fed. 529; Delbanco *v.* Singletary, 40 Fed. 177; Anderson *v.* Appleton, 32 Fed. 855. But see Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9) or to grant a provisional remedy (Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9; Commercial, etc., Bank *v.* Corbett, 6 Fed. Cas. No. 3,057, 5 Sawy. 172; Mahony Min. Co. *v.* Bennett, 16 Fed. Cas. No. 8,969, 5 Sawy. 141, 6 Reporter 99), but should not, before the statutory time for the filing has arrived, grant permission to take a deposition, except under extraordinary circumstances (North American Transp., etc., Co. *v.* Howells, 122 Fed. 694, 58 C. C. A. 442. But see Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9, citing an unreported case by Dillon, J.).

44. Bills *v.* New Orleans, etc., R. Co., 3 Fed. Cas. No. 1,409, 13 Blatchf. 227; Dart *v.* McKinney, 7 Fed. Cas. No. 3,583, 9 Blatchf. 359; Merchants', etc., Nat. Bank *v.* Wheeler, 17 Fed. Cas. No. 9,439, 13 Blatchf. 218. *Contra*, Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 19 Fed. 273; Brownell *v.* Gordon, 4 Fed. Cas. No. 2,039, McAllister 207; Martin *v.* Kanouse, 17 Fed. Cas. No. 9,162, 1 Blatchf. 149.

Counter-claim.— In an action at law, a legal counter-claim which might have been interposed in the state court may be pleaded in the circuit court of the United States after the removal. Frank *v.* Chetwood, 9 Fed. Cas. No. 5,051. See Partridge *v.* Phœnix Mut. L. Ins. Co., 15 Wall. (U. S.) 573, 21 L. ed. 229.

Whether or not on the transfer of a case from a state court to a United States court, under Judiciary Act, § 12, a new declaration should be filed, is a question of practice, and not a subject for error. Ætna Ins. Co. *v.* Weide, 9 Wall. (U. S.) 677, 19 L. ed. 810.

equity rules; although, if his pleading follows the usual form of a bill in equity, that will not be required.[45] When, however, it does not, and the relief cannot be afforded, except on the equity side of the court, a repleader will be ordered.[46] When the suit in the state court unites legal and equitable grounds of relief,[47] or defense,[48] as authorized by the state statute, it should be recast into two cases

45. Gridley *v.* Westbrook, 23 How. (U. S.) 503, 16 L. ed. 412; Dancel *v.* United Shoe Mach. Co., 120 Fed. 839; Durgan *v.* Redding, 103 Fed. 914; Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470; Leo *v.* Union Pac. R. Co., 17 Fed. 273; Akerly *v.* Vilas, 1 Fed. Cas. No. 120, 3 Biss. 332; Toucey *v.* Bowen, 24 Fed. Cas. No. 14,107, 1 Biss. 81; Dillon Removal Causes (4th ed.), § 47, p. 76. *Contra*, Boston Belting Co. *v.* Judson, 3 Fed. Cas. No. 1,674. But see Thornton N. Motley Co. *v.* Detroit Steel, etc., Co., 130 Fed. 396; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. 793.

Cross bill.— Where the state practice permits affirmative relief by an answer without a cross bill, an answer seeking affirmative relief, filed before a removal, will be sufficient, and a cross bill need not then be filed in the federal court. Detroit *v.* Detroit City R. Co., 55 Fed. 569.

Equity rule 94 concerning a stock-holder's bill does not apply to a suit brought in a state court and subsequently removed. Evans *v.* Union Pac. R. Co., 58 Fed. 497; Earle *v.* Seattle, etc., R. Co., 56 Fed. 909. But see Venner *v.* Great Northern R. Co., 153 Fed. 408.

If no repleader is had, so much of the pleadings as presents matters not cognizable on that side of the court to which the case is removed will be stricken out or disregarded, without prejudice to its presentation in a new suit. Northern Pac. R. Co. *v.* Paine, 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513; Lacroix *v.* Lyons, 27 Fed. 403; Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470; Perkins *v.* Hendryx, 23 Fed. 418; La Mothe Mfg. Co. *v.* National Tube Works Co., 14 Fed. Cas. No. 8,033, 15 Blatchf. 432.

46. Thornton N. Motley Co. *v.* Detroit Steel, etc., Co., 130 Fed. 396; Fletcher *v.* Burt, 126 Fed. 619, 63 C. C. A. 201; Perkins *v.* Hendryx, 23 Fed. 418; Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 19 Fed. 273.

The necessity of a repleader may be raised by a motion for a repleader (Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 19 Fed. 273) or by a demurrer (Perkins *v.* Hendryx, 23 Fed. 418; Benedict *v.* Williams, 11 Fed. 547). But if these grounds of objection are not specified a demurrer to a complaint which follows the state practice will, after a removal, be overruled when it states in substance facts which entitle the complainant to relief in equity, although it omits the address, the statement of citizenship, and the prayer for relief, which are required by the equity rules. Dancel *v.* United Shoe Mach. Co., 120 Fed. 839.

Law or equity side of court.—A suit to enforce a mechanic's lien must, after removal, be tried upon the equity side of the court, although the state practice permitted it to be maintained as an action at law. Hooven *v.* Featherstone, 99 Fed. 180. A suit upon a contract, to pay only royalties for the use of a patent, must, when brought against the assignee of the patent, who had assumed the contract, be continued upon the equity side. Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300. An action by a payee of notes, upon a covenant of a vendee of the land, for which they were given in payment, made with the vendor, to pay the same, must be continued at common law. North Alabama Dev. Co. *v.* Orman, 55 Fed. 18, 5 C. C. A. 22 [*affirming* 53 Fed. 469]. A suit upon a chose in action by an assignee must, after removal, be continued upon the equity side. Benedict *v.* Williams, 10 Fed. 208, 20 Blatchf. 276. But see Thompson *v.* Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765. But no stipulation of the parties can make a case cognizable on either side of the court to which it does not properly belong. North Alabama Dev. Co. *v.* Orman, 55 Fed. 18, 5 C. C. A. 22 [*affirming* 53 Fed. 469].

47. Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Schneider *v.* Foote, 27 Fed. 581, 23 Blatchf. 511; Lacroix *v.* Lyons, 27 Fed. 403; Phelps *v.* Elliott, 26 Fed. 881, 23 Blatchf. 470; Pilla *v.* German School Assoc., 23 Fed. 700 [*affirmed* in 131 U. S. 443, 9 S. Ct. 801, 33 L. ed. 216]; Perkins *v.* Hendryx, 23 Fed. 418; Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 19 Fed. 273; Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,829, 8 Blatchf. 299; La Mothe Mfg. Co. *v.* National Tube Works Co., 14 Fed. Cas. No. 8,033, 15 Blatchf. 432.

Where a claim for damages was blended with one for equitable relief, and the latter was not removable because ancillary to a previous proceeding in the state court it was held that on a motion to remand the whole case must be remanded, and that the federal court could not upon such motion order a repleader and compel the claim for damages to be separately stated, so that it might retain jurisdiction thereof on its common-law side. Ladd *v.* West, 55 Fed. 353.

Where, after the removal of a bill in equity, a declaration was filed in the federal court asking relief at law against some, but not all, of defendants, which was within the allegations of the original complaint, it was held that it should not be stricken from the files; nor should the complainants be compelled to elect whether to proceed at law or in equity. Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,829, 8 Blatchf. 299.

48. Northern Pac. R. Co. *v.* Paine, 119 U. S. 561, 7 S. Ct. 323, 30 L. ed. 513; Wright *v.* Kentucky, etc., R. Co., 117 U. S. 72, 6 S. Ct. 697, 29 L. ed. 821 [*affirming* 7 Fed. 793]; Pettus *v.* Smith, 117 Fed. 967; *In re* Foley, 76 Fed. 390.

after the removal, because in the federal courts the joinder of legal and equitable causes is forbidden. In such a case a repleader is necessary.[49]

D. Joinder of New Parties. After a petition for a removal has been duly presented, an amendment bringing in new parties,[50] or the intervention of new parties, whose citizenship is the same as that of plaintiffs,[51] or whose claims are less than the jurisdictional amount,[52] whether such new parties are made plaintiffs,[53] or defendants,[54] will not defeat the jurisdiction; even though such new parties file cross bills against others of defendants and strangers to the suit, whom it is then also necessary to make defendants.[55]

E. Dismissal of Parties. Where the removal was made by one only of defendants, because of a separable controversy, it has been held that, after an amendment dismissing him from the action,[56] or after a discontinuance as to

49. Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. ed. 569; Pettus *v.* Smith, 117 Fed. 967; Lacroix *v.* Lyons, 27 Fed. 403; La Mothe Mfg. Co. *v.* National Tube Works Co., 14 Fed. Cas. No. 8,033, 15 Blatchf. 432.

A failure to reply does not make the judgment or decree void. Hatcher *v.* Hendrie, etc., Mfg., etc., Co., 133 Fed. 267, 68 C. C. A. 19.

When, by the repleader, the cause is divided into an action at law and a suit in equity, neither of them is considered to constitute a new suit; but each is treated as a continuation of that which was removed; and for a defect in jurisdiction the whole cause will be remanded instead of dismissed. Utah-Nevada Co. *v.* De Lamar, 145 Fed. 505, 75 C. C. A. 1. And see Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 7, 3 L. R. A. 189; Schneider *v.* Foote, 27 Fed. 581, 23 Blatchf. 511.

When plaintiff proceeds after removal upon the wrong side of the court, the proper practice is to sustain a demurrer to his pleading, without prejudice to his right to replead on the other side. Bacon *v.* Felt, 38 Fed. 870; Pilla *v.* German School Assoc., 23 Fed. 700 [*affirmed* in 131 U. S. 443, 9 S. Ct. 801, 33 L. ed. 216]; Perkins *v.* Hendryx, 23 Fed. 418. But where, after the final hearing of a suit prosecuted in equity after the removal, the bill was dismissed, "without prejudice to any other appropriate remedy for relief which complainant might be advised to pursue," the decree was affirmed. Union Stockyards Co. *v.* Nashville Packing Co., 140 Fed. 701, 72 C. C. A. 195. So where plaintiff has erroneously elected to proceed in the cause at common law, or in equity, and his only remedy was on the other side of the court, the circuit court of appeals, when reversing for that reason a judgment in his favor, may give him leave to apply below for permission to amend and to proceed in equity (Dancel *v.* Goodyear Shoe Mach. Co., 137 Fed. 157 [*affirmed* in 144 Fed. 679, 75 C. C. A. 373 (certiorari *denied* in 202 U. S. 619, 26 S. Ct. 765, 50 L. ed. 1174)]; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300), or at common law (McConnell *v.* Provident Sav. L. Assur. Soc., 69 Fed. 113, 16 C. C. A. 172; Bacon *v.* Felt, 38 Fed. 870), as the case may be; provided at least that the objection was not taken below. But when such objection was duly taken in the court of first instance and there sustained, but plaintiff refused to amend, it has been held that this cannot be done. Fletcher *v.* Burt, 126 Fed. 619, 63 C. C. A. 201.

50. Phelps *v.* Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 888; Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Probst *v.* Cowen, 91 Fed. 929. *Contra*, Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,829, 8 Blatchf. 299.

51. Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Clarke *v.* Eureka County Bank, 116 Fed. 534; Graham *v.* Boston, etc., R. Co., 14 Fed. 753. But see Ward *v.* Arredondo, 29 Fed. Cas. No. 17,148, 1 Paine 410.

52. Handley *v.* Stutz, 137 U. S. 366, 11 S. Ct. 117, 34 L. ed. 706; Clarke *v.* Eureka County Bank, 116 Fed. 534; Bidwell *v.* Huff, 103 Fed. 362; National Bank of Commerce *v.* Allen, 90 Fed. 545, 33 C. C. A. 169; New York Silk Mfg. Co. *v.* Paterson Second Nat. Bank, 10 Fed. 204.

53. Stewart *v.* Dunham, 115 U. S. 61, 5 S. Ct. 1163, 29 L. ed. 329; Graham *v.* Boston, etc., R. Co., 14 Fed. 753. But see Forest Oil Co. *v.* Crawford, 101 Fed. 849, 42 C. C. A. 54.

54. Phelps *v.* Oaks, 117 U. S. 236, 6 S. Ct. 714, 29 L. ed. 888.

55. Lilienthal *v.* McCormack, 117 Fed. 89, 54 C. C. A. 475; Iowa Homestead Co. *v.* Des Moines Nav., etc., R. Co., 8 Fed. 97, 3 McCrary 95. See Jackson *v.* Pearson, 60 Fed. 113.

After removal, a cross bill may be filed setting up matter ancillary to the original suit, although, because defendant's assignor is a citizen of the same state as complainant, such cross bill could not have been begun in the federal court as an original suit. Brooks *v.* Laurent, 98 Fed. 647, 39 C. C. A. 201. If, however, the parties added subsequent to the removal were indispensable to the maintenance of the original suit, the case should be remanded after they have been brought in by amendment. Perry *v.* Clift, 32 Fed. 801.

Where omitted parties, who were entitled to be heard, applied for leave to intervene, the court made an order requiring plaintiff to amend his bill and make them defendants on pain of remanding the cause to the state court or dismissing it, as defendants might elect. Hunt *v.* Fisher, 29 Fed. 801.

56. Texas Transp. Co. *v.* Seelingson, 122

him,[57] or an amendment which leaves nothing in the case that affects his rights,[58] there should be a remand, even though he has previously been allowed by the state court to intervene.[59]

F. Reduction of Amount of Claim. A reduction of the amount claimed, when made subsequent to the removal, will not justify a remand,[60] unless it is clearly proved that the original sum was by mistake excessive.[61]

G. New Cause of Action. After removal plaintiff may amend his declaration by inserting new counts, for the same cause of action as that contained in the original counts.[62]

H. Disposition of Federal Question. When a case involving several questions has been removed, because one of them arises under the constitution or laws of the United States, after a decision of the court disposing of the federal question, there should be a remand.[63]

I. Change of Citizenship. A subsequent change of citizenship,[64] or the

U. S. 519, 7 S. Ct. 1261, 30 L. ed. 1150; Youtsey *v.* Hoffman, 108 Fed. 699.

57. Texas Transp. Co. *v.* Seelingson, 122 U. S. 519, 7 S. Ct. 1261, 30 L. ed. 1150; Bane *v.* Keefer, 66 Fed. 610; Bacon *v.* Felt, 38 Fed. 870; Ryan *v.* Young, 21 Fed. Cas. No. 12,188, 9 Biss. 63.

58. Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 8 Fed. 97, 3 McCrary 95.

59. Iowa Homestead Co. *v.* Des Moines Nav., etc., Co., 8 Fed. 97, 3 McCrary 95.

A plaintiff, who is a receiver of a state court, is not required to show its authority for such dismissal before the federal courts will entertain his motion. Youtsey *v.* Hoffman, 108 Fed. 699. Nor can the dismissal be prevented by a motion made by defendant, while it is pending, for leave to file an amended answer pleading a set-off. Youtsey *v.* Hoffman, 108 Fed. 699.

60. *Georgia.*— Cumberland Gap Bldg., etc., Assoc. *v.* Wells, 99 Ga. 228, 25 S. E. 246.

Illinois.— Louisville, etc., R. Co. *v.* Roehling, 11 Ill. App. 264.

Kansas.— Chicago, etc., R. Co. *v.* Stone, 70 Kan. 708, 79 Pac. 655.

New York.— Geiger *v.* Union Mut. L. Ins. Co., 1 N. Y. City Ct. 237.

South Carolina.— Ray *v.* Southern R. Co., 77 S. C. 103, 57 S. E. 636.

United States.— Kanouse *v.* Martin, 15 How. 198, 14 L. ed. 660; Donovan *v.* Dixieland Amusement Co., 152 Fed. 661; Peterson *v.* Chicago, etc., R. Co., 108 Fed. 561; Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438; Waite *v.* Phœnix Ins. Co., 62 Fed. 769; Maine *v.* Gilman, 11 Fed. 214; Ladd *v.* Tudor, 14 Fed. Cas. No. 7,975, 3 Woodb. & M. 325; McGinnity *v.* White, 16 Fed. Cas. No. 8,802, 3 Dill. 350; Roberts *v.* Nelson, 20 Fed. Cas. No. 11,907, 8 Blatchf. 74, 40 How. Pr. (N. Y.) 387; Wright *v.* Wells, 30 Fed. Cas. No. 18,101, Pet. C. C. 220; Zinkeisen *v.* Hufschmidt, 30 Fed. Cas. No. 18,214.

Contra.— Spiers *v.* Halsted, 74 N. C. 620.

See 42 Cent. Dig. tit. "Removal of Causes," § 133.

61. Hughes *v.* Peper Tobacco Warehouse Co., 126 Fed. 687.

62. West *v.* Smith, 101 U. S. 263, 25 L. ed. 809.

Plaintiff may change the original cause of action into another, such as one assigned by a citizen of the same state as plaintiff, which could not have been originally brought in the federal court. Green *v.* Custard, 23 How. (U. S.) 484, 16 L. ed. 471. So an action at law to recover the arrears of an annuity that had previously accrued may be changed by amendment into a suit in equity to compel specific performance by one who has assumed a contract to pay such annuity, with a decree for the payment of the arrears that accrued prior to its entry, and a direction that the instalments subsequently accruing shall also be paid and enforced by periodical judgments at the foot of such decree. Dancel *v.* Goodyear Shoe Mach. Co., 137 Fed. 157 [*affirmed* in 144 Fed. 679, 75 C. C. A. 481 (certiorari *denied* in 202 U. S. 619, 26 S. Ct. 765, 50 L. ed. 1174)]; Goodyear Shoe Mach. Co. *v.* Dancel, 119 Fed. 692, 56 C. C. A. 300. But a plaintiff cannot, after a removal, so amend his pleading as to change a suit in equity for the cancellation of a contract, into an action at law, for deceit in procuring such a contract. Blalock *v.* Equitable L. Assur. Soc., 73 Fed. 655.

Where the bill as originally filed did not state a case within the jurisdiction of the state court, it cannot, subsequent to its removal, be amended. Adams *v.* Heckscher, 80 Fed. 742. But where plaintiff's original pleading stated a case within the jurisdiction of the state court, and failed to allege facts sufficient to constitute a cause of action, and after a removal the service of the summons was set aside, the federal court may permit plaintiff to file an amended petition; and a new summons may issue under the same. U. S. Fidelity, etc., Co. *v.* Woodson County, 145 Fed. 144, 76 C. C. A. 114.

63. Hamblin *v.* Chicago, etc., R. Co., 43 Fed. 401.

A federal question, which is not frivolous, cannot be decided upon a motion to remand. Lowry *v.* Chicago, etc., R. Co., 46 Fed. 83.

64. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378]; Collins *v.* Ashland, 112 Fed. 175; Haracovic *v.* Standard Oil Co., 105 Fed. 785;

consolidation of a foreign with a domestic corporation,[65] will not defeat the jurisdiction.

J. Attachments. All orders, attachments, sequestrations, bonds, undertakings, security, and other proceedings, given or taken in the state court before the removal, remain in force until they are set aside, dissolved, or modified by the federal court.[66]

K. Injunctions. An injunction granted by the state court before the removal remains in force thereafter, until it has been dissolved.[67]

Tug River Coal, etc., Co. *v.* Brigel, 86 Fed. 818, 30 C. C. A. 415.

65. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*modifying* 75 Fed. 433, 22 C. C. A. 378]; Chicago, etc., R. Co. *v.* Minnesota, etc., R. Co., 29 Fed. 337.

66. 18 U. S. St. at L. 471, c. 137, § 4 [U. S. Comp. St. (1901) p. 511]; Carpenter *v.* New York, etc., R. Co., 11 How. Pr. (N. Y.) 481; Martin *v.* Thompson, 3 McCord (S. C.) 167; Barney *v.* Globe Bank, 2 Fed. Cas. No. 1,031, 5 Blatchf. 107; Clarke *v.* Chase, 5 Fed. Cas. No. 2,845, Brunn. Col. Cas. 638; New England Screw Co. *v.* Bliven, 18 Fed. Cas. No. 10,156, 3 Blatchf. 240.

An attachment levied upon the property of a non-resident under process of the state court in accordance with the statutes of the state will be upheld and enforced by the federal court after removal, although the federal court had no jurisdiction to levy such an attachment originally. Clark *v.* Wells, 203 U. S. 164, 27 S. Ct. 43, 51 L. ed. 138; Vermilya *v.* Brown, 65 Fed. 149; Crocker Nat. Bank *v.* Pagenstecher, 44 Fed. 705. See Purdy *v.* Muller, 81 Fed. 513. In such a case the federal court may serve process upon the non-resident by publication, in accordance with the state statute. In case of his failure to appear, however, no personal judgment can be entered against him; but the judgment entered can be enforced only against the property attached. Clark *v.* Wells, 203 U. S. 164, 27 S. Ct. 43, 51 L. ed. 138.

Where a suit in equity had been begun by a writ of foreign attachment in a state court it was held after a removal that the state practice should be followed, which authorized a rule directing plaintiffs to show cause of action, and why the attachment should not be dissolved. Commonwealth Trust Co. *v.* Frick, 120 Fed. 688.

The federal court may authorize its marshal to take into his custody property held by the sheriff under a writ of the state court issued before the removal. Friedman *v.* Israel, 26 Fed. 801. And see Dennistoun *v.* Draper, 7 Fed. Cas. No. 3,804, 5 Blatchf. 336. But where the removed cause was a suit in equity to enjoin the enforcement of, and to set aside, a judgment in a suit in the state court that had not been removed, where the sheriff held the proceeds of attached property, it was held that the federal court had no jurisdiction over the fund in the hands of the sheriff. Smith *v.* Schwed, 9 Fed. 483.

After removal, the federal court may set aside an attachment upon the ground that the state court had no power to grant the same. Corbitt *v.* Farmers' Bank, 114 Fed. 602. But when the state court had, upon a hearing, sustained the validity of the attachment or garnishment of a judgment of a federal court, the circuit court of the United States declined to review the propriety of such order, but suggested that the federal court, whose judgment was thus garnished, might properly disregard the writ. Loomis *v.* Carrington, 18 Fed. 97. Where the state attachment law provided that before defendant's appearance all creditors who applied to be made parties should share *pro rata* in the fund; and that after such appearance all other creditors should be deprived of a share in the fund, it was held that after the removal of the attachment suit to the federal court the latter had no power to strike off defendant's appearance in order to let in the other creditors. Second Nat. Bank *v.* New York Silk Mfg. Co., 21 Fed. Cas. No. 12,601*a*, 13 Reporter 355.

The sureties upon a delivery bond or a forthcoming bond remain liable, notwithstanding the removal. Ramsey *v.* Coolbaugh, 13 Iowa 164; State *v.* Peck, 32 W. Va. 606; 9 S. E. 919.

67. Fogg *v.* Fisk, 19 Fed. 235; Smith *v.* Schwed, 6 Fed. 455, 2 McCrary 441.

Continuing injunction.— The federal court after removal may continue an injunction previously granted by a state court, which a court of the United States could not have previously granted. Eureka, etc., R. Co. *v.* California, etc., R. Co., 103 Fed. 897; Hunt *v.* Fisher, 29 Fed. 801; Perry *v.* Sharpe, 8 Fed. 15. A federal court may make an order continuing an injunction granted by a state court before the removal, although the state court had no power to make the same. Hower *v.* Weiss Malting, etc., Co., 55 Fed. 356, 5 C. C. A. 129. Where a motion to continue the injunction or to make the same perpetual has been granted by the state court before the removal, the federal court will ordinarily follow that decision. New Orleans, etc., R. Co. *v.* New Orleans, 14 Fed. 373; Carrington *v.* Florida R. Co., 5 Fed. Cas. No. 2,448, 9 Blatchf. 468.

Dissolving injunction.— The federal court may dissolve an injunction granted by a state court, in a case which has since been removed. Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353; Sharp *v.* Whiteside, 19 Fed. 156. It will not do so because the bill was not verified, according to the practice in the federal court (Smith *v.* Schwed, 6 Fed. 455, 2 McCrary 441), nor because plaintiff, after

L. Receivers. A receiver appointed before the removal of the case remains in possession until himself removed, and he may be required to account in the federal court.[68]

M. Correction of Record in State Court. After a removal a sheriff cannot amend his return, previously made to the state court.[69]

N. Contempt Proceedings. The federal court cannot punish a party for his previous violation of an order of the state court.[70]

O. Depositions Taken or Begun in State Court. The federal court cannot compel a witness to sign a deposition, which has been taken from his testimony in shorthand previous to the removal.[71]

P. Appeal in State Court. A removal operates as an abandonment of an appeal from an interlocutory order not appealable in the federal courts.[72]

the removal, failed to prosecute his application to continue the injunction, upon the day fixed by the state court, which occurred before the next term of the circuit court of the United States (Hamilton *v.* Fowler, 83 Fed. 321). A motion to dissolve the injunction may be made and heard upon due notice to plaintiff at any time after the record has been filed in the federal court (Texas, etc., R. Co. *v.* Rust, 17 Fed. 275, 5 McCrary 348), and even, it seems to have been held, before that time (Champlain Constr. Co. *v.* O'Brien, 104 Fed. 930). The hearing of a motion to dissolve such an injunction should not be postponed, because of a motion to remand, based upon a defect in the form or amount of the removal bond. Coburn *v.* Cedar Valley Land, etc., Co., 25 Fed. 791.

An original motion for an injunction on the face of the bill may be heard in the federal court, when noticed after the removal, although the papers are not in accordance with the state practice. McLeod *v.* Duncan, 16 Fed. Cas. No. 8,898, 5 McLean 342.

68. Hinckley *v.* Gilman, etc., R. Co., 100 U. S. 153, 25 L. ed. 591; Mack *v.* Jones, 31 Fed. 189.

The federal court may remove or discharge a receiver appointed by the state court before the removal. Texas, etc., R. Co. *v.* Rust, 17 Fed. 275, 5 McCrary 348. But where a motion to discharge a receiver has been denied by the state court, the federal court will not review the same. Bryant *v.* Thompson, 27 Fed. 881.

Where a receiver, appointed by a federal court, removed a suit brought against him in the state court, it was held that plaintiff was entitled to a trial by jury, if he would have been so entitled in the state court. Vany *v.* Toledo, etc., R. Co., 67 Fed. 379; Bryant *v.* Thompson, 27 Fed. 881.

69. Tallman *v.* Baltimore, etc., R. Co., 45 Fed. 156. *Contra,* Richmond *v.* Brookings, 48 Fed. 241.

The record of the state court showing the time of filing the petition and bond may be proved, by the testimony of witnesses, to be erroneous. Stephens *v.* St. Louis, etc., R. Co., 47 Fed. 530, 14 L. R. A. 184.

70. Kirk *v.* Milwaukee Dust Collector Mfg. Co., 26 Fed. 501. But see Williams Mower, etc., Co. *v.* Raynor, 29 Fed. Cas. No. 17,748, 7 Biss. 245.

Where an order had been made directing defendant to show cause why he should not be punished for a disobedience to an order of the state court, the proceedings thereupon should be remanded, although jurisdiction of the original suit will be maintained. Voorhees *v.* Albright, 28 Fed. Cas. No. 16,999. And where an order in contempt proceedings had been appealed to the state supreme court before the removal, the federal court will hold proceedings for the enforcement of such order in abeyance, until the disposition of such appeal. Williams Mower, etc., Co. *v.* Raynor, 29 Fed. Cas. No. 17,748, 7 Biss. 245.

71. Arnold *v.* Kearney, 29 Fed. 820.

Answers to interrogatories.— The federal court cannot compel defendant to file answers to interrogatories annexed to the petition, in accordance with the Iowa statute. Pierce *v.* Union Pac. R. Co., 47 Fed. 709.

Depositions, taken subsequent to the removal before a referee previously appointed, are no part of the record in the federal court. Miller *v.* Tobin, 18 Fed. 609, 9 Sawy. 401.

Order for examination before trial.— It seems that an order of the state court for the examination of a party after issue and before trial, under section 870 of the New York code of civil procedure, must be vacated by the federal court after removal. *Ex p.* Fisk, 113 U. S. 713, 5 S. Ct. 724, 28 L. ed. 1117.

Reference to take deposition.— Where, before the removal of a cause from the state to the federal court, a reference was made to take the deposition of a witness according to the state practice, to be used on a motion in the suit, it was held that plaintiff must proceed with such reference after the removal of the cause. Bills *v.* New Orleans, etc., R. Co., 3 Fed. Cas. No. 1,409, 13 Blatchf. 227.

Where depositions taken to be used in an action in a state court that had been dismissed were admissible as evidence under the statute of the state in another suit subsequently brought, and such second suit was removed, it was held that such depositions were admissible in the federal court. Gravelle *v.* Minneapolis, etc., R. Co., 16 Fed. 435, 3 McCrary 385.

72. Freeman *v.* Butler, 39 Fed. 1. *Contra,* Williams Mower, etc., Co. *v.* Raynor, 29 Fed. Cas. No. 17,748, 7 Biss. 245.

Q. Motions Pending or Decided in State Court. Where a motion is pending at the time of the removal, it is transferred with the record to the federal court to be there determined.[73]

R. Motion to Set Aside Service of Process. The federal court may vacate an order previously made by the state court, denying a motion to set aside service of process.[74]

S. Previous Decisions in State Court. The decisions of the state court on a demurrer, or otherwise, made in the case before its removal, will ordinarily be followed by the circuit court.[75]

T. Re-Service or Re-Filing of Papers. In an action at common law a defendant is not obliged to re-serve or re-file any notice, which has been duly served or filed by him, as the case may be, in the state court before the removal.[76]

U. Consolidation. After removal the federal court may consolidate the removed cause with one originally brought within its jurisdiction.[77]

V. Interference With State Court in Case It Refuses to Relinquish Jurisdiction. If the state court refuses to relinquish jurisdiction, after the papers essential to a removal have been duly presented and filed, subsequent

73. Bryce *v.* Southern R. Co., 129 Fed. 966.

When a motion has been denied by the state court, leave to renew the same should be obtained before making it in the federal court. Guernsey *v.* Cross, 153 Fed. 827; Denison *v.* Shawmut Min. Co., 124 Fed. 860; Allmark *v.* Platte Steamship Co., 76 Fed. 615; Bryant *v.* Thompson, 27 Fed. 881; Loomis *v.* Carrington, 18 Fed. 97; New Orleans, etc., R. Co. *v.* New Orleans, 14 Fed. 373; Carrington *v.* Florida R. Co., 5 Fed. Cas. No. 2,448, 9 Blatchf. 468. See Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Carrington *v.* Florida R. Co., 5 Fed. Cas. No. 2,448, 9 Blatchf. 468. Ordinarily, when the state court has acted within its jurisdiction, such leave will not be granted unless such a showing is made as would justify an appeal or a rehearing under the state practice. Denison *v.* Shawmut Min. Co., 124 Fed. 860; Allmark *v.* Platte Steamship Co., 76 Fed. 615.

When, at the time of a removal, a motion was pending to resettle an order previously made, the federal court will entertain the application but will refuse to review the decision upon which that order had been entered. Milligan *v.* Lalance, etc., Mfg. Co., 17 Fed. 465, 21 Blatchf. 407.

Upon a motion to dismiss, made before the removal, when defendant had acquired the right to a dismissal under the state practice, it was held that the motion should be granted, although the practice of the federal court would not have justified a dismissal under such circumstances. Sutro *v.* Simpson, 14 Fed. 370, 4 McCrary 276.

Waiver of irregularity.— Where, before a petition and bond for the removal of a cause from a state court were passed upon by that court, a motion was made therein by defendant, which was brought on for hearing in the federal court, it was held that by seeking an adjournment of the hearing in the latter court without objecting to the irregularity of the hearing, plaintiff waived such irregularity. Kinne *v.* Lant, 68 Fed. 436.

74. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959. *Contra,* Guernsey *v.* Cross, 153 Fed. 827; Allmark *v.* Platte Steamship Co., 76 Fed. 615; Brooks *v.* Farwell, 4 Fed. 166, 2 McCrary 220.

75. Duncan *v.* Gegan, 101 U. S. 810, 25 L. ed. 875; Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Guernsey *v.* Cross, 153 Fed. 827; Dodd *v.* Louisville Bridge Co., 130 Fed. 186; Denison *v.* Shawmut Min. Co., 124 Fed. 860; Lookout Mountain R. Co. *v.* Houston, 44 Fed. 449; Cleaver *v.* Traders' Ins. Co., 40 Fed. 711; Bryant *v.* Thompson, 27 Fed. 881; Davis *v.* St. Louis, etc., R. Co., 25 Fed. 786; Phelps *v.* Canada Cent. R. Co., 19 Fed. 801, 20 Blatchf. 450; Loomis *v.* Carrington, 18 Fed. 97; Milligan *v.* Lalance, etc., Mfg. Co., 17 Fed. 465, 21 Blatchf. 407. See Wilson *v.* Smith, 117 Fed. 707. But see Congress, etc., Spring Co. *v.* Knowlton, 103 U. S. 49, 26 L. ed. 347.

Service on non-resident.— The rule in the text does not apply to decisions upon the validity of the service of process upon a non-resident defendant. Remington *v.* Central Pac. R. Co., 198 U. S. 95, 25 S. Ct. 577, 49 L. ed. 959; Allmark *v.* Platte Steamship Co., 76 Fed. 615. *Contra,* Bragdon *v.* Perkins-Campbell Co., 82 Fed. 338. See also Lathrop-Shea, etc., Co. *v.* Interior Constr., etc., Co., 150 Fed. 666.

Where a suit had been removed because of a separable controversy, it was held that the federal court had no jurisdiction to set aside a previous judgment of the state court against a defendant who was a citizen of the same state as plaintiff. Youtsey *v.* Hoffman, 108 Fed. 699.

76. Waldman *v.* Pennsylvania R. Co., 64 How. Pr. (N. Y.) 198; Johnson *v.* Bridgeport Deoxidized Bronze, etc., Co., 125 Fed. 631; Waldman *v.* Pennsylvania R. Co., 13 Fed. 801.

77. Wabash, etc., R. Co. *v.* Central Trust Co., 23 Fed. 513.

The consolidation of a case does not prevent its remand. Colburn *v.* Hill, 101 Fed. 500, 41 C. C. A. 467.

proceedings in such state court may be enjoined by the circuit court of the United States,[78] even, it has been held, when the state is plaintiff.[79]

W. Trial. A failure, within the time required by the state statute, to demand a jury trial before the removal, which delay by the state law amounts to a waiver of the right to trial by jury, does not affect the right to trial by jury in the federal court.[80]

X. Costs. The costs allowed in a removed case are those awarded by the statutes of the United States, and not those allowed by the state law.[81]

78. Kern *v.* Huidekoper, 103 U. S. 494, 26 L. ed. 497; French *v.* Hay, 22 Wall. (U. S.) 250, 22 L. ed. 857; Abeel *v.* Culberson, 56 Fed. 329; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170; Wagner *v.* Drake, 31 Fed. 849; Warren *v.* Ives, 29 Fed. Cas. No. 17,197, 1 Flipp. 356. *Contra,* Fisk *v.* Union Pac. R. Co., 9 Fed. Cas. No. 4,827, 6 Blatchf. 362; Penrose *v.* Penrose, 19 Fed. Cas. No. 10,958, 17 Blatchf. 332. See Chicago, etc., R. Co. *v.* Steep, 151 Fed. 908 [*affirmed* in 164 Fed. 785, 90 C. C. A. 431]. And see Spraggins *v.* Humphries County Ct., 22 Fed. Cas. No. 13,246, Brunn. Col. Cas. 218, Cooke (Tenn.) 160, holding that a circuit court of the United States may compel, by a mandamus, a state court to allow a removal.

Such a motion will not ordinarily be granted, before a motion to remand the cause has been decided, unless the right of removal is beyond dispute. Sinclair *v.* Pierce, 50 Fed. 851; Frishman *v.* Insurance Cos., 41 Fed. 449.

Petition filed with clerk in vacation.—An injunction was denied, when the petition had been filed with the clerk of the state court in vacation, but not presented to that court. Coker *v.* Monaghan Mills, 110 Fed. 803.

Determination of jurisdiction.—Where, upon the face of the record, including a petition for removal duly filed, a cause appears to be removable, on the filing of such record and the docketing of the case in the federal court that court acquires jurisdiction at least for the purpose of determining that question, and, as ancillary to such jurisdiction, may enjoin plaintiff from proceeding in the state court until it shall hear and determine the question of its own jurisdiction. McAlister *v.* Chesapeake, etc., R. Co., 157 Fed. 740, 85 C. C. A. 316.

When the removed case was brought at common law, the injunction is usually granted upon an original bill, which is considered to be ancillary in its nature, and which is filed in the circuit court of the United States. Madisonville Traction Co. *v.* St. Bernard Min. Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. ed. 462; Chicago, etc., R. Co. *v.* Steep, 151 Fed. 908 [*affirmed* in 164 Fed. 785, 90 C. C. A. 431]; New York Mut. L. Ins. Co. *v.* Langley, 145 Fed. 415.

79. Abeel *v.* Culberson, 56 Fed. 329.

80. Montgomery County *v.* Cochran, 116 Fed. 985.

Trial by jury.—Where a receiver, appointed by a federal court, removed a suit brought against him in the state court, it was held that plaintiff was entitled to a trial by jury, if he would have been so entitled in the state court. Vany *v.* Toledo, etc., R. Co., 67 Fed. 379; Bryant *v.* Thompson, 27 Fed. 881.

After the removal of a criminal prosecution against an officer of the United States, the state prosecuting officer is the proper person to try the case for plaintiff and the district attorney of the United States usually appears for defendant. Delaware *v.* Emerson, 8 Fed. 411.

81. Richter *v.* Magone, 47 Fed. 192; Chadbourne *v.* German-American Ins. Co., 31 Fed. 625, 24 Blatchf. 539; Penrose *v.* Penrose, 1 Fed. 479. *Contra,* Cleaver *v.* Traders' Ins. Co., 40 Fed. 863; The Garden City, 27 Fed. 234.

Interest on the judgment accruing during a stay, pending a motion for a new trial, may be included in the costs and will be calculated at the same rate of interest as judgments in the courts of the state. Gunther *v.* Liverpool, etc., Ins. Co., 10 Fed. 830, 20 Blatchf. 390.

The fees of witnesses, whose depositions were taken in the state court before the removal, were taxed, although such depositions were not offered in evidence upon the trial. Young *v.* Merchants' Ins. Co., 29 Fed. 273. But the fees of those served with subpœnas subsequent to the removal were not. Young *v.* Merchants' Ins. Co., 29 Fed. 273.

Security for costs.—Where, after the removal, plaintiff amended his complaint, it was held that he could then be compelled, under the rules of the federal court, to file security for costs, although, by the state practice, defendant had lost the right to demand security. Henning *v.* Western Union Tel. Co., 40 Fed. 658.

Where, after a removal, plaintiff recovers less than five hundred dollars, he will be entitled to costs if that amount would have entitled him to costs in the state court, although if the suit had been originally brought in the federal court, no costs would have been allowed. Kreager *v.* Judd, 5 Fed. 27. *Contra,* Richter *v.* Magone, 47 Fed. 192.

Failure to pay costs.—No stay of proceedings will be granted because of the failure of a party to pay costs awarded in the state court, subsequent to the removal. Tugman *v.* National Steamship Co., 30 Fed. 802 [*affirmed* in 143 U. S. 28, 12 S. Ct. 361, 27 L. ed. 87]; Penrose *v.* Penrose, 1 Fed. 479. So where, subsequent to the reversal by the supreme court of the United States, of a judgment of the state court, "with costs to the defendant to be taxed," because the case had previously been removed, the latter court awarded defendant the taxable costs of all the proceed-

Y. Execution. The time in which an execution can issue, on a judgment in a case brought in a state court and removed to a federal court, depends on the laws of the United States and not on the laws of the state.[82]

XIV. REMAND.

A. In General. The Judiciary Act of 1875, which in this respect is still in force, provides "that if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." [83]

B. Who May Move For Remand. A remand for want of jurisdiction, whether because there is a want of the requisite difference of citizenship,[84] because no federal question is involved,[85] or because the value of the matter in dispute is less than two thousand dollars,[86] may be made at the motion of either party, even by the party who removed the case. The objection that the case was not removed within the statutory time cannot be raised by the party who made the removal.[87]

C. Time of Motion to Remand. When the transcript is filed [88] before the return-day, that is, before the beginning of the next term, a motion to remand may be made immediately.[89] After the return-day a

ings in the state court, including an extra allowance, it was held that the proceedings in the federal court would not be stayed if plaintiff paid the costs in the supreme court of the United States only, and that the collection of the costs and allowance in the state court could not be thus enforced. National Steamship Co. *v.* Tugman, 143 U. S. 28, 12 S. Ct. 361, 27 L. ed. 87 [*affirming* 30 Fed. 802].

82. Nims *v.* Spurr, 138 Mass. 209.

83. 18 U. S. St. at L. 472, c. 137, § 5 [U. S. Comp. St. (1901) p. 511].

The suit may be remanded at the motion of plaintiff when neither he nor defendant resides in the district. *Ex p.* Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264.

Remand by consent.—A case which was properly removed cannot be remanded by consent. Lawton *v.* Blitch, 30 Fed. 641.

84. Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. ed. 462. *Contra*, Bushnell *v.* Kennedy, 9 Wall. (U. S.) 387, 19 L. ed. 736; Tootle *v.* Coleman, 107 Fed. 41, 45, 46 C. C. A. 132, 57 L. R. A. 120; Davies *v.* Lathrop, 13 Fed. 565, 21 Blatchf. 164.

A defendant, who had removed the case because of difference of citizenship between plaintiff and all of defendants but one, whom he alleged to be a nominal party, could not oppose a motion to remand by contending that it was the real party plaintiff and that the only actual controversy was between himself and the other defendants, who are citizens of different states. Mayer *v.* Denver, etc., R. Co., 41 Fed. 723.

85. Wabash R. Co. *v.* Barbour, 73 Fed. 513, 19 C. C. A. 546; Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322.

86. Lazensky *v.* Supreme Lodge K. H., 32 Fed. 417.

Where a party has procured a removal upon an averment that the amount in controversy was over two thousand dollars, exclusive of interest and costs, he cannot suggest to the circuit court of appeals that there was no jurisdiction below, because the judgment finally rendered was less than the jurisdictional amount. Eustis *v.* Henrietta, 74 Fed. 577, 20 C. C. A. 537.

87. Ayers *v.* Watson, 113 U. S. 594, 5 S. Ct. 641, 28 L. ed. 1093.

Remand by court sua sponte.— The court of first instance (Indiana *v.* Chicago Tolleston Club, 53 Fed. 18; Teas *v.* Albright, 13 Fed. 406; Johnson *v.* Johnson, 13 Fed. 193), or the court of review (Yellow Aster Min., etc., Co. *v.* Crane Co., 150 Fed. 580, 80 C. C. A. 566; Barth *v.* Coler, 60 Fed. 466, 9 C. C. A. 81), may remand a cause, of its own motion, for want of jurisdiction. So the court of first instance may, of its own motion, remand a case because it was removed too late. Bowers *v.* Supreme Council, A. L. H., 45 Fed. 81; Keeney *v.* Roberts, 39 Fed. 629, 12 Sawy. 39.

88. **Motion before filing of transcript.**— It is doubtful whether a motion to remand a cause can be made until the transcript has been filed. See *supra*, XIII, B.

89. Thompson *v.* Chicago, etc., R. Co., 60 Fed. 773; Anderson *v.* Appleton, 32 Fed. 855.

motion to remand a cause for want of jurisdiction may be made at any time.[90]

D. Second Motion to Remand. After a motion to remand has been once denied, a second motion may be granted, when founded upon facts which have

Contra, Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 36 Fed. 9.

Where the term was changed by statute, too late to permit the holding of a term at the substituted time, it was held that the motion to remand might be made at such special term after the transcript was filed. Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 37 Fed. 3.

90. Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Parkinson *v.* Barr, 105 Fed. 81; Broadway Ins. Co. *v.* Chicago, etc., R. Co., 101 Fed. 507; Indiana *v.* Lake Erie, etc., R. Co., 85 Fed. 1; Wabash R. Co. *v.* Barbour, 73 Fed. 513, 19 C. C. A. 546; Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322; Southworth *v.* Reid, 36 Fed. 451; Bronson *v.* St. Croix Lumber Co., 35 Fed. 634; Lazensky *v.* Supreme Lodge K. H., 32 Fed. 417; Kain *v.* Texas Pac. R. Co., 14 Fed. Cas. No. 7,596. But see Harvey *v.* Illinois Midland R. Co., 3 Fed. 707.

After abatement a suit cannot be remanded until it is revived. Wright *v.* Phipps, 58 Fed. 552.

Time of motion to remand.—A suit may be remanded after it has been consolidated with another of which the court has jurisdiction. Colburn *v.* Hill, 101 Fed. 500, 41 C. C. A. 467. A motion to remand for want of jurisdiction may be made after verdict (Mulcahey *v.* Lake Erie, etc., R. Co., 69 Fed. 172; Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322) or after judgment (Wabash R. Co. *v.* Barbour, 73 Fed. 513, 19 C. C. A. 546; Lazensky *v.* Supreme Lodge K. H., 32 Fed. 417. But see Mastin *v.* Chicago, etc., R. Co., 123 Fed. 827), or the judgment may be reversed and a remand ordered upon an appeal or writ of error by the party who removed the cause (Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. ed. 462; Wabash R. Co. *v.* Barbour, 73 Fed. 513, 19 C. C. A. 546). But an objection that the petition for removal was filed too late cannot be taken by either party for the first time upon an appeal. Knight *v.* International, etc., R. Co., 61 Fed. 87, 9 C. C. A. 376.

Waiver.—A motion to remand because the petition for the removal was filed too late is waived by laches (French *v.* Hay, 22 Wall. (U. S.) 238, 22 L. ed. 854; Guarantee Co. of North Dakota *v.* Hanway, 104 Fed. 369, 44 C. C. A. 312; Wyly *v.* Richmond, etc., R. Co., 63 Fed. 487; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170; Miller *v.* Kent, 18 Fed. 561, 20 Blatchf. 508. See Hervey *v.* Illinois Midland R. Co., 3 Fed. 707), such as delay of a year without excuse (Wyly *v.* Richmond, etc., R. Co., 63 Fed. 487; Baltimore, etc., R. Co. *v.* Ford, 35 Fed. 170; Miller *v.* Kent, 18 Fed. 561, 20 Blatchf. 508), and probably by taking any subsequent proceeding in the cause after the filing of the transcript, such as a consent to a transfer of the cause to the equity docket and its reference to a special master to be considered as an intervention in a previous suit in equity (Wyly *v.* Richmond, etc., R. Co., *supra*), a demand for trial (Baltimore, etc., R. Co. *v.* Ford, *supra*), or a trial (Guarantee Co. of North Dakota *v.* Hanway, 104 Fed. 369, 44 C. C. A. 312). So where the record showed a difference of citizenship, it was held that the objection that there was no sufficient proof of prejudice or local influence could not be made after testimony upon the issues had been taken. Neale *v.* Foster, 31 Fed. 53, 12 Sawy. 424. And the objection to the jurisdiction, because neither party is a resident of the district, is waived by a general appearance by plaintiff in the federal court, before his motion to remand. *Ex p.* Moore, 209 U. S. 490; Corwin Mfg. Co. *v.* Henrici Washer Co., 151 Fed. 938; Philadelphia, etc., Face Brick Co. *v.* Warford, 123 Fed. 843. See Abranches *v.* Schell, 1 Fed. Cas. No. 21, 4 Blatchf. 256. *Contra*, Yellow Aster Min., etc., Co. *v.* Crane Co., 150 Fed. 580, 80 C. C. A. 566. Where one of two defendants, sued upon a joint and several application, removed the case, and plaintiff, without protest, proceeded to trial and took judgment against him, it was held that this was a consent to a severance of the joint, into two several actions, and that a remand should not be ordered. Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 80 Fed. 766, 26 C. C. A. 146. But a delay of fifteen months by plaintiff did not waive his right to remand a cause because of defendant's failure to file the transcript, although plaintiff himself produced the same for filing at the time that he made such motion. McGregor *v.* McGillis, 30 Fed. 388. So where the father of an infant defendant had filed a petition for a removal with a bond, before service of process upon his child, and subsequently procured his appointment as guardian from the proper state court, it was held that his entry of an appearance for himself as guardian and for the infant, in the federal court, did not prevent a remand, although in the state court the guardian had the power to accept service of process for the infant and to enter an appearance for him. Woolridge *v.* McKenna, 8 Fed. 650. Where there is no difference of citizenship and the removal is sought because of an erroneous contention that the suit arises under the constitution and laws of the United States; the objection to the jurisdiction cannot be waived. *In re* Winn, 213, U. S. 458, 29 S. Ct. 515.

Where plaintiff, in ignorance of his right to remand the case because the petition for a removal was made too late, filed an answer in the federal court, he was permitted to withdraw the same and move to remand, it

since occurred.[91] It has been held that the motion may be renewed at any time. even though no new facts are brought to the attention of the court.[91a]

E. Form of Denial of Allegations in Petition For Removal. The allegations in a petition for a removal cannot be disputed, unless a plea in abatement is filed,[92] which should be supported by the oath of defendant or his agent; [93] and that is the safer practice.[94]

F. Evidence Upon Hearing. When any allegation in the petition is denied, the burden of proof rests on the petitioner.[95] If the issue is not tried

appearing that he had acted in good faith. Collins *v.* Scott, 76 Fed. 613.

91. Hamblin *v.* Chicago, etc., R. Co., 43 Fed. 401; Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 37 Fed. 3.

A second motion duly made may be granted, when the first was denied as premature. Kansas City, etc., R. Co. *v.* Interstate Lumber Co., 37 Fed. 3. So where, after overruling a motion to remand a cause removed because it arose under the laws of the United States, the question arising under those laws had been disposed of by demurrer, it was held that there was no longer any federal question in the case, and a second motion to remand was granted. Hamblin *v.* Chicago, etc., R. Co., 43 Fed. 401. And after a motion to remand based upon the face of the record had been denied, a second motion because of the alleged collusive joinder of a party was entertained. Pennsylvania R. Co. *v.* Allegheny Valley R. Co., 25 Fed. 113.

Leave to renew.—An order denying a motion to remand may grant leave to renew the same, when the facts are more fully presented. Goodnow *v.* Litchfield, 47 Fed. 753; New York *v.* New Jersey Steamboat Transp. Co., 24 Fed. 817.

91a. Weldon *v.* Fritzlen, 128 Fed. 608 [*reversed* upon another point in 135 Fed. 650, 68 C. C. A. 288, and *cited* without ruling upon the point in same case as Fritzlen *v.* Boatmen's Bank, 212 U. S. 364, 29 S. Ct. 366].

92. Filer *v.* Levy, 17 Fed. 609.

Such a plea will not be decided by technical rules, and is sufficient if it sets out fairly and with sufficient certainty, matters of fact, which, if true, negative the jurisdiction of the federal court. Johnson *v.* Accident Ins. Co. of North America, 35 Fed. 374. But a plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the state court, is insufficient. Spies *v.* Chicago, etc., R. Co., 32 Fed. 713. So is a plea denying defendant's belief in the existence of the prejudice or local influence set forth in the petition. Taylor County Court *v.* Baltimore, etc., R. Co., 35 Fed. 161. An averment in a plea, that a party was a citizen of a specified state, is not neutralized by an admission therein that such party resided abroad. Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Woaner *v.* Northern Pac. R. Co., 125 Fed. 155; Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503; Johnson *v.* Accident Ins. Co. of North America, 35 Fed. 374; Salem First Nat. Bank *v.* Salem Capital Flour Mills Co., 31 Fed. 580, 12 Sawy. 485, 496; McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Rumsey *v.* Call, 28 Fed. 769; Lacroix *v.* Lyons, 27 Fed. 403; Clarkhuff *v.* Wisconsin, etc., R. Co., 26 Fed. 465; Filer *v.* Levy, 17 Fed. 609; Hoyt *v.* Wright, 4 Fed. 168, 2 McCrary 222.

A formal plea is not indispensable, provided a traverse in some form is made. Morris *v.* Gilmer, 129 U. S. 315, 9 S. Ct. 289, 32 L. ed. 690; Curnow *v.* Phœnix Ins. Co., 44 Fed. 305; Anderson *v.* Appleton, 32 Fed. 855; Beadleston *v.* Harpending, 32 Fed. 644. A denial in plaintiff's petition to remand may be treated as a traversed of an allegation in defendant's petition of removal. Curnow *v.* Phœnix Ins. Co., 44 Fed. 305. It is the practice in the western district of Kentucky to treat as traversed without an express denial, allegations in a petition for removal that defendants were joined in fraud of the jurisdiction of the court for the sole purpose of preventing the removal. Boatner *v.* American Express Co., 122 Fed. 714. Allegations of conclusions of law, such as that a specified defendant is only a nominal party, need not, it seems, be specifically denied. Mayer *v.* Denver, etc., R. Co., 41 Fed. 723.

If the court has reason to doubt the existence of the jurisdictional facts, it has the right to examine the parties upon that question or to direct a plea in abatement to be filed and heard. Gribble *v.* Pioneer Press Co., 15 Fed. 689, 5 McCrary 73.

93. Lacroix *v.* Lyons, 27 Fed. 403; Filer *v.* Levy, 17 Fed. 609.

94. Southern Pac. R. Co. *v.* Harrison, 73 Tex. 103, 11 S. W. 168; Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; Imperial Refining Co. *v.* Wyman, 38 Fed. 574, 3 L. R. A. 503; Johnson *v.* Accident Ins. Co. of North America, 35 Fed. 374; McDonald *v.* Salem Capital Flour-Mills Co., 31 Fed. 577, 12 Sawy. 492; Rumsey *v.* Call, 28 Fed. 769; Lacroix *v.* Lyons, 27 Fed. 403; Clarkhuff *v.* Wisconsin, etc., R. Co., 26 Fed. 465.

95. Carson *v.* Dunham, 121 U. S. 421, 7 S. Ct. 1030, 30 L. ed. 992; New Castle *v.* Western Union Tel. Co., 152 Fed. 569; Davies *v.* Wells, 134 Fed. 139; Copeland *v.* Memphis, etc., R. Co., 6 Fed. Cas. No. 3,209, 3 Woods 651; Heath *v.* Austin, 11 Fed. Cas. No. 6,305, 12 Blatchf. 320.

Judicial notice.—The court will take judicial notice of the fact that one of the parties is a receiver appointed by it. Pitkin *v.* Cowen, 91 Fed. 599. It will take judicial notices of the state statutes, but not of the

upon oral testimony, affidavits by both parties may then be considered.[96] When the right to a removal depends upon the contention that one of defendants is a formal or is not a necessary party,[97] that there is a separable controversy,[98] that the suit arises under the constitution or laws or a treaty of the United States,[99] or that the right depends upon the nature of the suit,[1] the allegations of facts in the

rules of the state courts. Randall *v.* New England O. P., 118 Fed. 782. When the allegations of the complaint do not clearly show that the cause arises under the constitution or laws of the United States, the court may take judicial notice of a state statute, which is not therein mentioned, to which reference is made in the petition for removal. South Carolina *v.* Coosaw Min. Co., 45 Fed. 804 [*affirmed* in 144 U. S. 550, 12 S. Ct. 689, 36 L. ed. 537].

The quality of the testimony offered, and not merely the number of the witnesses, will determine the decision. Corbin *v.* Pike, 37 Iowa 637.

False allegation in petition.— Where defendant admitted upon the trial the falsity of an allegation in his petition, the petition should be treated as if amended accordingly. Koshland *v.* Home Mut. Ins. Co., 31 Oreg. 321, 49 Pac. 864, 50 Pac. 567.

96. Smith *v.* Crosby Lumber Co., 46 Fed. 819.

Pleadings in state court.— When the time of the proceedings for the removal is in question, pleadings in the state court, although they have been taken out of the record by stipulation, may be used upon a motion to remand, in order to show what had been done in the state court before the application for removal and to prove that such application was made too late. Wilkinson *v.* Delaware, etc., R. Co., 23 Fed. 562.

Statements in affidavits or other papers, or proceedings by either party, may be offered in evidence by the other, as admissions for or against the motion to remand. Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 6 S. Ct. 632, 29 L. ed. 837. See Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360.

A verified petition of removal will prevail against an unverified denial. Heath *v.* Austin, 11 Fed. Cas. No. 6,305, 12 Blatchf. 320.

A positive averment, on oath, by the counsel for the removing party, that the state judge, under a rule providing that the special term is always open when the judge is present, was holding a special term of his court when the petition was presented to him, is sufficient to show that the court was then in session, although such judge, on the presentation of the papers, made an order to show cause, which was not in form an order of the court. La Page *v.* Day, 74 Fed. 977.

97. Duncan *v.* St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 So. 924; Bryce *v.* Southern R. Co., 122 Fed. 709; Mayer *v.* Denver, etc., R. Co., 41 Fed. 723. See Plymouth Consol. Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232.

Where the averments of the complaint are so ambiguous as to make it doubtful whether certain defendants are necessary parties, and there are indications of a design to obstruct a removal by their joinder, the averments of the complaint will be rigidly scrutinized, the whole record, including plaintiff's affidavits therein, will be examined; and if it appears probable that those defendants are not necessary parties, the motion for a remand will be denied, but without prejudice to its subsequent renewal should they afterward appear to be necessary parties New York *v.* New Jersey Steam-Boat Transp. Co., 24 Fed. 817.

When the petition charges that parties have been fraudulently joined for the purpose of preventing a removal, if that petition is verified and states facts which show the misjoinder, the motion to remand will be denied, unless plaintiff offers evidence to the contrary. Atlanta, etc., R. Co. *v.* Southern R. Co., 153 Fed. 122, 82 C. C. A. 309; Chicago, etc., R. Co. *v.* Stepp, 151 Fed. 908 [*affirmed* in 164 Fed. 785, 90 C. C. A. 431]; Dishon *v.* Cincinnati, etc., R. Co., 133 Fed. 471, 66 C. C. A. 345; Bryce *v.* Southern R. Co., 122 Fed. 709; Free *v.* Western Union Tel. Co., 122 Fed. 309; Durkee *v.* Illinois Cent. R. Co., 81 Fed. 1; Goodnow *v.* Litchfield, 47 Fed. 753. See Plymouth Consol. Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 6 S. Ct. 1034, 30 L. ed. 232; Atlantic Coast Line R. Co. *v.* Bailey, 151 Fed. 891; Kelly *v.* Chicago, etc., R. Co., 122 Fed. 286. A denial, in the petition for a removal, of the joint negligence alleged in the complaint, raises no issue of fraudulent joinder, although the petition contains the further allegation that plaintiff knew that the two defendants were not jointly operating the car upon which plaintiff received the injury for which he sued. Shane *v.* Butte Electric R. Co., 150 Fed. 801. See also Thresher *v.* Western Union Tel. Co., 148 Fed. 649. *Contra,* Landers *v.* Felton, 73 Fed. 311. Allegations of conclusions of law do not render the petition of removal sufficient, either as a pleading or as evidence. Offner *v.* Chicago, etc., R. Co., 148 Fed. 201, 78 C. C. A. 359.

98. Long *v.* Buford, 24 Fed. 241. See Cella *v.* Brown, 144 Fed. 742, 75 C. C. A. 608; Iowa Lillooet Gold Min. Co. *v.* Bliss, 144 Fed. 446.

99. Mountain View Min., etc., Co. *v.* McFadden, 180 U. S. 533, 21 S. Ct. 488, 45 L. ed. 656; Arkansas *v.* Choctaw, etc., R. Co., 134 Fed. 106; Jones *v.* Oceanic Steam Nav. Co., 14 Fed. Cas. No. 7,485, 11 Blatchf. 406. See Chesapeake, etc., R. Co. *v.* Smith, 101 Ky. 707, 42 S. W. 538, 19 Ky. L. Rep. 1826; New Castle *v.* Postal Tel. Cable Co., 152 Fed. 572. But see South Carolina *v.* Coosaw Min. Co., 45 Fed. 804.

1. Anderson *v.* Appleton, 32 Fed. 855.

complaint are conclusive. Where the complaint shows the value of the matter in dispute, it ordinarily cannot be contradicted,[2] unless the petition charges a fraudulent understatement, which is proved.[3] Where the right of removal depends upon a difference of citizenship and the residence of the parties, the allegations in the complaint concerning citizenship and residence are not conclusive.[4]

G. Decision Upon Motion to Remand. On a motion to remand, the court will not inquire as to the truth of allegations of facts other than citizenship or residence, which are contained in the pleadings;[5] nor into the sufficiency

2. Smith *v.* Western Union Tel. Co., 79 Fed. 132. But see Dakota Bldg., etc., Assoc. *v.* Cunningham, 92 Tex. 155, 47 S. W. 714.

Upon a proceeding to condemn a right of way, where the party seeking the condemnation alleged that the interest of the removing party in the land was of merely nominal value, and the owner, in his petition for a removal, averred that the matter in controversy far exceeded two thousand dollars in value, it was held that the averments in the petition for the removal should control. Postal Tel. Cable Co. *v.* Southern R. Co., 88 Fed. 803.

Where the recovery of a specific thing, as in ejectment or replevin, is sought (Corbin *v.* Pike, 37 Iowa 637), or an injunction is prayed (New Castle *v.* Western Union Tel. Co., 152 Fed. 569; Langdon *v.* Hillside Coal, etc., Co., 41 Fed. 609), it seems that the question depends upon the evidence submitted, irrespective of fraud (Corbin *v.* Pike, *supra*), the burden of proof being upon defendant (New Castle *v.* Western Union Tel. Co., *supra*; Davies *v.* Wells, 134 Fed. 139).

Where the complaint does not show the value of the matter in dispute, an averment concerning the same in the petition for removal will, unless contradicted, be conclusive upon a motion to remand. Langdon *v.* Hillside Coal, etc., Co., 41 Fed. 609.

3. Swann *v.* Mutual Reserve Fund Life Assoc., 116 Fed. 232, where the fact that plaintiff claimed less than the amount to which he was entitled was, in the absence of a charge of fraud, held insufficient to justify a removal.

4. Egerton *v.* Starin, 91 Fed. 932; Rumsey *v.* Call, 28 Fed. 769. But see Stephenson *v.* Illinois Cent. R. Co., 75 S. W. 260, 25 Ky. L. Rep. 442.

This is true even if it relates to the sovereignty under which a party was incorporated. Greer *v.* Texas, etc., R. Co., 17 Tex. Civ. App. 356, 42 S. W. 1038.

An erroneous description of plaintiff's citizenship, in a pleading or other proceeding in the state court, will not estop him from proving the truth in support of a motion to remand. Egerton *v.* Starin, 91 Fed. 932. See Reynolds *v.* Adden, 136 U. S. 348, 10 S. Ct. 843, 34 L. ed. 360.

Proof of residence in a place is presumptive evidence of citizenship there (Collins *v.* Ashland, 112 Fed. 175; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76; Blair *v.* Silver Peak Mines, 93 Fed. 332, 84 Fed 737) and will countervail a denial of such citizenship made for want of knowledge, information, or belief (Hanchett *v.* Blair, *supra*). It seems that where defendant alleges a change of complainant's citizenship or residence, he must show both residence in the new locality and the intention to remain there. Gaddie *v.* Mann, 147 Fed. 955.

An official passport, certifying to the naturalization of the defendant as a citizen of a certain country, when accompanied by his affidavit, is *prima facie* evidence that he has complied with the statutes regulating naturalization there. Maloy *v.* Duden, 25 Fed. 673.

5. Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870; Shane *v.* Butte Electric R. Co., 150 Fed. 801; Carlisle *v.* Sunset Tel., etc., Co., 116 Fed. 896; Hax *v.* Caspar, 31 Fed. 499.

Dismissal of bill.— Upon a motion to remand, the court has no power to dismiss the bill, but merely to remand the cause to the state court. Richmond *v.* Brookings, 48 Fed. 241. *Contra*, Cassidy *v.* Atlanta, etc., R. Co., 109 Fed. 673; Merchants' Nat. Bank *v.* Brown, 17 Fed. 161, 4 Woods 263.

A motion to remand will not be granted because the federal courts enforce a different rule of damages from that which prevails in the state tribunals (Free *v.* Western Union Tel. Co., 122 Fed. 309), because of the effect upon the general proceedings for widening the streets of a city, in case of a decision of the federal court against the right to widen streets, on the land of a railroad company, or upon the amount of the value of the property of such corporation, or of the assessments for benefits which should be made against the same (Union Pac. R. Co. *v.* Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. ed. 319), because the evidence taken in the federal court will not be admissible in the state court (Birdseye *v.* Schaeffer, 37 Fed. 821 [*affirmed* in 140 U. S. 672, 11 S. Ct. 1017, 35 L. ed. 403]), nor, it was held, under the act of 1875, because defendant has given a bond in the state probate court, which might have affected the jurisdiction of the federal court to entertain the suit originally (Filer *v.* Levy, 17 Fed. 609). But where all the property of a foreign corporation had been placed in the custody of receivers appointed by the state courts, so that any judgment recovered in the federal court must be referred to the state court for payment, it was held that the case should be remanded. Goldberg *v.* German Ins. Co., 152 Fed. 831. Again a cause will not be remanded because the petition for removal was not verified (Allen *v.* Ryerson, 1 Fed. Cas. No. 235, 2 Dill. 501),

of the allegations therein, so as to decide whether plaintiff's pleading contains a good cause of action, or the answer a good defense,[6] except when it is claimed that a federal question is involved, when the court will determine whether a federal question which is not frivolous is actually raised.[7] The

because there was a defect in the form of the signature to the bond (Chambers *v.* McDougal, 42 Fed. 694; Kain *v.* Texas Pac. R. Co., 2 Fed. Cas. No. 7,596), or a defect in the form of the bond (Baker *v.* Peterson, 2 Fed. Cas. No. 776, 4 Dill. 562 note; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683), because the sureties on the bond are insufficient (Chambers *v.* McDougal, 42 Fed. 694; Van Allen *v.* Atchison, etc., R. Co., 3 Fed. 545, 1 McCrary 598; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683), nor because of mere irregularities in the removal (Northern Pac. Terminal Co. *v.* Lowenberg, 18 Fed. 339, 9 Sawy. 348). The federal court has discretionary power to grant a motion to remand a cause, because the transcript was not filed in time. St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703; McGregor *v.* McGillis, 30 Fed. 388; Hall *v.* Brooks, 14 Fed. 113, 21 Blatchf. 167; Kidder *v.* Featteau, 2 Fed. 616, 1 McCrary 323; Bright *v.* Milwaukee, etc., R. Co., 4 Fed. Cas. No. 1,877, 14 Blatchf. 214; Jackson *v.* Mutual L. Ins. Co., 13 Fed. Cas. No. 7,141, 3 Woods 413; McLean *v.* St. Paul, etc., R. Co., 16 Fed. Cas. No. 8,892, 16 Blatchf. 309 [*affirmed* in St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703]. It may deny a motion for a remand upon that ground, if defendant gives a reasonable excuse for his delay and offers to file the transcript at once. Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; St. Paul, etc., R. Co. *v.* McLean, 108 U. S. 212, 2 S. Ct. 498, 27 L. ed. 703; Bright *v.* Milwaukee, etc., R. Co., 4 Fed. Cas. No. 1,877, 14 Blatchf. 214; Kidder *v.* Featteau, *supra*; Woolridge *v.* McKenna, 8 Fed. 650; Hall *v.* Brooks, *supra*; Winchell *v.* Coney, 27 Fed. 482; Rowell *v.* Hill, 28 Fed. 433; McGregor *v.* McGillis, *supra*; Lucker *v.* Phœnix Assur. Co., 66 Fed. 161. A defect in the transcript is no ground for a remand. The remedy for such a defect is a writ of certiorari for a diminution of the record. Cook *v.* Whitney, 6 Fed. Cas. No. 3,166, 3 Woods 715; Dennis *v.* Alachua County, 7 Fed. Cas. No. 3,791, 3 Woods 683.

The fact that the federal court, upon a motion to remand, has no power to decide a motion made by the non-resident to quash the service of process upon the resident defendant, does not preclude a consideration of the question whether such resident was in court or not at the time limited for the filing of the petition for the removal. Diday *v.* New York, etc., R. Co., 107 Fed. 565.

When the jurisdiction of the federal court is doubtful, the cause should be remanded. Mathews Slate Co. *v.* Mathews, 148 Fed. 490; Nash *v.* McNamara, 145 Fed. 541; McKown *v.* Kansas, etc., Coal Co., 105 Fed. 657; Plant *v.* Harrison, 101 Fed. 307; Johnson *v.* Wells, etc., Co., 91 Fed. 1; Hutcheson *v.* Bigbee, 56 Fed. 329; Largey *v.* Blue Bird Min. Co., 49 Fed. 292; Blue Bird Min. Co. *v.* Largey, 49 Fed. 289; Fitzgerald *v.* Missouri Pac. R. Co., 45 Fed. 812; Kessinger *v.* Vannatta, 27 Fed. 890; Kansas *v.* Bradley, 26 Fed. 289; Levy *v.* Laclede Bank, 18 Fed. 193; Wolff *v.* Archibald, 14 Fed. 369, 4 McCrary 581; Evans *v.* Faxon, 10 Fed. 312, 11 Biss. 175; Deakin *v.* Lea, 7 Fed. Cas. No. 3,695, 11 Biss. 271; Heath *v.* Austin, 11 Fed. Cas. No. 6,305, 12 Blatchf. 320. *Contra*, Concord Coal Co. *v.* Haley, 76 Fed. 882; Heath *v.* Austin, 11 Fed. Cas. No. 6,305, 12 Blatchf. 320.

6. Marshall *v.* Holmes, 141 U. S. 589, 12 S. Ct. 62, 35 L. ed. 870; McGuire *v.* Great Northern R. Co., 153 Fed. 434; Broadway Ins. Co. *v.* Chicago Great Western R. Co., 101 Fed. 507; Hax *v.* Caspar, 31 Fed. 499.

Misjoinder of causes of action.— The question whether there is a misjoinder of causes of action in the complaint is not one for consideration upon a motion for remand. Fogarty *v.* Southern Pac. Co., 123 Fed. 973.

Where plaintiff prayed for an injunction and for damages, the injunctive relief being ancillary to a suit previously pending in the state court, it was held that, although the claim for damages might have been separately removable, the court, upon a motion to remand, had no power to order the pleadings recast into two suits, in law and equity; but that the whole must be remanded. Ladd *v.* West, 55 Fed. 353.

7. Southern Pac. R. Co. *v.* California, 118 U. S. 109, 6 S. Ct. 993, 30 L. ed. 103; Starin *v.* New York, 115 U. S. 248, 6 S. Ct. 28, 29 L. ed. 388; Lowry *v.* Chicago, etc., R. Co., 46 Fed. 83; Kessinger *v.* Vannatta, 27 Fed. 890; Wood *v.* Matthews, 30 Fed. Cas. No. 17,955, 2 Blatchf. 370, 23 Vt. 735. But see Nashville *v.* Cooper, 6 Wall. (U. S.) 247, 18 L. ed. 851.

Where the complaint sets out several causes of action, one of which is removable because of a difference of citizenship, and the others assigned claims over which the federal court would have had no original jurisdiction, the whole case can be removed. Hoge *v.* Canton Ins. Office, 103 Fed. 513; Sharkey *v.* Port Blakely Mill Co., 92 Fed. 425 [*affirmed* in 102 Fed. 259, 42 C. C. A. 329].

Where a case was removed by an officer of the United States, upon the ground that it was brought because of an act done under the revenue laws, and that did not appear upon the pleadings, it was held that the question would not be determined upon a motion for remand, but would be postponed until the trial. Dennistoun *v.* Draper, 7 Fed. Cas. No. 3,804, 5 Blatchf. 336.

Where the state court had decided upon defendant's application for a removal, that there was no separable controversy which gave him a right to the same, it was held

decision upon a motion to remand must be based upon facts appearing on the record.[8]

H. Costs Upon Motion to Remand. Ordinarily, when a motion to remand is granted, costs are imposed upon the removing party.[9]

I. Order of Remand. A formal order remanding the case is customary and is the regular practice.[10]

J. Review of Decision Upon Motion to Remand — 1. In General. The Judiciary Act of March 3, 1887, provides that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." [11]

that he could not contend for a contrary decision upon the same point, in the federal court, on a motion by plaintiff to remand the cause. Beadleston *v.* Harpending, 32 Fed. 644.

8. Hayward *v.* Nordberg Mfg. Co., 85 Fed. 4, 29 C. C. A. 438. But see Cassidy *v.* Atlanta, etc., R. Co., 109 Fed. 673, where, after a removal by a non-resident defendant, plaintiff entered a nonsuit as to him, leaving the only defendant a resident of the same state with plaintiff, and then moved to remand the cause, it was held that the order should be for a dismissal and not for a remand.

Contempt proceedings before removal.— Where, before the removal, a rule had been issued directing defendant to show cause why he should not be attached for contempt of an injunction in the suit, the federal court remanded the contempt proceedings, but kept jurisdiction of the principal suit. Voorhees *v.* Albright, 28 Fed. Cas. No. 16,999.

Where the bond did not show the residence, nor the sufficiency of the surety, and the petition stated that the petitioners "have made and herewith file a bond with good and sufficient surety," it was held that this statement must be accepted by the federal court as true, until the contrary was shown, although it did not appear that the state court had either accepted or refused the surety. Probst *v.* Cowen, 91 Fed. 929.

9. Josslyn *v.* Phillips, 27 Fed. 481.

The costs imposed upon a remand are the docket fee of twenty dollars and such taxable disbursements as have been incurred in the federal court (Josslyn *v.* Phillips, 27 Fed. 481), but not disbursements incurred in the state court after the petition for removal was filed (Young *v.* Merchants' Ins. Co., 29 Fed. 273), except the fees paid the state clerk for certifying to the transcript. In the absence of a stipulation in the bond to that effect, the court cannot, in its order of remand, direct the entry of judgment against the surety, without a separate suit, upon which he is entitled to a hearing. Colburn *v.* Hill, 103 Fed. 340, 43 C. C. A. 253.

Judgment for costs is entered in the circuit court of the United States. Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602; Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L ed. 528; Graves *v.* Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. ed. 462 [*reversing* 34 Fed. 692].

Remand after verdict.—Where the remand was made after a verdict against the removing party, no costs were imposed. Ferguson *v.* Ross, 38 Fed. 161, 3 L. R. A. 322.

Want of jurisdiction.— When a judgment or decree is reversed for want of jurisdiction, costs are imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant. Walker *v.* Collins, 167 U. S. 57, 17 S. Ct. 738, 42 L. ed. 76; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 977, 37 L. ed. 804; Martin *v.* Snyder, 148 U. S. 663, 13 S. Ct. 706, 37 L. ed. 602; Torrence *v.* Shedd, 144 U. S. 527, 12 S. Ct. 726, 36 L. ed. 528; Graves *v.* Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. ed. 462; Chapman *v.* Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. ed. 800; Peninsular Iron Co. *v.* Stone, 121 U. S. 631, 7 S. Ct. 1010, 30 L. ed. 1020; King Iron Bridge, etc., Co. *v.* Otoe County, 120 U. S. 225, 7 S. Ct. 552, 30 L. ed. 623; Everhart *v.* Huntsville Female College, 120 U. S. 223, 7 S. Ct. 555, 30 L. ed. 623; Peper *v.* Fordyce, 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435; Continental L. Ins. Co. *v.* Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. ed. 380; Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 4 S. Ct. 510, 28 L. ed. 462; Grand Trunk R. Co. *v.* Twitchell, 59 Fed. 727, 8 C. C. A. 237.

10. Bird *v.* Cockrem, 28 La. Ann. 70.

Such an order is not indispensable, at least where the record does not show a removable case and the state court enters an order dismissing the petition. Patten *v.* Cilley, 67 N. H. 520, 42 Atl. 47.

11. 24 U. S. St. at L. 552, c. 373, § 2 [U. S. Comp. St. (1901) p. 509].

The act of March 3, 1891, does not repeal this, either directly or by implication. Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 12 S. Ct. 123, 35 L. ed. 902.

If the state court proceeds to judgment in a cause, notwithstanding an application for removal, and there has been no remand by the federal court, such decision of the state court can be reviewed by the supreme court upon writ of error to the highest court of the state in which a decision upon the question could have been had. U. S. Rev. St. (1878) § 709; Chesapeake, etc., R. Co. *v.* McCabe, 213 U. S. 207, 29 S. Ct. 430; Cincinnati, etc., R. Co. *v.* Bohon, 200 U. S. 221, 26 S. Ct. 166, 50 L. ed. 448; Southern R. Co. *v.* Allison, 190 U. S. 326, 23 S. Ct. 713, 47 L. ed. 1078; Missouri, etc., R. Co. *v.* Hickman, 183 U. S. 53, 22 S. Ct. 18, 46 L. ed. 78; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Oakley

2. Review of Order of Remand — a. Review by Supreme Court of the United States. The supreme court of the United States cannot review immediately, either by appeal or writ of error, an order or judgment of a circuit court,[12] or of a circuit court of appeals,[13] or of a state court,[13a] remanding a cause. And an order remanding a cause cannot be reviewed by mandamus.[14]

b. Review by Circuit Court of Appeals. The circuit court of appeals cannot review an order remanding a cause.[15]

c. Review by Circuit Court. After a circuit court of the United States has entered an order remanding a cause, it cannot set the same aside and recover jurisdiction of the cause.[16]

3. Review of Order Denying Motion to Remand — a. Review by Appeal or Writ of Error. An order denying a motion to remand may be reviewed by the supreme court of the United States,[17] it seems, or by the circuit court of

v. Goodnow, 118 U. S. 43, 6 S. Ct. 944, 30 L. ed. 61; Stone *v.* South Carolina, 117 U. S. 430, 6 S. Ct. 799, 29 L. ed. 962; Kanouse *v.* Martin, 14 How. (U. S.) 23, 14 L. ed. 310, 15 How. 198, 14 L. ed. 660; Gordon *v.* Longest, 16 Pet. (U. S.) 97, 10 L. ed. 900. See also Burlington, etc., R. Co. *v.* Dunn, 121 U. S. 182, 7 S. Ct. 1114, 30 L. ed. 885, holding that where a state court has refused to allow the removal of a cause, on the ground that defendant has failed to prove the diverse citizenship of the parties, and has proceeded with it to a final decision, on writ of error to the state court, although the case is not within the letter of rule 32, it may be advanced on motion, and heard under the rules applicable to motions to dismiss.

12. Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536; Illinois Cent. R. Co. *v.* Brown, 156 U. S. 386, 15 S. Ct. 656, 39 L. ed. 461; Joy *v.* Adelbert College, 146 U. S. 355, 13 S. Ct. 186, 36 L. ed. 1003; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 12 S. Ct. 123, 35 L. ed. 902; Birdseye *v.* Shaeffer, 140 U. S. 117, 11 S. Ct. 885, 35 L. ed. 402; Texas Land, etc., Co. *v.* Scott, 137 U. S. 436, 11 S. Ct. 140, 34 L. ed. 730; Gurnee *v.* Patrick County, 137 U. S. 141, 11 S. Ct. 34, 34 L. ed. 601; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 10 S. Ct. 517, 33 L. ed. 871; Morey *v.* Lockhart, 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68.

The fact that the remand is made upon a decision overruling a demurrer does not give a right to a review by the supreme court. Birdseye *v.* Shaeffer, 140 U. S. 117, 11 S. Ct. 885, 35 L. ed. 402; Gurnee *v.* Patrick County, 137 U. S. 141, 11 S. Ct. 34, 34 L. ed. 601.

The supreme court of the United States cannot, by a writ of error to the final judgment of a state court, review an order remanding the cause, which was made by a federal court. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 16 S. Ct. 389, 40 L. ed. 536.

13. German Nat. Bank *v.* Speckert, 181 U. S. 405, 21 S. Ct. 688, 45 L. ed. 926.

13a. Chesapeake, etc., R. Co. *v.* McCabe, 213 U. S. 207, 29 S. Ct. 430.

14. *Ex p.* Pennsylvania Co., 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; *In re* Sherman, 124 U. S. 364, 8 S. Ct. 505, 31 L. ed. 423; *Ex p.* Hoard, 105 U. S. 578, 26 L. ed. 1176.

15. Cole *v.* Garland, 107 Fed. 759, 46 C. C. A. 626; *In re* Coe, 49 Fed. 481, 1 C. C. A. 326.

16. Empire Min. Co. *v.* Propeller Towboat Co., 59 S. C. 549, 38 S. E. 156.

When the federal court had set aside its order of remand at the term when the same was made, and meanwhile plaintiff had filed a copy of the first order with the state court and obtained a judgment there, which was affirmed on appeal by the supreme court of the state, it was held that a motion by plaintiff in the federal court to strike the cause from its docket would not be decided until defendant had an opportunity to bring the judgment of the state court before the supreme court of the United States for review. Empire Min. Co. *v.* Propeller Tow-Boat Co., 108 Fed. 900. But see Empire Min. Co. *v.* Propeller Towboat Co., 59 S. C. 549, 38 S. E. 156.

17. Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673; Cates *v.* Allen, 149 U. S. 451, 13 S. Ct. 883, 977, 37 L. ed. 804; Edrington *v.* Jefferson, 111 U. S. 770, 4 S. Ct. 683, 28 L. ed. 594.

If a review by the supreme court of the United States is desired, a certificate of jurisdiction should be obtained at the time of the entry of final judgment or decree. Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673.

Record.— Unless the transcript shows the jurisdiction, either by the petition for the removal or by statements in the pleadings or evidence, the appellate court will reverse the judgment and order a remand. Jackson *v.* Allen, 132 U. S. 27, 10 S. Ct. 9, 33 L. ed. 249; Crehore *v.* Ohio, etc., R. Co., 131 U. S. 240, 9 S. Ct. 692, 33 L. ed. 144; Hegler *v.* Faulkner, 127 U. S. 482, 8 S. Ct. 1203, 32 L. ed. 210; Cameron *v.* Hodges, 127 U. S. 322, 8 S. Ct. 1154, 32 L. ed. 132; Hancock *v.* Holbrook, 112 U. S. 229, 5 S. Ct. 115, 28 L. ed. 714 [*reversing* 9 Fed. 353, 4 Woods 52]; Southwestern Tel., etc., Co. *v.* Robinson, 48 Fed. 769, 1 C. C. A. 91. See Bush *v.* Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. ed. 354. The petition for removal is an

appeals [18] upon writ of error to, or appeal from, the final judgment or decree, as the case may be. It cannot, however, be reviewed by an immediate appeal or writ of error, since it is not a final order.[19]

b. Review by Mandamus. An order denying a motion to remand a cause because neither of the parties resides in the district where the suit is brought, when there is no federal question involved, can be reviewed by an application to the supreme court of the United States for a mandamus.[20]

c. Review by Circuit Court. The circuit court may review its own order denying a motion to remand, under the same circumstances that it may review any other order granted by it.[21] It has been held that the motion may be renewed at any time, even although no new facts are brought to the attention of the court.[21a]

K. Proceedings in Federal Court After Remand. After a remand the federal court can take no further proceedings in the case.[22]

REMOVAL OF CLOUD. See QUIETING TITLE, 32 Cyc. 1346.

REMOVAL OF THE RECORD. A term held to mean removal of the cause.[1]

REMOVE. To cause a thing to change place, or to cause it to cease to exist; [2]

essential part of the record to enable the court to determine its own jurisdiction, without which it will not proceed to a final adjudication. Larned *v.* Jenkins, 109 Fed. 100, 48 C. C. A. 252. Where, upon a foreclosure suit, the appeal was from an order confirming the sale, but not from the decree directing the sale, and this decree did not disclose affirmatively a want of jurisdiction, the supreme court of the United States will not examine the record, prior to the decree of sale, to see whether the case was properly removed. Turner *v.* Farmers' L. & T. Co., 106 U. S. 552, 1 S. Ct. 519, 27 L. ed. 273. When the right to a remand depends upon the evidence, it will not be reviewed upon appeal, unless such evidence is contained in the record. Wirgman *v.* Persons, 126 Fed. 449, 62 C C. A. 63.

18. Wabash R. Co. *v.* Barbour, 73 Fed. 513, 19 C. C. A. 546; Barth *v.* Coler, 60 Fed. 466, 9 C. C. A. 81.

19. Bender *v.* Pennsylvania Co., 148 U. S. 502, 13 S. Ct. 640, 37 L. ed. 537; Patten *v.* Cilley, 50 Fed. 337, 1 C. C. A. 522.

20. *Ex p.* Wisner, 203 U. S. 449, 27 S. Ct. 150, 51 L. ed. 264. See Chicago, etc., R. Co. *v.* Wiswall, 23 Wall. (U. S.) 507, 23 L. ed. 103 (where jurisdiction was claimed because of a difference of citizenship); *In re* Winn, 213 U. S. 458, 29 S. Ct. 515 (where it was erroneously contended that the case arose under the laws of the United States).

In case of an erroneous removal of a criminal prosecution, and a refusal to remand the same, the state may obtain a writ of mandamus to compel the remand of the prosecution and the restoration of the custody of the accused (Kentucky *v.* Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. ed. 633; Virginia *v.* Paul, 148 U. S. 107, 13 S. Ct. 536, 37 L. ed. 386; Virginia *v.* Rives, 100 U. S. 313, 25 L. ed. 667), and may also appeal to the supreme court from an order of the federal court granting the writ of habeas corpus (Kentucky *v.* Powers, *supra*).

Separable controversy.—An order denying a motion to remand a case, which was removed because of a separable controversy between citizens of different states, cannot be reviewed by a mandamus. *In re* Pollitz, 206 U. S. 323, 27 S. Ct. 729, 51 L. ed. 1081.

21. See *supra*, XIV, D.

Collateral review.— Where there is no fraud or collusion, a circuit court of the United States cannot declare void, in a collateral action, a judgment of the circuit court or of the circuit court of appeals, in a case removed from a state court, although the record fails to show facts necessary to warrant the removal. Dexter *v.* Sayward, 84 Fed. 296.

21a. Weldon *v.* Fritzlen, 128 Fed. 608 [*reversed* upon another point in 135 Fed. 650, 68 C. C. A. 288, and *cited* without ruling upon the point in same case as Fritzlen *v.* Boatmen's Bank, 212 U. S. 364, 29 S. Ct. 345].

22. Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693; Colburn *v.* Hill, 103 Fed. 340, 43 C. C. A. 253.

Confirmation of sale.—After remand a federal court cannot confirm a sale previously made. Colburn *v.* Hill, 103 Fed. 340, 43 C. C. A. 253.

The state court then alone has the power to determine what shall be done with the pleadings filed (Ayres *v.* Wiswall, 112 U. S. 187, 5 S. Ct. 90, 28 L. ed. 693) and testimony taken during the pendency of the suit in the federal court (Ayres *v.* Wiswall, *supra*; Broadway Ins. Co. *v.* Chicago, etc., R. Co., 101 Fed. 507.

1. Hughes *v.* Mine Hill, etc., R. Co., 30 Pa. St. 517, 518, where it is said: "Under the old English practice, each case was contained in a record by itself, and the very record was sent up for further proceedings to the other court, and there remained nothing in the first court to proceed upon. With us it is not entirely so, since much of the record is kept in dockets, and only copies of them are removed."

2. U. S. *v.* Peace, 48 Fed. 714.

to change place in any manner; or to make a change in place; to move or go from one place to another;[3] to move away from the position occupied; to displace;[4] sometimes used as synonymous with MOVE,[5] *q. v.* (See REMOVAL, *ante*, p. 1209.)

REMUNERATION. COMPENSATION,[6] *q. v.*; a return for services; something paid for services rendered;[7] a *quid pro quo*.[8] (See COMPENSATION, 8 Cyc. 401; FEES, 19 Cyc. 462.)

REMUNERATIVE DONATION. A gift, the object of which is to recompense for services rendered.[9] (See, generally, GIFTS, 20 Cyc. 1189.)

RENDER. To bestow or provide; to give in answer to requirement of duty or demand;[10] to furnish;[11] to give; present;[12] to make up; to finish;[13] to state; to deliver.[14] (See ENTER, 15 Cyc. 1052; RENDITION, *post*, p. 1330; RENDITION OF JUDGMENT, *post*, p. 1330.)

RENDERED. As applied to judgments or decisions, when the court read and filed its finding;[15] when the court makes an order therefor;[16] the time the judgment was in fact given and pronounced;[17] when a referee has actually decided the case, signed the record embodying such decision and notified the parties thereof;[18] when the court announces it or signs the judgment, as is the common practice, and returns the signed judgment to counsel.[19] (See ACCOUNTS

3. Webster Dict. [*quoted* in Parker *v.* State, 18 Tex. App. 72, 90].

4. Webster Dict. [*quoted* in South *v.* Sinking Fund Com'rs, 86 Ky. 186, 190, 5 S. W. 567, 9 Ky. L. Rep. 478].

5. Davis *v.* State, 68 Ala. 58, 65, 44 Am. Rep. 128.

6. See 8 Cyc. 402 text and note 83, 403 text and notes 84–86.

7. Reg. *v.* Postmaster-Gen., 1 Q. B. D. 658, 662, 663, 665, comparing the term with "emolument."

8. Reg. *v.* Postmaster-Gen., 1 Q. B. D. 658, 663.

9. Ackerman *v.* Larner, 116 La. 101, 116, 40 So. 581.

10. Standard Dict. [*quoted* in Dayton *v.* Ewart, 28 Mont. 153, 156, 72 Pac. 420, 98 Am. St. Rep. 549].

11. Manufacturers', etc., Mut. Ins. Co. *v.* Zeitinger, 168 Ill. 286, 292, 48 N. E. 179, 61 Am. St. Rep. 105; Century Dict.; Webster Dict. [both *quoted* in Peabody *v.* Satterlee, 166 N. Y. 174, 178, 59 N. E. 818, 52 L. R. A. 956]; Standard Dict. [*quoted* in Dayton *v.* Ewart, 28 Mont. 153, 156, 72 Pac. 420, 98 Am. St. Rep. 549].

12. Century Dict. [*quoted* in Peabody *v.* Satterlee, 166 N. Y. 174, 178, 59 N. E. 818, 52 L. R. A. 956].

13. Webster Dict. [*quoted* in Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 387, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122].

"Rendering of such judgment" is an expression said to mean the annunciation or declaring the decision of the court, indicated by the rule for judgment. California State Tel. Co. *v.* Patterson, 1 Nev. 150, 155; Fleet *v.* Youngs, 11 Wend. (N. Y.) 522, 527, 528, where it is used in a statute providing that a writ of error shall be brought within two years after the rendering of the judgment or final determination of the court.

14. Manufacturers', etc., Mut. Ins. Co. *v.* Zeitinger, 168 Ill. 286, 292, 48 N. E. 179, 61 Am. St. Rep. 105; Webster Dict. [*quoted* in Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 387, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122; Peabody *v.* Satterlee, 166 N. Y. 174, 178, 59 N. E. 818, 52 L. R. A. 956].

Distinguished from "forward" or "mail" see Manufacturers', etc., Mut. Ins. Co. *v.* Zeitinger, 168 Ill. 286, 292, 48 N. E. 179, 61 Am. St. Rep. 105.

15. Mayer *v.* Haggerty, 138 Ind. 628, 631, 38 N. E. 42.

16. State *v.* Biesman, 12 Mont. 11, 16, 29 Pac. 534.

17. Farmers' State Bank *v.* Bales, 64 Nebr. 870, 871, 90 N. W. 945.

"Rendered at chambers" is a term said to mean rendered out of court. Appleby *v.* South Carolina, etc., R. Co., 58 S. C. 33, 36, 36 S. E. 109.

18. Craig *v.* Craig, 66 Hun (N. Y.) 452, 454, 21 N. Y. Suppl. 241.

19. State *v.* Brown, 31 Wash. 397, 401, 72 Pac. 86, 62 L. R. A. 974 [*quoting* Quareles *v.* Seattle, 26 Wash. 226, 227, 66 Pac. 389].

Distinguished from: "Docketed" see Dieffenbach *v.* Roch, 112 N. Y. 621, 625, 20 N. E. 560, 2 L. R. A. 829. "Entered" see Coe *v.* Erb, 59 Ohio St. 259, 262, 52 N. E. 640, 69 Am. St. Rep. 764; State *v.* Brown, 31 Wash. 397, 401, 72 Pac. 86, 62 L. R. A. 974. "Given" see Schuster *v.* Rader, 13 Colo. 329, 334, 22 Pac. 505. "Given or made" see Harmon *v.* Comstock Horse, etc., Co., 9 Mont. 243, 248, 23 Pac. 470. "Reducing it to writing" see Ryals *v.* McArthur, 92 Ga. 378, 17 S. E. 350.

A judgment in ejectment is not rendered, within the meaning of Wis. Rev. St. § 3092, requiring the application for a new trial to be made within one year from the rendition of the judgment, until the costs are taxed and inserted therein. Haseltine *v.* Simpson, 61 Wis. 427, 428, 21 N. W. 299, 302.

Rendered means rendered in the trial court, rather than the judgment which happens to be rendered on a writ of error, as the word is used in Colo. Code Proc. c. 23, § 272, giving a defendant in ejectment the right of a new trial upon application therefor and pay-

AND ACCOUNTING, 1 Cyc. 363. See also RENDER; RENDITION; RENDITION OF JUDGMENT.)

RENDITION. The act of rendering.[20] (Rendition: Of Account, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 370. Of Verdict in — Civil Action, see TRIAL; Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 686. See also RENDER; RENDITION OF JUDGMENT.)

RENDITION OF JUDGMENT. Either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both;[21] its announcement by the court and entry upon the minutes of the clerk, or the filing of the findings and order for judgment;[22] the act, after the trial and final submission of a case, of pronouncing judgment in language which fully determines the rights of the parties to the action and leaves nothing more to be done except the entry of the judgment by the clerk;[23] the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy, as ascertained by the pleadings and the verdict.[24] (Rendition of Judgment: In General, see CONSTITUTIONAL LAW, 8 Cyc. 824; JUDGMENTS, 23 Cyc. 675, 681 note 82, 732, 754, 770, 835, 842, 1006, 1408 note 48; JUSTICES OF THE PEACE, 24 Cyc. 600; MANDAMUS, 26 Cyc. 210, 484; MORTGAGES, 27 Cyc. 1660. As Affecting — Collateral Attack Thereon, see JUDGMENTS, 23 Cyc. 1055; Conclusiveness of Adjudication, see JUDGMENTS, 23 Cyc. 1215. By Confession, see JUDGMENTS, 23 Cyc. 716. Failure to Enter Judgment, see JUDGMENTS, 23 Cyc. 842. In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 597. In Rem, see JUDGMENTS, 23 Cyc. 1406. Mode of, see JUDGMENTS, 23 Cyc. 786; JUSTICES OF THE PEACE, 24 Cyc. 654. On Appeal and After Remand, see APPEAL AND ERROR, 2 Cyc. 1029. Time For, see JUDGMENTS, 23 Cyc. 782; MORTGAGES, 27 Cyc. 1756. Time of, see JUDGMENTS, 23 Cyc. 350 note 84, 1384 note 96; JUSTICES OF THE PEACE, 24 Cyc. 598.)

REND-ROCK. A kind of dynamite.[25]

RENEW. In its popular sense, to refresh, revive, or rehabilitate an expiring or declining subject, but not appropriate to describe the making of a new contract or the creation of a new existence;[26] to re-establish a particular contract or another period of time, to restore to its former conditions;[27] to make again;[28] to make over, to re-establish, or to rebuild;[29] to grant a new loan on a new note

ment of costs within a limited time or after judgment is rendered. Iron Silver Min. Co. *v.* Mike, etc., Gold, etc., Min. Co., 56 Fed. 956, 957, 6 C. C. A. 180.

"Services rendered" without any qualifying words, imports that the services had been performed. Gabb *v.* King, 38 Cal. 143, 144.

20. Webster Dict. [*quoted* in Ætna L. Ins. Co. *v.* Hesser, 77 Iowa 381, 387, 42 N. W. 325, 14 Am. St. Rep. 297, 4 L. R. A. 122].

21. *In re* Rose, (Cal. 1888) 20 Pac. 712, 713.

22. Wood *v.* Etiwanda Water Co., 122 Cal. 152, 156, 54 Pac. 726 [*citing* Painter *v.* Painter, 113 Cal. 371, 45 Pac. 689; Schurtz *v.* Romer, 81 Cal. 244, 22 Pac. 657; Thomas *v.* Anderson, 55 Cal. 43].

23. State *v.* Henderson, 164 Mo. 347, 360, 64 S. W. 138, 86 Am. St. Rep. 618.

24. Columbus Water-Works Co. *v.* Columbus, 46 Kan. 666, 675, 26 Pac. 1046; Burns *v.* Skelton, 29 Tex. Civ. App. 453, 454, 68 S. W. 527; Winstead *v.* Evans, (Tex. Civ. App. 1896) 33 S. W. 580.

Distinguished from "entry" of the judgment see Schurtz *v.* Romer, 81 Cal. 244, 247, 22 Pac. 657; *In re* Rose, (Cal. 1888) 20 Pac. 712, 713; Cook's Estate, 77 Cal. 220, 226, 17 Pac. 923, 19 Pac. 431, 11 Am. St. Rep. 267, 1 L. R. A. 567; McLaughlin *v.* Doherty, 54 Cal. 519; Gray *v.* Palmer, 28 Cal. 416, 418; Simmons *v.* Hanne, 50 Fla. 267, 270, 39 So. 77; Vigo County *v.* Terre Haute, 147 Ind. 134, 136, 46 N. E. 350; Mayer *v.* Haggerty, 138 Ind. 628, 631, 38 N. E. 42; Chissom *v.* Barbour, 100 Ind. 1, 5; Martin *v.* Pifer, 96 Ind. 245, 248; Chamberlain *v.* Evansville, 77 Ind. 542, 548; Reily *v.* Burton, 71 Ind. 118, 126; Winstead *v.* Evans, (Tex. Civ. App. 1896) 33 S. W. 580. See JUDGMENTS, 23 Cyc. 835.

25. Stewart *v.* New York, etc., R. Co., 5 Silv. Sup. (N. Y.) 198, 203, 8 N. Y. Suppl. 19.

26. Webster Dict.; Worcester Dict. [both *quoted* in Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 21, 22, 17 N. E. 396, where it is said: "Thus, to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired, for after that time it would be practically impossible to renew them"]. *Compare* Cooper *v.* Oriental Sav., etc., Assoc., 100 Pa. St. 402, 406.

27. Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798.

28. Daggett *v.* Daggett, 124 Mass. 149, 151; Bouvier L. Dict. [*quoted* in Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798].

29. Kollock *v.* Scribner, 98 Wis. 104, 110, 73 N. W. 776.

for the amount of a former one;[30] specifically, to substitute for an old obligation a new one of the same nature.[31] (See Renewal.)

Renewable forever. A phrase used in the habendum of a lease and said to confer a right to renew in perpetuity.[32]

Renewal. In its broadest sense, that which is made anew or re-established;[33] a change of something old for something new;[34] the establishment of the particular contract for another period of time;[35] imparting continued or new force and effect;[36] the substitution of a new right or obligation for another of the same nature.[37] In law, an obligation on which time of payment is extended;[38] reloan on a new note given.[39] (Renewal: As Consideration For Indorsement, see Commercial Paper, 7 Cyc. 888. Bona Fide Purchaser Thereof, see Commercial Paper, 7 Cyc. 924. Of Application For License, see Intoxicating Liquors, 23 Cyc. 126. Of Application For Patent, see Patents, 30 Cyc. 892. Of Bond, see Banks and Banking, 5 Cyc. 456. Of Chattel Mortgage, see Chattel Mortgages, 6 Cyc. 1092, 7 Cyc. 68. Of Contract of Employment, see Master and Servant, 26 Cyc. 976. Of Covenant in a Lease, see Landlord and Tenant, 24 Cyc. 1087 note 18. Of Employment, Presumption as to, see Master and Servant, 26 Cyc. 976. Of Execution — In General, see Executions, 17 Cyc. 1034; From

30. Webster Dict. [*quoted* in Tannenbaum *v.* Bloomingdale, 27 Misc. (N. Y.) 532, 535, 58 N. Y. Suppl. 235].

31. Webster Dict. [*quoted* in Tannenbaum *v.* Bloomingdale, 27 Misc. (N. Y.) 532, 535, 58 N. Y. Suppl. 235].

Distinguished from "extend" see Quinn *v.* Valiquette, 80 Vt. 434, 443, 68 Atl. 515, 14 L. R. A. N. S. 962; Kollock *v.* Scribner, 98 Wis. 104, 111, 73 N. W. 776.

"Repair and renew" see Dwight *v.* Ludlow Mfg. Co., 128 Mass. 280, 281.

32. Clinch *v.* Pernette, 24 Can. Sup. Ct. 385, 400.

33. Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 492, 50 S. E. 396.

34. Bouvier L. Dict. [*quoted* in Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245, 247 (*cited* in Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 492, 50 S. E. 396)], where it is said: "It is not a word of art; it has no legal or technical signification."

35. Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 492, 50 S. E. 396 [*citing* Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798].

36. Anderson L. Dict. [*quoted* in Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798]. See also Landlord and Tenant, 24 Cyc. 1009 note 8.

37. Sponhaur *v.* Malloy, 21 Ind. App. 287, 52 N. E. 245, 247.

Renewal of license is a license granted at a general annual licensing meeting by way of renewal. Sharpe *v.* Wakefield, 21 L. R. Q. B. 66, 79.

The phrase "renewals of licenses" distinguished from "renewals of a license" see Tross *v.* Elizabeth Bd. of Excise, 59 N. J. L. 97, 98, 35 Atl. 646.

38. English L. Dict. [*quoted* in Lowry Nat. Bank *v.* Fickett, 122 Ga. 489, 492, 50 S. E. 396; Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798].

39. Webster Dict. [*quoted* in Gault *v.* McGrath, 32 Pa. St. 392, 398].

Each renewal of a policy of insurance is a new contract, and is subject to the local laws in force at the time of the renewal. Jenkins *v.* Covenant Mut. L. Ins. Co., 171 Mo. 375, 383, 71 S. W. 688 [*citing* Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115; Brady *v.* Northwestern Ins. Co., 11 Mich. 425].

"First privilege of a renewal" in a lease see Holloway *v.* Schmidt, 33 Misc. (N. Y.) 747, 67 N. Y. Suppl. 169.

"Renewal" as confirmation of a contract of an infant or a person of unsound mind see Minnich *v.* Darling, 8 Ind. App. 539, 36 N. E. 173, 175.

"Renewal," as used in a lease giving the privilege of renewal, means that a new lease must be executed; and hence an extension of the lease without a new lease being given does not comply with the provision. Kollock *v.* Scribner, 98 Wis. 104, 110, 73 N. W. 776.

"Renewal" of a life-policy see Heusser *v.* Continental L. Ins. Co., 20 Fed. 222, 225.

Renewal of a negotiable bill or note is regarded simply as a prolongation of the original contract. Koehler *v.* Hussey, 57 S. W. 241, 244, 22 Ky. L. Rep. 317.

Renewal of an indemnity bond given to insure a merchant against loss through the insolvency of debtors would be simply an extension of it, with all of its terms and conditions. Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 267, 46 Atl. 328, 1063.

Renewal premium see Fire Insurance, 19 Cyc. 801.

The general rule is that the renewal of notes does not amount to payment. Sather Banking Co. *v.* Arthur R. Briggs Co., 138 Cal. 724, 733, 72 Pac. 352; San Diego County Sav. Bank *v.* Central Market Co., 122 Cal. 28, 33, 54 Pac. 273.

Construed as an extension see Insurance, etc., Co. *v.* Missouri Nat. Bank, 71 Mo. 58, 60; Pitts *v.* Hall, 19 Fed. Cas. No. 11,193, 3 Blatchf. 201, 204.

Distinguished from "extension" see Wilson *v.* Rousseau, 30 Fed. Cas. No. 17,832, 1 Blatchf. 3, 19.

"Exceptions" see Goodyear *v.* Cary, 10 Fed. Cas. No. 5,562, 4 Blatchf. 271, 304, 1 Fish. Pat. Cas. 424.

Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 623. Of Existing Encumbrance, see FIRE INSURANCE, 19 Cyc. 757. Of Ferry Franchise, see FERRIES, 19 Cyc. 505. Of Filing or Record of Chattel Mortgage — In General, see CHATTEL MORTGAGES, 6 Cyc. 1092; As Against Creditors, see CHATTEL MORTGAGES, 6 Cyc. 1095; Effect of Failure, see CHATTEL MORTGAGES, 6 Cyc. 1094. Of Insurance, see ACCIDENT INSURANCE, 1 Cyc. 243; FIDELITY INSURANCE, 19 Cyc. 523; FIRE INSURANCE, 19 Cyc. 629, 639 note 83, 701 note 94; LIFE INSURANCE, 25 Cyc. 781; MUTUAL BENEFIT INSURANCE, 29 Cyc. 38. Of Judgment, see JUDGMENTS, 23 Cyc. 1407 note 48. Of Lease or Tenancy — In General, see LANDLORD AND TENANT, 24 Cyc. 990, 1007, 1263; Application of Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 215; As Affecting Priority Between Landlord's Lien and Lien of Mortgage, see LANDLORD AND TENANT, 24 Cyc. 1020; As Affecting Right to Distrain, see LANDLORD AND TENANT, 24 Cyc. 1285; Of City Property, see MUNICIPAL CORPORATIONS, 28 Cyc. 18; Of Railroad, see RAILROADS, 33 Cyc. 391; Of School and University Lands, see PUBLIC LANDS, 32 Cyc. 898; Option of or Payment For Tenant's Improvements, see LANDLORD AND TENANT, 24 Cyc. 993; Option of or Sale of Premises, see LANDLORD AND TENANT, 24 Cyc. 994; Right of Subtenant to, see LANDLORD AND TENANT, 24 Cyc. 998. Of License to Mine, see MINES AND MINERALS, 27 Cyc. 628. Of Limited Partnership, see PARTNERSHIP, 30 Cyc. 759. Of Mining Lease, see MINES AND MINERALS, 27 Cyc. 694. Of Mortgage — In General, see CHATTEL MORTGAGES, 7 Cyc. 68; MORTGAGES, 27 Cyc. 1067, 1075, 1222; As Affecting Priority, see MECHANICS' LIENS, 27 Cyc. 240. Of Motion, see MOTIONS, 28 Cyc. 18. Of Note — In General, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 160 note 79, 174, 248; COMMERCIAL PAPER, 7 Cyc. 875; GUARANTY, 20 Cyc. 1472 note 10; Antenuptial Indorsement of, see HUSBAND AND WIFE, 21 Cyc. 1317 note 40; Defenses Against, see COMMERCIAL PAPER, 7 Cyc. 880; Effect as Discharge, see COMMERCIAL PAPER, 7 Cyc. 882; Given by Former Husband, see HUSBAND AND WIFE, 21 Cyc. 1438 note 25; Indorsed by Insane Person, see INSANE PERSONS, 22 Cyc. 1205 note 6; Necessity of Surrender of to Bring Action on Original, see COMMERCIAL PAPER, 8 Cyc. 25; Release of Accommodation Indorser, see COMMERCIAL PAPER, 7 Cyc. 883; Secured by Mortgage, Taking up, see MORTGAGES, 27 Cyc. 1191 note 52, 1410; Taking of as Discharge of Mortgage Debt, see MORTGAGES, 27 Cyc. 1393; Waiver of Lien of Pledge, see PLEDGES, 31 Cyc. 821. Of Oral Contract, see FRAUDS, STATUTE OF, 20 Cyc. 208 note 45. Of Partnership, see PARTNERSHIP, 30 Cyc. 418. Of Partnership Negotiable Instrument After Dissolution, see PARTNERSHIP, 30 Cyc. 668. Of Period For Filing Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 146. Of Pledge as Conversion Thereof, see PLEDGES, 31 Cyc. 838. Of Process, see PROCESS, 32 Cyc. 444, 447. Of Usurious Loan, see USURY. Of Usurious Note, Affecting Rights of Bona Fide Purchaser, see COMMERCIAL PAPER, 7 Cyc. 902. See also RENEW, *ante*, p. 1329.)

RENEWED. A term applied to an obligation on which the time of payment has been extended.[40] The term is used and employed as meaning or

40. English L. Dict. [*quoted* in Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798], where it is said that the word "'renewed' or 'renewal,' as applied to promissory notes, in commercial and legal parlance, means something more than the substitution of another obligation for the old one."

"Received, renewed," indorsed on a note, might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date. Lime Rock Bank *v.* Mallett, 34 Me. 547, 548, 56 Am. Dec. 655.

"Renewed July 6," on a promissory note, is not construed as extended. Brenneke *v.* Smallman, 2 Cal. App. 306, 311, 83 Pac. 302.

The indorsement of the words "renewed for three months" on notes by the payee at the time when they became due does not make such words a part of the original contract, but at most can only be construed as a collateral contract not to sue until the time for which they are to be renewed. Central Bank *v.* Willard, 17 Pick. (Mass.) 150, 153, 28 Am. Dec. 284.

"Renewed" in connection with policies and premiums see Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1908) 47 S. W. 687, 689; Heusser *v.* Continental L. Ins. Co., 20 Fed. 222, 225. An insurance policy on which the premiums were accepted after its expiration, and receipts termed renewal receipts being given in which the premium was referred to

referring to the imparting continued or new force and effect.[41] (See RENEW; RENEWAL.)

RENOUNCE. To disclaim; disavow; to give up; forego; resign; relinquish.[42] (See RENUNCIATION.)

RENOVATED or PROCESS BUTTER. Butter which has been subjected to any process by which it is melted, clarified, or refined, and made to resemble genuine butter, always excepting "adulterated butter."[43]

RENT. As a noun, a profit out of lands and tenements.[44] As a verb, to grant the right to occupy lands, paying a certain sum therefor.[45] (Rent: In General, see LANDLORD AND TENANT, 24 Cyc. 1137. Accounting For — In General, see ACCOUNTS AND ACCOUNTING, 1 Cyc. 430; By Vendee Seeking Rescission of Contract, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 342; In Actions to Redeem From Execution Sale, see EXECUTIONS, 17 Cyc. 1337. Allowance and Charges For in Action For Partition, see PARTITION, 30 Cyc. 232. Allowance or Deduction of on Redemption From Mortgage Sale, see MORTGAGES, 27 Cyc. 1838. Application of Doctrine of Perpetuities to Disposition of, see PERPETUITIES, 30 Cyc. 1503. Application of Rents and Profits of Mortgaged Chattel by Mortgagee in Possession, see CHATTEL MORTGAGES, 7 Cyc. 91 note 13. As Constituting — Advancement, see DESCENT AND DISTRIBUTION, 14 Cyc. 180; Community Property, see HUSBAND AND WIFE, 21 Cyc. 1646. As Damage Under Fire Policy, see FIRE INSURANCE, 19 Cyc. 840. As Family Expense, see HUSBAND AND WIFE, 21 Cyc. 1231. As Mitigation of Damages in Action For Breach of Covenant, see COVENANTS, 11 Cyc. 1174. As Preferred Claim, see EXECUTIONS, 17 Cyc. 1355. Assignment of by Lessor, see LANDLORD AND TENANT, 24 Cyc. 928. As Subject to — Creditor's Bill, see CREDITORS' SUITS, 12 Cyc. 27; Garnishment, see GARNISHMENT, 20 Cyc. 990 note 68, 1007; Mechanic's Lien, see MECHANICS' LIENS, 27 Cyc. 230; Mortgage, see MORTGAGES, 27 Cyc. 1040. Availability of Rents Received by Heir For Debts of Intestate, see DESCENT AND DISTRIBUTION, 14 Cyc. 197. Condition of Appeal-Bond as Covering Rents and Profits of Land in Controversy Pending Appeal, see APPEAL AND ERROR, 2 Cyc. 956 note 33, 959 note 38. Conflicting Claims Against Tenant as Ground of Interpleader, see INTERPLEADER, 23 Cyc. 14. Constitutionality of Law Taking Away Grantee's Right to During Redemption Period, see CONSTITUTIONAL LAW, 8 Cyc. 1009. Corn Rent, see CORN RENT, 9 Cyc. 979. Diminution in Rental Value as Basis of Estimating Damage, see EMINENT DOMAIN, 15 Cyc. 702. Evidence of Parol Agreement as to Amount of to Vary Written Lease, see EVIDENCE, 17 Cyc. 623. Evidence of Value, see EVIDENCE, 16 Cyc. 1137. Exemption of, Accruing From Homestead, see HOMESTEADS, 21 Cyc. 496, 610 note 50. Failure to Pay as Rendering Gas or Oil Lease Void, see MINES AND MINERALS, 27 Cyc. 736. Ground-Rent — In General, see GROUND-RENTS, 20 Cyc. 1370; Action to Collect, see GROUND-RENTS, 20 Cyc. 1387. Instalments of as Constituting Distinct Causes of Action, see JUDGMENTS, 23 Cyc. 1183. Interest of Donee or Grantee Under Power to Receive Rents and Profits in Executors, see POWERS, 31 Cyc. 1092. Interest on Rent, in Arrear, see INTEREST, 22 Cyc. 1485 note 82, 1490 note 11, 1513 note 1. Judgment as Evidence of Amount of Claimed, see JUDGMENTS, 23 Cyc. 1337 note 44. Justice's Court's Jurisdiction of Actions or Proceedings For, see JUSTICES OF

as a renewal premium, was held to be a renewed policy. London West *v.* London Guarantee, etc., Co., 26 Ont. 520, 523.

41. Anderson L. Dict. [*quoted* in Kedey *v.* Petty, 153 Ind. 179, 184, 54 N. E. 798].

"Renewed" considered as a "continuance" see Long *v.* Grand Lodge A. O. U. W., 25 Ont. App. 147, 155.

42. Anderson L. Dict.

"Waive and renounce" as used in a lease whereby the lessee waives and renounces all claim to title of any kind, other than the leasehold interest created in the lease, are not words of conveyance and the lessee is not thereby estopped from claiming any interest which he may have had in the premises. Davis *v.* McGrew, 82 Cal. 135, 138, 23 Pac. 41.

43. Suppl. U. S. Comp. St. (1903) p. 267, as used in an act relating to oleomargarine see FOOD, 19 Cyc. 1088 note 9; OLEOMARGARINE, 29 Cyc. 1475.

44. Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 80, 83, 13 N. Y. Suppl. 126.

45. Rouse *v.* Catskill, etc., Steamboat Co., 59 Hun (N. Y.) 80, 83, 13 N. Y. Suppl. 126.

THE PEACE, 24 Cyc. 454, 468. Liability — For Rent on Improvements, see IMPROVEMENTS, 22 Cyc. 6; Of Assignee in Bankruptcy For Under Lease of Bankrupt, see BANKRUPTCY, 5 Cyc. 328; Of Bona Fide Purchaser From Fraudulent Grantee, see FRAUDULENT CONVEYANCES, 20 Cyc. 635; Of Committee of Lunatic For, see INSANE PERSONS, 22 Cyc. 1149 note 83; Of Equitable Lienee to Account For, see LIENS, 25 Cyc. 682 note 73; Of Executor For, Prior to Sale, of Real Estate Directed to Be Sold, see CONVERSION, 9 Cyc. 851 note 95; Of Grantee or Licensee to Pay For Use of Streets, see MUNICIPAL CORPORATIONS, 28 Cyc. 888; Of Guardian For, see GUARDIAN AND WARD, 21 Cyc. 86; Of Guardian of Lunatic For, see INSANE PERSONS, 22 Cyc. 1187; Of Heir Occupying Land, see DESCENT AND DISTRIBUTION, 14 Cyc. 120; Of Husband to Wife, see HUSBAND AND WIFE, 21 Cyc. 1390, 1405 note 25, 1429; Of Insolvent Corporation For, see CORPORATIONS, 10 Cyc. 686; Of Married Women Conducting Business, see HUSBAND AND WIFE, 21 Cyc. 1338 note 74; Of Purchaser From Infant For, on Avoidance of Deed by Infant, see INFANTS, 22 Cyc. 560; Of Purchaser Under Void Sale by Guardian Under Order of Court, see GUARDIAN AND WARD, 21 Cyc. 146; Of Wife's Separate Estate For, see HUSBAND AND WIFE, 21 Cyc. 1448. Lien For — Postponement of, see CHATTEL MORTGAGES, 7 Cyc. 39; Priority Over Chattel Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 41. Mortgage on as Ground For Appointment of Receiver, see MORTGAGES, 27 Cyc. 1626. Of Gas Meter, see GAS, 20 Cyc. 1186. Of Joint Property, see JOINT TENANCY, 23 Cyc. 491. Of Property — Of Child, see PARENT AND CHILD, 29 Cyc. 1654 note 16; Sold Under Execution, see EXECUTIONS, 17 Cyc. 1317. Of School and University Lands, see PUBLIC LANDS, 32 Cyc. 896. Of Telephone, see TELEGRAPHS AND TELEPHONES. Of Wife's Separate Estate, see HUSBAND AND WIFE, 21 Cyc. 1533, 1538. Payment of as Mode of Acquiring Settlement, see PAUPERS, 30 Cyc. 1086. Personal Liability of Fraudulent Grantee, see FRAUDULENT CONVEYANCES, 20 Cyc. 635. Presumption and Burden of Proof as to Ownership of, see HUSBAND AND WIFE, 21 Cyc. 1405 note 25. Presumption From Payment of to One Claiming as Owner, see LANDLORD AND TENANT, 24 Cyc. 888. Purchases Out of Rent of Separate Property of Wife, see HUSBAND AND WIFE, 21 Cyc. 1392. Receipt of Rents and Profits of Real Estate as Possession to Prove Ouster of Party Holding Life-Interest, see ADVERSE POSSESSION, 1 Cyc. 1033 note 79. Recovery of — Collected by Adverse Possessor, see MONEY RECEIVED, 27 Cyc. 865; In Action by Coparceners, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 446; On Cancellation of Deed, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 340; Under Leases by Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 344. Renting Property by Agent Under Power of Attorney, see PRINCIPAL AND AGENT, 31 Cyc. 1389. Reservation of as Essential to Create Relation of Landlord and Tenant, see LANDLORD AND TENANT, 24 Cyc. 877. Right — Of County Board to Distrain For, see COUNTIES, 11 Cyc. 463; Of County Board to Lease or Rent County Property, see COUNTIES, 11 Cyc. 463; Of Creditor to Prove Rent Accrued After Insolvency, see INSOLVENCY, 22 Cyc. 1312 note 82; Of Heirs to Rents and Profits of Ancestor, see DESCENT AND DISTRIBUTION, 14 Cyc. 113; Of Infant to Accounting For, see INFANTS, 22 Cyc. 529 note 65; Of Purchaser at Judicial Sale, see JUDICIAL SALES, 24 Cyc. 64; Of Purchaser at Partition Sale, see PARTITION, 30 Cyc. 311; Of Purchaser at Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 831; Of Purchaser at Sale Under Power, see MORTGAGES, 27 Cyc. 1490; Of Purchaser of Property Mortgaged or of Equity of Redemption to Rents, see MORTGAGES, 27 Cyc. 1339; Of Receiver of Insolvent Corporation to Hold Lease of Corporation and Pay Rent, see CORPORATIONS, 10 Cyc. 1313; Of Surviving Children or Heirs to Rent of Homestead, see HOMESTEADS, 21 Cyc. 573; Of Tenant by Curtesy, see CURTESY, 12 Cyc. 1014; Of Widow, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 377; Of Widow to Proportionate Share of From Husband's Estate Prior to Assignment of Dower, see DOWER, 14 Cyc. 971; To Have Property Rented Instead of Sold by Order of Court, see JUDICIAL SALES, 24 Cyc. 8; To Possession of by Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 234 note 92;

To Rents and Profits of Attached Property, see ATTACHMENT, 4 Cyc. 573 note 46, 658 note 45; To Rents and Profits of Mortgaged Property on Assignment of Mortgage or Debt, see MORTGAGES, 27 Cyc. 1298; To Rents of Wife's Realty, see HUSBAND AND WIFE, 21 Cyc. 1390; To Set Off Rents Against Claim For Compensation For Improvements, see IMPROVEMENTS, 22 Cyc. 28; To Trial by Jury in Distress Proceedings For Rent, see JURIES, 24 Cyc. 137. Rights and Liabilities — Of Life-Tenant as to, see ESTATES, 16 Cyc. 622; Of Parties to Mortgagee, see MORTGAGES, 27 Cyc. 1249; On Foreclosure Sale, see MORTGAGES, 27 Cyc. 1730. Sale of Rents and Profits Under Execution, see EXECUTIONS, 17 Cyc. 1237. Securing Portion of Rent to Widow in Lieu of Dower, see DOWER, 14 Cyc. 1004. Sharing Profits in Lieu of as Constituting Partnership, see PARTNERSHIP, 30 Cyc. 387. Under Lease of Railroad, see RAILROADS, 33 Cyc. 398. Under Mining Lease, see MINES AND MINERALS, 27 Cyc. 710. Under Oil, Gas, and Salt Leases, see MINES AND MINERALS, 27 Cyc. 741. Verbal Reservation of, see FRAUDS, STATUTE OF, 20 Cyc. 213 note 91. Water Rent, see WATERS. Wife's Separate Estate in Rents of Separate Property, see HUSBAND AND WIFE, 21 Cyc. 1646, 1657.)

RENTAL. A sum total of rents.[46] (See RENT, *ante*, p. 1333.)

RENTAL AGENT. One who rents premises and collects rents thereon.[47] (See RENT, *ante*, p. 1333.)

RENTAL VALUE. As applied to real estate, the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant upon a judicious system of husbandry.[48] As applied to personal property, the value of the use of the same.[49]

RENT CHARGE. See GROUND-RENTS, 20 Cyc. 1370 note 1.

RENTED. A term which refers as well to the act of a lessee as to that of the lessor.[50] A term which naturally means that the tenant has the exclusive possession for the time.[51] (See RENT, *ante*, p. 1333.)

RENTS AND PROFITS. As applied to real estate, the sum annually yielded by the same.[52] (See PROFIT, 32 Cyc. 585; RENT, *ante*, p. 1333.)

RENT SECK. See GROUND-RENTS, 20 Cyc. 1370 note 1.

RENT SERVICE. See GROUND-RENTS, 20 Cyc. 1370 note 1.

46. Webster Dict. [*quoted* in Fremont, etc., R. Co. *v.* Bates, 40 Nebr. 381, 393, 58 N. W. 959].

Distinguished from "royalties" see Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 348, 60 C. C. A. 220.

The term is properly applied to the charge imposed by a city on a telegraph company for the privilege of using the streets, alleys, and public places of the city, graduated by the amount of such use St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 97, 13 S. Ct. 485, 37 L. ed. 380.

47. St. Paul *v.* Clark, 84 Minn. 138, 140, 86 N. W. 893.

In the absence of definite proof it cannot be said that such agent is in all respects, so far as the control of the property is concerned, the representative of the owner. St. Paul *v.* Clark, 84 Minn. 138, 140, 86 N. W. 893.

48. Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 132, 42 N. W. 788.

It means substantially the same thing as "value of the use" of the premises. Alexander *v.* Bishop, 59 Iowa 572, 578, 13 N. W. 714; Nelson *v.* Minneapolis, etc., R. Co., 41 Minn. 131, 132, 42 N. W. 788.

As applied to land covered with a growing crop the term means not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the lands for the purposes of maturing and harvesting the crops. Blunck *v.* Chicago, etc., R. Co., (Iowa 1908) 115 N. W. 1013, 1017.

49. Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 106, 29 Atl. 69; Wood *v.* State, 66 Md. 61, 67, 5 Atl. 476.

If the cost of working a machine remains the same, its rental value must necessarily vary from time to time, as it is more or less available for existing needs. Maryland Ice Co. *v.* Arctic Ice Mach. Mfg. Co., 79 Md. 103, 106, 29 Atl. 69.

50. Gray *v.* La Fayette County, 65 Wis. 567, 569, 27 N. W. 311.

"Rented or leased" may be used in two senses. It may mean that one has rented from another, or it may mean that he has rented to another. Zink *v.* Grant, 25 Ohio St. 352, 354; Gray *v.* La Fayette County, 65 Wis. 567, 569, 27 N. W. 311.

51. Noyes *v.* Stillman, 24 Conn. 15, 24.

"Rented for a pasture" seems a rather equivocal phrase, which may be open for explanation. Noyes *v.* Stillman, 24 Conn. 15, 24.

52. Matter of Vedder, 15 N. Y. Suppl. 798, 805, 2 Connoly Surr. 548. See also Delaney *v.* Van Aulen, 84 N. Y. 16, 23.

The "rents and profits" of an estate, the "income," or the "net income" of it, are

RENUNCIATION. In general the giving up of a right.[53] As applied to the executor of a will, an act whereby a person, named in a will as executor, declines to take on himself the burden of that office.[54] (Renunciation: In General, see ABANDONMENT, 1 Cyc. 3, and Cross-References under RESCISSION. As Affecting Patents, see PATENTS, 30 Cyc. 869. By Assignee For Benefit of Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 210 note 11. Of Agency, see PRINCIPAL AND AGENT, 31 Cyc. 1306. Of Allegiance, see INTERNATIONAL LAW, 22 Cyc. 1749 note 78. Of Community — By Heir, see HUSBAND AND WIFE, 21 Cyc. 1712; By Surviving Spouse, see HUSBAND AND WIFE, 21 Cyc. 1706, 1710 note 66. Of Contract or Lease of Railroad by Receiver, see RAILROADS, 33 Cyc. 396, 420. Of Devise or Legacy, see WILLS. Of Dower by Infant, see INFANTS, 22 Cyc. 553 note 50. Of Guardian's Contract Respecting Ward's Land, see GUARDIAN AND WARD, 21 Cyc. 110. Of Inheritance — By Heir, see DESCENT AND DISTRIBUTION, 14 Cyc. 94, 187, 188; By Wife, see DESCENT AND DISTRIBUTION, 14 Cyc. 82. Of Office as Affecting Right to Execute Power, see POWERS, 31 Cyc. 1110. Of Right to Administer Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 80. Of Title in Ejectment, see EJECTMENT, 15 Cyc. 102. Of Title or Right as Ground of Estoppel, see ESTOPPEL, 16 Cyc. 757. Of Wife's Privilege or Mortgage on Husband's Property Where Community Rights Exist, see HUSBAND AND WIFE, 21 Cyc. 1662 note 28. On Dissolution of Community, see HUSBAND AND WIFE, 21 Cyc. 1700. See also RENOUNCE, *ante*, p. 1333.)

REOPENING. See REHEARING, *ante*, p. 1033.

REORGANIZATION. A term applied to the formation of a new corporation by the creditors and shareholders of a corporation which is in financial difficulties, for the purpose of purchasing the company's works and other property, after the foreclosure of a mortgage or judicial sale.[55] (Reorganization: Of Agricultural Society, see AGRICULTURE, 2 Cyc. 76. Of Bank, see BANKS AND BANKING, 5 Cyc. 573. Of Corporation, see CORPORATIONS, 10 Cyc. 281. Of County, see COUNTIES, 11 Cyc. 363. Of Insurance Company, see INSURANCE, 22 Cyc. 1403, 1419. Of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 237. Of Mutual Benefit Insurance Company, see MUTUAL BENEFIT INSURANCE, 29 Cyc. 22. Of Railroad Company — In General, see RAILROADS, 33 Cyc. 63; By Purchaser at Sale Under Foreclosure of Lien or Mortgage, see RAILROADS, 33 Cyc. 604. Of School-District, see SCHOOLS AND SCHOOL-DISTRICTS. Of State, see STATES. Of Street Railroad, see STREET RAILROADS. Of Telegraph or Telephone Company, see TELEGRAPHS AND TELEPHONES. Of Town, see TOWNS. Of Turnpike or Toll-Road Company, see TOLL-ROADS.)

REPAIR. As a noun, a restoration to a sound state of what had gone into partial decay or dilapidation, or bettering what had been destroyed in part;[56] restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction;[57] restoration to a sound or good state after decay, waste,

all equivalent expressions. Andrews *v.* Boyd, 5 Me. 199, 203. See also Pelham *v.* Middleborough, 4 Gray (Mass.) 57, 59.

Where there is occupation of a farm or land used only for agricultural purposes, the term includes the proceeds of the crops and other products sold or raised thereon, deducting the expense of cultivation. But the proprietor of city lots with improvements upon them, can only derive therefrom, as owner, a fair occupation rent for the purposes for which the premises are adapted. This constitutes the "rents and profits" in the legal sense of the term, of such property. Worthington *v.* Hess, 70 Md. 172, 185, 16 Atl. 534, 17 Atl. 1026; McLaughlin *v.* Barnum, 31 Md. 425.

53. Codding *v.* Newman, 3 Thomps. & C. (N. Y.) 364, 365.

A renunciation does not create a breach of contract.— There must be an adoption of the renunciation. Wells *v.* Hartford Manilla Co., 76 Conn. 27, 35, 55 Atl. 599.

To constitute a renunciation of a trust, there must be an express rejection or a tacit refusal to act; for there can be no renunciation where the trustee is ignorant of the existence of the paper creating the trust. Read *v.* Robinson, 6 Watts & S. (Pa.) 329, 333.

54. *In re* Maxwell, 3 N. J. Eq. 611, 614.

55. Morawetz Corp. [*quoted* in Symmes *v.* Union Trust Co., 60 Fed. 830, 870]. See CORPORATIONS, 10 Cyc. 281.

56. Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 370; State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038.

57. Goodyear Shoe Mach. Co. *v.* Jackson

injury, or partial destruction; supply of loss;[58] reparation; supply of loss; restoration after dilapidation.[59] As a verb, to mend, to restore to a sound state what has

112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

58. Webster Dict. [*quoted* in Farraher *v.* Keokuk, 111 Iowa 310, 313, 82 N. W. 773]. See also Seaboard Nat. Bank *v.* Woesten, 147 Mo. 467, 485, 48 S. W. 939, 48 L. R. A. 279; Blount *v.* Janesville, 31 Wis. 648, 654.

59. Walker Dict. [*quoted* in People *v.* Brooklyn, 21 Barb. (N. Y.) 484, 488; State *v.* Gibson County, 80 Ind. 478, 480, 41 Am. Rep. 821].

The word contemplates an existing structure which has become imperfect by reason of the action of the elements or otherwise. Gagnon *v.* U. S., 193 U. S. 451, 457, 24 S. Ct. 510, 48 L. ed. 745. See also Wattles *v.* South Omaha Ice, etc., R. Co., 50 Nebr. 251, 259, 69 N. W. 785, 61 Am. St. Rep. 554, 36 L. R. A. 424.

The demolition of a structure and its replacement by one of a different character cannot be considered as a repair of that structure. Matter of Repaving Fulton St., 29 How. Pr. (N. Y.) 429, 431.

Power of an executor in the preservation of his decedent's estate, to expend money for the repair of buildings belonging to the estate, extends to the erection of new buildings, in cases where the building has been destroyed by fire or damaged so as to be no longer available. *In re* Freud, 131 Cal. 667, 671, 63 Pac. 1080, 82 Am. St. Rep. 407.

Right of a grantee of a right of way to keep the road in repair is not limited to making good the defects in the original soil by subsidence or washing away; it must include the right of making the road such that it can be used for the purpose for which it was granted. U. S. Pipe Line Co. *v.* Delaware, etc. R. Co., 62 N. J. L. 254, 278, 41 Atl. 759, 42 L. R. A. 572; Missouri, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1908) 107 S. W. 572, 576; Newcomen *v.* Coulson, 5 Ch. D. 133, 143, 46 L. J. Ch. 459, 36 L. T. Rep. N. S. 385, 25 Wkly. Rep. 469.

A statute requiring a railroad company to keep its right of way fences in repair includes the duty to keep gates constituting a part of such fences securely closed. West *v.* Missouri Pac. R. Co., 26 Mo. App. 344, 348.

Includes: New roofing, new plumbing, and whatever is reasonably necessary to keep up the house (Stevens *v.* Milnor, 24 N. J. Eq. 358, 373); replacing a gate if removed, as used in a covenant of a lease to make all necessary repairs (Beach *v.* Crain, 2 N. Y. 86, 93, 49 Am. Dec. 369); the substitution of new curb-stones and gutters in streets for old ones (People *v.* Brooklyn, 21 Barb. (N. Y.) 484, 488]; the removal of an obstruction in a street, under a city ordinance requiring a railroad company to keep a street in good and sufficient repair (Pittsburg, etc., Pass. R. Co. *v.* Pittsburg, 80 Pa. St. 72, 76. See also Arthur *v.* Charleston, 51 W. Va. 132, 134, 41 S. E. 171; Gibson *v.* Huntington, 38 W. Va. 177, 179, 18 S. E. 447, 45 Am. St. Rep. 853, 22 L. R. A. 561); labor and materials furnished in enlarging or extending the promenade of a steamer, taking off and replacing the hurricane deck and sheathing her inside, under a statute giving a materialman a lien for materials, etc., furnished in the repair of a vessel (Donnell *v.* The Starlight, 103 Mass. 227, 232).

Does not include: The raising of an old roadbed to a higher level to prevent its being flooded by a river (Goodspeed's Appeal, 75 Conn. 271, 275, 53 Atl. 728); building a new bridge where the statute directed that highways should be kept in repair and amended (State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038); the construction of a new highway (Todd *v.* Rowley, 90 Mass. 51, 58); the construction of a new ditch, where the statute authorized the levy of assessments for keeping public ditches in repair (Romack *v.* Hobbs, (Ind. 1892) 32 N. E. 307); furnishing materials and labor in placing a lightning rod on a house, under a mechanic's lien law (Drew *v.* Mason, 81 Ill. 498, 499, 25 Am. Rep. 288); the enlarging or elevating of a building by raising it from one to two stories or extending its sides (Douglass *v.* Com., 2 Rawle (Pa.) 262, 264); the putting in of certain fixed machinery in a building (Rose *v.* Persse, etc., Paper Works, 29 Conn. 256, 268); the substitution of one system of heating for another or a new heater unless the old one was worn out (Gulliver *v.* Fowler, 64 Conn. 556, 566, 30 Atl. 852); the erection or maintenance of a guard rail, loose slat door, hurdle, or other device (Reading *v.* Reiner, 167 Pa. St. 41, 42, 31 Atl. 357); the practical rebuilding of a courthouse, or the construction of lasting and permanent improvements, such as extensive additions and enlargements, where the court has inherent power to order repairs to the courtroom, the repairs contemplated being those of necessity (White County *v.* Gevin, 136 Ind. 562, 581, 36 N. E. 237, 22 L. R. A. 402); the enlargement of a public ditch (Weaver *v.* Templin, 113 Ind. 298, 303, 14 N. E. 600); fencing uninclosed land, under a covenant by a tenant to keep the leased premises in repair (Hazlewood *v.* Pennybacker, (Tex. Civ. App. 1899) 50 S. W. 199, 202); labor performed in the removal of a building from one place to another (Trask *v.* Searle, 121 Mass. 229, 230); right to repave streets where the city charter gave right to repair (Hurley *v.* Trenton, 66 N. J. L. 538, 539, 49 Atl. 518); repaving with new and different materials selected by the city, where a city ordinance required a street railway to keep and maintain a portion of the street inside its rails and for two feet outside of them in good and sufficient repair (Dean *v.* Paterson, 67 N. J. L. 199, 200, 50 Atl. 620. See also Williamsport *v.* Williamsport Pass. R. Co., 203 Pa. St. 1, 4, 52 Atl. 51); putting in of sewer connection (Torreson *v.* Walla, 11 N. D. 481, 484, 92 N. W. 834); paving a street, where the authority of county commissioners was to keep streets in repair after certain work had been done on them but where they had not been

been partially destroyed, to make good an existing thing;[60] to restore to a sound or good condition, after injury or partial destruction;[61] to restore to a sound or good state after decay, injury, dilapidation, or partial destruction;[62] to replace or remake; to restore what has been impaired or injured;[63] to restore to a sound state; to mend or refit;[64] to mend, add to, or make over.[65] (Repair: Abandonment of Premises For Lack of, see LANDLORD AND TENANT, 24 Cyc. 1156. Agreement For in Lieu of Rent, see LANDLORD AND TENANT, 24 Cyc. 1190. Claim For or For Damages Arising From Landlord's Failure to Make, as Set-Off in Action For Rent, see LANDLORD AND TENANT, 24 Cyc. 1206. Contractor's Bonds For Bridges, see BRIDGES, 5 Cyc. 1083 note 53. Damages For Breach of Covenant, see DAMAGES, 13 Cyc. 74. Damages to Abutting Land From Failure to Make, see STREETS AND HIGHWAYS. Effect in Establishing Highways by Prescription, see STREETS AND HIGHWAYS. Entry to Make as Affecting Liability For Rent, see LANDLORD AND TENANT, 24 Cyc. 1147. Eviction of Tenant by Failure to Make or by Entry of Landlord to Make, see LANDLORD AND TENANT, 24 Cyc. 1131, 1132. Evidence of — Agreement For, to Vary Written Lease, see EVIDENCE, 17 Cyc. 624; Failure of Master to Make, in Action by Servant For Injuries, see MASTER AND SERVANT, 26 Cyc. 1432; In Action For Injuries, see STREETS AND HIGHWAYS; MUNICIPAL CORPORATIONS, 28 Cyc. 1492; NEGLIGENCE, 29 Cyc. 616; RAILROADS, 33 Cyc. 1286. Failure to Make — In General, see LANDLORD AND TENANT, 24 Cyc. 1115, 1127; As Contributory Negligence, see MASTER AND SERV-

paved (Santa Cruz Rock Pavement Co. *v.* Broderick, 113 Cal. 628, 633, 45 Pac. 863); paving streets in front of a house, under a statute giving a lien for labor and materials furnished for building, altering, repairing, or ornamenting any house or other building, or appurtenance thereto (Smith *v.* Kennedy, 89 Ill. 485, 487); and the filling in of a vacant lot (Alburo *v.* Villanueva, 7 Philippine 277, 279).

60. Mayer *v.* Morehead, 106 Ga. 434, 436, 32 S. E. 349.

61. Weaver *v.* Templin, 113 Ind. 298, 303, 14 N. E. 600; Pittsburg, etc., Pass. R. Co. *v.* Pittsburg, 80 Pa. St. 72, 76.

62. Webster Dict. [*quoted* in Covington *v.* Bullock, 103 S. W. 272, 276, 31 Ky. L. Rep. 688; Levi *v.* Coyne, 57 S. W. 790, 791, 22 Ky. L. Rep. 493; Atty.-Gen. *v.* Montcalm County, 141 Mich. 590, 597, 104 N. W. 792; Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 399, 56 S. W. 449, 48 L. R. A. 285; Verdin *v.* St. Louis, 131 Mo. 26, 87, 123, 33 S. W. 480, 36 S. W. 52; State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038; Martinez *v.* Thompson, 80 Tex. 568, 571, 16 S. W. 334; Gulf, etc., R. Co. *v.* Galveston, 69 Tex. 660, 663, 7 S. W. 520; Missouri, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1908) 107 S. W. 572, 576].

63. Callender *v.* Marsh, 1 Pick. (Mass.) 418, 429.

64. Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 370; State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038.

65. Standard Dict. [*quoted* in Farraher *v.* Keokuk, 111 Iowa 310, 313, 82 N. W. 773].

Meaning practically the same thing as "maintain" see Verdin *v.* St. Louis, 131 Mo. 26, 87, 123, 33 S. W. 480, 36 S. W. 52; Missouri, etc., R. Co. *v.* Bryan, (Tex. Civ. App. 1908) 107 S. W. 572, 576. See also Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 399, 56 S. W. 449, 48 L. R. A. 285.

Meaning "rebuild" in leases of property see LANDLORD AND TENANT, 24 Cyc. 1089 *et seq.*; in references to bridges see BRIDGES, 5 Cyc. 1085.

Distinguished from "build" (State *v.* White, 16 R. I. 591, 594, 18 Atl. 179, 1038); "reconstruct" (Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 534, 26 N. E. 88, 25 Am. St. Rep. 462, 10 L. R. A. 770; Farraher *v.* Keokuk, 111 Iowa 310, 313, 82 N. W. 773; Covington *v.* Bullock, 103 S. W. 276, 277, 31 Ky. L. Rep. 688; Levi *v.* Coyne, 57 S. W. 790, 791, 22 Ky. L. Rep. 493; Vincent *v.* Frelich, 50 La. Ann. 378, 382, 23 So. 373, 69 Am. St. Rep. 436; State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 277, 55 Am. Rep. 361; Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692; St. Louis Car-Coupler Co. *v.* Shickle, etc., Iron Co., 70 Fed. 783, 785).

A contract to "repair and renew" so far as necessary, the gutter of a building, meant that the contractor was to make such repairs and renewals that the existing gutter should do all that it was capable of doing, when in good condition according to its original construction and did not require the construction of a new gutter. Dwight *v.* Ludlow Mfg. Co., 128 Mass. 280, 281.

Power to alter, amend, and repair the streets of the city confers the power to change the grade of a street. Waddell *v.* New York, 8 Barb. (N. Y.) 95, 97.

Putting an oil tank in perfectly good repair means to restore to its former condition, not to change either the form or the material. Ardesco Oil Co. *v.* Richardson, 63 Pa. St. 162, 166. See also Gavan *v.* Norcross, 117 Ga. 356, 361, 43 S. E. 771; Atty.-Gen. *v.* Montcalm County, 141 Mich. 590, 597, 104 N. W. 792.

Under a covenant to repair a tenant is not liable for the extra expense of laying a new floor on an improved plan. Soward *v.* Leggatt, 7 C. & P. 613, 617, 32 E. C. L. 785.

ANT, 27 Cyc. 1251; As Ground For Forfeiture of Franchise, see CORPORATIONS, 10 Cyc. 1283. Forfeiture of Lease by Breach of Covenant, see LANDLORD AND TENANT, 24 Cyc. 1349 note 5. Injuries From Defects in Highway to Person Whose Duty it Was to Make, see STREETS AND HIGHWAYS. Liability — For Defect in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1362; For Injury Caused by Repairing Party-Wall, see PARTY-WALLS, 30 Cyc. 790; For Injury on Bridge, see BRIDGES, 5 Cyc. 1094; Of Abutting Owner For Failure to Make, see MUNICIPAL CORPORATIONS, 28 Cyc. 1435; Of Owner of Vessel, see SHIPPING; Of Tenant For Rent on Failure of Landlord to Make, see LANDLORD AND TENANT, 24 Cyc. 1159; Of Wife's Separate Estate For, see HUSBAND AND WIFE, 21 Cyc. 1444. Mandamus as Remedy to Compel, see BRIDGES, 5 Cyc. 1087; MANDAMUS, 26 Cyc. 296, 301. Maritime Lien For, see MARITIME LIENS, 26 Cyc. 761, 774. Master's Duty to Make, see MASTER AND SERVANT, 26 Cyc. 1127 note 26, 1136. Mechanic's Lien For, see MECHANICS' LIENS, 27 Cyc. 34. Of Bailed Property, see BAILMENTS, 5 Cyc. 176. Of Bridges, see BRIDGES, 5 Cyc. 1078, 1083. Of County Building, see COUNTIES, 11 Cyc. 460. Of Dam, see NAVIGABLE WATERS, 29 Cyc. 321. Of Drains, see DRAINS, 14 Cyc. 1054, 1060. Of Easement, see EASEMENTS, 14 Cyc. 1209. Of Highway, see STREETS AND HIGHWAYS. Of Insured Vessel, see MARINE INSURANCE, 26 Cyc. 676, 705. Of Joint Property, see JOINT TENANCY, 23 Cyc. 490. Of Leased Premises, see LANDLORD AND TENANT, 24 Cyc. 1081. Of Leased Railroad, see RAILROADS, 33 Cyc. 408. Of Life-Estate, see ESTATES, 16 Cyc. 629. Of Mortgaged Property, see MORTGAGES, 27 Cyc. 1264. Of Party-Wall, see PARTY-WALLS, 30 Cyc. 790. Of Patented Article as Constituting Infringement, see PATENTS, 30 Cyc. 985. Of Pent Roads, see PENT ROADS, 30 Cyc. 1379. Of Private Railroad Crossing, see RAILROADS, 33 Cyc. 303. Of Private Road, see PRIVATE ROADS, 32 Cyc. 383. Of Property Dedicated Constituting Acceptance, see DEDICATION, 13 Cyc. 471 note 91. Of Railroad, see RAILROADS, 33 Cyc. 330. Of Railroad Fence or Cattle-Guard, see RAILROADS, 33 Cyc. 311. Of Street — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 854; Assessments and Special Taxes For, see MUNICIPAL CORPORATIONS, 28 Cyc. 1111; Criminal Responsibility For Failure to Make, see MUNICIPAL CORPORATIONS, 28 Cyc. 479; Notice of Defect in, see MUNICIPAL CORPORATIONS, 28 Cyc. 1384; Recognition of Street by Making, see MUNICIPAL CORPORATIONS, 28 Cyc. 837. Of Street Railroad, see STREET RAILROADS. Of Turnpike, see TOLL-ROADS. Of Vessel — Admiralty Jurisdiction, see ADMIRALTY, 1 Cyc. 833; Right of Owner to Cost of, see COLLISION, 7 Cyc. 392. Option of Insurer to Make, see FIRE INSURANCE, 19 Cyc. 888. Payment of Rent by Making, see LANDLORD AND TENANT, 24 Cyc. 1190. Performance of Work as to Under Contract For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1056. Power of Agents to Make, see PRINCIPAL AND AGENT, 31 Cyc. 1387 note 96. Precautions Against Recurrence of Injury as Showing Duty to Make, see NEGLIGENCE, 29 Cyc. 618. Presumption From Making, see BRIDGES, 5 Cyc. 1113 note 10. Priority Between Lien For and Mortgage, see CHATTEL MORTGAGES, 7 Cyc. 39; MECHANICS' LIENS, 27 Cyc. 254; RAILROADS, 33 Cyc. 522. Reimbursement For Made by — Defeated Purchaser at Judicial Sale, see JUDICIAL SALES, 24 Cyc. 71; Husband on Wife's Separate Estate, see HUSBAND AND WIFE, 21 Cyc. 1426. Right of Mortgagor to Timber For, see MORTGAGES, 27 Cyc. 1247. Rights, Duties, and Liabilities of — Cotenant, see TENANCY IN COMMON; Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 271; Guardian, see GUARDIAN AND WARD, 21 Cyc. 97; Landlord and Tenant, see LANDLORD AND TENANT, 24 Cyc. 1081; Life-Tenant, see ESTATES, 16 Cyc. 629; Receiver, see RECEIVERS, *ante*, p. 281; Tenant in Dower, see DOWER, 14 Cyc. 1015 note 54; Trustee, see TRUSTS; Vendor and Vendee, see VENDOR AND PURCHASER. Servant Making, Application of Rule With Regard to Place of Work, Machinery, and Appliances, see MASTER AND SERVANT, 26 Cyc. 1148. Stipulations in Contract For Public Improvements as to, see MUNICIPAL CORPORATIONS, 28 Cyc. 1037. Title to Article Repaired at Expense of Repairer, see ACCESSION, 1 Cyc. 226. Underwriter's Liability For, see MARINE INSURANCE, 26 Cyc. 669. Untenantable Condition of Premises Pending or Failure

of Landlord to Make as Affecting Liability For Rent, see LANDLORD AND TENANT, 24 Cyc. 1156. Use of Soil, Timber, Etc., Within a Highway For, see STREETS AND HIGHWAYS. Validity of Stipulation as to, in Insurance Policy, see FIRE INSURANCE, 19 Cyc. 718. Waiver of Right to Avoid or Forfeit Insurance Implied From Election to Make, see FIRE INSURANCE, 19 Cyc. 889. See also IMPROVEMENTS, 22 Cyc. 1.)

REPAIR TRACK. One upon which cars needing repairs are put, and upon which it is not customary for the shifting engine to come without notice to the overhaulers at work there.[66] (See REPAIR, *ante*, p. 1336.)

REPARATION. Compensation for injuries or wrongs suffered.[67]

REPAVE. To replace an old pavement by a new one.[68] (See PAVE, 30 Cyc. 1160; PAVEMENT, 30 Cyc. 1161.)

REPAY. Return; restore, etc.[69] (See REPAYMENT.)

REPAYMENT. The act of repaying or paying back.[70] (Repayment: As to Party Making Advances on Property Holding it Until, see JOINT ADVENTURES, 23 Cyc. 458. Of Money Loaned by Wife, see FRAUDULENT CONVEYANCES, 20 Cyc. 528. Waiver of, see MARINE INSURANCE, 26 Cyc. 605 note 88.)

REPEAL. As a noun, the abrogation of one statute by another;[71] as a verb, to annul, to call back, to abrogate, by the same power that made or enacted;[72] to revoke; abrogate; to give up, dismiss; to call back, recall, revoke, retract.[73] (Repeal: By Implication, see CONSTITUTIONAL LAW, 8 Cyc. 748; STATUTES. By Subsequent Statute, see CHATTEL MORTGAGES, 6 Cyc. 1063 note 99; STATUTES. Effect of — As to Civil Damage Law, see INTOXICATING LIQUORS, 23 Cyc. 310; As to Homestead Exemption, see HOMESTEADS, 24 Cyc. 463; As to Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 212. Obsolete or Repealed Law, see INTERNAL REVENUE, 22 Cyc. 1606; JUDGMENTS, 23 Cyc. 1071 note 6. Of Corporate Character and General Corporation Law, see CORPORATIONS, 10 Cyc. 1272. Of Covenant by Statute, see CONTRACTS, 9 Cyc. 575 note 80. Of Criminal Law, see LARCENY, 25 Cyc. 54. Of Exemption Law, see JURIES, 24 Cyc. 207. Of Existing Laws, by Constitutional Provision, see INTOXICATING LIQUORS, 23

66. Richmond, etc., R. Co. *v.* Norment, 84 Va. 167, 175, 4 S. E. 211, 10 Am. St. Rep. 827, where it is said that with such a track overhaulers can do their work without being subjected to unnecessary danger.

67. Arkansas, etc., R. Co. *v.* Harris, 62 Ark. 452, 457, 36 S. W. 186, construing "proper reparation" employed in a statute requiring the posting of freight schedules.

68. Ten Eyck *v.* Albany, 65 Hun (N. Y.) 194, 197, 20 N. Y. Suppl. 157, 199.

The removal of the pavement forty feet in width through the center of a street two hundred feet wide, and the paving of a roadway twenty-five feet long each side of the street instead, constitute a repavement of the street, under Detroit City Charter (Local Acts (1887), p. 874, § 35), providing that the expense of paving a street may be assessed on adjoining property, but that the cost of repaving shall be paid by the city out of the repaving fund. Dickinson *v.* Detroit, 111 Mich. 480, 481, 69 N. W. 728.

Replacing of the flagging and the curb and gutter stones not a repavement see *In re* Roberts, 25 Hun (N. Y.) 371, 375.

Flagging and reflagging of sidewalks and the setting of curb and gutter stones not a repavement see *In re* Fay, 12 Hun (N. Y.) 490, 491.

69. Grant *v.* Dabney, 19 Kan. 388, 390, 27 Am. Rep. 125, where it is said that it does not necessarily mean to pay money.

In an act granting aid to a railroad "repay" purports a payment to the state of the moneys granted by the state, but does not of itself necessarily imply to repay the moneys as moneys advanced by way of loan to the defendant. People *v.* Central Pac. R. Co., 76 Cal. 29, 33, 18 Pac. 90, 93.

70. Century Dict.

71. Butte, etc., Consol. Min. Co. *v.* Montana Ore Purchasing Co., 24 Mont. 125, 133, 60 Pac. 1039.

Applied to statutes, it is, as its etymology imports, that the statute has been recalled or revoked. Oakland Paving Co. *v.* Hilton, 69 Cal. 479, 485, 11 Pac. 3, 6; Jessee *v.* De Shong, (Tex. Civ. App. 1907) 105 S. W. 1011, 1014.

Distinguished from "amendment" see State *v.* Hubbard, 148 Ala. 391, 394, 41 So. 903, 905.

Distinguished from "suspension" see Heinssen *v.* State, 14 Colo. 228, 234, 23 Pac. 995, 997.

A repeal by implication must be of necessary implication. Anderson L. Dict. [*quoted* in State *v.* Walbridge, 119 Mo. 383, 389, 24 S. W. 457, 41 Am. St. Rep. 663; State *v.* Wells, 210 Mo. 601, 109 S. W. 763].

72. State *v.* Patrick, 65 Mo. App. 653, 661.

73. Century Dict. [*quoted* in Wilson *v.* People, 36 Colo. 418, 85 Pac. 187, 189].

It usually implies a recalling of the act by the power that made or enacted it.

Cyc. 90. Of Franchises or Charter, see CONSTITUTIONAL LAW, 8 Cyc. 814. Of Law Creating District, see LEVEES, 25 Cyc. 198 note 77. Of Law Giving Right to Change Venue, see CONSTITUTIONAL LAW, 8 Cyc. 1032 note 31. Of Letters Patent, see PATENTS, 30 Cyc. 907. Of Lien Law, see MECHANICS' LIENS, 27 Cyc. 23. Of Liquor Law, see INTOXICATING LIQUORS, 23 Cyc. 93 note 45. Of Local Option, see INTOXICATING LIQUORS, 23 Cyc. 104. Of Municipal Charter, see MUNICIPAL CORPORATIONS, 28 Cyc. 253. Of Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 383. Of Statute, see FRAUDULENT CONVEYANCES, 20 Cyc. 344; JUDGMENTS, 23 Cyc. 842 note 34; LICENSES, 25 Cyc. 613; MANDAMUS, 26 Cyc. 425; MORTGAGES, 27 Cyc. 1752 note 76; STATUTES. Of Validating Act, see INTEREST, 22 Cyc. 1522 note 39. Reservation of Power to, see CONSTITUTIONAL LAW, 8 Cyc. 901 note 92; CORPORATIONS, 10 Cyc. 1087. Validity of Legislative, see CORPORATIONS, 10 Cyc. 1273.)

REPEALING ACT or ORDINANCE. A total abrogation of the law repealed.[74] (See REPEAL, *ante*, p. 1340; and, generally, STATUTES.)

REPEALING CLAUSE. Such an express enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys.[75] (See REPEAL, *ante*, p. 1340; REPEALING ACT; and, generally, STATUTES.)

REPEATED. A term applied to telegraph messages, and held to mean telegraphed back to the originating office for comparison.[76] (See, generally, TELEGRAPHS AND TELEPHONES.)

REPEATING. See ELECTIONS, 15 Cyc. 453.

REPELLITUR A SACRAMENTO INFAMIS. A maxim meaning "An infamous person should not be allowed to take an oath." [77]

REPERTUM AD UNIVERSOS QUOD PUBLICE FIT PER MAJOREM PARTEM. A rule of the Roman law, said to mean where no special provision is made by a charter, the whole are bound by the decision of the majority of the corporators present.[78]

REPETITION. In the civil law a demand or action for the restoration of money paid under mistake, or goods delivered by mistake or on an unperformed condition. In Scotch law, the act of reading over a witness's deposition, in order that he may adhere to it or correct it at his choice. The same as RECOLEMENT (*q. v.*) in the French law.[79] (Repetition: By Others, see LIBEL AND SLANDER, 25 Cyc. 430. Of Averment, see HOMICIDE, 21 Cyc. 865 note 35. Of Instruction, see CRIMINAL LAW, 12 Cyc. 661; TRIAL. Of Objection to Evidence, see CRIMINAL LAW, 12 Cyc. 564; TRIAL. Of Slander or Libel, In General, see JUDGMENTS, 23 Cyc. 1187 note 41; LIBEL AND SLANDER, 25 Cyc. 370. With Authorship Credited to Others, see HOMICIDE, 21 Cyc. 849 note 65; LIBEL AND SLANDER, 25 Cyc. 363.)

REPLEADER. See JUDGMENTS, 23 Cyc. 780; PLEADING, 31 Cyc. 511.

REPLENISH. Literally, to fill again, to fill up.[80]

Century Dict. [*quoted* in Wilson *v.* People, 36 Colo. 418, 85 Pac. 187, 189].

74. Ashton *v.* Rochester, 60 Hun (N. Y.) 372, 376, 14 N. Y. Suppl. 855.

75. Duffus *v.* Howard Furnace Co., 8 N. Y. App. Div. 567, 574, 40 N. Y. Suppl. 925 [*quoting* Butler *v.* Palmer, 1 Hill (N. Y.) 334], where it is said: "These rights are but an incident to the statute, and fall with it, unless saved by express words in the repealing clause."

76. Bennett *v.* Western Union Tel. Co., 2 N. Y. Suppl. 365.

77. Morgan Leg. Max.

78. Sutter *v.* Dutch Church, 3 Grant (Pa.) 336, 343 [*quoting In re* St. Mary's Church, 7 Serg. & R. (Pa.) 517].

79. Black L. Dict.

80. Bynum *v.* Miller, 89 N. C. 393, 395, where it is said: "Replenish is derived from the Latin words, *re* 'again,' and *plenus* 'full.' . . . Nothing can be filled up that is already full. . . . To replenish a thing necessarily implies exhaustion, reduction or diminution in the quantity of the commodity."

REPLEVIN

Edited by William A. Martin*

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*Author of "Adverse Possession," 1 Cyc. 968; "Appearances," 3 Cyc. 500; "Costs," 11 Cyc. 1. Editor of "Conspiracy," 8 Cyc. 615; "Dedication," 13 Cyc. 434; and "Dismissal and Nonsuit," 14 Cyc. 387.

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CROSS-REFERENCES

For Matters Relating to:
Consolidation of Actions, see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 399 note 34.
Detinue, see DETINUE, 14 Cyc. 239.
Election of Remedies, see ELECTION OF REMEDIES, 15 Cyc. 254.
Presenting Claim For Possession Against Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 454.
Proceedings For Establishment and Determination of Claims to Property Taken Under:
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Imprisonment on Execution Is Not "Imprisonment For Debt," see CONSTITUTIONAL LAW, 8 Cyc. 878.
Liability of Justice Acting Without Jurisdiction in, see JUSTICES OF THE PEACE, 24 Cyc. 423.
Of a Person, see HABEAS CORPUS, 21 Cyc. 284.
Pending as Ground For Abatement of Other Action, see ABATEMENT AND REVIVAL, 1 Cyc. 30 note 48.
Prevention of as Ground For Arrest of Defendant, see ARREST, 3 Cyc. 907.
Recovery of Damages For Wrongful, see SHERIFFS AND CONSTABLES; TRESPASS; TROVER AND CONVERSION.
Revival on Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 89 note 36.
Trespass, see TRESPASS.
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Writ De Homine Replegiando, see HABEAS CORPUS, 21 Cyc. 284.

I. RIGHT OF ACTION AND DEFENSES.

A. In General — 1. NATURE AND SCOPE OF REMEDY — a. In General. Replevin is a form of action which lies to regain possession of personal chattels which have

been unlawfully taken or detained, and also for damages for the taking and detention.[1] Replevin originated in common law as a remedy against the wrongful exercise of the right of distress for rent, and for several centuries the use of it in other takings was rare.[2] According to some authorities replevin could only be maintained in case of a wrongful distress,[3] and under some statutes has been limited to such cases.[4] But by the great weight of authority the remedy is not and never was restricted to cases of wrongful distress in the absence of any statutes relating to the subject but is a proper remedy for any unlawful taking.[5] In its origin the allowance of the writ was confined to cases where there had been a

1. *California.*—Fredericks *v.* Tracy, 98 Cal. 658, 659, 33 Pac. 750; Lazord *v.* Wheeler, 22 Cal. 139, 142.

Delaware.— Maclary *v.* Turner, 9 Houst. 281, 284, 32 Atl. 325.

Maryland.—Cullum *v.* Bevans, 6 Harr. & J. 469.

Michigan.— Stevenson *v.* Taylor, 2 Mich. N. P. 95.

Mississippi.— Burrage *v.* Melson, 48 Miss. 237.

North Dakota.— Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139.

Pennsylvania.— McJunkin *v.* Mathers, 158 Pa. St. 137, 27 Atl. 873; Fisher *v.* Whoollery, 25 Pa. St. 197; Boyle *v.* Rankin, 22 Pa. St. 168; Weaver *v.* Lawrence, 1 Dall. 156, 1 L. ed. 79. See also Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661; Healey *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39; 3 Blackstone Comm. 145; 1 Chitty Pl. 162; 2 Greenleaf Ev. 560; Martin Civ. Proc. § 105.

Other definitions are: Replevin is the name of one of the common-law actions, the distinguishing features of which are that it is brought to obtain possession of specific chattel property, and is prosecuted by a provisional seizure and delivery to plaintiff of the thing in suit. Abbott L. Dict. Replevin is a personal action *ex delicto* brought to recover possession of goods unlawfully taken (generally, but not only applicable to the taking of goods distrained for rent), the validity of which taking it is the mode of contesting if the party from whom the goods were taken wishes to have them back in specie, whereas, if he prefer to have damages instead the validity may be contested by action of trespass or unlawful distress. The word means a redelivery to the owner of the pledge or thing taken in distress. Wharton L. Lex. (7th ed.) p. 712. "Replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods and chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels." Gilbert Repl. 58 [*cited* in Williamson *v.* Ringgold, 30 Fed. Cas. No. 17,755, 4 Cranch C. C. 39].

The term "replevy" means "to redeliver goods which have been distrained, to the original possessor of them, on his giving pledges." 2 Bouvier L. Dict. 450 [*cited* in Kirk *v.* Morris, 40 Ala. 225, 229]. *Compare* ATTACHMENT, 4 Cyc. 735. See also Humes *v.* Scott, 130 Ala. 281, 30 So. 788; Steuer *v.* Maguire, 182 Mass. 575, 66 N. E. 706.

Replevin is a summary proceeding whereby, upon proper security the pledge is redelivered where property is pledged as security and the question of right is to be subsequently determined. Hewitson *v.* Hunt, 8 Rich. (S. C.) 106, 110.

Bail trover, in Georgia see Ga. Code (1896) § 4604. See also TROVER AND CONVERSION.

Damages see *infra*, VI.

Defendant's taking, detention, and possession see *infra*, I, D.

Plaintiff's title and right to possession see *infra*, I, C.

Property subject see *infra*, I, B.

2. 3 Blackstone Comm. 145; Coke Litt. 145*b*; Martin Civ. Proc. § 506; 2 Roscoe Actions 621. And see Sinnott *v.* Peiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565; Atty.-Gen. *v.* Brown, 1 Swanst. 265, 36 Eng. Reprint 384, 1 Wils. Ch. 323, 37 Eng. Reprint 138.

3. Wheelock *v.* Cozzens, 6 How. (Miss.) 279; Hewitson *v.* Hunt, 8 Rich. (S. C.) 106; 3 Blackstone Comm. 145. And see Smith *v.* Crockett, Minor (Ala.) 277; Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542.

4. Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324, this, however, is not the law under the present statutes of this state.

5. *Indiana.*— Daggett *v.* Robins, 2 Blackf. 415, 21 Am. Dec. 752.

Kentucky.— Bouldin *v.* Alexander, 7 T. B. Mon. 424.

Massachusetts.— Ilsley *v.* Stubbs, 5 Mass. 280.

New Hampshire.— Dame *v.* Dame, 43 N. H. 37.

New Jersey.— Caldwell *v.* West, 21 N. J. L. 411; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593.

New York.— Ely *v.* Ehle, 3 N. Y. 506; Clark *v.* Skinner, 20 Johns. 465, 11 Am. Dec. 302; Thompson *v.* Button, 14 Johns. 84; Pangburn *v.* Partridge, 7 Johns. 140, 5 Am. Dec. 250.

United States.— Slocum *v.* Mayberry, 2 Wheat. 1, 4 L. ed. 169.

England.— Farrell *v.* Beresford, 1 Ball & B. 328; George *v.* Chambers, 2 Dowl. P. C. N. S. 783, 7 Jur. 836, 17 L. J. M. C. 94, 11 M. & W. 149, 159, in which it was said by Parke, B., "though in ordinary practice it is applied only to a distress for rent, yet a replevin is, at common law, a remedy applicable in all cases where goods are improperly taken"; Mellor *v.* Leather, 1 E. & B. 619, 17

tortious taking,[6] but by virtue of statutes the remedy has been extended to cases of unlawful detention, although the original taking was lawful.[7] The statutory action of "claim and delivery" has been held to be only a modification of the common-law remedy of replevin,[8] and substantially the same as that remedy.[9]

b. An Action at Law and One Ex Delicto. Replevin is strictly a proceeding at law, it cannot be invoked as in an equitable suit for rescission or cancellation of a contract.[10] The action is one *ex delicto*, and all persons who participate in the tort are liable either jointly or severally.[11]

c. As a Possessory Action. Replevin being primarily a possessory action,[12]

Jur. 709, 22 L. J. M. C. 76, 72 E. C. L. 619; Allen *v.* Sharp, 2 Exch. 352, 17 L. J. Exch. 209; Anonymous, 1 Moll. 390; Shannon *v.* Shannon, 1 Sch. & Lef. 324; *Ex p.* Chamberlain, 1 Sch. & Lef. 320; Dove *v.* Spurvey, 2 Stark. 287, 3 E. C. L. 412; 1 Chitty Pl. 157; Martin Civ. Proc. 93, in which it was said that the use of replevin in other takings than distress for rent "was so rare for several centuries that we find Blackstone asserting that it lies only against a distrainer. But this restriction of the remedy never existed even in theory, and was contradicted by occasional decisions; and after Blackstone wrote, his statement was challenged as erroneous, and the action was held to lie in all wrongful takings, except when done under process against the plaintiff."

6. See *infra*, I, D, 1.

7. See *infra*, I, D, 2, a.

8. Gila Valley, etc., R. Co. *v.* Gila County, 8 Ariz. 292, 71 Pac. 913; Krebs Hop Co. *v.* Taylor, (Oreg. 1908) 97 Pac. 44, 98 Pac. 464. See also Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499; and *infra*, I, A, 2.

Claim and delivery is an action at law for the recovery of personal chattels wrongfully taken and detained or wrongfully detained, with damages which the wrongful taking or detention has occasioned. Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

9. Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077; Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216; Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277; Surles *v.* Sweeny, 11 Oreg. 21, 4 Pac. 469; Moser *v.* Jenkins, 5 Oreg. 447.

10. Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750; Moriarty *v.* Stofferan, 89 Ill. 528; Thompson *v.* Peck, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201; Penton *v.* Hansen, 13 Okla. 450, 73 Pac. 843.

11. Christy *v.* Ashlock, 93 Ill. App. 651, 654; Wharton L. Lex. (7th ed.) 712. To the same effect see Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109 [*citing* Chaffee *v.* U. S., 18 Wall. (U. S.) 516, 538, 21 L. ed. 908] (holding that the verdict therefor may be against one and in favor of another defendant); Hecht *v.* Heimann, 81 Mo. App. 370 (construing Rev. St. § 2925, relating to costs); Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077; May *v.* Newingham, 17 Pa. Super. Ct. 469.

12. *Delaware.*— Maclary *v.* Turner, 9 Houst. 281, 32 Atl. 325.

Florida.— Johnson *v.* Clutter Music House, 55 Fla. 385, 46 So. 1.

Indiana.— Boruff *v.* Stipp, 126 Ind. 32, 25 N. E. 865; Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Hall *v.* Durham, 113 Ind. 327, 15 N. E. 529; Van Gorder *v.* Smith, 99 Ind. 404; Meiser *v.* Smith, 2 Ind. App. 37, 27 N. E. 871; Consolidated Tank Line Co. *v.* Bronson, 2 Ind. App. 1, 28 N. E. 155; Whitehead *v.* Coyle, 1 Ind. App. 450, 27 N. E. 716.

Indian Territory.— Hancock *v.* Schockman, 4 Indian Terr. 138, 69 S. W. 826.

Kansas.— Johnson *v.* Boehme, 66 Kan. 72, 71 Pac. 243, 97 Am. St. Rep. 357.

Maine.— Smith *v.* Grant, 56 Me. 255.

Massachusetts.— Wheeler *v.* Train, 3 Pick. 255.

Michigan.— Eldridge *v.* Sherman, 70 Mich. 266, 38 N. W. 255; Stevenson *v.* Taylor, 2 Mich. N. P. 95, 96, where it is said that replevin, under the Michigan statute, is peculiarly a possessory action.

Missouri.—Mattison *v.* Hooberry, 104 Mo. App. 287, 78 S. W. 642.

New Hampshire.— Mitchell *v.* Roberts, 50 N. H. 486.

New York.—Fischer *v.* Cohen, 22 Misc. 117, 48 N. Y. Suppl. 775; Sharp *v.* Whittenhall, 3 Hill 576. See also Sinnott *v.* Feiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565; Wood *v.* Orser, 25 N. Y. 348; Roach *v.* Curtis, 50 Misc. 122, 100 N. Y. Suppl. 411 [*affirmed* in 115 N. Y. App. Div. 765, 101 N. Y. Suppl. 333 (*affirmed* in 191 N. Y. 387, 84 N. E. 283)].

North Dakota.— Parliman *v.* Young, 2 Dak. 175, 4 N. W. 139, 711.

Oregon.— Jenkins *v.* Ontario, 44 Oreg. 72, 74 Pac. 466, 102 Am. St. Rep. 625; La Vie *v.* Crosby, 43 Oreg. 612, 74 Pac. 220.

Pennsylvania.— McJunkin *v.* Mathers, 158 Pa. St. 137, 27 Atl. 873; Bower *v.* Tallman, 5 Watts & S. 556.

Rhode Island.— Warren *v.* Leiter, 24 R. I. 36, 52 Atl. 76.

United States.— Sloan *v.* Merchants' Sav., etc., Co., 160 Fed. 654, 88 C. C. A. 20.

See 42 Cent. Dig. tit. "Replevin," § 1.

The primary object of the action of replevin is to enable one who claims title, either generally or specifically, together with the immediate right of possession thereof, in and to any goods and chattels in the possession of another, who refuses to deliver them to the claimant on demand, to possess himself thereof in specie. Smith *v.* Grant, 56 Me. 255; Walker *v.* Osgood, 53 Me. 422; Warren *v.* Leiter, 24 R. I. 36, 52 Atl. 76. The primary purpose of replevin is to recover the posses-

it is obvious that the action cannot be sustained for the purpose of trying the right of property.[13]

d. As a Mixed Action. Replevin is what is usually called a mixed action,[14] being partly *in rem* and partly *in personam; in rem* so far as specific recovery of the chattels is concerned, and *in personam* as to the damages.[15]

e. Compared With and Distinguished From Other Remedies.[16] The proceeding in replevin being partly *in rem*[17] is therefore distinguishable from trespass and trover, in which action damages only are sought to be recovered.[18] However, in all cases where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie.[19] In the choice of remedies, as between

sion in specie, not its value. La Vie *v.* Crosby, 43 Oreg. 612, 74 Pac. 220.

13. Taggart *v.* Hart, Brayt. (Vt.) 215.

14. *Compare* ACTIONS, 1 Cyc. 731.

15. Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750; Krebs Hop Co. *v.* Taylor, (Oreg. 1908) 98 Pac. 494, 97 Pac. 44. See also Sharp *v.* Whittenhall, 3 Hill (N. Y.) 576; Fisher *v.* Whoollery, 25 Pa. St. 197 (holding that replevin in its inception is a mixed action, being a demand for the thing itself, and also for damages for the taking and detention); Bower *v.* Tallman, 5 Watts & S. (Pa.) 556; Waite *v.* Triblecock, 28 Fed. Cas. No. 17,046, 5 Dill. 547, 548, where it is said: "The action of replevin is not one *in rem*, and to give jurisdiction over the person he must be a party."

In Pennsylvania replevin is not altogether a proceeding *in rem*, but also against defendant personally. Bower *v.* Tallman, 5 Watts & S. 556.

In Rhode Island replevin is so far a proceeding *in rem* that unless the *res* has actually been taken possession of by the officer there is no case before the court and hence nothing to try. Warren *v.* Leiter, 24 R. I. 36, 52 Atl. 76; *In re* Alton Mfg. Co., 158 Fed. 367.

Where the property is not seized upon the writ, and plaintiff proceeds for its value, the suit becomes essentially a personal action and is governed by the same principles as an action for trover for conversion of the property. McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689.

16. **Distinguished from:** Detinue see DETINUE, 14 Cyc. 242 note 6. Possessory warrant see POSSESSORY WARRANT, 31 Cyc. 954 *et seq.*

17. See *supra*, I, A, 1, d.

18. Sinnott *v.* Feiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565 (holding that the action remains essentially to recover possession of chattels, as distinguished from actions for trespass or trover to recover damages for the seizure of, or for the value of the property); Sharp *v.* Whittenhall, 3 Hill (N. Y.) 576; Bower *v.* Tallman, 5 Watts & S. (Pa.) 556. See also TRESPASS; TROVER AND CONVERSION.

Distinguished from trespass.— The whole proceeding of replevin, at common law, is distinguished from that in trespass in this, among other things, that, while the latter is intended to procure a compensation in damages for goods wrongfully taken out of the actual or constructive possession of plaintiff, the object of the former is to procure the restitution of the goods themselves; and this it effects by a preliminary *ex parte* interference by the officer of the law with the possession. Mennie *v.* Blake, 6 E. & B. 842, 2 Jur. N. S. 953, 25 L. J. Q. B. 399, 4 Wkly. Rep. 739, 88 E. C. L. 842, holding likewise that the action of replevin, apart from the replevin itself, is again distinguished from trespass by this, that, at the time of declaring, the supposed wrongful possession has been put an end to, and the litigation proceeds for the purpose of deciding whether he, who by the supposition was originally possessed, and out of whose possession the goods were taken, and to whom they have been restored, ought to retain that possession, or whether it ought to be restored to defendant.

"**The essential distinction between trover and replevin** as regards the rule of damages, aside from the element of willfulness in the taking or detention, is briefly this: In trover the title to the property is regarded as having passed to the defendant, who is therefore liable for its value, simply, with interest. In replevin the title is treated as still in the plaintiff, who is therefore to recover not only the chattel itself, or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit." Sedgwick Dam. (8th ed.) § 528 [*quoted* in La. Vie *v.* Crosby, 43 Oreg. 612, 616, 74 Pac. 220].

19. Sawtelle *v.* Rollins, 23 Me. 196; Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593; Marshall *v.* Davis, 1 Wend. (N. Y.) 109, 19 Am. Dec. 463; Gates *v.* Bent, 31 Nova Scotia 544; Cook *v.* Fowler, 12 U. C. Q. B. 568.

"**Replevin is a substitute** for trespass and trover, to maintain either of which, in addition to his qualified property in the goods, [plaintiff] must have shown either that he had or was entitled to the immediate possession of them." Frisbee *v.* Langworthy, 11 Wis. 376, 379 [*citing* with approval Wheeler *v.* McFarland, 10 Wend. (N. Y.) 318 (*reversed* on other grounds in 26 Wend. 467)]; 1 Chitty Pl. 168, 169 [*quoted* in Lowe *v.* Wing, 56 Wis. 31, 34, 13 N. W. 892]. See also Hass *v.* Prescott, 38 Wis. 146; Saxton *v.* Williams, 15 Wis. 292. In some jurisdictions where the property seized in replevin has been returned to defendant, and plaintiff takes judgment absolutely for the value

replevin and trover, or trespass, the preference is with the former, in that it restores the property itself.[20]

2. Statutory Provisions and Remedies — a. In General. In some jurisdictions the action of replevin is still controlled by the common law, subject to modifications thereof made by the provisions of the code regulating the action.[21] While in other jurisdictions the common-law writ of replevin has been abolished, and the action cannot be maintained except under the statute.[22] In some jurisdictions the statutory remedy given in lieu of the common-law action of replevin is styled claim and delivery.[23]

b. Retroactive Operation. An action of replevin pending at the time of the

thereof and damages for the detention, the action of replevin performs the functions and accomplishes the results of an action in trover, and in such cases replevin and trover are concurrent remedies, governed by the same rules. Parmalee *v.* Loomis, 24 Mich. 242; Brewster *v.* Carmichael, 39 Wis. 456.

Replevin in the cepit will only lie where an action of trespass might have been maintained. Barrett *v.* Warren, 3 Hill (N. Y.) 348; Caron *v.* Graham, 18 U. C. Q. B. 315. The action of replevin is granted on tortious taking, and sounds in damages like an action of trespass to which it is extremely analogous. Williamson *v.* Ringgold, 30 Fed. Cas. No. 17,755, 4 Cranch C. C. 39.

Trover or replevin in the detinet will lie against a *bona fide* purchaser from one who had tortiously taken the goods. Neither trespass nor replevin in the *cepit* will lie in such case. Barrett *v.* Warren, 3 Hill (N. Y.) 348, 350, Cowen, J., dissenting, holding that trespass would lie against every possessor under the wrong-doer, except he be a *bona fide* purchaser for a valuable consideration.

Where there is not sufficient evidence of conversion to support an action of trover, replevin will not lie. Smalley *v.* Gallagher, 26 U. C. C. P. 531.

20. Burrage *v.* Melson, 48 Miss. 237.

21. *Arkansas.*— Eaton *v.* Langley, 65 Ark. 448, 450, 47 S. W. 123, 42 L. R. A. 474 [construing Sandells & H. Dig. § 6398]; Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179; McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210.

California.— Wellman *v.* English, 38 Cal. 583.

Iowa.— Chadwick *v.* Miller, 6 Iowa 34, 39, where it is said: "The plaintiff misconceives, probably from regarding the statute provisions as the whole of the law of replevin, whilst, in truth, the body and substance of it lies in the common law, and the statute contains a few special provisions only, upon the subject, which are to be understood with a reference to the common law."

Kansas.— Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482; Batchelor *v.* Walburn, 23 Kan. 733.

Michigan.— McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689; Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653.

Minnesota.— Coit *v.* Waples, 1 Minn. 134. See also Benjamin *v.* Smith, 43 Minn. 146, 44 N. W. 1083.

Missouri.— Eads *v.* Stephens, 63 Mo. 90; Hamilton *v.* Clark, 25 Mo. App. 428.

New York.— Vogel *v.* Badcock, 1 Abb. Pr. 176; Corbin *v.* Milton, 27 How. Pr. 76.

North Carolina.— Duffy *v.* Murrill, 31 N. C. 46.

Pennsylvania.— Rosenthal *v.* Lehman, 13 Phila. 1.

South Carolina.— Moorhead *v.* Barrett, Cheves 99. See also Pemble *v.* Clifford, 2 McCord 31, holding that the statute of 11 Geo. 2, providing that an avowant in replevin may, if the condition of the bond be broken, take an assignment thereof and bring an action of debt, although not binding as a statute law within the state, had become binding by usage and acquiescence.

South Dakota.— Simpson Brick-Press Co. *v.* Marshall, 5 S. D. 528, 59 N. W. 728.

See 42 Cent. Dig. tit. "Replevin," § 2.

"**The distinction** between the old action of replevin and the action under the Code has been many times pointed out by this court." Hart *v.* Moulton, 104 Wis. 349, 352, 80 N. W. 599, 76 Am. St. Rep. 881; Brewster *v.* Carmichael, 39 Wis. 456; Bigelow *v.* Doolittle, 36 Wis. 115; Dudley *v.* Ross, 27 Wis. 679.

"**The action of replevin is not an extraordinary remedy in derogation of the common law,** like the proceeding by attachment. On principle, the owner of personal property ought to have the same right to recover the possession of it in specie when wrongfully detained, as he has to recover a debt, and in either proceeding the law should be equally liberal in allowing amendments in furtherance of justice." Martinez *v.* Martinez, 2 N. M. 464, 469.

22. Bennett *v.* Allen, 30 Vt. 684; Miller *v.* Warner, Brayt. (Vt.) 168.

Replevin is sui generis and governed by its own provisions as found in the code. Ellison *v.* Lewis, 57 Miss. 588, 590.

In Virginia, as early as 1823, the common-law form of action of replevin was abolished for all purposes except cases of distress for rent (Vaiden *v.* Bell, 3 Rand. 448), and in 1849 it was abolished altogether, and for all purposes (Baltimore, etc., R. Co. *v.* Hamilton, 16 Fed. 181).

23. *Arizona.*— Gila Valley, etc., R. Co. *v.* Gila County, 8 Ariz. 292, 71 Pac. 913; Carroll *v.* Byers, 4 Ariz. 158, 36 Pac. 499.

California.— Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Idaho.— Hull *v.* Hull, 1 Ida. 361.

enactment of a statute changing or modifying the existing law as to the right of action or mode of procedure in replevin is not affected thereby.[24]

c. What Statute Controls — (i) *In General.* The provisions of the statute last enacted as to the right of action and procedure must control as far as they go; yet in certain cases former acts, not expressly repealed, may be brought to their aid so far as is necessary to prevent a failure of justice.[25]

(ii) *General and Special Statutes.* In some jurisdictions, by statute, replevin for cattle impounded will not lie under the general replevin law, but under special provisions of statute, giving a writ of replevin to one whose beasts are distrained or impounded.[26] So where a statute requires proceedings in replevin before justices to be the same as proceedings before the circuit court, a subsequent statute altering the proceedings before the circuit court affects likewise proceedings before justices.[27]

B. Property Subject to Replevin — 1. In General — a. Real Property.[28] The general rule is that a writ of replevin is effectual for the delivery of personal property only,[29] and rights in or injuries to real property cannot be determined in such actions.[30]

b. Personal Property — (i) *In General.* The general rule is that all personal property,[31] property attached to the property of defendant,[32] and animate as well as inanimate movable property,[33] unlawfully taken or retained from the owner thereof, is the subject of an action of replevin. However, the action of replevin will not lie for property on defendant's person,[34] property received in exchange for plaintiff's property,[35] shares in a corporation,[36] property destroyed and not in existence at the commencement of the action,[37] or for a coffin, with the corpse inclosed within it, after burial.[38]

New York.— Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104].

North Carolina.— Hooker *v.* Latham, 118 N. C. 179, 21 S. E. 1004.

See 42 Cent. Dig. tit. "Replevin," § 2; and *supra*, text and note 2.

24. This is merely an application of the well-established rule that a statute should never be held to be retroactive unless such a construction is required by express provision or by unavoidable implication. Smith *v.* Lyon, 44 Conn. 175; New York Nat. Park Bank *v.* Goddard, 87 Hun (N. Y.) 487, 34 N. Y. Suppl. 1144 [*affirming* 9 Misc. 626, 30 N. Y. Suppl. 417]; Vaiden *v.* Bell, 3 Rand. (Va.) 448. See also Statutes.

25. Collins *v.* Hough, 26 Mo. 149; Boylston Ins. Co. *v.* Davis, 74 N. C. 78.

26. Marx *v.* Woodruff, 50 Mich. 361, 15 N. W. 510; Campau *v.* Konan, 39 Mich. 362; Johnson *v.* Wing, 3 Mich. 163.

27. McKnight *v.* Crinnion, 22 Mo. 559.

28. Property attached to or severed from realty see *infra*, I, B, 2.

Title to real estate as within scope of inquiry see *infra*, V, B, 2.

29. See *infra*, I, B, 1, b, (I).

30. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Ricketts *v.* Dorrel, 55 Ind. 470; Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71; Vausse *v.* Russel, 2 McCord (S. C.) 329.

For a freehold illegally distrained replevin will not lie. Vausse *v.* Russel, 2 McCord (S. C.) 329.

31. See cased cited *infra*, note 32 *et seq.*

For goods in custody of another court see Courts, 11 Cyc. 1010 text and notes 87, 88.

32. Cheney *v.* Eastern Transp. Line, 59 Md. 557.

33. Eddy *v.* Davis, 35 Vt. 247, holding that the term "goods" in Vt. Comp. St. c. 33, §§ 1, 14 [Gen. St. 320, § 13], providing that the action of replevin may be maintained for goods unlawfully taken or detained from the owner thereof, applies to animate as well as inanimate movable property, and therefore cattle are repleviable.

Cattle impounded see *infra*, I, B, 1, b, (xi).

34. Maxham *v.* Day, 16 Gray (Mass.) 213, 77 Am. Dec. 409, holding that a writ of replevin gives a sheriff no authority to take from the person of defendant, without his consent, an article of personal ornament, even though worn by him for the sole purpose of keeping it beyond the reach of legal process. The exercise of such power by the sheriff is not only contrary to right and unsupported by authority, but is also inconsistent with sound policy.

35. Vogt Mfg., etc., Co. *v.* Oettinger, 88 Hun (N. Y.) 83, 34 N. Y. Suppl. 729, 2 N. Y. Annot. Cas. 275.

Replevin of slaves see Gullett *v.* Lamberton, 6 Ark. 109; Morris *v.* Cannon, 1 Harr. (Del.) 220.

36. Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624, on the ground that shares in a corporation are incorporeal and intangible property, incapable of seizure.

37. Burr *v.* Daugherty, 21 Ark. 559.

38. Guthrie *v.* Weaver, 1 Mo. App. 136.

Corpse.— Under Howell Annot. St. Mich. § 6856, providing for replevin where "personal

(II) *Records, Writings, and Documents in General.* The general rule is that replevin will lie for the recovery of records, documents, and writings in general, of value, unlawfully detained.[39] However, replevin will not lie to recover a deed where the title to land is involved in the action.[40]

(III) *Bills, Notes, Checks, Etc.* A promissory note is personal property, within the meaning of the various statutes, and may be recovered in an action of replevin.[41] Replevin likewise lies for the recovery of a check,[42] bill of exchange,[43] a bond,[44] or certificate of deposit.[45] However, after a check has been paid at bank and returned canceled to the drawer, being held by him only as a voucher, the drawer cannot resort to the action of replevin for the check, to enforce a claim he may have to be paid the amount of it by the payee.[46]

goods and chattels" have been wrongfully taken or detained, and sections 8346 and 8347, providing for judgment for defendant, when plaintiff fails in his case, for a return of the property or its full value, replevin will not lie to recover the body of plaintiff's brother in the hands of an undertaker, to whom it had been delivered by the authorities of a hospital. Keyes *v.* Konkel, 119 Mich. 550, 78 N. W. 649, 75 Am. St. Rep. 423, 44 L. R. A. 242. See, generally, Dead Bodies, 13 Cyc. 266 *et seq.*

39. *Arkansas.*— Harris *v.* Harris, 43 Ark. 535, policy of insurance.

Indiana.— Wilson *v.* Rybolt, 17 Ind. 391, 79 Am. Dec. 486 (title deeds); Southern Plank Road Co. *v.* Hixon, 5 Ind. 165 (record book of corporation); Opperman *v.* Citizens' Bank, (Ind. App. 1908) 85 N. E. 991 (certificate of bank stock); Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 568, 52 Am. St. Rep. 467 (certificate of bank stock).

Massachusetts.— Sawyer *v.* Baldwin, 11 Pick. 492 (parish records); Stebbins *v.* Jennings, 10 Pick. 172 (parish records).

Mississippi.— See Campbell *v.* Brooks, (1908) 47 So. 545, 546, in which it was said: "A deed, as such, is recoverable in an action of replevin, where same is unlawfully detained, if the controversy be really about the deed and nothing else, and the delivery of the deed is beyond dispute."

North Carolina.— Bridgers *v.* Ormond, (1908) 62 S. E. 422; Pasterfield *v.* Sawyer, 132 N. C. 258, 43 S. E. 799.

Oregon.— Willis *v.* Marks, 29 Oreg. 493, 45 Pac. 293, verified claim against estate.

United States.— Gibbs *v.* Usher, 10 Fed. Cas. No. 5,387, Holmes 348, under Massachusetts statute.

Canada.— Hammond *v.* McLay, 10 Can. L. J. 269, books of office.

See 42 Cent. Dig. tit. "Replevin," § 5.

Shares of stock.— Replevin does not lie to recover shares of stock, the proceeding not being aimed at the certificate representing the shares, which is not mentioned in the complaint. Stock in a corporation is an intangible incorporeal thing, and therefore incapable of identification or seizure under the writ. Ashton *v.* Heydenfeldt, 124 Cal. 14, 56 Pac. 624. To the same effect see Bell *v.* California Bank, 153 Cal. 234, 94 Pac. 889.

Proof of value necessary.— In replevin to recover a deed its value must be proved, and the failure to do so justifies a dismissal of the action. Flannigan *v.* Goggins, 71 Wis. 28, 36 N. W. 846.

40. Campbell *v.* Brooks, (Miss. 1908) 47 So. 545; Pasterfield *v.* Sawyer, 132 N. C. 258, 43 S. E. 799; Hooker *v.* Latham, 118 N. C. 179, 23 S. E. 1004; Flannigan *v.* Goggins, 71 Wis. 28, 36 N. W. 846. And see Nichols *v.* Mase, 94 N. Y. 160, holding that a railroad lease cannot be replevined. *Contra*, Simmonsen *v.* Curtis, 43 Minn. 539, 45 N. W. 1135, holding that replevin will lie in a court of competent jurisdiction on the part of the grantee to recover a deed, although the fact of its delivery be in controversy, and the title to realty consequently involved in the action.

The certificates of location under a patent, issued in pursuance of the act of congress of June 2, 1858, relating to the location of private land grants, being hereditaments, replevin would not lie to recover them. Walker *v.* Daly, 80 Wis. 222, 49 N. W. 812.

41. Bush *v.* Croomes, 125 Ind. 14, 24 N. E. 81; Savery *v.* Hays, 20 Iowa 25, 89 Am. Dec. 511; Graff *v.* Shannon, 7 Iowa 508; Pritchard *v.* Norwood, 155 Mass. 539, 30 N. E. 80; Masson *v.* Bovet, 1 Den. (N. Y.) 69, 43 Am. Dec. 651; Boughton *v.* Bruce, 20 Wend. (N. Y.) 234.

Where there is no delivery of the notes to the payee and no title thereto vests in him, he cannot maintain replevin against a third party in whose hands the maker has placed the notes with instructions not to deliver them until so directed by the maker. Nichols, etc., Co. *v.* Hillsboro First Nat. Bank, 6 N. D. 404, 71 N. W. 135.

42. Haas *v.* Altieri, 2 Misc. (N. Y.) 252, 21 N. Y. Suppl. 950.

43. Smith *v.* Eals, 81 Iowa 235, 46 N. W. 1110, 25 Am. St. Rep. 486, holding that the accepter of a bill of exchange which has subsequently been rendered void by a material alteration may maintain an action of replevin therefor against the holder.

44. Douglas *v.* Wolf, 6 Kan. 88 (city bonds); Sager *v.* Blain, 44 N. Y. 445 (government bonds).

45. Robinson *v.* Stewart, 97 Mich. 454, 56 N. W. 853.

46. Barnett *v.* Selling, 70 N. Y. 492.

Where a certified check, which was obtained by fraud from a bank, is cashed in good faith by a firm, and the payee, by mistake on both his part and that of the firm, fails to indorse it, the firm holds subject to all original defenses, and the bank is not liable;

(iv) *Money or Scrip.* The general rule is that money is not the subject of an action of replevin,[47] unless it is so marked or labeled as to be capable of identification.[48]

(v) *Undivided Shares in Property.*[49] The general rule is undisputed that replevin lies only for specific property, capable of identification or separation so as to be seized in kind,[50] and cannot be maintained for an undivided interest or share,[51] except in cases of fraud or wrongful confusion of property.[52] A further exception is made, by some authorities, where the property sought to be replevied consists of a part of a larger mass of the same nature and quality which can be easily divided into aliquot parts.[53]

(vi) *Commingled Goods.* Generally, where property cannot be identified or separated so as to be seized in kind, replevin will not lie.[54] However, according to the trend of modern decisions, where goods are mixed, and are of the same nature and value, although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, as in the case of oats, corn, or wheat, then each party may claim his aliquot part, and enforce his right in an action of replevin;[55] and the authorities all agree that where defendant, with fraudulent intent, takes property of the plaintiff and intermingles it with

but it cannot maintain replevin to recover possession of the check. Goshen Nat. Bank *v.* Bingham, 118 N. Y. 349, 23 N. E. 180, 16 Am. St. Rep. 765, 7 L. R. A. 595.

47. Lovell *v.* Hammond Co., 66 Conn. 500, 34 Atl. 511; Pilkington *v.* Trigg, 28 Mo. 95; Hamilton *v.* Clark, 25 Mo. App. 428; Sager *v.* Blain, 44 N. Y. 445.

Scrip.— A party cannot recover scrip of which the legal title is in defendant, by plaintiff's permission, in an action of replevin, or of claim and delivery, which is of the same legal nature. If plaintiff desires the identical scrip his remedy is in equity, and if he desires damages only he may maintain an action on the case. Wheeler *v.* Allen, 51 N. Y. 37 [*affirming* 49 Barb. 460]. *Compare* Saunders *v.* Jordan, 54 Miss. 428; Wright *v.* Battley, 15 Manitoba 322.

48. *California.*— Sharon *v.* Nunan, 63 Cal. 234; Skidmore *v.* Taylor, 29 Cal. 619 (parcel of money sealed up in leather bag); Griffith *v.* Bogardus, 14 Cal. 410.

Indian Territory.— Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110, money contained in a canvas waist-belt.

Mississippi.— Saunders *v.* Jordan, 54 Miss. 428, unindorsed county warrant, under Code (1871), § 1528, relating to replevin of "goods and chattels."

Missouri.— Hamilton *v.* Clark, 25 Mo. App. 428. And see St. Louis, etc., R. Co. *v.* Castell, 28 Mo. 379.

New York.— Graves *v.* Dudley, 20 N. Y. 76.

Ohio.— Knapp *v.* Springmeier, 7 Ohio Dec. (Reprint) 570, 3 Cinc. L. Bul. 1122, money marked on in a parcel.

See 42 Cent. Dig. tit. "Replevin," § 8.

49. **Right of joint owner or tenant in common to replevy chattel** see *infra*, I, C, 2, e.

50. Hart *v.* Morton, 44 Ark. 447; Ward *v.* Worthington, 33 Ark. 830; Low *v.* Martin, 18 Ill. 286; Stanley *v.* Robinson, 14 Ill. App. 480; Kaufmann *v.* Schilling, 58 Mo. 218; Huff *v.* Henry, 57 Mo. App. 341; Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177.

51. *Arkansas.*— Moseley *v.* Cheatham, 62 Ark. 133, 34 S. W. 543; Titsworth *v.* Frauenthal, 52 Ark. 254, 12 S. W. 498; Hart *v.* Morton, 44 Ark. 447; Washington *v.* Love, 34 Ark. 93; Ward *v.* Worthington, 33 Ark. 830.

Colorado.— Hoeffer *v.* Agee, 9 Colo. App. 189, 47 Pac. 973.

Idaho.— Hull *v.* Hull, 1 Ida. 361.

Illinois.— Low *v.* Martin, 18 Ill. 286; Stanley *v.* Robinson, 14 Ill. App. 480. And see Reynolds *v.* McCormick, 62 Ill. 412.

Indiana.— Bowen *v.* Roach, 78 Ind. 361.

Iowa.— Read *v.* Middleton, 62 Iowa 317, 17 N. W. 532, holding that replevin will not lie for the undivided share of a growing crop.

Massachusetts.— Hackett *v.* Potter, 131 Mass. 50 (holding that a part-owner of a vessel cannot maintain replevin for his undivided part, although he owns a major interest in the vessel); Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Michigan.— Kindy *v.* Green, 32 Mich. 310.

Missouri.— Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Lisenby *v.* Phelps, 71 Mo. 522; Kaufmann *v.* Schilling, 58 Mo. 218; Cross *v.* Hulett, 53 Mo. 397; Spooner *v.* Ross, 24 Mo. App. 599.

Oregon.— Schwarz *v.* Lee Gon, 46 Oreg. 219, 80 Pac. 110; Sharp *v.* Johnson, 38 Oreg. 246, 63 Pac. 485, 84 Am. St. Rep. 788; Phipps *v.* Taylor, 15 Oreg. 484, 16 Pac. 171; Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277.

Tennessee.— Jackson *v.* Stockard, 9 Baxt. 260.

See 42 Cent. Dig. tit. "Replevin," § 11.

52. Low *v.* Martin, 18 Ill. 286; Stanley *v.* Robinson, 14 Ill. App. 480. And see *infra*, I, B, 1, b, (vi).

53. Pitman *v.* Baumstark, 63 Kan. 69, 64 Pac. 968. And see *infra*, I, B, 1, b, (vi).

54. See *supra*, I, B, 1, b, (v).

55. *Arkansas.*— Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68. *Compare* Hart *v.* Morton, 44 Ark. 447.

property of his own so that they cannot be distinguished, plaintiff may maintain replevin for at least his share thereof.[56] In such cases the owner is allowed to take his own share of the bulk, kind for kind and measure for measure.[57] It seems, however, that if the character of the property is so essentially changed by the mixture that one aliquot part would not be the equivalent of another, the rule is otherwise.[58] And if the mixture occurs through plaintiff's fault, he

California.— Adams *v.* Gorham, 6 Cal. 68.
Iowa.— Read *v.* Middleton, 62 Iowa 317, 17 N. W. 532.
Kansas.— Piazzek *v.* White, 23 Kan. 621, 33 Am. Rep. 211.
Massachusetts.— Ryder *v.* Hathaway, 21 Pick. 298; Gardner *v.* Dutch, 9 Mass. 427. But see Scudder *v.* Worster, 11 Cush. 573.
Michigan.— Freese *v.* Arnold, 99 Mich. 13, 57 N. W. 1038; Wattles *v.* Dubois, 67 Mich. 313, 34 N. W. 672; Sutherland *v.* Carter, 52 Mich. 151, 471, 17 N. W. 780, 18 N. W. 223; Crapo *v.* Seybold, 36 Mich. 444.
Minnesota.— Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; Stone *v.* Quaal, 36 Minn. 46, 29 N. W. 326.
Missouri.— Kaufmann *v.* Schilling, 58 Mo. 218; Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222, 80 S. W. 356; Huff *v.* Henry, 57 Mo. App. 341.
Nebraska.— Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990; Grimes *v.* Cannell, 23 Nebr. 187, 36 N. W. 479.
New York.— Kimberly *v.* Patchin, 19 N. Y. 330, 75 Am. Dec. 334.
Pennsylvania.— Wilkinson *v.* Stewart, 85 Pa. St. 255; Henderson *v.* Lauck, 21 Pa. St. 359.
Wisconsin.— Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426; Halpin *v.* Stone, 78 Wis. 183, 47 N. W. 177; Eldred *v.* Oconto Co., 33 Wis. 133.
See 42 Cent. Dig. tit. "Replevin," § 15.
Contra.— Hull *v.* Hull, 1 Ida. 361; Low *v.* Martin, 18 Ill. 286.

Another statement of the doctrine is, in substance, that as to articles like wheat and the cereal grains, and the flour manufactured from them, wine, oil, and fruits of the earth which are sold, not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure, or count, and which are undistinguishable from each other by any physical difference in size, shape, texture, or quality, there may be different owners of a common mass, each having a separate property in his share, and each entitled to sever it from the share or shares of the others, and, if necessary for the preservation of his rights, to maintain replevin for the same, subject to deductions for any loss or waste properly falling to his share while the property remained in mass. Piazzek *v.* White, 23 Kan. 621, 33 Am. Rep. 211; Young *v.* Miles, 20 Wis. 615.

Grain.— Where grain belonging to different owners has been stored in mass with their consent, each may, if necessary for the maintenance of his rights, maintain replevin for his share (Piazzek *v.* White, 23 Kan. 621, 33 Am. Rep. 211; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; Kaufmann *v.* Schilling, 58 Mo. 218; Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990; Grimes *v.* Cannell, 23 Nebr. 187, 36 N. W. 479; Inglebright *v.* Hammond, 19 Ohio 337, 53 Am. Dec. 430; Henderson *v.* Lauck, 21 Pa. St. 359), subject to deduction of his proportion of loss or waste occurring to it while so in mass (Young *v.* Miles, 20 Wis. 615). A tenant in common of grain may maintain replevin against a cotenant who unlawfully withholds plaintiff's share. Freese *v.* Arnold, 99 Mich. 13, 57 N. W. 1038; Wattles *v.* Dubois, 67 Mich. 313, 34 N. W. 672; Sutherland *v.* Carter, 52 Mich. 151, 471, 17 N. W. 780, 18 N. W. 223; Crapo *v.* Seybold, 36 Mich. 444.

Lumber.— Replevin will lie for lumber, although it cannot be identified because of its being intermixed with other lumber of the same kind and value. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68; Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222, 80 S. W. 356. The owner of the lumber manufactured from logs which the manufacturer had mingled with his own logs of the same quality may replevy out of the common mass of the lumber manufactured from all of such logs a quantity not exceeding his contribution thereto. Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426.

When cotton has been innocently mixed and baled it has been held that replevin will not lie for part of the bale, since division in kind cannot be made without injury to the other party. For if the bale be torn to pieces the cotton would have to be rebaled at additional expense. Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68; McKennon *v.* May, 39 Ark. 442.

56. *Maine.*— Wingate *v.* Smith, 20 Me. 287.
Mississippi.— Peterson *v.* Polk, 67 Miss. 163, 6 So. 615.
Wisconsin.— Stearns *v.* Raymond, 26 Wis. 74.
United States.— Schulenberg *v.* Harriman, 21 Wall. 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398].
Canada.— McDonald *v.* Lane, 7 Can. Sup. Ct. 462; Des Brisay *v.* Mooney, 7 N. Brunsw. 53.
See 42 Cent. Dig. tit. "Replevin," § 15.
And see Stanley *v.* Robinson, 14 Ill. App. 480.

57. Kaufmann *v.* Schilling, 58 Mo. 218; Huff *v.* Henry, 57 Mo. App. 341.

58. Schwarz *v.* Lee Gon, 46 Oreg. 219, 80 Pac. 110 (where it is said that this rule can have no application to an action to recover an undivided interest in a certain number of bales of hops, which, as the evidence shows, not only vary in weight, but are not neces-

is not entitled to maintain replevin for his share of the property,[59] but only for such part thereof as he can identify as his own.[60]

(VII) *ARTICLES MANUFACTURED FROM MATERIAL TAKEN.* If property be taken from the possession of the rightful owner by a wilful trespasser or thief, who manufactures or converts it into a different article, the manufactured article, if it can be identified in its improved form, may be retaken by replevin from the wrong-doer,[61] or from a purchaser thereof whether he be an innocent purchaser [62] or one having notice,[63] because the wrong-doer has no title which he can convey,[64] however great the change that may be wrought; [65] and this is the rule of the civil as well as the common law.[66] The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them.[67] To authorize replevin for chattels so manufactured it is of course necessary that their identity be shown. If they cannot be identified the action must be for conversion,[68] and in all cases where the new product cannot be identified by mere inspection, the original must be traced by the testimony of witnesses from hand to hand through the process of transformation.[69] Although the contrary has been held,[70] the weight of authority is to the effect that where the wrongful taking was in good faith, and not an intentional injury, the owner of the original material cannot maintain replevin after it has undergone a transformation which converts it into an article substantially different.[71] Likewise, if property wrongfully taken afterward comes into the hands

sarily of uniform quality or grade. Plaintiff's interest therefore, if less than the entire amount, could not be separated from that of his cotenant without injury or loss to one party or the other, and replevin will not lie); Wilkinson *v.* Stewart, 85 Pa. St. 255.

59. Dillingham *v.* Smith, 30 Me. 370; Williams *v.* Morrison, 32 Fed. 177.

60. Dillingham *v.* Smith, 30 Me. 370.

61. *Arkansas.*— McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210. And see Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179.

Indiana.— See opinion of Biddle, J., in Ricketts *v.* Dorrel, 55 Ind. 470, 473.

Maine.— Wingate *v.* Smith, 20 Me. 287.

Mississippi.— Heard *v.* James, 49 Miss. 236.

Missouri.— Gray *v.* Parker, 38 Mo. 160.

New York.— Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Clemmons *v.* Brinn, 36 Misc. 157, 72 N. Y. Suppl. 1066 [*affirming* 35 Misc. 844, 72 N. Y. Suppl. 1097]; Brown *v.* Sax, 7 Cow. 95. And see Betts *v.* Lee, 5 Johns. 348, 4 Am. Dec. 368.

Pennsylvania.— Snyder *v.* Vaux, 2 Rawle 423.

And see as sustaining this doctrine Nesbitt *v.* St. Paul Lumber Co., 21 Minn. 491.

Reasons for rule.— The law will not permit any man to take advantage of his own wrong. Gray *v.* Parker, 38 Mo. 160. And if a wilful trespasser should be able to protect himself by any change which he might communicate to the shape or form of the materials, an unbounded license would be given to plunder and the security of personal property would be exceedingly diminished. Snyder *v.* Vaux, 2 Rawle (Pa.) 423.

Applications of rule.— The rule has been applied in the case of timber converted into cross ties (Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179; McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210), corn into whisky (Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307), trees or logs converted into boards or plank (Davis *v.* Easley, 13 Ill. 192; Wingate *v.* Smith, 20 Me. 287; Brown *v.* Sax, 7 Cow. (N. Y.) 95), or into rails and posts (Snyder *v.* Vaux, 2 Rawle (Pa.) 423), or into staves (Heard *v.* James, 49 Miss. 236). In all these cases it was held that there was not such an alteration in the property as would preclude a recovery in replevin. Other illustrations found in the books are manufacture of leather into shoes, cloth into garments, iron made into bars or tools, trees squared into timber, grapes made into wine, and olives into oil. See Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307 [*citing* Justinian Inst. Dig. lib. 10, tit. 4, leg. 12, § 13]; Brown *v.* Sax, 7 Cow. (N. Y.) 95 [*citing* Bro. Prop. pl. 23; F. Moore Rep. 20, pl. 67].

62. McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210; Strubbee *v.* Cincinnati R. Co., 78 Ky. 481, 39 Am. Rep. 251; Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

63. McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210.

64. McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210; Gray *v.* Parker, 38 Mo. 160; Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

65. Gray *v.* Parker, 38 Mo. 160.

66. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307; Justinian Inst. Dig. lib. 10, tit. 4, § 12.

67. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

68. Gray *v.* Parker, 38 Mo. 160; Snyder *v.* Vaux, 2 Rawle (Pa.) 423. And see Wingate *v.* Smith, 20 Me. 287.

69. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

70. Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179.

71. Wetherbee *v.* Green, 22 Mich. 311, 7 Am. Rep. 653; Heard *v.* James, 49 Miss.

of an innocent holder, who converts it into an article of different species, so that its identity is destroyed, the original owner cannot maintain replevin for it. His remedy is by action for the conversion.[72] But if property wrongfully taken comes into the hands of one who has actual or constructive notice of the trespass, and he converts it into a different article, the original owner may maintain replevin for it if he can identify it.[73]

(VIII) *PROPERTY ON DEFENDANT'S PERSON.* Property worn on the person cannot be seized on a writ of replevin,[74] and it makes no difference that it was worn for the purpose of keeping it beyond the reach of legal process.[75]

(IX) *PROPERTY DISTRAINED FOR RENT* — (A) *Property of Tenant.* In the absence of any statutory provisions affecting the doctrine, replevin may be brought to try the legality of a distress for rent, provided there is no sum whatever in arrear.[76] But if any sum, however small, were due, and the distress was for a greater sum, or excessive in regard to the quantity of goods taken, or otherwise irregular, replevin does not lie, but the remedy must be by action on the case.[77] Nor does replevin lie against one who has levied a distress warrant against property where the property remains in the actual possession of its owner.[78]

236; Gray *v.* Parker, 38 Mo. 160; Potter *v.* Mardre, 74 N. C. 36.

Application of rule.— The doctrine was applied where the property taken, a tree, was manufactured into a canoe. Potter *v.* Mardre, 74 N. C. 36.

72. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

Reason for rule.— In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed and may recover its value as it was when the conversion or consumption took place. Silsbury *v.* McCoon, 3 N. Y. 379, 53 Am. Dec. 307.

73. Nelson *v.* Graff, 12 Fed. 389.

74. Maxham *v.* Day, 16 Gray (Mass.) 213, 77 Am. Dec. 409. And see as sustaining this rule by analogy Mack *v.* Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267; Sunbolf *v.* Alford, 3 M. & W. 253.

Reason for rule.— "Practical jurisprudence looks, in the application of remedies, to the peace, good order and decorum of society. The evils which would flow from the unrestricted use of a civil process to search the person and to seize from it articles of dress or use or ornament, are obvious and manifold. It would bring the officer of law in direct contact with the citizen, under circumstances well calculated to excite irritation and anger, and lead directly to breaches of the peace. It would place in the hands of wicked and evil disposed persons the means of annoyance and injury, and the power to interfere wantonly and without just cause with the most sacred rights of the person." Maxham *v.* Day, 16 Gray (Mass.) 213, 219, 77 Am. Dec. 409.

75. Maxham *v.* Day, 16 Gray (Mass.) 213, 77 Am. Dec. 409.

76. Hare *v.* Stegall, 60 Ill. 380; Wilson *v.* Weller, 1 B. & B. 57, 3 Moore C. P. 294, 5 E. C. L. 501; 1 Chitty Pl. (6th Am. ed.) 188. And see Towns *v.* Boarman, 23 Miss. 186.

Rule under special statutory provisions.— By virtue of statutory provisions in some jurisdictions the common-law rule has been materially changed. In one state the statutes make replevin the method for the tenant to pursue whenever he would contest the landlord's right to sell the goods seized (Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774; Bair *v.* Warfel, 5 Lanc. L. Rev. (Pa.) 81), and where the statutory provisions have been complied with, it is the only remedy (Sassman *v.* Brisbane, 7 Phila. (Pa.) 159). So in another jurisdiction where attachment is sued out for rent against a tenant on affidavit that his rent is not due, but that the tenant is removing his property, so no distress can be made and the property attached is sold, an action cannot be maintained on the bond, for double damages, under a statute which by its terms is confined to cases where there have been sales of property under attachments "for rent pretended to be due and in arrear," where in truth no rent or other thing is due or in arrear. "In such cases the remedy of the tenant, where the attachment is wrongful, is . . . [under the statutes] by replevying the property and obtaining judgment for damages on the bond. . . . It is only where the landlord falsely pretends that there is something due where in truth nothing is due, that the tenant can without replevying the property maintain a suit on the bond for double damages." Kyzer *v.* Middleton, 61 Miss. 360, 362.

77. Lindley *v.* Miller, 67 Ill. 244; Hare *v.* Stegall, 60 Ill. 380; Whitney *v.* Carle, 8 B. Mon. (Ky.) 171; 1 Chitty Pl. (6th Am. ed.) 188.

78. Johnson *v.* Prussing, 4 Ill. App. 575, in which it was said that to sustain the action of replevin it is necessary to show that defendant took it from the actual or constructive possession of plaintiff.

(B) *Property of Third Person.* In the absence of statute relating thereto it has been held that where property is taken from its owner on a distress for rent against another, he may maintain replevin for it.[79] So by the provisions of the statutes of one jurisdiction replevin is the proper remedy to be used by a person whose goods have been improperly distrained for rent due by a tenant;[80] and where the provisions of the statute are complied with, he is bound to proceed by replevin or not at all.[81]

(X) *Cattle Distrained Damage Feasant.* Where, as is usually the case, the distraint of cattle damage feasant is regulated by statute, there must be a strict compliance therewith by one making a distraint; the cattle can only be held for causes mentioned in the statute;[82] and the rightfulness of the distraint may ordinarily be tried in an action of replevin.[83] The owner of cattle distrained damage feasant is entitled to succeed in an action of replevin if the land trespassed upon was not inclosed by a lawful fence;[84] and payment of the damage done is not essential to maintain the action.[85] So the owner may maintain replevin if the amount of damages demanded is excessive.[86] Where cattle have been distrained as damage feasant without lawful authority, even though they are forcibly reclaimed by the owner, the person making the distraint has no such special property in or right to possession of the cattle as will authorize him to bring replevin against the owner for the cattle.[87] And where by statute a person

79. Southern R. Co. *v.* Sarratt, 58 S. C. 98, 36 S. E. 504.

80. Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774; Caldeleugh *v.* Hollingsworth, 8 Watts & S. (Pa.) 302; Thomas *v.* Baner, 6 Pa. Dist. 177; Starr *v.* Simon, 9 Pa. Co. Ct. 15 (in which it was said that the Pennsylvania statute which reserves to the owner of goods distrained as well as to the tenant the right to replevy is an exception to another statute forbidding replevin for property seized for rent in arrear, and the owner may replevy after five days from the distraint if no sale has been made); Lardner *v.* Mutual L. Ins. Co., 32 Wkly. Notes Cas. (Pa.) 62 [*overruling* Power *v.* Howard, 22 Wkly. Notes Cas. (Pa.) 475.

81. Esterly Mach. Co. *v.* Spencer, 147 Pa. St. 466, 23 Atl. 774 (holding that where such a person receives notice of the distress, and the landlord postpones the sale to give him an opportunity to bring replevin, which he refuses to do, he cannot, after the sale, bring trespass against the landlord for the value of the goods); Caldeleugh *v.* Hollingsworth, 8 Watts & S. (Pa.) 302 (holding that the owner of a chattel which has been distrained for rent and sold cannot maintain trover for it against the landlord where the statutory provisions have been complied with); Thomas *v.* Baner, 6 Pa. Dist. 177.

82. Jones *v.* Clouser, 114 Ind. 387, 16 N. E. 797; Anderson *v.* Worley, 104 Ind. 165, 3 N. E. 817.

If the person making the distraint places his right to hold possession on a false ground, by asserting an unfounded claim for damages, he cannot change position to the injury of the owner who may replevy. Jones *v.* Clouser, 114 Ind. 387, 16 N. E. 797.

83. Syford *v.* Shriver, 61 Iowa 155, 16 N. W. 56.

Tender of damages.— If a tender of damages is required by statute the action cannot be maintained without such tender (Phelan *v.* Bonham, 9 Ark. 389; Holcomb *v.* Davis, 56 Ill. 413); but the action lies where such tender is made and the person making the distraint refuses to release the cattle distrained (Nelson *v.* Smith, 26 Ill. App. 57).

In Michigan, if a party has in good faith taken trespassing cattle damage feasant, replevin to test the validity of a distraint must be brought under the special statutes relating to the distraint and replevy of beasts. Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028; Marx *v.* Labadie, 51 Mich. 605, 17 N. W. 76; Marx *v.* Woodruff, 50 Mich. 361, 15 N. W. 510; Campau *v.* Konan, 39 Mich. 362; Hamlin *v.* Mack, 33 Mich. 103; Johnson *v.* Wing, 3 Mich. 163. But where cattle stray upon a person's land, through his neglect to maintain a sufficient fence, he has no right to distrain them, and the owner may replevy them under the general statute relating to replevin. The person distraining cannot by so doing and claiming damage which the statute says he shall not recover or the owner of the cattle be liable for drive his neighbor to proceed under this special statute, nor can he deprive him of any remedy the law affords him to recover property wrongfully detained. Cox *v.* Chester, 77 Mich. 494, 43 N. W. 1028.

84. Anderson *v.* Worley, 104 Ind. 165, 3 N. E. 817; Clark *v.* Stipp, 75 Ind. 114; Blizzard *v.* Walker, 32 Ind. 437.

Person distraining a trespasser.— If the lands of the person making the distraint are not inclosed by a lawful fence, he has no right to distrain, and if he does so the possession which he acquires is unlawful and he becomes a trespasser. Syford *v.* Shriver, 61 Iowa 155, 16 N. W. 56.

85. Blizzard *v.* Walker, 32 Ind. 437.

86. Norton *v.* Rockey, 46 Mich. 460, 9 N. W. 492.

87. Taylor *v.* Welbey, 36 Wis. 42.

who takes up animals as estrays is given a lien thereon for his lawful charges, and the owner is not entitled to possession except on payment of such damages, if he retakes the animals without paying the charges, the person who took them up may maintain an action of replevin.[88]

(xi) *Cattle Impounded* — (a) *By Owner of Land Trespassed On.* Where cattle damage feasant are distrained by one upon whose land they have trespassed, it seems that the owner may maintain replevin therefor if sufficient amends are tendered before they are actually impounded.[89] And where cattle have escaped and done damage to the land of the party impounding them, through no fault of the owner, he may have his action of replevin for their recovery.[90] The action of replevin cannot be maintained against a pound-keeper so long as he retains the creatures impounded within the custody of the law.[91] But where he voluntarily parts with his legal control over them he cannot lawfully retake them, and if he take them again replevin will lie against him.[92] Under a statute which provides that "in all cases, the owner of the creatures impounded may at any time, while the creatures remain in the pound, replevie the same, if he see cause," replevin is the appropriate remedy, to try as well the regularity of the proceedings in relation to the distress, as the legality of the taking.[93] Where cattle are impounded defendant must comply strictly with the requisites of the statute authorizing it or he will be a trespasser *ab initio* and the owner may maintain replevin for the cattle impounded.[94] And where cattle are seized and impounded and the appraisers appointed under the provisions of the statute decide that no damage was done, the impounding is illegal and the owner may maintain replevin therefor against the impounder.[95]

(b) *By Officer.* By the common law cattle wandering about damage feasant might be taken up and impounded and the owner cannot maintain replevin therefor; [96] and under a statute providing that all writs of replevin granted to an owner of chattels seized in distress by an officer acting in his official capacity under the authority of the state are void, replevin will not lie against an officer who in obedience to an ordinance impounds stray cattle.[97] So it has been held that where an officer has impounded animals running at large and there is nothing to show that he has failed to obey the strict letter of the statute, the owner cannot maintain replevin therefor unless he has complied with the statutory requirement as to payment or tender of costs or expenses.[98]

88. Ford *v.* Ford, 3 Wis. 399.

89. Dame *v.* Dame, 43 N. H. 37.

90. York *v.* Davis, 11 N. H. 241.

91. Bills *v.* Kinson, 21 N. H. 448; Protchard *v.* Stevens, 3 Hayw. (Tenn.) 522.

92. Bills *v.* Kinson, 21 N. H. 448.

93. Kimball *v.* Adams, 3 N. H. 182; Brown *v.* Smith, 1 N. H. 36.

94. Morse *v.* Reed, 28 Me. 481; Brown *v.* Smith, 1 N. H. 36; Armbruster *v.* Wilson, 43 Hun (N. Y.) 261.

Failure to give notice.— When cattle have been taken damage feasant, if notice be not given as the statute requires, the omission is a non-feasance which does not render the first taking unlawful; but the subsequent detention of the cattle will be deemed unlawful. The New Hampshire statute has made replevin an appropriate remedy for such unlawful detention. Kimball *v.* Adams, 3 N. H. 182.

Defective notice.— Where the statute provides that the notification to the owner of impounded animals must describe the creatures that did the damage, if the notification omits to describe one of the creatures, the owner may maintain replevin for it, but not for the others properly described. Such defect in the notice will not impair its validity as respects the creatures properly described. Brown *v.* Smith, 1 N. H. 36.

Requisites of certificate left with pound-keeper.— Where the statutory requirement that the certificate left with the pound-keeper shall state the town in which the impounder resided, and also the town in which the inclosure, wherein the damage was alleged to have been done, was situated, is not complied with, the owner of the cattle may maintain replevin against the impounder. Morse *v.* Reed, 28 Me. 481.

95. Osgood *v.* Green, 33 N. H. 318, 327, in which it was said that "he who would justify his acts under the statute must show that he has strictly complied with its provisions."

96. King *v.* Ford, 70 Ga. 628.

97. Boos *v.* Mathers, (Pa. 1893) 27 Atl. 881; McJunkin *v.* Mathers, 158 Pa. St. 137, 27 Atl. 137.

98. Wilhelm *v.* Scott, 14 Ind. App. 275, 40 N. E. 537, 42 N. E. 827.

2. Property Attached To or Severed From Realty — a. In General. The owner of realty may maintain replevin for chattels wrongfully severed therefrom or for articles wrongfully severed therefrom which by reason of the severance become personalty,[99] unless the land is in the adverse possession of defendant or of a third person. In this event replevin will not lie because the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants.[1] It is not to be understood, however, that an action of replevin cannot be maintained when plaintiff can make title to the chattel only by making title to the land from which it was severed.[2] The rule does not exclude proof of title on the part of plaintiff where no question of adverse possession is involved, for in all cases where the owner of land sues for property severed from the freehold, the action must rest upon the proof in the first instance of title or right of possession to the premises in plaintiff, otherwise no action for the recovery of such property would ever lie.[3]

b. Fixtures in General.[4] The possession of fixtures which for any reason are not a part of the realty may be recovered in replevin by one entitled to such possession.[5] But where chattels have by being affixed to realty become a part thereof, replevin will not lie for their recovery.[6] In case property which has been annexed to the freehold is severed therefrom it becomes personal property so as to become recoverable by an action of replevin.[7] But, in order to maintain such action, plaintiff must have had the actual or constructive possession of the land; and as the title to land cannot be tried *ex delicto*, in replevin, if the series of acts in which the severance and taking away has occurred are sufficient to

99. *California.*— Kimball *v.* Lohmas, 31 Cal. 154.

Illinois.— Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332; Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318.

Iowa.— Dubuque Cong. Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511.

Kentucky.— Hail *v.* Reed, 15 B. Mon. 479.

Minnesota.—Washburn *v.* Cutter, 17 Minn. 361.

Pennsylvania.—Green *v.* Ashland Iron Co., 62 Pa. St. 97; Coomalt *v.* Stanley, 3 Pa. L. J. Rep. 389.

United States.— Nelson *v.* Graff, 12 Fed. 389.

See 42 Cent. Dig. tit. "Replevin," § 23.

But see Hull *v.* Hull, 1 Ida. 361, which contains expressions in conflict with this view. It may be stated, however, that the facts of this case bring it squarely within the rule stated in the following paragraph of text.

1. *California.*— Emerson *v.* Whitaker, 83 Cal. 147, 23 Pac. 285; Martin *v.* Thompson, 62 Cal. 618; Page *v.* Fowler, 28 Cal. 605; Halleck *v.* Mixer, 16 Cal. 574.

Idaho.— Hull *v.* Hull, 1 Ida. 361.

Illinois.—Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318.

Minnesota.—Washburn *v.* Cutter, 17 Minn. 361.

Missouri.— McAllister *v.* Lawler, 32 Mo. App. 91

Pennsylvania.— Brown *v.* Caldwell, 10 Serg. & R. 114, 13 Am. Dec. 660, slates taken out of a quarry.

See 42 Cent. Dig. tit. "Replevin," § 23.

2. Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612.

3. Halleck *v.* Mixer, 16 Cal. 574; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Elliott *v.* Powell, 10 Watts (Pa.) 453, 36 Am. Dec. 200. And see Martin *v.* Thompson, 62 Cal. 618.

4. As to what are or are not fixtures constituting a part of the realty see Fixtures, 19 Cyc. 563.

5. Hamilton *v.* Stewart, 59 Ill. 330; Maguire *v.* Park, 140 Mass. 21, 1 N. E. 750.

6. *Illinois.*— Hacker *v.* Munroe, 56 Ill. App. 532.

Indiana.— Ricketts *v.* Dorrel, 55 Ind. 470, holding that fence rails and stakes, although unlawfully taken and detained by a wrongdoer, when used by him in the construction of a fence upon his real estate, thereby become part of such realty, and cannot be replevied by the owner as personal property.

Massachusetts.— Brown *v.* Wallis, 115 Mass. 156.

New York.— Cresson *v.* Stout, 17 Johns. 116, 8 Am. Dec. 373.

Texas.— Bull *v.* Jones, 9 Tex. Civ. App. 346, 29 S. W. 804.

England.— Niblet *v.* Smith, 4 T. R. 504.

See 42 Cent. Dig. tit. "Replevin," § 21.

7. *California.*— Sands *v.* Pfeiffer, 10 Cal. 258.

Florida.— Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061.

Illinois.— Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332.

Indiana.— Ricketts *v.* Dorrel, 55 Ind. 470; Moore *v.* Combs, 24 Ind. App. 464, 56 N. E. 35, rails.

Iowa.— Dubuque Cong. Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511.

Massachusetts.— Leonard *v.* Stickney, 131 Mass. 541.

Minnesota.—Washburn *v.* Cutter, 17 Minn. 361.

create an adverse possession in defendant, replevin cannot be maintained.[8] This possession must be something more than a mere trespass. It must be so long continued and so far yielded to as to constitute a possession to the exclusion of others — an occupancy as distinguished from a mere trespass.[9]

c. Buildings. Since the title to land cannot be litigated in an action of replevin,[10] the general rule is that replevin cannot be maintained for the recovery of possession of a house attached to the freehold.[11] However, a house, which by the express contract of the parties, or by implied agreement, is treated as personalty, may be the subject of replevin;[12] and where a house has been severed from the realty, the owner may maintain replevin for its recovery.[13]

d. Trees and Timber. The owner of land may maintain replevin for wood and timber unlawfully severed from the soil,[14] even where it has been converted into a manufactured article, so long as it is capable of identification.[15] It is essential, however, to the right to maintain replevin that the land should not

New York.— Cresson *v.* Stout, 17 Johns, 116, 8 Am. Dec. 373.

Pennsylvania.— Green *v.* Ashland Iron Co., 62 Pa. St. 97; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612 [*distinguishing* and *explaining* Powell *v.* Smith, 2 Watts 126].

Wisconsin.— Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689.

See 42 Cent. Dig. tit. "Replevin," §§ 21, 22.

8. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Washburn *v.* Cutter, 17 Minn. 361; Powell *v.* Smith, 2 Watts (Pa.) 126.

9. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061.

10. See *supra*, I, B, 2, b.

11. *California.*— Hines *v.* Good, 128 Cal. 38, 60 Pac. 527, 79 Am. St. Rep. 22.

Colorado.— Eddy *v.* Hall, 5 Colo. 576.

Illinois.— Salter *v.* Sample, 71 Ill. 430.

Nebraska.— Oskamp *v.* Crites, 37 Nebr. 837, 56 N. W. 394; McCormick *v.* Riewe, 14 Nebr. 509, 16 N. W. 832, 11 Nebr. 261, 9 N. W. 88.

South Carolina.— Vausse *v.* Russel, 2 McCord 329.

See 42 Cent. Dig. tit. "Replevin," § 22.

Illustration of rule.— Where defendant was in actual possession of certain real estate, claiming title in good faith, and sold a house thereon to another defendant, who removed it from the grounds, plaintiff, claiming to be the true owner of the realty, cannot bring an action of claim and delivery for the house. Hines *v.* Good, 128 Cal. 38, 60 Pac. 527, 79 Am. St. Rep. 22.

Sale of building with right to remove.— The sale of a building affixed to the realty with the right to sever and remove it does not operate to give it the character of personalty prior to severance, and on the subsequent refusal of the vendor to permit severance and removal replevin will not lie for possession. Eddy *v.* Hall, 5 Colo. 576.

12. *Dakota.*— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

Illinois.— Ballou *v.* Jones, 37 Ill. 95.

Kansas.— Rush County *v.* Stubbs, 25 Kan. 322.

Mississippi.— Weathersby *v.* Sleeper, 42 Miss. 732.

Nebraska.— McDaniel *v.* Lipp, 41 Nebr. 713, 60 N. W. 81; Waters *v.* Reuber, 16 Nebr. 99, 19 N. W. 687, 49 Am. Rep. 710; Mills *v.* Redick, 1 Nebr. 437.

New Jersey.— Brearley *v.* Cox, 24 N. J. L. 287.

Washington.— Page *v.* Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924.

Wisconsin.— Fitzgerald *v.* Anderson, 81 Wis. 341, 51 N. W. 554.

See 42 Cent. Dig. tit. "Replevin," § 22.

13. *Illinois.*— Dorr *v.* Dudderar, 88 Ill. 107; Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332.

Indiana.— Foy *v.* Reddick, 31 Ind. 414.

Maine.— Luce *v.* Ames, 84 Me. 133, 24 Atl. 720.

Michigan.— Cutter *v.* Wait, 131 Mich. 508, 91 N. W. 753; Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49, 52 N. W. 1035.

Wisconsin.— Huebschmann *v.* McHenry, 29 Wis. 655.

See 42 Cent. Dig. tit. "Replevin," § 22.

14. *California.*— Kimball *v.* Lohmas, 31 Cal. 154; Halleck *v.* Mixer, 16 Cal. 574.

Florida.— Sanborn *v.* Franklin County Lumber Co., 55 Fla. 389, 46 So. 85.

Illinois.— Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318.

Minnesota.— Washburn *v.* Cutter, 17 Minn. 361.

Pennsylvania.— Brewer *v.* Fleming, 51 Pa. St. 102; Coomalt *v.* Stanley, 3 Pa. L. J. Rep. 389.

See 42 Cent. Dig. tit. "Replevin," § 24.

Mortgagee out of possession.— In Rhode Island the action of replevin is maintainable by virtue of the statute "regulating proceedings in replevin," for goods and chattels unlawfully detained, although not unlawfully taken, as well as for goods and chattels unlawfully taken; and hence, like trespass, may be maintained by a mortgagee against a mortgagor in possession, for wood and timber cut upon the mortgaged estate in waste of the same, and in substantial diminution of the stipulated security of the mortgagee. Waterman *v.* Matteson, 4 R. I. 539.

15. See *supra*, I, B, 1, b, (VII).

be in the adverse possession of another, whether defendant or a third person. The law does not permit the owner to assert his title to the land against the person in adverse possession in that manner.[16] Where the owner of land makes a valid sale in writing of growing trees thereon, they become chattels in contemplation of law, and if a person who subsequently buys the land cuts and removes the trees, the purchaser of the trees may maintain replevin therefor.[17]

e. Growing or Standing Crops. The general rule is that replevin will lie for growing or standing crops by the owner thereof from whom they are unlawfully detained.[18] Annual crops, crops raised by yearly labor and cultivation, or *fructus industriales*, are to be regarded as personal chattels, independent of and distinct from the land, capable of being sold by oral contract, and this without regard to whether the crops are growing or, having matured, have ceased to derive any nutriment from the soil.[19]

f. Harvested Crops. Where crops have been wrongfully severed from the land of its owner, he may maintain replevin therefor if in possession of the land;[20] but in accordance with well settled principles considered in a preceding section,[21] the action cannot be maintained if the land is in the adverse possession of another.[22] The remedy it has been said is ejectment and trespass for mesne profits.[23]

3. Property in the Custody of the Law[24] — a. In General. It is a well settled doctrine of the common law that replevin will not lie for goods in the custody of the law,[25] any interference with goods so held being considered an infringement of the prerogative of the court and a contempt thereof.[26] The reason why property *in custodia legis* cannot be replevied is that to permit it to be done would be to

16. Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318; Clarke *v.* Clyde, 25 Wash. 661, 66 Pac. 46.

17. Warren *v.* Leland, 2 Barb. (N. Y.) 613.

18. *Arkansas.*— Cannon *v.* Matthews, 75 Ark. 336, 87 S. W. 428, 112 Am. St. Rep. 64, 69 L. R. A. 827, holding that growing strawberry plants attached to the soil are personal property, and the subject of replevin.

Illinois.— Reed *v.* Johnson, 14 Ill. 257.

Indiana.— Matlock *v.* Fry, 15 Ind. 483.

Iowa.— Hecht *v.* Dettman, 56 Iowa 679, 7 N. W. 495, 10 N. W. 241, 41 Am. Rep. 131.

Missouri.— Garth *v.* Caldwell, 72 Mo. 622; Salmon *v.* Fewell, 17 Mo. App. 118.

See 42 Cent. Dig. tit. "Replevin," § 25.

19. Garth *v.* Caldwell, 72 Mo. 622.

20. Martin *v.* Thompson, 62 Cal. 618.

21. See *supra*, I, B, 2, a.

22. Emerson *v.* Whitaker, 83 Cal. 147, 23 Pac. 285; Martin *v.* Thompson, 62 Cal. 618; Pennybecker *v.* McDougal, 46 Cal. 661; Page *v.* Fowler, 28 Cal. 605; De Mott *v.* Hagerman, 8 Cow. (N. Y.) 220, 18 Am. Dec. 443; Renick *v.* Boyd, 99 Pa. St. 555, 44 Am. Rep. 124.

Effect of special statutory provisions.— The rule is not affected by a statute which provides that in all actions of replevin to recover timber, lumber, coal, or "other property" severed from the realty, plaintiff shall be entitled to recover, although the title to the land from which the property severed was in dispute, provided plaintiff shows title in himself at the time of severance. Renick *v.* Boyd, 99 Pa. St. 555, 44 Am. Rep. 124.

23. Pennybecker *v.* McDougal, 46 Cal. 661; Renick *v.* Boyd, 99 Pa. St. 555, 44 Am. Rep. 124.

24. **For specific applications of the principle** see (Subsequent Sections in this Chapter).

25. *Arkansas.*— Hagan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769.

Colorado.— Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897.

Iowa.— Cooley *v.* Davis, 34 Iowa 128; Funk *v.* Israel, 5 Iowa 438.

Kansas.— Karr *v.* Stahl, 75 Kan. 387, 89 Pac. 669; Westenberger *v.* Wheaton, 8 Kan. 169.

Maryland.— Powell *v.* Bradlee, 9 Gill & J. 220; Cromwell *v.* Owings, 7 Harr. & J. 55.

Massachusetts.— Ilsley *v.* Stubbs, 5 Mass. 280.

New Hampshire.— Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331.

North Carolina.— McLeod *v.* Oates, 30 N. C. 387.

Pennsylvania.— Pott *v.* Oldwine, 7 Watts 173.

South Carolina.— Gist *v.* Cole, 2 Nott & M. 456, 10 Am. Dec. 616.

Washington.— Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

Wisconsin.— Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

United States.— Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390; Murphy *v.* Tindall, 17 Fed. Cas. No. 9,952*a*, Hempst. 10.

England.— Wilson *v.* Weller, 1 B. & B. 57, 3 Moore C. P. 294, 5 E. C. L. 501; Rex *v.* Monkhouse, Str. 1184, 93 Eng. Reprint 1116.

Canada.— Scott *v.* McRae, 3 Ont. Pr. 16.

26. Cooley *v.* Davis, 34 Iowa 128; Funk *v.*

interfere with the possession before the office of the law had been performed as to the process under which it was taken.[27] The law will not be so inconsistent with itself as to be auxiliary or lend its aid to an act which would operate to defeat its own purposes.[28] However, the rule does not apply where process by virtue of which property is seized is void.[29] The seizure must be upon valid and sufficient process.[30]

b. Property Seized Under Execution — (i) *Right of Defendant in Execution to Bring Replevin* — (a) *In General.* The general rule is well settled that where property has been taken under a valid execution, the defendant in the execution,[31] or any one claiming title under him subsequent to the levy of the execution,[32] cannot bring an action of replevin therefor against the officer levying it, or against one who is his agent or depositary, the possession of the latter being none the less the custody of the law.[33] At common law it is a contempt of court issuing an execution to replevy property taken under it by the execution debtor.[34] The general rule is not in any way affected by the fact that the property seized was set apart to defendant in bankruptcy proceedings com-

Israel, 5 Iowa 438; Westenberger *v.* Wheaton, 8 Kan. 169; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

27. Hagan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769.

28. Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

29. Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331; Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261; Mills *v.* Martin, 19 Johns. (N. Y.) 7; Marriott *v.* Shaw, Comyns 274, 92 Eng. Reprint 1069.

30. Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

31. *Arkansas.*— Goodrich *v.* Fritz, 4 Ark. 525.

California.— Norcross *v.* Nunan, 61 Cal. 640.

Indiana.— Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582.

Iowa.— Young *v.* Evans, 118 Iowa 144, 92 N. W. 111 (by express provision of statute); Armel *v.* Lendrum, 47 Iowa 535. And see Talbot *v.* De Forest, 3 Greene 586.

Kansas.— McGlothlin *v.* Madden, 16 Kan. 466; Westenberger *v.* Wheaton, 8 Kan. 169.

Kentucky.— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166; Bouldin *v.* Alexander, 7 T. B. Mon. 424.

Maryland.— Cromwell *v.* Owings, 7 Harr. & J. 55.

Michigan.— Ferguson *v.* Washer, 49 Mich. 390, 13 N. W. 788.

New Hampshire.— Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331; Kellogg *v.* Churchill, 2 N. H. 412, 9 Am. Dec. 104.

New Jersey.— Hawk *v.* Lepple, 51 N. J. L. 208, 17 Atl. 351, 14 Am. St. Rep. 677, 4 L. R. A. 48.

New York.— Keyser *v.* Waterbury, 7 Barb. 650; Barron *v.* Boyd, 1 Thomps. & C. 457; Dunham *v.* Wyckoff, 3 Wend. 280, 20 Am. Dec. 695; Hall *v.* Tuttle, 2 Wend. 475; Clark *v.* Skinner, 20 Johns. 465, 11 Am. Dec. 302.

North Carolina.— McLeod *v.* Oates, 30 N. C. 387.

England.— Winnard *v.* Foster, Lutw. 1190. See 42 Cent. Dig. tit. "Replevin," § 28.

Reason for rule.— "The reasons for this are of that imperative nature that make the rule indispensable to the administration of the law. Execution has been called the end of the law. But it will be only the beginning, and there would be no end of the law, if after a person has established his right by judgment, the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin." McLeod *v.* Oates, 30 N. C. 387. "If a defendant in the execution, after judgment had been legally entered against him upon a full and fair trial, were tolerated in bringing his action of replevin, and by it, to replevy the goods, taken in execution there might be no end to the delays, which the defendant might thus create. Justice and the end of the law, would be effectually subdued; for, although, the defendant in the execution, and plaintiff, in the action of replevin, would fail upon the trial, and judgment would be rendered in favor of the officer, for the restoration of the goods; yet the action might be again and again renewed, and delays, without end, effected. To prevent such abuses, and such contempts of the authority of courts, to prevent the monstrous absurdity of rendering the remedies, afforded by law, with a view to redress wrongs, the means of defeating the very end to be accomplished; the defendant in an execution, who should thus pervert the action of replevin, might, and ought to be severely punished for contempt." Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 124, 19 Am. Dec. 166 [*quoted* with approval in Westenberger *v.* Wheaton, 8 Kan. 169]. "It would be troubling the execution awarded if the party on whom the money was to be levied should patch back the goods by a replevin." Gilbert Repl. 122.

32. Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. 316.

33. Keyser *v.* Waterbury, 7 Barb. (N. Y.) 650.

34. Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55; Mitchell *v.* Roberts, 50 N. H. 486; Gilbert Repl. 122.

menced after entry of the judgment on which execution issued,[35] nor by irregularities in the proceedings for the judgment on which the execution was issued;[36] nor by the neglect of the officer taking the goods on execution to make an inventory;[37] nor by the fact that the judgment upon which the execution issued had been paid,[38] or that the execution contained a recital that the judgment had been paid. Such statement in no sense affects the formality of the writ.[39]

(B) *Where Judgment on Which Execution Issued Is Void.* Defendant in execution may maintain replevin for goods seized thereunder against the officer making the levy, where the judgment on which the execution issued is void;[40] and this is so, although the execution is regular on its face.[41] While such an execution would protect the officer when proceeded against as a wrong-doer, it cannot be made the basis of a claim of right to the property seized, without proof of a valid judgment.[42]

(C) *Where Process Is Void on Its Face.* A writ of execution void on its face will not protect an officer who undertakes to execute it, and the execution defendant may maintain replevin against the officer for its recovery.[43]

(D) *Where Judgment Was Rendered After Issuance of Execution.* If at the time an execution issued, and replevin was brought by defendant in execution there was no judgment or authority for the execution whatever, a judgment subsequently entered cannot operate back upon the rights of such defendant and take away a right of possession which existed at the time his action was commenced.[44]

(E) *Where Property Seized Is Exempt.* In many jurisdictions there are statutes which authorize a defendant in execution to bring replevin against an officer who, in making the levy by virtue of the execution, seizes property of the defendant which by statute is made exempt.[45] There is, however, considerable conflict of authority as to whether in the absence of such statutory authorization replevin will lie in favor of a defendant in execution against an officer who has seized his

35. Barron *v.* Boyd, 1 Thomps. & C. (N. Y.) 457. And see Westenberger *v.* Wheaton, 8 Kan. 169.

36. Norcross *v.* Nunan, 61 Cal. 640.

37. Ferguson *v.* Washer, 49 Mich. 390, 13 N. W. 788.

38. Armel *v.* Lendrum, 47 Iowa 535. And see as sustaining this proposition the analogous cases of Ruckman *v.* Cowell, 1 N. Y. 505; Lewis *v.* Palmer, 6 Wend. (N. Y.) 367; McGuinty *v.* Herrick, 5 Wend. (N. Y.) 240; Gardner *v.* Campbell, 15 Johns. (N. Y.) 401, holding that replevin will not lie against an officer who, having levied upon and taken goods in execution, receives from defendant the amount due on the execution, and then refuses to redeliver the goods.

39. Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. 316.

40. *Illinois.*— White *v.* Jones, 38 Ill. 159.

Iowa.— Balm *v.* Nunn, 63 Iowa 641, 19 N. W. 810.

Kansas.— Karr *v.* Stahl, 75 Kan. 387, 89 Pac. 669.

Michigan.— Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121; Wilson *v.* Martin, 44 Mich. 509, 7 N. W. 83; Gidday *v.* Witherspoon, 35 Mich. 368; Adams *v.* Hubbard, 30 Mich. 104; Beach *v.* Botsford, 1 Dougl. 199, 40 Am. Dec. 45.

Mississippi.— Breckenridge *v.* Johnson, 57 Miss. 371.

Nebraska.— Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232.

England.— George *v.* Chambers, 2 Dowl. P. C. N. S. 783, 7 Jur. 836, 12 L. J. M. C. 94, 11 M. & W. 149.

See 42 Cent. Dig. tit. "Replevin," § 28.

41. Adams *v.* Hubbard, 30 Mich. 104; Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

42. Adams *v.* Hubbard, 30 Mich. 104.

43. See Munis *v.* Herrera, 1 N. M. 362.

44. Campbell *v.* Williams, 39 Iowa 646.

45. *Florida.*—Allen *v.* Ingram, 39 Fla. 239, 22 So. 651; Loring *v.* Wittich, 16 Fla. 498, under statute providing that no replevin shall lie at the suit of defendant in any execution or attachment to recover goods and chattels seized by virtue thereof, unless such goods and chattels are exempted by law from such execution or attachment. This is the usual form of statute on the subject.

Indiana.— Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582.

Iowa.— Cooley *v.* Davis, 34 Iowa 128; Gimble *v.* Ackley, 12 Iowa 27; Funk *v.* Israel, 5 Iowa 438.

Kansas.— Westenberger *v.* Wheaton, 8 Kan. 169.

Minnesota.— See Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. 316; Whitney *v.* Swenson, 43 Minn. 337, 45 N. W. 609.

See 42 Cent. Dig. tit. "Replevin," § 28. And see the statutes of various states.

Effect of statute giving power to enjoin sale of exempt property.— The remedy so

exempt property under the execution. Some decisions hold that at common law the defendant is not entitled to maintain replevin under such circumstances;[46] and this view is inferentially supported by *dicta* in some of the cases where the right to maintain replevin because of statutory provisions was affirmed.[47] But according to the weight of authority, in cases where the question was directly involved, the right of defendant to maintain replevin independently of statutory authorization is upheld, on the ground that the property seized is not in the custody of the law,[48] and this, it is believed, is the correct view. It has also been held that this right is not affected by a statute which provides a special remedy for the debtor who desires to retain the property seized under execution and submit his right to it as exempt to the test of a trial; that the statutory remedy is merely cumulative.[49] It has been held that a statute providing that, where goods taken under execution or attached are claimed by a person other than the defendant in the suit, or debtor in the execution, such owner or other person may replevy them, excludes defendant in execution from maintaining replevin for goods attached even though exempt.[50]

(II) *Right of Stranger to Execution to Maintain Replevin* — (A) *In Absence of Statutory Authority.* There is great conflict of authority as to whether one whose property is seized under execution against another may

conferred is not taken away by a statute enlarging the equity powers of the circuit courts to the extent of giving them equity jurisdiction to enjoin the sale of property exempt by law, and to decree the setting aside, or to restrain the setting aside, of exempt property from forced sale. Allen *v.* Ingram, 39 Fla. 239, 22 So. 651.

Notice of ownership.—A statute providing that an officer is bound to levy on any personal property in the possession of defendant unless he has received notice in writing from some other person that the property belongs to him does not require the execution defendant to notify the officer that property levied on belongs to him, before he can maintain replevin to recover the property as being exempt from execution. Glover *v.* Narey, 92 Iowa 286, 60 N. W. 531; Parsons *v.* Thomas, 62 Iowa 319, 17 N. W. 526.

46. Reynolds *v.* Sallee, 2 B. Mon. (Ky.) 18; Buis *v.* Cooper, 63 Mo. App. 196, 202, in which it was said: "If exempt property is levied upon, there are ready and adequate means to restore it, other than by an independent suit in replevin, a proceeding which is necessarily accompanied by much delay as well as embarrassment to the court issuing the execution."

Illustrations of rule.— In Reynolds *v.* Sallee, 2 B. Mon. (Ky.) 18, Reynolds sued out a writ of replevin against Sallee for a horse; the latter avowed that he was a constable and had levied executions which were in his hands against Reynolds, on the horse; plaintiff pleaded that this horse was his only work beast and not subject to levy. To this the defendant demurred. The court sustained the demurrer, on the ground that a defendant in execution could not maintain replevin for the property levied on under the execution; that such a proceeding would be a contempt to the court issuing the execution.

47. See Cooley *v.* Davis, 34 Iowa 128; Westenberger *v.* Wheaton, 8 Kan. 169.

48. *District of Columbia.*— Wallingsford *v.* Bennett, 1 Mackey 303.

Mississippi.— Ross *v.* Hawthorne, 55 Miss. 557; Mosely *v.* Anderson, 40 Miss. 49.

Ohio.— Clark *v.* Hicks, 4 Ohio Dec. (Reprint) 413, 2 Clev. L. Rep. 129.

Tennessee.— Harris *v.* Austell, 2 Baxt. 148; Wilson *v.* McQueen, 1 Head 17.

Wisconsin.— Gilman *v.* Williams, 7 Wis. 329, 76 Am. Dec. 219.

See 42 Cent. Dig. tit. "Replevin," § 28.

Reasons for rule.— The law does not acquire possession of property by trespass or wrong, and it is no infraction of its dignity to surrender property that may have strayed into the keeping of its officers without authority of its process. The rule that property in the custody of the law cannot be replevied contemplates a case where the property is within the scope and power of the execution, and where the remedy for the abuse of the power and process may be obtained in the forum issuing the writ. Wallingsford *v.* Bennett, 1 Mackey (D. C.) 303. And see Wilson *v.* McQueen, 1 Head (Tenn.) 17 (in which it was said that the levy is in violation of law, and vests no interest or right whatever in the officer or execution creditor. Plaintiff, notwithstanding the levy, has the immediate right of property in the goods seized); Gilman *v.* Williams, 7 Wis. 329, 333, 76 Am. Dec. 219 (in which it was said: "The idea that an unlawful custody of property can be the custody of the law is simply absurd, not to say preposterous").

Right of execution debtor to select property.— The execution debtor may select the property levied on as exempt in lieu of homestead. The fact that he has other property does not prevent him from so doing. Clark *v.* Hicks, 4 Ohio Dec. (Reprint) 413, 2 Clev. L. Rep. 129.

49. Ross *v.* Hawthorne, 55 Miss. 551.

50. Prescott *v.* Starkey, 71 Vt. 118, 41 Atl. 1021.

maintain replevin therefor against the officer making the levy, in the absence of some statutory provision authorizing such suit, either expressly or by implication. Many decisions deny the right to maintain the replevin, usually on the ground that the property is in the custody of the law,[51] and hold that it makes no difference whether or not the property was in the hands of defendant in execution at the time of the taking,[52] and that it is a contempt of the court issuing an execution to replevy property taken under it whether by defendant in execution or any one else.[53] According to these decisions the remedy of the party aggrieved is an action of trespass or trover against the officer,[54] or replevin against the purchaser at a sale of the goods under the execution,[55] or to make claim for the property in accordance with statutory provisions therefor if such provisions exist.[56] The views enunciated by these decisions have by no means received universal acceptance. On the contrary, the weight of authority is probably the other way. There are numerous decisions which hold that replevin lies for goods taken upon execution if taken from the possession of plaintiff in replevin, by virtue of an execution running against another person.[57] So also there are many decisions which lay down the rule without the qualification stated in the preceding paragraph, that if an officer, through mistake or design, seizes property upon a writ of execution, not belonging to defendant in the writ, although belonging to defendant, he becomes a trespasser, and the goods may be taken

51. *Arkansas.*— Spring *v.* Bourland, 11 Ark. 658, 54 Am. Dec. 243; Goodrich *v.* Fritz, 4 Ark. 525.

Connecticut.— Howard *v.* Crandall, 39 Conn. 213.

Georgia.— Raiford *v.* Hyde, 36 Ga. 93.

Maryland.— Cromwell *v.* Owings, 7 Harr. & J. 55.

New Hampshire.— Kittredge *v.* Holt, 55 N. H. 621; Mitchell *v.* Roberts, 50 N. H. 486; Melcher *v.* Lamprey, 20 N. H. 403; Eastman *v.* Molony [*cited* in Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331]; Kellogg *v.* Churchill, 2 N. H. 412, 9 Am. Dec. 104.

North Carolina.— Carroll *v.* Hussey, 31 N. C. 89; McLeod *v.* Oates, 30 N. C. 387.

United States.— St. Paul, etc., R. Co. *v.* Drake, 72 Fed. 945, 19 C. C. A. 252, holding that third parties, claiming property levied on by the marshal, will not be permitted to take it out of his possession, under color of process, by means of a separate suit, even in the same court. The remedy is by ancillary proceedings in the same cause.

See 42 Cent. Dig. tit. "Replevin." § 30.

And see Hewitson *v.* Hunt, 8 Rich. (S. C.) 106, where the remedy was denied on the ground that replevin lies only in cases of wrongful distress in South Carolina.

Reasons assigned in support of doctrine.— "Execution has been called the end of the law. But it will be only the beginning, and there will be no end of the law, if after a person has established his right by judgment, the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin." McLeod *v.* Oates, 30 N. C. 387, 389. "If the goods were permitted to be taken from the hands of the officer by a writ of replevin, the rights of a creditor might always be defeated, by a mere stranger, having no right, since it could only be determined at the trial, and after the mischief was done, and the very object of the judgment disappointed, to whom the property belonged. And thus the law, by allowing process to defeat its own ends, would virtually close the door of justice against creditors seeking to enforce their judgments." Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55, 60.

Replevin in state court of property seized under process of federal court.— The possession by a marshal of a court of the United States of property by virtue of a levy under a writ of execution issued upon a judgment recovered in a circuit court of the United States is a complete defense to an action in a state court of replevin of the property seized, without regard to its rightful ownership. Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390. And see as sustaining this doctrine by analogy Freeman *v.* Howe, 24 How. (U. S.) 450, 16 L. ed. 749. And it seems that *vice versa* the possession of property held by process issuing from state courts is protected against any disturbance under process of the courts of the United States, excepting of course those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States. Covell *v.* Heyman, 111 U. S. 176, 4 S. Ct. 355, 28 L. ed. 390.

52. Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

53. Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

54. Goodrich *v.* Fritz, 4 Ark. 525; Raiford *v.* Hyde, 36 Ga. 93; Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

55. Goodrich *v.* Fritz, 4 Ark. 525; Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

56. Goodrich *v.* Fritz, 4 Ark. 525.

57. Schars *v.* Barnd, 27 Nebr. 94, 42 N. W. 906; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Judd *v.* Fox, 9 Cow. (N. Y.) 259; Gardner *v.* Campbell, 15 Johns. (N. Y.) 401; Thompson *v.* Button, 14 Johns.

from his possession by replevin.[58] There are also some decisions sustaining this view which do not show whether or not they were based on statutory provisions.[59]

(B) *Under Statutory Provisions* — (1) AUTHORIZING REPLEVIN — (a) IN GENERAL. Under statutory provisions in many jurisdictions it is held that one whose property has been seized under execution against another may maintain replevin against the officer levying the execution.[60] And this is true notwithstanding

(N. Y.) 84; Williamson *v.* Ringgold, 30 Fed. Cas. No. 17,755, 4 Cranch C. C. 39. And see Schneider *v.* Burke, 86 Ill. App. 160; Hall *v.* Tuttle, 2 Wend. (N. Y.) 475, in which case it was held that replevin will lie by the owner of goods against a sheriff for the recovery of property, levied upon by him by virtue of an execution against a third person, the property at the time of the levy being in the possession of defendant in the execution, where such property, after the levy, came peacefully into the possession of the owner, and was retaken by the sheriff.

58. *Kentucky.*— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166; Bouldin *v.* Alexander, 7 T. B. Mon. 424.

Mississippi.— Ford *v.* Dyer, 26 Miss. 243; Yarborough *v.* Harper, 25 Miss. 112.

Missouri.— Belkin *v.* Hill, 53 Mo. 492, 496 (in which it was said: "The right to sue the sheriff or his deputy, and the plaintiff in the execution, if he ordered or assented to the sale, is a right which always existed, except when positively prohibited by statute"); Talbot *v.* Magee, 59 Mo. App. 347. For rule under statutes since repealed see Hambleton *v.* Lynch, 32 Mo. 259; St. Louis, etc., R. Co. *v.* Castello, 39 Mo. 124; Bradley *v.* Holloway, 28 Mo. 150.

New Jersey.— Hawk *v.* Lepple, 51 N. J. L. 208, 17 Atl. 351, 4 L. R. A. 48, 14 Am. St. Rep. 677; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593.

New York.— Dunham *v.* Wyckoff, 3 Wend. 280, 20 Am. Dec. 695; Clark *v.* Skinner, 20 Johns. 465, 11 Am. Dec. 302. And see Allen *v.* Crary, 10 Wend. 349, 25 Am. Dec. 566, holding that replevin will lie against a plaintiff in execution by whose direction it is levied upon specified articles of property which prove not to belong to defendant in execution but belong to a third person.

Pennsylvania.— See Mulholm *v.* Cheney, Add. 301.

Wisconsin.— Gallagher *v.* Bishop, 15 Wis. 276.

England.— See Winnard *v.* Foster, Lutw. 1190.

Canada.— Flanagan *v.* Wheten, 31 N. Brunsw. 295; Burke *v.* McWhirter, 35 U. C. Q. B. 1.

See 42 Cent. Dig. tit. "Replevin," § 30.

Reasons assigned for rule.— The reasons for the rule, in respect to defendant in the execution, are not equally strong, in relation to those whose property may be seized under executions against others. The reason entirely fails, where an execution issues against A, and the officer levies on the property of B. It is a trespass, on the part of the officer, to seize property not owned by the defendant in the execution; and we perceive no reason founded in good policy, which should prevent the real owner from maintaining his action of replevin. Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166. Where a stranger to the judgment and execution brings replevin, it is not to question or overhaul those proceedings, but to obtain redress for a trespass done to him; the judgment and execution set out in the avowry are *res inter alios*, and cannot affect his rights or his remedies. Clark *v.* Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302.

Goods of a master or principal taken under an execution against his agent or servant while in the possession of the latter may be replevied. The chattels are deemed to be taken from the actual possession of plaintiff who was not the execution defendant, the possession of the servant or agent being the possession of the master or principal. Clark *v.* Skinner, 20 Johns. (N. Y.) 465, 11 Am. Dec. 302.

Replevin against assignee of sheriff.— Where the goods of A, having been seized by the sheriff under an execution against B, had been handed over by the sheriff to an assignee, to whom B had made a voluntary assignment in insolvency, it was held that A might maintain replevin against the assignee as well as the sheriff. Burke *v.* McWhirter, 35 U. C. Q. B. 1.

The taking of an indemnity bond from plaintiff by an officer, who has seized property under an execution, does not release the officer, nor plaintiff ordering or assenting to such action, from liability to a replevin suit by the owner of the property. Belkin *v.* Hill, 53 Mo. 492.

Property in hands of bailee.— When an officer wrongfully levies upon property of a stranger, he is the proper party defendant in an action of replevin even though the property levied upon be left with a third person as bailee. Talbot *v.* Magee, 59 Mo. App. 347.

Second levy on execution against plaintiff in replevin.— If intermediate seizure and sale of A's property on execution against B, and a levy on a second execution is made on the property as belonging to A, A cannot maintain replevin therefor. Sharp *v.* Whittenhall, 3 Hill (N. Y.) 576.

59. Clayton *v.* Johnson, 36 Ark. 406, 38 Am. Rep. 40; Wyatt *v.* Freeman, 4 Colo. 14; A. Leschen, etc., Rope Co. *v.* Craig, 18 Colo. App. 353, 71 Pac. 885; Agnew *v.* Wilson, 46 Ill. App. 205 Nelson *v.* McIntyre, 1 Ill. App. 603.

60. *California.*— Rhodes *v.* Patterson, 3 Cal. 469.

plaintiff in replevin was one of defendants in the former action, if the order of sale did not direct the seizure or sale of the property of such plaintiff, and was not issued against him.[61] These statutes of course have no application where plaintiff in replevin neither had nor was entitled to possession of the property at the time of the seizure under the execution.[62]

(b) Necessity For Notice of Ownership. If the statute provides that notice of ownership must be given to the officer who seized the property under execution prior to bringing suit, this requirement must be complied with or the suit cannot be maintained.[63]

(2) Prohibiting Replevin. By statute in one state [64] it is provided that all writs of replevin granted or issued for any owner of goods taken in execution by any officer, under the authority of the state are irregular, erroneous, and void. The statute applies, although a claimant has given a bond therefor, and it applies

Connecticut.— Hilton *v.* Osgood, 49 Conn. 110. Under a former statute replevin could be maintained to recover goods of one person seized on attachment against another but not when they were seized by virtue of an execution. Howard *v.* Crandall, 39 Conn. 213.

Delaware.— Sharp *v.* Arthurs, 1 Houst. 353. And see Stapleford *v.* White, 1 Houst. 238.

Indiana.— Hadley *v.* Hadley, 82 Ind. 95; Louthain *v.* Fitzer, 78 Ind. 449; Chinn *v.* Russell, 2 Blackf. 172.

Iowa.— Ralston *v.* Black, 15 Iowa 47.

Kansas.— Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751; Scott *v.* Wagner, 2 Kan. App. 386, 42 Pac. 741. See also Gross *v.* Bogard, 18 Kan. 288; Westenberger *v.* Wheaton, 8 Kan. 169.

Massachusetts.—Tracy *v.* Warren, 104 Mass. 376; Ilsley *v.* Stubbs, 5 Mass. 280.

Minnesota.—Whitney *v.* Swensen, 43 Minn. 337, 45 N. W. 609.

North Carolina.— Mitchell *v.* Sims, 124 N. C. 411, 32 S. E. 735; Churchill *v.* Lee, 77 N. C. 341; Jones *v.* Ward, 77 N. C. 337. For rule under former statutory provisions see Carroll *v.* Hussey, 31 N. C. 89; McLeod *v.* Oates, 30 N. C. 387.

South Carolina.— See Dudley *v.* Green, 46 S. C. 199, 24 S. E. 186; Code Civ. Proc. § 237.

Washington.— Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

See 42 Cent. Dig. tit. "Replevin," § 30.

Particular statutes under which right held to exist.— The right is held to exist under a statute providing that "the action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property with a right to their immediate possession, and which are wrongfully detained from him in any manner" (Hilton *v.* Osgood, 49 Conn. 110, 112); authorizing the suing out of a writ of replevin against the officer for chattels which he has attached or seized on execution, provided plaintiff in replevin be not the debtor (Ilsley *v.* Stubbs, 5 Mass. 280); under a statute providing that whenever any person tortiously takes and unlawfully detains the goods of another the owner, provided he is not the execution defendant, may replevy (Chinn *v.* Russell, 2 Blackf. (Ind.) 172); and that the affidavit shall state that the property was not seized under an execution or attachment against the property of plaintiff (Jones *v.* Ward, 77 N. C. 337; Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260).

When mortgagee may maintain replevin.— Where an officer levies an execution on property in the possession of a mortgagor, the levy attaches only to the interest of the mortgagor therein; and where the mortgagor's right of possession afterward terminates by default in the payment of the mortgage debt, it is held that upon default the mortgagee may maintain replevin against the officer therefor. Rankine *v.* Greer, 38 Kan. 343, 16 Pac. 680, 5 Am. St. Rep. 751.

Property in hands of bailee.— The owner of property seized in execution to satisfy a judgment against a third party may maintain an action of replevin against the officer, notwithstanding the property at the time of the commencement of the action is in the hands of his bailee. Ralston *v.* Black, 15 Iowa 47.

Property left in hands of execution defendant.— If a sheriff, by direction of a plaintiff, who is present, levy an execution upon goods of another than the execution defendant, the goods being present and within his control, and he leave them in the custody of the execution defendant where he found them, upon his delivery bond, without surety, the owner may, under the statute, maintain replevin against both, although the sheriff or plaintiff personally have not actual possession of the goods at the commencement of the suit. In such case the execution defendant is a mere receiptor of the goods, and the possession is that of the sheriff. Hadley *v.* Hadley, 82 Ind. 95.

61. Scott *v.* Wagner, 2 Kan. App. 386, 42 Pac. 741.

62. Stapleford *v.* White, 1 Houst. (Del.) 238, in which case the goods seized had been rented to defendant in execution to be returned on reasonable notice, and it appeared that no such notice had been given at the time of the seizure. And see Pinckney *v.* Darling, 3 N. Y. App. Div. 553, 38 N. Y. Suppl. 411 [*affirmed* in 158 N. Y. 728, 53 N. E. 1130].

63. Finch *v.* Hollinger, 43 Iowa 598; Kaster *v.* Pease, 42 Iowa 488.

64. Pa. Act, April 3, 1879.

both to cases where the officer making the seizure is in possession or where any person who is custodian of the goods is made defendant. Custodianship may be substituted, but the law's custody is not abandoned.[65] And in another jurisdiction it is provided that replevin shall not be maintained in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode provided by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin. Under this section replevin will not lie to recover property in the hands of the sheriffs under execution, the proper remedy being the interposition of a claim under another section which provides an exclusive remedy by claimant's issue.[66]

(c) *Property Owned in Common by Execution Debtor and Stranger to Execution.* Where an officer levies on property owned in common by the execution debtor and a stranger to the execution, he has the right to take the entire property into his possession and the stranger to the execution cannot maintain replevin for the property.[67]

(iii) *Property Sold Under Execution.* Where chattels have been sold under execution they cease to be in the custody of the law.[68] When the sale has been made, the object of the law is accomplished, and every man who has claims is left to his usual remedy,[69] and the true owner, whether defendant in the execution,[70] or one whose property has been sold under execution against another,[71] may bring replevin therefor against the purchaser in possession [72] or

65. Taylor *v.* Ellis, 200 Pa. St. 191, 49 Atl. 946 [*overruling* English *v.* Dalbrow, 1 Miles (Pa.) 160; Tufts *v.* Cole, 3 Kulp (Pa.) 436; and without mention. Weed *v.* Hill, 2 Miles (Pa.) 122].

66. Bernheimer *v.* Martin, 66 Miss. 486, 6 So. 326; Clark *v.* Clinton, 61 Miss. 337. And see Conn *v.* Bernheimer, 67 Miss. 498, 7 So. 345. Under earlier statutes, one whose property was seized under execution against another might maintain replevin therefor against the officer seizing it. Saunders *v.* Jordan, 54 Miss. 428; Swain *v.* Alcorn, 50 Miss. 320.

Under the statutes of Nova Scotia a stranger to the execution whose goods are seized cannot maintain replevin against the sheriff. Carty *v.* Bonnett, 12 Nova Scotia 293. The rule was otherwise before the enactment of the statute. Ring *v.* Brennan, 2 Nova Scotia 20.

67. Branch *v.* Wiseman, 51 Ind. 1, 3, in which it was said: "In an action against one of the partners, the officer must seize all the goods, because the moieties are undivided, for if he seize but a moiety and sell that, the other partners will have a right to a moiety of that moiety. He must seize the entire leviable property of the copartnership. He must take and retain custody of the property, for in no other way can he legally execute the writ and sell as much of the interest of his judgment debtor as may be sufficient to satisfy the execution." And see Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540, an analogous case in which the property was seized on an attachment.

68. Cromwell *v.* Owings, 7 Harr. & J. (Md.) 55.

69. Shearick *v.* Huber, 6 Binn. (Pa.) 2.

70. Heagle *v.* Wheeland, 64 Ill. 423, holding that where property is seized and sold for a fine, under a judgment void for want of jurisdiction, the party against whom the fine was recovered, and whose property was sold in satisfaction thereof, may contest the purchaser's title to the property, in an action of replevin.

71. Hicks *v.* Britt, 21 Ark. 422; Dodd *v.* McCraw, 8 Ark. 83, 46 Am. Dec. 301; Armistead *v.* Bernard, 62 Miss. 180; Crittenden *v.* Lingle, 14 Ohio St. 182, 84 Am. Dec. 370; Shearick *v.* Huber, 6 Binn. (Pa.) 2; Huber *v.* Sharck, 2 Browne (Pa.) 160.

Service of notice of ownership.—An action of replevin will lie against a sheriff or a purchaser from him, in favor of a third person who serves notice of ownership while the sheriff is in possession of the property under the writ, although he may have sold the same prior to commencement of suit. Action on the indemnifying bond is not the exclusive remedy. Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349.

Effect of special statutory provisions.—A statute which provides that "the action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property in some mode prescribed by law" only forbids the institution of an action of replevin to recover property held by an officer by virtue of an execution or attachment, and does not forbid an action of replevin against a purchaser of the property at a sale under the execution. Nor does plaintiff's failure to present and prosecute his claim operate as a waiver of his right to maintain replevin. Armistead *v.* Bernard, 62 Miss. 180.

72. See cases cited in preceding notes in this section.

his bailee who has actual custody of the chattels,[73] and no demand is necessary before bringing suit.[74]

c. Property Seized Under Process of Attachment — (i) *Right of Defendant in Attachment to Bring Replevin* — (a) *In General.* The general rule is well settled that defendant in attachment cannot maintain replevin for the attacned property against the officer making the seizure.[75] And the fact that the property is in the possession of another, as the mere agent or depositary of the officer, will not render it any the less in the custody of the law.[76] So the rule applies, although defendant in attachment is misdescribed in the writ and has pleaded in abatement thereof,[77] or although the levy is voidable [78] or even void.[79]

(b) *Where Property Seized Is Exempt.* As was shown in a preceding section, there is a conflict of authority as to whether defendant in execution, in the absence of some statute conferring the right, can maintain replevin to recover exempt property from an officer who has seized it by virtue of the execution.[80] In the absence of any direct authority on the question, it is perhaps safe to assert that in jurisdictions where a defendant in execution may maintain the action, a defendant in attachment may likewise do so, and in jurisdictions where a defendant in execution is not permitted to maintain the action, neither will a defendant in attachment. However, the right to maintain the action is now conferred by statute in many jurisdictions.[81]

73. Hicks *v.* Britt, 21 Ark. 422.

74. Hicks *v.* Britt, 21 Ark. 422.

75. *Kansas.*— Blair *v.* Shew, 24 Kan. 280; Bailey *v.* Bayne, 20 Kan. 657.

Massachusetts.— Perry *v.* Richardson, 9 Gray 216.

New Jersey.— Hawk *v.* Lepple, 51 N. J. L. 208, 17 Atl. 351, 14 Am. St. Rep. 677, 4 L. R. A. 48.

New York.— Keyser *v.* Waterbury, 7 Barb. 650.

Wisconsin.— Battis *v.* Hamlin, 22 Wis 669.

United States.— Tavenner *v.* Hunter, 22 Fed. Cas. No. 13,367, 1 Hayw. & H. 81.

See 42 Cent. Dig. tit. "Replevin," § 32.

Second attachment on property in custodian's hands.— Where property attached is suffered to remain in the attachment debtor's possession, on giving security for its safe-keeping and delivery to the officer making the attachment, and is subsequently attached by another officer under another writ and removed, the owner cannot maintain replevin therefor. While an attachment made by the second officer may be a trespass on the rights of the one who made the first, it is not an act of which the owner can complain. "As bailee of the first officer, the plaintiff has no special property in the goods, and as owner he cannot replevy from the one, who holds them by authority of an attachment on a writ against him." Brown *v.* Crockett, 22 Me. 537.

Property sold pendente lite as being perishable.— Under statutes providing that on the seizure of personal property in a proceeding to establish a vendor's lien thereon, the sheriff shall hold and dispose of the property as in replevin, and that if replevied chattels are expensive to keep, or perishable, they may be sold by the sheriff, as in cases of attachment, if the sheriff sells chattels held by him as being perishable or expensive to keep defendant in the proceeding cannot bring replevin against the purchaser on the ground that they should not have been sold. Riggs *v.* Coker, 69 Miss. 266, 13 So. 814.

76. Keyser *v.* Waterbury, 7 Barb. (N. Y.) 650.

77. Perry *v.* Richardson, 9 Gray (Mass.) 216.

78. Blair *v.* Shew, 24 Kan. 280.

79. Blair *v.* Shew, 24 Kan. 280.

80. See *supra*, I, B, 3, b, (I), (E).

81. *Arkansas.*— Mills *v.* Pryor, 65 Ark. 214, 45 S. W. 350.

Florida.— See Allen *v.* Ingram, 39 Fla. 239, 22 So. 651.

Iowa.— Wilson *v.* Stripe, 4 Greene 551, 61 Am. Dec. 138. And see Upp *v.* Neuhring, 127 Iowa 713, 104 N. W. 350.

Kansas.— Blair *v.* Shew, 24 Kan. 280; Westenberger *v.* Wheaton, 8 Kan. 169.

Michigan.— Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1036, holding, however, that the property must be claimed as exempt.

Mississippi.— Moseley *v.* Anderson, 40 Miss. 49, right held to be conferred by a statute providing that replevin shall lie "Whenever any goods or chattels shall be wrongfully taken or detained."

Oklahoma.— McFall *v.* Elmore, 20 Okla. 443, 94 Pac. 545.

South Carolina.— See Southern R. Co. *v.* Sarratt, 58 S. C. 98, 36 S. E. 504.

See 34 Cent. Dig. tit. "Replevin," § 33. And see the statutes of the various states.

Applications of rule.— Under a statute which permits one against whose property an execution or attachment has been issued to replevy such property where it is exempt by statute from such seizure, it is held that a tenant may recover by replevin property seized under a specific attachment to enforce a landlord's lien to which the property seized is not subject under the statute creating such lien. Mills *v.* Pryor, 65 Ark. 214, 45 S. W. 350.

(II) *Right of Stranger to Attachment to Bring Replevin*[82]— (A) *In Absence of and Under Special Statutory Provisions.* According to some decisions, where the practice is not affected by statute, if property of one person is seized on an attachment issued against another, the owner cannot maintain replevin, the view being that the property is in the custody of the law.[83] On the other hand it has been held that where an officer under a warrant of attachment seizes property in the possession of and owned by a person other than the one against whose property the warrant is issued, he is liable in an action of replevin to such person.[84] And the better view and the one maintained by the weight of authority is that if an officer, in attempting to execute process of attachment, by mistake or design, takes goods not the property of defendant in such writ, he is a trespasser and acquires no right to the goods seized, and the injured party may have replevin for their recovery. It is considered that the property is not in the custody of the law.[85] According to these decisions it is immaterial whether the property was taken from the possession of the party claiming it or from defend-

Necessity for notice.— Statutes providing that an officer is bound to levy on any personal property in the possession of defendant unless he has received notice in writing from some other person that such property belongs to him, and that the provisions as to notice of ownership are applicable to levies made under attachments, apply to third persons claiming ownership of attached property, and it is not necessary for defendant in attachment to give such notice before bringing replevin. Upp *v.* Neuhring, 127 Iowa 713, 104 N. W. 350; Glover *v.* Narey, 92 Iowa 286, 60 N. W. 531.

82. Power of court to issue replevin for property taken on process issued from another court see Courts, 11 Cyc. 988, 996 *et seq.*

83. Baltimore, etc., R. Co. *v.* Klaff, 103 Md. 357, 63 Atl. 360, 115 Am. St. Rep. 363, 5 L. R. A. N. S. 495; Smith *v.* Huntington, 3 N. H. 76, 14 Am. Dec. 331; Union Lumbering Co. *v.* Tronson, 36 Wis. 126; Battis *v.* Hamlin, 22 Wis. 669; Griffith *v.* Smith, 22 Wis. 646, 99 Am. Dec. 90.

84. Deutsch *v.* Reilly, 8 Daly (N. Y.) 132; Klee *v.* Grant, 4 Misc. (N. Y.) 88, 23 N. Y. Suppl. 855; Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623, holding that where A agreed to trade certain cattle to B, but the latter had not performed his part of the contract and A still retained possession, claiming ownership, a taking of the cattle under an attachment against B was wrongful and A could maintain replevin. See also Williams *v.* Eikenberry, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517, in which case it was held that where an officer attaches property found in the possession of a stranger, claiming title, in an action of replevin therefor by such stranger, the officer, in order to justify, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued.

85. *Arkansas.*— Willis *v.* Reinhardt, 52 Ark. 128, 12 S. W. 241.

Colorado.— Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313; Wilde *v.* Rawles, 13 Colo. 583, 22 Pac. 897; Hannan *v.* Connett, 10 Colo. App. 171, 50 Pac. 214.

Delaware.— Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

Illinois.— See Samuel *v.* Agnew, 80 Ill. 553, a case decided under a statute, but in which it was said the action would lie independent of statute.

Minnesota.— Caldwell *v.* Arnold, 8 Minn. 265.

Mississippi.— Hopkins *v.* Drake, 44 Miss. 619.

Missouri.— Wangler *v.* Franklin, 70 Mo. 659; Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107. And see Bradley *v.* Holloway, 28 Mo. 150.

New Jersey.— Brown *v.* Bissett, 21 N. J. L. 267.

Rhode Island.— Barron *v.* Arnold, 16 R. I. 22, 11 Atl. 298.

Tennessee.— Brammell *v.* Hart, 12 Heisk. 366.

Vermont.— May *v.* Hastings [*cited* in 24 Vt. 371]. And see Angell *v.* Keith, 24 Vt. 371.

Wisconsin.— Williams *v.* Morgan, 50 Wis. 548, 7 N. W. 541.

United States.— Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432.

See 42 Cent. Dig. tit. "Replevin," § 33.

Suit against officer and attaching creditor jointly.— The owner of property, attached in a suit against another, may maintain replevin therefor against the attaching creditor and the officer jointly, when the former assisted in taking the property, and took it into his own possession after the attachment. Esty *v.* Love, 32 Vt. 744.

Effect of assignment to dissolve attachment.— Where goods are attached, one seeking to replevy them as owner, by virtue of a sale thereof to him by defendant in attachment, cannot claim that by reason of an assignment by defendant in attachment for the benefit of creditors the attachment was dissolved. Josephi *v.* Furnish, 27 Oreg. 260, 41 Pac. 424.

Property owned jointly by third person and debtor.— Where an officer attaches property owned in common by the debtor and a third person, he has the right to take the entire property into his possession and the coöwner cannot maintain replevin therefor.

ant in attachment.[86] In many jurisdictions, also by virtue of statutory provisions, if the property of one person is seized under attachment against another he may maintain replevin against the officer taking it.[87] In any event, however,

Lawrence *v.* Burnham, 4 Nev. 361, 97 Am. Dec. 540.

86. See cases cited in preceding note.

87. *Arkansas.*— Willis *v.* Reinhardt, 52 Ark. 128, 12 S. W. 241; Hickman *v.* Ford, 43 Ark. 207.

California.— Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306.

Illinois.— Samuel *v.* Agnew, 80 Ill. 553; La Salle Pressed Brick Co. *v.* Coe, 53 Ill. App. 506.

Iowa.— Hall *v.* Ballou, 58 Iowa 585, 12 N. W. 475; Ramsden *v.* Wilson, 49 Iowa 211; Smith *v.* Montgomery, 5 Iowa 370; Miller *v.* Bryan, 3 Iowa 58.

Kansas.— See Stone *v.* Bird, 16 Kan. 488.

Massachusetts.— Tracy *v.* Warren, 104 Mass. 376.

New Hampshire.— Wheeler *v.* Eaton, 67 N. H. 368, 39 Atl. 901.

Canada.—Arnold *v.* Higgins, 11 U. C. Q. B. 191.

See 42 Cent. Dig. tit. "Replevin," § 33.

Statutes held to confer right.— The right is conferred by statutes providing that replevin shall not lie at the suit of any other person than defendant in execution or attachment unless he shall at the time have a right to reduce into his possession the goods taken (Samuel *v.* Agnew, 80 Ill. 553), and by a statute providing that wherever goods shall be wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, the owner or person who by law can maintain trespass or trover for personal property shall have and may bring an action of replevin for the recovery of such goods, in like manner as actions are brought and maintained "by any person complaining of an unlawful distress" (Arnold *v.* Higgins, 11 U. C. Q. B. 191).

Statutes held not to bar right.— Statutes providing that where an officer levying on property has taken an indemnity bond from the levying creditor, a claimant of the property shall be barred of an action against the officer, relate solely to the protection of the officer when he levies an execution; they do not bar an action to recover possession of property taken under the levy of an attachment. Hall *v.* Ballou, 58 Iowa 585, 12 N. W. 475. So notwithstanding statutes which provide that, where property is seized by execution or attachment, any party other than defendant may file a complaint with the justice, or, if the officer executing the writ has reason to believe that a third person has some claim to the property, he shall give notice to such party in writing that the property has been seized, and require him to assert his claim within twenty days thereafter; that a claimant of attached property shall prosecute his claim as in cases of property taken on execution, or be barred, yet where plaintiff's property was attached, and he had actual notice thereof, but before service of the notice by the officer he had commenced replevin for such property, he was entitled to continue such suit, since his right, under the statute, to file a complaint in the attachment suit was cumulative only, the notice of the attachment not having been given until the replevin was instituted. Patterson *v.* Snow, 24 Ind. App. 572, 57 N. E. 286.

Retention by officer after offer to give possession to plaintiff.— The owner of property attached as belonging to another may maintain replevin therefor, although on his demanding the property, the levying officer stated that he might have it if it was his, where the officer retained the same possession of the property after such statement as he had before. Wheeler *v.* Eaton, 67 N. H. 368, 39 Atl. 901.

Attachment no bar to replevin by same party.— The levy of an attachment on chattels as defendant's property does not prevent the party levying the attachment from subsequently seizing the same property in replevin as his own. There is no element of estoppel either of record or *in pais*. Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107.

Under the statutes of Connecticut a writ of replevin to obtain the restoration of goods attached, in favor of a claimant who was not a party to the attachment, must be brought against the attaching creditor and cannot be sustained against the officer who served the attachment. Bowen *v.* Hutchins, 18 Conn. 550. And see Hathaway *v.* St. John, 20 Conn. 343. Likewise in this state the right of a person to replevy goods attached in a suit against another person, given by the eighth section of the statute authorizing writs of replevin, as revised in 1821, exists only in favor of the owner of the goods, who is required to make out a title thereto. A person having a lien on goods attached in a suit against another person, who is the general owner, with no other interest therein, has not such a title to the property as will, under the statute, enable him to maintain an action of replevin. Brown *v.* Chickopee Falls Co., 16 Conn. 87.

In Michigan replevin will lie at the suit of the mortgagee of personal chattels against an officer who, by virtue of an attachment sued out against the mortgagor, levied upon them while they were in his possession, and who, when they are properly demanded, refuses to surrender them to the mortgagee, providing that "when either of the parties to an action of replevin, at the time of the commencement of the suit, shall have only a lien upon, or special property or part ownership in, the goods and chattels described in the writ, and is not the general owner thereof, that fact may be proved on the trial, or on the assessment of value, or on the assessment of damages in all cases aris-

plaintiff must have the right to immediate possession,[88] although his ownership need not be absolute.[89] By express statutory provision in one state property seized under attachment process cannot be recovered by a third person claiming the right of possession.[90]

(B) *Effect on Right of Making Claim in Other Proceedings.* Where one who claims property seized under attachment process against another institutes proceedings for the trial of the right of property and judgment is rendered against him, he cannot thereafter maintain replevin against the officer for the property.[91] However, the mere fact that he asks and obtains leave to interplead in the attachment suit will not bar his right to maintain replevin, where he does nothing more in the cause than this, and was not made a party to the action, nor any judgment rendered against him.[92]

d. Property Seized Under Writ of Replevin — (I) *When in Hands of Officer* — (A) *Right of Defendant or His Privies to Replevy.* The rule is well settled that neither defendant in replevin nor those in privity with him can maintain replevin for the property seized while in the hands of the officer pending the determination of the suit, since the property as to them is *in custodia legis*.[93] This is the rule at common law and it is not affected by a statute providing that when any goods or chattels attached on any writ of mesne or final process are claimed

ing under this chapter; and the finding of the jury or court, as the case may be, shall be according to such fact, and the court shall thereupon render such judgment as shall be just between the parties." Wood *v.* Weimar, 104 U. S. 786, 791, 26 L. ed. 779.

88. Brown *v.* Bissett, 21 N. J. L. 267.

89. Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623.

90. Butts *v.* Woods, 4 N. M. 187, 16 Pac. 617.

91. Bray *v.* Saaman, 13 Nebr. 518, 14 N. W. 474; Storms *v.* Eaton, 5 Nebr. 453; Abbey *v.* Searls, 4 Ohio St. 598, 599, in which it was said: "The claimant is not bound to have a trial of the right of property; and if he, nevertheless, see fit to have it, and fail to establish his right — thereby adding apparent strength to the claim of the creditor, that the property be held by the process — he ought not to be allowed, in a subsequent proceeding against the officer, to show his right to it."

92. Wangler *v.* Franklin, 70 Mo. 659.

93. *Arkansas.*— Hagan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769 (this case was decided under a statute expressly forbidding cross replevins, but such statute is merely declaratory of the common law); Beers *v.* Wuerpul, 24 Ark. 272.

California.—Fleming *v.* Wells, 65 Cal. 336, 4 Pac. 197.

Kansas.— Turner *v.* Reese, 22 Kan. 319. And see Gross *v.* Bogard, 18 Kan. 288.

Michigan.— Cavanaugh *v.* Sanderson, 152 Mich. 11, 115 S. W. 955; Simon *v.* Leland, 105 Mich. 226, 63 N. W. 76; Fisher *v.* Marquette Cir. Judge, 58 Mich. 450, 25 N. W. 460; Belden *v.* Laing, 8 Mich. 500.

Minnesota.— Larsen *v.* Nichols, 62 Minn. 256, 64 N. W. 553, 54 Am. St. Rep. 639.

Missouri.— Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503.

New Hampshire.— Bonney *v.* Smith, 59 N. H. 411; Sanborn *v.* Leavitt, 43 N. H. 473.

New York.— Morris *v.* De Witt, 5 Wend. 71.

Tennessee.— Dearmon *v.* Blackburn, 1 Sneed 390, 60 Am. Dec. 160.

United States.— Birch *v.* Gittings, 3 Fed. Cas. No. 1,426, 2 Cranch C. C. 66.

See 42 Cent. Dig. tit. "Replevin," § 35. And see Pollard *v.* Stovall, 60 Miss. 266.

Application of rule in case of purchaser.— A debtor mortgaged his stock of goods to a creditor in his individual capacity and as trustee for other creditors, and then sold the goods to a stranger to the mortgage. Certain of the unsecured creditors of the mortgagor replevied a portion of the goods, joining the mortgagor, the mortgagee, and the vendee as defendants, after which certain of the secured creditors, having received from the mortgagee an assignment of their interest in the mortgage, replevied the goods from the sheriff. It was held that the latter action was a cross replevin. Had the mortgagee brought the action it would have been a cross replevin. It was brought by persons in privity with him and is open to the same objection. Simon *v.* Leland, 105 Mich. 226, 63 N. W. 76.

Joinder of other parties in second suit.— B brought suit in replevin against F, who was a member of a firm, and N, who was its agent and in possession of the property, replevied. The firm then brought replevin against B, and joined three other defendants with him, for the same property delivered to B upon the first writ, and the only question in both suits was whether B or the firm were the owners of the property. It was held that the second suit was a cross replevin, and could not be maintained. That the parties in the second suit are not identical with those in the first suit is not important, unless the new parties claim some interest in the property, or right thereto, different from or independent of the parties to the first suit. Fisher *v.* Busch, 64 Mich. 180, 31 N. W. 39. So a second suit

by any other person he may maintain replevin therefor.[94] In support of the rule it is said that the law is not so inconsistent as to issue to its officers, compelled to act at their peril, commands wholly incompatible with each other;[95] that if such a proceeding were permitted, there would be no end to suits and the benefit of that action could never be realized;[96] and that in any event such a proceeding is wholly unnecessary, as the rights of both parties can be fully determined in the first suit.[97]

(B) *Right of Stranger to Writ to Replevy.* It is a very generally accepted doctrine that at common law property in the hands of an officer, which has been seized under a writ of replevin, cannot be taken on another writ of replevin pending suit even by a stranger to the first writ.[98] In some jurisdictions, however, the right of one whose property has been seized on a writ of replevin issued against another, to maintain replevin therefor while it is in the hands of the officer, is conferred by statute;[99] and it has been held that the right so conferred is not affected by the fact that under the provisions of another statute he might have intervened in the first action and set up his title to the property, the view being taken that the remedy by intervention is not exclusive.[1]

(II) *Where Property Has Been Delivered to Plaintiff in Replevin.* Some decisions lay down the rule without qualification, that property taken under a writ of replevin, although delivered into the possession of

in replevin brought by defendant in the first jointly with his partner against the bailees of plaintiff in the first is a cross replevin and cannot be maintained. It is none the less cross replevin because the partner of defendant in the second suit is joined as co-plaintiff, nor because the suit is brought against the bailees of plaintiff in the first suit. Beers *v.* Wuerpul, 24 Ark. 272.

Property not liable to seizure.— The rule stated in the text has been held to apply, although the property was not liable to seizure. Dearmon *v.* Blackburn, 1 Sneed (Tenn.) 390, 60 Am. Dec. 160.

Execution of redelivery bond.— The fact that defendant in the first replevin suit executes a redelivery bond to plaintiff and receives a return of the property from the sheriff does not affect the rule; the title to the property remains the same as before. Turner *v.* Reese, 22 Kan. 319.

94. Sanborn *v.* Leavitt, 43 N. H. 473.

95. Sanborn *v.* Leavitt, 43 N. H. 473.

96. Morris *v.* De Witt, 5 Wend. (N. Y.) 71. And see Larsen *v.* Nichols, 62 Minn. 256, 64 N. W. 553, 54 Am. St. Rep. 639.

97. Larsen *v.* Nichols, 62 Minn. 256, 64 N. W. 553, 54 Am. St. Rep. 639.

98. *Kansas.*— Gross *v.* Bogard, 18 Kan. 288.

Maryland.— Powell *v.* Bradlee, 9 Gill & J. 220.

Massachusetts.— White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502; Ilsley *v.* Stubbs, 5 Mass. 280.

New Hampshire.— Sanborn *v.* Leavitt, 43 N. H. 473.

New Jersey.— Weiner *v.* Van Rensselaer, 43 N. J. L. 547.

Wisconsin.— Watkins *v.* Page, 2 Wis. 92.

England.— See Hallett *v.* Byrt, Carth. 380, 90 Eng. Reprint 821.

See 42 Cent. Dig. tit. "Replevin," § 35.

Contra.— Coleman *v.* Reynolds, 207 Mo. 463, 105 S. W. 1070. And see Westbay *v.* Milligan, 74 Mo. App. 179.

Reason for rule.— "The distinction between goods taken on execution and by replevin is marked. In the latter case the identical goods are in the custody of the law, and are before the court to be disposed of as it shall see proper, and the proceeding is so far *in rem* that the goods cannot be seized upon any process until the court shall have taken action. If, therefore, a party finds his goods in the hands of an officer upon a valid writ of replevin, his remedy is by application to the court to be permitted to come in and set up his claim to them, and not by an independent replevin. Whereas, if goods are wrongfully seized by execution, it cannot be said to confer any lien on them, or to bear any resemblance to a proceeding *in rem*." Wells Replevin, § 257 [*quoted* with approval in Weiner *v.* Van Rensselaer, 43 N. J. L. 547, 549]. And see Hallett *v.* Byrt, Carth. 380, 90 Eng. Reprint 821.

99. Davis *v.* Gambert, 57 Iowa 239, 10 N. W. 658 (under a statute providing that the petition must show that the property "was neither taken on the order or judgment of a court against" plaintiff "nor under an execution or judgment against him or against the property"); Reiley *v.* Haynes, 38 Kan. 259, 16 Pac. 440, 5 Am. St. Rep. 737; Gross *v.* Bogard, 18 Kan. 288 (under a statute authorizing replevin for goods provided they were "not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process, issued against said plaintiff").

1. Davis *v.* Gambert, 57 Iowa 239, 10 N. W. 658.

plaintiff in replevin, is still in the custody of the law, plaintiff's custody being substituted for that of the officer, and cannot be seized under any judicial process whatever.[2] Where this process is replevin it does not seem to have been questioned that the rule is correct so far as defendant is concerned. A number of cases have held that, although property taken under a writ of replevin is delivered into the possession of plaintiff in the suit, it is still in the custody of the law so far as the parties to the suit or their grantees or privies are concerned, and that defendant or his grantees or privies cannot maintain replevin for such property.[3] There are, however, many decisions which have denied the application of the rule in cases where a stranger to the replevin suit sought to replevy the property. According to these decisions, after property has been delivered to plaintiff in replevin, it may be taken from him in another action of replevin by a third person who is a stranger to the parties to the first suit, notwithstanding the first suit is pending, the view being taken that the property is not in the custody of the law;[4] and it has been held that this right is not affected by a statute which makes provision for trial of the right of property before the sheriff

2. *California.*— Hunt *v.* Robinson, 11 Cal. 262.

Illinois.— Rhines *v.* Phelps, 8 Ill. 455; Goodheart *v.* Bowen, 2 Ill. App. 578.

Indiana.— Pipher *v.* Fordyce, 88 Ind. 436.

Massachusetts.— Lockwood *v.* Perry, 9 Metc. 440.

United States.— Hagan *v.* Lucas, 10 Pet. 400, 404, 9 L. ed. 470, in which it was said: "In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of the other processes, as it would have been in the hands of the sheriff."

3. Hines *v.* Allen, 55 Me. 114, 92 Am. Dec. 574; Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503. And see Lowry *v.* Hall, 2 Watts & S. (Pa.) 129, 37 Am. Dec. 495, holding that chattels delivered to plaintiff after a claim of property by defendant in a replevin issued out of the supreme court of New York cannot be counter-replevied in Pennsylvania, at least before the question of property has been determined in favor of defendant in the prior replevin.

4. *Arkansas.*— Hagan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769.

Maryland.— Powell *v.* Bradlee, 9 Gill & J. 220.

Massachusetts.— Kelleher *v.* Clark, 135 Mass. 45; White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502; Ilsley *v.* Stubbs, 5 Mass. 280.

Missouri.— Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503 [*overruling* Bates County Nat. Bank *v.* Owen, 79 Mo. 429]; Coen *v.* Watkins, 62 Mo. App. 502.

Nevada.— Buckley *v.* Buckley, 9 Nev. 373, 381, in which it was said: "One having the right of possession to property cannot be expected to stand by while strangers wrangle over it, subject as it must be to all the contingencies of loss which practically surround personal property in litigation."

New Hampshire.— Sanborn *v.* Leavitt, 43 N. H. 473; Bell *v.* Bartlett, 7 N. H. 178. And see *dictum* in Bonney *v.* Smith, 59 N. H. 411.

New Jersey.— Weiner *v.* Van Rensselaer, 43 N. J. L. 547.

Ohio.— See Frank *v.* Jenkins, 22 Ohio St. 597.

See 42 Cent. Dig. tit. "Replevin," § 35.

Reason for rule.— This is manifestly the true rule, for otherwise the true owner or a creditor of the true owner would be kept out of his own while a replevin suit was pending, and to which he or they were not parties, over which he had no control and by the judgment in which his rights could in no manner be affected, impaired, or taken away, and which could not determine the title or claim of such owner or his creditor. No principle of law can be found to justify a rule which would thus postpone, at least, and might impair or effectually destroy, the rights of third persons. The common reason given for such holding, that if third persons could take the property from the possession of one of the parties to the replevin suit, he would be disabled from returning the property in case he lost his suit, and might have to pay his adversary in that suit the assessed value of the property, and still not have the property, is more specious than substantial or right. The same result would follow if his adversary elected to take the assessed value and gave him his title to the property, and the true owner thereafter, after the termination of the replevin suit, seized the property. The fallacy in the reason so given lies in failing to observe that the judgment in the replevin suit only settles the controversy between the parties to that suit, and does not affect the rights of persons not parties to that suit. Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503.

Where goods are replevied from the custody of an agent or bailee of the party claiming to be the real owner thereof, it has been held that such party, not being named in the original suit, may maintain replevin against plaintiff in such suit to whom the

or the judge, that on the contrary the remedy so conferred by statute is merely cumulative.[5]

(III) *Where Property Is Retained by Defendant in Replevin.* When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to defendant upon a forthcoming bond, it is still in the custody of the state court, to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of a United States court, at the suit of the United States.[6]

(IV) *Where Property Has Been Sold by Plaintiff in Replevin.* Although one who brings a replevin suit and gives bond to prosecute the same acquires the right of possession pending suit, the property in the goods seized does not absolutely vest in him, so that he can sell the property, and where the suit abates by his death the right of possession acquired temporarily by him ceases, and the rightful owner may maintain replevin for the property against one to whom plaintiff in replevin sold it pending the suit.[7]

(V) *Right of Plaintiff to Maintain a Second Replevin.* Independently of a statute prohibiting the bringing of replevin for the recovery of property *in custodia legis*, a party at whose suit property has been seized by an officer cannot bring another suit to take the property out of his possession.[8]

(VI) *Right of Defendant in Replevin to Bring Replevin After Judgment Against Him.* After judgment against defendant in replevin he cannot sue out another writ of replevin to prevent execution against himself and to procure a restoration of the property to himself.[9]

(VII) *Replevin by Officer Against Another Officer Seizing Property in His Custody.* Under a statute providing that, at any time before a chattel which has been replevied is actually delivered to either party, third persons may file claims thereto with the officer, etc., does not furnish an exclusive remedy, but an officer having possession of the property involved under a writ of execution may maintain replevin against another officer who subsequently seizes the same property under a writ of replevin.[10]

e. Property Seized For Taxes — (I) *Right of Person Against Whom Tax Has Been Assessed to Bring Replevin* — (A) *General Rule and Its Application.* In most, if not all, states are statutes which prohibit replevin for property taken for a tax levied on under any law of the state. Property seized by a collector of taxes for the tax assessed on it is *in custodia legis* as if taken

goods have been delivered. White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502 [*criticizing dictum* in Portland Bank *v.* Stubbs, 6 Mass. 422, 4 Am. Dec. 151]. But see Larsen *v.* Nichols, 62 Minn. 256, 64 N. W. 553, 54 Am. St. Rep. 639, which holds that the fact that a party is enabled to bring replevin against an agent instead of the principal, because the agent happens to have the actual possession of the property, ought not to be allowed to take the case out of the rule against allowing cross replevin; that to do so would be a mere evasion of the rule.

Effect of agreement by plaintiff in replevin to waive actual delivery.— If plaintiff in replevin agrees to dispense with actual delivery of the property taken under the writ and to consider it delivered, a third person may replevy the property, as plaintiff in the first replevin will be precluded by the agreement from objecting that the property is in the custody of the law. Powell *v.* Bradlee, 9 Gill & J. (Md.) 220.

5. Hagan *v.* Deuell, 24 Ark. 216, 88 Am. Dec. 769.

6. U. S. *v.* Dantzler, 25 Fed. Cas. No. 14,917, 3 Woods 719.

7. Lockwood *v.* Perry, 9 Metc. (Mass.) 440.

8. Pollard *v.* Stovall, 60 Miss. 266, 268, in which it was said: "The officer is his agent as well as the agent of the law in holding the property; and if he is guilty of any breach of duty in relation to it, is liable to the power of the court in that suit, or to an action upon his official bond in an independent proceeding."

9. Tyson *v.* Bowden, 8 Fla. 61, 72, 71 Am. Dec. 101, in which it was said: "To allow a defendant in such an execution, not only to defeat it, but reverse its action and have property ordered to be delivered by him to plaintiff restored and returned, and that through process used to commence a suit would be unheard of. It would be changing the practice of the court in a very material respect, by giving superior efficacy and force to the institution and commencement of a suit over its end and termination."

10. Pracht *v.* Gunn, 69 N. Y. App. Div. 396, 74 N. Y. Suppl. 991.

upon execution.[11] And the general rule is well settled that where an officer distrains property for payment of taxes under a warrant valid on its face, the person chargeable with the payment of the taxes cannot maintain replevin against him for the possession of the property.[12] This, it has been said, is simply an application of the general rule that an officer is protected by process fair on its face.[13] The main object of the statutes prohibiting replevin for property seized for taxes is to prevent delays in the collection of the public revenue, and to drive parties claiming property so seized to some other remedy, which should not, during the litigation, prevent the prompt collection of the tax.[14] Were the rule otherwise, there would be no safety for the collector, and no certainty or promptitude in the collection of the public revenues.[15] Accordingly if jurisdiction to assess and levy the tax exists, the court will not concern itself with matters affecting the exercise of such jurisdiction however irregular and erroneous these proceedings may have been.[16] Replevin does not lie because the levy is excessive even though

11. Baltimore, etc., R. Co. *v.* Hamilton, 16 Fed. 181; Orr *v.* Ingle, 18 Fed. Cas. No. 10,588, 2 Cranch C. C. 193. And see Blain *v.* Irby, 25 Kan. 499; Virden *v.* Bowers, 55 Miss. 1; Keystone Lumber Co. *v.* Pederson, 93 Wis. 466, 67 N. W. 696, in which it was said that town treasurers under their warrants possess substantially the same powers as sheriffs under their executions.

12. *Arkansas.*— Crowell *v.* Barham, 57 Ark. 195, 21 S. W. 33.

Illinois.— Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176.

Indiana.— Maple *v.* Vestal, 114 Ind. 325, 16 N. E. 620; Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162.

Iowa.— Buell *v.* Schaale, 39 Iowa 293; Rogers *v.* Gwinn, 21 Iowa 58; Buell *v.* Ball, 20 Iowa 282; Emerick *v.* Sloan, 18 Iowa 139; Hershey *v.* Fry, 1 Iowa 593.

Maine.— Gerry *v.* Herrick, 87 Me. 219, 32 Atl. 882.

Michigan.— Northwestern Cooperage, etc., Co. *v.* Scott, 123 Mich. 357, 82 N. W. 76; Forster *v.* Brown, 119 Mich. 86, 77 N. W. 646; Scott *v.* Whelan, 96 Mich. 624, 55 N. W. 1025; Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779; Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689; Hill *v.* Wright, 49 Mich. 229, 13 N. W. 528; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162.

Minnesota.— Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219, 63 N. W. 630.

Missouri.— Hoskinson *v.* Helferstine, 80 Mo. 140; Mowrer *v.* Helferstine, 80 Mo. 23.

New York.— Troy, etc., R. Co. *v.* Kane, 72 N. Y. 614; Hudler *v.* Golden, 36 N. Y. 446; O'Reilly *v.* Good, 42 Barb. 521; People *v.* Albany Ct. C. Pl., 7 Wend. 485.

Pennsylvania.— Stiles *v.* Griffith, 3 Yeates 82.

Wisconsin.— Keystone Lumber Co. *v.* Pederson, 93 Wis. 466, 67 N. W. 696; Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 46 Am. Rep. 652.

United States.— Missouri *v.* Spiva, 42 Fed. 435; Dixwell *v.* Jones, 7 Fed. Cas. No. 3,937, 2 Dill. 184.

Canada.—Spry *v.* McKenzie, 18 U. C. Q. B. 161.

See 42 Cent. Dig. tit. "Replevin," § 38.

[I, B, 3, e, (I), (A)]

Taxes imposed by municipal corporation.— A statute forbidding replevin for public dues and taxes applies to replevin for property distrained for taxes imposed by a municipal corporation. Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176; Stiles *v.* Griffith, 3 Yeates (Pa.) 82; Orr *v.* Ingle, 18 Fed. Cas. No. 10,588, 2 Cranch C. C. 193.

A statute by virtue of which replevin may be prosecuted without asking for the immediate possession of the property does not change the rule which controls in the replevying of personal property taken for a tax. Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162. But see Dudley *v.* Ross, 27 Wis. 679.

Tax imposed under act of congress.— Property seized for a tax under an act of congress and under a warrant regular on its face cannot be replevied. O'Reilly *v.* Good, 42 Barb. (N. Y.) 521.

13. Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219, 63 N. W. 630.

14. Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162; O'Reilly *v.* Good, 42 Barb. (N. Y.) 521; People *v.* Albany Ct. C. Pl., 7 Wend. (N. Y.) 485. And see McClaughry *v.* Cratzenberg, 39 Ill. 117.

15. Dixwell *v.* Jones, 7 Fed. Cas. No. 3,937, 2 Dill. 184.

16. *Illinois.*— Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176.

Indiana.— Maple *v.* Vestal, 114 Ind. 325, 16 N. E. 620.

Iowa.— Buell *v.* Schaale, 39 Iowa 293; Rogers *v.* Gwinn, 21 Iowa 58; Hershey *v.* Fry, 1 Iowa 593.

Maine.— Gerry *v.* Herrick, 87 Me. 219, 32 Atl. 882.

Michigan.— Boyce *v.* Stevens, 86 Mich. 549, 49 N. W. 577; Hill *v.* Graham, 72 Mich. 659, 666, 40 N. W. 779 (in which it was said: "A person whose property is liable to assessment for taxes shall not be permitted to evade payment of his just proportion of the public burden by any errors, omissions or irregularities that do not prejudice his rights"); Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689.

Minnesota.— Nelson Lumber Co. *v.* McKinnon, 61 Minn. 219, 63 N. W. 630.

New York.— Troy, etc., R. Co. *v.* Kane, 72

the tax book shows that fact on its face,[17] because a portion of the taxes are illegally assessed,[18] because the property was assessed in the name of another person than the owner,[19] because the property was not assessable to plaintiff,[20] because the collector was not lawfully an officer,[21] because the collector seized the property without first making proper demand for the taxes,[22] because the assessment roll was not verified,[23] or because the dollar mark was omitted in stating the value of the property and the amount of the tax.[24] There is a conflict of authority as to whether the constitutionality of a law or the validity of an ordinance or by-law, by virtue of which a tax is imposed, can be determined in an action for replevin.[25]

(B) *Where Tax Warrant Is Void on Its Face.* Replevin lies for property seized for taxes on a warrant void on its face, as showing that it was issued without jurisdiction.[26]

(C) *Where There Is a Want of Jurisdiction to Impose Tax.* The prohibition against replevin for property taken under a tax warrant does not apply where there was no jurisdiction to levy the tax,[27] or where the officer assessing or collecting could not by any possibility have a right to act.[28] Under these circumstances it is no defense to the action that the warrant was regular on its face. This merely protects the officer making the seizure from personal liability as a trespasser or wrong-doer. It cannot be made the foundation of a right or claim against others, nor confer any right of property which, alone, is in issue in an action of replevin.[29]

N. Y. 614; O'Reilly *v.* Good, 42 Barb. 521; People *v.* Albany Ct. C. Pl., 7 Wend. 485.

17. Hoskinson *v.* Helferstine, 80 Mo. 140; Mowrer *v.* Helferstine, 80 Mo. 23.

18. Emerick *v.* Sloan, 18 Iowa 139; Scott *v.* Whelan, 96 Mich. 624, 55 N. W. 1025.

19. Hill *v.* Graham, 72 Mich. 659, 40 N. W. 779.

20. Forster *v.* Brown, 119 Mich. 86, 77 N. W. 646.

21. Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176. And see Hershey *v.* Fry, 1 Iowa 593.

22. Andrews *v.* Sellers, 11 Ind. App. 301, 38 N. E. 1101; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162; Missouri *v.* Spiva, 42 Fed. 435.

23. Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 46 Am. Rep. 652.

24. American Tool Co. *v.* Smith, 32 Hun (N. Y.) 121 [*affirmed* in 96 N. Y. 670].

25. **For cases holding that it can** see Morford *v.* Unger, 8 Iowa 82; Wilson *v.* Middlesex, 18 U. C. Q. B. 348. And see *dictum* in Macklot *v.* Davenport, 17 Iowa 379.

For cases maintaining the contrary view see Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176; McClaughry *v.* Cratzenberg, 39 Ill. 117 (in which it was said: "Disastrous, indeed, would be the consequences to the public was it allowed to every taxable inhabitant, who may have conceived the notion that a law of general application, imposing taxes, is void, and, therefore, he shall be permitted to arrest its operation, and thus break down the financial system of the State. If one may do it, a whole community may, and ruin and disgrace would inevitably follow the extinction of our State credit thus brought about. The law forbids the consideration of the question of the legality of a tax, assessment or fine, levied under any law standing on the statute book of the State, by means of the action of replevin"); O'Reilly *v.* Good, 42 Barb. (N. Y.) 521.

26. Wright *v.* Briggs, 2 Hill (N. Y.) 77. And see Brown *v.* Mosher, 83 Me. 111, 21 Atl. 835; Hudler *v.* Golden, 36 N. Y. 446.

27. McKay *v.* Batchellor, 2 Colo. 591; Buell *v.* Ball, 20 Iowa 282; McCoy *v.* Anderson, 47 Mich. 502, 11 N. W. 290; Macmonagle *v.* Campbell, 35 N. Brunsw. 625; Halpin *v.* Calder, 26 U. C. C. P. 501. And see People *v.* Albany Ct. C. Pl., 7 Wend. (N. Y.) 485.

28. Lantis *v.* Reithmiller, 95 Mich. 45, 54 N. W. 713; Hood *v.* Judkins, 61 Mich. 575, 28 N. W. 689; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 238, 100 Am. Dec. 162, in which it was said: "To construe the statute as applying to a case in which there is no statute authority for the assessment and collection of any tax by the officers who may have undertaken to assess or collect one, and where no possible proceedings of such officers could have given them authority to impose or collect any tax under any statute of the state . . . would be to extend the statute to cases which do not come within its spirit or intent."

Applications of rule.— The rule has been applied in cases where taxes were assessed against property not assessable in the township (McCoy *v.* Anderson, 47 Mich. 502, 11 N. W. 290; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162), where property was distrained without the district (McKay *v.* Batchellor, 2 Colo. 591), and where a tax was imposed by fence viewers having no jurisdiction to apportion fences between premises not inclosed (Lantis *v.* Reithmiller, 95 Mich. 45, 54 N. W. 713).

29. Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162.

(II) *Right of Stranger to Tax to Maintain Replevin.* As in the case of property seized under execution [30] or attachment [31] against another, one whose property has been wrongfully seized to satisfy a tax imposed on another is entitled to maintain replevin for the property against the officer seizing it. This right has been affirmed notwithstanding statutes which provide that replevin shall not lie for property taken for the collection of a tax in pursuance of any statute.[32] And it has further been held that a statute declaring that goods and chattels upon lands for which taxes are assessed shall be deemed to belong to the person to whom the lands are assessed does not apply to property belonging to another person in no way liable for the tax which is transiently upon lands assessed, but in the possession of the owner for his own purposes.[33] Nor is the rule affected by the fact that he acquired the property since the assessment of the tax for which the property was seized.[34]

(III) *Effect of Sale of Property on Right to Maintain Replevin.* One whose property has been seized and sold under a tax warrant against another may bring replevin against the purchaser.[35] So it would seem that the owner of property wrongfully seized under a tax warrant against himself might bring an action of replevin against the purchaser, because the property is no longer in the custody of the law.[36]

(IV) *Effect of Failure of Officer to Sell Property Within Time Fixed by Statute, on Right to Maintain Replevin.* Where a collector fails to sell property seized for taxes within the time required by statute, he becomes a trespasser *ab initio* and the owner may replevy them.[37] Nevertheless if the owner prevail in the replevin suit, the tax is not to be deemed satisfied and the officer may again seize the property for the tax.[38]

f. Property Seized in Satisfaction of Fines Imposed. The general rule is that property seized by an officer for the collection of a fine is in the custody of the law and the owner cannot maintain replevin against him to recover such property.[39] The rule does not apply, however, where the warrant is issued on a void judgment.[40] And where property is seized and sold for a fine under a judg-

30. See *supra*, I, B, 3, b, (II).

31. See *supra*, I, B, 3, c, (II).

32. Tousey *v.* Post, 91 Mich. 631, 52 N. W. 57; Travers *v.* Inslee, 19 Mich. 98; Lake Shore, etc., R. Co. *v.* Roach, 80 N. Y. 339; Hallock *v.* Rumsey, 22 Hun (N. Y.) 89; Stockwell *v.* Vietch, 15 Abb. Pr. (N. Y.) 412; C. C. Thompson Lumber Co. *v.* Hynes, 84 Wis. 353, 54 N. W. 576 (holding that the statutes apply only to cases in which the property seized is that of the person or one in privity with the person against whom the tax was assessed); Atlantic, etc., R. Co. *v.* Cleino, 2 Fed. Cas. 631, 2 Dill. 175. *Contra*, Vocht *v.* Reed, 70 Ill. 491 (two judges dissenting), which holds that replevin does not lie in any case, where property is seized by a tax-collector under a tax warrant; that it makes no difference that the property seized was seized on a warrant for taxes against one not the owner of the property; and that the owner's remedy is by trover or trespass against the officer.

33. Lake Shore, etc., R. Co. *v.* Roach, 80 N. Y. 339.

34. Atlantic, etc., R. Co. *v.* Cleino, 2 Fed. Cas. No. 631, 2 Dill. 175.

35. Crowell *v.* Barham, 57 Ark. 195, 21 S. W. 33; Wisconsin Oak Lumber Co. *v.* Laursen, 126 Wis. 484, 105 N. W. 906; Power *v.* Kindschi, 58 Wis. 539, 17 N. W. 689, 46 Am. Rep. 652.

36. See *supra*, I, B, 3, b, (III).

37. Farnsworth Co. *v.* Rand, 65 Me. 19; Brackett *v.* Vining, 49 Me. 356.

38. Farnsworth Co. *v.* Rand, 65 Me. 19, in which it was said that a contention that the officer, having once taken sufficient property of plaintiffs to satisfy the tax, cannot thereafter make another distraint for the same tax, cannot be sustained where the property distrained has been returned to the owner on account of the defect in the proceedings with costs and damages for taking it, and without in any manner being appropriated to the discharge of the tax.

39. Pott *v.* Oldwine, 7 Watts (Pa.) 173 (distress for militia fine); Lynah *v.* St. Paul's Parish Road Comrs., Harp. (S. C.) 336 (goods seized under execution against their owner issued by the commissioner of roads for a fine); Gist *v.* Cole, 2 Nott & M. (S. C.) 456, 10 Am. Dec. 616 (goods seized upon a warrant issued by an officer under the patrol law for a fine imposed upon nonperformance of patrol duty); Martin *v.* Mott, 12 Wheat. (U. S.) 19, 6 L. ed. 537 (goods seized on a warrant issued to the marshal to collect a fine imposed on plaintiff by the judgment of a court martial for refusal to do military duty); Rex *v.* Monkhouse, Str. 1184, 93 Eng. Reprint 1116 (goods distrained on a conviction for deer stealing).

40. Mills *v.* Martin, 19 Johns. (N. Y.)

ment void for want of jurisdiction the party against whom the fine was recovered and whose property was sold in satisfaction thereof may contest the purchaser's title to the property in an action of replevin.[41]

g. Property Seized For Forfeiture Under Revenue Laws. Where property has been seized for forfeiture thereof for a breach of the revenue laws, it is in the custody of the law and cannot be replevied from the collector.[42] The rule has no application, however, where there is no law by virtue of which the property could be seized.[43]

h. Intoxicating Liquors Seized as Being Kept For Sale in Violation of Law. Intoxicating liquors seized on valid process issued by a court possessing the requisite jurisdiction, under a valid statute, as being kept in violation of the liquor laws, are in the custody of the law, and the person against whom the proceedings have been brought cannot maintain replevin for their recovery against the officer making the seizure.[44] It is held, however, that liquors seized under an unconstitutional law[45] or invalid ordinance[46] may be replevied. And where intoxicating liquors are seized on a warrant against one person at a place described therein, charged to be maintained in violation of the liquor laws, a third person may maintain replevin therefor against the officer making the seizure for the purpose of determining his right thereto.[47]

i. Property Taken From Possession of Alleged Thief. Property alleged to have been stolen, which is in the custody of an officer of court pending the prosecution of the alleged thief, for the purposes of the prosecution, is in the custody of the law and cannot be replevied;[48] but after his conviction or acquittal, such officer has no right to withhold it from the owner, and the latter would be entitled to bring replevin against him for the property.[49] So it has been held that where property taken by an officer from one arrested for theft is restored to defendant on his giving bond to return it on demand of the officer or on order of court, and the court in its order expressly declared that the right of the true owner to maintain replevin should not be impaired by such order, defendant's possession of the property cannot be called the possession of the law and the true owner may maintain replevin against defendant therefor.[50]

C. Title and Right to Possession of Plaintiff — 1. In General — a. Necessity of. It is elementary that, in replevin, plaintiff must rely upon the strength of his own title or right to possession and not upon the weakness or lack of title in his adversary.[51]

7 (property taken under a warrant issued by a court which had no jurisdiction); Marriott *v.* Shaw, Comyns 274, 92 Eng. Reprint 1069.

41. Heagle *v.* Wheeland, 64 Ill. 423.

42. Scott *v.* McRae, 3 Ont. Pr. 16.

43. Slocum *v.* Mayberry, 2 Wheat. (U. S.) 1, 4 L. ed. 169. In this case the revenue officer had seized and detained both vessel and cargo under the Embargo Act. The supreme court of the United States held that the officer had power to seize and detain the vessel only, and not the cargo; and maintained an action of replevin brought for the latter by the owner.

44. *Iowa.*—Annheuser-Busch Brewing Assoc. *v.* Fullerton, 83 Iowa 760, 50 N. W. 56; Lemp *v.* Fullerton, 83 Iowa 192, 48 N. W. 1034, 13 L. R. A. 408; Fries *v.* Porch, 49 Iowa 351; Weir *v.* Allen, 47 Iowa 482; State *v.* Harris, 38 Iowa 242; Funk *v.* Israel, 5 Iowa 438, 451, in which it was said: "To suffer a party, in an action of replevin, to take the liquors out of the hands of the officer seizing the same, would be an interference with the administration of justice in criminal proceedings, and would defeat the whole object and intention of the prohibitory liquor law."

Kansas.— Greentree *v.* Wallace, 77 Kan. 149, 93 Pac. 598.

Maine.— Ring *v.* Nichols, 91 Me. 478, 40 Atl. 329; Musgrave *v.* Hall, 40 Me. 498.

Massachusetts.— Allen *v.* Staples, 6 Gray 491.

New Hampshire.— State *v.* Barrels of Liquor, 47 N. H. 369.

See 42 Cent. Dig. tit. "Replevin," § 37.

45. Cooley *v.* Davis, 34 Iowa 128; State *v.* Weir, 33 Iowa 134, 11 Am. Rep. 115.

46. Sullivan *v.* Stephenson, 62 Ill. 290.

47. *In re* Massey, 56 Kan. 120, 42 Pac. 365; Easter *v.* Traylor, 41 Kan. 493, 21 Pac. 606.

48. Simpson *v.* St. John, 93 N. Y. 363. And see Lynch *v.* St. John, 8 Daly (N. Y.) 142.

49. See Lynch *v.* St. John, 8 Daly (N. Y.) 142.

50. Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

51. *Arizona.*— Hall *v.* Southern Pac. Co., 6 Ariz. 378, 57 Pac. 617.

b. Right to Possession. As replevin is strictly a possessory action,[52] it lies only in behalf of one entitled to possession.[53] Not only must plaintiff have

Arkansas.— Black *v.* Roberson, (1908) 112 S. W. 402.

Colorado.— Kelly *v.* Lewis, 38 Colo. 18, 88 Pac. 388; Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660; Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

Connecticut.— Weller *v.* Ely, 45 Conn. 547.

Delaware.— Wilkins *v.* Wilson, 1 Marv. 404, 41 Atl. 76.

Florida.— Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Holliday *v.* McKinne, 22 Fla. 153.

Illinois.— Pease *v.* Ditto, 189 Ill. 456, 59 N. E. 983; Reynolds *v.* McCormick, 62 Ill. 412; La Salle Pressed Brick Co. *v.* Coe, 126 Ill. App. 308; Hacker *v.* Munroe, 56 Ill. App. 532.

Indiana.— Lane *v.* Sparks, 75 Ind. 278; Branch *v.* Wiseman, 51 Ind. 1; Davis *v.* Warfield, 38 Ind. 461; Simcoke *v.* Frederick, 1 Ind. 54; Morgan *v.* Jackson, 32 Ind. App. 169, 69 N. E. 410; Miller *v.* Lively, 1 Ind. App. 6, 27 N. E. 437. *Compare* Ingersoll *v.* Emmerson, 1 Ind. 76, holding that when plaintiff shows a *prima facie* right to the property he is entitled to recover unless defendant proves a better right.

Iowa.— Lufkin *v.* Preston, 52 Iowa 235, 3 N. W. 58; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307.

Louisiana.— Pritchett *v.* Coyle, 22 La. Ann. 57.

Massachusetts.— Harding *v.* Eldridge, 186 Mass. 39, 71 N. E. 115; Stanley *v.* Neale, 98 Mass. 343; Johnson *v.* Neale, 6 Allen 227.

Michigan.— Upham *v.* Caldwell, 100 Mich. 264, 58 N. W. 1001.

Mississippi.— Power *v.* Telford, 60 Miss. 195.

Missouri.— Leete *v.* St. Louis State Bank, 141 Mo. 584, 42 S. W. 927; Bowles Live Stock Commission Co. *v.* Hunter, 91 Mo. App. 436; Maryville Nat. Bank *v.* Snyder, 85 Mo. App. 82; Springfield Grocer Co. *v.* Shackelford, 65 Mo. App. 364; Moore *v.* Carr, 65 Mo. App. 64; Kennedy *v.* Dodson, 44 Mo. App. 550; Updyke *v.* Wheeler, 37 Mo. App. 580.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Nebraska.— Northrup *v.* Bathrick, (1907) 113 N. W. 808; Chadron First Nat. Bank *v.* Hughes, (1902) 92 N. W. 986; Herman *v.* Kneipp, 59 Nebr. 208, 80 N. W. 816; Fuller *v.* Brownell, 48 Nebr. 145, 67 N. W. 6; Johannson *v.* Miller, 45 Nebr. 53, 63 N. W. 141; Kavanaugh *v.* Brodball, 40 Nebr. 875, 59 N. W. 517; St. John *v.* Swanback, 39 Nebr. 841, 58 N. W. 288; Jones *v.* Loree, 37 Nebr. 816, 56 N. W. 390; Bardwell *v.* Stubbert, 17 Nebr. 485, 23 N. W. 344; Goodman *v.* Kennedy, 10 Nebr. 270, 4 N. W. 987.

New Hampshire.— Taylor *v.* True, 27 N. H. 220.

New Jersey.— Chambers *v.* Hunt, 18 N. J. L. 339.

Oklahoma.— Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

Pennsylvania.— Swope *v.* Crawford, 17 Lanc. L. Rev. 196.

South Carolina.— Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659.

See 42 Cent. Dig. tit. "Replevin," § 55.

A stranger who has no interest whatever in the goods in question cannot maintain replevin on the ground that they are wrongfully held by defendant. Wheeler *v.* Dixon, 51 Miss. 550; Jimmerson *v.* Greene, 7 Nebr. 26.

Where a void bill of lading is basis of plaintiff's claim, he is not entitled to recover, regardless of whether defendant has a right to possession. Ætna Nat. Bank *v.* Water Power Co., 58 Mo. App. 532.

Contest between defendant and intervener. — Where the issue resolves itself into one between defendant and an intervener, defendant virtually becomes plaintiff, and he must recover, if at all, on the strength of his own title. Burrows *v.* Waddell, 52 Iowa 195, 3 N. W. 37.

52. See *supra*, I, A, 1, c.

53. *Delaware.*—Jefferson *v.* Chase, 1 Houst. 219.

Florida.— Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597; Holliday *v.* McKinne, 22 Fla. 153.

Indiana.— Bradley *v.* Michael, Smith 346.

Iowa.— Rosenthal *v.* Risley, 11 Iowa 541.

Kansas.— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

Maryland.— Lamotte *v.* Wisner, 51 Md. 543.

Massachusetts.— Collins *v.* Evans, 15 Pick. 63; Wheeler *v.* Train, 3 Pick. 255.

Michigan.— Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

Missouri.— Gartside *v.* Nixon, 43 Mo. 138; Stone *v.* McNealy, 59 Mo. App. 396; Baker *v.* Campbell, 32 Mo. App. 529.

Montana.— Bach *v.* Montana Lumber, etc., Co., 15 Mont. 345, 39 Pac. 291.

Nebraska.— Jimmerson *v.* Greene, 7 Nebr. 26.

New Hampshire.— Mitchell *v.* Roberts, 50 N. H. 486.

New Jersey.— Bierman *v.* Reinhorn, 71 N. J. L. 422, 58 Atl. 1083; Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. 1073.

New York.— Wood *v.* Orser, 25 N. Y. 348; Dodworth *v.* Jones, 4 Duer 201; Williamson *v.* Lawrence, 8 Misc. 71, 28 N. Y. Suppl. 594; Fagan Iron Works *v.* Dawson Realty Co., 109 N. Y. Suppl. 740; Elwood *v.* Smith, 9 How. Pr. 528; Sharp *v.* Whittenhall, 3 Hill 576.

Pennsylvania.— Ferguson *v.* Lauterstein, 160 Pa. St. 427, 28 Atl. 852; Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90; Weed *v.* Hall, 101 Pa. St. 592; Lester *v.* McDowell, 18 Pa. St. 91; Bower *v.* Tallman, 5 Watts & S. 556.

the right to possession generally, but he must have the right to immediate,[54] and exclusive possession[55] at the time of the commencement of the

Tennessee.— Bogard *v.* Jones, 9 Humphr. 739.

Washington.— Sires *v.* Newton, 1 Wash. Terr. 356.

Wisconsin.— Timp *v.* Dockham, 32 Wis. 146, holding that plaintiff, by refusing to prosecute, virtually admitted that he had no right to possession.

England.— Comerford *v.* Blake, 2 Ir. Eq. 176.

See 42 Cent. Dig. tit. "Replevin," § 48.

A legal right to possession must be shown to exist in plaintiff. An equitable right is not sufficient. Fisher *v.* Alsten, 186 Mass. 549, 72 N. E. 78.

Statutory modification of rule.— Under statutes providing that the owner or person entitled to possession may institute an action of replevin, a person who shows himself to be within either of the above classes may bring the action, but a person who does not show himself to be within either may not. Swain *v.* Hutchinson First Nat. Bank, 100 Ill. App. 31 [*affirmed* in 201 Ill. 416, 66 N. E. 220]; Blakely Printing Co. *v.* Pease, 95 Ill. App. 341; Clark *v.* Anderson, 103 Me. 134, 68 Atl. 633; Marson *v.* Plummer, 64 Me. 315. *Compare* Sanford School Dist. No. 5 *v.* Lord, 44 Me. 374, holding that a right to possession is essential. And see the cases cited under Maine in the next succeeding note. Under a former statute in Connecticut, plaintiff could maintain replevin by simply making out title as the true owner. Spencer *v.* Roberts, 42 Conn. 75.

54. *Arkansas.*— McWhirter *v.* Penny, 82 Ark. 244, 101 S. W. 742; Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678; Thatcher *v.* Franklin, 37 Ark. 64; Wallace *v.* Brown, 17 Ark. 449; Hill *v.* Robinson, 16 Ark. 90; Cox *v.* Morrow, 14 Ark. 603; Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282.

California.— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; People's Sav. Bank *v.* Jones, 114 Cal. 422, 46 Pac. 278; Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106; Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Colorado.— Kelly *v.* Lewis, 38 Colo. 18, 88 Pac. 388.

Connecticut.— Peters *v.* Stewart, 45 Conn. 103, 29 Am. Rep. 663.

Hawaii.— Phillips *v.* Magoon, 9 Hawaii 9.

Indiana.— Clark *v.* Heck, 17 Ind. 281; Noble *v.* Epperly, 6 Ind. 414; Walpole *v.* Smith, 4 Blackf. 304; Chinn *v.* Russell, 2 Blackf. 172; Brown *v.* Loesch, 3 Ind. App. 145, 29 N. E. 450, holding that the purchaser of goods from an execution debtor cannot maintain replevin against the levying officer without first satisfying the judgment.

Iowa.— Alden *v.* Carver, 13 Iowa 253, 81 Am. Dec. 430; Cassel *v.* Western Stage Co., 12 Iowa 47; Kingsbury *v.* Buchanan, 11 Iowa 387; Marienthal *v.* Shafer, 6 Iowa 223; McCoy *v.* Cadle, 4 Iowa 557.

Kentucky.— Hooser *v.* Hays, 10 B. Mon. 72, 50 Am. Dec. 540; Dillon *v.* Wright, 7 J. J. Marsh. 10.

Maine.— Bartlett *v.* Goodwin, 71 Me. 350; Ingraham *v.* Martin, 15 Me. 373; Wyman *v.* Dorr, 3 Me. 183.

Massachusetts.— Pratt *v.* Parkman, 24 Pick. 42.

Michigan.— Clark *v.* West, 23 Mich. 242.

Mississippi.— Frizell *v.* White, 27 Miss. 198.

Missouri.— American Metal Co. *v.* Daugherty, 204 Mo. 71, 102 S. W. 538; Leete *v.* St. Louis State Bank, 141 Mo. 584, 42 S. W. 927; Stonebraker *v.* Ford, 81 Mo. 532; Bryant *v.* Dyer, 96 Mo. App. 455, 70 S. W. 516; Westbay *v.* Milligan, 89 Mo. App. 294; Upham *v.* Allen, 73 Mo. App. 224, 76 Mo. App. 206.

Montana.— Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. 648; Laubenheimer *v.* McDermott, 5 Mont. 512, 6 Pac. 344.

Nebraska.— Kavanaugh *v.* Brodball, 40 Nebr. 875, 59 N. W. 517; Nollkamper *v.* Wyatt, 27 Nebr. 565, 43 N. W. 357.

New York.— Osmun *v.* Barker, 92 Hun 609, 38 N. Y. Suppl. 43; McCurdy *v.* Brown, 1 Duer 101.

Oklahoma.— Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101; Olson *v.* Thompson, 6 Okla. 74, 48 Pac. 184.

Oregon.— Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216.

Pennsylvania.— Strong *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919; Heilman *v.* McKinstry, 18 Pa. Super. Ct. 70; Stone *v.* Rogers, 17 Pa. Super. Ct. 358.

Tennessee.— Shaddon *v.* Knott, 2 Swan. 358, 58 Am. Dec. 63.

Wisconsin.— Gillett *v.* Treganza, 6 Wis. 343.

United States.— Dixwell *v.* Jones, 7 Fed. Cas. No. 3,937, 2 Dill. 184 [*following* Gray *v.* Parker, 38 Mo. 160].

See 42 Cent. Dig. tit. "Replevin," § 52.

55. *California.*— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Hawaii.— Phillips *v.* Magoon, 9 Hawaii 9.

Missouri.— Leete *v.* St. Louis State Bank, 141 Mo. 584, 42 S. W. 927; Gray *v.* Parker, 38 Mo. 160; Steckman *v.* Galt State Bank, 126 Mo. App. 664, 105 S. W. 674; Bryant *v.* Dyer, 96 Mo. App. 455, 70 S. W. 516; Westbay *v.* Milligan, 89 Mo. App. 294; Upham *v.* Allen, 76 Mo. App. 206, 73 Mo. App. 224; Kennedy *v.* Dodson, 44 Mo. App. 550.

New Hampshire.— Stevens *v.* Chase, 61 N. H. 340.

New York.— Rogers *v.* Arnold, 12 Wend. 30.

Pennsylvania.— Reinheimer *v.* Hemingway, 35 Pa. St. 432.

Wisconsin.—Gillett *v.* Treganza, 6 Wis. 343.

United States.— Dixwell *v.* Jones, 7 Fed. Cas. No. 3,937, 2 Dill. 184.

See 42 Cent. Dig. tit. "Replevin," §§ 48, 52.

action,[56] or, as is sometimes stated, at the time of the taking and detention.[57] However, when plaintiff has shown his right to possession, he has shown sufficient right in himself to maintain the action.[58]

c. Title or Ownership — (i) *In General.* Although, as has been stated, the right to possession is sufficient to maintain an action of replevin,[59] such right

Right of joint tenant to sue see *infra*, I, C, 2, e.

The fact that other parties have an ultimate interest in an accounting for the proceeds of the property does not affect the right of plaintiff to maintain his action where he had the right to take possession at the time of the commencement of the action. Bostick *v.* Brittain, 25 Ark. 482.

Immaterial joining of others.— Where the whole possessory right is shown to be in plaintiff, the fact that he joins others with him in the suit and shares his recovery with him is immaterial. Lieberman *v.* Clark, 114 Tenn. 117, 85 S. W. 258, 69 L. R. A. 732.

56. *Arkansas.*— Bostick *v.* Brittain, 25 Ark. 482. And see Wallace *v.* Brown, 17 Ark. 449.

California.— Holly *v.* Heiskell, 112 Cal. 174, 44 Pac. 466; Masterson *v.* Clark, (1895) 41 Pac. 796 [*following* Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750]; Affierbach *v.* McGovern, 79 Cal. 268, 21 Pac. 837.

Colorado.— Kelly *v.* Lewis, 38 Colo. 18, 88 Pac. 388; McCraw *v.* Welch, 2 Colo. 284; Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899.

Delaware.— Staunton *v.* Smith, (1906) 65 Atl. 593. *Compare* Jefferson *v.* Chase, 1 Houst. 219, holding that that case turned entirely on the right of plaintiff to possession at the time of the taking.

Indiana.— Whitehead *v.* Coyle, 1 Ind. App. 450, 27 N. E. 716.

Iowa.— Hilman *v.* Brigham, 117 Iowa 70, 90 N. W. 491; Marshall *v.* Bunker, 40 Iowa 121.

Michigan.— Eldridge *v.* Sherman, 70 Mich. 266, 38 N. W. 255; Darling *v.* Tegler, 30 Mich. 54.

Missouri.— Kennedy *v.* Dodson, 44 Mo. App. 550.

Montana.— Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. 648.

Nebraska.— Kavanaugh *v.* Brodball, 40 Nebr. 875, 59 N. W. 517; Dillrance *v.* Murphy, 1 Nebr. (Unoff.) 298, 95 N. W. 608.

New Jersey.—Chambers *v.* Hunt, 18 N. J. L. 339.

New York.— Wood *v.* Orser, 25 N. Y. 348; Dodworth *v.* Jones, 4 Duer 201.

Oregon.— Casto *v.* Murray, 47 Oreg. 57, 81 Pac. 388, 883; Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216.

See 42 Cent. Dig. tit. "Replevin," §§ 48, 52.

Loss or acquisition of right intermediate commencement of action and trial.— In California the rule has been relaxed in cases where plaintiff did not have the right to possession at the time of the commencement of the action but acquired it before trial, on the ground that it would be a vain thing to award the possession to defendant merely that the property might again be replevied by plaintiff. Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434; Pico *v.* Pico, 56 Cal. 453; O'Connor *v.* Blake, 29 Cal. 312. *Compare* Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684, where it is stated that a subsequently acquired title is not alone sufficient. It has also been held that plaintiff cannot maintain his action where he has been divested of the right to possession before trial. Bolander *v.* Gentry, 36 Cal. 105, 95 Am. Dec. 162. Outside of California the rule is otherwise both as to the acquisition (Brown *v.* Loesch, 3 Ind. App. 145, 29 N. E. 450) and the loss of the right (Schlessinger *v.* Cook, 9 Wyo. 256, 62 Pac. 152).

57. Sanford School Dist. No. 5 *v.* Lord, 44 Me. 374; Stevens *v.* Chase, 61 N. H. 340.

58. *Arkansas.*— Prater *v.* Frazier, 11 Ark. 249.

California.— Lazard *v.* Wheeler, 22 Cal. 139.

Illinois.— Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

Indian Territory.— Hancock *v.* Schockman, 4 Indian Terr. 138, 69 S. W. 826.

Maryland.— Lamotte *v.* Wisner, 51 Md. 543 (holding it sufficient as against a trespasser or wrong-doer); Brooke *v.* Berry, 1 Gill 153; Smith *v.* Williamson, 1 Harr. & J. 147.

Mississippi.— Coleman *v.* Low, (1893) 13 So. 227; Saunders *v.* Jordan, 54 Miss. 428.

Missouri.— Kansas City Wholesale Grocery Co. *v.* McDonald, 118 Mo. App. 471, 95 S. W. 279.

New Jersey.—Chambers *v.* Hunt, 18 N. J. L. 339.

New York.— Neff *v.* Thompson, 8 Barb. 213; Williamson *v.* Lawrence, 8 Misc. 71, 28 N. Y. Suppl. 594 (statutory action against sheriff); Rogers *v.* Arnold, 12 Wend. 30. See also Brigham *v.* Bush, 33 Barb. 596, holding that a right to possession in a widow against all but the minor children was sufficient against a stranger.

Oregon.— Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623.

Pennsylvania.— Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Hoffman *v.* Sellers, 5 Pa. Dist. 395; Nichol *v.* Abram, 20 Pa. Co. Ct. 605; Midvale Steel Works *v.* Hallgarten, 15 Wkly. Notes Cas. 47.

Rhode Island.— Waterman *v.* Matteson, 4 R. I. 539.

Vermont.— Tittemore *v.* Labounty, 60 Vt. 624, 15 Atl. 196; Sprague *v.* Clark, 41 Vt. 6.

See 42 Cent. Dig. tit. "Replevin," § 48.

Whether the right is absolute or for purposes of security is immaterial. Brammell *v.* Hart, 12 Heisk. (Tenn.) 366.

59. See *supra*, I, C, 1, b.

can arise only by virtue of some general or special ownership,[60] hence it is necessary that plaintiff possess some property right in the goods or chattels in question, or, as it is frequently stated, the right to possession must be coupled with ownership, either general or special;[61] but the right to possession may be derived from either general or special ownership.[62]

(II) *ABSOLUTE OWNERSHIP.* In the absence of a possessory right shown to exist in another, the general property in chattels draws to it the right to possession;[63] and, in such a case, plaintiff establishes his right to possession by showing a clear legal title.[64] However, title or complete ownership in plaintiff is not absolutely essential to the maintenance of the action;[65] nor always sufficient, as the title

60. Black *v.* Roberson, (Ark. 1908) 112 S. W. 402; Street *v.* Sederburg, 41 Colo. 128, 92 Pac. 29. See also Baker *v.* Cordwell, 6 Colo. 199.

61. *Arkansas.*—Carpenter *v.* Glass, 67 Ark. 135, 53 S. W. 678; Thatcher *v.* Franklin, 37 Ark. 64; Wallace *v.* Brown, 17 Ark. 449; Wilson *v.* Royston, 2 Ark. 315.

California.— Keech *v.* Beatty, 127 Cal. 177, 59 Pac. 837; Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Cardinell *v.* Bennett, 52 Cal. 476.

Connecticut.— Weller *v.* Ely, 45 Conn. 547, by statute.

Illinois.— Stockton *v.* Lochnitt, 31 Ill. App. 214.

Indiana.— Clark *v.* Heck, 17 Ind. 281; Walpole *v.* Smith, 4 Blackf. 304; Parsley *v.* Huston, 3 Blackf. 348.

Maine.— Wyman *v.* Dorr, 3 Me. 183.

Massachusetts.— Perley *v.* Foster, 9 Mass. 112; Waterman *v.* Robinson, 5 Mass. 303.

Mississippi.— Curll *v.* Compton, 14 Sm. & M. 56.

Missouri.— American Metal Co. *v.* Daugherty, 204 Mo. 71, 102 S. W. 538; Gartside *v.* Nixon, 43 Mo. 138; Gray *v.* Parker, 38 Mo. 160; Pilkington *v.* Trigg, 28 Mo. 95; Mattison *v.* Hooberry, 104 Mo. App. 287, 78 S. W. 642; Bryant *v.* Dyer, 96 Mo. App. 455, 70 S. W. 516; Upham *v.* Allen, 73 Mo. App. 224; Baker *v.* Campbell, 32 Mo. App. 529; McMahill *v.* Walker, 22 Mo. App. 170.

Nebraska.— Jimmerson *v.* Greene, 7 Nebr. 26.

New Jersey.—Chambers *v.* Hunt, 18 N. J. L. 339.

New York.— Fagan Iron Works *v.* Dawson Realty Co., 109 N. Y. Suppl. 740; Harrison *v.* McIntosh, 1 Johns. 380; Pattison *v.* Adams, 7 Hill 126, 42 Am. Dec. 59.

Oklahoma.— Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101; Olson *v.* Thompson, 6 Okla. 74, 48 Pac. 184.

Pennsylvania.— Strong *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919; Lester *v.* McDowell, 18 Pa. St. 91; Stone *v.* Rogers, 17 Pa. Super. Ct. 358.

Tennessee.— Parham *v.* Riley, 4 Coldw. 5, holding that where the possession has been acquired by theft or robbery, neither the trespasser nor his vendee may maintain an action for the detention of it.

Wisconsin.— Gillett *v.* Treganza, 6 Wis. 343.

United States.— Dixwell *v.* Jones, 7 Fed. Cas. No. 3,937, 2 Dill. 184.

See 42 Cent. Dig. tit. "Replevin," §§ 45, 46.

Ownership in plaintiff is material only so far as it is necessary to show the right to possession. Schlessinger *v.* Cook, 9 Wyo. 256, 62 Pac. 152.

62. Lazard *v.* Wheeler, 22 Cal. 139; Sandford School Dist. No. 5 *v.* Lord, 44 Me. 374; Dodworth *v.* Jones, 4 Duer 201; Ferguson *v.* Lauterstein, 160 Pa. St. 427, 28 Atl. 852; Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612. See also *infra*, I, C, 1, c. (III).

Equitable title insufficient.— Although a strictly legal title is not essential, plaintiff must show ownership by a title recognized at law as distinguished from one which is recognized only in courts of equity. Coe *v.* Peacock, 2 Ohio Dec. (Reprint) 239, 2 West. L. Month. 134. *Contra*, under the present system of procedure in Ontario. Carter *v.* Long, 26 Can. Sup. Ct. 430.

63. Spencer *v.* Roberts, 42 Conn. 75; Hilman *v.* Brigham, 117 Iowa 70, 90 N. W. 491; Esson *v.* Tarbell, 9 Cush. (Mass.) 407; Chellis *v.* Grimes, 72 N. H. 104, 54 Atl. 943.

64. *Iowa.*— Mohn *v.* Stoner, 14 Iowa 115.

Maine.— Eveleth *v.* Blossom, 54 Me. 447, 92 Am. Dec. 555.

Massachusetts.— Fisher *v.* Alsten, 186 Mass. 549, 72 N. E. 78; Brookline *v.* Sherman, 140 Mass. 1, 1 N. E. 153, 54 Am. Rep. 434.

Missouri.— Leete *v.* St. Louis State Bank, 141 Mo. 584, 42 S. W. 927; McMahill *v.* Walker, 22 Mo. App. 170.

New York.— Ely *v.* Ehle, 3 N. Y. 506; Warren *v.* Leland, 2 Barb. 613.

United States.— Jackson *v.* Hale, 14 How. 525, 14 L. ed. 526.

See 42 Cent. Dig. tit. "Replevin," § 46.

When confined to title as source of right.— Where plaintiff bases his right to possession upon title he is confined to that source of right and cannot show a right arising from mere possession. Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660.

Title acquired by adverse possession confers upon the holder the right to maintain replevin, even against the original owner. Garrett *v.* Vaughan, 1 Baxt. (Tenn.) 113. See also Dillon *v.* Wright, 7 J. J. Marsh. (Ky.) 10.

Right of mortgagor to sue see CHATTEL MORTGAGES, 7 Cyc. 15.

65. *Arkansas.*— Britt *v.* Aylett, 11 Ark. 475, 52 Am. Dec. 282; Prater *v.* Frazier, 11 Ark. 249.

may be in one person and the right to possession in another, and the right to possession controls.[66] Although the fact that as against the owner another person has the right to possession bars the owner from maintaining replevin against such person,[67] it does not preclude him from maintaining replevin against a third person not entitled to possession.[68] Where plaintiff bases his right to possession upon a sale or exchange of the property to him, it is incumbent upon him to show that the circumstances were such as to create a valid sale or exchange which transferred the legal title to him.[69] On the other hand, where plaintiff has made an alleged sale of the property, he may establish his right to possession by showing that the circumstances were not such as to divest him of title, with its accompanying right to possession.[70]

(III) *Special Ownership.* In general, a person having a special interest or ownership in property entitling him to possession may maintain replevin [71]

California.— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684.

Maryland.— Lamotte *v.* Wisner, 51 Md. 543.

Mississippi.— Coleman *v.* Low, (1893) 13 So. 227.

New Jersey.—Chambers *v.* Hunt, 18 N. J. L. 339.

Oregon.— Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623.

Vermont.— Sprague *v.* Clark, 41 Vt. 6, holding that it is sufficient if plaintiff is entitled to the possession as against the person who takes it from him.

Contra.— As to goods attached, under Connecticut statute. Tomlinson *v.* Collins, 20 Conn. 364; Brown *v.* Chickopee Falls Co., 16 Conn. 87.

66. Spencer *v.* Roberts, 42 Conn. 75; Dentzel *v.* City, etc., R. Co., 90 Md. 434, 45 Atl. 201; Wood *v.* Orser, 25 N. Y. 348; Williams *v.* West, 2 Ohio St. 82.

67. Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106; Dillon *v.* Wright, 7 J. J. Marsh. (Ky.) 10; Shackelford *v.* Hargreaves, 42 Nebr. 680, 60 N. W. 951.

Rule where right is limited in time.— After the expiration of the time during which defendant is entitled to possession, the owner may recover the property from him by replevin. Magdeburg *v.* Uihlein, 53 Wis. 165, 10 N. W. 363.

68. Rowe *v.* Sharp, 51 Pa. St. 26.

Lien in third person.— Replevin may be maintained where plaintiff has the right to possession subject only to the lien of a third person. Neff *v.* Thompson, 8 Barb. (N. Y.) 213.

The rule is otherwise where another person has the full and complete right to possession. Wyman *v.* Dorr, 3 Me. 183.

69. *Hawaii.*— Phillips *v.* Magoon, 9 Hawaii 9.

Illinois.— Moser *v.* Kreigh, 49 Ill. 84; Rhea *v.* Riner, 21 Ill. 526.

Indiana.— Lane *v.* Sparks, 75 Ind. 278.

Kentucky.— Day *v.* Evanston, 64 S. W. 749, 23 Ky. L. Rep. 1099. See also Daniel *v.* Daniel, 6 B. Mon. 230, gift from married woman.

Maryland.— Stevenson *v.* Ridgeley, 3 Harr. & J. 281.

Michigan.— Metropolitan Lumber Co. *v.* McColeman, 140 Mich. 333, 103 N. W. 809; Hatch *v.* Fowler, 28 Mich. 205.

Missouri.— Wren *v.* Kuhler, 68 Mo. App. 680; Ætna Nat. Bank *v.* Water Power Co., 58 Mo. App. 532.

New Hampshire.— Chellis *v.* Grimes, 72 N. H. 104, 54 Atl. 943.

New York.— Hoffman House *v.* Barkley, 111 N. Y. App. Div. 564, 97 N. Y. Suppl. 1095; Mackay *v.* Mackay, 1 Lans. 506; Shapiro *v.* Lankay, 35 Misc. 39, 70 N. Y. Suppl. 218.

South Carolina.— Kirven *v.* Pinckney, 47 S. C. 229, 25 S. E. 202.

Canada.— O'Rourke *v.* Lee, 18 U. C. Q. B. 609.

And see, generally, Sales.

70. Buchanan *v.* Scandia Plow Co., 6 Colo. App. 34, 39 Pac. 899; Lutz *v.* Yount, 61 N. C. 367. See also Brown *v.* Campsall, 6 Harr. & J. (Md.) 491.

Duress.— A person who has sold the property in question under duress is not divested of his title and may maintain replevin against a purchaser from the vendee of the forced sale. Belote *v.* Henderson, 5 Coldw. (Tenn.) 471, 98 Am. Dec. 432.

Lack of consideration.— No action can be maintained where plaintiff has parted with his ownership for the obligation of another without fraud, even though defendant paid nothing for the property. Hacker *v.* Munroe, 56 Ill. App. 532.

Revesting of title.— Plaintiff may establish his right to sue by showing that a sale made by him has been rescinded. Gleason *v.* Drew, 9 Me. 79; Bemis *v.* De Land, 177 Mass. 182, 58 N. E. 684.

An owner of raffled property may maintain replevin against a party who was unsuccessful in the raffle and who has taken possession of the property without authority, even though he has delivered to the successful party a writing stating that he delivered the property to him. Miller *v.* Le Piere, 136 Mass. 20.

71. *Illinois.*— Blakely Printing Co. *v.* Pease, 95 Ill. App. 341.

Missouri.— Robertson *v.* Staed, 135 Mo. 135, 36 S. W. 610, 58 Am. St. Rep. 569, 33 L. R. A. 203; American Storage, etc., Co. *v.* Harding, 126 Mo. App. 489, 104 S. W. 484; Hazard *v.* Hall, 5 Mo. App. 584.

even against the general owner. Detention by the latter without right of possession is as unlawful as detention by any other person.[72]

d. Prior Possession — (i) *NECESSITY.* It may be stated generally that where plaintiff establishes his right to possession, through some general or special ownership, and where he does not base his right upon mere naked possession, he need not show that he has ever had actual possession of the property.[73]

(ii) *SUFFICIENCY.* As mere naked possession of property confers some rights to a continuance thereof, it being presumed to be rightful and some evidence of ownership, it has been held that, as against a mere wrong-doer and trespasser, a plaintiff may establish his right to possession and to maintain the action by showing prior possession,[74] although there is some authority to the contrary.[75]

New Hampshire.— Stevens *v.* Chase, 61 N. H. 340.

New York.— See Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762.

Pennsylvania.— Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33; Mead *v.* Kilday, 2 Watts 110.

Wisconsin.— Rohrer *v.* Lockery, 136 Wis. 532, 117 N. W. 1060.

See 42 Cent. Dig. tit. "Replevin," §§ 45, 46.

The head of a family may maintain replevin to recover exempt property regardless of whether the technical ownership is in himself or his wife. Starrett *v.* Deerfield, 40 Nebr. 846, 59 N. W. 352.

Right of mortgagee to maintain action see CHATTEL MORTGAGES, 7 Cyc. 20, 24.

72. Williams *v.* West, 2 Ohio St. 82; Woodson *v.* Pearce, 5 Sneed (Tenn.) 416.

Replevin against former owner and vendee. —A person possessing such a property right may maintain his action against the former owner and his vendee, where the property has fallen into their hands. Brooke *v.* Berry, 1 Gill (Md.) 153.

73. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Lazard *v.* Wheeler, 22 Cal. 139; Chinn *v.* Russell, 2 Blackf. (Ind.) 172; Neff *v.* Thompson, 8 Barb. (N. Y.) 213; Ferguson *v.* Lauterstein, 160 Pa. St. 427, 28 Atl. 852; Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Hoffman *v.* Sellers, 5 Pa. Dist. 395. *Compare* Wright *v.* Armstrong, 1 Ill. 172, holding that plaintiff must have actual or constructive possession. *Contra,* Pangburn *v.* Partridge, 7 Johns. (N. Y.) 140, 5 Am. Dec. 250; Byrd *v.* O'Hanlin, 1 Mills (S. C.) 401; Dickson *v.* Mathers, 7 Fed. Cas. No. 3,898*a*, Hempst. 65; Comerford *v.* Blake, 2 Ir. Eq. 176.

Special owner.— A plaintiff claiming a special property in the goods must have had actual possession to support his action. Holliday *v.* Lewis, 15 Mo. 403.

Statute of frauds.— Sometimes it is necessary that plaintiff assume possession of property bought by him to prevent the transaction being fraudulent as to creditors and hence invalid. Haberer *v.* Walzer, 109 Ill. App. 371. See also, generally, FRAUDS, STATUTE OF, 20 Cyc. 250.

74. *Colorado.*— Hall *v.* Johnson, 21 Colo. 414, 42 Pac. 660.

Delaware.— Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

Illinois.— Van Namee *v.* Bradley, 69 Ill. 299; Warner *v.* Cushman, 31 Ill. 283; Wheeler *v.* McCorristen, 24 Ill. 40; Downey *v.* Arnold, 97 Ill. App. 91.

Indiana.— Moorman *v.* Quick, 20 Ind. 67.

Iowa.— See Kinney *v.* McDermott, 55 Iowa 674, 8 N. W. 656, 39 Am. Rep. 191.

Massachusetts.— Odd Fellows' Hall Assoc. *v.* McAllister, 153 Mass. 292, 26 N. E. 862, 11 L. R. A. 172. But see Perley *v.* Foster, 9 Mass. 112; Waterman *v.* Robinson, 5 Mass. 303.

Michigan.— Sanford *v.* Millikin, 144 Mich. 311, 107 N. W. 884.

Minnesota.—Anderson *v.* Gouldberg, 51 Minn. 294, 53 N. W. 636.

Missouri.— Smith *v.* Lydick, 42 Mo. 209. *Contra,* McMahill *v.* Walker, 22 Mo. App. 170.

New York.— Rogers *v.* Arnold, 12 Wend. 30. In Frost *v.* Mott, 34 N. Y. 253, it was held that actual possession, accompanied by an equitable interest, is sufficient to maintain the action against a wrong-doer.

North Carolina.— Freshwater *v.* Nichols, 52 N. C. 251.

Oregon.— Taylor *v.* Brown, 49 Oreg. 423, 90 Pac. 673; Casto *v.* Murray, 47 Oreg. 57, 81 Pac. 388, 883; Lewis *v.* Birdsey, 19 Oreg. 164, 26 Pac. 623.

Wisconsin.— Kellogg *v.* Adams, 51 Wis. 138, 8 N. W. 115, 37 Am. Rep. 815; Dudley *v.* Ross, 27 Wis. 679.

See 42 Cent. Dig. tit. "Replevin," §§ 53, 54.

Vendor in possession.— A person who has executed a contract of sale but retains the property in his possession may maintain replevin against a third person. Wills *v.* Barrister, 36 Vt. 220.

Possession under claim of ownership.— The rule has been applied in cases where plaintiff was in possession under a claim of ownership made in good faith, although perhaps erroneous. Conely *v.* Dudley, 111 Mich. 122, 69 N. W. 151; Sprague *v.* Clark, 41 Vt. 6; Reynolds *v.* Dexter, 2 Wash. 185, 26 Pac. 221; Dresser *v.* Lemma, 122 Wis. 387, 100 N. W. 844; Sargant *v.* Toronto, 12 U. C. C. P. 185.

75. Ellsworth *v.* McDowell, 44 Nebr. 707, 62 N. W. 1082 (holding that the possession of property obtained by trespass cannot be

This rule does not apply where defendant possesses some interest in the property,[76] and the action necessarily fails when plaintiff bases it upon prior possession, and then fails to show such possession.[77]

2. TITLE AND RIGHT TO POSSESSION OF PARTICULAR CLASSES[78] OF PERSONS—a. Officer Under Process. An officer who has seized chattels under valid process has such a special property therein as will authorize him to maintain replevin against one who takes them out of his possession or that of his custodian.[79] However, before levy, he has no such interest as will authorize him to maintain the action,[80] and the same is the case if the levy be made on void process,[81] or where the levy and execution have been set aside before the return-day of the execution.[82] So also if goods of a stranger to the suit in which the levy was made are seized, the officer acquires no such interest as will entitle him to maintain replevin against the true owner.[83]

b. Lienor.[84] Replevin is the appropriate remedy on behalf of one having a lien on chattels, for the purpose of obtaining possession of which he is wrongfully deprived.[85]

c. Guardian. Under statutes giving to the guardian of the minor the right to the custody of the personal property owned by his ward, such guardian may maintain replevin to recover property unlawfully taken from his ward's estate.[86]

made the basis of an action of replevin); Chambers *v.* Hunt, 18 N. J. L. 339. See also Templeman *v.* Case, 10 Mod. 24, 88 Eng. Reprint 608. *Compare* Barkley *v.* Leiter, 49 Nebr. 123, 68 N. W. 381, holding that possession, coupled with strong proof of ownership, is sufficient as against one who cannot show a superior right.

76. Gartside *v.* Nixon, 43 Mo. 138; Broadwater *v.* Darne, 10 Mo. 277; Stone *v.* McNealy, 59 Mo. App. 396; Murray *v.* Lyons, (Tex. Civ. App. 1906) 95 S. W. 621.

77. Westbay *v.* Milligan, 89 Mo. App. 294; Maryville Nat. Bank *v.* Snyder, 85 Mo. App. 82; Updyke *v.* Wheeler, 37 Mo. App. 680.

78. Between mortgagees see CHATTEL MORTGAGES, 7 Cyc. 19.

By mortgagee against mortgagor see CHATTEL MORTGAGES, 7 Cyc. 24.

By mortgagee against third person see CHATTEL MORTGAGES, 7 Cyc. 19, 20.

By mortgagor against mortgagee see CHATTEL MORTGAGES, 7 Cyc. 15.

By purchaser of goods taken under process against seller see SALES.

By seller of goods taken under process against purchaser see SALES.

Right of bailee to replevy see BAILMENTS, 5 Cyc. 211, 214.

Right of bailor to replevy from bailee see BAILMENTS, 5 Cyc. 213, 214.

Right of purchaser to replevy goods from seller see SALES.

Right of seller to replevy from purchaser see SALES.

Right of seller to replevy goods from one who buys from the original purchaser see SALES.

79. *Delaware.*—Polite *v.* Jefferson, 5 Harr. 388.

Indiana.— Dunkin *v.* McKee, 23 Ind. 447; Fitch *v.* Dunn, 3 Blackf. 142.

Louisiana.—Newman *v.* Wilson, 1 La. Ann. 48.

Massachusetts.— Gordon *v.* Jenney, 16 Mass. 465; Thompson *v.* Marsh, 14 Mass. 269.

Missouri.— Carroll *v.* Frank, 28 Mo. App. 69.

New York.— Rhoads *v.* Woods, 41 Barb. 471.

Ohio.— Pugh *v.* Calloway, 10 Ohio St. 488.

South Carolina.— McClintock *v.* Graham, 3 McCord 243.

Wisconsin.— Martin *v.* Watson, 8 Wis. 315. See 42 Cent. Dig. tit. "Replevin," § 58.

Goods left in custody of owner.—Where there has been a valid levy, the officer making it has such a special property as will entitle him to maintain replevin therefor, although the property is left in the custody of the owner. Polite *v.* Jefferson, 5 Harr. (Del.) 388.

Replevin may be brought against the debtor himself by a sheriff after levying on his goods before the debt is satisfied or a sale made. McClintock *v.* Graham, 3 McCord (S. C.) 243.

80. Mulheisen *v.* Lane, 82 Ill. 117.

81. Clark *v.* Norton, 6 Minn. 412.

An officer who levies on and takes possession of property previously taken by an another officer on a valid levy acquires no right to the possession of the property, and if he is dispossessed by the officer making the first levy cannot maintain replevin against him. Flanagan *v.* Newman, 5 Colo. App. 245, 38 Pac. 431.

82. Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

83. Carroll *v.* Frank, 28 Mo. App. 69.

84. See also CARRIERS; CHATTEL MORTGAGES; LANDLORD AND TENANT; and other specific titles in which the question of liens and their enforcement arises.

85. Currier *v.* Ford, 26 Ill. 488; Phelan *v.* Terry, 101 Minn. 454, 112 N. W. 872; Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221.

86. Boruff *v.* Stipp, 126 Ind. 32, 25 N. E.

A statute giving an infant the right to sue by next friend does not control an action in which the guardian has himself the right to recover.[87]

d. Partners.[88] The members of a partnership may jointly maintain an action of replevin to recover the possession of property to which they are entitled;[89] but as the interest of one partner is only a right to share in the proceeds of the property after the payment of the firm debts [90] the action cannot be maintained by him alone, even though the property in question has been attached by the individual creditor of the other partner or partners,[91] except where he is entitled to the control and possession of the property.[92]

e. Joint Tenants and Tenants in Common.[93] To enable one to maintain an action of replevin, his right to the possession must be exclusive.[94] Therefore, as a general rule, where a personal chattel is owned by several persons, one part-owner cannot maintain replevin for his own share or interest.[95] All the owners must unite in the action,[96] for the reason that all joint owners, unless there is an agreement to the contrary,[97] are equally entitled to the possession of the property, and neither has the right to the immediate and exclusive possession of the same as against the other.[98] Thus, one tenant in common,[99] or joint

865; Meiser *v.* Smith, 2 Ind. App. 37, 27 N. E. 871.

87. Boruff *v.* Stipp, 126 Ind. 32, 25 N. E. 865.

88. **Right of one partner to maintain replevin against another copartner for partnership property** see PARTNERSHIP, 30 Cyc. 446.

89. Ferguson *v.* Day, 6 Ind. App. 138, 33 N. E. 213. See also Blake *v.* Blackley, 109 N. C. 257, 13 S. E. 786, 26 Am. St. Rep. 566.

Under the New York statute, requiring plaintiffs to swear that the property sought to be replevied has not been taken on execution or attachment against them, the members of a partnership cannot maintain the action where the property has been taken on attachment against some of them. Smith *v.* Orser, 43 Barb. 187 [*affirmed* in 42 N. Y. 132].

90. See PARTNERSHIP, 30 Cyc. 444.

91. Davis *v.* White, 1 Houst. (Del.) 228; Hacker *v.* Johnson, 66 Me. 21; Fay *v.* Duggan, 135 Mass. 242. *Contra*, Hutchinson *v.* Dubois, 45 Mich. 143, 7 N. W. 714, in which case, however, there was no plea of nonjoinder and the existence of the partnership was not clearly established by the evidence.

92. Harkey *v.* Tillman, 40 Ark. 551; Bostick *v.* Brittain, 25 Ark. 482.

A surviving partner may maintain an action of replevin, as he is entitled to possession. Smith *v.* Wood, 31 Md. 293. See also Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228.

93. **Replevin of undivided shares** see *supra*, I, B, 1, b, (v).

94. See *supra*, I, C, 1, b.

95. *Maine.*— McArthur *v.* Lane, 15 Me. 245.

Massachusetts.— Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131; Ladd *v.* Billings, 15 Mass. 15; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Missouri.—Gossett *v.* Drydale, 48 Mo. App. 430.

Pennsylvania.— Reinheimer *v.* Hemingway, 35 Pa. St. 432.

United States.— De Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515.

See 42 Cent. Dig. tit. "Replevin," § 64.

But see Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350, holding that under Rev. Laws, § 1230, providing that the owner or person entitled to the possession of goods unlawfully detained may replevy them, a joint owner, from whose sole possession a horse has strayed, may replevy the horse from one whose right to the possession is not superior to his.

96. *Arkansas.*— Cox *v.* Morrow, 14 Ark. 603.

Delaware.— Ellis *v.* Culver, 2 Harr. 129.

Massachusetts.— Corcoran *v.* White, 146 Mass. 329, 15 N. E. 636, 4 Am. St. Rep. 313; Fay *v.* Duggan, 135 Mass. 242; Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Tennessee.— Collier *v.* Yearwood, 5 Baxt. 581.

United States.— De Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515.

See 42 Cent. Dig. tit. "Replevin," § 64.

97. Rich *v.* Ryder, 105 Mass. 306, in which it was held that the general agent of a whaling vessel, lying at a port where the usage authorizes such agents to take possession of and distribute or sell ships' stores remaining at the end of the voyage, may maintain replevin against the master for such stores, notwithstanding both parties, with others, are joint owners of the vessel and her stores. See also Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990.

98. *California.*— Balch *v.* Jones, 61 Cal. 234.

Delaware.— Ellis *v.* Culver, 2 Harr. 129.

Indiana.— Bowen *v.* Roach, 78 Ind. 361.

Missouri.— Lisenby *v.* Phelps, 71 Mo. 522; Cross *v.* Hulett, 53 Mo. 397; Spooner *v.* Ross, 24 Mo. App. 599.

Nebraska.— Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990.

See 42 Cent. Dig. tit. "Replevin," §§ 64, 65.

99. *Arkansas.*— Ward *v.* Worthington, 33 Ark. 830.

owner,[1] cannot sustain replevin against his cotenant; nor against one to whom such cotenant has pledged or conveyed the property;[2] nor, it is probable, against a stranger in possession.[3] The doctrine above stated, that one joint owner cannot sustain replevin against his coöwner, applies more particularly to a single piece of property, or to things in their nature so far indivisible that the share of one is not susceptible of delivery without the whole.[4] But it does not obtain where the property is absolutely alike in quality and value, and is readily divisible by measurement or weight.[5] And where one repudiates the other's interest in property susceptible of division,[6] or takes possession of the common property and converts it to his own use,[7] the other may bring replevin for his share.

f. Purchaser at Sale Under Process or Distress Proceedings. One who has purchased personal property at an execution sale may maintain replevin against the execution debtor, even though the sale was, in some respects, irregular,[8] and a purchaser of land at an execution or foreclosure sale may maintain replevin for timber, crops, or machinery detached from the realty after the sale;[9] but not where they were detached before the sale;[10] so also, it has been held for obvious

California.— Balch *v.* Jones, 61 Cal. 234; Hewlett *v.* Owens, 50 Cal. 474.

Delaware.— Ellis *v.* Culver, 2 Harr. 129.

Kentucky.— Chinn *v.* Respass, 1 T. B. Mon. 25.

Maine.— Hardy *v.* Sprowle, 32 Me. 322.

Massachusetts.— Silloway *v.* Brown, 12 Allen 30; Barnes *v.* Bartlett, 15 Pick. 71; Wills *v.* Noyes, 12 Pick. 324.

Michigan.— Busch *v.* Nester, 70 Mich. 525, 38 N. W. 458; Kindy *v.* Green, 32 Mich. 310.

New Jersey.—Chambers *v.* Hunt, 22 N. J. L. 552; Hunt *v.* Chambers, 21 N. J. L. 620.

New York.— Hudson *v.* Swan, 83 N. Y. 552 [*affirming* 7 Abb. N. Cas. 324]; Davis *v.* Lottich, 46 N. Y. 393; Russell *v.* Allen, 13 N. Y. 173; Barrowcliffe *v.* Cummins, 66 Hun 1, 20 N. Y. Suppl. 787; Rogers *v.* Arnold, 12 Wend. 30.

North Carolina.— Strauss *v.* Crawford, 89 N. C. 149.

United States.— Bohlen *v.* Arthurs, 115 U. S. 482, 6 S. Ct. 114, 29 L. ed. 454.

See 42 Cent. Dig. tit. "Replevin," § 65.

1. *Arkansas.*— Carle *v.* Wall, (1891) 16 S. W. 293.

Connecticut.— Prentice *v.* Ladd, 12 Conn. 331.

Delaware.— Ellis *v.* Culver, 2 Harr. 129.

Indiana.— Bowen *v.* Roach, 78 Ind. 361; Noble *v.* Epperly, 6 Ind. 414.

Kentucky.— Chinn *v.* Respass, 1 T. B. Mon. 25.

Maryland.— McElderry *v.* Flannagan, 1 Harr. & G. 308.

Mississippi.—Holton *v.* Binns, 40 Miss. 491.

Missouri.— Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Lisenby *v.* Phelps, 71 Mo. 522; Cross *v.* Hulett, 53 Mo. 397; Spooner *v.* Ross, 24 Mo. App. 599.

New Jersey.— Chambers *v.* Hunt, 22 N.J. L. 552; Hunt *v.* Chambers, 21 N. J. L. 620.

New York.— Davis *v.* Lottich, 46 N. Y. 393.

Oregon.— Sharp *v.* Johnson, 38 Oreg. 246, 63 Pac. 485, 84 Am. St. Rep. 788.

Utah.— Hill *v.* Seager, 3 Utah 379, 3 Pac. 545, holding that the statutes of Utah have not changed the law in this respect.

See 42 Cent. Dig. tit. "Replevin," § 65.

2. Frans *v.* Young, 24 Iowa 375; Alford *v.* Bradeen, 1 Nev. 228; Davis *v.* Lottich, 46 N. Y. 393.

3. Ellis *v.* Culver, 2 Harr. (Del.) 129; Spooner *v.* Ross, 24 Mo. App. 599; Hunt *v.* Chambers, 21 N. J. L. 620. See, however, Miller *v.* Darling, 22 Minn. 303, holding that in the absence of a proper objection by answer or demurrer, one owner in common of personalty may, without joining his coöwners, maintain an action of replevin therefor against a stranger who has no right to its possession, or any part thereof. And where one has the full legal title to property, the fact that he is under an obligation to account to another with respect to a part of the property does not prevent his maintaining, as sole plaintiff, an action against a stranger for its possession. McDonald *v.* Daniels, 76 Kan. 388, 92 Pac. 51.

4. Read *v.* Middleton, 62 Iowa 317, 17 N. W. 532; Kaufmann *v.* Schilling, 58 Mo. 218; Fines *v.* Bolin, 36 Nebr. 621, 54 N. W. 990.

5. Pitman *v.* Baumstark, 63 Kan. 69, 64 Pac. 968.

6. Cornett *v.* Hall, 103 Mo. App. 353, 77 S. W. 122.

7. Schwartz *v.* Skinner, 47 Cal. 3.

8. Hazzard *v.* Burton, 4 Harr. (Del.) 62.

Undivided property.— The purchaser of an undivided one-half interest of personal property at a sheriff's sale may maintain the action after the sheriff has divided the property and delivered one half to him (Snyder *v.* Stehman, 10 Pa. Super. Ct. 639), but one who has purchased merely the interest of a partner in the firm property may not, as he is not entitled to possession (Reinheimer *v.* Hemingway, 35 Pa. St. 432).

Where goods not the property of the tenant, and exempt from distress, were sold under distress proceedings, the purchaser thereof cannot maintain replevin against the true owner. Owen *v.* Boyle, 22 Me. 47.

9. Marquette, etc., R. Co. *v.* Atkinson, 44 Mich. 166, 6 N. W. 230; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612.

10. Berthold *v.* Harmon, 12 Minn. 335, 93 Am. Dec. 233.

reasons that replevin cannot be maintained where another person has the right to possession. In order to maintain the action plaintiff must show an exclusive right to possession.[11]

g. Assignee, Consignee, or Bailee. An assignee,[12] or consignee,[13] has sufficient interest in the property to maintain replevin against a trespasser, or against an officer levying to satisfy a subordinate lien on the property.

D. Taking, Detention, or Possession by Defendant — 1. Wrongful Taking. At common law a writ of replevin does not lie unless there has been a tortious taking either originally or by construction of law by some act which makes the party a trespasser *ab initio*; a mere unlawful detention without an original wrongful taking not being sufficient.[14] Herein it is distinguishable from detinue which was the common-law action to obtain the property where defendant came rightfully into possession and the detention only was wrongful.[15]

2. Wrongful Detention — a. Sufficiency of Wrongful Detention Without Wrongful Taking. The rule stated in the preceding section, limiting the remedy to cases where the taking is tortious, no longer obtains in the United States and Canada, where by virtue of statutes the action lies for an unlawful detention, although the original taking was lawful.[16]

11. Bowen *v.* Roach, 78 Ind. 361; Berthold *v.* Holman, 12 Minn. 335, 93 Am. Dec. 233.

12. *California.*— Lazard *v.* Wheeler, 22 Cal. 139.

District of Columbia.— Wall *v.* De Mitkiewicz, 9 App. Cas. 109.

Kansas.— Sehrt-Patterson Milling Co. *v.* Levan, 9 Kan. App. 523, 58 Pac. 275.

Massachusetts.— Whipple *v.* Thayer, 16 Pick. 25, 26 Am. Dec. 626.

Nebraska.— Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3.

See 42 Cent. Dig. tit. "Replevin," § 66.

13. Peters *v.* Elliott, 78 Ill. 321; Powell *v.* Bradlee, 9 Gill & J. (Md.) 220; Butler *v.* Smith, 35 Miss. 457; Grosvenor *v.* Phillips, 2 Hill (N. Y.) 147.

14. *Arkansas.*—Trapnall *v.* Hattier, 6 Ark. 18.

Delaware.— Drummond *v.* Hopper, 4 Harr. 327. But see Clark *v.* Adair, 3 Harr. 113.

Kentucky.— Harper *v.* Baker, 3 T. B. Mon. 421, 16 Am. Dec. 112.

Mississippi.— Wheelock *v.* Cozzens, 6 How. 279.

Missouri.— Rector *v.* Chevalier, 1 Mo. 345.

New Hampshire.— Woodward *v.* Grand Trunk R. Co., 46 N. H. 524; Dame *v.* Dame, 43 N. H. 37.

New Jersey.— Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593.

New York.—Chapman *v.* Andrews, 3 Wend. 240; Marshall *v.* Davis, 1 Wend. 109, 19 Am. Dec. 463; Gardner *v.* Campbell, 15 Johns. 401; Thompson *v.* Button, 14 Johns. 84; Hopkins *v.* Hopkins, 10 Johns. 369; Pangburn *v.* Partridge, 7 Johns. 140, 5 Am. Dec. 250.

North Carolina.— Cummings *v.* MacGill, 6 N. C. 357.

Pennsylvania.— Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739.

South Carolina.— See Joplin *v.* Carrier, 11 S. C. 327.

Wyoming.— Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

United States.— Meany *v.* Head, 16 Fed. Cas. No. 9,379, 1 Mason 319; Murphy *v.* Tindall, 17 Fed. Cas. No. 9,952*a*, Hempst. 10.

England.— Galloway *v.* Bird, 4 Bing. 299, 5 L. J. C. P. O. S. 180, 12 Moore C. P. 547, 13 E. C. L. 512; Mennie *v.* Blake, 6 E. & B. 842, 2 Jur. N. S. 953, 25 L. J. Q. B. 399, 4 Wkly. Rep. 739, 88 E. C. L. 842; Shannon *v.* Shannon, 1 Sch. & Lef. 324; Matter of Wilson, 1 Sch. & Lef. 320 note; *Ex p.* Chamberlain, 1 Sch. & Lef. 320.

See 42 Cent. Dig. tit. "Replevin," § 71; 3 Blackstone Comm. 145; Wilkinson Repl. 6.

Contra.— *Dicta* in Baker *v.* Fales, 16 Mass. 147; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

What taking sufficient.—Any exercise of claim or dominion without right, by one having the goods in his power, constitutes a tortious taking. An actual manucaption or forcible dispossession is not necessary. Moore *v.* Moore, 4 Mo. 421; Haythorn *v.* Rushforth, 19 N. J. L. 160, 38 Am. Dec. 540; Latimer *v.* Wheeler, 3 Abb. Dec. (N. Y.) 35, 1 Keyes 468; Neff *v.* Thompson, 8 Barb. (N. Y.) 213; Stewart *v.* Wells, 6 Barb. (N. Y.) 79. But see Wallace *v.* Brown, 17 Ark. 449.

15. Hickey *v.* Hinsdale, 12 Mich. 99; 1 Chitty Pl. 186–190.

16. *Arkansas.*— McKinnis *v.* Little Rock, etc., R. Co., 44 Ark. 210; McDonald *v.* Smith, 21 Ark. 460.

Colorado.—See Paul *v.* Luttrell, 1 Colo. 317.

Connecticut.— Brown *v.* Poland, 54 Conn. 313, 7 Atl. 719.

Indiana.— Rose *v.* Cash, 58 Ind. 278; Baer *v.* Martin, 2 Ind. 229; Daggett *v.* Robins, 2 Blackf. 415, 21 Am. Dec. 752; Opperman *v.* Citizens' Bank, (App. 1908) 85 N. E. 991.

Maine.— Douglass *v.* Gardner, 63 Me. 462; Seaver *v.* Dingley, 4 Me. 306.

Maryland.—Lamotte *v.* Wisner, 51 Md. 543.

Massachusetts.— Whitman *v.* Merrill, 125 Mass. 127; Lockwood *v.* Perry, 9 Metc. 440; Marston *v.* Baldwin, 17 Mass. 606; Baker *v.* Fales, 16 Mass. 147; Badger *v.* Phinney, 15 Mass. 359, 8 Am. Dec. 105.

b. Necessity of Wrongful Detention. The detention of goods is a material fact necessary to maintain an action of replevin. A mere unlawful taking not followed by detention will not sustain the action.[17]

3. Possession of Defendant — a. Necessity For Actual or Constructive Possession — (i) *General Rule and Its Applications.* The general rule is well established that, in order to maintain replevin, it is essential that defendant should have either actual or constructive possession of the property sued for at the time suit was commenced, so that he may make delivery thereof to plaintiff if judgment be rendered against him.[18] Thus the action does not lie where defend-

Michigan.— Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153; Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936; Parish *v.* Morey, 40 Mich. 417; Sexton *v.* McDowd, 38 Mich. 148; Detroit Frear Stone Works *v.* White, 35 Mich. 77; Hickey *v.* Hinsdale, 12 Mich. 99.

Mississippi.— Burrage *v.* Melson, 48 Miss. 237.

Missouri.— Skinner *v.* Stouse, 4 Mo. 93.

New Hampshire.— Hart *v.* Boston, etc., R. Co., 72 N. H. 410, 56 Atl. 920.

New York.— Cummings *v.* Vorce, 3 Hill 282; Ross *v.* Cassidy, 27 How. Pr. 416; Drake *v.* Wakefield, 11 How. Pr. 106.

Ohio.— State *v.* Jennings, 14 Ohio St. 73; Stone *v.* Wilson, Wright 159.

Oregon.— Krebs Hop Co. *v.* Taylor, (1908) 97 Pac. 44, 98 Pac. 494.

Pennsylvania.— Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739; Moser *v.* Libenguth, 2 Rawle 428; Keite *v.* Boyd, 16 Serg. & R. 300; Stoughton *v.* Rappalo, 3 Serg. & R. 559; Shearick *v.* Huber, 6 Binn. 2; Weaver *v.* Lawrence, 1 Dall. 156, 1 L. ed. 79.

Rhode Island.— Waterman *v.* Matteson, 4 R. I. 539.

South Dakota.— Willis *v.* De Witt, 3 S. D. 281, 52 N. W. 1090.

Vermont.— Dearing *v.* Smith, 66 Vt. 60, 28 Atl. 630; Rowe *v.* Hicks, 58 Vt. 18, 4 Atl. 563.

Washington.— Laurendeau *v.* Fugelli, 5 Wash. 632, 32 Pac. 465.

Wyoming.— Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

United States.— Sutherland *v.* Brace, 73 Fed. 624, 19 C. C. A. 589 [*affirming* 71 Fed. 469, 18 C. C. A. 199].

Canada.— Grant *v.* Robertson, 2 Nova Scotia Dec. 247; Deal *v.* Potter, 26 U. C. Q. B. 578.

See 42 Cent. Dig. tit. "Replevin," §§ 71, 72.

17. *Colorado.*— Paul *v.* Luttrell, 1 Colo. 317.

Delaware.— Johnson *v.* Johnson, 4 Harr. 171.

Kansas.— Moses *v.* Morris, 20 Kan. 208; Brown *v.* Holmes, 13 Kan. 482; Arthur *v.* Wallace, 8 Kan. 267.

Massachusetts.— Page *v.* Crosby, 24 Pick. 211.

Michigan.— Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564; Toomey *v.* Woodruff, 50 Mich. 31, 14 N. W. 689; Morrison *v.* Lumbard, 48 Mich. 548, 12 N. W. 696; Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936; Sexton *v.* McDowd, 38 Mich. 148; Bacon *v.* Davis, 30 Mich. 157; Hickey *v.* Hinsdale, 12 Mich. 99.

New York.— Sherman *v.* Jenkins, 70 Hun 593, 24 N. Y. Suppl. 186; Thomas *v.* Williams, 32 Hun 257; Savage *v.* Perkins, 11 How. Pr. 17.

Ohio.— State *v.* Jennings, 14 Ohio St. 73.

South Dakota.— Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216.

Vermont.— Dearing *v.* Smith, 66 Vt. 60, 28 Atl. 630; Bent *v.* Bent, 44 Vt. 633.

18. *Arkansas.*— Casey *v.* Scott, 82 Ark. 362, 101 S. W. 1152; Wallace *v.* Brown, 17 Ark. 499; Beebe *v.* De Baun, 8 Ark. 510.

California.— Richards *v.* Morey, 133 Cal. 437, 65 Pac. 886; Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110; Riciotto *v.* Clement, 94 Cal. 105, 29 Pac. 414; Runge *v.* Wilson, 7 Cal. App. 577, 95 Pac. 178.

Delaware.— Reed *v.* Wiltbank, 2 Pennew. 243, 45 Atl. 400.

District of Columbia.— Carpenter *v.* Starr, 1 Mackey 417.

Indiana.— Van Gorder *v.* Smith, 99 Ind. 404; Hadley *v.* Hadley, 82 Ind. 75; Louthain *v.* Fitzer, 78 Ind. 449; Rose *v.* Cash, 58 Ind. 278; Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105; West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506.

Iowa.— Coffin *v.* Gephart, 18 Iowa 256.

Kansas.— Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997; Davis *v.* Van de Mark, 45 Kan. 130, 25 Pac. 589; Moses *v.* Morris, 20 Kan. 208.

Maine.— Howe *v.* Shaw, 56 Me. 291; Ramsdell *v.* Buswell, 54 Me. 546; Small *v.* Hutchins, 19 Me. 255.

Maryland.— Herzberg *v.* Sachsed, 60 Md. 426.

Massachusetts.—Calnan *v.* Stern, 153 Mass. 413, 26 N. E. 994; Hall *v.* White, 106 Mass. 599; Richardson *v.* Reed, 4 Gray 441, 64 Am. Dec. 77.

Michigan.— Hall *v.* Kalamazoo, 131 Mich. 404, 91 N. W. 615; Reid *v.* Parks, 122 Mich. 363, 81 N. W. 252; Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894; House *v.* Turner, 106 Mich. 240, 64 N. W. 20; Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564; Hinchman *v.* Doak, 48 Mich. 168, 12 N. W. 39; Sexton *v.* McDowd, 38 Mich. 148.

Minnesota.— Ames *v.* Mississippi Boom Co., 8 Minn. 467.

Mississippi.— Myrick *v.* National Cash-

ant never had possession of any sort,[19] although he tried to get possession and failed to do so,[20] or where he neither had possession nor claimed any right to possession [21] and was not in collusion with a co-defendant in respect of the property,[22] where plaintiff has actual possession of the goods sued for at the time of bringing suit,[23] where defendant has restored the property to plaintiff before suit was commenced,[24] or where defendant has in good faith and prior to the

Register Co., (1899) 25 So. 155; Griffin *v.* Lancaster, 59 Miss. 340.

Missouri.— Morrow *v.* Pryor, 125 Mo. App. 344, 102 S. W. 582; Penn *v.* Brashear, 65 Mo. App. 24; Feder *v.* Abrahams, 28 Mo. App. 454; Gulath *v.* Waldstein, 7 Mo. App. 66; Haeger *v.* Marcus, 5 Mo. App. 565; Davis *v.* Randolph, 3 Mo. App. 454.

Montana.— Glass *v.* Basin, etc., Min. Co., 31 Mont. 21, 77 Pac. 302.

Nebraska.— Burr *v.* McCallum, 59 Nebr. 326, 80 N. W. 1040, 80 Am. St. Rep. 677; Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Nebr. 20, 80 N. W. 47; Depriest *v.* McKinstry, 38 Nebr. 194, 56 N. W. 806.

Nevada.— Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240.

New Hampshire.— Mitchell *v.* Roberts, 50 N. H. 486.

New York.— Sinnott *v.* Feiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565; Wheeler *v.* Allen, 51 N. Y. 37; Latimer *v.* Wheeler, 30 Barb. 485 [*affirmed* in 3 Abb. Dec. 35, 1 Keyes 468]; Alaske Unterstuetzung Verein *v.* Wall, 28 Misc. 174, 58 N. Y. Suppl. 1115; Christie *v.* Corbett, 34 How. Pr. 19.

North Carolina.— Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044; Moore *v.* Brady, 125 N. C. 35, 34 S. E. 72; Webb *v.* Taylor, 80 N. C. 305; Haughton *v.* Newberry, 69 N. C. 456; Myers *v.* Credle, 63 N. C. 504.

North Dakota.— Best *v.* Muir, 8 N. D. 44, 77 N. W. 95, 73 Am. St. Rep. 742.

Ohio.— State *v.* Jennings, 14 Ohio St. 73; Simper *v.* Bentley, 15 Ohio Cir. Ct. 515, 8 Ohio Cir. Dec. 356; Allen *v.* Leget, 2 Ohio Dec. (Reprint) 152, 1 West. L. Month. 585.

Oklahoma.— Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

Oregon.— Krebe Hop Co. *v.* Taylor, (1908) 97 Pac. 44, 98 Pac. 494.

Pennsylvania.—English *v.* Dalbrow, 1 Miles 160.

South Dakota.—Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216; Longerbeam *v.* Huston, 20 S. D. 254, 105 N. W. 743; McCormick Harvesting Mach. Co. *v.* Woulph, 11 S. D. 252, 76 N. W. 939; Willis *v.* De Witt, 3 S. D. 281, 52 N. W. 1090.

Wisconsin.— McHugh *v.* Robinson, 71 Wis. 565, 37 N. W. 426; Grace *v.* Michel, 31 Wis. 533, 11 Am. Rep. 613; Johnson *v.* Garlick, 25 Wis. 705.

See 42 Cent. Dig. tit. "Replevin," §§ 78, 81.

19. *Indiana.*— Krug *v.* Herod, 69 Ind. 78; Baer *v.* Martin, 2 Ind. 229.

Massachusetts.— Whitwell *v.* Wells, 24 Pick. 25.

Mississippi.— Myrick *v.* National Cash Register, (1899) 25 So. 155, holding that replevin does not lie against one who purchased property under an agreement that title should remain in the seller until the purchase-price had been paid, and who without ever being in actual possession sold it before paying the purchase-money.

Nebraska.— Depriest *v.* McKinstry, 38 Nebr. 194, 56 N. W. 806.

New York.— Wheeler *v.* Allen, 51 N. Y. 37.

Wisconsin.— Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

See 42 Cent. Dig. tit. "Replevin," §§ 78, 81.

And see Jones *v.* Dowle, 1 Dowl. P. C. N. S. 391, 11 L. J. Exch. 52, 9 M. & W. 19.

20. Whitwell *v.* Wells, 24 Pick. (Mass.) 25.

21. Coffin *v.* Gephart, 18 Iowa 256; Ladd *v.* Brewer, 17 Kan. 204; Kittridge *v.* Miller, 45 Mich. 478, 8 N. W. 87; McHugh *v.* Robinson, 71 Wis. 565, 37 N. W. 426 (in this case cattle in the possession of a constable under an attachment were replevied by the owner. After the constable had given an undertaking which entitled him to have the cattle returned to him, the replevin suit was dismissed, but the cattle were never actually returned to the possession of the constable, and he afterward disclaimed such possession and refused to accept the delivery of the cattle upon any condition. It was held that the owner could not maintain a second action of replevin against the constable); Johnson *v.* Garlick, 25 Wis. 705 (holding that an action to recover possession of personal property will not lie against one who was not in the actual possession and control of it, and who disclaimed title or right of possession, upon demand made, pointing out the person in actual possession, although the property was in defendant's dwelling-house, and he advised the person in possession not to surrender it).

22. Coffin *v.* Gephart, 18 Iowa 256.

Subsequent release of property after refusal.— Replevin does not lie for an animal which defendant refused to deliver where he drove the animal from his premises before the writ was issued. Rogers *v.* Davis, 21 Mo. App. 150.

23. *Arkansas.*— Hodges *v.* Nall, 66 Ark. 135, 49 S. W. 352.

Michigan.— Clute *v.* Everhardt, 137 Mich. 5, 100 N. W. 124; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564.

New York.— Mahr *v.* Livingston, 55 Misc. 133, 106 N. Y. Suppl. 308.

Wisconsin.— McHugh *v.* Robinson, 71 Wis. 565, 37 N. W. 426.

United States.— Sloan *v.* Merchants' Sav., etc., Co., 160 Fed. 654, 88 C. C. A. 20.

24. Calnan *v.* Stern, 153 Mass. 413, 26

commencement of the action transferred and parted with possession of the property.[25]

(II) *Exceptions to Rule.* There is a considerable conflict of opinion as to whether an exception to the general rule that replevin lies only where defendant was in actual or constructive possession at the commencement of the suit exists where defendant has wrongfully parted with the possession of the goods sued for before suit brought. In the lower courts of New York there were rulings both ways on the question. It was finally settled by the court of appeals, however, that one in the possession of property without right cannot avoid the action of replevin by wrongfully transferring the property to another, even though the transfer be made before suit brought.[26] The reason assigned by this court in support of its conclusions was that on this state of facts detinue would lie at common law,[27] and that by the New York statutes the action of detinue was abolished and the action of replevin extended so as to serve all the purposes of

N. E. 994 (notwithstanding plaintiff's refusal to receive it); Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564 (in which it was held that the fact that defendant was guilty of a trespass in taking and using the chattels does not authorize replevin where the property was returned to plaintiff before suit was commenced); Christie *v.* Corbett, 34 How. Pr. (N. Y.) 19 (holding that although plaintiff objects to the manner in which the property is returned by defendant, as being injurious to him, but nevertheless accepts the possession, the action cannot be maintained); Kieper *v.* Carrier, 53 Wis. 404, 10 N. W. 562; Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155. And see Harrow *v.* Ryan, 31 Iowa 156.

Unconditional offer to restore property.— The object of the action is the recovery of the property in specie; and if, before suit brought, defendant unconditionally offers to restore the property, the object is already attained, and the suit is wholly unnecessary. Such offer is equivalent to a tender before suit brought. Although, in such actions, damages are recovered for the wrongful detention, yet they are merely incidents to the action. Church *v.* Frost, 3 Thomps. & C. (N. Y.) 318; Savage *v.* Perkins, 11 How. Pr. (N. Y.) 17. But an offer made after suit would not defeat the action. Guthman *v.* Kearn, 8 Nebr. 502, 1 N. W. 129.

25. Moses *v.* Morris, 20 Kan. 208, 213 (in which it was said: "He may have committed acts which make him liable in damages; and he may be liable for the value or use of the property in an action of another form; but the action of replevin is not the proper remedy in such instances"); Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153. And see Davis *v.* Van de Mark, 45 Kan. 130, 25 Pac. 589; Ladd *v.* Brewer, 17 Kan. 204.

Illustrations.— Defendant received from K, without fraudulent purpose toward plaintiff or circumstances to put him on inquiry, certain goods as security for money loaned. Before suit brought (replevin) defendant had returned the goods to K without notice from plaintiff that the goods were his. It was held that plaintiff could not recover. Carpenter *v.* Starr, 1 Mackey (D. C.) 417.

26. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259 [*overruling* Roberts *v.* Randel, 3 Sandf. (N. Y.) 707; Elwood *v.* Smith, 9 How. Pr. (N. Y.) 528]. For other New York cases sustaining the rule laid down in Nichols *v.* Michael, *supra*, see Sinnott *v.* Feiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565; Manning *v.* Keenan, 73 N. Y. 45; Barnett *v.* Selling, 70 N. Y. 492 [*affirming* on this point 9 Hun 236]; Latimer *v.* Wheeler, 3 Abb. Dec. (N. Y.) 35, 1 Keyes 468; Dunham *v.* Troy, etc., R. Co., 1 Abb. Dec. (N. Y.) 565, 3 Keyes 543, 3 Transcr. App. 67; Hitchcock *v.* Wimpleberg, 103 N. Y. App. Div. 53, 92 N. Y. Suppl. 997; Ellis *v.* Lersner, 48 Barb. (N. Y.) 539; Brockway *v.* Burnap, 16 Barb. (N. Y.) 309 [*reversing* 12 Barb. 347]; Tyler *v.* Young, 46 Misc. (N. Y.) 575, 92 N. Y. Suppl. 818; Ross *v.* Cassidy, 27 How. Pr. (N. Y.) 416; Drake *v.* Wakefield, 11 How. Pr. (N. Y.) 106; Savage *v.* Perkins, 11 How. Pr. (N. Y.) 17.

Illustrations.—A mortgagee of chattels to which the mortgagor had no title is liable to the real owner where he sells the chattels under the mortgage and delivers them to the purchaser after notice of the owner's claim, and it is no defense that he parted with the possession or control of the chattels before the action against him was commenced. Tasker *v.* Ryan, 4 N. Y. App. Div. 616, 40 N. Y. Suppl. 942. So the fraudulent vendee of goods and his assignee thereof for the benefit are liable to a joint action in replevin by the vendor to recover possession. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259. And in replevin against an agent for the sale of plaintiff's horses and another, to whom, without authority, such agent had traded the horses, it was held error to dismiss the complaint as against defendant agent, although it appeared on the trial that he had parted with possession of the property in suit. Jones *v.* Richards, 50 Misc. (N. Y.) 645, 98 N. Y. Suppl. 698.

27. Nichols *v.* Michael, 23 N. Y. 264, 272, 80 Am. Dec. 259 [*citing* Garth *v.* Howard, 8 Bing. 451, 21 E. C. L. 616, 5 C. & P. 346, 24 E. C. L. 599, 1 L. J. C. P. 129, 1 Moore & S. 628; Jones *v.* Dowle, 1 Dowl. P. C. N. S. 391, 11 L. J. Exch. 52, 9 M. & W. 19], in which it was said: "The theory upon which

both actions.[28] While the doctrine laid down by the New York court of appeals is flatly denied in many states,[29] it nevertheless obtains in many other states, sometimes because of statutes and sometimes apparently as a matter of judicial authority.[30] The doctrine, however, has never been extended — even in New York — to cases where defendant before suit brought did not part with possession by any act on his part, but the property was taken from him by process of

these cases proceed is perfectly sound, and applies directly to the present case. It is, that where a person is in possession of goods belonging to another, which he is bound to deliver upon demand, if he, without authority from the owner, parts with that possession to one who refuses to deliver them, he is responsible in detinue equally with the party refusing. He contributes to the detention. It is the consequence of his own wrongful delivery. The action in such cases may properly be brought against both, because the acts of both unite in producing the detention." This doctrine has been steadily adhered to by this court.

28. Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259.

29. *Maine.*— Ramsdell *v.* Buswell, 54 Me. 546 [*overruling* Sayward *v.* Warren, 27 Me. 453].

Missouri.— Feder *v.* Abrahams, 28 Mo. App. 454; Davis *v.* Randolph, 3 Mo. App. 454.

Montana.— Glass *v.* Basin, etc., Min. Co., 31 Mont. 21, 77 Pac. 302.

North Carolina.— Webb *v.* Taylor, 80 N. C. 305; Haughton *v.* Newberry, 69 N. C. 456.

Ohio.— Simper *v.* Bentley, 15 Ohio Cir. Ct. 515, 8 Ohio Cir. Dec. 356.

South Dakota.— Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216; Longerbeam *v.* Huston, 20 S. D. 254, 105 N. W. 743.

See 42 Cent. Dig. tit. "Replevin," § 81.

30. *Arkansas.*— Harkey *v.* Tillman, 40 Ark. 551, 555 [which *follows* Nichols *v.* Michael, 23 N. Y. 264, 80 Am. Dec. 259, and assigns the same reason] (where the court said: "It is the common law as to detinue, and we apprehend applies in all States where compensation in place of the property can be given in replevin, which thus becomes the substitute for detinue"); Washington *v.* Love, 34 Ark. 93.

Indiana.— Helman *v.* Withers, 3 Ind. App. 532, 30 N. E. 5, 50 Am. St. Rep. 295, in which it was said that replevin under the statutes of that state embraces detinue as it was at common law. And see West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506.

Iowa.— See Briggs *v.* McEwen, 77 Iowa 303, 42 N. W. 303; Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

Kansas.— See Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491, holding that a defendant in a replevin action, wrongfully in the possession of property, who has shifted the same to another defendant, and attempted to defeat those entitled to the possession from recovering the same, and whose defense in the action is based on grounds inconsistent with the right of possession in plaintiff, is not in a position to insist that a demand has not been made of him, nor that he did not unlawfully detain the property because he did not happen to have the actual manual possession thereof when the action was begun.

Michigan.— McBrian *v.* Morrison, 55 Mich. 351, 21 N. W. 368. And see Gildas *v.* Crosby, 61 Mich. 413, 28 N. W. 153.

Mississippi.— See Krosmopolski *v.* Paxton, 58 Miss. 581.

Nebraska.— See Depriest *v.* McKinstry, 38 Nebr. 194, 56 N. W. 806.

Oklahoma.— See *dictum* in Robb *v.* Dobrinski, 14 Okla. 563, 78 Pac. 101.

South Carolina.— Holliday *v.* Poston, 60 S. C. 103, 38 S. E. 449, under claim and delivery statutes.

Washington.—Andrews *v.* Hoeslich, 47 Wash. 220, 224, 91 Pac. 772, 125 Am. St. Rep. 896, 18 L. R. A. N. S. 1265, in which it was said: "In this state an action to recover the possession of personal property may be prosecuted without claiming delivery until after final judgment on the merits. In such a case the reason for the common-law rule forbidding the prosecution of an action of replevin against one not in possession fails, and we see no reason why an alternative judgment for the possession of the property or the recovery of its value may not be obtained, although the evidence establishes the fact that the defendant was not in possession at the commencement of the action, or at any time thereafter, provided it further appears that the defendant had theretofore been in possession, had voluntarily, wrongfully, and fraudulently parted with such possession, and that the plaintiff did not know before commencing action that the defendant had so parted with possession." But see Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355, which does not seem to be in accord with the later Washington case.

Wisconsin.— Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499 (holding that if defendant had wrongfully placed the property in the possession of someone else, to conceal it or to prevent the plaintiff from recovering it, then he was liable the same as if he was in the actual possession of the property); Gassner *v.* Marquardt, 76 Wis. 579, 45 N. W. 674.

In support of the expediency of the rule it has been said: "That would be a very inconvenient rule, which would enable one who had wrongfully taken or detained property from the owner to refuse to deliver, and hold to the last moment before the writ, and then evade a suit by a transfer of possession. His successor might do the

law valid on its face which he cannot resist.[31] Another exception is that when defendant has the property in his possession at the time the action is commenced, he cannot by the subsequent transfer or destruction of the property wholly deprive plaintiff of relief, and in such case the alternative judgment for the value of the property is granted.[32]

b. Sufficiency of Constructive Possession. Possession by defendant need not be actual; a constructive possession is sufficient.[33] Replevin will lie for personal property, although not in the actual possession of defendant, if it be under his control in the hands of another.[34]

c. Officer Who Has Sold Property Under Execution. An action of replevin does not lie against an officer who has sold goods seized under execution and parted with possession before the commencement of the action.[35]

d. Officer Who Has Levied on Property But Has Not Taken Possession. Where property levied on is not taken out of the actual possession of plaintiff in replevin, nor the possession in any way interfered with, it has been held that the action cannot be maintained,[36] although an inventory and appraisal is made of

same; and his after him; and so on *toties quoties*, until the costs of writs to the owner would consume the property." Harkey *v.* Tillman, 40 Ark. 551, 555. And see McBrian *v.* Morrison, 55 Mich. 351, 21 N. W. 368, in which it was said that it cannot always be possible for plaintiff to know whether defendant has parted with possession, and he might be subjected to costs and delays in redress which he is in no way in fault for thus incurring; that it would not be a difficult matter by a series of concealed transfers to cut him off entirely from this action.

31. Sinnott *v.* Feiock, 165 N. Y. 444, 59 N. E. 265, 80 Am. St. Rep. 736, 53 L. R. A. 565.

32. Richards *v.* Morey, 133 Cal. 437, 65 Pac. 886.

33. *Indiana.*— Teeple *v.* Dickey, 94 Ind. 124; Berghoff *v.* McDonald, 87 Ind. 549; Hadley *v.* Hadley, 82 Ind. 75; Louthain *v.* Fitzer, 78 Ind. 449.

Kansas.— Meixell *v.* Kirkpatrick, 33 Kan. 282, 6 Pac. 241.

Maine.— Howe *v.* Shaw, 56 Me. 291.

Michigan.— Coomer *v.* Gale Mfg. Co., 40 Mich. 691.

Minnesota.— Bradley *v.* Gamelle, 7 Minn. 331.

New Mexico.— Wetherill *v.* Elmer, (1907) 88 Pac. 1133; Hyde v. Elmer, (1907) 88 Pac. 1132.

New York.— Tyler *v.* Young, 46 Misc. 575, 92 N. Y. Suppl. 818.

Oregon.— Krebs Hop Co. *v.* Taylor, (1908) 98 Pac. 494, 97 Pac. 44.

See 42 Cent. Dig. tit. "Replevin," § 79.

Applications of rule.— Exercise of control of property by an officer by appointing a custodian of the property and refusal to surrender it on demand is sufficient possession to maintain the action. Wetherill *v.* Elmer, (N. M. 1907) 88 Pac. 1133; Hyde *v.* Elmer, (N. M. 1907) 88 Pac. 1132. So replevin will lie against the assignee of property even though he allow it to remain in the assignor's hands, unless he clearly makes known that he does not claim it. Coomer *v.* Gale Mfg. Co., 40 Mich. 691. And a principal's constructive possession of goods in the hands of his agent or bailee is sufficient to entitle the owner to maintain replevin against the principal. Krebs Hop Co. *v.* Taylor, (Oreg. 1908) 98 Pac. 494, 97 Pac. 44.

34. Bradley *v.* Gamelle, 7 Minn. 331.

35. Riciotto *v.* Clement, 94 Cal. 105, 29 Pac. 414; Redinger *v.* Jones, 68 Kan. 627, 75 Pac. 997; Moses *v.* Morris, 20 Kan. 208. The contrary doctrine prevails under the statute of South Carolina. Dudley *v.* Green, 46 S. C. 199, 24 S. E. 186. And under section 3239 of the code of Iowa, an action for the recovery of personal property wrongfully levied upon and sold by a sheriff to pay another's debt may be begun and maintained against the sheriff, notwithstanding he may have sold the property and parted with the possession thereof, provided due notice of plaintiff's ownership was served upon him while in possession. Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200. And in an early New York case it was held, in the absence of any special statute, that where a sheriff sells upon execution, sheep not belonging to defendant, replevin in the *cepit* will lie, by the owner, against the sheriff and the purchaser, although at the time of the sale, the sheep were at large in a field and no actual possession has been taken and no removal made by the purchaser. Neff *v.* Thompson, 8 Barb. (N. Y.) 213.

36. *Delaware.*— Reed *v.* Wiltbank, 2 Penew. 243, 45 Atl. 400.

Indiana.— Standard Oil Co. *v.* Bretz, 98 Ind. 231.

Iowa.— Hove *v.* McHenry, 60 Iowa 227, 14 N. W. 301.

Maine.— Lathrop *v.* Cook, 14 Me. 414, 31 Am. Dec. 62.

Michigan.— Morrison *v.* Lumbard, 48 Mich. 548, 12 N. W. 696; Bacon *v.* Davis, 30 Mich. 157; Hickey *v.* Hinsdale, 12 Mich. 99.

See 42 Cent. Dig. tit. "Replevin," § 76.

Contra.—Alvord *v.* Haynes, 13 Hun (N. Y.) 26, holding that a levy on property of a wife under execution against her husband is such an act of dominion as would sustain replevin though there was no removal.

the property [37] and although a receipt [38] or delivery bond [39] is given to defendant for the property. Where, however, property of one person is levied on as the property of another who is allowed to remain in the possession thereof, there is no such restoration to the rightful owner as will estop him from bringing an action of replevin.[40]

e. Execution or Attachment Creditor. Where property has been seized under execution or attachment replevin against the execution or attachment creditor does not lie whether by defendant in execution or attachment or a third person claiming the property seized.[41] The actual possession of the property by an officer is not constructive possession of the creditor, under whose direction the officer had seized the goods upon execution; but until they pass out of the officer's control by sale upon the execution or other legal means, they are regarded as in the custody of the law and in no way subject to the creditor's control.[42]

f. Person in Possession For Another. One whose goods are wrongfully withheld by the agent of another may maintain replevin therefor against the agent where the goods are in his actual possession,[43] and it has been held that he will still have such possession as to make him liable to the action, although he has placed

And see Angell *v.* Keith, 24 Vt. 371, 374, holding that replevin will lie against an officer who attaches property by leaving a copy in the town clerk's office, brought by some person other than the debtor. In this case it was said that "it has long been settled, that as to the debtor, this mode of attachment effectually divests him of all possession, so that he cannot sue even a stranger who intermeddles. And we think the officer is estopped from denying the taking, as to all others who show title to the property."

Invalid service of writ.—An officer read to plaintiff a writ of attachment against the property of a third person and told her that he attached certain property (which belonged to her), but did not remove it, nor take it into his possession or control, nor serve the writ on the attachment defendant, nor make return thereof. It was held that replevin would not lie against him, there being no legal service of the writ. Libby *v.* Murray, 51 Wis. 371, 8 N. W. 238.

37. Reed *v.* Wiltbank, 2 Pennew. (Del.) 243, 45 Atl. 400; Hove *v.* McHenry, 60 Iowa 227, 14 N. W. 301; Hickey *v.* Hinsdale, 12 Mich. 99.

38. Morrison *v.* Lumbard, 48 Mich. 548, 12 N. W. 696. See also Lathrop *v.* Cook, 14 Me. 414, 31 Am. Dec. 62, where plaintiff had given a receipt to the officer, promising to return the goods to him on demand, but containing no admission that the property was not in himself. But *compare* Small *v.* Hutchins, 19 Me. 255 [*distinguishing* Lathrop *v.* Cook, *supra*, and holding that the general owner of property in the hands of a bailee may maintain replevin against an officer who, having attached the same as the property of the bailee, puts it in the hands of a receiptor, by whom it is suffered to go back into the hands of the bailee — the attachment being not thereby dissolved].

39. Standard Oil Co. *v.* Bretz, 98 Ind. 231.

40. Gutsch *v.* McIlhargey, 69 Mich. 377, 37 N. W. 303.

41. Richardson *v.* Reed, 4 Gray (Mass.) 441, 64 Am. Dec. 77; Griffin *v.* Lancaster, 59 Miss. 340; Mitchell *v.* Roberts, 50 N. H. 486; Grace *v.* Mitchell, 31 Wis. 533, 11 Am. Rep. 613. *Compare* Bowen *v.* Hutchins, 18 Conn. 550, in which it was held that replevin lies in favor of a third person claiming goods attached, against plaintiff in attachment under a statute providing that plaintiff in such writ of replevin may cite the party who attached the goods, to appear before a proper court, to answer to a charge for unlawfully taking the same.

42. Mitchell *v.* Roberts, 50 N. H. 486.

In New York the early cases held that replevin would lie in favor of an owner of goods, against an execution creditor, for goods seized on execution against a third person. Stewart *v.* Wells, 6 Barb. 79; Acker *v.* Campbell, 23 Wend. 372; Fonda *v.* Van Horne, 15 Wend. 631, 30 Am. Dec. 77; Allen *v.* Crary, 10 Wend. 349, 25 Am. Dec. 566. These cases were severely criticized in the elaborately considered case of Mitchell *v.* Roberts, 50 N. H. 486, in which it was said that these cases were decided on the theory that replevin would lie wherever trespass *de bonis asportatis* would. "This doctrine, utterly inconsistent as it is with the theory which regards the possession of an officer of the court as the possession and custody of the law, has been long since exploded in the only state where, so far as I can ascertain, it ever temporarily prevailed."

43. Eveleth *v.* Blossom, 54 Me. 447, 92 Am. Dec. 555; Stevenson *v.* Taylor, 2 Mich. N. P. 95; Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. 63; Grossman *v.* Walters, 11 N. Y. Suppl. 471 [*affirmed* in 132 N. Y. 594, 30 N. E. 1151], auctioneer. See also Warder-Bushnell, etc., Co. *v.* Harris, 81 Iowa 153, 46 N. W. 859.

Persons acting ostensibly as agents for a steamship line, but who were in fact general partners in a firm operating the line, are liable to an action of replevin to recover possession of baggage delivered to them for carriage to a foreign port. Tanco *v.* Booth, 15 N. Y. Suppl. 110.

the property in the custody of a third person.[44] It has also been held that replevin will lie against any person wrongfully in actual physical possession of property, although he be holding it for another,[45] although there is authority to the effect that replevin will not lie against a mere servant who refuses to deliver property which he holds for his master.[46]

g. Estoppel to Deny Possession. Where defendants in replevin secured possession of the property by giving a forthcoming and delivery bond, they are estopped to deny that the property was in their possession at the time of the levy of the writ.[47] It is only upon the assumption that the property was taken from his possession that he was entitled to demand its return.[48] So where plaintiff in replevin alleges defendant to be in possession of the property and detaining the same from him, he is estopped from denying defendant's possession at the time of action brought.[49]

h. Effect of Voluntary Surrender of Property by Plaintiff. Where one voluntarily surrenders property to another believing, although erroneously, that the latter is legally entitled to it, he cannot maintain replevin therefor.[50]

E. Conditions Precedent[51] — 1. In General. Since in order to maintain an action of replevin plaintiff must be entitled to the immediate possession of the property,[52] he must as a condition precedent make payment or tender of any money

44. Berghoff *v.* McDonald, 87 Ind. 549.

45. Flatner *v.* Good, 35 Minn. 395, 29 N. W. 56. See also Barnhart *v.* Ford, 37 Kan. 520, 15 Pac. 542. And see Haskins *v.* Kelly, 1 Rob. (N. Y.) 160, 1 Abb. Pr. N. S. 63, a case where the person sued was an agent but in which it was said that actual possession of property by one wrongdoer for the benefit of another does not make it necessary that a suit be brought against the latter to recover possession of the property.

46. McDougall *v.* Travis, 24 Hun (N. Y.) 590, in which case it was held that a freight agent of a railroad company was a mere servant. This holding is contrary to that in Eveleth *v.* Blossom, 54 Me. 447, 92 Am. Dec. 555.

47. *Colorado.*— Benesch *v.* Waggner, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254.

Delaware.— Ott *v.* Specht, 8 Houst. 61, 12 Atl. 721.

Kansas.— Jordan *v.* Johnson, 1 Kan. 656, 42 Pac. 415; Nye *v.* Weiss, 7 Kan. App. 627, 53 Pac. 152.

Missouri.— Carpenter *v.* Stearns, 32 Mo. App. 132; Joseph Schneider Brewing Co. *v.* Niederweiser, 28 Mo. App. 233, unless fraud or mistake is shown.

New York.— Martin *v.* Gilbert, 119 N. Y. 298, 23 N. E. 813, 24 N. E. 460, 16 Am. St. Rep. 823; Diossy *v.* Morgan, 74 N. Y. 11; Weber *v.* Manne, 105 N. Y. 627 [*reversing* 42 Hun 557]; Austin *v.* Wauful, 13 N. Y. Suppl. 184. But see Nowell *v.* Gilbert, 49 Hun 489, 2 N. Y. Suppl. 525; Andrews *v.* Shattuck, 32 Barb. 396; Talcott *v.* Belding, 46 How. Pr. 419.

North Carolina.— Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620.

Ohio.— Stein-Block Co. *v.* Heinscheimer, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 43.

Oklahoma.— Boyce *v.* Augusta Camp, 14 Okla. 642, 78 Pac. 322.

Pennsylvania.— Rickard *v.* Mayor, 34 Pa. Super. Ct. 107. And see Ruch *v.* Morris, 28 Pa. St. 245.

South Dakota.— Griswold *v.* Lundback, 4 S. D. 441, 57 N. W. 339.

Washington.— Harris *v.* Hayfield, 5 Wash. 230, 31 Pac. 601.

See 42 Cent. Dig. tit. "Replevin," §§ 82, 110.

48. Diossy *v.* Morgan, 74 N. Y. 11.

49. Kingsbury *v.* Buchanan, 11 Iowa 387.

50. Taplin *v.* Wilson, 6 Thomps. & C. (N. Y.) 502.

What is not a voluntary surrender.— Where defendant, having learned that plaintiff had purchased personal property on which defendant held an unrecorded mortgage, told plaintiff that the articles were his property, whereupon plaintiff replied that, if they were defendant's property, he could come and get them, and defendant took the property in plaintiff's absence, and without his authority, the servant falsely representing to plaintiff's wife that plaintiff had sent him for them, it was held that plaintiff had not voluntarily surrendered the property, so as to preclude him from maintaining claim and delivery to recover it. Taylor *v.* Mills, 148 N. C. 415, 62 S. E. 556. And where, pending a dispute over the cost of constructing a building, plaintiff, at defendants' request, furnished them with certain vouchers, a general statement of expenditures, and an affidavit of its correctness made by his book-keeper, it was held that these papers were furnished for inspection only and that defendants did not become owners thereof and that plaintiff might recover them in an action of replevin. Drake *v.* Auerbach, 37 Minn. 505, 35 N. W. 367.

51. Conditions precedent to recovery of goods by purchaser see Sales.

Conditions precedent to recovery of goods by seller see Sales.

52. Lane *v.* Chatwick, 146 Mass. 68, 15

or performance of any other condition or obligation which may be necessary to vest in him such right of possession;[53] while on the other hand, although there may be something due from plaintiff to defendant, if its payment is not essential to vest in plaintiff a right to the possession of the property in question, no tender or payment is necessary as a condition precedent to the right to maintain the action.[54] Where such payment or tender is a condition precedent,[55] it follows that it must be made before the action is commenced,[56] unless by reason of the conduct of defendant the cause of action is complete without such payment or tender.[57] The general rule therefore is that where the party in possession has a lien upon the property, a tender of an amount sufficient to discharge such lien is a condition precedent to the right of the owner to maintain replevin for such property,[58] unless such lien is waived,[59] and where plaintiff has parted with property under circumstances which entitle him to recover the same, he must return or tender the money, notes, or other thing of value which was the consideration upon which he acted in parting with such property,[60] unless he is prevented from

N. E. 121; Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

Title and right to possession of plaintiff see *supra*, I, c.

53. Lane *v.* Chadwick, 146 Mass. 68, 15 N. E. 121 (holding that where goods are delivered to a common carrier accompanied by a bill and instructions to the carrier to deliver them to the consignee upon payment of the bill, the consignee cannot maintain replevin therefor without making such payment); Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

54. Mohn *v.* Stoner, 14 Iowa 115 (holding that where goods are sold on credit without any agreement as to the time of delivery, the vendee is entitled to immediate possession and may recover the same without any tender of the purchase-price); Kahle *v.* Sneed, 59 Pa. St. 388.

55. See Smith *v.* Woodleaf, 21 Kan. 717.

56. Ohio, etc., R. Co. *v.* Noe, 77 Ill. 513; Smith *v.* Woodleaf, 21 Kan. 717; Bills *v.* Vose, 27 N. H. 212, holding that in replevin for cattle impounded a tender of the fees and costs after the writ is placed in the sheriff's hands unconditionally for service will not support the action, but that if the writ was placed in the sheriff's hands to be used only after a tender and in case the cattle should not then be given up, it would not defeat the tender.

57. Lutz *v.* Yount, 61 N. C. 367 (holding that where a fictitious sale of a horse was made to prevent it from being impressed by the Confederate government, and subsequently upon plaintiff's claiming the horse defendant asserted an absolute property thereto in himself, this made plaintiff's cause of action complete and dispensed with any formal tender of the note given in exchange; it being sufficient for plaintiff to produce the note for the purpose of being given up upon the trial); Soell *v.* Hadden, 85 Tex. 182, 19 S. W. 1087 (holding that the assertion of a claim of absolute ownership in the property by defendant, a mortgagee, dispensed with the necessity of a tender of the amount of the debt before the institution of an action to recover the property).

58. *Arkansas.*— Burr *v.* Daugherty, 21 Ark. 559, holding that before a bailor can maintain replevin for goods stored with a warehouseman, he must pay or tender the amount due for storage for which the warehouseman has a lien.

Illinois.— Ohio, etc., R. Co. *v.* Noe, 77 Ill. 513; Edwin *v.* Jacobson, 47 Ill. App. 93.

Massachusetts.— Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

Nebraska.— Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387.

New York.—Williams *v.* Johnson, 11 Barb. 501.

Canada.— Lake *v.* Biggar, 11 U. C. C. P. 170, lien for repairs.

See 42 Cent. Dig. tit. "Replevin," § 83.

That defendant would have refused to deliver the property on which he has a lien if the amount due had been tendered will not excuse the failure to make such tender, since plaintiff in order to maintain the action must have a right of immediate possession, and if the lien is not waived it must be discharged before plaintiff can have such right. Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799.

59. See Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799; Clemson *v.* Davidson, 5 Binn. (Pa.) 392; Lake *v.* Biggar, 11 U. C. C. P. 170.

60. Reynolds *v.* Copeland, 71 Ind. 422 (holding that if one who has made an exchange of property desires to recover what he has surrendered, he must tender back what he has received, although the exchange may have been made under duress); Harvey *v.* Petrie, 100 Mich. 190, 59 N. W. 187 (holding that where plaintiff is induced by fraud to make an exchange of property he must in order to recover that which he has parted with tender back that which he has received); Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78 (holding that a sale, although induced by fraud, is not void but merely voidable, and that if the vendor seeks to rescind and recover the property sold he must return or tender whatever of value he has received); Oskamp *v.* Crites, 37 Nebr. 837, 56 N. W. 394 (holding that where property is sold subject to be defeated at the option of the vendor upon a failure of

so doing by defendant,[61] and where animals are impounded or rightfully taken as estrays or damage feasant, replevin will not lie for their recovery until the charges provided by statute have been paid or tendered.[62] If, however, a person takes up an animal of another which is not an estray or liable to be taken up, the owner may maintain replevin therefor without paying or tendering the expenses of keeping it,[63] and where expenses have been incurred by an officer in regard to property taken under a wrongful levy, the owner may replevy the same without tendering the amount so expended,[64] and if plaintiff's property has been sold to defendant by a third person having no right to dispose of it, it is not necessary for him to refund to defendant the amount paid by the latter to such third person.[65]

2. Necessity of Demand — a. In General. There is some conflict of authority as to the necessity of a demand for a surrender of the property in question as a condition precedent to an action of replevin;[66] but the general rule is that no demand need be made except where it is necessary to terminate a right of possession in defendant or to confer such right upon plaintiff,[67] or in other words when necessary to establish an unlawful taking or detention as against the rights of the true owner,[68] and wherever this may be otherwise shown no demand is necessary.[69] If the original taking was wrongful the subsequent detention continues to be wrongful,[70] and in such cases no demand is necessary;[71] but in order to maintain the action there must be either a wrongful taking or a wrongful detention,[72] and if the possession was rightfully acquired a demand is ordinarily necessary to make the subsequent detention wrongful,[73] since the law presumes, in the absence of any rebutting circumstances, that property which has come rightfully into the possession of defendant and which he is not entitled to retain will

the vendee to perform certain conditions subsequent, and such default is made, the vendor cannot insist upon the forfeiture and maintain replevin for the property without a return of the notes taken in payment); Dodge *v.* Fearey, 19 Hun (N. Y.) 277 (holding that in replevin to recover certain machinery on which payment has been made, the tender of the money received must be kept good up to and at the time of trial). See also Moffitt *v.* Shields, 67 Mich. 610, 35 N. W. 174.

If the thing received by plaintiff is worthless, a tender at the time of the trial would be sufficient. See Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78.

61. Potter *v.* Dennison, 10 Ill. 590, holding that in an action by a principal to recover goods which his agent had without authority transferred in exchange for land, it is not necessary to execute a return deed to defendant before bringing suit where plaintiff offers to do so but is prevented from so doing by defendant's refusal to furnish him with the necessary description of the land.

62. Davis *v.* Calvert, 17 Ark. 85; Phelan *v.* Bonham, 9 Ark. 389; Bills *v.* Vose, 27 N. H. 212; Moore *v.* Trout, 2 Del. Co. (Pa.) 13.

63. Walters *v.* Glats, 29 Iowa 437.

64. Sims *v.* Mead, 29 Kan. 124, holding that where a sheriff levies upon a growing crop of wheat belonging to A, under an execution against B, and obtains possession of the crop without the consent of A, and harvests, stacks, and threshes the same, A may maintain replevin to recover the crop without tendering the amount so expended.

65. More *v.* Finger, 128 Cal. 313, 60 Pac. 933, (1899) 58 Pac. 322.

66. See Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434; Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433, 20 So. 536; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

67. *Colorado.*— Klug *v.* Munce, 40 Colo. 276, 90 Pac. 603; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434.

Iowa.— Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Smith *v.* McLean, 24 Iowa 322.

Kansas.— Shoemaker *v.* Simpson, 16 Kan. 43.

New York.— Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Suppl. 744.

Oklahoma.— Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

Wyoming.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

See 42 Cent. Dig. tit. "Replevin," § 87.

68. Edmunds *v.* Hill, 133 Mass. 445; Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 68 N. Y. Suppl. 744.

69. Edmunds *v.* Hill, 133 Mass. 445; Perkins *v.* Barnes, 3 Nev. 557.

70. Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415; Bisbee *v.* Fadden, 140 Mass. 6, 1 N. E. 742; Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848.

71. See *infra*, I, E, 2, c.

72. Newman *v.* Jenne, 47 Me. 520.

73. Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415; Newman *v.* Jenne, 47 Me. 520.

Property lawfully acquired see *infra*, I, E, 2, b.

be surrendered to the person entitled thereto upon demand,[74] and he should be given an opportunity to do so before being subjected to the expense and inconvenience of an action;[75] but it also follows that since this is the object of the demand defendant cannot object that no demand was made if he subsequently contests the action on the merits, claiming title in himself, or where it otherwise appears that a demand if made would have been unavailing.[76] Under the statutes in some jurisdictions it seems that no demand is necessary in replevin in any case.[77]

b. Property Lawfully Taken by or in Possession of Defendant. The general rule is that replevin will not lie against one who has obtained possession of the property lawfully until a proper demand is made for the same, and possession refused.[78] This rule, the reasons for which have been previously stated,[79] has been applied to actions against a bailee,[80] an assignee for the benefit of creditors,[81]

74. Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853. See also Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433, 20 So. 536.

75. Burke *v.* Maguire, 154 Cal. 456, 98 Pac. 21; Becker *v.* Vandercook, 54 Mich. 114, 19 N. W. 771; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

76. Webster *v.* Brunswick-Balke-Callender Co., 37 Fla. 433, 20 So. 536; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 726; Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44.

Claim of title and right to possession by defendant see *infra*, I, E, 2, g.

Where demand would have been unavailing see *infra*, I, E, 2, h.

77. Dearing *v.* Ford, 13 Sm. & M. (Miss.) 269 (holding that under the Mississippi statute no demand is necessary in an action of replevin, although the original taking was not tortious, but that where the original possession of defendant is lawful he may tender the property to plaintiff and upon its delivery by proper plea discharge the action, and that plaintiff may even be adjudged to pay the costs); Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443 (construing Rev. St. § 1018, and holding that the statute does away with the necessity of any demand in an action of replevin which, in the absence of such statute, would be necessary in cases where the property was lawfully acquired by defendant, who merely detained it in his possession); Draper *v.* Moseley, 3 Baxt. (Tenn.) 201 (holding that under the statutory action of replevin no demand is required by the statute and therefore none is necessary in any case).

78. *Arkansas.*— Burr *v.* Daugherty, 21 Ark. 559, holding that replevin cannot be maintained for property stored with a warehouseman unless it is shown that plaintiff or his agent tendered the amount due for storage, the necessary expenses connected therewith, and demanded the property.

California.— Burke *v.* Maguire, 154 Cal. 456, 98 Pac. 21; McNally *v.* Connolly, (1885) 9 Pac. 169.

Colorado.— Roach *v.* Binder, 1 Colo. 322.

Connecticut.— Trowbridge *v.* Bosworth, 45 Conn. 166; Lynch *v.* Beecher, 38 Conn. 490.

Delaware.—Alrich *v.* Bowers, 3 Houst. 367; Windsor *v.* Boyce, 1 Houst. 605.

Illinois.— Ohio, etc., R. Co. *v.* Noe, 77 Ill. 513; Ingalls *v.* Bulkley, 13 Ill. 315; Hudson *v.* Maze, 4 Ill. 578; Rosenbaum *v.* King, 114 Ill. App. 648; Toledo, etc., R. Co. *v.* American Refrigerator Transit Co., 41 Ill. App. 625; Ehle *v.* Deitz, 32 Ill. App. 547.

Indiana.— Torian *v.* McClure, 83 Ind. 310; Lewis *v.* Masters, 8 Blackf. 244.

Iowa.— Gilchrist *v.* Moore, 7 Iowa 9; Stanchfield *v.* Palmer, 4 Greene 23.

Maine.— Newman *v.* Jenne, 47 Me. 520.

Michigan.—Anderson *v.* Pendl, 153 Mich. 693, 117 N. W. 326; Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78; Adams *v.* Wood, 51 Mich. 411, 16 N. W. 788; Campbell *v.* Quackenbush, 33 Mich. 287; Darling *v.* Tegler, 30 Mich. 54.

Minnesota.— Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470; Stratton *v.* Allen, 7 Minn. 502.

New York.— Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404; Jessop *v.* Miller, 2 Abb. Dec. 449, 1 Keyes 321; Hall *v.* Bassler, 96 N. Y. App. Div. 96, 88 N. Y. Suppl. 1039; Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337; Delahunty *v.* Hake, 10 N. Y. App. Div. 230, 41 N. Y. Suppl. 896; Treat *v.* Hathorn, 3 Hun 646; White *v.* Brown, 5 Lans. 78; Sluyter *v.* Williams, 1 Sweeny 215, 37 How. Pr. 109; Cumiskey *v.* Lewis, 14 Daly 466, 15 N. Y. St. 364; Fleischman *v.* Glaser, 28 Misc. 555, 59 N. Y. Suppl. 686; Frischman *v.* Mandel, 26 Misc. 820, 56 N. Y. Suppl. 1029; Porges *v.* Cohen, 23 Misc. 703, 52 N. Y. Suppl. 71; Talcott *v.* Belding, 46 How. Pr. 419; Boughton *v.* Bruce, 20 Wend. 234.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Wisconsin.— George *v.* McGovern, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77.

Canada.— Inglis *v.* Greenwood, 14 Nova Scotia 2.

See 42 Cent. Dig. tit. "Replevin," § 90.

79. See *supra*, I, E, 2, a.

80. Burr *v.* Dougherty, 21 Ark. 559; George *v.* McGovern, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77. But see Felton *v.* Hales, 67 N. C. 107.

81. Hudson *v.* Maze, 4 Ill. 578; Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449, 1 Keyes 321. But see Wolff *v.* Zeller, 31 Misc. (N. Y.) 255, 64 N. Y. Suppl. 129 [*reversing* 27 Misc. 646, 58 N. Y. Suppl. 608], holding that no demand is necessary in an action against an assignee for the benefit of creditors, where

a depository of an instrument delivered to be held in escrow,[82] and in some cases, although not uniformly, to innocent purchasers for value and without notice from persons having no authority to sell.[83] But even where possession was rightfully acquired the subsequent conduct of defendant may obviate the necessity of the demand,[84] as where he converts the property to his own use,[85] or deals with it as his own or in a manner inconsistent with plaintiff's ownership and right of possession.[86]

c. Property Wrongfully Taken by or in Possession of Defendant. A previous demand is not necessary in order to maintain replevin where the original taking is shown to have been wrongful,[87] as where defendant obtained possession of the property by fraud.[88] So also no demand is necessary as against a defendant who, although not the original wrongful taker, received the property with knowledge that it was so taken.[89]

the contract by means of which defendant's assignor fraudulently acquired the property was rescinded prior to the assignment.

82. Delahunty *v.* Hake, 10 N. Y. App. Div. 230, 41 N. Y. Suppl. 896.

83. See *infra*, I, E, 2, d.

84. Beebe *v.* De Baun, 8 Ark. 540; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219.

85. See Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; and *infra*, I, E, 2, e.

86. Henry *v.* Fine, 23 Ark. 417; McNeill *v.* Arnold, 17 Ark. 154; Prater *v.* Frazier, 11 Ark. 249.

87. *California.*— Cerf *v.* Phillips, 75 Cal. 185, 16 Pac. 778; McNally *v.* Connolly, (1885) 9 Pac. 169.

Colorado.— Klug *v.* Munce, 40 Colo. 276, 90 Pac. 603.

Connecticut.— Lynch *v.* Beecher, 38 Conn. 490.

Delaware.—Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

District of Columbia.—Justh *v.* Wilson, 19 D. C. 529.

Illinois.— Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Taylor *v.* Welsh, 138 Ill. App. 190; Ryan *v.* Schutt, 135 Ill. App. 554; Adams *v.* Wallace, 122 Ill. App. 550; Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544; W. H. Howard Commission Co. *v.* National Live Stock Bank, 93 Ill. App. 473; Richey *v.* Ford, 84 Ill. App. 121.

Indiana.— Jones *v.* Smith, 123 Ind. 585, 24 N. E. 368; Hall *v.* Durham, 117 Ind. 429, 20 N. E. 282; Hamilton *v.* Browning, 94 Ind. 242; Parrish *v.* Thurston, 87 Ind. 437; Cunningham *v.* Baker, 84 Ind. 597; Robinson *v.* Shatzley, 75 Ind. 461; Lewis *v.* Masters, 8 Blackf. 244; Ahlendorf *v.* Barkous, 20 Ind. App. 656, 50 N. E. 887.

Iowa.— Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363; Delancey *v.* Holcomb, 26 Iowa 94; Stanchfield *v.* Palmer, 4 Greene 23.

Kansas.— Salisbury *v.* Barton, 63 Kan. 552, 66 Pac. 618; Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491.

Maine.— Ayers *v.* Hewett, 19 Me. 281; Seaver *v.* Dingley, 4 Me. 306.

Massachusetts.— Cottrell *v.* Carter, 173 Mass. 155, 53 N. E. 375; Bisbee *v.* Fadden, 140 Mass. 6, 1 N. E. 742; Bussing *v.* Rice, 2 Cush. 48.

Michigan.— Payn *v.* Gidley, 122 Mich. 605, 81 N. W. 558; Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436; Bertwhistle *v.* Goodrich, 53 Mich. 457, 19 N. W. 143; Le Roy *v.* East Saginaw City R. Co., 18 Mich. 233, 100 Am. Dec. 162.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364.

New York.— Jessop *v.* Miller, 2 Abb. Dec. 449, 1 Keyes 321; New York Car Oil Co. *v.* Richmond, 6 Bosw. 213; Pringle *v.* Phillips, 5 Sandf. 157; Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Suppl. 744; Salomon *v.* Van Praag, 48 How. Pr. 338 [*affirmed* in 6 Hun 529]; Stillman *v.* Squire, 1 Den. 327; Pierce *v.* Van Dyke, 6 Hill 613 (holding that where the note is wrongfully taken and delivered to an attorney, replevin may be brought by one entitled to the possession of the note, without a previous demand, unless defendant took it for some lawful purpose).

Ohio.— Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

Oregon.— Krebs Hop Co. *v.* Taylor, (1908) 97 Pac. 44, 98 Pac. 494; Brown *v.* Lewis, 50 Oreg. 358, 92 Pac. 1058.

South Carolina.— Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126; Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

Utah.— Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848.

Wisconsin.— Perkins *v.* Best, 94 Wis. 168, 68 N. W. 762; Hyland *v.* Bohn Mfg. Co., 92 Wis. 157, 65 N. W. 170.

See 42 Cent. Dig. tit. "Replevin," § 89.

88. *California.*— Cerf *v.* Phillips, 75 Cal. 185, 16 Pac. 778.

Connecticut.— Lynch *v.* Beecher, 38 Conn. 490.

District of Columbia.—Justh *v.* Wilson, 19 D. C. 529.

Illinois.— Bruner *v.* Dyball, 42 Ill. 34; Goldschmidt *v.* Berry, 18 Ill. App. 276.

Indiana.— Parrish *v.* Thurston, 87 Ind. 437.

Maine.— Ayers *v.* Hewett, 19 Me. 281.

Massachusetts.—Bussing *v.* Rice, 2 Cush. 48.

Michigan.— Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436.

New York.— Salomon *v.* Van Praag, 48 How. Pr. 338 [*affirmed* in 6 Hun 529].

Ohio.— Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

See 42 Cent. Dig. tit. "Replevin," § 89.

89. Butters *v.* Haughwout, 42 Ill. 18, 89

d. Property Obtained From Person Without Authority to Transfer. The authorities are conflicting as to the necessity of a demand in an action of replevin against a defendant who is an innocent taker from a wrong-doer.[90] In some cases it has been held that a demand is necessary where defendant is an innocent purchaser for value and without notice from one who was a wrongful taker or without authority to sell,[91] on the ground that such purchaser cannot be deemed a wrong-doer in merely retaining, in the absence of any demand, what he has in good faith acquired,[92] and should not be subjected to suit without being given an opportunity to surrender the property;[93] and it has been held that this rule applies regardless of the nature of the fraud or wrong by which the property was originally acquired from plaintiff, or in what character or manner it was delivered to defendant, if no fraud or complicity in the transaction can be imputed to him.[94] On the contrary it has been held that a person wrongfully in possession or rightfully in possession but without authority to transfer the property cannot confer upon another a possession which, although innocent, will be rightful as against the true owner,[95] and that therefore no demand by plaintiff is necessary, although defendant is an innocent purchaser for value and without notice.[96] No demand is necessary where the purchaser knew that his vendor had no authority to sell,[97] or that he had procured the property by fraud,[98] or that it was claimed by other persons.[99]

e. Property Wrongfully Converted. It is very generally held that where there has been a conversion of the property by defendant or acts amounting to a conversion, no demand by plaintiff is necessary,[1] and this is the case

Am. Dec. 401; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

90. See Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795; Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 68 N. Y. Suppl. 744.

91. *Colorado.*— Roach *v.* Binder, 1 Colo. 322.

Connecticut.— Lynch *v.* Beecher, 38 Conn. 490.

Indiana.— Torian *v.* McClure, 83 Ind. 310; Conner *v.* Comstock, 17 Ind. 90; Wood *v.* Cohen, 6 Ind. 455, 63 Am. Dec. 389; Ledbetter *v.* Embree, 12 Ind. App. 617, 40 N. E. 928.

Minnesota.— Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364.

New York.— Millspaugh *v.* Mitchell, 8 Barb. 333; Barrett *v.* Warren, 3 Hill 348. But see Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Suppl. 744.

South Carolina.— Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

See 42 Cent. Dig. tit. "Replevin," § 92.

92. Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

93. Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 333; Burckhalter *v.* Mitchell, 27 S. C. 240, 2 S. E. 225.

94. Fuller *v.* Lewis, 3 Abb. Pr. (N. Y.) 383, 13 How. Pr. 219, where defendant was an assignee for the benefit of creditors of the original wrong-doer. But see Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 68 N. Y. Suppl. 744, where certain grounds of distinction are pointed out between the case of purchasers at execution sales and purchasers from a wrongful taker, and between cases of innocent purchasers and innocent bailees.

95. Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258. See also Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 68 N. Y. Suppl. 744.

96. Prime *v.* Cobb, 63 Me. 200; Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258; Ballou *v.* O'Brien, 20 Mich. 304; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795. See also Schwamb Lumber Co. *v.* Schaar, 94 Ill. App. 544. But see Becker *v.* Vandercook, 54 Mich. 114, 19 N. W. 771, holding that where a stranger removes to a blacksmith's shop a blanket apparently abandoned, and the blacksmith after several months loans it to one who does not know who the owner is, replevin cannot be maintained against the latter without making demand.

Illegal sale by pound-master.— No demand is necessary before bringing a replevin suit for a horse purchased by defendant at an illegal sale by a pound-master. Clark *v.* Lewis, 35 Ill. 417.

97. Kuhns *v.* Gates, 92 Ind. 66.

98. Butters *v.* Haughwout, 42 Ill. 18, 89 Am. Dec. 401; Goldschmidt *v.* Berry, 18 Ill. App. 276; Pringle *v.* Phillips, 5 Sandf. (N. Y.) 157.

99. Log Owners' Booming Co. *v.* Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. N. S. 573.

1. *Arkansas.*— Henry *v.* Fine, 23 Ark. 417; McNiell *v.* Arnold, 17 Ark. 154; Beebe *v.* De Baun, 8 Ark. 510.

Illinois.— Sinamaker *v.* Rose, 62 Ill. App. 118.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

Mississippi.— Morris *v.* Rucks, 62 Miss. 76.

New York.— Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Suppl.

notwithstanding the prior possession of the property was lawfully and rightfully acquired.[2]

f. Property Taken Under Process[3] — (i) *In General.* The owner of property which has been taken under execution or other process may maintain an action of replevin against the officer to recover the same without any previous demand if the taking was wrongful;[4] but if the property was rightfully taken by the officer under valid process and in the discharge of his official duty, if subsequent events entitle the owner to recover it a demand is necessary.[5] So it is held that no demand is necessary to recover property taken by an officer in abuse of his authority,[6] as by taking property under execution which is exempt,[7] or to recover property taken under an attachment founded upon a void affidavit.[8] The general rule is also that no demand is necessary to enable the true owner to recover property which has been seized as the property of another person under process against the latter,[9] particularly where at the time of the seizure the officer was notified as to the ownership of the property.[10] Some of the decisions, however, make a distinction in cases of this character, according to whose possession the property was in at the time of the seizure,[11] it being held that no demand is necessary if

744, where plaintiff's piano was wrongfully taken from her and stored by the taker with defendant, and it was held that defendant's refusal to inform plaintiff whether it had the piano, and its statement to her that she must sue the taker for the property, were acts of conversion, because inconsistent with plaintiff's right as owner, making its possession unlawful, and therefore demand and refusal were unnecessary to maintain replevin.

See 42 Cent. Dig. tit. "Replevin," § 91.

2. Prater *v.* Frazier, 11 Ark. 249; Beebe *v.* De Baun, 8 Ark. 510; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

Acts not amounting to a conversion.— The removal from one house to another of a piano which defendant came legally into the possession of, in the absence of anything to indicate an intention to secrete it or place it beyond the reach of the owner, is not a conversion and will not dispense with the necessity of a demand. Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337.

3. **For general right to replevy property taken under process** see *supra*, I, B, 3.

4. Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Burchett *v.* Purdy, 2 Okla. 391, 396, 37 Pac. 1053, where the court said: "Where the original taking was wrongful, and the officer was not in the proper discharge of his duty, or, if the seizure on execution is illegal in any manner, no demand is necessary."

Property taken under tax warrant.— Where property is taken under a tax warrant by a tax-collector, and the owner of the property taken was not liable for the tax, the taking is wrongful and such owner may maintain replevin against the officer without any demand. Coie *v.* Carl, 82 Hun (N. Y.) 360, 31 N. Y. Suppl. 565.

5. Hardy *v.* Wallis, 103 Ill. App. 141 (holding that where a constable has rightfully taken possession of property of a decedent under execution against one of the heirs prior to the appointment of an administrator, a demand by the administrator is necessary in an action to recover the property); Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129 (holding that where an officer seizes property under a writ of attachment issued by a justice of the peace having jurisdiction to issue the same, if it subsequently appears upon the filing of the complaint that the justice has no jurisdiction to proceed in the case, a demand is necessary in an action to recover the property from the officer). See also Ehle *v.* Deitz, 32 Ill. App. 547.

6. Vanderhorst *v.* Bacon, 38 Mich. 669, 31 Am. Rep. 328.

7. Vanderhorst *v.* Bacon, 38 Mich. 669, 33 Am. Rep. 328.

8. Aspell *v.* Hosbein, 98 Mich. 117, 57 N. W. 27.

9. *California.*— Ledley *v.* Hays, 1 Cal. 160.

Colorado.— Smith *v.* Jensen, 13 Colo. 213, 22 Pac. 434.

District of Columbia.—Williams *v.* Luckett, 7 Mackey 275.

Illinois.— Pogue *v.* Rowe, 236 Ill. 157, 86 N. E. 207.

Kansas.— Dickson *v.* Randall, 19 Kan. 212; Stone *v.* Bird, 16 Kan. 488; Burgwald *v.* Donelson, 2 Kan. App. 301, 43 Pac. 100.

Michigan.— Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Jackson *v.* Dean, 1 Dougl. 519.

New York.— Schwabeland *v.* Holahan, 10 Misc. 176, 30 N. Y. Suppl. 910 [*affirming* 6 Misc. 623, 26 N. Y. Suppl. 880].

Ohio.— Bancroft *v.* Blizzard, 13 Ohio 30.

Oklahoma.— Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

Oregon.—Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

See 42 Cent. Dig. tit. "Replevin," § 94.

10. Ledley *v.* Hays, 1 Cal. 160; Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722 [*affirming* 114 Ill. App. 483]; Stone *v.* Bird, 16 Kan. 488; Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

11. Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792; Tuttle *v.* Robinson, 78 Ill. 332; Nigh *v.* Dovel, 84 Ill. App. 228.

the property when seized was not in possession of the person named in the process;[12] but that if the property is found by the officer in the actual custody of the person named in the writ or process, the seizure is not to be deemed wrongful and a demand is necessary,[13] unless the officer at the time of the seizure was notified that the person in possession was not the owner.[14] Elsewhere this distinction has been expressly disapproved,[15] and it is held that the owner of the property may sue without demand, although at the time it was taken it was in possession of the person named in the process.[16] Where an officer has made an effectual levy on property which he leaves in the possession of the owner, he may without demand maintain replevin therefor against another officer who subsequently seizes it under a different process,[17] and the owner of property may without demand sue to recover it from a person who as plaintiff in another action of replevin has recovered it from a third person in whose possession it then was.[18]

(II) *Property Sold Under Process.* Where property has been wrongfully sold under process it has been held in some cases that the owner must make a demand therefor before he can maintain an action of replevin against one who has purchased it in good faith at the sale;[19] but in other cases it has been held that no demand is necessary.[20] A purchaser at a sheriff's sale must make a demand for the property bought before he can maintain replevin therefor.[21]

g. Claim of Title and Right of Possession by Defendant. Where in replevin defendant claims title to the property and the right of possession incident thereto, no demand by plaintiff is necessary,[22] although defendant may honestly believe

12. Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792; Tuttle *v.* Robinson, 78 Ill. 332; Nigh *v.* Dovel, 84 Ill. App. 228.

13. Killey *v.* Scannell, 12 Cal. 73; Stone *v.* O'Brien, 7 Colo. 458, 4 Pac. 792; Tuttle *v.* Robinson, 78 Ill. 332; Gilbert *v.* Murray, 69 Ill. App. 664; Vose *v.* Stickney, 8 Minn. 75. *Contra*, Masten *v.* Hayes, 24 Hun (N. Y.) [*reversing* 60 How. Pr. 302].

Property in possession of mortgagor.— Where personal property which has been mortgaged is left in the possession of the mortgagor and is taken by an officer under execution against the mortgagor, the mortgagee cannot maintain replevin against the officer without a prior demand. Keller *v.* Robinson, 153 Ill. 458, 38 N. E. 1072 [*reversing* 55 Ill. App. 56]; Simmons *v.* Jenkins, 76 Ill. 479; Gilbert *v.* Murray, 69 Ill. App. 664.

14. Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722 [*affirming* 114 Ill. App. 483].

15. Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480, holding that the necessity for a demand depends upon whether the taking was rightful as against the owner of the property, and that it is not material that the officer acted in good faith or that the property may have been in possession of the person named in the writ.

16. Hopkins *v.* Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480; Jackson *v.* Dean, 1 Dougl. (Mich.) 519; Bancroft *v.* Blizzard, 13 Ohio 30.

17. Pugh *v.* Calloway, 10 Ohio St. 488.

18. Kelleher *v.* Clark, 135 Mass. 45.

Demand in prior suit.— In an action of replevin to recover property which defendant has obtained by replevying it from a third person, the question as to whether any demand was necessary in the prior action is immaterial in the second action. Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101.

19. Ledbetter *v.* Embree, 12 Ind. App. 617, 40 N. E. 928; Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Rawley *v.* Brown, 18 Hun (N. Y.) 456; Millspaugh *v.* Mitchell, 8 Barb. (N. Y.) 333; Masten *v.* Webb, 60 How. Pr. (N. Y.) 302.

20. Hicks *v.* Britt, 21 Ark. 422; Edmunds *v.* Hill, 133 Mass. 445; Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

21. Johnson *v.* Johnson, 4 Harr. (Del.) 171.

22. *Arkansas.*— Henry *v.* Fine, 23 Ark. 417.

California.— Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

Colorado.—Copeland *v.* Kilpatrick, 38 Colo. 208, 88 Pac. 472; Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

District of Columbia.— Wall *v.* De Mitkiewicz, 9 App. Cas. 109.

Florida.— Webster *v.* Brunswick-Balke-Callender Co., 37 Fla. 433, 20 So. 536.

Illinois.— Oswald *v.* Hutchinson, 26 Ill. App. 273.

Iowa.— Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Redding *v.* Page, 52 Iowa 406, 3 N. W. 427; Delancey *v.* Holcomb, 26 Iowa 94; Smith *v.* McLean, 24 Iowa 322.

Kansas.— Barton *v.* Mulvane, 59 Kan. 313, 52 Pac. 883; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084; Shoemaker *v.* Simpson, 16 Kan. 43; Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415.

Massachusetts.— Freelove *v.* Freelove, 128 Mass. 190.

Michigan.— Breitenwischer *v.* Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372.

Missouri.— Harding *v.* Kelso, 91 Mo. App. 607.

that his claim is legal and just.[23] So if on the trial defendant contests the case upon the merits, basing his defense upon title in himself and the right of possession incident thereto, it is not necessary for plaintiff to prove a demand,[24] nor in such case can defendant defeat the action on the ground that no demand was in fact made,[25] although the case is one where a demand should have been made,[26] since defendant's position on the trial is inconsistent with any supposition that he would have restored the property if a demand had been made.[27] The rule that a demand is unnecessary where defendant contests the case upon the merits does not, however, apply to cases where a demand is necessary not merely as a basis for asserting the remedy, but to vest in plaintiff a right of possession, as where such right depends upon a condition which is broken only by a demand and refusal.[28]

h. Where Demand Would Have Been Unavailing. No demand is necessary where it appears from the facts and circumstances of the case that a demand if made would have been futile and unavailing,[29] and this fact may appear either

Wisconsin.— Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

See 42 Cent. Dig. tit. "Replevin," § 88.

23. Shoemaker *v.* Simpson, 16 Kan. 43.

24. *California.*— California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320; Latta *v.* Tutton, 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

Colorado.— Denver Live Stock Commission Co. *v.* Parks, 41 Colo. 164, 91 Pac. 1110; Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197.

Illinois.— Kingman *v.* Reinemer, 58 Ill. App. 173 [*affirmed* in 166 Ill. 208, 46 N. E. 786].

Iowa.— Smith *v.* McLean, 24 Iowa 322.

Kansas.— Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084; Bliss *v.* Couch, 46 Kan. 400, 26 Pac. 706; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; Shoemaker *v.* Simpson, 16 Kan. 43; St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312.

Maine.— O'Neil *v.* Bailey, 68 Me. 429; Lewis *v.* Smart, 67 Me. 206; Seaver *v.* Dingley, 4 Me. 306.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659.

Nebraska.— Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221; Heagney *v.* J. I. Case Threshing Mach. Co., 4 Nebr. (Unoff.) 745, 96 N. W. 175.

Nevada.— Perkins *v.* Barnes, 3 Nev. 557.

New York.— Knapp *v.* Scheider, 10 Daly 218.

North Carolina.— Buffkins *v.* Eason, 112 N. C. 162, 16 S. E. 916, where the complaint alleged plaintiff's title and the answer denied it, and it was held that the court properly withdrew an issue previously submitted to the jury as to whether there had been a demand for the crop before suit brought, since in such case no demand was necessary.

South Dakota.— Howard *v.* Braun, 14 S. D. 579, 86 N. W. 635.

West Virginia.— Kuykendall *v.* Fisher, 61 W. Va. 87, 56 S. E. 48, 8 L. R. A. N. S. 94.

Wisconsin.— Byrne *v.* Byrne, 89 Wis. 659, 62 N. W. 413.

Wyoming.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

See 42 Cent. Dig. tit. "Replevin," § 88.

25. *Colorado.*— Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

Indian Territory.— Sellers *v.* Catron, 5 Indian Terr. 263, 82 S. W. 742.

Kansas.— Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312.

Mississippi.—Newell *v.* Newell, 34 Miss. 385.

Nebraska.— Homan *v.* Laboo, 1 Nebr. 204.

North Carolina.— Heath *v.* Morgan, 117 N. C. 504, 23 S. E. 489; Felton *v.* Hales, 67 N. C. 107.

North Dakota.— Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44.

South Dakota.— Howard *v.* Braun, 14 S. D. 579, 86 N. W. 635.

Washington.— Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Wyoming.— Bunce *v.* McMahon, 6 Wyo. 24, 42 Pac. 23.

See 42 Cent. Dig. tit. "Replevin," § 88.

26. Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44. See also Homan *v.* Laboo, 1 Nebr. 204. But see Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404; Ludden, etc., Southern Music House *v.* Sumter, 47 S. C. 335, 25 S. E. 150, holding that in replevin defendant's possession in the first instance having been rightful, the fact that in his answer he denies the title of plaintiff is insufficient to show that his possession at the commencement of the action was wrongful and dispensed with the necessity for showing a demand and refusal.

27. Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

28. People's Furniture, etc., Co. *v.* Crosby, 57 Nebr. 282, 77 N. W. 658, 73 Am. St. Rep. 504.

29. *Arkansas.*— Beebe *v.* De Baun, 8 Ark. 510.

from the acts or declarations of defendant in regard to the property before the action is instituted,[30] or from the position taken by him upon the trial, as where he does not rely upon the want of a demand as a technical defense but contests the right of plaintiff upon the merits, claiming a superior right or title in himself.[31]

i. Waiver of Demand. In cases where a demand is necessary in replevin it may be waived by defendant,[32] or he may by contesting the case upon the merits and claiming title in himself be precluded from relying upon the absence of a demand as a defense to the action;[33] but a refusal to comply with a demand made after the suit is begun and the writ issued will not prevent defendant from relying upon the defense that no demand was made before suit,[34] and a mere denial of plaintiff's right to possession is not a plea of property in defendant and does not waive a demand where a demand is necessary to entitle plaintiff to recover.[35]

3. Sufficiency of Demand and Refusal. Where a demand is necessary there must be a distinct demand for possession and a refusal to deliver possession on the making of such demand;[36] but there need not be a formal demand and refusal

California.— Churchill *v.* More, 4 Cal. App. 219, 88 Pac. 290.

Colorado.— Copeland *v.* Kilpatrick, 38 Colo. 208, 88 Pac. 472; Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197.

Dakota.— Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

District of Columbia.— Wall *v.* De Mitkiewicz, 9 App. Cas. 109.

Illinois.— Cranz *v.* Kroger, 22 Ill. 74; Sinamaker *v.* Rose, 62 Ill. App. 118.

Kansas.— Barton *v.* Mulvane, 59 Kan. 313, 52 Pac. 883; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312; Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415.

New York.— Torres *v.* Rogers, 28 Misc. 176, 58 N. Y. Suppl. 1104, holding that, where defendant in replevin admits having disposed of the property and is therefore unable to comply with a demand, no demand is necessary.

North Carolina.— Satterthwaite *v.* Ellis, 129 N. C. 67, 39 S. E. 726.

North Dakota.— Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44.

Wisconsin.— Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745.

See 42 Cent. Dig. tit. "Replevin," § 96.

30. Sinamaker *v.* Rose, 62 Ill. App. 118; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

31. Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44; Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

Such a position is inconsistent with any supposition that the property would have been surrendered if a demand therefor had been made. Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853.

32. Hamilton *v.* Seeger, 75 Ill. App. 599, holding that where after the commencement of the suit a controversy arose as to the demand and defendant said: "I waive all demand; you can go ahead with your replevin," and plaintiff relying upon this declaration went on with the suit, this constituted a waiver of the necessity of a demand and estopped defendant from claiming that no demand was made. See also Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

Facts not amounting to waiver see Keller *v.* Robinson, 153 Ill. 458, 38 N. E. 1072 [*reversing* 55 Ill. App. 56].

33. See *supra*, I, E, 2, g.

34. Keller *v.* Robinson, 153 Ill. 458, 38 N. E. 1072 [*reversing* 55 Ill. App. 56].

35. Peters *v.* Parsons, 18 Nebr. 191, 24 N. W. 687.

36. *Connecticut.*—Trowbridge *v.* Bosworth, 45 Conn. 166, holding that where stock which had been impounded was let out by some unknown person and returned to the inclosure of the owner without any complicity on his part, a mere notice to the owner by the pound-keeper that they had been illegally returned, without any request for their redelivery or for permission to enter the inclosure and get them, to which notice no reply was made, is not a sufficient demand to enable the pound-keeper to maintain replevin for them.

Massachusetts.— Page *v.* Crosby, 24 Pick. 211, holding that where a demand is made by one whose right to the property is considered doubtful, and defendant does not refuse absolutely to deliver the property but says that he will consult his attorney and if advised that the person making the demand is entitled to the property he will deliver it, this is not a refusal which will authorize an action of replevin until after a reasonable time for such consultation has elapsed.

New York.— Moran *v.* Abbott, 26 N. Y. App. Div. 570, 50 N. Y. Suppl. 337, holding that where a chattel is in the possession of a conditional vendee who is in default upon the agreed payments, a demand for payment of the amount due without any demand in the alternative for a return of the chattel is not sufficient.

Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330 [*overruled* on other grounds in Kansas Moline Plow Co. *v.* Sherman, 3

in express words,[37] and unless the form of demand is prescribed by statute,[38] any words will suffice so long as they are understood by both parties to be a demand and refusal.[39] The demand may be sufficient, although it does not specify each article composing the property demanded,[40] particularly where plaintiff attempts to point out the particular articles claimed and defendant refuses to look or consider plaintiff's claims,[41] or peremptorily refuses to surrender any of the property.[42] So also the demand is not necessarily invalidated because it is for more than plaintiff is entitled to,[43] or because plaintiff fails to state the nature of his interest in the property.[44] The demand need not be made by plaintiff personally, it being sufficient if it is made by a person authorized to act for him;[45] but it must be made either by plaintiff or by someone authorized to act for him,[46] and a demand made by a person acting in his own right and not as agent of plaintiff cannot avail plaintiff.[47] The authority of an agent to make demand need not be in writing,[48] but defendant is not bound to deliver the property unless there is some evidence of the agent's authority sufficient to justify a reasonably prudent

Okla. 204, 41 Pac. 623, 32 L. R. A. 33], holding that there must be a distinct demand and refusal, and that the fact that plaintiff claimed the property at the time it was seized by defendant on an execution against a third person is not such a demand and refusal.

Vermont.— Bent *v.* Bent, 44 Vt. 633, holding that a refusal by the owner of a building containing furniture belonging to another to allow the latter to enter the building for the purpose of taking it away, if accompanied by an offer to put out the furniture for him whenever called for, is not such a refusal as will authorize an action of replevin.

See 42 Cent. Dig. tit. "Replevin," § 85.

37. Kiefer *v.* Carrier, 53 Wis. 404, 10 N. W. 562 (holding that where plaintiff's horses escaped and went upon the land of defendant who had previously forbidden plaintiff to come upon his land, and plaintiff with his servant went to defendant's house stating that they had come for the horses, and defendant merely stated that there were certain horses on his premises but that he did not know whether they belonged to plaintiff, the failure of defendant to revoke his previous notice and give plaintiff express permission to come upon his land to get the horses was equivalent to a refusal of plaintiff's demand); Merriam *v.* Lynch, 53 Wis. 82, 10 N. W. 1 (holding that when plaintiff undertakes in a lawful manner to remove chattels as his own from the possession of defendant, and the latter objects to his doing so, denying that plaintiff has any property therein, this is equivalent to a formal demand and refusal to lay the foundation for an action of replevin).

38. Brenot *v.* Robinson, 108 Cal. 143, 41 Pac. 37, holding that where the claimant's demand for property, prior to bringing action of claim and delivery, was not in the form prescribed by Code Civ. Proc. § 689, as amended in 1891, for such cases, defendant may set up such fact in his answer, or object to the admission of evidence of demand.

39. Truax *v.* Parvis, 7 Houst. (Del.) 330, 32 Atl. 227 [*reversed* on other grounds in 7 Houst. 574, 32 Atl. 1050]. See also Bennett Bros. Co. *v.* Tam, 24 Mont. 457, 62 Pac. 780, holding that it is a sufficient demand to sustain an action to recover goods sold but not paid for where plaintiff demands in the alternative either the amount due or the return of the goods purchased, and defendant replies that they can be obtained only by a lawsuit.

A demand of a bill of lading constituting the evidence of title to property is equivalent to a demand of the property represented by it and is sufficient to support an action of replevin for such property. Zachrisson *v.* Ahman, 2 Sandf. (N. Y.) 68.

40. Newman *v.* Bennett, 23 Ill. 427, holding that a demand for "Bennett's stock" is sufficient where defendant knows the cattle to which such demand refers and makes no objection at the time that the demand is not sufficiently specific.

41. Greenberg *v.* Stevens, 212 Ill. 606, 72 N. E. 722 [*affirming* 114 Ill. App. 483].

42. Appleton *v.* Barrett, 29 Wis. 221, holding that where the property claimed consists of various articles at different places, and on demand defendant peremptorily refuses to surrender any of the property, it is not necessary for plaintiff to make any further effort at specification or particular demand for the different articles.

43. King *v.* Fitch, 2 Abb. Dec. (N. Y.) 508, 1 Keyes 432, holding that where the owner of property which came lawfully into defendant's possession demands a delivery of more than he is entitled to, and defendant without requesting plaintiff to specify what he is entitled to refuses absolutely to deliver any of the property, he cannot afterward object that the demand was for too much.

44. Schoolcraft *v.* Simpson, 123 Mich. 215, 81 N. W. 1076.

45. Brown *v.* Poland, 54 Conn. 313, 7 Atl. 719; Newman *v.* Bennett, 23 Ill. 427 (holding that a demand made by one who stands *in loco parentis* to an infant is sufficient to justify replevin); Mason *v.* Rodgers, 116 Mo. App. 611, 92 S. W. 745.

46. Ingalls *v.* Bulkley, 13 Ill. 315; Fleischman *v.* Glaser, 28 Misc. (N. Y.) 555, 59 N. Y. Suppl. 686.

47. Page *v.* Crosby, 24 Pick. (Mass.) 211.

48. Ingalls *v.* Bulkley, 13 Ill. 315.

man in doing so.[49] The demand must ordinarily be made upon defendant himself.[50] In some cases it has been held that where the property is found in the possession of defendant's agent, a demand upon the agent is sufficient;[51] but on the contrary it has been held that a demand upon an agent having merely the custody of the property and without any general authority to act for defendant or make a delivery thereof is not sufficient,[52] that a demand made upon a servant of defendant having the custody of the property is not sufficient[53] unless the servant acted under the direction of the master in refusing to deliver the property,[54] and that a demand made upon defendant's wife is not sufficient unless it is shown that defendant had constituted her his agent for the purpose of receiving such demand.[55] In an action against a husband and wife to recover community property a demand upon the husband alone is sufficient where by statute he is manager of the community property,[56] and where a husband and wife are jointly in possession of property and the action is brought against the husband alone, a failure to also make demand upon the wife will not defeat the action;[57] but where the property is in possession of assignees for the benefit of creditors, and such assignees are not partners, a demand must be made upon each in order to maintain a joint action against them.[58] The demand must be made while defendant is still in possession of the property,[59] and at a time when plaintiff is entitled to its possession;[60] but plaintiff is not obliged to make such demand as soon as he is entitled to do so.[61] As to the stage of the proceedings at which the demand must be made the authorities are conflicting, it being held in some cases that the demand must be made before the writ is issued,[62] and in others that it may be made after the writ is issued if before it is served,[63] particularly if it is made provisionally to be used only in case defendant refuses to give up the property on demand.[64]

F. Defenses[65] **— 1. Invalidity of Plaintiff's Title.** In some jurisdictions it is held that in replevin a denial that the goods are the property of plaintiff is a good defense.[66] Where each party pleads in general terms that he has title to

49. Ingalls *v.* Bulkley, 13 Ill. 315.

50. Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Henrich *v.* Van Wrickler, 80 N. Y. App. Div. 250, 80 N. Y. Suppl. 226. But see Chamberlin *v.* Fuller, 59 Vt. 247, 9 Atl. 832, holding that in an action against an assignee of an insolvent debtor to recover property alleged to have been obtained by the debtor through fraud, a demand made upon the messenger of the court of insolvency who was in possession of the property awaiting the appointment of an assignee is sufficient.

51. Udell *v.* Slocum, 56 Ill. App. 216; Congdon *v.* Bailey, 121 Mich. 570, 80 N. W. 369 (demand on defendant's agent sufficient to support replevin against defendant after the agent has delivered possession to him).

52. Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364; Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404.

53. Page *v.* Crosby, 24 Pick. (Mass.) 211; Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404.

54. Goodwin *v.* Wertheimer, 99 N. Y. 149, 1 N. E. 404.

55. Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.

56. Standard Furniture Co. *v.* Anderson, 38 Wash. 582, 80 Pac. 815.

57. McGregor *v.* Cole, 100 Mich. 262, 58 N. W. 1008.

58. Jessop *v.* Miller, 2 Abb. Dec. (N. Y.) 449, 1 Keyes 321.

59. West *v.* Graff, 23 Ind. App. 410, 55 N. E. 506.

60. Delahunty *v.* Hake, 10 N. Y. App. Div. 230, 41 N. Y. Suppl. 896, holding that where certificates of stock were delivered to defendant to be held in escrow until a certain date, a demand made prior to this date when plaintiff was not entitled to their possession is not sufficient to authorize an action of replevin after such date where no new demand has been made.

61. Farrand, etc., Organ Co. *v.* Methodist Episcopal Church Bd. of Extension, 18 Utah 29, 54 Pac. 818.

62. Underwood *v.* Tatham, Smith (Ind.) 152; Darling *v.* Tegler, 30 Mich. 54.

63. Denver Live Stock Commission Co. *v.* Parks, 41 Colo. 164, 91 Pac. 1110 (holding that a demand made after the beginning of the action but prior to the execution of the writ is sufficient); Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253 (holding that in replevin before a justice of the peace it is sufficient if the demand is made before the papers are served on defendant).

64. O'Neil *v.* Bailey, 68 Me. 429.

65. Defense of purchaser in replevin by assignee of conditional contract of sale see Sales.

Defenses in replevin by purchaser see Sales.

Defenses in replevin by seller see Sales.

66. Shur *v.* Statler, 2 Ohio Dec. (Reprint)

the property, and denies the title alleged by the other party, defendant may avail himself of the defense that the conveyance under which plaintiff claims title was fraudulent and void as to defendant; [67] or where defendant is an officer holding under proper process, he may show that plaintiff acquired the property in fraud of plaintiff in his writ; [68] but such officer cannot set up in defense that the property was transferred fraudulently as to third persons, if such third persons make no complaint.[69]

2. TITLE IN OR LIEN OF DEFENDANT.[70] Property in defendant is a good defense in an action of replevin,[71] and this is ordinarily true whether it be an absolute,

70, 1 West. L. Month. 317. *Contra*, Siedenbach *v.* Riley, 36 Hun (N. Y.) 211 [*affirmed* in 111 N. Y. 560, 19 N. E. 275].

Title to land cannot be tried in an action of replevin, and therefore want of title in plaintiff cannot be set up as a defense to replevin for oats raised on such land. Barnhart *v.* Ford, 37 Kan. 520, 15 Pac. 542.

67. Mullen *v.* Noonan, 44 Minn. 541, 47 N. W. 164.

A defendant showing no title (Wyman *v.* Gould, 47 Me. 159), or right to possession (Raber *v.* Hyde, 138 Mich. 101, 101 N. W. 61), cannot impeach that of his opponent.

68. *California.*— Bolander *v.* Gentry, 36 Cal. 105, 95 Am. Dec. 162.

Massachusetts.— Gates *v.* Gates, 15 Mass. 310.

Michigan.— Pierce *v.* Hill, 35 Mich. 194, 24 Am. Rep. 541.

New York.—Thayer *v.* Willet, 5 Bosw. 344, 9 Abb. Pr. 325. See, however, Deutsch *v.* Reilly, 8 Daly 132, 57 How. Pr. 75 (holding that where a sheriff, under a warrant of attachment, seizes property owned by a person other than defendant, he is liable in replevin to the owner, and cannot defend the seizure on the ground that defendant conveyed the property to the person from whom it was taken, to defraud creditors); Hall *v.* Stryker, 9 Abb. Pr. 342.

South Carolina.— Paris *v.* Du Pre, 17 S. C. 282.

South Dakota.— Griswold *v.* Sundback, 6 S. D. 269, 60 N. W. 1068, holding, however, that in replevin against an attaching officer for property taken from plaintiff as the property of the debtor, defendant is precluded from questioning the *bona fides* of a prior sale of such property by the debtor to plaintiff, and on which he bases his right to possession, where it appears that defendant has relinquished his lien, and become a trespasser from the beginning, by unlawfully turning the property over to an agent of plaintiff in the attachment.

See 42 Cent. Dig. tit. "Replevin," § 101.

It is a material element of such defense that the relation of debtor and creditor exist between the attachment plaintiffs and the fraudulent grantor, and the question as to whether such transfer was fraudulent is immaterial until the officer has shown that he represents creditors. Dunn *v.* Overton, 15 Okla. 670, 83 Pac. 715.

Where the judgment on which an execution was issued is held invalid in an action of replevin by a purchaser from the execution debtor to recover goods taken by defendant, a constable, under the execution, defendant cannot attack the sale to plaintiff. Wilson *v.* Martin, 44 Mich. 509, 7 N. W. 83.

69. Hall *v.* Moriarty, 57 Mich. 345, 24 N. W. 96; Town *v.* Tabor, 34 Mich. 262.

70. Pleading title in defendant see *infra*, IV, B, 4.

71. *Illinois.*— Van Namee *v.* Bradley, 69 Ill. 299; Anderson *v.* Talcott, 6 Ill. 365.

Indiana.— Darter *v.* Brown, 48 Ind. 395.

Michigan.— Busch *v.* Nester, 70 Mich. 525, 38 N. W. 458.

New York.— Mitchell *v.* Hinman, 8 Wend. 667.

North Carolina.— Alsbrook *v.* Shields, 67 N. C. 333, holding that when the owner of property is deprived of possession, and regains the same, he may, in defense of an action of replevin against him, show his title to the property, notwithstanding that, in the recaption, he may have been guilty of a breach of the peace.

Oregon.— Spores *v.* Boggs, 6 Oreg. 122.

Pennsylvania.—Elliott *v.* Powell, 10 Watts 453, 36 Am. Dec. 200; Johnson *v.* Groff, 22 Pa. Super. Ct. 85. See also Fleming *v.* Heitshu, 7 Del. Co. 467.

Tennessee.— Deaderick *v.* Oulds, 86 Tenn. 14, 5 S. W. 487, 6 Am. St. Rep. 812.

United States.— Ingle *v.* Wallach, 1 Black 96, 17 L. ed. 50.

See 42 Cent. Dig. tit. "Replevin," § 102.

Purchase of property.—A *bona fide* purchase from the vendee of plaintiff constitutes a good defense in an action of replevin. Bragdon *v.* Penney, 35 Minn. 204, 28 N. W. 241; Lee *v.* Portwood, 41 Miss. 109; Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611. Purchase at a sheriff's sale, and possession thereunder, make a *prima facie* title against plaintiff who shows no title or possession in himself. Kingsbury *v.* Lane, 17 Mo. 261. In replevin for a distress for rent, the tenant may show that he purchased the premises, with the landlord's assent, prior to the rents becoming due; *aliter* if the issue is nothing in arrear, which admits the tenancy. Hill *v.* Miller, 5 Serg. & R. (Pa.) 355. In replevin for hay cut on premises claimed by plaintiff it is a good defense that defendant purchased the same from one in actual possession of the premises, holding them adversely to plaintiff. Stockwell *v.* Phelps, 34 N. Y. 363, 90 Am. Dec. 710.

Champertous deed.— Where plaintiffs in replevin to recover timber were in adverse

or a special or qualified property in the goods which are the subject-matter of the litigation.[72]

3. Title in or Lien of Third Persons.[73] According to many decisions defendant in an action of replevin may, as inducement to the traverse of plaintiff's title, set up title in a third person, and, if successful upon such issues, is entitled to judgment, without connecting himself with such outstanding title;[74] especially when the action is in the *cepit*.[75] The better rule, however, seems to be that plaintiff may recover against a mere trespasser on proof of prior possession only, and defendant cannot set up an outstanding title in a third person, with which he does not connect himself;[76] but, when plaintiff, never having had possession,

possession of the land from which the timber was taken, a deed by a person out of possession, under which defendant entered on the land and removed the timber, could not protect him against recovery, such deed being champertous. Lieberman *v.* Clark, 114 Tenn. 117, 85 S. W. 258, 69 L. R. A. 732.

Rights of mortgage bondholders.— In replevin for property sold by plaintiff with reservation of title as security for the purchase-price, the rights of innocent mortgage bondholders under a mortgage executed by the vendee are available as a defense. Ryle *v.* Knowles Loom Works, 87 Fed. 976, 31 C. C. A. 340.

72. *Indiana.*— Darter *v.* Brown, 48 Ind. 395 (bailee); Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208.

Iowa.— Lytle *v.* Crum, 50 Iowa 37.

Missouri.— Duke *v.* Duke, 93 Mo. App. 244 (agister's lien); Anthony *v.* Carp, 90 Mo. App. 387 (agister's lien).

New York.— Mitchell *v.* Hinman, 8 Wend. 667.

South Carolina.— Murdouch *v.* Tuten, 76 S. C. 502, 57 S. E. 547, holding, however, that it is no defense to an action for illegal seizure of mortgaged personalty that defendant had an equitable mortgage on the property, where there was no unpaid instalment of the price at the time of the seizure.

See 42 Cent. Dig. tit. "Replevin," § 102.

An equitable defense, such as an equitable lien on the property in controversy, may be interposed to a replevin suit. American Soda Fountain Co. *v.* Futrall, 73 Ark. 464, 84 S. W. 505, 108 Am. St. Rep. 64.

73. **Pleading title in third person** see *infra*, IV, B, 4.

74. *Illinois.*— Edwards *v.* McCurdy, 13 Ill. 496; Anderson *v.* Talcott, 6 Ill. 365.

Indiana.— Hall *v.* Henline, 9 Ind. 256; Martin *v.* Ray, 1 Blackf. 291.

Minnesota.— Loomis *v.* Youle, 1 Minn. 175.

Nebraska.— Fuller *v.* Brownell, 48 Nebr. 145, 67 N. W. 6; Sutro *v.* Hoile, 2 Nebr. 186.

New York.— Ingraham *v.* Hammond, 1 Hill 353; Prosser *v.* Woodward, 21 Wend. 205; Harrison *v.* McIntosh, 1 Johns. 380.

Oregon.— Spores *v.* Boggs, 6 Oreg. 122.

Pennsylvania.— Johnson *v.* Groff, 22 Pa. Super. Ct. 85.

England.— Butcher *v.* Porter, 1 Salk. 94, 91 Eng. Reprint 87.

See 42 Cent. Dig. tit. "Replevin." § 103.

75. Loomis *v.* Youle, 1 Minn. 175.

76. *Alabama.*— McIntosh *v.* Parker, 82 Ala. 238, 3 So. 19.

Illinois.— Van Namee *v.* Bradley, 69 Ill. 299.

Iowa.— Corbitt *v.* Heisey, 15 Iowa 296.

Kansas.— Buckhalter *v.* Nuzum, (App. 1900) 61 Pac. 310.

Maine.— Wilson *v.* Nichols, 29 Me. 566. See also Anderson Carriage Co. *v.* Bartley, 102 Me. 492, 67 Atl. 567.

Michigan.— Raber *v.* Hyde, 138 Mich. 101, 101 N. W. 61.

New York.— Stowell *v.* Otis, 71 N. Y. 36; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Gerber *v.* Monie, 56 Barb. 652; Hoyt *v.* Van Alstyne, 15 Barb. 568; King *v.* Orser, 4 Duer 431; Thompson *v.* Stever, 11 N. Y. St. 784; Rogers *v.* Arnold, 12 Wend. 30; Duncan *v.* Spear, 11 Wend. 54.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Rhode Island.—Kebabian *v.* Adams Express Co., 28 R. I. 177, 66 Atl. 201.

Texas.— Murray *v.* Lyons, (Civ. App. 1906) 95 S. W. 621; Jackson *v.* Nelson, (Civ. App. 1897) 39 S. W. 315.

Wisconsin.— Stern *v.* Riches, 111 Wis. 589, 87 N. W. 554.

See 42 Cent. Dig. tit. "Replevin," § 103.

The property in defendant or a third person sufficient to sustain a defense under the pleas of *non cepit* and *non detinet* must be such as goes to destroy the interest of plaintiff, which, if existing, would sustain the action, or, in other words, such as would defeat an action of trespass, if brought in place of this action in case of a wrongful taking, or trover, if brought for a wrongful detention. Van Namee *v.* Bradley, 69 Ill. 299; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30.

As a matter of pleading in actions of replevin, an answer of title in a third person is good without any allegations connecting defendant with the right of such person. Stowell *v.* Otis, 71 N. Y. 36; Johnson *v.* Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Rockwell *v.* Saunders, 19 Barb. (N. Y.) 473; McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36; Wright *v.* Bennett, 3 Barb. (N. Y.) 451; Pattison *v.* Adams, Lalor (N. Y.) 426.

In Iowa title in a third person not a party to the action cannot be shown in defense to a suit in replevin. Under Code, § 1999, such third person should be made a party. Reed *v.* Reed, 13 Iowa 5.

In New York, Code, § 1723, provides that

bases his right of recovery on his legal title, defendant may, unless estopped, set up an outstanding title in a third person, without connecting himself with it.[77] Where there is no wrongful taking, but merely wrongful detention, defendant may defeat plaintiff's claim by evidence that title or right of possession was not in plaintiff, but in a stranger, although he does not connect himself with such title.[78] The lien of a third person upon the property in question is no defense in replevin, as plaintiff takes subject thereto.[79] Where during the pendency of the action, and before trial, defendant has been legally required to deliver the property in dispute to a third person, who is the owner as against both parties to the suit, such delivery may be pleaded, and will constitute a good defense to the replevin suit.[80]

4. Set-Off and Counter-Claim. The rule is well settled in the earlier cases that a set-off is not allowable in an action of replevin,[81] except where equitable relief may be demanded under exceptional circumstances.[82] and in some juris-

in an action for the possession of a chattel defendant may avail himself of the title of a third person without connecting himself with that title. Carswell *v.* Alden, 12 N. Y. Civ. Proc. 137.

77. McIntosh *v.* Parker, 82 Ala. 238, 3 So. 19; Foster *v.* Chamberlain, 41 Ala. 158; Miller *v.* Jones, 26 Ala. 247; McCurry *v.* Hooper, 12 Ala. 823, 46 Am. Dec. 280.

78. Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Central Stock Yard, etc., Co. *v.* Mears, 89 N. Y. App. Div. 452, 85 N. Y. Suppl. 795. See also Stowell *v.* Otis, 71 N. Y. 36.

79. Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; McGill *v.* Howard, 61 Miss. 411; Burns *v.* Lidwell, 6 Mo. App. 192 (holding that, in a claim and delivery action, it is no defense for the taker to show that a third person claimed a lien on the property, the abstract right amounting to nothing unless enforced); Stowell *v.* Otis, 71 N. Y. 36; Carswell *v.* Alden, 12 N. Y. Civ. Proc. 137.

80. Neeb *v.* McMillan, 98 Iowa 718, 68 N. W. 438. But see Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432, holding that in an action against a sheriff to recover goods, or the value thereof, taken by him under a writ of attachment from the possession of a stranger to the writ, the fact that he has subsequently turned them over to a receiver, in accordance with an order of court made in a third suit, to which plaintiff was not a party, is immaterial, since, if he wrongfully seized the goods in the first instance, his liability arose at the time of seizure, and was not affected by the subsequent disposition of the goods.

81. Macky *v.* Dillinger, 73 Pa. St. 85; Phillips *v.* Monges, 4 Whart. (Pa.) 226; Warner *v.* Caulk, 3 Whart. (Pa.) 193; Peterson *v.* Haight, 3 Whart. (Pa.) 150; Patch Mfg. Co. *v.* Killinger, 26 Pa. Co. Ct. 539, 15 York Leg. Rec. 174; Jennings *v.* McKay, 4 Wkly. Notes Cas. (Pa.) 421; Talbott *v.* Padgett, 30 S. C. 167, 8 S. E. 845; Laycock *v.* Tufnell, 2 Chit. 531, 18 E. C. L. 772.

Replevin is in form an action ex delicto, and seeks damages for unlawfully seizing and carrying away personal property. Defendant cannot avail himself of a set-off, because the demand is uncertain in its nature, and it is no justification for a tortious act, that plaintiff is indebted to defendant. Fairman *v.* Fluck, 5 Watts (Pa.) 516.

No set-off against avowry for rent in replevin.— Goslin *v.* Redden, 3 Harr. (Del.) 21; Wolgamot *v.* Bruner, 4 Harr. & M. (Md.) 89; Fairman *v.* Fluck, 5 Watts (Pa.) 516; Gray *v.* Wilson, 4 Watts (Pa.) 39 (holding, however, that the rule that a set-off is not allowable in an action of replevin is not available on the trial of a feigned issue in an action of replevin to ascertain whether there is any rent due from a tenant to his landlord, since the action is in effect an action of debt); Roach *v.* Burgess, 20 Fed. Cas. No. 11,873, 4 Cranch C. C. 449. These principles, however, do not prevent the tenant from availing himself of anything in bar to the avowry for rent in arrear, which goes to show that the rent claimed by the avowant, or any portion of it, is not due; for that is the ground of the distress. Fairman *v.* Fluck, *supra*. And see *infra*, next note.

A demand originating in contract cannot be pleaded as a counter-claim in an action for the recovery of a specific chattel. Williams *v.* Irby, 15 S. C. 458.

82. Ludden, etc., Music House *v.* Hornsby, 45 S. C. 111, 22 S. E. 781 (holding that defendant might counter-claim in equity on the ground of fraud in the execution of the contract); Williams *v.* Irby, 15 S. C. 458.

Where a lessor has covenanted to make certain repairs and improvements in the demised premises, and has failed to perform his covenant, the tenant is entitled in replevin to such defalcation or reduction from the amount of the rent due as is equal to the proportionate part of the damages for the year; but he is not entitled to a deduction of the whole amount of the damage which he has sustained. Bloodworth *v.* Stevens, 51 Miss. 475; Warner *v.* Caulk, 3 Whart. (Pa.) 193; Peterson *v.* Haight, 3 Whart. (Pa.) 150; Fairman *v.* Fluck, 5 Watts (Pa.) 516; Murray *v.* Pennington, 3 Gratt. (Va.) 87. Therefore, where the goods of the tenant were distrained for the third quarter's rent, it was held that he could not deduct the damages which he had sustained during the quarters preceding. Warner *v.* Caulk, *supra*.

dictions the filing of a counter-claim in a replevin suit is expressly prohibited by statute.[83] Since the adoption of codes in most of the states, the doctrine of set-off and counter-claim has undergone much change. At first counter-claims were held not to be available in any action for a tort, and therefore not in replevin, which sounds in tort.[84] But this rule has been so far modified as to allow the interposition of a counter-claim in the full sense of the code, whether arising on contract or based upon a tort, in an action of replevin, whenever such counter-claim is founded upon a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, or whenever it is connected with the subject of the action.[85] There are decisions in which this right is recognized, but in which the facts require it to be enforced only so

When the goods sought to be replevied are the subject of a lien or charge, the charge upon them can be enforced by way of recoupment, for the charge is inseparable from the thing itself, and therefore, when the value of the thing is to be allowed in damages, the charge necessarily reduces the damages by way of a recoupment, in order to do justice to both parties. Macky *v.* Dillinger, 73 Pa. St. 85.

83. Sylvester *v.* Ammons, 126 Iowa 140, 101 N. W. 782; Chapin *v.* Garretson, 85 Iowa 377, 52 N. W. 104; Muir *v.* Miller, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032; McIntire *v.* Eastman, 76 Iowa 455, 41 N. W. 162. See also Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93, holding that under the Kansas statute, providing that a set-off can only be pleaded in actions founded on contract, it cannot be pleaded as a defense in an action of replevin, since such action is founded on tort and not on contract.

Iowa Code, § 3226, providing that no counter-claim shall be allowed in an action of replevin, does not prevent a defendant from recovering damages for the detention of the property replevied. McIntire *v.* Eastman, 76 Iowa 455, 41 N. W. 162.

Under an earlier Iowa statute, Code (1851), § 1740, any claim which would be the subject of an action against plaintiff, and which was held by defendant, either matured or not at the time the suit was commenced, may be set up as a set-off in an action of replevin. Dunham *v.* Dennis, 9 Iowa 543.

Case held not within such statute.—Where plaintiff's claim is really founded on contract, as where he seeks, by a writ of replevin, to enforce the provisions of a chattel mortgage, defendant may, notwithstanding the form of the action is replevin, avail himself, by way of set-off, of damages caused by the failure to the other party to the chattel mortgage to comply with his contract. Clement *v.* Field, 147 U. S. 467, 13 S. Ct. 358, 37 L. ed. 244 [*construing* a statute of Kansas, and *following* Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584].

84. Gottler *v.* Babcock, 7 Abb. Pr. (N. Y.) 392 note.

85. *Indiana.*— Reardon *v.* Higgins, 39 Ind. App. 363, 79 N. E. 208; Shipman Coal Min., etc., Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291, holding, however, that in the present case, the pleading, when considered as a cross bill to set aside the sale, must fail, as it introduces into the cause matter which is foreign to the subject of the complaint, although the same matter may be sufficient when pleaded as an answer in bar.

Kansas.— Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257. And see Frick Co. *v.* Stephens, 7 Kan. App. 745, 53 Pac. 378.

Missouri.— McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New York.— Thompson *v.* Kessel, 30 N. Y. 383; Cooper *v.* Kipp, 52 N. Y. App. Div. 250, 65 N. Y. Suppl. 379 (holding that in an action to recover a chattel, a claim for repairs made on it at the owner's request is sufficiently connected with the subject of the action, within Code Civ. Proc. § 501, defining counter-claims, to constitute a proper counter-claim); Brown *v.* Buckingham, 11 Abb. Pr. 387, 21 How. Pr. 190. *Compare* Roach *v.* Curtis, 50 Misc. 122, 100 N. Y. Suppl. 411.

North Carolina.— Wilson *v.* Hughes, 94 N. C. 182. *Compare* Mauney *v.* Ingram, 78 N. C. 96, 99, where it is said: "The action being in tort for withholding property to which the plaintiff is entitled, it is difficult to see how a mere money demand like this can be said to arise out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or be so connected with the subject of the action as to constitute the counter-claim defined in the Code."

Oregon.— Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808; Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277. And see Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077.

United States.— Clement *v.* Field, 147 U. S. 467, 13 S. Ct. 358, 37 L. ed. 244 [*following* Gardner *v.* Risher, 35 Kan. 93, 10 Pac. 584].

See 42 Cent. Dig. tit. "Replevin," § 106.

In replevin by a mortgagee to recover possession of the mortgaged property, which was sold to defendant, and the mortgage given to secure the purchase-price thereof, defendant may counter-claim damages arising from a breach of warranty of the goods sold. McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745; Wilson *v.* Hughes, 94 N. C. 182; Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

far as is necessary to defeat plaintiff's demand, and some of the decisions expressly confine it within that limit.[86] In other decisions counter-claims in replevin suits are not only sustained, but enforced to the extent of granting affirmative relief to defendants by judgments in their favor for amounts above the amounts found to be due to plaintiffs. That is to say, the counter-claim is enforced, in its proper sense, as a separate cause of action in favor of a defendant, and not merely as matter of defense against a plaintiff's case.[87] If a counter-claim may be set up in a reply, it can be only to defeat a recovery on a counter-claim in the answer, and not for an affirmative judgment on it.[88] There can be no counter-claim or set-off to a mere defense.[89] Matter pleaded expressly as a counter-claim, although not proper as such, may, if it constitute a defense to a claim in the opposite pleading, be available as a defense.[90]

5. Waiver of and Estoppel to Set Up Defense.[91] The general principles of waiver and estoppel [92] are applicable to the question of waiver of or estoppel to set up defenses in actions of replevin.[93]

86. Johnson *v.* St. Louis Butchers' Supply Co., 60 Ark. 387, 30 S. W. 429; Ames Iron Works *v.* Rea, 56 Ark. 450, 19 S. W. 1063; Rogers *v.* Kerr, 42 Ark. 100; Baldwin *v.* Burrows, 95 Ind. 81; Babb *v.* Talcott, 47 Mo. 343; Workman *v.* Warder, 28 Mo. App. 1; Dodd *v.* Wilson, 26 Mo. App. 462; Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

87. *Kansas.*—Deford *v.* Hutchison, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257.

Missouri.— McCormick Harvesting Mach. Co. *v.* Hill, 104 Mo. App. 544, 79 S. W. 745.

New York.— Cooper *v.* Kipp, 52 N. Y. App. Div. 250, 65 N. Y. Suppl. 379.

North Carolina.— Wilson *v.* Hughes, 94 N. C. 182.

South Carolina.— Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266.

Wisconsin.— Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

See 42 Cent. Dig. tit. "Replevin," § 106.

88. Townsend *v.* Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 N. W. 682, holding that where, in an action in replevin, defendant justifies the detention upon a lien claimed for storing the property, plaintiff may, in order to defeat the claim of lien, allege and prove damages sustained by him to as much as or more than the amount claimed to be due for storage.

89. Townsend *v.* Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 N. W. 682.

90. Townsend *v.* Minneapolis Cold-Storage, etc., Co., 46 Minn. 121, 48 N. W. 682.

91. Estoppel to deny possession by giving bond see *supra*, I, D, 3, g.

92. See generally, Estoppel, 16 Cyc. 671.

93. *Iowa.*— Warder *v.* Hoover, 51 Iowa 491, 1 N. W. 795, holding that in replevin for goods levied on by an officer under execution, the defense of want of notice of the right of ownership by plaintiff should be taken advantage of by demurrer to the complaint or petition, or by an averment in the answer or plea, and where it is not set up until the parties have rested, it will be deemed to have been waived.

Kansas.— Hasie *v.* Connor, 53 Kan. 713, 37 Pac. 128.

Maryland.— Powell *v.* Bradlee, 9 Gill & J. 220, holding that if one of plaintiffs in a previous replevin agrees to dispense with the actual delivery of the property taken under it, and to consider it delivered, so that plaintiff in a subsequent replevin may take it as if the delivery under the first writ has been consummated, it is not competent for plaintiffs in such first writ, to object that the property when taken under the second, was *in custodia legis*. But the objection that the property is *in custodia legis* may be made, unless there is an agreement, dispensing with the delivery prior to the execution of the second writ, although defendants subsequently to its execution may agree to waive the irregularity, and to ratify and confirm the proceedings of the sheriff. Powell *v.* Bradlee, *supra*.

Massachusetts.— Pomeroy *v.* Trimper, 8 Allen 398, 85 Am. Dec. 714, holding that a defendant in replevin who has prevented the officer from delivering the replevied property to plaintiff, by attaching it on a writ in his own favor, is estopped to object to the prosecution of the replevin on the ground of such non-delivery.

Michigan.—Hogan *v.* Hogan, 102 Mich. 641, 61 N. W. 73.

Missouri.— Yeldell *v.* Stemmons, 15 Mo. 443, holding that in replevin against a mortgagor of property by a purchaser at a sale on execution against the mortgagor, defendant is not estopped to set up want of property in the subject of the sale.

New York.— Burnham *v.* Brennan, 42 N. Y. Super. Ct. 49 (holding that making a return of *nulla bona* will not estop the sheriff from showing, when afterward sued to recover goods which he had seized under execution, that they belonged to the execution debtor and were subject to levy); Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Suppl. 950 (holding that where the drawer delivers a check to a third person upon his promise to deliver it to the person for whom it was intended, such party becomes a bailee for such person; and in replevin by such person for the check such party is estopped to assert a right in himself to the check).

Pennsylvania.— Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331, holding that in replevin for the wrongful detention of

6. In Actions For Property Taken on Legal Process. In replevin against an officer he may justify under a writ not returned at the time the suit was commenced, if the time for making the return had not then expired;[94] and where damages for detention are claimed he may justify by showing the issuance and levy of process by him on the property in suit subsequent to its seizure.[95] Nor is he deprived of the right to defend an action against him for the recovery of the property seized, by the fact that he violated an injunction improvidently granted restraining him from making the seizure.[96] It is not a valid defense, however, to an action against him by one whose property he has seized on execution against another, that he has taken an indemnity bond from the plaintiff in execution.[97] So it is not a defense to an action of replevin for property wrongfully seized on attachment, that defendant subsequently delivered the property to another person on order of the court made in a suit to which plaintiff was not a party;[98] and he cannot justify on the ground that the attachment plaintiff had an independent lien on the property prior to the attachment.[99]

7. Miscellaneous. It is no defense to an action of replevin that defendant purchased the property from one who had tortiously taken it from plaintiff and that plaintiff made no effort to obtain redress from the latter who was financially responsible;[1] that no demand was made for the property prior to suit, unless there was a tender of the property at the trial in accordance with statutory requirements[2] that plaintiff had committed an act which exposed the goods to forfeiture by the federal government, the property belonging to plaintiff until rendition of judgment of forfeiture;[3] that the property was more valuable than at the time of the taking, because of expenditures by defendant;[4] that before commencing the replevin suit plaintiff filed a claim for a mechanic's lien on land on which the property, claimed to be fixtures, was situated, which was not followed up by a suit to enforce it;[5] that plaintiff by the use of the property since the commencement of the action has realized more than sufficient to pay the amount of his claim, and has sold the property for a certain sum for which he has not accounted;[6] that defendant had taken the animals replevied while trespassing on his premises unless he shows that he has complied with the provisions of the estray laws after they were taken up;[7] that the property replevied (scrip) was of no value in the hands of any one else than plaintiff and that he might have obtained duplicates of it.[8]

G. Persons Who May Sue or Be Sued[9] **— 1. Persons Entitled to Sue.** Unless by reason of some special statutory provision,[10] a person cannot maintain

property, defendant is estopped, by an assertion of an absolute title to the property, made to plaintiff before suit, to allege at the trial that suit was brought prematurely.

Tennessee.— McFerrin *v.* Perry, 1 Sneed 314, holding that when plaintiff and defendant both claim under the same person, plaintiff by purchase and defendant by way of exchange, defendant is not estopped by his relation to the party under whom both claim, to show that the title was not in such party, but in a stranger.

See 42 Cent. Dig. tit. "Replevin," § 109.

94. Kingsbury *v.* Buchanan, 11 Iowa 387.

95. Blackman *v.* Wheaton, 13 Minn. 326.

96. Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841.

97. Saunders *v.* Jordon, 54 Miss. 428. *Compare* Ralston *v.* Oursler, 12 Ohio St. 105.

98. Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432.

99. Houck *v.* Linn, 48 Nebr. 227, 66 N. W. 1103.

1. Welker *v.* Wolverkuehler, 49 Mo. 35.

2. Goldsmith *v.* Taussig, 60 Mo. App. 460.

3. Stark *v.* Grant, 16 N. Y. Suppl. 526.

4. Sawyer *v.* Middlesboro Town Co., 17 S. W. 444, 13 Ky. L. Rep. 550.

5. Hacker *v.* Munroe, 56 Ill. App. 532, in which it was said that this does not change the character of the property or affect the right to maintain replevin.

6. Charles *v.* Malott, 51 Ind. 350.

7. James *v.* Fowler, 90 Ind. 563.

8. Bradley *v.* Gamelle, 7 Minn. 331.

9. Parties plaintiff see *infra*, II, C, 1.

Replevin by trustee or beneficiary see Trusts.

Replevin by United States see United States.

10. Kirk *v.* Morris, 40 Ala. 225, construing Code, § 2535, providing that goods taken in attachment may be replevied by defendant, or in his absence by a stranger, and holding that a stranger is a person not a party to the suit who acts for the benefit of defendant in attachment, and that where more than one such stranger makes application to

an action of replevin unless he is entitled to the possession of the property in question;[11] but this right to possession may follow either a general or special ownership,[12] and a person, although not in possession at the time of the taking, may maintain the action if he has a general property and the right of possession.[13] A curator may maintain replevin for property of his ward, to the possession of which he is entitled,[14] and a father, as the natural guardian of his minor children where they have no other guardian, may maintain replevin for their property.[15] Replevin may be maintained by a corporation,[16] a school-district,[17] or a parish,[18] and the superintendent of an unincorporated Sunday school may maintain an action of replevin to recover property belonging to the school.[19]

2. Persons Who May Be Sued. The general rule is that since replevin is a possessory action,[20] the person in possession is the proper and ordinarily the only proper or necessary defendant,[21] and that the action cannot be maintained against one who is not in either the actual or constructive possession or control of the property at the time the suit is instituted,[22] unless he has concealed, removed, or disposed of the same for the purpose of avoiding the writ;[23] but the action may be brought against one who is constructively, although not actually, in possession of the property;[24] and it has also been held that where one person wrongfully takes property and turns it over to another who wrongfully retains it, they may be sued jointly,[25] and that where the physicial possession is in one who is directed by another to refuse to give it up, the action may be brought against both,[26] and that one jointly interested in the object of the detention and assenting thereto for such purpose is also liable.[27] Where property of one person is taken by an

replevy, it is discretionary with the sheriff as to the one to whom the writ shall be given.

11. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

Title and right to possession of plaintiff see *supra*, I, C.

12. Sanford School Dist. No. 5 *v.* Lord, 44 Me. 374.

13. Chinn *v.* Russell, 2 Blackf. (Ind.) 172.

14. Mayer *v.* Columbia Sav. Bank, 86 Mo. App. 108.

15. Smith *v.* Williamson, 1 Harr. & J. (Md.) 147.

16. Stovell *v.* Alert Gold Min. Co., 38 Colo. 80, 87 Pac. 1071, holding that, although the secretary of a corporation is by law the custodian of its records and seal, a corporation may in its own name maintain an action to recover such property.

17. Sanford School Dist. No. 5 *v.* Lord, 44 Me. 374, holding that replevin may be maintained by a school-district to recover its records in the possession of one not legally elected as the clerk of such district.

18. Sudbury First Parish *v.* Stearns, 21 Pick. (Mass.) 148, holding that a parish may maintain replevin to recover its records from one assuming to act as clerk but not legally entitled to hold such office.

19. Climenson *v.* Green, 2 Chest. Co. Rep. (Pa.) 380.

20. House *v.* Turner, 106 Mich. 240, 64 N. W. 20.

21. See *infra*, II, C, 2.

22. *Indiana.*— Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829.

Massachusetts.—Richardson *v.* Reed, 4 Gray 441, 64 Am. Dec. 677.

Michigan.—House *v.* Turner, 106 Mich. 240, 64 N. W. 20.

Mississippi.— Griffin *v.* Lancaster, 59 Miss. 340.

Nebraska.—Depriest *v.* McKinstry, 38 Nebr. 194, 56 N. W. 806.

New York.— Murray *v.* Lese, 86 N. Y. Suppl. 581.

Ohio.— Bogan *v.* Stoutenburgh, 7 Ohio, Pt. II, 133.

See 42 Cent. Dig. tit. "Replevin," §§ 115, 116, 117.

Replevin will not lie against a justice who rendered judgment and issued the execution under which the property was seized but who was never either actually or constructively in possession of the property. Without this replevin does not lie. Fruits *v.* Elmore, 8 Ind. App. 278, 34 N. E. 829.

23. See Depriest *v.* McKinstry, 38 Nebr. 194, 56 N. W. 806.

24. Hadley *v.* Hadley, 82 Ind. 75 (holding that an officer who has levied upon property but left it in possession of the person with whom he found it upon receiving a delivery bond is still constructively in possession of the property so that the action may be brought against him); Krebs Hop Co. *v.* Taylor, (Oreg. 1908) 98 Pac. 494, 97 Pac. 44 (holding that a principal's constructive possession of goods in the hands of his agent or bailee is sufficient to entitle him to maintain replevin therefor).

25. Murdouch *v.* Tuten, 76 S. C. 502, 57 S. E. 547.

26. Northwestern State Bank *v.* Silberman, 154 Fed. 809, 83 C. C. A. 525.

27. Riley *v.* Noyes, 44 Vt. 455, holding that where one is interested jointly with another in the detention and impounding of a cow taken damage feasant as a mode of recovering the damage done by her, his assent to

officer under process directed against that of another, it is ordinarily held in jurisdictions where the action is allowed that it must be brought against the officer and not against plaintiff in the attachment or execution,[28] and that it cannot be brought against the latter either alone or jointly with the officer,[29] the possession of the officer not being the possession of plaintiff in the writ or process,[30] who therefore has neither an actual nor a constructive possession;[31] but on the contrary it has been held that where plaintiff in attachment or execution assumes control of the process or directs the officer to levy the same upon specific property, the action may be brought against him,[32] or against him and the officer jointly.[33] If a plaintiff in attachment assists the officer in seizing the property and thereafter takes it into his own possession with the concurrence of the officer, he is a proper defendant and may be sued jointly with the officer.[34] Under the statutes in one jurisdiction an action of replevin to recover goods attached in favor of a claimant who was not a party to the attachment must be brought against the attaching creditor and cannot be brought against the officer who served the attachment.[35]

II. Venue and Parties and Limitations.

A. Venue — 1. In General. Replevin is ordinarily held to be a local action,[36] although brought for a cause of action for which trespass *de bonis asportatis* would lie,[37]

such detention for that purpose is sufficient to make him liable in replevin.

28. *Illinois.*— Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378].

Massachusetts.—Richardson *v.* Reed, 4 Gray 441, 64 Am. Dec. 77.

Michigan.— House *v.* Turner, 106 Mich. 240, 64 N. W. 20.

Mississippi.— Griffin *v.* Lancaster, 59 Miss. 340, decided prior to the adoption of Code (1880), § 2633, by which actions of replevin for the recovery of property seized under execution or attachment are prohibited.

Ohio.— Bogan *v.* Stoutenburgh, 7 Ohio, Pt. II, 133.

See 42 Cent. Dig. tit. "Replevin," §§ 116, 117.

Under the Kentucky statute of 1842, a tenant whose property had been wrongfully distrained for rent might sue the landlord alone or at his option might also sue the officer. Powell *v.* Triplett, 6 B. Mon. (Ky.) 420.

29. Richardson *v.* Reed, 4 Gray (Mass.) 441, 64 Am. Dec. 77.

30. House *v.* Turner, 106 Mich. 240, 64 N. W. 20; Griffin *v.* Lancaster, 59 Miss. 340.

31. Bogan *v.* Stoutenburgh, 7 Ohio, Pt. II, 133.

32. Firestone *v.* Mishler, 18 Ind. 439; Knapp *v.* Smith, 27 N. Y. 277; Allen *v.* Crary, 10 Wend. (N. Y.) 349, 25 Am. Dec. 566.

33. Knapp *v.* Smith, 27 N. Y. 277.

34. Estey *v.* Love, 32 Vt. 744.

35. McDonald *v.* Holmes, 45 Conn. 157; Bowen *v.* Hutchins, 18 Conn. 550.

36. *Delaware.*— Parvis *v.* Truax, 7 Houst. 574, 32 Atl. 1050 [*reversing* 7 Houst. 330, 32 Atl. 227].

Maine.— Pease *v.* Simpson, 12 Me. 261.

Mississippi.— Ellison *v.* Lewis, 57 Miss. 588, holding that the action may be brought in the county where the property is found regardless of the county of defendant's residence.

New Hampshire.— Sleeper *v.* Osgood, 50 N. H. 331.

New York.— Williams *v.* Welch, 5 Wend. 290; Atkinson *v.* Holcomb, 4 Cow. 45.

Oregon.— Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5.

Pennsylvania.— See Muck *v.* Folkroad, 1 Brown 60, holding that in replevin for articles not distrained it is sufficient if the taking be laid in the county. Bue see Powell *v.* Smith, 2 Watts 126, where the action of replevin is said to be transitory.

Utah.— Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029.

United States.— Healey *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39. But see Healey *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39, holding that in Nevada the action is transitory, and can be brought wherever defendant resides, or, if he be a non-resident, in any county which plaintiff may designate in his complaint.

England.— Read *v.* How, 1 Brownl. & G. 176; Traverton *v.* Hicks, Carth. 185, 90 Eng. Reprint 712; Ward *v.* Lakin, Moore K. B. 678, 72 Eng. Reprint 834.

See 42 Cent. Dig. tit. "Replevin," § 118½.

But see Crocker *v.* Mann, 3 Mo. 472, 26 Am. Dec. 684 (holding that an action of replevin is not a local action in those cases where the object of the replevin is to try the mere right of property without reference to the place); Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661 (holding that under the statutes of Wyoming relating to replevin, replevin is not a local action and need not be brought where the goods are detained).

At common law replevin was a local action (Parvis *v.* Truax, 7 Houst. (Del.) 574, 32 Atl. 1050; Healey *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39); while under the statutes it is in some jurisdictions local and in others transitory (Healey *v.* Humphrey, *supra*.)

37. Williams *v.* Welch, 5 Wend. (N. Y.) 290.

and should therefore in the absence of some statutory provision, be brought in the county where the cause of action arose,[38] that is, where the property was unlawfully taken or is unlawfully detained,[39] and while it has been held that the action may be brought in either of such counties,[40] it has also been held that the question of venue depends upon whether the gist of the action is the unlawful taking or *cepit*,[41] or in the unlawful detention or *detinet*.[42] The venue of such actions is now ordinarily regulated by the statutes of the various jurisdictions,[43] according to the varying provisions of which the action must be brought in the county where the property or some part thereof is situated or found,[44] or in the county where defendant or one of defendants resides,[45] or if the action is before a justice of the peace either in the township where defendant resides or where the property was taken or is detained,[46] or the action may be brought either in the county where the wrongful taking occurred or where plaintiff resides,[47] or in any county where the property or some portion thereof is situated,[48]

38. Atkinson *v.* Holcomb, 4 Cow. (N. Y.) 45; Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848.

39. Hall *v.* Gilmore, 40 Me. 578; Pease *v.* Simpson, 12 Me. 261; Sleeper *v.* Osgood, 50 N. H. 331.

40. Pease *v.* Simpson, 12 Me. 261.

41. Woodward *v.* Edmunds, 20 Utah 118, 57 Pac. 848, holding that where the gist of the action is the wrongful taking or what at common law would be replevin in the *cepit* the action should be brought in the county where the wrongful taking occurred, and that in such case a demand being unnecessary will not if made affect the question of venue.

42. Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029, holding that where the action is in the *detinet* the cause of action arises when and where the demand is made and refused, and that the action should be brought in the county where the property is at this time and not in the county where it is when process is served.

43. See the statutes of the several states; and cases cited *infra*, notes in this section.

44. Allen *v.* St. Louis, etc., R. Co., 38 Mo. App. 294 ("in the county in which the said property may be found"); Brown *v.* Cogdell, 136 N. C. 32, 48 S. E. 515 (in the county where the property is situated); Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5 (in the county in which the subject of the action or some part thereof is situated).

The county where the property "is found" related to its location at the time the action is commenced and not to its location when seized under the writ. Craft *v.* Franks, 34 Iowa 504.

The county where the property is situated is not the county where it was taken, but the county where it is unlawfully held at the time the action is instituted. Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5.

45. Fry *v.* Shafor, 164 Ind. 699, 74 N. E. 503; Hodson *v.* Warner, 60 Ind. 214; Shryer *v.* Miner, 20 Ind. 175.

Where there are several defendants residing in different counties the action may be brought in any county in which any defendant resides, if such defendant was made a party in good faith, but if such defendant is not a necessary party and was made such merely to give the court of the county of his residence jurisdiction of the action, and the action is dismissed as to him, the case stands as if it had been originally instituted in a county where no defendant resided, and such fact may be pleaded by plaintiff to defeat the jurisdiction of the court. Shryer *v.* Miner, 20 Ind. 175.

46. Copple *v.* Lee, 78 Ind. 230.

Under the Indiana statute an action of replevin brought before a justice of the peace may be brought either in the township where defendant resides or in which the property was taken or is detained (Copple *v.* Lee, 78 Ind. 230; Cook *v.* Gibson, 21 Ind. 303; Jocelyn *v.* Barrett, 18 Ind. 128); but it must be brought in one or the other of such townships (Copple *v.* Lee, *supra* [*overruling* in so far as conflicting Test *v.* Small, 21 Ind. 127; Beddinger *v.* Jocelyn, 18 Ind. 325]).

47. Hinds *v.* Backus, 45 Minn. 170, 47 N. W. 655 (holding that the Minnesota statute of 1877, providing that the action may be brought "in the county where the wrongful taking occurred, or where the plaintiff resides," authorizes an action to be brought in the county where plaintiff resides, although the taking was by a sheriff, and the prior statutes in regard to actions against public officers provided that such actions should be tried in the county where the cause of action arose); Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

48. Laughlin *v.* Main, 63 Iowa 580, 19 N. W. 673; Porter *v.* Dalhoff, 59 Iowa 459, 13 N. W. 420.

Removal after institution of suit.— Where the petition shows that the property has been wrongfully removed into another county from that in which the action is commenced, the order may issue from the county whence the property was taken and be served in the county where the property is found. Hibbs *v.* Dunham, 54 Iowa 559, 6 N. W. 719. See also Crosier *v.* Stillson, 67 Vt. 315, 31 Atl. 779, holding that a writ of replevin made returnable to the county in which the property is detained may be served in another county to which the property has been transferred after the beginning of the suit.

or wherever defendant resides.[49] Where the statute provides that the action may be brought in the county where the property is situated, it is held that it is not necessary to do so, and that if defendant resides in another county plaintiff may elect to bring the action in that county,[50] but that the action must be brought either in the county where the property is situated or where defendant resides.[51]

2. CHANGE OF VENUE.[52] A change of venue may and should be granted where it appears that the action was not brought in the proper county,[53] provided a motion for a change of venue is made,[54] and notice thereof given to the adverse party.[55] If, however, the action was properly brought in the county where the property was taken or is situated, defendant is not entitled to a change of venue to the county of his residence because the property was not taken or delivered under the writ,[56] or because plaintiff does not claim an immediate delivery of the property;[57] and where replevin is held to be a local action the venue will not ordinarily be changed from the county where the cause of action arose.[58]

B. Time to Sue and Limitations. Replevin will not lie for property held in connection with a tenancy on shares running from year to year and terminable only on notice until the year has expired and notice has been given,[59] and a landlord cannot replevy his share of a crop until sufficient time has elapsed to allow the tenant to deliver it,[60] but replevin will lie for animals impounded either before or after they are advertised.[61] The statute of limitations applicable to such actions[62] begins to run from the time of the wrongful taking and not from the time when plaintiff first had knowledge thereof if there was no fraud or attempt

49. Healey *v.* Humphrey, 81 Fed. 990, 27 C. C. A. 39, holding that under the Nevada statute the action may be brought wherever defendant resides, or if defendant is a nonresident, in any county plaintiff may designate in his complaint.

50. Hibbs *v.* Dunham, 54 Iowa 559, 6 N. W. 719.

51. Parker *v.* Norris, 56 Iowa 295, 9 N. W. 225; Hibbs *v.* Dunham, 54 Iowa 559, 6 N. W. 719.

52. See, generally, VENUE.

53. Parker *v.* Norris, 56 Iowa 295, 9 N. W. 225; Brown *v.* Cogdell, 136 N. C. 32, 48 S. E. 515.

The court should grant a change of venue from one county to another where it appears that practically all of the transactions upon which the cause of action is based occurred in the latter county, and that the witnesses will be principally residents of that county and that their convenience requires the change. Zenner *v.* Dexter, 92 Hun (N. Y.) 195, 36 N. Y. Suppl. 590.

It is reversible error to exclude evidence offered in support of a motion for a change of venue in an action of replevin, where such evidence tends to show that the action was not brought in the proper county. Parker *v.* Norris, 56 Iowa 295, 9 N. W. 225.

54. Goldsmith *v.* Willson, 67 Iowa 662, 25 N. W. 870, holding that, although the action should be brought in the county where the property is situated instead of the county of defendant's residence, yet if no motion for a change of venue is made an action brought in the latter county may be prosecuted there to final judgment.

The demand must be made before answer under the Iowa statute, and if not so made the action, although brought in the wrong county, may be prosecuted there to termination. Kelley *v.* Cosgrove, 83 Iowa 229, 48 N. W. 979, 17 L. R. A. 779.

55. Graves *v.* Shoefelt, 60 Ill. 462, holding that it is not error to refuse a motion for a change of venue in an action of replevin where no notice of the motion has been given to the other party.

56. Laughlin *v.* Main, 63 Iowa 580, 19 N. W. 673, construing Iowa Code, § 3225, and holding that the action is properly brought in the county where the property is situated, whether the property is taken and delivered under the writ or not.

57. Benjamin *v.* Smith, 43 Minn. 146, 44 N. W. 1083, holding that under Gen. St. (1878) c. 66, § 132, it is optional with plaintiff to claim an immediate delivery of the property or to let the action proceed and obtain possession upon execution after judgment, and that a failure to claim immediate delivery does not change the action to one for conversion, and does not necessitate a change of venue from the county where the property was taken to the county of defendant's residence.

58. Atkinson *v.* Holcomb, 4 Cow. (N. Y.) 45, holding that whether such change may be made for any cause it will not be granted upon the ground of the convenience of witnesses.

59. Coan *v.* Mole, 39 Mich. 454.

60. Mouser *v.* Davis, 9 Ohio Dec. (Reprint) 237, 11 Cinc. L. Bul. 249.

61. Varney *v.* Bowker, 63 Me. 154.

62. See Payne *v.* Bruton, 10 Ark. 53; Wells *v.* Halpin, 59 Mo. 92; and, generally, LIMITATIONS OF ACTIONS, 25 Cyc. 1030.

The affidavit required by statute to be filed, stating that the cause of action accrued within two years, is merely a prerequisite to the issuance of the writ and not a statute of limitations; the limitation for

at concealment,[63] and if such fraud or concealment exists it must, in order to avail plaintiff, be the act of defendant himself;[64] but where a demand is a prerequisite to the bringing of the action, the limitation runs from the time of such demand.[65]

C. Parties — 1. Plaintiffs. Since, in an action of replevin the right to the possession of the property is essentially involved, the party entitled thereto must be the real plaintiff in the suit, and a party not holding the legal title, and in no way entitled to possession, cannot maintain replevin for the use of another;[66] but if a party who sues for the use of another is entitled to recover in his own name, the fact that the usee's name is inserted in the pleading should not alone defeat a recovery.[67] While it has been held that under certain circumstances a joint owner or tenant in common of property may sue alone to recover it,[68] the general rule is that an action of replevin cannot be maintained by one of several joint owners or tenants in common without joining the others as parties,[69] but while joint tenants or tenants in common may and should be joined,[70] several persons having separate and distinct interests in a chattel cannot join in such action,[71] nor can a person having neither title nor right of possession to the property in question join in an action for its recovery.[72] An agent or trustee being in the lawful possession of property, may bring the action of replevin in his own name for the recovery thereof,[73] and an administrator or executor may bring an action of

bringing the action being three years. Payne *v.* Bruton, 10 Ark. 53.

63. Dee *v.* Hyland, 3 Utah 308, 3 Pac. 388.

64. Wells *v.* Halpin, 59 Mo. 92.

65. Torian *v.* McClure, 83 Ind. 310, holding that where the property is in the hands of a purchaser in good faith for value and without notice of defect of title, a demand is necessary, and that the statute of limitations does not begin to run until the time of such demand. See also King *v.* Cressap, 22 La. Ann. 211, holding that a suit for the recovery of goods on deposit or their value is in time if brought within one year after demand for restitution.

66. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597; Meyer *v.* Mosler, 64 Miss. 610, 1 So. 837; Moore *v.* Watson, 20 R. I. 495, 40 Atl. 345.

67. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597.

The usee may be considered as no party to the action and his name treated as surplusage. Roof *v.* Chattanooga Wood Split Pulley Co., 36 Fla. 284, 18 So. 597. See also Meyer *v.* Mosler, 64 Miss. 610, 1 So. 837, holding, however, that while the name of a usee may be treated as surplusage, a recovery can be had only when the nominal plaintiff is entitled to recover.

68. Lannes *v.* Courege, 31 La. Ann. 74 (holding that one having a joint interest in personal property may sue alone to recover possession from a mere trespasser); Ferguson *v.* Rafferty, 128 Pa. St. 337, 18 Atl. 484, 6 L. R. A. 33 (holding that where one cotenant with the consent of one and without objection by the other of his cotenants has sold timber, reserving the right to hold the logs when cut as security for the purchase-price, he may bring replevin to enforce this security, and that defendant while claiming under the sale cannot defeat the action on the ground that the others interested in the property were not joined as plaintiffs); Chaffee *v.* Harrington, 60 Vt. 718, 15 Atl. 350 (holding that one joint owner of a horse who with the consent of the other joint owner has possession thereof may maintain replevin to recover it unless the right of defendant to the property is superior to his own).

69. *Delaware.*— Fell *v.* Taylor, 2 Pennew. 372, 45 Atl. 716.

Indiana.— Bain *v.* Trixler, 24 Ind. App. 246, 56 N. E. 690.

Massachusetts.— Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75.

Missouri.— Upham *v.* Allen, 76 Mo. App. 206 (holding that a plaintiff in replevin showing title in himself and others not parties cannot recover); Upham *v.* Allen, 73 Mo. App. 224.

Nebraska.— Honaker *v.* Vesey, 57 Nebr. 413, 77 N. W. 1100.

New Jersey.— Chambers *v.* Hunt, 18 N. J. L. 339.

North Carolina.— Heaton *v.* Wilson, 123 N. C. 398, 31 S. E. 671.

See 42 Cent. Dig. tit. "Replevin," § 121.

Joinder of joint tenants and tenants in common see *supra*, I, C, 2, e.

70. Honaker *v.* Vesey, 57 Nebr. 413, 77 N. W. 1100; Chambers *v.* Hunt, 18 N. J. L. 339.

71. Chambers *v.* Hunt, 18 N. J. L. 339; Wehlen *v.* Macke, 9 Ohio Dec. (Reprint) 565, 15 Cinc. L. Bul. 125.

72. Refeld *v.* Bellette, 14 Ark. 148. But see Lieberman *v.* Clark, 114 Tenn. 117, 85 S. W. 258, 69 L. R. A. 732, holding that where the whole possessory right of the property in replevin is in one of plaintiffs, it is immaterial to defendants if he joined others with him in the suit.

73. *Colorado.*— Bartels *v.* Arms, 3 Colo. 72.

Georgia.— McDuffie *v.* Irvine, 91 Ga. 748, 17 S. E. 1028.

Michigan.— Rose *v.* Eaton, 77 Mich. 247, 43 N. W. 972, holding that B as custodian for his children, being in the legal possession

replevin for property of his intestate in his own name; he need not sue in his representative capacity.[74]

2. Defendants. In an action of replevin the person in possession of the property is ordinarily the proper and only necessary party defendant,[75] but the joinder as defendant of a person not in possession of the property is not necessarily fatal to the action.[76] Plaintiff is not required to join as defendants persons claiming an interest in the property but not in possession thereof,[77] or a stranger in whom property is pleaded or shown,[78] or one claiming no interest in the property nor any right to possession;[79] nor is he entitled to an order making persons so interested but whose presence is not necessary to the determination of the controversy between him and defendant in possession parties against their will,[80] although they may properly be admitted as defendants upon their own application.[81] It has been held, however, that a servant who in the course of his employment wrongfully takes the property of another may be joined with the master in an action of replevin,[82] and that a sheriff and his purchaser under an execution sale may be joined in a replevin action by a third person who served notice of ownership on the sheriff prior to the sale.[83] Where the action is against an officer

of crops grown on their land, could replevin them in his own name, without joining the children, from an officer who seized them on execution against him.

Mississippi.— Garrett *v.* Carlton, 65 Miss. 188, 3 So. 376, holding that an action to recover property which had been conveyed to a trustee should be brought in the name of the trustee who has the legal title.

South Dakota.— Church *v.* Foley, 10 S. D. 74, 71 N. W. 759.

See 42 Cent. Dig. tit. "Replevin," § 121.

An agent of a mortgagee, never in possession of the property, cannot bring an action of replevin in his own name. Fullerton *v.* Morse, 162 Ill. 43, 44 N. E. 390 [*affirming* 63 Ill. App. 541].

74. Branch *v.* Branch, 6 Fla. 314; Kent *v.* Bothwell, 152 Mass. 341, 25 N. E. 721, 9 L. R. A. 258; Trask *v.* Donoghue, 1 Aik. (Vt.) 370, holding that an executor need not describe himself as such in an action to recover property of the estate wrongfully converted by a stranger, as his possession and accountability for the property make a sufficient title for him to recover in his own name.

But after a person has ceased to be administrator he cannot maintain an action of replevin for property belonging to the estate. Afflerbach *v.* McGovern, 79 Cal. 268, 21 Pac. 837.

75. *Illinois.*— Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378]; Christy *v.* Ashlock, 93 Ill. App. 651.

Maryland.— Hergberg *v.* Sachse, 60 Md. 426.

Michigan.— Colby *v.* Portman, 115 Mich. 95, 72 N. W. 1098. See also Michigan Mut. L. Ins. Co. *v.* Cronk, 93 Mich. 49, 52 N. W. 1035, holding that a house erected on land by a person in possession under a contract of purchase being personal property after such person wrongfully removes it from the land, no homestead right can attach thereto, and hence in an action of replevin by the vendor to recover it such person's wife is not a necessary party.

Missouri.— Kansas Moline Plow Co. *v.* Wayland, 81 Mo. App. 305, holding that in an action of replevin against the assignee of a vendee to recover goods fraudulently sold the vendee is not a proper party defendant.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Nebraska.— Engel *v.* Dado, 66 Nebr. 400, 92 N. W. 629.

New York.— Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261; Hazlett *v.* Hamilton Storage, etc., Co., 47 Misc. 660, 94 N. Y. Suppl. 580; King Co. *v.* Seed, 6 Misc. 4, 25 N. Y. Suppl. 1115.

Oklahoma.— Irwin *v.* Walling, 4 Okla. 128, 44 Pac. 219; Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

See 42 Cent. Dig. tit. "Replevin," § 122.

Where property is left by an officer with another person who retains possession thereof, such person, although he may be acting under the officer's orders, is a proper defendant in replevin to recover such property and the officer is not a necessary party. Engel *v.* Dado, 66 Nebr. 400, 92 N. W. 629.

76. Herzberg *v.* Sachse, 60 Md. 426.

77. Read *v.* Brayton, 143 N. Y. 342, 38 N. E. 261; Hazlett *v.* Hamilton Storage, etc., Co., 47 Misc. (N. Y.) 660, 94 N. Y. Suppl. 580.

78. Thompson *v.* Sweetser, 43 Ind. 312.

79. Gerth *v.* Gerth, 9 Cal. App. 735, 95 Pac. 904.

80. Goldstein *v.* Shapiro, 85 N. Y. App. Div. 83, 82 N. Y. Suppl. 1038; Hochman *v.* Hauptman, 76 N. Y. App. Div. 72, 78 N. Y. Suppl. 659; King Co. *v.* Seed, 6 Misc. (N. Y.) 4, 25 N. Y. Suppl. 1115.

81. Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161.

Intervention see *infra*, II, C, 3.

82. Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153, holding that a servant of a corporation may be joined with the company as defendant in replevin where he took the property in the course of his service to the company.

83. Mitchell *v.* McLeod, 127 Iowa 733, 104 N. W. 349.

to recover property wrongfully taken by him under process, he may be sued either as an officer or as an individual,[84] and in such action the officer is the only necessary party defendant,[85] it being unnecessary to join the judgment creditor or plaintiff in attachment,[86] although they may be properly admitted as defendants upon their own application.[87]

3. INTERVENTION. Subject to the general rules governing the right of intervention,[88] a person claiming title to or an interest in or claim or lien upon the property involved in an action of replevin may intervene in such action to protect his rights,[89] and the sureties on the bond of defendant in replevin may intervene to protect themselves from liability, as where defendant is insolvent,[90] or the action is not being defended in good faith.[91] But while interested parties may be permitted to come in, they will not be compelled to do so against their will,[92] although it has been held that where defendant by his answer disclaims title and alleges ownership of the property in a third person, the court should of its own motion require such person to intervene.[93] A person is not entitled to intervene, however, who has no interest which will in any way be affected by the decision

84. Irwin *v.* Walling, 4 Okla. 128, 44 Pac. 219; Burchett *v.* Purdy, 2 Okla. 391, 37 Pac. 1053.

85. *Illinois.*— Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378]. See also McCarthy *v.* Hetzner, 70 Ill. App. 480.

Iowa.— Bevan *v.* Hayden, 13 Iowa 122.

Kansas.— Hoisington *v.* Brakey, 31 Kan. 560, 3 Pac. 353.

Missouri.— Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583, holding, further, that the sureties on the officer's official bond are improperly joined as parties defendant, where they were not in any manner concerned with the seizure or detention of the property.

Washington.— Scott *v.* McGraw, 3 Wash. 675, 29 Pac. 260.

See 42 Cent. Dig. tit. "Replevin," § 122.

86. Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378]; Bevan *v.* Hayden, 13 Iowa 122; Hoisington *v.* Brakey, 31 Kan. 560, 3 Pac. 353.

87. Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161, holding that in an action of replevin against a sheriff to recover goods attached by him, it is proper to allow the plaintiff in the attachment suit to be made a co-defendant. See also Hoisington *v.* Brakey, 31 Kan. 560, 3 Pac. 353.

88. See, generally, PLEADING, 31 Cyc. 512.

89. *Arkansas.*— Lambert *v.* Tucker, 83 Ark. 416, 104 S. W. 131.

California.— Hendy Mach. Works *v.* Dillon, 135 Cal. 9, 66 Pac. 960, person claiming title to property.

Iowa.— Dupont *v.* Amos, 97 Iowa 484, 66 N. W. 774.

Kansas.— Wafer *v.* Harvey County Bank, 36 Kan. 292, 13 Pac. 209, holding that where creditors of a debtor cause property of the latter to be attached and an action of replevin is brought by a mortgagee or pledgee against the officer holding property, such creditors should be permitted to intervene in the action of replevin.

Missouri.— Talbot *v.* Magee, 59 Mo. App. 347, holding that in replevin before a justice to recover a mare from an execution plaintiff to whom the constable delivered her for safekeeping after levying upon her, it is not reversible error to deny the constable's application to be made a party defendant, where a defense that the constable might have made was not permitted to be made by the execution plaintiff as his bailee and custodian of the mare. But see Browning *v.* Randol, 69 Mo. App. 595, holding that an interplea cannot be filed by an adverse claimant of property in an action of replevin, and that an interplea in such an action cannot be treated as an intervention.

Nebraska.— Welborn *v.* Eskey, 25 Nebr. 195, 40 N. W. 960; Albright *v.* Brown, 23 Nebr. 136, 36 N. W. 297, mortgagee.

New York.— Rosenberg *v.* Salomon, 144 N. Y. 92, 38 N. E. 982 [*affirming* 8 Misc. 616, 29 N. Y. Suppl. 327] (judgment creditor in action against officer); Conklin *v.* Bishop, 3 Duer 646 (plaintiff in execution in action against constable); Friedman *v.* Schreiber, 50 Misc. 617, 98 N. Y. Suppl. 235; Standard Sewing Mach. Co. *v.* Heyman, 25 Misc. 429, 54 N. Y. Suppl. 936.

Ohio.— Morgan *v.* Spangler, 20 Ohio St. 38, plaintiff in attachment in action against sheriff.

Pennsylvania.— Lawall *v.* Lawall, 150 Pa. St. 626, 24 Atl. 289; Holmes *v.* Pennsylvania R. Co., 2 Pa. Co. Ct. 345, 18 Wkly. Notes Cas. 429, assignee of bill of lading in action against consignee and common carrier for goods stopped *in transitu*.

South Carolina.— Wilkins *v.* Lee, 42 S. C. 31, 19 S. E. 1016.

See 42 Cent. Dig. tit. "Replevin," § 123.

90. Coburn *v.* Smart, 53 Cal. 742; Boessneck *v.* Bab, 27 Misc. (N. Y.) 379, 58 N. Y. Suppl. 849.

91. Coburn *v.* Smart, 53 Cal. 742.

92. Goldstein *v.* Shapiro, 85 N. Y. App. Div. 83, 82 N. Y. Suppl. 1038; King Co. *v.* Seed, 6 Misc. (N. Y.) 4, 25 N. Y. Suppl. 1115.

93. Wilkins *v.* Lee, 42 S. C. 31, 19 S. E. 1016.

of the case,[94] nor will a person be permitted to intervene where there has been an unreasonable delay in making the application,[95] or to grant the application if it would delay the disposition of the case between the original parties,[96] or where the only right which the applicant shows to the property rests upon his own fraud;[97] and where a person with the consent of the parties consents to be a defendant after the action has been pending for several months, and no action is then taken by the court, it is not error for the trial court on rendering judgment to order that he be dropped from the action.[98]

4. Substitution of Parties. In some jurisdictions the statutes provide that in actions against an officer for the recovery of property seized under process, the court may upon application substitute plaintiff in such process as defendant,[99] but it is within the discretion of the court to grant or refuse such application.[1] Provision is also made by statute for the substitution of an assignee of the cause of action after suit brought as plaintiff,[2] and for the substitution as defendant of a person claiming the property in question, upon application of the original defendant who is in possession of the property but has no claim thereto.[3] It has been held, in the absence of express statutory provision, that where the property has been distrained for rent by an agent of a landlord, the landlord may come in and be substituted for the agent and avow for rent in arrear,[4] and that the coheirs or joint tenants of a defendant in replevin may upon his death come in and defend the action;[5] but where plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff, over defendant's objection,[6] or at least it is not error to refuse to do so where the person sought to be substituted as plaintiff has not given any bond,[7] and in any case where a substitution

94. Knowles Loom Works *v.* Ryle, 81 Fed. 940, holding that holders of bonds secured by a mortgage, to the lien whereof certain machinery is subject, are not entitled to intervene as parties defendant in an action of replevin for the machinery, where defendant has elected to give a claim property bond to the marshal, and to retain the machinery, as their interests cannot be affected by the decision.

95. Clemmons *v.* Hampton, 70 N. C. 534, in which case it was held that an application to intervene made by a person claiming to be the owner of a part of the property is properly denied on the ground of laches, where he has waited for more than three years after the seizure and shows no excuse for the delay.

96. Dupont *v.* Amos, 97 Iowa 484, 66 N. W. 774.

97. Levy *v.* Woodcock, 63 N. H. 413.

98. Harrison *v.* Clark, 74 Conn. 18, 49 Atl. 186.

99. Wafer *v.* Harvey County Bank, 36 Kan. 292, 13 Pac. 209; Sifford *v.* Beaty, 12 Ohio St. 189; France *v.* Omaha First Nat. Bank, 3 Wyo. 187, 18 Pac. 748.

1. Wafer *v.* Harvey County Bank, 36 Kan. 292, 13 Pac. 209 (holding that the refusal of such permission cannot be assigned for error unless the discretion of the court is clearly abused); Sifford *v.* Beatty, 12 Ohio St. 189 (holding that the statute authorizing such substitution is merely permissive and not mandatory, and that the application is properly denied where the action is to recover both the property and damages for its detention, and plaintiff in attachment seeking to be substituted is a non-resident and probably insolvent and the statute merely requires a bond for costs to be given).

2. See Kreibohm *v.* Yancey, 154 Mo. 67, 55 S. W. 260, holding that under Rev. St. (1889) § 2204, authorizing the substitution of the assignee of a cause of action as plaintiff after suit brought, there was no error in the trial court requiring plaintiff's assignee in an action of replevin who had possession of the property claimed to give a new bond as a condition for substitution.

3. State *v.* First Judicial Dist. Ct., 28 Mont. 445, 72 Pac. 867 (holding, however, that the court cannot make the order substituting a claimant on the application of a defendant who has no control of the property, because of its previous delivery to the sheriff, and no power to deliver it on the court's order); Lynch *v.* St. Johns, 8 Daly (N. Y.) 142 (holding, however, that the court cannot make an order substituting a claimant to the property as defendant unless the original defendant in possession thereof delivers it to the sheriff and the claimant makes the affidavit of title and right of possession as required by statute).

4. Keckley *v.* Harris, 2 McMull. (S. C.) 196.

5. Talvande *v.* Cripps, 2 McCord (S. C.) 164, where defendant as administrator and agent for the heirs, of whom he was one, had distrained for rent and the tenant had brought replevin, and defendant died while the action was pending, and the other heirs were allowed to come in and defend.

6. Meyer *v.* Omaha Furniture, etc., Co., 76 Nebr. 405, 107 N. W. 767; Flanders *v.* Lyon, 51 Nebr. 102, 70 N. W. 524.

7. Pierce *v.* Batten, 3 Kan. App. 396, 42

of parties is not a matter of right it should not be permitted where it would operate to the prejudice of the adverse party.[8] So it has been held that a substitution introducing entire new parties is properly refused.[9] Where there is a substitution of parties plaintiff a stipulation entered into by the original plaintiff will bind the substituted plaintiff.[10]

III. Proceedings For Taking and Redelivery of Property.

A. Affidavit [11] — **1. Necessity and Purpose.** The office of the affidavit which is required under the various statutes upon suing out a writ of replevin or instituting a claim and delivery proceeding is to anticipate the delivery of the property to plaintiff without waiting for the determination of his rights by judgment.[12] It corresponds to the "proceeding by plaint" under the statute of Marlbridge,[13] and where such immediate possession of the property is demanded, the affidavit required by statute is an essential prerequisite to the order for delivery or the issue or execution of the writ as the statute may provide.[14] The facts

Pac. 924, holding that one who neither demanded the property nor gave a bond could not be substituted for a plaintiff in replevin, who had made a demand and given bond, and who was in possession of the property.

8. Flanders *v.* Lyon, 51 Nebr. 102, 70 N. W. 524.

9. Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228. Substitution of surviving partners for individual plaintiff.

10. Temple *v.* Alexander, 53 Cal. 3.

11. See, generally, Affidavits, 2 Cyc. 1.

12. Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; Hawes *v.* Robinson, 44 Ark. 308 (to procure order of delivery); Eads *v.* Stephens, 63 Mo. 90; Bingham *v.* Morrow, 29 Mo. App. 448.

Preventing retention by defendant.— It also serves the purpose of preventing defendant's retention of the property by giving bond. Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223.

13. St. 52 Hen. II, c. 21 [*cited* in Anderson *v.* Hapler, 34 Ill. 436, 85 Am. Dec. 318]; Bardwell *v.* Stubbert, 17 Nebr. 485, 23 N. W. 344.

14. *Arkansas.*— Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196.

Connecticut.—Nichols *v.* Standish, 48 Conn. 321.

Kansas.— Paul *v.* Hodges, 26 Kan. 225.

Nebraska.—Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* judgment in 79 Nebr. 32, 112 N. W. 321]; J. I. Case Threshing Machine Co. *v.* Rosso, 78 Nebr. 184, 110 N. W. 685; Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843.

New York.— Berrien *v.* Westervelt, 12 Wend. 194, under statute forbidding execution of writ unless the prescribed affidavit is made.

See 42 Cent. Dig. tit. "Replevin," § 128.

As to a new party brought in by amendment after obtaining an order of delivery, the proceeding is held to be void without any additional affidavit, etc. Bardwell *v.* Stubbert, 17 Nebr. 485, 23 N. W. 344.

Objection jurisdictional or otherwise.—A failure to comply with the requirement is held to be merely an irregularity in procuring and issuing the replevin process, which at most makes it voidable at the election of defendant in replevin, but does not render it void (Nichols *v.* Standish, 48 Conn. 321), and it cannot be set up collaterally, as in proceedings to enforce liability on the replevin bond (Nichols *v.* Standish, *supra*; Jennison *v.* Haire, 29 Mich. 207). But under various statutes conferring jurisdiction of such possessory actions upon inferior courts, as justices of the peace, the affidavit is held to be the basis of the suit and without it there is no jurisdiction. Clow *v.* Gilbert, 54 Ill. App. 134; Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836; Elliott *v.* Whitmore, 5 Mich. 532; Crawford Commercial State Bank *v.* Ketcham, 46 Nebr. 568, 65 N. W. 201; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843; Detroit Safe Co. *v.* Kelly, 78 Wis. 134, 47 N. W. 187; Daily *v.* Doe, 3 Fed. 903, under New York statute, as to which, however, see Young *v.* Carey, 29 Misc. (N. Y.) 278, 61 N. Y. Suppl. 508, where the necessity for the affidavit is made to depend upon whether immediate possession of the property is sought. In Indiana the cases seem not to have been in accord, some considering the affidavit as not jurisdictional (Fawkner *v.* Baden, 89 Ind. 587; Eddy *v.* Beal, 34 Ind. 159; Lemert *v.* Shaffer, 5 Ind. App. 468, 31 N. E. 1128, 32 N. E. 788), while others take a different view (Deardoff *v.* Ulmer, 34 Ind. 353; Allen *v.* Frederick, 26 Ind. App. 430, 59 N. E. 330).

Affidavit before execution but not before issue of the writ is sometimes contemplated by the statute, and in such case jurisdiction to issue the writ does not depend upon the affidavit which, however, must be made and annexed to the writ before it is executed. Taylor *v.* Kalamazoo Circuit Judge, 100 Mich. 181, 58 N. W. 835; Baker *v.* Dubois, 32 Mich. 92; Wilbur *v.* Flood, 16 Mich. 40, 93 Am. Dec. 203; Phenix *v.* Clark, 2 Mich. 327.

A judgment by default cannot be sustained when the writ was improvidently issued without the required affidavit. Kehoe *v.* Rounds, 69 Ill. 351.

An oath before the magistrate will not suffice to take the place of the affidavit or oath or affirmation reduced to writing, pre-

necessary to be set forth in such affidavit are held to form no part of the issues,[15] although, on the other hand, when the purpose of the affidavit to authorize a preliminary seizure of property in an action before a justice of the peace has been accomplished it sometimes serves as a complaint.[16] Under various statutory provisions, the action may be brought and the rights of the parties tried without a preliminary seizure of the property, such seizure being a mere ancillary or provisional remedy which plaintiff may or may not pursue at his option, and the affidavit is not essential if he should elect to proceed without disturbing defendant's possession.[17] In such cases the affidavit is not jurisdictional. If there is no pleading there is no case in court to be tried, even though the affidavit is filed, while, on the other hand, if there is a good pleading there is a cause in court without the affidavit;[18] the action may proceed to judgment determining the rights of the parties;[19] and if the writ or order has issued improperly the remedy is by quashal or setting it aside.[20]

2. Affidavit by Agent or Attorney. Generally, under the various statutory provisions, an affidavit in replevin, which is verified by plaintiff's duly authorized agent or attorney, is sufficient,[21] or by plaintiff or someone who acts in his

scribed by the statute as a condition precedent to the attaching of jurisdiction. Evans *v.* Bouton, 85 Ill. 579.

15. Hoisington *v.* Armstrong, 22 Kan. 110; Moser *v.* Jenkins, 5 Oreg. 447. So where the cause may proceed without a preliminary seizure of the property, the facts justifying such seizure need not be set up in plaintiff's pleading in order to confer jurisdiction. Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* judgment in 79 Nebr. 32, 112 N. W. 321].

A variance between affidavit and complaint will not be material. Kerrigan *v.* Ray, 10 How. Pr. (N. Y.) 213; Moser *v.* Jenkins, 5 Oreg. 447. The rule was otherwise, however, under the old system of pleading. Kerrigan *v.* Ray, *supra*.

16. Hawes *v.* Robinson, 44 Ark. 308; Hanner *v.* Bailey, 30 Ark. 681.

On appeal from a judgment of a justice's court a new affidavit in replevin need not be filed unless by way of amendment, and, the original affidavit being sufficient, if another is filed in the appellate court it must be taken to be by way of amendment and not as stating a new cause of action. Dodd *v.* Skelton, 65 Nebr. 585, 91 N. W. 543; German Nat. Bank *v.* Aultman, 63 Nebr. 324, 88 N. W. 479.

17. *Arkansas.*— Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196; Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474.

California.— Wellman *v.* English, 38 Cal. 583, under claim and delivery statute.

Indiana.— Hodson *v.* Warner, 60 Ind. 214; Catterlin *v.* Mitchell, 27 Ind. 298, 89 Am. Dec. 501.

Kansas.— Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592; Batchelor *v.* Walburn, 23 Kan. 733; Williams *v.* Gardner, 22 Kan. 122.

Missouri.— Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223; Eads *v.* Stephens, 63 Mo. 90; Bingham *v.* Morrow, 29 Mo. App. 448; Keen *v.* Munger, 52 Mo. App. 660; Hamilton *v.* Clark, 25 Mo. App. 428.

Nebraska.—Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* judgment in 79 Nebr. 32, 112 N. W. 321].

New York.— Young *v.* Carey, 29 Misc. 278, 61 N. Y. Suppl. 508.

North Carolina.— Bridgers *v.* Ormond, 148 N. C. 375, 62 S. E. 422; Jarman *v.* Ward, 67 N. C. 32.

South Dakota.— Johnson *v.* Hillenhand, 18 S. D. 446, 101 N. W. 33; Simpson Brick-Press Co. *v.* Marshall, 5 S. D. 528, 59 N. W. 728, which cases are under claim and delivery statute.

See 42 Cent. Dig. tit. "Replevin," § 128.

18. Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196; Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223; F. G. Oxley Stave Co. *v.* Whitson, 34 Mo. App. 624; Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* judgment in 79 Nebr. 32, 112 N. W. 321].

19. Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196; Eaton *v.* Langley, 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474 (holding that under the statutory provision that a judgment for plaintiff may be for the delivery of the property, or for the value thereof, in case a delivery cannot be had, and damages for the detention, the right to this judgment is in no wise affected by the issue or failure to issue an order of delivery); Williams *v.* Gardner, 22 Kan. 122 (action proceeds as for damages); Jarman *v.* Ward, 67 N. C. 32 (under the claim and delivery statute the action proceeds as the old action of detinue).

Even if the writ issues the want of an affidavit is not material after judgment where the possession was not taken under the writ. Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592. So also where the order for possession issues from a justice's court on a defective affidavit, but the property is not found. Williams *v.* Gardner, 22 Kan. 122.

20. See *infra*, III, A, 4, a.

21. *Colorado.*— Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416.

Illinois.— Colborn *v.* Barton, 14 Ill. App. 449.

Indiana.— Hall *v.* Durham, 117 Ind. 429, 20 N. E. 282, as to the verification of a complaint in replevin.

Michigan.— Phenix *v.* Clark, 2 Mich. 327.

behalf,[22] as where the facts are within his personal knowledge or plaintiff is not within the county, etc.;[23] but it should appear that the person so making the affidavit is acting for the principal in the capacity as contemplated by the statute.[24] The facts which the statute requires to be alleged positively cannot be alleged in the form that affiant believes them;[25] and the affidavit must refer to the rights and

Nebraska.— Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

New York.— Sloan *v.* Implement Dealers' Mfg. Co., 25 Misc. 451, 55 N. Y. Suppl. 558.

Canada.— Arnold *v.* Hamilton, 1 Ont. Pr. 263, holding that a statute requiring an affidavit by the party, his agent or servant, requires that the agent, if the affidavit is made by the agent, shall be one bearing that general relation to the principal in respect to his business in which the cause of action arose, and not merely one who is acting for the principal in the matter of making the affidavit.

See 42 Cent. Dig. tit. "Replevin," § 131.

The father of a minor, who is his next friend in an action, can, as his natural guardian, make an affidavit in replevin for his son. Wilson *v.* Me-ne-chas, 40 Kan. 648, 20 Pac. 468.

Amended affidavit by agent see *infra*, III, A, 4, a.

22. Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

23. See the statutes of the several states; and the cases cited *supra*, note 21. See also AFFIDAVITS, 2 Cyc. 5.

24. Detroit Safe Co. *v.* Kelly, 78 Wis. 134, 47 N. W. 187, where it is held that since the affidavit required by the statute in an action before a justice of the peace is jurisdictional, one which fails to show that affiant, other than plaintiff, is acting on plaintiff's behalf, is void, and the objection is not waived by a failure to raise it either before the magistrate or in the circuit court on appeal. But the mere fact that the affidavit was made by another than plaintiff will not require its quashal and the affidavit not being in the record on appeal the person making it will be presumed to have possessed the proper qualification. Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416.

Description as agent or allegation of relation.— It is more regular that the fact of the agency should be stated and sworn to instead of being added to the name of the affiant by way of description in that part of the instrument designating the person who is swearing to the facts to be set out, but an affidavit in the first form is not fatally defective and the objection is not jurisdictional. Remington Sewing Mach. Co. *v.* Cushen, 8 Mo. App. 528, holding that where the affidavit states "J. L. Jackson, agent for plaintiff, makes oath and says," etc., the fact that J's agency is not stated is not fatal. In Canada it was held that under a statute enacting that before a writ of replevin shall issue, the person claiming the property, "his servant or agent" shall make a prescribed affidavit, which contemplates that the agent or servant shall sustain that relation in the particular business of the principal in which the cause of action arose and not one who is merely deputed to make the affidavit, the affidavit must show the agency contemplated, but that an affidavit showing that affiant is "now acting" for the principal will be sufficient if it can be gathered from other parts of the affidavit that such acting is as agent within the meaning of the statute. Arnold *v.* Hamilton, 1 Ont. Pr. 263.

Signing name of principal.— The affidavit should regularly be signed in the name of the agent, but signing in the name of the principal by the agent, naming him as such, is held sufficient where it is shown in the body of the instrument that it is made by affiant as agent. Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863; Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

25. Frink *v.* Flanagan, 6 Ill. 35; Cutler *v.* Rathbone, 1 Hill (N. Y.) 204, in which cases the affidavit was held amenable in this respect. But the court will assume personal knowledge in the case of allegations made by one who appears to have been in a position to have had such knowledge of the particular matters, without an express allegation of personal knowledge and an affidavit by an agent alleging personal knowledge and in addition thereto that he had been the agent and had personal charge of the transactions involved in the action is sufficient. Sloan *v.* Independent Dealers' Mfg. Co., 25 Misc. (N. Y.) 451, 55 N. Y. Suppl. 558, where it was held that the statute providing for the affidavit in replevin did not require that it be made to appear therein "to the satisfaction" of a judge, etc., that certain facts existed, as in the case of an attachment, but simply that the affidavit should "contain the following allegations," and that in the absence of an affirmative showing in the affidavit that the agent had no knowledge of the matters alleged in positive form, it is questionable whether the statute required the affidavit to show affirmatively that the agent had personal knowledge.

Where the principal might have alleged particular matters according to his best knowledge, the agent may make the affidavit in the same manner, and a provision of the code in regard to setting forth the grounds of information and belief, to the effect that where an affidavit is by an agent who is compelled to make allegations upon information and belief which his principal could make with positive knowledge he shall set forth the grounds of his information and belief, do not apply; or if they do apply, the affidavit in question was held sufficient, being positive as to all allegations except one, and having set forth certain causes of information and belief they must be held to apply to that particular allegation and may justify the allegation with-

claims of the principal and not those of the affiant, and if in each necessary allegation it refers to the claims of the affiant, it will be treated as in his favor individually and insufficient to authorize the issue of an order of the levy in favor of the principal.[26] Where plaintiff is a corporation, and therefore cannot make an affidavit, any official engaged in its management and familiar with the facts might properly do so.[27]

3. REQUISITES, SUFFICIENCY, AND VALIDITY[28] — a. In General. An affidavit made to obtain an order for delivery of the property or to authorize the issue of a writ of replevin must contain all the material averments which by the statute are essential to entitle the party to anticipate the delivery of the property,[29] and should be in the form prescribed;[30] but it need not contain any other averments, and if it is in the language of the statute it will be sufficient.[31] It is sufficient if it substantially complies with the statutory requisites, and mere formal or clerical defects are not fatal to the exercise of jurisdiction of the cause.[32] Thus defects in designating the name of plaintiff will not render the affidavit insufficient where the officer who issues the writ thereon certifies that the affidavit was subscribed and sworn to,[33] and a clerical mistake in the spelling of defendant's name is immaterial where the identity of the party otherwise appears.[34] It is not a good rule to permit affidavits to be untruely made under the expectation that something will be done to make them true, and where a demand is necessary to support the

out setting forth in all of the details just what the information was. Sloan *v.* Implement Dealers' Mfg. Co., 25 Misc. (N. Y.) 451, 55 N. Y. Suppl. 558.

26. Commercial State Bank *v.* Ketcham, 46 Nebr. 568, 65 N. W. 201, where a jurisdictional affidavit was not amendable. Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843.

27. National Enameling, etc., Co. *v.* Kaplan, 53 N. Y. App. Div. 96, 65 N. Y. Suppl. 782, affidavit by treasurer sufficient. See also AFFIDAVITS, 2 Cyc. 8.

28. **Form of affidavit** in whole, in substance, or in part see Burton *v.* Curyea, 40 Ill. 320, 322, 89 Am. Dec. 350; Knowles *v.* Cavanaugh, 144 Mich. 260, 262, 107 N. W. 1073; Stever *v.* Brown, 119 Mich. 196, 197, 77 N. W. 704; Carson *v.* Small, 32 Minn. 492, 493, 21 N. W. 737; Vinnedge *v.* Nicholai, 28 Nebr. 133, 136, 44 N. W. 89; Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863; Paddock *v.* Guyder, 8 N. Y. Suppl. 905, over motion to set aside proceedings which did not specify irregularities.

29. Evans *v.* Bouton, 85 Ill. 579; Paul *v.* Hodges, 26 Kan. 225; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843.

30. Frink *v.* Flanagan, 6 Ill. 35; Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622; Cutler *v.* Rathbone, 1 Hill (N. Y.) 204, which cases hold that the failure to allege the facts in positive form is amendable, the first case holding also that where the affidavit is not the foundation of the jurisdiction, appearance and pleading without objection is a waiver of the irregularity. See, generally, in this connection AFFIDAVITS, 2 Cyc. 25.

31. Burton *v.* Curyea, 40 Ill. 320, 89 Am. Dec. 350; Whisler *v.* Roberts, 19 Ill. 274; Ryan *v.* Schutt, 135 Ill. App. 554; Bringhurst *v.* Pollard, 6 Ind. 452; National Enameling, etc., Co. *v.* Kaplan, 53 N. Y. App. Div. 96, 65 N. Y. Suppl. 732; Hass *v.* Prescott, 38 Wis. 146.

Incorporation of defendant.— Under a statutory provision that in an action against a corporation plaintiff need not prove the existence of a corporation unless the answer is verified and contains an affirmative allegation that it is not a corporation, an affidavit in replevin, before an answer has been served, made upon information and belief it has been held is sufficient. Sloan *v.* Implement Dealers' Mfg. Co., 25 Misc. (N. Y.) 451, 55 N. Y. Suppl. 558.

32. Knowles *v.* Cavanaugh, 144 Mich. 260, 107 N. W. 1073; Smith *v.* Dodge, 37 Mich. 354, which cases refer to objections on certiorari.

Liberal construction.— Where a statement in the affidavit may be so read as to avoid unnecessary technicality, which will give to the language a natural meaning consonant with the requirements of the statute, this course will be adopted rather than to give the instrument a strained construction which will render it defective. Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

33. Olson *v.* Peabody, 121 Wis. 675, 99 N. W. 458, where plaintiff was described in the body of the affidavit as "Charles Olsen," and the instrument was signed "Charley Olson."

Names of partners.—An affidavit and process in replevin by a partnership are not so defective as to oust the justice of jurisdiction, although the names of the partners are not given, where the affidavit, by reference to the mortgage under which plaintiffs claim the property, sufficiently identifies plaintiffs. Knowles *v.* Cavanaugh, 144 Mich. 260, 107 N. W. 1073.

34. Olson *v.* Peabody, 121 Wis. 675, 99 N. W. 458, holding that the fact that a replevin affidavit gave the first name of the defendant as "Wimmiam," instead of "William," as it appeared in the warrant, was im-

writ, an affidavit which is sworn to before the demand is made is not sufficient.[35] At common law, replevin is a local action and the place, vill, or parish must be averred;[36] but under statutory provisions enlarging the remedy and making it transitory in its nature, it is not necessary to allege the particular place where the property was taken.[37] The affidavit of ownership of property annexed to a writ of replevin should not be entitled.[38] The affidavit must be made before an officer who is authorized to administer oaths, otherwise the writ and all proceedings therein will be set aside.[39] It would seem that it is not fatal to a recovery that inadvertently the affidavit made at the time it was filed did not have the jurat of the officer attached until after such filing.[40] Pursuant to the general rule announced in many jurisdictions,[41] an affidavit in replevin is sufficient, although it is not subscribed by affiant, where his name appears as affiant in the body of the instrument and the officer attaches his jurat and certifies that the affidavit was subscribed and sworn to before him.[42]

b. Incorporating in or Annexing Affidavit to Pleading. If plaintiff's pleading contains a statement of every fact which the statute requires to be shown in the affidavit, and the pleading is verified by affidavit covering every statement therein, this will be sufficient without a separate affidavit;[43] but in no event can the pleading supply the absence of the affidavit unless all that the affidavit is required to contain is embodied in the pleading,[44] and the pleading is verified in the form as required in the case of a separate affidavit.[45] On the other hand, the affidavit need not be annexed to the pleading or filed contemporaneously with it, but may be an independent instrument.[46]

c. Averment as to Title and Right to Possession. The affidavit in replevin should contain such an allegation as to ownership, general or special, in plaintiff, and his right to the immediate possession of the property as the statute prescribes,

material, where he appeared in the cause, and in his affidavit for the removal of the cause gave the name as it appeared in the warrant.

35. McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451.

36. Whisler *v.* Roberts, 19 Ill. 274.

37. Whisler *v.* Roberts, 19 Ill. 274.

38. Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26, holding, however, that it may be amended in this respect by the making and filing of a new affidavit.

39. Berrien *v.* Westervelt, 12 Wend. (N. Y.) 194, where a coroner was held to have no right to administer the oath because he is not of the number of those officers to whom general power was given to administer oaths or take affidavits and had no special authority to take affidavits in pending causes. See also AFFIDAVITS, 2 Cyc. 10 text and note 34.

40. Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196; Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10, holding that a justice of the peace who has omitted to attach his signature to the jurat to an affidavit in replevin signed and sworn to before him may do so when the objection is raised during the after proceedings in the case. But on the other hand a mere statement appearing in the record without a jurat of the officer is not of itself an affidavit, and since the statute requires an affidavit and not a mere oath, it does not appear from such instrument that the statement is sworn to in order to support a judgment by default. Kehoe *v.* Rounds, 69 Ill. 351.

A defect in the signature of the officer is not fatal. Branch *v.* Branch, 6 Fla. 314.

41. See AFFIDAVITS, 2 Cyc. 26.

42. Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836.

Signing by agent see *supra*, III, A, 2.

43. *Arkansas.*— Hanner *v.* Bailey, 30 Ark. 681.

Indiana.— Turpie *v.* Fagg, 124 Ind. 476, 22 N. E. 743; Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582; Eddy *v.* Beal, 34 Ind. 159; Minchrod *v.* Windoes, 29 Ind. 288.

Indian Territory.— Harris *v.* Castleberry, 3 Indian Terr. 576, 64 S. W. 541.

Missouri.— Keim *v.* Vette, 167 Mo. 389, 67 S. W. 223.

Nebraska.— Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622.

Ohio.— Bobilya *v.* Priddy, 68 Ohio St. 373, 67 N. E. 736, where it is said, however, that good practice requires the petition and affidavit in replevin to be separate, so that questions as to either may be made without reference to the other, although it is not error to combine them unless prejudice is caused thereby to defendant.

South Dakota.— See Johnson *v.* Hillenbrand, 14 S. D. 446, 101 N. W. 33.

See 42 Cent. Dig. tit. "Replevin," § 129.

44. J. I. Case Threshing Mach. Co. *v.* Rosso, 78 Nebr. 184, 110 N. W. 686.

45. Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622.

An amendment may be allowed upon just terms by the filing of an affidavit in proper form in the place of a verification of a pleading upon belief. Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622.

46. Keen *v.* Munger, 52 Mo. App. 660.

and an omission of such allegation will render the affidavit defective, upon proper objection thereto.[47] A general allegation of ownership is sufficient when the plaintiff does not claim a special property,[48] but in the latter event the facts in respect to such special property are under some statutes required to be alleged.[49] Under a statute which confers jurisdiction upon justices of the peace upon the filing of the prescribed affidavit the omission of such averment is fatal to the jurisdiction at any stage of the cause.[50] A mere clerical error manifest upon the face of the affidavit will not vitiate it.[51] It is not sufficient to aver the right, in the alternative, to be in one of two persons.[52]

d. Averment as to Taking or Detention — (i) *In General.* An allegation that the property was unlawfully taken or unlawfully detained is not necessary where the statute requires no such allegation,[53] but the requirement being only that the allegation in this respect shall be that plaintiff is the owner and lawfully entitled to the possession of the property, such allegation is all that is necessary.[54] Such allegation is necessary, however, under various statutes requiring it,[55] or

47. Spencer *v.* Bidwell, 49 Conn. 61 (on plea in abatement); Frink *v.* Flanagan, 6 Ill. 35; Paul *v.* Hodges, 26 Kan. 225; McArthur *v.* Hogan, 15 Fed. Cas. No. 8,659*a*, Hempst. 286.

If the statute does not require averment of ownership no such averment need be made. Hass *v.* Prescott, 38 Wis. 146 [*overruling* Child *v.* Child, 13 Wis. 17], although the affidavit constitutes plaintiff's pleading before a justice of the peace.

Amendment may be allowed to cure defects in this respect. Tuckaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32; Applewhite *v.* Allen, 8 Humphr. (Tenn.) 697, amendment on motion to quash. So an amendment of the affidavit to conform to the allegation of ownership contained in an amended petition may be granted. Tackaberry *v.* Gilmore, *supra*. And where a trustee sued out the writ by affidavit in his own name without adding the word "trustee," he will not fail in showing that he held as trustee, but an amendment will be allowed. McCarty *v.* Key, 87 Miss. 248, 39 So. 780.

48. Burns *v.* Roberts, 1 N. Y. Code Rep. 62.

49. Bolin *v.* Fines, 51 Nebr. 650, 71 N. W. 293; Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131.

Amendment.—A defect in this respect is amendable (Williams *v.* Gardner, 22 Kan. 122, holding that if the action had proceeded to the end as one of replevin, upon proper motion being made therefor by defendants the court should require plaintiff to amend his affidavit so as to make it correspond strictly with the requirements of the statute; and if plaintiff then fails to so amend, and only in that case, the justice should dismiss the action; but where the action does not proceed to the end as an action of replevin, the officer failing to find the property in controversy, the action was converted into one for damages only, and as an action for damages, no affidavit of any kind was required, and therefore a dismissal is not proper); but where the prescribed affidavit is jurisdictional, as in replevin before a justice of the peace, one alleging that affiant is entitled to the immediate possession of the property under a chattel mortgage securing a note is insufficient to give the justice jurisdiction to issue a writ where it does not show that the note has matured, or that any part of it remains unpaid, or the existence of any fact entitling him to the immediate possession of the property (Bolin *v.* Fines, 51 Nebr. 650, 71 N. W. 293).

Where the right is claimed under a writing it is held that it should be set out, but such omission is an amendable defect. Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131. But an affidavit averring that plaintiff was the owner and entitled to the immediate possession of the property is held to be *prima facie* good, as an allegation of absolute ownership, notwithstanding such ownership was alleged to have been based upon a chattel mortgage, when attacked by a motion in the nature of a demurrer. Vinnedge *v.* Nicholai, 28 Nebr. 133, 44 N. W. 89.

50. Bolin *v.* Fines, 51 Nebr. 650, 71 N. W. 293; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843; Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447.

51. Churchill *v.* Rea, 126 Mich. 175, 85 N. W. 465, where the error consisted in substituting in one place the names of defendants for plaintiffs.

Liberal construction.— Under a provision requiring the affidavit to state that plaintiffs are entitled to the "immediate" possession of the property, a liberal and natural construction of the language employed will be adopted to render the affidavits sufficient which omits the word "immediate" but is phrased in the present tense, which will be taken to mean that plaintiffs are entitled to the instant possession. Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

52. Spencer *v.* Bidwell, 49 Conn. 61, where the affidavit was held to be insufficient in that it alleged right to possession in the alternative, namely, in affiant as trustee of his wife or in his wife in her own right.

53. Whisler *v.* Roberts, 19 Ill. 274; Ryan *v.* Schutt, 135 Ill. App. 554.

54. Whisler *v.* Roberts, 19 Ill. 274.

55. See the statutes of the several states. And see Wilburn *v.* Flood, 16 Mich. 40, 93

that plaintiff was lawfully in possession of the property and that it was unlawfully taken from his possession.[56] Allegations in the language of the statute are sufficient,[57] but the entire absence of any statement either in the words of the statute or in their equivalent of a wrongful or any other detention of the property is fatal.[58]

(II) *Cause of Taking or Detention.* The statutes often require that the affidavit in replevin shall allege that the property was not taken for any tax, fine, or assessment,[59] and that it was not seized under any execution, attachment, or other legal process against the property of the plaintiff in replevin,[60] unless, as sometimes provided, the property levied on is exempt.[61] All these facts must be sworn to exist and an omission of any of them is fatal to the writ or order of delivery;[62] and the remedy thus provided under a claim and delivery statute cannot

Am. Dec. 203, as to affidavit required before service of the writ of replevin.

56. McArthur *v.* Hogan, 15 Fed. Cas. No. 8,659*a*, Hempst. 286.

An allegation insufficient to unite possession with right to lien.— The mere fact that plaintiff in his affidavit alleges that defendant wrongfully detains possession from him will not by itself show possession in defendant so as to unite such possession to her right to a landlord's lien and to enable defendant to retain such possession as against an innocent purchaser from the tenant apparently in possession and where the purchaser was actually in possession for the purpose of removing the property when defendant interfered with such removal. Brownell *v.* Twyman, 68 Ill. App. 67 [*distinguishing* Hunter *v.* Whitfield, 89 Ill. 229, in that there the landlord was clearly in possession of the property, the tenant having voluntarily abandoned the farm and the landlord having taken possession of the crops].

57. National Enameling, etc., Co. *v.* Kaplan, 53 N. Y. App. Div. 96, 65 N. Y. Suppl. 732.

Equivalent.—Although the word "detained" is omitted, to say that a man has property in his possession unlawfully, to which another is entitled, means about the same thing as to say it is detained, and the affidavit is not fatally defective. Smith *v.* Dodge, 37 Mich. 354. So an affidavit stating that plaintiff was entitled to possession of the property, which was then in possession of defendant, and that it was not subject to seizure, was a substantial compliance with the statute, and defendant's motion to quash the writ was properly overruled. Cartwright *v.* Smith, 104 Tenn. 689, 58 S. W. 331.

58. Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304; McArthur *v.* Hogan, 15 Fed. Cas. No. 8, 659*a*, Hempst. 286.

But in a court of record where the petition on file contains the allegation this is sufficient to confer jurisdiction to issue the writ and it will be voidable merely, so that if it is not attacked by proper plea the court might on application have allowed an amendment and therefore a failure to object in such court will conclude the party in this respect. Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

59. See the statutes of the several states.

60. See the statutes of the several states.

Control of particular statute omitting requirement.— In Indiana the affidavit for a writ of replevin before a justice of the peace need not aver that the property sought to be replevied had not been taken from plaintiff for any tax or assessment, nor seized under any execution or attachment against his goods, although it is otherwise in the circuit court. Bringhurst *v.* Pollard, 6 Ind. 452.

61. See the statutes of the several states. And see Carlson *v.* Small, 32 Minn. 492, 21 N. W. 737.

62. McClaughry *v.* Cratzenberg, 39 Ill. 117 (requiring the allegation in positive terms); Campbell *v.* Head, 13 Ill. 122; Clow *v.* Gilbert, 54 Ill. App. 134 (jurisdictional in action before justice of the peace); Westenberger *v.* Wheaton, 8 Kan. 169; Phenix *v.* Clark, 2 Mich. 327.

Objection and amendment.—A defect in respect to such allegation may be cured by amendment. Fisher *v.* Brown, 111 Ill. App. 486 (amendment of affidavit to make it show that the goods had not been seized under process against "plaintiffs" instead of against "affiant"); Colborn *v.* Barton, 14 Ill. App. 449 (that property was not held under replevin); Taylor *v.* Kalamazoo Cir. Judge, 100 Mich. 181, 58 N. W. 835; Wilson *v.* Macklin, 7 Nebr. 50. And objection for a mere defect in the statement in this respect should be made before trial. Auld *v.* Kimberlin, 7 Kan. 601. But it is too late to ask to amend after the writ is quashed on account of the defect, at which stage no complaint can be made of the action of the court in denying the application. Campbell *v.* Head, 13 Ill. 122.

Scope of application.— Such a provision being general and without exceptions as to any action, applies indiscriminately to all actions of replevin notwithstanding the property is of such a character that the statement in its nature is not appropriate thereto. Phenix *v.* Clark, 2 Mich. 327, replevin of assessment roll by highway commissioners from township supervisor.

Validity of judgment.—A valid judgment cannot be successfully contested in any way except by proceedings to set it aside. So that the object of such statute is not solely to protect the process of the court when issued on a valid judgment. The object of the clause,

be set aside and its requirements in these respects evaded by resorting to an injunction to restrain an officer from proceeding under a levy of process.[63] A substantial compliance with the statute is sufficient with respect to the form of the allegation.[64] The affidavit is not conclusive of the fact, by any means, that the

as drawn from its language, and from other parts of the section, as well as from the history of the action known as replevin, is to compel a party who desires to contest the validity of any judgment or order of a court, or any tax, fine, or amercement, or any other mesne or final process, so to do in some other way than by seizing property already in the custody of the law. An order of attachment is most frequently issued by the clerk under the law. If improvidently issued, and property is seized, the remedy of taking it out of the possession of the law, and by such a proceeding trying the validity of the order or writ is not tolerated. A safer and more reasonable remedy exists. Much less ought the validity of a judgment to be contested in such a proceeding. Westenberger *v.* Wheaton, 8 Kan. 169. But in Muller *v.* Plue, 45 Nebr. 701, 64 N. W. 232, it was held that the purpose of the statute in requiring an averment that the property was not taken in execution, etc., was to prevent one from replevying property which has been seized on execution issued upon a valid judgment against him, and should not be construed as prohibiting in all cases the replevin of property which has been levied upon by an officer under an execution, where the judgment is void or has been paid, etc. The court in effect reversed Wilson *v.* Macklin, 7 Nebr. 50, which held that an affidavit stating that the goods were not taken in execution on any order or judgment against plaintiff but were taken by execution issued against plaintiff on a void judgment was defective and that plaintiff could not assail the validity of the judgment upon which the execution issued.

Validity of tax.— The taking for a tax cannot be negatived in a form merely to raise the question of the validity of the tax, leaving the implication that the property had been taken in fact for a tax of some description, since the policy of the state forbids the stay of the execution of its revenue laws by such means. McClaughry *v.* Cratzenberg, 39 Ill. 117. But an exception in this respect is sometimes made by the statute, and the form of affidavit in that kind of a case is prescribed. Paddock *v.* Guyder, 55 Hun (N. Y.) 612, 8 N. Y. St. 905 (sufficient affidavit over motion not sufficiently specifying irregularities); Norris *v.* Jones, 7 Misc. (N. Y.) 198, 27 N. Y. Suppl. 209 [*affirmed* in 81 Hun 304, 27 N. Y. Suppl. 209, 30 N. Y. Suppl. 1134] (where it is shown that N. Y. Code Civ. Proc. § 1690, provides that an action to recover a chattel cannot be maintained when the chattel was taken by virtue of a warrant against plaintiff for the collection of a tax assessment or fine issued in pursuance of any statute of the state or of the United States, unless the taking was, or the detention is, unlawful, as specified in section 1695, and that the latter provides that the affidavit to be delivered to the sheriff must particularly describe the property to be replevied, and must state that it has not been taken by virtue of a warrant against plaintiff for the collection of a tax assessment or fine issued in pursuance of a statute of the state or of the United States, or, if it has been taken under color of such warrant, either that the taking was unlawful by reason of defects in the process or other cause specified, or that the detention is unlawful by reason of facts specified, which have subsequently occurred; and under the last provision it is held that an affidavit is insufficient, as stating a mere conclusion, where it alleges that the process was defective, in that the tax contained moneys which were not legally chargeable, but does not state what moneys were improperly included).

63. Hirsh *v.* Whitehead, 65 N. C. 516.

64. Williams *v.* Gardner, 22 Kan. 122 (holding that an affidavit alleging that the property in question "was not taken in execution on or under a judgment against the plaintiff," nor "by virtue of any other mesne or final process" issued against plaintiff was not insufficient because the allegation was not in the language of the statute that the property "was not taken in execution on any order or judgment against the plaintiff," and was sufficient to confer jurisdiction although it might have been defective in form); Auld *v.* Kimberlin, 7 Kan. 601 (to the same point as the case last above cited); Stever *v.* Brown, 119 Mich. 196, 77 N. W. 704; Carlson *v.* Small, 32 Minn. 492, 21 N. W. 737 (holding that the correct practice is to state the case accurately, which statement may be substantially in the statute language, either negativing the taking of the property under lawful process, or stating that process has been levied thereon, and that it is exempt, but that an affidavit which states in the statute language that the property in question was not taken from plaintiff "by any process legally or properly issued against him or, if so taken, it was exempt from seizure on such process," is not invalid on account of the retention of the alternative clause, and substantially states that the property was exempt whether taken under lawful process or not); Scott *v.* Jones, 7 Okla. 42, 54 Pac. 308 (where the affidavit did not expressly state in specific terms and in the very language of the statute that "the property had not been seized by virtue of an order of delivery issued under this article," but it did state, in addition to the other statutory averments required in the affidavit of replevin, that "the property was not taken on execution by any order of the court," and it was held that since "an order of delivery issued under this article" is "an order of

property was not taken for a tax, when the facts on the trial show otherwise,[65] and if it is shown that it was in fact taken for a tax, but against another person and as his property, plaintiff is not precluded from recovering.[66]

e. Description and Value of Property — (I) *DESCRIPTION.* It is essential to a proper affidavit in replevin that it describe the property sued for in such manner as to afford the means of identifying it.[67] After the order or writ is issued and served and there has been a defense to the action on the merits, and a verdict for plaintiff, as in this case, it is too late to object that the affidavit does not contain a specific description of the property.[68]

(II) *VALUE.*[69] When the statute does not, in terms, require the affidavit to state the value of the property, and the jurisdiction of the court does not depend upon value, it need not be stated.[70] It is otherwise, however, as to inferior courts

the court," the omitted clause is adequately covered by the language used).

65. Wisconsin Oak Lumber Co. *v.* Laursen, 126 Wis. 484, 105 N. W. 906; Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841.

66. Wisconsin Oak Lumber Co. *v.* Laursen, 126 Wis. 484, 105 N. W. 906.

67. Hawes *v.* Robinson, 44 Ark. 308; Brown *v.* Poland, 54 Conn. 313, 7 Atl. 719; Chatterton *v.* Saul, 16 Ill. 149 (holding that in replevin for a steam sawmill and its appurtenances the affidavit must aver that the property in question is personal estate); Thorn *v.* Lazarus, 39 N. Y. App. Div. 508, 57 N. Y. Suppl. 279; Van Dyke *v.* New York State Banking Co., 18 Misc. (N. Y.) 661, 43 N. Y. Suppl. 735 (holding that a description intelligible only to an expert is not a sufficient compliance with the statute).

Sufficient descriptions see King *v.* Connevy, 52 Ark. 115, 12 S. W. 203; Hill *v.* Robinson, 16 Ark. 90 (where the property was described as "1500 pounds of seed cotton," but the court questioned if, since the officer was required to take it into his possession, some further identification of the particular cotton sought to be recovered should not have been made, such as that it was at a certain place, in a pen-house, or pile); Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623 (where the description was a "quantity of wheat, rye, and oats, being one-half of the grain grown on the Simmons farm in the year 1892"); Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; Proper *v.* Conkling, 67 Mich. 244, 34 N. W. 560 (where the property was described as "one sewing-machine and one pool-table"); McCarthy *v.* Ockerman, 154 N. Y. 565, 49 N. E. 153 [*affirming* 92 Hun 19, 36 N. Y. Suppl. 914]; Marshall *v.* Friend, 33 Misc. (N. Y.) 443, 68 N. Y. Suppl. 502 (where the property was described as "10,090 wool pelts, the wool taken therefrom, and the skins thereof (otherwise known as slats) in pickle or lime"); Sloane *v.* Implement Dealers' Mfg. Co., 25 Misc. (N. Y.) 451, 55 N. Y. Suppl. 558.

Insufficient descriptions see National Enameling, etc., Co. *v.* Kaplan, 53 N. Y. App. Div. 96, 65 N. Y. Suppl. 732 (an affidavit describing some of the articles by abbreviations and by figures and letters, the meaning of which is not shown by anything contained in the schedule or in the affidavit); Schwietering *v.* Rothschild, 26 N. Y. App. Div. 614, 50 N. Y. Suppl. 206 (where the affidavit simply referred to some pieces and numbers of yards and other unintelligible numbers); Springfield Metal Casket Co. *v.* Wielar, 26 Misc. (N. Y.) 863, 56 N. Y. Suppl. 394 (where the property was described as "2 6–0 elliptic solid copper lining; 1 6–0 octagon, solid copper lining, full glass; 1 6–3 elliptic, zinc plated, full glass; 1 5–9 elliptic zinc plated, full glass"); Devoe *v.* Selig, 25 Misc. (N. Y.) 411, 54 N. Y. Suppl. 941; Jones *v.* Cook, 2 Ont. Pr. 396.

Amendment may be allowed to cure a defect in an affidavit insufficient by reason of the description of the property. Thorn *v.* Lazarus, 39 N. Y. App. Div. 508, 57 N. Y. Suppl. 279; Van Dyke *v.* New York State Banking Co., 18 Misc. (N. Y.) 661, 43 N. Y. Suppl. 735; Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131, defect supplied by supplementary affidavit on motion to set aside the replevin proceedings.

68. Hawes *v.* Robinson, 44 Ark. 308.

69. **Showing of justices' jurisdiction** see JUSTICES OF THE PEACE, 24 Cyc. 469 text and note 27.

70. Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801; People *v.* Core, 85 Ill. 248; Mattoon Heat, etc., Co. *v.* Walker, 134 Ill. App. 414. The value of the property could become important only in the event that appellants recovered a judgment for its return, when an assessment of its value might be proper as an incident to the trial but not as a part of it. Mattoon Heat, etc., Co. *v.* Walker, *supra.*

Means of fixing penalty of bond.— In Kentucky, before the passage of the act of 1842, it was necessary for plaintiff to execute bond in the clerk's office, in a penalty double the amount of the property about to be sued for, and hence an affidavit of its value was required as the means of fixing the penalty of the bond. But the act of 1842, instead of requiring the bond to be executed in the clerk's office, directed that it should be taken by the sheriff in the same penalty, and that the value of the property should be ascertained by two or more disinterested persons, under an oath administered by the officer, and this act was held to repeal all others coming within its purview, and substantially so much of the earlier act as required an affi-

whose jurisdiction is limited by the amount or value of property in controversy, as in the case of justices of the peace,[71] when such a showing is required by the statute as a condition to the exercise of jurisdiction,[72] and even where the statute does not specifically require such fact to be shown by affidavit, the jurisdiction of the justice which is made to depend upon the value of the property should be shown by the affidavit.[73] The objection to a mere defective statement of value, although fatal if seasonably taken, may be waived,[74] and the omission to state the

davit of value to be filed in the clerk's office. Aulick *v.* Adams, 12 B. Mon. (Ky.) 104.

71. McClure *v.* Hill, 36 Ark. 268, upon the question of the liability of the justice as for a trespass, the court holding that such affidavit should be made in order to show, if not to confer, jurisdiction.

72. *Colorado.*— Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416.

Michigan.— Sager *v.* Shutts, 53 Mich. 116, 18 N. W. 580.

New Mexico.— Barruel *v.* Irwin, 2 N. M. 223.

New York.— Dennis *v.* Crittenden, 42 N. Y. 542; Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 99 [*disapproving* Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253, where it was held that the affidavit was a jurisdictional prerequisite to the issue of the writ as a provisional remedy, and that judgment on the merits might be rendered, although a judgment on objection to the issue of the provisional writ should be reversed].

Wisconsin.— Darling *v.* Conklin, 42 Wis. 478, no jurisdiction if the affidavit states no value or states a value beyond the limit of the justice's jurisdiction.

See 42 Cent. Dig. tit. "Replevin," § 133.

Omission from a form prescribed of the averment of value is held not to dispense with its necessity as required by a previous section of the statute. Barruel *v.* Irwin, 2 N. M. 223.

When immediate possession is not sought. — The statute requiring the statement of the value of the property only applies to affidavits made in actions in claim and delivery, when the immediate possession is sought to be obtained, but no such requirement is made where the action to recover possession of the property is unaccompanied by a claim for immediate delivery. Johnson *v.* Hillenbrand, 18 S. D. 446, 101 N. W. 33. *Compare* Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 99, *supra*, this note.

Sufficiency — *A statement of aggregate value* satisfies the terms of the statute. Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416.

Negativing value in excess of jurisdiction. — Where the jurisdiction is conferred if the value of the property does not exceed a fixed sum, it has been held that the affidavit which alleges a certain value within the jurisdictional amount without alleging that it does not exceed such jurisdictional amount in value is insufficient upon timely objection, because property worth more than such amount may be truly averred to be worth that sum. Sager *v.* Shutts, 53 Mich. 116, 18 N. W. 580. But under provisions first providing that the justice shall have jurisdiction of an action for possession of personalty "the value of which as stated in the affidavit," etc., "shall not exceed the sum of," etc., and next that before any process shall issue plaintiff shall make proof by affidavit showing the "actual value" of the property, it was held that the affidavit is sufficient if it states the value within the jurisdiction of the court without negativing the fact that the property does not exceed such amount in value, the provision that the value shall not exceed the jurisdictional amount not appearing in that portion of the statute which specifies what shall be shown by the affidavit. Dennis *v.* Crittenden, 42 N. Y. 542, where it is further said that it is not a fair criticism that the property may be worth more than the jurisdictional amount and that all the affiant means is that it is worth as much as the sum which he names as the actual value.

73. Rice *v.* Travis, 216 Ill. 249, 74 N. E. 801 (construing a statutory provision under which jurisdiction is conferred upon justices of the peace "in actions of replevin when the value of the property claimed does not exceed $200"); Roach *v.* Moulton, 2 Pinn. (Wis.) 221 (where the point was not decided but the court expressed the opinion that it is much the safer practice to allege the value of the property in the affidavit, which is the foundation of the proceedings, and thus affirmatively show in the first instance that the justice has jurisdiction).

Jurisdiction dependent upon subsequent appraisement. — The value need not be averred where the statute contemplates that such writ may issue from a justice of the peace for property of greater value than the amount limiting his jurisdiction, under the provision that "whenever the appraised value of the property so taken shall exceed two hundred dollars the justice shall certify the proceeding upon the said writ to the district court of his county," etc. So that, in a certain sense, it is the appraisement of the property at a sum not in excess of the jurisdictional amount that gives the justice jurisdiction to try the cause; or more correctly speaking, the justice having jurisdiction of the cause, derived from the making and filing of the affidavit, will be divested of jurisdiction to try the cause by an appraisement of the property at a sum in excess of the jurisdictional amount; but in that case will retain jurisdiction to certify the proceedings to the district court. Hill *v.* Wilkinson, 25 Nebr. 103, 41 N. W. 134; Fergus *v.* Gagnon, 4 Nebr. (Unoff.) 25, 93 N. W. 146.

74. Sager *v.* Shutts, 53 Mich. 116, 18

value has been considered a defect which is not material after appearance and pleading to the merits; [75] but on the other hand, where the affidavit is the foundation of the suit, it is what must confer jurisdiction to entertain the suit upon appeal; it is what the appellate court must look to as conferring upon it the right to proceed to a trial *de novo*, and the objection may be made for the first time by motion to quash the writ in the latter court.[76]

4. Objections and Amendments — a. Objections in General. The affidavit and requisition indorsed thereon to obtain the immediate delivery of the property in the statutory action for that purpose should be considered in the nature of process. If process is used in a prohibited way, or for a prohibited purpose, the remedy by motion to set it aside has been approved; [77] and so as to objections based upon irregularities in plaintiff's affidavit; [78] but the motion should specify the particular irregularities or defects relied on.[79] If a writ of replevin issues without any affidavit, it will be set aside; [80] and if the order for delivery is made or the writ is improperly issued without the required affidavit, which is not essential to the jurisdiction of the court over the action, the remedy is the quashal or setting aside of the writ or order, and an order for the return of the property,[81] but not a dismissal of the suit,[82] and judgment cannot be arrested on such ground.[83]

b. Time to Object, Waiver, and Amendment. Objections to the affidavit should be taken promptly,[84] and by appearing generally and pleading without

N. W. 580, statement of value without negativing the fact that the value does not exceed the jurisdictional amount.

75. Mooney *v.* Myers, 5 Blackf. (Ind.) 331 (in an action before a justice of the peace, where the statement of demand filed before the writ issued stated the value of the property); Perkins *v.* Smith, 4 Blackf. (Ind.) 299 (holding that where defendant appears before the justice, pleads to the action, and goes into trial, without making any objection to the affidavit, it is too late for him to do it afterward, either before the justice, or, after the appeal, in the circuit court; that it is then immaterial whether the process was regular or irregular, or, indeed, whether there had been any process at all; that the affidavit in replevin before a justice of the peace may also answer for the written statement of the cause of action, because it contains a narration of the injury complained of, and that in this character it was open to objection, as any other cause of action would have been, and is subject to amendment).

76. Barruel *v.* Irwin, 2 N. M. 223.

An amendment cannot be allowed so as to confer jurisdiction where the affidavit alleges a value beyond the court's jurisdiction. Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 99.

77. O'Reilly *v.* Good, 42 Barb. (N. Y.) 521.

Where a material and essential allegation in the affidavit is shown to be false, plaintiff can stand in no better position than if he had made no affidavit whatever and a court is not powerless to set aside proceedings in such a case whether the affidavit was made fraudulently or ignorantly. This rule is applied to the falsity of the allegation that the property sought to be replevied had not been taken under process against plaintiff or for a tax, etc. O'Reilly *v.* Good, 42 Barb. (N. Y.) 521. So the truth of such allegation in the affidavit may be inquired into to defeat a cross replevin. Xenia Twine, etc., Co. *v.* Hooven, etc., Co., 11 Ohio Dec. (Reprint) 120, 25 Cinc. L. Bul. 10.

78. Paddock *v.* Guyder, 8 N. Y. Suppl. 905; Ethridge *v.* Orcutt, 12 N. Y. St. 372.

Duty of court.— When an affidavit for an order for the delivery of property is insufficient, it is the duty of the court, upon motion of defendant, to set the order aside, unless plaintiff, within a reasonable time to be fixed by the court, makes the affidavit sufficient by amendment. Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258.

79. Paddock *v.* Guyder, 8 N. Y. Suppl. 905.

80. Xenia Twine, etc., Co. *v.* Hooven, etc., Co., 11 Ohio Dec. (Reprint) 120, 25 Cinc. L. Bul. 10.

81. Schattler *v.* Heisman, 85 Ark. 73, 107 S. W. 196; Paul *v.* Hodges, 26 Kan. 225; Eads *v.* Stephens, 63 Mo. 90; Bingham *v.* Morrow, 29 Mo. App. 448; Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* judgment, on other grounds, in 79 Nebr. 32, 112 N. W. 321]; J. I. Case Threshing Mach. Co. *v.* Rosso, 78 Nebr. 184, 110 N. W. 686.

82. Eads *v.* Stephens, 63 Mo. 90; Bingham *v.* Morrow, 29 Mo. App. 448.

83. Keen *v.* Munger, 52 Mo. App. 660.

84. Branch *v.* Branch, 6 Fla. 314; Auld *v.* Kimberlin, 7 Kan. 601 (where the motion to set aside an order of delivery was not made until after answer filed and issues made up, and was not called up for action of the court until six months later and it was said that in such cases some discretion is left to the courts and that it is not unreasonable to hold that in ordinary cases such a motion ought not to be heard just as a cause is called up for hearing); Paddock *v.* Guyder, 8 N. Y. Suppl. 905 (disapproving delay until time to answer has expired);

objection and trying the cause upon the merits, defendant waives informalities, amendable defects, and clerical errors therein.[85] But where the affidavit in an action before a justice of the peace is jurisdictional, although defendant does not appear in that court, objections for failure to file it may be raised when the cause is removed to the circuit court and called for trial there,[86] and it would seem to be considered sometimes that if the objection is not then raised it may be waived;[87] while on the other hand it is held, more in consonance with the rule that a defect which goes to the jurisdiction of the court over the subject-matter cannot be waived, that failure to raise the objection either before the magistrate or in the circuit court cannot operate as a waiver.[88] In replevin amendments are permitted as in other actions at law, and the remedy is available to cure objections to the affidavit under the general rules and statutory provisions governing the subject of the amendments,[89] and without the aid of any statute particularly relating to this form of action.[90] Amendments may be allowed to correct defective statements,[91] the affidavit not being jurisdictional,[92] and to introduce matters

Ethridge *v.* Orcutt, 12 N. Y. St. 372 (denial of motion not made until after the time had expired in which to reclaim the property or to except to plaintiff's sureties).

85. *Arkansas.*— Hawes *v.* Robinson, 44 Ark. 308.

Florida.— Branch *v.* Branch, 6 Fla. 314.

Illinois.— Frink *v.* Flanagan, 6 Ill. 35; Fisher *v.* Brown, 111 Ill. App. 486.

Indiana.— Perkins *v.* Smith, 4 Blackf. 299.

Michigan.— Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565; Smith *v.* Dodge, 37 Mich. 354; Baker *v.* Dubois, 32 Mich. 92.

Minnesota.— McKee *v.* Metraw, 31 Minn. 429, 18 N. W. 148, in action before justice of the peace, although the defect is one which would have required dismissal if presented in time.

Nebraska.— Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

New York.— Hyde *v.* Patterson, 1 Abb. Pr. 248.

See 42 Cent. Dig. tit. "Replevin," § 137.

Where summons and process for delivery are distinct.— On the other hand, it is held that objections to the affidavit made in support of process for the immediate delivery of property are not waived by a general appearance in the action which is commenced by service of summons distinct from the replevin proceeding. McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451, distinguishing the former practice under which the action was commenced by writ of replevin. But see Hyde *v.* Patterson, 1 Abb. Pr. (N. Y.) 248, *supra*, this note.

86. Evans *v.* Bouton, 85 Ill. 579, where it is held that the fact that the several terms of the circuit court intervened did not prevent the raising of the objection.

87. Evans *v.* Bouton, 85 Ill. 579.

88. Detroit Safe Co. *v.* Kelly, 78 Wis. 134, 47 N. W. 187. See also *supra*, III, A, 1.

89. *Illinois.*— Colborn *v.* Barton, 14 Ill. App. 449, holding that an amendment to the affidavit in an action of replevin may be made by another agent of plaintiff than the agent who made the original affidavit.

Mississippi.— McCarty *v.* Key, 87 Miss. 248, 39 So. 780.

Nebraska.— Crans *v.* Cunningham, 13 Nebr. 204, 13 N. W. 176.

New York.— Thorn *v.* Lazarus, 39 N. Y. App. Div. 508, 57 N. Y. Suppl. 279; Van Dyke *v.* New York State Banking Co., 18 Misc. 661, 43 N. Y. Suppl. 735; McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451; Depew *v.* Leal, 2 Abb. Pr. 131; Stacy *v.* Farnham, 2 How. Pr. 26, by making and filing a new affidavit.

Ohio.— Van Halen *v.* Ridgeway, 2 Ohio Dec. (Reprint) 66, 1 West. L. Month. 280, on motion before trial.

Tennessee.—Applewhite *v.* Allen, 8 Humphr. 697.

See 42 Cent. Dig. tit. "Replevin," § 136.

Discretion of court.—A motion to amend an affidavit in replevin has been held to be addressed to the sound discretion of the court. McClaughry *v.* Cratzenberg, 39 Ill. 117 (on motion to quash); Campbell *v.* Head, 13 Ill. 122 (after sustaining motion to quash); Barruel *v.* Irwin, 2 N. M. 223. On the other hand it is sometimes the duty of the court to allow the amendment even after a motion to dismiss has been made where the ends of justice will be subserved thereby. Crans *v.* Cunningham, 13 Nebr. 204, 13 N. W. 176; Wilson *v.* Macklin, 7 Nebr. 50.

90. Frink *v.* Flanagan, 6 Ill. 35; Fisher *v.* Brown, 111 Ill. App. 486.

Statutory provision is sometimes expressly made permitting amendments in actions of replevin as in other cases at law. See the statutes of the several states. And see Fisher *v.* Brown, 111 Ill. App. 486.

The affidavit is a "proceeding" under the code provisions and as such is amendable. German Nat. Bank *v.* Aultman, 63 Nebr. 324, 88 N. W. 479; Commercial State Bank *v.* Ketcham, 46 Nebr. 568, 65 N. W. 201; Wilson *v.* Macklin, 7 Nebr. 50.

91. Fisher *v.* Brown, 111 Ill. App. 486; Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258; McCarty *v.* Key, 87 Miss. 248, 39 So. 780; Commercial State Bank *v.* Ketcham, 46 Nebr. 568, 65 N. W. 201; Lewis *v.* Connolly, 29 Nebr. 222, 45 N. W. 622; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843.

92. Frink *v.* Flanagan, 6 Ill. 35; Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

purely explanatory of the facts stated in the original affidavit, not amounting to new substantive matter,[93] and even to obviate objections of a substantial nature where the objection does not go to the jurisdiction of the court.[94] The amendment may be made when the particular objection is raised,[95] or, as under the provisions of the code, at any time before trial, or on the trial, where such amendment will be in furtherance of justice;[96] but the court may impose reasonable conditions as to costs.[97] And especially are defects amendable when objections thereto are not timely.[98] The application to amend, however, should be made before the cause is dismissed or a motion to quash is sustained.[99] Where the affidavit is jurisdictional, as in an action before the justice of the peace, an amendment to cure more than a mere indefinite or defective statement is not allowed;[1] but merely defective averments which do not render the affidavit void will not defeat plaintiff when the objection is taken on appeal for the first time;[2] and if an affidavit which is used as a pleading is defective in respect of the statement of the right of action, it may be amended on motion to quash, and if the objection is not raised it will not be regarded as fatal on a trial in the appellate court.[3]

93. Depew *v.* Leal, 2 Abb. Pr. (N. Y.) 131.

94. Colborn *v.* Barton, 14 Ill. App. 449; Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304, in a court of record, where a defect which would have been fatal to the affidavit on objection was held to be amendable, the petition supplying the necessary allegation.

An amendment which could not obviate the objection to the remedy by replevin is properly rejected. McClaughry *v.* Cratzenberg, 39 Ill. 117.

95. Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; Wilson *v.* Macklin, 7 Nebr. 50 (holding that even after motion to dismiss on the ground of a defect in the affidavit it is the duty of the court to allow an amendment); Thorn *v.* Lazarus, 39 N. Y. App. Div. 508, 57 N. Y. Suppl. 279; McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451; Applewhite *v.* Allen, 8 Humphr. (Tenn.) 697.

96. Crans *v.* Cunningham, 13 Nebr. 204, 13 N. W. 176.

When the issues are before a referee such amendment may be allowed by the court. Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32.

97. Crans *v.* Cunningham, 13 Nebr. 204, 13 N. W. 176; Applewhite *v.* Allen, 8 Humphr. (Tenn.) 697, payment of all previous costs of the cause imposed upon allowing amendment upon a motion to quash the writ.

Imposition of terms required.— Where defendants' motion was regular and authorized, the privilege accorded plaintiff should have been upon terms, and the order should be modified so as to deny defendants' motion and grant the leave to amend on the payment of costs of the motion below. Thorn *v.* Lazarus, 39 N. Y. App. Div. 508, 57 N. Y. Suppl. 279.

Effect of non-compliance with conditions.— Where, after the granting of a new trial, a party asks leave of court to amend the affidavit or replevin, and leave is granted by the court on condition, the conditions only apply to the right to amend, and if the party fails to comply with the conditions, he only forfeits his right to amend, and in such event the pleadings in the case remain precisely in the same condition they were before the leave to amend was granted; and if such pleadings properly present a case, the court should hear and determine the same on the merits; and it is error to dismiss the case for a failure to comply with the conditions attached to the leave to amend. Bayless *v.* McFarland, 10 Okla. 747, 63 Pac. 859.

98. Frink *v.* Flanagan, 6 Ill. 35 (defects waived by appearance and pleading, the affidavit not being the foundation of the jurisdiction); Ethridge *v.* Orcutt, 12 N. Y. St. 372 (although the defect might have been fatal on a timely objection).

99. Campbell *v.* Head, 13 Ill. 122 (where it is said that while the record was still within the control of the court, it might, within its discretion, have allowed the amendment and set aside the order quashing the writ, but certainly it was not bound to do so); Wilson *v.* Macklin, 7 Nebr. 50; Barruel *v.* Irwin, 2 N. M. 223.

The better practice is to make the order conditional that, in case of failure to amend in the time and upon the terms prescribed, the action be dismissed. Wilson *v.* Macklin, 7 Nebr. 50. See also Meyer *v.* Lane, 40 Kan. 491, 20 Pac. 258.

1. Jaynes *v.* Jaynes, 8 N. Y. Civ. Proc. 99, where the affidavit showed the value of the property to be beyond the jurisdiction of the court.

On appeal from the judgment of the justice an amendment is refused to cure fatal defects in a jurisdictional affidavit. Commercial State Bank *v.* Ketcham, 46 Nebr. 568, 61 N. W. 201; Clendenning *v.* Guise, 8 Wyo. 91, 55 Pac. 447. Where the writ is attacked by motion to quash on the ground that the rights and claims are alleged as in the individual individually instead of in the principal, it cannot be amended to make it an affidavit of the failure of the principal. Commercial State Bank *v.* Ketcham, *supra*; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843.

2. Dodd *v.* Skelton, 65 Nebr. 585, 91 N. W. 543.

3. Perkins *v.* Smith, 4 Blackf. (Ind.) 299;

B. Bond or Undertaking — 1. Purpose and Necessity — a. In General. The purpose served by a replevin bond is to provide security to defendant, if he prevails, for a return of the property, and to indemnify him for such damages and costs as he may be entitled to recover,[4] for the indemnity of the officer and defendant or person from whose custody he takes the property,[5] or for the benefit of all those interested in the trial of the right to the property, although it is given to the officer.[6] The general rule is that the taking of a replevin bond or undertaking is a necessary prerequisite. Until compliance with the requirement the officer is under no duty to execute the process;[7] or a bond or recognizance is required before the writ can lawfully issue,[8] and plaintiff has no right to demand execution of an order of delivery,[9] or, even where the officer has taken the property in his possession, to demand a delivery of it to him without having given the bond prescribed by law.[10] It is the officer's duty to take a bond as required by the statute.[11]

Dodd *v.* Skelton, 65 Nebr. 585, 91 N. W. 543; German Nat. Bank *v.* Aultman, 63 Nebr. 324, 88 N. W. 479.

4. Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205; Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Smith *v.* Whiting, 97 Mass. 316; Kimball Co. *v.* Tasca, 26 R. I. 565, 59 Atl. 919; Hubbard *v.* Young, 34 N. Brunsw. 641.

The bond is a substitute for the pledges at common law; *plegii de prosequendo,* and *plegii de retorno habendo.* Bacon Abr. tit. "Replevin" D. [*cited* in Morris *v.* Baker, 5 Wis. 389].

A justice of the peace acts ministerially in taking bond on issuing the writ. Gregory *v.* Sherman, 44 Conn. 466.

5. Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803.

6. Kendall *v.* Fitts, 22 N. H. 1; Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802. See also *infra,* VII, G, 4, a, (II).

7. Southern Orchard Planting Co. *v.* Gore, 83 Ark. 78, 102 S. W. 709; State *v.* Stephens, 14 Ark. 264; Poole *v.* Loomis, 5 Ark. 110; Pirani *v.* Barden, 5 Ark. 81; Baldwin *v.* Whittier, 16 Me. 33; Smith *v.* McFall, 18 Wend. (N. Y.) 521; Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272, holding that want of a proper bond exonerates a defendant in replevin from heeding the summons in the writ.

8. Gregory *v.* Sherman, 44 Conn. 466; Branch *v.* Branch, 6 Fla. 314.

Filing and indorsement thereof.— The receipt of a bond by the proper custodian and its lodgment in his office, and not the clerical act of indorsing it as filed, is the filing, and it is not material that a justice of the peace failed to perform the act of indorsing it as filed; and the bond was executed at the proper time sufficiently appears from the date thereof where it is certified by the justice in the writ itself that the bond was filed before the writ was issued. Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277.

Jurisdictional — *In general.*— Vaiden *v.* Bell, 3 Rand. (Va.) 448, holding that omission to give bond and security before the issuing of the writ of replevin does not invalidate the writ, but only subjects the sheriff to an action by defendant. So in Laird *v.* Upton, 8 N. M. 409, 45 Pac. 1010, it was held that the statute not requiring the giving of a bond in replevin prior to the issuance of the writ, except in actions against a sheriff, when, instead of being given to the sheriff as in ordinary cases, it is to be given to the clerk, who is also, in such case, to see to the service of the writ, the giving of the bond, even in such a case, prior to issuance of the writ is not jurisdictional, and the objection is waived by appearance and pleading to the merits.

So as to actions before justices of the peace, the bond not being necessary to the jurisdictional "to try and determine" the action, the immediate seizure of the property being a provisional remedy in the action. Fawkner *v.* Baden, 89 Ind. 587; Lemert *v.* Shaffner, 5 Ind. App. 468, 31 N. E. 1128, 32 N. E. 788. But see Allen *v.* Frederick, 28 Ind. App. 430, 59 N. E. 330.

9. Southern Orchard Planting Co. *v.* Gore, 83 Ark. 78, 102 S. W. 709.

10. Southern Orchard Planting Co. *v.* Gore, 83 Ark. 78, 102 S. W. 709; State *v.* Stephens, 14 Ark. 264.

11. *Arkansas.*— State *v.* Stephens, 14 Ark. 264 (holding that the officer exceeds his power and authority in taking the property into his possession without having received the bond intended for the protection and security of defendant, and, having done so, he is under no obligation to retain the property so taken, and it is his duty to at once restore it to defendant); Nunn *v.* Goodlett, 10 Ark. 89.

Delaware.— Clark *v.* Adair, 3 Harr. 113.

Maine.— Garlin *v.* Strickland, 27 Me. 443.

Missouri.— McAleenan *v.* Dickmann, 128 Mo. App. 703, 107 S. W. 444, statute mandatory, vesting no discretion in the officer.

New Hampshire.— Kendall *v.* Fitts, 22 N. H. 1.

Canada.— Logue *v.* Prescott, 18 Can. L. T. Occ. Notes 186, duty of sheriff under 60 Viet. c. 24, § 354, the court holding further that defendant on application to the sheriff is entitled to see the bond before he takes any step in the cause.

See 42 Cent. Dig. tit. "Replevin," § 139.

Waiver by defendant.— But where the bond is required only for security of defendant, he may waive it. Spencer *v.* Dickerson, 15 Ind. 368; Greely *v.* Currier, 39 Me. 516;

In some jurisdictions the writ may issue,[12] and the officer may commence the service thereof, before taking a bond, although under some statutes he cannot deliver the property to plaintiff;[13] nor, under some provisions, do anything more than is necessary to effect an appraisement of the property, until plaintiff has given the bond required by the statute,[14] and it is the duty of the officer to proceed to the extent of effecting the appraisement,[15] upon demand and tender of indemnity, where the value of the property, which is to determine the amount of the bond, must be fixed by the appraisement.[16] It is unnecessary to file a bond in an action for the possession of personalty where the action may proceed without immediate delivery and the immediate delivery is not demanded.[17]

b. Bond or Security For Costs. Where by statute plaintiff in replevin is required to give an undertaking as security for costs or a bond conditioned to pay such costs as defendant shall recover, such bond or undertaking is all that can be required of him, and it is not necessary that he should give in addition thereto any other bond or undertaking for costs.[18] It is otherwise where the

Wilson *v.* Nichols, 29 Me. 566; Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836.

The requirement may rest in the form of the writ prescribed, as where, although there is no distinct enactment providing for a bond, etc., the statute contains a distinct proviso or condition in the form of the writ provided for in these words: "Provided, he the said P. D. (where are the initials used to describe the plaintiff in the suit) shall give bond to the said S. P. (which letters are used in the same form to describe the defendant in the suit) with sufficient surety or sureties, &c." Purple *v.* Purple, 5 Pick. (Mass.) 226. See also Sumner *v.* Stewart, 3 N. H. 39, where, however, the form prescribed did not provide the particular obligee.

12. Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802.

13. Morris *v.* Baker, 5 Wis. 389 (holding that if plaintiff neglects or refuses to give the bond required in a reasonable time, the officer should redeliver the property to defendant); Graves *v.* Sittig, 5 Wis. 219 (holding that if a plaintiff in replevin neglects to execute a bond and take possession, he cannot have damages for the detention or depreciation of the property while in the hands of the officer).

14. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Hamberger *v.* Seavey, 165 Mass. 505, 43 N. E. 297; Smith *v.* Whiting, 97 Mass. 316; Wolcott *v.* Mead, 12 Metc. (Mass.) 516; McKinstry *v.* Collins, 76 Vt. 221, 56 Atl. 985.

15. See *infra*, III, E.

16. Hamberger *v.* Seavey, 165 Mass. 505, 43 N. E. 297.

17. *Indiana.*— Hodson *v.* Warner, 60 Ind. 214.

Kansas.— Batchelor *v.* Walburn, 23 Kan. 733; Goodwin *v.* Sutheimer, 8 Kan. App. 212, 55 Pac. 486.

Missouri.— South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360; Hamilton *v.* Clark, 25 Mo. App. 428.

North Carolina.— Jarman *v.* Ward, 67 N. C. 32.

South Carolina.— Dillard *v.* Samuels, 25 S. C. 318.

South Dakota.—Simpson Brick-Press Co. *v.* Marshall, 5 S. D. 528, 59 N. W. 728.

See 42 Cent. Dig. tit. "Replevin," § 139.

18. Singer Mfg. Co. *v.* Rhodes, 54 Conn. 48, 5 Atl. 610 (where a replevin bond conditioned to prosecute the suit to effect and pay any judgment that defendant may recover necessarily covers the costs as a part of the judgment and it is not necessary for a non-resident plaintiff to give the ordinary bond for costs); Moore *v.* Herron, 17 Nebr. 697, 703, 24 N. W. 425, 451 (where the undertaking as security in replevin was that plaintiff should duly prosecute the action and pay all costs, etc., and it was held that a separate undertaking as security for costs was not required); Doty *v.* Brown, 1 How. Pr. (N. Y.) 245 (holding that an additional bond for costs will not be required pending a new trial, although the costs already incurred exceed the penalty of the replevin bond); Rogers *v.* Hitchcock, 9 Wend. (N. Y.) 462; Stoddard *v.* Gilman, 22 Vt. 568; Dunshee *v.* Stearns, 1 Aik. (Vt.) 149 (in which cases it is held that no other security by way of recognizance was necessary, plaintiff having executed the replevin bond prescribed).

Undertaking not under seal.—In Boucher *v.* Pia, 8 Bosw. (N. Y.) 691, 14 Abb. Pr. 1, and Gelch *v.* Barnaby, 7 Abb. Pr. (N. Y.) 19, it was held that defendant in an action to recover a judgment for the possession of personal property under the code was entitled to the security for costs under a provision of the statute requiring non-resident plaintiffs to give a bond in a fixed penalty, and that his right was not affected by the fact that plaintiff had filed an undertaking not under seal in the form prescribed by the code for the purpose of obtaining the delivery of the property; that the latter undertaking is not a sealed instrument and will outlaw in six years after the cause of action accrued thereon, while liability on the cost bond continues twenty years. In Gelch *v.* Barnaby, *supra*, it is further pointed out that if defendant in the action requires the return of the property and complies with the provisions of the code in that regard, he might lose his right to proceed on plaintiff's undertaking for the possession of the property and in that event, if defendant succeeds in that action, the only judgment which he could recover would be for costs. But see Wisconsin M. & F. Ins. Co.

replevin bond does not provide security for costs, in which case an additional bond for that purpose is necessary.[19]

2. REQUISITES, SUFFICIENCY, AND VALIDITY — a. In General. The bond should conform to the requirements of the statute,[20] but where the language of the statute in giving a form is permissive, it is not necessary to follow it strictly.[21] On the other hand mere irregularities in that the statute has not been literally complied with,[22] or errors or defect in recital,[23] or error in or omission of date,[24] will not render the bond void or affect the liability of the parties thereon, although defendant in the replevin suit might have objected to it at the proper time in that suit;[25] and after plaintiff has obtained possession of the property in dispute by acting on the bond as a lawful and valid security, neither he nor his surety ought to be permitted to get rid of it by alleging that it is not so strong or so perfect as defendant might have required him to make it. It is enough that it contains all the essentials of a valid contract, and answers all the purposes intended by the statute.[26] If the instrument is good and enforceable at common law, and is not prohibited by statute, it may be enforced notwithstanding it may not be in all respects regular as a replevin bond or in strict conformity with the statute.[27] And so it is held

Bank *v.* Hobbs, 22 How. Pr. (N. Y.) 494, where the undertaking in replevin was held sufficient on a motion to dismiss the proceedings for irregularity in commencing them by reason of the failure to give the cost bond. The two cases first above cited were on motion to require the additional cost bond.

19. Fleet *v.* Lockwood, 17 Conn. 233, requiring if a non-resident give bonds for costs under the general statute applying to all civil actions where the replevin bond given by one to recover possession of property attached, the conditions of which referred only to the attachment proceedings and did not secure the costs to defendant in the replevin suit.

20. Hubbard *v.* Young, 34 N. Brunsw. 641. See also *infra*, III, B, 2, e.

A description of the property, which is required only to be set forth in the affidavit, need not be contained in the bond. Branch *v.* Branch, 6 Fla. 314.

21. Persse *v.* Watrous, 30 Conn. 139, sufficiency in action on the bond.

22. Branch *v.* Branch, 6 Fla. 314; Simonds *v.* Parker, 1 Metc. (Mass.) 508.

23. Hotz *v.* Bollman Bros. Co., 47 Ill. App. 378 (holding that the fact that the bond recites a wrong date as the commencement of the suit does not thereby vitiate it); Fuller *v.* Wright, 59 Ind. 333 (holding that the bond is not avoided by an erroneous description of the court in which the action is pending); Chadwick *v.* Badger, 9 N. H. 450 (inaccuracy by use of words in describing court which did not affect the identity of the court and might have been rejected); Hyde *v.* Patterson, 1 Abb. Pr. (N. Y.) 248 (holding that an undertaking in replevin reciting an affidavit made by plaintiff, but giving the wrong date of the affidavit, was not invalid, there being only one affidavit in the cause).

Want of form, substance, recital, or condition will not render the bond void, under statute in Indiana. Lemert *v.* Shaffer, 5 Ind. App. 468, 31 N. E. 1128, 32 N. E. 788.

24. Kimball *v.* Tasca, 26 R. I. 565, 59 Atl. 919 [*quoting* 5 Cyc. 734, upon the general rule in this respect as applied to replevin bonds]. The date of the bond is immaterial, if the fact in the return is true; because the bond may have been dated on a different day from the date of the return by mistake merely. Chandler *v.* Smith, 14 Mass. 313.

25. Hicklin *v.* Nebraska City Nat. Bank, 8 Nebr. 463, 1 N. W. 135; Shaw *v.* Tobias, 3 N. Y. 188.

26. Cooper *v.* Brown, 7 Dana (Ky.) 333; Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308; Shaw *v.* Tobias, 3 N. Y. 188.

27. *Arkansas.*— Nunn *v.* Goodlett, 10 Ark. 89, holding that unless the bond so departs from the requirements of the statute as to defeat the object of the statute, it may still be good as a common-law bond; and that while the sheriff, before he executes a writ of replevin, is required to take bond of plaintiff, a bond executed after the property is replevied and delivered to plaintiff is nevertheless valid.

Florida.— Branch *v.* Branch, 6 Fla. 314, holding this to be true, unless the statute has expressly declared such bond void, or it has been obtained by fraud, coercion, or oppression *colore officii*.

Illinois.— Wolfe *v.* McClure, 79 Ill. 564; Edwin *v.* Cox, 61 Ill. App. 567.

Massachusetts.— Morse *v.* Hodsdon, 5 Mass. 314.

New Hampshire.— Claggett *v.* Richards, 45 N. H. 360; Chadwick *v.* Badger, 9 N. H. 450; Whittemore *v.* Jones, 5 N. H. 362.

See 42 Cent. Dig. tit. "Replevin," § 140.

Contra.— See Pollok *v.* Gardner, 4 N. Brunsw. 655.

Although the instrument was not a bond because of the omission of seals, a suit could be maintained upon it. It filled the office of a replevin bond and secured the execution of the writ and the taking of the goods. Edwin *v.* Cox, 61 Ill. App. 567.

Where the bond is not prescribed by statute its validity depends upon usage and the legality of its conditions. If the sheriff takes a bond voluntarily given, with warrant to confess judgment, it is valid, although he might not have had the right to demand a

that the parties to the action may waive the formalities of the statutory proceedings, and, in such case, the sureties to the undertaking are bound by the waiver, and are estopped from questioning the recitals in the undertakings.[28]

b. Conditions. Ordinarily the conditions of a replevin bond are to be gathered from the local statutes which prescribe the bond consistently with the nature and purpose of the action or writ.[29] However, it is only necessary that the bond shall contain substantially the statutory conditions, and it need not follow the statute *in totidem verbis* [30] if the legal import is the same.[31] And although a condition may not be in conformity with the statute liability thereon may be enforceable as upon a voluntary obligation.[32]

bond containing such warrant; such warrant affects only the remedy and not the liability. Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802.

But where the writ of replevin is void on its face the replevin bond is also void. Rosen *v.* Fischel, 44 Conn. 371; Hicks *v.* Mendenhall, 17 Minn. 475, where, under Laws (1868), c. 76, a writ of replevin could no longer issue, the proceeding being by indorsement upon the affidavit of a requisition to the sheriff to take the property, instead of to the clerk to issue a writ, and it was held that the writ was unauthorized and void, and that the bond given to procure the issuance thereof, and a bond given in substitution thereof for insufficiency of the sureties in the first, are void, notwithstanding all the parties may have treated all the proceedings as regular. See also Frothingham *v.* Howard, 1 Aik. (Vt.) 139.

Identifying cause by name of defendant.— If defendant's name is not inserted in the bond, nor any language used from which it can be ascertained in what suit the bond was given, it is held that the bond is fatally defective in an action on the bond (Matthews *v.* Storms, 72 Ill. 316); or when pleaded in an action on the officer's bond for taking property without first requiring the necessary replevin bond (Arter *v.* People, 54 Ill. 228).

28. Harrison *v.* Wilkin, 69 N. Y. 412; Kilgore *v.* Rabb, 1 Nott & M. (S. C.) 331.

29. See the statutes of the several states. And see Cooper *v.* Brown, 7 Dana (Ky.) 333 (where it is shown that the bond then required by the English statutes only bound plaintiff for a return of the property, "if a return thereof should be awarded," but that the statute in Kentucky then in force makes plaintiff and his surety liable in all cases in which he shall fail successfully to prosecute his action, for the value of the property taken, unless it is restored); Clark *v.* Adair, 3 Harr. (Del.) 113 (holding that in case of distress for rent, the condition of the replevin bond was prescribed by the statute to prosecute the suit with effect and satisfy the judgment, and in other cases the condition was to prosecute the suit with effect, and to return the goods, if a return be awarded).

30. Persse *v.* Watrous, 30 Conn. 139; Lambden *v.* Conoway, 5 Harr. (Del.) 1; Duggan *v.* England, Harp. (S. C.) 215.

31. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139, holding that where the condition of the bond was to prosecute to effect before A B, justice of the peace, and the justice had not final jurisdiction, it was held that the bond was not void, as not complying with the statute, which requires a bond to prosecute to effect generally.

Delaware.— Lambden *v.* Conoway, 5 Harr. 1, holding that a replevin bond conditioned to appear and prosecute the suit to effect, and to indemnify the sheriff, is good, although the statutory condition is to prosecute the suit with effect, and satisfy any judgment which shall be given against the sheriff in replevin.

Kentucky.— Cooper *v.* Brown, 7 Dana 333, where the bond was held to be sufficient which, instead of providing for the return of the property and a payment of hire in the event of failing to establish plaintiff's right, as the statute prescribed, provided that plaintiff would well and truly prosecute his writ, pay all damages which might ensue to defendant and be adjudged against plaintiff and also to perform any judgment of the court.

Montana.— Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763, holding that under Civ. Code, § 157, requiring an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect," an undertaking is sufficient as a statutory bond which provides "for the prosecution of the action," omitting the words "without delay and with effect," over the objection that not being good as a statutory bond an assignment was necessary.

New Jersey.— West *v.* Caldwell, 23 N. J. L. 736, holding that the condition "to prosecute the suit and to return the same goods and chattels, if return thereof shall be adjudged," directed by the statute, is not essentially different from that "to prosecute the suit with effect and without delay, and to return the goods and chattels distrained in case return shall be awarded."

See 42 Cent. Dig. tit. "Replevin," § 141.

Misdescription of court.—Arnold *v.* Allen, 8 Mass. 147, where a replevin bond conditioned to prosecute the action at the "county court" next to be held at, etc., rightly describing the next term of the "common pleas" was held to be good; the words "county court" must intend the court of common pleas.

32. Claggett *v.* Richards, 45 N. H. 360; Whittemore *v.* Jones, 5 N. H. 362, bond including indemnity to the sheriff.

Valid as to statutory condition.— If a con-

c. Obligors and Obligees. The name of the obligee should appear in the bond.[33] Where the form of the bond prescribed by the statute does not particularize to whom it shall be made payable, the court has sanctioned the form making the officer the obligee where that had become the settled practice.[34] But where the statute directs a replevin bond to be given to defendant as obligee, a bond to the officer as obligee instead of to defendant is void, since it stands as a bond given to one who has no lawful authority to take it.[35] Where the bond is to be made to the officer, it is held that the officer intended by the statute is the one who in fact seizes the property,[36] and although the statute names the sheriff as the party to whom the bond is to be given, since under other provisions the coroner is required to perform the duties of the sheriff in certain prescribed emergencies, a bond in replevin given to the coroner is good.[37] It is sufficient in the replevin action if the bond is signed by the surety only, if the statute does not require more than a bond with sureties, plaintiff in replevin being liable without any bond,[38] and the sureties cannot escape liability in an action on the bond because the principal did not sign it;[39] but a bond executed by one claiming to execute it as

dition be part conformable to the statute, and another part not required by the statute, it is valid for the part which is good, unless the statute expressly annuls such bond. Lambden *v.* Conoway, 5 Harr. (Del.) 1.

The omission of a condition will not invalidate the bond, since each condition is an independent obligation and liability on that contained in the bond will be enforced. Hotz *v.* Bollman Bros. Co., 47 Ill. App. 378 (where the omission in the bond was as to the payment of the costs and damages for wrongfully suing out the writ, and it was held that such condition is separate and distinct from the conditions embodied in the bond sued on, and that an action will lie for a breach of either, as each condition is an independent obligation, and a failure to keep either one is a ground of action); Rauh *v.* Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42 (holding that under the statute providing that the principal and sureties to a bond shall be bound to the full extent contemplated by the law requiring the same, although defective in form, the sureties on a replevin bond which omits the statutory provision that the principal shall prosecute his action with effect are liable, where the principal dismisses his action without a determination of the merits); Hicklin *v.* Nebraska City Nat. Bank, 8 Nebr. 463, 1 N. W. 135 (omission of provision in undertaking for the return of the property to defendant in the event of a judgment for such return, not fatal but it creates a liability as far as it goes).

33. Titus *v.* Berry, 73 Me. 127.

34. Whittemore *v.* Jones, 5 N. H. 362 (distinguishing the practice in Massachusetts under the case cited *infra*, note 35); Sumner *v.* Stewart, 2 N. H. 39.

35. Purple *v.* Purple, 5 Pick. (Mass.) 226, holding that, although the statute contained no distinct requirement for such a bond, it was necessary under what was equivalent to such a requirement by reason of the proviso in the form of the writ required by the statute that plaintiff in the suit should give a bond to defendant, etc.

Clerical error.— Where objection was made in the replevin suit to a bond which was entitled in the case naming the parties, and recited the institution of the action, again naming the parties, the fact that it named the obligee as follows: "We . . . undertake to the said . . . (naming the officer), defendant in said action," was held not to render it insufficient as a bond running to defendant, and the insertion of the name of the officer under such circumstances will be considered as surplusage and as such disregarded, no proof of extrinsic circumstances being required to show who was the real obligee. Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308.

36. Claggett *v.* Richards, 45 N. H. 360, where the writ appears to have been issued in one county and executed in another by the sheriff of the latter, and it was held that the bond was properly made to the latter.

37. Speer *v.* Skinner, 35 Ill. 282, holding that in other proceedings it will be presumed that one of the contingencies had happened which made it necessary to direct the writ of replevin to the coroner.

38. Phillippi Christian Church *v.* Harbaugh, 64 Ind. 240 (where the statute did not require plaintiff to file his bond, but a bond with surety); South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360 (holding that a statute like that referred to in the case last above cited did not require plaintiff to sign the bond, although another section following in the statute gave the form of a bond which contemplated such signature).

39. *Kentucky.*— Cooper *v.* Brown, 7 Dana 333.

Maine.— Howe *v.* Handley, 28 Me. 241, under statutory provision that the officer is authorized to "take from the plaintiff or some one in his behalf a bond to the defendant with sufficient sureties."

Michigan.— *In re* Cahill, 48 Mich. 616, 12 N. W. 877, under statute similar to that in Maine last above mentioned.

Ohio.— Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599.

United States.— Wood *v.* Forrest, 30 Fed. Cas. No. 17,945, 2 Cranch C. C. 303.

See 42 Cent. Dig. tit. "Replevin," § 143.

agent for plaintiff, but having in fact no authority, will not authorize service of the writ.[40] Where the form of the recognizance required is a joint and several bond, inasmuch as the recognizors are jointly and severally liable, it is immaterial to defendant in the replevin which of the obligors is styled principal and which surety, as both are in legal effect principals,[41] and it is not necessary to the validity of the bond that the name of the surety is not mentioned in the body of the bond.[42] Under a statute requiring the bond to be executed "with sufficient sureties," it has been decided that defendant in replevin is entitled to two sureties in the replevin bond,[43] independently of plaintiff;[44] and if in this respect plaintiff fails to comply with the statute, defendant may object by plea in abatement or by motion seasonably filed,[45] or by exception to the sufficiency of the bond.[46] Plaintiff, however, on payment of costs, will be allowed to amend, by filing a new bond with sureties, and the sureties justifying.[47] But a replevin bond which the statute requires to be given with two or more sureties is not void because actually signed and delivered by one surety only.[48] The sufficiency of the sureties is a matter

40. Garlin *v.* Strickland, 27 Me. 443 (action against officer for taking property without first taking the statutory bond); Kimball Co. *v.* Tasca, 26 R. I. 565, 59 Atl. 919 (objection waived by trial on merits without raising it); Smith *v.* Fisher, 13 R. I. 624.

Bond of corporation.—A replevin bond purporting to be given by a corporation, but signed only by an individual, is defective, and would be so held on a plea in abatement on motion to dismiss seasonably made in the case. Kimball *v.* Tasca, 26 R. I. 565, 59 Atl. 919.

A partner may sign as principal in behalf of himself and copartners. Dunbar *v.* Scott, 14 R. I. 152.

41. Dorus *v.* Somers, 57 Conn. 192, 17 Atl. 852, holding that a plea in abatement on the ground of the insufficiency of a recognizance entered into by a stranger as principal and plaintiff in replevin as surety should not be sustained.

42. Clarke *v.* Bell, 2 Litt. (Ky.) 164, where the bond was in the first person plural and signed by the principal and surety.

43. Claflin *v.* Thayer, 13 Gray (Mass.) 459; Shaw *v.* Tobias, 3 N. Y. 188; Irr *v.* Schroeder, 6 N. Y. Civ. Proc. 253; Whaling *v.* Shales, 20 Wend. (N. Y.) 673; Smith *v.* McFall, 18 Wend. (N. Y.) 521; Whitford *v.* Goodwin, 13 R. I. 145; Hubbard *v.* Young, 34 N. Brunsw. 641.

In South Carolina the statute of George II, which requires two securities to a replevin bond, is not of force. McClary *v.* De Bow, 3 McCord 44.

Necessity that sureties be residents.— The officer is not bound, or even permitted, to accept as securities persons not residents of the county in which the proceedings are pending, and hence not within the jurisdiction of the court issuing the process in the case of future proceedings to enforce their liability. State *v.* Wait, 23 Nebr. 166, 36 N. W. 380. But one who rents and occupies a business office within the state is a "householder" and may be a surety on a replevin bond. Somerset, etc.. Sav. Bank *v.* Huyck, 33 How. Pr. (N. Y.) 323.

A surety company may, under the statute relating to such companies, properly be accepted as sole surety on a replevin bond. Leiter *v.* Lyons, 24 R. I. 42, 52 Atl. 78.

44. Smith *v.* Trawl, 1 Root (Conn.) 165; Burns *v.* Robbins, 1 Code Rep. (N. Y.) 62.

The solvency of plaintiff in the replevin suit does not dispense with the necessity for one or more sureties on the bond. Wilson *v.* Williams, 52 Ark. 360, 12 S. W. 780.

In replevin by a firm, a bond executed by the firm with one of the partners as surety is insufficient, the statute requiring security additional to the pecuniary responsibility of plaintiffs. Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537.

The prochein ami of an infant may become surety in a replevin bond, where the infant is plaintiff, and there is a cosurety. Anonymous, 2 Hill (N. Y.) 417.

45. Greely *v.* Currier, 39 Me. 516; Claflin *v.* Thayer, 13 Gray (Mass.) 459; Shaw *v.* Tobias, 3 N. Y. 188; Whaling *v.* Shales, 20 Wend. (N. Y.) 673 (holding that where there is but one surety, defendant may move to set aside the proceedings, and is not bound to except); McClary *v.* De Bow, 3 McCord (S. C.) 44 (holding that it is too late after judgment to take advantage of such omission).

46. Shaw *v.* Tobias, 3 N. Y. 188; Smith *v.* McFall, 18 Wend. (N. Y.) 521.

47. Shaw *v.* Tobias, 3 N. Y. 188; Whaling *v.* Shales, 20 Wend. (N. Y.) 673.

48. *Massachusetts.*— Simonds *v.* Parker, 1 Metc. 508.

New York.— Shaw *v.* Tobias, 3 N. Y. 188; Kesler *v.* Haynes, 6 Wend. 547, holding that if the officer omits to take sufficient surety, he is responsible, but the proceedings are not irregular.

Ohio.— Bigelow *v.* Comegys, 5 Ohio St. 256.

Pennsylvania.—Saeltzer *v.* Ginther, 2 Miles 86.

United States.— Haller *v.* Beall, 11 Fed. Cas. No. 5,957, 2 Cranch C. C. 227. And see Orr *v.* Ingle, 18 Fed. Cas. No. 10,588, 2 Cranch C. C. 193.

See 42 Cent. Dig. tit. "Replevin," § 144.

Statute merely directory as to the bond see Saeltzer *v.* Ginther, 2 Miles (Pa.) 86;

which does not in any way affect plaintiff in the replevin suit, but is a matter entirely between the sheriff and defendant in the suit.[49]

d. Amount or Penalty. The obligation or penalty of a replevin bond should be in an amount sufficient to secure a return of the property or an equivalent value,[50] and the statutes usually require that this amount shall be at least double the value of the property.[51] But a bond for less than double the value of the property is not for that reason void,[52] but is good at common law,[53] and, although it may be good ground for a motion in arrest of judgment,[54] defendant may waive the defect and accept the bond.[55]

e. Increase of Penalty, and New or Additional Bond.[56] Under some statutes a defective or insufficient replevin bond may be amended,[57] or a new or additional bond may be filed *nunc pro tunc*,[58] and a new bond may be ordered filed within such time as may be directed.[59] For example, a new or additional bond may be filed so as to cure a bond which is defective in not providing for a sufficient pen-

Haller *v.* Beall, 11 Fed. Cas. No. 5,957, 2 Cranch C. C. 227.

Such bond good at common law.— Saeltzer *v.* Ginther, 2 Miles (Pa.) 86.

49. Shaw *v.* Tobias, 3 N. Y. 188 (holding that if the party for whose benefit it was taken accepts a bond with only one surety, the maker of the bond cannot resist a recovery thereon on that ground); Hubbard *v.* Young, 34 N. Brunsw. 641; Taylor *v.* Burpee, 10 N. Brunsw. 191.

50. Plunkett *v.* Moore, 4 Harr. (Del.) 379.

51. *Florida.*— Branch *v.* Branch, 6 Fla. 314.

Illinois.— People *v.* Core, 85 Ill. 248.

Indiana.— Bugle *v.* Meyers, 59 Ind. 73 (holding, however, that a replevin bond in a justice's court is sufficient if it provides for the payment of a specific sum, as required by statute in actions in the circuit court, instead of being "in a sum double the value of such goods," as required by 1 Rev. St. (1876) p. 628, in a replevin bond before a justice); Deardorff *v.* Ulmer, 34 Ind. 353.

Massachusetts.—Clark *v.* Connecticut River R. Co., 6 Gray 363; Case *v.* Pettee, 5 Gray 27.

New York.— See N. Y. Code Civ. Proc. § 1699. *Compare* Furlong *v.* Munn, 1 How. Pr. 43.

Ohio.— Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599.

Tennessee.— Creamer *v.* Ford, 1 Heisk. 307, holding that a bond for costs only is not in compliance with such a requirement.

See 42 Cent. Dig. tit. "Replevin," § 145.

The criterion of the value of the property is not that stated in the declaration, but is the estimated value to be ascertained at the time the bond is given. Branch *v.* Branch, 6 Fla. 314. And under some statutes the officer must take an inventory and invoice of the value of the property and take a bond in double the amount of the value as he finds it to be. Mayer *v.* People, 190 Ill. 109, 60 N. E. 96 [*affirming* 92 Ill. App. 123]. But see Deardorff *v.* Ulmer, 34 Ind. 353, holding that the penalty should be double the value as stated in the verified complaint. But it has been held that where the penalty is "double the value of the property hereinafter named to be replevied," without stating what that value is, the bond is invalid, and if an objection be taken at the return-term of the action of replevin the action must be dismissed. Clark *v.* Connecticut River R. Co., 6 Gray (Mass.) 363; Case *v.* Pettee, 5 Gray (Mass.) 27; Bennett *v.* Allen, 30 Vt. 684.

The fact that the penalty is in more than double the value of the property is no ground for quashing the writ. Clap *v.* Guild, 8 Mass. 153.

52. Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599.

53. Tuck *v.* Moses, 54 Me. 115.

54. Deardorff *v.* Ulmer, 34 Ind. 353.

55. Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599. See also Tuck *v.* Moses, 54 Me. 115.

56. **Sureties** see *supra*, III, B, 2, c.

57. Smith *v.* Howard, 23 Ark. 203; Donley *v.* Fowler, 147 Mich. 288, 110 N. W. 1097; Bublitz *v.* Trombley, 113 Mich. 413, 71 N. W. 840; Kendall *v.* Fitts, 22 N. H. 1.

58. Smith *v.* Howard, 23 Ark. 203 (holding that it is error to refuse to permit a new bond to be executed in lieu of a defective replevin bond, pending a motion to dismiss the action for want of a sufficient bond); Donley *v.* Fowler, 147 Mich. 288, 110 N. W. 1097; Moore *v.* Lewis, 76 Mich. 300, 43 N. W. 11; Newland *v.* Willetts, 1 Barb. (N. Y.) 20; Cobb *v.* Lackey, 6 Duer (N. Y.) 649; Whaling *v.* Shales, 20 Wend. (N. Y.) 673. But see Lynch *v.* Bruce, 2 Dougl. (Mich.) 123.

If plaintiff is ready and willing to give a new bond the action should not be dismissed. Branch *v.* Branch, 6 Fla. 314.

59. Greig *v.* Ware, 25 Colo. 184, 55 Pac. 163 (holding also that on a failure to comply with such an order, the court may direct the return of the property to the adverse party pending trial); Treman *v.* Morris, 9 Ill. App. 237.

Where a motion for a new bond is continued to the next term and then granted, and plaintiff files a motion to set aside the order requiring the bond, which motion is continued to the next term and overruled, the order for a new bond will not be made to relate back to the term when the motion for it was filed, where there is nothing in the record to show on whose application the motion was continued. McAleenan *v.* Dickmann, 128 Mo. App. 703, 107 S. W. 444.

alty.[60] Defendant, however, may waive a new or additional bond, as by going to trial upon the merits without objection;[61] nor can a new or additional bond be required where defendant has retained possession of the property by giving a delivery bond,[62] or where the property has been placed in the custody of the court.[63] Under some statutes if the bond which is given is sufficient and regular under the statute, the court cannot require a new or additional bond.[64]

f. Justification. In the absence of statute the validity of a replevin bond is not affected by the failure of the sureties therein to justify.[65] Provision, however, is usually made by statute for the justification of such sureties, and when so required they must justify in the form and manner prescribed.[66] Under some statutes if defendant duly excepts to the sufficiency of plaintiff's sureties,[67] it is the duty of plaintiff either to procure a satisfactory justification of his sureties,[68] or to furnish another undertaking to the same effect as the original one, with other sureties who must then appear and justify,[69] and if neither of these things are done, it is the duty of the officer who seizes the property to return it to defendant to remain in his possession until the case is finally disposed of.[70] Where defendant excepts because one of the sureties fails to justify and a new surety is substituted, a new undertaking should be executed; and the original undertaking cannot be altered by inserting therein the name of the new surety, without the

60. Briggs *v.* Wiswell, 56 N. H. 319.

61. Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836.

62. Jackson *v.* Dummit, 62 Mo. App. 426.

63. Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363.

64. Hohensstein *v.* Westminster Candle Co., 31 N. Y. App. Div. 11, 52 N. Y. Suppl. 235 (holding this to be true, even though one of the original sureties becomes insolvent); U. S. Land, etc., Co. *v.* Bussey, 53 Hun (N. Y.) 516, 6 N. Y. Suppl. 416, 17 N. Y. Civ. Proc. 164; De Reguie *v.* Lewis, 3 Rob. (N. Y.) 708 (holding that after the sheriff has approved the bond, a new undertaking cannot be required, as the code of procedure does not provide for any other undertaking than that to be taken and approved by the sheriff, however inadequate the amount for which it is given); Bulmer *v.* Jenkins, 3 How. Pr. (N. Y.) 11 (holding that the court will not entertain a motion to increase the penalty of the replevin bond as it is a matter of discretion with the officers taking it, under the statute).

65. Wheeler *v.* Paterson, 64 Minn. 231, 66 N. W. 964, 58 Am. St. Rep. 527, holding that the omission of the sureties in a replevin bond, given in an action in a justice's court, to justify does not affect the validity of the bond, although it would be otherwise if it were in a district court.

66. See the statutes of the several states.

Under N. Y. Code Civ. Proc. § 2925, providing that in replevin in a justice's court the sureties in the replevin bond "must justify before the justice" on the return of the summons, an affidavit of justification need not be filed with the bond as section 812, providing that a bond executed by sureties must be accompanied by affidavits of justification, does not apply. Clark *v.* Hooper, 69 Hun 445, 23 N. Y. Suppl. 447.

Adjournment of proceedings.— Under N. Y. Code Civ. Proc. §§ 580, 1705, it is within the discretion of the court, where one party refuses to consent to an adjournment of the proceedings for justification of the other party's sureties, to adjourn for a reasonable length of time beyond the next judicial day. Troy Carriage Works *v.* Muxlow, 16 Misc. (N. Y.) 561, 38 N. Y. Suppl. 938 [*affirming* 15 Misc. 696, 37 N. Y. Suppl. 1023]. See also Burns *v.* Robbins, 1 Code Rep. (N. Y.) 62.

67. See Goff *v.* Bliss, 12 N. Y. Civ. Proc. 99.

Time within which defendant may except see Pardee *v.* Buell, 2 Hill (N. Y.) 357. See also N. Y. Code Civ. Proc. § 1703, providing that defendant must except within three days after the chattel is replevied, and a copy of the affidavit, requisition, and undertaking is served.

Notice of exception must be served on the sheriff under N. Y. Code Civ. Proc. § 1703. But see Cusick *v.* Cohen, 3 Den. (N. Y.) 267, holding that the exception may be filed in the clerk's office, and need not be entered on the bond or on the writ.

Waiver of objection see *infra*, III, B, 3, c.

68. Shull *v.* Barton, 58 Nebr. 741, 79 N. W. 732 [*overruling* Shull *v.* Barton, 56 Nebr. 716, 77 N. W. 132, 71 Am. St. Rep. 698]; Goff *v.* Bliss, 12 N. Y. Civ. Proc. 99. See also Burns *v.* Robbins, 1 Code Rep. (N. Y.) 62.

If the sureties fail to justify, upon such an exception, it is a defect in the proceedings which affects the substantial rights of defendant and for which a judgment against him will be reversed (Goff *v.* Bliss, 12 N. Y. Civ. Proc. 99), except where they attend and are ready to justify but defendant's counsel does not request it, and the trial proceeds on the merits without objection to the failure to justify (Webb *v.* Hecox, 27 Misc. (N. Y.) 169, 58 N. Y. Suppl. 382).

69. Goff *v.* Bliss, 12 N. Y. Civ. Proc. 99.

70. Goff *v.* Bliss, 12 N. Y. Civ. Proc. 99.

consent of the other surety, or of those for whose benefit or protection it is required to be given.[71]

g. Acceptance or Approval. Under some statutes before the replevying officer can lawfully deliver the property to plaintiff, the latter's replevin bond must be accepted or approved in a prescribed manner;[72] but where the statute does not require that the acceptance or approval shall be made in any prescribed manner, it may be sufficiently evidenced by the conduct of the magistrate or officer authorized to act.[73] Such acceptance or approval, however, forms no part of the obligation of the bond as against the obligor and sureties, and its omission does not affect its validity or render it unenforceable as against them;[74] but if the replevying officer delivers the property to plaintiff without complying with the statutory provisions as to such acceptance or approval, he becomes a wrong-doer from the beginning and is personally responsible in damages therefor.[75]

3. Defects and Objections — a. In General. If an officer serve a writ of replevin without first taking bond according to the provisions of the writ, defendant may avoid the process by plea in abatement,[76] and it is held to be sufficient ground for quashing or vacating the writ or requisition that plaintiff has not given a proper bond,[77] and since a valid bond is a condition precedent to the service of a writ of replevin, plaintiff cannot, by ratification of an invalid bond, after service of the writ, validate such service.[78] A defect apparent upon the face of a replevin bond may be taken advantage of either by a motion to dismiss or a plea or answer in abatement.[79] Where the defect in such a bond does not appeal

71. Cobb *v.* Lackey, 6 Duer (N. Y.) 649.

72. See the statutes of the several states. See also Branch *v.* Branch, 6 Fla. 314 (holding that where the clerk in approving the bond adds to his name the word "clerk" only, it is sufficient if the other proceedings which occur at the same time show of what court he is clerk, and that it is the same as that into which the writ is returnable); Grotz *v.* Hussey, 61 How. Pr. (N. Y.) 448 (holding that plaintiff's undertaking in replevin proceedings in a district court must be approved by the justice and not by the marshal).

Under Mass. Rev. Laws (1902), c. 190, §§ 15, 16, it is optional with the replevying officer to approve the sureties and thus become responsible if subsequently they are found financially insufficient, or to refer this question to a magistrate authorized to act, for his decision, and so avoid this liability; but if the latter course is adopted defendant, under the statute is entitled to notice in writing from the officer, stating the time and place of hearing with the names and places of residence of the sureties proposed. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98. See also Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403.

73. Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130 (holding that where the bond is delivered to the sheriff, and he, acting upon such delivery, places the property in the possession of the principal obligor, it constitutes an acceptance and approval of the bond); Doe *v.* Cunningham, 6 Blackf. (Ind.) 430; Burns *v.* Robbins, 1 Code Rep. (N. Y.) 62 (holding that if the sheriff proceeds to execute the process his approval may be inferred, and he may be permitted to indorse the undertaking as of the day it was received); Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126 (holding that a magistrate is not required to approve in writing a bond in claim and delivery, but that if he takes the bond and with his own hands sends it out of his office into the hands of an officer appointed by him, it is sufficient evidence of approval by him).

74. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Stone *v.* Jenks, 142 Mass. 519, 8 N. E. 403, holding that the approval of the bond provided for by the statute is for the officer's protection only, and a failure to have it approved does not thereby invalidate it.

75. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. 869.

Under Nebr. Code Civ. Proc. § 1040, a constable who accepts insufficient security on an undertaking in replevin is liable in damages to defendant in the action in which the same is taken. Busch *v.* Moline, etc., Co., 52 Nebr. 83, 71 N. W. 947. See also Thomas *v.* Edgerton, 40 Nebr. 25, 58 N. W. 551.

76. Cady *v.* Eggleston, 11 Mass. 282.

77. Greely *v.* Currier, 39 Me. 516; Campbell *v.* Morey, 27 Vt. 575; Morris *v.* Baker, 5 Wis. 389; Hubbard *v.* Young, 34 N. Brunsw. 641. *Contra*, where writ has not been executed. See Greenwade *v.* Fisher, 5 B. Mon. (Ky.) 167.

Excessive bond.— The taking of a bond in a larger sum than that specified in the writ is not ground for quashing the writ. Clap *v.* Guild, 8 Mass. 153.

78. Smith *v.* Fisher, 13 R. I. 624.

79. Commonwealth Bank *v.* Lacey, 1 Litt. (Ky.) 295 (holding, however, that a motion to quash a replevin bond cannot be made in the name of the surety only without joining the principal); Greely *v.* Currier, 39 Me. 516 (holding that a motion to dismiss must be

upon its face, as for instance the insufficiency of the security, it should be suggested and shown to the court by proof.[80] When proceedings in replevin are quashed for such defect, plaintiff cannot contest, by the introduction of testimony, the right of defendant to a return of the property.[81]

b. Curing Defects by Amendment. It has been held that the court may allow a replevin bond to be amended so as to conform to the statute.[82] And the right of amendment is frequently expressly conferred by statute.[83]

c. Waiver of Defects and Objections. Defects and irregularities in a replevin bond, not jurisdictional, but such that defendant may waive them, are deemed waived by defendant's proceeding to trial on the merits,[84] or by failure to make objection within a reasonable time,[85] or within the time prescribed by statute,[86] or imited by rule of court for filing dilatory pleas.[87] Likewise it seems that after

made within the time prescribed for filing pleas in abatement); Houghton *v.* Ware, 113 Mass. 49; Whitford *v.* Goodwin, 13 R. I. 145.

"Defects of form in process," upon which, under statute, the decision of the court below is final, include a defect apparent upon the face of a replevin bond. Houghton *v.* Ware, 113 Mass. 49.

No notice of the motion to quash is necessary where the defects are apparent on the record. McCormick *v.* Young, 3 J. J. Marsh. (Ky.) 180.

80. Dixon *v.* Thatcher, 8 Ark. 134.

Necessity of excepting to sureties.— Nebr. Code Civ. Proc. § 189, requiring defendant to give notice that he excepts to the sufficiency of the replevin bond, is not applicable to such a bond taken by a constable in an action pending before a justice of the peace. Busch *v.* Moline, etc., Co., 52 Nebr. 83, 71 N. W. 947 [*approving* Thomas *v.* Edgerton, 40 Nebr. 25, 58 N. W. 551].

Mode of taking exceptions.— Where defendant in replevin excepts to the sureties taken by the sheriff, he may file his exceptions in the clerk's office, and he is not obliged to seek the sheriff and enter his exceptions on the bond. Cusick *v.* Cohen, 3 Den. (N. Y.) 267.

81. Greely *v.* Currier, 39 Me. 516.

82. Smith *v.* Howard, 23 Ark. 203; Lee *v.* Mills, 69 Ga. 740. And see Prentiss *v.* Spalding, 2 Dougl. (Mich.) 84.

Amendment permitted on payment of costs. —A replevin bond, imperfect in itself, and executed with but one surety, may be amended, after service of the writ, on payment of costs of motion to set aside the proceedings. Hawley *v.* Bates, 19 Wend. (N. Y.) 632.

Where replevin is brought by plaintiff as an individual, the bond cannot be amended by adding after his name the word "executor." Taylor *v.* Jackson, 35 Misc. (N. Y.) 300, 71 N. Y. Suppl. 745.

83. Donley *v.* Fowler, 147 Mich. 288, 110 N. W. 1097; Bublitz *v.* Trombley, 113 Mich. 413, 71 N. W. 840; Hopkins *v.* Green, 93 Mich. 394, 53 N. W. 537.

N. Y. Code Civ. Proc. § 730, permitting an amendment of any defects in a bond or undertaking, applies to justices' courts; and by Laws (1894), c. 615, §§ 103, 117, the proceedings and practice in justices' courts apply to the city court. Rich *v.* Conley, 64 N. Y. Suppl. 333.

In Rhode Island it is held that a defective replevin bond cannot be amended under Gen. St. c. 224, § 4, that provision being applicable only in favor of defendant, and on his motion; nor under Gen. St. c. 199, § 4, reënacted in Pub. St. c. 210, § 4, permitting amendments of process, because the bond in a replevin suit is not a part of the process, but collateral to it. Simpson *v.* Wilcox, 18 R. I. 40, 25 Atl. 391 [*following* Whitford *v.* Goodwin, 13 R. I. 145].

84. *Indiana.*—Spencer *v.* Dickerson, 15 Ind. 368.

Massachusetts.— Simonds *v.* Parker, 1 Metc. 508; Chandler *v.* Smith, 14 Mass. 313.

Michigan.—Bloomingdale *v.* Chittenden, 75 Mich. 305, 42 N. W. 836; Pistorius *v.* Swarthout, 67 Mich. 186, 34 N. W. 547; Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565.

Minnesota.— McKee *v.* Metraw, 31 Minn. 429, 18 N. W. 148.

Nebraska.— Hudelson *v.* Tobias First Nat. Bank, 50 Nebr. 557, 71 N. W. 304.

Rhode Island.—W. W. Kimball Co. *v.* Tasca, 26 R. I. 565, 59 Atl. 919.

Vermont.— Tripp *v.* Howe, 45 Vt. 523.

See 42 Cent. Dig. tit. "Replevin," § 153.

85. Hughes *v.* Hardesty, 13 Bush 364.

The failure of sureties in a replevin bond to justify their pecuniary responsibility in writing indorsed on the bond is not jurisdictional, and is waived unless objection is seasonably made. Hatch *v.* Christmas, 68 Mich. 84, 35 N. W. 833.

86. Cromer *v.* Watson, 59 S. C. 488, 38 S. E. 126, holding that the objection that the magistrate did not indorse his approval on an undertaking is waived by not excepting thereto at the proper time.

Exceptions to sureties.— Under Nebr. Code Civ. Proc. § 189, exceptions to the sufficiency of sureties on replevin bonds must be taken within twenty-four hours from the time the bond is given, or all objections thereto will be deemed waived. Barton *v.* Shull, 70 Nebr. 324, 97 N. W. 292. So under the statute in North Carolina, if defendant fail, within three days after the service of the affidavit and undertaking, to give notice that he excepts to the sufficiency of the sureties, he shall be deemed to have waived all objections to them. Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

87. Greely *v.* Currier, 39 Me. 516; Simonds

issue joined on the merits it is too late to plead in abatement that no bond was returned;[88] and the same is true as to the objection that the bond was not given in due time, where the bond is not jurisdictional.[89]

C. Writ, Order, and Summons — 1. Issuance of Writ or Order — a. In General. At common law and under some statutes an action of replevin is commenced by a writ of replevin commanding the officer to whom it is directed to replevy the goods and deliver them to plaintiff and to summon defendant to appear and answer the taking and detention;[90] but under other statutes the action is commenced by a summons,[91] and a writ or order for the delivery of the property, which has, under such statutes, taken the place of the old writ of replevin, not only is not essential to the commencement of the action, but cannot be issued until after the action has commenced by the service of summons,[92] and furthermore the maintenance of the action is not dependent upon such an order being issued, as such order is merely ancillary,[93] and confers no title, but covers only a temporary right which may terminate upon a judgment against plaintiff.[94] Under some of such statutes, after plaintiff in replevin has complied with the statutory requirements as to the filing of a proper affidavit and bond,[95] it is the duty of the clerk of court to forthwith issue an order or writ for the replevin of the property designated.[96] A writ of replevin may be issued in one county to replevy goods in another county.[97] Where the writ has become lost, it should be restored by a copy thereof.[98]

b. Alias and Pluries Writs. As in case of the issuance of process generally,[99] where an original writ of replevin is improperly executed or for some other reason fails to fully subserve the purpose for which it is issued, an alias writ may be issued,[1] and if an alias writ proves to be ineffectual, a pluries writ may be

v. Parker, 1 Metc. (Mass.) 508; Tripp *v.* Howe, 45 Vt. 523.

88. Wilson *v.* Nichols, 29 Me. 566. See, however, Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272, holding that want of the proper bond exonerates a defendant in replevin from heeding the summons in the writ, and his entry of a general appearance in such case is no waiver of the irregularity.

89. Laird *v.* Upton, 8 N. M. 409, 45 Pac. 1010.

90. Snedeker *v.* Quick, 11 N. J. L. 179; Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272.

Time of issuance.— The writ should be sued out by plaintiff in time for the pleadings to be perfected at or before the next term of court. Luther *v.* Arnold, 7 Rich. (S. C.) 397.

91. See *infra*, III, C, 5.

92. Pelham *v.* Edwards, 45 Kan. 547, 26 Pac. 41 (holding also that in replevin an order for the delivery of the property cannot issue until a summons has been issued); McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451; Delin *v.* Stohl, 2 N. Y. Civ. Proc. 222 (holding that the action may be maintained in a justice's court, where summons has been personally served upon defendant or where he appears, although no process is issued for replevying the property at any time before execution is issued upon the judgment obtained). See also *supra*, III, A, 1.

Service of summons in another county.— If an action in replevin is properly brought in a county where the property is wrongfully held by an agent, who is made a party defendant and is properly summoned, a summons may issue and service be had in another county upon the agent's principal, who claims the right to the possession of the property as against plaintiff. Central Nat. Bank *v.* Brooke, 71 Kan. 767, 81 Pac. 498.

93. Varner *v.* Bowling, 54 Kan. 380, 38 Pac. 481.

94. Mohr *v.* Langan, 77 Mo. App. 481.

95. See *supra*, III, A, B.

96. Easter *v.* Traylor, 41 Kan. 493, 21 Pac. 606.

Ministerial duty.— The duty of the clerk to issue a writ in such cases is purely ministerial and not discretionary, and he is not excused from issuing it by the fact that he has been enjoined from issuing a writ in another action, or that the property is already in the custody of the sheriff. Easter *v.* Traylor, 41 Kan. 493, 21 Pac. 606.

97. Judson *v.* Adams, 8 Cush. (Mass.) 556 (holding that the writ may be issued by the clerk of court in one county returnable in another); Hiles *v.* McFarland, 3 Pinn. (Wis.) 365, 4 Chandl. 89 (alias writ); Buffalo, etc., R. Co. *v.* Gordon, 3 Can. L. J. 28 (holding that where the goods to be replevied have not been distrained, the writ may be sued out in any county to replevy goods in another county).

98. Kehoe *v.* Rounds, 69 Ill. 351.

99. See Process, 32 Cyc. 444.

1. Pool *v.* Loomis, 5 Ark. 110 (holding that the clerk may issue an alias writ without an order of the court); O'Brien *v.* Haynes, 61 Ill. 494; Anderson *v.* Lenawe Cir. Ct. Judge, 105 Mich. 89, 62 N. W. 1027; People

issued.[2] Where two writs issue on one affidavit, the issuance of the second does not invalidate or render void the first or the proceedings under it.[3]

2. Requisites and Sufficiency of Writ or Order in General. A writ or order of replevin should at least substantially comply with all requirements as to matters of form or contents prescribed by statute,[4] or rules of court,[5] and should be directed to the sheriff or other officer who is authorized to serve it,[6] and against the person who has the possession or custody of the property involved,[7] and who is a party to the action, or his agent,[8] as where the property has been seized under process or attachment, it should be directed against the sheriff or other officer who has the custody of the property;[9] and should be made returnable at or before the next term of court,[10] or within the time prescribed by statute.[11] It should also be made to appear in the writ that a legal bond was given, where such bond is a prerequisite to the issue of the writ;[12] but it is not essential that the writ should disclose the fact that the property to be replevied belonged to plaintiff or had been impounded or distrained,[13] nor need the writ show that the affidavit required by statute had been made by plaintiff.[14] Mere irregularities or informalities will not ordinarily invalidate the writ,[15] and if it is regular on its face, it will protect

v. Judge Mecosta Cir. Ct., 26 Mich. 414 (holding that an alias writ may be issued by an order of court for the purpose of personal service merely, where the property has been seized on the original writ, but there has been a failure of personal service on defendant during the life-time of the original writ); Hiles *v.* McFarlane, 3 Pinn. (Wis.) 365, 4 Chandl. 81. See also Chapelle *v.* Webster, 122 Mich. 482, 81 N. W. 341.

2. Branch *v.* Branch, 6 Fla. 314 (holding that such writ may be issued by order of the court, or that plaintiff may cause it to be issued without such an order); Snow *v.* Roy, 22 Wend. (N. Y.) 602 (holding that where plaintiff accepts part of the property which is the subject of the suit, the remainder not being found, he may issue an alias writ followed by a pluries for the residue of the property, but that there must be no delay in the prosecution of the suit).

3. Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599.

4. See Gould *v.* Barnard, 3 Mass. 199 (holding that the writ must be indorsed, although bonds are given to the sheriff to secure damages and costs); Roach *v.* Moulton, 2 Pinn. (Wis.) 221, 1 Chandl. 187; Schatsky *v.* Bateman, 17 Manitoba 347; Cornell *v.* Quick, Draper (U. C.) 427.

Under Minn. Laws (1868), c. 76 (Rev. Laws (1905), § 4207) plaintiff or his attorney may indorse upon the affidavit a requisition to the sheriff to take the property from defendant and deliver it to plaintiff, instead of to the clerk to issue a writ. Hicks *v.* Mendenhall, 17 Minn. 475; Castle *v.* Thomas, 16 Minn. 490, holding also that a writ issued, after the passage of such laws, in accordance with the statute which was repealed by such laws is absolutely void.

5. West Pub. Co. *v.* Bottineau, 34 Minn. 239, 25 N. W. 405.

6. Ralston *v.* Strong, 1 D. Chipm. (Vt.) 287; Hocken *v.* Doucett, 31 N. Brunsw. 369 (coroners); Gilchrist *v.* Conger, 11 U. C. Q. B. 197 (coroner where the sheriff is defendant).

Where an under sheriff attaches property, a writ of replevin against him may be directed to the sheriff whom he is under. Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26.

7. See Maxey *v.* White, 53 Miss. 80.

8. Lehman *v.* Mayer, 8 N. Y. App. Div. 311, 40 N. Y. Suppl. 933, holding that an order requiring the sheriff to take chattels from a person who is not a party to the action or to the motion for the order, nor an agent of a party, is erroneous.

9. Maxey *v.* White, 53 Miss. 80. See also Denison *v.* Raymond, Kirby (Conn.) 274.

10. See Cayward *v.* Doolittle, 6 Cow. (N. Y.) 602, holding that a writ attested at one term and returnable at the next term but one, an entire term intervening, is voidable.

11. See the statutes of the several states. See also Duffield *v.* Denver, etc., R. Co., 5 Colo. App. 25, 36 Pac. 622, holding that a writ of replevin is not void because made returnable within seven days, as it is not a summons within Sess. Laws (1891), p. 101.

12. Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324, holding, however, that it is not essential that the bond should appear at length on the face of the writ.

13. Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

14. Magee *v.* Siggerson, 4 Blackf. (Ind.) 70.

Variance between writ and copy served.—Defendant in replevin was served with a copy of the writ which failed to contain the name of the affiant at the foot of the affidavit, although his name did appear in the body of the affidavit; the original affidavit was duly subscribed and complete, and the copy in all other respects conformed thereto. It was held that the variance was not a material one, and that a plea in abatement for that cause would not lie. Matthai *v.* Capen, 65 Conn. 539, 33 Atl. 495.

15. Osgood *v.* Carver, 43 Conn. 24; State *v.* Wilson, 24 Kan. 50, holding that a writ which does not state in the body thereof the court in which the action was brought is merely irregular.

the officer who serves it because it is his duty to execute such process without investigating the cause of action.[16]

3. Description and Value of Property. A writ or order of replevin must specify the particular property to be replevied, and describe it with such a reasonable degree of certainty that the property may be identified and delivered to plaintiff;[17] but as a general rule it is not necessary that the writ should allege the value of the property to be replevied.[18] This rule, however, does not require a greater certainty of description than the nature of the property will reasonably admit of,[19] and although the description is general in its terms, if it is sufficiently full and definite to enable the property, with outside help, to be pointed out to or identified by the officer executing the writ, it is sufficient.[20] If there is no uncertainty as to the property to be taken, and the right property is taken, a variance between the description in the affidavit and that in the writ is immaterial;[21] but if the writ insufficiently describes the property the sheriff or other officer may refuse to execute it.[22]

4. Waiver of Objections and Amendment. The court may decline to quash the writ or order, and upon plaintiff's making seasonable application therefor may permit it to be amended,[23] so as to make it conform to the affidavit and bond,[24] or so as to correct a mistake or insufficiency in the description of the property;[25] but

Under R. I. Gen. St. c. 195, § 16, the omission of the words "original writ," from the clause, "provided the same is not taken, attached, or detained upon original writ," etc., cannot be objected to by plaintiff in replevin. Goodell *v.* Bates, 14 R. I. 65. But see Parker *v.* Palmer, 13 R. I. 359.

16. Osgood *v.* Carver, 43 Conn. 24; Watson *v.* Watson, 9 Conn. 140, 23 Am. Dec. 324.

17. *Colorado.*— Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277.

Indiana.—Magee *v.* Siggerson, 4 Blackf. 70.

Maine.— Musgrave *v.* Farren, 92 Me. 198, 42 Atl. 355; Wingate *v.* Smith, 20 Me. 287, holding that where mill logs are converted into boards before the writ is sued out, the writ should describe them as boards and not as mill logs.

Massachusetts.— Whittle *v.* Phelps, 181 Mass. 317, 63 N. E. 907.

Michigan.— Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10; Humphrey *v.* Bayn, 45 Mich. 565, 8 N. W. 556; Coman *v.* Thompson, 43 Mich. 389, 5 N. W. 452; Paterson *v.* Parsell, 38 Mich. 607.

Mississippi.— Evans *v.* Parks, (1893) 13 So. 240.

New Jersey.—Snedeker *v.* Quick, 11 N. J. L. 179.

New York.— De Witt *v.* Morris, 13 Wend. 496.

Oregon.— Foredice *v.* Rinehart, 11 Oreg. 208, 8 Pac. 285.

Wisconsin.— State *v.* Welch, 37 Wis. 196.

Canada.— Hoorigan *v.* Driscoll, 8 Ont. Pr. 184.

See 42 Cent Dig. tit. "Replevin," § 158.

A description in the affidavit annexed to the writ is not sufficient. Paterson *v.* Parsell, 38 Mich. 607.

18. Litchman *v.* Potter, 116 Mass. 371; Blake *v.* Darling, 116 Mass. 300; Pomeroy *v.* Trimper, 8 Allen (Mass.) 398, 85 Am. Dec. 714; State *v.* Welch, 37 Wis. 196; Dunlap *v.* Babang, 27 N. Brunsw. 549.

19. Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277.

20. Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228; Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650; Pingree *v.* Steere, 68 Mich. 204, 35 N. W. 905; Sexton *v.* McDowd, 38 Mich. 148; Waldron *v.* Leach, 9 R. I. 588; Williams *v.* Morrison, 28 Fed. 872.

The following descriptions have been held sufficient to identify the property: "The goods and chattels following, viz.: the contents of a grocery store," describing the store and naming the person by whom the goods were taken and held (Litchman *v.* Potter, 116 Mass. 371); "one sewing machine and one pool table" (Proper *v.* Conkling, 67 Mich. 244, 34 N. W. 560); "two yearlings, red and white in color" (Kelso *v.* Saxton, 40 Mich. 666); and "six oxen" (Farwell *v.* Fox, 18 Mich. 166). So a description of the property as so many bushels of wheat is sufficient to authorize a seizure of unthreshed wheat which has been harvested. Wattles *v.* Dubois, 67 Mich. 313, 34 N. W. 672.

21. McCourt *v.* Bond, 64 Wis. 596, 25 N. W. 532.

22. De Witt *v.* Morris, 13 Wend. (N. Y.) 496.

23. *Indiana.*— Simcoke *v.* Frederick, 1 Ind. 54.

Massachusetts.— Judson *v.* Adams, 8 Cush. 556; Jaques *v.* Sanderson, 8 Cush. 271; Poyen *v.* McNeill, 10 Mete. 291.

Mississippi.— Evans *v.* Parks, (1893) 13 So. 240.

New York.— Cutler *v.* Rathbone, 1 Hill 204; Cayward *v.* Doolittle, 6 Cow. 602.

Rhode Island.— Parker *v.* Palmer, 13 R. I. 359.

Canada.—Hocken *v.* Doucett, 31 N. Brunsw. 369.

See 42 Cent. Dig. tit. "Replevin," § 159.

24. Roberts *v.* Gee, 39 Fla. 531, 22 So. 877; Parks *v.* Barkham, 1 Mich. 95.

25. Evans *v.* Parks, (Miss. 1893) 13 So.

it cannot permit the writ to be amended so as to introduce a new cause of action.[26] Informalities or irregularities in a writ or order of replevin may be waived by defendant by his appearing, pleading, and proceeding to trial on the merits of the case without objecting thereto.[27]

5. Summons. Under some statutes provision is made for the commencement of an action of replevin by a summons,[28] which must comply with the statutory requirements as to matters of form,[29] although it is usually sufficient if it fairly apprises defendant of the fact that the action is an action of replevin, of the name of plaintiff and his attorney, of the court whence the writ issued, and the time and place for defendant to appear.[30] A formal variance between the writ and summons as to the nature of the action, as where the writ is in the *detinet* and the summons in the *cepit et detinet*, is immaterial.[31]

D. Service of Writ or Summons — 1. In General. The court has no jurisdiction to render judgment in a replevin suit where no service of process has been made on defendant,[32] unless service is waived by him;[33] and where defendant does not take exception to defects in the service at the term when he enters appearance, he cannot take it afterward.[34] Service of a writ of replevin

240; McCourt *v.* Bond, 64 Wis. 596, 25 N. W. 532; Nolty *v.* State, 17 Wis. 668; Hoorigan *v.* Driscoll, 8 Ont. Pr. 184.

26. Musgrove *v.* Farren, 92 Me. 198, 42 Atl. 355, holding that a writ insufficiently describing the property cannot be amended so as to increase the amount of property replevied.

27. *Arkansas.*— King *v.* Connevy, 52 Ark. 115, 12 S. W. 203.

Colorado.—Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277, holding that where defendant has pleaded that the property is his and has submitted the case to the jury upon its merits, it is too late for him to ask that the judgment be reversed because of uncertainty of description in the writ.

Kansas.— Carr *v.* Huffman, 47 Kan. 188, 27 Pac. 827.

Michigan.— Durrell *v.* Richardson, 119 Mich. 592, 78 N. W. 650; Peterson *v.* Fowler, 76 Mich. 258, 43 N. W. 10, holding that defendant cannot claim to have been misled by an insufficient description of the property in the writ, where by his plea and notice he alleges title to the same property.

Minnesota.— McKee *v.* Metraw, 31 Minn. 429, 18 N. W. 148. *Compare* Castle *v.* Thomas, 16 Minn. 490, in which it was held that a general appearance in an action of replevin does not operate as a waiver of an illegal writ.

New Jersey.— Kraemer *v.* Kraemer Drug Co., 59 N. J. L. 9, 35 Atl. 791; Snedeker *v.* Quick, 11 N. J. L. 179, holding, however, that appearance by defendant will not cure a writ of replevin defective in failing to specify the goods and chattels to be replevied.

Canada.— Alpha Oil Co. *v.* Donnelly, 12 Ont. Pr. 515.

See 42 Cent. Dig. tit. "Replevin," § 159.

But see Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272.

A defendant's appearance in response to a separate summons does not amount to a waiver of the replevin papers. McAdam *v.* Walbrau, 8 N. Y. Civ. Proc. 451.

28. See Pelham *v.* Edwards, 45 Kan. 547, 26 Pac. 41; West Pub. Co. *v.* Bottineau, 34 Minn. 239, 25 N. W. 405.

Alias summons see *Ex p.* Johnson, 7 Cow. (N. Y.) 424.

29. See the statutes of the several states; and cases cited *infra*, this note.

Indorsement of summons see Roggencamp *v.* Moore, 9 Nebr. 105, 2 N. W. 227, holding that it is only in actions for the recovery of money that the amount for which judgment will be taken if defendant fails to appear need be indorsed on the summons, and that such indorsement is not required in replevin.

When summons should be made returnable see Roggencamp *v.* Moore, 9 Nebr. 105, 2 N. W. 227.

30. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

31. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

32. Abrams *v.* Jones, 4 Wis. 806. And see Webb *v.* Hecox, 27 Misc. (N. Y.) 169, 58 N. Y. Suppl. 382, holding that under Code Civ. Proc. § 1700, requiring a constable in replevin to serve on defendant, or his agent from whom the possession is taken, a copy of the affidavit, requisition, and undertaking, a judgment for costs is void against a defendant not so served, where the constable's return does not show that the person in whose possession the property is found was such defendant's agent.

33. See cases cited *infra*, this note.

General appearance by defendant waives service of the writ or summons in replevin. Swann *v.* Shemwell, 2 Harr. & G. (Md.) 283; Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90. But see Taylor *v.* Adams Express Co., 9 Phila. (Pa.) 272.

Right to appear before service of summons. — After defendant's property has been taken on a writ of replevin, he is not bound to wait until he is served with summons before appearing. He has a right to appear immediately. Clinton *v.* King, 3 How. Pr. (N. Y.) 55.

34. Kittridge *v.* Bancroft, 1 Metc. (Mass.) 508. See also Baker *v.* Daily, 6 Nebr. 464,

must be made within the time,[35] and in the manner,[36] prescribed by statute. A plaintiff after demand need not delay serving his writ in order that defendant may satisfy himself that the demand is rightfully made.[37] Where the service is irregular,[38] but there has been no substantial damage to defendant, the proper practice is to allow an alias writ to issue, rather than to dismiss the proceeding.[39]

2. WHO MAY SERVE. Unless the proper officer to serve a writ of replevin is designated by statute,[40] it is immaterial whether it is served by a sheriff or by a constable.[41] In many jurisdictions the statutes provide that where the sheriff or his deputy is a party to the action,[42] or is interested in the case, the coroner is the proper officer to serve the writ.[43] Where the writ is issued by a justice of the peace, a constable is usually the proper officer to serve it.[44]

holding that objection to failure of sheriff to serve copy of order of delivery upon defendant must be taken before trial; afterward it is too late.

35. See the statutes of the several states.

A writ of replevin, returnable before a justice of the peace, like other justice's writs, is to be duly served not less than seven, nor more than sixty days before the day therein appointed for trial. Lord *v.* Poor, 23 Me. 569.

36. See the statutes of the several states.

A writ of replevin is a writ of summons, not attachment, and service upon defendant must conform to the provisions of the statute as to the service of writs of summons. Delivery of a copy to the agent of defendant, the latter being out of the state, is not sufficient. Gaffield *v.* Avery, 43 Vt. 668.

37. Parker *v.* Palmer, 13 R. I. 359.

38. Where service is set aside after the return-day, there can be no new service, and it operates as a discontinuance; and a defendant whose property has been taken may have a return, or waive it and require an assessment of damages. People *v.* Judge Washtenaw Cir. Ct., 23 Mich. 497.

39. Anderson *v.* Lenawee Cir. Judge, 105 Mich. 89, 62 N. W. 1027, holding that a writ of replevin should not be dismissed because the copy delivered to defendant at the time of service was not certified, no damage to defendant having been caused thereby. See also *supra*, III, C, 1, b.

40. See the statutes of the several states. And see cases cited *infra*, this note.

In Massachusetts, a constable had no authority, by Rev. St. c. 15, to serve a writ of replevin, except in a case where the sheriff or his deputy is a party to a suit in which the value of the property to be replevied does not exceed the sum of seventy dollars. Conner *v.* Palmer, 13 Metc. 302.

In Missouri a town marshal who is appointed as special constable by a justice of the peace, under the provisions of Rev. St. § 6149, has no authority or power to execute a writ of replevin. Mitchell *v.* Shaw, 53 Mo. App. 652.

In Vermont a writ of replevin on attached property, directed to and served by a constable, was void, as under Judiciary Act, § 46, such writs must have been directed to the sheriff. Ralston *v.* Strong, Brayt. 216.

41. Smith *v.* Eals, 81 Iowa 235, 46 N. W. 1110, 25 Am. St. Rep. 486.

42. Douglass *v.* Gardner, 63 Me. 462 (holding that the term "party" as used in the Maine statute, is confined to persons whose names are expressly mentioned in the record as plaintiff or defendant, and does not forbid the service of a writ of replevin by a deputy sheriff on one in whose hands another deputy to the same sheriff had placed the goods replevied, for the purpose of safe-keeping, after having attached them as the goods of a person other than plaintiff in replevin); Stacy *v.* Farnham, 2 How. Pr. (N. Y.) 26 (holding that where the action is neither brought by or against the sheriff, the writ is properly directed to and executed by him); Carson *v.* Browder, 2 Lea (Tenn.) 701 (holding that it is not a good plea in abatement to a writ of replevin that defendant held the property as deputy sheriff by virtue of the levy of an execution, and that the writ was directed to and executed by the sheriff, nor *a fortiori* is it a good plea in bar of the action).

The sheriff can execute a writ against his deputy, but the deputy cannot execute one against the sheriff. The distinction is obvious. The sheriff acts in his own name, and by virtue of his official authority. The deputy acts in the name of the sheriff, and by virtue of the authority from him derived. Ford *v.* Dyer, 26 Miss. 243.

43. Browning *v.* Bancroft, 5 Metc. (Mass.) 88.

A remote or contingent interest of the sheriff, which may arise and grow out of the suit afterward, is not such an interest as authorizes a coroner to serve the writ. It must be that the judgment in the suit will bind or conclude some valuable right or pecuniary interest of the sheriff. The sheriff has no such interest in an action of replevin by a third person against one of his deputies. Browning *v.* Bancroft, 5 Metc. (Mass.) 88.

A coroner may appoint a special deputy to execute a writ of replevin. Jewell *v.* Hutchinson, 31 N. J. L. 71.

44. See JUSTICES OF THE PEACE, 24 Cyc. 522 *et seq.*

City marshal.— Where the city charter provides that the city marshal shall be the chief of police of the city, and that the chief of police may serve any process which by law a constable may serve, the city marshal

3. Taking Property Under Writ or Order — a. In General. As a general rule the officer to whom the writ or order of replevin is directed should execute the same by taking and delivering the property as commanded therein;[45] but such officer may lawfully take only the property described or set forth in the writ or order,[46] or in the affidavit,[47] when found in the possession of defendant himself or his agent.[48] In order to constitute a valid levy, the act of taking possession must as a general rule be of such a character as will make the officer, if not protected by the writ or order, liable as for a trespass;[49] but it is not necessary that he should actually remove the property from the premises of defendant, but it is sufficient that he place his deputy or agent in possession,[50] or he may, with plaintiff's consent, leave the property in the possession of defendant,[51] upon taking his receipt therefor.[52] It has been held that the officer is not obliged to execute the writ unless someone attends to point out the articles he is to deliver.[53] Any irregularity in a levy made under a writ of replevin is cured by defendant giving a bond to return the property.[54] Where the replevin bond is not executed until after the property is taken and appraised, if there is reasonable doubt as to the ownership of the property, the officer may require sufficient security to indemnify him for taking it.[55]

b. Use of Force in Taking Property. As a general rule the officer to whom a writ or order of replevin is directed may use whatever force is reasonably necessary to enable him to execute it.[56] But in the absence of statute, such officer is ordinarily not justified in breaking open an outer door or window in order to execute the writ or order,[57] and if he does so, he commits a trespass which makes his subsequent acts unlawful, and justifies a householder in resisting his further

may serve a writ of replevin issued by a justice of the peace, and required by statute to be served by a constable. Fleugel *v.* Lards, 108 Mich. 682, 66 N. W. 585.

45. McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438, holding that, where an officer has not returned the original writ in a replevin suit, he has the right to complete the service thereof by taking and delivering the property described therein, although he has previously delivered a copy of the writ to defendant named therein.

46. Chandler *v.* Smith, 34 Ark. 527; Standard Foundry Co. *v.* Schloss, 43 Mo. App. 304; De Witt *v.* Morris, 13 Wend. (N. Y.) 496.

Where a part only of the property can be found see Lowrey *v.* Mansfield, 3 How. Pr. (N. Y.) 88, holding that the sheriff is not bound to take a part of the goods unless he can find them, but may arrest defendant instead; but that if he does take part he cannot arrest defendant on the same writ, although an alias writ may be issued for the part not taken at first and the remainder be taken or defendant be arrested on that. But see N. Y. Code Civ. Proc. (1909) § 1698.

47. King *v.* Orser, 4 Duer (N. Y.) 431.

48. Sexton *v.* McDowd, 38 Mich. 148 (holding that a writ of replevin will not protect an officer in taking the property described from some person besides defendant, owning and holding it in good faith); Lehman *v.* Mayer, 8 N. Y. App. Div. 311, 40 N. Y. Suppl. 933 (holding that the officer cannot be compelled to execute a requisition of replevin and take into his possession property which is in the possession of persons who are not parties to the action, or who are not shown to be the agents of defendant or in anywise connected with him); King *v.* Orser, 4 Duer (N. Y.) 421; Fraser *v.* Bruce, 12 Nova Scotia 61.

49. State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553.

50. Barbour *v.* White, 37 Ill. 164, holding that where the furniture of a hotel is to be levied on, an officer is to be considered as having made the levy from the time he places a deputy or agent in possession.

51. McGinnis *v.* Hart, 6 Iowa 204; Hunton *v.* Palmer, 67 N. J. L. 94, 50 Atl. 599, holding that where so directed in writing by plaintiff or his attorney, the officer to whom the writ issues may serve the process as in other cases without taking or delivering the property.

52. Glass *v.* Hauser, 40 Misc. (N. Y.) 661, 83 N. Y. Suppl. 177; Marshall *v.* Friend, 33 Misc. (N. Y.) 443, 68 N. Y. Suppl. 502.

53. Foredice *v.* Rinehart, 11 Oreg. 208, 8 Pac. 285; Warner *v.* Aughenbaugh, 15 Serg. & R. (Pa.) 9.

54. Carraway *v.* Wallace, (Miss.) 17 So. 930.

55. Hamberger *v.* Savey, 165 Mass. 505, 43 N. E. 297.

56. Prettyman *v.* Dean, 2 Harr. (Del.) 494; Yott *v.* People, 91 Ill. 11.

57. State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553; Kelley *v.* Schuyler, 20 R. I. 432, 39 Atl. 893, 44 L. R. A. 435, 73 Am. St. Rep. 887, holding that an officer has no right to break an outer door of a dwelling-house to execute a writ of replevin. But see Jones *v.* Herron, 12 Pa. Co. Ct. 183, 31 Wkly. Notes Cas. 263.

Under Ind. Rev. St. (1881) § 1271, authority to use force in executing a writ of

progress,[58] although it has been held that an officer may be justified in breaking open the outer door of a building which is fraudulently used to protect the property from legal process,[59] or that, where he has taken possession of the property in partial execution of the writ, he may on his return to complete the levy break open an outer door if necessary.[60] Where, however, the officer has lawfully entered or been admitted into the building, he may, if necessary, break open an inner door in order to reach the property called for in the writ.[61] Under some statutes, before the officer is justified in breaking open a door or building in order to execute the writ, he must publicly demand the delivery of the property, and grant a reasonable opportunity therefor,[62] except that such demand is not necessary where the property is in an untenanted or unoccupied house.[63]

4. Failure to Take Property. Usually the jurisdiction of the court to proceed in the cause and award the possession or the value of the property to the party entitled thereto is not ousted by a failure to take the property, caused either by an absence of demand by plaintiff for immediate possession,[64] or by the inability of the officer to find and seize the property.[65] At common law, when the goods sought to be replevied were concealed or removed beyond the reach of the officer, a writ of capias in withernam, authorizing the taking and detention of other goods of defendant, might issue.[66]

E. Appraisement. In many jurisdictions the statutes require the officer, immediately upon taking property in replevin, to cause it to be appraised by

replevin is confined to sheriffs, and a constable will be guilty of trespass for breaking into a building or inclosure to execute a writ. State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553.

58. State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553.

59. Stitt *v.* Wilson, Wright (Ohio) 505.

60. State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553.

61. Prettyman *v.* Dean, 2 Harr. (Del.) 494 (holding that a sheriff has a right to enter a house to execute a writ of replevin if the outer door is open, and to break open inner doors if the property is concealed); State *v.* Beckner, 132 Ind. 371, 31 N. E. 950, 32 Am. St. Rep. 257, (1891) 26 N. E. 553.

62. Butterfield *v.* Oppenheimer, 18 N. Y. Suppl. 826 [*affirmed* in 135 N. Y. 648, 32 N. E. 647] (holding that an officer in whose hands a requisition for goods has been placed for execution has no right to break open a vault in which such goods are, unless the person in possession of the vault refuses to open it after a reasonable opportunity to do so has been given him); Howe *v.* Oyer, 50 Hun (N. Y.) 559, 3 N. Y. Suppl. 526.

63. Howe *v.* Oyer, 50 Hun (N. Y.) 559, 3 N. Y. Suppl. 526 (holding that where a constable, after knocking at the door of a dwelling-house in which the property is, and calling out the name of the occupant, learns that no one is within, he need not make such public demand, but may lawfully break open the house and take the chattel); Stitt *v.* Wilson, Wright (Ohio) 505 (holding that where an untenanted house is fraudulently used to protect property from legal process, it may be broken open by an officer without a demand to have it opened).

64. Catterlin *v.* Mitchell, 27 Ind. 298, 89 Am. Dec. 501; Benjamin *v.* Smith, 43 Minn. 146, 44 N. W. 1083; Vogel *v.* Badcock, 1 Abb. Pr. (N. Y.) 176. See also Eads *v.* Stephen, 63 Mo. 90; F. G. Oxley Stave Co. *v.* Whitson, 34 Mo. App. 624.

65. Babcock *v.* Ashmead, 24 Kan. 585 (applying the rule to a case where the wrong property was taken possession of by the officer); McBrian *v.* Morrison, 55 Mich. 351, 21 N. W. 368; Fergus *v.* Gagnon, 4 Nebr. (Unoff.) 25, 93 N. W. 146; Bower *v.* Tallman, 5 Watts & S. (Pa.) 556. *Contra*, St. Martin *v.* Desnoyer, 1 Minn. 41, under early Minnesota statute.

An express stipulation by the parties that the right of property in one of the chattels, which was embraced in the pleadings but not taken under the writ, should be submitted to the jury, confers full jurisdiction of the question upon the court. Sanger *v.* Kinkade, 16 Ill. 44.

The Mississippi statute, allowing plaintiff to proceed to recover the value of the property on "a failure to take the goods," applies only to a case where defendant secreted or refused to deliver the property on proper demand therefor being made by the officer. Meyer *v.* Mosler, 64 Miss. 610, 1 So. 837.

66. Bennett *v.* Berry, 8 Blackf. (Ind.) 1; Swann *v.* Shemwell, 2 Harr. & G. (Md.) 283; McBrian *v.* Morrison, 55 Mich. 351, 21 N. W. 368; McColgan *v.* Huston, 2 Nott & M. (S. C.) 444.

In New York the writ was abolished by statute and the taking of the body of defendant as on a capias ad respondendum was substituted in its stead. This statute did not apply where a part of the goods were found. Snow *v.* Roy, 22 Wend. 602.

disinterested persons;[67] but he is justified or excused for omitting so to do, when the parties agree as to the value.[68]

F. Custody and Care of Property — 1. In General. Where the execution of the bond does not precede the issuance of the writ, the officer is authorized to seize the property and hold it a reasonable time for plaintiff to give the bond required by the statute.[69] On giving such bond, plaintiff is entitled to the possession of the property in dispute during the pendency of the action,[70] unless defendant elects to retain the possession and pursues the statutory requirements prescribing the procedure in such cases.[71]

2. Nature of Possession. If, pending the replevin action, the property actually remains in the manual possession of the sheriff, such possession, being the possession of the court, is one which cannot be disturbed by any other officer holding attachment or execution.[72] Whether property when in the possession of plaintiff is *in custodia legis* or not is a question upon which the authorities are not entirely in accord. The question mainly depends for its solution upon statutory provisions.[73] Thus under a replevin statute, providing for a return of the property to defendant, if he so elects, in case the judgment is for him, no title to the property vests in plaintiff on its delivery to him, but it remains in the custody of the law, and cannot pass even to a *bona fide* purchaser from plaintiff,[74] or be levied upon under attachment or execution.[75] Plaintiff has, however, a

67. See the statutes of the several states. And see cases cited *infra*, this note.

Basis of appraisement.— Goods replevied by a wholesale merchant from a retailer should be appraised at what they are worth to the latter in his store at the time they are replevied, and not their retail price. Grossman *v.* Wenham, 10 Ohio Cir. Ct. 348, 6 Ohio Cir. Dec. 563.

The sheriff's appraisal will be presumed correct until the contrary is shown. Chambers *v.* Hunt, 20 N. J. L. 109. The appraisement is the best evidence to prove its contents. Dempster Mill Mfg. Co. *v.* Holdrige First Nat. Bank, 49 Nebr. 321, 68 N. W. 477.

Amendment of appraiser's certificate.— The court may, in its discretion, allow the appraiser's certificate to be amended upon proof satisfactory to itself. Hammond *v.* Eaton, 15 Gray (Mass.) 186.

Reappraisement.— Under the Nebraska statute, there is no authority for reappraisement of property taken in replevin. Coombs *v.* Brenklander, 29 Nebr. 586, 45 N. W. 929.

68. Wolcott *v.* Mead, 12 Metc. (Mass). 516, holding that if the parties do so agree, the officer should certify that fact in his return, when he, for that reason, omits to appoint appraisers.

69. Morris *v.* Baker, 5 Wis. 389, holding that if plaintiff neglect or refuse to give the replevin bond required by the statute, the officer should redeliver the property to the person from whose possession it was taken.

70. Jenkins *v.* State, 60 Nebr. 205, 82 N. W. 622.

Delivery to plaintiff.— Property which has been replevied does not pass into the possession of plaintiff, after he has given a bond which has been accepted by the officer, until there is a formal delivery of the property (Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 422), unless such a delivery is waived, and a symbolical delivery is not sufficient, unless plaintiff consents thereto, the question of consent being one of fact (Hayes *v.* Lusby, 5 Harr. & J. (Md.) 485).

71. See *infra*, III, G.

72. McKinney *v.* Purcell, 28 Kan. 446; White *v.* Dolliver, 113 Mass. 400, 18 Am. Rep. 502.

Property seized by a sheriff under a writ of replevin is to be regarded as in custodia legis from the date of seizure under the writ. Hearn *v.* Ayres, 77 Ark. 497, 92 S. W. 768.

73. **Much of the difference arises from diverse statutory regulation,** and some of it may be ascribed to the fact that some cases treat a replevin bond as similar in all essential respects to a forthcoming bond, while other cases draw a distinction between the effect of the writ when used by a third person to recover possession of property that has been seized by an officer under judicial process, and when it is used to recover property from a private citizen. Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503.

74. *Massachusetts.*— Lockwood *v.* Perry, 9 Metc. 440.

Michigan.— Mannausau *v.* Wallace, 87 Mich. 543, 49 N. W. 1082.

Missouri.— Mohr *v.* Langan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503 (holding that where a complainant in replevin secured possession of the property under the writ, and sold the same, and judgment in the replevin suit was rendered against her, he was liable for conversion); Hawkins *v.* Taylor, 15 Mo. App. 238.

Montana.— Caldwell *v.* Gans, 1 Mont. 570.

Vermont.— Farnham *v.* Chapman, 60 Vt. 338, 14 Atl. 690.

See 42 Cent. Dig. tit. "Replevin," § 178.

75. *Illinois.*— Rhines *v.* Phelps, 8 Ill. 455.

Indiana.— Pipher *v.* Fordyce, 88 Ind. 436.

Kansas.— McKinney *v.* Purcell, 28 Kan. 446.

possession which defendant has no right to disturb or contest.[76] But where property is delivered to plaintiff upon the giving of a bond in double the value of the goods, and not conditioned for a return of the property, such bond is a substitute for the property, and plaintiff in the writ, while so in possession, can make a good title to the property to purchasers thereof, notwithstanding the fact that, upon the trial of the replevin, there is a verdict for defendant.[77] A plaintiff in replevin who is the real owner of the goods replevied may of course deal with them as his own.[78] And as against a person who is merely seeking to obtain possession to enforce a lien on the property, whether he is plaintiff in the suit or defendant asking for a return of the property seized by plaintiff therein, the party in possession may dispose of the property *pendente lite*, and thereafter the holder of the lien must look to the bond for protection.[79] But where the parties to a replevin action are litigating the question of title, the property remains *in custodia legis* pending the determination of the suit, even where the possession is delivered to plaintiff, and hence cannot pass even to a *bona fide* purchaser from plaintiff.[80]

G. Proceedings For Redelivery — 1. In General. In several jurisdictions, it is provided by statute that at any time before the delivery of the property to plaintiff, defendant may require the return thereof upon giving a prescribed bond or undertaking conditioned for the delivery of the property to plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may be adjudged against defendant;[81] and sometimes, upon his also making affidavit

New York.— Acker *v.* White, 25 Wend. 614.

Wisconsin.— Selleck *v.* Phelps, 11 Wis. 380.

United States.— Hagan *v.* Lucas, 10 Pet. 400, 9 L. ed. 470, holding that the property is as free from the reach of other processes as it would have been in the hands of the sheriff.

See 42 Cent. Dig. tit. "Replevin," § 177.

Upon death of plaintiff in replevin.—Where goods held by an officer under an execution were replevied, but plaintiff in replevin died pending the action, a retaking by the officer is lawful, as the right of possession of plaintiff in replevin terminated with his death, and his executor could not recover the goods from the officer by virtue of that possession. Burkle *v.* Luce, 6 Hill (N. Y.) 558.

Status of property as to third persons.— While it is true that property thus in possession of plaintiff in replevin cannot be seized under any other kind of judicial process by either party to the suit or their grantees or privies, it may be seized by a third person, under any appropriate judicial process, who claims hostile to both parties to the replevin suit. Mohr *v.* Lanagan, 162 Mo. 474, 63 S. W. 409, 85 Am. St. Rep. 503 [*overruling* Pleasant Hill Bank *v.* Owen, 79 Mo. 429].

76. Ford *v.* Bushor, 48 Mich. 534, 12 N. W. 690; Hawkins *v.* Taylor, 15 Mo. App. 238.

77. Crittenden *v.* Lingle, 14 Ohio St. 182, 84 Am. Dec. 370; Smith *v.* McGregor, 10 Ohio St. 461; Hunt *v.* Williams, 7 Ohio Cir. Ct. 224, 4 Ohio Cir. Dec. 568; Knight *v.* Kinney, 7 Ohio Cir. Ct. 59, 3 Ohio Cir. Dec. 662; Stewart *v.* Wolfe, 4 Pa. Cas. 314, 7 Atl. 165. See, however, Lovett *v.* Burkhardt, 44 Pa. St. 173, holding that the mere delivery to a plaintiff in a writ of replevin of the goods for which the writ is issued does not tend to prove property in him.

Under the amendment of April 4, 1891, of the Ohio Replevin Law (88 Ohio Laws 273), the bond no longer vests title to the property. Knight *v.* Kinney, 7 Ohio Cir. Ct. 59, 3 Ohio Cir. Dec. 662.

78. Gordon *v.* Jenney, 16 Mass. 465; Donohoe *v.* McAleer, 37 Mo. 312.

79. *Illinois.*— Bruner *v.* Dyball, 42 Ill. 34 (where it is said that where a party simply has a lien on property there is no hardship in remitting him to the security which the replevin bond affords, but it would be otherwise where the suit is brought to test the right of property); Speer *v.* Skinner, 35 Ill. 282.

Iowa.— Gimble *v.* Ackley, 12 Iowa 27.

New York.—Acker *v.* White, 25 Wend. 614.

North Dakota.— Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527.

Pennsylvania.— Frey *v.* Leeper, 2 Dall. 131, 1 L. ed. 319; Woglam *v.* Cowperthwaite, 2 Dall. 68, 1 L. ed. 292.

England.— Bradyll *v.* Ball, 1 Bro. Ch. 427, 28 Eng. Reprint 1219.

80. Bruner *v.* Dyball, 42 Ill. 34; Union Nat. Bank *v.* Moline, etc., Co., 7 N. D. 201, 73 N. W. 527.

81. *Colorado.*— Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955.

Delaware.— See Clark *v.* Adair, 3 Harr. 113.

Indian Territory.— Spencer *v.* Davidson, 5 Indian Terr. 231, 82 S. W. 731.

Iowa.— American Soda Fountain Co *v.* Dean Drug Co., 136 Iowa 312, 111 N. W. 534 (holding that such a bond is purely statutory); Gerlaugh *v.* Ryan, 127 Iowa 226, 103 N. W. 128.

that he is the owner of the property or entitled to possession, and serving upon the sheriff written notice that he requires the return thereof.[82] By giving bond and obtaining a redelivery of the property, defendant waives his right to object to the insufficiency of the proceedings taken by plaintiff to obtain a delivery.[83] The authorities are not entirely in accord as to the effect of such bond as a substitute for the property.[84]

2. COMPLIANCE WITH REQUIREMENTS — a. In General. In order to avail himself of the privilege of retaining the possession of the property, compliance by defendant with the conditions precedent imposed is necessary.[85] The initial steps must be taken within the time limited by the statute,[86] and the officer is required

Kansas.— Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415.

Kentucky.—Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210.

Montana.— Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765.

New York.— Talcott *v.* Belding, 36 N. Y. Super. Ct. 84; Barton *v.* Donnelly, 6 Misc. 473, 27 N. Y. Suppl. 525.

Ohio.— Uphaus *v.* Roof, 68 Ohio St. 401, 67 N. E. 717 (holding that there was no provision for such a bond prior to the amendment of the replevin laws, April 3, 1891); White *v.* Semper, 8 Ohio Cir. Ct. 346, 4 Ohio Cir. Dec. 408; Hunt *v.* Williams, 7 Ohio Cir. Ct. 224, 4 Ohio Cir. Dec. 568.

South Carolina.— Parish *v.* Smith, 66 S. C. 424, 45 S. E. 16; Polite *v.* Bero, 63 S. C. 209, 41 S. E. 305.

See 42 Cent. Dig. tit. "Replevin," § 179.

The Arkansas statute requires a bond to the effect that defendant shall perform the judgment of the court in the action. Dillard *v.* Nelson, 78 Ark. 237, 95 S. W. 460.

Without statute.— In Pennsylvania there is no statutory authority for a claim property bond in replevin, but the giving of such a bond is sanctioned by long usage. Snyder *v.* Frankenfield, 4 Pa. Dist. 767. However, defendant has no right to retain the chattels by giving a claim property bond unless he has a general or special property which entitles him to possession. Baird *v.* Porter, 67 Pa. St. 105.

In the federal courts it seems that defendant may, in a proper case, obtain a return of the property upon motion and giving the usual security. Emack *v.* Crabb, 8 Fed. Cas. No. 4,432, 5 Cranch C. C. 611; Greenwell *v.* Botelor, 10 Fed. Cas. No. 5,791, 3 Cranch C. C. 7.

When remedy available.—Defendant is not entitled to a redelivery where he has a right of action against the sheriff for taking goods other than those described in plaintiff's affidavit. Klinkowstein *v.* Greenberg, 15 Misc. (N. Y.) 479, 37 N. Y. Suppl. 206.

82. Teschner *v.* Deveron, 59 How. Pr. (N. Y.) 467. As to the proceedings required under early statutes see Grant *v.* Booth, 21 How. Pr. (N. Y.) 354; Miller *v.* Franklin, 17 Wend. (N. Y.) 278.

83. Wisconsin Mar., etc., Bank *v.* Hobbs, 22 How. Pr. (N. Y.) 494; Nicoll *v.* Pinner, 10 How. Pr. (N. Y.) 376. See also Gaiser *v.* Heim, 8 Ohio Cir. Ct. 120, 4 Ohio Cir. Dec. 378.

In Pennsylvania defendant by giving a claim property bond and retaining the property puts it out of his power to set up as a defense distraint for rent in arrear. Baird *v.* Porter, 67 Pa. St. 105.

84. Swantz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98; Hanlon *v.* O'Keefe, 55 Mo. App. 528, in which cases it is held that the bond does not stand in lieu of the property so as to entitle defendant, after judgment against him, to pay the assessed value and retain the property. In other cases it has been held that it is a substitute for the property and that defendant may sell and dispose of the property during the pendency of the action (Katz *v.* Hlavac, 88 Minn. 56, 92 N. W. 506), and in one jurisdiction the retention of the property by defendant under bond extinguishes plaintiff's title and the case proceeds as one of trespass (Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597; Rockey *v.* Burkhalter, 68 Pa. St. 221; Fisher *v.* Whoollery, 25 Pa. St. 197; Swope *v.* Crawford, 16 Pa. Super. Ct. 474, 18 Lanc. L. Rev. 177; Shoemaker *v.* Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. Ct. 159, 7 Kulp 528; Conlin *v.* Butler, 10 Kulp (Pa.) 273).

Order for return unnecessary.— So it has been held that on a discontinuance of the action or judgment in his favor the undertaking becomes *functus officio* and no order for the return of the property is necessary. Katz *v.* American Bonding, etc., Co., 86 Minn. 168, 90 N. W. 376; Hackett *v.* Bonnell, 16 Wis. 471.

85. Montgomery *v.* Black, 4 Harr. & M. (Md.) 391; Haeger *v.* Marcus, 5 Mo. App. 565; Teschner *v.* Deveron, 59 How. Pr. (N. Y.) 467.

86. Graham *v.* Wells, 18 How. Pr. (N. Y.) 376; McCann *v.* Thompson, 13 How. Pr. (N. Y.) 380.

The bond must be filed within the time prescribed. Lunneman *v.* Lunneman, 11 Pa. Dist. 759. *Compare* Hedderick *v.* Ponted, 6 Mont. 345, 12 Pac. 765, holding that a failure to file the bond with the clerk of court, as required by statute, will not defeat the right of action thereon.

Completion when begun in time.— But the proceedings may be completed so as to entitle defendant to a return of the property at any time before the final determination of the action. Corn Exch. Bank *v.* Blye, 102 N. Y. 305, 7 N. E. 49 [*affirming* 9 N. Y. Civ. Proc. 412].

to hold the property a designated time before turning it over to plaintiff, in order to give defendant an opportunity to give such bond, if he so desires.[87]

b. Sufficiency of Bond or Undertaking[88] — (i) *In General.* Under some statutes the bond of defendant is couched in the same language as that of plaintiff, in so far as it relates to the payment of money;[89] and a condition which states substantially that if defendant is not successful in the suit, he and the sureties will pay whatever judgment is rendered against him, is sufficient.[90] A redelivery bond is not fatally defective because it runs to plaintiff instead of the sheriff,[91] or because an unnecessary recital is inserted or omitted,[92] or because it is signed by the sureties only.[93] And when the bond does not violate a statute or contravene public policy, although it may be invalid as a statutory bond or undertaking, it may nevertheless be good as a common-law obligation.[94]

(ii) *Justification.* Justification by the sureties in accordance with the statutory provisions governing the same is sufficient.[95]

Waiver by excepting to plaintiff's security. — Defendant waives his right to give bond and regain possession of the property by excepting to the sufficiency of the sureties on plaintiff's undertaking (Vanderburgh *v.* Bassett, 4 Minn. 242; Cullen *v.* Miller, 5 Abb. N. Cas. (N. Y.) 282; Graham *v.* Wells, 18 How. Pr. (N. Y.) 376); and such right cannot be restored by countermanding his exception to the sureties after the expiration of the statutory time allowed for claiming a return (Vanderburgh *v.* Bassett, 4 Minn. 242).

87. Graham *v.* Wells, 18 How. Pr. (N. Y.) 376. If he do not elect to hold the property himself, he may take measures to see that the security given by plaintiff for a return of the property, in case a return should be adjudged, is sufficient. Graham *v.* Wells, 18 How. Pr. (N. Y.) 376. See also *supra*, III, B, 2, f.

Reasonable time. — The sheriff is obliged to allow defendant a reasonable time to find security. Clark *v.* Adair, 3 Harr. (Del.) 113; Kuhn *v.* Primer, 1 Dall. (Pa.) 225, 1 L. ed. 111.

88. **For forms of redelivery bonds** see Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Kennedy *v.* Brown, 21 Kan. 171; Nye *v.* Weiss, 7 Kan. App. 627, 53 Pac. 152; Alves *v.* Humphrey, 69 S. W. 1080, 24 Ky. L. Rep. 764; Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765 (held to be sufficient as a common-law bond); Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597.

89. John Church Co. *v.* Dorsey, 38 Misc. (N. Y.) 542, 77 N. Y. Suppl. 1065.

90. Watterson *v.* Fuellhart, 169 Pa. St. 612, 32 Atl. 597.

Effect on bond of void independent condition. — In jurisdictions where a judgment for a return of the property is unauthorized, a condition in the bond for a return is void; but, when independent of other conditions in the bond, its invalidity does not vitiate the whole bond. Chaffee *v.* Sangston, 10 Watts (Pa.) 265; Snyder *v.* Frankenfield, 4 Pa. Dist. 767. See also Moore *v.* Shenk, 3 Pa. St. 13, 45 Am. Dec. 618.

91. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331; Kimball Co. *v.* Bleick, 24 Oreg. 59, 32 Pac. 766.

92. Rouse *v.* Haas, 26 N. Y. App. Div. 171, 49 N. Y. Suppl. 867 (holding that where defendant intends to dispute the identity of the goods, the undertaking need not recite that the property sought to be returned is the property mentioned and described in the affidavit); Weber *v.* Manne, 42 Hun (N. Y.) 557, 4 N. Y. St. 497 [*affirming* 11 N. Y. Civ. Proc. 64].

93. Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765; Polite *v.* Bero, 63 S. C. 209, 41 S. E. 305.

The signature of the sureties by mark, with attestation, in literal compliance with the statute governing the same, constitutes a sufficient signing. Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210.

94. Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765, holding that the inconvenience, loss, or detriment resulting to plaintiff from a return of the property to defendant constitutes a legal and sufficient consideration for the bond.

95. Grant *v.* Booth, 21 How. Pr. (N. Y.) 354.

Justification is necessary in order to make the bond operative and entitle defendant to a return of the property. O'Connell *v.* Kelly, 15 Daly (N. Y.) 513, 8 N. Y. Suppl. 475; Graham *v.* Wells, 18 How. Pr. (N. Y.) 376. However, where all the other proceedings are regular, and the property was secured by means of the undertaking, the mere failure of the sureties to justify does not excuse them from liability. Barton *v.* Donnelly, 6 Misc. (N. Y.) 473, 27 N. Y. Suppl. 525.

When the bond is approved it becomes a fixed contract between the sureties and plaintiff, which cannot be changed or disturbed by the court, except by consent of plaintiff. Quarch *v.* Metz, 15 Misc. (N. Y.) 222, 37 N. Y. Suppl. 218. But an order of approval of the sufficiency of sureties, who have assumed no binding obligation, is nugatory and of no effect. Klinkowstein *v.* Greenberg, 15 Misc. (N. Y.) 479, 37 N. Y. Suppl. 206.

The time within which justification must be had is not limited (Graham *v.* Wells, 18 How. Pr. (N. Y.) 376), and a justification completed at any time before the final determination of the action is sufficient (Corn

(III) *AMENDMENT.* The court possesses the same power and discretion as in other actions to allow an amendment or the filing of a new[96] or additional security.[97]

c. Affidavit. The sufficiency of the affidavit required will depend upon the statute. It has been held sufficient when it contains the allegations required, although made on information and belief,[98] and when made by an agent or attorney of defendant, provided it sets forth the reason why it is not made by the party and the matter constituting the grounds of his belief.[99]

H. Claims of Third Persons. Sometimes under statutory provision a third person, not a party to the action, may obtain possession of the property by delivering to the sheriff an affidavit embodying his claim, and upon plaintiff failing to indemnify the sheriff.[1] The remedy furnished by the statute is not exclusive, and does not bar a third person from maintaining an action of replevin for the property or becoming a party to the action by interpleader.[2]

I. Return of Writ.[3] After service the officer must make a return of the writ showing that it was duly served.[4] The return, when made, is conclusive upon the parties of the facts which are set forth therein,[5] and, when sufficiently

Exch. Bank *v.* Blye, 102 N. Y. 305, 7 N. E. 49 [*affirming* 9 N. Y. Civ. Proc. 412]). However, where the justification has been commenced and suspended, it is proper for the court to fix a method by which it may be resumed at the pleasure of plaintiff. Troy Carriage Works *v.* Muxlow, 16 Misc. (N. Y.) 561, 38 N. Y. Suppl. 938. Statutory provisions relating to the adjournment of the justification have been construed to be directory and not mandatory. Troy Carriage Works *v.* Muxlow, *supra*.

A new justification will not be ordered where it does not appear that the insolvency of the sureties has arisen since they justified, or that their financial condition was unknown to plaintiff at the time of their approval by the court. McCrossin *v.* Clark, 1 Wkly. Notes Cas. (Pa.) 301.

96. Dale *v.* Gilbert, 128 N. Y. 625, 28 N. E. 512 [*reversing* 12 N. Y. Suppl. 370]; Hafelin *v.* Silverman, 11 Misc. (N. Y.) 723, 32 N. Y. Suppl. 918.

Filing new bond to make surety competent witness.—A motion of defendant for leave to file a new bond in order that he may call one of the sureties on the bond already given as a witness is not improperly denied, when not supported by affidavit showing the materiality of the testimony of the surety. Sopris *v.* Truax, 1 Colo. 89.

97. Smith *v.* Whitten, 117 N. C. 389, 23 S. E. 320, holding that where an undertaking was insufficient in amount, and the court ordered it to be enlarged, a new undertaking, filed in compliance with the order, is not a substitute for, but is in addition to, the original undertaking.

98. Lange *v.* Lewe, 58 N. Y. Super. Ct. 265, 11 N. Y. Suppl. 202.

99. Agnew *v.* Latham, 54 Misc. (N. Y.) 61, 105 N. Y. Suppl. 366.

1. King *v.* Orser, 4 Duer (N. Y.) 431 (holding that the statute applies only when the property was taken from the possession of defendant by the officer, in the proper discharge of his duty); Wright Steam Engine Works *v.* New York Kerosene Oil Engine Co., 44 Misc. (N. Y.) 580, 90 N. Y. Suppl. 130 (holding that when plaintiff fulfils the conditions in the statute by furnishing security, he is entitled to retain possession of the property); Pelham Hod Elevating Co. *v.* Baggaley, 12 N. Y. Suppl. 218.

Affidavit may be made by agent of third person.— Bishop *v.* Baxter, 3 Daly (N. Y.) 176.

2. Pracht *v.* Gunn, 69 N. Y. App. Div. 396, 74 N. Y. Suppl. 991; Standard Sewing Mach. Co. *v.* Heyman, 25 Misc. (N. Y.) 429, 54 N. Y. Suppl. 936.

Intervention see *supra*, II, C, 3.

3. Hutchinson *v.* McClellan, 2 Wis. 17.

South Carolina statute construed.—As there is no penalty attached by statute or rule of court for the failure of the sheriff to file the affidavit and notice required by S. C. Code, § 238, with the clerk within twenty days after taking the property, his non-compliance with the statute does not invalidate the proceedings. Alexander *v.* Jamison, 56 S. C. 409, 34 S. E. 695.

There is no duty on defendant to see that writ is returned. Persse *v.* Watrous, 30 Conn. 139.

4. Pool *v.* Loomis, 5 Ark. 110; Bent *v.* Bent, 43 Vt. 42.

Under the Massachusetts statute, it is not necessary that it appear in the officer's return that defendant was requested to appoint an appraiser to ascertain the value of the property, as it is the duty of the officer to appoint the appraisers; nor is it necessary that it appear that the parties did not agree as to the value of the property, although when they do so agree, such agreement must be certified in order to excuse the non-appointment of appraisers. Wolcott *v.* Mead, 12 Metc. 516.

A fair construction will be given the return, when its sufficiency is questioned, and a statement of the substantial facts will be held sufficient. Fleugel *v.* Lards, 108 Mich. 682, 66 N. W. 585; Miller *v.* Cushman, 38 Vt. 593.

5. Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235; Green *v.* Kindy, 43 Mich. 279, 5

definite,[6] is not collaterally impeachable.[7] The writ or requisition may be quashed where a proper return has not been made within a reasonable time;[8] but it has been held that it may be amended upon proof of mistake,[9] and that, when it is substantially correct, other facts not stated therein may be supplied by reference to other parts of the record.[10]

J. Quashing or Vacating Writ.[11] To obtain a quashal of the writ for defects in the writ itself,[12] or in the proceedings taken to obtain it,[13] the proper remedy is by motion, made after service[14] and return of the writ,[15] and before issue joined,[16] as where there is a material variance between the writ and the affidavit and bond,[17] or where it fails to specify and describe the property to be replevied.[18] A quashal of the writ on the motion of one defendant operates as a dismissal or discontinuance as to all,[19] and defendant is entitled to a return of the property,[20] but not to an assessment of damages, where the writ was quashed

N. W. 297; Claggett *v.* Richards, 45 N. H. 360; Diller *v.* Roberts, 13 Serg. & R. (Pa.) 60, 15 Am. Dec. 578. *Compare* Hayes *v.* Lusby, 5 Harr. & J. (Md.) 485, holding that the return is *prima facie* evidence that the acts stated therein were done as stated.

When not responsive to precept the return is not conclusive. Parker *v.* Palmer, 13 R. I. 359.

Not conclusve as to facts not stated therein.— The return of the officer that he took the property from the possession of defendant is not conclusive as to the fact of defendant's possession at the time suit was instituted, as the time of the service of the writ may be and often is a different date from that when suit was instituted. Clark *v.* Sublette, 117 Mo. App. 519, 94 S. W. 733.

6. Miller *v.* Moses, 56 Me. 128.

7. Crane *v.* McCoy, 6 Fed. Cas. No. 3,354, 1 Bond 42.

8. Lanahan *v.* Kent Cir. Judge, 106 Mich. 685, 64 N. W. 740; Sommers *v.* Hinas, (Mich. 1894) 58 N. W. 66, holding that the writ may be quashed on the ground that the return is not signed. *Contra*, Fryer *v.* Fryer, 6 Dana (Ky.) 54, holding that the failure of the officer to comply with the directory provisions of a statute in regard to reporting the assessed value of the property is not ground for quashing the writ.

9. Hammond *v.* Eaton, 15 Gray (Mass.) 186; Bent *v.* Bent, 43 Vt. 42.

10. Miller *v.* Cushman, 38 Vt. 593.

11. **Objections as to:** *Affidavit* see *supra*, III, A, 4.

Bond see *supra*, III, B, 3.

Return see *supra*, III, I.

Writ see *supra*, III, C, 4.

Waiver of objections and amendment see *supra*, III, C, 4.

12. Roberts *v.* Gee, 39 Fla. 531, 22 So. 877; Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228.

A formal defect in the writ which may be remedied by amendment will not be sufficient to require quashal. Cutler *v.* Rathbone, 1 Hill (N. Y.) 204.

Notice of motion for an order setting aside a replevin order see McDonald *v.* McKenzie, 20 Nova Scotia 282.

The writ will not be quashed on motion of the sheriff, where he is not a party to the action. English *v.* Dalbrow, 1 Miles (Pa.) 160.

13. Fawkner *v.* Baden, 89 Ind. 587.

Secondary evidence is admissible on such a motion, to show that the affidavit was duly made and filed, but was afterward lost or mislaid. Morgan *v.* Morgan, 31 Miss. 546.

14. Shewell *v.* MacKinley, 1 Miles (Pa.) 54.

15. Lewis *v.* Griswold, 1 Wend. (N. Y.) 292.

16. Clark *v.* Dunlap, 50 Mich. 492, 15 N. W. 565; Tripp *v.* Howe, 45 Vt. 523; Haller *v.* Beall, 11 Fed. Cas. No. 5,957, 2 Cranch C. C. 227. And see Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436. *Contra*, Morris *v.* Baker, 5 Wis. 389.

17. Roberts *v.* Gee, 39 Fla. 531, 22 So. 877.

But an objection to a variance between the writ and the declaration can be presented only by plea in abatement. Brown *v.* Peevey, 6 Ark. 37.

18. Parsell *v.* Genesee Cir. Judge, 39 Mich. 542; Evans *v.* Parks, (Miss. 1893) 13 So. 240 (holding that a writ of replevin which contains no description whatever of the property sought to be levied on should be quashed, in the absence of a motion for leave to amend); Snedeker *v.* Quick, 11 N. J. L. 179.

After appearance it has been held that defendant may move to quash for a material defect, as that the writ failed to specify the property. Snedeker *v.* Quick, 11 N. J. L. 179. But after appearance and demurrer by defendant, it is too late for him to move to quash the writ on the ground that the goods are not described with sufficient particularity. Kraemer *v.* Kraemer Drug Co., 59 N. J. L. 9, 35 Atl. 791.

19. Morris *v.* Baker, 5 Wis. 389.

20. Bettinson *v.* Lowery, 86 Me. 218, 29 Atl. 1003 [*following* Greeley *v.* Currier, 39 Me. 516]; Humphrey *v.* Bayn, 45 Mich. 565, 8 N. W. 556; Morris *v.* Baker, 5 Wis. 389. *Contra*, Dickinson *v.* Noland, 7 Ark. 25; Hartgraves *v.* Duval, 6 Ark. 506.

At common law, when the writ was abated or quashed on the plea or motion of defendant, he was entitled to a judgment for the return of the property only when he avowed, made cognisance, or put in a plea showing that he was entitled to possession. Gould *v.*

for non-description of the property seized.[21] The writ will not be quashed or vacated on account of the failure of the sheriff to permit defendant to give bond and retain the property,[22] nor where a clear case has not been made out.[23]

IV. Pleading and Evidence.

A. Declaration, Complaint or Petition [1] — 1. In General — a. Form and Requisites. In an action of replevin as in other civil actions the complaint must allege facts sufficient to constitute a cause of action,[2] and to show that it exists in favor of plaintiff,[3] and against defendant.[4] Whether the action is at common law or under the statutes,[5] the complaint must state in clear and concise language the facts upon which plaintiff bases his right and which entitle him to recover,[6] and it must allege facts and not matters of evidence,[7] or legal conclusions.[8] The material facts to be alleged are plaintiff's ownership, either general or special, of the property, describing it, his right to its immediate possession, and the wrongful taking or detention thereof by defendant,[9] and ordinarily this is all that is

Barnard, 3 Mass. 199; Hill *v.* Bloomer, 1 Pinn. (Wis.) 463.

21. Parsell *v.* Genesee Cir. Judge, 39 Mich. 542.

22. Wyatt *v.* Freeman, 4 Colo. 14; Robinson *v.* Austin, 3 Colo. 375; Parlin *v.* Austin, 3 Colo. 337.

23. Cliff *v.* Gunter, 4 N. Brunsw. 493.

Where an alias writ is useless, it is immaterial whether the court grants or overrules a motion to quash it, as no injury can accrue under either view. Morgan *v.* Morgan, 31 Miss. 546.

1. Form of declaration in replevin see Martin Civ. Proc. 374; Warren L. Studies 589.

2. Carman *v.* Ross, 64 Cal. 249, 29 Pac. 510 (holding that an averment in an action to recover possession of personal property that "plaintiff was and is the owner and in the possession of the property sued for" amounts to an averment that plaintiff was in the possession of the property when the action was commenced, and does not state a cause of action); Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931; Scofield *v.* Whitlegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104].

Allegations held insufficient to state a cause of action in replevin see Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931; Entsminger *v.* Jackson, 73 Ind. 144; Andrews *v.* Sellers, 11 Ind. App. 301, 38 N. E. 1101; Buell *v.* Schaale, 39 Iowa 293.

Allegations held sufficient to state a cause of action in replevin see Halleck *v.* Mitchell, 16 Cal. 574; Everett *v.* Buchanan, 2 Dak. 249, 6 N. W. 439, 8 N. W. 31; Schenck *v.* Long, 67 Ind. 579; McKinney *v.* First Nat. Bank, 36 Nebr. 629, 54 N. W. 963; Rickard *v.* Major, 34 Pa. Super. Ct. 107; Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232; Brookman *v.* State Ins. Co., 15 Wash. 29, 45 Pac. 655, 46 Pac. 243; Wegner *v.* Second Ward Sav. Bank, 76 Wis. 242, 44 N. W. 1096.

3. Entsminger *v.* Jackson, 73 Ind. 144; Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104].

In an action by an executor to recover property of his testator, the complaint should allege in direct terms the fact of the testator's death and that he left a last will and testament. Halleck *v.* Mixer, 16 Cal. 574.

Description of parties plaintiff.—A declaration in replevin in which plaintiffs described themselves as "trustees of the Colored Zion Baptist Church of Denver, who sue for the use and benefit of said church," is good on demurrer, whether the beneficiary is a corporation or a mere voluntary association. Shipton *v.* Norrid, 1 Colo. 404.

Title and right to possession of plaintiff see *infra*, IV, A, 2.

4. Crawshaw *v.* Wright, 5 Mo. App. 577 (holding that a complaint alleging a wrongful detention but not alleging that the property is detained by defendant is insufficient); Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315, 68 N. W. 954 (holding that where the complaint alleges a wrongful taking by a person other than defendant, and does not allege any facts showing that the property was ever in possession of defendant, it is insufficient, although it alleges a wrongful detention by defendant).

Taking and detention by defendant see *infra*, IV, A, 4.

5. Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931; Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104].

6. Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

7. Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104]; Pattison *v.* Adams, 7 Hill (N. Y.) 126, 42 Am. Dec. 59.

8. Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104].

9. Catterlin *v.* Mitchell, 27 Ind. 298, 89 Am. Dec. 501; Hoisington *v.* Armstrong, 22 Kan. 110; Wilson *v.* Fuller, 9 Kan. 176.

Description and value of property see *infra*, IV, A, 3.

Taking and detention by defendant see *infra*, IV, A, 4.

necessary to be stated,[10] except where it is necessary to allege a demand,[11] it being unnecessary to anticipate and negative matters of defense.[12] Where the form of complaint is prescribed by statute it need not be literally followed, it being sufficient if the statute is substantially complied with,[13] and if the statute does not prescribe any particular form of complaint, it is sufficient if it contains a plain and concise statement of the cause of action,[14] and it is not always necessary to allege in the complaint everything that is required to be stated in the affidavit.[15] In some jurisdictions where the action is brought before a justice of the peace, the affidavit is the only pleading required.[16] If the complaint states a cause of action in replevin the fact that it also alleges a conversion of the property by defendant to his own use does not change the form of action,[17] or deprive plaintiff of his right to a recovery of the property if the evidence upon the trial justifies such relief.[18]

b. Property Claimed.[19] The declaration or complaint in an action of replevin should not include any property not taken under the writ of replevin,[20] although it may include articles omitted in the summons,[21] or include only a part of the property mentioned in the affidavit.[22] In an action against an officer to recover property under writs of attachment issued in separate suits, the complaint need not state what part of the property was taken under each writ.[23]

c. Exhibits, Bills of Particulars, and Copies of Instruments.[24] A bill of particulars is not necessary in an action of replevin before a justice of the peace where the action is instituted by the filing of an affidavit,[25] since the affidavit contains all that is necessary to be stated in a bill of particulars and may be considered as such.[26] In an action of replevin to recover a written instrument it is not necessary to set out a copy thereof in the complaint.[27] An exhibit containing a description of the property must, in order to become a part of the complaint, be attached thereto.[28]

Title and right to possession of plaintiff see *infra*, IV, A, 2.

10. Catterlin *v.* Mitchell, 27 Ind. 298, 89 Am. Dec. 501; Hoisington *v.* Armstrong, 22 Kan. 110.

11. See *infra*, IV, A, 5.

12. McKinney *v.* Chadron First Nat. Bank, 36 Nebr. 629, 54 N. W. 963; Heisley *v.* Economy Tool Mfg. Co., 33 Pa. Super. Ct. 218; Drumgoole *v.* Lyle, 30 Pa. Super. Ct. 463.

13. Smith *v.* Montgomery, 5 Iowa 370; Berry *v.* Kauffmann, 70 Mo. 186.

14. Western R. Co. *v.* Bayne, 75 N. Y. 1, holding that, in an action for the claim and delivery of personal property, there is no requirement as to the form or contents of the complaint other than the general one that it shall contain a plain and concise statement of the cause of action.

15. Bosse *v.* Thomas, 3 Mo. App. 472.

16. Hanner *v.* Bailey, 30 Ark. 681; Fergus *v.* Gagnon, 4 Nebr. (Unoff.) 25, 93 N. W. 146.

17. Enos *v.* Bemis, 61 Wis. 656, 21 N. W. 812. See also Banfield *v.* Haeger, 45 N. Y. Super. Ct. 428.

18. More *v.* Finger, 128 Cal. 313, 60 Pac. 933, (1899) 58 Pac. 322.

19. Description and value of property see *infra*, IV, A, 3.

20. Sanderson *v.* Marks, 1 Harr. & G. (Md.) 252.

21. Finehout *v.* Crain, 4 Hill (N. Y.) 537.

22. Kerrigan *v.* Ray, 10 How. Pr. (N. Y.) 213, holding that a complaint, claiming only a part of the property mentioned in the affidavit and requisition originally issued to the sheriff, is good, it appearing that the other part had been taken from defendant by an attaching creditor before the summons could be served.

23. Glover *v.* Narey, 92 Iowa 286, 60 N. W. 531.

24. Bills of particulars generally see PLEADING, 31 Cyc. 565.

25. Hill *v.* Wilkinson, 25 Nebr. 103, 41 N. W. 134 (holding that Code Civ. Proc. § 951, which requires the filing of a bill of particulars by plaintiff in all cases before a justice of the peace, is not applicable to an action of replevin, since the affidavit in replevin takes the place of a bill of particulars); Sanderson *v.* Pullman, 9 Ohio Dec. (Reprint) 175, 11 Cinc. L. Bul. 145. See also Coombs *v.* Brenklander, 29 Nebr. 586, 45 N. W. 929, holding that a bill of particulars is not necessary in an action of replevin commenced in the county court, when the value of the property is within the jurisdiction of a justice of the peace, since Code Civ. Proc. § 1034, provides for the bringing of such actions upon the filing of the affidavit therein prescribed; and if a defective bill of particulars is filed in such a case, it is not sufficient ground for rendering judgment for defendant on the pleadings.

26. Starr *v.* Hinshaw, 23 Kan. 532.

27. Bales *v.* Scott, 26 Ind. 202.

28. Riley *v.* Pearson, 21 Oreg. 15, 26 Pac. 849, holding that it is not sufficient to file the exhibit as a separate paper, although it

d. Surplusage. Allegations in the declaration or complaint which are not necessary to the statement of plaintiff's cause of action may be disregarded as surplusage.[29]

e. Verification.[30] The statutes ordinarily require that the declaration, complaint, or petition in an action of replevin shall be verified,[31] and in the absence of such verification the writ cannot legally be issued;[32] but unless the statute so requires the verification need not be by plaintiff in person,[33] and if the verification contains the proper allegations for such purpose, the fact that it contains additional allegations will not vitiate it, but such additional matter may be treated as surplusage.[34]

f. Venue.[35] Replevin at common law and under most of the statutes is regarded as a local action,[36] and the complaint should contain allegations of venue,[37] and show the county in which the property is wrongfully held at the time the action is instituted.[38] In some cases it has been held that the venue must be alleged as of a particular place within the town or parish,[39] while in

is referred to in the complaint and alleged to be a part thereof.

29. Conner *v.* Bludworth, 54 Cal. 635 (allegations as to instruments by virtue of which plaintiff claims to be entitled to possession); Lay *v.* Neville, 25 Cal. 545 (allegation as to place where the property was taken); Roof *v.* Chattanooga, etc., Pulley Co., 36 Fla. 284, 18 So. 597 (insertion of the name of a usee in a complaint by a plaintiff entitled to recover in his own name); Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* former opinion in 79 Nebr. 32, 112 N. W. 321] (allegations as to facts constituting plaintiff's ownership following general allegations of ownership but not in any way contradictory of such general allegations).

30. Verifications of pleadings generally see JUSTICES OF THE PEACE, 24 Cyc. 565; PLEADING, 31 Cyc. 526.

31. Dowell *v.* Richardson, 10 Ind. 573 (holding that in an action before a justice of the peace the complaint must be verified); Duffy *v.* Dale, 42 Iowa 215; Cure *v.* Wilson, 25 Iowa 205.

32. Cure *v.* Wilson, 25 Iowa 205, holding that where the statute expressly requires the petition to be verified the writ cannot legally be issued without such verification, and if so issued should be quashed and the suit dismissed on motion.

33. Hall *v.* Durham, 117 Ind. 429, 20 N. E. 282, holding that the complaint may be verified by the attorney for plaintiff as his agent.

Insufficient verification by agent.—Where the jurat to a statement before a justice of the peace in a claim for the delivery of personal property purports to be made by an agent, but does not show for whom he acts, or to whose knowledge or belief he swears, such statement will not support the issuing of a delivery order, and on appeal to the circuit court cannot be amended, and where judgment in such a case is for defendant before the justice, and plaintiff appeals, the case should be dismissed. Crawshaw *v.* Wright, 5 Mo. App. 577.

Who may or must verify pleadings generally see PLEADING, 31 Cyc. 537.

34. Bingham *v.* Hill, 38 Ohio St. 657, holding that if the verification contains the proper allegations for such purpose, additional allegations inserted for the purpose of entitling plaintiff to an order for delivery will not vitiate the verification, but that as a verification they may be regarded as surplusage.

35. **Allegations as to venue in pleadings** generally see PLEADING, 31 Cyc. 94.

Venue in actions of replevin see *supra*, II, A.

36. See *supra*, II, A.

37. Byers *v.* Ferguson, 41 Oreg. 77, 67 Pac. 1067, 68 Pac. 5 (holding that since the action is local the complaint is demurrable unless it alleges the county in which the property is unlawfully held at the time the action is instituted); Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112 (holding that the complaint should allege the county in which the property is detained at the time of bringing the action and not merely the county in which it was taken); Kirk *v.* Matlock, 12 Oreg. 319, 7 Pac. 322 (holding, however, that an omission to state the place where the property was seized and located may be cured by verdict); Stiles *v.* James, 2 Wash. Terr. 194, 2 Pac. 188 (holding, however, that while an allegation of venue is essential to give jurisdiction of the subject-matter, such defect should be disregarded where the sheriff's return on file in the case shows that the property was found and taken by him within the jurisdiction of the court).

In Indiana it is held that under Rev. St. (1881) § 1547, it is not necessary for the complaint in replevin to allege that the property is detained in the county where the suit is brought. Gould *v.* O'Neal, 1 Ind. App. 144, 27 N. E. 307.

In a statement before a justice of the peace the venue is sufficiently laid if it appears in the margin of the statement. Stokes *v.* Crane, 46 Mo. 264.

38. Byers *v.* Ferguson, 41 Oreg. 77, 67 Pac. 1067, 68 Pac. 5; Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112. *Contra*, Gould *v.* O'Neal, 1 Ind. App. 144, 27 N. E. 307, under Rev. St. (1881) § 1547.

39. Gardner *v.* Humphrey, 10 Johns.

others it is held that it is sufficient if the venue is laid within the town [40] or county.[41]

g. Curing Defects by Reference to Affidavit.[42] The affidavit required to be filed in an action of replevin is no part of the pleadings,[43] and cannot be referred to or otherwise used to supplement or supply deficiencies in the complaint.[44]

h. Waiver of Objections and Cure by Subsequent Pleadings.[45] Defects in or grounds of objection to the declaration or complaint may be waived or cured by the subsequent pleading.[46] It has been held, however, that an allegation in the answer denying plaintiff's ownership will not cure the omission of an allegation of ownership in the complaint,[47] although it has also been held that a failure of the complaint to allege plaintiff's interest in the property is cured by an answer wherein the nature of his right is asserted.[48] If plaintiff fails to file and serve his complaint within the time limited by statute, an exception duly taken to a refusal of the court to dismiss upon this ground is not waived by pleading and going to trial.[49]

i. Aider by Verdict or Judgment. In accordance with the general rules of pleading,[50] many defects and omissions in the declaration or complaint in an action

(N. Y.) 53 (holding that unless the complaint states a place certain within the town or village, it is bad on demurrer, but that the defect may be cured by defendant pleading over); Potten *v.* Bradley, 2 M. & P. 78, 17 E. C. L. 625 (holding that in replevin to recover cattle the complaint must allege the particular place within the parish where they were taken).

40. Strong *v.* Lawler, 37 Conn. 177, holding that except perhaps in replevin for property distrained for rent, it is not necessary to allege the particular place where the property was taken as well as the town.

41. Muck *v.* Folkroad, 1 Browne (Pa.) 60, in which it was held that in replevin for articles not distrained for rent the declaration is sufficient if the taking is laid to the county.

42. Affidavit in actions of replevin see *supra*, III, A.

43. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; Loomis *v.* Youle, 1 Minn. 175.

In a justice's court the affidavit may be treated as a bill of particulars, but in a district court the affidavit is no part of the pleadings and cannot be used to supplement or supply material averments required to be stated in the petition. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281.

44. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; Loomis *v.* Youle, 1 Minn. 175; Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304.

In Missouri under a code provision it has been held that if the value of the property is stated in the affidavit annexed to the petition it need not be stated in the petition. Schaffer *v.* Faldwesch, 16 Mo. 337.

45. Cure by subsequent pleading generally see PLEADING, 31 Cyc. 714.

Waiver of objections to pleadings generally see PLEADING, 31 Cyc. 717.

46. *California.*— Williams *v.* Ashe, 111 Cal. 180, 43 Pac. 595, holding that an allegation of plaintiff's ownership as on and after a certain date instead of a specific allegation of ownership at the time of the commencement of the action is sufficient where defendant answers over without demurring specially.

Iowa.— Kennedy *v.* Roberts, 105 Iowa 521, 75 N. W. 363 (holding that an objection that the complaint does not allege that the property replevied was wrongfully taken by defendant is waived by failure to object in the trial court); Smith *v.* McLean, 24 Iowa 322 (holding that an objection that the petition does not set out or contain a copy of a chattel mortgage under which plaintiff claims a right of possession is waived unless objection be taken by demurrer).

Missouri.— Oliver *v.* Wooley, 68 Mo. App. 304, holding that where the complaint is defective in not describing the property with sufficient definiteness, but is not so defective as to fail to state a cause of action and no demurrer is filed, the objection is waived by answer.

New York.— Gardner *v.* Humphrey, 10 Johns. 53, holding that an omission to allege the venue as of a place certain within the town or village may be cured by defendant pleading over.

Oregon.— Byers *v.* Ferguson, 41 Oreg. 77, 65 Pac. 1067, 68 Pac. 5, holding that an objection that the complaint does not allege where the property is detained as well as where it was taken is cured by pleading over.

See 42 Cent. Dig. tit. "Replevin," § 208.

47. Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104]. But see PLEADING, 31 Cyc. 716 text and note 63.

48. Dillard *v.* McClure, 64 Mo. App. 488, where the complaint merely alleged that plaintiff was entitled to possession without alleging that he had any interest in the property by ownership or otherwise, but in the answer the nature of plaintiff's interest was asserted.

49. Elmore *v.* Garvey, 4 Wis. 152.

50. See PLEADING, 31 Cyc. 763 *et seq.*

of replevin may be cured by verdict;[51] but a declaration or complaint which entirely fails to state a cause of action cannot be aided by verdict.[52]

j. Time For Serving and Filing. Except where the time for filing and serving the declaration or complaint is regulated by special statutory provisions,[53] the rules and statutes governing actions generally apply in actions of replevin.[54]

2. Title and Right to Possession of Plaintiff — a. Title. The complaint in an action of replevin must allege either a general or special ownership of the property in plaintiff.[55] This should be done by a direct and issuable averment and not by allegations of the evidence of such ownership,[56] or allegations of legal conclusions growing out of the fact of ownership;[57] and so it is not sufficient merely to allege a right of possession in plaintiff,[58] or a wrongful detention by defend-

51. *Arkansas.*— Wadley *v.* Harris, 25 Ark. 36.

Idaho.— Pierce *v.* Langdon, 3 Ida. 141, 29 Pac. 401.

Indiana.— Hoke *v.* Applegate, 92 Ind. 570; Roberts *v.* Porter, 78 Ind. 130; Bales *v.* Scott, 26 Ind. 202 (failure to allege value of property); McPhelomy *v.* Solomon, 15 Ind. 189.

Minnesota.— Hurd *v.* Simonton, 10 Minn. 423 (failure to allege a demand and refusal); Coit *v.* Waples, 1 Minn. 134 (failure to allege that the property was wrongfully taken).

Missouri.— Stokes *v.* Crane, 46 Mo. 264 (holding that objections to a statement in an action of replevin begun before a justice of the peace that it fails to aver that plaintiff was lawfully entitled to the possession of the property sued for, that no venue is laid in the body of the statement, and that it is not verified by affidavit, are not grounds for arresting judgment); Keen *v.* Munger, 52 Mo. App. 660.

New Hampshire.— Lewis *v.* Clagett, Smith 187, defective description of property.

Oregon.— Kirk *v.* Matlock, 12 Oreg. 319, 7 Pac. 322, failure to allege the place from which the property was taken.

See 42 Cent. Dig. tit. "Replevin," § 209.

Nature of defects and omissions cured see, generally, Pleading, 31 Cyc. 766.

52. Staley House Furnishing Co. *v.* Wallace, 21 Mo. App. 128 (holding that a petition which does not state that the property is wrongfully detained or any facts from which a wrongful detention may be implied does not state a cause of action and is not aided by verdict); Lockhart *v.* Miller, 30 S. C. 326, 9 S. E. 511 (holding that a judgment for plaintiff cannot be sustained where the property was not described so that it could be identified). See also, generally, Pleading, 31 Cyc. 770.

53. Wilson *v.* Williams, 18 Wend. (N. Y.) 581; Murphy *v.* Sumner, 1 Hill (S. C.) 216; Elmore *v.* Garvey, 4 Wis. 152; Hutchinson *v.* McClellan, 2 Wis. 17.

54. Rodericks *v.* Payne, 1 McCord (S. C.) 407, holding that while in some respects a plaintiff in replevin is different from plaintiffs generally, he must be governed by the same rules when similarly situated, and that in filing his declaration and posting his rule to plead the general rules apply.

55. *Colorado.*— Street *v.* Sederburg, 41 Colo. 128, 92 Pac. 29; Elliott *v.* Greeley First Nat. Bank, 30 Colo. 279, 70 Pac. 421; Baker *v.* Cordwell, 6 Colo. 199.

Indiana.— Bailey *v.* Troxell, 43 Ind. 432, holding that a complaint which does not allege ownership of the property but only a promise of defendant to vest ownership in plaintiff upon certain conditions is bad.

Louisiana.— See Levert *v.* Hebert, 51 La. Ann. 222, 25 So. 118 (allegations held sufficient); Kemper *v.* Hulick, 16 La. 44.

Missouri.—Donnell *v.* Miller, 133 Mo. App. 693, 113 S. W. 1132; McCabe *v.* Black River Transp. Co., 131 Mo. App. 531, 110 S. W. 606; Benedict, etc., Mfg. Co. *v.* Jones, 60 Mo. App. 219.

New York.— Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104]; Vandenburgh *v.* Van Valkenburgh, 8 Barb. 217; Bond *v.* Mitchell, 3 Barb. 304; Pattison *v.* Adams, 7 Hill 126, 42 Am. Dec. 59.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Oklahoma.— Thompson *v.* Caddo County Bank, 15 Okla. 615, 82 Pac. 927, complaint held sufficient after verdict.

South Carolina.—Luther *v.* Arnold, 8 Rich. 24, 62 Am. Dec. 422.

South Dakota.— Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216.

See 42 Cent. Dig. tit. "Replevin," § 211, 212.

Action before justice of the peace.— In Missouri it is not necessary to allege ownership in replevin before a justice of the peace, it being sufficient to aver that plaintiff is lawfully entitled to the possession. Randol *v.* Buchanan, 61 Mo. App. 445.

56. Vandenburgh *v.* Van Valkenburgh, 8 Barb. (N. Y.) 217; Bond *v.* Mitchell, 3 Barb. (N. Y.) 304.

57. Street *v.* Sederburg, 41 Colo. 128, 92 Pac. 29; Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104].

58. Street *v.* Sederburg, 41 Colo. 128, 92 Pac. 29; Baker *v.* Cordwell, 6 Colo. 199; Donnell *v.* Miller, 133 Mo. App. 693, 113 S. W. 1132; Vandenburgh *v.* Van Valkenburgh, 8 Barb. (N. Y.) 217; Bond *v.* Mitchell, 3 Barb. (N. Y.) 304; Pattison *v.* Adams, 7 Hill (N. Y.) 126, 42 Am. Dec. 59. But see Seifret *v.* Kraft, 13 N. Y. Civ. Proc. 321, holding that an allegation that plaintiff was

ant.[59] The complaint need not, however, allege ownership in express terms if words of equivalent import are used,[60] as where it alleges a wrongful detention by defendant of the property "of the plaintiff," [61] or if it alleges facts which show his ownership or from which ownership may be implied.[62] So also where the ownership is expressly alleged it is sufficient to allege in general terms that plaintiff is the owner of the property,[63] without setting out the evidence, source, or nature of his title; [64] and if the complaint, after an allegation of general ownership, unnecessarily attempts to set out the facts constituting such ownership, these allegations if not contradictory of the general allegations of ownership may be disregarded as surplusage.[65] If, however, plaintiff bases his right of recovery upon a special ownership in the property, he must in his complaint set out the facts in relation thereto; [66] but if the facts alleged show plaintiff to be the owner of the property, it is not a fatal defect that he erroneously denominates his interest as a special property.[67]

b. Right to Possession. Since replevin is a possessory action the complaint should allege that plaintiff is entitled to the possession of the property,[68] but

lawfully possessed of the property is a sufficient averment as to his title.

59. Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 10 Abb. Pr. N. S. 104]; Tronson *v.* Union Lumbering Co., 38 Wis. 202.

60. Stickney *v.* Smith, 5 Minn. 486, holding that it is equivalent to an allegation of ownership where the complaint alleges that plaintiffs were possessed of the property "as of their own proper goods."

61. Van der Minden *v.* Elsas, 36 N. Y. Super. Ct. 66; Grever *v.* Taylor, 53 Ohio St. 621, 42 N. E. 829; Wilmot *v.* Lyon, 11 Ohio Cir. Ct. 238, 7 Ohio Cir. Dec. 394.

62. Visher *v.* Smith, 91 Cal. 260, 27 Pac. 650; Morrison *v.* Lewis, 49 N. Y. Super. Ct. 178, holding that in an action to recover property sold, where the sale was induced by fraud, ownership will be implied from an allegation of sale and delivery, and that no other allegation of ownership is necessary.

If the complaint alleges facts from which ownership may be implied, as distinguished from conclusions based upon the fact of ownership, it is sufficient without an express allegation of ownership. Morrison *v.* Lewis, 49 N. Y. Super. Ct. 178.

63. Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Krug *v.* McGilliard, 76 Ind. 28; Goodman *v.* Sampliner, 23 Ind. App. 72, 54 N. E. 823; Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332; Pattison *v.* Adams, Lalor (N. Y.) 426.

64. Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499; Krug *v.* McGilliard, 76 Ind. 28; Carlson *v.* Small, 32 Minn. 492, 21 N. W. 737; Mexico First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332.

Application of rule.— In an action by a guardian an allegation that "plaintiff as guardian," etc., "is entitled to the possession" is a sufficient allegation of ownership (Hoke *v.* Applegate, 92 Ind. 570); and in an action by an assignee for the benefit of creditors it is sufficient for him to allege generally that he is the owner and entitled to possession without alleging that he is the owner as assignee (Krug *v.* McGilliard, 76 Ind. 28); and a trustee suing need not set out how the trust was created or his title accrued (Skipton *v.* Norrid, 1 Colo. 404); but in an action by a husband and wife jointly it is not sufficient to allege that the property belongs to plaintiffs but the nature of the wife's interest must be alleged (Gentry *v.* Bargis, 6 Blackf. (Ind.) 261).

65. Racine-Sattley Co. *v.* Meinen, 79 Nebr. 33, 114 N. W. 602 [*vacating* former opinion in 79 Nebr. 32, 112 N. W. 321].

66. Paxton *v.* Learn, 55 Nebr. 459, 75 N. W. 1096; Thompson, etc., Mfg. Co. *v.* Nicholls, 52 Nebr. 312, 72 N. W. 217; Hudelson *v.* Tobias First Nat. Bank, 51 Nebr. 557, 71 N. W. 304; Norcross *v.* Baldwin, 50 Nebr. 885, 70 N. W. 511; Griffing *v.* Curtis, 50 Nebr. 334, 69 N. W. 968; Thompson *v.* Caddo County Bank, 15 Okla. 615, 82 Pac. 927. See also Starr *v.* Cox, (Kan. App. 1899) 57 Pac. 247.

In an action by a sheriff for property seized by him under an attachment and taken from him and detained by defendant, the complaint must allege facts showing that the property was liable to attachment. Allegations that the taking was wrongful and the detention unjust are mere propositions of law and without any facts to support them are insufficient. Tronson *v.* Union Lumbering Co., 38 Wis. 202.

Mortgagee in possession.—A petition in replevin that states that plaintiff was a mortgagee in possession of the property when it was taken from him by a stranger states a cause of action, without alleging a breach of the conditions of the mortgage. Meyer *v.* Plattsmouth First Nat. Bank, 63 Nebr. 679, 88 N. W. 867.

67. Robinson *v.* Fitch, 26 Ohio St. 659.

68. Entsminger *v.* Jackson, 73 Ind. 144; Midland Contracting Co. *v.* Toledo Foundry, etc., Co., 154 Fed. 797, 83 C. C. A. 489. *Compare* Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317, where it is stated that the material facts to be averred are a general or special ownership of the property in plaintiff, stating the facts in relation thereto which show a right of pos-

this need not be alleged in express terms,[69] it being sufficient if the complaint alleges facts which show that he is so entitled.[70] It has been held, however, that it is not a sufficient allegation of plaintiff's right to possession to allege merely that he is the owner of the property,[71] or that it is wrongfully detained by defendant,[72] or to allege both ownership and a wrongful detention,[73] since the ownership and right of possession may be in different persons,[74] and the allegation of wrongful detention is merely a conclusion of law;[75] but on the contrary it has been held that it is sufficient if the complaint alleges both ownership in plaintiff and a wrongful detention by defendant,[76] or if it merely alleges that plaintiff is the owner of the property.[77] Where plaintiff relies upon a special ownership in the property he must set out in his complaint the facts in relation thereto which entitle him to its possession.[78]

c. Time of Ownership and Right to Possession. Since plaintiff, in order to recover, must have an immediate right of possession, the allegations in the complaint of his ownership and right of possession must be as of the time that the action is instituted,[79] and it is not sufficient to allege that he was so entitled upon some specified date which was prior to the institution of the action,[80] even though

session and a wrongful detention by defendant, and that the right of possession being a legal conclusion need not be averred.

69. American Storage, etc., Co. *v.* Harding, 126 Mo. App. 489, 104 S. W. 484; Gage *v.* Wayland, 67 Wis. 566, 31 N. W. 108.

70. Visher *v.* Smith, 91 Cal. 260, 27 Pac. 650; American Storage, etc., Co. *v.* Harding, 126 Mo. App. 489, 104 S. W. 484; Gage *v.* Wayland, 67 Wis. 566, 31 N. W. 108.

71. Entsminger *v.* Jackson, 73 Ind. 144.

72. Loomis *v.* Youle, 1 Minn. 175; Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104].

73. Midland Contracting Co. *v.* Toledo Foundry, etc., Co., 154 Fed. 797, 83 C. C. A. 489.

74. Entsminger *v.* Jackson, 73 Ind. 144; Midland Contracting Co. *v.* Toledo Foundry, etc., Co., 154 Fed. 797, 83 C. C. A. 489.

75. Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104].

76. Grever *v.* Taylor, 53 Ohio St. 621, 42 N. E. 829 [*reversing* 6 Ohio Cir. Ct. 269, 3 Ohio Cir. Dec. 448]; Drumgoole *v.* Lyle, 30 Pa. Super. Ct. 463.

77. Illinois Sewing Mach. Co. *v.* Harrison, 43 Colo. 362, 96 Pac. 177. See also Pattison *v.* Adams, Lalor (N. Y.) 426, 428, where the complaint alleged both that plaintiffs were the owners of the property and also that they were entitled to the possession, and the court said: "The last clause is idle and nugatory; it adds nothing to the right or title of the plaintiffs, and is to be overlooked as surplusage. If the plaintiffs were, as they allege, owners of the chattels, the law implies that they were 'entitled to the possession thereof.'"

78. Norcross *v.* Baldwin, 50 Nebr. 885, 70 N. W. 511.

Allegations held sufficient to show a right to possession, where a special ownership is claimed see Hoy *v.* Leonard, 13 Colo. App. 449, 59 Pac. 229.

79. *California.*— Vanalstine *v.* Whelan, 135 Cal. 232, 67 Pac. 125 (holding, further, that such defect is not cured by an allegation in the answer that complainant was not the owner or entitled to the possession of the property at the times alleged in the petition, or at any other time); Bane *v.* Peerman, 125 Cal. 220, 57 Pac. 885; Truman *v.* Young, 121 Cal. 490, 53 Pac. 1073; Holly *v.* Heiskell, 112 Cal. 174, 44 Pac. 466; Masterson *v.* Clark, (1895) 41 Pac. 796; Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750; Afflerbach *v.* McGovern, 79 Cal. 268, 21 Pac. 837.

Idaho.— Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

Kansas.— Burgwald *v.* Donelson, 2 Kan. App. 301, 43 Pac. 100.

Minnesota.— Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171; Loomis *v.* Youle, 1 Minn. 175.

Montana.— Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657; McGregor *v.* Lang, 32 Mont. 568, 81 Pac. 343, where, however, the allegations were held sufficient as against a general demurrer.

New York.— Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13.

Oregon.— Casto *v.* Murray, 47 Oreg. 57, 81 Pac. 388, 883; Simonds *v.* Wrightman, 36 Oreg. 120, 58 Pac. 1100; Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216.

Utah.— Manti City Sav. Bank *v.* Peterson, 30 Utah 475, 86 Pac. 414, 116 Am. St. Rep. 862.

See 42 Cent. Dig. tit. "Replevin," § 214.

80. *California.*— Vanalstine *v.* Whelan, 135 Cal. 232, 67 Pac. 125; Bane *v.* Peerman, 125 Cal. 220, 57 Pac. 885; Truman *v.* Young, 121 Cal. 490, 53 Pac. 1073; Holly *v.* Heiskell, 112 Cal. 174, 44 Pac. 466; Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

Idaho.— Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

Montana.— Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657.

Oregon.— Simonds *v.* Wrightman, 36 Oreg. 120, 58 Pac. 1100; Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216.

it is further alleged that plaintiff demanded possession of the property,[81] and that defendant still wrongfully detains the same;[82] but it need not be alleged in express terms that plaintiff is entitled to the possession at the time the action is instituted if facts are alleged which show that he is so entitled,[83] and if it is alleged generally that plaintiff is the owner and is entitled to the possession of the property, it is not necessary to allege expressly that he is entitled to the immediate possession,[84] particularly where it is further alleged that defendant wrongfully took and detained the property.[85]

3. Description and Value of Property — a. In General. In an action of replevin the complaint must describe the property sought to be recovered with reasonable certainty,[86] more particularity being required in such an action where the property itself is sought to be recovered than in trespass, case, or trover, where the action is merely for damages,[87] although where the statute requires an affidavit to be delivered to the sheriff particularly describing the property the complaint need not describe the property with the same particularity as the affidavit.[88] The description must be sufficient to identify the property and to enable the officer to distinguish it from other property of like character,[89] and to

Utah.— Manti City Sav. Bank *v.* Peterson, 30 Utah 475, 86 Pac. 414, 116 Am. St. Rep. 862.

See 42 Cent. Dig. tit. "Replevin," § 214.

Ownership or right of possession at a prior date is evidence of a similar right at the time the action is instituted, but in pleading the ultimate and not the probative facts must be alleged. Fredericks *v.* Tracy, 98 Cal. 658, 33 Pac. 750.

The proximity of the date named to that on which the action is instituted does not alter the principle of the rule, and the complaint is insufficient, although it alleges ownership and right of possession on a date only one day prior to the institution of the action. Manti City Sav. Bank *v.* Peterson, 30 Utah 475, 86 Pac. 414, 116 Am. St. Rep. 862.

But if it is further alleged in addition to the allegation of plaintiff's ownership and right of possession on a certain date prior to the institution of the action that plaintiff was then in possession and that defendant wrongfully took the property, it is a sufficient allegation of possession at the time of the institution of the action. Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409 [*distinguishing* Truman *v.* Young, 121 Cal. 490, 53 Pac. 1073; and other California cases cited *supra*, in support of the text].

81. Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657.

82. Truman *v.* Young, 121 Cal. 490, 53 Pac. 1073; Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657; Kimball Co. *v.* Redfield, 33 Oreg. 292, 54 Pac. 216.

83. Casto *v.* Murray, 47 Oreg. 57, 81 Pac. 388, 883.

84. Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829.

85. Smith *v.* Wisconsin Inv. Co., 114 Wis. 151, 89 N. W. 829.

86. *California.*— Hawley *v.* Kocher, 123 Cal. 77, 55 Pac. 696.

Idaho.— Pierce *v.* Langdon, 3 Ida. 141, 28 Pac. 401.

Indiana.— Entsminger *v.* Jackson, 73 Ind. 144.

Kansas.— Smith *v.* McCoole, 5 Kan. App. 713, 46 Pac. 988.

Maine.— Wingate *v.* Smith, 20 Me. 287.

Michigan.— Stevens *v.* Osman, 1 Mich. 92, 48 Am. Dec. 696.

Missouri.—Edwards *v.* Eveler, 84 Mo. App. 405.

New York.— Root *v.* Woodruff, 6 Hill 418.

Ohio.— Knapp *v.* Springmeier, 7 Ohio Dec. (Reprint) 570, 3 Cinc. L. Bul. 1122.

Oregon.— Prescott *v.* Heilner, 13 Oreg. 200, 9 Pac. 403.

South Carolina.— Lockhart *v.* Little, 30 S. C. 326, 9 S. E. 511.

South Dakota.— Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216, holding that a description of the property as "goods, wares and merchandise," to a specified amount, is insufficient.

See 42 Cent. Dig. tit. "Replevin," §§ 215, 216, 217.

Reference to different paragraph of complaint.—Where the complaint consists of different paragraphs, each should be complete within itself and a defective description of the property in one paragraph cannot be supplied by reference to another (Entsminger *v.* Jackson, 73 Ind. 144); but such an objection should be raised by demurrer, and if the complaint is not demurred to and pleas to the merits are filed, such objection cannot be raised after verdict (McDonough *v.* Reilly, 131 Ill. App. 553).

Description held insufficient: In an action of replevin to recover grain. Pierce *v.* Langdon, 3 Ida. 141, 28 Pac. 401; Stevens *v.* Osman, 1 Mich. 92, 48 Am. Dec. 696; Edwards *v.* Eveler, 84 Mo. App. 405. In an action to recover live stock. Smith *v.* McCoole, 5 Kan. App. 713, 46 Pac. 988.

87. Hoke *v.* Applegate, 92 Ind. 570.

88. Clemmons *v.* Brinn, 36 Misc. (N. Y.) 157, 72 N. Y. Suppl. 1066 [*affirming* 35 Misc. 844, 72 N. Y. Suppl. 1097, 7 Am. Bankr. Rep. 714].

89. *Kansas.*— Smith *v.* McCoole, 5 Kan. App. 713, 46 Pac. 988.

enable defendant to know what property he is charged with detaining in order that he may prepare his defense to the action;[90] but if the property is thus clearly identified the description is sufficient,[91] and if the identity of the property is shown an error in the description is not fatal.[92] So also where circumstances render a specific description impossible a more general description may be sufficient if the circumstances are stated by way of excuse and are a sufficient excuse.[93] If the property has undergone a material change it must be described as it existed at the commencement of the suit.[94] In replevin to recover exempt property which has been taken on execution, it is not necessary to specifically designate the property as exempt,[95] unless the statute so requires,[96] and in replevin for an article which may or may not be a fixture, constituting a part of the realty, it is not necessary to allege that it is not.[97]

b. Value. There is some conflict of authority as to the necessity of alleging in the complaint the value of the property sought to be recovered, it having been held in some cases that no allegation of value is necessary,[98] or that it is not necessary if the action is in the *detinet*,[99] and that an allegation of value, if made, is a mere matter of form;[1] while on the other hand it has been held that there

Michigan.— Stevens *v.* Osman, 1 Mich. 92, 48 Am. Dec. 696.

Missouri.—Edwards *v.* Eveler, 84 Mo. App. 405, holding that a complaint in replevin averring that plaintiff was entitled to the possession of corn of about the value of one hundred dollars is insufficient, since the officer could not identify it and a judgment could not be enforced.

South Carolina.— Lockhart *v.* Little, 30 S. C. 326, 9 S. E. 511.

South Dakota.—Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216.

See 42 Cent. Dig. tit. "Replevin," §§ 215, 216, 217.

90. Smith *v.* McCoole, 5 Kan. App. 713, 46 Pac. 988; Kierbow *v.* Young, 20 S. D. 414, 107 N. W. 371, 8 L. R. A. N. S. 216.

91. Smith *v.* Stanford, 62 Ind. 392; Ellsworth *v.* Henshall, 4 Greene (Iowa) 417; Alberson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978.

Description held sufficient: In actions of replevin generally. McNorrill *v.* Daniel, 121 Ga. 78, 48 S. E. 680; Charles *v.* Valdosta Foundry, etc., Co., 4 Ga. App. 733, 62 S. E. 493; Hoke *v.* Applegate, 92 Ind. 570; Minchrod *v.* Windoes, 29 Ind. 288; Indiana Union Traction Co. *v.* Bick, 40 Ind. App. 451, 81 N. E. 617; Sawyer *v.* Middlesborough Town Co., 17 S. W. 444, 13 Ky. L. Rep. 550; Alberson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978; Ruch *v.* Morris, 28 Pa. St. 245; Casey *v.* Malidore, 19 Wash. 279, 53 Pac. 60. In actions to recover grain. Hall *v.* Durham, 117 Ind. 429, 20 N. E. 282; Smith *v.* Stanford, 62 Ind. 392; Ellingboe *v.* Brakken, 36 Minn. 156, 30 N. W. 659; Burr *v.* Brantley, 40 S. C. 538, 19 S. E. 199. In actions to recover live stock. Onstatt *v.* Ream, 30 Ind. 259, 95 Am. Dec. 695; Wood *v.* Darnell, 1 Ind. App. 215, 27 N. E. 447; Barse Live-Stock Commission Co. *v.* Turner, 56 Kan. 778, 44 Pac. 987; Farwell *v.* Fox, 18 Mich. 166; Crum *v.* Elliston, 33 Mo. App. 591; Bilby *v.* Townsend, 29 Nebr. 220, 45 N. W. 619; Nollkamper *v.* Wyatt, 27 Nebr. 565, 43 N. W. 357; Prescott *v.* Heilner, 13 Oreg. 200, 9 Pac. 403.

A description which would pass title in a chattel mortgage is sufficient in an action of replevin. Ft. Dodge *v.* Moore, 37 Iowa 388.

92. Barse Live-Stock Commission Co. *v.* Turner, 56 Kan. 778, 44 Pac. 987.

93. Hoke *v.* Applegate, 92 Ind. 570, holding that where plaintiff gives a general description of the property and alleges that he is unable to give a more specific description, for the reason that the property is in possession of defendant, the complaint is sufficient.

94. Wingate *v.* Smith, 20 Me. 287, holding that where logs belonging to plaintiff have been wrongfully taken by defendant and converted into boards before the commencement of the action, the property must be described as boards and not as logs.

95. Elliott *v.* Whitmore, 5 Mich. 532; Krause *v.* Herbert, 16 Oreg. 429, 18 Pac. 852. *Compare* Conklin *v.* McCauley, 41 N. Y. App. Div. 452, 58 N. Y. Suppl. 879, where, however, the allegations were held to be sufficient as by reasonable and fair intendment they implied that the article taken was exempt.

96. See Armel *v.* Lendrum, 47 Iowa 535.

97. Brearley *v.* Cox, 24 N. J. L. 287, holding that such articles as "mills, barns, steam engines, offices and sheds" may or may not be fixtures, and whether they are or are not is matter of evidence, unnecessary to be stated in the pleading.

98. Britton *v.* Morss, 6 Blackf. (Ind.) 469; Schaffer *v.* Faldwesch, 16 Mo. 337, holding that while the affidavit must state the value of the property, it is not necessary for the petition to do so.

99. Britton *v.* Morss, 6 Blackf. (Ind.) 469; Root *v.* Woodruff, 6 Hill (N. Y.) 418.

1. Bailey *v.* Evers, 21 Ark. 488, holding that an allegation in the declaration of the value of the property in replevin is a matter of form in pleading, and not an admission by plaintiff in an inquiry by the jury as to its value.

must be an allegation of value,[2] or at least where plaintiff seeks to recover the value of the property in case possession thereof cannot be delivered to him,[3] and that the allegation of value is a material allegation.[4] So also it has been held in some cases that a general allegation of value is sufficient without stating separately the value of the different articles sought to be recovered,[5] and in others that the separate value of each article must be stated.[6]

4. Taking and Detention by Defendant — a. In General. In order to state a cause of action in replevin the complaint must allege either a wrongful taking or a wrongful detention of the property by defendant;[7] but it need not allege both,[8] although it is proper to do so when necessary to make the complaint conform to the writ.[9] At common law replevin was spoken of as being in the *cepit* or in the *detinet*,[10] it being necessary in the former to allege a wrongful taking,[11] but not a wrongful detention,[12] which was necessary only in the latter,[13] although counts in the *cepit* and *detinet* might be joined.[14] Under the statutes the formal distinctions between replevin in the *cepit* and *detinet* have generally been done away with.[15] The gist of the action under the statutes is a wrongful detention of the property by defendant,[16] and this must be alleged in the complaint;[17] but it is not necessary to allege a wrongful taking.[18] While the allegation of wrongful

2. State *v.* Welch, 37 Wis. 196.

3. Lomme *v.* Sweeney, 1 Mont. 584 [*affirmed* in 22 Wall. (U. S.) 208, 22 L. ed. 727].

4. Tucker *v.* Parks, 7 Colo. 62, 1 Pac. 427.

5. Haynes *v.* Crutchfield, 7 Ala. 189; Wall *v.* De Mitkiewicz, 9 App. Cas. (D. C.) 109; Root *v.* Woodruff, 6 Hill (N. Y.) 418. See also Prescott *v.* Heilner, 13 Oreg. 200, 9 Pac. 403.

6. American-German Nat. Bank *v.* Gray, etc., Hardware Co., 110 S. W. 393, 33 Ky. L. Rep. 547. See also Charles *v.* Valdosta Foundry, etc., Co., 4 Ga. App. 733, 62 S. E. 493, where it was held proper to allow the complaint to be amended so as to allege the separate value of each article sued for, the original complaint having merely alleged the aggregate value.

7. Entsminger *v.* Jackson, 73 Ind. 144; Howe Sewing Machine Co. *v.* Haupt, 7 Daly (N. Y.) 108.

8. Hoffman *v.* Morton, 88 Hun (N. Y.) 18, 34 N. Y. Suppl. 508.

9. Dawes *v.* Glasgow, 1 Pinn. (Wis.) 171.

10. See Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177.

11. Coit *v.* Waples, 1 Minn. 134; Reynolds *v.* Loundsbury, 6 Hill (N. Y.) 534.

It need not be expressly alleged that the taking was wrongful if the allegations used import a wrongful taking or set out facts showing the taking to have been wrongful. Childs *v.* Hart, 7 Barb. (N. Y.) 370; Button *v.* Lusk, 10 N. Y. Suppl. 582, 19 N. Y. Civ. Proc. 111.

12. Hoffman *v.* Morton, 88 Hun (N. Y.) 18, 34 N. Y. Suppl. 508.

13. See Hoffman *v.* Morton, 88 Hun (N. Y.) 18, 34 N. Y. Suppl. 508.

14. See Cox *v.* Grace, 10 Ark. 86, holding that counts in the *cepit* and in the *detinet* may be joined in replevin, but in such case plaintiff must support each count by affidavit.

15. Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177; Denver Onyx, etc., Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

16. Draper *v.* Ellis, 12 Iowa 316; Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; Wilson *v.* Fuller, 9 Kan. 176.

17. Draper *v.* Ellis, 12 Iowa 316; Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281; Wilson *v.* Fuller, 9 Kan. 176; Tozier *v.* Merriam, 12 Minn. 87.

The word "wrongful" is sufficient to characterize the detention of the property, and it is not necessary to allege it to have been illegal or unlawful (Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661); nevertheless it has been held that if the statute uses the word "unlawful" it should be used in the complaint instead of using the word "wrongful" (Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582).

An allegation in the affidavit of a wrongful detention by defendant will not cure its omission in the petition. Wilhite *v.* Williams, 41 Kan. 288, 21 Pac. 256, 13 Am. St. Rep. 281.

Allegations insufficient.—A complaint alleging that a person other than defendant took a building from plaintiff's land and put it upon defendant's land, and that defendant has refused to deliver it to plaintiff or to permit him to remove it, but which does not allege or show that defendant, although owner of the land, exercises or can exercise any control over the building, does not show an unlawful detention thereof by defendant. Tozier *v.* Merriam, 12 Minn. 87.

18. Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Newell *v.* Newell, 34 Miss. 385; Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177; Denver Onyx, etc., Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

How possession was acquired is immaterial if at the time of the action plaintiff is entitled to the possession of the property and it is wrongfully detained by defendant. Ross *v.* Menefee, 125 Ind. 432, 25 N. E. 545; Denver Onyx, etc., Mfg. Co. *v.* Reynolds, 72 Fed. 464, 18 C. C. A. 638.

detention need not be made in express terms,[19] it must be made with reference to defendant,[20] and as of the time when the action is instituted;[21] but unless otherwise provided by statute,[22] this is ordinarily, so far as defendant's connection with the property is concerned, all that is necessary.[23] The New York statute requires that where the action is founded upon a wrongful detention the complaint must set out the facts showing that the detention was wrongful;[24] but if the complaint alleges a wrongful taking it is not necessary to set out the facts showing that the taking was wrongful,[25] or showing that the subsequent detention was wrongful.[26]

b. Negativing Taking For Tax, Assessment, or Under Process. In the absence of statute it is not necessary for the complaint to allege that the property in question was not taken for a tax, fine, or assessment or seized under execution, attachment, or other process,[27] and a requirement that such facts shall be stated in the affidavit does not apply to the complaint.[28] In some jurisdictions, however, these allegations are required in actions before a justice of the peace.[29]

5. DEMAND. The circumstances under which a demand is or is not a condition precedent to the right to maintain an action of replevin have been previously stated.[30] Where no demand is necessary in order to maintain the action, as where the original taking was wrongful, the complaint need not allege a demand,[31] and a complaint alleging merely a wrongful taking is sufficient.[32] Where, however, a demand is necessary, as where the property came lawfully into defendant's possession, it has ordinarily been held that the complaint must allege a demand,[33]

19. Visher *v.* Smith, 91 Cal. 260, 27 Pac. 650 (holding that allegations showing plaintiff's right to possession and alleging a refusal by defendant to surrender the property to plaintiff sufficiently show a wrongful detention); Adams *v.* Corriston, 7 Minn. 456.

An allegation that defendant "unlawfully holds" the property is equivalent to an allegation that it is unlawfully detained. Gould *v.* O'Neal, 1 Ind. App. 144, 27 N. E. 307.

20. Louisville, etc., R. Co. *v.* Payne, 103 Ind. 188, 2 N. E. 582; Crawshaw *v.* Wright, 5 Mo. App. 577.

21. Louisville, etc., R. Co. *v.* Payne, 103 Ind. 183, 2 N. E. 582; Burgwald *v.* Donelson, 2 Kan. App. 301, 43 Pac. 100.

22. See Pirani *v.* Barden, 5 Ark. 81, holding that where the action is in the *detinet* under the statute and does not allege a wrongful taking, the complaint must follow the form prescribed by the statute and allege a receipt of the property by defendant from plaintiff or from some other person to be delivered to plaintiff, and that although requested he has refused to deliver the same to plaintiff.

23. Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177. But see Stahl *v.* Chicago, etc., R. Co., 94 Wis. 315, 68 N. W. 954, holding that in an action against several defendants, a complaint alleging a wrongful taking by certain of them and a wrongful detention by all of them is not sufficient as against a defendant not named as one of those who wrongfully took the property or otherwise shown to have ever been in possession thereof, the allegation of a wrongful detention being as to him a mere conclusion of law without facts to support it.

A specific allegation may overcome a general allegation of wrongful detention where such specific allegation shows that defendant was rightfully in possession. Thieme *v.* Zumple, 152 Ind. 359, 52 N. E. 449.

24. Desbecker *v.* McFarline, 42 N. Y. App. Div. 455, 59 N. Y. Suppl. 439 [*affirmed* in 166 N. Y. 625, 60 N. E. 1110] (allegations held sufficient); Sommer *v.* Greenberg, 9 Misc. (N. Y.) 720, 29 N. Y. Suppl. 602 (allegations held sufficient); Scofield *v.* Valentini, 19 N. Y. Suppl. 225 (allegations held sufficient); Seifret *v.* Kraft, 13 N. Y. Civ. Proc. 321 (allegations held insufficient).

25. Gowing *v.* Warner, 30 Misc. (N. Y.) 593, 62 N. Y. Suppl. 797 [*affirming* 29 Misc. 593, 61 N. Y. Suppl. 500].

26. Gowing *v.* Warner, 30 Misc. (N. Y.) 593, 62 N. Y. Suppl. 797 [*affirming* 29 Misc. 593, 61 N. Y. Suppl. 500]. See also Seifret *v.* Kraft, 13 N. Y. Civ. Proc. 321.

27. Turpie *v.* Fagg, 124 Ind. 476, 22 N. E. 743; Payne *v.* June, 92 Ind. 252; Hoisington *v.* Armstrong, 22 Kan. 110; Daniels *v.* Cole, 21 Nebr. 156, 31 N. W. 491.

28. Hoisington *v.* Armstrong, 22 Kan. 110; Daniels *v.* Cole, 21 Nebr. 156, 31 N. W. 491; Hoffman *v.* Markham, 88 Hun (N. Y.) 18, 34 N. Y. Suppl. 508.

29. McCoy *v.* Reck, 50 Ind. 283; Dowell *v.* Richardson, 10 Ind. 573; Gist *v.* Loring, 60 Mo. 487.

30. See *supra*, I, E, 2.

31. Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 2 West. L. Month. 317.

32. Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49.

33. *Indiana.*— Combs *v.* Bays, 19 Ind. App. 263, 49 N. E. 358.

Minnesota.— Stratton *v.* Allen, 7 Minn. 502.

New York.— Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming*

it being insufficient where it is not alleged that the original taking was wrongful, merely to allege a wrongful detention;[34] but on the contrary it has been held that unless the complaint affirmatively shows that defendant came lawfully into possession of the property, it is sufficient to allege a wrongful detention without any allegation of demand,[35] and that under the allegation of wrongful detention plaintiff may show a wrongful taking or a demand and refusal to surrender the property, or any fact which will establish the allegation of wrongful detention.[36] If the allegation of the complaint affirmatively shows that defendant came lawfully into possession of the property, a demand must be alleged.[37]

6. Damages. Where the complaint demands a return of the property or its value and states the value, an *ad damnum* clause is not necessary;[38] but damage cannot be recovered unless there is an allegation of damage.[39] A general allegation of damage is, however, sufficient to authorize a recovery of such damages as are the natural and immediate consequence of the wrongful acts of defendant complained of,[40] such as damages for the value of the use of the property while wrongfully detained by defendant;[41] but special damages cannot be recovered unless specially pleaded,[42] such as damages for an injury to the property while in defendant's possession.[43] Where plaintiff sues for specific property and dam-

33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104]; Cumiskey *v.* Lewis, 15 N. Y. St. 364; Fuller *v.* Lewis, 3 Abb. Pr. 383, 13 How. Pr. 219.

Ohio.— Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 2 West. L. Month. 317.

South Carolina.— Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49, holding that a complaint in replevin, alleging that defendant, A, wrongfully took a horse from plaintiff, and sold it to defendant, B, and that "defendants still unjustly detain" the property, is good against A but not against B, there being no allegation of a demand on him, nor that he knew A had wrongfully taken the horse.

See 42 Cent. Dig. tit. "Replevin," § 223.

If no demand is alleged the complaint is subject to demurrer (Stratton *v.* Allen, 7 Minn. 502), and plaintiff should not be permitted to prove a demand upon the trial (Cumiskey *v.* Lewis, 15 N. Y. St. 364).

Allegations held sufficient as against a general demurrer see Brenot *v.* Robinson, 108 Cal. 143, 41 Pac. 37.

In an action before a justice of the peace it has been held that if the affidavit filed is such as the statute requires no other statement of a demand is necessary. Andre *v.* Johnson, 6 Blackf. (Ind.) 188.

34. Combs *v.* Bays, 19 Ind. App. 263, 49 N. E. 358; Stratton *v.* Allen, 7 Minn. 502; Scofield *v.* Whitelegge, 49 N. Y. 259, 12 Abb. Pr. N. S. 320 [*affirming* 33 N. Y. Super. Ct. 179, 10 Abb. Pr. N. S. 104].

Defect cured by verdict.—While a complaint not alleging a demand would be bad on demurrer, if it alleges a wrongful detention, the defect in failing to allege a demand is cured by verdict. Hurd *v.* Simonton, 10 Minn. 423.

35. Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428. See also Simser *v.* Cowan, 56 Barb. (N. Y.) 395, holding that in a complaint under the code for the unlawful detention of personal property, it is unnecessary to allege any demand or refusal, it being enough to charge defendant with taking or having wrongfully detained the property of plaintiff.

36. Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428. See also Farmers', etc., Bank *v.* Glen Elder Bank, 46 Kan. 376, 26 Pac. 680; Simser *v.* Cowan, 56 Barb. (N. Y.) 395.

37. Campbell *v.* Jones, 38 Cal. 507.

Although it is alleged that defendant had possession without right, if there is also a specific allegation showing that defendant had possession under a claim of right which if good would entitle him to the possession, the complaint is bad unless a demand is alleged. Thieme *v.* Zumpe, 152 Ind. 359, 52 N. E. 449.

38. Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758. But see Faget *v.* Brayton, 2 Harr. & J. (Md.) 350, where it is stated generally that an omission to allege damages in the complaint in an action of replevin is fatal.

39. Tucker *v.* Parks, 7 Colo. 62, 298, 1 Pac. 427, 3 Pac. 486; Jermyn *v.* Hunter, 93 N. Y. App. Div. 175, 87 N. Y. Suppl. 546.

40. Burkeholder *v.* Rudrow, 19 Mo. App. 60.

Construction of allegation.—Where the complaint demands a return of the property or its value, and a certain sum as damages, the allegation of damages will be deemed to be an allegation of such damages as plaintiff would be entitled to claim for the detention of the property. Hitchcock *v.* Wimpleberg, 103 N. Y. App. Div. 53, 92 N. Y. Suppl. 997 [*affirming* 45 Misc. 293, 92 N. Y. Suppl. 298].

41. Burkeholder *v.* Rudrow, 19 Mo. App. 60; Farrand, etc., Organ Co. *v.* M. E. Church Bd. of Extension, 17 Utah 469, 54 Pac. 818.

42. Burrage *v.* Melson, 48 Miss. 237; Cook *v.* Clary, 48 Mo. App. 166; Armagost *v.* Rising, 54 Nebr. 763, 75 N. W. 534; Rosecrans *v.* Asay, 49 Nebr. 512, 68 N. W. 627; Whitney *v.* Levon, 34 Nebr. 443, 51 N. W. 972; Jermyn *v.* Hunter, 93 N. Y. App. Div. 175, 87 N. Y. Suppl. 546.

43. Armagost *v.* Rising, 54 Nebr. 763, 75

ages for its detention, it is not necessary that the complaint should be amended in order to authorize a recovery of damages for the value of the property, where it is taken by the officer and subsequently returned to defendant because no bond is given by plaintiff.[44]

B. Plea or Answer — 1. In General. Defendant in replevin must file a plea or answer or there can be no trial for want of an issue, although plaintiff fails to appear,[45] and such plea must either traverse or confess and avoid the allegations in the complaint.[46] The form and effect of the common-law pleadings in replevin have been considerably modified by the statutes,[47] under which the wrongful detention is the gist of the action.[48] So ordinarily the general issue or general denial is a sufficient answer on the part of defendant,[49] as under the statutes it is much broader than the old plea of *non cepit*,[50] and puts in issue plaintiff's ownership and right of possession,[51] and every material allegation of the complaint,[52] and authorizes defendant to give in evidence any defenses which will defeat plaintiff's right of recovery.[53] Such plea closes the issues and puts plaintiff to proof of every fact material to the maintenance of the action,[54] and when pleaded it is not error to sustain a demurrer to a further answer setting up facts which may be proven under the general denial.[55] Defendant is not, however, obliged to plead the general issues but may, if he so desires, plead his defenses specifically,[56] in which case his answer will be subject to the ordinary rules of pleading.[57] The plea or answer must therefore state the facts upon which

N. W. 534; Whitney *v.* Levon, 34 Nebr. 443, 51 N. W. 972.

Allegations held sufficient after judgment to sustain findings of special damage for injury to the property see Rosecrans *v.* Asay, 49 Nebr. 512, 68 N. W. 627.

44. Pugh *v.* Calloway, 10 Ohio St. 488, decided under an Ohio statute providing that where the property has not been taken or has been returned to defendant the action may proceed as one for damages only, and that plaintiff shall be entitled to such damages as are right and proper.

45. Elsberg *v.* Maurin, 9 N. M. 645, 43 Pac. 690. But see Wellman *v.* Wellman, 11 Ohio Dec. (Reprint) 815, 30 Cinc. L. Bul. 19 [*reversed* in part on other grounds in 9 Ohio Cir. Ct. 72, 6 Ohio Cir. Dec. 61].

46. Hanington *v.* Girouard, 16 N. Brunsw. 151.

47. Jansen *v.* Effey, 10 Iowa 227; Gibson *v.* Mozier, 9 Mo. 256.

48. Amos *v.* Sinnott, 5 Ill. 440; Bailey *v.* Bayne, 20 Kan. 657. See also *infra*, IV, B, 2.

49. *Iowa.*— Jansen *v.* Effey, 10 Iowa 227.

Kansas.— White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320; Bailey *v.* Bayne, 20 Kan. 657.

Massachusetts.— D'Arcy *v.* Steuer, 179 Mass. 40, 60 N. E. 405.

Missouri.— Gibson *v.* Mozier, 9 Mo. 256.

Oklahoma.— Sallisaw First Nat. Bank *v.* Barbour, 21 Okla. 237, 95 Pac. 790.

Vermont.— Campbell *v.* Camp, 69 Vt. 97, 37 Atl. 238.

See 42 Cent. Dig. tit. "Replevin," § 227.

Not guilty is under the statutes the general issue (Gibson *v.* Mozier, 9 Mo. 256; Campbell *v.* Camp, 69 Vt. 97, 37 Atl. 238), while at common law the general issue is *non cepit* (Gibson *v.* Mozier, *supra*).

An answer alleging that defendant "denies generally and specifically" each and every allegation of the complaint except that defendant is in possession of the property is in effect a general denial. Russell *v.* Amundson, 4 N. D. 112, 59 N. W. 477.

But where a person not actually or constructively in possession of the property is without objection made a party defendant, because, as alleged, he "claims some interest" in the property, and he answers by a general denial, such answer without more presents no issue for trial. Van Gorder *v.* Smith, 99 Ind. 404.

50. D'Arcy *v.* Steuer, 179 Mass. 40, 60 N. E. 405; Gibson *v.* Mozier, 9 Mo. 256.

Plea of non cepit at common law see *infra*, IV, B, 2.

51. See *infra*, IV, G, 1, c.

52. Idaho Placer Min. Co. *v.* Green, 14 Ida. 249, 93 Pac. 954; Sallisaw First Nat. Bank *v.* Barbour, 21 Okla. 237, 95 Pac. 790.

53. See *infra*, IV, G, 2, a, (I).

54. Street *v.* Morgan, 64 Kan. 85, 67 Pac. 448.

55. Idaho Placer Min. Co. *v.* Green, 14 Ida. 249, 93 Pac. 954.

56. Randall *v.* Gross, 67 Nebr. 255, 93 N. W. 223; Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47. See also Schlessinger *v.* Cook, 9 Wyo. 256, 62 Pac. 152, holding that under Rev. St. § 3544, providing that defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he has, whether legal or equitable, defendant may in replevin as in other actions avail himself of any defense he may have, but that the statute does not create any new defenses or make that a defense which was not previously such.

57. Randall *v.* Gross, 67 Nebr. 255, 93 N. W. 223; Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47.

defendant relies and not matters of evidence,[58] or legal conclusions,[59] and it must set forth facts which if proved will constitute a good defense to the action.[60] Unnecessary allegations may be treated as surplusage,[61] and while a plea or answer which presents a good defense is not bad on general demurrer because it also sets up matters which are irrelevant,[62] such irrelevant allegations may be stricken out,[63] a plea which is merely frivolous or impertinent may be disregarded or stricken out on motion.[64] A plea or answer which is defective may be cured by a subsequent pleading,[65] or aided by proof,[66] or by verdict,[67] and if, although one denial of the answer is defective, there is another which puts in issue a material allegation of the complaint, it is error to render judgment on the pleadings.[68] An objection to defects on the face of the replevin bond may be taken either by a motion to dismiss or by a plea in abatement.[69] It has been held that a nonjoinder as plaintiffs of joint owners or tenants in common of the property must be taken advantage of by a plea in abatement, and that such objection is waived by pleading to the merits; [70] but on the contrary it has been held that such nonjoinder need not be pleaded in abatement,[71] but that it may be pleaded either in bar or abatement,[72] or be taken advantage of by demurrer,[73] or by motion in arrest of judgment,[74] or upon the trial under the general issue.[75]

Plea or answer held insufficient: For failing to state facts sufficient to constitute a defense. Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270; Roberts *v.* White, 146 Mass. 256, 15 N. E. 568; Miller *v.* Warden, 111 Pa. St. 300, 2 Atl. 90. As plea in abatement. Bent *v.* Bent, 43 Vt. 42.

Plea or answer held sufficient: Generally. Amos *v.* Sinnott, 5 Ill. 440; McFadden *v.* Fritz, 90 Ind. 590; Barnes *v.* Tannehill, 7 Blackf. (Ind.) 604. As a plea in abatement. Rauber *v.* Whitney, 125 Ind. 216, 25 N. E. 186.

A plea in bar is sufficiently certain if it sets forth the subject-matter of the defense relied on so that it may be fully understood by the adverse party, counsel, jury, and court. Davis *v.* Calvert, 17 Ark. 85.

Pleas in abatement must be filed in their order and cannot be pleaded either with or after pleas in bar. Pleading in bar is a waiver of matter in abatement. Keller *v.* Miller, 17 Ind. 206.

Plea in bar or abatement.—A plea that the property was delivered to defendant under an agreement between plaintiff and defendant, and that at the time of the agreement and delivery defendant was a married woman, is a plea in bar and not in abatement. North *v.* Downing, 2 Pa. Co. Ct. 276.

58. Alwood *v.* Ruckman, 21 Ill. 200.

59. Weed *v.* Hill, 2 Miles (Pa.) 122.

60. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188. See also Martz *v.* Putnam, 117 Ind. 392, 20 N. E. 270.

61. Lamping *v.* Payne, 83 Ill. 463; Lammers *v.* Meyer, 59 Ill. 214 (holding that where defendant files a plea of justification, alleging that he took the property under an execution and that the judgment and execution were in full force at the time of the levy, an allegation as to the date of the judgment is unnecessary and may be disregarded as surplusage); Whitaker *v.* Sigler, 44 Iowa 419 (holding that where both plaintiff and defendant claim title to the property, and defendant denies plaintiff's right thereto, an allegation by defendant as to his source of title is unnecessary and may be treated as surplusage); Bliss *v.* Badger, 36 Vt. 338.

A second plea substantially the same as the first may be rejected on plaintiff's motion. Mann *v.* Perkins, 4 Blackf. (Ind.) 271.

62. Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330.

63. Fleming *v.* Hawley, 65 Cal. 492, 4 Pac. 494; Maclary *v.* Turner, 9 Houst. (Del.) 281, 32 Atl. 325.

64. Lovett *v.* Burkhardt, 44 Pa. St. 173.

65. Anderson *v.* Talcott, 6 Ill. 365, holding that a plea which is defective in not traversing plaintiff's right of property in the goods sought to be replevied may be cured by plaintiff's replication of right of property in such goods.

66. Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81.

67. McCraw *v.* Welch, 2 Colo. 284; Wheeler *v.* Train, 3 Pick. (Mass.) 255.

But the want of a plea in replevin is not cured by verdict. Lecky *v.* McDermot, 5 Serg. & R. (Pa.) 331.

68. Bach *v.* Montana Lumber, etc., Co., 15 Mont. 345, 39 Pac. 291.

69. Houghton *v.* Ware, 113 Mass. 49, where the objection was taken by plea in abatement.

70. Brown *v.* Ravenscraft, 88 Md. 216, 44 Atl. 170; Wright *v.* Bennett, 3 Barb. (N. Y.) 451; De Wolf *v.* Harris, 8 Fed. Cas. No. 4,221, 4 Mason 515.

71. Upham *v.* Allen, 76 Mo. App. 206; Reinheimer *v.* Hemingway, 35 Pa. St. 432.

72. Cox *v.* Morrow, 14 Ark. 603; Fay *v.* Duggan, 135 Mass. 242; Chambers *v.* Hunt, 18 N. J. L. 339; Reinheimer *v.* Hemingway, 35 Pa. St. 432.

73. See Heaton *v.* Wilson, 123 N. C. 398, 31 S. E. 671.

74. See Heaton *v.* Wilson, 123 N. C. 398, 31 S. E. 671.

75. Upham *v.* Allen, 76 Mo. App. 206; Heaton *v.* Wilson, 123 N. C. 398, 31 S. E. 671.

2. Denial of Taking or Detention. At common law the gist of the action was the wrongful taking,[76] and the plea of *non cepit* the general issue,[77] which disavowed all connection with the property and made no claim to it [78] while under the statutes the gist of the action is the wrongful detention,[79] and the proper plea is *non detinet* or denial of the wrongful detention.[80] Where the action is for a wrongful taking *non detinet* is not a proper plea,[81] and where the action is for a wrongful detention *non cepit* is improper,[82] as it tenders an immaterial issue,[83] but if both a wrongful taking and a wrongful detention are alleged the answer should traverse the taking as well as the detention.[84] The plea of *non cepit* admits that the property is in plaintiff,[85] and the capacity of plaintiff to sue,[86] and puts in issue only the question of the wrongful taking.[87] It has also been held that the plea of *non detinet* puts in issue only the question of detention,[88] and admits the wrongful taking if a wrongful taking as well as a wrongful detention is alleged,[89] and also admits that the property is in plaintiff;[90] but on the contrary it has been held that the plea of *non detinet* or denial of the wrongful detention puts in issue not only the question of detention but plaintiff's right of ownership and possession.[91]

3. Denial of Plaintiff's Title.[92] While plaintiff's ownership of the property may be put in issue by a general denial,[93] a plea or answer specially denying plaintiff's ownership of the property is not demurrable as failing to state facts sufficient to constitute a defense.[94] This denial must, however, be in such form as to put in issue the allegations as to plaintiff's ownership in the complaint,[95] and the

76. Amos *v.* Sinnott, 5 Ill. 440; Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

77. Amos *v.* Sinnott, 5 Ill. 440; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Sayward *v.* Warren, 27 Me. 453.

78. Lewis *v.* Buck, 7 Minn. 104, 82 Am. Dec. 73.

79. Amos *v.* Sinnott, 5 Ill. 440; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Moore *v.* Kepner, 7 Nebr. 291.

80. Boyd *v.* McAdams, 16 Ill. 146; Amos *v.* Sinnott, 5 Ill. 440; Walpole *v.* Smith, 4 Blackf. (Ind.) 304; Moore *v.* Kepner, 7 Nebr. 291; Kelley *v.* Blakeley, 2 Ohio Dec. (Reprint) 251, 2 West. L. Month. 151.

In an action against two defendants each may interpose the plea of *non detinet* separately. Boyd *v.* McAdams, 16 Ill. 146.

A denial that the property ever came into defendant's possession at any time states a good defense. Roberts *v.* Johannas, 41 Wis. 616.

An answer denying that defendant ever withheld possession of the property or refused to deliver it to plaintiff, and further denying that plaintiff is entitled to possession, raises a material issue and plaintiff is not entitled to judgment on the pleadings. Martin *v.* Porter, 84 Cal. 476, 24 Pac. 109.

81. Davis *v.* Calvert, 17 Ark. 85.

82. Amos *v.* Sinnott, 5 Ill. 440.

83. Amos *v.* Sinnott, 5 Ill. 440; Walpole *v.* Smith, 4 Blackf. (Ind.) 304.

84. Simmons *v.* Jenkins, 76 Ill. 479; Sayward *v.* Warren, 27 Me. 453; Davidson *v.* Rex, 15 N. Brunsw. 526, holding that a plea denying that at the time of issuing the writ the property was in defendant's possession is bad for not traversing the wrongful taking of the property, as replevin lies for a wrongful taking, although the possession of defendant may have ceased.

85. Van Namee *v.* Bradley, 69 Ill. 299; Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 320; Simcoke *v.* Frederick, Smith (Ind.) 64; Mitchell *v.* Roberts, 50 N. H. 486.

Under the statutory system of pleading the plea of *non cepit* does not admit the property to be in plaintiff where the plea is accompanied by a brief statement denying that fact. Dillingham *v.* Smith, 30 Me. 370.

86. Pope *v.* Jackson, 65 Me. 162.

87. Van Namee *v.* Bradley, 69 Ill. 299.

88. Simmons *v.* Jenkins, 76 Ill. 479; Van Namee *v.* Bradley, 69 Ill. 299; Ingalls *v.* Bulkley, 15 Ill. 224.

89. Simmons *v.* Jenkins, 76 Ill. 479.

90. Van Namee *v.* Bradley, 69 Ill. 299; Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 320; Ingalls *v.* Bulkley, 15 Ill. 224.

91. Moore *v.* Kepner, 7 Nebr. 291; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Kelley *v.* Blakeley, 2 Ohio Dec. (Reprint) 251, 2 West. L. Month. 151; Kelly *v.* Blakely, 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 151. But see Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

92. Where defendant alleges title in himself or a third person see *infra*, IV, B, 4.

Where officer justifies under process see *infra*, IV, B, 5.

93. See *supra*, IV, B, 1.

94. Carman *v.* Ross, 64 Cal. 249, 29 Pac. 510; Hill *v.* Walsh, 6 S. D. 421, 61 N. W. 440.

95. Richardson *v.* Smith, 29 Cal. 529, holding that a denial that plaintiff was the owner "and" entitled to the possession of the property is not sufficient, as it is not a denial either that plaintiff was the owner of the property or that he was in possession

plea or answer should allege who is the owner of the property, otherwise it will be insufficient.[96]

4. Title in Defendant or Third Person. In an action of replevin a plea of property in defendant or in some third person is a good plea in bar;[97] but defendant should in the same plea traverse plaintiff's allegation of ownership or right of property,[98] which traverse raises the material issue to be tried,[99] the averment of property in defendant or another being by way of inducement.[1] Such plea closes the issue as to plaintiff's right and does not require a reply,[2] and it also admits the taking and detention of the property.[3] A plea of property in another should state whether it is in defendant or a third person,[4] and if in a third person

of it when taken, he being entitled to maintain an action for its recovery as against any one taking and withholding the property from him without right if he was in possession, although not the owner thereof.

Allegations sufficient.—An allegation that defendant purchased the property in question from a certain third person who was the owner thereof is a sufficient denial that plaintiff was the owner of the property. Litchfield *v.* Halligan, 48 Iowa 126.

96. Anstice *v.* Holmes, 3 Den. (N. Y.) 244, holding that a plea alleging that plaintiff is not the owner of the property is bad in form for not showing who is the owner.

97. *Arkansas.*—Anderson *v.* Dunn, 19 Ark. 650.

Illinois.— Lamping *v.* Payne, 83 Ill. 463; Boyd *v.* McAdams, 16 Ill. 146; Anderson *v.* Talcott, 6 Ill. 365.

Indiana.— Shappendocia *v.* Spencer, 73 Ind. 128 (holding that where the answer alleges title in defendant by purchase at a sale to satisfy a lien previously acquired upon the property by defendant, if the answer shows that defendant had acquired a valid lien it is sufficient without regard to the validity of the sale); Landers *v.* George, 40 Ind. 160; Simcoke *v.* Frederick, Smith 64.

Kentucky.— Tuley *v.* Mauzey, 4 B. Mon. 5.

Massachusetts.— See Verry *v.* Small, 16 Gray 121, holding that a plea of defendant of property in himself is not an "avoidance" within St. (1852) c. 312, providing that facts relied on in avoidance of actions must be set forth in precise terms.

Missouri.—Phillips *v.* Townsend, 4 Mo. 101, holding that a plea of property in plaintiff and another is good in bar or abatement.

New York.— Waite *v.* Sabel, 44 N. Y. App. Div. 634, 62 N. Y. Suppl. 419; Rogers *v.* Arnold, 12 Wend. 30.

Pennsylvania.— McDowell *v.* Windle, 2 Chest. Co. Rep. 477, 2 Del. Co. Rep. 356.

United States.— Ingle *v.* Wallach, 1 Black 96, 17 L. ed. 50.

See 42 Cent. Dig. tit. "Replevin," § 230.

Nature of plea.—A plea of property in defendant or a stranger is not in confession or avoidance of the action, and does not admit the allegation of the complaint that plaintiff is the owner of the property, but on the contrary denies it. It is in the nature of a special traverse and states by way of inducement that the property belongs to a stranger or defendant and traverses the ownership of plaintiff, which throws the burden of proof upon plaintiff and entitles him to open and close the case to the jury. Gentry *v.* Bargis, 6 Blackf. (Ind.) 261.

The short plea of property in defendant can be understood only as a claim of the entire property in the thing and will not justify proof of property in defendant and another. McIlvaine *v.* Holland, 5 Harr. (Del.) 10.

Although defendant's ownership is not alleged in express terms, a judgment in his favor cannot be reversed on that ground when no previous objection on that ground was made, and the answer denied plaintiff's ownership and demanded a return of the property and the other allegations clearly showed that defendant claimed to own the property. McIntire *v.* Eastman, 76 Iowa 455, 41 N. W. 162.

98. Atkins *v.* Byrnes, 71 Ill. 326; Anderson *v.* Talcott, 6 Ill. 365; Pringle *v.* Phillips, 1 Sandf. (N. Y.) 292; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50.

The reason that a traverse is indispensable is that two affirmatives, namely, property in plaintiff and property in defendant, cannot make an issue. Rogers *v.* Arnold, 12 Wend. (N. Y.) 30.

The proper form is to plead property in defendant or a stranger traversing property in plaintiff, which traverse raises the material issue to be tried, the averment of property in defendant or a stranger being by way of inducement. Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50.

Allegations sufficient.—An answer which alleges that defendant is the owner of the property and denies "the right of plaintiffs to maintain this action" is in substance a traverse of plaintiff's title, and puts in issue plaintiff's right of property. Chase *v.* Allen, 5 Allen (Mass.) 599.

99. Atkins *v.* Byrnes, 71 Ill. 326; Anderson *v.* Talcott, 6 Ill. 365; Chambers *v.* Hunt, 18 N. J. L. 339; Pringle *v.* Phillips, 1 Sandf. (N. Y.) 292; Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50.

1. Atkins *v.* Byrnes, 71 Ill. 326; Van Namee *v.* Bradley, 69 Ill. 299; Anderson *v.* Talcott, 6 Ill. 365; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50.

2. Landers *v.* George, 40 Ind. 160.

3. Kern *v.* Potter, 71 Ill. 19.

4. Anstice *v.* Holmes, 3 Den. 244.

such person should be named;[5] but where defendant denies plaintiff's title and claims title in himself, he need not set out the source of his title.[6]

5. Taking or Detention Under Process. While there is some conflict of authority as to whether in an action against a public officer justification under execution, attachment, or other process must be specially pleaded or may be shown under the general issue,[7] if such a plea is filed it must, in order to be sufficient, set forth facts which if proved will constitute a good defense to the action.[8] Where the property is taken upon execution the answer must allege the rendition of a judgment against the execution defendant,[9] and that the execution was issued thereon,[10] and was in full force and unsatisfied at the time of the levy,[11] and that the property was taken in pursuance of its authority.[12] The answer must also show that defendant was an officer,[13] and that the process was issued by competent authority,[14] and it must describe such process with sufficient certainty and particularity to identify it,[15] and to show its character;[16] it has been held, however, that it is not necessary that the execution or other process under which defendant justifies or a copy thereof should be filed with the answer.[17] So it is held that the answer must also allege that the property belonged to the defendant in the process,[18]

5. Anstice *v.* Holmes, 3 Den. (N. Y.) 244; North *v.* Firth, 2 Del. Co. Rep. (Pa.) 467. But see Anderson *v.* Dunn, 19 Ark. 650, holding that a plea alleging property in the "succession" of a certain named decedent is sufficient on demurrer, such allegation of property being merely matter of inducement to the traverse of plaintiff's title and not issuable.

6. Whitaker *v.* Sigler, 44 Iowa 419.

7. See *infra*, IV, G, 2, a, (III).

8. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188. See also Belden *v.* Laing, 8 Mich. 500; Flentge *v.* Priest, 53 Mo. 540.

Allegations held sufficient see Lammers *v.* Meyer, 59 Ill. 214.

Where property is taken on attachment a plea of justification by the officer is insufficient if it fails to allege that the affidavit was made and annexed to the writ as required by statute and without which the latter could not be executed (McCarty *v.* Gage, 3 Wis. 404); and it has also been held that the answer must show that the writ of attachment was returned by the officer (Brown *v.* Bissett, 21 N. J. L. 46. But see McCraw *v.* Welch, 2 Colo. 284; Levi *v.* Darling, 28 Ind. 497).

Seizure for taxes.— In replevin against a county treasurer and his deputy who plead justification under a seizure for the payment of taxes, it is not necessary for the answer to allege that the deputy who made the seizure had been sworn as such. Noland *v.* Busby, 28 Ind. 154.

Plea in abatement.— Where defendant in an action of replevin brought in a circuit court files a plea in abatement alleging that he took the property as town marshal of the city of Grand Rapids, under a warrant for the collection of a street assessment, he need not allege that the assessment was valid in order to show that the superior court of the city of Grand Rapids has exclusive jurisdiction of the action, under Howell Annot. St. Mich. § 6576, providing that such superior court shall have exclusive jurisdiction of all civil actions against the city or any of its officers. Chicago, etc., R. Co. *v.* Nester, 63 Mich. 657, 30 N. W. 315.

Nature of plea.—A pleading by defendant in replevin admitting the taking and justifying under legal process, and praying for a restitution of the property replevied, is in confession and avoidance, and every material allegation therein is deemed under the practice act to be controverted by plaintiff. Stringer *v.* Davis, 35 Cal. 25.

9. Heyman *v.* Covell, 36 Mich. 157; McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

10. Heyman *v.* Covell, 36 Mich. 157.

11. Dayton *v.* Fry, 29 Ill. 525.

Allegations held sufficient upon this point see Lammers *v.* Meyer, 59 Ill. 214.

12. Dayton *v.* Fry, 29 Ill. 525.

13. McDonald *v.* Prescott, 2 Nev. 109, 90 Am. Dec. 517.

14. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; Flentge *v.* Priest, 53 Mo. 540.

15. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188.

Justification under tax warrant.—Where defendant justifies under a warrant for the collection of taxes and the plea contains all the material averments in relation thereto, it is not necessary that it should set out the collector's warrant in full. Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176.

16. Debord *v.* La Hue, 26 Ind. 212 (holding that an answer alleging that defendant took the property under execution, without stating whether the execution was against the person or property of the execution defendant, is insufficient); Parsley *v.* Huston, 3 Blackf. (Ind.) 348 (holding that a plea is insufficient which alleges that the property was taken under two executions, but does not state their nature, whether writs of fieri facias or of capias ad satisfaciendum, or what they commanded the officer to do).

17. Thurston *v.* Boardman, Wils. (Ind.) 433; Kingsbury *v.* Buchanan, 11 Iowa 387. But see Bridges *v.* Layman, 31 Ind. 384.

18. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; Olds *v.* Andrews, 66 Ind. 147; Gentry *v.* Bargis, 6 Blackf. (Ind.) 261; Parsley *v.* Huston, 3 Blackf. (Ind.) 348; Philips *v.* Har-

and was taken as his property,[19] and that it was subject to be so taken,[20] and in addition to these allegations it should traverse plaintiff's allegation of ownership.[21] If, however, a plea, although insufficient as a plea of justification by reason of the omission of necessary allegations, alleges that the property belonged to a third person and was not the property of plaintiff, it is good as a plea of property in a stranger, and the other allegations may be treated as surplusage.[22]

6. Different or Inconsistent Pleas. Defendant may in replevin as in other civil actions plead more than one plea,[23] he being entitled to plead as many several matters as he may deem necessary for his defense,[24] notwithstanding they are to some extent inconsistent;[25] but these separate matters of defense should be distinctly and separately pleaded.[26] So defendant may plead both *non cepit* and property in himself or a stranger,[27] or he may plead both an absolute and a qualified ownership of the property,[28] or no demise and no rent in arrear,[29] or he may set up a general denial and a justification in his answer where they are separately pleaded,[30] notwithstanding the latter might be proven under the general denial.[31] Where, however, defendant sets up affirmative defenses in addition to a general denial, which might have been shown under the general denial, they may be stricken out on motion,[32] and if defendant in addition to the general denial

ris, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166; Smith *v.* Winston, 10 Mo. 299.

19. Heyman *v.* Covell, 36 Mich. 157.

20. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; Olds *v.* Andrews, 66 Ind. 147.

21. Schemerhorn *v.* Mitchell, 15 Ill. App. 418.

22. Parsley *v.* Huston, 3 Blackf. (Ind.) 348. See also Levi *v.* Darling, 28 Ind. 497; Dobson *v.* Owens, 5 Wyo. 325, 40 Pac. 442.

Plea of property in defendant or third person see *supra*, IV, B, 4.

23. Davis *v.* Calvert, 17 Ark. 85; Martin *v.* Ray, 1 Blackf. (Ind.) 291; Scott *v.* Hughes, 9 B. Mon. (Ky.) 104; Hackley *v.* Ogmun, 10 How. Pr. (N. Y.) 44. But see Bennett *v.* Holloway, 55 Miss. 211 (holding that under Code (1871), c. 16, "not guilty" is the only plea to an action of replevin, and that any additional plea may be stricken out on motion, section 597 of the code prescribing what pleas may be joined having no reference to actions of replevin); Vaiden *v.* Bell, 3 Rand. (Va.) 448 (holding under a Virginia statute that defendant in replevin could not plead several pleas, but that the error was cured by the statute of jeofails of 1819).

24. Davis *v.* Calvert, 17 Ark. 85; Scott *v.* Hughes, 9 B. Mon. (Ky.) 104.

25. Lamotte *v.* Wisner, 51 Md. 543 (*non cepit* and property in defendant or a stranger); Whitwell *v.* Wells, 24 Pick. (Mass.) 25 (*non cepit* and property in defendant or a stranger); Van Holten *v.* Lewis, 1 McCord Eq. (S. C.) 12 (no demise and no rent in arrear).

26. Martin *v.* Ray, 1 Blackf. (Ind.) 291, in which it was held, however, that this objection is not one of substance but of form, and should have been taken advantage of by special demurrer.

27. *Illinois.*—Amos *v.* Sinnott, 5 Ill. 440.

Maryland.— Lamotte *v.* Wisner, 51 Md. 543; Smith *v.* Morgan, 8 Gill 133.

Massachusetts.— Whitwell *v.* Wells, 24 Pick. 25; Simpson *v.* McFarland, 18 Pick. 427, 29 Am. Dec. 602.

New York.— Hackley *v.* Ogmun, 10 How. Pr. 44; Shuter *v.* Page, 11 Johns. 196.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

United States.— Dickson *v.* Mathers, 7 Fed. Cas. No. 3,898*a*, Hempst. 65.

See 42 Cent. Dig. tit. "Replevin," § 235.

Defendant may plead three pleas, *non cepit*, property in himself, and property in another. Smith *v.* Morgan, 8 Gill (Md.) 133.

28. Hartshorne *v.* Seeds, 1 Chest. Co. Rep. (Pa.) 460, holding that a plea of a qualified property or right of lien and a plea of absolute ownership are both claims to the right of possession and are not inconsistent according to the rules of pleading.

29. Van Holten *v.* Lewis, 1 McCord Eq. (S. C.) 12.

30. Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373 (general denial and plea of justification under attachment process); Hackley *v.* Ogmun, 10 How. Pr. (N. Y.) 44 (general denial and justification under execution process).

31. Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373.

32. Sparks *v.* Heritage, 45 Ind. 66 (holding, that since proof of ownership may be made by defendant in replevin under general denial, it is not error to strike out a special answer setting up the property in defendant); Livingston *v.* Moore, (Nebr. 1902) 89 N. W. 289; Ainsworth *v.* Love, 12 Pa. Co. Ct. 273 (holding that a special plea in replevin that defendants have a lien on the goods sued for, and are therefore entitled to possession, amounts to the general issue, and will be stricken out where a plea of the general issue was filed at the same time.) See also Davis *v.* Warfield, 38 Ind. 461, holding that since defendant in replevin may show under a general denial that the title to the property is not in plaintiff, a paragraph in the answer which in addition to a general denial sets up title in a third person is merely an argumentative denial of the fact of title in plaintiff, which plaintiff would be

pleads separate defenses in which plaintiff's ownership of the property and the fact of its detention by defendant are admitted, the general denial can be considered only as a denial of plaintiff's right to immediate possession and the wrongfulness of the detention by defendant.[33]

7. Affidavit of Defense. In jurisdictions where an affidavit of defense is required to be filed,[34] the sufficiency of such an affidavit in an action of replevin must be determined by the same rules that control in other actions where like affidavits are required.[35] The affidavit must state frankly and fairly the facts that support the claim advanced,[36] and any subject of defense set up must be specifically averred and nothing left to inference.[37]

C. Avowry or Cognizance and Plea Thereto[38] — **1. Avowry or Cognizance — a. Justifying Distress.** At common law, in an action of replevin for a distress for rent, an avowry or cognizance must show that defendant had title to the demised premises;[39] but this rule does not mean that he must deduce it down from the remotest source.[40] The statute 21 Hen. VIII, c. 19,

required to prove under the issue formed by the general denial, and that therefore the sustaining of a demurrer to such paragraph is not prejudicial to defendant.

33. Yandle *v.* Crane, 13 Kan. 344.

34. See, generally, Pleading, 31 Cyc. 231.

35. Miller *v.* Jackson, 34 Pa. Super. Ct. 31.

Affidavit held sufficient see Uncapher *v.* Baltimore, etc., R. Co., 112 Fed. 899.

Affidavit held insufficient see Miller *v.* Jackson, 34 Pa. Super. Ct. 31; Ramsdell *v.* Seybert, 27 Pa. Super. Ct. 133; Strafford *v.* Walter, 24 Pa. Super. Ct. 498.

36. Miller *v.* Jackson, 34 Pa. Super. Ct. 31, holding that where defendant claims ownership of the property, he must state fairly the facts in support of his claim and not legal conclusions or inferences.

37. Ramsdell *v.* Seybert, 27 Pa. Super. Ct. 133.

38. **Form of plea of avowry in replevin** see Martin Civ. Proc. 391; 2 Saunders Pl. & Ev. 763, 764.

Form of justification for removal of goods see 3 Chitty Pl. 1094 (ed. 1872); Martin Civ. Proc. 388.

39. Lavigne *v.* Russ, 36 Miss. 326; Nichols *v.* Dusenbury, 2 N. Y. 283; Wright *v.* Williams, 5 Cow. (N. Y.) 338; Bain *v.* Clark, 10 Johns. (N. Y.) 424; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Harrison *v.* McIntosh, 1 Johns. (N. Y.) 380; Hawkins *v.* Eckles, 2 B. & P. 359; Dally *v.* Sillby, 1 Bro. P. C. 525, 1 Eng. Reprint 733 (holding that in avowries, the commencement of particular estates must be shown, as that such a one was seized in fee and demised, that the estate out of which it was derived may appear sufficient to support it); Poole *v.* Longueville, 2 Saund. 282, 85 Eng. Reprint 1063; Reynolds *v.* Thorpe, 1 Str. 796, 93 Eng. Reprint 854; English *v.* Burnell, 2 Wils. C. P. 258, 95 Eng. Reprint 798.

"An avowry as distinguished from a cognizance, imports a taking in one's own right: a cognizance imports a justification under the authority of another." Brown *v.* Bissett, 21 N. J. L. 46, 49.

The office of an avowry is not to deny property in plaintiff, but to set up some legal right in defendant to take the property in dispute, without regard to its ownership, as that it was subject to distress for rent, damage feasant, etc. Simcoke *v.* Frederick, Smith (Ind.) 64. When the party who has made the distress comes to answer for it, he may justify in different rights, by several avowries, and thus bring each right distinctly before the court. Ross *v.* Holtzman, 20 Fed. Cas. No. 12,075, 3 Cranch C. C. 391.

In Vermont it is not necessary for defendant to set forth his title in the avowry. It is enough to state that he was the owner or lawful occupant of the close. That rule in the old English cases only applies to cases of distress for rent, where the landlord who distrained was out of possession and whose right to claim rent and made distress therefor depended wholly on his title. In such cases there was a manifest propriety in requiring him to set out his title. In this state there is no such species of replevin, and there is no propriety in requiring the avowant to set out his title any more than in trespass or ejectment. Gipson *v.* Bump, 30 Vt. 175.

An avowry bad in part is bad for the whole.— Pemberton *v.* Van Rensselaer, 1 Wend. (N. Y.) 307.

Rent charge.— There can be no avowry for a rent charge upon land payable to one who has no reversion. Pluck *v.* Digges, 2 Dow. & Cl. 180, 6 Eng. Reprint 695.

One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. Culley *v.* Spearman, 2 H. Bl. 386, 3 Rev. Rep. 420.

Husband and wife.—A husband may avow in his own name for rent due in right of his wife. Gravenor *v.* Woodhouse, 2 Bing. 71, 9 Moore C. P. 148, 9 E. C. L. 486.

40. Wright *v.* Williams, 5 Cow. (N. Y.) 338.

For example if defendant be seized in his demesne as of fee, it is enough for him to say so generally. Wright *v.* Williams, 5 Cow. (N. Y.) 338. Or, if seized or possessed of an inferior estate, he must show the seizin in fee of the one under whom he claims; and

was passed to meet the difficulty of knowing who the tenant was, in the cases mentioned in the preamble. It therefore dispensed with the naming of any person certain as tenant; but it left the necessity for showing specifically the landlord's title, as at common law.[41] To get rid of this difficulty the statute 11 Geo. II was passed in England. This statute made it sufficient for defendants in replevin to avow or make cognizance generally without setting forth the title of the landlord or lessor,[42] and has been expressly made of force, or adopted in practice, in many of the United States.[43] Even under this act, the existence of a demise at a certain rent mentioned must be averred, as well as enjoyment under it during the time in which the rent accrued, and that such rent remains due.[44] But while

then trace the title to himself particularly, down through its different stages. Wright *v.* Williams, *supra*. So if the demise was made by another, he must show the lessor's estate, and trace it particularly down to himself. Wright *v.* Williams, *supra*.

41. Banks *v.* Angell, 7 A. & E. 843, 2 Jur. 657, 7 L. J. Q. B. 109, 3 N. & P. 94, 34 E. C. L. 439.

42. See Banks *v.* Angell, 7 A. & E. 843, 2 Jur. 657, 7 L. J. Q. B. 109, 3 N. & P. 94; 34 E. C. L. 439; Staniford *v.* Sinclair, 2 Bing. 193, 3 L. J. C. P. O. S. 247, 9 Moore C. P. 376, 9 E. C. L. 541.

43. Taylor *v.* Moore, 3 Harr. (Del.) 6; Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Nichols *v.* Dusenbury, 2 N. Y. 283; Hill *v.* Stocking, 6 Hill (N. Y.) 277; Barr *v.* Hughes, 44 Pa. St. 516; Franciscus *v.* Reigart, 4 Watts (Pa.) 98.

Under 2 N. Y. Rev. St. p. 529, § 41, a general avowry which does not set forth the landlord's title is good when the tenant is in the enjoyment of the premises at the time the distress is made, although the rent is payable in advance, and the tenant leaves the premises before the end of the period for which the rent was to be paid. Nichols *v.* Dusenbury, 2 N. Y. 283.

In South Carolina, the statute 11 Geo. II, c. 19, although not expressly made of force, has been adopted in practice. Moorhead *v.* Barrett, Cheves 99.

Rule applicable to distress for ground-rent. Franciscus *v.* Reigart, 4 Watts (Pa.) 98; McCurdy *v.* Randolph, 2 Pa. L. J. Rep. 323.

Avowries and cognizances for distresses damage feasant are not within the statute 11 Geo. II, c. 19, § 22. They remain therefore as they were at common law, and are regulated by the same principles as avowries for distress for rent before the statute. Wright *v.* Williams, 5 Cow. (N. Y.) 338; Poole *v.* Longuevill, 2 Saund. 282, 284*c* note (3), 85 Eng. Reprint 1066. Under the Vermont practice, in replevin for beasts impounded, if defendant wishes to justify, he must plead an avowry, as at common law, setting forth the facts relied upon. Howard *v.* Black, 49 Vt. 9. An avowry, justifying the taking of cattle damage feasant, is sufficient without justifying the detention. Osgood *v.* Green, 30 N. H. 210. An avowant for a distress of cattle of a stranger, for rent, need not show that they were *levant et couchant* on the demised premises. It is enough to say they were there; and it lies with plaintiff to plead that they were not *levant et couchant*. Wright *v.* Williams, *supra*.

44. Lavigne *v.* Russ, 36 Miss. 326 (holding that the same rule applies where goods distrained for rent are replevied by a stranger); Barr *v.* Hughes, 44 Pa. St. 516; Thomas *v.* Pierce, 1 Chest. Co. Rep. (Pa.) 403; Moorhead *v.* Barrett, Cheves (S. C.) 99 (holding that there may possibly be cases where plaintiff in replevin may require the avowant to set out title to land, as where plaintiff is a stranger to the avowant, but, as between landlord and tenant, it never can be necessary); Banks *v.* Angell, 7 A. & E. 843, 2 Jur. 657, 7 L. J. Q. B. 109, 3 N. & P. 94, 34 E. C. L. 439.

In New York, since 2 Rev. St. 529, § 41, an avowry that the goods were taken by way of distress for rent need not set forth the landlord's title in detail, nor name any person certain as the tenant, but it must still show all the essential facts giving the right to distrain. Hill *v.* Stocking, 6 Hill 277, holding that an avowry is insufficient if it does not show that defendant was landlord.

An avowry setting up a distress on parcel of the demised premises must show the facts essential to the landlord's right to distrain with as much certainty as an avowry relating to the whole. Hill *v.* Stocking, 6 Hill (N. Y.) 277.

The omission of the requisite averments cannot be aided by setting forth the distress warrant and affidavit. Hill *v.* Stocking 6 Hill (N. Y.) 277.

A cognizance by defendant as bailiff, for double rent, under 11 Geo. II, c. 19, § 18, should show the terms of the tenancy, and of the notice to quit, in order that the tenant's power to determine the tenancy by notice to his landlord, and the sufficiency in law of the notice given, may appear. Humblestone *v.* Dubois, 2 Dowl. P. C. N. S. 506, 12 L. J. Exch. 98, 10 M. & W. 765.

Cause of distress.—An avowry in replevin that the taking of the goods was on premises leased for which rent was in arrears is sufficient, although it does not allege that the distress was taken for that rent. Baird *v.* Porter, 67 Pa. St. 105; Pullen *v.* Palmer, Carth. 328, 90 Eng. Reprint 792. The word because (*quia*) in the avowry sufficiently shows the cause of the distress, although the taking is not expressly avowed as for and in the name of a distress for the rent due and in arrear. Baird *v.* Porter, 67 Pa. St. 105.

the rent reserved must be accurately stated, the rent in arrears need not be.[45] Nor need the avowry show that the goods distrained belonged to the tenant.[46] In avowing as executor for a distress for rent, the avowant must show affirmatively that the rent fell due before his testator's death;[47] but it is unnecessary to show the title of the testator.[48] Although the landlord may avow generally since the statute, he must prove his title to the rent as he alleges it.[49] While it is not necessary to set forth the warrant and affidavit in the avowry, a general averment of the distress being sufficient,[50] yet if it sets out a defective affidavit, the avowry is demurrable.[51]

b. Justifying Taking Under Execution. An avowry justifying taking property under fieri facias must aver that it was the property of defendant in execution and subject to execution.[52]

c. Aider by Verdict or Judgment. All formal defects in an avowry or cognizance are cured by plaintiff pleading over and verdict or judgment on issue joined.[53] Whether failure of an avowry to allege the title of defendant, where such allegation is necessary, is cured by verdict is a question upon which the authorities are contradictory. The better rule perhaps is that such a case is one

45. Phipps *v.* Boyd, 54 Pa. St. 342; Barr *v.* Hughes, 44 Pa. St. 516, 517, where it is said: "It is the demise at 'such a certain rent,' not the amount of rent unpaid, which is the foundation of his claim. It is that alone which is legally essential to his right. The demise of itself shows how much rent is due." See also Lougee *v.* Colton, 9 Dana (Ky.) 123. But see Thomas *v.* Pierce, 1 Chest. Co. Rep. (Pa.) 403, holding that an avowry of rent in arrear, in an action of replevin, should state the amount of rent due and unpaid.

46. Applegate *v.* Crawford, 2 Ind. 579; Wright *v.* Mathews, 2 Blackf. (Ind.) 187.

An avowry admits the ownership of the goods in the plaintiff in the manner in which it is alleged in the declaration. Ball *v.* Penn, 10 Pa. Super. Ct. 544; Clarke *v.* Davies, 2 Marsh. 386, 7 Taunt. 72, 2 E. C. L. 265.

While the goods were in defendant's possession, there could be no such thing, at common law, as an avowry or cognizance in an action of replevin for a distress for rent. Cassidy *v.* Elias, 90 Pa. St. 434 (holding that if defendant claims as owner, that claim is inconsistent with the allegation that the property was seized as a pledge for rent in arrear, for it is a confession that the goods are owned by the tenant. If, on the other hand, he depends on his own right to distrain, he can have no standing unless he has surrendered the property in obedience to the command of the writ); Baird *v.* Porter, 67 Pa. St. 105.

47. Wright *v.* Williams, 5 Cow. (N. Y.) 338.

48. Martin *v.* Burton, 1 B. & B. 279, 3 Moore C. P. 608, 5 E. C. L. 635; Meriton *v.* Gilbee, 2 Moore C. P. 48, 8 Taunt. 159, 4 E. C. L. 89.

49. Taylor *v.* Moore, 3 Harr. (Del.) 6; Tice *v.* Norton, 4 Wend. (N. Y.) 663; Alexander *v.* Harris, 4 Cranch (U. S.) 299, 2 L. ed. 627 (holding that an averment of a demise for three years is not supported by proof of a lease for one year certain, and two years further possession, on the same terms, by consent of the landlord); Philpott *v.* Dobbinson, 6 Bing. 104, 7 L. J. C. P. O. S. 248, 3 M. & P. 320, 19 E. C. L. 55. But in Forty *v.* Imber, 6 East 434, 2 Smith K. B. 548, a variance between the demise, as stated in the avowry and as proved, was held immaterial, expressly upon the ground that the strictness of the proceedings in this action at common law had been relaxed by the statute of 11 George II, c. 19, § 22, and that since that statute defendant might recover rent for a less period than he avowed for.

If defendant set forth the name of the person claimed to be tenant, instead of availing himself of the statute in this particular, he will be bound to prove the allegation as laid. Hill *v.* Stocking, 6 Hill (N. Y.) 277.

An allegation that the warrant was under seal or that it was directed to any one is unnecessary, it being alleged to have been duly issued and delivered for execution to defendant. Reid *v.* McWhinnie, 27 U. C. Q. B. 289.

50. Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Dudley *v.* Harvey, 59 Miss. 34; Hill *v.* Stocking, 6 Hill (N. Y.) 277; Webber *v.* Shearman, 6 Hill (N. Y.) 20.

In pleading a warrant of distress as justification for taking property, an officer is not bound to aver that the land for which rent was due was situated in the county. Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300. But to authorize a judgment de retorno habendo, in favor of an officer who has taken property under a distress warrant, he should aver and prove that rent was due for land in the county, and such other facts as show that the warrant rightfully issued. Asbell *v.* Tipton, 1 B. Mon. (Ky.) 300.

51. Dudley *v.* Harvey, 59 Miss. 34.

52. Dillon *v.* Wright, 4 J. J. Marsh. (Ky.) 254; Whittington *v.* Deering, 3 J. J. Marsh. (Ky.) 684.

53. Loomis *v.* Tyler, 4 Day (Conn.) 141; Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

A mistaken date in the avowry is not ground for arresting judgment. Lewis *v.* Clagett, Smith (N. H.) 187.

of defective title, and not of a title defectively set forth, and therefore the defect is not cured by verdict.[54] And where the avowry is defective in failing to show the legal issue of the distress warrant, it has been held proper to arrest the judgment.[55]

2. Plea — a. Requisites and Sufficiency. A plea in bar to an avowry must be sufficiently certain and specific to demonstrate the insufficiency of the allegations therein.[56] A plea to an avowry is bad if it does not answer all that it professes to answer,[57] or if it tenders an immaterial issue;[58] plaintiff in replevin may plead several pleas to the avowry or cognizance of defendant;[59] but it seems that a plea which attempts to answer two distinct avowries is bad, although it alleges that the premises and the rent mentioned in both avowries are the same.[60] It has been held that a plea to an avowry or cognizance need not allege any place of taking, but that it is sufficient if it refers to the property mentioned in the declaration and avowry.[61] If plaintiff means to make the place material, he must, in his plea in bar or replication to the avowry, traverse the taking in the place alleged in the avowry, and take issue thereon.[62] An omission to join issue on an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, and is cured by verdict of "no rent due."[63]

b. Particular Pleas. To an avowry in case of distress for rent, plaintiff in replevin may plead no rent in arrear,[64] or *non tenure*,[65] or may traverse or deny

54. Bain *v.* Clark, 10 Johns. (N. Y.) 424; English *v.* Burnell, 2 Wils. C. P. 258, 95 Eng. Reprint 798. *Contra*, Freeman *v.* Jugg, 3 Salk. 307, 91 Eng. Reprint 841.

55. Whitney *v.* Carle, 8 B. Mon. (Ky.) 171.

56. Manuel *v.* Reath, 5 Phila. (Pa.) 11, holding that in replevin for goods distrained, a plea to defendant's avowry, alleging that defendant has parted with all his interest in the premises, but not stating that his interest was an estate for years, is bad on demurrer; for a lessor with an estate in fee may grant it absolutely, and yet retain the right of distress. And see Milliken *v.* Selye, 6 Hill (N. Y.) 623.

57. Nichols *v.* Dusenbury, 2 N. Y. 283, holding that where a defendant in replevin avowed the taking of the goods as a distress for a quarter's rent payable in advance, and the plea thereto, professing to be a complete answer, showed that the lessee occupied the premises for a part of the quarter and then abandoned the premises as untenantable in consequence of the landlord not finishing or repairing them according to his agreement, the plea was bad.

58. James *v.* Dunlap, 3 Ill. 481.

59. Roberts *v.* Tennell, 4 Litt. (Ky.) 286.

60. Nichols *v.* Dusenbury, 2 N. Y. 283, holding, however, that the rule is otherwise, if one of the avowries be bad in substance.

61. Judd *v.* Fox, 9 Cow. (N. Y.) 259. See also Lougee *v.* Colton, 9 Dana (Ky.) 123, holding that as a distress warrant may be levied anywhere in the county, the common-law doctrine that made the *locus in quo* traversable is inapplicable; and a plea of "*cepit in alio loco*" is immaterial.

62. Gardner *v.* Humphrey, 10 Johns. (N. Y.) 53.

63. Ingle *v.* Wallack, 1 Black (U. S.) 96, 17 L. ed. 50.

64. Horne *v.* Lewin, 1 Ld. Raym. 639, 641, 91 Eng. Reprint 1328, where it is said: "*Reins in arrere* is the proper plea in bar of an avowry, and is quasi a general issue."

A plea strictly denying any rent in arrear is necessary (Lougee *v.* Colton, 2 B. Mon. (Ky.) 115); and to say that the tenant was indebted the rents in the avowry mentioned, without denying that any was due, is not good (Lougee *v.* Colton, *supra*).

A plaintiff in replevin may plead a compulsory payment to the ground landlord or other encumbrancer having claims paramount to those of the immediate landlord making the distress. Under such a state of facts the proper form of plea is *riens in arrere*, concluding to the country. Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477; Taylor *v.* Zamira, 2 Marsh. 220, 6 Taunt. 524, 16 Rev. Rep. 668, 1 E. C. L. 736; Sapsford *v.* Fletcher, 4 T. R. 511. See also Johnson *v.* Jones, 9 A. & E. 809, 8 L. J. Q. B. 124, 1 P. & D. 651, 36 E. C. L. 423.

Plea of no rent in arrear admits the demise as set forth in the avowry. — Bloomer *v.* Juhel, 8 Wend. (N. Y.) 448; Alexander *v.* Harris, 4 Cranch (U. S.) 299, 2 L. ed. 627; Greer *v.* Nourse, 10 Fed. Cas. No. 5,793. 4 Cranch C. C. 527; Hill *v.* Wright, 2 Esp. 669.

65. Bloomer *v.* Juhel, 8 Wend. (N. Y.) 448, holding that a plea of non tenure, to an avowry for rent setting forth seizin in A, B, and deducing title from him to the avowant, and also showing a reversionary interest in the avowant after the termination of the demise under which the distress was made, admits the seizin and the demise to the avowant from the tenant of the freehold; it only puts in issue the demise under which the distress was taken.

Determination of tenancy must be shown. — A plea to an avowry alleging a tenancy, which does not show a determination of the tenancy by the expiration of the lease, and how it determined, is not a good plea. Whit-

the title set out in the avowry,[66] or set up new matter in avoidance of the bar interposed by the avowry.[67] Thus plaintiff may plead to defendant's avowry any matter showing an abuse of the distress, or any unlawful or illegal proceedings by defendant, after the taking.[68] So a plea which sets up as an answer to the avowry that the landlord did not have lawful cause to sue out the writ presents an issue which the tenant has a right to propound.[69] But plaintiff cannot plead *nil habuit in tenementis*;[70] and the plea *de injuria sua propria*, etc., to an avowry or cognizance, has been held bad upon special demurrer,[71] except where the avowry consists of matter of excuse only.[72] The pendency of an attachment execution must be pleaded in abatement and not in bar.[73] A plea of tender, to an avowry or cognizance, need not say *tout temps prist*; nor make a profert of the money in court.[74] Where defendant is an officer holding process, there is an obvious distinction between the case where he justifies or avows under that process, as taking the goods of plaintiff in replevin, and where the process is against a third person, not plaintiff in replevin. If of plaintiff in replevin, plaintiff in such case may deny the writ by *nul tiel record*, or he may traverse the matter of mere fact alleged in the plea or avowry;[75] but if the process is against a third person not plaintiff, the denial of property becomes the material allegation, and plaintiff will not be permitted to pass by this traverse and deny the matters in the introductory part of the plea, although set out in the form of avowry.[76]

D. Subsequent Pleadings — 1. Replication or Reply — a. Necessity. In replevin a general denial closes the issues and a reply is unnecessary.[77] This mode of pleading, however, is not compulsory. Defendant may, if he so elect, plead the specific facts constituting his defense, in which case the ordinary rules

ney *v.* Carle, 8 B. Mon. (Ky.) 171. A plea to an avowry of distress made for rent, "that when the distress was made, the relation of landlord and tenant had ceased, the landlord was in possession and the goods were not on the demised premises" is not good. Lougee *v.* Colton, 2 B. Mon. (Ky.) 115.

66. Sullivan *v.* Stradling, 2 Wils. C. P. 208, 95 Eng. Reprint 769.

67. Curtis *v.* Jones, 3 Den. (N. Y.) 590. For this purpose he may show, in answer to an avowry justifying under a mechanic's lien, that the work was done under an agreement which precluded the party from setting up a lien in his favor, or which was consistent with the existence of such a right. Curtis *v.* Jones, 3 Den. (N. Y.) 590. But the answer to the avowry, whatever it may be, must be properly pleaded; and when an agreement is set up in a plea, its terms and provisions must be stated with reasonable certainty and precision. Curtis *v.* Jones, *supra*.

68. Osgood *v.* Green, 30 N. H. 210. For example plaintiff may plead matter which shows defendant to be a trespasser *ab initio*. Adams *v.* Adams, 13 Pick. (Mass.) 384; Osgood *v.* Green, 30 N. H. 210; Kimball *v.* Adams, 3 N. H. 182; Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Jones *v.* Morris, 3 Exch. 742, 18 L. J. Exch. 477.

A plea in bar, setting forth a trespass by the landlord, but not alleging an eviction, is insufficient. Hunt *v.* Cope, Cowp. 242, 98 Eng. Reprint 1065.

69. Hauser *v.* Robbins, 61 Miss. 551.

70. Taylor *v.* Zamira, 2 Marsh. 220, 6 Taunt. 524, 16 Rev. Rep. 668, 1 E. C. L. 736; Sullivan *v.* Stradling, 2 Wils. C. P. 208, 95 Eng. Reprint 769.

71. Hopkins *v.* Hopkins, 10 Johns. (N. Y.) 369; Wallace *v.* Hibbs, 4 Phila. (Pa.) 154; Jones *v.* Kitchin, 1 B. & P. 76; Crogate's Case, 8 Coke 66*b*, 77 Eng. Reprint 574.

72. Bardons *v.* Selby, 9 Bing. 756, 23 E. C. L. 791 [*affirming* 3 B. & Ad. 2, 23 E. C. L. 1].

73. Derham *v.* Berry, 5 Phila. (Pa.) 475.

74. Hunter *v.* Le Conte, 6 Cow. (N. Y.) 728.

75. Brown *v.* Bissett, 21 N. J. L. 267.

76. Boswell *v.* Green, 25 N. J. L. 390; Brown *v.* Bissett, 21 N. J. L. 267, holding that a denial in plaintiff's plea of matter alleged in the introductory part of defendant's avowry, such as the existence of the writ of attachment, the proceedings of the sheriff, and levy, etc., renders the plea bad.

77. Street *v.* Morgan, 64 Kan. 85, 67 Pac. 448 (holding that additional averments in the answer that defendant is entitled to the possession of the property because he is the owner thereof, and for the further reason that the property had been delivered to him by an officer who seized it in another replevin action between the same parties, does not enlarge the issues, nor make a reply to the answer necessary); White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320; Russell *v.* Smith, 14 Kan. 366; Wilson *v.* Fuller, 9 Kan. 176 (holding that an answer in replevin setting forth that the property in controversy is the property of a third person, and that defendant as sheriff has levied an attachment on it, and holds it as the property of said third person, is in effect only a general denial, and needs no reply); Craig *v.* Grant, 6 Mich. 447; Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47.

of pleading will apply; and if new matter is pleaded in the answer requiring a reply, such reply must be filed,[78] or the new matter will, for the purposes of the trial, be taken as true.[79] So it is held in some jurisdictions that an answer of property in a third person, or in defendant, in effect denies the property or ownership of plaintiff, and is a good plea in bar, and completes the issue without the necessity of a reply.[80] But where defendant pleads property in himself or in others and also by special traverse denies that the property belongs to plaintiff in manner and form, etc., plaintiff should reply by taking issue on the traverse and reaffirming the property to be in himself in mode and form.[81] If permitted by statute, plaintiff may reply double in an action of replevin.[82] Under the codes of some states a reply is only required when a counter-claim is pleaded.[83]

b. Requisites and Sufficiency. The rules relating to the requisites and sufficiency of replications or replies generally [84] are applicable to such pleadings in actions of replevin.[85] Where a reply is necessary, plaintiff may allege therein any new matter not inconsistent with the complaint which constitutes a defense to new matter in the answer.[86] A replication or reply must answer the whole plea,[87] and should not tender a collateral issue, or it will be demurrable.[88] A general averment of fraud in a replication in replevin is sufficient, it being unnecessary to give the history and details of the fraud.[89]

2. Rejoinder. The necessity for a rejoinder in an action of replevin depends upon the circumstances of the case.[90]

E. Demurrer—1. Grounds. Defects in the declaration, complaint, or petition, in an action of replevin, may be taken advantage of by demurrer, as in other actions.[91] Such a declaration or complaint is not demurrable if the facts

78. Hunt *v.* Bennett, 4 Greene (Iowa) 512 (holding, however, that an allegation in an answer to a suit of replevin that defendant "is rightfully entitled to the property and to the possession thereof," following a denial of all the averments in plaintiff's petition, is cumulative of these denials, and not new matter requiring a denial); Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47; Ferrell *v.* Humphrey, 12 Ohio 112, holding, however, that where defendant is not prejudiced thereby, the want of a replication is not a sufficient ground to reverse the judgment.

79. Simmons *v.* Jenkins, 76 Ill. 479; Lewis *v.* Buck, 7 Minn. 104, 82 Am. Dec. 73; Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47.

80. Landers *v.* George, 40 Ind. 160; Riddle *v.* Parke, 12 Ind. 89; Williams *v.* Mathews, 30 Minn. 131, 14 N. W. 577.

81. Smith *v.* Morgan, 8 Gill (Md.) 133; Chambers *v.* Hunt, 18 N. J. L. 339 (holding likewise that plaintiff is not at liberty to traverse the matter of inducement as to the property being in others); Prosser *v.* Woodward, 21 Wend. (N. Y.) 205.

82. Cotter *v.* Doty, 5 Ohio 393.

In New York the general statute (2 Rev. St. p. 356, § 27), giving leave to reply double, does not apply to replevin, the pleadings therein being specially regulated by statutory provisions. Calvin *v.* La Farge, 6 Wend. 505.

83. Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266; Buffkin *v.* Eason, 110 N. C. 264, 14 S. E. 749.

Justification under process, not constituting a counter-claim, requires no reply. Carlson *v.* Small, 32 Minn. 492, 21 N. W. 737.

84. See, generally, Pleading, 31 Cyc. 248 *et seq.*

85. See cases cited *infra*, this note.

Replication held sufficient.— Lowry *v.* Kinsey, 26 Ill. App. 309.

Replication held insufficient.— Dixon *v.* Thatcher, 14 Ark. 141 (holding that when defendant, in an action of replevin, pleads property in himself, he avoids the injustice of the taking; and plaintiff in his replication must set forth such facts as will give him the right of dominion and control, even against him who has the legal title); Hoke *v.* Applegate, 92 Ind. 570; Powell *v.* Triplett, 6 B. Mon. (Ky.) 420; Lisher *v.* Pierson, 2 Wend. (N. Y.) 345, 20 Am. Dec. 612; Harrison *v.* McIntosh, 1 Johns. (N. Y.) 380 (holding that in replevin, a replication to a plea of property in a stranger that defendant entered the house of plaintiff in the night-time and took the goods is no answer to the plea); Pattison *v.* Adams, Lalor (N. Y.) 426.

86. Mayes *v.* Stephens, 38 Oreg. 512, 63 Pac. 760, 64 Pac. 319.

87. Phillips *v.* Townsend, 4 Mo. 101.

88. Mt. Carbon Coal, etc., Co. *v.* Andrews, 53 Ill. 176.

89. Fox *v.* Webster, 46 Mo. 181.

90. Tinsley *v.* Ross, 22 S. W. 313, 15 Ky. L. Rep. 44, holding that where the defense in an action to recover certain logs was that the land on which they were cut belonged to defendant, and plaintiff replied that the land belonged to him, and that he and those under whom he claimed had held possession adversely to all the world for forty years, it was not necessary for defendant to put in a rejoinder denying the adverse possession alleged by plaintiff.

91. Jones *v.* Johnson, 24 Ark. 260 (combining several forms of action); Draper *v.*

stated are sufficient to constitute any cause of action against defendant,[92] even though such facts may not be sufficient to sustain the particular cause of action upon which the complaint may seem to be based.[93] Since, where the code system of pleading prevails, a general denial in replevin puts in issue every fact contained in the complaint necessary to maintain the action, an answer containing a general denial is not as a whole subject to a general demurrer.[94] Objections to the affidavit must be raised by plea in abatement, and not by demurrer to the declaration.[95]

2. Form and Requisites. Special demurrers, as known in the common-law practice, are now generally abolished, but the principle remains that the demurrer shall distinctly specify the grounds of objection to the complaint, and an objection that it fails to state facts sufficient to constitute a cause of action is insufficient.[96] Where the facts are sufficient as a cause of action, and the objection raised is not specified, it must be considered as waived and disregarded.[97] In some jurisdictions it has been held that judgment can only be given upon the cause assigned in the demurrer, and, if it fails to assign or allege the proper cause it wholly fails.[98]

3. Operation and Effect. A demurrer in an action of replevin, as in other actions, admits the facts set out in the pleading demurred to and denies their sufficiency as a cause of action or defense.[99] Where defendant by demurrer admits the taking of the property, he cannot thereafter complain of insufficiency of description of such property in the petition or complaint.[1]

4. Scope of Inquiry. In some jurisdictions, on a demurrer to a complaint in replevin, nothing can be considered but the pleading demurred to, and the affidavit of plaintiff must be disregarded.[2]

5. Judgment. The general rule is that where any of the pleas in replevin present a complete bar to the action, and the demurrer thereto is overruled, without issue being taken thereon, the court should render final judgment against plaintiff.[3] A statute providing that the person found to be entitled to the pos-

Ellis, 12 Iowa 316 (failure to allege wrongful detention); Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228 (failure to sufficiently describe property); Southall *v.* Garner, 2 Leigh (Va.) 372 (defective avowry).

Objections to the authority of the officer who served the writ, and to the form of the replevin bond taken in the course of the service, cannot properly be made by demurrer, but only by answer in abatement or motion to dismiss. Smith *v.* Dexter, 121 Mass. 597.

A petition to replevy money generally is not demurrable, for if the money is marked or in a parcel replevin lies. Motion to make more definite is the proper mode of objecting. Knapp *v.* Springmeier, 7 Ohio Dec. (Reprint) 570, 3 Cinc. L. Bul. 1122.

92. Ingel *v.* Scott, 86 Ind. 518; Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49; Burr *v.* Brantley, 40 S. C. 538, 19 S. E. 199; Johnston *v.* Holmes, 32 S. C. 434, 11 S. E. 208.

Divisible declaration.— If defendant demur to the whole declaration, part of which is sufficient, and the residue not, the demurrer will be overruled, if the matters alleged be divisible in their nature. Newell *v.* Newell, 34 Miss. 385, holding that a declaration in replevin, for the recovery of a chattel and for damages for the wrongful taking or detention, is divisible, and hence a demurrer to the whole will be overruled if it be sufficient so far as it relates to the specific recovery of the chattel, although defective in reference to the damages claimed.

93. Burr *v.* Brantley, 40 S. C. 538, 19 S. E. 199.

94. Gila Valley, etc., R. Co. *v.* Gila County, 8 Ariz. 292, 71 Pac. 913.

95. Cox *v.* Grace, 10 Ark. 86.

96. Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.

97. Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.

98. Marx *v.* Croisan, 17 Oreg. 393, 21 Pac. 310.

99. Mauney *v.* Ingram, 78 N. C. 96, holding that where the answer sets up a lien on the property, a demurrer to the answer does not admit such lien, but merely admits the facts set out in the answer, denying their sufficiency in law.

1. Burr *v.* Brantley, 40 S. C. 538, 19 S. E. 199.

2. Magdeburg *v.* Uihlein, 53 Wis. 165, 10 N. W. 363. But see Newell *v.* Newell, 34 Miss. 385, holding that the affidavit in replevin is part of the record, and may be noticed on demurrer.

3. Kimball *v.* Citizens' Sav. Bank, 3 Ill. App. 320, holding that in such case it is error merely to render judgment for costs. See also Towns *v.* Boarman, 23 Miss. 186, holding that if a tenant whose property is attached for arrears in rent disputes the landlord's claim and sues out replevin, it is his duty to file in the circuit court the proper declaration in the action of replevin; and if the declaration be adjudged insufficient upon demurrer, and

session of property replevied may, at his option, have execution for its specific delivery or its value, has been held not to apply to cases decided on demurrer for defendant for want of jurisdiction, but only to cases decided on their merits.[4]

F. Amended and Supplemental Pleadings — 1. Amended Pleadings — a. In General. The right to amend is as liberally accorded in replevin actions as in other causes.[5] The amendment of pleadings is largely a discretionary matter, and a decision on such an application will not be reversed unless it is shown that there has been a clear abuse of discretion by the trial court.[6] Thus a complaint or petition in replevin may be amended to make general statements more specific, and to make more definite, that which is indefinite;[7] by alleging a special instead of a general ownership in the property or *vice versa*;[8] by omitting the claim for damages;[9] so that it may conform to the facts proved, provided, however, that the cause of action or defense, is not thereby changed;[10] so as to set up fraud;[11] so as to increase the value of the property above that alleged in the affidavit;[12] or so as to introduce, on appeal from a justice of the peace, facts essential to the action.[13] Practically the only limitation upon the power of the court to allow plaintiff to amend the complaint is that a new cause of action cannot be introduced,[14]

plaintiff does not amend or apply for leave to do so, it is not error for the court to render a judgment against plaintiff for double the amount of rent in arrears, to be ascertained by a jury of inquiry.

Demurrer to petition, and leave to amend. — Where in an action of claim and delivery, under Mo. Pr. Acts (1849), art 8, plaintiff gave a return bond and received the property sued for, and the court sustained a demurrer to the petition, and gave judgment for costs against plaintiff, no assessment of the value of the property, or damages for its detention being made, nor a return of the property awarded, and afterward, at the same term, granted plaintiff leave to amend his petition, it was held that this impliedly set aside the judgment for costs and reinstated the cause. Hansard *v.* Reed, 29 Mo. 472.

4. Williams *v.* Chapman, 60 Iowa 57, 14 N. W. 89.

5. Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 176; Hudelson *v.* Tobias First Nat. Bank, 56 Nebr. 247, 76 N. W. 570.

6. *Indiana.*— Case *v.* Moorman, 25 Ind. App. 293, 58 N. E. 85.

Kentucky.— Smith *v.* Smith, 3 B. Mon. 295.

New York.— Conklin *v.* McCauley, 41 N. Y. App. Div. 452, 58 N. Y. Suppl. 879.

Oklahoma.—Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924.

Oregon.— Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808.

See 42 Cent. Dig. tit. "Replevin," § 254.

Amendments in furtherance of justice to a party should be allowed if the making of them will work no injustice to the other party. McManus *v.* Walters, 62 Kan. 128, 61 Pac. 686. But amendments not in furtherance of justice are properly refused. Hale *v.* Wigton, 20 Nebr. 83, 29 N. W. 177.

Effect of laches.— It is proper to refuse leave to amend pleadings when asked for by negligent suitors, if the acts of negligence and the amendments in correction of them will be to the material disadvantage of the one who is without fault (McManus *v.* Walters, 62 Kan. 128, 61 Pac. 686); but unless such is the case a party should not be compelled to suffer for his laches. (McManus *v.* Walters, *supra*).

7. Swain *v.* Savage, 55 Nebr. 687, 77 N. W. 362; Donnel *v.* Drake, 16 Montg. L. Rep. (Pa.) 114; Hall *v.* Law Guarantee, etc., Co., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; Kirch *v.* Davies, 55 Wis. 287, 11 N. W. 689, holding that where the denials of the original answer in replevin relate only to the specific articles named in the original complaint, a failure to answer the amended complaint is an admission of its averment as to the additional chattels named therein.

8. Gray *v.* Doty, 77 Kan. 446, 94 Pac. 1008; Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 176; Tackaberry *v.* Gilmore, 57 Nebr. 450, 78 N. W. 32; Weich *v.* Millikin, 57 Nebr. 86, 77 N. W. 363; Swain *v.* Savage, 55 Nebr. 687, 77 N. W. 362; Suckstorf *v.* Butterfield, 4 Nebr. (Unoff.) 808, 96 N. W. 654; Swope *v.* Burnham, 6 Okla. 736, 52 Pac. 924.

9. Bensch *v.* Farnsworth, 9 Ind. App. 547, 34 N. E. 751, 37 N. E. 284.

10. Cain *v.* Cody, (Cal. 1892) 29 Pac. 778; Larson *v.* Johnson, 83 Minn. 351, 86 N. W. 350; Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745.

11. Kocher *v.* Palmetier, 112 Iowa 84, 83 N. W. 816; Joyner *v.* Early, 139 N. C. 49, 51 S. E. 778.

12. Autrey *v.* Bowen, 7 Colo. App. 408, 43 Pac. 908; Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Chandler *v.* Parker, (Kan. 1902) 70 Pac. 368; McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

13. Dowdy *v.* Wamble, 110 Mo. 280, 19 S. W. 489; Lakey *v.* Hoops, 80 Mo. App. 508.

14. National Steamship Co. *v.* Sheahan, 122 N. Y. 461, 25 N. E. 858, 10 L. R. A. 782 (holding that under Code Civ. Proc. § 723, where the proposed amendment would make a new cause of action, a referee had no power to allow it); Button *v.* Lusk, 10 N. Y. Suppl. 582 (holding that even if a wrongful taking should have been more fully alleged, the court has power to allow an amendment to that

and in some jurisdictions even this may be done.[15] Defendant may amend so as to demand a return of the property;[16] and where a defective answer is not attacked and is sufficient to inform plaintiff that defendant relies on a general denial, it is proper to permit an amendment properly pleading the general denial.[17] When an amended petition is permitted to be filed, it relates back to the commencement of the action, so that a new action need not be instituted nor a redelivery of the property made, as antecedent to the right to amend.[18]

b. Conditions on Granting Leave to Amend. The terms on which an amendment may be permitted rest ordinarily in the sound discretion of the trial court.[19] Thus it is in the discretion of the court to require the payment of all antecedent costs as a condition precedent to the allowance of the amendment.[20] If the party fails to comply with the conditions, he only forfeits his right to amend, and in such event the pleadings in the case remain precisely in the same condition they were before the leave to amend was granted;[21] and, if such pleadings properly present a case, the court should hear and determine the same on the merits, and it is error for the court to make an order dismissing the case for a failure to comply with the conditions attached to the leave to amend.[22]

c. Time of Amendment. The general rules as to the time for amendments[23] apply in actions of replevin.[24]

2. Supplemental Pleadings. The granting or refusal of leave to file a supplemental pleading is a matter largely within the discretion of the trial court;[25] but such discretion is not arbitrary, and the action of the court will be reviewed where it involves error of law or abuse of discretion.[26]

effect, as such amendment will not introduce a new cause of action); King *v.* Dudley, 113 N. C. 167, 18 S. E. 110; Willis *v.* De Witt, 3 S. D. 281, 52 N. W. 1090; Wise *v.* Jefferis, 51 Fed. 641, 2 C. C. A. 432. But see Goddard *v.* Cassell, 84 Hun (N. Y.) 43, 31 N. Y. Suppl. 1044, where, after an action of replevin had been brought, the court of appeals decided in a similar case that replevin would not lie, but that plaintiff's remedy was to sue for conversion, it was held not error to allow plaintiff to amend by changing the form of action from replevin to trover.

15. See cases cited *infra*, this note.

If defendant wrongfully disposes of the property before the commencement of the action, plaintiff may be allowed to amend so as to claim damages for a wrongful taking or conversion. Henderson *v.* Hart, 122 Cal. 332, 54 Pac. 1110; Riciotto *v.* Clement, 94 Cal. 105, 29 Pac. 414.

Adding counts.— Where part of the property claimed in a writ of replevin cannot be found, and there is personal service, plaintiff may add a count in trover. Dart *v.* Horn, 20 Ill. 212.

16. Pico *v.* Pico, 56 Cal. 453; Aultman *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

17. Rusho *v.* Richardson, 77 Nebr. 360, 109 N. W. 394.

18. Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 176; Suckstorf *v.* Butterfield, 4 Nebr. (Unoff.) 808, 96 N. W. 654.

19. Suckstorf *v.* Butterfield, 4 Nebr. (Unoff.) 808, 96 N. W. 654.

20. Wright *v.* Williams, 5 Cow. (N. Y.) 501; Semmes *v.* Oneale, 21 Fed. Cas. No. 12,654, 1 C. C. A. 246.

21. Bayless *v.* McFarland, 10 Okla. 747, 63 Pac. 859.

22. Bayless *v.* McFarland, 10 Okla. 747, 63 Pac. 859.

23. See, generally, Pleading, 31 Cyc. 393 *et seq.*

24. See cases cited *infra*, this note.

After jury sworn.—A declaration in the *detinuit* in replevin may be amended into a declaration in the *detinet* after the jury is sworn. Jefferson *v.* Chase, 1 Houst. (Del.) 219. *Compare* McIlvaine *v.* Holland, 5 Harr. (Del.) 10.

At any time during trial.— Hellings *v.* Wright, 14 Pa. St. 373. But see Butler *v.* Farley, 1 N. Y. Suppl. 849.

After verdict.— Trial courts have discretionary power to permit amendments of pleadings, even after verdict, in furtherance of justice, but such power should be more cautiously exercised after verdict than in cases where the application is made before verdict. Younglove *v.* Knox, 44 Fla. 743, 33 So. 427. Where an amendment after verdict makes a new issue, a new trial ought ordinarily to be granted, unless under very special circumstances. Younglove *v.* Knox, 44 Fla. 743, 33 So. 427. Thus it is error to permit an amendment of a pleading increasing the amount of the recovery prayed, to conform to the verdict, without setting aside the verdict and granting a new trial on payment of costs. Custer City First Nat. Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646.

After trial, judgment, or even appeal.— Aultman, etc., Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

25. Carroll *v.* Sprague, 59 Cal. 655; Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11; Sparks *v.* Green, 69 S. C. 198, 48 S. E. 61. See also Scott *v.* Hughes, 9 B. Mon. (Ky.) 104; and, generally, Pleading, 31 Cyc. 500.

26. Sparks *v.* Green, 69 S. C. 198, 48 S. E. 61.

G. Issues, Proof, and Variance — 1. Issues and Matters to Be Proved — a. In General. In replevin, as in other civil actions, matters properly pleaded by one party and not denied by the other are deemed to be admitted and need not be proved;[27] but in some instances matters alleged by way of inducement must necessarily be proved.[28]

b. Demand.[29] The making of a demand by plaintiff prior to the commencement of the suit for the return of the property is not in issue and need not be proved where defendant, either in his pleading or his evidence, asserts ownership or right to possession in himself and demands a return of the property,[30] or where plaintiff's allegation of a demand having been made is not denied,[31] or where the possession of one defendant was fraudulent and there is some evidence tending to show that the possession of the other defendant was collusive.[32]

c. Title and Right to Possession. Plaintiff's right to immediate and exclusive possession and his ownership, either general or special, necessary to support such right are put in issue and require proof, where defendant pleads a general denial,[33]

27. Bensley *v.* McMillan, 49 Iowa 517.

Waiver of issues of law.— Where issues of fact and of law are joined, and the parties proceed to trial on the issues of fact, without disposing of the issues of law, the latter are deemed to be waived. Freas *v.* Lake, 2 Colo. 480.

28. Schemerhorn *v.* Mitchell, 15 Ill. App. 418.

29. **As condition precedent to right of action** see *supra*, I, E, 2.

30. *California.*— California Cured Fruit Assoc. *v.* Stelling, 141 Cal. 713, 75 Pac. 320.

Illinois.—Kingman *v.* Reinemer, 58 Ill. App. 173.

Kansas.— Greenawalt *v.* Wilson, 52 Kan. 109, 34 Pac. 403; Chapin *v.* Jenkins, 50 Kan. 385, 31 Pac. 1084; Schmidt *v.* Bender, 39 Kan. 437, 18 Pac. 491; Raper *v.* Harrison, 37 Kan. 243, 15 Pac. 219; Fuller *v.* Torson, 8 Kan. App. 652, 56 Pac. 512.

Maine.— Lewis *v.* Smart, 67 Me. 206; Seaver *v.* Dingley, 4 Me. 306.

Minnesota.— Guthrie *v.* Olson, 44 Minn. 404, 46 N. W. 853; Kellogg *v.* Olson, 34 Minn. 103, 24 N. W. 364.

North Dakota.— Thompson *v.* Thompson, 11 N. D. 208, 91 N. W. 44.

See 42 Cent. Dig. tit. "Replevin," § 258.

31. Harrison *v.* Clark, 74 Conn. 18, 49 Atl. 186; Francisco *v.* Benepe, 6 Mont. 243, 11 Pac. 637.

32. Reeder *v.* Moore, 95 Mich. 594, 55 N. W. 436 [*distinguishing* Pangborn *v.* Ruemenapp, 74 Mich. 572, 42 N. W. 78, where defendant was in possession under a purchase made in good faith].

33. *Connecticut.*— Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875; McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981.

Indiana.— Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633; Ashby *v.* West, 3 Ind. 170.

Iowa.— Jansen *v.* Effey, 10 Iowa 227.

Massachusetts.— Frisch *v.* Wells, 200 Mass. 429, 86 N. E. 775; D'Arcy *v.* Steuer, 179 Mass. 40, 60 N. E. 405.

Missouri.— Gibson *v.* Mozier, 9 Mo. 256; Advance Thresher Co. *v.* Pierce, 74 Mo. App. 676.

Montana.— Kaufman *v.* Cooper, (1908) 98 Pac. 504.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Jacob *v.* Haefelein, 60 N. Y. App. Div. 533, 69 N. Y. Suppl. 1034; Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Suppl. 744 (holding that a general denial raises the issue whether defendant had lawful possession as against plaintiff); Haas *v.* Altieri, 2 Misc. 252, 21 N. Y. Suppl. 950 [*affirming* 19 N. Y. Suppl. 687].

Ohio.— Bailey *v.* Swain, 45 Ohio St. 657, 16 N. E. 370.

Oklahoma.— Payne *v.* McCormick Harvesting Mach. Co., 11 Okla. 318, 66 Pac. 287.

See 42 Cent. Dig. tit. "Replevin," § 259.

Facts necessary to establish right.—A general denial puts in issue not only plaintiff's right to possession, but also every collateral fact necessary to the establishment of the same. Oester *v.* Sitlington, 115 Mo. 247, 21 S. W. 820; Advance Thresher Co. *v.* Pierce, 74 Mo. App. 676; Aultman *v.* Stichler, 21 Nebr. 72, 31 N. W. 241. *Compare* George *v.* Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. Rep. 626.

Form of denial.—A denial by defendant that plaintiff is the owner of the property described in the complaint and an allegation that defendant has not sufficient information or belief upon the subject to enable him to answer plaintiff's allegation as to his right of possession, and that on that ground defendant denies the same, is sufficient to put in issue plaintiff's allegations that he is the owner and entitled to the possession of the property. Cunningham *v.* Skinner, 65 Cal. 385, 4 Pac. 373.

When special ownership is in issue.— It has been held that plaintiff's allegations of special ownership are put in issue only when defendant denies specifically the allegations of fact upon which the claim of ownership is based. Perry County Bank *v.* Rankin, 73 Ark. 589, 84 S. W. 725, 86 S. W. 279. See also Sargent *v.* Chapman, 12 Colo. App. 529, 56 Pac. 194.

Rule in absence of pleadings.— In McWhirter *v.* Penny, 82 Ark. 244, 101 S. W. 742, there were no formal pleadings but it was held that upon the affidavit and proof

not guilty,[34] *non detinet*,[35] or property in himself [36] or in a third person;[37] but not where he pleads *non cepit*,[38] or *cepit* in *alio loco*,[39] or where plaintiff replies no rent in arrear to an avowry.[40] Title to realty may become an issue, where the right to possession of the chattels in question depends upon it;[41] but the question whether the chattels are so annexed to the freehold as not to be the subject of replevin is not raised or put in issue by a plea of property.[42]

d. Location and Identity of Property. It is incumbent upon plaintiff to prove that the property which he claims is identical with that to which he is entitled;[43] but in at least one jurisdiction he need not prove the detention of

the only issue was the right to immediate possession.

Issue as to agreement between parties.— An allegation in the complaint that the property in question was at the time of the alleged sale by defendant on his premises and that it was to be hauled to plaintiff's warehouse as rapidly as it could be prepared justifies the submission of an issue to the jury as to whether defendant subsequently agreed with plaintiff that the property should remain on the land of defendant as the property of plaintiff. Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519.

Burden of proving right to possession see *infra*, IV, H, 2.

34. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Webster *v.* Brunswick-Balke-Callender Co., 37 Fla. 433, 20 So. 536; Holliday *v.* McKinne, 22 Fla. 153; Child *v.* Child, 13 Wis. 17; Heeron *v.* Beckwith, 1 Wis. 17.

Contra in absence of statute see Stewart *v.* Mills, 18 Fla. 57.

35. Patterson *v.* Fowler, 22 Ark. 396; Moore *v.* Kepner, 7 Nebr. 291; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Ferrell *v.* Humphrey, 12 Ohio 112; Kelley *v.* Blakeley, 2 Ohio Dec. (Reprint) 251, 2 West. L. Month. 151 [*affirmed* in 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 550, *disapproving* Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317]. *Contra*, Van Namee *v.* Bradley, 69 Ill. 299; Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 320; Ingalls *v.* Bulkley, 15 Ill. 224.

36. Reynolds *v.* McCormick, 62 Ill. 412; Underwood *v.* White, 45 Ill. 437; Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207; Strong *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919; Mathias *v.* Sellers, 86 Pa. St. 486, 27 Am. Rep. 723; Reinheimer *v.* Hemingway, 35 Pa. St. 432; Swope *v.* Crawford, 16 Pa. Super. Ct. 474.

37. Krause *v.* Curtis, 73 Ill. 450; Underwood *v.* White, 45 Ill. 437; Redman *v.* Hendricks, 1 Sandf. (N. Y.) 32.

Proof of actual ownership is not necessary, even though defendant asserts title in a third person, provided plaintiff shows that he is entitled to possession. Bartleson *v.* Mason, 53 Ill. App. 644.

Proof showing a tenancy in common between plaintiff and a third person does not support a plea of property in such third person. Under such a plea, it is incumbent upon defendant to show not only property in a third person, but also that there was no property in plaintiff. Godard *v.* Tuck, 11 N. Brunsw. 370.

Where plaintiff relies upon ownership, he is bound to prove a good title to the property in himself, not only as against the person from whom he bought it, but also as against a defendant in replevin who represents a creditor of the vendor of plaintiff (Nenbrand *v.* Myres, 7 Ohio Dec. (Reprint) 315, 2 Cinc. L. Bul. 97); and where no right or title whatever appears in plaintiff, defendant in order to entitle himself to a judgment for the value of the goods need not, in addition to showing possession under a claim of title, prove that he has a title against all the world (Steere *v.* Vanderberg, 90 Mich. 187, 51 N. W. 205. See also White *v.* White, 58 Mich. 546, 25 N. W. 490); but where defendant claims property in himself as administrator, it is incumbent upon him to show that the chattels are the property of the estate (Rose *v.* Cash, 58 Ind. 278).

38. *Arkansas.*— Carroll *v.* Harris, 19 Ark. 237.

Florida.— Hopkins *v.* Burney, 2 Fla. 42.

Illinois.— Van Namee *v.* Bradley, 69 Ill. 299; Chandler *v.* Lincoln, 52 Ill. 74; Bourk *v.* Riggs, 38 Ill. 320; Vose *v.* Hart, 12 Ill. 378.

Indiana.— Simcoke *v.* Frederick, Smith 64.

Maine.— Sawyer *v.* Huff, 25 Me. 464.

Missouri.— Gray *v.* Parker, 38 Mo. 160.

New Hampshire.— Sinclair *v.* Wheeler, 69 N. H. 538, 45 Atl. 1085; Mitchell *v.* Roberts, 50 N. H. 486.

England.— Dover *v.* Rawlings, 2 M. & Rob. 544.

See 42 Cent. Dig. tit. "Replevin," § 259.

39. See Williams *v.* Welch, 5 Wend. (N. Y.) 290.

40. Williams *v.* Smith, 10 Serg. & R. (Pa.) 202.

41. McKinnon *v.* Meston, 104 Mich. 642, 62 N. W. 1014; Myers *v.* Gowen, 13 Phila. (Pa.) 162; U. S. *v.* Steenerson, 50 Fed. 504, 1 C. C. A. 552.

42. Braddock Brewing Co. *v.* Pfaudler Vacuum Fermentation Co., 106 Fed. 604; 45 C. C. A. 491; Alexander *v.* Cowie, 19 N. Brunsw. 599.

43. Stanchfield *v.* Palmer, 4 Greene (Iowa) 23; Chaffee *v.* Blaisdell, 142 Mass. 538, 8 N. E. 435; Russell *v.* Amundson, 4 N. D. 112, 59 N. W. 477. But see Brewster *v.* Carmichael, 39 Wis. 456.

Confusion of goods.—Although a party does not lose his right of property in goods intermingled with others of the same kind,

the property in any particular county, although an allegation of that fact must be made in the affidavit.[44] Likewise, where defendant asserts a claim to the property in controversy under a mortgage, he must, in order to sustain his claim, prove that the property mortgaged is the same as that sought to be recovered.[45]

e. Taking and Detention. A plea of *non cepit* puts in issue the wrongful taking by defendant,[46] but plaintiff need prove a wrongful taking only when a plea of this nature is interposed.[47] At common law the plea of *non detinet* put in issue the detention of the property by defendant,[48] and under most statutes the unlawful detention of the goods constitutes the gist of the action and must always be proved when put in issue by a proper plea;[49] but when proved this is sufficient, although there is an additional allegation of unlawful taking.[50] Under the statutes of some jurisdictions plaintiff must prove that the property in controversy was not taken for a tax, assessment, or by virtue of process;[51] but in

he must necessarily fail in an action of replevin for their return, if he is unable to establish the identity of the chattls claimed. Ames *v.* Mississippi Boom Co., 8 Minn. 467; Gray *v.* Parker, 38 Mo. 160. *Contra,* Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551 [*affirming* 21 Fed. Cas. No. 12,486, 2 Dill. 398], construing the statutes of Minnesota.

The giving of an undertaking by defendant admits the identity of the property. Martin *v.* Gilbert, 119 N. Y. 298, 23 N. E. 813, 24 N. E. 460, 16 Am. St. Rep. 823; Hochberger *v.* Baum, 85 N. Y. Suppl. 385.

Bank-bills, where their recovery is sought in replevin, may be identified by proof of the bank, denomination, date, letter, number, or other proof, showing the particular bills in question. Proof that part of the bills are of a certain bank and denomination is *prima facie* sufficient, in the absence of evidence that the bank had ever issued any others of the same denomination or that defendant had in his possession any other bills of similar denomination upon that bank. Graves *v.* Dudley, 20 N. Y. 76.

The writ need not be put in evidence for the purpose of identifying the property replevied with that described in the declaration. Davidson *v.* Rex, 16 N. Brunsw. 396.

44. Cox *v.* Albert, 78 Ind. 241; Robinson *v.* Shatzley, 75 Ind. 461; Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106. See also Louthain *v.* May, 77 Ind. 109, holding that the place where the property is detained need not be proved by direct evidence, but that it may be inferred from other circumstances appearing in evidence.

45. Game *v.* Whaley, 43 Minn. 234, 45 N. W. 228.

46. *Arkansas.*— Carroll *v.* Harris, 19 Ark. 237; Town *v.* Evans, 6 Ark. 260.

Maine.— Sawyer *v.* Huff, 25 Me. 464.

New Hampshire.— Carter *v.* Piper, 57 N. H. 217.

New Jersey.— Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207.

Wisconsin.— Ronge *v.* Dawson, 9 Wis. 246. The rule is otherwise under the code of civil procedure, which makes the unlawful detention the gist of the action and the only matter requiring proof. Miller *v.* Hackbrath, 126 Wis. 50, 105 N. W. 311.

United States.— Calvert *v.* Stewart, 4 Fed. Cas. No. 2,327, 4 Cranch C. C. 728; Meany *v.* Head, 16 Fed. Cas. No. 9,379, 1 Mason 319.

See 42 Cent. Dig. tit. "Replevin," § 261.

Where the action is to recover goods distrained for rent, defendant need not, on the issue "no rent arrear" prove that the distress was laid by himself or by his authority. McLaughlin *v.* Riggs, 16 Fed. Cas. No. 8,872, 1 Cranch C. C. 410.

47. Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181; Harwood *v.* Smethurst, 29 N. J. L. 195, 80 Am. Dec. 207.

Under a plea of property, the place of taking is not material. Emmett *v.* Briggs, 21 N. J. L. 53.

48. See Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740.

49. Paul *v.* Luttrell, 1 Colo. 317; Ridenour *v.* Beekman, 68 Ind. 236; Baer *v.* Martin, 2 Ind. 229; Wilson *v.* Fuller, 9 Kan. 176; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740, holding that the wrongful detention was put in issue in that case by a general denial.

Plaintiff not required to prove bailment.— Phelan *v.* Bonham, 9 Ark. 389; Beebe *v.* De Baum, 8 Ark. 510.

Under a plea of non cepit and property in himself, defendant will not be permitted to show that he was not in possession of the chattels at the date of the writ. McLeod *v.* Johnson, 96 Me. 271, 52 Atl. 760. *Compare* Alexander *v.* Cowie, 19 N. Brunsw. 599, holding that proof of actual possession by defendant is necessary when a plea of *non cepit* has been made, as without that he cannot be said to have either taken or detained the goods from plaintiff.

50. Miller *v.* Hackbarth, 126 Wis. 50, 105 N. W. 311. *Compare* Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795, holding that, although by statute the action is in form, in all cases for detaining only, proof of either an unlawful taking or an unlawful detention is sufficient.

In Florida the statutory plea of not guilty puts in issue the wrongful taking and detention. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061.

51. Maple *v.* Vestal, 114 Ind. 325, 16 N. E. 620; Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162.

other jurisdictions an allegation of that fact, when required to be made in the affidavit or complaint, is considered as a mere negative averment, not requiring proof, unless the question is raised by the pleadings of defendant.[52]

f. Value of Property and Damages. Proof of the value of the property and of damages is required, although the allegation thereof in the complaint is not denied;[53] but the value of each article need not be proved, provided there is proof of the total value.[54]

g. Justification by Seizure Under Process. An officer who, either as a plaintiff seeking to recover the possession of property from a third person, or as a defendant attempting to justify his possession, bases his right to possession on an execution or other process issued in the enforcement of a judgment, must prove that at the time of the seizure he was an officer,[55] that the process was not only regular on its face but that it was issued by competent authority,[56] that it was issued upon a valid[57] and unsatisfied[58] judgment,[59] and that the property seized is the property of the execution debtor.[60] Where he bases his right upon a seizure under a writ of attachment, he must prove not only the existence of the writ, but also that the attachment defendant was indebted to the attachment plaintiff, and that all the jurisdictional steps were taken before the writ issued.[61]

52. Hoisington *v.* Armstrong, 22 Kan. 110; Knoche *v.* Perry, 90 Mo. App. 483; Carney *v.* Doyle, 14 Wis. 270.

53. Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675. See also Peyton *v.* Robertson, 9 Wheat. (U. S.) 527, 6 L. ed. 151, where it is held that the amount for which avowry is made, or in case the action is brought to try title, the value of the article, is the real matter in dispute. *Compare* Creamery Package Mfg. Co. *v.* Union Bank, 100 Iowa 370, 69 N. W. 676.

54. Goldsmith *v.* Willson, 67 Iowa 662, 25 N. W. 870.

55. Arn *v.* Parker, 39 Kan. 338, 18 Pac. 201; Graham *v.* Shaw, 38 Kan. 734, 17 Pac. 332, attachment.

Proof that he was an officer de jure is necessary. Outhouse *v.* Allen, 72 Ill. 529; Vaughn *v.* Owens, 21 Ill. App. 249. *Compare* Schemerhorn *v.* Mitchell, 15 Ill. App. 418, holding that *prima facie* evidence of his right to the office is sufficient, in the absence of evidence to the contrary. *Contra*, Dayton *v.* Wyoming Nat. Bank, 1 Wyo. 263, holding that it is sufficient to show that an officer claiming under an attachment was a sheriff *de facto*.

When admitted by the pleadings proof of defendant's official character is not required. Alexander *v.* Burnham, 18 Wis. 199.

56. Andrews *v.* Smith, 41 Mich. 683, 3 N. W. 181; Williams *v.* McGrade, 13 Minn. 46; Clark *v.* Norton, 6 Minn. 412; Schars *v.* Brand, 27 Nebr. 94, 42 N. W. 906; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593. See also Arn *v.* Parker, 39 Kan. 338, 18 Pac. 201.

The amount of the execution must be shown. Booth *v.* Ableman, 20 Wis. 21, 88 Am. Dec. 730.

57. Schemerhorn *v.* Mitchell, 15 Ill. App. 418; Andrews *v.* Smith, 41 Mich. 683, 3 N. W. 181; Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45. *Compare* Adams *v.* Davis, 109 Ind. 10, 9 N. E. 162, holding that a county treasurer who has seized property in satisfaction of delinquent taxes under a tax duplicate legal on its face need not show a legal assessment of the taxes.

58. Wyatt *v.* Freeman, 4 Colo. 14; Beach *v.* Botsford, 1 Dougl. (Mich.) 199, 40 Am. Dec. 45.

59. Johnson *v.* Holloway, 82 Ill. 334 (limiting the rule to cases where the levy was made upon property claimed by someone else than defendant in execution); Williams *v.* McGrade, 13 Minn. 46; Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593; Newton *v.* Brown, 2 Utah 126. See also Arn *v.* Parker, 39 Kan. 338, 18 Pac. 201.

On the contrary it has been held that the officer need not show the judgment where he proves an execution regular on its face and appearing to have been issued by a court having jurisdiction (Outhouse *v.* Allen, 72 Ill. 529; Clay *v.* Carpenter, 1 T. B. Mon. (Ky.) 10, 15 Am. Dec. 77), or where the adverse party in order to claim exemption against the levy introduces in evidence the execution, which describes the judgment (McGuire *v.* Galligan, 53 Mich. 453, 19 N. W. 142).

60. Bruen *v.* Ogden, 11 N. J. L. 370, 20 Am. Dec. 593, holding, however, that this is not required where defendant in execution is plaintiff in the replevin suit.

61. *Kansas.*— See Graham *v.* Shaw, 38 Kan. 734, 17 Pac. 332.

Missouri.— Clarke *v.* Laird, 60 Mo. App. 289; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581.

Nebraska.—Spaulding *v.* Overmire, 40 Nebr. 21, 58 N. W. 736; Hakanson *v.* Brodke, 36 Nebr. 42, 53 N. W. 1033; Gamble *v.* Williams, 33 Nebr. 270, 50 N. W. 3; Bartlett *v.* Cheesebrough, 32 Nebr. 339, 49 N. W. 360; Paxton *v.* Moravek, 31 Nebr. 305, 47 N. W. 919; Williams *v.* Eikenberry, 25 Nebr. 721, 41 N. W. 770, 13 Am. St. Rep. 517, 22 Nebr. 210, 34 N. W. 373; Oberfelder *v.* Kavanaugh, 21 Nebr. 483, 32 N. W. 295.

New Jersey.— Brown *v.* Bissett, 21 N. J. L. 46.

Oklahoma.— Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656, where the attaching plain-

2. Evidence Admissible Under Pleadings [62] — a. Under General Issue or General Denial — (i) *In General.* In accordance with the general rule,[63] it has been held that, in an action of replevin, a general denial puts in issue all the material allegations in the complaint, and that under it defendant may give in evidence any matter that tends to contradict and defeat plaintiff's claim.[64] However, where defendant tenders the general issue by plea of *non cepit* or *non detinet*, the scope of the evidence admissible is much more restricted.[65]

(ii) *Title and Right to Possession.* Under a general denial, defendant may show title or right to possession in himself,[66] or in a third person,[67] or any other matters, such as fraud, which tend to disprove plaintiff's title and right to

tiffs were substituted for the officer in the replevin suit.

Oregon.— Taylor *v.* Brown, 49 Oreg. 423, 90 Pac. 673.

Utah.— Newton *v.* Brown, 2 Utah 126.

See 42 Cent. Dig. tit. "Replevin," § 263.

When not put in issue by the pleadings the rule is otherwise. Dayton *v.* Wyoming Nat. Bank, 1 Wyo. 263.

62. General admissibility of evidence see *infra*, IV, I.

63. See Pleading, 31 Cyc. 687.

64. *Idaho.*— Idaho Placer Min. Co. *v.* Green, 14 Ida. 249, 93 Pac. 954, holding that a special denial under the Idaho statutes is the same as a general denial in other jurisdictions.

Kansas.— Street *v.* Morgan, 64 Kan. 85, 67 Pac. 448; White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320; Bailey *v.* Bayne, 20 Kan. 657; Shadduck *v.* Stotts, 9 Kan. App. 776, 59 Pac. 39 [*affirmed* in (1900) 61 Pac. 1131].

Missouri.— Advance Thresher Co. *v.* Pierce, 74 Mo. App. 676.

Montana.— Kaufman *v.* Cooper, (1908) 98 Pac. 504; Gallick *v.* Bordeaux, 22 Mont. 470, 56 Pac. 961.

Nebraska.— Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99; Davis *v.* Culver, 58 Nebr. 265, 78 N. W. 504; Johnston *v.* Milwaukee, etc., Inv. Co., 49 Nebr. 68, 68 N. W. 383; Merrill *v.* Wedgwood, 25 Nebr. 283, 41 N. W. 149; Richardson *v.* Steele, 9 Nebr. 483, 4 N. W. 83.

See 42 Cent. Dig. tit. "Replevin," § 272. See also *infra*, IV, G, 2, a, (II); IV, G, 2, a, (III).

Evidence of estoppel is admissible under a general denial. Towne *v.* Sparks, 23 Nebr. 142, 36 N. W. 375.

Evidence of absence of a demand is admissible under a general denial. Burckwalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

65. See *infra*, IV, G, 2, a, (II); IV, G, 2, a, (III).

Evidence of special damages suffered by the service of the writ of replevin is inadmissible under the general issue. Bateman *v.* Blake, 81 Mich. 227, 45 N. W. 831.

66. *Idaho.*— Lindsay *v.* Wyatt, 1 Ida. 738.

Indiana.— May *v.* Pavey, 63 Ind. 4; Sparks *v.* Heritage, 45 Ind. 66; Louchheim *v.* Gill, 17 Ind. 139.

Missouri.— Anthony *v.* Carp, 90 Mo. App. 387, holding that, under a general denial, defendant may show a right to possession by virtue of an agistor's lien.

Montana.— Kaufman *v.* Cooper, (1908) 98 Pac. 504.

Nebraska.— Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99.

New York.— Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740.

South Dakota.— Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

Washington.— Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725.

Wisconsin.— Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897; Timp *v.* Dockham, 32 Wis. 146.

See 42 Cent. Dig. tit. "Replevin," §§ 273, 274.

Compare Summerville *v.* Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

But see Wells *v.* Dizier, 9 La. Ann. 119; Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277, holding that defendant will not be allowed to show a right to possession arising from special ownership under a general denial.

67. *Indiana.*— Kennedy *v.* Shaw, 38 Ind. 474. See also Hall *v.* Henline, 9 Ind. 256 [*citing* Lewis *v.* Masters, 6 Blackf. 243], holding that under the old practice in a justice's court, defendant could prove property in himself or a stranger under the general issue, and that as the legislature has enlarged the defense under the general issue, the fact of property in a stranger is admissible without pleading it.

Nebraska.— Richardson *v.* Steele, 9 Nebr. 483, 4 N. W. 83.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275; Griffin *v.* Long Island R. Co., 101 N. Y. 348, 4 N. E. 740; Jacob *v.* Haeflein, 60 N. Y. App. Div. 533, 69 N. Y. Suppl. 1034; Stearns *v.* Early, 49 Misc. 614, 96 N. Y. Suppl. 837.

South Dakota.— Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

Washington.— Chamberlin *v.* Winn. 1 Wash. 501, 20 Pac. 780, 1 Wash. 259, 24 Pac. 446.

Wisconsin.— Delaney *v.* Canning, 52 Wis. 266, 8 N. W. 897; Timp *v.* Dockham, 32 Wis. 146.

See 42 Cent. Dig. tit. "Replevin," § 274.

Contra.— Draper *v.* Richards, 20 La. Ann. 306.

Evidence of joint ownership by plaintiff and a third person is admissible under a general denial. Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229.

possession.[68] Such evidence is also admissible under the statutory pleas of *non detinet*,[69] and not guilty;[70] but where defendant pleads the general issue of *non cepit* he thereby puts in issue only the unlawful taking, and is precluded from showing title in himself,[71] or in a third person.[72]

(III) *Taking and Detention.* Under a general denial defendant may show that his detention of the property is rightful.[73] While it has been held that, in an action against an officer, a justification of the taking and detention as being under execution, attachment, or other process must be specially pleaded,[74] and cannot be shown under the general issue,[75] the weight of authority is that defendant may justify the taking or detention of the property or show his right to the possession thereof by virtue of such process under a general denial;[76] but that matter

68. *Connecticut.*— Curnane *v.* Scheidel, 70 Conn. 13, 38 Atl. 875 (holding that evidence of ratification by plaintiff of an unauthorized sale by an agent was properly received); Smith *v.* Brockett, 69 Conn. 492, 38 Atl. 57.

Idaho.— Cornwall *v.* Mix, 3 Ida. 687, 34 Pac. 893.

Indiana.— Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633.

Kansas.— Deford *v.* Hutchinson, 45 Kan. 332, 26 Pac. 60, 45 Kan. 318, 25 Pac. 641, 11 L. R. A. 257; Holmberg *v.* Dean, 21 Kan. 73, holding that an assignment to plaintiff may be shown to be fraudulent and void.

Massachusetts.— Spooner *v.* Cummings, 151 Mass. 313, 23 N. E. 839.

Minnesota.— Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99; Aultman, etc., Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

Missouri.— Advance Thresher Co. *v.* Pierce, 74 Mo. App. 676; Pugh *v.* Williamson, 61 Mo. App. 165.

Nebraska.— Iowa Sav. Bank *v.* Frink, 1 Nebr. (Unoff.) 14, 26, 92 N. W. 916, holding that under a general denial in replevin defendant may show that the mortgage under which plaintiff claimed possession was obtained by duress, or was without consideration.

North Dakota.— Lane *v.* O'Toole, 8 N. D. 210, 78 N. W. 77; Plano Mfg. Co. *v.* Daley, 6 N. D. 330, 70 N. W. 277.

South Dakota.— Plano Mfg. Co. *v.* Person, 12 S. D. 448, 81 N. W. 897.

Wisconsin.—Timp *v.* Dockham, 32 Wis. 146.

United States.— Pan-American Amusement Co. *v.* Maguire, 142 Fed. 126, 73 C. C. A. 544.

See 42 Cent. Dig. tit. "Replevin," §§ 273, 274.

Invalidity of sale.— Thus, under a general denial, defendant may show that the sale, upon which plaintiff bases his title and right to possession, was absolutely void. Shipman Coal Min., etc., Co. *v.* Pfeiffer, 11 Ind. App. 445, 39 N. E. 291; Merrill *v.* Wedgwood, 25 Nebr. 283, 41 N. W. 149. See also Israel *v.* Day, 17 Colo. App. 200, 68 Pac. 122.

69. Coverlee *v.* Warner, 19 Ohio 29; Kelley *v.* Blakeley, 2 Ohio Dec. (Reprint) 251, 2 West. L. Month. 151 [*affirmed* in 2 Ohio Dec. (Reprint) 378, 2 West. L. Month. 550 (*disapproving* Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317)].

70. Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Webster *v.* Brunswick-Balke-Callender Co., 37 Fla. 433, 20 So. 536; Holliday *v.* McKinne, 22 Fla. 153; Scudder *v.* Worster, 11 Cush. (Mass.) 573; Miller *v.* Sleeper, 4 Cush. (Mass.) 369; Singer Mfg. Co. *v.* Benjamin, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25; Loomis *v.* Foster, 1 Mich. 165; Gibson *v.* Mozier, 9 Mo. 256.

71. *Arkansas.*— Ringo *v.* Field, 6 Ark. 43.

North Carolina.— Rowland *v.* Mann, 28 N. C. 38.

Pennsylvania.— Wiley *v.* McGrath, 194 Pa. St. 498, 45 Atl. 331, 75 Am. St. Rep. 709.

Wisconsin.— Douglass *v.* Garrett, 5 Wis. 85.

United States.— Dickson *v.* Mathers, 7 Fed. Cas. No. 3,898*a*, Hempst. 65.

See 42 Cent. Dig. tit. "Replevin," § 273.

72. *Arkansas.*— Ringo *v.* Field, 6 Ark. 43; Wilson *v.* Royston, 2 Ark. 315.

Illinois.—Galusha *v.* Butterfield, 3 Ill. 227.

Indiana.— Trotter *v.* Taylor, 5 Blackf. 431.

Kentucky.— Harper *v.* Baker, 3 T. B. Mon. 421, 16 Am. Dec. 112.

Maine.— Vickery *v.* Sherburne, 20 Me. 34.

See 42 Cent. Dig. tit. "Replevin," § 274.

73. Yandle *v.* Crane, 13 Kan. 344; Towne *v.* Sparks, 23 Nebr. 142, 36 N. W. 375; Payne *v.* McCormick Harvesting Mach. Co., 11 Okla. 318, 66 Pac. 287.

The Connecticut statute makes the filing of a disclaimer a condition precedent to the right of defendant, under a general denial, to claim or offer evidence to prove that he did not wrongfully detain the chattels described in the declaration. McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981.

74. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188; Snell *v.* Crowe, 3 Utah 26, 5 Pac. 522.

75. Daniel *v.* Hardwick, 88 Ala. 557, 7 So. 188.

76. *Colorado.*— Burchinell *v.* Butters, 7 Colo. App. 294, 43 Pac. 459.

Indiana.— Branch *v.* Wiseman, 51 Ind. 1.

Kansas.— Wester *v.* Long, 63 Kan. 876, 66 Pac. 1032; White *v.* Gemeny, 47 Kan. 741, 28 Pac. 1011, 27 Am. St. Rep. 320.

Michigan.— Snook *v.* Davis, 6 Mich. 156.

Missouri.— Young *v.* Glascock, 79 Mo. 574; Bosse *v.* Thomas, 3 Mo. App. 472.

Nebraska.— Horkey *v.* Kendall, 53 Nebr.

in justification or excuse cannot be shown under the common-law general issue of *non cepit*,[77] unless a notice of such special defense is annexed to the plea.[78]

b. Under Other Pleadings — (I) *In General.* The well-settled principle that evidence which tends to prove or disprove an issue presented by the pleadings should be admitted and that evidence of matters not put in issue by the pleadings should be excluded [79] applies in actions of replevin.[80]

(II) *Title and Right to Possession.* Either plaintiff or defendant may introduce evidence tending to show any property interest from which a right to possession arises, when they have alleged ownership generally without specifying the source of title, or have denied the adverse party's right to possession;[81] but

522, 73 N. W. 953, 68 Am. St. Rep. 623; Best *v.* Stewart, 48 Nebr. 859, 67 N. W. 881; Cool *v.* Roche, 15 Nebr. 24, 17 N. W. 119.

Ohio.— Bailey *v.* Swain, 45 Ohio St. 657, 16 N. E. 370; Oakes *v.* Wyatt, 10 Ohio 344; Moravec *v.* Buckley, 9 Ohio Dec. (Reprint) 226, 11 Cinc. L. Bul. 225.

South Dakota.— Conner *v.* Knott, 8 S. D. 304, 66 N. W. 461.

England.— Mellor *v.* Leather, 1 E. & B. 619, 17 Jur. 709, 22 L. J. M. C. 76, 72 E. C. L. 619.

See 42 Cent. Dig. tit. "Replevin," § 275.

But in replevin for animals impounded defendant can justify only under an avowry setting forth the facts relied on and not under the statutory plea of not guilty. Howard *v.* Black, 49 Vt. 9.

77. Carroll *v.* Harris, 19 Ark. 237; Hopkins *v.* Burney, 2 Fla. 42; McFarland *v.* Barker, 1 Mass. 153; Ely *v.* Ehle, 3 N. Y. 506.

Statutes allowing evidence of matters of excuse and justification to be shown under the general issue do not apply to actions of replevin where the general issue of *non cepit* is pleaded. Holmes *v.* Wood, 6 Mass. 1. But see Coon *v.* Congdon, 12 Wend. (N. Y.) 496.

78. Martin *v.* Watson, 8 Wis. 315. But see Coon *v.* Congdon, 12 Wend. (N. Y.) 496, holding such notice to be unnecessary by virtue of a statutory provision.

79. See Pleading, 31 Cyc. 680.

80. *Arkansas.*— Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68.

California.— Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434.

Connecticut.—Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499.

Iowa.— Dee *v.* Sears-Nattinger Automobile Co., (1908) 118 N. W. 529; Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535.

Kansas.— French *v.* Packer, (App. 1898) 52 Pac. 910, holding that a promissory note which did not appear in any manner to be connected with the note and mortgage on which plaintiff relied for his right of possession was properly excluded.

New York.— Rapid Safety Filter Co. *v.* Wyckoff, 20 Misc. 17, 44 N. Y. Suppl. 601; Spiegle *v.* Fehr, 101 N. Y. Suppl. 651; Murray *v.* Lese, 86 N. Y. Suppl. 581.

Oregon.— Dillery *v.* Borwick, 36 Oreg. 255, 59 Pac. 183.

See 42 Cent. Dig. tit. "Replevin," § 264.

Evidence of defendant's former financial standing is inadmissible. Mason *v.* Partrick, 100 Mich. 577, 59 N. W. 239.

A set-off cannot be given in evidence when not put in issue by the pleadings (Swing *v.* Sparks, 7 N. J. L. 59; Anderson *v.* Reynolds, 14 Serg. & R. (Pa.) 439); but evidence of one is admissible when improperly pleaded, and no objection thereto has been taken by demurrer (Goslin *v.* Redden, 3 Harr. (Del.) 21).

Residence of plaintiff.—A petition in replevin which contains all the averments required by the code is sufficient to admit proof of plaintiff's residence, although it is not pleaded. Newell *v.* Hayden, 8 Iowa 140.

Evidence admissible under issue of "no rent in arrear" see King *v.* Lambden, 4 Harr. (Del.) 283; Lyon *v.* Houk, 9 Watts (Pa.) 193; Robins *v.* Kitchen, 8 Watts (Pa.) 390; Kensil *v.* Chambers, 5 Phila. (Pa.) 64; White *v.* Cross, 29 Fed. Cas. No. 17,546, 2 Cranch C. C. 17.

81. Crocker *v.* Burns, 13 Colo. App. 54, 56 Pac. 199; Whitcher *v.* Shattuck, 3 Allen (Mass.) 319; Verry *v.* Small, 16 Gray (Mass.) 121 (holding that, under a specific denial of plaintiff's title and right to possession, defendant may show a right to possession by virtue of a pledge); Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99; Miller *v.* Adamson, 45 Minn. 99, 47 N. W. 452; Williams *v.* Griffin, 58 S. C. 370, 36 S. E. 665.

The whole pleading will be looked to in order to ascertain whether the pleader bases his claim upon ownership or some special interest (Darnall *v.* Bennett, 98 Iowa 410, 67 N. W. 273; King *v.* Lacrosse, 42 Minn. 488, 44 N. W. 517); and a defendant who has for his second plea pleaded property in himself, and for his third plea that he bought the property at an execution sale, is not precluded by his third plea from proving under his second plea any legal title no matter how derived (O'Connor *v.* Union Line Transp. Co., 31 Ill. 230).

Joint ownership.— Under a plea of property in himself, defendant may show a joint ownership in himself and plaintiff in order to rebut plaintiff's right to exclusive possession. Hunt *v.* Chambers, 21 N. J. L. 620.

A waiver of right to possession by plaintiff may be shown under an answer denying plaintiff's right to possession. Timberlake *v.* McArthur, 6 Ohio Dec. (Reprint) 925, 8 Am. L. Rec. 713.

where they have alleged a particular interest in the property the evidence admissible in their behalf must be confined to that which tends to establish the interest alleged.[82] Title in a third person may be shown by defendant under a plea setting up such fact,[83] or under a plea or answer denying plaintiff's title; [84] but a defendant who has pleaded title in a particular third person will not be permitted to show title in another person,[85] and a plaintiff who sues in his own name and as owner cannot introduce evidence showing title in a stranger.[86]

(III) *Taking, Detention, and Demand.* Evidence of a wrongful and forcible taking is admissible even under issues of property,[87] or wrongful detention,[88] and plaintiff may show a demand and refusal, or circumstances rendering a demand unnecessary, under pleadings directly raising that question or which do not but which are not demurred to.[89]

(IV) *Value of Property and Damages.* Although there is some authority for the proposition that no evidence of value is admissible unless the allegation of value in the petition is denied in the answer,[90] the general rule is that either or both parties may introduce evidence of the true value of the property, regard-

The record of prior replevin suit is admissible under a plea of property. Lowry *v.* Hall, 2 Watts & S. (Pa.) 129, 38 Am. Dec. 495.

How such proof may be met.— General allegations of ownership not only entitle plaintiff to establish such ownership by any competent proof, but also entitle defendant to meet the case made by plaintiff's evidence by any competent proof that tends to show that such evidence is untrue. Kerron *v.* North Pacific Lumbering, etc., Co., 1 Wash. 241, 24 Pac. 445.

82. Randall *v.* Persons, 42 Nebr. 607, 60 N. W. 898; Musser *v.* King, 40 Nebr. 892, 59 N. W. 744, 42 Am. St. Rep. 700; Hudson *v.* Swan, 83 N. Y. 552.

Mitigation of damages.— This rule does not preclude a defendant who has pleaded absolute property in himself from showing a special interest in the property in mitigation of damages. Collins *v.* Bellefonte Cent. R. Co., 171 Pa. St. 243, 33 Atl. 331.

Cumulative evidence is not objectionable. Wiley *v.* McGrath, 194 Pa. St. 498, 45 Atl. 331, 75 Am. St. Rep. 709.

83. Ingle *v.* Wallach, 1 Black (U. S.) 96, 17 L. ed. 50, holding that the rule applies even though the plea is informal.

The fact that plaintiff was not assessed for personal property taxes may be shown in evidence as a circumstance tending to show that he does not own the chattels in controversy. Kastl *v.* Arthur, 135 Mich. 278, 97 N. W. 711.

Evidence showing the manner of acquisition of title by a third person is admissible. Lamotte *v.* Wisner, 51 Md. 543.

Under the Indiana statute, title in a stranger may be proved without pleading it by a defendant in an action of replevin commenced before a justice of the peace and taken by appeal to the circuit court. Lewis *v.* Masters, 6 Blackf. (Ind.) 243.

84. Driscoll *v.* Dunwoody, 7 Mont. 394, 16 Pac. 726; Schulenberg *v.* Harriman, 21 Wall. (U. S.) 44, 22 L. ed. 551.

85. McClung *v.* Bergfeld, 4 Minn. 148.

86. Ash *v.* Mathes, 52 Mich. 615, 18 N. W. 384; Howland *v.* Fuller, 8 Minn. 50.

87. Moore *v.* Shenk, 3 Pa. St. 13, 45 Am. Dec. 618.

88. Paul *v.* Luttrell, 1 Colo. 317; Olsen *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428.

Place of taking.—An argumentative allegation of the place of taking, when not demurred to, authorizes the admission of evidence to sustain it (Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112); and when the place is not traversed, it becomes immaterial, and a taking in another place than that alleged may be shown (Gardner *v.* Humphrey, 10 Johns. (N. Y.) 53).

Where the property was taken and detained under process it is proper to admit in evidence the judgment and proceedings in the suit in which the process was issued (Gavigan *v.* Scott, 51 Mich. 373, 16 N. W. 769; Hines *v.* Chambers, 29 Minn. 7, 11 N. W. 129), as well as an amended levy indorsed before return (Johnson *v.* Sommers, 3 Ill. App. 55); but not a writ of attachment which is not signed by the clerk nor sealed with the seal of the court (Wheaton *v.* Thompson, 20 Minn. 196). Such evidence is not admissible when a proper foundation therefor has not been laid in the pleadings (Eikenbary *v.* Clifford, 34 Nebr. 607, 52 N. W. 377; Taylor *v.* Brown, 49 Oreg. 423, 90 Pac. 673); but plaintiff in an action for wrongful detention is not estopped by bringing his action in one county from showing that the property was seized in another county under a writ of attachment (Craig *v.* Grant, 6 Mich. 447). Under an answer alleging the taking and keeping possession of the chattels as stolen property under a warrant of arrest, it is not error to permit defendant to testify that he was an officer, that he took possession of the property under a belief that it was stolen, and that he was holding the same under direction of the magistrate. Murray *v.* Lyon, (Tex. Civ. App. 1906) 95 S. W. 621.

89. Paul *v.* Luttrell, 1 Colo. 317; Simser *v.* Cowan, 56 Barb. (N. Y.) 395; Oleson *v.* Merrill, 20 Wis. 462, 91 Am. Dec. 428.

90. Tully *v.* Harloe, 35 Cal. 302, 95 Am. Dec. 102; Schmitt *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99.

less of whether plaintiff's allegation in the petition is denied.[91] Value is immaterial and evidence of it is inadmissible where plaintiff has possession of the property at the time of trial and no damages are claimed.[92]

(v) *Existence of Fraud.*[93] Where fraud is specially pleaded and put in issue, evidence tending to support either the affirmative or the negative of the issue is competent,[94] and, although the general rule that fraud must be specially pleaded before evidence of it is admissible [95] has been followed as to actions of replevin in some jurisdictions,[96] it has been held in most jurisdictions that the general rule does not apply and that under allegations or denials of ownership and right of possession, either party may show that the right of the adverse party to possession is based upon fraud.[97]

91. Woodruff *v.* Cook, 25 Barb. (N. Y.) 505; Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200; Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675. See also Chicago, etc., R. Co. *v.* Northwestern Union Packet Co., 38 Iowa 377.

Admission not conclusive.— It has been held that plaintiff's allegation of value is competent evidence on the trial as an admission of value by him, but that it is not conclusive. Briggs *v.* Wiswell, 56 N. H. 319.

Where the replevin proceedings have been enjoined by a decree which settles the rights of the parties but does not find the value of the property, the court in the replevin action must determine that question and upon it both parties have the right to present evidence. Dehr *v.* Lampton, 31 Iowa 172.

What evidence admissible.— Evidence of the value of the use of the property from the time of taking to the time of trial is admissible (Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51; Benjamin *v.* Houston, 16 S. D. 569, 94 N. W. 584. *Compare* Ferguson *v.* Hogan, 25 Minn. 135, where the application of the rule was limited to cases where the value of such use is pleaded as special damages); as well as evidence of the cost price of the article (Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345); and the value of the component parts of the property (Indiana Union Traction Co. *v.* Bick, 40 Ind. App. 451, 81 N. E. 617). Testimony of the assignor of the goods as to their value when he was in possession is competent. Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535.

Evidence of special damages is admissible without being alleged in the declaration (Clark *v.* Martin, 120 Mass. 543. *Contra*, Burrage *v.* Melson, 48 Miss. 237); and evidence that part of the property was destroyed by fire through defendant's negligence is admissible where the damages allowed by such evidence go simply to the extinguishment of defendant's lien (Babb *v.* Talcott, 47 Mo. 343).

92. Foster *v.* Berkey, 8 Minn. 351.

93. Admissibility of evidence of fraud under general denial see *supra*, IV, G, 2, a, (II).

94. *Arkansas.*— Owen *v.* Mulkey, (1907) 106 S. W. 937.

Iowa.— Gervers *v.* Farmer, 109 Iowa 468, 80 N. W. 535. And see Nolan *v.* Jones, 53 Iowa 387, 5 N. W. 572.

New York.— Hersey *v.* Benedict, 15 Hun 282; Hochberger *v.* Baum, 85 N. Y. Suppl. 385.

North Dakota.— Taylor *v.* Rice, 1 N. D. 72, 44 N. W. 1017.

Vermont.— Bliss *v.* Badger, 36 Vt. 338, holding that the rule applies even though defendant does not set forth in his avowry the facts constituting the fraud.

Great latitude of proof is permitted where the question in an action of replevin is one of fraud, and the testimony of a witness which relates to a transaction with one not a party to the suit is competent. Katzenberger *v.* Leedom, 103 Tenn. 144, 52 S. W. 35.

95. See Pleading, 31 Cyc. 685.

96. Gray *v.* Earl, 13 Iowa 188; Newell *v.* Hayden, 8 Iowa 140; Bickle *v.* Irvine, 9 Mont. 251, 23 Pac. 244; Coos Bay, etc., R., etc., Nav. Co. *v.* Siglin, 26 Oreg. 387, 38 Pac. 192.

97. *Colorado.*— Benesch *v.* Waggner, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254.

Kentucky.— Stephens *v.* Frazier, 2 B. Mon. 250.

Massachusetts.— Quincy *v.* Hall, 1 Pick. 357, 11 Am. Dec. 198, holding that such evidence is admissible under a plea of property in a stranger.

Minnesota.— Kenney *v.* Goergen, 36 Minn. 190, 31 N. W. 210; Furman *v.* Tenny, 28 Minn. 77, 9 N. W. 172; Tupper *v.* Thompson, 26 Minn. 385, 4 N. W. 621.

Missouri.— Stone *v.* Barrett, 34 Mo. App. 15.

Nebraska.— Pekin Plow Co. *v.* Wilson, 66 Nebr. 115, 92 N. W. 176; Phenix Iron Works Co. *v.* McEvony, 47 Nebr. 228, 66 N. W. 290, 53 Am. St. Rep. 527; Gandy *v.* Pool, 14 Nebr. 98, 15 N. W. 223, holding that such evidence is admissible under a denial of unlawful detention.

Ohio.— Nenbrand *v.* Myres, 7 Ohio Dec. (Reprint) 315, 2 Cinc. L. Bul. 97.

Oklahoma.— See Strahorn-Hutton-Evans Commission Co. *v.* Florer, 7 Okla. 499, 54 Pac. 710, holding that plaintiff may show that defendant, at the time he purchased the property, had actual notice of plaintiff's mortgage.

Utah.— Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743; Jones *v.* McQueen, 13 Utah 178, 45 Pac. 202.

See 42 Cent. Dig. tit. "Replevin," § 268.

Reason for rule.— "This rule is doubtless based on the fact that in replevin the plaintiff is not bound to disclose any source of

3. Variance.[98] In replevin, as in other actions, the proof must conform to the allegations in the pleadings and a material variance is fatal,[99] while, on the other hand, a slight and immaterial variance may be disregarded,[1] or in some jurisdictions, be corrected by amendment of the pleading.[2] A general allegation of ownership and right of possession is sustained by proof of any interest in the property which confers the right to possession,[3] but a specific allegation of a particular interest or kind of ownership is not sustained by proof of a different interest.[4]

H. Presumptions and Burden of Proof — 1. In General. The rules applicable to presumptions and burden of proof in civil actions generally [5] apply in actions of replevin. Thus the burden is on plaintiff to establish his right to recover by a preponderance of the evidence.[6] Where plaintiff has made out a

title, and therefore the defendant is not bound to anticipate the source of title under which the plaintiff may claim." Jones *v.* McQueen, 13 Utah 178, 185, 45 Pac. 202 [*quoted* in Munns *v.* Loveland, 15 Utah 250, 49 Pac. 743].

98. See, generally, Pleading, 31 Cyc. 700.

99. *Illinois.*— Taylor *v.* Riddle, 35 Ill. 567.

Indiana.— Schenck *v.* Long, 67 Ind. 579.

Iowa.— Myers *v.* Townsend, 103 Iowa 569, 72 N. W. 761.

Missouri.— Davis *v.* Randolph, 3 Mo. App. 454.

New Hampshire.— Lothrop *v.* Locke, 59 N. H. 532.

New York.— Tice *v.* Norton, 4 Wend. 663.

Oregon.— Simonds *v.* Wrightman, 36 Oreg. 120, 58 Pac. 1100.

Pennsylvania.— Waltman *v.* Allison, 10 Pa. St. 464.

Washington.— Silsby *v.* Aldridge, 1 Wash. 117, 23 Pac. 836.

England.—John *v.* Jenkins, 1 Cromp. & M. 227, 2 L. J. Exch. 83, 3 Tyrw. 170; Roskruge *v.* Caddy, 7 Exch. 840, 22 L. J. Exch. 16; Brown *v.* Sayce, 4 Taunt. 320.

See 42 Cent. Dig. tit. "Replevin," § 278.

1. *Illinois.*— Boyle *v.* Miller, 93 Ill. App. 627.

Indiana.— Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

North Carolina.— Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519.

Texas.— Saenz *v.* Mumme, (Civ. App. 1905) 85 S. W. 59.

England.— Page *v.* Chuck, 3 L. J. C. P. O. S. 124, 10 Moore C. P. 264.

See 42 Cent. Dig. tit. "Replevin," § 278.

Instrument under seal.— Where it was wholly immaterial whether the instrument in question was under seal, an averment that it was in writing will be supported by the production of a written instrument either with or without a seal attached to the same. Jenkins *v.* Pell, 20 Wend. (N. Y.) 450 [*affirming* 17 Wend. 417].

No advantage can be taken of excess of proof.— Sexey *v.* Adkison, 40 Cal. 408.

2. Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519; Morrow *v.* Galbraith, 1 Phila. (Pa.) 552.

3. Darter *v.* Brown, 48 Ind. 395; Cassel *v.* Western Stage Co., 12 Iowa 47 (holding that an allegation of right to possession is proved by evidence of ownership, where no right of possession is shown by the opposite party); Anderson *v.* Stewart, 108 Md. 340, 70 Atl. 228. See also Schmidt *v.* Denver First Nat. Bank, 10 Colo. App. 261, 50 Pac. 733.

4. *Illinois.*— Eakin *v.* Eakin, 63 Ill. 160, holding that a plaintiff claiming the entire ownership of property cannot recover on proof of three-fourths' ownership.

Iowa.— Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535; Kern *v.* Wilson, 73 Iowa 490, 35 N. W. 594; Knowlton *v.* Lendrum, 54 Iowa 756, 7 N. W. 97. See, however, Harward *v.* Davenport, 105 Iowa 592, 75 N. W. 487, holding that an allegation of absolute ownership is sufficiently supported by evidence of ownership limited by two chattel mortgages, under Code (1873), § 2686, providing that no variance is to be deemed material unless it has actually misled the opposite party to his prejudice, and Code (1873), § 2729, providing that a party shall not be compelled to prove more than is necessary to entitle him to the relief asked for.

Kansas.— Kennett *v.* Peters, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274; Parry Mfg. Co. *v.* Myton, 8 Kan. App. 533, 54 Pac. 291.

Missouri.— Deyerle *v.* Hunt, 50 Mo. App. 541.

Nebraska.— Paxton *v.* Learn, 55 Nebr. 459, 75 N. W. 1096; Suckstorf *v.* Butterfield, 54 Nebr. 757, 74 N. W. 1076; Robinson *v.* Kilpatrick-Koch Dry Goods Co., 50 Nebr. 795, 70 N. W. 378; Strahle *v.* Stanton First Nat. Bank, 47 Nebr. 319, 66 N. W. 415; Camp *v.* Pollock, 45 Nebr. 771, 64 N. W. 231; Sharp *v.* Johnson, 44 Nebr. 165, 62 N. W. 466; Musser *v.* King, 40 Nebr. 892, 59 N. W. 744, 42 Am. St. Rep. 700.

United States.— Alexander *v.* Harris, 4 Cranch 299, 2 L. ed. 627.

See 42 Cent. Dig. tit. "Replevin," § 278.

5. See, generally, Evidence, 16 Cyc. 926.

6. Kerfoot *v.* Waterloo State Bank, 14 Okla. 104, 77 Pac. 46. See also Butler *v.* Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040; Thompson *v.* Ross, 87 Ind. 156; Kahn *v.* Hayes, 22 Ind. App. 182, 53 N. E. 430; Barry *v.* O'Brien, 103 Mass. 520; Miller *v.* McGehee, 60 Misc. 903; Western Union Sewing Mach. Co. *v.* Sachs, 32 Misc. (N. Y.) 736, 67 N. Y. Suppl. 2.

Right to begin.— If there be any affirmative issue on plaintiff, he is entitled to begin. Bills *v.* Vose, 27 N. H. 212.

prima facie case, the burden of proof is upon defendant to show matter in justification or defense.[7] After defendant has made out a *prima facie* defense to the action, the burden devolves upon plaintiff to obviate the effect thereof.[8]

2. Title and Right to Possession. In an action of replevin, in the absence of any direct evidence to the contrary, possession is presumptive evidence of ownership;[9] but when direct evidence is offered, the fact of possession loses its presumptive character, and is to be considered only in connection with other facts at its real probative value.[10] Therefore in replevin, where the right of property is in issue, the burden is on plaintiff to show his title or his right of possession.[11] He must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary.[12] Thus an answer in replevin denying

7. *Arkansas.*— Crenshaw *v.* Bradley, 52 Ark. 318, 12 S. W. 578.

California.— Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684.

Delaware.— Robelen *v.* Wilmington Nat. Bank, 1 Marv. 346, 41 Atl. 80.

Illinois.— Larsen *v.* Ditto, 90 Ill. App. 384; Shue *v.* Ingle, 87 Ill. App. 522.

Kansas.— Clyde First Nat. Bank *v.* Parkhurst, 54 Kan. 155, 37 Pac. 1001; Falk *v.* Decou, 8 Kan. App. 765, 61 Pac. 760.

Kentucky.— Hobbs *v.* Myres, 1 B. Mon. 241.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345.

New York.— Pierce *v.* Van Dyke, 6 Hill 613.

Rhode Island.— Kebabian *v.* Adams Express Co., 27 R. I. 564, 65 Atl. 271, holding that where plaintiff proves his ownership and right to possession, the burden of proving liens set up by pleas is on defendant.

Vermont.— Singer Mfg. Co. *v.* Nash, 70 Vt. 434, 41 Atl. 429.

See 42 Cent. Dig. tit. "Replevin," § 280.

8. Standish *v.* Flowers, 16 Wis. 110.

9. *Arkansas.*— Robinson *v.* Calloway, 4 Ark. 94.

Delaware.— Stockwell *v.* Robinson, 9 Houst. 313, 32 Atl. 528.

Indiana.— McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957.

Iowa.— Wallace *v.* Wallace, 62 Iowa 651, 17 N. W. 905; Rickner *v.* Dixon, 2 Greene 591.

Missouri.— Westbay *v.* Milligan, 89 Mo. App. 294; Stone *v.* McNealy, 59 Mo. App. 396; Phillips *v.* Schall, 21 Mo. App. 38.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Nebraska.— Elgin First Nat. Bank *v.* Adams, (1908) 118 N. W. 1057.

Wisconsin.— Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499.

United States.— Mitchell *v.* Wilson, 17 Fed. Cas. No. 9,672, 3 Cranch C. C. 242.

See 42 Cent. Dig. tit. "Replevin," § 281.

10. Westbay *v.* Milligan, 89 Mo. App. 294; Elgin First Nat. Bank *v.* Adams, (Nebr. 1908) 118 N. W. 1057.

Where the evidence of ownership is conflicting no such presumption arises. McElhanon *v.* McFerron, 36 Ill. App. 22.

11. *Arkansas.*— Dixon *v.* Thatcher, 14 Ark. 141; Robinson *v.* Calloway, 4 Ark. 94.

Colorado.— Austin *v.* Terry, 38 Colo. 407, 88 Pac. 189.

Delaware.— Ott *v.* Specht, 8 Houst. 61, 12 Atl. 721, holding that a plaintiff in replevin is not relieved from the *onus* of proving that he had a right to immediate possession at the commencement of suit, by the fact that in order to entitle defendant to retain possession of the chattels under a return bond given by him in the suit, he may be compelled to prove a right to possession in himself.

Illinois.— Monmouth Second Nat. Bank *v.* Thuet, 124 Ill. App. 501; Hacker *v.* Munroe, 56 Ill. App. 532.

Indiana.— Simcoke *v.* Frederick, 1 Ind. 54.

Iowa.— Hillman *v.* Brigham, 110 Iowa 220, 81 N. W. 451; Peake *v.* Conlan, 43 Iowa 297 (holding that where in replevin for a horse defendant claims title under a barter with plaintiff, the burden of proof is still upon plaintiff to establish his ownership); Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307.

Louisiana.— Crane *v.* Allen, 11 La. Ann. 493, holding that defendant in replevin claiming through plaintiff has the burden of proof to show clearly his right to the property.

Massachusetts.—Barry *v.* O'Brien, 103 Mass. 520.

Mississippi.— Brunson *v.* Volunteer Carriage Co., (1908) 47 So. 377.

Missouri.— Gray *v.* Parker, 38 Mo. 160; Phillips *v.* Schall, 21 Mo. App. 38.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

Nebraska.— Jenkins *v.* Mitchell, 40 Nebr. 664, 59 N. W. 90.

Washington.— Dodd *v.* Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

Wyoming.— Dayton *v.* Wyoming Nat. Bank, 1 Wyo. 263.

See 42 Cent. Dig. tit. "Replevin," § 281.

12. *Arkansas.*— Robinson *v.* Calloway, 4 Ark. 94.

Delaware.— Ott *v.* Specht, 8 Houst. 61, 12 Atl. 721.

Illinois.— Constantine *v.* Foster, 57 Ill. 36.

Indiana.— Simcoke *v.* Frederick, 1 Ind. 54.

Iowa.— Hillman *v.* Brigham, 110 Iowa 220, 81 N. W. 451; Hamilton *v.* Iowa City Nat. Bank, 40 Iowa 307.

Massachusetts.— Johnson *v.* Neale, 6 Allen 227.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

plaintiff's ownership of the property in controversy casts the burden of proof upon him,[13] unless defendant disclaims all right to the property.[14] So in a plea of property in defendant, or a stranger, traversing plaintiff's ownership, the only issuable fact in the plea is plaintiff's ownership, and the burden of the proof is on him.[15] Whether the plea of property in defendant, or a stranger, without more, is sufficient to put in issue plaintiff's right to the property, so as to put him on proof of his case, is a question upon which there is an apparent difference of opinion. In many decisions such a plea is held to have this result.[16] But in several jurisdictions defendant must, in addition to alleging the property in himself, traverse plaintiff's title, in order to throw the burden of proof on plaintiff;[17] where the plea is property in defendant or a third person, without a traverse of plaintiff's right, it leaves the burden of proof upon defendant to establish the truth of his plea.[18]

Nebraska.— G. T. Northwall Co. *v.* McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 N. W. 767.

See 42 Cent. Dig. tit. "Replevin," § 281.

13. *Arkansas.*— Kennedy *v.* Clayton, 29 Ark. 270. And see Erb *v.* Perkins, 32 Ark. 428, holding that a bankruptcy assignee's answer in replevin is sufficient to put plaintiff on proof of his alleged title, where it avers that the assignee has no knowledge or information sufficient to form a belief as to plaintiff's title.

Connecticut.—Kavanagh *v.* Phelps, 36 Conn. 111.

Illinois.— Constantine *v.* Foster, 57 Ill. 36; McLeroth *v.* Magerstadt, 136 Ill. App. 361.

Missouri.— Stone *v.* McNealy, 59 Mo. App. 396; Andrews *v.* Costican, 30 Mo. App. 29.

Montana.— Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583.

New Hampshire.— Taylor *v.* True, 27 N. H. 220.

See 42 Cent. Dig. tit. "Replevin," § 281.

Under the codes, a general denial has been held sufficient to put plaintiff to proof of title or right of possession without any averments of title in defendant or in a stranger. Hillman *v.* Brigham, 110 Iowa 220, 81 N. W. 451; Pulliam *v.* Burlingame, 81 Mo. 111, 51 Am. Rep. 229; Phillips *v.* Schall, 21 Mo. App. 38; G. T. Northwall Co. *v.* McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 N. W. 767.

Plea of non detinet.— Where issue is joined on a plea of *non detinet* in an action to recover personal property, the burden of proof is on plaintiff. Beal *v.* McKee, 145 Ala. 659, 39 So. 664.

14. Kavanagh *v.* Phelps, 36 Conn. 111.

15. *Arkansas.*— Patterson *v.* Fowler, 22 Ark. 396.

Illinois.— Constantine *v.* Foster, 57 Ill. 36.

Missouri.— Morgner *v.* Biggs, 46 Mo. 65.

Montana.— Frank *v.* Symons, 35 Mont. 56, 88 Pac. 561.

New Jersey.— Chambers *v.* Hunt, 22 N. J. L. 552; Hunt *v.* Chambers, 21 N. J. L. 620; Chambers *v.* Hunt, 18 N. J. L. 339.

North Dakota.— Haveron *v.* Anderson, 3 N. D. 540, 58 N. W. 340.

See 42 Cent. Dig. tit. "Replevin," § 281.

A special answer, following a general denial, alleging property in defendant, does not destroy the effect of the general denial, and relieve plaintiff from making all the proofs he would be required to make had the special answer been omitted. Downtain *v.* Ray, 31 Tex. Civ. App. 298, 71 S. W. 758; Wheeler, etc., Mfg. Co. *v.* Teetzlaff, 53 Wis. 211, 10 N. W. 155.

16. *Arkansas.*— Hill *v.* Fellows, 25 Ark. 11.

Delaware.— Pennington *v.* Chandler, 5 Harr. 394; McIlvaine *v.* Holland, 5 Harr. 226.

Illinois.— Jones *v.* Glathart, 100 Ill. App. 630; McFarlan *v.* McClellan, 3 Ill. App. 295.

Indiana.— Turner *v.* Cool, 23 Ind. 56, 60, 85 Am. Dec. 449 (where it is said: "The pleading thus made, though it does not directly deny that the sheaves of wheat were the property of the plaintiff, does so argumentatively, and therefore rested the burden of the issues on the plaintiff"); Noble *v.* Epperly, 6 Ind. 414.

Maryland.— Cullum *v.* Bevans, 6 Harr & J. 469.

New Hampshire.— Taylor *v.* True, 27 N. H. 220.

United States.— Williamson *v.* Ringold, 30 Fed. Cas. No. 17,755, 4 Cranch C. C. 39.

See 42 Cent. Dig. tit. "Replevin," § 281.

A plea of payment is in effect a plea of property in defendant, under which the burden is upon plaintiff to show his title. Johnston *v.* McCart, 24 Wash. 19, 63 Pac. 1121.

17. Atkins *v.* Byrnes, 71 Ill. 326; Reynolds *v.* McCormick, 62 Ill. 412; Chandler *v.* Lincoln, 52 Ill. 74; Anderson *v.* Talcott, 6 Ill. 365; Pinkstaff *v.* Cochran, 58 Ill. App. 72; Hacker *v.* Munroe, 56 Ill. App. 532; Pope *v.* Jackson, 65 Me. 162; Cooper *v.* Bakeman, 32 Me. 192; Greene *v.* Dingley, 24 Me. 131; Prosser *v.* Woodward, 21 Wend. (N. Y.) 205; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30.

18. Chandler *v.* Lincoln, 52 Ill. 74; Pope *v.* Jackson, 65 Me. 162; Cooper *v.* Bakeman, 32 Me. 192; Pease *v.* Magill, (N. D. 1908) 115 N. W. 260. And see Thompson *v.* Stever, 11 N. Y. St. 784, holding that where defendant in replevin admitted the taking of the wood from the premises in plaintiff's possession, but claimed title to the land, he had the burden of proving the title.

In Canada where a defendant in replevin pleads property in himself or a third person, and issue is taken thereon, the *onus* of prov-

3. Identity of Property. Where the identity of the property claimed by plaintiff is questioned, the burden is on him to establish that fact.[19] Where, however, plaintiff and defendant claim under different mortgages, and plaintiff offers evidence *prima facie* sufficient to show title in himself, the burden is on defendant to show that the property described in the mortgage under which he claims is the same as that in controversy.[20]

4. Taking and Detention. The action of replevin being founded on a wrongful taking or detention by defendant, the burden of proof is upon plaintiff to show such wrongful taking or detention, where defendant denies the allegations of wrong,[21] and such burden is not shifted to defendant by reason of special defenses being interposed as well as the general denial.[22] Where plaintiff establishes a *prima facie* title and right to the possession of the property, it is incumbent on defendant to show how he came into the possession of it.[23] Where it is shown that defendant was in possession of the property just previous to the institution of the action, the burden is on him to show that he had parted with it prior to the beginning of such action.[24]

5. Value of Property and Damages. The value of the goods stated in the replevin bond is *prima facie* evidence of plaintiff's damages, and if defendant contends for a less amount, the burden of proof is on him to show it.[25] In the absence of proof that the damages are more or less than the interest on the value, the presumption is that the damages are the interest during the time the successful party was wrongfully deprived of the use.[26] So in the absence of proof of the value of the property replevied at the time of the trial, it will be presumed to be of the same value then as found by the court when replevied.[27] Where plaintiff gives bond and acquires the possession, it is no more his duty to prove the value of the property than it is the duty of defendant, who seeks to regain possession, and thus becomes practically plaintiff.[28] Where property is replevied from a sheriff, it is ordinarily incumbent upon him to prove the value of the property;[29] but where plaintiff admits on the record the value of defendant's possession, and no evidence is given as to the general value of the property, it will be presumed that such value is equal to or exceeds the amount admitted by plaintiff as the value of defendant's special interest.[30]

6. Fraud. The burden is upon the party pleading fraud to prove it.[31] But

ing property is on defendant, and if he fails in doing so, plaintiff is entitled to recover. Ogden *v.* Bourgeois, 15 N. Brunsw. 365; Desbrisay *v.* Little, 11 N. Brunsw. 392; Graham *v.* Wetmore, 9 N. Brunsw. 373.

19. Myers *v.* Van Norman, 87 Ill. App. 500 (holding that in replevin of mortgaged property, the burden is upon plaintiff to show by the evidence that the property seized on the writ is covered by the mortgage); Schweinfurth *v.* Matson, 37 Ill. App. 62; Daniels *v.* Taubenblatt, 120 La. 349, 45 So. 273; Webber *v.* Read, 65 Me. 564; Russell *v.* Amundson, 4 N. D. 112, 59 N. W. 477.

20. Brunswick First Nat. Bank *v.* Wood, 124 Mo. 72, 27 S. W. 554; State Bank *v.* City Nat. Bank, 18 Okla. 10, 69 Pac. 206.

21. Morgan *v.* Jackson, 32 Ind. App. 169, 69 N. E. 410; Finnell *v.* Million, 99 Mo. App. 552, 74 S. W. 419 (holding that, in replevin against an officer for property claimed under a prior bill of sale, the wrongful taking and detention of the property by defendant was not to be presumed, but must be proved); Dodd *v.* Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

22. Dodd *v.* Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

23. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Conely *v.* Dudley, 111 Mich. 122, 69 N. W. 151; Barkley *v.* Leiter, 49 Nebr. 123, 68 N. W. 381; Bame *v.* Seykora, 77 Hun (N. Y.) 529, 28 N. Y. Suppl. 930.

24. Waterhouse *v.* Black, 87 Iowa 317, 54 N. W. 342; Nichols *v.* Dodson Lead, etc., Co., 85 Mo. App. 584.

25. Wood *v.* May, 30 Fed. Cas. No. 17,956, 3 Cranch C. C. 172.

In replevin for written securities they are presumed to be worth the principal and interest indicated on their face; and it is incumbent on defendant to rebut this presumption. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689.

26. New York Guaranty, etc., Co. *v.* Flynn, 55 N. Y. 653.

27. Jennings *v.* Sparkman, 48 Mo. App. 246; Monday *v.* Vance, (Tex. Civ. App. 1899) 51 S. W. 346.

28. Archer *v.* Long, 32 S. C. 171, 11 S. E. 86.

29. Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3.

30. Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3.

31. Williams *v.* Finlayson, 49 Fla. 264, 38

where plaintiff's title is alleged by defendant to be fraudulent, plaintiff must first show title in himself.[32]

I. Admissibility of Evidence[33] — **1. In General.** The rules applicable to admissibility of evidence in civil actions generally[34] apply in actions of replevin.[35]

2. Value of Property and Damages — a. In General. It is proper in an action of replevin to allow plaintiff to show the value of the property, to aid the jury in assessing his damages.[36] Evidence that a party has placed a certain

So. 50; Hyde *v.* Shank, 93 Mich. 535, 53 N. W. 787; Bristol *v.* Braidwood, 28 Mich. 191.

Intent to deceive.— Where actual fraud must be proved, this involves the proof of intent to deceive. Enright *v.* Fellheimer, 25 Misc. (N. Y.) 664, 56 N. Y. Suppl. 366.

32. Hardy *v.* Moore, 62 Iowa 65, 17 N. W. 200.

33. **As to admissibility of evidence under pleadings** see *supra*, IV, G, 2, b, (v).

34. See, generally, Evidence, 16 Cyc. 821.

35. **Admissible evidence.**— See the following cases where the evidence was held to be admissible:

Colorado.— Lemmon *v.* Beattie, 41 Colo. 68, 91 Pac. 1102.

Kentucky.— Crawford *v.* Hurd, 106 S. W. 849, 32 Ky. L. Rep. 636.

Maryland.—Joynes *v.* Wartman, 5 Md. 195.

Massachusetts.— United Shoe Mach. Co. *v.* Bresnahan Shoe Mach. Co., 197 Mass. 206, 83 N. E. 412.

Minnesota.— Goodell *v.* Ward, 17 Minn. 17.

Missouri.— Kerr *v.* Drew, 90 Mo. 147, 2 S. W. 136.

Montana.— Kaufman *v.* Cooper, (1908) 98 Pac. 504.

Nebraska.— Deck *v.* Smith, 12 Nebr. 389, 11 N. W. 852.

Pennsylvania.— Fairman *v.* Fluck, 5 Watts 516.

Virginia.— Nicholson *v.* Hancock, 4 Hen. & M. 491.

Wisconsin.— Trowbridge *v.* Sickler, 54 Wis. 306, 11 N. W. 581; Knowlton *v.* Culver, 1 Chandl. 214.

See 42 Cent. Dig. tit. "Replevin," § 285.

Inadmissible evidence.— See the following cases where the evidence was held to be inadmissible:

Colorado.— McCraw *v.* Welch, 2 Colo. 284.

Kansas.— Hardwick *v.* Brookover, 48 Kan. 609, 30 Pac. 21.

Maryland.— Basford *v.* Mills, 6 Md. 385.

Massachusetts.— Veazie *v.* Somerby, 5 Allen 280.

Michigan.— Fletcher *v.* Post, 104 Mich. 424, 62 N. W. 574; Ross *v.* Houghton, 54 Mich. 337, 20 N. W. 67; Jennings *v.* Prentice, 39 Mich. 421.

Minnesota.— Miller *v.* Darling, 22 Minn. 303.

Missouri.— Watkins *v.* Crenshaw, 59 Mo. App. 183.

Montana.— Woods *v.* Berry, 7 Mont. 195, 14 Pac. 758.

New York.— Brewster *v.* Silliman, 38 N. Y. 423; Gumberg *v.* Goodstein, 95 N. Y. App. Div. 101, 88 N. Y. Suppl. 423; Pierce *v.* Van Dyke, 6 Hill 613.

North Carolina.— McDaniel *v.* Allen, 99 N. C. 135, 5 S. E. 737.

Oregon.— Hexter *v.* Schneider, 14 Oreg. 184, 12 Pac. 668.

Pennsylvania.— Susquehanna Boom Co. *v.* Finney, 58 Pa. St. 200; Dannels *v.* Fitch, 8 Pa. St. 495; Knowles *v.* Lord, 4 Whart. 500, 34 Am. Dec. 525; Swope *v.* Crawford, 17 Lanc. L. Rev. 196.

United States.— White *v.* Cross, 29 Fed. Cas. No. 17,546, 2 Cranch C. C. 17.

See 42 Cent. Dig. tit. "Replevin," § 285.

Parol evidence or agreement.— Miller *v.* Graf, 14 Colo. App. 167, 59 Pac. 416; Woodward *v.* Garey, 42 Leg. Int. (Pa.) 490; Peeples *v.* Warren, 51 S. C. 560, 29 S. E. 659.

Declarations and admissions of parties.— Mitchell *v.* Sims, 124 N. C. 411, 32 S. E. 735; Keefer *v.* Keefer, 9 Pa. Super. Ct. 53, 43 Wkly. Notes Cas. 275; Word *v.* Kennon, (Tex. Civ. App. 1903) 75 S. W. 365; Resch *v.* Senn, 28 Wis. 286; Peoples *v.* Devault, 11 Heisk. (Tenn.) 431.

Custom.— Hillsburg *v.* Harrison, 2 Colo. App. 298, 30 Pac. 355.

Documentary evidence.— Flinn *v.* Ferry, 127 Cal. 648, 60 Pac. 434; Austin *v.* Terry, 38 Colo. 407, 88 Pac. 189; Churchill *v.* More, 4 Colo. App. 219; 88 Pac. 290; New York City State Bank *v.* Waterhouse, 70 Conn. 76, 38 Atl. 904, 66 Am. St. Rep. 82; Richbourg *v.* Rose, 53 Fla. 173, 44 So. 69, 125 Am. St. Rep. 1061; Mattingly *v.* Crowley, 42 Ill. 300; Haberer *v.* Walzer, 109 Ill. App. 371; Kahn *v.* Hayes, 22 Ind. App. 182, 53 N. E. 430; Fox *v.* Cox, 20 Ind. App. 61, 50 N. E. 92; Powers *v.* Benson, 120 Iowa 428, 94 N. W. 929; Benn *v.* Oliver, (Iowa 1899) 80 N. W. 392; Parkhurst *v.* Sharp, (Kan. App. 1900) 61 Pac. 531; French *v.* Parker, (Kan. App. 1898) 52 Pac. 910; Metropolitan Lumber Co. *v.* McColeman, 140 Mich. 333, 103 N. W. 809; Berger *v.* Clippert, 53 Mich. 468, 19 N. W. 149; Bennett *v.* Schuster, 24 Minn. 383; Finnell *v.* Million, 99 Mo. App. 552, 74 S. W. 419; Christian *v.* Smith, 85 Mo. App. 117; Wilson *v.* City Nat. Bank, 51 Nebr. 87, 70 N. W. 501; Northwall Co. *v.* McCormick Harvester Mach. Co., 2 Nebr. (Unoff.) 699, 89 N. W. 767; Snyder *v.* Anderson, 1 Nebr. (Unoff.) 406, 95 N. W. 698; Leavitt *v.* Shook, 47 Oreg. 239, 83 Pac. 391; Lynch *v.* Welsh, 3 Pa. St. 294; Cox *v.* Burdett, 23 Pa. Super. Ct. 346; Saenz *v.* Mumme Co., (Tex. Civ. App. 1905) 85 S. W. 59; Price Baking Powder Co. *v.* Rinear, 17 Wash. 95, 49 Pac. 223; Halford *v.* Dillon, 2 B. & B. 12, 4 Moore C. P. 381, 6 E. C. L. 16.

36. Mattoon Heat, etc., Co. *v.* Walker, 134 Ill. App. 414 (holding, however, that it is

value on property is competent against him as an admission.[37] Evidence of the cost of manufacturing an article and transporting it to market,[38] and of the state of the market as to supply and demand,[39] is admissible to show value, or to aid in assessing damages. Estimates in an appraisal of property made by one whose action does not legally affect the party against whom the evidence is offered is incompetent.[40] In mitigation of damages it has been held that plaintiff in replevin may prove a return of the property, or a part of it, to defendant,[41] or payments on the judgment under which the property replevied was seized,[42] after the commencement of the replevin suit, and before judgment. And after plaintiff in replevin has been nonsuited, he may still show that defendant has sustained no substantial damages, for the reason that he was not the owner of the property.[43]

b. Time of Valuation. Evidence showing the value of the property some time previous to the bringing of an action for its recovery or the value thereof is admissible, the lapse of time being an objection going to its weight, and not to its competency.[44] So it is competent to show the condition of the property at

not competent to show by evidence the value of the property involved in an action of replevin merely to lay the foundation of an appeal to the supreme, rather than to the appellate, court); Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465; Gurley *v.* Bunch, 130 Mo. App. 665, 108 S. W. 1109; Hoffman *v.* Gundrun, 15 N. Y. Suppl. 98 (holding that in replevin for goods sold under execution against a third person, the price which the goods brought at the execution sale is not conclusive, and evidence is admissible to show their actual value). And see Ellis *v.* Simpkins, 81 Mich. 1, 45 N. W. 646, holding that where defendant had been permitted to show the speed of certain horses of the blood of the one sued for, it was error not to allow plaintiff, on rebuttal, to show that certain horses of the same blood had not developed into fast trotters.

Only the value of the property in suit is material, and evidence as to the value of other property described in a bill of sale under which plaintiff claims is inadmissible. Burrill *v.* Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824.

Where the property cannot be delivered in specie, it is not error to permit plaintiff to show the value to aid the jury in assessing his damages. Miller *v.* Hahn, 84 N. C. 226.

The quality of the property may be shown as a means of showing value. Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

Place of valuation.— In an action against a sheriff in replevin for certain property seized by such sheriff while the property was in transit, evidence as to the market value of such property at the place of shipment is admissible, as tending to show, in connection with other testimony, its market value at the place of detention. Newton *v.* Brown, 1 Utah 287.

37. Curme *v.* Rauh, 100 Ind. 247; Drake *v.* Auerbach, 37 Minn. 505, 35 N. W. 367, holding that in claim and delivery, when the value of the property cannot be determined by the ordinary rule of market value, it is not error to permit a jury to consider the owner's estimate of its worth to him.

Plaintiff's affidavit of the value of the property, made in suing out the writ, is competent, but not conclusive, evidence of the value as against plaintiff. Lamy *v.* Remuson, 2 N. M. 245; Gilroy *v.* Everson-Hickok Co., 118 N. Y. App. Div. 733, 103 N. Y. Suppl. 620 [*affirmed* in 190 N. Y. 551, 83 N. E. 1125], holding that an affidavit made four years before the trial is insufficient proof upon which to base a finding of value at the time of the trial. And see *infra*, IV, I, 2, b.

38. Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144.

39. Washington Ice Co. *v.* Webster, 68 Me. 449.

40. Cassidy *v.* Elias, 90 Pa. St. 434. And see Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

41. De Witt *v.* Morris, 13 Wend. (N. Y.) 496.

42. Booth *v.* Ableman, 20 Wis. 21, 88 Am. Dec. 730.

But under N. Y. Code Civ. Proc. § 1726, requiring the jury, in replevin, where the verdict is for plaintiff, and the property is in defendant's possession, to assess the value of the property at the date of the trial, evidence that defendant paid a mortgage on the property after the commencement of the action is not admissible. Devlin *v.* Kosel, 3 Misc. 40, 22 N. Y. Suppl. 361 [*affirmed* in 142 N. Y. 676, 37 N. E. 824].

43. Harman *v.* Goodrich, 1 Greene (Iowa) 13; Belt *v.* Worthington, 3 Gill & J. (Md.) 247.

44. Denton *v.* Smith, 61 Mich. 431, 28 N. W. 160; Brewster *v.* Silliman, 38 N. Y. 423, at least when supplemented by evidence that the condition of the property had not changed. But see Gilroy *v.* Everson-Hickok Co., 118 N. Y. App. Div. 733, 103 N. Y. Suppl. 620 [*affirmed* in 190 N. Y. 551, 83 N. E. 1125] (holding that it was error, in replevin, to admit as evidence of the value of the property at the time of the trial the affidavit of plaintiff made four years before); McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200 (holding that, in replevin to recover a race-horse, evidence of his value several

any time after the commencement of the action and before judgment, such condition being a result of the detention.[45]

3. Taking and Detention of Property. Any legal evidence tending to prove the wrongful taking or detention of the property replevied,[46] such as proof of demand and refusal,[47] or any evidence tending to justify such taking or detention,[48] is admissible. But evidence showing the intention of defendant in taking and appropriating the property is immaterial, since his liability does not depend upon his intention.[49]

4. Title and Right to Possession in General. Where a party to an action of replevin claims title or right to possession of the property, any evidence tending to establish his claim, or the title of the person under whom he claims, is admissible.[50] Thus declarations of the parties or of third persons alleged to have an

months before the action was brought is inadmissible).

45. Miami Powder Co. *v.* Port Royal, etc., R. Co., 47 S. C. 324, 25 S. E. 153, 58 Am. St. Rep. 880.

46. Johnson *v.* Howe, 7 Ill. 342 (where, in an action of replevin for a horse, plaintiff offered to prove that defendant gave a general order to his servants before the commencement of the suit not to deliver the horse to plaintiff, and it was held that the evidence was admissible as tending to prove an unlawful detention); Black *v.* Foster, 28 Barb. (N. Y.) 387, 7 Abb. Pr. 406; Cothran *v.* Knight, 45 S. C. 1, 22 S. E. 596. And see Bloodworth *v.* Stevens, 51 Miss. 475, holding that, in an action of replevin testing the legality of a distress for rent, the issue presented as to the "unlawful taking" rests on the fact whether the rent is or is not due, and the tenant may show any matter competent to discharge this liability.

47. Belknap Sav. Bank *v.* Robinson, 66 Conn. 542, 34 Atl. 495; Toomey *v.* Woodruff, 50 Mich. 31, 14 N. W. 689.

48. Townsend *v.* Newell, 14 Pick. (Mass.) 332; Hubbardston Lumber Co. *v.* Covert, 35 Mich. 254.

49. Ecker *v.* Moore, 2 Pinn. (Wis.) 425, 2 Chandl. 85.

50. *Kansas.*— St. John State Bank *v.* Norduff, 2 Kan. App. 55, 43 Pac. 312.

Maryland.— Brooke *v.* Berry, 1 Gill 153.

Massachusetts.— Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131; Hosmer *v.* Moseley, 11 Cush. 211, holding that on the issue as to whether plaintiff's title is real or only colorable, plaintiff may show in support of his title that he assumed liabilities concerning the property of such a character as might naturally be expected of a *bona fide* holder.

Michigan.—Marthinson *v.* Wagner, 63 Mich. 543, 30 N. W. 184.

Wisconsin.— Lill's Chicago Brewery Co. *v.* Russell, 22 Wis. 178.

See 42 Cent. Dig. tit. "Replevin," § 289.

The making of a chattel mortgage is an act of dominion so as to be some evidence of title in the mortgagor, where the question is whether the chattels were the property of the mortgagor or of a third party who witnesses his signature to a mortgage, and there is independent evidence of possession in the mortgagor. Eames *v.* Snell, 143 Mass. 165, 9 N. E. 522.

Quality of property.— On an issue, in replevin for lumber, as to whether it was cut from a lot of logs belonging to plaintiff, or another lot, the quality of the lumber was admissible to show ownership, where it appeared that the two lots of logs were of different qualities. Jenkins *v.* Steanka, 19 Wis. 126, 88 Am. Dec. 675.

Although plaintiff is nonsuited, he may still, under the Iowa statute, offer testimony to prove ownership of the property in himself, upon inquiry into the right of defendant's possession. Harman *v.* Goodrich, 1 Greene (Iowa) 13.

The writ upon which property was attached, with the officer's return upon it, and the schedule of the attached property, are admissible in evidence, in an action of replevin to recover the property, in justification of defendant's title, and are not rendered incompetent by the fact that, at the time when the replevin suit was brought, execution had been issued and levied upon the property attached. Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131.

Consideration.— Where defendant claimed to be the owner of property which formerly belonged to plaintiff's husband, evidence of consideration passing from defendant to plaintiff's husband is material, and should be admitted. Wallace *v.* Wallace, 62 Iowa 651, 17 N. W. 905.

Insurance of goods.— In claim and delivery for tobacco sold to plaintiffs, evidence that plaintiffs had insured the tobacco immediately after the sale was competent, especially in view of their evidence that it was agreed that the tobacco, if burnt, should be plaintiffs' loss. Andrews *v.* Grimes, 148 N. C. 437, 62 S. E. 519.

Where defendant is a constable, his interest in the property is limited to the execution debtor's interest and plaintiff is entitled to show that the interest of the latter is merely nominal and of no value. Gillham *v.* Kerone, 45 Mo. 487.

In replevin by a legatee against the executor for a specific bequest testimony from the legatee tending to show that the property had been promised to him before the testator's death, but not as a gift *in præsenti* or *causa mortis*, is inadmissible. Eberstein *v.* Camp, 37 Mich. 176.

The books of account of a third person, not a party to the suit, are not admissible to

interest in the property, bearing on the question of title or right to possession of the property, are admissible.[51] So where one of the parties claims the property under a sale or mortgage, he may introduce the mortgage, or bill of sale, in evidence,[52] unless the genuineness of the instrument is questioned, and no attempt is made to establish the same.[53] On the other hand, it is competent for defendant to offer any evidence which may tend to show that plaintiff did not have the title or right of possession at the time the action was commenced.[54] Thus evidence of title in plaintiff may be rebutted by showing title in a third person.[55] But evidence on behalf of defendant that persons other than plaintiff claim the property is not admissible unless it is shown, or offered to be shown, that the right claimed is derived through plaintiff or owner of such property.[56]

5. Fraud. In replevin evidence is admissible in behalf of either party to prove fraud or bad faith in the acquisition of the property.[57]

J. Weight and Sufficiency of Evidence — 1. In General. The rules applicable to weight and sufficiency of evidence in civil actions generally [58] apply in actions of replevin.[59] In some jurisdictions it has been held that in an action of replevin in the *detinet* alone, the same proof is required as in an action of trover and conversion.[60]

2. Title and Right to Possession. Proof by plaintiff of ownership and right

prove ownership in an action of replevin. Watrous *v.* Cunningham, 65 Cal. 410, 4 Pac. 408.

On rebuttal plaintiff will not be permitted to make out a different right from that on which he rested his case in the first instance. Woolston *v.* Smead, 42 Mich. 54, 3 N. W. 251.

In Louisiana, in an exclusively possessory action, neither party can give evidence of title. An exception would probably take place where the extent of possession was disputed. Sears *v.* Wilson, 5 La. Ann. 689.

Evidence held immaterial on issue of title. — See Lansley *v.* Van Alstyne, 81 Iowa 476, 46 N. W. 1119; Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465; Gould *v.* Sanders, 69 Mich. 5, 37 N. W. 37; Edmunds *v.* Leavitt, 27 N. H. 198.

51. *Iowa.*— Wallace *v.* Wallace, 62 Iowa 651, 17 N. W. 905.

Massachusetts.— Bray *v.* Raymond, 166 Mass. 146, 44 N. E. 131.

Michigan.— Doyle *v.* Dobson, 74 Mich. 562, 42 N. W. 137.

New York.— Siedenbach *v.* Riley, 111 N. Y. 560, 19 N. E. 275.

Pennsylvania.— Orner *v.* Hollman, 4 Whart. 45.

Wisconsin.— Rohrer *v.* Lockery, 136 Wis. 532, 117 N. W. 1060.

See 42 Cent. Dig. tit. "Replevin," § 289.

Identity of purchaser.— Where an issue is raised as to the identity of the purchaser of certain property at a given sale, a conversation that took place while the sale was being made, between the seller and other persons present, is admissible. Watrous *v.* Cunningham, 71 Cal. 30, 11 Pac. 811.

52. Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590 (holding that a bill of sale to a plaintiff in replevin from a third party through whom he claims title is not inadmissible as *res inter alios acta*); Lansley *v.* Van Alstyne, 81 Iowa 476, 46 N. W. 1119; Shattuck *v.* Hall, 3 Kan. App. 374, 42 Pac. 1101.

53. Bray *v.* Flickinger, 79 Iowa 313, 44 N. W. 554.

54. Idaho Placer Min. Co. *v.* Green, 14 Ida. 249, 93 Pac. 954.

55. Brown *v.* Webster, 4 N. H. 500.

56. Kennett *v.* Fickel, 41 Kan. 211, 21 Pac. 93.

57. Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242 (holding that in replevin by an assignee for creditors of property attached by creditors of the assignor while in the assignee's possession, the creditors may show the fraudulent character of the assignment); Chamberlain *v.* Stern, 11 Nev. 268; Dutchess County Mut. Ins. Co. *v.* Hachfield, 73 N. Y. 226.

58. See, generally, Evidence, 17 Cyc. 753.

59. Evidence held sufficient.— *Delaware.*— Haines *v.* Wise, 4 Harr. 243.

Georgia.— Taylor *v.* Dobson, 89 Ga. 361, 15 S. E. 470.

Indiana.— Boesker *v.* Pickett. 81 Ind. 554.

Nebraska — Nunn *v.* Home Ins. Co., 31 Nebr. 39, 47 N. W. 467.

New Hampshire.— Edmunds *v.* Leavitt, 27 N. H. 198.

Texas.— Davenport *v.* Abbott, (Civ. App. 1894) 28 S. W. 218.

Wisconsin.— Murray *v.* Norwood, 77 Wis. 405, 46 N. W. 499.

England.— Gladman *v.* Plumer, 10 Jur. 109, 15 L. J. Q. B. 79.

See 42 Cent. Dig. tit. "Replevin," § 292.

Evidence held insufficient.—Jetton *v.* Smead, 29 Ark. 372; Truitt *v.* Revill, 4 Harr. (Del.) 71; Messer *v.* Bailey, 31 N. H. 9; Ewing *v.* Vanarsdall, 1 Serg. & R. (Pa.) 370.

60. Ingalls *v.* Bulkley, 13 Ill. 315. But see Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607, holding that in an action of replevin in the *detinet* the proof of refusal need not be as strong as in trover.

to possession makes a *prima facie* case, and a nonsuit should not be granted.[61] Proof of actual possession of property makes a *prima facie* case of title and right sufficient to support replevin against any but the true owner or one connecting his title with him;[62] but proof of a short possession, at a remote time, by plaintiff or his predecessor in title, is insufficient for that purpose.[63] Proof that property was levied on and sold under a valid execution, issued on a valid judgment, and that defendant became the purchaser, is sufficient to sustain a plea of ownership in himself.[64]

3. Taking and Detention of Property. Proof of the unlawful taking or detention of property, in replevin, may be made by any circumstances which go to satisfy the jury.[65] Thus proof of a demand and refusal,[66] or any circumstances

61. Youmans *v.* Caldwell, 4 Ohio St. 71; Kebabian *v.* Adams Express Co., 27 R. I. 564, 65 Atl. 271. And see the following cases where the evidence was held to make out a *prima facie* case of title or right to possession in plaintiff: Oxley State Co. *v.* Staggs, 59 Ark. 370, 27 S. W. 241; Elliott *v.* Elliott, 137 Iowa 290, 114 N. W. 1074; Western Realty Co. *v.* Musser, 97 Mo. App. 114, 71 S. W. 100; National Brewery Co. *v.* Lindsay, 72 Mo. App. 591; Govin *v.* De Miranda, 140 N. Y. 474, 35 N. E. 626; Krebs Lithographic Co. *v.* Studor, 9 Ohio Dec. (Reprint) 199, 11 Cinc. L. Bul. 190; Charlotte Furnace Co. *v.* Stouffer, 127 Pa. St. 336, 17 Atl. 994; Church *v.* Foley, 10 S. D. 74, 71 N. W. 759; Warder, etc., Co. *v.* Ingli, 1 S. D. 155, 46 N. W. 181; McCole *v.* Varnum, 64 Vt. 163, 23 Atl. 635.

Evidence held insufficient to prove plaintiff's title or right to possession: Beal *v.* McKee, 145 Ala. 659, 39 So. 664; Robinson *v.* Calloway, 4 Ark. 94; Austin *v.* Terry, 38 Colo. 407, 88 Pac. 189; Parker *v.* Foster, 29 Ill. App. 586; Brunson *v.* Volunteer Carriage Co., (Miss. 1908) 47 So. 377; Hoffman House *v.* Barkley, 111 N. Y. App. Div. 564, 97 N. Y. Suppl. 1095; Wheeler *v.* Vanderveer, 88 Hun (N. Y.) 233, 34 N. Y. Suppl. 799; Klingenstein *v.* Belsinger, 34 Misc. (N. Y.) 804, 68 N. Y. Suppl. 1130; Klee *v.* Grant, 2 Misc. (N. Y.) 412, 21 N. Y. Suppl. 1010 [*affirming* 17 N. Y. Suppl. 845]; Wagner Typewriter Co. *v.* Robinson, 84 N. Y. Suppl. 281.

An allegation of absolute ownership of property in an action of replevin has been held to be sustained by evidence which shows plaintiff to be a chattel mortgagee in possession. Falk *v.* Decou, 8 Kan. App. 765, 61 Pac. 760.

A claim of individual ownership is not sustained by evidence of title in a corporation of which plaintiff is a member. Dederick *v.* Brandt, 16 Ind. App. 264, 44 N. E. 1010.

Where the rights of a party are based on written leases of the parties from whom he claimed, the failure to offer in evidence such written leases will defeat the action. Johannson *v.* Miller, 45 Nebr. 53, 63 N. W. 141.

62. Springfield Grocer Co. *v.* Shackelford, 56 Mo. App. 642; Cheeseman *v.* Fenton, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010; Webb *v.* Phillips, 80 Fed. 954, 26 C. C. A. 272.

63. Webb *v.* Phillips, 80 Fed. 954, 26 C. C. A. 272.

64. O'Connor *v.* Union Line Transp. Co., 31 Ill. 230; Graham *v.* Carpenter, 35 Nebr. 782, 53 N. W. 992.

Proof that an officer holds property pursuant to an execution issued on a judgment suffices *prima facie* for the regularity of his claim to possession. Gruber *v.* Janns, 84 N. Y. Suppl. 882. It is not necessary that an officer bringing replevin to recover possession of goods on which he has made a valid levy should produce in evidence the judgment on which the execution under which the levy was made was founded. Pugh *v.* Calloway, 10 Ohio St. 488. But a purchaser of personal property at a sheriff's sale cannot maintain replevin against a party who subsequently causes the same property to be sold by virtue of a judgment and execution in his favor, without producing the judgment and execution under which his purchase was made. Sandeford *v.* Hess, 2 Head (Tenn.) 680.

65. Gray *v.* Nations, 1 Ark. 557 (holding that any evidence which shows that defendant obtained possession of the goods from any person not authorized to sell or transfer the same is sufficient evidence of an unlawful taking); Cranz *v.* Kroger, 22 Ill. 74.

Upon the plea of non cepit proof that defendant had the goods at the place alleged is sufficient to entitle plaintiff to recover. McLeod *v.* McMillan, 5 N. Brunsw. 64. So, on the issue of *non cepit*, proof that defendant took the property as an officer is sufficient proof of the caption. Harris *v.* D'Wolf, 4 Pet. (U. S.) 147, 7 L. ed. 811 [*affirming* 8 Fed. Cas. No. 4,221, 4 Mason 515].

Evidence held sufficient to show wrongful taking or detention.— See Aman *v.* Mottweiler, 15 Ind. App. 405, 44 N. E. 63; Faget *v.* Brayton, 2 Harr. & J. (Md.) 350; Goodell *v.* Ward, 17 Minn. 17; Crum *v.* Elliston, 33 Mo. App. 591; Oyler *v.* Dautoff, 36 Oreg. 357, 59 Pac. 474; Deal *v.* Potter, 26 U. C. Q. B. 578.

Evidence held insufficient to show wrongful detention.— See Brand *v.* Hedwick, 43 Kan. 131, 23 Pac. 111; Welton *v.* Holmes, 6 N. Y. St. 546.

Evidence held insufficient to sustain defense that goods replevied were in custody of law. See Reeside *v.* Fischer, 2 Harr. & G. (Md.) 320.

66. Cranz *v.* Kroger, 22 Ill. 74; Kelly *v.* Burchfield, 27 Kan. 700.

going to show that a demand would have been unavailing, or a refusal to listen to a demand,[67] would be sufficient.

4. Sufficiency to Support Verdict or Finding. Where the evidence makes a *prima facie* case for plaintiff, if a verdict is rendered for defendant, a new trial should be granted.[68] A judgment for plaintiff in replevin is not warranted where it does not appear that defendant is in possession of the goods or claiming title thereto.[69] In some jurisdictions it is held that a finding in replevin of a general ownership in a party to the action is not sustained by proof of a special interest in the property.[70] To support a verdict for damages, it is essential that there should be proof that such damages were in fact sustained.[71]

V. Trial, Judgment, Enforcement of Judgment, and Review.

A. Dismissal or Nonsuit in General — 1. Voluntary — a. Where Plaintiff Obtains Possession of Property — (i) *In General.* In an action of replevin both parties are regarded as equally actors;[72] and where plaintiff in replevin has been put in possession of property under his writ he cannot be permitted to escape liability to defendant by suffering a nonsuit or dismissing his action,[73]

67. Cranz *v.* Kroger, 22 Ill. 74.

68. Sharp *v.* McBride, 69 Ind. 396; Sather *v.* Sexton, 93 Minn. 480, 101 N. W. 654.

Evidence held to support the verdict or findings: Day *v.* Ferguson, 74 Ark. 298, 85 S. W. 771; Moran *v.* Lennon, (Cal. 1900) 59 Pac. 941; More *v.* Finger, (Cal. 1899) 58 Pac. 322, 123 Cal. 313, 60 Pac. 933; Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710; Black *v.* Black, 74 Cal. 520, 16 Pac. 311; Alper *v.* Tormey, 3 Cal. App. 396, 85 Pac. 661; Crowley *v.* Shepard, 38 Colo. 345, 88 Pac. 177; Parker *v.* Freeman, 11 Colo. 576, 19 Pac. 601; Gross *v.* Watkins, 11 Colo. 550, 19 Pac. 539; Demmons *v.* Booker, 128 Ga. 83, 57 S. E. 108; Schweinfurth *v.* Matson, 37 Ill. App. 62; Mariotte *v.* Bremer, 33 Ind. App. 701, 71 N. E. 250; Jordan *v.* Crickett, 123 Iowa 576, 99 N. W. 163; Crawford *v.* Hurd, 106 S. W. 849, 32 Ky. L. Rep. 636; Graham *v.* Strawsburg, 91 S. W. 737, 28 Ky. L. Rep. 1204; Dugan *v.* Nichols, 125 Mass. 576; Nicholson *v.* Dyer, 45 Mich. 610, 8 N. W. 515; Jones *v.* Minnesota, etc., R. Co., 97 Minn. 232, 106 N. W. 1048; Denison *v.* Sawyer, 95 Minn. 417, 104 N. W. 305; Caldwell *v.* Bruggerman, 8 Minn. 286; Maloney *v.* Neville, 128 Mo. App. 616, 107 S. W. 4; Koelling *v.* August Gast Bank Note, etc., Co., 97 Mo. App. 664, 71 S. W. 728; Gravert *v.* Goothard, 81 Nebr. 99, 115 N. W. 559; May *v.* Mendota First Nat. Bank, 74 Nebr. 251, 104 N. W. 184; Byrnes *v.* Eley, 70 Nebr. 283, 97 N. W. 298; Cook *v.* Vaughan, 1 Nebr. (Unoff.) 244, 95 N. W. 333; Johnson *v.* Neal, 32 Nebr. 14, 48 N. W. 897; Knapp *v.* Mahurin, 72 N. H. 595, 56 Atl. 315; Marigliano *v.* O'Connor, 99 N. Y. Suppl. 544; Reber *v.* Schroeder, 221 Pa. St. 152, 70 Atl. 556; Kebabian *v.* Adams Express Co., 28 R. I. 177, 66 Atl. 201; Longerbeam *v.* Huston, 20 S. D. 254, 105 N. W. 743; Church *v.* Foley, 10 S. D. 74, 71 N. W. 759.

Evidence held insufficient to support the verdict or findings: Day *v.* Ferguson, 74 Ark. 298, 85 S. W. 771; Wheeler *v.* Kassabaum, 76 Cal. 90, 18 Pac. 119; Duquesne Mfg. Co. *v.* Williams, 79 Ill. App. 276; Aultman *v.* Richardson, 21 Ind. App. 211, 52 N. E. 86; Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470; Cosgrove *v.* Kohler, 45 Minn. 148, 47 N. W. 539; Heyward *v.* Maynard, 119 N. Y. App. Div. 66, 103 N. Y. Suppl. 1028; National Cash Register Co. *v.* Agne, 43 N. Y. App. Div. 605, 60 N. Y. Suppl. 348; Chandless *v.* Globe Storage, etc., Co., 49 Misc. (N. Y.) 562, 98 N. Y. Suppl. 511; Shapiro *v.* Lankay, 35 Misc. (N. Y.) 39, 70 N. Y. Suppl. 218; Lindenkohl *v.* Weber, 3 Misc. (N. Y.) 27, 21 N. Y. Suppl. 1079; Ehrman *v.* Simpson, 110 N. Y. Suppl. 481; Dutch *v.* Parker, 97 N. Y. Suppl. 966; Schlitz Brewing Co. *v.* Grimmon, 28 Nev. 235, 81 Pac. 43; Harrison Bank *v.* Porter, 17 Okla. 256, 87 Pac. 585; Adler, etc., Clothing Co. *v.* Thorp, 102 Wis. 70, 78 N. W. 184.

Submission of question to jury. — In replevin for a piano sold to defendant on credit, evidence of the amount it was sold for, and that it had since been damaged in a certain amount, is sufficient to authorize the court in submitting the question of value to the jury. Story, etc., Piano Co. *v.* Gibbons, 96 Mo. App. 218, 70 S. W. 168.

69. Peninsular Stove Co. *v.* Ellis, 20 Ind. App. 491, 51 N. E. 105.

70. Schmitt, etc., Co. *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99.

Finding of special ownership sustained by evidence of lien. — Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

71. Mann *v.* Grove, 4 Heisk. (Tenn.) 403, holding that a verdict in replevin will be set aside, where damages are assessed in favor of defendant without proof of damages other than the value of the property at an indefinite time, and the fact and time of replevin.

72. Barrett *v.* Forrester, 1 Johns. Cas. (N. Y.) 247; Manix *v.* Howard, 82 N. C. 125.

73. *Kentucky.* — Rogers *v.* Bradford, 8 Bush 163.

Nebraska. — Vose *v.* Muller, 48 Nebr. 602, 67 N. W. 598; Garber *v.* Palmer, 47 Nebr. 699, 66 N. W. 656; Ahlman *v.* Meyer, 19 Nebr. 63, 26 N. E. 584; Moore *v.* Herron, 17

without the consent of the latter.[74] After the property has been seized and delivered to plaintiff defendant becomes the virtual plaintiff in the case.[75] Plaintiff cannot and does not thereby deprive defendant of his right to establish his title and right to possession, and obtain a judgment for the return of the property or its value,[76] and damages for the taking and withholding of the property.[77] If the rule were otherwise plaintiff, under color of legal process, would perpetrate a fraud on the law and be allowed to keep property, the title to which was *prima facie* in defendant from whom it was taken at the beginning of the suit.[78]

(II) *Return of Property or Judgment For Its Value.* In most jurisdictions if the property shall have been delivered to plaintiff, and defendant recover judgment by discontinuance or nonsuit, such judgment shall be that defendant have return of the property replevied, with damages for the detention,[79]

Nebr. 697, 703, 24 N. E. 425, 451; Aultman *v.* Reams, 9 Nebr. 487, 4 N. W. 81; Cook *v.* Vaughn, 1 Nebr. (Unoff.) 244, 95 N. W. 333.

North Carolina.— Manix *v.* Howard, 82 N. C. 125.

Pennsylvania.— Broom *v.* Fox, 2 Yeates 530.

South Carolina.— Younger *v.* Massey, 41 S. C. 50, 19 S. E. 125.

United States.— Jumeau *v.* Brooks, 109 Fed. 353, 48 C. C. A. 397.

See 42 Cent. Dig. tit. "Replevin," § 320.

74. Corbett *v.* Pond, 10 App. Cas. (D. C.) 17; Hall *v.* Smith, 10 Iowa 45 (holding likewise that defendant by assenting to such dismissal will not waive his right on the bond); Houck *v.* Linn, 56 Nebr. 743, 77 N. W. 51; Saussay *v.* W. J. Lemp Brewing Co., 52 Nebr. 627, 72 N. W. 1026; Garber *v.* Palmer, etc., Co., 47 Nebr. 699, 66 N. W. 656; Lamkin *v.* Rosenthal, 5 N. Y. App. Div. 532, 39 N. Y. Suppl. 483.

Consent of one of several defendants, the others having adverse interests to his, and who do not consent that the suit be dismissed on turning over the property to him, is insufficient. Saunders *v.* Closs, 117 Mich. 130, 75 N. W. 295. And one of defendants in replevin cannot bind other defendants, having interest adverse to his, by an agreement between them to which such other defendants do not consent, to discontinue the action without costs, and turn over the property to such defendants. Fowler *v.* Hosmer, 105 Mich. 90, 62 N. W. 1028; Williams *v.* McGrade, 18 Minn. 82.

An agent has no power to consent to dismissal in the absence of special authority to do so. Lamkin *v.* Rosenthal, 5 N. Y. App. Div. 532, 39 N. Y. Suppl. 483.

Under the statutes of Mississippi a tenant who replevies property distrained for rent may dismiss the action without leave of court. The statutes provide that if plaintiff in a writ of replevin of property distrained for rent make default or fail to prosecute the same, like judgment shall be entered against him and his sureties as on an issue found against him, and no new replevin or writ shall be allowed. Maxey *v.* White, 53 Miss. 80.

75. Corbett *v.* Pond, 10 App. Cas. (D. C.) 17.

76. *Kansas.*— McVey *v.* Burns, 14 Kan. 291.

Kentucky.— Rogers *v.* Bradford, 8 Bush 163.

Mississippi.— See Bernheimer *v.* Martin, 66 Miss. 486, 6 So. 326.

Missouri.— Berghoff *v.* Heckwolf, 26 Mo. 511; Collins *v.* Hough, 26 Mo. 149; Smith *v.* Winston, 10 Mo. 299. And see Nelson *v.* Luchtemeyer, 49 Mo. 56.

Nebraska.— Vose *v.* Muller, 48 Nebr. 602, 67 N. W. 598; Moore *v.* Herron, 17 Nebr. 697, 703, 24 N. W. 425, 451; Aultman *v.* Reams, 9 Nebr. 487, 4 N. W. 81.

New Mexico.— Brannin *v.* Bremen, 2 N. M. 40.

New York.— Lamkin *v.* Rosenthal, 5 N. Y. App. Div. 532, 39 N. Y. Suppl. 483; Rosenberg *v.* Flack, 57 Hun 587, 10 N. Y. Suppl. 759, holding that where replevin against a sheriff to recover goods levied on as the property of the execution debtor is discontinued by plaintiff without returning the goods to the sheriff, the discontinuance will be set aside, and the execution debtor allowed to contest the claim of plaintiff in replevin.

North Carolina.— Manix *v.* Howard, 82 N. C. 125.

Pennsylvania.— Brom *v.* Fox, 2 Yeates 530. And see Heilman *v.* McKinstry, 24 Pa. Co. Ct. 185, holding that the contention that a court has no power to set aside a voluntary nonsuit in an action of replevin and reinstate the case on the docket for the next term, because an action had accrued on the replevin bond, and that therefore damage would result to defendant, cannot be sustained, since, if on the trial the judgment is for defendant for the possession of the goods, he is protected from loss by his bond, and if judgment is against him, he would suffer no loss by their detention.

Tennessee.— Nashville Ins., etc., Co. *v.* Alexander, 10 Humphr. 378.

Washington.— Liebmann *v.* McGraw, 3 Wash. 520, 28 Pac. 1107.

See 42 Cent. Dig. tit. "Replevin," § 320 *et seq.*

77. Rogers *v.* Bradford, 8 Bush (Ky.) 163.

78. Manix *v.* Howard, 82 N. C. 125.

79. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139.

Georgia.— Smith *v.* Adams, 79 Ga. 802, 5 S. E. 242; Glover *v.* Gore, 74 Ga. 680.

or for the value of the property replevied, in which case such value shall be assessed upon the trial, or upon assessment of damages.[80] The judgment, it has been held, should be in the alternative — for the specific property if it can be had and if not for their value as assessed by the jury.[81] However, in some jurisdictions judgment on a discontinuance of replevin is for costs only, and not for a return, the remedy by action on the bond being held exclusive.[82]

b. Where Property Is Not Taken Under Writ or Is Returned to Defendant. It has been held though that the action may be dismissed if the property has not been taken under the writ,[83] or if taken has been returned to defendants on the failure of plaintiff to furnish the requisite bond,[84] or on restoration of the property to defendant on his giving the requisite bond.[85]

2. Involuntary — a. Grounds — (1) *Want of Prosecution.* The common-law rule is that in replevin defendant cannot move for judgment as in case of nonsuit for failure of plaintiff to proceed to trial. Both parties are regarded as actors in such action and either may bring the case to trial.[86] Now, however, in some jurisdictions, by statutory provision, actions of replevin present no exception to the general rule authorizing nonsuit for failure to prosecute actions.[87]

Indiana.— Mikesill *v.* Chaney, 6 Ind. 52.

Iowa.— Crist *v.* Francis, 50 Iowa 257; Marshall *v.* Bunker, 40 Iowa 121; Chadwick *v.* Miller, 6 Iowa 34.

Kentucky.— Rogers *v.* Bradford, 8 Bush 163; Kerley *v.* Hume, 3 T. B. Mon. 181.

Maine.— Washington Ice Co. *v.* Webster, 68 Me. 449.

Mississippi.— Bernheimer *v.* Martin, 66 Miss. 486, 6 So. 326.

Missouri.— Nelson *v.* Luchtemeyer, 49 Mo. 56; Berghoff *v.* Heckwolf, 26 Mo. 511; Smith *v.* Winston, 10 Mo. 299.

Montana.— Dahler *v.* Steele, 1 Mont. 206.

Tennessee.— Nashville Ins., etc., Co. *v.* Alexander, 10 Humphr. 378.

Washington.— Liebmann *v.* McGraw, 3 Wash. 520, 20 Pac. 1107.

Wisconsin.— Saunderson *v.* Lace, 2 Pinn. 257, 1 Chandl. 231.

United States.— Cammeyer *v.* Durham House Drainage Co., 35 Fed. 51.

See 42 Cent. Dig. tit. "Replevin," § 324.

80. Blake *v.* Powell, 26 Kan. 320; McVey *v.* Burns, 14 Kan. 291; Treadwell *v.* Paddock, 75 Mich. 286, 42 N. W. 820; People *v.* Tripp, 15 Mich. 518; Berghoff *v.* Heckwolf, 26 Mo. 511; Collins *v.* Hough, 26 Mo. 149; Smith *v.* Winston, 10 Mo. 299; Garber *v.* Palmer, 47 Nebr. 699, 66 N. W. 656. See also Knox *v.* Noble, 25 Kan. 449. *Compare* Stack *v.* Smith, 54 Mich. 238, 19 N. W. 968 (holding that where in replevin plaintiff discontinues on the adjourned day, and defendant does not appear, he cannot afterward demand judgment for the value of the property replevied from him); Live Oak Ranch Co. *v.* Ingraham, (Tex. Civ. App. 1898) 44 S. W. 588 (holding that where a judgment was rendered for the return of cattle, and not for any money demand against defendant if they could not be found, the jury need not find the value of each one of the herd, although it find the value of the entire herd).

81. Rogers *v.* Bradford, 8 Bush (Ky.) 163; Manix *v.* Howard, 82 N. C. 125.

82. McIlvaine *v.* Holland, 5 Harr. (Del.) 226; Hulman *v.* Benighof, 125 Ind. 481, 25 N. E. 549; Wiseman *v.* Lynn, 39 Ind. 250; Lapp *v.* Ritter, 88 Fed. 108.

Rights of interpleader.— Where defendant in claim and delivery retains the property by filing an undertaking for plaintiff's benefit, a claimant who interpleads may, by filing the affidavit and undertaking required by Code, § 331, either secure possession of the property, or an undertaking for its delivery or the value thereof, and is not entitled to any judgment other than for costs against plaintiff, who may therefore take a nonsuit. Dawson *v.* Thigpen, 137 N. C. 462, 49 S. E. 959.

83. Blandy *v.* Raquet, 14 Minn. 491; Saussay *v.* W. J. Lemp Brewing Co., 52 Nebr. 627, 72 N. W. 1026.

84. Saussay *v.* W. J. Lemp Brewing Co., 52 Nebr. 627, 72 N. W. 1026.

85. Rhoades *v.* McNulty, 52 Mo. App. 301. And see Hackett *v.* Bonnell, 16 Wis. 471, holding that where the property has been redelivered to defendant on his giving bond, plaintiff may dismiss the action on paying costs.

86. Harwood *v.* Smethurst, 30 N. J. L. 230; Ames *v.* Broderick, 18 N. J. L. 297; Barrett *v.* Forrester, 1 Johns. Cas. (N. Y.) 247; Schroeder *v.* Kahelenback, 6 Abb. Pr. 66; Eggleton *v.* Smart, W. Bl. 375, 96 Eng. Reprint 211; Shortridge *v.* Hiern, 5 T. R. 400; Jones *v.* Concannon, 3 T. R. 661. See, however, Snow *v.* Roy, 22 Wend. (N. Y.) 602.

87. Stein *v.* Goodenough, 73 N. J. L. 812, 64 Atl. 961 (holding that a nonsuit against plaintiff directed at circuit, for failure to bring on his case for trial, pursuant to his own notice, is proper, although plaintiff had not filed his replication); Capital Lumbering Co. *v.* Hall, 10 Oreg. 202 (holding that where, in an action for the recovery of specific personal property, plaintiff, to whom the property has been delivered, fails to prosecute, the suit will be dismissed with costs).

(II) *Failure to Give Bond or Defective Bond.* Failure to give bond within the time designated by the court,[88] or within a reasonable time after seizure of the property under the writ,[89] has been held sufficient ground in some jurisdictions for a dismissal of the action. And in some jurisdictions the filing of a defective bond [90] has also been sufficient ground for dismissal where the motion to dismiss has been made at the proper time.[91] Where, however, under the statutes, the action can be prosecuted without a bond, the fact that a bond given is invalid,[92] or that plaintiff is unable to give bond,[93] furnishes no ground for the dismissal of the action, but at most for an order that the property be restored to defendant, leaving the issues of wrongful detention and damages sustained thereby to be tried. Where the property is not restored to plaintiff, it is of course no ground to dismiss that the bond is inoperative, because defendant is not entitled to a bond.[94]

(III) *Failure or Insufficiency of Evidence.* Where the evidence tntroduced by plaintiff shows that he is not entitled to recover,[95] or plaintiff fails no make out a *prima facie* case,[96] a judgment of nonsuit may be entered on defendant's motion. Otherwise, however, where a *prima facie* case has been made out, no matter how insufficient, conflicting, and unsatisfactory the testimony may be.[97] When there is any competent, pertinent, and relevant testimony offered to the facts in dispute, the case passes into the hands of the jury, and beyond the judge.[98]

88. Town *v.* Evans, 11 Ark. 9; Smith *v.* Roby, 6 Heisk. (Tenn.) 546.

89. Morris *v.* Baker, 5 Wis. 389. And see Bent *v.* Bent, 43 Vt. 42, holding that failure of the officer to take a replevin bond as required by statute is ground for dismissal of the action.

90. Houghton *v.* Ware, 113 Mass. 49; Clark *v.* Connecticut River Co., 6 Gray (Mass.) 363; Weed *v.* Hinton, 7 Hill (N. Y.) 157; Whaling *v.* Shales, 20 Wend. (N. Y.) 673.

91. Lathrop *v.* Bowen, 121 Mass. 107; Claflin *v.* Thayer, 13 Gray (Mass.) 459; Bacon *v.* Weston, 11 Cush. (Mass.) 164; Wolcott *v.* Mead, 12 Metc. (Mass.) 516; Simonds *v.* Parker, 1 Metc. (Mass.) 508.

Sureties described as partnerships and signing in partnership names.— It is no ground for dismissing an action of replevin that in the replevin bond taken by the officer serving the writ the sureties are described as partnerships, and have signed and sealed the same in their partnership names; it is not to be assumed that the bond has been executed without authority and does not bind all whom it purports to bind. Judson *v.* Adams, 8 Cush. (Mass.) 556.

92. South Missouri Land Co. *v.* Jeffries, 40 Mo. App. 360. And see Bloomer *v.* Craig, 6 Dana (Ky.) 310.

93. Varner *v.* Bolin, 54 Kan. 380, 38 Pac. 481.

94. Baker *v.* Harper, 1 J. J. Marsh. (Ky.) 103.

95. Lauchheimer *v.* Jacobs, 126 Ga. 261, 55 S. E. 55. See Stout *v.* Watson, 19 Oreg. 251, 24 Pac. 230 (where plaintiff in replevin claimed title to the property, under an appointment which the evidence shows to be void); Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1; Gaynor *v.* Blewitt, 69 Wis. 582, 34 N. W. 725 (holding that in an action for the wrongful detention of personalty, where the real question litigated is the right of possession, if plaintiff's evidence shows simply that he was the owner and that defendant was rightfully in possession as his bailee, a judgment of nonsuit is proper).

96. Levy *v.* Kelter, 63 N. Y. App. Div. 392, 71 N. Y. Suppl. 509; Stone *v.* Rogers, 17 Pa. Super. Ct. 358 (holding that in replevin for certain sheep alleged to be the increment of five sheep claimed by plaintiff, under an alleged agreement in writing, by which the five sheep had been delivered on condition that the increment should be delivered to plaintiff when he became of age, the court commits no error in entering a compulsory nonsuit where the alleged written agreement was not proved and the identity of the original sheep and their certain increase was a matter of mere speculation); Wright *v.* Carp, 16 R. I. 719, 19 Atl. 709; Dodd *v.* Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

Limitations of rule.—Although there is no evidence to sustain an action of replevin a nonsuit will not be granted, if defendants interpose a "second defense" tendering new issues, to which replication is filed whereby the identity of the original action is lost. Meyers *v.* Hart, 3 Colo. App. 392, 33 Pac. 647. So it is not error to refuse to dismiss the action as to certain of defendants, although plaintiff failed to introduce evidence sufficient to charge them, where defendants in their answer jointly justified the taking by virtue of an attachment issued against all the defendants. Brewster *v.* Silliman, 38 N. Y. 423. And see Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 446.

97. Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1; Drummond *v.* Nicholls, 43 S. C. 486, 21 S. E. 322.

98. Norris *v.* Clinkscales, 44 S. C. 315, 22 S. E. 1.

So where the evidence shows that plaintiffs are entitled to recover a part of the property sued for and that they are not entitled to recover the balance there is no ground for nonsuit.[99]

(iv) *Miscellaneous.* It is a good ground for dismissal that the writ shows on its face that it cannot be sustained.[1] It is not a ground for dismissal that plaintiff failed to prove the value of the goods, it being shown that he was entitled to them;[2] that the money paid by plaintiff for the property was not her own;[3] that the officer who seized the property neglected to allow defendant an opportunity to execute a bond and retain the property;[4] that defendant disclaims title to the property;[5] that no declaration was filed at the first term;[6] that two animals included in the writ were appraised at one sum in the appraiser's certificate;[7] that an animal described in the writ as a heifer is described in the certificate of appraisement as a cow;[8] that plaintiff as executor has commenced an action against defendant and his officer for the conversion of the replevied property if it does not appear that the conversion relied upon was the same act for which the replevin was brought;[9] or that plaintiff has caused the officer, to whom the writ was committed, to bring an action against defendant and another officer for taking the replevied property out of his hands, before its delivery to plaintiff.[10] So it has been held that the dismissal of a writ of replevin on motion based upon affidavits, on the grounds that defendant was a deputy sheriff and the writ was directed to the sheriff and served by another deputy, that the writ was issued without authority of law, and that the service was unlawful and irregular and gave the court no jurisdiction, is error.[11]

b. Proceedings to Dismiss. In proceedings to dismiss the action, the statutory requirements must be strictly followed, and the motion therefor must contain all the requisites necessary to justify the court in granting such motion.[12]

99. Bell *v.* G. Ober, etc., Co., 111 Ga. 668, 36 S. E. 904.

1. American Tool Co. *v.* Smith, 14 Abb. N. Cas. (N. Y.) 378.

Failure to state jurisdictional facts, such as detention of the property by defendant, authorizes a dismissal of the action. Reigert *v.* Voelker, 6 Mo. App. 53; McArthur *v.* Hogan, 15 Fed. Cas. 8,659*a*, Hempst. 286.

2. Banfield *v.* Haeger, 45 N. Y. Super. Ct. 428; Hay *v.* Muller, 7 Misc. (N. Y.) 670, 28 N. Y. Suppl. 57.

3. West *v.* O'Leary, 56 N. J. L. 699, 29 Atl. 427, in which it was said: "As between vendor and vendee the legal title would pass according to the intention of the parties. Upon the question of title whether the vendor came by the cash she paid honestly or dishonestly is without significance. If she had stolen the money, she could, by its use, acquire legal title to property as against a vendor or his creditors."

4. Wyatt *v.* Freeman, 4 Colo. 14 (defendant's remedy being to move for restoration of the property on giving bond); Robinson *v.* Austin, 3 Colo. 375.

5. Choen *v.* Porter, 66 Ind. 194, 197 (in which it was said: "He is liable for damages and costs if he wrongfully and unlawfully detained it, and for the value of the property unless it is restored to the plaintiff"); Smith *v.* Emerson, 16 Ind. 355.

6. Amos *v.* Sinnott, 5 Ill. 440, in which it was said that the case should be continued at plaintiff's cost. *Compare* Hiles *v.* McFarland, 3 Pinn. (Wis.) 365, holding that a judgment of discontinuance and not nonsuit is the proper judgment, when plaintiff fails to file his declaration within ten days after return of the writ as prescribed by statute.

7. Mansir *v.* Crosby, 6 Gray (Mass.) 334, in which it was said that plaintiff on motion may amend the writ by inserting the value of the property in terms corresponding to those of the appraiser's certificate.

8. Pomeroy *v.* Trimper, 8 Allen (Mass.) 398, 85 Am. Dec. 714.

9. Pomeroy *v.* Trimper, 8 Allen (Mass.) 398, 85 Am. Dec. 714.

10. Pomeroy *v.* Trimper, 8 Allen (Mass.) 398, 85 Am. Dec. 714.

11. Jewell *v.* Lamoreaux, 30 Mich. 155, in which it was said that the questions sought to be determined were not properly triable on affidavits, but should have been in some way brought to trial on evidence upon issue of fact.

12. Claflin *v.* Thayer, 13 Gray (Mass.) 459; Vinnedge *v.* Nicholai, 28 Nebr. 133, 44 N. W. 89 (where, in replevin against a sheriff, a third party appointed by the clerk of court served the process. Defendant appeared generally and moved the court for leave to make proof of the value of the property seized and his damages by reason thereof, and for a dismissal of the case, and it was held that the motion was properly overruled, the jurisdiction of the court not having been questioned or attacked, although defendant alleges that the appointment of the person who served the process was irregular); Elsberg *v.* Maurin, 9 N. M. 645, 43 Pac. 690.

Consent in writing.— Where the property is taken by plaintiff, and returned to defend-

c. Character of Judgment Rendered — (i) *General Rule.* On a judgment of involuntary dismissal or nonsuit, defendant is ordinarily entitled to a judgment for the return of the property,[13] or for its value in case it cannot be returned;[14] and by some statutes it is expressly provided that, where defendant

ant on the proper bond, plaintiff cannot dismiss by a notice served on defendant's attorney even though they retain such notice as a consent in writing is required by statute. Williams *v.* McGrade, 18 Minn. 82.

Waiver of motion.—A motion to dismiss an action of replevin for want of a sufficient replevin bond is not waived by subsequently, and before the motion has been decided, filing an affidavit of defense and an answer to the merits. Clark *v.* Connecticut River Co., 6 Gray (Mass.) 363.

13. *Arkansas.*— Town *v.* Evans, 11 Ark. 9, dismissal for failure to file a bond within the time prescribed.

Connecticut.— Fleet *v.* Lockwood, 17 Conn. 233, dismissal for failure to give bond. And see Persse *v.* Watrous, 30 Conn. 139.

Florida.—Branch *v.* Branch, 5 Fla. 447, 451, dismissal for want of sufficient affidavit and bond. In this case it was said: "This must be so, or the plaintiff, by putting in an insufficient affidavit and bond, might obtain possession of the property, accomplish the object of his suit, and perhaps leave the defendant remediless, or if not entirely remediless, he would entail upon him a long and tedious litigation to obtain the possession of his property, of which he had been wrongfully dispossessed, through the instrumentality of the law, or of the value thereof."

Georgia.— See Calloway *v.* McElmurray, 91 Ga. 166, 17 S. E. 103.

Illinois.— Luthy *v.* Kline, 56 Ill. App. 314; McCrory *v.* Hamilton, 39 Ill. App. 490 (dismissal for want of prosecution); Fowler *v.* Richardson, 32 Ill. App. 252.

Iowa.— Funk *v.* Israel, 5 Iowa 438.

Massachusetts.— Lowe *v.* Brigham, 3 Allen 429 (dismissal for want of sufficient bond); Walbridge *v.* Shaw, 7 Cush. 560 (dismissal for want of sufficient bond).

Minnesota.—Pabst Brewing Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273 (dismissal for plaintiff's failure to substantiate his cause of action and right to recover); Terryll *v.* Bailey, 27 Minn. 304, 7 N. W. 261.

Nebraska.—Garber *v.* Palmer, 47 Nebr. 699, 66 N. W. 656.

New Mexico.— Barruel *v.* Irwin, 2 N. M. 223, dismissal for omission of affidavit to state value of property.

New York.— Van Alstine *v.* Kittle, 18 Wend. 524.

South Dakota.— See Aultman *v.* Becker, 10 S. D. 58, 71 N. W. 753, dismissal for failure to serve copy of complaint on defendant after demand within statutory period.

Vermont.— Thurber *v.* Richmond, 46 Vt. 395 (dismissal for want of proper bond); Collamer *v.* Page, 35 Vt. 387.

United States.— McArthur *v.* Hogan, 15 Fed. Cas. No. 8,659*a*, Hempst. 286, dismissal for defects in the affidavit.

England.—Salkold *v.* Skelton, Cro. Jac. 519, 79 Eng. Reprint 443.

See 42 Cent. Dig. tit. "Replevin," §§ 333, 351.

Form of judgment.—A judgment of dismissal for want of prosecution that defendant have a writ of retorno habendo and not that the property be returned, while informal, is not so defective as to be a nullity. In effect it is an adjudication of cost against plaintiff and that the property be returned to defendant. McCrory *v.* Hamilton, 39 Ill. App. 490. And see Luthy *v.* Kline, 56 Ill. App. 314; Fowler *v.* Richardson, 32 Ill. App. 252. So it has been held that a judgment that plaintiff take nothing by his writ, and that the said defendant have a return of the property so replevied as aforesaid is substantially, although not formally, correct. McArthur *v.* Hogan, 15 Fed. Cas. No. 8,659*a*, Hempst. 286.

Where the property is in the hands of the officer executing the writ, on dismissal of the suit for want of a proper bond defendant is entitled to an order that the officer return the property to defendant at the place where he took it. Thurber *v.* Richmond, 46 Vt. 395.

Amendment of judgment by adding order to restore property.—A judgment dismissing an action of bail trover is amendable at the same term of court by adding thereto an order for restoring the property to defendant, the same having been taken from his possession and turned over to plaintiff upon a bond given by the latter under section 3420 of the code. Calloway *v.* McElmurray, 91 Ga. 166, 17 S. E. 103.

In Georgia, after a judgment of nonsuit has been entered, defendant is entitled on motion of the bond given by plaintiff to acquire the property to judgment of restitution against plaintiff and his surety or for the value of the property as recited in the bond. Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11.

14. *Arkansas.*— Town *v.* Evans, 11 Ark. 9.

Georgia.— See Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11.

Iowa.— Funk *v.* Israel, 5 Iowa 438.

Minnesota.— Pabst Brewing Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273; Terryll *v.* Bailey, 27 Minn. 304, 7 N. W. 261.

South Dakota.— See Aultman *v.* Becker, 10 S. D. 58, 71 N. W. 753. *Contra,* Barruel *v.* Irwin, 2 N. M. 223.

Limiting value to defendant's special interest.— Where plaintiff is nonsuited because his evidence shows that defendant is entitled to possession as plaintiff's bailee, the court should assess and enter in the alternative judgment the value of defendant's special interest only and not the value of the whole property. Gaynor *v.* Blewitt, 69 Wis. 582, 34 N. W. 725.

is entitled to return of the property, he may instead of taking judgment for a return of the property take judgment for the value of the property.[15]

(II) *Where Action Dismissed For Want of Jurisdiction of Subject-Matter.* If the action is dismissed for want of jurisdiction of the subject-matter of the suit, the rule stated in the preceding section has no application, and the court is without power to order a return of the property.[16]

(III) *As Affected by Defendant's Pleadings or Absence of Pleadings.* Where defendant obtains a judgment of dismissal or nonsuit on failure of plaintiff's evidence to make out his case he is not entitled to a judgment for a return of the property, unless his pleadings would entitle him to such judgment. He is not entitled to such judgment on a plea of *non cepit* or *non detinet*.[17] Where, however, defendant obtains a judgment of dismissal or nonsuit before pleading, he is entitled to a return of the goods.[18] Thus it has been held that an avowry is not necessary to authorize the court to render a judgment for return of the goods where the writ is abated for irregularity in the replevin process.[19]

(IV) *Miscellaneous.* Defendant is not entitled to a return of the property where the complaint is dismissed on defendant's showing no right of property or possession in himself and alleging possession in another;[20] where plaintiff is nonsuited on the ground that the goods had never been in defendant's possession;[21] or where it appears, on dismissal of the suit, that plaintiff never obtained possession of the property under the writ;[22] and according to some decisions, no judgment for return can be given if the writ is abated on defendant's

15. See Town *v.* Evans, 11 Ark. 9, 11. And see statutes of the various states.

16. *Massachusetts.*— Gray *v.* Dean, 136 Mass. 128 (value of property less than jurisdictional amount); Jordan *v.* Dennis, 7 Metc. 590.

Nebraska.— State *v.* Letton, 56 Nebr. 158, 78 N. W. 533.

South Carolina.— Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323.

Vermont.— Widber *v.* Benjamin, 75 Vt. 152, 53 Atl. 1071 (value of property below jurisdictional amount); Collamer *v.* Page, 35 Vt. 387.

United States.— Burdett *v.* Doty, 38 Fed. 491, value of property below jurisdictional amount.

What is not a want of jurisdiction of the subject-matter.—An action of replevin was brought in a county where one of the parties resided, but not the county where the property replevied was detained, and for this reason the action was dismissed on motion. It was held that, notwithstanding this disposition of the cause, the court had jurisdiction, and it was their duty, to render a judgment for a return to defendant of the property replevied, without any proof of his right to have the property restored, and without any formal plea or avowry by defendant; and that plaintiff had no right to contest such a judgment on the ground that he owned the property. Collamer *v.* Page, 35 Vt. 387.

17. Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; People *v.* Niagara Ct. C. Pl., 4 Wend. (N. Y.) 217; Summer *v.* Kelly, 38 S. C. 507, 17 S. E. 364; Douglass *v.* Garrett, 5 Wis. 85; 1 Chitty Pl. 490. And see as sustaining this view Pabst Brewing Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273; Terryll *v.* Bailey, 27 Minn. 304, 7 N. W. 261; Capital Lumbering Co. *v.* Hall, 10 Oreg. 202. *Compare* Eborn *v.* Waldo, 51 N. C. 438, in which it was held, under a statute providing that when the property shall have been delivered to a plaintiff and he shall fail to return by being nonsuited there shall be an inquiry of the value of the property and of the damage by his detention, that a nonsuit is conclusive at least to the extent of defendant's right to a return of the property and to damages during the pendency of the action in which plaintiff failed. The act makes the nonsuit conclusive to the extent mentioned whatever the ground of nonsuit, and it is immaterial that the plea was *non cepit*. It makes no difference whether a nonsuit was ordered because there had been no taking or because property of defendant was not proved.

"**Non cepit** is a plea in bar, not involving the merits of the action; and if a defendant claims a return of the goods, he must add an avowry or cognizance inducing a return, or he is not entitled to judgment for a return." People *v.* Niagara Ct. C. Pl., 4 Wend. (N. Y.) 217.

18. Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Collamer *v.* Page, 35 Vt. 387.

19. Fleet *v.* Lockwood, 17 Conn. 233. See also Persse *v.* Watrous, 30 Conn. 139; Lowe *v.* Brigham, 3 Allen (Mass.) 429; Walbridge *v.* Shaw, 7 Cush. (Mass.) 560. *Contra*, Hill *v.* Bloomer, 1 Pinn. (Wis.) 463.

20. Nichols *v.* Potts, 35 Misc. (N. Y.) 273, 275, 71 N. Y. Suppl. 765, in which case the court said: "At the most the judgment should have gone no further than to dismiss the complaint, leaving the question of ownership, as between Bacon and the plaintiff [whom defendant alleges is the owner of the property] to be determined in an appropriate action."

21. Gallagher *v.* Bishop, 15 Wis. 276.

22. Prentiss *v.* Moore, 3 Ill. App. 539.

motion for want of service on him,[23] or on account of variance between it and the declaration,[24] or where the action is dismissed because the writ is void.[25]

d. Operation and Effect of Judgment. A judgment of dismissal or nonsuit for return of the property not being on the merits is not conclusive of defendant's ownership or right of possession.[26] Plaintiff's case is left as it was when he instituted his action,[27] and he may bring another action of replevin for the same property.[28]

e. Assessment of Value. The question of the method of assessing the value of the property is a matter of statutory regulation, and as these statutes vary widely in their provisions it is useless to attempt to state any general rule on the subject.[29]

f. Damages. In the absence of some statutory provision to the contrary,[30] on a dismissal of the action for some ground not relating to the merits, there can be no judgment for damages,[31] except perhaps mere nominal damages.[32] Defendant is not entitled to have his right to damages for the taking and detaining, or improper use of the property replevied, tried, or adjudicated.[33]

23. Smith *v.* Fisher, 13 R. I. 624. But see Fleet *v.* Lockwood, 17 Conn. 233.

24. Dickinson *v.* Noland, 7 Ark. 25; Hartgraves *v.* Duval, 6 Ark. 506.

25. Bolin *v.* Fines, 60 Nebr. 443, 83 N. W. 740; Reid *v.* Panska, 56 Nebr. 195, 78 N. W. 534; Hill *v.* Bloomer, 1 Pinn. (Wis.) 463, 467, in which it was said: "Where a writ is adjudged to be void or voidable, the parties are not considered to have been legally in court. The court refuses to take cognizance of the cause, or to recognize the parties, as being legally upon the record. The court in such case, cannot make any other order, than to dismiss the suit at the cost of the plaintiff." But see Barruel *v.* Irwin, 2 N. M. 223, where it was held that if the suit is dismissed for failure of the affidavit to state the value of the property, defendant is entitled to a return of the property.

26. Walbridge *v.* Shaw, 7 Cush. (Mass.) 560; Barruel *v.* Irwin, 2 N. M. 223; Collamer *v.* Page, 35 Vt. 387. And see Hill *v.* Webber, 50 Mich. 142, 15 N. W. 52.

27. Walbridge *v.* Shaw, 7 Cush. (Mass.) 560.

28. Morton *v.* Sweetser, 12 Allen (Mass.) 134; Walbridge *v.* Shaw, 7 Cush. (Mass.) 560.

That defendant had not in fact taken out any writ of return, or actually received the property into his custody under that judgment, is no valid objection where the judgment for a return was ordered upon the motion to dismiss the writ, and plaintiff yielded to it, and returned the property to the place from which he had taken the same under his defective proceedings. Walbridge *v.* Shaw, 7 Cush. (Mass.) 560.

29. **In Arkansas,** if the suit is dismissed for some irregularity or defect in the procedure, and defendant elect to take the value of the property, the court must order a jury to assess the value. Town *v.* Evans, 11 Ark. 9.

In Michigan it has been held that where defendant in replevin recovers judgment by nonsuit or discontinuance and elects to take judgment for the value of the property taken, he may, under a notice of trial, have the value of the property assessed by the court. The intervention of a jury is required only when damages are to be assessed. Johnson *v.* Disk, 69 Mich. 108, 36 N. W. 738; Pearsons *v.* Eaton, 18 Mich. 79.

In New York it has been held that where there is a dismissal or nonsuit during the trial, the value of the property may be assessed by the jury impaneled in the cause, and that a writ of inquiry need not issue for that purpose. But if there is a dismissal or nonsuit before trial, such value should be assessed on a writ of inquiry. Murphy *v.* Jenkins, 1 Den. 669; Van Alstine *v.* Kittle, 18 Wend. 524. Where, however, plaintiff in replevin is nonsuited at a trial on his opening proof, and defendant gives no evidence, if defendant has put in an avowry claiming the property under distress for rent, or if it appear that the property was distrained for rent, defendant cannot take the alternative judgment for its value, and have such value ascertained on a writ of inquiry, as the statute of replevin expressly excepts cases where the goods replevied were distrained from the provision for ascertaining their value by writ of inquiry after nonsuit. Redman *v.* Hendricks, 1 Sandf. 32.

In Wyoming, where judgment of nonsuit is awarded defendant on failure of proof, he may proceed to impanel a new jury to assess the value of the property. Bath *v.* Ingersoll, 1 Wyo. 280.

30. Garber *v.* Palmer, 47 Nebr. 699, 66 N. W. 656, holding that under the statute of Nebraska when a plaintiff in replevin who has obtained the property fails in his proof or fails to prosecute the action, defendant is entitled to judgment, and to a trial of his right of property or possession, for the purpose of establishing his damages.

Under the statutes of Vermont damages may be awarded defendant where the suit is dismissed on ground not going to the merits. Thurber *v.* Richmond, 46 Vt. 395 [*distinguishing* Collamer *v.* Page, 35 Vt. 387].

31. McArthur *v.* Lane, 15 Me. 245; Barruel *v.* Irwin, 2 N. M. 223; Pannell *v.* Hampton, 32 N. C. 463; Collamer *v.* Page, 35 Vt. 387. *Compare* McArthur *v.* Howett, 72 Ill. 358; Wood *v.* Braynard, 9 Pick. (Mass.) 322.

32. Barruel *v.* Irwin, 2 N. M. 223.

33. Collamer *v.* Page, 35 Vt. 387.

g. Reinstatement. Ordinarily the court will not reinstate at a subsequent term an action of replevin which has been discontinued,[34] or *non prossed*[35] at a preceding term. This may be done, however, if the discontinuance was the result of an error of the clerk.[36] And where a nonsuit is granted for non-appearance of plaintiff at the trial, and he appears a few minutes after opening of the court, and defendant in open court consents to a vacation of the judgment, it is an abuse of discretion for the court to refuse to do so.[37]

B. Scope of Inquiry and Powers of Court — 1. General Rules. In replevin the court may determine, not only the question of the right of possession, but also the right of property;[38] and in determining whether or not there shall be a return, the power of the court and the extent of inquiry are as unlimited in an action of replevin as in a suit in equity;[39] but the court from which the writ issues has no power, in case the officer fails to find the property therein described, to compel defendant by order to surrender it;[40] and in such action, no accounting can be had, the action involving only the legal rights of the parties.[41] The subject-matter of litigation necessarily consists only of the property mentioned in the complaint, and it is not competent for defendant by his answer to introduce a new and distinct subject-matter of litigation by claiming the release and return of other and distinct personal property,[42] even though he present such a case as would have enabled him to recover in an independent action;[43] nor can a claim for damages for taking or withholding such property or the value of its use be litigated;[44] but the rule does not exclude litigation in the action of the right to the increase of the disputed property.[45]

34. Mitchell *v.* Wilson, 17 Fed. Cas. No. 9,671, 3 Cranch C. C. 92; Thompson *v.* Wells, 23 Fed. Cas. No. 13,980, 3 Cranch C. C. 5.

35. McDaniel *v.* Fish, 16 Fed. Cas. No. 8,744, 2 Cranch C. C. 160.

36. Sherburne *v.* King, 21 Fed. Cas. No. 12,759, 2 Cranch C. C. 205.

37. Bank of Commerce *v.* Warren, 8 Wash. 477, 36 Pac. 440.

38. Boyden *v.* Frank, 20 Ill. App. 169 (replevin by an assignee for the benefit of creditors to recover property claimed as part of the assigned estate); Bath *v.* Miller, 53 Me. 308 (holding that when it is determined that the action cannot be maintained it is always necessary to inquire and determine and to have a distinct adjudication whether or not the property shall be returned to defendant, which involves an inquiry into the title and the right of possession, of the broadest and most unlimited character); Thomas *v.* Spofford 46 Me. 408. But see Miles *v.* Walther, 3 Mo. App. 96; Gillespie *v.* Brown, 16 Nebr. 457, 20 N. W. 632, holding that in replevin by plaintiff claiming under a mortgage of goods levied on by defendant under subsequent attachment proceedings against the mortgagor, the question whether defendant is entitled to a lien on the excess of the property over the amount secured cannot be tried, as replevin determines only the right to possession.

The title to an office in a corporation cannot be tried in an action of replevin for personalty of the corporation. Standard Gold Min. Co. *v.* Byers, 31 Wash. 100, 71 Pac. 766.

Under a statute requiring judgment according to the respective rights and interests of the parties in the property, the exact extent of the subsisting claim of a mortgagor who brings replevin is a legitimate subject of inquiry. Kohl *v.* Lynn, 34 Mich. 360, decided under Comp. Laws, § 6754.

39. Bath *v.* Miller, 53 Me. 308.

Where the special proceeding in replevin is not assailed, the only duty of the court is to decide the issue presented by the pleadings. Dodd *v.* Skelton, 65 Nebr. 585, 91 N. W. 543.

The question of the exempt character of property taken upon a distress for rent may be raised in replevin against the constable for taking the goods. Wallingsford *v.* Bennett, 1 Mackey (D. C.) 303.

Trial of legality of distress. — In replevin to recover goods distrained, the legality of the distress may be tried, provided there is no rent due; but, if there is rent due, however small, and the distress is excessive in regard to the quantity of goods taken, or otherwise irregular, the remedy of the tenant must be had in an action on the case. Whitcomb *v.* Brant, (N. J. Sup. 1908) 68 Atl. 1102.

40. Yott *v.* People, 91 Ill. 11.

41. Denison *v.* Sawyer, 95 Minn. 417, 104 N. W. 305.

42. Lovensohn *v.* Wild, 45 Cal. 8; Lindley *v.* Miller, 67 Ill. 244 (holding that on trial of a tenant's replevin of live stock distrained for rent, whatever liability may have been incurred by the landlord's permitting animals not distrained to follow and remain with the others, but without any refusal to surrender them, cannot be settled in the action); Buckley *v.* Buckley, 12 Nev. 423.

43. Lovensohn *v.* Ward, 45 Cal. 8.

44. Buckley *v.* Buckley, 12 Nev. 423.

45. Buckley *v.* Buckley, 12 Nev. 423, holding that, in an action brought to recover a flock of ewe sheep or their value, the right to their increase and the wool subsequently shorn

2. Trial of Title to Real Property. While the title to land cannot be tried directly in replevin for property severed from the freehold,[46] title to land may indirectly be brought in question and admitted in evidence where the party's right to the property in dispute depends on his ownership or right to possession of the premises;[47] but proof of the title is admitted not for the purpose of trying the title but for the purpose of proving possession of the land from which the property sought to be replevied was taken, and therefore to prove constructive possession of the personal property;[48] and thus where the issues are not framed to try title to land but to the personal property only, and the ownership of the personal property cannot be established by the ownership of the land, trial of title to the land cannot be had.[49]

C. Mode and Conduct of Trial. The general rules applicable to the mode and conduct of civil actions generally[50] apply in actions of replevin.[51]

D. Questions For Jury — 1. In General. The general rules as to questions of fact and the necessity of their submission to a jury applicable in other civil actions[52] apply in the action of replevin.[53]

2. Ownership, Right to Possession, and Demand. The question of ownership, when it is put in issue by the pleadings and the evidence is conflicting, should be submitted to the jury,[54] except where the circumstances are such as to render

from the flock are proper subjects of litigation in the same action; the rights of the parties relative to the increase being precisely the same as their rights to the original flock.

46. Jordan *v.* Johnson, 1 Kan. App. 656, 42 Pac. 415; Washburn *v.* Cutter, 17 Minn. 361.

47. *California.*— Halleck *v.* Mixer, 16 Cal. 574.

Indiana.— Bowen *v.* Roach, 78 Ind. 361.

Michigan.— Cutter *v.* Wait, 131 Mich. 508, 91 N. W. 753, 100 Am. St. Rep. 619.

Pennsylvania.— Clement *v.* Wright, 40 Pa. St. 250; Elliott *v.* Power, 10 Watts 453, 36 Am. Dec. 200.

Washington.— Laurendeau *v.* Fugelli, 5 Wash. 94, 31 Pac. 421, 5 Wash. 632, 32 Pac. 465, 1 Wash. 559, 21 Pac. 29.

Wisconsin.— Stahl *v.* Lynn, 81 Wis. 668, 51 N. W. 879.

See 42 Cent. Dig. tit. "Replevin," § 337.

48. Clement *v.* Wright, 40 Pa. St. 250.

49. Wilson *v.* Panne, 1 Kan. App. 721, 41 Pac. 984; Clement *v.* Wright, 40 Pa. St. 250.

50. See Trial.

51. See the following cases:

Colorado.— Freas *v.* Lake, 2 Colo. 480; McCraw *v.* Welch, 2 Colo. 284.

Georgia.— Jowers *v.* Blandy, 58 Ga. 379.

Illinois.— Peck *v.* Hubbard, 4 Ill. App. 566.

Iowa.— Newell *v.* Hayden, 8 Iowa 140.

Michigan.— Harbour *v.* Eldred, 107 Mich. 95, 64 N. W. 1054.

New Jersey.— Smethurst *v.* Harwood, 30 N. J. L. 230.

New York.— Martin *v.* Gilbert, 119 N. Y. 298, 23 N. E. 813, 24 N. E. 460, 16 Am. St. Rep. 823; Regan *v.* Priest, 3 Den. 163.

Rhode Island.— Hamilton *v.* Colt, 14 R. I. 209.

Tennessee.— Price *v.* Bescher, 12 Heisk. 372.

Vermont.— Carey *v.* Hart, 63 Vt. 424, 21 Atl. 537.

Virginia.— Maxwell *v.* Light, 1 Call 117.

See 42 Cent. Dig. tit. "Replevin," §§ 341, 342.

52. See, generally, Trial.

53. See the following cases:

California.— Griffith *v.* Bogardus, 14 Cal. 410.

Illinois.— Belcher *v.* Van Duzen, 37 Ill. 281; Ingalls *v.* Bulkley, 13 Ill. 315, holding that on replevin the question of authority in an agent to demand the property is for the jury.

Indiana.— Carrico *v.* Shepherd, 26 Ind. App. 207, 59 N. E. 347.

Maryland.— Hayes *v.* Lusby, 5 Harr. & J. 485.

New York.—Butterfield *v.* Oppenheimer, 135 N. Y. 648, 32 N. E. 647 [*affirming* 18 N. Y. Suppl. 826].

South Carolina.— Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

See 42 Cent. Dig. tit. "Replevin," § 343.

54. *California.*— Smith *v.* Arnold, 56 Cal. 640.

Iowa.— Nodle *v.* Hawthorne, 107 Iowa 380, 77 N. W. 1062.

Michigan.— Anderson *v.* Pendl, 153 Mich. 693, 117 N. W. 326.

Minnesota.— Honeywell *v.* Norby, 61 Minn. 188, 63 N. W. 488.

Missouri.— Calderwood *v.* Robertson, 112 Mo. App. 103, 86 S. W. 879, holding that, under the evidence, the question whether the chattels involved belonged to a partnership consisting of plaintiff and defendant was one for the jury.

Pennsylvania.— Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

See 42 Cent. Dig. tit. "Replevin," § 344.

Rule where evidence is not conflicting.— Where the only evidence indicating that plaintiff is not the owner of the property in question is so slight as to be entirely insufficient to support a finding that she is not such owner, the question of ownership should not be submitted to the jury. Gunn *v.* Mumford,

it a mixed question of law and fact. In such a case, only the determination of the facts should be left to the jury.[55] Other controverted questions bearing on plaintiff's or defendant's right to possession should be left to the jury,[56] together with the question whether a demand for the return of the property was made by plaintiff,[57] at a proper time and in a proper manner.[58]

3. Taking and Detention. Controverted questions concerning the taking and detention of the property are for the determination of the jury, under proper instructions by the court.[59]

4. Fraud. Evidence tending to show fraud or bad faith presents an issue of fact, the determination of which is within the province of the jury.[60]

5. Value and Identity. When disputed, the questions of value [61] and identity [62] should be submitted to the jury, but the rule is otherwise where the evidence is clear and undisputed.[63]

E. Direction of Verdict. Where the evidence is conflicting as to a material issue, or where there is evidence which, although slight, would justify a finding in favor of either party, it is error to direct a verdict, and such evidence should be submitted to the jury with proper instructions; [64] but where the complaint

74 N. J. L. 601, 65 Atl. 989. Likewise it is not error for the court to take from the jury the consideration of the question of ownership, where there is not a scintilla of evidence showing a transfer of title from defendant to plaintiff. Haveron *v.* Anderson, 3 N. D. 540, 58 N. W. 340.

The credibility of plaintiff's testimony as to a transfer of the property to him is for the determination of the jury, when it is unsupported by the testimony of other witnesses and is not so clear and certain in itself as to be conclusive. Goppelt *v.* Burgess, 132 Mich. 28, 92 N. W. 497.

55. Charles *v.* Lasher, 20 Ill. App. 36.

Return.— Under the Vermont statute it is not within the province of the jury to decide the ultimate question of a return of the property to defendant, but the facts may be properly submitted to the jury for determination. James Smith Woolen Mach. Co. *v.* Holden, 73 Vt. 396, 51 Atl. 2.

56. Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033 (right of plaintiff to sole possession); Loucks *v.* Winne, 127 N. Y. App. Div. 460, 111 N. Y. Suppl. 485; Merritt *v.* Lyon, 3 Barb. (N. Y.) 110; Bourne *v.* Merritt, 22 Vt. 429.

57. Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

58. Kane *v.* Reid, 33 Misc. (N. Y.) 802, 68 N. Y. Suppl. 623.

Contra as to conditional sales.— The rule is otherwise where the evidence shows that plaintiff made a conditional sale of the goods to defendant, and then, after defendant had defaulted as to payment of the purchase-price, delayed his demand for the goods too long to prevent the title vesting in defendant. Frech *v.* Lewis, 218 Pa. St. 141, 67 Atl. 45, 11 L. R. A. N. S. 948 [*reversing* 32 Pa. Super. Ct. 279].

59. Patterson *v.* Spooner, 143 Mich. 698, 107 N. W. 450 (unlawful taking of defendant's property by plaintiff on the writ of replevin); Clute *v.* Everhart, 137 Mich. 5, 100 N. W. 124; O'Connor *v.* Gidday, 63 Mich. 630, 30 N. W. 313; Barnes *v.* Plessner, 121 Mo. App. 677, 97 S. W. 626; Burckhalter *v.* Mitchell, 27 S. C. 240, 3 S. E. 225.

60. *Michigan.*— Pinkerton Bros. Co. *v.* Bromley, 128 Mich. 236, 87 N. W. 200.

Minnesota.— Blackman *v.* Wheaton, 13 Minn. 326.

Missouri.— Stein *v.* Hill, 100 Mo. App. 38, 71 S. W. 1107. But see Kean *v.* Newell, 2 Mo. 9, holding that the court should determine whether or not the facts found by the jury constitute fraud.

New York.— Merritt *v.* Lyon, 3 Barb. 110; Estey Mfg. Co. *v.* Waring, 7 N. Y. St. 775.

Pennsylvania.— Johnson *v.* Groff, 22 Pa. Super. Ct. 85.

Texas.— See Dysart *v.* Terrell, (Tex. Civ. App. 1902) 70 S. W. 986.

See 42 Cent. Dig. tit. "Replevin," § 346.

61. Haveron *v.* Anderson, 3 N. D. 540, 58 N. W. 340; Griswold *v.* Sundback, 6 S. D. 269, 60 N. W. 1068; Dysart *v.* Terrell, (Tex. Civ. App. 1902) 70 S. W. 986, holding that the court should submit to the jury the question as to the value of each item of the property claimed.

62. *Illinois.*— Vennum *v.* Thompson, 38 Ill. 143.

Iowa.— Stephens *v.* Williams, 46 Iowa 540.

Kentucky.— Sawyer *v.* Middlesborough Town Co., 17 S. W. 444, 13 Ky. L. Rep. 550.

Michigan.— Gottesman *v.* Chipman, 125 Mich. 60, 83 N. W. 1026.

Missouri.— Miller *v.* Marks, 20 Mo. App. 369.

See 42 Cent. Dig. tit. "Replevin," § 348.

63. Griswold *v.* Sundback, 6 S. D. 269, 60 N. W. 1068.

64. *Colorado.*— Buchanan *v.* Scandia Plow Co., 6 Colo. App. 334, 39 Pac. 899.

Georgia.— Bell *v.* G. Ober, etc., Co., 111 Ga. 668, 36 S. E. 904.

Iowa.— Bray *v.* Flickinger, 79 Iowa 313, 44 N. W. 554.

Kansas.— Parkhurst *v.* Sharp, (App. 1900) 61 Pac. 531.

Maryland.—Chappellear *v.* Harrison, 1 Gill & J. 477.

Minnesota.— Walker *v.* Ward, 104 Minn.

or petition fails to show that plaintiff is entitled to possession of the property, or that he has an interest therein, it is proper to direct a verdict for defendant;[65] and similarly, where the uncontradicted evidence of plaintiff establishes his right to recovery, it is proper to direct a verdict in his favor;[66] and in any event the court may direct the proper form of the verdict.[67]

F. Instructions — 1. General Rules. The rules governing instructions in civil actions generally[68] apply to actions of replevin. Thus the parties are entitled upon request to full instructions correctly stating the law.[69] Instructions must

386, 116 N. W. 647 (holding that where defendant in his answer justified the seizure and detention of the property as sheriff by virtue of an execution against a third person who it was alleged had an interest therein, it was a question for the jury whether the judgment debtor had any interest in the property at the time when levied on, and it was error to direct a verdict for plaintiff); Pound *v.* Pound, 60 Minn. 214, 62 N. W. 264.

Missouri.— Harvey *v.* Stephens, 159 Mo. 486, 60 S. W. 1055.

Nebraska.—Westover *v.* Vandoran, 29 Nebr. 652, 46 N. W. 47.

New York.— Siedenbach *v.* Riley, 36 Hun 211.

Oregon.— Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112.

Wisconsin.— Fitzgerald *v.* Anderson, 81 Wis. 341, 51 N. W. 554.

See 42 Cent. Dig. tit. "Replevin," § 352.

Directing verdict for nominal damages.— The successful plaintiff in replevin being entitled to damages under N. Y. Code Civ. Proc. § 1730, and the amount thereof being for the jury in such action, refusal to direct a verdict for nominal damages only, if a verdict is found for plaintiff, is proper. Hay *v.* Muller, 28 N. Y. Suppl. 57, 23 N. Y. Civ. Proc. 321 [*affirming* 6 Misc. 621, 26 N. Y. Suppl. 1135].

65. Hayes *v.* Tidsbury, 181 Mass. 292, 63 N. E. 890; Dillrance *v.* Murphy, 1 Nebr. (Unoff.) 298, 95 N. W. 608; Dillingham *v.* Flack, 17 N. Y. Suppl. 879. And see Metropolitan Music Co. *v.* Shirtly, 98 Minn. 292, 108 N. W. 271, where the evidence was held to authorize the direction of a verdict for an intervener.

66. Hay *v.* Muller, 28 N. Y. Suppl. 57, 23 N. Y. Civ. Proc. 321 [*affirming* 6 Misc. 621, 26 N. Y. Suppl. 1135]; Hussey *v.* Blaylock, 21 Okla. 220, 95 Pac. 773 (holding that in replevin, where the evidence showed that plaintiff had never parted with title to the property, but only the possession thereof to another, it was error to refuse to instruct for plaintiff, although the evidence showed defendant to be an innocent purchaser for value from such possessor); Zahl *v.* Billings, 118 Wis. 459, 95 N. W. 374; Brewster *v.* Carmichael, 39 Wis. 456.

67. Owens *v.* Gentry, 30 S. C. 490, 9 S. E. 525.

68. See Trial.

69. *Indiana.*— Clark *v.* Heck, 17 Ind. 281.

Iowa.— Becker *v.* Staab, 114 Iowa 319, 86 N. W. 305; Miller *v.* Bryan, 3 Iowa 58.

Michigan.—Gavigan *v.* Evans, 45 Mich. 597, 8 N. W. 545.

Missouri.— Rapp *v.* Vogel, 45 Mo. 524.

New York.— Morss *v.* Stone, 5 Barb. 516.

Texas.— Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

Wisconsin.— Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460; Knowlton *v.* Culver, 2 Pinn. 243, 52 Am. Dec. 156, 1 Chandl. 214.

See 42 Cent. Dig. tit. "Replevin," § 354.

The giving of an abstract proposition of law is error when there is no evidence upon which to base it. Gray *v.* Sharp, 17 Colo. App. 139, 67 Pac. 351.

It is improper to leave the question of adverse possession to the jury without instructing as to what would amount to adverse possession under the circumstances, where the possession was originally by bailment. Lockhart *v.* Luker, 36 Miss. 68.

Immaterial error in the giving of an instruction is not sufficient to work a reversal. Welch *v.* Miller, 32 Ill. App. 110; Berry *v.* Wilson, 64 Mo. 164; McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

Where demand is necessary before suit, proof of the demand should be embraced in the court's instruction as a necessary element to justify a verdict for plaintiff. Roach *v.* Binder, 1 Colo. 322 (holding likewise that in replevin an instruction that a demand may be inferred from the actions, conduct, and conversation of the parties is misleading, in that it comprehends conduct and conversation in the absence of the other party); Jarrard *v.* Harper, 42 Ill. 457, 92 Am. Dec. 84 (holding, however, that where the record in an action of replevin shows that there was clear proof of a demand before suit brought, and the evidence sustains the verdict, an instruction, silent on the necessity of proof of demand, stating that "if the jury believe from the evidence that the hog in question is plaintiff's hog they will find defendant guilty," is not ground for a reversal); Grand Rapids Chair Co. *v.* Lyon, 73 Mich. 438, 41 N. W. 497; Leiter *v.* Lyons, 23 R. I. 42, 52 Atl. 78; Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404; Dow *v.* Dempsey, 21 Wash. 86, 57 Pac. 355.

Instructions as to value of property and damages.— Instructions held proper see Holton *v.* Carter, 90 Ga. 299, 15 S. E. 819; Morss *v.* Stone, 5 Barb. (N. Y.) 516. Instructions held erroneous see Brown *v.* Morris, 3 Kan. App. 86, 45 Pac. 98; Peterson *v.* Hall, 61 Minn. 268, 63 N. W. 733 (holding that in replevin for a note and mortgage where the actual value is stated in the complaint to be the principal of the note it is error to charge that in fixing the value the jury may consider the interest in the

be applicable to the issues,[70] and to the facts which there is evidence tending to prove,[71] and must not invade the province of the jury,[72] and competent evidence which has been introduced must not be disregarded or ignored.[73] Instructions must not be vague, inconsistent, or misleading in point of law or of fact;[74] but must be considered as a whole,[75] and if instructions substantially embody those requested it is not error to fail to use the exact language requested.[76]

2. Title and Right to Possession. Proper instructions should be given the jury bearing upon the question of title and right of possession.[77] An instruction

note which had accrued prior to the action); Houston *v.* Smythe, 66 Miss. 118, 5 So. 520 (holding that it is error to direct the jury that, if they find for defendant, to fix the value of the property seized at a sum different from that stated in the pleadings of both parties); Brunell *v.* Cook, 13 Mont. 497, 34 Pac. 1015.

Detention of property.— Where the only material issue is whether or not defendant had lawful possession, and the evidence thereon is conflicting, a failure to properly instruct the jury upon the question of possession is reversible error. Clark *v.* Sublette, 117 Mo. App. 519, 94 S. W. 733. Similarly where defendant is in possession of the goods for the purpose of doing work upon them, and has neither a general nor special property in them, it is error to instruct that he was justified in refusing to deliver the goods on demand, if plaintiff had failed to pay for a part of the work according to contract. Nettleton *v.* Jackson, 30 Mo. App. 135.

70. Hardy *v.* Clendening, 25 Ark. 436; Koelling *v.* August Gast Bank Note, etc., Co., 97 Mo. App. 664, 71 S. W. 728.

71. Brown *v.* Morris, 3 Kan. App. 86, 45 Pac. 98; Nitz *v.* Bolton, 80 Mich. 470, 45 N. W. 189; Gulledge *v.* Slayden-Kirksey Woolen Mills Co., 75 Miss. 297, 22 So. 952; Francese *v.* Geraty, 104 N. Y. Suppl. 358.

72. Watkins *v.* White, 4 Ill. 549; Gilbert *v.* Forest City Furniture Co., 72 Ill. App. 186; Griswold *v.* Nichols, 117 Wis. 267, 94 N. W. 33; Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460.

73. *Illinois.*— Holliday *v.* Burgess, 34 Ill. 193.

Iowa.— Wendell *v.* Mallory Commission Co., 122 Iowa 712, 98 N. W. 612.

Mississippi.— Peterson *v.* Polk, 67 Miss. 163, 6 So. 615.

New York.— Morss *v.* Stone, 5 Barb. 516.

North Carolina.— Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

74. *Arkansas.*— Roach *v.* Johnson, 71 Ark. 344, 74 S. W. 299; Pyburne *v.* Moses, 54 Ark. 121, 15 S. W. 84.

Illinois.— Mathews *v.* Granger, 71 Ill. App. 467.

Maryland.— Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385.

Michigan.— Gustin *v.* Embury-Clark Lumber Co., 145 Mich. 101, 108 N. W. 650.

Mississippi.— Jamison *v.* Acker, (1893) 14 So. 691.

Montana.— Chan *v.* Slater, 33 Mont. 155, 82 Pac. 657.

Nebraska.— Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

Washington.— Reed *v.* Bank of Commerce, 8 Wash. 539, 36 Pac. 484.

Wisconsin.— Connolly *v.* Straw, 53 Wis. 645, 11 N. W. 17.

See 42 Cent. Dig. tit. "Replevin," § 354.

75. Chicago Title, etc., Co. *v.* Goldsmith, 173 Ill. 326, 50 N. E. 676 [*affirming* 69 Ill. App. 22]; Silsby *v.* Strong, 38 Oreg. 36, 62 Pac. 633; McKesson *v.* Sherman, 51 Wis. 303, 8 N. W. 200.

76. Minthon *v.* Lewis, 78 Iowa 620, 43 N. W. 465.

A statute providing that the judge shall give without change each instruction asked, or shall refuse it in full, is not violated where it appears that plaintiff's logs had been mixed with defendants and there was no evidence that they differed in description, quality, or value, and plaintiff was unable to identify his own, by an instruction of the law at defendant's request, "if the logs taken from the plaintiff could be identified," adding of its own motion a statement of the law "if the logs could not be identified." Eldred *v.* Oconto Co., 33 Wis. 133.

77. Winchester *v.* Bryant, 65 Ark. 116, 44 S. W. 1124.

Instructions as to title and right of possession.— Instructions held proper see Shrieves *v.* Morris, 151 Mass. 310, 23 N. E. 838; Dawson *v.* Wetherbee, 16 Gray (Mass.) 123, an instruction that if the acts and declarations relied on by plaintiff prove a sale were merely colorable and not intended to pass any title or possession to him, the jury might disregard them as evidence of ownership, is proper. Instructions held erroneous or misleading see Dunham *v.* H. D. Williams Cooperage Co., 83 Ark. 395, 103 S. W. 386; Rust Land, etc., Co. *v.* Isom, 70 Ark. 99, 66 S. W. 434, 91 Am. St. Rep. 68 (adverse possession); Winchester *v.* Bryant, 65 Ark. 116, 44 S. W. 1124; Israel *v.* Day, 17 Colo. App. 200, 68 Pac. 122; Holliday *v.* Burgess, 34 Ill. 193; Watkins *v.* White, 4 Ill. 549; Ware *v.* Souders, 120 Ill. App. 209; Gevers *v.* Farmer, 109 Iowa 468, 80 N. W. 535; Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385; Gavigan *v.* Evans, 45 Mich. 597, 8 N. W. 545; Peterson *v.* Pope, 67 Miss. 163, 6 So. 615; Woods *v.* Latta, 35 Mont. 9, 88 Pac. 402; Webster *v.* Sherman, 33 Mont. 448, 84 Pac. 878; Ettien *v.* Drum, 32 Mont. 311, 80 Pac. 369; Gallick *v.* Bordeaux, 31 Mont. 328, 78 Pac. 583; Meyer *v.* Plattsmouth First Nat. Bank, 63 Nebr. 679, 88 N. W. 867; Dysart *v.* Terrell, (Tex. Civ. App. 1902) 70

is proper which tells the jury, in substance, that plaintiff in replevin must recover upon the strength of his own title, where it appears that the property in question was indisputably in possession of defendant;[78] and an instruction to the effect that to enable plaintiff to recover the jury must be satisfied from the evidence that he has a general or special property in the chattel, and a right to its immediate possession, and that the evidence proves either an unlawful taking or an unlawful detention by defendant, is proper and should be given on request;[79] but an instruction is clearly erroneous which leaves out questions as to the ownership or right to possession of plaintiff, and confines itself to the question of the detention of the property in dispute,[80] and it is proper to refuse a charge that plaintiff in replevin can recover on a temporary right of possession, not explaining what facts in evidence would establish such a right.[81] Where the possession was originally by bailment, it is improper to leave the question of adverse possession to the jury without instructing them as what would amount to adverse possession under the circumstances of the case.[82]

3. Value of Property and Damages. The jury should be instructed that if they find for plaintiff they shall assess the value of the property at the amount warranted by the proof;[83] and it is error to direct the jury to find the value of property seized at a sum different from that stated in the pleadings of both parties,[84] and as the sole purpose of an instruction upon the question of damages as to furnish the jury a rule by which to estimate them,[85] where there is an entire absence of any evidence tending to show that plaintiff has sustained any damages by reason of the unlawful detention of his property, no instruction should be given on that point.[86] An instruction that the jury should assess defendant's

S. W. 986; Lillie *v.* Shaw, 22 Wash. 234, 60 Pac. 406.

Where the question of possession is unimportant it is not error to refuse to instruct the jury that continued possession created a presumption of ownership to be rebutted by a preponderance of evidence. Gavigan *v.* Evans, 45 Mich. 597, 8 N. W. 545.

78. McMahon *v.* Scott, 132 Ill. App. 582.

79. Clark *v.* Heck, 17 Ind. 281.

A charge that plaintiff must prove "absolute" ownership of the property is not erroneous, where the word "absolute" was not so used as to mislead the jury. Harward *v.* Davenport, 105 Iowa 592, 75 N. W. 487.

80. Chamberlin *v.* Winn, 1 Wash. 259, 24 Pac. 446, 1 Wash. 501, 20 Pac. 780.

81. Hopper *v.* Callahan, 78 Md. 529, 28 Atl. 385.

82. Lockhart *v.* Luker, 36 Miss. 68.

83. Jeffreys *v.* Greeley, 20 Fla. 819 (holding that there was no error, under the circumstances, in the use of the word "damages" in the charge, instead of the word "value"); Meyer *v.* Michaels, 69 Nebr. 138, 95 N. W. 63, 97 N. W. 817; Morss *v.* Stone, 5 Barb. (N. Y.) 516 (holding that if there is any evidence tending to show that a part of the goods replevied belonged to a third person, the jury ought to be charged, that if they find this to be a fact, to give a verdict for the value thereof to defendant); Linn *v.* Wright, 18 Tex. 317, 70 Am. Dec. 282.

Where the interest of the party entitled to possession is of a limited nature, less than the actual value of the property replevied, the jury should be directed to assess the value of the property, as against the actual owner, only at a sum which will be equivalent to such limited interest. Rhoads *v.* Woods, 41 Barb. (N. Y.) 471.

Where only one witness testified as to the value of the property claimed, it is error to refuse to charge that if the jury believed the testimony of that witness they should accept his valuation. Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

84. Peterson *v.* Hall, 61 Minn. 268, 63 N. W. 733 (holding that in replevin for a note and mortgage, where the actual value is stated in the complaint to be the principal of the note, it is error to charge that in fixing the value the jury may consider the interest on the note which had accrued prior to the action); Houston *v.* Smythe, 66 Miss. 118, 5 So. 520.

85. Morehead *v.* Adams, 18 Nebr. 569, 26 N. W. 242.

86. Brown *v.* Morris, 3 Kan. App. 86, 45 Pac. 98; Hanlon *v.* Goodyear, 103 Mo. App. 416, 77 S. W. 481. And see Brunell *v.* Cook, 13 Mont. 497, 34 Pac. 1015, where, in an action by a farmer to recover possession of horses, wagon, and harness, and for damages for their wrongful detention, a charge that the measure of damages was "the reasonable value of the use or hire of the property while in the possession of the defendant from the time of the demand" was held to be prejudicial to defendant when unaccompanied by considerations of whether the property could have been constantly employed by plaintiff at a given rate of earnings, or by letting for hire or by employment at home, and whether the gross earnings would have been diminished by expense for feeding and care.

damages for a wrongful taking at the value of the use of the property from the time of the taking to the present time is erroneous, as the jury should have been told to deduct from the earnings of the property any expense in caring for it.[87]

G. Verdict and Findings[88] **— 1. In General — a. Requisites and Sufficiency in General.** A verdict or finding in an action of replevin must be so definite, special, and full that the court may ascertain from its terms what judgment to render thereon,[89] and must be supported by the weight of the evidence,[90] and must not be repugnant or inconsistent,[91] and must comply at least substantially with all statutory requirements as to its form and contents,[92] although a verdict will not be set aside for formal defects or omissions therein, if it is supported by special findings and the evidence in the case.[93] The findings should state the ultimate facts pleaded, and not the probative facts,[94] and although it is the better form to embrace all the findings in one verdict, the fact that the findings are embraced in separate verdicts is merely an informality which will not vitiate the verdict.[95]

b. Responsiveness to Issues in General.[96] The verdict and findings in an action of replevin must be responsive to all the material issues of fact raised by the pleadings and proof,[97] and are generally sufficient if they follow the plead-

Punitive damages.— In replevin, where the evidence does not show any wilful wrong or malice on the part of defendant, there is no occasion for an instruction defining punitive damages. Gregory *v.* Woodbery, 53 Fla. 566, 43 So. 504.

87. Haggerty *v.* Lash, 34 Mont. 517, 87 Pac. 907, holding likewise that in such action, where defendant denied plaintiff's title and claimed damages for wrongful taking, plaintiff was entitled to an instruction that a party who claims compensation for an alleged wrong must show not only that he suffered a loss, but what was the amount of the loss, and that the burden of proving both was on the party alleging the wrong.

88. **Verdict** generally see TRIAL.

89. Alderman *v.* Manchester, 49 Mich. 48, 12 N. W. 905; Smith *v.* Dinneen, 61 N. Y. App. Div. 264, 70 N. Y. Suppl. 477; Hewson *v.* Saffin, 7 Ohio, Pt. II, 232.

If the verdict is so indefinite and uncertain that it is impossible to tell therefrom the conclusion of the jury as to a material issue, a judgment thereon cannot be sustained. Smith *v.* Dinneen, 61 N. Y. App. Div. 264, 70 N. Y. Suppl. 477.

90. Dobbins *v.* Hanchett, 20 Ill. App. 396 (holding that where defendant pleads property in several persons, and the jury returns a verdict of not guilty and property in a certain one of the parties, but the evidence shows title to have been in a certain other party, a judgment thereon will be reversed); Hedges *v.* Payne, 17 N. Y. Suppl. 809; Green *v.* Burke, 23 Wend. (N. Y.) 490.

91. Tardy *v.* Howard, 12 Ind. 404; Nottingham *v.* Vincent, 50 Mich. 461, 15 N. W. 551.

A verdict which finds two inconsistent material facts is void and cannot be the foundation of a legal judgment. Hewson *v.* Saffin, 7 Ohio, Pt. II, 232.

92. See the statutes of the several states; and the following cases:

California.— Washburn *v.* Huntington, 78 Cal. 573, 21 Pac. 305, holding that under Code Civ. Proc. § 667, it is essential to sustain a judgment for plaintiff that the court shall find that he is entitled to a recovery of the property sued for, and that a finding that he is entitled to judgment for a particular amount is not a compliance with the statute.

Colorado.— Hennessey *v.* Barnett, 12 Colo. App. 254, 55 Pac. 197.

Florida.—Johnson *v.* Clutter Music House, 55 Fla. 385, 46 So. 1.

Georgia.— Spence *v.* Holman, 30 Ga. 646.

Missouri.— Fulkerson *v.* Dinkins, 28 Mo. App. 160.

Nebraska.— Heffley *v.* Hunger, 54 Nebr. 776, 75 N. W. 53; Connelly *v.* Edgerton, 22 Nebr. 82, 34 N. W. 76.

Oregon.— Corbell *v.* Childers, 17 Oreg. 528, 21 Pac. 670.

Pennsylvania.— See Howard *v.* Johnson, 1 Ashm. 58.

See 42 Cent. Dig. tit. "Replevin," § 360.

A failure to comply with the statutory requirements is ground for a reversal, where it is prejudicial to the party complaining. Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150, 69 Nebr. 773, 96 N. W. 645.

In replevin before a justice, if he finds for plaintiff, he should find the value of the property, and that plaintiff is entitled to the possession, and should assess his damages for the unjust taking and detention, and should then enter an order on his docket that the officer deliver the property to plaintiff. Beemis *v.* Wylie, 19 Wis. 318.

93. Hershiser *v.* Delone, 24 Nebr. 380, 38 N. W. 863.

94. Vasey *v.* Campbell, 4 Cal. App. 451, 88 Pac. 509.

Findings as to ultimate facts control as against findings of probative facts. Vasey *v.* Campbell, 4 Cal. App. 451, 88 Pac. 509.

95. Mitchell *v.* Burch, 36 Ind. 529.

96. **Conformity of judgment to verdict in general** see *infra*, V, H, 1, d.

Sufficiency of verdict as to title and right to possession see *infra*, V, G, 1, d.

97. *Arkansas.*— Smith *v.* Houston, 25 Ark. 183.

ings.[98] If a verdict is responsive to the issues it will not be rejected because of immaterial findings;[99] but if it varies from the issues in a substantial matter, as where it finds only a part of that which is in issue, a judgment thereon cannot be sustained.[1] It is not required, however, that the verdict shall be expressed formally and precisely in the words of the issues, or that it shall find affirmatively or negatively on every issue;[2] but it will be liberally construed as to matters of form, and although it is expressed in an informal manner, if it contains sufficient to show the intention of the jury, the court may correct the informalities and

California.— Pratt *v.* Welcome, 6 Cal. App. 475, 92 Pac. 500.

Colorado.— Sears *v.* Andrews, 1 Colo. 88.

Dakota.— Rudolph *v.* North, 6 Dak. 79, 50 N. W. 487.

Idaho.— Campbell *v.* Rexburg First Nat. Bank, 13 Ida. 95, 88 Pac. 639.

Illinois.— Shelton *v.* Franklin, 68 Ill. 333.

Indiana.— Hess *v.* Hess, 119 Ind. 66, 21 N. E. 339 (holding that in an action of replevin for clover seed raised on certain land, a special finding showing that plaintiff had leased the land for one year and as much longer as he desired to retain it will not support a conclusion of law that he is entitled to clover seed produced upon the land in the third year after the lease was executed, unless there is also a finding that the tenancy continued up to that time); Washburn *v.* Roberts, 72 Ind. 213; Wilhelm *v.* Scott, 14 Ind. App. 275, 40 N. E. 537, 42 N. E. 827.

Kentucky.— Lyon *v.* Stewart, 5 J. J. Marsh. 676; Gambrell *v.* Gambrell, (1908) 113 S. W. 885.

Michigan.— Congdon *v.* Bailey, 121 Mich. 570, 80 N. W. 369; Moore *v.* Vrooman, 32 Mich. 526.

New Jersey.— Middleton *v.* Quigley, 12 N. J. L. 352.

North Dakota.— Johnson *v.* Glaspey, 16 N. D. 335, 113 N. W. 602.

Oregon.— Freeman *v.* Trummer, 50 Oreg. 287, 91 Pac. 1077 (holding that the findings support a judgment for defendant, where they conform to the new matter averred in the answer and disprove plaintiff's right, although there are no findings conformable to the complaint, where no request has been made therefor, since findings which support the judgment and conform to the theory of the prevailing party are sufficient); Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808 (holding that where plaintiff's right to possession depends upon the validity of a note and mortgage to which defendant pleads payment and usury, a verdict that the chattels are the property of defendant and that he is entitled to possession thereof is tantamount to a general verdict upon the issues of usury and payment and is sufficient to support a judgment for defendant).

South Dakota.— Hormann *v.* Sherin, 6 S. D. 82, 60 N. W. 145.

Wisconsin.— Feder *v.* Daniels, 79 Wis. 578, 48 N. W. 799; Hass *v.* Prescott, 38 Wis. 146.

See 42 Cent. Dig. tit. "Replevin," §§ 361, 362.

Illustrations.— Where the pleas are *non cepit*, property in defendant, property in a third person, and justification of the taking under an execution against such third person, a verdict for defendant should contain a finding of the issue for defendant, that the property is the property of the party defendant in the execution; and a finding that defendant is not guilty and that the right of special property is in defendant is not sufficient. Hanford *v.* Obrecht, 49 Ill. 146. Under a plea of property in defendant as sheriff under an execution, and in the judgment debtor, a verdict for defendant should find the issue for defendant and that the property in question was the property of the judgment debtor. Gilligan *v.* Stevens, 4 Ill. App. 401.

Where there is but one declaration with but one plea, against two persons jointly, two verdicts against such persons are void, as there should be either two declarations or only one verdict. Williams *v.* Devine, 52 Miss. 139.

A verdict in form as if the action were on the case is wholly unwarranted in an action of claim and delivery of personal property. Wheeler *v.* Allen, 49 Barb. (N. Y.) 460 [*affirmed* in 51 N. Y. 37].

A special finding which amounts to no more than a conclusion of law, which the jury cannot decide, will not authorize a judgment for the possession of the property. Keller *v.* Boatman, 49 Ind. 101.

Presumptions.— Where there are no written pleadings and the record does not disclose the issue tried, and the verdict is sufficient as to some issues which may arise in an action of replevin, it will be presumed that it is responsive to the issue which was tried. Sears *v.* Andrews, 1 Colo. 88.

98. Vasey *v.* Campbell, 4 Cal. App. 451, 88 Pac. 509.

99. Baum Iron Co. *v.* Union Sav. Bank, 50 Nebr. 387, 69 N. W. 939.

1. Goldstein *v.* Smith, 85 Ill. App. 588; Nelson *v.* Bowen, 15 Ill. App. 477; Hayes *v.* Slobodny, 54 Nebr. 511, 74 N. W. 961.

Where there is a substantial difference between the issues joined, a verdict finding only on one of the issues is insufficient. Middleton *v.* Quigley, 12 N. J. L. 352, holding that the pleas of "*non tenuit*" and "nothing in arrear," in replevin for goods seized in distress for rent, are substantially different, and a verdict finding for plaintiff on the issue of "nothing in arrear" without any finding on the issue of *non tenuit* will not support a judgment for him.

2. Payne *v.* June, 92 Ind. 252; Lindauer *v.* Teeter, 41 N. J. L. 255; Corbell *v.* Childers, 17 Oreg. 528, 21 Pac. 670.

put the verdict into proper form so as to make it serve as a basis for a judgment,[3] and will not reverse it on merely technical grounds unless the person complaining of the error has suffered injury thereby.[4] A verdict in replevin ordinarily sufficiently covers all the issues, where it finds for plaintiff or defendant, as the case may be, and that he is entitled to the immediate possession of the property described and sets out the property and its value, and assesses damages for the detention.[5]

c. General Finding For Plaintiff or Defendant. As a general rule a general verdict or finding for plaintiff or defendant responds to all the issues, as to which the law does not require a special verdict, and is a sufficient finding in favor of the prevailing party, of the title or right to possession of the property, or both, according as such facts are put in issue,[6] unless such verdict or finding is contrary to the evidence,[7] or is repugnant or inconsistent,[8] as where it is upon different and inconsistent pleas.[9] Thus it has been held that a general finding for plaintiff, assessing his damages, is equivalent to a finding that he is the owner and entitled to the possession of the property which is the subject-matter of the suit,[10]

3. *Nebraska.*— Degering *v.* Flick, 14 Nebr. 448, 16 N. W. 824.

New Jersey.—Lindauer *v.* Teeter, 41 N. J. L. 255.

New Mexico.— Brannin *v.* Bremen, 2 N. M. 40.

New York.—Thompson *v.* Button, 14 Johns. 84.

Pennsylvania.— Park *v.* Holmes, 147 Pa. St. 497, 23 Atl. 769.

Rhode Island.—Kebabian *v.* Adams Express Co., 28 R. I. 177, 66 Atl. 201.

See 42 Cent. Dig. tit. "Replevin," § 361. And see *infra*, V, G, 1, k.

4. Baum Iron Co. *v.* Union Sav. Bank, 50 Nebr. 387, 69 N. W. 939; Degering *v.* Flick, 14 Nebr. 448, 16 N. W. 824.

5. Washburn *v.* Roberts, 72 Ind. 213; Clerk *v.* Heck, 17 Ind. 281; Corbell *v.* Childers, 17 Oreg. 528, 21 Pac. 670.

6. *California.*— Cain *v.* Cody, (1892) 29 Pac. 778.

Colorado.— Freas *v.* Lake, 2 Colo. 480.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48, holding that, in an action of claim and delivery, a general verdict finding for or against either party is sufficient to enable the court to enter judgment thereon for the return of the property, when such return is the appropriate remedy.

Nebraska.— Degering *v.* Flick, 14 Nebr. 448, 16 N. W. 824.

New York.—Thompson *v.* Button, 14 Johns. 84.

See 42 Cent. Dig. tit. "Replevin," § 363.

An action against several defendants to recover possession of personal property, if the jury find exclusive right of possession of the property to be in one of the defendants, they are not bound to render a general verdict in favor of all the defendants. Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 446.

7. Green *v.* Burke, 23 Wend. (N. Y.) 490.

8. Tardy *v.* Howard, 12 Ind. 404.

9. Hewson *v.* Saffin, 7 Ohio, Pt. II, 232.

10. *California.*— Cain *v.* Cody, (1892) 29 Pac. 778.

Connecticut.— McNamara *v.* Lyon, 69 Conn. 447, 37 Atl. 981.

Indiana.— Payne *v.* June, 92 Ind. 252; Washburn *v.* Roberts, 72 Ind. 213; Crocker *v.* Hoffman, 48 Ind. 207; Rowan *v.* Teague, 24 Ind. 304; McAfee *v.* Montgomery, 21 Ind. App. 196, 51 N. E. 957 (holding also that a further finding in such a verdict that the property in question was unlawfully detained by defendant is unnecessary); Van Gundy *v.* Carrigan, 4 Ind. App. 333, 30 N. E. 933. See also Robertson *v.* Caldwell, 9 Ind. 514.

Iowa.— Newlien *v.* Reed, 30 Iowa 496.

Kansas.—O'Farrel *v.* McClure, (App. 1896) 47 Pac. 160.

Minnesota.— Coit *v.* Waples, 1 Minn. 134.

Montana.— McGregor *v.* Lang, 32 Mont. 568, 81 Pac. 343.

Nebraska.— Baum Iron Co. *v.* Union Sav. Bank, 50 Nebr. 387, 69 N. W. 939.

South Dakota.— Towne *v.* Liedle, 10 S. D. 460, 74 N. W. 232; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524.

Wisconsin.— Krause *v.* Cutting, 28 Wis. 655.

See 42 Cent. Dig. tit. "Replevin," § 363.

A general verdict for plaintiff is proper: (1) Where there has not been a delivery of the property to plaintiff and the answer does not deny the value of the property claimed; or (2) where the property has been delivered to plaintiff and the answer does not claim a redelivery. Archer *v.* Boudinet, Code Rep. N. S. (N. Y.) 372.

Where there is but one issue made by the pleadings which is as to the title of the property, if the jury find for plaintiff and find the value and assess the damages, such finding is sufficient. Everit *v.* Walworth County Bank, 13 Wis. 419. See also Donaldson *v.* Johnson, 2 Pinn. (Wis.) 482, 2 Chandl. 160.

Where defendant pleads non cepit and non tenuit and property in himself, a verdict finding him guilty, and assessing damages is equivalent to a finding of the property in plaintiff. Goldstein *v.* Smith, 85 Ill. App. 588.

In replevin for furniture of certain premises and also for a lease of the same, a verdict for plaintiff merely settles the right of possession of the paper on which the lease is

and of the issue of wrongful detention,[11] and it is not necessary that there shall be an express finding that plaintiff was the owner or entitled to the possession of the property at the time of the commencement of the action;[12] nor is such a general finding cut down by special matters stated in the verdict.[13] Likewise a general verdict for defendant, and assessing damages, is as against plaintiff a finding on all the issues,[14] such as *non cepit, non detinet,* property in defendant, or in a third person, and rightful possession in defendant.[15] Under some statutes, however, a general verdict for plaintiff in an action for the recovery of specific personal property is not sufficient, but it must specify the property to which he is entitled and its value;[16] or where the property has been delivered to plaintiff and the verdict is for defendant, it must find whether defendant had the right of property or the right of possession only, and if either is found in his favor, must also find the value of the property or the value of possession and such damages for withholding the same as may be just and proper.[17] A verdict of not guilty is responsive to those issues only, under which plaintiff is admitted to be the owner of the property.[18]

d. Title and Right to Possession.[19] The verdict in an action of replevin must be responsive to the issue of title or right to possession, or both, according as such issues are raised by the pleadings,[20] and must not be contradictory or inconsistent,[21] although an informality or defect in such a verdict will not be fatal, if it

written, and does not make the assertion by defendant of his right of possession unlawful. Clark *v.* Nevill, 1 Phila. (Pa.) 28.

11. O'Farrel *v.* McClure, (App. 1896) 47 Pac. 160; Eldred *v.* Oconto County, 33 Wis. 133.

Where defendants have admitted the detention by denying plaintiff's ownership, a verdict finding plaintiff the owner, and entitled to possession, implies that the detention was wrongful. Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

12. McGregor *v.* Lang, 32 Mont. 568, 81 Pac. 343.

13. Washburn *v.* Roberts, 72 Ind. 213.

14. Holmes *v.* Tarble, 77 Ill. App. 114; Baldwin *v.* Burrows, 95 Ind. 81; Brunk *v.* Champ, 88 Ind. 188 (holding that, in an action of replevin against a sheriff and execution plaintiffs, a verdict for defendants generally as to part of the property, instead of for the sheriff alone, is good); Wheat *v.* Catterlin, 23 Ind. 85 (holding that a verdict "for defendant" is in effect a finding that plaintiff unlawfully took the property, and that defendant is entitled to the possession); Huston *v.* Wilson, 3 Watts (Pa.) 287; Blakeslee *v.* Rossman, 44 Wis. 550.

A general finding "for defendant" is sufficient to support a judgment for defendant, without fixing the amount recoverable, where defendant by his pleading asks judgment for a specified amount, paid by him on the property which plaintiff seeks to recover, and of which plaintiff has taken possession under an order of delivery. Baldwin *v.* Dewitt, 43 S. W. 246, 19 Ky. L. Rep. 1248.

15. Freas *v.* Lake, 2 Colo. 480; Holmes *v.* Tarble, 77 Ill. App. 114; Atlas Sewer Pipe Co. *v.* Stickney, 70 Ill. App. 176.

16. Gulath *v.* Waldstein, 7 Mo. App. 66; Smith *v.* Smith, 17 Oreg. 444, 21 Pac. 439; Jones *v.* Snider, 8 Oreg. 127, holding that, where the court or statute directs a special verdict, the court will not render a judgment on a general verdict, for no presumption arises thereon that the jury has passed upon the issues not named therein. And see *infra*, V, G, 1, h.

17. State *v.* Dunn, 60 Mo. 64; Fulkerson *v.* Dinkins, 28 Mo. App. 160; Ford *v.* Ford, 3 Wis. 399.

18 Rohe *v.* Pease, 189 Ill. 207, 59 N. E. 520 [*reversing* 89 Ill. App. 687].

19. **Requisites and sufficiency as to the title and right to possession considered with other findings** see *supra*, V, G, 1, a.

20. *California.*— Pratt *v.* Welcome, 6 Cal. App. 475, 92 Pac. 500.

Illinois.— Shelton *v.* Franklin, 68 Ill. 333 (holding that a verdict finding the issues for defendant, but finding that the property is in a person not named in any one of the pleas, cannot be sustained); Nelson *v.* Bowen, 15 Ill. App. 477.

Indiana.— Robertson *v.* Caldwell, 9 Ind. 514, holding that a finding "that the possession of the property mentioned in the complaint be given to the plaintiff" is equivalent to a finding of property in plaintiff, and that he is entitled to possession.

Iowa.— Morris *v.* Burley, 74 Iowa 45, 36 N. W. 882.

New Jersey.—Chambers *v.* Hunt, 18 N. J. L. 339, holding that plaintiff cannot have judgment on an issue of property in him, unless the jury find the property to be in him as alleged, and that a verdict that the property is not in defendant or in those whom he alleges it to be by way of inducement is not sufficient.

Wisconsin.— Appleton *v.* Barrett, 22 Wis. 568.

See 42 Cent. Dig. tit. "Replevin," §§ 364, 365.

21. Nottingham *v.* Vincent, 50 Mich. 461, 15 N. W. 551 (holding that a special finding involving the conclusion that a certain per-

is sufficient when aided by special findings and the evidence.[22] Thus, where the question of the ownership of the property is in issue, the verdict must contain a finding on such question in accordance with the pleadings,[23] and must decide the ownership or right to possession of all the property in issue;[24] and while a general verdict for plaintiff or defendant as the case may be may be sufficient to support a judgment ordering a return of the property,[25] except where the statute directs that the verdict shall be special and find on all the issues,[26] the issue of ownership is ordinarily not sufficiently responded to, by a verdict which passes upon the right of possession only,[27] except where by statute a recovery may be had upon proof of either general or special ownership,[28] or where special property

son is holding chattels under an unexpired lease is inconsistent with a general verdict for the lessor, in replevin by him against an officer who has levied on the chattels under an execution against the lessee, as it negatives plaintiff's possessory right); Alderman *v.* Manchester, 49 Mich. 48, 12 N. W. 905 (holding that in an action of replevin for property levied on as that of a person other than plaintiff, a verdict that plaintiff is the general owner, and that defendant has a lien to the amount of his levy, is contradictory, and insufficient to sustain a judgment).

22. Hershiser *v.* Delone, 24 Nebr. 380, 28 N. W. 863, holding that the omission of the word "possession" in the verdict is not a fatal defect, where the special findings and the evidence show that plaintiff is the owner of the property and entitled to its possession.

23. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689; Ramsey *v.* Waters, 1 Mo. 406; Boswell *v.* Green, 25 N. J. L. 390 (holding that a finding that, at the time alleged in the declaration, the property and the goods were in plaintiff is sufficient in replevin against a sheriff); Smith *v.* Phelps, 7 Wis. 211. *Compare* Gambrell *v.* Gambrell, (Ky. 1908) 113 S. W. 885, holding that where the chattels described as in the possession of defendant are surrendered to plaintiff before or at the time of trial, or where the proof shows that they are the property of defendant and not the property of plaintiff, it is not necessary for the jury to find concerning such articles, although it is the better practice to so find if the property belongs to defendant.

Where the verdict finds the facts from which ownership results as a matter of law, it is sufficient, although it does not expressly determine the ownership of the property. National Cash Register Co. *v.* Booneville, 119 Wis. 222, 96 N. W. 558.

Where defendant pleads title in another, a verdict that the property was in plaintiff is responsive to the plea and covers the issues, although it omits the converse of the finding — that the property was not in the party set up as owner in the plea. Thompson *v.* Dyer, 25 R. I. 321, 55 Atl. 824, 25 R. I. 421, 56 Atl. 446.

24. Dowell *v.* Richardson, 10 Ind. 573 (holding that a verdict for plaintiff is bad for uncertainty if the court cannot determine therefrom what property the jury intended to find belonged to him); Feder *v.* Daniels, 79 Wis. 578, 48 N. W. 799; Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626 (holding that a verdict finding plaintiff to be entitled to part of the property, and silent as to the rest, is fatally defective, although the omitted property has not been taken from defendant's possession and his answer asks for no return); Young *v.* Lego, 38 Wis. 206 (holding that for a failure of the verdict to determine the right to the possession of one article in question there must be a new trial).

Inference.— Where plaintiff has possession of the property and the jury finds that defendant is entitled to a specified part of it, it is inferentially a finding that plaintiff is entitled to the remainder. Campbell *v.* Rexburg First Nat. Bank, 13 Idaho 95, 88 Pac. 639.

Where plaintiff disclaims ownership of part of the property, a verdict for him for that part cannot be sustained. Updyke *v.* Wheeler, 37 Mo. App. 680.

Articles which have been disposed of by defendant need not be awarded to plaintiff in an action of claim and delivery. Gambrell *v.* Gambrell, (Ky. 1908) 113 S. W. 885.

25. Harris *v.* O'Gorman, 118 Mich. 553, 77 N. W. 12.

26. Jones *v.* Snider, 8 Oreg. 127.

27. Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689; Feller *v.* Feller, 40 Oreg. 73, 66 Pac. 468 (holding that where plaintiff alleges that he is the owner and entitled to the possession of specified property, a verdict that plaintiff is entitled to the possession of such property as described in the complaint is insufficient to sustain a judgment for plaintiff, because of its not finding on the issue of ownership); Yick Kee *v.* Dunbar, 20 Oreg. 416, 26 Pac. 275; Appleton *v.* Barrett, 22 Wis. 568; Child *v.* Child, 13 Wis. 17.

But where, under the pleadings, each party claims the right of possession by virtue of absolute ownership, a verdict which finds either party entitled to the possession of the property and the value thereof is a sufficient finding of ownership and will support a judgment for the possession of the property or its value. Branstetter *v.* Morgan, 3 N. D. 290, 35 N. W. 758.

28. Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106 (holding that in such a case a verdict that plaintiff is entitled to the possession of the property without finding that he is the owner thereof is sufficient to sustain a judgment for him); Wyandotte Nat. Bank *v.* Simpson, 8 Kan. App. 748, 55 Pac. 347.

is the only real issue in the case.[29] Nor is the issue of the ownership responded to by a verdict of not guilty,[30] or by a verdict that defendant did or did not unlawfully take,[31] or did or did not unlawfully detain the property,[32] or by a verdict which finds only upon the issue of damages.[33] The issue of right of possession, however, is sufficiently covered by a verdict finding the right of property in plaintiff or defendant and assessing damages for its detention.[34] It has been held under the various statutes that where the property has been delivered to plaintiff and the jury find upon the issue joined for defendant, they must also find whether defendant had the right of property or the right of possession only at the commencement of the action;[35] that where the jury find for plaintiff and assess damages for the unlawful detention of the property it is unnecessary to find whether he has the right of property or the right of possession therein;[36] that the pleas of *non cepit* and *non detinet* put in issue both the right of possession and the wrongful taking, and that a verdict which fails to find the title or right of possession in either party is bad.[37]

e. Alternative Verdict. The statutes usually require that a verdict in favor of a party for a return of the property should be in the alternative for the possession of the property or for the value thereof in case it cannot be returned;[38] but

29. Single *v.* Barnard, 29 Wis. 463. *Compare* Kaufer *v.* Walsh, 88 Wis. 63, 59 N. W. 460, holding that where plaintiff shows a special property in the goods to an extent less than the value of the property is shown to be, a verdict that he is entitled to the possession of the property, and damages is erroneous.

30. Rohe *v.* Pease, 189 Ill. 207, 59 N. E. 520 [*reversing* 89 Ill. App. 657] (holding that it is erroneous for the court to award a writ of retorno habendo upon such a verdict); Hanford *v.* Obrecht, 38 Ill. 493; Faxon *v.* Monser, 125 Ill. App. 328; Hackett *v.* Jones, 34 Ill. App. 562.

Where, however, the evidence supports a plea of special property and right of possession, a verdict finding defendant not guilty, assessing damages, and directing a return of the goods, although incorrect in form for failing to directly decide the issue of special property, is substantially right and the court can correct the error in entering judgment. Kebabian *v.* Adams Express Co., 28 R. I. 177, 66 Atl. 201.

31. Boynton *v.* Page, 13 Wend. (N. Y.) 425; Sprague *v.* Kneeland, 12 Wend. (N. Y.) 161 (holding that where there is a plea of property as well as a plea of *non cepit* and the jury finds only the taking, a *venire de novo* will be awarded); Bemus *v.* Beekman, 3 Wend. (N. Y.) 667.

32. Harris *v.* O'Gorman, 118 Mich. 553, 77 N. W. 12; Page *v.* Ramsdell, 59 N. H. 575; Emmons *v.* Dowe, 2 Wis. 322.

33. Smith *v.* Smith, 17 Oreg. 444, 21 Pac. 439.

34. Stephens *v.* Scott, 13 Ind. 515; Cassel *v.* Western Stage Co., 12 Iowa 47.

An omission to make a finding as to the right of possession at the time of the commencement of the action is immaterial where the judgment in an action of claim and delivery is for defendant for a stipulated sum. Banning *v.* Marleau, 133 Cal. 485, 65 Pac. 964.

35. Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150, 69 Nebr. 773, 96 N. W. 645; Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975; Wolf *v.* Meyer, 12 Ohio St. 432.

36. Rogers *v.* Sample, 28 Nebr. 141, 44 N. W. 86.

37. Ford *v.* Ford, 3 Wis. 399; Heeron *v.* Beckwith, 1 Wis. 17, holding that the finding of a justice, or of the county court, is not complete upon the issue of not guilty unless it embrace the right of possession.

38. Campbell *v.* Rexburg First Nat. Bank, 13 Ida. 95, 88 Pac. 639; Carson *v.* Applegarth, 6 Nev. 187; Lewisohn *v.* Apple, 12 N. Y. Civ. Proc. 274; Bossard *v.* Vaughn, 68 S. C. 96, 46 S. E. 523; Finley *v.* Cudd, 42 S. C. 121, 20 S. E. 32 (holding that under Code, § 283, an alternative verdict for defendant is necessary only where he is entitled to a return of the property); Thompson *v.* Lee, 19 S. C. 489; Eason *v.* Miller, 18 S. C. 381; Bardin *v.* Drafts, 10 S. C. 493; Smith *v.* Phelps, 7 Wis. 211. See also Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48. But *compare* Van Meter *v.* Barnett, 119 Ind. 35, 20 N. E. 426.

Under Cal. Civ. Code, §§ 627, 667, in an action of claim and delivery, a verdict for the possession of the property or its value is sufficient, and it is not necessary that the verdict should provide for any delivery of the property; and where the verdict finds a right of possession, the right to a delivery, if it can be had, or if not, the value of the property, in the alternative, is a conclusion of law which the judgment must contain, but not the verdict. Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546 See also Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605.

Under Mont. Rev. Codes (1907), § 6760, (1103) providing that in replevin, if the property has not been delivered to plaintiff or if defendant claims a return, the jury, if their verdict be for plaintiff, or if, being in favor of defendant, they find that he is entitled to a return, shall find the value of the property and assess the damages, the verdict need not be in the alternative. Hynes *v.* Barnes, 30

an alternative verdict is not necessary upon such issues, where it is in favor of the party who has the possession of the property,[39] or where there cannot be a return of the property.[40]

f. Taking or Detention by Defendant. A verdict in an action of replevin should also be responsive to the question of unlawful taking or unlawful detention, or both, when in issue, otherwise a judgment on the verdict cannot be sustained.[41] As a general rule the verdict should either in general or specific terms pass upon the question of unlawful detention;[42] but where the verdict, when construed in the light of the issues and evidence, shows beyond all question the fact of unlawful detention, it is not fatally defective because it does not expressly state such fact.[43] Such issues are responded to by a verdict of guilty or not guilty;[44] but not by a verdict which is silent as to whether or not the property was unlawfully taken or detained, as where it merely finds on an issue as to the right of property;[45] nor does a verdict of unjust detention respond to an issue of unlawful taking.[46] It has been held, under the statutes, that in order to sustain a judgment for plaintiff, the verdict or special finding must show that defendant was in possession of the property when the writ of replevin was issued or at some time thereafter;[47] but on the other hand it has been held that since the gist of the action is the unlawful detention, a finding merely that plaintiff had possession of the property at the commencement of the action will not sustain a judgment against defendant for unlawfully detaining it.[48]

g. Partial Recovery. Where issue is joined on the right of property or posses-

Mont. 25, 75 Pac. 523. See also Anderson *v.* O'Laughlin, 1 Mont. 81.

Action against co-defendants.— In claim and delivery against co-defendants not jointly liable, a verdict for plaintiff for certain property, valued at a certain sum, with damages for detention, is too indefinite, as it should in such case be against each defendant separately for the specific property, or its value, wrongfully in his possession. Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

39. Finley *v.* Cudd, 42 S. C. 121, 20 S. E. 32.

40. Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137 (where by agreement of counsel it is conceded that the goods cannot be returned); McGraw *v.* Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810.

41. Williamson *v.* Strong, (Cal. 1902) 68 Pac. 486; Laughlin *v.* Thompson, 76 Cal. 287, 18 Pac. 330; Nelson *v.* Bowen, 15 Ill. App. 477; Ridenour *v.* Beekman, 68 Ind. 236; Leroy *v.* McConnell, 8 Kan. 273, holding that, in replevin under the code, the wrongful detention is the gist of the action, and a verdict that finds that there was no wrongful detention is sufficient.

42. Eiseley *v.* Malchow, 9 Nebr. 174, 2 N. W. 372.

43. Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Eiseley *v.* Malchow, 9 Nebr. 174, 2 N. W. 372 (holding that where the question of unlawful detention is controlled entirely by that of ownership, which is expressly covered by the finding, a judgment on such a verdict will not be reversed on the ground that it does not contain general or specific findings on the question of unlawful detention); Hormann *v.* Sherin, 6 S. D. 82, 60 N. W. 145 (holding that a verdict for "plaintiff on all the issues," and that "plaintiff is entitled to the immediate possession" of the property, is sufficient, if no objection thereto is made, when rendered, without expressly finding ownership in the plaintiff, and that it was wrongfully detained by defendant); Nebeker *v.* Harvey, 21 Utah 363, 60 Pac. 1029 (holding that the fact that the complaint contains an allegation of "wrongful taking" does not furnish a sufficient reason for setting aside a verdict for wrongful detention, when such detention is not only the main issue, but is the gravamen of the action, and when the case is tried mainly on that theory, and no objection to the complaint, based on such allegation, is raised by special plea, and the verdict is supported by the evidence).

44. Bourk *v.* Riggs, 38 Ill. 320; Nelson *v.* Bowen, 15 Ill. App. 477. But see Hanford *v.* Obrecht, 49 Ill. 146, holding that technically a verdict of not guilty is not a response to a plea of *non cepit*.

45. Smith *v.* Houston, 25 Ark. 183 (holding that a verdict that plaintiff was entitled to the property is not responsive to the issues upon the pleas of *non cepit* and property in defendant); Huff *v.* Gilbert, 4 Blackf. (Ind.) 19 (holding that a verdict finding the property to be in plaintiff is not responsive to unlawful taking or detention); Swain *v.* Roys, 4 Wis. 150 (holding that a verdict that the property detained is that of plaintiff and awarding damages for the detention is defective in not finding that the detention was unjust on the part of defendant).

46. Rouge *v.* Dawson, 9 Wis. 246, holding that in replevin in the *cepit*, a verdict of "unjust detention" does not dispose of the material issue raised by the allegation of taking, and is therefore bad.

47. Krosmopolski *v.* Paxton, 58 Miss. 581; McCormick *v.* McCormick, 40 Miss. 760.

48. Degering *v.* Flick, 14 Nebr. 450, 16 N. W. 825.

sion in several articles or portions of property, the jury may, according to the evidence, find that one part of the property belongs to plaintiff and that the other part belongs to defendant;[49] or where the action is against two or more defendants, one may be found guilty and the others not guilty.[50]

h. Description of Property. As a general rule a verdict in an action of replevin must describe the property involved with such definiteness and certainty that it may be clearly identified;[51] but where such property is specifically described in the pleadings, the description in the verdict may be made certain by a reference therein to the pleadings.[52] Where, however, the description of the property in the pleadings is insufficient, a verdict which refers only to the property described in the pleadings is fatally defective,[53] and where the property involved consists of a number of articles or animals, some description more precise than merely their number is necessary.[54]

i. Submission of Special Interrogatories. Under some statutes the court may, in its discretion, submit questions for special findings, in an action of replevin, in addition to the usual findings in such an action,[55] but only controverted issues of fact may be so submitted.[56] As a general rule, however, a general verdict which disposes of all the issues is sufficient to support a judgment in such an action,[57] although some of the specific questions which are submitted to the jury are returned unanswered, particularly where no objection is made at the time of the return of the verdict, or until after the jury is discharged.[58]

j. Construction and Operation. The verdict or findings in an action of replevin, as in civil cases generally, should be construed to uphold rather than to defeat the verdict or the judgment thereon,[59] and should be construed in con-

49. *Illinois.*— O'Keefe *v.* Kellogg, 15 Ill. 347.

Maryland.— Edelen *v.* Thompson, 2 Harr. & G. 31.

New Hampshire.— Williams *v.* Beede, 15 N. H. 483.

Texas.— See Elliott *v.* Long, 77 Tex. 467, 14 S. W. 145.

Vermont.— Hotchkiss *v.* Ashley, 44 Vt. 195.

Canada.— Haggart *v.* Kernahan, 17 U. C. Q. B. 341; Sills *v.* Hunt, 16 U. C. Q. B. 521; Henderson *v.* Sills, 8 U. C. C. P. 68; Hanington *v.* Cormier, 16 N. Brunsw. 212.

See 42 Cent. Dig. tit. "Replevin," § 369.

Joint ownership.— Where defendant pleads property in himself, and the evidence shows that defendant and plaintiff owned the property jointly, a verdict for defendant on such issue does not determine judicially that the property belongs to him exclusively, so as to prevent plaintiff from recovering his individual share. Reynolds *v.* McCormick, 62 Ill. 412.

50. Carothers *v.* Van Hagan, 2 Greene (Iowa) 481.

51. Lehman *v.* Mayer, 68 N. Y. App. Div. 12, 74 N. Y. Suppl. 194; Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277; Bossard *v.* Vaughn, 68 S. C. 96, 46 S. E. 523; Eason *v.* Miller, 18 S. C. 381; Harris *v.* Austell, 2 Baxt. (Tenn.) 148.

52. Anderson *v.* Lane, 32 Ind. 102 (holding that in such case a reference to the property in the verdict as "said property" is sufficient); Phœnix Furniture Co. *v.* Jaudon, 75 S. C. 229, 55 S. E. 308; Bossard *v.* Vaughn, 68 S. C. 96, 46 S. E. 523. See also Hotchkiss *v.* Ashley, 44 Vt. 195.

Where the answer puts in issue only the title to, and not the identity of, the article described in the complaint, a verdict that "we the jury find for the plaintiff and the value of the property taken to be $72.05 and interest" is sufficiently definite, where the undisputed averments of the complaint show what property is referred to. Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652, 9 L. R. A. 526.

53. Pierce *v.* Langdon, 3 Ida. 141, 28 Pac. 401; Richardson *v.* McCormick, 47 Iowa 80, holding that a verdict declaring plaintiff "entitled to the following property described in her petition," but which fails to enumerate the articles, is so indefinite and uncertain that no judgment can be rendered thereon.

54. Guille *v.* Fook, 13 Oreg. 577, 11 Pac. 277, holding that a verdict which finds plaintiff entitled to that portion of the property described in the complaint, to wit, forty-nine hogs, is too indefinite where the complaint described sixty-six hogs.

55. Singer Mfg. Co. *v.* Sammons, 49 Wis. 316, 5 N. W. 788, holding, however, that where a majority of the questions propounded are answered by a verdict in the usual form in such cases, and the others are immaterial, in view of the verdict rendered, no error can be predicated on a refusal to submit the latter questions.

56. Stringham *v.* Cook, 75 Wis. 589, 44 N. W. 777, holding also that where a special verdict is desired, questions which on the evidence can be answered only in one way need not be submitted to the jury.

57. See *supra*, V, G, 1, c.

58. Faulkner *v.* Meyers, 6 Nebr. 414.

59. Vasey *v.* Campbell, 4 Cal. App. 451,

nection with the issues and proof, and, although informal or irregular, will generally be held sufficient if, when so construed, the intention of the jury is clear and covers all the issues in the case,[60] and if no one is injured or prejudiced thereby, mere inaccuracies in the verdict will not invalidate it.[61] But where the verdict points specifically to one issue and omits others, it cannot be aided by intendment,[62] except where material or immaterial issues are joined and the material issue is passed upon by the jury.[63] A finding that plaintiff or defendant is the owner, etc., should be construed as relating to his title or possession at the time the action was commenced.[64]

k. Amendment or Correction. As a general rule, in replevin as in other civil actions, where the findings of the jury are free from ambiguity and their intention can be ascertained from the data given in the verdict or referred to in the pleadings, the court may amend the verdict in point of form or language so as to give the real intention full expression in proper legal terms,[65] as by rejecting surplusage from the verdict,[66] or where the jury find for plaintiff but award no damages for the detention, by adding nominal damages.[67] But the court cannot amend or change the verdict of the jury in matters of substance,[68] as where the verdict finds damages only, it cannot be amended by the court by entering both debt and damages without the consent of the jury or of proper counsel,[69] nor can a

88 Pac. 509; Blackfoot Stock Co. *v.* Delamue, 3 Ida. 291, 29 Pac. 97.

60. Lindauer *v.* Teeter, 41 N. J. L. 255; Blakeslee *v.* Rossman, 44 Wis. 550.

Joint defendants.—Where, under the pleadings and proof, the verdict if for plaintiff must be against defendants jointly, a verdict against "defendant" will be so understood. Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

61. Blakeslee *v.* Rossman, 44 Wis. 553.

Surplusage.— If the verdict otherwise sufficiently covers the issue of the case, mere surplusage therein should be disregarded. Van Meter *v.* Barnett, 119 Ind. 35, 20 N. E. 426 (holding that a verdict in an action before a justice of the peace is not contrary to law, merely because the jury found the value of the property in controversy, as such finding will be treated as surplusage); Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Lindauer *v.* Teeter, 41 N. J. L. 255.

62. Hackett *v.* Jones, 34 Ill. App. 562; Middleton *v.* Quigley, 12 N. J. L. 352.

A construction whereby a verdict expressed in the terms of one issue is extended to another issue is not admissible unless it appears to be the necessary conclusion upon the whole record. Middleton *v.* Quigley, 12 N. J. L. 352.

63. Ronge *v.* Dawson, 9 Wis. 246.

64. Riess *v.* Delles, 45 Wis. 662.

Presumption.— It has been held that, where the property is taken under process, it will be presumed in the absence of evidence to the contrary that it was taken from the possession of defendant, and a verdict finding all the issues for defendant will ordinarily be construed with reference to this presumption, and not as finding that defendant was not in possession at the commencement of the action. Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

65. *Kansas.*— Pope *v.* Bowzer, 1 Kan. App. 727, 41 Pac. 1048.

Minnesota.— Coit *v.* Waples, 1 Minn. 134.

New York.— Emerson *v.* Bleakley, 2 Abb. Dec. 22, 2 Transcr. App. 171, 3 Transcr. App. 100, 5 Abb. Pr. N. S. 350, 41 How. Pr. 511; Segelke *v.* Finan, 48 Hun 310, 1 N. Y. Suppl. 381, 15 N. Y. Civ. Proc. 1; Von Schoening *v.* Buchanan, 14 Abb. Pr. 185, 468.

Wisconsin.— Wallace *v.* Hilliard, 7 Wis. 627.

United States.— Arguellas *v.* Wood, 1 Fed. Cas. No. 520, 2 Cranch C. C. 579, holding that where in replevin for goods distrained for rent, the jury find the amount of the rent arrear in damages without stating it to be the amount of the rent, the court will permit the verdict to be so amended by the clerk after the jury have rendered their verdict and retired from the bar, and even after another cause has been tried.

Canada.— See Baxter *v.* Johnston, 10 N. Brunsw. 350.

See 42 Cent. Dig. tit. "Replevin," § 373.

66. Coit *v.* Waples, 1 Minn. 134.

67. Coit *v.* Waples, 1 Minn. 134; Segelke *v.* Finan, 48 Hun (N. Y.) 310, 1 N. Y. Suppl. 381, 15 N. Y. Civ. Proc. 1; Von Schoening *v.* Buchanan, 14 Abb. Pr. (N. Y.) 185, 468.

A verdict defective in substance cannot be amended by adding nominal damages. Bemus *v.* Beekman, 3 Wend. (N. Y.) 667 [*reversing* 7 Cow. 29]. See also Frey *v.* Drahos, 7 Nebr. 194, holding that under Code Civ. Proc. § 191, providing that in case either the right of property or right of possession be found in defendant's favor, his damages shall be assessed, the failure of the court on trial without a jury to assess at least nominal damages, where the right of possession is found in defendant, can be corrected only by a motion for a new trial, and preservation of all the testimony bearing on the question. And see *infra* V, G, 3.

68. Bodine *v.* Swisher, 66 Ill. 536; Moore *v.* Devol, 14 Iowa 112; Eaton *v.* Caldwell, 3 Minn. 134; Coit *v.* Waples, 1 Minn. 134; Wallace *v.* Hilliard, 7 Wis. 627.

69. Bodine *v.* Swisher, 66 Ill. 536.

verdict be amended so as to find the value of the property, where such value is not assessed by the jury.[70] The jury may likewise, before a delivery and record of the verdict, correct it to state separately where required by the statute, the value of the goods replevied, and the damages;[71] or the court may, of its own motion, remand the verdict to the jury, with instructions to find separately the value of each article replevied,[72] or to find the value of the property and damages for its detention.[73]

l. Waiver or Curing Defective Verdict. Where the verdict is defective in substance, as to some matter required by law, it cannot be cured by a waiver of one of the parties;[74] but mere inaccuracies or informalities will be regarded as waived if no objection is made thereto, before the jury is discharged.[75] Thus where the statute requires that in the event of the jury making a certain finding they shall assess the value of the property, a failure to make such an assessment is not cured by an assessment in the judgment,[76] or by a waiver of such defect by one of the parties only.[77]

2. Value of Property[78] — a. In General. A finding in a verdict in replevin as to the value of the property must ordinarily be supported by the evidence;[79] but where there is no evidence as to the value of the property, the jury may adopt as such value the amount alleged in the complaint,[80] and in assessing the value of the property involved, the jury ordinarily should not award a greater amount than that stated in the pleadings and included in the issues of the action;[81] but they are not controlled by the amount stated in an affidavit, required and given as a basis for obtaining an order of delivery of the property;[82] nor does the fact that an offer of judgment has been made, but refused, control the jury or make it erroneous for them to return a finding for a less amount than that contained in the offer.[83] It has been held that where the statement of the value of the property contained in the complaint is not denied, and the jury omit to pass upon the value of the property, the court may decide on its value for the purpose of making an allowance, in addition to costs.[84] The value of the property and damages for its taking and detention constitute separate and independent items and must be found separately.[85]

70. Eaton *v.* Caldwell, 3 Minn. 134; Wallace *v.* Hilliard, 7 Wis. 627. *Compare* Archer *v.* Boudinet, Code Rep. N. S. (N. Y.) 372.

71. Farmers' Packing Co. *v.* Brown, 87 Md. 1, 39 Atl. 625, holding that a verdict may be varied by the jury at any time before it is recorded.

Amendment of verdict after the jury separates see Trial.

72. Hanf *v.* Ford, 37 Ark. 544.

73. Noble *v.* Epperly, 6 Ind. 468.

74. Archer *v.* Long, 32 S. C. 171, 11 S. E. 86; Thompson *v.* Lee, 19 S. C. 489, holding that a verdict for defendant in replevin for one dollar, in disregard of a positive instruction that the jury must find for plaintiff the property in dispute, and must disregard defendant's counter-claim, cannot be cured by defendant's releasing his claim to the property.

75. Blackfoot Stock Co. *v.* Delamue, 3 Ida. 291, 29 Pac. 97 (after judgment); Kluse *v.* Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Gaines *v.* Tibbs, 6 Dana (Ky.) 143.

76. Clinton *v.* Stovall, 45 Mo. App. 642.

77. Archer *v.* Long, 32 S. C. 171, 11 S. E. 86. But see Dixon *v.* Atkinson, 86 Mo. App. 24.

78. **Amendment or correction of verdict as to assessment of value of property** see *supra*, V, G, 1, k.

Curing defective verdict as to assessment of value of property see *supra*, V, G, 1, l.

79. Bailey *v.* Ellis, 21 Ark. 488; Pratt *v.* Welcome, 6 Cal. App. 475, 92 Pac. 500; Ascher *v.* Schaeper, 25 Mo. App. 1. See also Harington *v.* Neely, 7 Baxt. (Tenn.) 442.

80. Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601 (holding that where the petition states the value of the property in controversy and the answer is a general denial, and no evidence of value is offered, it is proper for the jury to find for the value stated in the petition); North Star House Furnishing Co. *v.* Rinkey, 92 Minn. 80, 99 N. W. 429.

81. Tiedman *v.* O'Brien, 36 N. Y. Super. Ct. 539.

82. Mills *v.* Mills, 39 Kan. 455, 18 Pac. 521, holding that in an action of replevin in the district court, the value stated in the affidavit is not conclusive, but the jury may assess the value at any amount which the proof may show, within the value alleged in the petition, as the affidavit in such courts does not stand as the bill of particulars.

83. Bourda *v.* Jones, 110 Wis. 52, 85 N. W. 671.

84. Archer *v.* Boudinet, Code Rep. N. S. (N. Y.) 372.

85. Mix *v.* Kepner, 81 Mo. 93; Chapman

b. Necessity of Assessing Value. Under most statutes, where the effect of the verdict is to change the possession of the property from one party to another, as where the property has not been delivered to plaintiff and the verdict is in his favor, or where the property has been delivered to him and the verdict is for defendant, for its return, there must be a finding of the value of the property,[86] or the value of the right of possession, if it is found.[87] But it has been held that the value of the property need not be found where it is shown by the evidence that the property has been disposed of by the party who had it in his possession;[88] where the value of the property is stated in the affidavit attached to the peti-

v. Kerr, 80 Mo. 158; Simper *v.* White, 7 Ohio Cir. Ct. 303, 4 Ohio Cir. Dec. 607; Sayers *v.* Holmes, 2 Coldw. (Tenn.) 259. See also McCabe *v.* Morehead, 1 Watts & S. (Pa.) 513.

86. *Alabama.*— Levy *v.* Moog, 69 Ala. 63, holding that where property is claimed as exempt from attachment and a replevin bond is given therefor, the jury shall find the value of the property in case the verdict is rendered against the claimant.

California.— Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180; Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605. *Compare* Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228.

Indiana.— Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633; Tardy *v.* Howard, 12 Ind. 404 (holding that a verdict does not authorize a judgment for a return of the property where it does not determine the value of the property); Given *v.* Blann, 3 Blackf. 64; Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125. *Compare* Burket *v.* Pheister, 114 Ind. 503, 16 N. E. 813, holding that, under Rev. St. (1881) § 1550, where the cause originates before a justice, and the verdict is that defendant have return of the property, the jury need not assess the value, or the damages.

Kentucky.— Young *v.* Parsons, 2 Metc. 499.

Mississippi.— Bedon *v.* Alexander, 47 Miss. 254; Pearce *v.* Twichell, 41 Miss. 344.

Missouri.— Caldwell *v.* Ryan, 210 Mo. 17, 108 S. W. 533, 124 Am. St. Rep. 717, 16 L. R. A. N. S. 494; Hohenthal *v.* Watson, 28 Mo. 360; Dixon *v.* Atkinson, 86 Mo. App. 24.

Montana.—Anderson *v.* O'Laughlin, 1 Mont. 81, holding, however, that where the property has been delivered to plaintiff and the jury finds for defendant, plaintiff cannot complain of a failure to find the value of the property.

Nebraska.— Brownell *v.* Fuller, 57 Nebr. 368, 77 N. W. 775; Foss *v.* Marr, 40 Nebr. 559, 59 N. W. 122; Goodwin *v.* Potter, 40 Nebr. 553, 58 N. W. 1128; Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

Nevada.— Carson *v.* Applegarth, 6 Nev. 187.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162.

New York.— O'Reilly *v.* Erlanger, 108 N. Y. App. Div. 318, 95 N. Y. Suppl. 760; Hitchcock *v.* Wimpleberg, 103 N. Y. App. Div. 53, 92 N. Y. Suppl. 997; Conklin *v.* McCauley, 41 N. Y. App. Div. 452, 58 N. Y. Suppl. 879 (holding that in such a case a verdict for a certain sum of money is reversible error, although there is no proof that the chattel could be returned, or in whose possession it is); Phillips *v.* Melville, 10 Hun 211.

North Carolina.— Globe Oil Co. *v.* Meesick Grocery Co., 136 N. C. 354, 48 S. E. 781.

Oklahoma.—McFadyen *v.* Masters, 8 Okla. 174, 56 Pac. 1059, 11 Okla. 16, 66 Pac. 284.

Oregon.— Nunn *v.* Bird, 36 Oreg. 515, 59 Pac. 808.

Pennsylvania.— Warner *v.* Aughenbaugh, 15 Serg. & R. 9.

South Carolina.—Archer *v.* Long, 32 S. C. 171, 11 S. E. 86, even though there is no testimony as to value.

Tennessee.— Harington *v.* Neely, 7 Baxt. 442.

Washington.— Hall *v.* Law Guarantee, etc., Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; Quinn *v.* Parke, etc., Mach. Co., 5 Wash. 276, 31 Pac. 866 (holding that a verdict for plaintiff which merely assesses damages without assessing the value of the property is erroneous); Meeker *v.* Johnson, 3 Wash. 247, 28 Pac. 542.

Wisconsin.—Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980; Rose *v.* Tolly, 15 Wis. 443; Wallace *v.* Hilliard, 7 Wis. 627.

United States.— Williams *v.* Morrison, 28 Fed. 872, 29 Fed. 282. But see Thompson *v.* Carbery, 23 Fed. Cas. No. 13,946, 2 Cranch C. C. 39, holding that in replevin, if the title to the goods be in issue, the court will grant a new trial, if the jury give the defendant a verdict for the value of the goods, as well as damages for taking them.

See 42 Cent. Dig. tit. "Replevin," § 377.

87. Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975, holding that a verdict which finds the right of possession in defendant, but does not find the value of such right, and proceeds to find the value of the property, is insufficient and will not support a judgment.

88. Dillard *v.* McClure, 64 Mo. App. 488 (holding that in such a case the verdict should be for damages); McGraw *v.* Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810 (holding that where it is shown that some of the goods have been sold to third persons, and so cannot be returned, a verdict for damages only, and not in the alternative for the value of the goods, is not erroneous, especially where the point is not raised below.

tion,[89] or in the writ; [90] or where the verdict assesses damages, which are evidently the amount of the value of the property; [91] nor is an assessment of the value of the property necessary as to property, whether a part or the whole thereof, which is in possession of the prevailing party at the time the verdict is returned.[92] It has also been held that the jury need not assess the value of the property where the action is for specific property, and not in alternative of damages, and the property remains in the possession of the sheriff.[93]

c. Time of Valuation. Under some statutes the assessment of the value of the property, when required, must be as of the date of the trial,[94] and not as of the time of taking, or as of the commencement of the action,[95] or as of the time of the demand therefor,[96] except that where the property has been disposed of or destroyed, so as to render it impracticable to determine its value at the time

89. Schaffer *v.* Faldwesch, 16 Mo. 337.

90. Heald *v.* Cushman, 30 Me. 461, holding that where the value of the articles is stated in the writ, plaintiff cannot take exception after judgment that the jury should have found the value of the articles, if he did not request instructions to that effect.

91. Jeffreys *v.* Greeley, 20 Fla. 819; Western Stage Co. *v.* Walker, 2 Iowa 504, 65 Am. Dec. 789 (holding that a verdict for defendant in replevin need not find the value of the property, if it find damages which are evidently the amount of the value of the property, with interest, which finding is not complained of as to the amount by either side); Brannin *v.* Bremen, 2 N. M. 40. But see Eaton *v.* Caldwell, 3 Minn. 134, holding that where the value has not been assessed by the jury, it cannot be assumed to be the amount of damages found.

92. *Indiana.*— Indiana Union Traction Co. *v.* Bick, 40 Ind. App. 451, 81 N. E. 617; Busching *v.* Sunman, 19 Ind. App. 683, 49 N. E. 1091; Van Gundy *v.* Carrigan, 4 Ind. App. 333, 30 N. E. 933.

Iowa.— Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266.

Kansas.— Samuels *v.* Burnham, (App. 1900) 61 Pac. 755.

Michigan.— Merrill *v.* Butler, 18 Mich. 294.

Minnesota.— Cumbey *v.* Lovett, 76 Minn. 227, 79 N. W. 99 (holding that this rule applies where the right of property is special as well as where it is general); Hecklin *v.* Ess, 16 Minn. 51; Coit *v.* Waples, 1 Minn. 134.

Nebraska.— Hanscom *v.* Burmwood, 35 Nebr. 504, 53 N. W. 371; Kellar *v.* Van Brunt, 1 Nebr. (Unoff.) 301, 95 N. W. 668, holding that a verdict in replevin in which plaintiff has possession, and claims a special ownership, is not contrary to law because it does not find the value of plaintiff's ownership, or the value of the property.

New York.— Woodburn *v.* Chamberlin, 17 Barb. 446, holding a valuation is not necessary as to a specific part of the property in the prevailing party's possession. But see Tracy *v.* New York, etc., R. Co., 9 Bosw. 396.

Oregon.— Prescott *v.* Heilner, 13 Oreg. 200, 9 Pac. 403.

See 42 Cent. Dig. tit. "Replevin," § 385.

93. Avery *v.* Avery, 12 Tex. 54, 62 Am. Dec. 513.

Where there is no alternative judgment for the value of the property and none for damages, defendant, in case of a verdict for plaintiff, is not prejudiced by a failure to find the value of the property. Kennedy *v.* Clayton, 29 Ark. 270.

94. *Alabama.*— Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417.

Arizona.— Gray *v.* Robinson, 4 Ariz. 24, 33 Pac. 712.

California.— Phillips *v.* Sutherland, (1884) 2 Pac. 32.

Missouri.— Richey *v.* Burnes, 83 Mo. 362; Standard Oil Co. *v.* Meyer Bros. Drug Co., 84 Mo. App. 76; Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Kendall Boot, etc., Co. *v.* Bain, 46 Mo. App. 581; Hoester *v.* Teppe, 27 Mo. App. 207; Schultz *v.* Hickman, 27 Mo. App. 21, holding that the assessment of the property must be based on the value at the time of the trial, and plaintiff cannot complain because the jury found the value to be as sworn to by plaintiff when suing out the writ, after allowing for the difference between that date and the day of trial.

New York.— O'Reilley *v.* Erlanger, 108 N. Y. App. Div. 318, 95 N. Y. Suppl. 760; Gilroy *v.* Everson-Hickok Co., 103 N. Y. App. Div. 574, 93 N. Y. Suppl. 132, holding that the statute requiring a verdict in replevin to find the value of the chattel at the time of trial is not satisfied by finding it, without any evidence, as stated in plaintiff's affidavit, made twenty-seven months before the trial.

See 42 Cent. Dig. tit. "Replevin," § 379.

Presumption.— Where the jury fixes the value of the property at a given sum, it will be conclusively presumed that such was its value at the time of the trial. Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. (N. Y.) 445, 107 N. Y. Suppl. 163.

95. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678.

96. Duffus *v.* Schwinger, 79 Hun (N. Y.) 541, 29 N. Y. Suppl. 930, holding that where a verdict in replevin finds the value of the property at the time of demand, instead of at the time of the trial, contrary to Code Civ. Proc. § 1726, the verdict will be set aside.

of the trial, its value should be assessed as at the time of the wrongful taking or detention thereof.[97] Under other statutes, however, particularly where the property has been disposed of or destroyed, if plaintiff recovers, the value of the property is to be assessed as of the time the cause of action accrued, that is, at the time of the wrongful taking or detention,[98] and if defendant recovers, as of the time when the property is replevied from him.[99]

d. Separate Value of Each Article — (i) *In General.* In some jurisdictions, the value of each article need not be assessed separately, under a statute requiring that the value of the property be found, but a finding of the total aggregate value of the property is ordinarily sufficient,[1] unless the prevailing party, to whom the property is to be returned, demands a valuation of each article separately.[2] Under some statutes a finding of the value of any specific portion of the property is necessary only where there is an instruction to that effect by the court, and in the absence of such an instruction or a demand therefor, a failure to so find will not invalidate the verdict,[3] and under such a statute if the finding is by the court it is not error for it to find the aggregate value, particularly where issue is taken only upon the aggregate value.[4] But under most statutes, the jury must, as far as practicable, assess the value of each article separately,[5] when required to do so by either party,[6] particularly where the party against whom the verdict is found and who is in possession has the privilege of returning all or any number of the articles in satisfaction of the judgment *pro tanto*, and the articles sought to be recovered are distinct and separate,[7] although whatever, in

97. Willson *v.* Smith, 60 Mo. App. 469. See also Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482.

98. McLeod *v.* Capehart, 50 Minn. 101, 52 N. W. 381; Sherman *v.* Clark, 24 Minn. 37.

99. Sherman *v.* Clark, 24 Minn. 37; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243; Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

1. Copeland *v.* Kilpatrick, 38 Colo. 208, 88 Pac. 472; Stevenson *v.* Lord, 15 Colo. 131, 25 Pac. 313; Caldwell *v.* Bruggerman, 4 Minn. 270. See also Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 446.

2. Caldwell *v.* Bruggerman, 4 Minn. 270, holding that, where a part only of the property can be recovered, the prevailing party should be allowed to elect to take that part and a judgment for the value of the remainder thereof, and may demand that the jury assess the value of the property separately.

3. Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306; Bank *v.* Calkins, 16 S. D. 445, 93 N. W. 646.

An error can arise in such a case only where such an instruction will be pertinent and proper, and the instruction is asked and refused. Whetmore *v.* Rupe, 65 Cal. 237, 3 Pac. 851.

4. Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481 (holding that the failure of the trial court, without a jury, in finding for defendant, to find the separate value of each article involved, is not ground for a reversal where plaintiff has only alleged in his complaint their aggregate value); Kellogg *v.* Burr, 126 Cal. 38, 58 Pac. 306; Brenot *v.* Robinson, 108 Cal. 143, 41 Pac. 37; Whetmore *v.* Rupe, 65 Cal. 237, 3 Pac. 851 (holding that a judgment for defendant in replevin is not invalidated because the value of each separate article is not found, as plaintiff has not the option of returning each separate article or paying its value).

5. Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417. See also Black Raven Coal Co. *v.* Edmonson, 108 S. W. 955, 33 Ky. L. Rep. 3.

Sufficiency.— A verdict in a trial of title to a stock of goods, which states the number and value of each of the different articles composing the stock, the value of each lot separately, and then the aggregate value of the whole stock, substantially complies with such statute. Avary *v.* Perry Stove Mfg. Co., 96 Ala. 406, 11 So. 417.

6. Johnson *v.* Fraser, 2 Ida. 404, 18 Pac. 48; Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266, holding, however, that where in an action for specific chattels the judgment is for plaintiff, defendant is not prejudiced by the failure of the court to find the value of each article.

7. *Arkansas.*—Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652, 9 L. R. A. 526; Hanf *v.* Ford, 37 Ark. 544 (holding that defendant has an election to return any of the property or its value and is entitled for this purpose to have the value fixed by the jury); Noland *v.* Leech, 10 Ark. 504.

Mississippi.— Brady *v.* Cook, 68 Miss. 636, 10 So. 56; Spratley *v.* Kitchens, 55 Miss. 578; Whitfield *v.* Whitfield, 40 Miss. 352; Drane *v.* Hilzheim, 13 Sm. & M. 336; Dearing *v.* Ford, 13 Sm. & M. 269.

North Carolina.— Rowland *v.* Mann, 28 N. C. 38.

Tennessee.— Sayers *v.* Holmes, 2 Coldw. 259; Nashville Ins., etc., Co. *v.* Alexander, 10 Humphr. 378; Pickett *v.* Bridges, 10 Humphr. 171.

Texas.— Cole *v.* Crawford, 69 Tex. 124, 5 S. W. 646; Cook *v.* Halsell, 65 Tex. 1 (hold-

common understanding, are parts of one whole may be treated in the verdict as one article and valued accordingly.[8] But it has been held that it is not necessary that the jury should assess the value of the articles separately where a return thereof is not possible,[9] where there is no allegation or proof to support such a finding,[10] or where no demand is made at the time of the verdict for a separate valuation;[11] and where a party makes no request for such valuation before verdict, or fails to object to a verdict *in solido* before the jury is discharged, he thereby waives his right to a separate valuation.[12]

(II) *Remedy For Failure to Find.* Where the value of each separate article is not found, as required, the remedy of the aggrieved party is by motion for a *venire de novo* before the jury is discharged,[13] or by a new trial,[14] or, under some statutes, if the verdict is valid in other respects it may be remanded to the inferior court, with an order to award a writ of inquiry to ascertain such separate values.[15]

e. Value of Special Interest. As a general rule, where the verdict for the return of the property or its value is in favor of a party who has only a special or limited interest therein, it must find and specify the nature, extent, and amount or value of such special interest,[16] which finding must not exceed the amount or value of such interest;[17] and where there is a finding of such special interest and it is within the value of the property as proved, it is not necessary that there shall be a general finding of the value of the property.[18] It has been held, however, that this doctrine is applicable only where a return of the property may be awarded

ing that a verdict against parties who have replevied property should find the value of various items, as they have the right under the statute to return a part in satisfaction *pro tanto*); Hoeser *v.* Kraeka, 29 Tex. 450; Blakeley *v.* Duncan, 4 Tex. 184; Bowman *v.* Weber, (Civ. App. 1897) 41 S. W. 493.

See 42 Cent. Dig. tit. "Replevin," § 380.

8. Henry *v.* Dillard, 68 Miss. 536, 9 So. 298 (holding that, in replevin for a mare and colt, it is no ground for vacating the judgment that there was not a separate finding for the value of each article, the mare and colt being so intimately connected as to constitute one whole); Drane *v.* Hilzheim, 13 Sm. & M. (Miss.) 336.

9. Samuels *v.* Burham, (Kan. App. 1900) 61 Pac. 755; Brady *v.* Cook, 68 Miss. 636, 10 So. 56.

10. Knox *v.* Noble, 25 Kan. 449; Byrne *v.* Lynn, 18 Tex. Civ. App. 252, 44 S. W. 311, 544.

11. Blake *v.* Powell, 26 Kan. 320; Avery *v.* Popper, (Tex. Civ. App. 1898) 45 S. W. 951.

12. Hobbs *v.* Clark, 53 Ark. 411, 14 S. W. 652, 9 L. R. A. 526; Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48 (holding that where several articles are sought to be recovered, if either party desires a finding of the value of each article, he should request that such a finding be made or he cannot take advantage of the jury's failure to do so); Dunlap *v.* Flowers, 21 Okla. 600, 96 Pac. 643; Avery *v.* Popper, (Tex. Civ. App. 1898) 45 S. W. 951.

13. Hanf. *v.* Ford, 37 Ark. 544.

14. Hanf *v.* Ford, 37 Ark. 544.

15. Spratley *v.* Kitchens, 55 Miss. 578; Drane *v.* Hilzheim, 13 Sm. & M. (Miss.) 336.

16. *Michigan.*— Alderman *v.* Manchester, 49 Mich. 48, 12 N. W. 905; Farmers' L. & T. Co. *v.* St. Clair, 34 Mich. 518, holding that, in replevin by a mortgagee of a railroad company against a town treasurer, to recover possession of cars and locomotive seized by defendant for taxes assessed on the railroad company's lands, a verdict for defendant is fatally defective if it fails to specify defendant's interest.

Missouri.— Dixon *v.* Atkinson, 86 Mo. App. 24, holding that the jury should rightly adjust the respective interests of the parties.

Nebraska.— Mueller *v.* Parcel, 71 Nebr. 795, 99 N. W. 684; Creighton *v.* Haythorn, 49 Nebr. 526, 68 N. W. 934, holding that a verdict for defendant whose claim arises from a lien on the property, without a finding as to the value of his possession, is not responsive to the issues and is contrary to law.

New York.— Wood *v.* Orser, 25 N. Y. 348.

Oklahoma.— Chandler *v.* Colcord, 1 Okla. 260, 32 Pac. 330.

Wisconsin.— Warner *v.* Hunt, 30 Wis. 200; Fitzpatrick *v.* Warren, 1 Pinn. 541.

See 42 Cent. Dig. tit. "Replevin," § 384.

17. *California.*— Pico *v.* Martinez, 55 Cal. 148.

Colorado.— Witkowski *v.* Hill, 17 Colo. 372, 30 Pac. 55.

Georgia.— Ray *v.* Byrd, 118 Ga. 86, 44 S. E. 818.

Michigan.— Kennedy *v.* Dawson, 96 Mich. 79, 55 N. W. 616.

Mississippi.— Lloyd *v.* Goodwin, 12 Sm. & M. 223.

New York.— Townsend *v.* Bargy, 57 N. Y. 665; Cochran *v.* Gottwald, 40 N. Y. Super. Ct. 442.

See 42 Cent. Dig. tit. "Replevin," § 384.

18. Earle *v.* Burch, 21 Nebr. 702, 33 N. W. 254; Single *v.* Barnard, 29 Wis. 463.

as an alternative with judgment for its value,[19] and hence does not apply to a verdict in favor of a party who is in possession under a chattel mortgage, with authority to dispose of the property according to the terms of the mortgage, and according to law, to satisfy the mortgage debt or any part thereof;[20] nor in case of replevin by one partner against another partner for the possession of partnership property need there be a finding of the value of the successful partner's special interest in the property.[21] It has also been held in an action of replevin for goods distrained, on an issue of no rent in arrear, that the jury may fix the amount of rent due with interest from the time the writ of replevin is sued out, and are not confined to the value of the goods distrained.[22]

3. DAMAGES.[23] While the question of damages is not the prime object of an action of replevin, and it is not essential, in the absence of allegations and proof, to the validity of a verdict therein that they shall be assessed in favor of the prevailing party,[24] and the omission to so find is not such a defect as may be complained of by the party against whom the verdict is rendered,[25] yet in order to warrant a judgment for damages, the verdict must assess damages as such,[26] and as a general rule the question of damages is one of the issues in the case and if there is any proof to support it there should be a finding assessing them.[27] Thus as a general rule a verdict for the recovery or return of the property to plaintiff or defendant as the case may be should assess damages in his favor for the taking or detention, or both,[28] and such verdict may be for a certain sum as damages

19. Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

20. Woodruff *v.* King, 47 Wis. 261, 2 N. W. 452.

21. Jenkins *v.* Mitchell, 40 Nebr. 664, 59 N. W. 90, holding that where one partner by replevin takes the partnership property from the possession of the other, the value of defendant's possession shall be assessed at the full value of the property, as no accounting can be had in an action of replevin to determine his actual interest.

22. Albright *v.* Pickle, 4 Yeates (Pa.) 264. See also Arguelles *v.* Wood, 1 Fed. Cas. No. 520, 2 Cranch C. C. 579.

23. **Amendment of verdict by adding nominal damages** see *supra*, V, G, 1, k.

24. *Connecticut.*— Norman Printers' Supply Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499, holding that it is not essential that a verdict for plaintiff should assess damages unless required by the proof.

Indiana.— Buck *v.* Young, 1 Ind. App. 558, 27 N. E. 1106, holding that, although damages are claimed, if not proved, none need be found in the verdict.

Missouri.— Hopper *v.* Hopper, 84 Mo. App. 117, holding that a verdict in replevin which finds for plaintiff will support a judgment, although it does not assess the damages, since the statute requiring such an assessment is for the benefit of plaintiff, and he may waive compliance therewith.

New Hampshire.— McKean *v.* Cutler, 48 N. H. 370 [*overruling* Kendall *v.* Fitts, 22 N. H. 1].

Canada.— Fearon *v.* Murray, 10 N. Brunsw. 11.

See 42 Cent. Dig. tit. "Replevin," §§ 386, 387.

25. Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112; Gaines *v.* White, 1 S. D. 434, 47 N. W. 524, holding that since damages are not the prime object of an action of claim and delivery, but are the nominal issue only, a general verdict for plaintiff without assessing damages will not be set aside at defendant's instance.

26. Black *v.* Winterstein, 6 Nebr. 224, in which it was further held that assessing the value of the property will not answer this purpose. See also Wolf *v.* Meyer, 12 Ohio St. 432.

27. Smith *v.* Aurand, 10 Serg. & R. (Pa.) 92 (holding that on the issue of no rent in arrear a finding that defendant have damages and costs is regular); Newton *v.* Brown, 1 Utah 287 (holding that, in replevin against a sheriff for property seized by him while in transit from one place to another, the jury in assessing damages should be governed by the value of the property at the place of detention).

Value of property as damages.— Where the verdict is for defendant and plaintiff is in possession, it has been held that the damages should be assessed for the value of the property. Messer *v.* Bailey, 31 N. H. 9; Kendall *v.* Fitts, 22 N. H. 1. So if the verdict is for defendant and the property in the meanwhile has remained in the possession of a third person, who has acquired a special claim upon it, the verdict should be for defendant for damages for the full value of the property when replevied. Taylor *v.* Richardson, 4 Houst. (Del.) 300.

28. *California.*—Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546.

Indiana.— Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633; Crocker *v.* Hoffman, 48 Ind. 207; Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125.

Minnesota.— Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

Missouri.— Hohenthal *v.* Watson, 28 Mo. 360; Dixon *v.* Atkinson, 86 Mo. App. 24.

without specifying whether for the taking or detention.[29] A finding of damages must be supported by the evidence and cannot be based on mere conjecture.[30]

H. Judgment — 1. Form and Requisites — a. In General. The judgment in replevin should determine the rights of the parties with respect to every part of the property in controversy,[31] and although there has been held to be no authority in law for inserting equitable conditions into the finding and judgment in replevin,[32] great latitude is allowed and the statutory action is considered sufficiently flexible to authorize both legal and equitable rights to be determined in such action, it being the policy of the code and statutes to settle all the equities in the property, the subject of the controversy, in one action.[33] But a judgment similar to that rendered in assumpsit is not proper,[34] nor can a recovery as for money had and received be had when the action is in the form of replevin to recover money not specifically described.[35] Where there is a failure to recover for the property not seized because it is not shown to have been in the possession of defendant at the time of the institution of the action, care should be taken to

Nebraska.— Search *v.* Miller, 9 Nebr. 26, 1 N. W. 975.

New Hampshire.— Messer *v.* Bailey, 31 N. H. 9; Kendall *v.* Fitts, 22 N. H. 1.

New Jersey.— Frazier *v.* Fredericks, 24 N. J. L. 162.

New York.—O'Reilly *v.* Erlanger, 108 N. Y. App. Div. 318, 95 N. Y. Suppl. 760; Hitchcock *v.* Wimpleberg, 103 N. Y. App. Div. 53, 92 N. Y. Suppl. 997 [*affirming* 45 Misc. 293, 92 N. Y. Suppl. 291]; Phillips *v.* Melville, 10 Hun 211, holding that in replevin for property which has not been delivered to plaintiff, the jury should assess its value, and damages for its detention, and not simply render a general verdict for damages.

Pennsylvania.— Warner *v.* Aughenbaugh, 15 Serg. & R. 9.

Tennessee.— Parham *v.* Riley, 4 Coldw. 5, holding that under Code, § 3389, where the jury find for plaintiff, they must assess his damages for the seizure and detention.

Wisconsin.— Aultman Co. *v.* McDonough, 110 Wis. 263, 85 N. W. 980.

See 42 Cent. Dig. tit. "Replevin," § 386.

A verdict against two defendants not jointly liable, and having no privity of interest upon which to base a joint responsibility, should find against each for such damages as are proven for the detention by him. Norris *v.* Clinkscales, 47 S. C. 488, 25 S. E. 797.

29. Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546; Witcher *v.* Watkins, 11 Colo. 548, 19 Pac. 540. But see Phillips *v.* Melville, 10 Hun (N. Y.) 211.

Presumptions.— Where the verdict is for a certain sum as damages, it will be presumed to cover both the taking and detention, where both are alleged in the complaint. Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546.

30. Ascher *v.* Schaeper, 25 Mo. App. 1.

31. Rose *v.* Tolley, 15 Wis. 443. See Delin *v.* Stohl, 2 N. Y. Civ. Proc. 222.

A docket entry made by the clerk by direction of the judge of a finding for defendant in replevin is not a final judgment but rather in the nature of a memorandum of his decision upon the question which party was entitled to prevail, and the court may afterward order a return of the property and assess the damages on defendant's motion. Ashcroft *v.* Simmons, 163 Mass. 437, 40 N. E. 171.

32. Rose *v.* Tolley, 15 Wis. 443. But see Bassett *v.* Haren, 61 Minn. 346, 63 N. W. 713; Kulzer *v.* Simonton, 41 Wash. 587, 84 Pac. 582, holding that where in replevin by a seller of lumber the evidence justified a verdict against the fraudulent buyer and a third person, who obtained possession without paying anything except freight charges for transportation from the seller's mill to the place of delivery, the seller must repay the freight to obtain a judgment for the return of the lumber or its value.

33. McFayden *v.* Masters, 11 Okla. 16, 66 Pac. 284, 8 Okla. 174, 56 Pac. 1059; Brook *v.* Bayless, 6 Okla. 568, 52 Pac. 738, holding that the gist of the action is the right of plaintiff to the immediate possession of the property at the commencement of the action, and if the title or rights of the parties to the property should change *pendente lite* the judgment should adjust the equities between them as such equities stand at the time of its rendition. And see Deposit Nat. Bank *v.* Rogers, 166 N. Y. 380, 59 N. E. 922 [*affirming* 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155].

34. Nichols *v.* Dodson Lead, etc., Co., 85 Mo. App. 584; Hamilton *v.* Clark, 25 Mo. App. 428. But see Lehman-Higginson Grocer Co. *v.* McClain, (Kan. 1901) 64 Pac. 1029.

35. Sager *v.* Blain, 44 N. Y. 445.

In replevin before a justice of the peace where the chattel is not taken the judgment should award possession to plaintiff and fix the value of the chattel and declare plaintiff entitled to such value unless the property is delivered to him. Delin *v.* Stohl, 2 N. Y. Civ. Proc. 222. And see Green *v.* Farrin, 11 Ohio Cir. Ct. 294, 5 Ohio Cir. Dec. 181, holding that where in replevin a justice of the peace entered judgment finding the right of property and possession in plaintiff, "and I do assess his damages in the premises $125.00 and costs of suit," the judgment, although informal, was sufficient as a basis for an action on the redelivery bond.

Effect of stipulation releasing sheriff.— A stipulation by parties in replevin that the attached property shall be turned over to a third person to await final judgment releases the

embody this fact in the verdict or judgment so as to avoid a plea of *res adjudicata* in any subsequent proceedings to recover it.[36]

b. Description of Property. A judgment in replevin is bad for uncertainty, where it fails to specify and properly describe the particular property sought to be recovered;[37] and does not refer to any other pleading or paper which contains a sufficiently definite description,[38] so as to render it possible to identify the property and guide the party ordered to deliver it,[39] or to inform the sheriff serving the execution what property is included and what excluded.[40] A judgment which refers to the property described in the complaint is fatally defective if the description in the complaint is defective,[41] but a judgment is not invalidated by uncertainty of description caused by a mistake where from the whole of the record it can easily be known what was intended;[42] and a judgment that plaintiff recover "the property in controversy" is not bad for uncertainty in the recovery where, although the petition claims several articles, the record shows that the controversy is reduced to a specific number of them.[43]

c. Parties. Where property sought to be replevied has never been delivered to one who interpleads in the replevin suit, no verdict or judgment can be rendered against him for either the property or the money.[44] Nor can judgment for a return be rendered against part of several defendants, who never claimed or held possession;[45] but where defendants have a joint possession, a joint judgment against them is proper;[46] and where two defendants are sued jointly, and judgment goes against plaintiff, it is proper to render a joint judgment in favor of defendants;[47] and in a joint replevin suit there may be judgment for one plaintiff and against another;[48] and conversely, in replevin against several defendants, the court may adjudge the return of the goods in favor of such of defendants as are entitled to a return and refuse it as to the others;[49] and thus upon a verdict for defendants in replevin, where one of three defendants disclaims, the judgment may be for the other two defendants;[50] or the judgment may award a part of the property to each of two or more defendants.[51]

sheriff, and judgment in form only can be taken against him. Temple *v.* Alexander, 53 Cal. 3.

Where plaintiff in replevin dies and the suit is recovered by the heir under Code, § 2849, because no one would administer on the estate, a personal judgment against the heir is not absolutely void but is merely reversible error, the proper judgment under Code, § 2257, being that the creditor have judgment and execution against the land descended. Edgington *v.* Jamison, 2 Lea (Tenn.) 569.

36. Krosmopolski *v.* Paxton, 58 Miss. 581.

37. Cooke *v.* Aguirre, 86 Cal. 479, 25 Pac. 5 (description of property as "two stallion horses" held insufficient); Pierce *v.* Langdon, 3 Ida. 141, 28 Pac. 401; Harris *v.* Austell, 2 Baxt. (Tenn.) 148.

38. Cooke *v.* Aguirre, 86 Cal. 479, 25 Pac. 5.

39. McGregor *v.* Lang, 32 Mont. 568, 81 Pac. 343 (where, however, the description was held to be sufficient); Harris *v.* Austell, 2 Baxt. (Tenn.) 148.

40. Carrier *v.* Carrier, 71 Wis. 111, 36 N. W. 626.

41. Welch *v.* Smith, 45 Cal. 230; Pierce *v.* Langdon, 3 Ida. 141, 28 Pac. 401.

42. Mullaney *v.* Humes, 48 Kan. 368, 29 Pac. 691, 47 Kan. 99, 27 Pac. 817.

43. Coleman *v.* Reel, 75 Iowa 304, 39 N. W. 510, 9 Am. St. Rep. 484.

44. Chandler *v.* Smith, 34 Ark. 527; Meyer *v.* White, 4 Colo. App. 342, 35 Pac. 879.

45. Ream *v.* McElhone, 50 Kan. 409, 31 Pac. 1075; Hulett *v.* Patterson, 6 Pa. Cas. 22, 8 Atl. 917.

46. West Michigan Sav. Bank *v.* Howard, 52 Mich. 423, 18 N W. 199.

47. Myers *v.* Moulton, 71 Cal. 498, 12 Pac. 505; Watson *v.* Buckler, 29 Oreg. 235, 45 Pac. 765.

Where defendants claim title, one as assignee and the other as purchaser from him, it is error to enter a money judgment in their favor jointly. Redpath *v.* Brown, 71 Mich. 258, 39 N. W. 51.

48. Hamilton *v.* Browning, 94 Ind. 242.

49. Woodburn *v.* Chamberlin, 17 Barb. (N. Y.) 446.

But one part-owner of a chattel cannot have judgment against another part-owner for possession, one having as much right to possession as the other, nor can defendant have judgment for the possession of the part owned by him, nor for the value thereof, if possession be not given by plaintiff. Mills *v.* Malott, 43 Ind. 248.

50. Jandt *v.* Potthast, 102 Iowa 223, 71 N. W. 216 (holding, however, that in replevin a judgment in favor of several defendants jointly for the value of the goods was erroneous, where one of them claimed no interest therein, and did not ask for their return or value); Fischer *v.* Johnson, 74 Mo. App. 64.

51. Pilger *v.* Marder, 55 Nebr. 113, 75 N. W. 559.

d. Conformity to Verdict, Findings, or Pleadings. The general rule that a judgment must conform to and be warranted by the verdict and findings [52] applies in replevin.[53] Thus the judgment must not embrace issues which the jury did not determine,[54] but must be responsive to the pleading and the evidence under them,[55] and where the verdict assesses the value of the property replevied or the damages for its detention at a sum greater than that alleged in the petition, and no amendment is made or asked, the judgment should be entered only for the sum stated in the petition,[56] and thus under a declaration in replevin alleging

52. See JUDGMENTS, 23 Cyc. 820 *et seq.*

53. *California.*— Cooke *v.* Aguirre, 86 Cal. 479, 25 Pac. 5.

Florida.— Holliday *v.* McKinne, 22 Fla. 153.

Iowa.— Moore *v.* Devol, 14 Iowa 112.

Michigan.— Guerold *v.* Holtz, 103 Mich. 118, 61 N. W. 278 (holding that a general verdict for plaintiff in replevin, fixing the sum due under a contract of sale of a piano, and giving plaintiff a lien for that amount, does not warrant the entry of a judgment that the jury assess such amount as damages for detention); Gidday *v.* Witherspoon, 35 Mich. 368 (holding that, under the Michigan statute (Comp. Laws (1871), § 6754), requiring that in replevin, where a claim of lien is set up, it shall be specifically found, the court cannot establish such a claim by judgment when it is not so found); Sweetzer *v.* Mead, 5 Mich. 107 (holding that nothing but a general finding or joint special property in defendants to an action of replevin entitled them to a joint judgment, and a finding that each of two defendants has an independent lien for a specified amount on the property replevied will not support a joint judgment for the value of the property).

Nebraska.— Leighton *v.* Stuart, 10 Nebr. 224, 4 N. W. 1051.

New Jersey.— Tumulty *v.* Jordan, 67 N. J. L. 509, 51 Atl. 466, holding that a judgment for value is defective which includes all the goods found to be plaintiff's, not excepting those not found to have been in the possession of defendants.

New York.— Walsh *v.* Kelly, 40 N. Y. 556 [*affirming* 27 How. Pr. 359], holding that where the jury find in favor of plaintiff, assessing the value of the property and the amount of damages, a judgment for the whole amount with costs is bad in form and must be corrected.

North Carolina.—Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

Oklahoma.— Everett *v.* Akins, 8 Okla. 184, 56 Pac. 1062.

Vermont.— Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin.— Young *v.* Lego, 38 Wis. 206.

See 42 Cent. Dig. tit. "Replevin," § 394.

Substantial conformity is sufficient (Lewisohn *v.* Apple, 12 N. Y. Civ. Proc. 274. See Smith *v.* Aurand, 10 Serg. & R. (Pa.) 92); and a judgment is good, although based upon a verdict wrong in form but right in substance (Leonard *v.* Maginnis, 34 Minn. 506, 23 N. W. 733).

A judgment in the alternative which fails to conform to the pleadings and verdict is erroneous. Eaton *v.* Caldwell, 3 Minn. 134 (holding that where the verdict fails to find the value of the property, a judgment awarding such value in the alternative is irregular); Welton *v.* Baltezore, 17 Nebr. 399, 21 N. W. 1. And see Wagner Typewriter Co. *v.* Robinson, 84 N. Y. Suppl. 281. Thus, success upon the plea of *non cepit* does not entitle defendant to a judgment for the return of the property or for its value as a substitute (Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Douglass *v.* Garrett, 5 Wis. 85), and in some jurisdictions a defendant is not entitled to an alternative judgment for the return of the property or its value where his plea or answer fails to make the appropriate demand (Banning *v.* Marleau, 101 Cal. 238, 35 Pac. 772; Hinchman *v.* Doak, 48 Mich. 168, 12 N. W. 39, holding that where a defendant in replevin sets up no right or claim to the property, but denies having been in possession when the writ was issued and served, and defends on that ground, and has verdict in his favor, that he did not unlawfully detain, etc., he has no claim to a judgment for the return of the property, or for its value; Pabst Brewing Co. *v.* Butchart, 68 Minn. 303, 71 N. W. 273; Fowler *v.* Carr, 55 Mo. App. 145. And see Gould *v.* Scannell, 13 Cal. 430, holding that in an action to recover personal property, where plaintiff has obtained possession by a proceeding in the nature of replevin, the answer must set up that change of possession, that there may be proper averments on which judgment for a return or the value can be based), although in other jurisdictions a defendant in the action who sets up title in himself, on the issue being found for him, is entitled to a judgment for return or for the value of the property, and for damages for its detention, without an express prayer therefor (Deford *v.* Hutchison, 45 Kan. 332, 2 Pac. 60; Bates *v.* Buchanan, 2 Bush (Ky.) 117).

Where a defendant prayed only for the return of the property, it was sufficient in case he prevailed in the suit to justify a judgment awarding him the value of the property in case a return thereof could not be had. Myers *v.* Moulton, 71 Cal. 498, 12 Pac. 505.

54. Child *v.* Child, 13 Wis. 17.

55. Hamilton *v.* Clark, 25 Mo. App. 428; McCarty *v.* Hudsons, 24 Wend. (N. Y.) 291. See Gallipolis Furniture Co. *v.* Symmes, 19 Ohio Cir. Ct. 659, 10 Ohio Cir. Ct. 514.

56. O'Neal *v.* Wade, 3 Ind. 410; Ward *v.* Masterson, 10 Kan. 77; Kersenbrock *v.* Martin, 12 Nebr. 374, 11 N. W. 462; Brook *v.*

a stated amount to be the value of the property, it is error to enter judgment for a greater sum as such value;[57] but plaintiff by consenting to a reduction may have judgment entered in form producing the same result as if the verdict had been correctly rendered;[58] and while a judgment for the return of property in a replevin suit, under a verdict which fails to find the value of the property to be returned, is erroneous, yet in the absence of an appeal therefrom, it is not void, and in such case if the party recovering elects to have the property returned and demands the same, he is entitled to receive it;[59] and where an error has been made in the form of a judgment, by which its scope has been enlarged, or its amount increased beyond that plainly authorized by a verdict, referee's report, or decision of court, the judgment is not void or inoperative; the error being an irregularity merely which must be corrected, if at all, by motion in the court of original jurisdiction.[60] As a general rule, under a plea of *non cepit* alone,[61] or of *non detinet* alone,[62] or on issue joined on pleas of *non cepit* and *non detinet*, it is error to render

Bayless, 6 Okla. 568, 52 Pac. 738. See Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228.

If plaintiff count in the detinet, he can recover damages for the detention only until replevin, although he should prove the property still in defendant's possession. Plaintiff can recover no more than he seeks. Truitt *v.* Revill, 4 Harr. (Del.) 71.

Where no damages are alleged, the amount of the recovery cannot exceed the alleged value of the property. Hotchkiss *v.* Jones, 4 Ind. 260.

In Mississippi it is held that the rule that damages in excess of the amount laid in the declaration are not recoverable does not apply to actions in replevin. White *v.* Graves, 24 Miss. 166.

In Florida, under section 20, of the Practice Act of 1861 (McClellan Dig. § 28, p. 817), it is held that the *ad damnum* in a declaration for the recovery of specific goods refers to damages to be recovered for their detention, and not to the value of the goods; and when plaintiff elects, under the replevin statute, to take judgment for the value, the judgment will not be reversed as erroneous because it exceeds the amount of such *ad damnum*. Anderson *v.* Carlin, 24 Fla. 199, 3 So. 577.

57. Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51. *Compare* Singer Mfg. Co. *v.* Doxey, 65 Ind. 65, holding that in an action to recover the possession of personal property, the value placed upon the property by plaintiff in his complaint is not to be regarded as a limitation upon the amount of plaintiff's recovery, if the property cannot be found, or if, from any other cause, having obtained a judgment for its recovery, he should fail to get possession thereof. In this case it was further held that if such value were an absolute limitation upon the amount of plaintiff's recovery, then the complaint might have been so amended, on trial in the court below, as to make the averment of the value of the property correspond with the proof of its value; and therefore, in this court, it will be deemed and taken to have been thus amended.

Where the value of replevied property is fixed by a special finding on sufficient evidence, a judgment rendered on a general verdict limited to the same amount will not be disturbed. Citizens' Nat. Bank *v.* Wedgwood, 45 Nebr. 143, 63 N. W. 375.

In replevin before a justice of the peace, if plaintiff fix a value within the jurisdiction of the justice, but less than the real value, he is bound by the valuation; and if the property is not restored by the writ he cannot recover a greater amount than the value fixed. Gray *v.* Jones, 1 Head (Tenn.) 542.

58. Young *v.* Willet, 8 Bosw. (N. Y. 486.

59. State *v.* Dunn, 60 Mo. 64.

60. Corn Exch. Bank *v.* Blye, 119 N. Y. 414, 23 N. E. 805 [*reversing* 54 Hun 312, 7 N. Y. Suppl. 434].

61. *Florida.*— Hopkins *v.* Burney, 2 Fla. 42.

Illinois.— Underwood *v.* White, 45 Ill. 437; Vose *v.* Hart, 12 Ill. 378. And see Hanford *v.* Obrecht, 38 Ill. 493, where, in an action of replevin, the pleas were *non cepit*, property in defendant, property in a third person, and justification of the taking under an execution against such third person, and it was held to be an error to award a retorno habendo upon merely a verdict of not guilty.

Kentucky.— Bonner *v.* Coleman, 3 B. Mon. 464.

Massachusetts.—Whitwell *v.* Wells, 24 Pick. 25; Simpson *v.* McFarland, 18 Pick. 427, 29 Am. Dec. 602.

New York.— People *v.* Niagara Ct. C. Pl., 4 Wend. 217.

See 42 Cent. Dig. tit. "Replevin," § 403.

But where, with a plea of non cepit, a brief statement was filed by defendant that the property was in a third person; that defendant, being an officer, had attached it as the property of such third person, and that the property was not in plaintiff, and it was held that on a verdict that defendant "did not take," defendant was entitled to a judgment of return. Moulton *v.* Bird, 31 Me. 296.

62. Neis *v.* Gillen, 27 Ark. 184 (unless he plead with the general issue, or give notice of matter, which, if properly pleaded by avowry, or cognizance would be a bar to the action); Brown *v.* Sanford, 22 Ark. 76; Johnson *v.* Howe, 7 Ill. 342; Dyer *v.* Brown, 71 Ill. App. 317. But see Saunderson *v.* Lace, 2 Pinn.

a judgment awarding a return of the property to defendant; [63] but under some statutes the plea of *non detinet* puts in issue not only the detention of the goods but also the property of plaintiff therein and justifies a return.[64] If the right of property is put in issue by defendant, and the finding is in his favor, the reward of a retorno habendo is held to be a matter of course, whether prayed for by the plea or not; [65] but under some statutes it is held that defendant cannot have judgment for the return of the property or its value, unless he has claimed a return in his plea or answer. [66] Where the property has been taken from defendant and delivered to plaintiff, and judgment is rendered for defendant, it has been held that he cannot recover damages unless a claim therefor is set up in the answer; [67] but under some of the statutes the rule is otherwise.[68] Where the evidence fails to show the delivery of the property to plaintiff, a general finding for defendant will not support a judgment for the return of the property; [69] but the general rule is that in replevin, where a plea in abatement is sustained, defendant is entitled to judgment for the return of the property.[70]

e. Amendment and Correction. The rules relating to amendment and cor-

(Wis.) 257, 1 Chandl. 231, holding that under the territorial statute, defendant in replevin, under the plea of *non detinet*, in case he succeeds, is entitled to a return of the property replevied and damages.

63. Bourk *v.* Riggs, 38 Ill. 320; Mattson *v.* Hanisch, 5 Ill. App. 102.

64. Noble *v.* Epperly, 6 Ind. 414; Ford *v.* Ford, 3 Wis. 399.

65. *Illinois.*— King *v.* Ramsay, 13 Ill. 619; Harris *v.* McCasland, 29 Ill. App. 430.

Indiana.—Williams *v.* Kessler, 82 Ind. 183; Matlock *v.* Straughn, 21 Ind. 128; Conner *v.* Comstock, 17 Ind. 90.

Kentucky.— Stephens *v.* Frazier, 2 B. Mon. 250.

Maine.— Hoeffner *v.* Stratton, 57 Me. 360.

Massachusetts.— Hoffman *v.* Noble, 6 Metc. 68, 39 Am. Dec. 711.

Minnesota.— Adamson *v.* Sundby, 51 Minn. 460, 53 N. W. 761.

Montana.— Levelle *v.* Lowry, 5 Mont. 498, 6 Pac. 337; Anderson *v.* O'Laughlin, 1 Mont. 81.

New Hampshire.— See Brackett *v.* Whidden, 3 N. H. 17.

Oklahoma.— Kuhlman *v.* Willams, 1 Okla. 136, 28 Pac. 867.

Pennsylvania.— Weidel *v.* Roseberry, 13 Serg. & R. 178.

See 42 Cent. Dig. tit. "Replevin," § 403.

But see Hunt *v.* Bennett, 4 Greene (Iowa) 512, where, in a replevin suit, the jury found "for the defendant $50.00," and it was held that the judgment rendered on the verdict should not be for a return of the property, and that the verdict implied that plaintiff was entitled to the property by paying the fifty dollars.

Where the plea of the general issue only is interposed, return of the property may not be ordered where judgment is rendered for defendant on the sole ground that he had lawful possession at the time the writ issued, because no demand had been made. Farrah *v.* Bursley, 100 Mich. 547, 59 N. W. 245; Pierce *v.* Van Dyke, 6 Hill (N. Y.) 613; Heeron *v.* Beckwith, 1 Wis. 17.

66. Pico *v.* Pico, 56 Cal. 453; Wm. S. Merrill Chemical Co. *v.* Nickells, 66 Mo. App. 678; Fowler *v.* Carr, 55 Mo. App. 145. But see Puller *v.* Thomas, 36 Mo. App. 105.

67. Whitcomb *v.* Hoffman, 14 Hun (N. Y.) 335; Shafer *v.* Russell, 28 Utah 444, 79 Pac. 559, holding further that under Rev. St. (1898) §§ 2960, 2968, such claim must be set up by a statement of facts, and a mere clause in the prayer for relief asking for damages is insufficient.

Where the taking was accompanied with wrong and outrage, although the declaration contain no count claiming special damages, nor any averment that the taking was accompanied with circumstances of outrage and oppression, damages beyond the value of the property taken may be given. Schofield *v.* Ferrers, 46 Pa. St. 438. But if consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially pleaded. Schofield *v.* Ferrers, 46 Pa. St. 438.

68. Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085 (holding that under a general denial defendant may recover every item of damages properly allowable to him for the detention of the property); Creighton *v.* Newton, 5 Nebr. 100 (holding that under the statute defendant may under a general denial have such affirmative relief in damages as may be right and proper under the evidence); Merrick County School Dist. No. 2 *v.* Shoemaker, 5 Nebr. 36 (holding that under the statute the jury must assess for defendant such damages as they shall think just and proper, whether he pleads a general denial, new matters as a defense, or a demand for damages).

69. McKeal *v.* Freeman, 25 Ind. 151; Conner *v.* Comstock, 17 Ind. 90.

70. Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Kendrick *v.* Watkins, 54 Miss. 495. But see Gould *v.* Barnard, 3 Mass. 199, holding that where defendant in replevin pleads a want of an indorser in abatement of the writ, without any suggestion entitling him to the possession of the goods, and the writ is abated, he is entitled to a judgment for costs, but not for a return.

rection of judgments in actions generally [71] apply to judgments in replevin. Thus the court may on motion modify or correct the judgment so as to mold it in conformity with the verdict or findings,[72] and judgment absolute for the value of the goods may be amended into judgment in the alternative; [73] and conversely where, in an action for the possession of personal property, plaintiff does not claim delivery of the goods, and, notwithstanding, a judgment in the alternative for a return or for the value is entered, plaintiff will be permitted to amend the judgment; [74] but an amendment will not be allowed where the judgment in its resulting form would be unwarranted by the verdict or not in accordance with the statute in force at the time of rendition of the original judgment,[75] and the court may refuse an amendment for mistake of the clerk where the party seeking the amendment acquiesced in the judgment as rendered for a long time.[76]

2. By Default. Judgment by default may be had in replevin [77] as in other civil actions,[78] and, as in other civil actions, a default may be set aside.[79] Such a judgment may be rendered for want of a sufficient affidavit of defense; [80] but in order to sustain the judgment the affidavit filed in the cause must appear to have been sworn to.[81] A judgment by default in replevin for more than the

71. See Judgments, 23 Cyc. 632 *et seq.*

72. Sumner *v.* Cook, 12 Kan. 162, where through omission or mistake of the clerk judgment was entered simply for costs.

Judgment in excess of the value as set forth in the writ and the narr. may be cured by amendment even in the court of review. Cassidy *v.* Elias, 90 Pa. St. 434; Reilly *v.* Maryman, 18 Fed. Cas. No. 11,672, 1 Hayw. & H. 9, where in replevin to recover goods distrained for rent in which there was judgment for return of the goods replevied and for the rent in arrear, the court on motion ordered so much of the judgment as called for a return of the goods to be stricken out.

Where a replevin suit is dismissed for the want of a declaration and a judgment given against plaintiff for costs, the court cannot at a subsequent term on a notice to plaintiff that a writ of retorno habendo will be applied for so amend the record as to find the property in question, and determine that he recover it from plaintiff, the failure to award such writ on the dismissal of the replevin suit not authorizing the court to review its own judgment at a subsequent term and then enter a judgment which should have been entered in the first instance. Lill *v.* Stookey, 72 Ill. 495.

73. Meads *v.* Seaman, 92 Cal. 221, 28 Pac. 935; Clark *v.* Dreyer, 9 Colo. App. 453, 48 Pac. 818; Berthold *v.* Fox, 21 Minn. 51 (where through mistake the clerk entered an absolute money judgment upon a verdict in the alternative); Fitzhugh *v.* Wiman, 9 N. Y. 559 (where plaintiff having only a special interest in the property, and judgment being entered for his interest, it was amended into judgment for the goods or for their value assessed at this amount); Stauff *v.* Maher, 2 Daly (N. Y.) 142.

74. Aldrich *v.* Thiel, 3 Code Rep. (N. Y.) 91.

75. McGriff *v.* Reid, 37 Fla. 51, 19 So. 339.

76. Miller *v.* Daly, 55 Nebr. 771, 76 N. W. 447, holding that in an action dismissed for want of jurisdiction, a simple judgment for the value of the property, entered upon the express waiver by defendant of the return of the property to him, cannot, as a matter of right, almost a year later, be amended upon his motion so that the judgment shall be for the return of the property or for its value.

77. Kehoe *v.* Rounds, 69 Ill. 351. And see cases cited *infra*, this section.

A claimant who intervenes but without being made defendant is not entitled to judgment by default against the original plaintiff, as no issue can properly be made until the settlement of the suit between the original parties. Ettringham *v.* Handy, 60 Miss. 334.

Where defendant sets up a counter-claim for damages accruing from the seizure of the property which he alleges to be wrongful, and plaintiff fails to file a reply thereto, it is error to order judgment by default, and an inquiry in favor of defendant on the counter-claim, as the issue raised as to the lawfulness of the seizure is undetermined. Phipps *v.* Wilson, 125 N. C. 106, 34 S. E. 227.

In replevin against several defendants, some not served, and none of whom appear, final judgment cannot be entered against defendants in default until the issue as to the other defendants is disposed of. Ouly *v.* Dickinson, 5 Coldw. (Tenn.) 486.

78. See, generally, Judgments, 23 Cyc. 734 *et seq.*

79. Colvard *v.* Clute, 6 Wend. (N. Y.) 540.

80. Painter *v.* Snyder, 22 Pa. Super. Ct. 603, under act April 19, 1901 (P. L. 88).

Judgment by default for want of an appearance cannot be entered in an action of replevin under act of June 13, 1836. Ogilbe *v.* Bennett, 1 Pa. Co. Ct. 575; Crofut *v.* Chichester, 3 Phila. (Pa.) 457.

If the clerk fails to enter the appearance of defendant as required by statute, the latter cannot avail himself of the omission upon motion to set aside a default entered. Kesler *v.* Haynes, 6 Wend. (N. Y.) 547.

81. Kehoe *v.* Rounds, 69 Ill. 351.

amount claimed in the petition and indorsed on the summons is erroneous,[82] but may be permitted to stand upon remission of the surplus.[83]

3. On Offer. A mere nominal defendant has no right, without the knowledge or consent of the real party in interest, to make a stipulation for dismissal of the suit without judgment, unless the real party in interest has refused to indemnify him;[84] and when he is indemnified a judgment awarding the property to the claimant, entered in pursuance of an offer by the nominal party at claimant's instance, without the knowledge of the real party in interest will be set aside on motion.[85] An offer made after a return of the property to plaintiff, to allow judgment for damages for detention, with costs, without adjudging the title to the property, is insufficient for any purpose.[86]

4. Partial Recovery. Plaintiff may have judgment according to the extent of his title proved,[87] and if, on an issue as to plaintiff's title, he proves he has title to a part only of the property, defendant is entitled to judgment for return of the other part, and to damages for the taking;[88] but a plaintiff in replevin to whom chattels are delivered having established title to a portion thereof only is not entitled to judgment, upon surrendering the remainder to persons found by the jury to be owners, who are not made parties;[89] and where the property replevied has been delivered to plaintiff under the writ, it is error to render judgment for him for part of the property, leaving defendant to his remedy on the bond as to the rest, in regard to which the court finds that for want of testimony it is unable to determine the rights of the parties.[90]

5. Election Between Recovery of Property and Value. In some jurisdictions defendant, upon a finding in his favor, is entitled to a judgment for the return of the property to him, or he may waive that right and take judgment for the value of the property, in which case it is the duty of the jury to find the value;[91]

82. Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599, although the surplus be for interest accruing since the filing of the petition, there being no prayer for interest.

83. Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599.

84. Casper *v.* Kent Cir. Judge, 45 Mich. 251, 7 N. W. 816.

85. Carter *v.* Stevens, 4 Silv. Sup. (N. Y.) 4, 8 N. Y. Suppl. 217, holding that a constable who has levied on personal property, under an execution, being the agent of the execution creditor, has no power when indemnified by him to release the property to a claimant thereof.

86. Oleson *v.* Newell, 12 Minn. 186.

87. Collier *v.* Fitzpatrick, 19 Mont. 562, 48 Pac. 1103; Clark *v.* Keith, 9 Ohio 72 (holding that where the jury find for plaintiff as to a part of the articles replevied and for defendant as to a part, assessing to each the proper damages, separate judgments will be entered in favor of each with full costs); Walker *v.* Hunter, 29 Fed. Cas. No. 17,072, 5 Cranch C. C. 462.

88. Pratt *v.* Tucker, 67 Ill. 346; Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Clark *v.* Keith, 9 Ohio 72.

89. Wilde *v.* Paschen, 67 Wis. 90, 30 N. W. 279.

90. Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

91. Hill *v.* Fellows, 25 Ark. 11 (under Gould Dig. c. 145, §§ 44, 45); Frank *v.* Brown, 119 Mich. 631, 78 N. W. 670 (holding that defendant may have such judgment, although the officer has not made a return of the writ, proof being given that the property was delivered to plaintiff); Adams *v.* Champion, 31 Mich. 332; Wooldridge *v.* Quinn, 70 Mo. 370; Kronck *v.* Reid, 105 Mo. App. 430, 79 S. W. 1001; Caldwell *v.* Ryan, (Mo. App. 1904) 79 S. W. 743; Herring *v.* Corder, 49 Mo. App. 378.

In Minnesota where the property has been delivered to plaintiff before trial, and the jury find for defendant, and find the value of the property, defendant is not entitled to elect to take judgment for the value only, and not, in the alternative for the return of the property or for the value in case a return cannot be had. French *v.* Ginsburg, 57 Minn. 264, 59 N. W. 189.

Where defendant, as against plaintiff, has only a special interest in the property by way of lien, the judgment in his favor should be only for the value of his interest, or for the return of the property until such value should be paid, at defendant's election. Dilworth *v.* McKelvy, 30 Mo. 149.

That the sheriff was proceeding to collect the judgment for the value of the property is no preclusion of the right of defendant to exercise his election to take the specific property where it nowhere appears that the property was ever delivered to the sheriff under the judgment in the replevin suit. Harris *v.* Hitt, 58 Mo. App. 459.

S. C. Code, § 299, does not change the right of the parties as it previously existed to demand either damages for the taking and detention as in trover for conversion or the return of the property with damages.

and plaintiff has a similar right;[92] but neither can be compelled to elect.[93] It is not necessary that a party exercise his option before the finding is made, it being sufficient if he exercises it when judgment is taken;[94] and it has been held that the waiver of the right to have a return of the property need not appear of record, the acceptance of a verdict for its value being in effect an election,[95] but other authority is to the contrary.[96] In some jurisdictions, where the property is delivered to plaintiff and he fails in the action, defendant cannot have judgment for a return or for the value, at his election, but he must take a judgment in the alternative for the return of the property, or, if a return cannot be had, for the value as assessed.[97]

6. Return of Property — a. General Rules. Unless there has never been an actual change of possession, when of course an order for the return of the property is improper,[98] a judgment for possession alone being held suffi-

Richey *v.* Du Pre, 20 S. C. 6; Williams *v.* Irby, 16 S. C. 371; Joplin *v.* Carrier, 11 S. C. 327.

92. Hudson *v.* Goff, 77 Ga. 281, 3 S. E. 152; Clark *v.* Warner, 32 Iowa 219; McNorton *v.* Akers, 24 Iowa 369; Wooldridge *v.* Quinn, 70 Mo. 370; Riess *v.* Delles, 45 Wis. 662; Farmers' L. & T. Co. *v.* Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689; Pratt *v.* Donovan, 10 Wis. 378.

If a part of the goods can be returned, plaintiff can elect to take that part, and a judgment for the value of the remainder to be assessed by the jury. Caldwell *v.* Bruggerman, 4 Minn. 270.

Plaintiff's right is not lost by suing out a bail process pending the action, and causing the property to be seized; and this is so, although defendant may not have replevied or otherwise regained possession from the officer. Hudson *v.* Goff, 77 Ga. 281, 3 S. E. 152.

Where plaintiff in replevin takes a mere personal judgment, he loses his remedy against the property, the levy being held to be abandoned. Toland *v.* Swearingen, 39 Tex. 447.

93. Wooldridge *v.* Quinn, 70 Mo. 370.

94. Brown *v.* Horning, 76 Mich. 542, 43 N. W. 453 (where, after plaintiffs had sold the goods replevied beyond the jurisdiction of the court, they submitted to a nonsuit, and it was held on proceedings at a subsequent term to assess damages, that defendant's election to take the value of the goods was made in due time after the jury was sworn); Riess *v.* Delles, 45 Wis. 662.

95. Hill *v.* Fellows, 25 Ark. 11.

The fact that an execution issued and defendant paid the sheriff the assessed value does not constitute an election by plaintiff unless he accepts the amount collected. Hanlon *v.* O'Keefe, 55 Mo. App. 528.

96. Adams *v.* Champion, 31 Mich. 233, holding that it is essential to a judgment for defendant for the value of the property that the record should affirmatively and distinctly show the election to take the value, instead of a return of the property; and that the statute does not intend that a matter of such importance should be left to inference.

Defendant is not, however, required to file a written waiver of return, and elect to take judgment for the value of the property, before trial, but may do so at the trial without any formal entry or writing beyond a proper recital in the judgment. Brown *v.* Horning, 76 Mich. 542, 43 N. W. 453; Kline *v.* Kline, 49 Mich. 419, 13 N. W. 800.

In a justice's court waiver of the return, entered at defendant's request in open court, by the justice, authorizes judgment for value instead of for return. Humphrey *v.* Bayn, 45 Mich. 565, 8 N. W. 556.

97. Warren *v.* Leiter, 24 R. I. 36, 52 Atl. 76.

In New York the election given under the Revised Statutes is taken away by Code, § 277 (Dwight *v.* Enos, 9 N. Y. 470; Glann *v.* Younglove, 27 Barb. 480; Seaman *v.* Luce, 23 Barb. 240; Rockwell *v.* Saunders, 19 Barb. 473); and where the replevied property has been delivered to plaintiff before judgment, he cannot elect to take judgment for its value, and the judgment should be that plaintiff have possession and damages for the detention merely (Rockwell *v.* Saunders, *supra*).

98. *Iowa.*— Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

Kentucky.— Harrod *v.* Hill, 2 Dana 165. See Greenwade *v.* Fisher, 5 B. Mon. 167, holding that, although no bond may have been executed on suing out a writ of replevin, yet if the writ be not executed and the property not delivered to plaintiff, it is error to quash the writ and render judgment for a return of the property, the writ being good as a citation and the cause should progress.

Massachusetts.— Ware River R. Co. *v.* Vibbard, 114 Mass. 458.

Michigan.— Smith *v.* Dodge, 37 Mich. 354; Gidday *v.* Witherspoon, 35 Mich. 368, holding that where plaintiff in replevin failed for the reason that the property was shown to have been in his possession when he sued out his writ, a judgment for the return of the property to defendant was erroneous.

Minnesota.— See Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

Missouri.— Baird *v.* Taylor, 30 Mo. App. 580.

Oklahoma.— Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656.

Oregon.— Phipps *v.* Taylor, 15 Oreg. 484, 16 Pac. 171.

But in California, under Code Civ. Proc.

cient,[99] in actions of replevin where judgment is to be entered up for defendant, it should as a general rule include a judgment for the return of the property,[1] and at least nominal damages,[2] and even where defendant in replevin is prevented from declaring his right and obtaining a judgment, by plaintiff abating the suit, defendant may have a judgment of return if the condition of the cause will permit it,[3] and the same rule obtains where the suit is dismissed for want of a sufficient affidavit and bond;[4] and plaintiff in replevin found to be without title may be ordered to return the property to the one from whom it was taken, although the latter was holding simply in the right of the owner,[5] and if plaintiff fails to sustain an action of replevin, defendant is entitled to a judgment for return, even where his interest in the property is limited or special.[6] The mere fact, however, that there is no

§ 667, judgment for plaintiff must always be in the alternative, even though the property has already been delivered to plaintiff. Brichman *v.* Ross, 67 Cal. 601, 8 Pac. 316.

99. *California.*— Claudius *v.* Aguirre, 89 Cal. 501, 26 Pac. 1077.

Indiana.— Chissom *v.* Lamcool, 9 Ind. 530, holding that where plaintiffs gained possession of the property under the writ, the proper judgment, upon the finding of the jury for plaintiffs, is that the property was in them, or that they were entitled to its possession.

Iowa.— Clapp *v.* Trowbridge, 74 Iowa 550, 38 N. W. 411.

Massachusetts.— Ware River R. Co. *v.* Vibbard, 114 Mass. 458.

Michigan.— Smith *v.* Dodge, 37 Mich. 354.

Oklahoma.— Marrinan *v.* Knight, 7 Okla. 419, 54 Pac. 656.

Wisconsin.— See Young *v.* Lego, 38 Wis. 206.

1. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139.

Illinois.— Merrimac Paper Co. *v.* Illinois Trust, etc., Bank, 129 Ill. 296, 21 N. E. 787; MacLachlan *v.* Pease, 66 Ill. App. 634 [*affirmed* in 171 Ill. 527, 49 N. E. 714]; Lochnitt *v.* Stockton, 31 Ill. App. 217.

Kansas.— Wester *v.* Long, 63 Kan. 876, 66 Pac. 1032; Sumner *v.* Cook, 12 Kan. 162, holding that on a verdict for defendant in a replevin suit in which the property has been delivered to plaintiff, a judgment should be entered for the return of the property.

Kentucky.— Gaines *v.* Tibbs, 6 Dana 143.

Massachusetts.— Giroux *v.* Wheeler, 163 Mass. 48, 39 N. E. 470. See McNeal *v.* Leonard, 3 Allen 268.

Michigan.— Salter *v.* Sutterland, 125 Mich. 662, 85 N. W. 112.

Missouri.— Ingals *v.* Ferguson, 138 Mo. 358, 39 S. W. 801.

Tennessee.— Fugate *v.* Stapleton, 6 Baxt. 321.

United States.— Hemstead *v.* Colburn, 11 Fed. Cas. No. 6,347, 5 Cranch C. C. 655.

See 42 Cent. Dig. tit. "Replevin," § 399.

If the writ be returned "executed" and defendant succeed in the action, a judgment de retorno is proper, the presumption being on this return that the property had been returned to plaintiff, that being the command of the writ. Stephens *v.* Frazier, 2 B. Mon. (Ky.) 250.

It is irregularity for the court to order return before final judgment; the order for return should be made a part of the final judgment. Branch *v.* Branch, 5 Fla. 447.

Judgment for a return, not technically conforming to statute, but substantially correct, will be affirmed. McArthur *v.* Homan, 15 Fed. Cas. No. 8,659*a*, Hempst. 286. And see Wood *v.* May, 30 Fed. Cas. No. 17,956, 3 Cranch C. C. 172, holding that in replevin for goods distrained for rent arrear, if the jury do not render such a verdict as will enable the court to render the statutory judgment in favor of defendant, the court may render the common-law judgment for a return of the property replevied.

2. Frey *v.* Drahos, 7 Nebr. 194, holding that while a judgment in favor of defendant for a return of the property which fails to award at least nominal damages, is for that reason technically defective, still if it conform in this respect to the finding of fact which is not questioned by motion for a new trial, the judgment will not be reversed on that ground.

3. Persse *v.* Watrous, 30 Conn. 139.

Statutes requiring a return of the property in all cases of nonsuit are not unconditional, but are subject to the proviso that if plaintiff, between the time of the commencement of the suit and suffering nonsuit, shall become entitled to the possession of the property, judgment may be given against him for costs and such damages as defendant shall have sustained. Lane *v.* Kohn, 79 Ill. App. 396.

4. Branch *v.* Branch, 5 Fla. 447, holding that this must be so or plaintiff by putting in an insufficient affidavit and bond might obtain possession of the property, accomplish the object of his suit, and leave defendant remediless, or entail upon him a long and tedious litigation to obtain the possession of his property.

5. Lochnitt *v.* Stockton, 31 Ill. App. 217.

6. Witham *v.* Witham, 57 Me. 447, 99 Am. Dec. 787; Hoffman *v.* Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711; Charpentier *v.* Bresnahan, 74 Mich. 48, 41 N. W. 856.

While one tenant in common cannot as a general rule maintain replevin against his cotenant (see *supra*, I, C, 2, e), if plaintiff, having replevied his cotenant's property, fails in his action, his cotenant is entitled to a judgment for return (Witham *v.* Witham, 57 Me. 477, 99 Am. Dec. 787; Ingalls *v.* Fergu-

judgment for a return of the property nor for its value if a return cannot be had, does not render the judgment void or subject to collateral attack,[7] for defendant may have waived the right to a return of the property;[8] and if defendant is not the owner of the goods a judgment for return should not be entered, as a general rule.[9] Where defendants never took the goods and plaintiff had no property in them, defendants are not entitled to judgment for a return of the property,[10] and a return of the property will not be ordered when in equity it ought not to be returned, although defendant has judgment in his favor,[11] and if an action of replevin is defeated solely by reason of its being prematurely commenced, judgment for a return of the goods replevied will not be ordered.[12] Under some statutes judgment for defendant in replevin must be for the value of the property replevied and not for a return of them,[13] and in some jurisdictions there can be no judgment for the value of the property in replevin, in the absence of any judgment for a return thereof.[14]

b. Property Belonging to Third Person. The general rule is that the plea of property in a stranger is good and entitles defendant to a return if the issue is found for him,[15] and on a general verdict for defendants in replevin, an order of the court for the restoration to him of the property replevied is correct, although

son, 138 Mo. 358, 39 S. W. 801 [*reversing* 59 Mo. App. 299]).

Right of officer to return.— The general rule enunciated in many well considered cases is that in replevin for goods distrained, or levied on under other valid process, where the officer justifies under his writ, he is entitled to a return of the goods. Applegate *v.* Crawford, 2 Ind. 579 (holding that in replevin for goods distrained for rent where the constable justifies under his warrant and obtains judgment on a demurrer to his plea, he is entitled to a return of the goods); Powell *v.* Triplett, 6 B. Mon. (Ky.) 420 (holding, however, that, although the officer serving a distress warrant may justify under it in an action of replevin against him, there should not be a return of the property unless there was in fact rent in arrear at the time of the issuing of the writ); Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166 (holding that where replevin is brought to recover property taken by an officer upon execution, a judgment for defendant is for a return of the property); Gaines *v.* Tibbs, 6 Dana (Ky.) 143; Dawson *v.* Wetherbee, 2 Allen (Mass.) 461 (holding that after a verdict for defendant in an action of replevin against an attaching officer, in which the question of property in plaintiff was tried and a verdict found against him, judgment for return of goods replevied will be ordered, although since the rendition of the verdict the attachment has been dissolved); Frederick *v.* Mecosta Cir. Judge, 52 Mich. 529, 18 N. W. 343. See Kimball *v.* Thompson, 4 Cush. (Mass.) 441, 50 Am. Dec. 799. But where the replevin bond being defective the writ has not been served by the officer nor returned to the court issuing the writ, that court has no jurisdiction to order the return of the property. Adams *v.* McGlinchy, 62 Me. 533. An officer against whom replevin is brought for property taken upon execution, which he has no right to sell, has no right to a judgment for the return of property which he has not a right to sell. Saffell *v.* Wash, 4 B. Mon. (Ky.) 92.

Change of ownership pending suit.— Where an officer attaches property which is replevied from him and it appears that the property was in the attachment debtor's possession under a lease which has since expired, the officer is entitled to a judgment not for return but for costs only. Wheeler *v.* Train, 4 Pick. (Mass.) 168.

7. Fromlet *v.* Poor, 3 Ind. App. 425, 29 N. E. 1081.

8. Wright *v.* Card, 16 R. I. 719, 19 Atl. 709.

9. Kerley *v.* Hume, 3 T. B. Mon. (Ky.) 181.

10. Whitwell *v.* Wells, 24 Pick. (Mass.) 25.

11. Bath *v.* Miller, 53 Me. 308. See Kaehler *v.* Dobberpuhl, 60 Wis. 256, 18 N. W. 841.

12. Martin *v.* Bayley, 1 Allen (Mass.) 381.

13. See the statutes of the several states. And see Bell *v.* Bartlett, 7 N. H. 178; Fitzpatrick *v.* Warren, 1 Pinn. (Wis.) 541.

14. Washburn *v.* Huntington, 78 Cal. 573, 21 Pac. 305; Foster *v.* Bringham, 99 Ind. 505; Thomas *v.* Irwin, 90 Ind. 557; Spencer *v.* Bell, 109 N. C. 39, 13 S. E. 704.

15. *Kentucky.*—Tuley *v.* Mauzey, 4 B. Mon. 5.

Massachusetts.— Quincy *v.* Hall, 1 Pick. 357, 11 Am. Dec. 198.

Minnesota.— Loomis *v.* Youle, 1 Minn. 175, holding that the rule applies even when defendant does not connect himself with that title.

New York.— Rhodes *v.* Bunts, 21 Wend. 19; Harrison *v.* McIntosh, 1 Johns. 380.

Pennsylvania.— McDowell *v.* Windle, 2 Chest. Co. Rep. 477, 2 Del. Co. 356.

See 42 Cent. Dig. tit. "Replevin," § 402.

See, however, Dickinson *v.* Lovell, 35 N. H. 9, holding that in replevin, where defendant pleads property in a third person, and that he had attached the property on a writ founded on a debt, and judgment is rendered for de-

plaintiff may have produced evidence that it was owned by a third person, not a party to the suit, jointly with himself.[16]

7. Alternative Judgments. The general rule is that the judgment in an action of replevin should be in the alternative for the property or its value, as ascertained by the jury, if delivery cannot be had, with damages for its detention.[17]

fendant, he is entitled to a judgment for damages, instead of a return.

16. Waldman *v.* Broder, 10 Cal. 378.

17. *Arkansas.*— Jetton *v.* Smead, 29 Ark. 372; Rowark *v.* Lee, 14 Ark. 425.

California.— Etchepare *v.* Aguirre, 91 Cal. 288, 27 Pac. 668, 929, 25 Am. St. Rep. 180; Cooke *v.* Aguirre, 86 Cal. 479, 25 Pac. 5; Kneebone *v.* Kneebone, 83 Cal. 645, 23 Pac. 1031; Holmberg *v.* Hendy, (1886) 10 Pac. 394; Stewart *v.* Taylor, 68 Cal. 5, 8 Pac. 605; McCue *v.* Tunstead, 66 Cal. 486, 6 Pac. 316; Cummings *v.* Stewart, 42 Cal. 230.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48.

Illinois.— Lamping *v.* Payne, 83 Ill. 463, holding, however, that the provisions for an alternative judgment in replevin (Rev. St. (1874) c. 119, § 22), apply only to cases where the general property is in plaintiff, and defendant shows a special property by levy, lien, etc.

Indiana.— Bales *v.* Scott, 26 Ind. 202; Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125.

Kansas.— Johnson *v.* Boehme, 66 Kan. 72, 71 Pac. 243, 97 Am. St. Rep. 357 (holding, however, that the right of defendant in replevin to have a judgment in his favor in the alternative is not an exclusive remedy, and, if he does not avail himself of it, he may yet maintain his separate action and accomplish the same result); Chase County Nat. Bank *v.* Thompson, 54 Kan. 307, 38 Pac. 274; Ponceler *v.* Marshall, 45 Kan. 672, 26 Pac. 32; Armel *v.* Layton, 33 Kan. 41, 5 Pac. 441; Higbee *v.* McMillan, 18 Kan. 133; Ward *v.* Masterson, 10 Kan. 77; Hall *v.* Jenness, 6 Kan. 356; Garrett *v.* Wood, 3 Kan. 231; Burton *v.* Cochran, 5 Kan. App. 508, 47 Pac. 569.

Minnesota.— Sherman *v.* Clark, 24 Minn. 37; Kates *v.* Thomas, 14 Minn. 460; Eaton *v.* Caldwell, 3 Minn. 134.

Mississippi.— Anderson *v.* Tyson, 6 Sm. & M. 244.

Missouri.— Herring *v.* Corder, 49 Mo. App. 378 (holding that Rev. St. (1889) § 7490, requiring the judgment for defendant in replevin to be in the alternative for the return of the property or the value thereof, and damages for the taking, is complied with by a judgment that "defendant recover of plaintiff the said ninety-one hogs and three calves, or, at his election, take judgment for the sum of $442, the value of said property"); Gulath *v.* Waldstein, 7 Mo. App. 66.

Montana.— Hynes *v.* Barnes, 30 Mont. 25, 75 Pac. 523.

Nebraska.— Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Nebr. 20, 80 N. W. 47; Martin *v.* Foltz, 54 Nebr. 162, 74 N. W. 418; Goodwin *v.* Potter, 40 Nebr. 553, 58 N. W. 1128; Roberson *v.* Reiter, 38 Nebr. 198, 56 N. W. 877; Manker *v.* Sine, 35 Nebr. 746, 53 N. W. 734; Singer Mfg. Co. *v.* Dunham, 33 Nebr. 686, 50 N. W. 1122; Hooker *v.* Hammill, 7 Nebr. 231; Skow *v.* Locke, 3 Nebr. (Unoff.) 176, 91 N. W. 204.

Nevada.— Lambert *v.* McFarland, 2 Nev. 58.

New York.— Phillips *v.* Melville, 10 Hun 211; Dows *v.* Rush, 28 Barb. 157; Munsell *v.* Flood, 46 N. Y. Super. Ct. 134; Poplin *v.* Gottwald, 2 Sandf. 317 (holding that if the property has been delivered to plaintiff, and defendant by his answer claims a redelivery, a judgment on a verdict in his favor must be in the alternative for a return of the property or the value thereof in case it cannot be returned, even though there was testimony given on the trial tending to show that plaintiff had sold the property); Lewin *v.* Towbin, 31 Misc. 780, 65 N. Y. Suppl. 228; Wolf *v.* Farley, 16 N. Y. Suppl. 168; McNamara *v.* Eisenleff, 14 Abb. Pr. N. S. 25.

North Carolina.— Horton *v.* Horne, 99 N. C. 219, 5 S. E. 927; Council *v.* Averett, 90 N. C. 168; Manix *v.* Howard, 82 N. C. 125.

North Dakota.— Nichols, etc., Co. *v.* Paulson, 10 N. D. 440, 87 N. W. 977.

Oklahoma.— Wade *v.* Gould, 8 Okla. 690, 59 Pac. 11.

South Carolina.— Robbins *v.* Slattery, 30 S. C. 328, 9 S. E. 510.

South Dakota.— Pitts Agricultural Works *v.* Young, 6 S. D. 557, 62 N. W. 432.

Tennessee.—Hamilton *v.* Henney Buggy Co., 102 Tenn. 714, 52 S. W. 160 (holding that under Code, § 3390 (Milliken & V. Code, § 4126, Shannon Code, § 5144), providing that, in a replevin suit in the circuit court, judgment for defendant shall be for return of the property, or, on failure, that defendant recover the value of the property, and Act (1885), c. 59, amending such section by providing, that if such alternative judgment is rendered, and execution is issued thereon and returned, showing that the property has not been returned, and the execution has not been satisfied in whole or in part, defendant is entitled to a final judgment against plaintiff and his sureties for the whole of the original judgment, or so much of it as remained unsatisfied, not to be thereafter satisfied by return of the property, the latter form of judgment cannot be rendered in the first instance); Creamer *v.* Ford, 1 Heisk. 307.

Texas.— Lang *v.* Dougherty, 74 Tex. 226, 12 S. W. 29; Pridgin *v.* Strickland, 8 Tex. 427, 58 Am. Dec. 124; Clopton *v.* Goodbar, (Civ. App. 1900) 55 S. W. 972; Jackson *v.* Phillips, (Civ. App. 1896) 35 S. W. 745.

Washington.— Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. 725; Hall *v.* Law Guarantee, etc., Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St.

Where, however, a party is found to have only a special interest or ownership in the property, the judgment should be for a return of the property, or, if a return cannot be had, for an amount equal to the value of the special interest or ownership, not to exceed the value of the property.[18] Before the successful party can complain of the omission of a provision for the return he must show that the property is capable of being returned;[19] if for any reason a return cannot be had, where it would be the appropriate remedy, the judgment need not be in the alternative, but may be for the assessed value of the property only, including

Rep. 935; Seattle Nat. Bank *v.* Meerwaldt, 8 Wash. 630, 36 Pac. 763, holding that judgment authorizing plaintiff to issue execution against defendant unless the property be forthwith delivered is bad in form, under Wash. Code Pr. § 438.

Wisconsin.— Baxter *v.* Berg, 88 Wis. 399, 60 N. W. 711; Smith *v.* Coolbaugh, 19 Wis. 106; Booth *v.* Ableman, 18 Wis. 495; Rose *v.* Tolly, 15 Wis. 443; Heeron *v.* Beckwith, 1 Wis. 17. See Ela *v.* Bankes, 37 Wis. 89, holding that in an action of replevin, where judgment is rendered for defendant for the return or value of the whole property, such judgment is erroneous where one of plaintiffs is a tenant in common.

United States.—Hanchett *v.* Humphreys, 84 Fed. 862.

See 42 Cent. Dig. tit. "Replevin," §§ 410, 424.

In replevin before a justice of the peace an alternative judgment cannot be had under Ind. Rev. St. (1881) §§ 1550, 1571, but judgment should be merely for a return. Van Meter *v.* Barnett, 119 Ind. 35, 20 N. E. 426; Everman *v.* Hyman, 3 Ind. App. 459, 29 N. E. 1140. The same rule applies under Ind. Rev. St. (1894) § 1618. Woodward *v.* Myers, 15 Ind. App. 42, 43 N. E. 573.

In New Hampshire if a verdict be found for defendant, judgment should be for the value of the property only and not for a return. Messer *v.* Bailey, 31 N. H. 9; Kendall *v.* Fitts, 22 N. H. 1; Bell *v.* Bartlett, 7 N. H. 178.

Property in control of court.— Where the subject-matter of the replevin suit is in the control of the court, the judgment should be for a delivery only. An assessment of value and an alternative judgment are unnecessary. Harris *v.* Harris, 43 Ark. 535.

18. *Georgia.*— Jesse French Piano, etc., Co. *v.* Cardwell, 114 Ga. 340, 40 S. E. 292.

Illinois.— MacLachlan *v.* Pease, 171 Ill. 527, 49 N. E. 714 [*affirming* 66 Ill. App. 634]; Janes *v.* Gilbert, 168 Ill. 627, 48 N. E. 177 [*affirming* 68 Ill. App. 611]; Clow *v.* Yount, 93 Ill. App. 112, holding that under Hurd Rev. St. c. 119, § 22, providing that in replevin, if the right of property is adjudged against plaintiff, judgment shall be given for return of the property, or, if the property is held for the payment of any money, judgment may be in the alternative, that plaintiff pay the amount for which the same is held, with proper damages, or make return of the property, where the property sought to be recovered is held in pledge as security for the payment of money, a judgment in the alternative that plaintiff pay the amount for which the property is held, with the proper damages, withhin a given time, or make return of the property, is authorized.

Iowa.— Harward *v.* Davenport, 105 Iowa 592, 75 N. W. 487.

Kansas.— Scott *v.* Beard, 5 Kan. App. 560, 47 Pac. 986.

Minnesota.—Deal *v.* Osborne, 42 Minn. 102, 43 N. W. 835.

Mississippi.— Bond *v.* Griffin, 74 Miss. 599, 22 So. 187; Bates *v.* Snider, 59 Miss. 497.

New York.— Haehnel *v.* Trostler, 54 Misc. 262, 104 N. Y. Suppl. 533; Sprague *v.* King, 37 Misc. 792, 76 N. Y. Suppl. 897; McCobb *v.* Christiansen, 28 Misc. 119, 59 N. Y. Suppl. 303 [*affirming* 27 Misc. 825, 59 N. Y. Suppl. 187].

North Dakota.— Angell *v.* Egger, 6 N. D. 391, 71 N. W. 547.

Ohio.— Adler *v.* Johnston, 2 Ohio Cir. Ct. 95, 1 Ohio Cir. Dec. 382.

South Dakota.— National Bank of Commerce *v.* Feeney, 9 S. D. 550, 70 N. W. 874, 46 L. R. A. 732.

19. Goodman *v.* Kennedy, 10 Nebr. 270, 4 N. W. 987.

Where the chattels have been previously sold by the judgment debtor, a judgment for the value of the property is in that case sufficient, and it is not necessary that judgment be in the alternative. Cathey *v.* Bowen, 70 Ark. 348, 68 S. W. 31; Burke *v.* Koch, 75 Cal. 356, 17 Pac. 228 (where the property was fraudulently disposed of by defendant); McCarthy *v.* Strait, 7 Colo. App. 59, 42 Pac. 189. *Contra*, McNamara *v.* Eisenleff, 14 Abb. Pr. N. S. (N. Y.) 25, holding that in an action in the nature of replevin in a justice's court, as in a like action in a court of record, if the justice finds for plaintiff upon the main issue, the judgment must be in the alternative, for possession or for the recovery of possession, or the value thereof in case a delivery cannot be had, and damages, etc., and the fact that defendant has sold the property makes no difference, and a judgment for the value absolutely is not merely irregular, but is erroneous, and will be reversed on appeal.

Where the goods are so intermingled with goods of defendant that they are not distinguishable, judgment for return is unnecessary. Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710.

Plaintiff cannot retain chosen articles on payment of their value to defendant. Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481.

such damages as may be allowed,[20] and it has been held that where plaintiff brings replevin and fails to procure possession of the property, but continues the action as one for damages, an alternative judgment for the return of the property or its value is not required.[21] Where there is no evidence as to the value of the property sought to be recovered, a judgment that plaintiff recover the property, or the value thereof, in case recovery cannot be had, is erroneous.[22] The right of a party to an alternative judgment for the value of the property, if a return cannot be obtained, is exclusively for his own benefit, and he may waive it.[23]

8. Operation and Effect.[24] Primarily the action of replevin is possessory in its character, and unless the title to property is distinctively put in issue, a judgment in such action determines nothing beyond the right to possession.[25] Nevertheless under some circumstances a judgment for defendant may be conclusive as to the want of title in plaintiff.[26] A judgment for a return of the property to defendant is a direct and conclusive adjudication that defendant's right of possession is superior to plaintiff's.[27]

9. Satisfaction and Discharge[28] — **a. By Return of Property** — (i) *When Authorized.* The unsuccessful party in an action of replevin may discharge an ordinary judgment for the return of the property sued for, or, in default thereof for its value, by returning the property within a reasonable time, and paying whatever costs and damages are assessed against him. The option of returning

20. *Delaware.*— Clark *v.* Adair, 3 Harr. 113.

Idaho.— Johnson *v.* Fraser, 2 Ida. (Hasb.) 404, 18 Pac. 48.

Kansas.— Clouston *v.* Gray, 48 Kan. 31, 28 Pac. 983; Garrett *v.* Wood, 3 Kan. 231.

Missouri.— White *v.* Graves, 68 Mo. 218.

Nebraska.— Ulrich *v.* McConaughey, 63 Nebr. 10, 88 N. W. 150; Selby *v.* McQuillan, 59 Nebr. 158, 80 N. W. 504; Goodman *v.* Kennedy, 10 Nebr. 270, 4 N. W. 987.

North Carolina.— Holmes *v.* Godwin, 69 N. C. 467.

South Dakota.— Park *v.* Robinson, 15 S. D. 551, 91 N. W. 344.

Wisconsin.— Pranke *v.* Herman, 76 Wis. 428, 45 N. W. 312.

United States.— Boley *v.* Griswold, 20 Wall. 486, 22 L. ed. 375; Burton *v.* Platter, 53 Fed. 901, 4 C. C. A. 95.

See 42 Cent. Dig. tit. "Replevin," § 410.

But see Robbins *v.* Slattery, 30 S. C. 328, 9 S. E. 510.

Under Ky. Civ. Code, § 388, providing that where property obtained by an order of delivery is adjudged to defendant from whom taken by the order, the judgment shall be in the alternative, with the right on part of plaintiff to return the property or pay its value, a judgment in favor of a defendant for the value is erroneous. Reid *v.* King, 89 Ky. 388, 12 S. W. 772, 11 Ky. L. Rep. 615.

21. McCarty *v.* Morgan, 2 Nebr. (Unoff.) 274, 96 N. W. 489; Sloan *v.* Fist, 2 Nebr. (Unoff.) 664, 89 N. W. 760.

22. Sauer *v.* Traeger, 56 Minn. 364, 57 N. W. 933; Griffith *v.* Richmond, 126 N. C. 377, 35 S. E. 620.

23. Copeland *v.* Kilpatrick, 38 Colo. 208, 88 Pac. 472 (holding that under Mill. Annot. Code Colo. § 227, providing that in replevin judgment for plaintiff "may be for the possession, or the value thereof, in case a delivery cannot be had," although judgment for plaintiff should be in the alternative, defendant cannot complain if it is simply for the return of the property); Thompson *v.* Scheid, 39 Minn. 102, 38 N. W. 801, 12 Am. St. Rep. 619; Stevens *v.* McMillin, 37 Minn. 509, 35 N. W. 372; Wheeler *v.* Jones, 16 Mont. 87, 40 Pac. 77; Morrison *v.* Austin, 14 Wis. 601. But see Mayhew *v.* Mather, 82 Wis. 355, 52 N. W. 436.

Where a writ has been by mistake levied on property to which plaintiff has no claim, but which is of a like description as that mentioned in the writ, a defendant, upon waiving a return of the property, is entitled to a verdict for its value, and is not remitted to a separate action. Dewey *v.* Hastings, 79 Mich. 263, 44 N. W. 607.

24. **Operation of judgments generally as a bar** see Judgments, 23 Cyc. 1106 *et seq.*

25. Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Hall *v.* Durham, 113 Ind. 327, 15 N. E. 529; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161 (holding that the issuable facts or matters, upon which plaintiff's case proceeded, determine what was in issue, unless it appears from an examination of all the pleadings in a given case, that other matters were brought forward and thus became necessarily involved and determined in the suit, and that a judgment upon matters not thus in issue is not conclusive, and subjects adjudicated which were not in issue may be inquired into collaterally, notwithstanding the judgment); Hoke *v.* Applegate, 92 Ind. 570; Entsminger *v.* Jackson, 73 Ind. 144; Highnote *v.* White, 67 Ind. 596; Consolidated Tank Line Co. *v.* Bronson, 2 Ind. App. 1, 28 N. E. 155. And see Seldner *v.* Smith, 40 Md. 602.

26. Seldner *v.* Smith, 40 Md. 602.

27. Bath *v.* Miller, 53 Me. 308.

28. **Proceedings to compel entry of satisfaction** see, generally, Judgments, 23 Cyc. 1498.

the property or paying its value, under statutes of some states, rests with him and not with the prevailing party.[29] However, a judgment for damages cannot be satisfied, either wholly or in part, by a return of the property.[30]

(II) *SUFFICIENCY OF.* A judgment which is so framed as to permit a return of the property in suit is discharged by a delivery,[31] or a proper [32] tender,[33] within a reasonable time,[34] to the holder of the judgment [35] at his place of business,[36] of all and not merely a portion [37] of the identical property named in the

29. Carson *v.* Applegarth, 6 Nev. 187; Johnson *v.* Gallegos, 10 N. M. 1, 60 Pac. 71; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. (N. Y.) 445, 107 N. Y. Suppl. 163; Leve *v.* Frazier, 42 Oreg. 141, 70 Pac. 376; Marks *v.* Willis, 36 Oreg. 1, 58 Pac. 526, 78 Am. St. Rep. 752. See also White *v.* Woodruff, 25 Nebr. 797, 41 N. W. 785.

When prevailing party may elect.— The statutes of some jurisdictions have been construed to confer upon the prevailing party the right to elect whether he will take a return of the property or payment of its value (Koelling *v.* Gast Bank Note, etc., Co., 103 Mo. App. 98, 77 S. W. 414; Hanlon *v.* O'Keefe, 55 Mo. App. 528); but he must exercise his right before judgment, and is bound by the judgment, even though it is in the alternative and confers the right of election upon the defeated party (Oskaloosa Steam-Engine Works *v.* Nelson, 54 Iowa 519, 6 N. W. 718; Parker *v.* Oxendine, 85 Mo. App. 212).

30. Field *v.* Post, 38 N. J. L. 346; Shoemaker *v.* Shoemaker, 4 Pa. Dist. 398, 16 Pa. Co. Ct. 159, 7 Kulp 528.

31. Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670, holding that, although the property is so heavy and bulky as to make actual manual delivery difficult, it is the duty of the judgment debtor to take such action as will enable plaintiff to obtain actual possession.

An agreement between the attorney for the judgment creditor and the judgment debtor that the latter shall surrender possession of the property in question, and a subsequent written agreement between the attorney and a third person in possession of the goods stipulating that the latter shall ship the property to the judgment creditor, constitutes a sufficient delivery and return of the property to operate as a satisfaction of the judgment. High *v.* Emerson, 23 Wash. 103, 62 Pac. 455.

Recovery of possession in another action.— An alternative judgment is satisfied, except as to unpaid costs and damages, and the right to alternative relief is waived by the act of the prevailing party in recovering possession of the property in another action. Otto *v.* Burch, 50 Nebr. 894, 70 N. W. 513.

32. Stevens *v.* Tuite, 104 Mass. 328; Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. 150; Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308 (holding that a tender of similar property, of equal value, is not sufficient); Irvin *v.* Smith, 68 Wis. 227, 31 N. W. 912.

33. Parker *v.* Oxendine, 85 Mo. App. 212; Manker *v.* Sine, 47 Nebr. 736, 66 N. W. 840; Reavis *v.* Horner, 11 Nebr. 479, 9 N. W. 643; Marks *v.* Willis, 36 Oreg. 1, 58 Pac. 526, 78 Am. St. Rep. 752.

34. McClellan *v.* Marshall, 19 Iowa 561, 87 Am. Dec. 454; Archer *v.* Long, 47 S. C. 556, 25 S. E. 84.

35. Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801; Leve *v.* Frazier, 42 Oreg. 141, 7 Pac. 376 (holding that a delivery to one of plaintiffs is a delivery to all, even though they are hostile toward each other); Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

Delivery to duly authorized attorney sufficient.— See High *v.* Emerson, 23 Wash. 103, 62 Pac. 455.

Delivery to officer.—A delivery to an officer holding a special execution for the return of the property (Carrico *v.* Taylor, 3 Dana (Ky.) 33); or to an officer holding an execution against the property in an attachment suit, although the property was replevied from another officer who held it under the writ of attachment (Richards *v.* Rape, 3 Ill. App. 24), is sufficient, and, by statute in one jurisdiction, a delivery or tender, if unaccepted, must be made to the sheriff or constable of the court in which the judgment was rendered, in order to be effectual (Childs *v.* Wilkinson, 15 Tex. Civ. App. 687, 40 S. W. 749). However, an officer who had the custody of the goods under a writ of execution at the time they were replevied cannot, without express authority, waive a return of the property. Osborne *v.* Banks, 46 Conn. 444.

36. Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

Where the articles are so heavy and cumbrous as to render the application of the above rule impracticable, an offer to deliver the property at the place where it was replevied is sufficient. Nimon *v.* Reed, 79 Iowa 524, 44 N. W. 802; Reavis *v.* Horner, 11 Nebr. 479, 9 N. W. 643; Frey *v.* Drahos, 10 Nebr. 594, 7 N. W. 319. In Gans *v.* Woolfolk, 2 Mont. 458, it was held that the judgment debtor is not required to tender a bulky and cumbersome article to the judgment creditor wherever found, but that if the latter neglects or refuses to appoint a place for delivery, the debtor has a right to select a convenient place and there deliver the article.

Where the goods are in the custody of the judgment holder, a notice to him that he may retain the same and treat them as his own constitutes a sufficient return. Pittsburgh Nat. Bank of Commerce *v.* Hall, 107 Pa. St. 583.

37. *Colorado.*—Jones *v.* Messenger, 40 Colo. 37, 90 Pac. 64.

writ [38] in substantially the same condition as when taken, without deterioration in value.[39] It is immaterial whether the property is returned by the unsuccessful party or his sureties.[40]

b. By Payment of Value. Although a person against whom an alternative judgment has been rendered can satisfy it by the payment of the value, he cannot, by returning or tendering part of the property and paying the value of the remainder,[41] except where a portion of the goods are lost or so disposed of that they cannot be returned, and their separate value as found by the court can be definitely ascertained,[42] nor can he, by paying the assessed value against the will of the prevailing party, when the judgment authorizes such payment only in case a delivery of the property cannot be had.[43] The effect of the payment of the value of the property is to vest title thereto in the party against whom judgment was rendered, and to preclude the prevailing party from recovering its possession.[44]

10. Enforcement — a. By Execution — (I) *Right to.* A judgment in replevin which has not been complied with may be enforced by execution.[45]

Indiana.— Yelton *v.* Slinkard, 85 Ind. 190.
Kentucky.— Rennebaum *v.* Atkinson, 52 S. W. 828, 21 Ky. L. Rep. 587.
Massachusetts.— Stevens *v.* Tuite, 104 Mass. 328.
Texas.— Pauls *v.* Mundine, 37 Tex. Civ. App. 601, 85 S. W. 43.
See 42 Cent. Dig. tit. "Replevin," § 431.
Compare Harts *v.* Wendell, 26 Ill. App. 274, holding that a tender of a substantial part of the property must be accepted.
The acceptance of a part of the property does not operate as a satisfaction of the whole judgment. Black *v.* Black, 74 Cal. 520, 16 Pac. 311.
Delivery of part, accompanied by payment of value for remainder see *infra*, VI, I, 7, b.

38. Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. 150; Richardson Drug Co. *v.* Teasdell, 59 Nebr. 150, 80 N. W. 488; Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308 [*distinguishing* Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373, and Reavis *v.* Horner, 11 Nebr. 479, 9 N. W. 643]. See also Monness *v.* Livingston, 84 N. Y. Suppl. 124, where, in replevin for "two hundred and twenty boys' coats" it appeared that the articles were pieces of cloth cut in the shape of coats, but not yet made up, and it was held that the judgment for possession of "the property mentioned in the affidavit and complaint" was so substantially correct as to require the marshal to take the cut goods tendered to him.

39. *Colorado.*—Jones *v.* Messenger, 40 Colo. 37, 90 Pac. 64.
Indiana.— Yelton *v.* Slinkard, 85 Ind. 190.
Maine.— Berry *v.* Hoeffner, 56 Me. 170.
Massachusetts.— Parker *v.* Simonds, 8 Metc. 205.
Mississippi.—Hazlett *v.* Witherspoon, (1899) 25 So. 150.
Oregon.— Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.
South Carolina.— Archer *v.* Long, 47 S. C. 556, 25 S. E. 84.
Texas.— Childs *v.* Wilkinson, 15 Tex. Civ. App. 687, 40 S. W. 749.
Wisconsin.— Irvin *v.* Smith, 68 Wis. 227, 31 N. W. 912.
See 42 Cent. Dig. tit. "Replevin," § 430 *et seq.*
See, however, Paulson *v.* Nichols, etc., Co., 8 N. D. 606, 80 N. W. 765, holding that the successful party in claim and delivery may not refuse to receive the property in dispute when tendered in satisfaction of the judgment for value, and at the same time bring an action to recover damages to such property, whether accruing before or after the date of the judgment in claim and delivery.
The return of a worthless promissory note, made such by deterioration in value caused by the judgment debtor's retention of it, is not a compliance with the judgment. Fair *v.* Citizens' State Bank, 69 Kan. 353, 76 Pac. 847, 105 Am. St. Rep. 168.
In New York the prevailing party is obliged to accept the chattel, when it is tendered in the same condition as at the time of trial, as the damages for detention include any depreciation in value intermediate the wrongful taking and trial. Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. 445, 107 N. Y. Suppl. 163.

40. Johnson *v.* Gallegos, 10 N. M. 1, 60 Pac. 71.

41. Kingsley *v.* Sauer, 17 Misc. (N. Y.) 544, 41 N. Y. Suppl. 248; Connor *v.* Bates, 92 Tenn. 465, 22 S. W. 4.

42. Reavis *v.* Horner, 11 Nebr. 479, 9 N. W. 643; Archer *v.* Long, 47 S. C. 556, 25 S. E. 84. And see Pickett *v.* Bridges, 10 Humphr. (Tenn.) 171.

43. Swantz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98.

44. Kayser *v.* Bauer, 5 Kan. 202; Archibeque *v.* Miera, 1 N. M. 419; Houston *v.* Bibb, 50 N. C. 83, holding that where a recovery is had against defendant in replevin for a female slave, and he pays the damages assessed, this is a judicial transfer of the slave, but not of a child she had after wrongful taking but during the pendency of the suit.

45. Martin *v.* Ferguson, (Ky. 1908) 111 S. W. 281 [*following* Rennebaum *v.* Atkinson, 52 S. W. 828, 21 Ky. L. Rep. 587] (holding

(II) *Requisites, Service, and Return of Writ.* The writ of execution must follow the judgment,[46] and be in the language of the statute, commanding the officer to seize and retain the property, and collect the damages, or in case a delivery of the property cannot be had, to collect the value thereof, together with the damages.[47] Statutes allowing the writ to run to officers of other counties within the state are not applicable to actions of replevin,[48] but the rules governing in civil actions generally as to the service,[49] and return [50] of the writ, apply in actions of replevin.

(III) *Relief Against.* An injunction will issue to restrain the prevailing party from collecting by execution the value of the property where the judgment is in the alternative and a proper tender of the property has been made.[51] However, an injunction will not issue where an adequate remedy at law exists,[52] or where the facts are insufficient to justify equitable interference.[53] A stay of execution will be granted only when facts authorizing a stay are shown; [54] but after one has been granted, a writ of return issued during the time for which the stay is effective will be set aside.[55]

b. By Independent Action. A party who has recovered judgment for the value of the property may, in an independent action, pursue the fund realized from its sale pending suit,[56] and one who has been given judgment for the return of the property is entitled to a mandatory injunction for its delivery, after an execution has been returned unauthorized,[57] but he has no right to maintain an action of assumpsit to recover its value.[58]

I. Appeal and Error. The rules applicable in other civil actions [59] as to appeal and review are applicable in the action of replevin; [60] such as to the right

that plaintiff may, at his option, have an execution for the specific property or its assessed value); Field *v.* Post, 38 N. J. L. 346; Aldridge *v.* Loftin, 104 N. C. 122, 10 S. E. 210.

Writ of retorno habendo.— It has been held that under the present replevin statutes the writ of retorno habendo does not usually issue and that if the unsuccessful party does not comply with the judgment by returning the property, the prevailing party may proceed to collect the money judgment by ordinary process (Eickhoff *v.* Eikenbary, 52 Nebr. 332, 72 N. W. 308); but under the Pennsylvania practice the prevailing party may, at his option, issue a writ in the nature of a writ of retorno habendo, requiring the delivery of the property to him, with an added clause of fieri facias for damages awarded and costs, or in the first instance, issue execution for the value, together with the damages and costs (Reber *v.* Schroeder, 221 Pa. St. 152, 70 Atl. 556).

The fact that the property has been lost by an act of God does not excuse the defeated party from satisfying the judgment, hence it does not authorize the court to direct a return of an execution already issued without further proceedings under it and to direct that no other or further writ upon the judgment ever issue. De Thomas *v.* Witherby, 61 Cal. 92, 44 Am. Rep. 542.

46. Marks *v.* Willis, 36 Oreg. 1, 58 Pac. 526, 78 Am. St. Rep. 752.

47. Bales *v.* Scott, 26 Ind. 202; Garrett *v.* Wood, 3 Kan. 231.

Departure from statutory form not fatal when not prejudicial.— Kingsley *v.* Sauer, 17 Misc. (N. Y.) 544, 41 N. Y. Suppl. 248.

No amendment of the writ can be made after it has been returned unsatisfied and suit has been brought on the replevin bond. Eaton *v.* Campbell, 2 Mich. N. P. 10.

48. Rathbun *v.* Ranney, 14 Mich. 382.

49. Snydacker *v.* Brosse, 51 Ill. 357, 99 Am. Dec. 551, holding that the officer has no authority to break an outer door.

50. Irvin *v.* Smith, 68 Wis. 220, 31 N. W. 909.

51. McClellan *v.* Marshall, 19 Iowa 561, 87 Am. Dec. 454; Reavis *v.* Horner, Nebr. 479, 9 N. W. 643. See also Caldwell *v.* Whitaker, 4 Desauss. Eq. (S. C.) 402.

52. Andrews *v.* McLeod, 66 Miss. 348, 6 So. 181; Bowman *v.* McGregor, 6 Wash. 118, 32 Pac. 1059.

53. Davis *v.* Bayliss, 51 Iowa 435, 1 N. W. 697. See also Putnam *v.* Webb, 15 Oreg. 440, 15 Pac. 711.

54. Harker *v.* Arendell, 74 N. C. 85.

Massachusetts — Stay pending review not authorized.— Luckfort *v.* Keen, 7 Mass. 500.

The remedy of a third person is not by proceedings in the replevin action but by an independent action. Andrews *v.* McLeod, 66 Miss. 348, 6 So. 181; Veeder *v.* Fiske, 6 N. M. 288, 27 Pac. 642.

55. Roe *v.* McCrea, 1 Ashm. (Pa.) 16.

56. Lindsay *v.* Morse, 129 Mich. 350, 88 N. W. 881.

57. Cain *v.* Cain, 20 N. Y. Suppl. 45, 28 Abb. N. Cas. 423.

58. McKnight *v.* Dunlop, 4 Barb. (N. Y.) 36.

59. See Appeal and Error, 2 Cyc. 474.

60. See Cummins *v.* Holmes, 107 Ill. 552; Morris *v.* Preston, 93 Ill. 215; Mohme *v.* Livingston, 54 Iowa 458, 6 N. W. 717; Rogers

of review; [61] presentation and reservation in lower court of grounds of review; [62] objections to affidavit, writ, pleadings, and bond; [63] objections to verdict, findings, and judgment; [64] supersedeas or stay of proceedings; [65] review of proceedings before justices of the peace; [66] review of questions of fact, verdict, and find-

v. Bradford, 8 Bush (Ky.) 163; Johnson *v.* Richards, 11 Me. 49; Munley *v.* King, 40 Mo. App. 531; Morrill *v.* McNeill, 1 Nebr. (Unoff.) 651, 91 N. W. 601; Govin *v.* Di Miranda, 140 N. Y. 474, 35 N. E. 626; Vaiden *v.* Bell, 3 Rand. (Va.) 448; Haentze *v.* Howe, 28 Wis. 293.

61. *California.*— Martin *v.* Porter, 84 Cal. 476, 24 Pac. 109, holding that in replevin, although defendant denies ownership or possession, he is entitled to appeal from the judgment of court, "that plaintiff recover from the defendant all the property named in the complaint," although no costs were awarded plaintiff.

Idaho.— Blackfoot Stock Co. *v.* Delamue, 3 Ida. 291, 29 Pac. 97.

Indiana.— Branch *v.* Wiseman, 51 Ind. 1.

Iowa.— Prichard *v.* Hopkins, 52 Iowa 120, 2 N. W. 1028.

Kansas.— Weil *v.* Ryus, 39 Kan. 564, 18 Pac. 524.

Maine.— Carnick *v.* Wilson, 34 Me. 593.

Maryland.— Swann *v.* Shemwell, 2 Harr. & G. 283.

Massachusetts.— Jacques *v.* Sanderson, 8 Cush. 271.

Missouri.— Garth *v.* Caldwell, 72 Mo. 622; Clarkson *v.* Jenkins, 48 Mo. App. 221.

Nebraska.— Bates *v.* Stanley, 51 Nebr. 252, 70 N. W. 972; Williams *v.* Eikenberry, 22 Nebr. 210, 34 N. W. 373; Campbell *v.* Crone, 10 Nebr. 571, 7 N. W. 334.

New Mexico.— Abren *v.* Brown, 2 N. M. 11.

Ohio.— Reed *v.* Carpenter, 2 Ohio 79.

Oregon.— Culver *v.* Randle, 45 Oreg. 491, 78 Pac. 394.

Pennsylvania.—Wilson *v.* Gray, 8 Watts 25.

Rhode Island.— Leiter *v.* Lyons, 24 R. I. 42, 52 A. 78.

Tennessee.— Barry *v.* Frayser, 10 Heisk. 206.

Wisconsin.— Morrison *v.* Austin, 14 Wis. 601.

See 42 Cent. Dig. tit. "Replevin," § 447.

62. *California.*— Ryan *v.* Fitzgerald, 87 Cal. 345, 25 Pac. 546, holding that an objection to the form of the verdict in replevin, in that it omits to state whether the damages given are for the taking or the detention or for both, cannot be urged for the first time on appeal.

Colorado— Lamping *v.* Keenan, 9 Colo. 390, 12 Pac. 434.

Illinois.— Ballou *v.* Hushing, 46 Ill. App. 174.

Kansas.— Allen *v.* Gardner, 47 Kan. 337, 27 Pac. 982; Seip *v.* Tilghman, 23 Kan. 289; Kennedy *v.* Beck, 15 Kan. 555.

Louisiana.— Williams *v.* Barton, 13 La. 404.

Missouri.— Beatty *v.* Clarkson, 110 Mo. App. 1, 83 S. W. 1033; Goldsmith *v.* Taussig, 60 Mo. App. 460.

New York.— Gilroy *v.* Everson-Hickok Co., 103 N. Y. App. Div. 574, 93 N. Y. Suppl. 132 (holding that the question of error in not having the value of the property replevied fixed as of the date of the trial is sufficiently raised by exception to the direction of the verdict); Kauffman *v.* Klang, 16 Misc. 379, 38 N. Y. Suppl. 56.

Pennsylvania.— Mathias *v.* Sellers, 86 Pa. St. 486, 27 Am. Rep. 723.

See 42 Cent. Dig. tit. "Replevin," § 448.

63. **Affidavit.**— Turron *v.* Chopin, 13 Kan. 107; Armour *v.* Arres, 5 Nebr. (Unoff.) 383, 98 N. W. 843; Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710.

Writ.— Hook *v.* Fenner, 18 Colo. 283, 32 Pac. 614, 36 Am. St. Rep. 277; Eddy *v.* Beal, 34 Ind. 159.

Pleadings.— Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710; Williams *v.* Mellor, 12 Colo. 1, 19 Pac. 839; Noble *v.* Worthy, 1 Indian Terr. 458, 45 S. W. 137; Leek *v.* Chesley, 98 Iowa 593, 67 N. W. 580; Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266; Aultman, etc., Co. *v.* O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603; Krueger *v.* Pierce, 37 Wis. 269.

Bond.— Kennedy *v.* Roberts, 108 Iowa 521, 75 N. W. 363; Treat *v.* Hathorn, 3 Hun (N. Y.) 646.

64. **Verdict.**— Watts *v.* Green, 30 Ind. 98; Ruger *v.* Bungan, 10 Ind. 451; Stroud *v.* Morton, 70 Mo. App. 647.

Findings.— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84; Moore *v.* Vrooman, 32 Mich. 526.

Judgment.— Holt *v.* Van Eps, 1 Dak. 206, 46 N. W. 689; North Star Boot, etc., Co. *v.* Braithwaite, 4 Dak. 454, 34 N. W. 68; Pease *v.* Trench, 197 Ill. 101, 64 N. E. 368 [*affirming* 98 Ill. App. 24]; Woodbury *v.* Tuttle, 26 Ill. App. 211; Baker *v.* Horsey, 21 Ind. 246; Klotz *v.* James, 96 Iowa 1, 64 N. W. 648, 59 Am. St. Rep. 348.

65. Swasey *v.* Adair, 88 Cal. 203, 26 Pac. 83; Wheeler, etc., Mfg. Co. *v.* Johns, 37 Fla. 262, 20 So. 236; Elliott *v.* Buckland, Sheld. (N. Y.) 174, 37 How. Pr. 71; Lee *v.* Lord, 75 Wis. 35, 43 N. W. 799, 44 N. W. 771; Scott *v.* Corveth, 20 U. C. Q. B. 435, where defendant was successful, and plaintiff served notice of appeal, and applied to stay proceedings for a month to perfect his security, but the court refused to interfere.

66. *Colorado.*— Witcher *v.* Watkins, 11 Colo. 548, 19 Pac. 540.

Dakota.— Bonesteel *v.* Gardner, 1 Dak. 372, 46 N. W. 590.

Illinois.— Evans *v.* Bouton, 85 Ill. 579; Kantzler *v.* Albertson, 18 Ill. App. 313.

Indiana.— Everman *v.* Hyman, 3 Ind. App. 459, 29 N. E. 1140.

Iowa.— Draper *v.* Ellis, 12 Iowa 316.

Michigan.— Soper *v.* Hawkins, 56 Mich.

ings,[67] harmless error,[68] as in the admission and sufficiency of evidence,[69] instructions,[70] verdict, findings, and judgment, etc.;[71] and as to presumptions,[72] and determination and disposition of the cause.[73]

527, 23 N. W. 206; People *v.* Judges of Jackson Cir. Ct., 1 Dougl. 302.

Minnesota.— Daley *v.* Mead, 40 Minn. 382, 42 N. W. 85.

Missouri.— Carroll *v.* Hancock, 57 Mo. App. 228; Clarkson *v.* Jenkins, 48 Mo. App. 221; Crawshaw *v.* Wright, 5 Mo. App. 577.

Nebraska.— Wagner *v.* Evers, 20 Nebr. 183, 29 N. W. 298.

New Mexico.— Strauss *v.* Smith, 8 N. M. 391, 45 Pac. 930; Garland *v.* Bartels, 2 N. M. 1.

New York.— Howe Sewing Mach. Co. *v.* Haupt, 7 Daly 108.

Ohio.— Rollston *v.* Osenbaugh, 2 Ohio Dec. (Reprint) 242, 2 West. L. Month. 138.

Oregon.— Summers *v.* Harrington, 14 Oreg. 480, 13 Pac. 300.

Wisconsin.— Fugina *v.* Brownlie, 65 Wis. 628, 27 N. W. 408.

See 42 Cent. Dig. tit. "Replevin," § 452; JUSTICES OF THE PEACE, 24 Cyc. 638 *et seq.*

67. Graves *v.* Cowan, 43 Ark. 134; Asbill *v.* Standley, (Cal. 1892) 31 Pac. 738; Seligman *v.* Armando, 94 Cal. 314, 29 Pac. 710; Baker *v.* Riley, 2 Colo. App. 478, 31 Pac. 392; Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

68. *Arizona.*— Levy *v.* Leatherwood, 5 Ariz. 244, 52 Pac. 359.

Colorado.— Akron Bank *v.* Dole, 24 Colo. 1, 52 Pac. 673; Bruce *v.* Horn, 11 Colo. App. 316, 52 Pac. 1036.

Kansas.— Lamont *v.* Williams, 43 Kan. 558, 23 Pac. 592; Keystone Implement Co. *v.* Welsheimer, (App. 1898) 55 Pac. 348.

Michigan.— Pistorius *v.* Swarthout, 67 Mich. 186, 34 N. W. 547; Maxon *v.* Perrott, 17 Mich. 332, 97 Am. Dec. 191.

Nebraska.— Richardson Drug Co. *v.* Teasdall, 59 Nebr. 150, 80 N. W. 488; St. John *v.* Swanback, 39 Nebr. 841, 58 N. W. 288.

New Jersey.— Brown *v.* Bissett, 21 N. J. L. 46.

New York.— Webb *v.* Hecox, 27 Misc. 169, 58 N. Y. Suppl. 382.

Oregon.— Foredice *v.* Rinehart, 11 Oreg. 208, 8 Pac. 285.

Wisconsin.— Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436.

See 42 Cent. Dig. tit. "Replevin," § 454.

69. *Georgia.*— Frick *v.* Horne, 97 Ga. 353, 25 S. E. 315.

Kansas.— Carson *v.* Golden, 36 Kan. 705, 14 Pac. 166.

Kentucky.— Mullins *v.* Bullock, 19 S. W. 8, 14 Ky. L. Rep. 40.

Maine.— Musgrave *v.* Farren, 92 Me. 198, 42 Atl. 355.

Michigan.— Woolston *v.* Smead, 42 Mich. 54, 3 N. W. 251.

Minnesota.— Tancre *v.* Reynolds, 35 Minn. 476, 29 N. W. 171.

Missouri.— Edwards *v.* Eveler, 84 Mo. App. 405.

Wisconsin.— Merriam *v.* Lynch, 53 Wis. 82, 10 N. W. 1.

See 42 Cent. Dig. tit. "Replevin," § 455.

70. Muir *v.* Miller, 82 Iowa 700, 47 N. W. 1011, 48 N. W. 1032; Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112.

71. *Connecticut.*— Barney *v.* Brannan, 51 Conn. 175; Alling *v.* Shelton, 16 Conn. 436.

Illinois.— American Preservers' Co. *v.* Bishop, 184 Ill. 68, 56 N. E. 382.

Indiana.— Hyde *v.* Courtwright, 14 Ind. App. 106, 42 N. E. 647; Van Gundy *v.* Carrigan, 4 Ind. App. 333, 30 N. E. 933.

Indian Territory.— Eddings *v.* Boner, 1 Indian Terr. 173, 38 S. W. 1110.

Iowa.— Ormsby *v.* Nolan, 69 Iowa 130, 28 N. W. 569; Williams *v.* Wilcox, 66 Iowa 65, 23 N. W. 266.

Minnesota.— Ladd *v.* Newell, 34 Minn. 107, 24 N. W. 366.

Montana.— Wheeler *v.* Jones, 16 Mont. 87, 40 Pac. 77.

Nebraska.— Scott *v.* Burrill, 44 Nebr. 755, 62 N. W. 1093; Jameson *v.* Kent, 42 Nebr. 412, 60 N. W. 879; Hanscom *v.* Burmood, 35 Nebr. 504, 53 N. W. 371; Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3.

Oregon.— Moorhouse *v.* Donaca, 14 Oreg. 430, 13 Pac. 112.

Wisconsin.— Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436; Williams *v.* Porter, 41 Wis. 422.

Wyoming.— Gregory *v.* Morris, 1 Wyo. 213.

See 42 Cent. Dig. tit. "Replevin," § 457.

72. *Colorado.*— Morris *v.* Hanson, 2 Colo. App. 154, 30 Pac. 139.

Illinois.— Sumner *v.* Sleeth, 87 Ill. 500; Lane *v.* Kohn, 79 Ill. App. 396; Matson *v.* Davies, 35 Ill. App. 78; Mann *v.* Oberne, 15 Ill. App. 35.

Indiana.— Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130.

Iowa.— McGuffie *v.* Dervine, 1 Greene 251.

Kansas.— Sumner *v.* Cook, 12 Kan. 162.

Maine.— Shorey *v.* Hussey, 32 Me. 579.

Michigan.— Forster *v.* Brown, 119 Mich. 86, 77 N. W. 646.

Mississippi.— May *v.* Blum, (1897) 21 So. 528.

See 42 Cent. Dig. tit. "Replevin," § 458.

73. *Arizona.*— Billups *v.* Freeman, 5 Ariz. 268, 52 Pac. 367.

Kansas.— Frankhouser *v.* Cannon, 50 Kan. 621, 32 Pac. 379; Babb *v.* Aldrich, 45 Kan. 218, 25 Pac. 558; Hallowell *v.* Milne, 16 Kan. 65.

Kentucky.— Rennebaum *v.* Atkinson, 105 Ky. 396, 49 S. W. 1, 342, 20 Ky. L. Rep. 1346.

Nebraska.— Swain *v.* Savage, 55 Nebr. 687, 77 N. W. 362.

New York.— Mead *v.* Bateman, 9 Daly 174; Fischer *v.* Cohen, 22 Misc. 117, 48 N. Y. Suppl. 775, 27 N. Y. Civ. Proc. 139.

North Carolina.— Whitaker *v.* Dunn, 122 N. C. 103, 29 S. E. 54.

South Dakota.— McDonald *v.* Fuller, 11 S. D. 355, 77 N. W. 581, 74 Am. St. Rep. 815.

J. Costs.[74] — **1. Right Dependent Upon Amount or Value of Recovery**[75] — **a. Right to Recover Any Costs.** Statutes providing that there can be no recovery of costs unless the amount of the judgment exceeds a certain specified sum are applicable to actions of replevin, the value of the property being added to the damages in determining the amount of the judgment.[76]

b. Limitation on Costs Recoverable. Likewise, either under general statutes restricting the amount of costs recoverable to the amount of damages awarded when the latter is under a designated sum,[77] or under statutes specifically providing that, in actions to recover the possession of personal property, the amount of costs is limited to the amount of damages, provided the damages, together with the value of the property recovered, do not exceed a designated sum, the party recovering judgment must show that the damages, added to the value of the property, exceed the sum specified, in order to recover a full bill of costs.[78] The costs are limited to the amount of damages where the latter are under the statutory sum and the value of the property is not assessed by the jury,[79] and a party recovering the possession of personal property is entitled to no costs, where he is not awarded any damages, and the value of the property is not fixed.[80]

2. Right Dependent Upon Success or Failure of Party[81] — **a. Right of Prevailing Party.** The general rule that the prevailing or successful party in the action is entitled to costs[82] has been frequently applied in actions of replevin.[83]

Texas.— Hale *v.* Terrell, 3 Tex. App. Civ. Cas. § 455.

See 42 Cent. Dig. tit. "Replevin," § 459.

74. As to costs generally see Costs, 11 Cyc. 1.

75. Right as affected by amount of recovery in actions generally see Costs, 11 Cyc. 39 *et seq.*

76. Rohr *v.* McCraig, 33 Cal. 309; Chambers *v.* Hunt, 20 N. J. L. 109 [*reversed* on another point in 21 N. J. L. 620].

Value fixed by plaintiff's declaration.— A successful defendant may recover his costs, where the value of the property in dispute has been placed by plaintiff in his declaration at a sum exceeding that required by statute. Edgar *v.* Gray, 5 Cal. 267.

77. Moore *v.* Ross, Morr. (Iowa) 401; Dempsey *v.* Hill, 3 Ohio Dec. (Reprint) 260, 5 Wkly. L. Gaz. 181. The same result, although by a different course of reasoning, was reached in Gaston *v.* Canty, 48 Conn. 139, where it was held that the statute was not intended to make the amount of damages in an action of replevin determine the question of costs.

A certificate is necessary to obtain full costs in replevin as in other actions, although the affidavit and bond state the goods to be worth a sum above the jurisdiction of the inferior courts. Ashton *v.* McMillan, 3 Ont. Pr. 10.

78. Corbin *v.* Milton, 27 How. Pr. (N. Y.) 76; Minks *v.* Wolf, 8 How. Pr. (N. Y.) 238; Hoag *v.* Moss, 1 N. Y. City Ct. 174; Rogers *v.* Arnold, 12 Wend. (N. Y.) 30; Fitzer *v.* McCannan, 14 Wis. 63. See, however, Johnson *v.* Fellows, 6 Hill (N. Y.) 353 [*overruling* Small *v.* Bixley, 18 Wend. (N. Y.) 514], holding that defendant in replevin is entitled to full costs, although the value of that part of the property to which he was entitled by the verdict was assessed at a sum less than that designated by statute.

The fact that plaintiff's costs are only nominal, by reason of a statute of this nature, does not entitle defendant to any costs. Van Schoning *v.* Mitchell, 23 How. Pr. (N. Y.) 44.

Maine statute construed.— In Harding *v.* Harris, 2 Me. 162, it was held that St. (1822) c. 186, allowing plaintiff in replevin as costs only one fourth the value of his goods found for him, if the value be under twenty dollars, does not apply in taxing costs for defendant for whom was found a very small part of the goods replevied.

79. Coit *v.* Waples, 1 Minn. 134; Wolff *v.* Moses, 26 Misc. (N. Y.) 500, 57 N. Y. Suppl. 696 [*affirmed* in 39 N. Y. App. Div. 671, 57 N. Y. Suppl. 1151]; Rapid Safety Filter Co. *v.* Wyckoff, 20 Misc. (N. Y.) 429, 45 N. Y. Suppl. 1028 [*reversing* 19 Misc. 351, 43 N. Y. Suppl. 490]; Hawley *v.* Green, 18 Wend. (N. Y.) 654, holding that a sheriff's appraisal is not sufficient, as when the cause is tried, a part of the goods may be awarded to plaintiff and part to defendant.

80. Herman *v.* Girvin, 8 N. Y. App. Div. 418, 40 N. Y. Suppl. 845 [*disapproving* Claflin *v.* Davidson, 53 N. Y. Super. Ct. 122]; Lockwood *v.* Waldorf, 91 Hun (N. Y.) 281, 36 N. Y. Suppl. 199.

81. Right as affected by success or failure of party in actions generally see Costs, 11 Cyc. 27 *et seq.*

82. See Costs, 11 Cyc. 27.

83. *Florida.*— Webster *v.* Brunswick-Balke Callender Co., 37 Fla. 433, 20 So. 536.

Indiana.— Mitchell *v.* State, 3 Blackf. 391, holding that, although a defendant in replevin claiming property is not entitled to costs by the common law, yet under a statute allowing defendant costs where he prevails, a defendant who obtains a verdict in replevin is entitled to costs, as in all other cases.

Iowa.— Hove *v.* McHenry, 60 Iowa 227, 14 N. W. 301.

An exception has been made where defendant was without fault and no demand for the property was made prior to suit,[84] and it has been held that defendant, although unsuccessful, is entitled to his costs where the value of the property, as shown by the appraisal, is insufficient to confer jurisdiction upon the court, and there is no other evidence of its value.[85]

b. Where Each Party Successful in Part. Although the general rule that plaintiff is to be regarded as the prevailing party and entitled to costs, even though he recovers judgment for only part of the relief demanded and defendant is successful in part,[86] has been followed as to actions of replevin in a few jurisdictions,[87]

Kansas.— Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

Kentucky.— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

Maryland.— Burnett *v.* Bealmear, 79 Md. 36, 28 Atl. 898.

Massachusetts.— Wheeler *v.* Train, 4 Pick. 168.

Nevada.— Lapham *v.* Osborne, 20 Nev. 168, 18 Pac. 881.

New Jersey.— Constanzo *v.* New Jersey Cent. R. Co., 74 N. J. L. 79, 64 Atl. 1067.

North Carolina.— Rawlings *v.* Neal, 126 N. C. 271, 35 S. E. 597.

Ohio.— Rowan *v.* Johnson, 2 Ohio Dec. (Reprint) 254, 2 West. L. Month. 155; Shur *v.* Statler, 2 Ohio Dec. (Reprint) 70, 1 West. L. Month. 317.

Washington.— Mansfield *v.* Whatcom First Nat. Bank, 6 Wash. 603, 34 Pac. 143.

See 42 Cent. Dig. tit. "Replevin," § 462.

Replevin is an action "not founded on contract," within Mo. Rev. St. § 2925, giving plaintiff costs if he recovers in an action not founded on contract. Hecht *v.* Heimann, 81 Mo. App. 370.

On abatement of the writ of replevin, defendant is entitled to a judgment for costs. Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243; Gould *v.* Barnard, 3 Mass. 199.

Waiver of part of judgment.— The fact that a defendant, in whose favor findings have been rendered, waives or abandons part of the judgment to which the findings entitle him, by not demanding a return of the property, does not bar him of his right to judgment for costs. Cowlings *v.* Greenleaf, 32 Kan. 392, 4 Pac. 855.

Judgment for one of two defendants only.— In an action of replevin against two defendants, when the verdict and judgment are in favor of one of two defendants only, he is not entitled to recover costs from plaintiff. Ramsdell *v.* Owens, 30 Wkly. Notes Cas. (Pa.) 174.

84. Chipman *v.* McDonald, (Kan. App. 1899) 57 Pac. 252; Peters *v.* Parsons, 18 Nebr. 191, 24 N. W. 687; Littlefield *v.* Wilson, 1 Nebr. (Unoff.) 581, 95 N. W. 677.

The exception does not apply where defendant asserts ownership and right of possession in himself (Tilden *v.* Stilson, 49 Nebr. 382, 68 N. W. 478; Rodgers *v.* Graham, 36 Nebr. 730, 55 N. W. 243; Aultman, etc., Co. *v.* Steinan, 8 Nebr. 109; Homan *v.* Laboo, 1 Nebr. 204), or where defendant did not come into possession of the property rightfully (Wilcox *v.* Beitel, 43 Nebr. 457, 61 N. W. 722), or where a demand was properly made and defendant wrongfully detained the goods thereafter (Mason *v.* Rodgers, 116 Mo. App. 611, 92 S. W. 745).

85. Kirby Carpenter Co. *v.* Trombley, 101 Mich. 447, 59 N. W. 809. See, however, Merrill *v.* Butler, 18 Mich. 294, where plaintiff brought his action in the circuit court, alleging the value of the property was within its jurisdiction, and recovered a verdict for it, and where it was held that he was entitled to costs, and that the court or jury could not assess the value of the property to show that it was within the exclusive jurisdiction of the justice of the peace, and award defendant his costs.

86. See COSTS, 11 Cyc. 28.

87. Horton *v.* Horne, 99 N. C. 219, 5 S. E. 927 (substantial recovery); Vollum *v.* Simpson, 2 B. & P. 368; Cook *v.* Green, 5 Taunt. 593. See also Hennessey First Nat. Bank *v.* Farquharson, (Okla. 1908) 97 Pac. 559 (holding that as plaintiff was entitled to judgment for part of the property, the costs of the lower court should have been assessed against defendant, and that as defendant established his right on appeal to the remainder of the property, the costs of the appeal should be assessed to plaintiff); Dodd *v.* Joddrell, 2 T. R. 235.

In New York there existed at one time considerable confusion in the authorities on this question, due to the fact that the code of civil procedure prescribed a rule different from that of the Revised Statutes. However, it is now settled that there can be no apportionment of costs, where the complaint contains but one count and one cause of action, or where the complaint separately sets forth two or more causes of action, upon which issues of fact have been joined, and it is certified that the substantial cause of action was the same upon each issue. Newell Universal Mill Co. *v.* Muxlow, 115 N. Y. 170, 21 N. E. 1048 [*reversing* 51 Hun 453, 4 N. Y. Suppl. 197, 16 N. Y. Civ. Proc. 153, *affirming* 2 N. Y. Suppl. 223, *overruling* Ackerman *v.* De Lude, 36 Hun 44]; Mertens *v.* Fitzwater, 53 Hun 597, 6 N. Y. Suppl. 797; Kilburn *v.* Lowe, 37 Hun 237; Ackerman *v.* O'Gorman, 2 Silv. Sup. 109, 6 N. Y. Suppl. 825, 17 N. Y. Civ. Proc. 275; Stoddard *v.* Clarke, 9 Abb. Pr. N. S. 310; Vowles *v.* Murray, 50 How. Pr. 159. *Contra*, under the code (Porter *v.* Willet, 14 Abb. Pr. (N. Y.) 319) and under the Revised Statutes prior to the adoption of the code (Hull *v.* Halsted, 1 How. Pr. (N. Y.) 174; Johnson *v.* Fellows, 6 Hill

it has been held that the action of replevin constitutes an exception to the general rule as both parties are actors and claimants,[88] and in most jurisdictions the statutes have been construed to authorize, either expressly or impliedly, an apportionment where plaintiff has recovered judgment for part of the chattels in controversy and defendant part.[89]

3. Persons Liable. Upon the recovery of judgment in replevin against an officer and attachment or execution creditors, who appear to contest the title to the property, such creditors are solely liable for the costs of the action.[90]

4. Items Allowable.[91] In accordance with the rule obtaining in actions generally,[92] it has been held that attorney's fees are not allowable in an action of replevin,[93] except where there is statutory authority therefor.[94] Likewise time lost in prosecuting or defending the action,[95] and other incidental expenses, cannot be included in the bill of costs.[96]

VI. Damages.[97]

A. Right to Damages — 1. Plaintiff. By the action of replevin the law intends to give a complete remedy to the party entitled to possession not only as to the property itself, but also in respect to damages which are the natural result of the wrongful act,[98] and therefore it provides full compensation for the

(N. Y.) 353; Seymour *v.* Billings 12 Wend. (N. Y.) 285; Wright *v.* Williams, 2 Wend. (N. Y.) 632).

88. Brown *v.* Smith, 1 N. H. 36.

89. *Illinois.*— Lansing *v.* Bates, 11 Ill. 550.

Indiana.— Wright *v.* Mathews, 2 Blackf. 187.

Iowa.— Whitaker *v.* Sigler, 44 Iowa 419.

Kansas.— Friend *v.* Green, 43 Kan. 167, 23 Pac. 93.

Massachusetts.— Powell *v.* Hinsdale, 5 Mass. 343.

Nebraska.— McGillin *v.* Gleason, 34 Nebr. 694, 52 N. W. 287.

New Jersey.— Field *v.* Post, 38 N. J. L. 346.

Ohio.— Clark *v.* Keith, 9 Ohio 72. See also Rhodenbaugh *v.* Carey, 2 Ohio Dec. (Reprint) 162, 1 West. L. Month. 599, where the costs of error were divided after the court had allowed an excessive judgment to stand on condition that plaintiff remit the excess.

South Carolina.— Stoney *v.* Bailey, 28 S. C. 156, 5 S. E. 347.

Vermont.— Poor *v.* Woodburn, 25 Vt. 234.

Wisconsin.— Lanyon *v.* Woodward, 65 Wis. 543, 27 N. W. 337 (limiting the application of the rule to cases where the property has been delivered to and retained by plaintiff under the writ of replevin, and where the value of the property to which the court finds defendant entitled is over fifty dollars); Young *v.* Lego, 38 Wis. 206.

Canada.— Canniff *v.* Bogart, 6 Can. L. J. 59; Dickinson *v.* Ketchum, 2 N. Brunsw. 120.

See 42 Cent. Dig. tit. "Replevin," § 465.

Compare Cooley *v.* Gillan, 54 Conn. 80, 6 Atl. 180, holding that it was doubtful whether defendants were entitled to any costs, but that an allowance to them of the cost of their witnesses upon that part of the case that was decided in their favor would not be disturbed.

A judgment that each party pay his own costs will not be reversed, in the absence of any showing as to the amount of costs incurred on either side. Dresher *v.* Corson, 23 Kan. 313.

90. Van Gundy *v.* Carrigan, 4 Ind. App. 333, 30 N. E. 933.

91. Amount and items allowable in actions generally see Costs, 100 *et seq.*

92. See Costs, 11 Cyc. 104.

93. *Dakota.*— Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

Michigan.— Hatch *v.* Hart, 2 Mich. 289.

Mississippi.— Carraway *v.* Wallace, (1895) 17 So. 930; Taylor *v.* Morton, 61 Miss. 24; Cowden *v.* Lockridge, 60 Miss. 385.

Missouri.— Mix *v.* Kepner, 81 Mo. 93; Wright *v.* Broome, 67 Mo. App. 32; Trimble *v.* Keer, etc., Mercantile Co., 56 Mo. App. 683.

Utah.— Ryan, etc., Cattle Co. *v.* Slaughter, 6 Utah 278, 21 Pac. 997.

Canada.— Davis *v.* Cushing, 10 N. Brunsw. 383.

See 42 Cent. Dig. tit. "Replevin," § 468.

94. Yantis *v.* Burditt, 2 Dana (Ky.) 254; Hunton *v.* Palmer, 67 N. J. L. 94, 50 Atl. 599.

95. Taylor *v.* Morton, 61 Miss. 24.

96. Byrnes *v.* Palmer, 113 Mich. 17, 71 N. W. 331, holding that the expense of replacing a building wrongfully removed from plaintiff's land by defendant is not part of the taxable costs in replevin, since the officer executing the writ is not authorized to do more than deliver the building to plaintiff.

Jury fees.— Where the verdict is for defendant under a writ de proprietate propanda, jury fees are taxable as part of his costs of the inquisition. Hale *v.* Hilyard, 31 N. Brunsw. 87.

Expenses as element of damages see *infra*, VI, B, 5.

97. On dismissal or nonsuit see *supra*, V, A, 2, f.

98. Buckley *v.* Buckley, 12 Nev. 423, 430.

injury by granting a return of the property or its value if a return cannot be had with damages for the wrongful taking or detention.[99] Exemplary or punitive damages are also recoverable where there have been peculiar circumstances of outrage, oppression, and wrong in the taking or detention of the property.[1] In the absence of these circumstances, however, just compensation is all that can be awarded, since the object of the law is to restore plaintiff, so far as possible, to the condition he was in before the commission of the act complained of.[2] These damages are not limited to such as have accrued when the suit is instituted but may be estimated to the date of the verdict.[3]

2. Defendant. At common law, damages were not recoverable by a defendant in replevin.[4] The judgment for defendant was for restoration of property and costs.[5] Certain English statutes,[6] however, gave damages to avowants, or other persons making conusance, or justifying as bailiffs in replevin for rents or services;[7] and at the present day, either by statute or judicial authority, the general rule is that if defendant has judgment for a return of the property, he is also entitled to damages for the wrongful taking and detention,[8] in such amount

99. *Arkansas.*— Lesser *v.* Norman, 51 Ark. 301, 11 S. W. 281; Gray *v.* Nations, 1 Ark. 557. And see Town *v.* Wilson, 8 Ark. 464.

Colorado.— Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Illinois.— Taylor *v.* Welsh, 138 Ill. App. 190.

Indiana.— Mitchell *v.* Burch, 36 Ind. 529.

Kansas.— Chase County Nat. Bank *v.* Thompson, 54 Kan. 307, 38 Pac. 274.

Kentucky.— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

Maryland.— Dorsey *v.* Gassaway, 2 Harr. & J. 402, 3 Am. Dec. 557.

Mississippi.— Burrage *v.* Melson, 48 Miss. 237.

Nevada.— Buckley *v.* Buckley, 12 Nev. 423.

New Jersey.— Pedrick *v.* Kuemmell, 74 N. J. L. 379, 65 Atl. 846; Bishop, etc., Co. *v.* Keffer, 69 N. J. L. 47, 54 Atl. 402; Maguire *v.* Dutton, 54 N. J. L. 597, 25 Atl. 254.

New Mexico.— Hyde *v.* Elmer, (1907) 88 Pac. 1132.

Oregon.— Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638.

Pennsylvania.— Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206, 19 Atl. 844.

Tennessee.— Parham *v.* Riley, 4 Coldw. 5.

Wisconsin.— Graves *v.* Sittig, 5 Wis. 219.

Return of property not essential to allowance of damages.— In an action of replevin plaintiff if successful is entitled to all the damages he has sustained by the illegal detention of the property, whether the property sought to be replevied is obtained or not (Hoover *v.* Rhoads, 6 Iowa 505. And see Cook *v.* Hamilton, 67 Iowa 394, 25 N. W. 676) or whether he elects to take a money judgment for the value (Hasted *v.* Dodge, (Iowa 1888) 39 N. W. 668, (1887) 35 N. W. 462).

Failure of plaintiff to require immediate delivery of the property has been held not to affect his right to damages for detention. Pedrick *v.* Kuemmell, 74 N. J. L. 379, 65 Atl. 846.

Failure to get possession on appeal by opposite party.— The failure of a plaintiff in whose favor a judgment was rendered in justice's court, in an action for the recovery of personal property unlawfully detained, to get possession upon an appeal taken by the opposite party, by giving the undertaking mentioned in section 2, chapter 112, Laws of 1859, furnishes no reason why he should not recover all the damages he has sustained by the detention of the property pending such appeal. Williams *v.* Phelps, 16 Wis. 80.

1. See *infra*, VI, C, 9.

2. Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678. And see Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74.

3. Lesser *v.* Norman, 51 Ark. 301, 11 S. W. 281; Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

4. *Indiana.*— Wolf *v.* Blue, 5 Blackf. 153; White *v.* Lloyd, 3 Blackf. 390.

Iowa.— Mason *v.* Richards, 12 Iowa 73.

Kentucky.— Philips *v.* Harriss, 3 J. J. Marsh. 122, 19 Am. Dec. 166.

Maryland.— Hopewell *v.* Price, 2 Harr. & G. 275.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

United States.— Fields *v.* Crawford, 30 Fed. Cas. No. 18,296, 2 Hayw. & H. 256.

5. Philips *v.* Harriss, 3 J. J. Marsh. (Ky.) 122, 19 Am. Dec. 166. *Compare* White *v.* Lloyd, 3 Blackf. (Ind.) 390, in which it was said that costs could not be allowed.

6. St. 7 Hen. VIII, c. 4; 21 Hen. VIII, c. 19.

7. Hopewell *v.* Price, 2 Harr. & G. (Md.) 275; Turner *v.* Gallilee, Hardres 153.

8. *Illinois.*— Clow *v.* Yount, 93 Ill. App. 112.

Iowa.— McIntire *v.* Eastman, 76 Iowa 455, 41 N. W. 162.

Kentucky.— Rogers *v.* Bradford, 8 Bush 163; Tuley *v.* Mauzey, 4 B. Mon. 5.

Massachusetts.— Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805; Stevens *v.* Tuite, 104 Mass. 328.

Michigan.— Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936. And see Henderson *v.* Desborough, 28 Mich. 170.

Mississippi.— See Kendrick *v.* Watkins, 54 Miss. 495.

as will be a fair indemnity to him for the injury he has sustained thereby,[9] and the judgment rendered for these damages will not be discharged by a return of the property.[10] Damages should not be allowed, however, where the evidence fails to show that any have been sustained.[11] Nor should damages be allowed him if he is not entitled to a return of the property. Damages for detention are but an incident to the right of return, and there cannot be a judgment for damages where there can be none for a return.[12]

B. Damages Only Allowable as Incident to Suit For Possession — 1. In General. The damages recovered in replevin must be connected with and incident to the contest over possession of the property,[13] and unless they do so arise are not recoverable merely because connected with the transaction by reason or virtue of which plaintiff's alleged right of taking possession accrued.[14]

2. Injury to Property Other Than That in Suit. Damages for injury to property other than that replevied, as for instance personal effects in a building seized and removed under a writ of replevin, cannot be recovered by defendant. Matters of this character cannot properly be adjudicated in an action which concerns only the claims of the respective parties to the building.[15]

C. Elements and Measure of Damages — 1. Nominal Damages. In accordance with well-settled principles governing the law of damages[16] the prevailing party in an action of replevin is, in any event, entitled to nominal damages because his rights have been infringed.[17] To warrant a recovery of nominal damages, no evidence that actual damages have been sustained is necessary.[18] It is equally well settled, however, that in the absence of any evidence to show actual damages nothing beyond nominal damages are recoverable.[19]

2. Interest as an Element or Measure of Damages. Unless the property in suit has a usable value and damages are estimated on that basis,[20] the prevailing

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296; Creighton *v.* Newton, 5 Nebr. 100; Merrick County School Dist. No. 2 *v.* Shoemaker, 5 Nebr. 36.

New York.— Woodruff *v.* Cook, 25 Barb. 505; Rowley *v.* Gibbs, 14 Johns. 385.

Pennsylvania.— Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

Tennessee.— Mayberry *v.* Cliffe, 7 Coldw. 117.

Wisconsin.— Saunderson *v.* Lace, 2 Pinn. 257, 1 Chandl. 231.

Canada.— Freeman *v.* Harrington, 5 Nova Scotia 352.

See 42 Cent. Dig. tit. "Replevin," § 311.

A statute providing that no counter-claim shall be allowed in an action of replevin was not meant to prevent defendant from setting up the value of the property and the damages suffered by him on account of its detention under the writ, and recovering the property, or its value, and damages for its wrongful detention, where other statutes specially provide that he may do this. McIntire *v.* Eastman, 76 Iowa 455, 41 N. W. 162.

9. Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805.

10. Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 117.

11. Wangler *v.* Franklin, 70 Mo. 659.

12. Neis *v.* Gillen, 27 Ark. 184; Whitwell *v.* Wells, 24 Pick. (Mass.) 25.

13. Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085. And see cases cited, *infra*, VI, B, 2.

The replevin action is primarily to adjudicate the possession of the property.— Other rights and claims must be determined, as a general rule, in other appropriate proceedings, even though closely connected with the controversy out of which the contest over possession arises. Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

14. Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

15. Jameson *v.* Kent, 42 Nebr. 412, 60 N. W. 879; Dietrichs *v.* Lincoln, etc., R. Co., 13 Nebr. 43, 13 N. W. 13.

16. See Damages, 13 Cyc. 14.

17. Sanborn *v.* Leavitt, 43 N. H. 473; Frey *v.* Drahos, 7 Nebr. 194; Booth *v.* Ableman, 20 Wis. 21, 88 Am. Dec. 730; Treat *v.* Staples, 24 Fed. Cas. No. 14,162, Holmes 1.

18. See Damages, 13 Cyc. 14; and Frey *v.* Drahos, 7 Nebr. 94.

19. *Arkansas.*— Smith *v.* Houston, 25 Ark. 183.

Colorado.— Sopris *v.* Webster, 1 Colo. 507.

Illinois.— Seabury *v.* Ross, 69 Ill. 533.

Massachusetts.— Bartlett *v.* Brickett, 14 Allen 62.

Michigan.— Phenix *v.* Clark, 2 Mich. 327.

New Mexico.— Hyde *v.* Elmer, (1907) 88 Pac. 1132.

Tennessee.— Mann *v.* Grove, 4 Heisk. 403.

United States.— Treat *v.* Staples, 24 Fed. Cas. No. 14,162, Holmes 1.

See 42 Cent. Dig. tit. "Replevin," §§ 297, 312.

20. See *infra*, VI, C, 3, a.

party in replevin will be awarded interest on the value of the property during the time of the wrongful detention;[21] and in the absence of facts which would authorize the application of any different rule,[22] as for instance depreciation in the value of the property,[23] or bad faith, fraud, malice, gross negligence, or oppression on the part of the adverse party,[24] or a special agreement between the parties that the jury might find the value of the property and the damages in one sum,[25] such interest constitutes the measure of damages,[26] unless the property cannot

21. *California.*— Schmidt *v.* Nunan, 63 Cal. 371; Kelly *v.* McKibben, 54 Cal. 192; Freeborn *v.* Norcross, 49 Cal. 313; Page *v.* Fowler, 39 Cal. 412, 2 Am. Rep. 462.

Iowa.— Hurd *v.* Gallaher, 14 Iowa 394.

Michigan.— Nitz *v.* Bolton, 71 Mich. 388, 39 N. W. 15.

Minnesota.— Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Nebraska.— Dodge *v.* Runells, 20 Nebr. 33, 28 N. W. 849; Moore *v.* Kepner, 7 Nebr. 291.

New York.— Follett Wool Co. *v.* Utica Trust, etc., Co., 84 N. Y. App. Div. 151, 82 N. Y. Suppl. 597; Young *v.* Willet, 8 Bosw. 486; Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Suppl. 837; Rowley *v.* Gibbs, 14 Johns. 385.

North Carolina.— Patapsco Guano Co. *v.* Magee, 86 N. C. 350; Holmes *v.* Godwin, 69 N. C. 467.

Pennsylvania.— Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

Texas.— Halbert *v.* San Seba Springs Land, etc., Assoc., (Civ. App. 1895) 34 S. W. 636.

Wisconsin.— Beverich *v.* Welch, 7 Wis. 465; Morris *v.* Baker, 5 Wis. 389.

See 42 Cent. Dig. tit. "Replevin," §§ 309, 315.

But see Smith *v.* Roby, 6 Heisk. (Tenn.) 546, holding that judgment for value and interest is defeated and discharged by delivery of the property.

Illustrations.— Where wool belonging to plaintiff was pledged by plaintiff's bailee, without authority, to defendant, and on demand defendant refused to deliver the wool, which had been stored with a warehouse company, and, after suit brought against the latter to recover the same, it filed an interpleader, when the wool was ordered to be held by the sheriff, subject to an order of the court, plaintiff, on judgment in his favor, was entitled to interest on the value of the wool, as damages for withholding the same from the time of the demand. Follett Wool Co. *v.* Utica Trust, etc., Co., 84 N. Y. App. Div. 151, 82 N. Y. Suppl. 597. So it has been held that defendant on recovering logs cut from his land is entitled to recover interest on their value from the time the writ was served dispossessing him. Nitz *v.* Bolton, 71 Mich. 388, 39 N. W. 15.

Change of statutory rate pending trial.— Where the rate of interest is fixed by statute, the rate of interest being lowered by statute pending a replevin suit, the successful plaintiff may recover as damages interest measured by the old rate up to the time of the change, and by the lower rate thereafter. Saling *v.* Bolander, 125 Fed. 701, 60 C. C. A. 469.

22. *Arkansas.*— Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

Colorado.— Austin *v.* Terry, 13 Colo. App. 141, 56 Pac. 810.

Florida.— See Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51.

Mississippi.— Taylor *v.* Morton, 61 Miss. 24.

New York.— New York Guaranty, etc., Co. *v.* Flynn, 55 N. Y. 653.

Pennsylvania.— McDonald *v.* Scaife, 11 Pa. St. 381, 51 Am. Dec. 556; McCabe *v.* Morehead, 1 Watts & S. 513.

23. See *infra*, VI, C, 4.

24. See *infra*, VI, C, 9.

25. McCabe *v.* Morehead, 1 Watts & S. (Pa.) 513, holding that under such agreement the jury, in assessing damages for defendant, were not confined to interest on the value, but might give more if necessary to compensate defendant.

26. *Colorado.*— Machette *v.* Wanless, 2 Colo. 169; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 680; Austin *v.* Terry, 13 Colo. App. 141, 56 Pac. 810.

Illinois.— Merchants' Sav., etc., Co. *v.* Goodrich, 75 Ill. 554.

Iowa.— McCoy *v.* Cornell, 40 Iowa 457.

Kansas.— Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482.

Kentucky.— Yantis *v.* Burditt, 2 Dana 254.

Maine.— Dore *v.* Hight, 15 Me. 20.

Massachusetts.— Barnes *v.* Bartlett, 15 Pick. 71; Pike *v.* Huckins, 1 Mass. 421.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Dodge *v.* Runels, 20 Nebr. 33, 28 N. W. 849; Hainer *v.* Lee, 12 Nebr. 452, 11 N. W. 888; Hooker *v.* Hammill, 7 Nebr. 231.

New York.— Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Brizsee *v.* Maybee, 21 Wend. 144.

Pennsylvania.— McCabe *v.* Morehead, 1 Watts & S. 513.

Tennessee.— See Mayberry *v.* Cliffe, 7 Coldw. 117, holding that where under the statutes the value of the property is to be assessed as of the time when seized, defendant is entitled to interest on such valuation from the time of seizure.

Wisconsin.— Williams *v.* Phelps, 16 Wis. 80; Graves *v.* Sittig, 5 Wis. 219.

See 42 Cent. Dig. tit. "Replevin," §§ 309, 315.

Contra.— The measure of damages, recoverable by plaintiff in an action of replevin, is not the value of the property at the time it was taken from plaintiff, with damages for the detention, not exceeding six per cent per annum from that time; but the true measure is the value of the property at the date of the trial, with damages for the caption and detention, not measured by the standard of

be returned,[27] or the successful party elects to take the money value of the property,[28] or the action proceeds as one for damages only.[29] Under these circumstances the measure of damages is the value of the property at the time of the taking with interest from that date,[30] which is ordinarily to be computed to the date of the verdict.[31] The successful party is of course not entitled to interest and an allowance in addition thereto of the value of the use;[32] nor can interest be allowed in addition to a gross sum for damages, for this would amount to an award of double damages.[33] And under a statute which gives to a party to an action of replevin found entitled to property not in his possession the option to have an execution for the delivery of the specific property, or for its value "as determined by the jury," interest on the value of the property prior to the return of the verdict is erroneous. The statute refers to the time when judgment is rendered, or to a later date, and not to the time when the action was commenced.[34]

3. Value of Use of Property as an Element or Measure of Damages — a. Statement of Rule. As heretofore shown, interest in the ordinary measure of damages for the wrongful detention of property,[35] but the doctrine has no application where the property in suit has a usable value which exceeds the lawful rate of interest. Where this is the case, the successful party is entitled to recover as

six per cent interest, but including damages for depreciation, if any, since the taking. Miller *v.* Bryden, 34 Mo. App. 602.

Applications of rule.— The rule is generally applicable in all cases where the property detained was merchandise kept for sale, grain and all other articles of property useful only for sale or consumption. Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6; Machette *v.* Wanless, 2 Colo. 169; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641. So it has been held that the measure of damages in an action of replevin for a county warrant is legal interest thereon for the time of the unlawful detention. McCoy *v.* Cornell, 40 Iowa 457. In replevin for the wrongful detention of bank checks, where the checks are recovered and delivered to plaintiff, plaintiff can only recover, as damages for the wrongful detention, interest on the amount of the checks from the time of the demand and refusal until they are replevied. Merchants' Sav., etc., Co. *v.* Goodrich, 75 Ill. 554.

Compensatory damages, in addition to interest, may be allowed only where it is proved to be necessary to afford full indemnification. Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Suppl. 837; Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614.

Pretium affectionis.— In replevin for a slave, the *pretium affectionis* is not a proper element to be considered in estimating the value of the slave. Moseley *v.* Anderson, 40 Miss. 49.

Computation of interest.— The interest given by the same act is to be computed from the time when the writ of replevin was executed, not from its date. Yantis *v.* Burditt, 2 Dana (Ky.) 254.

27. Barnes *v.* Bartlett, 15 Pick. (Mass.) 71; Dodge *v.* Runels, 20 Nebr. 33, 28 N. W. 849; Moore *v.* Kepner, 7 Nebr. 291; Miller *v.* Hahn, 84 N. C. 226; Holmes *v.* Godwin, 69 N. C. 467. And see Garrett *v.* Wood, 3 Kan. 231.

The measure of damages for a promissory note is its value when not returned, and interest thereon. Vancleave *v.* Beach, 110 Ind. 269, 11 N. E. 228.

28. *Michigan.*— Ritz *v.* Bolton, 71 Mich. 388, 39 N. W. 15; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678.

Minnesota.— See Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Mississippi.— See Taylor *v.* Morton, 61 Miss. 24.

Montana.— Webster *v.* Sherman, 33 Mont. 448, 84 Pac. 878.

North Carolina.—Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

Pennsylvania.— McDonald *v.* Scaife, 11 Pa. St. 381, 51 Am. Dec. 556; Cox *v.* Burdett, 23 Pa. Super. Ct. 346, 351. And see Easton *v.* Worthington, 5 Serg. & R. 130.

Wisconsin.— Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436; Bigelow *v.* Doolittle, 36 Wis. 115; Bonesteel *v.* Orvis. 22 Wis. 522. And see Ingram *v.* Rankin, 47 Wis. 406, 2 N. W. 755, 32 Am. St. Rep. 762.

Wyoming.— Boswell *v.* Laramie First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

See 42 Cent. Dig. tit. "Replevin," §§ 309, 315.

29. Honaker *v.* Vesey, 57 Nebr. 413, 77 N. W. 1100; Hainer *v.* Lee, 12 Nebr. 452, 11 N. W. 888; Bocem Iron Co. *v.* Union Sav. Bank, (Nebr.) 89 N. W. 80. And see McGavock *v.* Chamberlain, 20 Ill. 219.

30. See cases cited *supra*, in notes 27, 28, 29.

31. Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678; Bigelow *v.* Doolittle, 36 Wis. 115. *Compare* Hainer *v.* Lee, 12 Nebr. 452, 11 N. W. 888, holding that interest is to be allowed from the date of the taking to the first day of the term of court at which the trial is had.

32. See *infra*, VI, C, 3.

33. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684; Freeborn *v.* Norcross, 49 Cal. 313.

34. Bonnot Co. *v.* Newman, 109 Iowa 580, 80 N. W. 655.

35. See *supra*, VI, C, 2.

damages for the detention, the value of such use during the period that he was wrongfully deprived thereof,[36] which value is to be estimated by the ordinary

36. *Arkansas.*—Minkwitz *v.* Steen, 36 Ark. 260; Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6; Dunnahoe *v.* Williams, 24 Ark. 264.

Colorado.— Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35; Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580.

Idaho.— Sebree *v.* Smith, 2 Ida. (Hasb.) 359, 16 Pac. 915.

Illinois.— Odell *v.* Hole, 25 Ill. 204; Butler *v.* Mehrling, 15 Ill. 488.

Indiana.— Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125.

Iowa.— Newberry *v.* Gibson, 125 Iowa 575, 101 N. W. 428; Cook *v.* Hamilton, 67 Iowa 394, 25 N. W. 676.

Kansas.— Stockton State Bank *v.* Showers, 65 Kan. 431, 70 Pac. 332; Barton *v.* Mulvane, 59 Kan. 313, 52 Pac. 88; Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482; Kennett *v.* Feckel, 41 Kan. 211, 21 Pac. 93; Palmer *v.* Meiners, 17 Kan. 478; Bell *v.* Campbell, 17 Kan. 211; Ladd *v.* Brewer, 17 Kan. 204; Yandle *v.* Kingsbury, 17 Kan. 195, 22 Am. Rep. 282.

Massachusetts.— Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805.

Michigan.— Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60; Burt *v.* Burt, 41 Mich. 82, 1 N. W. 936.

Minnesota.— Nash *v.* Larson, 80 Minn. 458, 83 N. W. 451, 81 Am. St. Rep. 272; Qualy *v.* Johnson, 80 Minn. 408, 83 N. W. 393; Williams *v.* Wood, 61 Minn. 194, 63 N. W. 492; Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260; Sherman *v.* Clark, 24 Minn. 37.

Montana.— Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194; Morgan *v.* Reynolds, 1 Mont. 163.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

New Hampshire.— Dickinson *v.* Lovell, 35 N. H. 9.

New York.— Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Suppl. 837.

North Carolina.— Scott *v.* Elliott, 63 N. C. 215.

North Dakota.— Northrup *v.* Cross, 2 N. D. 433, 51 N. W. 718.

Oregon.— Coffin *v.* Taylor, 16 Oreg. 375, 18 Pac. 638.

South Dakota.— Benjamin *v.* Huston, 16 S. D. 569, 94 N. W. 584.

Tennessee.— Stanley *v.* Donoho, 16 Lea 492; Mayberry *v.* Cliffe, 7 Coldw. 117.

Texas.— Clapp *v.* Walters, 2 Tex. 130; Mineralized Rubber Co. *v.* Cleburne, 22 Tex. Civ. App. 621, 56 S. W. 220.

Vermont.— McGrath *v.* Wilder, 77 Vt. 431, 60 Atl. 801.

Wisconsin.— Zitske *v.* Goldberg, 38 Wis. 216; Booth *v.* Ableman, 20 Wis. 602; Williams *v.* Phelps, 16 Wis. 83.

See 42 Cent. Dig. tit. "Replevin," §§ 306, 421.

Reason for rule.— The reason is that interest on the value of the property does not furnish adequate compensation for the wrongful detention (Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35; Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805; Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Booth *v.* Ableman, 20 Wis. 602; Williams *v.* Phelps, 16 Wis. 83); and that the wrong-doer who had had the use of it would make a profit out of his own wrong, which the law does not tolerate (Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35; Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641), and that it would deny to a plaintiff damages which naturally and certainly follow from a wrongful invasion of his rights (Foundry, etc., Wks. *v.* Lester, 49 Fla. 199, 38 So. 51).

Application of rule to specific property.— The rule has been applied in the case of household furniture (Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805); piano (Boston Loan Co. *v.* Myers, 143 Mass. 446, 9 N. E. 805; Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194); horses (Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125; Clark *v.* Martin, 120 Mass. 543; Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Zitske *v.* Goldberg, 38 Wis. 216); buggies (Clark *v.* Martin, *supra*); boats (Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564); milk cows (Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35; McGrath *v.* Wilder, 77 Vt. 431, 60 Atl. 801); and threshing machines (Peerless Mach. Co. *v.* Gates, 61 Minn. 124, 63 N. W. 260, holding that the measure of damages for such detention is the fair rental value of the machine, less the damages which would result to it from the extra wear and tear caused by the use of it while so rented).

Distinction between trover and replevin.— In trover plaintiff can only recover for the value of the property at the time of the conversion, with interest from that time to the date of the verdict. The reason for this distinction is plain. In replevin plaintiff never ceases to claim the property as his own, but seeks to obtain it rather than its value. In such case plaintiff, being entitled to the use of the property of which he has been unlawfully deprived, and not having waived the title thereof, has a right to recover the value of such use in damages. In trover, on the other hand, plaintiff concedes a change of title by the act of conversion and recognizes ownership in defendant. In that case damages for detention are waived, and it would be absurd to give plaintiff compensation for the use of the property. Farrar *v.* Eash, 5 Ind. App. 238, 31 N. E. 1125.

Where the property was not in fact used, there should be deducted from the market value of the use, taken as the basis for damages, a reasonable sum for deterioration in the condition of the property had it been used, and the necessary repairs and expenses

market price of the use of such property,[37] covering a period commencing with the beginning of the wrongful detention and ending at the time of the trial;[38] and in case the specific property instead of its value were recovered, this would constitute the measure of damages,[39] unless the facts of the cases were such as to authorize the allowance of exemplary or punitive damages.[40]

b. Exceptions to Rule. The rule allowing the successful party to recover the value of the use of the property as damages has no application where he has merely a special interest which confers no right to use the property,[41] where it is not shown that he could and did intend to use it, and was prevented from so doing by the unsuccessful party,[42] or where the value of the use does not exceed the legal interest on the value of the property,[43] or is purely speculative.[44] And he is not entitled to recover the value of the use, where in accordance with statutory provisions authorizing it he elects to take a money judgment for the value of the property as of the time of the taking.[45] And there cannot be a recovery for the value of the use and also interest on the value of the property,[46] as this would be compensating the successful party twice for the same injury.[47] Nor can there be a recovery for both the value of the use and for depreciation in value caused by the use.[48]

4. Depreciation in Value. Where by the terms of the judgment the prevailing party obtains neither possession of the property in suit or its value estimated as of the time of the trial he is entitled to recover as damages any depreciation or deterioration in the value which has taken place pending the wrongful detention from any cause.[49] If, however, the property has been restored to the successful

which the other party would have incurred if it had been used during such period of detention. Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51.

37. Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51; Stanley *v.* Donoho, 16 Lea (Tenn.) 492.

38. Chauvin *v.* Valiton, 8 Mont. 451, 20 Pac. 658, 3 L. R. A. 194.

39. Minkwitz *v.* Steen, 36 Ark. 260; Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35; Hutchinson *v.* Hutchinson, 102 Mich. 635, 61 N. W. 60; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564; Stanley *v.* Donoho, 16 Lea (Tenn.) 492. And see Butler *v.* Mehrling, 15 Ill. 488.

40. See *infra*, VI, C, 9.

41. Johnson *v.* Bailey, 17 Colo. 59, 28 Pac. 81 (property received in pledge under express contract to sell the same and account for the proceeds); Tandler *v.* Saunders, 56 Mich. 142, 22 N. W. 271 (deputy sheriff who has seized goods under attachment).

42. Smith *v.* Stevens, 14 Colo. App. 491, 60 Pac. 580; Barney *v.* Douglass, 22 Wis. 464.

43. Smith *v.* Stevens, 33 Colo. 427, 81 Pac. 35.

44. Houghton *v.* Rock, 8 Phila. (Pa.) 42.

45. Colean Implement Co. *v.* Strong, 126 Iowa 598, 102 N. W. 506; Newberry *v.* Gibson, 125 Iowa 575, 101 N. W. 428; Powers *v.* Benson, 120 Iowa 428, 94 N. W. 929 [*overruling* in effect Hartley State Bank *v.* McCorkell, 91 Iowa 660, 60 N. W. 197; Cook *v.* Hamilton, 67 Iowa 394, 25 N. W. 676]; Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678; Bigelow *v.* Doolittle, 36 Wis. 115.

Reason for rule.— If he elects to take the value of the property, he in effect thereby makes a sale of it to the adverse party at the date of its taking, and its value at that time, with interest up to the date of the verdict, is a fair compensation. There is no justice in his taking the value of the property, selling it to plaintiff against his will, and also charging him with the use of it in addition. Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678; Bigelow *v.* Doolittle, 36 Wis. 115.

Where suit is commenced in replevin and changed to trover, the rule of damages which governs in actions of trover will control, and plaintiff is not entitled to recover for the use of the property. By changing his form of action into trover plaintiff elects to treat the wrongful act of defendant as a conversion and thereby declares that by the conversion the title vested in defendant. McGavock *v.* Chamberlain, 20 Ill. 219.

46. Newman *v.* Cross, 108 Ga. 776, 33 S. E. 641; Just *v.* Porter, 64 Mich. 565, 31 N. W. 444; McGuire *v.* Galligan, 53 Mich. 453, 19 N. W. 142; Bigelow *v.* Doolittle, 36 Wis. 115.

47. Frey *v.* Drahos, 7 Nebr. 194.

48. Odell *v.* Hole, 25 Ill. 204. And see Ocala Foundry, etc., Works *v.* Lester, 49 Fla. 199, 38 So. 51.

49. *Illinois.*— Brennan *v.* Shinkle, 89 Ill. 604; Clow *v.* Yount, 93 Ill. App. 112.

Indiana.— Yelton *v.* Slinkard, 85 Ind. 190; Mitchell *v.* Burch, 36 Ind. 529.

Kansas.— Russell *v.* Smith, 14 Kan. 366.

Massachusetts.—Gordon *v.* Jenney, 16 Mass. 465.

Michigan.— Riley *v.* Littlefield, 84 Mich. 22, 47 N. W. 576; Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564.

party before suit, and it is afterward injured or otherwise impaired in value, it must be at his risk.[50] And it has been held that the same is the case where he fails to obtain possession of the property before trial by his neglect to execute a replevin bond.[51]

5. Expenses of Taking and Removing Property. In an action of replevin the expenses of taking and removing the property by the sheriff are not to be included in the damages given for its detention.[52] Under the New York statutes they constitute a part of the disbursements in the action and should be added to the costs.[53]

6. Attorneys' Fees and Other Expenditures Connected With Action. The general rule is well settled that, in the absence of some statutory provisions authorizing it, attorneys' fees are not allowed as damages in a replevin suit.[54] Such an

Missouri.— Mix *v.* Kepner, 81 Mo. 93; Chapman *v.* Kerr, 80 Mo. 158; Pope *v.* Jenkins, 30 Mo. 528; Cummings *v.* Badger Lumber Co., 130 Mo. App. 557, 109 S. W. 68; Hinchey *v.* Koch, 42 Mo. App. 230.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Moore *v.* Kepner, 7 Nebr. 291; Hooker *v.* Hammill, 7 Nebr. 231; Frey *v.* Drahos, 7 Nebr. 194.

New York.— Allen *v.* Fox, 51 N. Y. 562, 10 Am. St. Rep. 641; Brewster *v.* Silliman, 38 N. Y. 423; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. 445, 107 N. Y. Suppl. 163; Crossley *v.* Hojer, 11 Misc. 57, 31 N. Y. Suppl. 837; Young *v.* Willet, 8 Bosw. 486; Rowley *v.* Gibbs, 14 Johns. 385.

North Carolina.— Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745; Boylston Ins. Co. *v.* Davis, 70 N. C. 485; Holmes *v.* Godwin, 69 N. C. 467.

Pennsylvania.— Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

Tennessee.— Mayberry *v.* Cliffe, 7 Coldw. 117.

Wisconsin.— Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436; Wadleigh *v.* Buckingham, 80 Wis. 230, 49 N. W. 745; Zitske *v.* Goldberg, 38 Wis. 216; Beveridge *v.* Welch, 7 Wis. 465; Morris *v.* Baker, 5 Wis. 389.

See 42 Cent. Dig. tit. "Replevin," § 307.

Reason for rule.— The rule is eminently just in that it relieves the innocent owner from the risks of depreciation against which he is prevented from guarding by the wrongful detention of another, and requires such risks to be borne by him who wrongfully withholds the property. Findlay *v.* Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436. If the rule were otherwise it would be in the power of plaintiff, by returning the damaged or deteriorated property, to throw upon defendant the loss which he himself ought to sustain. Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 117.

Applications of rule.—In actions of replevin for the possession of bonds, plaintiff is entitled to recover any depreciation in the value of the bonds between the time he became entitled to their possession and the time he actually receives them. Clow *v.* Yount, 93 Ill. App. 112. In replevin for a horse seized by a sheriff on an attachment, plaintiff may recover damages arising from his depreciation in value by reason of not being properly cared for. Riley *v.* Littlefield, 84 Mich. 22, 47 N. W. 576. And see Zitske *v.* Goldberg, 38 Wis. 216.

50. Gordon *v.* Jenney, 16 Mass. 465.

51. Graves *v.* Sittig, 5 Wis. 219.

52. Young *v.* Atwood, 5 Hun (N. Y.) 234. And see Barney *v.* Douglass, 22 Wis. 464, in which it was said that it is doubtful whether the owner could recover as a part of his damages for the detention his expenses in going some distance with a team to remove the engine, after he knew that it was held by the opposite party, as sheriff, under an attachment, he not having ascertained whether it would be voluntarily delivered to him, nor being prepared to take it by legal proceedings. *Compare* Washington Ice Co. *v.* Webster, 68 Me. 449, in which it was held that the expense of procuring men, teams, and appliances for the removal of goods replevied and which became useless by reason of their being so replevied may be recovered by defendant as damages, when a nonsuit has been entered.

53. Young *v.* Atwood, 5 Hun (N. Y.) 234.

54. *California.*— Harris *v.* Smith, 132 Cal. 316, 64 Pac. 409; Hays *v.* Windsor, 130 Cal. 230, 62 Pac. 395; Black *v.* Hilliker, 130 Cal. 190, 62 Pac. 481.

Dakota.— Jandt *v.* South, 2 Dak. 46, 47 N. W. 779.

Florida.— Gregory *v.* Woodbery, 53 Fla. 566, 569, 43 So. 504, in which it was said: "The word 'damages' in paragraph 1 of section 1724 of the Revised Statutes of 1892, is not sufficiently comprehensive to embrace the attorney's fees incurred by the plaintiff in prosecuting his action of replevin."

Iowa.— Becker *v.* Staab, 114 Iowa 319, 86 N. W. 305.

Mississippi.— Taylor *v.* Morton, 61 Miss. 24; Cowden *v.* Lockridge, 60 Miss. 385.

Missouri.— Mix *v.* Kepner, 81 Mo. 93.

New York.— Sinskie *v.* Brust, 66 N. Y. App. Div. 34, 72 N. Y. Suppl. 922; Cook *v.* Gross, 60 N. Y. App. Div. 446, 69 N. Y. Suppl. 924; Hampton, etc., Lumber Co. *v.* Sizer, 35 Misc. 391, 71 N. Y. Suppl. 990.

South Carolina.— Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1.

Wyoming.— Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

allowance in replevin can only be made, if at all, under circumstances which would warrant the imposition of punitory or exemplary damages.[55] So also there can be no recovery for time lost[56] or expenses incurred in prosecuting the suit,[57] such as traveling expenses or hotel bills incurred in the prosecution of the action.[58]

7. Expenses Incurred in Search For Property. According to some decisions damages are allowable for time and expense incurred in searching for the property,[59] while others maintain the contrary doctrine.[60]

8. Contingent or Speculative Damages. Damages which cannot be established with reasonable certainty, or which are contingent or speculative, cannot be allowed either party in an action of replevin,[61] and anticipated profits in the ordinary sense of the term are usually within the prohibition.[62] It has been held, however, that the jury may, and if in their opinion justice demands it, ought to, allow defendant, as damages, the loss of near and probable profits arising from a temporary rise in market value.[63] And where, in an action for the wrongful detention of property, whereby plaintiff was interrupted in delivering certain lumber,

55. Cowden *v.* Lockridge, 60 Miss. 385. And see Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

56. Taylor *v.* Morton, 61 Miss. 24; Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1.

57. See Pacific Ins. Co. *v.* Conard, 18 Fed. Cas. No. 10,647, Baldw. 138 [*affirmed* in 6 Pet. 262, 8 L. ed. 392].

58. Hampton, etc., Lumber Co. *v.* Sizer, 35 Misc. (N. Y.) 391, 71 N. Y. Suppl. 990; Loeb *v.* Mann, 39 S. C. 465, 18 S. E. 1.

59. Brennan *v.* Shinkle, 89 Ill. 604 (in which it was held that these damages were authorized by a statute providing that if judgment is given for plaintiff, he shall recover damages for the detention, where the property was wrongfully detained by defendant); Mitchell *v.* Burch, 36 Ind. 529 (where there was some evidence of bad faith and concealment on defendant's property).

In California, under a statute providing that "the detriment caused by the wrongful conversion of personal property shall be presumed to be" among other things a fair compensation for the time and money properly expended in pursuit of the property, plaintiff in replevin may recover compensation for the pursuit of the property when he makes proper allegations of damages. Arzaga *v.* Villalba, 85 Cal. 191 [*limiting* Redington *v.* Nunan, 60 Cal. 632, and Kelly *v.* McKibben, 54 Cal. 192, holding the contrary to cases where plaintiff has so framed his complaint as to seek only a recovery of the property and has not alleged any damages]; Cain *v.* Cody, (Cal. 1892) 29 Pac. 778.

Property fraudulently taken out of officer's possession.—A sheriff of another state may sue to recover sequestered property fraudulently taken out of his possession, and he will be entitled to recover the amount of the expenses he has been compelled to incur in order to recover it. Newman *v.* Wilson, 1 La. Ann. 48.

60. Taylor *v.* Welsh, 138 Ill. App. 190 (no mention is made in this case of the earlier Illinois case to the contrary); Sinskie *v.* Brust, 66 N. Y. App. Div. 34, 72 N. Y. Suppl. 922.

61. *Arkansas.*— Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6, holding that the loss of a job by the taking and detention of one's tools is too remote as an element of damages.

Illinois.— Butler *v.* Mehrling, 15 Ill. 488.

Iowa.— Wilson *v.* Hillhouse, 14 Iowa 199, deposit of sum of money as indemnity with surety of replevin bond.

Kansas.— Haas *v.* Tough, 67 Kan. 253, 72 Pac. 856 (holding that in a replevin action for the recovery of ten horses, the cost of caring for and feeding fifteen other horses belonging to plaintiffs, in another town, during the time the ten were detained, cannot be recovered as damages on the ground that plaintiffs in the action intended to ship all of the horses to market in one car, and that all were necessary to make a car-load. Such damages are too remote and speculative); Smith *v.* Bryant, 1 Kan. App. 754, 41 Pac. 1069.

Michigan.— Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085.

North Carolina.— Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044; Sledge *v.* Reid, 73 N. C. 440.

Pennsylvania.— Houghton *v.* Rock, 8 Phila. 42.

South Carolina.— Loeb *v.* Mann, 41 S. C. 206, 18 S. E. 490.

Tennessee.— Mayberry *v.* Cliffe, 7 Coldw. 117.

Wisconsin.— Beveridge *v.* Welch, 7 Wis. 465, damages to plaintiff's character.

62. Aber *v.* Bratton, 60 Mich. 357, 27 N. W. 564 (holding that prospective profits which plaintiff would have derived from the use of the property contingent upon his chance of business are not allowable); Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044. And see Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144; McCabe *v.* Morehead, 1 Watts & S. (Pa.) 513, both cases holding that defendant in replevin is not entitled to special damages occasioned by interruption in business, in consequence of the property being taken from him under the writ.

63. Maybury *v.* Cliffe, 7 Coldw. (Tenn.) 117.

it was shown that plaintiff's business was necessarily interrupted for a definite time and to an extent to which plaintiff could not have lessened by reasonable effort, and that during such time plaintiff could with the means at his disposal have delivered a definite amount of lumber at a certain profit, such loss would be sufficiently certain for consideration and would be a basis for consequential damages.[64]

9. Punitive or Exemplary Damages. Punitive or exemplary damages are not allowable to either party in replevin in the absence of fraud, malice, gross negligence, or oppression.[65] Nevertheless circumstances may attend the taking and detention which will justify the jury in giving such damages. The exceptions are as well settled as the rule itself.[66] Thus it is very generally held that if plaintiff seizes the property without a *bona fide* claim of right, in bad faith, or under circumstances of aggravation or outrage, this would furnish a case for the exercise of the discretion of the jury in the allowance of exemplary or punitive damages,[67] as in a case for a wilful or malicious trespass; [68] and on the other hand plaintiff is entitled to damages of this character, where there have been peculiar circumstances of outrage, oppression, and wrong in the taking or detention of the property.[69]

10. Damages Resulting From Act of Party Claiming Them. Where a person permits the mingling of his property with that of another so as to make it impossible for an officer levying an execution against the property of the latter to select the judgment debtor's property and distinguish it from the former's property such officer is not liable in damages.[70]

11. Amount of Recovery Where Property Dies or Is Destroyed. According to the weight of authority, the measure of recovery by the successful party is not affected by the death or destruction of the property in suit, in the hands of the party cast, whether by accident or through the fault of the latter,[71] although there is authority for the position that if the property is destroyed without fault of the party cast, the value thereof cannot be recovered.[72]

64. Bowen *v.* King, 146 N. C. 385, 59 S. E. 1044.

65. McCormick Harvesting Mach. Co. *v.* Drake, (Kan. App. 1897) 48 Pac. 944; Knight *v.* Beckwith Commercial Co., 6 Wyo. 500, 46 Pac. 1094.

Illustration.—A defendant who in good faith purchased and obtained a deed to timbered land, and who found thereon freshly cut logs, which he reasonably believed were cut after his purchase, is not liable for exemplary damages for taking the logs, although it be ascertained that his deed was void on grounds not affecting his integrity, and that he did not purchase the logs. Acree *v.* Bufford, 80 Miss. 565, 31 So. 898.

66. Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

67. Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144; Cable *v.* Dakin, 20 Wend. (N. Y.) 172; McCabe *v.* Morehead, 1 Watts & S. (Pa.) 513; Mayberry *v.* Cliffe, 7 Coldw. (Tenn.) 117.

Under the statutes of South Carolina punitive damages are not recoverable in an action of claim and delivery. Brayton *v.* Beall, 73 S. C. 308, 53 S. E. 641; Tittle *v.* Kennedy, 71 S. C. 1, 50 S. E. 544. And see Vance *v.* W. A. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. ed. 1111.

68. Brizsee *v.* Maybee, 21 Wend. (N. Y.) 144.

69. Wiley *v.* McGrath, 194 Pa. St. 498, 45 Atl. 331, 75 Am. St. Rep. 709; Herdic *v.* Young, 55 Pa. St. 176, 79 Am. Dec. 739; McDonald *v.* Scaife, 11 Pa. St. 381, 51 Am. Dec. 556; Dennis *v.* Barber, 6 Serg. & R. (Pa.) 420; Cox *v.* Burdett, 23 Pa. Super. Ct. 352. And see Heard *v.* James, 49 Miss. 236.

70. Wildman *v.* Sterritt, 80 Mich. 651, 45 N. W. 657. And see as supporting this view Shumway *v.* Ritter, 8 Pick. (Mass.) 443, 19 Am. Dec. 340; Lewis *v.* Whittemore, 5 N. H. 364, 22 Am. Dec. 466.

71. *Illinois.*— Suppiger *v.* Gruaz, 137 Ill. 216, 27 N. E. 22, in which case defendant had judgment, and in which it was said that one who avails himself of the authority of the law to seize and detain the property of another should be held to the same responsibility as a bailee who comes rightfully into possession of and wrongfully detains the property.

Iowa.— Lillie *v.* McMillan, 52 Iowa 463, 3 N. W. 601; Hinkson *v.* Morrison, 47 Iowa 167.

Kentucky.— Scott *v.* Hughes, 9 B. Mon. 104.

Mississippi.— McPherson *v.* Acme Lumber Co., 70 Miss. 649, 12 So. 857; George *v.* Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. Rep. 626.

Missouri.— Jennings *v.* Sparkman, 48 Mo. App. 246.

New York.— Suydam *v.* Jenkins, 3 Sandf. 614.

North Carolina.— Miller *v.* Hahn, 84 N. C. 226; Holmes *v.* Godwin, 69 N. C. 467.

See 42 Cent. Dig. tit. "Replevin," § 299.

72. Joyce *v.* Lande, 6 La. 277 (holding

12. Amount Recoverable Where Prevailing Party Has Only Special Interest in Property — a. In General. The general rule is that where the rights of the successful party in an action of replevin are confined to a special and limited interest, it is erroneous to award him the full value of the property; the damages should be limited to the value of his special interest,[73] and in no case can the amount awarded for this special interest exceed the value of the property.[74] It has been held, however, that if defendant's interest be special, and plaintiff has no interest in the title, then judgment for defendant should be for the full value of the property, and defendant will be answerable over to the owner for the balance due to him.[75] In such case, the general value of the property would be assessed without regard to the value of the special interest.[76]

b. Property Taken Under Process. The general rule is that where property seized by an officer on legal process is replevied and he is successful in the replevin suit, he is not entitled to judgment for the full value of the property, if it exceeds the value of his special interest, but to a judgment only for the value of such interest.[77] If, however, the value of the property be less than the amount of this

that defendant, if he originally acquired possession in good faith, is not liable for the destruction of the property without his fault or fraud, but is liable for the use thereof from judicial demand until its destruction); Bobo *v.* Patton, 6 Heisk. (Tenn.) 172, 173, 19 Am. Rep. 593 (holding that where property replevied dies or is destroyed while in plaintiff's possession, before trial, and without his fault, if the verdict should be for defendant plaintiff is not liable for the value of the property but is liable for the value of the use during detention and up to the time it ceased to be serviceable. "The principle," it was said, "is, that if a bond or obligation possible of performance at the time of execution becomes impossible by the act of God, or of the law, or of the obligee himself, the obligation will be saved").

73. *Indiana.*— Noble *v.* Epperly, 6 Ind. 468.
Kansas.— Guy *v.* Doak, 47 Kan. 236, 366, 27 Pac. 968.
Maine.— Crabtree *v.* Clapham, 67 Me. 326.
Michigan.— Duke *v.* Beatty, 147 Mich. 665, 111 N. W. 176; Upham *v.* Caldwell, 100 Mich. 264, 38 N. W. 1001; Williams *v.* Bresnahan, 66 Mich. 634, 33 N. W. 739; Darling *v.* Tegler, 30 Mich. 54.
Missouri.— Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Burt *v.* Mears, 41 Mo. App. 231; Boutell *v.* Warne, 62 Mo. 350; Gaston *v.* Johnson, 107 Mo. App. 590, 80 S. W. 276; Hall *v.* Bramell, 87 Mo. App. 285.
Nebraska.— Cruts *v.* Wray, 19 Nebr. 581, 27 N. W. 634; Welton *v.* Beltezore, 17 Nebr. 399, 23 N. W. 1.
New York.— Seaman *v.* Luce, 23 Barb. 240.
North Carolina.— Barham *v.* Massey, 27 N. C. 192.
Ohio.— Adler *v.* Johnston, 2 Ohio Cir. Ct. 95, 1 Ohio Cir. Dec. 382.
Oklahoma.— Nichols, etc., Co. *v.* Bishop, 12 Okla. 250, 70 Pac. 188.
Wisconsin.— Klœtz *v.* Delles, 45 Wis. 484.
See 42 Cent. Dig. tit. "Replevin," § 408.
Interest of auctioneer.— Where goods were seized in the hands of the auctioneer by the sheriff, by virtue of a writ of attachment against the vendor of the consignor, and the auctioneer, by replevin, regained possession of them and sold them at auction, the amount of his recovery, under the judgment in the replevin suit, should have been measured by the sum total of his advancements, commissions, and charges, and the residue resulting from the sale should have been adjudged to defendant. Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735.
Where parties are joint owners, judgment in an action for possession of property worth three hundred and twenty-five dollars, which plaintiff obtained by giving a delivery bond, should not in cases of nonsuit be for its full value, but only for half its value in case it is not returned; it appearing that the parties are joint owners, and therefore entitled to joint possession. Kehoe *v.* McConaghy, 29 Wash. 175, 69 Pac. 742.

74. Cruts *v.* Wray, 19 Nebr. 581, 27 N. W. 634.

75. Faloln *v.* Manning, 35 Mo. 271; Dilworth *v.* McKelvy, 30 Mo. 149.

76. Dilworth *v.* McKelvy, 30 Mo. 149.

77. *Iowa.*— Young *v.* Evans, 118 Iowa 144, 92 N. W. 111.
Kansas.— Friend *v.* Green, 43 Kan. 167, 23 Pac. 93; Shahan *v.* Smith, 38 Kan. 474, 16 Pac. 749. And see Bowersock *v.* Adams, (1898) 54 Pac. 1064.
Michigan.— See Moore *v.* Vrooman, 32 Mich. 526.
Minnesota.— La Crosse, etc., Steam Packet Co. *v.* Robertson, 13 Minn. 291; Dodge *v.* Chandler, 13 Minn. 114.
Nebraska.— Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770; Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3; Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387; Sloan *v.* Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470; Kersenbrock *v.* Martin, 12 Nebr. 374, 11 N. W. 462; Black *v.* Winterstein, 6 Nebr. 224.
New York.— Seaman *v.* Luce, 23 Barb. 240; Niagara Elevating Co. *v.* McNamara, 4 Thomps. & C. 604.
Ohio.— Jennings *v.* Johnson, 17 Ohio 154, 49 Am. Dec. 451.

interest, he is entitled to judgment for the full value of the property.[78] If property seized on attachment or execution be replevied, and defendant is successful in the replevin suit, the measure of recovery is the amount necessary to satisfy the lien created by the writ and costs,[79] and according to some decisions interest in addition thereto.[80] So it has been held that where defendant in replevin lawfully held the property by virtue of a levy for taxes, the measure of damages is the amount of taxes and costs, and charges in making collection.[81] According to some decisions where property seized by an officer under legal process is replevied by a stranger to the writ, he is entitled, if successful in the replevin suit, to recover the full value of the property; he holding the balance beyond his own interest in trust for the general owner.[82]

13. Amount Recoverable Where Value of Property is Enhanced by Labor of Defendant. Where the taking by defendant is not in good faith or is characterized by malice or oppression, if its value is enhanced by the labor and skill of defendant, plaintiff, on a judgment in his favor, is entitled to recover the property as improved or its full value, without any allowance to defendant for the enhancement in value;[83] and there is likewise authority for the doctrine that this is the measure of recovery whether defendant acted in good faith or not.[84] The weight of authority, however, is against this latter doctrine. The better view seems to be that if the taking is in good faith, and the value of the property is enhanced by the skill and labor or money of defendant, the measure of plaintiff's recovery is the property or its value, less an allowance to defendant of an amount equal to the difference between the original and increased value of the property.[85]

Oklahoma.— Nichols, etc., Co. *v.* Bishop, 12 Okla. 250, 70 Pac. 188.

Wisconsin.— Bleiler *v.* Moore, 88 Wis. 438, 60 N. W. 792; Clark *v.* Lamoreux, 70 Wis. 508, 36 N. W. 393; Battis *v.* Hamlin, 22 Wis. 669; Booth *v.* Ableman, 20 Wis. 21, 602, 88 Am. Dec. 730; Saxton *v.* Williams, 15 Wis. 292.

See 42 Cent. Dig. tit. "Replevin," § 409.

78. Jennings *v.* Johnson, 17 Ohio 154, 49 Am. Dec. 451.

79. *Iowa.*— Young *v.* Evans, 118 Iowa 144, 92 N. W. 111.

Kansas.— Friend *v.* Green, 43 Kan. 167, 23 Pac. 93; Shahan *v.* Smith, 38 Kan. 474, 16 Pac. 749.

Nebraska.— Gamble *v.* Wilson, 33 Nebr. 270, 50 N. W. 3; Gates *v.* Parrott, 31 Nebr. 581, 48 N. W. 387; Sloan *v.* Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470; Kersenbrock *v.* Martin, 12 Nebr. 374, 11 N. W. 462.

New York.— Seaman *v.* Luce, 23 Barb. 240.

Ohio.— Jennings *v.* Johnson, 17 Ohio 154, 49 Am. Dec. 451.

Oklahoma.— Nichols, etc., Co. *v.* Bishop, 12 Okla. 250, 70 Pac. 188.

Wisconsin.— Clark *v.* Lamoureux, 70 Wis. 508, 36 N. W. 393; Smith *v.* Phillips, 47 Wis. 202, 2 N. W. 285; Booth *v.* Ableman, 20 Wis. 21, 88 Am. Dec. 730.

See 42 Cent. Dig. tit. "Replevin," § 409.

Attachments subsequent to replevy.— Amounts due on attachments which came into the hands of the officer after he had been divested of possession by replevin cannot be included in the judgment. Sloan *v.* Coburn, 26 Nebr. 607, 42 N. W. 726, 4 L. R. A. 470.

80. Shahan *v.* Smith, 38 Kan. 474, 16 Pac. 749; Merchants' Nat. Bank *v.* McDonald, 63 Nebr. 363, 88 N. W. 492, 89 N. W. 770; Jennings *v.* Johnson, 17 Ohio 154, 49 Am. Dec. 451; Battis *v.* Hamlin, 22 Wis. 669.

81. Black *v.* Winterstein, 6 Nebr. 224.

82. Atkins *v.* Moore, 82 Ill. 240; Broadwell *v.* Paradice, 81 Ill. 474; Wheat *v.* Bower, 42 Ill. App. 600; Buck *v.* Remsen, 34 N. Y. 383; Coos Bay R. Co. *v.* Siglin, 34 Oreg. 89, 53 Pac. 504.

83. Nicklase *v.* Morrison, 56 Ark. 553, 20 S. W. 414; Stotts *v.* Brookfield, 55 Ark. 307, 18 S. W. 179; Nitz *v.* Bolton, 71 Mich. 388, 39 N. W. 15 (where it appeared that plaintiff cut the logs in controversy on land claimed under a tax deed; the law under which the tax deed was issued having been declared unconstitutional more than six months before the cutting, and defendant who owned the land having waived a return of the logs, it was held that the measure of damages was the value of the logs at the time they were replevied with interest from that date. There was no ground, it was said, for claiming that defendant acted in good faith); Heard *v.* James, 49 Miss. 236; Cunningham *v.* Metropolitan Lumber Co., 110 Fed. 332, 49 C. C. A. 72 (holding that a purchaser of logs from a homestead claimant of public lands subsequently adjudged to have no title or right to sell such logs, who purchased with knowledge that the seller's title was in controversy in the courts, is not equitably entitled to repayment from the rightful owner of the sum expended in cutting such logs as a condition to their recovery in replevin). And see Phillips *v.* Stroup, (Pa. 1889) 17 Atl. 220.

84. Gray *v.* Robinson, 4 Ariz. 24, 33 Pac. 712; Sims *v.* Mead, 29 Kan. 124.

85. State *v.* Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81 (holding that in re-

14. Amount Recoverable Where Owner Buys in His Property at Judicial Sale. Where personal property is wrongfully taken by an officer and sold at judicial sale, and the owner buys it in, and thus becomes repossessed of it, he is not entitled in an action of claim and delivery against the officer to judgment for the value of the property, but in lieu thereof is entitled to recover what it cost him to regain possession with interest thereon from date of its payment.[86] The officer cannot object that the sum so paid at the sale exceeded the actual value of the property.[87]

D. Apportionment of Damages. If it be found that part of the goods belonged to plaintiff and part to defendant the damages must be apportioned between them.[88] Plaintiff is entitled to damages for the unlawful capture and detention of such of the goods as are found to be his property, and defendant is entitled to damages for the taking under the writ of the property found to belong to him.[89]

E. Time of Valuation of Property — 1. In General. There is considerable divergence in the decisions as respects the time at which the value of the property should be assessed, and this is due largely to the difference in the statutes. According to many decisions the value is to be assessed as of the time of the trial and the depreciation, if any, allowed as an element of damages.[90] Other

plevin by the state for logs cut from state pine lands under a void permit, where it appeared that defendant cut the timber in good faith, relying on the permit, and by his labor and money in cutting the logs and transporting them to a proper market materially enhanced their value, he is liable in the alternative for the value of the logs at the time and place of the original taking with interest from the time of the taking); Acree *v.* Bufford, 80 Miss. 565, 31 So. 898 (holding that in replevin by the owner against one who has removed timber from the lands upon which it grew, believing in good faith that he had title, defendant should be permitted to show in reduction of damages the costs of preparing the timber for and transporting it to the market where it was seized); Herdic *v.* Young, 55 Pa. St. 176, 93 Am. Dec. 739 (holding that the measure of damages in replevin for logs cut from plaintiff's land by mistake as to boundaries, and hauled to a boom, is the value of the logs at the boom less the cost of cutting, hauling, and driving them there); Keystone Lumber Co. *v.* Kolman, 103 Wis. 300, 79 N. W. 224; Hungerford *v.* Redford, 29 Wis. 345; Single *v.* Schneider, 24 Wis. 299.

86. Northrup *v.* Cross, 2 N. D. 433, 51 N. W. 718. And see Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

87. Leonard *v.* Maginnis, 34 Minn. 506, 26 N. W. 733.

88. Knowles *v.* Pierce, 5 Houst. (Del.) 178; Wright *v.* Mathews, 2 Blackf. (Ind.) 187; Powell *v.* Hinsdale, 5 Mass. 343.

89. Powell *v.* Hinsdale, 5 Mass. 343.

90. *Arizona.*— Gray *v.* Robinson, 4 Ariz. 24, 33 Pac. 712.

California.— Phillips *v.* Sutherland, (1884) 2 Pac. 32.

Missouri.— Richey *v.* Burnes, 83 Mo. 362; Mix *v.* Kepner, 81 Mo. 93; Chapman *v.* Kerr, 80 Mo. 158 [*disapproving* Miller *v.* Whitson, 40 Mo. 97; Woodburn *v.* Cogdal, 39 Mo. 222]; Pope *v.* Jenkins, 30 Mo. 528; Kirkendall *v.* Hartsock, 58 Mo. App. 234; W. W. Kendall Boat, etc., Co. *v.* Bain, 46 Mo. App. 581; Hinchey *v.* Koch, 42 Mo. App. 230; Hoester *v.* Teppe, 27 Mo. App. 207; Schultz *v.* Hickman, 27 Mo. App. 21; White *v.* Storms, 21 Mo. App. 288; Anchor Milling Co. *v.* Walsh, 20 Mo. App. 107; Burkeholder *v.* Rudrow, 19 Mo. App. 60.

Nevada.— Gardner *v.* Brown, 22 Nev. 156, 37 Pac. 240.

New York.— New York Guaranty, etc., Co. *v.* Flynn, 55 N. Y. 653; Allen *v.* Fox, 51 N. Y. 562, 10 Am. Rep. 641; Brewster *v.* Silliman, 38 N. Y. 423; Duffus *v.* Schwinger, 79 Hun 541, 29 N. Y. Suppl. 930; Young *v.* Willett, 8 Bosw. 486; Pabst Brewing Co. *v.* Rapid Safety Filter Co., 54 Misc. 305, 105 N. Y. Suppl. 962.

Texas.— Morris *v.* Coburn, 71 Tex. 406, 9 S. W. 345; Nolan *v.* Sevine, 36 Tex. Civ. App. 489, 81 S. W. 990. And see Halbert *v.* San Saba Springs Land, etc., Assoc., (Civ. App. 1895) 34 S. W. 636, holding that in replevin, where defendant did not allege any special damages, the measure of his damages is the value of the property at the time of the trial, and not at the time of its taking by plaintiff.

See 42 Cent. Dig. tit. "Replevin," §§ 379, 406, 420.

In North Carolina it is held that if the property can be returned, its value is to be assessed as of the time of the trial, and an element of damages will be the difference in value between the time of taking and the time of trial. Holmes *v.* Godwin, 69 N. C. 467. And see Scott *v.* Elliott, 63 N. C. 215. But where a return of the specific property cannot be had the value is assessed as of the time of the tortious taking or the wrongful detention by defendant and interest allowed as damages. Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745; Miller *v.* Hahn, 84 N. C. 226; Holmes *v.* Goodwin, *supra.*

Under the statutes of Georgia, on failure of plaintiff to establish his right to recover in bail trover, after having taken the property, if defendant chooses a money judgment,

decisions, however, hold that the value of the property should be assessed as of the time of the unlawful taking or detention, in which case the damages recoverable would ordinarily be interest on such value from that date.[91]

2. Where Property is Fluctuating in Value. There is also considerable diversity of opinion as to the time of assessing value where the property in suit is fluctuating in value. The question as to time of assessment is considered at length in another place in this work;[92] and inasmuch as it makes no difference in the determination of this question whether the form of the action is trover, detinue, trespass, or replevin,[93] no special consideration of it in a treatise on replevin is necessary.

F. Necessity For Assessment of Damages in the Replevin Suit. Ordinarily the provisions of the statutes contemplate that where plaintiff is successful all damages to which he is entitled shall be assessed and awarded by the judgment in the replevin suit,[94] which shall conclude him from maintaining any other action for damages;[95] but the rule is far from uniform in case defendant is successful. Under some statutes if plaintiff has obtained possession of the property, and defendant recovers judgment, the damages to which he is entitled must be assessed in the replevin suit,[96] and he cannot after final judgment in his favor successfully move to introduce evidence to show damages sustained,[97] or maintain another action to recover such damages,[98] or recover them in an action on the bond.[99] Under the provisions of other statutes, damages for defendant need not

he can take either the highest proved value of the property between the date plaintiff received it and the time of trial without hire or interest, or the market value at the date plaintiff received it, together with interest or hire, as he may prove. Jaques *v.* Stewart, 81 Ga. 81, 6 S. E. 815; Blakely Bank *v.* Cobb, 5 Ga. App. 289, 63 S. E. 24.

91. *Kansas.*— Werner *v.* Graley, 54 Kan. 383, 38 Pac. 482; Garrett *v.* Wood, 3 Kan. 231.

Maine.— Washington Ice Co. *v.* Webster, 68 Me. 449.

Michigan.— Nitz *v.* Bolton, 71 Mich. 388, 39 N. W. 15; Hanselman *v.* Kegel, 60 Mich. 540, 27 N. W. 678.

Minnesota.— Sherman *v.* Clark, 24 Minn. 37; Berthold *v.* Fox, 13 Minn. 501, 97 Am. Dec. 243.

Mississippi.— See Whitfield *v.* Whitfield, 40 Miss. 352.

Montana.— Osmers *v.* Furey, 32 Mont. 581, 81 Pac. 345, in case replevin cannot be had.

Nebraska.— Schrandt *v.* Young, 62 Nebr. 254, 86 N. W. 1085; Heidiman-Benoist Saddlery Co. *v.* Schott, 59 Nebr. 20, 80 N. W. 47; Dodge *v.* Runels, 20 Nebr. 33, 28 N. W. 849; Moore *v.* Kepner, 7 Nebr. 291; Frey *v.* Drahos, 7 Nebr. 194.

South Dakota.— Benjamin *v.* Huston, 16 S. D. 569, 94 N. W. 584.

Tennessee.— Mayberry *v.* Cliffe, 7 Coldw. 117.

See 42 Cent. Dig. tit. "Replevin," §§ 406, 420.

92. See Damages, 13 Cyc. 170 *et seq.*

93. Whitfield *v.* Whitfield, 40 Miss. 352; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507.

94. Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296; Globe Oil Co. *v.* Messick Grocery Co., 136 N. C. 354, 48 S. E. 781; Bower *v.* Tallman, 5 Watts & S. (Pa.) 556.

95. Bower *v.* Tallman, 5 Watts & S. (Pa.) 556.

96. *Colorado.*— Sopris *v.* Lilley, 2 Colo. 496.

Massachusetts.— Stevens *v.* Tuite, 104 Mass. 328.

Missouri.— White *v.* Van Houten, 51 Mo. 577; Hohenthal *v.* Watson, 28 Mo. 360; Freeman *v.* Lavenue, 99 Mo. App. 173, 72 S. W. 1085; Fulkerson *v.* Dinkins, 28 Mo. App. 160. See also Clinton *v.* Stovall, 45 Mo. App. 642.

Nebraska.— Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296.

New York.— Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. 445, 107 N. Y. Suppl. 163; Ritchie *v.* Talcott, 10 Misc. 412, 31 N. Y. Suppl. 196.

97. Freeman *v.* Lavenue, 99 Mo. App. 173, 72 S. W. 1085.

98. Teel *v.* Miles, 51 Nebr. 542, 71 N. W. 296 (holding that a defendant who has in an action of replevin recovered judgment for the return of the property and his damage for the wrongful detention thereof cannot thereafter maintain an action against plaintiff for damage on account of depreciation in the value of such property while in the possession of the latter); Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. (N. Y.) 445, 107 N. Y. Suppl. 163; Ritchie *v.* Talcott, 10 Misc. (N. Y.) 412, 31 N. Y. Suppl. 196.

99. Sopris *v.* Lilley, 2 Colo. 496 (condition of bond to pay all damages adjudged against plaintiff); Stevens *v.* Tuite, 104 Mass. 328 (condition of bond that plaintiff in replevin "shall pay all such costs and damages as the defendant in replevin shall recover against him, and shall also return the goods replevied in like good order and condition as when taken, in case such shall be the final judgment"); White *v.* Van Houten, 51 Mo. 577.

be asked for or assessed in the replevin suit, but may be recovered in an action on the bond.[1] So under others, damages for depreciation in value are recoverable in an action on the bond, although not assessed in the replevin suit.[2] And in one state, if the goods are *in esse* and may be returned on demand, if the damages are not then assessed and the property is returned and costs paid, defendant has no further remedy on the bond;[3] but when the property is not returned, defendant may recover all damages sustained in a suit on the bond, although no assessment was made in the replevin suit.[4]

VII. Liability on Bonds and Undertakings.[5]

A. In General. The several conditions inserted in a replevin bond are to be treated as separate and independent;[6] and an action may be maintained on the bond for the breach of any of such conditions.[7] A right of action on a replevin bond[8] carries with it the right to recover damages for a failure to perform its conditions.[9] The obligation of the sureties on defendant's replevy bond is created by the bond and dates only from its date;[10] and to justify a judgment against the obligor and sureties, there must have been some breach of the bond.[11] Where

1. Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930, condition of bond being to pay all damages "sustained by the replevying." And see Whitney *v.* Lehmer, 26 Ind. 503, holding that notwithstanding a statute requiring assessment of the value of the property and damages, defendant when he has obtained a judgment for the return of the property without an assessment of value may in a suit on the bond recover the value of the property for a breach of the conditions to return the property.

2. Fair *v.* Citizens' State Bank, 69 Kan. 353, 76 Pac. 847, 105 Am. St. Rep. 168; Mounts *v.* Murphy, 126 Ky. 803, 104 S. W. 978, 31 Ky. L. Rep. 1192; Citizens' Nat. Bank *v.* Oldham, 136 Mass. 515; Colby *v.* Yates, 12 Heisk. (Tenn.) 267.

3. Pettygrove *v.* Hoyt, 11 Me. 66.

4. Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Thomas *v.* Spofford, 46 Me. 408; Smith *v.* Dillingham, 33 Me. 384.

5. **Statutory provisions** see *supra*, I, A, 2. **Necessity, purpose, requisites, and validity** of bond, undertaking, or recognizance by: Plaintiff in replevin see *supra*, III, B, 1, 2, 3. Defendant in replevin see *supra*, III, G, 2, b. Third person claimant see *supra*, III, H. **Liability of surety on:** Bond in replevin by purchaser see Sales. Bond in replevin by seller see Sales. Bond to replevy execution see Executions, 17 Cyc. 1167. Forthcoming bond in distress proceeding see Landlord and Tenant, 24 Cyc. 1315. Forthcoming bond in execution see Executions, 17 Cyc. 1124. Sequestration bond see Sequestration. **Right of surety:** On replevin bond to intervene see Attachment, 4 Cyc. 726. To jury trial see Juries, 24 Cyc. 109.

6. *Colorado.*— Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803.

Illinois.—Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254; Humphrey *v.* Taggart, 38 Ill. 228.

Indiana.— Brown *v.* Parker, 5 Blackf. 291.

Iowa.— Hall *v.* Smith, 10 Iowa 45.

Kansas.— Little *v.* Bliss, 55 Kan. 94, 30 Pac. 1025; Manning *v.* Manning, 26 Kan. 98.

Missouri.— Elliott *v.* Black, 45 Mo. 372; Berghoff *v.* Heckwolf, 26 Mo. 511.

Pennsylvania.— Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Pittsburgh Nat. Bank of Commerce *v.* Hall, 107 Pa. St. 583; Balsley *v.* Hoffman, 13 Pa. St. 603; Gibbs *v.* Bartlett, 2 Watts & S. 29.

Rhode Island.— Gardiner *v.* McDermott, 12 R. I. 206.

South Carolina.— Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385.

England.— Moore *v.* Bowmaker, 2 Marsh. 392, 4 Price 223, 7 Taunt. 97, 2 E. C. L. 277.

See 42 Cent. Dig. tit. "Replevin," § 470 *et seq.*

7. See cases cited *supra*, note 6.

"In all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts or condition." Morgan *v.* Griffith, 7 Mod. 380, 87 Eng. Reprint 1304.

The conditions to prosecute the suit to effect and to make return of the property are distinct, and the condition is broken and the bond forfeited by failure in either. Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254; Brown *v.* Parker, 5 Blackf. (Ind.) 291; Perreau *v.* Bevan, 5 B. & C. 284, 8 D. & R. 72, 4 L. J. K. B. O. S. 177, 11 E. C. L. 464.

8. See *infra*, VII, B, 1; and VII, G, 1, a.

9. Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446.

Damages recoverable see *infra*, VII, D, 2.

10. Bateman *v.* Hipp, (Tex. Civ. App. 1908) 111 S. W. 971, holding that the sureties are not liable for the value of the use of the property which accrued prior to the time the property was replevied.

11. Gerlaugh *v.* Ryan, 127 Iowa 226, 103 N. W. 128; Lewis *v.* McNary, 38 Oreg. 116, 62 Pac. 897.

the statutes confer on a married woman the right to execute a forthcoming or redelivery bond, she is subject to judgment on it.[12]

B. Accrual or Release of Liability By Breach or Fulfilment of Conditions — 1. In General. Liability upon a bond in replevin accrues whenever there is a breach of any one or more of the several independent conditions of the bond;[13] and what will constitute an actionable breach must depend largely upon the nature and terms of the particular condition claimed to be broken.[14]

2. Failure to Prosecute Replevin Action.[15] Failure of plaintiff in replevin to prosecute the action to final judgment, in conformity with the condition of his bond, will constitute a breach thereof, and entitle defendant in replevin to judgment [16] for at least nominal damages on the bond,[17] even though no judgment for the return of the property is rendered,[18] and even though defendant in the replevin action had no lawful title in the property replevied.[19] It has been held that the condition in a replevin bond to prosecute the action "with effect" is to be construed as meaning with success, or to a successful termination.[20] However,

12. Ketchum *v.* Brennan, 53 Miss. 596.

13. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139.

Illinois.— Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254.

Maine.— Jones *v.* Smith, 79 Me. 452, 10 Atl. 256; Tuck *v.* Moses, 54 Me. 115.

Massachusetts.— See Smith *v.* Whiting, 97 Mass. 316.

Pennsylvania.— Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583.

England.— Perreau *v.* Bevan, 5 B. & C. 384, 8 D. & R. 72, 4 L. J. K. B. O. S. 177, 11 E. C. L. 464; Moore *v.* Bowmaker, 2 Marsh. 392, 4 Price 223, 7 Taunt. 97, 2 E. C. L. 277; Morgan *v.* Griffith, 7 Mod. 380, 87 Eng. Reprint 1304.

Several and independent conditions see *supra*, VII, A, text and notes 6, 7.

14. See *infra*, VII, B, 2 *et seq.*

15. **Dismissal for failure to prosecute** see *supra*, V, A.

Necessity of judgment on failure to prosecute see *infra*, V, A.

16. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139.

Maine.— Jones *v.* Smith, 79 Me. 452, 10 Atl. 256.

Massachusetts.— Smith *v.* Whiting, 100 Mass. 122.

New Jersey.— Marryott *v.* Young, 33 N. J. L. 336.

North Dakota.— Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564 [*distinguishing* Kidder *v.* Merryhew, 32 Mich. 470].

Pennsylvania.— Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Gibbs *v.* Bartlett, 2 Watts & S. 29.

South Carolina.— Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385.

England.— Morgan *v.* Griffith, 7 Mod. 380, 87 Eng. Reprint 1304; Dias *v.* Freeman, 5 T. R. 195.

Canada.— Golding *v.* Belknap, 26 U. C. Q. B. 163.

See 42 Cent. Dig. tit. "Replevin." § 470½.

Postponement of trial.— The trial of an action of replevin in a county court was by a judge's order, on the application of plaintiff therein, postponed to the next sitting thereof, and subsequently the action was by the judge's order transferred to another county court. In an action on the replevin bond it was held on demurrer that, the delay being that of plaintiff in the replevin action, without the consent or connivance of, and against the opposition of defendant, the sureties on the bond were not discharged. O'Donnell *v.* Duchenault, 14 Ont. 1.

Failure to prosecute appeal.— Where an action in replevin is determined against plaintiff, and he appeals, and fails to prosecute his appeal, he is liable on his bond. Webster *v.* Price, 1 Root (Conn.) 56.

Reversal but no venire de novo.— In Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29, it was held that the condition of a replevin bond required a continued prosecution of the action from the commencement to a successful termination, and that if plaintiff succeeded in the common pleas, and judgment was reversed in the supreme court, and no *venire de novo* awarded, there was a breach of the bond.

Whether the fault lies with plaintiff or with the justice of the peace was held to be immaterial in Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

17. Smith *v.* Whiting, 100 Mass. 122; Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385. See also Brookover *v.* Esterly, 12 Kan. 149.

Nominal damages see *infra*, VII, D, 2, b.

18. See *infra*, VII, B, 5.

19. Smith *v.* Whiting, 100 Mass. 122.

20. *Indiana.*— Brown *v.* Parker, 5 Blackf. 291.

Minnesota.— Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253, 22 N. W. 538.

Missouri.— Berghoff *v.* Heckwolf, 26 Mo. 511.

New York.— Gould *v.* Warner, 3 Wend. 54.

Pennsylvania.— Gibbs *v.* Bartlett, 2 Watts & S. 29.

England.— Perreau *v.* Bevan, 5 B. & C. 284, 8 D. & R. 72, 4 L. J. K. B. O. S. 177, 11 E. C. L. 464; Jackson *v.* Hansom, 1 Dowl. P. C. N. S. 69, 10 L. J. Exch. 396, 8 M. & W. 477; Tummons *v.* Ogle, 6 E. & B. 571, 3 Jur. N. S. 82, 25 L. J. Q. B. 403, 4 Wkly. Rep.

it has been held that a replevin bond, obligating plaintiff to "duly" prosecute the action, does not mean to successfully prosecute it.[21] Under the wording of some of the statutes, the condition of the undertaking is complied with by continuing the proceedings to judgment on the merits, although not in plaintiff's favor.[22] A failure to return a writ of replevin after service, through the negligence of plaintiff or of the officer employed by him,[23] or failure to enter the action,[24] is a failure to prosecute to effect, within the construction to be given to that term in a replevin bond.

3. Failure to Return Property — a. Under Plaintiff's Replevin Bond — (i) *In General.* To avoid liability on his replevin bond, plaintiff must tender the property to defendant in the same condition in which he received it, within a reasonable time after judgment for its return.[25] After the dismissal of a replevin suit, a failure to return the property in accordance with the judgment of the court is a breach of the replevin bond.[26] Furthermore, after dismissal of the action

596, 88 E. C. L. 571, 37 Eng. L. & Eq. 15; Morgan *v.* Griffith, 7 Mod. 380, 87 Eng. Reprint 1304.

Canada.— Welsh *v.* O'Brien, 28 U. C. Q. B. 405. See also Johnson *v.* Parke, 12 U. C. C. P. 179.

But see Ladd *v.* Prentice, 14 Conn. 109, holding that in all cases where a final trial has been had, and no obligation to redeliver the goods is incurred, plaintiff prosecutes to effect, and makes his plea good, within the intent of the statute, although the verdict and judgment are for defendant.

"The undertaking to prosecute with effect is certainly broken when the plaintiff in replevin fails in his action." Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814; Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583, 589. *Compare* Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

21. Citizens' State Bank *v.* Morse, 60 Kan. 526, 57 Pac. 115, where judgment was rendered for defendant for his costs, and the court differentiated the phrases "duly prosecute" and "prosecute with effect." *Compare* Ladd *v.* Prentice, 14 Conn, 109, *supra*, note 20.

22. Vallandingham *v.* Ray, 128 Ky. 506, 108 S. W. 896, 33 Ky. L. Rep. 392; Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

Although plaintiff is unsuccessful in maintaining his title or right to the property, the condition of his bond to "duly prosecute" the action is satisfied by his prompt trial of the action in the circuit court and in the court of appeals. Vallandingham *v.* Ray, 128 Ky. 506, 108 S. W. 896, 33 Ky. L. Rep. 392.

23. Allen *v.* Woodford, 36 Conn. 143; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256.

Absence of justice on return-day.— On the return-day of process the parties were present at the office of the justice, but the justice was absent, and the suit was not further prosecuted. It was held that the replevin suit was prosecuted as far as plaintiff therein was able to prosecute, and its abatement, by reason of the absence of the justice, was not a breach of the condition in the undertaking to prosecute. Pierce *v.* Hardee, 1 Thomps. & C. (N. Y.) 557.

24. Parker *v.* Young, 188 Mass. 600, 75 N. E. 98; Gardiner *v.* McDermott, 12 R. I. 206.

25. Berry *v.* Hoeffner, 56 Me. 170; Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583.

Statement of general rule.—"If plaintiff takes possession of property in replevin, and judgment is rendered for its return, plaintiff must seek defendant within a reasonable time and tender the property to him in the same condition in which it was received, to avoid liability on his bond, if the property is such that it can be readily moved; but if such course is difficult by reason of its bulky character, an offer to deliver . . . is sufficient." Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

26. Schweer *v.* Schwabacher, 17 Ill. App. 78; Davis *v.* Harding, 3 Allen (Mass.) 302; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727. See also as sustaining this view Golding *v.* Bellnap, 26 U. C. Q. B. 163. In Pittsburgh Nat. Bank *v.* Hall, 107 Pa. St. 583, 589, it is said: "The undertaking to prosecute with effect is certainly broken when the plaintiff in replevin fails in his action. If he fails to return the goods after being ordered to do so, that also is a breach, but it is a different and an independent breach of another undertaking." See also Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814. *Compare* Siebolt *v.* Konatz Saddlery Co, 15 N. D. 87, 106 N. W. 564.

Order of court without jurisdiction.—After a court has adjudged, without appeal being taken, that it had no jurisdiction of a replevin suit, its order that the property replevied be returned is void, and non-compliance therewith constitutes no breach of the bond conditioned for a return of the property, if a return be adjudged. Elder *v.* Greene, 34 S. C. 154, 13 S. E. 323.

Return as to part.— Where plaintiff in replevin succeeds only for part of the goods replevied, and a return is adjudged as to the rest, he is liable upon the replevin bond for not prosecuting the suit with effect for the goods for which he failed, and for not returning them. Patterson *v.* Fuller, 31 U. C. Q. B. 323.

of replevin or nonsuit of plaintiff therein,[27] the condition of a bond to return the property to defendant, if plaintiff does not prosecute his action with effect,[28] or if plaintiff fails to recover,[29] is broken, and liability upon the bond accrues even though no judgment is rendered awarding the custody of the property to defendant.[30]

(II) *Sufficiency of Return of Property* — (A) *In General.* There is no breach of a condition in a replevin bond for the return of the property to the obligee therein, provided the property comes into the hands of the obligee in any manner pending or subsequent to the replevin suit.[31] A tender of the property in satisfaction of a judgment in replevin for its return must be made to the holder of the judgment;[32] and where the condition of the bond, and the judgment of the court, require a return of the property to the party from whom it was taken, a return of the property to the sheriff is no defense to an action on the bond.[33]

(B) *In Same Condition.* A mere restoration of the property, in a damaged condition, is not a compliance with a bond which requires them to be restored "in like good order and condition as when taken," although that requirement is not inserted in the judgment.[34]

(C) *In Case of Bulky Articles.* Where the articles of property which have been replevied are very large or bulky, an offer to deliver is a sufficient tender of their return.[35]

(III) *Effect of Partial Return.* Where a return of the property is awarded, plaintiff may return a part of the goods, provided they are separable from and in no way dependent upon the others for use or value; and if they are in the same condition as when taken, such a return will be a defense *pro tanto* to a suit on the bond.[36]

b. Defendant's Redelivery Bond — (I) *In General.* By giving a redelivery bond, defendant obligates himself on the rendition of judgment against him, to

27. See *infra*, VII, B, 5, b, (I).

28. See Persse *v.* Watrous, 30 Conn. 139. See also Turnor *v.* Turner, 2 B. & B. 107, 4 Moore C. P. 606, 6 E. C. L. 58; Perreau *v.* Bevan, 5 B. & C. 284, 8 D. & R. 72, 4 L. J. K. B. O. S. 177, 11 E. C. L. 464; Phillips *v.* Price, 3 M. & S. 180.

29. Ernst *v.* Hogue, 86 Ala. 502, 5 So. 738; Wood *v.* Coman, 56 Ala. 283.

30. See *infra*, VII, B, 5, b, (I).

31. Hunt *v.* Robinson, 11 Cal. 262; Rinker *v.* Johnson, 29 Nebr. 783, 46 N. W. 211; Lewis *v.* McNary, 38 Oreg. 116, 62 Pac. 897.

Illustration of insufficient return.— Replevied goods were, by consent of the parties, left on the premises of defendant in charge of the occupant, and the suit having been decided in favor of defendant, plaintiff's attorney wrote to him, giving him notice that he could retain them and treat them as his own, and it was held, in a suit on the replevin bond, that the latter was not a sufficient return if the goods were in charge of an agent of plaintiff in replevin, unless the agent was withdrawn. Pittsburgh Nat. Bank of Commerce *v.* Hall, 107 Pa. St. 583.

32. Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

33. Gould *v.* Warner, 3 Wend. (N. Y.) 54.

34. Berry *v.* Hoeffner, 56 Me. 170; Parker *v.* Simonds, 8 Metc. (Mass.) 205; Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137 (holding that a condition in a bond for the delivery of a piano "in as good condition" as when taken is not fulfilled by a tender of the piano in as good condition, reasonable wear and tear excepted, the piano being in the possession of the principal on the bond in the meantime); Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792; Pittsburgh Nat. Bank of Commerce *v.* Hall, 107 Pa. St. 583. See, however, Douglass *v.* Douglass, 21 Wall. (U. S.) 98, 22 L. ed. 479, holding that if the obligor in the replevin bond has injured the property, or culpably suffered it to become injured while in his possession, a recovery cannot be had against him on the bond if the marshal has once taken possession. The marshal's possession is that of the obligee in the bond, and any redress for such injury must be had by a separate proceeding.

35. Gans *v.* Woolfolk, 2 Mont. 458; Frey *v.* Drahos, 10 Nebr. 594, 7 N. W. 319; Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

36. Edwin *v.* Cox, 61 Ill. App. 567; Larabee *v.* Cook, 8 Kan. App. 776, 61 Pac. 815; Sands *v.* Fritz, 84 Pa. St. 15 (holding that, in debt on a replevin bond, an affidavit of defense, setting forth that after judgment in the suit in replevin defendant had surrendered all the property replevied, except a part, which was missing, and that, instead of the latter, other and more valuable articles of the same description had been delivered to plaintiff, who had accepted the same, retaining a part and selling the rest, is sufficient); Parish *v.* Smith, 66 S. C. 424, 45 S. E. 16.

return the identical goods taken.[37] The requirement of the bond is fulfilled by a tender of the property in the same or better, but not in a worse, condition than when the same was replevied;[38] but plaintiff, by electing to take a money judgment for the value of the property, releases the sureties from their obligation to deliver the property.[39]

(II) *Necessity of Order or Judgment.*[40] There is no breach of a condition to deliver the property to plaintiff in case return thereof shall be awarded until a judgment or an order is entered for a return of the property.[41] The liability of the sureties does not accrue until there is a final judgment in the case, after trial upon the merits, adverse to defendant in the replevin suit.[42]

4. Non-Payment of Damages and Costs. The non-payment of the damages[43] and costs[44] adjudged in favor of defendant in the replevin action is a breach of the condition of the replevin bond upon which an action may be maintained.

5. Judgment in Replevin Proceedings — a. In General. Whether or not the rendition of a judgment in the original replevin suit is a prerequisite to the accrual of liability on the replevin bond depends upon the terms of condition for the breach of which liability is sought to be enforced.[45] The general rule is that there is no breach of a replevin bond and no right of action thereon accrues prior to the entry of some appropriate order or judgment in favor of the successful party or against the defeated party in the replevin suit,[46] and sometimes it is expressly so provided by statute;[47] and especially is this true where the condition of the bond, which has been broken, is to perform or do something which can only be required by the judgment in the replevin suit,[48] such as to pay damages[49] or costs[50] awarded, or to return the property to defendant if the judgment shall award the same to him;[51] for in such a case there can be no recovery on the bond of the value of the property replevied without proof of a judgment awarding its return, or for the

37. Binkley *v.* Dewall, (Kan. App. 1899) 58 Pac. 1028; Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. 150; Stern-Bloch Co. *v.* Heinsheimer, 1 Ohio S. & C. Pl. Dec. 651, 1 Ohio N. P. 44.

38. Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137.

39. Gerlaugh *v.* Ryan, 127 Iowa 226, 103 N. W. 128.

40. Necessity for order or judgment before suit on plaintiff's bond see *infra*, VII, B, 5.

41. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Jaggar *v.* Lalance, etc., Mfg. Co., 8 Daly (N. Y.) 251. See also Gallarati *v.* Orser, 27 N. Y. 324.

A finding that the right of possession is in plaintiff is not such a judgment as constitutes a breach of the condition of the bond. Lewin *v.* Stein, 7 Colo. App. 65, 42 Pac. 185.

The sureties on an undertaking given under N. Y. Code Proc. § 211, to procure the return to defendant of personal property taken by the sheriff in an action of replevin, the undertaking being conditioned "for the delivery of the said property to the plaintiff, if such delivery shall be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant in this action," are not liable for a breach of the condition of the undertaking upon a mere failure of defendant in the action to pay a money judgment for damages for the conversion of the property, no delivery of the property to plaintiff being adjudged, nor any demanded in the complaint. Jaggar *v.* Lalance, etc., Mfg. Co., 8 Daly (N. Y.) 251 [*following* Gallarati *v.* Orser, 27 N. Y. 324].

42. Spencer *v.* Davidson, 5 Indian Terr. 231, 82 S. W. 731.

Where an appeal was taken in the replevin suit and the evidence does not show a judgment rendered by the court appealed to, no recovery can be had on the bond. Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

43. Moore *v.* Shields, 17 Fed. Cas. No. 9,755, 2 Cranch C. C. 529, holding that it is not necessary that a writ of retorno habendo should have been issued and returned "eloigned."

Redelivery bond of defendant.— In jurisdictions where a judgment in the alternative is obligatory, the obligation of the sureties to pay the value of the property in suit is not absolute, but only conditional in case a return cannot be had. New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974.

44. Cook *v.* Lothrop, 18 Me. 260; Chadwick *v.* Badger, 9 N. H. 450.

45. See cases cited *infra*, notes 46–55.

46. Triest *v.* Watts, 58 Ga. 73; Morning *v.* Alexander, 10 Heisk. (Tenn.) 606; Boyer *v.* Fowler, 1 Wash. Terr. 101.

47. Hershiser *v.* Jordan, 25 Nebr. 275, 41 N. W. 147; Mulhall *v.* McVay, 2 Okla. 534, 37 Pac. 604.

48. See cases cited *infra*, note 52.

Failure to return property see *supra*, VII, B, 3.

Non-payment of damages or costs see *supra*, VII, B, 4.

49. See *supra*, VII, B, 4.

50. See *supra*, VII, B, 4.

51. See *supra*, VII, B, 3.

payment of an adjudged amount of money in lieu thereof.[52] Where, however, the condition of the bond may be broken without regard to the rendition of any judgment,[53] a formal judgment does not seem to be necessary as a condition precedent to the accrual of liability upon the bond;[54] thus a judgment for the return of the property is not necessary where it is sought to enforce liability on the bond for a breach of condition to prosecute the action of replevin.[55]

52. *Colorado.*— Lewin *v.* Stein, 7 Colo. App. 65, 42 Pac. 185, holding that a judgment in replevin that at the commencement of the action the right of possession was in plaintiff, that costs be taxed against defendant, and showing that they have been paid, will not support an action for breach of a delivery bond conditioned to deliver the property to plaintiff if delivery be adjudged, and to pay costs and damages awarded against defendant on failure to return the property.

Illinois.— Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254.

Kansas.— Citizens' State Bank *v.* Morse, 60 Kan. 526, 57 Pac. 115.

Kentucky.— Vallandingham *v.* Ray, 128 Ky. 506, 108 S. W. 896, 33 Ky. L. Rep. 392.

Maine.— Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39.

Missouri.— Cummings *v.* Badger Lumber Co., 130 Mo. App. 557, 109 S. W. 68.

Ohio.— Munding *v.* Michael, 10 Ohio Cir. Ct. 165, 6 Ohio Cir. Dec. 76.

See 42 Cent. Dig. tit. "Replevin," § 472.

Rule discussed and distinguished.— In Mounts *v.* Murphy, 126 Ky. 803, 807, 104 S. W. 978, 31 Ky. L. Rep. 1192, the court in discussing this question said: "We are referred to the case of Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283, as authorizing an action on a bond against the surety to recover from him damages when not fixed in the judgment disposing of the action for the claim and delivery of the property. The question in that case was not like the case at bar. In that case the plaintiff in the action obtained possession of some logs by giving the bond and afterward disposed of them, entered a motion, and dismissed the action without prejudice, and the court decided that it had violated its bond, in that it failed to duly prosecute the action. The court said in that case that: 'The plaintiff should not be permitted, by the execution of a bond, to obtain the possession of the property and upon its own motion dismiss the action without prejudice, and thus relieve itself and surety from all responsibility on the bond.' Here the defendant, now appellee, upon his own motion caused a dismissal of that action and caused a judgment to be rendered in his behalf for the property if to be had, if not, for its value, but failed to present and recover the damages he had sustained by the taking and withholding of the property from him."

Since a surety on a replevin bond is only liable if a return of the property be adjudged, where no return was adjudged, defendant was not entitled to judgment against the sureties, though entitled to judgment against plaintiff on equities arising in the case. Cummings *v.* Badger Lumber Co., 130 Mo. App. 557, 109 S. W. 68. Plaintiff in replevin, who obtained the property by giving a bond conditioned to perform the judgment rendered and return the property, if return be adjudged, though unsuccessful in the action, is not liable on his bond for failure to return the property, where defendant failed to obtain a judgment for such return or any amount for the seizure or detention of the property. Vallandingham *v.* Ray, 128 Ky. 506, 108 S. W. 896, 33 Ky. L. Rep. 392.

Judgment for return in higher court.—If an undertaking in an action of replevin commenced in a justice's court limits the liability of the person who executes it to a judgment for a return of the property rendered by the justice, and such judgment was not recovered in the justice's court, a recovery cannot be had on the undertaking, even if on appeal such judgment is rendered by the county court. Mitchum *v.* Swanton, 49 Cal. 302.

Common-law remedy on bond.— Where plaintiff in replevin is in possession of the property, and defendant recovers judgment for its return, but the value of the property is not found as required by Burns Annot. St. (1908) § 575 (Burns Annot. St. (1901) § 558), defendant in the replevin suit may sue on the bond to recover the value of the property, the common-law remedy for breach of the bond not being excluded by Burns Annot. St. (1908) § 599 (Burns Annot. St. (1901) § 581), authorizing on verdict for plaintiff, judgment in the alternative for the return of the property or the value thereof in case a return cannot be made. Whitney *v.* Lehmer, 26 Ind. 503; Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446. This holding is upon the ground that the right of action arises by the common law out of a breach of the contract, and, the statute giving a remedy without negative words, the common-law remedy still remains, and may be pursued at plaintiff's option. Lindsey *v.* Hewitt, *supra.*

53. See *supra*, VII, B, 2, 3.

54. See cases cited *infra*, note 55.

55. *California.*— Ginaca *v.* Atwood, 8 Cal. 446. But see Chambers *v.* Waters, 7 Cal. 390.

Connecticut.— Allen *v.* Woodford, 36 Conn 143; Persse *v.* Watrous, 30 Conn. 139. *Contra*, Ladd *v.* Prentice, 14 Conn. 109.

Idaho.— Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112.

Indiana.— Brown *v.* Parker, 5 Blackf. 291.

Iowa.— Hall *v.* Smith, 10 Iowa 45.

Kansas.— Manning *v.* Manning, 26 Kan. 98.

Kentucky.— See Roman *v.* Stratton, 2 Bibb 199.

Massachusetts.— Smith *v.* Whiting, 100 Mass. 122.

b. Dismissal or Nonsuit — (i) *General Rule.* Unless the breach relied on is of a condition which cannot be broken until a formal judgment on the merits has been had,[56] an order or judgment dismissing the replevin suit or nonsuiting plaintiff therein is ordinarily the only order or judgment necessary before defendant in replevin may sue to enforce liability upon the replevin bond.[57] Indeed, a voluntary discontinuance of the action or submission to nonsuit by plaintiff in replevin amounts to a breach of the condition in the replevin bond to prosecute the action "with effect."[58] A dismissal of such suit is held to constitute a breach of the bond, entitling the obligee to an action for a return of the property or its value, although such dismissal was ordered on his own motion for defect in the writ,[59] for want of jurisdiction,[60] or for failure of plaintiff to prosecute.[61]

(ii) *Qualifications of Rule.* However, after a replevin suit is compromised and dismissed by the parties, no suit can be maintained on the bond;[62]

Minnesota.— Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253, 22 N. W. 538.

Missouri.— Elliott *v.* Black, 45 Mo. 372; Berghoff *v.* Heckwolf, 26 Mo. 511.

New York.— See Rogers *v.* U. S. Fidelity, etc., Co., 84 N. Y. Suppl. 203.

Pennsylvania.— Pittsburgh Nat. Bank of Commerce *v.* Hall, 107 Pa. St. 583; Balsley *v.* Hoffman, 13 Pa. St. 603; Gibbs *v.* Bartlett, 2 Watts & S. 29 [*overruling* Kimmel *v.* Kint, 2 Watts 431].

Rhode Island.— Gardiner *v.* McDermott, 12 R. I. 206 [*criticizing* Smallwood *v.* Norton, 20 Me. 83, 37 Am. Dec. 39; Pettygrove *v.* Hoyt, 11 Me. 66; Collamer *v.* Page, 35 Vt. 387].

England.— Moore *v.* Bowmaker, 2 Marsh. 392, 4 Price 223, 7 Taunt. 97, 2 E. C. L. 277; Morgan *v.* Griffith, 7 Mod. 380, 87 Eng. Reprint 1304; Dias *v.* Freeman, 5 T. R. 195; Waterman *v.* Yea, 2 Wils. C. P. 42, 95 Eng. Reprint 674.

See 42 Cent. Dig. tit. "Replevin," § 472.

56. See *supra*, VII, B, 3, 4. See also cases cited *supra*, note 46.

57. *Indiana.*— Peffley *v.* Kenrick, 4 Ind. App. 510, 31 N. E. 40.

Kansas.— Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025.

Minnesota.— Boom *v.* St. Paul Foundry, etc., Co., 33 Minn. 253, 22 N. W. 538 [*distinguishing* Clark *v.* Norton, 6 Minn. 412].

North Dakota.—Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

United States.—Gilbert *v.* American Surety Co., 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253.

See 42 Cent. Dig. tit. "Replevin," § 471; and cases cited *infra*, note 58.

58. *Connecticut.*— Persse *v.* Watrous, 30 Conn. 139.

Illinois.—Langdoc *v.* Parkinson, 2 Ill. App. 136.

Kansas.— McKey *v.* Lauflin, 48 Kan. 581, 30 Pac. 16; Manning *v.* Manning, 26 Kan. 98.

Kentucky.— Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283; Roman *v.* Stratton, 2 Bibb 199.

Mississippi.— Maxey *v.* White, 53 Miss. 80.

Missouri.— Berghoff *v.* Heckwolf, 26 Mo. 511.

Montana.— Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

New Hampshire.— Chadwick *v.* Badger, 9 N. H. 450.

South Carolina.— Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385.

Washington.— Meigs *v.* Keach, 1 Wash. Terr. 305.

See 42 Cent. Dig. tit. "Replevin," § 471.

Compare Marshall *v.* Livingston, 77 Ga. 21, bail trover.

This is the general rule upon the dismissal of the action in replevin, even where there is no other judgment therein, as for a return of the property to defendant, and the like. As sustaining this proposition see cases cited *supra*, this note.

59. Waddell *v.* Bradway, 84 Ind. 537; McAlester *v.* Suchy, 1 Indian Terr. 666, 43 S. W. 952; Tuck *v.* Moses, 54 Me. 115; Barrett *v.* Habern, 22 Tex. Civ. App. 207, 54 S. W. 644. See also Meloche *v.* Reaume, 34 U. C. Q. B. 606.

Nonsuit in bail trover see Thomas *v.* Price, 88 Ga. 533, 15 S. E. 11.

60. Biddinger *v.* Pratt, 50 Ohio St. 719, 35 N. E. 795; Pierce *v.* King, 14 R. I. 611; Welsh *v.* O'Brien, 28 U. C. Q. B. 405.

61. See *supra*, VII, B, 2.

After death of plaintiff.— As the cause of action in replevin survives the death of plaintiff, an action may be maintained on the replevin bond where, after the death of plaintiff, before trial in the replevin suit, defendant recovers judgment of dismissal on failure of plaintiff's administratrix to come in. Lahey *v.* Brady, 1 Daly (N. Y.) 443.

62. Gerard *v.* Dill, 96 Ind. 101.

Similarly where defendant makes no allegation of ownership of, or right of possession to, the property replevied, and denies that it is in his possession, and plaintiff thereupon withdraws suit, and a judgment or dismissal is rendered, no action can be maintained against the sureties on the bond given by plaintiff for the prosecution of the action, and for the return of the property to defendant in case the possession thereof should be adjudged to him, or in case the action should abate or be discontinued before the property be so returned. Bown *v.* Weppner, 62 Hun (N. Y.) 579, 17 N. Y. Suppl. 193.

and where a proceeding, in which a defendant gives a replevin bond, is dismissed, the bond becomes *functus officio*, and hence there can be no recovery thereon.[63]

6. Effect of Payment of Judgment or Claim. The general rule is that payment of the original claim or satisfaction of the judgment in the replevin action is a complete discharge of principal and sureties on the replevin bond.[64] However, the surety on a replevin bond is not entitled to have the penalty of the bond reduced by reason of the fact that the property itself has been returned, but he still remains liable to the amount of the penalty for any other default of his principal, as for his failure to pay damages or costs adjudged against him.[65]

C. Rights and Discharge of Surety. The rules governing the rights and discharge of sureties generally [66] are applicable to sureties on replevin bonds,[67] and

63. Avery *v.* Popper, (Tex. 1898) 48 S. W. 572 [*modifying* (Civ. App.) 45 S. W. 951] (holding that where property seized under a writ of sequestration is replevied, the quashing of the sequestration discharges the replevin bond); Love *v.* Hudson, 24 Tex. Civ. App. 377, 59 S. W. 1127; Hail *v.* Tunstall, 21 Tex. Civ. App. 593, 54 S. W. 323; Lincoln *v.* Hollenbach, (Tex. Civ. App. 1899) 49 S. W. 686; Mitchell *v.* Bloom, (Tex. Civ. App. 1898) 46 S. W. 406, 91 Tex. 634, 45 S. W. 558.

64. Chambers *v.* Waters, 7 Cal. 390; Clements *v.* Dempsey, 7 Pa. Super. Ct. 52; Moore *v.* Campbell, 36 Vt. 361; Gage *v.* Allen, 84 Wis. 323, 54 N. W. 627.

65. Wyman *v.* Robinson, 73 Me. 384, 40 Am. Rep. 360 (where plaintiff in replevin gave a bond for one hundred and ten dollars, while the goods replevied greatly exceeded that amount in value. Defendant recovered for the value of the goods against a third party in whose hands they came, and it was held to be no defense to a suit on the bond for the unsatisfied damages); Hendly *v.* McIntyre, 132 N. C. 276, 43 S. E. 824.

66. See Principal and Surety, 32 Cyc. 149 *et seq.*

67. Edwards *v.* Cottrell, 43 Iowa 194 (holding that where a party claiming to be the owner of a chattel in the possession of another replevies the same, but before his interest is adjudged to be that of a mortgagee is entitled to the possession, the surety upon his replevin bond is discharged from liability thereon); Struman *v.* Robb, 37 Iowa 311 (holding that where attached goods are replevied by defendant, and he fails in both proceedings, and an execution is levied on the goods, the sureties on the replevin bond, in an action thereon, are entitled to have the proceeds of the levy first applied in discharge of their liability; and this right is *pro tanto* an equitable defense to the action at law); Quarch *v.* Metz, 15 Misc. (N. Y.) 622, 37 N. Y. Suppl. 218 (holding that where an undertaking given by defendant in replevin upon reclaiming the property has been approved, an order releasing one of the sureties thereon without the consent of plaintiff is erroneous); Clemmons *v.* Gorman, 7 Misc. (N. Y.) 45, 27 N. Y. Suppl. 354; Kimmel *v.* Kint, 2 Watts (Pa.) 431 (holding that signing judgment in a statute for rent in arrear without taking judgment *de retorno habendo* at common law discharges the replevin bond); Toland *v.* Swearingen, 39 Tex. 447 (holding that where plaintiff in replevin accepts a personal judgment, the sureties on his replevin bond are released).

If the principal in a replevin bond abandons the suit the surety may be permitted to prosecute for his own protection. Hoffman *v.* Steinau, 34 Hun (N. Y.) 239.

Discharge of surety by bankruptcy.— The liability of a surety on the replevin bond is provable in bankruptcy and is therefore a liability that is expunged by his discharge (Choate *v.* Quinichett, 12 Heisk. (Tenn.) 427); but it is no defense to an action against a surety on a replevin bond that the principal has become a bankrupt and obtained a certificate of discharge, and that therefore it has become impossible to fulfil the condition of the bond (Flagg *v.* Tyler, 6 Mass. 33), and the same rule is applicable to a surety on a redelivery bond (Robinson *v.* Soule, 56 Miss. 549). Discharge of surety by bankruptcy or insolvency generally see Principal and Surety, 32 Cyc. 227.

Where defendant in replevin by his laches or misconduct loses or waives his rights under the attachment lien, or renounces his right to a return by failing to make an avowry and pleading the general issue, or otherwise loses his rights in the particular case by his own neglect, the replevin bond thereby becomes inoperative, and the liability of the obligor terminates, although the condition of the bond has not been fulfilled. Persse *v.* Watrous, 30 Conn. 139; Snider's Sons Co. *v.* Armendt, 105 Ky. 317, 49 S. W. 10, 20 Ky. L. Rep. 1203, 88 Am. St. Rep. 306.

Where the trial of the replevin action was postponed at the instance of defendant, but without the direct assent or concurrence of the sureties, it was held that the sureties were discharged, the question being not whether they were injured by the delay but whether they might have been. Canniff *v.* Bogert, 6 U. C. C. P. 474. And see Daniels *v.* Patterson, 3 N. Y. 47, holding that where the replevin bond contains a condition that plaintiff shall prosecute "without delay" defendant loses his right of action on this condition if the prosecution is delayed for an unreasonable time with his consent.

The undertaking of a surety is to be strictly construed and cannot be varied or enlarged by judicial construction. Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254. Thus,

to sureties on redelivery bonds,[68] and thus the surety is discharged by any contract between the parties altering his position.[69] However, it has been held that

sureties on a replevin bond are not liable where no judgment of return has been rendered, although the verdict required such judgment. Mitchum *v.* Stanton, 49 Cal. 302; Reno *v.* Woodyatt, 81 Ill. App. 553; Thomas *v.* Irwin, 90 Ind. 557; New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974 (holding that in order to render the sureties liable on a bond given by defendant in replevin, under Minn. Gen. St. (1894) § 5278, the judgment for plaintiff must be one authorized by section 5420, and one which can be satisfied by a return of the property); Field *v.* Lumbard, 53 Nebr. 397, 73 N. W. 703. An action cannot be maintained against the sureties on a replevin bond for the amount of a judgment recovered in a proceeding other than that in which the undertaking was given. Cheatham *v.* Morrison, 31 S. C. 326, 9 S. E. 964. The same rule of strict construction applies to sureties on redelivery bonds. Lewin *v.* Stein, 7 Colo. App. 65, 42 Pac. 185; New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974, holding that the liability of the sureties cannot be changed or enlarged by any act of plaintiff in accepting or entering a judgment not authorized by statute.

Costs.— Where a redelivery bond in replevin is conditioned that the sureties will pay all costs and damages that may be adjudged against them, instead of "all costs and damages that may be adjudged against him (defendant) for taking or detention of the property," as required by Iowa Code, § 4172, they are not thereby rendered liable to a judgment against them for costs adjudged against defendant on a motion for continuance. American Soda Fountain Co. *v.* Dean Drug Co., 136 Iowa 312, 111 N. W. 534.

Transfer of action.— The sureties on a replevin bond are not discharged by the transfer of the replevin suit to another court by virtue of a statute. Reusch *v.* Demass, 34 Mich. 95.

Counter-claims.— The statutory undertaking given by a plaintiff in replevin, under N. Y. Code Civ. Proc. § 1699, to answer for "the payment to the defendant in any sum which the judgment awards to him against the plaintiff," has reference only to such damages as the statute authorizes in a replevin suit; and as sections 1730, 1731, 1733 preclude the rendition of an affirmative judgment for defendant for damages not connected with the chattel or the withholding of its possession, an action does not lie on the bond for the amount of a judgment on counter-claim disconnected from the chattels. Dickson *v.* Bickershoff, 48 Misc. (N. Y.) 353, 95 N. Y. Suppl. 585.

A release by plaintiff to one of several obligors in a replevin bond to the sheriff, after an assignment to plaintiff, releases all. Kirkendall *v.* Thomas, 7 U. C. Q. B. 30. Discharge of surety by release of cosurety, generally, see PRINCIPAL AND SURETY, 32 Cyc. 156.

68. See cases cited *infra*, this note.

A dismissal of the replevin suit by plaintiff releases the sureties from liability. Spencer *v.* Davidson, 5 Indian Terr. 231, 82 S. W. 731. Similarly the sureties are discharged by a voluntary dismissal as to one of the joint defendants who executed the bond. Tyler *v.* Davis, 63 Miss. 345. But the party for whose use the bond was taken is not estopped from maintaining a suit thereon by his knowledge of an unauthorized substitution of sureties, where his silence has in no way prejudiced the surety. Lowry *v.* Clark, 20 Pa. Super. Ct. 357.

The sureties are not released by the fact that the bond has been used as a set-off in another action (Jennings *v.* Hare, 104 Pa. St. 489), nor on the ground that the precise phraseology of the statute is not employed in the undertaking, where the legal effect of the language used is the same (John Church Co. *v.* Dorsey, 38 Misc. (N. Y.) 542, 77 N. Y. Suppl. 1065).

A secret and fraudulent arrangement between plaintiff and defendant in the replevin suit is no defense to the surety where he has not been prejudiced thereby. Hale *v.* Fitch, 8 Pa. St. 495.

An amendment in the replevin suit whereby plaintiffs are allowed to sue in different capacities and to add other plaintiffs, when authorized by law, does not release the surety. Jamieson *v.* Capron, 95 Pa. St. 15.

A surety cannot be released by plaintiff's attorney, without the consent of plaintiff. Lowry *v.* Clark, 20 Pa. Super. Ct. 357.

Delivery of the property to defendant must precede liability of sureties on the undertaking, although it is under seal, and such delivery must be alleged in the complaint in an action on the undertaking. Nickerson *v.* Chatterton, 7 Cal. 568.

69. Bolton *v.* Nitz, 88 Mich. 354, 50 N. W. 291, amendment of the writ after execution of the bond by which other property was inserted in the writ.

Voluntary submission of the replevin suit to arbitration, without the consent of the sureties on the replevin bond, discharges such sureties. Perkins *v.* Rudolph, 36 Ill. 306 (holding that the sureties in the bond undertake only that the principal will prosecute his suit with effect and without delay, and make a return of the property replevied if a return should be adjudged; and this undertaking to prosecute the writ with effect and without delay, as expressed, refers to its prosecution in court and not privately before arbitrators); Archer *v.* Hale, 4 Bing. 464, 6 L. J. C. P. O. S. 79, 1 M. & P. 285, 13 E. C. L. 590; Moore *v.* Bowmaker, 2 Marsh. 81, 3 Price 214, 6 Taunt. 379, 16 Rev. Rep. 628, 1 E. C. L. 663; Burke *v.* Glover, 21 U. C. Q. B. 294; Hutt *v.* Gilleland, 1 U. C. Q. B. 540. But see Aldridge *v.* Har-

any agreement that would be ineffectual to tie the hands of the creditor, as against the principal debtor, would likewise be ineffectual to operate as a discharge of the surety,[70] and where the statute gives plaintiff the election to take the value of the property instead of a return thereof, when successful in an action of replevin, the exercise of such election does not operate to release the sureties on the replevin bond.[71] There is considerable conflict of authority upon the question as to the liability of sureties upon a replevin bond, where performance of the bond is possible at the time it is made but before it can be performed becomes impossible by the death or destruction of the subject-matter, it being held in many jurisdictions that under such circumstances the obligors on the bond are thereby released.[72]

per, 10 Bing. 118, 2 L. J. C. P. 274, 3 Moore & S. 519, 25 E. C. L. 63. The rule is otherwise, however, where the sureties assent to the submission. Hutt *v.* Gilleland, 1 U. C. Q. B. 540. And see Burke *v.* Glover, 21 U. C. Q. B. 294. And where the parties in the replevin action submit the cause to arbitration, under an agreement that the award should have the same force and effect as a verdict, and should be final and the basis of a judgment, and the merits were tried, the obligors on the replevin bond are estopped to deny that the action was determined on the merits. Lee *v.* Grimes, 4 Colo. 185. And see Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651, holding that where an action in replevin is withdrawn, and the matters therein submitted to arbitrators, the parties are regarded as confessing the judgment, which may thereafter be entered according to its terms upon the award of arbitrators, and in such case neither the principal nor the sureties to the replevin bond will be discharged from their obligation by the reference to arbitrators.

The execution of a second replevin bond releases the surety in the first where it is expressly or by clear implication accepted in lieu of the first bond. Brooks *v.* Shepherd, 4 Bibb (Ky.) 572; Busch *v.* Fisher, 73 Mich. 370, 41 N. W. 325.

Where plaintiff in replevin dies pending the action, the cause of action survives, and defendant may procure an order against his personal representative and continue the suit and in such cases the sureties of plaintiff are liable on the bond. Corbett *v.* Pond, 10 App. Cas. (D. C.) 17; Strauss *v.* Merchants' L. & T. Co., 119 Ill. App. 588; Lahey *v.* Brady, 1 Daly (N. Y.) 443 [*distinguishing* Burkle *v.* Luce, 1 N. Y. 163]; Greer *v.* Howard, 41 Ohio St. 591; Barry *v.* Frayser, 10 Heisk. (Tenn.) 206. But it is a good bar to an action on a bond that after judgment against plaintiff in replevin he appealed, and before the sitting of the court on appeal, he died. Jenney *v.* Jenney, 14 Mass. 231.

70. Tousey *v.* Bishop, 22 Iowa 178 (holding that the sureties on a replevin bond will not be discharged by an agreement to stay execution against their principal, given on the understanding that such sureties were represented and satisfied, and under such circumstances that equity would not enjoin an execution taken out in violation of the agreement); London First Nat. Bank *v.* Gabbard, 55 S. W. 548, 21 Ky. L. Rep. 1441; Daniels *v.* Patterson, 3 N. Y. 47 (holding that the sureties in a replevin bond are not discharged by delay in prosecuting the replevin suit, where it does not appear to have been unreasonable and improper, although the prosecution of the suit was deferred with the assent of defendant, and without the knowledge of the sureties); Moore *v.* Bowmaker, 2 Marsh. 392, 4 Price 223, 7 Taunt. 97, 2 E. C. L. 277, 2 Marsh. 81, 3 Price 214, 6 Taunt. 379, 16 Rev. Rep. 628, 1 E. C. L. 663. And see Furber *v.* Bassett, 2 Duv. (Ky.) 433, holding that where the surety in a replevin bond writes to plaintiff, consenting to a stay of execution until a fixed time, and for a longer time if the principal requires it, he is not entitled to enjoin an execution issued more than one year after a former execution on the bond.

Plaintiff's appeal-bond in a replevin suit is a cumulative remedy in favor of defendant and does not supersede or take the place of the replevin bond given on the institution of the suit. Brabon *v.* Pierce, 34 Mich. 39; Campbell *v.* Lane, 2 Nebr. (Unoff.) 63, 95 N. W. 1043. Thus granting a writ of review and a supersedeas of the execution after judgment for defendant in the replevin suit, and taking a new bond which is not intended as a substitute for the original bond, will not discharge the original bond. Brown *v.* Brigham, 5 Allen (Mass.) 582. Similarly the giving of an appeal-bond does not release the sureties on the redelivery bond. Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004. See Drennen *v.* Shay, 6 Ohio S. & C. Pl. Dec. 341, 4 Ohio N. P. 184.

71. Thomson *v.* Joplin, 12 S. C. 580. But see Gerlaugh *v.* Ryan, 27 Iowa 226, 103 N. W. 128.

72. Walker *v.* Osgood, 53 Me. 422; Melvin *v.* Winslow, 10 Me. 397; Carpenter *v.* Stevens, 12 Wend. (N. Y.) 589, holding that if a live animal be replevied, and there is judgment of retorno habendo, it is a good plea to a suit on the replevin bond that the animal died without defendant's fault. And see Pait *v.* McCutchen, 43 Tex. 291, where one who believed his possession to be rightful executed a replevin bond for the delivery of a slave in 1857, and was afterward, when final judgment was rendered, prevented from delivery of the property by the laws of the United States and Texas, by reason of its having ceased to be property, and it was held that he was relieved thereby from all liability on his bond.

In other jurisdictions, however, the rule is laid down that destruction of the property after it is replevied constitutes no defense to an action on the replevin bond.[73] Where the condition of a replevin bond is possible of performance at the time it is made, but before it can be performed it becomes impossible through the act of God or of the law, or of the obligee, the obligor is thereby released.[74]

D. Extent of Liability — 1. In General. One who becomes surety on a replevin bond thereby becomes a joint debtor with the principal obligor,[75] and ordinarily his undertaking extends to all proceedings and adjudications in the same action through every court to which it may be carried by appeal in case the party giving the undertaking is finally defeated; [76] but a replevin bond conditioned only to prosecute the suit in replevin until the same is ended, and to pay such costs and damages as defendant in replevin might recover, does not extend to a judgment rendered on the review of such action.[77] Exemplary or punitive damages are not allowed,[78] and the general rule is that in an action on the replevin bond the recovery cannot exceed the penalty named in the bond.[79]

2. Measure of Damages — a. General Rule. The general rule of damages in a suit on the replevin bond is the value of the property, if it cannot be returned,[80]

73. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476]; Suppiger *v.* Gruaz, 137 Ill. 216, 27 N. E. 22 [*affirming* 36 Ill. App. 60]; Barry *v.* Frayser, 10 Heisk. (Tenn.) 206 [*distinguishing* Mosely *v.* Baker, 2 Sneed (Tenn.) 362]. But see Bobo *v.* Patton, 6 Heisk. (Tenn.) 172, 19 Am. Rep. 593.

The effect of giving a redelivery bond is to impose on defendants an obligation to account to plaintiffs for the value of the property, even though after the execution of the bond it is destroyed without fault on their part. Hinkson *v.* Morrison, 47 Iowa 167; Hazlett *v.* Witherspoon, (Miss. 1899) 25 So. 150; McPherson *v.* Acme Lumber Co., 70 Miss. 649, 12 So. 857; George *v.* Hewlett, 70 Miss. 1, 12 So. 855, 35 Am. St. Rep. 626 [*overruling* Whitfield *v.* Whitfield, 44 Miss. 254]; Bradley *v.* Campbell, 132 Mo. App. 78, 111 S. W. 514. *Compare* Pope *v.* Jenkins, 30 Mo. 528 (where the subject-matter of the suit, a slave, was retained by defendant under a forthcoming bond, and it was held that the death of the slave pending suit released defendants from liability); Jennings *v.* Sparkman, 48 Mo. App. 246.

74. Badlam *v.* Tucker, 1 Pick. (Mass.) 284. But see Harrison *v.* Wilkin, 78 N. Y. 390, holding that it is no defense to an action on an undertaking in replevin that the property was in such a position that it could not be reached.

Injunction restraining return. — Failure of plaintiff to return goods taken under a replevin bond after the suit is decided against him is not excused by the fact that he was prevented from returning the goods by an injunction, issued by a stranger after the proper demand was made by defendant for their return, provided plaintiff was in a position at that time to make the return. Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670.

75. Corbett *v.* Pond, 10 App. Cas. (D. C.) 17; Walls *v.* Johnson, 16 Ind. 374; Hutchins *v.* Hanna, 8 Ind. 533; McCormick Harvesting Mach. Co. *v.* Fisher, 63 Kan. 199, 65 Pac. 223; Harris *v.* Keckley, 2 McMull. (S. C.) 196.

A plaintiff in replevin who joins in the undertaking to prosecute the action and restore the property delivered to him, in case of judgment to that effect, is bound by the terms of the instrument to the same extent as any other obligor. Buck *v.* Lewis, 9 Minn. 314.

76. Letson *v.* Dodge, 61 Barb. (N. Y.) 125, holding that an action will lie on such undertaking after final judgment in the supreme court affirming a judgment against plaintiff recovered in a justice's court.

77. Bell *v.* Bartlett, 7 N. H. 178.

78. Dalby *v.* Campbell, 26 Ill. App. 502.

79. *Colorado.*— Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

Delaware.—Truitt *v.* Collins, 2 Pennew. 36, 45 Atl. 541.

Illinois.— Odell *v.* Hole, 25 Ill. 204.

Indiana.— Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463.

Massachusetts.—Wright *v.* Quirk, 105 Mass. 44; Leighton *v.* Brown, 98 Mass. 515.

Michigan.— Fraser *v.* Little, 13 Mich. 195, 87 Am. Dec. 741.

Nebraska.— Kaufman *v.* Wessel, 14 Nebr. 161, 15 N. W. 219.

New York.— Pettit *v.* Allen, 64 N. Y. App. Div. 579, 72 N. Y. Suppl. 287; Gould *v.* Warner, 3 Wend. 54.

Oregon.— Carlon *v.* Dixon, 14 Oreg. 293, 12 Pac. 394.

Pennsylvania.— Balsley *v.* Hoffman, 13 Pa. St. 603.

Texas.— Miles *v.* Davis, 36 Tex. 690.

Vermont.— Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

Canada.—Heley *v.* Cousins, 34 U. C. Q. B. 63. See 42 Cent. Dig. tit. "Replevin," § 487.

80. *Alabama.*— Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

California.— Mitchum *v.* Stanton, 49 Cal. 302; Ginaca *v.* Atwood, 8 Cal. 446.

Connecticut.—Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928; Ormsbee *v.* Davis, 16 Conn. 567.

Illinois.— Martin *v.* Hertz, 118 Ill. App. 297 [*affirmed* in 224 Ill. 84, 79 N. E. 558].

at the time at which it was taken in replevin,[81] with damages added thereto for its

Indiana.— Ringgenberg *v.* Hartman, (1889) 20 N. E. 637, 124 Ind. 186, 24 N. E. 987; Walls *v.* Johnson, 16 Ind. 374.

Kentucky.— Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283.

Maine.— Wyman *v.* Robinson, 73 Me. 384, 40 Am. Rep. 360.

Massachusetts.—Parker *v.* Simonds, 8 Metc. 205.

New Jersey.— Peacock *v.* Haney, 37 N. J. L. 179; Lutes *v.* Alpaugh, 23 N. J. L. 165.

New York.— Pettit *v.* Allen, 64 N. Y. App. Div. 579, 72 N. Y. Suppl. 287.

Ohio.— Berwanger *v.* Bristol, 3 Ohio S. & C. Pl. Dec. 683, 3 Ohio N. P. 161.

Pennsylvania.— Krumbhaar *v.* Stetler, 10 Pa. Co. Ct. 12; Chase *v.* Sherwood, 4 Lack. Leg. N. 271.

Tennessee.— Muhling *v.* Ganeman, 4 Baxt. 88.

Texas.— Talcott *v.* Rose, (Civ. App. 1901) 64 S. W. 1009.

Canada.— Ruttan *v.* Short, 12 U. C. Q. B. 485.

See 42 Cent. Dig. tit. "Replevin," § 488.

Where the value of the property is diminished by the use of it and by lapse of time, it has been held that the obligors in the replevin bond would be bound by the value of the property named in the bond. Howe *v.* Handley, 28 Me. 241.

The price at which defendant sold the property is no measure of damages on the bond. Schrader *v.* Wolflin, 21 Ind. 238. See Busch *v.* Fisher, 89 Mich. 192, 50 N. W. 788, holding that in an action on a bond given in replevin for logs, where, after the suit was brought, defendant manufactured some of the logs into lumber, the recovery is limited to the value of the logs, without reference to the value of the lumber, the bond having taken the place of the property.

In an action on a bond given for goods seized under execution the damages should not exceed the amount of the execution. Roman *v.* Stratton, 2 Bibb (Ky.) 199.

On a writ of inquiry of damages on a judgment by default or on demurrer for plaintiff in an action on a replevin bond, the value of the property as set out in the replevin is *prima facie* the measure of damages, subject to parol evidence of the actual value. Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29.

Where property is bona fide replevied in the maintenance of supposed rights, the measure of damages in a suit on the replevin bond, on the failure of plaintiff to return the property after judgment for defendant, is held to be the extent of the injuries sustained by the latter on account of such failure, and not necessarily the value of the property. Warner *v.* Matthews, 18 Ill. 83; Jackson *v.* Bry, 3 Ill. App. 586.

Where the obligee has only a special interest in or lien upon the property replevied, the measure of damages in an action on the bond is the value of such special interest. Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651; Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930; David *v.* Bradley, 79 Ill. 316; King *v.* Ramsay, 13 Ill. 619; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161; Clement *v.* Duffy, 54 Iowa 632, 7 N. W. 85; Bartlett *v.* Kidder, 14 Gray (Mass.) 449; Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155, 1 Am. St. Rep. 603; Lindner *v.* Brock, 40 Mich. 618; Claggett *v.* Richards, 45 N. H. 360; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727. And see Parker *v.* Simonds, 8 Metc. (Mass.) 205. But a party having a special interest in the property is entitled to recover, in an action on the bond, as against a stranger having no interest therein, not merely to the extent of his special interest, but the full value of the property; and the excess beyond his special interest he will hold in trust for the general owner. Atkins *v.* Moore, 82 Ill. 240; Smith *v.* Lisher, 23 Ind. 500; Farnham *v.* Moor, 21 Me. 508; Williams *v.* Vail, 9 Mich. 162, 80 Am. Dec. 76; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727.

In an action on a redelivery bond the undertaking of defendant to pay the assessed value of the property is construed to mean the value assessed by the judgment, rendered on the verdict, and not the value assessed by the appraisers. Berwanger *v.* Bristol, 3 Ohio S. & C. Pl. Dec. 683. The sureties are, however, liable to the full extent of the verdict rendered in the replevin suit. Parish *v.* Smith, 66 S. C. 424, 45 S. E. 16. The return of the property, or any part thereof, reduces the obligation of the sureties to the extent of the property returned at the value designated in the bond. Larabee *v.* Cook, (Kan. App. 1899) 61 Pac. 815.

81. *Connecticut.*— Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Illinois.— Plano Mfg. Co. *v.* Downey, 100 Ill. App. 36.

Kansas.— Edwards *v.* Bricker, (1903) 71 Pac. 587.

Maine.— Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Thomas *v.* Spofford, 46 Me. 408; Smith *v.* Dillingham, 33 Me. 384.

Texas.—McLeod Artesian Well Co. *v.* Craig, (Civ. App. 1897) 43 S. W. 934.

United States.— Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799.

Canada.—Patterson *v.* Fuller, 32 U. C. Q. B. 240.

See 42 Cent. Dig. tit. "Replevin," § 495.

But under other statutes the value of the property is held to be determined as of the time of the judgment or order for return. Lindsey *v.* Hewitt, 42 Ind. App. 573, 86 N. E. 446; Leighton *v.* Brown, 98 Mass. 515; Swift *v.* Barnes, 16 Pick. (Mass.) 194; Caldwell *v.* West, 21 N. J. L. 411; Talcott *v.* Rose, (Tex. Civ. App. 1901) 64 S. W. 1009. And see Pure Oil Co. *v.* Terry, 209 Pa. St. 403, 58 Atl. 814, where in replevin plaintiff allowed the property to remain in the possession of

detention,[82] and interest on the value of the property from the date of the judgment of return,[83] and costs and expenses of the main action,[84] in some jurisdic-

defendant until its sale, when part of it was purchased by defendant. Thereafter the replevin suit was tried, and judgment rendered for defendant, who sued on the replevin bond, and it was held that the measure of damages is the price paid by defendant for such of the goods as he bought at the sale, together with the actual value of the remainder at the time it was sold to others and taken away. And when the goods are not returned at the time of the demand upon the writ of return, if they shall then be of an increased market value, plaintiff is entitled to the value of the goods replevied at the date of demand on the writ of return. Treman *v.* Morris, 9 Ill. App. 237; Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Tuck *v.* Moses, 58 Me. 461.

82. Sopris *v.* Lilley, 2 Colo. 496; Pace *v.* Neal, 92 Ill. App. 416; Stevens *v.* Tuite, 104 Mass. 328; Parker *v.* Simonds, 8 Metc. (Mass.) 205; Arnold *v.* Bailey, 8 Mass. 145; Scott *v.* Elliott, 63 N. C. 215.

Double damages.— The obligation of sureties to the return bond in actions for the delivery of personal property, under Mo. Pr. Act (1849), § 8, cannot be extended to the payment of double damages, for the detention of the property by plaintiff. Collins *v.* Hough, 26 Mo. 149.

Although not assessed in the replevin suit, damages may be recovered for detention in an action on the bond. Shepard *v.* Butterfield, 41 Ill. 76; Thomas *v.* Spofford, 46 Me. 408.

But damages pending the replevin suit and before judgment for return was given cannot be recovered unless they were awarded in the replevin suit. Sopris *v.* Lilley, 2 Colo. 496.

Where the property is returned in a damaged condition, the amount of depreciation in value of such property as a result of such injury is a proper element of damages in an action on the replevin bond. Franks *v.* Matson, 211 Ill. 338, 71 N. E. 1011; Yelton *v.* Slinkard, 85 Ind. 190; Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799. But the amount of depreciation in the value of the property during the time of detention cannot be recovered in such action, unless the depreciation was occasioned by defendant's fault. Odell *v.* Hole, 25 Ill. 204.

83. *Alabama.*— Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

Illinois.— Hopkins *v.* Ladd, 35 Ill. 178; Pace *v.* Neal, 92 Ill. App. 416.

Indiana.— Story *v.* O'Dea, 23 Ind. 326; Walls *v.* Johnson, 16 Ind. 374.

Kentucky.— Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283.

Maine.— Howe *v.* Handley, 28 Me. 241.

Massachusetts.—Stevens *v.* Tuite, 104 Mass. 328; Huggeford *v.* Ford, 11 Pick. 223; Arnold *v.* Bailey, 8 Mass. 145.

New Jersey.— Peacock *v.* Haney, 37 N. J. L. 179; Caldwell *v.* West, 21 N. J. L. 411.

See 42 Cent. Dig. tit. "Replevin," § 490.

Where the damages equal the penalty of the bond, it is error to allow interest from the judgment in replevin as against the surety on the bond. Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

84. *California.*— Mitchum *v.* Stanton, 49 Cal. 302, holding that if the statutory form of the undertaking is followed, defendant can recover the value of the property and costs, on a judgment in his favor in the appellate court.

Delaware.— Truitt *v.* Collins, 2 Pennew. 36, 45 Atl. 541.

Illinois.— Larson *v.* Laird, 36 Ill. App. 402.

Indiana.— Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463, holding, however, that although costs incurred in defending a replevin suit are recoverable by defendant in an action on the replevin bond, costs made by plaintiff are not so recoverable.

Kentucky.— Galloway Bethume, 6 Bush 113.

Maine.— Howe *v.* Handley, 28 Me. 241; Hovey *v.* Coy, 17 Me. 266.

Minnesota.— Katz *v.* American Bonding, etc., Co., 86 Minn. 168, 90 N. W. 376.

Mississippi.— Sparks *v.* Hopsen, 83 Miss. 124, 35 So. 446; Phillips *v.* Cooper, 59 Miss. 17, holding that Code (1871), § 1535, relating to replevin, and declaring that the successful party may have his distringas to compel the delivery of the property, together with a fieri facias for damages and costs, the sureties on defendant's bond are liable for costs, although the bond is executed in the form prescribed by section 1530, and does not expressly include costs.

Nebraska.— Campbell *v.* Lane, 2 Nebr. (Unoff.) 63, 95 N. W. 1043.

New York.— Tibbles *v.* O'Connor, 28 Barb. 538.

North Carolina.— Hall *v.* Tillman, 110 N. C. 220, 14 S. E. 745.

Oregon.— Carlon *v.* Dixon, 14 Oreg. 293, 12 Pac. 394.

Pennsylvania.— Tibbal *v.* Cahoon, 10 Watts 232; Phillips *v.* Hyde, 1 Dall 439, 1 L. ed. 213.

South Carolina.— Rhodes *v.* Burkart, 28 S. C. 154, 5 S. E. 347.

Texas.— McLeod Artesian Well Co. *v.* Craig, (Civ. App. 1897) 43 S. W. 934.

England.— Branscombe *v.* Scarbrough, 6 Q. B. 13, 13 L. J. Q. B. 247, 51 E. C. L. 13.

Canada.— Burn *v.* Blecher, 14 U. C. C. P. 415.

See 42 Cent. Dig. tit. "Replevin," § 494.

Similarly a surety on a redelivery bond is not, after judgment against the obligor, exonerated by a delivery of the property merely, but is liable for damages and costs as well (Morrill *v.* Daniel, 47 Ark. 316, 1 S. W. 702; Phillips *v.* Cooper, 59 Miss. 17; John Church Co. *v.* Dorsey, 38 Misc. (N. Y.) 542, 77 N. Y. Suppl. 1065); even though the bond is

tions including the usual customary attorney's fees,[85] and the necessary expenses incurred by him by reason of the wrongful prosecution of the main suit.[86]

b. Nominal Damages. Only nominal damages can be allowed in an action on the replevin bond where the value of the property and value of its use since the judgment was given in the replevin suit are not shown,[87] or where there was no decision as to the merits of the case in the action in which the bond was given.[88] Where it appears that the obligee in the bond has no title to the property, or right to possession, he is entitled to only nominal damages where the principal obligor is defeated in the replevin suit,[89] and where there is only a technical breach of the bond, and the obligor therein has recovered the value of the property, he can only recover nominal damages in an action on the bond.[90]

E. Conclusiveness of Adjudication in Replevin Proceedings — 1. Judgment on the Merits — a. General Rule.[91] The general rule as to the conclusiveness upon the surety on a bond given in the course of legal proceedings, of a judgment against the principal,[92] applies to a surety upon a replevin bond,

silent on the subject (Sparks *v.* Hopsen, 83 Miss. 124, 35 So. 446); but in the absence of an order in the replevin suit for a return of the property, no damages for detention accruing subsequently can be recovered in an action on the bond (Colorado Springs Co. *v.* Hopkins, 5 Colo. 206), and where defendant is awarded possession of the property, the sureties are not liable for the costs of a motion for a continuance which was decided against him (American Soda Fountain Co. *v.* Dean Drug Co., 136 Iowa 312, 111 N. W. 534). A distinction has been made, however, between a replevin bond and a redelivery bond, in some cases, the rule being laid down that the costs in the replevin action may be recovered in an action on the replevin bond, but not in an action on the redelivery bond. Lutes *v.* Alpaugh, 23 N. J. L. 165; Brock *v.* Bolton, 37 S. C. 40, 16 S. E. 370 [*distinguishing* Rhodes *v.* Burkart, 28 S. C. 154, 5 S. E. 347], holding that a bond given by defendant in replevin, conditioned to return the property in dispute on order of the court and to pay any damages awarded against him, does not include costs.

In Missouri the surety on a replevin bond is not rendered liable by the statute for the costs of the suit. Morrow *v.* Shepherd, 9 Mo. 214.

Liability of surety to principal.—The surety on a forthcoming bond, given by plaintiff in replevin, is not liable thereon to his principal for plaintiff's costs. Hallman *v.* Dellinger, 84 N. C. 1.

Costs of writ of retorno habendo.— On a condition in a replevin bond to make return of the property if awarded, the costs of a writ of retorno habendo are recoverable distinct from the costs in the judgment. Langdoc *v.* Parkinson, 2 Ill. App. 136.

85. Jones *v.* Findley, 84 Ga. 52, 10 S. E. 541; Gilbert *v.* Sprague, 196 Ill. 444, 63 N. E. 993 [*reversing* 88 Ill. App. 508]; Richardson *v.* Gilbert, 135 Ill. App. 363; Pace *v.* Neal, 92 Ill. App. 416; Washburne *v.* Burke, 84 Ill. App. 587; Scott *v.* Rogers, 56 Ill. App. 571; Siegel *v.* Hanchett, 33 Ill. App. 634; Harts *v.* Wendell, 26 Ill. App. 274. See, however, Reno *v.* Woolyatt, 81 Ill. App. 553, holding that in an action on a replevin bond, where the writ in the original suit was not wrongfully sued out, the sureties on the bond are not liable for the attorney's fees to defendant in the replevin suit.

In other jurisdictions, however, the obligors in the replevin bond are liable only for the damages assessed in the action of replevin against plaintiff, and the taxable costs, and are not liable for the amount paid by defendant to his attorneys in defending the action. Davis *v.* Crow, 7 Blackf. (Ind.) 129; Consolidated Tank Line Co. *v.* Bronson, 2 Ind. App. 1, 28 N. E. 155; Edwards *v.* Bricker, 66 Kan. 241, 71 Pac. 587; Kenley *v.* Com., 6 B. Mon. (Ky.) 583; Kentucky Land, etc., Co. *v.* Crabtree, 80 S. W. 1161, 26 Ky. L. Rep. 283; Williams *v.* Crow, 10 Ont. App. 301.

86. *Connecticut.*—Gould *v.* Hayes, 71 Conn. 86, 40 Atl. 930.

Delaware.— Truitt *v.* Collins, 2 Pennew. 136, 45 Atl. 541.

Illinois.— Harts *v.* Wendell, 26 Ill. App. 274.

Indiana.— Davis *v.* Crow, 7 Blackf. 129.

Kansas.— Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025.

Maine.— Washington Ice Co. *v.* Webster, 62 Me. 341, 16 Am. Rep. 462; Howe *v.* Handley, 28 Me. 241.

United States.—Alexander *v.* Thomas, 1 Fed. Cas. No. 174, 1 Cranch C. C. 92.

87. Sopris *v.* Lilley, 2 Colo. 496; Morrison *v.* Yancey, 23 Mo. App. 670.

88. Webber *v.* Mackey, 31 Ill. App. 369; Miller *v.* Cheney, 88 Ind. 466; Robinson *v.* Teeter, 10 Ind. App. 698, 38 N. E. 222; Little *v.* Bliss, 55 Kan. 94, 39 Pac. 1025.

89. Stockwell *v.* Byrne, 22 Ind. 6; Consolidated Tank Line Co. *v.* Bronson, 2 Ind. App. 1, 28 N. E. 155; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256; Smith *v.* Whiting, 100 Mass. 122.

90. Stuart *v.* Trotter, 75 Iowa 96, 39 N. W. 212.

91. Evidence admissible in mitigation of damages see *infra*, VII, G, 6, b, (III).

92. See Judgments, 23 Cyc. 1278.

and he is conclusively bound by the judgment against the principal as to all matters which were, or might have been, litigated in the main action,[93] although he was not served with process and did not appear and defend,[94] and the surety cannot question the judgment upon any other ground than fraud or mistake;[95] and similarly matters litigated in the replevin suit cannot be reëxamined in a suit upon the redelivery bond.[96] Thus the amount of the judgment in replevin is conclusive in a subsequent action on a replevin bond for a breach thereof.[97] But the surety is not bound as to matter not respecting the merits of the replevin suit and not necessary to be pleaded therein;[98] and evidence that the judgment was subsequently satisfied by a delivery of the property is not objectionable as impeaching the record of the judgment, or the return by the officer in the replevin suit,[99] and the surety upon a replevin bond may prove in discharge of his liability that he has complied with the contract by offering to return the goods in accordance with the condition of the bond.[1]

93. *Illinois.*— Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476]; Warner *v.* Matthews, 18 Ill. 83. See Buckmaster *v.* Beames, 9 Ill. 443.

Indiana.— Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633 (holding that it is a universal rule that matters litigated in the replevin suit cannot be retried in a suit on the bond, and it will be presumed that all matters that might have been, were litigated); Lindsey *v.* Hewitt, (App. 1908) 86 N. E. 446.

Iowa.— Hershler *v.* Reynolds, 22 Iowa 152, holding that during the pendency of a replevin suit the sureties to the replevin bond are treated as in court; and, not objecting, they are concluded by a judgment or order to which the principal consents on condition that the execution is stayed for a time, although execution is so stayed.

Kansas.— Boyd *v.* Huffaker, 39 Kan. 525, 18 Pac. 508.

New York.— Christiansen *v.* Mendham, 45 N. Y. App. Div. 554, 61 N. Y. Suppl. 326 [*affirming* 28 Misc. 765, 59 N. Y. Suppl. 1100].

Oregon.— Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

South Carolina.— Cheatham *v.* Morrison, 37 S. C. 187, 15 S. E. 924.

Tennessee.— Wells *v.* Griffin, 2 Head 568.

Canada.— Meyers *v.* Maybee, 10 U. C. Q. B. 200.

See 42 Cent. Dig. tit. "Replevin," § 498.

But see Truitt *v.* Collins, 2 Pennew. (Del.) 36, 45 Atl. 541.

If the pendency of bankrupt proceedings invalidates a levy, they should be shown in an action of replevin to recover the value of the goods levied on, and not withheld to be litigated in proceedings relating to the replevin bond. Jacobson *v.* Metzgar, 43 Mich. 403, 5 N. W. 445.

One who replevies property transferred to him in fraud of creditors, and levied upon accordingly, cannot after suffering judgment in replevin enjoin a suit on the replevin bond, on the ground that the debtor had made a composition with creditors and thereby recovered his assets. Jacobson *v.* Metzgar, 43 Mich. 403, 5 N. W. 445.

A surety on a replevin bond cannot object to the form of proceeding against the principal; the surety is bound by the result of the litigation, although the principal waive the form. Greenlaw *v.* Logan, 2 Lea (Tenn.) 185.

A judgment by confession in the replevin suit is as binding on the sureties on the redelivery bond as a judgment on verdict, in the absence of fraud and collusion. Bradford *v.* Frederick, 101 Pa. St. 445.

94. Craig *v.* Herring, 80 Ga. 709, 6 S. E. 283 [*distinguishing* Neal *v.* Gordon, 60 Ga. 112]; Moore *v.* Kepner, 7 Nebr. 291, holding that by signing the replevin bond the surety submits himself to the jurisdiction of the court, and is not entitled to notice to defend, but is bound by the judgment against his principal.

95. Richardson *v.* People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100.

96. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206; Kennedy *v.* Brown, 21 Kan. 171; O'Loughlin *v.* Carr, 9 Kan. App. 818, 60 Pac. 478.

A sheriff's return of elongata to a writ de retorno habendo on judgment for a return in replevin is conclusive in an action on the replevin bond. Caldwell *v.* West, 21 N. J. L. 411; Phillips *v.* Hyde, 1 Dall. (Pa.) 439, 1 L. ed. 213.

97. Cantril *v.* Babcock, 11 Colo. 142, 458, 18 Pac. 342, 17 Pac. 296; Huggeford *v.* Ford, 11 Pick. (Mass.) 223; Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792; Parish *v.* Smith, 66 S. C. 424, 45 S. E. 16; Thompson *v.* Joplin, 12 S. C. 580.

98. David *v.* Bradley, 79 Ill. 316; Easter *v.* Foster, 173 Mass. 39, 53 N. E. 132, 73 Am. St. Rep. 257; Leonard *v.* Whitney, 109 Mass. 265; Davis *v.* Harding, 3 Allen (Mass.) 302.

Damages recovered by an attaching officer, in a replevin suit brought against him in which the property attached is replevied, being recovered in trust, are not conclusive upon the parties in a suit on the replevin bond. Howe *v.* Handley, 28 Me. 241.

99. Dempsey *v.* Cogswell, 29 Minn. 100, 12 N. W. 148.

1. Johnson *v.* Mason, 64 N. J. L. 258, 45 Atl. 618.

b. Title and Right to Possession. Where the judgment in replevin passes upon the question of title or possession to the property, the matter is *res judicata* in an action on the replevin bond,[2] and the rule is the same in an action on the redelivery bond,[3] and the obligee in a replevin bond cannot avoid a recovery against him on such bond by showing that the property replevied belonged to a stranger.[4] But unless the title to the property is put in issue and determined, a judgment in the replevin suit determines nothing beyond the right of possession, and evidence bearing on title and real ownership is admissible in an action on the bond as affecting the measure of damages,[5] and a plea in bar by the obligor as to all except nominal damages is admissible.[6] When the judgment in the replevin suit is in favor of defendant, plaintiff in that suit is estopped, in an action on a replevin bond, to deny that one of the obligees had any interest in the bond, on the ground that he had no interest in property involved in the suit.[7]

2. Dismissal or Nonsuit. While it has been held that where plaintiff in the replevin suit has voluntarily dismissed or submitted to a nonsuit, defendant in an action on the bond cannot show property in plaintiff in replevin, in bar of the action or in mitigation of damages,[8] the better and more generally followed rule

2. McMurchy *v.* O'Hair, 67 Ill. 242; Warner *v.* Matthews, 18 Ill. 83; Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; Woods *v.* Kessler, 93 Ind. 356; Davis *v.* Crow, 7 Blackf. (Ind.) 129; Hawley *v.* Warner, 12 Iowa 42; Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74, holding, however, that where an action in replevin was tried on issues to a plea of *non cepit* and property in defendant, and judgment on both issues was for defendant, although the obligor could not show in mitigation of damages that the title to the property was in plaintiff, as this was decided in that suit, he might show that title of plaintiff was of short duration and terminated by contract a short time after judgment.

Where goods owned in common and replevied from one of the owners by the others are not restored by them on a judgment for a return with judgment does not estop them from proving the common ownership of the goods on the question for what sum he shall take execution on a judgment in his favor on the replevin bond. Leonard *v.* Whitney, 109 Mass. 265.

3. Boyd *v.* Huffaker, 40 Kan. 634, 20 Pac. 459.

Subsequently acquired title.— Where a judgment for defendant and for a return of the property has been rendered in an action of replevin, plaintiff cannot, in an action against him, upon his bond, for failure to deliver the property, set up in defense to such action a new title to the property, acquired after the replevin bond was given, and before the judgment of return. Carr *v.* Ellis, 37 Ind. 465.

4. Smith *v.* Lisher, 23 Ind. 500; Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381. But see Walter *v.* Warfield, 2 Gill (Md.) 216, where defendant in replevin pleaded property in S, and, on judgment in his favor, brought an action on the bond, and it was held that the damages which he could recover thereon were only such as he had suffered personally by reason of the action in replevin, and defendants, in an action on the bond, might therefore show that S was the owner of the property, and that defendant in replevin had no personal interest therein.

5. *Connecticut.*— Fielding *v.* Silverstein, 70 Conn. 605, 40 Atl. 454.

Illinois.— Gilbert *v.* Sprague, 196 Ill. 444, 63 N. E. 993 [*reversing* 88 Ill. App. 508]; O'Donnell *v.* Colby, 153 Ill. 324, 38 N. E. 1065 [*reversing* 55 Ill. App. 112, 38 Ill. App. 196] (holding also that the rule applies where the merits were not determined because the court issuing the replevin writ had no jurisdiction); Warner *v.* Matthews, 18 Ill. 83; Hock *v.* Magerstadt, 124 Ill. App. 140; Lyon *v.* Pease, 86 Ill. App. 251; Farson *v.* Gilbert, 85 Ill. App. 364; Holler *v.* Coleson, 23 Ill. App. 324 (holding that in such case defendant might plead a qualified title in himself); Rankin *v.* Kinsey, 7 Ill. App. 215.

Indiana.— Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161; Wallace *v.* Clark, 7 Blackf. 298; Sherry *v.* Foresman, 6 Blackf. 56.

Iowa.— Hawley *v.* Warner, 12 Iowa 42; Buck *v.* Rhodes, 11 Iowa 348.

Maryland.— Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591; Mason *v.* Sumner, 22 Md. 312.

Michigan.— Simmons *v.* Robinson, 101 Mich. 240, 59 N. W. 623.

New York.— Freeman *v.* U. S. Fidelity, etc., Co., 43 Misc. 364, 87 N. Y. Suppl. 493.

See 42 Cent. Dig. tit. "Replevin," § 499.

Evidence admissible in mitigation of damages see *infra*, VII, G, 6, b, (III).

6. Stockwell *v.* Byrne, 22 Ind. 6.

7. Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

8. Clark *v.* Howell, 3 Colo. 564, under Rev. St. p. 540, § 14. See Ormsbee *v.* Davis, 16 Conn. 567, holding that where goods attached are replevied by a third person as his own, and a judgment in the replevin action for return thereof recovered on plaintiff's failure to prosecute his action, the replevin judgment is conclusive of the attachment plaintiff's right to have the property to satisfy a judgment recovered by him in his attachment suit, in an action against an estate on the replevin

is that when the merits of the replevin suit were not determined at the trial, great latitude is allowed in pleading defenses to the suit on the bond, and a plaintiff who has submitted to a nonsuit or dismissed the action of replevin may, when sued on the bond, prove title to the property in reduction of damages.[9]

F. Remedies in General. In the absence of express statutory provision, summary judgment rendered against the principal and sureties in a replevin bond, jointly, without any direct proceeding upon the bond, is erroneous.[10] The bond can only be made the foundation of a judgment by an action upon it,[11] either of debt,[12] or by scire facias,[13] in which the surety is a party. In some jurisdictions, however, the statutes provide for proceedings by rule or motion for judgment and award of execution on the replevin bond, after breach thereof,[14] and where a judgment is rendered against plaintiff in replevin, it may at the same time be entered up against the sureties on his replevin bond.[15] Such proceeding, however, being

bond for failure of his principal to deliver up the property.

9. Hanchett *v.* Gardner, 138 Ill. 571, 28 N. E. 788 [*affirming* 37 Ill. App. 79] (under Rev. St. c. 118, § 26); Stevison *v.* Earnest, 80 Ill. 513; Hulman *v.* Benighof, 125 Ind. 481, 25 N. E. 549 (under Rev. St. (1881) § 572); Robinson *v.* Teeter, 10 Ind. App. 698, 38 N. E. 222; Belt *v.* Worthington, 3 Gill & J. (Md.) 247; Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. 155, 1 Am. St. Rep. 603.

Waiver of return of property.— Where judgment by default was recovered against plaintiff in replevin, whereupon defendant waived a return of the property in controversy and had his damages assessed, in an action on the replevin bond the obligors could not show in mitigation of damages that the principal obligor, plaintiff in replevin suit, was a part-owner of the property in question, as allowed by Mich. Comp. Laws, § 677, in case where judgment for return is taken. Ryan *v.* Akeley, 42 Mich. 516, 4 N. W. 207.

10. Hurd *v.* Gallaher, 14 Iowa 394; Jansen *v.* Effey, 10 Iowa 227; Gay *v.* Morgan, 4 Bush (Ky.) 606; Thompson *v.* Raymon, 7 How. (Miss.) 186; Bancroft-Whitney Co. *v.* Gowan, 24 Wash. 66, 63 Pac. 1111; Eidson *v.* Woolery, 10 Wash. 225, 38 Pac. 1025.

11. Gay *v.* Morgan, 4 Bush (Ky.) 606; Thompson *v.* Raymon, 7 How. (Miss.) 186; Mariany *v.* Lemaire, (Tex. Civ. App. 1904) 83 S. W. 215.

12. Leland *v.* Barry, 69 Ill. 348; Peck *v.* Wilson, 22 Ill. 205 (holding that an action of debt on a forfeited replevin bond is not such a contract as is contemplated by the third and fourteenth sections of the Practice Act for the courts of Cook county. Those sections relate to contracts for the payment of money as damages arising from a breach on contract, and a plea to an action on such a bond should not be stricken from the files for want of an affidavit of merits); Manning *v.* Pierce, 3 Ill. 4; Salter *v.* Richardson, 3 T. B. Mon. (Ky.) 204; Chalfant *v.* Hart, 1 A. K. Marsh. (Ky.) 572; Pemble *v.* Clifford, 2 McCord (S. C.) 31.

13. Thompson *v.* Raymon, 7 How. (Miss.) 186; Pemble *v.* Clifford, 2 McCord (S. C.) 31, holding, however, that a proceeding by scire facias on a replevin bond cannot be resorted to unless the writ pro retorno habendo be issued and returned *elongata*.

Where execution might issue without revivor.— If scire facias be sued out on a replevin bond, upon which execution might have issued without revivor, a demurrer will be sustained to the writ. Davenport *v.* Irvine, 4 J. J. Marsh. (Ky.) 60.

14. Vannerson *v.* Staunton, —— Walk. (Miss.) 358 (holding that the motion, on a replevin bond, given by a tenant on replevying the goods distrained for rent under the statute, should be for execution, and not for judgment; the bond operating, after forfeiture, as a judgment); Hall *v.* Tillman, 103 N. C. 276, 9 S. E. 194; Harker *v.* Arendell, 74 N. C. 85; Richardson *v.* People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100; Woog *v.* People's Bank, 4 Ohio S. & C. Pl. Dec. 51, 2 Ohio N. P. 394.

In Georgia, judgment may be entered against a surety on a replevin bond given upon levy of a distress warrant at the trial of the issue on the warrant without notice to the surety; but, if the levying officer take a forthcoming bond, a summary judgment cannot be entered against the surety. Philman *v.* Marshall, 103 Ga. 82, 29 S. E. 598.

15. Glenn *v.* Porter, 68 Ark. 320, 57 S. W. 1109; Scott *v.* Elliott, 63 N. C. 215 (holding, however, that a judgment in replevin for the penalty of a bond given by defendant without a previous judgment against such defendant is erroneous); Booth *v.* Ableman, 20 Wis. 602; Pratt *v.* Donovan, 10 Wis. 378.

But in Tennessee under Acts (1885), c. 59, § 1, Code, § 5145, judgment for the penalty of the bond, without reference to the value of the property, is allowable only after plaintiff has failed to return the property and a writ of fieri facias has been returned unsatisfied in whole or in part and then at the term of the court to which that writ shall have been so returned. Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736, holding that where judgment was rendered at the trial court before plaintiff had an opportunity to return the property and before an execution had been issued, it was premature and unauthorized, and the fact that it was stayed by its own terms for forty days did not cure the defect.

Sureties become parties by executing bond. — A party who signs the undertaking as surety for the return of property replevied

a summary remedy, must conform to the statute in all material respects,[16] and the judgment must be such as is authorized by law.[17] When so authorized by statute, the court, in the replevin proceeding, may render judgment against the obligors in the replevy bond;[18] but the sureties are liable for only such summary judgment as the statute authorizes.[19]

G. Actions — 1. In General — a. Right of Action — (i) *In General.* The bond given in an action of replevin is intended as indemnity for both the officer and defendant in the action, and either may have a right of action thereon in case of a breach of its conditions.[20] An action cannot be maintained upon the replevin bond until a final determination of the action in which it was executed,[21] but subject to any conditions precedent which are required to be complied with,[22] such action may be brought as soon as there is a breach of the conditions of the bond either by failure to prosecute the action of replevin with effect,[23] or to comply with the judgment rendered therein.[24] A failure of the jury, in the action of

thereby becomes quasi, a party to the suit then pending, and is liable to have judgment entered against him with his principal, upon a failure of the principal to sustain his cause. Pratt *v.* Donovan, 10 Wis. 378. The surety, by the act of executing the bond, makes himself a party to the suit, and thereafter is so considered, and no further notice is required. Glenn *v.* Porter, 68 Ark. 320, 57 S. W. 1109.

The provision that the sureties be notified to appear in court and show cause why judgment should not be rendered against them for the breach of the undertaking gives said sureties a day in court and an opportunity to set up, by way of defense, any matter not concluded by the judgment in replevin. Woog *v.* People's Bank, 4 Ohio S. & C. Pl. Dec. 51, 2 Ohio N. P. 394.

A judgment by confession against the principal in a replevin bond may under some circumstances bind the sureties. Siddall *v.* Goggan, 68 Tex. 708, 5 S. W. 668.

16. Tifft *v.* Virden, 7 Sm. & M. (Miss.) 91 (holding that the record must show affirmatively that the bond had been lodged in the office of the clerk of court; and, if it shows that the bond was lost before it was lodged in the clerk's office, the court cannot take jurisdiction); Puller *v.* Thomas, 36 Mo. App. 105 (holding that if defendant wishes to avail himself of the summary remedy or judgment provided by Mo. Rev. St. § 3855, he must, in his answer, claim the property and demand a return thereof).

Where the bond is not in the form prescribed by statute, a summary judgment thereon is unauthorized. Dillard *v.* Nelson, 78 Ark. 237, 95 S. W. 460; Woolridge *v.* Quinn, 49 Mo. 425; Mariany *v.* Lemaire, (Tex. Civ. App. 1904) 83 S. W. 215.

If the proceeding is void, so that the court has no jurisdiction over the subject-matter, there can be no summary judgment rendered under the statute. Frederick *v.* Tiffin, 22 Mo. App. 443.

Notice, actual or constructive, to the obligors is necessary to authorize a summary judgment on a replevin bond. Danley *v.* Rector, 10 Ark. 211, 50 Am. Dec. 242; McKnight *v.* Smith, 5 Ark. 409.

17. Woodburn *v.* Driver, 81 Ark. 333, 99 S. W. 384 (holding that the rights of sureties are not affected by the transfer of the case to the chancery court); Hall *v.* Tillman, 103 N. C. 276, 9 S. E. 194; Nighbert *v.* Hornsby, 100 Tenn. 82, 42 S. W. 1060, 66 Am. St. Rep. 736; Rafalshy *v.* Kraus, 10 Heisk. (Tenn.) 558 (holding that where judgment against the principal was entered at one term, judgment could not be entered against the surety on motion made at the next term).

18. Cabell *v.* Floyd, 21 Tex. Civ. App. 135, 50 S. W. 478.

A judgment against the sureties, although not rendered against the principal, is not void, but is, at best, only voidable. Caball *v.* Floyd, 21 Tex. Civ. App. 135, 50 S. W. 478.

19. Woodburn *v.* Driver, 81 Ark. 333, 99 S. W. 384; Dillard *v.* Nelson, 78 Ark. 237, 95 S. W. 460; Dent *v.* Ross, 52 Miss. 188.

20. Smith *v.* Brown, 60 Ill. App. 77.

Parties see *infra*, VII, G, 4.

21. Hansard *v.* Reed, 29 Mo. 472 (holding that where in the action of replevin a demurrer to the complaint was sustained and judgment for costs entered against plaintiff, but without any assessment of the value of the property, or damages or award for its return, but the court subsequently at the same term granted plaintiff leave to amend his petition, this in effect set aside the judgment against plaintiff and reinstated the case on the docket, so that no action upon the bond could be brought while the case as so reinstated was still pending and not finally disposed of); Boughton *v.* Omaha L. & T. Co., 73 Mo. App. 597 (holding that an action of replevin is not finally disposed of, so as to authorize an action upon the bond, while an appeal from the judgment rendered before a justice of the peace in favor of defendant is pending on an appeal to a circuit court taken by plaintiff); Chase *v.* Sherwood, 4 Lack. Leg. N. (Pa.) 271 (holding that the assignee of a replevin bond cannot bring an action on the bond until judgment has been entered in the replevin suit).

22. See *infra*, VII, G, 2.

23. Gould *v.* Warner, 3 Wend. (N. Y.) 54; Turner *v.* Turner, 2 B. & B. 107, 4 Moore C. P. 606, 6 E. C. L. 58.

24. Walker *v.* Cooke, 163 Mass. 401, 40 N. E. 185.

replevin, to assess the value of the property as required by statute, will not prevent defendant from recovering its value in an action on the bond.[25] Plaintiff in replevin cannot after giving bond and getting possession of the property dismiss the action without prejudice and relieve himself and the sureties on the bond from liability,[26] and although in case of a dismissal by plaintiff defendant has a right to have a judgment rendered determining his rights, his failure to do so will not prevent him from suing upon the bond to recover such damages as he has sustained,[27] although it has been held that if the action of replevin is dismissed on motion of defendant, and judgment rendered in his favor, he cannot maintain an action against the sureties on the bond to recover damages for a detention of the property by plaintiff in replevin where no claim therefor was presented to and passed upon in the replevin action.[28] Plaintiff in replevin has a right to settle his liability with defendant in replevin after judgment in favor of the latter, and if he does so without any notice that other persons are interested in the property, such persons cannot thereafter maintain an action on the bond;[29] but where defendant in replevin to whom the bond has been given is an officer holding the property under process, he has no right, without the consent of the real parties in interest, to dismiss an action subsequently brought in his name upon the bond.[30] One who successfully defends an action of replevin is not estopped from maintaining an action on the undertaking by a stipulation in the replevin action that at the commencement of the action the property was in his possession.[31] A statute providing for the revival of an action against the legal representatives of a deceased party has been held to include an action on a replevin bond, although such action is not specified in the act.[32]

(II) *On Redelivery Bond.* Where the statute requires that where defendant in replevin gives a redelivery bond and obtains the property the judgment rendered upon a verdict for plaintiff shall be for the value of the property and damages for its detention, plaintiff may have execution upon such judgment or apply for an order for restoration of the property or he may sue upon the bond,[33] the remedy upon the bond being cumulative and the right to proceed against the sureties thereon not being waived or affected by the judgment rendered for the value of the property.[34] Where in an action of replevin before a justice of the peace, in which a redelivery bond was given, an appeal is taken to a district court, no cause of action accrues on the redelivery bond until a judgment for plaintiff is rendered in the latter court.[35] Where a redelivery bond is given to the officer for the use of the successful party in the action, he is a mere stakeholder and cannot release a surety on the bond.[36]

b. Jurisdiction. In the absence of statute it is not necessary that the action on a replevin bond should be brought in the same court where the action of replevin was brought,[37] and where plaintiff and the obligors in the bond are citizens of

25. Yelton *v.* Slinkard, 85 Ind. 190.

26. Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283.

27. Manning *v.* Manning, 26 Kan. 98.

28. Mounts *v.* Murphy, 126 Ky. 803, 104 S. W. 978, 31 Ky. L. Rep. 1192 [*distinguishing* Kentucky Land, etc., Co. *v.* Crabtree, 118 Ky. 395, 80 S. W. 1161, 26 Ky. L. Rep. 283].

29. Joseph Schlitz Brewing Co. *v.* Barr, 135 Ill. App. 467.

30. Norton *v.* Lawrence, 39 Kan. 458, 18 Pac. 526, holding that where plaintiff in replevin gives a bond to an officer who is holding the property under an attachment, the attaching creditor is the real party in interest, and that in an action on the bond such officer has no authority to dismiss the action as to a surety without the consent of the real parties in interest, and that such a dismissal is no bar to a subsequent action brought by such parties upon the bond.

31. Harrison *v.* Wilkin, 78 N. Y. 390.

32. Chinn *v.* Harrodsburg Sav. Inst., 8 Bush (Ky.) 290.

33. Johnson *v.* Mason, 64 N. J. L. 258, 45 Atl. 618.

34. Ft. Wayne Electric Corp. *v.* Security Trust, etc., Co., 65 N. J. L. 221, 47 Atl. 559.

35. Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

36. Lowry *v.* Clark, 20 Pa. Super. Ct. 357.

37. Walker *v.* Cooke, 163 Mass. 401, 40 N. E. 185, holding that a municipal court has jurisdiction of an action on a replevin bond given in an action in a superior court, if the

different states, the action on the bond may be brought in a federal court.[38] It has been held that a justice of the peace has no jurisdiction of an action on a replevin bond,[39] and that where an action of replevin is appealed from a justice of the peace to a circuit court, an action on the bond may properly be brought in the latter court.[40] In an action on a redelivery bond the amount in controversy when material in determining the jurisdiction of the court is the amount due on such bond including the amount of the judgment, interest, and costs in the replevin action.[41]

c. Assignment of Bond.[42] Under some statutes a replevin bond may be assigned, by the officer to whom it is given, to defendant only where it is given in a case of distress for rent,[43] and under such statutes if the bond is given in other cases, it is construed to be wholly for the protection of the officer and is not assignable.[44] Under other statutes, however, it seems that such an assignment of a replevin bond may be made to defendant or a party in interest, in any case.[45] Where the statute authorizing an assignment prescribes no mode therefor, the assignment may be made in writing, or by parol and delivery, or by any other act amounting to a legal transfer of the bond.[46]

2. Conditions Precedent — a. Demand or Execution. In the absence of a statutory provision to the contrary, where defendant in replevin has recovered a judgment for a return of the property, and damages and costs, he may maintain an action on the replevin bond, upon the failure of plaintiff in replevin to comply with the terms of the judgment, without any previous demand,[47] and without the issuance of an execution on such judgment.[48] Under some statutes, however, it is expressly provided that where judgment is rendered for defendant in a replevin

sum demanded is within the jurisdiction of the municipal court.

38. Patterson *v.* Mater, 26 Fed. 31.

39. Henoch *v.* Chaney, 61 Mo. 129.

40. Henoch *v.* Chaney, 61 Mo. 129.

41. Swartz *v.* English, 4 Kan. App. 509, 44 Pac. 1004.

42. Assignment as condition precedent to action on bond see *infra*, VII, G, 2, c.

Parties see *infra*, VII, G, 4.

43. Waples *v.* Adkins, 5 Harr. (Del.) 381; Everett *v.* Bartlett, 20 N. J. L. 117; Williamson *v.* Gordon, 20 N. J. L. 77. See also Charleston *v.* Price, 1 McCord (S. C.) 299; Meyers *v.* Maybee, 10 U. C. Q. B. 200.

In Pennsylvania, under the act of March 21, 1772, a replevin bond can be legally assigned to defendant in replevin only where it is given in case of distress for rent. Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802; Krumbhaar *v.* Stetler, 10 Pa. Co. Ct. 12. See also Balsley *v.* Hoffman, 13 Pa. St. 603; Com. *v.* Rees, 3 Whart. 124. It has been held, however, that such statute does not prevent the sheriff from taking a bond for his own protection in other cases of replevin, although the statute does not relate to such a bond, and that the sheriff may or may not assign the bond so taken to defendant, and if he does so defendant may use it, but that defendant cannot require him to assign it. Clawsen *v.* Seanor, 23 Pa. Co. Ct. 257.

44. Williamson *v.* Gordon, 20 N. J. L. 77. But see Clawsen *v.* Seanor, 23 Pa. Co. Ct. 257.

45. Nunn *v.* Goodlett, 10 Ark. 89; Wingate *v.* Brooks, 3 Cal. 112; Acker *v.* Finn, 5 Hill (N. Y.) 293; Hubbard *v.* Young, 34 N. Brunsw. 641; Bacon *v.* Langton, 9 U. C. C. P. 410. See also Greer *v.* Howard, 41 Ohio St. 591. But see Knapp *v.* Colburn, 4 Wend. (N. Y.) 616; Gould *v.* Warner, 3 Wend. (N. Y.) 54.

Under Mich. Comp. Laws, § 6764, the sheriff is required to assign the bond to defendant or his representatives on their request. Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297.

46. Nunn *v.* Goodlett, 10 Ark. 89 (holding that it is not necessary that the assignment should be dated, or that it should be made under the seal of the sheriff); Everett *v.* Bartlett, 20 N. J. L. 117.

A delivery of the bond to defendant's attorney is not an assignment to defendant. Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297.

47. Persse *v.* Watrous, 30 Conn. 139 (holding that where the alternative condition of a replevin bond is to return the goods to the officer who attached the same or to the officer having the execution in the original suit, no demand on the replevin bond either for the penalty thereof or for the amount of the judgment obtained in the attachment suit is necessary before bringing suit on the bond); Cook *v.* Lothrop, 18 Me. 260; Walker *v.* Cooke, 163 Mass. 401, 40 N. E. 185; Wright *v.* Quirk, 105 Mass. 44; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727 [*affirming* 1 Mont. 584] (holding that if a return be awarded in the replevin suit, the surety on the bond is liable on the condition of the bond to return, without a demand therefor).

48. Cook *v.* Lothrop, 18 Me. 260; Robertson *v.* Davidson, 14 Minn. 554; Potter *v.* James, 7 R. I. 312; Sweeney *v.* Lomme, 22 Wall. (U. S.) 208, 22 L. ed. 727 [*affirming* 1 Mont. 584].

suit, he cannot maintain an action on the replevin bond, particularly to hold the sureties liable thereon, until execution on the judgment in replevin has been issued and returned unsatisfied in whole or in part;[49] but it has been held that such a provision does not apply where no judgment at all is rendered in the replevin suit, and that if the action abates or is discontinued before the property is returned to defendant, and plaintiff retains the property, the sureties are bound on the undertaking.[50] In an action on a redelivery bond it is not necessary that plaintiff should demand a return of the property which was redelivered to defendant in replevin;[51] but under some statutes it is essential to a suit against sureties on the bond that execution should be issued against the original defendant in replevin and be returned unsatisfied in whole or in part.[52]

b. Writ of Return or Reprisal. In some jurisdictions, an action on plaintiff's replevin bond may be maintained wherever a return of the property has been adjudged in favor of defendant and the judgment is disobeyed, and it is not necessary as a condition precedent to the maintaining of such an action that a writ of retorno habendo be returned at length,[53] or, where the officer's return on such a writ is that he cannot find the goods, that a writ of reprisal be sued out.[54] Under some statutes, however, an action on the replevin bond cannot be maintained until a writ of retorno habendo has been issued and returned unsatisfied in whole or in part.[55]

49. Cornish *v.* Keesee, 17 Ark. 391; Scott *v.* Scott, 50 Mich. 372, 15 N. W. 515; Phillips *v.* Waterhouse, 40 Mich. 273; Williams *v.* Vail, 9 Mich. 162, 8 Am. Dec. 76; Hershiser *v.* Jordan, 25 Nebr. 275, 41 N. W. 147; Lininger *v.* Raymond, 9 Nebr. 40, 2 N. W. 359, holding that the surety on such a bond is not liable until after execution is returned unsatisfied against the principal. See also Duncan *v.* Owens, 47 Ark. 388, 1 S. W. 698, execution on bond given to secure discharge from arrest in replevin.

Sufficiency of return.—A return on the execution of "no property found" is sufficient to justify an action upon a replevin bond, under a statute requiring a return "that sufficient property of the plaintiffs cannot be found," etc. Cameron *v.* Boyle, 2 Greene (Iowa) 154.

Under N. Y. Code Civ. Proc. § 1733, a defendant in replevin who has recovered a final judgment cannot maintain an action against the sureties on plaintiff's undertaking given to procure a replevin, until after a return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of plaintiff, or for both purposes. See Letson *v.* Dodge, 61 Barb. 125, holding, however, that the provisions do not apply to an action on an undertaking to defendant in replevin commenced in a justice's court.

Under N. Y. Mun. Court Act (Laws (1902), c. 580, § 126), a defendant in replevin who has recovered a final judgment cannot maintain an action against the sureties in plaintiff's undertaking until after the issuance and return unsatisfied of an execution against plaintiff. De Veaux *v.* Holliday, 107 N. Y. Suppl. 747.

50. Verra *v.* Domenico Costantino, 84 N. Y. Suppl. 222, 33 N. Y. Civ. Proc. 189; Rogers *v.* U. S. Fidelity, etc., Co., 84 N. Y. Suppl. 203. But see Cornish *v.* Keesee, 17 Ark. 391, holding that defendant in replevin cannot maintain an action on the bond against the surety, where plaintiff fails to prosecute his action, until he has obtained some judgment against plaintiff on which execution has been returned unsatisfied in whole or in part.

51. Adams *v.* Wiesenthal, 69 N. J. L. 65, 54 Atl. 516.

52. Hager *v.* Clute, 10 Hun (N. Y.) 447; Baxter *v.* Maloney, 1 N. Y. City Ct. 383, holding, however, that an action on a bond to recover damages and costs awarded by the judgment in replevin may be maintained without the issue and return of such an execution, on the ground that the judgment as to these items is absolute, and that these charges will have to be paid whether the property is returned or not. But see Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670.

53. Peck *v.* Wilson, 22 Ill. 205; Hunter *v.* Sherman, 3 Ill. 539; Walker *v.* Cooke, 163 Mass. 401, 40 N. E. 185; Wright *v.* Quirk, 105 Mass. 44; Lomme *v.* Sweeney, 1 Mont. 584 [*affirmed* in 22 Wall. (U. S.) 208, 22 L. ed. 727]; Moore *v.* Shields, 17 Fed. Cas. No. 9,775, 2 Cranch C. C. 529. See also Gwillim *v.* Holbrook, 1 B. & P. 410.

Action for costs.— Where a suit is brought to recover costs for a breach of that part of the replevin bond which provides that plaintiffs will prosecute a suit to effect, a recovery may be had, although no writ of retorno is awarded. Myers *v.* Dixon, 106 Ill. App. 322.

54. Parker *v.* Simonds, 8 Metc. (Mass.) 205.

55. Cowdin *v.* Stanton, 12 Wend. (N. Y.) 120; Cowden *v.* Pease, 10 Wend. (N. Y.) 333; Pemble *v.* Clifford, 3 McCord (S. C.) 43 (holding that an action cannot be maintained on a replevin bond against the surety until a judgment has been obtained in the replevin suit and a retorno habendo awarded); Duggan *v.* England, Harp. (S. C.) 215.

c. Assignment of Bond.[56] Under some statutes where the sheriff or other officer is the obligee in a replevin bond, in order to enable defendant in replevin to maintain an action on the bond in his own name it is necessary that the bond be formally assigned to him;[57] but, under other statutes, an assignment of the bond to defendant is not necessary to enable him to sue thereon in his own name, particularly where the undertaking is not in terms to any obligee or promisee, and may be regarded as an undertaking to the sheriff or to defendant.[58] It is not essential to entitle plaintiff in replevin to maintain an action upon the redelivery bond that such bond should be assigned to him.[59]

3. Defenses — a. In General.[60] The defenses that may or may not be interposed in an action upon a replevin bond depend largely upon the rights decided in the replevin action, and the nature and conditions of the bond upon which the action is brought.[61] It has been held that it is a good defense to an action on a replevin bond that an appeal is pending in the replevin suit,[62] that the conditions of the bond have been properly performed,[63] that a surety's signature thereto had been induced by fraud,[64] or that the property could be returned.[65] But no defense can be set up in such an action which could with reasonable diligence have been interposed in the replevin action,[66] and this is also true in an action on a redelivery bond.[67] And it has been held that it is not a good defense to an action on a replevin bond that it is impossible to make a return of the property as by reason of its having been accidentally destroyed by fire,[68] that it is in such a position that it cannot be reached,[69] or that the property returned as replevied was never actually taken into custody;[70] or in the absence of knowledge or consent of the opposite party that the bond was delivered conditionally or in escrow,[71]

56. Parties see *infra*, VII, G, 4.

57. Nunn *v.* Goodlett, 10 Ark. 89; Green *v.* Kindy, 43 Mich. 279, 5 N. W. 297; Lazarus *v.* Trible, 1 Sm. & M. (Miss.) 575; Berry *v.* Mitchell, 7 N. Brunsw. 380. See also Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802.

Where property is replevied from an officer holding it under execution, plaintiff in execution cannot sue on the bond without an assignment by the sheriff of either the bond or the judgment in the replevin action, unless the sheriff refuses to make such assignment or to enforce the bond. Greer *v.* Howard, 41 Ohio St. 591.

58. Decker *v.* Anderson, 39 Barb. (N. Y.) 346.

59. Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765.

60. **Conclusiveness of adjudication in replevin action** see *supra*, VII, E.

Defenses in actions on bonds given to replevy attached property see Attachment, 4 Cyc. 700 *et seq.*

61. See Mason *v.* Sumner, 22 Md. 312; Belt *v.* Worthington, 3 Gill & J. (Md.) 247.

Where the surety had notice of plaintiff's claim of title, he cannot set up in defense an arrangement between plaintiff and defendant by which the apparent ownership of the chattel was given to defendant, nor can he set up an arrangement between them for an illegal purpose when he was not defrauded thereby. Dannels *v.* Fitch, 8 Pa. St. 495.

That a third person has filed a judgment lien on land of defendant in replevin by an attachment suit in which the property subsequently replevied was attached is no defense to an action on the replevin bond. Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

Where, in an action on a redelivery bond, it is shown that the property was sold by a receiver, and after the trial in the replevin action the owner applies to the court for the proceeds of the sale, and on such application receives a portion thereof, the remainder being retained to abide the result of the action in which the receiver was appointed, such facts constitute a defense to the action on the redelivery bond for the amount for which the property was sold at the receiver's sale. Boyd *v.* Huffaker, 39 Kan. 525, 18 Pac. 508.

62. Becker *v.* Ball, 18 U. C. Q. B. 192.

63. See Arnold *v.* Allen, 8 Mass. 147.

64. Anderson *v.* Bellenger, 87 Ala. 334, 6 So. 82, 13 Am. St. Rep. 46, 4 L. R. A. 680, holding that in an action on a statutory claim bond, a plea by one of the sureties that he was fraudulently induced by the sheriff to sign the bond under a mistake of fact, after it had been accepted and approved by the sheriff with the signatures of two other sureties only, is good.

65. Lee *v.* Hastings, 13 Nebr. 508, 14 N. W. 476.

66. Woods *v.* Kessler, 93 Ind. 356.

67. Holmes *v.* Langston, 110 Ga. 861, 36 S. E. 251; Boyd *v.* Huffaker, 39 Kan. 525, 18 Pac. 508.

68. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476].

69. Harrison *v.* Wilkin, 78 N. Y. 390.

70. Jackson *v.* Bry, 3 Ill. App. 586, holding, however, that the fact that the property was not taken into custody may be shown on the question of damages.

71. Richardson *v.* People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100.

that the property belonged to third persons,[72] or that defendant in replevin is enforcing an execution on the judgment recovered against plaintiff in replevin;[73] or in an action on a bond to recover the value of the replevied property, that plaintiff took out and collected an execution for costs on the judgment in his favor in the replevin suit;[74] or where the breach assigned is plaintiff's failure in the replevin action, it is no defense that such action was dismissed against his will.[75] Where property in the hands of an officer is replevied by a third person, it is no defense to an action on the replevin bond that the execution debtor was entitled to the goods as exempt;[76] that the attachment proceedings were invalid;[77] or that at the time plaintiff attached the goods they were held by the officer under prior attachments against the same debtor.[78]

b. Irregularities and Defects in Replevin Proceedings.[79] As a general rule mere irregularities or defects in the institution or prosecution of the replevin proceedings cannot be set up in defense of an action on the replevin bond.[80] Thus it has been held that it cannot be set up as a defense in such an action that the writ of replevin was defective[81] or was not returned,[82] that there are technical defects in the bond,[83] that the condition of the bond has become void,[84] that the bond was not signed by the required number of sureties,[85] or that the judgment is not in the alternative for either the return of the property or damages in lieu thereof.[86] But it has been held to be a complete defense to an action on a replevin

72. Staples *v.* Wood, (Tex. Civ. App. 1898) 48 S. W. 751.

73. Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130.

74. Kafer *v.* Harlow, 5 Allen (Mass.) 348.

75. Sherry *v.* Foresman, 6 Blackf. (Ind.) 56.

76. Capen *v.* Bartlett, 153 Mass. 346, 26 N. E. 873.

77. Farnham *v.* Moor, 21 Me. 508, holding that where goods are replevied from an attaching officer and it appears that plaintiff in replevin is a wrong-doer without title to any part of the goods attached, the invalidity of the attachment is no defense to an action on the bond.

78. Ormsbee *v.* Davis, 16 Conn. 567, 18 Conn. 555.

79. **Estoppel to set up irregularities and defects** see *infra*, VII, G, 3, b.

80. *Colorado.*— Cox *v.* Sargent, 10 Colo. App. 1, 50 Pac. 201.

Connecticut.— Nichols *v.* Standish, 48 Conn. 321.

Illinois.— Tedrick *v.* Wells, 59 Ill. App. 657.

Indiana.— Waddell *v.* Bradway, 84 Ind. 537.

Iowa.— Mason *v.* Richards, 12 Iowa 73; McGinnis *v.* Hart, 6 Iowa 204.

Massachusetts.— Flagg *v.* Tyler, 3 Mass. 303.

Michigan.— Dudley *v.* Conely, 125 Mich. 300, 84 N. W. 286; Estey *v.* Harmon, 40 Mich. 645.

Minnesota.— Robertson *v.* Davidson, 14 Minn. 554.

Missouri.— Reeves *v.* Reeves, 33 Mo. 28.

Montana.— Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

New York.— Harrison *v.* Wilkin, 78 N. Y. 390.

Oregon.— Carlon *v.* Dixon, 12 Oreg. 144, 6 Pac. 500, holding that where the affidavit and bond in replevin are sufficient, the fact that the direction to the sheriff indorsed on it is signed by plaintiff, instead of by the justice, as provided by statute, will not exonerate the sureties on the bond.

See 42 Cent. Dig. tit. "Replevin," § 515.

That there was no judgment for a return of the property does not prevent a recovery on a replevin bond, but plaintiff must show that he has sustained damages by reason of plaintiff in replevin not prosecuting the writ with effect. Burch *v.* Dowling, 4 Fed. Cas. No. 2,139, 5 Cranch C. C. 646.

Failure of a judgment creditor to execute an indemnifying bond as provided by statute, to the sheriff who is about to levy an execution on the judgment, does not prevent him from suing on the bond given by claimants and their sureties who replevied the property levied upon. Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

81. Waddell *v.* Bradway, 84 Ind. 537.

82. Nichols *v.* Standish, 48 Conn. 321.

83. Douglas *v.* Unmack, 77 Conn. 181, 58 Atl. 710, 107 Am. St. Rep. 25; Nichols *v.* Standish, 48 Conn. 321.

That a redelivery bond is not filed with the clerk of court as required by statute does not defeat the right to recover thereon. Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765.

84. Ward *v.* Hood, 124 Ala. 570, 27 So. 245, 82 Am. St. Rep. 205.

85. Shaw *v.* Tobias, 3 N. Y. 188 (holding that, although the statute requires two sureties in a replevin bond, the party for whose benefit it was taken may waive the objection that there is only one, and if he does so, the makers of the bond cannot resist a recovery thereon on that ground); Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

86. Eisenhart *v.* McGarry, 15 Colo. App. 1, 61 Pac. 56; McCarthy *v.* Strait, 7 Colo. App.

bond that the court was without jurisdiction to render the judgment in replevin,[87] or that the judgment was obtained by fraud.[88] It has also been held that the fact that a sum of money due on an open account between plaintiff and defendant in replevin was included in a judgment for the alternative value of the property is available to the surety as a defense *pro tanto*;[89] or that it may be proved in mitigation of damages that the action of replevin was defeated solely because it was prematurely commenced.[90] Under some statutes, if defendant fails to have his damages assessed in the replevin proceedings, he cannot afterward bring a separate action against plaintiff and his sureties on the replevin bond for the amount of damages suffered,[91] unless his failure to do so is caused by plaintiff's conduct in not prosecuting the suit to final judgment.[92]

c. Estoppel to Set Up Defense. As a general rule, plaintiff in replevin and his sureties are estopped in an action on the replevin bond to set up any matter of defense which is contradictory to or inconsistent with the material recitals in the bond,[93] except where the bond is void in its inception and possesses no force or validity.[94] Thus where the value of the property is recited in the bond, plaintiff in replevin is estopped thereby in an action on the bond to show that it was of less value than the amount so stated,[95] but such recital does not estop defendant in replevin from showing the true value of the property.[96] Where by virtue of the replevin bond and other proceedings in replevin, plaintiff in replevin acquires and retains possession of the property, both he and his sureties are estopped in an action on the replevin bond from setting up any matter of defense that disputes the regularity or validity of the bond,[97] or of the proceedings under which it was obtained;[98] or that disputes the levy of the officer, or the liability of the property on which it is made;[99] or that disputes the regularity of the replevin proceedings,[1]

59, 52 Pac. 189; Selby *v.* McQuillan, 59 Nebr. 158, 80 N. W. 504.

87. Robinson *v.* Bonjour, 16 Colo. App. 458, 66 Pac. 451; Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; McBrayer *v.* Jordan, 73 Nebr. 483, 103 N. W. 50. *Compare* McDermott *v.* Isbell, 4 Cal. 113 (holding that, in an action on a replevin bond, the fact that defendant had commenced his action before a tribunal incompetent to try the matter in dispute is no defense); Janssen *v.* Duncan, 43 Colo. 286, 95 Pac. 922.

88. McBrayer *v.* Jordan, 73 Nebr. 483, 103 N. W. 50.

89. Lee *v.* Hastings, 13 Nebr. 508, 14 N. W. 476.

90. Davis *v.* Harding, 3 Allen (Mass.) 302.

91. White *v.* Van Houten, 51 Mo. 577.

92. Elliott *v.* Black, 45 Mo. 372; Berghoff *v.* Heckwolf, 26 Mo. 511; Morrison *v.* Yancey, 23 Mo. App. 670.

93. Collins *v.* Mitchell, 5 Fla. 364; May *v.* Johnson, 3 Ind. 449; Auerbach *v.* Marks, 10 Daly (N. Y.) 171. And see, generally, ESTOPPEL, 16 Cyc. 702.

94. Caffrey *v.* Dudgeon, 38 Ind. 512, 10 Am. Rep. 126; Sturdevant *v.* Farmers', etc., Bank, 62 Nebr. 472, 87 N. W. 156. But see Walko *v.* Walko, 64 Conn. 74, 29 Atl. 243.

95. Wiseman *v.* Lynn, 39 Ind. 250; Tuck *v.* Moses, 58 Me. 461; Miller *v.* Moses, 56 Me. 128; Howe *v.* Handley, 28 Me. 241; Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792; Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799; Vulcan Iron Works *v.* Cyclone Steam Snow Plow Co., 48 Fed. 652 [*affirmed* in 52 Fed. 920, 3 C. C. A. 352]. *Compare* West *v.* Caldwell, 23 N. J. L. 736.

96. Tuck *v.* Moses, 58 Me. 461; Miller *v.* Moses, 56 Me. 128; Thomas *v.* Spofford, 46 Me. 408; West *v.* Caldwell, 23 N. J. L. 736; Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799.

97. Douglass *v.* Unmack, 77 Conn. 181, 58 Atl. 710, 107 Am. St. Rep. 25; Hartlep *v.* Cole, 120 Ind. 247, 22 N. E. 130; Trueblood *v.* Knox, 73 Ind. 310 (holding that the fact that the penalty named in a replevin bond is less than double the value of the property, cannot be set up as a defense in a suit on the bond, after the writ of replevin has been issued and possession of the property obtained upon it); Dale *v.* Heffner, 4 Baxt. (Tenn.) 217 (holding that a surety on a replevin bond is estopped to deny its validity on the ground that the value of the property attached is not fixed therein); Arthur *v.* Sherman, 11 Wash. 254, 39 Pac. 670 (holding that plaintiff in replevin who takes possession of property under the bond is estopped to deny that his signature was fixed by an unauthorized agent).

Consideration.— Where plaintiff in replevin obtains possession of the property sued for, he and his sureties are estopped from averring that there was no consideration for their undertaking. McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120.

98. Dale *v.* Heffner, 4 Baxt. (Tenn.) 217.

99. Adler *v.* Potter, 57 Ala. 571; Tedrick *v.* Wells, 59 Ill. App. 657.

1. Tedrick *v.* Wells, 59 Ill. App. 657; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. 120; McFadden *v.* Ross, 108 Ind. 512, 8 N. E.

as by denying the jurisdiction of the justice who issued the writ,[2] or of the trial court.[3] But an estoppel as to one condition in the bond does not necessarily operate as an estoppel as to a separate and distinct condition.[4]

d. Set-Off and Counter-Claim. Upon principle, a set-off, recoupment, or counter-claim should be allowed in an action on a replevin bond to the same extent as in any other form of action.[5] Thus a surety on a replevin bond may avail himself of any set-off or counter-claim that might be interposed by the principal obligor;[6] and although the action is brought in the name of the officer to whom the bond was given, defendant therein may set off a demand against defendant in replevin as he is the real party in interest;[7] but the claims must be due between all the parties in the action and in the same right.[8]

4. Parties — a. Parties Plaintiff — (1) *In General.* A replevin bond is given for the protection of both the officer and defendant in the action,[9] and where the officer is the obligee in the bond he may sue thereon in his own name,[10] and the action need not be brought in his name of office but may be in his individual name.[11] So also the officer having the legal right of action may sue upon the bond, at least in so far as defendants to such action are concerned, for the use of whatever person he chooses,[12] and it is not necessary that such person should have any other interest in or connection with the suit,[13] and while in case there are several defendants in the replevin action the officer may sue for the use of all jointly without bringing separate actions,[14] it is no ground of objection that the action is brought for the use of only one of them.[15] Defendant in replevin may also sue on the bond in the name of the officer for his own use.[16] The persons named as obligees in the bond should ordinarily join in an action thereon or in case of failure to do so should be made defendants;[17] but where in replevin against

161; Sammons *v.* Newman, 27 Ind. 508 (holding that where plaintiff in replevin has obtained possession of the property under his writ, neither he nor his sureties can be permitted to allege, in defense of an action on the bond, that no suit was pending when the bond was executed, because no summons ever issued in the replevin suit); Central Nat. Bank *v.* Brecheisen, 65 Kan. 807, 70 Pac. 895; McCormick Harvesting Mach. Co. *v.* Fisher, 63 Kan. 199, 65 Pac. 223; Stimer *v.* Allen, 88 Mich. 140, 50 N. W. 107 (that no affidavit was filed with the justice before the writ was issued).

Giving a delivery bond and thereby preventing the delivery of the property to plaintiff in replevin estops defendant in replevin, in an action on such bond, from denying the legal existence of plaintiff. Loaners' Bank *v.* Jacoby, 10 Hun (N. Y.) 143.

2. Fahnestock *v.* Gilham, 77 Ill. 637; Bates *v.* Williams, 43 Ill. 494; Harbaugh *v.* Albertson, 102 Ind. 69, 1 N. E. 298.

3. Janssen *v.* Duncan, 43 Colo. 286, 95 Pac. 922 [*distinguishing* Robinson *v.* Bonjour, 16 Colo. App. 458, 66 Pac. 451].

4. Alderman *v.* Roesel, 52 S. C. 162, 29 S. E. 385, holding that an estoppel as to the condition for the return of the property does not necessarily operate as an estoppel as to the condition to prosecute.

5. See, generally, Recoupment, Set-Off, and Counter-Claim, *ante*, p. 618. See also Henry *v.* Ferguson, 55 Mich. 399, 21 N. W. 381; McKelvey *v.* McLean, 34 U. C. Q. B. 635.

Use of goods.— In an action upon a replevin bond a set-off cannot be claimed for the use by defendant in replevin of their own property during the time that it is voluntarily left in their possession, from the issuance of the writ to the actual taking of the property by plaintiff in replevin. Pure Oil Co. *v.* Terry, 16 Pa. Super. Ct. 337.

6. Seldner *v.* Smith, 40 Md. 602.

7. Engs *v.* Matson, 11 Ill. App. 639; Balsley *v.* Hoffman, 13 Pa. St. 603, holding that the surety with the consent of his principal may set off a judgment obtained by his principal against defendant in replevin for whose use the action on the bond is brought.

8. Coffin *v.* McLean, 80 N. Y. 560; Gorman *v.* Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680.

In an action upon a replevin bond executed in favor of two plaintiffs, notes held against one of them by defendant are not available as a set-off. Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

9. Humphrey *v.* Taggart, 38 Ill. 228; Smith *v.* Brown, 60 Ill. App. 77; Caldwell *v.* West, 21 N. J. L. 411.

10. Ogle *v.* Smith, 2 Houst. (Del.) 174.

11. Caldwell *v.* West, 21 N. J. L. 411.

12. Atkins *v.* Moore, 82 Ill. 240; Tedrick *v.* Wells, 59 Ill. App. 657; Smith *v.* Hertz, 37 Ill. App. 36. See also Burgett *v.* Gilbert, 107 Ill. App. 351.

13. Atkins *v.* Moore, 82 Ill. 240; Smith *v.* Hertz, 37 Ill. App. 36.

14. Koehler *v.* King, 119 Ill. App. 6.

15. Buckmaster *v.* Beames, 9 Ill. 443.

16. Humphrey *v.* Taggart, 38 Ill. 228.

17. Kellar *v.* Carr, 119 Ind. 127, 21 N. E. 463, holding, however, that where one of two obligees sues alone, but alleges that the other

several defendants the final judgment is in favor of only one of them, to whom the entire property is awarded, he may sue on the bond without joining the other defendants who were obligees,[18] and if one of two obligees is insolvent and an assignee is appointed after the taking of the bond, such assignee cannot join in an action thereon, but such action must be brought in the name of the other obligee alone.[19] An action on the bond cannot be maintained by a person who is neither a party to the replevin proceeding nor an obligee in the bond;[20] and where a bond is given to defendant named in the suit and he disclaims any interest in the property, and another person is substituted as defendant after the bond is given and in whose favor judgment is rendered, such person cannot sue upon the bond.[21] Where the bond is assignable an assignee may sue thereon in his own name,[22] but if not assignable the action must be brought in the name of the officer to whom the bond was given for the use of the person beneficially entitled.[23]

(II) *Where Property Was Replevied From an Officer.* Where property is replevied from an officer who is in possession thereof by virtue of an execution or attachment, the bond taken by the officer who executes the writ of replevin is primarily for the benefit of the execution or attachment creditor.[24] In such case the officer executing the writ of replevin and to whom the bond is given may sue thereon,[25] and he may bring his action for the joint use of the execution or attachment creditor and the officer who was defendant in the action of replevin.[26] An action on the bond may also be brought jointly by the execution or attachment creditor and the officer who was defendant in the action of replevin,[27] and where there are different creditors, although claiming under different executions, they may join in such action.[28] The execution or attachment creditor may also as the real party in interest sue upon the bond in his own name,[29] without joining the officer,[30] and where the property replevied was taken on different executions, the different execution plaintiffs may join in an action on the bond.[31]

obligee who is not joined has no interest in the action, a demurrer for defect of parties plaintiff may properly be overruled, no objection being made to the non-joinder of such obligee as a party defendant.

18. Pilger *v.* Marder, 55 Nebr. 113, 75 N. W. 559.

19. Brown *v.* Brigham, 5 Allen (Mass.) 582.

20. Pipher *v.* Johnson, 108 Ind. 401, 9 N. E. 376.

21. Williams *v.* St. Louis, etc., R. Co., 8 Mo. App. 135.

22. Acker *v.* Finn, 5 Hill (N. Y.) 293 (holding that under 2 Rev. St. § 64, a replevin bond executed to a coroner may be assigned by him and that the assignee may sue thereon in his own name); Charleston *v.* Price, 1 McCord (S. C.) 299 (holding that replevin bonds are assignable and that under the statutes the assignee may sue in his own name); Bacon *v.* Langton, 9 U. C. C. P. 410 (holding that under the statutes all replevin bonds are assignable and the assignee may sue in his own name); Meyers *v.* Maybee, 10 U. C. Q. B. 200.

Assignability of bond see *supra*, VII, G, 1, c.

23. Waples *v.* Adkins, 5 Harr. (Del.) 381 (holding that, except in the case of a distress for rent, a replevin bond is not assignable, and that the action thereon must be brought in the name of the officer); Balsley *v.* Hoffman, 13 Pa. St. 603; Krumbhaar *v.* Stetler, 10 Pa. Co. Ct. 12 (holding that a bond not taken under the act of 1872, relating to replevin for rent, is not assignable by the sheriff to defendant in the replevin action, and that the action must be brought by the officer for the use of such defendant).

24. Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023; Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268.

25. Schott *v.* Youree, 142 Ill. 233, 31 N. E. 591 [*affirming* 41 Ill. App. 476] (holding further that if the bond is given to the officer and his "successors in office" the action is properly brought by the officer to whom the bond is given, the words quoted being without legal effect); Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378].

26. Blatchford *v.* Boyden, 122 Ill. 657, 13 N. E. 801 [*affirming* 18 Ill. App. 378].

27. Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023; Walls *v.* Johnson, 16 Ind. 374; Kaufman *v.* Wessel, 14 Nebr. 161, 15 N. W. 219.

Although not a party defendant in the replevin action the execution or attachment creditor may join with the officer in an action upon the bond. Quinnipiac Brewing Co. *v.* Hackbarth, 74 Conn. 392, 50 Atl. 1023.

28. Kaufman *v.* Wessel, 14 Nebr. 161, 15 N. W. 219.

29. Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268; Loome *v.* Sweeney, 1 Mont. 584 [*affirmed* in 22 Wall. 208, 22 L. ed. 727].

30. Kahn *v.* Gavit, 23 Ind. App. 274, 55 N. E. 268.

31. Thomas *v.* Irwin, 90 Ind. 557.

(iii) *In Actions on Redelivery Bond.* Although a redelivery bond is given to the officer, plaintiff in replevin is the real party in interest and may sue thereon in his own name,[32] and he should sue alone without joining the officer as a party.[33] If, however, the action is brought by the party having the legal right of action, defendant cannot object that it is not brought for the benefit of the proper person.[34] Where after a redelivery bond is given plaintiff in replevin dies and another person is substituted as plaintiff, the bond takes effect in favor of the latter party who may maintain an action thereon,[35] and an assignment of the judgment recovered against defendant in replevin operates as an assignment of the redelivery bond, and authorizes the assignee as the real party in interest to sue thereon in his own name.[36]

b. Parties Defendant — (i) *In General.* If plaintiff in the replevin action joins in the execution of the replevin bond, he may be sued thereon jointly with the sureties,[37] but if he did not sign the bond he should not be joined as a party defendant.[38] Where the liability of the obligors is joint and several it is no objection that one of them is not joined as a defendant,[39] and where the first bond filed is insufficient in amount and an additional bond is executed with a different surety, a recovery may be had against the surety on the first bond without making the surety on the second bond a party to the action.[40]

(ii) *In Actions on Redelivery Bond.* Where several defendants who are in possession of different parts of the property execute a joint bond, they are jointly liable and may be sued jointly together with the sureties.[41]

5. Pleading — a. Declaration or Complaint — (i) *In General.* In an action on a replevin bond the declaration or complaint must allege every fact necessary to authorize a recovery,[42] but need not negative matters of defense.[43] It must therefore show a breach of the condition of the bond,[44] but if a breach of condition is shown it is not necessary that the breach should be formally assigned.[45] A breach assigned must be as broad as the condition of the bond,[46] and if the condition is in the alternative it must be alleged that neither condition was performed,[47] but the breach need not be assigned in any broader terms than the

32. Kimball Co. *v.* Bleick, 24 Oreg. 59, 32 Pac. 766.

Assignment of bond.—Although the officer is named as obligee in the bond it seems that plaintiff in replevin as the real party in interest might sue in his own name without any assignment of the bond, but he may certainly sue in his own name where the bond is assigned to him by the officer. Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955.

33. McBeth *v.* Van Sickle, 6 Nev. 134, holding that, although the statute requires the bond to be delivered to the sheriff, he has no interest therein, and that plaintiff in replevin as the only person interested should sue alone.

34. Conlin *v.* Butler, 10 Kulp (Pa.) 273.

35. Emerson *v.* Booth, 51 Barb. (N. Y.) 40.

36. Schlieman *v.* Bowlin, 36 Minn. 198, 30 N. W. 879.

37. Buck *v.* Lewis, 9 Minn. 314, holding that even if it were unnecessary that he should be joined neither he nor the sureties can complain.

38. Jackson *v.* Morgan, 167 Ind. 528, 78 N. E. 633.

39. Becker *v.* Ball, 18 U. C. Q. B. 192.

40. Smith *v.* Whitten, 117 N. C. 389, 23 S. E. 320.

41. Boykin *v.* Rosenfield, 69 Tex. 115, 9 S. W. 318.

42. Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763; Wetherbee *v.* Colby, 6 Vt. 647.

Allegations held sufficient to state a cause of action on the bond see Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112; Story *v.* O'Dea, 23 Ind. 326; Dillon *v.* Scofield, 11 Nebr. 419, 9 N. W. 554; Gould *v.* Warner, 3 Wend. (N. Y.) 54; Cooper *v.* McGrew, 8 Oreg. 327.

Aider by verdict.—A defective complaint may be helped by verdict. An objection that it does not allege the value of the property should be taken advantage of by demurrer, and if not so taken is cured by verdict. Krumbhaar *v.* Stetler, 10 Pa. Co. Ct. 12.

43. Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

44. Barr *v.* McGary, 131 Pa. St. 401, 19 Atl. 45; Duggan *v.* England, Harp. (S. C.) 215.

Allegations held sufficient to show a breach of the condition of the bond see Manning *v.* Pierce, 3 Ill. 4; Keyes *v.* McNulty, 14 Iowa 484; Cameron *v.* Boyle, 2 Greene (Iowa) 154; Gorman *v.* Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680.

45. Hunter *v.* Sherman, 3 Ill. 539.

46. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206.

47. Duggan *v.* England, Harp. (S. C.) 215.

condition of the bond.[48] The complaint should describe the bond by setting forth its material portions either literally or according to their legal effect;[49] so as to show what were its conditions,[50] and must allege that it was delivered;[51] but the complaint need not show who were the principals and who the sureties on the bond,[52] or allege in terms that the bond was taken in pursuance of the statute,[53] nor is it necessary expressly to allege that the bond was executed in behalf of plaintiff in replevin, if it shows that it was given for the prosecution of such suit,[54] The complaint must also show what judgment was rendered in the replevin action,[55] and that it was such as the statute requires,[56] and a failure to comply with such judgment;[57] but it is sufficient to set out the judgment without setting out the whole record of the replevin suit,[58] and it is not necessary to state the avowry or cognizance,[59] or allege the issuing and return of execution in the replevin action.[60] A general description of the property is sufficient in an action on the bond,[61] and it is not necessary to allege a demand for the property replevied,[62] or the issuing of a writ retorno habendo.[63] Under some statutes, the bond or a copy thereof must be filed with the complaint;[64] but it is not necessary to file copies of the writ of replevin and the return of the officer thereon,[65] or a transcript of the record in the replevin suit.[66] The complaint may be amended as in other civil actions subject to the rules prevailing in such actions generally.[67]

(II) *Allegations as to Assignment of Bond.* Where an assignment of the bond by the officer is necessary in order to authorize the party beneficially interested to sue thereon,[68] the complaint must allege or show such an assignment,[69]

48. Peck *v.* Wilson, 22 Ill. 205; Hunter *v.* Sherman, 3 Ill. 539.

49. Mills *v.* Gleason, 21 Cal. 274, holding that it is not sufficient where there is no other description of the bond than that it corresponds with the provisions of the statute, but that the defect is one of form rather than substance and the condition must be taken by demurrer.

50. Barr *v.* McGary, 131 Pa. St. 401, 19 Atl. 45.

51. Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

52. Shappendocia *v.* Spencer, 73 Ind. 133.

53. Shaw *v.* Tobias, 3 N. Y. 188, holding that it is sufficient if the instrument as set forth is in accordance with the statute.

54. Shaw *v.* Tobias, 3 N. Y. 188.

55. Barr *v.* McGary, 131 Pa. St. 401, 19 Atl. 45.

56. Clary *v.* Rolland, 24 Cal. 147, holding that in a suit against the sureties on a replevin bond a complaint is not sufficient which does not aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in Pr. Act, § 200.

57. Barr *v.* McGary, 131 Pa. St. 401, 19 Atl. 45.

The complaint should allege as a breach of the condition of the bond, a failure to return the property replevied on the judgment in the replevin suit. Brown *v.* Brigham, 5 Allen (Mass.) 582.

58. Nunn *v.* Goodlett, 10 Ark. 89.

59. Gould *v.* Warner, 3 Wend. (N. Y.) 54.

60. Jennison *v.* Haire, 29 Mich. 207. *Contra*, Hershiser *v.* Jordan, 25 Nebr. 275, 41 N. W. 147.

Necessity of execution as condition precedent see *supra*, VII, G, 2, a.

61. Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112.

Reference to writ.—A declaration in which the property is described by reference to the writ of replevin, and which makes profert of the record and proceedings in the action of replevin, is sufficient. Cushenden *v.* Harman, 2 Tyler (Vt.) 431.

62. Wetherbee *v.* Colby, 6 Vt. 647; Cushenden *v.* Harman, 2 Tyler (Vt.) 431.

63. Hunter *v.* Sherman, 3 Ill. 539; Cowden *v.* Pease, 10 Wend. (N. Y.) 333 (holding that, although the issuing and return of such writ is essential to the maintenance of the action, it is merely a matter of proof and need not be alleged in the declaration); Knapp *v.* Colburn, 4 Wend. (N. Y.) 616.

64. Burtt *v.* Little, 12 Ind. App. 567, 40 N. E. 929.

65. Shappendocia *v.* Spencer, 73 Ind. 133.

66. Sammons *v.* Newman, 27 Ind. 508, holding that if such transcript of the proceedings in the replevin suit is filed with the complaint it is not cause for demurrer, but that the court may strike it out on motion.

67. Truitt *v.* Collins, 2 Pennew. (Del.) 36, 45 Atl. 541 (where plaintiff was allowed to amend his pleading from an action by plaintiff as assignee of the sheriff to one by the sheriff for the use of plaintiff); Keenan *v.* Washington Liquor Co., 8 Ida. 383, 69 Pac. 112; Wheat *v.* Catterlin, 23 Ind. 85 (holding that where the proceedings in an action of replevin are reviewed and corrected during the pendency of an action on the replevin bond, the court may allow the complaint in an action on the bond to be amended by adding the proceedings and judgment on review).

68. See *supra*, VII, G, 2, c.

69. Nunn *v.* Goodlett, 10 Ark. 89; Greer *v.* Howard, 41 Ohio St. 591, holding that

and that it was made before the action on the bond was brought,[70] and where such bonds are assignable only in certain cases the complaint must show that the bond in question was assignable.[71] If the complaint alleges an assignment of the bond it is not necessary to allege that the judgment in the action was also assigned;[72] and conversely it seems that as an assignment of the judgment operates as an assignment of the bond, it is sufficient merely to allege an assignment of the judgment.[73] If no assignment is necessary in order to authorize the action on the bond, it is not necessary that the complaint should allege an assignment.[74]

(III) *In Actions on Redelivery Bond.* In an action on a redelivery bond the declaration or complaint must allege that the officer returned the property to defendant,[75] and that such delivery was procured by means of the undertaking sued on;[76] but it is not necessary expressly to allege that the bond was given in an action of replevin if the bond is set out in the complaint and its recitals show that it was given in such an action,[77] and as plaintiff in replevin may sue on a redelivery bond without an assignment thereof, it is not necessary to allege an assignment in the complaint.[78] The complaint must show a breach of the condition of the bond,[79] and the breach assigned must be as broad as the condition.[80] The complaint must allege the rendition of a judgment in favor of plaintiff in the action of replevin,[81] and must allege facts showing that the judgment rendered was one authorized by law,[82] and where the judgment in the action of replevin is in the alternative for a return of the property or its value, the complaint must allege that neither condition has been performed;[83] but if it is alleged that defendant has failed to pay the judgment, it is not necessary to allege that it remains in full force and unappealed from.[84] It is not necessary to allege the regularity of the proceedings in the replevin suit,[85] it being sufficient to allege the rendition of judgment,[86] and it is not necessary to allege that execution has been issued

where the property was replevied from an officer holding the same under an execution, the complaint in an action on the bond by plaintiff in such action must allege an assignment of the bond or the judgment in replevin, which would have effected an assignment of the bond, or allege a refusal on the part of the sheriff to assign the bond or judgment or enforce the bond.

70. Nunn *v.* Goodlett, 10 Ark. 89, holding, however, that the complaint need not allege the exact date of the assignment if it shows that the assignment was before the action on the bond was brought.

71. Knapp *v.* Colburn, 4 Wend. (N. Y.) 616, holding that a replevin bond is assignable only in cases where the goods replevied were taken as a distress for rent, and that such fact must be averred in a declaration by assignees or it will be bad.

72. Morange *v.* Mudge, 6 Abb. Pr. (N. Y.) 243.

73. See Greer *v.* Howard, 41 Ohio St. 591, where, however, the complaint failed to allege an assignment of either the bond or the judgment.

74. Parrott *v.* Scott, 6 Mont. 340, 12 Pac. 763.

75. Nickerson *v.* Chatterton, 7 Cal. 568; Barton *v.* Donnelly, 6 Misc. (N. Y.) 473, 27 N. Y. Suppl. 525. But see Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331.

But if the bond itself states that the property was returned to defendant and the bond is made a part of the petition, no further allegation as to the return of the property is necessary. O'Loughlin *v.* Carr, 9 Kan. App. 818, 60 Pac. 478.

76. Barton *v.* Donnelly, 6 Misc. (N. Y.) 473, 27 N. Y. Suppl. 525.

77. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331.

78. Hedderick *v.* Pontet, 6 Mont. 345, 12 Pac. 765.

79. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206, holding that where the bond is conditioned to deliver the property "in case the return thereof shall be awarded," it is not sufficient merely to allege a failure to return the property, but in order to show a breach of the bond it must be alleged that an order was made for its return.

Allegations held sufficient generally see Fisse *v.* Katzentine, 93 Ind. 490. An allegation that the judgment remains in full force and effect and is wholly unpaid is sufficient to show a breach of the bond. Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210.

80. Colorado Springs Co. *v.* Hopkins, 5 Colo. 206.

81. Eldred *v.* Bennett, 33 Pa. St. 183.

82. Nickerson *v.* Chatterton, 7 Cal. 568. See also New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974.

83. Nickerson *v.* Chatterton, 7 Cal. 568.

84. Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108.

85. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331.

86. O'Loughlin *v.* Carr, 9 Kan. App. 818, 60 Pac. 478.

against defendant and returned unsatisfied.[87] It is not necessary that the bond or a copy thereof should be filed with the complaint,[88] unless the statute so requires.[89] A defect in the complaint which is not objected to may be cured by verdict.[90]

b. Plea, Answer, and Affidavit of Defense — (i) *In General.* In an action on a replevin bond the plea or answer must present a good defense to the action,[91] and in traversing the allegations of the complaint should do so directly and not inferentially, as by setting up facts inconsistent with what is there alleged.[92] So also the allegations of the plea or answer must not be repugnant to each other,[93] or tender an immaterial issue,[94] as by tendering issue only upon an allegation of the complaint, which is mere surplusage.[95] While a plea which purports to answer only a part of the action is good so far as it goes,[96] a plea to the whole declaration or complaint which is an answer to only a part thereof is bad,[97] since it must be sufficient as to all breaches of the conditions of the bond which are well assigned in the declaration or complaint.[98] Fraud or collusion in regard to the procuring of the judgment in the action of replevin may be pleaded as a defense,[99] but the facts constituting the alleged fraud or collusion must be set out.[1] A plea of *nil debet* is not a proper plea in an action on a replevin bond;[2] and where the complaint sets out the condition and alleges special breaches, a plea of general performance,[3] or a plea of *non damnificatus* is bad.[4] A plea of *nul tiel record* is bad where no record is averred in the declaration,[5] and although the complaint alleges an award of retorno habendo by a court of record, a plea of *nul tiel record* is not proper, since the action is not founded upon the record but upon the bond,[6] and a plea denying that plaintiff had any property in the goods replevied is bad where no such property is averred in the declaration.[7] Matters in excuse of a breach

87. Slack *v.* Heath, 4 E. D. Smith (N. Y.) 95, 1 Abb. Pr. 331.

88. Terry *v.* Johnson, 109 Ky. 589, 60 S. W. 300, 22 Ky. L. Rep. 1210.

89. Blackburn *v.* Crowder, 108 Ind. 238, 9 N. E. 108, holding that under a statute requiring the bond or a copy thereof to be filed with the complaint, if there is a variance between the recitals of the complaint and those of the bond filed therewith, the latter will control.

90. Chaffee *v.* Sangston, 10 Watts (Pa.) 265.

91. Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928; Goelz *v.* Joerg, 64 Ill. 114; Palmer *v.* Emery, 91 Ill. App. 207.

Plea insufficient.—A plea that plaintiff ought not to maintain his action because the suit in replevin was dismissed by agreement of the parties is bad because it attempts to set up a parol dispensation of a specialty, and because the agreement would not include an agreement to dispense with a return of the property, without which the dismissal would itself be a breach of the bond. O'Neal *v.* Wade, 3 Ind. 410. A plea alleging that defendant commenced an action of replevin without any delay and "from thence hitherto has continued and prosecuted his said suit, as in the said condition is mentioned" is insufficient for not alleging that the suit was prosecuted without delay. Casswell *v.* Catton, 9 U. C. Q. B. 282.

92. Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651.

93. Wright *v.* Card, 16 R. I. 719, 19 Atl. 709, holding that a plea setting up matters of confession and avoidance and then alleging a general performance is bad for repugnancy.

94. Barbour *v.* Perry, 41 Ill. App. 613.

95. Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

96. See Wright *v.* Card, 16 R. I. 719, 19 Atl. 709.

97. Sopris *v.* Lilly, 1 Colo. 266; Goelz *v.* Joerg, 64 Ill. 114; Humphrey *v.* Taggart, 38 Ill. 228; Palmer *v.* Emery, 91 Ill. App. 207; Fellheimer *v.* Hainline, 65 Ill. App. 384; Larson *v.* Laird, 36 Ill. App. 402; Morehead *v.* Yeazel, 10 Ill. App. 263; Lindsay *v.* Blood, 2 Mass. 518; Wood *v.* Franklin, 30 Fed. Cas. No. 17,946, 2 Cranch C. C. 115.

98. Sopris *v.* Lilly, 1 Colo. 266.

99. Wright *v.* Card, 16 R. I. 719, 19 Atl. 709.

1. Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928. See also Wright *v.* Card, 16 R. I. 719, 19 Atl. 709, where the allegations were held to be insufficient.

2. King *v.* Ramsay, 13 Ill. 619; Fellheimer *v.* Hainline, 65 Ill. App. 384.

3. Gorman *v.* Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680 [*affirming* 15 Fed. Cas. No. 8,246, 5 Cranch C. C. 531]; Wood *v.* Franklin, 30 Fed. Cas. No. 17,946, 2 Cranch C. C. 115. *Compare* Doogan *v.* Tyson, 6 Gill & J. (Md.) 453, holding that whether a plea of general performance is a correct plea or not, if incorrect it can only be objected to by special demurrer.

4. Wood *v.* Franklin, 30 Fed. Cas. No. 17,946, 2 Cranch C. C. 115.

5. Wood *v.* Franklin, 30 Fed. Cas. No. 17,946, 2 Cranch C. C. 115.

6. Fellheimer *v.* Hainline, 65 Ill. App. 384.

7. Wood *v.* Franklin, 30 Fed. Cas. No. 17,946, 2 Cranch C. C. 115.

of condition of the bond cannot be availed of unless specially pleaded;[8] but ordinarily facts and circumstances which are merely in mitigation of damages need not,[9] and should not be pleaded,[10] and a plea which does not answer any or any part of the breaches alleged, but merely sets up matters which would be properly considered in mitigation of damages, is bad.[11] In some jurisdictions, however, by statute defendant may plead in mitigation of damages that the merits of the case were not determined in the action of replevin and may set up his title to the property in question;[12] but such plea is not good if pleaded in bar of the whole cause of action as it does not answer the whole declaration.[13] The practice varies in different jurisdictions as to the necessity of filing an affidavit of merits or defense in an action on a replevin bond.[14]

(II) *In Actions on Redelivery Bond.* In an action on a redelivery bond the plea or answer must allege facts which if true present a good defense to the action;[15] and where the declaration or complaint sets out the conditions of the bond and specially assigns breaches, the plea or answer should traverse the breaches as laid and conclude to the country.[16] An answer is insufficient if it neither contradicts any material allegation of the complaint nor sets up any new matter constituting a defense;[17] and an answer made on information and belief is insufficient where the facts alleged are necessarily within the knowledge of the party pleading.[18] In an action on a redelivery bond no affidavit of defense is necessary.[19]

c. Other Pleadings. The rules of pleading applicable in civil actions generally[20] apply with regard to the replication or reply,[21] and to the subsequent pleadings.[22] A party who by replication waives an objection to a formal defect in the plea cannot afterward avail himself of such objection.[23]

6. Evidence — a. Presumptions and Burden of Proof. In an action on a replevin bond the burden is upon plaintiff to show a breach of the conditions of the bond,[24] and upon defendant to establish any matters of defense or in mitigation of damages.[25] In the absence of evidence of the value of the property at

8. Smith *v.* Bowers, 2 Nebr. (Unoff.) 611, 89 N. W. 596.

9. Bradley *v.* Reynolds, 61 Conn. 271, 23 Atl. 928.

10. Sammons *v.* Newman, 27 Ind. 508; Smith *v.* Lisher, 23 Ind. 500.

11. Wright *v.* Card, 16 R. I. 719, 19 Atl. 709.

12. Chinn *v.* McCoy, 19 Ill. 604. See also *supra*, VII, E, 1, a, b.

Form of plea.— Under such statute defendant must affirmatively state in his plea why the merits were not so determined, and enough of the proceedings in the former action should be set forth to enable the court to decide on demurrer whether the right of property was determined. King *v.* Ramsay, 13 Ill. 619.

13. Morehead *v.* Yeazel, 10 Ill. App. 263. See also King *v.* Ramsay, 13 Ill. 619.

14. See Peck *v.* Wilson, 22 Ill. 205 (holding that a plea in an action on a replevin bond should not be stricken from the files for want of an affidavit of merits); Barr *v.* McGary, 131 Pa. St. 401, 19 Atl. 45 (holding that an affidavit of defense is necessary where plaintiff has complied with the Pennsylvania Practice Act of 1887, without regard to the affidavit of defense law or cases arising under its provisions).

Affidavit of merits or defense generally see Pleading, 31 Cyc. 231.

15. Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955; Adams *v.* Wiesenthal, 69 N. J. L. 65, 54 Atl. 516.

16. Adams *v.* Wiesenthal, 69 N. J. L. 65, 54 Atl. 516.

17. Livingston *v.* Hammer, 7 Bosw. (N. Y.) 670, holding such an answer to be frivolous.

18. Smith *v.* Stubbs, 16 Colo. App. 130, 63 Pac. 955.

19. Elliott *v.* Kunszig, 9 Wkly. Notes Cas. (Pa.) 542.

20. See, generally, Pleading, 31 Cyc. 241.

21. See Clark *v.* Hanchett, 40 Ill. App. 212 (replication held defective); Doogan *v.* Tyson, 6 Gill & J. (Md.) 453 (holding that where defendant pleads a general performance, plaintiff must show his cause of action in his replication, stating the breaches of conditions of the bond upon which he intends to rely).

22. Clark *v.* Hanchett, 40 Ill. App. 212, holding that in the particular case the sustaining of a demurrer to the rejoinder was not prejudicial to defendant.

23. Fellheimer *v.* Hainline, 65 Ill. App. 384.

24. Gallup *v.* Wortmann, 11 Colo. App. 308, 53 Pac. 247.

25. Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131 [*affirming* 117 Ill. App. 176]; Stevison *v.* Ernest, 80 Ill. 513 (holding that where defendant pleads in mitigation of damages that the action of replevin was dismissed without the merits of the action being tried, and sets up his title to the property, the bur-

the time of the trial, it will be presumed to be of the same value as found by the court at the time it was replevied.[26]

b. Admissibility — (i) *In General.* In actions on replevin bonds the ordinary rules of evidence in civil actions apply,[27] and subject to such rules and except as to matters conclusively determined in the replevin action,[28] evidence which is relevant to any of the material facts in issue is admissible,[29] while evidence that is irrelevant or immaterial is not admissible.[30] The affidavit,[31] declaration, or petition,[32] writ and indorsement thereon,[33] and other papers and files in the replevin suit, if properly identified, are admissible,[34] and such record constitutes the proper means of showing the subject-matter of that suit.[35] The bond itself is also admissible in evidence where its execution is sufficiently proved.[36] It is error to refuse to permit plaintiff to prove that the property has not been returned as the condition of the bond required,[37] and where the value of the property is a material issue as affecting plaintiff's damages it is error to exclude evidence of such value.[38] In an action on a redelivery bond, testimony relating to the condition of the property at a time long subsequent to the bringing of the suit is properly rejected.[39]

(ii) *Evidence of Damages.* Any evidence is admissible which tends to show the damages actually sustained after judgment in the replevin action by reason of a failure to return the property in accordance with such judgment,[40] and while, under a general breach assigned, evidence of damages suffered by a detention of the property prior to an order of return is admissible,[41] yet it must be evidence of what the damages in fact were, without any reference to the former assessment.[42] The opinion of third persons as to the possible profits which plain-

den is upon him to prove such title); Clapham *v.* Crabtree, 72 Me. 473; Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

26. Monday *v.* Vance, (Tex. Civ. App. 1899) 51 S. W. 346.

27. See, generally, Evidence, 16 Cyc. 821.

28. **Conclusiveness of adjudication in replevin** see *supra*, VII, E.

29. Perrigo Gold Min., etc., Co. *v.* Grimes, 2 Colo. 651; Bolton *v.* Nitz, 88 Mich. 354, 50 N. W. 291; Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564; Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542.

30. Janssen *v.* Duncan, 43 Colo. 286, 95 Pac. 922; Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558 [*affirming* 118 Ill. App. 297]; Hanchett *v.* Buckley, 27 Ill. App. 159.

Evidence held inadmissible see Schrader *v.* Wolflin, 21 Ind. 238; Pye *v.* Wood, 3 Harr. & J. (Md.) 504.

31. Stevison *v.* Earnest, 80 Ill. 513; Love *v.* People, 94 Ill. App. 237, holding that the affidavit made by a plaintiff in a replevin suit is competent evidence against him in a suit on the bond.

32. Stevison *v.* Earnest, 80 Ill. 513; McGinnis *v.* Hart, 6 Iowa 204.

33. Stevison *v.* Earnest, 80 Ill. 513; McGinnis *v.* Hart, 6 Iowa 204; West *v.* Caldwell, 23 N. J. L. 736.

34. Stevison *v.* Earnest, 80 Ill. 513; Woods *v.* Kessler, 93 Ind. 356; West *v.* Caldwell, 23 N. J. L. 736.

The dismissal of the replevin suit does not remove the papers from the record, and the admission of such papers in evidence in an action on the bond is not error. Woods *v.* Kessler, 93 Ind. 356.

Form of execution.—An execution in favor of defendant issued in the form of an execution in favor of a plaintiff in assumpsit cannot be considered as an execution in the replevin suit and is not admissible in an action against the sureties on the bond where under the law they are not liable until execution has been issued in that suit and returned unsatisfied. Eaton *v.* Campbell, 2 Mich. N. P. 10.

35. McGinnis *v.* Hart, 6 Iowa 204.

36. McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161, holding that where defendants admit the genuineness of their signature to the bond and the approval of the sheriff is indorsed thereon as of the date of the commencement of the suit its execution is sufficiently proved to authorize its admission in evidence.

Copy of lost bond.— Where, prior to the dismissal of a replevin suit, the affidavit, writ, and bond were lost, and plaintiff therein obtained leave to substitute copies, he could not complain, in a suit upon the bond, that the copy of the bond was introduced in evidence against him. Fleet *v.* Hertz, 201 Ill. 594, 66 N. E. 858, 94 Am. St. Rep. 192 [*reversing* 98 Ill. App. 564].

37. Smith *v.* Pries, 21 Ill. 656.

38. Siebolt *v.* Konatz Saddlery Co., 15 N. D. 87, 106 N. W. 564.

39. Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137.

40. Miltimore *v.* Bottom, 66 Vt. 168, 28 Atl. 872.

41. Shepard *v.* Butterfield, 41 Ill. 76.

42. Shepard *v.* Butterfield, 41 Ill. 76, holding that when plaintiff in an action of replevin is nonsuited, and the court orders a return of the property, and damages are assessed for its detention, evidence of such

tiff might have realized if he had not been deprived of the property replevied is not admissible.[43]

(iii) *Evidence in Mitigation of Damages.* Since a replevin bond is one of indemnity only,[44] defendant in an action on the bond is entitled to show that the actual damage sustained by plaintiff was less than the value of the property replevied,[45] and to introduce evidence of any fact proper to be considered in mitigation of damages.[46] What evidence is so admissible depends upon the rights decided in the replevin action and the nature of the bond;[47] but since a judgment for defendant in replevin does not necessarily determine the title to the property,[48] defendant in the action on the bond is entitled to show that it was not determined in such suit;[49] to show in mitigation of damages the right upon which defendant in replevin recovered;[50] and to show that he was not the owner of the property,[51] that he had merely a qualified interest therein[52] and the extent of such interest,[53] that the interest which he had has ceased to exist[54] or was a mere possessory right,[55] or that plaintiff in replevin was in fact the owner of the property;[56] and although the question of title was decided in the action of replevin, defendant in the action on the bond may show in mitigation of damages that such title was of short duration and was terminated by contract shortly after such judgment.[57] Evidence is also admissible to show that plaintiff has received the value of the property replevied,[58] and in an action on a bond given in replevin for goods distrained for rent defendant may show in mitigation of damages that there was no rent in arrear.[59] In an action on a redelivery bond where the judgment in replevin was for a return of the property or a certain sum as its value, defendant may show in mitigation of damages that he offered to return the property without unreasonable delay and did return it before the commencement of the action on the bond.[60]

assessment is not admissible in an action subsequently brought on the replevin bond.

43. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591, holding that while plaintiff may recover for a loss of profits if proved with reasonable certainty, the mere opinion of a witness as to future profits has not that element of certainty necessary as a basis for estimating damages.

44. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591; Mason *v.* Sumner, 22 Md. 312; Belt *v.* Worthington, 3 Gill & J. (Md.) 247.

45. Jackson *v.* Emmons, 59 Conn. 493, 22 Atl. 296.

46. Jackson *v.* Emmons, 59 Conn. 493, 22 Atl. 296; Vinton *v.* Mansfield, 48 Conn. 474; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256.

Mortgage on property replevied.— Evidence in an action on a replevin bond that defendants, who were plaintiffs in the replevin suit, held a mortgage on the property involved in that suit, and that the notes secured by it are still unpaid, is admissible in mitigation of damages. Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987; McFadden *v.* Ross, 108 Ind. 512, 8 N. E. 161.

Fraud in procuring property.— In an action on a replevin bond, defendant may, in mitigation of damages, give evidence of fraud by which defendant was cheated by plaintiff and others in playing at cards, whereby plaintiff won the property of defendant which was the subject of the replevin. McDaniel *v.* Fish, 16 Fed. Cas. No. 8,744, 2 Cranch C. C. 160.

47. Mason *v.* Sumner, 22 Md. 312; Belt *v.* Worthington, 3 Gill & J. (Md.) 247.

48. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

49. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

50. Mason *v.* Sumner, 22 Md. 312.

51. Walter *v.* Warfield, 2 Gill (Md.) 216; Easter *v.* Foster, 173 Mass. 39, 53 N. E. 132, 73 Am. St. Rep. 257.

52. Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147; Mason *v.* Sumner, 22 Md. 312; Lindner *v.* Brock, 40 Mich. 618. But see Williams *v.* Vail, 9 Mich. 162, 80 Am. Dec. 76.

53. Hannon *v.* O'Dell, 71 Conn. 698, 43 Atl. 147; Lindner *v.* Brock, 40 Mich. 618.

54. Tuck *v.* Moses, 58 Me. 461.

55. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

56. Allen *v.* Woodford, 36 Conn. 143; Jones *v.* Smith, 79 Me. 452, 10 Atl. 256; Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591; Belt *v.* Worthington, 3 Gill & J. (Md.) 247; Ringgold *v.* Bacon, 20 Fed. Cas. No. 11,842, 3 Cranch C. C. 257 (holding further that plaintiff may rebut such evidence by showing that the deed under which plaintiff in replevin claims title was fraudulent and void); Smith *v.* Hazel, 22 Fed. Cas. No. 13,055, 3 Cranch C. C. 55.

57. Cumberland Coal, etc., Co. *v.* Tilghman, 13 Md. 74.

58. Vinton *v.* Mansfield, 48 Conn. 474.

59. Wood *v.* May, 30 Fed. Cas. No. 17,956, 3 Cranch C. C. 172. See also Mason *v.* Sumner, 22 Md. 312.

60. June *v.* Payne, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556.

(iv) *Value of Property.* As tending to show the value of the property at the time it was replevied, evidence is admissible as to its value before or after that time,[61] and the testimony of any witness of competent knowledge is admissible as to the value of the property.[62] The finding of the jury in the replevin action as to the value of the property is admissible in an action on the bond,[63] but a failure of the jury to assess the value will not preclude plaintiff from otherwise showing and recovering such value in an action on the bond.[64] The sum named in the bond is also evidence as to the value of the property;[65] but statements as to the value of the property in the bond, writ, or affidavit are not conclusive,[66] and it has been held will not preclude either party in an action on the bond from showing by parol evidence the true value of the property.[67] The original appraisement in the replevin action is not admissible on the question of value as against plaintiff who was defendant in replevin and had no part in procuring it to be made.[68]

c. Weight and Sufficiency. In an action upon a replevin bond the rules as to the weight and sufficiency of evidence in civil actions generally apply.[69] The value stated in the replevin affidavit,[70] in the writ of replevin,[71] or in the replevin bond [72] is *prima facie* evidence of the value of the property, and in the absence of any evidence to the contrary is sufficient;[73] but such statements are not conclusive evidence of the value of the property.[74] So also in an action on a bond given on the replevin of property held under an execution, the recital in the bond is *prima facie* evidence of the amount of the execution.[75] As the conditions to prosecute the replevin action and to make return of the property are distinct and separate, proof of a breach of the former is not sufficient evidence of a breach of the latter.[76]

61. Balsley *v.* Hoffman, 13 Pa. St. 603, holding further that where defendant is allowed to give evidence of the value of the property before and after the time it was replevied, plaintiff should be allowed the same privilege in rebuttal and not confined to the day on which the property was replevied.

62. Wright *v.* Quirk, 105 Mass. 44.

63. Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799, such finding is both admissible and conclusive.

64. Yelton *v.* Slinkard, 85 Ind. 190.

65. Wright *v.* Quirk, 105 Mass. 44.

66. See *infra*, VII, G, 6, c.

67. Farson *v.* Gilbert, 85 Ill. App. 364 (statement of value in affidavit); West *v.* Caldwell, 23 N. J. L. 736 (statement of value in bond). But see Wiseman *v.* Lynn, 39 Ind. 250 (statement of value in bond); Washington Ice Co. *v.* Webster, 125 U. S. 426, 8 S. Ct. 947, 31 L. ed. 799 (holding that it is not competent for defendant to show that the value of the property was less than that stated in the bond, but that plaintiff is not precluded from showing the value to be greater than that amount).

68. Wright *v.* Quirk, 105 Mass. 44; Kafer *v.* Harlow, 5 Allen (Mass.) 348.

69. See, generally, Evidence, 17 Cyc. 753, and cases cited *infra*, this note.

Evidence held sufficient: As to execution and delivery of the bond. Clark *v.* Dreyer, 9 Colo. 453, 48 Pac. 818. To show a breach of the conditions of the bond. Hood *v.* Spaeth, 51 N. J. L. 129, 16 Atl. 163. To establish the identity of the property replevied. Kellogg *v.* Boyden, 126 Ill. 378, 18 N. E. 770. To establish the ownership of the property. Wiseman *v.* Lynn, 39 Ind. 250.

Evidence held insufficient for failure to show that plaintiff in replevin took possession of the property in question by virtue of his writ of replevin see Pettit *v.* Allen, 64 N. Y. App. Div. 579, 72 N. Y. Suppl. 287.

In action on redelivery bond.— Evidence held insufficient to sustain verdict for defendants see Alves *v.* Humphrey, 69 S. W. 1080, 24 Ky. L. Rep. 764.

70. Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558 [*affirming* 118 Ill. App. 297]; Richardson *v.* Gilbert, 135 Ill. App. 363; Farson *v.* Gilbert, 114 Ill. App. 17; Farson *v.* Gilbert, 85 Ill. App. 364.

71. Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29.

72. Martin *v.* Hertz, 224 Ill. 84, 79 N. E. 558 [*affirming* 118 Ill. App. 297].

73. Martin *v.* Hertz, 224 Ill. 84, 69 N. E. 558 [*affirming* 118 Ill. App. 297] (statement of value in bond); Wiseman *v.* Lynn, 39 Ind. 250 (statement of value in bond); Wright *v.* Quirk, 105 Mass. 44 (statement of value in bond); Capital Lumbering Co. *v.* Learned, 36 Oreg. 544, 59 Pac. 454, 78 Am. St. Rep. 792 (statement of value in bond).

74. Farson *v.* Gilbert, 85 Ill. App. 364 (statement of value in affidavit); Wright *v.* Quirk, 105 Mass. 44 (statement of value in bond); West *v.* Caldwell, 23 N. J. L. 736 (statement of value in bond); Gibbs *v.* Bartlett, 2 Watts & S. (Pa.) 29 (statement of value in writ).

Admissibility of other evidence to show value notwithstanding recitals in the bond, writ, or affidavit see *supra*, VII, G, 6, b, (iv).

75. Roman *v.* Stratton, 2 Bibb (Ky.) 199.

76. Vinyard *v.* Barnes, 124 Ill. 346, 16 N. E. 254.

7. Issues, Proof, and Variance. As in other civil actions plaintiff must support by proof the material facts in issue necessary to authorize a recovery,[77] and defendant the facts relied on as a defense,[78] although matters which stand admitted by the pleadings need not be proved,[79] and the proof need not be more extensive than the breach of condition alleged.[80] Where the answer is a general denial, plaintiff should give in evidence the undertaking sued on to entitle him to a recovery; [81] and where the only breach of the bond is a failure to prosecute the suit to effect, such suit having been dismissed and no return of the property awarded, actual damages must be shown in order to authorize a recovery of more than nominal damages.[82] As in other civil actions the evidence to be admissible must conform to the pleadings and issues,[83] and evidence of expenses for attorney's fees is not admissible unless a proper foundation for such recovery is laid in the complaint.[84] Matters in mitigation of damages may be given in evidence by defendant under a general denial without being specially pleaded; [85] but a defense that the justice before whom the action of replevin was brought was without jurisdiction should, where such fact does not affirmatively appear from the proceedings, be specially pleaded.[86] The case must be proved as alleged,[87] and a material variance is fatal to a recovery; [88] but a variance which is not material may be disregarded.[89] In an action upon a redelivery bond plaintiff must prove the rendition of a judgment in his favor in the action of replevin,[90] and if plaintiff relies upon a judgment apparently not authorized by statute, it is incumbent upon him to show the exceptional facts which authorize the judgment.[91] No recovery can be had on a redelivery bond where there is no evidence of its contents or as to who are the sureties thereon.[92]

8. Trial, Judgment, and Review — a. Instructions. It has uniformly been held that the general rules which have been declared to be applicable to the giving or refusing of instructions in civil cases generally apply in actions on replevin bonds,[93]

77. Gallup *v.* Wortmann, 11 Colo. App. 308, 53 Pac. 247; Pettit *v.* Allen, 64 N. Y. App. Div. 579, 72 N. Y. Suppl. 287; Cowdin *v.* Stanton, 12 Wend. (N. Y.) 120; Knott *v.* Sherman, 7 S. D. 522, 64 N. W. 542. See also Le Barron *v.* Taylor, 53 Iowa 637, 6 N. W. 35.

Proof of execution of bond.— In an action of debt on a replevin bond, the introduction of the bond without objection, under a verified plea of *non est factum*, is not a waiver of proof of the execution of such bond (Carlson *v.* Gilbert, 99 Ill. App. 574); but where the declaration states the legal effect of the bond, it is unnecessary to prove its execution where it has not been denied by a plea verified by affidavit (Horner *v.* Boyden, 27 Ill. App. 573).

78. Clapham *v.* Crabtree, 72 Me. 473.

79. Richardson *v.* Gilbert, 135 Ill. App. 363 (holding that if no plea is filed traversing the allegation of the declaration of a failure to return the property, such allegation stands admitted and need not be proved); Hanchett *v.* Buckley, 27 Ill. App. 159 (holding that an allegation of the declaration that there was an award of retorno habendo upon dismissal of the replevin suit, unless denied by plea, stands admitted and need not be proved).

80. Kellogg *v.* Boyden, 126 Ill. 378, 18 N. E. 770.

81. Smith *v.* Lisher, 23 Ind. 500.

82. Imel *v.* Van Deren, 8 Colo. 90, 5 Pac. 803.

83. Chapin *v.* Matson, 37 Ill. App. 257; Wall *v.* Humphreys, 4 Dana 209; Gorman *v.* Lenox, 15 Pet. (U. S.) 115, 10 L. ed. 680 [*affirming* 15 Fed. Cas. No. 8,246, 5 Cranch C. C. 531].

84. Edwin *v.* Cox, 61 Ill. App. 567.

85. Smith *v.* Lisher, 23 Ind. 500.

86. Tyler *v.* Bowlus, 54 Ind. 333, 601.

87. Lockhart *v.* Bell, 2 Hill (S. C.) 422, holding that where the bond is declared on as a joint bond against two obligors, plaintiff cannot recover upon proof that it was executed by one of them without any proof as to the other.

88. Lockhart *v.* Bell, 2 Hill (S. C.) 422, holding that under a declaration against one defendant upon a bond as a joint and several obligation, plaintiff cannot recover upon the bond which as adduced and proved purports to be a joint obligation entered into by defendant and others.

89. Stevison *v.* Earnest, 80 Ill. 513.

90. Eldred *v.* Bennett, 33 Pa. St. 183.

91. New England Furniture, etc., Co. *v.* Bryant, 64 Minn. 256, 66 N. W. 974.

92. Rousher *v.* Hamm, 3 Brewst. (Pa.) 233.

93. See cases cited *infra*, this note.

Instructions held erroneous.— An instruction placing the burden of proof on the wrong party is erroneous. Hanchett *v.* Buckley, 27 Ill. App. 159. It is error, in an action on a replevin bond, to charge that the bond being one of indemnity only, the verdict must be for defendant unless plaintiff sustained actual

and redelivery bonds. There is nothing in the nature of such actions to warrant a departure from these rules.[94]

b. Verdict. In an action on a replevin bond the verdict should find both the debt and damage,[95] and the value of the property.[96] Where a verdict does substantial justice, and the party against whom it is rendered shows no merits, informality will not vitiate it.[97]

c. Judgment — (I) *In General* — (A) *In Action on Replevin Bond.* A judgment against the principal and sureties on the replevin bond must show the value of each separate article of the property replevied.[98] Where defendant demurs and his demurrer is overruled and he fails to obtain leave to plead, the judgment on the demurrer in such case is that plaintiff recover his debt and damages occasioned by detention of the same.[99] On a motion to have execution on a lost replevin bond, the judgment must conform to the statute authorizing the proceeding.[1]

(B) *In Action on Redelivery Bond.* Judgment against the sureties on a redelivery bond can be rendered only in the manner provided by statute.[2] A judgment against the sureties is not warranted where defendant's bond is not in compliance with statute;[3] but where, in the absence of contrary proof, the bond shows that the property is retained by defendant, a judgment against him is justified.[4] That defendant consented to judgment before maturity of the debt is no ground for complaint by his sureties;[5] and a consent judgment cannot be set aside as fraudulent at the instance of the sureties by motion in the same cause, but only in a separate action.[6]

(II) *By Confession.* In the absence of a statute or rule of public policy prohibiting it, a sheriff may take a bond, voluntarily offered him, containing a warrant to confess judgment.[7] Judgment on a replevin bond, with warrant to confess judgment, may be confessed after verdict in the replevin suit, and before final judgment is entered thereon.[8] But the confession of judgment is merely cautionary, and plaintiff has no right to enforce it unless there has been some breach of the condition of the bond, and then only to the amount of damages which he has suffered by reason of such breach.[9]

(III) *Against One or More Co-Parties.* Defendant in the replevin suit is entitled to judgment against as many as are legally liable on the replevin bond.[10] Where a defendant, after giving a redelivery bond which proves insufficient in amount, executes an additional bond, with a different surety, plaintiff

damage from the taking of the property under the writ, since where plaintiff in replevin fails to prosecute the writ with effect, defendant would in any case be entitled to nominal damages. Crabbs *v.* Koontz, 69 Md. 59, 13 Atl. 591.

Instruction held not to invade province of jury.— Where the record of the replevin suit is properly in evidence, an instruction stating the legal effect thereof does not invade the province of the jury. McGinnis *v.* Hart, 6 Iowa 204.

94. See Johnson *v.* Mason, 70 N. J. L. 13, 56 Atl. 137, requests for instructions held properly refused because based upon misstatements of facts.

95. Odell *v.* Hole, 25 Ill. 204.

96. Talcott *v.* Rose, (Tex. Civ. App. 1901) 64 S. W. 1009; Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217.

97. Bates *v.* Williams, 43 Ill. 494.

98. Bateman *v.* Hipp, (Tex. Civ. App. 1908) 111 S. W. 971; Cummings *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500; Meyers *v.* Bloon, 20 Tex. Civ. App. 554, 50 S. W. 217; Herder *v.* Schwab Clothing Co., (Tex. Civ. App. 1896) 37 S. W. 784.

99. Bates *v.* Williams, 43 Ill. 494.

1. Farrow *v.* Orear, 2 Duv. (Ky.) 261.

2. Baldwin *v.* Dillon, 30 Mo. 429, holding that in a suit for the possession of personal property, under the eighth article of the Practice Act of 1849 (Sess. Acts (1849), p. 82), if defendant gave a forthcoming bond, as allowed by said article, with sureties, judgment could be rendered against the sureties only in the mode pointed out in the ninth section of said article.

3. Fenn *v.* Harrington, 54 Miss. 733.

4. Fenn *v.* Harrington, 54 Miss. 733.

5. McDonald *v.* McBryde, 117 N. C. 125, 23 S. E. 103.

6. McDonald *v.* McBryde, 117 N. C. 125, 23 S. E. 103.

7. Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802.

8. Clark *v.* Morss, 142 Pa. St. 311, 21 Atl. 802.

9. Lewis *v.* Bonnert, 12 Pa. Co. Ct. 366.

10. Alexander *v.* Lydick, 80 Mo. 341.

may have judgment against the surety on the first bond, although he has not made the administrator of the surety on the additional bond a party to the action.[11]

(iv) *Conformity to Pleadings.* Where, in an action on a replevin bond, plaintiff has the election to sue either individually or representatively, judgment may be rendered accordingly.[12] A judgment against the sureties for an amount greater than that claimed by plaintiff is erroneous.[13]

(v) *Execution and Enforcement.* In an action on a replevin bond, judgment for plaintiff must be for the penalty of the bond, but execution can issue for so much thereof only as is due for the breach proved.[14]

d. Review. Where, on appeal in an action on a replevin bond, the judgment is erroneous for failure to find the value of each article replevied, but the evidence in the record is sufficient to show the value of each article, the appellate court has power to reform the judgment.[15] So where judgment is rendered in damages, for a greater amount than the *ad damnum* laid in the declaration, the appellate court may permit the judgment to be amended by remitting the excess.[16] If the verdict is against the weight of evidence, the judgment thereon will be reversed;[17] but reversal of a judgment cannot be had for harmless error,[18] nor for errors which were called to the attention of the trial court.[19] Instructions will be assumed to have been pertinent where nothing is shown to the contrary.[20]

REPLEVY. To redeliver goods which have been distrained to the original possessor of them upon his giving pledges.[1] (See, generally, Replevin.)

REPLICATION. In equity, the plaintiff's answer or reply to the defendant's plea or answer.[2] (See, generally, Equity, 16 Cyc. 320; Pleading, 31 Cyc. 241.)

REPLY. In a general sense, what the plaintiff, petitioner, or other person who has instituted a proceeding says in answer to the defendant's case. Under the code, it is generally the name of the pleading which corresponds to "replication" in common law or equity practice.[3] (See, generally, Equity, 16 Cyc. 320; Pleading, 31 Cyc. 241.)

REPORT.[4] The mechanical reproduction of what actually took place;[5] an

While a general judgment cannot be rendered against a married woman on a replevin bond, yet it can be rendered against her co-principal and sureties, who are legally liable thereon. Alexander *v.* Lydick, 80 Mo. 341.

11. Smith *v.* Whitten, 117 N. C. 389, 23 S. E. 320.

12. Oliver *v.* Townsend, 16 Iowa 430.

13. McGinnis *v.* Hart, 6 Iowa 204; Monday *v.* Vance, (Tex. Civ. App.) 51 S. W. 346, redelivery bond.

14. Wright *v.* Quirk, 105 Mass. 44.

Execution should be for the debt, with an indorsement that damages only should be collected thereon. Odell *v.* Hole, 25 Ill. 204.

15. Cummings *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500.

16. Hunter *v.* Sherman, 3 Ill. 539; Kaufman *v.* Wessel, 14 Nebr. 161, 15 N. W. 219.

17. Alves *v.* Humphrey, 69 S. W. 1080, 24 Ky. L. Rep. 764, holding that a verdict exonerating defendant and his sureties from liability on the ground that the property had been delivered to plaintiff is against the weight of evidence, where there is testimony showing that the delivery of the property to defendant was simply delayed until a proper bond was given.

18. Ringgenberg *v.* Hartman, 124 Ind. 186, 24 N. E. 987.

19. Crill *v.* Jeffrey, 95 Iowa 634, 64 N. W. 625.

20. McGinnis *v.* Hart, 6 Iowa 204.

1. Bouvier L. Dict. [*quoted* in Kirk *v.* Morris, 40 Ala. 225, 229].

The process indicated by this term is intended merely as an inexpensive method of preserving the property until it is wanted for the payment of a judgment that may be rendered. Humes *v.* Scott, 130 Ala. 281, 284, 30 So. 788.

"Replevied" as used in the rule that it is the duty of the officer, when property described in the writ is pointed out to him, to immediately take it in his possession for the purpose of having it appraised and ready to be replevied as soon as the bond is given, is used in its technical sense, and means "deliver to the owner." Steuer *v.* Macguire, 182 Mass. 575, 576, 66 N. E. 706.

2. Worthington's Appeal, 9 Kulp (Pa.) 132, 133.

General replication is a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the bill. Vanbibber *v.* Beirne, 6 W. Va. 168, 180.

3. Black L. Dict.

4. **Distinguished from "comment"** see Johns *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 209, 19 N. Y. Suppl. 3.

5. Jones *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 209, 19 N. Y. Suppl. 3.

account or statement of the results of examination or inquiry made by request or direction;[6] synonymous with "rumor."[7] (Report: By Bank Officer, see BANKS AND BANKING, 5 Cyc. 486. By Commissioners, Appraisers, or Viewers — In Condemnation Proceedings, see EMINENT DOMAIN, 15 Cyc. 890; In Drainage Proceedings, see DRAINS, 14 Cyc. 1039; In Highway Proceedings, see STREETS AND HIGHWAYS; In Proceedings For Municipal Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 984, 985; In Proceedings to Establish Private Road, see PRIVATE ROADS, 32 Cyc. 375. By Corporate Officer, see CORPORATIONS, 10 Cyc. 866. By Corporation of Property For Taxation, see TAXATION. By Telegraph or Telephone Company, see TELEGRAPHS AND TELEPHONES. Competency of Official as Evidence, see EVIDENCE, 17 Cyc. 296. In Partition Proceedings, see PARTITION, 30 Cyc. 259. In Proceedings to Fix Boundaries, see BOUNDARIES, 5 Cyc. 947. Of Auditor or Trustee in Attachment, see ATTACHMENT, 4 Cyc. 720. Of Case or Evidence For Consideration by Appellate Court, see APPEAL AND ERROR, 3 Cyc. 23. Of City Officer as to Fiscal Management, see MUNICIPAL CORPORATIONS, 28 Cyc. 1563. Of Commercial Agency, see EVIDENCE, 17 Cyc. 405. Of Commissioners — As to Confirmation of Spanish, Mexican, or French Land Grants, see PUBLIC LANDS, 32 Cyc. 1215; In Admiralty, see ADMIRALTY, 1 Cyc. 889; In Proceedings to Vacate Highways, see STREETS AND HIGHWAYS. Of Exempt Property of Bankrupt, see BANKRUPTCY, 5 Cyc. 361. Of Fence-Viewers, see FENCES, 19 Cyc. 477. Of Grand Juries, see GRAND JURIES, 20 Cyc. 1337. Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 238. Of Insurance Company, see INSURANCE, 22 Cyc. 1394. Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 32. Of Partnership Accounting, see PARTNERSHIP, 30 Cyc. 746. Of Public Finances, see COUNTIES, 11 Cyc. 518. Of Receiver, see RECEIVERS, *ante*, p. 246. Of Receiver's Sale, see RECEIVERS, *ante*, p. 321. Of Redemption From Tax-Sale, see TAXATION. Of Referee — In General, see APPEAL AND ERROR, 3 Cyc. 613, 703, 996, 1079; REFERENCES, *ante*, p. 770; In Creditor's Suit, see CREDITORS' SUITS, 12 Cyc. 55; In Equity, see EQUITY, 16 Cyc. 444. Of Sale by Order of Court — Of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 786; Of School or University Land, see PUBLIC LANDS, 32 Cyc. 884. Of Sale of Land For Taxes, see TAXATION. Privilege of Public Officer as to, see LIBEL AND SLANDER, 25 Cyc. 387, 406. See also REPORTS, *post*, p. 1610.)

REPORTER. Of a newspaper, is a person employed in reporting proceedings of courts, public meetings, legislative assemblies, and other services of a kindred character for the newspaper.[8] (Reporter: Of Legal Decisions, see REPORTS, *post*, p. 1617.)

6. Webster Dict. [*quoted* in Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18 20].

7. State *v.* Culler, 82 Mo. 623, 627.

"Newspaper report" defined see 29 Cyc. 691.

"Report the same to Congress" as meaning no more than that the court is to report the result of the adjudication directed by Congress to be made see Irwin *v.* U. S., 23 Ct. Cl. 149, 155.

"Report at the custom-house" as equivalent to "entered at the custom-house" see Mignano *v.* MacAndrews, 49 Fed. 376, 377.

8. Harris *v.* Norvell, 1 Abb. N. Cas. (N. Y.) 127, 131. *Compare* Michigan Trust Co. *v.* Grand Rapids Democrat, 113 Mich. 615, 617, 71 N. W. 1102, 67 Am. St. Rep. 486.

REPORTS

By Emilius O. Randall
Supreme Court Reporter of Supreme Court of Ohio

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CROSS-REFERENCES

For Matters Relating to:
Law Reports:
As Documentary Evidence, see Evidence, 17 Cyc. 424.
Copyright of:
In General, see Copyright, 9 Cyc. 899.
Opinion of Court, see Copyright, 9 Cyc. 899.
Syllabi, Statements, Indexes, Etc., see Copyright, 9 Cyc. 900.
Reading to Jury:
In Civil Action, see Trial.
In Criminal Prosecution, see Criminal Law, 12 Cyc. 583.

I. Definition.[1]

Reports are collections of the authoritative expositions of the law by the regularly constituted judicial tribunals supplemented and arranged by an officer

1. "Report" defined generally see *ante,* p. 1608.

called the court reporter.[2] Provisions in various state constitutions as to "department reports" do not apply to reports of judicial decisions.[3] Nor does the phrase "other printing and binding" include them.[4]

II. General Nature and Contents.

A. In General. Each volume of reports usually consists of a title page,[5] of a statement of the entry of copyright,[6] of a list of the judges composing the court,[7] of a table of cases reported in the volume [8] arranged in alphabetical order,[9] of an index to all subjects judicially considered,[10] arranged alphabetically, often consisting substantially of a reproduction of the head-notes of the cases reported,[11] and principally of the reported cases themselves.[12] In addition it may and frequently does contain appropriate cross-references and foot-notes.[13]

B. Component Parts of Cases Reported. A complete report of a decided case can usually be divided into six distinct parts: (1) The title of the case; [14] (2) the syllabus or head-note; [15] (3) the statement of the case,[16] sometimes embodied in the opinion and sometimes preceding it; [17] (4) the argument of counsel,[18]

2. See Banks *v.* West Pub. Co., 27 Fed. 50.

After opinions are printed and bound in book form, the volumes containing them are denominated "reports." But the name so given is used in a special and peculiar sense. Such reports are not reports within the ordinary meaning of the term. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18, 20.

"Report" in this sense is also defined as being "an account or statement of a judicial opinion or decision, or of a case argued and determined in a court of law, chancery," etc. Webster Int. Dict.

"Delivered" distinguished from "reported." — The final judgment of a court is never called a "report"; neither is the opinion giving the reasons on which the judgment is based. In appellate tribunals, when, in a given case, the court has reached its conclusion, and is ready to pronounce its judgment, some member of the court is usually designated to prepare the opinion, but he is never said to report it. The opinion is delivered, not reported, by him. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18, 20.

3. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

4. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

5. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

6. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

7. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

8. Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; State *v.* Gould, 34 Fed. 319.

9. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

10. Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; State *v.* Gould, 34 Fed. 319.

11. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

12. See *infra*, II, B.

13. Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; State *v.* Gould, 34 Fed. 319.

14. Hepburn "How to Study Cases," p. 1; Brief Making, § 17.

The title of the case gives the names of the parties, the court, the date, and the name, volume, and page of the report. Hepburn "How to Study Cases," p. 1.

15. Hepburn "How to Study Cases," p. 2; Brief Making, § 17. See also Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547; State *v.* Gould, 34 Fed. 319.

The syllabus or head-note indicates more or less fully the proposition of law for which, in the opinion of the reporter, or sometimes of a judge, the case is supposed to be an authority. Hepburn "How to Study Cases," p. 2.

16. Hepburn "How to Study Cases," p. 2; Brief Making, § 17.

The statement of the case is usually a recital drawn up by the judge, sometimes by the reporter, of the important facts in controversy, of the nature of plaintiff's claim, or, in older cases, of his form of action, and the manner in which his claim was presented to the trial court, including especially the course of the pleadings, of the rulings of the trial court, and the supposed errors therein, and of the manner in which the aid of the reviewing court has been sought. Hepburn "How to Study Cases," p. 2. See also Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; State *v.* Gould, 34 Fed. 319.

17. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

18. Hepburn "How to Study Cases," p. 2; Brief Making, § 17. See also Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. W. 177, 32 L. ed. 547; State *v.* Gould, 34 Fed. 319.

The argument of counsel is usually a somewhat summary statement of the arguments presented to the reviewing courts by the opposing counsel. Hepburn "How to Study Cases," p. 2.

with the names of the respective counsel;[19] (5) the opinion of the court;[20] and (6) the judgment.[21]

III. Right to Publish or to Control Publication.

A. In General. The right to publish or to control the publication of judicial decisions for general circulation has given rise to much contention; the doctrine of the English cases[22] differs materially from the rules enunciated by the American courts.[23] Moreover the decisions, even in America, are not in full accord.[24]

B. In England. The English cases hold that others than the reporter may not publish or sell any part of the latter's work which is original with him or avail themselves of his arrangement of the subject-matter.[25] It is also held "that it is piracy to collect together and reprint from the law reports all the cases upon a particular subject, although the collection and classification may be new with the addition of several previously unpublished decisions and notes."[26] And it is believed that in England the weight of authority is that the government may prevent the publication by private parties of the opinions written by the judges.[27]

C. In America — 1. In General. Since the right to first publish intellectual productions rests solely upon ownership of the literary property therein,[28] and the exclusive right of multiplying and vending copies of the same can be claimed only under the copyright laws,[29] it follows that the right of a state,[30] judge, reporter,[31] or other person to control the exclusive publication of law reports, or any part thereof, must depend entirely upon the protection afforded by the ownership of a valid copyright.

2. Literary Product of Courts and Judges. Neither the reporter[32] of, nor the judge[33] delivering, an opinion has such literary property therein as to entitle him to copyright the same; and while it has been held[34] and also doubted[35] that a state may itself take out the copyright, the better opinion is that no copyright

19. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

20. Hepburn "How to Study Cases," p. 2; Brief Making, § 17. See also Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; State *v.* Gould, 34 Fed. 319.

The opinion of the court is the vital part of the report. Its purpose is to show with clearness what questions were presented to and considered by the court, and what general principles of law were followed in answering them. Hepburn "How to Study Cases," p. 2.

21. Hepburn "How to Study Cases," p. 2; Brief Making, § 17.

The judgment is a brief summary of the result reached by the court. Hepburn "How to Study Cases," p. 2.

22. See *infra*, III, B.

23. See *infra*, III, C.

24. See *infra*, III, C.

25. Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Hodges *v.* Welsh, 2 Ir. Eq. 266; Butterworth *v.* Robinson, 5 Ves. Jr. 709, 31 Eng. Reprint 817.

26. Hodges *v.* Welsh, 2 Ir. Eq. 266.

27. See Banks *v.* West Pub. Co., 27 Fed. 50 [*citing* and *commenting* on Roper *v.* Streator, 6 Bacon Abr. 507; Eyre *v.* Carmen, 5 Bacon Abr. 509; Millar *v.* Taylor, 4 Burr. 2303; Basket *v.* Cambridge University, 2 Burr. 661. 2 Ld. Ken. 397, 96 Eng. Reprint 1222, W. Bl. 105, 96 Eng. Reprint 59; *In re* Roll's Abridgment, Carter 89; Stationers Co. *v.* Parker, Skin. 233, 90 Eng. Reprint 107].

28. See Literary Property, 25 Cyc. 1489.

29. See Copyright, 9 Cyc. 986.

30. See *infra*, III, C, 2.

31. See *infra*, III, C, 3.

32. See Copyright, 9 Cyc. 899 text and note 19.

33. See Copyright, 9 Cyc. 899 text and note 19.

A judge who writes an opinion is not the proprietor thereof. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425. Nor can he confer upon the reporter a copyright therein. Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055.

34. Gould *v.* Banks, 53 Conn. 435, 2 Atl. 886, 55 Am. Rep. 143.

The courts of Connecticut have taken the view that the judges being paid by the state the result of their mental labor is the property of the state and that it is for the state to say when and in what manner the decisions of its courts shall be published. Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215; Gould *v.* Banks, 54 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143.

The taking of a copyright in its official reports by the state in no sense offends the rule that judicial proceedings shall be public. The courts and their records are open to all. Gould *v.* Banks, 53 Conn. 415, 2 Atl. 899, 55 Am. Rep. 143.

35. Banks *v.* West Pub. Co., 27 Fed. 50.

in judicial decisions and opinions exists in favor of the state.[36] Opinions of the courts, after their delivery, are the property of and belong to the public.[37] Whenever the judges prepare, in addition to the opinions, the syllabi, head-notes, statements of the cases, and the like, no copyright can be had in such matter.[38] So far therefore as the opinions delivered and the literary product of judges performed by them as such are concerned, no one has the exclusive right to publish them or to control their publication.[39]

3. Literary Product of Reporters — a. Right of Reporter. All but the opinions of the court, and what is contained in those opinions, is usually the work of the reporter and the result of intellectual labor on his part;[40] hence the protection of the copyright may be extended to the supplementary matter added by the reporter to the decisions as well as to his original arrangement of the judicial expositions,[41] so as to prevent the publication by others of volumes of reports containing copies of such matters.

b. Right of Reporter's Assignee. Where the reporter assigns to another his whole interest in copyrighted reports the assignee has the right of renewal at the expiration of the first copyright period,[42] with all the attendant protection resulting therefrom.

c. Right of State. The legislature may enact that the reporter, or other officer, shall take out the copyright, in reports prepared by the reporter, for the state, in which case of course the reporter himself has no copyright;[43] but where the reporter as an individual could take no copyright the state could acquire none.[44]

4. Duty to Furnish Copies of Opinions. By the weight of authority, neither the judge nor the reporter having a copyrightable interest in the original opinions of the court,[45] copies of such opinions must be furnished to applicants who tender the proper fees therefor.[46] It is not within the constitutional power of the legis-

36. See Copyright, 9 Cyc. 899 text and note 20. See also 22 Cent. L. J. 240.

37. See 33 Alb. L. J. 441.

38. Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306.

39. See cases cited *supra*, notes 32–38.

40. Callaghan *v.* Myers, 128 U. S. 617, 645, 9 S. Ct. 177, 32 L. ed. 547.

In Connecticut, however, where the reporter is paid by the state, his intellectual product has been held to be the literary property of the state. Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215; Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143.

41. Mitchell *v.* Moore, 35 Ark. 617; Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215; Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143; Banks *v.* West Pub. Co., 27 Fed. 50. And see Copyright, 9 Cyc. 900 text and note 21.

A reporter, when there is no legislation forbidding it, may protect his work as any other author, but to do so it must be copyrighted in the same manner as other literary productions, as such right depends wholly upon the legislation of congress. Black *v.* Merrill, 51 Ind. 32, 37; Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Paige *v.* Banks, 13 Wall. (U. S.) 616, 20 L. ed. 709; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Banks *v.* West Pub. Co., 27 Fed. 50; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 362. See also Copyright, 9 Cyc. 900.

When prepared by the court, no right to copyright the syllabi or statements of facts vests in the reporter. See Copyright, 9 Cyc. 900 text and note 23.

42. Paige *v.* Banks, 13 Wall. (U. S.) 616, 20 L. ed. 709; Cowen *v.* Banks, 6 Fed. Cas. No. 3,295, 24 How. Pr. (N. Y.) 72.

43. Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328. See also Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215; Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143.

The government may contract with the reporter that the copyright in such matter shall vest in itself. See Copyright, 9 Cyc. 900 text and note 22.

44. Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306.

45. See *supra*, III, C, 2. See also Copyright, 9 Cyc. 899 text and notes 19, 20.

46. Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Banks *v.* Manchester, 128 U. S. 244, 9 S. Ct. 36, 32 L. ed. 425; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; State *v.* Gould, 34 Fed. 319; Banks *v.* West Pub. Co., 27 Fed. 50; Chase *v.* Sanborn, 5 Fed. Cas. No. 2,628, 4 Cliff. 306; Gould *v.* Hastings, 10 Fed. Cas. No. 5,639; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1, 7 Off. Gaz. 81; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165.

In Connecticut, however, the state having entered into a contract of the publication of

lature to enact that opinions should not be known to the public.[47] But while the reporter should allow the public free access to opinions in his custody, he has the right to make such reasonable regulations as to obtaining copies of them as he may deem necessary to secure the safety of his papers and the orderly administration of the affairs of his office.[48]

IV. PRINTING, SALE, AND DISTRIBUTION.

A. In General. While the state has the right to provide for and control the printing, publication, sale, and distribution of the reports of the decisions of its courts in their official form,[49] a citizen of the state, or any other person, has full right to print, publish, and sell on his own account volumes of reports containing the opinions of the courts and other matter prepared by the judges thereof, as well as any other matters not previously protected by a valid copyright.[50] The printing of reports is not embraced in constitutional provisions and requirements as to "printing for the judicial and other departments." [51]

B. Contracts For [52] **— 1. In General.** Generally contracts for the printing, publication, sale, and distribution of official reports are authorized by law; [53] and the duty of making such contracts devolves upon certain designated officials.[54]

the reports and provided for a copyright to be taken for its benefit it was decided that the reporter was not obliged to furnish to applicants advance sheets containing the opinions of the courts. Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215; Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143.

47. Nash *v.* Lathrop, 142 Mass. 29, 35, 6 N. E. 559, where the court said: "The decisions and opinions of the justices are the authorized expositions and interpretations of the law which are binding upon all the citizens. They declare the unwritten law, and construe and declare the meaning of the statutes. Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices. Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the Legislature."

48. Nash *v.* Lathrop, 142 Mass. 29, 6 N. E. 559.

Mandamus will not issue to compel the reporter of the decisions of the supreme court of errors of Connecticut to permit the applicant at all reasonable times to make copies of such opinions in the custody of the reporter, or to furnish certified copies thereof, at the usual and reasonable rates of compensation. for publication out of the state, in advance of their official publication by the reporter. Peck *v.* Hooker, 61 Conn. 413, 23 Atl. 741, 29 Am. St. Rep. 215.

49. *Colorado.*— Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

Connecticut.— Gould *v.* Banks, 53 Conn. 415, 2 Atl. 886, 55 Am. Rep. 143, where it is said that it is for the state to say when and in what manner it will publish the official volumes of reports of decisions of its courts.

Indiana.— Black *v.* Merrill, 51 Ind. 32, 35, where it is said: "The legislature may, doubtless, provide for the publication of the decisions through an officer, or otherwise."

Michigan.— People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274, where it is said that it is within the discretion of the legislature to decide whether it will publish the reports at the state's expense.

Missouri.— State *v.* McGrath, 60 Mo. 586.

Nebraska.— State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174; *In re* Brown, 15 Nebr. 688, 50 N. W. 273.

New Hampshire.— Litchfield *v.* Barker, 64 N. H. 443, 14 Atl. 725.

New York.— Little *v.* Banks, 85 N. Y. 258; Banks *v.* Hun, 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193; People *v.* Carr, 5 Silv. Sup. 302, 23 N. Y. Suppl. 112.

North Carolina.— Smith *v.* Thompson, 122 N. C. 215, 29 S. E. 223.

Ohio.— Banks *v.* De Witt, 42 Ohio St. 263.

South Dakota.— Tripp *v.* Ringrud, 2 S. D. 593, 51 N. W. 655.

When the constitution requires the legislature to regulate the reporting of the decisions of the courts, there is an implication that some one other than the legislature is to report them. Banks *v.* Hun, 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193.

50. State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174.

51. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274. See also Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

52. **Contract for state printing** generally see STATES.

53. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18; State *v.* McGrath, 60 Mo. 586; Little *v.* Banks, 85 N. Y. 258; People *v.* Carr, 5 Silv. Sup. (N. Y.) 302, 23 N. Y. Suppl. 112; Banks *v.* De Witt, 42 Ohio St. 263.

54. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18; Little *v.* Banks, 85 N. Y. 258; People *v.* Carr, 5 Silv. Sup. (N. Y.) 302, 23 N. Y. Suppl. 112.

The state, it has been held, is not a party to the individual contract made by the official reporter for the publication of such reports where he is to derive his compensation from the sale of books to the state at a certain price.[55]

2. Manner of Making Contract. Sometimes the law requires the officers to advertise for, receive, and consider proposals for the printing and publishing before making the contracts therefor.[56] In the absence of an imperative provision to the effect,[57] the contract need not necessarily be awarded to the lowest bidder,[58] as such officials have a discretion confided to them which in the absence of fraud is not subject to control by the court.[59] A proposal in response to advertisement for bids to print reports is not vitiated by a statement therein that the work will be done within the state and by a certain class of persons.[60]

3. Construction and Validity of Contract. The contract made by a reporter for the publication of the reports reported by him for a period as long as his term of office has been held not to be unreasonable in length of time.[61] That the work shall be done at the state capital does not impose a condition which will invalidate the contract.[62] The law will not imply an agreement on the part of a publisher not to manufacture and sell volumes of reports containing uncopyrighted literary matter on its own account, there being no such limitation in the contract between the parties.[63] Where the state officers are authorized by law to contract, on terms most advantageous to the public, with persons to publish the reports, they may insert in such contract that the publisher shall keep copies thereof on hand and be prepared to sell a certain number of volumes to other law book sellers or be liable for fixed sums to the state and to such other book sellers for failure to do so.[64] But where such contract is for a fixed period of time the publisher is required to keep the books on hand only during such period and for such a reasonable time thereafter as is necessary to finish volumes not completed at the expiration of the contract.[65] The contract with a printer to print and manufacture for the state volumes of reports, and to make plates which shall become the property of the state, has been held not to constitute the printer the agent of the state in the publishing business.[66]

55. Banks *v.* Hun 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193.

56. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18; People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274; People *v.* Carr, 5 Silv. Sup. (N. Y.) 302, 23 N. Y. Suppl. 112.

The published notice for bids should inform the bidders at what time the bids may open, so that they may be present and see the contract awarded to the lowest bidder as the law provides. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

57. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

Mandamus in favor of the lowest bidder may be resorted to in a proper case to compel the award of the contract to him. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

58. People *v.* Carr, 5 Silv. Sup. (N. Y.) 302, 23 N. Y. Suppl. 112, where it was the duty of certain officials to advertise for, receive, and consider proposals for the publication of judicial reports and make a contract on terms most advantageous to the public.

59. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

60. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

While discriminating official action in relation to public work, whether by way of statute, ordinance, resolution, or contract, is void, that doctrine does not apply to individuals who may discriminate as they choose in their private affairs and in the employment of union or non-union labor; and hence a proposal in a bid to print reports of a court of appeals, which contains the statement that the work will be done in the state and that only union labor will be employed, does not render the act of the state officers in awarding the contract to the bidder making such statement a discrimination in official action; nor is such award vitiated on the ground of the state's officer containing no corresponding stipulation. Gillette *v.* Peabody, 19 Colo. App. 356, 75 Pac. 18.

61. Banks *v.* Hun, 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193.

62. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

63. State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174.

64. Little *v.* Banks, 85 N. Y. 258.

Such sum is not a penalty but liquidated damages, and although the contract is between the state and an individual, a third person interested in its performance may take advantage of its provisions and enforce them by suit. Little *v.* Banks, 85 N. Y. 258.

65. Little *v.* Banks, 77 Hun (N. Y.) 511, 29 N. Y. Suppl. 87 [*affirmed* in 151 N. Y. 669, 46 N. E. 1149].

66. State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174.

4. Assignment of Contract. A contract, authorized by law, made by a publisher to print and bind for the state volumes of the state reports, may with the acquiescence of the state be assigned by the contractor so as to vest in the assignee all the rights and subject him to all the liabilities of the original contractor.[67]

C. Expenses of Publication. The expenses of publication may be borne wholly or in part by either the state [68] or the state reporter.[69] Where the publisher of reports is required to furnish copies for the use of the state and also keep them on hand so as to supply the legal profession, the state to pay the actual cost of the volumes it receives plus a commission, such publisher may stereotype all the volumes he prepares and the state must pay a part of such expense therefor, proportionate to the number of volumes it receives.[70]

D. Fixing Price. The legislature of the state has the right to prescribe the maximum price which the reporter may charge per volume for the reports.[71] Where the statute fixes the number of volumes which the reporter is obliged to print and establishes the maximum price he may charge per volume therefor, and he publishes a greater number, such additional volumes are his property in which he has the exclusive copyright, but he may charge therefor no more than the price prescribed by statute; such legislation does not amount to the taking of one's property and the bestowal of it upon another, and is constitutional.[72] And the legislature has the right to designate the price which any person may charge per volume for the reports; and although there may have been a contract made by private individuals for the sale of reports for a greater sum than that fixed by the legislature, only the maximum amount prescribed by the statutes can be recovered.[73] A contract having been made by the reporter for as long a period as his term of office, and a subsequent statute reducing the price which he shall receive from the state per volume was held to be invalid, as violating the constitutional prohibition against the impairment of the obligations of contracts.[74]

E. Furnishing Copies. The publisher may be required, either by statute or contract, as the case may be, to furnish a certain number of copies of the reports for the use of the state,[75] and sometimes at a stipulated price per volume.[76] Where the statutes of the state make it the duty of some official to distribute or furnish copies of the reports to the various towns or counties for the use of their inhabitants and officers,[77] the latter cannot make any distribution or use of them inconsistent with that object.[78] The laws of the state requiring the librarian to deliver

67. Banks *v.* De Witt, 42 Ohio St. 263. In this case B. & Brothers were the assignees of a contract made by D. & Co. to print and bind volume 28 of Ohio State Reports and the next succeeding volume or volumes or any that should be made ready for publication from and after the 23d day of June, 1882, D. & Co. to have the exclusive right to publish the reports aforesaid for the period of two years. At the expiration of the time designated, B. & Brothers had printed from manuscript furnished by the reporter a few pages of volumes 41 and 42 Ohio State Reports and had procured material and arranged for the printing of the entire volume. The reporter refusing to supply the necessary manuscript to complete them, the supreme court awarded against him a writ of mandamus requiring him to supply it, holding that B. & Brothers had the right to complete any volume of reports which they had begun in good faith to publish within two years.

68. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

69. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274.

The publication and the expenses of the same are sometimes left entirely within the hands of the official reporter. People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274, under Rev. St. (1838) p. 414.

70. State *v.* McGrath, 60 Mo. 586.

71. Black *v.* Merrill, 51 Ind. 32; Banks *v.* Hun, 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193; Little *v.* Banks, 77 Hun (N. Y.) 511, 29 N. Y. Suppl. 87 [*affirmed* in 151 N. Y. 669, 46 N. E. 1149].

72. Black *v.* Merrill, 51 Ind. 32.

73. Welling *v.* Merrill, 52 Ind. 350.

74. Banks *v.* Hun, 20 N. Y. App. Div. 501, 47 N. Y. Suppl. 193.

75. State *v.* McGrath, 60 Mo. 586.

76. State *v.* McGrath, 60 Mo. 586. See also Black *v.* Merrill, 51 Ind. 32.

77. Requirement is sometimes made for the distribution and furnishing of copies of the official reports to certain officers, courts, and the like. Litchfield *v.* Barker, 64 N. H. 443, 14 Atl. 725; Smith *v.* Thompson, 122 N. C. 215, 29 S. E. 223; Tripp *v.* Ringsrud, 2 S. D. 593, 51 N. W. 655.

78. Litchfield *v.* Parker, 64 N. H. 443, 14

copies of the reports to certain officers and courts, and providing that if compliance therewith should exhaust the supply of volumes therein specified, the secretary of state should furnish a sufficient number of copies, published or to be published, to meet such requirement, apply to future volumes as well as to those on hand, and the reporter may compel the secretary to purchase the necessary copies of reports prepared after the passage of such law, so as to make the required distribution.[79]

V. REPORTERS.

A. Definition. A reporter is a person who reports the decisions upon the questions of law in the cases adjudged in the courts of law and equity;[80] and a state reporter has been defined to be an official who edits and publishes decisions of the highest courts of the state.[81]

B. Nature of Office. An official reporter is a public officer,[82] and the presumption of faithfulness and honesty must be indulged in his favor as in the case of other public officers.[83] After the expiration of his term of office the outgoing reporter is to be considered as *functus officio*.[84] The appointment of deputy state reporters is sometimes authorized by law.[85]

C. Appointment and Removal. The constitutions of some of the states provide for the appointment of the reporter and specify his duties.[86] Where there is no such constitutional provision, it is not an interference of the executive department with the judicial, for the legislature to create, control, or abolish the office of reporter.[87] Although the reporter is an officer of the court and to some extent under its control, the right of the latter to remove him must be derived from

Atl. 725; Smith *v.* Thompson, 122 N. C. 215, 29 S. E. 223.

The selectmen of a town agreed with an attorney that he should take the state reports which had been furnished to it to his office, keep and use them free of charge and give the officers of the town such advice as they should require in the conduct of their official business. In holding that such contract is not valid the court said: "Forwarded and distributed to the towns, as one mode of publication, the reception and possession of the books by the town, from their very nature, must be for the use of the inhabitants, and the better to enable them, and especially the officers of the town, to acquaint themselves with the law of the land. Receiving and holding the books for such a purpose, the town has no power to divert them from that purpose, or to devote them to other purposes inconsistent with that. Devoting them to any other use, like a sale and an appropriation of the proceeds to the general expenses of the town, or a bailment to an individual for hire or otherwise, by a contract which would prevent the inhabitants from enjoying their use, would be a departure from the objects intended by their distribution, and a violation by the town of the implied conditions upon which they were received." Litchfield *v.* Parker, 64 N. H. 443, 444, 14 Atl. 725.

The secretary of state to whom the code commits the sale of the supreme court reports on a commission of five per cent upon the amount of such sale and who is authorized by N. C. Acts (1889), c. 473, § 5, to allow reasonable discount to booksellers in the state has no authority to contract with a firm of booksellers whereby all the reports are to be delivered to them for sale at a commission of twelve and a half per cent even though by such contract the secretary of state would be relieved of the distribution of the reports directed in section 3635 of the code and the state would be saved the expense of the rental or storage room for all the unsold reports on hand. Smith *v.* Thompson, 122 N. C. 215, 29 S. E. 223.

79. Tripp *v.* Ringsrud, 2 S. D. 593, 51 N. W. 655.

80. Black L. Dict.

81. Anderson L. Dict.

82. Black *v.* Merrill, 51 Ind. 32, 35; *In re* Opinion of Justices, 72 Me. 542; Banks *v.* De Witt, 42 Ohio St. 263.

Under Nebr. Laws (1879), p. 82, § 19, construed in connection with Const. art. 6, § 8, the state reporter, in the matter of the publication of the state supreme court reports, is and must be considered as the disbursing officer of the state, and not as a contractor. *In re* Brown, 15 Nebr. 688, 697, 50 N. W. 273.

83. Banks *v.* De Witt, 42 Ohio St. 263.

84. State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

Successor in office.—A reporter of the supreme court of Ohio was held not to be the successor of the reporter of the late supreme court in bank, as the two courts were distinct tribunals. *Ex p.* Lawrence, 1 Ohio St. 431.

85. Baggett *v.* Dunn, 69 Cal. 75, 10 Pac. 125.

86. See the constitutions of the several states.

87. Black *v.* Merrill, 51 Ind. 32; *In re* Opinion of Justices, 72 Me. 542; People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274; Banks *v.* De Witt, 42 Ohio St. 263.

the constitution or from the acts of the legislature.[88] When the power to appoint a reporter is in the governor alone he may remove the officer;[89] but it has been held that where the appointment can only be made with the advice and consent of the legislative body there can be no removal by the governor alone.[90]

D. Rights and Duties. In the absence of constitutional inhibition, the rights and duties of a reporter may be changed at the will of the legislature.[91] A reporter may have the exclusive right to print copies from plates belonging to the state where the volume was stereotyped at his expense.[92] Where a reporter who is a salaried officer has left unreported cases at the end of his term of office other than those he may need for the completion of the volume already begun, it is the duty of his successor to report such cases.[93]

E. Compensation. The compensation of the state reporter may be by way of salary[94] or by way of profits accruing from the sale of the books themselves.[95] A provision of law that the salary of the reporter for the last quarter of the year shall not be paid until the decisions of that year shall have been reported does not apply to a reporter whose term of office has expired.[96] Where the legislature of the state fixes the salary of the reporter he becomes entitled to demand and receive compensation at that rate from the commencement of his term so soon as the legislature appropriates money for that purpose.[97] But where a state constitution provides that no money shall be drawn from the treasury but in consequence of an appropriation made by law when the amount of a prior appropriation for a reporter's salary has been exhausted, no more can be drawn until there is a new appropriation by a subsequent legislature.[98] It has been held that where the reporter receives a fixed salary, such compensation is exclusive of all other, and that while the law authorizes a payment of a certain amount to him for each bound volume, he may have only the actual cost of the work; that he may not be credited with expenses incurred in preparing copies, reading proof, packing, and shipping.[99] Where the duties of the reporter entitled to an annual

88. State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

89. *In re* Opinion of Justices, 72 Me. 542. See also Story Const. § 1342 *et seq.*

90. *In re* Opinion of Justices, 72 Me. 542. This case arose in the construction of a statute providing for the appointment by the governor with the advice and consent of the council of a reporter who should be removable at the pleasure of the executive. The governor had issued an order declaring the reporter's term of office terminated. The council refused to concur in his removal. The court decided that under the constitution of the state the term "executive" meant the executive department and comprehended both governor and council, and that the governor's order was of no effect.

91. Black *v.* Merrill, 51 Ind. 32.

92. State Comptroller *v.* Hooker, 59 Conn. 332, 22 Atl. 317, holding that where a statute providing for the compensation of the reporter makes it his duty to have stereotyped at his own expense all volumes published by him, the plates to be the property of the state, subject to the right of the reporter to use the same for printing copies therefrom, the state may not use the plates nor is the reporter's right of property in them terminated by his resignation or death.

As to right of printer under similar circumstances see State *v.* State Journal Co., 77 Nebr. 752, 110 N. W. 763, 9 L. R. A. N. S. 174.

93. State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

94. Smith *v.* Dunn, 64 Cal. 164, 28 Pac. 32; People *v.* State Auditors, 42 Mich. 422, 4 N. W. 274; State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

Notwithstanding he leaves a large number of cases unreported, a reporter who has faithfully performed his duties as such has been held to be entitled, upon his retirement from office, to his full salary. State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

95. Comptroller *v.* Hooker, 59 Conn. 332, 22 Atl. 317.

96. State Reporter's Case, 150 Pa. St. 550, 24 Atl. 908.

97. Smith *v.* Dunn, 64 Cal. 164, 28 Pac. 232.

The constitution of California prohibits the legislature from granting extra compensation or allowance to a public officer and special legislation affecting the salary of any officer. The reporter was appointed Jan. 7, 1880. The law fixing his salary did not go into effect until July 1, 1880. The legislature passed an act appropriating the *pro rata* amount of salary for the interim between the two dates. Such act was held not to be in conflict with the constitution of the state upon the ground that there was no additional allowance of money for the same purpose. Smith *v.* Dunn, 64 Cal. 164, 28 Pac. 232.

98. Baggett *v.* Dunn, 69 Cal. 75, 10 Pac. 125.

99. *In re* Brown, 15 Nebr. 688, 50 N. W. 273.

salary have been fully performed in less than the year, he is entitled to his entire compensation if the duties for the year have been fully performed, although the office is abolished before the end of the year. If they have not been fully performed, his compensation must be such a part of his annual salary as the work he has done is of his entire duty, and the period of his service is not to be considered.[1]

REPOSITORY. A place where things are or may be deposited for safety or preservation; a depository; a storehouse; a magazine; a place where things are kept for sale; a shop.[1a]

REPRESENT. To stand in the place of;[2] to stand in a person's place, to act his part, to exercise his right, or to take his share;[3] to describe or portray in words; to declare; to set forth;[4] to exhibit to another mind in language.[5] (See REPRESENTATION; REPRESENTATIVE.)

REPRESENTATION. A fiction of the law, the effect of which is to put the representative in the place, degree, or right of the person represented.[6] In the law of contracts in general, a statement, incidental to a contract, relative to some fact having reference thereto, and upon the faith of which the contract is entered into.[7] In the law of insurance, a collateral statement, either by parol or in writing, of such facts or circumstances relative to the proposed adventure, and not inserted in the policy, as are necessary for the information of the assurer to enable him to form a just estimate of the risk;[8] an assertion by the insured of some fact;[9] a presentation of the elements upon which to estimate the risk proposed to be assumed;[10] a statement by the applicant to the insurer regarding a fact material

1. *Ex p.* Lawrence, 1 Ohio St. 431.

1a. State *v.* Sprague, 149 Mo. 409, 419, 50 S. W. 901.

2. Chase *v.* Swayne, 88 Tex. 218, 224, 30 S. W. 1049, 53 Am. St. Rep. 742.

As used in Cal. Code Civ. Proc. § 372, authorizing appointment of a guardian *ad litem* to represent an infant in an action or proceeding, means that he is to conduct and control the proceeding on behalf of the infant. Carpenter *v.* San Joaquin County, 75 Cal. 596, 599, 19 Pac. 174.

"Representing," as used in a petition stating that the "undersigned, representing a majority of the taxpayers of the town," etc., should be construed to mean that the petitioners were themselves such majority. Solon *v.* Williamsburgh Sav. Bank, 114 N. Y. 122, 130, 21 N. E. 168 [*affirming* 35 Hun 1, 7].

3. Abbott L. Dict. [*quoted* in Plummer *v.* Brown, 64 Cal. 429, 430, 1 Pac. 703; Brown *v.* Massey, 13 Okla. 670, 678, 76 Pac. 226].

4. Century Dict. [*quoted* in Butts *v.* Long, 94 Mo. App. 687, 692, 68 S. W. 754].

As used in a statute making it an offense to cause to be carried from one state to another any instrument purporting to represent a ticket in a lottery, means represent to the purchaser, standing as the representation of title to the indicated thing. Francis *v.* U. S., 188 U. S. 375, 378, 47 L. ed. 508, 23 S. Ct. 334.

5. Webster Int. Dict. [*quoted* in Butts *v.* Long, 94 Mo. App. 687, 692, 68 S. W. 754].

Does not import a promise, and does not give notice to the opposite party that a mere promise is relied upon. Cooper *v.* Landon, 102 Mass. 58, 60.

"Represent and warrant," is a phrase sometimes used to imply a promise to respond in damages for failure of the representations to hold good. Switzer *v.* Henking, 158 Fed. 784, 787, 86 C. C. A. 140, 15 L. R. A. N. S. 1151.

"Act, perform, or represent" means representation in dialogue and actions by persons who represent the composition as real, by performing or going through the various parts or characters severally assigned to them. Daly *v.* Palmer, 7 Fed. Cas. No. 3,552, 6 Blatchf. 256, 36 How. Pr. (N. Y.) 206.

"Represented," sometimes construed as "occupied" or "developed" (Consolidated Republican Mountain Min. Co. *v.* Lebanon Min. Co., 9 Colo. 343, 345, 12 Pac. 212); or "stated" (Peterson *v.* State, 83 Md. 194, 196, 34 Atl. 834).

6. Black L. Dict., *sub verb.* "Representation of Persons."

7. May Ins. § 181 [*quoted* in Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 257, 56 N. Y. Suppl. 1005].

Used for convenience as including both express and implied statements, and includes silence in certain cases. Foster *v.* McAlester, 3 Indian Terr. 307, 324, 58 S. W. 679.

A representation may arise, not only by way of concealment of part of the truth in regard to a whole fact, but from total and misleading silence. Watson *v.* Prather, (Ky. 1901) 65 S. W. 439.

8. Vandervoort *v.* Smith, 2 Cai. (N. Y.) 155, 160.

9. Ætna L. Ins. Co. *v.* Rehlaender, 68 Nebr. 284, 291, 94 N. W. 129, 132.

10. Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381, 390; Davis *v.* Ætna Mut. F. Ins. Co., 67 N. H. 335, 339, 39 Atl. 902.

to the proposed insurance;[11] a statement in regard to a material fact, made by the applicant for insurance to the insurer with reference to a proposed contract of insurance;[12] a verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise have formed of it.[13] (Representation: Application of Statute of Frauds to, see FRAUDS, STATUTE OF, 20 Cyc. 195. Assumption of Risk by Employee as Depending on Right to Rely on Representation of Master, see MASTER AND SERVANT, 26 Cyc. 1185. As to Age, see INFANTS, 22 Cyc. 550. By Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1587. By Individual Partner, see PARTNERSHIP, 30 Cyc. 522. By Insured, see FIRE INSURANCE, 19 Cyc. 677; LIFE INSURANCE, 25 Cyc. 798; MARINE INSURANCE, 26 Cyc. 613. By Mortgagee as Estoppel to Claim Priority, see MORTGAGES, 27 Cyc. 1228. By Partner After Dissolution of Firm, see PARTNERSHIP, 30 Cyc. 662. Constituting Equitable Estoppel, see ESTOPPEL, 16 Cyc. 722. Contributory Negligence of Servant as Affected by Representation by Master or Superior, see MASTER AND SERVANT, 26 Cyc. 1235. Distinguished From Warranty, see LIFE INSURANCE, 25 Cyc. 798. Estoppel by Mortgagee, see MORTGAGES, 27 Cyc. 1228. False, see FALSE PRETENSES, 19 Cyc. 394. Falsity or Materiality of, Whether Question of Law or Fact, see FIRE INSURANCE, 19 Cyc. 961. Misrepresentation, see FALSE PRETENSES, 19 Cyc. 394; FRAUD, 20 Cyc. 14. Necessity For Compliance With, see MARINE INSURANCE, 26 Cyc. 615. Of Absentee by Curator, see ABSENTEES, 1 Cyc. 203. Of Association by Officer or Committee, see ASSOCIATIONS, 4 Cyc. 308. Of Bank by Officer or Agent, see BANKS AND BANKING, 5 Cyc. 454. Of Carrier by Agent, see CARRIERS, 6 Cyc. 431. Of Client by Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 926. Of Corporation by Officer or Agent, see CORPORATIONS, 10 Cyc. 903. Of County by Officer or Agent, see COUNTIES, 11 Cyc. 388, 436. Of Debtor and Creditor by Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 232. Of Firm by Partner, see PARTNERSHIP, 30 Cyc. 438. Of Husband by Wife, and Vice Versa, see HUSBAND AND WIFE, 21 Cyc. 1234, 1417. Of Infant by Guardian *Ad Litem* or Next Friend, see INFANTS, 22 Cyc. 634. Of Insane Person by Guardian *Ad Litem* or Next Friend, see INSANE PERSONS, 22 Cyc. 1230. Of Insurance Company by Agent, see INSURANCE, 22 Cyc. 1427. Of Insured by Agent, see INSURANCE, 22 Cyc. 1444. Of Joint Stock Company by Officer, see JOINT STOCK COMPANIES, 23 Cyc. 470. Of Law as Fraud, see CONTRACTS, 9 Cyc. 420. Of Master, Right of Servant to Rely on, see MASTER AND SERVANT, 26 Cyc. 1185. Of Mining Corporation by Officer or Agent, see MINES AND MINERALS, 27 Cyc. 759. Of Municipality — By Attorney, see MUNICIPAL CORPORATIONS, 28 Cyc. 1764; By Officer or Agent, see MUNICIPAL CORPORATIONS, 28 Cyc. 463. Of Parent by Child, see PARENT AND CHILD, 29 Cyc. 1584. Of Principal — By Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1322; By Broker, see FACTORS AND BROKERS, 19 Cyc. 190; By Factor, see FACTORS AND BROKERS, 19 Cyc. 118. Of School-District by Officer or Agent, see SCHOOLS AND SCHOOL-DISTRICTS. Of State by Officer or Agent, see STATES. Of Town by Officer or Agent, see TOWNS. Of United States by Officer or Agent, see UNITED STATES. On Assignment of Mortgage, see MORTGAGES, 27 Cyc. 1310. To Master as to Age and Experience, see MASTER AND SERVANT, 26 Cyc. 1219. See also REPRESENT.)

REPRESENTATIVE. As an adjective, typifying; presenting by means of something; standing in the place of.[14] As a noun, a word said to have no technical

11. Maryland Fidelity, etc., Co. *v.* Guthrie Nat. Bank, 17 Okla. 397, 399, 87 Pac. 300; Rice *v.* Maryland Fidelity, etc., Co., 103 Fed. 427, 430, 43 C. C. A. 270.

12. Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 503, 10 Am. Rep. 166.

13. Ætna Ins. Co. *v.* Grube, 6 Minn. 82, 87; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,103, 2 Flipp. 9.

14. *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 568.

"Representative form of government" is one conducted and constituted by the agency of delegates, or deputies, chosen by the people. Lange *v.* Royal Highlanders, 75 Nebr. 188, 193, 106 N. W. 224, 110 N. W. 1110, 121 Am. St. Rep. 786, 10 L. R. A. N. S. 666. See REPUBLIC, *post*, p. 1622.

meaning in law;[15] one chosen by a principal to exercise for him a power or perform for him a trust;[16] one having legal authority to act in behalf of the property and bind the owner with reference thereto;[17] one that stands in the place of another, as heir, or in the right of succeeding to the estate by inheritance; one who takes by representation; one who occupies another's place and succeeds to his rights and liabilities;[18] one who exercises power derived from another;[19] one who occupies another's place, and succeeds to his rights and liabilities;[20] one who represents or is in the place of another;[21] one who represents or stands in place of another;[22] that which represents anything.[23] (Representative: Liability For Costs, see Costs, 11 Cyc. 93. Meaning of Term in Will, see Wills. Personal, see Executors and Administrators, 18 Cyc. 1; Guardian and Ward, 21 Cyc. 157. Right to Sue When Not Subject to Review, see Appeal and Error, 2 Cyc. 686. See also Legal Representative, 25 Cyc. 175.)

Reprieve.[24] To delay the punishment of; to suspend the execution of sentence; to relieve for a time or temporarily.[25] (Reprieve: In General, see Pardons, 29 Cyc. 1561. Effect on Sentence of Death, see Criminal Law, 12 Cyc. 790. Judicial Power to Grant, see Constitutional Law, 8 Cyc. 854. Revisory Authority of Judiciary Over Executive Power to Grant, see Constitutional Law, 8 Cyc. 854.)

Reprisal. See War.

Reprises. Deductions and duties paid yearly out of a manor and lands;[26] deductions and duties which are yearly paid out of a manor and lands, as rent charge, rent seck, pensions, corodies, annuities, etc.;[27] deductions and payments (as for annuities) out of lands;[28] the deductions and payments out of lands, annuities, and the like;[29] deductions on account of payments and expenses;[30] deductions or payments out of the value of lands;[31] yearly deductions, duties, or payments out of a manor and lands;[32] a resumption or taking back, used for such deductions as rent charges or annuities.[33]

Reproach. A term said to be synonymous with the words Censure, *q. v.*, and Obloquy, *q. v.*[34]

15. Jackson *v.* Tibbits, 9 Cow. (N. Y.) 241, 252, where it was held that "it may signify heirs or executors, or . . . may mean one who is substituted for another in any business."

"Representative in congress" is a phrase synonymous with "member of congress." Butler *v.* Hopper, 4 Fed. Cas. No. 2,241, 1 Wash. 499.

16. People *v.* Detroit, 28 Mich. 228, 245, 15 Am. Rep. 202.

17. Chicago *v.* Sherwood, 104 Ill. 549, 554.

18. Webster Dict. [*quoted* in Lee *v.* Dill, 39 Barb. (N. Y.) 516, 520, 16 Abb. Pr. 92, 96; Allen *v.* Stovall, 94 Tex. 618, 628, 63 S. W. 863, 64 S. W. 777].

Representative capacity is said to be a well understood term, and only applies to a party acting for and in behalf of some other party or estate, and not for himself personally. Van Brunt, etc., Co. *v.* Harrigan, 8 S. D. 96, 98, 65 N. W. 421.

19. Brown *v.* Forbes, 1 Nebr. (Unoff.) 888, 892, 96 N. W. 52.

20. Burrill L. Dict. [*quoted* in Lee *v.* Dill, 39 Barb. (N. Y.) 516, 520, 16 Abb. Pr. 92].

21. Bouvier L. Dict. [*quoted* in Delaunay *v.* Burnett, 9 Ill. 454, 494].

22. State Fair Assoc. *v.* Townsend, 69 Ark. 215, 218, 63 S. W. 65.

23. *Ex p.* Williams, (Cal. App. 1906) 87 Pac. 565, 568.

24. Derived from "reprendre" to take back see 4 Blackstone Comm. 349 [*quoted* in Butler *v.* State, 97 Ind. 373, 374; Sterling *v.* Drake, 29 Ohio St. 457, 460, 23 Am. Rep. 762].

25. Webster Dict. [*quoted* in George *v.* Lillard, 106 Ky. 820, 827, 51 S. W. 793, 1011, 90 Am. St. Rep. 230, 21 Ky. L. Rep. 483, dissenting opinion].

26. Webster Int. Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

27. Burrill L. Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

28. Standard Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

29. Bouvier L. Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

30. Anderson L. Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

31. Worcester Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

32. Century Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

33. Jacob L. Dict. [*quoted* in Delaware, etc., Canal Co. *v.* Von Storch, 196 Pa. St. 102, 104, 46 Atl. 375].

34. Bettner *v.* Holt, 70 Cal. 270, 275, 11 Pac. 713.

REPROBATA PECUNIA LIBERAT SOLVENTEM. A maxim meaning "Money refused (the refusal of money tendered) releases him who pays (or tenders it)." [35]

REPRODUCTION. Repetition or the act of reproducing.[36] (See REPAIR, *ante*, p. 1336.)

REPUBLIC. A government for the protection of the citizen against the exercise of all unjust power; a government administered by a few, as the representatives of the people and for their benefit; [37] an independent sovereign power.[38] (See DEMOCRACY, 13 Cyc. 781; GOVERNMENT, 20 Cyc. 1284.)

REPUBLICAN FORM OF GOVERNMENT. A government administered by representatives chosen or appointed by the people or by their authority; [39] a government by the people, through representatives appointed by them to the various departments — executive, legislative, judicial, as provided — either by direct vote or through some intervening officer or body by them selected and appointed by direct vote for the purpose; [40] a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior; [41] a state in which the sovereign power resides in the whole body of the people, and is exercised by representatives selected by them; [42] one in which the people select those who are to make their laws; [43] one constructed on the principle that the supreme power resides in the body of the people.[44] (See REPUBLIC; and, generally, CONSTITUTIONAL LAW, 8 Cyc. 778 note 31.)

REPUBLICATION. See PUBLICATION, 32 Cyc. 750; REPUBLISH.

REPUBLISH. To publish again that which has been before published.[45] (To Republish: Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 370, 430. Will, see WILLS. See also PUBLISH, 32 Cyc. 1258.)

REPUDIATION. Rejection; disclaimer; renunciation; the rejection or refusal of an offered or available right or privilege or of a duty or relation.[46] (Repudiation: In General, see ABANDONMENT, 1 Cyc. 3; RELEASE, *ante*, p. 1039, and Cross-References Under RESCISSION. Disclaimer — As Affecting Patent, see PATENTS, 30 Cyc. 930; Of Title in Ejectment, see EJECTMENT, 15 Cyc. 99. Of Accord Before Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 338. Of Act — Of Agent by Principal, see PRINCIPAL AND AGENT, 31 Cyc. 1294; Of Broker by Principal, see FACTORS AND BROKERS, 19 Cyc. 142, 202; Of Factor by Principal, see FACTORS AND BROKERS, 19 Cyc. 142; Of Servant by Master, see MASTER AND SERVANT, 26 Cyc. 987. Of Agency by Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1306. Of Award, see ARBI-

35. Black L. Dict. [*citing* Peytoe's Case, 9 Coke 77*b*, 79*a*, 77 Eng. Reprint 847].

36. Goodyear Shoe Mach. Co. *v.* Jackson, 112 Fed. 146, 150, 50 C. C. A. 159, 55 L. R. A. 692.

37. State *v.* Harris, 2 Bailey (S. C.) 598, 599.

38. Mexico *v.* De Arangoiz, 12 N. Y. Super. Ct. 634, 636, where it was said to be a state just as certainly and in the same sense as a monarchy, limited or absolute; and that every state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation.

39. Kadderly *v.* Portland, 44 Oreg. 118, 145, 74 Pac. 710, 75 Pac. 222.

40. Eckerson *v.* Des Moines, 137 Iowa 452, 461, 115 N. W. 177.

41. The Federalist 302 [*quoted* in Kadderly *v.* Portland, 44 Oreg. 118, 145, 74 Pac. 710, 75 Pac. 222].

42. Webster Dict. [*quoted* in *In re* Pfahler, 150 Cal. 71, 94, 88 Pac. 270, 280, 11 L. R. A. N. S. 1092, dissenting opinion].

43. *In re* Pfahler, 150 Cal. 71, 94, 88 Pac. 270, 11 L. R. A. N. S. 1092, where "a republican form of government" is said in the dissenting opinion of Mr. Justice McFarland to be radically different from a pure democracy in which the people collectively and as their own original act make the laws.

44. Chisholm *v.* Georgia, 2 Dall. (U. S.) 419, 457, 1 L. ed. 440.

45. Matter of Stickney, 31 N. Y. App. Div. 382, 386, 52 N. Y. Suppl. 929. See also Danley *v.* Jefferson, 150 Mich. 590, 114 N. W. 470, 121 Am. St. Rep. 640.

46. Black L. Dict. See Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 496, 59 N. W. 283, where it was said not to be a word of rare use or a technical term, but a word of common use and commonly understood.

A mere refusal to pay money when due, especially a refusal based upon the terms of the contract and in good faith, although mistakenly believed to be justified by it, is not a repudiation of the contract, and does not warrant a rescission. Daley *v.* People's Bldg., etc., Assoc., 178 Mass. 13, 18, 59 N. E. 452. See also Wapello County *v.* Burlington, etc., R. Co., 44 Iowa 585, 610.

"Repudiate the consideration" see Coleman *v.* Hayes, 92 N. Y. App. Div. 575, 578, 87 N. Y. Suppl. 12, 14.

TRATION AND AWARD, 3 Cyc. 721. Of Bet, see GAMING, 20 Cyc. 942. Of Community, see HUSBAND AND WIFE, 21 Cyc. 1700. Of Composition, see COMPOSITIONS WITH CREDITORS, 8 Cyc. 479. Of Contract — Generally, see CONTRACTS, 9 Cyc. 649; Of Broker, Sufficiency of Evidence, see FACTORS AND BROKERS, 19 Cyc. 142, 202; Of Infant, see INFANTS, 22 Cyc. 609; Of Lunatic, see INSANE PERSONS, 22 Cyc. 1209; Or Lease of Railroad by Receiver Thereof, see RAILROADS, 33 Cyc. 623. Of Devise or Legacy, see WILLS. Of Legitimacy of Child, see BASTARDS, 5 Cyc. 636. Of Office as Affecting Right to Execute Power, see POWERS, 31 Cyc. 1110. Of Right to Administer Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 148. Of State Debt, see STATES. Of Title or Right as Ground of Estoppel, see ESTOPPEL, 16 Cyc. 757. Of Trust as Affecting Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1169. See also DISCLAIMER, 14 Cyc. 295; RENUNCIATION, *ante*, p. 1336.)

REPUGNANCY. A disagreement or inconsistency between two or more clauses of the same instrument.[47] (Repugnancy: In Averments — Of Indictment or Information, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 298; Of Pleadings, see PLEADING, 31 Cyc. 75, 769. In Award, see ARBITRATION AND AWARD, 3 Cyc. 713. In Bill in Equity, see EQUITY, 16 Cyc. 238. In Description of Boundaries, see BOUNDARIES, 5 Cyc. 912. In Findings of Court, see TRIAL. In Indictment For Counterfeiting, see COUNTERFEITING, 11 Cyc. 316. In Indictment For Forgery, see FORGERY, 19 Cyc. 1399. In Parts or Clauses — Of Contracts, see CONTRACTS, 9 Cyc. 583; Of Deeds, see DEEDS, 13 Cyc. 618; Of Mortgages, see MORTGAGES, 27 Cyc. 1134; Of Ordinance or Statute, see MUNICIPAL CORPORATIONS, 28 Cyc. 386; STATUTES; Of Wills, see WILLS. In Verdict or Findings of Jury, see TRIAL. Of Custom or Usage to — Express Contract, see CUSTOMS AND USAGES, 12 Cyc. 1091; Rules of Law, see CUSTOMS AND USAGES, 12 Cyc. 1053.)

REPURCHASE. A term said to be synonymous with "redeem."[48] (Repurchase: Conveyance With Right to, see MORTGAGES, 27 Cyc. 1003. Reservation of Right to, see FRAUDULENT CONVEYANCES, 20 Cyc. 562, 568. See also PURCHASE, 32 Cyc. 1264.)

REPUTABLE. Being in good repute; held in esteem consistent with good faith;[49] being in good repute; held in esteem; estimable;[50] worthy of repute or distinction, held in esteem, honorable, praiseworthy.[51] (See REPUTATION.)

REPUTATIO EST VULGARIS OPINIO UBI NON EST VERITAS. ET VULGARIS OPINIO EST DUPLEX, SCIL.: OPINIO VULGARIS ORTA INTER GRAVES ET DISCRETOS HOMINES, ET QUÆ VULTUM VERITATIS HABET; ET OPINIO TANTUM ORTA INTER LEVES ET VULGARES HOMINES, ABSQUE SPECIE VERITATIS. A maxim meaning "Reputation is common opinion where there is not truth. And common opinion is of two kinds, to-wit: Common reputation arising among grave and sensible men, and which has the appearance of truth; and mere opinion arising among foolish and ignorant men, without any appearance of truth."[52]

REPUTATION. Common knowledge of a community;[53] opinion, or established opinion, or the opinion generally entertained;[54] the concurrence of many

47. Bouvier L. Dict. [*quoted* in Weller *v.* Carnew, 29 Ont. 400, 401].

"Repugnance" see Swan *v.* U. S., 3 Wyo. 151, 154, 9 Pac. 931, where it is defined as meaning "inconsistency," and where it is said that "these words, though not exactly synonymous, may be, and often are, used interchangeably."

48. Pace *v.* Bartles, 47 N. J. Eq. 170, 174, 20 Atl. 352.

49. Century Dict. [*quoted* in State *v.* Chittenden, 112 Wis. 569, 582, 88 N. W. 587].

50. Century Dict. [*quoted* in Wise *v.* State Veterinary Bd., 138 Mich. 428, 432, 101 N. W. 562].

51. Webster Dict. [*quoted* in Illinois State Bd. of Dental Examiners *v.* People, 123 Ill. 227, 245, 13 N. E. 201; State *v.* Chittenden, 112 Wis. 569, 582, 88 N. W. 587]. But see State *v.* Chittenden, 127 Wis. 468, 532, 107 N. W. 500, where this definition is criticized.

"Reputable freeholders."— Who are not within the New Jersey statute requiring petitions for inn and tavern licenses to be signed by see Austin *v.* Atlantic City, 48 N. J. L. 118, 120, 3 Atl. 65.

52. Black L. Dict. [*citing* Adams' Case, 4 Coke 104*b*, 107*b*, 76 Eng. Reprint 1091].

53. Smith *v.* Compton, 67 N. J. L. 548, 557, 52 Atl. 386, 58 L. R. A. 480.

54. *In re* Hurlburt, 68 Vt. 366, 369, 35 Atl. 77, 35 L. R. A. 794, where it is said to

voices to the same fact;[55] the estimate which the community has or expresses of a person's character;[56] the estimation in which a person is held by others;[57] the estimation in which one is held;[58] the evidence of character;[59] the fruit of one's walk and conversation — the result of deportment;[60] the general opinion of a person held by the community;[61] the hearsay of those who may be supposed to have been acquainted with the fact handed down from one to another;[62] the opinion which others may have formed or expressed of a person's character;[63] the sum of opinions entertained concerning an individual;[64] what is reported or understood from report to be the reality about a person or thing;[65] good name; the credit, honor, or character which is derived from a favorable public opinion or esteem, and character by report.[66] (Reputation: Acquisition of Corporate Name by, see CORPORATIONS, 10 Cyc. 151. As Evidence — Of Corporate Existence, see CORPORATIONS, 10 Cyc. 241; Of Fact Provable by, see JUDGMENTS, 23 Cyc. 1287; Of Marriage, see BIGAMY, 5 Cyc. 701; MARRIAGE, 26 Cyc. 840; Of Matters of Public or General Right or Interest, see EVIDENCE, 16 Cyc. 1286; Of Ownership of Land Upon Issue of Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1148; Of Partnership, see PARTNERSHIP, 30 Cyc. 412; Of Pedigree, Birth, and Relationship, see EVIDENCE, 16 Cyc. 1126; On Question of Legitimacy, see BASTARDS, 5 Cyc. 630. Bad as Ground of Mitigation of Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 418. Conspiracy to Injure, see CONSPIRACY, 8 Cyc. 636. Establishment of Relationship by, see INCEST, 22 Cyc. 56. Evidence as to — In General, see EVIDENCE, 16 Cyc. 1263; For Purpose of Impeachment, see WITNESSES; In Action For Assault and Battery, see ASSAULT AND BATTERY, 3 Cyc. 1093; In Action For Breach of Marriage Promise, see BREACH OF PROMISE, TO MARRY, 5 Cyc. 1013; In Action For False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 365; In Action For Injury to Servant, see MASTER AND SERVANT, 26 Cyc. 1300, 1436, 1439; In Action For Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 481, 583; In Action For Malicious Prosecution, see MALICIOUS PROSECUTION, 26 Cyc. 89; In Action For Negligence, see NEGLIGENCE, 29 Cyc. 610; Injury to as Element of Damages, see ATTACHMENT, 4 Cyc. 881; LIBEL AND SLANDER, 25 Cyc. 510, 533. In Proceedings to Ascertain and Establish Boundaries, see

be so used in cases where death is attempted to be proved by general reputation in the family.

55. Deputy *v.* Harris, 1 Marv. (Del.) 100, 104, 40 Atl. 714.

56. Moore *v.* Dozier, 128 Ga. 90, 96, 57 S. E. 110, where character is distinguished.

57. State *v.* Ussery, 118 N. C. 1177, 1180, 24 S. E. 414, where it is said "that character lives in a man — reputation outside of him."

58. Peters *v.* Bourneau, 22 Ill. App. 177, 180.

59. State *v.* Simmons, 74 Kan. 799, 801, 88 Pac. 57.

60. Cauley *v.* State, 92 Ala. 71, 73, 9 So. 456.

61. State *v.* Reed, 41 La. Ann. 581, 584, 7 So. 132.

62. Bliss *v.* Johnson, 162 Mass. 323, 324, 38 N. E. 446; Haddock *v.* Boston, etc., R. Co., 85 Mass. 298, 301, 81 Am. Dec. 656; Higham *v.* Ridgway, 10 East 109, 120, 10 Rev. Rep. 235.

63. Bucklin *v.* Ohio, 20 Ohio 18, 23, distinguishing character.

64. *In re* Spencer, 7 Cent. L. J. 84, 85, distinguishing character.

65. State *v.* Wilson, 15 R. I. 180, 181, 1 Atl. 415, distinguishing character.

66. Webster Dict. [*quoted* in Andre *v.* State, 5 Iowa 389, 393, 68 Am. Dec. 708].

"Character" and "reputation" said to be the same see Kimmel *v.* Kimmel, 3 Serg. & R. (Pa.) 336, 338, 8 Am. Dec. 655. But held not synonymous see Leverich *v.* Frank, 6 Oreg. 212, 213. But see World *v.* State, 50 Md. 49, 54.

In an action to establish a marriage, it may refer to the belief and speech of the people who have an opportunity to know the parties, and have heard of and observed their manner of living. Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638, 644; Com. *v.* Stump, 53 Pa. St. 132, 135, 91 Am. Dec. 198.

Of a witness for truth, it is an expression said to be equivalent to his character for truth. Knode *v.* Williamson, 17 Wall. (U. S.) 586, 588, 21 L. ed. 670.

The term has been said to be a sort of right to enjoy the good opinion of others, and is as capable of growth, and has as real an existence, as an arm or leg. Jones *v.* Bradstreet Co., 87 Ga. 79, 81, 13 S. E. 250.

With regard to the chastity of a woman it is what the people of her acquaintance generally say of her in this regard. State *v.* Bryan, 34 Kan. 63, 72, 8 Pac. 260.

With regard to the truth of a person, it is made by what his neighbors generally say of him in this regard. Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. 961.

Boundaries, 5 Cyc. 957. Issues as to and Evidence Admissible Thereunder, see Libel and Slander, 25 Cyc. 510, 512. Limiting Number of Witnesses to, see Criminal Law, 12 Cyc. 555. Marriage by, see Marriage, 26 Cyc. 872, 877 note 16, 888. Master's Liability For Injuries Caused by Fellow Servant as Depending on Latter's Reputation For Incompetency, see Master and Servant, 26 Cyc. 1300. Of Accused, see Adultery, 1 Cyc. 958, 961; Bastards, 5 Cyc. 661; Criminal Law, 12 Cyc. 415; Homicide, 21 Cyc. 905. Of Deceased in Prosecutions For Homicide, see Homicide, 21 Cyc. 907. Of Female in Prosecution For Abduction, see Abduction, 1 Cyc. 159. Of Incompetency of Fellow-Servant as Question For Jury in Action For Injuries to Servant, see Master and Servant, 26 Cyc. 1476. Of Person Assaulted, see Assault and Battery, 3 Cyc. 1056, 1093. Of Person Injured in Actions For Personal Injuries, see Damages, 13 Cyc. 196. Of Prosecutrix, see Bastards, 5 Cyc. 660; Incest, 22 Cyc. 54; Rape; Seduction. Of Wife in Action For Criminal Conversation, see Husband and Wife, 21 Cyc. 1627. Of Witness, Instruction as to, see Criminal Law, 12 Cyc. 606. Proof of Corporate Existence by, see Corporations, 10 Cyc. 241. Requirement of Good Character as Condition of Naturalization, see Aliens, 2 Cyc. 112 note 20. Weight and Sufficiency of Evidence as to Reputation of House or Place in Prosecutions Under Liquor Laws, see Intoxicating Liquors, 23 Cyc. 251. Whether Marriage Can Arise by, see Marriage, 26 Cyc. 840. See also Repute.)

Repute. Character attributed, public estimate, established opinion, reputation;[67] character reputed or attributed; established opinion.[68] (See Good Repute, 20 Cyc. 1262; Reputation, *ante*, p. 1624.)

Reputed. Considered, generally supposed.[69] (See Reputation, *ante*, p. 1624.)

Request. As a noun, the act of asking for anything desired.[70] As a verb, to ask for earnestly; to express desire for; to solicit; to entreat; to address with a request;[71] to ask; to solicit; to express desire for.[72] (Request: For Findings,

67. Com. *v.* Howe, 35 Pa. Super. Ct. 554, 568.

68. State *v.* Patterson, 88 Mo. 88, 104, 57 Am. Rep. 374.

In matters of pedigree, the term means such declarations and statements respecting the pedigree as have come down from generation to generation from deceased relatives, in such a way that even though it cannot be said or determined which of the deceased relatives originally made them or was personally cognizant of the facts therein stated, yet it appears that such declarations and statements were made as family history *ante litem motam* by a deceased person connected by blood or marriage with the person whose pedigree is to be established. *In re* Hurlburt, 68 Vt. 366, 377, 35 Atl. 77, 35 L. R. A. 794.

69. Santa Cruz Rock Pav. Co. *v.* Lyons, (Cal. 1896) 43 Pac. 599, 601.

"Reputed character" is a term said to mean the slow spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves. Wright *v.* Crawfordsville, 142 Ind. 636, 642, 42 N. E. 227, where it is distinguished from his real character, which is that impressed by nature, traits, or habits upon a person.

"Reputed owner" is one who, from all appearance, or from supposition, is the owner of a thing (Anderson L. Dict. [*quoted* in Santa Cruz Rock Pav. Co. *v.* Lyons, (Cal. 1896) 43 Pac. 599, 601]); a person who has to all appearances the title to and possession of property (Century Dict. [*quoted* in Santa Cruz Rock Pav. Co. *v.* Lyons, (Cal. 1896) 43 Pac. 599, 601]). See also Nininger *v.* Knox, 8 Minn. 140, where reputed ownership is said to be made up of the opinions of a man's neighbors. It is a number of voices concurring upon one or other of two facts.

"Reputed thieves" see Cowles *v.* Dunbar, 2 C. & P. 565, 567, M. & M. 37, 12 E. C. L. 735.

70. Webster Dict. [*quoted* in Philomath College *v.* Wyatt, 27 Oreg. 390, 446, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68].

71. Long *v.* State, 23 Nebr. 33, 45, 36 N. W. 310.

72. Webster Dict. [*quoted* in Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867].

Synonymous with "instance" or "wish" see Cornell *v.* Barney, 94 N. Y. 394, 399; Hopkins *v.* Glunt, 111 Pa. St. 287, 290, 2 Atl. 183.

Distinguished from "order" see Reg. *v.* Illidge, 2 C. & K. 871, 874, 3 Cox C. C. 552, 1 Den. C. C. 404, 13 Jur. 543, 18 L. J. M. C. 179, T. & M. 127, 61 E. C. L. 871.

"Request by mail" is a familiar phrase said not to import that the person to whom it is addressed shall receive it, but only that the person by whom it is made shall deposit in the post-office a written request, duly directed, so that, in the usual course of the mail, it will reach its destination. Lothrop *v.* Greenfield Stock, etc., Mut. F. Ins. Co., 2 Allen (Mass.) 82, 85.

"Request" for delivery of goods distinguished from warrant for the delivery of goods or order for the delivery of goods see Reg. *v.* Illidge, 2 C. & K. 871, 874, 3 Cox C. C. 552, 1 Den. C. C. 404, 13 Jur. 543, 18

see TRIAL. For Instructions, see CRIMINAL LAW, 12 Cyc. 658; TRIAL. For Money as Subject of Forgery, see FORGERY, 19 Cyc. 1385. For Special Findings, see TRIAL. For Submission of Issues to Jury, see TRIAL. Precatory Words in Instrument Creating Trust, see TRUSTS; WILLS. Privilege of Communications on Request of Person Defamed, see LIBEL AND SLANDER, 25 Cyc. 392. Recovery For Money Paid on Previous Request, see MONEY PAID, 27 Cyc. 837.)

REQUIRE. First, to ask as of right,[73] and by authority;[74] to claim as by right and authority;[75] to demand;[76] to insist;[77] to insist upon having; to exact.[78] Second, to claim; to render necessary as a duty, or something indispensable;[79] to claim as indispensable.[80] Third, to ask as a favor; to request.[81] Fourth, to call to account for.[82] Fifth, to make necessary;[83] to need;[84] or to be requisite;[85] to demand.[86] Sixth, to avenge; to take satisfaction for.[87] (See REQUIRED; REQUISITE.)

REQUIRED. Called for;[88] NECESSARY,[89] *q. v.*; that which is necessary;[90]

L. J. M. C. 179, T. & M. 127, 61 E. C. L. 871.

"Performed labor, etc., at the request of another" is a phrase equivalent to saying that he was employed by the other. Young *v.* Borzone, 26 Wash. 4, 22, 66 Pac. 135.

"At its instance and request" see Columbus, etc., R. Co. *v.* Gaffney, 65 Ohio St. 104, 118, 61 N. E. 152.

"Authorize and empower and request" see Hutton *v.* Hutton, 41 N. J. Eq. 267, 271, 3 Atl. 882.

"Requested" equivalent of "required" see Prentice *v.* Whitney, 8 Hun (N. Y.) 300, 301.

"Requested" distinguished from "instigated" see Cone *v.* Ivinson, 4 Wyo. 203, 240, 33 Pac. 31, 35 Pac. 933.

73. Mattingly *v.* Read, 3 Metc. (Ky.) 524, 526, 79 Am. Dec. 565.

74. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867; Webster Dict. [*quoted* in Meagher *v.* Van Zandt, 18 Nev. 230, 234, 2 Pac. 57; Brewster *v.* Brewster, 52 N. H. 52, 58; Federal Lead Co. *v.* Swyers, 161 Fed. 687, 692, 88 C. C. A. 547; U. S. *v.* Armour, 142 Fed. 808, 822].

75. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670.

76. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670; Mattingly *v.* Reed, 3 Metc. (Ky.) 524, 526, 79 Am. Dec. 565; Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867; Brewster *v.* Brewster, 52 N. H. 52, 58; Lippincott *v.* Ridgway, 11 N. J. Eq. 526, 534; U. S. *v.* Armour, 142 Fed. 808, 822; Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545, 547; Century Dict.; Webster Dict. [both *quoted* in Federal Lead Co. *v.* Swyers, 161 Fed. 687, 692, 88 C. C. A. 547].

77. Tennessee Coal, etc., Co. *v.* Waller, 37 Fed. 545, 547.

78. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670; Century Dict.; Webster Dict. [both *quoted* in Federal Lead Co. *v.* Swyers, 161 Fed. 687, 692, 88 C. C. A. 547].

79. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867.

80. Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670.

81. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867; Meagher *v.* Van Zandt, 18 Nev. 230, 235, 2 Pac. 57; Tennessee Coal & Iron Co. *v.* Waller, 37 Fed. 545, 547.

"Requiring" is a term sometimes construed in the sense of "requesting," "demanding." Hanson *v.* Maverick Oil Co., 67 N. H. 201, 202, 29 Atl. 459, construing N. H. Gen. Laws, c. 122, § 30; Laws (1879), c. 57, § 24.

82. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867.

83. Mattingly *v.* Reed, 3 Metc. (Ky.) 524, 526, 79 Am. Dec. 565; Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867.

84. Hull *v.* Holloway, 58 Conn. 210, 216, 20 Atl. 445; Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867; Cole *v.* Littlefield, 35 Me. 439, 445; Corlies *v.* Allen, 36 N. J. Eq. 100, 101; Hughes *v.* Chester, etc., R. Co., 1 Dr. & Sm. 524, 551, 9 Wkly. Rep. 760, 62 Eng. Reprint 478.

85. Hull *v.* Holloway, 58 Conn. 210, 216, 20 Atl. 445.

86. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867.

87. Johnson *v.* Clem, 4 Ky. L. Rep. 860, 867.

Synonymous with: "Authorize" see Turner *v.* State, 70 Ga. 765, 777. "Command" see U. S. *v.* San Francisco Bridge Co., 88 Fed. 891, 893. "Direct" see Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670; McLean County Coal Co. *v.* Bloomington, 234 Ill. 90, 98, 84 N. E. 624; U. S. *v.* Dimmick, 112 Fed. 350, 351; U. S. *v.* San Francisco Bridge Co., 88 Fed. 891, 893. "Exact" see Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670. "Necessary" see Miller *v.* Leo, 35 N. Y. App. Div. 589, 592, 55 N. Y. Suppl. 165; McKeever *v.* Canonsburg Iron Co., 138 Pa. St. 184, 190, 16 Atl. 97, 20 Atl. 938. "Order" see Kennedy *v.* Falde, 4 Dak. 319, 29 N. W. 667, 670; McLean County Coal Co. *v.* Bloomington, 234 Ill. 90, 98, 84 N. E. 624; U. S. *v.* Dimmick, 112 Fed. 350, 351; U. S. *v.* San Francisco Bridge Co., 88 Fed. 891, 893. "Prescribe" see U. S. *v.* Dimmick, 112 Fed. 350, 351. "Request" see Prentice *v.* Whitney, 8 Hun (N. Y.) 300, 301.

88. McReynolds' Appeal, 66 Pa. St. 102, 111.

"Fairly required" see Coe *v.* Aiken, 61 Fed. 24, 35.

89. People *v.* Central Pac. R. Co., 76 Cal. 29, 41, 18 Pac. 90; Flint, etc., R. Co. *v.* Detroit, etc., R. Co., 64 Mich. 350, 360, 31 N. W. 281.

90. Com. *v.* Chesapeake, etc., R. Co., 108 S. W. 851, 852, 32 Ky. L. Rep. 1400.

rendered necessary or indispensable;[91] having imperative need;[92] allowed;[93] compelled;[94] permitted;[95] requested;[96] commanded.[97] (See Require; Requisite.)

REQUIREMENTS. A term sometimes said to be synonymous with "needs."[98]

REQUISITE. Essential, indispensable.[99] (See Require; Required.)

REQUISITION. The act of requiring or demanding.[1] (See, generally, Extradition (International), 19 Cyc. 57; Extradition (Interstate), 19 Cyc. 89.)

REREDOS. A sort of screen at the back of the altar.[2]

RERUM ORDO CONFUNDITUR, SI UNICUIQUE JURISDICTIO NON SERVATUR. A maxim meaning "The order of things is confounded, if every one preserves not his jurisdiction."[3]

RERUM PROGRESSUS OSTENDUNT MULTA QUÆ IN INITIO PRÆCAVERI SEU PRÆVIDERI NON POSSUNT. A maxim meaning "The progress of events show many things which at the beginning could not be foreseen or guarded against."[4]

RERUM SUARUM QUILIBET EST MODERATOR ET ARBITER. A maxim meaning "Every one is the regulator and disposer of his own property."[5]

RES. In the civil law, a term said to signify a thing, an object.[6] (See Chattel Mortgages, 6 Cyc. 1035; Judgments, 23 Cyc. 1604.)

91. Century Dict. [*quoted* in Wilcox, etc., Co. *v.* Phœnix Ins. Co., 60 Fed. 929, 930].

92. Standard Dict. [*quoted* in Park *v.* Candler, 114 Ga. 466, 479, 40 S. E. 523].

93. Byrd *v.* State, 57 Miss. 243, 246, 34 Am. Rep. 440. But see State *v.* McCord, 8 Kan. 232, 239, 12 Am. Rep. 469.

94. State *v.* McCord, 8 Kan. 232, 239, 12 Am. Rep. 469. But see Byrd *v.* State, 57 Miss. 243, 246, 34 Am. Rep. 440.

95. Bowler *v.* Pipestone First Nat. Bank, 21 S. D. 449, 455, 113 N. W. 618.

"Desired and required" has been construed as intended to express a legislative wish and permission rather than a mandate. *Ex p.* Kohler, 74 Cal. 38, 43, 15 Pac. 436.

96. McKinnon *v.* Western Coal, etc., Co., 120 Mo. App. 148, 163, 96 S. W. 485, where the construction "needed" put upon the term in Bowerman *v.* Lackawanna Min. Co., 98 Mo. 308, 316, 71 S. W. 1062, was disapproved.

"Has been required" has been held to be equivalent to "has been requested." National Home Bldg., etc., Assoc. *v.* Dwelling-House Ins. Co., 106 Mich. 236, 240, 64 N. W. 21.

97. Huey *v.* Waldrop, 141 Ala. 318, 322, 37 So. 380.

98. Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 85, 93, 43 N. E. 774, 31 L. R. A. 529.

99. Funkhouser *v.* Spahr, 102 Va. 306, 310, 46 S. E. 378.

Requisite notice see Bowling *v.* Arthur, 34 Miss. 41, 54.

1. Atwood *v.* Charlton, 21 R. I. 568, 571, 45 Atl. 580.

"Requisitions for the surrender of fugitives," as used in the Spanish treaty, providing that requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or, in their absence, by superior consular officers, means the application for the final warrant for the surrender of the fugitives, which can only be executed by the executive authority after a judicial examination. Castro *v.* De Uriarte, 16 Fed. 93, 96.

Requisition for troops.—As the word is used in speaking of the requisition by the president of the United States upon the governor of the state for troops — a request to the governor of a state to organize a portion of militia to be held in readiness or rendezvous for the service of the United States. Mills *v.* Martin, 19 Johns. (N. Y.) 7, 26.

"Requisition of a physician," as used in a statute prohibiting the sale of liquors to minors except on the requisition of a physician for medicinal purposes, means an application, or a request, communicated by the physician directly to the seller, either orally or in writing, and not merely the advice of the physician that liquor should be used. Bain *v.* State, 61 Ala. 75, 79.

Requisition to sue see Lockridge *v.* Upton, 24 Mo. 184, 185.

2. Boyd *v.* Phillpotts, L. R. 4 A. & E. 297, 346.

3. Peloubet Leg. Max. [*citing* 4 Inst. Proem.].

4. Morgan Leg. Max. [*citing* Mildmay's Case, 6 Coke 40*a*, 40*b*, 77 Eng. Reprint 311].

5. Burrill L. Dict. [*citing* Coke Litt. 223*a*].

6. As a term of law, this word has a very wide and extended signification, including not only things which are objects of property, but also such as are not capable of individual ownership. In old English law it is said to have a general import comprehending both corporeal and incorporeal things, of whatever nature or species. In modern usage the term has been particularly applied to an object, subject-matter, or status considered as the defendant in an action, or as the object against which directly proceedings are taken. Black L. Dict. See also Lord *v.* Colvin, 4 Drew. 366, 374, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250, 62 Eng. Reprint 141, where this word was said to signify "business."

Res commones are, in civil law, things common to all (Black L. Dict.), such as the air, the water which runs in the rivers, the sea and its shores. Geer *v.* Connecticut, 161 U. S. 519, 525, 16 S. Ct. 600, 40 L. ed. 793.

RES ACCENDENT LUMINA REBUS. A maxim meaning "One thing throws light upon others." [7]

RES ACCESSORIA SEQUITUR REM PRINCIPALEM. A maxim meaning "An accessory follows its principal." [8]

RES ADJUDICATA. See RES JUDICATA, *post*, p. 1666.

RESALE. Where a person who has sold goods or other property to a purchaser, sells them again to someone else.[9] (Resale: Agreement to Account For Surplus on, see MORTGAGES, 27 Cyc. 1004. Allowance of Commission to Trustee on, see JUDICIAL SALES, 24 Cyc. 14 note 70. Application of Statute of Frauds to, see FRAUDS, STATUTE OF, 20 Cyc. 241. Notice of, see JUDICIAL SALES, 24 Cyc. 18 note 5. Of Goods by Seller, see SALES. Of Land — Sold For Taxes, see TAXATION; Under Water, see NAVIGABLE WATERS, 29 Cyc. 357. Of Property Sold at Auction, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 105. Of Railroad Under Foreclosure, see RAILROADS, 33 Cyc. 588. Of School, University, or Asylum Lands, see PUBLIC LANDS, 32 Cyc. 888. On Failure to Comply With Bid, see EXECUTIONS, 17 Cyc. 1259; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 783; GUARDIAN AND WARD, 21 Cyc. 141; JUDICIAL SALES, 24 Cyc. 45; MORTGAGES, 27 Cyc. 1704. On Setting Aside Judicial Sale, see JUDICIAL SALES, 24 Cyc. 48; MORTGAGES, 27 Cyc. 1511, 1720. Reappraisement on, see JUDICIAL SALES, 24 Cyc. 15. Rights and Remedies of First Purchaser on, see JUDICIAL SALES, 24 Cyc. 48. Security on, see JUDICIAL SALES, 24 Cyc. 40 note 1. Under Power in Mortgage, see MORTGAGES, 27 Cyc. 1511. When Should Be Ordered, see MORTGAGES, 27 Cyc. 1720. Whether Within Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 241.)

RES BONA FIDE VENDITA PROPTER MINIMAM CAUSAM INEMPTA. A maxim meaning "A thing sold in good faith, for even the most trifling consideration, will be regarded as sold." [10]

RESCIND. To abrogate, annul, avoid, or cancel a contract;[11] synonymous with "terminate." [12] (See RESCISSION.)

RESCISSION. The undoing of a thing.[13] (Rescission: In General, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 282. Adverse Possession of Vendor After, see ADVERSE POSSESSION, 1 Cyc. 1094. Agent's Power as to, see PRINCIPAL AND AGENT, 31 Cyc. 1387. Application of Statute of Frauds to, see FRAUDS, STATUTE OF, 20 Cyc. 219. As Against Third Person, see CONTRACTS, 9 Cyc. 442. Evidence of Mutual, see CONTRACTS, 9 Cyc. 351. Failure to Exercise Right of, see FIRE INSURANCE, 19 Cyc. 791; LIFE INSURANCE, 25 Cyc. 868; MUTUAL BENEFIT INSURANCE, 29 Cyc. 193. In Equity, see CONTRACTS, 9 Cyc. 433. Judge's Power as to Order of Coördinate Judge, see JUDGES, 23 Cyc. 540. Jurisdiction of Court in Action For, see COURTS, 11 Cyc. 686. Limitation of Actions For, see LIMITATIONS OF ACTIONS, 25 Cyc. 1178. Of Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 338. Of Acknowledgment of Debt or of New Promise,

7. Black L. Dict. [*citing* Keisselbrack *v.* Livingston, 4 Johns. Ch. (N. Y.) 144, 149].

8. Peloubet Leg. Max. [*citing* Br. 491].

9. Black L. Dict.

10. Morgan Leg. Max. [*citing* Domat. 1, 2, § 11, art. 3].

Applied in Masterton *v.* Beers, 6 Rob. (N. Y.) 368, 386.

11. Abbott L. Dict. [*quoted* in Powell *v.* F. C. Linde Co., 29 Misc. (N. Y.) 419, 420, 60 N. Y. Suppl. 1044].

12. Hurst *v.* Trow Printing, etc., Co., 2 Misc. (N. Y.) 361, 366, 22 N. Y. Suppl. 371, where it was said to be sometimes used in the narrower sense of terminate a contract as to future transactions.

13. Powell *v.* F. C. Linde Co., 29 Misc. (N. Y.) 419, 421, 60 N. Y. Suppl. 1044.

A term which imports an entire abandonment of a contract by one party on account of some act done or omitted to be done by the other, which puts it out of the power of the one or the other to perform it according to its terms. Galloway *v.* Holmes, 1 Dougl. (Mich.) 330, 346.

Rescission of a contract has been defined as the avoidance of a voidable contract. Tecumseh State Bank *v.* Maddox, 4 Okla. 583, 598, 46 Pac. 563. See also Seanor *v.* McLaughlin, 165 Pa. St. 150, 157, 30 Atl. 717, 32 L. R. A. 467, where it is said that "rescission is a fact; the word itself may be used by the contracting parties to indicate the right, but other words may be adopted to point out that course of conduct of the parties which shall constitute the fact of rescission."

see Limitations of Actions, 25 Cyc. 1367. Of Action — Of Advancement, see Descent and Distribution, 14 Cyc. 173; Of County Board, see Counties, 11 Cyc. 403. Of Agreement — As to Boundaries, see Boundaries, 5 Cyc. 936; Of Accord and Satisfaction by Subsequent Agreement, see Accord and Satisfaction, 1 Cyc. 338; To Marry, see Breach of Promise to Marry, 5 Cyc. 1001. Of Agreement, License, or Implied Grant of Right of Way, see Railroads, 33 Cyc. 156. Of Aid to Corporation and Subscription to or Purchase of Corporate Stock by City, see Municipal Corporations, 28 Cyc. 1559. Of Altered Contract, Right to Benefits Under, see Alterations of Instruments, 2 Cyc. 187. Of Auction Sale, see Auctions and Auctioneers, 4 Cyc. 1049. Of Bond, see Bonds, 5 Cyc. 776. Of Building Contract — Generally, see Builders and Architects, 6 Cyc. 24; As Affecting Mechanic's Lien, see Mechanics' Liens, 27 Cyc. 87. Of Chattel Mortgage, see Chattel Mortgages, 6 Cyc. 1100 note 70. Of Composition Between Creditors, see Compositions With Creditors, 8 Cyc. 488. Of Compromise, see Compromise and Settlement, 8 Cyc. 534. Of Contract — In General, see Contracts, 9 Cyc. 595; Between Husband and Wife, see Husband and Wife, 21 Cyc. 1301; By Erasure of Name, see Alterations of Instruments, 2 Cyc. 216; By Tenant Renting Land on Shares, see Landlord and Tenant, 24 Cyc. 1472; For Construction of Levee, see Levees, 25 Cyc. 192 note 17; For Exchange of Property, see Exchange of Property, 17 Cyc. 833 note 13; For Public Improvements, see Municipal Corporations, 28 Cyc. 1048; For Sale of Corporate Stock, see Corporations, 10 Cyc. 373; For Sale of Goods, see Sales; For Sale of Land, see Vendor and Purchaser; For Sale of Principal's Property by Agent, see Principal and Agent, 31 Cyc. 1360; For Work and Materials Affecting Lien, see Mechanics' Liens, 27 Cyc. 100; Of Agency, see Factors and Brokers, 19 Cyc. 192; Principal and Agent, 31 Cyc. 1292; Of Apprenticeship, see Apprentices, 3 Cyc. 561; Of Assignment, see Assignments, 4 Cyc. 81; Of County, see Counties, 11 Cyc. 486; Of Decedent in Relation to Realty, see Executors and Administrators, 18 Cyc. 316; Of Employment, see Master and Servant, 26 Cyc. 972; Of Grantee of Mortgaged Premises to Assume Mortgage, see Mortgages, 27 Cyc. 1360; Of Guaranty, see Guaranty, 20 Cyc. 1479; Of Infant, see Infants, 22 Cyc. 609; Of Insurance, see Fire Insurance, 19 Cyc. 651; Life Insurance, 25 Cyc. 788; Marine Insurance, 26 Cyc. 610; Mutual Benefit Insurance, 29 Cyc. 92; Of Lunatic, see Insane Persons, 22 Cyc. 1209; Of Married Woman, see Husband and Wife, 21 Cyc. 1327; Of Municipality, see Municipal Corporations, 28 Cyc. 681; Of Sale as Discharge of Purchase-Money Mortgage, see Mortgages, 27 Cyc. 1405; Of Spendthrift, see Spendthrifts; Of Subscription, see Subscriptions; Of Subscription to Stock, see Corporations, 10 Cyc. 425; Of Transfer of Commercial Paper by Indorsement, see Commercial Paper, 7 Cyc. 799. Of Conveyance — By Infant, see Infants, 22 Cyc. 546; By Lunatic, see Insane Persons, 22 Cyc. 1174; By Married Woman, see Husband and Wife, 21 Cyc. 1332, 1509; Of Land With Minerals, see Mines and Minerals, 27 Cyc. 675; Of Public Lands in Cases of Fraud, Mistake, or Trust, see Public Lands, 32 Cyc. 1073; Of Swamp and Overflowed Lands, see Public Lands, 32 Cyc. 924. Of Deed — Generally, see Deeds, 13 Cyc. 593; Of Partition, see Partition, 30 Cyc. 169. Of Firm Contract by Individual Partners, see Partnership, 30 Cyc. 491. Of Gift, see Gifts, 20 Cyc. 1212, 1243. Of Lease — In General, see Landlord and Tenant, 24 Cyc. 914; Of Railroad, see Railroads, 33 Cyc. 396. Of Marriage Settlement, see Husband and Wife, 21 Cyc. 1265. Of Mining Lease, License, or Contract, see Mines and Minerals, 27 Cyc. 692. Of Mortgage, see Mortgages, 27 Cyc. 1132. Of Municipal Council, see Municipal Corporations, 28 Cyc. 340. Of Nomination For Office, see Elections, 15 Cyc. 329. Of Offer of Bounty For Enlistment in Army or Navy, see Bounties, 5 Cyc. 981. Of Order of County Board, see Counties, 11 Cyc. 403. Of Payment, Operation, and Effect of, see Payment, 30 Cyc. 1221. Of Release, see Release. Of Rules of Court, see Courts, 11 Cyc. 743. Of Sale of County Property, Action For, see Counties, 11 Cyc. 467. Of Stipulation, see Stipu-

LATION. Of Vote to Increase Capital Stock, see CORPORATIONS, 10 Cyc. 545. Of Written Contract, Whether Within Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 219, 241. Operation of Rescission of Contract as Fraudulent Conveyance, see FRAUDULENT CONVEYANCES, 20 Cyc. 406. Proceedings For — Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 50 note 57; Revival of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 91. Revocation or Withdrawal of Offer of Contract, see CONTRACTS, 9 Cyc. 283. Rights of Undisclosed Principal as to, see PRINCIPAL AND AGENT, 31 Cyc. 1574. Setting Aside in Equity, see EQUITY, 16 Cyc. 156. Subsequent Revocation of Acceptance of Contract, see CONTRACTS, 9 Cyc. 288. Tenancy Implied Under Contract of Purchase — After Rescission, see LANDLORD AND TENANT, 24 Cyc. 886; Prior to Rescission, see LANDLORD AND TENANT, 24 Cyc. 884. Waiver by Subscriber of Right of, see CORPORATIONS, 10 Cyc. 425. See also RESCIND, *ante*, p. 1628.)

RESCRIPT. At common law, a COUNTERPART, *q. v.*, DUPLICATE, *q. v.*, or COPY, *q. v.*[14] In American law, the statement of the decision of the highest appellate tribunal; also, the brief statement sent to the court *a quo*.[15] (See APPEAL AND ERROR, 3 Cyc. 478.)

14. Black L. Dict.

15. Anderson L. Dict.

RESCUE

By Joseph B. Cheshire, Jr.

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CROSS-REFERENCES

For Matters Relating to:

Accessary After the Crime, see Criminal Law, 12 Cyc. 192.

Aider or Abetter, see Criminal Law, 12 Cyc. 186.

Breaking Jail, see Escape, 16 Cyc. 537.

Civil Liability:

For Rescue, see Torts.

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For Matters Relating to — (*continued*)

Escape by Prisoner, see ESCAPE, 16 Cyc. 537.

Interference With Officer Making Arrest, see OBSTRUCTING JUSTICE, 29 Cyc. 1326.

Obstructing Execution of Process, see OBSTRUCTING JUSTICE, 29 Cyc. 1326.

Penal Action For Pound Breach, see ANIMALS, 2 Cyc. 455.

Rescue as Riot, see RIOT, *post*, p. 1770.

I. RESCUE OF PERSONS.

A. Definition. Rescue at common law is the forcibly and knowingly freeing another from arrest or imprisonment.[1]

B. Nature and Elements of Offense — 1. In General — a. At Common Law. Rescue consists in a high contempt of the law in preventing the operation of its process.[2] The rescue of a traitor is treason; of a felon, felony; of a misdemeanant, a misdemeanor;[3] and of a person confined on civil process, a misdemeanor.[4] Rescuing a supposed felon, at common law, is felony, although he be not indicted.[5] The rescuers are in any event, whether the party rescued be convicted or not, guilty of a misdemeanor for obstructing public justice.[6] The essential elements of the offense, at common law, are: (1) Valid arrest;[7] (2) actual custody;[8] (3) the forcibly and knowingly freeing a person from arrest or custody;[9] and (4) escape of the prisoner.[10]

b. Under Statutes. In some jurisdictions rescue is made an offense by statute, and such statutes are generally declaratory of the common law.[11] But some

1. 4 Blackstone Comm. 131 [*quoted* in Robinson *v.* State, 82 Ga. 535, 544, 9 S. E. 528; Rome *v.* Omburg, 22 Ga. 67, 69].

Another definition.— Rescue is "when a man, lawfully arrested and taken, is set at large wrongfully." Coke Litt. 160*b*; Comyns Dig. [*quoted* in State *v.* Mazyck, 3 Rich. (S. C.) 291, 292].

Statutory definitions.— In some jurisdictions this offense is defined by statute. See Hillian *v.* State, 50 Ark. 523, 8 S. W. 834 (construing Mansfield Dig. § 1768); Robinson *v.* State, 82 Ga. 535, 9 S. E. 528 (construing Code, § 4478, and holding that rescue is where there is no effort on the part of the prisoner to escape, but his deliverance is effected by the intervention of others, without his coöperation); Brunson *v.* State, 97 Ind. 95 (construing Rev. St (1881) § 2034); Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655 (construing Pen. Code, art. 212); U. S. *v.* Clapox, 35 Fed. 575, 13 Sawy. 349 (construing Rev. St. (1878) § 5401 [U. S. Comp. St. (1901) p. 3656]).

"Escape," "prison breaking," and "rescue" distinguished see State *v.* Sutton, 170 Ind. 473, 84 N. E. 824. Where a prisoner's liberation is effected by others with force it is rescue. State *v.* Sutton, *supra*, construing Burns St. (1908) § 2400. Where a prisoner's liberation is effected by himself or others without force, it is an escape, not a rescue. State *v.* Sutton, *supra*. See also Robinson *v.* State, 82 Ga. 535, 544, 9 S. E. 528. Where a prisoner's liberation is effected by himself with force, it is prison-breaking, not rescue. State *v.* Sutton, *supra*. See also PRISONS, 32 Cyc. 316 text and note 9.

2. State *v.* Mazyck, 3 Rich. (S. C.) 291.

3. State *v.* Mazyck, 3 Rich. (S. C.) 291; Rex *v.* Pember, Cas. t. Hardw. 112, 95 Eng. Reprint 70; Rex *v.* Stokes, 5 C. & P. 148, 24 E. C. L. 498; Wilson *v.* Gary, Holt K. B. 628, 90 Eng. Reprint 1247; Rex *v.* Vaux, 11 Mod. 287, 88 Eng. Reprint 1044; Rex *v.* Haswell, R. & R. 340; Rex *v.* Belt, 2 Salk. 586, 91 Eng. Reprint 491; 4 Blackstone Comm. 131; 1 Hale P. C. 116; 2 Hawkins, c. 21, § 7.

4. State *v.* Mazyck, 3 Rich. (S. C.) 291; Reg. *v.* Allan, C. & M. 295, 5 Jur. 296, 41 E. C. L. 164.

5. Anonymous, Jenk. 171; Dyer 99 pl. 60; 1 Hale P. C. 606.

6. 1 Hale P. C. 116; 2 Hawkins, c. 21, § 8. See also Fluty *v.* Com., 105 S. W. 138, 32 Ky. L. Rep. 89.

Obstructing justice generally see OBSTRUCTING JUSTICE, 29 Cyc. 1325.

7. See *infra*, I, B, 2.

8. See *infra*, I, B, 3.

9. See *infra*, I, B, 4.

10. See *infra*, I, B, 5.

11. See the statutes of the several states. And see *supra*, note 1.

Burns Annot. St. Ind. (1908) § 2400, providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner, shall, on conviction, be punished, etc., includes cases where the accused with force aids or accomplishes the escape of a prisoner charged with or convicted of a felony, under such circumstances as would be a rescue at common law. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824.

statutes enlarge the offense, by including rescues effected, not only by force, but also by menaces of bodily harm or other unlawful means.[12]

2. Valid Arrest. It is necessary that the arrest of the party rescued be legal,[13] for, where one is unlawfully arrested or imprisoned, it is lawful for another, without violence, to assist in his rescue.[14] And, where the arrest is invalid, the officer is guilty of an affray in attempting to hold the prisoner by force against the efforts of himself and friends.[15] But, even when the arrest is illegal, third parties have no right to assault an officer to effect a rescue.[16]

3. Actual Custody. The party rescued must be in actual custody, but whether in the custody of an officer or of a private person is immaterial.[17] Custody means in a prison, jail, or calaboose, as well as in the hands of an officer.[18]

4. Forcibly and Knowingly Freeing Prisoner — a. Forcibly. At common law the rescue must be made forcibly.[19]

b. Knowingly. When the party rescued is in the custody of an officer, the rescuers must have knowledge of the lawfulness of the custody at their peril;[20] but, when the rescue is made from the custody of a private person, they must have actual knowledge of the lawful custody to be guilty.[21]

5. Escape of Prisoner. The escape of the party rescued is essential to the consummated offense of rescue.[22]

C. Accomplices, Aiders, and Abetters.[23] A prisoner who assists outsiders in effecting the escape of himself and other prisoners is an accomplice

12. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834, construing Mansfield Dig. § 1768.

13. Com. *v.* Lee, 107 Mass. 207; State *v.* Dunn, 25 N. J. L. 214.

Determination of validity.— The validity of the arrest cannot be determined by a rescue, or an attempt to rescue. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748; State *v.* Armistead, 106 N. C. 639, 10 S. E. 872.

Informality of process does not invalidate an arrest so as to justify a rescue. State *v.* Murray, 15 Me. 100; State *v.* Armistead, 106 N. C. 639, 10 S. E. 872, where the mittimus did not comply with all the requirements of N. C. Code, § 1238.

In England an arrest, founded on a warrant of a justice of the peace, issued on the certificate of the clerk of the peace that an indictment for a misdemeanor had been found against the party named therein, is valid. Rex *v.* Stokes, 5 C. & P. 148, 24 E. C. L. 498.

14. People *v.* Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190 (holding that, when the imprisonment is unlawful, and itself a crime, the reason which makes rescue an offense does not exist; and in such a case the right of liberty is absolute, and he who assists the prisoner to regain it is not guilty of the technical offense of rescue); State *v.* Rollins, 113 N. C. 722, 18 S. E. 394. But see Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379, construing Pen. Code, art. 227, and holding rescuers guilty, regardless of the legality of imprisonment.

15. State *v.* Rollins, 113 N. C. 722, 18 S. E. 394.

Affray generally see 2 Cyc. 40.

16. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; State *v.* Armistead, 106 N. C. 639, 10 S. E. 872; Rex *v.* Almey, 3 Jur. N. S. 750.

17. 1 Hale P. C. 606.

An affidavit charging that defendant rescued a prisoner from the custody of a deputy sheriff shows a rescue from a public officer, deputy sheriffs being clothed with the same duties and powers devolving upon their principals. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824.

18. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834 (construing Mansfield Dig. § 1768); State *v.* Watson, 66 Iowa 670, 24 N. W. 268; Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379 (construing Pen. Code, art. 227); 1 Hale P. C. 606.

"Custody" defined see 12 Cyc. 1024.

19. Com. *v.* Israel, 4 Leigh (Va.) 675; 4 Blackstone Comm. 131; Bacon Abr. tit. "Rescue," A. p. 87. And see State *v.* Armistead, 106 N. C. 639, 10 S. E. 872. But *compare* Hillian *v.* State, 50 Ark. 523, 8 S. W. 834, construing Mansfield Dig. § 1768, which, however, enlarges the common-law offense.

20. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824; State *v.* Hilton, 26 Mo. 199; 1 Hale P. C. 606. But *compare* U. S. *v.* Buck, 24 Fed. Cas. No. 14,680, 4 Phila. (Pa.) 161, construing Act, Sept. 18, 1850, § 7, and holding that the rescuers must act "knowingly and willingly," and that ignorance of the custody, or its lawfulness, is an excuse; but that failure to inquire, when inquiry would readily show the custody lawful, is evidence of knowledge.

21. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824; State *v.* Hilton, 26 Mo. 199; 1 Hale P. C. 606.

22. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834.

23. **Evidence of accomplice** see *infra*, I, F, 2.

Who are accomplices, aiders, abetters, or accessaries generally see Criminal Law, 12 Cyc. 185 *et seq.*

in the crime of rescue.[24] One who is present, aiding in the commencement of an assault with intent to rescue a prisoner, does not cease to be guilty because his fears prevent his going all lengths with his party.[25]

D. Attempts — 1. In General. At common law, upon a failure to accomplish a rescue, the "would be" rescuers may be convicted of an attempt,[26] and in some jurisdictions such attempts have been made criminal by statute;[27] some of them enlarging the common-law offense.[28]

2. Rights of Officer Resisting Attempt. When an attempt is made to rescue persons lawfully arrested, an officer may arrest the "would be" rescuers, using such force as is necessary to make the arrest, even though it is such as a jury would ordinarily consider excessive.[29]

E. Indictment or Information[30] **— 1. Essential Allegations and Averments — a. At Common Law.** The indictment must aver that the party rescued was held under lawful arrest.[31] The name of the party whom defendants attempted to rescue is wholly immaterial and need not be stated.[32] The indictment should state whether the person from whom the rescue was made was a public officer or a private person.[33] It is not necessary to set forth in the indictment the process by which the party rescued was held.[34] The indictment should state the nature and cause of the imprisonment of the person alleged to have been rescued.[35]

b. Under Statutes.[36] The indictment should contain all the elements of the offense as defined by statute.[37] And some statutes so define the offense as to

24. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834, construing Mansfield Dig. § 1768.

25. State *v.* Morris, 10 N. C. 388.

26. State *v.* Murray, 15 Me. 100; State *v.* Morris, 10 N. C. 388. And see State *v.* Garrett, 80 Iowa 589, 46 N. W. 748; 2 Bishop Cr. L. § 1089; 2 Wharton Cr. L. § 1680.

27. U. S. *v.* Buck, 24 Fed. Cas. No. 14,680, 4 Phila. (Pa.) 161, construing the act of Sept. 18, 1850, § 7.

28. Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379, holding legality of imprisonment immaterial under Pen. Code, art. 227.

Attempts generally see Criminal Law, 12 Cyc. 176.

29. State *v.* Rollins, 113 N. C. 722, 18 S. E. 394, holding, however, that the officer must act in good faith and free from malice; and that there is no presumption of law that the officer acted without malice and in good faith, when, in resisting an attempted rescue, such force is used that death is caused thereby.

30. Indictment or information generally see Indictments and Informations, 22 Cyc. 157 *et seq.*

31. Com. *v.* Lee, 107 Mass. 207; State *v.* Dunn, 25 N. J. L. 214; State *v.* Jones, 78 N. C. 420, holding that the indictment must allege that the prisoner had committed some offense for which he could be held, or facts or circumstances from which the court can see that he was lawfully in jail.

32. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

33. State *v.* Hilton, 26 Mo. 199.

Knowledge of defendant.—An indictment charging that defendant unlawfully and forcibly aided in the escape of a prisoner from the deputy sheriff by "drawing and pointing a shot gun" at such deputy and by assaulting his assistants, without alleging that accused knew that such prisoner was held in custody, was sufficient State *v.* Sutton, 170 Ind. 473, 84 N. E. 824.

34. Com. *v.* Lee, 107 Mass. 207.

35. State *v.* Hilton, 26 Mo. 199; 2 Chitty Cr. L. p. 183; 2 Hawkins, c. 21, § 5. *Contra*, Com. *v.* Lee, 107 Mass. 207.

36. For forms of indictment under statute which have been approved see Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379 (construing Pen. Code, art. 227); Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655 (construing Pen. Code, art. 212).

37. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824; Brunson *v.* State, 97 Ind. 95 (construing Rev. St. (1881) § 2034, and holding that an affidavit on which an information is based must charge that defendant forcibly freed such person, knowing him to be under arrest); State *v.* Barrett, 42 N. H. 466, construing Comp. St. c. 143, § 1, c. 32, § 7.

Following language of statute.—An affidavit charging defendant with rescuing a prisoner from the custody of a public officer, which follows the language of the statute, is ordinarily sufficient. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824.

Under Burns Annot. St. Ind. (1908) § 2400, providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner, shall, on conviction, be punished, etc., an affidavit for aiding the escape of a prisoner in the custody of a deputy sheriff, which alleges that the accused drew a gun on the deputy and attempted to shoot him therewith, and held and struck a third person who was assisting the deputy, whereby the prisoner escaped, is sufficient as against a motion to quash, although it does not aver that the accused knew that the prisoner was in custody, since by averring specific acts which in themselves were unlawful, by which

make certain averments unnecessary, which are essential to the validity of an indictment for the common-law offense.[38]

2. Variance. There is no variance between allegation and proof, where the indictment charges that the prisoner was rescued from the custody of a marshal, and proof that he was rescued from one claiming to be special constable, where it also appears that the justice of the peace who committed him appointed the marshal special constable to place him in the county jail — under a mistake of law, thinking said marshal had no such power, whereas he had such power without such special appointment.[39]

3. Joinder of Offenses. When a general verdict of guilty is returned, on an indictment charging assault and battery, as well as rescue, if the averments as to rescue are uncertain or bad they may be rejected as superfluous, and judgment entered as for assault and battery.[40] In some jurisdictions statutes permit a conviction for assault and battery upon an indictment for rescue.[41]

F. Evidence[42] **— 1. Admissibility.** Evidence which tends to show the identity of the parties connected with the crime is admissible.[43]

2. Weight and Sufficiency. Testimony of an accomplice will not support a conviction, unless corroborated in some material matter, tending to show the guilt of the accused.[44] That the accused entered a lower room of a jail by unbolting and unlocking a door, and that he then forced the jailer at the point of a pistol to unlock the prison cages, is sufficient evidence of "breaking" under the Texas statute.[45]

G. Defenses. That the party rescued was unlawfully arrested, or imprisoned, and that the rescue was effected without violence, is a good defense.[46] Ignorance of the lawfulness of the arrest, or custody, is a good defense, where the rescue is made from the custody of a private person;[47] but where the rescue is made from the custody of an officer, the rescuers must take notice of the lawfulness of the custody at their peril.[48] The accused can plead in defense conviction for aiding in the escape of one prisoner, to an indictment for rescuing and aiding in the escape of another, who escaped at one and the same time and by one and the same means as the first.[49] Failure to convict the party arrested will not justify an attempt which had been previously made to rescue him.[50] It is

the escape was made possible, the rule that knowledge of custody must be averred, so that an innocent aiding may not be punished, was obviated. State *v.* Sutton, 170 Ind. 473, 84 N. E. 824.

38. Loggins *v.* State, 32 Tex. Cr. 358, 24 S. W. 408, construing Pen. Code, art. 212, and holding it not necessary for the indictment to charge the offense as done "wilfully" and by "force."

39. State *v.* Watson, 66 Iowa 670, 24 N. W. 268.

40. State *v.* Morrison, 24 N. C. 9.

41. See the statutes of the several states. And see Rose *v.* State, 33 Ind. 167, construing 2 Gavin & H. St. p. 405, §§ 72, 73.

42. Evidence generally see Criminal Law, 12 Cyc. 379 *et seq.*

43. Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655; Gillian *v.* State, 3 Tex. App. 132, holding that evidence as to the names used by the rescuers to designate each other at the time of the rescue is admissible as part of the *res gestæ*.

44. Hillian *v.* State, 50 Ark. 523, 8 S. W. 834 (construing Mansfield Dig. § 2259, and holding also that a prisoner who helps outsiders in the rescue of himself and other prisoners is an accomplice within the statute); Gillian *v.* State, 3 Tex. App. 132 (holding that the fact that one of the rescuers was called by his colleagues by the same name as defendant is not sufficient corroborating evidence to warrant a conviction, when the only other testimony is that of an accomplice).

45. Williams *v.* State, 24 Tex. App. 17, 5 S. W. 655, construing Pen. Code, art. 212.

46. People *v.* Ah Teung, 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190. State *v.* Rollins, 113 N. C. 722, 18 S. E. 394. But see Starks *v.* State, 38 Tex. Cr. 233, 42 S. W. 379, construing Pen. Code, art. 227, and holding that rescue, as there defined, is an offense, regardless of the legality of the imprisonment.

Violent rescue.— The unlawfulness of the arrest, or imprisonment, is no defense, where the rescue is violent. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748; State *v.* Rollins, 113 N. C. 722, 18 S. E. 394; State *v.* Armistead, 106 N. C. 639, 10 S. E. 872; Rex *v.* Almey, 3 Jur. N. S. 750.

47. State *v.* Hilton, 26 Mo. 199; 1 Hale P. C. 606.

48. State *v.* Hilton, 26 Mo. 199; 1 Hale P. C. 606.

49. Hurst *v.* State, 86 Ala. 604, 6 So. 120, 11 Am. St. Rep. 79.

50. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

no defense to the crime of attempt to rescue that the ordinance under which the party whose rescue was attempted was arrested was not proved.[51]

H. Trial. The party rescued should be tried before the rescuers,[52] for the rescuers could not be tried and convicted for treason, or felony, unless the person rescued had been convicted of his offense.[53] But they could in any event be tried for a misdemeanor for obstructing public justice.[54]

I. Punishment[55] — **1. In General.** A party convicted of rescue is guilty of the same grade of offense as the party rescued, and is punishable accordingly.[56]

2. When Party Rescued Not Convicted. A rescuer is subject to fine and imprisonment, as for a misdemeanor, when the party rescued is acquitted.[57]

3. Rescue of One Confined on Civil Process. Where one confined on civil process is rescued, the rescuer is punishable as for the commission of a misdemeanor.[58]

II. Rescue of Property.

A. Definition. Rescue of property is the taking away and setting at liberty of a distrained animal against law,[59] or the recaption of goods distrained.[60]

B. Nature and Elements of Offense. To constitute a rescue of property there must be: (1) Actual possession in the party from whom the property is taken; and (2) a taking away and setting at liberty,[61] knowingly.[62] Rescuing goods distrained for rent is indictable at common law;[63] but an indictment for rescue will not lie for a trespass on property.[64] Where an officer makes an unlawful levy, defendants are not guilty of a rescue of the property, if they can retake possession of it peaceably; *aliter* if they commit a breach of the peace.[65] And, when an unlawful levy is attempted, the owner of the goods may use such force as is necessary to protect his possession.[66]

C. Indictment and Information[67] — **1. At Common Law.** The indictment must aver that the rescue was made knowingly.[68]

51. State *v.* Garrett, 80 Iowa 589, 46 N. W. 748.

52. State *v.* Cuthbert, T. U. P. Charlt. (Ga.) 13; 2 Hawkins, c. 21, § 8.

53. 1 Hale P. C. 116; 2 Hawkins, c. 21.

54. 1 Hale P. C. 116; 2 Hawkins, c. 21. See Fluty *v.* Com., 105 S. W. 138, 32 Ky. L. Rep. 89, holding that in a prosecution for rescue it is not necessary, before defendants can be punished, that the guilt of those whose escape they aided should be established.

55. **Punishment** generally see Criminal Law, 12 Cyc. 953 *et seq.*

56. State *v.* Mazyck, 3 Rich. (S. C.) 291. And see *supra*, I, B, 1.

57. 1 Hale P. C. 116; 2 Hawkins, c. 21, § 8.

Where one rescues a traitor and he dies before he is attainted, or is acquitted, the rescuer will be fined and imprisoned. 1 Hale P. C. 116.

58. State *v.* Mazyck, 3 Rich. (S. C.) 291; Reg. *v.* Allan, C. & M. 295, 5 Jur. 296, 41 E. C. L. 164.

59. Vinton *v.* Vinton, 17 Mass. 342 (construing St. (1788) c. 65, and holding that rescue is made to consist in taking the cattle out of the hands of the person driving them to pound, so as to endanger the losing of the remedy provided by said statute); Hamlin *v.* Mack, 33 Mich. 103 (holding that it is not necessary that positive violence, or menacing or threatening words, be used to characterize the act as rescue, for such a taking is esteemed in law a violent taking); State *v.* Barrett, 42 N. H. 466; Rex *v.* Bradshaw, 7 C. & P. 233, 32 E. C. L. 588. See also Animals, 2 Cyc. 455.

60. Com. *v.* Israel, 4 Leigh (Va.) 675; 6 Bacon Abr. tit. "Rescue," A. p. 87.

The taking of gunpowder, seized under 12 Geo. III, c. 61, out of the custody of those who made the seizure is sufficient to sustain an indictment for rescue. Rex *v.* Beauchamp, 5 L. J. M. C. O. S. 66.

61. Vinton *v.* Vinton, 17 Mass. 342.

62. Com. *v.* Israel, 4 Leigh (Va.) 675, holding that, where the rescue is made from an officer, defendant might be held to have knowledge at his peril; but when made from a private person defendant should actually know of the lawfulness of the possession.

63. Com. *v.* Beale, 5 Pick. (Mass.) 514.

64. State *v.* Mazyck, 3 Rich. (S. C.) 291.

65. Spencer *v.* McGowen, 13 Wend (N. Y.) 256; Hyatt *v.* Wood, 3 Johns. (N. Y.) 239; Finn *v.* Com., 6 Pa. St. 460; State *v.* Sotherlen, Harp. (S. C.) 414. *Contra*, State *v.* Cassidy, 4 S. D. 58, 54 N. W. 928, construing Comp. Laws, § 6336.

66. Com. *v.* Kennard, 8 Pick. (Mass.) 133. But see State *v.* Richardson, 38 N. H. 208, 75 Am. Dec. 173; State *v.* Downer, 8 Vt. 424, 30 Am. Dec. 482.

67. **Indictment or information** generally see Indictments and Informations, 22 Cyc. 157 *et seq.*

68. Com. *v.* Israel, 4 Leigh (Va.) 675, holding that an indictment charging defendant with the rescue of property which had

2. Under Statutes. An indictment, under a statute, must contain all the circumstances which constitute the definition of the offense in the act, so as to bring defendants precisely within it.[69] In an indictment for taking goods from the custody of a sheriff, an allegation that the sheriff was the owner of the goods is not demurrable, as the sheriff is the bailee in possession.[70]

D. Evidence.[71] The conduct of persons who attempt to rescue goods is competent for the consideration of the jury.[72]

E. Defenses. It is a good defense that the seizure of the property was unlawful and that the rescue was peaceably made. It is, however, otherwise where a breach of the peace is committed in making the rescue.[73]

III. Pound Breach.

Pound breach is a common-law offense in direct contempt of the authority of the law;[74] and is indictable as an injury and insult to public justice.[75] In some jurisdictions this offense is regulated by statute.[76] The breaking of the pound alone is not sufficient; but the driving and conveying away the impounded cattle is an essential part of the offense of pound breach.[77] Pound breach cannot be justified on the ground that the distress was without cause, for, when impounded, the distress is in the custody of the law.[78] But before the property is impounded

been distrained by a sheriff for public dues from a bailee, to whose safekeeping the sheriff had committed it, is defective, when it does not aver that defendant knew by what right such bailee held the property.

69. State *v.* Barrett, 42 N. H. 466. See also U. S. *v.* Ford, 34 Fed. 26, holding that an indictment, charging in the exact words of U. S. Rev. St. (1878) § 3177 [U. S. Comp. St. (1901) p. 2070], that defendant "did forcibly attempt to rescue" property seized by a revenue collector, does not state with sufficient certainty what acts were done by the defendant that constituted the offense charged. *Compare* Com. *v.* Hubbard, 24 Pick. (Mass.) 98, holding that an indictment under St. (1834) c. 184, § 184, for rescuing cattle, the use of the words "town way" and "highway" interchangeably does not make the allegations repugnant; "highway" being a general term in which "town way" is comprehended.

70. State *v.* Clapper, 59 Iowa 279, 13 N. W. 294.

71. Evidence generally see Criminal Law, 12 Cyc. 379 *et seq.*

72. U S. *v.* Ford, 33 Fed. 861.

73. Shipman *v.* Clark, 4 Den. (N. Y.) 446, 47 Am. Dec. 264; Spencer *v.* McGowen, 13 Wend. (N. Y.) 256; Hyatt *v.* Wood, 3 Johns. (N. Y.) 239; Finn *v.* Com., 6 Pa. St. 460. *Contra*, State *v.* Cassidy, 4 S. D. 58, 54 N. W. 928, construing Comp. Laws, § 6336.

74. State *v.* Young, 18 N. H. 543; 2 Hawkins, c. 10, § 56. See also Animals, 2 Cyc. 455.

75. Com. *v.* Beale, 5 Pick. (Mass.) 514; Reg. *v.* Butterfield, 17 Cox C. C. 598; 2 Chitty Cr. L. 204 *et seq.*; 1 Coke Inst. 47; 1 Russell Cr. 572.

76. See the statutes of the several states. And see Rome *v.* Omburg, 22 Ga. 67 (holding that breach of pound and liberating a cow is no violation of an ordinance against opposing and interrupting the marshal in executing an ordinance which required him to take up and impound cattle going at large in the city); Anderson *v.* People, 28 Ill. App. 317 (construing Rev. St. c. 54, § 21, which imposes a fine for rescuing cattle after they have been impounded and holding a prosecution thereunder a criminal prosecution): State *v.* Clark, 65 Iowa 336, 21 N. W. 666 (construing Acts of 18th Gen. Assembly, c. 188, § 2, making it a misdemeanor to release stock, and holding that the word "stock," as used therein, has its ordinary meaning as used in agriculture and includes swine); Pierce *v.* Josselyn, 17 Pick. (Mass.) 415 (construing St. (1788) c. 65, § 6, and holding the owner of a cow guilty of pound breach, who, after his cow, legally impounded, has been rescued, met the prisoners by whom she had been rescued, while driving her toward his house, and, with full knowledge of the facts, aided them in so driving her): Com. *v.* Beale, 5 Pick. (Mass.) 514 (holding the penalties of St. (1788) c. 65, § 6, for pound breach, or otherwise delivering creatures from a pound, are extended to cases of creatures impounded for going at large contrary to St. (1799) c. 61); State *v.* Hunter, 118 N. C. 1196, 24 S. E. 708 (construing Code, § 2819, and holding it a misdemeanor to release impounded stock; but defendant is not guilty within the spirit of the law for driving hogs from prosecutor's inclosure, where he had attempted to impound them, while defendant was in pursuit and in his plain view, and after he had received a message telling him not to put them up, that she was in pursuit).

77. State *v.* Young, 18 N. H. 543.

78. Com. *v.* Beale, 5 Pick. (Mass.) 514; Hamlin *v.* Mack, 33 Mich. 103 (holding no justification at common law, nor under Comp. Laws, §§ 6782–6783). *Compare* Melody *v.* Reab. 4 Mass. 471 (holding no justification under St. (1788) c. 65, but a good defense at common law and under St. (1788) c. 65, in a *qui tam* action).

the owner may make rescue, when the distress is without cause.[79] A stranger who commits pound breach cannot set up a subsequent irregularity in the proceedings as a defense to an action for damages.[80]

RES DENOMINATUR A PRINCIPALIORI PARTE. A maxim meaning "The thing is named from its principal part."[1]

RES DERELICTA. That property from which the mind has withdrawn affection, and which has thus fallen back into the natural state of *res nullius*, and consequently to be again susceptible of becoming the property of the occupant.[2]

RESEMBLANCE. See EVIDENCE, 17 Cyc. 153.

RESENTENCING. See CRIMINAL LAW, 12 Cyc. 702.

RESERVATION. That which is reserved, kept back, withheld;[3] a keeping aside or providing;[4] that part of a deed or other instrument which reserves a thing not *in esse* at the time of the grant, but newly created;[5] something newly created out of the granted premises by force and effect of the reservation itself, as an easement out of the land granted, or rent out of the land demised;[6] in general, like an exception, something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant.[7] (Reservation: As Subject of — Construction, see COVENANTS, 11 Cyc. 1050; Estoppel to Deny Grantor's Title, see ESTOPPEL, 16 Cyc. 689 note 23; Parol in Evidence, see EVIDENCE, 17 Cyc. 611, 620; Parol Under Statute of Frauds, see FRAUDS, STATUTE OF, 20 Cyc. 213. Creating Easement, see EASEMENTS, 14 Cyc. 1159, 1163. Distinguished From Exception, see DEEDS, 13 Cyc. 673; EASEMENTS, 14 Cyc. 1164. For Indians, see INDIANS, 22 Cyc. 124. For Public Purposes, see EMINENT DOMAIN, 15 Cyc. 601. In Deed, see DEEDS, 13 Cyc. 672. In Gift, see HUSBAND AND WIFE, 21 Cyc. 1373 note 61. In Grant of Right of Way, see RAILROADS, 33 Cyc. 172. In Instrument, in Relation to Boundaries, see BOUNDARIES, 5 Cyc. 882. In Mining Patent, see MINES AND MINERALS, 27 Cyc. 620. In Mortgage — In General, see MORTGAGES, 27 Cyc. 1093; Of Right to Sell, see MORTGAGES, 27 Cyc. 1134 note 58. Of Case For Appeal, see APPEAL AND ERROR, 2 Cyc. 522; CRIMINAL LAW, 12 Cyc. 824. Of Growing Crops, see CROPS, 12 Cyc. 977, 978 text and note 11, 979. Of Powers — In General, see POWERS, 31 Cyc. 1044; As Bearing on Question of Fraud, see FRAUDULENT CONVEYANCES, 20 Cyc. 559, 560, 561, 562; Of Revocation, see FRAUDULENT CONVEYANCES, 20 Cyc. 560; POWERS, 31 Cyc. 1054. Of Public Lands — In General, see PUBLIC LANDS, 32 Cyc. 858; As Affecting Power to Acquire Mineral Claims

79. Com. *v.* Beale, 5 Pick. (Mass.) 514; Cotsworth *v.* Betison, 1 Ld. Raym. 104, 91 Eng. Reprint 965; 1 Coke Litt. c. 7, § 58.

80. Hanbest *v.* Heerman, 2 Walk. (Pa.) 471.

1. Peloubet Leg. Max.

Applied in Littleton's Case, 5 Coke 47*a*, 47*b*, 77 Eng. Reprint 126.

Another form reads "*principali*" instead of "*principaliori.*" See Black L. Dict.

2. See Rhodes *v.* Whitehead, 27 Tex. 304, 313, 84 Am. Dec. 631.

3. Standard Dict. [*quoted* in Alberger *v.* Kingsbury, 6 Cal. App. 93, 97, 91 Pac. 674].

The word carries fee to Indians in acts and treaties.— Wray *v.* Doe, 10 Sm. & M. (Miss.) 452, 461; Niles *v.* Anderson, 5 How. (Miss.) 365, 383; Newman *v.* Doe, 4 How. (Miss.) 522, 560; Anderson *v.* Lewis, Freem. (Miss.) 178, 203; Meehan *v.* Jones, 70 Fed. 453, 454, 455. See also Best *v.* Polk, 18 Wall. (U. S.) 112, 116, 21 L. ed. 805.

4. Jacob L. Dict. [*quoted* in Parsell *v.* Stryker, 41 N. Y. 480, 483; Stephens *v.* Reynolds, 6 N. Y. 454, 458 [*quoted* in Wegner *v.* Lubenow, 12 N. D. 95, 102, 95 N. W. 442], which three cases refer to the definition as given under the word "Rent," although in the work quoted, it duly appears under "Reservation"], adding: "As when a man lets or parts with his land, but reserves or provides himself a rent out of it for his own livelihood."

5. Bouvier L. Dict. [*quoted* in Barnes *v.* Burt, 38 Conn. 541, 542].

6. Hurd *v.* Curtis, 7 Metc. (Mass.) 94, 110.

7. Dyer *v.* Sanford, 9 Metc. (Mass.) 395, 404, 43 Am. Dec. 399.

"Reservation of the minerals" see Eardley *v.* Granville, 3 Ch. D. 826, 834, 45 L. J. Ch. 669, 34 L. T. Rep. N. S. 609, 24 Wkly. Rep. 528.

By implication of law see Adams *v.* Marshall, 138 Mass. 228, 362, 52 Am. Rep. 271.

Within Them, see MINES AND MINERALS, 27 Cyc. 545; To Indians, see INDIANS, 22 Cyc. 114, 124, 140, 147. Of Question of Law at Trial as Basis of Judgment Notwithstanding Verdict, see JUDGMENTS, 23 Cyc. 780, 781 text and notes 6, 7. Of Questions For Purposes of Review, see APPEAL AND ERROR, 2 Cyc. 522, 624 note 36, 660, 719 note 9, 739 note 30, 969 note 96; CRIMINAL LAW, 12 Cyc. 808, 824; INSOLVENCY, 22 Cyc. 1359; JUSTICES OF THE PEACE, 24 Cyc. 656; TRIAL. Resulting in Mortgage — Reservation of Lien, in Deed, to Third Person, see MORTGAGES, 27 Cyc. 981; Reservation of Lien, in Deed, to Vendor, see MORTGAGES, 27 Cyc. 982; Reservation of Right to Redeem in Deed Absolute in Form, see MORTGAGES, 27 Cyc. 997. To Arbitrators, of Authority, see ARBITRATION AND AWARD, 3 Cyc. 697. To Assignor — For Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 126, 180; Of Judgment, and Right to Collect, see JUDGMENTS, 23 Cyc. 1421 note 47. To Creditors of Obligee of Rights Against Surety, see PRINCIPAL AND SURETY, 32 Cyc. 165. To Debtor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 126, 180; FRAUDULENT CONVEYANCES, 20 Cyc. 370, 558, 559, 560, 561, 562, 568, 763. To Decedent's Estate by Representatives, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 558, 669. To Dedicator, see DEDICATION, 13 Cyc. 491 note 15, text and notes 19, 21. To Defendant in Foreclosure in Decree, see MORTGAGES, 27 Cyc. 665 text and note 35. To Grantor — Bearing on the Question of Fraud, see FRAUDULENT CONVEYANCES, 20 Cyc. 451, 555, 559, 560, 561, 562; In Deed of Trust, of Right to Possess, Enjoy, and Receive Rents and Profits, see LANDLORD AND TENANT, 24 Cyc. 890 note 26. To Infant, of Day in Court, in Adverse Decree, see INFANTS, 22 Cyc. 697. To Insurance Company of Right to Cancel Policy, see FIRE INSURANCE, 19 Cyc. 643. To Landlord — Of Option to Sell, Renew, or Extend, see LANDLORD AND TENANT, 24 Cyc. 1027; Of Rent, see LANDLORD AND TENANT, 24 Cyc. 877; Of Sporting Rights Under English Ground Game Act, see FISH AND GAME, 19 Cyc. 990 note 16. To Legislature, of Power to Alter or Amend Corporate Charter, see CONSTITUTIONAL LAW, 8 Cyc. 962. To Lessee Under Original Lease, in Sublease, of Entire New Rent, see LANDLORD AND TENANT, 24 Cyc. 975 note 71. To Married Woman — Of Disposing Power, see HUSBAND AND WIFE, 21 Cyc. 1358 note 30; Of Her Judgment Lien on Husband's Land in Their Deed to Another, see HUSBAND AND WIFE, 21 Cyc. 1206 note 24.)

RESERVATIO NON DEBET ESSE DE PROFICUIS IPSIS QUIA EA CONCEDUNTUR, SED DE REDDITU NOVO EXTRA PROFICUA. A maxim meaning "A reservation ought not to be of the profits themselves, because they are granted, but from the new rent and out of the profits." [8]

RESERVATIO UT ET PROTESTATIO NON FACIT JUS, SED TUETUR. A maxim meaning "Reservation and protest do not create a right, but protect a right." [9]

RESERVATIVO. See CENSO, 6 Cyc. 733 note 1.

RESERVE. As a noun, the word applies to anything which is reserved.[10] As a

8. Peloubet Leg. Max.
Applied in Coke Litt. 142*a*.
9. Peloubet Leg. Max.
10. See cases cited *infra*, this note.
Indian reserve.— As defined by Can. St. (1876) 29 Vict. c. 18, § 3, and Can. St. (1840) 43 Vict. c. 28 (D) "'reserve' is declared to mean any tract or tracts of land set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, but which is unsurrendered, and includes all the trees,' &c., whereas 'Indian Lands' is to mean 'any reserve or portion of a reserve which has been surrendered to the Crown.' 'Special Reserve' includes lands set apart for the Indians, the legal estate to which is out-standing in trustees other than the Crown (as e. g., in Prince Edward Island and Quebec)." Reg. *v.* St. Catharines Milling, etc., Co., 10 Ont. 196, 223, 224.
"Railroad Reserve" see St. Louis, etc., R. Co. *v.* Tapp, 64 Ark. 357, 362, 42 S. W. 667.
In insurance; "reserve;" "reserve fund;" "reserve dividend fund;" "reserve dividend plan;" "in reserve."— See Nielsen *v.* Provident Sav. L. Assur. Soc., 139 Cal. 332, 336, 337, 73 Pac. 168, 96 Am. St. Rep. 146 (holding that within the meaning of the New York statute providing for the application of the "reserve" in any life insurance policy under certain circumstances, the term, describing the fund estimated on death losses based on the mortuary tables, includes an amount in excess of expense charges and death losses which had not been used by the company toward offsetting any increase in the premium and which properly belongs to the insured

verb,[11] to keep; to hold; to retain;[12] to withhold or keep back;[13] to set apart.[14]

although it be termed a "guaranty fund" in the policy); Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 667, 41 Atl. 4 (where the term "reserve dividend plan" was applied in a life insurance policy to a provision therein whereby it was agreed that the dividend surplus in which all the policies issued in that policy year might be entitled to share, should be apportioned and paid in cash to the surviving and persisting policyholders at the end of ten full years, and whereby each policyholder agrees to forego his right to an equitable surrender value during the dividend period, so that in case his policy lapses the whole amount of payments on that policy held by the company "in reserve" remains in its hands, whereby also each policyholder stipulates that any share of the dividend surplus which his policy may be entitled to during the dividend period, shall be apportioned among the surviving and persisting policyholders, and the fund so accumulating was called the "reserve dividend fund"); Detroit F. & M. Ins. Co. *v.* Hartz, 132 Mich. 518, 520, 94 N. W. 7 (where "reinsurance reserve fund" or "reserve fund" is said to be applied to a fund required by law (Mich. Comp. Laws, § 5169) to be kept by an insurance company for the protection of its patrons so that the company may have the means of reinsuring its risks if necessary); Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116, 126 [*quoted* in 7 Words & Phrases 6147, *sub verb.* "reserve fund" (*quoted* in State *v.* Vandiver, 213 Mo. 187, 213, 111 S. W. 911, 918)] (where "reserve" was defined by expert testimony which, though it had been ruled out at the trial, was held competent, no ground of objection appearing on record, as follows: In case of a level rate policy —"a sufficient percentum of the annual premiums to meet, when invested at a given rate of interest, all present and prospective liability on account of the particular policy." In case of "'term insurance' the entire mortuary premiums collected for the particular term." It was also testified that the word had no application to assessment insurance); Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163, 165 (where it is said that the terms "reserve dividend plan" and "reserve dividend fund" standing by themselves are meaningless; that to construe them it is necessary to have recourse to contemporaneous insurance literature).

As a mere descriptive term.— Where certain lots were granted "with a reserve" of certain streets previously projected on a plan "the expressions 'with the reserve,' &c., do not import a reservation to the grantor or releasor, but are used as descriptive of the premises conveyed" and pass the soil of the contemplated streets. Palmer *v.* Dougherty, 33 Me. 502, 507, 54 Am. Dec. 636.

11. Derived "from the Latin word '*reservo*' that is, to provide for store, as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood." 2 Coke Litt. 412 [*quoted* in Whitaker *v.* Brown, 46 Pa. St. 197, 198].

12. Myers *v.* Conway, 90 Ala. 109, 111, 7 So. 639.

"Right to reserve" services is an indefinite and ambiguous term unless explained by context or circumstances. Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 201, 7 L. R. A. 381, 24 Abb. N. Cas. 419.

"Right to reserve" a base ball player for the coming season, secured by contract to a base ball club, was held ineffectual as a ground for equitable enforcement where the terms upon which he was reserved were not definitely set forth. Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. Suppl. 779, 780, 24 Abb. N. Cas. 393 [*cited* in Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 201, 7 L. R. A. 381, 24 Abb. N. Cas. 419]; Philadelphia Ball Club *v.* Hallman, 8 Pa. Co. Ct. 57, 62 [*cited* in Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 201, 7 L. R. A. 381, 24 Abb. N. Cas. 419]. "Such right of reservation is nothing more or less than a prior and exclusive right as against the other clubs to enter into a contract securing the player's services for another season." He enjoys the privilege of serving or not with the club, as he sees fit, but whether he shall do so or not, and the conditions of his services if any, depend on a new contract for the season for which he is so reserved. This decision is based on the custom of base ball clubs. Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 204, 7 L. R. A. 381, 24 Abb. N. Cas. (N. Y.) 419.

13. See Florida East Coast R. Co. *v.* Worley, 49 Fla. 297, 312, 38 So. 618.

Applied in statutes to public lands, "reserved" usually, although not always, is held to include lands withdrawn for the purpose of supplying possible deficiencies in some former land grant. Northern Pac. R. Co. *v.* Musser-Sauntry Land, etc., Co., 168 U. S. 604, 608, 18 S. Ct. 205, 42 L. ed. 596. "Reserved to the United States" is construed to apply to "lands withdrawn from the public domain for some special use of the United States, and not lands already disposed of to states or others." Cahn *v.* Barnes, 5 Fed. 326, 331, 7 Sawy. 48 [*distinguishing* the use of the term in Burlington, etc., R. Co. *v.* Fremont County, 9 Wall. (U. S.) 89, 93, 19 L. ed. 563, where it was preceded by "heretofore" and applied to such lands granted to a state for certain purposes as had been "heretofore reserved"].

14. See Long *v.* Fewer, 53 Minn. 156, 159, 54 N. W. 1071 (where the owner of several adjoining lots granted one running to an alley reserved by the grantor, and it was held that the word "reserved" was not confined to the technical or literal meanings such as those of the lexicographers to "retain" or "hold back" or "except," that with the condition that the alley twelve feet wide was "to be used as such, said alley to be used for no other purpose," the deed gave to the grantor an easement for alley purposes and that title did not pass free from such easement); Meigs *v.* McClung, 9 Cranch (U. S.) 11, 17, 3 L. ed. 639 (where "reserved" is so construed as used of land in the Cherokee Indian treaty of

In deeds the use of the word technically denotes some lesser estate out of the estate granted,[15] or an exception,[16] or it may be used to create a reservation.[17] "Reserving" and "excepting," although strictly distinguishable, are often used interchangeably [18] or indiscriminately,[19] and the use of either term is not conclusive as to the nature of the provision.[20] In statutes of usury the perfect participle is used in a sense akin to "contracted for," or "provided for." [21] (Reserve: In

October 25, 1805, in the phrase "reserved for the particular disposal of the United States").

15. So said in Keeler *v.* Wood, 30 Vt. 242, 245, where the words "which is reserved for the use of our mother" in a deed, were held to create a life estate in her, especially in view of the nature of the property. But it was also said: "If the words had been 'reserving from the premises' (the land described) 'for the use of our mother' . . . it seems to us that there could have been no doubt that an estate for life only was intended. On the other hand if the sentence had been written, 'reserving from the premises,' etc. (the land described) and had wholly omitted the words 'which is reserved for the use of our mother,' the meaning then would have seemed to be plainly the reservation of the land described in fee simple."

16. See DEEDS, 13 Cyc. 673 note 72.

"Reserving" sometimes has the force of "'saving or excepting,'" 2 Thomas Coke Litt. 413 [*quoted* in Whitaker *v.* Brown, 46 Pa. St. 197, 198]; Coke Litt. 143*a* [*cited* in Dee *v.* King, 77 Vt. 230, 59 Atl. 839, 68 L. R. A. 860].

17. See DEEDS, 13 Cyc. 672 note 71.

The proper word to create an easement.— Where "excepting" or its equivalent is used in a deed for that purpose, it will be construed as meaning "reserving" in order to give effect to the intention. Bridge *v.* Pierson, 66 Barb. (N. Y.) 514, 518, where, however, the opinion of the court of appeals in 45 N. Y. 601, on which this decision is based, is respectfully criticized as not in accordance with the views of the supreme court. See page 520.

"Reserving" land "for a public street" creates a reservation proper and not an exception, for it does not require the exclusion of the fee, but only of an easement, or grant. Elliot *v.* Small, 35 Minn. 396, 398, 29 N. W. 158, 59 Am. Rep. 329 [*followed* in Winston *v.* Johnson, 42 Minn. 398, 401, 45 N. W. 958, where "excepting" and "reserving" land "for an alley" was construed with like effect].

18. Florida East Coast R. Co. *v.* Worley, 49 Fla. 297, 312, 38 So. 618. See also DEEDS, 13 Cyc. 674 [*cited* in Florida East Coast R. Co. *v.* Worley, 49 Fla. 297, 312, 38 So. 618, 623].

Distinguished but generally used as synonymous in the United States see Keeler *v.* Wood, 30 Vt. 242, 245, 246.

Often treated as synonymous in deeds see Roberts *v.* Robertson, 53 Vt. 690, 692, 38 Am. Rep. 710.

19. See Stockwell *v.* Couillard, 129 Mass. 231, 233 [*quoted* in Martin *v.* Cook, 102 Mich. 267, 272, 60 N. W. 679].

20. Stockwell *v.* Couillard, 129 Mass. 231, 233; Gale *v.* Coburn, 18 Pick. (Mass.) 397, 400; Martin *v.* Cook, 102 Mich. 267, 272, 60 N. W. 679.

"Reserved" is held synonymous with "pledged," as used in the phrase "reserved or pledged for the use of schools or colleges," in U. S. Rev. St. (1878) § 2275, providing for the substitution of other lands in favor of preëmptors who have settled before survey on lands so reserved. Ferry *v.* Street, 4 Utah 521, 531, 7 Pac. 712, 11 Pac. 571 [*affirmed* in 119 U. S. 385, 7 S. Ct. 231, 30 L. ed. 439].

On plats.— "Reserved Landing," marking, on a plat, a designated part of a tract appropriated to the public service, shows that the part so marked is reserved to the donor for his own benefit and use. Grant *v.* Davenport, 18 Iowa 179, 186, 187. "Reserved Public Square," as words used in a plat of a town to mark the designation of a lot, are indefinite and do not sufficiently define and indicate the public purpose for which the block is reserved to exclude parol testimony as to the object of the dedication. Daniels *v.* Wilson, 27 Wis. 492, 496, 497.

"Reserved" during life of a person named, other than the grantor, creates no interest in the person named. The provision in a deed whereby the grantor "'reserves the use . . . of land . . . or the rents and profits arising from it, during his life and the life of his wife'" creates no interest in the wife, and the grantor's administrator may recover from the grantee, who has occupied the land, a compensation for its use and occupation, not as rent, but on the theory that his entry thereon, under the deed, implied a promise to pay. Logan *v.* Caldwell, 23 Mo. 372, 373.

"Reserving . . . the right of mining" a certain amount of ore on granted mining lands leaves the property in the mines and unextracted ore in the grantee subject to the license to the grantor to enter the premises and exercise certain rights for the purpose of extracting a limited quantity of ore and revesting in the grantor the property in that which is thus separated from the mass. Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 321.

21. See Brickett *v.* Minot, 7 Metc. (Mass.) 291, 294 (where upon the question of the meaning of the words "reserved or taken," "taken or reserved," in Mass. Rev. St. c. 35, §§ 2, 4, relating to usury, it is said: "The meaning . . . is manifest. They refer to a usurious contract for the loan of money, whereby there had been reserved or taken a greater rate of interest than is allowed by law, at the inception of the contract; and not to the payment of unlawful and usurious interest on a lawful contract. The same words are used in the same sense in the English St. 12 Anne, c. 16, and in the provincial St. 5 Wm. & M. c. 1, (Anc. Chart. 257,) and in

Insurance, see INSURANCE, 22 Cyc. 1399 text and note 67. See also RESERVATION, and Cross-References Thereunder.)

RESERVE DIVIDEND FUND. See RESERVE, *ante* 1639, note 10.

RESERVE DIVIDEND PLAN. See RESERVE, *ante* 1639, note 10.

RESERVE FUND. See RESERVE, *ante* 1639, note 10.

RESERVE SECTION. In practice, in certain counties in New York, a section of the day calendar, consisting of causes which appear on the day calendar for the first time, and which are not to be tried that day, but are called at the opening of court to see if they are ready.[22]

RESERVOIR. As ordinarily defined, a place where water collects naturally or is stored for use when wanted, as to supply a fountain, a canal, or a city, or for any other purpose.[23] (Reservoir: In General, see WATERS. Distinguished From Dam, see DAM, 12 Cyc. 1193 note 57.)

RES EST MISERA UBI JUS EST VAGUM ET INCERTUM. A maxim meaning "It is a wretched state of things when law is vague and mutable."[24]

RESETTLE. A term which, as used in a restrictive provision in a contract of sale of practice, has been construed as referring both to residence and practice at once, and not to either alone.[25] It is also used in practice to express the judicial act of readjusting a case on appeal.[26] (See SETTLE.)

RESETTLEMENT. See APPEAL AND ERROR, 3 Cyc. 72.

RES GESTÆ. Things done, or liberally speaking, the facts of the transaction;[27] the things done, the facts of a transaction; circumstances evidentiary of a litigated fact;[28] the subject-matter, or thing done;[29] the transaction, thing done, the subject-matter;[30] the surrounding facts of a transaction, explanatory of an act or showing a motive for acting;[31] matters incidental to a main fact and explanatory of it, including acts and words which are so closely connected with a main fact as will constitute a part of it, and without a knowledge of which

the St. of 1783, c. 55"); Sloan *v.* Sommers, 14 N. J. L. 509, 514 (where, in construing N. J. Rev. Laws, c. 269, § 2, it is said: "These words 'reserved or taken,' are found in all the British statutes from the time of 21 James I, c. 17, to this time; and under them all, it has been uniformly held, that no subsequent taking, or agreement to take illegal interest, will invalidate a bond or other security originally free from corruption").

22. See Supreme Court Trial Term Calendar Rules in force in 1906 [*quoted* in Herbert Land Co. *v.* Lorenzen, 113 N. Y. App. Div. 892, 803, 99 N. Y. Suppl. 937].

23. Century Dict. [*quoted* in Howell *v.* Big Horn Basin Colonization Co., 14 Wyo. 14, 81 Pac. 785, 787, 1 L. R. A. N. S. 596].

Applied to the water contained see Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 604, where it is said, merely to illustrate a figure of speech, "Thus, in common speech, a reservoir often signifies the water kept, not the structure in which it is kept."

24. Black L. Dict.

Applied in Rex *v.* Knollys, 2 Salk. 509, 512, 91 Eng. Reprint 434, omitting the words "*et incertum*."

25. See Haldeman *v.* Simonton, 55 Iowa 144, 145, 7 N. W. 493, where it was held that the agreement of a physician not to "resettle" in his former location was not broken by practising there while residing elsewhere, and said also that it could not have been construed as prohibiting him from residing, without practising there.

26. See APPEAL AND ERROR, 3 Cyc. 72 text and notes 35–37.

27. People *v.* Wong Ark, 96 Cal. 125, 129, 30 Pac. 1115.

28. Anderson L. Dict. [*quoted* in Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026, 1031].

29. State *v.* Lenihan, 88 Iowa 670, 672, 56 N. W. 292.

30. People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103, 105.

31. Carr *v.* State, 43 Ark. 99, 103, adding: "They are proper to be submitted to a jury, providing they can be established by competent means, sanctioned by the law, and afford any fair presumption or inference as to the question in dispute. . . . Circumstances and declarations which are contemporaneous with the main fact under consideration or so nearly related to it as to illustrate its character and the state of mind, sentiments or dispositions of the actors are parts of the *res gestæ*."

Explanatory acts, exclamations, or declarations.— "Whenever it becomes important to show, upon the trial of a cause, the occurrence of any fact or event, it is competent and proper to also show any accompanying act, declaration or exclamation which relates to, or is explanatory of, such fact or event. Such acts, declarations or exclamations are known to the law as *res gestæ*." Lander *v.* People, 104 Ill. 248, 256 [*quoted* in Davids *v.* People, 192 Ill. 176, 189, 61 N. E. 537].

"The res gestæ are different in different cases; and it is not, perhaps, possible to frame any definition which would embrace all the various cases, which may arise in practice. It is for the judicial mind to determine, upon such principles and tests as are estab-

the main fact might not be properly understood;[32] events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events;[33] the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character;[34] including everything which may fairly be con-

lished by the law of evidence, what facts and circumstances, in particular cases, come within the import of the terms. In general, *res gestæ* mean those declarations, and those surrounding facts and circumstances, which grow out of the main transaction, and have those relations to it which have been above described," i. e., with reference to declarations, that of accompanying and tending to elucidate and explain the character and quality of the act, and being so connected with it as to constitute one transaction, and so as to derive credit from the act itself. Lund *v.* Tyngsborough, 9 Cush. (Mass.) 36, 42 [*cited* in O'Connor *v.* Chicago, etc., R. Co., 27 Minn. 166, 172, 6 N. W. 481, 38 Am. Rep. 288].

32. Eagon *v.* Eagon, 60 Kan. 697, 700, 57 Pac. 942.

33. Wharton Cr. Ev. (9th ed.) § 262 [*quoted* in Graves *v.* People, 18 Colo. 170, 177, 32 Pac. 63; State *v.* Tighe, 27 Mont. 327, 337, 71 Pac. 32 (*overruled* on a point not affecting the definition in State *v.* Sherman, 35 Mont. 512, 518, 519, 90 Pac. 981); Territory *v.* Clayton, 8 Mont. 1, 11, 19 Pac. 293; Freeman *v.* State, 40 Tex. Cr. 545, 553, 46 S. W. 641, 51 S. W. 230 (substituting "facts" for "events")]. See also Wharton Cr. Ev. § 262 [*quoted* in Territory *v.* Clayton, 8 Mont. 1, 11, 19 Pac. 293], where it is said: "The question is, is the evidence that of events speaking through participants or that of observers speaking about the event."

"What is done or said by participants, under the immediate spur of a transaction, becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself." Wharton Cr. Ev. (9th ed.) § 262 [*quoted* in Graves *v.* People, 18 Colo. 170, 177, 32 Pac. 63].

Manufactured evidence excluded.— "They may stand in immediate causal relation to the act — a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself." Wharton Ev. § 259 [*quoted* in Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 339, 3 S. W. 50, 3 Am. St. Rep. 230 (*quoted* in Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 180, 24 S. W. 106, where, however, the words "interposition of voluntary" are omitted); State *v.* Birks, 199 Mo. 263, 274, 97 S. W. 578; State *v.* Thompson, 132 Mo. 301, 322, 34 S. W. 31; State *v.* Walker, 78 Mo. 380, 386; Ward *v.* White, 86 Va. 212, 217, 218, 9 S. E. 1021, 19 Am. St. Rep. 883; State *v.* Prater, 52 W. Va. 132, 146, 43 S. W. 230; St. Clair *v.* U. S., 154 U. S. 134, 149, 14 S. Ct. 1002, 38 L. ed. 936]. "They must be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors." Wharton Cr. Ev. § 263 [*quoted* in Territory *v.* Clayton, 8 Mont. 1, 11, 19 Pac. 293].

34. Stirling *v.* Buckingham, 46 Conn. 461, 465 [*quoted* in Pinney *v.* Jones, 64 Conn. 545, 550, 30 Atl. 762, 42 Am. St. Rep. 209; Anderson L. Dict. (*quoted* in Chicago, etc., R. Co. *v.* Cummings, 24 Ind. App. 192, 53 N. E. 1026, 1031)]; Mitchum *v.* State, 11 Ga. 615, 622 [*quoted* in Price *v.* State, (Okla. 1908) 98 Pac. 447, 452]; Carter *v.* Buchannon, 3 Ga. 513, 517 [*quoted* in Hermes *v.* Chicago, etc., R. Co., 80 Wis. 590, 592, 50 N. W. 584, 27 Am. St. Rep. 69 (*quoted* in Illinois Cent. R. Co. *v.* Houchins, 125 Ky. 483, 488, 101 S. W. 924, 31 Ky. L. Rep. 93)].

Relation of events rather than time.— "Declarations which are the immediate accompaniments of an act are admissible as part of the *res gestæ*; remembering that immediateness is tested by closeness, not of time, but by causal relation." Wharton Ev. § 262 [*quoted* in Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 180, 24 S. W. 106; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 339, 3 S. W. 50, 3 Am. St. Rep. 230]. "Inquiry is rather into events than into the precise time which has elapsed. Is the proof offered of a matter fairly a part of the same transaction? Is it an event happening naturally and spontaneously as a part of the occurrence under investigation? If so, the law permits it to be proven as a part of it, since the whole scene, as it has transpired, ought to appear to the tribunal called upon to determine its character. Matters occurring before or after, that is, before the transaction begun or after it ended, are not part of it. To make them such, they must be so nearly connected with the 'actual' occurrence as to be without the suspicion of afterthought or forethought." Hall *v.* State, 48 Ga. 607, 608. See also *infra*, this note.

Contemporaneousness not exact.— "As long as the transaction continues, so long do acts and deeds emanating from it become part of it, so that, describing it in a court of justice, they can be detailed. . . . Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined." Wharton Cr. Ev. § 262 [*quoted* in Territory *v.* Clayton, 8 Mont. 1, 11, 19 Pac. 293]. "The *res gestæ* of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as cotemporaneous with it. No precise point of time can be fixed *a priori* where the *res gestæ* ends. Each case turns on its own circumstances." Hall *v.* State, 48 Ga. 607, 608. "There are no limits of time within which the *res gestæ* can be arbitrarily defined." State *v.* Ellington, 4 Ida. 529, 535, 43 Pac. 60. "The *res gestæ* . . . may be embraced

strued an incident of the event under consideration;[35] those circumstances which are the automatic and undesigned incidents of a particular litigated act, and are admissible when illustrative of such act.[36] (Res Gestæ: In General, see Evidence, 16 Cyc. 1148. Consisting in Declarations, in General, see Evidence, 16 Cyc. 1241. Consisting in Declarations as to Ownership — By Husband or Wife as Against Creditors, see Husband and Wife, 21 Cyc. 1408 text and note 50; Of Thing Given, see Gifts, 20 Cyc. 1247 note 87; Of Thing Stolen, see Larceny, 25 Cyc. 111 text and note 84. In Burglary, see Burglary, 6 Cyc. 233 note 71. In Conspiracy, see Conspiracy, 8 Cyc. 680 text and note 74; Criminal Law, 12 Cyc. 444 text and note 36, note 42. In Contract, see Contracts, 9 Cyc. 765 text and note 54. In Conveyance or Transfer, Declarations as to Sufficiency of Consideration, see Fraudulent Conveyances, 20 Cyc. 778 text and note 63. In Covenant, see Covenants, 11 Cyc. 1154. In Criminal Law in General — Acts and Declarations in General, see Criminal Law, 12 Cyc. 441; Acts and Declarations of Participants, see Criminal Law, 12 Cyc. 437 text and note 8; Declarations of Co-Defendants, see Criminal Law, 12 Cyc. 442 text and note 25; Declarations of Conspirators, see Conspiracy, 8 Cyc. 680 text and note 74; Criminal Law, 12 Cyc. 444 text and note 36, note 42; Declarations of Third Persons, see Criminal Law, 12 Cyc. 432; Homicide, 21 Cyc. 944 text and note 50; Declarations of Victims in General, see Criminal Law, 12 Cyc. 429 text and notes 52, 56; Declarations of Victims Exculpating Accused, see Criminal Law, 12 Cyc. 431 text and note 66; Explaining Matters in Evidence, see Criminal Law, 12 Cyc. 427 text and notes 38–40; Letters Addressed to Accused, see Criminal Law, 12 Cyc. 434 text and note 88; Other Crime Than That in Question, see Criminal Law, 12 Cyc. 407 text and note 18; Homicide, 21 Cyc. 944 text and note 53. In Gift, see Gifts, 20 Cyc. 1247 note 88. In Homicide — In General, see Homicide, 21 Cyc. 924; Attendant Circumstances in Various Connections, see Homicide, 21 Cyc. 924–944; Character, Dangerous, of Victim, see Homicide, 21 Cyc. 909 text and note 24; Declarations of Third Persons, see Homicide, 21 Cyc. 944 text and note 50; Declarations of Victim, see Homicide, 21 Cyc. 955 text and note 62, 973 text and note 31, 974 text and note 33, 975 text and note 35, 989 note 89, 990 text and note 97, text and note 99, 993, 994 text and note 15; Declarations, Self-Incriminating, of Persons Other Than Accused, see Homicide, 21 Cyc. 903 text and note 59; Other Crime Than That in Question, see Homicide, 21 Cyc. 944 text and note 53; Threats, see Homicide, 21 Cyc. 890 note 42, 923 text and note 59, text and note 61, 968 text and note 73; Trouble Between Accused and Third Person, see Homicide, 21 Cyc. 897 text and note 63. In Larceny, Not Embracing Declaration of Defendant When in Possession, as to Source of Alleged Title, see Larceny, 25 Cyc. 111 text and note 84.)

within the brief compass of time which comprises the duration of the principal act or transaction itself, or it may extend over a much longer period of time, if the transaction be one of a continuing character." McGowen *v.* McGowen, 52 Tex. 657, 664. "The old rule was, that to be part of the *res gestæ* the fact or statement should be contemporaneous with the transaction, and this rule is approved by many courts of the first ability. On the other hand, the rule has been construed so as to admit acts and declarations occurring not contemporaneously with the transaction, but which precede or follow it." Craig *v.* State, 30 Tex. App. 619, 621, 18 S. W. 297. They need not be contemporaneous with the main fact if sufficiently connected therewith. See the following authorities, all cited in Reg. *v.* Troop, 2 Can. Cr. Cas. 22, 33 note (where it is said: "The circumstances or declarations need not be contemporaneous with the main fact under consideration if so connected therewith as to illustrate its character, further its object, or to form in conjunction with it one continuous transaction"); Rouch *v.* Great Western R. Co., 1 Q. B. 51, 61, 5 Jur. 826, 4 P. & D. 686, 2 R. & Can. Cas. 505, 41 E. C. L. 432; Ridley *v.* Gyde, 9 Bing. 349, 352, 23 E. C. L. 611; Rawson *v.* Haight, 2 Bing. 99, 104, 9 E. C. L. 499, 1 C. & P. 77, 12 E. C. L. 55, 9 Moore C. P. 217 (per Parke, J.); Bateman *v.* Bailey, 5 T. R. 512, 513; Taylor Ev. (ed. 1897) § 588.

35. Reg. *v.* Troop, 2 Can. Cr. Cas. 22, 24, 33 note.

36. Wharton Ev. (3d ed.) § 259 [*quoted* in People *v.* Wong Ark, 96 Cal. 125, 129, 30 Pac. 1115; Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 11, 52 Pac. 211; State *v.* Birks, 199 Mo. 263, 274, 97 S. W. 578; State *v.* Hudspeth, 150 Mo. 12, 27, 51 S. W. 483; State *v.* Thompson, 132 Mo. 301, 322, 34 S. W. 31]. The words "automatic and" were omitted in

RESIDE. A word which may be used in two senses, the one, constructive, technical, legal, the other denoting the personal habitual habitation of individuals;[37]

Wharton Ev. (2d ed.) [*quoted* in Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 180, 24 S. W. 106; Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 338, 3 S. W. 50, 3 Am. St. Rep. 230; McLeod *v.* Johnson, 96 Me. 271, 279, 52 Atl. 760; State *v.* Walker, 78 Mo. 380, 386; Hunter *v.* State, 40 N. J. L. 495, 538 (substituting "which" for "and" between "act" and "are"); Coll *v.* Easton Transit Co., 180 Pa. St. 618, 626, 37 Atl. 89; Ward *v.* White, 86 Va. 212, 217, 9 S. E. 1021, 19 Am. St. Rep. 883 (*quoted* in Chattanooga, etc., R. Co. *v.* Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169 note); State *v.* Prater, 52 W. Va. 132, 146, 43 S. E. 230; St. Clair *v.* U. S., 154 U. S. 134, 149, 14 S. Ct. 1002, 38 L. ed. 936].

"The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character." 1 Greenleaf Ev. § 108 [*quoted* in People *v.* Dewey, 2 Ida. (Hasb.) 83, 6 Pac. 103, 105; Eagon *v.* Eagon, 60 Kan. 697, 699, 57 Pac. 942]. "These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist, as we will see, of sayings and doings of any one absorbed in the event, whether participant or bystander; they may comprise things left undone as well as things done, their sole distinguishing feature is that they should be automatic and necessary incidents of the litigated act, necessary in the sense that they are part of the immediate preparation for or emanations of such act which were not produced by the calculated policy of the actors." Wharton Ev. (3d ed.) [*quoted* in Denver, etc., R. Co. *v.* Spencer, 25 Colo. 9, 11, 52 Pac. 211; and (omitting what follows "things done") in State *v.* Birks, 199 Mo. 263, 264, 97 S. W. 678; State *v.* Hudspeth, 150 Mo. 12, 27, 51 S. W. 483; State *v.* Thompson, 132 Mo. 301, 322, 34 S. W. 31]. "Speeches of any one concerned" took the place of "sayings and doings of any one absorbed in the event" and "automatic and" was omitted in Wharton Ev. (2d ed.) [*quoted* in Ft. Smith Oil Co. *v.* Slover, 58 Ark. 168, 180, 24 S. W. 106] (omitting, however, the sentence beginning "they may consist" and which ends in "things done" and substituting "from" for "of" between "emanations" and "such act"); Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 338, 3 S. W. 50, 3 Am. St. Rep. 230; McLeod *v.* Johnson, 96 Me. 271, 279, 52 Atl. 760; State *v.* Walker, 78 Mo. 380, 386; Hunter *v.* State, 40 N. J. L. 495, 538; Coll *v.* Easton Transit Co., 180 Pa. St. 618, 626, 37 Atl. 89; Ward *v.* White, 86 Va. 212, 217, 9 S. E. 1021, 19 Am. St. Rep. 883 (where the passage is quoted only to and including "appreciable"); State *v.* Prater, 52 W. Va. 132, 146, 43 S. W. 230; St. Clair *v.* U. S., 154 U. S. 134, 149, 14 S. Ct. 1002, 38 L. ed. 936]. Incidents that are thus immediately and unconsciously connected with the act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. Wharton Ev. § 259 [*quoted* in Little Rock, etc., R. Co. *v.* Leverett, 48 Ark. 333, 339, 3 S. W. 50, 3 Am. St. Rep. 230; State *v.* Walker, 78 Mo. 380, 387; State *v.* Prater, 52 W. Va. 132, 146, 43 S. W. 230].

In criminal cases.— Cockburn, Ch. J., in a pamphlet, in answer to an article in the Times, by the author of Taylor on Evidence and criticizing one of his rulings, answered the question, "What is the meaning of the term '*res gestæ*,' as applied to a criminal case?" as follows: "Whatever act or series of acts constitute or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action of the latter, actual or constructive, as, e. g., in the case of flight or applications for assistance, form part of the principal transaction . . . or particulars of it; while, on the other hand statements made by the complaining party after all action on the part of the wrongdoer, actual or constructive, has ceased through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrongdoer, such as, e. g., statements made with a view to the apprehension of the offender, do not form part of the *res gestæ*." Reg. *v.* McMahon, 18 Ont. 502, 516, where Lord Cockburn's answer is quoted *ut supra*.

37. Hart *v.* Lindsey, 17 N. H. 235, 244, 43 Am. Dec. 597 (holding that a statute providing that one shall be liable to military duty where he shall "reside," etc., refers to the legal residence); Shattuck *v.* Maynard, 3 N. H. 123, 124 [*quoted* in Hart *v.* Lindsey, *supra*] (adding: "When a person has a fixed abode, where he dwells with his family, there can be no doubt as to the place where he resides. The place of his personal and legal residence are the same. So, when a person has no permanent habitation or family, but dwells in different places, as he happens to find employment, there can be no doubt as to the place, where he resides. He must be considered as residing where he actually or personally resides. But some individuals have permanent habitations, where their families constantly dwell, yet pass a great portion of their time in other places. Such persons have a legal residence with their families, and a personal residence in other places; and the word 'reside,' may, with respect to them, be used to denote either their personal, or their legal residence").

to live; to dwell, to be present;[38] to abide, to sojourn, to dwell permanently or for a length of time; to have a permanent abode for the time being as contradistinguished from a mere temporary locality of existence;[39] to dwell permanently or for a length of time; to have a settled abode for a time;[40] to abide

"[It] may, and sometimes does, have different meanings in the same or different articles or sections of a constitution or statute." People *v.* Owers, 29 Colo. 535, 546, 69 Pac. 515.

Exact meaning often depends upon connection in which it is used. State *v.* Selleck, 76 Nebr. 747, 750, 107 N. W. 1022.

38. Walker Dict.; Webster Dict. [*cited* in Lask *v.* U. S., 1 Pinn. (Wis.) 77, 79].

Used of a corporation, the term refers to its relation to its chief place of business. Eichhorn *v.* Louisville, etc., R. Co., 112 Ky. 338, 342, 65 S. W. 797, 23 Ky. L. Rep. 1640. A railroad company does "reside or carry on business" only in its head office. Ralph *v.* Great Western R. Co., 14 Can. L. J. N. S. 172, 173.

The state cannot reside.— State *v.* Trenton, 40 N. J. L. 89, 91, holding that "residing" as applied to resident creditors in N. J. St. April 11, 1896, § 20, concerning taxes, "refers to individual abode, though it is sometimes used figuratively. It will not apply to the state in its representative and governmental relation to its citizens. The people, as individuals, reside in the state, but the political body called the state cannot be said, in the proper use of language, to reside anywhere."

39. Long *v.* Ryan, 30 Gratt. (Va.) 718, 720 [*quoted* in Lawson *v.* Adlard, 46 Minn. 243, 245, 48 N. W. 1019].

Implies a longer time than "lodge," "stay," "remain," "abide." Hinds *v.* Hinds, 1 Iowa 36, 41.

"To reside at a house" means that a man is to be found at that house **whenever he is** wanted (*In re* Moir, 25 Ch. D. 605, 610, 53 L. J. Ch.. 474, 50 L. T. Rep. N. S. 10, 32 Wkly. Rep. 377 [*cited* in Wilkinson *v.* Wilson, 26 Ont. 213, 215]); that, for that house, he is rated to the poor rate, or is on the parish or the government rate books and that there he has a home (*In re* Moir, *supra*); the words require personal residence, as which, personal presence for any part of one day, is sufficient for that day's residence, and it is not necessary to spend the night of a day of residence at the house (Walcot *v.* Botfield, 18 Jur. 570, 571, 572, Kay 534, 2 Wkly. Rep. 393, 69 Eng. Reprint 226 [*cited* in Wilkinson *v.* Wilson, *supra*]).

"Resides out of the state" refers to time of absence, when used in relation to the statute of limitations. Venable *v.* Paulding, 19 Minn. 488.

"'Debtor having a family' residing in the state" see Bonnel *v.* Dunn, 28 N. J. L. 153, 155.

40. Webster Dict. [*quoted* in Quinn *v.* State, 35 Ind. 485, 490, 9 Am. Rep. 754; Hinds *v.* Hinds, 1 Iowa 36, 41; Drew *v.* Drew, 37 Me. 389, 393]; *Ex p.* Blumer, 27 Tex. 734, 736. The first nine words, only, are quoted in Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69. *Compare* Graham *v.* Cam, 51 Pa. St. 255, 258, 88 Am. Dec. 581; Ft. Worth, etc., R. Co. *v.* Monell, (Tex. Civ. App. 1908) 110 S. W. 504, 506, each attributing to Webster Dict. the following definition: "To dwell permanently for any length of time; 'a settled abode.'"

Often demands domicile, in constitutions and statutes see Sharp *v.* McIntire, 23 Colo. 99, 102, 46 Pac. 115 (construing Const. art. 1, § 7, and Mills Annot. St. Colo. § 1571, providing that a voter shall reside in the state six months immediately preceding the election); Quinn *v.* State, 35 Ind. 485, 490, 9 Am. Rep. 754 (where it is said, as used in the clause of the Indiana constitution relating to suffrage, to have been intended to "embrace the idea of fixed or permanent residence . . . the act of abiding or dwelling at the place, with the intention of remaining"); French *v.* Lighty, 9 Ind. 475, 477 note, point 3 (holding that a residence within the meaning of the Indiana constitution is a home); Shaw *v.* Shaw, 98 Mass. 158, 159 [*quoted* in Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722] (where it is said "to live, to reside, to dwell, to have one's home or domicil, are usually, in our statutes, equivalent and convertible terms," and held synonymous with "live" as the latter word is used in Gen. St. c. 107, §§ 11, 12, requiring parties to a divorce sought on grounds which had occurred within the state, to have "lived" together within the state); Opinion of Justices, 5 Metc. (Mass.) 587, 588 (where it is said that "one who has resided" and "inhabitant," used in regard to voters' qualification, the latter in the Constitution of 1820, and the former in amendments thereto, are equivalent, and confine the right of voting to the place where one has his domicile, or place of abode); Berry *v.* Wilcox, 44 Nebr. 82, 88, 62 N. W. 249, 48 Am. St. Rep. 706 (holding that one resides where he has his established home — that the fact that one is a student in a university does not in itself constitute "residing," on his part, where the university is situated, within the meaning of Comp. St. c. 26, § 32, prescribing qualifications of voters); Washington *v.* Thomas, 103 N. Y. App. Div. 423, 425, 92 N. Y. Suppl. 994 (holding that in the phrase "a county where one or more of the parties resided," describing the venue of an action, under N. Y. Code Civ. Proc. § 984, the word refers to a permanent residence, one's home as distinguished from a mere stopping place for the transaction of either business or pleasure, and is nearly or quite synonymous with "domicile"); Fry's Election Case, 71 Pa. St. 302, 306, 307, 10 Am. Rep. 698 [*cited* in State *v.* Aldrich, 14 R. I. 171, 174] (where "resided" as used in Const. art. 3, § 1, prescribing voters' qualifications, is held to refer to domiciliary residence); Middlebury *v.* Waltham, 6 Vt. 200, 202, and note (holding that "coming to reside" as applied in the

continuously; to have one's dwelling or home; to remain for a long time;[41] to make an abode for a considerable time, to be settled as in a home, live, dwell;[42] to live in a place;[43] to continue to sit; to remain;[44] to exist as an attribute of, inhere.[45] (See RESIDENCE, and Cross-References Thereunder; RESIDENT.)

RESIDENCE.[46] A word used in law to denote the fact that a person dwells in a given place or, in the case of a corporation, that the management is carried on there;[47] a word capable of different meanings,[48] including temporary residence or permanent domicile;[49] a word whose statutory meaning depends upon the con-

Vermont pauper acts to paupers moving from their settlement to other towns means coming with a view to permanent residence and not merely for a transient stay — coming with out the *animus revertendi*).

Not necessarily "be domiciled" see People *v.* Owers, 29 Colo. 535, 547, 69 Pac. 515 (holding that to reside within his district, as a qualification for office of district judge, is an actual, as distinguished from a legal or constructive residence, the provision being manifestly for the benefit of the people); Kelsey *v.* Green, 69 Conn. 291, 301, 37 Atl. 679, 38 L. R. A. 471 (where it is said that in the Connecticut statutes generally "the word 'reside' is used in a sense which includes all who are the actual, stated dwellers in any given place, even though they may have a technical domicil elsewhere"); State *v.* Selleck, 76 Nebr. 747, 749, 107 N. W. 1022 (where an amendment substituting "live" for "reside," supposed to be made under the theory that "reside" might apply only to those domiciled, was said, if so, to have been overcautious, as "reside" does not necessarily apply to a legal residence).

With "continue" or "continuously."— One does not continue to reside in a place, so as to obtain a settlement there, who goes out of the state leaving there his family who abandon the house and go to live with the wife's father. Middletown *v.* Poultney, 2 Vt. 437, 439. A requirement that a voter shall have "resided . . . continuously" in the electoral district for a period admits of a temporary absence with the intention of returning. *Re* Seymour Tp., 2 Ont. El. Cas. 69, 73.

41. Webster Dict. [*quoted* in Quinn *v.* State, 35 Ind. 485, 490, 9 Am. Rep. 754].

42. Webster Dict. [*quoted* in Ft. Worth, etc., R. Co. *v.* Monell, (Tex. Civ. App. 1908) 110 S. W. 504, 506].

43. Middlebury *v.* Waltham, 6 Vt. 200, 202.

44. Webster Dict. [*quoted* in Quinn *v.* State, 35 Ind. 485, 490, 9 Am. Rep. 754].

45. Webster Dict. [*quoted* in Ft. Worth, etc., R. Co. *v.* Monell, (Tex. Civ. App. 1908) 110 S. W. 504, 506].

46. **"Actual residence"** is personal presence in a place. Sears *v.* Boston, 1 Metc. (Mass.) 250, 251.

Actual domicile of wife cannot be regarded as actual residence or place of abode of husband see McPherson *v.* Housel, 13 N. J. Eq. 35, 37.

Actual and legal residence distinguished see Lawson *v.* Adlard, 46 Minn. 243, 245, 48 N. W. 1019.

"Legal residence" is the place of a man's fixed habitation, where his political rights, such as the right of elective franchise, are to be exercised and where he is liable to taxation. Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 522. Defined as "domicile" see Lawson *v.* Adlard, 46 Minn. 243, 244, 48 N. W. 1019.

"Usual residence" see Graham *v.* Com., 51 Pa. St. 255, 256, 88 Am. Dec. 581.

47. Rapalje & L. L. Dict. 1113 [*quoted* in Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 296, 46 N. E. 641].

48. See Shaeffer *v.* Gilbert, 73 Md. 66, 69, 20 Atl. 434; Wachusett Nat. Bank *v.* Fairbrother, 148 Mass. 181, 184, 19 N. E. 345, 12 Am. St. Rep. 530; Blackwell *v.* England, 8 E. & B. 541, 547, 3 Jur. N. S. 1302, 27 L. J. Q. B. 124, 6 Wkly. Rep. 59, 92 E. C. L. 541.

Has no fixed meaning applicable alike to all cases. State *v.* Smith, 64 Mo. App. 313.

Exact meaning often depends on connection in which the word is used. State *v.* Selleck, 76 Nebr. 747, 749, 107 N. W. 1022.

49. Anderson L. Dict. [*quoted* in Wallace *v.* State, 147 Ind. 621, 623, 47 N. E. 13].

As domicile.— See Jacob Dom. § 75 [*quoted* in Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722] (where it is said: "The great bulk of cases of domicil, reported in the American books, are cases of statutory residence. This is especially true with regard to the subject of voting, eligibility to office, taxation, jurisdiction in divorce, probate and administration, etc. With respect to these subjects, there is substantial unanimity in holding statutory residence to mean domicil"); Jacob Dom. § 75 [*cited* in Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722, where it is said that in statutes relating to succession, grant of administration, and of guardianship, the words "residence," or "reside" are "generally construed to mean the legal residence, and as equivalent to domicil"]. See also Humphrey *v.* Humphrey, 115 Mo. App. 361, 363, 91 S. W. 405 (where it is said that the word as used in divorce statutes has substantially the same attributes as domicile); Wood *v.* Roeder, 45 Nebr. 311, 315, 63 N. W. 853 (where the word is said to be generally convertible with "domicile" as applied in statutes, and especially in relation to jurisdictional proceedings); Berry *v.* Wilcox, 44 Nebr. 82, 85, 62 N. W. 249, 48 Am. St. Rep. 706 note (so construing the word when used with reference to qualification of voters); Kennedy *v.* Ryall, 67 N. Y. 379, 386 [*quoted* in People *v.* Platt, *supra*] (where it is said: "Generally speaking domicile and residence mean the same thing"); People *v.* Putnam County Surrogate's Ct., 36 Hun (N. Y.) 218, 220 [*quoted* in People *v.* Platt, 50 Hun (N. Y.) 454, 462, 3 N. Y. Suppl. 367] (where it is said to have much the same meaning as "domicile"); Crawford *v.* Wilson, 4 Barb.

text and the purpose of the statute,[50] which may as used in one statute be fulfilled by mere business residence, and in another require domicile in the strictest and most technical sense;[51] the act or state of being seated or settled in a place; the act, state or habit of dwelling or abiding in a place; the act or state of being a resident, or inhabitant; inhabitancy or habitancy; the place where one resides, habitation, domicile;[52] the place where a man's habitation is fixed without any present purpose of removing therefrom; domicile; an established abode fixed for a considerable time, whether with or without a present intention of ultimate

(N. Y.) 504, 520 (where it is said that "residence" and "domicil" generally mean the same); Chase *v.* Miller, 41 Pa. St. 403, 420 [*quoted* in People *v.* Platt, *supra*] (where "domicil" is said to be its primary signification); Lambe *v.* Smythe, 3 D. & L. 712, 713 (construing the word as "domicile or home," as it is used in 3 & 4 Wm. IV, c. 42, § 8, requiring an affidavit as preliminary to a plea in abatement for misjoinder to set forth the place of residence of the person so misjoined). See also *infra*, text and notes 52, 53, 71, 74–79.

Not domicile.— As qualification of voters see Estopinal *v.* Michel, 121 La. 879, 881, 46 So. 907, 19 L. R. A. N. S. 759 [*followed* in Estopinal *v.* Voght, 121 La. 883, 885, 46 So. 908]. In statutes relating to attachment of property of non-resident see Lawson *v.* Adlard, 46 Minn. 243, 245, 48 N. W. 1019. In provisions of New York school law relating to residence of children see People *v.* Hendrickson, 54 Misc. (N. Y.) 337, 341, 104 N. Y. Suppl. 122.

Not necessarily domicile see Wallace *v.* State, 147 Ind. 621, 623, 47 N. E. 13; Cincinnati, etc., R. Co. *v.* Ives, 3 N. Y. Suppl. 895.

"Becomes a domicile when it is taken up animo manendi" see Bouvier L. Dict. [*quoted* in Brown *v.* Boulden, 18 Tex. 431, 433]; Rindge *v.* Green, 52 Vt. 204, 206.

Distinguished from domicile see DOMICILE, 14 Cyc. 835. Of lesser meaning than domicile, which includes, with residence, the intention to remain see Long *v.* Ryan, 30 Gratt. (Va.) 718, 719, 720.

50. Shaeffer *v.* Gilbert, 73 Md. 66, 70, 20 Atl. 434; Tyler *v.* Murray, 57 Md. 418, 441; Anderson L. Dict. [*quoted* in Wallace *v.* State, 147 Ind. 621, 623, 47 N. E. 13]. See also the various titles noted in the cross-references.

51. Tyler *v.* Murray, 57 Md. 418, 441.

As domicile see *supra*, text and note 49.

Not mere place of business see Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105, 124 [*quoted* in Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222, 234], where it is said that one "cannot be a resident of two distinct places at the same time," but that he may for purposes of business establish himself in another state for an indefinite period, away from his family and remain there so continuously as to make himself a resident thereof for all the purposes of the attachment laws generally, and that a man's residence is where he actually dwells at the time, not merely where he may carry on business regularly.

52. Burrill L. Dict. [*quoted* in Hall *v.* Hall, 25 Wis. 600, 607].

"Residence, inhabitancy or domicil . . . although not in all respects precisely the same, they are nearly so, and depend upon much the same evidence." Thorndike *v.* Boston, 1 Metc. (Mass.) 242, 245 [*quoted*, in substance, in Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85]. "In legal phraseology residence is synonymous with inhabitancy or domicile." Ensign *v.* Ensign, 54 Misc. (N. Y.) 291, 296, 105 N. Y. Suppl. 918. "The terms legal residence or inhabitancy, and domicil mean the same thing." Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 522 [*quoted* in People *v.* Platt, 50 Hun (N. Y.) 454, 462, 3 N. Y. Suppl. 367; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85]. Inhabitancy and residence do not mean precisely the same thing as domicile when the latter is applied to successions to personal estate, but they mean a fixed and permanent abode, a dwelling place for the time being, as distinguished from a mere temporary locality of residence. *In re* Wrigley, 8 Wend. (N. Y.) 134, 140 [*quoted* in Drew *v.* Drew, 37 Me. 389, 393; Barney *v.* Oelrichs, 138 U. S. 529, 533, 11 S. Ct. 414, 34 L. ed. 1037]. "Permanence is declared to be more strongly imported by the term 'inhabitancy' than by 'residence.' Residence, nevertheless, and even domicil, is a quality which endures, when once acquired, until changed *animo et facto*." *In re* Hughes, Tuck. Surr. (N. Y.) 38, 39.

Pretence: Mere, said to be insufficient see Trumbull *v.* Moss, 28 Conn. 253, 256, 257 (where it is said that "residing" does not import mere stopping or being in a place); Perrine *v.* Evans, 35 N. J. L. 221, 223 (where it is said that "residence" is always a place of abode and never denotes merely the place where a man is or happens to be). Mere presence sufficient within statute see *In re* Doll, 47 Minn. 518, 521, 50 N. W. 607, holding that "residing in," in a statute providing for services by an officer "residing in any adjoining county," is not restricted to an actual personal residence, but includes the case of presence in the county for the purpose of transacting judicial business therein. The term generally imports a personal presence. Chinese Tax Cases, 14 Fed. 338, 344, 8 Sawy. 384.

In U. S. Bankr. Act (1898), § 7, subd. 8, such residence as will insure notice by mail to the creditor. See Weidenfeld *v.* Tillinghast, 104 N. Y. Suppl. 902, 904.

In homestead exemption laws meaning "an actual residence on the premises as a home or dwelling-place" see Quehl *v.* Peterson, 47 Minn. 13, 15, 49 N. W. 390.

Of minor within the school-district see Yale *v.* West Middle School Dist., 59 Conn. 489, 491, 22 Atl. 295, 13 L. R. A. 161; People *v.*

removal;[53] an abode or dwelling; a habitation; hence, the place where anything permanently rests;[54] the abode, or dwelling place, as distinguished from a mere locality of existence;[55] the place of abode, a dwelling, a habitation, the act of abiding in a place for some continuance of time;[56] place of abode;[57] a dwell-

Hendrickson, 54 Misc. (N. Y.) 337, 341, 104 N. Y. Suppl. 122.

By occupation.— To reside upon a farm, although living on adjoining property, within Mich. Comp. Laws, § 3990, relating to settler's license see Hedley *v.* Leonard, 35 Mich. 71, 76.

53. Century Dict. [*quoted* in Brisenden *v.* Chamberlain, 53 Fed. 307, 311].

Made up of fact and intention.—There must be the fact of abode and the intention of remaining. Wright *v.* Genesee Cir. Judge, 117 Mich. 244, 245, 75 N. W. 465, describing residence for jurisdiction in divorce.

"A fact easily ascertained" see Brisenden *v.* Chamberlain, 53 Fed. 307, 311.

A question of intent (see JURIES, 24 Cyc. 200 text and note 12 [*quoted* in State *v.* Wimby, 119 La. 139, 141, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. N. S. 98]; Casey's Case, 1 Ashm. (Pa.) 126); when synonymous with domicile (see Cannon's Estate, 15 Pa. Co. Ct. 312, 314).

Intention will be conclusively inferred so far as it may be a necessary element of residence. North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 211, 4 Am. Rep. 279.

Residence of non compos may be controlled by guardian. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524, 525.

Duration implied see Trumbull *v.* Moss, 28 Conn. 253, 256 (where it is said that "residing" in common understanding does not import mere stopping or being in a place, but abiding in it for some continuance of time); Shaeffer *v.* Gilbert, 73 Md. 66, 69, 20 Atl. 434; Kroge *v.* Modern Brotherhood of America, 126 Mo. App. 693, 701, 105 S. W. 685 (where it is said that the word may refer to a transient or temporary or to a fixed or settled abode); Coleman *v.* Territory, 5 Okla. 201, 208, 47 Pac. 1079 (where it is said that the term indicates **permanency** of occupation as distinct from lodging or boarding or temporary occupation); JURIES, 25 Cyc. 200, 201 note 12 [*cited* in State *v.* Wimby, 119 La. 139, 141, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. N. S. 98] (where it appears that the word may imply permanency or an indefinite period).

Not necessarily permanent see Wallace *v.* State, 147 Ind. 621, 623, 47 N. E. 13.

"Generally transient in its nature" see Bouvier L. Dict. [*quoted* in Brown *v.* Boulden, 18 Tex. 431, 433]; Rindge *v.* Green, 52 Vt. 204, 206.

54. Webster Dict. [*quoted* in People *v.* Platt, 50 Hun (N. Y.) 454, 470, 4 N. Y. Suppl. 367].

55. Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, 211 [*quoted* in *In re* Hughes, Tuck. Surr. (N. Y.) 38, where the definition is said to be "only modified" in Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423].

Cannot be referred to an occasional and temporary purpose see Bempde *v.* Johnstone, 3 Ves. Jr. 198, 201, 30 Eng. Reprint 967 [*cited* in Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513].

Requires the animus residendi see Whithorn *v.* Thomas, 8 Jur. 1008, 1010, 14 L. J. C. P. 38, 1 Lutw. Reg. Cas. 125, 7 M. & G. 1, 8 Scott N. R. 783, 49 E. C. L. 1 [*cited* in Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513].

Change of residence.— In order to accomplish a change of residence, there must be not only the intention to change but the fact of removal. Neither is sufficient without the other. Adams *v.* Evans, 19 Kan. 174, 176 [*cited* in Hatch *v.* Smith, 6 Kan. App. 645, 49 Pac. 698, 699]. "Residence is lost by leaving the place where one has acquired a permanent home, and removing to another place *animo non revertendi*, and is gained by remaining in such new place *animo manendi*." Tracy *v.* Tracy, 62 N. J. Eq. 807, 810, 48 Atl. 533, describing residence for purposes of divorce. "The inquiry is, *quo animo*, the party either moved to or from the state." *In re* Casey, 1 Ashm. (Pa.) 126. Change of place for a temporary purpose with an intention to return is not a change of residence within laws relating to attachment and other subjects of domestic policy. Stratton *v.* Brigham, 2 Sneed (Tenn.) 420, 422.

May be abandoned or lost without acquiring another. North Yarmouth *v.* West Gardiner, 58 Me. 207, 210, 4 Am. Rep. 279; Jefferson *v.* Washington, 19 Me. 293, 302; Exeter *v.* Brighton, 15 Me. 58, 61.

A soldier in the field retains the residence from which he has come. He has no residence in the field. Graham *v.* Com., 51 Pa. St. 255, 258, 88 Am. Dec. 581.

Logging camp is not a residence for purposes of trustee process as having "few abiding, homelike characteristics and qualities, especially as applicable to a person who is found to have a home or abode in another place." Rindge *v.* Green, 52 Vt. 204, 208.

Mere physical absence, with the *animus revertendi*, does not discontinue residence in a place. Reg. *v.* Abingdon Union, L. R. 5 Q. B. 406, 409, 39 L. J. M. C. 153, 22 L. T. Rep. N. S. 603, 18 Wkly. Rep. 981 [*cited* in Edwards *v.* St. John, 22 N. Brunsw. 297, 305].

56. Long *v.* Ryan, 30 Gratt. (Va.) 718, 720; *Re* Fraser, 30 Nova Scotia 272, 276. See also Cincinnati, etc., R. Co. *v.* Iver, 3 N. Y. Suppl. 895.

So defined according to the most approved lexicographers and writers see Cincinnati, etc., R. Co. *v.* Ives, 3 N. Y. Suppl. 895; *In re* Fraser, 30 Nova Scotia 272, 276.

The latter part of the definition beginning "the act" is also given in Lawson *r.* Adlard, 46 Minn. 243, 245, 48 N. W. 1019, so defining the word "in its popular sense."

57. Middlebury *r.* Waltham, 6 Vt. 200, 202.

ing;[58] place of abode, dwelling;[59] a place of abode, a place where a person lives;[60] the abode or place where one actually lives,[61] a dwelling; habitation;[62] place of dwelling, whether permanent or temporary;[63] the home or place of abode of the individual;[64] the place of abode; dwelling; or habitation for some continuance of time;[65] the place of abode or the act of dwelling or being in a place for a continuance of time;[66] the act of residing, abiding, or dwelling in a place for some continuance of time; the place where one resides;[67] the act or state of being seated or settled in a place;[68] the dwelling in a place for some continuance of time,[69] for business or other purposes;[70] the home or habitation fixed in any place without a present intention of removing therefrom;[71] a fixed and permanent abode or dwelling place for the time being;[72] a fixed and permanent abode, a dwelling-house for the time being, as contradistinguished from a mere temporary locality of existence;[73] the place where a person lives and has his fixed, permanent home

58. Graham *v.* Com., 51 Pa. St. 255, 258, 88 Am. Dec. 581.

59. Johnson Dict. [*quoted* in Reg. *v.* Hammond, 17 Q. B. 772, 781, 16 Jur. 194, 21 L. J. Q. B. 153, 79 E. C. L. 772, 8 Eng. L. & Eq. 356].

Synonymous with "dwelling-place" and "home" see Warren *v.* Thomaston, 43 Me. 406, 418, 69 Am. Dec. 69.

60. Mays *v.* State, 50 Tex. Cr. 391; 392, 97 S. W. 703.

"A person may have two places of residence, as in the city and country." *In re* Newcomb, 192 N. Y. 238, 250, 84 N. E. 950. Where a person has two residences at different seasons of the year, that will be deemed his domicile or home which he himself selects or describes as his home or where he votes or exercises the duties of a citizen. Burrill L. Dict. *sub verb.* "Domicile" [*quoted* in People *v.* Putnam County Surrogate Ct., 36 Hun (N. Y.) 218, 220, 16 Abb. N. Cas. 241]. One may fix his residence at two or more places and elect at which of them he will bring an action. Gulf, etc., R. Co. *v.* Overton, (Tex. Civ. App. 1907) 107 S. W. 71, 79 [*reversed* on other grounds in (1908) 110 S. W. 736].

In separate states may be one's domicile, residence, and place of business (Robinson *v.* Morrison, 2 App. Cas. (D. C.) 105, 124 [*quoted* in Howard *v.* Citizens' Bank, etc., Co., 12 App. Cas. (D. C.) 222, 234]); domicile, settlement, and residence (Cambridge *v.* Charlestown, 13 Mass. 501; Rindge *v.* Green, 52 Vt. 204, 206); domicile and residence (Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 14, 32 Am. Dec. 423 [*cited* in Morgan *v.* Nunes, 54 Miss. 308, 310]; Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 79, 80, 11 N. Y. Civ. Proc. 36, 40).

61. Rosenzweig *v.* Wood, 30 Misc. (N. Y.) 297, 299, 63 N. Y. Suppl. 447 [*affirmed* in 52 N. Y. App. Div. 631, 65 N. Y. Suppl. 1144].

62. Webster Dict. [*quoted* in Foot *v.* Harris, 2 Abb. Pr. (N. Y.) 454, 457].

63. *In re* Titterington, 130 Iowa 356, 358, 106 N. W. 761, where the term is so construed in contradistinction to "domicile."

64. Rindge *v.* Green, 52 Vt. 204, 208, where such is said to be the well-defined meaning of the term in law.

65. Griffin *v.* Woolford, 100 Va. 473, 479, 41 S. E. 949, so defining "habitancy" also.

66. Webster Dict. [*quoted* in Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 520].

67. Webster Dict. [*quoted* in People *v.* Platt, 50 Hun (N. Y.) 454, 470, 3 N. Y. Suppl. 367; Hall *v.* Hall, 25 Wis. 600, 607].

68. Matter of Collins, 64 How. Pr. (N. Y.) 63, 65, adding: "It imports not only personal presence in a place, but an attachment to it by those acts or habits which express the closest connection between a person and a place, as by usually sitting or lying there."

"Citizenship" and "residence" regarded as interchangeable.— As used in United States statutes of March 3, 1887, c. 373, §§ 1, 2, providing for jurisdiction of United States courts over certain causes and removal thereof from state courts see Baughman *v.* National Water Works Co., 46 Fed. 4, 6, 7. Of corporations see *infra*, text and notes 83–85.

69. Webster Dict. [*quoted* in Tazewell County *v.* Davenport, 40 Ill. 197, 205; Bartlett *v.* New York, 5 Sandf. (N. Y.) 44, 47].

70. Webster Dict. [*quoted* in Bartlett *v.* New York, 5 Sandf. (N. Y.) 44, 47].

71. Stratton *v.* Brigham, 2 Sneed (Tenn.) 420, 422, so defining both "residence" and "domicile" when used in connection with subjects of domestic policy such as taxation, settlement, voting, and attachment.

72. *In re* Wrigley, 8 Wend. (N. Y.) 134, 140, defining "inhabitancy" in like manner.

Implies an established abode fixed permanently for a time, for business or other purposes, although there may be an intent, in the future, at some time or other to return to the original domicile. Morgan *v.* Nunes, 54 Miss. 308, 310.

"A place of residence in the common law acceptation of the term means a fixed and permanent abode and dwelling place for the time being as contradistinguished from mere temporal local residence." Silvey *v.* Lindsay, 42 Hun (N. Y.) 116, 120.

A permanent abode as distinguished from a temporary sojourn, within the meaning of Indiana tax laws. Brookover *v.* Kase, 41 Ind. App. 102, 83 N. E. 524, 525.

73. Weitkamp *v.* Loehr, 53 N. Y. Super. Ct. 79, 82, 11 N. Y. Civ. Proc. 36, so defining "inhabitancy" also.

Not confined to the dwelling-house when applied to homestead property, but may include furniture connected therewith used to make the home more comfortable and enjoyable. Linn *v.* Ziegler, 68 Kan. 528, 531, 75 Pac. 489.

and principal establishment;[74] the place where a person's habitation is fixed without any present intention of removing therefrom;[75] the place where one resides; an abode; a dwelling or habitation; especially a settled or permanent home or domicile;[76] a place where a man's habitation is fixed without any present intention of moving therefrom, a domicile;[77] the place of one's domicile;[78] the place where a man establishes his abode and makes the seat of his property and exercises his civil and political rights;[79] the place where one habitually sleeps;[80] where one sleeps and lives;[81] the place where a man is chiefly to be found.[82] Of a corporation, its chief office or place of business;[83] the place where the real trade or business is carried on;[84] in another sense, its citizenship.[85] (Residence: Actual Residence — As Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 985; Distinguished From "Place of Business," see ATTACHMENT, 4 Cyc. 432. Choice of Place as Constitutional Right, see CONSTITUTIONAL LAW, 8 Cyc. 1106. Defined — In General, see ATTACHMENT, 4 Cyc. 432; As Electoral Qualification, see ELECTIONS, 15 Cyc. 290, 291 text and note 67; In a State, see ELECTIONS, 15 Cyc. 291 text and note 68. Distinguished From — Domicile, see DOMICILE, 14 Cyc. 835; GUARDIAN AND WARD, 21 Cyc. 24, 25 text and note 2; Home, see HOME, 21 Cyc. 446 note 17. In Relation to Administration of Decedent's Estates — Residence of Administrator Proposed, as Affecting Eligibility, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 95–96 text and notes 31–37; Residence of Creditors as Affecting Priority of Claims, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 556; Residence of Decedent as Affecting Jurisdiction Over Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 152 text and note 98; Residence of Executor as Affecting Competency, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 162 note 79; Residence of Executor as Affecting Requirement of Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 129 text and note 56; Residence of Family or Widow as Affecting Right to Allowance, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 385–386 text and notes 36–39. In Relation to — Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 985; Affidavits, Residence of Officer, see AFFIDAVITS, 2 Cyc.

Synonymous with "dwelling-house" as used in a statute providing for service at the "residence" see Foot *v.* Harris, 2 Abb. Pr. (N. Y.) 454, 457.

74. Burrill L. Dict. *sub verb.* "Domicile" [*quoted* in People *v.* Putnam County Surrogate's Ct., 36 Hun (N. Y.) 218, 220, 16 Abb. N. Cas. 241], where it is said also that the word has much the same significance as "domicile."

75. Tracy *v.* Tracy, 62 N. J. Eq. 807, 810, 48 Atl. 533.

76. Wright *v.* Genesee Cir. Judge, 117 Mich. 244, 245, 75 N. W. 465, construing the word with reference to requirements for divorce.

77. Matter of Zerega, 20 N. Y. Suppl. 417, 418, 1 Pow. Surr. 209.

78. Bouvier L. Dict. [*quoted* in Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 520; Hall *v.* Hall, 25 Wis. 600, 607].

Domicile, or not, see *supra*, text and note 49.

79. Chase *v.* Miller, 41 Pa. St. 403, 420 [*quoted* only to and including "property" in Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 512], so defining the term as synonymous, as a voter's qualification, with "domicil."

Defined by Kansas statutes as "the place adopted by a person as his place of habitation, and to which whenever he is absent he has the intention of returning;" also for voting purposes "the place where a married man's family resides." Hatch *v.* Smith, 6 Kan. App. 645, 49 Pac. 698, 699.

80. Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513.

"Place where a man sleeps" a possible interpretation in some cases see Attenborough *v.* Thompson, 2 H. & N. 559, 563, 3 Jur. N. S. 1307, 27 L. J. Exch. 23, 6 Wkly. Rep. 135.

81. Cesena Sulphur Co. *v.* Nicholson, 1 Ex. D. 428, 452, 45 L. J. Exch. 821, 35 L. T. Rep. N. S. 275, 25 Wkly. Rep. 71.

82. Attenborough *v.* Thompson, 2 H. & N. 559, 563, 3 Jur. N. S. 1307, 27 L. J. Exch. 23, 6 Wkly. Rep. 135, so construing the word as used in 17 & 18 Vict. c. 36, § 1, requiring an affidavit of the residence of every attesting witness to a bill of sale.

83. Eichhorn *v.* Louisville, etc., R. Co., 112 Ky. 338, 342, 65 S. W. 797, 23 Ky. L. Rep. 1640.

84. Cesena Sulphur Co. *v.* Nicholson, 1 Ex. D. 428, 452, 45 L. J. Exch. 821, 35 L. T. Rep. N. S. 275, 25 Wkly. Rep. 71.

85. See Baughman *v.* National Water-Works Co., 46 Fed. 4, 5, a case under the removal acts, where it is said: "Taking the decisions of the supreme court ever since it announced this doctrine up to the 122 U. S. Reports, it has always maintained that the terms 'citizenship' and 'residence' in respect of corporations are synonymous; that they mean one and the same thing; that 'residence' is inseparable from 'citizenship;' that the charter fixes citizenship, and residence and citizenship are one and the same thing in their legal import."

21, 30; Aliens, as Qualification For Naturalization, see ALIENS, 2 Cyc. 112 note 20. In Relation to Animal Property — Residence of Owner of Animal, to Be Stated in Certificate of Registration of Brand, see ANIMALS, 2 Cyc. 326; Residence of Taker of Estray, see ANIMALS, 2 Cyc. 360 note 90. In Relation to Appeals — Residence of Appellant, Affecting Right of Appeal, see APPEAL AND ERROR, 2 Cyc. 634 text and note 75; Residence of Surety on Appeal-Bond, as Qualification, see APPEAL AND ERROR, 2 Cyc. 831 text and note 1, note 2; Residence of Surety Required to Be Stated in Undertaking, see APPEAL AND ERROR, 2 Cyc. 838 note 32. In Relation to — Appearances, see APPEARANCES, 3 Cyc. 516, 517 text and notes 4, 5, 521–522 text and notes 12, 13, 14–16, 522, 523 text and notes 17–19; Arrest in Civil Actions, see ARREST, 3 Cyc. 901, 916; Assignments, Effect of Residence of Debtor Upon Diligence of Assignee of Claim, see ASSIGNMENTS, 4 Cyc. 84 note 10; Assignments For Benefit of Creditors, Residence of Insolvent as Affecting Right to Assign, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 130 note 31, 159 note 48. In Relation to Attachment — Residence of Deceased Owner of Property, see ATTACHMENT, 4 Cyc. 413; Residence of Defendant, see ATTACHMENT, 4 Cyc. 430–436 text and notes 81–13, 462, 489, 510, 512, 525; Residence of Parties in Cases Involving Foreign Corporations, see FOREIGN CORPORATIONS, 19 Cyc. 1331–1332 text and notes 87–99, 1332, 1333 text and notes 1, 2, 1333 text and notes 6, 7, 1334 text and notes 8–10, 15; Residence of Plaintiff Affecting Affidavit, see ATTACHMENT, 4 Cyc. 406, 488, 511; Residence of Surety on Bond as Qualification, see ATTACHMENT, 4 Cyc. 535–536 text and note 11. In Relation to — Bastardy, as Basis of Jurisdiction, see BASTARDS, 5 Cyc. 645; Bonds, see APPEAL AND ERROR, 2 Cyc. 831 text and notes 1, 2, 838 note 32; ATTACHMENT, 4 Cyc. 535–536 text and note 11; BONDS, 5 Cyc. 732 text and notes 26, 27; EXECUTORS AND ADMINISTRATORS, 18 Cyc. 129 text and note 56; Bounty, see BOUNTIES, 5 Cyc. 991 note 84; Champerty, Residence of Grantor, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 875–876 text and note 16; Chattel Mortgages, of Mortgagor as Place of Record, see CHATTEL MORTGAGES, 6 Cyc. 1083–1084 text and notes 72–75, 1084 text and notes 79, 80, 1084, 1085 text and notes 81–86. In Relation to Citizenship — As Affecting Expatriation, see CITIZENS, 7 Cyc. 146 text and note 43; As Qualification, see CITIZENS, 7 Cyc. 134 note 3, 141 note 28. In Relation to Commercial Paper — Residence of Accepter or Maker, Abandonment, see COMMERCIAL PAPER, 7 Cyc. 1180; Residence of Accepter or Maker as Place of Presentment For Payment, see COMMERCIAL PAPER, 7 Cyc. 989–991 text and notes 82, 83–86, 991 text and notes 88, 89, 992–995 text and notes 91–3; Residence of Drawee of Bill as Place of Presentment For Acceptance, see COMMERCIAL PAPER, 7 Cyc. 754 note 92; Residence of Party to Be Charged as Place to Give Notice of Dishonor, see COMMERCIAL PAPER, 7 Cyc. 1081 text and note 32, 1091, 1094 text and notes 69–71, 75, 76, 1095, 1117, 1120, 8 Cyc. 244. In Relation to Continuance, Residence of Witness, see CONTINUANCES IN CRIMINAL CASES, 9 Cyc. 181 text and notes 24–26. In Relation to Corporations — Residence of Corporation, in General, see FOREIGN CORPORATIONS, 19 Cyc. 1219 text and note 71; Residence of Corporation as Affecting Garnishment of Its Stock, see FOREIGN CORPORATIONS, 19 Cyc. 1338 text and notes 46–48; Residence of Corporation For Purposes of Jurisdiction Generally, see FOREIGN CORPORATIONS, 19 Cyc. 1324; Residence of Creditor as Affecting Attachment of Property of Domestic Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1334 text and note 15; Residence of Creditor as Affecting Attachment of Property of Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1332–1333 text and notes 1, 2; Residence of Creditor of Foreign Corporation as Affecting Attachment of Its Property For His Debt to Plaintiff, see FOREIGN CORPORATIONS, 19 Cyc. 1334 text and notes 8–10; Residence of Debtor, as Affecting Attachment For Debt to Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1333 text and notes 6, 7; Residence of Defendant as Affecting Garnishment of Foreign Corporation, see FOREIGN CORPORATIONS, 19 Cyc. 1336–1337 text and notes 34–37, 1337 text and note 44; Residence of Director, as Qualification For Office,

see Corporations, 10 Cyc. 737 text and notes 24–26; Residence of Foreign Corporation as Affecting Garnishment, see Foreign Corporations, 19 Cyc. 1337 text and notes 40, 41; Residence of Foreign Corporation as Affecting Jurisdiction in Actions Generally, see Foreign Corporations, 19 Cyc. 1343–1345, text and notes 77–87, 1348 text and note 8; Residence of Foreign Corporation as Prerequisites to Operations in State, see Commerce, 7 Cyc. 445 note 70; Residence of Foreign Corporation For Purposes of Attachment, see Foreign Corporations, 19 Cyc. 1331–1332 text and notes 94–99; Residence of Incorporators, Required to Be Stated in Certificate of Incorporation, see Corporations, 10 Cyc. 225; Residence of Officers, as Affecting Attachment of Property of Foreign Corporation, see Foreign Corporations, 19 Cyc. 1332 text and note 96; Residence of Officers of Foreign Corporations as Affecting Jurisdiction, see Foreign Corporations, 19 Cyc. 1345 text and note 91, 1348 text and note 9; Residence of Plaintiff in Action Against Foreign Corporation as Affecting Jurisdiction, see Foreign Corporations, 19 Cyc. 1338 text and note 51, 1339 text and note 53, 1340 text and notes 59–63, 1341 text and notes 66, 67, 69, 70, 1342–1343 text and notes 72–74, 1344 text and notes 82, 83, 1345, text and note 94, 1346 text and notes 95, 97; Residence of Shareholders Not Affecting Citizenship of Corporation, see Corporations, 10 Cyc. 150 text and note 44. In Relation to — Costs, as Affecting Requirement of Security, see Costs, 11 Cyc. 170, 219 text and notes 74–77; Courts, as Basis of Jurisdiction, see Courts, 11 Cyc. 667, 670, 863; Venue; Creditors' Suits, Residence of Debtor, see Creditors' Suits, 12 Cyc. 11, 34 note 81; Depositions, Residence of Witnesses, Required to Be Stated in Notice, see Depositions, 13 Cyc. 902; Divorce, Residence of Party as Basis of Jurisdiction, see Divorce, 14 Cyc. 584. In Relation to Domicile — In General, see Domicile, 14 Cyc. 831; Distinguished From Domicile, see Domicile, 14 Cyc. 835; Guardian and Ward, 21 Cyc. 24–25 text and note 2; Generally Synonymous in Statutes Relating to Appointment of Guardian, see Guardian and Ward, 21 Cyc. 25 text and note 3. In Relation to Elections, as Qualification For Voter, see Elections, 15 Cyc. 290. In Relation to Exemptions — Affecting Right to Exemption, see Exemptions, 18 Cyc. 1406; Affecting Right to Exemption of Persons From Service of Process, see Process, 32 Cyc. 491 text and notes 41, 42, 492–494 text and notes 45, 56, 494–495 text and notes 58–62. In Relation to Garnishment — As Affecting Jurisdiction, see Garnishment, 20 Cyc. 1035 text and notes 44–47; Residence of Corporation, as Affecting Garnishment of Its Stock, see Foreign Corporations, 19 Cyc. 1338 text and notes 46–48; Residence of Foreign Corporation, see Foreign Corporations, 19 Cyc. 1337, text and notes 40, 41; Residence of Garnishee, Required to Be Shown in Affidavit, see Garnishment, 20 Cyc. 1040 text and note 63; Residence of Plaintiff and Defendant, see Garnishment, 20 Cyc. 1041 note 63; Residence of Principal Defendant as Affecting Garnishment of Foreign Corporation, see Foreign Corporations, 19 Cyc. 1336–1337 text and notes 34–37, 1337 text and note 44. In Relation to Guardian and Ward — In General, Synonymous With Domicile in Statutes Relating to Appointment of Guardian, see Guardian and Ward, 21 Cyc. 25 text and note 3; Not Always Convertible With Domicile, see Guardian and Ward, 21 Cyc. 24–25 text and note 2; Residence of Guardian as Affecting Eligibility to Office, see Guardian and Ward, 21 Cyc. 37 text and notes 9–11; Residence of Minor, as Affecting Jurisdiction to Appoint Guardian, see Guardian and Ward, 21 Cyc. 24–25 text and notes 97–7. In Relation to Homesteads — Acquisition by, of Homestead Claim, see Public Lands, 32 Cyc. 833; Actual Place of, as Subject to Homestead Right, see Homesteads, 21 Cyc. 471 text and note 28, 472 note 28; As Affecting Right, in General, see Homesteads, 21 Cyc. 470; As Means of Acquiring Right, see Homesteads, 21 Cyc. 470 text and note 24; Character of, Constituted by Occupancy, see Homesteads, 21 Cyc. 473 text and notes 46–49; Use of Place of Residence as Affecting Property Set Apart to Survivors as Homestead, see Homesteads, 21 Cyc. 581; Use of Property as Appurtenant to Residence, see Homesteads, 21 Cyc. 476; Within State, of Husband or Widow, as Affecting Widow's

Homestead, see HOMESTEADS, 21 Cyc. 564. In Relation to Indictment — As Proper Description of Dwelling-House, see LARCENY, 25 Cyc. 99 text and note 23; Of Accused, When to Be Stated in Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 324. In Relation to Insolvency — Residence of Creditor, Affecting Result of Discharge of Insolvent, see INSOLVENCY, 22 Cyc. 1348, 1350, 1351 text and notes 29, 32; Residence of Insolvent, Affecting Liability to Involuntary Insolvency, see INSOLVENCY, 22 Cyc. 1273 text and note 1; Residence of Insolvent, Affecting Right to Voluntary Insolvency, see INSOLVENCY, 22 Cyc. 1266 note 55; Residence of Insolvent, as Essential to Jurisdiction, see INSOLVENCY, 22 Cyc. 1266 notes 47, 55, 1353 note 47. In Relation to Interest — In Hostile Territory During Civil War as Suspending Interest, see INTEREST, 22 Cyc. 1563 note 42; Of Parties to Contract For Interest, as Bearing on Their Intent as to Governing Law, see INTEREST, 22 Cyc. 1477 note 42. In Relation to Judgments — Of Defendant as Affecting Jurisdiction in Action on Foreign Judgment, see JUDGMENTS, 23 Cyc. 1582, 1583 text and notes 70–73, 1584–1586 text and notes 76–88; Of Defendant as Affecting Jurisdiction to Render Judgment, in General, see JUDGMENTS, 23 Cyc. 687–689 text and notes 17–22, 689, 690 text and notes 24–28, 693 text and notes 39, 40; Of Parties to Action on Foreign Judgment, see JUDGMENTS, 23 Cyc. 1563 note 49. In Relation to Laches, see EQUITY, 16 Cyc. 167 text and notes 56–58. In Relation to Licenses — As Subject of Discrimination, see LICENSES, 25 Cyc. 610, 611 text and notes 83–87; Required of Applicant For License to Sell Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 122. In Relation to — Life Insurance, as Subject of Warranty or Condition, see LIFE INSURANCE, 25 Cyc. 808, 822, 875; Limitations of Actions, as Affecting Operation of Statute, see LIMITATIONS OF ACTIONS, 25 Cyc. 985 note 23, 1022 text and note 88, 1227, 1417, 1427; Mandamus, see MANDAMUS, 26 Cyc. 434 note 14; Marriage, Residence of Parties, see MARRIAGE, 26 Cyc. 855 note 13. In Relation to Process — As Affecting Redemption From Service, see PROCESS, 32 Cyc. 491 text and notes 41, 42, 492–494 text and notes 45, 46, 494, 495 text and notes 58–62; As Affecting Result of Acceptance or Acknowledgment of Service, see PROCESS, 32 Cyc. 450 text and notes 60–62; As Bearing on Proceedings to Establish Highways, see STREETS AND HIGHWAYS; As Bearing on Substituted Service, see PROCESS, 32 Cyc. 461 text and note 78, 463 text and note 88, 464 note 92, 465 text and notes 11, 12, 466 text and notes 14–18, 468 text and note 31, 470 text and notes 51–56, 471 text and notes 60, 61, 472 text and notes 63–65, 473 text and note 79, 475 text and note 3, 475, 476 text and note 4, 477 text and notes 10, 11, 478 text and notes 25–27, 480 note 41, 482 text and note 64, 488 text and note 11, 504 text and note 29, 506 text and note 35; As Ground For Setting Aside For Defective Service, see PROCESS, 32 Cyc. 522 text and note 95; As Place For Leaving Copy, see PROCESS, 32 Cyc. 462, 465 text and notes 8, 9; JUSTICES OF THE PEACE, 24 Cyc. 523; In Defendant's House as Qualification to Receive Copy, see PROCESS, 32 Cyc. 465 text and note 8; Lack of, in Any Particular County, as Affecting Service, see PROCESS, 32 Cyc. 455 text and note 15; Of Infant as Affecting Service, see INFANTS, 22 Cyc. 679; Service in Cross Action Against Non-Resident, see PROCESS, 32 Cyc. 456 note 18. In Relation to Public Lands — On Homestead Claim, see PUBLIC LANDS, 32 Cyc. 833; On Lands Granted to Individual Indians, see INDIANS, 22 Cyc. 134. In Relation to — Set-Off, see SET-OFF AND COUNTER-CLAIM; Taxation, see TAXATION; Venue, in General, see VENUE. Of Absentee, see ABSENTEES, 1 Cyc. 202 text and note 2, 203 note 3, 208 text and note 97. Of Alien, see ALIENS, 2 Cyc. 84, 112 note 20. Of Attorney — Affecting Exemption From Service of Process, see PROCESS, 32 Cyc. 491 text and notes 41, 42; Removal From State as Ending Relation With Client, see ATTORNEY AND CLIENT, 4 Cyc. 954 text and notes 40, 41. Of Grand Juror, as Qualification, see GRAND JURIES, 20 Cyc. 1296. Of Husband and Wife — As Affecting Property Rights of Wife, see HUSBAND AND WIFE, 21 Cyc. 1366 text and note 93; As Domicile, Husband's Right to Choose, see HUSBAND AND WIFE, 21 Cyc. 1150. Of Indian, on Individual Grant, see INDIANS, 22 Cyc. 134. Of Infant — Affecting Appoint-

ment of Guardian Ad Litem, see INFANTS, 22 Cyc. 637 text and notes 62–64; Affecting Liability of Parent to Support Child, see PARENT AND CHILD, 29 Cyc. 1609; Affecting Right of Action For Injury to Child or Loss of Service, see PARENT AND CHILD, 29 Cyc. 1639; As Jurisdictional Requisite to Judicial Emancipation, see INFANTS, 22 Cyc. 518 text and note 53; In Relation to Substituted Service, see INFANTS, 22 Cyc. 679; With Parent, see PARENT AND CHILD, 29 Cyc. 1584 text and notes 15, 16. Of Insane Person — As Relating to Venue of Commission in Lunacy, see INSANE PERSONS, 22 Cyc. 1122 text and notes 55–57; To Be Certified in Fixing Liability For Removal and Maintenance Upon Poor District, see INSANE PERSONS, 22 Cyc. 1222 note 91. Of Judge — As Qualification For Office, see JUDGES, 23 Cyc. 510 text and note 46; Bearing on Vacancy of Office, see JUDGES, 23 Cyc. 507 text and note 40, 517 text and notes 20, 21, 22; Of Special Judge, see JUDGES, 23 Cyc. 607 text and notes 39, 40. Of Juror, as Qualification, see JURIES, 24 Cyc. 700; GRAND JURIES, 20 Cyc. 1296. Of Officers, in General, as Qualification, see OFFICERS, 29 Cyc. 1377. Of Pauper — As Mode of Acquiring Settlement, see PAUPERS, 30 Cyc. 1092; Liability of Place of Residence For Support, see PAUPERS, 30 Cyc. 1127 text and note 39, 1128. Of Real Estate Broker, see FACTORS AND BROKERS, 19 Cyc. 188 note 75. Of Tenant, as Purpose of Lease, see LANDLORD AND TENANT, 24 Cyc. 1049 text and note 44. Of Wife — As Affecting Her Right to Sue and Be Sued, see HUSBAND AND WIFE, 21 Cyc. 1514 text and note 17; With Husband, see HUSBAND AND WIFE, 21 Cyc. 1366 text and note 93. Ordinary Residence, see ORDINARY, 29 Cyc. 1525 text and note 48. Private Residence, see PRIVATE, 32 Cyc. 357 note 65. See also HABITANCY, 21 Cyc. 354; HABITATION, 21 Cyc. 355; NON-RESIDENCE, 29 Cyc. 1061; RESIDE; RESIDENT.)

RESIDENT. As an adjective, dwelling or having abode in any place, living, inhabiting, abiding, residing;[86] also used in the sense of "pertaining to residents."[87] As a noun, a dweller, or one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor, unless the statutory signification gives to the term when used in a par-

86. Worcester Dict. [*quoted* in Brisenden *v.* Chamberlain, 53 Fed. 307, 311].

"Having his home."— The word has been so construed as used in Me. Rev. St. c. 32, § 1, relating to paupers. Kennebunkport *v.* Buxton, 26 Me. 61, 68.

Never synonymous with "present" in any of its applications see Evans *v.* Perrine, 35 N. J. L. 221, 223.

"Person resident" is defined to be one "dwelling, or having his abode in any place." Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, 211 [*quoted* in Crawford *v.* Wilson, 4 Barb. (N. Y.) 504, 520]; Drake Attachm. § 59 [*quoted* in Munroe *v.* Williams, 37 S. C. 81, 86, 16 S. E. 533, 19 L. R. A. 665].

"Resident brother" as used to classify certain members of a mutual benefit society was held not to refer to the legal residence of members so described, but to designate one who at the time of claiming benefits is within the jurisdiction of the "tribe." Walsh *v.* Consumnes Tribe No. 14 I. O. R. M., 108 Cal. 496, 500, 41 Pac. 418.

"Resident citizen."— The adjective "resident" preceding "citizen" said to be quite as forcible to indicate a fixed home as "permanent residence." Powers *v.* Bryant, 7 Port. (Ala.) 9, 15.

"Resident owners," as petitioners for improvement of public roads under Ohio St. April 4, 1900, means residents of the county and not merely of the assessment district. Alexander *v.* Baker, 74 Ohio St. 258, 266, 268, 78 N. E. 366.

"A resident pauper is one who has a legal settlement in some town in the state, and is residing in a town in which aid is needed, and liable to be removed to the town of legal settlement, or to an order of removal to such town." Topsham *v.* Williamstown, 60 Vt. 467, 471, 12 Atl. 112.

Resident proprietor as used in Me. St. (1844) c. 123, § 10, relating to taxation is defined by Me. St. (1849) c. 131, § 1, as "owner or occupant." Hobbs *v.* Clements, 32 Me. 67, 68.

"Inhabitant or usually resident," in Okla. St. (1893) § 4952, excepting from the period of limitation the time during which the defendant is not "an inhabitant or usually resident within the territory," intends "open public residence as persons ordinarily reside in and inhabit a place, living and moving about in the ordinary way," and is not satisfied by occasional returns for brief periods or retiring or living secretly or in a concealed manner in the territory after flight therefrom. Coleman *v.* Territory, 5 Okla. 201, 207, 47 Pac. 1079.

"Ordinarily resident" given "the same interpretation as 'residence' has received in settlement and election cases" see Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513.

87. See *infra*, this note.

"Resident license" as used in Mo. St.

ticular connection, a meaning different from its grammatical import or that which it usually bears in common parlance;[88] a person coming into a place with intent to establish a domicile or permanent residence, and who in consequence actually remains there;[89] one who resides or dwells in a place for some

(1905) § 57, providing for issue of a resident license to hunt, means state license to residents of the county, and does not mean to make the license a county license. State *v.* Koock, (Mo. App. 1906) 96 S. W. 721, 723.

88. Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513, so defining the word as used "in ordinary phraseology."

A word which has different meanings according to the context (Edwards *v.* St. John, 22 N. Brunsw. 297, 305), and the purposes for which it is construed (see Mellish *v.* Van Norman, 13 U. C. Q. B. 451, 455 [*cited* in Ladouceur *v.* Salter, 6 Ont. Pr. 305, 306]).

"The term . . . has not a technical meaning. In some statutes, and for some purposes, it means one thing; in other statutes, and for other purposes, it means another thing." U. S. *v.* Nardello, 4 Mackey (D. C.) 503, 512.

Not easy to define satisfactorily see Brisenden *v.* Chamberlain, 53 Fed. 307, 311.

Perhaps the most satisfactory definition is that one is a resident of a place from which his departure is indefinite as to time, definite as to purpose, and for this purpose he has made the place his temporary abode. Brisenden *v.* Chamberlain, 53 Fed. 307, 311.

Includes women where no reason appears to the contrary, as in local option as to the sale of intoxicants. Blackwell *v.* State, 36 Ark. 178, 183, 184.

Applied to owner living upon the land as distinguished from "occupant" in tax laws see Toronto Bank *v.* Fanning, 17 Grant Ch. (U. C.) 514, 516.

"Actual resident" see Rix *v.* McHenry, 7 Cal. 89, 92 (holding that actual and not constructive presence is required by the California Homestead Act, § 2); Hamill *v.* Talbott, 81 Mo. App. 210, 215 (holding that actual residence is required for purposes of jurisdiction in divorce); Reg. *v.* Oxford University, L. R. 7 Q. B. 471, 473, 474 [*distinguished* in People *v.* Platt, 50 Hun (N. Y.) 454, 461, 3 N. Y. Suppl. 367].

Corporations included or not.—The ordinary reference of the word is to a natural person, and when construed otherwise the general purpose and spirit of the law must require it. State *v.* Haight, 35 N. J. L. 279, 283. A corporation may be considered as a resident, inhabitant, or citizen, for some purposes, such as jurisdiction and venue. State *v.* Metz. 32 N. J. L. 199, 203 [*cited* in State *v.* Haight, *supra*]. Held not to apply to corporations in New Jersey statute March 6, 1863, providing that residents of the state cannot be taxed for property belonging to them without the state. State *v.* Metz, *supra* [*cited* in State *v.* Haight, *supra*]. A domestic corporation must be a resident of some county within the meaning of N. Y. Const. art. 6, § 14, providing that the jurisdiction of county courts shall not extend to an action in which any person not a resident of the county shall be a defendant. Maisch *v.* New York, 127 N. Y. App. Div. 424, 426, 111 N. Y. Suppl. 645. Corporations are not residents of towns except by construction, independently of statutes rendering them liable as residents. People *v.* Schoonmaker, 63 Barb. (N. Y.) 44, 51.

89. Bouvier L. Dict. [*quoted* in Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85]; U. S. *v.* Penelope, 27 Fed. Cas. No. 16,024, 2 Pet. Adm. 438, adding: "Under this intention he takes a house, or lodgings, as one fixed and stationary, and opens a store, or takes any step preparatory to business, or in execution of this settled intention." Construing the term as used in non-intercourse laws relating to San Domingo, the report seems to show a quotation from Hylton *v.* Brown, 12 Fed. Cas. No. 6,981, 1 Wash. 298, where, however, the passage does not appear.

Intent and permanence.—As defined by Iowa Code, § 3076, relating to exemptions, "Any person coming into the state with the intention of remaining shall be considered a resident," within the meaning of the chapter relating to exemptions, and this has been held to include a person who has been at his intended district or residence but a few hours stopping in a tent, without any fixed place of abode. Cox *v.* Allen, 91 Iowa 462, 469, 59 N. W. 335. Implies a less fixed and permanent abode than "inhabitant." See Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423 [*quoted* in Tazewell County *v.* Davenport, 40 Ill. 197, 206 (*cited* in McFarlane *v.* Cornelius, 43 Oreg. 513, 522, 73 Pac. 325, 74 Pac. 468)]. As affecting jurisdiction, the word "involves the idea both of a dweller and of permanency." Routenberg *v.* Schweitzer, 50 N. Y. App. Div. 218, 220, 63 N. Y. Suppl. 746 [*reversed* in 165 N. Y. 175, 177, where, without objection to the proposition above quoted, it was held that Greater N. Y. Charter, § 1370, subd. 3, authorizes a non-resident defendant having a place for the regular transaction of business in the city to be treated as a resident]. The word does not include, within the meaning of an act for relief against absconding debtors, one who comes into the state on a commercial venture, without any intention of settling there. Matter of Fitzgerald, 2 Cai. (N. Y.) 318, 319 [*cited* in Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85; Frost *v.* Brisbin. 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423]. In relation to settlements of paupers, the word refers to "a locality of existence as permanent and firmly fixed as is legally conveyed by the word 'domicile.'" *In re* Hector, 24 N. Y. Suppl. 475, 481 [*quoted* in Syracuse *v.* Onondaga County, 25 Misc. (N. Y.) 371, 375, 55 N. Y. Suppl. 634]. For attachment in New York, one who has abandoned his native land and is living in New York with no intention of going elsewhere is held a resident of that state. Heid-

time;[90] inhabitant; one who resides in a place;[91] an inhabitant, one who resides

enbach *v.* Schland, 10 How. Pr. (N. Y.) 477, 478. "He is not said to be resident in a place who comes thither with a purpose of returning immediately." Brisenden *v.* Chamberlain, 53 Fed. 307, 311. "A mere transitory coming for a special purpose, a mere transient visit, does not fall within the legal meaning of the word 'resident.' He must have the intent of staying, or abiding, for permanent purposes; and begin it, though he does not continue to prosecute it." U. S. *v.* Penelope, 27 Fed. Cas. No. 16,024, 2 Pet. Adm. 438. The word "does not necessarily import permanence, nor yet any definite stay." La Pointe *v.* Grand Trunk R. Co., 26 U. C. Q. B. 479, 487. See also *infra*, text and note 91.

"Transient is the opposite of resident. The latter describes a person at rest in a town, while the former describes him in his passage through or across it." New Haven *v.* Middlebury, 63 Vt. 399, 404, 21 Atl. 608, comparing resident and transient paupers.

The time is not so essential as intent executed by making or beginning the actual establishment, though it is abandoned in a shorter or longer period. U. S. *v.* Penelope, 27 Fed. Cas. No. 16,024, 2 Pet. Adm. 438.

Domicile.— For purposes of jurisdiction in divorce, the word contemplates actual residence with substantially the same attributes as are attributed to domicile; and is not the place where the defendant in fact resides for the time being but a residence of a fixed and permanent character. Hamill *v.* Talbott, 81 Mo. App. 210, 215. In New York decisions relating to jurisdiction, the word is synonymous with "domiciled person." Hunt *v.* Hunt, 72 N. Y. 217, 240, 28 Am. Rep. 129 [*quoted* in Hammond *v.* Hammond, 103 N. Y. App. Div. 437, 443, 93 N. Y. Suppl. 1].

Merely doing business in a city does not constitute the person a resident. Wallace *v.* Castle, 68 N. Y. 370, 374.

"Resident of the state" is one who resides permanently or for a time in the state. It is error to define the word as used in relation to attachment as "one who has a fixed abode within the state, and not one whose residence is only temporary, or who is sojourning in the state for a temporary purpose only, with the intention of removing from the state when such temporary purpose is performed." Mann *v.* Taylor, 78 Iowa 355, 362, 363, 43 N. W. 220. A resident within the state is one who has a residence of a fixed or permanent character. Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85.

"Resident of another State."— In Va. St. March 17, 1856, intended to protect slave property, and subjecting to search vessels owned in whole or in part by any citizen or "resident," of another state and about to sail, the word is not used in any of its ordinary senses but to indicate those whose non-residence is of such a character that they are not amenable to the process of the courts of the state. Baker *v.* Wise, 16 Gratt. (Va.) 139, 212, 213, 219.

Compatible with absence.— The word may be applied to a person dwelling abroad but retaining residence in New York. De Meli *v.* De Meli, 5 N. Y. Civ. Proc. 306, 308 [*cited* in Weitkamp *v.* Loehr, 11 N. Y. Civ. Proc. 36, 41]. "One who, though absent in person, has here his home and permanent abiding place." So defined within the meaning of the Virginia statutes see 2 Barton L. Pr. 915 [*quoted* in Griffin *v.* Woolford, 100 Va. 473, 479, 41 S. E. 949]. A residence where one's wife and family reside and to which one can return at any time has been held sufficient to confer franchise. Taylor *v.* St. Mary Abbott Parish, L. R. 6 C. P. 309, 311, 1 Hopw. & C. 421, 40 L. J. C. P. 45, 23 L. T. Rep. N. S. 493, 19 Wkly. Rep. 100 [*quoted* in Edwards *v.* St. John, 22 N. Brunsw. 297, 305].

90. *Ex p.* Blumer 27 Tex. 734, 736.

91. Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, 211 [*doubted* in Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423, where it is said: "Approved lexicographers give a more fixed and definite character to the place of abode of one than of the other," which "frequently imports many privileges and duties which a mere resident could not claim or be subject to"].

Regarded as synonymous with inhabitant see Helle *v.* Deerfield Tp., 96 Ill. App. 642, 643 (where "resident" is said to be, of the two, more generally used in this country and probably the better understood); People *v.* Platt, 50 Hun (N. Y.) 454, 458, 3 N. Y. Suppl. 367 (defining the term as describing a qualification for commissioners of quarantine); Bell *v.* Pierce, 48 Barb. (N. Y.) 51, 53 (where it is said, in connection with tax laws, "The words are used as convertible terms"); Ensign *v.* Ensign, 54 Misc. (N. Y.) 291, 295, 296, 105 N. Y. Suppl. 917 (defining the word as used in N. Y. Code Civ. Proc. § 1673); Matter of Walker, 54 Misc. (N. Y.) 177, 180, 105 N. Y. Suppl. 890 (describing the word as used in N. Y. Code Civ. Proc. § 2476, subd. 1); Roosevelt *v.* Kellogg, 20 Johns. (N. Y.) 208, 210 [*cited* in *In re* Wrigley, 8 Wend. (N. Y.) 134, 140, and *doubted* in Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423]; Drake Attachm. (7th ed.) § 59 [*quoted* in Munroe *v.* Williams, 37 S. C. 81, 85, 86, 16 S. E. 533, 19 L. R. A. 665]; Brown *v.* Boulden, 18 Tex. 431, 434; Ullman *v.* State, 1 Tex. App. 220, 222, 28 Am. Rep. 405; U. S. *v.* The Penelope, 27 Fed. Cas. No. 16,024, 2 Pet. Adm. 438; Wanzer Lamp Co. *v.* Woods, 13 Ont. Pr. 511, 513, 514.

Distinguished from inhabitant see Tazewell County *v.* Davenport, 40 Ill. 197, 207; Harvard College *v.* Gore, 5 Pick. (Mass.) 370, 372; Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 13, 32 Am. Dec. 423; Abbott L. Dict. [*quoted* in Givanovich's Succession, (La. 1897) 24 So. 679, 680, in an opinion not given in the report in 50 La. Ann. 625]. See also Isham *v.* Gibbons, 1 Bradf. Surr. (N. Y.) 69, 81, where, after pointing out that the cases holding resident and inhabitant synonymous relate to statutes regulating the rights of creditors with a leaning toward a liberal construction in their favor and contemplating actual

or dwells in a place for some time;[92] one who has a residence in a legal sense;[93] one who has a seat or settlement in a place, one who dwells, abides, or lives in a place;[94] one who has residence in a place.[95] (See NON-RESIDENT, 29 Cyc. 106; RESIDE; RESIDENCE, *ante*, p. 1645, and Cross-References Thereunder.)

RESIDENT FREEHOLDER. A term which requires that both residence and freehold be in that locality in connection with which the term is used.[96] (See FREEHOLDER, 20 Cyc. 843.)

RESIDENT HOUSEHOLDER. A term of doubtful purport, as to the degree of localization implied.[97] (See EXEMPTIONS, 18 Cyc. 1404; HOUSEHOLDER, 21 Cyc. 1113.)

RESIDUARY ACCOUNT. In English practice, the account which every executor and administrator after paying the debts and particular legacies of the deceased and before paying over the residuum must pass before the Board of Inland Revenue.[98] (See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 351. See also RESIDUE, *post*, p. 1659.)

RESIDUARY BEQUEST. That which consists of the residue of the estate and not of a particular article.[99] (Residuary Bequest: Generally, see BEQUEST, 5 Cyc. 683; RESIDUARY LEGACY, *post*, p. 1659; RESIDUE, *post*, p. 1659; WILLS. As Differing in Effect From Residuary Devise, see RESIDUE, *post*, p. 1661, note 22.)

RESIDUARY CLAUSE. The clause in a will by which that part of the property is disposed of which remains after satisfying bequests and devises.[1] (See CLAUSE, 7 Cyc. 185; RESIDUE, *post*, p. 1659; WILLS.)

residence without regard to domicile, it is said that as far as the New York laws and constitution generally speak of residence, the idea of a fixed and permanent dwelling seems to be involved and is suggested; that the meaning of residence, as that of domicile, has been confused by neglect to distinguish between its different uses.

"'Resident,' 'domicile,' 'citizen,' and 'inhabitant' are used indiscriminately" in nearly all cases on jurisdiction for judgment *in personam* "to signify an actual permanent residence which has not been actually and in good faith changed." De la Montanya *v.* De la Montanya, 112 Cal. 101, 127, 44 Pac. 345, 53 Am. St. Rep. 165, 32 L. R. A. 82.

92. Burrill L. Dict. [*quoted* in Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 260, 263].

93. Century Dict. [*quoted* in Brisenden *v.* Chamberlain, 53 Fed. 307, 311].

94. Burrill L. Dict. [*quoted* in Brown *v.* Ashbough, 40 How. Pr. (N. Y.) 260, 263; Houghton *v.* Ault, 16 How. Pr. (N. Y.) 77, 85].

Compared with "settler" see Hume *v.* Gracy, 86 Tex. 671, 673, 27 S. W. 584.

95. Bouvier L. Dict. [*quoted* in Coleman *v.* Territory, 5 Okla. 201, 208, 47 Pac. 1079].

96. See Pittsburgh, etc., R. Co. *v.* Indianapolis, 147 Ind. 292, 295, 46 N. E. 641; Kirkland *v.* Indianapolis Bd. of Public Works, 142 Ind. 123, 129, 41 N. E. 374; State *v.* Kokomo, 108 Ind. 74, 78, 8 N. E. 718; Damp *v.* Dane, 29 Wis. 419, 427.

97. See Ross *v.* Banta, 140 Ind. 120, 141 (where the court declined to decide whether a resident of Indiana who was a householder in New Mexico was a "resident householder" within the meaning of Ind. Rev. St. (1881) § 703); Ross *v.* Banta, (Ind. 1893) 34 N. E. 865, 871 (where the opinion, which seems identical up to that point with that in 140 Ind. *supra*, there proceeds to argue that the householding and residence must have the same localization, and note that report in 140 Ind. is of November term, 1894, while that in 34 N. E. is dated September, 1893); Mark *v.* State, 15 Ind. 98, 100 (holding that the term applies to residents of the state without more narrow localization).

98. Black L. Dict.

99. Patterson *v.* Devlin, McMull. Eq. (S. C.) 459, 468.

"Such words as 'rest,' 'residue,' 'remainder,' are not indispensable to a residuary bequest" see Schouler Wills (3d ed.), § 522 [*quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 568, 49 S. E. 966].

Effect.— "A general residuary bequest carries with it everything not in terms disposed of, and with . . . exceptions . . . in connection with the subject of lapsed and void legacies, everything not effectually or well disposed of, as well as lapsed legacies, unless a contrary intent clearly appear from the will." Woerner Am. L. Adm. (2d ed.) § 462 [*quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 568, 49 S. E. 966]. "It seems to be well settled that a residuary bequest as to personal estate carries not only everything not attempted to be disposed of, but everything which turns out not to have been effectually disposed of, as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee, as to personalty, against every other person except the particular legatee." 2 Redfield Wills (3d ed.) 115 [*quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 571, 49 S. E. 966].

1. Bouvier L. Dict. [*quoted* in Jewett *v.* Jewett, 21 Oho Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131].

No particular form of expression is necessary to constitute a residuary clause and the words therein are given the widest possible scope because it is presumed that the tes-

RESIDUARY DEVISE. A devise of the balance of the whole from which a previous devise or devises had taken a part.[2] (Residuary Devise: Generally, see DEVISE, 14 Cyc. 284; RESIDUARY DEVISEE; RESIDUARY LEGACY; RESIDUE; WILLS. As Differing in Effect From Residuary Legacy or Residuary Bequest, see RESIDUE, *post*, p. 1661 note 22.)

RESIDUARY DEVISEE. The person to whom the residue of a testator's estate is devised after satisfying previous devises.[3] (See DEVISEE, 14 Cyc. 385; RESIDUARY LEGATEE, and Cross-References Thereunder; RESIDUE; WILLS.)

RESIDUARY ESTATE. What remains of testator's estate after deducting the debts and the bequests and devises.[4] (See RESIDUE; WILLS; and, generally, ESTATES, 16 Cyc. 595.)

RESIDUARY LEGACY. A legacy which embraces only that which remains after all the other bequests have been discharged.[5] (Residuary Legacy: Generally, see LEGACY, 25 Cyc. 172; RESIDUARY BEQUEST, *ante*, p. 1658; RESIDUARY DEVISE; RESIDUARY LEGATEE; RESIDUE; WILLS. As Differing in Effect From Residuary Devise, see RESIDUE, *post*, p. 1661 note 22.)

RESIDUARY LEGATEE. He to whom the residuum of the estate is left by will;[6] a person to whom is given a gift of the residue of the estate after payment of debts and legacies.[7] (Residuary Legatee: In General, see RESIDUE; WILLS. As Executor, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 130, 306 note 79, 603. As Plaintiff in Suit in Equity For Legacy, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 35. Sole Beneficiary also Representative Suing in Individual Capacity, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 880. See also LEGATEE, 25 Cyc. 179; RESIDUARY LEGACY.)

RESIDUE. A remainder; what is left; the rest;[8] that which remains;[9] that

tator by will intended to dispose of his whole estate. Barker *v.* Petersburg, 41 Ind. App. 447, 82 N. E. 996, 997.

2. Jewett *v.* Jewett, 21 Ohio Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131.

"A general residuary devise carries every real interest, whether known or unknown, immediate or remote, unless it is manifestly excluded. The intention to include is presumed, and an intention to exclude, must appear from other parts of the will, or the residuary devisee will take." Floyd *v.* Carow, 88 N. Y. 560, 568.

3. Bouvier L. Dict. [*quoted* in Jewett *v.* Jewett, 21 Ohio Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131].

4. Bouvier L. Dict. [*quoted* in Jewett *v.* Jewett, 21 Ohio Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131].

Something must be left over when the provisions of the will have been fulfilled in order that there may be what is termed a "residuary estate." Wetmore *v.* St. Luke's Hospital, 56 Hun (N. Y.) 313, 318, 9 N. Y. Suppl. 753.

"Residuary personal estate" as the term was used in a certain will, after reference to specific legacies, was held to include the whole estate after taking out those legacies, and not to be confined to the strict residue. Court *v.* Buckland, 1 Ch. D. 605, 609, 45 L. Ch. 214.

5. Cal. Civ. Code, § 1357 [*quoted* in Williams' Estate, 112 Cal. 521, 526, 44 Pac. 808, 53 Am. St. Rep. 224].

Distinguished from legacy of definite amount or as designated in a will "special legacy" see Derby *v.* Derby, 4 R. I. 414, 423.

6. Probate Ct. *v.* Matthews, 6 Vt. 269, 275.

Sufficient to show the intention that the residuum of the testator's estate, real and personal, pass to the person so designated. Laing *v.* Barbour, 119 Mass. 523, 525.

"No particular form of words is necessary to constitute a residuary legatee; any expression is sufficient from which the testator's intention is discernible that the person designated shall take the surplus. Nor is it of controlling consequence that the clause is not the last of the disposing provisions, though such is the usual position." Woerner Am. L. Adm. (2d ed.) § 462 [*quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 567, 49 S. E. 966].

Legatee of particular residue.— Where the words of a residuary clause are of themselves sufficient to constitute the person named therein a residuary legatee, a clear expression in the will or special words of unmistakable import are required to render him the legatee of a particular, instead of a general, residue. Morton *v.* Woodbury, 153 N. Y. 243, 47 N. E. 283 [the head note of which case is *quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 571, 49 S. E. 966].

"To entitle a residuary legatee to the benefit of a lapsed or void bequest . . . he must be a legatee of the residue generally, and not partially so." King *v.* Woodhull, 3 Edw. (N. Y.) 79, 82.

7. See Probate Ct. *v.* Matthews, 6 Vt. 269, 275.

8. Hulin *v.* Squires, 63 Hun (N. Y.) 352, 360, 18 N. Y. Suppl. 309.

Equivalent to "rest" see Bragaw *v.* Bolles, 51 N. J. Eq. 84, 90, 25 Atl. 947.

9. Barker *v.* Petersburg, 41 Ind. App. 447, 82 N. E. 996, 997.

which remains of something after taking away a part of it;[10] that which remains after a part is taken, separated, removed, or dealt with in some other way;[11] that which remains after a part is taken, separated, removed, or designated;[12] what is left after something else has been taken out;[13] what is left of a number or a quantity after something has been abstracted.[14] Of an estate, that which remains after all paramount claims are satisfied;[15] that which remains after discharging all legal and testamentary claims on the estate;[16] all that property which remains after paying charges and debts and satisfying all legacies and devises;[17] that portion of the estate which is left after payment of charges, debts, and particular legacies;[18] the surplus of the testator's estate remaining after all the debts and particular legacies have been discharged;[19] what remains after the payment of debts, funeral charges, expenses of administration, and legacies;[20] all property subject to be bequeathed by a person, not otherwise effectually disposed of;[21] all of which no effectual disposition is made by the will, other than the residuary clause,[22]

10. Bouvier L. Dict. [*quoted* in Phelps *v.* Robbins, 40 Conn. 250, 264; Jewett *v.* Jewett, 21 Ohio Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131; Morgan *v.* Huggins, 48 Fed. 3, 5, 9 L. R. A. 540 (reading "some" instead of "a")].

11. Century Dict. [*quoted* in Young *v.* Quimby, 98 Me. 167, 170, 56 Atl. 656].

12. Webster Dict. [*quoted* in Young *v.* Quimby, 98 Me. 167, 170, 56 Atl. 656].

13. Addeman *v.* Rice, 19 R. I. 30, 32, 31 Atl. 429.

14. Johnson *v.* Poulson, 32 N. J. Eq. 390, 395 [*quoted* in Stevens *v.* Flower, 46 N. J. Eq. 340, 344, 19 Atl. 777].

15. *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393, adapting the definition from Tomlinson *v.* Bury, 145 Mass. 346, 347, 14 N. E. 137, 1 Am. St. Rep. 464, where it is said: "Nothing is given by a residuary clause except upon the condition that something remains after all paramount claims upon the testator's estate are satisfied."

"The residue of the estate" in a statute providing that after certain enumerated expenditures the decree may assign it "evidently embraces all the estate, both real and personal, which is to be affected by the 'decree.'" Wood *v.* Myrick, 16 Minn. 494, per McMillan, J.

"The residue of 'the testator's estate and effects,' means what is left after all liabilities are discharged and all the purposes of the testator are carried into effect." Graves *v.* Howard, 56 N. C. 302, 305 [*quoted* in Morgan *v.* Huggins, 48 Fed. 3, 5, 9 L. R. A. 540].

Of personal estate, "the personal estate which remains after payment of the testator's debts, funeral and testamentary expenses, and the costs of administration of the estate including the costs of an administration suit." Kennedy *v.* Protestant Orphan's Home, 25 Ont. 235, 239. "It appears to have been long-settled law that there is no residue of personal estate until after payment of the debts, funeral and testamentary expenses, and all costs of the administration of the estate of the testator. Therefore, until you have paid the costs, you do not arrive at the net residue." Trethewy *v.* Helyar, 4 Ch. D. 53, 56, 46 L. J. Ch. 125 [*cited* in Kennedy Protestant Orphan's Home, *supra*, and *followed* in Fenton *v.* Wills, 7 Ch. D. 33, 34, 47 L. J. Ch. 191, 67 L. T. Rep. N. S. 373, 26 Wkly. Rep. 139]. "That which remains after payment of all that is properly a charge upon it, that is to say, the debts, the funeral and testamentary expenses, and the legacies." Field *v.* Peckett, 29 Beav. 568, 571, 7 Jur. 983, 30 L. J. Ch. 811, 4 L. T. Rep. N. S. 459, 9 Wkly. Rep. 525, 54 Eng. Reprint 748.

16. Eyre *v.* Marsden, 3 Jur. 450, 452, 4 Myl. & C. 231, 18 Eng. Ch. 231, 41 Eng. Reprint 91 [*quoted* in *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393].

17. Leahy *v.* Cardwell, 14 Oreg. 171, 172, 12 Pac. 307.

18. Phelps *v.* Robbins, 40 Conn. 250, 264 [*quoted* in Stevens *v.* Underhill, 67 N. H. 68, 72, 36 Atl. 370, substituting "bequests" for legacies]; Leahy *v.* Cardwell, 14 Oreg. 171, 173, 12 Pac. 307 (substituting "bequests" for "legacies" and adding: "It is the proper ascertainment of these, their payment and discharge, which creates the residue and makes it tangible as such"); *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393].

19. 2 Blackstone Comm. 514 [*quoted* in Leahy *v.* Cardwell, 14 Oreg. 171, 172, 12 Pac. 307].

Held equivalent to "surplus" see Jauretche *v.* Proctor, 48 Pa. St. 466, 471.

Distinguished from "surplusage" see Bragaw *v.* Bolles, 51 N. J. Eq. 84, 90, 25 Atl. 947.

20. Addeman *v.* Rice, 19 R. I. 30, 32, 31 Atl. 429.

21. See Harrington *v.* Pier, 105 Wis. 485, 499, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307 [*quoted* in *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393].

22. Skrymsher *v.* Northcote, 1 Swanst. 566, 570, 36 Eng. Reprint 507, 1 Wis. Ch. 248, 37 Eng. Reprint 108, 18 Rev. Rep. 142 [*quoted* in Sturgis *v.* Work, 122 Ind. 134, 138, 22 N. E. 996, 17 Am. St. Rep. 349 (quoting without citing the source); Floyd *v.* Carow, 88 N. Y. 560, 571; Prison Assoc. *v.* Russell, 103 Va. 563, 568, 49 S. E. 966; *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393; 1 Jarman Wills 764 (*quoted* in Morton *v.* Woodbury, 153 N. Y. 243, 257, 47 N. E. 283 [*quoted* in Gallavan *v.* Gallavan, 31 Misc. (N. Y.) 282, 284, 64 N. Y. Suppl. 329]), and *cited* in Beekman *v.* People, 27 Barb. (N. Y.) 260, 282].

with certain possible exceptions;[23] that only which remains undisposed of after satisfying all particular legacies and devises including any which may

Ineffectual disposition of portion of residue. — Where the residue is divided by the will and the disposal of one part is ineffectual, such part does not follow the other parts but is subject of an intestacy. Booth *v.* Baptist Church of Christ, 126 N. Y. 215, 245, 28 N. E. 238; Kerr *v.* Dougherty, 79 N. Y. 327, 346; Beekman *v.* Bonsor, 23 N. Y. 298, 312, 80 Am. Dec. 269; Hulin *v.* Squires, 63 Hun (N. Y.) 352, 360, 18 N. Y. Suppl. 309; Norris' Estate, 15 Pa. Dist. 449, 450; Prison Assoc. *v.* Russell, 103 Va. 563, 49 S. E. 966, 969; Harrington *v.* Pier, 105 Wis. 485, 498, 82 N. W. 345, 76 Am. St. Rep. 924, 50 L. R. A. 307; Skrymsher *v.* Northcote, 1 Swanst. 566, 570, 36 Eng. Reprint 507, 1 Wils. Ch. 248, 37 Eng. Reprint 108, 18 Rev. Rep. 142; 1 Jarman Wills 764 [*quoted* in Morton *v.* Woodbury, 153 N. Y. 243, 257, 47 N. E. 283].

No particular form of words is required to pass a residue. Delehanty *v.* St. Vincent's Orphan Asylum, 56 Hun (N. Y.) 55, 58, 8 N. Y. Suppl. 797 [*affirmed* in 134 N. Y. 612, 31 N. E. 629]. The following expressions have been held sufficient to pass a residue of realty and personalty: "Balance of my estate" (Holy Cross Roman Catholic German Church *v.* Wachter, 42 Barb. (N. Y.) 43, 50 [*cited* in Delehanty *v.* St. Vincent's Orphan Asylum, 56 Hun (N. Y.) 55, 58, 8 N. Y. Suppl. 797]; Grimes *v.* Smith, 70 Tex. 217, 220, 8 S. W. 33 [*cited* in Delehanty *v.* St. Vincent's Orphan Asylum, *supra*]); "my books and furniture and all other things" (*In re* Cadge, L. R. 1 P. & D. 543, 37 L. J. P. & M. 15, 17 L. T. Rep. N. S. 484, 16 Wkly. Rep. 406 [*cited* in Delehanty *v.* St. Vincent's Orphan Asylum, *supra*]).

"Residue of each share." — In a will giving to each son one half of his share in certain ways and leaving the residue of each share in trust "residue" means the other half, the portion left after the distribution of the half previously provided for. *In re* Baeder, 190 Pa. St. 606, 611, 42 Atl. 1102.

Distinction in application to realty and personalty see Morgan *v.* Huggins, 48 Fed. 3, 5, 9 L. R. A. 540 (where it is said: "In Rapalje & Lawrence there is a distinction in the definition of this term, 'residue,' when applied to 'devises,' and to 'legacies;' but it is substantially the same as that before given" (presumably referring to several definitions of "residue" previously quoted in the report); Rapalje & L. L. Dict. tit. "Devise," § 2 (which seems to give the only similar distinction made in that work and is probably the one referred to in Morgan *v.* Huggins, *supra*), where it is said: "A devise may be either specific . . . or residuary . . . but in some respects every residuary devise is in effect specific, for where the testator's personal estate is insufficient for the payment of his debts, the specific devisees must contribute towards their payment ratably with the residuary devisee . . . while in the case of personalty the debts are payable out of the residue in exoneration of the legacies." This distinction is borne out by the cases cited in Rapalje & Lawrence, *supra*, namely, Lancefield *v.* Iggulden, L. R. 10 Ch. 136, 141, 44 L. J. Ch. 203, 31 L. T. Rep. N. S. 813, 23 Wkly. Rep. 223; Hensman *v.* Fryer, L. R. 3 Ch. 420, 426, 37 L. J. Ch. 97, 17 L. T. Rep. N. S. 394, 16 Wkly. Rep. 162.

Gift or share of residue distinguished from legacy.—"In common parlance, as well as in a more precise use of language, a 'legacy' is distinguishable from the gift of a residue, or share in a residue." Quincy *v.* Rogers, 9 Cush. (Mass.) 291, 297 [*quoted* in White *v.* Ditson, 140 Mass. 351, 357, 4 N. E. 606, 54 Am. Rep. 473; Norris' Estate, 15 Pa. Dist. 449, 450, and *quoted* and *distinguished* in Hard *v.* Davison, 53 Hun (N. Y.) 112, 116, 6 N. Y. Suppl. 69 (*reversed* on grounds not interfering with the proposition here quoted in 117 N. Y. 606, 23 N. E. 177)]. Where a testator left pecuniary legacies to his two sisters and also to each one half the residue, on the death of each before his own, executed a codicil by which he disposed of the "legacy" left to her, it was held that the word "legacy" could not embrace the share of the residue which thereafter lapsed to intestacy and was distributable. Norris' Estate, 15 Pa. Dist. 449, 450. "It is doing violence to language to describe a share of residue as a pecuniary legacy." *In re* Elcom, [1894] 1 Ch. 303, 313, 63 L. J. Ch. 392, 70 L. T. Rep. N. S. 54, 42 Wkly. Rep. 279 [*quoted* in Norris' Estate, 15 Pa. Dist. 449, 451]. *Compare* Probate Ct. *v.* Matthews, 6 Vt. 269, 275 (where it is said: "Legacy is a bequest of goods and chattels by will or testament. The person to whom it is given is styled the legatee. And if the gift is of the residue of an estate, after payment of debts and legacies, he is then styled the residuary legatee"); Ward *v.* Grey, 26 Beav. 485, 492, 5 Jur. N. S. 948, 29 L. J. Ch. 74, 7 Wkly. Rep. 569, 53 Eng. Reprint 986 (where it is said: "It is true, that 'residue' is not a 'legacy' in the ordinary sense of the term. . . . On the other hand, the person who takes the residue is always called 'residuary legatee;' nor is there any other designation that I am aware of that is applied to the person taking that interest under any will," and holding that under a will requiring "legatees" to contribute "out of their legacies" the residuary legatee and the residue were included).

23. See *infra*, this note.

"The intention is the controlling consideration, and a particular interest, or estate, will not pass by a residuary clause when it appears from other provisions of the will that it was the intention of the testator to exclude such particular interest or estate from the residuary gift. . . . The intention of the testator to restrict the operation of the residuary clause, cannot, however, be deduced from the mere absence of words in the will, denoting, that a particular interest or estate upon which the residuary clause is claimed to operate, was in the contemplation of the testator when the will was made, or from the

be made by codicil;[24] whatever is not specifically devised or bequeathed;[25] that part of a testator's estate not otherwise disposed of;[26] what has not been particularly devised by will;[27] what remains after payment of legacies.[28] (Residue: In General, see RESIDUARY ACCOUNT, *ante*, p. 1658; RESIDUARY BEQUEST, *ante*, p. 1658; RESIDUARY CLAUSE, *ante*, p. 1658; RESIDUARY DEVISE, *ante*, p. 1659; RESIDUARY DEVISEE, *ante*, p. 1659; RESIDUARY ESTATE, *ante*, p. 1659; RESIDUARY LEGACY, *ante*, p. 1659; RESIDUARY LEGATEE, *ante*, p. 1659; RESIDUUM; REST, *post*, p. 1676; WILLS. Of Intestate Estate after Payment of Debts and Expenses, see, generally, DESCENT AND DISTRIBUTION, 14 Cyc. 1.)

RESIDUUM. In general, what there is left after a process of separation.[29] As residue of an estate, surplus of a testator's or intestate's estate after discharging all his liabilities;[30] what remains after administration, properly so called, is concluded.[31] (See RESIDUE, *ante*, p. 1659, and Cross-References Thereunder.)

fact that the reversion was a mere expectancy dependent upon the failure of issue or other improbable contingency." Floyd *v.* Carow, 88 N. Y. 560, 568.

Reward may be used in a different sense from the ordinary definition, as to describe the remainder of a fund, or indeed, of the whole estate after deducting merely some particular charges for bequests, but the presumption is very strong that it is used as generally defined, unless the contrary clearly appears from the context. *In re* Bradley, 123 Wis. 186, 188, 101 N. W. 393.

Must be construed with reference to that which has been previously mentioned, thus, where testator had fifteen acres of land described as "east of" a certain road whereof he devised a certain five acres to his wife for life and the "residue" of his land east of that road to another, "residue" only refers to that land which is left after deducting the five acres and not to the remainder of the estate in the five acres after the widow's decease. Young *v.* Quimby, 98 Me. 167, 170, 56 Atl. 656. Under Mich. St. March 10, 1881, § 1 (Howell St. § 5824) the testator's widow is permitted to take what the will provides "or, in lieu thereof, to take the sum or share that would have passed to her under the statute of distributions had the testator died intestate, until the sum shall amount to five thousand dollars, and of the residue of the estate one-half the sum or share that would have passed to her under the statute of distributions." Where "the residue of the estate" does not mean the whole sum to be distributed, the residue remaining after the debts and expenses of administration and legacies are paid, nor the residue after deducting merely the five thousand dollars, but the residue after deducting a portion of the estate of which the widow's proportionate share is five thousand dollars, so that in a case where the widow is entitled under the statute of distributions to one third after debts and expenses, first fifteen thousand dollars was deducted from the estate, of which she received five thousand dollars, then, of the residue left by deducting the fifteen thousand dollars one sixth was given her. Phillips *v.* Phillips, 91 Mich. 433, 434, 51 N. W. 1071.

May be limited by preceding specifications see Hambleton *v.* Darrington, 36 Md. 434, 445, 446; McChesney *v.* Bruce, 1 Md. 344, 346 [*cited* in Hambleton *v.* Darrington, *supra*]; Markant *v.* Twisden, 1 Eq. Cas. Abr. 212, 21 Eng. Reprint 997 [*cited* in Hambleton *v.* Darrington, *supra*].

"When a doubt arises as to the extent of the application of the word 'residue,' as used in a will, whether it was intended to apply to the residue of the whole estate, or to be confined to a particular part of the estate, courts generally incline to extend it to the whole estate, where there is no other residuary clause." 2 Redfield Wills 448 [*quoted* in Carr *v.* Dings, 58 Mo. 400, 406].

24. Duffield *v.* Pike, 71 Conn. 521, 526, 42 Atl. 641.

25. Bouvier L. Dict. [*quoted* in *In re* Willard, 68 Pa. St. 327, 332 (*quoted* in *In re* Pittman, 182 Pa. St. 355, 360, 38 Atl. 133 [*quoted* in Sproul's Estate, 105 Pa. St. 438, 441]) adding: "In whatever part of a will it may happen to be found it ought to have that meaning, unless the whole will taken together shows clearly it was not so intended"].

26. Woerner Am. L. Adm. (2d ed.) § 462 [*quoted* in Prison Assoc. *v.* Russell, 103 Va. 563, 568, 49 S. E. 966].

27. Bouvier L. Dict. [*quoted* in Phelps *v.* Robbins, 40 Conn. 250, 264; Jewett *v.* Jewett, 21 Ohio Cir. Ct. 278, 280, 12 Ohio Cir. Dec. 131; Morgan *v.* Huggins, 48 Fed. 3, 5].

28. Ward *v.* Grey, 26 Beav. 485, 492, 5 Jur. N. S. 948, 29 L. J. Ch. 74, 7 Wkly. Rep. 569, 53 Eng. Reprint 986.

29. Parsons *v.* Colgate, 15 Fed. 600, 603, 21 Blatchf. 171, applying the term to chemical substances.

Various residuums of one substance may exist, resulting from different processes, and where one residuum of a substance has been used in a patented preparation, the use of a different residuum of the same substance in a preparation of like use is not in itself an infringement on the patent. Parsons *v.* Colgate, 15 Fed. 600, 603, 21 Blatchf. 171.

30. Wharton L. Lex. [*quoted* in Morgan *v.* Huggins, 48 Fed. 3, 5].

A residuum of the residuum results where a will having described what is left of the estate after certain deductions, as the "residue" of the estate, subjects it to further deductions and disposes of the residue then remaining. U. S. Trust Co. *v.* Black, 9 Misc. (N. Y.) 653, 655, 30 N. Y. Suppl. 453.

"General residuum" see Homer *v.* Shelton, 2 Metc. (Mass.) 194, 197.

31. Robinson *v.* Millard, 133 Mass. 236, 239.

RESIGN. A word which, as used in an inartificial instrument, has been construed as a word of release, indicating clearly an intention of surrendering up possession.[32] (See RESIGNATION, and Cross-References Thereunder.)

RESIGNATIO EST JURIS PROPRII SPONTANEA REFUTATIO. A maxim meaning "Resignation is a spontaneous relinquishment of one's own right." [33]

RESIGNATION.[34] A term which may be used in one of the senses of "withdraw," or as equivalent to "abdicate;" [35] the act by which an officer renounces the further exercise of his office and returns the same into the hands of those from whom he received it.[36] (Resignation: Compared With Abdication, see ABDICATION, 1 Cyc. 139 note 31. Of Administrator — In General, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 148; As Affecting Compensation, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1165; As Affecting Limitations of Actions, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 914; As Affecting Right to Prosecute Appeal, see APPEAL AND ERROR, 2 Cyc. 631; As Affecting Settlement of Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1195; As Affecting Sureties on Administration Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1262; As Not Abating Action, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 69, 120 text and note 77. Of Army Officer, see ARMY AND NAVY, 3 Cyc. 821. Of Assignee For Creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 230. Of Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 203. Of Club Member, see Clubs, 7 Cyc. 262. Of Co-Executor as Affecting Right to Execute Power, see Powers, 31 Cyc. 1110 text and notes 89–93. Of Constable, see SHERIFFS AND CONSTABLES. Of Corporate Official — Directors, in General, see CORPORATIONS, 10 Cyc. 741; Failure of Bank Director to Serve Not a Renunciation of Office, see BANKS AND BANKING, 5 Cyc. text and note 78. Of County Board Member, see COUNTIES, 11 Cyc. 385. Of Curator Ad Hoc of Absent Defendant Not Permitted, see ABSENTEES, 1 Cyc. 207 text and note 84. Of District Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 694. Of Executor — In General, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 148; As Affecting Compensation, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1165; As Affecting Right to Execute Power, see POWERS, 31 Cyc. 1110 text and notes 89–93, text and note 95; As Affecting Settlement of Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc.

"Not a part of [the estate] to be administered" see Robinson *v.* Millard, 133 Mass. 236, 239.

32. See *In re* Narragansett Indians, 20 R. I. 715, 736, 737, 40 Atl. 347, so holding in case of a deed from Chief Ninigret of the Narragansetts to the colony of Rhode Island.

33. Black L. Dict.

34. **In Scotch law** the return of a fee into the hands of the superior. Bell L. Dict. [*cited* in Black L. Dict.].

35. See People *v.* Metropolitan Dist. Bd. of Police, 26 Barb. (N. Y.) 487, 500, 501, where the word is said to be used in N. Y. St. (1857) § 12, as equivalent to "withdraw" but not in the sense of "to 'desert,'" or of "a 'bare withdrawing, a temporary quitting of a thing,'" from which it greatly differs; and where "abdication" and "abdicate" are used evidently as in explanation of or in the sense of the words "resignation," "resigning."

36. Black L. Dict.

A transaction between parties.— "By the general rule of the common law a resignation made and accepted is a completed transaction, for then the minds of the parties have met, and the legal consequences of their mutual assent must follow. . . . But the Act Aug. 5, 1861 (12 U. S. St. L. 316, § 12,) makes a different rule for our Army." Mimmack *v.* U. S., 10 Ct. Cl. 584, 596.

"Immediate and unconditional."—A resignation describing itself in those terms, by an officer, from the United States army, can mean nothing less than an entire severance of his army connection, and cannot be construed as applying merely to active service. Turnley *v.* U. S., 24 Ct. Cl. 317, 328.

Implies previous election.—A "resignation implies that the person resigning has been elected into the office which he resigns. A man cannot resign that which he is not entitled to." Reg. *v.* Blizard, L. R. 2 Q. B. 55, 57, 7 B. & S. 922, 36 L. J. Q. B. 18, 15 L. T. Rep. N. S. 242, 15 Wkly. Rep. 105 [*quoted* in *In re* Corliss, 11 R. I. 638, 643, 23 Am. Rep. 538].

Acceptance of resignation assumes due election.— So held in regard to acceptance, by a corporate body, of the resignation of one of its officers. Reg. *v.* Blizard, L. R. 2 Q. B. 55, 58, 7 B. & S. 922, 36 L. J. Q. B. 18, 15 L. T. Rep. N. S. 242, 15 Wkly. Rep. 105.

In ecclesiastical law resignation is generally where a parson, vicar, or other beneficial clergyman voluntarily gives up and surrenders his charge. It is usually done by an instrument attested by a notary. See Phillimore Eccl. L. [*cited* in Black L. Dict.].

1195; As Affecting Sureties on Executor's Bond, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1262; As Not Abating Actions, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 69, 120 text and note 77. Of Guardian — As Depriving Him of Right to Prosecute Appeal, see APPEAL AND ERROR, 2 Cyc. 631; As Not Abating Action, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 70, 120, 121 text and note 78; For Infant, see GUARDIAN AND WARD, 21 Cyc. 52, 237; For Insane Person, see INSANE PERSONS, 22 Cyc. 1145. Of Judge, see JUDGES, 23 Cyc. 517 text and note 18, 526 note 91, 618 note 91. Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 412 text and note 76. Of Militia Member — In General, see MILITIA, 27 Cyc. 494; Officer, see MILITIA, 27 Cyc. 495. Of Municipal Officers — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 412 text and note 34, 429; From Board of Education, see MUNICIPAL CORPORATIONS, 28 Cyc. 578 text and note 15; From Fire Department, see MUNICIPAL CORPORATIONS, 28 Cyc. 551 text and note 71; Of Officer of Fire Department by Acceptance of Inferior Position, see MUNICIPAL CORPORATIONS, 28 Cyc. 554 text and note 2; Of Police Commissioner, see MUNICIPAL CORPORATIONS, 28 Cyc. 487 text and note 50; Of Policeman, see MUNICIPAL CORPORATIONS, 28 Cyc. 503. Of Naval Officer, see ARMY AND NAVY, 3 Cyc. 821. Of Official Party as Not Abating Action — Of Administrator, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 69, 120 text and note 77; Of Executor, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 69, 120 text and note 77; Of Guardian, see ABATEMENT AND REVIVAL, 1 Cyc. 118 text and note 70, 120, 121 text and note 78; Of Receiver, see ABATEMENT AND REVIVAL, 1 Cyc. 121 text and notes 81, 82; Of Trustee in Express Trust, see ABATEMENT AND REVIVAL, 1 Cyc. 121, 122 text and note 83. Of Prosecuting Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 694. Of Public Officer Generally — In General, see OFFICERS, 29 Cyc. 1403; As Bar to Mandamus, see MANDAMUS, 23 Cyc. 180 text and note 99; By Acceptance of Incompatible Office, see OFFICERS, 29 Cyc. 1382, 1383 text and notes 81, 82; Change in Incumbency of Office as Not Abating Action, see ABATEMENT AND REVIVAL, 1 Cyc. 119 text and note 72, 121 text and note 80; Not Constituted by Acceptance of Nomination to Incompatible Office, see OFFICERS, 29 Cyc. 1383 text and notes 83, 84; Not Constituted by Attempted Acceptance of Forbidden Office, see OFFICERS, 29 Cyc. 1383 text and note 85; Resignation of Second Office After Vacating First by Its Acceptance Not a Restoration to Former Office, see OFFICERS, 29 Cyc. 1384 text and note 99; Right of as Affected by Statute Providing For Holding Over, see OFFICERS, 29 Cyc. 1400 text and note 36; Validity of Contracts Tending to Resignation of Public Officer, see CONTRACTS, 9 Cyc. 495. Of Receiver — In General, see RECEIVERS, *ante*, p. 179; As Affecting Caption of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 121 text and notes 81, 82; In Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1459. Of Servant as Defense to Action, For Discharge, see MASTER AND SERVANT, 26 Cyc. 1002. Of Sheriff, see SHERIFFS AND CONSTABLES. Of State Officer, see STATES. Of Trustee — In General, see TRUSTS; In Bankruptcy, see BANKRUPTCY, 5 Cyc. 338; Of Express Trust as Affecting Caption of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 121, 122 text and note 83; Of Testamentary Trustee Who Is Also Executor as Disqualifying Him to Execute Power, see POWERS, 31 Cyc. 1110 text and note 96. Of United States Officer, see UNITED STATES.)

RES INTEGRA. A phrase applied to those points of law untouched by *dictum* or decision;[37] and not affected by precedent,[38] meaning "a whole thing; a new or unopened thing."[39]

RES INTER ALIOS ACTA. A thing done between others, or between third parties or strangers;[40] the usual abbreviation of the maxium "*res inter alios acta alteri nocere non debet.*"[41]

37. See Worrall *v.* Jacob, 3 Meriv. 256, 268, 36 Eng. Reprint 98 [*cited* in Black L. Dict.].
38. See Bruce County *v.* Cromar, 22 U. C. Q. B. 321, 328.
39. Black L. Dict.
40. Black L. Dict.
41. See EVIDENCE, 17 Cyc. 274. See also *post*, p. 1665.

RES INTER ALIOS ACTA, ALIOS NEC PRODEST NEC NOCET. A maxim meaning "A transaction between other parties neither benefits nor injures those not interested." [42]

RES INTER ALIOS ACTA ALTERI NOCERE NON DEBET. A maxim meaning "A transaction between two parties ought not to operate to the disadvantage of a third." [43]

RES INTER ALIOS JUDICATÆ NULLUM ALIIS PRÆJUDICIUM FACIUNT. A maxim meaning "Matters adjudged in a cause do not prejudice those who were not parties to it." [44]

RES IPSA LOQUITUR. A phrase meaning "The thing speaks for itself;" [45] "the affair speaks for itself;" [46] a general way of saying that the circumstances attendant upon an accident are of themselves of such a character as to justify a jury in inferring negligence as the cause of that accident.[47] (Res Ipsa Loquitur: Application — In General, see NEGLIGENCE, 29 Cyc. 590, 623; In Particular Connections, see CARRIERS, 6 Cyc. 628–632 text and notes 33, 46; ELECTRICITY, 15 Cyc. 478 text and note 69; MASTER AND SERVANT, 26 Cyc. 1411, 1412 text and notes 54, 55; MUNICIPAL CORPORATIONS, 28 Cyc. 1497 note 95. See, generally, NEGLIGENCE, 29 Cyc. 400, and Cross-References Thereunder.)

RESIST. To oppose by direct, active and quasi-forcible means, literally to stand against or withstand.[48] (See RESISTANCE, and Cross-References Thereunder.)

RESISTANCE. The opposition of force to force.[49] (Resistance: To Arrest — As Justification of Homicide by Officer, see HOMICIDE, 21 Cyc. 802; As Provoca-

42. Henry *v.* Woods, 77 Mo. 277, 281, where it is applied in the same manner as "*res inter alios acta alteri nocere non debet.*"

43. Morgan Leg. Max.

As a rule of evidence see EVIDENCE, 17 Cyc. 274; JUDGMENTS, 23 Cyc. 1269 note 48; LARCENY, 25 Cyc. 115.

Exception to the principle see FRAUD, 20 Cyc. 119 text and note 94.

44. Bouvier L. Dict.

Strangers not concluded by judgment see JUDGMENTS, 23 Cyc. 1280.

45. Huggard *v.* Glucose Sugar Refining Co., 132 Iowa 724, 736, 109 N. W. 475; Benedick *v.* Potts, 88 Md. 52, 55, 40 Atl. 1067, 41 L. R. A. 478 [*quoted* in Griffen *v.* Manice, 166 N. Y. 188, 196, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922 (*quoted* in Fisher *v.* New York Dock Co., 91 N. Y. App. Div. 526, 528, 87 N. Y. Suppl. 117)]; Mumma *v.* Easton, etc., R. Co., 73 N. J. L. 653, 65 Atl. 208; Houston, etc., R. Co. *v.* Roach, (Tex. Civ. App. 1908) 114 S. W. 418, 422; Gulf, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1901) 63 S. W. 164, 165; Bouvier L. Dict. [*quoted* in Viles *v.* Stantesky, 83 Ill. App. 398, 400].

46. American Steel, etc., Co. *v.* Mosele, 129 Ill. App. 8, 11; Shearman & Redf. Negl. § 59 [*quoted* in McCray *v.* Galveston, etc., R. Co., 89 Tex. 168, 171, 34 S. W. 95].

47. Benedick *v.* Potts, 88 Md. 52, 55, 40 Atl. 1067, 41 L. R. A. 478 [*quoted* in Griffin *v.* Manice, 166 N. Y. 188, 196, 59 N. E. 925, 82 Am. St. Rep. 630, 52 L. R. A. 922 (*quoted* in Fisher *v.* New York Dock Co., 91 N. Y. App. Div. 526, 528, 87 N. Y. Suppl. 117)]; Houston, etc., R. Co. *v.* Roach, (Tex. Civ. App. 1908) 114 S. W. 418, 422; Gulf, etc., R. Co. *v.* Wood, (Tex. Civ. App. 1901) 63 S. W. 164, 165.

"The meaning of the maxim is, that the *res*, the thing, of itself is evidence of negligence." Cunningham *v.* Dady, 191 N. Y. 152, 155, 83 N. E. 689.

Application.— The phrase is "used in actions for injury by negligence when no proof of negligence is required beyond the accident itself, which is such as necessarily to involve negligence." Bouvier L. Dict. [*quoted* in Viles *v.* Stantesky, 83 Ill. App. 398, 400]. It applies in cases in which the very occurrence itself imports negligence. Ennis *v.* Gray, 87 Hun (N. Y.) 355, 361, 34 N. Y. Suppl. 379.

48. State *v.* Welch, 37 Wis. 196, 201, 202, holding that the word as used in Rev. St. c. 167, § 18, providing for the punishment of persons who shall knowingly "resist" an officer executing process, is intended to exclude the less directly active conduct described by such words as "oppose, obstruct, hinder, prevent, interrupt, intimidate," and to include only resistance, active and direct, toward the officer.

Of Latin derivation, the word seems to retain the exact classical meaning. State *v.* Welch, 37 Wis. 196, 201.

"To resist or prevent" the master of a vessel "in the free and lawful exercise of his authority" under Act March 3, 1835, c. 40 (4 U. S. St. at L. 75), is an offense constituted by the mere resistance to the latter's authority, and it is enough to disobey lawful orders and with violence resist their enforcement. U. S. *v.* Peterson, 27 Fed. Cas. No. 16,037, 1 Woodb. & M. 305, 310 [*cited* in U. S. *v.* Huff, 13 Fed. 630, 637], charge to jury.

49. Bouvier L. Dict. [*quoted* in State *v.* Welch, 37 Wis. 196, 201].

When applied to persons always implies force and is always direct. See Crabb Syno-

tion Reducing Homicide to Manslaughter, see HOMICIDE, 21 Cyc. 750 note 92; When Justifiable, see ASSAULT AND BATTERY, 3 Cyc. 1048. To Customs Officials, see CUSTOMS DUTIES, 12 Cyc. 1169. To Execution of Process in General, see OBSTRUCTING JUSTICE, 29 Cyc. 1327. To Inspection of Premises Where Liquor Is Sold, see OBSTRUCTING JUSTICE, 29 Cyc. 1332 note 45. To Officer — In General, see OBSTRUCTING JUSTICE, 29 Cyc. 1327, 1331, 1335; In Act of Arresting, as Purpose of Attempt to Kill, see HOMICIDE, 21 Cyc. 787.)

RES JUDICATA EXCEPTIONEM PARIT PERPETUAM. A maxim meaning "A matter judicially decided begets a perpetual exception." [50]

RES JUDICATA FACIT EX ALBO NIGRUM, EX NIGRO ALBUM, EX CURVO RECTUM, EX RECTO CURVUM. A maxim meaning "A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked." [51]

RES JUDICATA INTER ALIOS ALÜS NEQUE NOCET NEQUE PRODEST. A maxim meaning "A thing decided between two litigants ought neither to work advantage or disadvantage to third persons." [52]

RES JUDICATA INTER PARTES JUS FACIT. A maxim meaning "A question adjudicated between the parties after hearing them, makes the law of that question." [53]

RES JUDICATA PRO VERITATE ACCIPITUR. A maxim meaning "A thing adjudged is taken for truth." [54]

RES JUDICATA PRO VERITATE HABETUR. A maxim meaning "A thing adjudged is held as truth." [55]

RES JUDICATA; RES ADJUDICATA. A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment; [56] a thing definitely settled by judicial decision; [57] the thing adjudged.[58] (Res Judicata: Application, see CONSTITUTIONAL LAW, 8 Cyc. 728 note 35; COURTS, 11 Cyc. 974 note 6; DESCENT

nyms [*cited* in State *v.* Welch, 37 Wis. 196, 201].

As contempt.— As used in U. S. Rev. St. (1878) § 725 [U. S. Comp. St. (1901) p. 583], relating to the power of the United States courts to punish as contempt "resistance" to process, orders, etc., the word "is to be understood as implying a willful purpose to interfere so as to prevent the execution or enforcement of process or the court's orders." U. S. *v.* José, 63 Fed. 951, 954.

50. Applied in Hamilton *v.* Dutch East India Co., 8 Bro. P. C. 264, 269, 3 Eng. Reprint 573.

51. Bouvier L. Dict.

52. Morgan Leg. Max.

53. Morgan Leg. Max.

54. Peloubet Leg. Max.

Applied in Hutton *v.* Camden, 39 N. J. L. 122, 127, 23 Am. Rep. 203 note; Bartolet *v.* Faust, 5 Phila. (Pa.) 316, 317.

55. Applied in: Hamilton *v.* Dutch East India Co., 8 Bro. P. C. 264, 269, 3 Eng. Reprint 573; Ralston *v.* Rowat, 1 Cl. & F. 424, 435, 6 Eng. Reprint 975.

56. Black L. Dict.

"A phrase of the civil law, constantly quoted in the books." Black L. Dict.

Used with different meanings in connection with different conditions and not always with discrimination. Fuller *v.* Metropolitan L. Ins. Co., 68 Conn. 55, 64, 35 Atl. 766, 57 Am. St. Rep. 84.

"The doctrine of res adjudicata, or estoppel by judgment, as it is sometimes less accurately termed, is a rule of law founded on the soundest consideration of public policy. It means that if an action be brought, and the merits of the question be discussed between the parties, and a final judgment be obtained by either party, the parties are concluded, and cannot again canvass the same question in another action. It is founded upon two maxims of the law, one of which is that 'a man should not be twice vexed for the same cause,' the other that 'it is for the public good that there be an end of litigation.'" Wisconsin *v.* Torinus, 28 Minn. 175, 179, 9 N. W. 725.

Concurrence of identity in four respects requisite.— "'In order to make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons, and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made.'" Bouvier L. Dict. [*quoted* in Atchison, etc., R. Co. *v.* Jefferson County, 12 Kan. 127, 135; Pennebaker *v.* Parker, 33 Pa. Super. Ct. 458, 461, also *quoted* in substance in Turner Tp. *v.* Williams, 17 S. D. 548, 552, 97 N. W. 842, and *cited* in Benz *v.* Hines, 3 Kan. 381, 390, 89 Am. Dec. 594 (*quoted* in Freeman Judgm. § 252 [*quoted* in Brady *v.* Pryor, 69 Ga. 691, 696])]. *Contra*, as to identity of cause of action see JUDGMENTS, 23 Cyc. 1215 text and note 78, 1218 text and note 80.

57. Cooley Const. Lim. (7th ed.) 80, (6th ed.) 60 [*quoted* in State *v.* Wear, 145 Mo. 162, 192, 46 S. W. 1099].

58. Muntz *v.* Algiers, etc., R. Co., 116 La. 236, 242, 40 So. 688.

and Distribution, 14 Cyc. 182; Dismissal and Nonsuit, 14 Cyc. 431; Estoppel, 16 Cyc. 685 text and note 5; Foreign Corporations, 19 Cyc. 1304 note 33; Husband and Wife, 21 Cyc. 1621 note 20, 1628 note 7, 1693 note 28; Infants, 22 Cyc. 703 text and note 62; Injunctions, 22 Cyc. 971, 1047 text and note 53; Insane Persons, 22 Cyc. 1168 note 39, 1216 note 68; Intoxicating Liquors, 23 Cyc. 135 text and note 89; Judgments, 23 Cyc. 837 text and note 90, 966 text and note 68, 970 note 15, 975 note 54, 1115 text and note 21, 1121 text and notes 59, 60, 61, 1122 notes 63, 65, 1123 note 73, 1129–1130 text and note 3, 1131 note 7, 1133 note 15, 1139 note 44, 1182, 1183 text and notes 19–23, 1546 text and note 55, 1602 text and note 85; Landlord and Tenant, 24 Cyc. 1206 note 41; Libel and Slander, 25 Cyc. 431, 483, 566; Life Insurance, 25 Cyc. 789 note 67. Conclusiveness of Adjudication, see Judgments, 23 Cyc. 1215. Procedure With Respect to Judgment as Estoppel, see Judgments, 23 Cyc. 1523. Statement of the Doctrine, see Judgments, 23 Cyc. 1215.)

RES LOCATA PERIT DOMINO. A maxim meaning "Located property perishes to the owner." That is, where located property perishes the loss is to the owner.[59]

RES MAGIS VALEAT QUAM PEREAT. A rule of construction[60] whereby doubtful instruments are so construed that they may rather stand than fall;[61] and which may be translated "Let the thing have effect rather than be destroyed."[62]

RES NULLIUS NATURALITER FIT PRIMI OCCUPANTIS. A maxim meaning "A thing which has no owner naturally belongs to the first finder."[63]

RESOLUTION. Merely the form in which the legislative body expresses an opinion; not a law;[64] a mode of municipal action different from an ordinance

59. See Res Perit Domino Suo, *post* 1672.
Applied in Bayne *v.* Walker, 3 Dow. 233, 236, 3 Eng. Reprint 1049.

60. See Barthel *v.* Scotten, 24 Can. Sup. Ct. 367, 371, 373, where it is said: "The maxim . . . is only a rule authorizing a certain presumption to be made in arriving at what must govern in all cases of construction, namely the intention of the parties;" and again "is only a rule to aid in arriving at the intention and does not in any case authorize the court to overrule the intention."

61. See Moore *v.* Hinnant, 89 N. C. 455, 462; Barthel *v.* Scotten, 24 Can. Sup. Ct. 367, 371, 373; British America Assur. Co. *v.* Law, 21 Can. Sup. Ct. 325, 329.

62. *Compare* Black L. Dict., under the more usual form "*ut res magis*," etc.

63. Bouvier L. Dict.
Occupantis, literally person "taking possession." See Black L. Dict., *sub verb.* "*Occupare.*"

64. McDowell *v.* People, 204 Ill. 499, 502, 68 N. E. 378; Paxton *v.* Bogardus, 201 Ill. 628, 640, 66 N. E. 853; Altamont *v.* Baltimore, etc., R. Co., 184 Ill. 47, 51, 56 N. E. 340.
"Be it resolved" requisite.— "A characteristic feature of a resolution is its enacting clause, 'Be it resolved;' were any other term used, it would cease to be a resolution." State *v.* Delesdenier, 7 Tex. 76, 95. *Compare In re* Senate File 31, 25 Nebr. 864, 876, 41 N. W. 981, holding that "Be it enacted" includes be it resolved and so may be used in passing a mere resolution.
Law in form of resolution.— "A resolution may or may not take effect as a law, depending upon the occasion and object of its use. It may be resorted to as a vehicle to convey the opinions or wishes of the legislature on any subject, without prescribing any rule of conduct to be observed. But whenever a joint resolution does undertake to lay down a rule of conduct for any portion of the people of the State, it becomes a law, and will take effect as such, notwithstanding the use of the word 'resolved' in its style, instead of the word 'enacted.'" Swann *v.* Buck, 40 Miss. 268, 293.
Not a law.— A resolution of the senate, 26 Feb. 1872, authorizing the issue of certificates to officers of the senate, is not a law within the meaning of U. S. Const. art. 4, § 31, providing that "no money shall be drawn from the treasury but in pursuance of an appropriation made by law." Reynolds *v.* Blue, 47 Ala. 711, 713. "A resolution proper is not a law. . . . A legislative body may in that form express an opinion, may govern its own procedure within the limitations imposed upon it by its constitution or charter, and, in case it have ministerial functions, may direct their performance; but it can not adopt that mode of procedure in making laws where the power which created it has commanded that it shall legislate in a different form." San Antonio *v.* Micklejohn, 89 Tex. 79, 82, 33 S. W. 735. A mere affirmative vote in a verbal motion in the council accepting a contract is not a resolution in the proper sense of the word and therefore not subject as such to affirmance or veto by the mayor. Galveston *v.* Morton, 58 Tex. 409, 414. As used in charter of El Paso, Texas, providing for submission of resolutions to the mayor, nothing more than the formal expression of the will of the city council. El Paso Gas, etc., Co. *v.* El Paso, 22 Tex. Civ. App. 309, 312, 54 S. W. 798. "A very different thing from a law." Cape Girardeau *v.* Fougeu, 30 Mo. App. 551, 556.

and less formal and less solemn than an ordinance; [65] only a less solemn or less usual form of an ordinance; [66] according to ordinary parliamentary practice, merely a suggestion or direction in writing, concurred in by the two houses of the assembly, if there be two houses, or passed by one house if there be but one, and not submitted to the executive for approval, ordinarily passed without the forms and delays which are generally required by constitutions and municipal charters as prerequisites of the enactment of valid laws or ordinances.[67] (Resolution: Legislative, see STATUTES. Municipal — In General, see MUNICIPAL CORPORATIONS, 28 Cyc. 62; Abolishing Office and Providing For Due Notice to Incumbent as Dismissal of Police Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 512, 513 text and note 43; For Election on Bond Issue, see MUNICIPAL CORPORATIONS, 28 Cyc. 1589 text and notes 58, 60–63, 1590 text and notes 64–69; For Forfeiture of Lease of Public Place, see MUNICIPAL CORPORATIONS, 28 Cyc. 939 text and note 66; For Issue of Bonds, see MUNICIPAL CORPORATIONS, 28 Cyc. 1585; For Levy of Assessments For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1140; For Levy of Tax, see MUNICIPAL CORPORATIONS, 28 Cyc. 1692; For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 971, 978, 979, 992, 1010. Municipal in Relation to Streets — As Evidence of Duty of Municipality, to Show Negligence in Care of Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1482 text and note 91; As Evidence of Knowledge of Defect in Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 1489 text and note 25, note 27, 1498 note 6; Establishing Street Grade, see MUNICIPAL CORPORATIONS, 28 Cyc. 839 text and note 63; Modifying Franchise to Use Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 888 text and note 21; Recognizing Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 837 text and note 38; Vacating Street, see MUNICIPAL CORPORATIONS, 28 Cyc. 841 text and note 80. Of Board of Health — Declaring Nuisance, see HEALTH, 21 Cyc. 397; For Measures Concerning Glandered Horses, see ANIMALS, 2 Cyc. 340; Power to Enforce, see HEALTH, 21 Cyc. 400. Of Corporation — Distinguished From By-Law, see CORPORATIONS, 10 Cyc. 350; For Execution of Corporate Mortgage, see CORPORATIONS, 10 Cyc. 1001 text and note 53, 1198 text and notes 21, 22, 25; For Taking by Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 827; Of County Board, see COUNTIES, 11 Cyc. 402. Relating to Streets and Highways in General, see STREETS AND HIGHWAYS.)

RESOLUTIVE CONDITION (CONDITION RÉSOLUTOIRE). In French and Lower

Compared with "order" see State *v.* Ames, 31 Minn. 440, 443, 18 N. W. 277.

Distinguished from "bill" see State *v.* Delesdenier, 7 Tex. 76, 95.

Passing and taking effect.— It need be read but once and may be passed by a *viva voce* vote, without the ayes and noes, whereupon, when engrossed, it becomes operative. Cape Girardeau *v.* Fougeu, 30 Mo. App. 551, 556.

65. Cape Girardeau *v.* Fougeu, 30 Mo. App. 551, 557.

Lacking solemnity of ordinance.— "When the law requires a proceeding to be instituted by an ordinance it cannot be effected by resolution merely. The latter, wanting the solemnities of the former, is not regarded as a legal equivalent." Paterson *v.* Barnet, 46 N. J. L. 62, 66. "An ordinance requires more solemnity than a resolution." State *v.* Bayonne, 35 N. J. L. 332, 337.

Temporary, as distinguished from ordinance.— A deliberate expression of the opinion of the mayor and aldermen that proposed changes in an ordinance should be made, with an instruction to the mayor to prepare an ordinance for adoption, however fully and positively expressed, is no more than a resolution, an order of a special and temporary character and not a law or ordinance. Such a proceeding furnishes a rule of conduct for the committee or official whom it instructs, but not a rule of conduct or government for the municipal corporation or for those who are affected by the municipal law. Jones *v.* McAlpine, 64 Ala. 511, 513. "A distinction is sometimes drawn between an ordinance and a resolution, by which, the one prescribes a permanent rule of conduct or government, while the other is of a temporary character and prescribes no permanent rule of government." Campbell *v.* Cincinnati, 49 Ohio St. 463, 470, 31 N. E. 606.

"Resolutions, and ordinances, of a general or permanent nature" under Ohio Rev. St. § 1694, and Ohio Mun. Code, § 98, see Campbell *v.* Cincinnati, 49 Ohio St. 463, 469, 470, 31 N. E. 606.

66. Kepner *v.* Com., 40 Pa. St. 124, 130 [*quoted* in Fuller *v.* Scranton, 2 Pa. Cas. 61, 4 Atl. 467], adding: "It is an ordinance still, if it is anything intended to regulate any of the affairs of the corporation."

67. See Cape Girardeau *v.* Fougeu, 30 Mo. App. 551, 556.

Canadian law, a condition pertaining to gifts, which exists when the gift takes effect immediately with the effects which it should produce, to the profit of the donee, but under the condition that if such an uncertain event takes place the gift shall terminate and the property shall be restored to the same state as if there had been no gift.[68] (Resolutive Condition: Otherwise Defined, see CONDITION, 8 Cyc. 556 note 96. See also RESOLUTORY CONDITION.)

RESOLUTO JURE CONCEDENTIS RESOLVITUR JUS CONCESSUM. A maxim meaning " the right of the grantor being extinguished, the right granted is extinguished." [69]

RESOLUTO JURE DANTIS, RESOLVITUR JUS ACCIPIENTIS. A maxim meaning " the right of the giver having ceased, or become void, the right of the receiver ceases also." [70]

RESOLUTORY CONDITION. The condition on which depends an obligation which is to take effect immediately, but is liable to be defeated when the contingent event happens.[71] (Resolutory Condition: Otherwise Defined, see CONDITION, 8 Cyc. 556 note 96. See also RESOLUTIVE CONDITION, *ante*, p. 1668.)

RESOLVE. To express as an opinion or determination by resolution or vote.[72] (See RESOLUTION, *ante*, p. 1667.)

RESORT. As a noun, a place of frequent assembly; a haunt;[73] a place frequented, as ale houses, or the resort of the idle and dissolute;[74] assembly; meeting; concourse; frequent assembly,[75] act of visiting.[76] As a verb, to go with a certain frequency,[77] or else in number more than that number engaged in a single

68. See Dalloz Repertoire de Jurisprudence, art. 1740 [*quoted* in Herse *v.* Dufaux, L. R. 4 P. C. 468, 490, 42 L. J. C. P. 1, 9 Moore P. C. N. S. 281, 21 Wkly. Rep. 313, 17 Eng. Reprint 520].

Operates as a revocation of the gift and divests the donee of the property in the subject of the gift. Herse *v.* Dufaux, L. R. 4 C. P. 468, 490, 42 L. J. C. P. 1, 9 Moore P. C. N. S. 281, 21 Wkly. Rep. 313, 17 Eng. Reprint 520.

69. Black L. Dict.

Cited in Broom Leg. Max. (7th Eng. ed.) 351; McIntyre *v.* Clark, 6 Misc. (N. Y.) 377, 379, 26 N. Y. Suppl. 744.

70. Trayner Leg. Max.

Applied in Barsalou *v.* Royal Inst., 5 Quebec Q. B. 383, 387.

71. See Moss *v.* Smoker, 2 La. Ann. 989, 991.

72. Webster Dict. (5th definition) [*quoted* in *In re* Senate File 31, 25 Nebr. 864, 876, 41 N. W. 981].

" Resolved " equivalent to " enacted." — The word " is as potent to declare the legislative will as the word 'enacted'" nor, when used in the title of a resolutive declaration undertaking to lay down a rule of conduct for any portion of the people of the state, does it preclude such declaration from being a law. Swann *v.* Buck, 40 Miss. 268, 293. Several definitions of " enact," namely, " to establish by law," " to perform or effect," " to decree," would be of equal force to the word " resolved;" therefore " Be it enacted " may mean " Be it resolved." *In re* Senate File 31, 25 Nebr. 864, 876, 41 N. W. 981.

" Be it resolved " as the term requisite to a resolution see RESOLUTION, *ante*, note 64.

73. Webster Dict. [*quoted* in *In re* Sic, 73 Cal. 142, 152, 14 Pac. 405].

" Sea side resort " or " summer resort " does not include places where in general the occupants reside and do business the entire year. *In re* Delaware Bay, etc., R. Co., (N. J. Ch. 1887) 11 Atl. 261, 263, construing the term as used in St. (1880) March 3 (Supplemental Revision, p. 34), exempting railroads constructed at and for transportation to seaside resorts from a provision requiring a certain frequency in running trains.

74. Webster Dict. [*quoted* in Bandalow *v.* People, 90 Ill. 218, 220].

75. Webster Dict. [*quoted* in Bandalow *v.* People, 90 Ill. 218, 220].

76. Webster Dict. [*quoted* in Bandalow *v.* People, 90 Ill. 218, 220].

77. See *infra*, this note.

Repetition or frequency implied. — Going to a place for a purpose, by several persons together and at one single time, is not resorting. Cain *v.* State, 30 Ala. 534, 535 [*cited, explained,* and apparently *misquoted* in Downey *v.* State, 90 Ala. 644, 646, 8 So. 869, as not requiring positive frequency]. As used in Kan. Gen. St. (1887) c. 165, § 4, par. 2533, declaring places, where persons are permitted to resort for the purpose of drinking intoxicating liquors, to be common nuisances, to " resort " means something of a common occurrence; the habitual frequenting of the place by more than one person. State *v.* Owens, 9 Kan. App. 595, 58 Pac. 240, 241; " 'resorted to' . . . means something of a common occurrence." People *v.* Pinkerton, 79 Mich. 110, 115, 44 N. W. 180, so defining the term in connection with a statement of the importance of showing that a house was " resorted to " as bearing upon a prosecution for keeping a disreputable house. The word implies frequent visiting, and when applied to the habit of criminal persons with regard to a house, gives ground for an inference of criminality in the use of the house. O'Brien *v.* People, 28 Mich. 213, 214. *Compare*, however, *infra*, text and notes 78, 79.

act of the kind for the purpose of which a place is visited;[78] also, to go, although but once.[79] (Resort: Correlative of Entertainment, see ENTERTAINMENT, 15 Cyc. 1054 text and note 74. Court of Last — Binding Effect of Decisions on Inferior Courts, see COURTS, 11 Cyc. 747; Exclusive Judge of Own Jurisdiction, see COURTS, 11 Cyc. 801 text and note 26. Place of, see PLACE, 30 Cyc. 1633 note 20.)

RESOURCES. Money or any property that can be converted into supplies; means of raising money or supplies, capabilities of producing wealth or to supply necessary wants; available means or capability of any kind;[80] a definition of "means."[81]

RESPECT. A voluntary tribute to worth.[82] As used between certain

"Used" not equivalent to "resorted to."— An indictment alleging that a house was "used" during a time specified for illegal gaming does not charge an offense, under a statute describing the offense as keeping a house "resorted to" for such purposes. Com. *v.* Stahl, 7 Allen (Mass.) 304, 305. See also State *v.* Dodge, 78 Me. 439, 441, 6 Atl. 875 [*explaining* State *v.* Lang, 63 Me. 215, 219, sustaining an indictment under Rev. St. c. 17, § 1, declaring places resorted to "for the illegal sale or keeping of intoxicating liquors" to be nuisances, where "used" is substituted for the statutory phrase "resorted to," as holding not that "used" means "resorted to," but that the statute meant "used"].

78. See *infra*, this note.

Number of visitors a substitute for frequency of occasions.— To make a house one where persons "resort" for the purpose of gaming, there must be either more than one occasion of going there, or more persons present upon that occasion than those engaged in gaming, within the meaning of a statute directed rather to the bad example than to the gaming itself. Wheelock *v.* State, 15 Tex. 260, 264 [*followed* in State *v.* Norton, 19 Tex. 102, 105]. See also Downey *v.* State, 90 Ala. 644, 646, 8 So. 869, holding the same doctrine, but basing it upon a passage purporting to be quoted from Cain *v.* State, 30 Ala. 534, in which, as reported, no such language appears.

79. State *v.* Ah Sam, 15 Nev. 27, 32, 27 Am. Rep. 454 (where it is held that "to go once" is to "resort to" within the meaning of St. (1879) 121, § 6, forbidding all persons to "resort" to certain places, and is said: "It is argued that resort means, not to go merely once, but to go and go again — in other words, to make a practice of going. The etymology of the word resort lends some support to this argument, but the definitions given in the lexicons show that whatever may have been its original meaning it no longer means anything more in the connection in which it is employed in the statute than to go once"); "The Lexicons" [*cited*, generally, in State *v.* Ah Sam, 15 Nev. 27, 32, 27 Am. Rep. 454,] for instance: Webster Int. Dict. (where the first definition is given as "to go; to repair; to betake one's self;" the third, "to have recourse; to apply; to betake one's self for help, relief, or advantage;" with no mention of frequency); Century Dict. (where the second definition is "to go; repair; go customarily or frequently;" and the third, "to have recourse; apply; betake one's self: with 'to'"); Standard Dict. (where the first definition is "to go frequently or habitually; to betake oneself; repair;" and the second, "to have recourse; apply or betake oneself for use as a means"). See also Downey *v.* State, 90 Ala. 644, 646, 8 So. 869 [*misquoting* apparently Cain *v.* State, 30 Ala. 534, 536, in which report the passage purporting to be quoted does not appear, and *explaining* Swallow *v.* State, 20 Ala. 30, 32], holding the same doctrine. *Compare*, however, *supra*, text and note 77.

80. Webster Dict. [*quoted* in Ming *v.* Woolfolk, 3 Mont. 380, 386 (*affirmed* in 116 U. S. 599, 6 S. Ct. 489, 29 L. ed. 740)].

Not necessarily money in hand, pocket, or bank see Sacry *v.* Lobree, 84 Cal. 41, 49, 23 Pac. 1088.

Products obviously included, of farm, forest, manufacture, art, education, etc., within the meaning of Tenn. St. Feb. 1885, § 1, relating to an exhibit of the "resources" of the various counties. Shelby County *v.* Tennessee Centennial Exposition Co., 96 Tenn. 653, 666, 36 S. W. 694, 33 L. R. A. 717.

Public schools.— "In the broad and liberal sense, the public schools of a county may well be classed among her resources." Shelby County *v.* Tennessee Centennial Exposition Co., 96 Tenn. 653, 666, 36 S. W. 694, 33 L. R. A. 717.

"Available assets and resources" in the statement, "A municipality's capacity for doing business on such cash basis, with outstanding liabilities, is necessarily measured by the amount of cash on hand and the available assets and resources readily convertible into cash to meet the payment of such liabilities as they become due," found in the decision in Earles *v.* Wells, 94 Wis. 285, 298, 299, 68 N. W. 964, 59 Am. St. Rep. 886, means "tangible property in the treasury, legally available, and properly applicable to the payment of debts, and readily convertible into money for that purpose" and the phrase does not include, as an offset against the city's debt, uncertain amounts receivable, such as a street railway tax or license dependent upon its earnings. Rice *v.* Milwaukee, 100 Wis. 516, 519, 521, 76 N. W. 341.

81. Webster Dict. *sub verb.* "Means" [*quoted* in Sacry *v.* Lobree, 84 Cal. 41, 49, 23 Pac. 1088].

82. See Stuart *v.* People, 4 Ill. 395, 405 [*quoted* in State *v.* Frew, 24 W. Va. 416, 439, 49 Am. Rep. 257, omitting the words "to courts," and again, in the same opinion, at page 478 (*quoted* also without the words "to

prepositions,— as in the phrases "in respect to," "in respect of," and the like,— reference; relation.[83]

RESPECTABLE. A word which, in its ordinary significance, would be open to construction and application at the discretion of the court,[84] but which, as used of witnesses, in statutes, is synonymous with "competent" or with the combined words, "credible disinterested."[85]

RESPECTIVE. Relating to particular persons or things, each to each, particular, common.[86] (See RESPECTIVELY.)

RESPECTIVELY. As relating to each;[87] as singly or severally considered;

courts" in Carter *v.* Com., 96 Va. 791, 813, 32 S. E. 780, 45 L. R. A. 310)], where it is said: "Respect to courts . . . is the voluntary tribute of the public to worth, virtue and intelligence."

83. See *infra*, this note.

"In respect to" see Muzzey *v.* Reardon, 57 N. H. 378, 381 (where, in construing Gen. St. c. 134, § 13, enabling a married woman holding property in her own right to sue and be sued upon contract made by her "in respect to" such property, it is said: "Wherever a married woman has been held liable on her contracts, they were contracts made by her with reference to property which she held to her sole and separate use,— that is, contracts connected with and growing out of that property, and entered into with a view to improve, protect, use, enjoy, manage, or dispose of such property for her support or benefit"); People *v.* Clarke, 9 N. Y. 349, 368 (holding that an action, not to recover the possession of lands but to vacate letters-patent, is "certainly a proceeding 'in respect to' lands, although not a suit or proceeding for lands").

"In respect of" construed "in relation to" see Woodruff *v.* Oswego Starch Factory, 70 N. Y. App. Div. 481, 484, 74 N. Y. Suppl. 961.

84. See Freleigh *v.* State, 8 Mo. 606, 610.

"Not respectable."— The expression, "you do not keep a respectable house," is likely, as a personal accusation, to be commonly understood as a charge of keeping a house that is not respectable, or a house of ill fame, and whether that, and the words "You are not respectable" impute a want of chastity, may properly be left to the jury in an action of slander. Loranger *v.* Loranger, 115 Mich. 681, 682, 74 N. W. 228.

85. Freleigh *v.* State, 8 Mo. 606, 610 [*cited* as to the synonymy with "competent" in Cox *v.* U. S., 5 Okla. 701, 707, 50 Pac. 175], referring to the use of the words respectively in certain statutes.

86. Webster Int. Dict. (3d definition) instancing "they returned to their 'respective' places of abode."

As applied to members of a class of devisees, the term has been held to repel the idea of a survivorship among them (Den *v.* Manners, 20 N. J. L. 142, 145); to disjoin the estate and prevent cross remainders (Davenport *v.* Oldis, 1 Atk. 579, 580, 26 Eng. Reprint 363 [*criticized* in Watson *v.* Foxon, *infra*]; Comber *v.* Hill, Str. 969, 970, 93 Eng. Reprint 973 [*criticized* in Watson *v.* Foxon, *infra*]), but has not always that effect (Watson *v.* Foxon, 2 East 36, 41; Atherton *v.* Pye, 4 T. R. 710, 713).

Respective rights.— Concerning recital in a deed of water rights to a corporation from its stockholders that the company shall "manage, control, and distribute said waters so herein conveyed for our benefit and according to our respective rights as fixed by our agreement . . . stock to be issued according to our respective rights in said waters as fixed by our said agreement," in the absence of any such agreement upon the record, and of any evidence to warrant the conclusion that the term "respective rights" gave any one stockholder a right not given to all, or included a right, independent of all regulations of the corporation, to use water in the particular manner and for the particular purpose he might at the time happen to be using it, it was said that the meaning of the term "the respective rights as fixed by our agreement" was not clear, that the term "most likely referred to the general right to water as measured by the acreage owned by each stockholder." Fuller *v.* Azusa Irr. Co.,, 138 Cal. 204, 214, 71 Pac. 98.

"Their respective claims" referring to claims of creditors as the basis of proportion of benefit in an assignment for creditors means "the claims which they respectively held when the assignment was made." Allen *v.* Danielson, 15 R. I. 480, 484, 8 Atl. 705.

Their "respective services," following an enumeration of kinds of officers, is used to distinguish between the different classes of officers named. U. S. *v.* Morton, 65 Fed. 204, 208, 13 C. C. A. 151, construing Act March 3, 1891 (26 U. S. St. at L. 826, § 9).

87. Webster Dict. [*quoted* in Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 535, 45 N. E. 708, 36 L. R. A. 812]; Theberath *v.* Celluloid Mfg. Co., 3 Fed. 143, 148, defining the word in "its obvious and most usual meaning."

Applying previous classification to general residue see Lipman's Appeal, 30 Pa. St. 180, 185, 72 Am. Dec. 692.

Applied to assessment of damages, "distributively."— In construing a statute requiring a jury to give such damages as they may think proportioned to the pecuniary injury resulting from death to the persons "respectively" for whose benefit the action may be brought, it is said: "This word 'respectively' requires the jury to assess the damages for the beneficiaries distributively; that is, ascertain how much pecuniary injury each beneficiary singly has sustained, and then bring in a verdict in gross, made up of these single sums combined." Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 535, 45 N. E. 708, 36 L. R. A. 812.

singly in the order designated.[88] A word of division or separation.[89] (See RESPECTIVE, *ante*, p. 1671.)

RES PERIT DOMINO SUO. A maxim meaning "The destruction of the thing is the loss of its owner."[90]

RES PER PECUNIAM ÆSTIMATUR, ET NON PECUNIA PER REM. A maxim meaning "The value of a thing is estimated according to its worth in money, but the value of money is not estimated by reference to a thing."[91]

RESPITE. A temporary suspension of the execution of a sentence;[92] a delay, forbearance, or continuation of time;[93] a privilege granted to a debtor.[94] (Respite: In Criminal Law — Reprieve, see CRIMINAL LAW, 12 Cyc. 790; PARDONS, 29 Cyc. 1561; Stay of Execution, see CRIMINAL LAW, 12 Cyc. 790; Suspension of Sentence, see CRIMINAL LAW, 12 Cyc. 772. To Insolvent Debtor, see INSOLVENCY, 22 Cyc. 1328, 1329.)

RESPONDEAT OUSTER. The form of judgment for the plaintiff upon an issue arising upon a dilatory plea, requiring the defendant to answer over.[95] (Respondeat Ouster: Judgment to Plead Over, see JUDGMENTS, 23 Cyc. 671 text and note 26, 749; JUSTICES OF THE PEACE, 24 Cyc. 653 note 86. Pleading Over, see PLEADING, 31 Cyc. 351.)

Dubious use after the phrase "for themselves, their heirs, executors, administrators and assigns" see Theberath *v.* Celluloid Mfg. Co., 3 Fed. 143, 148.

As used in Me. Pub. Laws (1887), c. 14, providing that a legitimate child and its issue "shall inherit from its parents respectively, and from their lineal and collateral kindred," the word "conveys the idea that such child shall inherit, in each case, from the parent or parents . . . and from the kindred of such parents," so strengthening the construction that the right to inherit of the kindred of his respective parents is coextensive with his right to inherit from his parents. Messer *v.* Jones, 88 Me. 349, 355, 34 Atl. 177.

88. Standard Dict. [*quoted* in Wolf *v.* Lake Erie, etc., R. Co., 55 Ohio St. 517, 535, 45 N. E. 708, 36 L. R. A. 812].

89. Alsop *v.* Russell, 38 Conn. 99, 103, holding that the word must be so taken in the phrase, in a will, "until my children shall respectively attain to the age of majority."

Converting joint tenancy into tenancy in common see Pery *v.* White, Cowp. 777, 781, 98 Eng. Reprint 1356 [*cited* in Doe *v.* Royle, *supra*]; Pearce *v.* Edmeades, 3 Jur. 245, 8 L. J. Exch. 61, 3 Y. & C. Exch. 252 [*quoted* in Doe *v.* Royle, 13 Q. B. 98, 112, 66 E. C. L. 98]; Doe *v.* Green, 4 M. & W. 229, 242. See also 1 Jarman Wills, 253, *et seq.* [*cited* in Stetson *v.* Eastman, 84 Me. 366, 371, 24 Atl. 868].

90. Bouvier L. Dict.

"Quoted chiefly in cases to which it did not apply in the Roman law" see Harvard L. Rev. 105 [*cited* in Bouvier L. Dict.].

Applied see Haynes *v.* Second Baptist Church, 12 Mo. App. 536, 540 [*affirmed* in 88 Mo. 285, 57 Am. Rep. 413].

Other forms are: "*Res perit domino*"— Applied in: Gage *v.* Libby, 14 Allen (Mass.) 261, 269; Boston, etc., Ice Co. *v.* Royal Ins. Co., 12 Allen (Mass.) 381, 90 Am. Dec. 151; Sammis *v.* Sly, 54 Ohio St. 511, 520, 44 N. E. 508, 56 Am. St. Rep. 731; Stern *v.* Rosenthal, 56 Misc. (N. Y.) 643, 644, 107 N. Y. Suppl. 772 (reading "*periit*" for "*perit*"); Diamond *v.* Harris, 33 Tex. 634, 637 (translating the words literally "the thing perishes to the lord"); Smith *v.* Drummond, 1 Cab. & E. 160; Espir *v.* Todd, 1 Cab. & E. 154, 155.

"*Res perit suo domino*"— Applied in: Lewis *v.* Woodfolk, 2 Baxt. (Tenn.) 25, 46; Osborn *v.* Nicholson, 13 Wall. (U. S.) 654, 660, 20 L. ed. 689; *discussed* in Broom Leg. Max. 418.

"*Res suo perit domino*"— Explained in Bayne *v.* Walker, 3 Dow. 233, 238, 3 Eng. Reprint 1049, as meaning that no person is bound to answer the consequences of the accident.

91. Black L. Dict.

92. Bouvier L. Dict. [*quoted* in Mishler *v.* Com., 62 Pa. St. 55, 60, 1 Am. Rep. 377].

93. Bouvier L. Dict. [*quoted* in Mishler *v.* Com., 62 Pa. St. 55, 60, 1 Am. Rep. 377]; Wharton L. Lex. [*quoted* in Mishler *v.* Com., *supra*].

"Respite of appeal [is] adjourning an appeal to some future time." Black L. Dict.

94. Dauphin *v.* Soulie, 3 Mart. N. S. (La.) 446, 448, adding: "and always derogatory to the rights of creditors who are in a minority, by changing their contracts without consent on their part."

"In the civil law.—A 'respite' is an act by which a debtor, who is unable to satisfy his debts at the moment, transacts (compromises) with his creditors, and obtains from them time or delay for the payment of the sums which he owes to them. The respite is either voluntary or forced. It is 'voluntary' when all the creditors consent to the proposal, which the debtor makes, to pay in a limited time the whole or a part of the debt. It is 'forced' when a part of the creditors refuse to accept the debtor's proposal, and when the latter is obliged to compel them by judicial authority to consent to what the others have determined, in the cases directed by law." See La. Civ. Code, arts. 3084, 3085 [*cited* in Black L. Dict.].

95. See Black L. Dict.

RESPONDEAT RAPTOR QUI IGNORARE NON POTUIT QUOD PUPILLUM ALIENUM ABDUXIT. A maxim meaning "Let the ravisher answer, for he could not be ignorant that he has taken away another's ward." [96]

RESPONDEAT SUPERIOR. Literally "Let the principal answer." [97] A general rule which charges the master with liability for the servant's negligence in the master's business causing injury to third persons; [98] founded on this principle, that he who expects to derive advantage from an act which is done by another

Merely interlocutory, and never given either upon a demurrer or trial by a plea in bar. Confined to plea in abatement put in before any plea in bar has been pleaded, and decided upon by demurrer in favor of the plaintiff. Bauer *v.* Roth, 4 Rawle (Pa.) 83, 92.

96. Peloubet Leg. Max.

Applied see Hob. 99.

97. Bouvier L. Dict.

98. Murray *v.* Usher, 117 N. Y. 543, 546, 23 N. E. 564 [*quoted* in Burns *v.* Pethcal, 75 Hun (N. Y.) 437, 444, 27 N. Y. Suppl. 499].

Application see Hardeman *v.* Williams, 150 Ala. 415, 418, 43 So. 726, 10 L. R. A. N. S. 653; Hearns *v.* Waterbury Hospital, 66 Conn. 98, 123, 33 Atl. 595, 31 L. R. A. 224; Griswold *v.* New York, etc., R. Co., 53 Conn. 371, 388, 4 Atl. 261, 55 Am. Rep. 115; Young *v.* New Haven, 39 Conn. 435, 443; Jewett *v.* New Haven, 38 Conn. 368, 386, 9 Am. Rep. 382; Judge *v.* Meriden, 38 Conn. 90, 97; Southern R. Co. *v.* Morrison, 105 Ga. 543, 547, 31 S. E. 564; McNulta *v.* Lockridge, 137 Ill. 270. 279, 27 N. E. 452, 31 Am. St. Rep. 362; St. Louis, etc., R. Co. *v.* Willis, 38 Kan. 330, 339, 16 Pac. 728; Kansas, etc., R. Co. *v.* Fitzsimmons, 18 Kan. 34, 40; Welch *v.* Maine Cent. R. Co., 86 Me. 552, 565, 567, 570, 30 Atl. 116, 25 L. R. A. 658; Bulger *v.* Eden, 82 Me. 352, 357, 19 Atl. 829, 9 L. R. A. 205; Smart *v.* White, 73 Me. 332, 339, 40 Am. Rep. 356; State *v.* Consolidated European, etc., R. Co., 67 Me. 479, 481; Woodcock *v.* Calais, 66 Me. 234, 235 [*cited* in Weed *v.* Greenwich, 45 Conn. 170, 188; Woodcock *v.* Calais, 68 Me. 244, 245]; Somes *v.* White, 65 Me. 542, 543, 20 Am. Rep. 718; Brown *v.* Vinalhaven, 65 Me. 402, 404, 20 Am. Rep. 709; Morgan *v.* Hallowell, 57 Me. 375, 378; Campbell *v.* Portland Sugar Co., 62 Me. 552, 566, 16 Am. Rep. 503; Rogers *v.* Ludlow Mfg. Co., 144 Mass. 198, 202, 11 N. E. 77, 59 Am. Rep. 68; Johnson *v.* Boston Tow-Boat Co., 135 Mass. 209, 210, 46 Am. Rep. 458; Lawrence *v.* Rice, 12 Metc. (Mass.) 527, 532; Farwell *v.* Boston, etc., R. Corp., 4 Metc. (Mass.) 49, 56, 38 Am. Dec. 339; Earle *v.* Hall, 2 Metc. (Mass.) 353, 357; Stone *v.* Codman, 15 Pick. (Mass.) 297, 299; Sproul *v.* Hemmingway, 14 Pick. (Mass.) 1, 4, 25 Am. Dec. 350; Richards *v.* Farnham, 13 Pick. (Mass.) 451, 457; Boyd *v.* Rice, 38 Mich. 599, 600; Bath *v.* Caton, 37 Mich. 199, 201; Detroit *v.* Corey, 9 Mich. 165, 184, 80 Am. Dec. 78; Morier *v.* R. Co., 31 Minn. 351, 352, 17 N. W. 952, 47 Am. Rep. 793 [*quoted* in Slater *v.* Advance Thresher Co., 97 Minn. 305, 308, 107 N. W. 133, 5 L. R. A. N. S. 598]; Haehl *v.* Wabash R. Co., 119 Mo. 325, 339, 24 S. W. 737; Gillespie *v.* Lincoln, 35 Nebr. 34, 40, 52 N. W. 811, 16 L. R. A. 349; Carter *v.* Berlin Mills Co., 58 N. H. 52, 54, 42 Am. Rep. 572; Wilson *v.* Peverly, 2 N. H. 548, 550; Condict *v.* Jersey City, 46 N. J. L. 157, 159, 161; McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 493, 39 Am. Rep. 606; Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 23, 10 Am. Rep. 205; Aycrigg *v.* New York, etc., R. Co., 30 N. J. L. 460, 462; Alcorn *v.* Philadelphia, 44 Pa. St. 348, 350 [*cited* in Muller *v.* Bayonne, 45 N. J. Eq. 237, 241, 19 Atl. 614]; Atchison, etc., R. Co. *v.* Martin, 7 N. M. 158, 183, 34 Pac. 536 [*affirmed* in 166 U. S. 399, 17 S. Ct. 603, 41 L. ed. 1051]; Maxmilian *v.* New York, 62 N. Y. 160, 163, 20 Am. Rep. 468; Higgins *v.* Watervliet Turnpike, etc., Co., 46 N. Y. 23, 27, 7 Am. Rep. 293 [*quoted* in Chicago Herald Co. *v.* Bryan, 195 Mo. 574, 588, 92 S. W. 902; Peck *v.* New York, etc., R. Co., 8 Hun (N. Y.) 286, 287]; Blake *v.* Ferris, 5 N. Y. 48, 50, 55 Am. Dec. 304; McNulty *v.* Ludwig, 125 N. Y. App. Div. 291, 109 N. Y. Suppl. 703; Woodhull *v.* New York, 76 Hun (N. Y.) 390, 393, 28 N. Y. Suppl. 120; Mutual L. Ins. Co. *v.* Forty-Second St., etc., R. Co., 74 Hun (N. Y.) 505, 511, 26 N. Y. Suppl. 545; Philips *v.* New Jersey Northern R. Co., 62 Hun (N. Y.) 233, 236, 16 N. Y. Suppl. 909; Piercy *v.* Averill, 37 Hun (N. Y.) 360, 363; People *v.* Dwyer, 27 Hun (N. Y.) 548, 552, 63 How. Pr. 115; Perry *v.* Lansing, 17 Hun (N. Y.) 34, 39; Potter *v.* Seymour, 4 Bosw. (N. Y.) 140, 147; Worthington *v.* Parker, 11 Daly (N. Y.) 545, 551, 561; McMullen *v.* Hoyt, 2 Daly (N. Y.) 271, 275; Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 254, 256; Hauser *v.* Metropolitan St. R. Co., 27 Misc. (N. Y.) 538, 539, 58 N. Y. Suppl. 286; McKnight *v.* Brooklyn, etc., R. Co., 23 Misc. (N. Y.) 527, 532, 51 N. Y. Suppl. 738; Higgins *v.* Western Union Tel. Co., 8 Misc. (N. Y.) 433, 435, 28 N. Y. Suppl. 676; Buffalo *v.* Clement, 19 N. Y. Suppl. 846, 848; O'Brien *v.* New York, 15 N. Y. Suppl. 520, 524 [*affirmed* in 65 Hun 112, 19 N. Y. Suppl. 793 (*affirmed* in 139 N. Y. 543, 39 N. E. 323)]; Walsh *v.* New York, 2 N. Y. St. 384, 385; Hexamer *v.* Webb, 1 N. Y. St. 46, 49; *Ex p.* Reed, 4 Hill (N. Y.) 572, 575; Bailey *v.* New York, 3 Hill (N. Y.) 531, 538, 38 Am. Dec. 669; Clodfelter *v.* State, 86 N. C. 51, 52, 41 Am. Rep. 440 [*quoted* in Bourn *v.* Hart, 93 Cal. 321, 327, 28 Pac. 951, 27 Am. St. Rep. 203, 15 L. R. A. 431]; Gates *v.* Pennsylvania R. Co., 150 Pa. St. 50, 53, 24 Atl. 638, 16 L. R. A. 554; Fire Ins. Patrol *v.* Boyd, 120 Pa. St. 624, 647, 15 Atl. 553, 6 Am. St. Rep. 743, 1 L. R. A. 417 [*quoted* in Haas *v.* Most Holy Redeemer Missionary Soc., 6 Misc. (N. Y.) 281, 285, 26 N. Y. Suppl. 868]; Boyd *v.* Philadelphia Ins. Patrol, 113 Pa. St. 269, 273, 6 Atl. 536; McCullough *v.* Shoneman, 105 Pa. St. 169, 172 51 Am. Rep. 194; Federal St., etc., R. Co. *v.* Gibson, 96 Pa. St. 83, 86; Wray *v.* Evans, 80

for him must answer for any injury which a third person may sustain from it.[99] (Respondeat Superior: Applied to Corporations, see CORPORATIONS, 10 Cyc. 1222. Liability of Master For Injuries to Third Persons by Acts, or Omissions of Servant, see MASTER AND SERVANT, 26 Cyc. 1518; NEGLIGENCE, 29 Cyc. 545. Liability of Principal to Third Person in Tort For Act of Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1581; NEGLIGENCE, 29 Cyc. 545.)

RESPONDENT. The party who makes an answer to a bill or other proceeding in chancery;[1] originally the person against whom a bill in equity was exhibited;[2] a person upon whom an ordinary petition in the court of chancery, or a libel in admiralty is served; defendant in divorce;[3] he who contends against an appeal.[4] (Respondent: Defendant — In General, see PARTIES, 30 Cyc. 98, 120, 143; In Divorce, see DIVORCE, 14 Cyc. 556, 584, 589, 592, 643, 654; In Equity, see EQUITY, 16 Cyc. 199, 205. In Appeal, see APPEAL AND ERROR, 2 Cyc. 764.)

RESPONDENTIA. A word which properly applies to the loan of money upon merchandise laden on board a ship, repayment whereof is made to depend upon the safe arrival of the merchandise at the destined port.[5] (See SHIPPING.)

RESPONSIBLE. Liable to account; accountable; answerable; able to discharge an obligation, or having an estate adequate to the payment of a debt;[6]

Pa. St. 102, 106; Meany *v.* Abbott, 6 Phila. (Pa.) 256; New York, etc., R. Co. *v.* Bell, 17 Wkly. Notes Cas. (Pa.) 457, 460; Fry *v.* Albemarle County, 86 Va. 195, 199, 9 S. E. 1004, 19 Am. St. Rep. 879; Underwood *v.* Paine Lumber Co., 79 Wis. 592, 595, 48 N. W. 673; King *v.* Oshkosh, 75 Wis. 517, 519, 44 N. W. 745; Bass *v.* Chicago, etc., R. Co., 42 Wis. 654, 678, 24 Am. Rep. 437; Hayes *v.* Oshkosh, 33 Wis. 314, 319, 14 Am. Rep. 760; Wilson *v.* Noonan, 27 Wis. 598, 608; Union Pac. R. Co. *v.* Artist, 60 Fed. 365, 367, 370, 9 C. C. A. 14, 23 L. R. A. 581; Raw *v.* Cutten, 9 Bing. 96, 101, 1 L. J. C. P. 171, 23 E. C. L. 501; Arthy *v.* Coleman, 8 E. & B. 1092, 92 E. C. L. 1092; Dansey *v.* Richardson, 25 Eng. L. & Eq. 76, 87; Metcalfe *v.* Hetherington, 11 Exch. 257, 268, 24 L. J. Exch. 314; Cranch *v.* White, 4 L. J. C. P. 113, 116; Wilson *v.* Merry, 19 L. T. Rep. N. S. 30, 33 [*quoted* in Campbell *v.* General Min. Assoc., 1 Nova Scotia Dec. 415, 418]; Hartnall *v.* Ryde Imp. Com'rs, 2 New Rep. 424, 425; Ellis *v.* Turner, 8 T. R. 531, 533 [*quoted* in Grant *v.* Norway, 10 C. B. 665, 686, 15 Jur. 296, 20 L. J. C. P. 93, 70 E. C. L. 665]; Brown *v.* Compton, 8 T. R. 424, 431; Fenn *v.* Harrison, 3 T. R. 757, 760; Peshall *v.* Layton, 2 T. R. 712, 713; Williams *v.* Wilson, 3 Brit. Col. 613, 614; Moir *v.* Halifax, 25 Nova Scotia 241, 245; Gilbert *v.* Yarmouth, 23 Nova Scotia 93, 106, 115; Evens *v.* Halifax, 5 Nova Scotia 111, 116, 118; Hesketh *v.* Toronto, 25 Ont. App. 449, 456; McDonald *v.* Dickenson, 24 Ont. App. 31, 34; Winterbottom *v.* London Police Com'rs, 1 Ont. L. Rep. 549, 554, 557; West *v.* Parkdale, 8 Ont. 59, 65; Dillon Mun. Corp. § 772 [*quoted* in Hurley *v.* Brooklyn, 8 N. Y. Suppl. 98, 100]; Dillon Mun. Corp. § 974 [*quoted* in Hesketh *v.* Toronto, *supra*; Seymour *v.* Maidstone Tp., 24 Ont. App. 370, 374; 1 Clarke & S. Dr. Cas. (Ont.) 317, 320]; Jones R. Sec. par. 509 [*cited* in Little *v.* Dusenbury, 46 N. J. L. 614, 638, 50 Am. Rep. 445]; Story Ag. § 452 [*quoted* in Western Maryland R. Co. *v.* Franklin Bank, 60 Md. 36, 44].

Application in French law see Carter *v.* Berlin Mills Co., 58 N. H. 52, 42 Am. Rep. 572.

99. Hall *v.* Smith, 2 Bing. 156, 160, 2 L. J. C. P. O. S. 113, 9 Moore C. P. 226, 9 E. C. L. 524 [*quoted* in Cardot *v.* Barney, 63 N. Y. 281, 287, 20 Am. Rep. 533].

Origin. — "The maxim . . . was first applied to public officers by the Statute of Westminster the Second, Cap. 2, from the words of which statute it is taken." Larkin *v.* McNutt, 2 Pr. Edw. Isl. 300, 303.

1. Black L. Dict.

2. Brower *v.* Nellis, 6 Ind. App. 323, 33 N. E. 672, 673.

3. See Black L. Dict.

4. See Black L. Dict., defining the word in a sense correlative to "appellant."

5. Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514 [*quoted* in Black L. Dict.].

Inaccurately applied to loans on bottomry see Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514.

Distinguished from bottomry see Maitland *v.* The Atlantic, 16 Fed. Cas. No. 8,980, Newb. Adm. 514; Black L. Dict.

Statutory definition: A contract by which a cargo or some part thereof is hypothecated as security for a loan, the repayment of which is dependent upon maritime risks. Cal. Civ. Code, § 3036 [*quoted* in Black L. Dict.]; Dak. Civ. Code, § 1796 [*quoted* in Black L. Dict.].

6. Webster Dict. [*quoted* in Gutta Percha Co. *v.* Stokely, 11 Phila. (Pa.) 219, 221].

In one sense, it is synonymous with accountable; answerable, legally or morally, for the discharge of a duty, trust, debt, service, or other obligation. People *v.* Kent, 160 Ill. 655, 661, 43 N. E. 760.

A promise to be responsible for the contract of another is a "contingent liability, and it becomes absolute only by due and unsuccessful diligence to obtain satisfaction from the principal." Gilbert *v.* Henck, 30 Pa. St. 205, 209 [*followed* in Bickel *v.* Auner, 9 Phila. (Pa.) 499].

"Reliable" may be taken as synonymous.

able to respond or answer in accordance with that which is expected or demanded.[7] (Responsible: Bidder, see COUNTIES, 11 Cyc. 482 note 68; LOW, 25 Cyc. 1587 note 6. See also RESPONSIBILITY.)

RESPONSIBILITY. Liability, obligation, bounden duty;[8] ability to answer in payment.[9] (Responsibility: For Crime, see CRIMINAL LAW, 12 Cyc. 464. See also RESPONSIBLE.)

RESPONSIO UNIUS NON OMNINO AUDIATUR. A maxim of the Roman law of evidence meaning "The answer of one witness shall not be heard at all."[10]

RESPONSIVENESS. Of Answer in Equity — Affecting Its Admissibility in Evidence, see EQUITY, 16 Cyc. 390; To Bill For Discovery, see DISCOVERY, 14 Cyc. 34. Of Answer of Witness, see DEPOSITIONS, 13 Cyc. 926; WITNESSES. Of Finding of Jury, see TRIAL.

RES PRIVATÆ SUNT QUÆ SINGULORUM SUNT. A maxim meaning "Private things are those which belong to an individual, and are not common to all."[11]

RES PROPRIA EST QUÆ COMMUNIS NON EST. A maxim meaning "A thing is private which is not common."[12]

People *v.* Kent, 160 Ill. 655, 660, 43 N. E. 760.

"Able to discharge an obligation," while not so strict a construction as "liable, answerable"; is the sense in which the word is used in N. H. Rev. St. c. 183, § 17, requiring a writ to be indorsed by a "responsible" person. Farley *v.* Day, 26 N. H. 527, 531.

From whom it is possible to collect. — The condition of a legacy to a school that "responsible citizens" shall pledge and subscribe a certain amount is not fulfilled when, from the evidence and from judicial experience, "it may be asserted with great confidence that it would not be possible at any time to collect from these subscribers anything near the nominal amount of those subscriptions." Yale College *v.* Runkle, 8 Fed. 576, 580.

"Able" and "trustworthy." — "Responsible" person to be employed to do printing for the territory under Okla. Sess. Laws (1897), c. 29, art. 1, § 1, means one "able to do the printing and discharge the obligations required" and "trustworthy." Leader Printing Co. *v.* Lowry, 9 Okla. 89, 96, 59 Pac. 242.

"Capability to discharge an obligation" is intended by the word when applied in relation to fitness to purchase on credit. Clopton *v.* Cozart, 13 Sm. & M. (Miss.) 363, 368.

"Lowest responsible bidder" see People *v.* Kent, 160 Ill. 655, 660, 43 N. E. 760 (holding that "responsible" in this connection is not confined to financial ability, its most usual sense, but may include the condition of being obliged by duty or contract to meet and discharge claims and obligations other than payment of money; construing the term as used in a Chicago ordinance of July 18, 1905, and an Illinois statute for the incorporation of cities and villages); State *v.* Rickards, 16 Mont. 145, 151, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298 (holding that the responsibility, demanded by the term as used in Mont. St. March 7, 1895, § 5, includes judgment, skill, ability, capacity, and integrity); Reuting *v.* Titusville, 175 Pa. St. 512, 519, 34 Atl. 916; Interstate Vitrified Brick, etc., Co. *v.* Philadelphia, 164 Pa. St. 477, 480, 30 Atl. 383; Douglass *v.* Com., 108 Pa. St. 559, 563; Findley *v.* Pittsburgh, 82 Pa. St. 351, 353 (*cited* in Louchheim *v.* Philadelphia, 15 Pa. Dist. 311, 312)] (holding that "responsible" as used in Pa. St. May 23, 1874, § 6, means more than pecuniary ability and may include judgment and skill); Com. *v.* Mitchell, 82 Pa. St. 343, 349 [*followed* in Hoole *v.* Kinkead, 16 Nev. 217 (construing St. (1881) p. 50, § 5); Gutta Percha Co. *v.* Stokely, 11 Phila. (Pa.) 219, 220 (holding that the word as used in Pa. St. May 23, 1874, § 6, required financial ability). For other cases where the phrase has been considered see LOW, 25 Cyc. 1657 note 6. See also *infra*, text and note 7.

7. Webster Dict. [*quoted* in People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118, 119, applying the definition in construing the phrase "lowest *bona fide* responsible bidder"].

8. Crockett *v.* Barre, 66 Vt. 269, 272, 29 Atl. 147.

"Credit and responsibility" may include collateral liability as well as exclusive. Norris *v.* Graham, 33 Md. 56, 58.

In French law — *Responsabilité* distinguished from *garantie* see 2 Sourdal Traité de Responsabilité No. 760 [*quoted* in Central Vermont R. Co. *v.* Lea Compagnie d'Assur., etc., 2 Quebec Q. B. 450, 452] (stating that civil responsibility has a place independently of all agreement between the responsible party and the other); 3 Dalloz Dictionnaire du Droit, art. 1, No. 4 [*quoted* in Central Vermont, etc., R. Co. *v.* La Compagnie d'Assurance, etc., *supra*] (stating that the responsibility is not derived from contract, but from that natural principle of justice which is that each repairs the damage caused by his act).

9. Webster Int. Dict. [*quoted* in *Ex p.* Hawley, (S. D. 1908) 115 N. W. 93, 95, holding that such, i. e., "ability to respond in damages for actual injuries," is the meaning of the word as used in Dak. St. (1907) c. 194, § 1, requiring evidence of responsibility of owners of tree nurseries desiring to sell nursery stock within the state].

10. Black L. Dict.

In modern practice, followed, as a general rule, where a material fact is put in issue by the answer see Watson *v.* Palmer, 5 Ark. 501, 505.

11. Morgan Leg. Max.

12. Peloubet Leg. Max.

RES PUBLICA EST CŒTUS MULTITUDINIS JURIS CONSENSU, ET UTILITAS COMMUNIONE. A maxim meaning "A commonwealth is the assemblage of a multitude, by a legal agreement, with a mutual participation of advantage." [13]

RES QUÆ INTRA PRÆSIDIA PERDUCTÆ NONDUM SUNT, QUANQUAM AB HOSTIBUS OCCUPATÆ, IDEO POSTLIMINII NON EGENT, QUIA DOMINUM NONDUM MATURUNT EX GENTIUM JURE. A maxim meaning "Things which have not yet been introduced within the enemy's lines, although held by the enemy, do not need the fiction of postliminy on this account, because their ownership by the law of nations has not yet changed." [14]

RES SACRA NON RECIPIT ÆSTIMATIONEM. A maxim meaning "A sacred thing does not admit of valuation." [15]

RES STULTA EST NEQUITIÆ MODUS. A maxim meaning "A stupid act is a manner of wickedness." [16]

RES SUA NEMINI SERVIT. A maxim meaning "No one can have a servitude over his own property." [17]

RES SUO PERIT DOMINO. See RES PERIT DOMINO SUO, *ante*, p. 1672.

REST. Remaining part; [18] a definition of residue.[19] (Rest: As Residue, see RESIDUE, *ante*, p. 1659, and Cross-References Thereunder. In Computing Interest, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 263 text and notes 67, 68; GUARDIAN AND WARD, 21 Cyc. 97 text and note 99; INTEREST, 22 Cyc. 1654; MORTGAGES, 26 Cyc. 614; TRUSTS.)

Cited in Le Breton *v.* Miles, 8 Paige (N. Y.) 261, 270.

13. Morgan Leg. Max.

14. Black L. Dict. [*citing* 3 Grotius de Jure Bellum, c. 6, § 3, c. 9, § 16].

15. Bouvier L. Dict.

16. Lofft Max. No. 208.

Different renderings have been given as follows: "Moderation in wickedness adds foolishness to crime" (Morgan Leg. Max.).

"Res profecto stulta est nequitiæ modus," interpreted, "There is no mean in wickedness" (Morgan Leg. Max.).

17. Trayner Leg. Max.

18. See Sweitzer's Estate, 142 Pa. St. 541, 547, 21 Atl. 885, as follows: "The words 'the rest' evidently have reference to what remains of the property in part previously given away."

19. See RESIDUE, *ante*, p. 1659 text and note 8.

"All the rest" see Graydon *v.* Graydon, 23 N. J. Eq. 229, 233 (holding that the words exclude what has been provided for immediately before); Wright *v.* Page, 10 Wheat. (U. S.) 204, 236, 6 L. ed. 303 (holding that the words, applied to land, "do not of themselves, import a devise of the fee; but unless aided by the context, the devisee, whether he be a sole or a residuary devisee, will, if there be no words of limitation, take only a life-estate").

Distinguished from "surplusage" see Bragaw *v.* Bolles, 51 N. J. Eq. 84, 90, 25 Atl. 947.

"Rest" and "residue" naturally include all property of every nature. Bragaw *v.* Bolles, 51 N. J. Eq. 84, 90, 25 Atl. 947.

"Rest and residue" see Carrol *v.* Connet, 2 J. J. Marsh. (Ky.) 195, 201 (where it is said: "'All the rest and residue,' means what remains for distribution, according to law, that is, what is left after payment of debts. It means this or nothing"); Chapman *v.* Chick, 81 Me. 109, 117, 16 Atl. 407 (where the term is said to be effective to pass realty as well as personalty); Sanborn *v.* Clough, 64 N. H. 315, 320, 10 Atl. 678 (holding that the term would be meaningless, unless construed with reference to a deduction from the whole, so that a bequest of all of "the rest and residue of all my money in banks . . . stocks and bonds," after certain expenditures specified in words immediately preceding it in the same clause, either postponed the legacy to the payment of such expenses or made it subject to them, although they were customary expenditures that would, ordinarily, have come out of the estate); Le Rougetel *v.* Mann, 63 N. H. 472, 473, 3 Atl. 746 (holding that "the mere enumeration of some items in this clause prior to the words 'rest and residue,' does not necessarily alter their proper meaning," whereby a general residue is created); Miller *v.* Worrall, 62 N. J. Eq. 776, 779, 48 Atl. 586, 90 Am. St. Rep. 480 (holding that "rest and residue of my property, 'personal and mixed'" does not carry realty); Prowitt *v.* Rodman, 37 N. Y. 42, 49, 4 Transcr. App. 412 (holding that "all the rest and residue" after specific dispositions includes all testator's estate and effects and shows the intention to prevent intestacy on any point).

"Rest, residue and remainder" see Hoyt *v.* Hoyt, 85 N. Y. 142, 150 (holding that the words mean "that which has been left, when something that has been before named and given has been set apart"); Gallavan *v.* Gallavan, 57 N. Y. App. Div. 320, 322, 68 N. Y. Suppl. 30 (holding that a disposition of "'all the rest, residue and remainder of my property, both real and personal'" expresses no intent to limit or exclude from the residue anything whatever which for any reason might prove to be ineffectually disposed of, and expresses a clear intent to make a full disposition of the testator's property); Jeremy's Estate, 178 Pa. St. 477, 478, 35 Atl. 847 (holding that "all the rest, residue

RESTAURANT. An establishment for the sale of refreshments, both food and drink;[20] a place for refreshment; a house where liquors and cooked food are sold;[21] an eating-house;[22] an eating-house; a place where something to eat, ready prepared, or which can be readily prepared, may be obtained;[23] an eating-house; a place where eatables can be obtained at all reasonable hours.[24] (Restaurant: As Place Subject to Prohibition Against — Discrimination by Reason of Race or Color, see CIVIL RIGHTS, 7 Cyc. 171; CONSTITUTIONAL LAW, 8 Cyc. 1095 text and note 99; Gaming, see GAMING, 20 Cyc. 890 text and note 9, 891, note 14; Sale of Liquor, see INTOXICATING LIQUORS, 23 Cyc. 199 note 58. As Subject to License or Tax Upon Privilege — In General, see LICENSES, 25 Cyc. 614 text and note 17; Not a Hotel as to Grantee of Liquor License, see INTOXICATING LIQUORS, 23 Cyc. 117 note 54. Open on Sunday, see SUNDAY. Serving Food at Restaurant as Sale under Butter Law, see FOOD, 19 Cyc. 1092 note 29.)

RESTAURANT KEEPER. A caterer who keeps a place for serving meals, and provides, prepares, and cooks raw materials to suite the taste of his patrons.[25] (Restaurant Keeper: Liable — For Injury Caused by Negligence of Servant, see INNKEEPERS, 22 Cyc. 1081 note 3; For Loss of Guest's Property, as Bailee, see INKEEPERS, 22 Cyc. 1086; To License or Privilege Tax, see LICENSE, 25 Cyc. 614 text and note 17; To Penalty For Sale or Use of Oleomargarine, see FOOD, 19 Cyc. 1087 note 4. See also RESTAURANT.)

REST HOME. As used in a will, devising property for the establishment of a

and remainder," unqualified, covers the whole estate, both in quality and quantity).

"Rest of my heirs," after a mention of one heir for whom some provision has been made as a participant with the rest in a fund, applies to heirs generally, and not to particular heirs of the particular sum, and does not imply the exclusion of another heir for whom other provision has been made. Turner's Appeal, 52 Mich. 398, 400, 18 N. W. 123.

20. Century Dict. [*quoted* in Page *v.* District of Columbia, 20 App. Cas. (D. C.) 469, 475, as the "modern definition"].

Without definite legal meaning see Lewis *v.* Hitchcock, 10 Fed. 4, 6.

Used indiscriminately for all places where refreshments can be had, from the mere eating-house or cookshop to the more common shops or stores where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate. Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 426, 27 N. W. 586.

Not a mere drinking house see *In re* Liquor Licenses, 4 Montg. Co. Rep. (Pa.) 77, 79.

Not an inn when merely a place to which a person resorts for the temporary purpose of obtaining a meal. Carpenter *v.* Taylor, 1 Hilt. (N. Y.) 193, 195 [*cited* in People *v.* Jones, 54 Barb. (N. Y.) 311, 317; Cromwell *v.* Stephens, 3 Abb. Pr. N. S. (N. Y.) 26, 35]. See also INTOXICATING LIQUORS, 23 Cyc. 117 note 54.

Inn not necessarily excluded in the legal sense. See Lewis *v.* Hitchcock, 10 Fed. 4, 6.

May comprise bar or lodgings without ceasing to be a restaurant. Lewis *v.* Hitchcock, 10 Fed. 4, 6.

Defined by ordinance, "every place where food or refreshments of any kind — not including spirituous, vinous or malt liquors — are prepared for casual visitors." Louisville License Ord. § 37 [*quoted* in New Galt House *v.* Louisville, 111 S. W. 351, 352, 33 Ky. L. Rep. 869, 17 L. R. A. N. S. 566].

Does not include a drug shop where a soda fountain is kept and the refreshments sold consist in soda water, phosphates, ice-cream soda and the like, within the meaning of the Ill. Civ. Rights Act (Cecil *v.* Green, 60 Ill. App. 61, 63 [*affirmed* in 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566]); nor a shop used for the manufacture and sale of tobacco, snuff, and cigars (State *v.* Hogan, 30 N. H. 268, 273).

"Servant-girl at a restaurant," as entitled to a preferred lien for wages, does not include a girl employed as a singer and dancer in a concert saloon. Cleveland *v.* O'Neil, 4 C. Pl. (Pa.) 148, 149.

21. Encyclopedia Dict. [*quoted* in Page *v.* District of Columbia, 20 App. Cas. (D. C.) 469, 475].

22. Cecil *v.* Green, 60 Ill. App. 61, 63 [*affirmed* in 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566] (where "eating house" is said to be Webster's only definition of restaurant and itself to be defined as "a house where provisions are sold ready cooked, and generally eaten on the premises"); State *v.* Hogan, 30 N. H. 268, 272; *In re* Liquor Licenses, 4 Montg. Co. Rep. (Pa.) 77, 79; Webster Dict. [*quoted* in Cleveland *v.* O'Neil, 4 C. Pl. (Pa.) 148, 149].

23. State *v.* Hogan, 30 N. H. 268, 372.

As currently understood, only, or chiefly, an eating-house. Lewis *v.* Hitchcock, 10 Fed. 4, 6.

24. *In re* Liquor Licenses, 4 Montg. Co. Rep. (Pa.) 77, 79.

25. *In re* Ah Yow, 59 Fed. 561, 562.

Under Chinese Exclusion Act a restaurant keeper is held not to come within any of the descriptions of Chinese privileged to enter the United States. *In re* Ah Yow, 59 Fed. 561, 562.

Not a merchant see *In re* Ah Yow, 59 Fed. 561, 562.

rest home for worthy working girls, a place of rest for girls who are working for small wages where they may go and board in the country at a low price.[26]

RESTITUTIO IN INTEGRUM. A phrase originally of the civil law meaning "Restoration or restitution to the previous condition." [27]

RESTITUTION. In practice, the return of something to the owner of it or to the person entitled to it,[28] properly speaking, made only to a defendant whose money or property has been taken from him by the erroneous order of a court and is not available to third parties.[29] At common law, a remedy whose object was to restore to the appellant a specified thing or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal.[30] In equity, the restoration of both parties to their original condition (when practicable) upon the rescission of a contract for fraud or similar cause.[31] In maritime law, the replacing, by general contribution among the owners of a cargo, of articles lost by jettison from a cargo saved in part.[32] (Restitution: As Affecting Damages — For Conversion or Detention, see DAMAGES, 13 Cyc. 19 text and note 27; Reparation of Loss Not Preventing Nominal Damages, see Damages, 13 Cyc. 16. As Condition of Action — Of Deceit, see FRAUD, 20 Cyc. 91; Of Trover, see TROVER AND CONVERSION. As Condition of Avoidance — Of Accord and Satisfaction, see ACCORD AND SATISFACTION, 1 Cyc. 339–340 text and notes 11–17; Of Deeds in General, see DEEDS, 13 Cyc. 593–594 text and notes 76–78; Of Encumbrance or Transfer of Homestead, see HOMESTEADS, 22 Cyc. 560; Of Infant's Contract, see INFANTS, 22 Cyc. 613; Of Infant's Transaction Affecting Property, see INFANTS, 22 Cyc. 557; Of Insane Person's Contract or Deed, see INSANE PERSONS, 22 Cyc. 1175, 1210; Of Instruments in General, see CANCELLATION OF INSTRUMENTS, 8 Cyc. 306; Of Release, see RELEASE, *ante*, p. 1071; Of Sale, in General, see SALES; VENDOR AND PURCHASER; Of Sale at Auction For Puffing, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1046, 1047 text and note 43; Of Usurious Contract, see USURY. As Condition of Vacation of Judgment Entered on Note of Married Woman For Purchase of Real Estate, see JUDGMENTS, 23 Cyc. 970 note 7. By Certiorari, see CERTIORARI, 6 Cyc. 836; JUSTICES OF THE PEACE, 24 Cyc. 784 text and note 4. By Mandamus Pursuant to Reversal of Judgment or Decree, see MANDAMUS, 26 Cyc. 215. In Ejectment, see EJECTMENT, 15 Cyc. 194. In Forcible Entry and Detainer, Civil — As Execution and Enforcement of Judgment, see FORCIBLE ENTRY AND DETAINER, 19 Cyc.

26. Sherman *v.* Congregational Home Missionary Soc., 176 Mass. 349, 351, 57 N. E. 702, holding such institution a valid public charity.

27. Black L. Dict.

Example see American Educational Co. *v.* Taggert, 124 Ill. App. 567, 572, where it was said that "*restitutio in integrum*" was impossible where a plaintiff could not return all she had received from defendant.

As admiralty rule of damages in collision cases see The Baltimore *v.* Rowland, 8 Wall. (U. S.) 377, 385, 19 L. ed. 463 [*quoted* in *In re* The Loch Trool, 150 Fed. 429, 432]; *In re* The Rickmers, 142 Fed. 305, 309, 73 C. C. A. 415; The Northumbria, L. R. 3 A. & E. 6, 12, 39 L. J. P. & M. 3, 21 L. T. Rep. N. S. 681, 18 Wkly. Rep. 188; The Black Prince, Lush. 568, 572 [*cited* in The City of Peking, 15 App. Cas. 438, 442, 6 Aspin. 572, 59 L. J. P. C. 88, 63 L. T. Rep. N. S. 722, 39 Wkly. Rep. 177]. Measure of Damages in Collision, see COLLISION, 7 Cyc. 390.

28. Black L. Dict.

29. Pawnee City First Nat. Bank *v.* Avery Planter Co., 69 Nebr. 329, 333, 95 N. W. 622, 624, 111 Am. St. Rep. 541.

"Restitution is not of mere right.— It is *ex gratia*, resting in the exercise of a sound discretion, and the Court will not order it where the justice of the case does not call for it, or where the process is set aside for a mere slip." Harger *v.* Washington County Com'rs, 12 Pa. St. 251, 254 [*quoted* in Gould *v.* McFall, 118 Pa. St. 455, 456–457, 12 Atl. 336, 4 Am. St. Rep. 606 (*quoted* in State *v.* Horton, 70 Nebr. 334, 341, 97 N. W. 434)].

30. Haebler *v.* Myers, 132 N. Y. 363, 366, 30 N. E. 963, 28 Am. St. Rep. 589, 15 L. R. A. 588, adding: "It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal which directed 'that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid.'"

Assumpsit substituted for writ of restitution see Cummings *v.* Noyes, 10 Mass. 433, 434.

31. Black L. Dict.

32. See Black L. Dict.

1175–1176 text and notes 91–5; Judgment, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1173 text and notes 74, 78; Of Leased Premises, see LANDLARD AND TENANT, 24 Cyc. 1399; On Inquisition, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1190; On Reversal of Judgment, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1174 note 78. In Forcible Entry and Detainer, Criminal — Right to, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1122; Title Necessary to Authorize Award, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1115 note 41. Of Attorney's Excessive Allowance, see ATTORNEY AND CLIENT, 4 Cyc. 1021 note 31. Of Conjugal Rights, see MARRIAGE, 26 Cyc. 921. Of Criminally Obtained Property in General, see CRIMINAL LAW, 12 Cyc. 972. Of Embezzled Money, Intention or Offer to Make, see EMBEZZLEMENT, 15 Cyc. 487. Of Fine After Vacation of Judgment, see FINES, 19 Cyc. 559. Of Fraudulently Obtained Property, see CRIMINAL LAW, 12 Cyc. 972 text and note 61. Of Judgment Debtor's Money Collected on Judgment as Restoring Right to Appeal, see APPEAL AND ERROR, 2 Cyc. 654. Of Judgment Debtor's Property, After Supplementary Proceedings, Action For, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 423 note 21. Of Leased Premises — Award of in Action For Possession, see LANDLORD AND TENANT, 24 Cyc. 1450 note 31; Reëntry and Recovery of Possession by Landlord, see LANDLORD AND TENANT, 24 Cyc. 1391; Rule For, Pending, as Preventing Action For Abuse of Process, see LANDLORD AND TENANT, 24 Cyc. 1463 note 66; To Tenant Under Forcible Entry and Detainer Acts, see LANDLORD AND TENANT, 24 Cyc. 1399. Of Lost Property, see FINDING LOST GOODS, 19 Cyc. 540. Of Mining Property, Injunction to Restrain Possession, see MINES AND MINERALS, 27 Cyc. 662 text and note 35. Of Paraphernal Property, Petition For by Wife on Separation, see HUSBAND AND WIFE, 21 Cyc. 1699 note 80. Of Pledge on Discharge, see PLEDGES, 31 Cyc. 854. Of Recaptured Property, see WAR. Of Stolen Property — In General, see LARCENY, 25 Cyc. 54; Mortgage to Secure Payment For Stolen Goods, see MORTGAGES, 27 Cyc. 1051 note 93. Of Vessel, Decree After Capture or Seizure as Terminating Right of Abandonment, see MARINE INSURANCE, 26 Cyc. 693 note 72. On Annulment of Marriage, of Property of Parties, see MARRIAGE, 26 Cyc. 918. On Pardon — Of Costs Paid, see PARDONS, 29 Cyc. 1568 note 48; Of Fine, see PARDONS, 29 Cyc. 1568; Of Office Forfeited, see PARDONS, 29 Cyc. 1569. On Reopening of Judgment Merely to Permit a Defense, Not to Be Ordered, see JUDGMENTS, 23 Cyc. 975 text and note 52. On Reversal or Vacation of Judgment — In General, see APPEAL AND ERROR, 3 Cyc. 462; JUDGMENTS, 23 Cyc. 975; In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1174 note 78; Judgment of Restitution, After Reversal of Erroneous Judgment, Conclusive, see JUDGMENTS, 23 Cyc. 1218 note 78; Order of Restitution on Vacating or Reversing Judgment, Not Open to Collateral Attack, see JUDGMENTS, 23 Cyc. 1057 text and note 30. On Supersedeas After Execution, Security in Case of Reversal, see APPEAL AND ERROR, 2 Cyc. 916. On Supersedeas After Levy, see APPEAL AND ERROR, 2 Cyc. 915 note 80, 916. Re-Restitution — On Quashing of Inquest or Indictment in Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1123; On Vacation of Judgment Vacating Other Judgment, see APPEAL AND ERROR, 32 Cyc. 463 note 56. Through Consul, of Property of Fellow-Countryman, see AMBASSADORS AND CONSULS, 2 Cyc. 274. See also RESTORATION, and Cross-References Thereunder.)

RESTORATION. The act of restoring.[33] (Restoration: Award of Possession or Return of Property in Replevin, see REPLEVIN. Of Altered Instrument — In General, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 182; Effect as to Discharge of Sureties, see PRINCIPAL AND SURETY, 32 Cyc. 179. Of Amount of Fine Paid, Operation of Pardon as to, see PARDONS, 29 Cyc. 1568. Of Attachment Lien, see ATTACHMENTS, 4 Cyc. 629 note 60. Of Attorney After Disbarment, see ATTORNEY AND CLIENT, 4 Cyc. 918 note 4. Of Consideration as Condition Precedent — To Action of Trover, see TROVER AND CONVERSION; To Cancellation of Instru-

33. Century Dict.

ments, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 306; DEEDS, 13 Cyc. 593; RELEASE; To Relief in Action to Avoid Transfer or Encumbrance of Homestead, see HOMESTEADS, 21 Cyc. 560; To Rescission of Contract, see ACCORD AND SATISFACTION, 1 Cyc. 531; EXCHANGE OF PROPERTY, 17 Cyc. 841 note 49, 846 note 60; INFANTS, 22 Cyc. 613; INSANE PERSONS, 22 Cyc. 1210; SALES; USURY; VENDOR AND PURCHASER. Of Costs of Prosecution Paid, Effect of Pardon as to, see PARDONS, 29 Cyc. 1568 note 48. Of Former Status of Parties — As Condition Precedent to Cancellation of Instruments, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 306; To Champertous Agreement, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 880. Of Government After Revolt, Rights of, see INTERNATIONAL LAW, 22 Cyc. 1730 note 14. Of Highway — After Construction of Railroad Therein, see RAILROADS, 33 Cyc. 236; By Railroad Crossing Same, see RAILROADS, 33 Cyc. 270. Of Inchoate Right of Dower, see DOWER, 14 Cyc. 958. Of Judgment Illegally Vacated, see JUDGMENTS, 23 Cyc. 1406 note 36. Of Lien or Levy of Execution, see EXECUTIONS, 17 Cyc. 1121. Of Lost or Divested Jurisdiction of Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 489. Of Lost Property, see FINDING LOST GOODS, 19 Cyc. 540. Of Offices Forfeited, Operation of Pardon as to, see PARDONS, 29 Cyc. 1569. Of Possession of Mining Property, Injunction For, see MINES AND MINERALS, 27 Cyc. 662. Of Premium Paid on Insurance, see FIRE INSURANCE, 19 Cyc. 609; LIFE INSURANCE, 25 Cyc. 791; MARINE INSURANCE, 26 Cyc. 606; MUTUAL BENEFIT INSURANCE, 29 Cyc. 103. Of Property — As Affecting Damages For Taking or Detaining, see DAMAGES, 13 Cyc. 69; As Condition Precedent to Rescission by Purchaser, see SALES; VENDOR AND PURCHASER; Converted as Mitigation of Damages For Conversion, see TROVER AND CONVERSION; Embezzled as Defense, see EMBEZZLEMENT, 15 Cyc. 508; On Annulment of Marriage, see MARRIAGE, 26 Cyc. 918; On Certiorari, see CERTIORARI, 6 Cyc. 836; On Rescinding Auction Sale, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1049; On Reversal of Judgment by Appellate Court, see APPEAL AND ERROR, 3 Cyc. 462; On Vacating or Setting Aside Judgment, see JUDGMENTS, 23 Cyc. 975; Pledged on Payment or Other Discharge of Pledge, see PLEDGES, 31 Cyc. 854; Taken in Detinue, see DETINUE, 14 Cyc. 261. Of Recaptured Property to Owner, see WAR. Of Stolen Property — In General, see LARCENY, 25 Cyc. 54; Mitigation of Punishment, see LARCENY, 25 Cyc. 56. On Appeal, of Property Levied on Under Execution, see APPEAL AND ERROR, 2 Cyc. 915 note 80. Request For on Application For Dissolution of Attachment, see ATTACHMENT, 4 Cyc. 789. To Office or Employment, Mandamus as Remedy, see MANDAMUS, 26 Cyc. 260. To Sanity, see INSANE PERSONS, 22 Cyc. 1146. See also RESTITUTION.)

RESTORE. To bring back to a former and better state; to bring or put back to a former condition or position.[34] Applied to what has become lost or defective,

34. Century Dict. [*quoted* in Hempstead *v.* New York, 52 N. Y. App. Div. 182, 187, 65 N. Y. Suppl. 14].

A "covenant to redeliver or restore to the lessor in the same plight and condition, usual wear and tear excepted (or other words of like import), does not bind the covenantor to rebuild in case of casual destruction by fire, or impose the burden of the loss on him." Levey *v.* Dyess, 51 Miss. 501, 509.

"Repair" a synonym according to the lexicographers see State *v.* Gibson County, 80 Ind. 478, 481, 41 Am. Rep. 821.

"Substitute, restate, restore, and like words, may be used as implying the same general meaning." Bowman *v.* McLaughlin, 45 Miss. 461, 487.

Relates to something having a previous existence.— Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 433, 72 N. W. 1118, holding that Rev. St. § 1836, requiring railroads to restore highways crossed by them applies only to highways already existing, a general legislative policy to the contrary notwithstanding. *Contra,* Louisville, etc., R. Co. *v.* Smith, 91 Ind. 119, 121 [*disapproved* in Chicago, etc., R. Co. *v.* Milwaukee, 97 Wis. 418, 433, 72 N. W. 1118], holding that the word in a like statute (Ind. Rev. St. (1881) § 3903, applies to highways laid out across the road after it is constructed.

Railroads required to "restore" highways which they cross see State *v.* New Haven, etc., Co., 45 Conn. 331, 344 (in construing 4 Conn. Priv. Laws, p. 890, it is said: "The word 'restore' imports a physical impairment of the road bed itself. It is an apt word when used with reference to such a road, but is inappropriate when used with reference to a road physically complete and to indicate the removal of an obstruction which has no connection with the traveled

to bring back, to heal.[35] (See RESTORATION, *ante*, p. 1679, and Cross-References Thereunder.)

RESTRAIN. To hold back, to curb, to hold in, to check, to prevent, to hinder;[36] hold back; repress; hold in check;[37] to keep from action, to repress, to prevent, to debar;[38] to curb; to check; to repress; to debar; to prevent; to hinder;[39] to prohibit, limit, confine, or abridge.[40] As used in grants of municipal power,[41] the term may confer power to license that which is made subject to restraint,[42]

path, but is an obstruction only as it is calculated at certain times to frighten horses. . . . If there is no crossing, and the road bed itself is undisturbed, no structural restoration is required. Restoration in the sense of removing all danger is impossible"); People *v.* New York Cent., etc., R. Co., 74 N. Y. 302, 305, where, in construing St. (1850) c. 140, § 28, it is said: "The statute implies that the usefulness of a highway intersected may be to some extent impaired, and I think it fairly implies also that the crossing must be such, as that the usefulnesss of the highway shall not be destroyed"); Moundsville *v.* Ohio, etc., R. Co., 37 W. Va. 92, 97, 16 S. E. 514, 20 L. R. A. 161 (where, in construing St. (1872–1873) 224, Code (1891), 530, and the common law rule, it is said that the requirement of restoration of the highway to its former condition is not to be taken literally, "but, though 'restoration,' as here used, may not mean 'restoration to the same surface or elevation,' yet it does mean that the highway must be brought back to its former usefulness, and rendered as passable as before, so as not unnecessarily to impair its usefulness for ordinary travel"); Roberts *v.* Chicago, etc., R. Co., 35 Wis. 679, 684 (applying Rev. St. c. 79, § 11); Duffy *v.* Chicago, etc., R. Co., 32 Wis. 269, 274 [*approved* in Roberts *v.* Chicago, etc., R. Co., *supra*. See *supra*, this note as to application to highway constructed after the roadbed.

Attached property "restored" to mortgagee.— In Mass. Rev. St. c. 9, §§ 78, 79, declaring that on demand and default of payment from the attaching officer, a mortgaged property attached should be restored to the mortgagee, the term may imply that the property was taken out of the constructive, not the actual possession of the mortgagor but more satisfactory, perhaps, is the larger and more generic meaning, equivalent to the direction that it shall be surrendered and delivered to the mortgagee from whom it is detained by the officer without law and against right. Esson *v.* Tarbell, 9 Cush. (Mass.) 407, 414.

35. Bowman *v.* McLaughlin, 45 Miss. 461, 486.

36. Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 226, 30 Am. Rep. 545, adding "and to that extent it may mean to govern."

Restraining religious freedom see Frolickstein *v.* Mobile, 40 Ala. 725, 727 (holding that one is not restrained in his religious sentiments by a prohibition against selling goods from his store on Sunday); Thurston *v.* Whitney, 2 Cush. (Mass.) 104, 110 (holding that to restrain one in his person or estate for his religious profession or sentiments cannot consist in merely refusing to admit as a witness one who does not believe in God and a future state of rewards and punishments).

Not synonymous with "prohibit" see Emporia *v.* Volmer, 12 Kan. 622, 630 [*cited* in Stebbins *v.* Mayer, 38 Kan. 573, 577, 16 Pac. 745, holding that the word "prohibiting" in the title of a statute is not broad enough to authorize an ordinance "restraining"].

Not synonymous with "suppress" see Emporia *v.* Volmer, 12 Kan. 622, 630; *In re* Snell, 58 Vt. 207, 209, 1 Atl. 566.

Not more comprehensive than "regulate" see Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 226, 30 Am. Rep. 545.

Unlawful restraint of commerce may be permanent or temporary; the law draws no distinction in this respect. *In re* Charge to Grand Jury, 62 Fed. 828, 831.

37. Burlington *v.* Lawrence, 42 Iowa 681, 682, adding: "While the subject is not suppressed, it is held in check and under control."

38. Smith *v.* Warrior, 99 Ala. 481, 482, 12 So. 418.

39. Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506, where it is said that the lexicographers all agree upon this definition.

40. *In re* Charge to Grand Jury, 62 Fed. 828, 831.

41. **Power to restrain animals** from going at large does not merely authorize a penalty inflicted upon the owners of stray animals but "to adopt such suitable and appropriate regulations on the subject as would specifically prevent and hinder the animals themselves from being at large on highways and commons." Whitlock *v.* West, 26 Conn. 406, 413.

Power to require a bond from an applicant for a license to keep a barroom is included in authority to "regulate and restrain." *In re* Schneider, 11 Oreg. 288, 298, 8 Pac. 289.

42. **Power to license included** see Mt. Carmel *v.* Wabash County, 50 Ill. 69, 73; Smith *v.* Madison, 7 Ind. 86, 90; Burlington *v.* Lawrence, 42 Iowa 681, 682; Emporia *v.* Volmer, 12 Kan. 622, 630; *In re* Snell, 58 Vt. 207, 209, 1 Atl. 566. See also State *v.* Stevens, 114 N. C. 873, 876, 19 S. E. 861, holding that the power to "regulate and restrain," in connection with a direction to collect a license tax, gives power to impose such tax. *Contra*, *Ex p.* Garza, 28 Tex. App. 381, 386, 13 S. W. 779, 19 Am. St. Rep. 845 [*disapproving* Smith *v.* Madison, *supra*, and Burlington *v.* Lawrence, *supra*]. *Compare* St. Louis *v.* Smith, 2 Mo. 113, 115, where a distinction was drawn as to power to license, between the case of "tippling houses" and

to punish,[43] to prohibit.[44] (See RESTRAINT, and Cross-References Thereunder; RESTRAINT OF TRADE, and Cross-References Thereunder.)

RESTRAINING ORDER. See INJUNCTIONS, 22 Cyc. 745; PROHIBITION, 32 Cyc. 596.

RESTRAINT. Abridgment of liberty or hindrance of the will;[45] prohibition of action; holding or pressing back from action; hindrance; CONFINEMENT, *q. v.*; RESTRICTION, *q. v.*[46] (Restraint; Extent of to Constitute False Imprisonment, see FALSE IMPRISONMENT, 19 Cyc. 322. For Which Resort May Be Had to Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 289. Insurance of Vessel Against, see MARINE INSURANCE, 26 Cyc. 656. Of Alienation — In General, see PERPETUITIES, 30 Cyc. 1518; Conditions in Deeds, see DEEDS, 13 Cyc. 687; Conditions in Wills, see WILLS. Of Insane Persons, see INSANE PERSONS, 22 Cyc. 1160. Of Insured Vessel, Effect as to Right to Abandon For Total Loss, see MARINE INSURANCE, 26 Cyc. 692. Of Marriage, Validity — Of Bill or Note Given For, see COMMERCIAL PAPER, 7 Cyc. 744; Of Conditions in Deed, see DEEDS, 13 Cyc. 686; Of Conditions in Wills, see WILLS; Of Contract in, see CONTRACTS, 9 Cyc. 518. Of Prisoners, see PRISONS, 32 Cyc. 329.)

RESTRAINT OF TRADE. A term which is said to include all kinds of those contracts which in fact restrain or may restrain trade.[47] (Restraint of Trade: Bills and Notes Given in, see COMMERCIAL PAPER, 7 Cyc. 744. By-Laws of Corporation Operating as, see CORPORATIONS, 10 Cyc. 359. Contracts in — In General, see CONTRACTS, 9 Cyc. 523; As Subjects For Protection and Relief by Injunction, see INJUNCTIONS, 22 Cyc. 865; Constitutionality of Statute Avoiding, see CONSTITUTIONAL LAW, 8 Cyc. 1113 note 61. Through Trusts and Other Combi-

that of houses of prostitution on the ground that the law could permit the former to exist, but not the latter — it was further said, however, as to houses of prostitution, that if the corporation did not choose to suppress them it might restrain them within such limits as it might see fit.

43. **Power to punish included** see Centerville *v.* Miller, 57 Iowa 56, 57, 10 N. W. 293 (holding that power to restrain authorizes punishment of persons engaging in riots, noise, disturbance, or disorderly assemblages); Ogden *v.* Madison, 111 Wis. 413, 419, 87 N. W. 568, 55 L. R. A. 506. See also Winooski *v.* Gokey, 49 Vt. 282, 286, holding that the power to "suppress and restrain" gives the right to impose reasonable penalties. *Compare* Ogden City *v.* McLaughlin, 5 Utah 387, 389, 16 Pac. 321, holding that authority to restrain houses of prostitution does not authorize the punishment of persons resorting to them.

44. See *infra*, this note.

Power to prohibit not included see Mernaugh *v.* Orlando, 41 Fla. 433, 438, 27 So. 34 (holding that authority to restrain does not confer the power to prohibit barrooms and the like as used in a provision also granting power to require all such places to be kept and used subject to reasonable regulations and under license); Steffy *v.* Monroe City, 135 Ind. 466, 469, 35 N. E. 121, 41 Am. St. Rep. 436 (holding that power to restrain does not confer the right to prohibit the sale of intoxicating liquors). See also St. Louis *v.* Smith, 2 Mo. 113, 115 [*quoted* in State *v.* Fay, 44 N. J. L. 474, 476], holding that the words "restrain" and "prohibit," used together in a statute granting municipal authority, gave two powers, one to prohibit the existence altogether, the other to keep within certain limits as to number and order at discretion.

Power to prohibit included see Smith *v.* Warrior, 99 Ala. 481, 482, 12 So. 418.

Power to prohibit one thing in order to restrain another see Vinson *v.* Monticello, 118 Ind. 103, 104, 19 N. E. 734, holding that power to regulate and restrain the sale of intoxicating liquors includes as a necessary incident the power to prohibit the barter or giving away of the same.

45. Edmondson *v.* Harris, 2 Tenn. Ch. 427, 434.

46. U. S. *v.* Elliott, 64 Fed. 27, 30, where it is said that such are among the recognized meanings of the word, and such was its use in the phrase "restraint of commerce" used in a statute making contracts in restraint of trade or commerce unlawful.

In reference to the execution of wills, the term is said to mean that kind of influence which is exercised by force, or threats, or coercion, physical or mental, which the testator is not able to resist, or from fear, by which the testator is prevented from exercising and expressing his own judgment and desire. *In re* Black, Myr. Prob. (Cal.) 24, 31.

Statutory definition see *Ex p.* Snodgrass, 43 Tex. Cr. 359, 361, 65 S. W. 1061.

Does not mean only corporal confinement or the fear of bodily harm. Taking away the will of the person by threats or by improper means of any kind not willingly assented to by the person, but brought about by the exercise of authority or by fear, or apprehension of loss of any kind, must be a restraint. Starratt *v.* Miller, Hodg. El. Rep. Ont. 458, 467.

For derivation of the term see CONSTRAINT, 8 Cyc. 1141 note 4.

47. U. S. *v.* Trans-Missouri Freight Assoc.,

nations, see MONOPOLIES, 27 Cyc. 899. See also RESTRAIN, *ante*, p. 1681; RESTRAINT, *ante*, p. 1682.)

RES TRANSIT CUM SUO ONERE. A maxim meaning "The thing passes with its burden." [48]

RESTRICT. To restrain within bounds; [49] to restrain within bounds; to limit; to confine.[50] (See also RESTRICTION.)

RESTRICTION. LIMITATION, *q. v.*; confinement within bounds.[51] (Restriction: As to Buildings, Effect as Breach of Covenant of Warranty by Grantor, see COVENANTS, 11 Cyc. 1125. As to Use of Property, Effect as Breach of Covenant Against Encumbrances by Grantor, see COVENANTS, 11 Cyc. 1117. By Constitution as to Assessment or Special Taxes For Public Improvement, see MUNICIPAL CORPORATIONS, 23 Cyc. 1103. By Statute on Creation of Future Interest in Realty and Personalty, see PERPETUITIES, 30 Cyc. 1517. In Assignment — In General, see ASSIGNMENTS, 4 Cyc. 75; Of Patent, see PATENTS, 30 Cyc. 951. In Bill or Note Affecting Negotiability, see COMMERCIAL PAPER, 7 Cyc. 575. In Constitution as Self-Executing Provisions, see CONSTITUTIONAL LAW, 8 Cyc. 754. In Deed — In General, see DEEDS, 13 Cyc. 683; Injunction to Restrain Violation of as to Kind of Business, see INJUNCTIONS, 22 Cyc. 861. In Indorsement of Note For Transfer as Affecting Liability of Indorser, see COMMERCIAL PAPER, 7 Cyc. 806. In Lease — As to Assignment of Leasehold, or Subletting, see LANDLORD AND TENANT, 24 Cyc. 966; As to Use of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1062; Injunction to Prevent Violation of as to Subletting, see LANDLORD AND TENANT, 24 Cyc. 972. In License to Use Patent, see PATENTS, 30 Cyc. 958. In Mining Lease as to Use, see MINES AND MINERALS, 27 Cyc. 699. In Power, Construction, and Execution, see POWERS, 31 Cyc. 1057. In Will, see WILLS. Of Admitted Evidence For Special Purposes, see CRIMINAL LAW, 12 Cyc. 553; TRIAL. Of Foreign Corporation by State Laws — In General, see FOREIGN CORPORATIONS, 9 Cyc. 1251; Consequences of Violation of, see FOREIGN CORPORATIONS, 19 Cyc. 1289; Engaged in Interstate Commerce, see FOREIGN CORPORATIONS, 19 Cyc. 1228; Provisions Subjecting to Same Liability as Domestic Corporations, see FOREIGN CORPORATIONS, 19 Cyc. 1235. Of Functions of Jury as Denial or Infringement of Right to Trial by, see JURIES, 24 Cyc. 191. On Apparent Authority of President to Represent Corporation, see CORPORATIONS, 10 Cyc. 913. On Partner's Authority to Represent Firm, see PARTNERSHIP, 30 Cyc. 481. On Police Power of Municipality by Contract or License, see MUNICIPAL CORPORATIONS, 28 Cyc. 696. On Referee in Bankruptcy, see BANKRUPTCY, 5 Cyc. 277. On Right of Testamentary Disposition, see WILLS. On Right to Transfer Shares of Corporate Stock, see CORPORATIONS, 10 Cyc. 579. On Use of Property Constituting Implied Covenants, see COVENANTS, 11 Cyc. 1051. Or Enlargement of Jurisdiction of Court by Legislature, see COURTS, 11 Cyc. 783. Sublease in Violation of, see LANDLORD AND TENANT, 24 Cyc. 987.)

166 U. S. 290, 328, 17 S. Ct. 540, 41 L. R. A. 1007.

48. Black L. Dict. adding: "Where a thing has been incumbered by mortgage, the incumbrance follows it wherever it goes."

49. Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 319, 4 S. W. 567, 2 Am. St. Rep. 494, where it was held, construing a statute prohibiting carriers to limit or restrict their liability as it exists at common law, by any general or special notice, or in any other manner whatever, that the term was used to prohibit the carrier from so contracting as to make his liability depend on facts other than such as would fix liability under the settled rules of the common law.

50. Webster Dict. [*quoted* in Atlantic Coast Line R. Co. *v.* Beazley, 54 Fla. 311, 361, 45 So. 761; Mumford *v.* Chicago, etc., R. Co., 128 Iowa 685, 691, 104 N. W. 1135].

51. Curry *v.* Marvin, 2 Fla. 411, 415, where it was held that, as used in a state constitution providing that the supreme court should have jurisdiction under restrictions and regulations prescribed by law, the term applied to the amount and to the time within which an appeal might be taken, or a writ of error sued out.

Distinguished from "reservation" or "exception" see Greber *v.* Kleckner, 2 Pa. St. 289, 292.

When used in connection with a grant of an interest in real property the term is in a sense analogous to "condition," and either

RESTRICTIVE INDORSEMENT. An indorsement precluding the person to whom it is made from transferring the instrument over to another, so as to give him a right of action, either against the person imposing the restriction, or against any of the preceding parties.[52] (Restrictive Indorsement: Of Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 806.)

RESTRICTIVE TITLE. In reference to statutes, a title where a particular fact or branch of a subject is carved out and selected as the subject of the legislation.[53]

RESULT. The effect of one or more concurrent causes;[54] that which springs or rebounds back from some pre-existing thing.[55]

RESULTING POWERS. A term which has been used in constitutional law to designate the powers exercised by Congress which are not expressly given nor ancillary to any single enumerated power.[56]

RESULTING TRUST. See TRUSTS.

RESUME. To take again; to take back;[57] to take up again after an interruption; begin anew.[58]

RESURVEY. To survey again.[59] (Resurvey: Of Public Lands, see PUBLIC LANDS, 32 Cyc. 806.)

RETAIL. To sell in small parcels or quantities, and not in gross;[60] to sell in small quantities;[61] to sell by small quantities, in broken parts, in small lots or

term may denote limitation upon the full and unqualified enjoyment of the right granted. Worcester *v.* Worcester Consol. St. R. Co., 192 Mass. 106, 113, 78 N. E. 222.

52. Drew *v.* Jacocks, 6 N. C. 138.

Distinguished from "full indorsement" and "blank indorsement" see Lee *v.* Chillicothe Branch State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325.

53. Memphis St. R. Co. *v.* Byrne, 119 Tenn. 278, 289, 104 S. W. 460.

54. Thompson *v.* Louisville, etc., R. Co., 91 Ala. 496, 498, 8 So. 406, 11 L. R. A. 146.

55. Transatlantic Ins. Co. *v.* Bamberger, 11 S. W. 595, 596, 11 Ky. L. Rep. 101, where it is said: "The word is in common use by all classes,— the lettered as well as the unlettered."

In reference to the law of negligence it is said: "One must distinguish somewhat between the term . . . as applied to the injury and . . . as applied to the proximate consequences of the injury." Fisher *v.* Western Union Tel. Co., 119 Wis. 146, 153, 96 N. W. 545.

As used in the statement of the rule of law that an independent contractor represents the will of his employer only as to the "result" of his work, and not as to the means whereby it is accomplished, the term means a production or product of some sort, and not a service. Jensen *v.* Barbour, 15 Mont. 582, 593, 39 Pac. 906; Texas, etc., R. Co. *v.* Parsons, (Tex. Civ. App. 1908) 109 S. W. 240, 247.

"Result of the election" see Hobson *v.* Morin, 1 Ont. El. Cas. 383, 393.

56. Knox *v.* Lee, 12 Wall. (U. S.) 457, 535, 20 L. ed. 287, where the right to sue and make contracts, requiring an oath from officers of the government, building a capitol or presidential mansion, and the enactment of a penal code are given as instances of such power.

57. Century Dict.

As used in reference to the act of taking by the public of a road from its owners, the term is an allusion to one of the alleged sources of the public right to take private property, whether held in fee or otherwise, and not a suggestion that the owner's title is exceptionally defeasible. Opinion of Justices, 66 N. H. 629, 635, 33 Atl. 1076.

58. Century Dict.

In a statute requiring that proof shall be made that an insolvent corporation will not be able to "resume" its business with safety to the public and advantage to its stockholders within a short time, the term is to be taken in the sense of taking up again any suspended function. Reinhardt *v.* Inter-State Tel. Co., 71 N. J. Eq. 70, 79, 63 Atl. 1097; Ft. Wayne Electric Corp. *v.* Franklin Electric Light Co., 57 N. J. Eq. 7, 13, 41 Atl. 217.

"Resume work" as used in a statute providing that mining claims shall be open to relocation after the expiration of a certain time, if the locator has not resumed work on the claim before said location, means to actually begin work anew, with the *bona fide* intention of prosecuting such work. McCormick *v.* Baldwin, 104 Cal. 227, 229, 37 Pac. 903.

59. Trudeau *v.* Sheldon, 62 Vt. 198, 202, 20 Atl. 161, where it is said: "There must have been a previous survey to warrant what is defined as a re-survey."

Under a statute relative to the resurvey of highways the term has been held to mean "relocate." Culver *v.* Fair Haven, 67 Vt. 163, 166, 31 Atl. 143.

60. Bridges *v.* State, 37 Ark. 224, 226; Bouvier L. Dict. [*quoted* in McArthur *v.* State, 69 Ga. 444, 446; State *v.* Lowenhaught, 11 Lea (Tenn.) 13, 14].

As used in a statute prohibiting the sale of domestic wines and cider in barrooms by retail, the term means the sale in quantities less than one quart. Beiser *v.* State, 79 Ga. 326, 329, 4 S. E. 257.

61. Harris *v.* Livingston, 28 Ala. 577, 579; Com. *v.* Kimball, 7 Metc. (Mass.) 304, 308; State *v.* Cassety, 1 Rich. (S. C.) 90, 91; Koenig *v.* State, 33 Tex. Cr. 367, 378, 26 S. W. 835, 47 Am. St. Rep. 35.

parcels, not in bulk.[62] (See RETAILER, *post*, this page, and Cross-References Thereunder; RETAIL LIQUOR DEALER, *post*, this page.)

RETAILER. One who sells goods by small quantities or parcels;[63] one who deals in merchandise in smaller quantities than he buys, generally with a view to profit.[64] (Retailer: As Subjects of Special License Tax, see LICENSES, 25 Cyc. 615. Regulations as to the Sale of Liquor at Retail, see INTOXICATING LIQUORS, 23 Cyc. 161. See also RETAIL.)

RETAIL LIQUOR DEALER. Any one who sells in small quantities directly to the consumer;[65] first, one who sells spirituous liquors in quantities of less than a quart; second, a person who sells such liquor by the quart to a person of known intemperate habits; third, those who sell in any quantities to be drunk on or about the place;[66] one who sells by small quantities, to suit customers, liquors which are bought in larger amounts generally;[67] one who sells to persons or customers for purposes of consumption.[68] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 117, 161.)

RETAIN. To keep in pay, to hire;[69] to keep in possession or hold back;[70] to hold or keep that which one already owns, not to lose or part with or dismiss it.[71]

RETAINER. A dependent or hanger on;[72] a remedy by mere operation of law.[73] Used with regard to attorneys at law, the word is said to mean the securing

May be either for or without consideration. — Markle *v.* Akron, 14 Ohio 586, 592.

"To retail spirituous liquors," under a statute making it an offense to do so without license, means to vend liquors in small quantities for gain. State *v.* Mooty, 3 Hill (S. C.) 187, 189.

62. State *v.* Hawkins, 91 N. C. 626, 627.

Distinguished from "wholesale" see People *v.* Abraham, 16 N. Y. App. Div. 58, 62, 44 N. Y. Suppl. 1077; Tripp *v.* Hennessy, 10 R. I. 129, 131; Gorsuth *v.* Butterfield, 2 Wis. 237, 243.

"Retailing" differs radically from "dispensing" or "compounding." People *v.* Abraham, 16 N. Y. App. Div. 58, 62, 44 N. Y. Suppl. 1077.

A vegetable dealer in the market conducts a business of "selling at retail." State *v.* Cendo, 38 La. Ann. 828, 829.

63. Campbell *v.* Anthony, 40 Kan. 652, 654, 20 Pac. 492.

64. Bouvier L. Dict. [*quoted* in State *v.* Lowenhaught, 11 Lea (Tenn.) 13, 15].

Includes a sugar planter who keeps a store on his plantation, where though the bulk of the sales are made to employees on the plantation, yet other persons are not forbidden to purchase from the store (Thibaut *v.* Dymond, 37 La. Ann. 902, 903) and the keeper of a woodyard in a city (Washington *v.* Casanave, 29 Fed. Cas. No. 17,225, 5 Cranch C. C. 500).

65. Thibaut *v.* Kearney, 45 La. Ann. 149, 151, 12 So. 139, 18 L. R. A. 596.

66. Elam *v.* State, 25 Ala. 53, 55.

67. Webb *v.* State, 11 Lea (Tenn.) 662, 665; State *v.* Lowenhaught, 11 Lea (Tenn.) 13, 15.

68. State *v.* Tarver, 11 Lea (Tenn.) 658, 660, where he is distinguished from a wholesale dealer.

Includes a person who on a few occasions sold case whisky in quantities less than a quart. Lemons *v.* State, 50 Ala. 130, 132.

One act of selling does not constitute engaging in or carrying on the business unless an intention to do so is concurrent with the selling. Bryant *v.* State, 46 Ala. 302, 303.

Does not apply to one selling an occasional drink of spirits out of a bottle at a place outside a barroom, without intending to defraud the national revenue. U. S. *v.* Jackson, 26 Fed. Cas. No. 15,455, 1 Hughes 531.

69. Elderton *v.* Emmons, 6 C. B. 160, 176, 17 L. J. C. P. 307, 60 E. C. L. 160.

70. Cudworth *v.* Bostwick, 69 N. H. 536, 537, 45 Atl. 408.

71. Webster Int. Dict. [*quoted* in Featherston *v.* Merrimon, 140 N. C. 199, 205, 61 S. E. 675].

"Retain and employ" are words used in the precedents continually as meaning a hiring, engaging, and keeping a person in service. Emmons *v.* Elderton, 13 C. B. 495, 504, 76 E. C. L. 495, 4 H. L. Cas. 624, 10 Eng. Reprint 606, 18 Jur. 21.

A word which does not necessarily show that there was a consideration. Elsee *v.* Gatward, 5 T. R. 143, 151.

Retained.— Employed for reward, and it is not necessary to use the words "retained for certain reward in that behalf." Clark *v.* Baird, 29 N. Brunsw. 620, 629.

72. Luty *v.* Purdy, 2 Overt. (Tenn.) 163, 167, where it was so used with regard to an army camp.

73. Miller *v.* Irby, 63 Ala. 477, 483 [*citing* 3 Blackstone Comm. 18], where it is explained and defined by Blackstone as follows: "If a person, indebted to another, makes his creditor, or debtee, his executor; or, if such a creditor obtains letters of administration to his debtor; in these cases, the law gives him a remedy for his debt, by allowing him to 'retain' so much as will pay himself, before any other creditors whose debts are of equal degree." See also Taylor *v.* Deblois, 23 Fed. Cas. No. 13,790, 4 Mason 131, where it is further said that the general principle in cases of retainer is that where the party unites in himself, by representation or otherwise, the character of debtor and creditor, he is entitled to retain, inasmuch as he cannot

of an attorney at law to perform professional services in the business of another, in such manner that he cannot engage himself to or perform any services in the employment, or in any manner to do anything in the business prejudicial to the party employing him;[74] the act of a client by which he engages an attorney or counsellor to manage a cause, either by prosecuting it when he is plaintiff or defending it when he is defendant.[75] A preliminary fee given a counsel to secure his services, or rather as it has been said, to prevent the opposite side from engaging him;[76] the engagement of a counsel or solicitor to take or defend proceedings, or to advise or otherwise act for the client.[77] (Retainer: Notice of Retainer and Appearance, see APPEARANCES, 3 Cyc. 504. Of Attorney, see ATTORNEY AND CLIENT, 4 Cyc. 926.)

RETAINING FEE. A fee given to counsel on being consulted in order to insure his future services.[78] (See RETAINER, *ante*, p. 1685; and, generally, ATTORNEY AND CLIENT, 4 Cyc. 982.)

RETAINING LIEN. A term sometimes used to mean the possessory lien of an attorney.[79]

RETAKING. See RECAPTION, 33 Cyc. 1571.

RETALIATORY STATUTE. See FOREIGN CORPORATIONS, 19 Cyc. 1264; TAXATION.

RETAXATION. See COSTS, 11 Cyc. 163; TAXATION.

RETIREMENT. The act of retiring, or the state of being retired; withdrawal; seclusion.[80] (Retirement: Of Army or Navy Officer, see ARMY AND NAVY, 3 Cyc. 822. Of Fireman on Pension, see MUNICIPAL CORPORATIONS, 28 Cyc. 554. Of Partner, see PARTNERSHIP, 30 Cyc. 603. Of Policeman on Pension, see MUNICIPAL CORPORATIONS, 28 Cyc. 531.)

RETIRING BOARD. See ARMY AND NAVY, 3 Cyc. 822.

RETIRING PARTNER. See PARTNERSHIP, 30 Cyc. 610.

RETORNO HABENDO. See DE RETORNO HABENDO, 13 Cyc. 1045.

RETRACTION. The act of withdrawing something advanced, stated, claimed or done; declaration of change of opinion.[81] (Retraction: Of Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 431, 546. Of Plea of Guilty, see CRIMINAL LAW, 12 Cyc. 350. Of Ratification of Agent's Acts, see PRINCIPAL AND AGENT, 31 Cyc. 1284. See also REVOCATION.)

RETRAXIT. At common law, an open, voluntary renunciation of a claim in court, whereby the party making the same forever loses his action.[82] (Retraxit: Authority of Attorney to Enter, see ATTORNEY AND CLIENT, 4 Cyc. 936. Distinction Between, and Nolle Prosequi, see DISMISSAL AND NONSUIT, 14 Cyc. 393. Effect of Judgment Entered Thereon as Estoppel, see JUDGMENTS, 23 Cyc. 1138. Entry of Retraxit, Dismissal, or Discontinuance, see DISMISSAL AND NONSUIT, 14 Cyc. 417. Right of Retractor to Appeal, see APPEAL AND ERROR, 2 Cyc. 660 note 31.)

sue himself, and the law will presume a retainer in satisfaction of the debt if there are assets in his hands.

74. Kelley *v.* Richardson, 69 Mich. 430, 461, 37 N. W. 514.

75. Abbott L. Dict. [*quoted* in Blackman *v.* Webb, 38 Kan. 668, 669, 17 Pac. 464]; Bouvier L. Dict. [*quoted* in Agnew *v.* Walden, 84 Ala 502, 504, 4 So. 672; Knight *v.* Russ, 77 Cal. 410, 412, 19 Pac. 698; Blackman *v.* Webb, *supra*; Blair *v.* Columbian Fireproofing Co., 191 Mass. 333, 336, 77 N. E. 762]; Webster Dict.; Worcester Dict. [*quoted* in Agnew *v.* Walden, *supra*].

76 Imperial Dict. [*quoted* in Agnew *v.* Walden, 84 Ala. 502, 504, 4 So. 672].

77. Rapalje & L. L. Dict. [*quoted* in Agnew *v.* Walden, 84 Ala. 502, 504, 4 So. 672].

78. Bouvier L. Dict. [*quoted* in Blair *v.* Columbian Fireproofing Co., 191 Mass. 333, 336, 77 N. E. 762].

79. See ATTORNEY AND CLIENT, 4 Cyc. 1009. See also Koons *v.* Beach, 147 Ind. 137, 139, 45 N. E. 601, 46 N. E. 587; Matter of Lexington Ave., 30 N. Y. App. Div. 602, 606, 52 N. Y. Suppl. 203; *In re* Wilson, 12 Fed. 235, 239.

80. Webster Int. Dict.

81. Webster Int. Dict.

82. Hibernia Sav., etc., Soc. *v.* Portener, 139 Cal. 90, 93, 72 Pac. 716. For other cases with the same holding see Westbay *v.* Gray, 116 Cal. 660, 666, 48 Pac. 800; Merritt *v.* Campbell, 47 Cal. 542, 545; Broward *v.* Roche, 21 Fla. 465, 477; Loomis *v.* Green, 7 Me. 386, 391; Walker *v.* St. Paul City R. Co., 52 Minn. 127, 130, 53 N. W. 1068; Napier *v.* Gidiere, Cheves (S. C.) 101, 102.

RETREAT. To retire from an enemy, or from any advanced position.[83] (See HOMICIDE, 21 Cyc. 792, 820, 1058.)

RETROACTIVE EFFECT. See ALIENS, 2 Cyc. 118; INTOXICATING LIQUORS, 23 Cyc. 111.

RETROACTIVE LAW. A term which means the same as RETROSPECTIVE LAW, *q. v.*[84]

RETROCESSION. The restitution of an ancient title to the true owner.[85]

RETROSPECTIVE LAW. One which is made to affect acts or facts transpiring, or rights accruing before it came into force.[86] (Retrospective Law: Application of to Criminal Prosecution, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 172. Effect of Upon Homestead Exemption, see HOMESTEADS, 21 Cyc. 462, 576. Operation of — In Attachment Case, see ATTACHMENT, 4 Cyc. 402; In License Act, see LICENSES, 25 Cyc. 623. Power of Congress to Pass, see INTERNAL REVENUE, 22 Cyc. 1607. Statute of Fraud Whether, see FRAUDS, STATUTE OF, 20 Cyc. 281. Statute of Limitations, Operation of, Whether Prospective or Retrospective, see LIMITATIONS OF ACTIONS, 25 Cyc. 991. See, generally, CONSTITUTIONAL LAW, 8 Cyc. 1017; STATUTES.)

RETURN. As a noun, a short account, in writing, made by a ministerial officer of the manner in which he has executed a writ;[87] the act of a sheriff, constable or other ministerial officer, in delivering back to the court a writ, notice, or other paper;[88] a short account in writing, made by the sheriff, of the manner in which he has executed his writ;[89] the answer made by the officer, indorsed on the writ, certifying to the court the fact and manner of service;[90] the certificate of the officer to whom any process is directed, stating what he has done in obedience to the command therein given, or the reason for his neglect in not fulfilling them.[91] As a verb, to cause to take again a former position; put, carry, or send back as to a former place or holder;[92] to turn back; to go or come again to the same place or condition.[93] (Return: Accrual of Right of Action For Failure to

"Dismissal distinguished" see Bullock *v.* Perry, 2 Stew. & P. (Ala.) 319, 321.

"Nonsuit" distinguished see Evans *v.* McMahan, 1 Ala. 45, 47; Hallack *v.* Loft, 19 Colo. 74, 80, 34 Pac. 568; Herring *v.* Poritz, 6 Ill. App. 208, 211; Thompson *v.* Thompson, 65 S. W. 457, 459, 23 Ky. L. Rep. 1535; Worke *v.* Byers, 10 N. C. 228, 231; South Branch R. Co. *v.* Long, 26 W. Va. 692, 700; U. S. *v.* Parker, 120 U. S. 89, 98, 7 S. Ct. 454, 30 L. ed. 601.

83. Webster Dict.

"Retreated" distinguished from "retired" see Delaney *v.* State, 14 Wyo. 1, 81 Pac. 792.

"Retreat to the wall" is an expression which is said to mean only that the party must avail himself of any apparently reasonable avenue of escape by which his danger might be averted, and the necessity of slaying his assailant avoided. People *v.* Iams, 57 Cal. 115, 120. See also State *v.* Gardner, 96 Minn. 318, 324, 104 N. W. 971, 2 L. R. A. N. S. 49.

84. Black L. Dict.

85. Amet *v.* Boyer, 43 La. Ann. 562, 578, 9 So. 622, where it is said that such an act confers no new title, but merely recognizes and confirms a previously existing title in another.

86. Black L. Dict.

87. Phillips County *v.* Pillow, 47 Ark. 404, 406, 1 S. W. 686 [*citing* Stephen Pl. 25].

88. Black L. Dict. [*quoted* in Clyatt *v.* U. S., 197 U. S. 207, 219, 25 S. Ct. 429, 49 L. ed. 726].

89. Bouvier L. Dict. [*quoted* in Kingsbury *v.* Buchanan, 11 Iowa 387, 391]. See also Smith *v.* Kelly, 7 N. C. 507, 510; Davis *v.* Reaves, 7 Lea (Tenn.) 585, 590.

90. Burrill L. Dict. [*quoted* in Horton *v.* Kansas City, etc., R. Co., 26 Mo. App. 349, 355].

91. Herman Ex. [*quoted* in Jones *v.* Goodbar, 60 Ark. 182, 185, 29 S. W. 462]. See also State *v.* Bulkeley, 61 Conn. 287, 363, 23 Atl. 186, 14 L. R. A. 657.

Technically and literally the term, as applied to a writ, includes not only the certificate of the sheriff, but also the filing of it in court. But frequently in statutes, and usually in common speech, the word means merely the certificate, without regard to whether it has been filed or not. Easton *v.* Childs, 67 Minn. 242, 245, 69 N. W. 903.

The term is very frequently used as synonymous with "return day." Aldrich *v.* Maitland, 4 Mich. 205, 211.

92. Standard Dict. [*quoted* in Clyatt *v.* U. S., 197 U. S. 207, 219, 25 S. Ct. 429, 49 L. ed. 726].

93. Webster Dict. [*quoted* in Clyatt *v.* U. S., 197 U. S. 207, 219, 25 S. Ct. 429, 49 L. ed. 726].

As used in a will directing that certain land given to a person is to "return" to testator's legatees upon the happening of a certain event, the term means to come back from him to whom it was given. Den *v.* Crawford, 8 N. J. L. 90, 112. See also Harris *v.* Dyer, 18 R. I. 540, 544, 28 Atl. 971. Used in a

Return Execution or For Illegal or Defective Return, see SHERIFFS AND CONSTABLES. Authentication and Certification — Of Papers Included in or Annexed to the Record on Appeal, see APPEAL AND ERROR, 3 Cyc. 106; Of Transcript or Return, see APPEAL AND ERROR, 3 Cyc. 105. By Justice of the Peace on Appeal or Error to Review Proceedings Had Before Him, see JUSTICES OF THE PEACE, 24 Cyc. 698. Collateral Attack on Judgment Based on Defects in Return of Service of Process, see JUDGMENTS, 23 Cyc. 1077. Competency of Official Return as Evidence, see EVIDENCE, 17 Cyc. 308. Conclusiveness of Return as Evidence in Election Contest, see ELECTIONS, 15 Cyc. 418. Directions as to — In Execution From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 622; In Process, see PROCESS, 32 Cyc. 431; In Process in Civil Cases in Justice's Courts, see JUSTICES OF THE PEACE, 24 Cyc. 519; Of Execution, see EXECUTIONS, 17 Cyc. 1022; Of Execution Against the Person, see EXECUTIONS, 17 Cyc. 1510; Of Writ of Attachment, see ATTACHMENTS, 4 Cyc. 549. Effect of — Appearance as Waiver of Defects in Return of Process, see APPEARANCES, 3 Cyc. 517; Defects or Errors in Return on Appeal, see APPEAL AND ERROR, 3 Cyc. 134; Failure to File Record, see APPEAL AND ERROR, 3 Cyc. 115; Failure to Make Return, see APPEAL AND ERROR, 3 Cyc. 138. Falsity of Return of Process as Ground — For Equitable Relief, see JUDGMENTS, 23 Cyc. 996; For Opening or Vacating, see JUDGMENTS, 23 Cyc. 915. Irregularities in Return Affecting Admissibility of Deposition in Evidence, see DEPOSITIONS, 13 Cyc. 996. Liabilities of Sheriff For Falsity of or Failure to Make, see SHERIFFS AND CONSTABLES. Necessity of Return of Execution Against Principal in Administration Bond Before Proceeding Against Sureties, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1283. Objection on Appeal to Sufficiency of Service of Process, see APPEAL AND ERROR, 2 Cyc. 688. Of Admeasurement of Dower, see DOWER, 14 Cyc. 1008. Of Appraisement of Property Taken Under Execution, see EXECUTIONS, 17 Cyc. 1110. Of Assessment Roll — In Proceedings For Assessments For Benefits From Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1167; In Tax Proceedings in General, see TAXATION. Of Attachment — In General, see ATTACHMENT, 4 Cyc. 606; Against Real Property, see ATTACHMENT, 4 Cyc. 594; In Contempt Proceedings, see CONTEMPT, 9 Cyc. 42; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 538; In Proceedings to Enforce Lien Against Logs, see LOGGING, 5 Cyc. 1596. Of Award, see ARBITRATION AND AWARD, 3 Cyc. 672. Of Bond or Undertaking in Civil Actions, see BAIL, 5 Cyc. 27. Of Certificate — Of Solemnization or Celebration of Marriage, see MARRIAGE, 26 Cyc. 860; On Discharge of Poor Debtor, see EXECUTIONS, 17 Cyc. 1565. Of Certiorari — In General, see CERTIORARI, 6 Cyc. 802; To Review Summary Proceedings For Possession of Demised Premises, see LANDLORD AND TENANT, 24 Cyc. 1458. Of Citation on Writ of Error, see APPEAL AND ERROR, 2 Cyc. 862. Of Commissioners — On Actual Partition, see PARTITION, 30 Cyc. 259; Viewers or Surveyors of Private Roads, see PRIVATE ROADS, 32 Cyc. 375. Of Consideration — On Cancellation of Instrument, see CANCELLATION OF INSTRUMENTS, 6 Cyc. 306; On Rescission of Contracts of Sale, see SALES; VENDOR AND PURCHASER. Of Depositions, see DEPOSITIONS, 13 Cyc. 942. Of Distress Warrant, see LANDLORD AND TENANT, 24 Cyc. 1317. Of Earnest Money to Purchaser on Vacating Judicial Sale, see JUDICIAL SALES, 24 Cyc. 48. Of Elections, see ELECTIONS, 15 Cyc. 375. Of Evidence on Report of Master in Equity, see EQUITY, 16 Cyc. 446. Of Execution — In General, see EXECUTIONS,

will in reference to the residue of an estate in lands, the term has been held to mean "remain." Den *v.* McMurtrie, 15 N. J. L. 276, 286.

"Returning" money raised on pledge is "repaying" the money borrowed. Baltimore *v.* Gill, 31 Md. 375, 388. See also *In re* Alliance Soc., 28 Ch. D. 559, 568, 54 L. J. Ch. 540, 52 L. T. Rep. N. S. 695.

As used in a state constitution providing that if any bill shall not be returned within ten days after it shall have been presented to the governor, the same shall be a law, the term means a step taken by which his own time for deliberation is ended. Harpending *v.* Haight, 39 Cal. 189, 199, 2 Am. Rep. 432.

"Return on demand" see Laforge *v.* Jayne, 9 Pa. St. 410, 412.

"Return the record" see Mossberg *v.* Nutter, 124 Fed. 966, 967, 60 C. C. A. 98.

17 Cyc. 1365; Against Fraudulent Grantee, see FRAUDULENT CONVEYANCES, 20 Cyc. 695; Against Principal Unsatisfied in Action Against Principal and Surety by Creditor, see PRINCIPAL AND SURETY, 32 Cyc. 142; Against the Person, see EXECUTIONS, 17 Cyc. 1518; As Affecting Lien, see EXECUTIONS, 17 Cyc. 1072; As Condition Precedent to Appointment of Receiver in Supplementary Proceedings, see EXECUTIONS, 17 Cyc. 1451; From Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 630. Of Findings, Amendment of Plea or Answer After, see PLEADING, 31 Cyc. 401. Of Foreclosure Sale, see MORTGAGES, 27 Cyc. 1706. Of Goods — As Condition Precedent to Rescission of Contract of Sale, see SALES; On Breach of Warranty, see SALES. Of Indictment, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 210. Of Judicial Sale, see JUDICIAL SALES, 24 Cyc. 32. Of Maps or Plats in Report of Commissioners and Other Like Officers in Proceedings to Establish Streets or Highways, see STREETS AND HIGHWAYS. Of Municipal Ordinance After Approval, see MUNICIPAL CORPORATIONS, 28 Cyc. 358. Of Notice — In Proceedings to Establish Streets or Highways, see STREETS AND HIGHWAYS; Of Assessment For Benefits From Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1148. Of Officers as to Sales in Partition, see PARTITION, 30 Cyc. 276. Of Prior Writs of Execution as Prerequisite to Issuance of Subsequent Writs, see EXECUTIONS, 17 Cyc. 1936. Of Prisoner as Defense to Action For Allowing Escape, see PRISONS, 32 Cyc. 341. Of Process — In General, see PROCESS, 32 Cyc. 496; Alteration of, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 242 Amendment of, see PROCESS, 32 Cyc. 537; Amendment of Directions For in PROCESS, see PROCESS, 32 Cyc. 533; As Ground For or Condition Precedent to Service by Publication, see PROCESS, 32 Cyc. 472; Defects and Irregularities, see PROCESS, 32 Cyc. 522; For Arrest in Civil Action, see ARREST, 3 Cyc. 958; In Actions Against Husband or Wife, see HUSBAND AND WIFE, 21 Cyc. 1555; In Actions Against Infants, see INFANTS, 22 Cyc. 680; In Actions to Foreclose Mortgage, see MORTGAGES, 27 Cyc. 1589; In Admiralty, see ADMIRALTY, 1 Cyc. 866; In Civil Cases in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 524; In Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1149; Quashing, Vacating, or Setting Aside, see PROCESS, 32 Cyc. 522. Of Property Converted as Mitigation of Damages For Conversion, see TROVER AND CONVERSION. Of Report of — Commissioners and Other Like Officers in Establishing Streets or Highways and Proceedings Thereon, see STREETS AND HIGHWAYS; Referee in Proceedings on Disputed Claims Against Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 522. Of Sale — Of Attached Property, see ATTACHMENT, 4 Cyc. 715; Of Decedent's Land, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 786; Of Land, Etc., by Receivers, see RECEIVERS, *ante*, p. 323; Of Land For Assessment or Special Taxes For Public Improvements, see MUNICIPAL CORPORATIONS, 28 Cyc. 1245; Of Ward's Land by Guardian Under Order of Court, see GUARDIAN AND WARD, 21 Cyc. 136. Of Securities Given to Indemnify Surety, see PRINCIPAL AND SURETY, 32 Cyc. 243. Of Service — Of Citation or Notice in Proceedings For Sale of Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 732; Of Notice, see NOTICE, 29 Cyc. 1119; Of Notice of Appeal, see APPEAL AND ERROR, 2 Cyc. 872; JUSTICES OF THE PEACE, 24 Cyc. 686; Of Pleading, see PLEADING, 31 Cyc. 596; Of Scire Facias on Forfeited Bail-Bond in Criminal Prosecution, see BAIL, 5 Cyc. 139. Of Stolen Property as Defense to Prosecution For Larceny, see LARCENY, 25 Cyc. 56. Of Summons or Notice — To Defendant in Garnishment Proceedings, see GARNISHMENT, 20 Cyc. 1051; To Grand Jurors, see GRAND JURIES, 20 Cyc. 1314. Of Survey of Homestead, see HOMESTEADS, 21 Cyc. 484. Of Tax-Sale, see TAXATION. Of Venire, see JURIES, 24 Cyc. 228, 239. Of Warning Out Notice, see PAUPERS, 30 Cyc. 1099. Of Warrant of Arrest, Necessity For to Justify Arrest, see FALSE IMPRISONMENT, 19 Cyc. 347. Of Writ — Of Certiorari to Review Proceedings of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 775; Of Error, see APPEAL AND ERROR, 2 Cyc. 857; Of Ne Exeat, see NE EXEAT, 29 Cyc. 395; Of Replevin, see REPLEVIN; Of Scire Facias in General, see SCIRE FACIAS; Of Scire Facias to Revive Judgment, see JUDGMENTS,

23 Cyc. 1454; Of Sequestration, see SEQUESTRATION; Or Order in Actions For Injunction, see INJUNCTIONS, 22 Cyc. 962; Or Summons of Garnishment, see GARNISHMENT, 20 Cyc. 1051. On Appeal, see APPEAL AND ERROR, 3 Cyc. 92. On Execution to Prevent Judgment From Becoming Dormant, see JUDGMENTS, 23 Cyc. 1430. On Search Warrant For Intoxicating Liquors, see INTOXICATING LIQUORS, 23 Cyc. 298. Payment of Fees For Return of Appeal From Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 668. Power of Trial Court to Amend Return Pending Appeal, see APPEAL AND ERROR, 2 Cyc. 977. Presumptions as to Justice's Return on Appeal, see JUSTICES OF THE PEACE, 24 Cyc. 746. Right — To Contradict Officer's Return in Attachment, see ATTACHMENT, 4 Cyc. 620; To Mandamus to Compel Returns by Election Officers, see MANDAMUS, 26 Cyc. 274. Satisfaction of Judgment by Return of Execution, see JUDGMENTS, 23 Cyc. 1492. Service of Process After Return-Day, see PROCESS, 32 Cyc. 456. Specification of Return-Day in Writ of Error, see APPEAL AND ERROR, 2 Cyc. 856. Sufficiency of Return — In Action Against Corporation, see PROCESS, 32 Cyc. 557; On Fieri Facias to Authorize Action on Delivery Bond, see ATTACHMENT, 4 Cyc. 693; To Fix Liability of Bail in Civil Action, see BAIL, 5 Cyc. 44. Supplemental Transcript of Return, see APPEAL AND ERROR, 3 Cyc. 105. To Inquisition of Insanity, see INSANE PERSONS, 22 Cyc. 1129. To Preliminary Examination of Accused, see CRIMINAL LAW, 12 Cyc. 320. To State and Residence After Absence, Effect on Limitations, see LIMITATIONS OF ACTIONS, 25 Cyc. 1251. To Writ — Of Habeas Corpus, see HABEAS CORPUS, 21 Cyc. 317; Of Mandamus, see MANDAMUS, 26 Cyc. 447, 493; Of Prohibition, see PROHIBITION, 32 Cyc. 628. Transmission, Filing, Printing, and Service of Copies of Record on Appeal, see APPEAL AND ERROR, 3 Cyc. 111. Waiver by Appearance of Defects in Return of Process in Civil Cases in Justices' Courts, see JUSTICES OF THE PEACE, 24 Cyc. 526. See also Cross-References Under RESTITUTION; RESTORATION.)

RETURNABLE. Capable of being returned; in law, legally required to be returned.[94] (See RETURN.)

RETURN COMMISSIONS. A term which, in reference to commission merchants, is said to mean that on goods taken away by a consignor before sale, the consignee receives an equitable allowance to cover the expense of handling, insuring, and storing the goods while in his charge.[95]

RETURN-DAY. The last day on which any process can be returned;[96] the day appointed by law when writs are to be returned and filed.[97] (Return-Day: Duty of Garnishee to Answer Before, of Writ, see GARNISHMENT, 20 Cyc. 1083. Specification of, see APPEAL AND ERROR, 2 Cyc. 856, 860. Time of Service of Writ Before, see GARNISHMENT, 20 Cyc. 1048.)

RETURNS. An official statement of the votes cast at an election, transmitted to some authorized custodian, for the purpose of being canvassed by some proper authority.[98] (See ELECTIONS, 15 Cyc. 375.)

REUNION. A word which used without qualification is said to mean the resumption of a former relation.[99]

REUS. The defendant in an action or suit.[1] (See, generally, ACTIONS, 1 Cyc. 715 note 16; COURTS, 11 Cyc. 652 note 1.)

94. Webster Dict. [*quoted* in Daniels *v.* Lewis, 7 Colo. 430, 434, 4 Pac. 57].

"Returnable process" is a term used to designate the process upon which the officer receiving it is bound to certify his doings. Utica City Bank *v.* Buell, 9 Abb. Pr. (N. Y.) 385, 391, 17 How. Pr. 498.

95. Botany Worsted Works *v.* Wendt, 22 Misc. (N. Y.) 156, 48 N. Y. Suppl. 1024.

96. Carlson *v.* Burt, 111 Cal. 129, 131, 132, 43 Pac. 583, where it is said, in reference to election returns: "It would seem that any return is timely which is received before the board commences the canvass."

97. Bouvier L. Dict. [*quoted* in Bankers' Iowa State Bank *v.* Jordan, 111 Iowa 324, 328, 82 N. W. 779].

The term has reference to the filing of a suit. Mt. Vernon Bank *v.* Gibbs, 1 Ga. App. 662, 665, 58 S. E. 269.

Elections.— Statutory definition of "return-day" see Swinson *v.* McKay, (Tex. Civ. App. 1907) 106 S. W. 934, 935.

98. State *v.* St. Paul, 25 Minn. 106, 108.

99. Clark *v.* Brown, (Tex. Civ. App. 1908) 108 S. W. 421, 439.

1. Matter of Miller, 1 Daly (N. Y.) 562, 574.

REUS EXCIPIENDO FIT ACTOR. A maxim meaning "The defendant by a plea becomes plaintiff." [2]

REUS LÆSÆ MAJESTATIS PUNITUR, UT PEREAT UNUS NE PEREANT OMNES. A maxim meaning "A traitor is punished, that one may die lest all perish." [3]

REVEALED LAW. See LAW OF NATURE, 25 Cyc. 168.

REVEL. To behave in a noisy, boisterous manner, like a bacchanalian.[4]

REVENDICATION. The right of an unpaid vendor on the insolvency of the vendee to reclaim in specie such part of the goods as remain in the hands of the vendee entire, and without having changed its quality;[5] the right to reclaim, to demand the restoration of;[6] a real action which relates to claims made on immovable property, or to the immovable rights to which they are subjected.[7] (See, generally, SALES.)

REVENGE. A malicious injury inflicted in return for an injury.[8] (See HOMICIDE, 21 Cyc. 673 note 69.)

REVENUE. (1) That which returns, or comes back, from an investment; the annual rents, profits, interests, or issues of any species of property, real or personal; (2) hence return, reward, as a rich revenue of praise; (3) the annual product of taxes, excise customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use;[9] the yearly income of a government or a person natural or artificial, from the property belonging to such government or person;[10] the income of the state;[11] the income which a state collects and receives into its treasury and has appropriated for the payment of its expenses;[12] the product or fruit of taxation;[13] the income of the government arising from taxation, duties and the like;[14] the annual profits of taxes, excise, customs duties, rents, etc., which a nation or state collects and receives into the treasury for public use;[15] the income of the state or nation derived from the duties and taxes

2. Peloubet Leg. Max. [*citing* Best Ev. 144].

Applied in McLachlan *v.* Accident Ins. Co., 3 Quebec Super. Ct. 230, 234.

3. Peloubet Leg. Max. [*citing* Beverley's Case, 4 Coke 123*b*, 124*b*, 76 Eng. Reprint 1118].

4. *In re* Began, 12 R. I. 309, 310 [*citing* Webster Dict.].

5. Benedict *v.* Schaettle, 12 Ohio St. 515, 520.

6. Smart *v.* Bibbins, 109 La. 986, 989, 34 So. 49.

7. Ellis *v.* Davis, 109 U. S. 485, 502, 3 S. Ct. 327, 27 L. ed. 1006, an action given by La. Pr. Code, art. 4.

8. People *v.* Pierson, 2 Ida. (Hasb.) 76, 3 Pac. 688.

9. Webster Dict. [*quoted* in Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732].

In a restricted sense the term is confined to taxes and assessments for purely governmental purposes, as distinguished from those levied where a direct return is made to the citizen. Omaha *v.* Hodgskins, 70 Nebr. 229, 231, 97 N. W. 346.

In the absence of qualifying words or circumstances implying an intention to employ the term in different sense, the term is confined to the usual public income — taxation. Laughlin *v.* Santa Fe County, 3 N. M. 264, 5 Pac. 817.

10. People *v.* New York Cent. R. Co., 34 Barb. (N. Y.) 123, 134.

11. U. S. *v.* Bromley, 12 How. (U. S.) 88, 13 L. ed. 905.

12. Com. *v.* Brown, 91 Va. 762, 779, 21 S. E. 357, 28 L. R. A. 110.

13. U. S. *v.* Wright, 28 Fed. Cas. No. 16,770, 3 Pittsb. 192.

Embraces all taxes and assessments imposed by public authority and includes special assessments made by a city for public improvement. Herhold *v.* Chicago, 106 Ill. 547, 548; People *v.* Springer, 106 Ill. 542, 544; Potwin *v.* Johnson, 106 Ill. 532, 533; Webster *v.* People, 98 Ill. 343, 346; Claypool Drainage, etc., Dist. *v.* Chicago, etc., R. Co., 81 Ill. App. 433, 434; Gunning *v.* People, 76 Ill. App. 574, 578; Phœnix Grain, etc., Exch. *v.* Gleason, 22 Ill. App. 373, 374.

License-fee construed not to be "revenue tax" see Welch *v.* Hotchkiss 39 Conn. 140, 142, 12 Am. Rep. 383.

Used in the same sense as "'money received' from the license" where a city levied a license fee in the exercise of its police power, and provided that the revenue derived from such license should be expended in a particular manner. Vansant *v.* Harlem Stage Co., 59 Md. 330, 334.

"Revenues of the State canals" see People *v.* New York Cent. R. Co., 24 N. Y. 485, 491 [*affirming* 34 Barb. 123].

14. Bouvier L. Dict. [*quoted* in State *v.* School Fund Com'rs, 4 Kan. 261, 268; Com. *v.* Bailey, 3 Ky. L. Rep. 110, 117; The Nashville, 17 Fed. Cas. No. 10,023, 4 Biss. 188, 192].

15. Webster Dict. [*quoted* in Fletcher *v.* Oliver, 25 Ark. 289, 295; State *v.* Ewing, 22 Kan. 708, 712; State *v.* Hill, 38 Nebr. 698, 718, 57 N. W. 548; Pottsville Borough *v.* Pottsville Gas Co., 15 Pa. Dist. 979, 980, 32 Pa. Co. Ct. 7; U. S. *v.* Norton, 91 U. S. 566, 568, 23 L. ed. 454, 2 Cow. Cr. 358, 391].

and other sources for the payment of the national expenses;[16] income or annual profit received from lands or other property;[17] a return for capital invested or labor bestowed;[18] synonymous with FUNDS, *q. v.*[19] (Revenue: In General, see CUSTOMS DUTIES, 12 Cyc. 1104; INTERNAL REVENUE, 22 Cyc. 1592; LICENSES, 25 Cyc. 593; TAXATION. Admiralty Jurisdiction of Revenue Cases, see ADMIRALTY, 1 Cyc. 837. Appeals — In Cases Relating to Revenue, see APPEAL AND ERROR, 2 Cyc. 550; Under Revenue Laws, see COURTS, 11 Cyc. 944. Effect of Violation of Revenue Laws on Contracts of Maritime Insurance, see MARITIME INSURANCE, 26 Cyc. 577. Postal Revenue, Disposition of, see POST-OFFICE, 31 Cyc. 987. Power to License Sale of Intoxicating Liquors, For Purpose of Racing, see INTOXICATING LIQUORS, 23 Cyc. 64.)

REVENUE LAWS. Certain legislative measures imposing taxes upon the people either directly or indirectly, or laying dues, imports or excises for the use of the government, and giving to the persons from whom money is exacted no equivalent in return;[20] laws made for the direct and avowed purpose of creating and securing revenues or public funds for the services of the government;[21] laws which provide for the assessment and collection of a tax to defray the expenses of the government.[22] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1104; INTERNAL REVENUE, 23 Cyc. 1592; STATUTES; TAXATION.)

REVEREND. A word which has been said not to be a title of honor or dignity, but an epithet, an adjective as a laudatory or complimentary epithet, a mark of respect or reverence as the name imports, but nothing more.[23]

REVERSAL. A word which when used with regard to a judgment is said to mean to vacate the decree reversed and leave it as if it had never been rendered.[24] (Reversal: Of Decree of Foreclosure of Mortgage, Effect on Title of Purchasers, see MORTGAGES, 27 Cyc. 1733. Of Judgment on Appeal — In Civil Case, see APPEAL AND ERROR, 3 Cyc. 440; In Criminal Prosecution, see CRIMINAL LAW, 12 Cyc. 940; In Suit For Malicious Prosecution, see MALICIOUS PROSECUTIONS, 26 Cyc. 119. Of Justice's Judgment, see JUSTICES OF THE PEACE, 24 Cyc. 755. Title of Purchasers as Affected by Reversal of Judgment or Decree For Judicial Sale, see JUDICIAL SALES, 24 Cyc. 65.)

See also Webster *v.* People, 98 Ill. 343, 346; Phœnix Grain, etc., Exch. *v.* Gleason, 22 Ill. App. 372, 374.

16. Worcester Dict. [*quoted* in Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732].

17. Worcester Dict. [*quoted* in Bates *v.* Porter, 74 Cal. 224, 239, 15 Pac. 732; Cromie *v.* Wabash, etc., Canal, 71 Ind. 208, 216].

18. Webster Dict. [*quoted* in People *v.* New York Cent. R. Co., 24 N. Y. 485, 490].

19. *In re* Watson, 51 La. Ann. 1641, 1644, 26 So. 409.

Construed to mean "estimated revenue" see Babcock *v.* Goodrich, 47 Cal. 488, 513.

"A minor's 'revenues'" must be taken to be what remains each year after the payment of taxes for that year. Sims *v.* Billington, 50 La. Ann. 968, 976, 24 So. 637. See also *In re* Watson, 51 La. Ann. 1641, 1644, 26 So. 409.

20. H. A. Thierman Co. *v.* Com., 123 Ky. 740, 752, 97 S. W. 366, 30 Ky. L. Rep. 72; U. S. *v.* James, 26 Fed. Cas. No. 15,464, 13 Blatchf. 207.

21. H. A. Thierman Co. *v.* Com., 123 Ky. 740, 751, 97 S. W. 366, 30 Ky. L. Rep. 72; State *v.* Bernheim, 19 Mont. 512, 516, 49 Pac. 441; U. S. *v.* Mayo, 26 Fed. Cas. No. 15,755, 1 Gall. 396.

22. Peyton *v.* Bliss, 19 Fed. Cas. No. 11,055, Woolw. 170, 173.

Confined to bills to levy taxes in the strict sense of the word, and has not been understood to extend to bills for other purposes which incidentally create revenue. See Anderson *v.* Ritterbusch, (Okla. 1908) 98 Pac. 1002, 1006.

Used in connection with the jurisdiction of the United States courts the term is confined to laws imposing duties on imports or tonnage or a law providing in terms for revenue. Bryant Bros. Co. *v.* Robinson, 149 Fed. 321, 325, 79 C. C. A. 259.

The term includes statutes providing for mode of suing for and recovering penalties and forfeitures for violation of the revenue laws of the United States (The Abigail, 1 Fed. Cas. 18, 3 Mason 331); and post-office laws of the United States (Warner *v.* Fowler, 29 Fed. Cas. No. 17,182, 4 Blatchf. 311).

An act to establish a postal money system is not a revenue law within the meaning of the act for the punishment of certain crimes against the United States. U. S. *v.* Norton, 91 U. S. 566, 567, 23 L. ed. 454.

"Revenue laws of a State" does not embrace ordinances of municipal corporations. Davenport *v.* Dows, 15 Wall. (U. S.) 390, 392, 21 L. ed. 96.

23. Keet *v.* Smith, 1 P. D. 73, 79, 45 L. J. P. C. 10, 33 L. T. Rep. N. S. 794, 24 Wkly. Rep. 375.

24. Cowdery *v.* London, etc., Bank, 139 Cal. 298, 304, 73 Pac. 196, 96 Am. St. Rep.

REVERSE. To overthrow, set aside, make void, annul, repeal, or revoke;[25] to set aside or annul.[26] (See also REVERSAL.)

REVERSED CURRENT. An electric current, which is periodically reversed by a commutator, which thus breaks the current between the changes in direction and takes off the current in sections.[27] (See, generally, ELECTRICITY, 15 Cyc. 466.)

REVERSIBLE ERROR. Such an error as warrants the appellate court in reversing the judgment and remanding the cause.[28] (See, generally, APPEAL AND ERROR, 2 Cyc. 474.)

REVERSION. A term which signifies a return to a pre-existence of former state or place;[29] the return of an estate to the grantor and his heirs after the grant is over.[30] (Reversion: Generally, see ESTATES, 16 Cyc. 661. Accrual of Right to Donor, see GIFTS, 20 Cyc. 1213. Action by Assignee of Estate in, for Rents, see LANDLORD AND TENANT, 24 Cyc. 408. As Property Subject to Judgment Lien, see JUDGMENTS, 23 Cyc. 1369. Compensation For Reversionary Interest in Land Taken For Public Use, see EMINENT DOMAIN, 15 Cyc. 793. Construction of Deed as a Conveyance of, see DEEDS, 13 Cyc. 547. Descent and Distribution of, see DESCENT AND DISTRIBUTION, 14 Cyc 33. Estoppel of Tenant to Deny Title of Grantee of Landlord's Reversion, see LANDLORD AND TENANT, 24 Cyc. 945. Landlord's Action For Injuries to, see LANDLORD AND TENANT, 24 Cyc. 930. Landlord's Title and Reversion, see LANDLORD AND TENANT, 24 Cyc. 923. Mechanics' Liens on Reversion of Landlord For Improvements by Tenant, see MECHANICS' LIENS, 27 Cyc. 56. Mortgages of Estates in, see MORTGAGES, 27 Cyc. 1039. Of Cemetery Land to Original Owners or Heirs, see CEMETERIES, 6 Cyc. 716. Of Charitable Devises and Bequests, see CHARITIES, 6 Cyc. 973. Of Gift, see DESCENT AND DISTRIBUTION, 14 Cyc. 33. Of Property Condemned, see EMINENT DOMAIN, 15 Cyc. 1027. Of Surplus to Debtor on Determination of Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1355. On Change of Location or Discontinuance of Highways, see STREETS AND HIGHWAYS. Partition of Estates in Reversion, see PARTITION, 30 Cyc. 182. Right of Husband to Curtesy in Reversion in Expectancy of Wife, see CURTESY, 12 Cyc. 1011. Rights and Liabilities of Assignee of, see LANDLORD AND TENANT, 24 Cyc. 1108. Rights of Husband in Wife's Estate in, see HUSBAND AND WIFE, 21 Cyc. 1159. Rule Against Perpetuities as Applied to, see PERPETUITIES, 30 Cyc. 1473. Subject to Execution, see EXECUTIONS, 17 Cyc. 952. To United States, of Land Granted to States in Aid of Railroad Not Disposed of Within a Fixed Time, see PUBLIC LANDS, 32 Cyc. 974. Transfer of — Lessor's Reversion in Mining Property, see MINES AND MINERALS, 27 Cyc. 703; To Tenant, Effect of, see LANDLORD AND TENANT, 24 Cyc. 925.

REVERT. In the usual and ordinary meaning, to return, to come back;[31]

115. See also Coughlin *v.* McElroy, 72 Conn. 444, 446, 44 Atl. 743, where it is said that the reversal of a judgment annuls it, but does not necessarily set aside the foundation on which it rests, since this foundation may be sufficient to support a judgment of a different kind, and may be such as to require it.

"Reversed" and "remanded."— It is a settled rule, unless there is something in the opinion of the court or the order made by it restricting the operation of these words, they have the ordinary meaning, and it is error, on the entry of such order, for the court below not to award a new trial. Myers *v.* McDonald, 68 Cal. 162, 166, 8 Pac. 809.

Judgment reversed and cause remanded see Ryan *v.* Tomlinson, 39 Cal. 639, 646.

25. Century Dict. [*quoted* in Cowdery *v.* London, etc., Bank, 139 Cal. 298, 303, 73 Pac. 196, 96 Am St. Rep. 115].

26 Laithe *v.* McDonald, 7 Kan. 254, 268.

The word "reversed" in its technical sense applies to the ultimate decision annulling expressly what had been done before. King *v.* Sloan, 1 Serg. & R. (Pa.) 77, 79.

27. Westinghouse Electric, etc., Co. *v.* New England Granite Co., 103 Fed. 951, 952.

28. New Mexican R. Co. *v.* Hendricks, 6 N. M. 611, 615, 30 Pac. 901.

29. Clute *v.* New York Cent., etc., R. Co., 120 N. Y. 267, 272, 24 N. E. 317.

30. Booth *v.* Terrell, 16 Ga. 20, 25; Hobson *v.* Huxtable, 79 Nebr. 340, 342, 116 N. W. 278.

31. Pearce *v.* Lott, 101 Ga. 395, 399, 29 S. E. 276.

In its legal sense, is, for property to go back, or return, to a person who formerly owned it, but who parted with the possession or title to it by creating an estate in another which has terminated by his act or by operation of law. Anderson L. Dict. [*quoted*

to return.[32] In law, to return to the proprietor after the determination of a particular estate granted by him;[33] to fall back into the possession of the donor or of the former proprietor.[34] (See REVERSION, *ante*, p. 1693.)

REVERTER. Reversion.[35] (See REVERSION, *ante*, p. 1693.)

REVESTING TITLE. See DEEDS, 13 Cyc. 723.

in Pearce *v.* Lott, 101 Ga. 395, 399, 29 S. E. 276].

32. Sweet L. Dict. [*quoted* in McPheeters *v.* Wright, 124 Ind. 560, 576, 24 N. E. 734, 9 L. R. A. 176].

33. Webster Dict. [*quoted* in McPheeters *v.* Wright, 124 Ind. 560, 576, 24 N. E. 734, 9 L. R. A. 176].

34. Worcester Dict. [*quoted* in McPheeters *v.* Wright, 124 Ind. 560, 576, 24 N. E. 734, 9 L. R. A. 176].

35. Black L. Dict., where it is said that a possibility of reverter is that species of reversionary interest which exists when the grant is so limited that it may possibly terminate. To the same effect see Lougheed *v.* Dykeman Baptist Church, etc., 40 N. Y. Suppl. 586.

REVIEW

By Joseph B. Cheshire, Jr.*

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CROSS-REFERENCES

For Matters Relating to:

Actions and Other Proceedings to Review Judgments, see JUDGMENTS, 23 Cyc. 886.

Amendment, Correction, and Review of Judgments in Same Court, see JUDGMENTS, 23 Cyc. 859.

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I. NATURE AND GROUNDS.

A. Nature and Scope of Remedy. A review, as the term is used in this article, is a proceeding which exists by virtue of statute in a few jurisdictions,[1] and which was unknown to the common law.[2] It has been aptly termed a "singular process," [3] and seems to have been borrowed from courts of equity.[4] The proceeding is often called an action of review,[5] and is in its nature a new trial of the issues previously tried between the parties,[6] the cause of action being brought into court again for trial by a new writ called a writ of review.[7] The proceeding in some respects resembles a writ of error,[8] and also a new trial; [9] but it never operates in form as a reversal of the original judgment,[10] nor is it properly speak-

1. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Howe *v.* Hapgood, 13 Mass. 490; Swett *v.* Sullivan, 7 Mass. 342; Carroll *v.* Locke, 58 N. H. 163; Barron *v.* Jackson, 42 N. H. 419; Knox *v.* Knox, 12 N. H. 352; Frost *v.* Philbrook, 28 Vt. 736; Bloss *v.* Kittridge, 4 Vt. 272.

The writ of review in civil actions is provided by statute to correct errors in judgments rendered on verdicts and is unknown at the common law. Swett *v.* Sullivan, 7 Mass. 342.

Statutes not retroactive.— Statutes giving a right to review are not retroactive and would not be constitutional if they permitted a review of judgments which at the time of their enactment had become final and conclusive, all existing remedies having been exhausted and rights having become permanently vested. Atkinson *v.* Dunlap, 50 Me. 111.

2. Swett *v.* Sullivan, 7 Mass. 342; Barron *v.* Jackson, 42 N. H. 419; Knox *v.* Knox, 12 N. H. 332.

3. See Swett *v.* Sullivan, 7 Mass. 342.

4. Barron *v.* Jackson, 42 N. H. 419.

5. See Knox *v.* Knox, 12 N. H. 352.

6. Haynes *v.* Ordway, 52 N. H. 284; Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469; Knox *v.* Knox, 12 N. H. 352; Burley *v.* Burley, 6 N. H. 204.

7. Bradstreet *v.* Partridge, 59 Me. 155; Knox *v.* Knox, 12 N. H. 352.

8. Little *v.* Bunce, 7 N. H. 485, 28 Am. Dec. 363, where it is said that a writ of review resembles a writ of error in that the party prevailing upon a review is to be restored to all that he has lost by the first judgment.

A review differs from a writ of error in that it is not to reverse a judgment for errors in the record of law or fact, but assumes that the original judgment is to stand, the party bringing the review seeking to obtain a new judgment in his favor equal to the former judgment against him or some part thereof. Bradstreet *v.* Partridge, 59 Me. 155.

9. Barron *v.* Jackson, 42 N. H. 419.

10. Pike *v.* Pike, 24 N. H. 384; Knox *v.* Knox, 12 N. H. 352.

ing a new trial granted as in a case before final judgment.[11] It does not operate to vacate the original judgment,[12] or even as a supersedeas or stay of execution,[13] and is not necessarily in the court where the original judgment reviewed was rendered.[14] It is in one aspect a new and independent proceeding,[15] commenced by a writ which is a new process,[16] upon the return of which the whole case is subject to review upon the original pleadings [17] unless an amendment is allowed; [18] but as regards the merits of the controversy it is the same action and cannot properly be regarded as an independent one.[19] The nature of a review as regards its purpose and effect also differs according to whether it is brought by the original plaintiff who has failed to sustain his suit or by the original defendant against whom judgment has been obtained,[20] it being in the first instance in effect a continuation of the original suit, plaintiff in review still seeking to recover the debt or damages for which his original action was instituted,[21] while in the latter, although the review arises out of and involves the same matters as were in controversy in the original suit, it is in effect a new action to recover back in the shape of damages what defendant alleges has been wrongfully obtained from him upon the first trial,[22] and when thus brought by defendant is somewhat analogous to an action for money had and received.[23]

B. Right of Review — 1. In General. Under some of the statutes, or at least in certain cases and within a limited period, a review may be claimed as a matter of right,[24] which in effect permits the party aggrieved by the first verdict to claim as a matter of right a second trial of the same issues.[25] The policy of such a provision has been questioned by the courts,[26] and in New Hampshire the

But in effect, although technically the first judgment is not reversed, the second judgment is practically a reversal in so far as it differs from the first. Haynes *v.* Ordway, 52 N. H. 284.

11. Bradstreet *v.* Partridge, 59 Me. 155; Barron *v.* Jackson, 42 N. H. 419.

A distinction between a new trial and a review is that in the former the verdict is set aside as improperly rendered but in the latter the judgment stands. Barron *v.* Jackson, 42 N. H. 419.

12. Barron *v.* Jackson, 42 N. H. 419.

13. Barron *v.* Jackson, 42 N. H. 419; Pike *v.* Pike, 24 N. H. 384.

14. Barron *v.* Jackson, 42 N. H. 419.

15. Bradstreet *v.* Partridge, 59 Me. 155; Barron *v.* Jackson, 42 N. H. 419.

16. Bradstreet *v.* Partridge, 59 Me. 155; Davenport *v.* Holland, 2 Cush. (Mass.) 1; Barron *v.* Jackson, 42 N. H. 419.

17. Bradstreet *v.* Partridge, 59 Me. 155; Swett *v.* Sullivan, 7 Mass. 342; Knox *v.* Knox, 12 N. H. 352.

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19. Knox *v.* Knox, 12 N. H. 352.

20. Knox *v.* Knox, 12 N. H. 352.

21. Knox *v.* Knox, 12 N. H. 352.

22. Pike *v.* Pike, 24 N. H. 384; Knox *v.* Knox, 12 N. H. 352.

The mode by which defendant attempts to recover is by trying over again the original cause of action and making it appear that plaintiff has no right to sustain a suit against him, or at least was not entitled to recover so much as he obtained. Knox *v.* Knox, 12 N. H. 352.

23. Knox *v.* Knox, 12 N. H. 352.

24. Jackson *v.* Gould, 72 Me. 335; Sturtevant *v.* Randall, 49 Me. 446; Howe *v.* Hapgood, 13 Mass. 490; Burrell *v.* Burrell, 10 Mass. 221; Knox *v.* Knox, 12 N. H. 352; Frost *v.* Philbrook, 28 Vt. 736.

Either party against whom two verdicts have not been found may sue his writ of review as of right. Swett *v.* Sullivan, 7 Mass. 342.

In Maine it is stated in a case decided in 1824 that the legislature had repealed the provision of the statute authorizing reviews as a matter of right (see Haskell *v.* Becket, 3 Me. 92); but under the statute of 1852 the granting of writs to review judgments against bankrupts was not discretionary with the court but imperative as to all cases coming within the purview of the statute (Colby *v.* Dennis, 36 Me. 9); and the statute of 1859 authorized a review as a matter of right upon certain specified grounds (Sturtevant *v.* Randall, 49 Me. 446).

In Massachusetts it seems that the provision of the statute authorizing reviews as a matter of right has been repealed. See Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray 415.

25. Knox *v.* Knox, 12 N. H. 352, 357, where the court said: "It seems to have been considered here, in Massachusetts, and in some other states, that a party ought not to be finally concluded by a single verdict of a jury, in a contested case. In the early practice here, new trials were not granted by the court for any error in the proceedings; but judgment being rendered, the aggrieved party was at liberty, by new process, to review the case once, as a matter of right."

26. Burrell *v.* Burrell, 10 Mass. 221, 222, where the court said: "The policy of reviews is certainly questionable. They may have been of more utility in former times than they are at present. The practice of granting new trials, upon sufficient cause sug-

provision of the statute permitting a review as a matter of right has been repealed.[27] Ordinarily, however, and except where it can be claimed as a matter of right, the right to a review rests in the discretion of the court.[28] So except in so far as the authority of the court is limited by the provisions of the statute as to the grounds and requisites for granting reviews,[29] it may in its discretion grant a review in cases where the applicant cannot claim it as a matter of right,[30] or where having had such right it has been lost through accident, misfortune, or mistake,[31] as by failing to institute the proceeding within the time limited by the statute.[32]

2. Existence of Other Remedy. A review is proper to correct errors in the original action or proceeding or judgment rendered therein where the party prejudiced thereby has no other adequate remedy;[33] but ordinarily a review will not be granted where there is a regular and adequate remedy, as by writ of error or appeal.[34] A review may, however, be granted where a party has been deprived of his remedy by writ of error or appeal without fault on his part,[35] unless it is

gested, is probably a more suitable remedy for every supposed failure of justice in a past trial than a review of right by the party. But the statutes upon this subject are imperative."

27. Rowell *v.* Boston, etc., R. Co., 59 N. H. 35 (holding, however, that the statute did not apply so as to take away the right of review in actions in which judgment had been rendered and the limitation of time for review had not expired at the time of the passage of the act); Dickinson *v.* Lovell, 36 N. H. 364 (holding, however, that the statute did not apply so as to take away the right of review in actions pending at the time the statute went into effect).

28. Sherman *v.* Ward, 73 Me. 29; Bradstreet *v.* Partridge, 59 Me. 155; Parker *v.* Currier, 24 Me. 168; Stillman *v.* Donovan, 170 Mass. 360, 49 N. E. 628; Scituate Water Co. *v.* Simmons, 167 Mass. 313, 45 N. E. 750; Sylvester *v.* Hubley, 157 Mass. 306, 32 N. E. 166; Hayes *v.* Collins, 114 Mass. 54.

Exercise of discretion and imposition of terms in granting writ see *infra*, II, E, 4.

Appeal from decision granting or refusing writ see *infra*, II, G, 1.

29. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

30. Sherman *v.* Ward, 73 Me. 29.

Grounds for granting review see *infra*, I, D.

31. Jackson *v.* Gould, 72 Me. 335; Coburn *v.* Rogers, 32 N. H. 372, holding that such a case is within the application of the phrase "in any other case" as used in the New Hampshire statute.

32. Jackson *v.* Gould, 72 Me. 335.

33. Denison *v.* Portland Co., 60 Me. 519 (holding that a writ of error will not lie to reverse a judgment founded on a report of referees, on the ground that their report was based on advice given them by a third person, but that the remedy to correct irregularities which do not appear upon the record is by review); Hagar *v.* Springer, 60 Me. 436 (holding that where a debtor has made partial payments, but the creditor takes judgment for the full amount of the debt, the debtor cannot recover the partial payments, but his remedy is by a review of the action in which the judgment was rendered); Reynard *v.* Brecknell, 4 Pick. (Mass.) 302 (holding that where a party is aggrieved by a determination of the court of common pleas on matters clearly in its discretion, such as the postponement or continuance of an action, he can obtain a remedy only from the supreme judicial court by petition for review); Loring *v.* Mansfield, 17 Mass. 394 (holding that where in an action on a promissory note on which partial payments had been indorsed, defendant appeared and entered his defense, and judgment was rendered against him for the amount appearing due on the note, after deducting the sums indorsed, he (defendant) cannot maintain an action against plaintiff for money had and received, on the ground that he had made certain other payments not indorsed and not allowed in the action; his remedy, if any, being by an application for a review of the action on the note).

34. Elden *v.* Cole, 8 Me. 211 (holding that St. (1821) c. 67, regulating reviews, does not apply to a judgment rendered in the court of common pleas upon demurrer from which an appeal was claimed but by mistake was not entered; the remedy, if any, being by writ of error); Manning *v.* Nettleton, 140 Mass. 421, 4 N. E. 802 (construing Pub. St. c. 187, § 22, under which a petition for reviewing a judgment rendered in the absence and without the knowledge of the petitioner might be filed within one year after notice, and holding that where a party brought suit as next friend to a minor, himself as attorney, he cannot claim the provisions of the act as applying to him on the ground that the judgment for costs complained of should have been rendered against the minor, his remedy being by writ of error); Hart *v.* Huckins, 5 Mass. 260 (holding that where upon a petition for a review it appears from the record that the judgment complained of would be reversed upon error, a review will not be granted).

35. Keene *v.* White, 136 Mass. 23 (construing Pub. St. c. 187, § 25, which gives the superior court power to grant reviews of judgments rendered before a district court in any case in which a review might be granted if the judgment had been rendered in the superior court, and holding that the superior court may grant a review of a district court judgment, where the party has lost his right

otherwise provided by statute.[36] A supreme court will not grant a writ of review upon petition where an inferior court has jurisdiction of such petition.[37]

3. Recourse to Other Remedy or Proceeding. It seems that the existence of a right of review will not preclude a resort to a different remedy,[38] but where a party must make an election he cannot pursue a different remedy and at the same time reserve a right to prosecute a review.[39] The denial of a motion for a new trial by a superior court will not, however, as a matter of law, preclude a supreme court from granting a petition for review.[40]

4. Persons Entitled. In cases where a review is authorized either party to the original action may maintain the proceeding therefor,[41] but ordinarily the only persons entitled to a review are the parties to the original judgment or those who represent their interests or have by law succeeded to their rights as by death or bankruptcy.[42] Where the original action is brought by or against a nominal party, the real party in interest may maintain a writ of review,[43] but a person who is merely interested in or affected by the result of the action and who is not a party in interest in the legal sense of that phrase has no such right.[44] An action of review is a chose in action which by virtue of an adjudication of bankruptcy vests in the assignee who alone is empowered to prosecute or defend it.[45] Where

of appeal without fault on his part); Petersham *v.* Dana, 12 Mass. 429 (where, by reason of the omission of necessary formalities on the part of the presiding justice and clerk, in bringing up the case by writ of error, the petitioner without fault on his part was deprived of his remedy by writ of error); Champion *v.* Brooks, 9 Mass. 228 (holding that a review will be granted where an appeal lay, if the party neglected to appeal, not from his own laches, but from the misapprehension of the parties and of the lower court, and if it appears that justice has not been done).

36. Smith *v.* McDaniel, 15 N. H. 474, construing Laws (ed. 1830), c. 362, and holding that a creditor, having the right to appeal from the determination of commissioners of an insolvent estate is not entitled to a writ of review, where he fails to enter his appeal at the term of court prescribed by the statute allowing such appeals, the statute expressly providing that, in case the creditor failed to enter his appeal as there allowed, he should be forever barred.

37. Merrill *v.* Crocket, 6 Me. 412, holding that the court, in the exercise of its general power to grant reviews in all cases, will not sustain an application for the review of an action in a justice's court, where the party aggrieved may have redress in the court of common pleas.

38. See Smith *v.* Paige, 4 Allen (Mass.) 94 (writ of error); Bodurtha *v.* Goodrich, 3 Gray (Mass.) 508 (writ of error).

39. Barker *v.* Wendell, 12 N. H. 119.

40. Stillman *v.* Whittemore, 165 Mass. 234, 42 N. E. 1126.

41. See Howe *v.* Hapgood, 13 Mass. 490; Swett *v.* Sullivan, 7 Mass. 342; Knox *v.* Knox, 12 N. H. 352; Frost *v.* Philbrook, 28 Vt. 736.

One of several defendants against whom judgment was rendered in the original action may have a review of the case. Paine *v.* Tilden, 20 Vt. 554. See also Emerson *v.* Pattee, 1 Mass. 482. *Compare* Nowell *v.* Sanborn, 44 Me. 80, where the court expressed a doubt as to the right of one of several defendants to a review in the absence of statute, but permitted it under the circumstances of the particular case, the other defendants having defaulted in the original action, and defendant applying for the review having given a bond for damages and costs.

42. Johnson *v.* Johnson, 81 Me. 202, 16 Atl. 661; Taylor *v.* Sewall, 69 Me. 148 (holding that an administrator *de bonis non* cannot maintain a petition to review a judgment rendered against his predecessor for any cause, since he is neither a party to such judgment nor in privity with, nor the representative of the interests of, any one who is); Berry *v.* Whitaker, 58 Me. 422 (holding that an administrator cannot prosecute a writ of review in a real action not brought to foreclose a mortgage, since, although the action does not abate by the death of the original party, he has no interest in the subject-matter); Elwell *v.* Sylvester, 27 Me. 536; Skillings *v.* Massachusetts Ben. Assoc., 155 Mass. 581, 30 N. E. 367; Winch *v.* Hosmer, 122 Mass. 438.

Only a party to an action should have leave to bring an action of review. He may be a party by record or a party in interest, but he should be a party having the care or responsibility of the action. Johnson *v.* Johnson, 81 Me. 202, 16 Atl. 661.

43. Winch *v.* Hosmer, 122 Mass. 438. See also Skillings *v.* Massachusetts Ben. Assoc., 155 Mass. 581, 30 N. E. 367.

44. Johnson *v.* Johnson, 81 Me. 202, 16 Atl. 661, holding that under the Maine statute which expressly provides that a review may be obtained on petition by "a party in interest, who was not a party to the record" in an action, such person must be a party in interest in the legal sense, and that a widow who is a residuary legatee is not a party in interest who may obtain a review of an action by the administrator *cum testamento annexo* against an alleged debtor of the estate.

45. Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469.

a writ of review is sued out by a party not entitled thereto it may be quashed on motion as well as abated by plea,[46] and it is the duty of the court in such cases to abate the writ *ex officio* upon discovery of such defect.[47]

5. Estoppel or Waiver. The statutory right to a review is one which may be waived by the party or parties entitled thereto,[48] but where a party waives his right of review, acting on the advice of his counsel that he could have relief by writ of error, which he could not, the right of review will be restored.[49] Both parties, or either party, may waive the right of review by an agreement that one trial shall be final as to the parties or party making the agreement;[50] but where the agreement is unilateral, the other party, by accepting the proposed benefit, is not deprived of his right of review,[51] nor is a party precluded by such an agreement from his right of review where he recovers judgment in the trial court and the other party reverses the judgment on appeal.[52] Where an action is referred by agreement the right to a review is waived where the reference is under a statute which provides that judgment rendered upon the report shall be final and conclusive,[53] or where the agreement itself provides that the report of the referee shall be final and that judgment shall be rendered thereon.[54] A party does not waive his right of review by simply paying the judgment in the original action,[55] and a voluntary direction by plaintiff that judgment be entered in favor of one of several defendants, without anything to show that such judgment is final, is no waiver of the right of review as to such defendant.[56] A conveyance of the premises by plaintiff in a real action after a verdict in his favor but before judgment does not preclude a judgment in his favor on a review of the action, provided he is otherwise entitled thereto.[57]

6. Successive Writs or Proceedings. Ordinarily the statutes authorize but one review of a case;[58] but a judgment upon review which does not pass upon

46. Hall *v.* Wolcott, 10 Mass. 218.

47. Hall *v.* Wolcott, 10 Mass. 218.

48. Carroll *v.* Locke, 58 N. H. 163.

49. McFadden *v.* Otis, 6 Mass. 323.

50. See Hatch *v.* Dennis, 10 Me. 244; Hall *v.* Wolcott, 10 Mass. 218.

51. Hall *v.* Wolcott, 10 Mass. 218.

52. Hatch *v.* Dennis, 10 Me. 244, holding that defendant in an action on a promissory note is not precluded from his right to a writ of review by an agreement that "one trial should be final on his part," where plaintiff on appeal reverses the judgment of the trial court which was in favor of defendant.

53. Rand *v.* Merchants' Despatch Transp. Co., 60 N. H. 276 (holding that a party by agreeing to a reference under such a statute accepts all the provisions of the statute); Bennett *v.* Atwood, 57 N. H. 216. See also Parsons *v.* Hilliard, 61 N. H. 642.

54. Carroll *v.* Locke, 58 N. H. 163; Bennett *v.* Atwood, 57 N. H. 216.

55. Watson *v.* Joselyn, 29 Vt. 455. But see Smith *v.* O'Brien, 146 Mass. 294, 15 N. E. 645, holding that where execution was about to be enforced against the property of the party against whom the original judgment was rendered, he paid a part of the judgment and agreed to pay the balance on a certain day upon condition that the attorney for the successful party would refrain from enforcing it until that time, this constituted a waiver of the right to review the judgment.

56. Lyndon *v.* Cook, 19 Vt. 35, where, in an action of tort against several defendants, plaintiff voluntarily entered judgment in favor of one of defendants and then called him as a witness, and, on the trial of the action, a verdict was rendered in favor of the other defendants, and plaintiff entered a review as to all of defendants.

57. Berry *v.* Whitaker, 58 Me. 422.

58. Ruggles *v.* Freeland, 6 Mass. 513; Frost *v.* Philbrook, 28 Vt. 736, holding that under the Vermont statute providing that "either party may once, and no more, review his cause," where plaintiff in an action of ejectment against two defendants recovered a verdict against only one of them who entered a review, plaintiff at the same time entering a review against the other defendant, and on the second trial a verdict was rendered in favor of both defendants, plaintiff was not entitled to review the action as to defendant against whom he obtained a verdict at the first trial.

The Massachusetts statute of 1891, vesting a discretionary power in the supreme judicial court to grant reviews, has been held not to repeal the provision of the former statute that but one review should be granted, and therefore not to authorize the court to grant a second review after one had been granted and prosecuted. Ruggles *v.* Freeland, 6 Mass. 513. But see Howe *v.* Hapgood, 13 Mass. 490, 491, where the court, although holding that a party against whom judgment by default was rendered on one review brought by the other party was not entitled to a second review as a matter of right under the statute of 1786, said: "The remedy for the present plaintiff, if he is aggrieved, is to petition the Court; for, by the last statute of 1791, c. 17, we may, in all cases, and as often as justice requires, grant reviews upon

the merits is not a bar to a new petition for review,[59] and a review commenced and discontinued is not a bar to another review in the same action, if not prevented by other limitations.[60]

C. Decisions Reviewable — 1. In General. The question as to what judgments, decrees, or decisions are reviewable depends upon the provisions of the statutes,[61] and a review can be granted only in cases coming within their application.[62] In this regard it is to be observed that there is a lack of uniformity not only between the statutes of the different jurisdictions,[63] but also between the successive statutes of the same jurisdiction.[64]

2. In Maine. In Maine the right of review has been enlarged by successive statutes,[65] and while it is held that a review cannot be granted in a criminal case,[66] it may be granted in all civil actions where judgment has been rendered in any judicial tribunal,[67] whether rendered upon a verdict or upon an award or report of referees.[68] A review cannot be granted as to a matter not before the court at the original trial and as to which no adjudication or decree was made.[69]

3. In Massachusetts. The Massachusetts statutes authorize the granting of reviews where judgment has been rendered in any civil action,[70] either by the supreme judicial court or court of common pleas,[71] whether upon a verdict or report of referees or upon a nonsuit or default or in any other way.[72] In some of the earlier cases it was held that a review was authorized only where the original action was commenced by writ,[73] and there was a trial by jury and judgment rendered upon a verdict; [74] and the provision of the statute giving a review as a

petition, on such terms as we may think equitable and just."

59. Hayes *v.* Collins, 114 Mass. 54, where the judgment upon the first petition was not one of dismissal upon the merits, but merely for respondent for his costs.

60. Burrell *v.* Burrell, 10 Mass. 221.

61. Solomons *v.* Chesley, 57 N. H. 163; Chesman *v.* Lane, 17 Vt. 88.

62. Wells' Case, 2 Me. 322.

63. Solomons *v.* Chesley, 57 N. H. 163.

64. Gooding *v.* Baker, 60 Me. 52; Solomons *v.* Chesley, 57 N. H. 163.

65. Gooding *v.* Baker, 60 Me. 52.

66. Wells' Case, 2 Me. 322, construing St. (1821) c. 57, as applying to civil cases only.

67. Gooding *v.* Baker, 60 Me. 52.

68. Gooding *v.* Baker, 60 Me. 52, construing Rev. St. (1871) c. 89, § 1, and Acts (1860), c. 107, and holding that the supreme judicial court, held by one justice, may grant a review of a judgment rendered in the superior court, upon a report of referees, in an action referred to them by rule of the latter court, although no other matters in dispute between the parties were included in the rule.

Petition for partition.— Under an early statute the court, while denying the application for review upon other grounds, expressed a doubt as to whether a petition for partition was a "civil action" within the application of the statute (Sturtivant *v.* Greeley, 4 Me. 534); but the Revision of 1840, c. 123, expressly included petitions for partition (see Gooding *v.* Baker, 60 Me. 52).

69. Henderson *v.* Henderson, 64 Me. 419, holding that where a husband obtains a judgment of divorce, the wife cannot review such judgment as to alimony and dower alone, where the judgment contains no mention of dower or alimony, and no decree was made as to either.

70. Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640 (construing Pub. St. c. 187, §§ 16, 22, authorizing writs of review, and holding that a judgment of the superior court, upon the verdict of a jury, assessing damages upon the petition of one whose land has been taken for a railroad, is a judgment in a "civil action" within the meaning of the above statute); Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415.

71. Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415.

72. See Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415.

73. Borden *v.* Brown, 7 Mass. 93 (holding upon this ground that there could be no review of a petition for partition); Dickenson *v.* Davis, 4 Mass 520 (construing St. (1786) c. 21, and holding that a writ of review will not lie from a judgment rendered upon an award of referees, under a submission entered into before a justice of the peace, pursuant to the above statute, for, when a review is grantable, the cause must be triable on a review; it must therefore be commenced by writ, containing a declaration, to which a plea may be pleaded and an issue joined and tried). See also Stone *v.* Davis, 14 Mass. 360, holding that no review lies upon a report of referees where the party found to be indebted has paid the sum awarded, and the report with the acknowledgment of satisfaction has been returned and recorded. But see Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640, where the statements of the earlier cases that a review would lie only where the action was commenced by writ are said to be *dicta*, the court holding that the decisive question is whether the proceeding is in substance a civil action, and not the form of the process.

74. Perry *v.* Goodwin, 6 Mass. 498, holding

matter of right was limited to cases where there had been but one verdict against the party aggrieved by the judgment sought to be reviewed.[75] Later cases under the statutes authorizing the court to grant reviews distinctly hold that the right is not limited to cases where the original action is commenced by writ,[76] or where the pleadings are in the same form as in ordinary actions at law,[77] or where the judgment is rendered on a verdict of a jury.[78] A review may be granted of an action commenced by petition,[79] an action decided upon an agreed state of facts submitted to the court,[80] a judgment rendered on a scire facias against bail,[81] a judgment against a trustee,[82] a judgment of a lower court, affirming a judgment of a justice of the peace, rendered on the complaint of the defendant in review,[83] and judgments by default;[84] but a review will not lie to reverse a decree dismissing a libel for divorce.[85] The denial by the superior court of a motion for a new trial does not deprive the supreme court of its jurisdiction to grant a writ of review,[86] and the supreme court may grant a review of its own judgment, affirming the judgment of the court below, to which exceptions were taken and accidentally omitted in the supreme court, on being satisfied that the exceptions affect the substantial merits of the case.[87]

4. In New Hampshire. Under the New Hampshire statutes it has been held that a review can be granted only in civil actions commenced by writ and having the characteristics of a common-law action,[88] and that a review cannot be granted of a petition relating to divorce or alimony,[89] or in an appeal from a decree of a judge of probate approving a will,[90] or any suit or proceeding in equity,[91] and

that under the statute of 1876, chapter 66, no review could be had where judgment was by default, whether the damages were assessed by the court or by a jury.

75. Perry *v.* Goodwin, 6 Mass. 498, construing St. (1786) c. 66, authorizing reviews, and providing that either party aggrieved, where only one verdict has been given against him, may, within two years, review the same and have one trial more, which shall be upon the issues appearing upon the record.

Where plaintiff's declaration contained two counts for different causes of action, and there had been two trials, resulting in one verdict in his favor and one against him on each count, it was held that he was entitled to a review, there having in effect been but one verdict against him on each cause of action. Rice *v.* Townsend, 1 Mass. 366.

76. Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640.

77. Hubon *v.* Bousley, 123 Mass. 368.

78. Hubon *v.* Bousley, 123 Mass. 368; Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415; Stockbridge *v.* West Stockbridge, 13 Mass. 302.

79. Nantasket Beach R. Co. *v.* Ransom, 147 Mass. 240, 17 N. E. 640, holding that there may be a review of a judgment of the superior court upon the verdict of a jury assessing damages upon the petition of one whose land has been taken for a railroad. See also Hubon *v.* Bousley, 123 Mass. 368, construing Gen. St. c. 146, and holding that a review will lie of a judgment rendered on a petition, inserted in a writ of summons, to enforce a mechanic's lien.

80. Stockbridge *v.* West Stockbridge, 13 Mass. 302.

81. Safford *v.* Knight, 117 Mass. 281; Thayer *v.* Goddard, 19 Pick. (Mass.) 60.

82. Brigham *v.* Elliot, 12 Pick. (Mass.) 172 (construing St. (1791) c. 17, § 2, and holding that a review will be granted where it appears that a trustee has been charged by accident or mistake, when he ought to have been discharged); *Ex p.* Packard, 10 Mass. 426 (where the judgment against the trustee was by default on a scire facias).

83. Anderson *v.* Brown, 10 Gray (Mass.) 92, construing Rev. St. c. 99, § 19.

84. James *v.* Townsend, 104 Mass. 367, construing Gen. St. c. 146, § 21.

85. Lucas *v.* Lucas, 3 Gray (Mass.) 136, construing Rev. St. c. 99, §§ 1, 19.

86. Stillman *v.* Whittemore, 165 Mass. 234, 42 N. E. 1126, construing Pub. St. c. 187, § 22.

87. Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415, construing Rev. St. c. 99, § 19, and holding that the statute seems designed to reach every case, whether it could be foreseen or not, with no other limitation than that the court should think it, under all the circumstances, reasonable.

88. Sheafe *v.* Sheafe, 29 N. H. 269.

89. Sheafe *v.* Sheafe, 29 N. H. 269.

90. Barnes *v.* Abbott, 55 N. H. 147, construing Gen. St. c. 215, and holding that there is no review in an appeal from a decree of the judge of probate, approving a will, for if it had been the intention of the legislature that a review should lie in such a case, it can hardly be supposed that it would have left the matter to be ascertained by inference from the provisions of the above statute, so clearly applicable to suits at law, and so inapplicable to probate appeals.

91. Brooks *v.* Howard, 55 N. H. 69, construing Gen. St. c. 215, and holding that every portion of said statute is especially adapted to proceedings at law, while there is a very noticeable absence, not only of provisions which we should expect to find, but

under the earlier statutes it was held that no review could be granted where judgment in the original action was rendered by default; [92] but some radical changes have been made by the later statutes and a review may now be granted where judgment was by default.[93] Under the later statutes a review may be granted of civil actions in which issue has been joined and judgment rendered, and of such actions in which judgment has been rendered by agreement of the parties open to review,[94] and a review may be granted where an issue was joined and determined whether by the verdict of the jury or otherwise.[95] By "issue joined" is meant an issue of fact reached by the parties as distinguished from cases where defendant does not plead or appear and thus no issue is raised,[96] and it is sufficient where defendant pleads the general issue, although plaintiff does not file a *similiter*,[97] or where defendant appears in opposition to plaintiff's claim and agrees to a judgment, although no plea is filed or issue formally joined.[98] A review may be had by appellant of a cause appealed to the supreme court from the judgment of a police court, such appellant being entitled to one review,[99] but no review can be granted from a judgment or decree which by statute or by agreement of the parties is final and conclusive.[1]

5. In Vermont. The Vermont statutes give a right of review, with a few exceptions, in all civil causes; [2] but the words "civil causes" have reference only to those suits or actions which are commenced and prosecuted according to the course of the common law,[3] and apply only to the cause itself and not to a separate issue, adjunct or incident of such cause.[4] It has been held that there may be a review of a judgment rendered on a writ of scire facias,[5] a judgment on a bond given by a deputy to the sheriff,[6] and in cases in which the judgment sought to be reviewed was commenced by trustee process; [7] but that there is no right of

of some which would seem to be almost indispensable, had the intention been to include equity proceedings.

92. Smith *v.* Gilman, 3 N. H. 501. See also Solomons *v.* Chesley, 57 N. H. 163.

93. Solomons *v.* Chesley, 57 N. H. 163 [*distinguishing* Smith *v.* Gilman, 3 N. H. 501, which it is said was decided under a statute authorizing reviews of "actions tried," while the later statutes authorize reviews of actions where "issue has been joined and judgment rendered"].

94. Messer *v.* Smyth, 60 N. H. 436; Solomons *v.* Chesley, 57 N. H. 163.

95. Solomons *v.* Chesley, 57 N. H. 163.

96. Solomons *v.* Chesley, 57 N. H. 163.

97. Solomons *v.* Chesley, 57 N. H. 163.

98. Messer *v.* Smyth, 60 N. H. 436, construing Gen. St. c. 215, § 1, giving the right of review in any action in which issue is joined, and holding that where in a suit on a mortgage note defendants appeared and consented that judgment might be entered in the same sum as judgment had been previously entered on the mortgage, this appearance and consent were equivalent to pleading the general issue within the statute. And see Coburn *v.* Rogers, 32 N. H. 372, holding that there is a right of review, where judgment by default is entered by consent, reserving the right to review.

99. Moulton *v.* Fellows, 51 N. H. 421, construing Gen. St. c. 215, § 1, which makes no distinction between actions which are in the supreme court by appeal from a justice of the peace, or police court, and those originally there.

1. Bennett *v.* Atwood, 57 N. H. 216 (holding that where a case is referred by consent either under a statute or pursuant to an agreement providing that judgment on the report shall be final and conclusive, no review can be granted); Smith *v.* McDaniel, 15 N. H. 474 (holding that under a statute providing that a creditor who fails to appeal within a certain time from the determination of commissioners of an insolvent estate shall be forever barred, the court has no authority to grant a review upon a petition by a creditor who has failed to enter his appeal as allowed by the statute).

2. See Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699; Allen *v.* Taylor, 26 Vt. 599.

3. Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699.

4. Allen *v.* Taylor, 26 Vt. 599; Hall *v.* Hall, 24 Vt. 637.

5. Aldrich *v.* Williams, 10 Vt. 295, construing St. (1824) and holding that the writ of scire facias is subject to review because it is not like the common and ordinary writs, to carry into effect a former judgment, but it is in the nature of an original action.

6. Page *v.* Barney, Brayt. (Vt.) 23.

7. Allen *v.* Seaver, 38 Vt. 673, construing the statutes relating to proceedings against trustees and proceedings to collect taxes and holding that suits brought by a collector, according to the provisions of the statute, to collect a tax by means of the trustee process, are within the provisions of the act giving a right of review.

But there is no right of review of a judgment that defendant, trustee in trustee process, has assets of an absconding debtor (Huntington *v.* Bishop, 5 Vt. 186); nor is there any right of review of a judgment on a plea that the person, as whose trustee defendant is

review of a petition for partition,[8] a declaration for betterments,[9] a plea in offset in an action of book-account,[10] or of a judgment on a writ of error.[11] The statutes expressly exclude from the right of review cases where judgment has been twice rendered in favor of the same party.[12]

D. Grounds For Review — 1. In General. In some cases the statutes specify certain grounds upon which a review may be claimed as a matter of right,[13] or upon which the court may grant a review,[14] and where the right is expressly limited by statute, a review cannot be claimed or granted except upon the grounds authorized by the statute;[15] but the statutes authorizing reviews are remedial and should be liberally construed.[16] Ordinarily the statutes give the courts very broad discretionary powers in regard to granting reviews,[17] and in the exercise of such discretion the court may grant a review whenever it satisfactorily appears that injustice has been done,[18] and the court is satisfied that it would be for the furtherance of justice;[19] and the court is not limited to such grounds as would authorize the granting of a new trial at common law.[20] On the other hand the court will not grant a review where upon the whole case made by the petition it cannot perceive any probability that injustice was done,[21] or that anything in the promotion of justice would be gained by granting a review.[22] The court may grant a review where injustice has been done by hurrying a party to trial unprepared,[23] and a review may be granted to enable defendant to set up a discharge in bankruptcy by way of defense;[24] but a review will not be granted merely because the original action was brought in petitioner's name without his authority,[25] or

sued, is not an absconding or concealed debtor (Emerson *v.* Paine, 9 Vt. 271).

8. Nichols *v.* Nichols, 28 Vt. 228, 67 Am. Dec. 699, holding that the words, "civil causes," used in the statute, have reference only to those suits or actions, which are commenced and prosecuted according to the course of the common law.

9. Allen *v.* Taylor, 26 Vt. 599 (holding that the provisions of this statute do not extend to a declaration for betterments, filed in an action of ejectment after a final judgment in the case, for the action of ejectment is the principal cause or suit in which the right to review exists, and the declaration for betterments is a mere adjunct to the action of ejectment); Gage *v.* Ladd, 6 Vt. 174.

10. Hall *v.* Hall, 24 Vt. 637, holding that the words, "civil cause," used by the statute, have always been held to mean the cause itself and not some adjunct or incident of the cause.

11. Enos *v.* Boardman, 2 Tyler (Vt.) 271, construing Judiciary Act, § 3.

12. Haskins *v.* Ferris, 23 Vt. 673; Chesman *v.* Lane, 17 Vt. 88, holding that where defendant filed a plea in offset to plaintiff's demand, but at the first trial submitted no proof thereof, and plaintiff recovered a judgment for his whole claim, and defendant then, by leave of court, filed an additional plea in offset, founded upon the same subject-matter, and at a subsequent term introduced evidence and so far sustained his offset that plaintiff recovered judgment for but a part of his claim, plaintiff is not entitled to a review, judgment having been rendered for him twice in the same cause.

13. Sturtevant *v.* Randall, 49 Me. 446.

14. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

Fraud, when injustice has resulted and another trial would be equitable and just, is a ground for granting a review under the Maine statute. See Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683.

15. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Pierce *v.* Bent, 67 Me. 404.

16. McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856.

17. Holmes *v.* Fox, 19 Me. 107; Morrell *v.* Kimball, 1 Me. 322; Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415.

18. Holmes *v.* Fox, 19 Me. 107.

19. Wilbur *v.* Dyer, 39 Me. 169; Morrell *v.* Kimball, 1 Me. 322.

20. Morrell *v.* Kimball, 1 Me. 322.

21. Todd *v.* Chipman, 62 Me. 189.

22. Weld *v.* Sabin, 20 N. H. 533, 51 Am. Dec. 240.

23. Reynard *v.* Brecknell, 4 Pick. (Mass.) 302.

24. Golden *v.* Blaskopf, 126 Mass. 523, where the discharge was procured and the suggestion of bankruptcy filed before the rendition of the original judgment but was not brought to the attention of the court. *Compare* Bush *v.* Hovey, 124 Mass. 217, holding that the court may refuse to grant a review to enable defendant to set up a discharge in bankruptcy, in an action where a bond to dissolve an attachment had been given, where since the discharge defendant had given a new bond, and the original plaintiff would be entitled to a special judgment to enable him to proceed against the sureties on such bond and defendant notwithstanding his discharge would be liable to the sureties for the amount paid by them.

25. Fullam *v.* McKenny, 16 Gray (Mass.) 579, holding that the mere fact that the action in which judgment has been rendered for defendant for costs was brought in plain-

for the sole purpose of striking out the name of the original plaintiff and substituting that of another party.[26] A review will not ordinarily be granted because of matters within the discretion of the trial court, such as the refusal of a continuance or postponement,[27] or a motion for a new trial,[28] or ordering a case for trial out of its regular order on the docket,[29] unless some misapprehension, corruption, or incompetency on the part of the trial court is clearly shown;[30] but if a party is seriously injured by any ruling of the trial court as to matters within its discretion, a petition for review is the proper remedy and may be granted by the supreme court.[31]

2. Newly Discovered Evidence. Newly discovered evidence is a ground for a review,[32] and a review should be granted on this ground where petitioner is not chargeable with any fault in regard to not discovering or producing such evidence at the first trial,[33] and such evidence is sufficient to sustain a verdict in his favor;[34] but a review will not be granted on the ground of newly discovered evidence where such evidence would not be likely to change the result,[35] or for the purpose of admitting testimony which was, or with reasonable diligence might have been, within petitioner's knowledge and reach at the original trial and was either wilfully suppressed or negligently omitted,[36] or for the purpose of admitting testimony which under the rules of evidence in force at the time of the original trial was not then admissible.[37] To authorize a review upon the ground of newly discovered evidence it must also appear that such evidence is admissible,[38] and not merely cumulative,[39] collateral,[40] or for the purpose of discrediting a witness,[41] and the court must also be satisfied from the evidence introduced in support of the petition that the alleged newly discovered evidence could not have been obtained by diligent inquiry prior to the trial of the original action.[42]

tiff's name without his consent is no ground for granting a review.

26. Skillings *v.* Massachusetts Ben. Assoc., 155 Mass. 581, 30 N. E. 367, construing Pub. St. c. 187, § 22, and holding that the superior court has no power to grant a writ of review to set aside a judgment obtained in an action in the trial of which no error of law or fact occurred, for the sole purpose of striking out the name of plaintiff in the original action, and substituting therefor the name of another person, who, if he prevailed, would hold the money recovered in his own right, and not for the benefit of the original plaintiff.

27. Weeks *v.* Adamson, 106 Mass. 514.

28. See Dearborn *v.* Mathes, 128 Mass. 194.

29. Converse *v.* Carter, 8 Allen (Mass.) 568.

30. Converse *v.* Carter, 8 Allen (Mass.) 568.

31. Reynard *v.* Brecknell, 4 Pick. (Mass.) 302.

32. Buck *v.* Pierce, (Me. 1885) 1 Atl. 137; Dwinel *v.* Godfrey, 44 Me. 65; Ward *v.* Clapp, 6 Metc. (Mass.) 414, holding that where a party uses due diligence to procure evidence to prove a material part of his case, but is prevented from procuring it by measures taken by the witnesses to conceal the facts from his knowledge, and he therefore submits his case to the court on an agreed statement of such facts as are known to him, and the court decides against him, he is entitled to a review of the judgmeent rendered on his subsequently discovering proof of such concealed facts.

Newly discovered evidence is a ground for review where a witness whose testimony on the trial was against petitioner has ascertained that by mistake he testified incorrectly; or where the newly discovered evidence relates to confessions or declarations of the other party as to a material fact unknown to petitioner at the time of the trial and inconsistent with the evidence adduced by such party at the trial; or where the newly discovered evidence was placed beyond the knowledge or control of petitioner by means of the other party and with a view to prejudice petitioner's case. Warren *v.* Hope, 6 Me. 479.

33. Buck *v.* Pierce, (Me. 1885) 1 Atl. 137; Ward *v.* Clapp, 6 Metc. (Mass.) 414.

34. Dwinel *v.* Godfrey, 44 Me. 65.

35. Trask *v.* Unity, 74 Me. 208; Todd *v.* Chipman, 62 Me. 189.

36. Todd *v.* Chipman, 62 Me. 189.

37. Berry *v.* Lisherness, 50 Me. 118, holding that a petition for review on the ground of newly discovered evidence will not be granted because since the trial of the cause a change has been made by the legislature in the rules of evidence, by which the petitioner could now introduce important testimony which was excluded before.

38. Crooker *v.* Randall, 53 Me. 355.

39. Trask *v.* Unity, 74 Me. 208; Crooker *v.* Randall, 53 Me. 355; Warren *v.* Hope, 6 Me. 479.

40. Trask *v.* Unity, 74 Me. 208.

41. Trask *v.* Unity, 74 Me. 208.

42. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683; Buck *v.* Pierce, (Me. 1885) 1 Atl. 137; Trask *v.* Unity, 74 Me. 208; Atkinson

3. Want of Notice. Where judgment is rendered against a party who had no notice of the pendency of the suit, a review will be granted on his showing probable grounds of defense,[43] and on an application for review based upon this ground evidence is admissible to contradict the return of the officer stating that he summoned such party to appear;[44] and although the record shows that petitioner appeared by attorney in the original action, evidence is admissible to show that such appearance was without his knowledge and authority.[45]

4. Accident, Surprise, Mistake, or Misfortune. Accident, surprise, mistake, or misfortune, by reason of which justice has not been done, is ground for review,[46] and in some cases the statutes expressly so provide,[47] and a review may be granted where through such causes a party has been deprived of the opportunity of being heard upon the original trial,[48] or deprived of his right to an appeal or new trial,[49] or where judgment against him has been affirmed in an appellate court through

v. Conner, 56 Me. 546; Carpenter *v.* Sellers, 38 Me. 427, holding that a review will not be granted because of the discovery of a document, before supposed to be lost, when the former action failed by reason of improperly admitting evidence as to the contents of such document, without first properly proving its loss.

Where the same efforts that were made after the trial if made before would have discovered the same evidence that is made the basis of the petition a review will not be granted. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683.

A second review for newly discovered evidence will not be granted after the lapse of eight years from the time of the commencement of the action and after two verdicts adverse to the petitioner and after one review has been had on account of newly discovered evidence, unless the court is fully satisfied that the alleged newly discovered evidence was unattainable by the utmost diligence at any of the former proceedings and that such evidence would change the result. Trask *v.* Unity, 74 Me. 208.

43. McNamara *v.* Carr, 84 Me. 299, 24 Atl. 856 (construing Rev. St. c. 89, § 1, and holding that a review will be granted upon a petition for review of an action brought against defendant during his absence from the state, and of which he had no notice, where he shows that an attorney who appeared for him and consented to a judgment by default, did so without his knowledge or authority); Holmes *v.* Fox, 19 Me. 107 (holding that where process is served on a resident defendant, who was temporarily absent from the state, by leaving a copy of the summons at the last and usual place of abode of his agent, he is entitled to a writ of review); Brewer *v.* Holmes, 1 Metc. (Mass.) 288; Chase *v.* Brown, 32 N. H. 130 (construing Rev. St. c. 192, § 2, and holding that where judgment has been rendered against defendant in his absence without actual notice, and for a larger sum than it is shown plaintiff was willing to take in settlement in full for his claim, he is entitled to a review of the action).

44. Brewer *v.* Holmes, 1 Metc. (Mass.) 288.

45. Brewer *v.* Holmes, 1 Metc. (Mass.) 288.

46. Hutchinson *v.* Gurley, 8 Allen (Mass.) 23; Woodworth *v.* Wilson, 50 N. H. 220.

47. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683; Nashua, etc., R. Co. *v.* Stimpson, 35 N. H. 286; Chase *v.* Brown, 32 N. H. 130.

But to authorize a review the court must be satisfied of three propositions, namely: (1) That justice has not been done; (2) that the consequent injustice was through fraud, accident, mistake, or misfortune; and (3) that a further hearing would be just and equitable; and the court cannot disregard any of these essential requirements. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

48. Nashua, etc., R. Co. *v.* Stimpson, 35 N. H. 286; New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170, failure to appear and defend due to a mistake of petitioner's attorney as to the time of the session of court, petitioner having a good defense and intending to make it.

Where it distinctly appears that a trial has not been had by reason of accident, mistake, or misfortune, the court will generally grant a review without inquiring into the merits, if satisfied that a matter of controversy actually exists which the party claiming the review desires and intends to try. Nashua, etc., R. Co. *v.* Stimpson, 35 N. H. 286.

49. Hutchinson *v.* Gurley, 8 Allen (Mass.) 23 (holding that a review of a judgment of a justice of the peace may be granted on the ground that the party against whom it was rendered intended to appeal and thought he had appealed); Woodworth *v.* Wilson, 50 N. H. 220 (where a petition for review was granted to a non-resident, on the ground of accident and mistake, in that a miscarriage of letters between his attorneys prevented a seasonable application for a new trial or appeal).

Decision of commissioners of insolvent estate.— Under the New Hampshire statute which provides that if a creditor fails to appeal from the decision of the commissioners within the time limited his claim shall be forever barred, if such appeal was not taken the court cannot grant a review, although the failure to appeal was due to accident, mistake, or misfortune. Hilton *v.* Wiggin, 46 N. H. 120.

the accidental failure to enter in that court the exceptions taken upon the trial.[50] But the court must be satisfied not only of the fact of such accident, surprise, etc.,[51] but it must also appear that by reason thereof justice has not been done,[52] and it is a failure of justice actually experienced in the case sought to be reviewed which is contemplated by this rule,[53] although this may consist either in the result of the original trial or in a subsequent deprivation of the right to an appeal, new trial, or review as of right.[54] So also the words "accident, mistake, or misfortune" ordinarily import something outside of petitioner's control or at least something that a reasonably prudent man would not be expected to guard against or provide for,[55] and a review will not be granted on this ground where a party fails to prepare his case with reference to all the probable contingencies of the trial,[56] or for the purpose of otherwise relieving him of the results of culpable negligence on his part.[57] A review may be granted to correct a mistake made by commissioners in the partition of land,[58] by the clerk of the court in computing the amount due on a promissory note,[59] or by parties in the statement of a case for the opinion of the court, where the error was made without any want of due diligence.[60] But it is not every mistake either of the tribunal or the party which will justify a review,[61] and a review will not be granted because of a mistake in opinion or judgment where no data were accidentally overlooked,[62] or, where defendant makes a deliberate erroneous admission, when it appears that the facts were matters of record to which defendant had access at the time of the admission,[63] or because of a mistake in an agreed statement of facts where the

50. Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415, holding that the supreme court may grant a review of its judgment affirming a judgment of the court of common pleas, to which exceptions were taken and accidentally omitted to be entered in the supreme court, on being satisfied that the exceptions affect the substantial merits of the case.

51. Atkinson *v.* Connor, 56 Me. 546.

52. Pierce *v.* Bent, 67 Me. 404; Weld *v.* Sabin, 20 N. H. 533, 51 Am. Dec. 240.

Where a judgment by default is rendered against a party through accident or misfortune a review will not be granted where it does not appear that he had any defense or that anything could be gained in the promotion of justice by granting the review. Weld *v.* Sabin, 20 N. H. 533, 51 Am. Dec. 240.

53. Pierce *v.* Bent, 67 Me. 404.

54. Woodworth *v.* Wilson, 50 N. H. 220.

55. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683, construing Rev. St. c. 89, § 1, subs. 7.

56. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683 (construing Rev. St. c. 89, § 1, subs. 7, providing that a review may be granted in any case where it appears that through fraud, accident, mistake, or misfortune, justice has not been done and that a further hearing would be equitable, and holding that a judgment afterward shown to be erroneous because of imperfect and too scanty data furnished by the parties, is not the result of accident, mistake, or misfortune within said statute); Atkinson *v.* Connor, 56 Me. 546 (holding that where a party has reasonable cause to expect that a certain point will be controverted and he might, by proper diligence, have obtained evidence to substantiate the point, he cannot have a review on the ground of surprise or mistake); Clark *v.* Brigham, 22 Pick. (Mass.) 81 (holding that where defendant supposed that the question whether he was liable to plaintiff at all would be first tried, and neglected to procure evidence as to the amount of damages, thinking that if a verdict should be found against him the damages would be the subject of a future inquiry, he is not entitled to a review).

57. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683; Atkinson *v.* Connor, 56 Me. 546; Clark *v.* Brigham, 22 Pick. (Mass.) 81.

58. Wilbur *v.* Dyer, 39 Me. 169. *Compare* Sturdivant *v.* Greeley, 4 Me. 534, holding that where in partition a judgment was rendered upon demurrer, the title of the petitioner not being contested, but a mistake was made by the commissioners, which was not discovered until after the final judgment, a review will not be granted to correct such an error.

59. Ilsley *v.* Knight, 1 Mass. 467.

60. Stockbridge *v.* West Stockbridge, 13 Mass. 302.

61. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683.

62. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683, construing Rev. St. c. 89, § 1.

63. Brooks *v.* Belfast, etc., R. Co., 72 Me. 365, holding that a review of a judgment against a defendant will not be granted because of an error in an admission by defendant, in an action to collect a subscription to stock, deliberately made, when it appears that all the facts were matters of record to which defendant had access at the time of the admission, although it might be different if defendant had been entrapped or misled into making the fatal admission, without laches on his part, or had been prevented from ascertaining and procuring evidence of the real facts.

facts in regard to such matter were within the knowledge of the applicant and their legal effect on his rights could easily have been ascertained.[64]

5. Mistake or Negligence of Attorney. A writ of review will be granted for the mistake of a party's attorney, where such mistake was the result of accident, and not of carelessness, inattention, or error of judgment,[65] but a review will not ordinarily be granted because of the negligence of an attorney,[66] or an error of judgment on his part as to some point involved in the proceedings,[67] or where the consequences of the error of counsel could have been avoided by the exercise of ordinary diligence.[68]

6. Conduct or Testimony of Witness. While a review will not be granted simply to discredit a witness who testified at the trial,[69] it is sufficient ground for granting a review where a witness who has testified to material facts adverse to petitioner upon the first trial subsequently discovers that through mistake he testified incorrectly,[70] or where such witness is subsequently convicted of perjury in regard to such testimony.[71]

7. Qualifications or Conduct of Juror. It is not sufficient ground for granting a review that a member of the jury in the original action had expressed a general opinion in regard to the case before the trial, if he had formed no judgment of the merits and stood indifferent between the parties,[72] or that a juror was hostile to petitioner, if this fact was known at the time of the trial and no objection was made on this ground;[73] but a review will be granted on account of the interest of a juror, which was not known to petitioner until after a verdict against him and adjournment of the court.[74]

64. Ryder *v.* Phœnix Ins. Co., 101 Mass. 548.

65. Shurtleff *v.* Thompson, 63 Me. 118 (holding that defendant was entitled to a review to plead his discharge in bankruptcy, where his counsel failed to appear for him in defense, through a mistaken belief that counsel employed by another defendant also represented defendant and would protect his interests); Sylvester *v.* Hubley, 157 Mass. 306, 32 N. E. 166 (where it appeared that there might have been a misunderstanding between petitioner and his attorney, not wholly imputable to negligence on the part of either of them); Thayer *v.* Goddard, 19 Pick. (Mass.) 60 (where a review was granted for the mistake of an attorney in not entering an appearance, when the mistake was due to accident and not to carelessness or inattention); Woodworth *v.* Wilson, 50 N. H. 220 (where a petition for review was granted a non-resident on the ground of accident and mistake, in that a miscarriage of letters between his attorneys prevented a seasonable application for a new trial or appeal); New England Mut. F. Ins. Co. *v.* Lisbon Mfg. Co., 22 N. H. 170 (where the attorney failed to enter an appearance through a mistake as to the date of the session of court); Riley *v.* Emerson, 5 N. H. 531.

66. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143 (default entered through negligence of applicant's attorney who, although notified of the assignment of the case for trial, did not notify applicant or appear to defend the action); Crooker *v.* Randall, 53 Me. 355; Stillman *v.* Donovan, 170 Mass. 360, 49 N. E. 628 (failure of counsel to except to alleged erroneous rulings and instructions of trial court). But see Sylvester *v.* Hubley, 157 Mass. 306, 32 N. E. 166, where the court, in allowing the writ, said that while it was true as a general rule that a review should not be granted where the only cause of complaint grows out of the negligence or misconduct of petitioner's attorney, it was not prepared to lay down an absolute rule that in no case would a review be granted on this ground, since cases might arise where such a rule would work great injustice.

67. Heath *v.* Marshall, 46 N. H. 40. *Compare* McFadden *v.* Otis, 6 Mass. 323, holding that where a party, acting on the advice of his attorney, waived his right of review, thinking he could have relief by writ of error, which he could not, the right of review will be restored.

68. Heath *v.* Marshall, 46 N. H. 40.

69. Trask *v.* Unity, 74 Me. 208; Haskell *v.* Becket, 3 Me. 92.

70. Warren *v.* Hope, 6 Me. 479.

71. Morrell *v.* Kimball, 1 Me. 322, holding that a review will be granted in such a case, although the witness convicted of perjury was summoned by the party against whom the verdict was returned. And see Sturtevant *v.* Randall, 49 Me. 446, construing St. (1859) c. 94, giving a review, as a matter of right, upon proof: (1) That, upon the original trial, a witness testified falsely against petitioner to material facts; (2) that he was taken by surprise, so that he was unable then to produce evidence that it was false; (3) that such witness has been convicted of perjury in such testimony, or that petitioner has discovered sufficient proof of its falsity in the opinion of the court.

72. Haskell *v.* Becket, 3 Me. 92.

73. Haskell *v.* Becket, 3 Me. 92.

74. Davis *v.* Allen, 11 Pick. (Mass.) 466, 22 Am. Dec. 386.

II. PROCEDURE AND RELIEF GRANTED.

A. In General. Proceedings for review consist in the suing out of a writ of review,[75] which is a new process by which the parties and cause of action are again brought into court,[76] and a subsequent retrial of the original action.[77] Where a review is a matter of right the writ may be sued out without application to the court for leave to do so,[78] and where the remedy exists as a matter of right the writ will not be granted upon petition;[79] but where it is not a matter of right the proceeding must be instituted by a petition to the court for leave to sue out the writ.[80] If the petition is granted the party sues out his writ, which should be entered as a new action, and all proceedings under the petition for the writ are ended.[81] The trial of the review is not necessarily in the same court where the original judgment was rendered.[82]

B. Time For Taking Proceedings. The statutes in some cases provide that proceedings for review must be brought within a certain period after the rendition of the judgment complained of,[83] or within a certain period after notice of such judgment if it was rendered in the absence of petitioner and without his knowledge;[84] but even where a party is entitled to a writ of review as a matter of right, and fails to bring it within the time limited by the statute, he may still be allowed the writ in the discretion of the court, upon petition.[85] The period of the limitation is to be computed from the term of which the judgment was

75. Bradstreet *v.* Partridge, 59 Me. 155; Knox *v* Knox, 12 N. H. 352.

76. Davenport *v.* Holland, 2 Cush. (Mass.) 1; Barron *v.* Jackson, 42 N. H. 419; Knox *v.* Knox, 12 N. H. 352.

77. Swett *v.* Sullivan, 7 Mass. 342; Knox *v.* Knox, 12 N. H. 352.

78. Jackson *v.* Gould, 72 Me. 335.

79. Byrnes *v.* Piper, 5 Mass. 363; Smith *v.* Cole, 18 N. H. 280.

80. Bradstreet *v.* Partridge, 59 Me. 155.

Petition for writ see *infra*, II, E, 1.

81. Bradstreet *v.* Partridge, 59 Me. 155.

82. Barron *v.* Jackson, 42 N. H. 419.

In Massachusetts the provision of Rev. St. c. 99, § 25, that all reviews granted by the supreme judicial court should be tried in that court, was not affected by St. (1859) c. 196. Day *v.* Croak, 13 Gray 461.

In New Hampshire under the statute of 1832, it was held that a writ of review of an action wherein judgment was rendered in the superior court must issue from and be made returnable in the court of common pleas (Exeter Bank *v.* Gilman, 8 N. H. 332); and that on a review of a judgment rendered by a justice of the peace the writ should be brought in the court of common pleas (Rigney *v.* Hutchins, 9 N. H. 257).

83. Jackson *v.* Gould, 72 Me. 335 (within one year after judgment when brought as a matter of right); Leighton *v.* Lithgow, 2 Me. 114 (within three years); Manning *v.* Nettleton, 140 Mass. 421, 4 N. E. 802; Matthewson *v.* Moulton, 135 Mass. 122 (within one year after rendition of judgment unless rendered in absence of and without knowledge of petitioner); Hobbs *v.* Whidden, 27 N. H. 386 (holding that the supreme court has no authority to grant a writ of review unless the petition is filed within three years after the rendition of the judgment complained of); Howard *v.* Hunt, 17 N. H. 449; French *v.* Wilkins, 17 Vt. 341 (within three years).

The Maine statute of 1852 authorized writs of review on judgments against certified bankrupts without regard to the time when the judgments were rendered. Colby *v.* Dennis, 36 Me. 9.

84. James *v.* Townsend, 104 Mass. 367.

The Massachusetts statute provides that if the judgment complained of was rendered in the absence of petitioner and without his knowledge, the petiton for review shall be filed within one year after he first had notice of the judgment (Matthewson *v.* Moulton, 135 Mass. 122); and it was the intention of the legislature to authorize any party to file his petition for review within one year after notice of a judgment against him whenever by any means and for any cause there was in fact no service of process upon him and no notice of the pendency of the suit, so that he was deprived of the opportunity to appear and defend his rights in the original suit (James *v.* Townsend, 104 Mass. 367); and the term "absence" does not in such statute necessarily mean out of the state (James *v.* Townsend, *supra*); but if defendant has notice of the suit by service of process upon him, he is constructively and by legal intendment present in court, and a judgment upon his default is not rendered in his absence within the meaning of the statute (Riley *v.* Hale, 146 Mass. 465, 16 N. E. 276; Matthewson *v.* Moulton, *supra*).

85. Jackson *v.* Gould, 72 Me. 335, construing Rev. St. c. 82, §§ 3, 4, 5, and holding that a review is allowable upon petition, in the discretion of the court, in spite of the right being lost by lapse of time, where petitioner is a non-resident, was absent from the state, and had no notice of the action until levy.

entitled,[86] and the day on which the judgment was rendered is to be excluded.[87] The running of the limitation stops when the writ is sued out,[88] and the review is brought in season if the writ is issued within the time limited, although not served until after the expiration thereof.[89] The writ cannot be sued out until final judgment on the petition therefor,[90] and should not be sued out until the record on the petition is closed;[91] but although the statutes do not expressly limit the time within which the writ must be sued out after application therefor has been granted, this must be done promptly, or at least within a reasonable time.[92]

C. Parties.[93] A writ of review may be brought by either party to the original action,[94] and should be brought only in the name of the party or parties who actually appear on the record as plaintiff or defendant,[95] or by one representing the interest of a party;[96] but the court may permit the substitution of a proper party by amendment,[97] or the real party in interest may, upon indemnifying the formal party of record against costs, be allowed to sue out a writ of review in his name.[98] Under a statute which does not authorize a review of a judgment by default, if one of two defendants suffers judgment by default, a review by plaintiff must be brought only against defendant with whom issue was joined.[99] One defendant in an action of tort may review where the judgment is final as to the other defendants,[1] but where there are several parties plaintiff or defendant, a review had by one party, in the name of all his co-plaintiffs or co-defendants, binds only the party suing out the review.[2]

D. Bond or Other Security. A bond given by a party in the original action as security for the payment of such costs and damages as might be recovered is discharged by the rendition of judgment in his favor in that action, and

86. Leighton *v.* Lithgow, 2 Me. 114. See also New Hampshire Strafford Bank *v.* Cornell, 2 N. H. 324, construing St. (1818) c. 78, § 3, and holding that, where judgment is rendered in one county as of a prior term in another county, a writ of review of such judgment must be brought within one year from the last day of such prior term.

87. French *v.* Wilkins, 17 Vt. 341, construing Rev. St. c. 26, § 28.

88. Society for Propagating Gospel *v.* Whitcomb, 2 N. H. 227, holding that the statute of limitations of Feb. 9, 1791, as to reviews, stops when the writ is sued out.

89. Howard *v.* Hunt, 17 N. H. 449.

90. Bradstreet *v.* Partridge, 59 Me. 155.

91. Bradstreet *v.* Partridge, 61 Me. 335.

92. Di Filippo *v.* Allen, 163 Mass. 528, 40 N. E. 856 (holding that a writ of review brought ten months after leave of court obtained is not seasonably prosecuted, and will be dismissed on motion, although during the greater part of that period plaintiff in review, who had left the commonwealth on business, was detained abroad by illness); Quinn *v.* Brennan, 148 Mass. 562, 20 N. E. 184 (holding that a writ not brought for more than a year after leave granted was too late and was properly dismissed).

93. Persons entitled to writ see *supra*, I, B, 4.

94. Swett *v.* Sullivan, 7 Mass. 342; Knox *v.* Knox, 12 N. H. 352.

95. Elwell *v.* Sylvester, 27 Me. 536; Fling *v.* Trafton, 13 Me. 295 (holding that where the name of one of two defendants is stricken out on motion of plaintiff's attorney, by leave of court and with the consent of the other defendant, a writ of review must be sued out in the name of the other defendant alone, and a motion made by the original plaintiff, at the trial of the review, to restore the name stricken out, will not be allowed); Skillings *v.* Massachusetts Ben. Assoc., 155 Mass. 581, 30 N. E. 367; Carrique *v.* Bristol Print Works, 8 Metc. (Mass.) 444.

96. Elwell *v.* Sylvester, 27 Me. 536 (holding that a review of a judgment for partition will be granted only upon the application of a party to the original proceeding, or one representing him in interest, and a person interested in the estate divided cannot be admitted as a party after partition has been ordered and the proceedings finally closed); Skillings *v.* Massachusetts Ben. Assoc., 155 Mass. 581, 30 N. E. 367; Winch *v.* Hosmer, 122 Mass. 438 (construing Gen. St. c. 146, §§ 30–38, and holding that a writ of review, like a writ of error, must be in the name of a party to the original judgment, or in the name of those who have by law succeeded to his rights upon his death or bankruptcy).

97. Winch *v.* Hosmer, 122 Mass. 438.

98. Winch *v.* Hosmer, 122 Mass. 438; Fuller *v.* Storer, 111 Mass. 281.

99. Perry *v.* Goodwin, 6 Mass. 498 (construing St. (1786) c. 66); Smith *v.* Gilman, 3 N. H. 501.

1. Paine *v.* Tilden, 20 Vt. 554, holding that this will not have the effect of carrying the case forward as to the defendants who do not review.

2. Emerson *v.* Pattee, 1 Mass. 482, holding that where one of several defendants prosecutes a review in the name of all, and further damages are allowed against defendants on review, judgment for the additional damages should be entered against defendant prosecuting the review and him only.

does not cover any judgment that may be recovered against him on review.[3] On the trial of the review no security is ordinarily taken or can be required of either party,[4] it being unnecessary unless a supersedeas or stay of execution is asked,[5] although the court may in its discretion upon cause shown require security for costs;[6] but since the review does not of itself operate as a supersedeas or stay of execution, if such supersedeas or stay is desired a bond must be given.[7] The court may grant a supersedeas or stay of execution upon such a bond being given,[8] and in some cases the statutes provide the form and conditions of the bond to be given.[9] Proceedings for review, where a bond is given to stay execution, must be promptly brought.[10] While a bond is not vitiated because it is not drawn in strict conformity to the statute,[11] or because it omits certain conditions prescribed by the court if it is still a good bond under the requirements of the statute,[12] yet the sureties have a right to insist upon a strict construction of their written contract,[13] and to authorize a recovery on the bond a breach of its conditions must be clearly shown.[14] What will constitute a breach of the bond so as to

3. Bell *v.* Bartlett, 7 N. H. 178.

4. Bell *v.* Bartlett, 7 N. H. 178.

5. Crehore *v.* Pike, 47 Me. 435; Bacon *v.* Otis, 11 Mass. 407.

6. Sanford *v.* Candia, 54 N. H. 419 (holding that where on review plaintiff is not an inhabitant of the state, the court may in its discretion properly require security for costs); Gale *v.* French, 16 N. H. 95 (construing Rev. St. c. 191, § 7, empowering the court, upon cause shown, to order reasonable security for costs to be furnished, and holding that, on an application for a review, mere insolvency of petitioner affords no ground for the exercise of the discretion conferred by such section, but that such discretion might be exercised in a cause in which plaintiff was prosecuting a review of a suit which had once been decided against him).

7. Crehore *v.* Pike, 47 Me. 435; Randall *v.* Bancroft, 10 Allen (Mass.) 346; Bacon *v.* Otis, 11 Mass. 407.

8. Leavitt *v.* Lyons, 118 Mass. 470; Lehan *v.* Good, 8 Cush. (Mass.) 302; Bacon *v.* Otis, 11 Mass. 407.

Substitution of bail.—The county court has the power to change bail taken for a review, upon the substitution of other sufficient and satisfactory bail, and the bail so substituted is liable for the costs and intervening damages accruing from the time the review was granted. Colgate *v.* Hill, 20 Vt. 56.

Second stay of execution.— Where on a petition for review a stay of execution is granted upon petitioner giving a bond, and notice is ordered returnable at the same term, and petitioner fails to serve the notice as required, a second stay of execution will not be granted where before a second notice would be returnable the year within which execution must issue would expire, and the successful party in the original suit would be put to his scire facias or an action of debt upon the judgment. Nichols *v.* Foster, 7 Mass. 63.

9. See Whittaker *v.* Berry, 64 Me. 236; Crehore *v.* Pike, 47 Me. 435; Leavitt *v.* Lyons, 118 Mass. 470; Peasely *v.* Buckminster, 1 Tyler (Vt.) 264.

Imposing additional conditions.—In Massachusetts the statutes formerly authorized the court to impose such other terms and conditions in addition to those prescribed by the statute as it might think just and reasonable (Lehan *v.* Good, 8 Cush. (Mass.) 302); but a later statute prescribing the form of bond omits this provision of the earlier statute (see Leavitt *v.* Lyons, 118 Mass. 470).

10. Quinn *v.* Brennan, 148 Mass. 562, 20 N. E. 184, holding that, although the statutes do not set any time within which a writ of review must be brought, they impliedly require promptness, and a bond having been given conditioned that the obligor "shall forthwith prosecute a review to final judgment," proceedings begun more than a year thereafter are too late.

Sickness is no excuse for delay, and the fact that after his petition was granted plaintiff in proceedings for review was forced to leave the commonwealth on private business, and to remain absent for several months through illness, will not excuse a failure to prosecute a review to final judgment within a reasonable time. Di Filippo *v.* Allen, 163 Mass. 528, 40 N. E. 856.

But a condition to prosecute "forthwith," the petition for review to final judgment is satisfied by doing so within such time as the court having jurisdiction of the petition may order, and such condition is not broken by failure to take out an order of notice upon the petition returnable at the next term of court as directed by the original order upon the petition, if while the case is pending a new order of notice is issued returnable at a subsequent term. Bamforth *v.* Raddin, 14 Allen (Mass.) 66.

11. Green *v.* French, 1 Allen (Mass.) 265; Bingham *v.* Pepoon, 9 Mass. 239.

12. Leavitt *v.* Lyons, 118 Mass. 470.

13. Green *v.* French, 1 Allen (Mass.) 265.

14. Ellis *v.* Pulsifer, 4 Allen (Mass.) 165, holding that an action will not lie upon a bond given by plaintiff in review, conditioned to pay to defendant in review the sum for which judgment was rendered with interest and costs "in case the former judgment shall be affirmed in full or in part, and the sum for which judgment shall be rendered, if the said judgment shall be affirmed in part."

authorize an action thereon necessarily depends upon the terms of its conditions.[15] So it may constitute a breach of condition where the petition for review is dismissed or denied,[16] but not necessarily so.[17] So also it may constitute a breach of condition where plaintiff in review is nonsuited,[18] or where the writ is authorized but is subsequently dismissed because not seasonably prosecuted.[19] The extent of the liability on the bond where there has been a breach thereof also depends upon the terms of its conditions.[20] A condition for the payment of interest does not include interest on the costs of the review,[21] and double interest, secured by a bond to review an action, is to be computed only to the time of the rendition of the judgment on review, after which simple interest should be charged.[22]

where the record of the proceedings on the writ of review does not show that the former judgment was affirmed in full or in part, but only a judgment that defendant in review recover his costs of suit.

15. Crehore *v.* Pike, 47 Me. 435; Green *v.* French, 1 Allen (Mass.) 265.

Original judgment affirmed as to one of two defendants.— Where defendants gave a bond with sureties to prosecute a review to final judgment, and to "pay such judgment as may be recovered against them," and on review plaintiff in the original action discontinued as to one of defendants and recovered judgment against the other, which was not paid, it was held that the sureties on the bond were liable for the amount of the judgment. Happenny *v.* Trayner, 111 Miss. 279.

Failure to enter review at term specified.— Where defendant obtains a stay of execution on giving a bond conditioned to procure a writ of review by causing the same to be entered at the next term of court, and, not being able before the expiration of the term mentioned in the bond to procure service of the writ, alters it so as to make it returnable at the next ensuing term, and serves and enters it at that term, the condition of the bond is broken by the failure to enter the writ at the term specified, and his inability to get service of the writ is no defense to an action on the bond. Lehan *v.* Good, 8 Cush. (Mass.) 302.

Condition to pay intervening damages and additional costs.— Where a bond on review is conditioned to pay "all intervening damages occasioned to the adverse party by delay, with additional costs in case judgment be affirmed," a mere affirmance of the judgment gives no right of action on the bond, but it must appear that intervening damages have been sustained or additional costs recovered (Brown *v.* Clark, 27 Vt. 576); and the fact that judgment is rendered for a given sum in damages and for a given sum for costs is insufficient to create a liability on the bond unless it is shown that such costs were costs accruing after the review was entered (Brown *v.* Clark, 28 Vt. 690); and the extra expense in procuring witnesses and employing counsel and the time and money necessarily expended in defense of the suit are not "intervening damages" within the application of such condition (Peasely *v.* Buckminster, 1 Tyler (Vt.) 264); and if there have been additional costs but no intervening damages, only such costs can be recovered (Roberts *v.* Warner, 17 Vt. 46).

16. Kenney *v.* Burke, 61 Me. 134 (holding that a denial of the petition is a breach of the bond and that a suit thereon is maintainable after such denial, although before such suit is instituted a new petition and a new bond for the same purpose have been filed and a stay of execution ordered); Randall *v.* Bancroft, 10 Allen (Mass.) 346 (holding that where a bond is given by petitioner conditioned that he shall "forthwith prosecute a review of said action to final judgment, and satisfy such execution as may be issued against him on the review," and the petition is dismissed upon the hearing, it is a breach of the condition of the bond).

17. Roberts *v.* Pepper, 108 Mass. 356 (holding that where a bond is given conditioned that petitioner shall prosecute the petition to final judgment and pay costs and damages, and the petition is dismissed without costs, there is no breach of the condition); Green *v.* French, 1 Allen (Mass.) 265 (holding that where a bond is given providing for the payment of whatever shall be due to the obligee "upon the judgment aforesaid, after the final judgment in review," and no writ of review is granted but the petition is dismissed, there is no breach of condition, the order of dismissal not being a final judgment in review).

18. Hicks *v.* Atkins, 4 Mass. 103, holding that where a bond is given conditioned to prosecute the review to final judgment and to pay the damages and costs which plaintiff may recover on review or the original judgment and interest thereon in case the review should not be so prosecuted, and after entering the review such party is nonsuited, his surety is liable for the amount of the original judgment with interest, the writ of review not having been prosecuted to final judgment.

19. Quinn *v.* Brennan, 148 Mass. 562, 20 N. E. 184, holding that where the bond is conditioned that plaintiff in review shall "forthwith prosecute a review to final judgment," and because of unreasonable delay in prosecuting the writ it is subsequently dismissed, there is a breach of the condition of the bond.

20. Whittaker *v.* Berry, 64 Me. 236; Crehore *v.* Pike, 47 Me. 435; Roberts *v.* Warner, 17 Vt. 46.

21. Whittaker *v.* Berry, 64 Me. 236.

22. Bacon *v.* Otis, 11 Mass. 407. See also Jenkins *v.* New England Mar. Ins. Co., 6 Mass. 335.

In case of a breach of condition of the bond an action may be maintained thereon without any prior issuance of execution against the principal debtor,[23] and if there has been a breach of condition there may be in any event a recovery of nominal damages and costs;[24] but on a judgment rendered in an action on the bond the court should award execution for only so much of the penal sum as is then due and payable in equity and good conscience for the breach of the condition.[25] Bail for a review by defendant is not discharged by the death of defendant where the administrator appears and judgment is rendered in favor of plaintiff.[26]

E. Proceedings to Procure Writ — 1. Petition or Application. The petition or application on review must set out the facts upon which the party relies as a ground for the relief asked for,[27] and must allege facts sufficient to authorize the court to grant the same,[28] and to apprise respondent as to what may be necessary in the arrangement of his defense.[29] It may be met by plea or demurrer,[30] and if by plea a replication thereto may be filed.[31] The court may, however, permit an application or petition for review to be amended,[32] and this notwithstanding such a period has elapsed since the rendition of the original judgment that a new petition could not be filed.[33] So a petition for review may be amended by inserting a newly discovered cause of review, which existed at the time of filing the petition but was not then known to petitioner,[34] or the petition may be amended by inserting the names of witnesses to the alleged facts;[35] but a new party cannot be introduced into a petition for a review by amendment.[36]

2. Notice. No review should be granted until due notice has been given to the adverse party,[37] and while the court is not obliged to quash the writ for want of notice, but may subsequently hear the parties upon the merits of the application,[38] a rule to show cause why such writ should not be quashed should ordinarily be granted upon affidavit of the adverse party that he had no notice.[39] Where the statute prescribes no particular form of notice, if the parties interested have substantial notice of the application, it is sufficient;[40] and where the statute does not prescribe the manner in which notice shall be given or the term to which it

23. Smith *v.* Ingraham, 22 Vt. 414.

24. Brown *v.* Clark, 28 Vt. 690, holding that in an action on a bond for review, of which there has been a breach, if it appears that the original debt has been paid after the commencement of the suit but without the costs, plaintiff is entitled to recover nominal damages and costs.

25. Quinn *v.* Brennan, 148 Mass. 562, 20 N. E. 184, holding that where there has been a breach of condition by failure promptly to prosecute the review after leave granted but plaintiff in review has satisfied the claim against him, execution is properly awarded for a merely nominal sum on the bond with costs.

26. Hoy *v.* Herrington, Brayt. (Vt.) 36.

27. Davis *v.* Beebe, 5 Vt. 560.

28. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143; Thompson *v.* Hinds, 33 Me. 584.

In Maine the names of the witnesses to prove newly discovered evidence and to what each is expected to testify must be stated in the petition upon oath. Berry *v.* Lisherness, 50 Me. 118.

Grounds for review see *supra*, I, D.

29. Thompson *v.* Hinds, 33 Me. 584, holding that an application for review on the ground of any alleged facts must name the witnesses by whom the facts are to be proved and state what particular facts each witness is expected to testify to.

30. Davis *v.* Beebe, 5 Vt. 560.

31. Watson *v.* Joslyn, 29 Vt. 455, holding, however, that the replication was bad on account of a departure, the introduction of new parties, repugnance, and want of traverse to the plea.

32. Davenport *v.* Holland, 2 Cush. (Mass.) 1.

33. Davenport *v.* Holland, 2 Cush. (Mass.) 1.

34. Davenport *v.* Holland, 2 Cush. (Mass.) 1.

35. Haskell *v.* Hazard, 33 Me. 585, holding that this may be done after the supersedeas has been granted and the bond has been filed.

36. Elwell *v.* Sylvester, 27 Me. 536, holding that where a petition for a review of a judgment for partition has been presented in the name of one as guardian and in behalf of certain minors, and notice has been ordered thereon, and the opposing party has appeared, it cannot be amended so as to make the minors the petitioners by such person as their guardian.

37. Colby *v.* Dennis, 36 Me. 9; Clap *v.* Joslyn, 1 Mass. 129.

38. Clap *v.* Joslyn, 1 Mass. 129.

39. Clap *v.* Joslyn, 1 Mass. 129.

40. Ferrill *v.* Simpson, 8 Pick. (Mass.) 359, holding that where a nominal party's attorney of record had notice and the real parties in interest were present, such notice is sufficient.

shall be made returnable, a notice allowing such time as the law prescribes for notice in other cases and returnable where respondent may be heard is all that is required.[41]

3. EVIDENCE. On an application for review the court should require evidence to be submitted in support of the allegations of the petition,[42] and where respondent offers competent evidence in opposition to that offered by petitioner in support of his application, it is error for the court to exclude it.[43] Petitioner must establish to the satisfaction of the court the existence of grounds authorizing the issuance of the writ,[44] but on an application for a review of an action in which petitioner was defaulted, slight evidence is sufficient to sustain the application.[45] At the hearing of a petition for a review, the petitioner will be confined to the facts alleged in the petition,[46] and the witnesses named therein,[47] and a witness will be confined to the matters set forth in the petition to be proved by him.[48] So also petitioner will not be allowed to testify to facts known to him at the time of the trial and which the rules of evidence then in force precluded him from testifying to.[49] The affidavit of the petitioner for review may be used on the hearing of the petition to prove facts known only to himself,[50] but affidavits of other persons will not be received in evidence,[51] nor will the affidavit of petitioner be received except as to facts known exclusively to himself.[52] A juror may be examined generally in support of the verdict in the former action.[53]

4. HEARING AND ORDER. A petition for review is not in itself a review of the

41. Colby *v.* Dennis, 36 Me. 9.

42. Willard *v.* Ward, 3 Mass. 24, holding, however, that in a case of particular hardship and where petitioner stipulates to pay double costs, the court may make a rule to show cause without affidavits.

The legal costs which respondent may tax in case petitioner fails of success are not a sufficient recompense for being compelled to appear and answer to a complaint which may be idle and vexatious. Willard *v.* Ward, 3 Mass. 24.

43. Richardson *v.* Lloyd, 99 Mass. 475.

44. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

Newly discovered evidence.— Where newly discovered evidence is relied on as a ground of review, it must be established that such evidence is in fact new and that it is material. Richardson *v.* Lloyd, 99 Mass. 475.

Grounds for review see *supra*, I, D.

45. Coffin *v.* Abbot, 7 Mass. 252, holding that slight evidence is sufficient to sustain the petition because the granting of the petition is not the trial of the cause but merely a determination that the petitioner shall not be precluded from making a defense.

46. Warren *v.* Hope, 6 Me. 479 (holding that on an application based upon the ground of newly discovered evidence, petitioner will not be permitted to offer testimony as to any newly discovered evidence other than that stated in the petition); Simmons *v.* Apthorp, 1 Mass. 99 (where a review was asked for on the ground of fraud, and the petitioner was confined to the only allegations in his petition, namely, fraud, and there being no evidence of fraud, the writ was refused).

47. See Warren *v.* Hope, 6 Me. 479.

48. Berry *v.* Lisherness, 50 Me. 118, construing Rev. St. c. 89, § 3, and holding that a witness cannot testify as to facts set forth in the petition, which are to be proved by other witnesses therein named.

49. Berry *v.* Lisherness, 50 Me. 118, holding that such facts are clearly not newly discovered evidence, but a new way to make testimony available, which was before known but unavailable; and were this a ground for review, then upon every change in the law of evidence, or in relation to competency of witnesses, reviews might be granted.

50. Coffin *v.* Abbot, 7 Mass. 252.

51. Gray *v.* Moore, 7 Gray (Mass.) 215 (holding that the admission of such affidavits is ground for an exception, for the testimony of any witness should be taken either *viva voce* or by deposition, so as to afford an opportunity for cross-examination); Coffin *v.* Abbot, 7 Mass. 252 (holding that affidavits of persons other than the petitioner will not be received as evidence on the hearing of the petition, unless they are presented in the form of regular depositions to be used in the trial of a cause).

52. Rogers *v.* Hill, 4 Mass. 349, holding that an affidavit in support of a petition for review, alleging that since the trial affiant had learned that a certain witness would have testified to facts therein recited material to his defense, and that at the trial he was ignorant thereof, is insufficient without the deposition or personal testimony of such witness of the facts to which he will testify.

53. Haskell *v.* Becket, 3 Me. 92 (holding that a juror should be called on to explain his own feelings and declarations, on an application for a review on the ground that such juror was hostile to petitioner, and that such juror had expressed a general opinion of the cause before the trial); Ferrill *v.* Simpson, 8 Pick. (Mass.) 359 (holding that a juror may be called to testify that a misapprehension as to certain matters on the former trial had no influence upon the verdict).

action named,[54] and ordinarily the only judgment that can be rendered on such petition is that the writ be or be not issued, with an allowance of costs,[55] after which all proceedings under the petition are ended.[56] The court should not grant the application where it does not appear that any injustice was done on the former trial,[57] that a review would be likely to change the result,[58] or that anything in the promotion of justice would be gained thereby;[59] nor should it be granted merely to relieve petitioner of the results of his own culpable negligence.[60] So also where the writ is not sued out as a matter of right but upon application to the court, the court may in granting it impose such terms and conditions as it may deem reasonable and proper,[61] and a failure to perform such conditions may be pleaded in bar of the action of review;[62] but the court may in its discretion grant a review without imposing any conditions.[63]

5. EFFECT OF PROCEEDINGS. A writ of review does not operate to vacate the judgment in the original action,[64] or even as a supersedeas or stay of execution,[65] unless by special order of the court upon a proper bond being given;[66] but pending review, the judgment in the original action is not final or conclusive between the parties,[67] and pending review, the judgment in the original action cannot be

54. Bradstreet *v.* Partridge, 59 Me. 155.

55. Davenport *v.* Holland, 2 Cush. (Mass.) 1.

56. Bradstreet *v.* Partridge, 59 Me. 155.

57. Todd *v.* Chipman, 62 Me. 189.

58. Trask *v.* Unity, 74 Me. 208; Todd *v.* Chipman, 62 Me. 189; Parker *v.* Currier, 24 Me. 168, holding that the court will not exercise its discretion in granting a writ of review, when it is satisfied that a review of the action would result in a verdict similar to the one before returned.

59. Weld *v.* Sabin, 20 N. H. 533, 51 Am. Dec. 240; Emery *v.* Chesley, 18 N. H. 198.

60. Pickering *v.* Cassidy, 93 Me. 139, 44 Atl. 683; Clark *v.* Brigham, 22 Pick. (Mass.) 81.

The discretion of the court should be exercised in such a way as to promote an orderly and proper administration of justice, and not to encourage carelessness, ignorance, or laxity of practice in the conduct of cases. Sylvester *v.* Hubley, 157 Mass. 306, 22 N. E. 166.

61. Berry *v.* Titus, 76 Me. 285 (where the review was granted so far only as was necessary to revise the assessment of damages); Jackson *v.* Gould, 72 Me. 335 (review granted as a matter of discretion after time for review as a matter of right had expired upon condition that petitioner should waive the right to plead the statute of limitations in defense of the action); Austin *v.* Dunham, 65 Me. 533 (holding that where after a trial a party becomes insane, and his guardian petitions for a review, a review may be granted upon the condition that the petitioner will stipulate that no objection shall be made to the respondent's testifying generally upon the trial of the case in review); Jones *v.* Eaton, 51 Me. 386; Tuttle *v.* Gates, 24 Me. 395.

Requiring security for costs see Sanford *v.* Candia, 54 N. H. 419; and *supra*, II, D.

62. Jones *v.* Eaton, 51 Me. 386.

63. Sherman *v.* Ward, 73 Me. 29.

64. Barron *v.* Jackson, 42 N. H. 419, construing Acts (1855), c. 1659, § 24, and Rev. St. c. 192, and holding that in this respect it is the same, whether brought as of right or by grant upon petition.

65. Dyer *v.* Wilbur, 48 Me. 287 (construing Rev. St. c. 89, and holding that review is not a writ of error by which a judgment is reversed, nullified, and rendered void *ab initio*, but a remedial process to enable a party to correct wholly, or in part, a former judgment by means of a new one, and supersedeas or stay of execution of the first judgment is only effected by filing a bond); Brown *v.* Brigham, 5 Allen (Mass.) 582 (holding that execution in the original suit is not stayed by proceedings in review, unless it be by special order of court, upon the giving of a proper bond by plaintiff in review, and if no bond is given the original judgment may be executed while the suit in review is pending); Swett *v.* Sullivan, 7 Mass. 342 (construing St. (1784) c. 10 and holding that if the original defendant reviews, plaintiff may still execute his judgment, unless defendant gives bond to stay plaintiff's execution); Barron *v.* Jackson, 42 N. H. 419 (construing Acts (1855), c. 1659, § 24, and Rev. St. c. 192, and holding that in this respect it is the same whether brought as of right or by grant upon petition); Pike *v.* Pike, 24 N. H. 384.

66. Dyer *v.* Wilbur, 48 Me. 287; Brown *v.* Brigham, 5 Allen (Mass.) 582.

Bond to procure stay of execution see *supra*, II, D.

In New Hampshire under rule of court No. 48, where plaintiff obtains a verdict and defendant can show that plaintiff is insolvent or that by reason of his pecuniary condition it would be difficult to collect from him the sum by which the damages might be reduced upon the review he is entitled to a stay of execution as a matter of right. Wiggin *v.* Janvrin, 47 N. H. 295.

67. Haynes *v.* Ordway, 52 N. H. 284 (holding that although technically the first judgment is not reversed but a new judgment is rendered, yet it is in its nature and effect so far a reversal of the former verdict as the second verdict differs from the first, and is substantially, although not technically, either

pleaded in bar or given in evidence as affecting the rights of the parties thereto in any other suit.[68]

F. Proceedings on Trial of Review — 1. In General. The trial of a review is in the nature of a new and independent action both as regards the original action [69] and also as regards the proceedings on the application for the writ.[70] It is begun by the suing out of the writ of review,[71] which is the process in this new action,[72] and the review cannot properly be said to be pending until the writ is sued out.[73]

2. Writ or Process. A writ of review, while termed a writ of right,[74] is a judicial and not an original writ,[75] and need not be indorsed,[76] but a proper seal should be affixed thereto.[77] Defects in the writ may be amended,[78] and the party suing out a writ of review, or his attorney, may alter it at any time before service by changing the return-day.[79] The writ should recite briefly the former proceedings; [80] but a writ of review will not be dismissed because it does not appear from the writ itself what the judgment was as regards all the parties to the original suit,[81] and in a writ to review a judgment of the court of common pleas, an omission to allege that the judgment was in affirmance of a judgment of a justice of the peace is no variance.[82] A writ of review will abate for a mistake in the name of the place of residence of one of the parties,[83] and a writ of review sued out in the name of a person not entitled thereto may be quashed on motion,[84] or abated by the court *ex officio* on the discovery of the defect,[85] and notice to show cause why a writ of review should not be quashed may be made on an attorney of the adverse party in court without inserting the name of the attorney in the rule or any special order of the court for service upon him.[86] Objections which go merely to the form of the writ must be made at the return-term of the writ or will be held to be waived,[87] and a general appearance by defendant, although afterward withdrawn, waives any error or defect in the writ.[88] Where a review is granted pursuant to statute, the writ must be entered at the next following term, unless otherwise specially provided in the order of court by which the review is granted,[89]

a reversal of the former judgment or a correction of any errors that may have occurred therein); Eastman *v.* Amoskeag Mfg. Co., 47 N. H. 71 (holding that plaintiff's rights at law will not be considered as established when he has obtained a judgment and the action is still pending under a writ of review).

68. Haynes *v.* Ordway, 52 N. H. 284.

69. Bradstreet *v.* Partridge, 59 Me. 155; Barron *v.* Jackson, 42 N. H. 419; Badger *v.* Gilmore, 37 N. H. 457.

70. Bradstreet *v.* Partridge, 59 Me. 155.

71. Bradstreet *v.* Partridge, 59 Me. 155; Badger *v.* Gilmore, 37 N. H. 457.

72. Badger *v.* Gilmore, 37 N. H. 457.

73. Badger *v.* Gilmore, 37 N. H. 457.

74. Burrell *v.* Burrell, 10 Mass. 221; Badger *v.* Gilmore, 37 N. H. 457.

75. Tracy *v.* Perry, 5 N. H. 172. See also Badger *v.* Gilmore, 37 N. H. 457. *Compare* Burrell *v.* Burrell, 10 Mass. 221, 222, where the court said: "It is issued by the officer of the court, and in that respect may be regarded as of the nature of a judicial writ. It is, however, sometimes issued in the form of a capias and attachment, and with the same efficacy, and seems therefore to be, to some purposes, an original writ."

76. Tracy *v.* Perry, 5 N. H. 172, holding that writs of review are judicial writs, and not original writs, within the meaning of the statute which requires such writs to be indorsed.

77. Brewer *v.* Sibley, 13 Metc. (Mass.) 175, holding, however, that the want of a seal is merely a formal defect which is waived if no objection is made upon the return of the writ.

78. Tilton *v.* Parker, 4 N. H. 142.

79. Plumer *v.* Fogg, 18 N. H. 559, holding that a party, or his attorney, may alter the return-day of a writ of review at any time before service, although after service of the writ it becomes a record and cannot be altered but upon motion and as an amendment.

80. See Pike *v.* Pike, 24 N. H. 384.

81. Allen *v.* Seaver, 38 Vt 673, holding that where a judgment in a trustee suit is sought to be reviewed, the fact that the writ does not allege that a judgment was obtained against the trustee furnishes no ground for dismissing the writ of review.

82. Anderson *v.* Brown, 10 Gray (Mass.) 92.

83. Ballard *v.* McLean, Quincy (Mass.) 106.

84. Hall *v.* Wolcott, 10 Mass. 218.

85. Hall *v.* Wolcott, 10 Mass. 218.

86. Clap *v.* Joslyn, 1 Mass. 129.

87. Brewer *v.* Sibley, 13 Metc. (Mass.) 175, holding that the omission of a seal is such a formal defect.

88. Fay *v.* Hayden, 7 Gray (Mass.) 41.

89. Hobart *v.* Tilton, 1 Me. 399, construing St. (1791) c. 17.

but if plaintiff fails to enter the writ at the next term after it is granted, the court has power, in its discretion, to allow it to be entered at the second term.[90] The court to which the writ should be made returnable depends upon the provisions of the statutes.[91] The writ must be served personally upon such defendants in review as are residents of the state,[92] but where such a party lives outside of the state a good service may be made by leaving a copy of the writ with his original attorney of record.[93] Service of the writ upon a person not an original party according to the record without any leave of court to connect him therewith is a mere nullity.[94]

3. Pleading. On a review the case is tried on the original pleadings,[95] unless an amendment is allowed,[96] but while no new pleadings are necessary,[97] the court may permit an amendment.[98] The allowance or refusal of amendments is, however, within the discretion of the court,[99] and new pleadings must be confined to cases where such amendments would have been allowed in the original suit.[1] So while the pleadings may be amended in matters of form,[2] they cannot be so amended as to change the form or cause of action,[3] or introduce a new cause of action.[4] On review matters arising since judgment in the original cause cannot be pleaded in bar of the maintenance of the suit;[5] but if the new matter avoids

90. Look *v.* Ramsdell, 68 Me. 479, construing Rev. St. c. 89, § 7.

91. Day *v.* Croak, 13 Gray (Mass.) 461 (holding that a writ to review a judgment of the court of common pleas granted by the supreme judicial court is returnable to the latter court, under Rev. St. c. 99, § 25); Exeter Bank *v.* Gilman, 8 N. H. 332 (holding that under the New Hampshire statute of 1832, a writ to review a judgment of the superior court must issue from and be made returnable to the court of common pleas).

92. Tilton *v.* Parker, 4 N. H. 142, construing Act Feb. 9, 1791, § 14, and holding that where there were two defendants in an action sought to be reviewed, one of whom was supposed, both in the original writ and in the writ of review, to be an inhabitant of the state, the service of the writ of review on their attorney, who had appeared in the cause, was insufficient, the statute authorizing such service only as to non-residents.

93. Smith *v.* Hill, 45 N. H. 403.

94. Smith *v.* Hill, 45 N. H. 403.

95. Swett *v.* Sullivan, 7 Mass. 342; Perry *v.* Goodwin, 6 Mass. 498; Otis *v.* Currier, 17 N. H. 463; Knox *v.* Knox, 12 N. H. 352.

96. See Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469; Otis *v.* Currier, 17 N. H. 463.

97. See Frost *v.* Chesley, Smith (N. H.) 202.

98. Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415 (construing Rev. St. c. 99, § 19, and holding that amendments may be ordered by the supreme court); Judd *v.* Buchanan, 4 Mass. 579; Colebrook *v.* Merrill, 49 N. H. 213; Frost *v.* Chesley, Smith (N. H.) 202 (construing St. (1805) c. 90, providing that actions on review shall be tried on the pleas made on the former trial on record, and holding that this merely means that no new pleadings shall be required, and not that no amendment of the declaration may be permitted on review). *Compare* Swett *v.* Sullivan, 7 Mass. 342; Perry *v.* Goodwin, 6 Mass. 498; Bowman *v.* Whittemore, 1 Mass. 242.

99. Colebrook *v.* Merrill, 49 N. H. 213.

1. Foster *v.* Plummer, 3 Cush. (Mass.) 381.

2. See Foster *v.* Plummer, 3 Cush. (Mass.) 381; Edgerly *v.* Emerson, 4 N. H. 147; Tilton *v.* Parker, 4 N. H. 142.

3. Pearson *v.* Smith, 54 N. H. 65, holding that the form and cause of action must be preserved, and amendments must be consistent with the original declaration, so that the court can see that plaintiff will offer in evidence only some matter for which the original action was instituted.

4. Edgerly *v.* Emerson, 4 N. H. 147, holding that a set-off, being in the nature of a cross action and a new ground of action, cannot be introduced into a cause on review by way of amendment.

5. Foster *v.* Plummer, 3 Cush. (Mass.) 381 (holding that the original defendant cannot on a writ of review in his defense thereto avail himself of a discharge in insolvency, obtained in pursuance of proceedings commenced since the rendition of the original judgment against him); Zollar *v.* Janvrin, 49 N. H. 114, 6 Am. Rep. 469 (holding that where plaintiff in the original action attached defendant's property and recovered judgment, and the attachment was dissolved upon defendant giving bond to prosecute his review, defendant, plaintiff in review, cannot plead in bar to a further maintenance of the suit his discharge in bankruptcy, granted subsequently to his giving bond to dissolve the attachment); Otis *v.* Currier, 17 N. H. 463 (holding that on a writ of review, a plea in bar setting forth matter arising subsequent to the original judgment is irregular, and that such plea is not cured or strengthened by a replication); Burley *v.* Burley, 6 N. H. 204 (holding that there is no new matter which can be pleaded by plaintiff in review). But see Todd *v.* Barton, 117 Mass. 291, holding

plaintiff's cause of action from the beginning, it may be given in evidence by defendant under the general issue filed in the original action.[6] It has been suggested, however, as qualification of this rule that a release of the original judgment might be pleaded by plaintiff in review,[7] or that a release of the right of review might be pleaded by defendant in review.[8] It has been held that there can be no demurrer filed to the declaration on review,[9] and also that while there is no right to file a demurrer, the court may in its discretion permit or refuse to permit it to be filed.[10]

4. EVIDENCE. Each party in an action of review is entitled to all the evidence used on the former trial, which at that time was not liable to any legal objection, or which may not, on the review, be obtained from the same source in a better or more authentic form,[11] and either party is entitled to introduce new evidence,[12] although the original pleadings are not amended.[13] On review, the judgment rendered in the original action is not evidence for or against either party;[14] and where the parties in the original suit make an agreed case "for the purposes of this suit," such agreed case is not admissible in the trial on review;[15] but where an agreement is not limited to the original action, it is competent on review upon the question of the amount in controversy.[16] Where by statute parties are competent witnesses in ordinary actions, they are not precluded from testifying as witnesses in an action of review.[17]

5. TRIAL OR HEARING. Upon review the action is to be tried substantially as if no verdict had ever been rendered,[18] and upon the review of a cause, decided

that where defendant prior to the original judgment has suggested his bankruptcy and filed a motion for a continuance to await a discharge, he may, upon obtaining a review of the judgment against him, plead his discharge in bar of the action, although it was granted after the rendition of the original judgment, as in so doing he merely perfects the same defense which was set up in the original action.

The reason for this rule is that if the verdict and judgment were originally right, nothing which has since occurred can make them wrong. Burley *v.* Burley, 6 N. H. 204.

6. Barker *v.* Wendell, 12 N. H. 119.

7. Foster *v.* Plummer, 3 Cush. (Mass.) 381, 383, where the court, although holding that a discharge in bankruptcy obtained subsequently to the original judgment could not be set up on review, said: "A release of the original judgment, which is a voluntary extinguishment of that which constitutes the sub-stratum of the review, may stand on a different footing."

8. Burley *v.* Burley, 6 N. H. 204, 205, where the court said: "We are not aware of any new matter that can be pleaded by a plaintiff in review. A defendant in review may, perhaps, plead a release of the right of review."

9. Eldridge *v.* Bellows, Smith (N. H.) 356.

10. Colebrook *v.* Merrill, 9 N. H. 213, holding that in the particular case the court properly refused to permit a demurrer to be filed.

11. Gold *v.* Eddy, 1 Mass. 1 (where a deposition taken for the original action of one who had since become a party to the suit was allowed in evidence); Pickering *v.* De Rochemont, 60 N. H. 179 (construing Gen. St. c. 212, § 8, and c. 215, § 9, and holding that an auditor's report, admissible on the original trial, is also admissible on review).

But a certified copy of a paper used and filed upon the original trial cannot be used as of course upon the review, and if objection is made thereto the original must be produced. Belknap *v.* Wendell, 31 N. H. 92.

12. Foster *v.* Plummer, 3 Cush. (Mass.) 381; Perry *v.* Goodwin, 6 Mass. 498.

13. Perry *v.* Goodwin, 6 Mass. 498.

14. Messer *v.* Swan, 4 N. H. 481. See also Good *v.* Lehan, 8 Cush. (Mass.) 299, holding that a judgment for plaintiff in an action on a promissory note is not *prima facie* evidence on review of the execution of the note, for the note is the foundation on which the judgment, the superstructure, rests, and to receive the judgment as *prima facie* evidence of the genuineness of the note would be relying on the superstructure to sustain the foundation.

15. Page *v.* Brewster, 58 N. H. 126, holding that the word "suit" is synonymous with "action," and a review being in effect, as well as in form, a new action to recover in the shape of damages what, it is alleged, has been wrongfully taken in the original suit, the agreed case is not evidence on review.

16. Russell *v.* Babbitt, 60 N. H. 373, where there was an agreement by the parties at the original trial that if plaintiff was entitled to recover anything, it would be fifty-seven dollars and fifty-five cents, and evidence of the agreement was held competent as to the amount in controversy, so that the action might be referred without consent of parties.

17. Badger *v.* Gilmore, 37 N. H. 457.

18. Johnson *v.* Atlantic, etc., R. Co., 43 N. H. 410, holding that, without such trial, an error in the former judgment cannot be corrected.

upon demurrer and resting upon the same pleadings, the court will permit counsel to argue it again.[19] Where there are issues of law as well as issues of fact all the issues may be again tried, the issues of law by the court, and those of fact by the jury;[20] but the questions to be tried by a jury on review must be comprehended in the pleadings on which the former trial was had.[21] The jury may find their verdict for the original defendant, or for the original plaintiff, with greater or less damages than he recovered at the former trial;[22] but when the jury have found the amount of damages, they may compare the amount with the former verdict, and if the difference is merely nominal and unsubstantial, they may, in their discretion, return a verdict for the same amount as the former verdict.[23] The question of jurisdiction can be raised at the hearing upon the writ.[24] It is no peremptory ground for a nonsuit, when a plaintiff has produced the usual copies upon a review, certified to be copies of all papers used and filed upon the former trial, that a paper so used is not copied.[25]

6. JUDGMENT. The judgment rendered on a review does not operate in form as a reversal of the original judgment,[26] either in whole or in part.[27] The original judgment stands,[28] and any proceedings which have been regularly taken thereunder are valid,[29] and the party in whose favor it was rendered is entitled to whatever he has obtained thereby.[30] On the review a new judgment is rendered which provides the proper remedy as the rights of the parties then appear,[31] and the court is not limited to any particular form of judgment but will render such special judgment as the just and legal rights of the parties require.[32] It has been held that on review judgment should be rendered without regard to the former judgment, and that the second judgment is a substitute for the first, which there-

19. Hazen *v.* Smith, 2 Tyler (Vt.) 59.

20. Perry *v.* Goodwin, 6 Mass. 498.

21. Hart *v.* Johnson, 7 Mass. 472, construing St. (1807) c. 74, and holding said statute not to extend to actions on review, and that therefore, where judgment was recovered in the original action for seizin of the demanded premises, plaintiff in review cannot file a claim for the jury to inquire into the increased value of the property on account of betterments, no such allegation or claim being included in the original action.

22. Swett *v.* Sullivan, 7 Mass. 342.

Where defendant recovers judgment on a set-off in the original action, and plaintiff reviews.— Defendant in assumpsit pleaded *non assumpsit* and set-off and had a verdict for a balance of two dollars and thirty-six cents. He remitted two dollars and twenty-six cents of the verdict and took judgment for the balance. On a review by plaintiff, defendant had a verdict for four dollars and fifty cents, and it was held that the remittitur in the original action did not preclude defendant from recovering a larger amount on review, and that he was entitled to execution for four dollars and forty cents. Dame *v.* Twombly, Smith (N. H.) 262.

23. Carpenter *v.* Pierce, 13 N. H. 403.

24. Smith *v.* Brown, 136 Mass. 416, holding that the objection that the court had no jurisdiction to issue the writ can be raised, on the hearing of a writ of review in the superior court.

25. Belknap *v.* Wendell, 31 N. H. 92, construing Rev. St. c. 192, § 8, and holding that the court has, in such a case, as in others, a discretion as to the manner of conducting a trial and ample power to suspend the proceedings to give time to supply any casual omissions, where substantial justice seems to require it.

26. Whittaker *v.* Berry, 64 Me. 236; Curtis *v.* Curtis, 47 Me. 525; Ely *v.* Forward, 7 Mass. 25; Otis *v.* Currier, 18 N. H. 85; Knox *v.* Knox, 12 N. H. 352; Hart *v.* Little, Smith (N. H.) 52. *Compare* Whitton *v.* Bicknell, 3 Allen (Mass.) 472.

If the original action is for the recovery of land and plaintiff obtains judgment, a recovery by defendant upon review operates more nearly like a technical reversal. In such case defendant has judgment for the land or for the part to which it appears he has title and he has a writ of possession. Otis *v.* Currier, 18 N. H. 85.

27. Curtis *v.* Curtis, 47 Me. 525; Ely *v.* Forward, 7 Mass. 25. *Compare* Johnson *v.* Wetherbee, 3 Pick. (Mass.) 247.

28. Whittaker *v.* Berry, 64 Me. 236; Otis *v.* Currier, 18 N. H. 85; Knox *v.* Knox, 12 N. H. 352; Hart *v.* Little, Smith (N. H.) 52.

29. Dyer *v.* Wilbur, 48 Me. 287; Curtis *v.* Curtis, 47 Me. 525; Drew *v.* Munsey, Smith (N. H.) 317; Haven *v.* Libbey, Smith (N. H.) 109; Hodgdon *v.* Lougee, Smith (N. H.) 104.

If the first judgment has been satisfied by levy upon real estate, the levy is valid and conveys a good title, although subsequently on a review of such judgment the original defendant recovers a judgment against the original plaintiff for a sum equal to the whole amount of the first judgment. Curtis *v.* Curtis, 47 Me. 525.

30. Knox *v.* Knox, 12 N. H. 352.

31. Otis *v.* Currier, 18 N. H. 85.

32. Fuller *v.* Storer, 111 Mass. 281;

upon becomes inoperative so that no action can be maintained thereon;[33] but on the contrary it is held that this is not necessarily the case,[34] but that the original judgment remains in force,[35] and that the judgment rendered on review should be such as to correct the error, if any, in the former judgment.[36] So if it is determined that the original judgment was correct, defendant in review merely takes judgment for costs,[37] and the original judgment is not affected,[38] and execution may be issued thereon if it has not already been satisfied.[39] If the former judgment was wrong plaintiff in review will have judgment to recover what he should previously have recovered if he is the original plaintiff and failed upon his first trial,[40] or to recover back what was erroneously recovered on the first trial if he is the original defendant against whom judgment was rendered,[41] together with interest from the time of payment if the amount has been paid;[42] but a judgment on review only gives a right of restitution against some party to the record.[43] If the original judgment was for plaintiff and the damages are increased on review, he takes judgment for the amount of the increase,[44] without regard to the party by whom the review is brought,[45] and if the damages are decreased the original defendant takes judgment for the amount of the decrease,[46] whether he has paid the original judgment or not.[47] If the first judgment is for the original plaintiff and the second for the original defendant, and the first has not been satisfied, one may be set off against the other.[48]

G. Appeal or Other Proceeding For Review — 1. Decision on Application For Writ. Where an application or petition for review is addressed to the discretion of the court, the decision of the court in granting or refusing the same is not ordinarily subject to exception,[49] and can be reviewed on exceptions only

Carrique *v.* Bristol Paint Works, 8 Metc. (Mass.) 444.

33. Dunlap *v.* Burnham, 38 Me. 112. See also Whitton *v.* Bicknell, 3 Allen (Mass.) 472 (construing Rev. St. c. 99, § 10, and Gen. St. c. 146, §§ 32, 38, and holding that an action cannot be maintained on a recognizance given by a defendant arrested on an execution, when the judgment upon which the execution issued has been reversed on a review, a judgment of reversal being the proper judgment on review where the original judgment was erroneous and there has been no satisfaction of it); Stevens *v.* Sabin, 20 N. H. 529.

34. Dyer *v.* Wilbur, 48 Me. 287.

35. Whittaker *v.* Berry, 64 Me. 236.

Debt lies upon the original judgment, although the result has been partially reversed on review. Hart *v.* Little, Smith (N. H.) 52.

36. Dyer *v.* Wilbur, 48 Me. 287; Swett *v.* Sullivan, 7 Mass. 342; Otis *v.* Currier, 18 N. H. 85; Knox *v.* Knox, 12 N. H. 352.

37. Curtis *v.* Curtis, 47 Me. 525; Ely *v.* Forward, 7 Mass. 25; Knox *v.* Knox, 12 N. H. 352.

38. Dyer *v.* Wilbur, 48 Me. 287.

39. Curtis *v.* Curtis, 47 Me. 525; Ely *v.* Forward, 7 Mass. 25.

40. Otis *v.* Currier, 18 N. H. 85.

41. Curtis *v.* Curtis, 47 Me. 525; Carrique *v.* Bristol Paint Works, 8 Metc. (Mass.) 444; Ely *v.* Forward, 7 Mass. 25; Otis *v.* Currier, 18 N. H. 85.

42. Ordway *v.* Haynes, 54 N. H. 346.

43. Little *v.* Bunee, 7 N. H. 485, 28 Am. Dec. 363, where A lodged with B, as collateral security, a note made by C and payable to A, but not to order, and B brought a suit on the note against C in the name of A, and recovered judgment which was paid by C to B, and the judgment was reversed on review, and C sued B to recover back the amount of the costs, the damages having been paid by B, and it was held that the action could not be maintained.

44. Whittaker *v.* Berry, 64 Me. 236; Dyer *v.* Wilbur, 48 Me. 287; Andrews *v.* Foster, 42 N. H. 376.

Review by one of several defendants.— Where judgment is rendered in the original action against several defendants and a review is brought by only one of them, and plaintiff again recovers judgment but for an increased amount, judgment should be rendered against defendant bringing the review for the damages found by the last verdict and the costs of the review, and the former judgment be affirmed to stand as a joint judgment against all of the original defendants. Emerson *v.* Pattee, 1 Mass. 482.

45. Andrews *v.* Foster, 42 N. H. 376.

46. Whittaker *v.* Berry, 64 Me. 236; Dyer *v.* Wilbur, 48 Me. 287; Lincoln *v.* Goulding, 3 Mass. 234; Shepard *v.* Hatch, 54 N. H. 96; Otis *v.* Currier, 18 N. H. 85.

47. Shepard *v.* Hatch, 54 N. H. 96.

48. Curtis *v.* Curtis, 47 Me. 525.

49. Sherman *v.* Ward, 73 Me. 29; York, etc., R. Co. *v.* Clark, 45 Me. 151; Stillman *v.* Donovan, 170 Mass. 360, 49 N. E. 628; Scituate Water Co. *v.* Simmons, 167 Mass. 313, 45 N. E. 750; Stillman *v.* Whittemore, 165 Mass. 234, 42 N. E. 1126 (holding that the denial of a writ of review, based on error in the exclusion of evidence, to which petitioners failed to except through inadvertence,

for erroneous rulings in regard to matters of law.[50] The findings of the court on questions of fact are also conclusive and cannot be reviewed on exceptions.[51] The decision of the court may, however, be reviewed on exceptions for errors in matters of law,[52] as in disregarding the express requirements of the statute as to the grounds and conditions necessary for granting a review,[53] or in granting the writ to a person not entitled under the statute to make application therefor,[54] or for error in regard to the admission of evidence,[55] or in regard to permitting or refusing amendments to the petition.[56]

2. Decision on Trial of Review. An appeal will lie from the decision rendered on the trial of a review,[57] and a judgment on a writ of review, sued out as of right by a party not entitled to it by statute, will be reversed on a writ of error;[58] but a decision of the court on review as to costs is conclusive and not subject to exception.[59]

H. Costs — 1. On Application For Writ. On the application for a writ of review it is said that there is no fixed rule as to costs, but that the question should be determined by the court upon the particular circumstances of each case.[60] Where on application for a writ of review the petition is dismissed, the court may award costs to respondents;[61] but costs will not be allowed respondents, upon

will not be disturbed as an abuse of discretion of the judge to whom the petition was presented); Todd *v.* Barton, 117 Mass. 291 (holding that it is within the discretion of the court, if satisfied that the refusal of a continuance has worked injustice to the petitioner, to grant him a review, and that such exercise of discretion is not subject to exception); Boston *v.* Robbins, 116 Mass. 313; Weeks *v.* Adamson, 106 Mass. 514 (holding that the decision of a single justice of the supreme court, refusing a review of a judgment rendered in the superior court, is discretionary and not open to exception).

50. Scruton *v.* Multon, 45 Me. 417 (construing St. (1857) c. 77, § 27, and holding that exceptions will not lie to the denial of a review by a judge at *nisi prius*, in the exercise of his discretion, where there is no direction, opinion, or judgment given in matter of law); Moody *v.* Larrabee, 39 Me. 282; Stillman *v.* Donovan, 170 Mass. 360, 49 N. E. 628; Stillman *v.* Whittemore, 165 Mass. 234, 42 N. E. 1126; Sylvester *v.* Hubley, 157 Mass. 306, 22 N. E. 166; Boston *v.* Robbins, 116 Mass. 313; Hayes *v.* Collins, 114 Mass. 54.

51. Sturtevant *v.* Randall, 49 Me. 446 (holding that, upon a petition for review under Laws (1859), c. 94, the findings of the judge at *nisi prius* on questions of fact are conclusive, and cannot be revised on exceptions); Moody *v.* Larrabee, 39 Me. 282 (construing St. (1852) c. 246, § 13, and holding that under this statute, which provides that all petitions for review may be heard by the presiding justice at any term held for the trial of jury causes, subject to exception on matters of law, no exception lies to the determination of the judge as to the facts established by the testimony in the case); Sylvester *v.* Hubley, 157 Mass. 306, 22 N. E. 166.

52. Boston *v.* Robbins, 116 Mass. 313; Davenport *v.* Holland, 2 Cush. (Mass.) 1, holding that an order of the court of common pleas, granting a petition for writ of review, is subject to revision in the supreme judicial court on exceptions to matters of law.

53. Donnell *v.* Hodsdon, 102 Me. 420, 67 Atl. 143.

54. Hall *v.* Wolcott, 10 Mass. 218.

55. Gray *v.* Moore, 7 Gray (Mass.) 215, holding that exceptions lie to the admission of affidavits of witnesses, other than the petitioner, on the hearing of a petition for review. *Compare* York, etc., R. Co. *v.* Clark, 45 Me. 151.

56. Davenport *v.* Holland, 2 Cush. (Mass.) 1, holding, however, that while the decision of the court was reviewable upon this ground, there was no error in allowing the petition to be amended.

57. Tay *v.* Piage, 37 N. H. 468.

58. Hall *v.* Wolcott, 10 Mass. 218.

59. Lunt *v.* Stimpson, 73 Me. 245, construing Rev. St. c. 89, § 15, and holding that the judge who orders judgment for the prevailing party in an action of review must determine whether, in his opinion, justice requires that such party should recover the costs to which he would have been entitled in the original action, had he then prevailed, and such determination cannot be reversed on exceptions.

60. Ilsley *v.* Knight, 1 Mass. 467, holding that costs will not be allowed petitioner on the application for a writ of review, although the writ is granted, where the mistake complained of is the miscalculation by the clerk of interest on a note which petitioner's counsel should have discovered at the time it was made.

61. Hopkins *v.* Benson, 21 Me. 399, holding that while a petition for review is not an action within the application of the statute allowing costs to the prevailing party, it is within the application of another statute authorizing the court in its discretion to allow costs to a person appearing as respondent "on application for a writ of certiorari, mandamus or quo warranto. . . . [or for] any like process."

the dismissal of a petition for review, where the petition does not appear vexatious, but is founded upon a mistake of remedy.[62]

2. On Review — a. In General. On a review the prevailing party is ordinarily entitled to costs as in other civil actions,[63] unless the court in granting the review otherwise orders,[64] but interest will not be allowed on costs of review.[65] It has been held, however, that if defendant reviews and merely succeeds in obtaining a slight reduction in the amount of damages the court may in its discretion limit his costs,[66] and that a party who obtains a verdict on review by means of a certificate in bankruptcy, which is in effect a reversal of the original judgment, is not entitled to recover costs.[67] An indorser of the original writ is not liable as such for the costs which defendant may recover upon review.[68]

b. Costs of Original Action. Under some statutes it has been held that the party prevailing on review is entitled to costs both of the review and also of the

62. Byrnes *v.* Piper, 5 Mass. 363.

63. Dodge *v.* Reed, 40 Me. 331; Pasche *v.* Graham, 180 Mass. 157, 61 N. E. 883; Nashua, etc., R. Co. *v.* Stimpson, 35 N. H. 286; Woodbury *v.* Parshley, 10 N. H. 392.

Who is the prevailing party.— On review of an action in which debt, damages, or land is demanded, the party in whose favor the error in the original judgment is corrected is the prevailing party and is entitled to costs. Bruce *v.* Learned, 4 Mass. 614, construing St. (1784) c. 28, § 9. A review is a new action, and a party who obtains in it a result more favorable to him than that of the original action is the prevailing party. Williams *v.* Williams, 133 Mass. 587. Where on review a party reduces the damages recovered against him in the original action, he is the prevailing party and entitled to costs. Dodge *v.* Reed, 40 Me. 331; Billerica *v.* Carlisle, 2 Mass. 158. Where judgment was had against a defendant, who, as plaintiff in review, pleaded a set-off by way of amendment, and recovered judgment thereon against plaintiff in the original suit, although the amendment could have been filed in the original action, the new issue presented thereby was triable in review, under the statute, and therefore plaintiff in review was the prevailing party and entitled to costs. Pasche *v.* Graham, 180 Mass. 157, 61 N. E. 883. In an action on contract defendant filed a general denial, and also a declaration in set-off, but defaulted and judgment was entered against him for one thousand dollars and costs. On review the original plaintiff recovered one dollar. It was held that plaintiff in review was entitled to costs, even though the sum recovered by the original plaintiff was reduced by set-off. Williams *v.* Williams, 133 Mass. 587. A plaintiff in review who succeeds in correcting an error in the former verdict against him is entitled to judgment for costs, as the prevailing party, notwithstanding the amount of the judgment on review is larger than the original verdict, due to the accumulation of interest. Kavanagh *v.* Askins, 2 Me. 397. Where plaintiff in review finds that he cannot prevail and becomes nonsuited, defendant in review is the prevailing party and entitled to costs. Treat *v.* Hathaway, 7 Mass. 503. Where plaintiff in the original action recovers damages in a larger amount on review than he did in the original action, he is the prevailing party, and is entitled to recover costs of the original action and also the costs of the review. Avery *v.* Holmes, 10 N. H. 574. If the party bringing the review fails to change the decision of the case, so that defendant in review is, upon the new trial, entitled to the same judgment that was rendered in the first action, defendant in review takes a judgment for his costs, as the prevailing party. Knox *v.* Knox, 12 N. H. 352. Where, upon the review of a real action brought by the original demandant, the land and improvements are each estimated by the jury at a less sum than by the former verdict, the tenant is the prevailing party. Erving *v.* Pray, 1 Me. 255.

Several parties, plaintiff or defendant.— In an action for trespass for assault and battery against two defendants, defendants severally pleaded not guilty, and the jury found them both guilty and assessed the damages against them in the sum of ten dollars. Plaintiff reviewed the action, and the jury brought in a verdict of not guilty as to one defendant and guilty as to the other, against whom they assessed damages in the sum of sixteen dollars. It was held that defendant found not guilty on review was the prevailing party and entitled to recover his costs, while plaintiff was entitled to recover his costs against defendant found guilty. Galloway *v.* Pitman, 3 Mass. 408. Where, in trespass against three, judgment was rendered against all, and on a review by them a verdict was rendered against two only, the third, who had paid no part of the first judgment, was allowed to tax the costs of travel and attendance for himself and all the witnesses used in the defense, both on the first trial and on the review. Durgin *v.* Leighton, 10 Mass. 56.

64. See Pasche *v.* Graham, 180 Mass. 157, 61 N. E. 883.

65. Whittaker *v.* Berry, 64 Me. 236, construing Rev. St. (1857) c. 89, §§ 9, 10.

66. Woodbury *v.* Parshley, 10 N. H. 392, 393, decided under a statute authorizing the court "to limit and allow such bills of costs as law and justice shall require."

67. Foster *v.* Hinckley, 40 Me. 54, construing St. (1848) c. 60.

68. Sanford *v.* Candia, 54 N. H. 419.

original action,[69] or that he is so entitled unless the court otherwise orders,[70] while under others it has been held that the prevailing party can recover only the costs of the review,[71] or that he is not entitled to costs of the original action where the second judgment merely reduces the damages and is not in effect a complete reversal of the first.[72]

REVISE. To review or re-examine for correction;[1] to review, alter, or amend.[2] (See also REVISION.)

REVISION. The act of reëxamination to correct, review, alter or amend;[3] review, re-examination, looking at again.[4] (Revision: Board of, see MUNICIPAL CORPORATIONS, 28 Cyc. 318; TAXATION. Of Assessment, see MUNICIPAL CORPORATIONS, 28 Cyc. 1176. Of Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1355. Of Jury List, see JURIES, 24 Cyc. 217. Of Sentence, see CRIMINAL LAW, 12 Cyc. 783. Of Statute, see STATUTES. Repealing Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 386 note 79.)

REVISORY. Having the power or purpose of revision.[5] (See also REVISION.)

REVIVAL. The act of reviving, or the state of being revived.[6] (Revival: Continuance by, see JUDGMENTS, 23 Cyc. 1399. Failure of Creditor to Revive Claim or Judgment Against Principal as Affecting Discharge of Surety, see PRINCIPAL AND SURETY, 32 Cyc. 224. Of Action — As Subject of Mandamus, see MANDAMUS, 26 Cyc. 203; By and Against Whom, see ABATEMENT AND REVIVAL, 1 Cyc. 120; APPEAL AND ERROR, 2 Cyc. 710; On Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 47; On Transfer of Subject-Matter, see ABATEMENT AND REVIVAL, 1 Cyc. 116; To Redeem From Foreclosure Sale, see MORTGAGES, 27 Cyc. 1823. Of Annuity on Death of Annuitant, see ANNUITIES, 2 Cyc. 470. Of Appeal on Death of Party, see APPEAL AND ERROR, 2 Cyc. 773. Of Attachment

69. Durgin *v.* Leighton, 10 Mass. 56 (holding that where in the original action judgment was rendered against three defendants and on review against only two of them, the third defendant prevailing on review is entitled to costs both of the original action and of the review); Avery *v.* Holmes, 10 N. H. 574 (where the review was prior to the act of 1838, limiting the costs recoverable to those of the review).

70. Lunt *v.* Stimpson, 73 Me. 245 (holding that in the absence of any order by the court to the contrary it must be taken for granted that in his opinion justice requires that the prevailing party shall recover the costs of both actions); Brown *v.* Cousens, 51 Me. 301 (construing St. (1864) c. 268, and holding that on review of a suit by a married woman after limitations have run against the suit, in giving judgment against the original plaintiff for debt and costs and interest thereon, judgment will not be entered for such further sum as the party prevailing in review would have been entitled to recover as costs in the original cause, unless it appears that justice requires such judgment).

71. Taylor *v.* Gilman, 61 N. H. 636, holding that the party reviewing never recovers back, as costs or damages, the costs adjudged to the other party in the original action.

72. Billerica *v.* Carlisle, 2 Mass. 158, holding that where on review by defendant the original judgment is merely reversed in part as to damages, the costs of the original action are not affected.

1. Casey *v.* Harned, 5 Iowa 1, 12.

2. Webster Dict. [*quoted* in State *v.* Towery, 143 Ala. 48, 49, 39 So. 309; Vinsant *v.* Knox, 27 Ark. 266, 272]. See also Falconer *v.* Robinson, 46 Ala. 340, 348.

"Revise, amend, and consolidate" see Graham *v.* Muskegon County Clerk, 116 Mich. 571, 572, 74 N. W. 729. See also Atty.-Gen. *v.* Parsell, 100 Mich. 170, 173, 58 N. W. 839.

"Revised Statutes" see Matter of Norton, 39 N.Y. App. Div. 369, 371, 57 N.Y. Suppl. 407.

3. Webster Dict. [*quoted* in State *v.* King County Super. Ct., 9 Wash. 369, 373, 37 Pac. 489].

4. Century Dict. [*quoted* in Goodwin *v.* Prime, 92 Me. 355, 363, 42 Atl. 785].

A revision of statutes implies a reëxamination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the legislature does the same thing, in effect, as when a particular section is amended by the words "so as to read as follows." The revision is a substitute. It displaces and repeals the former law as it stood, relating to the subject within its purview. Cortesy *v.* Territory, 7 N. M. 89, 92, 32 Pac. 504.

"'Revision' and 'correction'" see Hutcheson *v.* Storrie, 92 Tex. 685, 696, 51 S. W. 848, 71 Am. St. Rep. 884, 45 L. R. A. 289.

5. Webster Dict. [*quoted* in State *v.* King County Super. Ct., 9 Wash. 369, 373, 37 Pac. 489].

6. Webster Int. Dict.

Lien, see ATTACHMENT, 4 Cyc. 629. Of Decree, see EQUITY, 16 Cyc. 500. Of Forfeited Policy, see FIRE INSURANCE, 19 Cyc. 709; LIFE INSURANCE, 25 Cyc. 847. Of Indebtedness Barred by Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 1325. Of Judgment—In General, see APPEAL AND ERROR, 2 Cyc. 941 note 39; CONSTITUTIONAL LAW, 8 Cyc. 823; GUARDIAN AND WARD, 21 Cyc. 219 note 77; HUSBAND AND WIFE, 21 Cyc. 1585; INSANE PERSONS, 22 Cyc. 1243 note 32; JUDGMENTS, 23 Cyc. 1436; By Creditor After Termination of Lien, see JUDGMENTS, 23 Cyc. 1440; Commencement of Lien of Revived Judgment, see JUDGMENTS, 23 Cyc. 1363; Continuance of Lien by Revival, see JUDGMENTS, 23 Cyc. 1399; In Action By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1064; In Action By or Against Husband or Wife, or Both, see HUSBAND AND WIFE, 21 Cyc. 1585; In Justice's Court, see JUSTICES OF THE PEACE, 24 Cyc. 610, 611. Of Lease After Waiver, see LANDLORD AND TENANT, 24 Cyc. 911. Of Liability For Rent, see LANDLORD AND TENANT, 24 Cyc. 1161. Of Lien, see EXECUTIONS, 17 Cyc. 1121; MARITIME LIENS, 26 Cyc. 801; MORTGAGES, 27 Cyc. 1163 note 76, 1165. Of Lost Right, see EASEMENTS, 14 Cyc. 1185, 1196. Of Mandamus Proceeding, see MANDAMUS, 26 Cyc. 424. Of Maritime Lien, see MARITIME LIENS, 26 Cyc. 801. Of Merged Debt, see JUDGMENTS, 23 Cyc. 1109 note 86. Of Mortgage Lien—In General, see MORTGAGES, 27 Cyc. 1163 note 76; On Sale by Mortgagor to Mortgagee, see MORTGAGES, 27 Cyc. 1165. Of Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 387. Of Offense, see DIVORCE, 14 Cyc. 641. Of Partnership Debts After Dissolution, see PARTNERSHIP, 30 Cyc. 663. Of Policy, see FIRE INSURANCE, 19 Cyc. 709, 723; LIFE INSURANCE, 25 Cyc. 847. Of Preliminary or Interlocutory Injunction, see INJUNCTIONS, 22 Cyc. 973. Of Proceedings on Appeal, see APPEAL AND ERROR, 2 Cyc. 773. Of Right to Redeem, see MORTGAGES, 27 Cyc. 1823. Of Statutes — In General, see STATUTES; Of Limitation, see LIMITATIONS OF ACTIONS, 25 Cyc. 1363. Of Suit, see ATTORNEY AND CLIENT, 4 Cyc. 938. Of Trust as a Separate Estate, see HUSBAND AND WIFE, 21 Cyc. 1363. Of Will, see WILLS. Taking Despositions After, see CONTINUANCES IN CIVIL CASES, 9 Cyc. 121; DETINUE, 14 Cyc. 271. Taking Out Scire Facias For, see JUDGMENTS, 23 Cyc. 1421. Time For, see JUDGMENTS, 23 Cyc. 1445.)

REVIVE. To restore or bring again to life;[7] to give life to again;[8] to bring again to life, to reanimate, to renew, to bring into action after a suspension.[9]

REVIVOR. Revival of a suit which is abated by the death or marriage of any of the parties.[10] (Revivor: Bill of, see EQUITY, 16 Cyc. 363.[11] On Death of Party, see ABATEMENT AND REVIVAL, 1 Cyc. 47, 82. On Transfer of Subject-Matter, see ABATEMENT AND REVIVAL, 1 Cyc. 86. See also REVIVAL.)

REVOCABILITY. The property of being revocable; revocableness.[12] (Revocability: Of Assignment, see ASSIGNMENTS, 4 Cyc. 81 note 96. Of Contract, see COMMERCIAL PAPER, 7 Cyc. 647. Of Power to Take Possession, see CHATTEL MORTGAGES, 6 Cyc. 1051 note 53.)

REVOCATION. Recall.[13] Applied to wills, an act of the mind, which must

7. Leman *v.* Cunningham, 12 Ida. 135, 85 Pac. 212, 214 [*quoting* Brier *v.* Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831]; Thornhill *v.* Hargreaves, 76 Nebr. 582, 590, 107 N. W. 847; Tacoma Nat. Bank *v.* Sprague, 33 Wash. 285, 288, 74 Pac. 393, 394.

8. *In re* Bank of Commerce, 153 Ind. 460, 471, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489, where it is said: "The syllable *re* indicates the use of old matter and the syllable *vive* means 'to give life to,' which is one of the primary meanings of the word 'create.'"

9. Webster Dict. [*quoted* in Lindsey *v.* Lyman, 37 Iowa 206, 207].

"Revived" is the revitalization of a dead cause of action and the restoring of a lapsed period of its statutory life. Bullard *v.* Lopez, 7 N. M. 561, 566, 37 Pac. 1103.

10. Webster Int. Dict. [*citing* Blackstone Comm.].

11. See also COUNTIES, 11 Cyc. 609 note 51.

12. Century Dict.

13. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., 8 Del. Ch. 468, 494, 46 Atl. 12, where it is said that "the power of revocation" by the legislature permits the withdrawal of a single right or privilege, without revoking the whole franchise.

"Revocation not only means the recalling of the power, but may denote 'the vacating' of the grant for cause." Houston *v.* Hous-

be demonstrated by some outward and visible sign;[14] an act by which the will ceases to have any effect or efficacy;[15] an act of the mind, which must be demonstrated by some outward and visible sign or symbol of revocation;[16] an act done by the party by which he recalls his will;[17] anything which renders a bequest inoperative at the testator's death.[18] In reference to a grant, the recalling of the power, the vacating of the grant for cause.[19] (Revocation: Acts Amounting to, see COMMERCIAL PAPER, 7 Cyc. 648 note 27. And Defeasance of Warrant of Attorney, see JUDGMENTS, 23 Cyc. 707. And Impeachment of Discharge, see BANKRUPTCY, 5 Cyc. 410. Assignment, Affected by, see ASSIGNMENTS, 4 Cyc. 81. By Assignor, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 210 note 10. By Drawer, see COMMERCIAL PAPER, 7 Cyc. 651 note 57. By Guarantor, see GUARANTY, 20 Cyc. 1479. Effect of, see ADOPTION OF CHILDREN, 1 Cyc. 929. Effect of Failure to Exercise Power of in Deed, see HUSBAND AND WIFE, 21 Cyc. 1156 note 1. Injunction Against, see FOREIGN CORPORATIONS, 19 Cyc. 1288. Mandamus — As Remedy to Revoke License, or to Prevent or Set Aside Revocation, see MANDAMUS, 26 Cyc. 290; To Compel Action on Petition For, see INTOXICATING LIQUORS, 23 Cyc. 159. Of Abandonment For Constructive Total Loss Under Marine Insurance Policy, see INSURANCE, 26 Cyc. 704. Of Acceptance of Bill of Exchange, see COMMERCIAL PAPER, 7 Cyc. 774. Of Advancement, see DESCENT AND DISTRIBUTION, 14 Cyc. 173. Of Agency — In General, see PRINCIPAL AND AGENT, 31 Cyc. 1294; Of Factor and Broker, see FACTORS AND BROKERS, 19 Cyc. 117, 192 note 93, 193 note 99. Of Agreement — As to Custody or Control of Child, see PARENT AND CHILD, 29 Cyc. 1592; Of Adjoining Owners as to Party-Wall, see PARTY-WALLS, 30 Cyc. 776. Of Agreement, License, or Implied Grant of Rights of Way of Railroads, see RAILROADS, 33 Cyc. 156. Of Allowance to Surviving Wife, Husband, or Children From Decedent's Estate, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 404. Of Antenuptial Contract, see HUSBAND AND WIFE, 21 Cyc. 1265. Of Appointment — As Removal of Disqualification, see JUDGES, 23 Cyc. 598; Of Agent, see FOREIGN CORPORATIONS, 19 Cyc. 1256 note 61; Of Ancillary Administrator, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1226; Of Guardian, see GUARDIAN AND WARD, 21 Cyc. 50. Of Assent to Legacy or Devise, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 601. Of Assignment, see ASSIGNMENTS, 4 Cyc. 81; ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 209. Of Auctioneer's License, see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1040. Of Authority — In General, see ALTERATIONS OF INSTRUMENTS, 2 Cyc. 153, 169 note 36; AUCTIONS AND AUCTIONEERS, 4 Cyc. 1042; FACTORS AND BROKERS, 19 Cyc. 221; Of a General Agent, see FIRE INSURANCE, 19 Cyc. 593 note 83; To Sue, see APPEAL AND ERROR, 2 Cyc. 685 note 68. Of Bond, see BONDS, 5 Cyc. 776. Of Certificate or License — To Practise Medicine, see PHYSICIANS AND SURGEONS, 30 Cyc. 1555; To Teach School, see SCHOOLS AND SCHOOL-DISTRICTS. Of Charter or Franchise, see RAILROADS, 33 Cyc. 73. Of Check by Drawer Before Payment, see BANKS AND BANKING, 5 Cyc. 540. Of Commercial Paper, see COMMERCIAL PAPER, 8 Cyc. 294. Of Composition Deed, see INSOLVENCY, 22 Cyc. 1329. Of Consent of — Local Authorities as to Legislative Control of Municipality, see MUNICIPAL CORPORATIONS, 28 Cyc. 297; Property-Owner, see INTOXICATING LIQUORS, 23 Cyc. 129 note 37. Of Dedication, see DEDICATION, 13 Cyc. 489. Of Deed by Grantor, see DEEDS, 13 Cyc. 720. Of Delivery by Mail, see COMMERCIAL

ton City St. R. Co., 83 Tex. 548, 557, 19 S. W. 127, 29 Am. St. Rep. 679.

Death of one plaintiff in a cause referred is not a revocation of the authority of the referees. Freeborn *v.* Denman, 8 N. J. L. 116.

Distinguished from "alteration" see Miles' Appeal, 68 Conn. 237, 245, 36 Atl. 39, 36 L. R. A. 176; Eschbach *v.* Collins, 61 Md. 478, 499, 48 Am. Rep. 123.

14. Woodruff *v.* Hundley, 127 Ala. 640, 654, 29 So. 98, 85 Am. St. Rep. 145.

15. Carter *v.* Thomas, 4 Me. 341, 342.

16. Graham *v.* Burch, 47 Minn. 171, 174, 49 N. W. 697, 28 Am. St. Rep. 339 [*quoting* Dan *v.* Brown, 4 Cow. 483, 15 Am. Dec. 395]; Warner *v.* Warner, 37 Vt. 356, 365.

17. Lathrop *v.* Dunlop, 4 Hun (N. Y.) 213, 215.

18. Langdon *v.* Astor, 16 N. Y. 9, 39.

19. Houston *v.* Houston City St. R. Co., 83 Tex. 548, 557, 19 S. W. 127, 29 Am. St. Rep. 679.

PAPER, 7 Cyc. 684 note 63. Of Devise, see CONVERSION, 9 Cyc. 851. Of Discharge, see INSOLVENCY, 22 Cyc. 1341. Of Easement, see EASEMENTS, 14 Cyc. 1196. Of Emancipation of Child, see INFANTS, 22 Cyc. 517 note 42; PARENT AND CHILD, 29 Cyc. 1675. Of Execution of — Bond, After Delivery, see APPEAL AND ERROR, 2 Cyc. 917 note 90; Power, see POWERS, 31 Cyc. 1143. Of Executive Order, see INDIANS, 22 Cyc. 146 note 34. Of Franchise, see CORPORATIONS, 10 Cyc. 1087; MONOPOLIES, 27 Cyc. 897. Of Gift, see GIFTS, 20 Cyc. 1212, 1227, 1243; HUSBAND AND WIFE, 21 Cyc. 1294 note 29; PARENT AND CHILD, 29 Cyc. 1660. Of Grant of — Lands by United States in Aid of Railroads, see PUBLIC LANDS, 32 Cyc. 978; Public Aid to Railroads, see RAILROADS, 33 Cyc. 86; Swamp and Overflowed Lands, see PUBLIC LANDS, 32 Cyc. 924. Of Guaranty, see GUARANTY, 20 Cyc. 1479. Of Guardian's Appointment, see GUARDIAN AND WARD, 21 Cyc. 50. Of Guardianship, see INSANE PERSONS, 22 Cyc. 1150 note 88. Of Indorsement of Negotiable Instrument, see COMMERCIAL PAPER, 7 Cyc. 799. Of Insolvent's Discharge, see INSOLVENCY, 22 Cyc. 1339. Of Insurance Agent's Power to Contract, see INSURANCE, 22 Cyc. 1429. Of Letters — On Restoration of Reason, see INSANE PERSONS, 22 Cyc. 1146; Testamentary or of Administration, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 151.[20] Of License — For Occupation or Privilege in General, see LICENSES, 25 Cyc. 625; In Respect of Real Property, see LICENSES, 25 Cyc. 645; Of Foreign Insurance Company, see INSURANCE, 22 Cyc. 1393; MANDAMUS, 26 Cyc. 233 note 28; Of Pilot, see PILOTS, 30 Cyc. 1612; To Sell Liquor, see INTOXICATING LIQUORS, 23 Cyc. 72, 155; To Surrender Lease, see LANDLORD AND TENANT, 24 Cyc. 1367 note 49; To Use Patent, see PATENTS, 30 Cyc. 961; When Compelled by Mandamus, see MANDAMUS, 26 Cyc. 290. Of Marriage Settlement, see HUSBAND AND WIFE, 21 Cyc. 1265. Of Mining License, see MINES AND MINERALS, 27 Cyc. 692. Of Monopoly, see MONOPOLIES, 27 Cyc. 897. Of Negotiable Instrument, see COMMERCIAL PAPER, 8 Cyc. 294. Of Note by Death, see COMMERCIAL PAPER, 7 Cyc. 726 note 13. Of Offer — In General, see CONTRACTS, 9 Cyc. 283, 333 note 31; By Commencement of Suit, see COMPROMISE AND SETTLEMENT, 8 Cyc. 513 note 40; Or Acceptance, see CONTRACTS, 9 Cyc. 283, 288. Of Order — Appointing Receiver, see RECEIVERS, *ante*, p. 158; By Drawer of Check, see BANKS AND BANKING, 5 Cyc. 410; For Calling of a Special Term, see COURTS, 11 Cyc. 731; For Payment of Money, see COMMERCIAL PAPER 7 Cyc. 647; Of Adoption, see ADOPTION, 1 Cyc. 928; Of Allowance, see APPEAL AND ERROR, 2 Cyc. 814; Of Court, see JUDGMENTS, 23 Cyc. 837 note 95; Of Reference, see REFERENCES, *ante*, p. 801. Of Pardon, see PARDONS, 29 Cyc. 1569. Of Parol Gift of Land Inter Vivos, see GIFTS, 20 Cyc. 1212. Of Permit, see FOREIGN CORPORATIONS, 19 Cyc. 1287; MUNICIPAL CORPORATIONS, 28 Cyc. 748. Of Power — In General, see POWERS, 31 Cyc. 1051; Of Sale in Mortgage, see MORTGAGES, 27 Cyc. 1452; Of Sale of Property Pledged, see PLEDGES, 31 Cyc. 873. Of Previous Will, and Homologation of Will, see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 435 note 11. Of Probate of Will, see WILLS. Of Promise to Accept Bill of Exchange, see COMMERCIAL PAPER, 7 Cyc. 774. Of Release of Claims Against Assigned Estate, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 209. Of Request Not to Sue, see COMMERCIAL PAPER, 7 Cyc. 923 note 82. Of Respite in Insolvency Proceedings, see INSOLVENCY, 22 Cyc. 1332. Of Right — To Continue Improvement, see IMPROVEMENTS, 22 Cyc. 10; To Use Streets, see MUNICIPAL CORPORATIONS, 28 Cyc. 889. Of Rule, Application For, see JUSTICES OF THE PEACE, 24 Cyc. 414 note 93. Of Spanish, Mexican, or French Land Grants, or Claims to Confirmation Thereof, see PUBLIC LANDS, 32 Cyc. 1196. Of Submission, see ARBITRATION AND AWARD, 3 Cyc. 610; JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 407 note 84, 417 note 61. Of Subscription — Generally, see SUBSCRIPTIONS; To Corporate Stock, see CORPORATIONS, 10 Cyc. 385. Of Surrender of Insurance, see FIRE INSURANCE, 19 Cyc. 649; LIFE INSURANCE, 25 Cyc. 785. Of Trust, see TRUSTS. Of Unaccepted Offer to Guaranty, see GUARANTY, 20 Cyc. 1404. Of Waiver of Exemption, see EXEMPTIONS, 18 Cyc. 1455; HOMESTEADS, 21 Cyc.

20. See also COMMERCIAL PAPER, 8 Cyc. 80 note 96.

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REVOKE. To annul;[21] to recall, to take back, to repeal;[22] to recall what one has done or promised.[23] Applied to a testamentary disposition, to annul it, so that in legal contemplation it ceases to exist and becomes as inoperative as if it had never been written.[24] (See also REVOCATION, *ante*, p. 1724.)

REVOLT. An open rebellion or mutiny[25] of the crew against the authority of the master, in the command, navigation, or control of the ship;[26] an usurpation of the authority and command of the ship, and an overthrow of that of the master or other commanding officer;[27] something like rebellion or resistance to lawful authority.[28] (Revolt: In General, see INSURRECTION, 22 Cyc. 1451. And Restoration of Legitimate Government, see INTERNATIONAL LAW, 22 Cyc. 1730 note 14. Of Seaman, see SEAMEN.)

REVOLUTION. A term which, when used in reference to government, has a positive and qualified meaning. When employed in the first, it supposes a radical change of the whole system and structure of the government; when in the latter, it conveys the idea of modification only.[29] (Revolution: Generally, see INSURRECTION, 22 Cyc. 1451. In Chili, see INTERNATIONAL LAW, 22 Cyc. 1716 note 56. Publisher of an Article Instigating, see CONSTITUTIONAL LAW, 8 Cyc. 892 note 25. Recognition of Independence on Belligerency, and Accession of New Government, see INTERNATIONAL LAW, 22 Cyc. 1714.)

REVOLUTIONIST. See INTERNATIONAL LAW, 22 Cyc. 1752 note 86, 1753 note 92.

REVOLVER.[30] See WEAPONS.

21. Eschbach *v.* Collins, 61 Md. 478, 499, 48 Am. Rep. 123.

"To revoke" sometimes denotes the right to annul, rescind, or abolish. Webster Dict. [*quoted* in Houston *v.* Houston City St. R. Co., 83 Tex. 548, 557, 19 S. W. 127, 29 Am. St. Rep. 679].

22. *In re* Morrow, 204 Pa. St. 484, 486, 54 Atl. 342; Sloan's Appeal, 168 Pa. St. 422, 430, 32 Atl. 42, 47 Am. St. Rep. 889.

"Revoked" is a word applied to an order of removal, and it is said to import that an order is in force until it is recalled. Taber *v.* New Bedford, 177 Mass. 197, 199, 58 N. E. 640.

23. Langdon *v.* Astor, 16 N. Y. 9, 39.

24. Gardiner *v.* Gardiner, 65 N. H. 230, 231, 19 Atl. 651, 8 L. R. A. 383. See also Langdon *v.* Astor, 3 Duer (N. Y.) 477, 561.

25. U. S. *v.* Haines, 26 Fed. Cas. No. 15,275, 5 Mason 272; U. S. *v.* Hemmer, 26 Fed. Cas. No. 15,345, 4 Mason 105, 260.

26. U. S. *v.* Haines, 26 Fed. Cas. No. 15,275, 5 Mason 272.

As for example, where the crew, or any part of them, throw off all obedience to the commander and forcibly take possession of the vessel, by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command. U. S. *v.* Haskell, 26 Fed. Cas. No. 15,321, 4 Wash. 402.

27. U. S. *v.* Hemmer, 26 Fed. Cas. No. 15,345, 4 Mason 105, where it is said: "Wherever the crew, or any part thereof, take possession of the vessel against the will, and in defiance of the authority of the master, or put another person in command, and control her navigation against his will or orders . . . any act done with intent to accomplish such an object is an endeavor to commit a revolt."

28. Reg. *v.* McGregor, 1 C. & K. 429, 431, 47 E. C. L. 429.

29. McMullen *v.* Hodge, 5 Tex. 34, 75, where it is said: "The Revolution of Texas was clearly of the last description:"

30. Revolvers as personal baggage see CARRIERS, 6 Cyc. 666 note 32.

REWARDS

By William T. Brantly
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CROSS-REFERENCES

For Matters Relating to:
Bounty, see BOUNTIES, 5 Cyc. 976.
Contract in General, see CONTRACTS, 9 Cyc. 213.
Informer and His Rights, see CUSTOMS DUTIES, 12 Cyc. 1104; FINES, 19 Cyc. 543; FORFEITURES, 19 Cyc. 1355; INTERNAL REVENUE, 22 Cyc. 1592; PENALTIES, 30 Cyc. 1331.
Reward:
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Bet, see BET, 5 Cyc. 689 note 35.
Bounty, see BOUNTIES, 5 Cyc. 977 note 2.
Mandamus to Compel Payment, see MANDAMUS, 26 Cyc. 125.
Receiving Stolen Goods to Obtain, see RECEIVING STOLEN GOODS, *ante*, p. 513.
Taking Property to Obtain, see LARCENY, 25 Cyc. 48 text and notes 19, 20.
Withholding Property to Obtain, see LARCENY, 25 Cyc. 38.
Right of Finder of Lost Goods, see FINDING LOST GOODS, 19 Cyc. 541.

I. DEFINITION.

A reward is a sum of money or other compensation offered to the public generally, or to a class of persons, for the performance of a designated service.[1]

II. OFFER OF REWARD; ACCEPTANCE; PERFORMANCE.

A. In General. The basis of the right to a reward is "in the nature of a contract."[2] Hence, as in the case of other contracts,[3] a binding and enforceable con-

1. Madison First Nat. Bank *v.* Hart, 55 Ill. 62; Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210.

Other definitions are: "A recompense or premium offered by the government or an individual for special or extraordinary services to be performed." Black L. Dict. [*quoted* in Campbell *v.* Mercer, 108 Ga. 103, 107, 33 S. E. 871]. See also Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 542, 95 N. W. 969, 99 Am. St. Rep. 1012.

"A sum paid for the performance of some specific act to some person or persons." Kircher *v.* Murray, 54 Fed. 617, 624.

"Compensation or remuneration for services; a sum of money paid or taken for doing or forbearing to do some act." Burrill L. Dict. [*quoted* in State *v.* Dustin, 5 Oreg. 375, 377, 20 Am. Rep. 746].

"Bet" distinguished see 5 Cyc. 684 note 35.

"Bounty" distinguished see BOUNTIES, 5 Cyc. 977 note 2; Kircher *v.* Murray, 54 Fed. 617, 624. See also Eichelberger *v.* Sifford, 27 Md. 320, 330; Abbe *v.* Allen, 39 How. Pr. (N. Y.) 481, 488.

2. Freeman *v.* Boston, 5 Metc. (Mass.) 56, 57; Vitty *v.* Eley, 51 N. Y. App. Div. 44, 64 N. Y. Suppl. 397; Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296.

Contracts may originate in advertisements addressed to the general public. Anderson *v.* Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707. The rule as to the payment of an offered reward is based upon the principles applicable to contracts; it being universally held that if one having knowledge of an offered reward does that for which the offer is made, by such performance there is a meeting of minds and a contract made. Van Vlissingen *v.* Manning, 105 Ill. App. 255.

Contract consummated upon: Acceptance of offer see *infra*, II, C, 4. Performance of services see *infra*, II, G, 7.

3. Cee CONTRACTS, 9 Cyc. 247.

tract to pay a reward rests on the one side upon a valid offer,[4] and on the other side upon an acceptance of such offer,[5] including its terms and conditions,[6] by a performance of the service requested in the offer[7] before the offer lapses[8] or is revoked.[9] Until acceptance by performance of the services, it is a mere proposition;[10] but when accepted by performance it becomes a binding contract, subject to the laws governing contracts generally.[11]

B. Offer of Reward — 1. Nature of Offer — a. In General. An offer of or promise to pay a reward is a proposal merely[12] or a conditional promise,[13] on the part of the offerer, and not a consummated contract.[14] It may be said to be in effect the offer of a promise for an act, and the offer becomes a binding contract when the act is done or the service rendered in accordance with the terms of the offer before it lapses or is revoked.

b. Subject-Matter, Terms, and Conditions — (i) *In General.* Subject to the rule which forbids illegal contracts,[15] the performance of any act or service may constitute the subject-matter of an offer of reward.[16] The offerer may, however, prescribe whatever terms he sees fit and such terms must be substantially complied with before a recovery can be had upon the contract.[17]

4. Freeman *v.* Boston, 5 Metc. (Mass.) 56, 57; Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296. See *infra*, II, B.

5. Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296. See *infra*, II, C.

The motive inducing consent may be immaterial, but the consent is vital. Fitch *v.* Snedaker, 38 N. Y. 248, 252, 97 Am. Dec. 791.

6. See *infra*, II, B, 1, b.

7. Freeman *v.* Boston, 5 Metc. (Mass.) 56, 57. See *infra*, II, G.

8. See *infra*, II, B, 6.

9. See *infra*, II, B, 5.

10. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871. See *infra*, II, B, 1, a.

11. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871. See *infra*, II, C, 4; II, G, 7.

Consideration for the contract see *infra*, II, D.

Construction of the offer of reward see *infra*, II, F.

Legality of contract see *infra*, II, E.

12. *Arkansas.*— Amis *v.* Conner, 43 Ark. 337.

California.— Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Connecticut.— Bull *v.* Talcot, 2 Root 119, 1 Am. Dec. 62.

Georgia.— Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871; Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193.

Indiana.— Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657; Harson *v.* Pike, 16 Ind. 140.

Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155; Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. St. Rep. 185.

New York.— Pierson *v.* Morch, 82 N. Y. 503; Grady *v.* Crook, 2 Abb. N. Cas. 53 [*affirmed* in 72 N. Y. 612].

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484. See also Patton *v.* Hassinger, 69 Pa. St. 311.

Texas.— Kasling *v.* Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

See 42 Cent. Dig. tit. "Rewards," § 3.

13. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48; Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Williams *v.* West Chicago, etc., R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; Freeman *v.* Boston, 5 Metc. (Mass.) 56.

14. Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Harson *v.* Pike, 16 Ind. 140; Cummings *v.* Gann, 52 Pa. St. 484.

15. See Contracts, 9 Cyc. 465 *et seq.*; and *infra*, II, E.

16. For illustrations see *infra*, II, B, 1, b, (II).

17. *Arkansas.*— Amis *v.* Conner, 43 Ark. 337.

Connecticut.— Gardner *v.* Hartford, 14 Conn. 195.

Illinois.— Williams *v.* West Chicago, etc., R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222.

Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Massachusetts.— Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.

Michigan.— Peterson *v.* Mark, 134 Mich. 594, 96 N. W. 926.

New York.— Jones *v.* Phœnix Bank, 8 N. Y. 228.

Pennsylvania.— Com. *v.* Edwards, 10 Phila. 215.

Texas.— Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

United States.— Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.

See 42 Cent. Dig. tit. "Rewards," § 3.

It is entirely optional with the person offering a reward, to do it on such terms as he pleases. Freeman *v.* Boston, 5 Metc. (Mass.) 56.

(II) *Particular Services.* An offer of reward may be made for the purpose of procuring information and evidence,[18] such as information or evidence which will lead to the arrest or conviction, or both, of a certain person or persons,[19] or which will lead to the return or recovery of stolen property.[20] So the offer may be for the arrest of a certain person or persons;[21] for the arrest and delivery of a certain person or persons;[22] for the arrest and conviction of a certain person or persons;[23] for the detection, apprehension, and bringing to justice of an offender or offenders;[24] for the conviction of persons for offenses thereafter commit-

18. *Connecticut.*—*In re* Kely, 39 Conn. 159.
Illinois.— Higgins *v.* Lessig, 49 Ill. App. 459.
Massachusetts.— Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.
New Mexico.— Cunningham *v.* Fiske, 13 N. M. 331, 83 Pac. 789.
New York.— Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596; Fargo *v.* Arthur, 43 How. Pr. 193.
United States.— Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.
England.— Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418.
See 42 Cent. Dig. tit. "Rewards," § 8 *et seq.*
19. Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509. See also *infra*, II, G, 3, c, (I).
20. Neville *v.* Kelly, 2 C. B. N. S. 740, 32 L. J. C. P. 118, 10 Wkly. Rep. 697, 104 E. C. L. 740. See also *infra*, II, G, 3, c, (I).
21. *Arkansas.*— Stroud *v.* Garrison, 24 Ark. 53.
Illinois.— Montgomery County *v.* Robinson, 85 Ill. 174.
Indiana.— Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.
Kentucky.— Moseley *v.* Stone, 108 Ky. 492, 56 S. W. 965, 22 Ky. L. Rep. 173; Heather *v.* Thompson, 78 S. W. 194, 25 Ky. L. Rep. 1554.
Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.
Maryland.— Goldsborough *v.* Cradie, 28 Md. 477.
Massachusetts.— Crawshaw *v.* Roxbury, 7 Gray 374.
Mississippi.— Oktibbeha County *v.* Cottrell, 70 Miss. 117, 12 So. 156.
Missouri.— Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127; Ralls County *v.* Stephens, 104 Mo. App. 115, 78 S. W. 291.
Nevada.— Sias *v.* Hallock, 14 Nev. 332.
New Jersey.— Furman *v.* Parke, 21 N. J. L. 310.
North Carolina.— Washburn *v.* Humphreys, 35 N. C. 88.
Ohio.— Gilmore *v.* Lewis, 12 Ohio 281.
Pennsylvania.— Juniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696.
Texas.— Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.
United States.— McClaughry *v.* King, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. N. S. 216.
England.— Bent *v.* Wakefield Bank, 4 C. P. D. 1, 14 Cox C. C. 208, 39 L. T. Rep. N. S. 576, 27 Wkly. Rep. 168.
See 42 Cent. Dig. tit. "Rewards," § 9; and *infra*, II, G, 3, c, (II).
22. *Georgia.*— Hewitt *v.* Lamb, 130 Ga. 709, 61 S. E. 716.
Kansas.— Stone *v.* Dysert, 20 Kan. 123.
Kentucky.— Stephens *v.* Brooks, 2 Bush 137; Nall *v.* Proctor, 3 Metc. 447.
Maryland.—Goldsborough *v.* Cradie, 28 Md. 477.
Mississippi.— Gould *v.* Chickasaw County, 85 Miss. 123, 37 So. 710.
North Carolina.— Currie *v.* Swindall, 33 N. C. 361.
Pennsylvania.— Juniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696.
South Carolina.— Clanton *v.* Young, 11 Rich. 546.
Texas.—Adair *v.* Cooper, 25 Tex. 548.
See 42 Cent. Dig. tit. "Rewards," § 10; and *infra*, II, G, 3, c, (III).
23. *Alabama.*— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48. An offer may be conditioned on procuring the arrest and conviction of a person. Central R., etc., Co. *v.* Cheatham, *supra*.
California.— Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. 361.
Illinois.— Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.
Kentucky.— Louisville, etc., R. Co. *v.* Goodnight, 10 Bush 552, 19 Am. Rep. 80.
Louisiana.— Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.
Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.
Massachusetts.— Mead *v.* Boston, 3 Cush. 404.
Missouri.— Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386.
New Jersey.— Furman *v.* Parke, 21 N. J. L. 310.
New York.— Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.
Pennsylvania.— Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738.
Vermont.— Russell *v.* Stewart, 44 Vt. 170.
Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.
United States.— Williams *v.* U. S., 12 Ct. Cl. 192.
Canada.— Fortier *v.* Wilson, 11 U. C. C. P. 495.
See 42 Cent. Dig. tit. "Rewards," § 9; and *infra*, II, G, 3, c, (IV).
24. Central R., etc., Co. *v.* Cheatham, 85

ted;[25] for the detection and conviction of offenders;[26] for the recovery of stolen property;[27] for the recovery of stolen property and the apprehension of the thief;[28] for the return of lost property;[29] or for the recovery or rescue of a person.[30] So too the offer may be of a prize or premium to a certain person or persons, who may make the best exhibits or plans,[31] or to the owner of a horse making the best time on a designated occasion.[32]

2. Who May Make Offer — a. In General. Any person capable of making a contract[33] may bind himself by a public offer of a reward.[34]

b. Private Corporation. A corporation is authorized, through its officers, to offer a reward for the arrest or conviction of a person who has stolen from it, or who unlawfully interferes with its property or business.[35]

Ala. 292, 4 So. 828, 7 Am. St. Rep. 48. See also *infra*, II, G, 3, c, (IV).

25. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738, offenses against election laws.

26. Gardner *v.* Hartford, 14 Conn. 195.

27. Schirm *v.* Wieman, 103 Md. 541, 63 Atl. 1056, 115 Am. St. Rep. 373, 7 L. R. A. N. S. 175; Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596; Mirams *v.* Our Dogs Pub. Co., [1901] 2 K. B. 564, 70 L. J. K. B. 879, 85 L. T. Rep. N. S. 6, 17 T. L. R. 649, 49 Wkly. Rep. 626. See also *infra*, II, G, 3, c, (V).

28. Jones *v.* Phœnix Bank, 8 N. Y. 228. See also *infra*, II, G, 3, c, (VI), (VII).

29. *Iowa.*— Hawk *v.* Marion County, 48 Iowa 472.

Louisiana.— Deslondes *v.* Wilson, 5 La. 397, 25 Am. Dec. 187.

Maryland.— Wilson *v.* Guyton, 8 Gill 213.

Massachusetts.— Chase *v.* Corcoran, 106 Mass. 286.

Michigan.— Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

New York.—Amory *v.* Flyn, 10 Johns. 102, 6 Am. Dec. 316.

Oregon.— Watts *v.* Ward, 1 Oreg. 86, 62 Am. Dec. 299.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

United States.— Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533.

See 42 Cent. Dig. tit. "Rewards," § 12; and *infra*, II, G, 3, c, (VIII).

30. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

31. See Agriculture, 2 Cyc. 74; Gaming, 20 Cyc. 925.

Prize for the best picture exhibited see Trego *v.* Pennsylvania Academy of Fine Arts, 2 Pa. Cas. 313, 3 Atl. 819.

Prize for the suggestion of a name see Holt *v.* Wood, 14 Pa. Co. Ct. 499.

Prize to architects for plans see Walsh *v.* St. Louis Exposition, etc., Assoc., 16 Mo. App. 502; Cope *v.* Hastings, 183 Pa. St. 300, 38 Atl. 717.

32. People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Porter *v.* Day, 71 Wis. 296, 37 N. W. 259. See also Agriculture, 2 Cyc. 74; Gaming, 20 Cyc. 924.

The offer of a prize or premium to the persons who may make the best exhibits or plans, or to the owner of a horse making the best time on a designated occasion, is in effect the offer of a reward for an act, and may be recovered in an action by the person who complies with the conditions of the offer. West *v.* Carter, 129 Ill. 249, 21 N. E. 782; Alvord *v.* Smith, 63 Ind. 58; Delier *v.* Plymouth Agricultural Soc., 57 Iowa 481, 10 N. W. 872; Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075; Misner *v.* Knapp, 13 Oreg. 135, 9 Pac. 65, 57 Am. Rep. 6; Moshier *v.* La Crosse County Agricultural Soc., 90 Wis. 37, 62 N. W. 932.

Premium defined see 31 Cyc. 1164.

Prize defined see 32 Cyc. 394.

Purse defined see 32 Cyc. 1272.

33. Campbell *v.* Mercer, 108 Ga. 103, 108, 33 S. E. 871; Furman *v.* Parke, 21 N. J. L. 310, 312; Mountain *v.* Multnomah County, 16 Oreg. 279, 281, 18 Pac. 464; Jacob L. Dict.

34. *California.*— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Georgia.— Campbell *v.* Mercer, 108 Ga. 103, 108, 33 S. E. 871.

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 25 Am. Rep. 1.

Kentucky.— Marking *v.* Needy, 8 Bush 22.

Louisiana.— Murray *v.* Kennedy, 15 La. Ann. 385, 76 Am. Dec. 189.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New Jersey.— Furman *v.* Parke, 21 N. J. L. 310, 312.

Oregon.— Mountain *v.* Multnomah County, 16 Oreg. 279, 281, 18 Pac. 464.

See 42 Cent. Dig. tit. "Rewards," § 3 *et seq.*

Offer by executor or administrator see Campbell *v.* Mercer, 108 Ga. 103, 107, 33 S. E. 871.

35. *Alabama.*— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

Arkansas.—Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 540.

Illinois.— Minneapolis Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154.

Indiana.—American Express Co. *v.* Patterson, 73 Ind. 430.

Mississippi.—Norwood, etc., Co. *v.* Andrews, 71 Miss. 641, 16 So. 262.

Pennsylvania.— Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426.

See 42 Cent. Dig. tit. "Rewards," § 1 *et seq.*

c. Municipal Corporation — (i) *In General.* It is generally held that municipal corporations unless authorized by statute are not empowered to offer rewards for the arrest or conviction of offenders against the criminal law of the state, and that the power to provide for the general welfare does not confer such authority;[36] but a few cases hold that municipalities have the power to offer such rewards.[37] When authorized to offer rewards the extent of the authority as well as the mode of its exercise depends upon the language of the statute.[38]

Bank may offer reward. Minneapolis Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154; Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426.

An insurance company may, when properly authorized, offer a reward with regard to matters connected with its insurance business. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

A board of underwriters may authorize the insurance companies to offer a reward in matters connected with their insurance business. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

A railroad company has implied power to offer a general standing reward for the detection, apprehension, and bringing to justice of a person who may obstruct its road or otherwise offend against its property rights. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48; Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

Telephone company may offer a reward. Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

36. *Connecticut.*— Crofut *v.* Danbury, 65 Conn. 294, 32 Atl. 365.

District of Columbia.— Baker *v.* Washington, 7 D. C. 134.

Florida.— Murphy *v.* Jacksonville, 18 Fla. 318, 43 Am. Rep. 323.

Indiana.— Grant County *v.* Bradford, 72 Ind. 455, 37 Am. Rep. 174.

Iowa.— Hanger *v.* Des Moines, 52 Iowa 193, 2 N. W. 1105, 35 Am. Rep. 266; Hawk *v.* Marion County, 48 Iowa 472.

Kansas.— Felker *v.* Elk County, 70 Kan. 96, 78 Pac. 167.

Kentucky.— Patton *v.* Stephens, 14 Bush 324.

Maine.— Gale *v.* South Berwick, 51 Me. 174.

New Hampshire.—Abel *v.* Pembroke, 61 N. H. 357.

Oregon.— Mountain *v.* Multnomah County, 16 Oreg. 279, 18 Pac. 464.

Virginia.— Winchester *v.* Redmond, 93 Va. 711, 25 S. E. 1001, 57 Am. St. Rep. 822.

Wisconsin.— Butler *v.* Milwaukee, 15 Wis. 493.

Canada.— Cornwall *v.* West Missouri Tp., 25 U. C. C. P. 9.

See 42 Cent. Dig. tit. "Rewards," § 6.

A resolution of the county commissioners offering a reward for the finding and identification of a missing man is in excess of legal power conferred upon them as commissioners, and does not authorize a contract between the county and a third person. Scheiber *v.* Von Arx, 87 Minn. 298, 92 N. W. 3.

A sheriff has no power to bind the county by the offer of a reward for the capture of an escaped criminal. Crawford County *v.* Spenney, 21 Ill. 288; Bemis *v.* Rice County, 23 Minn. 73.

37. Carnes *v.* Red River Parish Police Jury, 110 La. 1011, 35 So. 267; Crawshaw *v.* Roxbury, 7 Gray (Mass.) 374; Freeman *v.* Boston, 5 Metc. (Mass.) 56; People *v.* Holly, 119 Mich. 637, 78 N. W. 665, 76 Am. St. Rep. 435, 44 L. R. A. 677; York *v.* Forscht, 23 Pa. St. 391. *Compare* Stamp *v.* Cass County, 47 Mich. 330, 11 N. W. 183.

Under a power to regulate shops for the sale of liquor a municipal corporation may offer rewards for the conviction of offenders against the provisions of the liquor law. Carnes *v.* Red River Parish Police Jury, 110 La. 1011, 35 So. 267.

Under the welfare clause, a municipal corporation is authorized to offer a reward for the detection and conviction of incendiaries should they destroy property within the city limits. People *v.* Holly, 119 Mich. 637, 78 N. W. 665, 75 Am. St. Rep. 435, 44 L. R. A. 677.

Adoption of offer of private person.—A county is liable under the statute when the authorities adopt or indorse an offer made by private persons. Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

38. *Massachusetts.*— Day *v.* Otis, 8 Allen 477.

Michigan.— Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952.

Missouri.— Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New York.— People *v.* Brower, 111 N. Y. App. Div. 915, 97 N. Y. Suppl. 349.

See 42 Cent. Dig. tit. "Rewards," § 6.

For example in Hawk *v.* Marion County, 48 Iowa 472, it was held that county officers had the power to offer a reward for the recovery of money stolen from the county, although the offer of a reward for the arrest of the thieves was beyond their authority.

Apprehension of one "charged with crime." — Day *v.* Otis, 8 Allen (Mass.) 477.

Persons theretofore guilty.—A New York county board of supervisors cannot under the statute offer a reward for the conviction of persons theretofore guilty. People *v.* Brower, 111 N. Y. App. Div. 915, 97 N. Y. Suppl. 349.

Two-thirds vote for authorization.— Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952.

The offer of a reward, when made by a municipality empowered to make such an offer, must be made by the proper municipal authorities.[39]

(II) *Personal Liability of Officials.* When persons who are public officers publish a reward which they are not authorized to offer as such, or which is in excess of their authority, they are not as a general rule personally liable thereunder,[40] but may be so when the true construction of the offer authorizes such inference.[41]

d. State.[42] The legislature has the power to offer rewards for the doing of acts which will be of public benefit;[43] and it may, as has been shown, delegate this power to municipal corporations.[44] So too it may empower designated officers to offer rewards for certain purposes.[45] The authority of an official to offer a reward must be governed by the construction of the statutory provisions.[46]

In writing.— When a county judge authorizes another by telephone to sign his name to the offer, that is sufficient under a statute requiring the offer to be in writing. Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

Qualifications as to value.— When a statute authorizes a county board to offer rewards for the arrest or conviction of persons stealing any horse, etc., or neat cattle, or any other property exceeding fifty dollars in value, a board has the power to offer a reward when the thing stolen was a horse worth less than fifty dollars, since the qualification as to value was not intended to apply to the property enumerated. Butler *v.* McLean County, 32 Ill. App. 397.

39. People *v.* Holly, 119 Mich. 637, 78 N. W. 665, 75 Am. St. Rep. 435, 44 L. R. A. 677.

Common council.— Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952.

County board.— Butler *v.* McLean County, 32 Ill. App. 397.

County judge.— Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

Mayor and aldermen.— Freeman *v.* Boston, 5 Metc. (Mass.) 56.

Police commissioners see Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952.

Selectmen.— Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Day *v.* Otis, 8 Allen (Mass.) 477.

Supervisors.— People *v.* Brower, 111 N. Y. App. Div. 915, 97 N. Y. Suppl. 349.

40. Scheiber *v.* Von Arx, 87 Minn. 298, 92 N. W. 3; Belknap *v.* Reinhart, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621; Hite *v.* Goodman, 21 N. C. 364.

41. Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189; Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Timken *v.* Tallmadge, 54 N. J. L. 117, 22 Atl. 996.

An offer by B, R, and S, as "selectmen of Milton," has been held to be a personal offer of the persons so signing it, especially if they do not in their official capacity have authority to bind the town of which they were selectmen. Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

When the mayor of a city in New Jersey offers a reward for the arrest of a fugitive defaulting official and he is wholly without authority as mayor to offer rewards, he is personally liable on such offer, since in that state municipal officers who exceed their authority are liable in the same manner as agents who do so. Timken *v.* Tallmadge, 54 N. J. L. 117, 22 Atl. 996.

Where a United States marshal offers a reward for the capture of a fugitive, adding after his name, the words, "U. S. Marshal," he is personally liable. Murray *v.* Kennedy, 15 La. Ann. 385, 77 Am. Dec. 189.

Question for jury.— Defendant, as chairman of the democratic state committee, published the offer of a reward of one thousand dollars for the conviction of any person violating the election laws, and afterward in a speech he declared that he had one thousand dollars to pay for such conviction. It was a question for the jury to decide whether defendant offered to pay the reward himself personally or offered it in his representative capacity, undertaking to bind only the committee. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 1082, 17 L. R. A. 536.

42. **Construction of statutory reward** see *infra*, II, F, 3.

43. Butler County *v.* Leibold, 107 Pa. St. 407; Cutting *v.* Taylor, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691, where the reward was offered to fire companies complying with certain conditions which would benefit the public by the protection of property against fires.

44. See *supra*, II, B, 2, c.

45. See cases cited *infra*, this note.

Governor.— Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355; Crawford County *v.* Spenney, 21 Ill. 288; Hager *v.* Sidebottom, (Ky.) 113 S. W. 870; State *v.* Dinkins, 77 Miss. 874, 27 So. 832; Jones *v.* Gibbs, 51 Miss. 401.

United States attorney-general.— U. S. *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738, under 26 U. S. St. at L. 985.

United States marshal see U. S. *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738.

46. Hungerford *v.* Moore, 65 Ala. 232; Drew *v.* Ricks, 17 Ala. 25; Crawford County *v.* Spenney, 21 Ill. 288; Anderson *v.* Pierce County, 40 Nebr. 481, 58 N. W. 955; Gibbs *v.* U. S., 14 Ct. Cl. 544.

Discretion of governor.— The governor, in

e. Agent. An offer may be made by an agent of the offerer.[47] The offer must be the authorized act of the party on whose behalf it purports to be made.[48]

3. To Whom Offer May Be Made. The offer may be directed to a particular person or class of persons, or to any and all persons complying with the terms of the offer.[49]

4. Manner of Making Offer. The offer of reward may be made orally,[50] or otherwise.[51] The offer may be by any advertisement or other statement publicly

offering a reward for the apprehension of an offender, as authorized by Ky. St. (1903) §§ 1932, 1933, must exercise discretion as to whether a reward shall be offered, and the amount thereof, and must also determine to what jail the offender shall be delivered, etc. Hager *v.* Sidebottom, (Ky.) 113 S. W. 870.

47. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

An offer signed by a superintendent signing his name as such has been held to be sufficient as a binding offer of the company itself. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

48. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

The act of a cashier in offering a reward may become binding on the bank by acquiescence of the directors. Kelsey *v.* Crawford County Nat. Bank, 69 Pa. St. 426.

The general manager of a railroad company has authority to offer a general reward for the arrest and conviction of any person found maliciously obstructing its tracks. Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

Superintendent of a railroad company.— It is within the purposes and scope of the agency of a superintendent of a railroad company to offer a reward for bringing to justice all persons who obstruct its road or offend against its property rights. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

When the president of a bank offers a reward for information leading to the arrest of a defaulter, it is binding on the bank unless it be proved that the president exceeded his authority. Minneapolis Bank *v.* Griffin, 168 Ill. 314, 48 N. E. 154.

A majority vote cannot authorize the mayor to offer a reward for the conviction of incendiaries, when a municipal charter provides that the common council may by a two-thirds vote authorize the police commissioners to offer a reward for the arrest of a criminal. Loveland *v.* Detroit, 41 Mich. 367, 1 N. W. 952.

Telephonic authorization may be sufficient. Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

A writing which "guarantees" the payment of a sum offered by a third person for an arrest and conviction is in effect the offer of a reward by the person signing it. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871.

A reward was published in the names of defendants who did not authorize the publication but who did not object to or countermand it. In an action to recover the reward by a person who had complied with its conditions, the court said: "There is nothing to found an estoppel upon, but the mere knowledge of the defendants that an advertisement over their names had appeared in the public press. This advertisement was not the act of the defendants; hence to make them liable the act of the plaintiff must have been done under such circumstances that the silence of the defendants amounted to a fraud upon him. This requires some intent — an implied admission on the part of the defendants. . . . The plaintiff's belief in the genuineness of the advertisement . . . cannot of itself affect the appellants. They must have been placed in such a situation that their conduct was equivalent to standing by and seeing the plaintiff act, knowing that he believed the advertisement to be genuine." Hugill *v.* Kinney, 9 Oreg. 250, 251, 42 Am. Rep. 801.

The governor's private secretary, authorized by Ky. Acts (1906), p. 260, c. 30, to assist him in the labors of the office, cannot in the absence of the governor offer a reward. Hager *v.* Sidebottom, (Ky.) 113 S. W. 870.

49. *California.*— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Massachusetts.— Freeman *v.* Boston, 5 Metc. 56.

Pennsylvania.— Butler County *v.* Liebold, 107 Pa. St. 407.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

United States.— Franklin *v.* Heiser, 9 Fed. Cas. No. 5,054, 6 Blatchf. 426.

See 42 Cent. Dig. tit. "Rewards," § 13 *et seq.*

50. Wilson *v.* McClure, 50 Ill. 366; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738; Patton *v.* Hassinger, 69 Pa. St. 311; Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

Made at a public gathering.— Wilson *v.* McClure, 50 Ill. 366.

Made by one standing in a crowd and shouting out the offer to those present see Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

Made in a political speech.— Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738.

Statute of frauds.— The contract is not one required to be in writing by the statute of frauds. Williams *v.* Byrnes, 8 L. T. Rep. N. S. 69, 1 Moore P. C. N. S. 154, 15 Eng. Reprint 660.

51. Murray *v.* Kennedy, 15 La. Ann. 385,

proclaimed.[52] It may be published by being spread upon the record of the proper court or tribunal authorized to make the offer.[53]

5. Revocation of Offer — a. In General. The offer may be revoked at any time before its acceptance by performance, since an unaccepted offer creates no contractual rights.[54]

b. After Performance or Part Performance. After performance[55] or part performance, however, the offer cannot be revoked so as to deprive a person, who acted on the faith of it, of any compensation.[56]

6. Lapse of Offer. As in the case of other contracts[57] an offer of reward, not limited in its duration, must be considered as having been withdrawn after the expiration of a reasonable time from its date;[58] for it lapses after the expira-

77 Am. Dec. 189; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012. See also cases cited *infra*, notes 52, 53.

By hand-bills.— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St Rep. 48; Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738; Tarner *v.* Walker, L. R. 2 Q. B. 301, 8 B. & S. 314, 36 L. J. Q. B. 112, 16 L. T. Rep. N. S. 234, 15 Wkly. Rep. 407 [*affirming* L. R. 1 Q. B. 641, 6 B. & S. 871, 35 L. J. Q. B. 179, 14 L. T. Rep. N. S. 660, 14 Wkly. Rep. 793, 118 E. C. L. 871]; Thatcher *v.* England, 3 C. B. 254, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254.

By mailing circulars.— Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

By municipal ordinance see cases cited *supra*, II, B, 2, c.

By postal cards.— Swanton *v.* Ost, 74 Ill. App. 281; State *v.* Woodruff, 47 Kan. 151, 27 Pac. 842, 27 Am. St. Rep. 285.

By printed circulars.— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

By proclamation properly signed by an authorized officer see Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728, holding that no publication other than entry upon the executive journals is necessary in such a case.

By publication in newspaper.— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142.

By private contract with particular person. — Franklin *v.* Heiser, 9 Fed. Cas. No. 5,054, 6 Blatchf. 426.

By statute see cases cited *supra*, II, B, 2, d; and *infra*, II, F, 3; II, G, 8.

By telegram.— Cummings *v.* Gann, 52 Pa. St. 484.

52. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Indiana.— Harson *v.* Pike, 16 Ind. 140.

Massachusetts.— Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.

Missouri.—Anderson *v.* Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

New Jersey.— Furman *v.* Parke, 21 N. J. L. 310.

New York.—Pierson *v.* Morch, 82 N. Y. 503.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

See 42 Cent. Dig. tit. "Rewards," § 3; and cases cited *supra*, note 51.

Statutes of limitations.— The contract has been held not to be one in writing within the meaning of the statutes of limitations. Cunningham *v.* Fiske, 13 N. M. 331, 83 Pac. 789. In Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634, it was held that an advertisement offering a reward for certain information became, upon its acceptance, a written contract, against which the statute would not run for four years. Lapse of offer see *infra*, II, B, 6.

53. Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59.

54. *California.*— Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Georgia.— Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193.

Indiana.— Harson *v.* Pike, 16 Ind. 140.

Maine.— Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

United States.— Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.

See 42 Cent. Dig. tit. "Rewards," § 5.

When made by public advertisement it may be withdrawn in the same way, although the service is afterward rendered by a person who did not know of the revocation. Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.

The discontinuance of the advertisement is not in itself a revocation of the offer. Loring *v.* Boston, 7 Metc. (Mass.) 409. When the offer was published for two weeks in a newspaper and then discontinued, performance ten months afterward is too late. Lauve *v.* Balfour, 1 Tex. App. Civ. Cas. § 726.

55. **Effect of performance** or of part performance see *infra*, II, G, 4, 5.

56. Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29, where the offer was for the detection, arrest, and conviction of a criminal, and was withdrawn before conviction but after the detection and arrest.

57. See Contracts, 9 Cyc. 291.

58. Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A.

tion of a reasonable time, and what constitutes a reasonable time depends largely upon the circumstances under which the particular offer was made.[59]

C. Acceptance of Offer of Reward — 1. Who May Accept.[60] An offer of reward may be accepted by any part of the public, if it be offered to the public,[61] or by any particular person or class of persons, if such proposition is made to them.[62]

2. Notice of Acceptance.[63] It is not necessary that the person performing the service for which a reward is offered generally should give notice to the offerer that he accepts the offer, for in such case the party making the offer impliedly dispenses with actual notice and the doing of the act completes the contract.[64]

3. Time of Acceptance.[65] Acceptance of an offer of reward by performing or

503 (after twelve years); Loring *v.* Boston, 7 Metc. (Mass.) 409 (after three years); Shaub *v.* Lancaster City, 156 Pa. St. 362, 26 Atl. 1067, 21 L. R. A. 691 (after ten years). *Compare* Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111, holding that if the offer was not limited in time, it will be presumed to have remained open during the fifth day after it was made. But see *In re* Kelly, 39 Conn. 159, where it was held that an offer of reward was not barred by lapse of time, but continued and was binding until the statute of limitations had run against the crime, concerning which the offer of reward was made.

Rule explained and applied.— The offer of a reward for the apprehension and conviction of any person engaged in incendiary attempts cannot be accepted three years and eight months after it was made. Loring *v.* Boston, 7 Metc. (Mass.) 409, 412. In this case the court said: "Although not limited in its terms it is manifest, we think, that it could not have been intended to be perpetual, or to last ten or twenty years, or more; and therefore must have been understood to have some limit. . . . There being no limit in terms, then by a general rule of law it must be limited to a reasonable time, that is, the service must be done within a reasonable time after the offer was made. What is a reasonable time, when all the facts and circumstances are proved on which it depends, is a question of law. To determine it, we are first to consider the objects and purposes for which such reward is offered. . . . Though such discontinuance [of the advertisement] is not a revocation of the offer, it proves that those who made it no longer held it forth conspicuously as a continuing offer; and it is not reasonable to regard it as a continuing offer for any considerable term of time afterwards."

After acceptance, however, see Ryer *v.* Stockwell, 14 Cal. 134 73 Am. Dec. 634. See also *infra*, II, C, 4.

59. Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503.

Revocation is conclusively presumed to have been made where the offer is not accepted within a reasonable time. Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503, a lapse of more than twelve years. See *infra*, II, G, 2, a.

60. **Acceptance by:** Public officer see *infra*, III, C. Servant or employee see *infra*, III, B.

Who may accept upon offer of reward for the discovery of property or apprehension of offender see Contracts, 9 Cyc. 255 text and note 72.

61. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871.

Rewards are generally offered to the public at large and they may be accepted by any one of the public except in the case of officers whose duty it is to do the required act. Butler County *v.* Leibold, 107 Pa. St. 407. See *infra*, III, C.

Owner of stolen property.— A statute gave a reward to "whoever shall pursue and apprehend any person who shall have stolen any mare," etc. Since the statute makes no distinction between the owner of a stolen horse and any other person, the owner is entitled to such reward. Butler County *v.* Leibold, 107 Pa. St. 407.

62. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871.

When offered to a designated class of persons, the offer can be accepted only by one of that class. Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

However, if the services are accepted the offerer may be liable for the reward earned by one not included in the designated class. Madison First Nat. Bank *v.* Hart, 55 Ill. 62.

63. **Performance of service without knowledge of offer** see *infra*, II, G, 6.

64. *Illinois.*— Madison First Nat. Bank *v.* Hart, 55 Ill. 62; Wilson *v.* McClure, 50 Ill. 366.

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Harson *v.* Pike, 16 Ind. 140.

Massachusetts.— Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142.

New Hampshire.— Morse *v.* Bellows, 7 N. H. 549, 28 Am. Dec. 372.

Pennsylvania.— Patton *v.* Hassinger, 69 Pa. St. 311.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

United States.— Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.

See 42 Cent. Dig. tit. "Rewards," § 7.

Notification of acceptance being for the benefit of the person who makes the offer, he may dispense with it if he thinks it desirable to do so. Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210.

65. **Time of performance** see *infra*, II, G, 2.

commencing to perform the service requested must be within a reasonable time, unless the time is limited in the offer itself.[66]

4. Effect of Acceptance. While a mere offer not assented to does not constitute a contract,[67] an acceptance of the terms of an offer of reward by any person who complies therewith by performing the service creates a complete and valid contract,[68] provided the performance takes place prior to the withdrawal of the offer.[69]

5. What Constitutes Acceptance. Acting upon the offer and complying with its terms and conditions will operate as an acceptance of the offer.[70]

D. Consideration — 1. Necessity. As in the case of other contracts[71] a consideration is necessary to support the contract for a reward.[72]

2. What Is a Valid Consideration. The consideration which supports the promise of a reward is not benefit to the promisor, but the fact that upon the faith of his promise some act has been done by the promisee;[73] hence, the performance of the terms of an offer constitute a good and sufficient consideration for the contract upon which to base the recovery by the claimant,[74] but performance of services which one is otherwise bound to do does not operate as such a consideration.[75]

E. Illegality — 1. In General. As to its legality the contract must be tested by the same rules which govern other contracts.[76] Thus the contract may be

66. See *supra*, II, B, 6.

67. Van Vlissingen *v.* Manning, 105 Ill. App. 255.

Prior to acceptance of, or performance of the services specified therein, an offer of reward is not a contract. Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278. See *supra*, II, A; Harson *v.* Pike, 16 Ind. 140; Cummings *v.* Gann, 52 Pa. St. 484.

68. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Indiana.— Harson *v.* Pike, 16 Ind. 1′ .

New Jersey.—Furman *v.* Parke, 21 N. J. L. 310.

New York.— Pierson *v.* Morch, 82 N. Y. 503.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

See 42 Cent. Dig. tit. "Rewards," § 7.

"Although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement." Carlill *v.* Smoke Ball Co., [1893] 1 Q. B. 256, 268, 67 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 839, 4 Reports 176, 41 Wkly. Rep. 210, per Borden, L. J.

69. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.

It is elementary that where a party publishes an offer to the world, and before it is withdrawn another acts upon it, the party making the offer is bound to perform his promise. Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657.

If, in reliance upon the offer, plaintiff accepted the proposal and performed the service for which the reward was offered before the offer was revoked, a valid contract was thereby consummated. Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111.

70. See *infra*, II, G, 1, 7.

71. See Contracts, 9 Cyc. 308.

72. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738.

If not based upon a sufficient consideration, the contract for a reward is not enforceable. Stilk *v.* Myrick, 2 Campb. 317, 11 Rev. Rep. 717; Harris *v.* Watson, Peake N. P. 72, 3 Rev. Rep. 654.

73. Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Furman *v.* Parke, 21 N. J. L. 310.

Inconvenience or detriment to the promisee the consideration. Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210.

The trouble to which the accepter puts himself in order to comply with the terms and conditions of the offer is the consideration. Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634, holding that one who performs the terms and conditions of an offer of reward can hardly be said to have done what every good citizen is bound to do, and that the agreement should not be considered as a *nudum pactum*.

74. Morrell *v.* Quarles, 35 Ala. 544; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503; Freeman *v.* Boston, 5 Metc. (Mass.) 56.

75. Harris *v.* Carter, 2 C. L. R. 1582, 3 E. & B. 559, 18 Jur. 1014, 23 L. J. Q. B. 295, 2 Wkly. Rep. 409, 77 E. C. L. 559.

Performance by public officer see *infra*, III, C.

Performance by servant or employee see *infra*, III, B.

76. Boehmer *v.* Foval, 55 Ill. App. 71. See Contracts, 9 Cyc. 465, 483.

A promise to bribe a bailiff to take bail is

invalid as being against public policy.[77] It is not against public policy to offer a reward for securing the conviction of a person who thereafter perpetrates an offense.[78]

2. Intent, Interest, or Motive of Offerer. While the offer must have been made with intent to create and have been capable of creating a legal relation between the offerer and the accepter,[79] it not being necessary that the offerer of the reward should have any personal interest in the subject-matter,[80] his motive in making the offer is immaterial,[81] so far as the validity of the contract is concerned.[82]

3. Prizes and Premiums. The offer of a prize to the owner of the horse that wins a race, made in good faith and not as a cover for betting, and when it is payable by the person or association making the offer out of its own funds, is not gambling or a wagering transaction.[83]

illegal. Stotesbury *v.* Smith, 2 Burr. 924, 97 Eng. Reprint 635.

Illegal consideration vitiates the contract. Boehmer *v.* Foval, 55 Ill. App. 71.

"No questions will be asked" used in an offer in violation of statute see Mirams *v.* Our Dogs Pub. Co., [1901] 2 K. B. 564, 70 L. J. K. B. 879, 85 L. T. Rep. N. S. 6, 17 T. L. R. 649, 49 Wkly. Rep. 626.

Offer of reward: Construed as contempt of court see Butler *v.* Butler, 13 P. D. 73, 57 L. J. P. D. & Adm. 42, 58 L. T. Rep. N. S. 563; Brodribb *v.* Brodribb, 11 P. D. 66, 50 J. P. 407, 55 L. J. P. D. & Adm. 47, 56 L. T. Rep. N. S. 672, 34 Wkly. Rep. 580. For illegal arrest see Marking *v.* Needy, 8 Bush (Ky.) 22; Moore *v.* Peace, 97 S. W. 762, 30 Ky. L. Rep. 193; Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398. For testimony in favor of offerer see Boehmer *v.* Foval, 55 Ill. App. 71. Relating to lottery transaction see Dieckhoff *v.* Fox, 56 Minn. 438, 57 N. W. 930. To a voter see State *v.* Dustin, 5 Oreg. 375, 20 Am. Rep. 746.

Offering to give official salary to the county see State *v.* Dustin, 5 Oreg. 375, 20 Am. Rep. 746; State *v.* Purdy, 36 Wis. 213, 17 Am. Rep. 485.

Part of an entire consideration being illegal the whole contract is void. Boehmer *v.* Foval, 55 Ill. App. 71.

77. Marking *v.* Needy, 8 Bush (Ky.) 22 [*followed* in Moore *v.* Peace, 97 S. W. 762, 30 Ky. L. Rep. 193]; Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

Marriage brokerage contract.— Crawford *v.* Russell, 62 Barb. (N. Y.) 92; Keat *v.* Allen, 2 Vern. Ch. 588, 23 Eng. Reprint 983. See Contracts, 9 Cyc. 518; 26 Cyc. 926.

Offer to public officer see *infra*, III, C.

Offer to servant or employee see *infra*, III, B.

Not against public policy.— The offer of a reward for the conviction of persons for offenses thereafter committed against election laws is not void as against public policy. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738. A contract by which one agrees to pay for the return of his property which had been stolen is not illegal or against public policy, provided there is no stipulation to refrain from prosecuting the thief or to compound the felony. Schirm *v.* Wieman, 103 Md. 541, 63 Atl. 1056, 115 Am. St. Rep. 373, 7 L. R. A. N. S. 175.

78. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738.

79. Higgins *v.* Lessig, 49 Ill. App. 459; Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, 57 J. P. 325, 62 L. J. Q. B. 257, 67 L. T. Rep. N. S. 837, 4 Reports 176, 41 Wkly. Rep. 210, where the advertisement was as follows: "£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter." It was held that this advertisement was not a mere puff but was intended to be a promise, and that plaintiff who had performed the conditions was entitled to recover the reward.

Expression of wrath coupled with boasting and bluster was held not to show such an intent. Higgins *v.* Lessig, 49 Ill. App. 459.

Where the advertisement is nothing more than a suggestion to induce offers of a contract by others it imposes of itself no liability. Anderson *v.* St. Louis Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

80. Furman *v.* Parke, 21 N. J. L. 310.

81. Furman *v.* Parke, 21 N. J. L. 310; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

82. Furman *v.* Parke, 21 N. J. L. 310.

The secret motives of one making an offer of reward form no part of the contract. Kasling *v.* Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

The fact that the offerer expected others than the one arrested and proved guilty to be arrested will not relieve him from liability upon his offer when it has been acted upon by another. Kasling *v.* Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

83. Hankins *v.* Ottinger, 115 Cal. 454, 47 Pac. 254, 40 L. R. A. 76; People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Porter *v.* Day, 71 Wis. 296, 37 N. W. 259. See also Delier *v.* Plymouth Agricultural Soc., 57 Iowa 481, 10 N. W. 872.

But when a statute prohibits the offering of such rewards or premiums they cannot be

F. Construction of Offer — 1. General Rules Applicable. The general rules governing the interpretation of contracts[84] apply.[85] As the contract depends wholly upon the offer on one side and the performance on the other, without other communication between the parties,[86] the legal import and effect of the contract must be determined by the terms of the offer, fairly construed according to the intent of the party making it.[87] A fair interpretation of the offer should be given with due regard to the meaning of the language employed.[88] An offer of a reward for "the arrest and conviction" of an offender cannot, it has been held, be taken literally.[89]

recovered. Bronson Agricultural, etc., Assoc. *v.* Ramsdell, 24 Mich. 441.

When an exhibitor at a fair has become entitled to a certain sum offered for the best exhibit, there is no consideration for his agreement to take less than the amount due. Murray *v.* Walker, 83 Iowa 202, 48 N. W. 1075.

84. Interpretation of contract generally see Contracts, 9 Cyc. 577.

85. Central R., etc., Co. *v.* Cheatham, 85 Ala 292, 4 So. 828, 7 Am. St. Rep. 48; Freeman *v.* Boston, 5 Metc. (Mass.) 56; Washburn *v.* Humphreys, 35 N. C. 88.

Parol testimony cannot be admitted to explain or interpret a resolution of a board of underwriters of the city of New Orleans, offering a reward to be paid by the insurance companies for the apprehension of, with sufficient evidence to convict, any person guilty of the crime of arson. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

86. See *supra*, II, A.

87. Freeman *v.* Boston, 5 Metc. (Mass.) 56, 57, per Shaw, C. J.

The intent manifested by an advertisement must govern in its interpretation. Anderson *v.* St. Louis Public Schools, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707.

88. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

Illustration.— When a negro slave was stolen a reward of one hundred dollars was offered for the apprehension of both the negro and the thief, or fifty dollars for the negro out of the state, twenty-five dollars for the apprehension of the negro within the state. This means that the one hundred dollars was offered only for the arrest of the thief and the negro if taken without the state. Washburn *v.* Humphreys, 35 N. C. 88.

The words and terms used must be given their fair and reasonable import taken in connection with the circumstances in which they are used. Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

A dog is included in the words "any property whatsoever" in the Larceny Act of 1861, which imposes a penalty on any one who publicly advertises a reward for the return of any property whatsoever and uses in such advertisement any words purporting that no questions will be asked. Mirams *v.* Our Dogs Pub. Co., [1901] 2 K. B. 564, 70 L. J. K. B. 879, 85 L. T. Rep. N. S. 6, 17 T. L. R. 649, 49 Wkly. Rep. 626.

The abbreviation of the word "superintendent" in the signature of a railroad superintendent to an offer of reward is not material. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

A reward offered for a "capture" is not a reward offered for information. Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

The broadest meaning of the word "lost" was given to the term as used in an offer of reward in Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

The word "recover" may have its meaning affected by the circumstances under which it is used or the connection in which it is used in the offer of a reward. Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

The words "apprehension" and "arrest" have been construed to be interchangeable terms, arrest meaning the same as apprehension. Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

The more reasonable of two constructions should be given to the meaning of the terms of an offer of reward. Washburn *v.* Humphreys, 35 N. C. 88.

Where the mere reading of the offer makes its nature plain and unmistakable, this meaning should be adopted. Juniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696.

Where the advertisement offering the reward is signed by the city clerk and purports to be made "by order of the Mayor and Aldermen," it is the official act of the mayor and aldermen; and in construing it, the advertisement and the note authorizing it are to be taken together. Freeman *v.* Boston, 5 Metc. (Mass.) 56.

89. Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

For the arrest and conviction of an unknown offender should not be taken literally. Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012. In Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222, the offer was as follows: "$500 reward will be paid to any parties who will secure the arrest and conviction of any person who has injured persons or property by throwing stones or other missiles at the trains of the Chicago & Alton Railroad Company." This was construed not to apply to the case of a missile thrown in the course of a fight between an employee or passenger and a stranger.

Not in the alternative.— The offer of five thousand dollars for an arrest and conviction or information leading thereto is not in the alternative for two things, or ten thousand dollars, but for one thing and only five

2. Past or Future Offenses. Where the terms of the offer are general, the offer may apply equally to offenses committed either before or after the date of the offer.[90] Whether a reward for the arrest and conviction of a criminal applies to past or future offenses or to both is a question dependent upon the construction of the offer.[91]

3. Statutory Rewards. When a reward is offered by a statute, or by officials in pursuance of a statute, the question as to when the reward is earned, as well as that of the authority of the official to offer it, depends upon the construction of the statute;[92] and such a statute is to be liberally construed.[93]

G. Performance of Service — 1. Necessity. To make the offer a binding and enforceable contract, the act must be done or the services rendered in accordance with the terms of the offer, before it lapses or is revoked.[94]

2. Time of Performance — a. In General. Although the offer may not designate any time within which the services are to be rendered, it must be accepted by such performance within a reasonable time according to the nature of the subject-matter.[95]

b. Commenced Prior to Offer. Performance begun before the offer is made entitles the party to the reward when it is completed afterward.[96]

thousand dollars. Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193.

90. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

91. Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338; Abel *v.* Pembroke, 61 N. H. 357. In Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48, the reward was offered "for the arrest, with proof to convict, of any person or persons for the malicious obstructing of the tracks," and this was held applicable to both past and future offenses. In Freeman *v.* Boston, 5 Metc. (Mass.) 56, the advertisement recited that sundry houses had been set on fire and offered the reward for the conviction of any person setting fire to buildings. This was held to apply only to offenses previously committed.

92. Hungerford *v.* Moore, 65 Ala. 232; Drew *v.* Ricks, 17 Ala. 25; Crawford County *v.* Spenney 21 Ill. 288; Anderson *v.* Pierce County, 40 Nebr. 481, 58 N. W. 955; Gibbs *v.* U. S., 14 Ct. Cl. 544. See also *infra*, II, G, 3, c, (IX); III, C, 1, b.

Reward for offenders against state laws does not include offenders against the laws of the United States. Sias *v.* Hallock, 14 Nev. 332, where a reward payable by statute for the arrest of those who rob or attempt to rob was held to apply to a violation of the state law, but not to a robbery of the mail which is an offense against the United States.

Miss. Code (1892), § 1387, giving a reward to one who arrests a fleeing homicide and delivers him up for trial was construed in Newton County *v.* Doolittle, 72 Miss. 929, 18 So. 451, and Tate County *v.* Moore, 87 Miss. 245, 39 So. 781. See also as to statutory rewards in that state Martin *v.* Copiah County, 71 Miss. 407, 15 So. 73; Newton County *v.* Wells, 67 Miss. 151, 6 So. 614; Wilson *v.* Wallace, 64 Miss. 13, 8 So. 128; Itawamba County *v.* Candler, 62 Miss. 193; Jones *v.* Gibbs, 51 Miss. 401.

93. *In re* Kelly, 39 Conn. 159. But see Com. *v.* Edwards, 10 Phila. (Pa.) 215, where a statutory reward for the pursuit and arrest of a horse thief was held not to include a mule thief, construing the Pennsylvania Act of March 15, 1821, 7 Sm. Laws, p. 388.

94. Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62; Vigo Agricultural Soc. *v.* Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. St. Rep. 657; Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155. See also *supra*, II, A.

95. Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503; Loring *v.* Boston, 7 Metc. (Mass.) 409; Schaub *v.* Lancaster, 156 Pa. St. 362, 26 Atl. 1067, 21 L. R. A. 691.

Statutory limitation of prosecution.— In *In re* Kelly, 39 Conn. 159, 163, the court said: "The offer, it is true, is not limited in its terms as to time, but the statute of limitations, which is applicable to the crime in question, necessarily restricts the offer to the period within which the delinquent must be informed against and prosecuted, three years next after the offence was committed. So long as the statute of limitations continued to run against the offender, so long would this offer of reward continue good. As soon as the statute becomes a bar to the prosecution, all liability to pay the reward of course ceases, for the conviction of the offender is an event necessarily antecedent to the payment of the reward." In this case the offer was to the person "who shall be the means of detecting and convicting" certain incendiaries. In Drummond *v.* U. S., 35 Ct. Cl. 356, a claimant who made the arrest ten years after the offer of the reward was held to be entitled to recover it, since the prosecution for the crime had not become barred by statute.

Lapse of offer see *supra*, II, B, 6.

Within what time offer must be accepted see *supra*, II, C, 3.

96. Neville *v.* Kelly, 12 C. B. N. S. 740, 32 L. J. C. P. 118, 10 Wkly. Rep. 697, 104 E. C. L. 740.

3. What Constitutes Performance — a. In General. The person making the offer having the right to prescribe the conditions under which he will be liable,[97] the reward can be claimed only by him who, according to the true construction of the offer, has complied with these conditions,[98] and who was the moving cause of the performance of the services.[99]

b. Substantial Performance. Literal performance is not necessary.[1] Substantial compliance with the terms of the offer is in general sufficient.[2] However, substantial compliance at least with the conditions of the offer must be shown in order to authorize recovery.[3]

c. Under Offers For Particular Services — (I) *Information* — (A) *In General.* When the reward is offered for information leading to the arrest of a criminal or to the recovery of stolen property, etc., that person is entitled to it who first gives the information which is the effective means of securing the arrest or recovery of the property, although the physical capture may be made by others.[4] However, the information furnished by a person under such an offer of reward must be timely[5]

Necessity of knowledge of offer see *infra*, II, G, 6.

Revocation after part performance see *supra*, II, B, 5, b.

97. Right of offerer to prescribe conditions in offer see *supra*, II, B, 1, b, (I).

98. *California.*— Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111.

Connecticut.—Gardner *v.* Hartford, 14 Conn. 195; Bull *v.* Talcot, 2 Root 119, 1 Am. Dec. 62.

Illinois.— Chicago, etc., R. Co. *v.* Sebring, 19 Ill. App. 222.

Maine.— Haskell *v.* Davidson, 91 Me. 490, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Massachusetts.— Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.

Michigan.— Peterson *v.* Mark, 134 Mich. 594, 96 N. W. 926.

New York.— Jones *v.* Phœnix Bank, 8 N. Y. 228.

Pennsylvania.— Com. *v.* Edwards, 10 Phila. 215.

Texas.— Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Cr. 345, 72 S. W. 241.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. St. Rep. 731.

See 42 Cent. Dig. tit. "Rewards," § 8 *et seq.*

99. Rinehart *v.* Lancaster, 18 Wkly. Notes Cas. (Pa.) 364.

Performance may be by agent of claimant. Shuey *v.* U. S., 92 U. S. 73, 76, 23 L. ed. 697; Montgomery County *v.* Robinson, 85 Ill. 174; Heather *v.* Thompson, 78 S. W. 194, 25 Ky. L. Rep. 1554.

1. Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155; Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.

2. *Delaware.*— Gilkey *v.* Bailey, 2 Harr. 359.

Illinois.— Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

Kentucky.— Louisville, etc., R. Co. *v.* Goodnight, 10 Bush 552, 19 Am. Rep. 80.

Louisiana.— Salbadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Massachusetts.— Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.

New York.— Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Brennan *v.* Haff, 1 Hilt. 151.

United States.— Franklin *v.* Heiser, 9 Fed. Cas. No. 5,054, 6 Blatchf. 426.

England.— Smith *v.* Moore, 1 C. B. 138, 9 Jur. 352, 50 E. C. L. 438.

See 42 Cent. Dig. tit. "Rewards," § 8.

3. Burke *v.* Wells, 50 Cal. 218; Williams *v.* West Shore, etc., R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59; Ralls County *v.* Stephens, 104 Mo. App. 115, 78 S. W. 291; Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386; Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697.

4. Higgins *v.* Lessig, 49 Ill. App. 459; Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596; Shuey *v.* U. S., 92 U. S. 73, 76, 23 L. ed. 697; Tarner *v.* Walker, L. R. 2 Q. B. 301, 8 B. & S. 314, 36 L. J. Q. B. 112, 16 L. T. Rep. N. S. 234, 15 Wkly. Rep. 407; Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418; Thatcher *v.* England, 3 C. B. 254, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254; Smith *v.* Moore, 1 C. B. 438, 9 Jur. 352, 50 E. C. L. 438; Lancaster *v.* Walsh, 1 H. & H. 258, 4 M. & W. 16; Fallick *v.* Barber, 1 M. & S. 108.

"Information" means the communication of material facts for the first time. Lancaster *v.* Walsh, 1 H. & H. 258, 262, 4 M. & W. 16.

Production of letter.— If a person proclaims that he is desirous of obtaining an alleged letter, and will pay a reward for its production to him, one who, in consideration of such proclamation and offer, produces the letter and claims the reward is entitled to a judgment therefor. Wilson *v.* Stump, 103 Cal. 255, 67 Pac. 151, 42 Am. St. Rep. 111.

5. Higgins *v.* Lessig, 49 Ill. App. 459; Bent *v.* Wakefield Bank, 4 C. P. D. 1, 14 Cox

and adequate,[6] as furnishing information which does not lead to the desired result or information already known is not sufficient.

(B) *Furnishing Part of Information.* One who furnishes a part of the information necessary to secure a conviction is entitled to the reward offered for information leading to conviction.[7]

(C) *Informant as Witness or Prosecutor.* The informant need not act as prosecutor to entitle him to the reward.[8] Nor is it necessary that he should be a witness at the trial of the offender.[9]

(D) *Conviction Not Necessary.* When the reward offered is for the detection or discovery of an offender his conviction is not necessary; the giving of information entitles the informant to the reward.[10]

(E) *To Whom Information to Be Given.* The information must be given to the offerer or to a person in authority.[11]

(F) *Motive of Informant.* The motive of the claimant in supplying the requisite information is immaterial to his recovery of the reward.[12]

C. C. 208, 39 L. T. Rep. N. S. 576, 27 Wkly. Rep. 168.

Information is given too late after the criminal has surrendered himself to justice. Bent *v.* Wakefield Bank, 4 C. P. D. 1, 14 Cox C. C. 208, 39 L. T. Rep. N. S. 576, 27 Wkly. Rep. 168.

Information already known will not entitle the giver to the reward. Higgins *v.* Lessig, 49 Ill. App. 459.

Sufficient information.— Where the reward was for such information as would lead to the recovery of certain stolen property and the apprehension of the thief, plaintiff who had arrested the thief before the offer was made but gave defendant information leading to the recovery of the property afterward is entitled to the reward. Neville *v.* Kelly, 12 C. B. N. S. 740, 32 L. J. C. P. 118, 10 Wkly. Rep. 697, 104 E. C. L. 740.

6. Smith *v.* Moore, 1 C. B. 438, 9 Jur. 352, 50 E. C. L. 438.

Adequate information.— A reward having been offered for information leading to the discovery of a thief, A told B that C knew something of the theft and if given refreshment might be induced to confess. This was accordingly done and C confessed and was convicted. A was held to be entitled to the reward. Smith *v.* Moore, 1 C. B. 438, 9 Jur. 352, 50 E. C. L. 438.

Inadequate information.—After the offer of a reward by a New York bank for information leading to the arrest of its defaulting, absconding teller, one T notified the bank that the fugitive was at a certain hotel in Boston, but when an officer sent there to arrest him arrived, the fugitive had disappeared. Afterward plaintiff, a hotel-keeper in Boston, informed the police that the defaulter was at his hotel and he was there arrested and subsequently convicted. Since T's information did not lead to the arrest while that of plaintiff did, the latter is entitled to all of the reward. Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596.

Question for jury.—A watchmaker to whom a stolen watch had been brought by a receiver informed the person robbed of this fact who was thereby enabled to discover from the receiver where the thieves could be found and they were arrested and convicted. It was left to the jury to say whether this information entitled the watchmaker to recover a reward offered for information leading to the apprehension and conviction of the thieves. Tarner *v.* Walker, L. R. 2 Q. B. 301, 8 B. & S. 314, 36 L. J. Q. B. 112, 16 L. T. Rep. N. S. 234, 15 Wkly. Rep. 407.

7. *In re* Kelly, 39 Conn. 159.

8. U. S. *v.* 100 Barrels Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244.

9. Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747; U. S. *v.* 100 Barrels Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244.

10. Brennan *v.* Haff, 1 Hilt. (N. Y.) 151; Cunningham *v.* Fiske, 13 N. M. 331, 337, 83 Pac. 789, where the offer was for the discovery of certain murderers the court said that plaintiff might prove that the parties he asserted to be the murderers were such "even against evidence of a failure to convict, since that might result from causes entirely independent of the fact that the actual murderers were discovered and tried. The cause of action therefore accrued when the murderers were discovered." But see *infra*, III, G, 3, c, (IV).

Proof of guilt.— In Amis *v.* Conner, 43 Ark. 337, when the reward was offered for the arrest of the persons who committed a burglary, plaintiff caused the arrest of certain persons who escaped from jail before trial. It was held that he could not recover the reward without proving that these persons were guilty.

11. Lancaster *v.* Walsh, 1 H. & H. 258, 4 M. & W. 16; Lockhart *v.* Barnard, 9 Jur. 929, 15 L. J. Exch. 1, 14 M. & W. 674; Fallick *v.* Barber, 1 M. & S. 108.

12. Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418. But in Vittey *v.* Eley, 51 N. Y. App. Div. 44, 64 N. Y. Suppl. 397, it was ruled that the giving of the information must be voluntary and if it be screwed out of the claimant by threats of prosecution, "that would destroy the contractual element."

(II) *ARREST* — (A) *In General.* When the reward is offered for the arrest or apprehension [13] of a criminal, most cases hold that the person who causes the arrest to be made by an officer or other person, or who furnishes the information which leads directly to the arrest, has complied with the terms of the offer and is entitled to the reward.[14] But the doctrine of a few cases is that the giving of information which leads to an arrest actually made by others is not a performance of an offer of a reward for an arrest.[15] One who merely accompanies the real captor is not entitled to any part of the reward.[16]

(B) *As to Person Arrested.* The arrest must be of such person as is described in the offer.[17]

13. Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127.

14. *Illinois.*—Montgomery County *v.* Robinson, 85 Ill. 174; Swanton *v.* Ost, 74 Ill. App. 281.

Kentucky.—Heather *v.* Thompson, 78 S. W. 194, 25 Ky. L. Rep. 1554.

Maine.— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Maryland.— Goldsborough *v.* Cradie, 28 Md. 477.

Massachusetts.— Crawshaw *v.* Roxbury, 7 Gray 374.

Missouri.— Ralls County *v.* Stephens, 104 Mo. App. 115, 78 S. W. 291.

Ohio.— Gilmore *v.* Lewis, 12 Ohio 281.

See 42 Cent. Dig. tit. "Rewards," § 9.

Personal arrest by claimant is not necessary. Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155; Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

Performance by agent.— In Montgomery County *v.* Robinson, 85 Ill. 174, a county reward was offered to whomsoever shall "pursue and arrest, beyond the limits of this county, any person guilty of stealing any horse, mare, colt, mule or ass, within the territory of this county . . . payable on the conviction." A horse thief fled from that county to another state where he was put in jail on another charge. Plaintiff who learned this procured a requisition on the governor of the other state and had the thief brought back by a person employed by him and a conviction followed. Under these circumstances plaintiff was entitled to the reward since the person who made the pursuit and capture was his agent. When an agent is employed to make an arrest, the concealment by his principal of the fact that a reward had been offered gives to the agent no claim thereto, but the principal who instigated the arrest is entitled to all of it. Heather *v.* Thompson, 78 S. W. 194, 25 Ky. L. Rep. 1554.

A reward offered for the arrest of two persons is not earned by the arrest of one of them. Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.

15. Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284; Sias *v.* Hallock, 14 Nev. 332; Juniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696; McClaughry *v.* King, 147 Fed. 463, 79 C. C. A. 91, 7 L. R. A. N. S. 216.

One is not entitled to a reward for the capture of a thief simply because he has informed an officer where the thief can be found. Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

The person who actually arrests the thief is the one entitled to the reward, not the constable who furnished the information upon which the thief was recognized and apprehended. Walker's Application, 9 Pa. Dist. 121 (holding that the reward should be paid to the sheriff of Forest county, who arrests a man in that county for stealing a horse in Venango county upon information given by the sheriff thereof); Com. *v.* Anderson, 5 Kulp (Pa.) 302; Com. *v.* Fisher, 5 York Leg. Rec. (Pa.) 103.

Two rewards for different services.— In Shuey *v.* U. S., 92 U. S. 73, 23 L. ed. 697, two distinct rewards were offered, one for the apprehension of a fugitive and the other for information that would conduce to his arrest. The former reward contemplated the actual capture of the fugitive and was not earned by the giving of information which led to his arrest by a foreign government See Ste. Marie *v.* U. S., 9 Ct. Cl. 415.

16. Stroud *v.* Garrison, 24 Ark. 53; Johnson *v.* Com., 76 S. W. 832, 25 Ky. L. Rep. 986.

17. Amis *v.* Conner, 43 Ark. 337; State *v.* Auditor, 61 Mo. 263; Com. *v.* Edwards, 10 Phila. (Pa.) 215.

"Fugitives from justice."— In State *v.* Auditor, 61 Mo. 263, 269, a proclamation offered a reward for the arrest of named persons who had fled from justice. The reward claimant made the arrest seven years afterward. The court said: "It does not follow from this that the arrest of the persons advertised as fugitives would authorize the payment of the reward offered, if it appeared that at the time of their arrest they were not in fact fugitives from justice, but living openly and notoriously at their usual places of abode, without any concealment, and accessible by the officers of the law at all times. . . . The reward is offered to secure fugitives from justice, and not to secure the delivery of a person not a fugitive." See also Monroe County *v.* Bell, (Miss. 1895) 18 So 121.

Guilty persons.— If the reward is offered for the arrest of the persons who committed a burglary the claimant must show that the persons whose arrest he caused but who es-

(c) *Illegality of Arrest.* The arrest must be legal, since a promise to pay for the arrest of a person who is entitled to the enjoyment of his liberty, or against whom there exists no reasonable ground of suspicion, is contrary to public policy and therefore not enforceable.[18]

(d) *Necessity of Conviction.* Under a statute authorizing the offer of a reward for the arrest and apprehension of an offender, a person claiming the reward has no duty resting upon him of convicting the person arrested, although the reward cannot be paid until after such conviction, and the offer of the reward purports to be for such arrest and conviction.[19]

(e) *Voluntary Surrender of Offender.* If the offender voluntarily surrenders himself, the reward is not earned by the person who takes him into custody.[20]

(iii) *Arrest and Delivery.* When the reward is offered for the capture or arrest of an offender and his delivery, the claimant must show both a capture and a delivery by him,[21] unless after capture the delivery be prevented by lawful authority,[22] or by the death of the person arrested.[23]

(iv) *Arrest and Conviction* — (a) *In General.* The rule is well settled that when the reward is offered for the arrest and conviction of an offender the terms are construed copulatively and the claimant must show that he caused both the arrest and the subsequent conviction,[24] unless conviction be prevented by the

caped from jail were the guilty parties. Annis *v.* Conner, 43 Ark. 337.

"Horse thief."— When a reward is offered by statute for the arrest of any person who steals a "horse, mare or gelding," it cannot be claimed by one who pursues and arrests a thief who has stolen a mule. Com. *v.* Edwards, 10 Phila. (Pa.) 215.

"Runaway slaves."— If the reward is offered for the apprehension of runaway slaves it cannot be recovered by one who apprehended the negroes when they were returning to their owner. Goldsborough *v.* Cradie, 28 Md. 477.

18. Marking *v.* Needy, 8 Bush (Ky.) 22 [*followed* in Moore *v.* Peace, 97 S. W. 762, 30 Ky. L. Rep. 193]; Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

19. Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59. See also *supra*, II, G, 3, c, (I), (D).

20. Currie *v.* Swindall, 33 N. C. 361; Bent *v.* Wakefield Bank, 4 C. P. D. 1, 14 Cox C. C. 208, 39 L. T. Rep. N. S. 576, 27 Wkly. Rep. 168. See also Oktibbeha County *v.* Cottrel, 70 Miss. 117, 12 So. 156.

On way to surrender.— A statutory reward cannot be claimed for making an arrest when it appears that the person arrested was, in open day, on a public highway, going to the town in which he lived, and, if he had not been arrested when he was, would, within a few minutes, have arrived in the business part of the town, and when it also appears that, when arrested, he said he was on his way to surrender to the proper authorities. Oktibbeha County *v.* Cottrel, 70 Miss. 117, 12 So. 156.

21. *Kentucky.*— Nall *v.* Proctor, 3 Metc. 447.

Maryland.— Goldsborough *v.* Cradie, 28 Md. 477.

Mississippi.— Gould *v.* Chickasaw County, 85 Miss. 123, 37 So. 710.

North Carolina.— Currie *v.* Swindall, 33 N. C. 361.

Pennsylvania.— Juniata County *v.* McDonald, 122 Pa. St. 115, 15 Atl. 696.

South Carolina.— Clanton *v.* Young, 11 Rich. 546.

Texas.— Adair *v.* Cooper, 25 Tex. 548.

See 42 Cent. Dig. tit. "Rewards," § 10.

Delivery to agent.— Where A offered a reward for the arrest of B and his delivery to a sheriff in Georgia, and C, with the assistance of others, arrested B in California and delivered him to the agent of the state of Georgia, who brought him to Georgia and delivered him to the sheriff, C having made the arrest in California was held to be entitled to the reward. Hewitt *v.* Lamb, 130 Ga. 709, 61 S. E. 716.

22. Stone *v.* Dysert, 20 Kan. 123; Stephens *v.* Brooks, 2 Bush (Ky.) 137.

23. Mosley *v.* Stone, 108 Ky. 492, 56 S. W. 965, 22 Ky. L. Rep. 173, where the criminal was wounded when the arrest was made and died before delivery to the jail.

24. *Alabama.*— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

California.— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634; Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. 361.

Illinois.— Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

Missouri.—Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386.

New Jersey.— Furman *v.* Parke, 21 N. J. L. 310.

New York.— Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791.

Pennsylvania.—Rinehart *v.* Lancaster, 3 Pa. Cas. 210, 6 Atl. 91.

Canada.— Fortier *v.* Wilson, 11 U. C. C. P. 495.

See 42 Cent. Dig. tit. "Rewards," § 9.

Both are conditions precedent.— In Fitch *v.* Snedaker, 38 N. Y. 248, 250, 97 Am. Dec.

offerer,[25] or by lawful authority.[26] It is the ruling in some cases that one who claims such a reward must show that the arrest was made by him, or upon information supplied by him, and also that he gave some of the evidence or took part in the trial which resulted in the conviction;[27] but according to the weight of authority the offer is not to be so literally construed, and its terms are complied with by one who gives to the proper authorities or to the offerer, information which leads to the arrest and subsequent conviction of the offender, although he neither makes the arrest himself nor testifies at the trial.[28]

(B) *What Is "Conviction"* — (1) IN GENERAL. The word "conviction" in the offer is to be taken in its popular sense and means a plea or verdict of guilty,

791, where the reward was offered for such information as shall lead to the apprehension and conviction of the person guilty of a murder, the court said: "In order to entitle any person to the reward offered in this case, he must give such information as shall lead to both apprehension and conviction. That is, both must happen, and happen as a consequence of the information given. No person could claim the reward whose information caused the apprehension, until conviction followed, both are conditions precedent. No one could therefore claim the reward, who gave no information whatever until after the apprehension, although the information he afterward gave was the evidence upon which conviction was had, and, however clear, that, had the information been concealed or suppressed there could have been no conviction."

No apportionment of such reward.— In Hogan *v.* Stophlet, 179 Ill. 150, 153, 53 N. E. 604, 44 L. R. A. 809, the court said: "The reward was offered, not for the conviction alone, but for the apprehension and conviction of the guilty party. Appellant is entitled to recover for both, or he cannot recover at all. The reward cannot be apportioned, that is to say, there can be no apportionment of it between what is due for the apprehension and what is due for the conviction. The offer must be enforced as an entirety or not at all."

Conviction of precise offense.— Where the reward was for the detection and conviction of any person who may be guilty of feloniously setting fire to a building and the evidence shows that a person was convicted of setting fire to a building, but the court could not infer that it was feloniously done, a recovery of such reward was not allowed. Mead *v.* Boston, 3 Cush. (Mass.) 404. The offer of a reward by a telephone company for the conviction of persons tearing down or cutting wire or obstructing the transmission of messages does not apply to the cutting of a dead wire, since that does not interfere with messages. Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241. A reward for the detection and conviction of persons who "set fire to any building destroyed" is not earned by the detection and conviction of a person who set fire to a building where the fire went out before any very substantial damage was done, since the injury did not amount to a destruction within the meaning of the offer. Gardner *v.* Hartford, 14 Conn. 195.

Plaintiff must have been principally instrumental in securing the arrest and conviction. Rinehart *v.* Lancaster, 18 Wkly. Notes Cas. (Pa.) 364.

25. Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80, where the indictment was dismissed at the request of the attorney of the offerer.

26. Williams *v.* U. S., 12 Ct. Cl. 192, where, after a verdict of guilty, the district attorney moved the court to suspend judgment.

Suicide before conviction.— A person who had been arrested, charged with murder upon plaintiff's information, committed suicide in jail before trial. It was held that plaintiff could not recover a reward offered for information which would lead to conviction, because conviction is a condition precedent. Fortier *v.* Wilson, 11 U. C. C. P. 495.

27. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828; Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Lovejoy *v.* Atchison, etc., R. Co., 53 Mo. App. 386.

To furnish information that leads to arrest merely does not entitle one to a reward offered for the "arrest and conviction" of an offender. Williams *v.* Chicago St. R. Co., 119 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

28. *Maine.*— Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Massachusetts.— Crawshaw *v.* Roxbury, 7 Gray 374; Besse *v.* Dyer, 9 Allen 151, 85 Am. Dec. 747.

Missouri.— Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59.

Vermont.— Russell *v.* Stewart, 44 Vt. 170.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969.

See 42 Cent. Dig. tit. "Rewards," § 9.

The service contemplated is the obtaining and giving to some proper person interested sufficient information in relation to the perpetrator of the crime and his whereabouts as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction. Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

Identifying parties already under arrest not having done anything toward their capture or conviction would not entitle one to the reward. Williams *v.* West Chicago St. R. Co.,

although not followed by a sentence.[29] If an appeal from the judgment be taken, the reward is not earned till final conviction.[30]

(2) SECURED BY OTHER EVIDENCE. The communication of suspicions as to the guilt of a person whose arrest and conviction are secured by other evidence is not a compliance with the terms of the offer.[31]

(c) *Claiming and Receiving Witness' Fees.* Claiming and receiving witness' fees for attendance at the trial does not prejudice one in his claim for a reward for the arrest and conviction of the person testified against.[32]

(v) *RECOVERY OF STOLEN PROPERTY.* The person who imparts to the owner or to the police authorities knowledge of the facts which leads to the discovery of the things stolen with a view of obtaining the promised reward is entitled to the same, but he who makes the actual physical seizure in consequence of such information is not so entitled.[33]

(vi) *RECOVERY OF STOLEN PROPERTY AND APPREHENSION OF THIEF.* If the reward is offered for the apprehension of the thief and the recovery of the stolen property both conditions must be performed in order to make the offerer liable.[34]

(vii) *RECOVERY OF STOLEN PROPERTY AND DETECTION OF THIEF.* One who gives the owners of stolen property, who have offered a reward for its recovery and detection of the thief, information by which with reasonable diligence on their part they are enabled to recover the property and detect the thief is entitled to the reward.[35]

(viii) *RETURN OF LOST PROPERTY* — (A) *In General.* The finder of lost property is not entitled to a reward for restoring it to the owner if none has been offered;[36] but he is entitled if a reward has been offered.[37]

191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278.

29. Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738; Williams *v.* U. S., 12 Ct. Cl. 192. See also Haskell *v.* Davidson, 91 Me. 488, 40 Atl. 330, 64 Am. St. Rep. 254, 42 L. R. A. 155.

An order arresting judgment and discharging the prisoner does not set aside a verdict of guilty in a criminal case; and such verdict is nevertheless a conviction, within the meaning of a contract to pay a reward for the conviction of the person guilty of the offense in question. Buckley *v.* Schwartz, 83 Wis. 304, 53 N. W. 511.

30. Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44, 20 Ky. L. Rep. 1806.

31. Burke *v.* Wells, 50 Cal. 218; Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Austin *v.* Milwaukee County, 24 Wis. 278. *Compare* City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

32. Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59.

33. Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95.

34. Jones *v.* Phœnix Bank, 8 N. Y. 228, 232, where there was an offer of five thousand dollars for the apprehension of a forger and the recovery of the money, or a proportionate amount for any part thereof. The court said that "the apprehension of the offender coupled either with a complete or partial recovery of the money, entitles the party to the whole or a part of the reward, according to the amount of the money recovered. But neither the apprehension of the offender alone, nor the recovery of the money or any part of it alone, comes within the terms of the offer."

35. Besse *v.* Dyer, 9 Allen (Mass.) 151, 85 Am. Dec. 747.

36. Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Watts *v.* Ward, 1 Oreg. 86, 62 Am. Dec. 299; Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533.

But he may be entitled to compensation for his expense in preserving the property. Reeder *v.* Anderson, 4 Dana (Ky.) 193; Chase *v.* Corcoran, 106 Mass. 286.

Finder cannot use the property without the owner's consent, for the purpose of compensating himself for the trouble of finding and taking care of it. Amory *v.* Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Watts *v.* Ward, 1 Oreg. 86, 62 Am. Dec. 299.

37. Pierson *v.* Morch, 82 N. Y. 503; Cummings *v.* Gann, 52 Pa. St. 484.

Insisting upon the identification of the property before restoring it does not waive the right to claim the reward. Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

Aiding the finder. — Where defendant offered a reward for the recovery of the body of his son who had been drowned, the fact that he supplied plaintiff with a diving suit and a man to work the apparatus does not disentitle plaintiff to the reward. Bagnall *v.* Barnard, 59 Hun (N. Y.) 151, 13 N. Y. Suppl. 199.

Refusal of agent to disclose name of finder. — The reward cannot be recovered back because the agent or lawyer who returned the property refused to disclose the name of the

(B) *Return of Part of Property.* If only part of the lost property is restored to the loser, the finder is so entitled to a proportionate part of the reward.[38]

(C) *Lien of Finder.* If the reward offered is certain and definite, the finder has a lien on the property till the reward is paid;[39] but if the offer be indefinite, such as that of a "liberal reward," the finder has no lien on the property but must restore it to the owner and sue for his services on a *quantum meruit*.[40]

4. Part Performance[41] — a. In General. When the offer of a reward is entire, the general rule may be stated to be that the person who performs only part of the service or services requested is not entitled to any of the reward, since an entire contract is not apportionable and also because a part performance is not the doing of the act in consideration of which the promise was made.[42]

finder and made threats. Grady *v.* Crook, 2 Abb. N. Cas. (N. Y.) 53 [*affirmed* in 72 N. Y. 612].

Mislaid property.— A distinction is made between property lost, that is, when the possession has been involuntarily and accidentally parted with, and property mislaid, that is, when the place where it was put is forgotten. McAvoy *v.* Medina, 11 Allen (Mass.) 548, 87 Am. Dec. 733; Sovern *v.* Yoran, 16 Oreg. 269, 20 Pac. 100, 8 Am. St. Rep. 293; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502. And it has been held that a reward for the return of lost property is not earned by one who finds it in a place where it had been deposited. Kincaid *v.* Eaton, 98 Mass. 139, 93 Am. Dec. 142; Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

Where the property was not lost or was not recovered within the terms of the advertised offer, the reward cannot be said to be earned. Commercial Bank *v.* Pleasants, 6 Whart. (Pa.) 375.

Rescue of body "dead or alive."— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731, a man standing alongside of a house in flames said: "I will give $5,000 to any person who will bring the body of my wife out of that building, dead or alive." A person who relying on that offer rescued the body of the wife of the offerer from the burning building was held to be entitled to recover the reward.

Return of lost boy.— In Peterson *v.* Mark, 134 Mich. 594, 96 N. W. 926, the action was to recover a reward offered for the delivery of a lost boy and the defense was that the boy was not lost when found by plaintiff but was on his way home. Evidence that the boy was several miles from his home and was going in the opposite direction from it, when plaintiff took possession of him, was held to warrant the inference that the boy was lost.

38. Hawk *v.* Marion County, 48 Iowa 472; Deslondes *v.* Wilson, 5 La. 397, 25 Am. Dec. 187; Symmes *v.* Frazier, 6 Mass 344, 4 Am. Dec. 142.

Reason of rule.— In such case the terms of the offer have not been complied with and consequently no contract has been made, but the right to recover a part of the reward may be justified on the ground of quasi-contract since the loser has received a benefit from an act done at his request. In Symmes *v.* Frazier, *supra*, the court said that to give the finder of part of the lost property a *pro rata* share of the reward offered is "consistent with honesty and fair dealing . . . and not inconsistent with any principle of law."

39. Wilson *v.* Guyton, 8 Gill (Md.) 213; Preston *v.* Neale, 12 Gray (Mass.) 222; Wentworth *v.* Day, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888; Cummings *v.* Gann, 52 Pa. St. 484.

40. Wilson *v.* Guyton, 8 Gill (Md.) 213, 215. But in Baker *v.* Hoag, 7 Barb. (N. Y.) 113, where the promise was to "see the finder paid" the court said that "he was entitled to receive his compensation before he parted with the possession of the property" and that the finding was "like any other services performed upon property at the request of the owner." In Wilson *v.* Guyton, *supra*, the court said: "There was no fixed or certain reward offered by the owner, to be paid on the delivery of his property. His offer was to pay a "liberal reward." Who was to be the arbiter of the liberality of the offered reward? It cannot be supposed that the owner, by his offer, designed to constitute the recoverer of his property the exclusive judge of the amount to be paid him as a reward. And it is equally unreasonable and unjust, to say that the owner should be such exclusive judge. In the event of a difference between them, upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve the delays incident to litigation, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part, that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion; and, therefore, the law will never infer its existence either from the agreement of the parties, or in furtherance of public convenience or policy."

41. Hungerford *v.* Moore, 65 Ala. 232; Drew *v.* Ricks, 17 Ala. 25; Crawford County *v.* Spenney, 21 Ill. 288; Anderson *v.* Pierce County, 40 Nebr. 481, 58 N. W. 955; Gibbs *v.* U. S., 14 Ct. Cl. 544.

42. Part performance before offer made see *supra*, II, G, 2, b.

But this rule has been held not to apply to offers of rewards for the recovery of lost goods or property.[43]

b. Where Complete Performance Prevented. When the claimant has performed part of the service and is prevented by the offerer, or by those for whose acts he is responsible, from completing the work, he is entitled to the whole reward, or at least to compensation on a *quantum meruit*.[44]

5. Apportionment Where Several Performed — a. Acting in Concert. When the services asked for are rendered by several persons acting in concert, the reward is to be divided among them according to the relative value of their acts.[45] Where several persons join in claiming a reward, it is only necessary that they show that through their joint efforts the terms and conditions of the reward were satisfied.[46]

43. Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. 361; Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456; Furman *v.* Parke, 21 N. J. L. 310; Jones *v.* Phœnix Bank, 8 N. Y. 228; Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.

Insufficiency of part performance.—In Blain *v.* Pacific Express Co., 69 Tex. 74, 78, 6 S. W. 679, where the offer was for the arrest of two persons who had stolen money and only one was arrested and convicted the court said: "The promise is to pay so much money for the arrest of two persons. This is an entire proposition which, when acted upon by any person, would constitute a contract single in its nature, and not subject to apportionment under rules recognized wherever the common law is in force. No facts are stated, such as that the plaintiffs were prevented from arresting both the persons for whom a reward was offered by the fault or fraud of the defendant, from which the law would raise a new contract and give a remedy on a *quantum meruit*. It would be but the ordinary case of a partial performance of an entire contract."

Arrest and conviction of one of several murderers.— Where a reward is offered for the arrest and conviction of any one implicated in the murder of several persons, performance is not sufficient where one is arrested and convicted who was implicated in the murder of but one of the persons mentioned in the offer. Furman *v.* Parke, 21 N. J. L. 310.

No apportionment of a reward can be made for partial performance of the terms and conditions of the offer. Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.

Apportionment see *infra*, II, G, 5.

44. See *supra*, II, G, 3, c, (VIII).

45. Stone *v.* Dysert, 20 Kan. 123; Louisville, etc., R. Co. *v.* Goodnight, 10 Bush (Ky.) 552, 19 Am. Rep. 80; Blain *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.

Conviction prevented see *supra*, II, G, 3, c, (IV).

Delivery prevented see *supra*, II, G, 3, c, (III).

46. *Maryland.*— Goldsborough *v.* Cradie, 28 Md. 477.

Nebraska.— Elkhorn Valley Lodge No. 57, I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859.

New Hampshire.— Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185.

New York.— Fargo *v.* Arthur, 43 How. Pr. 193.

Ohio.— Rea *v.* Smith, 2 Handy 193, 12 Ohio Dec. (Reprint) 398.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

See 42 Cent. Dig. tit. "Rewards," § 16.

Compare Hart *v.* Green, 16 Colo. App. 70, 65 Pac. 344.

Information supplied by several.— When two or more persons disclose different facts which together lead to the result desired the reward is to be divided among them. Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193, where the requisite information was supplied by several parties, not a repetition of the same but information of independent facts, and the whole combined led to the apprehension and conviction for which the reward was offered, it was held that the distribution of the reward among the claimants should not be arbitrary but based on the relative value of their acts. In Thatcher *v.* England, 3 C. B. 254, 264, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254, the offer stated that £30 will be paid on recovery of the property and conviction of the offender, or in proportion to the amount recovered. Maule, J., said: "The advertiser intended that the reward should be paid among such persons as should give information and assistance in the recovery of the property, and the conviction of the offender, in proportion to the importance and value of their respective services. It is difficult to put a value on information. . . . It often happens that there is no one individual who gives information that is in itself useful; but that several persons give different pieces of information, the whole of which combined leads to the apprehension and conviction of the offender. One man discovers who he is, another where he is likely to be met with at a particular time, and so on."

Question of fact.— Where several persons searched for a dead body for the recovery of which a reward had been offered, and it was found by one, the question whether he acted independently or jointly with the other searchers is a question of fact. Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859.

b. Not Acting in Concert. If the service demanded is done by two or more persons not acting in concert with one another, then he alone is entitled to the reward who first complies with the terms of the offer.[47]

6. Performance Without Knowledge of Offer. According to the weight of authority the person rendering the service must have knowledge of the offer in order to be entitled to the reward;[48] but in other cases it is ruled that the person who performs the services is entitled to the reward, although he did not know of its offer at the time.[49] It has been suggested that when the reward is offered by statute a knowledge thereof should not be required in order to entitle one complying with its terms to recover.[50]

Not partners.— The mere fact that two or more persons act together in making an arrest does not make them partners so as to authorize one to make an agreement with a stranger concerning the division of the reward which will bind the others. Hart *v.* Green, 16 Colo. App. 70, 65 Pac. 344.

47. Goldsborough *v.* Cradie, 28 Md. 477; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193.

They need not show that they all did the work, it being sufficient if each performed a substantial part thereof. Goldsborough *v.* Cradie, 28 Md. 477; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193.

48. Stroud *v.* Garrison, 24 Ark. 53; Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Thatcher *v.* England, 3 C. B. 254, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254. See also *infra*, III, A.

49. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

California.— Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65.

Connecticut.— Marvin *v.* Treat, 37 Conn. 96, 9 Am. Rep. 307.

Illinois.— Williams *v.* West Chicago St. R. Co., 191 Ill. 610, 61 N. E. 456, 85 Am. St. Rep. 278; Ensminger *v.* Horn, 70 Ill. App. 605.

Missouri.— Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59; Sanderson *v.* Lane, 43 Mo. App. 158.

New York.— Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; City Bank *v.* Bangs, 2 Edw. 95.

North Dakota.— Couch *v.* State, 14 N. D. 361, 103 N. W. 942.

Tennessee.— Stamper *v.* Temple, 6 Humphr. 113, 14 Am. Dec. 296.

Texas.— Broadnax *v.* Ledbetter, 100 Tex. 375, 99 S. W. 1111, 9 L. R. A. N. S. 1057.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

See 42 Cent. Dig. tit. "Rewards," § 7.

Compare Abel *v.* Pembroke, 61 N. H. 357.

The reason for this rule, that is, that knowledge is necessary, is based on the theory everywhere recognized that an offer of a reward is the same as any other contractual offer and must be known and accepted by being acted upon. Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59. If the promise of a reward is to be brought, as seems sensible, within the classification of a contract, it is impossible to see how any other conclusion can be logically arrived at; for in every contract there must be an *aggregatio mentium*, and how can a meeting of minds exist without the acceptance of an offer, express or implied, or arising, at least, from some fiction of law? Smith *v.* Vernon County, *supra*. In Missouri the *dicta* of the courts show a trend toward the view that knowledge and reliance upon an offer of reward is necessary to recovery. Smith *v.* Vernon County, *supra* [*reviewing* Cummings *v.* Clinton County, 181 Mo. 162, 79 S. W. 1127; Ralls County *v.* Stephens, 104 Mo. App. 115, 78 S. W. 291; Sanderson *v.* Lane, 43 Mo. App. 158], where, however, Lamm, J., said: "It would serve no useful purpose to seek to disturb the reasoning of the foregoing cases, which seems to be in line with the better American doctrine, although if the question was entirely *res integra* we might be inclined to adopt the persuasive reasoning of Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728," *infra*, note 50.

50. *Delaware.*— Eagle *v.* Smith, 4 Houst. 293.

Indiana.— Dawkins *v.* Sappington, 26 Ind. 199; Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

Kentucky.— Auditor *v.* Ballard, 9 Bush 572, 15 Am. Rep. 728.

Massachusetts.— Crawshaw *v.* Roxbury, 7 Gray 374.

Vermont.— Russell *v.* Stewart, 44 Vt. 170.

United States.— Drummond *v.* U. S., 35 Ct. Cl. 356.

England.— Gibbons *v.* Proctor, 55 J. P. 616, 64 L. T. Rep. N. S. 594.

See 42 Cent. Dig. tit. "Rewards," § 7.

However, the decisions in Eagle *v.* Smith, 4 Houst. (Del.) 293, and Dawkins *v.* Sappington, 26 Ind. 199, are based upon an erroneous interpretation of Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418.

The reasoning of the authorities holding to the theory that knowledge of the reward is not necessary is thus expressed in Auditor *v.* Ballard, 9 Bush (Ky.) 572, 15 Am. Rep. 728, where it is said that the appellee is not entitled to the reward because he did not

7. Effect of Performance. If an offer is acted upon before its expiration [51] or revocation,[52] the offer and the acceptance by performance become a valid contract,[53] based upon a sufficient consideration,[54] upon which an action will lie to recover the amount of reward offered.[55]

8. Earning Statutory Reward. When a statutory reward is earned largely depends upon the construction given to the statute.[56]

III. Who May Claim Rewards.

A. In General. The general rule is that when a reward is offered to the public it may be claimed as earned by any one who performs the required act under the terms and conditions, if any, imposed by the offerer.[57] One cannot recover a reward where his acts were performed with knowledge of the offer, but without any intention of claiming it.[58] The information, it has been held, must

know at the time he arrested the fugitive and delivered him to the jailer that one had been offered, and therefore the services could not have been performed in consideration of the reward. If the offer was made in good faith, why should the state inquire whether appellee knew that it had been made? Would the benefit to the state be diminished by a discovery of the fact that the appellee, instead of acting from mercenary motives, had been actuated solely by a desire to prevent the escape of a fugitive and to bring a felon to trial? And is it not well that all may know that whoever in the community has it in his power to prevent the final escape of a fugitive from justice, and does prevent it, not only performs a virtuous service, but will entitle himself to such reward as may be offered therefor.

51. Broadnax *v.* Ledbetter, 100 Tex. 375, 378, 99 S. W. 1111, 9 L. R. A. N. S. 1057, where the court said: "It may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract. But the liability of the individual citizen must arise from a contract binding him to pay." However, in Abel *v.* Pembroke, 61 N. H. 357, the action was to recover a reward offered by a statute, which directed the payment to be made to the person who should in consequence of such offer apprehend any person charged with having committed any capital or other high crime, and it was held that under the plain language of the statute there could be no recovery for what was not done in consequence of the offer.

52. Expiration by lapse of time see *supra*, II, B, 6.

53. Revocation see *supra*, II, B, 5.

54. *Alabama.*— Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 40 So. 828, 7 Am. St. Rep. 48.

California.— Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

Illinois.— Von Vlissingen *v.* Manning, 105 Ill. App. 255.

Indiana.— Harson *v.* Pike, 16 Ind. 140.

Maine.— Mitchell *v.* Abbott, 86 Me. 338, 29 Atl. 1118, 41 Am. St. Rep. 559, 25 L. R. A. 503.

New Jersey.— Furman *v.* Parke, 21 N. J. L. 310.

New York.— Pierson *v.* Morch, 82 N. Y. 503.

Pennsylvania.— Cummings *v.* Gann, 52 Pa. St. 484, 490.

Texas.— Kasling *v.* Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

Wisconsin.— Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

See 42 Cent. Dig. tit. "Rewards," § 8 *et seq.*

Rule restated.— In the case of an offered reward for the doing of a certain thing, the act of one who, knowing of this, performs the condition, creates a contract; the performance constitutes both acceptance and fulfilment. Van Vlissingen *v.* Manning, 105 Ill. App. 255.

55. Consideration see *supra*, II, D.

56. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48; Morrell *v.* Quarles, 35 Ala. 544; Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

57. Bull *v.* Talcot, 2 Root (Conn.) 119, 1 Am. Dec. 62.

Effect of performance see II, G, 7.

Where many persons are engaged in the search for a dead body, for the recovery of which a reward is offered, and one acting on his own account, independent of others, and for the purpose of securing the reward, succeeds in finding the missing body, he will be entitled to the whole of such reward. Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859.

Claimant may estop himself from right to recover a reward. Witty *v.* Southern Pac. Co., 76 Fed. 217.

58. Hewitt *v.* Anderson, 56 Cal. 476, 38 Am. Rep. 65. In Abel *v.* Pembroke, 61 N. H. 357, the action was to recover a reward offered by a statute which directed payment to be made to the person who shall in consequence of such offer apprehend any person charged with having committed any capital or high crime," and it was held that under the plain language of a statute there could be no recovery for what was not done in consequence of the offer.

Knowledge of offer see *supra*, II, G, 6.

be given voluntarily, with knowledge of the offer of reward, and with a view to obtaining it.[59]

B. Agents, Employees, Etc. To the general rule that when the reward is offered to the public it may be claimed by any one doing the required act there are certain exceptions in the case of agents, employees, and other persons whose duty it already was to do that for the doing of which the reward is offered.[60]

C. Police and Other Officers — 1. Acting Within Scope of Official Duty — a. In General. From an early day [61] it has been established and continues to be the rule [62] that an agreement to pay money to a sheriff or other public officer for doing what he ought to do is void and against public policy. Accordingly, a public officer, such as a sheriff, constable, or policeman, is not entitled to a reward offered for the arrest or conviction of a criminal, when the service performed is within the scope or line of the duties of such officer.[63] It makes no difference

59. Vitty *v.* Eley, 51 N. Y. App. Div. 44, 64 N. Y. Suppl. 397.

60. Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. 361; Stacy *v.* State Bank, 5 Ill. 91; Pruitt *v.* Miller, 3 Ind. 16; Spinney *v.* U. S., 32 Ct. Cl. 397. See also Heather *v.* Thompson, 78 S. W. 194, 25 Ky. L. Rep. 1554.

Public officers and servants see *infra*, III, C.

A director in a bank cannot claim a reward offered for the detection of the person who had robbed the bank and for the recovery of the money stolen. Stacy *v.* State Bank, 5 Ill. 91.

It is the duty of a postmaster to assist in capturing the thief when his office has been robbed and therefore he cannot claim a general reward offered to all persons for the arrest of post-office burglars. Spinney *v.* U. S., 32 Ct. Cl. 397.

A private watchman employed by a railway company may claim a reward offered by a bank for the arrest of a defaulter. Minneapolis Bank *v.* Griffin, 66 Ill. App. 577 [*affirmed* in 168 Ill. 314, 48 N. E. 154].

A railroad employee, however, may claim a reward offered to the public for the arrest of persons injuring the property of the railroad. Chicago, etc., R. Co. *v.* Sebring, 16 Ill. App. 181, 19 Ill. App. 222.

Act in violation of duty.— A reward was offered for the return of a lunatic who had escaped from an asylum. The lunatic had been placed in the poorhouse of a county into which he had wandered and he was returned by the overseer of the poorhouse. Since the overseer had no right to take any one away without legal authority, he could not recover the reward. Ring *v.* Devlin, 68 Wis. 384, 32 N. W. 121.

61. Bridge *v.* Cage, Cro. Jac. 103, 79 Eng. Reprint 89.

"If once it should be allowed That such Promises [to an officer to pay more for his services than the law allows] could maintain an Action, the People would quickly be given to understand how kindly they would be taken, and happy would that Man be who could have his Business well done without them." 1 Hawkins P. C. c. 68, § 4.

"It would open a door to profligacy, chicanery, and corruption, if the officers appointed to carry out the criminal law were permitted to stipulate by private contract; it would open a door to the escape of offenders by culpable supineness and indifference on the part of those officers, and compel the injured persons to take upon themselves the burden of public prosecutions." Smith *v.* Whildin, 10 Pa. St. 39, 40, 49 Am. Dec. 572.

Such promises are void not only because of want of consideration (see Contracts, 9 Cyc. 348 text and note 41), but because they are contrary to public policy (see Contracts, 9 Cyc. 497 text and note 3).

A species of quasi-extortion, and partaking of the character of a bribe. See Stacy *v.* State Bank, 5 Ill. 91; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Ring *v.* Devlin, 68 Wis. 384, 32 N. W. 121; Stotesbury *v.* Smith, 2 Burr. 924, 97 Eng. Reprint 635; Bridge *v.* Cage, Cro. Jac. 103, 79 Eng. Reprint 89; Badow *v.* Salter, W. Jones 65, 82 Eng. Reprint 34; and cases cited *infra*, note 63.

62. **The policy of the law forbids** a public officer or those called to aid him in the discharge of public duty, receiving for his or their services any reward or compensation beyond that allowed by law. St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 66; Marking *v.* Needy, 8 Bush (Ky.) 22; Pool *v.* Boston, 5 Cush. (Mass.) 219; Day *v.* Putnam Ins. Co., 16 Minn. 408; Warner *v.* Grace, 14 Minn. 487; Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Gilmore *v.* Lewis, 12 Ohio 281; Stamper *v.* Temple, 6 Humphr. (Tenn.) 113, 44 Am. Dec. 296.

63. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Arkansas.— St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 66.

California.— Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355.

Connecticut.—*In re* Russell, 51 Conn. 577, 50 Am. Rep. 55.

Illinois.— Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Mahoney *v.* Whyte, 49 Ill. App. 97.

Indiana.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Iowa.— Means *v.* Hendershott, 24 Iowa 78.

Kentucky.— Marking *v.* Needy, 8 Bush

that the services were rendered at a time when the officer was not on duty,[64] or that the crime for which the arrest was made was committed in another county of the state.[65]

b. In Case of Statutory Reward. Some cases make a distinction between the right of an officer to take a reward from a private individual for the performance of his official duty and his right to such reward when offered by a statute or public authority, holding that in the latter case he is entitled;[66] but other authori-

22; Smitha *v.* Gentry, 45 S. W. 515, 20 Ky. L. Rep. 171, 42 L. R. A. 302.

Massachusetts.— Davies *v.* Burns, 5 Allen 349; Pool *v.* Boston, 5 Cush. 219.

Minnesota.— Day *v.* Putnam Ins. Co., 16 Minn. 408; Warner *v.* Grace, 14 Minn. 487.

Missouri.— Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658; Thornton *v.* Missouri Pac. R. Co., 42 Mo. App. 58.

Nebraska.— Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888.

New York.— Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596; Hatch *v.* Mann, 15 Wend. 44; City Bank *v.* Bangs, 2 Edw. 95.

North Carolina.— Malpass *v.* Caldwell, 70 N. C. 130.

Ohio.—Somerset Bank *v.* Edmund, 76 Ohio 396, 81 N. E. 641, 11 L. R. A. N. S. 1170; Gilmore *v.* Lewis, 12 Ohio 281.

Pennsylvania.— Smith *v.* Whildin, 10 Pa. St. 39, 49 Am. Dec. 572.

Tennessee.—Stamper *v.* Temple, 6 Humphr. 113, 44 Am. Dec. 296.

Texas.— Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

Vermont.— Brown *v.* Godfrey, 33 Vt. 120.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

United States.— U. S. *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738.

England.— Thatcher *v.* England, 6 C. B. 263, 10 Jur. 597, 15 L. J. C. P. 241, 54 E. C. L. 254.

See 42 Cent. Dig. tit. "Rewards," § 14. See also CONTRACTS, 9 Cyc. 348 text and note 41.

A man acting as one of the posse comitatus, called out by the sheriff to protect property during a strike, cannot claim a reward offered for the arrest of persons interfering with such property. St. Louis, etc., R. Co. *v.* Grafton, 51 Ark. 504, 11 S. W. 702, 14 Am. St. Rep. 66.

A constable.— Hatch *v.* Mann, 15 Wend. (N. Y.) 44 [*reversing* 9 Wend. 262].

Constable within his jurisdiction.— Somerset Bank *v.* Edmund, 76 Ohio St. 396, 81 N. E. 641, 11 L. R. A. N. S. 1170.

Deputy sheriff.—Cornwell *v.* St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305.

Detective, in obedience to orders from his superior, going to another state and making an arrest, is not entitled to the reward offered, because what he did was in pursuance of his duty. Atwood *v.* Armstrong, 102 N. Y. App. Div. 601, 92 N. Y. Suppl. 596.

A peace officer.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

Policeman.— Kick *v.* Merry, 23 Mo. 72, 66 Am. Dec. 658.

A regular constable.— Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Sheriff.— Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.

A sheriff in a sister state, arresting a fugitive from justice under a warrant and pursuant to a notice from a sheriff in this state, describing such fugitive and indicating the place where he may be found, acts strictly within the line of his duty as an officer, and is entitled only to such reward or compensation as is allowed him by law, and cannot recover from county commissioners in this state a general reward offered by them for the apprehension of such fugitive under Rev. St. § 918.

Special deputy.— Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888; Brown *v.* Sandusky County, 24 Ohio Cir. Ct. 481.

A watchman.— Pool *v.* Boston, 5 Cush. (Mass.) 219.

Agent of officer.— If a police officer communicates information as to the guilt of a suspected offender to a person who induces the criminal to confess and his conviction is secured in consequence of the confession such person cannot recover the reward. Dunham *v.* Stockbridge, 133 Mass. 233, 236. In this case the court said: "Undoubtedly a person may act in concert with an officer, and while so acting may discover evidence which may entitle him to the whole reward, but when the information which led to the discovery was first obtained by the officer, and then such information was communicated by him to another person, who acted on it specifically according to the request and direction of the officer, it is doubtful whether such a person must not be regarded as the agent of the officer."

The making of extraordinary efforts and the incurring of expense not covered by legal fees will not, it has been held, entitle an officer to recover a reward for making an arrest which it was his legal duty to make. Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.

64. *In re* Russell, 51 Conn. 577, 50 Am. Rep. 55.

65. Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355; Warner *v.* Grace, 14 Minn. 487.

66. Porterfield *v.* State, 92 Tenn. 289, 21 S. W. 519; U. S. *v.* Matthews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738.

A deputy United States marshal, who had complied with all the conditions of the offer and of the statute, was entitled to receive the amount of the reward offered. U. S. *v.* Mat-

ties hold that an officer is not entitled even to a statutory reward unless it is expressly so provided in the statute.[67]

2. Acting Without Scope of Official Duty. When an officer performs the services for which the reward is offered by acts outside of the line of his duty, he is entitled to the reward.[68]

3. Ceasing to Be Officer. When an officer has ceased to be such, he may become entitled to the reward by services thereafter rendered.[69]

D. Particeps Criminis. One who aids or abets in the commission of a crime, or in its concealment, cannot recover a reward offered for the arrest or conviction of the person who committed it, since no man shall take advantage of his own wrong.[70]

thews, 173 U. S. 381, 19 S. Ct. 413, 43 L. ed. 738.

67. Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355; Pool *v.* Boston, 5 Cush. (Mass.) 219; *Ex p.* Gore, 57 Miss. 251.

68. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Indiana.— Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Louisiana.— Pilie *v.* New Orleans, 19 La. Ann. 274; Murphy *v.* New Orleans, 11 La. Ann. 323.

Missouri.— Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59. *Compare* Cornwell *v.* St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305.

New York.—Gregg *v.* Pierce, 53 Barb. 387.

Texas.— Kasling *v.* Morris, 71 Tex. 584, 9 S. W. 739, 10 Am. St. Rep. 797.

Vermont.— Russell *v.* Stewart, 44 Vt. 170; Davis *v.* Munson, 43 Vt. 676, 5 Am. Rep. 315; Brown *v.* Godfrey, 33 Vt. 120.

Wisconsin.— Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

See 42 Cent. Dig. tit. "Rewards," § 15.

Compare Curran *v.* Collier, 7 Indian Terr. 148, 104 S. W. 572.

If an officer renders extraordinary services beyond or outside the limit of his ordinary official duty and for which a reward has been offered, he becomes entitled to the reward. Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Cornwell *v.* St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305; Gregg *v.* Pierce, 53 Barb. (N. Y.) 387; Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

Acts as private person.— In Brown *v.* Godfrey, 33 Vt. 120, the court said that "an officer has no authority, and is not bound, to search for offenders outside of the line of his jurisdiction, and if he should go in pursuit of an offender beyond or without his jurisdiction, his services, while thus without his jurisdiction, would be those of a private person . . . and for the payment of such services he would be allowed to stipulate by contract like any private person."

A fireman does not contract to risk his life in rescuing a person from a burning building in the fire department's service, and is therefore entitled to the reward offered for such rescue. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

A special constable, holding a warrant directed simply to any constable of the county, and who, relying upon an offer of reward, makes the arrest, has been held to be entitled to the reward. Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1.

Police officer arresting a fugitive from another state for a crime there committed may recover a reward offered for such arrest. Morrell *v.* Quarles, 35 Ala. 544; Smith *v.* Vernon County, 188 Mo. 501, 87 S. W. 949, 107 Am. St. Rep. 324, 70 L. R. A. 59.

A surety on a bail-bond having offered a reward for the delivery of the principal, neither public policy nor positive law prevents policemen from receiving the reward, it being offered solely for the surety's benefit to save him harmless on the bond. Curran *v.* Collier, 7 Indian Terr. 148, 104 S. W. 572.

69. Cornwell *v.* St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305.

Where an offer of reward is renewed to one who had been a deputy sheriff and the offer is acted upon, it becomes a contract which is executed upon rendition of the services for which the reward is offered, and a substantial performance of the conditions of the reward entitles the claimant to the recompense proffered. Cornwell *v.* St. Louis Transit Co., 100 Mo. App. 258, 73 S. W. 305.

70. Clinton County *v.* Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780; Hassan *v.* Doe, 38 Me. 45; Jenkins *v.* Kelren, 12 Gray (Mass.) 330, 74 Am. Dec. 596; Bledsoe *v.* Jackson, 4 Sneed (Tenn.) 429.

One who colludes with an escaped criminal, inducing him to allow himself to be delivered up for trial, promising that a part of the reward offered for him, when collected, should be used in his defense, is not entitled to the reward. State *v.* Dinkins, 77 Miss. 874, 27 So. 832.

The person who had concealed a fugitive murderer and agreed to share with him the reward offered for his arrest cannot recover it. Bledsoe *v.* Jackson, 4 Sneed (Tenn.) 429.

Vote buying.— A statute provided that any person furnishing testimony necessary to procure the conviction of any one selling his vote should be entitled to a certain reward. It was not then a statutory crime in that state to buy votes. A claimant who bought, or caused to be bought, certain votes cannot recover the reward, because vote buying is an

IV. Recovery of Reward.

A. Right of Action. A right of action to recover a reward accrues to plaintiff upon his doing the act or performing the service for which the reward was offered.[71]

B. Form of Action. Assumpsit [72] is the ordinary action for the recovery of a reward, but debt also lies.[73]

C. Where There Are Several Claimants — 1. Parties. If the arrest or other service by which the reward was earned was performed by two or more persons, they should sue jointly.[74]

2. Interpleader. When the reward is claimed by different persons, the offerer may file a bill of interpleader.[75]

3. Recovery of One From the Other. The person really entitled to a reward may recover it from one to whom it was erroneously paid.[76]

D. Pleading [77] — 1. Declaration or Complaint. The declaration or complaint must contain sufficient allegations as to the contract,[78] based upon the offer of defendant,[79] which was accepted by plaintiff,[80] who complied with the terms and conditions [81] by performing the services requested.[82]

immoral and wrongful act, and public policy forbids a recovery in such case. Clinton County *v.* Davis, 162 Ind. 60, 69 N. E. 680, 64 L. R. A. 780. Defendant having offered a reward for the arrest of persons violating the election laws, plaintiff obtained from a tax collector a tax receipt purporting to have been issued to E L J, a fictitious person. This was unlawful, and plaintiff arrested the tax collector. The trial judge said that if plaintiff "induced this man to commit a crime . . . by any trick or device or artifice, induced him to do a thing that he would not have done of his own volition and own mind, there could be no recovery. But if he simply went to him and asked him for a tax receipt, and that was all he did, and it was furnished him, I don't think that that was such a trick or artifice as makes it improper or illegal that Mr. Wilmoth should recover." And this charge was approved on appeal. Wilmoth *v.* Hensel, 151 Pa. St. 200, 208, 25 Atl. 86, 31 Am. St. Rep. 738.

71. See *supra*, II, G, 7.

Assignment after action commenced does not operate to defeat the action. Goldsborough *v.* Cradie, 28 Md. 477.

Conditions precedent.— The offering and payment of rewards for the arrest of escaped criminals is intrusted solely to the discretion of the governor, and a suit cannot be maintained against the state for the recovery of a reward which the governor has refused to order paid. State *v.* Dinkins, 77 Miss. 874, 27 So. 832. One who sues to recover an unpaid reward for the "return of a stolen horse" is not obliged, before bringing his suit, to put the owner in possession of the animal. Everman *v.* Hyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

72. Madison First Nat. Bank *v.* Hart, 55 Ill. 62; Symmes *v.* Frazier, 6 Mass. 344, 4 Am. Dec. 142; Furman *v.* Parke, 21 N. J. L. 310; Fitch *v.* Snedaker, 38 N. Y. 248, 97 Am. Dec. 791; Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418; Lancaster *v.* Walsh, 1 H. & H. 258, 4 M. & W. 16.

Assumpsit generally see Assumpsit, Action of, 4 Cyc. 317.

73. Furman *v.* Parke, 21 N. J. L. 310.

Debt generally see Debt, Action of, 13 Cyc. 402.

74. Goldsborough *v.* Cradie, 28 Md. 477; Janvrin *v.* Exeter, 48 N. H. 83, 2 Am. Rep. 185; Williams *v.* Carwardine, 4 B. & Ad. 621, 24 E. C. L. 274, 5 C. & P. 566, 24 E. C. L. 711, 2 L. J. K. B. 101, 1 N. & M. 418. *Compare* Jenkins *v.* Kelren, 12 Gray (Mass.) 330, 74 Am. Dec. 596.

Parties generally see Parties, 30 Cyc. 1.

75. Howland *v.* Lounds, 51 N. Y. 604, 609, 10 Am. Rep. 654; Fargo *v.* Arthur, 43 How. Pr. (N. Y.) 193; City Bank *v.* Bangs, 2 Paige (N. Y.) 570. *Compare* Ensminger *v.* Horne, 70 Ill. App. 605; Mahoney *v.* Whyte, 49 Ill. App. 97; Burritt *v.* Press Pub. Co., 19 N. Y. App. Div. 609, 46 N. Y. Suppl. 295; City Bank *v.* Bangs, 2 Edw. (N. Y.) 95; Russell *v.* Stewart, 44 Vt. 170.

Interpleader generally see Interpleader, 23 Cyc. 1.

For action in the nature of a bill of interpleader see Warner *v.* Grace, 14 Minn. 487.

76. Stephens *v.* Brooks, 2 Bush (Ky.) 137; Williams *v.* Thweatt, 12 Rich. (S. C.) 478.

The fact that one claimant sued for the reward and recovered a judgment does not affect the right of another claimant. Swanton *v.* Ost, 74 Ill. App. 281.

Intervention see Burke *v.* Wells, 50 Cal. 218; Ward *v.* Keystone Land Co., (Tex. Civ. App. 1896) 38 S. W. 532.

77. Pleading generally see Pleading, 31 Cyc. 1.

78. See *supra*, II.

79. Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1. See also *supra*, II, B.

80. See *supra*, II, C.

81. Reif *v.* Paige, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731. See *supra*, II, G.

82. See *supra*, II, G.

Sufficiency of the declaration or complaint

2. Plea or Answer. The plea or answer must conform to the rules of pleading governing actions of assumpsit [83] or debt,[84] as the case may be.

E. Evidence — 1. Presumptions [85] and Burden of Proof. The burden of proof is on plaintiff to prove the material allegations of the declaration or complaint.[86] When the reward was offered by an official of a corporation it is not necessary to prove that authority to do so had been conferred on him by a resolution of the board of directors.[87] The presumption is, in the absence of rebutting evidence, that the act was an official transaction, where a circular having been sent by mail to plaintiff suing to recover a reward, in response to a letter directed to the superintendent, is in an official envelope and addressed in the handwriting of his secretary.[88] Where a resolution was adopted in good faith at a regular meeting of the board, and, after being signed by the commissioners individually, was attested by the county auditor, and in that form published in a newspaper, the authorized inference to be drawn from such published resolution is that the board intended in its official capacity to create a public liability.[89]

2. Admissibility. Plaintiff is entitled to offer evidence as to all of his acts by which he earned the reward.[90]

in particular cases see Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111; McLeod *v.* Meade, 77 Cal. 87, 19 Pac. 189; Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1. In Codding *v.* Inhabitants of Mansfield, 7 Gray (Mass.) 272, an extremely technical rule of pleading was applied. The reward was offered "to any person who will give information to the subscribers that will lead to the detection and conviction of the person who set fire to the dwelling house of C. P. Lobdell." The declaration alleged that the plaintiff arrested one P as the person who set fire to the house and gave information thereof to the defendant whereupon such proceedings were had that the prisoner was convicted. This was adjudged to be insufficient because "for aught that the declaration states, Pickering may have been detected before the plaintiff arrested him, or afterwards, on information derived wholly from other persons than the plaintiff."

Negativing revocation of offer.— If a complaint alleges an offer of a reward, and that within five days thereafter in reliance thereon plaintiff performed the services requested, it need not aver that such offer had not been revoked or withdrawn. Wilson *v.* Stump, 103 Cal. 255, 37 Pac. 151, 42 Am. St. Rep. 111.

83. See Assumpsit, Action of, 4 Cyc. 348.

84. See Debt, Action of, 13 Cyc. 417.

Plea of non est factum see Blaine *v.* Pacific Express Co., 69 Tex. 74, 6 S. W. 679.

Setting up special defense.— Where a telephone company offered a reward for the conviction of any person guilty of cutting, pulling, tearing down, or misplacing its wires, posts, etc., or unlawfully obstructing the transmission of messages in violation of article 784 of the Penal Code, the company had the right, in an action against it, to recover the reward because of the conviction of one for cutting a wire, to plead as a special defense the fact that the wire cut was a dead one, and did not come within the offer and that plaintiff had personal notice that the reward did not apply to such wires. Southwestern Tel., etc., Co. *v.* Priest, 31 Tex. Civ. App. 345, 72 S. W. 241.

85. Presumption as to lapse of offer see *supra*, II, B, 6.

86. Amis *v.* Conner, 43 Ark. 337; Higgins *v.* Lessig, 49 Ill. App. 459; Howland *v.* Lounds, 51 N. Y. 604, 10 Am. Rep. 654.

Authority of agent.— A hand-bill headed with the names of two railroad companies offering a reward "for the arrest, with proof to convict, any person or persons for the maliciously obstructing of the tracks of these companies" signed T. D. K. Superintendent, is on its face the act of the corporation acting through its agent, and it is not necessary to show that the superintendent had express authority conferred upon him by a resolution of the board of directors. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

87. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48, where plaintiff wrote to the superintendent of a railway company, evidence that in reply he received a copy of the hand-bill by which the reward was offered in an official envelope of the company is admissible to prove that the superintendent acted officially.

88. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

89. Scheiber *v.* Von Arx, 87 Minn. 298, 92 N. W. 3.

90. Simonds *v.* Clapp, 16 N. H. 222; Brague *v.* Lord, 2 Abb. N. Cas. (N. Y.) 1; Rollins *v.* Clement, 25 S. C. 601.

Any facts tending to show ratification by the company, by the acts of the superintendent on the part of the company offering a reward, may be submitted to the jury. Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. Rep. 48.

A record of the conviction of a person for shooting another, and the trial of his guilt, are admissible in evidence against one who has offered a reward for the arrest and conviction, for the purpose of showing that the person convicted was guilty, and that the

3. Weight and Sufficiency. The general rules relating to weight and sufficiency of evidence [91] apply.[92] If the reward was offered for the arrest and conviction of the person who committed a certain crime, the record of the conviction of a person for that crime is *prima facie* evidence of his guilt and it need not be otherwise proved.[93] An official certificate of the governor to a reward offered for the apprehension of an offender is only *prima facie* valid, and may be shown to be invalid by proof that would invalidate other official certificates purporting to be acts of the officers whose names they bear.[94]

F. Variance. The rules of variance [95] between the allegation in the pleadings of the proof thereunder apply.[96]

G. Trial. Directing the verdict,[97] dismissal of the proceeding,[98] giving and refusing of instructions,[99] questions of fact for the jury,[1] and costs [2] are governed

reward had been earned by plaintiff who caused the arrest and conviction. Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509.

To prove the offer of a reward for the arrest of a person, a copy of the governor's proclamation duly certified by the secretary of state, with whom the original is deposited, is admissible. McPeek *v.* Western Union Tel. Co., 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214.

91. See Evidence, 17 Cyc. 753.

92. Campbell *v.* Mercier, 108 Ga. 103, 33 S. E. 871; Cornwell *v.* St. Louis Transit Co., 106 Mo. 135, 80 S. W. 744.

Thus evidence that a person who offered a reward for the arrest and conviction of any person found maliciously obstructing railroad tracks has acted for three years as general superintendent of the company; that notices offering such reward were posted at every station and must have been seen by the president; that such notices were furnished to such manager by the vice-president, and that the act of the manager in offering the reward was never repudiated by the company, sufficiently sustained a finding that the company's officers knew of and ratified the act of the manager who offered the reward. Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

93. *Arkansas.*— Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54.

California.— Burke *v.* Wells, 34 Cal. 60.

Massachusetts.— Brown *v.* Bradlee, 156 Mass. 28, 30 N. E. 85, 32 Am. St. Rep. 430, 15 L. R. A. 509; Mead. *v.* Boston, 3 Cush. 404.

New York.— Brennan *v.* Haff, 1 Hilt. 151.

Pennsylvania.— York *v.* Forscht, 23 Pa. St. 391.

See 42 Cent. Dig. tit. "Rewards," § 23.

94. Hager *v.* Sidebottom, (Ky. 1908) 113 S. W. 870.

95. See Pleading, 31 Cyc. 700.

96. *In re* Kelly, 39 Conn. 159; Mount *v.* Montgomery County, 168 Ind. 661, 80 N. E. 629, 14 L. R. A. N. S. 483; Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44, 20 Ky. L. Rep. 1806; Morris *v.* Kasling, 79 Tex. 141, 15 S. W. 226, 11 L. R. A. 398.

Illustration.— Where, in an action to recover a reward for the prosecution of vote sellers at an election, defendant pleaded an unlawful contract between plaintiff and one of the bribers to pay the latter for information, merely to link plaintiff with the alleged unlawful transaction, and not as the basis of a cause of action, the fact that the answer charged that the contract was entered into between plainiff and B and T, and the proof showed that the contract was merely between plaintiff and B, constituted a mere variance, and not a failure of proof. Mount *v.* Montgomery County, 168 Ind. 661, 80 N. E. 629, 14 L. R. A. N. S. 483. A reward offered for the apprehension and conviction of such person as may have been implicated in the murder of four named individuals is not recoverable, upon an allegation that plaintiff had caused a certain party to be convicted of the murder of one of the individuals, it not being alleged that he was concerned in the murder of the other three. Furman *v.* Parke, 21 N. J. L. 310.

97. Hart *v.* Green, 16 Colo. App. 70, 65 Pac. 344; Curran *v.* Collier, 7 Indian Terr. 148, 104 S. W. 572; Huckins *v.* East Saginaw Second Nat. Bank, 47 Mich. 92, 10 N. W. 122. See also Trial.

98. Johnson *v.* Com., 76 S. W. 832, 25 Ky. L. Rep. 986. See also Dismissal and Nonsuit, 14 Cyc. 387.

99. See Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193; Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Everman *v.* Heyman, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284; Dunham *v.* Stockbridge, 133 Mass. 233; Huckins *v.* East Saginaw Second Nat. Bank, 47 Mich. 92, 10 N. W. 122; Cornwall *v.* St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744; Hugill *v.* Kinney, 9 Oreg. 250, 42 Am. Rep. 801. See also Trial.

1. Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859; Miller *v.* Hogeboom, 56 Nebr. 434, 76 N. W. 888; Wilmoth *v.* Hensel, 151 Pa. St. 200, 25 Atl. 86, 31 Am. St. Rep. 738; Tarner *v.* Walker, L. R. 1 Q. B. 641, 6 B. & S. 871, 35 L. J. Q. B. 179, 14 L. T. Rep. N. S. 660, 14 Wkly. Rep. 793, 118 E. C. L. 871 [*affirmed* in L. R. 2 Q. B. 301, 8 B. & S. 314, 36 L. J. Q. B. 112, 16 L. T. Rep. N. S. 234, 15 Wkly. Rep. 407]; Lancaster *v.* Walsh, 1 H. & H. 258, 261, 4 M. & W. 16. See also Trial.

2. Kinn *v.* Mineral Point First Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012. See also Costs, 11 Cyc. 1 *et seq.*

by the rules of procedure in civil actions generally. It was held to be improper to adjudge costs in favor of a bank out of the fund deposited in court, such fund being an award paid into court under interpleader proceedings, where two or more persons were claiming it.[3]

H. Appeal. The review of the judgment [4] follows the practice applicable to appeals in civil actions in general.[5] The usual presumptions will be indulged.[6] Prejudicial instructions are ground for reversal;[7] otherwise where the error is harmless.[8] Claims for services to a county under a reward offered therefor by the board of supervisors are within the exclusive jurisdiction of the board, and its disposition of them is not subject to review on the facts; nor will any action lie against the county therefor after the board has considered and rejected them.[9]

V. MANDAMUS.

Mandamus may lie in a proper case [10] to compel a public officer to pay a statutory reward which has been earned.[11]

REX AD JUSTITIAM FACIENDAM NON COGITUR. A maxim meaning "The king can not be forced to do justice." [1]

REX DATUR PROPTER REGNUM; NON REGNUM PROPTER REGEM. A maxim meaning "A king is given for the sake of the kingdom; not the kingdom for a king." [2]

REX DEBET ESSE SUB LEGE; QUIA LEX FACIT REGEM. A maxim meaning "The king should be subject to the law; for the law makes the king." [3]

REX EST CAPUT ET SALUS REIPUBLICÆ. A maxim meaning "The king is the guardian and head of the commonwealth." [4]

REX EST LEGALIS ET POLITICUS. A maxim meaning "The king is both a legal and political person." [5]

REX EST LEX VIVENS. A maxim meaning "The king is the living law." [6]

REX EST MAJOR SINGULIS, MINOR UNIVERSIS. A maxim meaning "The king is greater than any single person, less than all." [7]

REX EST PATER PATRIÆ. A maxim meaning "The king is the father of his country." [8]

REX EST PERSONA MIXTA, MEDICUS REGNI; PATER PATRIÆ; ET SPONSUS REGNI. A maxim meaning "The king is a mixed person; the physician of the state, the father of the country, and the husband of the kingdom." [9]

3. Kinn *v.* Mineral Point Nat. Bank, 118 Wis. 537, 95 N. W. 969, 99 Am. St. Rep. 1012.

4. Campbell *v.* Mercer, 108 Ga. 103, 33 S. E. 871; Hogan *v.* Stophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809; Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859.

5. See APPEAL AND ERROR, 2 Cyc. 474.

6. Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. 802, 115 Am. St. Rep. 54 (holding that it must be presumed that if the record shows that a paper was placed in evidence, its contents were made known to the jury on the trial); Means *v.* Hendershott, 24 Iowa 78; Elkhorn Valley Lodge No. 57 I. O. O. F. *v.* Hudson, 59 Nebr. 672, 81 N. W. 859.

7. Biggers *v.* Owen, 79 Ga. 658, 5 S. E. 193; Dunham *v.* Stockbridge, 133 Mass. 233; Hugill *v.* Kinney, 9 Oreg. 250, 42 Am. Rep. 801.

8. Bronnenberg *v.* Coburn, 110 Ind. 169, 11 N. E. 29; Hayden *v.* Souger, 56 Ind. 42, 26 Am. Rep. 1; Cornwell *v.* St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744.

9. Stamp *v.* Cass County, 47 Mich. 330, 11 N. W. 183.

One who claims all of a reward and submits the matter to a board of supervisors, who give him only a part, cannot further litigate the question. Prentiss *v.* Farnham, 22 Barb. (N. Y.) 519.

10. See MANDAMUS, 26 Cyc. 227.

11. See Lees *v.* Colgan, 120 Cal. 262, 52 Pac. 502, 40 L. R. A. 355; Hager *v.* Sidebottom, (Ky. 1908) 113 S. W. 870; Stone *v.* Wickliffe, 106 Ky. 252, 50 S. W. 44, 20 Ky. L. Rep. 1806.

1. Morgan Leg. Max. [*citing* Halkerstone Max.].

2. Morgan Leg. Max.

3. Peloubet Leg. Max. [*citing* 1 Blackstone Comm. 239].

4. Peloubet Leg. Max. [*citing* Beverley's Case, 4 Coke 123*b*, 124, 76 Eng. Reprint 1118].

5. Black L. Dict.

6. Morgan Leg. Max. [*citing* Jenkins Cent. 17].

7. Black L. Dict.

8. Morgan Leg. Max. [*citing* Halkerstone Max. 162].

9. Peloubet Leg. Max. [*citing* Magdalen College Case, 11 Coke 66*b*, 70*b*].

REX EST PERSONA SACRA ET MIXTA CUM SACERDOTE. A maxim meaning "The king is a sacred person, and mixed with the priesthood." [10]

REX EST QUI METUIT, ET QUI CUPIT NIHIL. A maxim meaning "He is truly a king who fears nothing, and who desires nothing." [11]

REX HOC SOLUM NON POTEST FACERE QUOD NON POTEST INJUSTE AGERE. A maxim meaning "The king can do everything but an injustice." [12]

REX IN REGNO SUO NON HABET PAREM. A maxim meaning "The king has no equal in his own kingdom." [13]

REX LEGE CADERE NON POTEST. A maxim meaning "The king can not legally cease." [14]

REX LEGI SUBJECTUS EST. A maxim meaning "The king is subject to the law." [15]

REX NIHIL ALIUD EST QUAM LEX AGENS. A maxim meaning "The king is nothing else than law in action." [16]

REX NIL DAT NISI PER RECORDUM. A maxim meaning "The king gives nothing except by record." [17]

REX NIL POTEST JUBERE NISI PER CURIAM LEGITIME CONSTITUAM. A maxim meaning "The king can order nothing except through his regularly-constituted parliament." [18]

REX NON DEBET ESSE SUB HOMINE, SED SUB DEO ET SUB LEGE, QUIA LEX FACIT REGEM. A maxim meaning "The king ought to be under no man, but under God and the law, because the law makes a king." [19]

REX NON DEBET JUDICARE SED SECUNDUM LEGEM. A maxim meaning "The king ought to govern only according to law." [20]

REX NON EST UBI VOLUNTAS DOMINATUR. A maxim meaning "He is not a king who is ruled by his own will." [21]

REX NON POTEST FALLERE NEC FALLI. A maxim meaning "The king cannot deceive, nor be deceived." [22]

REX NON POTEST INVITUM CIVEM REGNO REPELLERE. A maxim meaning "The king can not expel a subject against his will from the kingdom." [23]

REX NON POTEST MALUM VEL INJURIAM FACERE. A maxim meaning "The king can not do evil or injustice." [24]

REX NON POTEST PECCARE. A maxim meaning "The king cannot do wrong." [25]

REX NON POTEST SUBDITIUM ONERARE IMPOSITIONIBUS. A maxim meaning "The king may not oppressively levy taxes upon a subject." [26]

REX NUNQUAM INFRA ÆTATEM EST. A maxim meaning "The king is never an infant." [27]

REX NUNQUAM MORITUR. A maxim meaning "The king never dies." [28]

REX PRÆSUMITUR IN SCRINIO PECTORIS SUI HABERE OMNIA JURA. A maxim meaning "The king is presumed to have all the law in the recesses of his heart." [29]

10. Peloubet Leg. Max. [*citing* 5 Coke 28*b*, 77 Eng. Reprint 33].
11. Morgan Leg. Max. [*citing* Riley Max. 401].
12. Black L. Dict. [*citing* Magdalen College Case, 11 Coke 66*b*, 72*a*].
13. Peloubet Leg. Max. [*citing* Wharton Leg. Max. 899].
14. Morgan Leg. Max. [*citing* Halkerstone Max. 163].
15. *In re* Massey, 45 Fed. 629, 637.
16. Morgan Leg. Max. [*citing* Halkerstone Max. 163].
17. Morgan Leg. Max. [*citing* Halkerstone Max. 163].
18. Morgan Leg. Max. [*citing* Halkerstone Max. 163].
19. Black L. Dict. [*citing* Broom Leg. Max. 47].
20. Peloubet Leg. Max. [*citing* Jenkins Cent. 9].
21. Morgan Leg. Max. [*citing* Halkerstone Max. 163].
22. Peloubet Leg. Max. [*citing* Jenkins Cent. 48].
23. Morgan Leg. Max. [*citing* Halkerstone Max. 164].
24. Morgan Leg. Max. [*citing* Halkerstone Max. 164].
25. Black L. Dict. [*citing* 2 Rolle 304].
26. Morgan Leg. Max. [*citing* Halkerstone Max. 164].
27. Morgan Leg. Max. [*citing* Halkerstone Max. 164].
28. Black L. Dict. [*citing* Broom Max. 50; Branch Max. (5th ed.) 197].
29. Morgan Leg. Max. [*citing* Halkerstone Max. 164].

REX PROSEQUI IN JUDICIS POTEST IN QUA CURIA SIBI VISUM FUERIT. A maxim meaning "The king can proceed to judgment in whatever court he pleases." [30]

REX QUOD INJUSTUM EST FACERE NON POTEST. A maxim meaning "The king cannot do what is unjust." [31]

REX SEMPER PRÆSUMITUR ATTENDERE ARDUA REGNI PRO BONO PUBLICO OMNIUM. A maxim meaning "The king is always presumed to attend to the business of the realm for the public good of all." [32]

REX SUMMUS DOMINUS SUPRA OMNES. A maxim meaning "The king is the great lord over all." [33]

REX TUETUR LEGEM, ET LEX TUETUR JUS. A maxim meaning "The king protects the law, and the law protects the right." [34]

RHEUMATIC FEVER. Acute articular rheumatism.[35] (See RHEUMATISM.)

RHEUMATISM. An acute general disease, variable and shifting in character, attacking the joints, with a marked tendency to involve the heart; [36] the disease specifically known as acute articular rheumatism.[37]

RHUMKORF COIL. A coil constructed on the following principle: Around a central core of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound in the same direction a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top, and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called "condenser," which is a series or number of plates of tin foil such as we find wound around tobacco. That stores up electricity somewhat on the principle of a Leyden jar, and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser were not there.[38] (See, generally, ELECTRICITY, 15 Cyc. 466.)

RIBBON. A strip of fine stuff as silk, satin, or velvet, having two selvages.[39]

RIBS. In mining, the columns or partitions left in the coal vein to support the roof.[40]

RIB SIDE. A mining term applied to the sides of an entry or room in the mine.[41]

RICE ANTHRACITE COAL. That which will pass through a three-eighth inch mesh and over a three-sixteenth inch mesh.[42] (See COAL, 7 Cyc. 266.)

RICH. Having wealth or large possessions; possessed of much money, goods,

30. Peloubet Leg. Max. [*citing* Wharton Leg. Max. 900].

31. Peloubet Leg. Max. [*citing* Jenkins Cent. 9].

32. Morgan Leg. Max. [*citing* Sadler's Case, 4 Coke 54*b*, 56, 76 Eng. Reprint 1012].

33. Peloubet Leg. Max. [*citing* 2 Inst. 501].

34. Peloubet Leg. Max. [*citing* Coke Litt. 130*a*].

35. Century Dict. [*quoted* in Holmes *v.* Continental Casualty Co., 102 Me. 287, 288, 65 Atl. 385].

36. Blackman *v.* U. S. Casualty Co., 117 Tenn. 578, 593, 103 S. W. 784, where it is said to be characterized by local fever, inflammation, swelling, aching pains, and acid sweats, distressing, debilitating, and frequently prostrating.

37. Century Dict. [*quoted* in Holmes *v.* Continental Casualty Co., 102 Me. 287, 288, 65 Atl. 385, where it is said that the name includes also the "sub-acute and chronic forms apparently of the same causation"].

Acute articular rheumatism is an acute febrile disease, with pains and inflammation of the joints as the prominent symptom. Century Dict. [*quoted* in Holmes *v.* Continental Casualty Co., 102 Me. 287, 288, 65 Atl. 385].

38. Robertson *v.* Oelschlaeger, 137 U. S. 436, 442, 443, 11 S. Ct. 148, 150, 34 L. ed. 744, where it is said "that [it] is used in schools and universities, and also by physicians. . . . It is also used to explode mines at times . . . [and] dynamite cartridges. . . . It has no practical use in telegraphing. Its main use is for illustrating the laws of electrical induction."

39. Century Dict.

Silk and cotton velvet ribbons, silk being the component material of chief value, are "ribbons," within Act Cong. June 30, 1864. Lane *v.* Russell, 14 Fed. Cas. No. 8,053, 4 Cliff. 122, 126. See also Chapon *v.* Smythe, 5 Fed. Cas. No. 2,611, 11 Blatchf. 120.

40. Reddon *v.* Union Pac. R. Co., 5 Utah 344, 349, 15 Pac. 262.

41. Muren Coal, etc., Co. *v.* Howell, 119 Ill. App. 209, 211.

42. Westinghouse *v.* Remington Salt Co., 116 N. Y. App. Div. 123, 127, 101 N. Y. Suppl. 305.

land, or other valuable property; wealthy; opulent; opposed to poor.[43] (See DESCENT AND DISTRIBUTION, 14 Cyc. 79 note 92.)

RIDE. To be carried on a horse or other animal or in any kind of vehicle or carriage; to be carried or travel on horseback.[44] (See DRIVE, 14 Cyc. 1076.)

RIDER. A new and unrelated enactment or provision attached to appropriation bills in the legislature.[45] (See STATUTES.)

RIDGLING. The male of any beast half-gelt;[46] an animal half castrated.[47]

RIGGING THE MARKET. Going into the market pretending to buy shares by a person whom you put forward to buy them, who is not really buying them, but only pretending to buy them, in order that they may be quoted in the public papers as bearing a premium, which premium is never paid.[48]

RIGHT. As an adjective, the term has been defined as meaning fit; suitable; proper; correct;[49] opposed to left.[50] As a noun in the plural, the term is said to be a generic and common word embracing whatever may be lawfully claimed.[51]

43. Century Dict.

Rich is a relative term.— Leppelman's Succession, 30 La. Ann. 468, 471.

44. Webster Dict. [*quoted* in Citizens' R. Co. *v.* Ford, 93 Tex. 110, 113, 53 S. W. 575, 46 L. R. A. 457].

The term "riding," in a Sunday statute which operates to prohibit riding on Sunday, is to be construed as meaning unnecessary riding, and therefore does not operate to preclude riding in the open air for exercise necessary for the promotion of health. Sullivan *v.* Maine Cent. R. Co., 82 Me. 196, 198, 19 Atl. 169, 8 L. R. A. 427.

The words "ride or drive" are not confined to animals but to anything capable of being ridden or driven. State *v.* Thurston, 28 R. I. 265, 66 Atl. 580, 581.

Riding on platform of car distinguished from occupation of the platform for a necessary or proper purpose. Standard L., etc., Ins. Co. *v.* Thornton, 100 Fed. 582, 588, 40 C. C. A. 564, 49 L. R. A. 116.

45. Com. *v.* Barnett, 199 Pa. St. 161, 172, 48 Atl. 976.

46. Douglass *v.* Moses, 89 Iowa 40, 41, 56 N. W. 271, 48 Am. St. Rep. 353; Webster Dict. [*quoted* in Brisco *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162].

47. Webster Dict. [*quoted* in Briscoe *v.* State, 4 Tex. App. 219, 221, 30 Am. Rep. 162].

Distinguished from "gelding" and "stallion" see State *v.* McDonald, 10 Mont. 21, 22, 24 Pac. 628, 24 Am. St. Rep. 25. See GELDING, 20 Cyc. 1181.

48. Rubery *v.* Grant, L. R. 13 Eq. 443, 447, 42 L. J. Ch. 19, 26 L. T. Rep. N. S. 538.

49. Webster Int. Dict.

Archbishop Whately says "That which is conformable to the supreme will is absolutely right, and is called right simply, without any reference to a special end. The opposite to right is wrong." This announces a standard but gives no practical aid. Allen *v.* Ferguson, 18 Wall. (U. S.) 1, 4, 21 L. ed. 854.

"Right-and-wrong test" see State *v.* Mowry, 37 Kan. 369, 375, 15 Pac. 282; State *v.* Harrison, 36 W. Va. 729, 740, 15 S. E. 982, 18 L. R. A. 224. See also CRIMINAL LAW, 12 Cyc. 165.

50. Webster Int. Dict.

"Right bank" see Borkenhagen *v.* Vianden, 82 Wis. 206, 208, 52 N. W. 260.

51. Lomas *v.* State, 3 Heisk. (Tenn.) 287, 306.

Rights are of three kinds: Rights *jus proprietatis*, *jus possessionis*, and *jus vagum*, or an imperfect right. Settlements may be ranked among the latter species. It is a right to pre-emption; a claim to favour. Smith *v.* Brown, 1 Yeates (Pa.) 513, 516. All rights which appertain to man are of one or the other of two classes, that is to say, first, natural rights; or second, acquired rights. Borden *v.* State, 11 Ark. 519, 527, 54 Am. Dec. 217.

Rights are said to be merged when the same person who is bound to pay is also entitled to receive. Bouvier L. Dict. [*quoted* in Muscogee Mfg. Co. *v.* Eagle, etc., Mills, 126 Ga. 210, 218, 54 S. E. 1028, 7 L. R. A. N. S. 1139].

"Rights" as applied to property refers to the free use, enjoyment, and disposal of it. 1 Blackstone Comm. 138 [*quoted* in Ammidown *v.* Granite Bank, 8 Allen (Mass.) 285, 290].

"Rights" as used in a bond given by an administrator is construed to mean only such rights of the deceased as survive to the personal representative. Newport Prob. Ct. *v.* Hazard, 13 R. I. 3, 9.

"Rights" includes not only property rights, but also such municipal powers as were necessary to the performance of the obligations and the discharge of the liabilities legally assumed and incurred by a defunct city. Barber Asphalt Paving Co. *v.* Field, 134 Mo. App. 663, 667, 111 S. W. 907.

Construed as power to invest funds see St. Joseph F. & M. Ins. Co. *v.* Houch, 63 Mo. 112, 118.

Construed as property rights see Smith *v.* Hightstown Borough, 71 N. J. L. 276, 279, 57 Atl. 901.

Distinguished from titles see Stewart *v.* Munroe, 56 How. Pr. (N. Y.) 193, 196.

Not synonymous with "franchises" see Alexandria, etc., R. Co. *v.* Alexandria, etc., R. Co., 75 Va. 780, 789, 40 Am. Rep. 743.

"All rights" embrace each right. Atlantic, etc., R. Co. *v.* Allen, 15 Fla. 637, 638, where it is said: "It is going too far to hold that 'each right' [of a corporation] must be enumerated in order to pass it."

"Money, rights or credits" see Sargeant *v.* Leland, 2 Vt. 277, 280.

As a noun in the singular,[52] a just claim, or that to which one has a just claim; that which may be lawfully claimed of any other person; in law that which the law directs, a liberty of doing or possessing something consistently with law;[53] an enforceable claim or title to any subject matter whatever;[54] just claim, legal title, ownership;[55] a lawful title or claim to anything;[56] property, interest, power, prerogative, immunity, privilege;[57] a liberty of doing or possessing something consistently with the law;[58] a legal consequence which attaches to certain facts;[59] that which a man is entitled to have, or to do, or to receive from others, within the limits prescribed by law;[60] that which justly belongs to one; that

"**Rights and credits**" see Burnham *v.* Doolittle, 14 Nebr. 214, 218, 15 N. W. 606. See also COVENANTS, 11 Cyc. 1190 note 73. This term is said to include the right of redemption in mortgaged and pledged personal property. Burnham *v.* Doolittle, 14 Nebr. 214, 218, 15 N. W. 606.

"**Rights**" **and** "**effects**" see Union Nat. Bank *v.* Byram, 131 Ill. 92, 100, 22 N. E. 842.

"**Rights and immunities**" see CORPORATIONS, 10 Cyc. 306.

"**Rights or liabilities**" as including a note not yet due see Means *v.* Harrison, 114 Ill. 248, 251, 2 N. E. 64.

"**Rights and obligations**" see CONTRACTS, 9 Cyc. 652.

"**Rights**" **and** "**privileges**" see U. S. *v.* Patrick, 54 Fed. 338, 348, where it is said: "The words . . . have, of course, a variety of meanings, according to the connection or context in which they are used." The words do not include the offices and position of public officers within the meaning of the constitution, art. 1, § 2. Hennepin County Com'rs *v.* Jones, 18 Minn. 199, 203. As used in U. S. Rev. St. (1878) § 5508 [U. S. Comp. St. (1901) p. 3712], the phrase "right or privilege" extends to no other right than one arising under the constitution and laws of the federal government and includes no right or privilege dependent on any state law. U. S. *v.* Ringeling, 8 Mont. 353, 357, 26 Pac. 643. All the rights and privileges of constituent companies granted by a charter to a consolidated company does not pass to the consolidated company the exemption from taxation of one of the constituent companies. Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 257, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; Memphis *v.* Phœnix F. & M. Ins. Co., 91 Tenn. 566, 19 S. W. 1044. *Compare* Atlanta, etc., Air-Line R. Co. *v.* State, 63 Ga. 483, 484.

"**Rights in ports and shores**" are according to Hale of three kinds. First, the *jus privatum*, or right of property or franchise; second, *jus publicum*, or public right of passage and navigation; and third, the *jus regium*, or governmental right. Wilson *v.* Welch, 12 Oreg. 353, 359, 7 Pac. 341.

"**Rights of a shareholder**" are rights of a contract, or, in technical language, choses in action. Union Nat. Bank *v.* Byram, 131 Ill. 92, 100, 22 N. E. 842 [*quoted* in Morawetz Priv. Corp. §§ 224, 225].

"**Right secured**" see Camp *v.* Smith, 2 Minn. 155, 165.

"**His rights under said contract**" see Cohrt *v.* Kock, 56 Iowa 658, 660, 10 N. W. 230.

52. **Synonymous with** "debt or duty" (Beach *v.* Boynton, 26 Vt. 725, 736; Brooks *v.* Clayes, 10 Vt. 37, 54), "deed" (Rowton *v.* Rowton, 1 Hen. & M. (Va.) 92, 98), "estate" (Northern Pac. R. Co. *v.* Amacker, 53 Fed. 48, 56), "power" (Mabie *v.* Whittaker, 10 Wash. 656, 663, 39 Pac. 172), "privilege" (Smith *v.* Cornell University, 21 Misc. (N. Y.) 220, 222, 45 N. Y. Suppl. 640), and "title" (Price *v.* Deal, 90 N. C. 291, 294).

Equivalent to "all right" (Monmouth *v.* Plimpton, 77 Me. 556, 560, 1 Atl. 693) and "title" (Monmouth *v.* Plimpton, *supra*).

Distinguished from a "cause of action" (Smart *v.* Morrison, 15 Ill. App. 226, 229), "indulgence" (Brown *v.* Meady, 10 Me. 391, 395, 25 Am. Dec. 248), and "law" (State *v.* Worden, 46 Conn. 349, 364, 33 Am. Rep. 27).

As correlative with "**duty**" see Lake Shore, etc., R. Co. *v.* Kurtz, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303, 304; Bouvier L. Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

53. Imperial Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 90].

Construed to mean a tangible legal right, one resting on contract or in tort, which would be recognized and enforced by law see Pittsburgh, etc., R. Co. *v.* Cox, 55 Ohio St. 497, 511, 45 N. E. 641, 35 L. R. A. 507.

Construed as embracing some other right than those arising under an obligation, contract, or lien see Gould *v.* Eagle Creek School Dist., 7 Minn. 203.

The double liability of the stock-holders of a bank is not a "right" or "credit" of the bank. Runner *v.* Dwiggins, 147 Ind. 238, 239, 46 N. E. 580, 36 L. R. A. 645.

54. Anderson L. Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

55. Webster Dict. [*quoted* in Monmouth *v.* Plimpton, 77 Me. 556, 560, 1 Atl. 693].

56. Browne L. Dict. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

57. Walker Dict. [*quoted* in People *v.* Dikeman, 7 How. Pr. (N. Y.) 124, 130, where it is said: "In law it is most frequently applied to property in its restricted sense, but it is often used to designate power, prerogative and privilege, and especially when applied to corporations"].

58. Wharton L. Lex. [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 91].

59. White *v.* Multnomah County, 13 Oreg. 317, 323, 10 Pac. 484, 57 Am. Rep. 20.

60. Atchison, etc., R. Co. *v.* Baty, 6 Nebr. 37, 40, 29 Am. Rep. 356.

which one has a claim to possess or own; [61] a well-founded claim; [62] that which one has a legal or social claim to do or exact; legal power; authority, that which justly belongs to one; that which one has a claim to possess or own; the interest or share which anyone has in a piece of property; title; claim; interest; ownership; [63] something with which the law invests one person and in respect to which,

61. Webster Dict. [*quoted* in Carney *v.* Kain, 40 W. Va. 758, 781, 23 S. E. 650].

62. Bouvier L. Dict. [*quoted* in Union Nat. Bank *v.* Byram, 131 Ill. 92, 100, 22 N. E. 842; Smart *v.* Morrison, 15 Ill. App. 226, 229; Northern Pac. R. Co. *v.* Amacker, 53 Fed. 48, 56].

63. Webster Dict. [*quoted* in *Ex p.* Bailey, 20 Okla. 497, 501, 94 Pac. 553].

A person has a right, when the law authorizes him, to exact from another an act or forbearance. People *v.* Ulster County, 65 N. Y. 300, 308.

Right is no part of the corporate thing, that remains as perfect after the right has issued or been exercised as before. Funk *v.* Haldeman, 53 Pa. St. 229, 242.

According to the Spanish civil law, a right "was either in the thing or to the thing." Sullivan *v.* Richardson, 33 Fla. 1, 116, 14 So. 692.

Right is sometimes presumed from circumstances, where the origin and fountain cannot be found. By a long series of years, wrongs may ripen into rights; but the enjoyment of a right gives no title to its continuance beyond its own limits and duration. Tinkham *v.* Arnold, 3 Me. 120, 125.

"Right and claim" see Richardson *v.* Cambridge, 2 Allen (Mass.) 118, 121, 79 Am. Dec. 767.

"Right and interest by descent" see Wright *v.* Holmes, 100 Me. 508, 512, 62 Atl. 507, 3 L. R. A. N. S. 769.

"Right and justice" see *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 408, 17 Am. Dec. 525.

"Rights and privileges" see Adams *v.* Yazoo, etc., R. Co., 77 Miss. 194, 258, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; Smith *v.* Floyd, 140 N. Y. 337, 340, 35 N. E. 606; Memphis *v.* Phœnix F. & M. Ins. Co., 91 Tenn. 566, 567, 19 S. W. 1044; International, etc., R. Co. *v.* State, 75 Tex. 356, 373, 12 S. W. 685.

"Right by prescription" see Hinckel *v.* Stevens, 35 N. Y. App. Div. 5, 8, 54 N. Y. Suppl. 457. See also EASEMENTS, 14 Cyc. 1145.

"Right, debt or duty" see Corey *v.* Morrill, 71 Vt. 51, 59, 42 Atl. 976.

"Right existing or accrued" see Sehl *v.* Syracuse, 81 N. Y. App. Div. 543, 546, 81 N. Y. Suppl. 482.

"Right heir" is a person who takes an inheritance as *persona designata* (Mason *v.* Baily, 6 Del. Ch. 129, 158, 14 Atl. 309); the children of testator's children (Ballentine *v.* Wood, 42 N. J. Eq. 552, 557, 9 Atl. 582). See also Brown *v.* Wadsworth, 168 N. Y. 225, 237, 61 N. E. 250; *In re* Ferguson, 28 Can. Sup. Ct. 38, 51; and 21 Cyc. 422.

"Right hereby secured" see Coleman *v.* Allen, 5 Mo. App. 127, 135.

"Right in a contract" see Booth *v.* Burgess, 72 N. J. Eq. 181, 188, 65 Atl. 226.

"Right in a highway" see La Crosse *v.* Cameron, 80 Fed. 264, 276, 25 C. C. A. 399.

"Right in rem" see Wabash, etc., R. Co. *v.* Shacklet, 105 Ill. 364, 379, 44 Am. Rep. 791.

"Right 'lawfully accrued or established'" see People *v.* Cohocton Stone Road, 25 Hun (N. Y.) 13, 17.

"Rights of another" see Wood *v.* Michigan Air-Line R. Co., 81 Mich. 358, 362, 45 N. W. 980.

"Right of appeal" see Johnson *v.* U. S., 6 Utah 403, 406, 24 Pac. 256, 677.

"Right of conquest" is the right of discovery. Caldwell *v.* State, 1 Stew. & P. (Ala.) 327, 408.

"Right of conscience" is simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever, or support any religion; and to do, or forbear to do, any act for conscience sake, the doing or forbearing of which is not prejudicial to the public weal. Specht *v.* Com., 8 Pa. St. 312, 322, 49 Am. Dec. 518. See also State *v.* Cummings, 36 Mo. 263, 264, 273, 276 [*reversed* in 4 Wall. (U. S.) 277, 18 L. ed. 356].

"Right of dower" see Woodford *v.* Woodford, 44 N. J. Eq. 79, 80, 14 Atl. 273; DOWER, 14 Cyc. 831, 880.

"Right of drainage" see Nellis *v.* Munson, 108 N. Y. 453, 459, 15 N. E. 739; Wetmore *v.* Fiske, 15 R. I. 354, 359, 5 Atl. 375, 10 Atl. 627, 629 [*quoting* Kent. Comm. 436].

"Right of election" see Catlin *v.* Catlin, 60 Md. 573, 577.

"Right of fishery" see Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 636, 72 Pac. 161; Shively *v.* Bowlby, 152 U. S. 1, 11, 14 S. Ct. 548, 38 L. ed. 331; FISH AND GAME, 19 Cyc. 988.

"Right of free passage" see Castle *v.* Bell Tel. Co., 49 N. Y. App. Div. 437, 440, 63 N. Y. Suppl. 482.

"Right of lien" see Wood's Appeal, 30 Pa. St. 274, 277.

"Right of navigation" see McNeil *v.* Jones, 26 Nova Scotia 299, 203; NAVIGABLE WATERS, 29 Cyc. 304.

"Right of occupation" is the right gained by conquest. Caldwell *v.* State, 1 Stew. & P. (Ala.) 327, 407.

"Right of personal security see Coulter *v.* American Mach. Express Co., 56 N. Y. 585, 587; CONSTITUTIONAL LAW, 8 Cyc. 883.

"Right of possession" see *Ex p.* Norris, 8 S. C. 408, 483; POSSESSION, 31 Cyc. 924 note 87, 925 note 93.

"Right of pre-emption" see Franklin *v.* Kelley, 2 Nebr. 79, 107; and PUBLIC LANDS, 32 Cyc. 841.

"Right of priority" see U. S. *v.* Preston, 27 Fed. Cas. No. 16,087, 4 Wash. 446, 451.

"Right of defence" is the right to do whatever apparently is reasonably necessary

for his benefit, another, or perhaps all others, are required by the law to do or perform acts or to forbear or sustain from acts.[64] (See DROIT, 14 Cyc. 1076; JUS, 24 Cyc. 376.)

RIGHT AWAY. At once; without delay.[65]

RIGHTFUL. Lawful;[66] legitimate.[67]

to be done in defense. Aldrich *v.* Wright, 53 N. H. 398, 400, 16 Am. Rep. 339.

Right of recaption or recapture see CHATTEL MORTGAGES, 7 Cyc. 71 note 90; CONTRACTS, 9 Cyc. 442 note 1.

"Right of redemption" is the agreement or paction, by which the vendor reserves to himself the power of taking back the thing sold by returning the price paid for it. La. Civ. Code (1900), art. 2567. Construed as equity of redemption see Holmes *v.* Jordon, 163 Mass. 147, 149, 39 N. E. 1005. Distinguished from equity of redemption see Mayer *v.* Farmers' Bank, 44 Iowa 212, 216. See also REDEMPTION, *ante*, p. 766, and Cross-References Thereunder.

"Right of reply" is the right to again address the jury at the close of the evidence. Reg. *v.* Le Blanc, 6 Can. Cr. Cas. 348, 349. See, generally, TRIAL.

"Right of rescission" is an equity established independently of a written contract, deed, or other instrument. Isner *v.* Nydegger, 63 W. Va. 677, 682, 60 S. E. 793. See also CANCELLATION OF INSTRUMENTS, 6 Cyc. 282.

"Right of stoppage in transitu" see SALES.

"Right of suit" is a present right to resort to the courts for redress. Jacobsen *v.* Jacobsen, 11 Oreg. 454, 455, 5 Pac. 567.

"Right or title" see Spencer *v.* Weston, 18 N. C. 213, 216; Williams *v.* Heard, 140 U. S. 529, 536, 11 S. Ct. 885, 35 L. ed. 550.

Right, privilege, or immunity see New York *v.* Hoffman, 7 Wall. (U. S.) 16, 22, 19 L. ed. 57.

"Right, title and interest" are words used in an assignment of a judgment together with the words "without recourse" to indicate the absence of any intention to warrant validity or value of the judgment or that it was collectable. Scofield *v.* Moore, 31 Iowa 241, 245. See also CHARITIES, 6 Cyc. 951; CHATTEL MORTGAGES, 6 Cyc. 1077 note 39; COMMERCIAL PAPER, 7 Cyc. 707 note 83.

"Right to acquire, hold, and dispose of property" see CONSTITUTIONAL LAW, 8 Cyc. 886.

"Right to a free market" is the right of every dealer, in the full enjoyment of his right to contract, to have all other dealers with him left free to deal or not as they may voluntarily elect. Booth *v.* Burgess, 72 N. J. Eq. 181, 188, 65 Atl. 226.

"Right to be heard by himself and counsel or either" as guaranteed by the constitution, is the right of an accused person to be heard by counsel before the court and jury on any and every point involved in the issues upon which the jury are to render verdict. Mitchell *v.* State, 114 Ala. 1, 5, 22 So. 71.

"Right to bring suit" see CAUSE OF ACTION, 6 Cyc. 705.

"Right to flowing water" is a right incident to property in the land (Lux *v.* Haggin, 69 Cal. 255, 400, 4 Pac. 919, 10 Pac. 674; Elliot *v.* Fitchburg R. Co., 10 Cush. (Mass.) 191, 193, 57 Am. Dec. 85); a corporeal right or hereditament which follows or is embraced by the owner of the soil over which it naturally passes (Lux *v.* Haggin, 69 Cal. 255, 392, 4 Pac. 919, 10 Pac. 674 [*citing* Sackett *v.* Wheaton, 17 Pick. (Mass.) 103, 105]; Hill *v.* Newman, 5 Cal. 445, 447, 63 Am. Dec. 140). See also Partridge *v.* Eaton, 3 Hun (N. Y.) 533, 534.

"Right to liberty" as guaranteed in the constitution, art. 1, § 6, a term said to include the right of the individual to exercise his faculties and to follow a lawful avocation for the support of life. Bertholf *v.* O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323.

"Right to life" as guaranteed by the constitution, art. 1, § 6, is a term said to include the right of the individual to his body in its completeness and without dismemberment, the right to liberty and the right to property. Bertholf *v.* O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323.

"Right to navigate" or "of navigation" is the right to pass by water. Queddy River Driving Boom Co. *v.* Davidson, 3 Cartwr. Cas. (Can.) 243, 262.

"Right to redeem" is a term implying a right to disencumber, to liberate from a lien or claim. Century Dict. [*quoted* in Millett *v.* Mullen, 95 Me. 400, 417, 49 Atl. 871], where it is said it implies more than a right to acquire. Equivalent to right to obtain a release see Clark *v.* Fontain, 144 Mass. 287, 292, 10 N. W. 831. See also REDEMPTION, *ante*, p. 766, and Cross-Reference Thereunder.

"Right to reserve" is in baseball nomenclature, an option. Metropolitan Exhibition Co. *v.* Ewing, 42 Fed. 198, 202, 7 L. R. A. 381.

"Right to use a mine" is a phrase said to imply a right to possess it. O'Donnell *v.* Luskin, 12 Montg. Co. Rep. (Pa.) 109, 110.

64. Galveston, etc., R. Co. *v.* Hennegan, 33 Tex. Civ. App. 314, 317, 76 S. W. 452.

65. Webster Int. Dict. see Lorimer *v.* Boylan, 98 Mich. 18, 22, 56 N. W. 1043.

66. Territory *v.* O'Conner, 5 Dak. 397, 41 N. W. 746, 749, 3 L. R. A. 355; Maynard *v.* Hill, 2 Wash. Terr. 321, 326, 5 Pac. 717.

67. Baca *v.* Parez, 8 N. M. 187, 200, 42 Pac. 162.

"Rightful subjects of legislation" embraces subjects already sufficiently defined by the general consent and practice of the people, who, in congress, have mentioned them. Maynard *v.* Valentine, 2 Wash. Terr. 3, 14, 3 Pac. 195, 200, where it refers to the use of the phrase in 9 St. 325, § 16, granting Washington territory legislative power over all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.

RIGHT OF ACTION or IN ACTION. A right to commence and maintain an action.[68] In the Roman law, "*jus persequendi in judicio sibi debetur.*"[69] (Right of Action or in Action: In General, see ACTIONS, 1 Cyc. 642, and, CAUSE OF ACTION, 6 Cyc. 705. As Constituting Assets of Decedent's Estates, see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 175. Assignment of, see ASSIGNMENTS, 4 Cyc. 91. As Vested Right, see CONSTITUTIONAL LAW, 8 Cyc. 910. Compared With Other Legal Terms, see ACTIONS, 1 Cyc. 642. Meaning of in Attachment, see ATTACHMENT, 4 Cyc. 447 note 66. Purchase For Purpose of Bringing Suit, see CHAMPERTY AND MAINTENANCE, 6 Cyc. 855. Title of Heirs and Distributees to Rights in Action of Decedent, see DESCENT AND DISTRIBUTION, 14 Cyc. 139.)

RIGHT OF ENTRY. Right to possession;[70] right to take possession of lands by the legal owner.[71] (Right of Entry: In General, see FORCIBLE ENTRY AND DETAINER, 19 Cyc. 1112; LANDLORD AND TENANT, 24 Cyc. 845. As Affecting Adverse Possession, see ADVERSE POSSESSION, 1 Cyc. 1009. On Premises, Admissibility of Evidence as to, on Question of Contributory Negligence, see NEGLIGENCE, 29 Cyc. 620. Upon Disseizin, see HUSBAND AND WIFE, 21 Cyc. 1531 note 55.)

RIGHT OF PRIVACY. The right to be let alone.[72] (Right of Privacy: Protection of, see INJUNCTIONS, 22 Cyc. 899.)

RIGHT OF PROPERTY. Consists in the free use, enjoyment, and disposition of all a person's acquisitions without any control or diminution save only by the law of the land;[73] the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the state.[74] (See, generally, PROPERTY, 32 Cyc. 678.)

RIGHT OF PROPERTY, TRIAL OF. A statutory remedy or proceeding,[75] said to be equitable in its character,[76] and in its nature a substitute for cross replevin or replevin for property in the possession of an officer by virtue of a writ of execution, sequestration, attachment, or like writ,[77] whereby a claimant of personal property[78] who is not a party to such writ, or his agent or attorney, is permitted

68. Boody *v.* Watson, 64 N. H. 162, 168, 9 Atl. 794.

The term is said to include actions for demands or claims arising *ex delicto*, as well as *ex contractu*, and includes present, but not future demands. Lum *v.* The Buckeye, 24 Miss. 564, 566. See also Honey *v.* Chicago, etc., R. Co., 59 Fed. 423, 424.

Distinguished from "cause of action" see Staunton Coal Co. *v.* Fischer, 119 Ill. App. 284, 286.

69. Webster *v.* County Com'rs, 63 Me. 27, 30.

70. Cecil *v.* Clarke, 44 W. Va. 659, 666, 30 S. E. 216.

Synonymous to "right of action" see Guion *v.* Anderson, 8 Humphr. (Tenn.) 298, 307.

71. Bouvier L. Dict. [*quoted* in Guion *v.* Anderson, 8 Humphr. (Tenn.) 298, 306].

72. Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 544, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478.

It is a right founded upon the claim that a man has the right to pass through this world if he wills without having his picture published, his business enterprises discussed, his successful experiments given up for the benefit of others or his eccentricities commented upon, either in handbills, periodicals, or newspapers. Roberson *v.* Rochester Folding-Box Co., 171 N. Y. 538, 544, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478 (where it is held that such right does not exist in law, and is not enforceable in equity); Owen *v.* Partridge, 40 Misc. (N. Y.) 415, 420, 82 N. Y. Suppl. 248.

73. Roderigas *v.* East River Sav. Inst., 48 How. Pr. (N. Y.) 166, 174 [*citing* 1 Blackstone 138]; Matter of Jacobs, 2 N. Y. Cr. 539, 543; Evans *v.* Reading Chemical Fertilizer Co., 160 Pa. St. 209, 218, 28 Atl. 702.

74. Bertholf *v.* O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323.

"The exclusive right of using and transferring property," says Chancellor Kent, "follows as a natural consequence from the perception and admission of the right itself." Roderigas *v.* East River Sav. Inst., 48 How. Pr. (N. Y.) 166, 174.

The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129, 137, 21 L. ed. 929.

Contingent interest construed as a right of property see Nash *v.* Nash, 12 Allen (Mass.) 345, 348.

75. See the statutes of the several states; particularly Sayles Civ. St. Tex. (1897) §§ 5286–5312, where the proceeding is styled "Trial of Right of Property."

76. Neal *v.* Newland, 4 Ark. 459, 460.

77. Hersley *v.* Clarksville Institute, 15 Ark. 128, 130.

78. Jones *v.* Bull, (Tex. Civ. App. 1896) 36 S. W. 501.

to interpose his claim and have his right to the possession of the property determined in the manner prescribed by the provisions of the statute.[79] (See ATTACHMENT, 4 Cyc. 724; EXECUTIONS, 17 Cyc. 1199; GARNISHMENT, 20 Cyc. 1130; INTERPLEADER, 23 Cyc. 1; REPLEVIN, *ante*, p. 1379.)

RIGHT OF SEARCH. See INTOXICATING LIQUORS, 23 Cyc. 87; SEARCHES AND SEIZURES; WAR.

RIGHT OF WAY. An easement of perpetual use;[80] an easement appurtenant to an estate owned by the person in whose favor the easement exists;[81] a mere easement[82] on the lands of others;[83] an easement or incorporeal hereditament;[84] in common law, an easement, in the civil law, a servitude, a charge imposed upon one heritage for the use and advantage of a heritage belonging to another person;[85] a private way, which is an incorporeal hereditament of that class of easements, in which a particular person, or particular description of persons, have an interest and a right, though another person is the owner of the fee of the land, in which it is claimed;[86] the privilege which an individual or a particular description of individuals as the inhabitants of a certain village, or the owners or occupiers of a certain farm have of going over another's ground;[87] the privilege which one person, or particular description of persons, may have of passing over the land of another in some particular line;[88] a right of ingress and egress to and from the grantee's lands;[89] the right of passing over another man's ground;[90] the right of travel over another's land;[91] a right to pass for all or for certain purposes, at all or at certain times, over and upon another man's land;[92] a right to pass over the land of another;[93] a right to pass over another's land more or less frequently, according to the nature of the use to be made of the easement;[94] the right to use the passage over the lands of another;[95] nothing more than a special and limited right of use;[96] a mere incorporeal right.[97] For an irrigation ditch, an easement; a charge or burden upon the land of one for the benefit of another.[98] From necessity, is where a man having several tracts of land sells one which is surrounded by the others, having no way of ingress and egress but through one of those reserved.[99] (Right of Way: Across Allotted Lands, see INDIANS, 22 Cyc. 136 note 36. As Continuous Easement, see EASEMENTS, 14 Cyc. 1169. At Intersection of Different Railroads, see RAILROADS, 33 Cyc. 737. Authority to Maintain Telegraph or Telephone Line Along, see GAS, 20 Cyc. 1156 note 8. Care Required and Liability of Railroad on Setting Fire on Right of Way, see RAIL-

79. Sayles Civ. St. Tex. (1897) § 5286 *et seq.*

80. McGhee *v.* Wilson, 111 Ala. 615, 620, 20 So. 619, 56 Am. St. Rep. 72.

81. Gulick *v.* Fisher, 92 Md. 353, 357, 48 Atl. 375.

82. Stockton Gas, etc., Co. *v.* San Joaquin County, 148 Cal. 313, 322, 83 Pac. 54, 5 L. R. A. N. S. 174.

83. Brown *v.* Young, 69 Iowa 625, 626, 29 N. W. 941; Postal Tel. Cable Co. *v.* Louisiana Western R. Co., 49 La. Ann. 1270, 1278, 22 So. 219; Lidgerding *v.* Zignego, 77 Minn. 421, 424, 80 N. W. 360, 361, 77 Am. St. Rep. 677; Clawson *v.* Wallace, 16 Utah 300, 306, 52 Pac. 9.

84. Stuyvesant *v.* Woodruff, 21 N. J. L. 133, 136, 47 Am. Dec. 156.

85. Manbeck *v.* Jones, 190 Pa. St. 171, 173, 42 Atl. 536.

86. Wild *v.* Deig, 43 Ind. 455, 458, 13 Am. St. Rep. 399; Anderson L. Dict. [*quoted* in Postal Tel. Cable Co. *v.* Southern R. Co., 90 Fed. 30, 32].

87. Lanier *v.* Booth, 50 Miss. 410, 413, distinguishing a "common highway."

88. Kripp *v.* Curtis, 71 Cal. 62, 63, 11 Pac. 879.

89. San Rafel Ranch Co. *v.* Ralph Rogers Co., 154 Cal. 76, 77, 96 Pac. 1092, 1093.

90. Williams *v.* Western Union R. Co., 50 Wis. 71, 76, 5 N. W. 482.

91. Clawson *v.* Wallace, 16 Utah 300, 306, 52 Pac. 9.

92. Stuyvesant *v.* Woodruff, 21 N. J. L. 133, 136, 47 Am. Dec. 156.

93. Poole *v.* Greer, (Del. 1907) 65 Atl. 767.

94. Bodfish *v.* Bodfish, 105 Mass. 317, 319; Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 N. W. 246, 2 L. R. A. 188.

95. Postal Tel. Cable Co. *v.* Southern R. Co., 90 Fed. 30, 32.

96. Bosley *v.* Susquehanna Canal, 3 Bland (Md.) 63, 67.

97. Warren Borough *v.* Pleasant Bridge Co., 16 Pa. Co. Ct. 44, 45.

98. Blake *v.* Boye, 38 Colo. 55, 62, 88 Pac. 470, 8 L. R. A. N. S. 418.

99. Lawton *v.* Rivers, 2 McCord (S. C.) 445, 447, 13 Am. Dec. 741.

Distinguished from public ways (see Boyden *v.* Achenbach, 79 N. C. 539, 541); road (Chollar-Potosi Min. Co. *v.* Kennedy, 3 Nev. 361, 373, 93 Am. Dec. 409; Green *v.* Morris, etc., R. Co., 24 N. J. L. 486, 490).

ROADS, 33 Cyc. 1325. Conclusive Presumption of Purchaser as to, see JUDICIAL SALES, 24 Cyc. 58 note 28. Contract For, see HUSBAND AND WIFE, 21 Cyc. 1507 note 57. Cutting Timber by Telegraph Company on, see CORPORATIONS, 10 Cyc. 1212. Declaration in an Action For Obstructing, see CASE, ACTION ON, 6 Cyc. 696 note 59. Duty of — Railroad to Keep Right of Way Free From Combustibles, see RAILROADS, 33 Cyc. 1338; Vessel Having Right of Way, see COLLISION, 7 Cyc. 345. Effect of Signals by Vessels as to Right of Way — In General, see COLLISION, 7 Cyc. 339; In Rivers and Harbors as to Right of Way, see COLLISION, 7 Cyc. 369. Establishing a Highway Across, see FOREIGN CORPORATIONS, 19 Cyc. 1330 note 85. Exercise by Government of, see INDIANS, 22 Cyc. 127. For Construction of Canal, see CANALS, 6 Cyc. 268. For Erection of Toll Bridge, see BRIDGES, 5 Cyc. 1064. For Improvement of River, see NAVIGABLE WATERS, 29 Cyc. 298. Grant of, to Railroad by — Homesteader, see PUBLIC LANDS, 32 Cyc. 953; United States, see PUBLIC LANDS, 32 Cyc. 988. Inclusion in Mortgage of Railroad of Right of Way Acquired After Execution Thereof, see RAILROADS, 33 Cyc. 487. Irreparable Injury to, see INJUNCTIONS, 22 Cyc. 849. Justice's Court's Jurisdiction of Actions For Injuries to Rights of Way, see JUSTICES OF THE PEACE, 24 Cyc. 457. Liability of Railroad Company to Pay Interest For, see INTEREST, 22 Cyc. 1485 note 82. Liens on Railroads For Right of Way Granted, see RAILROADS, 33 Cyc. 460. Maintenance of Action For Obstruction of, see CASE, ACTION ON, 6 Cyc. 691 note 29. Necessity of Consent of Both Husband and Wife to Grant of Right of Way Over Homestead, see HOMESTEADS, 21 Cyc. 529. Of Drain, see DRAINS, 14 Cyc. 1051. Of Railroad — In General, see RAILROADS, 33 Cyc. 146; Appropriation to New or Additional Use, see EMINENT DOMAIN, 15 Cyc. 617; As Boundary, see BOUNDARIES, 5 Cyc. 905; Mortgage of, see RAILROADS, 33 Cyc. 496. Of Street Railroad, see STREET RAILROADS. Of Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES. Of Turnpike or Toll-Road, see TOLL-ROADS. Of Water Company, see WATERS. Power of Railroad Company to Obtain Injunction to Prevent Crossing, see INJUNCTIONS, 22 Cyc. 835 note 45. Priorities Between Liens For Right of Way Granted Railroad and Mortgages, see RAILROADS, 33 Cyc. 527. Right of *Bona Fide* Occupant to Recover For Structures on, see IMPROVEMENTS, 22 Cyc. 6 note 7. Rights and Liabilities of Purchasers of Railroad Under Foreclosure of Mortgage or Lien as to, see RAILROADS, 33 Cyc. 590. Right to Acquire by Prescription, see EASEMENTS, 14 Cyc. 1154. Running of Interest on Land Taken For, see INTEREST, 22 Cyc. 1513 note 1. Through Prior Locations, see MINES AND MINERALS, 27 Cyc. 588. Title to Property Erected on Abandoned, see FIXTURES, 19 Cyc. 1071 note 92. Upon the Effect of Signals as to, see COLLISION, 7 Cyc. 369 note 60.)

RIGHTS, BILL OF. See CONSTITUTIONAL LAW, 8 Cyc. 877.

RIGHT TO OPEN AND CLOSE. See CRIMINAL LAW, 12 Cyc. 570; TRIAL.

RIGHT, WRIT OF. See REAL ACTIONS, 33 Cyc. 1542.

RIGIDLY. To the same extent; exactly.[1]

RING. A combination for illegal or otherwise improper purposes.[2]

RING-DROPPING. A trick variously practised.[3]

RINGING UP or **RINGING OUT.** In exchange parlance the set-off of one trade against another in making settlements;[4] a term used by dealers in auctions on

1. State *v.* Feuerhaken, 96 Iowa 299, 301, 65 N. W. 299.

2. Schomberg *v.* Walker, 132 Cal. 224, 228, 64 Pac. 290, 291 [*citing* Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 435, 34 Pac. 128, 37 Am. St. Rep. 70].

3. Black L. Dict.

One mode is as follows, the circumstances being taken from Patrick's Case, East P. C. 678: The prisoner, with accomplices, being with their victim, pretend to find a ring wrapped in paper, appearing to be a jeweler's receipt for a "rich, brilliant diamond ring." They offer to leave the ring with the victim if he will deposit some money and his watch as a security. He lays down his watch and money, is beckoned out of the room by one of the confederates, while the others take away his watch, etc. This is a larceny. See Rex *v.* Patch, Leach C. C. 273; Wharton Cr. L. § 973.

4. Pardridge *v.* Cutler, 68 Ill. App. 569, 573, where it is said: "'Ringing up'— is necessarily no more illegal or improper than is the setting off of credit balances by merchants through checks on banks." See also

the board of trade to close out transactions and get them off their books by forming rings or temporary clearing houses through which, by means of a system of mutual offsets, and adjustment of differences, saving an actual delivery and change of possession.[5]

RING UP FARES. A term said to mean pulling a rope at the side of a car upon receipt of each fare to move the index one point on the circular scale of the regulator, the registry of the fare being announced by the stroke of a bell.[6]

RING WASTE. A highly purified article of scoured wool, made from wool top or combed wool.[7]

Samuels *v.* Oliver, 130 Ill. 73, 77, 22 N. E. 499; Ward *v.* Vosburgh, 31 Fed. 12, 16 [*quoting* Williar *v.* Irwin, 30 Fed. Cas. No. 17,761, 11 Biss. 57], where it is said: "When one commission merchant, upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain, for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then, in such case, the two commission merchants meet together, and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as a guarantor to his customer. . . . Though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another who owes like wheat for like delivery to the first commission merchant, that then, in such case, they settle by what they call a 'ring,' that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been canceled or surrendered; and that he guaranties to his customer the performance of the contract originally made in his behalf."

5. Clarke *v.* Foss, 5 Fed. Cas. No. 2,852, 7 Biss. 540, 17 Nat. Bankr. Reg. 261.

6. Pittsburgh, etc., R. Co. *v.* McCurdy, 114 Pa. St. 554, 557, 8 Atl. 230, 60 Am. Rep. 363.

7. Standard Varnish Works *v.* U. S., 59 Fed. 456, 457, 8 C. C. A. 178.

RIOT

By Byron L. Bargar*

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CROSS-REFERENCES

For Matters Relating to:

Affray, see AFFRAY, 2 Cyc. 241.
Breach of the Peace, see BREACH OF THE PEACE, 5 Cyc. 1023.
Former Jeopardy, see CRIMINAL LAW, 12 Cyc. 285.
Insurrection, see INSURRECTION, 22 Cyc. 1451.
Mob Defined, see MOB, 27 Cyc. 812.
Prize-Fighting, see PRIZE-FIGHTING, 32 Cyc. 395.
Riot:
Claim Against Government For Injury During, see INTERNATIONAL LAW, 22 Cyc. 1753.
Conviction of Assault as Bar, see CRIMINAL LAW, 12 Cyc. 284.
Conviction of Other Offense Under Charge of, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 481 note 92.
Joinder With Charge of Unlawful Assemblage, see INDICTMENTS AND INFORMATIONS, 22 Cyc. 400.
Liability of Municipality For Injury During, see COUNTIES, 11 Cyc. 501; MUNICIPAL CORPORATIONS, 28 Cyc. 1295.
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Manslaughter in Connection With, see HOMICIDE, 21 Cyc. 716.
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I. DEFINITION.

A. In General. A riot is a tumultuous disturbance of the peace by three or more persons, assembled and acting with a common intent; either in executing a lawful private enterprise in a violent and turbulent manner, to the terror of the people, or in executing an unlawful enterprise in a violent and turbulent man-

ner.[1] The modern definition of riot is in harmony with and follows the common-law definition, and the legal meaning of the word corresponds with the meaning

1. *Georgia.*— Dixon *v.* State, 105 Ga. 787, 793, 31 S. E. 750; Jacobs *v.* State, 20 Ga. 839, 841.

Illinois.— Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301.

Indiana.— Kiphart *v.* State, 42 Ind. 273, 275; State *v.* Dillard, 5 Blackf. 365, 35 Am. Dec. 128; State *v.* Acra, 2 Ind. App. 384, 28 N. E. 570, 571.

Massachusetts.— Com. *v.* Runnels, 10 Mass. 518, 520, 6 Am. Dec. 148.

New Hampshire.—State *v.* Russell, 45 N. H. 83, 84.

New York.— Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411; People *v.* White, 55 Barb. 606, 613; People *v.* Judson, 11 Daly 1, 17.

North Carolina.— State *v.* Simpson, 12 N. C. 504, 505.

Pennsylvania.— Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 92, 40 Am. Rep. 629; Com. *v.* Cribs, Add. 277.

South Carolina.— State *v.* Sims, 16 S. C. 486, 490.

Utah.— People *v.* O'Loughlin, 3 Utah 133, 149, 1 Pac. 653.

Wisconsin.—Aron *v.* Wausau, 98 Wis. 592, 597, 74 N. W. 354, 40 L. R. A. 733.

United States.— U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. *v.* Stewart, 27 Fed. Cas. No. 16,401*a*, 2 Hayw. & H. 280.

England.— Clifford *v.* Brandon, 2 Campb. 358, 366, 11 Rev. Rep. 731; Rex *v.* James, 5 C. & P. 153, 24 E. C. L. 500; Rex *v.* Billingham, 2 C. & P. 234, 31 Rev. Rep. 665, 12 E. C. L. 545; Reg. *v.* Soley, 11 Mod. 115, 116, 88 Eng. Reprint 935, 2 Salk. 594, 91 Eng. Reprint 503; Anonymous, 6 Mod. 43, 87 Eng. Reprint 806.

See 42 Cent. Dig. tit. "Riot," § 1.

Hawkins' definition is "a tumultuous disturbance of the peace by three or more persons assembling together of their own authority, with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterward actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself was lawful or unlawful." 1 Hawkins P. C. 513 [*quoted* in Roberts *v.* State, 21 Ark. 183, 185; Cherrydale *v.* Hawman, (Kan. 1909) 101 Pac. 994, 995; Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236; Adamson *v.* New York, 188 N. Y. 255, 258, 80 N. E. 937, 117 Am. St. Rep. 863, 10 L. R. A. N. S. 925; Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411; People *v.* Judson, 11 Daly (N. Y.) 1, 83; State *v.* Hughes, 72 N. C. 25, 26; State *v.* Stalcup, 23 N. C. 30, 31, 35 Am. Dec. 732; Com. *v.* Martin, 7 Pa. Dist. 219, 225, 9 Kulp 69; State *v.* Johnson, 43 S. C. 123, 125, 20 S. E. 988; State *v.* Connolly, 3 Rich. (S. C.) 337, 338; State *v.* Brazil, Rice (S. C.) 257, 260; State *v.* Brooks, 1 Hill (S. C.) 361, 362; State *v.* Cole, 2 McCord (S. C.) 117, 119; State *v.* Creighton, 1 Nott & M. (S. C.) 256, 257; Reg. *v.* Kelly, 6 U. C. C. P. 372].

Lord Coke's definition.— "Riot, in the common law, signifieth when three or more do any unlawful act, as to beat a man, or to hurt him in his park, chase, or warren, or to enter or take possession of another man's land, or to cut or destroy his corn, grass, or other profit." People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653.

Lord Holt in Reg. *v.* Soley, 11 Mod. 115, 116, 88 Eng. Reprint 935, 2 Salk. 594, 91 Eng. Reprint 503 [*quoted* in State *v.* Brazil, Rice (S. C.) 257, 260], defines a riot thus: "If a number of men assemble with arms, *in terrorem populi*, although no act be done, it is a riot."

Blackstone's definition.— "A 'riot' is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as, if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner." 4 Blackstone Comm. 146, 147 [*quoted* in Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 235; Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411; People *v.* Judson, 11 Daly (N. Y.) 1, 56; Spruill *v.* North Carolina Mut. L. Ins. Co., 46 N. C. 126, 127; State *v.* Sims, 16 S. C. 486, 490].

According to Stroud and Burrill, an unlawful act committed with force and violence by three or more constitute a riot. Burrill L. Dict.; Stroud Jud. Dict. [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411].

Other definitions are: "A tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist each other against any one who shall oppose them," etc. Bouvier L. Dict. [*quoted* in Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236].

"The tumultuous disturbance of the public peace by an unlawful assembly of three or more persons, in the execution of some private object." Webster Dict. [*quoted* in Spring Garden Ins. Co. *v.* Imperial Tobacco Co., *supra*].

"Where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel, or do a lawful act in a violent or tumultuous manner." Com. *v.* Martin, 7 Pa. Dist. 219, 225, 9 Kulp 69.

"A riot is (1) where an unlawful assembly has actually begun to execute the purpose for which it is assembled, by a breach of the peace and to the terror of the public; or (2) where a lawful assembly has formed and proceeded

given to it in ordinary usage.[2] It has no technical import, as distinguished from its signification when used in the every-day affairs of life.[3] However, riots present such diverse elements that neither a general definition nor the commonly accepted common-law definition [4] could enumerate all the distinguishing characteristics of every such offense without being so lengthy as to be obscure in meaning.

B. Statutory Provisions. Many of the states and territories have, by statute, either defined the offense of riot or provided a specific penalty therefor.[5]

to execute an unlawful purpose to the terror of the people, although they had not that purpose when they assembled." Clark Elem. L. 119.

2. Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236.

Common-law definition has been approved in Dupin *v.* Mutual Ins. Co., 5 La. Ann. 482; State *v.* Snow, 18 Me. 346; Com. *v.* Gibney, 2 Allen (Mass.) 150; State *v.* Hughes, 72 N. C. 25; State *v.* Stalcup, 23 N. C. 30, 35 Am. Dec. 732; Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629; Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733. See also cases cited *supra*, note 1.

Bishop's definition is "such disorderly conduct in three or more assembled persons, actually accomplishing an object, as is calculated to terrify others." 2 Bishop Cr. L. § 1143 [*quoted* in Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236; Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411; People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653].

As used in the Gen. Mun. L. c. 17, § 21, making a city liable for "property destroyed by riot," which act was passed before riot was made a statutory crime, the word is to be construed as having its common-law meaning. Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411.

3. Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236.

"Riot," as used in a life policy, wherein it is provided that the policy shall be void if the insured die by means of any riot, means where three or more persons actually do some unlawful act, either with or without a common cause. Spruill *v.* North Carolina Mut. L. Ins. Co., 46 N. C. 126, 127.

"Riot is practically synonymous with mob" in legal usage. Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 153, 64 N. Y. Suppl. 411. See 27 Cyc. 812.

"Mob violence" defined see 29 Cyc. 813.

"Brawls" defined see 5 Cyc. 996.

A **"rioter"** has been defined as "he who inflames people's minds, and induces them by violent means to accomplish an illegal object." Spies *v.* People, 122 Ill. 1, 198, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320 [*citing* Reg. *v.* Sharpe, 3 Cox C. C. 288].

"Riotous" has been said to mean "partaking of the nature of an unlawful assembly or its acts; seditious, tumultuous" (Webster Dict. [*quoted* in Madisonville *v.* Bishop, 113 Ky. 106, 109, 67 S. W. 269, 23 Ky. L. Rep. 2363, 57 L. R. A. 130]); or "violent" (State *v.* Kutter, 59 Ind. 572, 574). In a popular sense, it means "wanton" or "boisterous." State *v.* Kennan, 25 Wash. 621, 626, 66 Pac. 62.

"Riotously" see *infra*, IV, B, 5.

4. In State *v.* Brazil, Rice (S. C.) 257, 260, the court commenting upon the definition of Hawkins says: "This partakes of the imperfections of all definitions, and a correct idea of the offence is only to be obtained by analysing the cases which have been decided." See also Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 64 N. Y. Suppl. 411; People *v.* Judson, 11 Daly (N. Y.) 1; *In re* Charge to Grand Jury, 4 Pa. L. J. 29; State *v.* Connolly, 3 Rich. (S. C.) 337; State *v.* Brooks, 1 Hill (S. C.) 361; State *v.* Cole, 2 McCord (S. C.) 117; Reg. *v.* Cunninghame, 16 Cox C. C. 420; Rex *v.* Hughes, 4 C. & P. 373, 19 E. C. L. 560.

5. See Alaska Pen. Code, § 111; Ariz. Pen. Code, § 369; Ark. Dig. St. § 2024; Cal. Pen. Code, § 404; Mill Annot. St. Colo. p. 927, § 1310; Conn. Gen. St. § 1277; Del. Annot. Rev. Code, p. 923, c. 127, § 17; Ga. Cr. Code, § 354; Hawaii Rev. Laws, § 3075; Idaho Pen. Code, § 4769; Starr & C. Annot. St. Ill. p. 1346, par. 416; Burns Suppl. (1905) St. Ind. § 2083; Iowa Code, § 5031; Kan. Gen. St. § 2354; La. Rev. Laws, p. 244; Me. Rev. St. p. 926, § 2; Minn. Rev. Laws, § 5014; Mo. Annot. St. (1906) §§ 2129, 2130; Mont. Pen. Code, § 741; Nebr. Annot. St. § 2080; Nev. Comp. Laws, § 4760; N. M. Comp. Laws, § 1393; N. Y. Pen. Laws, § 2090; Wadhams Consol. Laws N. Y. (1909) p. 2964; N. D. Rev. Codes, § 9081; Ohio Rev. St. § 6893; Okla. Rev. St. § 2374; Oreg. Annot. Codes & St. § 1913; Porto Rico Pen. Code (1902), § 359; S. D. Pen. Code, § 491; Tex. Pen. Code, arts. 299, 315; Utah Rev. St. § 4301; Vt. St. §§ 5036, 5037; Wash. Code & St. § 1073; Wyo. Rev. St. § 5047.

Riot is not a statutory crime in some states, but may be punished as a common-law offense. See Miss. Code (1906), §§ 1525, 1526; N. J. Gen. St. p. 1083, § 192; N. C. Rev. (1905) § 3293; R. I. Gen. Laws, p. 1013, § 1; Va. Code (1904), §§ 3774, 3881; W. Va. Const. art. 8, § 21. See also Green *v.* State, 109 Ga. 536, 35 S. E. 97; Prince *v.* State, 30 Ga. 27; Cherryvale *v.* Hawman, (Kan. 1909) 101 Pac. 994; Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 64 N. Y. Suppl. 411; Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787; State *v.* Page, 15 S. D. 613, 91 N. W. 313; Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676; People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653; Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

These riot statutes are based upon the common-law crime and require the application of general rules of construction.[6]

C. Distinguished From Other Offenses. Riot,[7] rout,[8] and unlawful assembly [9] are kindred offenses, and the greater includes the less;[10] yet the several offenses are clearly distinguishable each from the others.[11] It is apparent from the definition given [12] that riot is an offense distinct from affray,[13] insurrection,[14] treason,[15] or trespass.[16]

II. Nature and Characteristics of the Offense.

A. Acts Constituting the Offense in General. The violent and turbulent enterprises of bodies of men [17] have uniformly been considered as dangerous to

6. See cases cited *supra*, notes 1, 2.

A statutory definition frequently omits parts of the common-law definition. Cherryvale *v.* Hawman, (Kan. 1909) 101 Pac. 994, 995.

Meaning "force and violence" in the Utah act defining riot see People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Meaning of "public peace" in the Utah statute defining riot see People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

7. **Riot** defined see *supra*, I, A.

8. **A rout** is "where three or more meet to do an unlawful act upon a common ground, . . . and make some advances towards it" (Blackstone Comm. [*quoted* in People *v.* Judson, 11 Daly (N. Y.) 1, 56]); "a tumultuous meeting of three or more persons upon some common purpose, to do an unlawful act, making some motion towards its execution" (State *v.* Sumner, 2 Speers (S. C.) 599, 600, 42 Am. Dec. 387); "an assembly moving forward towards the execution of its unlawful design" (Follis *v.* State, 37 Tex. Cr. 535, 40 S. W. 277 [*quoting* Hawkins P. C. c. 65, § 9]); "an unlawful assembly which has made a motion toward the execution of the common purpose of the persons assembled" (Clark Elem. L. 119).

9. **An unlawful assemblage** is "when three or more persons assemble themselves together to do an unlawful act . . . and fail without doing it, or making any motion towards it." Blackstone Comm. [*quoted* in People *v.* Judson, 11 Daly (N. Y.) 1, 56]. See also Unlawful Assembly.

10. State *v.* Brazil, Rice (S. C.) 257, 258; Hawkins P. C. c. 65, § 9 [*quoted* in Follis *v.* State, 37 Tex. Cr. 535, 537, 40 S. W. 277].

"Three allied disturbances of the public peace" see Hawkins P. C. c. 65, § 9 [*quoted* in Follis *v.* State, 37 Tex. Cr. 535, 537, 40 S. W. 277].

11. State *v.* Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387; Hawkins P. C. c. 65, § 9 [*quoted* in Follis *v.* State, 37 Tex. Cr. 535, 537, 40 S. W. 277].

At common law, if the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose, which, if executed, would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. Rex *v.* Birt, 5 C. & P. 154, 24 E. C. L. 501; Rex *v.* Pugh, Holt K. B. 636, 90 Eng. Reprint 1251.

Apt illustration of distinctions.— "If three or more persons meet together for the purpose of beating another who lives a mile off, there is an unlawful assembly. While they are on the road to carry out the purpose, there is a rout. Where they make the attack and beat him, there is a riot." Clark Elem. L. 119. See also State *v.* Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387; Follis *v.* State, 37 Tex. Cr. 535, 40 S. W. 277.

An unlawful assembly must precede the unlawful acts which complete the offense of riot. State *v.* Hughes, 72 N. C. 25.

"An unlawful assembly is a distinct offense at common law, and if persons assemble for a purpose which, if executed, would constitute a riot, but separate without carrying out their purpose, their acts constitute an unlawful assembly." State *v.* Stephanus, (Oreg. 1909) 99 Pac. 428.

What degree of execution of their purpose will convert a rout into a riot it may often be difficult to determine. State *v.* Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387.

12. See *supra*, I, A.

13. See 2 Cyc. 42 note 8. An unlawful assembly, riotously and tumultuously disturbing the selectmen of a town in the exercise of their duty on a public day and in a public place and obstructing the inhabitants of the town in the use of their constitutional privilege of election is a riot, and not an affray. Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.

14. See Insurrection, 22 Cyc. 1452 note 2.

15. Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733. See also Treason.

"Riot, insurrection, and civil commotion" were held to import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. Boon *v.* Ætna Ins. Co., 40 Conn. 575, 584.

16. Com. *v.* Runnels, 10 Mass. 518, 520, 6 Am. Dec. 148 [*quoted* in People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653], where it is said: "To disturb another in the enjoyment of a lawful right is a trespass; and if it is done by numbers unlawfully combined, the same act is a riot."

17. **Unlawful assembly** is a necessary ele-

the rights of other citizens.[18] Thus where a band of persons makes an uproar and displays arms,[19] or makes an assault accompanied with loud threats and threatening display of force,[20] or forcibly destroys the property of another,[21] a riot may be committed, often in combination with another offense. Civil officers may commit a riot by a digression from the line of duty.[22] Mischief makers may become rioters while indulging in a *charivari*,[23] or in holiday celebrations.[24] Intimidating civil officers may constitute a riot[25] and so may the coercion of work-

ment of a riot. State *v.* Hughes, 72 N. C. 25.

18. Com. *v.* Cribs, Add. (Pa.) 277; Higgins *v.* Minaghan, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

Evidence to establish riot see *infra*, VI.

Kicking a foot ball in a town, although an amusement, when accompanied by circumstances of noise and tumult, such as were calculated to excite terror and alarm among the inhabitants of the town, was said to be a riot. 2 Chitty Cr. L. 494 [*cited* in State *v.* Brazil, Rice (S. C.) 257, 261].

19. Com. *v.* Armstrong, 11 Phila. (Pa.) 656, holding that the arming of men, to the number of three or more, with guns, in organized force, in a peaceful neighborhood, to the terror of the citizens, is riot.

Where three men in front of a house at night curse and threaten the occupant in loud voices, repeatedly firing a gun, thereby greatly frightening him and the members of his family, each participating in such conduct, they are all guilty of riot. Lewis *v.* State, 2 Ga. App. 659, 58 S. E. 1070.

20. *Georgia.*— Stafford *v.* State, 93 Ga. 207, 19 S. E. 50 (holding that where defendant and another assaulted the complaining witness under circumstances indicating a previous agreement to use violence, a conviction for riot is justified); Stokes *v.* State, 73 Ga. 816 (holding that the fact that more than two persons with common intent to force another to divide fish caught by all, in a certain way, ran him off into a yard, pursuing him with brickbats tumultuously to his home, make a riot); Jacobs *v.* State, 20 Ga. 839 (holding that where the evidence established that defendant cursed and swore and threatened to whip a person on the public highway, abusing him in the most violent manner, and raising their sticks over his head within striking distance, a riot was committed).

Illinois.— Logg *v.* People, 92 Ill. 598, holding that proof that A and B, while endeavoring to prevent C and D from fighting, were struck, A by C, and B by D, and that C and D acted together in such striking, is *prima facie* evidence of a riot on the part of C and D.

Indiana.— Kiphart *v.* State, 42 Ind. 273 (holding that where defendants did do an unlawful act by touching, striking, and beating a person in a rough and insolent and angry manner, and threatening two others, all in a riotous and tumultuous manner, these acts constitute a riot); State *v.* Acra, 2 Ind. App. 384, 28 N. E. 570 (holding that where persons in a riotous, tumultuous, and violent manner attempt to commit a violent injury on the person of another, violently threatening to beat, cut, and shoot him, the offense is riot).

New Hampshire.— State *v.* Russell, 45 N. H. 83, holding that an assault upon one, committed tumultuously by a number of persons, is a riot.

South Carolina.— State *v.* Jackson, 1 Speers 13.

Texas.— McKinney *v.* State, (Cr. App 1902) 68 S. W. 176, holding that where persons assemble for the purpose and with the intent of violently beating, bruising, and injuring another person, and actually carried out that purpose, this constitutes riot.

An assault committed by three or more with a preconceived intent has been held to constitute a riot. People *v.* White, 55 Barb. (N. Y.) 606 [*affirmed* in 32 N. Y. 465].

21. Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 96, 40 Am. Rep. 629, holding that where a breaker at a coal mine was set afire at night by a party of men, who fired a number of shots, drove the watchman away, and then burned the breaker, there was riot.

Five masked men, forcibly breaking at night into a dwelling-house, and compelling the occupant to vacate, under threats of personal violence, and then burning the building, constitutes a riot, within the meaning of a fire insurance policy stipulating against loss or damage by fire caused by riot, etc. Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868.

22. Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301.

So an officer holding an execution cannot break down the doors of an outbuilding, without a previous demand and refusal to open them, and if he does he may be guilty of riot. Douglass *v.* State, 6 Yerg. (Tenn.) 525.

If a sheriff and posse, on the way to take a felon, turn aside and attack a peaceable unoffending citizen, both the sheriff and posse would be guilty of riot. State *v.* Cole, 2 McCord (S. C.) 117.

23. State *v.* Brown, 69 Ind. 95, 35 Am. Rep. 210.

24. Madisonville *v.* Bishop, 113 Ky. 106, 67 S. W. 269, 23 Ky. L. Rep. 2363, 57 L. R. A. 130, holding that where one thousand people were assembled in the main street of a city celebrating Christmas by obstructing traffic and discharging bombs and skyrockets and other missiles, loaded with powerful explosives, at private property, endangering life and preventing the use of the street for business, such conduct was riotous. But *compare* Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

25. Green *v.* State, 109 Ga. 536, 35 S. E.

men.[26] Malicious mischief,[27] night disorders,[28] pole-raising[29] and prize-fights[30] may also become riots. The forcible appropriation of property is an act of riotous tendency,[31] while public meetings[32] are prolific sources of this offense. A disturbance at a theater may result in riot[33] and an act of trespass is often accompanied by it.[34]

97 (holding that where a number of persons, some bearing deadly weapons exposed to view, suddenly congregated for the purpose of preventing the removal of a prisoner from jail, and acted in an exciting manner, talking loudly, ran about from place to place and made use of threatening, profane, and violent language thereby intimidating the sheriff and his posse and actually preventing the removal of the prisoner, a conviction for riot was authorized); U. S. *v.* Stewart, 27 Fed. Cas. No. 16,401*a*, 2 Hayw. & H. 280 (holding that three or more persons who act in concert, by prior arrangement, in a violent and turbulent manner, in opposing the mayor in keeping the polls open and preserving the peace on election day, are guilty of riot).

An assault upon and the beating of peace officers in a tumultuous manner, but without terrifying others, is held to be riot in State *v.* Sims, 16 S. C. 486. See also State *v.* Seeley, (Oreg. 1908) 94 Pac. 37, construing the Oregon statute.

26. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

27. State *v.* Alexander, 7 Rich. (S. C.) 5.

28. Com. *v.* Cribs, Add. (Pa.) 277.

Thus where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols, or both, and marched backwards and forwards through the streets, shooting guns and blowing horns, to the terror and alarm of the inhabitants, they were guilty of a riot. State *v.* Brazil, Rice (S. C.) 257, 258.

29. Com. *v.* Morrison, Add. (Pa.) 274.

30. State *v.* Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387.

About one thousand spectators were assembled at a prize-fight. A magistrate went to the place and forbade the fight. A person in the crowd insisted that the fight should proceed and the magistrate attempted to arrest him, whereupon a tumult arose and a forcible rescue was accomplished. The rescuers were convicted of riot. Rex *v.* Bilingham, 2 C. & P. 234, 31 Rev. Rep. 665, 12 E. C. L. 545.

31. State *v.* Simpson, 12 N. C. 504.

32. See cases cited *infra*, this note.

Thus where a call of a public meeting is addressed exclusively to persons favorable to its objects, the interference of individuals hostile to its proceedings, and the breaking up and dispersion of the meeting by them, is a riot of a flagrant kind. Com. *v.* Daley, 4 Pa. L. J. 150. So where three or more persons by agreement go to a church where divine service is to be performed, and laugh and talk during the performance of the same in a manner which might be excusable in a tavern, and in so doing manifest determination to resist by force any effort that may be made to remove them, or prevent their so doing, they are guilty of riot. Com. *v.* Dupuy, Brightly (Pa.) 44. And where a public meeting is called to concert measures for the relief of certain persons in custody, and a magistrate, fearing a disturbance, posts a notice to the effect that the meeting will not be permitted; and the police, under such a notice, attempt to prevent such an assembly and three or more persons attempt to break through the cordon of police to reach the place of assembly, such an attempt has been held to constitute a riot. Reg. *v.* Cunninghame, 16 Cox C. C. 420.

33. People *v.* Judson, 11 Daly (N. Y.) 1.

Hissing actor.— If a body of men go to the theater with the settled intention of hissing an actor and thereupon effect this object by tumult and disorder they are guilty of riot. Clifford *v.* Brandon,, 2 Campb. 358, 366, 11 Rev. Rep. 731.

34. *Indiana.*— Where four persons violently and unlawfully burst open an outer door of a dwelling-house and then and there tear down and carry off one of the window shutters, accompanying these acts by throwing missiles against the house, a riot is committed. State *v.* Scaggs, 6 Blackf. 37.

Nebraska.— Defendants, four in number, with force and violence, through a window, entered a dwelling-house on premises belonging to one of them, but lawfully in the possession of another, and removed the goods of the occupant therefrom. It was held that they were properly convicted of an offense under Cr. Code, § 26, which provides that "if three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another . . . and shall make any movement or preparation therefor," they shall be fined, etc. Meese *v.* State, 15 Nebr. 558, 560, 20 N. W. 33.

Virginia.— The upper part of a house, used as a sleeping apartment for a family, and the lower part, used as a store on one side and a dining-room for the family on the other side, is a dwelling-house within the meaning of Code, c. 195, § 6, relating to rioters, and the breaking of a window, and the breaking open of the front door of the house by splitting a panel and removing the bar with which it was fastened, is sufficient to bring the guilty parties within the statute. Samanni *v.* Com., 16 Gratt. (Va.) 543.

United States.—An assemblage for the purpose of seizing a man without lawful authority, executed by tumultuously surrounding his house, and entering it, is a riot. U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

B. Number of Persons Necessary. The common-law rule requires that three or more persons must act together in committing the offense,[35] and most of the statutes defining riot provide that the offense cannot be committed by less than three persons;[36] but a number of states and territories, in their riot statutes, fix the minimum number of persons at two.[37] One state makes the number depend upon whether arms are carried.[38]

C. Purpose of Original Assembly — 1. May Be Lawful. It is not necessary that the riotous violence should have been premeditated by the assembled perpetrators;[39] therefore the original assembly may have been by accident or for a lawful purpose.[40] To this view there is a dissenting opinion; but it seems to be based on an erroneous idea of what had been the English rule,[41] the early English cases holding that where, in a lawful assembly, a sudden fray happens

England.— Defendants were copyholders who claimed a right of common in certain fields after harvest. Being kept out by inclosures, they proceeded to pull these down, although forbidden to do so. An information for riot was granted on these facts. Rex *v.* Wyvill, 7 Mod. 286, 87 Eng. Reprint 1245.

See 42 Cent. Dig. tit. "Riot," § 2.

35. *Alabama.*— Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Florida.—Ammons *v.* State, 9 Fla. 530.

Kentucky.— White *v.* Com., 10 Bush 557.

Maryland.— Beard *v.* State, 74 Md. 130, 21 Atl. 700.

Massachusetts.— Com. *v.* Gibney, 2 Allen 150.

Michigan.— Stout *v.* Keyes, 2 Dougl. 184, 43 Am. Dec. 465.

New Hampshire.—State *v.* Russell, 45 N. H. 83.

Pennsylvania.— Shouse *v.* Com., 5 Pa. St. 83; Com. *v.* Dupuy, Brightly 44.

South Carolina.— State *v.* Jackson, 1 Speers 13.

Tennessee.— State *v.* Allison, 3 Yerg. 428.

United States.— U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. *v.* Stewart, 27 Fed. Cas. No. 16,401*a*, 2 Hayw. & H. 280.

England.— Reg. *v.* Cunninghame, 16 Cox C. C. 420; Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252; Rex *v.* Sudbury, 12 Mod. 262, 88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 502.

See 42 Cent. Dig. tit. "Riot," § 4.

Illustration.— "By the common law, where three persons are together for a common, unlawful purpose, and acting in concert, it is not necessary, to constitute a riot, that all should do some physical act. It is enough, if two, or perhaps one, does the unlawful deed, if the other be aiding, assisting and abetting. He becomes an actor by aiding and abetting. Suppose one actually pulls down a building, while the other two stand by to watch and keep others off, they become participators in the act." State *v.* Straw, 33 Me. 554, 556, construing the provisions of Me. Rev. St. c. 159, § 3.

36. See statutes cited *supra*, note 5. See also Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 64 N. Y. Suppl. 411; State *v.* Mizis, 48 Oreg. 165, 85 Pac. 611, 86 Pac. 361; Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

37. See Ariz. Pen. Code, § 369; Cal. Pen. Code, § 404; Mills Annot. St. Colo. p. 927, § 1310; Ga. Cr. Code, § 354; Ida. Pen. Code, § 4769; Starr & C. St. Ill. p. 1346, par. 416; Mont. Pen. Code, § 741; Nev. Comp. Laws, § 4760; Porto Rico Pen. Code, § 359; Utah Rev. St. § 4301. See also Dixon *v.* State, 105 Ga. 787, 31 S. E. 750; Prince *v.* State, 30 Ga. 27; Croy *v.* State, 4 Ga. App. 457, 61 S. E. 847; Stanfield *v.* State, 1 Ga. App. 532, 57 S. E. 953; People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653.

A riot cannot be committed by one person alone. People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653.

38. La. Rev. Laws, p. 244, where "three armed or ten unarmed" is the language employed.

39. *Maine.*— State *v.* Snow, 18 Me. 346.

New York.— People *v.* Judson, 11 Daly 1.

South Carolina.— State *v.* Cole, 2 McCord 117.

United States.— U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601.

England.— Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252.

See 42 Cent. Dig. tit. "Riot," § 3.

40. *Maine.*— State *v.* Snow, 18 Me. 346.

Massachusetts.—Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.

New York.— Solomon *v.* Kingston, 24 Hun 562 [*affirmed* in 96 N. Y. 651].

Ohio.— Champaign County *v.* Church, 62 Ohio St. 318, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738.

Pennsylvania.— Com. *v.* Cribs, Add. 277.

South Carolina.— State *v.* Cole, 2 McCord 117.

Texas.— Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676.

Wisconsin.— State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

United States.— U. S. *v.* McFarland, 26 Fed. Cas. No. 15,674, 1 Cranch C. C. 140.

England.— Rex *v.* Hubson, East P. C. 258, Leach C. C. 7; Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252.

See 42 Cent. Dig. tit. "Riot," § 3.

41. State *v.* Stalcup, 23 N. C. 30, 35 Am. Dec. 732, where the English case cited (Rex *v.* Birt, 5 C. & P. 154, 24 E. C. L. 501) does not bear out the opinion.

"between" the persons assembled, there is no riot, but if a stranger is attacked,[42] or the assembly was originally unlawful,[43] a riot is accomplished.

2. May Be Unlawful. If parties assemble unlawfully, or for an unlawful purpose, and execute any part of an unlawful purpose with violence, such acts may make a riot.[44]

D. Mutual or Common Intent. It has been said that "a mutual intent to assist one another against any who shall oppose them" is an element of the offense of riot.[45] But it seems that, while this specific intention may be held by rioters, it is not in general essential to the offense.[46] The intention which is generally an element of the offense is the intent to join in or encourage the acts which constitute the riot, namely, the assembly, violence, turbulence, and the act violently and turbulently performed.[47]

42. Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252.

43. Anonymous, 6 Mod. 43, 87 Eng. Reprint 806.

44. *Georgia.*— Fisher *v.* State, 78 Ga. 258.

Indiana.— State *v.* Scaggs, 6 Blackf. 37.

Iowa.— State *v.* Johnson, 89 Iowa 594, 57 N. W. 302.

Nebraska.— Meese *v.* State, 15 Nebr. 558, 20 N. W. 33.

New Hampshire.— State *v.* Batchelder, 5 N. H. 549.

Virginia.— Com. *v.* Kinney, 2 Va. Cas. 139.

United States.— U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675; U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601.

England.— Rex *v.* Birt, 5 C. & P. 154, 24 E. C. L. 501.

See 42 Cent. Dig. tit. "Riot," § 3.

45. People *v.* Judson, 11 Daly (N. Y.) 1; *In re* Charge to Grand Jury, 4 Pa. L. J. 29; State *v.* Connolly, 3 Rich. (S. C.) 337; State *v.* Cole, 2 McCord (S. C.) 117; U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

46. *Georgia.*—Jemley *v.* State, 121 Ga. 346, 49 S. E. 292.

Massachusetts.— Com. *v.* Berry, 5 Gray 93.

New Hampshire.— State *v.* Russell, 45 N. H. 83, holding that intent to mutually assist each other is not necessary.

New York.— People *v.* Jusdon, 11 Daly 1.

Pennsylvania.— *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

United States.—U. S. *v.* McFarland, 26 Fed. Cas. No. 15,674, 1 Cranch C. C. 140, where it is said: "The unlawful act is evidence of the unlawful intent."

To constitute a riot, it is not necessary that the violence and tumult actually committed should have been premeditated by three or more persons assembled with intent to commit the same, nor that there should have been promises of mutual assistance, before or at the time of committing the actual violence. U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601. If defendants assembled together for the purpose of seizing one S on account of insulting expressions they had heard he had used, then such assembly, agreeing together to accomplish such object, and their attempting to execute it by tumultuously surrounding the house, and entering it with intent to seize him, without legal authority therefor, constituted a riot; and the jury may infer the intent from the acts done. U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

"It would be endless, as well as superfluous, to examine whether every particular person engaged in a riot was in truth one of the first assembly, or had a previous knowledge of their design." *In re* Charge to Grand Jury, 4 Pa. L. J. 29, 32.

"The concert of action may exist in the execution of the act. It is not necessary that the parties should deliberate before hand, that they should interchange views with each other before commencing the execution of the design. . . . It is declared by Sir William Blackstone, that a riot may exist with or without a common design." People *v.* Judson, 11 Daly (N. Y.) 184.

47. *Georgia.*— Hunter *v.* State, 127 Ga. 43, 55 S. E. 1044; Baptist *v.* State, 109 Ga. 546, 35 S. E. 658; Tripp *v.* State, 109 Ga. 489, 34 S. E. 1021; Prince *v.* State, 30 Ga. 27; Stanfield *v.* State, 1 Ga. App. 532, 57 S. E. 953.

Maine.— State *v.* Snow, 18 Me. 346, 347, where it is said: "Blackstone defines a riot to be, where three or more actually do an unlawful act of violence. It seems however, that there must be some degree of premeditation, for the execution of a common purpose."

Massachusetts.— Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.

New York.— See People *v.* Judson, 11 Daly 1.

Ohio.— The jury were charged "that if the crowd came together with an innocent purpose, and afterwards lynched Mitchell, they would not be a mob unless they had specifically agreed to be a mob, after they had assembled. This charge is not merely seriously misleading. It is erroneous. It is an ancient doctrine in the criminal law, as old as Hale's Pleas of the Crown, at least, that, although the assembly was lawful, the persons assembled might unite in unlawful conduct and thus become rioters." Champaign County *v.* Church, 62 Ohio St. 318, 348, 57 N. E. 50, 78 Am. St. Rep. 718, 48 L. R. A. 738.

Oregon.— Although the individual acts of the rioters be separate, they constitute riot if done in accomplishing a common purpose.

E. Enterprise of Private Nature. The term "riot" is sometimes limited to the tumultuous disturbances which arise in the execution of private enterprises or quarrels, as distinguished from a public attempt to overthrow or subvert the government, which is treason.[48]

F. Riotous Execution of Lawful Enterprise — 1. In General. Where a lawful private enterprise is executed by three or more persons with such violence and turbulence as to cause terror to citizens in the vicinity, the transaction may become a riot.[49]

2. In Terrorem Populi.[50] Where the conduct of assembled persons, engaged in a lawful enterprise, inspires terror, and so occasions riot, this terror is said to be the gist of the offense.[51]

G. Execution of Unlawful Enterprise. It seems that the violent and

State *v.* Mizis, 48 Oreg. 165, 85 Pac. 611, 86 Pac. 361.

Pennsylvania.— Com. *v.* Cribs, Add. 277.

South Carolina.— State *v.* Connolly, 3 Rich. 337.

Tennessee.— West *v.* State, 9 Humphr. 66.

Wisconsin.— Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

Canada.— See Reg. *v.* Corcoran, 26 U. C. C. P. 134, holding that where rioters attacked a procession, and one of the processionists, acting alone, fired once in the air and once at the rioters, he should not be convicted of riot.

If a patrol who originally assembled for the performance of a lawful duty afterward unite in committing a breach of the peace, it is as much a riot as if the original assembly had been for that purpose. State *v.* Cole, 2 McCord (S. C.) 117.

Concert of action also.— In Georgia to constitute riot there must not only be a common intent to do an unlawful act on the part of two or more persons, or some act in a violent manner, but also concert of action. Jemley *v.* State, 121 Ga. 346, 49 S. E. 292; Coney *v.* State, 113 Ga. 1060, 39 S. E. 425; Croy *v.* State, 4 Ga. App. 457, 61 S. E. 847; Lewis *v.* State, 2 Ga. App. 659, 58 S. E. 1070; Stanfield *v.* State, 1 Ga. App. 532, 57 S. E. 953. *Compare* Scott *v.* U. S., Morr. (Iowa) 142; State *v.* Straw, 33 Me. 554.

48. People *v.* Judson, 11 Daly (N. Y.) 1; Homestead Case, 1 Pa. Dist. 785.

49. *Georgia.*— Jacobs *v.* State, 20 Ga. 839; Croy *v.* State, 4 Ga. App. 457, 61 S. E. 847; Lewis *v.* State, 2 Ga. App. 659, 58 S. E. 1070.

Indiana.— Kiphart *v.* State, 42 Ind. 273; Bankus *v.* State, 4 Ind. 114.

Pennsylvania.— Com. *v.* Cribs, Add. 277.

South Carolina.— State *v.* Blair, 13 Rich. 93; State *v.* Brooks, 1 Hill 361.

Utah.— See People *v.* O'Loughlin, 3 Utah 133, 147, 1 Pac. 653.

Virginia.— Henderson *v.* Com., 8 Gratt. 708, 56 Am. Dec. 160.

See 42 Cent. Dig. tit. "Riot," § 1 *et seq.*

This general rule is based on the effect of such turbulence, in that, by causing the terror, it directly violates the right to personal security which a government secures to its citizens. Jacobs *v.* State, 20 Ga. 839, and cases cited *supra*, this note. A *charivari* continuing until two A. M., the noise being heard a mile away, was held to be a riot, although the participants were unarmed, in good humor, remained on the highway, and refrained from indecent language. Bankus *v.* State, 4 Ind. 114. "If parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot at common law." State *v.* Stephanus, (Oreg. 1909) 99 Pac. 428.

"Force" and "violence" do not necessarily mean actual use of physical force accompanied with turbulence or violence; but any unlawful act, however apparently peaceable and quiet, when done with such numbers, in such manner, and under such circumstances as to show that the actors intended to and were capable of carrying out and did so carry out an unlawful purpose in an unlawful manner, rendering resistance thereto apparently, in the minds of reasonable men of ordinary courage, dangerous to life or property, is such "force" and "violence" as is contemplated by the statute. People *v.* O'Loughlin, 3 Utah 133, 134, 1 Pac. 653.

Immediate power of executing their purpose is necessary under the Utah statute. People *v.* O'Loughlin, 3 Utah 133, 148, 1 Pac. 653.

Statutory exception.— A statute may require that the act, done or attempted to be done, be an unlawful act executed in a violent and turbulent manner, to constitute riot. Smith *v.* State, 14 Mo. 147.

50. In terrorem populi see 23 Cyc. 39.

51. *Indiana.*— Thayer *v.* State, 11 Ind. 287.

Massachusetts.— Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.

South Carolina.— State *v.* Sims, 16 S. C. 486.

Tennessee.— State *v.* Whitesides, 1 Swan 88.

Utah.— See People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

England.— Reg. *v.* Hughes, 4 C. & P. 373, 19 E. C. L. 560; Reg. *v.* Soley, 11 Mod. 115, 88 Eng. Reprint 935, 2 Salk. 594, 91 Eng. Reprint 503.

"It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened." 2 Wharton Cr. L. §§ 1537, 1544 [*quoted* in Spring Garden Ins. Co. *v.* Imperial Tobacco Co., (Ky. 1909) 116 S. W. 234, 236].

turbulent execution of any unlawful act capable of being so committed, by a sufficient number of persons, may be a riot,[52] even though no person or persons are actually terrified.[53]

H. Reading Riot Act Unnecessary. At common law a riot is no less a riot because the proclamation from the riot act has not been read. If the proclamation be not read the parties are guilty of the common-law offense, which is a misdemeanor.[54]

III. PARTIES TO THE OFFENSE.

A. Active Rioters. All concerned in an unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common object of the assembly,[55] and all who are present at the commission of any riotous act and actively engage therein by act, sign, or word are principal rioters.[56] All

52. *Delaware.*— State *v.* Townsend, 2 Harr. 543.

Georgia.— Green *v.* State, 109 Ga. 536, 35 S. E. 97; Fisher *v.* State, 78 Ga. 258; Bolden *v.* State, 64 Ga. 361; Sanders *v.* State, 60 Ga. 126; Rachels *v.* State, 51 Ga. 374; Davenport *v.* State, 38 Ga. 184; Croy *v.* State, 4 Ga. App. 457, 61 S. E. 847.

Illinois.— Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; Dougherty *v.* People, 5 Ill. 179.

Indiana.— Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868; State *v.* Acra, 2 Ind. App. 384, 28 N. E. 570.

Iowa.— State *v.* Johnson, 89 Iowa 594, 57 N. W. 302.

Maine.— State *v.* Straw, 33 Me. 554.

Massachusetts.— Com. *v.* Campbell, 7 Allen 541, 83 Am. Dec. 705; Com. *v.* Berry, 5 Gray 93.

Missouri.— Smith *v.* State, 14 Mo. 147.

New Hampshire.— State *v.* Russell, 45 N. H. 83; State *v.* Batchelder, 5 N. H. 549.

Oregon.— Newby *v.* Territory, 1 Oreg. 163.

Pennsylvania.— Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629; Shouse *v.* Com., 5 Pa. St. 83; Homestead Case, 1 Pa. Dist. 785.

South Carolina.— State *v.* Jenkins, 14 Rich. 215, 94 Am. Dec. 132; State *v.* Littlejohn, 1 Bay 316.

Tennessee.— Douglass *v.* State, 6 Yerg. 525.

Texas.— McKinney *v.* State, (Cr. App. 1902) 68 S. W. 176.

Virginia.— Com. *v.* Kinney, 2 Va. Cas. 139.

Wisconsin.—State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

England.— Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Rex *v.* Hughes, 4 C. & P. 373, 19 E. C. L. 560; Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252; Reg. *v.* Casey, Ir. R. 8 C. L. 408; Rex *v.* Sudbury, 12 Mod. 262, 88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 502; Reg. *v.* Wallis, 1 Salk. 334, 91 Eng. Reprint 294.

See 42 Cent. Dig. tit "Riot," § 1 *et seq.*

As where police officers forcibly and turbulently take property which may not lawfully be taken without an order of court. Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301.

53. See cases cited *supra*, note 52.

"The phrase in terrorem populi is used by Hawkins as descriptive of the offence denominated a riot; but it is clear that there may be a riot without terrifying any one." Com. *v.* Runnels, 10 Mass. 518, 519, 6 Am. Dec. 148 [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 154, 64 N. Y. Suppl. 411].

The essence of a "riot" may be the *terrorem populi* or it may be the committing of some unlawful act with violence, or in a violent and tumultuous manner. State *v.* Sims, 16 S. C. 486, 490.

54. State *v.* Russell, 45 N. H. 83; Rex *v.* Fursey, 6 C. & P. 81, 25 E. C. L. 332.

55. *Georgia.*— Green *v.* State, 109 Ga. 536, 35 S. E. 97.

New York.— Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 64 N. Y. Suppl. 411.

Pennsylvania.— *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

United States.— U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

England.— Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Rex *v.* Billingham, 2 C. & P. 234, 31 Rev. Rep. 665, 12 E. C. L. 545; Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252.

See 42 Cent. Dig. tit. "Riot," § 7.

Qualification.— All persons who by their presence encourage a fight from which death ensues to one of the combatants are guilty of manslaughter, although they neither say nor do anything. But if the death be caused not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encouraged the fight by their presence are not answerable. Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343.

56. Doan *v.* State, 26 Ind. 495.

"All who aid, encourage or promote [a riot] by words, signs or other acts are principals and jointly guilty of the offense." State *v.* Mizis, 48 Oreg. 165, 180, 85 Pac. 611, 86 Pac. 361.

A person who joins himself to rioters, after the riot begins, or encourages them by words, signs or gestures, or otherwise takes part in their proceedings, is a rioter. People *v.* White, 55 Barb. (N. Y.) 606 [*affirmed* in 32 N. Y. 465]; *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

One seen coming from the rioters armed and intoxicated, styling himself the leader, was held a rioter. State *v.* Brazil, Rice (S. C.) 257.

Servants.— One who commits an unlawful

those who incite others to commit riot,[57] or actively participate in enterprises which reasonably lead to riot, if a riot results, may be principal rioters, although absent from the place where the riot is committed.[58]

B. Quiescent Rioters. Persons present at a riot who do nothing and say nothing in furtherance of the offense may not be rioters, although they have no particular business in the vicinity.[59] Yet if persons are present in order to lend the courage of their presence to the rioters, or to assist if necessary, they may become equally guilty with the principals.[60]

C. After Notice to Disperse. After a magistrate or peace officer has called upon the assembled rioters and spectators to disperse, those who refuse, and remain, become principal rioters.[61]

D. Corporations. A corporation cannot in general be indicted for riot.[62]

IV. INDICTMENT OR INFORMATION.[63]

A. Form in General. In cases where two grades of offense are the result of the same act, it would seem that the state should unite both offenses in the same indictment under separate counts.[64] In alleging the statutory offense it is unnecessary to follow common-law precedents as to each element of the offense.[65] If it

act while acting as the servant, or by the direction, of another, is as guilty as if he acted for himself, and may be one of three committing a riot. State *v.* Jackson, 1 Speers (S. C.) 13; State *v.* Calder, 2 McCord (S. C.) 462; State *v.* Thackam, 1 Bay (S. C.) 358; State *v.* Bugbee, 22 Vt. 32.

57. Newby *v.* Territory, 1 Oreg. 163; Reg. *v.* Sharpe, 3 Cox C. C. 288. In one case, however, it is said that where a single person is engaged in the act of violence, and others stand by inciting him to the act, it is not a riot. Scott *v.* U. S., Morr. (Iowa) 142.

Inflammatory speeches.— If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and inflame them, with a view to incite them to acts of violence, and if that same meeting is so connected, in point of circumstances, with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, those who incited are guilty of riot, although they are not present when it occurs. Reg. *v.* Sharpe, 3 Cox C. C. 288.

Persons assembled with intent to whip a man, or to have it done, are guilty of a riot, although some other person inflicts the blows. Newby *v.* Territory, 1 Oreg. 163.

58. *Illinois.*— Bell *v.* Mallory, 61 Ill. 167, holding that the unlawful acts of one are chargeable against all the confederates.

Kentucky.—Madisonville *v.* Bishop, 113 Ky. 106, 67 S. W. 269, 23 Ky. L. Rep. 2363, 57 L. R. A. 130.

Pennsylvania.— Com. *v.* Cribs, Add. 277.

South Carolina.— State *v.* Blair, 13 Rich. 93.

United States.— U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

England.— Reg. *v.* Howell, 9 C. & P. 437, 38 E. C. L. 259; Ashton's Case, 12 Mod. 256, 88 Eng. Reprint 1304; Reg. *v.* Wallis, 1 Salk. 334, 91 Eng. Reprint 294.

See 42 Cent. Dig. tit. "Riot," § 7.

One who begins a riot, but leaves it before it is over, is responsible for all acts done in completion of the offense. State *v.* Blair, 13 Rich. (S. C.) 93.

59. See cases cited *infra*, this note.

"To make a man a party to a riot, he must be active, either in doing or countenancing, or supporting, or ready, if necessary to support the unlawful act." Com. *v.* Craig, Add. (Pa.) 190; *In re* Charge to Grand Jury, 4 Pa. L. J. 29; Reg. *v.* Atkinson, 11 Cox C. C. 330. An early English case indicates that if the assembly were originally lawful and certain of those assembled suddenly undertake and commit a riot; only those who act are guilty of riot. Reg. *v.* Ellis, Holt K. B. 636, 90 Eng. Reprint 1252.

60. State *v.* Straw, 33 Me. 554; Williams *v.* State, 9 Mo. 270; U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601; Reg. *v.* Young, 8 C. & P. 644, 34 E. C. L. 939; Rex *v.* Murphy, 6 C. & P. 103, 25 E. C. L. 343.

61. *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

62. Reg. *v.* Great North of England R. Co., 9 Q. B. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16, 58 E. C. L. 315; 1 Blackstone Comm. 476, 477.

63. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 157.

Form of indictment see Roberts *v.* State, 21 Ark. 183, 184; State *v.* Brazil, Rice (S. C.) 257, 258; 2 Archbold Cr. Pl. & Pr. (8th ed.) [*quoted* in Blackwell *v.* State, 30 Tex. App. 672, 674, 18 S. W. 676]; 2 Bishop Cr. Proc. § 992 [*quoted* in Blackwell *v.* State, *supra*].

64. Perkins *v.* State, 78 Ga. 316; Com. *v.* Kinney, 2 Va. Cas. 139. *Compare* Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774, where the indictment was sustained against the objection that it was duplicitous.

Duplicity see *infra*, IV, B, 9.

65. Whitley *v.* State, 66 Ga. 656.

Common-law indictment good.— Where an offense, as defined and prohibited by the statute, is essentially the same as that defined and prohibited by the common law, as in the

is alleged that any unlawful act is performed in a violent and tumultuous manner, and the act as performed is described, it is unnecessary to state the circumstances constituting the violence and tumult;[66] but a description of the violence and of the tumult should be connected with the description of an act otherwise lawful.[67]

B. Particular Averments — 1. Participants. It is not necessary to allege names of three or more persons charged with riot. It is sufficient to name those who are known and to allege that the others are unknown.[68]

2. Purpose of Assembly. From the common-law forms it seems that the disturbance of the peace is a sufficiently precise statement of the purposes of the rioters. The disturbance of the peace is an unlawful purpose, which may be accomplished by noise, outcries, and general disorderly conduct, without attacking the person or property of any one.[69]

statute concerning riots, an indictment which is good at common law is also good under the statute. Roberts *v.* State, 21 Ark. 183.

66. Lock *v.* State, 122 Ga. 730, 50 S. E. 932; Baptist *v.* State, 109 Ga. 546, 35 S. E. 658; State *v.* Dean, 71 Wis. 678, 38 N. W. 341.

Good counts.— An indictment alleging that certain named persons "did in a violent and tumultuous manner prevent the sheriff . . . from removing [from] the common jail" a prisoner therein confined sufficiently charges the offense of riot, as against a special demurrer setting up that the indictment did "not allege any act done in a violent and tumultuous manner, which prevented" the sheriff from removing the prisoner. *Aliter* if the point had been made that the act charged was not set forth with sufficient particularity. Green *v.* State, 109 Ga. 536, 35 S. E. 97. An indictment which alleges that defendants, "on the first day of September, 1888, at and within the county of Pope, then and there, being together, did riotously, and with force and violence assault, beat, wound, and ill-treat" a certain person, sufficiently charged a riot, and the time and place of its commission. Lambert *v.* People, 34 Ill. App. 637. "That James Scaggs, jun., Thomas Scaggs, William Huff, and Jackson Trent, late of, &c., labourers, on, &c. at, &c. with force and arms, in a riotous, violent, and unlawful manner, did then and there violently and unlawfully burst open the outer door of the dwelling-house of one Thomas Smith, situate, &c. . . . contrary to the form of the statute, &c." State *v.* Scaggs, 6 Blackf. (Ind.) 37. An affidavit and information charging that "on" etc., "in," etc., A, B and C "did then and there, in a riotous, tumultuous, and violent manner, assemble themselves together, and then and there, in a riotous, tumultuous, and violent manner . . . unlawfully attempt to commit a violent injury on the person of said affiant by then and there violently and unlawfully threatening to beat, cut, and shoot said affiant, contrary to the forms of the statute," etc., state facts sufficient to constitute a charge of riot. State *v.* Acra, 2 Ind. App. 384, 28 N. E. 570.

67. See cases cited *infra*, this note.

In a disturbance near a dwelling-house, where verbal threats against the owner of the house were made, it should be alleged that the owner was in the house, or within hearing, at the time. State *v.* Hathcock, 29 N. C. 52.

Unlawfulness and violence.— Where an offense consists in three or more persons doing an act in a violent and tumultuous manner, it is not necessary, in order to sustain a prosecution for such an offense, that the act done should be unlawful. Although the word violent be not used in the affidavit or information, in describing the offense, if the allegation show that the act was done violently, it will be sufficient. Kiphart *v.* State, 42 Ind. 273. Averment as to violence or unlawful act see *infra*, IV, B, 5, 8.

68. Thayer *v.* State, 11 Ind. 287; Com. *v.* Berry, 5 Gray (Mass.) 93; State *v.* Brazil, Rice (S. C.) 257; State *v.* Calder, 2 McCord (S. C.) 462.

For example an indictment for riot which charged that two defendants, who were named, with divers other persons, "to the jurors unknown," to the number of ten did assemble, etc., was held sufficient to sustain a verdict of guilty against the two defendants who were tried and convicted. State *v.* Brazil, Rice (S. C.) 257.

69. State *v.* Russell, 45 N. H. 83; State *v.* Renton, 15 N. H. 169; U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

Illustration.— On the trial of persons indicted for a riot, a count of the indictment setting forth that they, with others, riotously assembled, to the disturbance of the public peace, and then riotously began to pull down a certain dwelling-house, it was held to be sufficient, although it did not state the unlawful act which they were assembled to commit. Com *v.* Jenkins, Thach. Cr. Cas. (Mass.) 118.

Contrary rule.— One American case seems to have followed the case of Reg. *v.* Gulston, *infra*, in holding that, after a lawful assembly, a subsequent agreement of the persons so assembled, to commit an unlawful act, must be charged in the indictment. Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676. It is held in one English case that "an indictment for riot must shew explicitly for what act the rioters assembled;" but the court gives this reason for its opinion: "The act ought to be shewn, that the Court might judge, whether the act was unlawful or not." Reg. *v.* Gulston, 2 Ld. Raym. 1210, 92 Eng. Reprint 298.

3. Inciting a Riot. It is an indictable offense at common law to incite others to insurrection, tumult, and riot;[70] and the indictment need not aver that insurrection, tumult, and riot were thereby excited.[71]

4. As to Terror. If an indictment for riot alleges that an unlawful act has been committed, the words "*in terrorem populi*" are not necessary;[72] *aliter* where the offense consists of terrifying people.[73]

5. As to Violence. An allegation that the act upon which the offense is based was riotously, tumultuously, and violently committed, or partly committed, is necessary to an indictment, unless words equivalent thereto are used.[74]

6. Proclamation to Disperse. In an indictment for riot it is not necessary to allege a proclamation to disperse.[75]

7. Unlawful Assembly. Where an unlawful assembly has ripened into a riot it has been said that the unlawful assembly must be charged in the indictment.[76]

8. Unlawful Act. In general an indictment for riotously committing an unlawful act should set forth circumstances which show the commission of the unlawful act,[77] as, where a dwelling-house has been damaged, ownership in others than the rioters should be alleged.[78] It is sufficient if the facts charged constitute an attempt to commit an act of violence, which, if completed, would be an indictable offense.[79]

For form of complaint held to be insufficient for not alleging a common intent or purpose see Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

Under the Texas statute, an indictment for riot must show for what purpose the rioters assembled. See Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676, for an information vitally defective for not alleging that the defendants did "unlawfully assemble together," or that having lawfully assembled they afterward joined in the commission of an unlawful act, which they proceeded to do or commit.

70. See *supra*, I, A; III, A.

71. U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

72. *Indiana.*—Thayer *v.* State, 11 Ind. 287.
Massachusetts.— Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148.
South Carolina.— State *v.* Sims, 16 S. C. 486.
Tennessee.— State *v.* Whitesides, 1 Swan 88.
England.— Rex *v.* Hughes, 4 C. & P. 373, 19 E. C. L. 560; Reg. *v.* Soley, 11 Mod. 115, 88 Eng. Reprint 935, 2 Salk. 594, 91 Eng. Reprint 503.

73. Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148; State *v.* Brazil, Rice (S. C.) 257.

"Lord Holt has given a distinction, founded in good sense, between those indictments, in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consist in going about armed, &c., without committing any act, the words aforesaid are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is committed the words are useless." Com. *v.* Runnels, 10 Mass. 518, 519, 6 Am. Dec. 148 [*quoted* in Marshall *v.* Buffalo, 50 N. Y. App. Div. 149, 154, 64 N. Y. Suppl. 411]; State *v.* Sims, 16 S. C. 486; Reg. *v.* Soley, 11 Mod. 115, 2 Salk. 594, 91 Eng. Reprint 503.

74. State *v.* Kutter, 59 Ind. 572; State *v.* Dillard, 5 Blackf. (Ind.) 365, 35 Am. Dec. 128; State *v.* Acra, 2 Ind. App. 384, 28 N. E. 570; Com. *v.* Runnels, 10 Mass. 518, 6 Am. Dec. 148; Martin *v.* State, 9 Mo. 286. See also Kiphart *v.* State, 42 Ind. 273.

75. State *v.* Russell, 45 N. H. 83.

76. Com. *v.* Gibney, 2 Allen (Mass.) 150; McWaters *v.* State, 10 Mo. 167; Blackwell *v.* State, 30 Tex. App. 672, 18 S. W. 676. See also State *v.* Hughes, 72 N. C. 25.

But it is not necessary to allege that defendants assembled to assist each other in the execution of an act of a private nature, or that they executed the act for which they assembled. State *v.* Russell, 45 N. H. 83.

77. See cases cited *infra*, note 78.

78. State *v.* Martin, 7 N. C. 533; Reg. *v.* Soley, 11 Mod. 115, 88 Eng. Reprint 935, 2 Salk. 594, 91 Eng. Reprint 503.

79. State *v.* York, 70 N. C. 66; Bonneville *v.* State, 53 Wis. 680, 11 N. W. 427.

Illustration.— As where an indictment charged that defendants "with force and arms at Columbia, in the county and State aforesaid, unlawfully, riotously and routously, did assemble and gather together to disturb the peace of the said State; and being so then and there assembled and gathered together, in and upon one E. R. Warner, a peace officer and policeman of the city of Columbia, in the county and State aforesaid . . . then and there unlawfully, riotously and routously, did make an assault; and then the said E. R. Warner . . . then and there unlawfully, riotously, and routously, did beat, bruise, and wound, and illtreat, and other wrongs to the said E. R. Warner . . . then and there unlawfully, riotously, and routously, did to the great damage of the said E. R. Warner . . . in contempt and defiance of the laws . . . against the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the State." State *v.* Sims, 16 S. C. 486, 487.

To support an indictment for a riot in obstructing and breaking up a justice's court,

9. Duplicity. An indictment is not open to the objection of duplicity because it alleges a riotous assembly, and an act of violence which of itself might constitute a distinct offense.[80]

C. Proof and Variance. The general rules as to issues, proof, and variance [81] apply in prosecutions for riot.[82] Where an indictment alleges that but three persons committed a riot, proof that but two of these were engaged will not sustain the charge; [83] but where an indictment charges that three named persons, together with others to the jurors unknown, committed a riot, the acquittal of one or two of the defendants cannot be offered as a reason for the discharge of the rest.[84]

V. Defenses.

A. In General. The absence of any essential element of the offense [85] may be set up as a defense; especially that the act or acts charged would not, even if true, constitute riot.[86]

B. Absence. A person who joins the rioters after cessation of the riotous acts is not guilty of riot.[87]

C. Accident. A rioter cannot be held guilty of murder or manslaughter by reason of the accidental killing of a person by those who are engaged in suppressing the riot.[88]

D. Acquittal of Co-Defendants. In states where three perpetrators are required, if but two of the alleged are found guilty, and all the rest are acquitted, the judgment may be arrested.[89]

it is not necessary to allege or prove that the person holding the court was commissioner, or that he was proceeding lawfully in the business before him. State *v.* Boies, 34 Me. 235.

80. State *v.* Russell, 45 N. H. 83; Rex *v.* Sudbury, 12 Mod. 262, 88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 502. *Compare* Hobbs *v.* State, 133 Ind. 404, 32 N. E. 1019, 18 L. R. A. 774.

81. See Indictments and Informations, 22 Cyc. 445.

82. See cases cited *infra*, this and notes 83, 84.

The erection and exhibition of a stuffed Paddy, constructed and exposed in such a way as to be calculated to produce a riot and disturbance, is a misdemeanor at common law, although if it should appear in evidence that the figure thus exposed was not a Paddy, but a Shelah, the two effigies appearing to be of an opposite character and the indictment averring it to be a Paddy, the variance is fatal. Com. *v.* Haines, 6 Pa. L. J. 239.

An indictment charging a riot and forcible trespass to land which is in the actual possession of a tenant of the owner should charge the possession to be in the tenant and not in the owner; if the latter is charged to be in possession, proof of the possession of his tenant will not support the indictment. State *v.* Wilson, 23 N. C. 32.

In an indictment containing a count for riot and assault, if defendant be found guilty generally thereunder, the judgment will not be arrested if there be one good count, although the others may be defective. State *v.* Connolly, 3 Rich. (S. C.) 337.

Where one person is indicted for assault with intent to kill, it is not error to refuse to charge that defendant may be convicted of riot. Robinson *v.* State, 84 Ga. 674, 11 S. E. 544.

83. *Georgia.*—Martin *v.* State, 115 Ga. 255, 41 S. E. 576; Robinson *v.* State, 84 Ga. 674, 11 S. E. 544.

Massachusetts.— Com. *v.* Berry, 5 Gray 93.

Missouri.— State *v.* Kuhlmann, 5 Mo. App. 588.

North Carolina.— State *v.* Wilson, 23 N. C. 32.

Oklahoma.— Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

South Carolina.— State *v.* Connolly, 3 Rich. 337.

84. See cases cited *supra*, note 83.

85. Essential elements of offense see *supra*, I; II.

86. See cases cited *infra*, this note.

An unlawful act executed peaceably and quietly by a number of persons is not a riot. Riley *v.* People, 29 Ill. App. 139; Reg. *v.* Hunt, 1 Cox C. C. 177.

Force necessary in executing legal process does not constitute riot. Graves *v.* State, 1 Ind. 368; Com. *v.* Taylor, 4 Pa. L. J. Rep. 480.

Acts constituting offense see *supra*, II, A.

87. Sloan *v.* State, 9 Ind. 565.

88. Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 517. *Compare* Rex *v.* Murphy, 6 C. & P. 103, 25 E. Ch. 343.

89. *Georgia.*— Hawkins *v.* State, 13 Ga. 322, 58 Am. Dec. 517.

Indiana.— Turpin *v.* State, 4 Blackf. 72.

Iowa.— See Scott *v.* U. S., Morr. 142.

Massachusetts.— Com. *v.* Berry, 5 Gray 93.

Oklahoma.— See Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

England.— Rex *v.* Sudbury, 12 Mod. 262,

E. Non-Participation. It has been said that, in riotous and tumultuous assemblages, all who are present and are not actually assisting in their suppression are, in the presumption of law, participants; but that spectators who are so circumstanced may remove this presumption by proof of their actual non-participation and harmless intent, although this proof will not avail them if they remain after notice to disperse.[90]

F. Twice in Jeopardy. The defense of twice in jeopardy for the same act [91] may be interposed by defendant in a proper case.[92]

G. Miscellaneous Defenses. A defense showing that the tumult was partly sanctioned by holiday custom, and the violent act was accidental, has been considered good, on the ground that there was no common intent.[93] Where agents of the federal government are acting in accordance with the laws defining their duties, they cannot be held rioters because of the violation of some municipal regulation.[94]

VI. EVIDENCE.[95]

A. In General. To sustain a conviction of one charged with the offense of riot it is necessary that the evidence should show the joint action of at least the requisite number of persons with a common intent to do an unlawful act of violence or a lawful act in a violent and tumultuous manner; [96] and in the proof of these elements of the offense,[97] the general rules relating to presumptions [98] and burden of proof,[99] to circumstantial evidence,[1] to opinion evidence,[2] and to

88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 503.

Compare Butler *v.* People, 125 Ill. 641, 18 N. E. 338, 8 Am. St. Rep. 423, 1 L. R. A. 211 [*distinguished* in State *v.* Taylor, 41 Tex. Cr. 564, 55 S. W. 961].

However, the fact that one of the three is acquitted by a different jury does not work an acquittal of one found guilty. Simmons *v.* Territory, 11 Okla. 574, 69 Pac. 787.

Joint or separate trial see *infra*, VII, B.

Where one of several indicted for a riot is convicted, the others not yet taken, he is estopped by the verdict to deny his guilt, and may be punished, although the others may be acquitted. State *v.* Pugh, 3 N. C. 55, 2 Am. Dec. 621.

90. *In re* Charge to Grand Jury, 4 Pa. L. J. 29. See *supra*, III, B.

This is not the rule, under the statutory offense, in Missouri. State *v.* McBride, 19 Mo. 239.

91. See CRIMINAL LAW, 12 Cyc. 284.

92. See cases cited *infra*, this note.

A conviction against one under an indictment for an assault and battery may be pleaded by him in bar to an indictment against the same defendant and two others, for a riot and beating a person, the assault and battery in each case being identically the same. Com. *v.* Kinney, 2 Va. Cas. 139; Rex *v.* Sudbury, 12 Mod. 262, 88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 502; Reg. *v.* Kelly, 6 U. C. C. P. (Can.) 372. But it is also said that a conviction for assault and battery does not bar a prosecution for riot, for they are distinct offenses even when arising from the same breach of the peace. In announcing this decision the court said: "The punishment for a riot would be a defense against a prosecution for an assault and battery, but not *vice versa*." No authorities are cited in this opinion. Scott *v.* U. S., Morr. (Iowa) 142, 144. An indictment pending, for assault, on which no conviction has been had, is no bar to an indictment for riot. Com. *v.* Berry, 5 Gray (Mass.) 93.

Where a riot took place at a religious meeting, it was held that the rioters could not be indicted both for the riot and for disturbing the religious meeting, as the punishment for the riot covered the latter offense; it was the same act. State *v.* Townsend, 2 Harr. (Del.) 543.

93. Aron *v.* Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

94. U. S. *v.* Hart, 26 Fed. Cas. No. 15,316, Pet. 390, 3 Wheel. Cr. 304.

95. **Evidence** generally see CRIMINAL LAW, 12 Cyc. 379 *et seq.*

96. Hunt *v.* State, 116 Ga. 615, 42 S. E. 1004; Baptist *v.* State, 109 Ga. 546, 35 S. E. 658; Dixon *v.* State, 105 Ga. 787, 31 S. E. 750.

97. **Elements of the offense** see *supra*, I; II.

98. See CRIMINAL LAW, 12 Cyc. 384.

Presumption of common intent may arise from the circumstances and acts committed. State *v.* Seeley, 51 Oreg. 131, 94 Pac. 37.

99. See CRIMINAL LAW, 12 Cyc. 379. See also *infra*, VI, H.

After case shown.— If two persons, while endeavoring to separate two others, and prevent their quarreling and fighting, are struck, the one by one of the combatants, and the other by another of the combatants, they both acting together, this is *prima facie* a riot on the part of the persons so striking, and, if there are circumstances of defense, it devolves upon them to show what they are. Logg *v.* People, 92 Ill. 598.

1. See CRIMINAL LAW, 12 Cyc. 390 *et seq.* See also *infra*, VI, D, E.

2. See EVIDENCE, 17 Cyc. 25 *et seq.*

the weight and sufficiency of evidence in prosecutions under informations or indictments for criminal offenses generally [3] apply.

B. Admissions. The acts and declarations of one defendant, at the time of the riot, are admissible in evidence against all the defendants on trial.[4]

C. Concert of Action. Concert of action, by the proper number of persons, must be shown,[5] when concert of action is an element of the offense.[6]

D. General Alarm. Testimony of a general feeling of alarm and disquiet is properly received to show that defendants disturbed the public peace.[7]

E. Intent. It is not necessary that the common purpose of the rioters should be established by positive proof, but such purpose and intent may be inferred and found from the circumstances and acts committed.[8]

F. Other Riotous Acts. Other riotous acts by defendants at a different place and time are not competent, in evidence, unless it is first shown that the various acts were all parts of one continuous transaction.[9]

G. Trespass. Where a riot includes a trespass it is not necessary to prove the actual ownership of the property, but its possession in some one other than the rioters should be shown.[10]

H. Unknown Rioters. A charge that some of the rioters are unknown is a negative averment, and need not be proved, the *onus* of disproving it being on defendant.[11]

Mere opinion evidence as to the effect of the use of certain words is inadmissible. Shuler *v.* State, 126 Ga. 630, 55 S. E. 496.

3. See CRIMINAL LAW, 12 Cyc. 485; EVIDENCE, 17 Cyc. 753 *et seq.*

Evidence held sufficient to sustain conviction see Lewis *v.* State, 2 Ga. App. 659, 58 S. E. 1070; State *v.* Seeley, 51 Oreg. 131, 94 Pac. 37; State *v.* Brazil, Rice (S. C.) 257. See also cases cited *supra*, II, A.

Evidence held insufficient to sustain conviction see Stanfield *v.* State, 1 Ga. App. 532, 57 S. E. 953. See also cases cited *supra*, II, A.

4. State *v.* Brazil, Rice (S. C.) 257; People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Qualification.— But what one of two joint defendants said, in the absence of the other defendant, some thirty minutes after the alleged riot, not of a character to throw any light on the question of the guilt of either, was irrelevant. Shuler *v.* State, 126 Ga. 630, 55 S. E. 496.

5. Turner *v.* State, 120 Ga. 850, 48 S. E. 312; Coney *v.* State, 113 Ga. 1060, 39 S. E. 425.

In one English case it is said that the parties charged must be proved to have been present, before the fact of the riot can be given in evidence. Nicholson's Case, 1 Lew. C. C. 300.

6. Concert of action as element of offense see *supra*, II, D, text and note 47.

7. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Testimony that a woman fainted, from fright caused by the tumult, was properly admitted to throw light on the conduct of the accused. Johnson *v.* State, 124 Ga. 656, 52 S. E. 880.

Declarations, expressions of fear, and acts of the residents of the neighborhood, during and while the acts of defendants were being performed, are admissible as tending to show a breach of the public peace, within the meaning of the statute defining riot. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

Evidence of the effect upon the minds and feelings of the people in the vicinity, occasioned by the unlawful acts, was admissible as tending to show a breach of the public peace, within the meaning of the statute defining riot. People *v.* O'Loughlin, 3 Utah 133, 1 Pac. 653.

8. State *v.* Seeley, 51 Oreg. 131, 94 Pac. 37; State *v.* Mizis, 48 Oreg. 165, 85 Pac. 611, 86 Pac. 361; State *v.* Johnson, 43 S. C. 123, 20 S. E. 988; West *v.* State, 9 Humphr. (Tenn.) 66; U. S. *v.* McFarland, 26 Fed. Cas. No. 15,674, 1 Cranch C. C. 140; U. S. *v.* Peaco, 27 Fed. Cas. No. 16,018, 4 Cranch C. C. 601; U. S. *v.* Stockwell, 27 Fed. Cas. No. 16,405, 4 Cranch C. C. 671. See also People *v.* Judson, 11 Daly (N. Y.) 1.

Under the common-law rule, where defendant's witnesses have testified that they were of the party concerned in the riot, they will not be allowed to give evidence of their intention in meeting. U. S. *v.* Dunn, 25 Fed. Cas. No. 15,007, 1 Cranch C. C. 165.

Statutory exception.— The mere fact that three or more persons in a violent manner beat another does not raise the presumption of law that they assembled with that intent, or, after being assembled, agreed mutually to assist one another in executing such purpose, under Mo. Acts (1855), p. 618, § 3. State *v.* Kempf, 26 Mo. 429.

9. Com. *v.* Campbell, 7 Allen (Mass.) 541, 83 Am. Dec. 705; State *v.* Renton, 15 N. H. 169.

10. State *v.* Wilson, 23 N. C. 32; State *v.* Bennett, 20 N. C. 170.

Under an indictment for riotously breaking into an outhouse it is competent to show that the house was within the curtilage. Douglass *v.* State, 6 Yerg. (Tenn.) 525.

11. State *v.* Blair, 13 Rich. (S. C.) 93.

VII. TRIAL.[12]

A. In General. Riot, being originally a common-law misdemeanor, may be tried under common-law rules, wherever they still obtain.[13]

B. Joint or Separate Trial. It is entirely in the discretion of the court to determine whether several defendants shall be tried jointly or separately.[14] Where three are indicted for a riot and one is tried separately and found guilty and then a second is tried and acquitted, the court must nevertheless enter judgment against the first; for the court cannot look to extrinsic facts to find reasons to arrest the judgment, but must find them in the record of the one found guilty.[15]

C. Combined Offenses. On an indictment for a riot and assault, defendants may be found guilty of the assault and acquitted of the riot.[16]

D. Charge to Jury. The charge to the jury must define riot according to the law of the jurisdiction and must be so clear that, when applied to the facts, it furnishes a true guide for a proper finding of both law and fact.[17]

E. Verdict. Where the riot is charged as having been committed by a certain number of defendants, and two are found guilty and all the rest are acquitted, finding less than the minimum number guilty furnishes ground for motion in

12. Trial generally see CRIMINAL LAW, 12 Cyc. 504 *et seq.*

13. People *v.* White, 55 Barb. (N. Y.) 606 [*affirmed* in 32 N. Y. 415]; U. S. *v.* McFarlane, 26 Fed. Cas. No. 15,675, 1 Cranch C. C. 163.

The court of general sessions has jurisdiction of riots only when they are of a high and aggravated character. State *v.* Sims, 16 S. C. 486.

14. People *v.* White, 55 Barb. (N. Y.) 606 [*affirmed* in 32 N. Y. 465]; People *v.* Judson, 11 Daly (N. Y.) 1; State *v.* Littlejohn, 1 Bay (S. C.) 316. See also CRIMINAL LAW, 12 Cyc. 505.

State's evidence.— Where four defendants, jointly indicted for riot, have been put on trial, and the state announces that it will claim no conviction as to two of them and then examines these two as witnesses against the others, a verdict is not void because it finds all guilty. Sims *v.* State, 87 Ga. 569, 13 S. E. 551.

15. State *v.* Pugh, 3 N. C. 55, 2 Am. Dec. 621; State *v.* Allison, 3 Yerg. (Tenn.) 428; Rex *v.* Scott, 3 Burr. 1262, 97 Eng. Reprint 822, 1 W. Bl. 350, 96 Eng. Reprint 195.

Acquittal of co-defendant see *supra*, V, D.

16. Rex *v.* Hemings, 2 Show. 93, 89 Eng. Reprint 816. But *compare* Reg. *v.* Kelly, 6 U. C. C. P. 372, where defendant was indicted for riot and assault, and the jury found him guilty of a riot but not assault, and it was held that a conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed, although defendant might have been guilty of riot or guilty of joining in an unlawful assembly.

On an indictment for riot, and a riotous assault and battery, by four persons, one of them may be convicted of the assault and battery, and the others acquitted of the whole. Shouse *v.* Com., 5 Pa. St. 83.

Where the grand jury on one count for riot and assault, in an indictment, find defendant guilty of a riot, it is a partial finding of the entire count and therefore void. State *v.* Creighton, 1 Nott & M. (S. C.) 256.

Where defendants are indicted for the felony of riotous demolition, the indictment may be sustained as for a misdemeanor at common law; that is, for a riot, with a statement of the demolition of the house as matter of aggravation. Reg. *v.* Casey, Ir. R. 8 C. L. 408.

17. Hunter *v.* State, 127 Ga. 43, 55 S. E. 1044; Shuler *v.* State, 126 Ga. 630, 55 S. E. 496; Whitley *v.* State, 66 Ga. 656; State *v.* Snow, 18 Me. 346.

Illustrations.— It is error to charge that: "If the defendants 'united, with or without a common intent, in doing an unlawful act of violence, the acts and words of each one while the thing [was] in progress [became] the acts and words of the other.'" Hunter *v.* State, 127 Ga. 43, 55 S. E. 1044. Where defendants were indicted for riot under Ga. Code, § 4514, and the evidence showed that they were engaged in beating another person in a violent and tumultuous manner, the court properly refused to charge the law as to assault and battery. Perkins *v.* State, 78 Ga. 316. On the trial of an indictment for riot, an instruction that if "the defendants or any two of them," riotously, etc., assaulted, etc., then the jury should find "the defendants" guilty instead of "such defendants," is erroneous. Lambert *v.* People, 34 Ill. App. 637. An unqualified charge that, if a person at some distance when the riot takes place comes up immediately afterward and does violence on the same object, he is not guilty of a riot, is properly refused. Hibbs *v.* State, 24 Ind. 140. An instruction that each of defendants must have been "acting in conjunction with not less than two other persons in committing the act," was not objectionable, as misleading the jury to infer that any two persons would answer the requirement. State *v.* Mizis, 48 Oreg. 165, 85 Pac. 611, 86 Pac. 361.

arrest of judgment.[18] Where the findings do not embrace the elements necessary to constitute a riot, they must operate as an acquittal of that offense.[19] A general verdict of guilty under an indictment for riot has been held to be sufficient, although the evidence merely establishes that defendants were guilty of rout or unlawful assembly.[20]

VIII. Sentence and Punishment.

A. Generally. At common law the offense of riot is a misdemeanor.[21] By most of the state statutes riot is also made a misdemeanor; but an occasional statute, although making the offense a misdemeanor, also makes the crime a felony where certain matters of aggravation have been laid and proven.[22]

B. Imprisonment. While the common-law offense provides for both a fine and jail imprisonment, the imprisonment is not a necessary part of the punishment.[23]

C. Statutory Penalties. Where a statute fixes the penalty for the common-law offense, no other than the statutory penalty can be inflicted.[24]

IX. Suppression of Riot.

A. By Private Citizens. Citizens may, on their own authority, lawfully endeavor to suppress a riot when it assumes a dangerous form, and may arm them-

18. *Indiana.*— Hardebeck *v.* State, 10 Ind. 459.

Louisiana.— State *v.* Egan, 10 La. Ann. 698.

South Carolina.— State *v.* Brooks, 1 Hill 361; Carlile *v.* Maxwell, 1 McCord 534.

United States.— U. S. *v.* Cole, 25 Fed. Cas. No. 14,832, 5 McLean 513.

England.— Rex *v.* Sudbury, 12 Mod. 262, 88 Eng. Reprint 1309, 2 Salk. 593, 91 Eng. Reprint 502.

Acquittal of co-defendant as defense see *supra*, V, D.

Joint or separate trial see *supra*, VII, B.

Trial for combined offenses see *supra*, VII, C.

Where a verdict acquits all but two of several indicted for a riot, and finds these guilty; or in conspiracy acquits all but one, it is repugnant and void as to those found guilty, unless the indictment charges them as having made such a riot or conspired with certain persons unknown to the jurors, for there can be no riot where there are no more than two, or a conspiracy where there is no more than one. 2 Hawkins P. C. c. 47, § 8.

Erroneous verdict.— On the trial of several persons for riot, a verdict which finds two guilty of "unlawful riot" in effect acquits such defendants. Barron *v.* State, 74 Ga. 833.

19. State *v.* Stephanus, (Oreg. 1909) 99 Pac. 428.

Where the verdict finds facts from which the court can see that the assembly of defendants was not unlawful, defendants cannot be convicted of a riot. State *v.* Hughes, 72 N. C. 25.

20. State *v.* Sumner, 2 Speers (S. C.) 599, 42 Am. Dec. 387.

After a general verdict of guilty, on an indictment for a riot, which is conformable to the usual precedents, it seems wholly immaterial whether the facts proved establish that defendants are guilty of a riot, a rout, or an unlawful assembly. State *v.* Brazil, Rice (S. C.) 257.

Conviction of other offense under charge of riot see Indictments and Informations, 22 Cyc. 481 note 92.

21. People *v.* White, 55 Barb. (N. Y.) 606 [*affirmed* in 32 N. Y. 465]; U. S. *v.* McFarlane, 26 Fed. Cas. No. 15,675, 1 Cranch C. C. 163; Reg. *v.* Casey, Ir. R. 8 C. L. 408.

22. See statutes cited *supra*, p. 1773, note 5. See also S. D. Comp. Laws, § 6678 [*quoted* in State *v.* Page, 15 S. D. 613, 615, 91 N. W. 313].

Under Alaska Pen. Code, § 112, which provides that a person convicted of riot under the preceding section shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years "if such person carried at the time of such riot any species of dangerous weapon, or was disguised, or encouraged or solicited other persons who participated in the riots to acts of force or violence," and in all other cases by imprisonment in the county jail not more than a year or by a fine, a court is without power to impose a penitentiary sentence where the indictment did not charge any of the acts of aggravation enumerated. Christensen *v.* U. S., 151 Fed. 766, 81 C. C. A. 390.

23. U. S. *v.* McFarlane, 26 Fed. Cas. No. 15,675, 1 Cranch C. C. 163.

Aggravated riot not amounting to felony.— Where persons are convicted of a riot, although with the aggravation of riotously rescuing a fugitive slave from his master, it is illegal to sentence them to the penitentiary, the proper imprisonment for such offense being in the county jail. Clellans *v.* Com., 8 Pa. St. 223.

24. White *v.* Com., 10 Bush (Ky.) 557.

Under a statute providing that a rioter, who carries a dangerous weapon, shall be imprisoned in the penitentiary, but in all other cases the punishment shall be a jail sentence or fine, it was decided that where, in the course of a riot where defendant participated, other participants committed an assault with a dangerous weapon, defendant was subjected to punishment for that offense. State *v.* Mizis,

selves for that purpose, and whatever is honestly done by them in execution of that object will be supported and justified by the common law, although it is more discreet for everyone in such a case to be assistant to the sheriff and other civil authorities in doing so.[25]

B. By Civil Authorities — 1. Reading Riot Act. Under the old common law and the English statutes, if the statutory riot act was properly and carefully read to rioters, and they refused to desist and disperse, and remained assembled for one hour or more, the rioters thereupon become felons.[26] Generally, in the United States, an order by a peace officer, directing rioters to disperse, brands those who remain as rioters and causes them, by remaining, to declare their intent to be considered as members of the mob.[27]

2. Posse Comitatus.[28] It is a general rule that every citizen capable of bearing arms, of every rank, description, and denomination, is bound to yield a prompt obedience, when called to the assistance of the sheriff, or other authorized peace officer, to suppress a riot; and neglect so to do is, at common law, a subject for fine and imprisonment.[29] It is also an offense for a magistrate to refuse to raise the posse, when necessity therefor arises.[30] With this posse the sheriff may exercise an authority, as their chief, which can hardly be distinguished from that of a general subduing a revolt.[31]

3. Militia as Posse Comitatus. Where a force of militia reports to a civil officer, to aid him to suppress riot, this force has no power to act independently of civil authority, or to usurp its functions, or take its place. Such force may act simply as armed police, subject to the control of magistrates and other civil authorities.[32] While such a military force is acting strictly in aid of civil authorities, the military officers have only the same powers as have the civil officers, and the military officers only have these powers when the civil officers direct their exercise.[33] But the command over the military force, by the civil officers, may be exercised only by giving general directions; such as to clear the streets, or guard certain property; for the commander of the military force may exercise his discretion, under the governing legal restrictions, as to the best means of executing his orders.[34]

C. By the State — 1. In General. Primarily, the duty of protecting lives

48 Oreg. 165, 85 Pac. 611, 86 Pac. 361. But a driving whip is not such dangerous weapon. State *v.* Page, 15 S. D. 613, 91 N. W. 313.

25. Pond *v.* People, 8 Mich. 150; Com. *v.* Hare, 4 Pa. L. J. 257.

26. Rex *v.* Woolcock, 5 C. & P. 516, 24 E. C. L. 684; Rex *v.* Birt 5 C. & P. 154, 24 E. C. L. 501; Rex *v.* James, 5 C. & P. 153, 24 E. C. L. 500; Rex *v.* Childe, 4 C. & P. 442, 19 E. C. L. 593.

27. *In re* Charge to Grand Jury, 4 Pa. L. J. 29.

"Mob" and "riot" are said to be synonymous terms. See *supra*, p. 1773, note 3.

28. "Posse comitatus" defined see 31 Cyc. 922.

29. *In re* Charge to Grand Jury, 4 Pa. L. J. 29; Rex *v.* Pinney, 3 B. & Ad. 947, 23 E. C. L. 412, 5 C. & P. 254, 24 E. C. L. 552; Reg. *v.* Vincent, 9 C. & P. 91, 38 E. C. L. 65.

The marshal has a right to take a posse, and to call on all citizens to aid him in arresting rioters; and the citizens have a right to arm themselves. U. S. *v.* Fenwick, 25 Fed. Cas. No. 15,086, 4 Cranch C. C. 675.

30. Rex *v.* Kennett, 5 C. & P. 282, 24 E. C. L. 566.

In a case where the mayor of London was convicted of failure to suppress a riot, it was said: "If on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him." Rex *v.* Kennett, 5 C. & P. 282, 24 E. C. L. 566.

31. Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193; Com. *v.* Daley, 4 Pa. L. J. 150.

Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rule which applies when a house is entered in the night by burglars, or a traveler shoots a highwayman who demands his money. Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193.

32. Ela *v.* Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356; State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62.

33. State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62.

34. Ela *v.* Smith, 5 Gray (Mass.) 121, 66 Am. Dec. 356; State *v.* Coit, 8 Ohio S. & C. Pl. Dec. 62.

and property from the unlawful violence of mobs or rioters rests in the state. This duty is not divested, nor in any degree impaired or diminished, by the delegation of the same duty to municipalities.[35]

2. Governor's Independent Action. Except when inhibited by a state constitution, the governor may dispense with certain statutory formalities, where an emergency requires it, and may direct the use of the state military forces in the suppression of riot.[36] He may authorize his militia officers to act independently of the minor civil authorities and to use all means necessary for the restoration of order.[37]

RIOTER. See Riot, *ante*, p. 1773 note 2.

RIOTOUS. See Riot, *ante*, p. 1773 note 2.

RIOTOUS ASSEMBLY. See Riot, *ante*, p. 1770; Unlawful Assembly.

RIOTOUSLY. See Riot, *ante*, p. 1783.

RIP. To separate or divide the parts of by cutting or tearing; tear or cut open or off; split.[1]

RIPA. A Latin word meaning bank of stream not navigable;[2] a river bank;[3] shore of a river.[4]

RIPARIAN.[5] A term used to describe the rights of owners of uplands along running streams or rivers;[6] relating to the bank of a stream or other water — river, lake, or sea;[7] pertaining to or situated on the bank of a river;[8] of or pertaining to the bank of a river.[9] (See Riparian Proprietor; Riparian Rights, and, generally, Navigable Waters, 29 Cyc. 333; Waters.)

35. Chicago *v.* Chicago League Ball Club, 196 Ill. 54, 63 N. E. 695, 89 Am. St. Rep. 243; Hubbard *v.* Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477; Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667.

Power of municipality to suppress see Municipal Corporations, 28 Cyc. 707 text and notes 75, 76.

But in Canada a municipality may be charged with the pay of troops called by it for riot duty. Crewe-Read *v.* Cape Breton County, 14 Can. Sup. Ct. 8.

36. See cases cited *infra*, this note.

The state constitutional provision, often found, to the effect that the military shall be subordinate to the civil power, does not prohibit a governor from using troops independently of minor civil officers in enforcing the laws of the state. *In re* Moyer, 35 Colo. 159, 85 Pac. 190, 117 Am. St. Rep. 189, 12 L. R. A. N. S. 979; Hartranft's Appeal, 85 Pa. St. 433, 27 Am. Rep. 667; Chapin *v.* Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116.

Where a statute provides that a governor must require local authorities to suppress a riot, before he may act independently, this course of action is not binding on him, when, in his judgment, the danger of riot is so imminent as not to permit of the delay necessary to so many formalities. Chapin *v.* Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116.

The governor's decision that it is necessary to use the military forces, to suppress riot, is not one that may be reviewed by any court, where the power has been vested in the governor by the same laws which have created the court. Hartranft's Appeal, 85 Pa. St. 433, 444, 27 Am. Rep. 667.

37. *In re* Moyer, 35 Colo. 159, 85 Pac. 190, 117 Am. St. Rep. 189, 12 L. R. A. N. S. 979; *In re* Boyle, 6 Ida. 609, 57 Pac. 706, 96 Am. St. Rep. 286, 45 L. R. A. 832; Com. *v.* Shortall, 206 Pa. St. 165, 55 Atl. 952, 98 Am. St. Rep. 759, 65 L. R. A. 193.

1. Century Dict.

As applied to lead in sheets. — The word "rip," as used in N. J. Rev. St. p. 250, § 132, providing that if any person shall steal, rip, cut, or break, with intent to steal, any lead or iron bar, iron rail, gate, or palisade, or any lock fixed to any building of another, he shall be deemed guilty of a misdemeanor, properly applies to lead in sheets of roofing, or any other shape than bars. Bars of lead or iron may be broken or cut, but with respect to lead or iron in that shape the legislature would hardly apply the term "rip." State *v.* Stone, 30 N. J. L. 299, 300.

2. Gough *v.* Bell, 22 N. J. L. 441, 464.

3. Sutter *v.* Heckman, 1 Alaska 188, 192.

4. Anderson L. Dict. [*quoted* in Bathgate *v.* Irvine, 126 Cal. 135, 143, 58 Pa. 442, 77 Am. St. Rep. 158].

5. **Derived from the Latin "ripa"** see Sutter *v.* Heckman, 1 Alaska 188, 192.

6. Sutter *v.* Heckman, 1 Alaska 188, 192.

7. Anderson L. Dict. [*quoted* in Bathgate *v.* Irvine, 126 Cal. 135, 143, 58 Pac. 442, 77 Am. St. Rep. 158], where it was said that land whose watershed does not drain into a stream is not riparian to such stream.

8. Century Dict. [*quoted* in Mobile Dry-Docks Co. *v.* Mobile, 146 Ala. 198, 203, 40 So. 205, 3 L. R. A. N. S. 822; Mobile Transp. Co. *v.* Mobile, 128 Ala. 335, 348, 30 So. 645, 86 Am. St. Rep. 143, 64 L. R. A. 333.

9. Webster Int. Dict. [*quoted* in Mobile Dry-Dock Co. *v.* Mobile, 146 Ala. 198, 203, 40 So. 205, 3 L. R. A. N. S. 822].

RIPARIAN PROPRIETOR. An owner of land, bounded generally upon a stream of water, and as such having a qualified property in the soil to the thread of the stream, with the privileges annexed thereto by law;[10] one whose land is bounded by a natural stream, or through whose land it flows;[11] one whose land is bounded by a navigable stream;[12] one who owns land bounded upon a watercourse or lake;[13] in its common law sense, the owner of the *ripa* or bank of streams not navigable.[14] (See RIPARIAN RIGHTS; and, generally, NAVIGABLE WATERS, 29 Cyc. 333; WATERS.)

RIPARIAN RIGHTS. A term used with regard to riparian proprietors, said to mean access to the navigable river in front of his lot, the right to make a landing wharf or pier for his own use, or the use of the public, subject to the general rules imposed by the legislature for the rights of the public.[15] (Riparian Rights: In General, see NAVIGABLE WATERS, 29 Cyc. 333; RIPARIAN; RIPARIAN PROPRIETORS; WATERS. Compensation to Riparian-Owner For Establishment of Harbor Lines, see CONSTITUTIONAL LAW, 8 Cyc. 1125 note 56. In Lakes, see COMMON LAW, 8 Cyc. 380 note 85. Whether Subject to Power of Eminent Domain, see EMINENT DOMAIN, 15 Cyc. 609, 648.)

RIPARUM USUS PUBLICUS EST JURE GENTIUM, SICUT IPSIUS FLUMINIS. A maxim meaning "The use of river-banks is by the law of nations public, like that of the stream itself."[16]

RIPE. Full-grown; developed; finished; having experience; knowledge, or skill; equipped; accomplished; wise; clever.[17]

RIPRAP. A term said to apply to stone when laid into a kind of shingling upon the slope of a dirt embankment at such points as it is likely to be washed by water.[18]

RISING OF COURT. A term used as the equivalent to "final adjournment" or "the last day of the term."[19]

RISK. The hazard of loss of a ship, goods or other property; the degree of hazard or danger upon which the premiums of insurance are calculated.[20] (Risk:

Land extending beyond watershed.— When an owner's lands bordered on a stream, the fact that a part of it extended beyond the natural watershed of the stream did not prevent that part from being riparian land. Jones *v.* Conn, 39 Oreg. 30, 39, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630.

Land extending to levee.— Those lands which actually extend to a river — that is, which come down to the banks of the river, are riparian, and on the borders of the Mississippi, and other navigable streams, where there are levees established according to law, the levees shall form the banks — the lands extending to the levee, although not actually washed by the river. Hart *v.* Orleans Parish Levee Com'rs, 54 Fed. 559, 561.

10. Bardwell *v.* Ames, 22 Pick. (Mass.) 333, 355.

11. Jones *v.* Conn, 39 Oreg. 30, 38, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, 54 L. R. A. 630.

12. Potomac Steam-Boat Co. *v.* Upper Potomac Steam-Boat Co., 109 U. S. 672, 682, 4 S. Ct. 15, 27 L. ed. 1070.

13. Grant *v.* Hemphill, 92 Iowa 218, 224, 59 N. W. 263, 60 N. W. 618; French Glenn Live Stock Co. *v.* Springer, 35 Oreg. 312, 322, 58 Pac. 102.

14. Gough *v.* Bell, 22 N. J. L. 441, 464.

The words "owner of lands situate along or upon "tide-waters" identical with riparian owner. Fitzgerald *v.* Faunce, 46 N. J. L. 536, 594.

15. North Hempstead *v.* Gregory, 66 N. Y. Suppl. 28; Potomac Steam-Boat Co. *v.* Upper Potomac Steam-Boat Co., 109 U. S. 672, 682, 4 S. Ct. 415, 27 L. ed. 1070.

16. Peloubet Leg. Max. [*citing* Dig. 1. 8. 5].

17. Century Dict.

In a silo contract providing for the delivery of beets mentioned therein when ripe, the term is construed to mean when they should contain twelve per cent of sugar, with a purity coefficient of eighty. Norfolk Beet Sugar Co. *v.* Berger, 1 Nebr. (Unoff.) 151, 157, 95 N. W. 336.

"Ripe for judgment" as used in a rule of court relating to the entry of judgments in actions see Dalton-Ingersoll Co. *v.* Fiske, 175 Mass. 15, 17, 55 N. E. 468.

18. Wood *v.* Vermont Cent. R. Co., 24 Vt. 608, 610, where it is said that in other words, "rip rap" is a kind of wall, so as to imply that "cubic" yard, when applied to it, would have the same signification as when applied to a wall.

19. State *v.* Weaver, 11 Nebr. 163, 165, 8 N. W. 385, 386, where it is used in a statute requiring a party to reduce his exceptions to writing within such time as the court may direct, not exceeding forty days from "the rising of the court."

20. Century Dict.

Assumed by Servant, see MASTER AND SERVANT, 26 Cyc. 1177. Assumption of Risk by Shipper as to Cars in Which Live Stock Shipped, see CARRIERS, 6 Cyc. 441. Collisions Caused by Perils of the Sea, see COLLISIONS, 7 Cyc. 316 note 40. Duration of, in Policy of Marine Insurance, see MARINE INSURANCE, 26 Cyc. 595. Effect of Stipulation That Goods Accepted by Carrier at Owner's Risk, see CARRIERS, 6 Cyc. 407. Loading and Unloading Live Stock at Shipper's Risk, see CARRIERS, 6 Cyc. 391 note 68, 441. Of Collision, What Constitutes, see COLLISION, 7 Cyc. 326. Of Owners and Carriers of Goods by Water, see SHIPPING. Within Insurance Policy, see ACCIDENT INSURANCE, 1 Cyc. 239, 248; FIRE INSURANCE, 19 Cyc. 827; MARINE INSURANCE, 26 Cyc. 650.)

RIVAL. A river bank or shore; a stream or watercourse.[21]

RIVER.[22] A body of flowing water of no specific dimensions, larger than a brook or rivulet, less than a sea, a running stream pent on either side by walls or banks;[23] a considerable body of water flowing with a perceptible current, in a certain definite course or channel, and usually without cessation during the entire year;[24] a considerable stream of water that has a current of its own, flowing from a higher level, that constitutes its source, to its mouth, where it debouches;[25] a large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook;[26] a large stream of water flowing in a channel;[27] a large stream of water flowing in a channel on land toward the ocean, a lake, or another river; a stream larger than a rivulet or brook;[28] a large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, marsh, or another river;[29] a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width;[30] a running stream of water pent in on either side by banks, shores or walls;[31] a stream flowing in a channel into another river, into the ocean, or into a lake or sea;[32] a current of water;[33] a flood or flowing course; a current; a stream of water;[34] a land current of water bigger than a brook;[35] water flowing in a channel between banks more or less defined.[36] (River: In General, see NAVIGABLE WATERS, 29 Cyc. 285;

21. Hudson *v.* Tabor, 1 Q. B. D. 225, 232, 45 L. J. Q. B. 190, 34 L. T. Rep. N. S. 249, 24 Wkly. Rep. 579.

22. Derived from the Latin word "rivus" see Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45; State *v.* Gilmanton, 14 N. H. 467, 477.

23. Shelby County *v.* Castetter, 7 Ind. App. 309, 33 N. E. 986, 987, 34 N. E. 687; Alabama *v.* Georgia, 23 How. (U. S.) 505, 513, 16 L. ed. 556; Woolrych Dict. [*quoted* in Alabama *v.* Georgia, *supra*].

24. Century Dict. [*quoted* in Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45].

25. Chamberlain *v.* Hemingway, 63 Conn. 1, 5, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45; The Garden City, 26 Fed. 766, 772.

26. Worcester Dict. [*quoted* in Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 241, 38 Am. St. Rep. 330, 22 L. R. A. 45; The Garden City, 26 Fed. 766, 772].

27. Webster L. Dict. [*quoted* in State *v.* Gilmanton, 14 N. H. 467, 478].

28. Webster Dict. [*quoted* in Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 241, 38 Am. St. Rep. 330, 22 L. R. A. 45; Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463; The Garden City, 26 Fed. 766, 772].

29. Imperial Dict. [*quoted* in Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45; The Garden City, 26 Fed. 766, 772].

30. Bouvier L. Dict. [*quoted* in Berlin Mills Co. *v.* Wentworth, 60 N. H. 156], said to be so called whether its current sets always one way or flows and reflows with the tide.

31. State *v.* Faudre, 54 W. Va. 122, 125, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877.

32. Stormonth Dict. [*quoted* in Chamberlain *v.* Hemingway, 63 Conn. 1, 6, 27 Atl. 239, 38 Am. St. Rep. 330, 22 L. R. A. 45; The Garden City, 26 Fed. 766, 772].

33. Rees Encycl. [*quoted* in State *v.* Gilmanton, 14 N. H. 467, 478].

34. Richardson L. Dict. [*quoted* in State *v.* Gilmanton, 14 N. H. 467, 478].

35. Johnson L. Dict. [*quoted* in Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463; State *v.* Gilmanton, 14 N. H. 467, 478].

36. New Hamburg *v.* Waterloo County, 22 Ont. 193, 202.

Consists of water, a bed, and banks; these several parts constituting the whole river. Dodge County *v.* Saunders County, 70 Nebr. 442, 446, 97 N. W. 617; Starr *v.* Child, 20 Wend. (N. Y.) 149, 153; Gavit *v.* Chambers, 3 Ohio 495, 497.

Does not consist of main channel alone but of other waters surrounding islands contained therein though known under different names. Schermerhorn *v.* Hudson River R. Co., 38 N. Y. 103, 104.

WATERS. As Boundary — Generally, see BOUNDARIES, 5 Cyc. 894; INTERNATIONAL LAW, 22 Cyc. 1722; Of Municipal Corporation, see MUNICIPAL CORPORATIONS, 28 Cyc. 181. Changing Channel of Navigable River, see COMMERCE, 7 Cyc. 454 note 25. Collision in, see COLLISION, 7 Cyc. 299. Driving, Floating, or Rafting Logs in, see LOGGING, 25 Cyc. 1541. Embankments and Other Works Constructed by Public Authority to Protect Land From Inundation From, see LEVEES, 25 Cyc. 188. Ferries, see FERRIES, 19 Cyc. 491. Pilots, see PILOTS, 30 Cyc. 1607.)

RIVER BED. That portion of the soil which is alternately covered and left bare;[37] that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water;[38] the hollow basin through which the water of the river flows at low water mark;[39] the space contained between its banks;[40] the space subjacent to the river through which it flows;[41] the channel of a stream; the part between the banks worn by the regular flow of the water.[42] (See RIVER.)

RIVER FRONT. A term said to be applicable to the shores above low water mark, and used in connection with land under water.[43] (See RIVER.)

ROAD. See STREETS AND HIGHWAYS.

ROAD-BED. That part of the railroad company's right of way which is occupied by the ties and rails constituting the railroad track;[44] the bed or foundation upon which rests the superstructure of rails and sleepers;[45] the bed upon which the superstructure of the railroad rests;[46] the track in use, or intended to be used, on which to operate trains;[47] the bed or foundation on which the superstructure of the railway rests.[48] (Road-Bed: Accidents — From Walking on, see ACCIDENT

Distinguished from "bay" see Johnson *v.* State, 74 Ala. 537, 538; State *v.* Gilmanton, 9 N. H. 461, 463.

Distinguished from "lake" see Jones *v.* Lee, 77 Mich. 35, 40, 43 N. W. 855.

A fresh-water river, like a tidal river, is composed of the *alveus*, or bed, and the water, but it has banks instead of shores. State *v.* Longfellow, 169 Mo. 109, 121, 69 S. W. 374; State *v.* Faudre, 54 W. Va. 122, 125, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877.

The phrase "navigable river," has a technical meaning in the common law. A river is navigable in the technical sense, as high up from its mouth as the tide flows. Morgan *v.* Reading, 3 Sm. & M. (Miss.) 366, 402.

37. Alabama *v.* Georgia, 23 How. (U. S.) 505, 515, 16 L. ed. 556.

38. Howard *v.* Ingersoll, 13 How. (U. S.) 381, 427, 14 L. ed. 189.

39. Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 205, 7 Ohio N. P. 495.

40. Pulley *v.* Municipality No. 2, 18 La. 278, 282.

41. Harlan, etc., Co. *v.* Paschall, 5 Del. Ch. 435, 463.

42. Bouvier L. Dict. [*quoted* in Dayton *v.* Cooper Hydraulic Co., 10 Ohio S. & C. Pl. Dec. 192, 205, 7 Ohio N. P. 495].

A natural object, to be sought for not merely by the application of any abstract rules, but as other natural objects are sought for and found by the distinctive appearances they present, the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water. Howard *v.* Ingersoll, 13 How. (U. S.) 381, 428, 14 L. ed. 189.

In a limited sense that part which is almost covered by water. Haight *v.* Keokuk, 4 Iowa 199, 212.

Distinguished from mere surplus drainage flowing without definite course or certain limits. Paine Lumber Co. *v.* U. S., 55 Fed. 854, 864, where it is said to be a definite and commonly a permanent channel.

Includes the shores and the whole space through which the river flows. Ravenswood *v.* Flemings, 22 W. Va. 52, 66, 46 Am. Rep. 485.

43. Eastman *v.* St. Anthony Falls Water-Power Co., 43 Minn. 60, 64, 44 N. W. 882.

44. Meadows *v.* Pacific Mut. L. Ins. Co., 129 Mo. 76, 97, 31 S. W. 578, 50 Am. St. Rep. 427, where it is said not to include the entire space in the right of way.

45. *In re* New York Bay R. Co., 75 N. J. L. 389, 393, 67 Atl. 1049; *In re* United New Jersey R., etc., Co., 75 N. J. L. 385, 386, 67 Atl. 1075.

46. Dunn *v.* Burlington, etc., R. Co., 35 Minn. 73, 80, 27 N. W. 448.

47. Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 520, 522, 6 So. 407, where it is said that it must include a sufficient space on either side of the track to allow trains to pass in safety.

48. Standard L., etc., Ins. Co. *v.* Langston, 60 Ark. 381, 385, 30 S. W. 427; San Francisco, etc., R. Co. *v.* Stockton, 149 Cal. 83, 90, 84 Pac. 771; Webster Dict. [*quoted* in San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12, 34; Cass County *v.* Chicago, etc., R. Co., 25 Nebr. 348, 353, 41 N. W. 246, 2 L. R. A. 188; Santa Clara County *v.* Southern Pac. R. Co., 118 U. S.

INSURANCE, 1 Cyc. 268; To Trains Resulting From Defects in, see RAILROADS, 33 Cyc. 740. Duty of Railroad to Furnish Safe, see MASTER AND SERVANT, 26 Cyc. 1125. Injuries to Employees From Defects in, see MASTER AND SERVANT, 26 Cyc. 1097. Plan and Mode of Construction of, see RAILROADS, 33 Cyc. 234.)

ROAD DISTRICT. See STREETS AND HIGHWAYS.

ROAD OVERSEER. See STREETS AND HIGHWAYS.

ROADSTEAD. A place where vessels usually anchor.[49]

ROAD SUPERVISOR. See STREETS AND HIGHWAYS.

ROAD TAX. See STREETS AND HIGHWAYS.

ROADWAY. Applied to railroads, the right of way;[50] whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track.[51] (See EASEMENTS, 14 Cyc. 1174; RAILROADS, 33 Cyc. 164.)

ROAST. To heat highly (metallic ores) with access of air, but without fusing, for the purpose of driving off or volatilizing impurities or for oxidizing them;[52] to dissipate by heat the volatile parts of, as ores;[53] to expel volatile matters from by exposing to heat, as ores.[54]

394, 413, 6 S. Ct. 1132, 4 L. ed. 118]; Webster Dict.; Worcester Dict. [both *quoted* in San Francisco *v.* Central Pac. R. Co., 63 Cal. 467, 469, 49 Am. Rep. 98; Shreveport *v.* Shreveport Belt R. Co., 107 La. 785, 787, 32 So. 189].

Synonymous with railroad track see Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 520, 522, 6 So. 407, 408. See 33 Cyc. 1406.

Includes the roadway or right of way, with the roadbed and its superstructure of ties, rails, etc., in place thereon. State *v.* Hannibal, etc., R. Co., 135 Mo. 618, 637, 37 S. W. 532.

Land taken by a railroad company for sidings and turnouts for the speedy and safe passage of its cars would probably be termed roadbed, within the meaning of its charter authorizing it to appropriate for a road-bed a strip of land of a certain width. Philadelphia *v.* Philadelphia, etc., R. Co., 177 Pa. St. 292, 298, 35 Atl. 610, 34 L. R. A. 564.

49. The Willard Saulsbury, 29 Fed. Cas. No. 17,681, 1 Lowell 194, 196, where it is distinguished from "fairway."

50. San Francisco, etc., R. Co. *v.* Stockton, 149 Cal. 83, 87, 84 Pac. 771; San Francisco, etc., R. Co. *v.* State Bd. of Equalization, 60 Cal. 12, 34; Santa Clara County *v.* Southern Pac. R. Co., 118 U. S. 394, 413, 6 S. Ct. 1132, 30 L. ed. 118.

51. San Francisco *v.* Cent. Pac. R. Co., 63 Cal. 467, 469, 49 Am. Rep. 98 (where this is said to be so with the addition of the part denominated "road-bed"); Chicago, etc., R. Co. *v.* Cass County, 8 N. D. 18, 20, 76 N. W. 239 (where under this term is included all ground necessary for the construction of side-tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the object of their incorporation).

52. Standard Dict. [*quoted* in U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 192, 71 Pac. 954].

53. Webster Dict. [*quoted* in U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 192, 71 Pac. 954].

54. Worcester Dict. [*quoted* in U. S. *v.* United Verde Copper Co., 8 Ariz. 186, 192, 71 Pac. 954].

ROBBERY

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CROSS-REFERENCES

For Matters Relating to:

Assault and Battery, see ASSAULT AND BATTERY, 3 Cyc. 1014.
Burglary, see BURGLARY, 6 Cyc. 169.
Charging Commission of Robbery, see LIBEL AND SLANDER, 25 Cyc. 286.
Extortion, see EXTORTION, 19 Cyc. 35.
Extradition of Robber, see EXTRADITION (INTERNATIONAL), 19 Cyc. 55 note 18; EXTRADITION (INTERSTATE), 19 Cyc. 86.
Forcible Trespass, see TRESPASS.
Homicide in Commission of Robbery, see HOMICIDE, 21 Cyc. 718 text and note 61.
Insurance Against Robbery, see THEFT INSURANCE.
Larceny, see LARCENY, 25 Cyc. 1.
Piracy, see PIRACY, 30 Cyc. 1627.
Receiving Stolen Goods, see RECEIVING STOLEN GOODS, *ante,* p. 513.
Robbery:
By Married Woman, see HUSBAND AND WIFE, 21 Cyc. 1356 note 10.
From Mails, see POST-OFFICE, 32 Cyc. 1013.
Of Passenger, see CARRIERS, 6 Cyc. 604.
On High Seas, see PIRACY, 30 Cyc. 1627.
Threats, see THREATS.
Venue of Prosecution For Robbery, see CRIMINAL LAW, 12 Cyc. 233.

I. DEFINITION.

A. At Common Law. Robbery, at common law, is the taking, with intent [1] to steal, of personal property [2] in possession of another,[3] from his person or in his presence,[4] by violence [5] or by putting him in fear.[6]

1. See *infra,* II, A.
2. See *infra,* II, B.
3. See *infra,* II. F.
4. See *infra,* II, C.
5. See *infra,* II, D.
6. See *infra,* II, D, 4.

This definition is supported in:

Arizona.— Ramirez *v.* Territory, 9 Ariz. 177, 80 Pac. 391.
Arkansas.— Clary *v.* State, 33 Ark. 561.
California.— *In re* Myrtle, 2 Cal. App. 383, 84 Pac. 334; People *v.* Cleary, 1 Cal. App. 50, 81 Pac. 753.
Georgia.— Long *v.* State, 12 Ga. 293.
Illinois.— O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639.
Iowa.— State *v.* Kegan, 62 Iowa 106, 17 N. W. 179.
Kentucky.— Stockton *v.* Com., 125 Ky. 268, 101 S. W. 298, 30 Ky. L. Rep. 1302.
Massachusetts.— Com. *v.* Humphries, 7 Mass. 242.
Missouri.— State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.
New Hampshire.— State *v.* Gorham, 55 N. H. 152.

B. Under Statutes — 1. In General. In a majority of jurisdictions, statutes have been enacted defining robbery substantially in accord with the common law.[7]

2. Degrees. Some jurisdictions divide robbery into different degrees, varying with the violence used[8] or other circumstances under which the crime is committed.[9]

II. Elements of Offense.

A. Intent. Since robbery includes larceny,[10] the element of intent to steal,[11] or *animus furandi*, is essential in robbery as it is in larceny.[12] Accordingly it is

Pennsylvania.— Com. *v.* Snelling, 4 Binn. 379.

Tennessee.— Hammond *v.* State, 3 Coldw. 129.

Virginia.— Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

West Virginia.— State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

Wyoming.— McGinnis *v.* State, 16 Wyo. 72, 91 Pac. 936.

United States.— U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209.

See 42 Cent. Dig. tit. "Robbery," § 1.

Other definitions are: "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C. 707.

"The felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P. C. 532.

"The felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear." 4 Blackstone Comm. 242.

Distinguished from extortion see Extortion, 19 Cyc. 37 note 1.

Distinguished from simple larceny.— Robbery includes larceny, but to constitute robbery there must be the additional aggravating circumstances of a taking from the person by violence or putting in fear. Clary *v.* State, 33 Ark. 561; Com. *v.* Humphries, 7 Mass. 242. See also Larceny, 25 Cyc. 64.

Distinguished from larceny from the person.— "The secret and furtive taking of money from the person of another without his knowledge or consent, and the deceitful means and artful practices resorted to by swindlers to cheat and defraud others, are just the reverse of the force or intimidation, which is an indispensable element of robbery." Doyle *v.* State, 77 Ga. 513, 515. See also People *v.* Campbell, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107, holding that the difference between larceny from the person and robbery lies in the force or intimidation used.

7. See the statutes of the several states. See also the following cases:

Arizona.— Smith *v.* Territory, 4 Ariz. 95, 78 Pac. 1035.

California.— People *v.* Mondia, 146 Cal. 142, 79 Pac. 842; *In re* Myrtle, 2 Cal. App. 383, 84 Pac. 334.

Georgia.— Hickey *v.* State, 125 Ga. 145, 53 S. E. 1026; Pride *v.* State, 124 Ga. 791, 53 S. E. 192; Clay *v.* State, 122 Ga. 136, 50 S. E. 56.

Illinois.— O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639.

Iowa.— State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125.

Montana.— State *v.* Paisley, 36 Mont. 237, 92 Pac. 566.

Nebraska.— Buckley *v.* State, 79 Nebr. 86, 112 N. W. 283.

North Dakota.— State *v.* Fordham, 13 N. D. 494, 101 N. W. 888.

Philippine Islands.— U. S. *v.* Palmadres, 7 Philippine 120, 122.

Washington.— State *v.* Parsons, 44 Wash. 299, 87 Pac. 349, 7 L. R. A. N. S. 566.

Wyoming.— McGinnis *v.* State, 16 Wyo. 72, 91 Pac. 936.

See 42 Cent. Dig. tit. "Robbery," § 2.

Construction.— The statutes have uniformly been construed in accordance with the construction placed upon similar words at common law. Thus the statutory words "from the person" have been construed to include "from the presence." State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252; Turner *v.* State, 1 Ohio St. 422.

8. See the statutes of the several states. And see Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523; People *v.* Massett, 7 N. Y. Suppl. 839, 7 N. Y. Cr. 393.

Robbery in first degree see State *v.* Adams, 58 Kan. 365, 49 Pac. 81; State *v.* Adair, 160 Mo. 391, 61 S. W. 187; State *v.* Broderick, 59 Mo. 318; People *v.* Du Veau, 105 N. Y. App. Div. 381, 94 N. Y. Suppl. 225.

As to violence as element of offense see *infra*, II, D.

9. See the statutes of the several states.

Robbery on highway.—A special punishment is sometimes provided for robbery committed upon or near a highway. State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813. A railroad is not a "highway" under such statutes. State *v.* Johnson, 61 N. C. 140.

As to necessary elements of offense see *infra*, II.

10. See *supra*, note 6.

11. As to intent to steal generally see Larceny, 25 Cyc. 45.

As to necessity of alleging intent in indictment see *infra*, III, A, 2, c.

12. *Kentucky.*— Triplett *v.* Com., 122 Ky. 35, 91 S. W. 281, 28 Ky. L. Rep. 974.

Missouri.— State *v.* Smith, 174 Mo. 586, 74 S. W. 624; State *v.* Woodward, 131 Mo. 369,

not robbery to take property under a *bona fide* claim of right or title,[13] or in pursuance of a warrant technically insufficient,[14] or under supposed military orders.[15]

B. Property Subject of Robbery. The same property which is the subject of larceny[16] is the subject of robbery.[17] The value of the property taken is immaterial.[18]

C. Taking From the Person or Presence. To constitute robbery, it is essential that there be a taking "from the person."[19] To satisfy this requirement, it is sufficient that property be taken "in the owner's presence."[20]

33 S. W. 14; State *v.* O'Connor, 105 Mo. 121, 16 S. W. 510.

Nebraska.— Langford *v.* State, 32 Nebr. 782, 49 N. W. 766.

North Carolina.— State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

North Dakota.— State *v.* Fordham, 13 N. D. 494, 101 N. W. 888.

Pennsylvania.— Com. *v.* White, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. Rep. 628.

Virginia.— Jordan *v.* Com., 25 Gratt. 943.

West Virginia.— State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

England.— Reg. *v.* Edwards, 1 Cox C. C. 32; Rex *v.* Gnosil, 1 C. & P. 304, 12 E. C. L. 182.

See 42 Cent. Dig. tit. "Robbery," § 3.

Secrecy is not an indispensable element to the felonious intent necessary to constitute the crime of robbery. State *v.* Bradburn, 104 N. C. 881, 10 S. E. 526.

Taking in joke.— It has been held that it is not robbery to obtain property by means of violence or menace merely as a joke. Com. *v.* White, 133 Pa. St. 182, 19 Atl. 350, 19 Am. St. Rep. 628.

Use of property.— It is not necessary that the prisoner should intend to appropriate the property taken to his own use. Jordan *v.* Com., 25 Gratt. (Va.) 943. The use to which it is subsequently put in no way affects the question of guilt. Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

13. *Arkansas.*— Brown *v.* State, 28 Ark. 126.

Georgia.— Crawford *v.* State, 90 Ga. 701, 17 S. E. 628, 35 Am. St. Rep. 242.

North Carolina.— State *v.* Deal, 64 N. C. 270.

Ohio.— State *v.* Carmans, Tapp. 65.

Texas.— Glenn *v.* State, 49 Tex. Cr. 349, 92 S. W. 806.

Utah.— People *v.* Hughes, 11 Utah 100, 39 Pac. 492.

England.— Rex *v.* Hall, 3 C. & P. 409, 14 E. C. L. 635.

See 42 Cent. Dig. tit. "Robbery," § 3.

Illustration.— The fact that A, a creditor, violently assaulted B, his debtor, and so forced him to give a cheque and money in payment of the debt, did not make A guilty of robbery, because there was no felonious intent. Reg. *v.* Hemmings, 4 F. & F. 50. But see Farrin *v.* State, 51 Tex. Cr. 41, 10 S. W. 916, 123 Am. St. Rep. 874, 10 L. R. A. N. S. 744.

14. *In re* Lewis, 83 Fed. 159.

15. State *v.* Sowls, 61 N. C. 151.

16. **Property subject of larceny see** LARCENY, 25 Cyc. 12.

17. State *v.* Trexler, 4 N. C. 188, 6 Am. Dec. 558.

Chose in action.— Where choses in action are made by statute the subjects of larceny, they are also the subjects of robbery. Turner *v.* State, 1 Ohio St. 422.

18. People *v.* Stevens, 141 Cal. 488, 75 Pac. 62.

Illustrations.—A valise not wholly worthless or unfit for use, and which the owner kept and preserved as of value to him, is the subject of robbery, although it may not have had any specific pecuniary value. Jackson *v.* State, 69 Ala. 249. A, who attacked B and by violence took from him a piece of paper on which was written a memorandum respecting money due B, was properly found guilty of robbery. Rex *v.* Bingley, 5 C. & P. 602, 24 E. C. L. 729.

19. *California.*— People *v.* Beck, 21 Cal. 385.

Georgia.— Stegar *v.* State, 39 Ga. 583, 99 Am. Dec. 472.

Illinois.— O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639.

Iowa.— State *v.* Leighton, 56 Iowa 595, 9 N. W. 896.

Missouri.— State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.

Tennessee.— Crews *v.* State, 3 Coldw. 350; Kit *v.* State, 11 Humphr. 167.

United States.— U. S. *v.* Jones, 1 Fed. Cas. No. 15,494, 3 Wash. 209.

England.— Rex *v.* Phipoe, East P. C. 599, Leach C. C. 774.

See 42 Cent. Dig. tit. "Robbery," § 9.

As to allegation in indictment of taking from person see *infra*, III, A, 2, b.

20. Hill *v.* State, 145 Ala. 58, 40 So. 654; O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639; Hill *v.* State, 42 Nebr. 503, 60 N. W. 916; Rex *v.* Francis, East P. C. 708, Str. 1015; Rex *v.* Grey, East P. C. 708.

Illustrations.—A, traveling with B, and having been intrusted with B's goods to help carry them, by violence feloniously exerted against B, carried off the goods. A was guilty of robbery, since up to the time of the violence his possession was constructively that of B, and the taking being in B's presence, was constructively from his person. James *v.* State, 53 Ala. 380. *Compare* Rex *v.* Fallows, 5 C. & P. 508, 24 E. C. L. 680. While B was in his smokehouse, about fifteen paces from his house, defendant came up and said that if B put his head out, he would "shoot it off." B, being thus detained, co-defendant entered the house and carried off valuables of B, who did not know why he was detained until defendants had left. This was

D. Violence or Putting in Fear — 1. In General. It is further essential in the perpetration of this offense that the taking be accomplished by violence or by putting in fear.[21]

2. Must Precede or Accompany Taking. The violence or intimidation in robbery must precede or be contemporaneous with the taking of the property.[22]

3. Violence — a. In General. The violence which constitutes an essential element of the crime of robbery must be actual personal violence,[23] but the degree of force used is immaterial, except under statutes which provide for a punishment varying with the violence which accompanies the taking.[24] All the force that

a sufficient taking in the presence of B to constitute robbery. Clements *v.* State, 84 Ga. 660, 11 S. E. 505, 20 Am. St. Rep. 385. Where defendant, by violence, bound owner and then went into another room and took the property, there was a sufficient taking from the person. State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252. Defendants, who forcibly entered an express car and by violence ejected the express agent, cut the train into two parts and moved a portion about a quarter of a mile, where they blew the safe, were guilty of robbery. State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293.

This is true where the prosecution is under a statute mentioning only a taking "from the person." State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252; Turner *v.* State, 1 Ohio St. 422.

21. *Georgia.*— Long *v.* State, 12 Ga. 293.

Illinois.— Collins *v.* People, 39 Ill. 233.

Iowa.— State *v.* Osborne, 116 Iowa 479, 89 N. W. 1077.

Kentucky.— Jones *v.* Com., 57 S. W. 472, 22 Ky. L. Rep. 388.

Texas.— Gallagher *v.* State, 34 Tex. Cr. 306, 30 S. W. 557. See also Reyes *v.* State, (Cr. App. 1907) 102 S. W. 1156.

England.— Rex *v.* Smith, 2 East P. C. 783.

See 42 Cent. Dig. tit. "Robbery," §§ 6, 7.

Either force or fear is sufficient, it is not necessary that both be alleged or proved.

Massachusetts.— See Com. *v.* Humphries, 7 Mass. 242, holding that St. (1804) c. 142, which contains the terms robbing "by force and violence, or other assault, and putting in fear," has not added to the common-law requisites in this particular.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

Missouri.— State *v.* Broderick, 59 Mo. 318. See also State *v.* Montgomery, 109 Mo. 645, 19 S. W. 221, 32 Am. St. Rep. 684, holding that Rev. St. (1889) § 3530, providing that every person who shall be convicted of feloniously taking the property of another from his person or in his presence, and against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree, does not define several distinct felonies, but merely one felony which may be committed in several ways.

New Hampshire.— State *v.* Gorham, 55 N. H. 152.

New York.— People *v.* Glynn, 54 Hun 332, 7 N. Y. Suppl. 555 [*affirmed* in 123 N. Y. 631, 25 N. E. 953].

North Carolina.— State *v.* Burke, 73 N. C. 83.

Texas.— Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024; Pendy *v.* State, 34 Tex. Cr. 643, 31 S. W. 647; Bond *v.* State, 20 Tex. App. 421.

See 42 Cent. Dig. tit. "Robbery," §§ 6, 7.

As to allegation in indictment of violence or putting in fear see *infra*, III, A, 2, a.

22. *Florida.*— Colbey *v.* State, 46 Fla. 112, 35 So. 189, 110 Am. St. Rep. 87.

Georgia.— Fanning *v.* State, 66 Ga. 167.

Indiana.— Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110.

Kansas.— State *v.* Miller, 53 Kan. 324, 36 Pac. 751.

Kentucky.— Jones *v.* Com., 74 S. W. 263, 24 Ky. L. Rep. 2481.

Ohio.— Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136.

England.— Rex *v.* Jackson, East P. C. addenda xxi, Leach C. C. 193 note, Leach C. C. 618 note.

See 42 Cent. Dig. tit. "Robbery," §§ 6, 7.

Therefore, it is larceny from the person, and not robbery, where one who has feloniously obtained property, from the person of another by stealth, uses violence or intimidation to prevent the owner from regaining his property.

Alabama.— Thomas *v.* State, 91 Ala. 34, 9 So. 81.

Arkansas.— Routt *v.* State, 61 Ark. 594, 34 S. W. 262.

California.— People *v.* Stevens, 141 Cal. 488, 75 Pac. 62.

Georgia.— Long *v.* State, 12 Ga. 293.

Kentucky.— Dawson *v.* Com., 74 S. W. 701, 25 Ky. L. Rep. 5.

New York.— *Compare* People *v.* Glynn, 54 Hun 332, 334, 7 N. Y. Suppl. 555 [*affirmed* in 123 N. Y. 631, 25 N. E. 953], where the court said: "Although the thief may have procured possession of the property of another without force or violence, the removal of the property from the presence of that other, with force or violence, constitutes robbery."

See 42 Cent. Dig. tit. "Robbery," §§ 6, 7.

23. Long *v.* State, 12 Ga. 293; Stockton *v.* Com., 125 Ky. 268, 101 S. W. 298, 30 Ky. L. Rep. 1302; State *v.* Paisley, 36 Mont. 237, 92 Pac. 566; State *v.* Donohue, (N. J. Sup. 1904) 59 Atl. 12. See also Williams *v.* State, 51 Tex. Cr. 361, 102 S. W. 1134, 123 Am. St. Rep. 884.

24. Seymour *v.* State, 15 Ind. 288; People *v.* Foley, 44 Hun (N. Y.) 628.

is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.[25]

b. Snatching. The mere snatching of an article from the person of another, without violence or putting in fear, is not robbery,[26] except where there is some injury or violence to the person of the owner[27] or where the property snatched is so attached to the person or clothes of the owner as to afford resistance.[28]

4. Putting in Fear — a. In General. A charge of robbery may be established by proof that the property was obtained through intimidation from threats, either of immediate or future violence.[29] A putting in fear of bodily injury has

25. Colbey *v.* State, 46 Fla. 112, 35 So. 189, 110 Am. St. Rep. 87; Territory *v.* McKern, 3 Ida. 15, 26 Pac. 123; Williams *v.* Com., 50 S. W. 240, 20 Ky. L. Rep. 1850. See also People *v.* Ortega, 7 Cal. App. 480, 94 Pac. 869.

Degree of force.— The force may be used simply to bewilder or confuse. Mahoney *v.* People, 3 Hun (N. Y.) 202, 5 Thomps. & C. 329. No blow or injury is necessary. Com. *v.* Davis, 66 S. W. 27, 23 Ky. L. Rep. 1717. There is sufficient violence to constitute robbery where the victim's property is taken from his pocket without his knowledge, while he is being pushed or shoved about (Snyder *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1538; Com. *v.* Snelling, 4 Binn. (Pa.) 379), or with such force as to bruise or render lame the owner's arm (Klein *v.* People, 113 Ill. 596), or where an officer, under pretense of making a search, holds up the victim's hands and extracts money from his pocket (Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024. And see Rex *v.* Gascoigne, 2 East P. C. 709, Leach C. C. 313).

It is not robbery to obtain property from another without violence, by artifice and trickery (Thomas *v.* State, 91 Ala. 34, 9 So. 81; Doyle *v.* State, 77 Ga. 513; Shinn *v.* State, 64 Ind. 13, 31 Am. Rep. 110), or by the use of only sufficient force to remove the property from the owner's pocket (Fanning *v.* State, 66 Ga. 167; Territory *v.* McKern, 3 Ida. 15, 26 Pac. 123), or from his presence (Bowlin *v.* State, 72 Ark. 530, 81 S. W. 838).

26. *Georgia.*— Jackson *v.* State, 114 Ga. 826, 40 S. E. 1001, 88 Am. St. Rep. 60; Spencer *v.* State, 106 Ga. 692, 32 S. E. 849; Doyle *v.* State, 77 Ga. 513. But under Ga. Pen. Code (1895), § 151, as amended, a sudden snatching of money with intent to steal is robbery by force. Pride *v.* State, 125 Ga. 750, 54 S. E. 688. See also Hickey *v.* State, 125 Ga. 145, 53 S. E. 1026; Morris *v.* State, 125 Ga. 36, 53 S. E. 564.

Indiana.— Bonsall *v.* State, 35 Ind. 460.

Massachusetts.— Com. *v.* Ordway, 12 Cush. 270.

Missouri.— State *v.* Sommers, 12 Mo. App. 374.

New York.— People *v.* Hall, 6 Park. Cr. 642; McCloskey *v.* People, 5 Park. Cr. 299.

North Carolina.— State *v.* John, 50 N. C. 163, 69 Am. Dec. 777.

Tennessee.— Enos *v.* State, 3 Heisk. 58 note.

Texas.— Johnson *v.* State, 35 Tex. Cr. 140, 32 S. W. 537.

England.— Reg. *v.* Walls, 2 C. & K. 214, 61 E. C. L. 214; Rex *v.* Baker, East P. C. 702, Leach C. C. 324.

Contra.— State *v.* Carr, 43 Iowa 418; Jones Com., 112 Ky. 689, 66 S. W. 633, 23 Ky. L. Rep. 2081, 99 Am. St. Rep. 330, 57 L. R. A. 432. See also Stockton *v.* Com., 125 Ky. 268, 101 S. W. 298, 30 Ky. L. Rep. 1302. *Compare* State *v.* West, 106 La. 274, 30 So. 848; Sherman *v.* State, 4 Ohio Cir. Ct. 531, 2 Ohio Cir. Dec. 691.

See 42 Cent. Dig. tit. "Robbery," § 6.

Simply knocking property out of owner's hand and picking it up after he has left is similar to snatching and is not robbery. People *v.* McGinty, 24 Hun (N. Y.) 62; Rex *v.* Francis, East P. C. 708, Str. 1015.

27. Smith *v.* State, 117 Ga. 320, 43 S. E. 736 (where a purse secured by a steel chain around the owner's finger was suddenly snatched with force sufficient to break the chain and injure the owner's finger); Carter *v.* State, 3 Ga. App. 477, 60 S. E. 216 (where one in an attempt to commit larceny from the person was caught by his intended victim with his hand in his pocket, and a struggle ensued, the former endeavoring to take the money and the latter resisting the effort, and the money was finally taken by the infliction of physical injuries); Rex *v.* Lapier, 2 East P. C. 708, Leach C. C. 360 (where an earring was snatched from a woman's ear, the blood being drawn from her ear); Rex *v.* Moore, Leach C. C. 335 (where a diamond pin was snatched from a lady's hair so violently as to take with it part of her hair).

28. Smith *v.* State, 117 Ga. 320, 43 S. E. 736; People *v.* Campbell, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107; State *v.* McCune, 5 R. I. 60, 70 Am. Dec. 176; Rex *v.* Mason, Leach C. C. 548.

Illustrations.— It is robbery where defendant snatched a watch from the owner's person with sufficient force to break the chain. Perry *v.* Com., 85 S. W. 732, 27 Ky. L. Rep. 512. And so where defendant, in snatching a watch, tore the chain from the buttonhole and from the watch. State *v.* Broderick, 59 Mo. 318. *Compare* U. S. *v.* Sims, 27 Fed. Cas. No. 16,290, 4 Cranch C. C. 618. So it is robbery if the snatching is accompanied by violence creating resistance, however slight, or by intimidation. Evans *v.* State, 80 Ala. 4; McDow *v.* State, 110 Ga. 293, 34 S. E. 1019.

29. State *v.* Howerton, 58 Mo. 581. See also Com. *v.* Titsworth, 98 S. W. 1028, 30 Ky. L. Rep. 402.

always been considered sufficient to render guilty of robbery one thus obtaining property from the person of another.[30]

b. Of Injury to Property. Robbery may be committed by obtaining property from the person of another by threats of injury to his property.[31]

c. Of Injury to Reputation. Threats of criminal prosecution, thus putting the owner of property in fear of injury to his reputation, do not amount to that constructive violence which will change an offense from larceny to robbery,[32] except where the threat is to prosecute for an unnatural crime.[33]

E. Consent of Owner. In robbery, as in larceny,[34] the taking of property must be "without the consent" of the owner.[35]

The menace must be such as to excite reasonable apprehension of danger. Davis *v.* Com., 54 S. W. 959, 21 Ky. L. Rep. 1295; State *v.* Carmans, Tapp. (Ohio) 65.

Great terror.— It is not necessary that the fear amount to great terror. State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

To constitute robbery by intimidation, it is essential that the property be surrendered because of the apprehension of injury. Steward *v.* People, 224 Ill. 434, 79 N. E. 636; Rippetoe *v.* People, 172 Ill. 173, 50 N. E. 166; Rex *v.* Reane, East P. C. 734, Leach C. C. 616.

30. *Georgia.*— Long *v.* State, 12 Ga. 293.

North Dakota.— State *v.* Sanders, 14 N. D. 203, 103 N. W. 419.

Tennessee.— Britt *v.* State, 7 Humphr. 45.

Texas.— Coffelt *v.* State, 27 Tex. App. 608, 11 S. W. 639, 11 Am. St. Rep. 205.

England.— Rex *v.* Blackham, East P. C. 711.

See 42 Cent. Dig. tit. "Robbery," § 7.

Forcing sale by threats.— If a person by threats compels another to give him goods, and by way of color obliges him to take, or if he offers, less than the value, it is robbery. Rex *v.* Simons, 2 East P. C. 712.

31 Rex *v.* Brown, East P. C. 731 (threat to bring mob and burn prosecutor's house, if money not given); Rex *v.* Simons, East P. C. 731 (threat to tear down corn and level house); Rex *v.* Astley, East P. C. 729; Rex *v.* Taplin, East P. C. 712.

32. *Florida.*— Simmons *v.* State, 41 Fla. 316, 25 So. 881.

Georgia.— Long *v.* State, 12 Ga. 293.

Tennessee.— Britt *v.* State, 7 Humphr. 45.

Texas.— Williams *v.* State, 12 Tex. App. 240.

England.— Rex *v.* Wood, East P. C. 732, Leach C. C. 833.

See 42 Cent. Dig. tit. "Robbery," § 7.

Reason for rule.— To obtain money by a threat to take the party before a magistrate and thence to prison is not robbery, for the threat of legal imprisonment ought not so to alarm any mind as to induce the person to part with his property. Rex *v.* Wood, 2 East P. C. 732, Leach C. C. 833.

Threat to accuse husband of indecent assault.— Obtaining money from a woman by threatening to accuse her husband of an indecent assault is not robbery. Rex *v.* Edwards, 5 C. & P. 518, 1 M. & Rob. 257, 24 E. C. L. 685.

If threats to prosecute for other crimes are accompanied with violence or intimidation, and property is given up in consequence, the offense is robbery. Sweat *v.* State, 90 Ga. 315, 17 S. E. 273; Bussey *v.* State, 71 Ga. 100, 51 Am. Rep. 256; Williams *v.* State, (Tex. Cr. App. 1900) 55 S. W. 500.

33. *Georgia.*— Long *v.* State, 12 Ga. 293.

Nebraska.— Thompson *v.* State, 61 Nebr. 210, 85 N. W. 62, 87 Am. St. Rep. 453.

New York.— People *v.* McDaniels, 1 Park. Cr. 198.

Tennessee.— Britt *v.* State, 7 Humphr. 45.

England.— Rex *v.* Gardner, 1 C. & P. 479, 12 E. C. L. 278; Rex *v.* Hickman, East P. C. 728, Leach C. C. 310; Rex *v.* Jones, East P. C. 714, Leach C. C. 164; Rex *v.* Donnally, East P. C. 713, Leach C. C. 229; Rex *v.* Elmstead, 2 Russell, Cr. & M. 106. But see Rex *v.* Fuller, R. & R. 302.

See 42 Cent. Dig. tit. "Robbery," § 7.

Reason for exception.— "So abominable is the crime, and so destructive is even the accusation of it, of all social right and privilege, that the law considers that the accusation is a coercion which men cannot resist." Long *v.* State, 12 Ga. 293, 319.

Such threats are sufficient, whether the party is guilty or not. Long *v.* State, 12 Ga. 293; Rex *v.* Gardner, 1 C. & P. 479, 12 E. C. L. 278.

34. **Consent of owner** generally see LARCENY, IV, 25 Cyc. 38.

35. *Alabama.*— Jackson *v.* State, 69 Ala. 249.

Georgia.— Long *v.* State, 12 Ga. 293.

Indiana.— Seymour *v.* State, 15 Ind. 288.

Texas.— Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024.

England.— Rex *v.* Fuller, R. & R. 302.

See 42 Cent. Dig. tit. "Robbery," § 8.

Carrying marked money, in anticipation of being robbed, in order to detect the robber, is not such consent. Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024.

Taking "against the will."— Strictly speaking, the taking need not be "against the will" as is illustrated where a man is knocked down without previous warning and stripped of his property while senseless, which has always been considered to be robbery (Rex *v.* Hawkins, 3 C. & P. 392, 14 E. C. L. 626; 4 Blackstone Comm. 243, 244), or where force is used to divert the owner's attention, while his property is being taken without

F. Taking From Owner. It is not necessary that the property be taken from the person of the actual owner.[36]

G. Asportation. The same asportation is necessary in robbery as in larceny.[37]

III. PROSECUTION AND PUNISHMENT.

A. Indictment or Information — 1. In General. An indictment which charges the felonious and forcible taking by the accused, from the person of another, of goods to the value specified, by violence and putting in fear, and that such goods were the property of the person robbed, is a good charge of robbery at common law.[38]

2. Special Allegations — a. Force or Fear.[39] An indictment or information

his knowledge (Snyder *v.* Com., 55 S. W. 679, 21 Ky. L. Rep. 1538; Com. *v.* Snelling, 4 Binn. (Pa.) 379).

36. *California.*— People *v.* Anderson, 80 Cal. 205, 22 Pac. 139. See also People *v.* Vice, 21 Cal. 344, holding that it is not necessary that the property should belong to the person from whose possession it was forcibly taken.

Massachusetts.— Com. *v.* Clifford, 8 Cush. 215.

Michigan.—Durand *v.* People, 47 Mich. 332, 11 N. W. 184.

Nevada.— State *v.* Ah Loi, 5 Nev. 99.

New York.— Brooks *v.* People, 49 N. Y. 436, 10 Am. Rep. 398.

See 42 Cent. Dig. tit. "Robbery," § 4.

Mere possession or custody in an employee is sufficient to constitute him the owner as against the robber. State *v.* Montgomery, 181 Mo. 19, 79 S. W. 693, 67 L. R. A. 343.

Property lost at gaming.—A loser at cards, who by force compels the winner to surrender the money won, is not guilty of robbery. Gant *v.* State, 115 Ga. 205, 41 S. E. 698; Thompson *v.* Com., 18 S. W. 1022, 13 Ky. L. Rep. 1916. But see *contra,* Carroll *v.* State, 42 Tex. Cr. 30, 57 S. W. 99.

Taking from possessor.— The owner of property entitled to its possession is not guilty of robbery in violently taking it from the person of the possessor. People *v.* Vice, 21 Cal. 344; Barnes *v.* State, 9 Tex. App. 128. But see Black *v.* State, 3 Yerg. (Tenn.) 588.

37. Com. *v.* Clifford, 8 Cush. (Mass.) 215.

As to asportation in larceny see LARCENY, 25 Cyc. 18.

Sufficiency of asportation.—Although there must be an actual taking of the property from the person to constitute robbery, the crime is consummated if the thief retains possession but a short time, and it is no less robbery because ineffectual in its consequences. People *v.* Campbell, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107.

38. *Kentucky.*— Com. *v.* Finn, 120 Ky. 693, 86 S. W. 693, 27 Ky. L. Rep. 771.

Missouri.— State *v.* Wilcoxen, 38 Mo. 370.

Montana.— State *v.* Gill, 21 Mont. 151, 53 Pac. 184.

New Hampshire.— State *v.* Gorham, 55 N. H. 152.

Texas.— Reardon *v.* State, 4 Tex. App. 602.

Virginia.— Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

See 42 Cent. Dig. tit. "Robbery," § 16.

Highway robbery.—An indictment for highway robbery, which charges the offense to have been committed near the highway, is good. State *v.* Anthony, 29 N. C. 234. It is not necessary to specify the particular highway. State *v.* Burke, 73 N. C. 83; State *v.* Wilson, 67 N. C. 456.

When based upon a statute, the indictment or information for the offense should be made with reference thereto, and will be sufficient if charging the offense in the language of the statute.

Alabama.— Toliver *v.* State, 142 Ala. 3, 38 So. 801; Thompson *v.* State, 106 Ala. 67, 17 So. 512.

Georgia.— Long *v.* State, 12 Ga. 293.

Iowa.— State *v.* Osborne, 96 Iowa 281, 65 N. W. 159; State *v.* Brewer, 53 Iowa 735, 6 N. W. 62.

Kansas.— State *v.* Stoffel, 48 Kan. 364, 29 Pac. 685; State *v.* Ready, 44 Kan. 697, 700, 26 Pac. 58; State *v.* Barnett, 3 Kan. 250, 87 Am. Dec. 471.

Louisiana.— State *v.* Curtin, 111 La. 129, 35 So. 485; State *v.* Henry, 47 La. Ann. 1587, 18 So. 638.

Michigan.— People *v.* Calvin, 60 Mich. 113, 26 N. W. 851.

Minnesota.— State *v.* O'Neil, 71 Minn. 399, 73 N. W. 1091.

Missouri.— State *v.* Howerton, 59 Mo. 91; State *v.* Scott, 39 Mo. 424; State *v.* Davidson, 38 Mo. 374.

Montana.— State *v.* Paisley, 36 Mont. 237, 92 Pac. 566.

Oregon.— State *v.* Carlson, 39 Oreg. 19, 62 Pac. 1016, 1119.

Pennsylvania.—Acker *v.* Com., 94 Pa. St. 284.

Tennessee.— State *v.* Swafford, 3 Lea 162.

Texas.— Burns *v.* State, 12 Tex. App. 269.

See 42 Cent. Dig. tit. "Robbery," § 16.

Immaterial omissions.— The omission of the word "rob" will not invalidate the indictment where the facts as charged constitute robbery. State *v.* Robinson, 29 La. Ann. 364. An allegation of present ability to commit a violent injury is unnecessary. Craig *v.* State, 157 Ind. 574, 62 N. E. 5. Where several are indicted for robbery, it is not necessary to aver that they were together. Rex *v.* Rafferty, 2 Lew. C. C. 271.

39. **As to force or fear as element of offense** see *supra,* II, D.

in a prosecution for robbery should allege a taking by means of violence or putting in fear.[40]

b. Taking From Person or Presence.[41] It should be alleged that there was a taking "from the person."[42]

c. Intent.[43] An intent to steal should be alleged in some form in an indictment for robbery.[44]

d. Ownership of Property.[45] There should be an allegation setting out the ownership of the property taken, in order to negative the idea that defendant was taking his own property.[46]

40. *Illinois.*— Collins *v.* People, 39 Ill. 233.
Indiana.— Craig *v.* State, 157 Ind. 574, 62 N. E. 5.
Iowa.— State *v.* Brewer, 53 Iowa 735, 6 N. W. 62.
Louisiana.— State *v.* Cook, 20 La. Ann. 145.
Mississippi.— State *v.* Presley, 91 Miss. 377, 44 So. 827.
Missouri.— State *v.* Montgomery, 109 Mo. 645, 19 S. W. 221, 23 Am. St. Rep. 684. And see State *v.* Calvert, 209 Mo. 280, 107 S. W. 1078.
Montana.— State *v.* Gill, 21 Mont. 151, 53 Pac. 184.
North Carolina.— State *v.* Brown, 113 N. C. 645, 18 S. E. 51; State *v.* Cowan, 29 N. C. 239.
Tennessee.— McTigue *v.* State, 4 Baxt. 313.
Texas.— Wiley *v.* State, (Cr. App. 1898) 43 S. W. 995; Trimble *v.* State, 16 Tex. App. 115.
Utah.— State *v.* Waldron, 28 Utah 14, 76 Pac. 1135; State *v.* Davis, 28 Utah 10, 76 Pac. 705.
Wisconsin.— See Gilloti *v.* State, 135 Wis. 634, 116 N. W. 252.
See 42 Cent. Dig. tit. "Robbery," § 23.
"With force and arms."— It is insufficient to aver a taking from the person of another "with force and arms." Com. *v.* Mills, 3 Pa. Super. Ct. 161.
Force and fear.— It is not necessary to allege both force and fear, either being sufficient.
Arkansas.— Traver *v.* State, 72 Ark. 524, 81 S. W. 615; Young *v.* State, 50 Ark. 501, 8 S. W. 828; Clary *v.* State, 33 Ark. 561.
Kentucky.— Blanton *v.* Com., 58 S. W. 422, 22 Ky. L. Rep. 515.
Massachusetts.— Com. *v.* Humphries, 7 Mass. 242.
Mississippi.— Cunningham *v.* State, (1900) 28 So. 750.
Missouri.— State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; State *v.* Stinson, 124 Mo. 447, 27 S. W. 1098.
Montana.— State *v.* Paisley, 36 Mont. 237, 92 Pac. 566.
Texas.— Burns *v.* State, (Cr. App. 1902) 70 S. W. 24.
See 42 Cent. Dig. tit. "Robbery," § 23.
The degree of force used need not be alleged. State *v.* Paisley, 36 Mont. 237, 92 Pac. 566.
The kind of fear or means whereby it was created need not be alleged. State *v.* Moore, 203 Mo. 624, 102 S. W. 537; State *v.* Paisley, 36 Mont. 237, 92 Pac. 566; State *v.* Clancy, 20 Mont. 498, 52 Pac. 267; State *v.* Sanders, 14 N. D. 203, 103 N. W. 419. *Compare* Slover *v.* Territory, 5 Okla. 506, 49 Pac. 1009.
Form of information alleging force is set out in State *v.* Paisley, 36 Mont. 237, 92 Pac. 566, 569; Gilloti *v.* State, 135 Wis. 634, 635, 116 N. W. 252.

41. **Taking from person or presence as** element of offense see *supra*, II, C.

42. *California.*— People *v.* Ah Sing, 95 Cal. 654, 30 Pac. 796; People *v.* Beck, 21 Cal. 385. See also People *v.* Ho Sing, 6 Cal. App. 752, 93 Pac. 204.
Kentucky.— Breckinridge *v.* Com., 97 Ky. 267, 30 S. W. 634, 17 Ky. L. Rep. 163.
Mississippi.— Smith *v.* State, 82 Miss. 793, 35 So. 178.
Missouri.— State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575.
Tennessee.— Kit *v.* State, 11 Humphr. 167.
Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.
See 42 Cent. Dig. tit. "Robbery," § 22.
An allegation of a taking "from the possession" is not sufficient. Hill *v.* State, 145 Ala. 58, 40 So. 654; Smith *v.* State, 37 Tex. Cr. 342, 39 S. W. 933.
An indictment is defective which charges a taking "from the person or immediate presence," as charging in the disjunctive. Slover *v.* Territory, 5 Okla. 506, 49 Pac. 1009.

43. **Intent as element of offense** see *supra*, II, A.

44. *Alabama.*— Chappell *v.* State, 52 Ala. 359.
Arkansas.— Keeton *v.* State, 70 Ark. 163, 66 S. W. 645.
Iowa.— State *v.* Kegan, 62 Iowa 106, 17 N. W. 179.
Kentucky.— Ward *v.* Com., 14 Bush 233.
Missouri.— State *v.* Brown, 104 Mo. 365, 16 S. W. 406.
Montana.— State *v.* Gill, 21 Mont. 151, 53 Pac. 184.
Nebraska.— Smith *v.* State, 72 Nebr. 345, 100 N. W. 806.
North Carolina.— State *v.* Brown, 113 N. C. 645, 18 S. E. 51.
North Dakota.— State *v.* Fordham, 13 N. D. 494, 101 N. W. 888.
Ohio.— Boose *v.* State, 10 Ohio St. 575; Matthews *v.* State, 4 Ohio St. 539; Turner *v.* State, 1 Ohio St. 422.
Texas.— Murphy *v.* State, 43 Tex. Cr. 515, 67 S. W. 108.
See 42 Cent. Dig. tit. "Robbery," § 18.

45. **As element of offense** see *supra*, II, F.

46. *Alabama.*— Dorsey *v.* State, 134 Ala. 553, 33 So. 350.

e. Description of Property.[47] An indictment for robbery sufficiently describes the property taken, if it enables the jury to identify the chattels stolen with those referred to in the indictment, and shows the court that the articles are the subject of robbery.[48]

Arkansas.— Boles *v.* State, 58 Ark. 35, 22 S. W. 887.

California.— People *v.* Ammerman, 118 Cal. 23, 50 Pac. 15; People *v.* Hicks, 66 Cal. 103, 4 Pac. 1093; People *v.* Vice, 21 Cal. 344.

Iowa.— State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125.

Massachusetts.— Com. *v.* Clifford, 8 Cush. 215.

Texas.— Smedly *v.* State, 30 Tex. 214; Higgins *v.* State, (App. 1892) 19 S. W. 503; Parker *v.* State, 9 Tex. App. 351; Barnes *v.* State, 9 Tex. App. 128.

Washington.— State *v.* Morgan, 31 Wash. 226, 71 Pac. 723; State *v.* Dengel, 24 Wash. 49, 63 Pac. 1104.

Wyoming.— McGinnis *v.* State, 16 Wyo. 72, 91 Pac. 936, holding that an information for robbery, which alleges that accused "feloniously" took from a person named by violence a specified sum, is fatally bad for failing to allege the ownership of the property; the word "feloniously" characterizing the act as being done with a criminal intent, and not being a substitute for an allegation of ownership.

United States.— U. S. *v.* McNemara, 26 Fed. Cas. No. 15,701, 2 Cranch C. C. 45.

Compare Owen *v.* Com., 76 S. W. 3, 25 Ky. L. Rep. 466; State *v.* Eddy, 46 Oreg. 625, 81 Pac. 941, 82 Pac. 707; Clemons *v.* State, 92 Tenn. 282, 21 S. W. 525.

See 42 Cent. Dig. tit. "Robbery," § 21.

Forms of indictment in whole, in part, or in substance with allegations as to ownership are set out in the following cases:

Alabama.— Danzey *v.* State, 126 Ala. 15, 16, 28 So. 697.

California.— *In re* Myrtle, 2 Cal. App. 383, 84 Pac. 335.

Iowa.— State *v.* Carr, 43 Iowa 418, 420.

Missouri.— State *v.* Morledge, 164 Mo. 522, 65 S. W. 226; State *v.* Kennedy, 154 Mo. 268, 282, 55 S. W. 293.

Texas.— Williams *v.* State, 37 Tex. Cr. 147, 38 S. W. 999.

47. **Property subject of robbery** see *supra*, II, B.

48. *California.*— People *v.* Chuey Ying Git, 100 Cal. 437, 34 Pac. 1080.

Indiana.— Brennon *v.* State, 25 Ind. 403; Terry *v.* State, 13 Ind. 70.

New York.— People *v.* Loop, 3 Park. Cr. 559.

North Carolina.— State *v.* Burke, 73 N. C. 83.

North Dakota.— State *v.* Sanders, 14 N. D. 203, 103 N. W. 419.

Washington.— State *v.* Johnson, 19 Wash. 410, 53 Pac. 667.

West Virginia.— State *v.* McCoy, (1907) 59 S. E. 758, holding that an indictment for robbery of "one promissory note of the value of $50.85, one purse of the value of 25 cents, and one time check of the value of 50 cents," sufficiently describes the property.

See 42 Cent. Dig. tit. "Robbery," § 19.

Form of indictment with description of property is set out in State *v.* McCoy, (W. Va. 1907) 59 S. E. 758.

Money.— Where the property taken is money, a description of it as a specified sum in lawful money, without stating the number of pieces, their denomination or whether notes or coin, is usually considered sufficient.

Alabama.— Boyd *v.* State, 153 Ala. 41, 45 So. 591.

California.— People *v.* Stevens, 141 Cal. 488, 75 Pac. 62; People *v.* Richards, 136 Cal. 127, 68 Pac. 477; People *v.* Howard, 3 Cal. App. 36, 84 Pac. 462.

Georgia.— Humphries *v.* State, 100 Ga. 260, 28 S. E. 25.

Louisiana.— State *v.* Devine, 51 La. Ann. 1296, 26 So. 105.

Massachusetts.— Com. *v.* Griffiths, 126 Mass. 252.

Missouri.— State *v.* Calvert, 209 Mo. 280, 107 S. W. 1078; State *v.* Rush, 95 Mo. 199, 8 S. W. 221; State *v.* Burnett, 81 Mo. 119.

Texas.— Parrent *v.* State, (Cr. App. 1903) 76 S. W. 474; White *v.* State, (Cr. App. 1900) 57 S. W. 100; Colter *v.* State, 37 Tex. Cr. 284, 39 S. W. 576; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629.

Utah.— State *v.* La Chall, 28 Utah 80, 77 Pac. 3.

See 42 Cent. Dig. tit. "Robbery," § 19.

This is true where it is alleged that a more particular description is unknown.— Brown *v.* State, 120 Ala. 342, 25 So. 182; Owens *v.* State, 104 Ala. 18, 16 So. 575; State *v.* Stewart, 1 Pennew. 433, 42 Atl. 624; McQueen *v.* State, 82 Ind. 72; Territory *v.* Bell, 5 Mont. 562, 6 Pac. 60; Quinlan *v.* People, 6 Park. Cr. (N. Y.) 9; Wade *v.* State, 35 Tex. Cir. 170, 32 S. W. 772, 60 Am. St. Rep. 31; Winston *v.* State, 9 Tex. App. 143. But see Watts *v.* State, (1905) 39 So. 455; Nevill *v.* State, 133 Ala. 99, 32 So. 596; Croker *v.* State, 47 Ala. 53; Arnold *v.* State, 52 Ind. 281, 21 Am. Rep. 175.

Sufficient descriptions.— The following descriptions have been held sufficient: "Thirty dollars of greenbacks" (Wesley *v.* State, 61 Ala. 282); "the sum of $1745 in paper currency of the United States of America" (State *v.* Shonhausen, 26 La. Ann. 421. See also State *v.* Carro, 26 La. Ann. 377); "three silver dollars in coin of the value of three dollars" (Kirk *v.* State, 35 Tex. Cr. 224, 32 S. W. 1045. See also Gables *v.* State, (Tex. Cr. App. 1901) 68 S. W. 288; Moore *v.* State, 36 Tex. Cr. 88, 35 S. W. 668); "silver coin of the value of $2.00" (State *v.* Jackson, 26 W. Va. 250); "one United States note, commonly called greenback, of the value of ten dollars" (McEntee *v.* State, 24 Wis. 43).

f. Taking Against the Will.[49] It should appear from the indictment that the owner did not consent to the taking of his property; but, if lack of consent otherwise appears, an express allegation of a taking against the will is unnecessary.[50]

g. Asportation.[51] Where the taking is properly alleged, it has been held unnecessary to charge a carrying away.[52]

h. Value. Where there are no degrees of the offense, the authorities have usually not required a specific allegation of value.[53]

3. Variance. The allegations and proof must correspond.[54] Where an indictment alleges the taking of several articles, it is sufficient to prove the taking of any one of them,[55] but the evidence must show a taking of some property answering substantially to that described.[56]

49. Taking against will as element of offense see *supra*, II, E.

50. *California.*— People *v.* Riley, 75 Cal. 98, 16 Pac. 544; People *v.* Shuler, 28 Cal. 490.

Indiana.—Anderson *v.* State, 28 Ind. 22; Terry *v.* State, 13 Ind. 70.

Louisiana.— State *v.* Patterson, 42 La. Ann. 934, 8 So. 529.

Mississippi.— State *v.* Presley, 91 Miss. 377, 44 So. 827.

Pennsylvania.—Acker *v.* Com., 94 Pa. St. 284.

Utah.— State *v.* La Chall, 28 Utah 80, 77 Pac 3.

See 42 Cent. Dig. tit. "Robbery," § 22.

51. Asportation as element of offense see *supra*, II, G.

52. Terry *v.* State, 13 Ind. 70; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629; State *v.* Smith, 40 Wash. 615, 82 Pac. 918. *Compare* Com. *v.* Clifford, 8 Cush. (Mass.) 215.

53. Baldwin *v.* Com., 2 Ky. L. Rep. 439; State *v.* Perley, 86 Me. 427, 30 Atl. 74, 41 Am. St. Rep. 564; State *v.* Brown, 113 N. C. 645, 18 S. E. 51; Williams *v.* State, 34 Tex. Cr. 523, 31 S. W. 405; Williams *v.* State, 10 Tex. App. 8. *Compare* State *v.* Sagermond, 40 Kan. 107, 19 Pac. 370, 10 Am. St. Rep. 169.

Where several articles are taken, the separate value need not be alleged. Jackson *v.* State, 69 Ala. 249.

54. For illustrations of fatal variance see State *v.* Stewart, 1 Pennew. (Del.) 433, 42 Atl. 624 (robbery on or near a highway charged, but shown to have been committed in a building facing on a street); Glass *v.* Com., 6 Bush (Ky.) 436; State *v.* Crowell, 149 Mo. 391, 50 S. W. 893, 73 Am. St. Rep. 402 (robbery by "putting in fear" only charged but robbery only by force and violence shown); State *v.* Cowan, 29 N. C. 239 (robbery "in" highway charged, but shown to have been committed "near" the highway); State *v.* Fallon, 2 N. D. 510, 52 N. W. 318.

What is not a variance see McNamara *v.* People, 24 Colo. 61, 48 Pac. 541; State *v.* Alexander, 66 Kan. 726, 72 Pac. 227 (taking gold watch charged, but proof showed watch to be a gold-filled case watch); State *v.* Lamb, 141 Mo. 298, 42 S. W. 827 (robbery "from the person" charged and evidence showing a robbery "in the presence"); State *v.* Sanders, 14 N. D. 203, 103 N. W. 419 (putting in fear alone charged and both force and fear shown); Stewart *v.* State, (Tex. Cr. App. 1895) 31 S. W. 407; Williams *v.* State, 34 Tex. Cr. 523, 31 S. W. 405; Allen *v.* U. S., 115 Fed. 3, 52 C. C. A. 597 (taking of paper money of Canada charged, and evidence showing that money was issued by Canada or by Canadian chartered banks). Where defendant was charged with robbery in taking from prosecutor a ten-dollar bill, evidence that defendant compelled prosecutor to throw the bill on the floor, and then compelled another to take it and get it changed, after which defendant paid prosecutor two dollars, and retained the balance, did not constitute a variance. Fanin *v.* State, 51 Tex. Cr. 41, 100 S. W. 916, 123 Am. St. Rep. 874, 10 L. R. A. N. S. 744. So where defendant was charged with robbery under an indictment alleging that he took a ten-dollar bill from prosecutor, proof that defendant claiming eight dollars from prosecutor for wages compelled him to deliver up a ten-dollar bill, and thereafter returned two dollars change, did not constitute a variance. Fanin *v.* State, *supra*. Again under an information for robbery alleging a striking and wounding, the statute being in the alternative, proof of either will suffice. McDuffee *v.* State, 55 Fla. 125, 46 So. 721.

The ownership of the property must be proved as alleged (Staples *v.* State, 114 Ga. 256, 40 S. E. 264; Crews *v.* State, 3 Coldw. (Tenn.) 350. *Compare* People *v.* Gonzales, (Cal. 1899) 56 Pac. 804), except when the statute provides otherwise (People *v.* Anderson, 80 Cal. 205, 22 Pac. 139; State *v.* Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897).

Indictment for robbery and conviction for larceny see Larceny, 25 Cyc. 103.

55. *Alabama.*— Brown *v.* State, 120 Ala. 342, 25 So. 182.

Arkansas.— Phillips *v.* State, 36 Ark. 282.

Florida.— Williams *v.* State, 42 Fla. 205, 27 So. 898.

North Dakota.— State *v.* Sanders, 14 N. D. 203, 103 N. W. 419.

Texas.— White *v.* State, (Cr. App. 1900) 57 S. W. 100.

Washington.— State *v.* Smith, 40 Wash. 615, 82 Pac. 918.

See 42 Cent. Dig. tit. "Robbery," § 27.

56. People *v.* Richards, 136 Cal. 127, 68 Pac. 477; Com. *v.* Cahill, 12 Allen (Mass.) 540. *Compare* Burke *v.* People, 148 Ill. 70, 35 N. E. 376.

B. Persons Liable. If several associate together to commit robbery, and are present ready to aid and assist, all are guilty, although some do not participate in the taking.[57]

C. Defenses.[58] Where the offense of robbery is actually completed, the redelivery of the property to the owner is no defense.[59] Nor is it a defense that the robbery was committed under the command of a superior.[60] Arresting officers who use violence and rob the party arrested are not exonerated on account of the legality of the arrest,[61] but it is a defense that property was taken as an act of war.[62] On a trial for robbery near a highway, the fact that neither accused nor prosecutor knew of the road, constitutes no defense.[63]

D. Evidence[64] — **1. Burden of Proof and Presumptions.** The burden of proving every element of the crime of robbery is on the state.[65] Possession of the property by the complaining witness, or his agent, at the time it was stolen, is presumptive evidence of ownership.[66]

2. Admissibility — a. In General. In a prosecution for robbery, the entire transaction may be shown,[67] together with anything tending to connect accused

Bank-notes.— Mont. Pen. Code, § 2109, providing that on a trial for larceny of money or bank-notes, the allegations of the indictment are sustained if defendant be proved to have stolen any money or notes, although the particular species be not proved, is applicable to a prosecution for robbery. State *v.* Rodgers, 21 Mont. 143, 53 Pac. 97.

Taking other property.— Evidence that defendant took something more than was described in indictment does not permit a conviction. Brown *v.* State, 120 Ala. 342, 25 So. 182.

57. Com. *v.* Ryan, 154 Mass. 422, 28 N. E. 289; State *v.* Stewart, 127 Mo. 290, 29 S. W. 986; State *v.* O'Keefe, 23 Nev. 127, 43 Pac. 918, 62 Am. St. Rep. 768; People *v.* McElroy, 14 N. Y. Suppl. 203.

All must share in the felonious design. Williams *v.* Com., 110 S. W. 339, 33 Ky. L. Rep. 330; People *v.* Foley, 59 Mich. 553, 26 N. W. 699; Reg. *v.* Henry, 9 C. & P. 309, 2 Moody C. C. 118, 38 E. C. L. 187. *Compare* Ferguson *v.* State, 32 Ga. 658. So if a gang of poachers attack a gamekeeper and leave him senseless on the ground, and one of them returns and steals his money, that one only can be convicted of robbery, as it was not in pursuance of any common intent. Rex *v.* Hawkins, 3 C. & P. 392, 14 E. C. L. 626.

The several confederates need not be actually present when the property is taken. State *v.* Heyward, 2 Nott & M. (S. C.) 312, 10 Am. Dec. 604; Ashworth *v.* State, 31 Tex. Cr. 419, 20 S. W. 982.

Receiving property obtained by robbery.— One who receives money obtained by robbery, with knowledge that it was so obtained, is not an accessary to the robbery. People *v.* Shephardson, 48 Cal. 189.

As to principals and accessaries generally see Criminal Law, 12 Cyc. 183.

58. **Defenses** generally see Criminal Law, 12 Cyc. 155.

59. McGinty *v.* State, 97 Ga. 368, 23 S. E. 831; Rex *v.* Peat, East P. C. 557, Leach C. C. 266.

60. Thomas *v.* State, 134 Ala. 126, 33 So. 130.

61. Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024.

62. Hammond *v.* State, 3 Coldw. (Tenn.) 129.

63. State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

64. **Evidence** generally see Criminal Law, 12 Cyc. 379.

65. See Criminal Law, 12 Cyc. 379 *et seq.*

Lack of owner's consent.— It being necessary under the statute of robbery only to charge a forcible and fraudulent taking from the person and possession of another, the state need not prove, where a third person other than the one robbed was the true owner, that defendant did not have his consent, but proof of the contrary is for defendant. Williams *v.* State, 37 Tex. Cr. 147, 38 S. W. 999.

66. People *v.* Oldham, 111 Cal. 648, 44 Pac. 312. See also *infra*, III, D, 3, e.

Either fear or criminal intent may be inferred from a consideration of the entire surroundings. Long *v.* State, 12 Ga. 293; State *v.* Glovery, 10 Nev. 24.

Presumption from recent possession.—A presumption of guilt may arise from the recent possession of stolen property. State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125. See also Larceny, 25 Cyc. 131.

67. *Iowa.*— State *v.* Miller, 83 Iowa 291, 49 N. W. 90.

Kentucky.— Pickerel *v.* Com., 30 S. W. 617, 17 Ky. L. Rep. 120.

Montana.— State *v.* Howard, 30 Mont. 518, 77 Pac. 50.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

Texas.— Underwood *v.* State, 39 Tex. Cr. 409, 46 S. W. 245; Williams *v.* State, 34 Tex. Cr. 523, 31 S. W. 405.

See 42 Cent. Dig. tit. "Robbery," § 29.

A complaint of robbery made immediately after the occurrence has been admitted as part of the *res gestæ*. People *v.* Murphy, 56 Mich. 546, 23 N. W. 215; Driscoll *v.* People, 47 Mich. 413, 11 N. W. 221.

Motive.— Evidence that defendant was

with the crime [68] or establish his identity.[69] Of course evidence which is irrelevant is inadmissible.[70]

b. Intent.[71] Evidence of the conduct of defendant before the taking may be admissible to show intent.[72]

c. Circumstances and Condition of Person Robbed. To show that force and violence were used, the extent of the injuries inflicted on the person robbed may be proved.[73]

greatly in need of money to pay his debts may be introduced to show motive. Armstrong *v.* State, 34 Tex. Cr. 248, 30 S. W. 235.

Evidence relevant to corroborate the prosecuting witness is admissible. Com. *v.* Watson, 109 Mass. 354; State *v.* Balch, 136 Mo. 103, 37 S. W. 808; Delaney *v.* State, 48 Tex. Cr. 594, 90 S. W. 642. Accordingly where there was evidence on a prosecution for robbery that, in the scuffle between defendant and prosecutor, two bills in prosecutor's hand were torn in two, the torn pieces remaining with prosecutor were admissible in corroboration of his testimony as to the assault. Tracey *v.* State, 46 Nebr. 361, 64 N. W. 1069.

Possession of money.— On a trial for robbery, it was permissible for the state to prove by others than the person robbed that he had money on his person shortly before the robbery, and to do so it was competent to show that he was spending money in a near-by saloon, whence he went in a short time to the place where he was robbed, and that he drew out his pocket-book at the saloon, and was seen with money out in front of the saloon. Boyd *v.* State, 153 Ala. 41, 45 So. 591.

68. Keating *v.* State, 67 Nebr. 560, 93 N. W. 980; Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

69. Com. *v.* Kelly, 186 Mass. 403, 71 N. E. 807; Davis *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1099.

Robbery on train.— In a prosecution for robbery committed on a railroad train, the conductor's pass issued to defendant is admissible in evidence. Tabor *v.* State, 52 Tex. Cr. 387, 107 S. W. 1116.

70. *California.*— People *v.* Clark, 106 Cal. 32, 39 Pac. 53.

Georgia.— Lampkin *v.* State, 87 Ga. 516, 13 S. E. 523.

Iowa.— State *v.* Beck, 73 Iowa 616, 35 N. W. 684.

Montana.— State *v.* Howard, 30 Mont. 518, 77 Pac. 50.

Texas.— Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629.

Virginia.— Thompson *v.* Com., 88 Va. 45, 13 S. E. 304.

See 42 Cent. Dig. tit. "Robbery," § 29.

Illustrations.— To show lack of ownership, evidence that the person from whom the property was taken had failed to place it on the assessment roll is inadmissible. State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406. So where the witness testified that the accused took him to a house of ill fame, and thence into the street where he was robbed, evidence that the accused was not accustomed to visit such places was immaterial. People *v.* Becker, 48 Mich. 43, 11 N. W. 779. Evidence that the money stolen was won by gambling from defendant is inadmissible. Blain *v.* State, 34 Tex. Cr. 448, 31 S. W. 368. So evidence that defendant worked for wages some months prior to the robbery is not relevant. Colter *v.* State, 37 Tex. Cr. 284, 39 S. W. 576. Where defendant, accused of robbery, claimed that it was committed by F, evidence that F later tried to steal defendant's purse is inadmissible. State *v.* Totten, 72 Vt. 73, 47 Atl. 105.

71. **Intent as element of offense** see *supra*, II, A.

72. State *v.* Fallon, 2 N. D. 510, 52 N. W. 318 (evidence that shortly before the robbery defendant drew a revolver and ordered others off the street); State *v.* Shields, 13 S. D. 464, 83 N. W. 559 (evidence that the accused saw and commented on the value of the watch carried by the prosecutor); Gables *v.* State, (Tex. Cr. App. 1901) 68 S. W. 288 (evidence that defendant put drugs in beer sold to the prosecuting witness).

Claim of right.— It is competent for defendant to testify that, at the time of the alleged robbery, he thought that he had a right to take the property as his own. State *v.* Hollyway, 41 Iowa 200, 20 Am. Rep. 586; People *v.* Hughes, 11 Utah 100, 39 Pac. 492. See also *supra*, II, A.

Where defendants formed part of a mob and advised the prosecutor to give money to the mob, evidence of demands made by the same mob at other places is admissible to show that the advice was not *bona fide*. Rex *v.* Winkworth, 4 C. & P. 444, 19 E. C. L. 594.

73. Brown *v.* State, 120 Ala. 342, 25 So. 182; State *v.* Alexander, 66 Kan. 726, 72 Pac. 227.

This may be shown either by the attending physician, or by one who saw the person robbed immediately after the robbery. Com. *v.* Flynn, 165 Mass. 153, 42 N. E. 562.

Frightening.— It is competent to show by the person robbed that he was frightened. Long *v.* State, 12 Ga. 293; Dill *v.* State, 6 Tex. App. 113.

Possession of property by prosecuting witness.— Evidence that shortly before the robbery the prosecuting witness had the property charged to have been taken, and that he did not have it immediately afterward, is admissible. Bradley *v.* State, 103 Ala. 29, 15 So. 640; People *v.* Linares, 142 Cal. 17, 75 Pac. 308; State *v.* Hyatt, 179 Mo. 344, 78 S. W. 601; Bloomer *v.* People, 1 Abb. Dec. (N. Y.) 146, 3 Keyes 9.

Possession of weapon.—In a prosecution for

d. Possession of Stolen Property [74] or of Weapons. Possession by the accused of the stolen property shortly after the robbery is admissible against him.[75] Where the robbery was committed with the aid of weapons, evidence is admissible to show that, shortly after the robbery, the accused had similar weapons.[76]

3. Weight and Sufficiency [77] — a. In General. The state must prove by direct or circumstantial evidence every element of the crime set forth in the indictment.[78]

robbery, evidence, as to the revolver taken from the person robbed and introduced in evidence, was admissible. State *v.* Finn, 199 Mo. 597, 98 S. W. 9.

74. As to presumption from possession of stolen property see *supra*, III, D, 1.

75. *California.*— People *v.* Sullivan, 144 Cal. 471, 77 Pac. 1000; People *v.* Castile, 3 Cal. App. 487, 86 Pac. 746; People *v.* Salas, 2 Cal. App. 537, 84 Pac. 295.

Missouri.— State *v.* Balch, 136 Mo. 103, 37 S. W. 808.

New York.— People *v.* Mackinder, 80 Hun 40, 29 N. Y. Suppl. 842.

Texas.— Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629.

Utah.— People *v.* Kerm, 8 Utah 268, 30 Pac. 988.

See 42 Cent. Dig. tit. "Robbery," § 31.

Illustrations.—A letter written by defendant a few days after the robbery, in which he stated that he had got hold of about fifteen dollars, is admissible, in connection with other evidence, where it appeared that the amount taken was about nfteen dollars. Williams *v.* State, 123 Ala. 39, 26 So. 521. Where the article taken was a watch and the accused and a certain woman were very intimate, evidence that the watch was in the possession of the woman the morning after the robbery was admissible. Clay *v.* State, 122 Ga. 136, 50 S. E. 56. So a finding of part of the stolen property in the cell of defendant may be shown. People *v.* Whitson, 43 Mich. 419, 5 N. W. 454. Evidence that the stolen property was found the morning after the robbery, in the house where defendant was arrested, is competent. State *v.* Wyatt, 124 Mo. 537, 27 S. W. 1096.

Explaining possession.— Defendant may introduce evidence to account for the amount of money found on him after the robbery. Chancey *v.* State, 50 Tex. Cr. 85, 96 S. W. 12. But the receipt of money by the accused from proper sources is immaterial, where it is not claimed that the money stolen was found in his possession. People *v.* Becker, 48 Mich. 43, 11 N. W. 779.

Conflicting accounts of defendant.— Where a witness testified that the defendant had made three statements as to where she had obtained the articles in question, it was error to allow the witness, who had given the substance of one statement, to testify that he did not remember the other two statements, "except that they were different from each other and from the first statement." Moses *v.* State, 88 Ala. 78, 7 So. 101, 16 Am. St. Rep. 21.

76. *California.*— People *v.* Ward, 77 Cal. 113, 19 Pac. 373.

Illinois.— Bow *v.* People, 160 Ill. 438, 43 N. E. 593.

Louisiana.— State *v.* Gordon, 115 La. 571, 39 So. 625.

Minnesota.— State *v.* Minot, 79 Minn. 118, 81 N. W. 753.

Texas.— Williams *v.* State, 34 Tex. Cr. 523, 31 S. W. 405; Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

See 42 Cent. Dig. tit. "Robbery," § 31.

Burglars' tools.— Evidence that burglars' tools were found on defendant at the time of his arrest is incompetent, it not appearing that the articles found were used in aiding the commission of the offense charged. People *v.* Sansome, 84 Cal. 449, 24 Pac. 143. *Compare* State *v.* Shannon, 33 Mo. 596. See also Williams *v.* State, 51 Nebr. 711, 71 N. W. 729.

Purchase of cartridges.— Evidence is competent that before the robbery defendant had attempted to buy cartridges for his gun. People *v.* Oldham, 111 Cal. 648, 44 Pac. 312.

77. As to weight and sufficiency of evidence generally see Criminal Law, 12 Cyc. 485 *et seq.*

78. *Alabama.*— Thomas *v.* State, 134 Ala. 126, 33 So. 130.

Arizona.— Ramirez *v.* Territory, (1905) 80 Pac. 391.

Arkansas.— Rogers *v.* State, (1908) 109 S. W. 1160; Shell *v.* State, 84 Ark. 344, 105 S. W. 575.

California.— People *v.* Nolan, 144 Cal. 75, 77 Pac. 774; People *v.* Patterson, 124 Cal. 102, 56 Pac. 882; People *v.* Gonzales, (1899) 56 Pac. 804; People *v.* McDonald, (1896) 45 Pac. 1005; People *v.* Barry, 90 Cal. 41, 27 Pac. 62; People *v.* Lum Yit, 83 Cal. 130, 23 Pac. 228; People *v.* White, 5 Cal. App. 329, 90 Pac. 471.

Georgia.— Hickey *v.* State, 125 Ga. 145, 53 S. E. 1026; Moran *v.* State, 125 Ga. 33, 53 S. E. 806; Johnson *v.* State, 1 Ga. App. 729, 57 S. E. 1056; Harris *v.* State, 1 Ga. App. 136, 57 S. E. 937.

Illinois.— People *v.* Campbell, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107; Steward *v.* People, 224 Ill. 434, 79 N. E. 636; Turley *v.* People, 188 Ill. 628, 59 N. E. 506; Rippetoe *v.* People, 172 Ill. 173, 50 N. E. 166; Hall *v.* People, 171 Ill. 540, 49 N. E. 495.

Indiana.— Lee *v.* State, 156 Ind. 541, 60 N. E. 299; McCarty *v.* State, 127 Ind. 223, 26 N. E. 665; Brennon *v.* State, 25 Ind. 403.

Kentucky.— Kincaid *v.* Com., 78 S. W. 433, 25 Ky. L. Rep. 1695.

Minnesota.— State *v.* Minot, 79 Minn. 118, 81 N. W. 753.

Missouri.— State *v.* Calvert, 209 Mo. 280, 107 S. W. 1078; State *v.* Vaughan, 199 Mo.

b. Intent.[79] The felonious intent must be affirmatively established,[80] but such intent may be made to appear by the circumstances which accompany the taking.[81]

c. Identity of Accused. The prosecution must satisfy the jury as to the identity of the person on trial with the person who committed the crime.[82]

d. Force or Fear.[83] While the evidence must show that the taking was

108, 97 S. W. 879; State *v.* Davis, 186 Mo. 533, 85 S. W. 354; State *v.* Swisher, 186 Mo. 1, 84 S. W. 911; State *v.* Alexander, 184 Mo. 266, 83 S. W. 753; State *v.* Rowland, 174 Mo. 373, 74 S. W. 622; State *v.* Tate, 156 Mo. 119, 56 S. W. 1099; State *v.* Tate, 145 Mo. 667, 47 S. W. 792; State *v.* Moore, 106 Mo. 480, 17 S. W. 658.

Montana.— State *v.* Roach, 11 Mont. 227, 28 Pac. 260; State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088.

Nebraska.— Walbridge *v.* State, 13 Nebr. 236, 13 N. W. 209, where the only evidence connecting defendant with the crime was that it was committed at his house, at night, by several persons with whom he was on intimate terms, and that, although denied credit for a trifling sum the day before the robbery, he had paid a bill of twenty-five dollars the next day.

New York.— People *v.* McKenna, 118 N. Y. App. Div. 766, 103 N. Y. Suppl. 870; People *v.* O'Neil, 6 N. Y. Cr. 226, 4 N. Y. Suppl. 410.

North Carolina.— State *v.* Leach, 119 N. C. 828, 25 S. E. 858.

Ohio.— McNeal *v.* State, 11 Ohio Dec. (Reprint) 782, 29 Cinc. L. Bul. 185.

South Dakota.— State *v.* Shields, 13 S. D. 464, 83 N. W. 559.

Texas.— Tabor *v.* State, 52 Tex. Cr. 387, 107 S. W. 1116; Reyes *v.* State, (Cr. App. 1907) 102 S. W. 1156; Glenn *v.* State, 49 Tex. Cr. 349, 92 S. W. 806; Gables *v.* State, (Cr. App. 1901) 68 S. W. 288; Brooks *v.* State, (Cr. App. 1896) 37 S. W. 739; Rogers *v.* State, 32 Tex. Cr. 447, 24 S. W. 282; Odle *v.* State, 13 Tex. App. 612.

Virginia.— Wheeler *v.* Com., 86 Va. 658, 10 S. E. 924.

Washington.— State *v.* Jamieson, 45 Wash. 314, 88 Pac. 214.

See 42 Cent. Dig. tit. "Robbery," § 32.

Robbery aggravated by wounding.— An indictment under Mass. Rev. St. c. 125, § 13, which alleges that defendant robbed A and struck and wounded him, is not proved, as to the wounding, by evidence that defendant made a slight scratch on A's face by rupturing the cuticle only. Com. *v.* Gallagher, 6 Metc. (Mass.) 565.

79. Intent as element of offense see *supra*, II, A.

80. Coles *v.* State, 23 Ohio Cir. Ct. 313; Denman *v.* State, (Tex. Cr. App. 1898) 47 S. W. 366.

81. *California.*— People *v.* Hite, 135 Cal. 76, 67 Pac. 57.

Illinois.— Howard *v.* People, 193 Ill. 615, 61 N. E. 1016.

Missouri.— State *v.* Carroll, 160 Mo. 368, 60 S. W. 1087, where the defense was that the money taken was due for drinks, but the evidence showed that defendant stealthily approached the customer and forcibly took more than the amount claimed to be due, and then tried to escape from a policeman who witnessed the act, and made no explanation when arrested.

New York.— Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460.

Texas.— Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024.

See 42 Cent. Dig. tit. "Robbery," § 33.

Defendant's declarations of another purpose, made immediately before the robbery, are not conclusive. People *v.* Woody, 48 Cal. 80.

82. *Arkansas.*— James *v.* State, (1902) 68 S. W. 247.

California.— People *v.* Kelly, 146 Cal. 119, 79 Pac. 846; People *v.* Cappola, (1899) 56 Pac. 248; People *v.* Castile, 3 Cal. App. 485, 86 Pac. 745.

Georgia.— Usom *v.* State, 97 Ga. 194, 22 S. E. 399.

Illinois.— Schroeder *v.* People, 196 Ill. 211, 63 N. E. 678; Ogden *v.* People, 134 Ill. 599, 25 N. E. 755.

Iowa.— State *v.* Brafford, 121 Iowa 115, 96 N. W. 710; State *v.* Reasby, 100 Iowa 231, 69 N. W. 451; State *v.* Callahan, 96 Iowa 304, 65 N. W. 150; State *v.* Sipult, 81 Iowa 40, 46 N. W. 748.

Minnesota.— State *v.* Blanchard, 88 Minn. 82, 92 N. W. 504.

Missouri.— State *v.* Rowland, 174 Mo. 373, 74 S. W. 622.

Nebraska.— Keating *v.* State, 67 Nebr. 560, 93 N. W. 980.

New York.— People *v.* Stack, 41 N. Y. App. Div. 548, 58 N. Y. Suppl. 691; People *v.* Flanagan, 22 N. Y. App. Div. 516, 48 N. Y. Suppl. 241 [*affirmed* in 158 N. Y. 722, 53 N. E. 1129].

Texas.— Carson *v.* State, (Cr. App. 1893) 24 S. W. 643.

Washington.— State *v.* Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

See 42 Cent. Dig. tit. "Robbery," § 34.

Insufficient evidence of identity.— Where the only evidence connecting defendant with the crime is the opinion of the person robbed that defendant was of the form and size of one of his assailants, and the fact that he associated much with one of those convicted, defendant should be acquitted. State *v.* Campbell, 69 Iowa 556, 29 N. W. 604.

Witness need not positively identify.— State *v.* Lucas, 57 Iowa 501, 10 N. W. 868.

83. Force or fear as element of offense see *supra*, II, D.

accomplished by violence or by putting in fear,[84] it is not necessary that there be proof of actual fear, as fear may be presumed where there is just cause for it.[85]

e. Ownership and Value of Property. Where defendant makes no claim of right, the fact that the property taken was in the possession of the prosecuting witness is sufficient evidence of ownership.[86] Testimony that the articles taken were articles which the person robbed "had purchased," is sufficient evidence of value.[87]

E. Trial [88] **— 1. Province of Court and Jury.** All controverted questions of fact must be left to the jury.[89]

2. Instructions. The court's instructions should clearly apprise the jury of every essential element of the offense;[90] therefore the jury should be instructed

84. Stevens *v.* State, 19 Nebr. 647, 28 N. W. 304. See also *supra*, II, D.

Evidence sufficient to show violence see State *v.* Duffy, 124 Iowa 705, 100 N. W. 796; Blanton *v.* Com., 58 S. W. 422, 22 Ky. L. Rep. 515; People *v.* McElroy, 14 N. Y. Suppl. 203; State *v.* Parsons, 44 Wash. 299, 87 Pac. 349, 7 L. R. A. N. S. 566.

Evidence sufficient to show fear see Williams *v.* State, 51 Nebr. 711, 71 N. W. 729; McCormick *v.* State, 26 Tex. App. 678, 9 S. W. 277.

85. State *v.* Kennedy, 154 Mo. 268, 55 S. W. 293; State *v.* Lamb, 141 Mo. 298, 42 S. W. 827; State *v.* Lawler, 130 Mo. 366, 32 S. W. 979, 51 Am. St. Rep. 575; Trimble *v.* State, 61 Nebr. 604, 85 N. W. 844; Tones *v.* State, 48 Tex. Cr. 363, 88 S. W. 217, 122 Am. St. Rep. 759, 1 L. R. A. N. S. 1024.

86. People *v.* Nelson, 56 Cal. 77; Howard *v.* People, 193 Ill. 615, 61 N. E. 1016; Bow *v.* People, 160 Ill. 438, 43 N. E. 593; State *v.* Hobgood, 46 La. Ann. 855, 15 So. 406; State *v.* Howard, 30 Mont. 518, 77 Pac. 50. See also *supra*, III, D, 1.

87. James *v.* State, 53 Ala. 380.

The value of United States coin need not be proved. Barddell *v.* State, 144 Ala. 54, 39 So. 975; People *v.* Stevens, 141 Cal. 488, 75 Pac. 62; State *v.* Helvin, 65 Iowa 289, 21 N. W. 645; State *v.* Hyde, 22 Wash. 551, 61 Pac. 719.

88. Trial generally see Criminal Law, 12 Cyc. 504 *et seq.*

89. **It is for the jury to decide** whether violence was used (People *v.* Church, 116 Cal. 300, 48 Pac. 125; State *v.* Calhoun, 72 Iowa 432, 34 N. W. 194, 2 Am. St. Rep. 252; King *v.* Com., 76 S. W. 341, 25 Ky. L. Rep. 713; Thompson *v.* State, (Tex. Cr. App. 1894) 26 S. W. 1081), whether defendant (Smith *v.* People, 39 Colo. 202, 88 Pac. 1072; State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088) or the property taken (Com. *v.* Tolliver, 119 Mass. 312) has been properly identified, or whether the act was done with felonious intent (Triplett *v.* Com., 122 Ky. 35, 91 S. W. 281, 28 Ky. L. Rep. 974; Hope *v.* People, 83 N. Y. 418, 38 Am. Rep. 460; Bloomer *v.* People, 1 Abb. Dec. (N. Y.) 146, 3 Keyes 9; People *v.* Hall, 6 Park. Cr. (N. Y.) 642; State *v.* Sowls, 61 N. C. 151).

Inferences from facts.—It is not the judge's duty to point out what inferences may or should be drawn from particular facts in evidence. Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

90. *Georgia.*— Grant *v.* State, 125 Ga. 259, 54 S. E. 191; Clay *v.* State, 122 Ga. 136, 50 S. E. 56.

Iowa.— State *v.* Atkins, 122 Iowa 161, 97 N. W. 996.

Missouri.— State *v.* Alexander, 184 Mo. 266, 83 S. W. 753.

Oklahoma.— Axhelm *v.* U. S., 9 Okla. 321, 60 Pac. 98.

Tennessee.— Miller *v.* State, 12 Lea 223.

Texas.— See Burnsides *v.* State, 51 Tex. Cr. 399, 102 S. W. 118.

West Virginia.— State *v.* McCoy, (1907) 59 S. E. 758.

See 42 Cent. Dig. tit. "Robbery," § 38.

Assuming truth of matters in issue.— A charge is erroneous which assumes the truth of matters of fact in controversy. State *v.* Bailey, 54 Iowa 414, 6 N. W. 589; Bradshaw *v.* State, 44 Tex. Cr. 222, 70 S. W. 215; Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

Definition of crime.—On a trial for robbery, it is sufficient for the court, in defining robbery, to give the statutory definition of the crime. People *v.* White, 5 Cal. App. 329, 90 Pac. 471.

Defendant's possession of stolen property.— The court may properly give instructions relative to the effect as evidence of the defendant's unexplained possession of the property taken when the robbery was committed (People *v.* Wilson, 135 Cal. 331, 67 Pac. 322; People *v.* Hallam, 6 Cal. App. 331, 92 Pac. 190; State *v.* Harris, 97 Iowa 407, 66 N. W. 728; Ford *v.* State, 41 Tex. Cr. 1, 51 S. W. 935, 53 S. W. 869. But see Tabor *v.* State, 52 Tex. Cr. 387, 107 S. W. 1116), but the weight as evidence of such possession must be left to the jury (State *v.* Sullivan, 9 Mont. 174, 22 Pac. 1088).

A request to charge should be refused, although correct in the abstract, if there is no evidence in the case on which to base it.

Arkansas.— Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

California.— People *v.* Modina, 146 Cal. 142, 79 Pac. 842.

Georgia.— Ferguson *v.* State, 32 Ga. 658.

Missouri.— State *v.* McLain, 159 Mo. 340, 60 S. W. 736.

North Carolina.— State *v.* Graham, 133 N. C. 645, 45 S. E. 514.

See 42 Cent. Dig. tit. "Robbery," § 39.

as to the necessity for a taking by force or fear,[91] from the person[92] with a felonious intent.[93] Instructions should be given as to any offense of a lower grade necessarily included within the crime charged.[94]

3. VERDICT. On a trial for robbery, a general verdict is sufficient to convict of the highest offense charged in the indictment.[95]

Compare Boyd *v.* State, 153 Ala. 41, 45 So. 591.

Construction as a whole.— In determining whether the court erred in charging the jury, all the instructions are to be taken together and read as a whole. People *v.* Etting, 99 Cal. 577, 34 Pac. 237; State *v.* Bateman, 196 Mo. 35, 95 S. W. 413; State *v.* Rodgers, 21 Mont. 143, 53 Pac. 97.

An inaccurate instruction furnishes no ground for reversal, where it could not have been prejudicial. State *v.* Davis, 186 Mo. 533, 85 S. W. 354.

91. State *v.* Miller, 83 Iowa 291, 49 N. W. 90; State *v.* Johnson, 26 Mont. 9, 66 Pac. 290. See also *supra*, II, D. And see Carter *v.* State, 3 Ga. App. 477, 60 S. E. 216, holding that as on an indictment charging robbery by force and intimidation a verdict can be found for both grades of the crime, or for either as may be shown by the evidence, a charge to that effect is not erroneous.

Degree of force.— In a prosecution for robbery it was proper to charge that the degree of force used was immaterial so long as it was sufficient to compel prosecutor to part with his property. State *v.* Parsons, 44 Wash. 299, 87 Pac. 349, 7 L. R. A. N. S. 566.

92. People *v.* Stevens, 141 Cal. 488, 75 Pac. 62; State *v.* Davidson, 38 Mo. 374. See also *supra*, II, C.

93. *Georgia.*— Sledge *v.* State, 99 Ga. 684, 26 S. E. 756.

Illinois.— Turley *v.* People, 188 Ill. 628, 59 N. E. 506.

Missouri.— State *v.* Graves, 185 Mo. 713, 84 S. W. 904; State *v.* Brown, 104 Mo. 365, 16 S. W. 406.

Montana.—State *v.* Oliver, 20 Mont. 318, 50 Pac. 1018.

North Dakota.— State *v.* Fordham, 13 N. D. 494, 101 N. W. 888.

Texas.— Bollen *v.* State, 48 Tex. Cr. 70, 86 S. W. 1025; Smith *v.* State, (Cr. App. 1904) 81 S. W. 712.

West Virginia.— State *v.* McCoy, 63 W. Va. 69, 59 S. E. 758.

See 42 Cent. Dig. tit. "Robbery," § 38; and *supra*, II, A.

Use of word "felonious."— If the element of felonious intent is sufficiently expressed otherwise, it is unnecessary to use the word "felonious" or to define it. State *v.* Spray, 174 Mo. 569, 74 S. W. 846; State *v.* Rowland, 174 Mo. 373, 74 S. W. 622. A failure to instruct on the intent with which property was taken is not cured by the use of the words, "wilfully, feloniously and violently," in describing the taking. State *v.* McLain, 159 Mo. 340, 60 S. W. 736.

Charge as to intent.— An instruction, on a trial for robbery, that if accused by the use of force and violence on the person of the prosecutrix, or by putting her in fear, compelled her against her will to deliver to him her personal property, and that accused took and received the same by such means, he was guilty of robbery, although he may have attacked the prosecutrix for some other purpose, is not open to the objection that it advised the jury that the intent to take the property was not necessary to constitute the crime. People *v.* White, 5 Cal. App. 329, 90 Pac. 471.

Facts establishing intent.— It is not the province of the court to instruct the jury what facts would have established an intent on the part of defendant to commit a robbery. State *v.* West, 157 Mo. 309, 57 S. W. 1071.

94. People *v.* Robinson, 65 Cal. 136, 3 Pac. 607; Duffy *v.* State, 154 Ind. 250, 56 N. E. 209; State *v.* Duffy, 124 Iowa 705, 100 N. W. 796; Richards *v.* Com., 67 S. W. 818, 24 Ky. L. Rep. 14.

The rule of the text does not apply where the evidence establishes that accused was guilty of robbery, or was not guilty of any offense.

California.— People *v.* O'Brien, 88 Cal. 483, 26 Pac. 362.

Iowa.— State *v.* Stanley, 109 Iowa 142, 80 N. W. 228.

Kansas.— State *v.* Clough, 70 Kan. 510, 79 Pac. 117.

Missouri.— State *v.* Coffee, 158 Mo. 568, 59 S. W. 964; State *v.* Brown, 104 Mo. 365, 16 S. W. 406. See also State *v.* Whalen, 148 Mo. 286, 49 S. W. 989, holding that an instruction as to petit larceny need not be given in a prosecution for robbery committed by seizing prosecutrix and dragging her into an alley, where one person wrenched her pocket-book from her, the only defense being an alibi.

North Carolina.— State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

Texas.— Long *v.* State, 47 Tex. Civ. App. 296, 83 S. W. 384.

See 42 Cent. Dig. tit. "Robbery," § 39.

95. If the jury find that defendant is only guilty of the included offense of larceny, they should so state. People *v.* Gilbert, 60 Cal. 108; State *v.* Clough, 70 Kan. 510, 79 Pac. 117; State *v.* Steptoe, 65 Mo. 640 [*affirming* 1 Mo. App. 19]. See also Harris *v.* State, 1 Ga. App. 136, 57 S. E. 937.

Responsiveness to indictment.— A verdict that the jury find defendant "guilty of robbery and assess his punishment at confinement in the penitentiary for life" is responsive to an indictment charging simple robbery and robbery with a deadly weapon. Tabor *v.* State, 52 Tex. Cr. 387, 107 S. W. 1113.

Special verdict omitting intent.— Upon an indictment for robbery, a special verdict which finds acts of violence, but does not find with what intent they were committed,

4. Punishment. The punishment for robbery is fixed by statute.[96]

F. Review.[97] An appellate court will not interfere with a conviction obtained before a trial court where the error complained of could not have been prejudicial to defendant.[98]

IV. Attempts and Assaults With Intent to Rob.

A. In General. In many jurisdictions, statutes have been enacted providing for the punishment of assaults with intent to rob.[99]

B. Elements of Offense. The crime of assault with intent to rob may be committed by intimidation as well as by actual force, and proof of actual ability to inflict the injury threatened is not necessarily essential.[1]

C. Indictment or Information — 1. In General. An indictment or information for assault with intent to rob must allege every fact and circumstance

is imperfect, and there must be a new trial. State *v.* Curtis, 71 N. C. 56. See also Rex *v.* Edmonstone, 13 Can. Cr. Cas. 125.

96. See the statutes of the several states.

At common law, robbery was considered as one of the most enormous of felonies, and it was excluded by early English statutes from the benefit of the clergy. 4 Blackstone Comm. 243; 3 Chitty Cr. L. 806. See also U. S. *v.* Evans, 28 App. Cas. (D. C.) 264.

Excessive punishment.— A sentence of twelve years is not excessive, the maximum being twenty. State *v.* Lucas, 57 Iowa 501, 10 N. W. 868. Nor is a sentence of seventeen years where defendant used a revolver and threatened to kill prosecuting witness. State *v.* Brafford, 121 Iowa 115, 96 N. W. 710. Where defendants robbed one of three thousand five hundred dollars and there was reason to believe that they were habitual criminals, a sentence of twenty-five years was held to be proper. State *v.* Levy, 126 Mo. 554, 29 S. W. 703. A sentence of twelve years is not excessive where defendant placed a knife at his victim's throat and robbed him. Bennett *v.* State, (Tex. Cr. App. 1894) 27 S. W. 135.

A statute providing a special punishment for robbery committed in certain places will not be construed to repeal an existing statute as to robbery generally. Smith *v.* Territory, 4 Ariz. 95, 78 Pac. 1035.

For the construction of particular statutes relative to the punishment of robbery see the following cases:

California.— People *v.* Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087.

Massachusetts.— Evans *v.* Com., 3 Metc. 453.

Nebraska.— Buckley *v.* State, 79 Nebr. 86, 112 N. W. 283.

Oklahoma.— Slover *v.* Territory, 5 Okla. 506, 49 Pac. 1009.

Virginia.— Houston *v.* Com., 87 Va. 257, 12 S. E. 385.

See 42 Cent. Dig. tit. "Robbery," § 43.

97. Review generally see Criminal Law, 12 Cyc. 792.

98. People *v.* Clary, 72 Cal. 59, 13 Pac. 77; State *v.* Durbin, 22 La. Ann. 154; Ford *v.* State, 41 Tex. Cr. 1, 51 S. W. 935, 53 S. W. 869; Green *v.* State, 32 Tex. Cr. 298, 22 S. W. 1094.

Record on appeal.— A reviewing court will not grant a new trial because of alleged error in the charge, where the evidence given, which is not before the reviewing court, may have justified the charge. White *v.* State, (Tex. Cr. App. 1899) 53 S. W. 631.

99. See the statutes of the several states. See also the following cases:

California.— People *v.* Burns, 138 Cal. 159, 69 Pac. 16, 70 Pac. 1087, 60 L. R. A. 270.

Georgia.— Erwin *v.* State, 117 Ga. 296, 43 S. E. 719.

Illinois.— Kelly *v.* People, 132 Ill. 363, 24 N. E. 56.

Massachusetts.— Com. *v.* Martin, 17 Mass. 359.

Michigan.— People *v.* Scofield, 142 Mich. 221, 105 N. W. 610.

Texas.— Robinson *v.* State, 11 Tex. App. 309.

See 42 Cent. Dig. tit. "Robbery," § 12.

1. McNamara *v.* People, 24 Colo. 61, 48 Pac. 541. See also Hamilton *v.* State, 36 Ind. 280, 10 Am. Rep. 22, holding that where the charge is an assault with intent to rob of a certain sum of money, it is no defense that the party assaulted had no money on his person at that time.

As to present ability to commit assault generally see Assault and Battery, 3 Cyc. 1025.

Assault on person intended to be robbed.— It must be proved that the assault was made on the person intended to be robbed. Rex *v.* Thomas, East P. C. 417, Leach C. C. 372. And see Rex *v.* Trusty, East P. C. 418.

Dangerous weapon.—To constitute the crime of assault with intent to rob being armed with a dangerous weapon, it must be shown that accused was armed with a dangerous weapon which is done when the state proves that a revolver was pointed at the prosecutor within shooting distance, with a threat or other words indicating intention to fire and the prosecutor did not know that the weapon was not loaded. Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

Intent.— The felonious intent to steal is an essential ingredient. Taylor *v.* Com., 3 Bush (Ky.) 508; Latimer *v.* State, 55 Nebr. 609, 76 N. W. 207, 70 Am. St. Rep. 403; State *v.* Glovery, 10 Nev. 24.

Violence, in order to constitute the crime, must not be subsequent to the attempt to

that is necessary to constitute the offense.[2] The same particularity is not required in charging attempted acts as is required in charging the completed crime.[3]

2. Variance. The allegations in the indictment must be supported by proof.[4]

D. Evidence. Evidence is inadmissible to show that the person assaulted had no money, unless it be shown that defendant knew that fact.[5]

E. Instructions. An instruction is erroneous which omits the element of felonious intent.[6]

take the property. Hanson *v.* State, 43 Ohio St. 376, 1 N. E. 136.

2. *Illinois.*— Conolly *v.* People, 4 Ill. 474.

Iowa.— State *v.* Callahan, 96 Iowa 304, 65 N. W. 150.

Maryland.— Hollohan *v.* State, 32 Md. 399.

Massachusetts.— Com. *v.* Cody, 165 Mass. 133, 42 N. E. 575; Com. *v.* Mowry, 11 Allen 20.

South Dakota.— State *v.* Shields, 13 S. D. 464, 83 N. W. 559.

Texas.— Adams *v.* State, (Cr. App. 1901) 62 S. W. 1059; Clark *v.* State, 41 Tex. Cr. 641, 56 S. W. 621.

Washington.— State *v.* Fenton, 30 Wash. 325, 70 Pac. 741; State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

Wisconsin.— See Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

England.— Reg. *v.* Huxley, C. & M. 596, 41 E. C. L. 324.

See 42 Cent. Dig. tit. "Robbery," § 25.

"Attempt" includes "intent."— An indictment charging that defendant did make an assault upon one, and, by putting him in fear of life, did "attempt" to fraudulently take certain property from his person, sufficiently charges an assault with intent to commit robbery. Runnells *v.* State, 34 Tex. Cr. 431, 30 S. W. 1065; Atkinson *v.* State, 34 Tex. Cr. 424, 30 S. W. 1064.

Words of statute.— It is not necessary to use the words of the statute, if others of like import are used. Corneille *v.* State, 16 Ind. 232; State *v.* Bohn, 19 Wash. 36, 52 Pac. 325.

3. Traver *v.* State, 72 Ark. 524, 81 S. W. 615.

Description of property.— It is not necessary to describe the particular property which the defendant intended to take.

Indiana.— Dickinson *v.* State, 70 Ind. 247.

Kansas.— State *v.* Roberts, 67 Kan. 631, 73 Pac. 905.

Kentucky.— Taylor *v.* Com., 3 Bush 508.

Mississippi.—Grogan *v.* State, 63 Miss. 147.

Texas.— Crumes *v.* State, 28 Tex. App. 516, 13 S. W. 868, 19 Am. St. Rep. 853.

See 42 Cent. Dig. tit. "Robbery," § 25.

Ownership of property.—An indictment under Oreg. Cr. Code, § 533, "for assault and robbery, being armed with a dangerous weapon," need not allege that the money taken from the person assaulted was his property and not the property of the accused. State *v.* Dilley, 15 Oreg. 70, 13 Pac. 648.

Value of property.— It is not necessary to allege the value of the property. Buntin *v.* State, 68 Ind. 38.

Elements of intended offense.— It is not necessary to give the constituent elements of the offense intended to be committed. Dickerson *v.* Com., 2 Bush (Ky.) 1; Hollohan *v.* State, 32 Md. 399; Morris *v.* State, 13 Tex. App. 65.

4. Erwin *v.* State, 117 Ga. 296, 43 S. E. 719. In this case the indictment charged the accused with assault with intent to rob, in that he made an assault on the person of H, and by menaces in a forcible manner demanded money of H, with intent to commit a robbery. It was held that a verdict of guilty was unwarranted, where there was no evidence that he made a demand of H for his money by menaces, although he may have committed the offense in some other way.

5. Angley *v.* State, 35 Tex. Cr. 427, 34 S. W. 116.

Burden of proof.— Where, on a trial for an assault with intent to rob, being armed with a dangerous weapon, the state proves that a revolver was pointed at the prosecutor within shooting distance with a threat to fire, and prosecutor did not know that the revolver was not loaded, or if accused admits the act of pointing a revolver at prosecutor, it devolves on accused to show that the weapon was not loaded to meet the presumption that the revolver was loaded. Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

Evidence sufficient to sustain a conviction see State *v.* Roberts, 67 Kan. 631, 73 Pac. 905; Burns *v.* State, (Tex. Cr. App. 1902) 70 S. W. 24; Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

Evidence insufficient to sustain a conviction see Garrity *v.* People, 70 Ill. 83; State *v.* Tate, 145 Mo. 667, 47 S. W. 792; Sanders *v.* State, 53 Tex. Cr. 613, 111 S. W. 157; Reg. *v.* Birch, 2 C. & K. 193, 2 Cox C. C. 22, 1 Den. C. C. 185, 61 E. C. L. 193.

6. Axhelm *v.* U. S., 9 Okla. 321, 60 Pac. 98.

Dangerous weapon.—An instruction on a trial for an assault with intent to rob being armed with a dangerous weapon, that if the revolver, as used by accused, was the means by which prosecutor was compelled to submit to the robbery, the revolver was shown to be a dangerous weapon, was erroneous in the absence of direct proof that the revolver was loaded, and the jury should have been told what facts will justify them in finding that the revolver was a dangerous weapon. Lipscomb *v.* State, 130 Wis. 238, 109 N. W. 986.

Simple assault.— On a prosecution for assault with intent to commit robbery, there being no evidence of assault except in connection with the attempt to commit robbery, no instruction as to simple assault need be given. People *v.* Fitts, 4 Cal. App. 432, 91 Pac. 536.

ROCHESTER TONIC. A beverage known to the manufacturers as "lager beer," which contained a less per cent. of alcohol than contained in ordinary beer — the second brew or draw of the beer.[1]

ROCK. The stratum or formation of stone or other fixed hard material underlying and supporting the loose material of which the surface of the earth is ordinarily composed;[2] the stony matter which constitutes the earth's crust as distinguished from clay, gravel, sand, peat, etc.;[3] a mass of material matter composed of one or more, usually of several, kinds of minerals, having as a rule no definite external form, and liable to vary considerably in chemical composition;[4] technically, a mixture of mineral substances, except when it is one species, in a bed or mass;[5] a large concrete mass of stony material.[6]

ROCK EXCAVATION. The term is said to mean the excavation of all the diverse qualities of what was properly called rock encountered in the progress of the work.[7]

ROCK OIL. PETROLEUM,[8] *q. v.*

RODEO BOUNDARIES. See BOUNDARIES, 5 Cyc. 941 note 3.

ROGATIONES, QUÆSTIONES, ET POSITIONES DEBENT ESSE SIMPLICES. A maxim meaning "Demands, questions, and answers ought to be simple."[9]

ROGATIO TESTIUM. A phrase used to refer to a formal calling of witnesses to bear witness, used in the case of nuncupative wills.[10] (See, generally, WILLS.)

ROGATORY. See LETTERS ROGATORY, 25 Cyc. 186.

ROGUE. In English criminal law, an idle and disorderly person; a trickster; a wandering beggar; a vagrant or vagabond.[11] (See, generally, LIBEL AND SLANDER, 25 Cyc. 306.)

ROGUES' GALLERY. A collection of photographs of notorious law-breakers kept at police headquarters.[12]

ROISTERER. Said to be derived from the old French word "rusterer," meaning ruffian.[13]

ROLL. Technically, a schedule of parchment, which may be turned up with the hand in the form of a pipe or tube, sheet to sheet, tacked together in such manner that the whole length might be wound up together in the form of spiral rolls.[14] (Roll: Assessment, see MUNICIPAL CORPORATIONS, 28 Cyc. 1166; TAXATION. Judgment, see JUDGMENT ROLL, 23 Cyc. 622; JUDGMENTS, 23 Cyc. 847 Striking From, see ATTORNEY AND CLIENT, 4 Cyc. 905.)

ROLLING CREDIT. A mercantile term said to mean that where purchases were made on sixty days' time, from time to time, under such credit, the purchaser would not have the right to continue to purchase up to the given amount, unless upon paying the overdue accounts; but that the vendee would have the

1. U. S. *v.* Cohn, 2 Indian Terr. 474, 498, 52 S. W. 38.

2. Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771.

3. Encyclopedic Dict. [*quoted* in Chicago *v.* Duffy, 117 Ill. App. 261, 277].

4. Encyclopedia Britannica, Vol. X [*quoted* in Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771].

5. Standard Dict. [*quoted* in Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771].

6. Webster Dict. [*quoted* in Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771].

Includes soapstone see Okey *v.* Moyers, 117 Iowa 514, 515, 91 N. W. 771.

A stone weighing two pounds cannot properly be styled a "rock." State *v.* Seamons, 1 Greene (Iowa) 418, 420.

7. Drhew *v.* Altoona City, 121 Pa. St. 401, 421, 15 Atl. 636, where it was used in a contract specifying a particular price for "rock excavation."

Applies to all rock tunnel and includes tunnel in mixed earth and rock. Chicago *v.* McKechney, 205 Ill. 372, 452, 68 N. E. 954.

8. Century Dict.

Includes kerosene see Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26, 29.

9. Morgan Leg. Max. [*citing* Hob. 143].

10. Godfrey *v.* Smith, 73 Nebr. 756, 766, 103 N. W. 450.

11. Black L. Dict. [*citing* 4 Blackstone Comm. 169].

12. Century Dict. See Schulman *v.* Whitaker, 115 La. 628, 630, 39 So. 737, where it is said that causing the physical measurements and photographs to be taken and placed in the rogues' gallery is one of the well-recognized methods adopted by all police authorities in large cities for the preventing and suppressing of crime.

13. State *v.* Smith, 125 N. C. 615, 626, 34 S. E. 235 [*citing* Century Dict.].

14. Bouvier L. Dict. [*quoted* in Colman *v.* Shattuck, 2 Hun (N. Y.) 497, 502].

right to refuse further sales upon default of purchaser to pay overdue accounts promptly, notwithstanding the stipulation for rolling credit, for a stipulated time up to a given amount.[15]

ROLLING STOCK. Movable property belonging to a railroad corporation.[16] (Rolling Stock: Authority of Receiver of Railroad as to Purchase and Lease of, see RAILROADS, 33 Cyc. 626. Fire Insurance Policy on, see FIRE INSURANCE, 19 Cyc. 667 note 66. Mortgage of, see RAILROADS, 33 Cyc. 496, 503, 528. Situs of, see COMMERCE, 7 Cyc. 480. Taxation of, see TAXATION.)

ROMAN CATHOLIC. A Christian who admits the authority of the pope.[17]

ROMAN CENSUS. A numbering of the people with a valuation of their fortunes.[18]

ROMAN LAW. In a general sense, comprehends all the laws which prevailed among the Romans, without regard to the time of their origin, including the collections of Justinian, now generally denominated the civil law.[19] (See CIVIL LAW, 7 Cyc. 156.)

RONDO. A game played with balls, by rolling them upon a billiard table, at which the players bet against each other, but not against the keeper or exhibitor of the table, who receives from the players a compensation, or commission upon the amount bet between them, for the use of his table; and he is in no other way concerned in the game.[20] (See GAMING, 20 Cyc. 887 note 62.)

ROOFING. A term said to mean the material for a roof.[21]

ROOM. In its broad sense, any space or apartment separated from others by partitions;[22] a single inclosure, separated by partitions or other means from the other parts of the building;[23] space in a building marked off or set apart by a partition; space which has been set apart or appropriated to any purpose.[24] (See CHAMBRE, 6 Cyc. 846; and, generally, BURGLARY, 6 Cyc. 191 note 23.)

ROOT. The underground portion of a tree or plant which serves to support and nourish it.[25]

ROPE-MAKER. One who twists yarn into rope.[26]

ROPEWALK. A long low building or shed prepared for making ropes, and furnished with machinery for that purpose.[27]

15. Tobler *v.* Willis, 59 Tex. 80, 85.

16. Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443, 448, where it is said to mean such property as in its ordinary use is taken from one part of the line to another, such as cars, locomotives, and their attachments and usual accompaniments.

Term implies reverse of annexation and a permanent fixture. Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619, 635.

17. Hale *v.* Everett, 53 N. H. 9, 55, 16 Am. Rep. 82.

18. Williams' Case, 3 Bland (Md.) 186, 246, where it is said: "Which, although said to have been made every five years, was not always taken at certain intervals; and was sometimes omitted altogether. It does not, however, appear to have been, in fact, an enumeration of all the inhabitants, but was merely a numbering and classing of the citizens of Rome, and of the colonial cities."

19. Burrill L. Dict.

20. State *v.* Hawkins, 15 Ark. 259, 260.

21. Sylvania *v.* Hilton, 123 Ga. 754, 760, 51 S. E. 744, 107 Am. St. Rep. 162, 2 L. R. A. N. S. 483.

22. Crosby *v.* Montgomery, 108 Ala. 498, 503, 18 So. 723, where it is said that a mere closet or any small apartment thus separated would be included in this comprehensive definition of a room in its general acceptation.

23. State *v.* Barge, 82 Minn. 256, 260, 84 N. W. 911, 53 L. R. A. 428.

24. Webster Dict. [*quoted* in Bentley *v.* Taylor, 81 Iowa 306, 308, 47 N. W. 58].

Applies as truly to a place of great privacy as to a place of public resort. Grom *v.* People, 135 Ill. App. 453, 456.

Distinguished from "floor" see Lowell *v.* Strahan, 145 Mass. 1, 8, 12 N. E. 401, 1 Am. St. Rep. 422.

Distinguished from "house" see Hodges *v.* State, 44 Tex. Cr. 444, 445, 72 S. W. 179.

Distinguished from "loft" see Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 427, 59 Am. Dec. 192.

25. Black L. Dict.

"Roots prepared or otherwise," in a policy exempting them among other articles, includes pinkroot cut up and prepared. Klett *v.* Delaware Ins. Co., 23 Pa. St. 262, 264.

Used in a policy of insurance the term is said to be confined to such roots as are perishable in their nature and does not include "sarsaparilla." Sampson *v.* Gizzam, 6 Port. (Ala.) 123, 135, 30 Am. Dec. 578; Coit *v.* Commercial Ins. Co., 7 Johns. (N. Y.) 385, 389, 5 Am. Dec. 282.

26. Wall *v.* Howard Ins. Co., 14 Barb. (N. Y.) 383, 387, where "rope making" is distinguished from spinning of the yarn or hackling of the hemp.

27. Century Dict.

ROSARY. An article composed of beads, a metal chain, and a cross, the beads being fastened on the chain at regular intervals, and is not complete without a cross.[28]

ROSTER. A word used instead of "register," and comprehends a list of all military officers, connected with a regiment, brigade or division, and is kept as are records of orders and official communications.[29]

ROTARY. Turning round and round, as a wheel on its axis;[30] turning, as a wheel on its axis.[31]

ROTTEN. Not firm or trusty; unsound; defective; etc.[32]

ROUGH HANDLING. A term which as applied to a shipment of cattle was held to mean such unreasonable and negligent handling of the cattle as was beyond the natural and usual way of handling such shipments.[33]

ROUND. Having every portion of the surface or of the circumference equally distant from the centre; spherical; circular.[34]

ROUNDHOUSE. See ENGINE-HOUSE, 15 Cyc. 1049.

ROUND LOT. A term as applied in a contract for the sale of grain is said to mean a lot of five thousand bushels.[35]

ROUND SUM. A term, which when used in an instruction as to damages, is said to describe a lump sum in contradistinction from one that is the result of calculation or exact computation.[36]

ROUND TRIP. In relation to a sea voyage, a term said to mean a trip from the port of departure to the same port on return;[37] in relation to transportation, the performance of services both ways over a route.[38]

ROUND TRIP TICKET. See EXCURSION TICKET, 17 Cyc. 873.

ROUND-UP. In the custom of cattle men, a gathering together of the cattle every spring, at which the brands are examined, and the cattle of the several ranches and owners are separated or "cut out."[39]

ROUSTABOUT. A name by which negro deck hands on the steamers plying the Mississippi river and its tributaries are known;[40] a negro deck hand engaged on steamboats to do the work of loading, unloading, etc.[41]

ROUT. See RIOT, *ante*, p. 1774 text and note 8.

A deed conveying a ropewalk includes the land on which the ropewalk stood, and also such land in addition as was used habitually and necessarily in the absence of the ropewalk, in the same way that under the description of a house or a mill used in a deed the yard and curtilage of the house and the millyard will pass. Davis *v.* Handy, 37 N. H. 65, 71.

28. Benziger *v.* Robertson, 122 U. S. 211, 212, 7 S. Ct. 1169, 30 L. ed. 1149, where it is said that they are used by Roman Catholics in counting their prayers, and are carried in the pocket when not so in use, and are never used for ornament.

29. Mathews *v.* Bowman, 25 Me. 157, 167.

30. Century Dict. [*quoted* in Kip-Armstrong Co. *v.* King Phillip Mills, 130 Fed. 28, 29].

31. Webster Dict. [*quoted* in Kip-Armstrong Co. *v.* King Phillip Mills, 130 Fed. 28, 29].

A "rotary tubular steam boiler" is defined as a "tubular boiler with a cylindrical shell supported by trunnions to permit revolution." Kip-Armstrong Co. *v.* King Phillip Mills, 130 Fed. 28, 29.

32. Webster Dict. [*quoted* in Haworth *v.* Seevers Mfg. Co., 87 Iowa 765, 775, 51 N. W. 68, 62 N. W. 325]. See also Steinmetz *v.* U. S. Ins. Co., 2 Serg. & R. (Pa.) 293, 296.

33. Southern Kansas R. Co. *v.* Yarborough, (Tex. Civ. App. 1908) 109 S. W. 390, 392.

34. Webster Int. Dict.

As applied to saw logs the term is said to mean that their shape is circular or inclining to a circle, and does not mean in the shape of an absolute circle — that every point upon the surface shall be equidistant from the center. Bucki *v.* McKinnon, 37 Fla. 391, 395, 20 So. 540.

Sometimes equivalent to "large, great, or considerable." Golden *v.* Clinton, 54 Mo. App. 100, 118.

Used in a deed conveying certain plains, together "with the woodland adjoining to said plains, extending four English miles round the said plains" see Jackson *v.* Reeves, 3 Cai. (N. Y.) 293, 298.

35. Hammond *v.* Olmstead, 10 Fed. 223, 226.

36. Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 771, 36 C. C. A. 475. See also Golden *v.* Clinton, 54 Mo. App. 100, 118.

37. Pacific Mail Steamship Co. *v.* U. S., 18 Ct. Cl. 30, 38.

38. Century Dict. [*quoted* in Kelly *v.* New York City R. Co., 104 N. Y. Suppl. 561, 565].

39. Hebberd *v.* Southwestern Land, etc., Co., 55 N. J. Eq. 18, 27, 36 Atl. 122.

40. Riley *v.* Allen, 23 Fed. 46, 47.

41. U. S. *v.* Trice, 30 Fed. 490.

ROUTE. A way used for going from one place to another.[42] (Route: Liability of Carrier For Loss or Injury to Goods Caused by Deviation From, see CARRIERS, 6 Cyc. 383; SHIPPING. Location of Railroad, Termini, and Stations, see RAILROADS, 33 Cyc. 111.)

ROYAL FISHERY. A term applied at common law to the right of fishery, by virtue of the king's prerogative, in a royal or navigable river so far as the sea ebbed and flowed in it.[43] (See, generally, FISH AND GAME, 19 Cyc. 988.)

ROYAL FISHES. A term used at common law to designate the grand fishes of the sea, as whales and sturgeons.[44]

ROYAL GRANTS. Conveyances of record, in England, which are of two kinds: (1) Letters patent; and (2) letters close, or writs close.[45]

ROYAL RIVER. A term used at common law to designate a navigable river so far as the sea ebbed and flowed.[46] (See, generally, NAVIGABLE WATERS, 29 Cyc. 285.)

ROYALTY. A tax or duty paid to the owner of a patent for the privilege of manufacturing or using the patented article;[47] something proportionate to the use of a patented device; in other words, a kind of excise;[48] specific sums paid annually, or at other stated periods, for the right to use a patented device, whether it is used much or little or not at all.[49] (Royalty: For Use of Patent, see PATENTS, 30 Cyc. 963. Right of Husband as Tenant by the Curtesy to, see CURTESY, 12 Cyc. 1014 note 82. Subject to Creditors' Bill, see CREDITORS' SUITS, 12 Cyc. 31. Under Mining Lease, see MINES AND MINERALS, 27 Cyc. 710. Under Oil, Gas, and Salt Leases, see MINES AND MINERALS, 27 Cyc. 741.)

RUBBER HOSE. A tubing of indefinite length, open at both ends.[50]

RUBBER THREAD. A term said to include any strip of rubber of whatever shape.[51]

RUBBISH. Any useless or worthless stuff; that which serves no good purpose,

42. Fleming & T. Standard French Dict. [*quoted* in Atty.-Gen. *v.* West Wisconsin R. Co., 36 Wis. 466, 494].

"Route of travel" is a term said to mean the way or road traveled. Maynard *v.* Cedar County, 51 Iowa 430, 431, 1 N. W. 701, 702, where it is used in the code requiring mileage to be computed by the most direct route of travel.

"The land route usually traveled" as used in Code, § 3931, providing that in conveying a convict to the penitentiary it is the duty of the sheriff to travel "the land route usually traveled," means the land route usually traveled within the state, and not one which may be through other states, there being a land route exclusively within the state which is sometimes traveled. Greene *v.* McGhee, 37 Ala. 164, 165.

The term "routes and bounds," in a statute requiring the commissioners in laying out a highway to make out and subscribe a certificate describing "the road so laid out particularly, by routes and bounds," is sufficiently complied with by a description referring to an established highway. People *v.* Milton Highway Com'rs, 37 N. Y. 360, 364.

43. Arnold *v.* Mundy, 6 N. J. L. 1, 86, 10 Am. Dec. 356.

44. Arnold *v.* Mundy, 6 N. J. L. 1, 86, 10 Am. Dec. 356, where it is said they were so called because no subject could have them without the king's special grant.

45. Black L. Dict. [*citing* 1 Stephen Comm.]. See also Wilkinson *v.* American Iron Mountain Co., 20 Mo. 122.

46. Arnold *v.* Mundy, 6 N. J. L. 1, 86, 10 Am. Dec. 356.

47. Hubenthal *v.* Kennedy, 76 Iowa 707, 711, 39 N. W. 694.

48. Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 348, 60 C. C. A. 220 [*citing* Bouvier L. Dict.].

49. Western Union Tel. Co. *v.* American Bell Tel. Co., 125 Fed. 342, 349, 60 C. C. A. 220.

As applied in a contract for the sale of coal underlying lands, it is said to mean the share of the profit reserved by the owner for permitting the removal of the coal and is in the nature of rent. Kissick *v.* Bolton, 134 Iowa 650, 652, 112 N. W. 95.

"Advanced royalty," as used in a contract for the sale of coal underlying lands, was employed with reference to a failure to take coal out in the years mentioned and must have been intended as payment in advance for coal subsequently to be mined. Kissick *v.* Bolton, 134 Iowa 650, 651, 112 N. W. 95.

When used interchangeably with "rental" see Western Union Tel. Co. *v.* American Bell Tel. Co., 105 Fed. 684, 685. And see also Reynolds *v.* Hanna, 55 Fed. 783, 800, where it is said to be the most appropriate word where rental is based upon the quantity of coal or other mineral that is taken from a mine.

50. Dodge *v.* Porter, 98 Fed. 624, 627, where it is distinguished from an annular pneumatic tube forming a tire.

51. Haskell Golf Ball Co. *v.* Perfect Golf Ball Co., 143 Fed. 128, 130.

or is fit only to be thrown away; trash; trumpery; litter; used of both material or immaterial things.[52]

RUBBLE-STONES. Rough, irregular stones, such as are found in quarries that furnish small and inferior stone only, or are the remains in ledges from which dimension or other large stones have been taken; and when used for constructing walls they are not dressed, hewn, or cut, and so lose none of their measurement in laying.[53]

RUBLE. A term given to the money of account in Russia.[54]

RUBRICS. A name given in England to the titles of acts of parliament.[55]

RUDE. Rough, insulting.[56]

RUDELY. In a rude manner, coarsely, uncivilly, violently.[57]

RUG. A coarse, nappy, woolen fabric, used for various purposes as (a) for cover of a bed; (b) for protecting the carpet before a fire; (c) for protecting the legs against the cold in riding.[58] (See, generally, CUSTOMS DUTIES, 12 Cyc. 1124.)

RUIN. A term which when used with reference to a building is said to mean the collapse, the fall, or the giving way of the whole or of some part of the building whereby some one is injured.[59]

RULE or RULES. That which is prescribed or laid down as a guide to conduct; that which is settled by authority or custom; a regulation; a prescription; a minor law; a uniform course of things;[60] the regulation adopted by a deliberative body for the conduct of its proceedings.[61] In parliamentary language, devices in words and phrases for the control and direction of those who have something else given them to do.[62] (Rule or Rules: Against Perpetuities, see PERPETUITIES, 30 Cyc. 1466. Applicable to Secured Claims Against Insolvent Estate, see INSOLVENCY, 22 Cyc. 1314. Civil Service, see OFFICERS, 29 Cyc. 1378. Construction of, see MASTER AND SERVANT, 26 Cyc. 1472. Cy-Pres Doctrine, see CHARITIES, 6 Cyc. 961. Disobedience of, see MASTER AND SERVANT, 26 Cyc. 1245, 1267, 1440, 1512. Duty of Master to Adopt and Promulgate, see MASTER AND SERVANT,

52. Century Dict.

As used in the Metropolitan Paving Act (57 Geo. III, c. 29, §§ 59, 60), entitling scavengers to dust, ashes, rubbish, etc., within certain districts, the term applies to such things as are in the contemplation of the owner rubbish, and which he desires to dispose of in that character. Filbey *v.* Combe, 2 M. & W. 677, 683.

53. Hawkins *v.* U. S., 12 Ct. Cl. 181, 188.

Ranged rubble or broken ashlar are ordinarily a larger stone, which, when cut, trimmed, and laid, make a wall of coursed masonry as if constructed of squared stone of different sizes, somewhat like that produced by dimension-stone; and in cutting they are reduced in size, and measure much less in the wall than when first quarried. Hawkins *v.* U. S., 12 Ct. Cl. 181, 188.

54. Pleasants *v.* Maryland Ins. Co., 8 Cranch (U. S.) 55, 58, 3 L. ed. 486, where it is said: "It was originally a coin corresponding in value to the American dollar; but by the forced circulation of a paper representative of the ruble, dependent on nothing but mere national faith or national force for its value, the silver ruble has nominally doubled or trebled itself in value."

55. State *v.* Woolard, 119 N. C. 779, 780, 25 S. E. 719, where it is said that they were so called because written in red ink.

56. Webster Dict. [*quoted* in Holmes *v.* Carolina Cent. R. Co., 94 N. C. 318, 323].

57. State *v.* Lawrence, 19 Nebr. 307, 314, 27 N. W. 126.

58. Webster Dict. [*quoted* in Ingersoll *v.* Magone, 53 Fed. 1008, 1010, 4 C. C. A. 150].

59. Frank *v.* Suthon, 159 Fed. 174, 178.

As applied to a coal mine, the term is said not to be confined in its meaning to an utter destruction of the works but must be presumed to include a serious impairment of them, and anything which would essentially promote their injury, decay, or destruction. Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 217, 25 N. E. 788.

60. Bates *v.* Nome, 1 Alaska 208, 218; Webster Dict. [*quoted* in South Florida R. Co. *v.* Rhodes, 25 Fla. 40, 46, 5 So. 633, 23 Am. St. Rep. 506, 3 L. R. A. 733].

61. Armatage *v.* Fisher, 74 Hun (N. Y.) 167, 172, 26 N. Y. Suppl. 364, 367, where it is distinguished from "ordinance."

62. Taylor *v.* Lambertville, 43 N. J. Eq. 107, 112, 10 Atl. 809.

Distinguished from "order" see Morris *v.* Pilot Com'rs, 7 Del. Ch. 136, 160, 30 Atl. 667.

Distinguished from whim, caprice, compact, agreement, or mere discretion see Merchants' Exch. *v.* Knott, 212 Mo. 616, 640, 111 S. W. 565.

"Rules, regulations and by-laws," said to be words of equal import with "ordinance." See Taylor *v.* Lambertville, 43 N. J. Eq. 107, 112, 10 Atl. 809. See also Hunt *v.* Lambertville, 45 N. J. L. 279, 282.

Used in the plural in connection with the word "regulations," a term which is said, in a legal sense, to mean "laws." Higbee *v.* Higbee, 4 Utah 19, 26, 5 Pac. 693. The phrase "rules and regulations" as applied

26 Cyc. 1157. Judicial Notice of, see EVIDENCE, 16 Cyc. 903. Liability For Injuries to Persons Invited or Permitted to Ride on Trains or Cars in Violation of, see RAILROADS, 33 Cyc. 818. Of Carrier — Enforcement of, see CARRIERS, 6 Cyc. 545; Relating to Carriage of Passengers, see CARRIERS, 6 Cyc. 545. Of Construction — Of Contract, see CONTRACTS, 9 Cyc. 577; Of Insurance Contract, see FIDELITY INSURANCE, 19 Cyc. 517; FIRE INSURANCE, 19 Cyc. 655; LIFE INSURANCE, 25 Cyc. 739; MARINE INSURANCE, 26 Cyc. 579; MUTUAL BENEFIT INSURANCE, 29 Cyc. 66; Of Mortgage, see MORTGAGES, 27 Cyc. 1133; Of Municipal Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 388. Of Court, see COURTS, 11 Cyc. 739, 888, 948, 952. Of Decision — Generally, see COURTS, 11 Cyc. 744; As Affecting Arbitration, see ARBITRATION AND AWARD, 3 Cyc. 698. Of Exchange, see EXCHANGES, 17 Cyc. 852, 855. Of Innkeeper, see INNKEEPERS, 22 Cyc. 1081. Of Insurance Companies Generally as Affecting Rights and Liabilities of Members, see INSURANCE, 22 Cyc. 1411. Of Labor Union, Validity of, see LABOR UNIONS, 24 Cyc. 824. Of Master — In General, see MASTER AND SERVANT, 26 Cyc. 1157; Application of to Injuries to Persons on or About Railroad Cars, see RAILROADS, 33 Cyc. 648. Of Methods of Work, see MASTER AND SERVANT, 26 Cyc. 1151, 1413, 1451. Of Miners as to Location of Mining Claim, see MINES AND MINERALS, 27 Cyc. 553. Of Navigation, see COLLISION, 7 Cyc. 319. Of Practice — In Admiralty, see ADMIRALTY, 1 Cyc. 846; In Land-Office, see PUBLIC LANDS, 32 Cyc. 1006. Of Procedure — Of Municipal Council, see MUNICIPAL CORPORATIONS, 28 Cyc. 319; Of Parliamentary Body, see PARLIAMENTARY LAW, 29 Cyc. 1687. Of Property, see COURTS, 11 Cyc. 755. Of Sanitary Authorities, see HEALTH, 21 Cyc. 387. Proceedings by Rule Against Sureties on Forfeited Delivery Bond, see ATTACHMENT, 4 Cyc. 760. Promulgation of, see MASTER AND SERVANT, 26 Cyc. 1340. Regulating — Admission of Attorney to Practice, see ATTORNEY AND CLIENT, 4 Cyc. 900; Police Commissioners or Board, see MUNICIPAL CORPORATIONS, 28 Cyc. 489; Supply of Gas to Private Consumers, see GAS, 20 Cyc. 1162. Rule or Order on Dismissal or Discontinuance of Action, see ABATEMENT AND REVIVAL, 1 Cyc. 25. Violation of by Insured, see ACCIDENT INSURANCE, 1 Cyc. 256, 292; and see also REGULATIONS.)

RULE ABSOLUTE. That which commands the subject-matter of the rule to be forthwith enforced.[63]

RULE-DAY. In practice, the day on which a rule is returnable, or on which the act or duty enjoined by a rule is to be performed.[64]

RULE IN SHELLEY'S CASE. A celebrated rule in English law, propounded in Lord Coke's reports in the following form: That whenever a man, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word "heirs" is a word of limitation and not of purchase.[65] In other words,

to railroad corporations implies uniformity in operation, not discrimination for the pecuniary advantage of the promulgator. Indianapolis Union R. Co. *v.* Dohn, 153 Ind. 10, 12, 53 N. E. 937, 938, 74 Am. St. Rep. 274, 45 L. R. A. 427. See CARRIERS, 6 Cyc. 545.

63. Black L. Dict.

"Rule absolute for new trial" is a phrase said to imply that a judgment has been vacated, verdict set aside, and new trial granted. Fisher *v.* Hestonville, etc., Pass. R. Co., 185 Pa. St. 602, 605, 40 Atl. 97 (where it is said that the better practice is, where a judgment is set aside, after the term at which it is entered, to make a formal entry, "Judgment vacated, verdict set aside and new trial granted"); Evans *v.* Freeman, 140 Fed. 419, 423.

64. Black L. Dict.

As used in Fla. Cir. Ct. Rule 13, providing that all declarations shall be filed on or before the rule day to which the process is made returnable, means the return-day on which a defendant is required to appear by summons duly served and returned. Cook *v.* Cook, 18 Fla. 634, 637.

65. Black L. Dict. [*citing* Shelley's Case, 1 Coke 93*b*, 104*a*, 76 Eng. Reprint 206; 1 Stephen Comm. 308]; Shelley's Case, 1 Coke 93*b*, 104, 76 Eng. Reprint 206 [*quoted* in Jones *v.* Jones, 20 Ga. 699, 700].

Other statements of the rule.— "If an estate of freehold is given to the ancestor and a remainder be therein limited to his heirs or the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the freehold and he takes an estate in fee or in tail according to the terms of the limitation." Smith *v.* Smith, 24 S. C. 304, 314.

it is to be understood as expressing the quantity of estate which the party is to take, and not as conferring any distinct estate on the persons who may become his representatives.[66] (Rule in Shelley's Case: Application to Construction — Of Deed, see DEEDS, 13 Cyc. 658; Of Trust Deed, see TRUSTS; Of Will, see WILLS.)

RULE NISI. A rule which will become imperative and final unless cause be shown against it.[67] (Rule Nisi: Service of in Proceedings to Foreclose, see MORTGAGES, 27 Cyc. 1587 note 45. Superseded by Motion For New Trial, see NEW TRIAL, 29 Cyc. 941. When Granted in Foreclosure Proceedings, see MORTGAGES, 27 Cyc. 1514. See also RULE TO SHOW CAUSE.)

RULE OF CONSTRUCTION. A mere judicial exposition of the natural meaning of a certain form of expression.[68] (Rule of Construction: Of Contract — In General, see CONTRACTS, 9 Cyc. 577; Of Insurance, see FIDELITY INSURANCE, 19 Cyc. 517; FIRE INSURANCE, 19 Cyc. 655; LIFE INSURANCE, 25 Cyc. 739; MARINE INSURANCE, 26 Cyc. 579; MUTUAL BENEFIT INSURANCE, 29 Cyc. 66; Of Mortgage, see MORTGAGES, 27 Cyc. 1133. Of Ordinance, see MUNICIPAL CORPORATIONS, 28 Cyc. 388.)

RULE OF COURT. A term said to mean uniformity, regulation in practice alike to all suitors, established and fixed, as much as a statute itself, and known to all litigants and attorneys;[69] an order made by a court, between the parties to a cause before it, or touching the discharge of duty by those engaged in the conduct of its proceedings, either as permanent officers of the court or as serving therein in some temporary capacity;[70] an order generally made by a court having competent jurisdiction.[71] (See, generally, COURTS, 11 Cyc. 739.)

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent Comm. 225 [*quoted* in Hardage *v.* Stroope, 58 Ark. 303, 307, 24 S. W. 490; Wescott *v.* Binford, 104 Iowa 645, 648, 74 N. W. 18, 65 Am. St. Rep. 530; Kiene *v.* Gmehle, 85 Iowa 312, 316, 52 N. W. 232; Pierson *v.* Lane, 60 Iowa 60, 61, 14 N. W. 90; Hampton *v.* Rather, 30 Miss. 193, 203; Hancock *v.* Butler, 21 Tex. 804, 807].

"Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to heirs, or heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail; and the words 'heirs,' or 'heirs of the body,' are words of limitation, and not of purchase." McIlhinny *v.* McIlhinny, 137 Ind. 411, 414, 37 N. E. 147, 45 Am. St. Rep. 186, 24 L. R. A. 489; Andrews *v.* Spurlin, 35 Ind. 262, 265.

"Where the ancestor takes an estate of freehold with remainder to his heirs, or heirs of his body, the word 'heirs' is a word of limitation of the estate, and not of purchase." Rogers *v.* Rogers, 3 Wend. (N. Y.) 503, 511, 20 Am. Dec. 716.

"When an estate of freehold is limited to a person, and in the same instrument there is a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word 'heirs' is to be taken as a word of limitation, or, in other words, the ancestor takes the whole estate comprised in these words; if it be to the heirs of his body, a fee tail; if to his heirs, a fee simple." Trumbull *v.* Trumbull, 149 Mass. 200, 202, 21 N. E. 366, 4 L. R. A. 117 [*citing* Shelley's Case, 1 Coke 93*a*, 76 Eng. Reprint 206; 1 Powell Dev. 429].

"Where one takes an estate by grant or devise, and the deed or gift by its terms gives him a life estate only, with remainder, immediately thereafter, or after the expiration of an intermediate estate, to his heirs, or the heirs of his body, then, if there should be such heirs, the tenant for life would become seized of an estate in fee simple, and those in remainder would take as heirs, and not as purchasers." Duffy *v.* Jarvis, 84 Fed. 731, 733.

66. Black L. Dict. [*citing* Shelley's Case, 1 Coke 93*b*, 104*a*, 76 Eng. Reprint 206; 1 Stephen Comm. 308].

This rule was of feudal origin and policy, and was designed to favor the transmission of estates by descent, and prohibit their transmission in certain lines of succession by means of a deed or will instead of by inheritance, according to the course of the law. Zabriskie *v.* Wood, 23 N. J. Eq. 541, 544.

67. Black L. Dict.

68. Dutton *v.* Pugh, 45 N. J. Eq. 426, 431, 18 Atl. 207; Post *v.* Herbert, 27 N. J. Eq. 540, 543, where this definition is said to apply to subordinate rules of construction.

69. Bates *v.* Nome, 1 Alaska 208, 216; Wilson *v.* Big Joe Block Coal Co., 135 Iowa 531, 537, 113 N. W. 348; Spangler *v.* Atchison, etc., R. Co., 42 Fed. 305, 306.

70. Goodlett *v.* Charles, 14 Rich. (S. C.) 46, 49, where it is said to be authenticated by the signature of the judge, or, in certain instances, by the clerk.

71. Bouvier L. Dict. [*quoted* in Barney *v.* State, 49 Nebr. 515, 522, 68 N. W. 636].

RULE OF DECISION. See COURTS, 11 Cyc. 895, 977.

RULE OF NAVIGATION. See COLLISION, 7 Cyc. 319.

RULE OF PROPERTY. A settled legal principle governing the ownership and devolution of property;[72] the decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to title.[73] (See COURTS, 11 Cyc. 755.)

RULES OF PROCEDURE. Rules made by any legislative body, as to the mode and manner of conducting the business of the body.[74]

RULE TO PLEAD. See APPEAL AND ERROR, 2 Cyc. 1058; JUDGMENTS, 23 Cyc. 745; PLEADING, 31 Cyc. 131.

RULE TO SHOW CAUSE. A rule commanding the party to appear and show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced; a rule *nisi*.[75] (Rule to Show Cause: In Mandamus Proceedings, see MANDAMUS, 26 Cyc. 470. In Proceedings For Violations of Injunctions, see INJUNCTIONS, 22 Cyc. 1022. In Prohibition Proceedings, see PROHIBITION, 32 Cyc. 627. In Quo Warranto Proceedings, see QUO WARRANTO, 32 Cyc. 1438. Nature of, see MOTIONS, 28 Cyc. 10. Service of, see CONTEMPT, 9 Cyc. 41. See also RULE NISI.)

RULING or RULINGS. A settlement or decision of a point of law arising from the trial of the case, without necessarily the force and solemnity of a judgment or order.[76] (See, generally, APPEAL AND ERROR, 2 Cyc. 711, 1045; COURTS, 11 Cyc. 757.)

RUM. Spirit distilled from the juice of the sugar-cane in any form, commonly from the refuse juice left from sugar-making, but often from molasses, as especially in countries where the sugar-cane is not produced.[77] (See, generally, INTOXICATING LIQUORS, 23 Cyc. 62, 63.)

RUMOR. The common talk;[78] a current story passing from one person to another without any known authority for the truth of it;[79] a flying or popular

Power to make all necessary rules and regulations for conforming the designation and impaneling of juries to the laws and usages in force at the time in the state, enables federal courts to adopt the laws and usages of the state in respect to the challenges of jurors, in cases both civil and criminal except in case of treason or other crimes the punishment for which is death. U. S. *v.* Shackleford, 18 How. (U. S.) 588, 590, 15 L. ed. 495.

72. Yazoo, etc., R. Co. *v.* Adams, 81 Miss. 90, 115, 32 So. 937.

73. Edwards *v.* Davenport, 20 Fed. 756, 763, 4 McCrary 34.

74. Heyker *v.* McLaughlin, 106 Ky. 509, 514, 50 S. W. 859, 51 S. W. 820, 20 Ky. L. Rep. 1983 (where it is said that "they are intended for the orderly and proper disposition of the matters before it"); Heiskell *v.* Baltimore, 65 Md. 125, 148, 4 Atl. 116, 57 Am. Rep. 308.

75. Black L. Dict.

76. Black L. Dict.; Century Dict. [both *quoted* in State *v.* O'Brien, 18 Mont. 1, 5, 43 Pac. 1091, 44 Pac. 399].

The term has been held to be applicable only to decisions upon questions of law and not to findings upon matters of fact. Paine *v.* Newton St. R. Co., 192 Miss. 90, 93, 77 N. E. 1026; Anderson *v.* O'Donnell, 29 S. C. 355, 365, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632.

In the plural covers all rulings, including that on the motion for a new trial. Gilmer *v.* Sidenstricker, 42 W. Va. 52, 53, 24 S. E. 566.

The refusal of a judge to do a ministerial act is not a "ruling" or "decision." Cruse *v.* McQueen, (Tex. Civ. App. 1894) 25 S. W. 711, 712.

The phrase "rulings of the court in the cause in the progress of the trial" in U. S. Rev. St. (1878) § 700 [U. S. Comp. St. (1901) p. 570], providing that they may be excepted to at the time, or may be reviewed upon a writ of error, etc., refers only to rulings on the admission or rejection of evidence; and hence no exceptions can be taken to the refusal of the judge to approve or disapprove a list of propositions of law. Key West *v.* Baer, 66 Fed. 440, 441, 13 C. C. A. 572. See also Cooper *v.* Omohundro, 19 Wall. (U. S.) 65, 69, 22 L. ed. 47.

77. Century Dict.

"Rum disease" is that appetite for spirits which cannot be overcome except by actual restraint. Streitwolf *v.* Streitwolf, (N. J. Ch. 1900) 47 Atl. 14, 18.

78. Smith *v.* Moore, 74 Vt. 81, 86, 52 Atl. 320, where it is said that "any rumor" meant any current report, and not the remarks of a single person.

79. Webster Dict. [*quoted* in State *v.* Culler, 82 Mo. 623, 627].

"Rumor and newspaper reports," if we apply the maxim *noscitur a sociis*, were intended to occupy in point of evidential force the same footing. State *v.* Culler, 82 Mo. 623, 627.

report;[80] synonymous with HEARSAY, *q. v.*, REPORT, *q. v.*, story.[81] (Rumor: Admissibility in Evidence — Generally, see EVIDENCE, 16 Cyc. 1213; In Justification of Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 513; In Mitigation of Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 423, 520. As Constructive Notice, see NOTICE, 29 Cyc. 1115. As Defense of Libel or Slander, see LIBEL AND SLANDER, 25 Cyc. 415. Disqualification of Juror by Opinions Derived From, see JURIES, 24 Cyc. 295. Duty of Insured to Communicate, see MARINE INSURANCE, 26 Cyc. 621. Effect of, That Insured Has Absconded, see ACCIDENT INSURANCE, 1 Cyc. 284. Repetition of Libelous or Slanderous, see LIBEL AND SLANDER, 25 Cyc. 370.)

RUN. An expression said to mean operate, control, and manage;[82] to pass, spread, or communicate in ordinary modes.[83]

RUN INTO MONEY. A common phrase said to mean after the time of payment mentioned in a note has elapsed.[84] (See, generally, COMMERCIAL PAPER, 6 Cyc. 1014.)

RUNNING ACCOUNT. Mutual accounts;[85] mutual accounts and reciprocal demands between parties, which accounts and demands remain open and unsettled.[86] (See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 363 text and note 9; LIMITATIONS OF ACTIONS, 25 Cyc. 1421 note 62.)

RUNNING AT LARGE. See ANIMALS, 2 Cyc. 375, 443; RAILROADS, 33 Cyc. 1165.

RUNNING CONNECTIONS. A railroad term said to include only such arrangements as to the time of arrival and departure of freight and passenger trains, and as to stations, platforms, and other facilities as will enable companies desiring to connect to do so without serious inconvenience.[87]

RUNNING DAYS. All days, whether they are working days or non-working days;[88] consecutive days, unless there be some particular custom;[89] days as they run, day by day;[90] successive or consecutive days, without regard to the question

80. Smith *v.* Moore, 74 Vt. 81, 86, 52 Atl. 320; Webster Dict. [*quoted* in State *v.* Culler, 82 Mo. 623, 627].

81. State *v.* Culler, 82 Mo. 623, 627.

82. Diel *v.* Henry Zeltner Brewing Co., 30 N. Y. App. Div. 291, 293, 51 N. Y. Suppl. 930, where it was used in the statement of a witness in a personal injury case that the wagons causing the injury are run by defendant.

83. Ayer *v.* Starkey, 30 Conn. 304, 307, where it was used in a statute in reference to fires.

Equivalent to "remove" in an indictment alleging that defendant did "run" the property out of the state see Williams *v.* State, 27 Tex. App. 258, 260, 11 S. W. 114.

An order of court to conduct and "run the hotel," and for that purpose to make such purchases as may be necessary, and no provision being made for the receiver to raise money, impliedly authorized him to purchase necessary supplies to conduct the hotel business on credit. Highland Ave., etc., R. Co. *v.* Thornton, 105 Ala. 225, 228, 16 So. 699.

"To run out a line," when used in connection with surveying, means that a person qualified to do such work shall go upon the ground, and with proper instruments, chainmen and necessary assistants, establish and mark a line upon the surface of the earth. Mineral County *v.* Hinsdale County, 25 Colo. 95, 99, 53 Pac. 383.

84. Perry *v.* Smith, 22 Vt. 301, 306, so used where notes are made payable in specific articles of property.

85. Picker *v.* Fitzelle, 28 N. Y. App. Div. 519, 520, 51 N. Y. Suppl. 205, where it is said: "A running account necessarily contemplates continuous dealing, and this intention is further emphasized by the provision that the account shall be for an indefinite time."

86. Brackenridge *v.* Baltzell, 1 Ind. 333, 335.

An account with a bank for money loaned, checks paid, etc., which during the time makes monthly statements, striking the balance due each month, which is carried forward and charged, constitutes a "running account," and is in effect but one transaction. Pickett *v.* Merchants' Nat. Bank, 32 Ark. 346, 355.

Distinguished from "cases where the items are all on one side" see Leonard *v.* U. S., 18 Ct. Cl. 382, 385.

87. Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 476, 478 [*affirmed* in 61 Fed. 158, 163, 9 C. C. A. 409], where it is so used in construing the provision of the charter of the Northern Pacific Railroad Company, requiring that company to permit other railroad companies "to form running connections with it, on fair and equitable terms."

88. Nielsen *v.* Wait, 16 Q. B. D. 67, 79, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33.

89. Brown *v.* Johnson, C. & M. 404, 448, 11 L. J. Exch. 373, 10 M. & W. 331, 41 E. C. L. 242.

90. Davis *v.* Prendergast, 7 Fed. Cas. No.

whether they are days on which work could be done or not.[91] (See Lay Days, 25 Cyc. 169; and, generally, Shipping.)

Running Head. The line at the top of the page, which contains the folio or number of the page with the title of the book.[92]

Running Lease. A lease which provided that the tenancy should not be confined to any portion of the land granted but allowed the tenant the use of all the land he could clear in his lifetime.[93]

Running Light. An expression used with regard to a railroad engine when it is not drawing cars.[94]

Running Policy. See Marine Insurance, 26 Cyc. 645.

Running Switch. See Flying Switch, 19 Cyc. 1081; Railroads, 33 Cyc. 953.

Running With the Land. See Covenants, 11 Cyc. 1080.

Run Out. A term used by founders to denote the escape of heated metal through any imperfections in the mold.[95] In relation to boundaries, where lines have been drawn and unmistakably defined by nature, if a disputed boundary falls upon one of them, its designation as the true line, naming known points as its termini, and giving its course.[96]

Runway. The path or tracks over which anything runs; a passageway.[97] (See, generally, Master and Servant, 26 Cyc. 1116.)

Rupture. As a noun, hernia, especially abdominal hernia.[98] As a verb, to break apart or separate the parts.[99] (See, generally, Accident Insurance, 1 Cyc. 263.)

Rural Homestead. See Homesteads, 21 Cyc. 488.

Rush or Horse Game. The practice of the game is to find some one in advance, when the others form in a line, each one in the rear pushing the one in advance of him, and so on through the line until the one to be "rushed," who knows nothing of what is coming, is rushed upon by the one in his rear, and pushed or rushed.[1] (See, generally, Assault and Battery, 3 Cyc. 1066.)

Russetts. An inferior quality of grape fruit.[2]

Rust. The oxidation of any metal.[3] (See, generally, Carriers, 6 Cyc. 521 note 32.)

Rusticum Forum. A term applied to three persons chosen by the vendor and vendee of land to ascertain and fix the value of the land and certify such valuation.[4]

Rusticum Jus. In maritime law, the application of an equal division of damages.[5] (See, generally, Collision, 7 Cyc. 312.)

Ruunt Magna In Se. A maxim meaning "Great interests are apt to clash."[6]

3,647, 16 Blatchf. 565, 567, where it is said the term "running days" was employed to exclude the idea of working days only.

91. Crowell *v.* Barreda, 16 Gray (Mass.) 471, 472.

Comprehend every day, including Sundays and holidays and mean the same as "days." Nielsen *v.* Wait, 16 Q. B. D. 67, 73, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33.

Where loading or unloading is required by a charter party to be within a certain number of days generally, or so many working days, they do not include Sundays or custom-house holidays; but the rule is otherwise where the words are "running days." Field *v.* Chase, Lalor (N. Y.) 50, 52.

92. Century Dict. [*quoted* in Miller *v.* State, 81 Ark. 359, 362, 99 S. W. 533].

93. Cowan *v.* Hatcher, (Tenn. Ch. App. 1900) 59 S. W. 689, 691.

94. Galveston, etc., R. Co. *v.* Nicholson, (Tex. Civ. App. 1900) 57 S. W. 693, 694.

95. Kehoe *v.* Allen, 92 Mich. 464, 466, 52 N. W. 740, 31 Am. St. Rep. 608.

96. Hinsdale County *v.* Mineral County, 9 Colo. App. 368, 48 Pac. 675, 678.

97. Century Dict.

98. Century Dict.

99. Dallas *v.* Moore, 32 Tex. Civ. App. 230, 237, 74 S. W. 95.

1. Markley *v.* Whitman, 95 Mich. 236, 54 N. W. 763, 35 Am. St. Rep. 558, 20 L. R. A. 55.

2. Abel *v.* Murphy, 43 Misc. (N. Y.) 648, 649, 88 N. Y. Suppl. 256.

3. Johnson Dict.; Latham Dict.; Webster Dict.; Worcester Dict. [*quoted* in Wolff *v.* The Vaderland, 18 Fed. 733, 739].

4. Dickinson *v.* Chesapeake, etc., R. Co., 7 W. Va. 390, 429. See also Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339, 353.

5. The Victory, 68 Fed. 395, 400, 15 C. C. A. 490. See also 3 Kent Comm. 231, where it is called "*rusticum judicium*."

6. Morgan Leg. Max.

S. An abbreviation for "section," "statute," and various other words of which it is the initial.[7]

SABBATH. See SUNDAY.

SACK. A fund in hand to be used for purposes of corruption.[8]

SACRAMENTA PAUPERUM SUNT SERVANDA. A maxim meaning "The oaths of the poor are to be kept." [9]

SACRAMENTA PUBERUM SUNT SERVANDA. A maxim meaning "The oaths of minors are to be kept inviolate." [10]

SACRAMENTUM HABET IN SE TRES COMITES, VERITATEM, JUSTITIAM ET JUDICIUM; VERITAS HABENDA EST IN JURATO; JUSTITIA ET JUSTICIUM IN JUDICE. A maxim meaning "An oath has in it three component parts, truth, justice, and judgment; truth in the party swearing; justice and judgment in the judge administering the oath." [11]

SACRAMENTUM SI FATUUM FUERIT, LICET FALSUM, TAMEN NON COMMITTIT PERJURIUM. A maxim meaning "A foolish oath, though false, makes not perjury." [12]

SACRED THINGS. In the classification of the Spanish civil law, those established for the service of God, and, as the consequence of such establishment, the dominion of them was not in man and they could not be counted property.[13]

SACRIFICE. As known to the maritime law, a term which is used in the sense of giving up or suffering to be lost for the sake of something else, not in the sense of an immolation.[14]

SACRILEGII INSTAR EST RESCRIPTUM PRINCIPIS OBVIARE. A maxim meaning "It is like sacrilege to oppose the order of the ruler of one's country." [15]

SACRILEGIUS OMNIUM PRÆDONUM CUPIDITATEM ET SCELERA SUPERAT. A maxim meaning "A sacrilegious person transcends the cupidity and wickedness of all other despoilers." [16]

SADDLERY. A term which ought to be applied to the trappings of a well horse, a "going" horse, and not a sick one.[17]

SÆPE CONSTITUTUM EST, RES INTER ALIOS JUDICATAS ALIIS NON PRÆJUDICARE. A maxim meaning "It has often been settled that matters adjudged between others ought not to prejudice those who were not parties." [18]

SÆPENUMERO UBI PROPRIETAS VERBORUM ATTENDITUR, SENSUS VERITATIS AMITTITUR. A maxim meaning "Frequently where the propriety of words is attended to, the meaning of truth is lost." [19]

SÆPE VIATOREM NOVA, NON VETUS ORBITA FALLIT. A maxim meaning "Often it is the new track, not the old one, which deceives the traveler." [20]

SÆVITIA. CRUEL TREATMENT,[21] *q. v.*

SAFE. As an adjective, free from danger of any kind.[22] As a noun, a place

7. Black L. Dict.

8. Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 436, 34 Pac. 128, 37 Am. St. Rep. 70, where the term was so construed when used in a newspaper publication stating that a corporation would put a large sum of money into the fight to corrupt voters, and that a certain person would have charge of the "sack."

9. Morgan Leg. Max. [*citing* Halkerstone Leg. Max.].

10. Morgan Leg. Max. [*citing* Trayner Leg. Max.].

11. Peloubet Leg. Max. [*citing* 3 Inst. 160].

12. Bouvier L. Dict. [*citing* 2 Inst. 167].

13. Sullivan *v.* Richardson, 33 Fla. 1, 114, 14 So. 692.

14. The Roanoke, 46 Fed. 297, 298.

15. Morgan Leg. Max. [*citing* Tayler L. Gloss.].

16. Morgan Leg. Max. [*citing* Adams' Case, 4 Coke 104*b*, 106, 76 Eng. Reprint 1091].

17. Veil *v.* U. S., 113 Fed. 856, where it is held that the term does not include woolen bands intended for use of veterinary surgeons, to be applied to lame legs.

18. Black L. Dict. [*citing* Dig. 42, 1, 63].

19. Bouvier L. Dict.

20. Peloubet Leg. Max. [*citing* 4 Inst. 34].

21. Ring *v.* Ring, 118 Ga. 183, 184, 44 S. E. 861, 62 L. R. A. 878.

22. Webster Dict. [*quoted* in Louisville, etc., R. Co. *v.* Brownlee, 14 Bush (Ky.) 590, 595].

As used in reference to the duties of masters to servants, or railroads to passengers, the term does not have an absolute and unqualified meaning. St. Louis, etc., R. Co. *v.* Barnett, 65 Ark. 255, 258, 45 S. W. 550. The term as used in the law requiring a master to furnish his servant a safe place to

or structure for the storage of money, papers, or valuables, in safety from risk of theft or fire.[23] (Safe: Compliance With Iron Safe Clause in Insurance Policy, see FIRE INSURANCE, 19 Cyc. 761.)

SAFE CRACKER. One who uses explosives in an attempt to break open a safe used for keeping valuables, with intent to commit a larceny.[24]

SAFE DEPOSIT COMPANY. A company which maintains vaults for the deposit and safekeeping of valuables in which compartments or boxes are rented to customers who have exclusive access thereto, subject to the oversight and under the rules and regulations of the company.[25] (Safe Deposit Company: In General, see WAREHOUSEMEN. Garnishment of Property in Custody of, see GARNISHMENT, 20 Cyc. 1022. Liability of Banks For Negligence in Caring For Special Deposit, see BANKS AND BANKING, 5 Cyc. 518.)

SAFELY. In a safe manner.[26]

SAFE PLACE TO WORK. See MASTER AND SERVANT, 26 Cyc. 1097.

SAFETY GATES. Physical hindrances in the way of those seeking to cross railroad tracks.[27]

SAGO FLOUR. A term which is said to indicate the first and only form in which the product of the sago palm is known in this country.[28]

SAID. Aforesaid;[29] before mentioned.[30]

work, and in common parlance, does not mean a place so made or guarded as to exclude all possibility of danger. Martin *v.* Des Moines Edison Light Co., 131 Iowa 724, 731, 106 N. W. 359.

The words "safe" and "care" and "safe place" are frequently used interchangeably with "reasonably safe" and "reasonable care." "Safe" and "unsafe" are words frequently used in comparison by courts in discussing the question of a reasonably safe place, and evidently without any intention of changing the well-established rule of reasonable care or a reasonably safe place. Gray *v.* Washington Water Power Co., 30 Wash. 665, 671, 71 Pac. 206.

Used in connection with other words.— "Safe and convenient" see Morgan *v.* Lewiston, 91 Me. 566, 570, 40 Atl. 545; Church *v.* Cherryfield, 33 Me. 460; McClosky *v.* Moies, 19 R. I. 297, 299, 33 Atl. 225. "Safe and close custody" see Steere *v.* Field, 22 Fed. Cas. No. 13,350, 2 Mason 486, 495. "Safe and suitable" see Wall *v.* Marshutz, 138 Cal. 522, 526, 71 Pac. 692. "Safe berth" see The Juniata, 124 Fed. 861, 863. "Safe distance" see Wadsworth *v.* Marshall, 88 Me. 263, 271, 34 Atl. 30, 32 L. R. A. 588. "Safe-keeping" see Wright *v.* Paine, 62 Ala. 340, 344, 34 Am. Rep. 24. "Safe machinery" see Gulf, etc., R. Co. *v.* Wells, 81 Tex. 685, 687, 17 S. W. 511. "Safe and workmanlike manner" see Consolidated Coal Co. *v.* Schaefer, 135 Ill. 210, 216, 25 N. E. 788. "Safe port" see Atkins *v.* Fibre Disintegrating Co., 2 Fed. Cas. No. 601, 2 Ben. 381, 383. "Safe rate of speed" see Cleveland, etc., R. Co. *v.* Newell, 75 Ind. 542, 544.

23. Century Dict.

24. State *v.* O'Day, 74 S. C. 448, 450, 54 S. E. 607, where it is said that it is not necessary that the attempt should be successful, to constitute a person a safe cracker.

25. Bouvier L. Dict.

26. Century Dict.

Used in connection with other words.— "Safely and securely" see Ross *v.* Hill, 2 C. B. 877, 890, 3 D. & L. 788, 10 Jur. 435, 15 L. J. C. P. 182, 52 E. C. L. 877. "Safely delivered" see The Thornley, 98 Fed. 735, 742, 39 C. C. A. 248. "Safely keep" see Cormack *v.* Wolcott, 37 Kan. 391, 394, 15 Pac. 245. "Safely promise" see Syracuse Knitting Co. *v.* Blanchard, 69 N. H. 447, 448, 43 Atl. 637.

27. West Jersey, etc., R. Co. *v.* Bridgeton, 64 N. J. L. 189, 190, 44 Atl. 848, where the term is distinguished from "warning signals."

28. Littlejohn *v.* U. S., 119 Fed. 483, 484.

29. State *v.* Skeggs, 154 Ala. 249, 260, 46 So. 268.

30. State *v.* Skeggs, 154 Ala. 249, 260, 46 So. 268; Bouvier L. Dict. [*quoted* in Brown *v.* State, 28 Tex. App. 379, 380, 13 S. W. 150].

Distinguished from "same" see Wilkinson *v.* State, 10 Ind. 372, 373; Brown *v.* State, 28 Tex. App. 379, 380, 13 S. W. 150.

A word of reference to what has been already spoken of or specified, and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. Hinrichsen *v.* Hinrichsen, 172 Ill. 462, 465, 50 N. E. 135. See also Carver *v.* Carver, 97 Ind. 497, 503; Com. *v.* Schweiters, 122 Ky. 874, 880, 93 S. W. 592, 29 Ky. L. Rep. 417; Ellis *v.* Horine, 1 A. K. Marsh. (Ky.) 417, 418; Antipoeda Baptist Church *v.* Mulford, 8 N. J. L. 182, 190.

The phrase "said defendants" in a prayer for relief, refers to defendants previously named in the bill. Wheeler, etc., Mfg. Co. *v.* Filer, 52 N. J. Eq. 164, 168, 28 Atl. 13.

In contracts and pleadings it is usual and proper, when it is desired to speak of a person or thing before mentioned, to designate them by the term "said" or "aforesaid" or some similar term. Bouvier L. Dict. [*quoted* in Brown *v.* State, 28 Tex. App. 379, 380, 13 S. W. 150].

SAIL. In insurance law, to put to sea, to begin a voyage.[31]

SAILOR. A seaman; a MARINER,[32] *q. v.* (Sailor: In General, see SEAMEN. Domicile of, see DOMICILE, 14 Cyc. 849. Pension of, see PENSIONS, 30 Cyc. 1366. Preference of Discharged Sailor in Appointment to Office, see OFFICERS, 29 Cyc. 1374.)

SAKE. A Japanese beverage manufactured from rice by a peculiar process of fermentation.[33]

SALAMANDER. A mixture of iron, graphite, silica, and other elements.[34]

SALARY.[35] A periodical allowance made as compensation to a person for his official or professional services or for his regular work;[36] an agreed compensation for services, payable at regular intervals;[37] an annual compensation for services rendered;[38] the per-annum compensation of men in official and in some other positions[39] or situations;[40] the periodical compensation due to men in official and other situations;[41] an annual or periodical payment for services;[42] an annual or periodical payment for services, a stipulated periodical recompense; a stipend; wages; hire; an allowance;[43] a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered;[44] a reward or compensation for services performed;[45] a reward or recompense paid for

31. Black L. Dict.

Distinguished from "depart" see DEPART, 13 Cyc. 787 note 15.

If a ship quits her moorings and removes, although only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing; but it is otherwise if at the time when she quits her moorings and hoists her sails, she is not in a condition for completing her sea voyage. Pittigrew *v.* Pringle, 3 B. & Ad. 514, 520, 23 E. C. L. 229. See also Union Ins. Co. *v.* Tysen, 3 Hill (N. Y.) 118, 126; Graham *v.* Barras, 5 B. & Ad. 1011, 1020, 3 N. & M. 125, 27 E. C. L. 424; Lang *v.* Anderdon, 3 B. & C. 495, 499, 10 E. C. L. 228, 1 C. & P. 171, 12 E. C. L. 108, 5 D. & R. 393, 3 L. J. K. B. O. S. 62, 27 Rev. Rep. 412.

A provision in a charter party requiring freight to be paid when a vessel has "sailed," means when the vessel has actually started upon its voyage, and not merely leaving the harbor to prepare for the voyage. Hudson *v.* Bilton, 6 E. & B. 565, 570, 2 Jur. N. S. 784, 26 L. J. Q. B. 27, 80 E. C. L. 565; Thompson *v.* Gillespy, 5 E. & B. 209, 226, 1 Jur. N. S. 779, 24 L. J. Q. B. 340, 3 Wkly. Rep. 505, 85 E. C. L. 209. See also Sea Ins. Co. *v.* Blogg, [1898] 1 Q. B. 27, 31, 3 Com. Cas. 1, 67 L. J. Q. B. 22, 14 T. L. R. 20 [*affirmed* in [1898] 2 Q. B. 398, 67 L. J. Q. B. 757, 78 L. T. Rep. N. S. 785, 14 T. L. R. 474, 47 Wkly. Rep. 71].

"'Sails' . . . on shares" see Marshall *v.* Boardman, 89 Me. 87, 90, 35 Atl. 1024, 56 Am. St. Rep. 392.

"Sail with convoy" see Simond *v.* Boydell, Dougl. (3d ed.) 268, 271, 99 Eng. Reprint 175.

"To sail her himself," in an agreement for the charter of a vessel, that the captain thereof was to sail her himself, means not only that he was to command her but to employ the crew necessary for her navigation. Sheriffs *v.* Pugh, 22 Wis. 273, 278, 94 Am. Dec. 600.

"'To sail' on or before a given day," by common usage, imports the same as the words "'conditioned' to sail," or "'warranted' to sail on or before a certain day." Glaholm *v.* Hays, 10 L. J. C. P. 98, 104, 2 M. & G. 257, 2 Scott N. R. 471, 40 E. C. L. 589.

32. Black L. Dict.

33. Stratton *v.* Komada, 148 Fed. 125, 126.

34. Illinois Steel Co. *v.* Saylor, 129 Ill. App. 73, 76.

35. **Derived** from *salarium*, which is from the word "*sal*," salt, being an article in which the Roman soldiers were paid. Martin *v.* Santa Barbara County, 105 Cal. 208, 212, 38 Pac. 687; Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 141; Cowdin *v.* Huff, 10 Ind. 83, 85.

36. Standard Dict. [*quoted* in Henderson *v.* Koenig, 168 Mo. 356, 367, 68 S. W. 72, 57 L. R. A. 659].

37. San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362, 363, where it is said that while this is the strict meaning of the term, a more liberal meaning is frequently given to the word.

38. Burrill L. Dict. [*quoted* in State *v.* Speed, 183 Mo. 186, 198, 81 S. W. 1260; People *v.* Myers, 11 N. Y. Suppl. 217, 218, 25 Abb. N. Cas. 368].

39. Anderson L. Dict. [*quoted* in State *v.* Speed, 183 Mo. 186, 198, 81 S. W. 1260].

40. Seiler *v.* State, 160 Ind. 605, 619, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 141; Cowdin *v.* Huff, 10 Ind. 83, 85; Winfield L. Dict. [*quoted* in People *v.* Myers, 11 N. Y. Suppl. 217, 219, 25 Abb. N. Cas. 368].

41. Martin *v.* Santa Barbara County, 105 Cal. 208, 212, 38 Pac. 687.

42. Webster Dict. [*quoted* in Com. *v.* Bailey, 3 Ky. L. Rep. 110, 114]; Worcester Dict. [*quoted* in Com. *v.* Bailey, 3 Ky. L. Rep. 110, 114].

43. Worcester Dict. [*quoted* in Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 142].

44. Benedict *v.* U. S., 176 U. S. 357, 360, 20 S. Ct. 458, 44 L. ed. 503.

45. Abbott L. Dict. [*quoted* in People *v.*

personal services;[46] a reward or recompense for services performed;[47] annual or periodical recompense or pay;[48] a stipulation, periodical recompense;[49] a recompense or consideration made to a person for his pains and industry in another man's business;[50] a recompense or consideration stipulated to be paid to a person for services,[51] usually a fixed sum to be paid by the year;[52] a recompense or consideration to be paid to a public officer for continuous, as contradistinguished from particular services;[53] a certain annual stipend, payable to an officer for performing his whole duty;[54] a fixed sum to be paid by the year for services;[55] a fixed sum paid to a person for his services, yearly, half-yearly, or quarterly; stipend; wages;[56] annual or periodical wages or pay; hire;[57] fixed regular wages, as by the year, quarter, or month.[58] (Salary: Assignment of Future, see ASSIGNMENTS, 4 Cyc. 19.

Myers, 11 N. Y. Suppl. 217, 218, 25 Abb. N. Cas. 368].

46. Windmiller *v.* People, 78 Ill. App. 273, 276, where it is said: "As applied to a public officer, it means the compensation paid him for his personal service in the discharge of the duties of his office. It does not include money necessarily paid to others as expenses in performing the duties of the office." See also Marion County *v.* Lear, 108 Ill. 343, 350; People *v.* Adams, 65 Ill. App. 283, 286; Sniffen *v.* New York, 4 Sandf. (N. Y.) 193, 196; Houser *v.* Umatilla County, 30 Oreg. 486, 489, 49 Pac. 867.

But under some statutes the term has been held to include clerk hire. Beaumont *v.* Ramsey County, 32 Minn. 108, 111, 19 N. W. 727; Bruce *v.* Dodge County Com'rs, 20 Minn. 388, 389.

47. Bouvier L. Dict. [*quoted* in State *v.* Barnes, 24 Fla. 29, 32, 3 So. 433; People *v.* Adams, 65 Ill. App. 283, 286; Hartman *v.* Mitzel, 8 Pa. Super. Ct. 22, 24; Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 8, 9 S. E. 759, 19 Am. St. Rep. 858; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372, 376].

48. Webster Dict. [*quoted* in Cane *v.* New York, 34 N. Y. Suppl. 675].

49. Worcester Dict. [*quoted* in Com. *v.* Bailey, 3 Ky. L. Rep. 110, 114].

50. Abbott L. Dict. [*quoted* in Hopkins *v.* Cromwell, 89 N. Y. App. Div. 481, 485, 85 N. Y. Suppl. 839]; Tomlinson L. Dict. [*quoted* in Buxton *v.* Rutherford County Com'rs, 82 N. C. 91, 95, where it is said: "According then to this definition of the term, the compensation of one hundred dollars given to the judges of the superior courts for their services in holding the special courts, to be paid by the commissioners of the county in which the courts are held, is a part of their salary"].

51. Webster Dict. [*quoted* in Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 142; People *v.* Wemple, 52 Hun (N. Y.) 414, 419, 5 N. Y. Suppl. 495]. See also Marioneaux *v.* Cutler, 32 Utah 475, 487, 91 Pac. 355.

52. Webster Dict. [*quoted* in People *v.* Myers, 11 N. Y. Suppl. 217, 218, 25 Abb. N. Cas. 368].

53. Teller County *v.* Trowbridge, 42 Colo. 449, 455, 95 Pac. 554.

54. Fulgham *v.* Lightfoot, 1 Call (Va.) 250, 255.

55. Burrill L. Dict. [*quoted* in State *v.* Speed, 183 Mo. 186, 198, 81 S. W. 1260; People *v.* Myers, 11 N. Y. Suppl. 217, 218, 25 Abb. N. Cas. 368].

56. Stormonth Dict. [*quoted* in Com. *v.* Bailey, 3 Ky. L. Rep. 110, 114].

57. Webster Dict. [*quoted* in Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 142].

58. Webster Dict. [*quoted* in Houser *v.* Orangeburg County, 59 S. C. 265, 266, 37 S. E. 831].

A synonym of "stipend," "pay," "hire," "wages," "allowance." Webster Dict. [*quoted* in San Juan County *v.* Oliver, 7 Colo. App. 515, 44 Pac. 362, 363; Indianapolis School Com'rs *v.* Wasson, 74 Ind. 133, 142].

Distinguished from "fees" see Dane *v.* Smith, 54 Ala. 47, 49; Teller County *v.* Trowbridge, 42 Colo. 449, 455, 95 Pac. 554; State *v.* Barnes, 24 Fla. 29, 32, 3 So. 433; Cowdin *v.* Huff, 10 Ind. 83, 85; Thompson *v.* Phillips, 12 Ohio St. 617; Landis *v.* Lincoln County, 31 Oreg. 424, 427, 50 Pac. 530; *In re* Actuarial Fees, 32 Pa. Co. Ct. 225, 234; Cox *v.* Holmes, 14 Wash. 255, 256, 44 Pac. 262.

Does not include the commissions of a factor or broker (Hamberger *v.* Marcus, 157 Pa. St. 133, 139, 27 Atl. 681, 37 Am. St. Rep. 719); profits which a person contracted to receive for goods sold for another (Brierre *v.* His Creditors, 43 La. Ann. 423, 425, 9 So. 640); *per diem* expenses allowed a judge while absent from home holding a general or special term of court (People *v.* Wemple, 52 Hun (N. Y.) 414, 419, 5 N. Y. Suppl. 495. See also Gobrecht *v.* Cincinnati, 51 Ohio St. 68, 72, 36 N. E. 782, 23 L. R. A. 609); travelling expenses of public officer (Houser *v.* Orangeburg County, 59 S. C. 265, 266, 37 S. E. 831).

Distinguished from "wages" see McLellan *v.* Young, 54 Ga. 399, 400, 21 Am. Rep. 276; Meyers *v.* New York, 69 Hun (N. Y.) 291, 295, 23 N. Y. Suppl. 484; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 50, 61 N. Y. Suppl. 724; People *v.* Brookfield, 13 Misc. (N. Y.) 566, 34 N. Y. Suppl. 674; Cane *v.* New York, 34 N. Y. Suppl. 675; People *v.* Myers, 11 N. Y. Suppl. 217, 219, 25 Abb. N. Cas. 368; Bell *v.* Indian Live-Stock Co., (Tex. 1889) 11 S. W. 344, 346, 3 L. R. A. 642; Gordon *v.* Jennings, 9 Q. B. D. 45, 46, 46 J. P. 519, 51 L. J. Q. B. 417, 46 L. T. Rep. N. S. 534, 30 Wkly. Rep. 704. See also MASTER AND SERVANT, 26 Cyc. 1068. But a number of cases hold that the term is synonymous with "wages." White

Conflicting Claims Against City For, see INTERPLEADER, 23 Cyc. 7 note 13. Exemption From Legal Process, see EXEMPTIONS, 18 Cyc. 1429. Garnishment of, see GARNISHMENT, 20 Cyc. 1007. Interest on, see INTEREST, 22 Cyc. 1485 note 82. Of Agent, see PRINCIPAL AND AGENT, 31 Cyc. 1487. Of Ambassador and Consul, see AMBASSADORS AND CONSULS, 2 Cyc. 264. Of Army or Navy Officer, see ARMY AND NAVY, 3 Cyc. 825, 826. Of Attorney-General, see ATTORNEY-GENERAL, 4 Cyc. 1027. Of Clerk of Court, see CLERKS OF COURTS, 7 Cyc. 213. Of Coroner, see CORONERS, 9 Cyc. 994. Of Corporate Officer, see CORPORATIONS, 10 Cyc. 921, 923, 933. Of County Board, see COUNTIES, 11 Cyc. 386. Of County Officer, see COUNTIES, 11 Cyc. 428. Of Court Attendant or Assistant, see COURTS, 11 Cyc. 723. Of Court Stenographer, see COURTS, 11 Cyc. 721. Of Customs Officer, see CUSTOMS DUTIES, 11 Cyc. 1134, 1136. Of Fireman, see MUNICIPAL CORPORATIONS, 28 Cyc. 551. Of Health Officer, see HEALTH, 21 Cyc. 386. Of Inspection Officer, see INSPECTION, 22 Cyc. 1368. Of Insurance Agent, see INSURANCE, 22 Cyc. 1439. Of Judge, see JUDGES, 23 Cyc. 526. Of Justice of the Peace, see JUSTICES OF THE PEACE, 24 Cyc. 418. Of Municipal — Agent or Employee, see MUNICIPAL CORPORATIONS, 28 Cyc. 599; Officer, see MUNICIPAL CORPORATIONS, 28 Cyc. 448. Of Policeman, see MUNICIPAL CORPORATIONS, 28 Cyc. 525. Of Postmaster, see POST-OFFICE, 31 Cyc. 977. Of Prison Officer, see PRISONS, 32 Cyc. 321. Of Prosecuting Attorney, see PROSECUTING AND DISTRICT ATTORNEYS, 32 Cyc. 695, 708. Of Public Officer — In General, see OFFICERS, 29 Cyc. 1422; As Liability Created by Statute Within Meaning of Limitation Acts, see LIMITATIONS OF ACTIONS, 25 Cyc. 1053; Federal Taxation of, see INTERNAL REVENUE, 22 Cyc. 1658, 1661; Garnishment of, see GARNISHMENT, 20 Cyc. 1030; Mandamus as Remedy to Compel Officer to Draw Warrant For, see MANDAMUS, 26 Cyc. 235 note 46; Mandamus as Remedy to Compel Payment, see MANDAMUS, 26 Cyc. 266. Of Railroad Commissioner, see RAILROADS, 33 Cyc. 49. Of Sheriff or Constable, see SHERIFFS AND CONSTABLES. Of Teacher — In General, see SCHOOLS AND SCHOOL-DISTRICTS; Mandamus as Remedy to Compel Payment of, see MANDAMUS, 26 Cyc. 286. Of Town Officer, see TOWNS. Of United States Marshal, see UNITED STATES MARSHALS. Of Wife Living Apart From Her Husband, see HUSBAND AND WIFE, 21 Cyc. 1154 note 87. Operation and Effect of Statutes Regulating, see CONSTITUTIONAL LAW, 8 Cyc. 759. Sharing Profits in Addition to as Constituting Partnership, see PARTNERSHIP, 30 Cyc. 388. Taxation of Judge's, see JUDGES, 23 Cyc. 532 note 31.)

v. Hayden, 126 Cal. 621, 627, 59 Pac. 118; Morse *v.* Robertson, 9 Hawaii 195, 197; Dayton *v.* Ewart, 28 Mont. 153, 156, 72 Pac. 420, 98 Am. St. Rep. 549; Hopkins *v.* Cromwell, 89 N. Y. App. Div. 481, 485, 85 N. Y. Suppl. 839; Com. *v.* Butler, 99 Pa. St. 535, 542.

While the term in its original and strict sense signifies a fixed compensation it is frequently used as the equivalent of "compensation." Martin *v.* Santa Barbara County, 105 Cal. 208, 212, 38 Pac. 687. See also Kirkwood *v.* Soto, 87 Cal. 394, 396, 25 Pac. 488.

The term is usually applied to the reward paid to a public officer for the performance of his official duties. Abbott L. Dict. [*quoted* in People *v.* Myers, 11 N. Y. Suppl. 217, 218, 25 Abb. N. Cas. 368]; Bouvier L. Dict. [*quoted* in Fidelity Ins., etc., Co. *v.* Shenandoah Valley R. Co., 86 Va. 1, 8, 9 S. E. 759, 19 Am. St. Rep. 858; Fidelity Ins., etc., Co. *v.* Shenandoah Iron Co., 42 Fed. 372, 376].

In reference to public officers the term means a fixed compensation, made by law to be paid periodically for services, whether there be any services actually rendered or not. Scharrenbroich *v.* Lewis, etc., County, 33 Mont. 250, 257, 83 Pac. 482. The salary of a public officer is a provision made by law for his maintenance and support, during his term, to the end that without anxiety concerning his means of subsistence he may be able to devote himself entirely to the duties of his office. Ruperich *v.* Baehr, 142 Cal. 190, 194, 75 Pac. 782; Lewis *v.* Denver, 9 Colo. App. 328, 48 Pac. 317. The words "salary or compensation" in the Greater New York charter, providing that the salary or compensation of officers who become members of the police force through consolidation shall not be decreased as the sum is lawfully fixed at the time this charter takes effect, and immediately prior thereto, is not synonymous with the phrase "prospective scale of salaries." People *v.* York, 29 Misc. (N. Y.) 158, 159, 60 N. Y. Suppl. 795. A public officer paid by fees is not the recipient of a salary. Henderson *v.* Koenig, 168 Mo. 356, 367, 68 S. W. 72, 57 L. R. A. 659. Where the compensation of an officer is a fixed sum for a definite period, and not a rate of commission, this makes it a salary. Castle *v.* Lawlor, 47 Conn. 340, 345.

SALE AND EXCHANGE. A term which, in reference to real estate, implies that the proceeds of the sale are to be vested in another estate of the same character, and to be settled to the same uses.[59]

SALE AND RETURN. An agreement by which goods are delivered by a wholesale dealer, to a retail dealer, to be paid for at a certain rate, if sold again by the latter; and if not sold, to be returned.[60]

SALE, BILL OF. See SALES.

The term implies a contract of employment. Davis *v.* Fall River, 155 Mass. 96, 29 N. E. 202.

The term imports permanency of employment. White *v.* Koehler, 70 N. J. L. 526, 527, 57 Atl. 124.

The length of time of service cannot be implied by the use of the term in an offer of employment. Palmer *v.* Marquette, etc., Rolling Mill Co., 32 Mich. 274, 276.

59. Rail *v.* Dotson, 14 Sm. & M. (Miss.) 176, 184.

60. Story Sales [*quoted* in Haskins *v.* Dern, 19 Utah 89, 98, 56 Pac. 953].

Distinguished from "conditional contract" see Hickman *v.* Shimp, 109 Pa. St. 16, 19.